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To

CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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I. REGULATION.[1]

[EDITED BY EDWARD G. BENEDICT, ESQ., OF THE NEW YORK BAR]

A. National Character of Vessels. The ownership of a vessel determines its national character,[2] and this may be proved in the same manner as that

1. As to carriage of passengers see *infra*, VIII, B.
Regulation by state or municipality as interference with commerce see COMMERCE, 7 Cyc. 422.
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2. Jenks *v.* Hallet, 1 Cai. (N. Y.) 60; U. S. *v.* Jenkins, 26 Fed. Cas. No. 15,473.

of any other chattel.[3] The term "vessel of the United States" is made by the legislation of congress a legal technical term, and the requisites are expressly laid down, which entitle a vessel to that national designation.[4]

B. Registry, Enrolment, and License[5] **— 1. In General.** The statutes of the United States require that every ship or vessel of the United States shall be registered or enrolled in the office of, or licensed by, the collector of customs of the district in which is the home port of the vessel, which is defined to be the port at or nearest to which the owner, or, if more than one, the husband or acting and managing owner, resides.[6] To entitle a vessel to such registry, enrolment,

A passport granted by any particular government to protect against its own cruisers is not a sailing under the protection of the flag of that government, so as to stamp a national character on the vessel. Jenks *v.* Hallet, 1 Cai. (N. Y.) 60.

3. U. S. *v.* Jenkins, 26 Fed. Cas. No. 15,473.

The certificate of registry of a vessel under the laws of the United States, and proof that she carries the American flag, are competent, and *prima facie* sufficient to establish her nationality, without direct proof of the citizenship of her owners. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936; The Princess Charlotte, Brown & L. 75. But such evidence may, in a civil case, be outweighed by circumstantial evidence to the contrary. The Princess Charlotte, *supra*. To prove that a ship is a British ship, it is not necessary to produce the registry or a copy thereof; it is sufficient to show orally that she belongs to British owners, and carries the British flag. Reg. *v.* Seberg, L. R. 1 C. C. 264, 11 Cox C. C. 520, 39 L. J. M. C. 133, 22 L. T. Rep. N. S. 523, 18 Wkly. Rep. 935; Reg. *v.* Allen, 10 Cox C. C. 405; Le Cheminant *v.* Pearson, 4 Taunt. 367, 13 Rev. Rep. 636.

In prize cases the flag and ship's documents are conclusive as to the nationality of the ship, but not of the cargo. The Vreede Scholtys, 5 C. Rob. 5 note; The Vrow Elizabeth, 5 C. Rob. 2. The registry, flag, and pass of a ship carry with them the presumption that they are true and correct, and the owner is estopped to aver against them. The Laura, 12 L. T. Rep. N. S. 685, 3 Moore P. C. N. S. 181, 13 Wkly. Rep. 369, 16 Eng. Reprint 68.

4. See cases cited *infra*, this note.

By the Registry Act of 1792, the pertinent part of which is now embodied in U. S. Rev. St. (1878) § 4131 [U. S. Comp. St. (1901) p. 2803], vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting trade or fisheries (see *infra*, I, B, 3) shall be deemed vessels of the United States. See Davidson *v.* Gorham, 6 Cal. 343; Kirkpatrick *v.* Augusta Bank, 30 Ga. 465; Best *v.* Staple, 61 N. Y. 71; Lawrence *v.* Hodges, 92 N. C. 672, 53 Am. Rep. 436; The Merritt, 17 Wall. (U. S.) 582, 21 L. ed. 682 [*affirming* 16 Fed. Cas. No. 9,222, 2 Biss. 381]; White's Bank *v.* Smith, 7 Wall. (U. S.) 646, 19 L. ed. 211.

Use made of vessel immaterial.—A steamer, enrolled and licensed in the office of collector of customs under the statutes of the United States, is a vessel of the United States, regardless of what use may be made of her. Fleming *v.* Philadelphia Fire Assoc., 147 Mich. 404, 110 N. W. 933; Lawrence *v.* Hodges, 92 N. C. 672, 53 Am. Rep. 436. The fact that the owner may be using a vessel, registered as a vessel of the United States, in violation of a state law, and is liable to a penalty therefor, does not affect the status of the vessel. Fleming *v.* Philadelphia Fire Assoc., *supra*. A vessel of the United States, duly registered, does not lose her status as such while in the Detroit river. Fleming *v.* Philadelphia Fire Assoc., *supra*.

In order to show the loss of nationality in an American vessel, it is not enough to show that she was taken abroad and sold; it must also appear that she was sold to a foreigner. U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18.

5. As evidence of nationality see *supra*, I, A.

As evidence of title see *infra*, II, B, 2.

Penalties and forfeitures for violation of registry laws see *infra*, I, E, 1.

Registration of vessels as constituting regulation of commerce see Commerce, 7 Cyc. 466.

The only classes of vessels which are entitled to be registered or enrolled as vessels of the United States are: (1) Vessels built in the United States and owned by a citizen; (2) vessels captured in war and condemned as prize, and owned by a citizen; (3) vessels forfeited and sold for breach of the laws of the United States and purchased and owned by a citizen; (4) vessels wrecked in the United States, and purchased and repaired by a citizen, if the repairs are equal to three fourths of the cost of the vessel when so repaired; (5) vessels of the government sold to a citizen of the United States; (6) steamboats employed only in a river or bay of the United States and owned wholly or in part by an alien resident within the United States. U. S. Rev. St. (1878) §§ 4131, 4132, 4165, 4180–4184, 4312, 4316 [U. S. Comp. St. (1901) pp. 2803, 2805, 2825, 2832–2834, 2959, 2960].

6. The two statutes providing generally for registry and enrolment and license of vessels are the act of Dec. 31, 1792 (U. S. Rev. St. (1878) § 4131 *et seq.* [U. S. Comp. St. (1901) p. 2803]) applicable exclusively to registry of vessels engaged in foreign commerce, and the act of Feb. 18, 1793 (U. S. Rev. St. (1878) § 4311 *et seq* [U. S. Comp. St. (1901) p. 2959]) applicable exclusively to vessels engaged in domestic commerce.

or license, application must be made under oath, setting forth certain particulars as to her age, measurement, tonnage, etc.[7] Upon receiving such registry or enrolment she becomes a vessel of the United States, and entitled to all the privileges and protection which the laws confer upon that character.[8]

2. Registry — a. In General. The registration of vessels is not compulsory on their owners, it being a privilege and advantage of which they may or may not avail themselves as they choose.[9] None but citizens of the United States are entitled to have their vessels registered.[10] Nor can a vessel be registered until proof of the citizenship of all her owners is placed on record.[11] Registers

Vessels engaged in the foreign trade are registered, and those engaged in the coasting and home trade are enrolled and licensed; and the words "register" and "enrolment" are used to distinguish the certificates granted to those two classes of vessels. Vessels under twenty tons may be licensed without being enrolled (U. S. Rev. St. (1878) § 4311 [U. S. Comp. St. (1901) p. 2959]); The Mohawk, 3 Wall. (U. S.) 566, 18 L. ed. 67; Bigley *v.* New York, etc., R. Steamship Co., 105 Fed. 74. In the case of vessels used on our northern frontiers which are necessarily engaged in both the foreign and home traffic at the same time the certificate of enrolment is made equivalent to both registry and enrolment. U. S. Rev. St. (1878) § 4318 [U. S. Comp. St. (1901) p. 2961]. The intention of this act on the subject of enrolled and licensed vessels was to enable such vessels in certain cases to engage in foreign and domestic commerce at one and the same time, without the formality of a registry, not exacting the restrictions or enforcing the penalties imposed on registered vessels. U. S. *v.* The Forrester, 25 Fed. Cas. No. 15,132, 1 Newb. Adm. 81.

7. Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057. See U. S. Rev. St. (1878) §§ 4142 *et seq.*, 4312, 4320 *et seq.* [U. S. Comp. St. (1901) pp. 2809, 2959, 2962].

8. Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057.

9. Davidson *v.* Gorham, 6 Cal. 343.

The policy of the registry law is to give certain advantages to American built and American owned vessels. Smith *v.* Hammond, 22 Fed. Cas. No. 13,053.

Nature of registry.— The registry of a vessel is in the nature of a continuing license. It secures to the owners certain privileges so long as the registry continues in force and no longer; and the registry will continue in force so long only as the legal status of the vessel remains unchanged. Chadwick *v.* Baker, 54 Me. 9.

The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936; The Mohawk, 3 Wall. (U. S.) 566, 18 L. ed. 67.

10. Chadwick *v.* Baker, 54 Me. 9. See U. S. Rev. St. (1878) § 4131 [U. S. Comp. St. (1901) p. 2803].

American vessels captured and condemned by a foreign power are not entitled to registry even if they again became American property (Smith *v.* Hammond, 22 Fed. Cas. No. 13,053); but if sold to a foreigner and afterward repurchased by an American citizen, they may be registered anew (Smith *v.* Hammond, *supra*).

A vessel wrecked at sea, and then brought into the United States is not a vessel "wrecked in the United States" (U. S. Rev. St. (1878) § 4136 [U. S. Comp. St. (1901) p. 2807]), and is not entitled to an American register as such, where her repairs amounted to three fourths of her value when repaired. U. S. *v.* The Victoria Perez, 28 Fed. Cas. No. 16,620, 8 Ben. 109.

Transfer to American citizen in trust.— The directors of a foreign corporation owning vessels have no power to transfer such vessels in trust for the corporation to such of their members as are American citizens for the purpose of giving such vessels an American registry. Ogden *v.* Murray, 39 N. Y. 202.

The word "vessel" includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. Arnold *v.* Eastin, 116 Ky. 686, 76 S. W. 855, 25 Ky. L. Rep. 895. See U. S. Rev. St. (1878) § 3 [U. S. Comp. St. (1901) p. 4]. Barges used for the transportation of coal on an inland river are "vessels," within the statute. Arnold *v.* Eastin, *supra*.

Rebuilt vessel.— As public policy is against changing the names of vessels, courts of admiralty will go far in ruling that rebuilt vessels are in law identical with those from the material of which they are built, and requiring them to be registered in the same name. Where any substantial portion of the frame or skeleton of an old vessel is built upon and preserved intact in constructing the new, the courts lean toward holding the vessel to be the same in law; but where no such part of the frame or skeleton is left intact, but each timber of the old vessel is first dislocated before being used in the new, in such case the vessel is a new one, and may bear a new name, although having the model of the old vessel. U. S. *v.* The Grace Meade, 25 Fed. Cas. No. 15,243, 2 Hughes 83.

11. Chadwick *v.* Baker, 54 Me. 9.

Necessity of disclosure of equitable title.— The registry acts of the United States do not require a disclosure of the equitable title of the vessel registered unless that title is in the subject of a foreign state. Scudder *v.* Calais Steamboat Co., 21 Fed. Cas. No. 12,566; U. S. *v.* The Fideliter, 25 Fed. Cas. No. 15,088;

are either permanent or temporary,[12] but a vessel cannot have more than one register at the same time; the "temporary," being superseded by the "permanent," register.[13]

b. Effect of Sale of Vessel.[14] The sale of a vessel to a foreigner not only deprives her of her registry, but also denationalizes her, so as to render her incapable of being registered.[15] A sale to an American citizen does not denationalize the vessel, but only causes her to lose her registry, and she may be registered anew upon proof that the new owner is a citizen of the United States.[16] To entitle ships to be registered anew after sale, and to be deemed ships of the United States, with the privileges and exemptions of such ships, it is necessary that the transfer should be made according to the form prescribed in the registry acts; that is to say, that it should be by some instrument in writing, which shall recite at length the certificate of registry;[17] but the acts do not declare transfer by any other method void and illegal; but simply deny to ships transferred in any other manner the privileges of ships of the United States, and deem them alien or foreign ships.[18]

c. Deposit of Register With Consul. On arrival at a foreign port masters of vessels are required by statute[19] to deposit their registers with the consul or commercial agent, if any, at that port.[20]

Weston *v.* Penniman, 29 Fed. Cas. No. 17,455, 1 Mason 306.

12. See cases cited *infra*, this note.

Permanent registers are defined in the treasury regulations as being those granted by collectors to ships and vessels belonging to ports within their respective districts. Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463.

Temporary registers are defined to be those granted by collectors to ships and vessels belonging to ports in other districts. Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463.

13. Chadwick *v.* Baker, 54 Me. 9, holding the "permanent" and "temporary," when applied to the registers of a vessel, do not imply that they are coexistent, but successive.

14. Forfeiture for sale or failure to register see *infra*, I, E, 1.

15. U. S. Rev. St. (1878) § 4172 [U. S. Comp. St. (1901) p. 2828]. And see Davidson *v.* Gorham, 6 Cal. 343; The Maria, 16 Fed. Cas. No. 9,075, Deady 89; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226.

A corporation organized and existing under the laws of a foreign country is "a subject or citizen of a foreign prince or state," as the case may be, within the meaning of the registry act without reference to the nationality or citizenship of the shareholders therein. The Maria, 16 Fed. Cas. No. 9,075, Deady 89.

A sale upon credit, and upon the condition that the purchaser shall not use the vessel until the purchase-money is all paid, and that if default is made therein the seller may retake the vessel into his possession, is a sale, within the meaning of the registry act. The Maria, 16 Fed. Cas. No. 9,075, Deady 89.

16. Davidson *v.* Gorham, 6 Cal. 343; Chadwick *v.* Baker, 54 Me. 9; Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057.

Nature of sale.— Such sale as creates a new owner, or part-owner, renders a vessel's former registry void. Chadwick *v.* Baker, 54 Me. 9.

Liability of collector for refusal to re-register.—A collector, who wrongfully refuses to re-register a vessel which, being originally American, was sold to a foreigner, and then again purchased by an American, is not personally liable in damages, when his refusal is based on an honest mistake in the construction of the law. Smith *v.* Hammond, 22 Fed. Cas. No. 13,053.

17. *Alabama.*— Fontaine *v.* Beers, 19 Ala. 722.

Louisiana.— Begley *v.* Morgan, 15 La. 162, 35 Am. Dec. 188.

Maine.— Mitchell *v.* Taylor, 32 Me. 434.

Massachusetts.— Hatch *v.* Smith, 5 Mass. 42.

Rhode Island.— Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057.

United States.— Fitz *v.* The Galiot Amelie, 6 Wall. 18, 18 L. ed. 806; Ohl *v.* Eagle Ins. Co., 18 Fed. Cas. No. 10,472, 4 Mason 172; Weston *v.* Penniman, 29 Fed. Cas. No. 17,455, 1 Mason 306.

18. Mitchell *v.* Taylor, 32 Me. 434; Hatch *v.* Smith, 5 Mass. 42; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226; Weston *v.* Penniman, 29 Fed. Cas. No. 17,455, 1 Mason 306.

19. U. S. Rev. St. (1878) § 4309 [U. S. Comp. St. (1901) p. 2956].

20. See cases cited *infra*, this note.

The arrival spoken of means an arrival for purposes of business, requiring an entry and clearance and stay at the port so long as to require some of the acts connected with business; and not merely touching at a port for advices, or to ascertain the state of the market, or being driven in by an adverse wind and sailing again as soon as it changes. Harrison *v.* Vose, 9 How. (U. S.) 372, 13 L. ed. 179; Toler *v.* White, 24 Fed. Cas. No. 14,079, 1 Ware 280; U. S. *v.* Shackford, 27 Fed. Cas. No. 16,262, 5 Mason 445. But see Parsons *v.* Hunter, 18 Fed. Cas. No. 10,778, 2 Sumn. 419, holding that any voluntary arrival in a foreign port in the course of a

3. Enrolment and License — a. In General. "Enrolment" is the term used in describing the registry of a vessel engaged in coastwise or inland navigation or commerce, as distinguished from a vessel engaged in foreign commerce and navigation,[21] and to entitle a vessel to enrolment "the same requirements in all respects shall be complied with as are required before registering a vessel;" [22] but a violation of these provisions is not followed by the same penalties and forfeitures.[23] License means the same as enrolment, but is applied to vessels of less than twenty tons burden.[24] The acts of congress providing for the enrolment and license of vessels do not apply to vessels employed upon the interior waters of the country unless such waters are public navigable waters of the United States.[25]

b. Effect of Sale of Vessel. The sale of a licensed vessel to one who is a foreigner renders such vessel liable to forfeiture,[26] unless the owner shall have

voyage, although for advices only, and not the port of final destination, seems to be within the provisions of the act.

An arrival at a foreign port from another foreign port is within the purview of U. S. Rev. St. (1878) § 4309 [U. S. Comp. St. (1901) p. 2956], requiring the master of an American vessel, on his arrival at a foreign port, to deposit his register with the consul or commercial agent, if any, at that port. Gould *v.* Staples, 9 Fed. 159.

21. Moore *v.* Lincoln Park, etc., Consol. Co., 196 Pa. St. 519, 46 Atl. 857; The Mohawk, 3 Wall. (U. S.) 566, 18 L. ed. 67; U. S. *v.* The Planter, 27 Fed. Cas. No. 16,054, Newb. Adm. 262. See U. S. Rev. St. (1878) § 4311 *et seq.* [U. C. Comp. St. (1901) p. 2959].

22. Moore *v.* Lincoln Park, etc., Consol. Co., 196 Pa. St. 519, 46 Atl. 857; The Mohawk, 3 Wall. (U. S.) 566, 18 L. ed. 67; Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1.513, 1 Cliff. 463; The Two Friends, 24 Fed. Cas. No. 14,289, 1 Gall. 118; U. S. *v.* Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81; U. S. *v.* Hipkin, 26 Fed. Cas. No. 15,371.

Necessity of oath.—Previous to registry an oath is required, showing the place where the vessel was built, her owner or owners' names and place of abode, with some other details, and the penalty for false swearing is the forfeiture of the vessel. Moore *v.* Lincoln Park, etc., Consol. Co., 196 Pa. St. 519, 46 Atl. 857; U. S. *v.* Bartlett, 24 Fed. Cas. No. 14,532, 2 Ware 17. But Act Cong. April 25, 1866 (14 U. S. St. at L. 40), directing the secretary of the treasury to issue enrolment and license to certain vessels therein named, is mandatory in its terms; and an oath in accordance with the provisions of Act Dec. 31, 1792, § 4 (U. S. St. at L. 287), to obtain enrolment and license under the former act is unnecessary. The Acorn, 1 Fed. Cas. No. 29, 2 Abb. 434.

23. The Mohawk, 3 Wall. (U. S.) 566, 18 L. ed. 67; The Henry, 11 Fed. Cas. No. 6,373, 1 Hask. 100; The Two Friends, 24 Fed. Cas. No. 14,289, 1 Gall. 118; U. S. *v.* Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81.

24. U. S. Rev. St. (1878) § 4311 [U. S. Comp. St. (1901) p. 2959].

25. The Montello, 11 Wall. (U. S.) 411, 20 L. ed. 191.

When river deemsd navigable water of United States.—A river can be deemed a navigable water of the United States, only when it forms, by itself or by its connection with other waters, a continuous highway over which commerce is or may be carried on with other states or foreign countries. The Montello, 11 Wall. (U. S.) 411, 20 L. ed. 191.

What constitutes coasting trade.—A license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States. Veazie *v.* Moor, 14 How. (U. S.) 568, 14 L. ed. 545. Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a state, or the watercourses partaking of the character of canals exclusively within the interior of a state, and made practicable for navigation by the funds of the state, or by privileges she may have conferred for the accomplishment of the same end. North River Steam Boat Co. *v.* Hoffman, 5 Johns. Ch. (N. Y.) 300; Veazie *v.* Moor, 14 How. (U. S.) 568, 14 L. ed. 545. Coasting trade includes trade between Porto Rico and the United States. Bigley *v.* New York, etc., Steamship Co., 105 Fed. 74. It does not apply to ferrying across a river. U. S. *v.* The James Morrison, 26 Fed. Cas. No. 15,465, Newb. Adm. 241. But although a vessel navigates only from port to port in the same state, if its employment constitutes a link in a chain of commerce among the states, it will be considered as in the coasting trade, within the meaning of the license act. U. S. *v.* The James Morrison, *supra.*

A canal-boat is not a ship or vessel within the meaning of the statute. U. S. *v.* The Ohio, 26 Fed. Cas. No. 15,915, 9 Phila. (Pa.) 448; U. S. *v.* The Pennsylvania Canal Boats Nos. 68 and 69, 27 Fed. Cas. No. 16,027.

Extension to western lakes.—Act March 2, 1831 (4 U. S. St. at L. 487), regulating the foreign and coasting trade on the northern, northeastern, and northwestern frontiers, in effect extended Act Feb. 18, 1793 (1 U. S. St. at L. 305), to the western lakes. U. S. *v.* Sweeney, 28 Fed. Cas. No. 16,426, 1 Biss. 309.

26. Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226, U. S. Rev. St. (1878) § 4377 [U. S. Comp. St. (1901) p. 2986].

previously surrendered and delivered up his license;[27] but the sale itself of a licensed vessel to a foreigner is not void.[28]

4. Port of Registry or Enrolment. Under the registry and enrolment acts[29] vessels are required to be registered or enrolled in the collection district that comprehends the port to which they belong; "which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."[30] Vessels may be registered by the collector of the port where at the time the registry is effected such vessels may be.[31] But if a vessel is registered at a port other than that to which she belongs, and she afterward arrives at her home port, she is to be there registered anew, and her former certificate given up.[32]

5. Reciprocal Exchanges. Collectors of the several districts are authorized to enroll and license any ship or vessel that may be registered, upon such registry being given up, or to register any ship or vessel that may be enrolled, upon such enrolment and license being given up as therein required.[33] Whenever such exchanges are made, it becomes the duty of the collector making the same to transmit the register or enrolment given up to him to the register of the treasury; and the one granted in lieu of the one given up shall within ten days after the arrival of the ship or vessel within the district to which she belongs be delivered to the collector of said district, and be by him canceled.[34] In no event has the collector the right to keep both the register and enrolment, and if he does so he is liable for the resulting damage.[35]

C. Duties and Taxes[36] **— 1. In General.** The subject of tonnage tax is regulated by statute.[37] A tonnage tax is a tax on entry, and applies only to

27. U. S. *v.* The Hawke, 26 Fed. Cas. No. 15,331, Bee 34; U. S. Rev. St. (1878) § 4337 [U. S. Comp. St. (1901) p. 2969].

28. Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226.

29. U. S. Rev. St. (1878) § 4311 *et seq.* [U. S. Comp. St. (1901) p. 2959]; U. S. Rev. St. (1878) § 4131 *et seq.* [U. S. Comp. St. (1901) p. 2803].

30. U. S. Rev. St. (1878) § 4141 [U. S. Comp. St. (1901) p. 2808]. And see Moore *v.* Lincoln Park, etc., Consol. Co., 196 Pa. St. 519, 46 Atl. 857; Stephenson *v.* The Francis, 21 Fed. 715; The Mary Chilton, 4 Fed. 847; The E. A. Barnard, 2 Fed. 712; Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463; The St. Lawrence, 21 Fed. Cas. No. 12,234, 3 Ware 211.

The place at which the ship's husband spends two thirds of his time and transacts his business is the proper place for enrolling and licensing the vessel, although he has a legal domicile in another district. The St. Lawrence, 21 Fed. Cas. No. 12,234, 3 Ware 211.

A master sailing a vessel on shares, he to supply and man her, and pay a certain part of the net earnings to the owners, is not the "acting and managing owner," but the charterer; and his sailing on foreign voyages from New York more or less often would not make New York his "usual residence," if his family lived in Massachusetts. The Jennie B. Gilkey, 19 Fed. 127.

When owner is corporation.—A corporation of one state, which owns a vessel with which it does business in another state, where it has an office, may there enroll it. Moore *v.* Lincoln Park, etc., Consol. Co., 196 Pa. St. 519, 46 Atl. 857.

The port of registry is prima facie the home port of a vessel (The Jennie B. Gilkey, 19 Fed. 127), and this presumption must be overcome by clear proof, before any other port is taken as the home port (The Jennie B. Gilkey, *supra*).

31. Chadwick *v.* Baker, 54 Me. 9.

32. Chadwick *v.* Baker, 54 Me. 9.

33. Badger *v.* Gutierez, 111 U. S. 734, 4 S. Ct. 563, 28 L. ed. 581; Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463.

Whose application necessary.— These reciprocal changes may be made upon the application of the master or commander, when the ship or vessel is in a district other than the one to which she belongs. Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463. But in every such case the master or commander is required to make oath that, according to his best knowledge and belief, the property of the vessel remains as expressed in the register or enrolment proposed to be given up. Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463.

34. Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057; Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463.

35. Badger *v.* Gutierez, 111 U. S. 734, 4 S. Ct. 563, 28 L. ed. 581.

36. **Customs duties on vessels and equipment** see Customs Duties, 12 Cyc. 1132.

License-tax on vessels by state as interference with commerce see Commerce, 7 Cyc. 466.

Place of taxation see Taxation.

37. U. S. Rev. St. (1878) § 4219 [U. S. Comp. St. (1901) p. 2848].

Amount of duty.— This section imposes

vessels coming in to trade.[38] Moreover it is only to be levied on foreign vessels, or vessels coming from some foreign port or place.[39] A duty of fifty cents per ton, denominated "light money," is levied and collected on all vessels not of the United States, which may enter the ports of the United States.[40] Such light money is levied and collected in the same manner and under the same regulations as tonnage duties.[41]

2. Remedies — a. In General. The collector may refuse to enter as well as to clear a vessel which has not paid her tonnage duties;[42] but if he neglects or forgets to do so, the United States has an action for the duties against the owner,[43] and perhaps against the master,[44] and also against the ship;[45] but not against a mere consignee of the vessel, for he has no interest or special property in the vessel.[46]

duties on vessels built within the United States, but belonging wholly or in part to subjects of foreign powers, at the rate of thirty cents per ton; on other vessels not of the United States at the rate of fifty cents per ton. See The Alta, 148 Fed. 663, 78 C. C. A. 415.

Pilotage as constituting impost or tonnage tax see Commerce, 7 Cyc. 460 notes 56, 57.

Power to levy see Commerce, 7 Cyc. 476.

Quarantine charges as tonnage tax see Commerce, 7 Cyc. 475 note 81.

State harbor fees as impost or tonnage tax see Commerce, 7 Cyc. 463 notes 80, 81.

Wharfage fees as tonnage tax see Commerce, 7 Cyc. 475 note 81.

38. Ripley *v.* Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

Vessels forced in by distress are not liable to tonnage duty. Ripley *v.* Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271.

39. The Alta, 136 Fed. 513, 69 C. C. A. 289.

Terms "foreign vessel" and "foreign port or place" construed.—A foreign-built vessel, owned entirely by a citizen of the United States, and entering a port of the United States from Manila, P. I., does not enter from a "foreign port or place," and is therefore not subject to tonnage duty under U. S. Rev. St. (1878) § 4219 [U. S. Comp. St. (1901) p. 2848], nor is she subject to such duty under 32 U. S. St. at L. 54, c. 140 [U. S. Comp. St. Suppl. (1903) p. 349], extending such duties to "foreign vessels entering from the Philippine archipelago, since, while not "a vessel of the United States," because not entitled to registry, she is an American, and not a foreign vessel, by virtue of the citizenship of her owner. The Alta, 136 Fed. 513, 69 C. C. A. 289. But a vessel not registered in the United States is a vessel "not of the United States," within the meaning of U. S. Rev. St. (1878) § 4219 [U. S. Comp. St. (1901) p. 2848], although owned by a citizen of the United States, and on her entry from a foreign port is subject to tonnage duty at the rate of fifty cents per ton thereunder. The Alta, 148 Fed. 663, 78 C. C. A. 415.

Effect of British treaty of 1815.—The tonnage duties, etc., payable on foreign vessels were not changed by the British treaty of July 3, 1815, or the acts of congress and the president's proclamation pursuant thereto, so far as respects vessels coming from British colonies. U. S. *v.* Hathaway, 26 Fed. Cas. No. 15,326, 3 Mason 324. The treaty of 1815, putting British vessels coming into our ports, as to duties and charges, on the same footing as American vessels, extends to vessels coming from European ports, and not to vessels coming from the West Indies, or the British possessions in North America. U. S. *v.* Hathaway, *supra*.

Exception.—A vessel belonging in whole or in part to an alien may, under U. S. Rev. St. (1878) § 4347, pass from one district of the United States to another, with cargo brought from a foreign port, and not "unladen," without thereby becoming liable to a tonnage tax under U. S. Rev. St. (1878) § 4219 [U. S. Comp. St. (1901) p. 2848], and merchandise is not "unladen," or "taken," within the meaning of these terms, as used in these sections, unless there is an actual removal of the same from or to the vessel. Laidlaw *v.* Abraham, 43 Fed. 297; *In re* Laidlaw, 42 Fed. 401.

40. The Alta, 136 Fed. 513, 69 C. C. A. 289; The Miranda, 51 Fed. 523, 2 C. C. A. 362.

Exemption.— The statute does not operate upon unregistered vessels owned by citizens of the United States, and carrying a sea letter or other regular document issued from a custom-house of the United States proving the vessel to be American property. U. S. *v.* The Miranda, 51 Fed. 523, 2 C. C. A. 362 [*affirming* 47 Fed. 815].

Proof to entitle vessel to exemption.— The fact that the vessel is American property exempts her from liability to pay light money; and the law is complied with if this fact be shown to the collector by any competent evidence. The Alta, 148 Fed. 663, 78 C. C. A. 415; The Alta, 136 Fed. 513, 69 C. C. A. 289.

41. The Alta, 136 Fed. 513, 69 C. C. A. 289.

42. The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477.

43. The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477; U. S. *v.* Hathaway, 26 Fed. Cas. No. 15,326, 3 Mason 324.

44. The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477.

45. The George T. Kemp, 10 Fed. Cas. No. 5,341, 2 Lowell 477.

46. U. S. *v.* Hathaway, 26 Fed. Cas. No. 15,326, 3 Mason 324 [*cited* in Knox *v.* Devens, 14 Fed. Cas. 7,905, 5 Mason 380].

b. To Recover Back Tax. In case of an erroneous imposition of a tonnage tax, the statute gives the party a remedy by an appeal to the treasury department, on which the decision of the commissioner of navigation is final.[47] But such decision is "final" in the department only, and the person who paid the tax still has a right of action to recover the same.[48]

D. Inspection[49] **— 1. In General.** Various acts of congress have been passed for the purpose of requiring vessels, propelled in whole or in part by steam, to undergo periodical inspection.[50] The various kinds of small steam craft which were intended to be embraced within the law are enumerated;[51] and by a later

47. *In re* Laidlaw, 42 Fed. 401.

48. Ripley *v.* Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271; Laidlaw *v.* Abraham, 43 Fed. 297.

Pleading.— In a complaint in an action against a collector to recover a sum alleged to have been wrongfully exacted as tonnage tax, an allegation that a collector "exacted" certain tonnage duties is equivalent to saying that they were "ascertained and liquidated" by him, as provided in U. S. Rev. St. (1878) § 2931; and an allegation that the grounds of the objection to the collector's decision exacting such duties were specified in the notice to him "clearly and distinctly" is equivalent to saying they were "distinctly and specifically" set forth therein, as required in said section. Laidlaw *v.* Abraham, 43 Fed. 297.

49. Lack of inspection as affecting owner's right to limit liability see *infra*, VII, D, 14, a, (II).

50. U. S. Rev. St. (1878) §§ 4399–4462 [U. S. Comp. St. (1901) pp. 3015–3044].

By U. S. Rev. St. (1878) § 4400 [U. S. Comp. St. (1901) p. 3015], it is declared that all steam vessels, with certain exceptions, navigating any waters of the United States which are common highways of commerce, or open to general and competitive navigation, shall be subject to inspection. All vessels which navigate those waters, whether engaged in commerce, local or interstate, or for purposes of pleasure simply, may be alike subjected to the regulations which congress prescribed. The Oyster Police Steamers, 31 Fed. 763 [*affirmed* in 35 Fed. 926]. The earlier inspection acts were construed to apply only to vessels engaged in interstate or foreign commerce. The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. ed. 999; The Bright Star, 4 Fed. Cas. No. 1,880, Woolw. 266; The Farragut, 8 Fed. Cas. No. 4,677, 6 Blatchf. 207; The Oconto, 18 Fed. Cas. No. 10,421, 5 Biss. 460 [*affirmed* in 16 Fed. Cas. No. 9,330, 6 Biss. 243]; The Thomas Swan, 23 Fed. Cas. No. 13,931, 6 Ben. 42; U. S. *v.* The Seneca, 27 Fed. Cas. No. 16,251, 1 Biss. 371. Under these acts also inspection was required only of vessels carrying passengers. The Jacob G. Neafie, 13 Fed. Cas. No. 7,156, 8 Ben. 251; The Sun, 23 Fed. Cas. No. 13,612, 1 Biss. 373.

Purpose of law.— The provisions of the legislation of congress with regard to inspection of the hulls and boilers of steam vessels are intended, not alone for the protection of those on board the vessel itself, but for the protection of all other persons and property engaged in navigation, which might in any way be subject to damage from any accident which might happen for want of that attention to safety which the inspection enforces. The Oyster Police Steamers, 31 Fed. 763 [*affirmed* in 35 Fed. 927].

Inspection after repairs.— It is as much the duty of an owner of a steamship, under U. S. Rev. St. (1878) § 4418 [U. S. Comp. St. (1901) p. 3024], to cause an inspection of a boiler which has been repaired in a substantial part as to cause an inspection of a new boiler before using the same. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366; Posey *v.* Scoville, 10 Fed. 140.

An unfinished vessel need not be inspected before being moved from one place to another in the course of her construction; and a voyage from the place where the vessel is constructed to another place, by direction of the inspectors, to enable her to be inspected, is not a violation of the navigation laws. The Joshua Leviness, 13 Fed. Cas. No. 7,549, 9 Ben. 339.

Foreign vessels.— By the act of Aug. 7, 1882, it was provided that all foreign private vessels should be subject to like inspection. See Deslions *v.* La Compagnie Generale Transatlantique, 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973 [*affirming* 144 Fed. 781, 75 C. C. A. 647].

Frequency of inspection.— Act July 7, 1838 (5 U. S. St. at L. 304), requiring steamboats to be inspected "once in every six months," means that not more than six months shall elapse between the successive inspections, and is not satisfied by dividing time into periods of six months, and making one inspection early in one period and another late in the other. Virginia, etc., Steam Nav. Co. *v.* U. S., 28 Fed. Cas. No. 16,973, Taney 418.

51. U. S. Rev. St. (1878) § 4426, declares that the hull and boilers of every ferry-boat, canal-boat, yacht, or other small craft of like character, propelled by steam, shall be inspected under the provisions of this title. It is difficult to draw the line between vessels propelled by steam which are so small and insignificant that they do not come within the inspection laws, and larger boats which do. Thus a small steam pleasure yacht, run occasionally by its owners for amusement, has been held not to be a vessel navigating the public waters of the United States, within the meaning of the steam inspection law. U. S. *v.* The Mollie, 26 Fed. Cas. No. 15,795, 2 Woods 318. On the other hand it has been held that a craft thirty-seven feet long, of eight feet beam, and three feet nine inches

statute [52] vessels propelled by gas, fluid, or electricity are included.[53] It is the duty of the master or owner of a steam vessel to make a written application for her inspection; [54] and if the government inspectors fail to discharge properly their duty of inspection of a vessel, privity or knowledge of defects which would have been revealed by a proper inspection is not to be imputed to a corporation owning the vessel, which has delegated the matter of inspection of the vessel to a competent employee.[55]

2. Authority and Compensation of Inspectors. The supervising inspectors [56] are authorized to establish rules necessary to carry out the statutory provisions as to steam vessels,[57] but they have no authority to establish regulations except such as relate to carrying out such provisions.[58] The compensation of inspectors is fixed by statute.[59]

E. Penalties and Forfeitures For Violations of Regulations [60] — **1. In General.** For the violation of shipping regulations congress has imposed penalties and in some cases forfeiture of the vessel. Thus penalties are provided for permitting a steam vessel to be navigated without being inspected; [61] for commencing a voyage without a licensed engineer on board; [62] for failure to exhibit

depth of hold, and having a small engine and boiler, must be inspected, such vessel differing but slightly from a ferry-boat or a yacht, and falling under "other small craft of like character." Hartranft *v.* Du Pont, 118 U. S. 223, 6 S. Ct. 1188, 30 L. ed. 205.

The act of June 8, 1864 (13 U. S. St. at L. 120), subjects to inspection under that act ferry-boats engaged in foreign and interstate commerce. The Bright Star, 4 Fed. Cas. No. 1,880, Woolw. 266.

52. 29 U. S. St. at L. 489 [U. S. Comp. St. (1901) p. 3029].

53. See U. S. *v.* Nash, 111 Fed. 525.

54. The Jacob G. Neafie, 13 Fed. Cas. No. 7,156, 8 Ben. 251.

55. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366 [*modifying* 66 Fed. 575].

56. **Appointment and qualification** see U. S. Rev. St. (1878) §§ 4402, 4404 [U. S. Comp. St. (1901) p. 3017].

57. Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210, rule that all passenger and freight steamers shall have one of the crew on watch in or near the pilot-house.

58. U. S. *v.* Miller, 26 Fed. 95.

The subject of lights to be carried by barges or other vessels is not included in any of the provisions of title 52, but is regulated by title 48; therefore the amendment made February, 1885, to section 20 of general rule 3 of the supervising inspectors, requiring barges in tow to carry a red and a green light, is unauthorized and void. U. S. *v.* Miller, 26 Fed. 95.

59. See cases cited *infra*, this note.

Special inspectors.— The appointment of a local inspector of the hulls of steam vessels by the secretary of the treasury as a special inspector of foreign vessels, under the act of congress of Aug. 7, 1882, which fixes the compensation of such special inspectors at two thousand dollars per year, entitles the appointee to such compensation for his services, although the appointment is made with the distinct condition that he is not to receive any additional compensation. Glavey *v.* U. S., 182 U. S. 595, 21 S. Ct. 891, 45 L. ed. 1247 [*reversing* 35 Ct. Cl. 242]. The failure of a special inspector to give a bond will not preclude him from recovering compensation for his services as such officer when he has been duly appointed and taken the oath of office. Glavey *v.* U. S., *supra*.

60. **For violations of particular shipping regulations** as to carriage of passengers see *infra*, VIII, B, 2.

For violation of customs laws see Customs Duties, 12 Cyc. 1173, 1174.

Under embargo act see War.

61. U. S. Rev. St. (1878) § 4499 [U. S. Comp. St. (1901) p. 3060].

Vessel in government service.— The owner of a river steamboat is not liable to the penalty for non-inspection, where the last year's inspection expires while the vessel is in the service of the government under military impressment. U. S. *v.* Moore, 26 Fed. Cas. No. 15,801, 2 Bond 34.

While vessels propelled by gas, fluid, naphtha, or electric motors are subject to the same provisions as steam vessels in respect to inspection, they are not subject to forfeiture for failure to comply with such provisions. The Ben R., 134 Fed. 784, 67 C. C. A. 290.

62. See cases cited *infra*, this note.

A vessel without passengers or freight is not subject to the penalty. Board of Steamboat Engineers *v.* Miller, 9 Ala. 511.

The penalty is incurred by the captain or owner of the boat, and whoever is in command of the boat when the law is violated is liable as captain. Leonard *v.* Board of Engineers, 10 Ala. 52. The captain is subject to the penalty, although the services of the engineer may have been engaged by a different person as owner of the boat. Walker *v.* Board of Steamboat Engineers, 14 Ala. 228.

Completion of voyage unnecessary.— It is not necessary, to incur a forfeiture under this act, that the meditated voyage should be actually performed. It is sufficient if it be commenced, and the boat be actually run without a licensed engineer on board em-

enrolment or license to revenue officers; [63] for failure to deposit the ship's register with the consul on arrival in a foreign port; [64] for failure to deliver up a temporary register after arrival of the vessel at the port to which she belongs.[65] For the violation of more important regulations absolute forfeiture of the vessel or its value is exacted. Thus provision is made for the forfeiture of a vessel or its value for fraudulently obtaining a register, enrolment, or license; [66] for fraudulent

ployed to manage the engine. Leonard *v.* Board of Engineers, 10 Ala. 52.

63. U. S. Rev. St. (1878) § 4336 [U. S. Comp. St. (1901) p. 2969.

Where a vessel is not enrolled or licensed a failure to exhibit the enrolment and license when required by such an officer does not render the master liable. The John J. Wiltsie, 10 Fed. Cas. No. 5,353, 3 Ben. 251.

64. U. S. Rev. St. (1878) § 4309 [U. S. Comp. St. (1901) p. 2956].

Time for bringing suit.—The penalty of five hundred dollars for not depositing the ship's register with the consul on arrival in a foreign port must be sued for within two years. Parsons *v.* Hunter, 18 Fed. Cas. No. 10,778, 2 Sumn. 355.

Evidence.—A consul's certificate of the arrival and departure of the vessel is not evidence. Levy *v.* Burley, 15 Fed. Cas. No. 8,300, 2 Sumn. 355.

65. U. S. Rev. St. (1878) § 4160 [U. S. Comp. St. (1901) p. 2824].

What constitutes arrival.— To affect the master of a vessel with the penalty provided for his non-delivery of a temporary register granted under the coasting act of 1793, there must not only be an arrival at the port to which the vessel belongs, but it must be an arrival there, not by accident, or from necessity, but intentionally, as one of the termini of the voyage. U. S. *v.* Shackford, 27 Fed. Cas. No. 16,262, 5 Mason 445 [*affirming* 27 Fed. Cas. No. 16,263, 1 Ware 169].

66. U. S. Rev. St. (1878) § 4189 [U. S. Comp. St. (1901) p. 2836]; U. S. Rev. St. (1878) § 4172 [U. S. Comp. St. (1901) p. 2828]; U. S. Rev. St. (1878) § 4143 [U. S. Comp. St. (1901) p. 2809]. And see The Fideliter, 8 Fed. Cas. No. 4,756, Deady 620; U. S. *v.* Fideliter, 25 Fed. Cas. No. 15,088; U. S. *v.* The Sciota, 27 Fed. Cas. No. 16,240.

A foreign vessel wrecked, rebuilt, and enrolled as a new domestic vessel is liable to forfeiture, under U. S. Rev. St. (1878) § 4189 [U. S. Comp. St. (1901) p. 2836], as fraudulently enrolled, although she might have been enrolled under U. S. Rev. St. (1878) § 4136 [U. S. Comp. St. (1901) p. 2807], as a foreign vessel wrecked in the United States and purchased and repaired by a citizen. The Hud and Frank, 12 Fed. Cas. No. 6,824, 1 Hask. 192.

Falsity of extrajudicial oath no cause of forfeiture.— The oath made in accordance with U. S. Rev. St. (1878) § 4142 [U. S. Comp. St. (1901) p. 2809] to procure enrolment, is extrajudicial, and of no effect after the passage of the act of April 25, 1866, which directs the enrolment and license of certain vessels and is mandatory in its terms; and no forfeiture can be decreed because of the falsity of such oath. The Acorn, 1 Fed. Cas. No. 29, 2 Abb. 434.

Nature of penalty.— The sum secured by a bond given under the act of Dec. 31, 1792, relative to registry of vessels, is not a liquidated amount of damages due under a contract, but a fixed and certain punishment for an offense; and it is none the less so because security is taken in advance by the United States, before the offense is committed, for the payment of the fine, if the law be violated, and the proceeds are to be distributed in the mode provided in section 29 of that act. U. S. *v.* Montell, 26 Fed. Cas. No. 15,798, Taney 47.

Amount of penalty.— The penalty given by U. S. Rev. St. (1878) § 4143 [U. S. Comp. St. (1901) p. 2809], in relation to false swearing by the owner of a vessel in an oath taken by him to obtain the registry of the vessel, is equal in amount to the value of the vessel at the time of the commission of the illegal act which causes the forfeiture; and the amount of such penalty is not affected by any subsequent change in the value of said vessel, or by its loss or destruction. U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,289.

Defenses.— In an action by the United States to recover the penalty imposed for making a false oath to secure the registry of a vessel, averments in an answer setting up that defendant was ignorant of the law, and, regarding the proceedings for the registry as purely formal, did not read the papers he signed, constitute no defense, and are properly stricken out on motion as immaterial and impertinent. Peacock *v.* U. S., 125 Fed. 583, 60 C. C. A. 389.

Evidence.—Where, in a libel for forfeiture for alleged violation of the registry laws, grounded upon the allegation that claimant was not the owner, the government's evidence as a whole makes out a case for claimant, he need not offer any evidence. The Acorn, 1 Fed. Cas. No. 29, 2 Abb. 434. The letters of the agent of the vessel to the owners are not admissible to prove the violation; *aliter* of the agent's acts within the scope of his authority. U. S. *v.* The Burdett, 9 Pet. (U. S.) 682, 9 L. ed. 273. Where the documents by means of which the registry of a vessel has been obtained are identified and come from the possession of the government, it is not necessary to prove the signature of each paper. The Mary Celeste, 16 Fed. Cas. No. 9,202, 2 Lowell 354. The production of a forged protest and other papers from the files of the New York custom-house, with proof that they were the only documents on file there in connection with the issuing of the register to a wrecked foreign vessel which was rebuilt, and the fact that the owner, when examined as a witness in the cause and shown the papers in

use of register; [67] for failure to report the sale of a registered vessel to a foreigner; [68] for the transfer of a licensed vessel to a foreigner; [69] for engaging in a trade other than that for which she was licensed; [70] for proceeding on a foreign voyage without

question, did not intimate that they were not the papers used in obtaining the register, is sufficient evidence that they were the papers presented to the secretary of the treasury, and on which the register was obtained, in proceedings to forfeit her for fraudulent registration. U. S. *v.* The Victoria Perez, 28 Fed. Cas. No. 16,620, 8 Ben. 109.

67. 1 U. S. St. at L. 298, c. 1, § 27. And see The Mohawk, 3 Wall. (U. S.) 566, 18 L. ed. 67 (holding that the forfeiture prescribed by Act (1792), § 27, for fraudulently using a register for a vessel not entitled to it, applies to a vessel enrolled under the act of 1852, and employed on the northern frontier, although no penalty is contained in that act; act March 2, 1831, making the certificate of enrolment of vessels so employed equivalent to both registry and enrolment); The Margaret, 9 Wheat. (U. S.) 421, 6 L. ed. 125; The Neptune, 3 Wheat. (U. S.) 601, 4 L. ed. 469, holding that the statute applies as well to vessels which have not been previously registered as to those to which registers have been previously granted.

68. U. S. Rev. St. (1878) § 4172 [U. S. Comp. St. (1901) p. 2828]. And see The Margaret, 9 Wheat. (U. S.) 421, 6 L. ed. 125.

The statute does not require a beneficial or bona fide sale; but a transmutation of ownership, "by way of trust, confidence, or otherwise," is sufficient. The Margaret, 9 Wheat. (U. S.) 421, 6 L. ed. 125.

Forfeiture takes place at the moment of sale or transfer to an alien, and any subsequent judgment of forfeiture relates back to that time, and a levy on the forfeited property under an execution against the alien previous to the prosecution of the forfeiture will not prevent the forfeiture. The Florenzo, 9 Fed. Cas. No. 4,886, Blatchf. & H. 52.

Exception.— The proviso that where the ship shall be owned, in part only, by a person ignorant of the transfer, such part shall not be subject to forfeiture, applies only to the case of a part-owner, and not to a sole owner. The Margaret, 9 Wheat. (U. S.) 421, 6 L. ed. 125; The Florenzo, 9 Fed. Cas. No. 4,886, Blatchf. & H. 52.

Statute not applicable to enrolled and licensed vessels.— U. S. *v.* Sciota, 27 Fed. Cas. No. 16,240.

69. U. S. Rev. St. (1878) § 4377 [U. S. Comp. St. (1901) p. 2986].

Formal delivery is unnecessary to constitute a "transfer."— U. S. *v.* The Vermont, 28 Fed. Cas. No. 16,618*a*.

A vessel enrolled but not licensed is not forfeited by a sale to an alien. Wilkes *v.* People's F. Ins. Co., 19 N. Y. 184.

A vessel whose license has become void by reason of a subsequent sale is no longer a licensed and enrolled vessel, so as to be subject to forfeiture by her sale in whole or in part to a foreigner. U. S. *v.* The Sciota, 27 Fed. Cas. No. 16,240. But a licensed vessel, transferred in whole or in part to a foreigner, is forfeited, although upon such transfer the license is no longer in force. The Two Friends, 24 Fed. Cas. No. 14,289. 1 Gall. 118.

70. U. S. Rev. St. (1878) § 4377 [U. S. Comp. St. (1901) p. 2986]. And see The Active *v.* U. S., 7 Cranch (U. S.) 100, 3 L. ed. 282; The Eliza, 8 Fed. Cas. No. 4,346, 2 Gall. 4; The Ocean Bride, 18 Fed. Cas. No. 10,404, 1 Hask. 331.

The object of the law is manifest.— It is to prevent vessels engaged in the coasting trade and fisheries from becoming the medium of the introduction of smuggled goods, under the security and cover of their license. The Friendship, 9 Fed. Cas. No. 5,124, 1 Gall. 45; The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105.

A coasting vessel engaged in an illegal traffic is employed in a trade other than that for which she is licensed, and consequently liable to condemnation. The Eliza, 8 Fed. Cas. No. 4,346, 2 Gall. 4; The Julia, 14 Fed. Cas. No. 7,574, 1 Gall. 233; The Resolution, 20 Fed. Cas. No. 11,709, 2 Gall. 47; U. S. *v.* The Mars, 26 Fed. Cas. No. 15,723, 1 Gall. 237. Property seized on board of a vessel condemned for engaging in illegal traffic will not be restored to the claimant unless he shows a good title to it, although it is not condemned as forfeited; but it will be retained in the registry until the real owner proves his title. The Eliza, *supra*.

Meaning of "trade."— "Trade" **in the act** is used as equivalent to occupation, employment, or business for gain or profit. The Nymph, 18 Fed. Cas. No. 10,388, 1 Sumn. 516. Therefore carrying goods, not for hire, but as a neighborly or friendly act, is not engaging in "trade" within the statute. The Swallow, 23 Fed. Cas. No. 13,666, 1 Ware 13; The Willie G., 30 Fed. Cas. No. 17,762, 1 Hask. 253.

A single act of unlawful trading will work her forfeiture, although the vessel continues her licensed business. The Ocean Bride, 18 Fed. Cas. No. 10,404, 1 Hask. 331; The Swallow, 23 Fed. Cas. No. 13,666, 1 Ware 13.

The mackerel fishery and cod fishery are "trades," within the meaning of the statute. The Nymph, 18 Fed. Cas. No. 10,388, 1 Sumn. 516 [*affirming* 18 Fed. Cas. No. 10,389, 1 Ware 259]. Therefore a vessel licensed for the cod fishery is not authorized by her license to engage in the mackerel fishery. The Nymph, *supra*. But vessels under a license to catch cod will not be forfeited by catching mackerel, so long as the catching of the mackerel is incidental merely, and not the main object of pursuit. U. S. *v.* The Paryntha Davis, 27 Fed. Cas. No. 16,004, 3 Ware 159 [*affirmed* in 27 Fed. Cas. No. 16,003, 1 Cliff. 532]; U. S. *v.* The Reindeer, 27 Fed. Cas. No. 16,145.

The cargo is not liable to forfeiture, unless it belongs to the master, owner, or a mariner

giving up her enrolment and license, and without being registered;[71] for trading without enrolment or license;[72] for landing cargo before due entry thereof;[73] and for violation of the revenue laws.[74]

2. Lien For Penalty. A statute imposing a penalty against vessels or their owners for the violation of shipping regulations does not give the United States a lien therefor.[75] Where absolute forfeiture is the statutory penalty for an act, the title accrues when the penal act is committed,[76] and the forfeiture is not defeated by a subsequent sale to a *bona fide* purchaser.[77] If the forfeiture is alternative, property or its value, the title does not vest until the election is made.[78] Meanwhile an innocent purchaser may acquire a title not subject to forfeiture by subsequent seizure.[79]

of the vessel. The Active *v.* U. S., 7 Cranch (U. S.) 100, 3 L. ed. 282.

A certificate of probable cause will be given to preserve the officer making an improper seizure from the payment of costs, if such officer acts in good faith and has reasonable grounds to suppose that the law has been violated. U. S. *v.* The Reindeer, 27 Fed. Cas. No. 16,145. Such certificate may also be given in such case to protect the officer making the seizure from liability therefor. U. S. *v.* The Reindeer, *supra.*

The libel.—Where a vessel is seized for engaging in a trade other than that for which she is licensed, the libel need not specify the particular trade in which she was engaged at the time of the seizure. The U. S. *v.* The Paryntha Davis, 27 Fed. Cas. No. 16,003, 1 Cliff. 532.

Evidence.— Upon a proceeding for the forfeiture of a vessel licensed for the fisheries for carrying merchandise from a foreign port, when the importation is admitted or proved, the burden rests with the claimants to establish their innocence. The Ocean Bride, 18 Fed. Cas. No. 10,404, 1 Hask. 331. The illegal employment may be shown from circumstances, even against the direct testimony of the master and crew. The Ocean Bride, *supra.*

71. U. S. Rev. St. (1878) § 4337 [U. S. Comp. St. (1901) p. 2969].

What constitutes "foreign voyage."—A "foreign voyage," within the meaning of the Coasting and Fishing Act, is where a vessel departs from the United States for a foreign port with an intent there to engage in trade, and not merely a voyage to a foreign port within the usual voyage of vessels licensed for the fisheries. Taber *v.* U. S., 23 Fed. Cas. No. 13,722, 1 Story 1; The Three Brothers, 23 Fed. Cas. No. 14,009, 1 Gall. 142. And see The Lark, 14 Fed. Cas. No. 8,090, 1 Gall. 55. Therefore a vessel sailing under a fishing license may touch at a foreign port and procure supplies without incurring forfeiture under this act. The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105; The Willie G., 30 Fed. Cas. No. 17,762, 1 Hask. 253. A whaling voyage is not a foreign voyage. Taber *v.* U. S., *supra.*

When forfeiture attaches.— The forfeiture does not attach until the vessel has actually left port with an intent to proceed on such foreign voyage. The Friendship, 9 Fed. Cas. No. 5,124, 1 Gall. 45; The Julia, 14 Fed. Cas. No. 7,573, 1 Gall. 43.

72. U. S. Rev. St. (1878) § 4371 [U. S. Comp. St. (1901) p. 2984].

What vessels within scope of statute.— This provision is applicable only to vessels engaged in domestic trade. U. S. *v.* The Margaret Yates, 26 Fed. Cas. No. 15,720, 22 Vt. 663. It inflicts a forfeiture of the ship and cargo only in cases of unregistered vessels found with foreign goods on board in the coasting trade, and not of vessels licensed for the fisheries. The Eliza, 8 Fed. Cas. No. 4,346, 2 Gall. 4.

73. U. S. Rev. St. (1878) § 2867 [U. S. Comp. St. (1901) p. 1908]. And see Phile *v.* The Anna, 1 Dall. (Pa.) 197, 1 L. ed. 98, holding that everything put on board of a vessel is, generally speaking, comprehended in the description of her cargo, within the meaning of that term as used in an information against a ship for landing part of her cargo without having it entered at the collector's office.

74. U. S. Rev. St. (1878) § 2497. And see The Merritt, 17 Wall. (U. S.) 582, 21 L. ed. 682 [*affirming* 16 Fed. Cas. No. 9,222, 2 Biss. 381]; U. S. *v.* Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81.

Necessity of statutory authority.— A municipal seizure of a vessel and cargo for violation of the revenue law can neither be justified nor excused on the ground of probable cause, unless under the special provisions of some statute. The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111.

75. The Ranier, 20 Fed. Cas. No. 11,565, Deady 438; The Laurel, 26 Fed. Cas. No. 15,569, Newb. Adm. 269.

76. The Mary Celeste, 16 Fed. Cas. No. 9,202, 2 Lowell 354.

77. The Mars, 8 Cranch (U. S.) 417, 3 L. ed. 609; The Monte Christo, 17 Fed. Cas. No. 9,719, 6 Ben. 148.

78. U. S. *v.* Grundy, 3 Cranch (U. S.) 337, 2 L. ed. 459; The Mary Celeste, 16 Fed. Cas. No. 9,202, 2 Lowell 354; U. S. *v.* Hamilton, 26 Fed. Cas. No. 15,289.

The phrase, "shall be liable to forfeiture," does not effect a present absolute forfeiture, but only gives a right to have the vessel declared forfeited upon due process of law. The Kate Heron, 14 Fed. Cas. No. 7,619, 6 Sawy. 106.

79. Ingersoll *v.* Jackson, 14 Mass. 109;

3. Remission. The power of remitting penalties and forfeitures belongs exclusively to the secretary of the treasury,[80] and the fact that a libel or information has been filed to enforce the penalty or forfeiture is immaterial.[81] The secretary has the power, after a remission has been granted and communicated to the claimant, to revoke the warrant.[82]

F. Offenses Against Navigation Laws[83] — 1. Boarding Vessel Without Consent of Master. It is made an indictable offense by statute[84] for any person not being in the United States service, and not being duly authorized by law, to go on board a vessel about to arrive at her place of destination before her actual arrival, without the permission of the master.[85] The offense becomes complete upon his boarding the vessel without having obtained the leave which the statute required, no matter what his motive was, and without regard to the fact that permission was afterward given him by the captain to remain on board.[86] The section is intended to protect foreign vessels as well as vessels of the United States.[87]

The Kate Heron, 14 Fed. Cas. No. 7,619, 6 Sawy. 106; The Mary Celeste, 16 Fed. Cas. No. 9,202, 2 Lowell 354; U. S. *v.* The Anthony Mangin, 24 Fed. Cas. No. 14,461, 2 Pet. Adm. 452.

80. The Palo Alto, 18 Fed. Cas. No. 10,700, 2 Ware 344.

Conditions precedent.— If the remission is on the payment of costs, this is a condition precedent, and the remission is inoperative until the costs are paid. The Palo Alto, 18 Fed. Cas. No. 10,700, 2 Ware 344. A tender of the costs, after a reasonable time allowed for taxing them, is equivalent to actual payment to revest the right of property and possession. A neglect of the collector seasonably to furnish the attorney with the costs of seizure and custody will not defeat or suspend the right of the claimant to the possession of the property. The Palo Alto, *supra*.

81. Peacock *v.* U. S., 125 Fed. 583, 60 C. C. A. 389, holding that the right to prefer a petition through the judge of the district for a remission of such penalty or forfeiture by the secretary of the treasury does not require the court to postpone the trial of an action brought to recover the penalty on the presenting of such a petition, the secretary having the same power to remit the penalty after as before judgment thereon.

The court has no authority to revise his decision or inquire into the grounds on which it is made. The Palo Alto, 18 Fed. Cas. No. 10,700, 2 Ware 344. If a remission is granted before a libel or information has been filed, it operates directly to revest the right of property and possession in the petitioner, and the collector, on his presenting the warrant of remission, is bound to restore it. The Palo Alto, *supra*. But, after the filing of a libel or information, the property is in the custody of the law, and the collector cannot restore the possession without an order of the court. The Palo Alto, *supra*.

82. The Palo Alto, 18 Fed. Cas. No. 10,700, 2 Ware 344.

If the remission is free and unconditional, the power of revocation continues after the remittitur is filed and an order of restoration passed, and until the precept is finally executed by a delivery of the property into the possession of the claimant. The Palo Alto, 18 Fed. Cas. No. 10,700, 2 Ware 344.

If the remission is conditional, the secretary has no power to revoke it after the condition has been performed, whether the possession of the goods has been delivered to the claimant or not. The Palo Alto, 18 Fed. Cas. No. 10,700, 2 Ware 344.

83. Incident to carriage of passengers see *infra*, VIII, B, 3.

On and incident to wreck see *infra*, XII.

Of seaman see Seamen, 35 Cyc. 1255.

84. U. S. Rev. St. (1878) § 4606 [U. S. Comp. St. (1901) p. 3118].

85. U. S. *v.* Anderson, 24 Fed. Cas. No. 14,447, 10 Blatchf. 226, although at the time of the boarding the vessel was temporarily at anchor in the bay.

A runner for a sailors' boarding-house is not exempt from the prohibition. U. S. *v.* Anderson, 24 Fed. Cas. No. 14,447, 10 Blatchf. 226.

Climbing on the rail of the vessel from a boat in the act of entering the vessel without permission is within the prohibition. U. S. *v.* Anderson, 24 Fed. Cas. No. 14,447, 10 Blatchf. 226.

Punishment.— The offense is punishable, on conviction, by the imposition of a penalty not exceeding two hundred dollars, and imprisonment until the payment thereof, not exceeding six months. U. S. *v.* Anderson, 24 Fed. Cas. No. 14,447, 10 Blatchf. 226.

Evidence.— It is not necessary for the United States, in such a prosecution, to prove that the prisoner was not in the United States service, or was not duly authorized by law to go on board of the vessel. U. S. *v.* Anderson, 24 Fed. Cas. No. 14,447, 10 Blatchf. 226. Proof that the master was not on board, and that the mate in command gave no permission, and caused defendant to be arrested on the spot, is sufficient to support a conviction, in the absence of evidence showing that permission had been given by the master. U. S. *v.* Anderson, *supra*.

86. Com. *v.* Kennedy, 160 Mass. 312, 35 N. E. 1131.

87. U. S. *v.* Sullivan, 43 Fed. 602; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,447, 10 Blatchf. 226.

2. Destroying or Casting Away Vessel. By statute [88] it is made a crime punishable by death for a person not being an owner to wilfully and corruptly cast away or otherwise destroy on the high seas any vessel to which he belongs.[89] The act must be done wilfully and feloniously,[90] by a person not an owner,[91] and on the high seas.[92] The destruction of vessels on waters not within the maritime jurisdiction of the United States is sometimes provided against by state statutes.[93]

3. Navigating Steam Vessel Without Licensed Engineer. By statute the navigation of a vessel propelled by steam without a licensed engineer is made a crime.[94] Knowledge on the part of the owner that the engineer was not licensed is unnecessary.[95] The commission of this offense on waters not within the maritime jurisdiction of the United States is usually punished by state statutes.[96]

II. Title and Ownership.[97]

[Edited by Edward G. Benedict, Esq., of the New York Bar]

A. Modes of Acquiring Title. Title may be acquired by purchase [98] or by building. Under a contract for building an entire vessel, the general rule of

88. U. S. Rev. St. (1878) § 5366 [U. S. Comp. St. (1901) p. 3642].

89. See cases cited *infra*, this note.

The legal meaning of the term "destroy," as used in the act of congress, is to unfit the vessel for service, beyond the hopes of recovery, by ordinary means. This, as to the extent of the injury, is synonymous with "cast away." Both mean such an act as causes the vessel to perish, to be lost, to be irrecoverable by ordinary means. U. S. *v.* Johns, 26 Fed. Cas. No. 15,481, 1 Wash. 363, 4 Dall. (Pa.) 412, 1 L. ed. 888.

Evidence.— In a prosecution for casting away and destroying a vessel with intent to prejudice the underwriters, evidence as to insurance on the cargo is inadmissible, as the underwriters meant in the law making such act an offense are those upon the vessel, and not those upon the cargo. U. S. *v.* Johns, 26 Fed. Cas. No. 15,481, 1 Wash. 363, 4 Dall. (Pa.) 412, 1 L. ed. 888. On an indictment for setting fire to a vessel on the high seas, the mere possibility that the fire might have been occasioned by spontaneous combustion or by accident is no answer to strong probable evidence against a prisoner. U. S. *v.* Lockman, 26 Fed. Cas. No. 15,620, Brunn. Col. Cas. 554.

90. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435.

An indictment for wilfully setting fire to a ship at sea with intent to burn her, under U. S. Rev. St. (1878) § 5367 [U. S. Comp. St. (1901) p. 3642], is sufficient where it follows the words of the statute without alleging that the offense was feloniously committed. U. S. *v.* McAvoy, 26 Fed. Cas. No. 15,654, 4 Blatchf. 418, 18 How. Pr. (N. Y.) 380.

91. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435.

The fact that the owner is on board and authorizes or commands the destruction of the vessel is no defense to an indictment against the master for wilfully destroying her with intent to defraud the underwriters. U. S. *v.* Jacobson, 26 Fed. Cas. No. 15,461, Brunn. Col. Cas. 410; U. S. *v.* Vanranst, 28 Fed. Cas. No. 16,608, 3 Wash. 146.

A minor who ships on board a vessel without the knowledge of his parents may be convicted under this act. U. S. *v.* Lockman, 26 Fed. Cas. No. 15,620, Brunn. Col. Cas. 554.

92. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435.

The place where the offense is committed is an essential element in the description of the crime. The mere fact that the accused wilfully destroyed the vessel, being upon waters within the jurisdiction of the United States, does not subject him to prosecution and punishment under this act, unless the vessel was at the time on the high seas. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,731, 3 Blatchf. 435. The Great Lakes are not "high seas," within the meaning of the act. Miller's Case, 17 Fed. Cas. No. 9,558, Brown Adm. 156.

93. Mass. Acts (1804), c. 131.

The crime of maliciously burning a "vessel lying in the body of any county," under Mass. Acts (1804), c. 121, is committed when the vessel burned lies in water which flows within the body of the county, in distinction from one upon the high seas and out of the body of the county. The language used does not mean a boat in an unfinished state, and still in the hands of the builder. Com. *v.* Francis, Thach. Cr. Cas. (Mass.) 240.

94. U. S. Rev. St. (1878) § 4426 [U. S. Comp. St. (1901) p. 3029].

By 29 U. S. St. at L. 489 [U. S. Comp. St. (1901) p. 3029], one who navigates a gasoline launch in the carrying of passengers or freight for hire, without a licensed engineer, is guilty of a crime. U. S. *v.* Nash, 111 Fed. 525.

95. U. S. *v.* Sims, 9 Fed. 443.

96. Mass. Pub. St. c. 102, §§ 120–122.

An indictment for a violation of this statute, following the language of the statute, need not allege that the passenger was carried for hire, as the term "passenger" is used in the ordinary sense. Com. *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536.

97. **Insurable interests of ship's owners,** husband, vendor, or purchaser see Marine Insurance, 26 Cyc. 554 *et seq.*

98. See *infra*, II, E.

law is, that no property vests in the party for whom she is built until she is ready for delivery, and has been accepted or approved by such party,[99] at least as against third persons.[1] Nevertheless there is no arbitrary rule of construction controlling such agreements, but the question is one of intent, open in every case to be determined upon the terms of the contract, and the circumstances attending the transaction.[2] Accordingly the fact that the purchase-price of the vessel was to be paid in instalments as the work progressed,[3] and the further fact that the construction was to take place under the superintendence of an agent who was authorized to reject or approve any materials used in the construction or equipment of such vessel,[4] are not deemed in this country sufficient evidence of an intent that the property in the vessel should vest in the purchaser prior to final delivery. On the other hand, in England the inference from such facts is directly the reverse of that drawn here.[5] Of course parties may agree for the transfer of title in advance of delivery, and such agreement may be inferred in the absence

99. Low *v.* Austin, 20 N. Y. 181; Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; Merritt *v.* Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Scull *v.* Shakespear, 75 Pa. St. 297; *In re* Reany Engineers, etc., Works, 9 Phila. (Pa.) 620; De Wolf *v.* Tupper, 24 Fed. 289; Clarke *v.* Spence, 4 A. & E. 448, 1 Harr. & W. 760, 5 L. J. K. B. 161, 6 N. & M. 399, 31 E. C. L. 206; Stringer *v.* Murray, 2 B. & Ald. 248; Laidler *v.* Burlinson, 6 L. J. Exch. 160, 2 M. & W. 602; Mucklow *v.* Mangles, 1 Taunt. 318, 9 Rev. Rep. 784.

1. The Sam Slick, 21 Fed. Cas. No. 12,283, 1 Sprague 289.

2. Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; *In re* Reany Engineers, etc., Works, 9 Phila. (Pa.) 620; Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139; The Poconoket, 67 Fed. 262 [*affirmed* in 70 Fed. 640, 17 C. C. A. 309 (*affirmed* in 168 U. S. 707, 18 S. Ct. 939, 42 L. ed. 1214)]; Anglo-Egyptian Nav. Co. *v.* Rennie, L. R. 10 C. P. 271, 44 L. J. C. P. 130, 32 L. T. Rep. N. S. 467, 23 Wkly. Rep. 626; Reid *v.* Fairbanks, 13 C. B. 692, 1 C. L. R. 787, 17 Jur. 918, 22 L. J. C. P. 206, 76 E. C. L. 692; Wood *v.* Bell, 5 E. & B. 772, 2 Jur. N. S. 349, 25 L. J. Q. B. 148, 4 Wkly. Rep. 202, 85 E. C. L. 772 [*affirmed* in 6 E. & B. 355, 2 Jur. N. S. 664, 25 L. J. Q. B. 321, 4 Wkly. Rep. 553, 88 E. C. L. 355].

Right to prove parol agreement.— Where a written contract for the construction of a vessel does not embody the entire agreement of the parties, and is absolutely silent on the subject of when the title should pass to the purchasers, it is proper to receive oral evidence of a parol agreement by and between the parties in regard thereto, made before the execution of the written contract. The Poconoket, 70 Fed. 640, 17 C. C. A. 309 [*affirmed* in 168 U. S. 707, 18 S. Ct. 939, 42 L. ed. 1214, and *affirming* 67 Fed. 262].

3. *Massachusetts.*—Williams *v.* Jackman, 16 Gray 514.

New Jersey.— Edwards *v.* Elliott, 36 N. J. L. 449, 13 Am. Rep. 463 [*affirming* 35 N. J. L. 265 (*affirmed* in 21 Wall. (U. S.) 532, 22 L. ed. 487)]; Stevens *v.* Shippen, 29 N. J. Eq. 602.

New York.— Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55.

Wisconsin.— Haney *v.* The Rosebelle, 20 Wis. 247.

United States.— Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139; The Poconoket, 67 Fed. 262 [*affirmed* in 70 Fed. 640, 17 C. C. A. 309 (*affirmed* in 168 U. S. 707, 18 S. Ct. 939, 42 L. ed. 1214)]; The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, 4 Sawy. 143. *Contra*, Sandford *v.* Wiggins Ferry Co., 27 Ind. 522; *In re* Derbyshire, 11 Phila. (Pa.) 627.

The stipulation for payments at particular stages of the work is a usual and almost necessary one in contracts involving a large expenditure. It is a mere arrangement for distributing the burden of expenditures incident to such a contract between the parties, and "only shows that the party advancing is willing thus to assist the artisan, provided he can see that the work is going on in good faith, so as to afford a reasonable prospect that he will realize the avails of his expenditure in a reasonable period." The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, 4 Sawy. 143.

4. Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; Clarkson *v.* Stevens, 106 U. S. 505, 1 S. Ct. 200, 27 L. ed. 139; The Revenue Cutter No. 2, 20 Fed. Cas. No. 11,714, 4 Sawy. 143, holding that the appointment and inspection of the agent were merely a prudent and convenient means to secure the faithful performance of the contract.

5. Seath *v.* Moore, 11 App. Cas. 350, 5 Aspin. 586, 55 L. J. P. C. 54, 54 L. T. Rep. N. S. 690; Clarke *v.* Spence, 4 A. & E. 448, 1 Harr. & W. 760, 5 L. J. K. B. 161, 6 N. & M. 399, 31 E. C. L. 206; Woods *v.* Russell, 5 B. & Ald. 942, 24 Rev. Rep. 621, 7 E. C. L. 512; Wood *v.* Bell, 5 E. & B. 772, 2 Jur. N. S. 349, 25 L. J. Q. B. 148, 4 Wkly. Rep. 202, 85 E. C. L. 772 [*affirmed* in 6 E. & B. 355, 2 Jur. N. S. 664, 25 L. J. Q. B. 321, 4 Wkly. Rep. 553, 88 E. C. L. 355]. And see *Ex p.* Lambton, L. R. 10 Ch. 405, 2 Aspin. 525, 44 L. J. Bankr. 81, 32 L. T. Rep. N. S. 380, 23 Wkly. Rep. 662; Clarke *v.* Millwall Dock Co., 17 Q. B. D. 494, 51 J. P. 5, 55 L. J. Q. B. 378, 54 L. T. Rep. N. S. 814, 34 Wkly. Rep. 698. *Compare* Anglo-Egyptian Nav. Co. *v.* Rennie, L. R. 10 C. P. 271, 44 L. J. C. P. 130, 32 L. T. Rep. N. S. 467, 23

of positive expression, where the contract and attendant circumstances justify it,[8] but the burden is on the purchaser to show the fact.[7]

B. Evidence of Title[8] **— 1. In General.** Since the title of a vessel may pass by delivery under a parol contract,[9] it is not necessary to prove ownership by the register, or by bill of sale or other instrument in writing; but parol evidence may be received for this purpose,[10] notwithstanding the legal title is shown by the register to be in other persons.[11] Actual possession by the party in whom the interest is alleged to be, and acts of ownership by him, are in cases of vessels, as with other personal property, presumptive evidence of title.[12] Where a *prima facie* case of ownership of a vessel is established, it at least shifts the burden of proof to show that such vessel was not under the control of the persons so established *prima facie* as owners.[13]

2. Registry and Enrolment — a. In General. The registry acts are considered as institutions purely local and municipal for purposes of public policy.[14]

Wkly. Rep. 626, where it was held that the provisions as to payment were not intended to have the effect of passing the property in each portion of work certified by the inspector as properly done to plaintiffs as and when his certificate was given.

6. See Glover *v.* Austin, 6 Pick. (Mass.) 209; The Poconoket, 67 Fed. 262 [*affirmed* in 70 Fed. 640, 17 C. C. A. 309 (*affirmed* in 168 U. S. 707, 18 S. Ct. 939, 42 L. ed. 1214)]; Seath *v.* Moore, 11 App. Cas. 350, 5 Aspin. 586, 55 L. J. P. C. 54, 54 L. T. Rep. N. S. 690.

7. Edwards *v.* Elliott, 36 N. J. L. 449, 13 Am. Rep. 463 [*affirming* 35 N. J. L. 265 (*affirmed* in 21 Wall. (U. S.) 532, 22 L. ed. 487)].

8. Evidence of sale see *infra*, II, E, 3.

Evidence that transaction constitutes mortgage see *infra*, II, F, 1.

9. See *infra*, II, E, 1.

10. *Florida.*— Leon *v.* Kerrion, 47 Fla. 178, 36 So. 173.

Louisiana.— Shields *v.* Perry, 16 La. 463.

Maine.— Lyman *v.* Redman, 23 Me. 289.

Massachusetts.— Vinal *v.* Burrill, 16 Pick. 401.

Minnesota.— McMahon *v.* Davidson, 12 Minn. 357.

Missouri.— Ward *v.* Bodeman, 1 Mo. App. 272.

New York.— Stacy *v.* Graham, 3 Duer 444 [*affirmed* in 14 N. Y. 492].

North Carolina.— Truett *v.* Chaplin, 11 N. C. 178.

Pennsylvania.—Richardson *v.* Montgomery, 49 Pa. St. 203.

United States.— Scudder *v.* Calais Steamboat Co., 21 Fed. Cas. No. 12,565, 1 Cliff. 370.

England.— Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535, 102 Eng. Reprint 779.

Canada.— O'Neill *v.* Baker, 18 U. C. Q. B. 127.

See 44 Cent. Dig. tit. "Shipping," § 55.

If a plaintiff seeks to prove title by the register and fails, he cannot afterward prove a possessory title by parol evidence. Sherriff *v.* Cadell, 2 Esp. 616.

Evidence held insufficient to show ownership.— The Robert R. Kirkland, 153 Fed. 863, 83 C. C. A. 45 [*affirming* 143 Fed. 610].

Evidence held to establish prima facie case of ownership.— Carlson *v.* White Star Steamship Co., 39 Wash. 394, 81 Pac. 838.

Declaration of ownership.— A declaration of ownership is held to be *prima facie* evidence of ownership without the register. Tibbald *v.* Wood, 1 F. & F. 287.

Appearance in action.—In an action against the owners of a ship it is *prima facie* evidence of ownership to produce an undertaking to appear for them, given before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he describes them as owners without further proof of agency. Marshall *v.* Cliff, 4 Campb. 133.

Documentary evidence is not necessary, unless the asserted ownership is denied, and the party has been called on to produce such documents. Bas *v.* Steele, 2 Fed. Cas. No. 1,088, 3 Wash. 381.

11. Vinal *v.* Burrill, 16 Pick. (Mass.) 140; Whiton *v.* Spring, 74 N. Y. 169; Stacy *v.* Graham, 3 Duer (N. Y.) 444 [*affirmed* in 14 N. Y. 492]; Leonard *v.* Huntington, 15 Johns. (N. Y.) 298; Wendover *v.* Hogeboom, 7 Johns. (N. Y.) 308; Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535, 102 Eng. Reprint 779.

12. *Alabama.*— Fontaine *v.* Beers, 19 Ala. 722.

California.— Bailey *v.* The New World, 2 Cal. 370.

Maine.— McLellan *v.* Osborne, 51 Me. 85; Badger *v.* Cumberland Bank, 26 Me. 428 (possession and receipt of earnings); Lyman *v.* Redman, 23 Me. 289.

Massachusetts.— Stearns *v.* Doe, 12 Gray 482, 74 Am. Dec. 608.

New York.— Hesketh *v.* Stevens, 7 Barb. 488; Stacy *v.* Graham, 3 Duer 444 [*affirmed* in 14 N. Y. 492].

United States.— Bas *v.* Steel, 2 Fed. Cas. No. 1,088, 3 Wash. 381.

England.— Robertson *v.* French, 4 East 130, 4 Esp. 246, 7 Rev. Rep. 535, 102 Eng. Reprint 779.

See 44 Cent. Dig. tit. "Shipping," §§ 55, 56.

13. Vincent *v.* Soper Lumber Co., 113 Ill. App. 463.

14. Bradbury *v.* Johnson, 41 Me. 582, 66

The register therefore is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner.[15] Without such connecting proof the register has been held not to be even *prima facie* evidence to charge a person as owner;[16] and even with such proof it is not conclusive evidence of ownership; for an equitable title in one person may well consist with the documentary title, at the custom-house, in another.[17] Where, however, the question of ownership is merely incidental, the registry alone is deemed sufficient *prima facie* evidence.[18] But in favor of the person claiming as owner, it is no evidence at all, being nothing more than his declaration.[19] Nor is the enrolment of a vessel evidence of a higher nature than the registry.[20] There is no principle upon which it is admissible, as evidence of prop-

Am. Dec. 264; Miller *v.* Hill, 10 Humphr. (Tenn.) 470.

A certificate of registry is not a document of title, and does not necessarily contain notice of all changes of ownership. Card *v.* Hines, 35 Fed. 598.

15. *California.*— Brooks *v.* Minturn, 1 Cal. 481 [*overruled* on other grounds in Curtiss *v.* Bachman, 84 Cal. 218, 24 Pac. 379].

Indiana.— Moore *v.* Anderson, 8 Ind. 18.

Louisiana.— Begley *v.* Morgan, 15 La. 162, 35 Am. Dec. 188; Ligon *v.* Orleans Nav. Co., 7 Mart N. S. 682.

Maine.— Dyer *v.* Snow, 47 Me. 254; Bradbury *v.* Johnson, 41 Me. 582, 66 Am. Dec. 264; Holmes *v.* Sprowl, 31 Me. 73.

Missouri.—Ward *v.* Bodeman, 1 Mo. App. 272.

New York.— Bryan *v.* Bowles, 1 Daly 171; Thorn *v.* Hicks, 7 Cow. 697; Leonard *v.* Huntington, 15 Johns. 298; Sharp *v.* United Ins. Co., 14 Johns. 201.

Pennsylvania.— Woods *v.* Courter, 1 Dall. 141, 1 L. ed. 73.

United States.— Bas *v.* Steele, 2 Fed. Cas. No. 1,088, 3 Wash. 381; Scudder *v.* Calais Steamboat Co., 21 Fed. Cas. No. 12,565, 1 Cliff. 370 [*reversed* on other grounds in 2 Black, 372, 17 L. ed. 282].

England.— Smith *v.* Fuge, 3 Campb. 456; Pirie *v.* Anderson, 3 Campb. 242 note, 4 Taunt. 652; Stokes *v.* Carne, 2 Campb. 339; Tinkler *v.* Walpole, 14 East 226, 104 Eng. Reprint 587; Ditchburn *v.* Spracklin, 5 Esp. 31; Cooper *v.* South, 4 Taunt. 802; Fraser *v.* Hopkins, 2 Taunt. 5.

See 44 Cent. Dig. tit. "Shipping," § 57.

Where the owner of a vessel actually procures its registry at the custom-house, making affidavit that he is the owner, it is evidence to charge him, although it may be rebutted. Bryan *v.* Bowles, 1 Daly (N. Y.) 171. In an action against a person, as owner, the register, if the oath of ownership is made by himself, is treated as an admission, which may be given in evidence to charge him. Bradbury *v.* Johnson, 41 Me. 582, 66 Am. Dec. 264.

A sworn copy of a steamboat register from the records of the custom-house is not *prima facie* evidence of ownership, even against the party making it, on affidavit, without the proof connecting the party charged with the register by his direct or accepted act. Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

16. *California.*— Brooks *v.* Minturn, 1 Cal. 481 [*overruled* on other grounds in Curtiss *v.* Bachman, 84 Cal. 218, 24 Pac. 379].

Maine.— Bradbury *v.* Johnson, 41 Me. 582, 66 Am. Dec. 264.

New York.— Bryan *v.* Bowles, 1 Daly 171; Sharp *v.* United Ins. Co., 14 Johns. 201.

United States.— Scudder *v.* Calais Steamboat Co., 21 Fed. Cas. No. 12,565, 1 Cliff. 370.

England.— Pirie *v.* Anderson, 3 Campb. 242 note, 4 Taunt. 652; Fraser *v.* Hopkins, 2 Taunt. 5.

See 44 Cent. Dig. tit. "Shipping," § 57.

17. *California.*— Brooks *v.* Minturn, 1 Cal. 481 [*overruled* on other grounds in Curtiss *v.* Bachman, 84 Cal. 218, 24 Pac. 379].

Connecticut.— Starr *v.* Knox, 2 Conn. 215.

Maine.— Bradbury *v.* Johnson, 41 Me. 582, 66 Am. Dec. 264; Colson *v.* Bonzey, 6 Me. 474.

Missouri.— Ward *v.* Bodeman, 1 Mo. App. 272.

New York.— Ring *v.* Franklin, 2 Hall 1; Baxter *v.* Wallace, 1 Daly 303; Bryan *v.* Bowles, 1 Daly 171.

United States.— Chickering *v.* Hatch, 5 Fed. Cas. No. 2,671, 1 Story 516.

England.— Hackwood *v.* Lyall, 17 C. B. 124, 2 Jur. N. S. 44 note, 25 L. J. C. P. 44 note, 84 E. C. L. 124; Brodie *v.* Howard, 17 C. B. 109, 1 Jur. N. S. 1209, 25 L. J. C. P. 57, 84 E. C. L. 109; Myers *v.* Willis, 17 C. B. 77, 2 Jur. N. S. 41, 25 L. J. C. P. 39, 4 Wkly. Rep. 42, 84 E. C. L. 77 [*affirmed* in 18 C. B. 886, 2 Jur. N. S. 788, 25 L. J. C. P. 255, 4 Wkly. Rep. 637, 86 E. C. L. 886]. *Contra*, under former law. *Ex p.* Houghton, 1 Rose 177, 17 Ves. Jr. 251, 11 Rev. Rep. 73, 34 Eng. Reprint 97; *Ex p.* Yallop, 15 Ves. Jr. 60, 10 Rev. Rep. 24, 33 Eng. Reprint 677.

Canada.— Schofield *v.* Anderson, 31 N. Brunsw. 518; Smith *v.* Fulton, 11 Nova Scotia 225.

See 44 Cent. Dig. tit. "Shipping," § 57.

18. Moore *v.* Anderson, 8 Ind. 18; Bradbury *v.* Johnson, 41 Me. 582, 66 Am. Dec. 264.

19. Moore *v.* Anderson, 8 Ind. 18; Bradbury *v.* Johnson, 41 Me. 582, 66 Am. Dec. 264; Flower *v.* Young, 3 Campb. 240. But see Brooks *v.* Minturn, 1 Cal. 481 [*overruled* on other grounds in Curtiss *v.* Bachman, 84 Cal. 218, 24 Pac. 379].

20. Dyer *v.* Snow, 47 Me. 254.

erty, either in favor of or against persons named therein as part-owners, who were not instrumental in procuring it to be made, and who have neither authorized nor assented to it.[21] Without such connecting proof, the enrolment has not been held to be even *prima facie* proof, to charge a person as owner,[22] and even with such proof it is not conclusive evidence of ownership.[23] But, upon an incidental question, not affecting the title of the parties, it is competent evidence; and, unless contradicted by clear evidence, will be held conclusive as to the port or place to which the vessel belongs.[24]

b. In Criminal Cases. In a criminal prosecution the registry of a vessel is no evidence of ownership by a citizen of the United States.[25] The fact of ownership must be proved as any other fact by witnesses whom defendant may cross-examine.[26] It is, however, *prima facie* evidence of the national character of the vessel.[27]

3. Bill of Sale. A bill of sale of a vessel is competent evidence of title in the purchaser,[28] but it is not conclusive evidence.[29]

C. Part-Owners[30] **— 1. Nature of Interest.** As a general rule the several owners of a merchant vessel or steamboat hold their respective interests therein as tenants in common and not as copartners, and consequently are to be governed by the rules of law applicable to that species of tenure.[31] But to this rule there

21. Alexander's Succession, 18 La. Ann. 337; Miller *v.* Hill, 10 Humphr. (Tenn.) 470; The Nancy Dell, 14 Fed. 744; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, Newb. Adm. 176.

An enrolment by one who has the custody and control of the vessel is not merely an enrolment; it is a solemn and formal declaration that he holds for those who are set forth as owners on the face of the enrolment, which makes his possession theirs, and raises that presumption in favor of their right, which the law always attaches to possession until rebutted by countervailing proof. Hall *v.* Insurance Co., 3 Phila. (Pa.) 331.

22. Dyer *v.* Snow, 47 Me. 254; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, Newb. Adm. 176.

23. Dyer *v.* Snow, 47 Me. 254; Jordan *v.* Young, 37 Me. 276; Colson *v.* Bonzey, 6 Me. 474; Bixby *v.* Franklin Ins. Co., 8 Pick. (Mass.) 86.

24. Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, Newb. Adm. 176.

25. U. S. *v.* Brune, 24 Fed. Cas. No. 14,677, 2 Wall. Jr. 264.

26. U. S. *v.* Brune, 24 Fed. Cas. No. 14,677, 2 Wall. Jr. 264.

27. Reg. *v.* Bjornsen, 10 Cox C. C. 74, 11 Jur. N. S. 589, L. & C. 545, 34 L. J. M. C. 180, 12 L. T. Rep. N. S. 473, 13 Wkly. Rep. 664.

Entry in the book of registry of the bill of sale of part of a ship has been held sufficient evidence of ownership in a criminal case. Rex *v.* Philp, 1 Moody C. C. 263.

28. Johnson *v.* Martin, 68 Miss. 330, 8 So. 847; Lord *v.* Ferguson, 9 N. H. 380.

29. Colson *v.* Bonzey, 6 Me. 474; Bixby *v.* Franklin Ins. Co., 8 Pick. (Mass.) 86; Hozey *v.* Buchanan, 16 Pet. (U. S.) 215, 10 L. ed. 941.

30. Maritime lien of part-owner see Maritime Liens, 26 Cyc. 757.

Contribution between part-owners see Tenancy in Common.

31. *Alabama.*— Jones *v.* Sims, 6 Port. 138.

Florida.— Hyer *v.* Caro, 17 Fla. 332; Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

Kentucky.— Patterson *v.* Chalmers, 7 B. Mon. 595; Lyon *v.* Johnson, 3 Dana 544.

Louisiana.— Woods *v.* Pickett, 30 La. Ann. 1095; Owens *v.* Davis, 15 La. Ann. 22; Whipple *v.* Hill, 14 La. Ann. 437; Byrne *v.* Hooper, 2 Rob. 229. And see Baldwin *v.* Gray, 4 Mart. N. S. 192, 16 Am. Dec. 169; Carroll *v.* Waters, 9 Mart. 500, 13 Am. Dec. 316.

Maryland.— Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681.

Massachusetts.—Atkins *v.* Lewis, 168 Mass. 534, 47 N. E. 507; Thorndike *v.* De Wolf, 6 Pick. 120.

Minnesota.— Russell *v.* Minnesota Outfit, 1 Minn. 162.

Missouri.— Saltmarsh *v.* Rowe, 10 Mo. 38; Ward *v.* Bodeman, 1 Mo. App. 272.

New York.— Donnell *v.* Walsh, 33 N. Y. 43, 88 Am. Dec. 361; Merritt *v.* Walsh, 32 N. Y. 685; Wright *v.* Marshall, 3 Daly 331; Bishop *v.* Edmiston, 16 Abb. Pr. 466; Nicoll *v.* Mumford, 4 Johns. Ch. 522 [*reversed* on other grounds in 20 Johns. 611].

Pennsylvania.—Croasdale *v.* Von Boyneburgk, 195 Pa. St. 377, 46 Atl. 6; Adams *v.* Carroll, 85 Pa. St. 209; Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513; Endsor *v.* Simpson, 12 Phila. 392.

Virginia.— Briggs *v.* Barnett, 108 Va. 404, 61 S. E. 797.

United States.— The Ole Oleson, 20 Fed. 384; Scull *v.* Raymond, 18 Fed. 547; Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791; De Wolf *v.* Howland, 7 Fed. Cas. No. 3,852, 2 Paine 356; The Larch, 14 Fed. Cas. No. 8,085, 2 Curt. 427; Magruder *v.* Bowie, 16 Fed. Cas. No. 8,964, 2 Cranch C. C. 577; Montell *v.* The William H. Rutan, 17 Fed. Cas. No. 9,724; Revens *v.* Lewis, 20 Fed. Cas. No. 11,711, 2 Paine 202; The Brig Sally, 41 Ct. Cl. 431.

England.—Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396;

may be exceptions, either growing out of the express agreement of the parties, or to be implied from the nature and character of the business or adventure in which they may be engaged.[32] Thus owners of a vessel may enter into a special agreement constituting them partners.[33] Likewise they may become partners in a trade or business in which the vessel is employed.[34] But, when it is claimed that such relation exists, it must be averred and proved by competent testimony. It cannot be inferred from the joint ownership alone.[35]

2. Rights and Liabilities[36] — a. In General. The powers and rights of coöwners of ships are in general essentially the same as in the case of other tenants in common in any other chattels.[37] The power of one part-owner to bind another depends upon the question of authority, which is always a mere question of fact.[38]

Holderness *v.* Shackels, 8 B. & C. 612, 7 L. J. K. B. O. S. 80, 3 M. & R. 25, 15 E. C. L. 303; Helme *v.* Smith, 7 Bing. 709, 9 L. J. C. P. O. S. 206, 5 M. & P. 744, 20 E. C. L. 316; Brodie *v.* Howard, 17 C. B. 109, 1 Jur. N. S. 1209, 25 L. J. C. P. 57, 84 E. C. L. 109; Green *v.* Briggs, 6 Hare 395, 12 Jur. 326, 17 L. J. Ch. 323, 31 Eng. Ch. 395, 67 Eng. Reprint 1219; The Spirit of the Ocean, 34 L. J. Adm. 74, 12 L. T. Rep. N. S. 239; *Ex p.* Young, 2 Rose 78 note, 2 Ves. & B. 242, 13 Rev. Rep. 73, 35 Eng. Reprint 311 [*overruling* Doddington *v.* Hallet, 1 Ves. 496, 27 Eng. Reprint 1165]; Buxton *v.* Snee, 1 Ves. 155, 27 Eng. Reprint 952.

Canada.— Bentley *v.* Murphy, 1 Ont. Wkly. Rep. 726; Baker *v.* Casey, 19 Grant Ch. (U. C.) 537.

See 44 Cent. Dig. tit. "Shipping," § 72.

Running a steamboat on shares does not make the owners partners in respect to the vessel. The Daniel Kaine, 35 Fed. 785.

32. Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

33. *Alabama.*— Jones *v.* Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716.

Kentucky.— Patterson *v.* Chalmers, 7 B. Mon. 595.

Maine.— Phillips *v.* Purington, 15 Me. 425; Harding *v.* Foxcroft, 6 Me. 76.

New York.— Dunham *v.* Jarvis, 8 Barb. 88, 2 Edm. Sel. Cas. 145; Mumford *v.* Nicoll, 20 Johns. 611.

Pennsylvania.— Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513.

United States.— Revens *v.* Lewis, 20 Fed. Cas. No. 11,711, 2 Paine 202; The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

See 44 Cent. Dig. tit. "Shipping," § 72.

Where partnership funds are invested in the purchase of a steamboat, in the absence of any positive stipulations between the part-owners to the contrary, they will hold their respective interests in strict partnership and the property will be subject to the law of partnership. Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198; Ward *v.* Bodeman, 1 Mo. App. 272.

34. *Alabama.*— Jones *v.* Sims, 6 Port. 138; Jones *v.* Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716.

Louisiana.— Woods *v.* Pickett, 30 La. Ann. 1095; Owens *v.* Davis, 15 La. Ann. 22; Whipple *v.* Hill, 14 La. Ann. 437; Violett *v.* Fairchild, 6 La. Ann. 193; Lacoste *v.* Sellick, 1 La. Ann. 336; Byrne *v.* Hooper, 2 Rob. 229; Banchor *v.* Bell, 2 Rob. 182; Black *v.* Savory, 17 La. 85; Burke *v.* Clarke, 11 La. 206; David *v.* Eloi, 4 La. 106; Kimbal *v.* Blanc, 8 Mart. N. S. 386.

Minnesota.— Russell *v.* Minnesota Outfit, 1 Minn. 162.

New York.— Donnell *v.* Walsh, 33 N. Y. 43, 88 Am. Dec. 361; Merritt *v.* Walsh, 32 N. Y. 685.

Pennsylvania.— Croasdale *v.* Von Boyneburgk, 195 Pa. St. 377, 46 Atl. 6; Adams *v.* Carroll, 85 Pa. St. 209.

England.— Holderness *v.* Shackels, 8 B. & C. 612, 7 L. J. K. B. O. S. 80, 3 M. & R. 25, 15 E. C. L. 303; Green *v.* Briggs, 6 Hare 395, 12 Jur. 326, 17 L. J. Ch. 323, 31 Eng. Ch. 395, 67 Eng. Reprint 1219.

Canada.— Baker *v.* Casey, 19 Grant Ch. (U. C.) 537.

See 44 Cent. Dig. tit. "Shipping," § 72.

Effect of change of ownership.— Every change in the owners of a boat while she is engaged in carrying passengers and merchandise for hire creates and constitutes a new partnership. Violet *v.* Fairchild, 6 La. Ann. 193.

35. Harding *v.* Foxcroft, 6 Me. 76; Croasdale *v.* Von Boyneburgk, 195 Pa. St. 377, 46 Atl. 6.

Admissibility of declarations of alleged partners.— On the question whether a partnership did or did not exist, the declarations of the alleged partners, unaccompanied by acts, and unconnected with any of their declarations proved by the other party, are inadmissible in their own favor. Phillips *v.* Purington, 15 Me. 425.

36. Right to purchase at sale by master see *infra*, IV, A, 2.

Liability for torts see *infra*, V, C, 1, d.

Liability for destruction of vessel while in possession as charterer see *infra*, III, N.

Effect of limited liability act see *infra*, XI, A–E.

37. Briggs *v.* Barnett, 108 Va. 404, 61 S. E. 797.

38. Stedman *v.* Feidler, 25 Barb. (N. Y.) 605 [*affirmed* in 20 N. Y. 437]. And see *infra*, II, C, 2, e.

Part-owner as master.— The master of a vessel, who is also part-owner, must be considered as agent for the owners, where they do not interfere, and a contract made by him in his own name inures to their use and is

An individual part-owner has no power, by virtue of his relation to his coöwners, to bind them in relation to any matters beyond the necessary and regular use of the vessel.[39] He cannot sell [40] or mortgage [41] the interests of his coöwners, draw drafts or notes in their name,[42] apply the freight earned in payment of his individual debt,[43] or procure insurance for the other owners [44] unless a partnership relation exists between them; [45] nor can it be inferred from the general authority of the ship's husband.[46] It is necessary to show an authority to procure the insurance for the other owners,[47] or a subsequent ratification.[48]

b. As to Use and Control of Vessel — (I) *In General.* As between part-owners, those owning a majority in interest have the right to control the use of the ship,[49] upon giving security by stipulation to the minority, if required, to bring back and restore the ship to them, or in case of her loss to pay them the value of their shares,[50] in which case the minority owners will not be entitled to

binding on them. Baker *v.* Corey, 19 Pick. (Mass.) 496.

39. Montell *v.* The William H. Rutan, 17 Fed. Cas. No. 9,724.

40. See *infra*, II, E, 1.

41. Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

42. Brooks *v.* Harris, 12 Ala. 555; Woods *v.* Pickett, 30 La. Ann. 1095; Oglesby *v.* The D. S. Stacy, 10 La. Ann. 117; Whiton *v.* Spring, 74 N. Y. 169.

43. Jones *v.* Sims, 9 Port. (Ala.) 236, 33 Am. Dec. 313; Donovan *v.* Dymond, 7 Fed. Cas. No. 3,993, 3 Woods 141. And see Green *v.* Briggs, 6 Hare 395, 12 Jur. 326, 17 L. J. Ch. 323, 31 Eng. Ch. 395, 67 Eng. Reprint 1219.

44. *Indiana.*— Holcroft *v.* Wilkes, 16 Ind. 373.

Louisiana.—Woods *v.* Pickett, 30 La. Ann. 1095.

Maine.— Sawyer *v.* Freeman, 35 Me. 542; Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474.

Massachusetts.— Finney *v.* Fairhaven Ins. Co., 5 Metc. 192, 38 Am. Dec. 397; Foster *v.* U. S. Ins. Co., 11 Pick. 85.

New York.— McCready *v.* Woodhull, 34 Barb. 80.

England.— Hooper *v.* Lusby, 4 Campb. 66; Bell *v.* Humphries, 2 Stark. 345, 3 E. C. L. 438; Ogle *v.* Wrangham, Abbott Shipp. (13th ed.) 96.

See 44 Cent. Dig. tit. "Shipping," § 61.

45. Hooper *v.* Lusby, 4 Campb. 66.

46. See *infra*, II, D.

47. Woods *v.* Pickett, 30 La. Ann. 1095; Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474; Lindsay *v.* Gibbs, 3 De G. & J. 690, 5 Jur. N. S. 376, 28 L. J. Ch. 692, 7 Wkly. Rep. 320, 60 Eng. Ch. 533, 44 Eng. Reprint 1435; Ogle *v.* Wrangham, Abbott Shipp. (13th ed.) 96.

48. Woods *v.* Pickett, 30 La. Ann. 1095; Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474; Ogle *v.* Wrangham, Abbott Shipp. (13th ed.) 96.

The bringing of an action on the policy in their names is a sufficient ratification. Finney *v.* Fairhaven Ins. Co., 5 Metc. (Mass.) 192, 38 Am. Dec. 397.

49. *Connecticut.*— Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Gould *v.* Stanton, 16 Conn. 12; Williams *v.* Kelly, 2 Conn. 218 note.

Florida.— Hyer *v.* Caro, 17 Fla. 332.

Georgia.—Swift *v.* Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101.

Louisiana.— Jouanneau *v.* Shannon, 4 La. Ann. 330.

Maine.— Hall *v.* Thing, 23 Me. 461.

Minnesota.— Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397.

New York.— Stedman *v.* Feidler, 25 Barb. 605 [*affirmed* in 20 N. Y. 437].

Pennsylvania.— Paynter *v.* Paynter, 7 Phila. 336.

United States.— The Orleans, 11 Pet. 175, 9 L. ed. 677; Clayton *v.* The Eliza B. Emory, 4 Fed. 342; Diedman *v.* The Joseph Hume, 7 Fed. Cas. No. 3,901; Revens *v.* Lewis, 20 Fed. Cas. No. 11,711, 2 Paine 202; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236; Willings *v.* Blight, 30 Fed. Cas. No. 17,765, 2 Pet. Adm. 288.

England.— Falkland *v.* Cheney, 5 Bro. P. C. 476, 2 Eng. Reprint 807; Japp *v.* Campbell, 57 L. J. Q. B. 79.

Canada.— Merchants' Bank *v.* Graham, 27 Grant Ch. (U. C.) 524.

See 44 Cent. Dig. tit. "Shipping," § 63.

Removal of master see *infra*, IV, A, 4.

Reason of rule.— It is considered to be for the interest of the country as well as of the ship-owners that ships should be employed; and it is more reasonable that they should be employed at the will of the majority, than that the minority should elect, or that they should remain unemployed. Gould *v.* Stanton, 16 Conn. 12. There must necessarily be a discretion intrusted for the benefit of all to the owners of a major part, to enable them to take advantage of the changing aspects of business, and to secure the benefit of adventures holding out the prospect of favorable results, to change the employment of the vessel from the performance of foreign voyages, to the coasting trade, and the fishing business, if the vessel be of a suitable character for such employment. Hall *v.* Thing, 23 Me. 461.

Minority should be informed of voyage intended.— Willings *v.* Blight, 30 Fed. Cas. No. 17,765, 2 Pet. Adm. 288.

50. *Connecticut.*— Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Gould *v.* Stan-

share in the profits or be liable for the expenses of running the ship.[51] And the minority owners may employ the ship, in the like manner, if the majority decline to employ her at all.[52] In these cases a court of admiralty will if necessary compel the dissenting part-owners, if they are in possession of the ship, to yield the property to those who have thus the right to employ it for that purpose.[53]

ton, 16 Conn. 12; Williams *v.* Kelly, 2 Conn. 218 note.

Florida.— Hyer *v.* Caro, 17 Fla. 332.

Minnesota.— Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397.

New York.— Stedman *v.* Feidler, 25 Barb. 605 [*affirmed* in 20 N. Y. 437].

Pennsylvania.— Paynter *v.* Paynter, 7 Phila. 336.

United States.— The Orleans, 11 Pet. 175, 9 L. ed. 677; Coyne *v.* Caples, 8 Fed. 638, 7 Sawy. 360; Fox *v.* Paine, 9 Fed. Cas. No. 5,014, Crabbe 271; Sturges *v.* The Mary Staples, 23 Fed. Cas. No. 13,566*a*; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236.

England.— The England, 12 P. D. 32, 6 Aspin. 140, 56 L. J. Adm. 115, 56 L. T. Rep. N. S. 896, 35 Wkly. Rep. 367; The Robert Dickinson, 10 P. D. 15, 5 Aspin. 341, 54 L. J. P. D. & Adm. 5, 52 L. T. Rep. N. S. 55, 33 Wkly. Rep. 400; Japp *v.* Campbell, 57 L. J. Q. B. 79.

Canada.— Merchants' Bank *v.* Graham, 27 Grant Ch. (U. C.) 524.

See 44 Cent. Dig. tit. "Shipping," § 65.

Subject only to this right of the minority owner, the majority owners have unlimited control over his interest. They may at all times employ the ship as they please without consulting him, and in case of his dissent, for their own exclusive use and profit. Stedman *v.* Feidler, 25 Barb. (N. Y.) 605 [*affirmed* in 20 N. Y. 437].

The object of the bond is not to exempt from personal liability, but to save the dissentient part-owner from the loss of his interest in the vessed or of injury to it through the contemplated voyage, which mere dissent would not secure to him. Scull *v.* Raymond, 18 Fed. 547.

Intemperance of the master is a sufficient ground for a decree in admiralty requiring the majority owners of a vessel to give the dissenting owners a stipulation for her safe return from a proposed foreign voyage. Bragdon *v.* The Kitty Simpson, 3 Fed. Cas. No. 1,798.

Unregistered owner.— Where a part-owner of a vessel, known to be such by the other owners, omits to comply with the requisitions of the registry act, etc., without any fraudulent intent, and one of the other owners obtains an enrolment of the vessel, and swears that he and other persons own her, and totally omits the name of such part-owner, the latter, upon application to the court, is entitled to an order that the other owners shall give security for the safety of the vessel on a voyage not approved by him. Fox *v.* Paine, 9 Fed. Cas. No. 5,014, Crabbe 271.

Necessity of demand for security.— A dissenting owner is not bound to demand a bond, and failure to do so will not prevent his recovering costs on a libel to secure such bond. Sturges *v.* The Mary Staples, 23 Fed. Cas. No. 13,566*a*.

Amount of bond.— In England the dissenting owner is entitled to a bond conditioned at the agreed or appraised value of his share. The England, 12 P. D. 32, 6 Aspin. 140, 56 L. J. Adm. 115, 56 L. T. Rep. N. S. 896, 35 Wkly. Rep. 367; The Robert Dickinson, 10 P. D. 15, 5 Aspin. 341, 54 L. J. P. D. & Adm. 5, 52 L. T. Rep. N. S. 55, 33 Wkly Rep. 400. In this country the practice is usually to require a bond in double the value of such share. Fox *v.* Paine, 9 Fed. Cas. No. 5,014, Crabbe 271; The Marengo, 16 Fed. Cas. No. 9,066, 1 Sprague 506. If the parties cannot agree on the value of the shares they must be appraised in the usual way. The Robert Dickinson, 10 P. D. 15, 5 Aspin. 341, 54 L. J. P. D. & Adm. 5, 52 L. T. Rep. N. S. 55, 33 Wkly. Rep. 400.

The stipulation is in its nature provisional. — It is not treated or allowed as a continuing, permanent arrangement, by which the rights of an owner are protected and preserved; but simply as a present measure of relief, afforded in a particular case, for a particular voyage. Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236. And see Rodick *v.* Hinckley, 8 Me. 274. But the stipulation may be so worded as to cover more than one voyage. See The Vivienne, 12 P. D. 185, 6 Aspin. 178, 56 L. J. P. D. & Adm. 107, 57 L. T. Rep. N. S. 316, 36 Wkly. Rep. 110.

Compliance with condition.— The condition of the bond must be fairly complied with. Rodick *v.* Hinckley, 8 Me. 274. Thus a stipulation for the safe return of a vessel to a named port is not satisfied by her return to another port. The Susan E. Voorhis, 23 Fed. Cas. No. 13,633, 10 Ben. 380; The Regalia, 5 Aspin. 338, 51 L. T. Rep. N. S. 904. *Compare* The Margaret, 2 Hagg. Adm. 275.

51. See *infra*, II, C, 2, c.

52. Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Gould *v.* Stanton, 16 Conn. 12; The Orleans, 11 Pet. (U. S.) 175, 9 L. ed. 677; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236. See also Hyer *v.* Caro, 17 Fla. 332.

53. Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Hyer *v.* Caro, 17 Fla. 332.

Purpose of interference.— These rules have been adopted only for the purpose of providing that the ship should not be kept idle, but employed where it is desired by any of the owners, notwithstanding the others may object, and it is only for the purpose of carrying that object into effect that the courts will interfere in the manner which has been stated. Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72. But where it does not appear that it is the object of a portion of the

(11) *Sale in Case of Disagreement.* In England it was formerly held that a court of admiralty had no power to order the sale of a vessel in case of disagreement among joint owners,[54] but the law is now otherwise.[55] In this country it seems to be well established that where the equal part-owners of a vessel cannot agree concerning her use and employment, a court of admiralty has jurisdiction, upon the application of either party, to compel a sale of the same and divide the proceeds between the owners;[56] but, where the disagreement arises between unequal owners, the jurisdiction is doubted and denied.[57] The disagreement which will justify a sale must be a disagreement as to the manner in which the vessel shall be employed, and not upon the question of employment or not.[58]

c. As to Profits and Expenses. By the common law one tenant in common having possession of a chattel may use it for his own exclusive benefit, and while doing so he alone is liable for all charges affecting it.[59] This rule, applied to ships, has been so far modified as to entitle each part-owner to share in the profits, and to render him liable for the expenses, of the vessel, unless he has dissented from the voyage.[60] But part-owners who dissent from the voyage and take

owners of a ship, in applying for the possession of it, to employ it themselves, or no purpose appears excepting merely to procure a transfer of the possession of the vessel to themselves, such interposition, as it would be wholly useless, would be refused. Southworth *v.* Smith, *supra.*

54. The Apollo, 1 Hagg. Adm. 306; Ouston *v.* Hebden, 1 Wils. C. P. 101, 95 Eng. Reprint 515.

55. Since the passing of the 8th section of the Admiralty Court Act of 1861, the court has a discretionary power to order the sale of a vessel proceeded against in an action of coöwnership, notwithstanding the sale is opposed by the majority of the coöwners. The Nelly Schneider, 3 P. D. 152, 4 Aspin. 54, 39 L. T. Rep. N. S. 360, 27 Wkly. Rep. 308.

56. Coyne *v.* Caples, 8 Fed. 638, 7 Sawy. 360; Burr *v.* The St. Thomas, 4 Fed. Cas. No. 2,194*a* (holding further that a motion founded on affidavits made by the half owners in possession for leave to retain and employ the vessel, upon giving security for one half her value, will not be considered, on the application for sale, where no answer has been filed); Lewis *v.* Kinney, 15 Fed. Cas. No. 8,325, 5 Dill. 159; The Ocean Belle, 18 Fed. Cas. No. 10,402, 6 Ben. 253; The Seneca, 21 Fed. Cas. No. 12,670, 3 Wall. Jr. 395, 6 Pa. L. J. 213 [*reversing* 7 Fed. Cas. No. 3,650, Gilp. 10]; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236; The Vincennes, 28 Fed. Cas. No. 16,944. In Tunno *v.* The Betsina, *supra,* the court mentions three cases in which a sale may be ordered. The first case is illustrated by a disagreement between owners equal in interest, and both desiring to employ the vessel. The second case is where the minority do not wish to employ the vessel, but the majority who wish to employ the vessel cannot give a sufficient stipulation. The third case is where a majority in value showing it to be for the general good ask for a sale.

Sale to terminate receivership.— Where, on account of litigation between part-owners of a vessel, it has been sailed under the direction of a receiver for two years, and must be fitted out for another season or lie useless, the sale of the property will be ordered to terminate the receivership, it being inconvenient that the court should conduct operations for so long a time. Crane *v.* Ford, Hopk. (N. Y.) 114.

57. The Orleans, 11 Pet. (U. S.) 175, 183, 9 L. ed. 677 (where it is said: "The jurisdiction of courts of admiralty in cases of part-owners, having unequal interests and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called"); Coyne *v.* Caples, 8 Fed. 638, 7 Sawy. 360; Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791; Lewis *v.* Kinney, 15 Fed. Cas. No. 8,325, 5 Dill. 159; The Ocean Belle, 18 Fed. Cas. No. 10,402, 6 Ben. 253; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236.

58. The Annie H. Smith, 1 Fed. Cas. No. 420, 10 Ben. 110; Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236.

The sale of a vessel is not encouraged because the interference of the court in aiding a discontented part-owner to force a sale would in many cases serve only to gratify caprice or passion, tend to the injury of other part-owners, and invite frequent and injurious interruptions of commercial operations. Tunno *v.* The Betsina, 24 Fed. Cas. No. 14,236.

59. See Tenancy in Common.

60. *Connecticut.*— Gould *v.* Stanton, 16 Conn. 12; Williams *v.* Kelly, 2 Conn. 218 note.

Georgia.— Swift *v.* Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101.

Maine.— Hall *v.* Thing, 23 Me. 461.

United States.— Scull *v.* Raymond, 18 Fed. 547.

England.— The Vindobala, 13 P. D. 42, 57 L. J. P. D. & Adm. 37, 58 L. T. Rep. N. S. 353 [*reversed,* it seems, on other grounds in 14 P. D. 50, 6 Aspin. 376, 58 L. J. P. D. & Adm. 51, 6 L. T. Rep. N. S. 657, 37 Wkly. Rep. 409]; Anonymous, Skin. 230, 90 Eng.

security for the safe return of the vessel are no longer entitled to share in the profits, or liable for the expenses.[61] Some cases appear to hold that the taking of a bond is necessary to render the dissent effective;[62] but the better rule is that, while the taking of a bond is the best evidence that the dissenting owner abandoned all control and interest in the voyage, it is not the only evidence, and proof of actual dissent is sufficient.[63] So a part-owner who dissents from the authority of the managing coöwner to bind him for supplies is no longer entitled to share the profits, or liable for the expenses; and this, whether the creditors have notice or not of his dissent.[64]

d. As to Loss or Injury of Vessel or Cargo — (i) *Between Themselves.*[65] One joint owner of a vessel cannot maintain an action against his coöwner for a conversion thereof,[66] except in case of a total destruction, or something equivalent thereto, through the fault of such coöwner.[67] Injury to or loss of the vessel by negligence is not sufficient.[68]

Reprint 106; Strelly *v.* Winson, 1 Vern. Ch. 297, 23 Eng. Reprint 480.

Canada.— Merchants' Bank *v.* Graham, 27 Grant Ch. (U. C.) 524.

See 44 Cent. Dig. tit. "Shipping," § 66.

Ownership prima facie evidence of right to share of earnings.— Call *v.* Houdlette, 70 Me. 308.

Money paid to part-owners for their votes in the appointment of a captain is no profit of the ship. Moffatt *v.* Farquharson, 2 Bro. Ch. 338, 29 Eng. Ch. 189.

61. *Florida.*— Hyer *v.* Caro, 17 Fla. 332.

Minnesota.— Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397.

New York.— Stedman *v.* Feidler, 25 Barb. 605 [*affirmed* in 20 N. Y. 437].

United States.— Scull *v.* Raymond, 18 Fed. 547; The Marengo, 16 Fed. Cas. No. 9,065, 1 Lowell 52.

England.— The England, 12 P. D. 32, 6 Aspin. 140, 56 L. J. Adm. 115, 56 L. T. Rep. N. S. 896, 35 Wkly. Rep. 367.

Canada.— Merchants' Bank *v.* Graham, 27 Grant Ch. (U. C.) 524.

See 44 Cent. Dig. tit. "Shipping," § 66.

Liability for expenses incurred previous to taking bond.— A part-owner who takes security is not entitled to share in the profits of the voyage, but he may be liable for expenses incurred in fitting out the vessel for the voyage, previous to the taking of the security. Davis *v.* Johnston, 4 Sim. 539, 6 Eng. Ch. 539, 58 Eng. Reprint 202.

62. Gould *v.* Stanton, 17 Conn. 377; Gould *v.* Stanton, 16 Conn. 12; Williams *v.* Kelly, 2 Conn. 218 note; Jouanneau *v.* Shannon, 4 La. Ann. 330.

63. *Massachusetts.*— Taylor *v.* Richards, 3 Gray 326.

Minnesota.— Swain *v.* Knapp, 34 Minn. 232, 25 N. W. 397.

New York.— Stedman *v.* Feidler, 20 N. Y. 437 [*affirming* 25 Barb. 605].

United States.— Scull *v.* Raymond, 18 Fed. 547.

England.— Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396; Horn *v.* Gilpin, Ambl. 255, 27 Eng. Reprint 170; Anonymous, Skin. 230, 90 Eng. Reprint 106; Strelly *v.* Winson, 1 Vern. Ch. 297, 23 Eng. Reprint 480.

Express dissent necessary to relieve from liability.— Holmes *v.* Bigelow, 3 Desauss. Eq. (S. C.) 497.

Where a part-owner of a vessel employs her on his own account and risk, the other part-owners are not entitled to a share of the profits arising from such employment. Coyne *v.* Caples, 8 Fed. 638, 7 Sawy. 360.

64. Stedman *v.* Feidler, 20 N. Y. 437 [*affirming* 25 Barb. 605].

65. Sale by part-owner as conversion see Tenancy in Common.

66. Lowthorp *v.* Smith, 2 N. C. 255; Alderson *v.* Schulze, 64 Wis. 460, 24 N. W. 492; Knight *v.* Coates, L. R. 1 Ir. 53; Barnardiston *v.* Chapman [*cited* in Heath *v.* Hubbard, 4 East 110, 121, 102 Eng. Reprint 771]; Graves *v.* Saucer, 1 Keb. 38, 83 Eng. Reprint 798, 1 Lev. 29, 83 Eng. Reprint 281, T. Raym. 15, 83 Eng. Reprint 8; Rourke *v.* Union Ins. Co., 23 Can. Sup. Ct. 344; McNabb *v.* Howland, 11 U. C. C. P. 434.

67. Hyer *v.* Caro, 17 Fla. 332; Alderson *v.* Schulze, 64 Wis. 460, 24 N. W. 492; Rourke *v.* Union Ins. Co., 23 Can. Sup. Ct. 344.

What constitutes "destruction."— Actual destruction is unnecessary; it is sufficient if plaintiff's right of recaption is put an end to by the act of defendant. Knight *v.* Coates, L. R. 1 Ir. 53. In Lowthorp *v.* Smith, 2 N. C. 255, it is held that if a joint owner of a vessel, after getting sole possession, shall, without consent or against the will of the other owner, send the vessel to sea, and she is lost, the jury may consider such loss as a destruction of the vessel. And see Barnardiston *v.* Chapman [*cited* in Heath *v.* Hubbard, 4 East 110, 121, 102 Eng. Reprint 771]. In Kellum *v.* Knechdt, 17 Hun (N. Y.) 583, it was held that an action can be maintained against tenants in common as wrongdoers, when it appears that, by their unjust acts, any destruction of the joint property or profits is accomplished, as by interruption of a voyage for which the vessel was under charter.

68. Hyer *v.* Caro, 17 Fla. 332; Moody *v.* Buck, 1 Sandf. (N. Y.) 304 (even though one assumed the management, etc., without the license or consent of the other); Alderson *v.* Schulze, 64 Wis. 460, 24 N. W. 492. But see Berthond *v.* Gordon, 6 La. 579; Ralston

(II) *As to Third Persons.* If the owners of a vessel are not concerned in its navigation, they are not, upon the ground of ownership, liable for the loss of goods shipped on board of it;[69] but if they are entitled to its earnings, and jointly liable for losses, they may be regarded as partners, so far as it relates to all liabilities incurred by the injury or destruction of the vessel.[70]

e. As to Repairs and Supplies. As a general rule one part-owner may bind the others for necessary supplies and repairs for a ship, procured on credit, and render his coöwners liable to be sued for the price of them.[71] This authority arises where there is an implied agency on the part of one part-owner to act for the rest;[72] but it is subject to be modified, controlled, or negatived by other facts

v. Barclay, 6 Mart. (La.) 649, 12 Am. Dec. 483, both of which cases hold that one part-owner of a steamboat, acting as agent for another at a distance to insure the latter's interest, and discontinuing such insurance without instructions from or notice to him, will be liable for any resulting loss.

The reason is that each cotenant may protect himself and need not leave the property in the uncontrolled possession of the other unless he choose to do so; and if he does so choose he must take the consequences. Hyer *v.* Caro, 17 Fla. 332.

69. Jones *v.* Sims, 6 Port. (Ala.) 138.

70. Jones *v.* Scott, 2 Ala. 58; Jones *v.* Sims, 6 Port. (Ala.) 138; Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Hadfield *v.* Jameson, 2 Munf. (Va.) 53.

After death of coöwner.— Where one of the part-owners of a steamer, in the exercise of his legal rights, continues the steamer in her usual trade, after the death of his co-proprietor, without objection on the part of the heirs or representatives of the deceased, any loss resulting from an explosion of her boilers must be borne by the co-proprietors in proportion to their respective interests, unless it be shown to have resulted from the negligence or misconduct of the surviving part-owner. Jouanneau *v.* Shannon, 4 La. Ann. 330.

71. *Kentucky.*— Patterson *v.* Chalmers, 7 B. Mon. 595.

Louisiana.— Woods *v.* Pickett, 30 La. 1095.

Maine.— Bowen *v.* Peters, 71 Me. 463; Elder *v.* Larrabee, 45 Me. 590, 71 Am. Dec. 567; Hall *v.* Thing, 23 Me. 461; Harding *v.* Foxcroft, 6 Me. 76.

Michigan.—Sheehan *v.* Dalrymple, 19 Mich. 239.

Missouri.— Saltmarsh *v.* Rowe, 10 Mo. 38.

New York.— McCready *v.* Thorn, 51 N. Y. 454; Stedman *v.* Feidler, 20 N. Y. 437 [*affirming* 25 Barb. 605]; King *v.* Lowry, 20 Barb. 532.

Pennsylvania.— Scottin *v.* Stanley, 1 Dall. 129, 1 L. ed. 67, holding that part-owners of a vessel are liable for articles furnished and work done to the ship after they became owners, if such articles or work are charged to the ship, although the contract was made before they became owners.

United States.— Gum *v.* Frost, 4 Fed. 745.

Canada.— Cobb *v.* Turner, 2 Nova Scotia 332.

See 44 Cent. Dig. tit. "Shipping," § 67.

Compare The William Thomas *v.* Ellis, 4 Harr. (Del.) 309, holding that a part-owner of a vessel who is not the master or ship's husband cannot order repairs and sue his partner at law for his share of the expense.

Authority in home port.— A part-owner of a vessel who has not the general legal authority of a master, or the special authority of a ship's husband or agent, cannot furnish repairs and supplies at the port where his coöwners reside, and bind them without their consent and orders. The William Thomas *v.* Ellis, 4 Harr. (Del.) 309; Elder *v.* Larrabee, 45 Me. 590, 71 Am. Dec. 527; Hardy *v.* Sproule, 31 Me. 71; Benson *v.* Thompson, 27 Me. 470, 46 Am. Dec. 617; Pentz *v.* Clarke, 41 Md. 327. *Compare* Bowen *v.* Peters, 71 Me. 463, holding that as to one who furnishes materials to make the vessel seaworthy upon the order of a part-owner in possession, the presumption of the authority of such part-owner to bind all the owners for such goods remains, even if it be in the home port, unless there is something more than the single fact of the place of registry or enrolment, or of the owner's residence, to remove it.

72. Elder *v.* Larrabee, 45 Me. 590, 71 Am. Dec. 567; McCready *v.* Thorn, 51 N. Y. 454; Stedman *v.* Feidler, 20 N. Y. 437; Scull *v.* Raymond, 18 Fed. 547; Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396.

A part-owner has no general authority to bind his coöwners. It is a question of agency. Pentz *v.* Clarke, 41 Md. 327; Atkins *v.* Lewis, 168 Mass. 534, 47 N. E. 507; Hackwood *v.* Lyall, 17 C. B. 124, 2 Jur. N. S. 44 note, 25 L. J. C. P. 44 note, 84 E. C. L. 124; Brodie *v.* Howard, 17 C. B. 109, 1 Jur. N. S. 1209, 25 L. J. C. P. 57, 84 E. C. L. 109.

The question in each case is one of fact, whether he has had such authority committed to him (Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396), or if this is not in fact the case, whether he has been allowed to hold himself out as armed with such apparent authority (Frazer *v.* Cuthbertson, *supra*).

The executors of a deceased part-owner of a vessel are not chargeable for necessaries supplied or money advanced the vessel after their testator's death, where they have done nothing to take the benefit of the employment of the vessel nor given any authority to the master or ship's husband to act for them. Stedman *v.* Feidler, 20 N. Y. 437; Gum *v.* Frost, 4 Fed. 745.

and circumstances.[73] Thus it may be shown that he has actually parted with his interest, although still a registered owner;[74] or that he has committed the vessel to the exclusive care and control of the other owners, and thereby disentitled himself to share in her earnings;[75] or has given them notice to incur no further expense on the vessel;[76] or has expressly dissented from the employment of the vessel, and communicated such dissent to the master or ship's husband;[77] and in every such case it seems that he will not be liable, unless, by some previous act, he has misled the party furnishing the necessaries into the belief that he was liable.[78] Nor does the exemption of the owner or part-owner depend upon notice to the person supplying the necessaries or making the advances of the facts exempting him from liability.[79]

f. Remedies — (I) *BETWEEN THEMSELVES* — (A) *In General.* The ordinary remedy of part-owners to obtain an adjustment of the ship's account among themselves is a suit in equity.[80] But this rule that equity must be resorted to is

73. Bowen *v.* Peters, 71 Me. 463; Elder *v.* Larrabee, 45 Me. 590, 71 Am. Dec. 567; Sheehan *v.* Dalrymple, 19 Mich. 239; Stedman *v.* Feidler, 25 Barb. (N. Y.) 605 [*affirmed* in 20 N. Y. 437].

Acceptance of note of one owner.— The mere acceptance, by those who furnish supplies to a ship belonging to several joint owners, of a note from one of them, does not show that the credit was given exclusively to him, or that the others were released (Bentley *v.* Clark, 3 Dana (Ky.) 564; Wilkins *v.* Reed, 6 Me. 220, 19 Am. Dec. 211; King *v.* Lowry, 20 Barb. (N. Y.) 532; Higgins *v.* Packard, 2 Hall (N. Y.) 586; Muldon *v.* Whitlock, 1 Cow. (N. Y.) 290, 13 Am. Dec. 533; Schemerhorn *v.* Loines, 7 Johns. (N. Y.) 311; Keay *v.* Fenwick, 1 C. P. D. 745; The Huntsman, [1894] P. 214, 7 Aspin. 431, 70 L. T. Rep. N. S. 386, 5 Reports 698; Robinson *v.* Read, 9 B. & C. 449, 7 L. J. K. B. O. S. 236, 4 M. & R. 349, 17 E. C. L. 205; Whitwell *v.* Perrin, 4 C. B. N. S. 412, 93 E. C. L. 412. *Contra*, Chapman *v.* Durant, 10 Mass. 47), in the absence of proof that the note was taken as payment, and with the intent to discharge the other owners (King *v.* Lowry, 20 Barb. (N. Y.) 532; Snelling *v.* Howard, 7 Rob. (N. Y.) 400 [*affirmed* in 51 N. Y. 373]; Reed *v.* White, 5 Esp. 122).

74. *Alabama.*— Jones *v.* Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716.

Massachusetts.— Dame *v.* Hadlock, 4 Pick. 458; Hussey *v.* Allen, 6 Mass. 163.

New York.— Thorn *v.* Hicks, 7 Cow. 697; Leonard *v.* Huntington, 15 Johns. 298; Wendover *v.* Hogeboom, 7 Johns. 308.

United States.— Gum *v.* Frost, 4 Fed. 745.

England.— Rex *v.* Teal, 11 East 307, 10 Rev. Rep. 516, 103 Eng. Reprint 1022; Curling *v.* Robertson, 13 L. J. C. P. 137, 7 M. & G. 336, 8 Scott N. R. 12, 49 E. C. L. 336; Rands *v.* Thomas, 5 M. & S. 244.

Canada.— Fowler *v.* Borden, 4 Nova Scotia 79.

See 44 Cent. Dig. tit. "Shipping," § 67.

Legal ownership is prima facie evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and the legal owners having ceased to interfere with the management of the ship. Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396; Jennings *v.* Griffiths, R. & M. 42, 27 Rev. Rep. 730, 21 E. C. L. 700.

75. Stedman *v.* Feidler, 25 Barb. (N. Y.) 605 [*affirmed* in 20 N. Y. 437]; Gum *v.* Frost, 4 Fed. 745; Briggs *v.* Wilkinson, 7 B. & C. 30, 9 D. & R. 871, 5 L. J. K. B. O. S. 349, 14 E. C. L. 24.

The personal liability of a part-owner does not necessarily attach as an incident to his naked legal ownership, but depends upon the possession, use, and control of the ship. Tuckerman *v.* Brown, 17 Barb. (N. Y.) 191; Thorn *v.* Hicks, 7 Cow. (N. Y.) 697; Scull *v.* Raymond, 18 Fed. 547. Thus a mortgagee, although holding the legal title of the ship, if he has not the possession and use of her, is by the well-settled American law not personally liable for her supplies (see *infra*, II, F, 6, a); and so in cases of a nominal owner holding the title in trust only for others who have the use and control of the ship (Macy *v.* Wheeler, 30 N. Y. 231; Scull *v.* Raymond, 18 Fed. 547). Upon the same principle, if the ship is chartered upon terms which give the charterer the entire control of the ship, he is regarded as owner *pro hac vice*, and the general owner is not liable. Tuckerman *v.* Brown, 17 Barb. (N. Y.) 191; Gum *v.* Frost, 4 Fed. 745; Reeve *v.* Davis, 1 A. & E. 312, 3 N. & M. 873, 28 E. C. L. 159.

76. Atkins *v.* Lewis, 168 Mass. 534, 47 N. E. 507.

77. Stedman *v.* Feidler, 20 N. Y. 437; Scull *v.* Raymond, 18 Fed. 547; Gum *v.* Frost, 4 Fed. 745; Brodie *v.* Howard, 17 C. B. 109, 1 Jur. N. S. 1209, 25 L. J. C. P. 57, 84 E. C. L. 109.

78. Scull *v.* Raymond, 18 Fed. 547; Gum *v.* Frost, 4 Fed. 745.

For instance he may so conduct himself as to have held himself out to the party contracted with as one upon whose credit the work was to be done. Brodie *v.* Howard, 17 C. B. 109, 1 Jur. N. S. 1209, 25 L. J. C. P. 57, 84 E. C. L. 109.

79. Atkins *v.* Lewis, 168 Mass. 534, 47 N. E. 507; Scull *v.* Raymond, 18 Fed. 547; Gum *v.* Frost, 4 Fed. 745; Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396; Brodie *v.* Howard, 17 C. B. 109, 1 Jur. N. S. 1209, 25 L. J. C. P. 57, 84 E. C. L. 109.

80. Knowlton *v.* Reed, 38 Me. 246; Milburn

not absolute and unqualified.[81] It applies to cases relating to earnings and disbursements, when no settlement has been made or account stated between them;[82] but if no question of partnership is involved, an action is maintainable at law.[83]

(B) *Enjoining Use or Sale of Ship.* An owner of an unequal moiety of a vessel will be restrained by injunction from employing the vessel contrary to the wish of the other owner;[84] but an injunction will not issue to restrain the majority from running the ship, where they have given bond to account for the share of the minority owners;[85] and an injunction will be refused, when the ship is on the point of sailing, unless the delay in making the application is accounted for.[86] So one part-owner of a vessel may maintain a bill in equity to enjoin the other from selling his share;[87] to restrain the purchaser of a vessel from interfering with her sailing in pursuance of a charter-party previously entered into;[88] and to restrain the removing of a vessel out of the jurisdiction of the court pending litigation.[89]

v. Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; Whiton *v.* Spring, 74 N. Y. 169. And see ACCOUNTS AND ACCOUNTING, 1 Cyc. 351.

Jurisdiction of admiralty in matters of account see ADMIRALTY, 1 Cyc. 824 note 21.

81. Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491; Sturges *v.* Judson, 1 N. Y. City Ct. 256.

82. Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491; Curtis *v.* Blanchard, 45 Me. 228; Knowlton *v.* Reed, 38 Me. 246; Maguire *v.* Pingree, 30 Me. 508.

83. Sheehan *v.* Dalrymple, 19 Mich. 239; Gilman *v.* Leavitt, Smith (N. H.) 304; Sturges *v.* Judson, 1 N. Y. City Ct. 256; Helme *v.* Smith, 7 Bing. 709, 9 L. J. C. P. O. S. 206, 5 M. & P. 744, 20 E. C. L. 316. And see Brown *v.* Tapscott, 9 L. J. Exch. 139, 6 M. & W. 119.

Action against ship's husband for freight.— Part-owners of a vessel are not partners, and each may maintain a separate action against the ship's husband for his proportion of the freight; and this, although he be one of the part-owners. Magruder *v.* Bowie, 16 Fed. Cas. No. 8,964, 2 Cranch C. C. 577.

If the joint interest is determined, or the partnership is dissolved, all accounts and liabilities being settled and discharged, and a balance remains due from one cotenant or copartner to another, it may be recovered in an action of assumpsit. Chadbourne *v.* Duncan, 36 Me. 89; Blood *v.* White, 3 Cush. (Mass.) 416; Law *v.* Thorndike, 20 Pick. (Mass.) 317; Fanning *v.* Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Turner *v.* McMann, 22 N. Brunsw. 391. But see Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681. The relation of quasi-partnership between ship-owners is generally only for the adventure, and, where accounts are settled and a balance struck at the end of each voyage, an action at law may be maintained by one part-owner against the managing part-owner for his share of the earnings of the vessel. McLauthlin *v.* Smith, 166 Mass. 131, 44 N. E. 125.

In cases of contract growing out of the original construction of the vessel, an action at law is the appropriate remedy, notwithstanding the builder is a part-owner. Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491.

Action for not accounting.—Where the duty to account is cast upon the ship's husband by agreement, an action lies against him upon the agreement by each of the part-owners for failure to do so. Owston *v.* Ogle, 13 East 538, 12 Rev. Rep. 426, 104 Eng. Reprint 479.

Notice of suit.— A part-owner of a boat cannot sue the other part-owners for services without giving the statutory notice; and the proof of such notice devolves upon him. The Raritan *v.* McCloy, 10 Mo. 534.

84. Paynter *v.* Paynter, 7 Phila. (Pa.) 336.

85. Dunham *v.* Jarvis, 8 Barb. (N. Y.) 88, 2 Edm. Sel. Cas. 145.

In England the court of admiralty is open to applications by part-owners to restrain the sailing of ships without their consent, until security is given to the amount of the respective shares. Haly *v.* Goodson, 2 Meriv. 77, 16 Rev. Rep. 145, 35 Eng. Reprint 870. And a court of equity will not interfere by injunction unless the admiralty court has been previously applied to, and refused to interfere, or can only afford a dilatory and inadequate relief. Brennan *v.* Preston, 10 Hare 331, 1 Wkly. Rep. 112, 115, 44 Eng. Ch. 321, 68 Eng. Reprint 953 [*affirming* 2 De G. M. & G. 813, 1 Wkly. Rep. 69, 86, 51 Eng. Ch. 637, 42 Eng. Reprint 1090]. But where the shares are not ascertained, that court has no jurisdiction; and in such case the court of chancery will exercise a concurrent jurisdiction, by injunction, to restrain the sailing of a ship until the share of the party complaining shall be ascertained, and security given to the amount of it. Castelli *v.* Cook, 7 Hare 89, 13 Jur. 675, 18 L. J. Ch. 148, 27 Eng. Ch. 89, 68 Eng. Reprint 36; Hallaran *v.* Donal, 9 Ir. Eq. 217; Haly *v.* Goodson, *supra*. And see Darby *v.* Baines, 9 Hare 369, 21 L. J. Ch. 801, 41 Eng. Ch. 369, 68 Eng. Reprint 550.

86. Hallaran *v.* Donal, 9 Ir. Eq. 217; Christie *v.* Craig, 2 Meriv. 137, 35 Eng. Reprint 892.

87. Thoms *v.* Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467.

88. Messageries Imperiales Co. *v.* Baines, 7 L. T. Rep. N. S. 763, 11 Wkly. Rep. 322.

89. Hart *v.* Herwig, L. R. 8 Ch. 860, 2 Aspin. 63, 42 L. J. Ch. 457, 29 L. T. Rep.

(II) *By or Against Third Persons*[90]—(A) *Parties.* If part-owners of a vessel make a contract with a third person, which is joint in its nature, their action on the contract must be joint.[91] So if part-owners give a joint authority to an agent to sell the entire ship, they cannot maintain separate actions against him for their respective shares of the money, although each may do so if they separately authorized the agent to sell their respective shares of the ship.[92] But where the language of the contract is several, and the interests of the parties are several, the action must be several.[93] And it has been held that a part-owner may sustain a petitory suit against a merely fraudulent possessor without joining the other part-owners.[94]

(B) *Evidence.* Joint owners of a vessel are presumed to be owners of equal parts;[95] but the presumption is liable to be rebutted by evidence of insurance by each in different proportions,[96] or by the production of the books and papers of the vessel;[97] and parol evidence of their contents, unless specially objected to as secondary, must receive the same consideration as the books and papers themselves.[98]

D. Managing Owner or Ship's Husband[99] **— 1. Powers and Duties.** The ship's husband or managing owner has authority to do whatever is necessary

N. S. 47, 21 Wkly. Rep. 663; Clavering *v.* Aguire, L. R. 5 Ir. 97.

90. Attachment of vessel or interest see ATTACHMENT, 4 Cyc. 557 note 41.

91. *Arkansas.*— Phillips *v.* Pennywit, 1 Ark. 59.

Maine.—White *v.* Curtis, 35 Me. 534.

New Hampshire.—Gilman *v.* Leavitt, Smith 304.

New York.— Coster *v.* New York, etc., R. Co., 6 Duer 43; Wright *v.* Marshall, 3 Daly 331; Buckman *v.* Brett, 13 Abb. Pr. 119.

United States.— Richmond *v.* New Bedford Copper Co., 20 Fed. Cas. No. 11,800, 2 Lowell 315.

All the part-owners should join as plaintiffs for the recovery of freight, because all of them are partners with respect to the concerns of the ship. Robinson *v.* Cushing, 11 Me. 480; Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; Donnell *v.* Walsh, 33 N. Y. 43, 88 Am. Dec. 361; Merritt *v.* Walsh, 32 N. Y. 685. But under a statute providing that "any boat or vessel may institute suit in the name of such boat or vessel, through the owner, master, agent or consignee thereof, for all freights due to such boat," one part-owner of a steamboat may sue in the name of the boat. The Beardstown *v.* Goodrich, 16 Mo. 153.

If any of the owners refuse to become plaintiffs, they should be made defendants. Coster *v.* New York, etc., R. Co., 6 Duer (N. Y.) 43. The libel will not be dismissed because some of the part-owners refuse to proceed. Richmond *v.* New Bedford Copper Co., 20 Fed. Cas. No. 11,800, 2 Lowell 315.

Effect of death.— If joined as plaintiffs and one dies the right of action survives to the surviving part-owners, who may afterward be compelled to pay to the personal representatives of the deceased the value of his share. Wright *v.* Marshall, 3 Daly (N. Y.) 331; Bucknam *v.* Brett, 13 Abb. Pr. (N. Y.) 119. If joined as defendants and the death of one of them occurs, the executor or personal representatives of the one so dying cannot be sued or joined with the summons as the liability differs in the case of each. The executor is charged *de bonis testatoris*, the survivors *de bonis propriis*, and the judgment could not be thus rendered. Wright *v.* Marshall, *supra*; Bucknam *v.* Brett, *supra*.

Dormant partners, although legally interested in the event of the suit, need not join. Phillips *v.* Pennywit, 1 Ark. 59.

Exception to rule.— One of two joint owners of a vessel may sue for his share of a demand due such owners, without joining his cotenant, whose share has already been paid. Gilman *v.* Leavitt, Smith (N. H.) 304; Bishop *v.* Edmiston, 16 Abb. Pr. (N. Y.) 466; Sedgworth *v.* Overend, 7 T. R. 279, 101 Eng. Reprint 974; Addison *v.* Overend, 6 T. R. 766, 101 Eng. Reprint 816.

92. Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; Hatsall *v.* Griffith, 2 Cromp. & M. 679, 3 L. J. Exch. 191, 4 Tyrw. 487.

93. Servante *v.* James, 10 B. & C. 410, 8 L. J. K. B. O. S. 64, 5 M. & Rob. 299, 21 E. C. L. 177.

Illustrations.— A part-owner of a vessel obtaining an insurance on his separate interest may maintain an action for such insurance, without the joinder of his coöwners, their interests not being joint. Gray *v.* Buck, 78 Me. 477, 7 Atl. 16. One joint owner of a vessel may sue alone for his share of the surplus proceeds of a sale on execution against him and other owners. Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513.

94. The Friendship, 9 Fed. Cas. No. 5,123, 2 Curt. 426.

95. Jouanneau *v.* Shannon, 4 La. Ann. 330; The Schooner Nantasket, 39 Ct. Cl. 119; The Ship Betsey, 23 Ct. Cl. 277.

96. The Schooner Nantasket, 39 Ct. Cl. 119; The Ship Betsey, 23 Ct. Cl. 277.

97 Jouanneau *v.* Shannon, 4 La. Ann. 330.

98. Jouanneau *v.* Shannon, 4 La. Ann. 330.

99. Managing owner defined see 25 Cyc. 124.

to enable the ship to prosecute her voyage and earn freight. And for all such purposes he is the agent of the owners and can bind them by his contracts.[2] But as this is only an implied authority it must cease when it is revoked,[3] or

1. Coulthurst *v.* Sweet, L. R. 1 C. P. 649; Barker *v.* Highley, 15 C. B. N. S. 27, 10 Jur. N. S. 391, 32 L. J. C. P. 270, 9 L. T. Rep. N. S. 228, 11 Wkly. Rep. 968, 109 E. C. L. 27.

Mode of appointment.— A ship's husband may be appointed by a written instrument or orally, or his appointment may be inferred from his exercising the duties of his office with the knowledge and consent of the owners. McCready *v.* Thorn, 51 N. Y. 454.

Scope and purpose of agency.— The implied agency of the ship's husband has only to do with the present or future use of the ship. Chase *v.* McLean, 130 N. Y. 529, 29 N. E. 986. It is based on present and pressing necessity, occasioned by the dangers of navigation with a vessel out of repair, improperly rigged, and inadequately provisioned. Chase *v.* McLean, *supra*.

The powers of a ship's husband are determined mainly by usage, and are defined as follows: "To provide for the complete seaworthiness of the ship; to see that she has on board all necessary and proper papers; to make contracts for freight, to collect the freight and to enter into proper charter-parties; to direct the repairs, appoint the officers and mariners; to see that the vessel is furnished with provisions and stores, and generally to conduct all the affairs and arrangements for the due employment of the ship in commerce and navigation. Chase *v.* McLean, 130 N. Y. 529, 534, 29 N. E. 986; McCready *v.* Thorn, 51 N. Y. 454.

Acts outside authority of managing owner or ship's husband.— A managing owner or ship's husband cannot, without special authority, purchase a cargo for the owners (Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243; The Ole Oleson, 20 Fed. 384), or insure (Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395; Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; McCready *v.* Woodhull, 34 Barb. (N. Y.) 80; The Ole Oleson, *supra*; French *v.* Backhouse, 5 Burr. 2727, 98 Eng. Reprint 431; Bell *v.* Humphries, 2 Stark. 345, 3 E. C. L. 438), or give up the lien for freight (The Ole Oleson, *supra*), or pledge his owner's credit for the expenses of a lawsuit (Campbell *v.* Stein, 6 Dow. 116, 3 Eng. Reprint 1417), or cancel a charter-party (Thomas *v.* Lewis, 4 Ex. D. 18, 4 Aspin. 51, 48 L. J. Exch. 7, 39 L. T. Rep. N. S. 669, 27 Wkly. Rep. 111), or, it is said, borrow money (Arey *v.* Hall, 81 Me. 17, 16 Atl. 302, 10 Am. St. Rep. 232; The Ole Oleson, *supra*), although in this latter respect the limitations on his powers formerly existing seem to have been modified (see Chase *v.* McLean, 130 N. Y. 529, 29 N. E. 986 [*reversing* 4 Silv. Sup. 16, 8 N. Y. Suppl. 903]; McCready *v.* Thorn, 51 N. Y. 454).

2. *Delaware.*— The William Thomas *v.* Ellis, 4 Harr. 309.

Maine.— Hall *v.* Thing, 23 Me. 461; Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243.

Massachusetts.— Atkins *v.* Lewis, 168 Mass. 534, 47 N. E. 507.

New York.— Chase *v.* McLean, 130 N. Y. 529, 29 N. E. 986.

United States.— The Ole Oleson, 20 Fed. 384; Scull *v.* Raymond, 18 Fed. 547; Gum *v.* Frost, 4 Fed. 745; Lyles *v.* Styles, 15 Fed. Cas. No. 8,625, 2 Wash. 224; Revens *v.* Lewis, 20 Fed. Cas. No. 11,711, 2 Paine 202.

England.— The Huntsman, [1894] P. 214, 7 Aspin. 431, 70 L. T. Rep. N. S. 386, 6 Reports 698; Tolson *v.* Hallett, Ambl. 270, 27 Eng. Reprint 180; Barker *v.* Highley, 5 C. B. N. S. 27, 10 Jur. N. S. 391, 32 L. J. C. P. 270, 9 L. T. Rep. N. S. 228, 11 Wkly. Rep. 968, 109 E. C. L. 27 (where it was held that he may release the ship according to the rules of the court by procuring bail for damages and costs); Darby *v.* Baines, 9 Hare 369, 21 L. J. Ch. 801, 41 Eng. Ch. 369, 68 Eng. Reprint 550.

Canada.— Smith *v.* Fulton, 11 Nova Scotia 225; Harrison *v.* Harris, 1 U. C. C. P. 235.

See 44 Cent. Dig. tit. "Shipping," § 53.

Extent of liability.— Where the ship's husband is not a part-owner of the ship, all the owners are responsible *in solido* for his just expenditures and charges (Briggs *v.* Barnett, 108 Va. 404, 61 S. E. 797); but, where he is part-owner, each is liable only for his own share of such expenditures and charges (Briggs *v.* Barnett, *supra*).

In the home port, where all the owners reside, the managing owner, although registered as such at the custom-house, cannot, merely by virtue of that relation, order supplies, and bind his coöwners to a personal liability therefor; nor do they become liable merely because the creditor, on his books charges the supplies against the vessel and owners. Briggs *v.* Barnett, 108 Va. 404, 61 S. E. 797; Woodall *v.* Dempsey, 100 Fed. 653; Spedden *v.* Koenig, 78 Fed. 504, 24 C. C. A. 189; Steele *v.* Dixon, 3 Ct. of Sess. Cas. (4th ser.) 1003. And see Burton *v.* Burton, 1 L. T. Rep. N. S. 552. But in some states it has been held that a ship's husband has power to contract for repairs, even in a home port, if they were absolutely necessary. Chase *v.* McLean, 130 N. Y. 529, 29 N. E. 986; Provost *v.* Patchin, 9 N. Y. 235. And see Atkins *v.* Lewis, 168 Mass. 534, 47 N. E. 507.

3. Revens *v.* Lewis, 20 Fed. Cas. No. 11,711, 2 Paine 202.

Each coöwner may retract his authority to the managing owner without consulting the other coöwners. The Vindobala, 13 P. D. 42, 57 L. J. P. D. & Adm. 37, 58 L. T. Rep. N. S. 353 [*reversed* on other grounds in 14 P. D. 50, 6 Aspin. 376, 58 L. J. P. D. & Adm. 51, 60 L. T. Rep. N. S. 657, 37 Wkly. Rep. 409].

Death of part-owner.— The authority of ship's husband to bind the part-owner for supplies is revoked by the death of the latter, and his estate cannot be charged for such

when anything is done which has the effect of rebutting the presumption which ordinarily arises as to such implied authority.[4]

2. Compensation. A managing owner or ship's husband is entitled to reasonable remuneration for his services,[5] which is usually fixed by an agreement among the part-owners.[6] But there is no fixed rate applicable.[7]

E. Sales[8] **— 1. In General.** Where the part-owners of a vessel are not partners, any one of them may sell his own interest at his pleasure;[9] but he cannot sell the interest of a coöwner without his consent.[10] All the owners may, however, combine and sell or authorize the sale of the whole vessel.[11]

2. What Law Governs. The validity of a contract of sale of a vessel is governed by the laws of the state where it was made and performed.[12]

supplies. Stedman *v.* Feidler, 20 N. Y. 437. It would be a breach of trust for executors to authorize the master or ship's husband, in the absence of an express power under the will, to act for them in the purchase of supplies, and no presumption can therefore arise that they have done so. Gum *v.* Frost, 4 Fed. 745.

4. Hall *v.* Thing, 23 Me. 461; Scull *v.* Raymond, 18 Fed. 547; Revens *v.* Lewis, 20 Fed. Cas No. 11,711, 2 Paine 202; Thompson *v.* Finden, 4 C. & P. 158, 19 E. C. L. 455 (where the understanding was that the person who directed the work to be done should be looked to exclusively); Harrison *v.* Harris, 1 U. C. C. P. 235 (holding that where the joint ownership is not disputed, and there is nothing to exempt from liability by the terms of the contract or the situation of the parties, the mere circumstance of plaintiff's having made out his account against the managing owner as captain, instead of against the owners generally or against the vessel, does not repel the implied agency, or show a credit exclusively given to such captain or manager).

There is no magic in the term "managing owner" which creates him a plenipotentiary for those owners whose agent he is not in fact. Frazer *v.* Cuthbertson, 6 Q. B. D. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396. Thus when it affirmatively appears that any one part-owner was neither intended to be represented by the managing owner or ship's husband in the navigation of the ship or in ordering repairs or supplies, and that he was never authorized to represent or bind the owner who never ratified or adopted the voyage, but dissented from it, there is no reason or legal principle upon which he can be held for the supplies ordered. Scull *v.* Raymond, 18 Fed. 547. So it has been held that the fact that defendant had allowed the entry on the register describing one as managing owner to remain unaltered did not *per se* amount to a holding out of such person as his agent, so as to render defendant liable for the necessaries supplied by plaintiffs, and that inasmuch as he had not in fact authority to bind defendant, plaintiff could not recover against defendant for such necessaries. Frazer *v.* Cuthbertson, *supra*. And see Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453.

5. The Meredith, 10 P. D. 69, 5 Aspin. 400, 52 L. T. Rep. N. S. 520; Salter *v.* Adey, 1 Jur. N. S. 930, 24 L. T. Rep. N. S. 229. And see Besse *v.* Hecht, 85 Fed. 677.

Right to extra commissions.— A managing owner who receives a fixed remuneration for his services as such is not entitled to charge a commission for doing anything within the terms of his agency. Williamson *v.* Hine, [1891] Ch. 390, 6 Aspin. 559, 60 L. J. Ch. 123, 63 L. T. Rep. N. S. 682, 39 Wkly. Rep. 239.

Persons entitled to remuneration.— A director of a company owning vessels cannot act as husband of one of the vessels and receive the usual remuneration of a ship's husband. The two positions are incompatible. Benson *v.* Heathorn, 1 Y. & Coll. 326, 20 Eng. Ch. 326, 62 Eng. Reprint 909. But the managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting and distributing the freight, there being no incompatibility between those services and his fiduciary character as managing owner. Smith *v.* Lay, 3 Kay & J. 105, 69 Eng. Reprint 1041.

6. The Meredith, 10 P. D. 69, 5 Aspin. 400, 52 L. T. Rep. N. S. 520.

In the absence of an agreement, it seems a part-owner acting as ship's husband is not entitled to a large commission. Miller *v.* Mackay, 34 Beav. 295, 55 Eng. Reprint 649, 31 Beav. 77, 54 Eng. Reprint 1066.

7. The Meredith, 10 P. D. 69, 5 Aspin. 400, 52 L. T. Rep. N. S. 520.

8. By master see *infra*, IV, B, 4.

On disagreement of part-owners see *supra*, II, C, 2, b, (II).

Commission on sale see *infra*, IV, D, 2.

Effect of sale as to registry see *supra*, I, B, 2, b.

9. *Alabama.*— Jones *v.* Scott, 2 Ala. 58; Jones *v.* Sims, 6 Port. 138.

Louisiana.— Byrne *v.* Hooper, 2 Rob. 229.

Pennsylvania.— Croasdale *v.* Von Boyneburgk, 195 Pa. St. 377, 46 Atl. 6.

United States.— Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791.

England.—Keay *v.* Fenwick, 1 C. P. D. 745. See 44 Cent. Dig. tit. "Shipping," § 81.

10. Byrne *v.* Hooper, 2 Rob. (La.) 229; Saltmarsh *v.* Rowe, 10 Mo. 38; Whiton *v.* Spring, 74 N. Y. 169; Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791.

A part-owner as ship's husband has no authority to sell the interests of his coöwners. Whiton *v.* Spring, 74 N. Y. 169.

11. Keay *v.* Fenwick, 1 C. P. D. 745.

12. Bulkley *v.* Honold, 19 How. (U. S.) 390, 15 L. ed. 663.

3. Evidence of Sale.[13] No distinction is made in the evidence applicable between the sale and delivery of a vessel and any other property. What is competent in one case is admissible in the other.[14] It is not required that the contract of sale should be proved to have been made in express terms, but it may be inferred from conversations and acts of the parties like other contracts.[15]

4. Bill of Sale[16] **— a. Necessity.** A written instrument is required to pass the title to a ship so as to preserve her national character;[17] but as between the parties the sale and delivery of a vessel suffices, at common law, to pass the title, without a bill of sale or other instrument in writing,[18] unless the contract provides otherwise.[19] But by statute in England,[20] Canada,[21] and in some of the United States[22] a bill of sale is made necessary.

Vessel at sea.— The validity of the assignment of a vessel at sea must be determined by the laws of the state where it was made. Southern Bank *v.* Wood, 14 La. Ann. 554, 74 Am. Dec. 446; Thuret *v.* Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508.

The validity of the sale of a British ship in a foreign port is determined by the law usually enforced in the court of admiralty, unless the foreign law be specially pleaded. The Bonita, 30 L. J. Adm. 145, Lush. 252, 5 L. T. Rep. N. S. 141.

13. Evidence that transaction constitutes mortgage see *infra*, II, F, 1.

14. Badger *v.* Cumberland Bank, 26 Me. 428.

The bill of sale and the enrolment of a steamboat are *prima facie* evidence of a *bona fide* sale. Seaman *v.* Enterprise F., etc., Ins. Co., 21 Fed. 778.

15. Badger *v.* Cumberland Bank, 26 Me. 428.

Parol evidence.— The sale of a vessel, like that of any other personal chattel, may be proved by parol. Chadbourne *v.* Duncan, 36 Me. 89. Accounts kept of the proceeds of the vessel, and of the repairs, prove a use and possession, which is at least equivalent to a formal delivery at the time of the transfer. Badger *v.* Cumberland Bank, 26 Me. 428.

Evidence held to show simulated sale see Hastings *v.* Drew, 76 N. Y. 9.

16. As evidence of title see *supra*, II, B, 3.

Reformation of bill of sale see Reformation of Instruments, 34 Cyc. 899.

17. See *supra*, I, B, 2, b.

18. *Alabama.*— Fontaine *v.* Beers, 19 Ala. 722.

Connecticut.—Scranton *v.* Coe, 40 Conn. 159.

Louisiana.— Shields *v.* Perry, 16 La. 463.

Maine.— Rice *v.* McLarren, 42 Me. 157; Chadbourne *v.* Duncan, 36 Me. 89; Metcalf *v.* Taylor, 36 Me. 28; Mitchell *v.* Taylor, 32 Me. 434; Barnes *v.* Taylor, 31 Me. 329; Richardson *v.* Kimball, 28 Me. 463; Badger *v.* Cumberland Bank, 26 Me. 428.

Massachusetts.—Wilson *v.* Almy, 105 Mass. 436; Vinal *v.* Burrill, 16 Pick. 401; Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140.

Minnesota.— McMahon *v.* Davidson, 12 Minn. 357.

New York.— Thorn *v.* Hicks, 7 Cow. 697; Leonard *v.* Huntington, 15 Johns. 298; Wendover *v.* Hogeboom, 7 Johns. 308.

Rhode Island.— Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057.

United States.— The Amelie, 6 Wall. 18, 18 L. ed. 806; Hozey *v.* Buchanan, 16 Pet. 215, 10 L. ed. 941; U. S. *v.* Willings, 4 Cranch 48, 2 L. ed. 546; The Marion S. Harris, 85 Fed. 798, 29 C. C. A. 428; The Active, 1 Fed. Cas. No. 34, Olcott 286; Scudder *v.* Calais Steamboat Co., 21 Fed. Cas. No. 12,565, 1 Cliff. 370 [*reversed* on other grounds in 2 Black 372, 17 L. ed. 282].

See 44 Cent. Dig. tit. "Shipping," §§ 85, 86.

An unfinished vessel can be transferred by verbal agreement and the full performance thereof the same as any other chattel or tangible article of personal property. Misner *v.* Strong, 181 N. Y. 163, 73 N. E. 965; *In re* Derbyshire, 81 Pa. St. 18.

Under the general maritime law, it is stated by Judge Story, citing The Sisters, 5 C. Rob. 155, a written instrument to transfer is necessary to pass the title to a ship. Ohl *v.* Eagle Ins. Co., 18 Fed. Cas. No. 10,472, 4 Mason 172; Weston *v.* Penniman, 29 Fed. Cas. No. 17,455, 1 Mason 306. And see Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140.

19. Rice *v.* McLarren, 42 Me. 157; Higgins *v.* Chessman, 9 Pick. (Mass.) 7.

20. See Chasteauneuf *v.* Capeyron, 7 App. Cas. 127, 4 Aspin. 489, 51 L. J. P. C. 37, 46 L. T. Rep. N. S. 65; Union Bank *v.* Lenanton, 3 C. P. D. 243, 3 Aspin. 600, 47 L. J. C. P. 409, 38 L. T. Rep. N. S. 698 (holding that a ship built in order to be sold to a foreigner and to be delivered to him at a foreign port was not a British ship within the meaning of the Merchant Shipping Act of 1854, and that an assignment of her need not be by bill of sale); The Sisters, 5 C. Rob. 155.

A transfer of a ship, which has not been registered as a British ship under section 19 of the Merchant Shipping Act of 1854, is good, although not made by bill of sale under section 55. Union Bank *v.* Lenanton, 3 C. P. D. 243, 3 Aspin. 600, 47 L. J. C. P. 409, 38 L. T. Rep. N. S. 698.

21. Cutten *v.* McFarlane, 7 Nova Scotia 468.

The property in an unregistered ship may be transferred by parol like any other personal chattel. McLean *v.* Grant, 3 N. Brunsw. 50; Chisholm *v.* Potter, 11 U. C. C. P. 165.

22. Yarnberg *v.* Watson, 13 Oreg. 11, 4 Pac. 296, holding, however, that a boat in an

b. Requisites and Validity. In the United States a bill of sale of a ship is good, although it does not recite the certificate prescribed by the registry act.[23] The only penalty of a non-recital of the register, and a corresponding change of papers, is, that the vessel ceases to enjoy the privileges obtained by registration;[24] and this seems now to be the law of England.[25] Nor is it required, to make a bill of sale of a vessel valid, that it shall be enrolled in the custom-house;[26] the enrolment is only necessary to entitle the vessel to the character and privileges of an American vessel.[27]

c. Construction. A bill of sale of a vessel should be construed according to its terms and the intention of the parties.[28] Preferably a bill of sale should actually express the matter to be transferred; but general terms, such as appurtenances and necessaries, which have a fixed and technical meaning, may be, and often are, employed.[29] Only those things will be considered appurtenances and necessaries to a ship which are really necessary to it in carrying on its

unfinished state, unfit for carriage of passengers or goods, or for any purpose for which a vessel is intended, is not a vessel, within the meaning of Code, § 773, providing that a sale or transfer of a vessel is not valid, unless it be in writing and signed by the party making the transfer.

23. Mitchell *v.* Taylor, 32 Me. 434; De Wolf *v.* Harris, 8 Fed. Cas. No. 4,221, 4 Mason 515; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226.

The filling up of a blank left in the bill of sale for the certificate of registry does not render the bill of sale void. Wooley *v.* Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246.

24. Mitchell *v.* Taylor, 32 Me. 434; Wendover *v.* Hogeboom, 7 Johns. (N. Y.) 308; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; D'Wolf *v.* Harris, 8 Fed. Cas. No. 4,221, 4 Mason 515; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226. And see *supra*, I, B, 2, b.

25. Under the British registry acts previous to the Merchant Shipping Act of 1854, however formal the contract for the sale of a ship might be, it was a nullity in a court of law or equity, unless it recited the certificate of registry. Biddell *v.* Leeder, 1 B. & C. 327, 8 E. C. L. 141; Duncan *v.* Tindall, 13 C. B. 258, 17 Jur. 347, 22 L. J. C. P. 137, 76 E. C. L. 258; McCalmont *v.* Rankin, 2 De G. M. & G. 403, 22 L. J. Ch. 554, 51 Eng. Ch. 316, 42 Eng. Reprint 928; Hughes *v.* Morris, 2 De G. M. & G. 349, 16 Jur. 603, 21 L. J. Ch. 761, 51 Eng. Ch. 273, 42 Eng. Reprint 907. But a mere clerical mistake would not vitiate it. Rolleston *v.* Smith, 4 T. R. 161, 100 Eng. Reprint 950. In the case of a transfer not made by the party but by a public officer acting under legal authority, the same necessity did not exist. Thus a sheriff's assignment did not require a recital of the certificate of ownership, of which he might be ignorant, or which he might not be able to discover; and the sale being not by the owner, but by authority of law, the property passed without observance of the formalities required in sales by the owners themselves. Bloxam *v.* Hubbard, 5 East 407, 1 Smith K. B. 487, 102 Eng. Reprint 1126; The Tremont, 1 W. Rob. 163. And see Smith *v.* Jones, 5 U. C. C. P. 425; Smith *v.* Brown, 14 U. C. Q. B. 1. A bond given by third parties for the assignment of a vessel, but which is not intended to operate as an assignment, need not contain a recital of the certificate of ownership. Corby *v.* Cotton, 3 Can. L. J. 50. The Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104), now in force, came into operation on the first of May, 1855, and has introduced a variety of important alterations of the law relating to the ownership, measurement, and registry of British ships. By this new act the recital of the certificate of registry in a bill of sale, or executory contract for the sale of a ship, is not required. Wilson *v.* Cameron, 22 U. C. C. P. 198. Again, in 1862, 25 & 26 Vict. c. 63, still further relaxes the stringency of the former law. The case of Stapleton *v.* Haymen, 2 H. & C. 918, 10 Jur. N. S. 497, 33 L. J. Exch. 170, 9 L. T. Rep. N. S. 655, 12 Wkly. Rep. 317, fully explains the changes thus created.

26. Hozey *v.* Buchanan, 16 Pet. (U. S.) 215, 10 L. ed. 941. And see *infra*, II, G, 1.

27. Hozey *v.* Buchanan, 16 Pet. (U. S.) 215, 10 L. ed. 941.

28. Richardson *v.* Clark, 15 Me. 421.

The bill of sale controls the question as to the intention of the parties. Newberry *v.* The Fashion, 18 Fed. Cas. No. 10,143, 1 Newb. Adm. 67.

29. Richardson *v.* Clark, 15 Me. 421.

When a fixed and technical meaning is not appropriate to the language used, the intention of the parties should be submitted to a jury. Richardson *v.* Clark, 15 Me. 421. In using general terms the parties will be supposed to intend to embrace whatever is essential in the subject of conveyance and its beneficial enjoyment, according to its nature and design. Richardson *v.* Clark, *supra*.

A ship is included in the general term "effects," and will pass, in a conveyance, under the words, "goods, merchandise, and effects." Welsh *v.* Parish, 1 Hill (S. C.) 155.

Transfer of insurance.— Where a contract for the sale of a vessel required the sellers to deliver the ship, together with her unexpired insurance fully paid up, but no policies were mentioned in the contract, and the purchaser did not know how many policies

accepted business,[30] and there is no implied warranty that duplicates shall be furnished.[31]

5. Delivery — a. Necessity. The general rule of law is that the payment of the price is sufficient to complete the sale of a vessel between the seller and purchaser;[32] but as respects a second purchaser or creditor having no notice a delivery is necessary.[33] The question, what constitutes a delivery, is often of difficult solution. If the vessel is in port at the time of sale, actual delivery is usually held necessary to perfect the title against creditors.[34] But if the vessel is at sea a delivery of such evidence of title as the seller possesses is sufficient to pass title to the vendee,[35] without a delivery of the vessel itself,[36] provided the vendee takes possession as soon as the property is within his reach;[37] and the same rule applies in all cases where the vessel is so situated that a delivery cannot be made at the time of sale.[38] But if at the time of the contract it is understood

there were, nor by whom issued, the seller was not required to vest the purchaser with the title to the particular policies then covering the ship, but only title to equivalent policies. Livermore *v.* Brauer, 128 Fed. 265, 62 C. C. A. 647.

30. Gazzam *v.* Moe, 40 Wash. 593, 82 Pac. 912, 8 L. R. A. N. S. 793. And see Gullman *v.* Sharp, 81 Hun (N. Y.) 462, 30 N. Y. Suppl. 1036.

What passes under term "appurtenances." — The term "appurtenances" has been held to include a new ashpan which had not been put on board, but lay on the dock (Newberry *v.* The Fashion, 18 Fed. Cas. No. 10,143, Newb. Adm. 67) and a chronometer (Armstrong *v.* McGregor, 2 Ct. of Sess. Cas. (4th ser.) 339. But see Richardson *v.* Clark, 15 Me. 421). It has also been held not to include the ship's boat (Starr *v.* Goodwin, 2 Root (Conn.) 71), a launch too large to be carried on board (Forrest *v.* Vanderbilt, 107 Fed. 734, 46 C. C. A. 611, 52 L. R. A. 473), a pump placed on the boat by a third person with the owner's permission (Gullman *v.* Sharp, 81 Hun (N. Y.) 462, 30 N. Y. Suppl. 1036), an old crank shaft and rudder removed from the vessel, and replaced by new ones (Gazzam *v.* Moe, 40 Wash. 593, 82 Pac. 912, 8 L. R. A. N. S. 793), ballast (Burchard *v.* Tapscott, 3 Duer (N. Y.) 363; Lano *v.* Neale, 2 Stark. 105, 3 E. C. L. 336), the ship's stores (Robertson *v.* Dennistoun, 3 Macph. 829), or the cargo (Langton *v.* Horton, 5 Beav. 9, 6 Jur. 357, 594, 11 L. J. Ch. 233, 49 Eng. Reprint 479).

31. Gazzam *v.* Moe, 40 Wash. 593, 82 Pac. 912, 8 L. R. A. N. S. 793.

32. Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245; Winsor *v.* McLellan, 30 Fed. Cas. No. 17,887, 2 Story 492; Robinson *v.* McDonnell, 2 B. & Ald. 134, 5 M. & S. 228.

33. Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245; Winsor *v.* McLellan, 30 Fed. Cas. No. 17,887, 2 Story 492; Robinson *v.* McDonnell, 2 B. & Ald. 134, 5 M. & S. 228.

If a third party claiming title had notice of such sale before his rights accrued, he cannot allege any defect in the sale for want of a delivery, because he was not injured by it. Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245.

34. Richardson *v.* Kimball, 28 Me. 463.

35. *Louisiana.*— Southern Bank *v.* Wood, 14 La. Ann. 554, 74 Am. Dec. 446; Thuret *v.* Jenkins, 7 Mart. 318, 12 Am. Dec. 508.

Maine.— Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245; Brinley *v.* Spring, 7 Me. 241.

Massachusetts.— Badlam *v.* Tucker, 1 Pick. 388, 11 Am. Dec. 202; Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253.

New Hampshire.— Lord *v.* Ferguson, 9 N. H. 380.

Pennsylvania.—Morgan *v.* Biddle, 1 Yeates 3.

England.—Brown *v.* Heathcote, 1 Atk. 160, 26 Eng. Reprint 103.

See 44 Cent. Dig. tit. "Shipping," § 87.

The transmission by mail of a bill of sale of a steamboat to the purchaser, and its receipt, are a delivery to him of the boat at the moment of transmission. Begley *v.* Morgan, 15 La. 162, 35 Am. Dec. 188.

36. Thuret *v.* Jenkins, 7 Mart. (La.) 318, 12 Am. Dec. 508; Gardner *v.* Howland, 2 Pick. (Mass.) 599; Putnam *v.* Dutch, 8 Mass. 287; Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253.

37. Southern Bank *v.* Wood, 14 La. Ann. 554, 74 Am. Dec. 446; Gardner *v.* Howland, 2 Pick. (Mass.) 599; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253; Morgan *v.* Biddle, 1 Yeates (Pa.) 3; Mair *v.* Glennie, 4 M. & S. 240, 16 Rev. Rep. 445; *Ex p.* Matthews, 2 Ves. 272, 28 Eng. Reprint 176.

Presumption of fraud.— The negligence in not taking possession must be such as to afford ground for the presumption of fraud. Brinley *v.* Spring, 7 Me. 241; Gardner *v.* Howland, 2 Pick. (Mass.) 599. The neglect of delivery may be a circumstance from which a jury may, with other circumstances, presume fraud; but the sale is not thereby void. Portland Bank *v.* Stacey, 4 Mass. 661, 3 Am. Dec. 253. Should such a vessel arrive at another port, notice of the sale, forwarded by the purchaser to the captain, would seem to be equivalent to taking possession. Brinley *v.* Spring, *supra*; Mair *v.* Glennie, 4 M. & S. 240, 16 Rev. Rep. 445.

38. Ludwig *v.* Fuller, 17 Me. 162, 35 Am. Dec. 245 (vessel on the stocks); Putnam *v.* Dutch, 8 Mass. 287 (vessel at home, but in a port distant from the place where the contract is made).

and intended that a formal delivery shall be made to complete the sale, the transfer is not complete until such delivery is made.[39]

b. Place. Where the place of delivery is not designated in the contract of sale, and there is nothing in the condition or situation of the parties to determine the same, it is the privilege of the purchaser to name the place, provided it is a reasonable and suitable one.[40] But if the purchaser refuse or fail to provide such place, a delivery may be tendered at safe and usual anchorage in the harbor.[41] In offering delivery, the seller is under obligation to afford an opportunity to the purchaser to make examination;[42] but he is under no obligation to incur any such unusual expense as would be involved in hauling the vessel into dry-dock, and making a delivery there.[43]

6. Rights and Liabilities of Vendor[44] — a. In General. Where a contract for the sale of a vessel is made, and the vessel delivered to the purchaser, the responsibility of the vendor ceases as owner, although by the express terms of the contract he retains the legal title in himself, for the purpose of securing the consideration money, until it is paid.[45] Nor are the original owners liable to pay for supplies furnished a vessel at sea, after they have sold all their interest in the vessel, although neither the master nor the merchant furnishing the supplies has any knowledge of the sale.[46]

b. Lien. The vendor of a vessel has, in common with the vendors of other property, a lien on the thing sold.[47] But such lien is lost by delivery of the vessel to the purchaser.[48] A vendor cannot assert a lien against a vessel for services performed on her before sale.[49]

7. Rights and Liabilities of Purchasers[50] — a. In General. The bill of sale entirely divests the title of the vendor; immediately on the execution of the bill of sale the vendee becomes entitled to all the benefits of ownership, and he takes with them all the concurrent liabilities.[51] Where the bill of sale is unconditional,

A sale of a share in a ship is good without actual delivery. Addis *v.* Baker, Anstr. 222.

39. Rice *v.* McLarren, 42 Me. 157; Higgins *v.* Chessman, 9 Pick. (Mass.) 7.

40. Lincoln *v.* Gallagher, 79 Me. 189, 8 Atl. 883.

41. Lincoln *v.* Gallagher, 79 Me. 189, 8 Atl. 883.

42. Lincoln *v.* Gallagher, 79 Me. 189, 8 Atl. 883.

43. Lincoln *v.* Gallagher, 79 Me. 189, 8 Atl. 883.

44. Liability of part-owner after contracting to sell see *supra*, II, C, 2, e.

45. Tyler *v.* Holmes, 38 Me. 258; Cutler *v.* Thurlo, 20 Me. 213; Brooks *v.* Bondsey, 17 Pick. (Mass.) 441, 28 Am. Dec. 313; Thorn *v.* Hicks, 7 Cow. (N. Y.) 697; Leonard *v.* Huntington, 15 Johns. (N. Y.) 298; Hemm *v.* Williamson, 47 Ohio St. 493, 25 N. E. 1; Heppard *v.* The General Cadwalader, 11 Fed. Cas. No. 6,390, 6 Pa. L. J. 473. And see Young *v.* Brander, 8 East 10, 103 Eng. Reprint 248.

The true question for the jury in cases of this description is: "On whose credit were the supplies furnished or the repairs done?" Jennings *v.* Griffiths, R. & M. 42, 27 Rev. Rep. 730, 21 E. C. L. 700.

46. Hussey *v.* Allen, 6 Mass. 163.

47. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; The St. Mary, 21 Fed. Cas. No. 12,242, 2 Blatchf. 329.

Time for enforcement.— Under La. Rev. Civ. Code, art. 3237, a vendor's lien or privilege on a steamboat must be enforced within six months from the date of the sale, although a note payable at a distant day has been given for the credit portion of the purchase-price. *In re* Red River Line, 115 La. 867, 40 So. 250. The prescription is not of the debt, but of the privilege, and the delay commences to run from the date of the contract, and not from the maturity of the debt. *In re* Red River Line, *supra*; Violett *v.* Fairchild, 6 La. Ann. 193. The acceptance of a note payable at a distant date as a part of the purchase-price novates the debt and waives the vendor's lien. *In re* Red River Line, *supra*; Violett *v.* Fairchild, *supra*.

48. Baker *v.* Dewey, 15 Grant Ch. (U. C.) 668.

49. Ullery *v.* The Mayflower, 75 Fed. 842. See also Richardson *v.* Kimball, 28 Me. 463.

50. Lien for charter money see *infra*, III, K, 5.

Right of purchaser of master's share to command vessel see *infra*, IV, A, 2.

Right to collect freight see *infra*, VII, E, 3, b.

51. Trewhella *v.* Rowe, 11 East 435, 103 Eng. Reprint 1072; The Spirit of the Ocean, 34 L. J. Adm. 74, 12 L. T. Rep. N. S. 239.

The purchaser from a part-owner becomes vested with his entire right and title (Bradshaw *v.* The Sylph, 3 Fed. Cas. No. 1,791), and if the sum for which a part-owner of a vessel is liable for outfits has been balanced upon the ship's books, with the consent of

the purchaser is liable for supplies, although he may never have taken possession of the vessel,[52] and although neither the master nor the merchant furnishing the supplies had any knowledge of the sale.[53] After a contract of purchase, and before the title is actually transferred, the purchaser is liable for supplies, if he is in possession of the vessel at the time,[54] and the person in whom the legal title is is not liable.[55] The purchaser is not liable for repairs made and supplies furnished before the sale,[56] in the absence of a special agreement to that effect,[57] unless the vessel was at sea at the time of the sale, in which case the purchaser takes her subject to all encumbrances upon her, and to all lawful contracts made by the master, before notice of the purchase;[58] but he is not liable for the expense of any antecedent adventure from which he derives no profit.[59]

b. Bona Fide Purchasers.[60] The purchaser of a vessel from the owner of record is entitled to protection as against the real owner,[61] or a prior unrecorded sale,[62] unless it appears that the sale to such purchaser is colorable and without

all the parties, by charging the same to a firm of which he was a member, a purchaser of his interest in the vessel will take it discharged of the lien upon his share of the proceeds of the voyage (Mendell *v.* Bonney, 5 Allen (Mass.) 205).

52. Lord *v.* Ferguson, 9 N. H. 380; Flanders *v.* Merritt, 3 Barb. (N. Y.) 201, where there is no evidence that credit was given to another person, or that the owner has divested himself of his right, as owner, to the control and possession and earnings of the vessel.

53. Lord *v.* Ferguson, 9 N. H. 380.

54. Macy *v.* Wheeler, 30 N. Y. 231; Manning *v.* Dunn, 14 Barb. (N. Y.) 583; Leonard *v.* Huntington, 15 Johns. (N. Y.) 298.

Possession of a vessel under an agreement for sale does not confer upon the vendee an apparent authority to create liens for supplies; and a person furnishing supplies upon the order of such a person is put upon inquiry as to his actual authority. The H. C. Grady, 87 Fed. 232.

Effect of refusal to fulfil contract.— Where possession of a vessel has been delivered under a contract of sale, the refusal of the intended purchaser to carry out the contract does not make his possession tortious, or vitiate the contracts of the vessel while it continued. Ostensible ownership and present possession are sufficient to bind the vessel in favor of shippers. The Julia Smith, 13 Fed. Cas. No. 7,136, 6 McLean 484, Newb. Adm. 61.

55. See *supra*, II, E, 6, a.

56. Rennell *v.* Kimball, 5 Allen (Mass.) 356; Higgins *v.* Packard, 2 Hall (N. Y.) 226; Chapman *v.* Callis, 9 C. B. N. S. 769, 7 Jur. N. S. 995, 30 L. J. C. P. 241, 3 L. T. Rep. N. S. 890, 9 Wkly. Rep. 375, 99 E. C. L. 769; Carswell *v.* Finlay, 14 Ct. of Sess. Cas. (4th ser.) 903; Trewhella *v.* Rowe, 11 East 435, 103 Eng. Reprint 1072.

57. Myers *v.* Perry, 1 La. Ann. 372; Rennell *v.* Kimball, 5 Allen (Mass.) 356.

Agreement to pay liens.— A person who buys a vessel, upon which creditors have a lien by express agreement with the vendor, in ignorance of such agreement, but, after the purchase, assents to it, is bound by his assent; and although he has paid the purchase-money to the vendor, he cannot maintain trover for the vessel against a creditor, who detains it for his lien. Norris *v.* Williams, 1 Cromp. & M. 842, 2 L. J. Exch. 257.

58. Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151; The Vindobala, 14 P. D. 50, 6 Aspin. 376, 58 L. J. P. D. & Adm. 51, 60 L. T. Rep. N. S. 657, 37 Wkly. Rep. 409; The Vindobala, 13 P. D. 42, 57 L. J. P. D. & Adm. 37, 58 L. T. Rep. N. S. 353 [*reversed* on other grounds in 14 P. D. 50, 6 Aspin. 376, 58 L. J. P. D. & Adm. 51, 60 L. T. Rep. N. S. 657, 37 Wkly. Rep. 409].

59. The Meredith, 10 P. D. 69, 5 Aspin. 400, 52 L. T. Rep. N. S. 520, holding that the purchaser of a vessel is not liable for losses arising out of a time charter, where such time charter was at an end before he became owner.

60. **Record of prior conveyance as affecting bona fide purchaser** see *infra*, II, G, 1.

Sale of vessel to bona fide purchaser as affecting forfeiture for violation of regulations see *supra*, I, E, 1.

Enforcement of maritime liens against bona fide purchasers see MARITIME LIENS, 26 Cyc. 794.

Lien for damages for collision with vessel subsequently transferred to bona fide purchaser see COLLISION, 7 Cyc. 375 note 84.

61. The Horlock, 2 P. D. 243, 3 Aspin. 421, 47 L. J. Adm. 5, 36 L. T. Rep. N. S. 622.

Section 43 of the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104) is express and gives a good title to a purchaser from a registered owner who has power "absolutely to dispose" of any ship, or share of a ship, of which he is a registered owner. The Horlock, 2 P. D. 243, 3 Aspin. 421, 47 L. J. Adm. 5, 36 L. T. Rep. N. S. 622. *Prima facie* the register gives a good legal title, and a *bona fide* purchaser is not bound to make further inquiries when he sees that the vendor is registered owner. Fraud on the part of a person so registered does not make the transaction of registration void, but only voidable against him, and does not affect the position of a *bona fide* purchaser from him. The Horlock, *supra*.

62. The Superior, 23 Fed. Cas. No. 13,626, 5 Sawy. 83.

consideration.[63] An authorized but long-continued possession does not estop the owner of a boat from claiming title against a *bona fide* purchaser under an unauthorized sale.[64]

F. Mortgages and Hypothecations[65] — **1. Evidence as to Character of Transaction.** A bill of sale of a vessel, absolute in its terms, may be shown by parol evidence to be only a mortgage.[66] The effect of the instrument is not confined to the immediate parties; at all events, if third persons are not prejudiced thereby.[67]

2. What Law Governs. Previous to the passage of the federal statute[68] the subject of the validity of mortgages upon vessels, and their registration, was a matter to be regulated by the laws of the states;[69] and the rights arising under such instrument were to be determined by the laws of the states in which the transaction might have taken place;[70] and it was competent for those courts to decide what were the laws and usages of commerce which would justify the execution of such a mortgage.[71] But the rules held by such courts were superseded when congress acted upon the subject, and established different regulations from those recognized by the state courts;[72] and a mortgage of a vessel according to this act is good, although not according to state law.[73]

63. The Superior, 23 Fed. Cas. No. 13,626, 5 Sawy. 83.

64. Dieholt *v.* The Chester Hair, 4 Fed. 571, 572, where it is said: "Possession, and that apparent ownership which may be inferred from possession, is not such an *indicium* of ownership that a *bona fide* purchaser from the party in possession gets a good title as against the real owner, though the possession has been by consent of the owner."

65. Jurisdiction of admiralty see Admiralty, 1 Cyc. 824 note 21.

Bottomry and respondentia see *infra*, VI.

Recording mortgages see *infra*, II, G.

66. Blanchard *v.* Fearing, 4 Allen (Mass.) 118; Howard *v.* Odell, 1 Allen (Mass.) 85; Weston *v.* Wright, 1 Rob. (N. Y.) 312; Birkbeck *v.* Tucker, 2 Hall (N. Y.) 139; Ring *v.* Franklin, 2 Hall (N. Y.) 9; Bryan *v.* Bowles, 1 Daly (N. Y.) 171; Champlin *v.* Butler, 18 Johns. (N. Y.) 169; McLellan *v.* Shinn, 15 Wall. (U. S.) 105, 21 L. ed. 87; The Innisfallen, L. R. 1 A. & E. 72, 12 Jur. N. S. 653, 32 L. J. Adm. 110, 16 L. T. Rep. N. S. 71; Langton *v.* Horton, 5 Beav. 9, 6 Jur. 357, 594, 11 L. J. Ch. 233, 49 Eng. Reprint 479; Cox *v.* Reid, 1 C. & P. 602, 12 E. C. L. 342, R. & M. 199, 21 E. C. L. 733; Gardner *v.* Cazenove, 1 H. & N. 423, 26 L. J. Exch. 17, 5 Wkly. Rep. 195; The Jane, 23 L. T. Rep. N. S. 791. *Contra*, Henderson *v.* Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434. And see *infra*, II, F, 6, b.

It is a question of intention entirely, and if the parties intended that the apparently absolute deed should in truth be but conditional, then that fact may be shown in any form of proof which can establish it. Birkbeck *v.* Tucker, 2 Hall (N. Y.) 139; The Innisfallen, L. R. 1 A. & E. 72, 12 Jur. N. S. 653, 32 L. J. Adm. 110, 16 L. T. Rep. N. S. 71.

The provisions of the Merchant Shipping Act (17 & 18 Vict. c. 104, § 66) do not prevent the owners from showing that the transfer, although absolute in its terms, was intended as a security only. Ward *v.* Beck, 13 C. B. N. S. 668, 9 Jur. N. S. 912, 32 L. J. C. P. 113, 106 E. C. L. 668.

Evidence held to show bill of sale to be mortgage.— The Clifton, 143 Fed. 460, 74 C. C. A. 594; The Blohm, 3 Fed. Cas. No. 1,556, 1 Ben. 228; The Panama, 18 Fed. Cas. No. 10,703, Olcott 343.

67. Birkbeck *v.* Tucker, 2 Hall (N. Y.) 139.

When third parties misled.— If trust and confidence have been reposed in it by third parties, with the honest belief that it was indefeasible, and such parties have been misled by its form, they have a right to insist that, as to them, it shall be what upon its face it purports to be. McLellan *v.* Shinn, 15 Wall. (U. S.) 105, 21 L. ed. 87.

68. U. S. Rev. St. (1878) § 4192 [U. S. Comp. St. (1901) p. 2837].

In England the law applicable to the mortgage and hypothecation of vessels is now the Imperial Merchant Shipping Act of 1854, as modified by 36 Vict. c. 128, and this is also the law of the province of Quebec. Ross *v.* Smith, 23 L. C. Jur. 309.

69. Shaw *v.* McCandless, 36 Miss. 296.

70. Shaw *v.* McCandless, 36 Miss. 296.

In Louisiana vessels could only be mortgaged in accordance with the laws and usages of commerce. Hill *v.* De Lizardi, 2 Rob. 89; Hill *v.* Phœnix Tow Boat Co., 2 Rob. 35; Loze *v.* Dimitry, 7 La. 485. Therefore a conventional mortgage on a schooner, executed by the owner in favor of a creditor to secure the payment of a debt duly recorded in the mortgage office, was invalid. Wickham *v.* Levistones, 11 La. Ann. 702; Malcolm *v.* The Henrietta, 7 La. 488. So taking of a mortgage on a vessel by notarial act confers no right or privilege whatever, as ships cannot be mortgaged in that manner. Grant *v.* Fiol, 17 La. 158.

71. Shaw *v.* McCandless, 36 Miss. 296.

72. Mitchell *v.* Steelman, 8 Cal. 363; Shaw *v.* McCandless, 36 Miss. 296.

73. Shaw *v.* McCandless, 36 Miss. 296. And see *infra*, II, G, 2.

3. Requisites and Validity. A mortgage upon a vessel is precisely like other chattel mortgages,[74] except that, to be valid as against others than the mortgagor, his heirs and devisees, and persons having actual notice thereof, it must be recorded,[75] and, in England and Canada, should contain a recital of the certificate of ownership.[76]

4. Necessity of Delivery — a. In General. In the absence of a statute to the contrary,[77] a mortgage of a vessel, although unaccompanied by an immediate delivery and not followed by an actual change of possession, is not void if it be made to appear on the part of the mortgagee that the same was made in good faith and without any intent to defraud purchasers or creditors.[78] The want of change of possession subjects the instrument *prima facie* to the imputation of fraud, but such imputation may be rebutted by proof of good faith.[79] If the vessel is at sea or ready to go to sea, a mortgage thereof will be good as against creditors or assignees in bankruptcy, if the muniments of title are transferred,[80] and possession is taken by the mortgagee as soon as possible.[81] So any other sufficient reason for not changing possession in case of a mortgage suffices.[82]

b. Vessel in Process of Construction. Where a ship-builder, before he commences building the vessel, enters into a contract by which he hypothecates the

74. See, generally, Chattel Mortgages, 6 Cyc. 980. And see Kimball *v.* Farmers', etc., Nat. Bank, 138 N. Y. 500, 34 N. E. 337, 20 L. R. A. 457; Thompson *v.* Smith, 1 Madd. 395, 56 Eng. Reprint 145.

Execution — witnesses.— Under the Merchant Shipping Act, a mortgage executed before one witness is valid. Ross *v.* Smith, 23 L. C. Jur. 309.

Effect of misdescription of vessel.— That a mortgage misdescribed the vessel is immaterial, if the identity is clear, and defendant, a purchaser of the boat, was not misled by the misdescription. Mattingly *v.* Darwin, 23 Ill. 618. And see Bell *v.* London Bank, 3 H. & N. 730, 28 L. J. Exch. 116.

75. See *infra*, II, G, 1.

76. Coleman *v.* Sherwood, 2 Grant Ch (U. C.) 652; Sherwood *v.* Coleman, 6 U. C. Q. B. 614; Watkins *v.* Corbett, 6 U. C. Q. B. 587.

Where this is omitted the mortgage will be wholly void. Watkins *v.* Corbett, 6 U. C. Q. B. 587.

77. Under N. Y. Laws (1864), c. 412, §§ 1, 2, the want of an immediate delivery and change of possession in the case of mortgaged property does not, as in the case of absolute sales, merely raise a presumption of fraud, which can be rebutted by proof of good faith, and due diligence in taking possession, but it makes the alleged lien absolutely void. Keller *v.* Paine, 107 N. Y. 83, 13 N. E. 635.

78. Cole *v.* White, 26 Wend. (N. Y.) 511; Leland *v.* The Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92. *Compare* Kirkley *v.* Hodgson, 1 B. & C. 588, 2 D. & R. 848, 1 L. J. K. B. O. S. 185, 8 E. C. L. 248. And see Hay *v.* Monkhouse, Holt N. P. 603, 3 E. C. L. 236.

Constructive possession.—A mortgagee may recover upon a ship mortgage, although never in possession of the ship, if the mortgagor has given all the possession he can give. Belchier *v.* Parsons, 1 Ld. Ken. 38, 96 Eng. Reprint 908.

79. Cole *v.* White, 26 Wend. (N. Y.) 511; Leland *v.* Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92.

If the assignment is in all other respects bona fide; if the parties act honestly and fairly, and held out no false colors to deceive creditors, then there is nothing in this circumstance which destroys the legal validity of the assignment. De Wolf *v.* Harris, 8 Fed. Cas. No. 4,221, 4 Mason 515.

The testimony to be received will be governed by the general rules of evidence applicable to questions in which it is the province of a jury to pass upon the intent of parties, and all proof tending to satisfy the understanding or the conscience of the jury as to the *bona fides* of the transaction not inconsistent with the general law of evidence is admissible. Cole *v.* White, 26 Wend. (N. Y.) 511.

80. Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Morgan *v.* Biddle, 1 Yeates (Pa.) 3; *Ex p.* Batson, 3 Bro. Ch. 362, 29 Eng. Reprint 584; Atkinson *v.* Maling, 2 T. R. 462, 1 Rev. Rep. 524, 100 Eng. Reprint 249; *Ex p.* Matthews, 2 Ves. 272, 28 Eng. Reprint 176.

81. *Massachusetts.*— Badlam *v.* Tucker, 1 Pick. 389, 11 Am. Dec. 202.

New York.— Cole *v.* White, 26 Wend. 511.

Pennsylvania.— Morgan *v.* Biddle, 1 Yeates 3.

United States.— Leland *v.* The Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92.

England.— *Ex p.* Batson, 3 Bro. Ch. 362, 29 Eng. Reprint 584; Atkinson *v.* Maling, 2 T. R. 462, 1 Rev. Rep. 524, 100 Eng. Reprint 249; *Ex p.* Matthews, 2 Ves. 272, 28 Eng. Reprint 176.

See 44 Cent. Dig. tit. "Shipping," § 99.

82. Leland *v.* The Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92.

Where an undivided share of a vessel is mortgaged, delivery of possession is unnecessary. Winsor *v.* McLellan, 30 Fed. Cas. No. 17,887, 2 Story 492; Gillespy *v.* Coutts, Ambl. 652, 27 Eng. Reprint 423.

vessel to be built for advances, it is a valid hypothecation of the builder's interest, and gives a lien which will attach as the vessel comes into existence.[83] But such a mortgage or hypothecation, without actual possession or delivery, is not available against a subsequent *bona fide* purchaser,[84] or attaching creditors.[85]

5. Priorities[86] — a. In General. A mortgage on a boat is not a maritime contract,[87] and must be postponed to maritime liens, although subsequently created,[88] such as claims for seamen's wages,[89] and supplies and repairs furnished in a foreign port;[90] claims for supplies, repairs, and insurance furnished in the home port of the boat, for which the state law gives a lien, whether the same be furnished before or after the recording of the mortgage;[91] and construction claims for which, by the state law, a lien existed prior to the recording of the mortgage.[92] The federal recording statute[93] does not affect this result.[94] After the satisfaction of the maritime liens, a debt secured by a mortgage on the vessel will be

83. Hull of a New Ship, 12 Fed. Cas. No. 6,859, 2 Ware 203; Bell *v.* London Bank, 3 H. & N. 730, 28 L. J. Exch. 116.

By deposit of builder's certificate.— The deposit of the builder's certificate is a good equitable mortgage of all his property and interest in the ship, and although unfinished, it does not require registration under the Bills of Sale Act of 1854. *Ex p.* Hodgkin, L. R. 20 Eq. 746, 44 L. J. Bankr. 107; 33 L. T. Rep. N. S. 62, 24 Wkly. Rep. 68.

84. Bonsey *v.* Amee, 8 Pick. (Mass.) 236; *Ex p.* Hodgkin, L. R. 20 Eq. 746, 44 L. J. Bankr. 107, 33 L. T. Rep. N. S. 62, 24 Wkly. Rep. 68; Daniel *v.* Russell, 14 Ves. Jr. 393, 33 Eng. Reprint 572.

85. Goodenow *v.* Dunn, 21 Me. 86.

86. Priority of bottomry lien see *infra*, VI, I, 2.

87. The Madrid, 40 Fed. 677; The Guiding Star, 18 Fed. 263 [*affirming* 9 Fed. 521]; Adams *v.* The Wyoming, 1 Fed. Cas. No. 71.

88. Freights of The Kate, 63 Fed. 706; Adams *v.* The Wyoming, 1 Fed. Cas. No. 71; The Hendrik Hudson, 11 Fed. Cas. No. 6,358; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*c* [*affirmed* in 19 How. 239, 15 L. ed. 625]; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*d*; The Dowthorpe, 2 Notes of Cas. 264, 3 Notes of Cas. 623, 2 W. Rob. 73, 365. And see Maritime Liens, 26 Cyc. 802 note 16.

A mortgagee who permits a mortgagor to retain possession subjects a vessel to such liens as may accrue under the latter's management. The Live Oak, 30 Fed. 78.

Liens for advances of funds for the necessities of vessels in a foreign port have priority over existing mortgages to creditors at home. The Emily B. Souder, 17 Wall. (U. S.) 666, 21 L. ed. 683.

The successful suitor in a cause of damage has a lien upon the property condemned which is paramount to the claim of a mortgagee or bondholder prior to the period when the damage is done. The Aline, 1 W. Rob. 112.

89. The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; The Wexford, 7 Fed. 674; The Prince George, 3 Hagg. Adm. 376. And see The Penokee, 90 Fed. 825, 33 C. C. A. 298.

90. The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263]; The Granite State, 10 Fed. Cas. No. 5,687, 1 Sprague 277; Reeder *v.* The George's Creek, 20 Fed. Cas. No. 11,654. *Contra*, Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*b*; Thomas *v.* The Kosciusko, 23 Fed. Cas. No. 13,901.

English rule.—Materialmen supplying necessaries in England to a British or British colonial vessel do not, under the Admiralty Court Act of 1861 (24 Vict. c. 10), § 5, acquire a maritime lien upon the ship. The ship does not become chargeable with the necessaries supplied until actually arrested by the court of admiralty. A mortgagee therefore is entitled to priority over materialmen. The Rio Tinto, 9 App. Cas. 356, 5 Aspin. 224, 50 L. T. Rep. N. S. 461; The Two Ellens, L. R. 4 P. C. 161, 1 Aspin. 208, 41 L. J. Adm. 33, 26 L. T. Rep. N. S. 1, 8 Moore P. C. N. S. 398, 20 Wkly. Rep. 592, 17 Eng. Reprint 361; The Scio, L. R. 1 A. & E. 353, 16 L. T. Rep. N. S. 642; The Pacific, Brown & L. 243, 10 Jur. N. S. 1110, 33 L. J. Adm. 120, 10 L. T. Rep. N. S. 541 [*overruling* The Skipworth, 10 Jur. N. S. 445, 10 L. T. Rep. N. S. 43]; The Harriet, 18 L. T. Rep. N. S. 804. And see Maritime Liens, 26 Cyc. 803 notes 20, 21.

91. Jones *v.* Keen, 115 Mass. 170; The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; The Madrid, 40 Fed. 677; The Guiding Star, 18 Fed. 263 [*affirming* 9 Fed. 521]; Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*d*. *Contra*, The De Smet, 10 Fed. 483; Baldwin *v.* The Bradish Johnson, 2 Fed. Cas. No. 798, 3 Woods 582; The Grace Greenwood, 10 Fed. Cas. No. 5,652, 2 Biss. 131; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61; The Kate Hinchman, 14 Fed. Cas. No. 7,621, 7 Biss. 238. And see Maritime Liens, 26 Cyc. 804 note 27.

92. Provost *v.* Wilcox, 17 Ohio 359; Kellogg *v.* Brennan, 14 Ohio 72; The Guiding Star, 9 Fed. 521 [*affirmed* in 18 Fed. 263].

93. U. S. Rev. St. (1878) § 4192 [U. S. Comp. St. (1901) p. 2837].

94. See cases cited *infra*, this note.

That provision merely requires recording of mortgages or other conveyances of vessels as essential to their validity, except as against the grantors or other persons having actual notice thereof, and leaves all questions as to the priority of the encumbrances as they were before. The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. ed. 345; The

paid before the debts of the general creditors.[95] If the contract of the parties expressly excludes any lien,[96] or is too indefinite to constitute any lien,[97] or the lien has been lost,[98] or become stale,[99] no claim to priority over mortgagees can be admitted.

b. As Between Mortgages. In the absence of special equities, mortgages are entitled to priority according to their respective dates of record.[1] Under some circumstances priority between mortgages may depend upon a state of facts wholly independent of the dates of the instruments.[2]

6. Rights and Liabilities of Mortgagor and Mortgagee — a. In General. So long as the mortgagee of the ship does not take possession, the mortgagor, as the registered owner of the ship, retains all the rights and privileges of ownership,[3] and all contracts made by him are valid so long as they do not impair the

Madrid, 40 Fed. 677; The Guiding Star, 18 Fed. 263; The Favorite, 8 Fed. Cas. No. 4,699, 3 Sawy. 405. And see Maritime Liens, 26 Cyc. 803 note 18.

95. Brown *v.* The Seguranca, 70 Fed. 258; The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383.

96. The Allianca, 70 Fed. 258.

97. The Seguranca, 63 Fed. 726 [*affirmed* in 73 Fed. 503, 19 C. C. A. 541].

98. The Vigilancia, 70 Fed. 248.

Where a vessel is libeled for salvage, and released on bond, the salvors cease to have any lien on the vessel, and are not entitled to priority over a valid mortgage which antedates the salvage service. Roberts *v.* The Huntsville, 20 Fed. Cas. No. 11,904, 3 Woods 386.

99. Adams *v.* The Wyoming, 1 Fed. Cas. No. 71; The Columbia, 6 Fed. Cas. No. 3,036, 13 Blatchf. 521.

The wages of seamen, if sued upon during the season after they have accrued, are not stale, as against the claims of mortgagees whose mortgages were executed before the wages were earned. The Live Oak, 30 Fed. 78.

1. Baumgartner *v.* The W. B. Cole, 49 Fed. 587 [*affirmed* in 59 Fed. 182, 8 C. C. A. 78], holding further that one who takes a mortgage of a vessel by assignment after the recording of a mortgage of earlier date cannot protect himself from the priority of its lien, except by clearly showing that some one of the owners of the vessel through whom he acquired his lien was a *bona fide* purchaser without notice.

By section 69 of the Merchant Shipping Act of 1854, mortgagees are entitled to priority according to their date of entry in the register books. The Royal Arch, Swab. 269.

2. See cases cited *infra*, this note.

Mortgages to secure future advances.— When a vessel has been mortgaged successively to two persons, to secure future advances and credits, advances in excess of the mortgage security, made by the first mortgagee after learning of the second mortgage, are subordinate to the equity of the second mortgagee. The Kate O'Neil, 65 Fed. 111. And this is so notwithstanding section 69 of the Merchant Shipping Act of 1854. The Benwell Tower, 8 Aspin. 13, 72 L. T. Rep. N. S. 664.

3. Kimball *v.* Farmers', etc., Nat. Bank, 138 N. Y. 500, 34 N. E. 337, 20 L. R. A. 497; Keith *v.* Burrows, 2 App. Cas. 636, 3 Aspin. 481, 46 L. J. C. P. 801, 37 L. T. Rep. N. S. 291, 25 Wkly. Rep. 831; Law Guarantee, etc., Soc. *v.* Russian Bank, [1905] 1 K. B. 815, 10 Aspin. 41, 10 Com. Cas. 159, 74 L. J. K. B. 577, 92 L. T. Rep. N. S. 435, 21 T. L. R. 383; The Innisfallen, L. R. 1 A. & E. 72, 12 Jur. N. S. 653, 32 L. J. Adm. 110, 16 L. T. Rep. N. S. 71; Collins *v.* Lamport, 11 Jur. N. S. 1, 34 L. J. Ch. 196, 11 L. T. Rep. N. S. 497; The Jane, 23 L. T. Rep. N. S. 791; D'Aoust *v.* McDonald, 22 L. C. Jur. 79.

The effect of the English Merchant Shipping Act upon the status of the mortgagee of a ship is as follows: It first declares that the mortgagee is not the owner; then that the mortgagor has not ceased to be the owner; then that the mortgagor shall be the owner, save so far as may be necessary for making the ship an available security for the mortgage debt. Brown *v.* Tanner, L. R. 3 Ch. 597, 37 L. J. Ch. 923, 18 L. T. Rep. N. S. 624, 16 Wkly. Rep. 882; Collins *v.* Lamport, 11 Jur. N. S. 1, 34 L. J. Ch. 196, 11 L. T. Rep. N. S. 497, 13 Wkly. Rep. 283; Kemp *v.* Smith, 23 L. C. Jur. 289.

Formerly, by reason of the earlier statutes, the mortgagee, the moment a mortgage was made and registered, became, in the eye of the law, the owner of the property; and the result was that the law was in the habit of regarding the mortgagor as standing in the capacity of a quasi-agent to the mortgagee, and the mortgagee frequently found himself bound, either by the contracts of the mortgagor, or at all events by the necessary expenditure and outgoings of the vessel. That was a very serious injury and inconvenience to the mortgagees, and it interposed considerable difficulty in the way of mortgagors getting money upon this species of security. See Collins *v.* Lamport, 11 Jur. N. S. 1, 34 L. J. Ch. 196, 11 L. T. Rep. N. S. 497, 13 Wkly. Rep. 283.

Every mortgage implies a debt, for which the mortgagor's personal estate is liable, although there be no bond or covenant for the payment of the mortgage money. King *v.* King, 3 P. Wms. 358, 24 Eng. Reprint 1100.

Right to sue for injury to vessel.— The owner as per registry of a vessel can maintain an action for an injury to her, notwithstanding she is mortgaged and in possession

security of the mortgagee.[4] The mortgagee is not, by reason of his mortgage, deemed owner of the vessel, nor does he obtain thereby a right to the earnings;[5] but on taking possession, or doing something equivalent to it, the mortgagee takes the right to all earnings then accruing,[6] but not to earnings which have

of the mortgagee, who receives her earnings, if the owner's right of redemption is still good. Wilson *v.* Knapp, 42 N. Y. Super. Ct. 25 [*affirmed* in 70 N. Y. 596].

4. Eureka Min., etc., Co. *v.* Lewiston Nav. Co., 12 Ida. 472, 86 Pac. 49; Merchants' Banking Co. *v.* The Afton, 134 Fed. 727, 67 C. C. A. 618; The Innisfallen, L. R. 1 A. & E. 72, 12 Jur. N. S. 653, 32 L. J. Adm. 110, 16 L. T. Rep. N. S. 71; The Heather Bell, [1901] P. 272, 9 Aspin. 192, 206, 70 L. J. P. D. & Adm. 57, 84 L. T. Rep. N. S. 794, 17 T. L. R. 541, 49 Wkly. Rep. 577; Collins *v.* Lamport, 11 Jur. N. S. 1, 34 L. J. Ch. 196, 11 L. T. Rep. N. S. 497, 13 Wkly. Rep. 283; The Jane, 23 L. T. Rep. N. S. 791.

Prevention of interference with contracts. — Where the owner of a ship which is mortgaged charters her before the mortgagee takes possession, the mortgagee will be restrained by injunction from interfering with the due execution of the charter-party, unless it will materially impair the value of his security (The Innisfallen, L. R. 1 A. & E. 72, 12 Jur. N. S. 653, 32 L. J. Adm. 110, 16 L. T. Rep. N. S. 71; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Collins *v.* Lamport, 11 Jur. N. S. 1, 34 L. J. Ch. 196, 11 L. T. Rep. N. S. 497, 13 Wkly. Rep. 283), and if the vessel be arrested in an action by the mortgagee, the court will release her on the application of the charterer, unless such injury is shown by the mortgagee (The Fanchon, 5 P. D. 173, 4 Aspin. 272, 50 L. J. Adm. 4, 42 L. T. Rep. N. S. 483, 29 Wkly. Rep. 339; The Blanche, 6 Aspin. 272, 58 L. T. Rep. N. S. 592; The Maxima, 4 Aspin. 21, 39 L. T. Rep. N. S. 112).

Where a mortgagor of a ship does some act which prejudices or injures the security of the mortgagee, the declaration in 17 & 18 Vict. c. 104, §§ 70, 71, that the mortgagor is to be deemed the owner, ceases to have any binding effect against the mortgagee, and he may exercise the powers given to him by the mortgage. Law Guarantee, etc., Soc. *v.* Russian Bank, [1905] 1 K. B. 815, 10 Aspin. 41, 10 Com. Cas. 159, 74 L. J. K. B. 577, 92 L. T. Rep. N. S. 435, 21 T. L. R. 383; The Celtic King, [1894] P. 175, 7 Aspin. 440, 63 L. J. Adm. 37, 70 L. T. Rep. N. S. 562, 6 Reports 754; Collins *v.* Lamport, 11 Jur. N. S. 1, 34 L. J. Ch. 196, 11 L. T. Rep. N. S. 497, 13 Wkly. Rep. 283.

Right to make changes, additions, and repairs. — A mortgagor of a ship in possession with the consent of the mortgagee is thereby authorized to make any change, addition, or repairs thereon necessary and convenient for her preservation and use as a ship, so that it does not wilfully depreciate her value as a security to the mortgagee; and in such case the old material displaced by the new may be disposed of by the mortgagor as his property, unaffected by the mortgage. The Canada, 7 Fed. 248, 7 Sawy. 180. In case old material is not disposed of, and is left on board and passes into the possession of the mortgagee with the vessel, and is capable of being used in some form in its ordinary navigation, it would still be within the operation of the mortgage and belong to the mortgagee. The Canada, *supra*.

5. *Massachusetts.* — Milton *v.* Mosher, 7 Metc. 244.

New York. — Kimball *v.* Farmers', etc., Nat. Bank, 138 N. Y. 500, 34 N. E. 337, 20 L. R. A. 497.

Wisconsin. — Tenney *v.* State Bank, 20 Wis. 152.

United States. — The Wexford, 7 Fed. 674; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226.

England. — Keith *v.* Burrows, 2 App. Cas. 636, 3 Aspin. 481, 46 L. J. C. P. 801, 37 L. T. Rep. N. S. 291, 25 Wkly. Rep. 831; The Benwell Tower, 8 Aspin. 13, 72 L. T. Rep. N. S. 664; Willis *v.* Palmer, 7 C. B. N. S. 340, 6 Jur. N. S. 732, 29 L. J. C. P. 194, 2 L. T. Rep. N. S. 626, 8 Wkly. Rep. 295, 97 E. C. L. 340; Gardner *v.* Cazenove, 1 H. & N. 423, 26 L. J. Exch. 17, 5 Wkly. Rep. 195; Belfast Harbour Com'rs *v.* Lawther, 17 Ir. Ch. 54.

Canada. — Merchants' Bank *v.* Graham, 27 Grant Ch. (U. C.) 524.

See 44 Cent. Dig. tit. "Shipping," § 105.

6. Kimball *v.* Farmers', etc., Nat. Bank, 138 N. Y. 500, 34 N. E. 337, 20 L. R. A. 497; Merchants' Banking Co. *v.* The Afton, 134 Fed. 727, 67 C. C. A. 618; Keith *v.* Burrows, 2 App. Cas. 636, 3 Aspin. 481, 46 L. J. C. P. 801, 37 L. T. Rep. N. S. 291, 25 Wkly. Rep. 831 [*affirming* 2 C. P. D. 163, 46 L. J. C. P. 452, 36 L. T. Rep. N. S. 567, 25 Wkly. Rep. 446 (*reversing* 1 C. P. D. 722, 45 L. J. C. P. 876, 35 L. T. Rep. N. S. 508, 25 Wkly. Rep. 43)]; Brown *v.* Tanner, L. R. 3 Ch. 597, 37 L. J. Ch. 923, 18 L. T. Rep. N. S. 624, 16 Wkly. Rep. 882; Banner *v.* Berridge, 18 Ch. D. 254, 4 Aspin. 420, 50 L. J. Ch. 630, 44 L. T. Rep. N. S. 680, 29 Wkly. Rep. 844; Wilson *v.* Wilson, L. R. 14 Eq. 32, 1 Aspin. 265, 41 L. J. Ch. 423, 26 L. T. Rep. N. S. 346, 20 Wkly. Rep. 436; The Benwell Tower, 8 Aspin. 13, 72 L. T. Rep. N. S. 664; Tanner *v.* Phillips, 1 Aspin. 448, 42 L. J. Ch. 125, 27 L. T. Rep. N. S. 480, 717, 21 Wkly. Rep. 68; Cato *v.* Irving, 5 De G. & Sm. 210, 16 Jur. 161, 21 L. J. Ch. 675, 64 Eng. Reprint 1084; Gibson *v.* Ingo, 6 Hare 112, 31 Eng. Ch. 112, 67 Eng. Reprint 1103.

The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable. Keith *v.* Burrows, 2 App. Cas. 636, 3 Aspin. 481, 46 L. J

been received by the mortgagor, although for the voyage then current.[7] Although the execution of a mortgage on a ship does not render the mortgagee the owner of the ship, he may dispose of it absolutely,[8] and may intervene and contest claims affecting his lien upon the vessel.[9] The claims of a mortgagee are extinguished

C. P. 801, 37 L. T. Rep. N. S. 291, 25 Wkly Rep. 831.

Nature of possession to be taken.— There are cases which seem to establish that a first mortgagee who cannot take actual possession of a ship may, by taking constructive possession, entitle himself to exercise all the rights of an owner in possession. But in order to constitute constructive possession acts must be done on his behalf which clearly indicate an intention on his part to assume the rights of ownership. Rusden *v.* Pope, L. R. 3 Exch. 269, 37 L. J. Exch. 137, 18 L. T. Rep. N. S. 651, 16 Wkly. Rep. 1122; The Benwell Tower, 8 Aspin. 13, 72 L. T. Rep. N. S. 664. In Beynon *v.* Godden, 3 Ex. D. 263, 4 Aspin. 10, 48 L. J. Exch. 80, 39 L. T. Rep. N. S. 82, 26 Wkly. Rep. 672, the mortgagee of certain shares in a ship joined with the other owners in appointing a new ship's husband, and so effectually interfered by asserting his rights as owner. When the mortgage is of the entirety, the mortgagee may take exclusive possession. Cato *v.* Irving, 5 De G. & Sm. 210, 16 Jur. 161, 21 L. J. Ch. 675, 64 Eng. Reprint 1084. When it is of shares only, he cannot take possession so as to entitle him to prevent the owner taking possession of part. Cato *v.* Irving, *supra*. In such cases if the mortgagee, without formally taking possession, gives notice, and requires payment to himself of his shares, that entitles him to receive his share of the freight then accruing and not actually due. Cato *v.* Irving, *supra*. A second mortgagee has no right to take actual possession, and therefore cannot by his own act give himself that which is equivalent to possession. Liverpool Mar. Credit Co. *v.* Wilson, L. R. 7 Ch. 507, 41 L. J. Ch. 798, 26 L. T. Rep. N. S. 717, 20 Wkly. Rep. 665. But, as between him and the mortgagor, the equitable right of the second mortgagee is the same as the legal right of the first mortgagee. Liverpool Mar. Credit Co. *v.* Wilson, *supra*.

Mortgagees of a ship who take possession before the conclusion of a voyage are entitled to the freight then accruing. Beynon *v.* Godden, 3 Ex. D. 263, 4 Aspin. 10, 48 L. J. Exch. 80, 39 L. T. Rep. N. S. 82, 26 Wkly. Rep. 672. A mortgagee who takes possession before the cargo is delivered comes within the rule. Cato *v.* Irving, 5 De G. & Sm. 210, 16 Jur. 161, 21 L. J. Ch. 675, 64 Eng. Reprint 1084.

Effect of assignment of freight by mortgagor.— There is authority for the proposition that the mortgagee's right to the freight on taking possession cannot be defeated or curtailed by an assignment by the ship-owner. Merchants' Banking Co. *v.* The Afton, 134 Fed. 727, 67 C. C. A. 618; Liverpool Mar. Credit Co. *v.* Wilson, L. R. 7 Ch. 507, 41 L. J. Ch. 798, 26 L. T. Rep. N. S. 717, 20 Wkly. Rep. 665; Brown *v.* Tanner, L. R. 3 Ch. 597, 37 L. J. Ch. 923, 18 L. T. Rep. N. S. 624, 16 Wkly. Rep. 882; Wilson *v.* Wilson, L. R. 14 Eq. 32, 1 Aspin. 265, 41 L. J. Ch. 423, 26 L. T. Rep. N. S. 346, 20 Wkly. Rep. 436; Tanner *v.* Phillips, 10 Aspin. 448, 42 L. J. Ch. 125, 27 L. T. Rep. N. S. 480, 717, 21 Wkly. Rep. 68; Japp *v.* Campbell, 57 L. J. Q. B. 79. The owner can transfer no better title than he has at the time, and, if the mortgagee takes possession before the freight is paid, the owner has no title to it, his defeasible title having been divested. Merchants' Banking Co. *v.* The Afton, *supra*; Dobbyn *v.* Comerford, 10 Ir. Ch. 327. And if this be so, it follows *a fortiori* that persons who are not even assignees, but have a mere personal claim against the captain and ship's husband, cannot claim a right to freight as against the mortgagee of ship. Japp *v.* Campbell, 57 L. J. Q. B. 79.

7. Merchants' Banking Co. *v.* The Afton, 134 Fed. 727, 67 C. C. A. 618; Wilson *v.* Wilson, L. R. 14 Eq. 32, 1 Aspin. 265, 41 L. J. Ch. 423, 26 L. T. Rep. N. S. 346, 20 Wkly. Rep. 436; Cato *v.* Irving, 5 De G. & Sm. 210, 16 Jur. 161, 21 L. J. Ch. 675, 64 Eng. Reprint 1084.

8. Samuel *v.* Jones, 7 L. T. Rep. N. S. 760; *In re* Robert, 18 Quebec Super. Ct. 101.

By the 71st clause of the English Merchant Shipping Act of 1854, every recorded mortgagee shall have power absolutely to dispose of the ship, in respect of which he is registered as such, and to give effectual receipts for the purchase-money; but, if there are more persons than one recorded as mortgagees of the same ship, no second or subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship, without the concurrence of every prior mortgagee. See Kemp *v.* Smith, 23 L. C. Jur. 289.

Sale by first mortgagee with assent of second mortgagee.— Where the first mortgagee of a ship, with the sanction and authority of the second mortgagee, sells her and receives the proceeds, which exceed the amount due to him, he is accountable to the second mortgagee in the character of trustee for the surplus. Tanner *v.* Heard, 23 Beav. 555, 3 Jur. N. S. 427, 5 Wkly. Rep. 420, 53 Eng. Reprint 219.

Sale after tender of sum due on mortgage.— A mortgagee who sells the ship when the amount due on the mortgage has been tendered to him is liable to pay the mortgagor the value of the ship beyond that sum. McLarty *v.* Middleton, 9 Wkly. Rep. 861 [*affirmed* in 4 L. T. Rep. N. S. 852, 10 Wkly. Rep. 219].

Manner of sale.— Where a mortgagee has authority to sell only by public auction, a sale by private contract is unlawful. Brouard *v.* Dumaresque, 3 Moore P. C. 457, 13 Eng. Reprint 186.

9. The Hendrik Hudson, 11 Fed. Cas. No.

by a decree and sale in a suit brought to enforce a maritime lien,[10] although the mortgagee fails to appear or refuses to submit his claims and interests to the decision of the court or to be bound by its decree;[11] and his rights after such sale exist only against the proceeds of the sale.[12] A mortgagee has a beneficial interest in the vessel which may be attached by his creditors.[13] The assignee of a mortgage of a vessel takes it with all the rights and powers which were possessed by the mortgagee;[14] and no equities existing between several mortgagors will deprive the assignee of any of the usual remedies for the enforcement of the security.[15]

b. Liability For Supplies and Repairs.[16] Whatever doubts may formerly have been entertained as to the liability of a mortgagee of a vessel, not having her in his possession or control, for supplies and repairs furnished on the order or at the request of the master or mortgagor, it is now well settled, both in this country and in England, that no such liability exists.[17] Nor is the case altered because the mortgagee holds the legal title under a bill of sale absolute on its face, and stands upon the registry as the owner.[18] In order to render a mortgagee

6,358; Thomas *v.* Jamesson, 23 Fed. Cas. No. 13,900, 1 Cranch C. C. 91.

Intervention to secure proceeds of sale see *infra*, next note.

10. The Hendrik Hudson, 11 Fed. Cas. No. 6,358.

11. The Hendrik Hudson, 11 Fed. Cas. No. 6,358. *Contra*, Schuchardt *v.* The Angelique, 21 Fed. Cas. No. 12,483*a*.

Under the English Merchant Shipping Act, a vessel which has been mortgaged and the mortgage registered cannot be seized or brought to sale by any subsequent creditor of the mortgagor, without the consent of the mortgagee, or the order of a court of competent jurisdiction (Dickinson *v.* Kitchen, 8 E. & B. 789, 92 E. C. L. 789; Daigneault *v.* Brule, 22 Quebec Super. Ct. 20; *In re* Robert, 18 Quebec Super. Ct. 101; Ross *v.* Smith, 23 L. C. Jur. 309; Kelly *v.* Hamilton, 16 L. C. Jur. 320. And see The Eastern Belle, 3 Aspin. 19, 33 L. T. Rep. N. S. 214. But see D'Aoust *v.* McDonald, 22 L. C. Jur. 79); although the vessel, at the time of the seizure, be in the actual possession of the mortgagor, and the term for the repayment of the mortgage debt have not yet elapsed (Ross *v.* Smith, *supra*).

12. The Hendrik Hudson, 11 Fed. Cas. No. 6,358. See also Garritson *v.* His Creditors, 7 La. 551; Loew *v.* Austin, 140 Pa. St. 41, 21 Atl. 240; The Acme, 1 Fed. Cas. No. 28, 7 Blatchf. 366 [*reversing* 1 Fed. Cas. No. 27, 2 Ben. 386].

That a mortgagee purchased a vessel sold at a marshal's sale in a proceeding *in rem* against her does not extinguish the mortgagee's claim to the proceeds of sale. The Syracuse, 23 Fed. Cas. No. 13,716, 9 Ben. 348.

A mere agreement for a mortgage on a vessel does not give such an interest in the *res* as will entitle the party to claim proceeds of a sale of the vessel from the registry of a court of admiralty. The Favorite, 8 Fed. Cas. No. 4,699, 3 Sawy. 405.

13. Lyon *v.* Johnson, 3 Dana (Ky.) 544.

14. Dalrymple *v.* Sheehan, 20 Mich. 224.

15. Dalrymple *v.* Sheehan, 20 Mich. 224.

16. **Liability for wages of seamen** see SEAMEN, 35 Cyc. 1230.

17. *Maine.*—Wood *v.* Stockwell, 55 Me. 76; Cutler *v.* Thurlo, 20 Me. 213; Winslow *v.* Tarbox, 18 Me. 132.

Massachusetts.— Blanchard *v.* Fearing, 4 Allen 118; Howard *v.* Odell, 1 Allen 85; Brooks *v.* Bondsey, 17 Pick. 441, 28 Am. Dec. 313.

New Hampshire.— Lord *v.* Ferguson, 9 N. H. 380.

New York.— Hesketh *v.* Stevens, 7 Barb. 488; Birkbeck *v.* Tucker, 2 Hall 139; Ring *v.* Franklin, 2 Hall 9; Thorn *v.* Hicks, 7 Cow. 697; Leonard *v.* Huntington, 15 Johns. 298; McIntyre *v.* Scott, 8 Johns. 159.

Pennsylvania.— Duff *v.* Bayard, 4 Watts & S. 240, 39 Am. Dec. 73.

South Carolina.— Cordray *v.* Mordecai, 2 Rich. 518.

United States.—McLellan *v.* Shinn, 15 Wall. 105, 21 L. ed. 87; Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453; Scull *v.* Raymond, 18 Fed. 547; Dodge *v.* Leary, 7 Fed. Cas. No. 3,952*b*; Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278; Macy *v.* De Wolf, 16 Fed. Cas. No. 8,933, 3 Woodb. & M. 193; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226.

England.— Jackson *v.* Vernon, 1 H. Bl. 114; Baker *v.* Buckle, 7 Moore C. P. 349, 24 Rev. Rep. 685, 17 E. C. L. 515; Twentyman *v.* Hart, 1 Stark. 366, 2 E. C. L. 142.

See 44 Cent. Dig. tit. "Shipping," § 106.

One who purchases a vessel at marshal's sale, takes the legal title, and is registered as owner at the custom-house, but who in fact purchases for another and holds the title merely as collateral security for a debt, is a mere mortgagee. Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453.

18. *Maine.*— Cutler *v.* Thurlo, 20 Me. 213.

Massachusetts.— Howard *v.* Odell, 1 Allen 85; Brooks *v.* Bondsey, 17 Pick. 441, 28 Am. Dec. 313.

New Hampshire.— Lord *v.* Ferguson, 9 N. H. 380.

New York.— Weber *v.* Sampson, 6 Duer 358; Baxter *v.* Wallace, 1 Daly 303, 24 How. Pr. 484.

United States.—McLellan *v.* Shinn, 15 Wall 105, 21 L. ed. 87; Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453.

England.— Myers *v.* Willis, 17 C. B. 77, 2 Jur. N. S. 41, 25 L. J. C. P. 39, 4 Wkly. Rep.

liable it must be shown either that he was in possession of the vessel;[19] that the supplies were furnished, or the repairs made, at his request,[20] or by the direction of someone authorized to contract on his behalf;[21] or that he adopted the risks and expenses of the voyage,[22] or held himself out as the real owner of the vessel in such way as to lead persons to believe that the master or mortgagor was his agent authorized to make contracts concerning the vessel.[23]

7. Foreclosure and Discharge. The discharge[24] and foreclosure[25] of mortgages on vessels are governed by the rules applicable in the case of chattel mortgages generally.

42, 84 E. C. L. 77 [*affirmed* in 18 C. B. 886, 2 Jur. N. S. 788, 25 L. J. C. P. 255, 4 Wkly. Rep. 637, 86 E. C. L. 886].

See 44 Cent. Dig. tit. "Shipping," § 106.

But see Starr *v.* Knox, 2 Conn. 215, holding that if the mortgagee of a vessel appears from the register and papers to be the absolute, unconditional owner of a vessel, he is bound by such evidence, and will be liable for the necessary disbursements in repairs and supplies procured by the master during the voyage, if the individuals so making the advances make them on the credit of such evidence.

True relation may be shown.— Parol evidence is admissible to show that the bill of sale, whereby the vessel is conveyed, although absolute upon its face, was nevertheless intended as a mortgage. Ring *v.* Franklin, 2 Hall (N. Y.) 1; Champlin *v.* Butler, 18 Johns. (N. Y.) 169; Cordray *v.* Mordecai, 2 Rich. (S. C.) 518; Jones *v.* Blum, 2 Rich. (S. C.) 475; Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453; Cox *v.* Reid, 1 C. & P. 602, 12 E. C. L. 342, R. & M. 199, 21 E. C. L. 733. And see *supra*, II, F, 1.

The mortgagor of a vessel is a competent witness for the mortgagee, who is sued as owner, to show the nature of the transfer, and to prove that a conveyance, apparently absolute, was in fact conditional. Ring *v.* Franklin, 2 Hall (N. Y.) 1.

19. Tucker *v.* Buffington, 15 Mass. 477; Baxter *v.* Wallace, 1 Daly (N. Y.) 303; Miln *v.* Spinola, 6 Hill (N. Y.) 218 [*affirming* 4 Hill 177] (although his relation to the ship was unknown to the creditor when the demand arose); Champlin *v.* Butler, 18 Johns. (N. Y.) 169; Havilland *v.* Thomson, 3 Macph. 313; *Ex p.* Howden, 11 L. J. Bankr. 19, 2 Mont. D. & De G. 574.

What constitutes possession.— The policy of the law being to regard the legal title to a vessel as the controlling one, for the purpose of protecting all who give credit to her owners or have remedies against them, very slight acts of possession by the mortgagee will be considered as placing him in that position, and subjecting him to those liabilities; but to charge him personally there must be some unequivocal act of possession. Stalker *v.* The Henry Kneeland, 22 Fed. Cas. No. 13,282. He does not, merely by delivery of the documents, acquire such possession as to incur any liability for expenses. Fisher *v.* Willing, 8 Serg. & R. (Pa.) 118.

20. Weber *v.* Sampson, 6 Duer (N. Y.) 358; Ring *v.* Franklin, 2 Hall (N. Y.) 1; Baxter *v.* Wallace, 1 Daly (N. Y.) 303.

If a person who is mortgagee as well as broker of a ship gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or as a person having an interest in the vessel. Castle *v.* Duke, 5 C. & P. 359, 24 E. C. L. 605.

21. Howard *v.* Odell, 1 Allen (Mass.) 85; Ring *v.* Franklin, 2 Hall (N. Y.) 1; Baxter *v.* Wallace, 1 Daly (N. Y.) 303; Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453.

Neither the master nor the mortgagor have authority to act as agent of the mortgagee, if he is not in possession of the vessel, and does not receive the benefit of her earnings, or exercise any control over her, but only holds his title as collateral security for his debt. Howard *v.* Odell, 1 Allen (Mass.) 85; Morgan *v.* Shinn, 15 Wall. (U. S.) 105, 21 L. ed. 87. But see Williams *v.* Allsup, 10 C. B. N. S. 417, 8 Jur. N. S. 57, 30 L. J. C. P. 353, 4 L. T. Rep. N. S. 550, 100 E. C. L. 417, holding that where the mortgagee leaves the mortgagor in possession of the vessel, and allows him to use her, the mortgagor has implied authority to order repairs to be made, and the shipwright is entitled to hold the vessel as against the mortgagee until his debt is paid.

22. Weston *v.* Wright, 1 Rob. (N. Y.) 312; Delano *v.* Wright, 1 Rob. (N. Y.) 298.

23. Howard *v.* Odell, 1 Allen (Mass.) 85; Tucker *v.* Buffington, 15 Mass. 477.

24. See Chattel Mortgages, 7 Cyc. 66, 67.

Duty of registrar to enter discharge.— Upon production of a mortgage with a receipt for the mortgage money indorsed, the registrar's duty is to enter the discharge of the mortgage on the register. Holderness *v.* Lamport, 29 Beav. 129, 7 Jur. N. S. 564, 30 L. J. Ch. 489, 9 Wkly. Rep. 327, 54 Eng. Reprint 576. But there is no provision in the merchant shipping acts which authorizes the registrar to erase entries of mortgages. Chasteauneuf *v.* Capeyron, 7 App. Cas. 127, 4 Aspin. 489, 51 L. J. P. C. 37, 46 L. T. Rep. N. S. 65.

25. See Chattel Mortgages, 7 Cyc. 92–121.

Recording notice of foreclosure see Taber *v.* Hamlin, 97 Mass. 489, 93 Am. Dec. 113. And see Chattel Mortgages, 7 Cyc. 96 note 59.

Presence of vessel as condition precedent to valid sale see Means *v.* Worthington, 22 Ohio St. 622. And see Chattel Mortgages, 7 Cyc. 96 note 61.

G. Recording Conveyances — 1. Necessity of Recording. Mortgages on vessels, although not recorded, are good as between the parties,[26] and against their assigns under bankrupt and insolvent systems, although not recorded till after their appointment.[27] But as against creditors of the mortgagor,[28] or *bona fide* purchasers from the mortgagor in possession,[29] an unrecorded mortgage is invalid. By act of congress[30] it is provided that a conveyance or a mortgage of a vessel, to be valid against a subsequent purchaser or creditor of the mortgagor without actual notice, must be recorded.[31] But as against persons having actual

Power to enter deficiency judgment see Toby *v.* Oregon Pac. R. Co., 98 Cal. 490, 33 Pac. 550.

26. Leland *v.* Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92; Winsor *v.* McLellan, 30 Fed. Cas. No. 17,887, 2 Story 492. See, generally, Chattel Mortgages, 6 Cyc. 1065.

27. Leland *v.* Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92. And see Chattel Mortgages, 6 Cyc. 1066.

28. Zacharie *v.* O'Beirne, 6 La. 398. And see Chattel Mortgages, 6 Cyc. 1068.

29. The Mary, 16 Fed. Cas. No. 9,187, 1 Paine 671; The Romp, 20 Fed. Cas. No. 12,030, Olcott 196. And see Chattel Mortgages, 6 Cyc. 1072.

One who purchases with notice of a prior mortgage is not a *bona fide* purchaser (The Independence, 13 Fed. Cas. No. 7,013, 9 Ben. 395, 55 How. Pr. (N. Y.) 205), unless his vendor who purchased before the mortgage was recorded was a *bona fide* purchaser without notice, and the burden is on him to show that fact (Baumgartner *v.* The W. B. Cole, 49 Fed. 587).

A person who has notice enough to put him on inquiry is bound to make inquiry, and will be held to have had notice of everything to which such inquiry would have reasonably led. The Independence, 13 Fed. Cas. No. 7,013, 9 Ben. 395, 55 How. Pr. (N. Y.) 205.

Where fraudulent concealment.— The legal title of a mortgagee of a ship who for the purpose of facilitating a sale by the mortgagor conceals his mortgage cannot prevail in equity against a purchaser for valuable consideration without notice. Hooper *v.* Gumm, L. R. 2 Ch. 282, 36 L. J. Ch. 605, 16 L. T. Rep. N. S. 107, 15 Wkly. Rep. 464.

30. U. S. Rev. St. (1878) § 4192 [U. S. Comp. St. (1901) p. 2837].

31. Foster *v.* Chamberlain, 41 Ala. 158; The Superior, 23 Fed. Cas. No. 13,626, 5 Sawy. 83.

Act constitutional.— Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463.

Subsequent recording ineffectual as to antecedent creditors.— Arnold *v.* Eastin, 116 Ky. 686, 76 S. W. 855, 25 Ky. L. Rep. 895.

An oral gift of a vessel is not sufficient to pass title thereto as against the creditors of the giver. Palmer *v.* Smith, 126 Mich. 352, 85 N. W. 870.

An assignment for benefit of creditors is a conveyance within U. S. Rev. St. (1878) § 4192 [U. S. Comp. St. (1901) p. 2837]. Haug *v.* Detroit Third Nat. Bank, 77 Mich. 474, 43 N. W. 939.

A charter-party is not a conveyance, within the provisions of the act of July 29, 1850, and is not required to be recorded in the collector's office. Mott *v.* Ruckman, 17 Fed. Cas. No. 9,881, 3 Blatchf. 71.

Necessity of indexing.— A mortgage recorded under this statute is constructive notice, although not indexed. The W. B. Cole, 59 Fed. 182, 8 C. C. A. 78 [*affirming* 49 Fed. 587].

Possession under unrecorded conveyance.— One deriving title to a vessel through a deed not recorded at the port of enrolment takes his title subject to the superior rights of one having a prior unrecorded deed accompanied by possession. The Mary F. Bofinger *v.* The United States, 18 Ct. Cl. 148.

Vessels to which statutory provisions apply.— The act of July 29, 1850, providing for the recording of mortgages, etc., of vessels, applies only to vessels which have been registered or enrolled at the time when the instrument is made. Before such registry or enrolment, they are subject to the laws of the state. Foster *v.* Perkins, 42 Me. 168; Johnson *v.* Merrill, 122 Mass. 153; Veazie *v.* Somerby, 5 Allen (Mass.) 280; Brammell *v.* Hart, 12 Heisk. (Tenn.) 366; Thurber *v.* The Fannie, 23 Fed. Cas. No. 14,014, 8 Ben. 429. In order, however, to give validity to a mortgage upon a vessel alleged to be a vessel of the United States employed in the coasting trade, as against the state statute, it must be made to appear that she was registered and also that she was enrolled and licensed as required by the act of 1793 (1 U. S. St. at L. 305). Best *v.* Staple, 61 N. Y. 71. A vessel not properly enrolled (Brammell *v.* Hart, *supra*), or which has lost her national character (Davidson *v.* Gorham, 6 Cal. 343; Johnson *v.* Merrill, 122 Mass. 153), is not a vessel of the United States within this statute. A vessel which is not required to be enrolled becomes, if enrolled, a national vessel. Lawrence *v.* Hodges, 92 N. C. 672, 53 Am. Rep. 436. Canal-boats do not come within the description of vessels of the United States. Witherbee *v.* Taft, 51 N. Y. App. Div. 87, 64 N. Y. Suppl. 347; Hicks *v.* Williams, 17 Barb. (N. Y.) 523. The filing of mortgages on canal-boats in New York depends wholly upon N. Y. Act, April 28, 1864 (N. Y. Laws (1864), p. 993), as such act entirely superseded N. Y. Act, April 29, 1833 (N. Y. Laws (1833), p. 402), and N. Y. Act, April 15, 1858 (N. Y. Laws (1858), p. 396) so far as they related to canal-boats. The Independence, 13 Fed. Cas. No. 7,013, 9 Ben. 395.

Place of record.— Mortgages of vessels should, under the act of July 29, 1850, be

notice thereof, a mortgage or conveyance is valid, although not recorded as required by this statute.[32] In England and Canada the recording of conveyances and mortgages of vessels is also regulated by statute.[33]

2. What Law Governs. Before a vessel is registered or enrolled, a mortgage of it will be valid if recorded agreeably to the laws of the state.[34] After it is registered or enrolled, a mortgage of it will not be valid against any person other than

recorded at the home port, and not at the port of last registry and enrolment. Johnson *v.* Merrill, 122 Mass. 153; White's Bank *v.* Smith, 7 Wall. (U. S.) 646, 19 L. ed. 211; Blanchard *v.* The Martha Washington, 3 Fed. Cas. No. 1,513, 1 Cliff. 463; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61. *Contra,* Chadwick *v.* Baker, 54 Me. 9; Potter *v.* Irish, 10 Gray (Mass.) 416. The recording of the mortgage elsewhere is as ineffectual as if it had not been recorded at all, so far as constituting it constructive notice to creditors or purchasers was concerned. Foster *v.* Chamberlain, 41 Ala. 158; Arnold *v.* Eastin, 116 Ky. 686, 76 S. W. 855, 25 Ky. L. Rep. 895. Previous to this act, providing for the recording of bills of sale, mortgages, etc., of vessels, they were required to be filed, by the laws of many of the states, in the clerk's office, or some place of public deposit in the town or city where the vendor or mortgagor resided, in order to protect the interests of the vendee or mortgagee against subsequent *bona fide* purchasers or mortgagees. White's Bank *v.* Smith, 7 Wall. (U. S.) 646, 19 L. ed. 211. And see Cape Fear Steamboat Co. *v.* Conner, 3 Rich. (S. C.) 335; Beaumont *v.* Yeatman, 8 Humphr. (Tenn.) 542. And this practice continued in many places after the passage of the act of 1850, for abundant caution, on account of a doubt as to the effect that would or might be given to it as a recording act, from the very imperfect provisions of the law. White's Bank *v.* Smith, 7 Wall. (U. S.) 646, 19 L. ed. 211.

32. Parker Mills *v.* Jacot, 8 Bosw. (N. Y.) 161; Moore *v.* Simonds, 100 U. S. 145, 25 L. ed. 590; The W. B. Cole, 59 Fed. 182, 8 C. C. A. 78 [*affirming* 49 Fed. 587]; The John T. Moore, 13 Fed. Cas. No. 7,430, 3 Woods 61.

Possession of the vessel by the vendee is sufficient notice. Hobbs *v.* The Interchange, 1 W. Va. 57.

Constructive notice is not enough. Secrist *v.* German Ins. Co., 19 Ohio St. 476.

33. See cases cited *infra,* this note.

Under 17 & 18 Vict. c. 104, sales of ships can only be made in the manner prescribed by the statute. Chasteauneuf *v.* Capeyron, 7 App. Cas. 127, 4 Aspin. 489, 51 L. J. P. C. 37, 46 L. T. Rep. N. S. 65; Liverpool Borough Bank *v.* Turner, 1 Johns. & H. 159, 6 Jur. N. S. 935, 29 L. J. Ch. 827, 8 Wkly. Rep. 730, 70 Eng. Reprint 703 [*affirmed* in 2 De G. F. & J. 502, 7 Jur. N. S. 150, 30 L. J. Ch. 379, 3 L. T. Rep. N. S. 494, 9 Wkly. Rep. 292, 63 Eng. Ch. 391, 45 Eng. Reprint 715]. One of the requisites for completing the transfer of any British ship is an entry of the bill of sale at the proper custom-house, in the book of registry, and the indorsement thereof on the certificate. De Wolf *v.* Carvill, 11 N. Brunsw. 299; Cutten *v.* McFarlane, 7 Nova Scotia 468; Orser *v.* Mounteny, 9 U. C. Q. B. 382; Smith *v.* Brown, 14 U. C. Q. B. 1. The property in a ship passes, as between the vendor and his assignees and the vendee, by a bill of sale, although the transfer is not registered pursuant to the Merchant Shipping Act of 1854, § 55 (Stapleton *v.* Haymen, 2 H. & C. 918, 10 Jur. N. S. 497, 33 L. J. Exch. 170, 9 L. T. Rep. N. S. 655, 12 Wkly. Rep. 317), but, until registration of the transfer under section 57, the transferee cannot transfer the vessel to a purchaser from himself (Stapleton *v.* Haymen, *supra*). An unregistered ship is a thing the transfer of which is not dealt with either by the Merchant Shipping Act or the Bills of Sale Act, and goes according to the common law, and the transfer is good, although there has been no registration at all. Union Bank *v.* Lenanton, 3 C. P. D. 243, 3 Aspin. 600, 47 L. J. C. P. 409, 38 L. T. Rep. N. S. 698. The duty to register a transfer of ownership rests with the vendee. The Spirit of the Ocean, 34 L. J. Adm. 74, 12 L. T. Rep. N. S. 239. A legal mortgage of a ship in statutory form and registered has priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the charge. Black *v.* Williams, [1895] 1 Ch. 408, 64 L. J. Ch. 137, 2 Manson 86, 13 Reports 224, 43 Wkly. Rep. 346; Coombes *v.* Mansfield, 3 Drew. 193, 3 Eq. Rep. 566, 1 Jur. N. S. 270, 24 L. J. Ch. 513, 3 Wkly. Rep. 345, 61 Eng. Reprint 877; De Wolf *v.* Carvill, 11 N. Brunsw. 299; Luffman *v.* Luffman, 25 Ont. App. 48. *Contra,* under earlier registry act. McCalmont *v.* Rankin, 2 De G. M. & G. 403, 22 L. J. Ch. 554, 51 Eng. Ch. 316, 42 Eng. Reprint 928 [*affirming* 8 Hare 1, 14 Jur. 475, 19 L. J. Ch. 215, 32 Eng. Ch. 1, 68 Eng. Reprint 249].

The Bills of Sale Act of 1878, § 4, excepts from registration as a bill of sale transfers or assignments of a ship and vessel or any share thereof. Gapp *v.* Bond, 19 Q. B. D. 200, 56 L. J. Q. B. 438, 57 L. T. Rep. N. S. 437, 35 Wkly Rep. 683; Union Bank *v.* Lenanton, 3 C. P. D. 243, 3 Aspin. 600, 47 L. J. C. P. 409, 38 L. T. Rep. N. S. 698. A barge is a vessel within this exception. Gapp *v.* Bond, *supra.*

In Canada, under Civ. Code, §§ 2360, 2361, the transfer of inland vessels must be registered at the custom-house; otherwise no title or interest in the vessel intended to be sold will pass to the purchaser. Calvin *v.* Tranchemontagne, 14 L. C. Jur. 210.

34. Stinson *v.* Minor, 34 Ind. 89; Perkins *v.* Emerson, 59 Me. 319; Foster *v.* Perkins, 42 Me. 168; Brammell *v.* Hart, 12 Heisk. (Tenn.) 366.

the mortgagor, his heirs and devisees, and persons having actual notice thereof, unless recorded as required by the laws of the United States.[35]

3. EFFECT OF RECORDING. The statute relating to the recording of conveyances and mortgages on vessels gives no lien or other priority to mortgages and conveyances than they had before the act was passed, except to recorded conveyances and mortgages, over mortgages and conveyances not recorded, in certain cases.[36] Neither does it affect the personal liability of the owner,[37] nor give a force or validity to a conveyance or mortgage which it has not by the state law.[38] The proper construction of the recording acts charges every person taking title with all conveyances or mortgages made by any one in the chain of title while he holds title, whether the recording of such conveyances occurs then or not.[39] The statute is no less effective in favor of an attaching creditor without notice than it is in favor of a purchaser.[40]

4. RENEWAL AND REFILING.[41] In some states there are statutory provisions requiring that mortgages on canal-boats must be refiled within a specified time after the original filing, in order to be valid against third persons.[42]

III. CHARTERS.

[EDITED BY CHARLES R. HICKOX, ESQ., OF THE NEW YORK BAR]

A. Form, Requisites, and Validity. A charter is merely a contract concerning a ship and does not require any particular form for its validity.[43] Usually it is a contract by which the ship-owner agrees to carry goods or passengers on a specified voyage, or it is an agreement for the use of the entire vessel

35. *Maine.*— Perkins *v.* Emerson, 59 Me. 319; Wood *v.* Stockwell, 55 Me. 76.

Michigan.— Fleming *v.* Philadelphia F. Assoc., 147 Mich. 404, 110 N. W. 933; Haug *v.* Detroit Third Nat. Bank, 77 Mich. 474, 43 N. W. 939; Robinson *v.* Rice, 3 Mich. 235.

New York.— Best *v.* Staple, 61 N. Y. 71; Folger *v.* Weber, 16 Hun 512.

North Carolina.— Lawrence *v.* Hodges, 92 N. C. 672, 53 Am. Rep. 436.

United States.—Aldrich *v.* Ætna Ins. Co., 8 Wall. 491, 19 L. ed. 473; White's Bank *v.* Smith, 7 Wall. 646, 19 L. ed. 211; The Gordon Campbell, 131 Fed. 963; The Vigilancia, 73 Fed. 452, 19 C. C. A. 528; Thomas *v.* The Kosciusko, 23 Fed. Cas. No. 13,901.

See 44 Cent. Dig. tit. "Shipping," § 112.

Contra.— Karr *v.* Schade, 7 Lea (Tenn.) 294.

36. White's Bank *v.* Smith, 7 Wall. (U. S.) 646, 19 L. ed. 211; The Madrid, 40 Fed. 677; The Guiding Star, 18 Fed. 263; The De Smet, 10 Fed. 483; The Favorite, 8 Fed. Cas. No. 4,699, 3 Sawy. 405.

37. Hurd *v.* Reeve, 12 Fed. Cas. No. 6,917; Mott *v.* Ruckman, 17 Fed. Cas. No. 9,881, 3 Blatchf. 71.

38. Boderick's Succession, 12 La. Ann. 521; Srodes *v.* The Collier, 22 Fed. Cas. No. 13,272*a*; Orr *v.* Dickinson, Johns. 1, 5 Jur. N. S. 672, 28 L. J. Ch. 516, 70 Eng. Reprint 315.

Registration is but the record of a fact done — a record of the sale, not the sale itself. The Spirit of the Ocean, 34 L. J. Adm. 74, 12 L. T. Rep. N. S. 239.

39. The W. B. Cole, 59 Fed. 182, 8 C. C. A. 78.

40. Potter *v.* Irish, 10 Gray (Mass.) 416; The Parker Mills *v.* Jacot, 8 Bosw. (N. Y.) 161; Secrist *v.* German Ins. Co., 19 Ohio St. 476. But see Fort Pitt Nat. Bank *v.* Williams, 43 La. Ann. 418, 9 So. 117.

41. See, generally, CHATTEL MORTGAGES, 6 Cyc. 1092 *et seq.*

42. See the statutes of the several states. And see cases cited *infra*, this note.

By a statute of New York (N. Y. Laws (1864), p. 993), every mortgage on canal-boats, or a copy thereof, is required to be filed in the office of the auditor of the canal department, and within thirty days next preceding a year from the filing thereof a copy is required to be again filed, or the mortgage shall be void as against the creditors of the mortgagor, or subsequent purchasers, or mortgagees in good faith. Marsden *v.* Cornell, 62 N. Y. 215. But under this act no filing is necessary after the original filing of the mortgage and the first filing of the copy with the proper statement. The Independence, 13 Fed. Cas. No. 7,013, 9 Ben. 395, 55 How. Pr. (N. Y.) 205. The refiling of a copy of such mortgage, after the expiration of the time in which such filing is required, revives the mortgage, and makes it good against all subsequent creditors, purchasers, and mortgagees, but it is subject to the claims of purchasers and mortgagees whose rights accrued during the default, and to the rights of all creditors whose debts were contracted before the refiling, as well those contracted before the default as after; and it is not necessary, to entitle creditors to the protection of this act, that their debts should have become liens by judgment or attachment before the refiling, if they have been made liens before the question arises. Herrick *v.* King, 19 N. J. Eq. 80.

43. Coe *v.* Cook, 3 Whart. (Pa.) 569; Quillan *v.* Brunswick, etc., R. Co., 130 Fed. 216; James *v.* Brophy, 71 Fed. 310, 18 C. C. A. 49.

for a period of time in such localities as may be designated. The term "charter" commonly is not applied to a shipment of an individual package.[44] Charter-parties are usually in writing, but may be by parol,[45] and terminable at will.[46] As in other contracts, the minds of the parties must meet without variance between the offer and acceptance.[47]

B. Execution — 1. Authority to Execute. A charter-party is usually made through a broker, but, as in the case of any other contract, may be closed directly by the principals.[48] The broker is merely an agent. His authority is dependent on the specific instructions he may have received, or it may be implied from a course of dealing with the principal.[49] Although the charter contract is not signed in behalf of the ship or her owners, it is binding upon both parties, if it has been delivered to and accepted by them, and the ship has entered on its performance;[50] but an unauthorized agent cannot bind the vessel[51] unless his contract be ratified,[52] with full knowledge of all the facts.[53] A charter-party executed by one known to both parties to have no authority binds not the alleged charterer but the signer himself.[54] The master has power to make a charter-party in a

44. Stalker *v.* The Henry Kneeland, 22 Fed. Cas. No. 13,282. See Swift *v.* Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101.

45. Fish *v.* Sullivan, 40 La. Ann. 193, 3 So. 730; Muggridge *v.* Eveleth, 9 Metc. (Mass.) 233; Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140; Huron Barge Co. *v.* Turney, 71 Fed. 972; James *v.* Brophy, 71 Fed. 310, 18 C. C. A. 49; Burrill *v.* Crossman, 65 Fed. 104; Quirk *v.* Clinton, 20 Fed. Cas. No. 11,518; Lidgett *v.* Williams, 4 Hare 456, 14 L. J. Ch. 459, 30 Eng. Ch. 456, 67 Eng. Reprint 727.

46. Fish *v.* Sullivan, 40 La. Ann. 193, 3 So. 730.

47. Metropolitan Coal Co. *v.* Boutell Transp., etc., Co., 185 Mass. 391, 70 N. E. 421; Nipigon Transit Co. *v.* Smythe, 137 Mich. 103, 100 N. W. 275; La Compania, etc., *v.* Spanish-American Light, etc., Co., 146 U. S. 483, 13 S. Ct. 142, 36 L. ed. 1054.

An agreement for a charter-party which contains the substantial provisions of a charter-party, a definite voyage to be performed on one side and a definite compensation to be paid therefor by the other side, may be held to amount to a present charter-party, although a more formal instrument was contemplated. The Tribune, 24 Fed. Cas. No. 14,171, 3 Sumn. 144. But not so of an agreement to assign to one of the parties all the freight earned by a vessel up to certain specified sums, and one half of all above them. Stalker *v.* The Henry Kneeland, 22 Fed. Cas. No. 13,282.

A charter conditioned upon the responsibility of a guarantor of the charterer is of no effect if the guarantor turns out to be not responsible. Erlen *v.* The Brewer, 8 Fed. Cas. No. 4,519 [*reversing* 8 Fed. Cas. No. 4,519*a*]. And see The H. W. Edye, 12 Fed. Cas. No. 6,964, 10 Ben. 238.

48. Bangs *v.* Lowber, 2 Fed. Cas. No. 840, 2 Cliff. 157; Quirk *v.* Clinton, 20 Fed. Cas. No. 11,518.

An agreement made by all the owners jointly with one of their own number cannot be enforced at law. Terry *v.* Brightman, 132 Mass. 318.

49. Saveland *v.* Green, 40 Wis. 431; The S. L. Watson, 118 Fed. 945, 55 C. C. A. 439.

Broker insufficiently authorized.—A shipbroker at the home port of a vessel, where her managing owner resides, cannot bind the owners by a charter-party executed upon the mere authority of a telegram from the master, and without consulting the managing owner; nor will the silence of the managing owner, after notice, operate as a ratification, if such notice contained an incorrect statement of the facts. Craig *v.* Magee, 11 Fed. 175.

50. James *v.* Brophy, 71 Fed. 310, 18 C. C. A. 49.

A charter procured through the broker's fraud will not be sustained. Hendricksson *v.* Wright, 14 Phila. (Pa.) 590.

Undisclosed principal.—A managing owner, who makes a charter-party, as such, without disclosing the other part-owners, is personally liable thereon. Kerry *v.* Pacific Mar. Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65.

A charter-party made by agents who are part-owners to enable an individual creditor to repay himself out of earnings is void as against the vessel and other owners. The A. M. Bliss, 1 Fed. Cas. No. 274, 2 Lowell 103.

51. Nipigon Transit Co. *v.* Smythe, 137 Mich. 103, 100 N. W. 275.

52. Metropolitan Coal Co. *v.* Boutell Transp., etc., Co., 196 Mass. 72, 81 N. E. 645; Morris *v.* The Alvah, 59 Fed. 630 [*affirmed* in 77 Fed. 315, 23 C. C. A. 181], holding that a contract binds the ship when it is confirmed by those who have authority, and the ship has actually entered upon the performance of it, although it may have been a contract preliminary to a maritime contract, or made by brokers acting without sufficient authority.

The owner cannot ratify in part and reject in part. La Compania, etc. *v.* Spanish-American Light, etc., Co., 146 U. S. 483, 13 S. Ct. 142, 36 L. ed. 1054 [*affirming* 31 Fed. 492].

53. Starr *v.* Galgate Ship Co., 68 Fed. 234, 15 C. C. A. 366 [*reversing* 58 Fed. 894].

54. New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 688, 21 Blatchf. 332.

foreign port, where the vessel-owners have no agent;[55] but it is essential to the validity of a charter-party, made with the master of a vessel at her home port, that the managing owner should ratify;[56] and the master cannot, by mere virtue of his office, bind his owners by a charter-party under seal, so as to subject them to an action of covenant thereon.[57]

2. Execution by Ship-Broker; Commissions. If a charter is executed by a ship-broker his commissions for procuring the charter are payable as soon as the charter is effected, and do not depend on freight being taken or earned or on the voyage being completed;[58] and if the broker finds a person ready to contract on the terms offered by the principal, and the contract is not completed through the refusal or inability of the principal to perform his part, the broker is still entitled to his commission,[59] unless the expressed intention of the parties was that the broker should not be entitled to his commission if the earning of hire was prevented by causes such as in fact put an end to the charter-party.[60] But a broker is not entitled to a commission on a new charter, incorporating new provisions and made directly between ship-owner and charterer, as an extension or renewal of a former charter effected through him.[61] If the contract is in fact consummated through the broker's efforts he is entitled to his commission, although the prin-

55. Hurry *v.* Hurry, 12 Fed. Cas. No. 6,922, 2 Wash. 145, holding, however, that the master has no power to enter into a charter in a foreign port for the purpose of giving a creditor of the vessel-owner a security for his debt.

56. Craig *v.* Magee, 14 Phila. (Pa.) 502.

A master, sailing a vessel on shares by agreement with the owners, has not thereby authority to enter into a charter-party in the home port, binding the owners. Swan *v.* Ruckman, 25 How. Pr. (N. Y.) 468.

57. Pickering *v.* Holt, 6 Me. 160.

58. Brown *v.* Post, 6 Rob. (N. Y.) 111; Hill *v.* Kitching, 3 C. B. 299, 15 L. J. C. P. N. S. 251, 54 E. C. L. 299, holding that apart from express stipulation a ship-broker's commission is due, although no freight is earned in consequence of the loss of the chartered vessel, and a ship returns from her voyage with only a small portion of the cargo on board, or with light articles. See Winter *v.* Mair, 3 Taunt. 531.

Loss of the vessel during the voyage, although it may bar an action by the owner for his freight, is no defense to an action by the broker for his commission, even though such action was in form for breach of contract of affreightment. Hagar *v.* Donaldson, 154 Pa. St. 242, 25 Atl. 824.

If several brokers are employed by a ship-owner, but unknown to each other negotiate with the same freighter or purchaser, the broker who first introduces the party is entitled to the commission, and even where the parties are known to each other, the broker who first brings them into communication in the particular transaction earns his commission if business results. Burnett *v.* Bouch, 9 C. & P. 620, 38 E. C. L. 362; Cunard *v.* Van Oppen, 1 F. & F. 716.

Charter sufficiently definite to entitle broker to commission.—A charter-party, whereby steamers are hired by a steamboat company owning them to the United States government for one month, "and as much longer as said vessels may be required by the United States war department," is not void for uncertainty, so as to deprive a broker through whose services the charter was effected of the right to recover a commission agreed to be paid of five per cent on the earnings of the steamers in case of his effecting the charter. Sturgis *v.* New Jersey Steamboat Co., 62 N. Y. 625.

59. Cook *v.* Fiske, 12 Gray (Mass.) 491 (holding that a broker who, being employed by the owner of a vessel to obtain a charter, brings to him a person with whom he makes an agreement for a charter, is entitled to the usual commissions, although the owner afterward without legal excuse refuses to sign the charter-party and the voyage is never completed); Jewett *v.* Emson, 2 Rob. (N. Y.) 165; Inchbald *v.* Neilgherry Coffee, etc., Plantation Co., 17 C. B. N. S. 733, 10 Jur. N. S. 1129, 34 L. J. C. P. 15, 11 L. T. Rep. N. S. 345, 13 Wkly. Rep. 95, 112 E. C. L. 733; Prickett *v.* Badger, 1 C. B. N. S. 296, 3 Jur. N. S. 66, 26 L. J. C. P. 33, 5 Wkly. Rep. 117, 87 E. C. L. 296; Thompson *v.* Clark, 1 Mar. L. Cas. 256. But see Broad *v.* Thomas, 7 Bing. 99, 20 E. C. L. 53, 4 C. & P. 338, 19 E. C. L. 543, 9 L. J. C. P. O. S. 32, 4 M. & P. 732.

Where a person employed by the ship-owner has introduced a second broker who has introduced another, and this has continued until some person in the chain has introduced a charterer, if the charter is the result of such an introduction the brokers who have so brought the parties together are entitled to the commission. Smith *v.* Boutcher, 1 C. & K. 573, 47 E. C. L. 573; Kynaston *v.* Nicholson, 1 Mar. L. Cas. 350. But see Notman *v.* Galveston Steamship Co., 137 N. Y. App. Div. 851; Gibson *v.* Crick, 1 H. & C. 142, 31 L. J. Exch. 304, 6 L. T. Rep. N. S. 392, 10 Wkly. Rep. 525.

60. White *v.* Turnbull, 8 Aspin. 406, 3 Com. Cas. 183, 78 L. T. Rep. N. S. 726, 14 T. L. R. 401.

61. A shipping broker has no lien on a vessel for services in procuring a charter-

cipals complete the contract without his help.[62] Nothing is payable to the broker for his trouble and expense unless they result in a binding charter;[63] and a broker cannot act as agent for both parties to the transaction so as to be entitled to pay for his services from each one unless both parties understand his position and expressly agree to such payments.[64] In some ports by usage when negotiation is closed the ship-owners are liable to the broker for a fixed commission for bringing the parties together.[65] Generally where the amount has not been agreed upon, it must be ascertained by reference to the customary rate, if there be one, and if not, upon the basis of a reasonable remuneration under the circumstances,[66] estimated, not by the ultimate profits actually derived from the adventure, but by what they would be if successful.[67] If the charterer's agent is to have a commission on freight at the port of discharge, this is to be reckoned on the freight received, and not on the gross freight list, some of which could not be collected.[68] Although making entry was by charter-party the duty of the charterer's broker, yet, if he be informed that entry has been made, he will not be allowed to recover for making entry a second time, or for the services of a tug in making the entry;[69] and where a charter-party confines the duties of a ship's agent to "custom-house business" he is not the general representative of the ship, and is not entitled to an "attendance fee."[70] An undertaking by a broker to procure a ship is a promise founded upon sufficient consideration so that the broker may be sued for non-performance.[71]

3. Subcharter or Assignment of Charter. In the absence of prohibitions in the original charter-party a charterer may execute a subcharter,[72] which may give to a subcharterer greater rights than the original charterer possessed,[73] and

party. The Thames, 10 Fed. 848; The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 129.

62. Green *v.* Bartlett, 14 C. B. N. S. 681, 32 L. J. C. P. 261, 8 L. T. Rep. N. S. 503, 11 Wkly. Rep. 834, 108 E. C. L. 681; Burnett *v.* Bouch, 9 C. & P. 620, 38 E. C. L. 362; Wilkinson *v.* Martin, 8 C. & P. 1, 34 E. C. L. 575.

63. Read *v.* Rann, 10 B. & C. 438, 8 L. J. K. B. O. S. 144, 21 E. C. L. 189; Dalton *v.* Irvin, 4 C. & P. 289, 19 E. C. L. 519.

64. Robbins *v.* Sears, 23 Fed. 874.

Omission to insert in the charter-party anything respecting the broker's compensation for the consignment of the vessel to him on the return voyage is at the most only evidence to be submitted to the jury that the owners were not to pay additional sums besides the commission mentioned. Weber *v.* Kingsland, 3 Bosw. (N. Y.) 415.

The broker may recover the whole commission in his own name, although he may be bound to pay over a portion to others who have aided in procuring such charter. Bruce *v.* Parsons, 12 Cush. (Mass.) 591. See Cook *v.* Fiske, 78 Mass. 491, holding the evidence insufficient to prove a custom such as will prevent a broker from recovering his commissions.

65. Jewett *v.* Emson, 2 Rob. (N. Y.) 165.

66. Holl *v.* Pinsent, 6 Moore C. P. 228, 17 E. C. L. 480.

Charter-party held not to embody the whole agreement between the owners and brokers, or presumptively to define all the duties which the brokers should perform, or all the compensation which they should receive see Weber *v.* Kingsland, 8 Bosw. (N. Y.) 415.

67. Brown *v.* Post, 6 Rob. (N. Y.) 111.

Liability under preliminary memorandum. — Ship-brokers are not entitled to commission for negotiating a charter, where they bring a ship-owner and the proposed charterer together, who draw up a memorandum of the conditions of the charter, with the understanding that it is not to be a binding agreement until subsequent papers should be drawn up; but commission will be due if it was understood that the memorandum incorporated the entire agreement, and the subsequent papers were to be drawn merely so that each should have a duplicate copy. Jewett *v.* Emson, 2 Rob. (N. Y.) 165.

When the contract is to be performed in a foreign country the commission to which the brokers are entitled should be reckoned on the amount to which the charterers would have been entitled in foreign currency upon performing the voyage. Brown *v.* Post, 6 Rob. (N. Y.) 111.

68. Mauran *v.* Warren, 16 Fed. Cas. No. 9,310, 2 Lowell 53.

69. Muller *v.* Spreckels, 48 Fed. 574.

70. Muller *v.* Spreckels, 48 Fed. 574.

71. Gliddon *v.* Brodersen, Cab. & E. 197.

72. Moss *v.* Husted, 66 N. Y. 539; The Ely, 110 Fed. 563 [*affirmed* in 122 Fed. 447, 58 C. C. A. 429]; Schmidt *v.* Smith, 21 Fed. Cas. No. 12,466, 7 Ben. 361, holding that under a subcharter for "a full and complete cargo," made subject to the conditions of the charter, which describes the vessel as "of the net measurement of 537 tons, or thereabouts," the subcharterers are entitled to the specified cargo space and not to the full capacity of the vessel.

73. Church Cooperage Co. *v.* Pinkney, 170 Fed. 266, 95 C. C. A. 462.

which is not merely an equitable assignment of the first charter, but an independent contract.[74] A charterer may also assign the original charter.[75]

C. Modification, Cancellation, and Breach. The charter-party may be modified or canceled by a subsequent agreement.[76] Thus owners may contract with the shippers, varying or annulling the charter-party in relation to their respective parts of the cargo,[77] or as to the voyages to be made; [78] but a ship's husband cannot bind the owners by an agreement to cancel a charter-party and pay a sum of money upon such cancellation; [79] and neither the master nor the agent of the vessel can vary the terms of the charter to the detriment of the owners.[80] Where a ship has been chartered by the owners, the master cannot effectually agree to change her destination [81] or alter the amount of freight to be paid or the manner of payment; [82] but where the charter-party expressly authorizes the charterer's agent at the loading port to make alterations in the charter this includes authority to allow the ship to make an intermediate voyage before loading the homeward cargo.[83] In like manner a charter-party may be canceled

Where a charter-party authorizes the charterer to relet the vessel in whole or in part, the charterer is authorized to make subcontracts of affreightment and to sign bills of lading to shippers of goods from other ports which he may procure to be forwarded by other vessels to be transhipped upon the chartered vessel pursuant to the charter; and the ship will be bound thereby from the time they are received on board with knowledge of the facts. The T. A. Goddard, 12 Fed. 174.

Subcharter by agent of charterer.—Where a vessel is chartered for a voyage and return, and at the port of destination the agent of the charterer, not being able to furnish her with freight, subcharters her to other persons there, who load her with goods consigned to parties at the home port under special bills of lading, which do not refer to the original charter-party, the owner may be entitled to freight under such special bills of lading, whether the consignee knew of the terms of the charter-party or not. Sears *v.* Wills, 1 Black (U. S.) 108, 17 L. ed. 35.

Subcontracts of affreightment of the charterer bind the vessel.— The Euripides, 52 Fed. 161 [*reversed* on other grounds in 71 Fed. 728, 18 C. C. A. 226], so holding whether a bill of lading was executed or not.

74. Swift *v.* Tross, 55 How. Pr. (N. Y.) 255.

75. Baetjer *v.* Bors, 2 Fed. Cas. No. 724, 7 Ben. 280, holding, however, that on a libel, by a charterer of a vessel against a person to whom the charter has been assigned, for breach of the contract to accept the vessel, the charterer can only recover the damages sustained by him, and not the damages sustained by the master or owners of the vessel, unless their interest under the charter was directly assigned to him, or unless he has paid a judgment recovered against him for the damages sustained by the owners or master.

Under a guaranty on an assignment of a charter that the vessel is first class, it is necessary that she be actually classified; but a delay to classify such vessel, where no damage is set up, when she is tendered as ready, for want of a classification, will not excuse performance by the transferee. Baetjer *v.* Bors, 2 Fed. Cas. No. 724, 7 Ben. 280.

76. Wheeler *v.* Curtis, 11 Wend. (N. Y.) 653; Boyd *v.* Moses, 7 Wall. (U. S.) 316, 19 L. ed. 192; The Donald, 115 Fed. 744; Croockewit *v.* Fletcher, 1 H. & N. 893, 26 L. J. Exch. 153, 5 Wkly. Rep. 348.

Assumpsit lies where a sealed charter-party was afterward altered by a parol contract distinct from and not inconsistent with the contract by deed, being anterior to it in point of time and execution. White *v.* Parkin, 12 East 578, 11 Rev. Rep. 488, 104 Eng. Reprint 225. But where a charter-party was executed under seal, for the transportation of goods, and the parties on the same day made an agreement on a separate piece of paper, not under seal, referring to the charter-party, which agreement was illegal and void, it did not affect the charter-party, which remained valid and binding. Ogden *v.* Barker, 18 Johns. (N. Y.) 87.

77. Mactier *v.* Wirgman, 4 Harr. & J. (Md.) 568.

78. Cutler *v.* Lennox, 137 Mass. 506.

79. Homas *v.* Lewis, 4 Ex. D. 18, 4 Aspin. 51, 48 L. J. Exch. 7, 38 L. T. Rep. N. S. 669, 27 Wkly. Rep. 111.

80. Blue Star Steamship Co. *v.* Keyser, 81 Fed. 507; Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368 (holding that a person authorized to act for the charterers of a vessel, as agent to procure a cargo in a foreign port, is not thereby authorized to modify or cancel the charter-party of his principal); Pew *v.* Langhlin, 3 Fed. 39; Sickens *v.* Irving, 7 C. B. N. S. 165, 6 Jur. N. S. 200, 29 L. J. C. P. 25, 97 E. C. L. 165. See Hendrickson *v.* Wright, 28 Fed. 242.

81. Capper *v.* Wallace, 5 Q. B. D. 163, 4 Aspin. 223, 49 L. J. Q. B. 350, 42 L. T. Rep. N. S. 130, 28 Wkly. Rep. 424; Burgon *v.* Sharpe, 2 Campb. 529.

82. Reynolds *v.* Jex, 7 B. & S. 86, 34 L. J. Q. B. 251, 13 Wkly. Rep. 968; Pearson *v.* Göschen, 17 C. B. N. S. 352, 10 Jur. N. S. 903, 33 L. J. C. P. 265, 10 L. T. Rep. N. S. 758, 12 Wkly. Rep. 1116, 112 E. C. L. 352; The Canada, 13 T. L. R. 238.

83. Wiggins *v.* Johnston, 15 L. J. Exch. 202, 14 M. & W. 609.

for justifiable cause,[84] as by breach of a condition precedent,[85] or under an option contained in the contract itself; [86] and the failure of the hirer to fulfil his part of the agreement will justify the owner in disregarding the agreement and seeking other employment.[87] A chartering of a vessel, by the owners, for the default of the charterer in not furnishing the cargo, is for the benefit of all concerned and is not a rescission of the contract discharging the freighter from liability.[88] A refusal of the master to complete the voyage within the time specified excuses the charterer from furnishing the cargo.[89] A provision in a charter that either side may cancel on thirty days' notice may be waived if each party sues the other claiming damages as for entire breach of charter.[90]

D. Construction, Operation, and Effect — 1. General Rules. The construction of a charter-party is governed by the rules that control the construction

84. The B. L. Harriman, 9 Wall. (U. S.) 161, 19 L. ed. 629; Starr *v.* Galgate Ship Co., 68 Fed. 234, 15 C. C. A. 366 [*reversing* 58 Fed. 894]; Simonetti *v.* Foster, 2 Fed. 415, holding that where a charter-party guaranteed the vessel to be able to stow and carry, on the draught of water allowed by the surveyors of the board of underwriters, at least one thousand tons dead weight, and a survey indicated that the capacity so to stow and carry on such draught was but nine hundred and twenty-five tons, the charterers were not bound to accept and load such vessel.

Refusal by a foreign nation to permit loading the cargo does not relieve the charterer from liability for failure to load, there being no provision in the charter-party for this contingency. Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611.

Place of cancellation.— On charters for loading the ship in remote places across the seas, options providing for the acceptance or rejection of the charter are to be exercised at the place where the ship is to load, and the ship has no right to call upon the charterer to exercise his option elsewhere. The Samuel W. Hall, 49 Fed. 281.

A constructive cancellation is not proved by the notification by the charterers to the owners that they would hold the owners in damages for non-compliance, and the refusal of the charterers to give orders after the time for fulfilling the contract had expired. Maury *v.* Culliford, 10 Fed. 388, 4 Woods 118.

Evidence held insufficient to show cancellation see Porteous *v.* Williams, 115 N. Y. 116, 21 N. E. 711.

Facts held insufficient to justify rescission of contract see The Ask, 156 Fed. 678; Cornwall *v.* Moore, 125 Fed. 646 (holding that neither the age of a vessel, nor the length of time she had been upon her copper, nor the fact that owing to her age insurance could not be obtained on the cargo intended to be shipped by the charterers, establishes that she was in fact unseaworthy for the voyage, so as to authorize the charterer's surveyor so to certify and to entitle the charterers to cancel the charter, where it provided for a certificate to be made on an actual survey); Ansgar Steamship Co. *v.* William W. Brauer Steamship Co., 121 Fed. 426; Leblond *v.* McNear, 104 Fed. 826 [*affirmed* in 123 Fed. 384, 61 C. C. A. 564]; Steel *v.* Grand Canary Coaling Co., 9 Aspin. 584, 9 Com. Cas. 275, 90 L. T. Rep. N. S. 729, 20 L. T. R. 542.

85. Rosasco *v.* Pitch Pine Lumber Co., 121 Fed. 437 [*affirmed* in 138 Fed. 25, 70 C. C. A. 455].

86. Cornwall *v.* Moore, 125 Fed. 646; The Ceres, 72 Fed. 936, 19 C. C. A. 243, holding that a provision in a charter-party giving the charterers an option to terminate it at any time on giving thirty days' notice does not entitle the owners to thirty days' notice of a cancellation for breach of a guaranty on their part contained in the instrument.

Time of exercising option.—A charterer, given the right by the charter-party to cancel in case the vessel does not arrive at the loading port by a specified date, is not required to exercise his option until her arrival, and his right to cancel is not lost by his refusal to state his election on request of the owners, after such date had passed, and when the vessel was in a distant port, and the time when she would arrive was unknown. Karran *v.* Peabody, 145 Fed. 166, 76 C. C. A. 136.

Refusal to exercise prematurely an option to cancel the charter does not justify the other party in canceling it. The Progreso, 50 Fed. 835, 2 C. C. A. 45 [*affirming* 42 Fed. 229].

87. Ferris *v.* The Alida, 14 Phila. (Pa.) 602; Kleine *v.* Catara, 14 Fed. Cas. No. 7,869, 2 Gall. 61. But see Chamberlain *v.* Pettit, 49 Fed. 109, holding that a charter of a vessel to carry a certain named cargo, drawn in formal terms and without conditions, will not be construed as a mere memorandum, not binding on the parties, merely because the charterer failed to get the cargo, where there is nothing to show that the ship's representative understood that he was to be affected by such failure.

Voluntary surrender of the vessel by the charterer is surrender of the charter-party and prevents him from subsequently reclaiming possession of her. Bergen *v.* The Taminend, 3 Fed. Cas. No. 1,339.

88. Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611.

89. Poland *v.* Maryland Coal Co., 19 Fed. Cas. No. 11,244, 8 Ben. 347 [*affirmed* in 19 Fed. Cas. No. 11,245, 14 Blatchf. 519]. And see *infra*, III, L, 1, a.

90. J. M. Guffey Petroleum Co. *v.* Coastwise Transportation Co., — Fed. —.

of contracts generally. The intent of the parties is to be sought, and when found is to be made effectual if possible.[91] A charter should have the liberal construction that mercantile contracts should receive, in furtherance of the real intention of the parties; and all the provisions must be taken into consideration in determining the scope and effect of the charter as a whole.[92] A clause in a charter that any dispute is to be submitted to arbitration is not enforceable, and a breach of the agreement gives rise to nominal damages only. As admiralty does not recognize claims for nominal damages exceptions will be sustained to a libel claim-

91. Grimberg *v.* Columbia Packers' Assoc., 47 Oreg. 257, 83 Pac. 194, 114 Am. St. Rep. 927; The Progreso, 50 Fed. 835, 2 C. C. A. 45.

Construction of charter-party or bill of lading as to demurrage see *infra*, IX, A, 1.

Nature, construction, and effect of contract of affreightment in general see *infra*, VII, B, 1, a.

Matter expunged from a printed form used in drawing up a charter-party may be considered in determining the intention of the parties. One Thousand Bags of Sugar *v.* Harrison, 53 Fed. 828, 4 C. C. A. 34 [*affirming* 50 Fed. 116].

Written words override the printed form. Seagar *v.* New York, etc., Mail Steamship Co., 55 Fed. 324.

If a charter-party contains a technical phrase, subjecting the master to unusual duties, that phrase must be made clear by evidence; and if there are two constructions the master may adopt either without being guilty of a deviation. The John H. Pearson, 14 Fed. 749 [*reversed* on other grounds in 121 U. S. 469, 7 S. Ct. 1008, 30 L. ed. 979].

The term "voyage" includes the loading of the cargo (The Canon Park, 15 P. D. 203, 6 Aspin. 543, 59 L. J. P. D. & Adm. 74, 63 L. T. Rep. N. S. 356, 39 Wkly. Rep. 191), and also the discharge of the cargo (The Mary Adelaide Randall, 93 Fed. 222; The Glenochil, [1896] P. 10, 8 Aspin. 219, 65 L. J. P. D. & Adm. 1, 73 L. T. Rep. N. S. 416).

The word "about," used in a time charter in designating the length of the term, is applicable to an underlap and to an overlap on the exact term stated. If the voyage terminates so near the end of the fixed time as to make another voyage unreasonable, the charterer may deliver or the owner may withdraw the vessel, or, if another voyage is reasonable, the charterer may require it at the charter rate of freight. The Rygja, 161 Fed. 106, 88 C. C. A. 270 [*reversing* 149 Fed. 896]. But see The Tweedie Trading Co. *v.* Actiesselskabet Sangstad, — Fed. —.

The fixing of the value of the vessel in a charter is to be construed as having the meaning that the value agreed on was to be paid in case of default in returning. Sun Printing, etc., Assoc. *v.* Moore, 183 U. S. 642, 22 S. Ct. 240, 46 L. ed. 366.

A clause in a charter-party for cesser of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate. Burrill *v.* Crossman, 91 Fed. 543, 33 C. C. A. 663 [*reversed* on other grounds in 179 U. S. 100, 21 S. Ct. 38, 45 L. ed. 106].

The construction of a charter-party is for the court and not for the jury. Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 70 N. Y. Suppl. 956.

92. Leonard *v.* Bosch, 72 N. J. Eq. 131, 64 Atl. 1001 [*affirmed* in (1908) 71 Atl. 1134]; Roberts *v.* Opdyke, 40 N. Y. 259 (holding that a charter-party stipulating that the vessel should carry "seven hundred tons measurement of assorted cargo, or more, if that does not make her draw over fourteen feet of water," ought to be construed as meaning that the vessel shall not in any case be loaded so as to draw more than fourteen feet, and not as guaranteeing that she will carry seven huudred tons at least, and that then the charterer may put on additional cargo in case the aggregate does not make her draw more than fourteen feet); Crossman *v.* Burrill, 179 U. S. 100, 21 S. Ct. 38, 45 L. ed. 106; Raymond *v.* Tyson, 17 How. (U. S.) 53, 15 L. ed. 47; Bowers Hydraulic Dredging Co. *v.* Federal Contracting Co., 148 Fed. 290 [*affirmed* in 153 Fed. 879, 83 C. C. A. 52]; Falls of Keltie Steamship Co. *v.* U. S., etc., Steamship Co., 108 Fed. 416; The Helios, 108 Fed. 279 [*modified* in 115 Fed. 705, 53 C. C. A. 598]; American Steel-Barge Co. *v.* Cargo of Coal ex The City of Everett, 107 Fed. 964; Menantic Steamship Co. *v.* Peirce, 88 Fed. 308; Eddy *v.* Northern Steamship Co., 79 Fed. 361; The Progreso, 50 Fed. 835, 2 C. C. A. 45; The B. F. Bruce, 50 Fed. 118; The Hound, 12 Fed. Cas. No. 6,731 (holding that a provision in a charter-party that the vessel shall carry "all such lawful passengers" as charterers' agent shall think proper to ship must be construed to mean a reasonable number only, having regard to comfort and safety); Hulthen v. Stewart, [1903] A. C. 389, 9 Aspin. 403, 8 Com. Cas. 297, 72 L. J. K. B. 917, 89 L. T. Rep. N. S. 702, 19 T. L. R. 513 [*affirming* [1902] 2 K. B. 199, 7 Com. Cas. 139, 71 L. J. K. B. 624, 86 L. T. Rep. N. S. 397, 18 T. L. R. 429, 50 Wkly. Rep. 538]; Carlton Steamship Co. *v.* Castle Mail Packets Co., [1898] A. C. 486, 8 Aspin. 402, 67 L. J. Q. B. 795, 78 L. T. Rep. N. S. 661, 14 T. L. R. 469, 47 Wkly. Rep. 65; The Hollinside, [1898] P. 131, 3 Com. Cas. 100, 67 L. J. P. D. & Adm. 45, 14 T. L. R. 258, 46 Wkly. Rep. 639; Dimech *v.* Corlett, 12 Moore P. C. 199, 14 Eng. Reprint 887.

A charter which embodies and adopts another instrument by reference thereto is to be construed with reference to it. James *v.* Brophy, 71 Fed. 310, 18 C. C. A. 49.

ing damages for breach of agreement to arbitrate and the libel will be dismissed.[93] A custom or usage may be shown in evidence in a suit to determine the rights of the parties under the charter, where it is silent on the subject to which the custom relates, in order to place the court in the position of the parties when the charter was made;[94] but to entitle such custom to be read into the charter there must be

General provisions are governed by specific provisions.— Karran *v.* Peabody, 145 Fed. 166, 76 C. C. A. 136.

93. Munson *v.* Straits of Dover Steamship Co., 99 Fed. 787 [*affirmed* in 102 Fed. 926, 43 C. C. A. 57]; Ross *v.* Compagnie Commerciale de Transportation de Vapeur, 45 Fed. 207.

Particular phrases construed.— The term, "weather working day," when used in a charter-party, means a day, otherwise a working day, when the weather will reasonably permit the carrying on of the work contemplated. The India *v.* Donald, 49 Fed. 76, 1 C. C. A. 174. Quarantine regulations which interfere with the charter engagements of a vessel are within the clause excepting liability for results caused by restraints of princes, rulers, and people. Clyde Commercial Steamship Co. *v.* West India Steamship Co., 169 Fed. 275, 94 C. C. A. 551; The Santona, 152 Fed. 516; The Progreso, 50 Fed. 835, 2 C. C. A. 45. A clause of a charter-party providing that the vessel is to be "reported at the custom-house" by the charterers' agents or their appointees is not equivalent to a consignment to them, and does not give them the right to do the inward business of the ship. Mignano *v.* MacAndrews, 53 Fed. 958, 4 C. C. A. 6 [*affirming* 49 Fed. 376]. A guaranty of eight feet of water "at the place of loading," in a charter-party will be construed to mean eight feet, or at least a sufficient depth to enable the vessel to perform her voyage at the place of loading and thence to the open sea. Hart *v.* Shaw, 11 Fed. Cas. No. 6,155, 1 Cliff. 358. A provision in a charter of a steamship for the fruit trade that she "is to lay up for overhauling, two weeks each year, in winter, at time charterers designate," gives the charterers a right to have the vessel laid up annually, without paying hire, for two weeks, in the winter time, for the usual overhauling, but they cannot require her to lay up when all the circumstances show that the pretended layup is a subterfuge to evade payment of hire in the meantime. Wessels *v.* The Ceres, 72 Fed. 936, 19 C. C. A. 243 [*reversing* 61 Fed. 701]. A yacht is "laid up for repairs," within the provision of a charter-party, in such case allowing a rebate from the charter-money, where it is at rest, having some damage made good that in a material degree impaired its ability to pursue the voyage as a yacht, although the charterer may continue to eat and sleep and entertain friends on board. Dahlgren *v.* Whitaker, 124 Fed. 695. The use of the words "lawful passengers," in the charter of a ship for the purpose of carrying passengers between foreign countries, must be understood to refer to such description and number of persons as by law could be carried between the countries where the voyage was to begin and end. The Hound, 12 Fed. Cas. No. 6,731. A clause requiring the vessel to "sail 48 hours after orders are given." Rosasco *v.* Pitch Pine Lumber Co., 138 Fed. 25, 70 C. C. A. 455 [*affirming* 121 Fed. 437]. A stipulation in a charter-party that the cargo was to be discharged "with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours . . . according to the custom of the respective ports." Hulthen *v.* Stewart, [1903] A. C. 389, 9 Aspin. 403, 8 Com. Cas. 297, 72 L. J. K. B. 917, 89 L. T. Rep. N. S. 702, 19 T. L. R. 513 [*affirming* [1902] 2 K. B. 199, 7 Com. Cas. 139, 71 L. J. Q. B. 624, 86 L. T. Rep. N. S. 397, 18 T. L. R. 429, 50 Wkly. Rep. 538]. A sailing ship to proceed to a specified port and "in the usual and customary manner load in regular turn" coal from a certain named colliery or any other colliery the charterers might name. Barque Quilpue *v.* Brown, [1904] 2 K. B. 264, 9 Aspin. 596, 9 Com. Cas. 13, 73 L. J. K. B. 596, 90 L. T. Rep. N. S. 765. A clause in a charter-party that the vessel was to guarantee insurance at lowest regular rates. Leonard *v.* Bosch, 72 N. J. Eq. 131, 64 Atl. 1001 [*affirmed* in (1908) 71 Atl. 1134]. "Payment of hire shall cease until she be again in an efficient state to resume her service." The Queen Olga, 162 Fed. 490. The owner "shall provide and pay for all . . . consular charges, except those pertaining to the captain, officers, or crew." Owners liable for failure of master to secure bill of health. The Queen Olga, *supra*.

94. Perkins *v.* Jordan, 35 Me. 23; Barker *v.* Borzone, 48 Md. 474; Dahlgren *v.* Whitaker, 124 Fed. 695; The Helios, 115 Fed. 705, 53 C. C. A. 598 [*modifying* 108 Fed. 279]; Continental Coal Co. *v.* Birdsall, 108 Fed. 882, 48 C. C. A. 124; Straits of Dover Steamship Co. *v.* Munson, 95 Fed. 690 (holding that a charter of a steamer for a term of three months at a monthly hire, which gave the charterer the right to send her to any ports within certain named limits, from which it was customary for vessels to bring return cargoes, must be construed in the light of such usage, and as authorizing the charterer to make at least one complete voyage with return cargo, and he would not be compelled to return her unladen for the purpose of making delivery of her by the expiration of the term, where she was not delayed through his fault or negligence); Eddy *v.* Northern Steamship Co., 79 Fed. 361 (holding that parol evidence of a usage whereby lake navigation is considered as closing November 30 each year is admissible to show the termination on the date of a charter which requires the vessel to carry as many cargoes as she can between the date of the charter and the close of navigation for the season); The

no room to doubt its existence,[95] and it must be so general and long established that the parties are conclusively presumed to have contracted with reference to it;[96] and it must be reasonable, certain, and consistent with the contract, and is not allowed to vary its express terms;[97] nor is it permissible to incorporate a custom into an express charter in writing the terms of which are neither technical nor ambiguous;[98] and in the absence of fraud or misrepresentation in the inception of a charter-party, the owner and charterers must be governed by its express terms.[99] Where the provisions of the charter are inharmonious, the general intent, as evidenced by its written portions and its evident leading purpose, should control the minor provisions,[1] and parol evidence is admissible to explain the written contract by applying it to the subject of it,[2] the common-law doctrine of bailment and common carriers being applicable.[3] Representations as to measurement, capacity, and tonnage are to be taken as merely descriptive, when the contract taken as a whole shows that the real consideration was the actual carrying capacity of the vessel;[4] and representations by an owner prior to a charter as to the speed of his vessel, which are not embodied in the charter, are superseded by that instrument, in the absence of fraud or mutual mistake;[5] but the rule is otherwise when the representations amount to a warranty or guarantee, or where the misdescription is so gross as to amount to fraud.[6] Exceptions in a

Principia, 34 Fed. 667 (holding that the phrase "working hours," in a clause of a charter-party, means those hours during which work is ordinarily done about the business to which the clause relates, and is to be construed according to the custom of the port as to the working and hauling of vessels in loading and discharging); Turnbull *v.* Citizens' Bank, 16 Fed. 145, 4 Woods 193; Aktieselkab Helios *v.* Ekman, [1897] 2 Q. B. 83, 8 Aspin. 244, 2 Com. Cas. 163, 66 L. J. Q. B. 538, 76 L. T. Rep. N. S. 537. See Hart *v.* Leach, 21 Fed. 77, holding that under a charter-party which provides for "ballast outward, and a cargo of fruit back," owners of the vessel cannot be held liable for the loss of gold coin intrusted to the master, unless the charter is controlled by usage. *Compare* Hall *v.* Hurlbut, 11 Fed. Cas. No. 5,936, Taney 589, holding that the fact that it is a usage of a special line of trade to ship certain goods at a particular season of the year cannot be permitted to affect the construction of a charter-party not naming the date of shipment, although made with reference to that season, but which, from unforeseen and unavoidable mishaps, it has been impracticable to carry out at the time intended.

95. Continental Coal Co. *v.* Birdsall, 108 Fed. 882, 48 C. C. A. 124.

96. Continental Coal Co. *v.* Birdsall, 108 Fed. 882, 48 C. C. A. 124, holding that a charter, which by its terms required the charterer to "provide and furnish the vessel a full and complete cargo of coal," cannot be held to exempt him from such requirement on account of a strike among coal miners, merely upon the testimony of coal operators that such was the custom of the port where no provision to the contrary was made in the charter, when no one of the witnesses ever knew of a case in which a charterer had been so relieved, and as against the testimony of other witnesses of longer experience that no such custom existed.

97. Holloway *v.* McNear, 81 Cal. 154, 22 Pac. 514; Barker *v.* Borzone, 48 Md. 474; The Clintonia, 104 Fed. 92; Turnbull *v.* Citizens' Bank, 16 Fed. 145, 4 Woods 193; Lindsay *v.* Cusimano, 10 Fed. 302 [*affirmed* in 12 Fed. 503], holding that where a charter-party provides that the cargo will be discharged with "customary despatch," a custom of the port authorizing certain delays does not operate to permit the consignee voluntarily to delay the discharge in violation of the express terms of the contract.

A custom requiring the vessel to overload has no effect on the construction of a charter-party. Macy *v.* Perry, 99 Fed. 1004, 40 C. C. A. 217 [*affirming* 91 Fed. 671]; The Hound, 12 Fed. Cas. No. 6,731.

98. Sorensen *v.* Keyser, 51 Fed. 30, 2 C. C. A. 92.

99. The South America, 27 Fed. 386.

Waiver of precedent agreements.— By the execution of a charter-party all antecedent verbal agreements inconsistent with its terms are waived, and the charter-party becomes the only competent evidence of the contract between the parties. Barclay *v.* Holme, 2 Fed. Cas. No. 974. But see Webster *v.* Vogel, 62 Ill. 184.

1. The Chadwicke, 29 Fed. 521.

2. Almgren *v.* Dutilh, 5 N. Y. 28.

3. Gracie *v.* Palmer, 8 Wheat. (U. S.) 605, 5 L. ed. 696.

A charterer is not authorized as such to make insurance for the owners. Sawyer *v.* Freeman, 35 Me. 542.

4. Lovell *v.* Davis, 101 U. S. 541, 25 L. ed. 944; Rawson *v.* Lyon, 23 Fed. 107; Watts *v.* Camors, 10 Fed. 145 [*affirmed* in 115 U. S. 353, 6 S. Ct. 91, 29 L. ed. 406]. See Ashburner *v.* Balchen, 7 N. Y. 262.

5. Matthias *v.* Beeche, 111 Fed. 940.

6. Behn *v.* Burness, 3 B. & S. 751, 9 Jur. N. S. 620, 32 L. J. Q. B. 204, 8 L. T. Rep. N. S. 207, 11 Wkly. Rep. 496, 113 E. C. L. 751.

bill of lading or charter-party, inserted by the ship-owner for his own benefit, are to be construed most strongly against him.[7]

2. As Affected by Bill of Lading. As between the charterer and the owner, the charter-party, and not the bill of lading, is the controlling document.[8] Bills of lading which do not refer to the charter-party do not, as between the ship-owner and the charterer, operate as new contracts, and their stipulations do not supersede the provisions of the charter-party on the same subject.[9] Unless there is sufficient evidence of a waiver of the provisions of the charter, or of some new contract, mere loose and inharmonious expressions in the bill of lading which refer to the charter will not supersede the latter, as respects matters which the charter was clearly designed to cover.[10] Where terms of the charter-party are specifically incorporated by reference in the bill of lading, the charter-party terms are to be looked to for the contract of the parties.[11] The *bona fide* indorsee of a bill of lading is not affected by the provisions of a charter-party, of which he has no knowledge or notice to put him on inquiry. He is liable for freight only according to the provisions of the bill of lading.[12] Where the charter-party requires the master to sign shippers' bills of lading as presented, without prejudice to the charter-party, he is bound to sign any usual bill presented, describing goods actually delivered to the vessel, and a refusal to do so is a breach of the charter-party which entitles the shipper to such damages as may be shown.[13] But the master is not required to sign erroneous bills;[14] nor does the provision require the

7. Compania de Navigacion la Flecha *v.* Brauer, 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398. See Speeding *v.* Hard, 80 Fed. 933, 26 C. C. A. 261.

8. Huron Barge Co. *v.* Turney, 71 Fed. 972; The Energia, 66 Fed. 604, 13 C. C. A. 653 (holding that a stipulation in the printed form of a bill of lading that the carrier's liability is to be determined by the laws of England, even if valid, is ineffective, where the instrument was given under a charter which contained no such clause, and the evidence shows that there was no such intention of making a different contract by the bills of lading from that in the charter-party); Ardan Steamship Co. *v.* Theband, 35 Fed. 620; The Chadwicke, 29 Fed. 521; Higgins *v.* Watson, 12 Fed. Cas. No. 6,470; Two Hundred and Sixty Hogsheads of Molasses, 24 Fed. Cas. No. 14,296, 1 Hask. 24 (holding that the bill of lading between such parties is but evidence of the shipping of the merchandise pursuant to the contract, and any of the terms in conflict with the charter-party will not supersede or control that contract); Willett *v.* Phillips, 29 Fed. Cas. No. 17,683, 8 Ben. 459 (holding that stipulations in bills of lading as to perils of the seas cannot affect the rights of the charterer under the charter-party, which does not contain such exceptions). And see Cobb *v.* Blanchard, 11 Allen (Mass.) 409.

But bills of lading issued by the master under charterer's instructions to third parties bind the ship and owners to third parties and the latter may not be affected by charter provisions. Robinson *v.* Holst, 96 Ga. 19, 23 S. E. 76.

A provision in a charter-party that bills of lading are to be binding upon master and owners as proof of quantity delivered to the ship makes the bills conclusive, evidence on that point. Rhodes *v.* Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859; The Sikh, 175 Fed. 869; Sawyer *v.* Cleveland Iron Min. Co., 69 Fed. 211, 16 C. C. A. 191; Lightburne *v.* The Tongoy, 55 Fed. 329.

9. The Iona, 80 Fed. 933, 26 C. C. A. 261 (holding that a provision in the charter-party that charterer's responsibility is to cease as soon as the cargo is all on board and bills of lading signed does not operate to release the ship from responsibility at that time; and a provision in the charter-party that cargoes are to be delivered according to the custom of the port still binds the ship); Ardan Steamship Co. *v.* Theband, 35 Fed. 620; The Chadwicke, 29 Fed. 521; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,020, 1 Sprague 343; Wagstaff *v.* Anderson, 5 C. P. D. 171, 49 L. J. C. P. 485, 42 L. T. Rep. N. S. 720, 28 Wkly. Rep. 856; Faith *v.* East India Co., 4 B. & Ald. 630, 23 Rev. Rep. 423, 6 E. C. L. 630, 106 Eng. Reprint 1067; Gledstanes *v.* Allen, 12 C. B. 202, 74 E. C. L. 202.

10. The Chadwicke, 29 Fed. 521.

11. The Ethel, 8 Fed. Cas. No. 4,540, 5 Ben. 154.

12. The Querini Stamphalia, 19 Fed. 123.

13. Lightburne *v.* The Tongoy, 55 Fed. 329.

A charter-party, stipulating that demurrage shall be paid day by day and that the master shall sign bills of lading, requires the master to sign bills, although demurrage may be at the time due and unpaid. The Mispah, 17 Fed. Cas. No. 9,648, 5 Reporter 519.

14. Lightburne *v.* The Tongoy, 55 Fed. 329; The Peer of the Realm, 19 Fed. 216.

Notice to a shipper of a charter-party has not the effect of incorporating into the bill of lading terms inconsistent therewith which the captain was not bound by the charter-party to embody in the bill of lading. Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826, 9 Aspin. 588, 74 L. J. P. C. 17, 91 L. T. Rep. N. S. 216, 20 T. L. R. 599.

master to sign them in any form the charterers may choose. He is only required to sign bills lawfully and rightfully presented under the charter provisions.[15]

3. Conflict of Laws. The intention of the parties controls as to the law governing the interpretation of charter-parties,[16] and complying with a presumed intention, the law of the flag has been applied in some cases.[17] In other cases the *lex loci contractus* [18] has been applied, and it will be considered to be the same as that of the forum, when it does not otherwise appear.[19]

E. Charterer as Owner Pro Hac Vice — 1. In General. If by the terms of a charter, or necessary intendment of the parties, the entire vessel is left to the charterer, with a transfer to him of its command and possession, and consequently of control over its navigation, he will generally be considered as owner *pro hac vice*, that is, as owner for the voyage or service stipulated, as to parties dealing with him in such capacity,[20] whether the letting is in writing or by

15. McPherson *v.* Cox, 86 N. Y. 472 [*reversing* 21 Hun 493]; Wyman *v.* The Sprott, 70 Fed. 327.

16. The Wilhelm Schmidt, 25 L. T. Rep. N. S. 34, 1 Aspin. 82.

17. The Express, L. R. 3 A. & E. 597, 1 Aspin. 355, 41 L. J. Adm. 79, 26 L. T. Rep. N. S. 956.

Prima facie, the law of the place where a contract is made is that on which the parties are presumed to have dealt; but a contract of affreightment made between persons of different nationalities, in a place where both of them were foreigners, to be performed partly there by the ship breaking ground in order to start for the port of lading, a place where both parties would also have been foreigners; partly at the latter port, by taking the cargo on board; and partly on board the ship at sea, subject there to the laws of the country of the ship; and partly by final delivery at the port of discharge, is to be construed by the law of the nation of the ship. Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602, 118 E. C. L. 100 [*followed* in *In re* Missouri Steamship Co., 42 Ch. D. 321, 6 Aspin. 423, 58 L. J. Ch. 721, 61 L. T. Rep. N. S. 316, 37 Wkly. Rep. 696].

18. China Mut. Ins. Co. *v.* Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576 [*affirming* 20 N. Y. Suppl. 796]; Adler *v.* Galbraith, etc., Co., 156 Fed. 259; The San Roman, L. R. 5 P. C. 301, 1 Aspin. 603, 42 L. J. Adm. 46, 28 L. T. Rep. N. S. 381, 21 Wkly. Rep. 393]; Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602, 118 E. C. L. 100; The Industrie, [1894] P. 58, 7 Aspin. 457, 63 L. J. P. D. & Adm. 84, 70 L. T. Rep. N. S. 791, 6 Reports 681, 42 Wkly. Rep. 280.

19. Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311.

20. *Louisiana.*— Fish *v.* Sullivan, 40 La. Ann. 193, 3 So. 730 (as where under a charter-party there is an entire surrender by the owner of the vessel to the charterer, who hires the vessel as one hires a house, takes her empty, and provides officers, crew, provisions, etc.); Wilkinson *v.* Dalferes, 27 La. Ann. 379.

Maine.— McLellan *v.* Reed, 35 Me. 172.

Michigan.— Marquette First Nat. Bank *v.* Stewart, 26 Mich. 83.

New York.— Rosenstein *v.* Vogemann, 102 N. Y. App. Div. 39, 92 N. Y. Suppl. 86 [*affirmed* in 184 N. Y. 325, 77 N. E. 625] (holding that where a time charter-party provided that the captain, although appointed by the owners, should be under the orders of the charterers as regarded employment, agency, or other arrangements, and the charterers agreed to indemnify the owners from all liabilities arising from the captain's signing bills of lading, the charterers were to be regarded as owners as between themselves and shippers); Hagar *v.* Clark, 12 Hun 524.

Oregon.— Grimberg *v.* Columbia Packers' Assoc., 47 Oreg. 257, 83 Pac. 194.

United States.— Leary *v.* U. S., 14 Wall. 607, 20 L. ed. 756; Hills *v.* Leeds, 149 Fed. 878 [*affirmed* in 158 Fed. 1020, 85 C. C. A. 489]; The Del Norte, 111 Fed. 542 [*affirmed* in 119 Fed. 118, 55 C. C. A. 220] (holding also that a provision in a charter, giving the master authority to control the operations of the vessel in towing barges, and expressly exempting the owner from liability for the abandonment of any tow where, in the judgment of the master, the safety of the vessel required such abandonment, did not confer on the master any powers he would not otherwise have had, or change the relation of the charterer to the ship as owner *pro hac vice*, and it gave him no claim on the vessel on account of the wrongful act of the master in abandoning a barge without necessity); American Steel Barge Co. *v.* Cargo of Coal, 107 Fed. 964 [*reversed* on other grounds in 115 Fed. 670]; Donahoe *v.* Kettell, 7 Fed. Cas. No. 3,980, 1 Cliff. 135; Drinkwater *v.* Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145 (holding that a stipulation to victual and man a vessel, pay all port charges, and deliver her to her owner at the end of the voyage makes the charterer owner for the voyage, although one of the owners was named as master); Hill *v.* The Golden Gate, 12 Fed. Cas. No. 6,491 [*affirming* 12 Fed. Cas. No. 6,492, Newb. Adm. 308]; Winter *v.* Simonton, 30 Fed. Cas. No. 17,894, 3 Cranch C. C. 104 (holding that an agreement for the hire of a vessel for a given term at a certain rate per month, the vessel being manned and victualed by the owners, the hirer paying port charges and pilotage, makes the hirer owner *pro hac vice*). But see Clyde Commercial Steamship Co. *v.* West India Steamship Co., 169 Fed.

parol.[21] The general owner is not a common carrier, but a bailee to transport for hire,[22] and the charter is a contract for the lease of the vessel.[23] The officers and crew are servants of the charterer, and the charterer becomes the carrier of the goods shipped, and in procuring freight the master is then the agent of the charterer,[24] and the general owner is not responsible for the contracts of the master or charterer if the creditor has notice of such charter-party,[25] particularly where the charter expressly makes the master the agent of the charterer.[26] If the charter-party lets only the use of the vessel, the owner at the time retaining the command and possession and control over its navigation, the charterer is regarded as a contractor for a designated service, the charter-party being a mere contract of affreightment and the duties and responsibilities of the owner are not changed, and the charterer is not clothed with the character or responsibility of ownership.[27] A special ownership does not pass, although the terms of the instrument are "let and hired,"

275, 94 C. C. A. 551; Golcar Steamship Co. *v.* Tweedie Trading Co., 146 Fed. 563.

England.— Meiklereid *v.* West, 45 L. J. M. C. 91, 1 Q. B. D. 428, 3 Aspin. 129, 34 L. T. Rep. N. S. 353, 24 Wkly. Rep. 703; Reeve *v.* Davis, 1 A. & E. 312, 3 N. & M. 873, 28 E. C. L. 159.

See 44 Cent. Dig. tit. "Shipping," § 149.

But he is not such in a contest with the actual owners for the value of the vessel and on the terms of the charter-party. Wilkinson *v.* Dalferes, 27 La. Ann. 379.

21. Swanton *v.* Reed, 35 Me. 176; McLellan *v.* Reed, 35 Me. 172.

22. Gracie *v.* Palmer, 8 Wheat. (U. S.) 605, 5 L. ed. 696; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,020, 1 Sprague 343.

23. Leary *v.* U. S., 14 Wall. (U. S.) 607, 20 L. ed. 786.

24. Donahoe *v.* Kettell, 7 Fed. Cas. No. 3,980, 1 Cliff. 135; Richardson *v.* Winsor, 20 Fed. Cas. No. 11,795, 3 Cliff. 395.

25. Reynolds *v.* Toppan, 15 Mass. 370, 8 Am. Dec. 110; Urann *v.* Fletcher, 1 Gray (Mass.) 125; Marquette First Nat. Bank *v.* Stewart, 26 Mich. 83; Devoe *v.* The Fashion, 7 Fed. Cas. No. 3,844; Hill *v.* Golden Gate, 12 Fed. Cas. No. 6,491 [*affirming* 12 Fed. Cas. No. 6,492, Newb. Adm. 308].

26. The Shadwan, 49 Fed. 379 [*affirmed* in 55 Fed. 1002, 5 C. C. A. 381].

27. *Georgia.*— Swift *v.* Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101.

Maine.— Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268.

Missouri.— Adams *v.* Homeyer, 45 Mo. 545, 100 Am. Dec. 391, holding that where a charter-party provides that the owner of a vessel shall appoint the captain to command and run the vessel, such provision clearly indicates the intention on the part of the owner to retain control and possession of the vessel.

New York.— Hagar *v.* Clark, 78 N. Y. 45 [*reversing* 12 Hun 524]; Brown *v.* Gray, 70 Hun 261, 24 N. Y. Suppl. 61; Holmes *v.* Pavenstedt, 5 Sandf. 97; McIntyre *v.* Bowne, 1 Johns. 229.

Oregon.— Multnomah County *v.* Willamette Towing Co., 49 Oreg. 204, 89 Pac. 389; Grimberg *v.* Columbia Packers' Assoc., 47 Oreg. 257, 83 Pac. 194, 114 Am. St. Rep. 927, holding that a charter-party binding the owner to keep the vessel during the voyage well fitted, tackled, etc., giving the charterer the sole use of the vessel, except the private apartments of the master in the cabin, and providing that no goods shall be laden on board, except for the charterers, gives the owner an oversight over the vessel during the voyage, and binds him to engage in freighting her, and is inconsistent with a demise of her to the charterer.

United States.— Leary *v.* U. S., 14 Wall. 607, 20 L. ed. 756 (holding that stipulations in a charter-party that the general owners shall keep the vessel in good condition during the existence of the charter, and receive on board certain goods at the request of the government, the charterer, and refuse to receive other goods without its assent, is conclusive evidence that the possession and control of the vessel had not passed to the charterer, but had been retained by the general owner); Marcardier *v.* Chesapeake Ins. Co., 8 Cranch 39, 3 L. ed. 481; The Del Norte, 111 Fed. 542 [*affirmed* in 119 Fed. 118, 55 C. C. A. 220]; American Steel-Barge Co. *v.* Cargo of Coal, 107 Fed. 964 [*reversed* on other grounds in 115 Fed. 669]; *In re* Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589; Donahoe *v.* Kettell, 7 Fed. Cas. No. 3,980, 1 Cliff. 135; Eames *v.* Cavaroc, 8 Fed. Cas. No. 4,238, Newb. Adm. 528; Kleine *v.* Catara, 14 Fed. Cas. No. 7,869, 2 Gall. 61; Richardson *v.* Winsor, 20 Fed. Cas. No. 11,795, 3 Cliff. 395 (holding that the charter-party is a mere contract of affreightment, where the owners agree to keep the vessel tight, staunch, fitted, and provisioned, and to receive on board such lawful goods as the charterers or their agents may think proper to ship); The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551 (holding that the general owner is owner for the voyage, if the vessel is navigated at his expense and by his master and crew, and especially where he retains a part of the vessel for his own use); Weston *v.* Minot, 29 Fed. Cas. No. 17,453, 3 Woodb. & M. 475 (holding that where it was agreed that the charterers should not pay for steam to tow the vessel to sea, unless they ordered it, and steam was used to tow the vessel without their order, but after they had loaded her to a depth beyond seventeen feet, and the port regulations did not require the pilots to take vessels to sea without steam when loaded beyond that

and the hirer agrees to pay a gross sum.[28] Under these circumstances the master is the owner's agent and the latter is charged with his acts and contracts.[29] So, although the charterer agrees to provide and pay all port charges, it has been held that the owner is liable for delay to the vessel or a fine imposed for failure of the master to secure a bill of health.[30] Where the officers of the vessel are agents of the owners as to certain matters, and of the charterers as to others, they will be regarded as agents of one party or the other according to the work on which they are engaged.[31] The inclination of courts is to construe a charter-party as a contract of affreightment, charging the ship-owners as carriers, and not as a demise of the vessel, unless its tenor clearly calls for the latter construction;[32] and the general owner of a ship will be deemed owner for the voyage where the intention of the parties in that respect is indefinite on the face of the charter-party;[33] and a charter-party will not be construed as a demise of the ship, unless the possession is transferred to the charterer, even where the whole capacity of the vessel is let.[34] But where the entire capacity of the vessel is chartered to one party, the owner becomes a special and not a common carrier, and may contract against consequences of his servants' negligence.[35]

2. Liability of Charterer — a. For Repairs and Supplies. As a general rule the owner is liable for all supplies furnished his ship, the presumption being that she is navigated for his benefit;[36] but if the charterer is owner *pro hac vice*,[37] he is

depth, the charterers were not to be liable to pay for the steam).

See 44 Cent. Dig. tit. "Shipping," § 149 *et seq.*

The test generally is whose servants are to be in charge, if the ship-owner's, he is a carrier of the charterer's goods, if the charterer's, then the ship-owner is not a carrier but a letter of personal property and the contract one of hiring. Weir *v.* Union Steamship Co., [1900] A. C. 525, 9 Aspin. 111, 5 Com. Cas. 363, 69 L. J. Q. B. 809, 82 L. T. Rep. N. S. 91; Schreibler Baumwoll Mfg. Co. *v.* Furness, [1893] A. C. 8, 7 Aspin. 263, 62 L. J. Q. B. 201, 68 L. T. Rep. N. S. 1, 1 Reports 59; Manchester Trust *v.* Furness, [1895] 2 Q. B. 539, 8 Aspin. 57, 64 L. J. Q. B. 766, 73 L. T. Rep. N. S. 110, 14 Reports 739, 44 Wkly. Rep. 178. But this test is not conclusive. See cases cited *supra*, note 20 *et seq.*

28. The Argyle *v.* Worthington, 17 Ohio 460; Grimberg *v.* Columbia Packers' Assoc., 47 Oreg. 257, 83 Pac. 194, 114 Am. St. Rep. 927 (holding that a provision in a charter-party, whereby the charterer covenants to charter and hire a vessel and to pay for the charter, including the captain's salary, during the voyage, a specified sum on the acceptance of the vessel and a specified sum per month until the vessel is discharged of her cargo, is not inconsistent with a contract of affreightment only, where the provision is contained in a covenant on the part of the charterer, and the owner has not on his part employed any words operative as a demise); Palmer *v.* Gracie, 18 Fed. Cas. No. 10,692, 4 Wash. 110 [*reversed* on other grounds in 8 Wheat. 605, 5 L. ed. 696].

29. Hooe *v.* Groverman, 1 Cranch (U. S.) 214, 2 L. ed. 86; The Nicaragua, 72 Fed. 207, 18 C. C. A. 511 [*affirming* 71 Fed. 723, holding that the master is the owner's agent, charged with the duty of getting proper entrance permits to the ports within the charter limits; and, for his default therein, the ship and her owner are liable.

30. Dunlop Steamship Co. *v.* Tweedie Trading Co., 178 Fed. 673.

31. Bull *v.* New York, etc., Steamship Co., 167 Fed. 792, 93 C. C. A. 182; The Endsleigh, 124 Fed. 858; The Turgot, 11 P. D. 21, 5 Aspin. 548, 54 L. T. Rep. N. S. 276, 34 Wkly. Rep. 552.

32. Hagar *v.* Clark, 78 N. Y. 45 (holding that in the absence of any clear and determinate transfer of the rights and authority of the general owners of a vessel chartered for a voyage, the same will be deemed continued, the presumption being against such a transfer, and the charterer cannot be held as special owner for the voyage until the entire command and possession of the vessel, and consequent control over its navigation, have been surrendered); Grimberg *v.* Columbia Packers' Assoc., 47 Oreg. 257, 83 Pac. 194, 114 Am. St. Rep. 927 (holding that the word "freighting" in a charter-party, whereby the owner of a vessel agrees on the "freighting" and chartering thereof to the charterer for one voyage, means a loading with goods for transportation, and does not indicate a demise of the vessel to the charterer); Reed *v.* U. S., 11 Wall. (U. S.) 591, 20 L. ed. 220; Richardson *v.* Winsor, 20 Fed. Cas. No. 11,795, 3 Cliff. 395. See Husten *v.* Richards, 44 Me. 182.

33. The Aberfoyle, 1 Fed. Cas. No. 16, Abb. Adm. 242; *In re* Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589.

34. The Erie, 8 Fed. Cas. No. 4,512, 2 Ware 225.

35. The Fri, 154 Fed. 333, 83 C. C. A. 205.

36. Jones *v.* Blum, 2 Rich. (S. C.) 475, holding that the question in each case is to whom was the credit given. See Woolsey *v.* Funke, 121 N. Y. 87, 24 N. E. 191. And see *supra*, III, E, 1.

37. See *supra*, III, E, 1.

liable for repairs, materials, and supplies for the vessel,[38] and the owner is absolved from liability therefor,[39] although he has reserved the right to terminate the charter-party at any time.[40]

b. For Torts. The general rules above stated [41] apply to liability of owner or charterer for tort.[42] The charterers when owners for the voyage are liable for negligence in the running of the vessel.[43] On the other hand, if there is a time charter which does not amount to a demise, and the owner undertakes to supply winches and men to work them, and an accident is caused through the winchman's negligence to a stevedore employed by the charterer in loading or unloading cargo, the charterer, and not the owner, would be liable. For the work with respect to the cargo is that of the charterer and he is responsible for the instrumentality used to carry on the work, no matter by whom supplied.[44] The duty of the owner is satisfied if he supplies a competent man to drive the winch;[45] and in such case the owner is not liable to the charterer for the cost of a winchman supplied from shore because the ship's man, because of objection by labor unions or for any other reason, is *persona non grata* to the stevedores or the charterers.[46] If the contract is one of affreightment merely, the owners and not the charterers are the ones to be charged.[47] As in other cases [48] the presumption is against the charterer being owner *pro hac vice*.[49] But the owner of a vessel who secretly charters her to another, concealing the fact from the officers and hands of the boat, will be

38. *Alabama.*— Finnegan *v.* Frank, 67 Ala. 21.

Louisiana.— Fish *v.* Sullivan, 40 La. Ann. 193, 3 So. 730.

Maine.— Swanton *v.* Reed, 35 Me. 176.

Massachusetts.— Goodridge *v.* Lord, 10 Mass. 483.

South Carolina.— Jones *v.* Blum, 2 Rich. 475.

United States.—McCarthy *v.* Eggers, 1 Fed. 478 [*reversing* 15 Fed. Cas. No. 8,681, 8 Ben. 688].

See 44 Cent. Dig. tit. "Shipping," § 151.

The master of a vessel, who is also the charterer and has stipulated to furnish her with all the requisite stores and material, is exclusively responsible for supplies purchased by him from one who is chargeable with notice of the facts. Mott *v.* Ruckman, 17 Fed. Cas. No. 9,881, 3 Blatchf. 71.

39. Perry *v.* Osborne, 5 Pick. (Mass.) 422; Jones *v.* Blum, 2 Rich. (S. C.) 475; McCarthy *v.* Eggers, 1 Fed. 578 [*reversing* 15 Fed. Cas. No. 8,681, 10 Ben. 688]. See The Kate, 164 U. S. 458, 17 S. Ct. 135, 41 L. ed. 512; The Secret, 15 Fed. 480 (holding that where charterers of a vessel had no authority to bind her owners or the vessel for a supply of coal in a foreign port, as could have been easily learned if diligence had been used, a vendor may not hold the vessel for such supplies, although the charterer represented that the coal was intended for the ship); Campbell *v.* The Alknomac, 4 Fed. Cas. No. 2,350, Bee 124.

40. Rich *v.* Jordan, 164 Mass. 127, 41 N. E. 56.

41. See *supra*, III, E, 1, a.

42. See cases cited *infra*, this section.

The owner of a vessel is not liable for barratry of the captain and crew beyond the sum mentioned in the charter-party. Campbell *v.* Alknomac, 4 Fed. Cas. No. 2,350, Bee 124.

43. Sherman *v.* Fream, 30 Barb. (N. Y.) 478; The Barnstable, 181 U. S. 464, 21 S. Ct. 684, 45 L. ed. 954; Posey *v.* Scoville, 10 Fed. 140, explosion of the boilers. And see Ferguson *v.* The Terrier, 73 Fed. 265, holding that where the owners of a chartered vessel appoint the officers and crew and retain control, the vessel will remain liable for the injury to a stevedore, working in the hold beneath an open hatch, by the dropping down of a board upon him by a member of the crew of the ship.

Under Ky. Rev. St. p. 202, providing that a boat "and owner" shall be liable for any damage unlawfully done by her to any other boat or property through the wilful or negligent conduct of her officers or crew, the boat and owners are equally liable for damages in case of a collision, whether the officers and crew were acting for the owners of the boat or for charterers of the boat at the time of the injury. Sparks *v.* The Kate French, 3 Metc. 533.

44. See The Volund, —— Fed. ——, Aug. 1910.

45. The Elton, 142 Fed. 367, 73 C. C. A. 467.

46. Constantine, etc., Steamship Co. *v.* Tweedie Trading Co., 159 Fed. 706, 86 C. C. A. 574.

47. Bissell *v.* Torrey, 60 N. Y. 635 [*affirming* 65 Barb. 188] (holding that while one engaged in the business of towing boats by a steamer chartered by him for that purpose may be liable for breach of contract, he is not liable, in an action for negligence, for injuries to a boat resulting from the negligence of those navigating the steamer; the owner retaining possession and general control, and the direction of its master and crew); Sherman *v.* Fream, 30 Barb. (N. Y.) 478.

48. See *supra*, III, E, 1.

49. Ross *v.* Charleston, etc., Transp. Co., 42 S. C. 447, 20 S. E. 285.

liable to third persons for injuries caused by the negligence of the officers and hands in the management of the boat, if a sufficient legal excuse for the secrecy is not given, so as to remove the presumption of fraud, rendering the charter-party void as against third persons.[50]

c. For Injury to or Non-Delivery of Goods. The shipper under an ordinary bill of lading has his remedy against the ship, whether the charter is one where the owner retains possession and command, or whether the control and navigation pass to the charterer; but whether the owner or the charterer is ultimately liable depends on the terms of the charter-party.[51] It is immaterial, however, to the question of liability whether the owner receives for the use of the vessel a stipulated sum or a share of its earnings. In either case the party who by the contract with the owner is entitled to the possession and command of the vessel is liable for not delivering goods.[52] If the charterer is owner *pro hac vice*, he alone is personally liable for injury to or non-delivery of the cargo,[53] unless the owner has by his conduct induced a reasonable belief in the shipper that the vessel was to sail on his account, and under his direction and control.[54] Under the ordinary form of time charter which does not operate as a demise where the owner controls the actual navigation of the vessel in going on the voyages ordered by the charterer, the latter, as between the ship-owner and charterer, is responsible for claims for damage to or shortage of cargo.[55] Where the charterer agrees to supply and pay for the coal the officers are his agents as to the coal and the ship-owner would not be liable to the charterer for loss or misappropriation of the coal,[56] and is in addition liable to the charterer for any damage to cargo by his servants;[57] and the owners of a chartered vessel, retaining control of her navigation, are liable for injuries to a part of the cargo occasioned by unaccustomed and dangerous goods subsequently taken aboard.[58] But neither the charterer nor owner is liable for injury to the cargo by employees of the shipper.[59]

F. Seaworthiness and Fitness of Vessel — 1. Rule Stated. Every one, either as owner or chartered owner, who offers a vessel for freight or charter is bound to furnish one that is stanch, tight, and seaworthy,[60] and to keep her in

50. New Haven Steamboat, etc., Co. *v.* Vanderbilt, 16 Conn. 420.

51. Richardson *v.* Winsor, 20 Fed. Cas. No. 11,795, 3 Cliff. 395. And see The T. A. Goddard, 12 Fed. 174, holding that the master is chargeable with knowledge of the shipper's rights, and the vessel is liable *in rem* for damages to cargo through dangerous goods, although such dangerous goods were taken on at the request of the charterer.

52. Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268; Tuckerman *v.* Brown, 17 Barb. (N. Y.) 191; Richardson *v.* Winsor, 20 Fed. Cas. No. 11,795, 3 Cliff. 395.

53. Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79; Cutler *v.* Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385 (where the master chartered the vessel under circumstances making him owner *pro hac vice*); Reynolds *v.* Toppan, 15 Mass. 370, 8 Am. Dec. 110; Richardson *v.* Winsor, 20 Fed. Cas. No. 11,795, 3 Cliff. 395.

54. Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79.

55. Clyde Commercial Steamships *v.* U. S. Shipping Co., 152 Fed. 516.

56. The Endsleigh, 124 Fed. 858.

In the case of a time charter in the ordinary form, not operating as a demise of the ship, the contracts contained in bills of lading signed by the captain are made with the ship-owner and not with the charterer, notwithstanding that, by the terms of the time charter, the captain is to be under the orders and direction of the charterer as regards agency, employment, and other arrangements. Wehner *v.* Dene Steam Shipping Co., [1905] 2 K. B. 92, 10 Com. Cas. 139, 74 L. J. K. B. 550, 21 T. L. R. 339.

57. The Craigallion, 20 Fed. 747.

58. The T. A. Goddard, 12 Fed. 174.

59. The Miletus, 17 Fed. Cas. No. 9,545, 5 Blatchf. 335 [*affirming* 29 Fed. Cas. No. 17,461], holding that where, under a special clause in a charter-party, stevedores, selected as agents of the shippers of a cargo, discharge it, the loss or damage done to the cargo by such stevedores in discharging it falls upon the shipper.

60. Mississippi Agricultural Bank *v.* The Jane, 19 La. 1; Lyon *v.* Tiffany, 76 Mich. 158, 42 N. W. 1098; Work *v.* Leathers, 97 U. S. 379, 24 L. ed. 1012 [*affirming* 29 Fed. Cas. No. 17,415, 1 Woods 271]; The New York, 93 Fed. 495; McCann *v.* Conery, 11 Fed. 747; Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368; Wilson *v.* Griswold, 30 Fed. Cas. No. 17,806, 9 Blatchf. 267, holding that there is an implied covenant of seaworthiness where a vessel is let by a charter-party under seal for the transportation of goods, although the charterer is to man,

proper repair, unless prevented by perils of the sea or unavoidable accident.[61] In such case, although the charterer may have undertaken to provide and pay for the coal, the ship-owner is liable for failure of the master to notify the charterer of

victual, and navigate the vessel. But see Cook *v.* Gowan, 15 Gray (Mass.) 237 (holding that a covenant in a charter-party that the vessel "shall be kept tight, stanch, well fitted and tackled" for a voyage contains no implied warranty of seaworthiness; and if the vessel is made seaworthy as soon as her unseaworthiness is discovered there is no breach of covenant); Swift *v.* Tross, 55 How. Pr. (N. Y.) 255 (holding that the charterer of a vessel, executing a sub-charter containing an agreement that the vessel was seaworthy, was liable for damages resulting from a breach of the agreement); Bowie *v.* Wheelright, 3 Fed. Cas. No. 1,733, 2 Cranch C. C 167 (holding that in a charter-party, the words "charter and to freight let" do not imply a covenant in law that the vessel is or shall be seaworthy).

Nature of the warranty.— The warranty of seaworthiness is a warranty that the vessel is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved seaworthy in the judgment of impartial and experienced men versed in the business, and the test is not whether the vessel may possibly make one or several voyages without foundering, but whether she is so stanch in her character as to prove herself fit for navigation in the eyes of all competent nautical men. Premuda *v.* Goepel, 23 Fed. 410, holding that in this case in view of an almost unanimous refusal to insure on the part of an insurance company and of the direct evidence of serious defects in her hull, the vessel was not seaworthy.

When the owner is kept in ignorance of her destination, of the service in which she is to be engaged, and the use to which she is to be put, there can be no implied warranty of a vessel's seagoing qualities. Richardson *v.* U. S., 2 Ct. Cl. 483. And the same rule applies where the charterer misrepresents to the owner the depth of water in which the vessel is to navigate. Donovan *v.* Sheridan, 4 Misc. (N. Y.) 433, 24 N. Y. Suppl. 116, holding that where a boat drawing seven feet of water is chartered by plaintiff to defendants to run to a certain point on a river, and defendants state to plaintiff that the channel of the river is more than ten feet deep, when in fact it was not more than six feet deep, the doctrine of implied warranty of fitness does not apply.

The proper ballasting of the ship, and the amount and arrangement of the cargo so as to make her sufficiently steady, are included in seaworthiness. Sumner *v.* Caswell, 20 Fed. 249; Weir *v.* Union Steamship Co., [1900] 1 Q. B. 28, 9 Aspin. 13, 5 Com. Cas. 24, 69 L. J. Q. B. 193, 81 L. T. Rep. N. S. 553 [*affirmed* in [1900] A. C. 526, 9 Aspin. 111, 5 Com. Cas. 363, 69 L. J. Q. B. 809, 82 L. T. Rep. N. S. 91]. But see The Hiram, 101 Fed. 138.

The obligation extends to the vessel on which reshipment of the goods may become necessary at an intermediate point in the voyage. Mississippi Agricultural Bank *v.* The Jane, 19 La. 1. And the owner of a chartered vessel, which becomes unseaworthy on the voyage to the port of loading, who fails to report her disability on her arrival, in consequence of which according to the usual procedure a cargo is procured or prepared for shipment, is liable for the damage resulting to the charterer from inability of the vessel to proceed with the cargo, which deteriorated through the delay. The Ask, 156 Fed. 678; The Director, 34 Fed. 57, 13 Sawy. 172 [*affirmed* in 36 Fed. 335, 13 Sawy. 479]. And where a vessel, by accident or otherwise, proves leaky and unfit for sea, while taking in her cargo and before she breaks ground on her voyage, it will justify a freighter in taking out the goods and shipping them on board another vessel. Purvis *v.* Tunno, 2 Bay (S. C.) 492. Similarly where four impartial, competent, and experienced persons having, after examination of a vessel, expressed the belief that she was not seaworthy, and the owner having refused to dock the vessel and settle the question, notwithstanding the subsequent good performance of the ship, the charterers are justified in rejecting her. Svendsen *v.* Stursberg, 31 Fed. 86.

The Harter Act, Act Feb. 13, 1893, c. 105, 27 U. S. St. at L. 445 [U. S. Comp. St (1901) p. 2946], does not interfere with the liberty of contract between the owner and charterers in regard to a proper fitting of the vessel for the voyage, or with any contract the parties may make as respects the responsibility for the sufficiency of special fittings. Hine *v.* New York, etc., Co., 68 Fed. 920 [*affirmed* in 73 Fed. 852, 20 C. C. A. 63], holding that a charter of a ship to carry asphalt, the ship to be "fitted with shifting boards and bulkheads, suitable for carrying asphalt cargo safely, to be done by the owner's agents, but at charterers' expense," imposes upon the owner the duty of providing suitable bulkheads and fittings; and where they are insufficient, and break under the weight of the cargo, causing delay and expense for unloading, refitting and reloading, he cannot recover charter hire, or a general average expense, for such delay and costs.

A clause which reads, "Charterers to approve the ventilation," does not leave the subject to the unreasonable and arbitrary decision of the charterer, but becomes a question for the jury to determine from the evidence, whether the ship is properly ventilated for the purposes for which it was chartered. Russell *v.* Allerton, 108 N. Y. 288, 15 N. E. 391.

61. Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179; Work *v.* The Leathers, 97 U. S. 379, 24 L. ed. 1012; Wood *v.* The Wilmington, 48 Fed. 566 (holding that notwithstanding the charterer had control of the boat for the period of the contract, the boat was liable *in rem* to him for an injury to the cargo caused by the master's failure to keep her in

the quantity of coal necessary for that stage of the voyage.[62] Although the hirer must not abandon the vessel while he can keep her afloat and suitably provide for the employment and destination for which she was hired, the owner must be ready to pay all expenses and damages necessarily incurred for the purpose of keeping her in fit condition.[63] The vessel must be cleansed of cargo from one voyage so that she will be seaworthy to carry cargo on subsequent voyage;[64] and must be fit and competent for the kind of cargo and particular service for which she is chartered.[65] A subcharter of a vessel for a mentioned cargo carries a warranty that she is fit to carry that cargo, and the chartered owner will be liable for damage to the cargo due to the nature of the previous cargo carried on the vessel, although the original charter put the risk of such damage on the charterer, as both under the implied terms of the charter and under an express covenant in the charter that the ship shall be tight, stanch, strong, and fitted for the voyage,[66] and must be properly manned and officered.[67] This obligation of an owner to see that a chartered vessel is seaworthy and suitable for service extends both to

thorough repair); Whipple *v.* Mississippi, etc., Packet Co., 34 Fed. 54; The Francis Wright, 9 Fed. Cas. No. 5,044, 7 Ben. 88.

Where a vessel becomes disabled while taking in cargo, the freighter will not be bound by the charter-party, unless she is repaired and rendered fit for the voyage within a reasonable time, of which the jury are the proper judges. Purvis *v.* Tunno, 1 Brev. (S. C.) 260, 2 Am. Dec. 664.

Speed of vessel.— Where a charter-party of a steamship for the fruit trade guarantees that she shall make a certain average speed in moderate weather, "fruit or light laden," it is a continuing guaranty that the average speed shall be accomplished during the term of the charter under the conditions stated; "light laden" means a cargo, the equivalent of a fruit cargo, or one not more cumbersome or more unfavorable to speed. Wessels *v.* The Ceres, 72 Fed. 936, 19 C. C. A. 243 [*affirming* 61 Fed. 701], holding that the charterers under such a charter-party are not to be charged with heedlessness in continuing to run the vessel in the fruit trade after she had failed on several voyages to maintain the guaranteed speed, where the owner by promises that the speed should be improved prevailed upon them not to throw up the contract.

Where the journey is in stages the implied warranty of seaworthiness for the voyage at the commencement thereof attaches at the commencement of each stage. If she is unseaworthy for lack of coal at the beginning of the second stage the cargo-owner is entitled to recover for the damage he sustains in consequence, the negligence of the servants of the ship-owner being no answer to the breach of warranty. The Vortigern, [1899] P. 140, 8 Aspin. 523, 4 Com. Cas. 152, 68 L. J. P. D. & Adm. 49, 80 L. T. Rep. N. S. 382, 15 T. L. R. 259, 47 Wkly. Rep. 437.

62. Similarly under a charter of a vessel fully equipped for a voyage, with an option to the hirer of continuing the charter, if, through lack of equipment and unseaworthiness at the beginning of the original voyage, the vessel breaks down during the extended period, to the charterer's injury, he may recover therefor. Leiter *v.* Ronalds, 84 Fed. 894; McIver *v.* Tate Steamers, [1903] 1 K. B. 362, 9 Aspin. 362, 8 Com. Cas. 124, 72 L. J. K. B. 253, 88 L. T. Rep. N. S. 182, 19 T. L. R. 217, 51 Wkly. Rep. 393.

63. Kimball *v.* Tucker, 10 Mass. 192, holding, however, that there is no implied promise in a charter-party for the owner to reimburse the hirer for casual profits lost by his advancing money to pay for necessary repairs on the vessel.

64. Dene Steam Shipping Co. *v.* Tweedie Trading Co., 133 Fed. 589 [*affirmed* in 143 Fed. 854, 74 C. C. A. 606] (where the vessel was considered to have been rendered unseaworthy because asphalt became wedged behind the vessel's permanent battens and could not be removed without renewing the battens. The trouble could have been avoided by lining the holds with boards. This was held to be the owner's duty); The Lizzie W. Virden, 11 Fed. 903.

65. Dene Steam Shipping Co. *v.* Tweedie Trading Co., 133 Fed. 589 [*affirmed* in 143 Fed. 854, 74 C. C. A. 606] (holding that asphalt is "lawful cargo," under a charter which includes the West Indies; and it is the duty of the owner, in order to render the vessel seaworthy, to fit her for the proper carriage of such cargo by lining the holds with boards, where her construction is such as to require it, and in this respect there is no difference between a time charter and a voyage charter); The Regulus, 18 Fed. 380.

66. Church Cooperage Co. *v.* Pinkney, 170 Fed. 266, 95 C. C. A. 462 [*reversing* 163 Fed. 653]. Sumner *v.* Caswell, 20 Fed. 249; The Lizzie W. Virden, 8 Fed. 624, 19 Bradf. 340; The Vesta, 6 Fed. 532. But see The Hiram, 101 Fed. 138.

If the charter is to carry passengers the law will imply that the vessel is fit for that purpose. Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368.

67. Tebo *v.* Jordan, 67 Hun (N. Y.) 392, 22 N. Y. Suppl. 156; The Giles Loring, 48 Fed. 463; The Vincennes, 28 Fed. Cas. No. 16,945, 3 Ware 171. But see Mahoney *v.* Martin, 35 La. Ann. 29, holding that where the duty of discharging devolves on the charterer's consignees, it is no breach of the war-

known and unknown defects,[68] and the owners may be held liable, although there was a thorough repair at the port of discharge;[69] but this warranty does not require that the vessel shall be such that insurance companies shall be willing to insure her;[70] and a chartered vessel required by the charter to be seaworthy is required to be so with respect to the stowage of cargo as well as in hull and equipment, and, in the absence of special contract, must be supplied with proper fittings for the stowage of any lawful cargo.[71] A charterer who accepts a vessel which is in a defective condition cannot complain of injury to the cargo caused by such defects where the vessel was examined and accepted with knowledge of her condition.[72] The principle is applicable, however, only where the charterer had full knowledge, otherwise he has a right to rely on the implied warranty.[73] Where the charter declares that the vessel was in good order and condition, the presumption is in favor of seaworthiness.[74] The charterer therefore assumes the obligation that the vessel will continue to be capable to proceed on her voyage, so far as relates to all defects which can be ascertained by inspection, and the owner assumes the obligation that the vessel will continue to be able to proceed, so far as relates to latent defects; and if an accident which interrupts the progress of the boat is the result of a defect which is ascertainable by inspection, then the owner can recover; but if of a defect which was latent, then the verdict must be for the charterers.[75]

2. Time of Seaworthiness. The warranty of seaworthiness attaches as a general rule at the date of the charter and delivery of the cargo to the vessel,[76] and extends to the time when the vessel actually breaks ground for the voyage, and not merely to the time when she begins to take in cargo.[77] This implied warranty is not varied by an express warranty in the charter that the vessel shall be stanch, strong, and true.[78] The implied warranty or condition precedent that the vessel is seaworthy at the date of the charter does not attach to a charter to commence when the vessel is ready to receive cargo at place of lading, a port

ranty of seaworthiness that the master was drunk at the port of delivery while the cargo was being discharged.

68. Work *v.* Leathers, 97 U. S. 379, 24 L. ed. 1012; Hubert *v.* Recknagel, 13 Fed. 912, holding that under the usual covenants of a charter-party that the vessel is "tight, stanch, and strong," the owners are answerable for latent, as well as visible, defects whereby the cargo is damaged.

69. Hubert *v.* Recknagel, 13 Fed. 912.

70. Harloff *v.* Barber, 150 Fed. 185.

71. Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22, 75 C. C. A. 180]; The Vincennes, 28 Fed. Cas. No. 16,945, 3 Ware 171. But see The Vesta, 6 Fed. 532, holding that where a vessel was chartered for the transportation of wheat in bulk across the Atlantic in winter, under a warranty that she should be tight, stanch, and strong, and in every way fitted for the voyage, it was essential that the vessel should be a good sea risk for the merchandise specified as cargo, and that this requirement of the charter was not satisfied by an old vessel built of soft wood, when underwriters declined to insure cargo for that reason.

72. The Presque Isle, 140 Fed. 202; Glasgow Shipowners Co. *v.* Bacon, 132 Fed. 881 [*affirmed* in 139 Fed. 541, 71 C. C. A. 329] (holding that in the absence of any speed warranty in a charter or provisions for docking and cleaning, the charterer may not deduct charter hire because the vessel's speed is retarded by her dirty bottom and which the charterer knew of when the contract was made, or should have expected from the circumstances attending the hiring); Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22, 75 C. C. A. 180]; Frank Waterhouse *v.* Rock Island Alaska Min. Co., 97 Fed. 466, 38 C. C. A. 281.

73. The Presque Isle, 140 Fed. 202.

74. McCann *v.* Conery, 11 Fed. 747.

75. McCann *v.* Conery, 11 Fed. 747.

76. The Director, 34 Fed. 57, 13 Sawy. 172 [*affirmed* in 36 Fed. 335, 13 Sawy. 479].

Charter-party held to have been complied with by owner within reasonable time under the circumstances see Culliford *v.* Vinet, 128 U. S. 135, 9 S. Ct. 50, 32 L. ed. 381 [*reversing* 20 Fed. 734].

77. Bowring *v.* Thebaud, 56 Fed. 520, 5 C. C. A. 640 [*affirming* 42 Fed. 794]; Sumner *v.* Caswell, 20 Fed. 249. But see The Carron Park, 15 P. D. 203, 6 Aspin. 543, 59 L. J. P. D. & Adm. 74, 63 L. T. Rep. N. S. 356, 39 Wkly. Rep. 191.

78. Church Cooperage Co. *v.* Pinkney, 170 Fed. 266, 95 C. C. A. 462; Bowring *v.* Thebaud, 56 Fed. 520, 5 C. C. A. 640 [*affirming* 42 Fed. 794]; Sumner *v.* Caswell, 20 Fed. 249. But see Ahrenberg *v.* Wright, 30 Hun (N. Y.) 75, holding that if a charter-party guarantees that a ship is A 1, this means as a general rule that she is so when the charter-party is made, not that she shall be so at a future time.

other than the port in which the charter is executed and to which the vessel must proceed in order to load.[79]

3. EVIDENCE. It is an ordinary presumption that a vessel is seaworthy and in good order when she undertakes a voyage;[80] but this presumption is rebutted by proof that she is old and approaching the end of her life as a ship, and that she suddenly failed in a vital part without any apparent cause.[81] Generally where a defect in a vessel develops without any apparent cause, it is presumed to have existed when the service began.[82] It has been held that in a libel by the owners on a charter-party for refusing to furnish a cargo on the pretense that the ship was unseaworthy, the burden of proving the seaworthiness is on the owners.[83] Fraud cannot be imputed where the owner of a vessel makes no representations of her seaworthiness, and affords the agents of the charterers ample facilities for inspection, and where the vessel is chartered upon the faith of their examination and report.[84]

4. DAMAGES. Where a chartered vessel, when delivered to the charterers, is unfit for the service for which she was engaged, and the charterers do not succeed in an attempt to remedy the defects, they are entitled to return the vessel and recover actual legal damages;[85] and if the vessel has not already sailed the charterer may recover his cargo and obtain damages for failure of the warranty.[86] If after the vessel sails the cargo is damaged or lost in consequence of unseaworthiness, the charterer can recover the value of the property so injured.[87] If the speed of the vessel is not up to the charter requirements, and in consequence the cargo is

79. The Star of Hope, 22 Fed. Cas. No. 13,312, 1 Hask. 36 [*affirmed* in 85 Fed. Cas. No. 4,710, 3 Cliff. 91].

80. Work *v.* Leathers, 97 U. S. 379, 24 L. ed. 1012 [*affirming* 29 Fed. Cas. No. 17,415, 1 Woods 271]; McCann *v.* Conery, 11 Fed. 747 (holding that under a charter-party declaring that the vessel was in good order and condition the presumption is in favor of seaworthiness); Pyman *v.* Von Singen, 3 Fed. 802, 5 Hughes 196 (holding that the presumption is not rebutted where it is shown, in a suit against charterers for damages for breach of a charter-party, that a ship not two years old, and carrying ballast only, was disabled, within thirty-six hours after leaving port, by the loosening of the bolts of the propeller's shaft, from the racing of the propeller during a gale, although there was no testimony that the bolts were specially examined just previous to starting); Bowley *v.* U. S., 8 Ct. Cl. 187. And see Bursley *v.* The Marlborough, 47 Fed. 667; The Rover, 33 Fed. 515.

The breaking of a junk ring on a steamship engine cylinder must be held an "accident of the sea and of the machinery," within the meaning of a charter-party exempting the ship from liability for losses to cargo caused by such dangers, when such ring performed its functions without jar or fault prior to the breakdown, and no flaw was disclosed by an examination of the broken pieces. The Curlew, 55 Fed. 1003, 5 C. C. A. 386 [*affirming* 51 Fed. 246].

Circumstances held to show unseaworthiness see The Giles Loring, 48 Fed. 463; McAdams *v.* Leverich, 35 Fed. 305; Sumner *v.* Caswell, 20 Fed. 249.

Circumstances held not to show unseaworthiness see The Piskataqua, 35 Fed. 622; Pyman *v.* Von Singen, 3 Fed. 802, 5 Hughes 196 (holding that the fact that a chartered ship was not provided with rimers for boring out the bolt holes after they had worked out of shape, and extra bolts to fit them, so that the difficulty might have been remedied at sea without putting into port, did not constitute negligence, so as to excuse the charterers for refusing to load because of delay in arriving at port of lading caused by putting into port for repairs); Von Lingen *v.* Davidson, 1 Fed. 178 [*reversed* on other grounds in 4 Fed. 346, 5 Hughes 221, and in 113 U. S. 40, 5 S. Ct. 346, 28 L. ed. 885], holding that the stoppage of a steamer for five hours at a port in the course of her voyage for the purpose of taking in a small quantity of additional coal is not a breach of a provision in the charter-party that such steamer was "in every way fitted for the voyage."

81. Werk *v.* Leathers, 29 Fed. Cas. No. 17,415, 1 Woods 271 [*affirmed* in 97 U. S. 379, 24 L. ed. 1012].

82. Work *v.* Leathers, 97 U. S. 379, 24 L. ed. 1012.

83. The Vincennes, 28 Fed. Cas. No. 16,945, 3 Ware 171, holding also that when the question of seaworthiness is in issue, evidence of the performance of voyages immediately before or after that contemplated is inadmissible, except so far as they may offer just inferences as to her actual condition at the time.

84. Richardson *v.* U. S., 2 Ct. Cl. 483.

85. McAdams *v.* Leverich, 35 Fed. 305.

86. The Director, 36 Fed. 335, 13 Sawy. 479, 34 Fed. 57, 13 Sawy. 172.

87. Meyer *v.* Barker, 6 Binn. (Pa.) 228, holding that charterers may recover of the owners the whole amount of a loss occasioned by unseaworthiness, although the underwriters have already paid part of the loss.

injured, the charterer may recover damages measured by the deterioration of the cargo due to delay;[88] but damages are not recoverable for delay due to accidents excepted under a charter-party.[89] There is no implied promise in a charter-party for the owner to reimburse the hirer for casual profits lost by his advancing money to pay for necessary repairs on the vessel.[90]

G. Readiness and Despatch of Vessel — 1. In General. The vessel must be ready for loading at the time contracted for,[91] and if she is, refusal of the charterer to ship is a breach of his contract.[92] If necessary, the vessel must wait for cargo at the port of lading during all the agreed lay days.[93] Provisions in a charter-party as to the commencement of the lay days for loading and discharging are of the essence of the contract, and on failure of the owners to tender the vessel within the required time the charterer may rescind the contract;[94] and until the lay days have expired there is no breach of the charterer's contract to load.[95] But where the charterer refuses to accept the vessel or provide a cargo, the owner need not keep her in readiness for delivery during all the lay days;[96] and if after the lay days have expired or the charterer has refused to load the ship-owner keeps the ship idle he is not entitled to recover for the subsequent detention.[97]

2. Delay in Sailing For or Arriving At Port of Lading. Where the contract so provides, the vessel must sail without delay to enter upon the charter at the port of loading at the time specified,[98] the stipulation being construed as a condition precedent or warranty which if not fulfilled entitles the charterer to reject

The remedy of such underwriters is against the owners on a payment by mistake.

The owner is liable for the cost of lining a vessel, and of removing the same, where, owing to her construction, it was necessary to render her seaworthy for the carriage of a cargo, which was in contemplation when the charter was made. Tweedie Trading Co. *v.* Dene Steam Shipping Co., 140 Fed. 779.

88. Wessels *v.* The Ceres, 72 Fed. 936, 19 C. C. A. 243 [*affirming* 61 Fed. 701]. And see The Ask, 156 Fed. 678.

89. The Curlew, 51 Fed. 246 [*affirmed* in 55 Fed. 1003, 5 C. C. A. 286].

90. Kimball *v.* Tucker, 10 Mass. 192.

91. Weisser *v.* Maitland, 3 Sandf. (N. Y.) 318; Crow *v.* Myers, 41 Fed. 806. See Murrell *v.* Whiting, 32 Ala. 54; Love *v.* Ross, 4 Call (Va.) 590, holding that where a charter-party provides that the vessel shall be loaded by a certain time, and the owner agrees that she shall sail at a certain time for certain ports and return, but by his fault she is not ready to sail until long after the time specified, he cannot come into equity to enforce the terms of the charter-party against the shipper.

Although it is Sunday and the work of loading cannot begin until the following day, the condition of a charter-party that the ship shall be "ready for cargo" at the port of lading on or before the last day of the month is satisfied by her arrival on that day in actual readiness to receive cargo. Gill *v.* Browne, 53 Fed. 394, 3 C. C. A. 573 [*affirming* 50 Fed. 941], holding that there is no custom of the port of Philadelphia requiring that, when the last day that a ship could be in readiness falls on Sunday, she should present herself on the previous Saturday, and that the rule of the Philadelphia Maritime Exchange providing that, when vessels chartered to load grain at that port are ready for cargo, the notice of readiness must be accompanied by a certificate of readiness from the surveyors of the board of marine underwriters, cannot be regarded as incorporated into a charter-party made in the city of New York for the employment of a British vessel, when the contract itself makes no reference to such rule, and the owner is ignorant of its existence.

Unlawful seizure and detention of the vessel by a stranger does not terminate a parol contract for the charter of the vessel. Muggridge *v.* Eveleth, 9 Metc. (Mass.) 233.

92. Bennett *v.* Lingham, 31 Fed. 85, where the "middle of September" was construed to mean as late as the twenty-seventh, the charterer having acquiesced.

93. Harries *v.* Edmonds, 1 C. & K. 686, 47 E. C. L. 686.

94. Barker *v.* Borzone, 48 Md. 474.

95. Avery *v.* Bowden, 5 E. & B. 714, 729, 1 Jur. N. S. 1167, 25 L. J. Q. B. 49, 55, 4 Wkly. Rep. 93, 95, 85 E. C. L. 714, 729 [*affirmed* in 6 E. & B. 953, 3 Jur. N. S. 238, 26 L. J. Q. B. 3, 5, 5 Wkly. Rep. 45, 88 E. C. L. 953].

96. Bactjer *v.* Bors, 2 Fed. Cas. No. 724, 7 Ben. 280; Hall *v.* Hurlbut, 11 Fed. Cas. No. 5,936, Taney 589; Harries *v.* Edmonds, 1 C. & K. 686, 47 E. C. L. 686. And see Wilkie *v.* Schultz, 35 La. Ann. 491, holding that where the charterer refuses to comply with his contract, except on a verbal alteration of its terms, alleged to have been assented to by the master, the latter may, without holding the vessel till the last day for demurrage, seek cargo elsewhere.

97. Bright *v.* Page, 3 B. & P. 295 note, 6 Rev. Rep. 795; Dimech *v.* Corlett, 12 Moore P. C. 199, 14 Eng. Reprint 887.

98. Olsen *v.* Hunter-Benn, 54 Fed. 530; Gill *v.* Browne, 53 Fed. 394, 3 C. C. A. 573 [*affirming* 50 Fed. 941]; The Religione E.

the vessel,[99] unless the delay was caused by the shipper's fault [1] or he has waived his right to cancel by loading the cargo.[2] In the absence of an express stipulation one is implied.[3] But a forcible detention will excuse from the performance of

Liberta, 20 Fed. Cas. No. 11,694, 5 Reporter 646, 5 Wkly. Notes Cas. (Pa.) 211.

The word "direct," as used in a statement in a charter-party that the chartered vessel was to "proceed thence direct, to load on this charter," means that the vessel is to take a direct course from one of the ports named to the other, without deviation or unnecessary delay, and not that she must leave the port first named immediately. The Onrust, 18 Fed. Cas. No. 10,540, 6 Blatchf. 533 [*affirming* 18 Fed. Cas. No. 10,539, 1 Ben. 431].

99. Porteous *v.* Williams, 115 N. Y. 116, 21 N. E. 711; The Whickham, 113 U. S. 40, 5 S. Ct. 346, 28 L. ed. 885 [*affirming* 4 Fed. 346, 5 Hughes 221, and *reversing* 1 Fed. 178]; Lowber *v.* Bangs, 2 Wall. (U. S.) 728, 17 L. ed. 768 [*reversing* 2 Fed. Cas. No. 840, 2 Cliff. 157]; Giuseppe *v.* Manufacturers' Export Co., 124 Fed. 663; Olsen *v.* Hunter-Benn, 54 Fed. 530 (holding that the provision in a charter-party that the vessel to be chartered is "at Santos, or sailed," is a contract that she will soon sail, or has sailed, therefrom); Pedersen *v.* Pagenstecher, 32 Fed. 841 (holding that the vessel under such a stipulation takes upon herself the risks of all causes that may prevent a compliance with the condition); The Orsino, 24 Fed. 918; Antola *v.* Gill, 7 Fed. 487, 5 Hughes 284 [*affirming* 5 Fed. 128]; Deshon *v.* Fosdick, 7 Fed. Cas. No. 3,819, 1 Woods 286; Croockewit *v.* Fletcher, 1 H. & N. 893, 26 L. J. Exch. 153, 5 Wkly. Rep. 348; Glaholm *v.* Hays, 10 L. J. C. P. 98, 2 M. & G. 257, 2 Scott N. R. 471, 40 E. C. L. 589. And see Funch *v.* Abenheim, 20 Hun (N. Y.) 1, holding that a charterer may rescind a charter-party for mutual mistake, where it was executed in New York while both parties supposed the vessel would leave London June 5, whereas it did not lease until June 23, where the charterer stated before executing the charter-party that the time of departure from London was material to him. *Compare* Rosasco *v.* Pitch Pine Lumber Co., 121 Fed. 437 [*affirmed* in 138 Fed. 25, 70 C. C. A. 455] (holding that a provision of a charter-party requiring the vessel to sail in ballast for the port of loading within forty-eight hours after notice from the charterer is not a condition precedent, a breach of which entitles the charterer to cancel the contract, where there is a subsquent provision for a canceling date if the vessel shall not have arrived at the port of loading, and she arrives within the time so fixed. In such case the breach of the first condition merely gives a right of action for damages); Fearing *v.* Cheeseman, 8 Fed. Cas. No. 4,710, 3 Cliff. 91 [*affirming* 22 Fed. Cas. No. 13,312, 1 Hask. 36] (holding that the implied covenant that a vessel shall sail for the port of lading within a reasonable time, and with reasonable despatch, is not a condition precedent, and the charterer cannot cancel the contract unless the delay is so great as to frustrate the voyage intended).

The rule applies to a stipulation that the vessel is ready to sail and has sailed.— The March, 25 Fed. 106.

Under a charter giving the charterer the option to cancel if the vessel should be detained for more than ten days for repairs, "such option to be declared at the expiry of said ten days," if he fails to make such declaration ten days after the repairs are commenced, but permits them to proceed without objection, he is estopped to make it when the vessel is subsequently tendered after their completion. McNear *v.* Lehlond, 123 Fed. 384, 61 C. C. A. 564 [*affirming* 104 Fed. 826].

Indefinite expressions being read as negativing an intention to make time of the essence of the contract do not constitute conditions precedent. This rule has been applied to a stipulation that the ship should sail with the first favorable wind (Bornmann *v.* Tooke, 1 Campb. 377, 10 Rev. Rep. 747), or "proceed immediately" to the port of lading (Nelson *v.* Dundee East Coast Shipping Co., [1907] A. C. 927), or that the vessel was expected to be ready to load at a date specified (Forest Oak Steam Shipping Co. *v.* Richard, 5 Com. Cas. 100).

1. Woolsey *v.* Finke, 2 N. Y. Suppl. 112.

An injunction will not be granted to restrain the ship-owner from using the vessel for any purposes other than those of the charter-party where the vessel having been delayed, the charterer refused to extend the time for cancellation, or to promise to load the vessel if she proceeded to the agreed port, and said that, if he did load, the rate of freight must be reduced, and insisted on the vessel proceeding to the agreed port, whereupon the ship-owner refused to send his vessel there. Bucknall *v.* Tatem, 9 Aspin. 127, 83 L. T. Rep. N. S. 121.

2. Schooner Mahukona Co. *v.* Charles Nelson Co., 142 Fed. 615. See The Ekliptika, 95 Fed. 836.

3. Heller *v.* Pendleton, 148 Fed. 1014; The Alert, 61 Fed. 504 [*affirmed* in 74 Fed. 649, 20 C. C. A. 581]; Olsen *v.* Hunter-Benn, 54 Fed. 530; The Star of Hope, 22 Fed. Cas. No. 13,312, 1 Hask. 36 [*affirmed* in 8 Fed. Cas. No. 4,710, 3 Cliff. 91]. See Renard *v.* Sampson, 2 Duer (N. Y.) 285 [*affirmed* in 12 N. Y. 561].

Where no stipulation is made as to the day the vessel should sail, or the time she was to be allowed for the trip, she must sail within a reasonable time, and proceed with reasonable despatch and without unnecessary deviation to the place of loading, unless delayed by the public enemy or perils of the seas. Fearing *v.* Cheeseman, 8 Fed. Cas. No. 4,710, 3 Cliff. 91 [*affirming* 22 Fed. Cas. No. 13,312, 1 Hask. 36].

the obligation created by law.[4] Thus where the charter does not fix a definite time for the vessel to be at the port of lading the charterers are bound if the master uses reasonable diligence in bringing her to the port.[5] Inevitable accident or perils of the sea, that delay the vessel in reaching the port of lading beyond the usual term of passage, do not relieve the charterers from their contract, if the vessel be tendered in a reasonable time.[6] Under an express stipulation that a vessel will sail on a stated day to load, if she has broken ground for the voyage the stipulation is complied with, although she has been subsequently delayed by storms.[7]

3. Despatch Money. It is usually provided in charter-parties for a particular voyage or cargo that if the cargo shall be laden or discharged at an earlier date than is specified the charterer shall be entitled to a credit described as despatch money,[8] the method of computation of the despatch being usually stipulated in the charter-party at a rate *per diem*.[9] Where the charter specifies the number of days allowed for loading, exclusive of Sundays and holidays, and provides that despatch is to be allowed the charterer for each running day or part of a day saved in loading, the despatch is to be computed on the difference between the time when the loading was actually completed and the vessel turned over to the master for the purpose of the voyage, and the time when the lay days for loading would have expired under the charter, including Sundays or holidays occurring during such time; but the charterer cannot have despatch for any time elapsing after the vessel was loaded but unable to sail because the charterer withheld the clearance papers unjustifiably.[10]

H. Character of Cargo to Be Furnished. The cargo offered by the hirer must be adapted to the nature and capacity of the vessel,[11] although the con-

4. Street *v.* The Progresso, 42 Fed. 229 [*affirmed* in 50 Fed. 835, 2 C. C. A. 45] (quarantine embargo); The Onrust, 18 Fed. Cas. No. 10,539, 1 Ben. 431 [*affirmed* in 18 Fed. Cas. No. 10,540, 6 Blatchf. 533] (delay in the service of the United States).

5. Lovell *v.* Davis, 101 U. S. 541, 25 L. ed. 944; The Onrust, 18 Fed. Cas. No. 10,539, 1 Ben. 431 [*affirmed* in 18 Fed. Cas. No. 10,540, 6 Blatchf. 533].

6. Schooner Mahukona Co. *v.* Charles Nelson Co., 142 Fed. 615; Huron Barge Co. *v.* Turney, 71 Fed. 972; Hall *v.* Hurlbut, 11 Fed. Cas. No. 5,936, Taney 589 (holding that where a charter-party does not contain a stipulation that the vessel shall arrive at the port of shipment by a particular day, the shipper takes the risk of delay or detention by any superior force, which the vessel could not resist, and the refusal of a charterer therefore, under such circumstances, to furnish a cargo, because of her arrival at the port after the time of shipping the proposed cargo had gone by, is a breach of contract, for which he is liable in damages); The Star of Hope, 22 Fed. Cas. No. 13,312, 1 Hask. 36 [*affirmed* in 8 Fed. Cas. No. 4,710, 3 Cliff. 91]; Potter *v.* Burrell, [1897] 1 Q. B. 97, 8 Aspin. 200, 66 L. J. Q. B. 63, 75 L. T. Rep. N. S. 491, 45 Wkly. Rep. 145.

But when the cause of the delay is removed, the master must thereafter use all due diligence to fulfill the contract. Street *v.* The Progresso, 42 Fed. 229 [*affirmed* in 50 Fed. 835, 2 C. C. A. 45].

7. The Francesca Curro, 9 Fed. Cas. No. 5,029, 4 Wkly. Notes Cas. (Pa.) 415. But see Pedersen *v.* Pagenstecher, 32 Fed. 841, holding that moving from a dock out to the roadstead and sailing several days later is not sufficient.

8. Earnshaw *v.* McHose, 56 Fed. 606, 6 C. C. A. 51 [*affirming* 48 Fed. 589] (where, under the circumstances of that case and in the absence of any unusual expenditure by plaintiff to secure despatch, the despatch money was held to be merely a deduction from the freight, which must be allowed on the invoice price); The Glendevon, [1893] P. 269, 7 Aspin. 439, 62 L. J. P. D. & Adm. 123, 70 L. T. Rep. N. S. 416, 1 Reports 662.

Provision for despatch money in charter-party construed see Myers *v.* The Unionist, 48 Fed. 315.

The term "bad weather," in a charter-party providing for a credit to the charterer of *per diem* despatch money, is construed to include weather not fit or reasonably safe for loading by reason of the state of the sea as well as of the atmosphere, and the days during which there was such weather must be deducted from the time taken in loading and discharging in computing the amount of despatch money. The Ocean Prince, 50 Fed. 115.

9. Laing *v.* Hollway, 3 Q. B. D. 437, 47 L. J. Q. B. 512, 26 Wkly. Rep. 769; The Glendevon, [1893] P. 269, 7 Aspin. 439, 62 L. J. P. D. & Adm. 123, 70 L. T. Rep. N. S. 416, 1 Reports 662.

10. Red "R." Steamship Co. *v.* North American Transport Co., 91 Fed. 168, 33 C. C. A. 432.

11. Husten *v.* Richards, 44 Me. 182. But see Stanton *v.* Richardson, 3 Aspin. 23, 45

tract to hire covers the whole vessel under and above decks, and provides for the payment of a fixed sum for the use of the vessel.[12] If the charterer has taken the whole capacity of the vessel, he is bound to furnish a full cargo,[13] unless relieved by a clause in the contract,[14] and has no right, in the absence of express stipulation

L. J. C. P. 78, 33 L. T. Rep. N. S. 193, 24 Wkly. Rep. 324.

Thus a master who has given the use of his vessel for a load of timber is not bound to take sticks of timber too large for the vessel. Thorndike *v.* Rokes, 76 Me. 396.

Where a vessel is chartered and rechartered to carry lumber it is for the original charterer to see that she is provided with such length and sizes as will give a full cargo; and if her master receives and stows in good faith what is furnished by the merchant under the subcharter, and it is of such sizes that there is not as much loaded as could have been with different kinds of lumber, no action lies against the vessel. The Lloyd, 21 Fed. 420.

12. Husten *v.* Richards, 44 Me. 182.

13. McQuade *v.* McNaughton, 49 Fed. 284 (holding that the failure of a charterer to load a full cargo on a vessel before she was obliged to leave to reach another port, where she had contracted to be ready to deliver by a certain date, will not be excused on account of the incapacity of the master when the receipt of cargo and management of the vessel were in the hands of a competent person, and the failure to load resulted from the charterer's lack of expedition); Isis Steamship Co. *v.* Bahr, [1900] A. C. 340, 9 Aspin. 109, 5 Com. Cas. 277, 69 L. J. Q. B. 660, 82 L. T. Rep. N. S. 571, 16 T. L. R. 381; Morris *v.* Levison, 1 C. P. D. 155, 3 Aspin. 171, 45 L. J. C. P. 409, 34 L. T. Rep. N. S. 576, 24 Wkly. Rep. 517; Jones *v.* Holm, L. R. 2 Exch. 335, 36 L. J. Exch. 192, 16 L. T. Rep. N. S. 794, 16 Wkly. Rep. 62; Hunter *v.* Fry, 2 B. & Ald. 421, 21 Rev. Rep. 340, 106 Eng. Reprint 420; Hills *v.* Sughrue, 15 M. & W. 253. And see Clarke *v.* Crabtree, 5 Fed. Cas. No. 2,847, 2 Curt. 87 [*affirming* 6 Fed. Cas. No. 3,314, 1 Sprague 217], holding that under a charter-party to furnish a cargo of salt at a certain port, to be purchased by the master with the vessel's funds, the charterer takes the risk of there being salt at such port to make up a cargo, and the master is not bound to wait for a cargo the stipulated number of lay days, when there is no hope of obtaining any. *Compare* Nordaas *v.* Hubbard, 48 Fed. 921, holding that a charter-party providing that the vessel shall load at Mobile a cargo not exceeding what she can reasonably carry does not compel the shipper, after he has loaded her to the draught of the river at the city, to furnish her more at the deeper anchorage in the bay of Mobile, thirty miles from the city.

Refusal of a charterer to fill the vessel up after furnishing a partial cargo does not relieve the master of the obligation to carry forward the cargo he has, if the same is sufficient security for the full freight; but if it is in bad condition, and depreciating so rapidly as in all probability to become insufficient as security, he is not bound to go forward with it, but may discharge it, and then enforce against it his lien for the freight and demurrage due under the charter-party. Stepanovit *v.* Gillibrand, 22 Fed. Cas. No. 13,360.

Merchandise for ballast.— A ship-owner is entitled to take merchandise on board as ballast, provided it occupies no more space than the ballast would have done and leaves to the charterer the full space of the vessel for his cargo. Towse *v.* Henderson, 4 Exch. 890, 19 L. J. Exch. 163. A charterer must fill the cargo space and cannot load goods which leave broken stowage, without paying for dead freight. Cole *v.* Meek, 15 C. B. N. S. 795, 33 L. J. C. P. 183, 9 L. T. Rep. N. S. 653, 12 Wkly. Rep. 349, 109 E. C. L. 795. But see Cuthbert *v.* Cumming, 11 Exch. 405, 1 Jur. N. S. 686, 24 L. J. Exch. 310, 3 Wkly. Rep. 553, holding that a full and complete cargo of sugar and molasses meant a full cargo of sugar and molasses packed in hogsheads and puncheons, although when so packed the ship could not be completely filled.

Cargo held "a full and complete cargo" within the terms of the charter-party see Isis Steamship Co. *v.* Bahr, [1900] A. C. 340, 9 Aspin. 109, 5 Com. Cas. 277, 69 L. J. Q. B. 660, 82 L. T. Rep. N. S. 571, 16 T. L. R. 381.

"Say about."— Where a charter-party provides for shipment of a complete cargo of cast iron pipe, "say about 3400 gross tons," it should be construed as contemplating a margin beyond three thousand four hundred tons, and is not fulfilled by the shipment of three thousand two hundred and fifty-eight tons. Wood *v.* Sewall, 128 Fed. 141 [*affirmed* in 135 Fed. 12, 67 C. C. A. 580]. But where a charter-party provides that the ship shall load a cargo of ore, say about two thousand eight hundred tons, not exceeding what she can reasonably stow and carry, two thousand eight hundred and eighty tons being the amount she can reasonably carry, the charterer fulfils the obligation imposed upon him by providing a cargo of two thousand eight hundred and forty tons. Miller *v.* Borner, [1900] 1 Q. B. 691, 9 Aspin. 31, 5 Com. Cas. 107, 69 L. J. Q. B. 429, 82 L. T. Rep. N. S. 258, 48 Wkly. Rep. 588.

A charterer under a charter to carry passengers cannot refuse to accept the vessel and furnish passengers without a valid legal excuse. Post *v.* Koch, 30 Fed. 208.

14. Morse *v.* Lehigh, etc., Coal Co., 36 Fed. 831; Furness *v.* Forwood, 8 Aspin. 298, 77 L. T. Rep. N. S. 95.

The master cannot refuse to sign bills of lading in the ordinary form until a claim for demurrage has been settled, where the charter-party provides that bills of lading are to be signed as presented without prejudice

or established usage, to refuse to furnish the cargo because of the employment by the master of a stevedore who, although competent and experienced, is personally objectionable to him.[15] Where a charter-party provides that the vessel is to carry a full load, but places the loading under the master's direction, and provides that the charterer shall not be responsible for stowage, the latter is not liable for failure to take a full cargo resulting from defective stowage.[16] Nor is the charterer liable for damage to cargo by stevedores appointed by charterer but paid by the ship, who separated bundles of cargo to make broken stowage, and thus put more cargo in the ship.[17] The cargo must be of the character specified in the charter.[18] Notwithstanding a provision of a charter-party requiring the ship to receive all such lawful cargo as the charterers may think proper to ship, some discretion is left in the master, whose duty it is to exercise his judgment for the benefit of all concerned; and where the owners are responsible for proper stowage and safe carriage he is justified in refusing to load goods where there is danger that they will be injured by other cargo previously loaded;[19] and although a charter provides that the whole of a vessel shall be at the charterer's disposal, with the right to put on board a full cargo, it is still the master's duty to determine when the limit of safe loading is reached.[20] The owner is not compelled to alter his vessel to receive a cargo of articles of a different size than contracted for,[21] and is not liable for property of a nature entirely different from the cargo specified, intrusted to the master and stolen by him.[22] On the other hand, an owner who has let the entire capacity of the vessel must so stow the cargo that the vessel carries a cargo utilizing the full carrying capacity of the vessel.[23]

I. Voyage — 1. Route; Delay and Deviation. Under a charter for a voyage the voyage begins when the vessel is delivered to the charterer.[24] A vessel must

to the charter-party, and that the vessel is to have an absolute lien on the cargo for all freight and demurrage. Cushing *v.* McLeod, 2 N. Brunsw. Eq. 63.

15. Thompson *v.* Geo. W. Bush, etc., Co., 60 Fed. 631 [*affirmed* in 65 Fed. 812, 13 C. C. A. 148].

16. Manchisa *v.* Card, 39 Fed. 492.

17. Bethel *v.* Mellor, etc., Co., 131 Fed. 129.

Under a charter-party providing that cargo is to be furnished as "required" by the master, it is sufficient on the ship's part if the master gives notice that he is in want of more cargo. Tyson *v.* Belmont, 24 Fed. Cas. No. 14,316 [*affirmed* in 3 Fed. Cas. No. 1,281, 3 Blatchf. 530].

18. Rich *v.* Parrott, 20 Fed. Cas. No. 11,760, 1 Cliff. 55, holding that under a charter providing that the charterers shall furnish a full cargo, "sufficient saltpetre or its equivalent for ballast," the charterer is bound to furnish ballast paying freight, which must be heavy goods usually purchased for exportation and suitable for ballast.

19. Birt *v.* Hardie, 132 Fed. 61.

20. The Giles Loring, 48 Fed. 463.

21. Beecher *v.* Bechtel, 3 Fed. Cas. No. 1,221, 3 Blatchf. 40 [*reversing* 3 Fed. Cas. No. 1,220*a*].

22. Hart *v.* Leach, 21 Fed. 77.

23. The John A. Briggs, 113 Fed. 948.

24. The Buckingham, 129 Fed. 975.

Despatch money.—Where charterers, by the master's consent, and without prejudice to the continuance of the lay days, commence loading, with the ship's appliances, before the hour fixed by the charter for the commencement of the lay days, the time thus gained is not time "saved in loading," in the meaning of a provision in the charter-party allowing despatch money for time so saved. But under a charter-party providing for despatch money "if steamer be dispatched in less time than is specified," despatch money will be payable from the day the ship is actually despatched by the charterers, although by permission of the master they began loading before the lay days commenced. But if they delay her by refusing clearance papers while attempting to induce the master to insert in the bills of lading a provision different from that authorized by the charter, no despatch money will be payable during such delay. Red. R Steamship Co. *v.* North American Transport Co., 84 Fed. 467 [*modified* in 91 Fed. 168, 33 C. C. A. 432].

Where a vessel is chartered without any limitation of time, it is an indefeasible hiring for every voyage which she shall have undertaken before notice from the owner of his intention to put an end to the contract. Cutler *v.* Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385. Where a charter-party for the period of six months contained the clause: "Vessel, if kept over the charter time, the same rate as the charter, with the privilege of six months over the charter if wanted," the charterers had the right to keep the vessel for such time as they wished, not exceeding six months additional in all, at the charter-price. Hunt *v.* Metcalf, 47 Fed. 73. And see The Rygja, 161 Fed. 106, 88 C. C. A. 270.

Special provisions as to duration of contract and number of voyages construed see

[III, I, 1]

sail without unnecessary delay, and proceed with all reasonable despatch to her destination,[25] by the route specified in the charter,[26] or, in the absence of charter provision, by the usual and customary course.[27] The conditions of the contract, nature of the cargo, and objects of the voyage may all be considered in determining what is reasonable despatch.[28] When an owner charters a ship and covenants to keep her well and sufficiently manned, he assumes the risk of being able to retain on board the seamen necessary to sail her, and failure to have a sufficient crew on the voyage will not excuse a deviation to ship more seamen.[29] A deviation renders the carrier liable for loss even though the loss is caused by a peril excepted in the charter.[30] The carrier is not liable for consequences of a deviation made necessary by peril of the sea,[31] or for the purpose of saving life,[32] or to make repairs; [33] nor

Canada Shipping Co. *v.* Acer, 26 Fed. 874; The Calabria, 24 Fed. 607.

25. Nine Thousand Bunches of Bananas, 55 Fed. 1003, 5 C. C. A. 386; The Success, 23 Fed. Cas. No. 13,586, 7 Blatchf. 551.

Effect of quarantine.— Under a time charter-party not amounting to a demise, the ship is liable to the charterers for damage to perishable cargo, resulting from detention at quarantine because of the master's act in taking on board, without the charterer's consent, a passenger who was without the health certificate which the master knew would be required at the port of destination. The Nicaragua, 72 Fed. 207, 18 C. C. A. 511 [*affirming* 71 Fed. 723].

The vessel is not bound to enter upon a voyage which it is reasonably certain cannot be completed and the cargo discharged before the expiration of the charter limit. Walsh *v.* Tweedie Trading Co., 152 Fed. 276 [*affirmed* in 170 Fed. 60, 95 C. C. A. 336]; The Saugstad, —— Fed. ——; The Mary Adelaide Randall, 98 Fed. 895, 39 C. C. A. 335 [*affirming* 93 Fed. 222]. But where a time charter contains the provisions "hire to continue from the time specified for terminating the charter until her delivery to owner," and the vessel was at the port of redelivery thirteen days before the time specified for terminating the charter, it was held in view of the local usage that the charterer was entitled to send the vessel for a new voyage of from three to six weeks, but was not entitled to send her on a voyage of eight or nine weeks. Anderson *v.* Munson, 104 Fed. 913; Straits of Dover Steamship Co. *v.* Munson, 95 Fed. 690.

An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience will justify delay in the prosecution of a voyage (The San Roman, L. R. 5 P. C. 301, 1 Aspin. 603, 42 L. J. Adm. 46, 28 L. T. Rep. N. S. 381, 21 Wkly. Rep. 393), or the discharge at loading port of cargo which master reasonably supposed was contraband (The Styria, 186 U. S. 1, 22 S. Ct. 731, 46 L. ed. 1027).

26. The John H. Pearson, 121 U. S. 469, 7 S. Ct. 1008, 30 L. ed. 979 [*reversing* 14 Fed. 749].

The term "northern passage," in the Mediterranean fruit trade, and incorporated in a charter-party to ship fruit from Sicily to Boston, has a distinct meaning. Its course is from Gibraltar north of the Azores, if possible; if not, just south of the islands, thence to the southern point or tail of the Great Banks, and then direct to port. The John H. Pearson, 33 Fed. 845, holding that where a charter-party to ship fruit provided that the vessel should take the "northern passage," in the absence of any known passage to which that description had been given, the ship was bound to keep the coolest passage those in the trade were accustomed to keep.

27. Davis *v.* Garrett, 6 Bing. 716, 8 L. J. C. P. O. S. 253, 4 M. & P. 540, 31 Rev. Rep. 524, 19 E. C. L. 321.

Whether Halifax is en route to South America from New York may be determined by evidence of commercial practice. Glasgow Steamshipping Co. *v.* Tweedie Trading Co., 154 Fed. 84.

28. The Success, 23 Fed. Cas. No. 13,586, 7 Blatchf. 551.

29. The Ethel, 8 Fed. Cas. No. 4,540, 5 Ben. 154.

30. The Dunbeth, [1897] P. 133, 8 Aspin. 284, 66 L. J. P. D. & Adm. 66, 76 L. T. Rep. N. S. 658.

Facts held not to constitute deviation see Caffin *v.* Aldridge, [1895] 2 Q. B. 648, 8 Aspin. 233, 65 L. J. Q. B. 85, 73 L. T. Rep. N. S. 426, 44 Wkly. Rep. 129. Putting a vessel with cargo on board upon a dry dock without any maritime necessity was held to constitute a deviation making owner liable as insurer and responsible for damage to cargo from fire, notwithstanding the fire statute. The Indrapura, 171 Fed. 929.

Light dues, made payable by a deviation, are port charges, within the meaning of such term in a charter-party permitting a deviation for the purpose of discharging part of the cargo upon payment of port charges. Newman *v.* Lamport, [1896] 1 Q. B. 20, 8 Aspin. 76, 65 L. J. Q. B. 102, 72 L. T. Rep. N. S. 475.

Authority of master to deviate from route in general see *infra*, IV, B, 3, c.

31. Wood *v.* Hubbard, 62 Fed. 753, 10 C. C. A. 623; The Maria Luigia, 28 Fed. 244 [*reversing* 18 Fed. 556].

32. Scaramanga *v.* Stamp, 5 C. P. D. 295, 4 Aspin. 295, 49 L. J. C. P. 674, 42 L. T. Rep. N. S. 840, 28 Wkly. Rep. 691.

33. Phelps *v.* Hill, [1891] 1 Q. B. 605, 7 Aspin. 42, 60 L. J. Q. B. 382, 64 L. T. Rep. N. S. 610, holding, however, that in selecting a port of refuge for repairs the master must not make any greater departure from the

is there any penalty on the owner if the deviation is without damage.[34] So a deviation to assist vessels under permission contained in the charter does not subject the owner to any claim.[35] The clause must be construed, however, as limited to deviations which do not frustrate the object of the contract.[36] It is held that in the absence of charter provision a deviation merely to save property is not justifiable.[37]

2. Destination and Port of Discharge; Delivery of Vessel to Owner. In determining the place of discharge the word "port" is taken to mean commercial area as it would be understood by business men in view of the nature of the charter-party.[38] Where there are several places in the port at which the cargo may be properly discharged, the ship-owner must follow the direction of the charterer as to which place to go.[39] The charterer must, however, name a physically safe port of destination,[40] and furthermore the port so designated must be politically

proper course of the voyage than is reasonably necessary having regard to the interests of all parties and taking into account the question of expense.

Right to retain cargo.— The owners of a chartered vessel, compelled to put in at an intermediate point, have a right to retain the cargo until the ship should be repaired and placed in a condition to proceed on her voyage and earn full freight, if the necessary repairs could be completed in a reasonable time; and, if that could not be effected, he has the right to cause the cargo to be transported in another vessel. Vance *v.* Clark, 1 La. 324.

34. Clipsham *v.* Vertue, 5 Q. B. 265, Dav. & M. 343, 8 Jur. 32, 13 L. J. Q. B. 2, 48 E. C. L. 265.

35. Velasco Terminal R. Co. *v.* The Brixham, 54 Fed. 539.

36. Potter *v.* Burrell, [1897] 1 Q. B. 97, 8 Aspin. 200, 66 L. J. Q. B. 63, 75 L. T. Rep. N. S. 491, 45 Wkly. Rep. 145.

Limitation of authority to deviate.— Liberty given a vessel to call "at any port or ports," or to tow and assist vessels "in all situations," refers to ports along the course of the voyage specified, or vessels met with in the ordinary conrse of such voyage, and where a vessel after loading proceeds forty miles directly out of her course to take in tow a disabled vessel, and is detained about seven days, it is an unjustifiable deviation. Ardan Steamship Co. *v.* Theband, 35 Fed. 620.

37. Scaramanga *v.* Stamp, 5 C. P. D. 295, 4 Aspin. 295, 49 L. J. C. P. 674, 42 L. T. Rep. N. S. 840, 28 Wkly. Rep. 691. But see Sturtevant *v.* The George Nicholans, 23 Fed. Cas. No. 13,578, Newb. Adm. 449.

38. Leonis Steamship Co. *v.* Rank, [1908] 1 K. B. 499, 13 Com. Cas. 136, 77 L. J. K. B. 224, 52 Sol. J. 621, 24 T. L. R. 128.

Delivery of vessel to owner.—Where a charterer is to deliver a vessel to the owner at the home port or another at the latter's option, and it is not exercised, a tender of her at either port is sufficient to relieve the charterer of further liability. Hunt *v.* Metcalf, 47 Fed. 73. If the place of delivery is not mentioned, a notice of readiness to redeliver, given to plaintiff, must be treated under the contract as an actual delivery. Albertson *v.* Hooker, 5 Cal. 176. Under a charter-party by which the vessel is to be delivered to the owner at a specified port at the expiration of the charter in as good condition as when chartered, providing that she be kept in condition by the owner, the charterer, on neglect of the owner to keep her in good order, may deliver her without sending her to the port named. Strong *v.* U. S., 154 U. S. 632, 14 S. Ct. 1182, 24 L. ed. 664 [*affirming* 13 Ct. Cl. 544].

39. Leonis Steamship Co. *v.* Rank, [1908] 1 K. B. 499, 13 Com. Cas. 136, 77 L. J. K. B. 224, 52 Sol. J. 621, 24 Wkly. Rep. 128; The Felix, L. R. 2 A. & E. 273, 37 L. J. Adm. 48, 18 L. T. Rep. N. S. 587, 17 Wkly. Rep. 102; East Yorkshire Steamship Co. *v.* Hancock, 5 Com. Cas. 266.

Where a ship is chartered to discharge at the port of New York, she cannot be compelled to discharge at New Rochelle, on Long Island sound; that place being neither within the port of New York geographically, nor as defined by Greater New York Charter (1901), § 864, etc. Mitchell *v.* Cargo of Lumber, 117 Fed. 189.

40. The Gazelle, 11 Fed. 429, 5 Hughes 391 [*affirmed* in 128 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496]; Smith *v.* Dart, 14 Q. B. D. 105, 5 Aspin. 360, 54 L. J. Q. B. 121, 52 L. T. Rep. N. S. 218, 33 Wkly. Rep. 455; The Alhambra, 6 P. D. 68, 4 Aspin. 410, 50 L. J. P. D. & Adm. 36, 43 L. T. Rep. N. S. 636, 29 Wkly. Rep. 655; *Re* Goodbody, 8 Aspin. 503, 5 Com. Cas. 59, 80 L. T. Rep. N. S. 188 [*affirmed* in 9 Aspin. 69, 5 Com. Cas. 59, 82 L. T. Rep. N. S. 484]. But see Capper *v.* Wallace, 5 Q. B. D. 163, 4 Aspin. 223, 49 L. J. Q. B. 350, 42 L. T. Rep. N. S. 130, 28 Wkly. Rep. 424.

A temporary obstacle does not make a port unsafe.— Ogden *v.* Graham, 1 B. & S. 773, 8 Jur. N. S. 613, 31 L. J. Q. B. 26, 5 L. T. Rep. N. S. 396, 10 Wkly. Rep. 77, 101 E. C. L. 773; Parker *v.* Winlow, 7 E. & B. 942, 4 Jur. N. S. 84, 27 L. J. Q. B. 49, 90 E. C. L. 942.

The words "or so near thereto as the vessel can safely come and always lay and discharge afloat" relate to obstacles which permanently prevent the ship from reaching her destination within a reasonable time, not to temporary obstacles which may be regarded as having been in the mind of the parties, such as

safe.[41] If the consignee insists upon delivery at an unsafe port the master may return with the cargo, if there is no place to store it at the adjacent port.[42] Where bills of lading are given by the master for delivery of the goods at the port named, the ship-owner cannot afterward object that it is not a safe port. He must go where he has contracted to go.[43] If the charterer has named a port of discharge he cannot afterward change the destination without the consent of the carrier,[44] unless under an option in the charter-party.[45]

J. Receiving and Discharging Cargo — 1. Loading and Stowage. A charter-party for the transportation of a cargo of merchandise, and not prescribing the mode of stowing, tacitly refers to the established and known usage of the trade for the manner of stowing the cargo.[46] There is an implied obligation that loading

inability to go to a wharf in a tidal harbor, where upon arrival the tides are neap (Carlton Steamship Co. *v.* Castle Mail Packets Co., [1897] 2 Q. B. 485, 8 Aspin. 325, 66 L. J. K. B. 819, 77 L. T. Rep. N. S. 332, 46 Wkly. Rep. 68 [*affirmed* in [1898] A. C. 486, 8 Aspin. 402, 67 L. J. Q. B. 795, 78 L. T. Rep. N. S. 661, 14 T. L. R. 469, 47 Wkly. Rep. 65]; Parker *v.* Winlow, 7 E. & B. 942, 4 Jur. N. S. 84, 27 L. J. Q. B. 49, 90 E. C. L. 942; Bastifell *v.* Lloyd, 1 H. & C. 388, 31 L. J. Exch. 413, 10 Wkly. Rep. 721); or where the water is closed by ice (Tillmanns *v.* Knutsford, [1908] 2 K. B. 385, 13 Com. Cas. 244, 77 L. J. K. B. 778, 24 T. L. R. 454 [*affirmed* in [1908] A. C. 406, 11 Aspin. 105, 13 Com. Cas. 334, 77 L. J. K. B. 977, 99 L. T. Rep. N. S. 399, 24 T. L. R. 786]; Metcalfe *v.* Britannia Ironworks Co., 2 Q. B. D. 423, 3 Aspin. 407, 46 L. J. Q. B. 443, 36 L. T. Rep. N. S. 451, 25 Wkly. Rep. 720). The obstacle need not be a physical one, as where it arises from a refusal of those controlling the port of destination to allow landing. Dahl *v.* Nelson, 6 App. Cas. 38, 4 Aspin. 392, 50 L. J. Ch. 411, 44 L. T. Rep. N. S. 381, 29 Wkly. Rep. 543.

If it would be necessary to discharge part of the cargo in order to proceed to the port named by the charterer's agents, the captain is entitled, unless it is otherwise provided by the charter-party, to refuse to proceed to the port so named, and in such a case evidence of a custom to lighten vessels to enable them to proceed to the port named is not admissible. Reynolds *v.* Tomlinson, [1896] 1 Q. B. 586, 8 Aspin. 150, 65 L. J. Q. B. 496, 74 L. T. Rep. N. S. 591.

A ship cannot be required to submit to being dismantled or mutilated in order to discharge her cargo under a charter, and where she cannot approach the place of discharge designated by the charterer without such mutilation that place is not a safe one for her within the meaning of the charter. Mencke *v.* A Cargo of Sugar, 99 Fed. 298 [*reversed* in 108 Fed. 89, 47 C. C. A. 222, and *affirmed* in 187 U. S. 248, 23 S. Ct. 86, 47 L. ed. 163].

41. The Teutonia, L. R. 3 A. & E. 394, 20 Wkly. Rep. 261 [*affirmed* in L. R. 4 P. C. 171, 1 Aspin. 214, 41 L. J. Adm. 57, 26 L. T. Rep. N. S. 48, 8 Moore P. C. N. S. 411, 20 Wkly. Rep. 421, 17 Eng. Reprint 366].

42. Mecke *v.* The Antonio Zambrana, 70 Fed. 320.

43. The Maggie Moore, 8 Fed. 620, 5 Hughes 287; Capper *v.* Wallace, 5 Q. B. D. 163, 4 Aspin. 223, 49 L. J. Q. B. 350, 42 L. T. Rep. N. S. 130, 28 Wkly. Rep. 424. And see The Gazelle, 11 Fed. 429, 5 Hughes 391 [*affirmed* in 128 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496], holding that where the vessel could not get into the port, and there was no anchorage near and customarily used in connection with it, where she could safely lay and discharge, it was the duty of the master to refuse to sign bills of lading to deliver the cargo there, even with the clause inserted, "as near thereunto as the vessel can safely get, and always lay and discharge afloat."

44. Davidson *v.* Gwynne, 12 East 381, 11 Rev. Rep. 420, 104 Eng. Reprint 149. And see Johnson *v.* D. H. Bibb Lumber Co., 140 Cal. 95, 73 Pac. 730, holding that where defendant chartered a vessel for three trips between certain ports, and the charterer directed the vessel on one of the trips to discharge at an intermediate port without the owner's consent, the owner was entitled to recover the freight the vessel would have earned under the charter-party if she had sailed to the port designated therein.

45. The Chadwicke, 29 Fed. 521.

A stipulation giving a shipper the privilege of a change of destination because of blockade does not authorize the carrier to make such change on the advice of the consignee because of a poor market. Eneas *v.* Schiffer, 8 Fed. Cas. No. 4,484.

46. Lamb *v.* Parkman, 14 Fed. Cas. No. 8,020, 1 Sprague 343. And see Tyson *v.* Belmont, 24 Fed. Cas. No. 14,316 [*affirmed* in 3 Fed. Cas. No. 1,281, 3 Blatchf. 530], holding that where a charter-party was executed at New York to take a load of lumber from the port of Apalachicola to a foreign country, it is to be presumed that the parties contracted with reference to the character of that port, and the incidents and difficulties attendant on entering the harbor and loading the vessel at that place.

The master cannot be charged with negligence where he is compelled by the charterer to accept apparently lawful cargo which because of inherent latent defect injures other cargo. The Keystone, 31 Fed. 412.

Care of cargo after delivery alongside of vessel.— Where a vessel is chartered for a cargo, a provision that the cargo is "to be delivered alongside, and held at charterer's risk and expense," is not unreasonable in

and unloading shall be so done by the vessel-owner as not to cause unnecessary injury to the goods.[47] It is for the master of the ship, and not the charterer, to determine where the different articles of merchandise offered shall be placed and how proportioned; and if the charterer offers to furnish goods in sufficient quantities, of the various kinds required by charter-party, it is the duty of the master to make known to him what quantity of the several articles will be necessary to load the ship, as required by the charter-party.[48] The master in stowing cargo may make departures from the stipulations of the charter-party, necessary for the safety of the voyage, such as the carrying of more ballast than that stipulated, and loading below decks instead of above decks.[49] It is the duty of the master when fully cognizant of the facts to determine when the vessel has taken on as much cargo as is prudent, although the cargo is being loaded by the shippers.[50] The ship is liable for all damage to cargo of which the overloading is the proximate cause.[51] Where, however, the cargo is negligently and unskilfully loaded and stowed by the charterer, the owner is not liable for the resultant loss.[52]

2. DISCHARGE. The charterer must discharge promptly and is liable for delay in doing so;[53] but not if he has endeavored to discharge with reasonable diligence

itself, or invalid as exempting the master from liability for his own negligence. The Ira B. Ellems, 50 Fed. 934, 2 C. C. A. 85 [*affirming* 48 Fed. 591], holding that where a raft of logs was brought alongside in the evening, and moored, by the charterer's agent and employees, the master was bound only to exercise ordinary care to see that it was not carried away during the night. And thus where under a charter the charterer reserved "the option of appointing stevedore for loading at the ship's expense," but there was no provision that the stevedore was to act under the master's orders and part of the cargo was towed to the ship in lighters, and made fast, and one of the lighters, after being fastened, capsized, losing her load, an action *in rem* for the lost cargo could not be maintained against the vessel. Guerard *v.* Lovspring, 42 Fed. 853. And see Shaw *v.* Hart, 21 Fed. Cas. No. 12,720, 1 Sprague 567.

47. Kerry *v.* Pacific Marine Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65.

48. Rich *v.* Parrott, 20 Fed. Cas. No. 11,761, 1 Sprague 358.

49. Reynolds *v.* The Joseph, 20 Fed. Cas. No. 11,730, 2 Hughes 58, holding, however, that the admiralty court will decree in favor of the charterer a proper allowance for any space he may have lost by such changes.

But refusal of the master to stow all the cargo in the hold, resulting in the inability of the vessel to carry the limit of passengers stipulated in the charter, renders the vessel-owners liable in damages. Parsons *v.* Ogden, 18 Fed. Cas. No. 10,781, 4 Blatchf. 99.

Failure to provide proper dunnage is a breach of a charter to stow cargo properly. Robinson *v.* Franklin Sugar Refining Co., 70 Fed. 792.

50. The Giles Loring, 48 Fed. 463; Burdge *v.* Two Hundred and Twenty Tons of Fish Scrap, 2 Fed. 783, 5 Hughes 141.

51. The Regulus, 18 Fed. 380, damage to fruit by reason of overloading so that the hatches had to be kept closed and the cargo was damaged by want of ventilation.

52. The South America, 27 Fed. 386.

Where the owners of the vessel contract to furnish the use of tackle in loading, and to afford charterers the same accommodation as if the ship were loaded by the pound, they are bound to the charterers, and the charterers' agents, the stevedore and his employees, to furnish proper machinery and tackle, and to use proper care to keep it in order. Anderson *v.* The Ashebrooke, 44 Fed. 124.

53. Hine *v.* Perkins, 55 Fed. 996, 5 C. C. A. 377 [*reversing* 50 Fed. 434] (holding that where the vessel has four hatches, the charterers must discharge at a herth where all four can be used); Bertellote *v.* Part of Cargo of Brimstone, 3 Fed. 661, 5 Hughes 201; The Deerhound, 9 Aspin. 189, 6 Com. Cas. 104, 84 L. T. Rep. N. S. 360, 17 T. L. R. 328, 49 Wkly. Rep. 511; Hulthen *v.* Stewart, 6 Com. Cas. 65, 17 T. L. R. 283.

"Customary dispatch in discharging" means discharging with speed, haste, expedition, and due diligence, according to the lawful, reasonable, well-known customs of the port of discharge. It is the same as "usual custom," but not the same as "quick despatch," which latter has been held to exclude certain usages and customs. Lindsay *v.* Cusimano, 12 Fed. 503 [*following* 10 Fed. 302]. In such case the fact that there is a custom of the port authorizing certain delays does not operate to permit the consignee voluntarily to delay the discharge in violation of the express terms of the contract. Lindsay *v.* Cusimano, 10 Fed. 302. Under a charter-party providing that a cargo should be discharged at a specified dock with all despatch as fast as steamer can deliver, as customary, although the more usual method at that dock is to discharge such a cargo into railroad trucks, but it is practicable to discharge into lighters, it was the duty of the receivers of the cargo, if railway trucks could not be obtained, to discharge into lighters. Rodenacker *v.* May, 6 Com. Cas. 37.

If by the quarantine regulations, after the voyage has begun, the ship cannot discharge at the port itself, but may at a short dis-

under existing circumstances.[54] Where the bill of lading provides for delivery from the ship's deck, when the ship's responsibility shall cease, the obligation to protect the cargo on the wharf is upon the charterers, if reasonable opportunity to take delivery from the ship's deck has been furnished.[55] Although a ship, as a common carrier, where she selects her own wharf, is answerable for its sufficiency until the lapse of a reasonable time for removal of the goods by the consignee, including the necessary custom-house weighing and gauging, she is not responsible for the breaking down of a wharf apparently sound and in good condition, selected by the consignee in accordance with the provisions of the charter, when the breaking down occurs through secret defects of which the ship has no notice, and the evidence does not establish any unusual or excessive deposit of cargo for a sound wharf.[56] Where a consignee refuses to receive cargo in accordance with the provisions of the charter-party, the shipmaster is authorized to land and store it at the nearest proper and convenient port, having reference to his own convenience and the apparent best interests of its owner, and acting prudently and in good faith.[57]

3. Employment of Stevedore. In the absence of any provision to the contrary in the charter-party, or any different custom of the port, a vessel is entitled to select and employ a competent stevedore to load the cargo furnished by the charterer.[58] If the charterer does the stevedoring he is not entitled to more than the service would have cost the ship.[59] Under a charter providing that the vessel should employ a stevedore satisfactory to the charterers, if the one selected by the master is unsatisfactory the charterers may themselves select another.[60] The mere fact that a charter-party makes the charterers liable for the expenses of loading and unloading is not sufficient to exempt the vessel from liability to one who renders services as a stevedore in loading at the request of one whom he supposes to be the owner's or charterer's agent;[61] nor does a stipulation that the ship is to employ the charterer's stevedore and clerk amount to a special agreement that the charterer shall perform the duty of lading and stowing, or make them

tance, where it is usual for vessels under quarantine to do so, the charterers must accept the cargo there. They cannot compel the ship to sail with it to the quarantine ground, retain it on board the whole time, and return and discharge it. Shepherd *v.* Lanfear, 5 La. 336, 25 Am. Dec. 181.

54. Marshall *v.* McNear, 121 Fed. 428.

55. Lindsay *v.* Cusimano, 10 Fed. 302 [*affirmed* in 12 Fed. 503].

56. Young *v.* Lehmann, 27 Fed. 383, holding also that where a charter-party provided that the consignee should choose a wharf for unloading, and he, finding it difficult to select a suitable one, requested the ship's agents to select one, and they did so, they acted in the matter as consignee's agents, and the ship was not liable for any defect in the wharf.

57. Compagnie du Boleo *v.* The Scandinavia, 49 Fed. 658.

58. George W. Bush, etc., Co. *v.* Thompson, 65 Fed. 812, 13 C. C. A. 148 [*affirming* 60 Fed. 631].

59. Muller *v.* Spreckels, 48 Fed. 574.

Under a charter-party requiring the vessel to discharge by night, as well as by day, if required by the charterer or consignee, and also giving the charterer the option to provide the stevedore for discharging, for which the vessel agreed to pay at not exceeding a specified rate, where he exercised such option, he does the stevedoring and is not entitled to charge for discharging a sum exceeding the stipulated rate because of night work, especially where by means of it he earned despatch money under the charter. The Bencliff, 155 Fed. 242.

60. The Alexander Gibson *v.* Portland Shipping Co., 56 Fed. 603, 6 C. C. A. 47.

"Stevedore employed by vessel to be approved by charterers," in a charter, does not bind the charterer to approve a stevedore employed by the owners, but requires the one selected by the owners to be subjected to the charterers' approval and refusal of the latter to approve the stevedore, without giving any reason therefor, does not give the stevedore so disapproved any right of action for damages against him, whatever may be the rights of the other party to the contract. John B. Honor Co. *v.* Middle Division El. Co., 105 Fed. 387, 44 C. C. A. 539.

Under a charter requiring owners "to provide men to run winches," the ship's duty is satisfied by furnishing competent men, although they may not be *personæ gratæ* to the charterer's stevedores. Constantine, etc., Steamship Co. *v.* Tweedie Trading Co., 159 Fed. 706, 86 C. C. A. 574; British Maritime Trust *v.* Munson Steamship Line, 149 Fed. 533.

61. Norwegian Steamship Co. *v.* Washington, 57 Fed. 224, 6 C. C. A. 313, holding that

responsible for the character of the stowage.[62] Thus the ship is liable for damage to cargo caused by the bad stowage of charterer's stevedore, where her officers retain control over the disposition of the cargo.[63] A charter providing for payment of stevedore by the charterer is not affected by a usage, unknown to the master, for the master to pay the stevedore for unloading.[64]

4. EXPENSES. Where the charter provides upon whom the cost of lighterage,[65] wharfage,[66] or stevedoring [67] shall fall the terms of the contract of course prevail.[68] Under a charter-party stipulating that the charterer shall deliver a cargo on board at his expense of lighterage, it is necessarily implied that the charterer will both lighter the cargo and pay for the lighterage and his obligation is not fulfilled by depositing the cargo on a wharf; [69] but if a vessel, in order to earn greater freight,

the burden is on the vessel to show that the stevedores had knowledge of the terms of the charter-party.

62. Richardson *v.* Winsor, 20 Fed. Cas. No. 11,795, 3 Cliff. 395.

63. Bethel *v.* Mellor, etc., Co., 131 Fed. 129; Robinson *v.* Franklin Sugar Refining Co., 70 Fed. 792; The Keystone, 31 Fed. 412; The Boskenna Bay, 22 Fed. 662 [*reversed* on other grounds in 40 Fed. 91, 6 L. R. A. 172]; The T. A. Goddard, 12 Fed. 174.

64. Isaksson *v.* Williams, 26 Fed. 642.

65. Mencke *v.* A Cargo of Java Sugar, 187 U. S. 248, 23 S. Ct. 86, 47 L. ed. 163 [*reversing* 108 Fed. 89, 47 C. C. A. 222, and *affirming* 99 Fed. 298]; Carr *v.* Austin, etc., R. Co., 14 Fed. 419, 4 Woods 327, holding that where a charter-party provides that "the cargo is to be brought to and taken from along-side at merchant's risk and expense, and free of lighterage to the ship, etc., and being so loaded shall therewith proceed," etc., the cost of lighterage at the ports of both departure and destination for lading and discharge of the cargo is at the expense of the merchant. But see Dow *v.* Hare, 7 Fed. Cas. No. 4,037*a*.

66. Lowry *v.* U. S. Shipping Co., 84 Fed. 685; Johnson *v.* Baugh, etc., Co., 58 Fed. 424 (holding that a stipulation in a charter-party that cargoes are "to be brought to and taken from alongside, at charterer's risk and expense, and, should there be any lighterage or wharfage, this to be also for charterer's account," makes the charterer, or the consignee, who stands in his place, responsible for wharfage in unloading as well as in loading); and where, under the proper construction of a charter-party, the consignee is liable for wharfage, the fact that the master, immediately after unloading, affixes his name to the wharfage bill, is not an admission of liability as between himself and the consignee, when he denies liability at the time, and it appears that such signature is necessary to a settlement between the consignee and charterer, as a certification that the wharfage charge is correct in amount. See Hammett *v.* Chase, 158 Fed. 203, holding a charterer who is bound by the contract to furnish the vessel with a berth for discharging liable for extra wharfage which the master was obliged to pay at a designated berth, and also for overtime paid to a government inspector due to delay in discharging, for which he was responsible.

67. Golcar Steamship Co. *v.* Tweedie Trading Co., 146 Fed. 563; Macy *v.* Perry, 91 Fed. 671.

A provision for customary rates means reasonable compensation in the absence of evidence of established customary rates. Macy *v.* Perry, 91 Fed. 671.

68. The owner of a vessel is bound by the customs of a port to which he contracts to carry a cargo, where the charter provides that "the cargo is to be brought alongside the vessel and taken away at the expense and risk of the charterers, according to the use and customs of the place of loading and discharging." Nordaas *v.* Hubbard, 48 Fed. 921 (holding that a custom of the port of Mobile by which vessels taking on additional cargo at a deeper anchorage bear the cost of lightering, although not so notorious or so acquiesced in as to have the force of law, is binding on a vessel whose charter-party provides that the custom of the port is to be observed in all cases not especially provided for); Bertellote *v.* Part of Cargo of Brimstone, 3 Fed. 661, 5 Hughes 201. But where the charter-party provides that the cargo is to be brought to and taken from alongside the steamer at charterer's risk and expense, any custom of the port to the contrary notwithstanding, the provision excludes the custom of a port by which the duty of a ship-owner under an obligation to deliver alongside is to deliver into barges or on to a quay, and the duty of the ship-owner is completely performed by delivery over the ship's rail. Brenda Steamship Co. *v.* Green, [1900] 1 Q. B. 518, 9 Aspin. 55, 5 Com. Cas. 195, 69 L. J. Q. B. 445, 82 L. T. Rep. N. S. 66, 16 T. L. R. 226, 48 Wkly. Rep. 321. The custom of a port requiring a vessel discharging to pile bales on the dock for one half its width and the length of the vessel is not inconsistent with a clause of a charter-party providing that "cargo shall be received and delivered alongside of the vessel . . . within reach of her tackles," and the charterer is not liable to the vessel for the expense of such piling. Seagar *v.* New York, etc., Mail Steamship Co., 55 Fed. 880, 5 C. C. A. 290 [*affirming* 55 Fed. 324].

69. Nelson *v.* Odiorne, 45 N. Y. 489, holding also that the fact that the "customary" way of loading at that place was at the wharf did not relieve the charterer from his obligation to provide lighterage.

Charter construed as not binding the char-

gets the shipper to furnish at a deeper anchorage cargo in addition to what he had furnished at the agreed place of loading, the cost of lightering must be borne by the vessel, and delivery to the lighter is delivery to the vessel.[70] Similarly if extra expense is incurred in loading simply to enable the charterer to carry a greater load the extra expense must be borne by the charterer.[71] But the owner of a vessel chartered to one who becomes owner *pro hac vice* [72] is not responsible for wharfage incurred after he has chartered the vessel.[73] Where a vessel, to make the delivery required by the terms of the charter, is compelled to enter a dock, and for this purpose enters the dock of the charterer, she is liable to him for the ordinary charges for wharfage in like manner as at any other wharf.[74]

K. Charter-Money and Other Compensation — 1. When Earned. In order to be entitled to charter-money the owner must fully perform his contract.[75] Transportation of part of the cargo is not sufficient.[76] Where a vessel is chartered to perform a stipulated voyage and deliver to a person named, failure so to deliver will prevent recovery of charter-money, even if the failure is not attributable to the fault of the carrier.[77] Thus if a vessel is captured, the whole voyage is broken up, and no freight can be recovered.[78] Under a charter-party which provides for payment of freight on delivery of cargo at port of discharge, no freight is earned if the vessel is wrecked, and is unable to deliver the cargo; [79] but if a vessel, hired by a charter-party in which no provision is made for an eventual misfortune, is

terer to furnish or provide the lighterage, but only to pay for it see Barrett *v.* Oregon, etc., Nav. Co., 22 Fed. 452, 10 Sawy. 523.

Where goods were landed at the wrong port under the direction of an agent of the charterers, they were held to be liable for the expense attending unlading and relading the goods. Weston *v.* Minot, 29 Fed. Cas. No. 17,453, 3 Woodh. & M. 437.

70. Nordaas *v.* Hubbard, 48 Fed. 921.

71. Macy *v.* Perry, 99 Fed. 1004, 40 C. C. A. 217 [*affirming* 91 Fed. 671].

72. **When charterer becomes owner pro hac vice** see *supra*, III, E.

73. Philadelphia *v.* Naglee, 1 Ashm. (Pa.) 37.

74. Muller *v.* Spreckels, 48 Fed. 574.

75. Burn Line *v.* U. S., etc., Steamship Co., 162 Fed. 298, 89 C. C. A. 278 (holding that where the charter-party provides for payment of the hire or freight in instalments at specified times, the owners cannot collect an instalment falling due after the ship has stranded and become a total loss); Davidson *v.* Four Hundred Tons Iron Ore, 18 Fed. 94.

Blockade or embargo.— Where a chartered vessel, on arriving near her port of destination, was turned away by reason of its being blockaded, and returned to her port of lading, freight is not due on the charter-party nor *pro rata itineris* for the agreed voyage has not been performed. Burrill *v.* Cleeman, 17 Johns. (N. Y.) 72; Scott *v.* Libby, 2 Johns. (N. Y.) 336, 3 Am. Dec. 431. The same rule applies to an embargo. Brown *v.* Delano, 12 Mass. 370. And see Sturgis *v.* Gardner, 2 Brev. (S. C.) 233.

Advanced freight can be recovered back by the charterer, in case of the loss of the ship or non-performance of the voyage, whether by the fault of the master or not. Lawsom *v.* Worms, 6 Cal. 365. The English law is *contra*. See Oriental Steamship Co. *v.* Tylor, [1893] 2 Q. B. 518, 7 Aspin. 377, 63 L. J. Q. B. 128, 69 L. T. Rep. N. S. 577, 4 Reports 554, 42 Wkly. Rep. 89.

The risk and danger of losing a cargo in performing or attempting to perform a stipulated voyage will not entitle the carrier to any compensation where there has not been performance. The Harriman, 11 Fed. Cas. No. 6,104, 5 Sawy. 611 [*affirmed* in 9 Wall. 161, 19 L. ed. 629].

An error in judgment on the part of the master not shown to be incompetent in respect to the navigation of the vessel does not relieve the charterers from paying the stipulated hire of the vessel. Haggett *v.* Bowman, 11 Fed. Cas. No. 5,900, 1 Sawy. 4.

Where the vessel is sold charter-money subsequently earned passes to the purchaser. Williams *v.* Johnson, 11 Barb. (N. Y.) 501. But the interest of a purchaser from one member of a partnership owning a part interest in the vessel is subject to an account to be taken between the partners as to former voyages. William *v.* Lawrence, 53 Barb. (N. Y.) 320 [*affirmed* in 47 N. Y. 462].

76. Davidson *v.* Four Hundred Tons Iron Ore, 18 Fed. 94.

77. The Harriman, 9 Wall. (U. S.) 161, 19 L. ed. 629, holding that where a vessel was chartered under a contract to convey a cargo to a distant port, and there deliver it to the commandant of a fleet, and during the voyage there was a change in the military operations of the fleet, and the vessel returned without delivering, the owner was not entitled to charter-money even *pro rata*. But see Work *v.* Leathers, 97 U. S. 379, 24 L. ed. 1012, holding that if a charterer uses a vessel which proves to be defective, he must pay for the use to the extent to which he used the vessel.

78. Tittermary *v.* Gardiner, 4 Yeates (Pa.) 157.

79. China Mut. Ins. Co. *v.* Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576; Burn

wrecked, and the cargo is delivered to the owner with his assent, the charterer must pay freight for it *pro rata itineris*.[80] If the delivery of the cargo is prevented by the neglect or default of the hirer, the owner is as well entitled to the hire as upon proving an actual discharge and delivery of the cargo.[81] The owners are entitled to full charter-money, if the charterer refuses to go on with the voyage, where, on an accident happening, the vessel returns to the port of departure, is repaired within a reasonable time, and ready to sail.[82] The same rule applies where a vessel, abandoned by her officers and crew, is brought by salvors into a port distant from the port of discharge and repaired.[83] If in consequence of the consignee's wrongful neglect to unload, the vessel is lost with the cargo after arrival, the owner is entitled to freight.[84] But where a vessel is chartered at the port of shipment, the freight to be paid on the arrival and discharge of the cargo at the port of destination, and the vessel springs a leak and puts back to the port of shipment, and the cargo is there discharged, and, being damaged, is sold by the master as unfit for the ship and dangerous to the crew, the owners of the vessel are not entitled to recover freight.[85] Similarly if the charter contains no exceptions as to perils of the seas, and the vessel, meeting heavy weather, puts back, and a part of the cargo damaged by sea perils is taken out and sold, and the balance is carried forward and delivered to the consignees under bills of lading excepting perils of the seas, no part of the charter-money is recoverable, as the contract was not performed.[86] A charter which provides for a payment of charter-money at stated periods, as per month or parts of month, is a charter for a specified time, and, although the vessel is lost before the voyage is completed, the stipulated compensation is recoverable to the time of loss.[87] Although freight is payable monthly, if required, yet, where the voyage is never completed, and the vessel condemned by a foreign tribunal through the fraud of one of the owners, who is in charge of the vessel, freight is not recoverable, although the other owners are innocent of the fraud.[88] Charterers of a vessel for an entire voyage who by themselves or their authorized agent waive the terms of the charter-party and consent to and order a deviation from the voyage agreed on, are liable to pay the stipulated price in like manner as if the voyage originally contemplated had been performed.[89] Although a deviation be made under a charter providing that charter-money is to be paid a specified number of days after return to the port

Line *v.* U. S., etc., Steamship Co., 162 Fed. 298, 89 C. C. A. 278. And see Parker *v.* Gilliam, 23 N. C. 545.

80. Coffin *v.* Storer, 5 Mass. 252, 4 Am. Dec. 54.

81. Gage *v.* Maryland Coal Co., 124 Mass. 442; Bradstreet *v.* Baldwin, 11 Mass. 229; Wood *v.* Hubbard, 62 Fed. 753, 10 C. C. A. 623, holding that where a vessel under charter had loaded her cargo and left the port of loading with manifest intent to proceed to her port of destination, she had commenced her voyage so as to earn freight, although, in consequence of her becoming icebound, the voyage was broken up by the charterers, and notwithstanding her crew was temporarily incomplete.

Evidence held to support findings by the trial court that libellants had not established their claim for dead freight under a charter based on the ground that the water on a bar was not of sufficient depth to enable the vessel to load a full cargo, and that there was not a failure to exercise customary despatch in discharging which entitled them to demurrage. See Pendleton *v.* U. S., etc., Co., 145 Fed. 508, 76 C. C. A. 186.

82. Tio *v.* Vance, 11 La. 199, 30 Am. Dec. 715.

The tender and refusal of a new cargo, after repairs to a vessel so injured as to necessitate unloading the first cargo, entitles the charterer to treat the voyage as broken up, and to demand the damaged cargo without payment of freight. The Luteken, 15 Fed. Cas. No. 8,609, 6 Ben. 565.

83. The Eliza Lines, 61 Fed. 308.

84. Brown *v.* Ralston, 9 Leigh (Va.) 532.

85. Miston *v.* Lord, 17 Fed. Cas. No. 9,655, 1 Blatchf. 354.

86. Willett *v.* Phillips, 29 Fed. Cas. No. 17,683, 8 Ben. 459.

87. Brewer *v.* Churchill, 45 Me. 64; Cook *v.* Gowan, 15 Gray (Mass.) 237; McGilvery *v.* Capen, 7 Gray (Mass.) 525; Brown *v.* Hunt, 11 Mass. 45; Brett *v.* Zachrissen, 4 Fed. Cas. No. 1,845, where on the loss of the vessel the cargo saved was abandoned to the underwriters.

88. Hadfield *v.* Jameson, 2 Munf. (Va.) 53.

89. Baker *v.* Pratt, 4 Allen (Mass.) 158, holding also that the fact that a memorandum of such consent and order is afterward written upon the charter-party and signed by

of departure, the owner is not thereby entitled to seize the vessel at the port of deviation and retain the cargo for freight.[90] Acquiescence by a shipper in an unauthorized change of destination renders him liable for the price agreed on for the voyage, but not for the special premium agreed to be paid on delivery of cargo at the port designated in the contract.[91]

2. Amount and Rate — a. General Rules. Where the amount or rate of freight is stipulated the contract price controls,[92] and if a specified load is contracted for the owner is entitled to the full freight therefor, although through the default of the charterer a smaller amount is carried,[93] allowing a fair margin under

such agent with his own name alone is immaterial.

90. Pickman *v.* Woods, 6 Pick. (Mass.) 248.

91. Eneas *v.* Schiffer, 9 Fed. Cas. No. 4,484.

92. Love *v.* Ross, 4 Call (Va.) 590; Donaldson *v.* Severn River Glass Sand Co., 138 Fed. 691; Otis Mfg. Co. *v.* The Ira B. Ellems, 50 Fed. 934, 2 C. C. A. 85 [*affirming* 48 Fed. 591]. See The Drottning Sophia, 153 Fed. 1017, holding that where a provision is made in a charter-party that it shall be superseded by the bills of lading, and an adjustment is made between the charterers and the master before the sailing of the vessel and bills of lading are signed showing that no dead freight is due, it cannot be recovered afterward by the owner from the charterers.

Where a charter-party provides for freight at the "going rate" at the time the vessel presents itself for lading, such rate is to be ascertained by the last actual contract made on that day, or, where the rate varies, it is to be ascertained by the average for the day. Barrett *v.* The Wacousta, 2 Fed. Cas. No. 1,050, 1 Flipp. 517.

Particular stipulations as to amount and rate construed see Stewart *v.* Reed, 46 Me. 321; Schwartze *v.* Tyson, 4 Harr. & J. (Md.) 288; Nelson *v.* Recknagel, 3 Bosw. (N. Y.) 459; Ward *v.* Whitney, 3 Sandf. (N. Y.) 599 [*affirmed* in 8 N. Y. 442]; Kinnear *v.* Powell, 3 Misc. (N. Y.) 449, 23 N. Y. Suppl. 182 [*affirmed* in 142 N. Y. 684, 37 N. E. 828]; Lombard Steamship Co. *v.* Lanasa, etc., Steamship, etc., Co., 163 Fed. 433; Bollman *v.* Tweedie Trading Co., 150 Fed. 434; Capuccio *v.* Barber, 148 Fed. 473; Arenburg *v.* Grupe, 135 Fed. 238 (holding that a provision in a charter-party for the carriage of a cargo of timber from a Cuban port to New York fixing the freight per thousand feet, "Cuban invoice," means the same as "Cuban invoice measure," the term having a known meaning in the trade, as relating to a peculiar system of measurement; and the vessel-owners are bound by such provision, although the agents who negotiated the charter had no actual knowledge of such meaning); Portland Flouring-Mills Co. *v.* Weir, 95 Fed. 997; Christie *v.* Davis Coal, etc., Co., 95 Fed. 837; Blue Star Steamship Co. *v.* Keyser, 81 Fed. 507 (holding that address commissions are not included in the expression, "in charter party cash advanced for ship's disbursements," and therefore are to be excluded from the amount on which the commission is charged); O'Brien *v.* 1,614 Bags of Guano, 48 Fed. 726; Eisenhauer *v.* De Belaunzaran, 26 Fed. 784; Boult *v.* The Naval Reserve, 5 Fed. 209, 5 Hughes 233; One Hundred and Eighteen Sticks of Timber, 18 Fed. Cas. No. 10,519, 10 Ben. 86; London Transport Co. *v.* Trechmann, [1904] 1 K. B. 635, 9 Aspin. 518, 9 Com. Cas. 133, 73 L. J. K. B. 253, 90 L. T. Rep. N. S. 132; Weir *v.* Girvin, [1900] 1 Q. B. 45, 9 Aspin. 7, 5 Com. Cas. 40, 69 L. J. Q. B. 168, 81 L. T. Rep. N. S. 687, 16 T. L. R. 31, 48 Wkly. Rep. 179; Tonnelier *v.* Smith, 8 Aspin. 327, 2 Com. Cas. 258, 77 L. T. Rep. N. S. 277, 13 T. L. R. 560 (holding that where by a charter-party it was provided that the charterer should pay freight at a certain rate per month, the charterer was bound to pay the full freight in advance at the beginning of each month, although it might be probable that the hire would not continue for the whole month); The Dowlais, 18 T. L. R. 198, 51 Wkly. Rep. 88 [*affirmed* in 18 T. L. R. 683].

An indorsement on a charter increasing the rate, made without consideration, is as to the increase void and only the original rate is payable. Allen *v.* Bareda, 7 Bosw. (N. Y.) 204.

Where a vessel was let to perform several consecutive voyages, in the course of which she performed an intermediate voyage at the request of the supercargo, the agent of the freighter, for which the owner was paid by the supercargo while abroad, the fact of the additional voyage did not show the substitution of a new contract, and the owner was entitled to recover on the covenant in the charter-party; he not claiming anything for the additional voyage in the action brought by him. Solomon *v.* Higgins, 6 Wend. (N. Y.) 425.

Charterers are bound in solido as commercial partners.— Mahoney *v.* Martin, 35 La. Ann. 29.

93. Duffie *v.* Hayes, 15 Johns. (N. Y.) 327 (holding that where the whole of a vessel is chartered to take a cargo at certain specified rates per ton, square foot, and the like, the owner of the vessel is entitled to freight for a full cargo, and not for what the vessel actually carried); The Frogner, 49 Fed. 876; The B. J. Willard, 3 Fed. Cas. No. 1,454, 8 Wkly. Notes Cas. (Pa.) 47; Shaw *v.* Hart, 21 Fed. Cas. No. 12,720, 1 Sprague 567. But see Eikrem *v.* New England Briquette Coal Co., 125 Fed. 987, holding that under a charter-party providing that the charterer shall provide a full and complete cargo of a specified kind of cargo, he to pay one dollar

an approximation clause in the charter-party.[94] The measure of the dead freight to be recovered is the difference between the net freight for a full cargo of the goods contracted for, and what would have been netted by any other reasonable cargo which by due diligence could have been obtained.[95] If because the vessel is not in condition to receive a full cargo of the kind specified it is not carried, the vessel being in fault must bear the loss and not the charterers.[96] Where a charterer contracts with the owner to load the vessel with not to exceed a specified amount, and by error of both the master and the charterer the vessel takes on board in excess of that amount, by reason of which additional weight the vessel is detained, the ship-owner cannot, in addition to his claim for damages, recover *pro rata* freight for the transportation of the additional weight.[97]

b. Voyage Out and Return. Where a vessel is chartered for a voyage out and home, for a gross sum, the outward and homeward voyages are considered one and entire, and her return is a condition precedent to entitle the owner to freight.[98] The owner cannot recover on the charter-party or on an implied assumpsit for the freight of the outward voyage; nor in such case if the freighter accepts the outward cargo can the owner recover *pro rata* freight.[99] But if two voyages, one outward and one homeward, are contemplated, and the vessel is lost on the

and seventy-five cents per ton for freight, there can be recovery only for the amount shipped; there being no evidence that the vessel could have prudently taken more such cargo, or that the master erred in his judgment that she could not prudently carry more.

If rate is per package of a certain size for a full cargo, and a cargo is loaded of packages of larger size, the owner can recover as for a full cargo of the size specified. Atkins *v.* Fiber Disintegrating Co., 18 Wall. (U. S.) 272, 21 L. ed. 841 [*affirming* 2 Fed. Cas. No. 602, 7 Blatchf. 555 (*reversing* 2 Fed. Cas. No. 601, 2 Ben. 381)].

A stipulation in a charter-party giving charterers a right to appoint the stevedore, the steamer paying the expense thereof at usual rates for first-class work, requires the charterers to acount to the ship for a secret rebate received from the stevedore whom they appointed. Lowry *v.* U. S. Shipping Co., 84 Fed. 685.

94. Parker *v.* Tiers, 29 Fed. 800.

95. Stepanovit *v.* Gillibrand, 22 Fed. Cas. No. 13,360.

96. Holyoke *v.* Depew, 12 Fed. Cas. No. 6,652, 2 Ben. 334.

Authority of master as to change of rate or settlement of advances.—Where a charter-party provides a certain freight rate, the master of the vessel cannot change such rate in the bill of lading by inserting an increased rate for the purpose of collecting such higher rate from the consignee for the benefit of the consignor, and the owner is not liable to the consignee for failure of the master, who executes such a bill of lading, to collect the increased rate from the consignee. Randall *v.* Brodhead, 60 N. Y. App. Div. 567, 70 N. Y. Suppl. 43. And see Merchants' Banking Co. *v.* Cargo of the Afton, 134 Fed. 727, 67 C. C. A. 618 [*reversing* 125 Fed. 258]. But where, by a provision of a charter-party for a foreign vessel to be loaded at a port in this country, the charterer was required to advance expense money to the master at the port of loading, for which the master should give drafts on the owners, and the contract further provided that any dispute thereunder should be settled at the port where it arose, the master was thereby authorized to make settlement with the charterer for advances; and such settlement with the charterer, in the absence of fraud or mistake, was binding on the owners. Keyser *v.* Blue Star Steamship Co., 91 Fed. 267, 33 C. C. A. 496 [*reversing* 81 Fed. 507]. And see The Drottning Sophia, 153 Fed. 1017.

97. Shaw *v.* Folsom, 38 Fed. 356 [*affirmed* in 40 Fed. 511].

98. Towle *v.* Kettell, 5 Cush. (Mass.) 18; Penoyer *v.* Hallett, 15 Johns, (N. Y.) 332, 8 Am. Dec. 239; Barker *v.* Cheriot, 2 Johns. (N. Y.) 352 (where the vessel was captured on the return voyage); The Erie, 8 Fed. Cas. No. 4,512, 3 Ware 225; Weston *v.* Minot, 29 Fed. Cas. No. 17,453, 3 Woodb. & M. 437 (holding that freight contracted for in gross for a voyage out and in cannot be apportioned and recovered for a part of the cargo or a part of the voyage unless, from some expression in the contract, or nature of the voyage, or act of the hirer of the vessel, or measure of the government, an apportionment becomes feasible and just). But see Sandry *v.* Lynch, 1 Mart. (La.) 57, holding that where a ship is chartered for a voyage out and back for an entire sum, and the voyage is broken up by an attachment of the shipper's goods before sailing, the ship will be entitled to one-fourth the entire freight.

By the maritime law, when a ship is chartered to one or more ports out and home, freight will be due to each port where cargo is delivered, although the ship is lost on her return home, and freight is due as far as the charterer has had the beneficial use of the vessel. The Erie, 8 Fed. Cas. No. 4,512, 3 Ware 225.

99. Penoyer *v.* Hallett, 15 Johns. (N. Y.) 332, 8 Am. Dec. 239.

latter, freight may be recovered for the outward voyage.[1] Under those circumstances if the vessel is captured on her homeward voyage, the charterer is liable for hire only for the outward voyage, including half the time of delay at the port for which he started for home.[2] But while the owner and charterer as between themselves may make the whole freight in such a voyage depend on the safe arrival of the ship at her home port or on any other contingency,[3] if the only other contingency specified is the delivery of a cargo, and the language of the contract leaves it doubtful whether the voyage is single or divisible, the presumption of law is that the voyage is divisible, and this presumption holds, although the freight is made payable after the ship returns to her home port.[4] The contract may be an indivisible one and return of the vessel a condition precedent to payment of freight, even if freight is to be paid at a monthly rate.[5]

3. Time For Which Compensation May Be Collected. Unless the charter provides for cessation of hire in specified contingencies hire runs continuously.[6] Under a charter-party in which the owner agrees that the vessel shall be kept tight, stanch, well-fitted, and tackled for a voyage, the charterer takes on himself the risk of such delay as is necessary to enable the owner to perform his contract of keeping the vessel seaworthy during the voyage, and cannot subject the owner to any loss or damage resulting from the retardation occasioned by putting into port for repairs.[7] The rule is otherwise and charter-money is not payable where the charter provides that it is not to be paid for time lost by reason of the vessel being out of order,[8] nor is hire payable for the time she is being put into condition to carry the cargo for which she is chartered.[9] Where the charter specifies certain contingencies in which hire is to cease, those contingencies cannot

1. Coffin *v.* Storer, 5 Mass. 252, 4 Am. Dec. 54.

2. Locke *v.* Swan, 13 Mass. 76.

3. The Erie, 8 Fed. Cas. No. 4,512, 3 Ware 225 [*cited* in The L. L. Lamb, 31 Fed. 29].

4. The Erie, 8 Fed. Cas. No. 4,512, 3 Ware 225 [*cited* in The L. L. Lamb, 31 Fed. 29]. But see Cutts *v.* Frost, Smith (N. H.) 309, holding that under these circumstances where the vessel was lost, with all the cargo, on the homeward voyage, the charterer was not liable, even for the outward freight.

5. Hamilton *v.* Warfield, 2 Gill & J. (Md.) 482, 20 Am. Dec. 448.

6. Spafford *v.* Dodge, 14 Mass. 66 (holding that where a vessel was hired by a charter-party at a certain rate per month, so long as she should continue in the service of the hirer, and was seized as prize, and detained for several months, but afterward completed her voyage, the hirer was bound to pay the stipulated hire for the time of such detention); Minot *v.* Durant, 7 Mass. 436 (holding that where a charterer contracts to pay a certain sum per month for the hire of the vessel during a voyage, the hire was payable while the vessel was detained in port by an embargo made by the government); U. S. *v.* Shea, 152 U. S. 178, 14 S. Ct. 519, 38 L. ed. 403 (holding that hire runs while the vessel is laid up undergoing repairs for an accident); Hine *v.* New York, etc., Co., 68 Fed. 920 [*affirmed* in 73 Fed. 852, 20 C. C. A. 63]. But see The South America, 27 Fed. 386 (holding that where one chartered a barge for six months at a certain rate per month, with the privilege of renewal for six months additional, and the barge, before the expiration of the first six months, sprung a leak, and was taken possession of by the insurance companies, the owner, knowing this, could not treat the failure to deliver the barge to him as a renewal of the lease, and recover rent for the additional six months); White's Case, 11 Ct. Cl. 578 [*affirmed* in 154 U. S. 661, 14 S. Ct. 1192, 26 L. ed. 178] (holding that where a vessel is let to the government, and, by the terms of the charter-party, the owners are to keep her "tight, staunch," etc., "fit for merchants' service," the owners cannot recover for her services when laid up for repairs).

Where a charter-party definitely fixes a time for discharge, the charterer is liable for delay beyond such time, although caused by the act of the public enemy. Burrill *v.* Crossman, 69 Fed. 747, 16 C. C. A. 381 [*modifying* 65 Fed. 104].

The money is not payable until the return of the vessel, or the expiration of a reasonable time therefor under the circumstances, under a charter providing for a rate *per diem* payable upon delivery back to the owner of the vessel in good order. Stein *v.* The Prairie Rose, 17 Ohio St. 471, 93 Am. Dec. 631.

7. Cook *v.* Gowan, 15 Gray (Mass.) 237.

8. Strong *v.* U. S., 154 U. S. 632, 14 S. Ct. 1182, 24 L. ed. 664 [*affirming* 13 Ct. Cl. 544].

Where the pretended lay-up is a subterfuge to evade payment of hire in the meantime, charter-money must be paid as if the vessel were actually in commission. Wessels *v.* The Ceres, 72 Fed. 936, 19 C. C. A. 243 [*reversing* 61 Fed. 701].

9. La Compania Bilbaina de Navegacion de Bilbao *v.* Spanish-American Light, etc., Co.,

be enlarged by implication for causes not assigned.[10] Under a charter-party for a voyage to a certain port, or, in case it be blockaded, to a market and return, the vessel is not liable for the time necessarily consumed in the deviation to ascertain whether the port of destination was blockaded.[11]

4. Deductions and Offsets. A charterer is entitled as a general rule to deduction from freight money as an offset to any breach of duty on the part of the owner, such as results in damage to cargo,[12] or loss thereof.[13] Thus deduction may be claimed for loss consequent upon refusal to load a full cargo,[14] or delay in departure,[15]

146 U. S. 483, 13 S. Ct. 142, 36 L. ed. 1054 [*affirming* 31 Fed. 492].

10. Clyde Commercial Steamship Co. *v.* West India Steamship Co., 169 Fed. 275, 94 C. C. A. 551; Clyde Commercial Steamships *v.* U. S. Shipping Co., 152 Fed. 516.

11. Stokely *v.* Smith, 23 Fed. Cas. No. 13,473, 2 Ben. 407.

12. Dickie *v.* Wilson, 49 Fed. 390. And see The Tangier, 32 Fed. 230, holding that where a vessel under charter delivers a consignment of fruit, a portion of which is damaged, it is incumbent upon her to ascertain the amount of damage before retaining a part of the consignment for balance of freight, in order that she may not, by retaining an unreasonable amount, become liable for the storage and selling charges, and that when a ship is, by her charter-party, entitled to her whole freight, "upon a true delivery" of the cargo, and she delivers a portion in a damaged condition, she is entitled only to the specified freight, less the damage for the loss on the cargo.

Where the words "on intake weight" are inserted in a charter, the charterer is bound to pay freight on the whole cargo taken aboard, although part of it was damaged without the ship's fault by an excepted peril, and sold on the voyage (One Thousand Bags of Sugar *v.* Harrison, 53 Fed. 828, 4 C. C. A. 34 [*affirming* 50 Fed. 116]), and this is also true where cargo is jettisoned (Christie *v.* Davis Coal, etc., Co., 110 Fed. 1006, 49 C. C. A. 170 [*affirming* 95 Fed. 837]).

A stipulation in a charter "only half freight to be paid for all barrels delivered in a broken state" covers all barrels broken when delivered, although some were broken when shipped (Durkee *v.* Workman, 8 Fed. Cas. No. 4,194 [*affirming* 8 Fed. Cas. No. 4,195, 1 Wkly. Notes Cas. (Pa.) 204]), and where a charter-party provides that "if vessel should be lost after discharge of outward cargo, one half of this charter shall be considered due and payable," as after the completion of the outward voyage only one half of the freight is still unearned, and so liable to be lost by reason of a maritime risk, only that portion of the total freight can then be hypothecated under a bottomry bond (Brett *v.* Van Praag, 157 Mass. 132, 31 N. E. 761, holding that when such charter-party also provides for a payment on account of freight at the outward port, such payment is to be charged against that part of the freight which is already earned).

Deductions disallowed see The Santona, 152 Fed. 516 (holding that under a provision of a time charter requiring the owners to provide men to work the winches both day and night as required, the ship's duty is fulfilled by providing sober and competent winchmen from among the crew, and, where the charterers for their own convenience employ shore winchmen, the wages of such winchmen cannot be deducted from the charter hire); Glasgow Shipowners' Co. *v.* Bacon, 139 Fed. 541, 71 C. C. A. 329 [*affirming* 132 Fed. 771] (holding that the charterer of a vessel by a time charter is not entitled to a deduction from the charter hire because the vessel, owing to the foulness of her hull, failed to make the time he expected or that was made on a previous voyage, where he accepted her with knowledge that she had not been in dry dock for several months, during which time she had been employed in tropical waters, without any warranty as to speed, and where the clause in the printed charter for docking and cleaning was stricken out). See also The Asphodel, 111 Fed. 940; The Hurstdale, 169 Fed. 912 [*affirmed* —— Fed. ——]; The Burma,— — Fed. ——.

13. Elwell *v.* Skiddy, 77 N. Y. 282, holding that in a suit for freight and demurrage against the assignees of the bill of lading of a cargo of sugar, who were in fact the agents of the owner and consignor of the cargo, defendants were entitled to recoup damages accruing from the master's violation of revenue laws, whereby the cargo was seized by the authorities, and during the detention there was a loss by drainage and waste. But see Mayo *v.* Preston, 131 Mass. 304; Roberts *v.* Societa Anonima, 53 N. Y. Super. Ct. 424, holding that the obligation of the charterer to pay a lump sum agreed upon is not lessened by the loss, not shown to be the fault of any one, except possibly thieves, of an insignificant portion of the cargo, one hundred boxes of lemons for instance.

14. See Vaccarezzo *v.* 567,000 Gallons of Molasses, 161 Fed. 543, 88 C. C. A. 485 [*affirming* 149 Fed. 792], where, however, the evidence was held not to sustain the defense of a charterer to a suit for charter hire, admittedly due under a time charter based on the claim that the master refused to load full cargoes.

15. The Disa, 153 Fed. 322; Hoadley *v.* The Lizzie, 39 Fed. 44 (holding that, although the charter-party provided that the freight should be paid in advance on the vessel's being loaded, libellants could properly refuse to pay the freight because of delay in loading and departure); The Giulio, 34 Fed. 909.

or delivery,[16] or discharge of the cargo,[17] or failure to transport all the goods contracted for,[18] or any other just claim which he may have against the owner with respect to the carriage of the goods.[19] But the claim must not be too remote to be offset.[20] Stipulated commissions on advances made for the disbursements of the vessel on entering on the charter may be offset against the hire;[21] and although where a party contracts to load a ship at a stipulated price per ton and fails to ship the whole number of tons he is liable for the deficiency,[22] where goods are offered by a third person to make up the deficiency at reduced prices, which are current prices, the master of the vessel must receive them and credit the original charterer with their earnings.[23] While the charterer is entitled to recoup any damages set up in the answer which arose out of any breach of the charter-party by the owners of the vessel, to the amount of such freight, for any claim beyond that he must resort to his own proper action.[24] Furthermore the parties may specifically agree that charter hire shall be suspended in certain instances,[25] or in case the vessel becomes unfit for use because of defect in her outfit,[26] or because of detention by accidents to the vessel.[27] But there cannot be any deduction for delay or abandonment of the voyage resulting from ordinary perils of navigation, of which the charterer assumed the risk,[28] or from his own voluntary action.[29] Where the charterers of a foreign ship, being responsible to the owners for the charter hire, and having received freight upon goods delivered to the consignees, are liable to the latter for damage claims

16. Hagar *v.* Clark, 78 N. Y. 45 [*reversing* 12 Hun 524]; Tweedie Trading Co. *v.* George D. Emery Co., 154 Fed. 472, 84 C. C. A. 253 [*affirming* 146 Fed. 618]; Haggett *v.* Bowman, 11 Fed. Cas. No. 5,900, 1 Sawy. 4 (holding that a deduction from the monthly hire of a vessel will be made, where the voyage has been protracted by reason of the insufficiency of the sails).

17. Munson Steamship Line *v.* Miramar Steamship Co., 150 Fed. 437 [*affirmed* in 166 Fed. 722, 92 C. C. A. 412], holding that where a time charter of a steamer required her to be in every way fitted for the service, the charterer is entitled to an allowance for delay in discharging due to the defective condition of the winches or deficiency in steam power for operating them.

18. Myers *v.* The Unionist, 48 Fed. 315. But see Ruger *v.* Reck, 5 Fed. 131.

19. See Wall *v.* Ninety-Five Thousand Feet of Lumber, 26 Fed. 716; Booker *v.* Pocklington Steamship Co., [1899] 2 Q. B. 690, 9 Aspin. 22, 5 Com. Cas. 15, 69 L. J. Q. B. 10, 81 L. T. Rep. N. S. 524, 16 T. L. R. 19.

Deductions disallowed under particular circumstances see Mignano *v.* MacAndrews, 49 Fed. 376 [*affirmed* in 53 Fed. 958, 4 C. C. A. 6]. (a deduction for failure to report vessel at custom-house); The Dan, 40 Fed. 691 (a deduction for alleged negligent stowage).

The cesser of liability clause in a charter, "all claims on charterers to cease" after settlement between the master and the charterer, will not prevent the correction of errors in the settlement itself. The Serapis, 37 Fed. 436.

20. McKay *v.* Ennis, 37 Fed. 229. See The Buckingham, 129 Fed. 975.

21. Gow *v.* William W. Brauer Steamship Co., 113 Fed. 672.

22. Heckscher *v.* McCrea, 24 Wend. (N. Y.) 304.

23. Heckscher *v.* McCrea, 24 Wend. (N. Y.) 304. But see Stone *v.* Woodruff, 28 Hun (N. Y.) 534, holding that where a chartered vessel arrived at the port of lading, and there was no cargo to be had, nor was there anything else to load with, but the captain was told that by going to a neighboring port he might, within a week or more, be able to procure a cargo, he was justified in returning without a freight, and the charterer was liable for the amount stipulated for by the charter-party.

24. Holyoke *v.* Depew, 12 Fed. Cas. No. 6,652, 2 Ben. 334.

25. Glasgow Steam Shipping Co. *v.* Tweedie Trading Co., 154 Fed. 84; The Santona, 152 Fed. 516, holding, however, that where it is specifically agreed by charter-party that hire shall be suspended in certain instances, it cannot be suspended by implication for reasons not assigned in the contract.

26. Hills *v.* Leeds, 149 Fed. 878 [*affirmed* in 158 Fed. 1020], where, however, in an action to recover the balance due on a charter-party, the evidence was held insufficient, within a provision in the charter-party that, in case she should become unfit for use for a period of more than forty-eight hours because of any defect in her outfit, there should be a *pro rata* return of the charter-money to the hirer.

27. Vogeman *v.* Zanzibar Steamship Co., 6 Com. Cas. 253 [*affirmed* in 7 Com. Cas. 254].

28. Nicolini *v.* Lutcher, etc., Lumber Co., 108 Fed. 550, 47 C. C. A. 482.

29. Actiesselskabet Albis *v.* Munson, 130 Fed. 32 [*affirmed* in 139 Fed. 234] (where a delay in having a vessel dry-docked and painted as ordered by the charterer was due to the charterer's fault); Gow *v.* William W. Brauer Steamship Co., 113 Fed. 672 (where the charterers wrongfully arrested the

arising through negligence of the ship, and the owners are foreign, and have no assets in this country, the charterers will not be required by a court of admiralty to pay over to the owners the whole amount of the charter hire, except upon security indemnifying them against such reasonable and probable demands as may have arisen against the charterers through the fault of the owners in the transportation of the cargo.[30] A vessel chartered to carry forward part of the cargo of another vessel from a port into which the latter had put in distress is entitled to her freight without deductions for advances made by the charterers of such other vessel secured by a bottomry note, which also assigned the freight to pay such advances.[31]

5. Lien — a. Existence and Extent. The ship-owners have a lien on goods for the freight due for transportation, which may be enforced in admiralty by a libel *in rem*; it is immaterial whether the contract is by bill of lading or charter-party.[32] The lien attaches at the time when the goods are laden on board,[33] and

vessel); Nicolini *v.* Lutcher, etc., Lumber Co., 108 Fed. 550, 47 C. C. A. 482.

30. Milburn *v.* Nord-Deutscher Lloyd, 58 Fed. 603.

31. Berry *v.* Grace, 62 Fed. 607.

32. Gracie *v.* Palmer, 8 Wheat. (U. S.) 605, 5 L. ed. 696 [*reversing* 18 Fed. Cas. No. 10,692, 4 Wash. 110]; Hard *v.* The Enchantress, 58 Fed. 910 [*affirmed* in 63 Fed. 272, 11 C. C. A. 180]; Eisenbauer *v.* De Belaunzaran, 26 Fed. 784; Drinkwater *v.* The Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145; Kimball *v.* The Anna Kimball, 14 Fed. Cas. No. 7,772, 2 Cliff. 4 [*reversing* 1 Fed. Cas. No. 404, 2 Sprague 33, and *affirmed* in 3 Wall. 37, 18 L. ed. 50]; The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551; Anonymous, 12 Mod. 447, 88 Eng. Reprint 1442.

Goods shipped in fraud of their owner are not subjected to a lien in favor of the owner of the vessel, although he may be guiltless. Robinson *v.* Baker, 5 Cush. (Mass.) 137, 51 Am. Dec. 54. *Compare* The Karo, 29 Fed. 652.

Circus horses are to be regarded as cargo to which a maritime lien will attach for freight under a charter for a voyage out and return to carry a circus outfit. Fourteen Horses, 9 Fed. Cas. No. 4,990, 10 Ben. 358.

The refusal of a master to deliver a cargo until security is furnished for the freight gives no right of action to the charterer, as the cargo is subject to a lien for freight. Otis Mfg. Co. *v.* The Ira B. Ellems, 48 Fed. 591 [*affirmed* in 50 Fed. 934]. And the master, as agent of the owners of a chartered vessel, may retain for the freight the proceeds of the outward and inward cargo. Leefe *v.* Walker, 18 La. 1.

Cesser of liability.—Where a charter-party provides for a lien for freight, and for a stipulated rate of demurrage after a fixed time, and also provides that the charterer's liability shall cease on signing bills of lading, the cesser clause applies only so far as the lien is commensurate with the charterer's liability; and, if bills are signed which give a more limited lien, the charterer's liability continues. Burrill *v.* Crossman, 69 Fed. 747, 16 C. C. A. 381.

The purchaser of a vessel has a lien on goods for freight earned after his purchase. Williams *v.* Johnson, 11 Barb. (N. Y.) 501.

A clause in the charter-party that the parties bind the ship and goods, respectively, for the performance of the covenants, payments, and agreements thereof, is a valid clause, creating a lien on the goods for such performance, and may be enforced against the goods by a detention by the ship-owner for the freight and by a suit in admiralty (The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551); and it is competent for a time charterer, by a provision in the charter, whether it is or is not a demise of the vessel, to pledge the freight to be earned by her during the term to secure the payment of the charter hire; and such a provision gives the owner an equitable lien in admiralty, as of the date of the charter, on any freight subsequently stipulated to be paid under a bill of lading, and subrogates him to the lien of the charterer for the freight, and to the remedies of the charterer to enforce its payment (American Steel Barge Co. *v.* Chesapeake, etc., Coal Agency Co., 115 Fed. 669, 53 C. C. A. 301 [*reversing* 107 Fed. 964], holding that a provision of a charter-party that "the owners shall have a lien on all . . . sub-freight for charter money due under this charter" cannot be applied, as against a cargo-owner other than the charterer, beyond the amount of freight stipulated in the bill of lading; but to such extent it is valid and enforceable, as creating an admiralty lien on the freight, even where the charter is a demise of the ship). Furthermore a lien may be created on charter-money to repay a loan, and the pledge, although oral, will be valid. Bank of British North America *v.* The Ansgar, 127 Fed. 859 [*affirmed* in 137 Fed. 534, 70 C. C. A. 118].

33. Blowers *v.* One Wire Rope Cable, 19 Fed. 444.

Goods shipped by a commission merchant are subject to a lien for freight when put on board, although the owner of the vessel has notice of the real ownership of the goods, and although when the goods are partly loaded the commission merchant becomes insolvent. Hayes *v.* Campbell, 55 Cal. 421, 36 Am. Rep. 43.

the voyage commenced;[34] and if the cargo is actually loaded on board the lien attaches, although the goods are not entirely detached from the land.[35] The lien is confined to freight for the particular shipment and the owner has no general lien for debts due from the consignee so as to defeat the vendor's right of stoppage *in transitu*;[36] nor can the owner claim a lien for more freight than is reserved by the bill of lading against a shipper or purchaser who is a stranger to the charter-party and who has taken the bill without notice;[37] and a *bona fide* indorsee of the bill of lading without notice of the charter-party or any freight except that expressed in the bill of lading may on payment of the freight stipulated in the bill of lading take his goods.[38] But the owner is not bound by bills of lading in the hands of a shipper or his agent to the prejudice of the charter-party liens when it appears that the bill of lading was given without authority and under circumstances which have put the shipper upon inquiry.[39] If the bill of lading incorporates the terms of the charter-party, the lien of the owner on the goods for the charter freight is preserved.[40] Although the owner in the absence of express stipulation has no lien for demurrage or dead freight,[41] or for pilotage or port

34. Burgess *v.* Gun, 3 Harr. & J. (Md.) 225.

35. Blowers *v.* One Wire Rope Cable, 19 Fed. 444, holding that where the owner of a canal-boat agreed with a shipper to take a cable on his boat for transportation and the boat was ordered by the shipper to the dock of the manufacturer of the cable, who loaded the cable on the boat with knowledge of the agreement, the lien on the cable during the time the vessel was detained by reason of the shipper not fulfilling his contract with the manufacturer to pay for the cable existed against the manufacturer, even though he never fully released the cable, but kept it fastened to his property.

36. Oppenheim *v.* Russell, 3 B. & P. 42, 6 Rev. Rep. 604.

37. Gardner *v.* Trechmann, 15 Q. B. D. 154, 5 Aspin. 558, 54 L. J. Q. B. 515, 53 L. T. Rep. N. S. 518; Fry *v.* Chartered Mercantile Bank, L. R. 1 C. P. 689, 35 L. J. C. P. 306, 14 L. T. Rep. N. S. 709, 14 Wkly. Rep. 920; Gilkison *v.* Middleton, 2 C. B. N. S. 134, 26 L. J. C. P. 209, 89 E. C. L. 134; Shand *v.* Sanderson, 4 H. & N. 381, 28 L. J. Exch. 278, 7 Wkly. Rep. 416; Foster *v.* Colby, 3 H. & N. 705, 28 L. J. Exch. 81. But see The Karo, 29 Fed. 652, holding that where the charterer of a ship, under a charter-party giving the owners a lien on any part of the cargo for all freight and charges named therein, issues fraudulently a bill of lading for the goods of a third party, who had no knowledge of the charter-party, the goods so shipped are subject to the lien given by the charter-party, where the master acted in good faith.

Apportionment of subfreight between charterer and owner.—Agents appointed by the charterer or his subcharterers to collect freight due under bills of lading collect the same on behalf of all parties concerned, including the ship-owner having a lien on cargoes and subfreights for hire due and unpaid under the time charter. A ship-owner having such a lien, who claims the freight from the agent before the latter has paid it to or allowed it in account with the charterers, has a right to have paid to him an amount equal to the amount of hire presently due to him and unpaid for which he has the lien. Any further sum received by him as freight from the agents he holds to the use of the charterers. Wehner *v.* Dene Steam Shipping Co., [1905] 2 K. B. 92, 10 Com. Cas. 139, 74 L. J. K. B. 550, 21 T. L. R. 339.

38. Foster *v.* Colby, 3 H. & N. 705, 28 L. J. Exch. 81.

39. Faith *v.* East India Co., 4 B. & Ald. 630, 23 Rev. Rep. 423, 6 E. C. L. 630, 106 Eng. Reprint 1067; Small *v.* Moates, 9 Bing. 574, 2 Moore & S. 674, 23 E. C. L. 711. *Compare* Campion *v.* Colvin, 3 Bing. N. Cas. 17, 2 Hodges 116, 5 L. J. C. P. 317, 3 Scott 338, 32 E. C. L. 18; Reynolds *v.* Jex, 7 R. & S. 86, 34 L. J. Q. B. 251, 13 Wkly. Rep. 968.

40. Porteus *v.* Watney, 3 Q. B. D. 534, 4 Aspin. 34, 47 L. J. Q. B. 643, 39 L. T. Rep. N. S. 195, 27 Wkly. Rep. 30; Gray *v.* Carr, L. R. 6 Q. B. 522, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173; Lamb *v.* Kaselack, 19 Sc. L. Rep. 336. But see Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826, 9 Aspin. 599, 74 L. J. P. C. 17, 91 L. T. Rep. N. S. 216, 20 T. L. R. 599; Serraino *v.* Campbell, [1891] 1 Q. B. 283, 7 Aspin. 48, 60 L. J. Q. B. 303, 64 L. T. Rep. N. S. 615, 39 Wkly. Rep. 356.

But where the clause is "paying for the goods as per charter-party," or "payable as per charter-party," it is construed to mean paying for the goods at the rate mentioned in the charter-party, and further liens imposed by the charter do not exist against those goods in the hands of third persons. Frey *v.* Chartered Mercantile Bank, L. R. 1 C. P. 689, 35 L. J. C. P. 306, 14 L. T. Rep. N. S. 709, 14 Wkly. Rep. 920; Smith *v.* Steveking, 4 E. & B. 945, 24 L. J. Q. B. 257, 3 Wkly. Rep. 411, 82 E. C. L. 945 [*affirmed* in 5 E. & B. 589, 1 Jur. N. S. 1135, 4 Wkly. Rep. 25, 85 E. C. L. 589].

41. Phillips *v.* Rodie, 15 East 547, 13 Rev. Rep. 528, 104 Eng. Reprint 950; Gladstone *v.* Birley, 2 Meriv. 401, 35 Eng. Reprint 993, 3 M. & S. 205, 105 Eng. Reprint 587, 15 Rev. Rep. 465.

charges,[42] such a lien may be reserved; and a lien for freight, dead freight, and demurrage, so expressly reserved by the charter-party, attaches the moment cargo is put on board under a bill of lading made subject to the charter-party.[43] Under such a charter the owner has a right to insist that cargo offered as the property of third persons shall not be carried, unless their consent to said condition be indorsed upon the bill of lading;[44] and where the bill of lading provides that the consignee is to pay freight and all other conditions as per charter-party, the conditions of paying dead freight and demurrage are incorporated and liens therefor preserved.[45] The owner is not bound to wait until the cargo is discharged to enforce his lien for charter freight, where there is a breach of the agreement to pay the charter hire in monthly instalments,[46] but may enforce the lien by retaining all the goods on which freight is payable,[47] or he may deliver in instalments, retaining the balance of the goods for the whole freight.[48] Where by the charter-party the charterers are owners for the voyage, the general owners have no lien on the cargo for the hire of the ship;[49] and the same rule applies where it appears from the charter-party that the intention of the parties was that the owner should rely on the personal responsibility of the charterer for the payment of the vessel's hire.[50]

b. Amount. Where the owners have a lien on the cargo for the charter-money the lien covers the whole amount due and unpaid under the charter-party,[51] and applies to the whole cargo,[52] but only to the extent that the freight on such merchandise is still to be paid by the shipper or consignee,[53] and the amount is not

42. Faith *v.* East India Co., 4 B. & Ald. 630, 23 Rev. Rep. 423, 6 E. C. L. 630, 106 Eng. Reprint 1067.

43. The Eliza, 8 Fed. Cas. No. 4,347, 1 Lowell 83; Stepanovit *v.* Gillibrand, etc., 22 Fed. Cas. No. 13,360. But see Leisy *v.* Buyers, 36 La. Ann. 705, holding that, although mere knowledge on the part of a third shipper that the charter-party contains the provision, "Vessel to have lien on cargo for freight, dead freight, and demurrage," might suffice to bind the third shipper to its conditions; when the course of dealing of the vessel has been such as to lead such shipper to suppose that the conditions would not be insisted on, and under such belief he has sent goods to the vessel, and the vessel's agents knew when they received the goods that the third shipper would not assent to the conditions, such shipper must be given a clean bill of lading, or his goods returned to him.

Under a clause in a time charter giving owners a lien "on all cargoes and subfreights for any amount due under this charter," the ship-owner is entitled to a lien on the freights of the vessel for the charter hire earned, for necessary advances for the voyage, and for indemnity against claims for supplies to the ship or damages to cargo which the charterer was bound to pay, but not for damages for the less profitable employment of the vessels during the remainder of the charter period, after withdrawal by the owners from the charterers' service in consequence of their insolvency. Freights of The Kate, 63 Fed. 707.

44. Gomila *v.* Adams, 36 La. Ann. 221.

45. Porteus *v.* Watney, 3 Q. B. D. 534, 4 Aspin. 34, 47 L. J. Q. B. 643, 39 L. T. Rep. N. S. 195, 27 Wkly. Rep. 30; Gray *v.* Carr, L. R. 6 Q. B. 522, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173; Wegener *v.* Smith, 15 C. B. 285, 3 C. L. R. 47, 24 L. J. C. P. 25, 80 E. C. L. 285. *Compare* Serraino *v.* Campbell, [1891] 1 Q. B. 283, 7 Aspin. 48, 60 L. J. Q. B. 303, 64 L. T. Rep. N. S. 615, 39 Wkly. Rep. 356.

If the bill of lading provides merely that freight shall be paid as per charter-party the lien given by the charter-party does not attach for demurrage against holders of the bill of lading who are strangers to the charter-party. McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 1 Aspin. 160, 25 L. T. Rep. N. S. 317; Chappel *v.* Comfort, 10 C. B. N. S. 802, 8 Jur. N. S. 177, 31 L. J. C. P. 58, 4 L. T. Rep. N. S. 448, 9 Wkly. Rep. 694, 100 E. C. L. 802; Smith *v.* Sieveking, 4 E. & B. 945, 24 L. J. Q. B. 257, 3 Wkly. Rep. 411, 82 E. C. L. 945 [*affirmed* in 5 E. & B. 589, 1 Jur. N. S. 1135, 4 Wkly. Rep. 25, 85 E. C. L. 589].

46. Fourteen Horses, etc., 9 Fed. Cas. No. 4,990, 10 Ben. 358.

47. Perez *v.* Alsop, 3 F. & F. 188.

48. Black *v.* Rose, 10 Jur. N. S. 1009, 11 L. T. Rep. N. S. 31, 2 Moore P. C. N. S. 277, 12 Wkly. Rep. 1123, 15 Eng. Reprint 906.

49. Pickman *v.* Woods, 6 Pick. (Mass.) 248; Lander *v.* Clark, 1 Hall (N. Y.) 394; Clarkson *v.* Edes, 4 Cow. (N. Y.) 470; Drinkwater *v.* The Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145.

50. Brown *v.* Howard, 1 Cal. 423.

51. Gracie *v.* Palmer, 8 Wheat. (U. S.) 605, 5 L. ed. 696 [*reversing* 18 Fed. Cas. No. 10,692, 4 Wash. 110]; De Wolf *v.* Two Hundred and Sixty-Six Hogsheads and Thirty-One Tierces Molasses, 7 Fed. Cas. No. 3,853.

52. The Antonia Johanna, 1 Wheat. (U. S.) 159, 4 L. ed. 60; Nine Hundred and Forty-Eight Pieces of Lumber, 18 Fed. Cas. No. 10,270, 7 Ben. 389.

53. Holmes *v.* Pavenstedt, 5 Sandf. (N. Y.) 97.

limited by the penal sum in the charter-party;[54] but as, on general principles of law, merchandise is bound for its own transportation only, the liability cannot be extended further, except by stipulation in the charter-party under which the voyage was performed.[55]

c. Waiver, Loss, or Discharge. The owner's lien may be waived or displaced by any special agreement inconsistent with its existence,[56] but is presumed to exist until such inconsistency appears;[57] and a clause in a charter-party by which the owner binds the vessel and the charterers bind the cargo for the performance of their respective covenants is sufficient to dispel doubt arising on the construction of other stipulations as to whether the lien for freight was intended to be waived by the parties;[58] and if the contract gives the lien expressly, yet contains terms inconsistent with it, the conflict must be settled so as best to give effect to the apparent intention of the parties, having regard to the ordinary rules of construction.[59] If the owner stipulates to receive the freight at a time and place other than the time and place for the delivery of the cargo, and without reference to such time and place, he is to be considered as having waived his lien.[60] Thus if the freight is not payable until after the goods have been delivered, the shipowner has no lien, for a lien for freight implies possession of the goods;[61] but a clause in a charter-party providing that the freight shall be paid a specified number of days after the ship's return and discharge does not waive the lien for

54. The Salem's Cargo, 21 Fed. Cas. No. 12,248, 1 Sprague 389.

55. Webb *v.* Anderson, 29 Fed. Cas. No. 17,318, Taney 504, holding that where the freight on a cargo out and a cargo back is to be paid at a certain sum on the cargo out, the charterer has no lien for freight on the cargo back purchased with the proceeds by one who took an assignment of the bills of lading to secure advances, except to the extent of the surplus. But see Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589, holding that where by a charter-party the freight was to be paid in gross on the successful close of the whole voyage, and the bill of lading declared that the return cargo should be delivered to the shipper or his assigns, they paying freight as per charter-party, a lien attached to the homeward cargo for the freight due for the whole voyage.

56. The Bird of Paradise, 5 Wall. (U. S.) 545, 18 L. ed. 662 (where there was a partial waiver); The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551. And see Welch *v.* McClintock, 10 Gray (Mass.) 215; The Moringen, 98 Fed. 996, holding that where a charter provides for the payment of a fixed sum in advance, and at a particular place, payment thereof cannot be demanded elsewhere and at other times.

If the charter-party is inconsistent with a lien for freight, the right to a lien does not arise. Carver Carriage by Sea (5th ed.) 873.

The master has no authority by signing bills of lading to waive the lien of the shipowner on the goods of the charterer; and such bills of lading will not give a right to persons who take them with knowledge of the charter-party to have the goods free from the lien. The Salem's Cargo, 21 Fed. Cas. No. 12,248, 1 Sprague 389.

A charter-party by which the owner gives up the possession and control of the ship to the charterer is inconsistent with a lien for freight on goods carried in the ship, and the owner not having possession of the goods cannot detain them for unpaid freight (Belcher *v.* Capper, 11 L. J. C. P. 274, 4 M. & G. 502, 5 Scott N. R. 257, 43 E. C. L. 262. *Compare* Christie *v.* Lewis, 2 B. & B. 410, 5 Moore C. P. 211, 23 Rev. Rep. 483, 6 E. C. L. 206); but it seems that if the charter-party expressly gives a lien for the freight, this difficulty will be overcome (Small *v.* Moates, 9 Bing. 574, 2 Moore & S. 674, 23 E. C. L. 711. And see The Stornoway, 4 Aspin. 529, 51 L. J. P. D. & Adm. 27, 46 L. T. Rep. N. S. 773).

57. The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551.

58. The Kimball, 3 Wall. (U. S.) 37, 18 L. ed. 50, holding that it is not to be presumed that the owner of a ship, having a lien on a cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to be payable at the time of the expected arrival of the ship at the port of delivery, and the notes being unpaid, he may return them and enforce his lien.

59. Carver Carriage by Sea (5th ed.) 873 [*citing* Foster *v.* Colby, 3 H. & N. 705, 28 L. J. Exch. 81].

60. Raymond *v.* Tyson, 17 How. (U. S.) 53, 15 L. ed. 47.

61. Foster *v.* Colby, 3 H. & N. 705, 28 L. J. Exch. 181; Alsager *v.* St. Katherine's Dock Co., 15 L. J. Exch. 34, 14 M. & W. 794; Lucas *v.* Nockells, 4 Bing. 729, 13 E. C. L. 713, 1 Cl. & F. 438, 6 Eng. Reprint 980, 1 M. & P. 783, 2 Y. & J. 304, 29 Rev. Rep. 721.

The fact that the freighter or consignee has become insolvent does not alter the obligation to deliver the goods. Alsager *v.* St. Katherine's Dock Co., 15 L. J. Exch. 34, 14 M. & W. 794.

freight; the word "discharge" merely referring to the unlading, and not to the delivery of the cargo;[62] and the lien is not lost by an agreement providing for the mode of its payment, not inconsistent with the lien.[63] In order to maintain his lien the ship-owner must retain possession of the goods by himself or his agents, and even if he parts with the goods to another, who acts on his instructions but in such a way as to give the right of possession to that other as against himself, the lien will be terminated.[64] But stipulations in the charter requiring the delivery of the cargo within reach of the ship's tackle, and providing that the balance of the charter-money remaining unpaid on the termination of the homeward voyage shall be payable a specified number of days after discharge of the cargo, are not inconsistent with the right of the owner to retain the cargo for the preservation of his lien.[65] It is competent for the master to land goods and still preserve the lien by placing them in warehouses over which he or the agent of the ship has exclusive control;[66] and similarly where the ship-owner is required by law to land and warehouse the goods in a particular place, the lien will continue while they are so deposited, for as they are taken out of his hands by operation of law the law preserves the charge for him;[67] and if the goods have been merely placed in a warehouse pending a delivery to the consignee, even though the lien may be for the time lost, it seems that it will revive and reattach on the ship-owner's retaking possession of the goods.[68] The master waives his lien on the goods for freight where he directs the consignee to pay the freight moneys to the charterer;[69] but a payment of freight to the charterer by the consignee will not discharge the lien on the goods for the charter-money, where the charterer is not owner for the voyage, and the consignee has notice of that fact.[70] The effect of a provision of a time charter giving the owner of the vessel a lien on all cargoes and subfreights for the charter hire, as against a shipper other than the charterer, is merely to subrogate the vessel-owner to the rights of the charterer, and where the shipper has paid the freight to the charterer in good faith, he is protected in such payment, and a lien on the cargo cannot be asserted by the vessel-owner any more than by the charterer;[71] but the payment of the freight by the consignee to the general owner on account of unpaid charter hire will be a defense to any claim for the freight by the charterer, although he gave notice before the payment to the consignee not to pay to the general owner.[72] Under some circumstances the

62. Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589.

63. Blowers *v.* One Wire Rope Cable, 19 Fed. 444 (holding that an agreement to pay freight at a *per diem* rate on the happening of a future event is not incompatible with a lien for freight and with proceedings to enforce it at once in default of payment as agreed); Fourteen Horses, 9 Fed. Cas. No. 4,990, 10 Ben. 358 (holding that where the charter expressly pledges both vessel and cargo for its performance, the lien for freight is not waived by making it payable in monthly instalments); Crawshay *v.* Homfray, 4 B. & Ald. 50, 22 Rev. Rep. 618, 6 E. C. L. 385, 106 Eng. Reprint 856; Chase *v.* Westmore, 5 M. & S. 180, 105 Eng. Reprint 1016. See Howard *v.* Macondray, 7 Gray (Mass.) 516.

A stipulation merely for payment of freight by commercial paper due after delivery does not affect the lien. Tate *v.* Meek, 2 Moore C. P. 278, 8 Taunt. 280, 19 Rev. Rep. 518, 4 E. C. L. 146. But see Hewison *v.* Guthrie, 2 Bing. N. Cas. 755, 2 Hodges 51, 5 L. J. C. P. 283, 3 Scott 298, 29 E. C. L. 748.

Where objection is taken by the ship-owner to one of the bills given for freight, the lien is lost if the bills are negotiated. Horncastle *v.* Farran, 3 B. & Ald. 497, 2 Stark. 590, 22 Rev. Rep. 461, 5 E. C. L. 288, 106 Eng. Reprint 743. See Brinney *v.* Poyntz, 4 B. & Ad. 568, 2 L. J. K. B. 55, 1 N. & M. 229, 24 E. C. L. 250. But if the bill is dishonored at maturity before the goods have been delivered, the lien will revive. Gunn *v.* Bolckow, L. R. 10 Ch. 491, 44 L. J. Ch. 732, 32 L. T. Rep. N. S. 781, 23 Wkly. Rep. 739.

64. Carver Carriage by Sea (5th ed.) 894.

65. The Kimball, 3 Wall. (U. S.) 37, 18 L. ed. 50.

66. Carver Carriage by Sea (5th ed.) 894.

67. Wilson *v.* Kymer, 1 M. & S. 157, 105 Eng. Reprint 59.

68. Carver Carriage by Sea (5th ed.) 894.

69. Shaw *v.* Thompson, 21 Fed. Cas. No. 12,726, Olcott 144.

70. Clarkson *v.* Edes, 4 Cow. (N. Y.) 470; Shaw *v.* Thompson, 21 Fed. Cas. No. 12,726, Olcott 144.

71. Larsen *v.* 150 Bales of Sisal Grass, 147 Fed. 783.

72. Mactaggert *v.* Henry, 3 E. D. Smith (N. Y.) 390.

ship-owner's lien for freight will be terminated if the contract becomes impossible of performance,[73] as where the ship has been wrecked and the ship-owner has no means or intention of carrying the cargo to its destination.[74]

L. Breach of Charter — 1. By Owner or Master — a. What Constitutes Breach, and Effect Thereof; Waiver. A breach of the charter by the owner or his agents gives a cause of action for damage against him,[75] and may justify the charterer in repudiating the contract.[76] As a general rule a charterer is not bound to accept a substituted performance, and an owner having made an unqualified contract must, unless prevented by the act of God, peril of the sea, or unavoidable disaster, perform it according to its terms; [77] but where the ship is wrecked before

73. Carver Carriage by Sea (5th ed.) 896.

Impossibility of delivering cargo owing to war does not deprive the ship-owner of his charter freight or his lien for it. The Teutonia, L. R. 4 P. C. 171, 1 Aspin. 214, 41 L. J. Adm. 57, 26 L. T. Rep. N. S. 48, 8 Moore P. C. N. S. 411, 20 Wkly. Rep. 421 [*affirming* L. R. 3 A. & E. 394, 20 Wkly. Rep. 261].

74. Nelson *v.* Association for Protection of Commercial Interests, 43 L. J. C. P. 218.

75. Smith *v.* Heinlein, 132 Fed. 1001; The Donald, 115 Fed. 744; Dene Steamship Co. *v.* Munson, 103 Fed. 983; Lightburne *v.* The Tongoy, 55 Fed. 329; The Starlight, 42 Fed. 167; Hoadley *v.* The Lizzie, 39 Fed. 44; Gomila *v.* Culliford, 20 Fed. 734 [*reversed* on other grounds in 128 U. S. 135, 9 S. Ct. 50, 32 L. ed. 381].

Injuria absque damno.—Damages cannot be recovered by the charterer by reason of the vessel having been removed from the loading port previous to the signing of the bills of lading, and without sailing orders from him, where the master acted prudently, and for the interest of all concerned, and the charterer suffered no loss or injury thereby (Portland Shipping Co. *v.* The Alex Gibson, 44 Fed. 371); and in general where no actual damage is sustained by the charterer, a libel for breach of the charter will not lie, and the ground on which the master's refusal to fulfil the contract is based becomes immaterial (Munson *v.* Straits of Dover Steamship Co., 102 Fed. 926, 43 C. C. A. 57; The Habil, 100 Fed. 120, where the libel was dismissed because charterer was entitled only to nominal damages for breach by owner of agreement to submit dispute to arbitration; The Willowdene, 96 Fed. 569).

Facts held to constitute breach by owner or master see Smith *v.* Heinlein, 132 Fed. 1001; Wood *v.* Sewall, 128 Fed. 141 [*affirmed* in 135 Fed. 12, 67 C. C. A. 580]; The Helios, 115 Fed. 705, 55 C. C. A. 598 [*modifying* 108 Fed. 279]; The Oregon *v.* Pittsburgh, etc., Iron Co., 55 Fed. 666, 5 C. C. A. 229; Hoadley *v.* The Lizzie, 39 Fed. 44.

Facts held not to constitute breach by master or owner see Manha *v.* Union Fertilizer Co., 151 Cal. 581, 91 Pac. 393; Lombard Steamship Co. *v.* Lanasa, etc., Steamship, etc., Co., 163 Fed. 433; Wood *v.* Sewall, 128 Fed. 141 [*affirmed* in 135 Fed. 12, 67 C. C. A. 580]; Culliford *v.* Gomila, 128 U. S. 135, 9 S. Ct. 50, 32 L. ed. 381; Manchester Steamship Co. *v.* Parr, 130 Fed. 999; Lake Steam Shipping Co. *v.* Bacon, 129 Fed. 819; Hreglich *v.* One Thousand Tons of Coal, 128 Fed. 464; Gow *v.* William W. Brauer Steamship Co., 113 Fed. 672; Matthias *v.* Beeche, 111 Fed. 940; Donkin *v.* Herbst, 55 Fed. 1002, 5 C. C. A. 381 [*affirming* 49 Fed. 379] (holding that where the final refusal to permit the ship to enter a port was not due to the lack of the *visé*, but because she came from an infected port outside the charter limits and without a clean bill of health, for which the owners were not responsible, the charterers' claim of damages must be dismissed, and the owner could recover her charter-money); Dow *v.* Hare, 7 Fed. Cas. No. 4,037*a*; Forest Oak Steam Shipping Co. *v.* Richard, 5 Com. Cas. 100.

In Louisiana it is held that a vessel cannot be put in default under its charter-party, except by commencement of a suit, a demand in writing, a protest by a notary public, or a verbal requisition made in the presence of two witnesses. Eden *v.* Lemandre, 27 La. Ann. 176.

Freight on cargo carried in violation of charter.—A charterer of the whole cargo capacity of a vessel, and the services of her officers and crew, for a specified voyage, may recover, by libel against the vessel, freight earned by carrying cargo for others during part of the voyage, without his permission, less the expenses incurred in earning it. The Port Adelaide, 62 Fed. 486, 10 C. C. A. 505 [*affirming* 59 Fed. 174].

In an action against the managing owner of a vessel on a charter-party on which he is personally liable, a finding that he is a part-owner of the vessel is immaterial. Kerry *v.* Pacific Mar. Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65.

Charterers can recover for breach of a collateral verbal warranty.— Hassan *v.* Runciman, 10 Aspin. 31, 10 Com. Cas. 19, 91 L. T. Rep. N. S. 808.

76. Hoadley *v.* The Lizzie, 39 Fed. 44.

Facts held not to subject the charter to cancellation by charterer see Bonanno *v.* Tweedie Trading Co., 117 Fed. 991 [*affirmed* in 130 Fed. 448, 64 C. C. A. 650] (holding also that the evidence was insufficient to establish a custom of a port requiring vessels to be entered at the custom-house before they can be tendered for loading, to save a cancellation date); McKeen *v.* Davis Coke, etc., Co., 110 Fed. 576; Forest Oak Steam Shipping Co. *v.* Richard, 5 Com. Cas. 100.

77. Higginson *v.* Weld, 14 Gray (Mass.)

the time for the performance of the contract, the owner, in order to escape liability for the repayment of money paid on the contract, must furnish other ships, equally safe, and with equal accommodations.[78] Breach of the charter by the owner may, however, be waived,[79] and strict performance may be excused by the act of the charterer,[80] or by various circumstances which may or may not have been within the contemplation of the parties on the execution of the charter.[81] The Harter Act[82] does not affect the rights of parties under a time charter-party.[83]

b. Damages. In an action for breach of a charter-party whereby the charterer was compelled to pay for the transportation of cargo by other vessels, the measure

165; Lumbermen's Min. Co. *v.* Gilchrist, 50 Fed. 118 [*affirmed* in 55 Fed. 677, 5 C. C. A. 239]; The B. F. Bruce, 50 Fed. 118.

78. Turner *v.* Barneson, 22 Wash. 78, 60 Pac. 54.

79. Gilchrist *v.* Lumberman's Min. Co., 65 Fed. 1005, 13 C. C. A. 272 (holding that where an owner of a vessel fails to return for a cargo as required by the charter, and afterward the charterer sent for the vessel, representing that there would be no difficulty in loading her before the end of the season, and she was then sent, and could not be loaded before the season ended, the charterer, by his request and representations, waives any right to hold her for her previous delay); The Oregon *v.* Pittsburgh, etc., Iron Co., 55 Fed. 666, 5 C. C. A. 229. But see The Giulio, 34 Fed. 909, holding that charterers who load a vessel with return cargo after a period of negligent delay on the part of the vessel do not thereby necessarily waive the right of action already accrued.

An agent to load cargoes has not, in general, power to waive forfeiture of charter-party, so as to bind his non-resident principal and the advancement by an agent of a small sum, without commissions, to a delayed vessel, is not a waiver or forfeiture of charter-party by delayed arrival, when accompanied by a declaration that he did not know what his principal, the charterer, would do about the delay. Olsen *v.* Hunter-Benn, 54 Fed. 530.

80. The John A. Briggs, 120 Fed. 6 [*modifying* 113 Fed. 948]; Lumberman's Min. Co. *v.* Gilchrist, 55 Fed. 681, 5 C. C. A. 244 [*reversing* 50 Fed. 124]; Otis Mfg. Co. *v.* The Ira B. Ellems, 50 Fed. 934, 2 C. C. A. 85 [*affirming* 48 Fed. 591] (holding that a vessel being an American vessel, and the charter-party having been signed upon the high seas, the customs officer of a foreign port did not constitute the proper forum in which to claim redress for alleged neglect of master in not preventing loss of logs moored alongside ship for loading; and the threat to institute legal proceedings before such officer was of itself sufficient to justify the master in leaving without completing load); Myers *v.* The Unionist, 48 Fed. 315; The Alida, 8 Fed. 47 (holding that where a verbal agreement was made, at the same time as the written charter, that the charterer should furnish the provisions and pay the current expenses in part payment of the stipulated charter price of the vessel, a failure so to provide for the current expenses would justify the master in leaving the work); Wright *v.* The Francesca Curro, 30 Fed. Cas. No. 18,088, 5 Wkly. Notes Cas. (Pa.) 104. But see Matthias *v.* Beech, 111 Fed. 940.

81. The Minnie E. Kelton, 109 Fed. 164, 48 C. C. A. 271; Card *v.* Hine, 39 Fed. 818.

Facts held not to constitute excuse for breach see Higginson *v.* Weld, 14 Gray (Mass.) 165 (insanity of master); The B. L. Harriman, 9 Wall. (U. S.) 161, 19 L. ed. 629 (holding that performance of a charter to proceed to a distant port specified, made during a war, for the purpose of furnishing coal for one of the parties to it, is not dispensed with by the fact, learned in the course of the voyage, that the whole purpose of the voyage was defeated by the changed condition of military operations, where the language of the charter-party was absolute in its terms, and without provision for any contingency); The Oregon *v.* Pittsburg, etc., Iron Co., 55 Fed. 666, 5 C. C. A. 229; Lumberman's Min. Co. *v.* Gilchrist, 55 Fed. 677, 5 C. C. A. 239 [*affirming* 50 Fed. 118]; The Giles Loring, 48 Fed. 463.

Where the meaning of the charter-party is clear, a mistake cannot be alleged in defense to a suit *in rem* for breach. The Hermitage, 11 Fed. Cas. No. 6,410, 4 Blatchf. 474.

Desertion of seamen, causing a delay, is not a peril of the sea, within the meaning of a charter-party, and does not afford an excuse to the carrier for a failure to perform his contract. The Ethel, 8 Fed. Cas. No. 4,540, 5 Ben. 154.

Acts of the master acting as agent of the charterer do not constitute breach by the owners. Donkin *v.* Herbst, 55 Fed. 1002, 5 C. C. A. 381, 14 U. S. App. 358 [*affirming* 49 Fed. 379].

A charterer who by obstructive tactics prevents the owner from entering the vessel at the custom-house before the time she was required by the charter to be tendered for loading will not be permitted to avail himself of the fact that she was not so entered as a ground for canceling the charter. Bonanno *v.* Tweedie Trading Co., 117 Fed. 991 [*affirmed* in 130 Fed. 448, 64 C. C. A. 650].

82. 26 U. S. St. at L. 445, c. 105 [U. S. Comp. St. (1901) p. 2946].

83. Lake Steam Shipping Co. *v.* Bacon, 129 Fed. 819.

of damages is the difference between the freight as fixed in the charter-party and the freight and other charges actually paid for the transportation of the cargoes,[84] with an allowance for depreciation and the difference in the market value if any during the delay, together with the expense, in the case of live stock, of keeping the stock for a reasonable time until other transportation could be procured,[85] and such other damage as is the natural and probable consequence of breach of the contract;[86] and a vessel is liable for the fall in market prices during a period of negligent delay on her part, although such delay arose before the cargo was shipped, when the delay was voluntary, and was in the course of the voyage contracted for by the charter, and after it had been begun.[87] If no other transportation is obtainable, the charterer's measure of damages is the difference in the value of the cargo at the shipping point and the place of destination, less the cost of transportation,[88] and in the absence of evidence by the charterer from which such amount can be determined, only nominal damages are recoverable.[89] In an action for a breach of charter by reason of the refusal of the master to commence the voyage, where the charter binds the parties to a penalty for its breach, the sum mentioned in the penal clause of the instrument will be regarded as a penalty, and not as liquidated damages;[90] and nominal damages only are recoverable

84. Parker *v.* McCaldin, 3 Misc. (N. Y.) 14, 22 N. Y. Suppl. 358; Sanders *v.* Munson, 74 Fed. 649, 20 C. C. A. 581 [*affirming* 61 Fed. 504] (holding that where the charterer has learned that the steamer cannot be repaired in time for delivery in season he may notify the owner that he will not accept a later delivery, and it thereupon becomes the owner's duty to find a fit substitute, and, if he fails, the charterer himself is entitled to procure the most suitable substitute practicable under the circumstances, and recover of the owner any additional hire that he necessarily pays); Lumberman's Min. Co. *v.* Gilchrist, 55 Fed. 677, 5 C. C. A. 239 [*affirming* 50 Fed. 118]; The Oregon *v.* Pittsburg, etc., Iron Co., 55 Fed. 666, 5 C. C. A. 229; The Augustine Kobb, 37 Fed. 696; The Rossend Castle, 30 Fed. 462; Oakes *v.* Richardson, 18 Fed. Cas. No. 10,390, 2 Lowell 173.

If there is a market price of transportation the difference between that and the charter price will govern; if there is no market price, the actual cost of subsequent transportation by another vessel is the basis of computation. The S. L. Watson, 118 Fed. 945, 55 C. C. A. 439; The Rossend Castle, 30 Fed. 462.

85. Wheelwright *v.* Walsh, 44 Fed. 380 (holding also that if there was no fall in price, then the only damage was the interest on the amount paid for the cargo so purchased during the time that elapsed before the charter cargo arrived); The Rossend Castle, 30 Fed. 462 (making such an allowance in the case of live stock).

86. Lightburne *v.* The Tongoy, 55 Fed. 329; The Augustine Kobbe, 37 Fed. 696 (holding that loss of commissions provided for in the instrument, which apply to advances made under it, are elements of damage); Mauran *v.* Warren, 16 Fed. Cas. No. 9,310, 2 Lowell 53; The Mispah, 17 Fed. Cas. No. 9,648, 5 Reporter 519.

Losses too remote and uncertain to furnish a measure of damages or to have been within the contemplation of the parties cannot be recovered. The A. Denicke, 138 Fed. 645, 7 C. C. A. 95; Wood *v.* Sewall, 128 Fed. 141 [*affirmed* in 135 Fed. 12, 67 C. C. A. 580]; Richard *v.* Holman, 123 Fed. 734 (holding that the fact of a re-charter by the original charterer of a vessel to carry a cargo of grain at a specified rate, which it does not appear was contemplated by the owners at the time of making the contract, and of which they had no notice or knowledge, cannot affect the measure of damages recoverable for their failure to deliver the vessel, so as to entitle the charterer to recover the profit he would have made on ths re-charter, where freights had declined prior to the time when the vessel was required to be tendered, and the market rate was then definitely less than the charter rate, so that under the established rule no substantial damages were recoverable); The Georg Dumois, 115 Fed. 65, 52 C. C. A. 659; The Habil, 100 Fed. 120 (such as loss of commission which might have been made on sale of the cargo).

An unjustifiable deviation renders the vessel liable to the charterer for the increased premiums of insurance, and interest on his goods during the delay. Ardan Steamship Co. *v.* Theband, 35 Fed. 620.

87. The Giulio, 34 Fed. 909.

88. Parker *v.* McCaldin, 3 Misc. (N. Y.) 14, 22 N. Y. Suppl. 358; The A. Denicke, 138 Fed. 645, 71 C. C. A. 95.

89. The A. Denicke, 138 Fed. 645, 71 C. C. A. 95.

90. Watts *v.* Camors, 115 U. S. 353, 6 S. Ct. 91, 29 L. ed. 406 [*affirming* 10 Fed. 145] (holding that the clause in a charter-party by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to be performed of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach

where the libellant fails to prove some actual damage suffered, notwithstanding the agreement binds the parties to a penalty for its breach,[91] cases in which loss of profits on the goods have been allowed as damages[92] being exceptional.[93] Where performance of the charter is entered into and the voyage is broken up by the ship-owners, and the charterer sues for breach of the contract, the measure of damages is compensation for the actual loss and expenses incurred in and about the voyage, the labor and services in procuring another vessel, and reasonable disbursements in the action beyond the taxed costs.[94] In an action for the breach of a charter because of the failure of the vessel to proceed with reasonable despatch, the rule of damages is the difference between the fair market value of the cargo at the port of destination on a day when the cargo ought to have been delivered, and its value at the time when the vessel arrived and was in readiness to make delivery.[95] Where the vessel was delayed by the defective condition of her machinery and the negligence of the engineer, the charterer was entitled to recover extra expenses and probable profits lost by the delay, and the owner may set off against this sum an unpaid balance due for the use of the vessel.[96]

c. Lien. Charterers have a lien on the vessel for damages caused by breach of the charter.[97] Thus where the owners of a vessel, the whole of which is chartered for a specific voyage, retain possession and control by appointment of her officers and men, and the master during the voyage takes on freight for an intermediate voyage not authorized by the charter-party, the charterer has a maritime lien on the vessel for the amount received by the owners for carrying such freight;[98] and if a vessel is chartered, and the master is agent of the owners, it is his duty to collect freight for the charterer, and the ship will be liable for a refusal to pay over on his part unless the master is made the charterer's agent by virtue of some express authority conferred on him by the charterer to act as his agent.[99] But a wholly executory charter for the transportation of merchandise does not create a maritime lien on the vessel,[1] as where no goods are put on board;[2] and a breach of contract for the hire of a vessel which never entered on the performance, although part of the consideration was paid, does not create a lien on the vessel

of the contract, and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular state in which the contract is made and the court of admiralty sits); Chadwick *v.* The Adelaide, 5 Fed. Cas. No. 2,571. But see Nielson *v.* Read, 12 Fed. 441.

91. Chadwick *v.* The Adelaide, 5 Fed. Cas. No. 2,571.

92. Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368 (holding that where charterers procured passengers at rates that would have netted a gain, and these gains they were prevented from making by failure of owner to perform the contract, the loss was a damage to plaintiff, which he is entitled to recover); Oakes *v.* Richardson, 18 Fed. Cas. No. 10,390, 2 Lowell 173.

93. Chadwick *v.* The Adelaide, 5 Fed. Cas. No. 2,571 [*following* The Tribune, 21 Fed. Cas. No. 14,171, 3 Sumn. 144], holding that in an action on a charter-party for a breach thereof by reason of the refusal of the master to commence the voyage, the due performance of the voyage being subject to many future contingencies, estimated profits cannot be computed as an element of damage.

94. The Tribune, 21 Fed. Cas. No. 14,171, 3 Sumn. 144.

95. The Success, 23 Fed. Cas. No. 13,586, 7 Blatchf. 551.

96. Seaman *v.* Slater, 49 Fed. 37.

97. The Augustine Kobbe, 37 Fed. 696; The Panama, 18 Fed. Cas. No. 10,703, Olcott 343 (holding that damages sustained by a charterer of a ship, in the loss or delay of his voyage through the negligence or fault of the owner, are a lien on the vessel; and if a mortgagee satisfies the demand, and takes an assignment of the claim, he is entitled to come on remnants in court for repayment); The Oregon *v.* Pittsburg, etc., Iron Co., 55 Fed. 666, 5 C. C. A. 229.

One chartering a vessel with knowledge of existing liens must, when the voyage is broken up by seizure by creditors, have his damage by breach of charter subordinated to the earlier claims; but he will be allowed moneys advanced for the necessities of the vessel, and will be paid *pari passu* with these liens. The Augustine Kobbe, 39 Fed. 559.

98. The Port Adelaide, 62 Fed. 486, 10 C. C. A. 505.

99. The Maiden City, 33 Fed. 715.

1. Hannah *v.* The Carrington, 11 Fed. Cas. No. 6,029 (holding that there is no lien on the vessel for the performance of a charter until a lawful contract is made); The Pauline, 19 Fed. Cas. No. 10,848, 1 Biss. 390.

2. The Asa Eldridge, 8 Fed. 720; Hannah *v.* The Carrington, 11 Fed. Cas. No. 6,029.

enforceable in admiralty.[3] There is no lien on a vessel for breach of a charter which has been partly performed by the carriage and delivery of one or more of, but not all, the cargoes to be carried.[4]

2. By Charterer — a. What Constitutes and Effect Thereof; Waiver. In like manner as a breach of the charter by the owner gives a cause of action against him and may justify him in repudiating the contract,[5] so its breach by the charterer gives similar rights against him to the owner; such as an action for damages;[6] and the owner may be justified in refusing on his part to comply with the terms of the contract;[7] and if the charterer puts a cargo on board, and then takes it out and refuses to fulfil the charter-party, and the charter-party gives to the owner a lien on the cargo for a breach by the charterer, the lien attaches as soon as the cargo is put on board, and the owner can libel the cargo *in rem* in admiralty for the breach.[8] The breach may, however, be waived by the owner;[9] and where the charterer offers a substantial compliance the owner cannot recover damages as for a breach of the charter;[10] and notwithstanding a charter is invalid, the charterer may by subsequent negotiation be liable as on a new contract to reimburse the ship-owner for time and expenses incurred in attempting performance.[11] But an effort on the part of owners of a vessel, which the lessees refuse to accept when

3. The William Fletcher, 29 Fed. Cas. No. 17,692, 8 Ben. 537.

4. The Thomas P. Sheldon, 113 Fed. 779 [*modified* in 118 Fed. 945].

5. See *supra*, III, L, 1, a.

6. Wilhelmsen *v.* Tweedie Trading Co., 149 Fed. 928; Kennedy *v.* Weston, 136 Fed. 166, 69 C. C. A. 78; Bonanno *v.* Tweedie Trading Co., 130 Fed. 448, 64 C. C. A. 650 [*affirming* 117 Fed. 991]; Thompson *v.* Bush, 60 Fed. 631 [*affirmed* in 65 Fed. 812, 13 C. C. A. 148] (holding that under a charter-party requiring the charterer to furnish a full cargo of lumber to be loaded by the vessel, the shipper has no right, in the absence of express stipulation or established usage, to refuse to furnish the cargo because of the employment by the master of a stevedore who, although competent and experienced, is personally objectionable to the shipper); Bramhall *v.* Shaler, 4 Fed. Cas. No. 1,805*a* (holding that where by a charter one half the charter-money is to be paid by the consignees at the place of destination, and the consignees refuse to accept the consignment, the charter is violated and a right of action accrues to the owner of the vessel). *Compare* Constantine, etc., Steamship Co. *v.* Tweedie Trading Co., 159 Fed. 706, 86 C. C. A. 574.

An action by the managing owners of a vessel described in a charter, for breach of charter, cannot be defeated by showing that the vessel was only owned in part by plaintiffs. Torras *v.* Raeburn, 108 Ga. 345, 33 S. E. 989.

Defense that charterer was induced to contract by fraud held not sustained by evidence see Dunbar *v.* Weston, 93 Fed. 472.

Facts held not to constitute a breach of the charter by the charterer see Dene Steam Shipping Co. *v.* Bucknall, 5 Com. Cas. 372.

7. *Re* Tyrer, 9 Aspin. 186, 6 Com. Cas. 143, 84 L. T. Rep. N. S. 653 [*reversed* on other grounds in 7 Com. Cas. 166, 86 L. T. Rep. N. S. 697, 18 T. L. R. 589], holding that the right of the owners to withdraw the steamer on the ground of non-payment of hire must be exercised within a reasonable time after the failure to pay. See The Donald, 115 Fed. 744, holding, however, that a charterer, who takes a vessel for a voyage on an agreement simply to assume a payment of charter hire, for which a former time charterer was then in default, is not bound by the terms of the time charter, and, in the absence of any demand by the owner for payment of hire in advance, is not in default for non-payment before arrival of the vessel, so as to justify the owner in refusing to comply with the terms of his agreement.

Where a charterer without justification refuses to accept the vessel when tendered for loading, the owner is not bound to accept such renunciation of the contract, but may at his option treat it as still in force; and in such case he is not required to accept other employment for the vessel until the lay days for loading allowed by the charter have expired, and there has been an actual breach of the contract by the charterer. Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22].

8. The Hermitage, 12 Fed. Cas. No. 6,410, 4 Blatchf. 474.

9. Chamberlain *v.* Pettit, 49 Fed. 109 (where, however, the facts were held not to constitute waiver); Nova Scotia Steel Co. *v.* Sutherland Steam Shipping Co., 5 Com. Cas. 106.

10. Isis Steamship Co. *v.* Bahr, [1899] 2 Q. B. 364, 4 Com. Cas. 307, 68 L. J. Q. B. 930, 81 L. T. Rep. N. S. 241, 15 T. L. R. 465 [*affirmed* in [1900] A. C. 340, 9 Aspin. 109, 5 Com. Cas. 277, 69 L. J. Q. B. 660, 82 L. T. Rep. N. S. 571, 16 T. L. R. 381]; Dobell *v.* Green, 8 Aspin. 473, 4 Com. Cas. 85, 80 L. T. Rep. N. S. 19, 15 T. L. R. 158 [*affirmed* in [1900] 1 Q. B. 526, 9 Aspin. 53, 5 Com. Cas. 161, 69 L. J. Q. B. 454, 82 L. T. Rep. N. S. 314, 16 T. L. R. 204].

11. Wilson *v.* Leroy, 30 Fed. Cas. No. 17,817, 1 Brock. 447.

tendered in accordance with the charter, so to use the vessel after the charterer's default as to reduce their damages is not an acquiescence in the default, defeating their right to a recovery for breach of the charter.[12]

b. Damages. The damages to be awarded for the violation of a charter must be estimated by the rules of the commercial and admiralty law, and be the actual damage suffered, unless the law of the place of contract governs the measure of damages,[13] the charterer being liable for all damage flowing as a natural and probable consequence from the breach.[14] Thus the measure of damages for a total breach of a charter by the charterer by refusing to accept the vessel is the net amount that would have been earned by the vessel under the charter, less the net amount earned, or which might with reasonable diligence have been earned, during the time required for the making of the voyage under the charter.[15] The char-

12. Orr *v.* Wilson, 48 La. Ann. 1313, 20 So. 724; Woolsey *v.* Finke, 2 N. Y. Suppl. 112.

13. Watts *v.* Camors, 115 U. S. 353, 6 S. Ct. 91, 29 L. ed. 406 [*affirming* 10 Fed. 145], holding that the clause in a charter-party by which the parties mutually bind themselves, the ship and freight and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract, and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular state in which the contract is made and the court of admiralty sits.

Where by the terms of the charter-party the charterer agreed to insure the advanced freight at the ship's expense, it being deducted from the freight money paid, but failed to do so until long after the risk had commenced, by reason whereof the owner was compelled to insure for his own protection, the owner can recover of the charterer the amount paid by him for insurance. Lawson *v.* Worms, 6 Cal. 365.

If the charter does not stipulate as to time of arrival of the vessel at the port of lading, and the vessel arrives at such port after the season of shipping has gone by, the unusual delay having been caused by a violent storm, the court, in computing the damages in an action against the charterer for failure to furnish a cargo, will take into consideration the failure of the master to inform the charterers of the delay caused by the storm, where the vessel was put into an intermediate port for repairs. Hall *v.* Hurlbut, 11 Fed. Cas. No. 5,936, Taney 589.

14. Bacon *v.* Ennis, 110 Fed. 404 [*reversed* on other grounds in 114 Fed. 260, 52 C. C. A. 146], holding that under a charter which required the ship to go to the port of loading, "or as near as she can safely go," and required the charterer to load a full cargo of ore, where the ship could not load a full cargo at the berth assigned her by the charterer, because of a bar in the harbor which she could not cross, it was the duty of the charterer to complete her load outside the bar, no custom to the contrary being shown, and his failure to do so renders him liable for dead freight, and the owner is entitled to recover from a charterer the amount necessarily expended by the master in trimming a cargo after loading, made necessary by the fact that the cargo was not in proper condition, or that the ship was loaded at a place where she could not "always lie afloat," as required by the charter.

Wharfage.— In an action by the owner of a vessel against the charterer, on an agreement to pay wharfage, where the cause of action is laid on the breach of the express agreement, and not on any implied contract of indemnity, the measure of plaintiff's damages is the amount of wharfage, with interest, exclusive of the amount plaintiff was compelled to pay to release the boat from attachment. Compton *v.* Heissenbuttel, 2 Misc. (N. Y.) 340, 21 N. Y. Suppl. 965 [*reversing* 1 Misc. 81, 20 N. Y. Suppl. 402].

15. Barker *v.* Borzone, 48 Md. 474; Cornwall *v.* Moore, 125 Fed. 646; Leblond *v.* McNear, 104 Fed. 826 [*affirmed* in 123 Fed. 384, 61 C. C. A. 564]; Dalbeattie Steamship Co. *v.* Card, 59 Fed. 159; Greenwell *v.* Ross, 34 Fed. 656 (holding that in an action for refusal to furnish cargo according to the terms of a charter-party, libellant may recover for difference of freight between a cargo obtained and that contracted for, less freight refused because of space occupied by extra fuel required to make a longer voyage, but not for expenses incurred to fix defendant's liability, the ship being unconditionally refused, nor for demurrage, when the ship was loaded in less time after the contract was repudiated than was allowed by the charter-party); Jordan *v.* Eaton, 13 Fed. Cas. No. 7,520, 2 Hask. 236.

Vessel rechartered to original charterer.— Where, on the refusal of a charterer, without legal cause, to accept the vessel, she was at once advertised for charter and rechartered to the same person, for the same voyage, at a lower rate, and made the voyage, the measure of damages for breach of the first charter is the difference between the freight she would have received under such charter and the amount actually earned under the second up to the time when the voyage under the first would have been completed, the expenses of the two voyages being presumably

terer of a vessel for a particular voyage, who agrees to furnish a full cargo at a specified rate, is answerable if he fails to do so, to the owner of the vessel for what it could have taken safely, had a full cargo been furnished at the stipulated rates, allowing the net earnings of the vessel during the time it would have been occupied in performing the stipulated voyage.[16] But where, in violation of a charter-party, a full cargo is not furnished, the master, who does not show on what terms he has engaged with other parties, can recover only his primage and the excess of the freight in the charter-party over the current rates when the contract is broken.[17] It is the duty of the master of a chartered vessel, on failure of the charterer to furnish a cargo as agreed, to use all ordinary means and diligence to secure another cargo, and his neglect to do this will not be allowed to enhance the damages in an action by the owner against the charterer for the breach of contract.[18]

M. Loss of or Injury to Cargo; Lien. The owners of a chartered vessel, retaining control of her navigation, are liable for injuries or loss of cargo attributable to their fault or a non-excepted peril.[19] Thus they are liable for injury to or loss of cargo occasioned by unaccustomed and dangerous goods subsequently taken on board, the charterer not consenting,[20] by unseaworthiness,[21] improper

the same; and where the one actually made was under ordinary conditions it furnishes competent evidence of the time which would have been required under the first charter. Leblond *v.* McNear, 104 Fed. 826 [*affirmed* in 123 Fed. 384, 61 C. C. A. 564].

16. Ashburner *v.* Balchen, 7 N. Y. 262.

17. Wilson *v.* Cammack, 7 La. Ann. 155.

18. Murrell *v.* Whiting, 32 Ala. 54. But see Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22, 75 C. C. A. 180], holding that while the owner of a vessel which the charterer has refused to accept is bound to use diligence in rechartering, he is not required to accept an offer made during the lay days contracted for in the charter, because of a letter of refusal from the charterer based on an erroneous assumption of fact and an erroneous construction of the charter, where the owner had reason to suppose the grounds assigned would be removed or not insisted on when properly understood, and specially when the charter offered would require the vessel to proceed to another port for loading.

Burden of proof.—The law imposes on a charterer who has without justification refused to accept the vessel the burden of proving in mitigation of damages that the owner could with reasonable diligence have reduced or prevented the loss or damage occasioned by his breach of the contract. Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22, 75 C. C. A. 180].

Where the owner before the expiration of the term sold the vessel, he could not recover the contract rental after the date of such sale, which placed it out of his power either to perform the contract thereafter, or to reduce the damages for its breach, as he was bound to do, by otherwise using or leasing the vessel, if that could be done in the exercise of reasonable diligence. William H. Beard Dredging Co. *v.* Hughes, 121 Fed. 808, 58 C. C. A. 192.

19. The T. A. Goddard, 12 Fed. 174.

Under a charter exempting the owner from liability due to accident to machinery, his failure to promptly notify the charterer of a break-down at sea which delayed arrival at the port of loading for several days, did not render him liable for a loss of bananas which had been cut in anticipation of her earlier arrival, there being no provision of the charter requiring such notice. The Disa, 153 Fed. 322. But see The Ask, 156 Fed. 678.

The owner may exempt himself in England from liability for accident to the hull, and for negligence of pilot, mariners, or other person employed by the ship-owner or for whose acts he is responsible, and that the owners will be protected by the words "at charterers' risk." Wade *v.* Cockerline, 10 Com. Cas. 115, 21 T. L. R. 296, 53 Wkly. Rep. 420.

The fact of damage to a cargo by rats is evidence that sufficient care and skill were not exercised to rid the vessel of rats. The Carlotta, 5 Fed. Cas. No. 2,413, 9 Ben. 1. But see Church Cooperage Co. *v.* Pinckney, 170 Fed. 266, 95 C. C. A. 462, commenting on this case.

Libellant's claim must be limited strictly to the cargo proved damaged, where, after request, he failed to make full examination in his power as to the extent of the damage. The Marinin S., 28 Fed. 664.

Where a charterer agreed to pay any damages that the vessel may be subjected to, arising from cargo in casks being stowed between-decks and running on other cargo, the vessel is, notwithstanding this agreement, liable for damage caused to cargo in the lower hold by the leakage of lard from the casks and through the deck, if the deck is not well and sufficiently calked. Moses *v.* Boyd, 17 Fed. Cas. No. 9,871, 5 Blatchf. 357 [*affirmed* in 7 Wall. 316, 19 L. ed. 192].

20. The T. A. Goddard, 12 Fed. 174.

21. Tygert-Allen Fertilizer Co. *v.* Hagan, 103 Fed. 663. And see The City of Lincoln *v.* Smith, [1904] A. C. 250, 9 Aspin. 586, 73 L. J. P. C. 45, 91 L. T. Rep. N. S. 206, holding that the owner of a chartered ship, in herself seaworthy, but rendered unseaworthy by the improper loading of cargo and ballast which is carried out under his orders, is

stowage,[22] or towage.[23] But where the charterer becomes owner *pro hac vice*, he cannot recover from the owner for a shortage in delivery of or damage to cargo;[24] and where a ship is chartered to carry the goods of a single freighter only on a particular voyage, she is not a common carrier, but is subject only to the express and implied obligations of the charter-party and bill of lading;[25] and the owner may stipulate against negligence of his servants.[26] But notwithstanding the charterer has control of the boat for the period of the contract, the boat is liable *in rem* to him for an injury to the cargo caused by the master's failure to keep her in thorough repair under an agreement by him so to do.[27] If a vessel is let on a contract of affreightment by charter-party, the owners will not be held responsible for a loss occasioned by the violence of the elements, although the dangers of the seas are not expressly excepted by the charter-party;[28] and where the circumstances

liable for damage occasioned by his personal negligence.

22. Corsar *v.* Spreckels, 141 Fed. 260, 72 C. C. A. 378 (holding that a ship is responsible for the proper stowage of her cargo, although the charter-party gives the charterer the option of appointing the stevedores, to be paid by the owners, where it also provides that they shall be under the direction of the master and the owners responsible for all risks of loading and stowage); Bethel *v.* Mellor, 131 Fed. 129 (holding also that a provision of a charter-party that the master shall employ the charterers' stevedores at ports of loading, and discharge and pay them stated compensation, "the stevedores to be wholly under the direction and control of the master," does not affect the liability of the ship or owners for improper stowage); The Sloga, 22 Fed. Cas. No. 12,955, 10 Ben. 315.

Stowage held not improper see The Keystone, 31 Fed. 412.

The charterer of a vessel who ships an article new in commerce whose dangerous character is unknown, either to him or the owner, is liable for injury to other cargo coming in contact therewith, and the increased expenditure in discharging caused by its peculiar character; for where damage is sustained in a case not falling within the category of an inevitable accident, and neither party is in actual fault, the loss must fall on him who, from the relation he bears to the transaction, is supposed to have been possessed of the necessary knowledge to avoid the difficulty. Pierce *v.* Winsor, 19 Fed. Cas. No. 11,150, 2 Cliff. 18 [*affirming* 19 Fed. Cas. No. 11,151, 2 Sprague 35].

23. Rodgers *v.* Bouker Contracting Co., 134 Fed 702.

24. Golcar Steamship Co. *v.* Tweedie Trading Co., 146 Fed. 563; The Caroline Miller, 53 Fed. 136; Starin's City, etc., Transp. Co. *v.* The Daniel Burns, 52 Fed. 159 [*affirmed* in 56 Fed. 605, 6 C. C. A. 49].

25. The Dan, 40 Fed. 691 (holding that a vessel chartered to transport a specific cargo only is not a common carrier, and hence is not an insurer of the safe delivery of the cargo, and can be held for damage to cargo only on proof of negligence); Sumner *v.* Caswell, 20 Fed. 249. And see Hart *v.* Leach, 21 Fed. 77.

26. The Fri, 154 Fed. 333, 82 C. C. A. 205.

27. Wood *v.* The Wilmington, 48 Fed. 566.

28. The Casco, 5 Fed. Cas. No. 2,486, 2 Ware 188.

What constitutes a peril of the sea absolving the owner.— In the absence of a clause in the charter-party providing for the cleansing of the vessel in a specified manner, or for taking only specified cargo, or for freeing the vessel from petroleum damage to specified cargo, damage from petroleum occasioned by leakage, diffusion, or impregnation is not a peril of the sea. The Lizzie W. Virden, 11 Fed. 903. And see Church Cooperage Co. *v.* Pinkney, 170 Fed. 266, 95 C. C. A. 462. But damage to cargo by sea water entering ventilator holes, after the ventilators had been carried away by a heavy sea which came aboard in a gale, was the result of a peril of the seas, for which the ship was not liable, where it appeared that the firmness of the ventilators had been thoroughly tested by shaking, and by examination of the flanges and the screws and bolts securing them to the deck, although the screws and bolts were not taken out for inspection. Darragh *v.* The Dunbritton, 73 Fed. 352, 19 C. C. A. 449 [*affirming* 61 Fed. 764, and *distinguishing* The Edwin I. Morrison, 153 U. S. 199, 14 S. Ct. 823, 38 L. ed. 688]. And loss by jettison if justified also comes within the meaning of the term. Bursley *v.* The Marlborough, 47 Fed. 667. As does also damage by oil, which, although properly stowed, escaped by natural and usual leakage into the hold, and was afterward carried up into contact with the cargo by water that entered the ship in consequence of a sea peril. Darragh *v.* The Dunbritton, *supra*. Where a vessel arrived with her cargo damaged both above and below by water in the hold, she was not held liable for the damage above caused by water taken in through deck openings in heavy weather, but was liable for the damage below caused by a bad condition of the ship's pump and valve, that condition existing at the commencement of the voyage, and it appearing that reasonable care had not been taken to remove the water when it was found that the pumps were choked. American Sugar Refining Co. *v.* The Euripides, 52 Fed. 161.

Evidence held not to sustain the defense that damage was occasioned by peril of the

attending the loss would amply account for damage to the cargo, in the absence of satisfactory proof that the damage therefrom arose from other causes, it will be attributed to peril of the seas;[29] but if the owners are chargeable with any neglect or fault without which the loss would not have happened they will be liable.[30] In every contract of affreightment, whether by charter-party or bill of lading, the ship is by the marine law hypothecated to the shipper for any damage his goods may sustain from the insufficiency of the vessel or the fault of the master or crew.[31]

N. Loss of or Injury to Vessel — 1. Nature and Extent of Liability. When a charter-party is a demise the charterer is liable for loss of or injury to the vessel, when the vessel is laid up equally as when on voyage.[32] In other cases the general rule that a bailee for hire is not liable for the loss of the property without his fault is applicable in the absence of any express provision therein affecting the question, other than the usual covenant for return of the property at the end of the term, which is a condition of all bailments, implied if not expressed,[33] and there cannot be a recovery from a charterer for injuries to the vessel as a general rule, without proof of negligence,[34] nor for inevitable accident.[35]

sea see The Edwin I. Morrison, 153 U. S. 199, 14 S. Ct. 823, 38 L. ed. 688 [*reversing* 40 Fed. 501]; Bregaro *v.* The Centurion, 68 Fed. 382, 15 C. C. A. 480 [*reversing* 57 Fed. 412], where sugar in the hold received damage caused by a severe squall, which heaved the ship at an angle of forty-five degrees, whereby some of the casks of molasses were broken and their contents ran down the scupper pipes into the bilges of the hold beneath, so that the bilges and sluiceways became clogged with molasses, causing it to flow over the bottom of the hold and dissolve the sugar.

The owners may expressly except perils of the sea (The Chasca, 23 Fed. 156), or damage from breaking of machinery (Chadwick *v.* Denniston, 41 Fed. 58).

29. Evans *v.* Spreckels, 45 Fed. 265.

30. The Casco, 5 Fed. Cas. No. 2,486, 2 Ware 188.

31. The New York, 93 Fed. 495; The Casco, 5 Fed. Cas. No. 2,486, 2 Ware 188.

Where, under a charter amounting to a demise or lease of the vessel, the charterer pays for damages to cargo, resulting from the fault of the ship, as from her unseaworthiness, he is subrogated to the lien of the cargo-owner therefor, his relation to the ship as to such damages being that of surety. The New York, 93 Fed. 495.

32. Ames *v.* New Orleans, etc., Transp. Co., 36 La. Ann. 479.

33. Worrall *v.* Davis Coal, etc., Co., 113 Fed. 549 [*affirmed* in 122 Fed. 436, 58 C. C. A. 418] (a case of subcharter); Lake Michigan Car Ferry Co. *v.* Crosby, 107 Fed. 723.

Where a vessel was chartered for waters where the owner knew she would be in danger from the action of ship-worms, but he was willing to have her remain in service as long as he was paid the agreed compensation, it was held that he took all the risks of destruction from the worms, and could not recover for the hull, which was destroyed by worms. Pratt's Case, 3 Ct. Cl. 105.

A charterer of a vessel under a verbal charter being bound as a bailee for hire to use reasonable care and diligence to protect the property from injury is liable for its loss by being crushed by floating ice, where it was left on the north side of a pier generally regarded as dangerous on an ebb tide when there was ice moving in the river. Bleakley *v.* New York, 139 Fed. 807.

The fact that a time charterer of a vessel subchartered her, to be used as a newspaper despatch boat in time of war, such employment being lawful, does not render him liable for a loss or injury arising from sea perils, merely because in such service she was subjected to different perils from those she would have encountered if she had been employed in the carrying of cargoes. The Ely, 122 Fed. 447, 58 C. C. A. 429 [*affirming* 110 Fed. 563], where the evidence was held to support a decree holding that the time charterer of a steamer was not liable for injury to the vessel by stranding, claimed on the ground that she was subchartered without authority, for an unlawful purpose, and that at the time of the stranding she was employed by the subcharterer in service, in violation of the neutrality laws in time of war.

34. W. H. Beard Dredging Co. *v.* Hughes, 113 Fed. 680 [*affirmed* in 121 Fed. 808, 58 C. C. A. 192] (holding, however, that a charterer is liable for an injury to the chartered vessel through the negligence of a company which he hired to tow the same); Jackson *v.* Easton, 13 Fed. Cas. No. 7,134, 7 Ben. 191 (holding that where the charterers of a canal-boat agree to pay a specified sum per day for the use of the boat, and there is no express contract by the charterers to tow the boat safely or to return her in good condition, the charterers are not liable to the owner where she is sunk by the explosion of the boiler of a tug which they had employed to tow her, where it appears that the charterers were free from negligence).

35. Booth *v.* New York, 127 Fed. 459.

An injury to a vessel which could have been foreseen, and might reasonably have been expected in the ordinary course of events, cannot be considered as happening through inevitable accident within the meaning of this rule. Bleakley *v.* New York, 139 Fed. 807.

The charterer is, however, liable for an injury to the vessel sustained in a voyage not authorized by the charter-party [36] or where the vessel used in a manner other than for the use for which it was chartered,[37] independently of any question of negligence; [38] and the fact that a charterer puts the chartered vessel to a different use from that specified in the charter renders him liable to the owner as an insurer for an injury to the vessel.[39] The charterer is of course liable for loss resulting from negligence on his part or through his servants or employees,[40] but not for

36. Latson *v.* Sturm, 14 Fed. Cas. No. 8,115, 2 Ben. 327.

37. Beach *v.* Raritan, etc., R. Co., 37 N. Y. 457, holding the charterer liable where the vessel hired as a receiving barge was used for transporting, and in such use was lost.

38. Beach *v.* Raritan, etc., R. Co., 37 N. Y. 457.

39. Sutcliff *v.* Seligman, 121 Fed. 803, 58 C. C. A. 251 [*reversing* 110 Fed. 560]. But see The Ely, 110 Fed. 563 [*affirmed* in 122 Fed. 447, 58 C. C. A. 429], holding that, as between owner and charterer, the charterer's violation of the terms of the charter does not make him responsible for damages by marine perils in no way brought about by such violation.

40. Swenson *v.* Ward, 48 Misc. (N. Y.) 534, 96 N. Y. Suppl. 175; The Three Brothers, 145 Fed. 177, 76 C. C. A. 147 [*affirming* 134 Fed. 1001] (holding a city liable for injury to a hired scow from floating ice while being moved by its direction to a safer place in a river by a tug also in its employ, which performed its work in a proper manner, on the ground that the city failed to exercise ordinary care as bailee in permitting the scow to remain until such time in a place which was dangerous in winter time when ice was running); International Contracting Co. *v.* Walsh, 115 Fed. 851 (holding, however, that while a hirer of scows which went adrift by reason of the insufficiency of the lines with which they were equipped by the owner, if negligent in failing to make an effort to recover the vessels, or promptly to notify the owner of their loss is liable for damages approximately resulting from such negligence or delay, the contract cannot be considered as remaining in force thereafter, so as to render him liable for further fire); Phœnix Towing, etc., Co. *v.* New York, 60 Fed. 1019.

Where the charterers at the termination of the lease undertake to deliver the vessel to the owner at a port other than that named in the lease and where the boat then was, although at the owner's request and without charge, they remain liable until the delivery of the vessel for any injury through their negligence or failure to exercise such maritime skill and care in towing from one port to the other as was reasonable under the conditions and circumstances existing at the time. Cotton *v.* Almy, 141 Fed. 358, 72 C. C. A. 506.

A charterer who, without the consent of the owner or master, in loading, subjects her masts to strains far above their computed working strength, takes the risk and responsibility. Bollman *v.* Tweedie Trading Co., 150 Fed. 434; British Maritime Trust *v.* Munson Steamship Line, 149 Fed. 533. See also Bull *v.* New York, etc., Steamship Co., 167 Fed. 792, 93 C. C. A. 182.

The burden is on the charterer as a bailee to show that the loss was caused without any negligence on his part. Swenson *v.* Snare, etc., Co., 160 Fed. 459, 87 C. C. A. 443 [*affirming* 145 Fed. 727]. But see International Contracting Co. *v.* Walsh, 115 Fed. 851, holding that an injury to scows, resulting from their going adrift by reason of the parting of their lines while being towed in from the dumping grounds, in the absence of proof of negligent handling of the tow, or that the sea was in such condition as to render it negligence in the hirer to attempt their navigation, was presumably due to their not being equipped by the owner with suitable lines; and to charge the hirer with liability therefor the burden rests upon the owner to show clearly that the risk of injury from such cause was assumed by the hirer.

Illustrations.—Within this rule the charterer has been held liable for damage from landing at an unusual place, with which the master was unacquainted, and striking upon rocks near the shore without the fault of the master (Fox *v.* Damm, 105 Fed. 254), improper loading (Interstate Transp. Co. *v.* New Orleans, 52 La. Ann. 1859, 28 So. 310; Lake Michigan Car Ferry Transp. Co. *v.* Crosby, 107 Fed. 723), stranding (Dailey *v.* New York, 128 Fed. 796; Bouker *v.* Smith, 40 Fed. 839 [*affirmed* in 49 Fed. 954, 1 C. C. A. 481]; negligent towage by a company employed by the charterer (The Naos, 144 Fed. 292 (holding that a charterer who contracts to furnish certain towage to the chartered vessel cannot relieve himself from responsibility for the manner in which the service is performed by employing a tug to perform it, but is liable for any damage or injury caused to the vessel through the negligence or fault of such tug); Thompson *v.* Winslow, 128 Fed. 73), or by the charterer himself (Swenson *v.* Snare, etc., Co., 145 Fed. 727 [*affirmed* in 160 Fed. 459, 87 C. C. A. 443], where the capsizing of a pile-driver while being towed by respondent company to which it had been chartered was held, under the evidence, not due to unseaworthiness, but to improper towing in turning the pile-driver too suddenly, which rendered respondent liable for the damages), unskilful handling (King *v.* Connabeer, 148 Fed. 136, where an injury to the owner's coal barge was due to the fault of the charterer in moving her while discharging in a river at a time when the tide was too strong, in consequence of which she broke the lines and drifted against a bridge pier), or berthing (Carroll *v.* Holway, 158 Fed. 328, holding

loss due to negligence of the owner's servants;[41] and the owner of a vessel has no recourse against the charterer to recover damages adjudged against her because of her unseaworthiness for the use to which she was put, where he knew of such use when the charter was made, and the charterer is not otherwise shown to have been negligent.[42] The mere fact that the charterer of a vessel, in pursuance of the charter, has insured it for the benefit of the owner, does not constitute a defense to an action against the former for failure to return the vessel according to his contract, where it has been destroyed by act of God before the time for its return, unless it is also shown that the owner has received the insurance money;[43] nor does the fact that the owner of a wrecked vessel had undertaken formally to abandon the wreck to the underwriters affect the rights or liabilities of the charterer under a charter which provided that he should have the insurance extended if it should expire before the voyage should be completed, and should deliver up the vessel in as good condition as when it was hired, natural wear and tear excepted.[44] The parties may themselves regulate the liability for loss of or injury to the vessel

the charterers of a vessel who were charged by the charter-party with the duty of discharging her and with furnishing her with a suitable berth liable for her injury while lying in a dock to which they assigned her, and which was not used by vessels of her size, by reason of the dangerous condition of the bottom where they failed to exercise reasonable care, or, in fact, any care, to ascertain its condition), failure to keep a tug in readiness whereby the vessel sunk (H. M. Loud, etc., Lumber Co. *v.* Peter, 20 Ohio Cir. Ct. 73, 11 Ohio Cir. Dec. 155), and loss by fire because of the negligence of the charterers' servants in handling a gasoline stove provided for culinary purposes (Foret *v.* Mathes, 159 Fed. 128, 86 C. C. A. 333)

Where one of the coöwners of a vessel charters it, he is liable to the others for the destruction of the vessel, caused by his negligence while acting as master. Williams *v.* Hays, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153.

41. Auten *v.* Bennett, 88 N. Y. App. Div. 15, 84 N. Y. Suppl. 689 (holding that where, under the terms of a charter-party, the owner of the vessel furnishes the crew, which controls the navigation, the charterer is not liable for depreciation resulting from the crew's negligence, although the owner agrees "to deliver" the vessel to the charterer, who agrees to return her in as good condition as when received, and even though a charterer agreed to return the vessel in as good condition as when received, his liability does not extend to depreciation resulting from unseaworthiness, since every charter-party contains an implied warranty of seaworthiness); Dene Steamship Co. *v.* Munson, 103 Fed. 983. And see Bleakley *v.* Sheridan, 120 N. Y. App. Div. 471, 104 N. Y. Suppl. 1060, holding that where plaintiff chartered a scow to defendant and furnished a captain to care for her, it was the captain's duty to take proper care of the scow during a storm, notwithstanding defendant had broken her contract not to send the scow to a specified place. *Compare* Hastorf *v.* Moore, 92 Fed. 398, holding that where the charterer's employees who, under the charter, had control of the movements of a scow hired from the owner, for convenience in unloading awung the stern inshore, where she grounded on some spiles and was injured, the presence of a boatman or scowman employed by the owner did not relieve the charterer from liability, where such man exercised no authority as to the movement of the scow, and had no knowledge of the presence of the spiles.

Illustrations.—Within this rule the charterer has been held not to be liable where the loss was caused by improper loading by the owner's master (Dunwoody *v.* Saunders, 50 Fla. 202, 39 So. 965; Dene Steam Shipping Co. *v.* Tweedie Trading Co., 133 Fed. 589 [*affirmed* in 143 Fed. 854, 74 C. C. A. 606]; Dene Steamship Co. *v.* Munson, 103 Fed. 983), by stranding (Glover *v.* Thomas, 63 N. Y. 642), by negligent pilotage by owner's pilot (Martin *v.* Farnsworth, 33 N. Y. Super. Ct. 246, 41 How. Pr. 59 [*affirmed* in 49 N. Y. 555]; Pendleton *v.* The Martin Kalbfleisch, 55 Fed. 336, 5 C. C. A. 120; Fraser *v.* Bee, 17 T. L. R. 101, 49 Wkly. Rep. 336, where the pilot, although paid by the charterers, was held not to be their servant, and therefore the charterers were not bound to pay hire during the period that the ship was in dock undergoing repairs), by negligence of the owner's master in leaving her tied up at a dock by a line which was too short, by reason of which when the tide fell she careened, filled, and sank (Zabriskie *v.* New York, 160 Fed. 235), or by lack of care by the owner's master in failing to use proper means to protect the vessel during loading (Worrall *v.* Davis Coal, etc., Co., 122 Fed. 436, 58 C. C. A. 418 [*affirming* 113 Fed. 549].

42. The Willie, 134 Fed. 759.

Where the owner's master waives the objection that a port is unsafe, the owners of the vessel cannot recover damages for the injury received by the vessel in coming out of such port. Atkins *v.* Fibre Disintegrating Co., 2 Fed. Cas. No. 601, 2 Ben. 381 [*affirmed* in 18 Wall. 272, 21 L. ed. 841].

43. Steele *v.* Buck, 61 Ill. 343, 14 Am. Rep. 60.

44. Marquette First Nat. Bank *v.* Stewart, 26 Mich. 83.

in which case the contract will control;[45] and a stipulation, in a charter demising a vessel, by which the risk of loss or damage to the vessel through the negligence of the master, which the law would otherwise cast upon the charterer, is assumed by the owner, is not invalid as against public policy.[46] An agreement in a charter-party to deliver the vessel to its owner in good condition, on the termination of the charter, is not an absolute promise by the charterer to deliver; he is absolved if the vessel is destroyed without his fault before the expiration of the contract;[47] and a stipulation in a contract for the hiring of a vessel for a specified time, binding the hirer to return her in as good condition as when taken, reasonable use, wear, and tear excepted, does not entitle the owner to refuse to accept the vessel when tendered back, and to recover her value, because of a breach of such stipulation, but only to recover the damages arising from the breach.[48]

45. Goddin *v.* Welton, 34 Mo. 448 (holding that where a charter-party contained the words, "In case of a loss of the said boat she will be at the risk of the owners," and the boat sank without the fault of those having control of her, who ineffectually made such attempts to raise her as they could, this was a loss within the meaning of the charter-party, as defeating the object of the contract, which was the use of her during the season); Leeds *v.* Hills, 158 Fed. 1020, 85 C. C. A. 489 [*affirming* 149 Fed. 878] (holding that where a charter-party required the hirer to redeliver the yacht to her owner in the same condition in which he received her, and when she was delivered the blades of both her propellers were bent, her owner was entitled to recover the expense incident to the repair thereof); Detroit *v.* Grummond, 121 Fed. 963, 58 C. C. A. 301 (holding that under a provision of a contract for the hiring of a vessel to be moored and used for a hospital, binding the city, which was the hirer, to pay a stipulated sum as the value of the vessel in case she should be "lost or destroyed" by the fault of the hirer, the city did not become bound to pay for the vessel because of a damage by fire through the negligence of its servants, not amounting to a total loss or destruction of the vessel).

An absolute obligation to return a vessel at the expiration of the term of hiring is imposed upon the charterer, failure to comply with which is not excused because the vessel is lost without fault on his part, by a charter-party which, after providing for the surrender of the vessel at the expiration of the term "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," and requiring the hirer to make all repairs and to assume liability for all loss and damages, fixes in express terms the value of the vessel, and makes provision for security to protect against any loss or damage sustained by a failure of the hirer to fulfil any of the obligations which the contract imposes. Moore *v.* Sun Printing, etc., Assoc., 101 Fed. 591, 41 C. C. A. 506 [*affirmed* in 183 U. S. 642, 22 S. Ct. 240, 46 L. ed. 366].

Under a covenant to restore the vessel "dangers of the seas excepted," the charterer is liable for the value of the vessel in case of its destruction by an accidental fire originating on board; such fire not being one of the dangers of the seas within the exception. Airey *v.* Merrill, 1 Fed. Cas. No. 115, 2 Curt. 8.

Duty to insure.— Under a charter-party providing that the charterer should return a boat at a specified time in as good condition as it now is, with the exception of the ordinary use and wear, the charterer was not bound to insure against the perils of the sea, and if the boat was lost in a storm, in the life of the charter, without his fault, he was not liable for its value. Ames *v.* Belden, 17 Barb. (N. Y.) 513.

46. McCormick *v.* Shippy, 119 Fed. 226 [*affirmed* in 124 Fed. 48, 59 C. C. A. 568], holding also that a provision in a time charter-party for a yacht that the charterer shall "maintain the yacht in a thoroughly efficient state, in hull and machinery, for and during the service" binds him only to make the wear and tear repairs which would otherwise be imposed by law upon the owner, and is not in conflict with a clause exempting him from responsibility for loss or damage to the vessel.

47. Young *v.* Leary, 135 N. Y. 569, 32 N. E. 607, holding that if the delivery of the vessel by the charterer at the time specified was waived by the owner on account of negotiations for its sale to the charterer, and its loss occurred without his fault during the time thus impliedly extended, the charterer would not be liable, and consequently his surety could not be held; and the fact that the surety participated in the negotiations for sale, and thus was a party to the delay, is immaterial.

Striking trees and snags, and sinking, are maritime risks, assumed by the owner of a vessel in a charter-party; and liability therefor is not affected by the fact that at the time of the accidents a pilot furnished by the charterer is in charge, he not having been objected to by the owner or shown to have been unskilful or negligent. Strong *v.* U. S., 154 U. S. 632, 14 S. Ct. 1182, 24 L. ed. 664.

The charterer of a steamer to be used for wrecking purposes is bound only to ordinary diligence as a bailee for hire, and is not responsible for accidents caused by *vis major*. Browning *v.* Baker, 4 Fed. Cas. No. 2,041, 2 Hughes 30.

48. Detroit *v.* Grummond, 121 Fed. 963, 58 C. C. A. 301.

2. Damages. It is competent for the parties to a charter to fix the value of the vessel therein as a basis of damages in the event of her loss, and such valuation is conclusive upon them in the absence of fraud or mutual mistake, especially where the vessel has no determinable market value.[49] In a suit on a charter-party for breach of a covenant to return a vessel, she having been burned, the charter-money for the time preceding the destruction of the vessel may be allowed as damages, and the damages will not be reduced because the vessel, when burned, was lying on a shoal on which she had stranded, unless it affirmatively appear that her value was thereby materially diminished,[50] and the rule applied in marine insurance,[51] that the injury of a vessel constitutes a total loss, where the cost of repair would exceed half her value, is not applicable to the case of injury to a vessel under lease, so as to entitle the owner to recover her full value as stipulated in the lease in the event of total loss, at least where there was no abandonment to the lessees.[52]

O. Charter by Government — 1. In General. The general rules of operation and construction governing charters between private persons[53] apply to charters by the government;[54] and where the use of a vessel chartered by the government in time of war for transportation of passengers and stores is not limited to any particular waters, she may be sent up a river in aid of military forces.[55]

2. Charter-Money. The government is not liable for compensation during retention of the vessel by a marshal incident to a marine risk, which the owner expressly assumed;[56] nor after the voyage is broken up where the government is not owner *pro hac vice* and the compensation is for employment under pain of impressment with compensation *per diem* until the voyage is broken up.[57] If the charter amounts to a contract for hiring, and not for service, the government is bound to pay rent for a vessel furnished and accepted thereunder until final return to the contractor, although the vessel has been injured and laid up for repairs during

49. Moore *v.* Sun Printing, etc., Assoc., 101 Fed. 591, 41 C. C. A. 506 [*affirmed* in 183 U. S. 642, 22 S. Ct. 240, 46 L. ed. 366].

50. Merrill *v.* Arey, 17 Fed. Cas. No. 9,468, 3 Ware 215 [*affirmed* in 1 Fed. Cas. No. 115, 2 Curt. 8].

51. See Marine Insurance, 26 Cyc. 689.

52. Cotton *v.* Almy, 141 Fed. 358, 72 C. C. A. 506.

The finding of an assessor of the cost of repairs to a vessel made necessary by grounding through the fault of the charterer, based upon an itemized account for such repairs, with uncontradicted testimony that the account was paid, and that the repairs were all necessitated by the grounding, will not be disturbed. Thompson *v.* Winslow, 130 Fed. 1001 [*affirmed* in 134 Fed. 546, 67 C. C. A. 470].

53. See *supra*, III, D.

54. Fogg *v.* U. S., 5 Ct. Cl. 264, holding that where a charter-party between the government and an individual provided that the time of the vessel's service was "to cease from the time of notice to the master on board," and a quartermaster, being the consignee, neglected to give any notice and kept the vessel waiting a month in port, he had no legal authority to antedate her discharge, the loss was due to his neglect of duty, and the owners were entitled to recover hire to the time of actual discharge.

Munitions of war are "stores," and soldiers "passengers," within the charter of a vessel by the government in time of war. Strong *v.* U. S., 154 U. S. 632, 14 S. Ct. 1182, 24 L. ed. 664.

55. Strong *v.* U. S., 154 U. S. 632, 14 S. Ct. 1182, 24 L. ed. 664.

Where a vessel is equipped and chartered for the purpose of supplying troops with water, and agrees to deliver the water at such places as ordered, it will be presumed, in the absence of evidence to the contrary, that the parties mutually intended the water to be supplied to soldiers on transports, wherever they might be at sea, if necessity required, although delivery be attended with risks. Donald *v.* U. S., 39 Ct. Cl. 357.

56. Goodwin *v.* U. S., 17 Wall. (U. S.) 515, 21 L. ed. 669, where the marshal held the vessel under a libel brought for failure to pay a bottomry bond for repairs to stop a leak.

57. Reed *v.* U. S., 11 Wall. (U. S.) 591, 20 L. ed. 220, holding that an order by the government to the owners of a vessel, during war, to get her ready, under pain of impressment, to transport a cargo, under which order she sails under protest with her owners, officers, and crew, does not make the government owners for the voyage, but leaves the possession with the general owners under a contract for *per diem* compensation from the commencement of the voyage until it was broken up, including also as many days in addition as would have been spent, if no disaster had occurred, in completing the trip.

part of the time it was in the service of the government.[58] Where the government agrees that the stipulated hire of a barge impressed into service shall be at a specified rate *per diem* until the barge be returned or accounted for, it is charged with the duty of notifying the owners of the loss of the barge, and, if notice is not given until long after the loss, the government is subject to the payment of the hire until the notice was received.[59] Allowing a vessel chartered by the government to remain in its service after the master has been notified that her wages must be reduced below the charter rate or the vessel be discharged, coupled with acceptance of the reduced rate, accompanied by the giving of a receipt in full, will conclude the owner from recovering the rate stipulated in the charter.[60] The owners of a vessel, let to the United States as a transport in time of war, have no lien for their charter-money on goods the United States may put on board.[61]

3. Loss of or Injury to Vessel; Lien. The government may, in like manner as a private person,[62] regulate, by contract, its liability for loss or injury to the vessel while in its employ.[63] Where the government charters a private vessel for military purposes it is very generally agreed that the owner shall be compensated for losses due to war risks and the agreement is valid and will be enforced.[64] Such a provision does not cover a marine risk expressly assumed by the owner;[65] nor damage caused by the disobedience of the owner's master to the orders of the military officer commanding;[66] nor will a stipulation that the government shall indemnify the owner for any extraordinary marine risk cover an ordinary marine risk, such as striking the fluke of a submerged anchor and sinking,[67] the risk meant being a risk extraordinary in kind and not in degree.[68] But under a charter which provided that only the war risk should be borne by the government, where the vessel was towed into a certain channel while in service, under orders of the naval commander and against the remonstrances of the master, and was injured by being run aground, the government was held liable for the injuries to the ves-

58. U. S. *v.* Shea, 152 U. S. 178, 14 S. Ct. 519, 38 L. ed. 403; Dozier *v.* U. S., 9 Ct. Cl. 342.

59. Smith *v.* U. S., 9 Ct. Cl. 237.

60. Field *v.* U. S., 12 Ct. Cl. 355 (holding also that where the government, as charterer of a vessel, reserved the right to discharge her at any time, and subsequently gave notice to the master that the charter rate was reduced, with a request that the charter be sent to the charterer, so that the reduction might be indorsed thereon, it was not sufficient for the master to protest to the messenger, and withhold the charter-party); Clark *v.* U. S., 9 Ct. Cl. 377.

61. The Undaunted, 24 Fed. Cas. No. 14,336, 2 Sprague 194.

62. See *supra*, III, N.

63. New Bedford, etc., Propeller Co. *v.* U. S., 14 Wall. (U. S.) 670, 20 L. ed. 760; Clark *v.* U. S., 9 Ct. Cl. 377, holding that where a charter-party with the government provides that the owner shall navigate the vessel and keep her staunch, but that the charterers will assume the "war and all other risks," the government is liable to the owner for injuries received by the vessel running on stumps in river navigation without fault of the master or crew, the risk being a marine risk.

64. Clyde *v.* U. S., 9 Ct. Cl. 184, holding that where the government insures in a charter-party against "war risk," and the vessel is driven ashore by a gale and captured by the enemy, the government is liable. See Morgan *v.* U. S., 14 Wall. (U. S.) 531, 20 L. ed. 738.

65. Morgan *v.* U. S., 14 Wall. (U. S.) 531, 20 L. ed. 738; Donald *v.* U. S., 39 Ct. Cl. 357; Reybold *v.* U. S., 5 Ct. Cl. 277 [*affirmed* in 15 Wall. 202, 21 L. ed. 57], holding that where a charter-party of a steamer chartered for military services in time of war provided that the marine risk should be borne by the owners, it meant the risks incident to the service in which it might be employed, and, on being ordered to proceed down a river at the time when ordinary navigation was suspended by reason of ice, the master complied without objection, and the vessel was lost on account of injuries from the ice, the loss must be borne by the owners.

Sufficiency of evidence to support recovery. —Where the charter of a vessel by the government provided that the war risks should be borne by the charterers and the marine risks by the owners, and while on a military expedition a hole was knocked in the bottom of the vessel, it was not sufficient for the owners, in order to recover, to show that the enemy had planted obstructions in the river and that the injury might have been caused by such obstructions. Field *v.* U. S., 12 Ct. Cl. 355.

66. White *v.* U. S., 154 U. S. 661, 14 S. Ct. 1192, 26 L. ed. 178.

67. Leary *v.* U. S., 14 Wall. (U. S.) 607, 20 L. ed. 756 [*affirming* 5 Ct. Cl. 234].

68. Leary *v.* U. S., 5 Ct. Cl. 234 [*affirmed* in 14 Wall. 607, 20 L. ed. 756].

sel.[69] Where the owner retains possession of command and navigation of the vessel, the government is not, as a general rule, liable for loss of or injury to the vessel, during the term of employment.[70] Thus where a vessel which has been chartered by the government is in the possession of the captain and crew provided by the owners, and the charterer only directs her destination, the control and responsibility are in the owners, even though the pilot, selected and employed by the captain, and placed in charge of the vessel on pilot ground, is commissioned by the government and employed by the month for the pilotage of government transports; and the government is not liable for repairs necessitated by sinking the vessel, nor for the hire of the vessel while being repaired.[71] Where injuries to an impressed vessel were made good to the owners by the insurers, the owners have no right of action against the government for the same damages.[72]

P. Rights and Liabilities of Third Persons — 1. Shippers. The general owner of a vessel, who has given to another a charter for a voyage, but who retains control, equips, mans, victuals, and sails her at his own expense, is owner for the voyage, and is liable for the safe carriage and proper delivery of goods received on board by the master, although so received under the contract by the owner with the charterer, and although the master has not given a bill of lading;[73] but a freighter who contracts with the charterer for repairing the vessel has not any privity with the owner, and cannot claim the benefit of the owner's warranty to the charterer that the vessel was seaworthy;[74] and the owner of a vessel under a charter, the hirer having the whole control of the vessel for the time, to victual and man her, and pay over a portion of the net proceeds to the owner for the use of the vessel, is not liable to the shippers of goods on board the vessel which had been embezzled or otherwise not accounted for by the master.[75] But the fact that a vessel has been let by a charter-party so that the charterer is to be deemed the special owner and have control of her does not deprive the shipper of his lien on the vessel for the execution of the contract of affreightment,[76] for the

69. Talbot *v.* U. S., 7 Ct. Cl. 417. But see Mott *v.* U. S., 9 Ct. Cl. 257, holding that where the owner of a vessel chartered to the government assumed the "marine risks," and the vessel was wrecked by collision in a fog, the owner could not recover, although she was compelled in a military exigency to undertake the voyage amid extrahazardous circumstances, in the absence of her master and engineer, and against the remonstrances of her other officers.

70. Shaw *v.* U. S., 93 U. S. 235, 23 L. ed. 880 [*affirming* 9 Ct. Cl. 388], holding that where a steamer was used in the service of the United States by a quartermaster of the United States for a trip to different points, the compensation proposed being stated at the time to the captain, and no objection being made, and the possession, command, and management of the steamer being retained by its owner, the United States were not liable to the owner for the value of the steamer destroyed by fire while returning from the trip, without his fault.

If the owner of a vessel voluntarily continues her navigation after her impressment by the government, and a loss is occasioned without fault or negligence on the part of their owners or representatives, the owner cannot recover under the act of March 3, 1849 (9 U. S. St. at L. 414), providing that the owner of the impressed vessel, who has suffered the loss of the property, shall be paid the value thereof, as the act changes the character of the transaction from impressment to contract. Shaw *v.* U. S., 9 Ct. Cl. 388.

Where a vessel is chartered by the government for freighting, the government is not justified in putting a cannon aboard and using the vessel as a gunboat, and for injuries thus caused the owners may recover, notwithstanding their agreement to keep her staunch. Clark *v.* U. S., 9 Ct. Cl. 377.

71. Flushing, etc., Steam Ferry Co. *v.* U. S., 6 Ct. Cl. 1.

72. Dozier *v.* U. S., 9 Ct. Cl. 342.

73. Robinson *v.* Chittenden, 69 N. Y. 525.

74. Agricultural Bank *v.* The Jane, 19 La. 1.

75. Reynolds *v.* Toppan, 15 Mass. 370, 8 Am. Dec. 110.

A vessel being chartered by a minor does not render the general owner liable to shippers, the contract being only voidable by the minor. Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

76. The Coventina, 52 Fed. 156; The Blenheim, 3 Fed. Cas. No. 1,539, 5 Sawy. 192; The Phebe, 19 Fed. Cas. No. 11,064, 1 Ware 265. And see Wyman *v.* The Sprott, 70 Fed. 327.

When a vessel is attached by the charterer after cargo has been put aboard, and could not be released until the end of an uncertain litigation, the shipper's goods must be transferred to another vessel, or notice given the shipper of the liability to delay, with the

maritime law gives a lien on a vessel for the safe conveyance and delivery of goods; and the fact that a charter-party existed, of which the shipper had no knowledge, cannot change the liability or relieve the vessel from the lien which the contract establishes; [77] and the master is chargeable with knowledge of the shipper's rights, and the vessel is liable *in rem* for damage to cargo from dangerous goods, although they were taken on at the request of the charterer.[78] A decree for loss by negligence may be made directly against the ship, and need not provide that collection shall first be made from the charterer, and only the deficiency, if any, from the ship.[79] Where the owner of a vessel, notwithstanding the charter-party, makes special contracts through the master in respect to freight, the bills of lading govern the rights of the parties; [80] and the master cannot keep the goods delivered to him for shipment, and refuse to sign a bill of lading to the order of the shipper, irrespective of his orders from the charterers, or the contract between the shipper and his vendee; [81] nor is a shipper who delivers goods to a railroad company under a through bill of lading to a foreign seaport bound to accept from the forwarding vessel a bill of lading with the additional qualification, "Other conditions as per charter-party." [82] Where a vessel is chartered for a voyage out and return at a monthly rate, payable after her return, a shipper of a portion of the outward cargo, who takes a bill of lading providing for payment of freight "as per charter-party," is not liable to the vessel for freight, especially where by a memorandum at the foot of the charter-party the hirer stipulates that the master may collect return freights toward payment of the charter-money.[83]

2. Consignees of Cargo. The consignee of a charterer, who deals with him in that character, must be presumed to know the contents of the charter-party; [84] and where the consignee has notice that freight must be paid to the master, and not to the charterer, it imposes the like obligation upon him as if so reserved in the bill of lading; [85] and a consignee has no right to appropriate moneys due for freight to satisfy advances made by him to the charterer, although the bill of lading directs the freight to be paid to the consignee; but a direction to the consignee by the master to pay a sum out of the freights to the charterer will be equivalent to payment to the master. The master, notwithstanding any interference or direction of the charterer, has a right to retain the goods until his lien shall be satisfied,[86] and he may sue the consignees after delivery to them of the goods and recover the freight, at least to the amount due on the charter-party.[87]

privilege of reshipping, and in default of this the ship takes on herself the risk of loss by delay, with right of recourse for indemnity over to the person causing it. Musica *v.* The Coventina, 52 Fed. 156.

A ship is liable in rem on the master's contract of affreightment, although it is let to him by charter-party, of which the shipper is ignorant. McCullough *v.* The Echo, 16 Fed. Cas. No. 8,740*a*.

77. Sanders *v.* The Ellen Hardy, 21 Fed. Cas. No. 12,293.

78. The T. A. Goddard, 12 Fed. 174.

79. The Freeman *v.* Buckingham, 18 How. (U. S.) 182, 15 L. ed. 341; The Alert, 61 Fed. 113, 9 C. C. A. 390 [*affirming* 40 Fed. 836]. But see Bregaro *v.* The Centurion, 57 Fed. 412 [*reversed* on other grounds in 68 Fed. 382, 15 C. C. A. 480], where under the peculiar circumstances it was held that the cargo-owner was entitled to a decree for his damage against both ship and charterer, the damage to be collected in the first instance from the charterer, who was bound to indemnify the ship, and any deficit to be paid by the ship.

80. The Carlotta, 5 Fed. Cas. No. 2,413, 9 Ben. 1. And see Sears *v.* 4,885 Bags of Linseed, 1 Black (U. S.) 108, 17 L. ed. 35.

81. The M. K. Rawley, 17 Fed. Cas. No. 9,679, 2 Lowell 447.

82. Chamberlain *v.* The Torgorm, 48 Fed. 584.

83. Perkins *v.* Hill, 19 Fed. Cas. No. 10,987, 2 Woodb. & M. 158 [*reversing* 19 Fed. Cas. No. 10,986, 1 Sprague 123].

84. Shaw *v.* Thompson, 21 Fed. Cas. No. 12,726, Olcott 144 [*cited* with approval in Hatch *v.* Tucker, 12 R. I. 501, 34 Am. Rep. 707].

85. Shaw *v.* Thompson, 21 Fed. Cas. No. 12,726, Olcott 144, holding that if the consignee of a charterer credits the freight on the consignment to him on debts owing him by the charterer, he will not thereby acquit himself of liability to the master therefor, where by the charter-party the entire possession and control of the vessel remain with the master and owner.

86. The Tangier, 32 Fed. 230.

87. Shaw *v.* Thompson, 21 Fed. Cas. No. 12,726, Olcott 144.

This right is strengthened where the consignee, on receipt of the goods, promises the master to pay the freight,[88] and receipt of the goods alone by the consignee may constitute an implied assumpsit.[89] If a charter-party does not give the entire control of the vessel to the charterer, or postpone the payment of the charter-money beyond the delivery of the cargo, the lien of the general owner for freight will not be divested, nor his right to collect it; and the payment of the freight by the consignee to the general owner will be a defense to any claim for it by the charterer, although he gave notice, before the payment to the consignee, not to pay to the general owner;[90] but where the charter stipulates that the master shall sign a draft on the consignees, in favor of the charterers, for the freight, he cannot refuse his signature on the ground that demurrage is due him, especially where the charterers have claims against the vessel in excess of the demurrage claimed;[91] and the consignee is entitled to abandon the goods to the vessel and to recover from the vessel the value of the goods, less the lawful charges, where delay was caused by the wrongful acts of the master in making an extortionate demand for demurrage, and in not storing the goods in a warehouse instead of keeping them on board.[92] A consignee, authorized by the charterer to furnish a cargo under a charter-party, is not thereby authorized to change or waive any of its stipulations, or to make any agreement as to the manner in which the ship shall be loaded or ballasted.[93] Where the charter-party is not proved, or where it makes no provision in regard to the consignee or mode of delivery, the bills of lading become the proper and controlling evidence, in whole or in part, of the contract.[94] When by bills of lading cargo is consigned to order, it is the right of the ship to be informed, by an inspection of the indorsements on the bills of lading that have been signed and delivered by the master, as to who is entitled to receive the cargo; and if he does not do so, and the cargo is placed in store after a survey, the consignee cannot object that there was no delivery.[95] The vessel is liable to the consignee of a bill of lading for a shortage in delivery occasioned by the negligence of the captain.[96]

Q. Letting Vessel on Shares — 1. General Rules. Where a vessel is let to the master on shares, he victualing and manning her, employing her at his will, and exercising full control, and yielding to the owners, for her hire, a certain share of the net earnings, the liability of the general owners ceases, and the master is placed in their stead during the time the vessel continues thus under his control, and is considered owner *pro hac vice* as to all persons but the actual owner;[97] and

88. Ruggles *v.* Bucknor, 20 Fed. Cas. No. 12,115, 1 Paine 358.

89. Certain Logs of Mahogany, 5 Fed. Cas. No. 2,559, 2 Sumn. 589, holding that where by the charter-party the freight is a gross sum payable on the successful close of the whole voyage, and the bill of lading declares that the return cargo should be delivered to the shipper or his assigns, they paying freight, as per charter-party, a lien attaching to the homeward cargo for the freight due from the whole voyage, the consignee by his receipt of the goods became personally liable upon his implied assumpsit for the whole freight.

90. Mactaggert *v.* Henry, 3 E. D. Smith (N. Y.) 390.

91. Reynolds *v.* The Joseph, 20 Fed. Cas. No. 11,730, 2 Hughes 58.

92. Hoxsie *v.* The Reuben Doud, 46 Fed. 800.

93. Rich *v.* Parrott, 20 Fed. Cas. No. 11,761, 1 Sprague 358.

94. Strong *v.* Certain Quantity of Wheat, 23 Fed. Cas. No. 13,541.

95. The Adella S. Hills, 47 Fed. 76.

96. The Nora, 14 Fed. 429. But see Isham *v.* A Cargo of Pine Piles, 46 Fed. 403.

97. Bridges *v.* Sprague, 57 Me. 543, 99 Am. Dec. 788; Williams *v.* Williams, 23 Me. 17; Thompson *v.* Snow, 4 Me. 264, 16 Am. Dec. 263; Pearce *v.* Phillips, 4 Mass. 672; Howard *v.* Ross, 3 N. C. 333, holding that where the owner of a vessel parts with her management and control to the captain under a contract to receive part of the earnings, the owner is discharged from liability on contracts made by the captain for taking in cargo on freight. But see Vose *v.* Cockroft, 45 Barb. (N. Y.) 58 [*affirmed* in 44 N. Y. 415]; Kenzel *v.* Kirk, 37 Barb. (N. Y.) 113, 21 How. Pr. 184 [*affirmed* in 2 Abb. Dec. 500, 32 How. Pr. 269].

Such an agreement is valid, although made by parol.— Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140.

Assignment of contract to mate; usage.— Where a contract between ship-owners and the master, whereby the latter was to run the ship on shares, has been assigned by the

the contract between the owner and master does not create a partnership;[98] and where the master of a vessel agrees to sail her on halves, man and victual her, and give the owner one-half of the earnings, the owner, having by his contract substituted the master in his place, cannot claim as owner freight earned under the contract;[99] and if, on account of the loss of a part of the goods, there is no profit on the whole adventure, the owner of the vessel is not entitled to any part of the particular profits from the goods not lost.[1] In such case the master and the real owner share equally in the earnings when collected, and the master becomes a trustee of the owner's share, when received, and holds it for the latter's use.[2] The taking of the vessel by the master, his victualing and manning her, paying a portion of the port charges, and having a share of the profits, do not of themselves constitute him the owner *pro hac vice*, but it is the entire control and direction of the vessel which he has the power to assert and the surrender by the owners of all power over her for the time being which will exonerate them from their liability for the contracts of the master relating to the usual employment of the vessel in the carriage of goods.[3] Where a cargo is shipped on half profits, they are to be estimated on a sale at the destination of the vessel; and if the voyage is broken up by an overwhelming calamity, freight is not recoverable; and the claim to half profits, being for mere possibilities and contingencies, is incapable of being estimated.[4]

2. Liabilities — a. Supplies and Repairs. Where a master hires a vessel on shares under an agreement making him owner *pro hac vice*, he, and not the general owner, is responsible for necessary repairs or supplies, the relation of agency not existing between the master and owner,[5] except perhaps for implements for neces-

master, to the mate, evidence of the custom of the port as regards contracts for running ships on shares is admissible to establish the terms of the contract between the owners and the mate. Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

Agreement letting vessel to master on shares construed see Brown *v.* Hicks, 24 Fed. 811.

98. Bridges *v.* Sprague, 57 Me. 543, 99 Am. Dec. 788.

Barratry by master.— One hiring a vessel for six months, rendering to the owners a moiety of the earnings and sailing as master, is so far the owner that he cannot be charged with barratry (Taggard *v.* Loring, 16 Mass. 336, 8 Am. Dec. 140); similarly where the master is owner for the voyage, although his conduct in regard to miscarriage and disposition of goods would otherwise be barratrous, it does not amount to barratry, and the insurers are therefore not liable (Hallet *v.* Columbian Ins. Co., 8 Johns. (N. Y.) 272).

99. Bridges *v.* Sprague, 57 Me. 543, 99 Am. Dec. 788. But see Brown *v.* Putnam, 2 Metc. (Mass.) 275.

1. Pearce *v.* Phillips, 4 Mass. 672.

2. Williams *v.* Williams, 23 Me. 17.

Where a third person, knowing all the facts, is authorized by the master to receive the freight already earned on a promise to pay the owner his share, and afterward receives the money, he holds it for the use of the owner, who may maintain a suit therefor. Williams *v.* Williams, 23 Me. 17.

3. Lyman *v.* Redman, 23 Me. 289.

4. The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

5. Houston *v.* Darling, 16 Me. 413; Winsor *v.* Cutts, 7 Me. 261 (where a fishing vessel was let on shares to the master, who was to victual and man her, the owner having nothing to do with the purchase of supplies, or with the employment of the vessel, it was held that the owner was not liable for supplies furnished to the master); Stirling *v.* Loud, 33 Md. 436 (holding the master, and not the owner, responsible for the supplies furnished, notwithstanding the fact that the account thereof was kept and the bill made out against the vessel and her owner); Tucker *v.* Stimson, 12 Gray (Mass.) 487; Baker *v.* Huckins, 5 Gray (Mass.) 596 (holding the general owners of a vessel not liable for stores furnished to the master to victual her while in his possession under a charter-party for a definite period, by which he has the entire management, and they are to pay for keeping her in repair and to receive a proportion of her earnings); Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558; The H. B. Foster, 11 Fed. Cas. No. 6,291, 3 Ware 165 (holding the general owners not responsible for supplies or repairs furnished in a foreign port); Webb *v.* Peirce, 29 Fed. Cas. No. 17,320, 1 Curt. 104 [*reversing* 29 Fed. Cas. No. 17,321, 1 Sprague 192]. But see McCready *v.* Thorne, 49 Barb. (N. Y.) 438; Kenzel *v.* Kirk, 37 Barb. (N. Y.) 113, 21 How. Pr. 184 [*affirmed* in 2 Abb. Dec. 500, 32 How. Pr. 269], holding that where the vessel is let to the master on shares, although the master agrees with the owner to buy the supplies at his own cost, still, unless the sellers of the supplies have notice of this agreement, or an opportunity by reasonable care and caution to learn it, the owners are subject to the usual liability.

sary and permanent use on board the vessel; [6] and the hirer, and not the general owners, will be liable for goods shipped on freight and used for the benefit of the vessel; [7] but, although the master is owner for the voyage, the general owners may nevertheless be liable for supplies, on the ground of an agency for the owners to procure them arising out of the particular terms on which the master hires the vessel; [8] and in order to make the master of a vessel the owner *pro hac vice*, under a contract for sailing her on shares, he must have the exclusive control of her for the time being; otherwise the owners will be liable for supplies furnished her on their credit.[9] A master appointed by the owner, and sailing the vessel on shares with him, has no power to bind one who holds the title merely as security for supplies furnished in her home port, by representing such person as owner.[10]

b. Losses and Injuries. The owner of a vessel who lets her on an agreement making the charterer owner *pro hac vice* is not liable to a shipper whose goods have been lost; [11] and it is not material to the question of liability whether the owner of the vessel receive for its use a stipulated sum or a share of its earnings; in either case the party who by the contract with the owner is entitled to the possession, command, and navigation of the vessel, and not the owner, is liable for not delivering goods.[12] Thus where the master has control of a vessel, which he sails on shares, making him *pro hac vice* owner, he is alone responsible for loss of merchandise shipped on board,[13] although in the ultimate analysis the loss is really borne by both, being deducted from the common profits in which both share according to the agreement.[14] If a vessel is chartered to the master under terms not making him owner *pro hac vice*, the general owners are directly liable as owners for the voyage; and the claim of the shippers for damages is not restricted to the master personally, although their agreement is made solely with him.[15]

R. Actions on Charter-Parties — 1. General Rules; Jurisdiction. The general rules applying to actions on maritime contracts [16] apply to actions for breach of charter-parties,[17] such actions coming within the jurisdiction of admi-

Where a fishing vessel is run under an agreement by which the cost of repairs is deducted from the proceeds of the entire catch before division, a seaman's cruising is to be counted as a single voyage, and the earnings for the whole season's fishing are, equally with the vessel, liable for the cost of repairs contracted on the vessel's account; and, when such vessel is wrecked, her owners, in a suit by a materialman, are liable to the extent of the season's earnings, added to the value of the wreck. Whitcomb *v.* Emerson, 50 Fed. 128.

Agreements held not to render the captain owner pro hac vice, so as to relieve the general owners of their liability for supplies see Saxton *v.* Read, Lalor (N. Y.) 323.

6. Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

7. Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103.

8. Mayo *v.* Snow, 16 Fed. Cas. No. 9,356, 2 Curt. 102.

9. Noyes *v.* Staples, 61 Me. 422.

10. Harriman *v.* Dodge, 11 Fed. Cas. No. 6,104*a*.

11. Cutler *v.* Winsor, 6 Pick. (Mass.) 335, 17 Am. Dec. 385.

12. Tuckerman *v.* Brown, 17 Barb. (N. Y.) 191.

13. Bonzey *v.* Hodgkins, 55 Me. 98.

Where the captain and joint owner of a vessel, making a voyage in which the freighters and the owners of the vessel by contract agree to share the net profits of the voyage, with orders to dispose of the interest of the freighters when ascertained in a certain way, disposes of it in a different way, and a loss thereby accrues to the freighters, for which he is liable, the other joint owners will not be liable to him for contribution. Gilchrist *v.* Ward, 4 Mass. 692.

14. Putnam *v.* Wood, 3 Mass. 381, 3 Am. Dec. 179.

15. Arthur *v.* The Cassius, 1 Fed. Cas. No. 564, 2 Story 81.

16. See Admiralty, 1 Cyc. 846 *et seq.*

17. The Dan, 40 Fed. 691; Cannon *v.* Vose, 5 Fed. Cas. No. 2,386*a*.

Where a vessel, while under charter, violated a law of another state, and was subsequently seized on her return to that state, and the owner paid the statute penalty to release her, he could not maintain an action of tort against the charterer to recover the money paid; the vessel not having been condemned. Lewis *v.* Holbrook, 9 Allen (Mass.) 347.

Time of bringing action.— Action held prematurely brought see Cargo of Salt, 5 Fed. Cas. No. 2,406, 4 Blatchf. 224. Actions held not prematurely brought see Ward *v.* Whitney, 3 Sandf. (N. Y.) 399 [*affirmed* in 8 N. Y. 442]; Simpson *v.* One Hundred and Ten Sticks of Hewn Timber, 7 Fed. 243, holding that in an action against cargo to recover

ralty.[18] In cases of breach of charter, a libel will lie *in rem* against the vessel and *in personam* against the owner.[19] An action for freight under the charter may also be brought in a state court in like manner as any other action for debt.[20] But it has been held that admiralty has not jurisdiction of a libel for breach of an executory contract whereby a vessel was chartered to libellants for the transportation of merchandise.[21] The refusal of a master to deliver a cargo until security is furnished for the freight does not give a right of action to the charterer, as the cargo is subject to a lien for freight.[22]

2. Parties. A suit for damages, founded on a charter executed in the name of the managing owners and ship's husband, may be brought in the names of the owners expressed in the instrument.[23] A suit on a charter signed by the master, to whom the charter-money is to be paid, is properly brought in his name alone.[24] Where a charter-party, which is made with the owners only, the master not being a party to it, stipulates that the master is to sign the bills of lading, an action *in personam* will not lie against the master for failing to sign a clear bill, but the remedy is against the owners, or *in rem* against the vessel.[25] A memorandum indorsed on a charter-party, and signed by the master at a port in the course of the voyage, whereby he agrees to consign the vessel, on arrival at destination, to a certain firm, if a contract at all, is one between the master and the charterers, and the firm, not being privy to it, cannot maintain an action against the master for loss of commissions occasioned by his refusal to make the consignment;[26] nor can the master in charge at the time of seizure be made liable *in personam* for breach of the charter made by his predecessor, even though he has, without consideration, promised to execute it.[27] An agreement by parol to sell an interest in a ship, without conveyance of the title, does not make the vendee a necessary party to an action commenced for freight carried on a charter-party.[28]

3. Pleading. The general rules of pleading[29] apply to actions brought on

freight, where the libel was filed before all the cargo had been landed, and the evidence showed that there was no ability to pay the freight and demurrage, and in fact no intention to pay the same on the part of the charterer, the action was not prematurely brought, and the ship was entitled to a decree for the freight.

18. The Oregon *v.* Pittsburgh, etc., Iron Co., 55 Fed. 666, 5 C. C. A. 229; Atlantic, etc., Guano Co. *v.* The Robert Center, 2 Fed. Cas. No. 630. But see Alherti *v.* The Virginia, 1 Fed. Cas. No. 141, 2 Paine 115, holding that where the owner of a vessel under charter for the West Indies agreed by letter that, if a certain price could not be obtained at a designated port, the vessel should proceed to another, and he violated the agreement, admiralty has not jurisdiction of the case, as the latter agreement was merely of a personal nature. See, generally, Admiralty, 1 Cyc. 829 *et seq.*

The customs officers of a foreign port do not constitute the proper forum in which to claim redress for breach of a charter-party for an American vessel signed on the high seas. The Ira B. Ellems, 50 Fed. 934, 2 C. C. A. 85.

19. The J. F. Warner, 22 Fed. 342. And see, generally, Admiralty, 1 Cyc. 829 *et seq.*

20. Ward *v.* Whitney, 3 Sandf. (N. Y.) 399 [*affirmed* in 8 N. Y. 442]; Wheeler *v.* Curtis, 11 Wend. (N. Y.) 653, *indebitatus assumpsit.*

Circumstances held to justify an injunction and the appointment of a receiver to collect freight, notwithstanding the allegations of the answer and affidavits showed that defendants had chartered the vessel from the owner for such voyage see Sorley *v.* Brewer, 1 Daly (N. Y.) 79 [*affirming* 18 How. Pr. 276, 509].

21. The Pauline, 19 Fed. Cas. No. 10,848, 1 Biss. 390. And see, generally, Admiralty, 1 Cyc. 527.

22. Otis Mfg. Co. *v.* The Ira B. Ellems, 48 Fed. 591 [*affirmed* in 50 Fed. 934, 2 C. C. A. 85].

23. Bangs *v.* Lowber, 2 Fed. Cas. No. 840, 2 Cliff. 157.

24. Baker *v.* Ward, 2 Fed. Cas. No. 785, 3 Ben. 499.

Where a master takes a vessel on shares, under a contract not making him owner *pro hac vice*, an action for freight may be maintained in the name of the owners (Sims *v.* Howard, 40 Me. 276); but where the owners of a vessel have let her on shares, under a contract making the master owner *pro hac vice*, they cannot maintain an action for freight earned by the vessel during that time, as such action could only be maintained by the master (Manter *v.* Holmes, 10 Metc. (Mass.) 402).

25. Paterson *v.* Dakin, 31 Fed. 682.

26. La Scala *v.* Boughton, 37 Fed. 62.

27. Chiesa *v.* Conover, 40 Fed. 496.

28. Ward *v.* Whitney, 8 N. Y. 442.

29. See Pleading, 31 Cyc. 1.

charter-parties in state courts.[30] The complaint or declaration must set forth substantially all the necessary facts,[31] must comport with the writing declared on, and it must appear that the money demanded had become due.[32] In an action for the breach of a contract to charter a vessel, the declaration need not allege the rate of freight agreed to be paid, the suit being, not for freight earned, but for a breach of the contract in failing to load and unload the boat.[33]

4. Evidence — a. Presumptions and Burden of Proof. The burden of proof is on the party having the affirmative of the issue;[34] and plaintiffs or libellants suing for breach of a charter are bound to show that they fulfilled the contract on their part.[35] On a suit for freight under the charter of a vessel to carry a cargo at a stipulated price per ton, the burden rests on the carrier to prove the quantity carried;[36] but where on arrival at a port at which a ship has agreed to take in a cargo none is to be obtained, and she returns safely in ballast, plaintiff suing on the charter-party need not show affirmatively that she was seaworthy and provided with all the requisites of the voyage.[37]

b. Admissibility. Parol evidence is not admissible to vary the terms of a written charter for a vessel;[38] but an agreement purporting to be a charter-party, but not containing all the essential elements, may be aided by parol evidence;[39]

30. Patrick *v.* Metcalf, 9 Bosw. (N. Y.) 483 [*affirmed* in 37 N. Y. 332, 4 Transcr. App. 235]; Coster *v.* New York, etc., R. Co., 5 Duer (N. Y.) 677. And see Dolz *v.* Morris, 10 Hun (N. Y.) 201, holding that a charterer, suing for a breach of a charter-party of a certain named brig, "of the burden of one hundred and fifty-eight tons or thereabonts," may show that the brig was of two hundred and fifty tons' burden, as enhancing the damages.

Replication held responsive to plea see Wheeler *v.* Curtis, 11 Wend. (N. Y.) 653.

31. Lorent *v.* Potts, 4 N. C. 86 (holding that a recovery of freight on a charter-party cannot be had unless plaintiff avers that he carried the goods according to contract); Stone *v.* Patterson, 6 Call (Va.) 71 (holding that where a charterer stipulated to pay the agreed value of a ship, in case of her being captured and condemned, in a suit on the charter-party the declaration should show where and by whom the ship was captured, and when and where she was condemned).

32. Stodard *v.* Gates, 2 Root (Conn.) 157.

33. Borden Min. Co. *v.* Barry, 17 Md. 419.

34. Murrell *v.* Whiting, 32 Ala. 54 (holding that the burden of proof is on defendant, sued for failure to provide a cargo, to show in mitigation of damages that a second cargo might have been obtained by the use of ordinary means and proper opportunities on the part of plaintiffs); Wickersham *v.* Southard, 67 Me. 595 (holding that, although the owners of a vessel let on shares to the master are not liable for disbursements on its account, when the master by the terms of the letting has the entire control and management of the same, yet, to exonerate the owners, it must affirmatively appear that the master has such entire control); Wheelwright *v.* Walsh, 42 Fed. 862; The Principia, 34 Fed. 667; Bowley *v.* U. S., 8 Ct. Cl. 187 (holding that where a charter-party is not for a period of time, but for voyages specified, the owners being bound only to due diligence in the circumstances in which the voyages are made, although the compensation is an allowance *per diem*, if the charterer alleges a want of this diligence, the burden is on him to prove it).

35. Funcheon *v.* Harvey, 119 Mass. 469 (holding that where plaintiff's declaration alleges that he has performed all things on his part to be performed, in a charter-party requiring him to take a perishable cargo "with all convenient speed, and proceed direct to the port of delivery," and the cargo is there delivered in a damaged condition, the burden of proof on the issue of unnecessary delay is on plaintiff); Funch *v.* Ahenheim, 20 Hun (N. Y.) 1; Beecher *v.* Bechtel, 3 Fed. Cas. No. 1,220*a*.

Presumption.— Where a steamer in the military service under a charter-party not naming a fixed period passes to another military department and is paid at a different rate of compensation, and the accounts between the parties do not refer to the original charter-party, while the claimant does not explain by what authority the steamer passed from one department to the other, the presumption is that she is in service to the second department under a new contract. Sweeney *v.* U. S., 5 Ct. Cl. 285 [*affirmed* in 17 Wall. 75, 21 L. ed. 575].

Where a party seeks to recover for lighterage service on a contract therefor, and the defense is that the lighterage was not performed with proper despatch, the burden of proof is on plaintiff to excuse himself for the want of that despatch and diligence which he was ordinarily bound to exercise. The Nadia, 18 Fed. 729.

36. The Alonzo, 1 Fed. Cas. No. 257, 1 Hask. 184.

37. Stackpole *v.* Wickham, 7 La. Ann. 678.

38. Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79; Matthias *v.* Beecher, 111 Fed. 940; Sorensen *v.* Keyser, 51 Fed. 30, 2 C. C. A. 92.

39. Stalker *v.* The Henry Kneeland, 22 Fed. Cas. No. 13,282.

and parol evidence of mutual mistake,[40] and of circumstances leading up to the contract, is properly admitted to explain its terms.[41] Where a charter is made subject to the custom of the port, evidence of the custom is admissible.[42] If the agent of the owner charters a ship in his own name without mentioning the name of the principal, the owner may show by extrinsic evidence that he is the principal in the contract in an action to recover the freight;[43] and in an action on a charter-party to recover the price agreed on for the use of the vessel, defendant may give evidence of fraudulent representations by plaintiff as to the tons burden of the vessel, in mitigation or satisfaction of plaintiff's claim.[44] Hearsay evidence is inadmissible.[45] On a libel against a vessel for failure to complete a voyage according to a charter-party, whereby the cargo suffered injury, an unusual procrastination of the voyage is not in itself evidence of incompetency in the crew to navigate the vessel; but it is admissible in corroboration of the opinion and judgment of witnesses that the crew was insufficient for the service.[46]

c. Weight and Sufficiency. The general rules governing the weight and sufficiency of evidence[47] apply to actions for breach of charters.[48] Although the honest opinion of a competent master that he has taken on board all the cargo his vessel will safely carry is not absolutely binding on the charterer, it is entitled to very great weight, and can be controlled only by decisive evidence of a mistake on his part.[49] The admissions of the master at the end of the voyage as to the meaning of a technical phrase in the charter-party are not conclusive on him or his coöwners on the merits of the case.[50] The assent of the captain or owners to an alteration by the charterer's agent in a charter-party is not sufficiently proved by the testimony of the ship's brokers that, under the circumstances, they must have obtained such consent, although they have no distinct recollection of so doing.[51]

5. Trial; Judgment and Decree. The general rules governing trials of civil actions,[52] and in so far as applicable the rules governing cases in admiralty,[53] apply to actions for breach of charter-parties.[54] As in other cases, the general rule that

40. Funch *v.* Abenheim, 20 Hun (N. Y.) 1.
41. Almgren *v.* Dutilh, 5 N. Y. 28.
42. Smith *v.* Lawrence, 26 Conn. 468. But see The Oregon *v.* Pittsburgh, etc., Iron Co., 55 Fed. 666, 5 C. C. A. 229, holding that in an action against a vessel for breach of contract for failing to make as many trips as possible, because she towed more than two vessels, the construction of the contract cannot be varied by evidence of a custom for propellers of her class to tow at times as many as five vessels, where it is not shown that they always tow more than one or two.
43. Brooks *v.* Minturn, 1 Cal. 481.
44. Johnson *v.* Miln, 14 Wend. (N. Y.) 195.
45. Boland *v.* Northwestern Fuel Co., 34 Fed. 523, holding that in an action for damages for breach of a contract of affreightment, evidence is not admissible to show, in mitigation of damages, what plaintiff's boat "was said to have earned."
46. The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,323, 1 Blatchf. 196].
47. See Evidence, 17 Cyc. 753 *et seq.*
48. Aktieselskabet Banan *v.* Hoadley, 60 Fed. 447, 9 C. C. A. 61; The Regulus, 18 Fed. 380; The Nora, 14 Fed. 429; The Carlotta, 5 Fed. Cas. No. 2,413, 9 Ben. 1; The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110, holding that in an action *in rem* to recover damages for breach of a charter-party, the testimony of a crew to their own good health and bodily ability when they left port is adequately rebutted by proof that they had been in the hospital with a maligant fever, and, shortly after rejoining the ship, had a relapse at sea, and became totally disabled to sail the vessel.
49. Weston *v.* Foster, 29 Fed. Cas. No. 17,452, 2 Curt. 119; Weston *v.* Minot, 29 Fed. Cas. No. 17,453, 3 Woodb. & M. 437.
50. The John H. Pearson, 14 Fed. 749 [*reversed* on other grounds in 121 U. S. 469, 7 S. Ct. 1008, 30 L. ed. 979].
51. Pew *v.* Laughlin, 3 Fed. 39.
52. See Trial.
53. See Admiralty, 1 Cyc. 946 *et seq.*
54. See cases cited *infra*, this note and note 55.

Findings.— A positive finding, in an action for breach of a charter-party, that the port to which a vessel was ordered was not a safe port is not controlled by recitals of evidence that large English steamers habitually, and several American vessels had in fact, discharged their cargoes at anchorage without disaster. The Gazelle, 123 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496 [*affirming* 11 Fed. 429, 5 Hughes 391]. Nor can it be assigned for error that the circuit court failed to make a distinct finding on the issue that, by the custom of trade between the Atlantic ports and Denmark, the port to which the vessel was ordered was recognized as being within the

questions of fact are to be submitted to the jury for their determination under proper instructions from the court is applicable.[55]

IV. MASTER.[1]

[Edited by William S. Montgomery, Esq., of the New York Bar]

A. Appointment and Removal — 1. In General. The appointment and employment of a master of a vessel is wholly within the discretion of the owners of the vessel,[2] and if they act in good faith the appointment may be made by a majority in interest of the owners.[3] It has also been held that, in a case of necessity, such as the death or removal of the master in a foreign port, a master may be appointed by the consul resident there, of the country to which the vessel belongs,[4] by an agent of the owners to whom the original master has applied for assistance,[5] by the consignees of the cargo, who have advanced money for the necessary repairs of the vessel,[6] or by the commanding officer of a war vessel which has recaptured the vessel.[7] While in some maritime countries the mode of a shipmaster's appointment is prescribed by law,[8] in England and in this country, except in so far as a master is required by statute to undergo an examination before the local inspectors, as to his character, experience, and habits,

charter-party, the record not showing any proof of such custom, and the custom of recognizing as safe a port which is not in fact reasonably safe being incompetent to contradict directly the charter-party. The Gazelle, *supra*.

Judgment or decree.— A ship chartered so that the charterer is deemed to be the special owner is nevertheless not freed from liability on his contracts of affreightment; and a decree for loss by negligence may be made directly against the ship, and need not provide that the collection shall first be made from the charterer, and only the deficiency, if any, from the ship. The Alert, 61 Fed. 113, 9 C. C. A. 390 [*followed* in The Freeman *v.* Buckingham, 18 How. 182, 15 L. ed. 341]. Where the charterer gives possession and control to the charterers for a time certain, without condition of forfeiture for a breach, the court cannot decree possession to the general owners on a libel alleging a breach of the contract. The Prometheus, 20 Fed. Cas. No. 11,442, 1 Lowell 491.

55. Barreda *v.* Silsbee, 21 How. (U. S.) 146, 16 L. ed. 86.

Particular questions held properly submitted to the jury see Murrell *v.* Whiting, 32 Ala. 54 (what constitutes a reasonable time within which the owners of the vessel were bound to offer to make the second voyage, in order to bind the charterer under the contract, in an action by the ship-owners, for damages for failure to furnish a cargo); Lyon *v.* Tiffany, 76 Mich. 158, 42 N. W. 1098 (whether the injury was caused by leakage, through unseaworthiness, for which plaintiff would be liable, or by water washed in from above, which was defendants' risk); Almgren *v.* Dutilh, 5 N. Y. 28 (what space was necessary for accommodation of officers and crew, provision, water, and fuel); Bulow *v.* Goddard, 1 Nott & M. (S. C.) 45, 9 Am. Dec. 663 (holding that under a charter-party providing that, "if the said ship . . . enters into the port of Lisbon . . . the voyage ends," it is for a jury to determine whether, by going to the outer port of Lisbon, about five miles from the town, the ship "entered" the port of Lisbon); Tyson *v.* Belmont, 24 Fed. Cas. No. 14,316 [*affirmed* in 3 Fed. Cas. No. 1,281, 3 Blatchf. 530] (whether the master had acted judiciously and properly in determining that it would be unsafe to cross the bar if the ship were more deeply laden, and that, if his action was proper, it was the charterer's duty to deliver the remainder of the cargo outside).

Evidence held sufficient to go to jury see Lewis *v.* Holbrook, 9 Allen (Mass.) 347; Russell *v.* Allerton, 108 N. Y. 288, 15 N. E. 391.

1. **Admissions by master or captain as evidence** see Evidence, 16 Cyc. 1015.

Definition of master see Master of a Ship, 26 Cyc. 1587.

Master as member of crew see Seamen, 35 Cyc. 1181 note 32.

Status of master after abandonment of insured vessel see Marine Insurance, 26 Cyc. 707.

2. Jones *v.* Davis, 13 Fed. Cas. No. 7,466, Abb. Adm. 446.

Masters for different purposes.— One person may be employed as master to superintend the loading and repairing of a vessel for sea, and another person employed to take command of her upon the voyage. Jones *v.* Davis, 13 Fed. Cas. No. 7,466, Abb. Adm. 446.

3. Card *v.* Hope, 2 B. & C. 661, 4 D. & R. 164, 2 L. J. K. B. O. S. 96, 26 Rev. Rep. 503, 9 E. C. L. 288.

4. The Giles Loring, 48 Fed. 463 (upon the request of the dying master); Pickersgill *v.* Williams, 19 Fed. Cas. No. 11,123; The Zodiac, 1 Hagg. Adm. 320; The Cynthia, 16 Jur. 748.

5. The Kennersley Castle, 3 Hagg. Adm. 1; The Tartar, 1 Hagg. Adm. 1.

6. The Alexander, 1 Dods. 278.

7. The Eliza Cornish, 17 Jur. 738, 1 Spinks 36.

8. The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309.

and to receive a license,[9] and make oath before an inspector to faithfully, honestly, and skilfully perform his duties,[10] the law does not interfere in relation to the qualifications or mode of appointment of a master further than as regards his national character,[11] and no formalities are necessary to his employment, but any mode of authorization competent to give power to one man to act for and bind another is sufficient to constitute him master of the vessel;[12] but while the employment of a master may be inferred from circumstances, the inference should be such as leaves no fair reason to doubt that fact.[13] The requirements of the registry acts of the United States in respect to inserting the name of the master in a ship's register are for the protection of the revenue, and a failure to comply therewith does not affect the validity of a master's authority;[14] and while the person in whose name as master a vessel is registered must ordinarily be deemed her master for every legal intent and purpose,[15] yet it has been held that one to whom the navigation, discipline, and control of a vessel is intrusted must be considered her master, although another is registered as such.[16] The master's contract of employment may contain any stipulation that may be agreed upon between the parties,[17] even though the particular stipulation would be unreasonable if set up as a usage,[18] or oppressive if imposed upon a member of the crew.[19]

2. Right of Purchaser of Master's Share. As a general rule the right of a master to command his vessel is personal to him, and a sale by a master who is a part-owner of the vessel of his interest therein transfers no right to the command which the other owners are bound to respect,[20] although a majority in interest of them consent to the transfer.[21]

3. Succession of Command. Upon a master becoming separated from his vessel by death or other casualty, or upon his becoming incapable of having command as by reason of sickness, insanity, or otherwise, the command of the vessel, with duties which go with it, devolves upon the first mate as a matter of course, at least until another master is appointed;[22] and when the master and

9. U. S. Rev. St. (1878) §§ 4438, 4439, as amended in U. S. Rev. St. Suppl. (1892–1899) pp. 908, 909.

10. U. S. Rev. St. (1878) § 4445 [U. S. Comp. St. (1901) p. 3038].

11. The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309.

12. Clark *v.* Richards, 1 Conn. 54 (holding that it is sufficient to charge the owner if the master be such in fact with the owner's privity, although there be no special appointment); The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309. See also Donovan *v.* Salem, etc., Nav. Co., 142 Fed. 985.

13. Jones *v.* Davis, 13 Fed. Cas. No. 7,460, Abb. Adm. 446.

14. Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453; The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309.

15. Adams *v.* Wyoming, 1 Fed. Cas. No. 71; The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309; The Dubuque, 7 Fed. Cas. No 4,110, 2 Abb. 20; Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

An alien cannot, under the United States registry laws, be deemed the master of a vessel. The Dubuque, 7 Fed. Cas. No. 4,110, 2 Abb. 20.

16. Pond *v.* The Hattie Thomas, 59 Fed. 297 [*criticizing* The Dubuque, 7 Fed. Cas. No. 4,110, 2 Abb. 20].

17. Bourne *v.* Smith, 3 Fed. Cas. No. 1,701, 1 Lowell 547, holding that the general rule that the owners of a vessel have no power to incorporate unusual and onerous stipulations into their shipping articles does not apply to a contract with the master.

18. Bourne *v.* Smith, 3 Fed. Cas. No. 1,701, 1 Lowell 547.

19. Bourne *v.* Smith, 3 Fed. Cas. No. 1,701, 1 Lowell 547.

20. Ward *v.* Ruckman, 36 N. Y. 26, 93 Am. Dec. 479, 1 Transcr. App. 172 [*affirming* 34 Barb. 419]; Williams *v.* Ireland, 11 Phila. (Pa.) 273, 2 Wkly. Notes Cas. 442; The Lizzie Merry, 15 Fed. Cas. No. 8,423, 10 Ben. 140.

Such a purchaser acquires only an expectancy that the owners will permit him to retain the command. Williams *v.* Ireland, 11 Phila. (Pa.) 273, 2 Wkly. Notes Cas. 442.

A purchaser at an execution sale of a master's interest in a vessel is not entitled to supersede the master in the command of the vessel, or to deprive him of the possession thereof. Loring *v.* Illsley, 1 Cal. 24.

21. Williams *v.* Ireland, 11 Phila. (Pa.) 273, 2 Wkly. Notes Cas. 442.

A contract to sell the command even by the owners of a majority in interest is incapable of enforcement. Williams *v.* Ireland, 11 Phila. (Pa.) 273, 2 Wkly. Notes Cas. 442; Card *v.* Hope, 2 B. & C. 661, 4 D. & R. 164, 2 L. J. K. B. O. S. 96, 26 Rev. Rep. 503, 9 E. C. L. 288.

22. Copeland *v.* New England Mar. Ins. Co., 2 Metc. (Mass.) 432; The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309; Sheridan

mate are both absent, such command and duties devolve upon the next highest officer on board.[23]

4. Term of Employment and Removal.[24] The term or duration of a master's employment ordinarily depends upon the terms of the contract employing him,[25] and, in the absence of an express limitation, is presumed to continue until the owners by some declaration or overt act remove him.[26] Where a master is employed under an express agreement, as for a particular voyage or for a particular time, the owners cannot dismiss him before the end of his term, without becoming liable in damages,[27] except for sufficient cause[28] and upon reasonable notice.[29] But where the master is employed under a general agreement, the owners or a majority in interest of them have the right to remove him at any time without assigning any cause and without being liable for damages,[30] although he is a part-

v. Furbur, 21 Fed. Cas. No. 12,761, 1 Blatchf. & H. 423; Hanson *v.* Royden, L. R. 3 C. P. 47, 37 L. J. C. P. 66, 17 L. T. Rep. N. S. 214, 16 Wkly. Rep. 205; The Favourite, 2 C. Rob. 232; The Tecumseh, 6 Notes of Cas. 658, 3 W. Rob. 144. See also The George, 10 Fed. Cas. No. 5,329, 1 Sumn. 151; The Providence, 1 Hagg. Adm. 391.

The possibility of the command being devolved on him is a contingency contemplated by the mate by his engagement, and he engages for a competent degree of skill in seamanship and navigation for the management of the vessel on the happening of this event, and is also entitled to the ordinary presumption in his favor that he acted with fidelity and ordinary skill until the contrary is proved. Carrington *v.* The Anne C. Pratt, 5 Fed. Cas. No. 2,445.

23. See U. S. *v.* Taylor, 28 Fed. Cas. No. 16,442, 2 Sumn. 584.

24. Term for which wages can be collected see *infra*, IV, D, 1.

25. Slocum *v.* Swift, 22 Fed. Cas. No. 12,954, 2 Lowell 212, holding that a contract for a whaling voyage not exceeding five years' duration does not mean several voyages extending through five years, but ends when the object of the voyage is fulfilled, that is, when a full cargo is obtained.

26. Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558; The Gananoque, Lush. 448.

A mere vote of the owners conditionally dismissing a master does not affect third parties. Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

27. Moore *v.* Curry, 106 Mass. 409; Montgomery *v.* Henry, 1 Dall. (Pa.) 49, 1 L. ed. 32, 1 Am. Dec. 223 [*affirming* 16 Fed. Cas. No. 9,737, Bee 388, 2 Pet. Adm. 397]; Lombard Steamship Co. *v.* Anderson, 134 Fed. 568, 67 C. C. A. 432; The Lizzie Merry, 15 Fed. Cas. No. 8,423, 10 Ben. 140; Guilford *v.* Anglo-French Steamship Co., 9 Can. Sup. Ct. 303, 2 Can. L. T. Occ. Notes 250 [*reversing* 1 Can. L. T. Occ. Notes 554, 14 Nova Scotia 54]; Roberts *v.* Tartar, 13 Brit. Col. 474. See also De Land *v.* Hall, 134 Mich. 381, 96 N. W. 449.

Where a part-owner of a ship is master in possession under a written agreement, he cannot be removed by his coöwners (Rea *v.* Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159), but only a written agreement entitling such owner to possession can defeat the right of his coöwners to resume possession of the vessell at their pleasure (Clayton *v.* The Eliza B. Emory, 4 Fed. 342).

Jurisdiction.—A court having original admiralty jurisdiction has cognizance of a claim for wrongful dismissal. The Blessing, 3 P. D. 35, 3 Aspin. 561, 38 L. T. Rep. N. S. 259, 26 Wkly. Rep. 404.

28. Tuells *v.* Torras, 113 Ga. 691, 39 S. E. 455; Barker *v.* York, 3 La. Ann. 90; Budge *v.* Mott, 47 Wis. 611, 3 N. W. 381; The Marina, 50 L. J. P. D. & Adm. 33, 29 Wkly. Rep. 508.

Immorality or intemperance alone of a master is not sufficient grounds for dismissal. The Bella Mudge, Young Adm. (Nova Scotia) 222.

Under the Merchants' Shipping Act (1854) § 240, the court of admiralty has power on an application of the owners or part-owners to remove the master of a ship, if it is satisfied that the removal is necessary, as where he attempts to defraud. The Royalist, Brown. & L. 46, 9 Jur. N. S. 852, 32 L. J. Adm. 105.

29. Creen *v.* Wright, 1 C. P. D. 591, 3 Aspin. 254, 35 L. T. Rep. N. S. 339.

30. Woodbury *v.* Brazier, 48 Me. 302; Ward *v.* Ruckman, 36 N. Y. 26, 93 Am. Dec. 479, 1 Transcr. App. 172 [*affirming* 34 Barb. 419]; Montgomery *v.* Henry, 1 Dall. (Pa.) 49, 1 Am. Dec. 223, 1 L. ed. 32 [*affirming* 16 Fed. Cas. No. 9,737, Bee 388, 2 Pet. Adm. 397]; Clayton *v.* The Eliza B. Emory, 4 Fed. 342; Childs *v.* Gladding, 5 Fed. Cas. No. 2,678; Higgins *v.* Jenks, 12 Fed. Cas. No. 6,468, 3 Ware 17; The Lizzie Merry, 15 Fed. Cas. No. 8,423, 10 Ben. 140. See also Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558; The See Reuter, 1 Dods. 22.

The master of a tramp steamship who is not employed for any particular voyage or for any stated time may be discharged by the owners at any time without assigning any cause and without incurring liability for damages. Lombard Steamship Co. *v.* Anderson, 134 Fed. 568, 67 C. C. A. 432.

There is no forcible dispossession where a master appointed by the majority owners goes aboard the vessel during the temporary absence of the previous master and takes possession. The Lizzie Merry, 15 Fed. Cas. No. 8,423, 10 Ben. 140.

owner of the vessel.[31] The sequestration of a vessel by the government terminates the relationship existing between a master and the owners of the vessel.[32] The death of a part-owner does not *ipso facto* revoke the authority of the master of a vessel as to such part-owner's share.[33]

B. Authority and Duties[34] — **1. In General — a. Scope and Extent in General.** As a general rule it is the right and duty of a master of a vessel, in the exercise of a sound discretion and in good faith, to do all things in respect to the equipment and conduct of the voyage that are reasonably necessary to the protection and preservation of the interests under his charge, whether that of owners, charterers, cargo owners, or underwriters,[35] and in case of necessity or calamity during the voyage, the master, in the absence of the parties concerned, is by law created their agent, and his acts done under such circumstances in the exercise of a sound discretion and in good faith are binding on such parties.[36] He may act as agent of the owners or consignees of the cargo in their absence, to the extent that it may be reasonably necessary for him to act to protect or preserve the cargo in the course of the voyage;[37] but he cannot, without special authority, represent or act for any part of the cargo after it is delivered to the consignees.[38]

b. Accounting to Owners. It is the duty of the master of a vessel to render a full and satisfactory account to the owners of the vessel, of moneys received, or which should have been received, and of the disbursements and expenditures of the vessel during the voyage,[39] before he is entitled to any wages.[40]

c. As to Passengers and Crew.[41] The master of a vessel at sea is the supreme officer, and he has the sole and exclusive authority on board of his vessel, and it

31. Ward *v.* Ruckman, 36 N. Y. 26, 93 Am. Dec. 479, 1 Transcr. App. 172 [*affirming* 34 Barb. 419]; Clayton *v.* The Eliza B. Emory, 4 Fed. 342; Childs *v.* Gladding, 5 Fed. Cas. No. 2,678; The New Draper, 4 C. Rob. 287; The Johan and Siegmund, Edw. Adm. 242; The Kent, Lush. 495. See also Higgins *v.* Jenks, 12 Fed. Cas. No. 6,468, 3 Ware 17.

32. Hill *v.* Stetson, 39 N. J. L. 84.

33. Grant *v.* Carver, 75 Me. 524.

34. **Authority to order general average act** see *infra*, X, C, 1.

Right to retain goods liable to contribution in general average see *infra*, X, F, 7.

35. Healey *v.* Martin, 11 Fed. Cas. No. 6,295, holding that it is within the sound discretion of the master to judge as to when additional supplies of wood and water are necessary and as to what risks are to be incurred in procuring them.

36. Douglas *v.* Moody, 9 Mass. 548; Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131; Harrison *v.* Fortlage, 161 U. S. 57, 16 S. Ct. 488, 40 L. ed. 616 (holding that the master in a case of necessity may act as agent for persons having insurable interests in the cargo); Gernon *v.* Cochran, 10 Fed. Cas. No. 5,368, Bee 209 (holding that the master in a foreign port represents both owners and shippers, they not having any other agents on the spot); Jordan *v.* Warren Ins. Co., 13 Fed. Cas. No. 7,524, 1 Story 342; Miston *v.* Lord, 17 Fed. Cas. No. 9,655, 1 Blatchf. 354. But see The Mercurius, 1 C. Rob. 80.

37. Spear *v.* Place, 11 How. (U. S.) 522, 13 L. ed. 796.

38. Spear *v.* Place, 11 How. (U. S.) 522, 13 L. ed. 796.

39. Babcock *v.* Terry, 1 Fed. Cas. No. 702, 1 Lowell 66; Robinson *v.* Hinckley, 20 Fed. Cas. No. 11,954, 2 Paine 457. See also Mauran *v.* Warren, 16 Fed. Cas. No. 9,310, 2 Lowell 53.

Trade profits.—Where a master having authority to employ his vessel for freight to the best advantage, but not to purchase a cargo on the owner's account, loads the ship with a cargo of his own upon his being unable to procure remunerative freight, he is liable to account to the owners for all profits made by the sale of the cargo and not merely for a proper freight. Shallcross *v.* Oldham, 2 Johns. & H. 609, 5 L. T. Rep. N. S. 824, 10 Wkly. Rep. 291, 70 Eng. Reprint 1202.

Effect of death of part-owner.—Where, upon the death of a part-owner, the master pays over to the ship's husband the net earnings of such owner's share with the rest of the earnings that came to his hands, he relieves himself of liability to the estate of the deceased, unless the representatives have given notice that they have revoked the authority of the ship's husband to receive their part of the earnings. Grant *v.* Carver, 75 Me. 524.

Where the owner of a ship and cargo gives a creditor a bill of sale of the ship and cargo as security, which bill is absolute on its face, and the master accounts with the creditor, supposing his title absolute, he will be protected against the claims of the real owner. Tripler *v.* Olcott, 3 Johns. Ch. (N. Y.) 473.

40. Robison *v.* Hinckley, 20 Fed. Cas. No. 11,954, 2 Paine 457. See also The Fleur-de-Lis, L. R. 1 A. & E. 49, 12 Jur. N. S. 379.

41. **As to passengers' effects** see *infra*, VIII, E.

Rights, duties, and liabilities of master as to discipline and punishment of seamen see SEAMEN, 35 Cyc. 1247.

is his right and duty to control the inferior officers as well as the crew,[42] to do justice to all persons under his command,[43] and to protect passengers and seamen from maltreatment while on board the vessel.[44] In respect to passengers, the master owes a higher and more delicate duty than he owes to his crew;[45] but at the same time he has the necessary control over his passengers and may make proper regulations for their government, such as may insure their safety, promote the general comfort, and preserve decent order; and he may enforce these regulations by a temperate and needful exercise of power.[46] He may even use force to passengers when necessary to the safety of the ship and those on board,[47] or to preserve order;[48] but before using force toward a passenger, there must be a breach of some regulation on his part and a clear necessity for the exercise of the degree of force used.[49]

42. Butler *v.* McClellan, 4 Fed. Cas. No. 2,242, 1 Ware 220; Kraskopp *v.* Ames, 14 Fed. Cas. No. 7,131; Smith *v.* Wilson, 22 Fed. Cas. No. 13,128, 31 How. Pr. (N. Y.) 272.

43. White *v.* McDonough, 29 Fed. Cas. No. 17,552, 3 Sawy. 311.

Hear grievances.— It is the duty of the master to hear complaints of inferiors against superiors made in a reasonable manner, and to redress grievances found to exist, and he is not necessarily to sustain the superior because of his station. Hathaway *v.* Jones, 11 Fed. Cas. No. 6,212, 2 Sprague 56.

44. The Lizzie Burril, 115 Fed. 1015; Dorrel *v.* Schwerman, 111 Fed. 209; White *v.* McDonough, 29 Fed. Cas. No. 17,552, 3 Sawy. 311.

45. Chamberlain *v.* Chandler, 5 Fed. Cas. No. 2,575, 3 Mason 242; White *v.* McDonough, 29 Fed. Cas. No. 17,552, 3 Sawy. 311.

In loco parentis.— Toward women and minors, the master of a ship is bound at all times to exercise the care and tenderness of a *pater familias*, and this is especially his duty when they are unaccompanied by a natural guardian. The fact is that, in the eye of the law, he stands to all his passengers *in loco parentis*. They are entitled, as a matter of right, to his attention and protection. Smith *v.* Wilson, 22 Fed. Cas. No. 13,128, 31 How. Pr. (N. Y.) 272.

46. Krauskopp *v.* Ames, 14 Fed. Cas. No. 7,931; Smith *v.* Wilson, 22 Fed. Cas. No. 13,128, 31 How. Pr. (N. Y.) 272; Aldworth *v.* Stewart, 4 F. & F. 957, 14 L. T. Rep. N. S. 862.

Rights of master.— Courteous request, patience, and renewed remonstrance or reprimand, and, at least just so much restraint, and if that be unavailing, just so much active force, and no more, as the exigency may call for are the legitimate rights of the master of a vessel over his passengers, and such rights should be exercised deliberately and with moderation, without any haste or rudeness and after a patient examination of the facts; and no punishment higher than a reprimand should ever be inflicted on a passenger without a conference with the other officers of the ship and an entry of the facts on the log-book, the only exception to this rule being that of necessity present or imminent. Krauskopp *v.* Ames, 14 Fed. Cas. No. 7,931.

In case of the appearance of a contagious and infectious disease, it is his duty to protect from infection, as far as possible, the other passengers and the crew; and in order to do this he may isolate the sick person from all others on board, having reasonable regard to the sick person's comfort and welfare. The Hammonia, 11 Fed. Cas. No. 6,006, 10 Ben. 512.

Exclusion from table.— Conduct unbecoming a gentleman, in the strict sense of the word, will justify a captain of a ship in excluding a passenger from the table whom he has engaged by contract to provide for there, and while it is difficult to say in what degree want of polish will, in point of law, warrant such exclusion, it is clear that if a passenger uses threats of personal violence toward the captain, the latter may exclude him from the table, and require him to take his meals in his own private apartment. Prendergast *v.* Compton, 8 C. & P. 454, 34 E. C. L. 832.

47. Boyce *v.* Douglas, 1 Campb. 60.

Invading state-room.— If the master is of the opinion that the good order or safety of the ship requires it, he may invade the privacy of a state-room, and exclude a passenger from the cabin. Smith *v.* Wilson, 22 Fed. Cas. No. 13,128, 31 How. Pr. (N. Y.) 272.

On the approach of an enemy, he may assign passengers to various stations which it is their duty to accept, and if they refuse, may confine them if the discipline of the crew and the security of the vessel require it. Boyce *v.* Bayliffe, 1 Campb. 58.

Arrest of passenger.— The authority of a master to arrest passengers cannot be delegated to a minor official or others on board, but, as far as is reasonably possible, must be exercised personally, at least to the extent of giving directions therefor, and even if such authority may be delegated, it must be to a person of experience and known character, intelligence, judgment, and tact, and must not be exercised without the master being called on to determine the necessity therefor, unless the ship or other passengers are in danger. Ragland *v.* Norfolk, etc., Steambost Co., 163 Fed. 376 [*modified* on other grounds in 169 Fed. 286].

48. Noden *v.* Johnson, 16 Q. B. 218, 15 Jur. 424, 20 L. J. Q. B. 95, 71 E. C. L. 218.

49. Krauskopp *v.* Ames, 14 Fed. Cas. No. 7,031.

2. As Agent For Owners or Charterers[50] — a. In General. The master of a vessel is *prima facie* the agent of the owners of the vessel;[51] but where possession and control of the vessel is transferred by the owners to charterers, and the master is appointed by the latter, he is the latter's agent.[52] A master's power to bind his owners personally is but a branch of the general law of agency,[53] and is such as is conferred upon him by the laws of the country to which his vessel belongs,[54] and by his expressed or implied instructions.[55] In many respects, however, the authority of a master is from the necessities of the case more extensive than that of an ordinary agent;[56] but in order that he may exercise extraordinary powers, exigencies must arise in which it is impossible for the owners or their general agent to be consulted and the necessities of the business require that he should act promptly.[57] As a general rule the master of a vessel is the general agent of the owners or charterers for all purposes connected with the ordinary employment of the vessel during a voyage;[58] and consequently they are bound by all acts done or contracts entered into by him within the scope of his authority relative to the regular business of the vessel,[59] and his authority cannot be limited by

50. Agreements of consortship by master see *infra*, V, A, 3.

Power of master: To arbitrate salvage claims see Salvage, 35 Cyc. 761. To hypothecate see *infra*, VI, D, 2. To make charter see *supra*, III, B, 1. To make contracts of salvage see Salvage, 35 Cyc. 729. To make contracts of towage see Towage.

Liability as between owner and charterer see *supra*, III, E, 1.

51. The St. Cloud, Brown. & L. 4, 8 L. T. Rep. N. S. 54; The David Wallace *v.* Bain, 8 Can. Exch. 205.

52. The David Wallace *v.* Bain, 8 Can. Exch. 205.

Third persons dealing with him with notice of the charter-party cannot hold the original owner liable for his acts as such agent. The St. Cloud, Brown. & L. 4, 8 L. T. Rep. N. S. 54; The David Wallace *v.* Bain, 8 Can. Exch. 205. See also *supra*, III, E, 1.

53. Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602, 118 E. C. L. 100 [*affirming* 10 Jur. N. S. 949, 33 L. J. Q. B. 241, 10 L. T. Rep. N. S. 570, 12 Wkly. Rep. 953].

54. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 365; Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602 [*affirming* 10 Jur. N. S. 949, 33 L. J. Q. B. 241, 10 L. T. Rep. N. S. 570, 12 Wkly. Rep. 953].

The liability of the owners of a vessel for the contracts of the master is governed by the law of the place of their domicile, and not by that of the place where the contracts are made or to be discharged. Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 365.

55. Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 365.

Special instructions to a master directing him in case of emergency to apply to certain firms abroad "who would give him any assistance required" do not authorize him to do anything not included in his general powers. Lyall *v.* Hicks, 27 Beav. 616, 54 Eng. Reprint 244.

56. Merritt *v.* Walsh, 32 N. Y. 685.

57. Merritt *v.* Walsh, 32 N. Y. 685.

58. Merwin *v.* Shailer, 16 Conn. 489; Bergerat *v.* Farish, 9 Rob. (La.) 346; The Brig Maria, 39 Ct. Cl. 39; Hedley *v.* Pinkney, etc., Steamship Co., [1894] A. C. 222, 7 Aspin. 483, 63 L. J. Q. B. 419, 70 L. T. Rep. N. S. 630, 6 Reports 106, 42 Wkly. Rep. 497; Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665.

59. *Delaware.*— Davis *v.* Marshall, 4 Harr. 64.

Illinois.— Vessel Owners' Towing Co. *v.* Taylor, 126 Ill. 250, 18 N. E. 663.

Indiana.— Holcroft *v.* Halbert, 16 Ind. 256.

Louisiana.— Mackey *v.* De Blanc, 12 La. Ann. 377; Lambeth *v.* Vawter, 6 Rob. 127.

Maine.— Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243; Hathorn *v.* Curtis, 8 Me. 356.

Massachusetts.— Reynolds *v.* Toppan, 15 Mass. 370, 8 Am. Dec. 110, holding that it must appear, besides the fact of ownership, that the vessel is in the owners' employment, and that the master was appointed by them and acted within the scope of his authority.

North Carolina.— Howard *v.* Ross, 3 N. C. 333.

Pennsylvania.— Glading *v.* George, 3 Grant 290.

South Carolina.— McDaniel *v.* Emanuel, 2 Rich. 455.

United States.— The Edward H. Blake, 92 Fed. 202, 34 C. C. A. 297 (construction of charter-party); The Gulnare, 24 Fed. 487; The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309; The Zenobia, 30 Fed. Cas. No. 18,208, Abb. Adm. 48.

England.— Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665; Yates *v.* Hall, 1 T. R. 73, 99 Eng. Reprint 979.

See 44 Cent. Dig. tit. "Shipping," § 257.

On navigable rivers.— Powers of masters of boats engaged in commerce on interstate navigable rivers are determined by maritime law. Holcroft *v.* Halbert, 16 Ind. 256.

Holding out.—Where the owners of a vessel permit the master to do certain acts or make certain contracts not within the usual scope of his employment, or have ratified such

any private orders not known to the party in any way dealing with him.[60] But they are not bound by the acts or contracts of the master beyond the scope of his authority,[61] unless they assent to or ratify the same;[62] and a master's general powers as agent are so much a matter of law that persons dealing with him are bound to take notice of them at their peril.[63] The master of a vessel may not delegate all his authority as agent;[64] but in case of an emergency he may employ experienced agents to assist him,[65] and may request the ship's brokers to contract as his agent for outfitting the vessel.[66] Like other agents, the master must also act with entire good faith and loyalty to his employers' interests, so as to protect and preserve the vessel and cargo.[67]

b. Repairs, Supplies, and Other Necessaries — (i) *In General.* As a general rule the master of a vessel as such has authority to bind the owners, in their absence, by contracts or expenditures for whatever necessaries are reasonably fit and proper for the safety of the vessel and the due performance of the voyage,[68] and unless credit therefor is given exclusively to the master or to third parties,[69] or unless some other person has such authority in the particular instance and this is known to the creditor,[70] the master may bind them for such repairs,[71] equip-

acts when known to them, they will be bound by such acts. Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243.

60. Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665.

61. Holcroft *v.* Halbert, 16 Ind. 256; Warren *v.* Skolfield, 104 Mass. 503; The Guiding Star, 62 Fed. 407, 10 C. C. A. 454 [*affirming* 53 Fed. 936]; The Erinagh, 7 Fed. 231; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465.

A subscription to a person who keeps lights in a dangerous place of navigation does not come within the general powers of a master. Strong *v.* Saunders, 15 Mich. 339.

62. Davis *v.* Marshall, 4 Harr. (Del.) 64.

63. Holcroft *v.* Halbert, 16 Ind. 256.

The flag of a vessel is notice to all the world that the master's implied authority is limited by the law of the country of that flag. Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602, 118 E. C. L. 100 [*affirming* 10 Jur. N. S. 949, 33 L. J. Q. B. 241, 10 L. T. Rep. N. S. 570, 12 Wkly. Rep. 953].

64. Commercial Nat. Bank *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Suppl. 508 [*modifying* 53 Misc. 97, 102 N. Y. Suppl. 931].

65. The Ripon City, 102 Fed. 176, 42 C. C. A. 247.

66. Commercial Nat. Bank *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Suppl. 508 [*modifying* 53 Misc. 97, 102 N. Y. Suppl. 931].

67. The master must employ his whole time and attention in the service of his employer (Gardner *v.* McCutcheon, 4 Beav. 534, 49 Eng. Reprint 446; Thompson *v.* Havelock, 1 Camph. 527), and a custom allowing him to trade on his own private account during the voyage cannot be maintained (Gardner *v.* McCutcheon, *supra*).

The master cannot become a purchaser at a sale of his employer's property which is sold by his authority as agent (Barker *v.* Marine Ins. Co., 2 Fed. Cas. No. 992, 2 Mason 369), and if he purchases his ship in a foreign port at an authorized sale, the purchase is generally considered as made for the benefit of the owners if they elect so to regard it (Chamberlain *v.* Harrod, 5 Me. 420).

68. Merwin *v.* Shailer, 16 Conn. 489; Holcroft *v.* Halbert, 16 Ind. 256; Clark *v.* Humphreys, 25 Mo. 99; Frost *v.* Oliver, 1 C. L. R. 1003, 2 E. & B. 301, 18 Jur. 166, 22 L. J. Q. B. 353, 75 E. C. L. 301. But *compare* Mackenzie *v.* Pooley, 11 Exch. 638, 25 L. J. Exch. 124, 4 Wkly. Rep. 262.

69. *California.*— Crawford *v.* Roberts, 50 Cal. 235.

Maryland.—Abbott *v.* Baltimore, etc., Steam Packet Co., 1 Md. Ch. 542.

New York.—Witherbee *v.* Paris, 67 Hun 620, 22 N. Y. Suppl. 447.

North Carolina.—Williams *v.* Windley, 86 N. C. 107, holding that a contract made by the master of a vessel for fitting out, victualing, and repairing, and which binds him personally, binds the owner also unless it is clearly shown that the credit is given to the one exclusive of the other.

Pennsylvania.— Gading *v.* George, 3 Grant 290.

England.— Gordon *v.* Hare, 1 L. J. K. B. O. S. 70.

See 44 Cent. Dig. tit. "Shipping," § 258.

70. The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226.

71. *Connecticut.*—Woodruff, etc., Iron Works *v.* Stetson, 31 Conn. 51.

Kentucky.— Patterson *v.* Chalmers, 7 B. Mon. 595.

New York.—Witherbee *v.* Paris, 67 Hun 620, 22 N. Y. Suppl. 447.

North Carolina.—Williams *v.* Windley, 86 N. C. 107.

United States.— The Aurora, 1 Wheat. 96, 4 L. ed. 45; Black Diamond Coal-Min. Co. *v.* The H. C. Grady, 87 Fed. 232; The Gulnare, 24 Fed. 487; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; Philips *v.* Ledley, 19 Fed. Cas. No. 11,096, 1 Wash. 226.

England.—Webster *v.* Seekamp, 4 B. & Ald. 352, 23 Rev. Rep. 307, 6 E. C. L. 515; Frost

ment,[72] and other supplies,[73] services of seamen,[74] and necessary port charges,[75] as the interests of the owners render reasonably necessary, and interested parties may assume that he has such authority, unless something appears to suggest the contrary and put them on inquiry.[76] But he cannot bind the owners for items which are not necessaries unless he is specially authorized to do so,[77] nor can he

v. Oliver, 1 C. L. R. 1003, 2 E. & B. 301, 18 Jur. 166, 22 L. J. Q. B. 353, 75 E. C. L. 301.

See 44 Cent. Dig. tit. "Shipping," § 258.

Cannot contract beyond value of ship and freight.— The master of a ship is the agent of the owners with the power to bind them for repairs to the extent of the value of the ship and freight but no further, unless expressly clothed with larger authority. Stirling *v.* Nevassa Phosphate Co., 35 Md. 128, 6 Am. Rep. 372; Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55.

72. Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243; Bond *v.* McKinnon, 9 Allen (Mass.) 344 (chronometer); Bliss *v.* Ropes, 9 Allen (Mass.) 339 (chronometer); Commercial Nat. Bank *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Suppl. 508 [*modifying* 53 Misc. 97, 102 N. Y. Suppl. 931]; Schultz *v.* Bosman, 21 Fed. Cas. No. 12,488, 5 Hughes 97 (a pair of side-lights and a fog-bell).

73. *Connecticut.*—Williams *v.* Kelly, 2 Conn. 218 note.

Kentucky.— Patterson *v.* Chalmers, 7 B. Mon. 595.

Louisiana.— Barker *v.* York, 3 La. Ann. 90; Calef *v.* The Bonaparte, 1 Rob. 463, 38 Am. Dec. 190.

Maryland.—Abbott *v.* Baltimore, etc., Steam Packet Co., 1 Md. Ch. 542.

North Carolina.—Williams *v.* Windley, 86 N. C. 107.

Pennsylvania.— Phillips *v.* Tapper, 2 Pa St. 323, provisions and necessaries furnished and charged to the captain of the boat.

South Carolina.— Pratt *v.* Tunno, 2 Brev. 449.

United States.— The Aurora, 1 Wheat. 96, 4 L. ed. 45; Black Diamond Coal-Min. Co. *v.* The H. C. Grady, 87 Fed. 232; The Gulnare, 24 Fed. 487; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

England.— Cary *v.* White, 5 Bro. P. C. 325, 2 Eng. Reprint 708, 2 Eq. Cas. Abr. 722, 22 Eng. Reprint 608; Mitcheson *v.* Oliver, 5 E. & B. 419, 1 Jur. N. S. 900, 25 L. J. Q. B. 39, 85 E. C. L. 419; Speerman *v.* Degrave, 2 Vern. Ch. 643, 23 Eng. Reprint 1020.

See 44 Cent. Dig. tit. "Shipping," § 258.

It is essential that the supplies furnished were necessary in order to bind the owners to pay therefor (Whitten *v.* Tisdale, 43 Me. 451); but it is not essential that they were absolutely necessary or actually placed on board (Merritt *v.* Brewer, 17 Fed. Cas. No. 9,483).

Newspaper notices cautioning all persons against trusting any of the crew or other persons on account of the vessel, published without signature, or anything to show by whose authority they were inserted, are too vague to affect the liability of the owners for supplies furnished the master. Saxton *v.* Read, Lalor (N. Y.) 323.

Who liable.— The master of a boat in ordering supplies is agent, not of the owner of the boat as such, but of those who have control of the vessel and the right to receive her freight, and mere ownership without any right to the profit or use of the property will not of itself make a person liable for supplies furnished to the vessel. Ward *v.* Bodeman, 1 Mo. App. 272. *Compare* Williams *v.* Kelly, 2 Conn. 218 note. The possession, control, and management of the vessel with the right to direct her destination and receive her earnings will fix the responsibility for such supplies whether the person has the legal title or not. Lincoln *v.* Wright, 23 Pa. St. 76, 62 Am. Dec. 316.

Estoppel.— The owners of a vessel are estopped to assert that one acting as master had no right as such to order stores for the voyage, if they permitted him to order the articles and retained them. Stringham *v.* Schloener, 23 Fed. Cas. No. 13,536, 4 Ben. 16.

That the master purchased the supplies in a neighboring port instead of the one where his vessel lay does not affect the liability of the owner of the vessel therefor. Kenzel *v.* Kirk, 37 Barb. (N. Y.) 113, 21 How. Pr. 184 [*affirmed* in 2 Abb. Dec. 500, 32 How. Pr. 269].

A written contract for supplies for a vessel by the master is binding on the owners, if it shows on its face that such was the intention, although it is signed by him in his own name only. Negus *v.* Simpson, 99 Mass. 388.

74. Carr *v.* Burke, 32 Mo. 233; Kohler *v.* Wright, 7 Bosw. (N. Y.) 318. See also Hanson *v.* Royden, L. R. 3 C. P. 47, 37 L. J. C. P. 66, 17 L. T. Rep. N. S. 214, 16 Wkly. Rep. 205; Yates *v.* Hall, 1 T. R. 73, 99 Eng. Reprint 979.

Steward.—A master of a vessel may hire a steward (Luttrell *v.* China Nav. Co., 1 New Rep. 329), and may engage a seaman to serve as steward at higher wages (Hicks *v.* Walker, 4 Wkly. Rep. 511).

Extra pilotage services.—A master may bind his vessel to pay for extra pilotage services rendered at his request. The Cervantes, 135 Fed. 573.

75. Chicago Commercial Nat. Bank *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Suppl. 508 [*modifying* 53 Misc. 97, 102 N. Y. Suppl. 931].

76. Black Diamond Coal-Min. Co. *v.* The H. C. Grady, 87 Fed. 232.

77. Holcroft *v.* Halbert, 16 Ind. 256; Pratt *v.* Tunno, 2 Brev. (S. C.) 449; The Erinagh, 7 Fed. 231; Drain *v.* Scott, 3 Macph. 114. See also Curran *v.* Wood, 15 L. T. Rep. N. S. 592.

purchase supplies or merchandise for third persons on the credit of the owner of the vessel.[78]

(II) *Consulting Owners or Agent.* Whilst the above rule seems to be well settled as to the powers of the master in purchasing supplies and necessaries when in a foreign port from which communication cannot be readily had with the owners or their agent, there is some conflict in the authorities as to his power in a home port or where the owner or agent may be communicated with. In some jurisdictions it is held that the master may bind the owner for necessaries, such as supplies or repairs either in a foreign port or even in the home port,[79] unless he in fact has no such authority and the parties dealing with him have knowledge of that fact,[80] or unless the supplies or repairs are furnished on the exclusive credit of the master.[81] In other jurisdictions, however, this authority is limited to a foreign port or to a home port where the owner does not reside and is not within easy access of the master,[82] and where the owners or their agent are at the port of the vessel's anchorage or so near it that they can be readily consulted or can be reasonably expected to interfere personally, the master cannot, without consulting them, pledge the owners' credit for the ship's necessaries, and hence the owners will not be liable on such a contract,[83] unless the master has special authority for that purpose,[84] or the owners have held him out as having such authority,[85] or have ratified the contract after it was made,[86] or there is some custom of trade warranting it.[87]

c. Contracts of Affreightment. Where a vessel is loaded wholly by the owners and is not employed in carrying freight for hire, the master thereof has no authority to enter into contracts of affreightment,[88] except where it is necessary in a foreign port to diminish the loss to the owners or charterers, by reason of the failure to obtain an expected cargo.[89] But the master of a vessel engaged

Medical attendance.—Where seamen are injured by an accident, and put on shore while the ship proceeds on her voyage, the captain has no implied authority to make the shipowner liable for expenses incurred for their maintenance and care. Organ *v.* Brodie, 3 C. L. R. 51, 10 Exch. 449, 24 L. J. Exch. 70, 3 Wkly. Rep. 13.

78. Calef *v.* The Bonaparte, 1 Rob. (La.) 463, 38 Am. Dec. 190.

79. Holcroft *v.* Halbert, 16 Ind. 256; Carr *v.* Burke, 32 Mo. 233; Provost *v.* Patchin, 9 N. Y. 235; McCready *v.* Thorne, 49 Barb. (N. Y.) 438; Winsor *v.* Maddock, 64 Pa. St. 231; Glading *v.* George, 3 Grant (Pa.) 290; Wainwright *v.* Crawford, 3 Yeates (Pa.) 131. See also Daly *v.* Monroe, 2 N. Y. City Ct. 160.

Presumption.— Even at a home port, the master of a vessel is presumed to have authority to contract for such articles for the use of the vessel as come within the general appellation of "ship's stores," and the owner of the vessel is liable for the value of the same, unless he shows that the master had no such authority. Crawford *v.* Roberts, 50 Cal. 235.

That the master is furnished with money for the purpose of procuring supplies does not affect the liability of the owner if the tradesmen had no knowledge of that fact. Glading *v.* George, 3 Grant (Pa.) 290.

80. Provost *v.* Patchin, 9 N. Y. 235; Glading *v.* George, 3 Grant (Pa.) 290.

81. Winsor *v.* Maddock, 64 Pa. St. 231.

82. Woodruff, etc., Iron Works *v.* Stetson, 31 Conn. 51; Schultz *v.* Bosman, 21 Fed. Cas. No. 12,488, 5 Hughes 97.

What are foreign ports.— Ports of the several states of the United States are foreign ports as regards the authority of masters lying therein to pledge the credit of the owners for supplies necessary for their vessels. Negus *v.* Simpson, 99 Mass. 388; Black Diamond Coal Min. Co. *v.* The H. C. Grady, 87 Fed. 232.

Home port defined see 21 Cyc. 447.

83. *Connecticut.*—Woodruff, etc., Iron Wks. *v.* Stetson, 31 Conn. 51.

Louisiana.—Agricultural Bank *v.* The Jane, 19 La. 1.

Maine.— Jordan *v.* Young, 37 Me. 276.

Maryland.— Pentz *v.* Clarke, 41 Md. 327.

England.— Gunn *v.* Roberts, L. R. 9 C. P. 331, 2 Aspin. 250, 43 L. J. C. P. 233, 30 L. T. Rep. N. S. 424, 22 Wkly. Rep. 652; Beldon *v.* Campbell, 6 Exch. 886, 20 L. J. Exch. 342; Curran *v.* Wood, 15 L. T. Rep. N. S. 592.

See 44 Cent. Dig. tit. "Shipping," § 259.

84. Dyer *v.* Snow, 47 Me. 254; Pentz *v.* Clarke, 41 Md. 327; The Jeanie Landles, 17 Fed. 91, 9 Sawy. 102; Arthur *v.* Barton, 9 L. J. Exch. 187, 6 M. & W. 138; Pettipas *v.* Crosby, 9 Can. L. T. Occ. Notes 197, 20 Nova Scotia 446.

85. Pentz *v.* Clarke, 41 Md. 327.

86. Pentz *v.* Clarke, 41 Md. 327.

87. Arthur *v.* Barton, 9 L. J. Exch. 187, 6 M. & W. 138.

88. Walter *v.* Brewer, 11 Mass. 99 (unless the owners assent); King *v.* Lenox, 19 Johns. (N. Y.) 235.

89. Crabtree *v.* Clark, 6 Fed. Cas. No. 3,314, Sprague 217.

in carrying freight may enter into contracts of affreightment binding on the owners upon such terms as are authorized by the usual course of trade of his vessel,[90] particularly at a foreign port,[91] unless the owner is on board attending exclusively to the shipment of the cargo,[92] or unless such authority is given to another.[93] The master, however, can only procure freight for the vessel on the ordinary terms,[94] and he cannot make the freight payable to other than the owner,[95] or contract to carry goods free,[96] or at a lower rate than the owner has contracted for, for the same goods.[97]

d. Authority and Duties as to Cargo in General.[98] It is the duty of the master as such of a general ship to see to the safe loading, stowage, and transportation of the cargo,[99] and other than this he has no authority to exercise or duty to perform in respect to the cargo, as the supercargo, if there is one, represents the owners of the cargo.[1] The master, however, may be authorized to act as supercargo during the voyage,[2] as where he is also the consignee of the cargo for sale;[3] and when he also acts as supercargo, what he does relative to the safe-keeping and transportation of the cargo he does as master, and his acts bind the owners of the vessel;[4] but what he does relative to its sale and disposition after reaching the port of destination he does as supercargo, and neither the owners of the vessel nor the vessel itself are responsible therefor.[5]

90. Bergerot *v.* Farish, 9 Rob. (La.) 346; Porter *v.* Curry, 7 La. 233; The Argyle *v.* Worthington, 17 Ohio 460; The Flash, 9 Fed. Cas. No. 4,857, Abb. Adm. 67; Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665; Rienquist *v.* Ditchell, 3 Esp. 64, 2 Campb. 556 note. See also The Hendrik Hudson, 11 Fed. Cas. No. 6,358; Pearson *v.* Göschen, 17 C. B. N. S. 352, 10 Jur. N. S. 903, 34 L. J. C. P. 265, 10 L. T. Rep. N. S. 758, 12 Wkly. Rep. 1116, 112 E. C. L. 352.

Application.—Where the registered owner of a vessel appoints her master with an agreement that the master shall have the entire control of the vessel and make contracts of affreightment and divide the gross earnings with the owner, the owner is liable on contracts made by the master with shippers who have no notice of the arrangement between the master and the owner. Tomlinson *v.* Holt, 49 Cal. 310; Oakland Cotton Mfg. Co. *v.* Jennings, 46 Cal. 175, 13 Am. Rep. 209.

A master may make contracts to take effect in futuro to carry freight according to the usual course of trade of his vessel. Porter *v.* Curry, 7 La. 233.

To render the owner liable it must appear: That he owned the vessel; that the vessel was in his employment; that the master was appointed by him; and acted within the scope of his authority. Reynolds *v.* Toppan, 15 Mass. 370, 8 Am. Dec. 110. See also Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55.

By the custom existing upon the Great Lakes, the master of a vessel has, by virtue of his office, power to bind his vessel by receiving for transportation goods subject to prior charges, which he is to collect from the consignee and to return to the shippers. The Hendrik Hudson, 11 Fed. Cas. No. 6,358.

91. Ward *v.* Green, 6 Cow. (N. Y.) 173, 16 Am. Dec. 437; Murfree *v.* Redding, 2 N. C. 276.

92. Ward *v.* Green, 6 Cow. (N. Y.) 173, 16 Am. Dec. 437.

93. Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55.

94. The Sir Henry Webb, 13 Jur. 639.

95. Reynolds *v.* Jex, 7 B. & S. 86, 34 L. J. Q. B. 251, 13 Wkly. Rep. 968; Walshe *v.* Provan, 1 C. L. R. 823, 8 Exch. 843, 22 L. J. Exch. 355.

96. Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665; Dewell *v.* Moxon, 1 Taunt. 391.

97. Pickernell *v.* Jauberry, 3 F. & F. 217.

98. **Duty of master as to receiving and discharging cargo of chartered vessel** see *supra*, III, J.

99. Burdge *v.* Two Hundred and Twenty Tons of Fish Scrap, 2 Fed. 783, 5 Hughes 141 (holding that it is the duty of the master when fully cognizant of the facts to determine when the vessel has taken as much cargo at the wharf as is prudent, in view of the depth of water, although the cargo is being loaded by the shippers); Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226. And see *infra*, VII, C, D.

1. Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226.

Rights, powers, and compensation of supercargo generally see *infra*, VII, F.

2. Smedley *v.* Yeaton, 22 Fed. Cas. No. 12,965, 3 Cranch C. C. 181.

The master cannot wholly abandon his duty as master to discharge that of supercargo, but must act in both capacities so far as possible with reference to the respective principals. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

3. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316; Williams *v.* Nichols, 13 Wend. (N. Y.) 58; Smedley *v.* Yeaton, 22 Fed. Cas. No. 12,965, 3 Cranch C. C. 181.

4. Williams *v.* Nichols, 13 Wend. (N. Y.) 58; The Maiden City, 33 Fed. 715; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165.

5. Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621; Williams *v.* Nichols, 13 Wend. (N. Y.) 58; The Maiden City, 33 Fed. 715; The New

e. Authority as to Purchase of Cargo. As a general rule, it is not within the general powers of a master to purchase a cargo on behalf of the owners,[6] and the owners are not liable for such purchases by the master unless previously authorized [7] or subsequently ratified.[8] Upon the failure of the charterers of a vessel to furnish a certain cargo at a certain port, the master, although he is required to use reasonable efforts to diminish the charterers' loss, is not bound in order to do so to purchase a cargo at his own risk,[9] or to go to other ports to obtain it.[10]

f. Collection of Freight. As a general rule a master has authority and it is his duty to collect the freight due on the goods carried in his vessel,[11] unless authority to make such collections is given to another;[12] and he has no authority to release a charterer from paying the freight reserved in the charter-party,[13] or to vary the terms of the contract made by the owner in respect thereto.[14] If he acts as agent of the owners of a chartered vessel, it is his duty to collect the freight for the benefit of the charterer,[15] and if he neglects or refuses to pay over such freight, the owners will be liable therefor,[16] unless he is made the agent of the charterers for that purpose.[17]

g. Borrowing Money. The master of a vessel when without funds or the means of raising them, in a foreign port, may as a rule bind the owners of the vessel for money borrowed in good faith to pay for repairs, supplies, and other necessaries reasonably fit and proper to enable the vessel to continue on her voyage,[18]

Hampshire, 21 Fed. 924; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165. See also *infra*, IV, B, 5, c.

6. Lyman *v.* Redman, 23 Me. 289; Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243; Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45; Hathorn *v.* Curtis, 8 Me. 356; The Ole Oleson, 20 Fed. 384.

The usage of a particular place that the master of a vessel as such has power to purchase a cargo on account of the owners without authority from them is not valid and cannot bind the owners. Hewett *v.* Buck, 17 Me. 147, 35 Am. Dec. 243.

7. Morton *v.* Day, 6 La. Ann. 762; Lyman *v.* Redman, 23 Me. 289; Hathorn *v.* Curtis, 8 Me. 356; Bidenlac *v.* Smith, 31 N. Y. 259.

8. Lyman *v.* Redman, 23 Me. 289.

9. Crabtree *v.* Clark, 6 Fed. Cas. No. 3,314, 1 Sprague 217.

10. Crabtree *v.* Clark, 6 Fed. Cas. No. 3,314, 1 Sprague 217.

11. Swift *v.* Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101 (holding that if he neglects to collect freights in which he has an interest he cannot make the owners respond for his interest, unless they were instrumental in preventing payment); Ingersoll *v.* Van Bokkelin, 7 Cow. (N. Y.) 670 [*reversed* on other grounds in 5 Wend. 315]; Damora *v.* Craig, 48 Fed. 736.

The master should collect the freight in the medium of payment which he is instructed to receive. The Dunmore, 2 Aspin. 599, 32 L. T. Rep. N. S. 340.

12. The Edmund, 29 L. J. Adm. 76, 2 L. T. Rep. N. S. 192, Lush. 58.

13. Balcarres Brook Steamship Co. *v.* Grace, 75 Fed. 1017, 22 C. C. A. 7 [*reversing* 66 Fed. 358].

14. Balcarres Brook Steamship Co. *v.* Grace, 75 Fed. 1017, 22 C. C. A. 7 [*reversing* 66 Fed. 358]. *Compare* Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665; Pearson *v.* Göschen, 17 C. B. N. S. 352, 10 Jur. N. S. 903, 33 L. J. C. P. 265, 10 L. T. Rep. N. S. 758, 12 Wkly. Rep. 1116, 112 E. C. L. 352.

15. The Maiden City, 33 Fed. 715.

16. The Maiden City, 33 Fed. 715.

17. The Maiden City, 33 Fed. 715.

18. *Connecticut.*—Williams *v.* Kelly, 2 Conn. 218 note.

Louisiana.— Mississippi Agricultural Bank *v.* The Jane, 19 La. 1; McGregor *v.* Brittingham, 12 La. 182.

Maine.— Descadillas *v.* Harris, 8 Me. 298.

Maryland.— Miller *v.* Palmer, 58 Md. 451.

Massachusetts.— Stearns *v.* Doe, 12 Gray 482, 74 Am. Dec. 608, holding that the master may pledge the credit of the owner for money needed to pay the officers and crew if the money is necessary for the purpose, is loaned in good faith, and due diligence is used to ascertain the necessity.

New York.— Lobach *v.* Hotchkiss, 17 Abb. Pr. 88, holding that the owners are liable irrespective of the fact that the master is interested in the voyage to such an extent that the owner might not be liable for ordinary advances.

Ohio.— See The Arkansas Mail *v.* Fox, 1 Ohio Dec. (Reprint) 219.

Pennsylvania.—Wainwright *v.* Crawford, 4 Dall. 225, 1 L. ed. 810. See also Cupisino *v.* Perez, 2 Dall. 194, 1 L. ed. 345.

United States.— Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226.

England.— Edwards *v.* Havill, 14 C. B. 107, 2 C. L. R. 1343, 17 Jur. 1103, 23 L. J. C. P. 8, 2 Wkly. Rep. 12, 78 E. C. L. 107; Grant *v.* Norway, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665; Beldon *v.* Campbell, 6 Exch. 886, 20 L. J. Exch. 342; Arthur *v.* Barton, 9 L. J. Exch. 187, 6 M. & W. 138; The Sophie, 1 Notes of Cas. 393, 1 W. Rob. 368; Robinson *v.* Lyall, 7 Price 592; Rocher

although the necessity therefor arose from the master's own misconduct;[19] and this rule applies even in a home port where the power of communication with the owners is not correspondent with the existing necessity;[20] but where the vessel is in a port where the owners may be readily communicated with, the master ordinarily has no authority to pledge the owners' credit for money borrowed without consulting with them.[21] The money borrowed, however, must be necessary, that is, it must be required for purposes which are reasonably fit and proper under the circumstances under which the vessel is placed, otherwise the owners are not liable therefor,[22] and it is the duty of the loaner to see that the money is needed for such purposes;[23] nor are the owners liable for advances which are collusively made.[24]

h. Execution of Bonds, Notes, and Bills of Exchange.[25] The master of a vessel has no power to execute, indorse, or accept bills of exchange or notes binding on the owners of his vessel,[26] except in a foreign port for necessary repairs or supplies,[27] or except where he is specially authorized to do so.[28] In a foreign port the master may bind the owners by the execution of a bond to procure the release of his vessel,[29] but he has no such authority in the home port;[30] nor can

v. Busher, 1 Stark. 27, 18 Rev. Rep. 742, 2 E. C. L. 21.

Canada.— Reide *v.* The Queen of the Isles, 3 Can. Exch. 258.

See 44 Cent. Dig. tit. "Shipping," § 265.

Existing indebtedness.—A master has no authority to borrow money to pay a debt for supplies and services for which the owners of the vessel are already personally responsible by the contract under which the supplies were furnished or the services rendered (Beldon *v.* Campbell, 6 Exch. 886, 20 L. J. Exch. 342); but no such restriction on the authority of the master exists where the debt constitutes a lien on the vessel or cargo capable of immediate enforcement in a foreign port, and in such a case the master may borrow money on the credit of the owner to pay for such debt (Stearns *v.* Doe, 12 Gray (Mass.) 482, 74 Am. Dec. 608).

Where the owner takes the benefit of money borrowed by the master without authority he is liable for its repayment. Ashmall *v.* Wood, 3 Jur. N. S. 232, 5 Wkly. Rep. 397.

19. Descadillas *v.* Harris, 8 Me. 298.

20. Stonehouse *v.* Gent, 2 Q. B. 431 note, 42 E. C. L. 746; Johns *v.* Simons, 2 Q. B. 425, 42 E. C. L. 743; Detroit Third Nat. Bank *v.* Symes, 4 Can. Exch. 400.

21. Mississippi Agricultural Bank *v.* The Jane, 19 La. 1; George W. Bush, etc., Co. *v.* Fitzpatrick, 73 Fed. 501; Johns *v.* Simons, 2 Q. B. 425, 42 E. C. L. 743; Williamson *v.* Page, 1 C. & K. 581, 47 E. C. L. 581.

22. Merwin *v.* Shailer, 16 Conn. 489; Miller *v.* Palmer, 58 Md. 451; Stearns *v.* Doe, 12 Gray (Mass.) 482, 74 Am. Dec. 608; George W. Bush, etc., Co. *v.* Fitzpatrick, 73 Fed. 501.

At common law the master cannot make the owners liable for money not actually necessary, although he may pretend that it is. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42.

23. Stearns *v.* Doe, 12 Gray (Mass.) 482, 74 Am. Dec. 608; George W. Bush, etc., Co. *v.* Fitzpatrick, 73 Fed. 501; Mackintosh *v.* Mitcheson, 4 Exch. 175, 18 L. J. Exch. 385; Bogle *v.* Atty, Gow. 50, 5 E. C. L. 865; Palmer *v.* Gooch, 2 Stark. 428, 3 E. C. L. 475.

The money must be advanced expressly for the purpose of purchasing necessaries. Thacker *v.* Moates, 1 M. & Rob. 79.

24. Miller *v.* Palmer, 58 Md. 451.

25. **Authority of clerk** see *infra*, V, A, 1.

Authority of master to execute bottomry and respondentia bonds see *infra*, VI, D, 2.

26. *Alabama.*— May *v.* Kelly, 27 Ala. 497.

Indiana.— Holcroft *v.* Wilkes, 16 Ind. 373; Holcroft *v.* Halbert, 16 Ind. 256.

Louisiana.— Lambert *v.* Vawter, 6 Rob. 127.

Massachusetts.— Bowen *v.* Stoddard, 10 Metc. 375.

Missouri.— Gregg *v.* Robbins, 28 Mo. 347; Clark *v.* Humphreys, 25 Mo. 99.

United States.— See George W. Bush, etc., Co. *v.* Fitzpatrick, 73 Fed. 501.

England.— Strickland *v.* Neilson, 7 Macph. 400; Drain *v.* Scott, 3 Macph. 114.

See 44 Cent. Dig. tit. "Shipping," § 266.

An objection that the master was without authority to draw a bill on account of the owners is too late after the owners have answered, in an action on the bill, showing that the bill was drawn to release the vessel from seizure. Anderson *v.* Folger, 11 La. Ann. 269.

A usage among the owners of vessels at particular ports to pay bills drawn by masters for supplies furnished to their vessels in foreign ports cannot bind them as accepters of such bills. Bowen *v.* Stoddard, 10 Metc. (Mass.) 375; Clark *v.* Humphreys, 25 Mo. 99.

27. Clark *v.* Humphreys, 25 Mo. 99; Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42; Milward *v.* Hallett, 2 Cai. (N. Y.) 77. But see Bowen *v.* Stoddard, 10 Metc. (Mass.) 375.

28. Pickersgill *v.* Williams, 19 Fed. Cas. No. 11,123; Wallace *v.* Agry, 29 Fed. Cas. No. 17,096, 4 Mason 336; Huntley *v.* Sanderson, 1 Cromp. & M. 467.

29. Stedman *v.* Patchin, 34 Barb. (N. Y.) 218.

30. Carr *v.* Burke, 32 Mo. 233.

he give an appeal-bond in the home port of the vessel without consulting the owners.[31]

1. Allowance or Settlement of Claims. The master of a vessel has no power to allow or settle claims against the vessel or against the owners,[32] except such as accrue during the time he is the master,[33] and he particularly has no such power where the claim is not a valid one against the owners.[34]

3. Management and Navigation of Vessel — a. Repair of Vessel. It is the duty of the master to use reasonable care, diligence, and skill to keep his vessel in such repair as to make its condition seaworthy.[35]

b. Navigation of Vessel in General. The captain or master of a vessel has control of every department of service on board, and it is his duty personally to see to the course of his vessel,[36] and to see that the officers and crew under him properly perform their assigned duties in respect to the navigation of the vessel,[37] even in local waters where the vessel for the time being is in charge of a local pilot,[38] and if there is any misconduct or neglect he is responsible civilly,[39] and under some statutes criminally,[40] for the consequences.

c. Delay In or Deviation From Voyage.[41] It is also the duty of the master

31. Gager *v.* Babcock, 48 N. Y. 154, 8 Am. Rep. 532, holding that where a vessel while in her home port near which her owner resides is seized under process, but is released and restored to the master, he has no authority as master, without consulting the owner, to prosecute an appeal or give an appeal-bond.

32. Kelley *v.* Merrill, 14 Me. 228.

33. Kelley *v.* Merrill, 14 Me. 228. See also Randall *v.* Brodhead, 60 N. Y. App. Div. 567, 70 N. Y. Suppl. 43; Alexander *v.* Dowie, 1 H. & N. 152, 25 L. J. Exch. 281.

34. Merritt *v.* Walsh, 32 N. Y. 685, holding that the master has no power in a domestic port to bind the owners by the allowance of a claim which is not a valid one against them.

Barred claims.—Where a shipmaster is discharged from his liability for supplies furnished at a distant port, by the neglect of the creditor to retain the debt out of funds of the owner paid over after the supplies were furnished, he cannot, upon paying the debt after the claim against the owner is barred by the statute of limitations, claim reimbursement from the owner; and the retention by the creditor of the funds of the master, without the latter's consent, cannot be treated as a payment by him for the purpose of such reimbursement. Bissell *v.* Bozman, 17 N. C. 229.

35. The Giles Loring, 48 Fed. 463 (holding that if a full cargo will submerge the copper on a vessel so as to subject the hull to worms, it is the duty of the master to put on additional copper if it can be procured); Benson *v.* Chapman, 8 C. B. 950, 65 E. C. L. 950, 2 H. L. Cas. 696, 9 Eng. Reprint 1256, 13 Jur. 969.

Degree of care and diligence.—If a vessel on a voyage becomes damaged, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the vessel, is bound to consider the interests of all concerned, whether it be to return to his port of loading and repair, or repair at the nearest possible place before proceeding, or going on without repair, and if it is within his power to effect the repairs without any great delay or expense, it is his duty to repair before proceeding. The Rona, 5 Aspin. 259, 51 L. T. Rep. N. S. 28.

36. Union Ins. Co. *v.* Dexter, 52 Fed. 152.

37. U. S. *v.* Farnham, 25 Fed. Cas. No. 15,071, 2 Blatchf. 528, 11 N. Y. Leg. Obs. 161.

Distinction.—The duties and responsibilities of the captain of a steamboat are the same as those of the captain of any other vessel; and there is no distinction in law or maritime usage between the relative duties and responsibilities of different officers who serve on vessels propelled by steam, whether they navigate inland waters exclusively or are sea-going vessels. U. S. *v.* Farnham, 25 Fed. Cas. No. 15,071, 2 Blatchf. 528, 11 N. Y. Leg. Obs. 161.

38. The Oregon, 158 U. S. 186, 15 S. Ct. 804, 39 L. ed. 943 [*reversing* 45 Fed. 62].

While a licensed harbor or river pilot supersedes the master for the time being in the command and navigation of his vessel, yet the master is not justified in leaving the pilot in sole charge of the vessel. He is still in command except so far as her navigation is concerned, and is bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties; and he may advise with the pilot and even displace him in case of intoxication or manifest incompetence. The Oregon, 158 Fed. 186, 15 S. Ct. 804, 39 L. ed. 943 [*reversing* 45 Fed. 62]. See also Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique, 63 Fed. 845, 182 U. S. 406, 21 S. Ct. 831, 45 L. ed. 1155; The Batavien, 1 Spinks 378.

39. Union Ins. Co. *v.* Dexter, 52 Fed. 152; U. S. *v.* Farnham, 25 Fed. Cas. No. 15,071, 2 Blatchf. 528.

40. See U. S. *v.* Farnham, 25 Fed. Cas. No. 15,071, 2 Blatchf. 528.

41. **Liability of vessel for injuries to cargo by reason of delay or deviation** see *infra*, VII, D, 8.

to follow his instructions as to the course of his voyage,[42] and if he deviates therefrom he will be responsible for the consequences to his owners,[43] unless such deviation is authorized by the owners' agent at an intermediate port,[44] or is caused by necessity, as by stress of weather or for the safety of the vessel or crew,[45] or unless the owners ratify his acts.[46] The master may deviate from his course for the purpose of saving human life;[47] and while there is no obligation upon him to lie by or delay the progress of his voyage for the purpose of preserving property,[48] the maritime law and commercial usage do not prohibit him from deviating in the exercise of a sound discretion to save property that is in peril.[49]

4. Sale or Other Disposition of Vessel[50] — a. In General. Except in a case of necessity,[51] the master of a vessel as such has no power to sell or otherwise dispose of the vessel or any part thereof without special authority therefor from the owners,[52] and hence the owners are ordinarily not bound by a fraudulent sale made by the master without such authority,[53] or in excess of his special authority.[54]

b. Necessity For Sale — (i) *In General.* The rule is well settled that in a case of an urgent necessity, as where it becomes impossible to continue the voyage by reason of the vessel becoming wrecked, stranded, or otherwise disabled, and it is impossible or impracticable to communicate with the owners,[55] the master not only has implied authority, but it also becomes his duty, to sell the vessel for the benefit of the owners and all other interests concerned, in order to save them from a greater loss,[56] provided he acts in good faith and with due discre-

42. Robinson *v.* Hinckley, 20 Fed. Cas. No. 11,954, 2 Paine 457; Burgon *v.* Sharpe, 2 Campb. 529, 11 Rev. Rep. 788.

43. Robinson *v.* Hinckley, 20 Fed. Cas. No. 11,954, 2 Paine 457.

44. Robinson *v.* Hinckley, 20 Fed. Cas. No. 11,954, 2 Paine 457.

45. Sylvain *v.* Canadian Forwarding, etc., Co., 10 Quebec Super. Ct. 195 [*reversing* 7 Quebec Super. Ct. 256].

46. Codwise *v.* Hacker, 1 Cai. (N. Y.) 526.

47. Scaramanga *v.* Stamp, 5 C. P. D. 295, 4 Aspin. 295, 49 L. J. C. P. 674, 42 L. T. Rep. N. S. 840, 28 Wkly. Rep. 691.

A stoppage or interruption for the purpose of saving human lives is not such a deviation as will render the master civilly or criminally responsible for any subsequent disaster to his vessel. Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449.

48. Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449.

49. Sturtevant *v.* The George Nicholaus, 23 Fed. Cas. No. 13,578, Newb. Adm. 449. But see Scaramanga *v.* Stamp, 5 C. P. D. 295, 4 Aspin. 295, 49 L. J. C. P. 674, 42 L. T. Rep. N. S. 840, 28 Wkly. Rep. 691.

50. Effect of sale on liens see Maritime Liens, 26 Cyc. 799.

Presumption as to validity of sale see *infra*, IV, F, 3.

Recovery as for a total loss on a sale from necessity see Marine Insurance, 26 Cyc. 687, 694.

51. See *infra*, IV, B, 4, b.

52. *Indiana.*— Ingersoll *v.* Emmerson, 1 Ind. 76.

Louisiana.— Peck *v.* Gale, 3 La. 320.

Maine.— Gates *v.* Thompson, 57 Me. 442, 99 Am. Dec. 782; Johnson *v.* Wingate, 29 Me. 404.

United States.— The Yarkland, 117 Fed. 335 [*affirmed* in 120 Fed. 887, 58 C. C. A. 73]; The Henry, 11 Fed. Cas. No. 6,372, Blatchf. & H. 465; Skrine *v.* The Hope, 22 Fed. Cas. No. 12,927, Bee 2; The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465.

England.— Reid *v.* Darby, 10 East 143, 103 Eng. Reprint 730; Hayman *v.* Molton, 5 Esp. 65, 8 Rev. Rep. 837; The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252; Johnson *v.* Shippen, 2 Ld. Raym. 982, 92 Eng. Reprint 154.

See 44 Cent. Dig. tit. "Shipping," § 272.

The bar of the vessel cannot be sold by the master so as to give the purchaser an interest in the vessel, although he may grant the privilege of keeping a bar so long as he is concerned with the vessel, but in such a case the barkeeper is on the same footing as others engaged on the vessel, and must be under the supervision intrusted to the master. Kelly *v.* Dickinson, 15 Mo. 193.

53. Ingersoll *v.* Emmerson, 1 Ind. 76; East India Co. *v.* Ekines, 2 Bro. P. C. 382, 1 Eng. Reprint 1011 [*affirming* 1 P. Wms. 350, 24 Eng. Reprint 441]; The Empress, 3 Jur. N. S. 119, Swab. 160, 5 Wkly. Rep. 165.

54. Johnson *v.* Wingate, 29 Me. 404; Gibson *v.* Colt, 7 Johns. (N. Y.) 390, holding that the power to sell does not give the power to warrant the title.

55. See *infra*, IV, B, 4, b, (III).

56. *Louisiana.*— Peck *v.* Gale, 3 La. 320.

Maine.— Duncan *v.* Reed, 39 Me. 415, 63 Am. Dec. 635.

Massachusetts.— Woods *v.* Clark, 24 Pick. 35.

New York.— Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355.

United States.— The Amelie, 6 Wall. 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Yarkland, 120 Fed. 887, 58 C. C. A. 73 [*affirming* 117 Fed. 336]; Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M.

tion.[57] The necessity which will justify the master in making such a sale is a question of fact depending upon the particular circumstances existing at the time of the sale;[58] and the mere fact that the vessel is subsequently rescued and repaired by the purchaser does not invalidate the sale.[59] It must be an apparent moral necessity,[60] and must be extreme or urgent.[61]

(II) *APPLICATIONS.* Thus if the master acts in good faith and with due discretion, he is justified in selling the vessel where the circumstances are such that a person of prudent and sound mind, after carefully observing all the facts and weighing all the probabilities, could have no doubt as to the advisability of the sale,[62] as where the vessel is exposed to an actual and impending peril, or to a peril likely to ensue, and from which it is probable in the opinion of persons competent to judge that it cannot be rescued;[63] or where the vessel has become

303; The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465.

England.— Ireland *v.* Thomson, 4 C. B. 149, 17 L. J. C. P. 241, 56 E. C. L. 149; The Fannie, Edw. Adm. 117; Hayman *v.* Molton, 5 Esp. 65, 8 Rev. Rep. 837; Hunter *v.* Parker, 10 L. J. Exch. 231, 7 M. & W. 322; Idle *v.* Royal Exch. Assur. Co., 3 Moore C. P. 115, 8 Taunt. 755, 21 Rev. Rep. 538, 4 E. C. L. 368. But see *In re* Tremenhere, 1 Sid. 452, 82 Eng. Reprint 1213.

Canada.— Orange *v.* McKay, 5 Nova Scotia 444.

See 44 Cent. Dig. tit. "Shipping," § 273.

The rigging and sails as well as the vessel may be sold by the master. The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213.

The master's duties do not cease until the proceeds of the sale are placed at the disposal of the owners. Duncan *v.* Reed, 39 Me. 415, 63 Am. Dec. 635. See also Ireland *v.* Thomson, 4 C. B. 149, 17 L. J. C. P. 241, 56 E. C. L. 149.

The mere presence of an agent of the owners of the vessel at the sale of her by her master does not constitute a sale any the less a sale by the master. The Henry, 11 Fed. Cas. No. 6,372, 1 Blatchf. & H. 465.

57. See *infra*, IV, B, 4, h, (IV).

58. Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213; The Yarkland, 120 Fed. 887, 58 C. C. A. 73 [*affirming* 117 Fed. 336]; The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305; The Glasgow, 2 Jur. N. S. 1147, 12 Moore P. C. 355 note, Swab. 145, 5 Wkly. Rep. 10, 14 Eng. Reprint 946; The Victor, 13 L. T. Rep. N. S. 21.

59. The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213; The Yarkland, 120 Fed. 887, 58 C. C. A. 73 [*affirming* 117 Fed. 336]; The Glasgow, 2 Jur. N. S. 1147, 12 Moore P. C. 355 note, Swab. 145, 5 Wkly. Rep. 10, 14 Eng. Reprint 946; Idle *v.* Royal Exch. Assur. Co., 3 Moore C. P. 115, 8 Taunt. 755, 21 Rev. Rep. 538, 4 E. C. L. 368.

60. *Maine.*— Dunning *v.* Merchants' Mut. Mar. Ins. Co., 57 Me. 108; Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55; Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676.

Massachusetts.— Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249.

United States.— Hartman *v.* The Will, 11 Fed. Cas. No. 6,163, 4 Pa. L. J. 350; The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305.

England.— Somes *v.* Sugrue, 4 C. & P. 276, 19 E. C. L. 513.

Canada.— Orange *v.* McKay, 5 Nova Scotia 444.

See 44 Cent. Dig. tit. "Shipping," § 273.

61. *Louisiana.*— Peck *v.* Nashville Mar., etc., Ins. Co., 6 La. Ann. 148.

Maine.— Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248.

Massachusetts.— Gordon *v.* Massachusetts, etc., F. Ins. Co., 2 Pick. 249.

United States.— The Sarah Ann, 13 Pet. 387, 10 L. ed. 213; The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465.

England.— Cobequid Mar. Ins. Co. *v.* Barteaux, L. R. 6 P. C. 319, 2 Aspin. 536, 32 L. T. Rep. N. S. 510, 23 Wkly. Rep. 892; The Margaret Mitchell, 4 Jur. N. S. 1193, Swab. 382; The Bonita, 30 L. J. Adm. 145, Lush. 252, 5 L. T. Rep. N. S. 141.

See 44 Cent. Dig. tit. "Shipping," § 273.

An extreme or urgent necessity within the meaning of this rule is such a necessity as leaves the master no alternative as a prudent and skilful man, acting *bona fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, except to sell the vessel as she lies. Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466; Chambers *v.* Grantzon, 7 Bosw. (N. Y.) 414; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Herald, 11 Fed. Cas. No. 6,393, 8 Ben. 109; Cobequid Mar. Ins. Co. *v.* Barteaux, L. R. 6 P. C. 319, 2 Aspin. 536, 32 L. T. Rep. N. S. 510, 23 Wkly. Rep. 892.

An absolute necessity is not essential. Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676.

62. Chambers *v.* Grantzon, 7 Bosw. (N. Y.) 414; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Yarkland, 117 Fed. 336 [*affirmed* in 120 Fed. 887, 58 C. C. A. 73]; The Australia, 13 Moore P. C. 132, Swab. 480, 7 Wkly. Rep. 718, 15 Eng. Reprint 50.

63. Dunning *v.* Merchants' Mut. Mar. Ins. Co., 57 Me. 108; The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213; The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305.

so disabled that it cannot proceed upon its voyage without repairs and there are no means of getting repairs made in the place where the vessel is,[64] or the master has no funds or way of raising the necessary means for procuring repairs;[65] or where the injuries are so great that the cost of repairing would be greater than[66] or disproportionate to the value of the vessel.[67]

(III) *Ability to Communicate With Owners.* A master's power of selling the vessel from necessity without consulting the owners arises, however, only where by reason of the distance from the owners or the pressing imminence of the peril to which the vessel is exposed it is not reasonable and practicable to communicate with them.[68] Where practicable, the owners should have an opportunity to decide whether in their judgment the sale is necessary, and if by the ordinary means of conveying intelligence of the situation of the vessel the master can obtain directions from them as to what he should do, he should resort to those means,[69] and if he sells without such communication where it is practicable, the sale is invalid.[70]

(IV) *Good Faith in Making Sale.* It is essential to the validity of such a sale that the necessity therefor and the good faith of the master in making the sale must concur.[71] In determining the necessity for, and in effecting, the sale the master must act with entire good faith,[72] and exercise his best discretion in pursuing the course which will best promote the interests of all concerned.[73] If

Rule of action.— The master must collect the best information his situation and the urgency of the case may admit, in respect to the actual condition and injury of his vessel, the character of her exposure in that situation, and the known and probable means he may command for her relief, and then, if his honest opinion concurs with that of competent persons, whom he may have opportunity to consult, his power to sell is not only complete, but the necessity then becomes an urgent duty upon him to sell for the preservation of the interests of all concerned. The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213; The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305.

64. The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440].

65. The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Glasgow, 2 Jur. N. S. 1147, 12 Moore P. C. 355 note, Swab. 145, 5 Wkly. Rep. 10, 14 Eng. Reprint 946.

66. The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440].

67. Chambers *v.* Grantzon, 7 Bosw. (N. Y.) 414; The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213; Somes *v.* Sugrue, 4 C. & P. 276, 19 E. C. L. 513; The Uniao Vencedora, 33 L. J. Adm. 195, 11 L. T. Rep. N. S. 351; The Australia, 13 Moore P. C. 132, Swab. 480, 7 Wkly. Rep. 718, 15 Eng. Reprint 50; Robertson *v.* Caruthers, 2 Stark. 571, 20 Rev. Rep. 738, 3 E. C. L. 534.

Where it will cost more than one half the value of the vessel to repair her, the master is justified in making a sale from necessity. Dunning *v.* Merchants' Mut. Mar. Ins. Co., 57 Me. 108; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 1,838, 2 Cliff. 440].

68. Peck *v.* Nashville Mar., etc., Ins. Co., 6 La. Ann. 148; Hall *v.* Franklin Ins. Co., 9 Pick. (Mass.) 466; The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213 [*affirming* 21 Fed. Cas. No. 12,342, 2 Sumn. 206]; The Herald, 11 Fed. Cas. No. 6,393, 8 Ben. 409; The Uniao Vencedora, 33 L. J. Adm. 195, 11 L. T. Rep. N. S. 351; The Australia, 13 Moore P. C. 132, Swab. 480, 7 Wkly. Rep. 718, 15 Eng. Reprint 50. But *compare* Scull *v.* Briddle, 21 Fed. Cas. No. 12,569, 2 Wash. 150.

69. The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213 [*affirming* 21 Fed. Cas. No. 12,342, 2 Sumn. 206]; The Yarkland, 117 Fed. 336 [*affirmed* in 120 Fed. 887, 58 C. C. A. 73]; The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252.

70. Miller *v.* Thompson, 60 Me. 322; Gates *v.* Thompson, 57 Me. 442, 99 Am. Dec. 782; The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252.

71. Dunning *v.* Merchants' Mut. Mar. Ins. Co., 57 Me. 108; Chambers *v.* Grantzon, 7 Bosw. (N. Y.) 414; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213; The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465; The William Carey, 29 Fed. Cas. No. 17,689, 3 Ware 313.

72. Peck *v.* Gale, 3 La. 320; Hartman *v.* The Will, 9 Pa. L. J. 111; The Yarkland, 120 Fed. 887, 58 C. C. A. 73 [*affirming* 117 Fed. 336]; The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305; The Fannie, Edw. Adm. 117.

A purchase by the master of the vessel at a sale of necessity by him is invalid. Glover *v.* Ames, 8 Fed. 351.

73. Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676; The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213; The Herald, 11

the master sells in bad faith or without necessity, he is guilty of an unlawful conversion,[74] and the owners are not thereby divested of their title,[75] but may assert their rights of property against the purchasers.[76] The purchasers, however, should be allowed for their expenditures in rescuing and repairing the vessel.[77]

c. Ratification of Sale. An unauthorized sale of the vessel by the master may be subsequently ratified by the owners,[78] as where with an actual or constructive knowledge of the master's acts they accept the proceeds of the sale,[79] unless they are received without the intention of appropriating them,[80] or where with such knowledge they otherwise acquiesce in the master's act.[81]

5. Sale or Other Disposition of Cargo[82] — a. In General. As a general rule the master of a vessel as such has no authority to sell or otherwise dispose of the cargo or any portion thereof,[83] except to the extent that he is specially authorized to do so,[84] and except in a case of necessity;[85] and if he sells without such special authority or such necessity he is personally liable to the shippers,[86] and must account therefor to them,[87] or the owners of the vessel may be held

Fed. Cas. No. 6,393, 8 Ben. 409; The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305; Read *v.* Bonham, 3 B. & B. 147, 6 Moore C. P. 397, 23 Rev. Rep. 587, 7 E. C. L. 653; Hayman *v.* Molton, 5 Esp. 65, 8 Rev. Rep. 837.

Consulting consul.— Before selling in a foreign port the master should consult the consul of his country resident there. The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252.

Consulting surveyors.— While it is not absolutely necessary in such a case that there should be a survey of the vessel before the sale, the master should not sell when in port with a disabled ship without first calling to his aid disinterested persons of skill and experience who are competent to advise after a full survey of the vessel and her injuries, whether she had better be repaired or sold, and although his authority does not depend upon their recommendation, yet if he acts on their advice it is strong evidence in justification of his conduct. Gordon *v.* Massachusetts F., etc., Ins. Co., 2 Pick. (Mass.) 249; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806 [*affirming* 9 Fed. Cas. No. 4,838, 2 Cliff. 440]; The Yarkland, 117 Fed. 336 [*affirmed* in 120 Fed. 887, 58 C. C. A. 73]; The Herald, 11 Fed. Cas. No. 6,393, 8 Ben. 409; Orange *v.* McKay, 5 Nova Scotia 444.

A sale by auction is a prudent and proper step to pursue, but not absolutely necessary. Orange *v.* McKay, 5 Nova Scotia 444.

74. Brightman *v.* Eddy, 97 Mass. 478.

75. Harrison *v.* The Susan Ludwig, 11 Fed. Cas. No. 6,145*a*; Ridgway *v.* Roberts, 4 Hare 106, 30 Eng. Ch. 106, 67 Eng. Reprint 580; The Eliza Cornish, 17 Jur. 738, 1 Spinks 36.

76. The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213 [*affirming* 21 Fed. Cas. No. 12,342, 2 Sumn. 206, and *criticizing* Scull *v.* Briddle, 21 Fed. Cas. No. 12,569, 2 Wash. 150]; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; The Henry, 11 Fed. Cas. No. 6,372, Blatchf. & H. 465.

77. The Sarah Ann, 13 Pet. (U. S.) 387, 10 L. ed. 213 [*affirming* 21 Fed. Cas. No. 12,342, 2 Sumn. 206]; The Henry, 11 Fed. Cas. No. 6,372, Blatchf. & H. 465.

78. Glover *v.* Ames, 8 Fed. 351; The Sarah Harris, 21 Fed. Cas. No. 12,345, 7 Ben. 28.

79. Harris *v.* Burdett, 76 N. Y. 582 [*affirming* 43 N. Y. Super. Ct. 57]; The Sarah Harris, 21 Fed. Cas. No. 12,345, 7 Ben. 28; The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252; Hunter *v.* Parker, 10 L. J. Exch. 281, 7 M. & W. 322.

80. The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252.

81. Johnson *v.* Wingate, 29 Me. 404; The Australia, 13 Moore P. C. 132, Swab. 480, 7 Wkly. Rep. 718, 15 Eng. Reprint 50.

Vague expressions of approval do not amount to a confirmation of the sale if the owners at the time were not aware of the true state of the facts relating thereto. The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252.

82. **Authority as to cargo in general** see *supra*, IV, B, 2, d.

Authority as to purchase of cargo see *supra*, IV, B, 2, e.

83. Peters *v.* Ballistier, 3 Pick. (Mass.) 495; Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Stillman *v.* Hurd, 10 Tex. 109; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465.

84. Peters *v.* Ballistier, 3 Pick. (Mass.) 495; Forrester *v.* Dodge, 12 Mass. 565; Bidenlac *v.* Smith, 31 N. Y. 259; Rapp *v.* Palmer, 3 Watts (Pa.) 178. And see *infra*, IV, B, 5, c.

Authority to dispose of the cargo as he thinks best for the interest of the owner gives the master no authority to sell the cargo to pay the owner's general debts. Peters *v.* Ballistier, 3 Pick. (Mass.) 495.

A general practice of the master in former voyages of selling the cargo on approval by the owners does not give rise to implied authority in him to sell the cargo. Henshaw *v.* Clark, 2 Root (Conn.) 103.

85. See *infra*, IV, B, 5, b.

86. Harper *v.* Corson, 20 N. J. L. 674; Smith *v.* Martin, 6 Binn. (Pa.) 262; Pope *v.* Nickerson, 19 Fed. Cas. No 11,274, 3 Story 465.

87. Redfield *v.* Davis, 6 Conn. 439.

Where the master remits the proceeds to one whom he believes to be the owner, which

liable,[88] or both the master and owners,[89] or the vessel may be held liable for the value of the goods so sold.[90] Furthermore the sale is invalid and confers no title upon the purchaser,[91] unless ratified by the owner.[92]

b. In Case of Necessity — (i) *In General.* It is a well settled rule that the master of a vessel not only has authority, but it is also his duty, to sell the cargo or any part thereof when it becomes necessary for him to do so for the best interests of all concerned.[93] But he must act in good faith in making the sale,[94] and must be unable to communicate with the owners before the necessity for action becomes imperative,[95] and to effect such communication he is bound to use

belief has been encouraged by the acts of the real owner, the master is not liable to the latter for doing so. Low *v.* De Wolf, 8 Pick. (Mass.) 101.

88. Myers *v.* Baymore, 10 Pa. St. 114, 49 Am. Dec. 586.

89. Ewbank *v.* Nutting, 7 C. B. 797, 62 E. C. L. 797.

90. Englehart *v.* The Pedro, 7 Fed. Cas. No. 4,489; Myers *v.* The Harriet, 17 Fed. Cas. No. 9,992.

The shipper's damages are to be measured by the value of the cargo at the place of shipment, together with all expenses and interest from the time of shipment, and if the libellant claims more than this or respondent asks to be discharged for less, they must clearly show the value of the goods at their destination. Myers *v.* The Harriet, 17 Fed. Cas. No. 9,992.

91. Graham *v.* Underwood, 15 La. Ann. 402; Peters *v.* Ballistier, 3 Pick. (Mass.) 495; Stillman *v.* Hurd, 10 Tex. 109; Atlantic Mut. Ins. Co. *v.* Huth, 16 Ch. D. 474, 4 Aspin. 369, 44 L. T. Rep. N. S. 67, 29 Wkly. Rep. 387; Freeman *v.* East India Co., 5 B. & Ald. 617, 1 D. & R. 234, 24 Rev. Rep. 497, 7 E. C. L. 337.

Estoppel.— The purchaser of the cargo of a stranded vessel on a sale by the master will not be heard to say that a sale was necessary by reason of the purchaser's refusal to permit his vessel to be used for a transhipment. The Bridgewater, 4 Fed. Cas. No. 1,864.

92. Stillman *v.* Hurd, 10 Tex. 109.

The commencement of a suit by the owners of the cargo against the master for its value, which he has sold without authority, which suit is abandoned without judgment, is not a ratification of the sale, and does not affect the right to recover against the purchaser. Stillman *v.* Hurd, 10 Tex. 109.

93. *Louisiana.*— Graham *v.* Underwood, 15 La. Ann. 402; Caldwell *v.* Western M. & F. Ins. Co., 19 La. 42, 36 Am. Dec. 667.

Maine.— Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248.

Maryland.— Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

New Jersey.— Harper *v.* Corson, 20 N. J. L. 674.

New York.— Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355; Saltus *v.* Everett, 20 Wend. 267, 32 Am. Dec. 541.

Texas.— Stillman *v.* Hurd, 10 Tex. 109.

United States.— Post *v.* Jones, 19 How. 150, 15 L. ed. 618; The Brewster, 95 Fed. 1000; The Bridgewater, 4 Fed. Cas. No. 1,864; Myers *v.* The Harriet, 17 Fed. Cas. No. 9,992; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465.

England.— Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep. 728, 17 Eng. Reprint 393; Atlantic Mut. Mar. Ins. Co. *v.* Huth, 16 Ch. D. 474, 4 Aspin. 369, 44 L. T. Rep. N. S. 67, 29 Wkly. Rep. 387; Freeman *v.* East India Co., 5 B. & Ald. 617, 1 D. & R. 234, 24 Rev. Rep. 497, 7 E. C. L. 337; Morris *v.* Robinson, 3 B. & C. 196, 5 D. & R. 35, 27 Rev. Rep. 322, 10 E. C. L. 97; The Gratitudine, 3 C. Rob. 240.

See 44 Cent. Dig. tit. "Shipping," §§ 280, 281.

There is a "necessity" for the sale if, under the circumstances of the case, a sale is the best and most prudent thing to be done for the interest of the owners. Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep. 728, 17 Eng. Reprint 393.

If other means of saving the cargo be within the master's reach he must use all proper diligence, taking his situation and the cargo's condition into consideration, to procure such means. Caldwell *v.* Western M. & F. Ins. Co., 19 La. 42, 36 Am. Dec. 667. See also Atlantic Mut. Ins. Co. *v.* Huth, 16 Ch. D. 474, 4 Aspin. 369, 44 L. T. Rep. N. S. 67, 29 Wkly. Rep. 387.

Upon the Great Lakes where voyages are short, harbors of refuge many, and telegraph communications with the owners comparatively easy, a master has no power to sell any portion of the cargo except where an immediate sale is the only alternative to a total loss by a jettison. The Bridgewater, 4 Fed. Cas. No. 1,864

94. Caldwell *v.* Western M. & F. Ins. Co., 19 La. 42, 36 Am. Dec. 667; Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355; The Bridgewater, 4 Fed. Cas. No. 1,864.

Good faith alone is not sufficient if no necessity for the sale exists. Myers *v.* Baymore, 10 Pa. St. 114, 49 Am. Dec. 586.

The master cannot become a purchaser at a sale of the cargo which is sold by his authority as the agent of the owners. Barker *v.* Marine Ins. Co., 2 Fed. Cas. No. 992, 2 Mason 369.

95. The Bridgewater, 4 Fed. Cas. No. 1,864; Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep.

every available means within his power.[96] The master may also in case of urgent necessity throw overboard or otherwise sacrifice his cargo to obtain the release of his distressed vessel,[97] but he has no right to give it away for such a purpose.[98]

(II) *In Case of Wrecked or Disabled Vessel.*[99] In accordance with the above rules, where a vessel becomes disabled, wrecked, or stranded, it is the duty of the master to use all reasonable efforts to have the cargo stored or transshipped and conveyed to its destination;[1] and as a general rule the master has no authority under such circumstances, except in a case of necessity, to sell any part of the cargo at an intermediate port to which his vessel is driven;[2] and if the master breaks up the voyage at an intermediate port he has no authority to sell any part of the cargo to pay for advances made to him in order to repair for a new voyage,[3] or to pay seamen's wages.[4] But where a vessel has become unable

728, 17 Eng. Reprint 393; The Gratitudine, 3 C. Rob. 240.

The master must, if practicable, consult with the cargo owners, otherwise the sale is invalid. Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355; Astsrup *v.* Lewy, 19 Fed. 536; Wagstaff *v.* Anderson, 5 C. P. D. 171, 49 L. J. C. P. 485, 42 L. T. Rep. N. S. 720, 28 Wkly. Rep. 856.

The possibility of communicating with the cargo owner depends on the circumstances of each case, involving a consideration of the facts which create the urgency for an early sale, the distance of the port from the owners, the means of communication which exists, and the general position of the master in the particular emergency. Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep. 728.

Communication only needs to be made where an answer can be obtained, or there is a reasonable expectation that it can be obtained, before sale. Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep. 728.

The fact that the master cannot communicate with all the owners of a general cargo does not of itself justify him in selling without communicating with any of the owners, but this fact is to be considered when an estimate of his conduct has to be formed. Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep. 728.

96. Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248.

The master is bound to employ the telegraph as a means of communication, where it can usefully be done; but the state of the particular telegraph, the way in which it is managed, and the possibility of transmitting explanatory messages are proper subjects to be considered in determining the question of the practicability of communication. Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. N. S. 482, 20 Wkly. Rep. 728, 17 Eng. Reprint 393. See also Pike *v.* Balch, 38 Me. 302, 61 Am. Dec. 248.

97. The Albany, 44 Fed. 431.

Jettison of cargo in general see *infra*, VII, D, 3.

98. The Albany, 44 Fed. 431.

The donee takes no title to the property under such circumstances, but is liable therefor as bailee, and is bound to surrender it on demand to the owner. The Albany, 44 Fed. 431.

99. **Right to sell damaged cargo** see *infra*, VII, D, 11, b.

1. See *infra*, VII, C, 1.

2. Smith *v.* Martin, 6 Binn. (Pa.) 262; Halwerson *v.* Cole, 1 Speers (S. C.) 321, 40 Am. Dec. 603; The Bridgewater, 4 Fed. Cas. No. 1,864 (holding that a sale of the cargo of a stranded vessel by the master is unnecessary, and therefore void, if he can tranship or store the cargo, or if he has any other alternative which a prudent owner on the spot would adopt); Englehart *v.* The Pedro, 8 Fed. Cas. No. 4,489; Watt *v.* Potter, 29 Fed. Cas. No. 17,291, 2 Mason 77; Atlantic Mut. Ins. Co. *v.* Huth, 16 Ch. D. 474, 4 Aspin. 369, 44 L. T. Rep. N. S. 67, 29 Wkly. Rep. 387; Freeman *v.* East India Co., 5 B. & Ald. 617, 1 D. & R. 234, 24 Rev. Rep. 497, 7 E. C. L. 337; Cannan *v.* Meaburn, 1 Bing. 243, 1 L. J. C. P. O. S. 84, 8 Moore C. P. 127, 8 E. C. L. 491; Van Omeron *v.* Dowick, 2 Campb. 42, 11 Rev. Rep. 656. See also Cammell *v.* Sewell, 5 H. & N. 728, 6 Jur. N. S. 918, 29 L. J. Exch. 350, 2 L. T. Rep. N. S. 799, 8 Wkly. Rep. 639.

In case of shipwreck the master will be justified in selling the cargo only by a legal necessity, and not by the fact that a prudent owner would sell or that a sale would be best for all concerned. Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131, 13 Pick. 543.

A usage at the place where the disaster occurred for the master of a stranded vessel to sell the cargo without necessity is void. Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131, 13 Pick. 543.

Communication with owners.— Where the cargo of a stranded vessel is landed without damage, and it is not of a perishable nature and might be kept until the owners can be heard from, the master has no authority to sell it without consulting the owners and insurers. Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131, 13 Pick. 543.

3. Watt *v.* Potter, 29 Fed. Cas. No. 17,291, 2 Mason 77.

4. Watt *v.* Potter, 29 Fed. Cas. No. 17,291, 2 Mason 77.

to proceed upon her voyage without repairs or supplies, and the master is otherwise unable to raise funds to procure the same, he may, if he acts in good faith, sell so much of the cargo as may be necessary to put him in funds to make repairs or obtain the necessary supplies;[5] but before selling any of the cargo, the master should avail himself of all reasonable means to raise funds otherwise for such purposes, and the sale is not justified if it is made without his attempting to raise funds by hypothecation of the vessel or by maritime contract.[6] The master may also be justified, where his vessel is in a port of distress, in selling so much of the cargo as is of a perishable nature and damaged;[7] or where the vessel is in need of repairs, and the delay for repairs will be longer than is consistent with the preservation of that part of the cargo which is perishable,[8] and it cannot be reshipped to its port of destination except at a ruinous expense,[9] or ruinous loss in value.[10] The above rules have no application to a wreck in a distant ocean where the property is derelict or about to become so.[11]

c. Sale at Port of Destination. Where a cargo has reached its port of destination, the master ordinarily has no authority to sell any part of it,[12] unless he is specially authorized to do so,[13] as where it is consigned to him for sale,[14] or unless it is of a perishable nature, and the consignees refuse to receive it, and it cannot be readily stored in a place suitable to preserve it.[15] Where a master

5. Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 203; Myers *v.* The Harriet, 17 Fed. Cas. No. 9,992; Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226; Watt *v.* Potter, 29 Fed. Cas. No. 17,291, 2 Mason 77; The Gratitudine, 3 C. Rob. 240.

Right of cargo owner to restrain master from selling see Rayne *v.* Benedict, 5 Jur. 598, 10 L. J. Ch. 297.

Shipper's lien.— Shippers whose goods are disposed of to raise money for necessary repairs have a lien upon the vessel for the value of the goods at the port of destination. The Boston, 3 Fed. Cas. No. 1,669, Blatchf. & H. 309; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465. See also Hill *v.* The Oregon, 1 La. 543; Atkinson *v.* Stephens, 7 Exch. 567, 21 L. J. Exch. 329.

The master of a whale ship has a right to ship to a foreign port oil enough to raise money for his necessary disbursements, but if he sells in large excess thereof he may be compelled to account as though he had received it on a final division at a settlement of the voyage. Babcock *v.* Terry, 97 Mass. 482.

6. Myers *v.* The Harriet, 17 Fed. Cas. No. 9,992; Atkinson *v.* Stephens, 7 Exch. 567, 21 L. J. Exch. 329.

Except where he is clearly unable to procure funds on the credit of the ship or to hypothecate the cargo, the master has no authority to sell the cargo in order to make repairs. The Harriet, 11 Fed. Cas. No. 6,094.

7. Smith *v.* Martin, 6 Binn. (Pa.) 262; Stillman *v.* Hurd, 10 Tex. 109; Maas *v.* The Pedee, 15 Fed. Cas. No. 8,652; The Veronica Madre, 18 Fed. Cas. No. 16,923, 10 Ben. 24. And see *infra*, VII, D, 11, b.

Where the cargo is materially damaged, the master need not wait a great length of time at a heavy expense to overhaul, repack, and reship it, where little or nothing can be saved thereby, but he may exercise a sound discretion and sell it for the benefit of all concerned. Robertson *v.* Western Mar., etc., Ins. Co., 19 La. 227, 36 Am. Dec. 673.

Where a cargo is so much injured that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to land and sell the cargo at the place where the necessity arises, although it might have been carried to the port of destination, and there landed. Jordan *v.* Warren Ins. Co., 13 Fed. Cas. No. 7,524, 1 Story 342.

8. The Velona, 28 Fed. Cas. No. 16,912, 3 Ware 139.

9. Hooper *v.* Rathbone, 12 Fed. Cas. No. 6,676, Taney 519.

10. Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355.

If the cargo can be conveyed to its place of destination without a loss exceeding fifty per cent, the master should convey it there and not sell it. Bryant *v.* Commonwealth Ins. Co., 6 Pick. (Mass.) 131, 13 Pick. 543.

11. Post *v.* Jones, 19 How. (U. S.) 150, 15 L. ed. 618 (holding that a sale by the master of the derelict cargo of a whaling vessel, wrecked in Behring strait, to the masters of other vessels who have rescued him and his crew, is not a valid contract and gives no title to the purchasers, who must be treated as salvors of the cargo); Jones *v.* The Richmond, 13 Fed. Cas. No. 7,492. But see Jones *v.* The Richmond, 13 Fed. Cas. No. 7,491.

12. Everett *v.* Saltus, 15 Wend. (N. Y.) 474 [*affirmed* in 20 Wend. 267, 32 Am. Dec. 541]; United Ins. Co. *v.* Scott, 1 Johns. (N. Y.) 106; Moore *v.* Hill, 38 Fed. 330.

13. Jones *v.* Hoyt, 23 Conn. 157 (fraudulent purchase by master); Smith *v.* Davenport, 34 Me. 520; Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

14. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

15. The Maria White, 16 Fed. Cas. No. 9,083, 1 Hask. 204.

with authority to sell the goods on arrival at the port of destination has unsuccessfully used all reasonable efforts to effect a sale, and is under the necessity of leaving the port with his vessel, he is justified in committing the goods to a responsible merchant there for sale.[16]

C. Individual Rights and Privileges[17] — **1. In General.** The individual rights and privileges of the master of a vessel in the voyage or its results ordinarily depend upon the terms of his agreement with the owners.[18] He may be given a right or privilege to traffic on his own account;[19] but unless expressly given, the master cannot exercise a right or privilege which is inconsistent with his agency.[20] A master has no right to take any member of his family on the voyage free of charge, without a distinct understanding to that effect with the owners.[21]

2. Rights as to Freight. The freight, money, or its equivalent, on a cargo generally belongs to the owners of the vessel and not to the master;[22] but the owners cannot enforce the payment of freight against the shippers until the demands of the master thereon are satisfied.[23] Where by the shipping papers the master is made directly responsible to the seamen for their wages, he may retain freight to indemnify himself.[24]

D. Wages and Other Remuneration[25] — **1. In General.** A master's right to compensation, whether in the form of wages[26] or commissions,[27] the term

The master need not await the expiration of lay days, in which the cargo is to be discharged, before sale (The Maria White, 16 Fed. Cas. No. 9,083, 1 Hask. 204), nor is he bound to sell the cargo until after the expiration of such days, but may in the meantime keep the cargo in the ship (Robbins *v.* Codman, 4 E. D. Smith (N. Y.) 315).

16. Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621; Day *v.* Noble, 2 Pick. (Mass.) 615, 13 Am. Dec. 463; Lawler *v.* Keaquick, 1 Johns. Cas. (N. Y.) 174.

Where consignees are selected by a ship's master or supercargo in a foreign port, according to usage and in good faith, they are so far the agents of the owners that, upon the death of such master or supercargo, his representatives are not responsible for the consequences of such consignees' misconduct or neglect in the execution of their agency after his death, not imputable to instructions previously given by such master or supercargo while living. Pawson *v.* Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

17. Insurable interest of master see Marine Insurance, 26 Cyc. 556.

Rights and liabilities of master who sails vessel on shares see *supra*, III, Q.

18. See Manter *v.* Holmes, 10 Metc. (Mass.) 402; Bray *v.* Bates, 9 Metc. (Mass.) 237.

Where it is agreed that the master may be interested to a certain extent in the profit and loss of the shipment, he has merely a right to participate in the profits, but no special or general property in the goods. Fleming *v.* Bevan, 2 Pa. St. 408.

19. Mathewson *v.* Clarke, 6 How. (U. S.) 122, 12 L. ed. 370.

Where the master is given the privilege of loading a certain amount of goods at a certain port for his own profit as a part of his compensation, and the owner changes the voyage so as to omit to touch at that port, he must make a reasonable indemnity to the master for his loss. Pawson *v.* Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

Loss of vessel.— Where a master who is also supercargo sails under a special agreement as to his compensation, and after the loss of his vessel at a foreign port charters another and proceeds to traffic as before, informing his partners of his willingness to continue under the same agreement, to which they do not object, the business of the new vessel must be regulated by the same rules which governed the transaction of the old vessel. Mathewson *v.* Clarke, 6 How. (U. S.) 122, 12 L. ed. 370.

20. Roorbach *v.* North River Steamboat Co., 6 Johns. Ch. (N. Y.) 469 (holding that the captain of a steamboat has no right to make a contract for carriage on board the boat on his own account, and that the owners are entitled to call for an assignment of such contract); Mathewson *v.* Clarke, 6 How. (U. S.) 122, 12 L. ed. 370.

21. Marshall *v.* Crawford, 16 Fed. Cas. No. 9,126, 4 Sawy. 37; Winsor *v.* The Sampson, 30 Fed. Cas. No. 17,888, 1 Sprague 548.

22. Fitzpatrick *v.* Smith, 1 Desauss. Eq. (S. C.) 340.

Where a master loans a part of the money received for freight and takes a note therefor payable to himself, and dies before the note is paid, his administrator will not be entitled to reclaim it, as such note is the property of the owner of the vessel held by the master in trust, and clearly distinguishable from other assets belonging to his estate. Thompson *v.* White, 45 Me. 445.

23. Lane *v.* Penniman, 4 Mass. 91.

24. Goodridge *v.* Lord, 10 Mass. 483.

25. Accounting for moneys received as condition precedent to claiming wages see *supra*, IV, B, 1, b.

Compensation of master who takes a share of the proceeds or profits see *supra*, III, Q.

26. Woodbury *v.* Brazier, 48 Me. 302.

Estoppel to claim wages as against a purchaser of the vessel see The Richmond, 20 Fed. Cas. No. 11,795*a*.

27. Woodbury *v.* Brazier, 48 Me. 302 (hold-

for which he is entitled to compensation,[28] and the amount and manner of payment[29] depend upon the terms of his contract as construed with the custom or usage existing at the place of employment,[30] and upon his proper performance of his services thereunder.[31] Unless his contract stipulates to the contrary, a master is entitled to his wages during the time the vessel is detained without his fault;[32] but he is not entitled to wages as such for time subsequent to his actually ceasing to serve as master,[33] as where he is discharged in a foreign port, unless there is a stipulation therefor, he is not entitled to wages for the period occupied in returning to the port of his employment.[34] The fact that the master is also a part-owner of the vessel does not affect his right to wages due him.[35]

2. Extra Compensation. As a general rule a master is entitled to extra compensation for services rendered out of the line of his duties;[36] as where his vessel is lost he is entitled on a *quantum meruit* for services rendered in saving and trans-

ing that a master engaged under a contract for monthly wages and commissions is entitled to commissions on sums received for demurrage); Babcock *v.* Terry, 1 Fed. Cas. No. 702, 1 Lowell 66; Stavers *v.* Curling, 3 Bing. N. Cas. 355, 2 Hodges 237, 6 L. J. C. P. 41, 3 Scott 740, 32 E. C. L. 169.

A right to commission on sales and investments does not entitle the master to a commission on freight. Miller *v.* Livingston, 1 Cai. (N. Y.) 349.

The master of a whaling vessel may be allowed a commission for selling the oil after the voyage is ended (Slocum *v.* Swift, 22 Fed. Cas. No. 12,954, 2 Lowell 212), but in the absence of an express stipulation in his contract he has no right to charge a commission on money paid out to the crew in the course of the voyage (Babcock *v.* Terry, 1 Fed. Cas. No. 702, 1 Lowell 66).

A master who is the real shipper is not entitled to commissions, especially where he is free from risk. Parker *v.* McIver, 1 Desauss. Eq. (S. C.) 274, 1 Am. Dec. 656.

28. Woodbury *v.* Brazier, 48 Me. 302; Kells *v.* Boyd, 31 Fed. 621, holding that the wages should be computed from the time of the employment.

A receipt in full by a master, wrongfully discharged, for his wages to the time of his discharge, is no bar to a libel for wages for the residue of his term, where the receipt is not intended as a settlement for the wrongful discharge. Fee *v.* Orient Guano Mfg. Co., 44 Fed. 430 [*affirming* 36 Fed. 509].

29. Stanwood *v.* Flagg, 98 Mass. 124, holding that, where there is no express stipulation for payment in gold, a master may pay himself out of the freight money due to him in a British port, in sterling.

30. The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334, holding that where it is the custom of steamboat owners to hire masters for the season at a yearly salary payable in ten equal parts, the season being understood to begin with March and end with December, a master who continues with the vessel after such an employment without any further special contract will be implied to continue the hiring according to such usage.

Partial payment.— Where it is the custom to hire masters for the season, which season is understood to begin and end with certain dates, the master is entitled to recover a proportionate part of his salary when his services do not commence or terminate with the season. The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

31. The Chieftain, Brown. & L. 104, 9 Jur. N. S. 388, 32 L. J. Adm. 106, 8 L. T. Rep. N. S. 120, 11 Wkly. Rep. 537, holding that the master is entitled to his wages if he performs his duties as master, although during his service he does not sleep on board the vessel, and many of his duties are performed on shore. See also The Rajah *v.* Cochin, Swab. 473.

Part performance.— Where a part only of a master's service is performed, such proportion of his remuneration should be allowed as appears just on comparing the services rendered under the voyage as originally contemplated, with those remaining unperformed. Pawson *v.* Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

32. Swift *v.* Tatner, 89 Ga. 660, 15 S. E. 842, 32 Am. St. Rep. 101. See also Gillingham *v.* Charleston Tow-boat, etc., Co., 40 Fed. 649.

33. Moore *v.* Jones, 15 Mass. 424. But see The Camilla, Swab. 312, 6 Wkly. Rep. 840.

Where a master abandons his vessel to the insurers he cannot recover wages for the time subsequent to his ceasing to actually serve as master. Jenkins *v.* Wheeler, 2 Abb. Dec. (N. Y.) 442, 3 Keyes 645, 4 Transcr. App. 250, 37 How. Pr. 458 [*affirming* 4 Rob. 575].

34. Pawson *v.* Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213; Peters *v.* Speights, 4 Md. Ch. 375; Lombard Steamship Co. *v.* Anderson, 134 Fed. 568, 67 C. C. A. 432.

35. The Joseph Dexter, 20 L. T. Rep. N. S. 820; The D. Jex, 13 L. T. Rep. N. S. 22; Guildford *v.* Anglo-France Steamship Co., 9 Can. Sup. Ct. 303, 2 Can. L. T. Occ. Notes 250 [*affirming* 1 Can. L. T. Occ. Notes 554, 14 Nova Scotia 54]; The Aura, Young Adm. (Nova Scotia) 54.

36. Slocum *v.* Swift, 22 Fed. Cas. No. 12,954, 2 Lowell 212; String *v.* Hill, 23 Fed. Cas. No. 13,535, 1 Crabbe 454, painting the ship.

Rate.— Extra services performed by a master immediately after his employment has ceased should be paid for at the rate pre-

mitting the funds or proceeds of the vessel to the owners;[37] but he is not entitled to extra compensation for services which are within the line of his duties as master.[38] Under some statutes it has been held that a master is entitled to extra wages if there is a delay in the payment of his wages without sufficient cause.[39]

3. Forfeiture and Deductions. A master forfeits his right to wages where he is guilty of negligence or misconduct which results in a serious damage or loss to the owners,[40] as where the vessel is lost by his negligence or misconduct,[41] or where he changes the voyage contrary to his instructions.[42] But where the negligence or misconduct does not cause serious injury or inconvenience to the owners, it does not effect a forfeiture of his wages,[43] although in such a case the owners may be entitled to deduct or offset the damages actually sustained against the wages due to the master.[44] Nor will a master incur the penalty of a forfeiture of his wages by a mere error of judgment, although it results in a loss.[45] Habitual intoxication of the master will effect a forfeiture of his wages,[46] but occasional

viously paid him. The Cimbria, 156 Fed. 378.

37. Duncan *v.* Reed, 39 Me. 415, 63 Am. Dec. 635; McGilvery *v.* Stackpole, 38 Me. 283, 61 Am. Dec. 245, holding further that such services must be in the implied employment of the owners and not merely for himself.

38. Bartlette *v.* The Viola, 2 Fed. Cas. No. 1,083 (holding that the master is not entitled to additional pay for standing on watch as pilot); Slocum *v.* Swift, 22 Fed. Cas. No. 12,954, 2 Lowell 212 (holding that the master is not entitled to extra pay for services rendered as cooper while the cooper is ill).

39. Under the British Merchant Shipping Act (17 & 18 Vict. 104) the master is entitled to double pay for a delay in the payment of wages due him unless he himself causes the delay. The Wexford, 7 Fed. 674; Covert *v.* The Wexford, 3 Fed. 577. These cases relied upon The Princess Helena, 30 L. J. Adm. 137, 4 L. T. Rep. N. S. 869, Lush. 190, which put such a construction upon this statute. But The Princess Helena, *supra*, was expressly overruled in The Arina, 12 P. D. 118, 6 Aspin. 141, 56 L. J. P. D. & Adm. 57, 57 L. T. Rep. N. S. 121, 35 Wkly. Rep. 654, which held that the master was not entitled to double pay in such a case under this statute. See also The Turgot, 11 P. D. 21, 5 Aspin. 548, 54 L. T. Rep. N. S. 276, 34 Wkly. Rep. 552; The Rainbow, 5 Aspin. 479, 53 L. T. Rep. N. S. 91.

40. The Fairport, 10 P. D. 13, 5 Aspin. 348, 54 L. J. Adm. 3, 52 L. T. Rep. N. S. 62, 33 Wkly. Rep. 448; The Marina, 50 L. J. P. D. & Adm. 33, 29 Wkly. Rep. 508.

Where a vessel is driven ashore by reason of the master's wilful disobedience of his direct and positive orders, he forfeits all right to wages. The Huron, 6 Can. L. T. Occ. Notes 127.

41. Latham *v.* West, 5 Mart. (La.) 573.

42. Codwise *v.* Hacker, 1 Cai. (N. Y.) 526 (holding that in such a case he forfeits all wages); Robinson *v.* Hinckley, 20 Fed. Cas. No. 11,954, 2 Paine 457; The Roebuck, 2 Aspin. 387, 31 L. T. Rep. N. S. 274.

43. Pawson *v.* Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213; The Carlotta, 30 Fed. 378; The Joseph Dexter, 20 L. T. Rep. N. S. 820.

Smuggling by the master, where it is not gross and attended with serious damage or loss to the owner, is not visited with a penalty of forfeiture of wages. Freeman *v.* Walker, 6 Me. 68; Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161.

Bringing distilled spirits on board.—A clause of the shipping articles prohibiting the bringing on board of distilled spirits is not broken by the master by carrying Madeira wine on board, and he does not thereby incur a forfeiture of his wages. Parsons *v.* Terry, 18 Fed. Cas. No. 10,782, 1 Lowell 60.

44. Freeman *v.* Walker, 6 Me. 68; Jenkins *v.* Wheeler, 4 Rob. (N. Y.) 575 [*affirmed* in 2 Abb. Dec. 442, 3 Keyes 645, 4 Transcr. App. 450, 37 How. Pr. 458]; Brennan *v.* Hagen, 147 Fed. 290. See also Lombard Steamship Co. *v.* Anderson, 134 Fed. 568, 67 C. C. A. 432; Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161; The Repulse, 4 Notes of Cas. 169; Sylvain *v.* Canadian Forwarding, etc., Co., 10 Quebec Super. Ct. 195 [*reversing* 7 Quebec Super. Ct. 256].

Where the master's misconduct is not the proximate cause of the owner's damages, such damages cannot be set up in recoupment against the master's claim for wages. Smith *v.* Osborn, 143 Mass. 185, 9 N. E. 558.

45. Marshall *v.* Crawford, 16 Fed. Cas. No. 9,126, 4 Sawy. 37; The Dunmore, 2 Aspin. 599, 32 L. T. Rep. N. S. 340; The Atlantic, 9 Jur. N. S. 183, 7 L. T. Rep. N. S. 647, 11 Wkly. Rep. 188; The Camilla, Swab. 312, 6 Wkly. Rep. 840. See also The Alexander Williams, Young Adm. (Nova Scotia) 217.

Mere error of judgment on the part of the master, in the management of the concerns of a vessel in a foreign port, unaccompanied by corrupt intention or wilful disobedience of orders, will not *per se* entail a forfeiture of his wages. The Thomas Worthington, 6 Notes of Cas. 570, 3 W. Rob. 128.

46. The Macleod, 5 P. D. 254, 50 L. J. P. D. & Adm. 6, 29 Wkly. Rep. 34; The Roebuck, 2 Aspin. 387, 31 L. T. Rep. N. S. 274 (holding that constant drunkenness on the part of the master, whether there is proof of

acts of this kind if unaccompanied with neglect of duty will not have this effect.[47] A master's wages may also be forfeited by desertion.[48]

4. Wreck or Capture of Vessel. As a general rule a master's wages as such cease from the time the vessel and cargo pass out of his hands upon the vessel's becoming wrecked,[49] or captured;[50] but he may recover for wages which were earned before the loss.[51] Moreover after such wreck or capture a new duty devolves upon the master, who is bound to remain by the vessel and use all reasonable endeavors to rescue or recover the property and transmit the proceeds to the owner, and for such services he is entitled to recover a reasonable compensation.[52]

5. Persons Liable.[53] Ordinarily the person liable for a master's wages and disbursements is the person who employs him.[54] If he is employed by the owners of a chartered vessel he cannot recover for his services from the charterer, although the latter is required by the charter-party to pay a certain sum per month as the master's wages.[55] The master of a stranded vessel who remains with her does so as agent of whoever may be ultimately determined to be her owner in consequence of that event, and is entitled to recover wages for such services from such person.[56]

6. Primage. Primage, which is an allowance by the shippers to the master for his care and trouble relative to the cargo,[57] formerly belonged, by custom or usage, to the master for his own use,[58] unless he otherwise agreed with the own-

neglect of duty or not, will work a forfeiture of either the whole or a part of his wages according to circumstances); The Atlantic, 9 Jur. N. S. 183, 7 L. T. Rep. N. S. 647, 11 Wkly. Rep. 188.

47. The Roebuck, 2 Aspin. 387, 31 L. T. Rep. N. S. 274; The Atlantic, 9 Jur. N. S. 183, 7 L. T. Rep. N. S. 647, 11 Wkly. Rep. 188.

48. The Roebuck, 2 Aspin. 387, 31 L. T. Rep. N. S. 274, holding, however, that there is not an absolute desertion working a forfeiture of the whole of his wages, if there is an intention of returning upon the part of the master.

49. McGilvery *v.* Stackpole, 38 Me. 283, 61 Am. Dec. 245.

50. Smith *v.* Gilbert, 4 Day (Conn.) 105; Moore *v.* Jones, 15 Mass. 424; Arfridson *v.* Ladd, 12 Mass. 173.

Qualification of rule.— Where a person contracts to act as flag captain, that is, to act as captain toward belligerents, and to look after the interests of owners in case of capture or condemnation, another person in fact being master of the vessel, his compensation for such services is not to be regarded as wages of a master mariner, and does not cease on the capture of the vessel. Arfridson *v.* Ladd, 12 Mass. 173.

51. Moore *v.* Jones, 15 Mass. 424; Ferguson *v.* Fitt, 1 N. C. 239; Hawkins *v.* Twizell, 5 E. & B. 883, 2 Jur. N. S. 302, 25 L. J. Q. B. 160, 4 Wkly. Rep. 242, 85 E. C. L. 883.

52. Smith *v.* Gilbert, 4 Day (Conn.) 105; Duncan *v.* Reed, 39 Me. 415, 63 Am. Dec. 635.

The master of a neutral ship which is captured is bound to remain by the ship until condemnation, or a recovery is hopeless, and his wages after the capture and until condemnation, etc., are a charge to be paid by the owners. Willard *v.* Dorr, 29 Fed. Cas. No. 17,680, 3 Mason 161.

53. Liability of mortgagee in possession see *supra*, II, F, 6.

54. Hynes *v.* Kirkman, 4 La. 47, holding that where the master of a vessel owned by a firm is employed by one of the partners, but is compelled by the latter's fault to leave before the expiration of his term, he may recover wages for the whole term from the firm or either partner.

Trustees holding the title of a vessel and controlling and managing her for the benefit of others are liable for the wages of a master appointed by them. Winsor *v.* Sampson, 30 Fed. Cas. No. 17,888, 1 Sprague 148.

A part-owner who has agreed with the other owners to run the vessel on shares, and pay her disbursements, is personally liable to a master whom he has employed for all his wages and disbursements. Douse *v.* Sargent, 48 Fed. 695.

55. McGilvrey *v.* Capen, 7 Gray (Mass.) 523.

56. Hume *v.* Frenz, 150 Fed. 502, 80 C. C. A. 320 [*reversing* 141 Fed. 481], holding that where an abandonment of a vessel in such a case is subsequently accepted by the insurers, although it may be months afterward, it relates back to the date of the stranding and the master is from that time their agent for whose wages they are liable.

57. See Primage, 31 Cyc. 1172.

58. Peters *v.* Speights, 4 Md. Ch. 375; Best *v.* Saunders, 7 L. J. K. B. O. S. 50, M. & M. 208, 3 M. & R. 4, 22 E. C. L. 511.

Where there was no custom at the port of shipment making primage payable, the master was not entitled thereto, although the bill of lading provided for the payment of freight at a certain rate "with primage and average accustomed." Vose *v.* Morton, 5 Gray (Mass.) 594.

Where the owners received payment in respect to primage from the freighters, the master was entitled to recover it from them, where there was nothing in the agreement between them mentioning primage. Charle-

ers.[59] The later rule, however, seems to be that primage belongs to the owners or freighters and is but an increase of the freight rate,[60] and is no longer a gratuity to the master unless so expressly stipulated.[61]

7. Reimbursement For Personal Expenses. A master is entitled to reimbursement or indemnity for all expenses or liabilities incurred by him in the line of his duties as agent of the owners,[62] such as expenses of board and medical attendance rendered to the master in a sickness incurred in the vessel's service;[63] but he is not entitled to reimbursement for expenses and liabilities incurred by him not in the line of his duties as master,[64] or contrary to the owner's instructions,[65] or which are caused by his own wrong.[66] The master is also entitled to expenses incurred by him in going from the place at which he is employed to the place where he is to take charge of his vessel;[67] but in case of a discharge or other termination of his relation in a foreign port he is not entitled to the expenses of a return trip,[68] unless his contract of employment so stipulates.[69]

ton *v.* Coatesworth, R. & M. 175, 21 E. C. L. 725.

59. Peters *v.* Speights, 4 Md. Ch. 375; Caughey *v.* Gordon, 3 C. P. D. 419, 27 Wkly. Rep. 50; Scott *v.* Miller, 3 Bing. N. Cas. 811, 5 Scott 11, 32 E. C. L. 373.

Nothing but an express agreement could deprive a master of his right to recover primage from the freighter. Best *v.* Saunders, 7 L. J. K. B. O. S. 50, M. & M. 208, 3 M. & R. 4, 22 E. C. L. 511, holding further that an agreement by the master to receive from the owner a fixed sum in full of all primage and other allowances did not divest the master of this right.

60. Carr *v.* Austin, etc., R. Co., 14 Fed. 419, 4 Woods 327.

61. Carr *v.* Austin, etc., R. Co., 14 Fed. 419, 4 Woods 327, holding that where the charter-party makes no mention of primage none can be allowed, although it has been stipulated for in the bill of lading. See also The Ismaele, 14 Fed. 491 [*affirmed* in 22 Fed. 559].

Where the owners promise the master five per cent on freight as collected, and they make insurance on the freight, and the vessel is lost and no freight earned, the master cannot maintain an action for primage, although the owners collect their insurance. Pedrick *v.* Fisher, 19 Fed. Cas. No. 10,900, 1 Sprague 565.

The right of a master to primage is an insurable interest, but the owners are not bound to insure such right of the master. Pedrick *v.* Fisher, 19 Fed. Cas. No. 10,900, 1 Sprague 565.

62. Woodbury *v.* Brazier, 48 Me. 302; Henderson *v.* Sevey, 2 Me. 139; The Limerick, 1 P. D. 411, 3 Aspin. 206, 34 L. T. Rep. N. S. 708; The Albion, 1 Aspin. 481, 27 L. T. Rep. N. S. 723; The Chieftain, Brown & L. 104, 9 Jur. N. S. 388, 32 L. J. Adm. 106, 8 L. T. Rep. N. S. 120, 11 Wkly. Rep. 537. See also The Dora Tully, 5 Aspin. 550, 54 L. T. Rep. N. S. 467. But *compare* The Governor Carey, 10 Fed. Cas. No. 5,645*a*, 2 Hask. 487, holding that a master cannot recover for expenses in saving the cargo from wreck where his contract requires its delivery at the port of destination as a prerequisite to the earning of freight.

The expense of regulating the master's chronometer, where he uses it for the benefit of the vessel solely, should be borne by the ship. Winsor *v.* Sampson, 30 Fed. Cas. No. 17,888, 1 Sprague 548.

Defense on criminal charge.—Where a master, while at a foreign port, incurs expenses in defending himself against a criminal charge maliciously brought by the members of the crew whom he has censured for misconduct, he is entitled to the expenses of his defense, on the ground that the charge originated directly from the performance by him of his duty to his owners in chastising the men. The James Seddon, L. R. 1 A. & E. 62, 12 Jur. N. S. 609, 35 L. J. Adm. 117, 14 Wkly. Rep. 973.

63. Duncan *v.* Reed, 39 Me. 415, 63 Am. Dec. 635; Van Lier *v.* Dord, 28 Fed. Cas. No. 16,862.

Where the expenses of the last sickness and funeral of the master of a vessel are paid by the consignee according to the custom of the port where he lives, he is entitled to reimbursement. Winthrop *v.* Carleton, 12 Mass. 4.

64. Barker *v.* York, 3 La. Ann. 90, holding that the owners are not liable for fees of counsel employed by the master in resisting his removal, where their interests conflict with the course pursued by the master.

65. Rennell *v.* Kimball, 5 Allen (Mass.) 356.

66. The Limerick, 1 P. D. 411, 3 Aspin. 206, 34 L. T. Rep. N. S. 708 [*reversing* 1 P. D. 292, 45 L. J. P. D. & Adm. 97].

67. Woodbury *v.* Brazier, 48 Me. 302.

68. Woodbury *v.* Brazier, 48 Me. 302; Peters *v.* Speights, 4 Md. Ch. 375.

A statute allowing extra pay to seamen discharged from service in a foreign port does not apply to the master of a vessel. Woodbury *v.* Brazier, 48 Me. 302.

69. Lombard Steamship Co. *v.* Anderson, 134 Fed. 568, 67 C. C. A. 432, holding that where, by his contract of employment, the master is to be returned to the port of shipment at the termination of his employment, and he is discharged at a foreign port, he is entitled to the expense of his passage to the port of his employment. See also Slocum *v.* Swift, 22 Fed. Cas. No. 12,954, 2 Lowell 212.

8. Liens For Wages and Disbursements[70] **— a. Lien For Wages.** As a general rule the presumption is that the master of a vessel trusts to the personal credit of the owners for his wages,[71] and is not entitled to a lien therefor on the vessel,[72] or on goods consigned to his owners,[73] unless he contracts to render the services on the credit of the vessel,[74] or unless such a lien is given by statute.[75]

70. Lien for wages of seamen see Seamen, 35 Cyc. 1230.

Maritime liens in general see Maritime Liens, 26 Cyc. 743.

71. McDowell *v.* The Lena Mowbray, 71 Fed. 720.

72. *Illinois.*— Chauncey *v.* Jackson, 9 Ill. 435.

Missouri.— Lancaster *v.* The Hardin, 28 Mo. 351.

New York.— Tisdale *v.* Grant, 12 Barb. 411; Jenkins *v.* Wheeler, 4 Rob. 575 [*affirmed* in 2 Abb. Dec. 442, 3 Keyes 645, 4 Transcr. App. 450, 37 How. Pr. 458].

Pennsylvania.— Fisher *v.* Willing, 8 Serg. & R. 118.

United States.— The Orleans *v.* Phoebus, 11 Pet. 175, 9 L. ed. 677; The Louis Olsen, 57 Fed. 845, 6 C. C. A. 608 [*reversing* 52 Fed. 652] (construing California statutes); Howard *v.* The Georgia, 46 Fed. 669; The Wyoming, 36 Fed. 493; The M. Vandercook, 24 Fed. 472; The Short Cut, 6 Fed. 630; Adams *v.* The Wyoming, 1 Fed. Cas. No. 71, 2 N. J. L. J. 275; Bartlette *v.* The Viola, 2 Fed. Cas. No. 1,083; Drinkwater *v.* The Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145; The Dubuque, 7 Fed. Cas. No. 4,110, 2 Abb. 20; Dudley *v.* The Superior, 7 Fed. Cas. No. 4,115, Newb. Adm. 176; Gardner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223; The Gate City, 10 Fed. Cas. No. 5,267, 5 Biss. 200; The Grace Darling, 10 Fed. Cas. No. 5,651, 2 Hask. 278; The Grand Turk, 10 Fed. Cas. No. 5,683, 1 Paine 73; The Havana, 11 Fed. Cas. No. 6,226, 1 Sprague 402; The Monongahela, 17 Fed. Cas. No. 9,712, 5 Biss. 131; Phillips *v.* The Thomas Scattergood, 19 Fed. Cas. No. 11,106, Gilp. 1; Revens *v.* Lewis, 20 Fed. Cas. No. 11,711, 2 Paine 202; Zollinger *v.* The Emma, 30 Fed. Cas. No. 18,218. See also The D. C. Salisbury, 7 Fed. Cas. No. 3,694, Olcott 71; The Island City, 13 Fed. Cas. No. 7,109, 1 Lowell 375.

See 44 Cent. Dig. tit. "Shipping," § 305.

Upon the Great Lakes, as upon the high seas, the master is not entitled to any lien on the vessel for his wages, and this rule is not affected by the fact that the owners have appointed a purser who is the financial officer of the vessel, and has the custody of the freight money. The Nebraska, 75 Fed. 598, 21 C. C. A. 448.

Additional services.— The master cannot enforce a lien for additional services as clerk or manager without showing a special contract designating the extra compensation. The Gate City, 10 Fed. Cas. No. 5,267, 5 Biss. 200.

A sailing master has a lien for his wages. The Carlotta, 30 Fed. 378.

Who is master.— One to whom the navigation, discipline, and control of the vessel are intrusted must be considered as master, within the meaning of the above rule, although another is registered as such. Pond *v.* The Hattie Thomas, 59 Fed. 297. But an engineer of a steam dredge, who is the highest officer on the dredge and who directs the firemen and any other hands aboard, but has no authority to engage or dismiss hands or purchase supplies, is not such a master. McNamara *v.* The Atlantic, 53 Fed. 607.

73. Vowell *v.* Bacon, 28 Fed. Cas. No. 17,018, 4 Cranch C. C. 97.

74. Radowitch *v.* Siewerd, 25 La. Ann. 315; Pond *v.* The Hattie Thomas, 59 Fed. 297. See also McDowell *v.* The Lena Mowbray, 71 Fed. 720.

75. Chauncey *v.* Jackson, 9 Ill. 435; Eymar *v.* Lawrence, 8 La. 38; The William M. Hoag, 69 Fed. 742 [*affirmed* in 168 U. S. 437, 443, 18 S. Ct. 114, 42 L. ed. 537], holding that, where a state statute gives a lien for wages without excepting masters from its benefits, the federal courts will uphold the lien of a master on a vessel plying between points on a river at which are stationed agents having authority to conduct the vessel's business.

Master as part-owner.—A statute giving a lien for master's wages will not be enforced by a federal court in favor of a master who is also a part-owner. McDowell *v.* The Lena Mowbray, 71 Fed. 720. See also The Raritan *v.* McCloy, 10 Mo. 534.

Intervention.—A master cannot, by an intervening libel, avail himself of an original libel in order to obtain the benefit of a statutory lien for wages which has expired by limitation. The Short Cut, 6 Fed. 630.

Pennsylvania act of April 20, 1858, gives the master a lien for his wages on domestic vessels navigating the Allegheny, Monongahela, and Ohio rivers. Parker *v.* The Little Acme, 43 Fed. 925, holding, however, that where a sheriff seizes and takes possession of a steamboat, and runs the same without the consent or knowledge of the owners, one who acts as master and pilot during that time must look to the sheriff for his compensation and has no lien against the boat.

In England a master has a lien for his wages on the vessel under the Merchants' Shipping Act of 1894, and prior similar statutes. The Panthea, 1 Aspin. 133, 25 L. T. Rep. N. S. 389; The Rajah of Cochin, Swab. 473. See also The Havana, 11 Fed. Cas. No. 6,226, 1 Sprague 402; The Ringdove, Swab. 310. Such a lien of the master extends to his claim for extra services for a delay in payment of which he is not the cause (The Wexford, 7 Fed. 674), but the lien attaches only to the vessel in which the wages were earned (The Julindur, 1 Spinks 71). Under the Admiralty Court Act of 1861 the master was held to have such a lien. See The Edwin,

But it has been held that the master has a lien for his wages on the freight,[76] or on the cargo to the extent of the freight earned thereof.[77]

b. Lien For Disbursements and Damages. As a general rule the master of a vessel who has made necessary advances or disbursements from his own funds for expenses and liabilities incurred during the voyage has, at common law, and in some jurisdictions by statute, a lien therefor on the vessel,[78] and freight,[79] and

Brown. & L. 281, 33 L. J. Adm. 197, 10 L. T. Rep. N. S. 658, 12 Wkly. Rep. 992. For cases holding a contrary doctrine prior to the enactment of such statutes see Smith *v.* Plummer, 1 B. & Ald. 575, 19 Rev. Rep. 391; Wilkins *v.* Carmichael, Dougl. (3d ed.) 101, 99 Eng. Reprint 70; Bristow *v.* Whitmore, 9 H. L. Cas. 391, 8 Jur. N. S. 291, 31 L. J. Ch. 467, 4 L. T. Rep. N. S. 622, 9 Wkly. Rep. 621, 11 Eng. Reprint 781 [*reversing* 4 De G. & J. 325, 6 Jur. N. S. 29, 28 L. J. Ch. 807, 1 L. T. Rep. N. S. 173, 61 Eng. Ch. 255, 45 Eng. Reprint 126, and *affirming* Johns. 96, 70 Eng. Reprint 354, 4 Kay & J. 743, 70 Eng. Reprint 308, 28 L. J. Ch. 801, 7 Wkly. Rep. 150].

In Canada a master is entitled by statute to a lien on the vessel for his wages. Symes *v.* The City of Windsor, 4 Can. Exch. 362 [*affirmed* in 4 Can. Exch. 400]; Reide *v.* The Queen of the Isles, 3 Can. Exch. 258. But *compare* Bergman *v.* The Aurora, 3 Can. Exch. 228.

76. Adams *v.* The Wyoming, 1 Fed. Cas. No. 71, 2 N. J. L. J. 275; Drinkwater *v.* The Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145. But see Shaw *v.* Gookin, 7 N. H. 16; Jenkins *v.* Wheeler, 4 Rob. (N. Y.) 575 [*affirmed* in 2 Abb. Dec. 442, 3 Keyes 645, 4 Transcr. App. 450, 37 How. Pr. 458]; Van Bokkelin *v.* Ingersoll, 5 Wend. (N. Y.) 315 [*reversing* 7 Cow. 670]; Smith *v.* Plummer, 1 B. & Ald. 575, 19 Rev. Rep. 391; Atkinson *v.* Cotesworth, 3 B. & C. 647, 10 E. C. L. 294, 1 C. & P. 339, 12 E. C. L. 203, 5 D. & R. 552, 3 L. J. K. B. O. S. 104, 27 Rev. Rep. 450, holding that the master has no lien on the freight for wages, unless it is a matter of stipulation between himself and the owners.

Where the master does not unload the cargo he is only entitled to a lien upon such of the freight as the vessel has actually earned, that being the freight less what it costs to unload. The Arcturus, 17 Fed. 95.

77. The Arcturus, 17 Fed. 95. But see Jenkins *v.* Wheeler, 4 Rob. (N. Y.) 575 [*affirmed* in 2 Abb. Dec. 442, 3 Keyes 645, 4 Transcr. App. 450, 37 How. Pr. 458].

78. Sturtevant *v.* Brewer, 4 Bosw. (N. Y.) 628; The Louis Olsen, 57 Fed. 845, 6 C. C. A. 608 [*reversing* 52 Fed. 652]; Gardner *v.* The New Jersey, 9 Fed. Cas. No. 5,233, 1 Pet. Adm. 223.

In England, under the Merchants' Shipping Act of 1894 and prior similar statutes, the master has a lien on his vessel for all disbursements and liabilities properly incurred by him on account of the vessel. Morgan *v.* Castlegate Steamship Co., [1893] A. C. 38, 7 Aspin. 284, 62 L. J. P. C. 17, 68 L. T. Rep. N. S. 99, 1 Reports 97, 41 Wkly. Rep. 349; The Ripon City, [1897] P. 226, 8 Aspin. 304, 66 L. J. P. D. & Adm. 110, 77 L. T. Rep. N. S. 98; The Orienta, [1895] P. 49, 7 Aspin. 529, 64 L. J. P. D. & Adm. 32, 71 L. T. Rep. N. S. 711, 11 Reports 687. It was formerly held that the Admiralty Court Act of 1861 gave the master a maritime lien on his vessel for disbursements (The Feronia, L. R. 2 A. & E. 65, 37 L. J. Adm. 60, 17 L. T. Rep. N. S. 619, 16 Wkly. Rep. 585; The Mary Ann, L. R. 1 A. & E. 8, 12 Jur. N. S. 31, 35 L. J. Adm. 6, 13 L. T. Rep. N. S. 384, 14 Wkly. Rep. 136; The Fairport, 8 P. D. 48, 5 Aspin. 62, 52 L. J. Adm. 21, 48 L. T. Rep. N. S. 536, 31 Wkly. Rep. 616; The Panthea, 1 Aspin. 133, 25 L. T. Rep. N. S. 389; The Edwin, Brown. & L. 281, 33 L. J. Adm. 197, 10 L. T. Rep. N. S. 658, 12 Wkly. Rep. 992; The Glentanner, Swab. 415), but the doctrine of these cases was later overruled and it was held that such act did not give the master such a lien (The Sara, 14 App. Cas. 209, 6 Aspin. 413, 58 L. J. P. D. & Adm. 57, 61 L. T. Rep. N. S. 26, 38 Wkly. Rep. 129). For cases, prior to such statutes, holding that the master had no such lien see Wilkins *v.* Carmichael, Dougl. (3d ed.) 101, 99 Eng. Reprint 70; Hussey *v.* Christie, 9 East 426, 103 Eng. Reprint 636, 13 Ves. Jr. 594, 33 Eng. Reprint 636; Bristow *v.* Whitemore, 9 H. L. Cas. 391, 31 L. J. Ch. 467, 8 Jur. N. S. 291, 4 L. T. Rep. N. S. 622, 9 Wkly. Rep. 621, 11 Eng. Reprint 781 [*reversing* 4 De G. & J. 425, 6 Jur. N. S. 29, 28 L. J. Ch. 807, 1 L. T. Rep. N. S. 173, 61 Eng. Ch. 255, 45 Eng. Reprint 126, and *affirming* Johns. 96, 70 Eng. Reprint 354, 4 Kay & J. 743, 70 Eng. Reprint 308, 28 L. J. Ch. 801, 7 Wkly. Rep. 150].

In Canada by statute, the master of a vessel is given a lien for disbursements made and liabilities incurred by him on account of the vessel. Detroit Third Nat. Bank *v.* Symes, 4 Can. Exch. 400; Reide *v.* The Queen of the Isles, 3 Can. Exch. 258. But see prior to statute Land *v.* Malden, 5 U. C. Q. B. 309.

Insurance received for the vessel's loss is not covered by such a lien. Eymar *v.* Lawrence, 8 La. 38.

79. Call *v.* Richards, 1 Gray (Mass.) 179; Lewis *v.* Hancock, 11 Mass. 72; Sturtevant *v.* Brewer, 4 Bosw. (N. Y.) 628; Van Bokkelin *v.* Ingersoll, 5 Wend. (N. Y.) 315 [*reversing* 7 Cow. 670] (holding that a master has a lien upon freight for port fees, repairs, supplies, and all necessary expenses in a foreign port, and that payment thereof to the ship-owner does not discharge such lien after notice to the consignee); Drinkwater *v.* The Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; Morgan *v.* Castlegate Steamship

cargo,[80] which may be enforced after the return of the vessel to her home port.[81] A master has no lien on the vessel for unliquidated damages for a breach of his contract of employment.[82]

c. What Law Governs. As a general rule a master's rights relative to his lien for wages and disbursements are governed by the law of the flag, or in other words, by the law of the country to which his vessel belongs,[83] and the admiralty courts of the United States will enforce a lien given by the law of such country, although in the particular case the master is not entitled to a lien under the laws of the United States;[84] but where the contract is made in a foreign port, in the absence of evidence as to the law there, the general maritime law of the forum will be presumed to control.[85]

d. Priorities.[86] A master's lien for wages, where it exists,[87] and also his lien for disbursements ordinarily takes priority over all other claims against the vessel[88] except claims for salvage,[89] and for damages by collision,[90] and except claims for which the master is personally responsible.[91] Thus it has been held that a master's lien for wages or disbursements outranks claims of holders of bottomry bonds on which the master is not personally liable,[92] and claims for necessaries.[93]

Co., [1893] A. C. 38, 7 Aspin. 284, 62 L. J. P. C. 17, 68 L. T. Rep. N. S. 99, 1 Reports 97, 41 Wkly. Rep. 349 (holding, however, that the Merchant Shipping Act of 1889 under which such lien exists, gives a lien only in cases in which the master has authority to pledge the credit of the owner); White *v.* Baring, 4 Esp. 22, 6 Rev. Rep. 836. But see Smith *v.* Plummer, 1 B. & Ald. 575, 19 Rev. Rep. 391; Atkinson *v.* Cotesworth, 3 B. & C. 647, 10 E. C. L. 294, 1 C. & P. 339, 12 E. C. L. 203, 5 D. & R. 552, 3 L. J. K. B. O. S. 104, 27 Rev. Rep. 450.

80. Newhall *v.* Dunlap, 14 Me. 180, 31 Am. Dec. 45, holding that where a master has authority to purchase a cargo, and he draws a bill making himself personally liable, and with the proceeds purchases a cargo, he has a lien thereon for his indemnity which is not destroyed by the death of the owner.

81. Sturtevant *v.* Brewer, 4 Bosw. (N. Y.) 628.

82. The Laurel, 113 Fed. 373.

The master has no lien upon the certificate of registry or ship's papers in case of a wrongful dismissal. The St. Olaf, 2 P. D. 113, 3 Aspin. 268, 35 L. T. Rep. N. S. 423. See also Gibson *v.* Ingo, 6 Hare 112, 31 Eng. Ch. 112, 67 Eng. Reprint 1103.

83. The Velox, 21 Fed. 479; Covert *v.* The Wexford, 3 Fed. 577; The Countess of Dufferin, 6 Fed. Cas. No. 3,280, 10 Ben. 155.

Nationality of vessel.—Where a citizen of the United States contracts with another also a citizen, to act as master of a vessel which carries the British flag and is registered in the name of a British subject, but of which fact the master is ignorant until after the contract is made, as between them the vessel is a United States vessel and the master's right to a lien is governed by the law of the United States and not by the law of England. Chisholm *v.* The J. L. Pendergast, 32 Fed. 415 [*reversing* 29 Fed. 127].

84. The Felice B., 40 Fed. 653 (Italian vessel); The Angela Maria, 35 Fed. 430 (Italian vessel); Covert *v.* The Wexford, 3 Fed. 577.

85. Howard *v.* The Georgia, 46 Fed. 669. See also The Countess of Dufferin, 6 Fed. Cas. No. 3,280, 10 Ben. 155.

86. Priority of maritime liens in general see MARITIME LIENS, 26 Cyc. 802.

87. See *supra*, IV, D, 8, a.

88. The Panthea, 1 Aspin. 133, 25 L. T. Rep. N. S. 389.

A master's lien on freight is prior to the liens of general creditors. Drinkwater *v.* The Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145. See also Call *v.* Richards, 1 Gray (Mass.) 179.

89. The Panthea, 1 Aspin. 133, 25 L. T. Rep. N. S. 389.

90. The Pride of the Ocean, 7 Fed. 247; The Panthea, 1 Aspin. 133, 25 L. T. Rep. N. S. 389. *Compare* The Adolph, 7 Fed. 501.

91. The Monadnock, 17 Fed. Cas. No. 9,704, 5 Ben. 357. See also MARITIME LIENS, 26 Cyc. 806 text and note 46.

92. The Felice B., 40 Fed. 353; The Irma, 13 Fed. Cas. No. 7,064, 6 Ben. 1; The Daring, L. R. 2 A. & E. 260, 37 L. J. Adm. 29; The Hope, 1 Aspin. 563, 28 L. T. Rep. N. S. 287; The Salacia, 9 Jur. N. S. 27, 32 L. J. Adm. 41, 7 L. T. Rep. N. S. 440, 11 Wkly. Rep. 189.

Where the master binds himself by such bond, he cannot compete with the bondholder for his wages. The Salacia, 9 Jur. N. S. 27, 32 L. J. Adm. 41, 7 L. T. Rep. N. S. 440, 11 Wkly. Rep. 189; The Jonathan Goodhue, Swab. 524; The William, Swab. 346, 6 Wkly. Rep. 871.

93. The Queen, 19 L. T. Rep. N. S. 706.

A shipwright's lien is postponed to a master's claim for wages earned prior to the repairs. The Gustaf, 31 L. J. Adm. 207, 6 L. T. Rep. N. S. 660, Lush. 506.

But where a master who as part-owner orders necessaries for the ship and the necessaries are supplied and the master becomes liable for payment, the materialmen are entitled to be paid for the necessaries out of the proceeds of the ship and freight, in priority to a claim of the master for wages and disbursements. The Jennie Lind, L. R. 3 A. & E. 529, 1 Aspin. 294, 41 L. J. Adm.

It has also been held that a master's lien against the vessel for wages or disbursements is to be preferred to claims of mortgagees of the vessel.[94]

e. Loss of Lien. A master's lien may be lost or waived by his acts inconsistent therewith,[95] as by his unreasonably delaying to enforce it,[96] or by his failing to pay for his stock in the company owning the vessel.[97]

E. Liabilities of Master[98] **— 1. In General.** As a general rule the master of a vessel is personally liable on all contracts made by him relative to the ordinary employment of the vessel,[99] as for necessary supplies or repairs,[1] unless he contracts on the owner's credit,[2] or stipulates against his own liability,[3] or unless the person furnishing the supplies has funds of the owner in his hands sufficient to pay therefor.[4] Where a master acts as bailee of certain articles he is not liable for their loss if he uses ordinary care in keeping them.[5]

2. For Negligence or Misconduct — a. In General. It is the duty of a master to use reasonable skill, care, and diligence in the performance of his duties, and if he does so he is not liable to his owners for losses arising from unavoidable accidents, mere errors of judgment, or failure of success;[6] but he is personally liable for damages caused by his negligence or misconduct[7] to passen-

63, 26 L. T. Rep. N. S. 591, 20 Wkly. Rep. 895.

94. The Mary Ann, L. R. 1 A. & E. 8, 12 Jur. N. S. 31, 35 L. J. Adm. 6, 13 L. T. Rep. N. S. 384, 14 Wkly. Rep. 136; The Limerick, 1 P. D. 411, 3 Aspin. 206, 34 L. T. Rep. N. S. 708; The Hope, 1 Aspin. 563, 28 L. T. Rep. N. S. 287; The Chieftain, Brown. & L. 212; Bristow *v.* Whitmore, 9 H. L. Cas. 391, 8 Jur. N. S. 291, 31 L. J. Ch. 467, 4 L. T. Rep. N. S. 622, 9 Wkly. Rep. 621, 11 Eng. Reprint 781; Symes *v.* The City of Windsor, 4 Can. Exch. 462 [*affirmed* in 4 Can. Exch. 400]. *Compare* Lister *v.* Payn, 11 Sim. 348, 34 Eng. Ch. 348, 59 Eng. Reprint 908.

The master's lien is prior to ordinary claims by mortgagees, but not to any portion of the mortgage debt, the payment of which the master has personally guaranteed to the mortgagees. The Bangor Castle, 8 Aspin. 156, 74 L. T. Rep. N. S. 768.

95. See Covert *v.* The Wexford, 3 Fed. 577; The Rainbow, 5 Aspin. 479, 53 L. T. Rep. N. S. 91.

The release of a personal claim against the owners by the master does not release the vessel from his lien. The Chieftain, Brown. & L. 212.

The acceptance of a promissory note by the master from part of the coöwners for the amount of his claim, which note has never been paid, does not take away his lien upon the ship, although sold to and paid for by a third party in ignorance of the debt. The Aura, Young Adm. (Nova Scotia) 54.

Taking a mortgage on the ship does not cause the master to lose his lien. The Albion, 1 Aspin. 481, 27 L. T. Rep. N. S. 723.

96. The Chieftain, Brown. & L. 212.

97. The Short Cut, 6 Fed. 630, holding that such failure of a master will defeat his claim for wages under a statute giving him a lien, in advance of the payment of the debts of the vessel.

98. Liability of master for wages of seamen see Seamen, 35 Cyc. 1227.

Liability of master of tug on promise to pay for injury to tow see Towage.

99. Stocker *v.* Corlett, 3 Brev. (S. C.) 236; Sydnor *v.* Hurd, 8 Tex. 98; Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558, holding that a master is personally liable on a contract for the transportation of goods in discharge of a debt due from him, part of which does not rest on a maritime contract.

Surgical attention.—Where the master of a vessel on which a hoy has been injured by the negligence of the crew takes him to the office of a physician and requests that surgical attention be given him, and the attention is given, the physician can recover from the master for the services rendered. Berry *v.* Pusey, 80 Ky. 166.

1. Henshaw *v.* Rollins, 5 La. 335, 25 Am. Dec. 180; Mead *v.* Buckner, 2 La. 282; Sydnor *v.* Hurd, 8 Tex. 98; The Elmville, [1904] P. 319, 9 Aspin. 606, 73 L. J. P. D. & Adm. 104, 91 L. T. Rep. N. S. 151; Essery *v.* Cobb, 5 C. & P. 358, 24 E. C. L. 604.

Where supplies are ordered for a ship by the owner before the appointment of the master, although some are not delivered until afterward, yet as no personal credit is given to the master, he is not answerable for any of them. Farmer *v.* Davies, 1 T. R. 108, 1 Rev. Rep. 159.

2. Stocker *v.* Corlett, 3 Brev. (S. C.) 236; Sydnor *v.* Hurd, 8 Tex. 98; Essery *v.* Cobb, 5 C. & P. 358, 24 E. C. L. 604. See also The Serapis, 37 Fed. 436.

3. Sydnor *v.* Hurd, 8 Tex. 98.

4. Bissell *v.* Boznam, 17 N. C. 229, holding that a person furnishing supplies to a master in a foreign port for the use of his vessel cannot charge the master therefor if such person subsequently has funds of the owner in his hands sufficient to reimburse himself, although he pays them over without deduction.

5. Pender *v.* Robbins, 51 N. C. 207.

6. Dean *v.* Angus, 7 Fed. Cas. No. 3,703, Bee 378.

7. Goldenbow *v.* Wright, 13 La. 371; Hennen *v.* Munroe, 11 Mart. (La.) 579; White *v.* McDonough, 29 Fed. Cas. No. 17,552, 3 Sawy. 311.

gers,[8] third persons on or about his vessel,[9] or to his owners,[10] as for barratry.[11] A master is also liable for damages caused by his negligence or misconduct to shippers,[12] as where he fails or refuses to deliver any part of the cargo in accordance with the bill of lading pertaining thereto;[13] but he is not so liable if he exercises proper care and diligence in receiving and caring for the cargo.[14]

Injunction against master for infringement of patent see Adair *v.* Young, 12 Ch. D. 13, 40 L. T. Rep. N. S. 598.

Indorsement of bill of lading.—Where there is no legal and just claim for demurrage or otherwise, it is the master's duty to give a clear bill of lading, and if he indorses an unfounded claim upon it he is liable for nominal damages, although he honestly believes such claim to be valid, but he is not liable in such a case for vindictive or punitive damages. Paterson *v.* Dakin, 31 Fed. 682.

Where a master issues a fraudulent bill of lading, he is liable in damages to an assignee thereof in good faith who makes advances thereon, and where he is part-owner of the vessel such damages may be recovered against the vessel to the extent of his interest therein. Montell *v.* The William H. Rutan, 17 Fed. Cas. No. 9,724.

8. Keene *v.* Lizardi, 5 La. 431, 25 Am. Dec. 197.

Gambling.—A master is liable to make good the loss, where a common gambler cheats a minor passenger out of a sum of money, and he fails after notice to compel restitution. Smith *v.* Wilson, 22 Fed. Cas. No. 13,128, 31 How. Pr. (N. Y.) 272.

9. Rhodes *v.* Roberts, 1 Stew. (Ala.) 145; Eyre *v.* Norsworthy, 4 C. & P. 502, 19 E. C. L. 622; Tarleton *v.* McGawley, 1 Peake N. P. 205, 3 Rev. Rep. 689.

Licensee.—A master is liable to a person invited to go aboard his vessel, for personal injuries caused by the master's negligence in piling goods along the passageway to the vessel. Leathers *v.* Blessing, 105 U. S. 626, 26 L. ed. 1192.

10. Brannan *v.* Hoel, 15 La. Ann. 308; Brown *v.* Smith, 12 Cush. (Mass.) 366 (holding that the master of a whaling vessel is liable to the owners for essentially violating any of the material orders or instructions under which he sails); Reeves *v.* Burrows, 1 Nott & M. (S. C.) 427; Union Ins. Co. *v.* Dexter, 52 Fed. 152; Atkyns *v.* Burrows, 2 Fed. Cas. No. 618, 1 Pet. Adm. 244.

See 44 Cent. Dig. tit. "Shipping," § 309.

Where the owners are compelled to pay a fine or damages by reason of the master's misconduct, the master is liable over to the owners for the amount so paid. Brannan *v.* Hoel, 15 La. Ann. 308; Purveyance *v.* Angus, 1 Dall. (Pa.) 180, 1 L. ed. 90 (holding further that the court may, under favorable circumstances, reduce the *quantum* of damages below what the owners have paid); Bucklin *v.* Miller, 12 Wash. 152, 40 Pac. 732.

Where a master improperly discharges the mate he is liable to the owners for damages occurring to them thereby. Atkyns *v.* Burrows, 2 Fed. Cas. No. 618, 1 Pet. Adm. 244.

Damages.—Where the master of a whaling vessel abandons the voyage and wrongfully sells the property of the owners on board, reasonable damages for breaking up the voyage may be recovered in an action against him, but conjectural or possible profits cannot be taken into consideration; and the subsequent collection from him of a part of the proceeds of such sale is no bar to an action against him for breaking up the voyage and disposing of the property, but merely reduces the damages. Brown *v.* Smith, 12 Cush. (Mass.) 366.

Waiver.—Where the owners of a vessel take the cargo of their master and state that they find no fault with him, they thereby waive his disobedience of orders in sailing on a different voyage from the one he was instructed to follow. Codwise *v.* Hacker, 1 Cai. (N. Y.) 526.

Temporary insanity of the master resulting from exhaustion caused by his efforts to save the vessel from destruction is a good defense to an action against him for the negligent destruction of his vessel. Williams *v.* Hays, 157 N. Y. 541, 52 N. E. 589, 68 Am. St. Rep. 797, 43 L. R. A. 253.

11. Anonymous, 2 Ch. Cas. 238, 22 Eng. Reprint 925.

Definition and essentials of barratry see Marine Insurance, 26 Cyc. 657 *et seq.*

12. Union Ins. Co. *v.* Dexter, 52 Fed. 152; Kennedy *v.* Dodge, 14 Fed. Cas. No. 7,701, 1 Ben. 311; Knox *v.* The Ninetta, 14 Fed. Cas. No. 7,912, Crabbe 534, 5 Pa. L. J. 33, holding that where the master violates a contract not to take additional cargo he becomes an insurer and is liable for any loss which may afterward occur.

Liability of master for lost or stolen goods see Watkinson *v.* Laughton, 8 Johns. (N. Y.) 213; Morse *v.* Slue, 1 Vent. 190, 238, 86 Eng. Reprint 129, 159.

The fact that the master subjects the cargo to a risk of possible damage or destruction does not render him personally liable, if no damage actually occurs. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

13. Stille *v.* Traverse, 23 Fed. Cas. No. 13,444, 3 Wash. 43.

Conversion.—An unjustifiable refusal by a master to proceed on the voyage or deliver the cargo will be a conversion of it. Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151. But where a master has issued bills of lading in good faith to a person returning shipping receipts, issued to the true owner on his putting the goods on board for transportation, he is not liable in trover to the shipper on a demand of the goods, unless the shipper upon making such demand surrenders the bills of lading, or indemnifies him against them and against all damages arising from the delay necessary to unload the goods. Keyser *v.* Harbeck, 3 Duer (N. Y.) 373.

14. Cheviot *v.* Brooks, 1 Johns. (N. Y.)

b. Acts of Subordinates. The master of a vessel is ordinarily liable for the acts of all persons under, or supposed to be under, his command while engaged about their ordinary duties as subordinate officers of the vessel or as seamen.[15] Where part of the cargo is lost by the negligence and misconduct of the crew, the master must contribute, with the crew, his proportionate part of the loss.[16] Where a pilot is hired to accompany a vessel on a voyage he is under the command of the master of the vessel, and the master is liable for his acts of negligence or misconduct while in the performance of his duties;[17] but where the pilot is a compulsory one, that is, one whom the master of a vessel is required by statute to take on board for the pilotage of his vessel in or out of certain ports, the master ordinarily is not liable for his acts.[18]

3. Liability of Either Master or Owner, or Both. Whilst in maritime law, the master as well as the owners of a vessel is liable as a common carrier,[19] yet they are liable severally and not jointly,[20] and the master is liable only for reasonable care and diligence and the exercise of such skill as his position is supposed to require.[21] The rule seems to be well settled that parties contracting with a master in a foreign port for repairs or supplies for his vessel have a double remedy against the master or the owners on the contract,[22] unless such liability be excluded, as to the one or the other of them, by the express terms of the contract,[23] and they may sue either the master or the owners of the vessel or both simultaneously,[24] and in enforcing this double remedy they may proceed by separate actions against the owners or master *in personam*, or the vessel *in rem*, either simultaneously or at different periods.[25]

364; Mepham *v.* Biesel, 9 Wall. (U. S.) 370, 19 L. ed. 677 [*affirming* 3 Fed. Cas. No. 1,450, 1 Woolw. 225].

15. Daret *v.* Gray, 12 La. Ann. 394; Keene *v.* Lizardi, 5 La. 431, 25 Am. Dec. 197; Kennedy *v.* Ryall, 67 N. Y. 379 [*affirming* 40 N. Y. Super. Ct. 347] (holding that the master is liable to the same extent as though he were the owner, for the negligent acts of those under his authority, whether such persons are employed by the owner or master); Denison *v.* Seymour, 9 Wend. (N. Y.) 9.

The visit of the health officer to the vessel does not divest the master of his general power and control, or relieve him from liability for the negligence of his subordinates. Ryall *v.* Kennedy, 40 N. Y. Super. Ct. 347 [*affirmed* in 67 N. Y. 379].

16. Crammer *v.* The Fair American, 6 Fed. Cas. No. 3,347, 1 Pet. Adm. 242 (holding that the master must contribute according to his wages for goods lost by an embezzlement by a part of the crew); Wilson *v.* The Belvidere, 30 Fed. Cas. No. 17,790, 1 Pet. Adm. 258.

17. Martin *v.* Farnsworth, 33 N. Y. Super. Ct. 246, 41 How. Pr. 59 [*affirmed* in 49 N. Y. 555]; Denison *v.* Seymour, 9 Wend. (N. Y.) 9. But *compare* Davis *v.* Houren, 6 Rob. (La.) 255 (holding that the captain of a towboat is not liable to the owners for a collision, caused by the pilot, where he was asleep during the pilot's watch, as it is physically impossible for the master to be always on deck and he is not liable for every act or omission of the other officers); Aldrich *v.* Simmons, 1 Stark. 214, 2 E. C. L. 87.

18. The Octavia Stella, 6 Aspin. 182, 57 L. T. Rep. N. S. 632; Oakley *v.* Speedy, 4 Aspin. 134, 40 L. T. Rep. N. S. 881, holding that the master is not liable to penalties for infringement of rules of navigation where the ship is in charge of a compulsory pilot. See also Snell *v.* Rich, 1 Johns. (N. Y.) 305.

19. Rochereau *v.* The Hausa, 14 La. Ann. 431 (holding that the master and owners of a vessel are liable for the acts of stevedores employed by them to load their vessel); Patton *v.* Magrath, 1 Rice (S. C.) 162, 33 Am. Dec. 98; Bissell *v.* Mepham, 3 Fed. Cas. No. 1,450, 1 Woolw. 225 [*affirmed* in 9 Wall. 370, 19 L. ed. 677]; White *v.* McDonough, 29 Fed. Cas. No. 17,552, 3 Sawy. 311.

20. Le Blanc *v.* Sweet, 107 La. 355, 31 So. 766, 90 Am. St. Rep. 303 (holding that where an action is brought against the owner and the master of a vessel for injuries to a passenger and the master acted only in his representative capacity, the owner alone is liable); Walston *v.* Meyers, 50 N. C. 174; Patton *v.* Magrath, 1 Rice (S. C.) 162, 33 Am. Dec. 98.

21. Bissell *v.* Mepham, 3 Fed. Cas. No. 1,450, Woolw. 225 [*affirmed* in 9 Wall. 370, 19 L. ed. 677]. See also *supra*, IV, E, 2, a.

22. Mead *v.* Buckner, 2 La. 282; Marquand *v.* Webb, 16 Johns. (N. Y.) 89; Stocker *v.* Corlett, 3 Brev. (S. C.) 236; *Ex p.* Bland, 2 Rose 91.

23. *Ex p.* Bland, 2 Rose 91.

24. Zacharie *v.* Kirk, 14 La. Ann. 433.

25. Henshaw *v.* Rollins, 5 La. 335, 25 Am. Dec. 180; Bissell *v.* Bozman, 17 N. C. 229; Brookman *v.* The Rebecca Fogg, 4 Fed. Cas. No. 1,941; Rich *v.* Coe, Cowp. 636, 98 Eng. Reprint 1281; Frechette *v.* Martin, 21 Quebec Super. Ct. 417. See also The Felice B., 40 Fed. 653.

Joinder of proceeding in rem and in personam for same cause in admiralty see Admiralty, 1 Cyc. 848.

F. Actions[26] **— 1. Nature and Form of Remedy.** A master's proper remedy for his wages and disbursements is ordinarily by an action *in personam* against the owners,[27] and he has no right to proceed *in rem* against the vessel therefor,[28] except where a lien on the vessel therefor is created by statute,[29] or by the law of the flag of the vessel.[30] A master who is improperly discharged cannot maintain a libel in admiralty to compel the owners to fulfil his contract with him,[31] but his proper remedy is an action at law for damages for the breach of the contract.[32] The owners of a vessel may sue her master in admiralty for damages caused by his wrongful acts,[33] as may also a passenger who is injured thereby.[34] Trover lies against the owners of a vessel for a wrongful sale by the master of cargo under circumstances not inconsistent with the general scope of his authority.[35] A master who has a lien on goods for his disbursements may maintain trover against one who converts the goods;[36] but trover will not lie against the master for cargo unless the freight is paid or tendered or the payment thereof is waived,[37] or for goods which were lost so that they did not come to the use of the master.[38] Where a master who is also part-owner sells the cargo and receives the proceeds, another

26. Actions on charter-party against master see *supra*, III, R, 2.

Prosecutions against master under immigration laws see ALIENS, 2 Cyc. 124.

27. Chauncey *v.* Jackson, 9 Ill. 435; Loring *v.* Loring, 64 Me. 556 (holding that he may maintain an action at law to recover his wages and disbursements); Bartlette *v.* The Viola, 2 Fed. Cas. No. 1,083; Hammond *v.* Essex F., etc., Ins. Co., 11 Fed. Cas. No. 6,001, 4 Mason 196 (holding that a master may sue in admiralty *in personam* for his wages); The Larch, 14 Fed. Cas. No. 8,085, 2 Curt. 427; The Leonidas, 15 Fed. Cas. No. 8,262, Olcott 12. See also The Grand Trunk, 10 Fed. Cas. No. 5,683, 1 Paine 73.

Jurisdiction of the city court of New York over marine causes under Code Civ. Proc. § 317 see Warn *v.* Easton, etc., Transit Co., 2 N. Y. Suppl. 620, holding, however, that a master's action for wages is not a marine cause within the meaning of such statute.

28. Borden *v.* The Eagle, 1 Ohio Dec. (Reprint) 473, 10 West. L. J. 137; The Grand Trunk, 10 Fed. Cas. No. 5,683, 1 Paine 73; The Leonidas, 15 Fed. Cas. No. 8,26°, Olcott 12. *Compare* L'Arina *v.* The Exchange, 14 Fed. Cas. No. 8,088, Bee 198.

29. The William M. Hoag, 168 U. S. 443, 18 S. Ct. 114, 42 L. ed. 537 [*affirming* 69 Fed. 742]; Whitney *v.* The Mary Gratwick, 29 Fed. Cas. No. 17,591, 2 Sawy. 342. See also The W. B. Hall, 8 Can. L. T. Occ. Notes 169.

Under the British Merchants' Shipping Acts a master has a right *in rem* for his wages and such disbursements as were necessary for the navigation of his vessel. The Beeswing, 5 Aspin. 484, 53 L. T. Rep. N. S. 554; The Marco Polo, 1 Aspin. 54, 24 L. T. Rep. N. S. 804; The Feronia, L. R. 2 A. & E. 65, 37 L. J. Adm. 60, 7 L. T. Rep. N. S. 619, 16 Wkly. Rep. 585. See also The Caledonia, 2 Jur. N. S. 48, Swab. 17, 4 Wkly. Rep. 183. Such statutes extend to the masters of foreign ships and give them a remedy against the ship and freight for wages (The Milford, 4 Jur. N. S. 417, Swab. 362, 6 Wkly. Rep. 554), but it has been held that the jurisdiction of the court of admiralty over causes of wages of foreign masters is discretionary only (The Herzogin Marie, 5 L. T. Rep. N. S. 88, Lush. 292). As to notice to and protest by consul see The Leon XIII, 8 P. D. 121, 5 Aspin. 73, 52 L. J. P. D. & Adm. 58, 48 L. T. Rep. N. S. 770; The Octavie, Brown. & L. 215, 33 L. J. Adm. 115, 9 L. T. Rep. N. S. 695; The Herzogin Marie, 5 L. T. Rep. N. S. 88, Lush. 292.

30. The Havana, 11 Fed. Cas. No. 6,226, 1 Sprague 402; The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142.

Right to possession.— The fact that the master of a British vessel claims a lien on her under the English law is not ground for his refusal to deliver the vessel to her owners. Muir *v.* The Brisk, 17 Fed. Cas. No. 9,901, 4 Ben. 252.

31. Montgomery *v.* Henry, 1 Dall. (Pa.) 49, 1 Am. Dec. 223, 1 L. ed. 32 [*affirming* 17 Fed. Cas. No. 9,737, Bee 388, 2 Pet. Adm. 397].

32. Montgomery *v.* Henry, 1 Dall. (Pa.) 49, 1 Am. Dec. 223, 1 L. ed. 32 [*affirming* 17 Fed. Cas. No. 9,737, Bee 388, 2 Pet. Adm. 397]; Clayton *v.* The Eliza B. Emery, 4 Fed. 342.

33. Dean *v.* Angus, 7 Fed. Cas. Nos. 3,702, 3,703, Bee 369, 378.

34. Chamberlain *v.* Chandler, 5 Fed. Cas. No. 2,575, 3 Mason 242, holding that the admiralty court has jurisdiction for personal wrongs committed to a passenger on the high seas by the master of a vessel, whether the wrongs be by direct force or consequential injuries.

35. Ewbank *v.* Nutting, 7 C. B. 797, 62 E. C. L. 797.

36. Ingersoll *v.* Van Bokkelin, 7 Cow. (N. Y.) 670 [*reversed* on other grounds in 5 Wend. 315], holding that in such a case he may recover the amount of his lien as damages.

37. Hodgson *v.* Woodhouse, 12 Fed. Cas. No. 6,571, 1 Cranch C. C. 549; Keyser *v.* Harbeck, 3 Duer (N. Y.) 373.

38. Hodgson *v.* Woodhouse, 12 Fed. Cas. No. 6,571, 1 Cranch C. C. 549.

part-owner of such cargo may maintain an action on the case against him for his share of the proceeds.[39]

2. Parties and Pleading. The parties and pleading in an action relative to a master of a vessel are ordinarily governed by the rules relating to parties,[40] and pleading,[41] in civil actions generally, and in admiralty suits. As a general rule a master has such a special interest in the vessel and cargo that he may sue in his own name for freight,[42] or to recover damages for the breach of a contract of affreightment,[43] or he may bring an action in his own name either at law or in equity against one who wrongfully interferes with the vessel or cargo.[44] A master may also file a claim in admiralty on behalf of the owners, where the latter are absent.[45]

3. Presumptions and Burden of Proof. As a general rule questions relative to presumptions[46] and burden of proof,[47] in actions growing out of the acts of a master of a vessel, are governed by the rules applying in civil cases generally. Thus where the question of the validity of a sale by a master in a foreign port arises in an action with the purchaser at such sale, the burden of showing good faith in making the sale and the necessity therefor is upon the purchaser of the vessel,[46]

39. True *v.* McGilvery, 43 Me. 485.

40. See, generally, Admiralty, 1 Cyc. 850 *et seq.*; Parties, 30 Cyc. 1. See also Alexander *v.* Simms, 20 Beav. 123, 24 L. J. Ch. 618, 52 Eng. Reprint 549.

41. See, generally, Admiralty, 1 Cyc. 853 *et seq.*; Pleading, 31 Cyc. 1.

Joinder and splitting of action.—An action on the case for damages for a master's false representations and warranty of authority cannot be joined with an action against the vessel on a draft drawn by such master. The Serapis, 37 Fed. 436.

Variance in an action by a master for his wages see De Land *v.* Hall, 134 Mich. 381, 96 N. W. 449.

42. Houghton *v.* Lynch, 13 Minn. 85; Kennedy *v.* Eilau, 17 Abb. Pr. (N. Y.) 73, 26 How. Pr. 197; Hus *v.* Kampf, 12 Fed. Cas. No. 6,943, 10 Ben. 231.

Where the master is owner pro hac vice, as where the owners of the vessel have let her on shares to him for a certain time, he is the proper party to sue for freight earned by the vessel during that time. Manter *v.* Holmes, 10 Metc. (Mass.) 462; Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 184.

43. Clendaniel *v.* Tuckerman, 17 Barb. (N. Y.) 184; Disney *v.* Furness, 79 Fed. 810.

44. Tuells *v.* Torras, 113 Ga. 691, 39 S. E. 455; Houghton *v.* Lynch, 13 Minn. 85; Pitts *v.* Gainee, 1 Ld. Raym. 558, 91 Eng. Reprint 1272.

Measure of damages in libel by a master for the illegal seizure of his vessel see The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111.

45. The Sally, 21 Fed. Cas. No. 12,258, 1 Gall. 401; The Hoop, 1 C. Rob. 129. See also, generally, Admiralty, 1 Cyc. 862.

46. See, generally, Evidence, 16 Cyc. 1050 *et seq.*

Presumption of fraud.—A sale of a vessel by her master in a foreign port for necessary charges, under the authority of the United States consul, is conclusively presumed to be fraudulent where the purchase-money is secured by the consul's note, upon an agreement that the vessel be transferred to trustees for the benefit of the consul's wife. Riley *v.* The Obell Mitchell, 20 Fed. Cas. No. 11,839.

Presumption of wages paid.—In an action by a master after a sale of the vessel to recover for services rendered during several years preceding the sale, the presumption is that the wages were paid from freight earned during that time. The Richmond, 20 Fed. Cas. No. 11,795a.

Presumption as to credit.—In the absence of proof that supplies or repairs were furnished to a vessel on the credit of the master, the presumption in law in a home port is that they were furnished on the credit of the owner (Glading *v.* George, 3 Grant (Pa.) 290); but this presumption may be rebutted by circumstances, as where the master promises to pay cash and no mention is made of the owners (Gordon *v.* Hare, 1 L. J. K. B. O. S. 70).

A survey taken to enable a master to decide whether or not to sell an injured vessel is presumed to be correct, but is not conclusive. Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676.

47. See, generally, Evidence, 16 Cyc. 926 *et seq.*

In an action by a master to recover wages, it is sufficient for him to show that he has performed his services, and the owners must then adduce evidence to prove that he is not entitled to remuneration. Brown *v.* Milner, 1 Moore C. P. 65, 7 Taunt. 319, 18 Rev. Rep. 493, 2 E. C. L. 381.

48. The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806; The Henry, 11 Fed. Cas. No. 6,372, Blatchf. & H. 465; The Glasgow, 2 Jur. N. S. 1147, 12 Moore P. C. 355 note, Swab. 145, 5 Wkly. Rep. 10, 14 Eng. Reprint 946; The Bonita, 30 L. J. Adm. 145, 5 L. T. Rep. N. S. 141, Lush. 252.

The first purchaser is bound to prove such necessity, but whether such burden attaches to a second purchaser depends upon the circumstances of the case. The Australia, 13

or cargo,[49] as the case may be; but where the necessity for the sale is relied upon by the master as a justification of his acts, the burden of proof is upon him.[50] So in an action for supplies and repairs furnished to a vessel in a foreign port by order of the master, the burden of proof is on plaintiff to show that the articles furnished were necessaries to the extent at least of showing that they were what a reasonable and prudent owner would have bought.[51] It is incumbent upon a lender of money to a master of a vessel, in an action against the owner, to show the necessity for the loan.[52]

4. Admissibility of Evidence.[53] The admissibility of evidence in actions arising out of the acts of the master of a vessel is ordinarily regulated by the rules applying to the admissibility of evidence in civil actions generally, and by the rules in admiralty.[54] In case of a sale of a stranded or disabled vessel or cargo by the master, evidence is admissible, upon the question of his good faith in making the sale and the necessity therefor, of the facility with which the vessel was afterward rescued by the purchaser,[55] as is also a survey of the vessel,[56] and the fact of his taking advice from other competent persons.[57] The circumstance that the master believed at the time that he could get the stranded vessel off is admissible to show bad faith on his part,[58] but proof that the purchaser believed himself able to rescue the vessel can have no such effect.[59] The advice of surveyors is also competent evidence upon the question of necessity for a sale of the cargo.[60]

5. Weight and Sufficiency of Evidence. The general rules governing the weight and sufficiency of evidence in civil cases generally also apply in actions arising out of the acts of the master of a vessel.[61] A survey taken to enable the

Moore P. C. 132, Swab. 480, 7 Wkly. Rep. 718, 15 Eng. Reprint 50.

A purchaser is not bound to furnish direct and positive proof of the honesty of the master's conduct and of the necessity for the sale, but presumptive proof of these facts is sufficient. The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305.

49. Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Atlantic Mut. Ins. Co. *v.* Huth, 16 Ch. D. 474, 4 Aspin. 369, 44 L. T. Rep. N. S. 67, 29 Wkly. Rep. 387.

50. Australasian Steam Nav. Co. *v.* Morse, L. R. 4 P. C. 222, 1 Aspin. 407, 27 L. T. Rep. N. S. 357, 8 Moore P. C. 482, 20 Wkly. Rep. 728, 17 Eng. Reprint 393.

51. Clark *v.* Humphreys, 25 Mo. 99; Ford *v.* Crocker, 48 Barb. (N. Y.) 142; Mackintosh *v.* Mitcheson, 4 Exch. 175, 18 L. J. Exch. 385.

Express proof need not be given that the supplies were necessary, but such necessity may be inferred from the circumstances of the case; and the absence of proof that any part thereof was for the master's private use is *prima facie* sufficient to charge the owners with the whole bill. Ford *v.* Crocker, 48 Barb. (N. Y.) 142.

52. Merwin *v.* Shailer, 16 Conn. 489; Baring *v.* Souder, 9 Phila. (Pa.) 20 (holding that it is incumbent on the creditor to show that there was a reasonable ground for believing that the money was needed for the use of the vessel and would be so applied); Bogle *v.* Atty, Gow. 50, 5 E. C. L. 865; The Sophie, 1 Notes of Cas. 393, 1 W. Rob. 368; Palmer *v.* Gooch, 2 Stark. 428, 3 E. C. L. 475; Rocher *v.* Busher, 1 Stark. 27, 18 Rev. Rep. 742, 2 E. C. L. 21; The Alexander, 1 W. Rob. 346.

53. **Admissibility of protest of master as evidence in actions for insurance** see Marine Insurance, 26 Cyc. 732.

Admissions by master as evidence see Evidence, 16 Cyc. 1015 text and note 6.

Admissibility of log-book as evidence see Evidence, 17 Cyc. 405.

54. See, generally, Admiralty, 1 Cyc. 883 *et seq.*; Evidence, 16 Cyc. 1110 *et seq.*, 17 Cyc. 1 *et seq.*

Evidence of a custom authorizing masters of coasting vessels to sell their cargoes without express authority is inadmissible where the manifest repels the existence of any possible authority in the master. Stillman *v.* Hurd, 10 Tex. 109.

A protest on account of the vessel and cargo, given on the oath of the master and sailors before a notary, is not admissible in the master's favor in an action against himself. Cunningham *v.* Butler, 3 N. C. 392; Miller *v.* Ireland, 1 N. C. 134.

55. The Henry, 11 Fed. Cas. No. 6,372, Blatchf. & H. 465.

56. The Henry, 11 Fed. Cas. No. 6,372, Blatchf. & H. 465, holding, however, that a paper purporting to be a survey, but not drawn up, subscribed, or sworn to prior to the sale, will not be received as evidence of a survey.

57. Hartshorne *v.* Campbell, 1 Yeates (Pa.) 143.

58. The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305.

59. The Lucinda Snow, 15 Fed. Cas. No. 8,591, Abb. Adm. 305.

60. Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355.

61. See, generally, Evidence, 17 Cyc. 753 *et seq.*

master to decide whether or not to sell an injured vessel does not *per se* render the sale valid, but it affords strong evidence in justification of it;[62] and the fact that the surveyor's advice afterward turns out to be erroneous does not disprove the necessity for the sale.[63] On the question of the integrity of the sale of a vessel by the master his evidence is vital to one claiming title under such sale.[64]

6. Questions For Jury. The general rule applicable in civil actions generally that questions of fact upon which the evidence is conflicting or doubtful are to be determined by the jury applies in actions relative to the masters of vessels.[65] Thus ordinarily it is a question of fact for the jury as to whether or not, under the circumstances of the particular case, a necessity existed for the master to sell the vessel [66] or cargo.[67] In an action by one who has loaned money to a master in a foreign port, the questions of the necessity for the money, the good faith in making the loan, and the diligence of the loaner in ascertaining the necessity are for the jury.[68]

V. Rights and Liabilities of Vessels and Owners in General.

[Edited by William S. Montgomery, Esq., of the New York Bar]

A. Rights and Liabilities in General [69] — 1. Representation of Vessel or Owners in General. The power to represent or act as agent for a vessel or her owners and the rights and liabilities growing out of such representation are ordinarily governed by the general law of principal and agent.[70] Thus as a general rule the owners are bound by all acts done by their agents within the scope of their authority; [71] but a special agent of the charterer of a vessel has no power as

Evidence held insufficient, in an action by a master for his wages, to sustain the defense of misconduct see Nisson *v.* Wessels, 18 Fed. Cas. No. 10,278, 5 Ben. 483.

62. Prince *v.* Ocean Ins. Co., 40 Me. 481, 63 Am. Dec. 676; Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355; The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806.

63. The Amelie, 6 Wall. (U. S.) 18, 18 L. ed. 806.

64. Hartman *v.* The Will, 11 Fed. Cas. No. 6,163.

65. See, generally, Trial. See also Wilcox *v.* Philips, 29 Fed. Cas. No. 17,639, 1 Wall. Jr. 47, holding that in a suit by the owners of a vessel against her master to recover certain profits as a part of the earnings of the vessel, it should be left to the jury to say whether by the usage of trade such profits belong to the master.

Whether a master's condition of incompetency at a certain time is so apparent as to charge the mate with negligence in not forcibly taking charge of the vessel is a question for the jury. Williams *v.* Hays, 157 N. Y. 541, 52 N. E. 589, 68 Am. St. Rep. 797, 43 L. R. A. 253 [*reversing* 2 N. Y. App. Div. 183, 37 N. Y. Suppl. 708].

The extent of the general usage of a vessel, and consequent implied authority of the master, is ordinarily for the jury to decide, and it is therefore erroneous for the court to assume it as established, or to state it to exist as a legal presumption. The General Worth *v.* Hopkins, 30 Miss. 703.

66. Orange *v.* McKay, 5 Nova Scotia 444.

67. Caldwell *v.* Western M. & F. Ins. Co., 19 La. 42, 36 Am. Dec. 667; Butler *v.* Murray, 30 N. Y. 88, 86 Am. Dec. 355.

68. Stearns *v.* Doe, 12 Gray (Mass.) 482, 74 Am. Dec. 608.

69. Debts and contracts subject to limitation under limited liability statutes see *infra*, XI, B.

Liability of either master or owner or both see *supra*, IV, E, 3.

Liability on contracts of master see *supra*, IV, B, 2.

Liabilities of owners as to seaworthiness and fitness under charter see *supra*, III, F.

Rights and liabilities of part-owners see *supra*, II, C, 2.

Maritime liens in general see Maritime Liens, 26 Cyc. 743.

70. See, generally, Principal and Agent, 31 Cyc. 1175.

Acknowledgment of debt.—The acknowledgment of a master of the correctness of bills presented for supplies furnished the vessel is binding on the owners (Black *v.* Savory, 17 La. 85. See also Pell *v.* Dickens, 3 B. Mon. (Ky.) 57), unless the power to make such an acknowledgment or admission is denied by statute (Phelps *v.* The Eureka, 14 Mo. 532, holding that under Rev. Code (1845), neither the captain, clerk, nor other officer of any vessel has power to bind her by making any admission of the indebtedness of the vessel).

Estoppel to deny responsibility as owners see The Jane Gray, 99 Fed. 582.

Revocability.— A custom that an agency to act for a ship in distress is irrevocable is invalid as being unreasonable. Minis *v.* Nelson, 43 Fed. 777.

71. Hyde *v.* Henry, 3 Mart. N. S. (La.) 179.

A ship's agent as such has no authority to sell and transfer all claims due the ship and her owners. Ely *v.* U. S., 19 Ct. Cl. 658.

such to represent and bind the vessel or her owners;[72] nor has the underwriter of a vessel any authority to contract for the vessel until there has been an abandonment and an acceptance thereof by him.[73] Where the owners of several vessels form an association to run their vessels and to collect and receive the earnings thereof in a common fund out of which all the expenses of the vessels are to be paid, it is in fact a private copartnership, and each member is responsible individually for his acts or contracts in the business of the common concern,[74] and the members of the association are jointly liable upon contracts made by an agent of the association on its behalf.[75] A pledgee of a vessel must use ordinary care in protecting and preserving it.[76]

2. Contracts in General. The rights and liabilities of the owners of a vessel under contracts relating thereto, whether entered into by them or their authorized agents, depend upon the terms of the particular contract, and the proper performance thereof.[77] A reasonable custom at the port at which a contract is made and of which the owners' agent has knowledge at the time constitutes a part of the contract and is binding on the owners.[78] A contractor who undertakes to make and finish or fit up a vessel impliedly undertakes that she shall be reasonably fit for the purpose for which he knows she is intended to be used;[79] and if she is not so finished or fitted up the contractor will not be exonerated, although her unfitness is occasioned by secret defects in the materials used.[80]

3. Consortship. An agreement of consortship[81] between the masters of two or more vessels is not merely personal between the masters but extends to the

Contracts of a managing agent within the sphere of his authority are the actual contracts of the owners and not of the vessels to which they relate, as in the case of contracts made by a master on a voyage or in foreign ports. Great Lakes Towing Co. *v.* Mill Transp. Co., 155 Fed. 11, 83 C. C. A. 607.

72. The Joseph Cunard, 13 Fed. Cas. No. 7,535, Olcott 120.

73. The Senator, 21 Fed. Cas. No. 12,665, Brown Adm. 544. See also Marine Insurance, 26 Cyc. 706.

74. The Swallow, 23 Fed. Cas. No. 13,665, Olcott 334.

Partnership generally see Partnership, 30 Cyc. 334.

75. Slocum *v.* Fairchild, 7 Hill (N. Y.) 292 [*affirming* 19 Wend. 329].

Where, however, the owners are not in fact partners and do not own or use any property in common or share any of the profits, the fact that they allow their boats to be advertised as forming a line under a common name, and have a common agent who solicits custom and transacts business for all, does not make them jointly liable for the torts and contracts of each other. Citizens' Ins. Co. *v.* Kountz Line, 48 Fed. 838 [*affirming* 10 Fed. 768].

76. Fagin *v.* Thompson, 38 Fed. 467.

77. See Gilchrist *v.* Partridge, 73 Me. 214.

Construction of particular contracts.— Where a ship-owner contracts to send all ships of his line to a certain pier, a ship which belongs to him but which is under a contract of affreightment to a foreign firm, the captain, crew, and ship being, however, under his control and direction, properly belongs to his line within the meaning of the agreement. Elwell *v.* Fabre, 13 N. Y. Suppl. 829. Where a contractor undertakes to pull a schooner lodged in the launching, to the owner's satisfaction, the contract requires that the pulling shall be of such a character as will satisfy a reasonably prudent man in the light of the circumstances surrounding the transaction, and where after such pulling the schooner is not floated and the contractor's services are further required in subsequent endeavors which are finally successful, he is entitled to recover for such subsequent services on a *quantum meruit*. Merritt, etc., Derrick, etc., Co. *v.* Greene, 147 Fed. 317.

78. Horan *v.* Strachan, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471, holding that where, upon taking charge of a vessel which is on fire in a port, the shipping firm informs the master that, by the custom of the port, custody, commission, and attendance fees are charged in such cases and the master makes no protest, it cannot be said that the master was ignorant of the custom.

79. Furniss *v.* Brown, 18 How. Pr. (N. Y.) 191 (holding that an agreement to fit up a steamboat in a suitable manner for her to proceed from New York to the Pacific by way of the Straits of Magellan and to trade along the west coast of America, or in the rivers of the same, is an agreement to fit her as far as such a boat can be fitted for a single sea voyage and not for ocean service); Cunningham *v.* Hall, 6 Fed. Cas. No. 3,482, 1 Sprague 404; Shepherd *v.* Pybus, 11 L. J. C. P. 101, 3 M. & G. 868, 4 Scott N. R. 434, 42 E. C. L. 452.

80. Cunningham *v.* Hall, 6 Fed. Cas. No. 3,582, 1 Sprague 404.

81. **An agreement of consortship** is a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. Andrews *v.* Wall, 3 How. (U. S.) 568, 11 L. ed. 729.

owners and crews,[82] and to persons joining or becoming interested in a vessel during the continuance of the agreement,[83] and is for and on account of the vessels.[84] Such an agreement, unless limited by special understandings when made, is considered to be general and to extend to all earnings by either vessel,[85] and in the absence of a stipulation as to its termination, it can only be terminated by voluntary dissolution and notice.[86] No mutual liens arise from a contract of consortship, and no suit *in rem* can be maintained for its enforcement.[87]

4. Liability For Supplies, Repairs, and Services[88] — a. In General. As a general rule the owners of a vessel[89] and the vessel itself[90] are liable for necessary supplies,[91] services,[92] repairs,[93] and advances[94] furnished and received to the use

82. Andrews *v.* Wall, 3 How. (U. S.) 568, 11 L. ed. 729.

83. Cash *v.* One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, 5 Fed. Cas. No. 2,498.

84. Cash *v.* One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, 5 Fed. Cas. No. 2,498.

85. Cash *v.* One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, 5 Fed. Cas. No. 2,498, holding that the special intention or understanding of either party will not control its operation, unless expressed when the agreement is made.

86. Andrews *v.* Wall, 3 How. (U. S.) 568, 11 L. ed. 729 (holding that if the agreement is made for an indefinite period it does not expire with the mere removal of one of the masters from his vessel but continues until dissolved on notice to the other parties); Cash *v.* One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, 5 Fed. Cas. No. 2,498 (holding further that a change of owners, master, or crew of one vessel without notice to the other parties cannot affect the consortship).

87. Vandewater *v.* The Yankee Blade, 28 Fed. Cas. No. 16,847, McAllister 9.

88. Authority of master to contract for supplies, repairs, and services see *supra*, IV, B, 2, b.

Duty of master to repair see *supra*, IV, B, 3, a.

Liability as between owner and charterer see *supra*, III, E.

Liability of mortgagee see *supra*, II, F, 6, b.

Liability of seller after sale see *supra*, II, E, 6.

Liability where vessel is let on shares see *supra*, III, Q, 2, a.

Repairs subjects of compensation in general average see *infra*, X, D, 5, l.

89. Bent *v.* Lauve, 3 La. Ann. 88; Stewart *v.* Rogers, 19 Md. 98; Burquin *v.* Flinn, 1 McCord (S. C.) 316; Berwind *v.* Schultz, 25 Fed. 912.

Fraudulently breaking up voyage.— Where a cargo is laden on a vessel whose owners know that she is not seaworthy and who intend to fraudulently break up the voyage at an intermediate port, which intention is afterward carried out, all the expenses of taking the vessel into the intermediate port and her expenses there and the cost of discharging, storing, and reshipping the cargo must be borne by the vessel and her owners and are not a legitimate charge against the cargo. Gardner *v.* One Thousand Four Hundred and Sixty-Seven Bales of Cotton, 20 Fed. 529.

Where it does not affirmatively appear that the seller of supplies relied exclusively on the agent's credit for payment, the seller may resort to the owner of the vessel when payment is refused by the agent. Berwind *v.* Schultz, 25 Fed. 912 [*reversed* on other grounds in 28 Fed. 110].

Estoppel.— An advance made by the owners to their agent, to reimburse him for an alleged payment for supplies, does not estop the materialman from prosecuting his claim against the owners, unless his connection with the misrepresentation can be shown; and a receipted bill in the hands of the agent, not shown to the owners, and by which they were not misled, does not work an equitable estoppel. Berwind *v.* Schultz, 28 Fed. 110 [*reversing* 25 Fed. 912]. See also Borland *v.* Zittlosen, 27 Fed. 131.

90. Gardner *v.* One Thousand Four Hundred and Sixty-Seven Bales of Cotton, 20 Fed. 529; Frechette *v.* Martin, 21 Quebec Super. Ct. 417. See also The David Wallace *v.* Bain, 8 Can. Exch. 205. And see, generally, Maritime Liens, 26 Cyc. 759 *et seq.*

91. Bent *v.* Lauve, 3 La. Ann. 88; Commercial Nat. Bank *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Suppl. 508 [*modifying* 53 Misc. 97, 102 N. Y. Suppl. 931]; Burquin *v.* Flinn, 1 McCord (S. C.) 316; Rudolph *v.* Bryan, 161 Fed. 233; Cloy *v.* Jacques, 27 U. C. Q. B. 88. See also The Mecca, [1897] A. C. 286, 8 Aspin. 266, 66 L. J. P. D. & Adm. 86, 76 L. T. Rep. N. S. 579, 13 T. L. R. 339, 45 Wkly. Rep. 667.

Insurance premiums are not necessaries within the meaning of the above rule. The André Theodore, 10 Aspin. 94, 93 L. T. Rep. N. S. 184, 21 T. L. R. 158.

92. James *v.* Bixby, 11 Mass. 34.

A custom that the agent of a ship in distress shall receive in all cases a certain commission on the value of the cargo discharged, and an attendance fee in the discretion of the agent, is void as to the attendance fee for want of uniformity, but valid as to the commission. Minis *v.* Nelson, 43 Fed. 777.

Services not within the contract cannot be recovered for against the owners. The Erinagh, 7 Fed. 231.

93. Nash *v.* Parker, 38 Me. 489; Harrison *v.* Harris, 1 U. C. C. P. 235. See also *infra*, V, A, 4, b.

94. Hanschell *v.* Swan, 23 Misc. (N. Y.)

of a vessel in a foreign port,[95] upon the order of the master or other duly authorized agent within the scope of his authority,[96] unless credit therefor is given exclusively to the master or agent or others,[97] or unless by the usage and understanding of the business the agent only is held,[98] or unless the special circumstances of the case show that only the agent was intended to be bound and the person furnishing the necessaries or supplies knew or was chargeable with knowledge of it.[99]

b. Liability For Repairs. The nature and extent of the owners' liability for repairs furnished their vessel upon a contract therefor depend upon the terms of the particular contract,[1] and the due performance thereof by the contractors.[2] It is the duty of one who contracts to repair a vessel to do the work as rapidly as is reasonably possible,[3] and to release the vessel from the dry dock as soon as the repairs are so far along that they can be completed with her afloat.[4]

c. Grounds of Liability. The liability of the owners of a vessel to pay for repairs and supplies ordered by the master or agent does not rest upon the ground of ownership of the vessel,[5] but upon the ground of a contract made by one who is the owners' agent for the purpose of ordering such supplies or repairs,[6] although

304, 51 N. Y. Suppl. 42; The Irthington, 27 Fed. 143. See also The Wyandotte, 136 Fed. 470 [*affirmed* in 145 Fed. 321, 75 C. C. A. 117].

Money fraudulently advanced to the master of a vessel cannot be recovered from the owner. The Alvega, 30 Fed. 694.

Where a vessel goes into an enemy's port pretending to be a neutral, and obtains a credit for repairs and other purposes there, but her cargo is discovered, and she is condemned, an action may be maintained after the return of peace to recover the sum so advanced. Musson *v.* Fales, 16 Mass. 332.

95. **Foreign port defined** see 19 Cyc. 1352.

96. The Suliote, 23 Fed. 919. See also Frazer *v.* Cuthbertson, L. R. 6 Q. B. 93, 50 L. J. Q. B. 277, 29 Wkly. Rep. 396.

Ship-broker.— Where a foreign vessel is consigned to a ship's brokers at a certain port for cargo, the brokers have implied authority to purchase necessary supplies to prepare the vessel for sailing. Commercial Nat. Bank *v.* Sloman, 121 N. Y. App. Div. 874, 106 N. Y. Suppl. 508 [*modifying* 53 Misc. 97, 102 N. Y. Suppl. 931].

One of two or more joint agents has no power as agent to contract for the making of repairs on the vessel without the concurrence of his co-agents. The Robert R. Kirkland, 153 Fed. 863, 83 C. C. A. 45 [*affirming* 143 Fed. 610].

An unauthorized agent has no power to bind the owners of a vessel for repairs and supplies. Tinker *v.* Marquette, 2 Ohio Dec. (Reprint) 52, 1 West. L. Month. 215.

97. James *v.* Bixby, 11 Mass. 34; The Iris, 88 Fed. 902 [*reversed* on other grounds in 100 Fed. 104, 40 C. C. A. 301]; Berwind *v.* Schultz, 25 Fed. 912; Cox *v.* Reid, 1 C. & P. 602, 12 E. C. L. 342, R. & M. 199, 21 E. C. L. 733; The Wellgunde, 18 T. L. R. 719.

The acceptance of a note given by the master for a balance due for repairs, without any explanation, is sufficient to show that credit was given to him and not to the owners. Warner *v.* Miller, 13 Hun (N. Y.) 654.

98. Berwind *v.* Schultz, 25 Fed. 912.

99. Berwind *v.* Schultz, 25 Fed. 912.

1. See The Czarina, 152 Fed. 297 [*affirmed* in 158 Fed. 1019, 86 C. C. A. 671].

An agreement to prepare a steam yacht for a dock trial does not require that the repairer shall furnish a new boiler if the dock trial develops leaks, especially where it is subsequently shown that the boiler was so faulty in construction that it was necessary to replace it for one of a different type. The Czarina, 152 Fed. 297 [*affirmed* in 158 Fed. 1019, 86 C. C. A. 671].

2. Lawrence *v.* Morrisania Steam-Boat Co., 9 Fed. 208.

Inspection and approval.— Where an agreement is for alterations "under the inspection and subject to the approval" of a certain person of experience in such matters, acting for the owners, the acceptance by that person is, in the absence of fraud and mistake, binding upon such owners. Flint *v.* Gibson, 106 Mass. 391.

3. The Mary N. Bourke, 145 Fed. 909, 76 C. C. A. 441 [*modifying* and *affirming* 135 Fed. 895], holding that the owners of the vessel are entitled to a set-off for demurrage against the cost of repairs, where there is unnecessary delay in the completion of the work during the busy season of navigation.

4. The Mary N. Bourke, 145 Fed. 909, 76 C. C. A. 441 [*modifying* and *affirming* 135 Fed. 895], holding further that the repairer will not be allowed a charge for lay days for the use of the dock after the time she should have been so released by the use of reasonable despatch in the work.

5. The Great Eastern, L. R. 2 A. & E. 88, 17 L. T. Rep. N. S. 667.

6. Berwind *v.* Schultz, 25 Fed. 912; Heppard *v.* The General Cadwalader, 11 Fed. Cas. No. 6,390; The Great Eastern, L. R. 2 A. & E. 88, 17 L. T. Rep. N. S. 667.

In a home port where all the owners reside, the managing owner, although registered as such at the custom-house, cannot merely by virtue of that relation order supplies and bind his coöwners to a personal liability therefor. Woodall *v.* Dempsey, 100 Fed. 653; Spedden *v.* Koenig, 78 Fed. 504, 24 C. C. A. 189.

if such necessaries are furnished with the knowledge of the owners and they receive the benefit of the same, it will be presumed that they were furnished at their instance and request.[7] In the absence of express authority to pledge the owners' credit, the owners are liable for supplies and repairs furnished to their vessel in a foreign port only in the case of a necessity or apparent necessity for the credit of the vessel to obtain them,[8] and hence where the master or agent has funds of the owners in his hands at the time sufficient to pay for such necessaries, and the contractor has actual or constructive notice of this fact, no credit therefor is presumed to be given to the owners of the vessel.[9]

d. Who Liable as Owners. Although the registered or legal owners of the vessel are *prima facie* liable for necessaries furnished to her,[10] the mere fact alone that one is the registered owner or holder of the legal title of a vessel does not make him liable for supplies, repairs, and other necessaries furnished to her,[11] as he may hold her merely in trust, and be neither an actual nor apparent owner;[12] but this liability rests upon the persons who have the actual interest, control, and management of the vessel at the time and who benefit by the supplies or repairs furnished.[13]

5. Negotiable Instruments.[14] A clerk of a vessel may bind the owners thereof by a draft, note, or other negotiable instrument so far as its consideration inures to their benefit.[15]

6. Actions and Other Proceedings.[16] Except in so far as they are regulated by special statutory provisions,[17] the rules applicable in civil actions generally,

7. James *v.* Bixby, 11 Mass. 34.

8. Berwind *v.* Schultz, 25 Fed. 912; The Suliote, 23 Fed. 919.

9. Hazlehurst *v.* The Lulu, 10 Wall. (U. S.) 192, 19 L. ed. 906; Berwind *v.* Schultz, 25 Fed. 912; The Suliote, 23 Fed. 919.

10. Cox *v.* Reid, 1 C. & P. 602, 12 E. C. L. 342, R. & M. 199, 21 E. C. L. 733; Jennings *v.* Griffiths, R. & M. 42, 27 Rev. Rep. 730, 21 E. C. L. 700.

11. *Kentucky.*— Strader *v.* Lambeth, 7 B. Mon. 589.

Maine.— Nash *v.* Parker, 38 Me. 489.

New York.— Macy *v.* Wheeler, 30 N. Y. 231, 18 Abb. Pr. 73.

United States.— Borland *v.* Zittlosen, 27 Fed. 131.

England.— Reeve *v.* Davis, 1 A. & E. 312, 3 N. & M. 873, 28 E. C. L. 159; Myers *v.* Willis, 18 C. B. 886, 25 L. J. C. P. 255, 4 Wkly. Rep. 637, 86 E. C. L. 886; Tibbald *v.* Wood, 1 F. & F. 287. See also Brodie *v.* Howard, 17 C. B. 109, 1 Jur. N. S. 1209, 25 L. J. C. P. 57, 84 E. C. L. 109.

Canada.— Nelson *v.* Wigle, 8 Ont. 82; Hawn *v.* Roche, 27 U. C. C. P. 142.

See 44 Cent. Dig. tit. "Shipping," § 323.

12. Strader *v.* Lambeth, 7 B. Mon. (Ky.) 589; Macy *v.* Wheeler, 30 N. Y. 231, 18 Abb. Pr. 73.

13. Nash *v.* Parker, 38 Me. 489; Macy *v.* Wheeler, 30 N. Y. 231, 18 Abb. Pr. 73 (holding that the law adjudges the credit to have been given to the person in the actual possession of the vessel who controls her operations, receives her freight and earnings, and directs her designation); Decker *v.* Furniss, 3 Duer (N. Y.) 291 [*reversed* on the facts in 14 N. Y. 611]; Leonard *v.* Huntington, 15 Johns. (N. Y.) 298; Harrington *v.* Fry, 2 Bing. 179, 9 E. C. L. 535, 1 C. & P. 289, 12 E. C. L. 173, 3 L. J. C. P. O. S. 244, 9 Moore C. P. 344, R. & M. 90; Jennings *v* Griffith, R. & M. 42, 27 Rev. Rep. 730, 21 E. C. L. 700; Rochester, etc., Coal, etc., Co. *v.* The Garden City, 7 Can. Exch. 34 [*affirmed* in 7 Can. Exch. 94]; Russell *v.* Marshall, 2 Nova Scotia 330. See also Briggs *v.* Wilkinson, 7 B. & C. 30, 9 D. & R. 871, 5 L. J. K. B. O. S. 349, 14 E. C. L. 24; Fraser *v.* Flint, 4 U. C. Q. B. O. S. 12.

A beneficial interest in a steamboat, without the holding of a legal title thereto, will render the owner of such interest liable for services done or supplies furnished for the boat. Strader *v.* Lambeth, 7 B. Mon. (Ky.) 589.

14. Authority of master to give negotiable instrument see *supra*, IV, B, 2, h.

15. Oglesby *v.* The D. S. Stacy, 10 La. Ann. 117; Moss *v.* Smoker, 2 La. Ann. 989, holding that where the business of a steamer is to carry freight for hire, notes executed by the clerk on behalf of the owners in pursuance of an agreement made by the master or the clerk in order to obtain the carriage of merchandise and earn freight are binding on the owners. But *compare* Anderson *v.* Irwin, 7 La. Ann. 494, holding that the owners are not bound by a note executed by the clerk for stores furnished, and that, if such note is relied on as a receipt which the clerk is authorized to give, it should be shown that the maker was clerk when the stores were delivered.

16. Actions involving authority of master see *supra*, IV, F.

Actions involving rights and liabilities under charter-party see *supra*, III, R.

Enforcement of stevedores' claims in admiralty see Admiralty, 1 Cyc. 833.

Vessels as property subject to attachment see Attachment, 4 Cyc. 557.

17. See the statutes of the several states.

and, where applicable, the rules in admiralty cases apply in actions or proceedings to enforce the rights and liabilities of vessels and their owners, in regard to questions of process,[18] notice,[19] parties,[20] pleading,[21] presumptions and burden of proof,[22] and the admissibility,[23] and in regard to the weight and sufficiency of the

See also De Witt *v.* Burnett, 3 Barb. (N. Y.) 89.

The provisions of the Ohio Water Craft Act do not give a right of action against a water craft in the state on an indebtedness contracted in another state, and it is immaterial whether there is or is not a liability to such an action in the state where the indebtedness accrued. Goodsell *v.* The Brig St. Louis, 1 Ohio Dec. (Reprint) 207, 4 West. L. J. 123 [*affirmed* in 16 Ohio 178]. Nor can an action be maintained under such statute to recover a sum agreed by the master of the vessel to be paid to one for acting as a local agent of the vessel, for services performed on land. Howe *v.* The Steamboat Empire, 1 Ohio Dec. (Reprint) 477, 10 West. L. J. 142.

Under Canada Admiralty Courts Acts (1861), § 5, and the Colonial Courts Admiralty Act (1890), § 2, (3), (a), where the owner of a ship is the debtor, the action cannot be maintained against her if the necessaries are supplied at the port to which the ship belongs, or if at the time of the institution of the action any owner or part-owner of the ship is domiciled in Canada. The David Wallace *v.* Bain, 8 Can. Exch. 205; Rochester, etc., Coal, etc., Co. *v.* The Garden City, 7 Can. Exch. 34 [*affirmed* in 7 Can. Exch. 94].

18. See, generally, ADMIRALTY, 1 Cyc. 866 *et seq.*; MARITIME LIENS, 26 Cyc. 813; PROCESS, 32 Cyc. 412.

Process must be served on the owners, where they are known and reside in the state, and cannot be served on the master. Gazzam *v.* Wright, 3 La. 449. Under an Arkansas statute (Mansfield Dig. § 4986) a constructive service upon the owners of a vessel is not sufficient to support a personal judgment against them. Ford *v.* Adams, 54 Ark. 137, 15 S. W. 186.

A return to a writ against a vessel which omits to state that the officer seized the vessel is defective, although it is not necessary that he should state in his return that he retains the vessel in his custody. Blaisdell *v.* The William Pope, 19 Mo. 157.

Amendment of return see Blaisdell *v.* The William Pope, 19 Mo. 157 (holding that the court may permit an amendment of an officer's return to a writ of seizure, although such officer is no longer an officer of the court); International Grain Ceiling Co. *v.* Dill, 13 Fed. Cas. No. 7,053, 10 Ben. 92 (holding that any person interested in the suit may move for an amendment of the officer's return).

Execution against a vessel under the Ohio Water Craft Law, §§ 4, 5, 6, see Levi *v.* The Steamboat Baltimore, 12 Ohio Dec. (Reprint) 387, 2 Handy 172.

19. Howell *v.* Gaddis, 31 N. J. L. 313, holding that in a suit brought under the act (Nixon Dig. 529) for the collection of demands against ships, steamboats, and other vessels, the failure of the commissioner issuing the warrant for the seizure of the vessel to give immediate notice of the issuing of the warrant, and that claims must be presented within a certain time, does not vitiate the proceedings.

20. See, generally, ADMIRALTY, 1 Cyc. 850; PARTIES, 30 Cyc. 1.

Partnership.— The master and seamen of a vessel who ship on shares, instead of wages, do not thereby become partners with the owners and need not join or be joined in actions by or against them relating to the voyage. Grozier *v.* Atwood, 4 Pick. (Mass.) 234; Baxter *v.* Rodman, 3 Pick. (Mass.) 435.

21. See, generally, ADMIRALTY, 1 Cyc. 853 *et seq.*; PLEADING, 31 Cyc. 1. See also Luce *v.* Hadley, 119 Mass. 229 (holding that in a declaration for supplies furnished a mortgagee in possession to whom the supplies were furnished under circumstances rendering him liable for them he may properly be described as owner); Smithers *v.* The War Eagle, 29 Mo. 312 (holding that in an action against a steamboat as a common carrier it is not necessary that the petition should expressly state that the steamboat is a common carrier, but it is sufficient if it clearly appears from the whole petition that the contract was entered into with her in that capacity).

The declaration in a suit under a statute for materials, supplies, etc., furnished a vessel should show that the cause of action falls within the provisions of the statute. Borden *v.* The Schooner Eagle, 1 Ohio Dec. (Reprint) 473, 10 West. L. J. 137. See also Hamilton *v.* The R. B. Hamilton, 16 Ohio St. 428.

Plea in abatement.— In an action for supplies furnished a vessel, a non-joinder of any part-owner of the vessel may be taken advantage of by plea in abatement. Sager *v.* Nichols, 1 Daly (N. Y.) 1.

22. See, generally, EVIDENCE, 16 Cyc. 926, 1050. See also Bass *v.* O'Brien, 12 Gray (Mass.) 477; Blackstock *v.* Leidy, 19 Pa. St. 335 (holding that, where plaintiff proves the furnishing of supplies to a vessel and then shows that defendants were the owners, the presumption is that the vessel was navigated for their benefit and at their charge); Cash *v.* One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, 5 Fed. Cas. No. 2,498 (holding that the burden of proving the restricted character of an agreement of consortship rests upon the party alleging it).

Presumptions and burden of proof in actions involving authority of master see *supra*, IV, F, 3.

23. See, generally, ADMIRALTY, 1 Cyc. 883 *et seq.*; EVIDENCE, 16 Cyc. 1110 *et seq.*

evidence.[24] Such rules also apply in regard to questions of claim and intervention,[25] and in regard to questions for the jury,[26] and costs.[27]

B. Dry-Dock Companies.[28] Although all the obligations imposed by law on a carrier of goods do not attach, the employment of a dry-dock owner is in a substantial sense a public one and public policy requires a high degree of responsibility.[29] Hence the dry-dock owner is liable for injuries to a vessel caused by his negligence while the vessel is in his care,[30] and ignorance of the weak and unsea-

Admissibility of evidence in actions involving the authority of a master see *supra*, IV, F, 4.

Under the general issue in an action for services, materials, and supplies furnished to a vessel, the owners may prove that at the time they were rendered or furnished the vessel was chartered to a third person. Fish *v.* Sullivan, 40 La. Ann. 193, 3 So. 730; Pontchartrain Co. *v.* Heirne, 2 La. Ann. 129.

A note given on behalf of the owners of a vessel by their authorized agent for the amount of certain demands is evidence both as to the justice and the amount of the demand (Byrne *v.* The Elk, 6 Mo. 555), and it is competent for defendant to show that the note was accepted on the individual credit of the maker, a former owner (The Resort *v.* Brooke, 10 Mo. 531).

The oath of ownership made in taking out the register of a vessel is admissible in evidence, although not conclusive, against defendant, in an action for supplies furnished for the vessel. Lincoln *v.* Wright, 23 Pa. St. 76, 62 Am. Dec. 316.

24. See, generally, ADMIRALTY, 1 Cyc. 885; EVIDENCE, 17 Cyc. 753 *et seq.* See also Oakes *v.* Cushing, 24 Me. 313 (evidence held sufficient to authorize jury to find a verdict for plaintiff in an action for labor performed); Casey *v.* Leary, 5 Fed. Cas. No. 2,497, 2 Ben. 530 (holding that on a libel *in personam* for supplies furnished a vessel, if the recorded owner, who has sworn that he is her owner, may be allowed to take the position that he has no interest in her, such position must be sustained by some other proof than the declaration of the party himself).

Weight and sufficiency of evidence in actions involving authority of master see *supra*, IV, F, 5.

An admission in an answer in an action for supplies furnished a vessel that the vessel was in a foreign port is an admission of an apparent necessity for the credit of the vessel for the alleged supplies furnished, although the answer also avers that the owner was in good credit in such port. The Washington Irving, 29 Fed. Cas. No. 17,245, 2 Ben. 323.

In Ohio, where a note given for money borrowed for the use of a boat is sued on, there must be other proof accompanying it that it was given for money borrowed and expended for some of the particular items, such as materials, supplies, or labor, for which an action is given under the Water Craft Law. McGuire *v.* The Canal Boat Kentucky, 1 Ohio Dec. (Reprint) 263, 6 West. L. J. 179.

25. See, generally, ADMIRALTY, 1 Cyc. 862 *et seq.*

Election.— A shipwright in possession under a common-law lien, from whom the vessel is taken upon arrest by a marshal, has an election to appear as a technical "claimant" for the redelivery of the vessel, or as an "intervener" only for the recognition and payment of his claim, but if he appears as "claimant" and gives a bond for the libellant's demand, he has no right as a matter of course afterward to change his position to that of intervener merely. The Two Marys, 12 Fed. 152.

26. See, generally, ADMIRALTY, 1 Cyc. 887 *et seq.*; TRIAL. See also Henderson *v.* Mayhew, 2 Gill (Md.) 393, 41 Am. Dec. 434.

Questions for jury in questions involving authority of master see *supra*, IV, F, 6.

What are necessaries is a question for the jury to decide. Burquin *v.* Flinn, 1 McCord (S. C.) 316.

27. See, generally, ADMIRALTY, 1 Cyc. 908; COSTS, 11 Cyc. 1.

On a libel to enforce an agreement of consortship by the masters of vessels, where the question is one of considerable interest and the court is unable to say that respondent's refusal to pay, thus compelling a resort to the court, was wrong under the circumstances, he should not be charged with the costs but the same should be ordered paid from the fund in controversy. Cash *v.* One Thousand Two Hundred and Seventy-Seven Dollars and Five Cents, 5 Fed. Cas. No. 2,498.

28. Salvage in dry-dock see SALVAGE, 35 Cyc. 723.

29. Norwich, etc., Transp. Co. *v.* New York Balance Dock Co., 22 Fed. 672.

Liability to third person.— The owner of a dry dock is liable to the employee of a third person engaged by the ship-owner to repair the vessel after she had been placed in dock, for an injury caused by defects in the dock. Cook *v.* New York Floating Dry Dock Co., 1 Hilt. (N. Y.) 436.

30. Brooklyn Water Front Warehouse, etc., Co. *v.* The Sappho, 44 Fed. 359; Norwich, etc., Transp. Co. *v.* New York Balance Dock Co., 22 Fed. 672.

There is no liability for delay in completing a contract to raise the vessel caused by the bursting of a bulkhead of the dock, in the absence of any stipulation as to time in the contract, and in the absence of negligence, as the temporary destruction of the bulkhead is attributable to the occurrence of an unforeseen event. New York Balance Dry-Dock Co. *v.* Howes, 18 Fed. Cas. No. 10,202, 9 Ben. 232.

Contributory negligence of the ship-owner, while the vessel is being repaired under his superintendence, bars a recovery against

worthy condition of the vessel is no defense as, in the absence of representation or special agreement, his contract is to dock the vessel as she is.[31] The charges of the dock owner are usually limited by the contract,[32] and in the absence of contract the customary rates prevailing in that particular harbor control.[33]

C. Torts[34] **— 1. In General — a. Rights and Liabilities in General.** An owner of a vessel is entitled to recover for injuries caused to him or his vessel by the negligence or other torts of others;[35] and except in so far as their liability is limited or exempted by statute,[36] it is a general rule of the maritime law that a vessel or her owners are liable for all damages caused by the negligence and other wrongs of the owners,[37] or of those in charge of the offending vessel,[38] as for malicious or wilful torts,[39] and this liability extends to a municipal corporation as

the dock-owner for loss sustained by fire. Burckle *v.* New York Dry Dock Co., 2 Hall (N. Y.) 170.

31. Norwich, etc., Transp. Co. *v.* New York Balance Dock Co., 22 Fed. 672.

32. New York Balance Dry Dock Co. *v.* Howes, 18 Fed. Cas. No. 10,202, 9 Ben. 232.

The lessor of land to which a dock is permanently attached is entitled to a lessor's privilege on the dock itself. Cochran *v.* Ocean Dry-Dock Co., 30 La. Ann. 1365.

33. Burlee Dry Dock Co. *v.* Morris, etc., Dredging Co., 145 Fed. 740 [*affirmed* in 151 Fed. 1020, 81 C. C. A. 681].

Customs of other docks in other places will not be allowed to control, nor will the owner of the dock be allowed to charge the ship with greater sums as the wages of the workmen and the price of materials than are actually so paid, where he also makes a separate charge for his own superintendence. Ives *v.* The Buckeye State, 13 Fed. Cas. No. 7,117, 1 Newb. 69.

34. Liability for personal injuries to seamen see SEAMEN, 35 Cyc. 1244.

Liability of owner or charterer see *supra*, III, E, 1, b.

Liability of owner of wharf boat see WHARVES.

Liability of towboat or owner see TOWAGE.

Liability of vessel or owner for injuries to seamen or other employees for defects in vessels or dangerous methods of work see MASTER AND SERVANT, 26 Cyc. 1120, 1188, 1358.

Personal injuries to passengers see *infra*, VIII.

35. Dennison *v.* Hyde, 6 Conn. 508, unlawful seizure.

36. Norfolk, etc., R. Co. *v.* Berkshire, 59 Fed. 1007, holding that Act Feb. 13, 1893, § 3 (27 U. S. St. at L. 445 [U. S. Comp. St. (1901) p. 2946]), exempting vessels in the coasting trade and their owners from liability in certain cases, applies only to the rights and liabilities of owners and shippers, and does not abolish liability to third persons for marine torts. See also *infra*, VII, D, 13, b.

37. Strawbridge *v.* Turner, 9 La. 213; The Mary, 123 Fed. 609; The Lord Derby, 17 Fed. 265, bite of dog.

Deportation.— Where a steamship company wrongfully deports a family of immigrants, for which it has agreed to become responsible on being furnished sufficient security, without giving the family a reasonable time to furnish the security, proof of such facts establishes a *prima facie* cause of action against the steamship company for the damages sustained, and it cannot defend an action for such damages on the ground that the deportation is an act of the law. Kahaner *v.* International Nav. Co., 117 Fed. 979.

A vessel cannot be held liable in admiralty any more than at common law as an instrumentality of harm unless the owner thereof is accountable for the injury either personally or upon the principle of agency. Workman *v.* New York, 179 U. S. 552, 21 S. Ct. 212, 45 L. ed. 314 [*reversing* 67 Fed. 347, 14 C. C. A. 530, and *affirming* 63 Fed. 298].

38. Workman *v.* New York, 179 U. S. 552, 21 S. Ct. 212, 45 L. ed. 314 [*reversing* 67 Fed. 347, 14 C. C. A. 530, and *affirming* 63 Fed. 298]; Romney Marsh *v.* Trinity House Corp., L. R. 7 Exch. 247, 41 L. J. Exch. 106, 20 Wkly. Rep. 952.

Law governing.— A state statute which creates a liability or authorizes a recovery for the consequences of a tortious act operates as efficiently upon a vessel of the state when on the high seas as when physically within the state, the vessel being deemed a part of the territory to which it belongs. International Nav. Co. *v.* Lindstrom, 123 Fed. 475, 60 C. C. A. 649 [*reversing* 117 Fed. 170].

39. Weyant *v.* The Petersburg, 68 Fed. 387, holding that a vessel employed and used with malicious intent to arrest another vessel without process and bring her forcibly into port, whether aware of the malice or not, is liable to the owner of the vessel so arrested for the damages and expenses. *Compare* The G. H. Starbuck, 10 Fed. Cas. No. 5,378, 5 Ben. 53, holding that a tug in charge of a pilot during the absence of the master is not liable for the taking off of sailors and their baggage from another vessel against the remonstrance of such vessel, unless the persons in charge have knowledge that they are committing an unlawful act, and the bonding of the vessel when sued for the tort is not a ratification of such acts.

A state statute authorizing the collection of claims against vessels by proceeding against them by name only does not make such a vessel liable for wilful trespasses of its officers or crew committed beyond the limits of the state without the knowledge and consent of the owners. The Ohio *v.* Stunt, 10 Ohio St. 582; The Champion *v.* Jantzen, 16 Ohio 91.

Under Admiralty Rule 16, only the owner of a vessel is liable *in personam* for injuries so wilfully or negligently inflicted as to con-

owner,[40] since the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty.[41] But there is no liability upon the owners or the vessel for injuries which are the result of perils of the sea or inevitable accident,[42] or without negligence or other wrong on the part of the owners or of those in charge of the vessel.[43]

b. Dangerous and Defective Condition of Vessel or Appliances.[44] It is the duty of the owners of a vessel, which they owe to persons who may be rightly upon or near their vessel and to all who may be affected by her use, to use reasonable care and skill to keep the vessel and her appliances in a reasonably safe condition, and if they fail to do so, they and their vessel are liable for damages caused to persons or property by the dangerous or defective condition of the vessel,[45] or of her appliances,[46] such as for fires caused to adjoining property by reason of insufficient or defective appliances;[47] but they are not liable for damages caused

stitute an assault and battery. The Lord Derby, 17 Fed. 265.

40. Workman *v.* New York, 179 U. S. 552, 21 S. Ct. 212, 45 L. ed. 314 [*reversing* 67 Fed. 347, 14 C. C. A. 530, and *affirming* 63 Fed. 298]. And see MUNICIPAL CORPORATIONS, 28 Cyc. 1312.

41. New York *v.* Workman, 179 U. S. 552, 21 S. Ct. 212, 45 L. ed. 314 [*reversing* 67 Fed. 347, 14 C. C. A. 530, and *affirming* 63 Fed. 298].

42. Haulenbeek *v.* Hunt, 49 N. Y. App. Div. 47, 63 N. Y. Suppl. 405; McCauley *v.* Logan, 152 Pa. St. 202, 25 Atl. 499; The Carl Frederick, 33 Fed. 589, 13 Sawy. 97; The Harry Buschman, 33 Fed. 558; The Austria, 9 Fed. 916, 7 Sawy. 434; River Wear Com'rs *v.* Adamson, 2 App. Cas. 743, 47 L. J. Q. B. 193, 37 L. T. Rep. N. S. 543, 26 Wkly. Rep. 217.

Peril of sea.— Where a vessel which has been lying at anchor in one spot for a number of days suddenly begins dragging, by reason of a kedge which had been lost becoming so fouled in her anchor as to wrap around the chain and cause the anchor to lose its hold, the accident must be ascribed to the peril of the sea. The Carl Frederick, 33 Fed. 589, 13 Sawy. 97.

An inevitable accident which will exonerate a vessel from liability does not mean an accident which is unavoidable under any circumstances, but one which cannot be prevented by the exercise of ordinary care, caution, and maritime skill. The Blackheath, 154 Fed. 758; Bailey *v.* Cates, 35 Can. Sup. Ct. 293 [*affirming* 11 Brit. Col. 62].

43. The B. F. Hart, 35 Fed. 535; Romney Marsh *v.* Trinity House Corp., L. R. 7 Exch. 247, 41 L. J. Exch. 106, 20 Wkly. Rep. 952; The Albert Edward, 44 L. J. Adm. 49, 24 Wkly. Rep. 179.

44. **Injuries to stevedores or other independent contractors** and their employees through dangerous or defective condition of vessel or appliances see *infra*, V, C, 3, b, (II); V, C, 3, b, (III).

45. Haulenbeek *v.* Hunt, 49 N. Y. App. Div. 47, 63 N. Y. Suppl. 405; The Martha E. Wallace, 151 Fed. 353 [*affirmed* in 158 Fed. 1021, 86 C. C. A. 673]; The Yoxford, 33 Fed. 521, holding that, where a hatch cover gives way by reason of its own defect and so precipitates a person who steps on it into the hold of the vessel without fault on his part, the vessel is liable.

46. Butterfield *v.* Arnold, 131 Mich. 583, 92 N. W. 97.

Degree of care.— Owners furnishing modern appliances for the convenience of their vessel are held to the strictest rule of diligence and care as to the sufficiency of such appliances. The Edith Godden, 23 Fed. 43.

A failure to provide appliances required by statute renders the owners of a vessel liable for injuries caused thereby, to one who is rightly on the vessel. England *v.* Gripon, 15 La. Ann. 304.

The breaking of a chain furnished and used in unloading a heavy article if unexplained is *prima facie* evidence of negligence, which authorizes a judgment against the owners for damages, in the absence of proof of contributory negligence. The Robert Lewers Co. *v.* Kekauoha, 114 Fed. 849, 52 C. C. A. 483.

47. Gerke *v.* California Steam Navigation Co., 9 Cal. 251, 70 Am. Dec. 650 (holding that a steamboat owner is liable for damage to growing crops occasioned by a fire thrown from the boat's defective chimneys); Anderson *v.* Cape Fear Steamboat Co., 64 N. C. 399 (holding that where a steamboat as originally constructed is provided with an effective spark extinguisher, but it is removed because it diminished her speed, her owners are liable for injuries caused by fire afterward communicated by sparks from her chimney).

The owner of a steamboat is not required to use the most effective means known to prevent the escape of sparks from its smokestack, and if he uses an appliance or device which experience has shown to be reasonably effective in accomplishing that result, he is not required to use additional appliances or devices, although the danger might thereby be greatly lessened. Cheboygan Lumber Co. *v.* Delta Transp. Co., 100 Mich. 16, 58 N. W. 630.

A failure to use fire screens as required by statute is negligence. Burrows *v.* Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468.

Proximate cause.— Where a building is set

by dangerous or defective conditions which are not due to any negligence on their part,[48] as where the defect or dangerous condition is caused by perils of the sea or unavoidable accident.[49]

c. Misconduct of Master [50] — (i) *In General.* It is a well-established principle of maritime law that, in the absence of a statute limiting liability, the owners of a vessel, and the vessel, are liable for all damages caused to third persons or strangers, by the torts of the master within the scope of his employment,[51] but not for torts committed by the master outside the course and scope of his employment,[52] unless they ratify the same.[53] Thus the owners and vessel are liable for the wilful and malicious acts of the master, if they are done in the course and scope of his employment,[54] but not for wilful or malicious acts committed by the master, for a personal motive, outside of the scope of his employment, and without his owner's knowledge or approval.[55] By the civil law and common law the owners of a vessel are liable to the full amount for damages caused by the misconduct of the master;[56] but by the general maritime law of Europe and this country the responsibility of the owners for the torts of the master is limited to the value of the vessel and freight, and by abandoning these they are discharged from all personal responsibility.[57] The owners, however, are not liable for the torts of the master, to their *cestuis que trustent*, or copartners, or joint shareholders, if they use due care in selecting him.[58]

(ii) *Embezzlement.* Where the master of a vessel undertakes, for the shipper, to sell cargo and remit the proceeds, he ordinarily does so as supercargo or factor of the shipper, and if he embezzles or fails to account to the shipper for such proceeds, the vessel or her owners are not liable therefor,[59] unless they

on fire by sparks from a steamer which escape because of negligence of the owner of the vessel or those in charge of her, and such fire extends to another building, and the burning of the latter building is a result naturally and reasonably to be expected from the burning of the former building under the circumstances, and is the result of the continued effect of sparks from the steamer without the aid of other causes not reasonably to be expected, the negligence of defendant will be considered as the proximate cause of the burning of the latter building. Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516.

48. Caniff *v.* Blanchard Nav. Co., 66 Mich. 638, 33 N. W. 744, 11 Am. St. Rep. 541 (holding that it is not negligence for the owner of a boat laid up in winter quarters to leave her hatches off without protection against persons falling into them); The Northtown, 124 Fed. 740 (secret defect in iron); The Hadje, 50 Fed. 225 [*affirming* 1 Fed. 89].

49. Haulenbeek *v.* Hunt, 49 N. Y. App. Div. 47, 63 N. Y. Suppl. 405.

50. Liability of master see *supra*, IV, E, 2.

51. Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286; Malpica *v.* McKown, 1 La. 248, 20 Am. Dec. 279; Tillmore *v.* Moore, 4 Fed. 231, 5 Hughes 217 (abducting an infant); The Aberfoyle, 1 Fed. Cas. No. 16, Abb. Adm. 242; The John L. Dimmick, 13 Fed. Cas. No. 7,355, 3 Ware 196; Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303; McGuire *v.* The Golden Gate, 16 Fed. Cas. No. 8,815, 1 McAll. 104; Sherwood *v.* Hall, 21 Fed. Cas. No. 12,777, 3 Sumn. 127; Boak *v.* Baden, 8 Can. Exch. 343.

The law of the country where the tort is committed governs such liability. Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286.

Extent of liability.— Where the masters of two vessels take goods from another vessel without the consent of those in charge, which are divided between the vessels, the owners of one of the vessels can only be held liable for the value of such of the goods taken as are applied to the use and benefit of their vessel, and which it would have been within the scope of the master's employment to procure. Guttner *v.* Pacific Steam Whaling Co., 96 Fed. 617.

52. Haack *v.* Fearing, 5 Rob. (N. Y.) 528; The Dauntless, 7 Fed. 366.

53. The Dauntless, 7 Fed. 366.

54. Ralston *v.* The State Rights, 20 Fed. Cas. No. 11,540, Crabbe 22.

55. Price *v.* Thornton, 10 Mo. 135; Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill (N. Y.) 480 (holding that where the master commits a wilful trespass, *quoad hoc*, he ceases to be master); North American Dredging, etc., Co. *v.* The River Mersey, 48 Fed. 686; The Aberfoyle, 1 Fed. Cas. No. 16, Abb. Adm. 242; Ralston *v.* The State Rights, 20 Fed. Cas. No. 11,540, Crabbe 22; Sunday *v.* Gordon, 23 Fed. Cas. No. 13,616, Blatchf. & H. 569.

56. The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187; Stinson *v.* Wyman, 23 Fed. Cas. No. 13,460, 2 Ware 176.

57. The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187; Stinson *v.* Wyman, 23 Fed. Cas. No. 13,460, 2 Ware 176.

58. Joy *v.* Allen, 13 Fed. Cas. No. 7,552, 2 Woodb. & M. 303.

59. Williams *v.* Nichols, 13 Wend. (N. Y.) 58; Crawford *v.* Erie, 4 Ohio Dec. (Reprint)

expressly authorize the master to act as such a factor,[60] or unless he has implied authority to do so by the usage of trade.[61]

d. Persons Liable.[62] As a general rule those persons are liable for torts committed in the operation of a vessel who at the time sustain the relation of master or principal to the person in immediate control of the vessel.[63] Where the owners of several vessels form a partnership or hold themselves out as engaged in a joint enterprise, they are jointly liable for the default or negligence of those placed in charge of any of the vessels,[64] or each partner is liable for damages caused by the negligence of the servants and agents of the partnership while conducting its business.[65]

e. Liens.[66] A maritime lien for damages to person or property caused by torts in the use of a vessel usually attaches in favor of the injured person against the vessel,[67] and in some jurisdictions such a lien is expressly provided for by statute.[68] Laches or delay in the enforcement of such lien may operate to divest it.[69]

11, Clev. L. Rec. 7; Taylor *v.* Wells, 3 Watts (Pa.) 65; The New Hampshire, 21 Fed. 924.

60. Taylor *v.* Wells, 3 Watts (Pa.) 65.

61. Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268; Schooner Jane Louisa *v.* Williams, 1 Ohio Dec. (Reprint) 228 (holding that where the usage of trade, in consigning goods by a vessel, is for the consignor to direct the master, by memorandum on the bill of lading, to collect freight and charges of the consignee, and the master does so, the vessel is liable for the master's failure to pay over to the consignor the part belonging to him); Taylor *v.* Wells, 3 Watts (Pa.) 65.

62. Liability as between owner and charterer see *supra*, III, E, 1, b.

63. Pope *v.* Seckworth, 47 Fed. 830 (although not the actual owner); Scull *v.* Raymond, 18 Fed. 547.

The liability of the owners of a vessel will be presumed to continue until they affirmatively establish the existence of some contract which relieves them therefrom; and the mere fact that they have chartered the vessel to another does not relieve them from liability unless the entire possession, authority, and control over the vessel have been transferred to the charterer. Anderson *v.* Boyer, 13 N. Y. App. Div. 258, 43 N. Y. Suppl. 87 [*reversed* on the facts in 156 N. Y. 93, 50 N. E. 976].

The registered "managing owner" of a vessel is liable for the negligent management of the vessel by the master, to whom she has been let on shares, although such negligence occurs during her employment under a charter-party of which the owner knew nothing. Steel *v.* Lester, 3 C. P. D. 121, 3 Aspin. 537, 47 L. J. C. P. 43, 37 L. T. Rep. N. S. 642, 26 Wkly. Rep. 212.

64. Sun Mut. Ins. Co. *v.* Kountz Line, 122 U. S. 583, 7 S. Ct. 1278, 30 L. ed. 1137 [*reversing* 10 Fed. 768, 48 Fed. 838], holding also that the fact that such persons own no property in common, and that each is entitled to receive the net earnings of his own boat, is immaterial.

65. Bowas *v.* Pioneer Tow Line, 3 Fed. Cas. No. 1,713, 2 Sawy. 21.

66. Maritime liens generally see MARITIME LIENS, 26 Cyc. 743.

67. The China, 7 Wall. (U. S.) 53, 19 L. ed. 67; Cavalier *v.* The Christobal Colon, 44 Fed. 803; The Carolina, 30 Fed. 199 [*affirmed* in 32 Fed. 112] (holding that a lien arises against a vessel for damages from personal injuries occasioned by a failure to provide safe machinery for the discharge of her cargo); The Germania, 10 Fed. Cas. No. 5,360, 9 Ben. 356. See also COLLISIONS, 7 Cyc. 374.

It is the settled rule in the United States that there is a maritime lien for the injury inflicted by a maritime tort, with but few exceptions, such as that made by admiralty rule 16 in the case of suits for assault and beating. The Anaces, 93 Fed. 240, 34 C. C. A. 558 [*reversing* 87 Fed. 565].

68. Chicago *v.* The Queen City, 17 Ill. App. 203 (holding that Rev. St. c. 12, providing that all water craft above five tons "used" in navigating the waters of the state shall be subject to liens for all damages done by such water craft, applies to a vessel navigating such waters, although owned out of the state); Pousarques *v.* Natchez, 15 La. Ann. 80; West *v.* Martin, 51 Wash. 85, 97 Pac. 1102, 47 Wash. 417, 92 Pac. 334 (holding that Ballinger Annot. Codes & St. 5953 (Pierce Code, § 6077), providing for a lien on a vessel for injuries committed by it to persons or property within the state, or while transporting such persons or property to or from the state, is not limited to transportable property, but includes damage to a permanent structure, and applies to foreign as well as domestic vessels); McRoberts *v.* The Henry Clay, 17 Wis. 101 (holding that Gen. Laws (1859), c. 151, may be resorted to for enforcing claims of the kind therein specified, which accrue out of the state, in all cases where the person who is liable remains owner of the vessel at the time it is proceeded against in the state, although it does not operate to create a specific lien out of the state, from transactions occurring entirely outside of it); Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 7 S. Ct. 254, 30 L. ed. 447.

69. The Martino Cilento, 22 Fed. 859, holding, however, that where no claims of sub-

f. Contributory Negligence [70] — (I) *IN GENERAL.* Where a person injured through the tort of a vessel is himself guilty of contributory negligence,[71] it is the general rule at common law that he can recover nothing for his injuries,[72] except where his negligence is not concurrent, and the proximate cause of the injury is the negligent act of the offending vessel.[73] In admiralty, however, contributory negligence on the part of the person damaged is no bar to a recovery; [74] but where the negligence of respondent concurs with the negligence of libellant in causing the injury, the damages should be apportioned,[75] provided the libellant's fault, although evident, is neither wilful, gross, nor inexcusable, and the other circumstances present a strong case for his relief,[76] and the case is not within the limitation of liability statutes, by reason of which the owners of the offending vessel are exempt; [77] but this rule does not apply where the proximate cause of libellant's injury is not his negligence but the subsequent negligence of respondent.[78]

(II) *OF STEVEDORES AND OTHER INDEPENDENT CONTRACTORS AND THEIR EMPLOYEES.* Stevedores and other independent contractors and their

sequent purchasers, lienors, or encumbrancers are involved, a maritime lien for damages will not be deemed stale or barred by lapse of time, through a delay of two years in filing the libel, merely on the ground that some witnesses have in the meantime been lost by the respondents.

70. Contributory negligence of passengers see *infra*, VIII, D, 4, b.

71. Anderson *v.* The E. B. Ward, Jr., 33 Fed. 44 (contributory negligence in falling into a hatchway); King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1 (holding that contributory negligence in respect to the burning of a building by sparks from a steamer is not imputable to the owner for constructing the building of wood, although it is within five feet of a dock on a public navigable river).

Reliance on precaution.— A vessel has the right to act on the assumption that another vessel will take proper steps to avert a disaster, and the fact that the former vessel might have averted a disaster which it has no reason to foresee does not constitute contributory negligence. The Ellen Heron, 55 Fed. 766 [*affirmed* in 61 Fed. 220, 9 C. C. A. 455] (injury by swell); Nelson *v.* The Majestic, 48 Fed. 730, 1 C. C. A. 78 [*affirming* 44 Fed. 813] (injury by swell).

Emergency.— The fact that a person in the presence of an imminent and unexpected danger does not act with deliberation does not make him chargeable with contributory negligence. The Schooner Robert Lewers Co. *v.* Kekauoha, 114 Fed. 849, 52 C. C. A. 483.

72. *Louisiana.*— Love *v.* The Montgomery, 10 La. Ann. 113.

Missouri.— Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434.

New York.— Leroy *v.* North German Lloyd Steamship Co., 16 Misc. 162, 38 N. Y. Suppl. 835.

Pennsylvania.— Brown *v.* French, 104 Pa. St. 604.

United States.— King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1.

See 44 Cent. Dig. tit. "Shipping," § 341.

73. Wright *v.* Brown, 4 Ind. 95, 58 Am. Dec. 622; Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434; McGregor *v.* Rogers, Wright (Ohio) 582, holding that, where a boat is sunk by defendant running against it negligently, it is no excuse that plaintiff might safely have moored his boat elsewhere.

74. The Max Morris *v.* Curry, 137 U. S. 1, 11 S. Ct. 29, 34 L. ed. 586 [*affirming* 28 Fed. 881 (*affirming* 24 Fed. 860)]; Anderson *v.* Ashebrooke, 44 Fed. 124; The Daylesford, 30 Fed. 633.

75. The Max Morris *v.* Curry, 137 U. S. 1, 11 S. Ct. 29, 34 L. ed. 586 [*affirming* 28 Fed. 881 (*affirming* 24 Fed. 860)]; The Eugene F. Moran, 143 Fed. 187; The Steam Dredge No. 1, 134 Fed. 161, 67 C. C. A. 67, 69 L. R. A. 293; The No. 6H, 108 Fed. 429; The New Hampshire, 88 Fed. 306; Finch *v.* The Lighter Mystic, 44 Fed. 398; Anderson *v.* The Ashebrooke, 44 Fed. 124; De Lelle *v.* The Atalanta, 34 Fed. 918; The Eddystone, 33 Fed. 925; The Truro, 31 Fed. 158; The Drew, 22 Fed. 852. See 44 Cent. Dig. tit. "Shipping," § 341. But see The Explorer, 20 Fed. 135.

Division of loss generally see ADMIRALTY, 1 Cyc. 878; COLLISION, 7 Cyc. 311 *et seq.*, 377 *et seq.*

All cases of maritime torts occasioned by concurring negligence are within the admiralty rule apportioning damages when both parties are at fault. The Max Morris *v.* Curry, 137 U. S. 1, 11 S. Ct. 29, 34 L. ed. 586 [*affirming* 28 Fed. 881 (*affirming* 24 Fed. 860)].

76. The Max Morris *v.* Curry, 137 U. S. 1, 11 S. Ct. 29, 34 L. ed. 586 [*affirming* 28 Fed. 881 (*affirming* 24 Fed. 860)]; The Truro, 31 Fed. 158.

77. Quinlan *v.* Pew, 56 Fed. 111, 5 C. C. A. 438, holding that, under Rev. St. § 4283, a member of a fishing crew, who is a co-charterer with the master of the fishing vessel, stands in no better position than the master in respect to a defect in the vessel which is known to the master, and hence cannot recover against the owner for a personal injury resulting from such defect. See also *infra*, XI.

78. The Steam Dredge No. 1, 134 Fed. 160 [*affirming* 122 Fed. 679].

employees engaged in work on or about a vessel assume usually all the ordinary and usual risks and perils incident to their employment, and all risks of which they have knowledge or should have knowledge, and hence cannot recover for injuries received by reason of such risks,[79] such as the incompetency and carelessness of their fellow servants,[80] particularly where they do not use proper care in the face of such risks;[81] but they do not assume the risks of unusual or extraordinary dangers of which they have no knowledge, and of which knowledge cannot be imputed to them,[82] and which are caused by the negligence of the owners or the master.[83] But they have a right to presume that the owners will exercise due care and diligence in performing their duty to use reasonable care to protect them from injury, and hence are not guilty of contributory negligence if, in the absence of knowledge to the contrary, they in good faith and with due care rely upon a condition of things which they have a right to presume exists.[84]

g. Damages.[85] The measure of damages for which the owners and vessel are liable in case of a maritime tort is usually the actual loss sustained by the person damaged, as a proximate result of the vessel's negligence.[86] In estimating apportioned damages, in admiralty, the estimate of personal damages to a stevedore or other independent contractor or employee should include only expenses and loss of time or wages,[87] and he should not be allowed anything for pain and suffering.[88]

2. Torts Caused by Negligence[89] **— a. Negligent Management or Navigation in General.** It is the duty of those conducting a vessel in navigable waters

79. Wholey *v.* British, etc., Steamship Co., 158 Fed. 379 [*affirmed* in 171 Fed. 399]; The Scandinavia, 156 Fed. 403; The Saratoga, 94 Fed. 221, 36 C. C. A. 208 [*reversing* 87 Fed. 349]; The Hadje, 50 Fed. 225.

Assumption of risk generally see Master and Servant, 26 Cyc. 1177 *et seq.*, 1188.

80. The Persian Monarch, 55 Fed. 333, 5 C. C. A. 117 [*reversing* 49 Fed. 669]; The Islands, 28 Fed. 478. See also Master and Servant, 26 Cyc. 1358 *et seq.*

81. Lehigh Valley Transp. Co. *v.* Cook, 138 Ill. App. 405; McCarthy *v.* Lehigh Valley Transp. Co., 48 Minn. 533, 51 N. W. 480; Kraeft *v.* Mayer, 92 Wis. 252, 65 N. W. 1032; The Scandinavia, 156 Fed. 403; The Santiago, 137 Fed. 323, 69 C. C. A. 653; The Patria, 135 Fed. 255; Regina *v.* Dunlop Steamship Co., 128 Fed. 784; Maryland *v.* Westoll, 106 Fed. 233; The Nikolai II, 102 Fed. 174; The Louisiana, 74 Fed. 748, 21 C. C. A. 60; Deming *v.* The Argonaut, 61 Fed. 517; The Serapis, 51 Fed. 91, 2 C. C. A. 102 [*reversing* 49 Fed. 393]; Ennis *v.* The Maharajah, 49 Fed. 111, 1 C. C. A. 181 [*affirming* 40 Fed. 784]; Doyle *v.* The Jersey City, 46 Fed. 134; Anderson *v.* The Ashebrooke, 44 Fed. 124; The Truro, 31 Fed. 158; The Gladiolus, 22 Fed. 454 [*affirming* 21 Fed. 417]; The Carl, 18 Fed. 655; The Privateer, 14 Fed. 872. See 44 Cent. Dig. tit. "Shipping," § 342. See also The Tresco, 134 Fed. 819, 67 C. C. A. 465 [*reversing* 128 Fed. 780].

Using improper appliances.— Where proper appliances are furnished to such a person and he voluntarily and unnecessarily elects to use an improper, defective, or dangerous appliance and is injured, his negligence will preclude a recovery. The Leocadia, 35 Fed. 534.

82. McGill *v.* Michigan Steamship Co., 144 Fed. 788, 75 C. C. A. 578 [*reversing* 133 Fed. 577]; The Elton, 83 Fed. 519, 31 C. C. A. 496.

83. Carlson *v.* White Star Steamship Co., 39 Wash. 394, 81 Pac. 838; McGill *v.* Michigan Steamship Co., 144 Fed. 788, 75 C. C. A. 518 [*reversing* 133 Fed. 577].

84. Perkins *v.* Furness, 167 Mass. 403, 45 N. E. 759 (not bound to examine a hatch to ascertain whether all the hatch covers are in place); Morel *v.* Lehman, 159 Fed. 124, 86 C. C. A. 512; The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A. 56 [*affirming* 136 Fed. 271]; The Red Jacket, 110 Fed. 224; Cannon *v.* The Protos, 48 Fed. 919 (justified in believing feeding hole closed).

85. **Division of damages** see *supra*, V, C, 1, f, (I); Admiralty, 1 Cyc. 878; Collision, 7 Cyc. 377 *et seq.*

Measure of damages: For injuries to seamen see Seamen, 35 Cyc. 1246. For injuries to tow see Towage. In collision cases generally see Collision, 7 Cyc. 390 *et seq.*

86. Cornwall *v.* The New York, 38 Fed. 710; The Guillermo, 26 Fed. 921; Hollyday *v.* The David Reeves, 12 Fed. Cas. No. 6,625, 5 Hughes 89; Sherwood *v.* Hall, 21 Fed. Cas. No. 12,777, 3 Sumn. 127, holding that the measure of damages for the tort of a master of a vessel who has shipped a minor known to him to have run away from another vessel is the amount of wages he was earning on the other vessel, with expenses and losses.

Remote damages cannot be recovered. Letts *v.* Hackett, 15 Fed. Cas. No. 8,283, Brown Adm. 480.

87. The Eddystone, 33 Fed. 925; The Truro, 31 Fed. 158.

88. The Truro, 31 Fed. 158.

89. **Contributory negligence** see *supra*, V, C, 1, f.

to use all reasonable care and prudence to avoid causing injuries to others, and as a general rule the owners of a vessel and the vessel are liable for all natural and proximate damages caused to persons or property by reason of her negligent management,[90] or navigation,[91] as by reason of the negligence or tortious acts of the master or crew,[92] although committed without authority or knowledge of the owners,[93] particularly where the negligent acts are in violation of a stat-

Dangerous or defective condition of vessel or appliances see *supra*, V, C, 1, b.

Injuries to licensees or trespassers by acts of negligence see *infra*, V, C, 3.

Loss or injury of vessel through negligence of charterer see *supra*, III, N.

90. The Steam Dredge No. 1, 122 Fed. 679; Jarvis *v.* The Iniziativa, 57 Fed. 311, 6 C. C. A. 346 [*affirming* 50 Fed. 229], holding that a vessel is negligent in leaving a loaded lighter without an attentive watchman.

Negligence of stevedore.— The owners of a vessel are liable for the negligent acts of stevedores employed by them to load their vessel (Rochereau *v.* Hausa, 14 La. Ann. 431; Serviss *v.* The Chattahoochee, 37 Fed. 153 [*affirmed* in 39 Fed. 368]), but they are not liable for the negligence of stevedores employed for a gross sum by the consignees of the charterers in unloading the cargo (Linton *v.* Smith, 8 Gray (Mass.) 147).

91. Watson *v.* McGuire, 17 B. Mon. (Ky.) 31; Stoker *v.* Hodge Fence, etc., Co., 116 La. 926, 41 So. 211; The Mary, 123 Fed. 609; The Addie B., 43 Fed. 163 (negligence of tug in rendering salvage to a yacht and thereby injuring another yacht); Ladd *v.* Foster, 31 Fed. 827, 12 Sawy. 547. See also Cooper *v.* Eastern Transp. Co., 75 N. Y. 116.

The natural and probable consequence of a vessel's negligence may be recovered for, although the injury in the precise form in which it resulted was not foreseen. Hill *v.* Winsor, 118 Mass. 251.

Injury to pipe line by negligent dragging of anchor see Maine Water Co. *v.* Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953.

Tying up river craft to each other.— The custom of tying up one craft to another on the shores of the Allegheny river is merely a privilege, and imposes no duty on the inner craft to make it secure enough to hold both, and where the owner of one craft in attempting to land by fastening to another breaks the lashings of the latter, and draws it into the current, he is liable for the resulting damages. Pope *v.* Seckworth, 47 Fed. 830.

Negligence of tow.— Where damages are caused by the negligence of a vessel which is in tow, the fact that the tugboat, which is doing the towing, was also negligent is no defense. Maine Water Co. *v.* Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953.

92. Cook *v.* Parham, 24 Ala. 21 (holding that a vessel may be held liable for neglect to provide competent officers, although the party injured has the means of knowing the officer's character for care and skill); Dooley *v.* Booth, 96 N. Y. Suppl. 253 (negligence of master in charge of unloading and unmooring a scow); Carlson *v.* White Star Steamship Co., 39 Wash. 394, 81 Pac. 838 (negligence in unloading lumber from a vessel to a lighter); Workman *v.* New York, 179 U. S. 552, 21 S. Ct. 212, 45 L. ed. 314 [*reversing* 67 Fed. 347, 14 C. C. A. 530, and *affirming* 63 Fed. 298] (holding that a vessel by whomsoever owned or navigated is liable for an actionable injury resulting from the negligence of the master and crew of the vessel, except that a government vessel cannot be held so liable since the government cannot be sued in its own courts); The Bulley, 138 Fed. 170; The On-The-Level, 128 Fed. 511 Memphis, etc., Packet Co. *v.* Overman Carriage Co, 93 Fed. 246 (negligence in passing under bridge and running into pier). See also Anderson *v.* Boyer, 156 N. Y. 93, 50 N. E. 976 [*reversing* 13 N. Y. App. Div. 258, 43 N. Y. Suppl. 87].

In admiralty the owner of a vessel is liable *in personam* and the vessel *in rem* for injuries done to person and property by the negligence of the master and crew of the vessel only where the owner would under the same circumstances be liable in a suit at common law. The Germania, 10 Fed. Cas. No. 5,360, 9 Ben. 356.

Injury to telegraph cable.—A vessel is liable for the negligence of her master and crew in fouling a telegraph cable by her anchor, or in injuring the cable in attempting to release the anchor. The Clara Killam, L. R. 3 A. & E. 161, 39 L. J. Adm. 50, 23 L. T. Rep. N. S. 27, 19 Wkly. Rep. 25; Submarine Tel. Co. *v.* Dickson, 15 C. B. N. S. 759, 33 L. J. C. P. 139, 109 E. C. L. 759. See also The Anita Berwind, 107 Fed. 721. *Compare* Bell Tel. Co. *v.* The Brigantine Rapid, 5 Can. Exch. 413. Under 25 U. S. St. at L. c. 17, § 3, which provides that a cable shall be cut only when necessary to save life or limb or a vessel, and art. 7 of the treaty of 1884, which requires cable companies to reimburse shipowners for anchors sacrificed to avoid injury to a cable, if the officers of the vessel cut a cable in order to release their anchor, when they have another anchor on board, they are guilty either of wilful injury to the cable, or of culpable negligence, for which the vessel is liable. The William H. Bailey, 100 Fed. 115, 103 Fed. 799 [*affirmed* in 111 Fed. 1006].

Injury to government breakwater.— A master navigating the waters of Lake Superior cannot as a matter of law be said to be free from negligence in colliding with an incompleted extension of a government breakwater in an important harbor in that lake, where he has the means of ascertaining the conditions which, if known, would prevent the collision. Davidson Steamship Co. *v.* U. S., 205 U. S. 187, 27 S. Ct. 480, 51 L. ed. 764 [*affirming* 142 Fed. 315, 73 C. C. A. 425].

93. The Bulley, 138 Fed. 170.

ute;[94] and in some jurisdictions this liability is expressly provided for by statute.[95] But the owners or vessel cannot be held liable for damages which cannot be attributed to negligence on her part or on the part of the master and crew,[96] as where the injuries are caused by the negligence of an independent contractor or his servants having no connection with the vessel.[97] Although the right of navigation in navigable waters is ordinarily paramount to the right of fishing therein where the rights conflict,[98] yet where both can be freely and fairly enjoyed, the right of navigation has no right to trespass upon and injure the right of fishing, and in such case the owners of a vessel will be liable for damages caused to fishermen by the negligent navigation of their vessel,[99] although they do not act maliciously or wantonly.[1]

b. Injury From Suction or Swell. It is a well-established rule that where a vessel propelled by paddle wheels or propellers is being navigated in a river or

94. The Craigearn, 106 Fed. 978, crowding another vessel while passing in a narrow channel.

Fire hose.— A vessel is liable for damages caused by a failure to use reasonable care and prudence to keep its fire hose in readiness for immediate service as required by statute. The Garden City, 26 Fed. 766.

95. Howes *v.* The Red Chief, 15 La. Ann. 321 (holding that the act of March 15, 1855, section 9, providing that where any loss, etc., has been caused by any carelessness, etc., in the management of any steamboat, etc., the party injured shall have a privilege, etc., upon such steamboat, etc., embraces all cases of loss or damage arising from negligence in the management of such boats and cannot be restricted to cases of collision); The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. ed. 760 (holding that Wis. Rev. St. (1898) § 3348, imposing a liability on every vessel for damages arising from injuries to persons or property by such vessel covers only cases of damage done by the vessel herself as the offending thing, to persons and property outside the vessel).

96. Memphis, etc., Packet Co. *v.* Forgarty, 9 Ohio Cir. Ct. 418, 6 Ohio Cir. Dec. 375; The Euxinia, 150 Fed. 541, 80 C. C. A. 254 [*reversing* 136 Fed. 502, 144 Fed. 524]; The Anita Berwind, 107 Fed. 721 (breaking of submarine cable held not negligent); *In re* Demarest, 86 Fed. 803; *In re* Saville, 86 Fed. 800; Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique, 63 Fed. 845, 182 U. S. 406, 21 S. Ct. 831, 45 L. ed. 1155 (holding that an ocean steamship is not negligent in backing out from her dock to go out on the ebb tide with only one tug to assist her in turning in the river, where the tug is a powerful one, and its use is continued as long as practicable, and it can be done safely, with proper care, and it is customary to employ but one tug for the purpose); The Chicasaw, 41 Fed. 627 [*reversing* 38 Fed. 358] (holding that it is not the duty of a steamboat to protect a coal flat which is moored to her for the purpose of supplying coal from floating adrift).

The test as to whether the course taken by a vessel's officer was negligent or unauthorized and reckless is that of good seamanship under the impending peril. The Chicasaw, 41 Fed. 627 [*reversing* 38 Fed. 358].

Right of vessel to cut loose coal flat moored to her to protect herself see The Chicasaw, 41 Fed. 627 [*reversing* 38 Fed. 358].

97. International Mercantile Mar. Co. *v.* Gaffney, 143 Fed. 305, 74 C. C. A. 443.

98. See FISH AND GAME, 19 Cyc. 993.

99. *Michigan.*— Bishop *v.* Baldwin, 147 Mich. 22, 110 N. W. 139.

New Jersey.— Post *v.* Munn, 4 N. J. L. 61, 7 Am. Dec. 570.

Pennsylvania.— Cobb *v.* Bennett, 75 Pa. St. 326, 15 Am. Rep. 752.

Wisconsin.—Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807, holding that the owner of a vessel which on a clear, calm day negligently runs through a fisherman's net that is easily perceptible and which can be avoided without prejudice to the prosecution of the voyage, is liable for the damage.

Canada.— Hubbard *v.* Dickie, 39 Nova Scotia 506.

See 44 Cent. Dig. tit. "Shipping," § 344. See also FISH AND GAME, 19 Cyc. 1001 text and note 71.

A navigator may not, by his own negligence, unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right. Thus he may run his vessel over a net in the night-time when he cannot see it, or in the daytime if he cannot avoid it without interfering with the reasonable prosecution of his voyage, or is driven upon it by stress of weather; but if he runs over the net in daylight, in a calm sea, when, if he looks, he cannot fail to see it, and seeing, might easily, and without prejudice to his voyage, avoid it, he is answerable. Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

Whether or not the owner of fish nets had a statutory right to set them where they were, or whether as between himself and the owner of the shore he was a trespasser, is immaterial in an action for injuries negligently caused to such nets by a vessel. Bishop *v.* Baldwin, 147 Mich. 22, 110 N. W. 139.

1. Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

harbor in the vicinity of other smaller or weaker craft or vessels, which are properly in such waters, and which may be affected by her displacement, it is the duty of those in charge of her to exercise reasonable care and prudence in view of the circumstances existing at the time, to avoid injuring such other craft or vessels which she is approaching or passing, or which are anchored or moored near by, by reason of the suction or swell caused by the movement of her paddle wheels or propeller,[2] and if they fail to exercise such care and prudence, the owners of the offending vessel are liable for damages caused thereby to such other craft or vessel,[3] particularly where the act of the offending vessel is in violation of some statutory regulation.[4] The degree of care and prudence that must be exercised in this regard depends upon the circumstances of each particular case, and the vessel causing the injury must be held responsible for any failure to appreciate the reasonable effect of her speed and motion through the water at the particular place and under the particular circumstances,[5] such as the size of the wave she is known to displace,[6] the fact that she is leav-

2. Watson *v.* McGuire, 17 B. Mon. (Ky.) 31 (holding that while the owner of a steamer, while passing coal boats, is required to exercise such care and precaution as an ordinarily prudent and skilful man under like circumstances would observe, he is not held to the same degree of care and precaution that he would be as bailee having the control and possession of another's property); The Asbury Park, 138 Fed. 925 (holding that where a vessel, either from her construction or the speed with which she is customarily navigated, is known to be peculiarly liable to cause swells dangerous to other shipping, she must exercise unusual care in her navigation); The Rotherfield, 123 Fed. 460; The New York, 34 Fed. 757. But *compare* Fawcett *v.* The Natchez, 8 Fed. Cas. No. 4,703, 3 Woods 16, holding that steamers and other water craft navigating the Mississippi river have the right to follow the usual channel, and that it is incumbent upon those who have rafts, barges, and other craft moored to the banks to foresee and provide against accidents liable to be caused by the swell of passing steamers.

There is no distinction between harbor and river navigation in respect to the liability of a larger vessel for causing dangerous swells by which other lawful and properly handled vessels are injured. The Hendrick Hudson, 159 Fed. 581.

As to floating dry docks.— The duty of a passing steamer with respect to causing dangerous swells is the same toward a floating dry dock permanently located along the side of a pier as toward vessels in the same situation, and she is bound to exercise reasonable care to avoid causing injury to such dock, having regard to the character of the structure and its greater liability to injury from its size and therefore longer subjection to the action of the swells. Shewan *v.* New England Nav. Co., 155 Fed. 860 [*reversed* on the facts in 169 Fed. 285].

3. Watson *v.* McGuire, 17 B. Mon. (Ky.) 31; O'Reilly *v.* New Brunswick, etc., Steamboat Co., 26 Misc. (N. Y.) 195, 55 N. Y. Suppl. 1133 [*reversed* on other grounds in 28 Misc. 112, 59 N. Y. Suppl. 261]; The Hendrick Hudson, 163 Fed. 862 [*affirmed* in 168 Fed. 1021]; The Asbury Park, 147 Fed. 194, 78 C. C. A. 1 [*affirming* 136 Fed. 269]; The Rotherfield, 123 Fed. 460. See also Smith *v.* Dobson, 3 M. & G. 59, 3 Scott N. R. 336, 42 E. C. L. 40.

Presumption.— Where a vessel, while passing a wharf on a river, both in going out and on coming in, produces so large a wave as to cause a vessel which was properly moored to the wharf to range so violently as to break her lines, although no such effects follow the passing of other vessels at greater speed, such facts raise a presumption of negligent navigation on the part of such vessel which renders her liable for an injury. The Havana, 100 Fed. 857.

That other vessels were not injured by the swell, or that the one injured might have prevented the injury by taking unusual precautions, is no defense to a suit for injuries caused by the swell of a passing steamer. The Asbury Park, 138 Fed. 925.

4. Kelley Island Lime, etc., Co. *v.* Cleveland, 144 Fed. 207, passing in a narrow channel in violation of statute.

5. The Chester W. Chapin, 155 Fed. 854; The Daniel Drew, 6 Fed. Cas. No. 3,565, 15 Blatchf. 523.

The presence of vessels in the neighborhood which may be reasonably expected to be affected by the swells of the steamer causing the injury are to be taken into consideration, and the officers of the steamer must use reasonable judgment and care, not only to see whether such an accident is likely to happen, but whether they have taken all reasonable precautions to avoid such an accident, even when the result of former experience has shown that in the ordinary and usual course of events the boat passed is likely to escape injury. The Chester W. Chapin, 155 Fed. 854.

6. The Chester W. Chapin, 155 Fed. 854 (holding that the master of a steamer is held to be presumed to be acquainted with the amount of disturbance caused by her and its probable effect); The Drew, 22 Fed. 852 (holding that a steamboat passing in the vicinity of other craft in shallow water is

ing,[7] or passing a slip or dock where she knows or has reason to know vessels are moored;[8] and where such a vessel in passing near a smaller or weaker vessel has reason to apprehend danger thereto from her swells, it is her duty to slacken her speed,[9] or to stop her paddle wheels or propeller,[10] or to keep at a greater distance,[11] although she is proceeding at her ordinary rate of speed.[12] Thus the owners of a vessel or the vessel itself may, under the circumstances of the particular case, be liable for damages caused to other vessels by the suction or swell resulting from her proceeding too near the damaged vessel at a high rate of speed,[13] or by proceeding at too great a speed under the circumstances.[14] Those in charge of a smaller or weaker vessel, if it is in a proper place and properly navigated and managed, have a right to assume that the larger vessel will observe reasonable precautions to avoid injuring her by reason of her swell or suction,[15] and they are under no obligation to warn the larger vessel of the danger;[16] but at the same time it is their duty to use all reasonable care and prudence to avoid the effect of such known dangers,[17]

bound to use all reasonable precautions from doing them injury from the known suction and swells she causes).

The size of each steamer's waves when they reach the slips depends upon her model, the speed of her propeller, and her distance from the docks; and every steamer must take the risk of regulating her speed and distance accordingly. The New Hampshire, 88 Fed. 306.

7. The Leo, 15 Fed. Cas. No. 8,250, 3 Ben. 569, holding that a large propeller has no right to set in motion a great current of water in a crowded slip, without in some way notifying the vessels likely to be affected by it, so as to give them an opportunity to protect themselves from it by getting out extra fasts.

8. Bell *v.* New Jersey Steamboat Co., 54 N. Y. App. Div. 526, 66 N. Y. Suppl. 1031, holding that a steamboat in passing docks should proceed at such rate that no danger would be liable to result, provided she has timely notice of vessels at the docks.

In passing slips a steamer is bound to go at such moderate speed and at such a distance away that her waves will not do damage to ships properly moored in the slips that she passes. The New Hampshire, 88 Fed. 306.

9. **Negligence in not reducing speed** while passing near a dock or slip (see Shewan *v.* New England Nav. Co., 169 Fed. 285 [*reversing* on other grounds 155 Fed. 860]; The New Hampshire, 88 Fed. 306), or while passing near a tow of scows (see The Chester W. Chapin, 155 Fed. 854; Ross *v.* New Jersey Cent. R. Co., 146 Fed. 608 [*affirmed* in 157 Fed. 1004, 85 C. C. A. 678]; The Asbury Park, 138 Fed. 617 [*affirmed* in 142 Fed. 1037, 71 C. C. A. 684]; The Columbia, 61 Fed. 220, 9 C. C. A. 455 [*affirming* 55 Fed. 766 (holding that where a steamer ascending a narrow channel against the ebb tide causes so violent a motion at the time of passing a tow as to produce a collision between a canal bridge and a lighter in the tow, it is sufficient to show either that she did not slow up at all or as soon as she should have done so, and in the absence of any excuse renders her responsible for the damage); Smith *v.* The Monmouth, 44 Fed. 809).

10. Daniels *v.* Carney, 148 Ala. 81, 42 So. 452, 121 Am. St. Rep. 34, 7 L. R. A. N. S 920.

Negligence in failing to stop paddle wheels or propeller while passing near a tow (see The St. Paul, 124 Fed. 103), or landing or dock (see The New York, 34 Fed. 757).

11. The Chester W. Chapin, 155 Fed. 854.

12. The Hendrick Hudson, 163 Fed. 862 [*affirmed* in 168 Fed. 1021] (holding that vessels using a dock cannot be expected to so manage their work as to receive extraordinary swells without harm and that a vessel making such swells, although navigated in the usual manner, is responsible for their effects upon innocent vessels); Nelson *v.* The Majestic, 48 Fed. 730, 1 C. C. A. 78 [*affirming* 44 Fed. 813]. But *compare* The Daniel Drew, 6 Fed. Cas. No. 3,565, 13 Blatchf. 523.

13. Wright *v.* Brown, 4 Ind. 95, 58 Am. Dec. 622; Boyer *v.* The Connecticut, 45 Fed. 374; Smith *v.* The Monmouth, 44 Fed. 809; The Morrisania, 17 Fed. Cas. No. 9,838, 13 Blatchf. 512.

14. The Asbury Park, 144 Fed. 553; The Rhode Island, 24 Fed. 295; The Southfield, 19 Fed. 841; The Tiger Lily, 11 Fed. 744; The C. H. Northam, 5 Fed. Cas. No. 2,689, 7 Ben. 249 [*affirmed* in 5 Fed. Cas. No. 2,690, 13 Blatchf. 31] (holding that a steamboat passing a tow is bound to know the depth of water and whether her swell will endanger the tow, and that she is liable for the injury where she passes in a narrow place or at such speed that her suction and swell break the fastenings or drive the boats in the tow forcibly together so as to cause injury); Mason *v.* Sargent, 16 Fed. Cas. No. 9,253; The Batavier, 9 Moore P. C. 286, 1 Spinks 378, 14 Eng. Reprint 305.

15. Daniels *v.* Carney, 148 Ala. 81, 42 So. 452, 121 Am. St. Rep. 34, 7 L. R. A. N. S. 920; The Chester W. Chapin, 155 Fed. 854.

16. The Chester W. Chapin, 155 Fed. 854.

17. O'Reilly *v.* New Brunswick, etc., Steamboat Co., 26 Misc. (N. Y.) 195, 55 N. Y. Suppl. 1133 [*reversed* on other grounds in 28 Misc. 112, 59 N. Y. Suppl. 261] (holding, however, that it is not contributory negligence for the owner of a canal-boat to leave her tied to a dock in charge of a man); Shewan *v.* New England Nav. Co., 155 Fed.

and the vessel causing the suction or swell is liable only for such damages as are the proximate result of her negligence.[18]

c. Negligence of Pilot. Where the pilot of a vessel is not a compulsory one in the sense that the owners or master of the vessel are bound to accept him, but is employed voluntarily, the owners of the vessel are liable for his negligent acts.[19] But where he is a compulsory pilot in the sense that he has compulsory charge of the vessel, he is in no sense an agent or servant of the owners of the vessel, and at common law they are not liable for his negligent acts,[20] and this doctrine prevails in England both at common law and in admiralty,[21] except where by statute he is compulsory only in the sense that his fee must be paid, and he is not in compulsory charge of the vessel.[22] In this country the question of the liability of the owner of a ship for the act of a compulsory pilot has received considerable discussion, and while the owners of a vessel are not personally liable for the negligent acts of such a pilot,[23] yet by the admiralty law the fault or negligence of a compulsory pilot is imputable to the vessel and it may be held liable therefor *in rem*.[24]

860 [*reversed* on the facts in 169 Fed. 285]; The Drew, 22 Fed. 852; Fawcett *v.* The Natchez, 8 Fed. Cas. No. 4,703, 3 Woods 16.

18. The St. Paul, 171 Fed. 606 (holding that, although a vessel is negligent in making a dangerous swell, she is not liable where the injury sustained by a scow in a tow is the result of the improper make-up of the tow in that the boats are fastened within four or five feet of each other); The Hendrick Hudson, 159 Fed. 581; The La Savoie, 157 Fed. 312; The Newcastle, 147 Fed. 534; The Asbury Park, 147 Fed. 194, 78 C. C. A. 1 [*reversing* 136 Fed. 269]; The Kaiser Wilhelm Der Grosse, 145 Fed. 623, 76 C. C. A. 374 [*reversing* 134 Fed. 1012]; Garfield, etc., Coal Co. *v.* The Mt. Hope, 79 Fed. 119; Manhattan Lighterage Co. *v.* The Pilgrim, 57 Fed. 670; Cornwall *v.* The New York, 38 Fed. 710.

19. Yates *v.* Brown, 8 Pick. (Mass.) 23 (although appointed by public authority); Shaw *v.* Reed, 9 Watts & S. (Pa.) 72; Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique, 63 Fed. 845, 182 U. S. 406, 21 S. Ct. 831, 45 L. ed. 1155; The Cayo Bonito, [1903] P. 203, 9 Aspin. 445, 72 L. J. P. D. & Adm. 70, 89 L. T. Rep. N. S. 260, 19 T. L. R. 609, 52 Wkly. Rep. 133 [*affirming* [1902] P. 216, 71 L. J. P. D. & Adm. 38, 86 L. T. Rep. N. S. 867, 18 T. L. R. 680]; The Clymene, [1897] P. 295, 8 Aspin. 287, 66 L. J. P. D. & Adm. 152, 76 L. T. Rep. N. S. 811, 46 Wkly. Rep. 109. See also Bussy *v.* Donaldson, 4 Dall. (Pa.) 206, 1 L. ed. 802; Atty.-Gen. *v.* Case, 3 Price 302, 17 Rev. Rep. 566.

20. Griswold *v.* Sharpe, 2 Cal. 17; Harrison *v.* Hughes, 125 Fed. 860, 60 C. C. A. 442 [*affirming* 110 Fed. 545]; Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique, 63 Fed. 845, 182 U. S. 406, 21 S. Ct. 831, 45 L. ed. 1155.

Obligation to take pilot see PILOTS, 30 Cyc. 1614.

21. Smith *v.* Condry, 1 How. (U. S.) 28, 11 L. ed. 35; The Ole Bull, [1905] P. 52, 10 Aspin. 84, 74 L. J. P. D. & Adm. 75, 92 L. T. Rep. N. S. 807, 21 T. L. R. 133, 53 Wkly. Rep. 590; The Sussex, (1904] P. 236, 9 Aspin. 578, 73 L. J. P. D. & Adm. 73, 90 L. T. Rep. N. S. 549; The Warsaw, [1898] P. 127, 8 Aspin. 399, 67 L. J. P. D. & Adm. 50, 78 L. T. Rep. N. S. 327, 14 L. T. R. 275, 46 Wkly. Rep. 638; The Burma, 8 Aspin. 547, 80 L. T. Rep. N. S. 808; The Girolamo, 3 Hagg. Adm. 169; The Annapolis, 30 L. J. Adm. 201, 4 L. T. Rep. N. S. 417, Lush. 295; Carruthers *v.* Sydebotham, 4 M. & S. 77; The Suffolk, 21 T. L. R. 267; The Agricola, 2 W. Rob. 11; The Maria, 1 W. Rob. 95.

The fault must be that of the pilot alone in order to exempt the owners, and if the master and crew coöperate in any way in the negligent act of the pilot, or the damage is caused by disobedience of his orders, the owners are liable. The Protector, 1 W. Rob. 45; The Queen, L. R. 2 A. & E. 354, 38 L. J. Adm. 39, 20 L. T. Rep. N. S. 855; The Tactician, [1907] P. 244, 76 L. J. P. D. & Adm. 80, 23 T. L. R. 369; The Neptune The Second, 1 Dods. 467; The Benmohr, 52 Wkly. Rep. 686.

22. The Halley, L. R. 2 A. & E. 3, 17 L. T. Rep. N. S. 329, 16 Wkly. Rep. 284 [*reversed* on other grounds in L. R. 2 P. C. 193, 37 L. J. Adm. 33, 18 L. T. Rep. N. S. 879, 5 Moore P. C. N. S. 263, 16 Wkly. Rep. 998, 16 Eng. Reprint 514; The Dallington, [1903] P. 77, 9 Aspin. 377, 72 L. J. P. D. & Adm. 17, 88 L. T. Rep. N. S. 128, 19 T. L. R. 250, 51 Wkly. Rep. 607; The Prins Hendrik, [1899] P. 177, 68 L. J. P. D. & Adm. 86, 80 L. T. Rep. N. S. 838, 8 Aspin. 548; The Guy Mannering, 7 P. D. 132, 4 Aspin. 553, 51 L. J. P. D. & Adm. 57, 46 L. T. Rep. N. S. 905, 30 Wkly. Rep. 835; The Augusta, 6 Aspin. 161, 57 L. T. Rep. N. S. 326.

23. Crisp *v.* U. S., etc., Steamship Co., 124 Fed. 748 (holding that the fault of a compulsory pilot is not imputable to the shipowner, or to the charterer where the pilot is his agent); Homer Ramsdell Transp. Co. *v.* Compagnie Generale Transatlantique, 63 Fed. 845, 182 U. S. 406, 21 S. Ct. 831, 45 L. ed. 1155.

24. Ralli *v.* Troup, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742; The China *v.* Walsh, 7 Wall. (U. S.) 53, 19 L. ed. 67; The Blackheath, 154 Fed. 758; Harrison *v.* Hughes,

3. Injuries to Licensees and Trespassers — a. In General. As a general rule those in charge of a vessel are bound to exercise ordinary care to avoid injuring persons who are rightfully on or about the vessel by express or implied invitation,[25] and hence the vessel and her owners are liable for injuries caused to persons, who are on the vessel by express or implied invitation, by reason of their negligence or of that of the master or crew,[26] as by dangerous or defective conditions or appliances;[27] but they do not owe such duty to trespassers or mere licensees, as such persons enter upon the vessel at their own risk, and the vessel is bound to refrain only from wilfully and wantonly injuring them.[28]

125 Fed. 860, 60 C. C. A. 442 [*affirming* 110 Fed. 545]. See also The E. M. Norton, 15 Fed. 636.

The theory of the admiralty law in this country in such cases is that a collision impresses upon the wrong-doing vessel a maritime lien, which the vessel carries with it into whosesoever hands it may come. The vessel is treated, according to this theory, as the guilty thing. It is the *res*, to which fault is imputable, and which is held to respond to damages. The responsibility of the owners, as owners, and the law of agency, as applicable to the employment of a pilot, do not come into consideration. Harrison *v.* Hughes, 125 Fed. 860, 60 C. C. A. 442 [*affirming* 110 Fed. 545].

25. *California.*— Grundel *v.* Union Iron Works, 141 Cal. 564, 75 Pac. 184.

Illinois.—Atkins *v.* Lackawanna Transp. Co., 182 Ill. 237, 54 N. E. 1004 [*affirming* 79 Ill. App. 19], holding that a transportation company is required to exercise reasonable care, but not the highest degree of care, for the safety of one employed by its men, engaged in unloading its vessel, to supply them with drinking water.

Massachusetts.— Severy *v.* Nickerson, 120 Mass. 306, 21 Am. Rep. 514.

New York.— Casey *v.* Lehigh Valley R. Co., 128 N. Y. App. Div. 86, 112 N. Y. Suppl. 522.

United States.— The Euxinia, 150 Fed. 541, 80 C. C. A. 254 [*reversing* 136 Fed. 502, 144 Fed. 524].

See 44 Cent. Dig. tit. "Shipping," §§ 349–352.

Safe place to work.— A servant employed by a vessel to work in the hold, in a place where there is danger of injury from objects falling through openings in the deck above, where others are at work, from which danger he cannot protect himself, is not furnished a safe place to work, and the master is liable for injuries inflicted upon him through the negligence of co-servants or of an independent contractor, engaged in other work upon the decks in permitting an object to fall on him. The Magdaline, 91 Fed. 798.

Visitor.— It is the duty of the owners of a vessel by whose permission or at whose implied invitation a visitor has come on board at a port to exercise reasonable care to avoid injury to such visitor, and to give him a reasonable opportunity to go on shore before the vessel departs. The City of Seattle, 150 Fed. 537, 80 C. C. A. 279, 10 L. R. A. 969. See also Atkins *v.* Lackawanna Transp. Co., 182 Ill. 237, 54 N. E. 1004 [*affirming* 79 Ill. App. 19].

Crossing other vessels.— Vessels necessarily mooring in the slips of a harbor, outside of other vessels next the wharf, have an implied license for their officers and men to cross the intervening vessel for necessary purposes on shore; but such a license does not impose any duty upon the owner, as respects the licensee, to keep all possible modes of crossing safe, but at most only such passageways as are designed or known to be customarily used as such. Anderson *v.* Scully, 31 Fed. 161.

26. Duhme *v.* Hamburg-American Packet Co., 107 N. Y. App. Div. 237, 94 N. Y. Suppl. 1102 [*reversed* on the facts in 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615]; Leathers *v.* Blessing, 105 U. S. 626, 26 L. ed. 1192; The Steam Dredge No. 1, 122 Fed. 679 (holding that a dredge is liable for injuries received by a government inspector while on board in the performance of his duties and in the exercise of due care, through the negligent handling of her machinery by those in charge); The City of Naples, 69 Fed. 794, 16 C. C. A. 421 [*affirming* 61 Fed. 1012] (negligent injury to grain inspector); The Calista Hawes, 14 Fed. 493 (negligent injury to assistant United States weigher).

27. The Daylesford, 30 Fed. 633 (holding that where a custom-house officer has the right to use a ladder as a means of descent from a vessel to the wharf, the vessel owes him a duty to see that it is properly secured); The Guillermo, 26 Fed. 921 (holding that the leaving of a hatchway open in a dark and narrow place is negligence on the part of the vessel as to a roundsman whose duty it is to go on board the vessel to see that the night inspectors are at their post).

28. *California.*— Grundel *v.* Union Iron Works, 141 Cal. 564, 75 Pac. 184, holding that the owner of a vessel tied to his private wharf owes no duty to licensees to keep the premises or the passageway from the wharf to the vessel in a safe condition.

Louisiana.— Dowty *v.* Templeton, 9 La. Ann. 549; Rice *v.* Cade, 10 La. 288.

Massachusetts.— Metcalfe *v.* Cunard Steamship Co., 147 Mass. 66, 16 N. E. 701; Severy *v.* Nickerson, 120 Mass. 306, 21 Am. Rep. 514.

New York.— Belford *v.* Canada Shipping Co., 35 Hun 347.

United States.— Zanone *v.* Oceanic Steam Nav. Co., 177 Fed. 912 (former tally clerk); The Marie, 137 Fed. 448; The Thomas Turnbull, 99 Fed. 781; The Germania, 10 Fed. Cas. No. 5,360, 9 Ben. 356.

b. Injuries to Stevedores and Other Independent Contractors and Their Employees[29] — (I) *In General.* As a general rule a vessel which is in charge of stevedores or independent contractors is not liable in admiralty for injuries to them or their employees,[30] unless a contractual relation exists between the vessel or owner and the person injured,[31] or unless the injuries are sustained by reason of a failure on the part of the owners or of those in charge of the management or navigation of the vessel to perform their maritime duties or obligations.[32] However, the owners of a vessel owe to stevedores and other independent contractors and their employees while engaged in work about or upon the vessel the duty of exercising reasonable care to protect them from injuries by the operations and management of the vessel,[33] and hence the owners and vessel are liable to such persons for injuries caused by the negligence of the master or crew while in the performance of their duties;[34] but they are not liable for injuries to employees

See 44 Cent. Dig. tit. "Shipping," §§ 349-352.

Open hatches.— The owners of a vessel are not bound to close the hatches at night, so as to protect from injury a trespasser or one who has no right or license to be upon the vessel. Baker *v.* Byrne, 58 Barb. (N. Y.) 438.

29. **Contributory negligence** see *supra*, V, C, 1, f.

30. The Clan Graham, 163 Fed. 961; The Patria, 135 Fed. 255; The Thyra, 114 Fed. 978.

31. The Clan Graham, 163 Fed. 961; The Thyra, 114 Fed. 978. See also West *v.* Brakelow Steamship Co., 124 Ga. 658, 52 S. E. 888; The Mary Stewart, 10 Fed. 137, 5 Hughes 312. But see The Wyneric, 156 Fed. 276, holding that the liability of a vessel for an injury to an employee of a stevedore while working on the vessel does not depend upon any contractual relation between the vessel or owner and the employee, but upon the breach of some implied duty to exercise due care as to the condition of the vessel and appliances, which might affect the safety of persons necessarily employed to work therein.

An employee of a stevedore who is injured by the use of a defective winch cannot recover against the owner in the absence of proof of a contract between the owner of the vessel and the stevedore, or that the latter was acting as the servant of the owner or that the owner undertook to furnish a suitable winch in unloading the vessel. Pingree *v.* Leyland, 135 Mass. 398.

32. The Clan Graham, 163 Fed. 961; The Thyra, 114 Fed. 978.

33. Casey *v.* Lehigh Valley R. Co., 128 N. Y. App. Div. 86, 112 N. Y. Suppl. 522; The Brookby, 165 Fed. 93, holding that the retention of an incompetent winchman is negligence which will render the vessel liable for injuries resulting therefrom.

The test of an owner's liability in admiralty for damages for personal injuries sustained by a stevedore or contractor or employee is whether the owner would be liable under the same circumstances at common law. Jeffries *v.* De Hart, 102 Fed. 765, 42 C. C. A. 615; The Rheola, 7 Fed. 781 [*reversed* on other grounds in 19 Fed. 926].

Stevedore living on vessel.— A stevedore whose duties require him to live on the vessel, his employment being continuous while the boat is *en route*, is not entitled to the care required of the owner of the vessel with reference to passengers, but only to that required as to servants. Lambert *v.* La Conner Trading, etc., Co., 37 Wash. 113, 79 Pac. 608.

34. Perkins *v.* Furness, 167 Mass. 403, 45 N. E. 759 (negligence as to hatch); Johnson *v.* Netherlands American Steam Nav. Co., 10 N. Y. Suppl. 927; The Evelyn, 152 Fed. 847; McGill *v.* Michigan Steamship Co., 144 Fed. 788, 75 C. C. A. 518 [*reversing* 133 Fed. 577]; Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212; McGough *v.* Ropner, 87 Fed. 534 (negligence of crew in operating winch); The State of Missouri, 76 Fed. 376, 22 C. C. A. 239; Ferguson *v.* The Terrier, 73 Fed. 265; Boden *v.* Demwolf, 56 Fed. 846 (holding that the owner is liable for negligently injuring the stevedore's employee who, after the work of loading is either finished or suspended, goes into the hold to get his coat); Keiley *v.* The Allianca, 44 Fed. 97 (negligent injury to contractor's employee while cleaning the inside of a vessel's boiler, by the escape of steam and hot water into the boiler); The Barraconta, 39 Fed. 428; The Polaria, 25 Fed. 735; Todd *v.* The Tulchen, 2 Fed. 600; Gerrity *v.* The Kate Cann, 2 Fed. 241 [*affirmed* in 8 Fed. 719]. But *compare* Baccus *v.* The Manhanset, 69 Fed. 471.

Damages.— Where a stevedore brings suit in tort for injuries sustained by the negligence of a vessel, he is not entitled to recover, under the maritime law, expenses and wages for time lost by reason of his injuries, regardless of the question of contributory negligence, as such rights are based on contract. Lambert *v.* La Conner Trading, etc., Co., 37 Wash. 113, 79 Pac. 608.

Indemnity.— A clause in a contract with stevedores stating that they are insured against all accidents which may occur to their men while employed by them does not give the vessel a right of action against the stevedores for indemnity, because of a recovery against her by one of the stevedore's employees for an injury caused solely by the vessel's negligence. The Slingsby, 116 Fed.

of a stevedore through the negligence of the stevedore or co-employees.[35] Stevedores and their employees are fellow servants with the members of the crew of the vessel where all are engaged in the common work of loading or unloading;[36] and hence a winchman furnished by a vessel to assist the stevedores, and under the latter's control and orders, is a fellow servant with them and their employees, and if ordinary care is exercised by the master of the vessel to furnish a competent winchman, the vessel is not liable to the stevedores or their employees for injuries resulting from a negligent act of such winchman.[37]

(II) *Dangerous or Defective Condition of Vessel.*[38] The owners of a vessel owe to stevedores or other independent contractors and their employees engaged upon or about the vessel the duty of furnishing a reasonably safe place in which the workmen are to perform their services, in so far as the construction of the vessel and its various parts are concerned, and are liable for the resulting injuries to such workmen by reason of their failure to exercise ordinary care to provide reasonably safe places to work in,[39] and a reasonably safe passageway to and from such place,[40] and by reason of their failure to exercise ordinary care to keep the premises reasonably secure against danger.[41] Thus the owners are

227 [*affirmed* in 120 Fed. 748, 57 C. C. A. 52].

A release given to a stevedore by one injured by the negligence of a seaman is no defense in an action against the vessel, where no negligence of the stevedore is shown. The Polaria, 25 Fed. 735.

35. West *v.* Brakelow Steamship Co., 124 Ga. 658, 52 S. E. 888; Rankin *v.* Merchants', etc., Transp. Co., 73 Ga. 229, 54 Am. Rep. 874; The Beechdene, 121 Fed. 593; The Kensington, 91 Fed. 681.

Concurrent negligence.— Where the accident is due to the combined carelessness of the vessel's employees, and of other employees of the stevedore, together with some negligence on the part of the injured person himself, the vessel is not liable. The Joseph John, 86 Fed. 471, 30 C. C. A. 199.

The duty of guarding or warning the men engaged in the discharge of a vessel against danger caused by improper stowage, in matters of detail, is that of the contracting stevedores rather than of the officers of the vessel. The Beechdene, 121 Fed. 593.

36. See Master and Servant, 26 Cyc. 1360.

37. The Brookby, 165 Fed. 93; The Elton, 142 Fed. 367, 73 C. C. A. 467 [*reversing* 131 Fed. 562, and *overruling* The Slingsby, 120 Fed. 748, 57 C. C. A. 52 (*affirming* 116 Fed. 227)]; The Turquoise, 114 Fed. 402; The Anaces, 106 Fed. 742, 45 C. C. A. 596 [*affirming* 96 Fed. 856]; The Harold, 21 Fed. 428. See also Mercurio *v.* Lunn, 93 Fed. 592, 35 C. C. A. 467; The Anaces, 93 Fed. 240, 34 C. C. A. 558 [*reversing* 87 Fed. 565]. But *compare* The City of San Antonio, 143 Fed. 955, 75 C. C. A. 27 [*affirming* 135 Fed. 879]; The Gladestry, 124 Fed. 112; Grasso *v.* The Lisnacrieve, 87 Fed. 570; McGough *v.* Ropner, 87 Fed. 534.

38. Injuries in general from dangerous or defective condition of vessel or appliances see *supra*, V, C, 1, b.

39. The Clan Graham, 163 Fed. 961; Wholey *v.* British, etc., Steamship Co., 158 Fed. 379 [*affirmed* in 171 Fed. 399]; The Chicago, 156 Fed. 374; Leyland *v.* Holmes, 153 Fed. 557, 82 C. C. A. 511; The Martha E. Wallace, 151 Fed. 353 [*affirmed* in 158 Fed. 1021, 86 C. C. A. 673]; The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A. 56 [*affirming* 136 Fed. 271]; The Saranac, 132 Fed. 936 (holding that a vessel is liable, where it is shown that the employee when injured was in the proper discharge of his duties, and that the proximate cause of the injury was a structural defect or weakness of material in some part of the vessel); The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58; Cannon *v.* The Protos, 48 Fed. 919; The Max Morris, 24 Fed. 860; The Rheola, 7 Fed. 781. See 44 Cent. Dig. tit. "Shipping," § 350.

Facts sufficient to constitute negligence on the part of the owners in regard to the safe condition of the vessel and to render them liable therefor see The Chicago, 156 Fed. 374; The Wyneric, 156 Fed. 276; Cliffe *v.* Pacific Mail Steamship Co., 81 Fed. 809; Cannon *v.* The Protos, 48 Fed. 919; Crawford *v.* The Wells City, 38 Fed. 47; The Truro, 31 Fed. 158 (unsafe ladder); The Helios, 12 Fed. 732.

Joint and several liability.— A ship-owner who contracts with a ship-liner to put up cattle stalls between decks is jointly and severally liable with him for an injury sustained by one of the workmen employed in the work, caused by a fall through an unprotected open hatchway, although the ship-liner's foreman knew of the danger and warned his men against it; and such warning to the men, given in a general way, does not relieve the contractor from his liability, in the absence of proof that plaintiff heard it. Proulx *v.* Lee, 27 Quebec Super. Ct. 304.

40. The Clan Graham, 163 Fed. 961; The Saranac, 132 Fed. 936.

41. Casey *v.* Lehigh Valley R. Co., 128 N. Y. App. Div. 86, 112 N. Y. Suppl. 522; Kraeft *v.* Mayer, 92 Wis. 252, 65 N. W. 1032; The Joseph B. Thomas, 86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58 [*affirming* 81 Fed. 578]; The Illinois, 63 Fed. 161.

liable if due care is not used to inspect the vessel so as to discover latent defects which should be known to the officers of the vessel,[42] and to warn them of any latent danger known to the vessel.[43] But where the owners turn the vessel over to the stevedores or independent contractors in a safe condition they are not liable for injuries to stevedores or contractors or their employees, arising from dangers created by the manner in which the injured employee and his fellow workmen do their work,[44] or by defects of which the owners or their agents had no notice, and time and opportunity to repair,[45] or by reason of the injured employee's own negligence.[46]

(III) *Dangerous or Defective Appliances.* Where appliances for oading or unloading are furnished to stevedores, by the owners of the vessel, and the latter exercise due and proper care to furnish appliances which are reasonably safe for the work in hand, they are not liable for injuries caused to the stevedores or their employees by the use of such appliances,[47] as by reason of defects which they could not discover by ordinary care,[48] or by reason of the negligent

An open hatchway on a vessel provided with the usual combings is not ordinarily negligence on the part of the ship-owner as regards one employed in loading the vessel. Horne *v.* George H. Hammond Co., 71 Fed. 314, 18 C. C. A. 54; Dwyer *v.* National Steamship Co., 4 Fed. 493, 17 Blatchf. 472. Thus the leaving open of the hatches of a vessel during intervals in unloading is not negligence as to stevedores, where the passageway and the hatches are reasonably lighted. Deming *v.* The Argonaut, 61 Fed. 517. But an open hatchway in a dark and unusual place, without notification or warning to those who are working near it, is negligence for which the owner is liable. West India, etc., Steamship Co. *v.* Weibel, 113 Fed. 169, 51 C. C. A. 116.

42. Wholey *v.* British, etc., Steamship Co., 158 Fed. 379 [*affirmed* in 171 Fed. 399]; The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A. 56 [*affirming* 136 Fed. 271]; The Red Jacket, 110 Fed. 224; The William Branfoot *v.* Hamilton, 52 Fed. 390, 3 C. C. A. 155 [*affirming* 48 Fed. 914] (holding that a vessel is liable to a stevedore who is injured by the falling of a stanchion because of defects in its fastenings, not observed by him and not apparent to the eye, but which a proper inspection by the ship's officers would have disclosed); The Rheola, 7 Fed. 781.

43. The Chicago, 156 Fed. 374; Leyland *v.* Holmes, 153 Fed. 557, 82 C. C. A. 511; McGill *v.* Michigan Steamship Co., 144 Fed. 788, 75 C. C. A. 518 [*reversing* 133 Fed. 577]; The Earl of Dunmore, 120 Fed. 858; Burrell *v.* Fleming, 109 Fed. 489, 47 C. C. A. 598; Keliher *v.* The Nebo, 40 Fed. 31.

44. The Clan Graham, 163 Fed. 961; The Ranza, 156 Fed. 373; Bettis *v.* Leyland, 153 Fed. 571, 82 C. C. A. 525; The Charles Tiberghien, 143 Fed. 676; The Elleric, 134 Fed. 146; The Saranac, 132 Fed. 936; The Allison White, 131 Fed. 991; Regina *v.* Dunlop Steamship Co., 128 Fed. 784 (negligence in replacing hatch cover); The Noranmore, 113 Fed. 367; The Aldborough, 106 Fed. 90; Roymann *v.* Brown, 105 Fed. 250, 44 C. C. A. 464; The Manitoba, 99 Fed. 780; The Picqua, 97 Fed. 649; Lunney *v.* The Concord, 58 Fed. 913; Hughes *v.* The Pieter de Conick, 46 Fed. 795; The William F. Babcock, 31 Fed. 418, 12 Sawy. 412; The Theresina, 31 Fed. 90. See 44 Cent. Dig. tit. "Shipping," § 350.

Where hatch covers are repaired by fresh wood so that the number indicating their proper places is obliterated, it is the duty of stevedores engaged in covering the hatches to ascertain, by trying the different covers, where they belong. The Elleric, 134 Fed. 146.

Warning.— Where a vessel is turned over for loading to a contractor who is fully informed of the location of a hatchway and that it is uncovered, the vessel owes no further duty to warn the individual stevedores employed by such contractor of the danger from such hatchway or to protect them therefrom, but such duty devolves upon their master. The Auchenarden, 100 Fed. 895.

45. Roymann *v.* Brown, 105 Fed. 250, 44 C. C. A. 464.

46. The Prins Willem II, 128 Fed. 655; The Indrani, 101 Fed. 596, 41 C. C. A. 511; The Hadje, 50 Fed. 225. See also *supra*, V, C, 1, f, (II).

47. The Hillarius, 163 Fed. 421; The Noranmore, 113 Fed. 367; The Menominee, 101 Fed. 136; Mercurio *v.* Lunn, 93 Fed. 592, 35 C. C. A. 467; Crawley *v.* The Edwin, 87 Fed. 540 (holding that where the appliance furnished is such as is usually in use on old ships, and is not unsuitable, it is not the duty of the ship-owners to furnish a later appliance, although it is a superior one); The Aalesund, 1 Fed. Cas. No. 1, 9 Ben. 203. See also West *v.* Barkelow Steamship Co., 124 Ga. 658, 52 S. E. 888.

48. Johnston *v.* Turnbull, 124 Fed. 476 [*affirmed* in 130 Fed. 769, 65 C. C. A. 157]; The Drummond, 114 Fed. 976; The Benbrack, 33 Fed. 687; The Dago, 31 Fed. 574 (holding that the owners of a vessel are not liable to the employee of a stevedore, who has full charge of the unloading of the vessel, for injury to the employee caused by defective tackle furnished by the vessel, where it has no apparent defect, and the stevedore is an experienced and competent one, who has the exclusive appointment of the laborers and

use or operation of the appliances by the stevedores or their employees;[49] nor are they liable for a failure to furnish appliances which they are under no duty to furnish.[50] But where it is the owner's duty, as where they undertake to furnish appliances, they are liable if they fail to use proper and due care to furnish appliances which are reasonably safe,[51] as where they fail to properly inspect the appliances before turning them over to the stevedores,[52] except where the appliances are selected by the stevedores, although furnished by the owners;[53] and, although they are under no duty to furnish appliances, they are liable if they negligently permit defective appliances owned by them to be used.[54]

4. Actions and Other Proceedings — a. In General. Trespass on the case does not lie against the owner of a vessel for the wilful misconduct of the master.[55] In some jurisdictions special statutory provisions give a remedy against a vessel or her owners for damages caused by her torts,[56] as by a proceeding *in rem*,[57] or by attachment and summary seizure of the vessel,[58] in which case the statutory provisions authorizing such a procedure must be fully complied with.[59] Under some statutes

control of the work); Bedard *v.* Perry, 9 Quebec Pr. 81.

49. The Hillarius, 163 Fed. 421; The Tripoli, 156 Fed. 223; The St. Gothard, 153 Fed. 855, 83 C. C. A. 37 [*reversing* 149 Fed. 790]; Carlson *v.* Comeric Co., 140 Fed. 109.

50. The Santiago, 137 Fed. 323, 69 C. C. A. 653.

Lights.— Where it is the custom for stevedores, employed in loading a ship, to furnish their own lights, the master and crew are not negligent in not keeping the between-decks lighted, to enable the stevedore's gang to reach their sleeping hammocks in safety. The Nikolai II, 102 Fed. 174. Nor is a vessel under an obligation to light a certain section of the hold until its representatives are notified that the men are ready to work there. The Santiago, 137 Fed. 323, 69 C. C. A. 653. But it is negligence of the vessel not to have proper lights at a dark place where the men are working. Nelson *v.* The Manhanset, 53 Fed. 843 [*affirmed* in 69 Fed. 843, 13 C. C. A. 677].

51. West *v.* Brakelow Steamship Co., 124 Ga. 658, 52 S. E. 888; Connors *v.* King Line, 98 N. Y. App. Div. 261, 90 N. Y. Suppl. 652; Morel *v.* Lehman, 159 Fed. 124, 86 C. C. A. 512; Neptune Steam Nav. Co. *v.* Borkmann, 118 Fed. 420, 55 C. C. A. 548; The Elton, 83 Fed. 519, 31 C. C. A. 496; Steel *v.* McNeil, 60 Fed. 105, 8 C. C. A. 512 [*affirming* 56 Fed. 241]; The Carolina, 32 Fed. 112 [*affirming* 30 Fed. 199]; The Rheola, 19 Fed. 926. See 44 Cent. Dig. tit. "Shipping," § 350.

52. Connors *v.* King Line, 98 N. Y. App. Div. 261, 90 N. Y. Suppl. 652; The Tresco, 134 Fed. 819, 67 C. C. A. 465 [*reversing* 128 Fed. 780]; Neptune Steam Nav. Co. *v.* Borkmann, 118 Fed. 420, 55 C. C. A. 548; Marney *v.* Scott, [1899] 1 Q. B. 986, 68 L. J. Q. B. 736, 15 T. L. R. 320, 47 Wkly. Rep. 666.

53. Jeffries *v.* De Hart, 102 Fed. 765, 42 C. C. A. 615, holding that where a ship contracts with master stevedores, for the loading of the vessel, agreeing to furnish "all necessary steam, slings, and rope for falls," and the tackle used is selected by the stevedores themselves, with the consent of the officers of the ship, from a large quantity on board owned by the ship, and suitable for the purpose, the ship-owner owes no duty to a stevedore employed by the contractor to supervise or control such selection, and is not liable for the death of the stevedore, caused by the giving way of such tackle.

54. Connors *v.* King Line, 98 N. Y. App Div. 261, 90 N. Y. Suppl. 652.

55. Richmond Turnpike Co. *v.* Vanderbilt, 1 Hill (N. Y.) 480.

56. See the statutes of the several states. See also The City of Erie *v.* Canfield, 27 Mich. 479, holding that the act of Feb. 5, 1854 (Comp. Laws (1871), p. 1861), providing for the collection of demands against water craft, was intended to give a remedy in all cases coming within its provisions, where the vessel at the time was navigating the waters of the state.

57. Howes *v.* The Red Chief, 15 La. Ann. 321.

58. The Avon, 2 Fed. Cas. No. 680, 1 Brown Adm. 170; The G. H. Montague, 10 Fed. Cas. No. 5,377, 4 Blatchf. 461.

Affidavit.—Where an affidavit for an attachment against a vessel for damages resulting from a tort alleges that defendant is the master and part-owner of the vessel, and the declaration alleges that the other owners are unknown, they are sufficient to sustain the attachment. Walter *v.* Kierstead, 74 Ga. 18.

Repeal of statute see Robinson *v.* The Red Jacket, 1 Mich. 171.

Regularity of attachment.— Where in an action to enforce a lien on a vessel, given by a state statute, a temporary receiver is appointed, and the vessel is taken in charge by him at the beginning of the action, it is in effect an equitable attachment; and where after such proceedings defendants appear and execute a bond that they will pay plaintiff any sum or claim established on the cause of action alleged in the complaint, the bond becomes substituted for the property, and no question as to the regularity of the attachment can afterward be raised. West *v.* Martin, 51 Wash. 85, 97 Pac. 1102, 47 Wash. 417, 92 Pac. 334.

59. The G. H. Montague, 10 Fed. Cas. No. 5,377, 4 Blatchf. 461, holding that where the

there may be a restitution of the vessel to the owners upon the filing of a proper bond;[60] and where a vessel is so restored or discharged from seizure, and an action is brought on the bond, it is substantially an action of trespass, and defendant may tender compensation or satisfaction for the injury and loss only on the ground that it was casual or involuntary.[61]

b. Jurisdiction.[62] A lien on a vessel for a maritime tort is usually enforceable only in the federal courts,[63] and the state courts cannot enforce such a lien,[64] unless jurisdiction thereof is given to the state court by statute.[65] A lien accorded by the maritime law for a maritime tort is a proprietary interest which travels with the vessel and may be enforced notwithstanding she has sailed into another jurisdiction from that in which the tort was committed.[66]

c. Parties.[67] An action against a vessel for damages caused by a tort should be brought in the name of the person damaged;[68] and after the issuance of an attachment against a vessel the proceeding in a state court should so far conform to the nature of the admiralty practice as that the declaration should be filed against the vessel itself and not against the owners,[69] and that the owners be allowed to intervene and make themselves parties to the suit if they desire to do so.[70] In a libel *in rem* for a marine tort all persons have a right to intervene for their interests.[71]

d. Pleading and Evidence. The rules applicable in civil actions generally, and where applicable the rules in admiralty, ordinarily govern actions against a vessel or her owners for damages caused by torts of the vessel, such as by negligence in the management or navigation of the vessel, in regard to matters of pleading,[72]

statutory provisions are not complied with, no jurisdiction is acquired to issue process to seize the vessel.

Under La. Act, March 15, 1895, § 9, it is not necessary to swear to the names of the owners in order to proceed by provisional seizure. Howes *v.* The Red Chief, 15 La. Ann. 321.

60. People *v.* Wayne Cir. Judge, 39 Mich. 115, holding also that under Comp. Laws, § 210, the county clerk's approval of the bonds offered upon obtaining restitution of a steamer, seized to enforce a lien for damages caused by the misconduct of the master, is not reviewable by the circuit judge upon affidavits contradicting the evidence on which the bonds were approved.

61. Slack *v.* Brown, 13 Wend. (N. Y.) 390.

62. **Admiralty jurisdiction** see ADMIRALTY, 1 Cyc. 841 *et seq.*

63. Young *v.* The Princess Royal, 22 La. Ann. 388, 2 Am. Rep. 731; The Markee, 14 Fed. 112 [*affirming* 3 Fed. 45] (holding that the refusal of a master to issue a bill of lading to vendors in whose name the goods are shipped, even though he had previously issued a bill of lading to the vendee who absconded, is a maritime tort for which an action may be brought in the district court); The Ferreri, 9 Fed. 468.

64. Stevenson *v.* Edwards, 24 La. Ann. 266; Young *v.* The Princess Royal, 22 La. Ann. 388, 2 Am. St. Rep. 731.

65. See Holloway *v.* The Western Belle, 11 Mo. 147.

In Washington the lien on a vessel created by Ballinger Annot. Codes & St. § 5953 (Pierce Code, § 6077), for injuries committed by it, is enforceable in the state courts, where the claim for injury is not within the jurisdiction of admiralty. West *v.* Martin, 51 Wash. 85, 97 Pac. 1102, 47 Wash. 417, 92 Pac. 334.

66. The Avon, 2 Fed. Cas. No. 680, Brown Adm. 170, holding also that such lien may be enforced by seizure, although no such remedy is allowed in the jurisdiction into which the vessel has sailed, and although the vessel has been there sold by a private transfer to a purchaser in good faith and without notice.

67. **Parties** generally see ADMIRALTY, 1 Cyc. 850; PARTIES, 30 Cyc. 1.

68. The Blue Ridge *v.* The Time, 9 Mo. 650.

A statute authorizing suits in the names of steamboats in certain cases does not authorize a complaint in the name of a boat for an injury done her, against another boat. The Blue Ridge *v.* The Time, 9 Mo. 650.

69. The Farmer *v.* McCraw, 26 Ala. 189, 62 Am. Dec. 718 (holding that, where an attachment is sued out against a steamboat to recover damages, the declaration must be against the boat itself and not against the owners, although the attachment bond is made payable to the owners and their names are also stated in the affidavit on which the attachment was issued); Otis *v.* Thorn, 18 Ala. 395.

70. Otis *v.* Thorn, 18 Ala. 395.

71. The America, 1 Fed. Cas. No. 288, holding further that the suit is in substance against such persons, as much as if they were specially named defendants, and that they are bound by the proceedings and decree, and that a sale of the *res* under such proceedings extinguishes their rights.

72. See, generally, ADMIRALTY, 1 Cyc. 853; NEGLIGENCE, 29 Cyc. 565; PLEADING, 31 Cyc. 1. See also The Rheola, 7 Fed. 781, answer.

Declaration or complaint held sufficient: In an action against the owners of a vessel

and in regard to the presumptions,[73] and burden of proof,[74] and the admissibility,[75]

for personal injuries resulting from negligence in loading a vessel. Phillips *v.* Portage Transit Co., 137 Wis. 189, 118 N. W. 539. To show a duty on the part of defendant toward plaintiff an employee of a stevedore and to set forth a cause of action. Coughlin *v.* Boston Tow-Boat Co., 151 Mass. 92, 23 N. E. 721.

A verified complaint as a condition to the seizure of a vessel by a summary process must strictly conform to the statute authorizing it. The G. H. Montague, 10 Fed. Cas. No. 5,377, 4 Blatchf. 461.

A complaint in an attachment against a steamboat for an injury done to a sail-boat, which alleges that the injury happened by the carelessness and negligence on the part of the officers in charge of the steamboat, and without fault or negligence on the part of plaintiff or his agents, is sufficient. Lusk *v.* Davis, 27 Ind. 334.

The improper use of proper appliances to prevent the escape of sparks from the smoke-stack of a steamboat must be distinctly averred in order to be available as a ground of recovery in a suit for the loss of property set on fire as claimed by sparks thus emitted. Cheboygan Lumber Co. *v.* Delta Transp. Co., 100 Mich. 16, 58 N. W. 630.

Amendment.— Where a libel alleges generally as a ground of a vessel's liability for an injury to a stevedore that a hatch cover was improperly constructed, libellant may properly be given leave to amend during trial by setting out the particulars in which the construction is claimed to have been defective. The Saranac, 132 Fed. 936.

73. See, generally, EVIDENCE, 16 Cyc. 1050; NEGLIGENCE, 29 Cyc. 589.

Illustrations.— Where a stevedore engaged in his ordinary occupation falls through an ordinary coal bunker hatch that is used for storing cargo, the presumption is of his negligence rather than that of the officers of the vessel. The Gladiolus, 21 Fed. 417. So where in removing a cargo from a vessel by means of a swinging crane and a bucket, the bucket dips over and empties its contents on one who is lawfully standing on the deck of the vessel, the action raises a presumption of negligence either in the character of the machinery used or in the care with which it was handled. Cummings *v.* National Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665.

The rule that a moving vessel is presumably in fault for a collision with one at anchor and without fault (See COLLISION, 7 Cyc. 397 text and note 92), and can only exonerate herself by showing that the collision was the result of inevitable accident, applies with greater force to a collision with a stationary object fixed in the land, such as a beacon or pier (The Blackheath, 154 Fed. 758; Pennsylvania R. Co. *v.* Ropner, 105 Fed. 397). **The burden rests upon the vessel under way in such a case, in order to exonerate herself from liability, to show that it was not** in her power to prevent the injury by adopting any practicable precautions. The Rotherfield, 123 Fed. 460. *Compare* The Chickasaw, 41 Fed. 627.

74. See, generally, EVIDENCE, 16 Cyc. 926; NEGLIGENCE, 29 Cyc. 597. See also Young *v.* Owen Sound Dredge Co., 27 Ont. App. 649.

Illustrations.— In an action by a stevedore to recover for personal injuries received while assisting to discharge a vessel, and caused by the breaking of an iron hook furnished by the vessel, on the ground that such hook was of poor material and had previously been partly broken, the burden rests upon the libellant to prove that the respondent was negligent in the selection of the hook or in failing to keep it in good condition, and such burden must be sustained by evidence sufficiently clear, distinct, and preponderating as to enable the court to find such a fact without resort to conjecture or surmises as to the cause of the breakage. The Baron Innerdale, 93 Fed. 492. The burden of proof is on the owners of a lighter to show that their authority over it, and liability for the acts of the crew, have been superseded by a contract relieving them therefrom, where they rely upon such fact as a matter of defense. Anderson *v.* Boyer, 13 N. Y. App. Div. 258, 43 N. Y. Suppl. 87 [*reversed* on other grounds in 156 N. Y. 93, 56 N. E. 976].

75. See, generally, ADMIRALTY, 1 Cyc. 883; EVIDENCE, 16 Cyc. 1110; NEGLIGENCE, 29 Cyc. 606.

Evidence held admissible: In an action for injuries received while working for a stevedore see Kilroy *v.* Delaware, etc., Canal Co., 56 N. Y. Super. Ct. 138, 1 N. Y. Suppl. 779 [*affirmed* in 121 N. Y. 22, 24 N. E. 192]. In an action against a vessel to recover for damages for negligently sinking an anchored boat by passing her with such speed as to push ice floes against her, evidence that the person in charge of the vessel had been warned that it was dangerous to speed fast in the place in question is admissible. O'Reilly *v.* New Brunswick, etc., Steamboat Co., 26 Misc. (N. Y.) 195, 55 N. Y. Suppl. 1133 [*reversed* on other grounds in 28 Misc. 112, 59 N. Y. Suppl. 261].

Evidence held inadmissible: In an action for the death of plaintiff's husband who was employed by a town as bridge-tender and who was killed by reason of a collision of defendant's boat with the bridge see Castello *v.* Landwehr, 28 Wis. 522. As to negligence or want of negligence on the part of defendant in an action for negligently setting fire to plaintiff's property see Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164. Evidence that the steamboat had navigated other rivers and among lumber yards of other cities and had set no fires is inadmissible in an action for negligently burning plaintiff's property by the emission of sparks from the boat (Atkinson *v.* Goodrich Transp. Co., *supra*); nor is evidence that on other occasions,

and weight and sufficiency of the evidence,[76] relative to the negligence on the part of the vessel or the person injured.

e. Questions For Jury. The general rule applicable in civil actions,[77] that where there is sufficient evidence to be submitted to the jury,[78] but it is conflicting or doubtful, questions of fact are ordinarily for the jury to determine, applies in actions against a vessel or her owners for damages caused by a tort of the vessel.[79] Thus the fact of the owner's or vessel's negligence,[80] the injured

at different times and places, screens were open and cinders had escaped, admissible in an action for negligence for injuries by sparks (Edwards *v.* Ottawa River Nav. Co., 39 U. C. Q. B. 264).

76. See, generally, ADMIRALTY, 1 Cyc. 885; EVIDENCE, 17 Cyc. 753; NEGLIGENCE, 29 Cyc. 621. See also Ross *v.* New Jersey Cent. R. Co., 146 Fed. 608 [*affirmed* in 157 Fed. 1004, 85 C. C. A. 678]; The Phœnix, 34 Fed. 760.

Evidence held sufficient: To establish a *prima facie* case of negligence on the part of a vessel in running violently against a wharf and injuring plaintiff who was standing thereon (Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. ed. 270 [*affirming* 6 Mackey (D. C.) 39]); in a suit by a stevedore's employee to recover for personal injury caused by the falling of a hatch cover (Leyland *v.* Holmes, 153 Fed. 557, 82 C. C. A. 511), or by the drawing apart of a splice in a wire rope provided by defendant (Mason *v.* Tower Hill Co., 83 Hun (N. Y.) 479, 32 N. Y. Suppl. 36). In an action against the captain and owners of a steamboat for injuries resulting from the bursting of a boiler. Poree *v.* Cannon, 14 La. Ann. 501. To establish negligence of the crew in an action for injuries to a stevedore. McGivern *v.* Wilson, 160 Mass. 370, 35 N. E. 864. To warrant a finding in an action by an employee of a coal dealer for injury due to defective tackle, used for loading coal from a barge employed by defendant, that there was an implied agreement between the parties, that defendant would furnish the tackle, which was on the barge, for use in unloading the coal. Hays *v.* Philadelphia, etc., Iron Co., 150 Mass. 457, 23 N. E. 225.

Evidence held insufficient: To establish negligence of defendant in an action for injuries to an employee of a stevedore. *In re* Berwind-White Coal Min. Co., 116 Fed. 51; The Nikolai II, 102 Fed. 174. To show, in an action for injuries to a crib by a steamer, that the steamer was so negligently and improperly navigated and managed as to render the owner liable. Graham, etc., Transp. Co. *v.* Chicago, 126 Ill. App. 113. To show that defendants were negligent in failing to cover a scuttle hole through which plaintiff fell. Kraeft *v.* Mayer, 92 Wis. 252, 65 N. W. 1032. To sustain the allegations of a libel that an injury to libellant resulted from a defect in the fittings of a vessel, in view of the rule that a libellant in such case must establish his claim with reasonable certainty (Johnson *v.* Leyland, 153 Fed. 572, 82 C. C. A. 526. See also The Ranza, 164 Fed. 699); or that his injuries resulted from the disobedience of his orders by the winchman, who was employed by the vessel (Calise *v.* Cairnstrath, 124 Fed. 109). To establish the identification of the offending vessel. New York Cent., etc., R. Co. *v.* Maine Steamship Co., 156 Fed. 984.

Evidence of ownership held sufficient as established by the insignia on its smokestack see Casey *v.* Lehigh Valley R. Co., 128 N. Y. App. Div. 86, 112 N. Y. Suppl. 522.

Contributory negligence.— Evidence that plaintiff, who was injured by falling through a hatchway, had previously worked on the vessel and had opportunity to learn the position of the hatchway and that it was open on certain occasions is not conclusive that he had such knowledge. Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84.

77. See, generally, NEGLIGENCE, 29 Cyc. 627; TRIAL.

78. See Passano *v.* The New Brunswick, 43 Fed. 174, libel dismissed, as to damage caused by swell.

Evidence held sufficient: To take the case to the jury in an action for damages caused by running defendant's tugboats and rafts over plaintiff's fish nets. Bishop *v.* Baldwin, 147 Mich. 22, 110 N. W. 139. To take the issue of defendant's negligence to the jury in an action for injuries by the breaking of a fender rope. Butterfield *v.* Arnold, 131 Mich. 583, 92 N. W. 97. To go to the jury to establish negligence in the management of the vessel. Hilliard *v.* Thurston, 9 Ont. App. 514. To authorize the submission of the question of defendant's negligence and plaintiff's contributory negligence to the jury. Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212. To warrant the submission of the question of negligence to the jury, in an action for the death of a husband resulting from the alleged negligent management of defendant's boat, in attempting to pass a drawbridge in charge of deceased. Castello *v.* Landwehr, 28 Wis. 522.

Evidence held to warrant the direction of a verdict for defendant, in an action for a loss of property by reason of a defective spark arrester on defendant's vessel. Montgomery *v.* Muskegon Booming Co., 88 Mich. 633, 50 N. W. 729, 26 Am. St. Rep. 308.

79. Rooney *v.* Compagnie Generale Transatlantique, 10 Daly (N. Y.) 241, holding that the question of whether the owners of the vessel undertook to supply the ropes used and whether if they did they fulfilled their duty in this instance is for the jury.

80. Casey *v.* Lehigh Valley R. Co., 128 N. Y. App. Div. 86, 112 N. Y. Suppl. 522; O'Reilly *v.* New Brunswick, etc., Steamboat

person's contributory negligence,[81] and the question of proximate and remote cause [82] are ordinarily questions of fact for the jury.

f. Instructions. In accordance with the rules governing in civil actions generally,[83] an instruction in an action for damages caused by the tort of a vessel should submit the case to the jury upon the theory of each party and the evidence in support thereof,[84] and should clearly and accurately state the law applicable to all the facts in issue,[85] and must not be upon a question of fact,[86] or lay stress upon particular facts,[87] or ignore material facts in evidence,[88] and must not be inconsistent [89] or misleading.[90]

g. Costs.[91] A failure to properly notify the owners of a vessel of the damages caused by her swell will justify the court in decreeing that the costs of the suit be deducted from libellant's damages.[92] Where two vessels are libeled for injuries caused by the swell produced by the two vessels, and the libel is dismissed as to one of the vessels and the other is held liable, the costs of trial of the vessel against which the libel is dismissed should be assessed against the other vessel where the latter opposed libellant's offer to discontinue as to such vessel.[93]

VI. BOTTOMRY AND RESPONDENTIA.

[EDITED BY LAWRENCE KNEELAND, ESQ., OF THE NEW YORK BAR]

A. Definitions — 1. BOTTOMRY. A bottomry [93a] bond is a contract for a loan of money on the bottom of a ship, at an extraordinary interest, upon maritime risks, to be borne by the lender, for a voyage or a definite period.[94] It is a peculiar contract differing essentially from a loan with security, and is inconsistent with the existence of the lien implied by the marine law to secure advances to a master

Co., 26 Misc. (N. Y.) 195, 55 N. Y. Suppl. 1133 [*reversed* on other grounds in 28 Misc. 112, 59 N. Y. Suppl. 261]; Scott *v.* Hunter, 46 Pa. St. 192, 84 Am. Dec. 542; Kellogg *v.* Milwaukee, etc., R. Co., 14 Fed. Cas. No. 7,764, 5 Dill. 537 [*affirmed* in 94 U. S. 469, 24 L. ed. 256]. See, generally, NEGLIGENCE, 29 Cyc. 634.

81. McGivern *v.* Wilson, 160 Mass. 370, 35 N. E. 864; Butterfield *v.* Arnold, 131 Mich. 583, 92 N. W. 97; Rexter *v.* Starin, 73 N. Y. 601. See, generally, NEGLIGENCE, 29 Cyc. 640.

82. Kellogg *v.* Milwaukee, etc., R. Co., 14 Fed. Cas. No. 7,664, 5 Dill. 537 [*affirmed* in 94 U. S. 469, 24 L. ed. 256]. See, generally, NEGLIGENCE, 29 Cyc. 639.

83. See, generally, NEGLIGENCE, 29 Cyc. 643; TRIAL.

84. Cheboygan Lumber Co. *v.* Delta Transp. Co., 100 Mich. 16, 58 N. W. 630.

85. Walsh *v.* Mississippi Valley Transp. Co., 52 Mo. 434; Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164 (nonprejudicial instruction in an action for damages caused for negligently setting fire); Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212.

86. New Jersey Steamboat Co. *v.* New York, 109 N. Y. 621, 15 N. E. 877; Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212.

87. Netherlands-American Steam Nav. Co. *v.* Diamond, 128 Fed. 570, 63 C. C. A. 212.

88. Atkinson *v.* Goodrich Transp. Co., 69 Wis. 5, 31 N. W. 164.

89. Cheboygan Lumber Co. *v.* Delta Transp. Co., 100 Mich. 16, 58 N. W. 630.

90. Carpenter *v.* Eastern Transp. Co., 71 N. Y. 574.

91. Costs generally see ADMIRALTY, 1 Cyc. 908; COSTS, 11 Cyc. 1.

92. The Rhode Island, 20 Fed. Cas. No. 11,742, 8 Ben. 50.

93. The New York, 34 Fed. 757.

93a. So called because the bottom or keel of the vessel is figuratively used to express the whole vessel. Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514, 516.

94. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157, 186.

Other definitions are: "An obligation, executed, generally, in a foreign port, by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed on; which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at the port of destination; but becomes absolutely void and of no effect in case of her loss before such arrival." The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 135, 19 L. ed. 651.

"A contract in the nature of a mortgage pledging the ship (or bottom); or the ship and freight; or the ship, freight and cargo; as a security for the repayment of money loaned." Davies *v.* Soelberg, 24 Wash. 308, 314, 64 Pac. 540 [*quoting* Conklin Adm.].

Code definition.—"Bottomry is a contract by which a ship or its freightage is hypothecated as security for a loan, which is to be repaid only in case the ship survives a particular risk, voyage, or period. Cal. Civ. Code (1906), § 3017; N. D. Codes (1899), § 4770; S. D. Rev. Codes (1903), § 2130.

in a foreign port to make necessary repairs,[95] and as the lender sustains the hazard of the voyage he receives upon its happy termination a greater price or premium for his money than the rate of interest allowed by law in ordinary cases.[96] It does not create a personal obligation on the owner till the vessel reaches port;[97] but if the ship arrives at the port of her destination, the borrower, personally, as well as the ship, is liable for the repayment of the loan, together with such premium thereon as may have been agreed on.[98]

2. RESPONDENTIA. A respondentia bond is a loan of money upon merchandise laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port.[99] There is a tendency in modern law to use "bottomry" for either contract for a loan of money subject to marine risk and at maritime interest, whether upon hull or cargo, and to discontinue the use of the term "respondentia,"[1] and in this article "bottomry" will be used to convey both meanings.

B. Requisites and Validity of Bond — 1. FORM AND CONSTRUCTION. The object of the bond is to procure necessary supplies for vessels in distress in foreign ports, where the master and owners are without credit, and, if assistance could not be so procured, the vessel and cargo might perish.[2] No particular form of contract is necessary;[3] and the fact that when a contract is made for a bottomry bond for money advanced no exact amount of money is agreed on does not affect the validity of the bond for the amount actually required for repairs and supplies obtained,[4] and although the earlier bottomry contracts were executed under seal, the later usage has dispensed with the seal.[5] These bonds are of high and privi-

95. The Ann C. Pratt, 1 Fed. Cas. No. 409, 1 Curt. 340 [*reversing* 5 Fed. Cas. No. 2,445, 10 N. Y. Leg. Obs. 193, and *affirmed* in 18 How. 63, 15 L. ed. 267].

96. Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514. And see *infra*, VI, B, 2.

97. Davies *v.* Soelberg, 24 Wash. 308, 314, 64 Pac. 540.

98. The Dora, 34 Fed. 343.

99. Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,890, Newb. Adm. 514, 516.

It is a mercantile contract consisting of a loan of money upon hypothecation of cargo, as bottomry is upon security of the hull, to be repaid with maritime interest if the cargo arrives safe, or sustains injury only through its own defects or the fault of master and mariners. Abbott L. Dict.

1. Abbott L. Dict. "Respondentia."

2. Hill *v.* Phœnix Tow Boat Co., 2 Rob. (La.) 35.

3. See Force *v.* The Pride of the Ocean, 3 Fed. 162 (holding that an agreement for maritime interests is a necessary element of such a contract); Eneas *v.* The Charlotte Minerva, 8 Fed. Cas. No. 4,483.

Form of bond in modern use see O'Brien *v.* Miller, 168 U. S. 287, 298, 18 S. Ct. 140, 42 L. ed. 469.

A draft payable a specified number of days after the vessel's arrival is a good contract of bottomry. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42; Monsen *v.* Amsinck, 166 Fed. 817; The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

A bill of sale will not be construed as a bottomry bond when not intended so to operate. Ridgway *v.* Roberts, 4 Hare 106, 30 Eng. Ch. 106, 67 Eng. Reprint 580.

Recording and registration.—A bottomry bond need not be recorded under Mass. Act (1832), c. 57, which provides for the registration of mortgages of personal property. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157. But see Greeley *v.* Waterhouse, 19 Me. 9, 36 Am. Dec. 730, holding that a bottomry bond, when unaccompanied by delivery, cannot be regarded as a mortgage, unless recorded as required by St. (1839) c. 390.

Waiver of statutory provisions as to form. — Provisions of the law of the flag, prescribing the form of bottomry bonds, even if they could affect transactions in a foreign port, are waived by the execution in such a port of a bottomry bond in a different form by the master and part-owner without objection by the other owners. The Eliza Lines, 61 Fed. 308.

Bond held valid see Thorndike *v.* Stone, 11 Pick. (Mass.) 183.

Instrument held not to be a bottomry bond see The Heinrich Bjorn, 10 P. D. 44, 5 Aspin. 391, 54 L. J. Adm. 33, 52 L. T. Rep. N. S. 560, 33 Wkly. Rep. 719 [*affirmed* in 11 App. Cas. 270, 6 Aspin. 1, 55 L. J. Adm. 80, 55 L. T. Rep. N. S. 66].

4. Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

5. The Dora, 34 Fed. 343.

Negotiability.—A master's bottomry obligation, payable to order on arrival at port of destination, is not such a negotiable instrument as to give the indorsee any better rights than those of the payee. The Lykus, 36 Fed. 919. But the bond is assignable and the assignee may sue in his own or the assignor's name. Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308. But like all assignees he takes subject to the equities

leged character and held in great sanctity in maritime courts,[6] and are liberally construed so as to carry into effect the intention of the parties,[7] and to give effect to the contract according to the manifest intent of all its provisions,[8] and where there is no suspicion of fraud every fair presumption is to be made to support them,[9] the law of the ship's home governing[10] in the absence of express stipulation,[11] and the respondentia bond, memorandum indorsed on it, and the outward bill of lading and assignment thereon, are all to be construed as one instrument for the purpose of discovering the intention of the parties.[12] But contracts of bottomry and respondentia are so different in different countries, although resembling each other in some prominent features, that, when disputes arise, they are to be decided by the words of the particular contract in question rather than by any principles of general commercial law.[13]

2. Contents; Marine Risk; Maritime Interest. It is essential to a bottomry transaction that the money lent should run the hazard of the voyage, and be upon maritime or marine risk; an instrument for the repayment of money absolutely is not a bottomry contract;[14] and to constitute a valid contract of bottomry,

against his assignor. The Onward, L. R. 4 A. & E. 38, 1 Aspin. 40, 42 L. J. Adm. 61, 28 L. T. Rep. N. S. 204, 21 Wkly. Rep. 601.

6. O'Brien *v.* Miller, 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469; Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; The Prince George, 4 Moore P. C. 21, 13 Eng. Reprint 208.

7. Niagara Ins. Co. *v.* Searle, 2 Hall (N. Y.) 32; Delaware Ins. Co. *v.* Archer, 3 Rawle (Pa.) 216; Miller *v.* O'Brien, 35 Fed. 779; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465; The Zephyr, 30 Fed. Cas. No. 18,210, 3 Mason 341; Simonds *v.* Hodgson, 3 B. & Ad. 50, 1 L. J. K. B. 51, 23 E. C. L. 32; The Kennersley Castle, 3 Hagg. Adm. 1.

Bond covering cargo in two vessels.—A bottomry bond, covering a vessel and the cargo on board as well as part of the cargo transhipped to another vessel, conditioned to be void if "said vessel" should be utterly lost, should be construed as becoming void only in case of the loss of both vessels, but not on the total loss of the vessel from which the transhipment was made and her remaining cargo. O'Brien *v.* Miller, 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469 [*reversing* 67 Fed. 605, 14 C. C. A. 566, and *affirming* 59 Fed. 621].

8. Oliver *v.* The Sirius, 54 Fed. 188, 4 C. C. A. 273.

The rule that the whole contract must be brought into view, and must be interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them, is especially applicable to the interpretation of contracts of bottomry and respondentia. O'Brien *v.* Miller, 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469.

9. The Prince George, 4 Moore P. C. 21, 13 Eng. Reprint 208 [*quoted* in O'Brien *v.* Miller, 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469].

10. Force *v.* Providence Washington Ins Co., 35 Fed. 767; The Karnak, L. R. 2 P. C. 505, 38 L. J. Adm. 57, 21 L. T. Rep. N. S. 159, 6 Moore P. C. N. S. 136, 17 Wkly. Rep. 1028, 16 Eng. Reprint 677; Lloyd *v.* Guibert, L. R. 1 Q. B. 115, 6 B. & S. 100, 35 L. J. Q. B. 74, 13 L. T. Rep. N. S. 602; The Gaetano, 7 P. D. 137, 4 Aspin. 470, 51 L. J. Adm. 67, 46 L. T. Rep. N. S. 835, 30 Wkly. Rep. 766. But see Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55; The Hamburg, 4 Brown & L. 253, 10 Jur. N. S. 600, 36 L. J. Adm. 116, 10 L. T. Rep. N. S. 206, 2 Moore P. C. N. S. 289, 12 Wkly. Rep. 628, 15 Eng. Reprint 911.

11. The Gaetano, 7 P. D. 137, 4 Aspin. 470, 51 L. J. Adm. 67, 46 L. T. Rep. N. S. 835, 30 Wkly. Rep. 766. And see The Wyandotte, 145 Fed. 321, 75 C. C. A. 117 [*affirming* 136 Fed. 470], holding that where the charter of an English vessel executed in New York provided that it should be governed by the American law, and the vessel shipped her cargo and contracted debts for which a bottomry bond was executed at New Orleans, the liability of the vessel was governed by the law of the United States, and not by the law of the flag.

12. Atlantic Ins. Co. *v.* Conard, 2 Fed. Cas. No. 627, 4 Wash. 662 [*affirmed* in 1 Pet. 386, 7 L. ed. 189].

13. O'Brien *v.* Miller, 67 Fed. 605, 14 C. C. A. 566 [*reversed* on other grounds in 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469].

14. Greeley *v.* Waterhouse, 19 Me. 9, 36 Am. Dec. 730; Thorndike *v.* Stone, 11 Pick. (Mass.) 183; Northwestern Ins. Co. *v.* Ferward, 36 N. Y. 139; The Sophie Wilhelmine, 58 Fed. 890, 7 C. C. A. 569; The E. A. Barnard, 2 Fed. 712; The Clotilda, 5 Fed. Cas. No. 2,903, 1 Hask. 412; Greely *v.* Smith, 10 Fed. Cas. No. 5,750, 3 Woodb. & M. 236 (holding that a bottomry bond is not valid as such unless the debt is risked on the loss of the vessel, and that, although maritime interest secured is one evidence of this risk, it is not alone sufficient to show the bond to be in bottomry, and if the person be still liable in the event the vessel is not lost, the obligation may be good in bottomry, but not so if the person is liable, although the vessel is lost); Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514 (holding that where a bond contained the stipula-

where more than statutable interest is reserved, both the principal and interest must be put at risk;[15] but a hypothecation will be held to be a bottomry bond, although it contains a provision that, in case the bills of exchange given by the master for the money advanced are not accepted and paid, the bond shall become due, where it also contains a condition that the party taking it shall assume the risk of the voyage, as the conditions must be taken together.[16] A stipulation in a bottomry bond providing that, in the event of the ship in the course of the voyage putting into any port of refuge to repair, the money shall forthwith become due and payable, does not invalidate the bond provided that a maritime risk is in the contemplation of the parties;[17] and a bottomry bond may be valid which states that it is to be paid a stated number of days after arrival, renunciation in case of loss of the vessel being implied;[18] and where the insurer of a vessel, having the right to loan upon bottomry, being applied to by the owners for a bottomry bond, and unwilling to increase the amount of risk on the vessel, suspends a part of the policy equal to the amount of the loan, during its continuance, this is valid as a bottomry loan.[19] An agreement for maritime interest is a usual but not a necessary element in a contract of bottomry;[20] and sometimes bonds are made bearing

tion that the lenders did not take upon themselves the marine risks usual in cases of bottomry and hypothecation, the instrument wanted the essential characteristic of bottomry, and created no lien which could be enforced *in rem* in admiralty, and that the simultaneous drawing of a bill of exchange could not help the matter, since it was merely as collateral to the bond); The William & Emmeline, 29 Fed. Cas. No. 17,687, Blatchf. & H. 66; Stainbank *v.* Shepard, 13 C. B. 418, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418; The Indomitable, 5 Jur. N. S. 632, Swab. 446; Hill *v.* Snow, 1 Keb. 358, 83 Eng. Reprint 993; The Grecia, 7 Notes of Cas. 410.

Freight to be earned after the maritime risk is ended cannot be pledged. The Staffordshire, L. R. 4 P. C. 194, 1 Aspin. 365, 41 L. J. Adm. 49, 27 L. T. Rep. N. S. 46, 8 Moore P. C. N. S. 443, 20 Wkly. Rep. 557, 17 Eng. Reprint 378.

A bond covering in part property not exposed to maritime risk is bad as to that part, but may be good as to the residue. *In re* Cargo ex Sulton, 5 Jur. N. S. 1060, Swab. 504.

But the words "lost or not lost," omitted in the respondentia bond, may be supplied by other equivalent expressions, so as to place the money loaned at the risk of the lender. Atlantic Ins. Co. *v.* Conard, 2 Fed. Cas. No. 627, 4 Wash. 662 [*affirmed* in 1 Pet. 386, 7 L. ed. 189].

A clause of sale in a bottomry bond does not destroy its character or operation. Robertson *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 250, 1 Am. Dec. 166. But when, by the terms of a contract, the borrower assigns to the lender, as collateral security for a loan, two policies of insurance on a vessel, and one upon the freight, and besides gives him a bill of sale of the vessel, it is not bottomry. Braynard *v.* Hoppock, 32 N. Y. 571, 88 Am. Dec. 349 [*affirming* 7 Bosw. 157].

A hypothecation in the form of a mortgage is not a bottomry bond, where the creditor neither assumes the risk of a voyage nor reserves marine interest. The Hilarity, 12 Fed. Cas. No. 6,480, Blatchf. & H. 90.

Sea risk need not be expressly mentioned if the lender clearly undertakes it. Simonds *v.* Hodgson, 3 B. & Ad. 50, 1 L. J. K. B. 51, 23 E. C. L. 32.

The essential difference between a bottomry bond and a simple loan is that on the latter the money is at the risk of the borrower, and must be paid at all events, and in the former it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514; The Mary, 16 Fed. Cas. No. 9,187, 1 Paine 671.

15. Ohio Ins. Co. *v.* Edmondson, 5 La. 295; Thorndike *v.* Stone, 11 Pick. (Mass.) 183; Jennings *v.* Commonwealth Ins. Co., 4 Binn. (Pa.) 244, 5 Am. Dec. 404.

16. The Edward Albro, 8 Fed. Cas. No. 4,290, 10 Ben. 668.

17. The Haabet, [1899] P. 295, 8 Aspin. 605, 68 L. J. P. D. & Adm. 121, 81 L. T. Rep. N. S. 463, 16 T. L. R. 548, 48 Wkly. Rep. 223.

18. The Eliza Lines, 61 Fed. 308; The Dora, 34 Fed. 343; Bolten *v.* The James L. Pendergast, 30 Fed. 717. And see Lloyd *v.* McMasters, 7 Mart. (La.) 249.

Contract sufficiently subject to risk.—A bottomry bond which does not purport to create any personal liability, and which is payable five days after the arrival of the ship at her port of destination, expresses a contract by which the debt is subject to the maritime risk essential to support such a bond. The Northern Light, 106 Fed. 748.

19. Northwestern Ins. Co. *v.* Ferward, 36 N. Y. 139.

20. Cole *v.* White, 26 Wend. (N. Y.) 511; Force *v.* The Pride of the Ocean, 3 Fed. 162; The Reliance, 3 Hag. Adm. 66; The Change, Swab. 240, 5 Wkly. Rep. 547. The Emancipation, 1 W. Rob. 124. *Compare* Leland *v.* The Medora, 15 Fed. Cas. No. 8,237, 2 Woodb. & M. 92 (holding that when a bond provides for no maritime interest, or marine risk, and

only the ordinary rate of interest,[21] and a bond is valid, although no interest is stipulated for;[22] but a loan on low or legal interest will create a suspicion that the marine risk was not contracted for, and that the parties did not intend a bottomry contract.[23] A loan secured by a bottomry bond is not affected by the usury laws, since the lender is the insurer of the vessel for the voyage to the extent of his loan;[24] but the reservation of marine interest in a contract for the loan of money on a vessel to be paid at all events is usurious.[25] A bottomry bond, made for a larger sum than is due, for the purpose of being used to defraud underwriters, is void, and no remedy can be had upon it, although no fraud was intended against the owners of the vessel.[26]

3. Effect of Partial Invalidity; Ratification. A bottomry bond may be good in part, and bad in part, and will be sustained as far as it is good;[27] and the objection that a bottomry bond given in good faith for necessary supplies was executed without due authority operates only to reduce the premium so far as

its condition is a mere pledge of a vessel to secure a debt and simple interest, it is not a bottomry bond); The Mary, 16 Fed. Cas. No. 9,187, 1 Paine 671 (holding that marine interest is requisite to a bottomry loan; but if not expressed in the bond it will be presumed to have been included in the principal).

If the premium is inflamed by extortion and manifestly exorbitant, a court of admiralty may moderate it (The Hunter, 12 Fed. Cas. No. 6,904, 1 Ware 249; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; The Pontida, 9 P. D. 177, 5 Aspin. 330, 53 L. J. Adm. 78, 51 L. T. Rep. N. S. 849, 33 Wkly. Rep. 38; The Cognac, 2 Hagg. Adm. 377; The Zodiac, 1 Hagg. Adm. 320; The Huntley, Lush. 24; The Heart of Oak, 1 W. Rob. 204. See The Gauntlet, 13 Jur. 413); but it must act in the exercise of such power with great caution and take into consideration all the circumstances of each particular transaction (The Cognac, *supra*; The Zodiac, *supra*). The exaction of a premium of ten per cent besides interest, on the amount loaned on a bottomry bond on a bark having several hundred miles to sail before completing her voyage, is not so extortionate as to invalidate the bond (The Northern Light, 106 Fed. 748), and excessive premium alone has been held no reason for pronouncing the bond invalid (The Laurel, Brown & L. 317, 11 Jur. N. S. 46, 13 Wkly. Rep. 352; The Lord Cochrane, 3 Notes of Cas. 172, 2 W. Rob. 320); but a court of equity may refuse to assist a bottomry bond carrying unwarrantable interest (Dandy *v.* Turner, 1 Eq. Cas. Abr. 372, 21 Eng. Reprint 1111).

Where the validity of the bond is open to doubt, libellant may be regarded as an equitable transferee of the master's liens on the cargo, and entitled to the benefit of them as a means of reimbursement; but he will be confined to the ordinary rate of six per cent, although the bond stipulated for a maritime premium of thirteen and one-half per cent. Bradley *v.* Cargo of Lumber, 29 Fed. 648.

Date from which interest allowed.—Where the bottomry bondholder is resident abroad, and has no agent in this country, interest will not be payable prior to the arrival of a power of attorney to receive the principal. The New Brunswick, 1 W. Rob. 28.

21. The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651.

22. The Cecilie, 4 P. D. 210, 4 Aspin. 78, 40 L. T. Rep. N. S. 200.

23. Force *v.* The Pride of the Ocean, 3 Fed. 162 (holding, however, that the presumption is not conclusive); The Royal Arch, Swab. 269, 6 Wkly. Rep. 191 (holding that no particular rate of interest is essential, although when the ordinary or a low rate of interest is taken it raises a suspicion that sea risk was not intended, and sea risk is essential to the jurisdiction of the court).

24. Cole *v.* White, 26 Wend. (N. Y.) 511; Davies *v.* Soelberg, 24 Wash. 308, 64 Pac. 540; The Dora, 34 Fed. 343; Sharpley *v.* Hurrel [*cited* in Roberts *v.* Tremoile, 2 Cro. Jac. 208, 79 Eng. Reprint 182, 2 Rolle 47, 48, 81 Eng. Reprint 650]; Joy *v.* Kent, Hardres 418; Mason *v.* Abdy, Holt K. B 738, 90 Eng. Reprint 1306; Appleton *v.* Brian, 1 Keb. 711, 83 Eng. Reprint 1200; Roberts *v.* Tremoile, 2 Rolle 47, 81 Eng. Reprint 650; Sharpley *v.* Hurrel, Cro. Jac. 208, 79 Eng. Reprint 182; Soome *v.* Gleen, 1 Sid. 27, 82 Eng. Reprint 949; Chesterfield *v.* Jansen, 2 Ves. Sr. 27, 124.

25. Braynard *v.* Hoppock, 32 N. Y. 571, 88 Am. Dec. 349 [*affirming* 7 Bosw. 157]; Hill *v.* Snow, 1 Keb. 358, 83 Eng. Reprint 993. And see The D. H. Bills, 4 Aspin. 20, 38 L. T. Rep. N. S. 786.

26. Carrington *v.* The Ann C. Pratt, 5 Fed. Cas. No. 2,445, 10 N. Y. Leg. Obs. 193 [*affirmed* in 18 How. 63, 15 L. ed. 267].

27. Carrington *v.* The Ann C. Pratt, 18 How. (U. S.) 63, 15 L. ed. 267; The Virgin *v.* Vyfhius, 8 Pet. (U. S.) 538, 8 L. ed. 1036; The Dora, 34 Fed. 343; The Bridgewater, 4 Fed. Cas. No. 1,865, Olcott 35; The Hunter, 12 Fed. Cas. No. 6,904, 1 Ware 249; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; The Augusta, 1 Dods. 283; The Tartar, 1 Hagg. Adm. 1; The Hebe, 10 Jur. 227, 2 W. Rob. 412; *In re* Cargo ex Sultan, 5 Jur. N. S. 1060, Swab. 504; The Prince George, 4 Moore P. C. 21, 13 Eng. Reprint 208; The Osmanli, 7 Notes of Cas. 322, 3 W. Rob.

the ship is concerned, but does not necessarily relieve the vessel from liability for the advances made, if that liability can be sustained on the principles of hypothecation.[28] But the fraudulent taking of a bottomry bond for a larger amount than the actual advance vitiates the bond, and entirely avoids the bottomry lien; and the party taking it under such circumstances has no lien upon the vessel for his actual advances under the general maritime law;[29] and where a bottomry bond covering the whole vessel is void *in toto* against a part-owner of the vessel for fraud, it cannot be good in part against a purchaser from him, with knowledge that part of the debt secured by the bond was originally good.[30] However, a bottomry bond is not rendered invalid merely because it covers items of advance not entitled to a bottomry lien. It will be good for the sums which are clearly claimed as a maritime hypothecation, and will be reformed by the court, rejecting the surplus in its final decree;[31] and a bond, bad as a bottomry bond, may be good as a mortgage of the vessel, but if the laws of the state where it is made require a mortgage to be put on record, and the mortgaged property to be passed to the mortgagee if these provisions are not complied with, such a bond is bad even as a mortgage.[32] A bottomry bond which might otherwise be held invalid may be ratified by the owner.[33]

C. Operation and Effect — 1. In General. A bottomry bond executed by the master does not vest an absolute interest in the ship, but gives a claim on her which admiralty may enforce;[34] nor does a respondentia bond pass the

198; The Heart of Oak, 1 W. Rob. 204. See The Empire of Peace, 39 L. J. Adm. 12, 21 L. T. Rep. N. S. 763.

Power of admiralty to reduce excessive interest see *supra*, note 20.

28. The Eureka, 8 Fed. Cas. No. 4,547, 2 Lowell 417.

29. Carrington *v.* The Ann C. Pratt, 5 Fed. Cas. No. 2,445, 10 N. Y. Leg. Obs. 193 [*affirmed* in 18 How. 63, 15 L. ed. 267], holding that the rule of the admiralty which holds that a bond may be good for a part and bad for a part does not apply to the one made for the purpose of defrauding the insurers; but a fraudulent bond will not necessarily vitiate the consideration so far as it is meritorious, and for so much the creditor may recover by process *in rem*, on the hypothecation implied by law.

When the express contract of bottomry is void for fraud, no recovery can be had upon the footing of an implied contract and lien. The Ann C. Pratt, 1 Fed. Cas. No. 409, 1 Curt. 340 [*reversing* 5 Fed. Cas. No. 2,445, 10 N. Y. Leg. Obs. 193, and *affirmed* in 18 How. 63, 15 L. ed. 267].

A bottomry bond, given for a larger sum than was advanced, for the purpose of deceiving the underwriter on the vessel, is void *in toto*. The Ann C. Pratt, 1 Fed. Cas. No. 409, 1 Curt. 340 [*reversing* 5 Fed. Cas. No. 2,445, 10 N. Y. Leg. Obs. 193, and *affirmed* in 18 How. 63, 15 L. ed. 267].

A bond may be given, although money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred. The Royal Arch, Swab. 269, 6 Wkly. Rep. 191.

30. The William, 29 Fed. Cas. No. 17,684.

31. Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

32. Greely *v.* Smith, 10 Fed. Cas. No. 5,750, 3 Woodb. & M. 236.

33. The Eliza Lines, 61 Fed. 308.

Illustrations.—Where the owners, with all the facts before them under which a bottomry bond was given by the master in a foreign port, claim and receive their share of the general average from the underwriters, it amounts to a ratification of the making of the bond (Gardner *v.* The White Squall, 9 Fed. Cas. No. 5,239); and if the owner of the cargo stands by and suffers the cargo to be sold under the bottomry bond, without requiring evidence of the necessity for the repairs, it will not avail him, in an action against the ship-owners, to show that the necessity did not exist (Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55).

Acquiescence by part-owners in a bottomry loan, the circumstances whereof are suspicious, is evidence that it was *bona fide*. Roberts *v.* The Yuba, 20 Fed. Cas. No. 11,920.

34. Blaine *v.* The Charles Carter, 4 Cranch (U. S.) 328, 2 L. ed. 636.

The lender acquires no interest in the vessel, his interest is *jus in rem* not *jus in re* until so declared by the court. The Tobago, 5 C. Rob. 218.

Effect of recitals.—A recital that the master was necessitated to take the sum loaned upon the vessel, her cargo, and freight, will not control the actual hypothecation clause confined in terms to the vessel and the freight. The Zephyr, 30 Fed. Cas. No. 18,210, 3 Mason 341. And while recitals of the amount of advances secured are evidence of the true amount, they do not estop the obligor from showing that the amount was in fact less. Oliver *v.* The Sirius, 54 Fed. 188, 4 C. C. A. 273. And where bottomry bonds are given as collateral security for debts due, that fact may be shown if the interests of third persons are thereby to be affected, notwithstanding the recital in the bond that they are given for money lent and advanced.

right of property in the goods, being a mere personal contract;[35] and where a bottomry bond is given to secure debts for which simple contract securities have been previously given, the bond cannot be regarded as merely collateral security, but the simple contracts are merged in the bond, and the previous securities cannot afterward be enforced;[36] but the lender may recover in assumpsit upon bills where subsequent to the bills a bottomry bond was executed;[37] and bills of exchange may be given in connection with a bottomry bond as representing the debt so secured, but such bills will not mature until the vessel returns to port. The bill is collateral to the bond and subject to the same contingencies.[38]

2. Personal Liability. To support a bottomry bond the money must have been advanced on the faith of the vessel;[39] and there is no element of personal liability connected with a bottomry bond proper, and, if one be otherwise good, it will be void if made by a master where the personal liability of the owner had first been relied on.[40] The liability of the owner is limited to the value of the ship and freight, if the value of the ship fall short of the debt, and the lender on bottomry loses the balance; the master having no right to pledge the ship and also the owner's personal responsibility,[41] whether maritime interest be stipulated for or not;[42] and even though the master execute a bottomry bond hypothecating as well the cargo as the ship and freight, and the cargo is afterward sold on such bond, the owner's personal liability will be no greater;[43] and sums advanced for disbursements partly upon personal security and partly upon security of freight cannot be made the subject of bottomry.[44] But a bottomry bond is good which includes the personal liability of the master.[45]

Greeley *v.* Waterhouse, 19 Me. 9, 36 Am. Dec. 730.

Insurable interest of owner.—Where a vessel is under bottomry at the time of the insurance the owners have to that extent no insurable interest in the vessel. Read *v.* Mutual Safety Ins. Co., 3 Sandf. (N. Y.) 54.

35. U. S. *v.* Delaware Ins. Co., 25 Fed. Cas. No. 14,942, 4 Wash. 418.

36. Bray *v.* Bates, 9 Metc. (Mass.) 237.

37. Weston *v.* Foster, 2 Bing. N. Cas. 693, 5 L. J. C. P. 242, 3 Scott 155, 29 E. C. L. 720.

38. Davies *v.* Soelberg, 24 Wash. 308, 64 Pac. 540; The Hunter, 12 Fed. Cas. No. 6,904, 1 Ware 251; Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514; The Onward, L. R. 4 A. & E. 38, 1 Aspin. 40, 42 L. J. Adm. 61, 28 L. T. Rep. N. S. 204, 21 Wkly. Rep. 601; Stainbank *v.* Shepard, 13 C. B. 418, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418; The Ariadne, 1 W. Rob. 411; The Emancipation, 1 W. Rob. 124.

39. Rucher *v.* Conyngham, 20 Fed. Cas. No. 12,106, 2 Pet. Adm. 295; Selden *v.* Hendrickson, 21 Fed. Cas. No. 12,639, 1 Brock. 396.

40. The Sophie Wilhelmine, 58 Fed. 890, 7 C. C. A. 569; Greely *v.* Smith, 10 Fed. Cas. No. 5,750, 3 Woodb. & M. 236.

A bottomry bond cannot be given in connection with personal security by the owner of the vessel to pay the debt regardless of the vessel to port. Davies *v.* Soelberg, 24 Wash. 308, 64 Pac. 540.

41. The Virgin, 8 Pet. (U. S.) 538, 8 L. ed. 1036; Stainbank *v.* Shepard, 13 C. B. 418, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418; Anonymous, 2 Ch. Cas. 238, 22 Eng. Reprint 925; Johnson *v.* Shippin, 1 Salk. 35, 91 Eng. Reprint 37. And see Brook *v.* Williams, 2 Root (Conn.) 27. *Compare* Samsun *v.* Braggington, 1 Ves. 442, 27 Eng. Reprint 1132.

But where a vessel is captured and afterward compensation awarded the owner, the lender on bottomry may recover from the owner in an action of assumpsit for money had and received the amount awarded for the capture. Appleton *v.* Crowninshield, 8 Mass. 340.

Foreign law as to lien material.—The fact that by the law of the country in which the bond is given there is a lien upon the ship furnishes a presumption in favor of bottomry as against personal credit. The Vibilia, 1 W. Rob. 1.

Effect of condition in bond.—Where there is a clause that the vessel is to have on board the amount lent in goods, and the vessel is lost having goods on board of less value, the omission is insufficient to justify a recovery *in toto*; but the lenders are entitled to recover the difference in amount between the sum lent and the sum on board at the time of the loss. Franklin Ins. Co. *v.* Lord, 9 Fed. Cas. No. 5.057, 4 Mason 248.

42. Stainbank *v.* Shepard, 13 C. B. 418, 1 C. L. R. 609, 17 Jur. 1032, 22 L. J. Exch. 341, 1 Wkly. Rep. 505, 76 E. C. L. 418.

43. Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55.

44. The Empire of Peace, 39 L. J. Adm. 12, 21 L. T. Rep. N. S. 763.

45. Kelly *v.* Cushing, 48 Barb. (N. Y.) 269, holding, however, that in such case the master is not liable for the debt secured unless the vessel arrives.

D. Capacity to Execute — 1. Owner. The owner of the vessel may execute a bottomry bond but, unlike the master,[46] is not limited in his power to pledge the vessel to a case of necessity, but has an absolute control over her;[47] nor is it necessary that a respondentia loan by the owner of the cargo should be expended in fitting out the ship, or invested in the goods on which the risk is run.[48] It is not necessary to the validity of a bottomry bond, made by the owner of a vessel, that the money borrowed should be advanced for the necessities of the ship, or cargo, or voyage;[49] but he may employ the money at his discretion; the lender retaining his lien so long as the ship bears the risk,[50] and a valid bottomry bond may be made by the owners of a vessel in a foreign or home port,[51] without the master joining in the bond;[52] and the owner of a ship may bottomry her abroad to secure a loan of money or his personal liabilities for the ship or voyage, provided the debt be put at maritime risk, without regard to his inability to obtain credit or supplies by other means, or the receipt of the consideration before the ship went to sea, and it is not necessary that the loan or supplies shall have been already received when the bond is executed, if the credit was upon the faith that a bottomry security should be given.[53]

2. Master — a. General Rules. In cases of necessity,[54] where he has no other means at his command,[55] a master may, in a foreign port,[56] obtain money for repairs, supplies, or other needs of the ship on bottomry on the ship;[57] and he may bottomry the cargo to pay for repairs or supplies to the ship, provided the cargo owner is thereby benefited,[58] and the ship and freight are insuffi-

46. See *infra*, VI, D, 2.

47. The Mary, 16 Fed. Cas. No. 9,187, 1 Paine 671, holding that he may pledge her for money to purchase a cargo.

48. Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189.

49. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157 (holding, however, that the rule is otherwise where the money was borrowed by the master *virtute officii*); Eneas *v.* The Charlotte Minerva, 8 Fed. Cas. No. 4,483; The Mary, 16 Fed. Cas. No. 9,187, 1 Paine 671; The Panama, 18 Fed. Cas. No. 10,703, Olcott 343.

Fraudulent bond given by owner of part interest.—Where the owner of less than a half interest in a vessel, having title to the whole in his name, gave a bottomry bond covering the whole value of the vessel, although only one third of the sum was actually due, and this bond was set up as a defense to a suit by the other part-owner of the vessel for a conveyance of his share, the bond was fraudulent and could not be sustained as a defense to a suit by the other part-owner for a conveyance of his share. The William, 29 Fed. Cas. No. 17,684.

A bottomry bond given by the owner to the master to secure certain advances and wages due to him is valid. Miller *v.* The Rebecca, 17 Fed. Cas. No. 9,587, Bee 151.

50. Greeley *v.* Waterhouse, 19 Me. 9, 36 Am. Dec. 730; Eneas *v.* The Charlotte Minerva, 8 Fed. Cas. No. 4,483.

51. Greeley *v.* Waterhouse, 19 Me. 9, 36 Am. Dec. 730; The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157; Forbes *v.* The Hannah, 9 Fed. Cas. No. 4,925, Bee 348; The Duke of Bedford, 2 Hagg. Adm. 294.

52. The Duke of Bedford, 2 Hagg. Adm. 294.

53. The Panama, 18 Fed. Cas. No. 10,703, Olcott 343, holding that a bottomry of a ship in a foreign port by her owner is valid, although a part of the loan for which it is given consists of a bill of exchange drawn by the bottomry lender on the home port of the ship, and that the credit of the bottomry lender, given in aid of the ship or owner in a foreign port, is a sufficient consideration to support the security, but that a court of admiralty may call for proof that such credit or liabilities had been actually satisfied by the lender before decreeing an enforcement of the bottomry.

Bottomry for preëxisting debt generally see *infra*, VI, E, 2.

54. See *infra*, VI, D, 2, b.

55. See *infra*, VI, D, 2, b.

56. See *infra*, VI, D, 2, b.

57. The Gustavia, 11 Fed. Cas. No. 5,876, Blatchf. & H. 189; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255.

A bond may be given by a substituted master to the merchant who appointed him. The Rubicon, 3 Hagg. Adm. 9.

In the absence of the master the mate may in a case of capture and recapture bottomry the ship for payment of salvage. Parmenter *v.* Todhunter, 1 Campb. 541.

A master under arrest may execute a valid bond. The Heart of Oak, 1 W. Rob. 204.

The master acts as the agent alone of the owner of the ship in ordering repairs and borrowing money on bottomry. Benson *v.* Duncan, 3 Exch. 644, 14 Jur. 218, 18 L. J. Exch. 169.

58. Schmidt *v.* The George Nicholaus, 21 Fed. Cas. No. 12,463 (holding that when necessary repairs can be made within a reasonable time, the master may hypothecate freight and cargo for that purpose, instead

cient,[59] although a note or other obligation is given for the demand,[60] and although the ship be hired upon charter, and the master has been appointed by the charterers;[61] and a master appointed in a foreign port by the American consul on the recovery of a vessel from a master who had barratrously run away with her has the same powers as one appointed directly by the owner;[62] but where advances were made, and a bond given, after the master had resigned his command, and another master, appointed by the charterers, had succeeded to it, the bond is not valid.[63] Authority to raise money on the vessel itself in the absence of other means is implied where the owner refuses to pay a bill given for supplies furnished, and sends the creditor to demand payment from the master in a foreign port.[64]

b. Extent and Limitation of Authority. A bottomry bond can be given by the master of the vessel in and only in case of necessity[65] and great dis-

of transhipping); The Gratitudine, 3 C. Rob. 240, 261; The Elephanta, 15 Jur. 1185.

A master has power to bottomry the cargo for a reasonable purpose only, for the benefit of the ship and cargo. Hussey *v.* Christie, 9 East 426, 103 Eng. Reprint 636, 13 Ves. Jr. 599, 33 Eng. Reprint 417, 9 Rev. Rep. 585.

Bond given to meet expenses caused by cargo owners' delay.—Where the master was obliged to sell part of the cargo abroad to defray the ship's expenses and gave a bond on cargo for further advances, the owners of the cargo, if they caused the delay which occasioned the expenses, cannot refuse payment of any part of the freight or deduct it from the sum due on the bond. The Angerona, 1 Dods. 382.

59. The Dowthorpe, 2 Notes of Cas. 264, 2 W. Rob. 73.

60. The Hilarity, 12 Fed. Cas. No. 6,480, 1 Blatchf. & H. 90.

61. Breed *v.* The Venus, 4 Fed. Cas. No. 1,827.

62. The Jacmel Packet, 13 Fed. Cas. No. 7,154, 2 Ben. 107, holding that he has power to execute a bottomry bond in the foreign port to secure the payment of advances made the vessel, and the compensation to the one who detected the fraud and recovered the property, it appearing that the former master intended to sell the ship and cargo at such port.

63. Walden *v.* Chamberlain, 28 Fed. Cas. No. 17,055, 3 Wash. 290 [*affirmed* in 1 Wheat. 96, 4 L. ed. 45].

64. Thomas *v.* Gittings, 23 Fed. Cas. No. 13,897, Taney 472.

65. Marziou *v.* Pioche, 8 Cal. 522; Fontaine *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 29; Reade *v.* Commercial Ins. Co., 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; The Aurora, 1 Wheat. (U. S.) 96, 4 L. ed. 45; Grace *v.* The Mauna Loa, 76 Fed. 829; The Archer, 23 Fed. 350, 23 Blatchf. 186; The Boston, 3 Fed. Cas. No. 1,669, 1 Blatchf. & H. 309; Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; The Santissima Trinidad, 5 Fed. Cas. No. 2,383; Forbes *v.* The Hannah, 9 Fed. Cas. No. 4,925, Bee 348; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55 (that is to say, where it is necessary for the interest of the owner, or there is reasonable ground to believe it will be for his interest); O'Hara *v.* The Mary, 18 Fed. Cas. No. 10,467, Bee 100; Patton *v.* The Randolph, 18 Fed. Cas. No. 10,837, Gilp. 457; Putnam *v.* The Polly, 20 Fed. Cas. No. 11,482, Bee 157; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226; Schmidt *v.* The George Nicholaus, 21 Fed. Cas. No. 12,463; Lyall *v.* Hicks, 27 Beav. 616, 54 Eng. Reprint 244; The Reliance, 3 Hagg. Adm. 66; Bridgeman's Case, Hob. 11, 80 Eng. Reprint 162; Anonymous, Holt K. B. 650, 90 Eng. Reprint 1260, 3 Salk. 23, 91 Eng. Reprint 668; Dobson *v.* Lyall, 8 Jur. 969, 11 Jur. 179 note, 6 L. J. Ch. 115, 3 Myl. & C. 453 note, 40 Eng. Reprint 1003 note, 2 Phil. 323 note, 22 Eng. Ch. 323 note, 41 Eng. Reprint 967 note. But see Eneas *v.* The Charlotte Minerva, 8 Fed. Cas. No. 4,483, which does not, however, conflict with the rule stated in the text as the master who signed the bottomry bond was also owner.

An anticipated necessity for funds will not justify giving the bond. Gibbs *v.* The Texas, 10 Fed. Cas. No. 5,385, Crabbe 236. See The Magoun, 9 Fed. Cas. No. 5,163.

Facts held to constitute necessity see The Northern Light, 106 Fed. 748; The Magoun, 9 Fed. Cas. No. 5,163, where the master of a vessel testified that she had been greatly injured by rubbing on rocks, and that surveyors required that she be overhauled and repaired; that he was absolutely in want of money for supplies, and could not leave port unless he could have the money; and that he applied to various persons without success, and could not get the money unless he could secure the loan by bottomry, and this was held sufficient proof of the necessity of the loan.

Although a master's obligation be in the form of bottomry, if the ship is under no such necessity as would authorize bottomry, and the charter does not authorize it, no lien is thereby created on the vessel. The Lykus, 36 Fed. 919.

There must be a twofold necessity for raising money to justify a master in raising it on bottomry: There must be a necessity of obtaining repairs or supplies in order to prosecute the voyage; and there must be a necessity of resorting to this method to obtain the money from inability to procure the required funds in any other way. Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; The Lavinia *v.* Barclay, 14 Fed.

tress,[66] in a foreign port,[67] where the owner is not present [68] and has no representative [69] with funds,[70] and is not easily communicated with,[71] and when he has no other means at his command,[72] nor any funds or credit of his owner [73] or of his own,[74] nor any other means of getting money,[75] such as advances on the freight or passage money,[76] and there are no goods of his own or of his owner on board; [77] but if he has money on board belonging to shippers, he is not bound to apply it to the ship's necessities before borrowing on bottomry, at least if not equal to the amount of repairs. The law invests him with a large discretion on the subject.[78] The necessity must be such as would induce a prudent owner to provide funds for the cost of them on the security of the ship,[79] and that if the master did not take up the money the

Cas. No. 8,125, 1 Wash. 49; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226.

Consent of a managing part-owner to a bottomry bond binds the coöwners and is strong evidence of the necessity of the bond. The Royal Arch, Swab. 269, 6 Wkly. Rep. 191.

66. Tunno *v.* The Mary, 24 Fed. Cas. No. 14,237, Bee 120.

The necessity which will validate bottomry of a cargo is a high degree of need arising when choice is to be made of one of several alternatives, under the peril of severe loss, if a wrong choice should be made. The Karnak, L. R. 2 P. C. 505, 38 L. J. Adm. 57, 21 L. T. Rep. N. S. 159, 6 Moore P. C. N. S. 136, 17 Wkly. Rep. 1028, 16 Eng. Reprint 677.

67. The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651; The Archer, 23 Fed. 350, 23 Blatchf. 186; Burke *v.* M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; Forbes *v.* The Hannah, 9 Fed. Cas. No. 4,925, Bee 348; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; The Gustavia, 11 Fed. Cas. No. 5,876, 1 Blatchf. & H. 189; O'Hara *v.* The Mary, 18 Fed. Cas. No 10,467, Bee 100; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226; Rucher *v.* Conyngham, 20 Fed. Cas. No. 12,106, 2 Pet. Adm. 295.

What ports are foreign.—All ports other than those of the state where the vessels belong are foreign, in the jurisprudence of the United States. Burke *v.* M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; Selden *v.* Hendrickson, 21 Fed. Cas. No. 12,639, 1 Brock. 396 (holding that a ship belonging to a port in Virginia may be hypothecated by the master for money lent to make repairs, in New York, that are necessary to enable her to pursue the voyage). And the master may hypothecate ship and cargo, although lying in a part of the country in which the owners reside, provided he has no means of communicating with the owners. La Ysabel, 1 Dods. 273; The Rhodamanthe, 1 Dods. 201; The Oriental, 7 Moore P. C. 398, 13 Eng. Reprint 934; The Trident, 1 W. Rob. 29. See The Barbara, 4 C. Rob. 1.

68. Patton *v.* The Randolph, 18 Fed. Cas. No. 10,837, Gilp. 457; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226.

69. Boreal *v.* The Golden Rose, 3 Fed. Cas. No. 1,658, Bee 131; The Faithful, 31 L. J. Adm. 81. See Selden *v.* Hendrickson, 21 Fed. Cas. No. 12,639, 1 Brock. 396.

70. Lyall *v.* Hicks, 27 Beav. 616, 54 Eng. Reprint 244.

71. See *infra*, VI, D, 2, c.

72. Boreal *v.* The Golden Rose, 3 Fed. Cas. No. 1,658, Bee 131; Tunno *v.* The Mary, 24 Fed. Cas. No. 14,237, Bee 120.

73. Thomas *v.* Osborn, 19 How. (U. S.) 22, 15 L. ed. 534; The Aurora, 1 Wheat. (U. S.) 96, 4 L. ed. 45; Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; The Gustavia, 11 Fed. Cas. No. 5,876, 1 Blatchf. & H. 189; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; Patton *v.* Randolph, 18 Fed. Cas. No. 10,837, Gilp. 457; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226; The Hersey, 3 Hagg. Adm. 404.

A total want of sufficient credit is essential to the validity of the bond. The Santissima Trinidad, 5 Fed. Cas. No. 2,383; Forbes *v.* The Hannah, 9 Fed. Cas. No. 4,925, Bee 348; O'Hara *v.* The Mary, 18 Fed. Cas. No. 10,467, Bee 100. And the master is bound to ascertain whether supplies can be procured on the personal credit of the owner before he resorts to a bottomry bond as security for their amount. The Ship Eliza, 1 Moore P. C. 5, 12 Eng. Reprint 712.

74. Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255.

75. Harned *v.* Churchman, 4 La. Ann. 310, 50 Am. Dec. 573 (holding that it must appear that the advances were for repairs or supplies necessary for the voyage or the vessel's safety, and which could not be procured on reasonable terms, or with funds in his control, or on the owner's credit, independent of the hypothecation); Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308; Gibbs *v.* The Texas, 10 Fed. Cas. No. 5,385, Crabbe 236; Rucher *v.* Conyngham, 20 Fed. Cas. No. 12,106, 2 Pet. Adm. 295.

It is proper to advertise before taking money on bottomry, but the neglect of the master to do so does not affect the validity of the bond. The Reliance, 3 Hagg. Adm. 66.

76. Burke *v.* The P. M. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308.

77. Cupisino *v.* Perez, 2 Dall. (Pa.) 194, 1 L. ed. 345; Rucher *v.* Conyngham, 20 Fed. Cas. No. 12,106, 2 Pet. Adm. 295.

78. The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255.

79. St. Thomas Bank *v.* The Julia Blake, 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595; The Grapeshot *v.* Wallerstein, 9 Wall.

voyage would be defeated or at least retarded;[80] but the necessity for supplies to support a bottomry bond need not have been so urgent that the vessel must have been lost to the owner without them.[81] The contract cannot be entered into by the master before the voyage is begun,[82] or contrary to instruction,[83] or in those places where the owners reside,[84] or have credit,[85] even for those necessities without which the vessel cannot proceed to sea.[86] But it is no objection to a bottomry by the master for necessary repairs in a foreign port that the loan was effected after the same were made,[87] and in a case of necessity, the master of a ship may hypothecate her as well at the port of destination as at any other foreign port.[88]

c. Necessity of Communication With Owner. While all maritime ports other than those of the state where the vessel belongs are foreign to the vessel, within the rule permitting hypothecation by the master only in a foreign port,[89] the validity of a hypothecation bond does not rest on the locality of the port alone at which it is effected, but on the difficulty of communication between the master and owner,[90] and a master has no authority to bottomry the ship, where he does not communicate with the owner of the vessel,[91] or her charterer,[92] or to hypothecate the cargo without communicating with the owner of the cargo,[93] or the con-

(U. S.) 129, 19 L. ed. 651; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228 [*citing* Abbott Shipping]; Webster *v.* Seekamp, 4 B. & Ald. 352, 23 Rev. Rep. 307, 6 E. C. L. 515.

Supplies are necessary when they are fit and proper for the service in which the vessel is engaged, and such as a prudent owner would order. The Medora, 16 Fed. Cas. No. 9,391, 1 Sprague 138.

80. Cupisini *v.* Perez, 2 Dall. (Pa.) 194, 1 L. ed. 345.

81. Thomas *v.* Gittings, 23 Fed. Cas. No. 13,897, Taney 472.

82. Turnbull *v.* The Enterprise, 24 Fed. Cas. No. 14,242, Bee 345; Lister *v.* Baxter, Str. 695, 93 Eng. Reprint 789. See The Jenny, 2 W. Rob. 5.

A bottomry bond upon ship, freight, and cargo for necessary repairs to the ship executed after the repairs done and the contract of affreightment but before actual shipment of the cargo is bad as to the cargo. The Jonathan Goodhue, Swab. 355.

83. Grace *v.* The Mauna Loa, 76 Fed. 829; The Reliance, 3 Hagg. Adm. 66.

84. Forbes *v.* The Hannah, 9 Fed. Cas. No. 4,925, Bee 348; The Lavinia *v.* Barclay, 15 Fed. Cas. No. 8,125, 1 Wash. 49; Rucher *v.* Conyngham, 20 Fed. Cas. No. 12,106, 2 Pet. Adm. 295; Turnbull *v.* The Enterprise, 24 Fed. Cas. No. 14,242, Bee 345.

85. The Sydney Cove, 2 Dods. 1; The Nelson, 1 Hagg. Adm. 169; Soares *v.* Rahn, 3 Moore P. C. 1, 13 Eng. Reprint 1; The Ship Eliza, 1 Moore P. C. 5, 12 Eng. Reprint 712.

86. Turnbull *v.* The Enterprise, 24 Fed. Cas. No. 14,242, Bee 345.

87. The Kathleen, 13 Fed. Cas. No. 7,624, 2 Ben. 458.

88. Reade *v.* Commercial Ins. Co., 3 Johns. (N. Y.) 352, 3 Am. Dec. 495.

89. See *supra*, note 65.

90. The William & Emmeline, 29 Fed. Cas. No. 17,687, Blatchf. & H. 66 (holding that the port of Charleston, S. C., is to be considered as a foreign port to New York as to the master's right to hypothecate); The Oriental, 7 Moore P. C. 398, 13 Eng. Reprint 934.

91. Grace *v.* The Mauna Loa, 76 Fed. 829; The Giulio, 27 Fed. 318; The Archer, 23 Fed. 350, 23 Blatchf. 186; The C. M. Titus, 7 Fed. 826; The Circassian, 5 Fed. Cas. No. 2,724, 3 Ben. 398; The Panama, L. R. 3 P. C. 199, 39 L. J. Adm. 37, 23 L. T. Rep. N. S. 12, 6 Moore P. C. N. S. 484, 18 Wkly. Rep. 1011, 16 Eng. Reprint 808. But see The Eureka, 8 Fed. Cas. No. 4,547, 2 Lowell 417; Glasscott *v.* Lang, 11 Jur. 642, 16 L. J. Ch. 429, 2 Phil. 310, 22 Eng. Ch. 310, 41 Eng. Reprint 962.

The rule applies to a contract for pumping out a canal-boat and repairing leaks; and the lender who could have learned on inquiry who and where the shipper or owner was, having failed to make such inquiry, is bound by the facts as they were. The C. M. Titus, 7 Fed. 826.

Communication held sufficient see The Karnak, L. R. 2 C. P. 505, 38 L. J. Adm. 57, 21 L. T. Rep. N. S. 159, 6 Moore P. C. 136, 17 Wkly. Rep. 1028, 16 Eng. Reprint 677.

The defense of failure to communicate must be specifically pleaded. *In re* Cargo *ex* The Olivier, 31 L. J. Adm. 137, 6 L. T. Rep. N. S. 259, Lush. 484.

92. See The Northern Light, 106 Fed. 748.

93. The Julia Blake, 14 Fed. Cas. No. 7,578, 16 Blatchf. 472 [*affirmed* in 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595]; The Onward, L. R. 4 A. & E. 38, 1 Aspin. 40, 42 L. J. Adm. 61, 28 L. T. Rep. N. S. 204, 21 Wkly. Rep. 601; The Lizzie, L. R. 2 A. & E. 254, 19 L. T. Rep. N. S. 71; The Hamburg, Brown & L. 253, 10 Jur. N. S. 600, 33 L. J. Adm. 116, 10 L. T. Rep. N. S. 206, 2 Moore P. C. N. S. 289, 12 Wkly. Rep. 628, 15 Eng. Reprint 911; The Nuova Loanese, 17 Jur. 263; *In re* Cargo *ex* The Olivier, 31 L. J. Adm. 137, 6 L. T. Rep. N. S. 259, Lush. 484; The Bonaparte, 8 Moore P. C. 459, 14 Eng. Reprint 175.

signee,[94] if communication be practicable,[95] within a reasonable time,[96] stating the necessity for the expenditure and for the hypothecation.[97] But where no sufficiently speedy means of communication exist between the place where the vessel is in distress and the place of residence of the owner, the master may raise money on bottomry without first notifying the owner;[98] and the possibility of communication must be construed by estimating the cost and risk incidental to delay from the attempt and the probability of failure after every exertion made.[99] It is a question which must be decided by the circumstances of each particular case.[1] The mortgagee of a ship cannot, for the purposes of such previous communication as is necessary between the party hypothecating the ship and the owner, be deemed an owner, although it may be otherwise if the mortgagee is also the ship's agent and agent for the owner.[2]

d. Interest in Vessel or Cargo. A bottomry bond, executed by the master of a ship, as master, if he is at the time owner also, will impart to the holder the same rights and privileges as if given in the character of owner;[3] and a master can, in a foreign port, hypothecate his vessel for the payment, without maritime interest, of money advanced by a stranger for necessary repairs, and to secure the payment of a bill of exchange drawn by him on the owner of the vessel for those advances, although he is himself owner of cargo more than sufficient to pay

The rule applies to the master of a chartered government transport, and he has no right to hypothecate the cargo without first communicating with the proper officers of the government. Goodwin *v.* The United States, 6 Ct. Cl. 146 [*affirmed* in 17 Wall. 515, 21 L. ed. 669].

94. *In re* Cargo *ex* The Olivier, 31 L. J. Adm. 137, 6 L. T. Rep. N. S. 259, Lush. 484.

95. The Julia Blake, 14 Fed. Cas. No. 7,578, 16 Blatchf. 472 [*affirmed* in 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595]; The Panama, L. R. 3 P. C. 199, 39 L. J. Adm. 37, 23 L. T. Rep. N. S. 12, 6 Moore P. C. N. S. 484, 18 Wkly. Rep. 1011, 16 Eng. Reprint 808.

An allegation that the owner was insolvent is no excuse for not communicating unless he has been judicially declared insolvent and the ownership of the vessel vested in his assignees to whom such notice must be given. The Panama, L. R. 3 P. C. 199, 39 L. J. Adm. 37, 23 L. T. Rep. N. S. 12, 6 Moore P. C. N. S. 484, 18 Wkly. Rep. 1011, 16 Eng. Reprint 808.

96. The Northern Light, 106 Fed. 748.

97. The Julia Blake, 14 Fed. Cas. No. 7,578, 16 Blatchf. 472 [*affirmed* in 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595]; Kleinwort *v.* The Cassa Marittima, 2 App. Cas. 156, 3 Aspin. 358, 36 L. T. Rep. N. S. 118, 25 Wkly. Rep. 608.

A mere statement of injuries sustained by the ship and of the consequent necessity for repairs entailing considerable expense without stating that a bottomry bond is proposed is not sufficient communication. Kleinwort *v.* The Cassa Marittima, 2 App. Cas. 156, 3 Aspin. 358, 36 L. T. Rep. N. S. 118, 25 Wkly. Rep. 608; The Onward, L. R. 4 A. & E. 38, 1 Aspin. 40, 42 L. J. Adm. 61, 28 L. T. Rep. N. S. 204, 21 Wkly. Rep. 601.

Notice held sufficient see The Bonaparte, 8 Moore P. C. 459, 14 Eng. Reprint 175.

98. Elwell *v.* The Georgia, 32 Fed. 843 (where a sum of money was paid to a bottomry lender, who was master of another vessel, for allowing his mate to take charge of the vessel borrowing and on suit brought on the bond, it was held, while allowing the bond, that it should be reduced by the amount so paid); The Staffordshire, L. R. 4 P. C. 194, 1 Aspin. 365, 41 L. J. Adm. 49, 27 L. T. Rep. N. S. 46, 8 Moore P. C. N. S. 443, 20 Wkly. Rep. 557, 17 Eng. Reprint 378.

99. The Karnak, L. R. 2 P. C. 505, 38 L. J. Adm. 57, 21 L. T. Rep. N. S. 159, 6 Moore P. C. N. S. 136, 17 Wkly. Rep. 1028, 16 Eng. Reprint 677.

1. The Hamburg, Brown & L 253, 10 Jur. N. S. 600, 33 L. J. Adm. 116, 10 L. T. Rep. N. S. 206, 2 Moore P. C. N. S. 289, 12 Wkly. Rep. 628, 15 Eng. Reprint 911.

2. The Staffordshire, L. R. 4 P. C. 194, 1 Aspin. 365, 41 L. J. Adm. 49, 27 L. T. Rep. N. S. 46, 8 Moore P. C. N. S. 443, 20 Wkly. Rep. 557, 17 Eng. Reprint 378.

3. Hurry *v.* The John & Alice, 12 Fed. Cas. No. 6,923, 1 Wash. 293 (holding, however, that if this is not given by virtue of his authority as master, it will not be a maritime hypothecation); The Panama, 18 Fed. Cas. No. 10,703, Olcott 343. But see The Archer, 23 Fed. 350, 23 Blatchf. 186 [*reversing* 15 Fed. 276], holding that where the master of a vessel was also the registered owner, but another was the equitable owner, and, the vessel having met with disaster, the master executed a bottomry bond to secure advances for repairs and supplies, and he was in communication by mail and telegraph with the equitable owner, and the latter was ready to provide funds, the holder of the bottomry bond, with knowledge of all the facts at the time he took it, could not recover; that the equitable owner should be regarded as the legal owner of the vessel; and that the master had no authority to execute the bond; but that, to the extent the bond represented supplies and repairs which the master could properly order, the holder should be subrogated to the liens therefor.

for the repairs, and is solely concerned in interest in the voyage;[4] and the master who is also part-owner may create a bottomry on his own interest without the existence of any necessity for a bottomry.[5]

E. Purpose For Which Bond May Be Given — 1. Rule Stated. In general the purpose for which the bond may be given by the master is to effectuate the objects of the voyage or the safety of the ship;[6] but with this limitation all expenses incurred in the port where the bond is given relating to the ship or crew being expenses for which the master or owner of the ship is liable and necessary to enable the ship to proceed on her voyage may be allowed.[7] They may be for repairs;[8] supplies;[9] to enable her to leave a port where she is detained;[10] to free the ship from arrest;[11] to enable the voyage to be prosecuted;[12] for pumping out the

4. The William & Emmeline, 29 Fed. Cas. No. 17,687, Blatchf. & H. 66.

5. The Kathleen, 14 Fed. Cas. No. 7,624, 2 Ben. 458.

6. Harned *v.* Churchman, 4 La. Ann. 310, 50 Am. Dec. 573; The Aurora, 1 Wheat. (U. S.) 96, 4 L. ed. 45 (holding that a *bona fide* creditor, who advances money to relieve a ship from actual arrest on account of debts that are a lien on her, may stipulate for maritime interest, and the necessity will justify the master in giving it; *aliter* in case of a mere threat to arrest a ship for a preëxisting debt); Rucher *v.* Conyngham, 20 Fed. Cas. No. 12,106, 2 Pet. Adm. 295; Selden *v.* Hendrickson, 21 Fed. Cas. No. 12,639, 1 Brock. 396; Cal. Civ. Code (1906), § 3020; N. D. Rev. Codes (1899), § 4772; S. D. Rev. Codes (1903), § 2132.

A bill for the services of a stevedore in a port of distress, in the necessary unloading of a vessel to ascertain the extent of the damages, may be included in the amount of the bottomry bond (The Yuba, 30 Fed. Cas. No. 18,193, 4 Blatchf. 352); also a stevedore's bill for taking cargo on board (The Edward Albro, 8 Fed. Cas. No. 4,290, 10 Ben. 668).

Propriety of particular items in a bottomry bond.— The following items are properly included in a bottomry bond: Commissions for procuring freight; stevedore's bill for taking cargo on board; funeral expenses of former master who died while the ship was in port; advertising for a master, for bottomry and for bills against the ship; for drawing the bottomry bond and stamps on it; for a butcher's bill, the items of which were not given, but which were shown to be correct; and expenses of survey and cost of repairs. The following items are improperly included in a bottomry bond: The amount paid for old iron to be taken as freight; and the cost of a suit against the master of the vessel to recover the price of the old iron; money furnished to the master, but not proved to have been used for the ship, or loaned for the ship's use; items for personal expenses of the master for cab hire and liquors; commissions on the obligee's own bill for supplies; cash for a set of scales, weights, and measures, not shown to be necessary for the ship; and items of luxuries in the bill for supplies furnished by the obligee. The Edward Albro, 8 Fed. Cas. No. 4,290, 10 Ben. 668.

"Necessaries" includes whatever is fit and proper for the service on which the vessel is engaged, or whatever would have been ordered by a prudent owner if present (The Riga, L. R. 3 A. & E. 516, 1 Aspin. 246, 41 L. J. Adm. 39, 26 L. T. Rep. N. S. 202, 20 Wkly. Rep. 927; Webster *v.* Seekamp, 4 B. & Ald. 352, 23 Rev. Rep. 307, 6 E. C. L. 515), the term as relating to hypothecation by the master being analogous to its meaning in other parts of the law (The Karnak, L. R. 2 P. C. 505, 38 L. J. Adm. 57, 21 L. T. Rep. N. S. 159, 6 Moore P. C. N. S. 136, 17 Wkly. Rep. 1028, 16 Eng. Reprint 677).

7. The Edmond, 30 L. J. Adm. 128, 2 L. T. Rep. N. S. 394, Lush. 211, holding that where the agent of the ship abroad applied a balance of freight in discharge of law expenses relating to the ship's business and took a bottomry bond for other payment for which there was a lien on the ship, the law expenses could not be deducted from the bond.

8. Harned *v.* Churchman, 4 La. Ann. 310, 50 Am. Dec. 573; Fontaine *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 29; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; Gibbs *v.* The Texas, 10 Fed. Cas. No. 5,385, Crabbe 236; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; Patton *v.* The Randolph, 18 Fed. Cas. No. 10,837, Gilp. 457; Schmidt *v.* The George Nicholaus, 21 Fed. Cas. No. 12,463; Selden *v.* Hendrickson, 21 Fed. Cas. No. 12,639, 1 Brock. 396; The William & Emmeline, 29 Fed. Cas. No. 17,687, Blatchf. & H. 66.

9. Harned *v.* Churchman, 4 La. Ann. 310, 50 Am. Dec. 573; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; Gibbs *v.* The Texas, 10 Fed. Cas. No. 5,385, Crabbe 236.

10. Gibbs *v.* The Texas, 10 Fed. Cas. No. 5,385, Crabbe 236.

11. The Hersey, 3 Hagg. Adm. 404; *In re* Cargo *ex* The Sultan, 5 Jur. N. S. 1060, Swab. 504 (vessel arrested for salvage); The Osmanli, 7 Notes of Cas. 322, 3 W. Rob. 198. But see The Augusta, 1 Dods. 283, holding that the mere fact that by the law of the port in which the bond is given the ship may be detained does not validate a bond otherwise invalid.

12. Marziou *v.* Pioche, 8 Cal. 522; Davies *v.* Soelberg, 24 Wash. 308, 64 Pac. 540; The C. M. Titus, 7 Fed. 826; Hurry *v.* The John & Alice, 12 Fed. Cas. No. 6,923, 1 Wash. 293; Knight *v.* The Attila, 14 Fed. Cas. No. 7,881,

boat and repairing leaks;[13] unloading of the outward cargo;[14] to meet consul's charges;[15] or to relieve the vessel and cargo from the liens of salvors and prevent delay and expense in their enforcement;[16] and on the necessary abandonment of the voyage in a foreign port after repairs made, the master may hypothecate the vessel for the purpose of getting her back to the owners, or for a voyage to a place where she can be sold without sacrifice.[17] A charge for commissions in procuring a loan on bottomry is incidental to the loan itself, and a proper charge as incidental to the repairs;[18] and a bottomry bond is not vitiated by the stipulation that the cost of insurance shall be included in the sum to be paid by the ship in case of her safe arrival;[19] but commissions paid the master by the bondholder are not to be included in a bottomry bond, although if the master has paid them to the owner, he is to repay them without interest.[20] Items for wages of the master and expenses of board while in a port of distress, and advances to meet the liabilities or necessities it was anticipated the vessel might be under in her after employment, are not particulars for which the vessel can be subjected by the master by a bottomry bond,[21] and a master cannot mortgage or hypothecate the ship for the benefit of the cargo,[22] or for a debt of his own,[23] although its non-payment might prevent his returning with the ship.[24] Disbursements must be for charges for which the owner or master of the ship is liable; those for which the consignee of the cargo is liable are not the subject of bottomry.[25]

2. Security For Preëxisting Debt. While the general rule is that the master of a vessel cannot hypothecate for a preëxisting debt, but only for advances made at the time the necessity existed,[26] it is no objection that the advances were made from time to time before it was executed, if the original understanding was that

Crabbe 326; Walden *v.* Chamberlain, 28 Fed. Cas. No. 17,055, 3 Wash. 290 [*affirmed* in 1 Wheat. 96, 4 L. ed. 45]; The Edmond, 30 L. J. Adm. 128, 2 L. T. Rep. N. S. 394, Lush. 211.

13. The C. M. Titus, 7 Fed. 826.

14. The Edmond, 30 L. J. Adm. 128, 2 L. T. Rep. N. S. 394, Lush. 211.

15. The Zodiac, 1 Hagg. Adm. 320; The Gauntlet, 6 Notes of Cas. 370, 3 W. Rob. 82, for suppressing mutiny.

16. The Clotilda, 5 Fed. Cas. No. 2,903, 1 Hask. 412.

17. The Robert L. Lane, 20 Fed. Cas. No. 11,892, 1 Lowell 388.

Where a voyage is broken up by a capture and compulsory sale of the cargo, the master may hypothecate the ship for money advanced to enable him to return home with her. Crawford *v.* The William Penn, 6 Fed. Cas. No. 3,373, 3 Wash. 484.

18. The Yuba, 30 Fed. Cas. No. 18,193, 4 Blatchf. 352. But see The Roderick Dhu, Swab. 177, 5 Wkly. Rep. 168, holding that where on taking the accounts in a bottomry suit it was found that, after reducing the commission charged by the ship's agent, which was excessive, nothing was due upon the bond, the bond was invalid.

19. The Robert L. Lane, 20 Fed. Cas. No. 11,892, 1 Lowell 388. But see The Serafina, Brown & L. 277.

But a charge for insuring part of the money lent on bottomry at a bottomry premium will be disallowed. The lender must insure by a separate contract on his own account. The Boddington, 2 Hagg. Adm. 422.

20. The Eureka, 8 Fed. Cas. No. 4,547, 2 Lowell 417.

21. The Edward Albro, 8 Fed. Cas. No. 4,290, 10 Ben. 668; Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

22. Fontaine *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 29.

23. King *v.* Perry, 3 Salk. 23, 91 Eng. Reprint 669. But see The Karnak, L. R. 2 P. C. 505, 38 L. J. Adm. 57, 21 L. T. Rep. N. S. 159, 6 Moore P. C. N. S. 136, 17 Wkly. Rep. 1028, 16 Eng. Reprint 677.

Advance of money to the master for alleged services in taking care of the cargo and for personal expenses is not allowed as charges on cargo. The Glenmanna, Lush. 115.

24. Dobson *v.* Lyall, 8 Jur. 969, 11 Jur. 179 note, 6 L. J. Ch. 115, 3 Myl. & C. 453 note, 14 Eng. Ch. 453 note, 40 Eng. Reprint 1003 note, 2 Phil. 323 note, 22 Eng. Ch. 323 note, 41 Eng. Reprint 967 note.

25. The Edmond, 30 L. J. Adm. 128, 2 L. T. Rep. N. S. 394, Lush. 211.

26. Greely *v.* Smith, 10 Fed. Cas. No. 5,750, 3 Woodb. & M. 236 (holding that a bottomry bond is not valid for a preëxisting debt, but only for advances to aid in repairs or outfits and cargo for the voyage); Hurry *v.* The John & Alice, 12 Fed. Cas. No. 6,923, 1 Wash. 293; The Heisey, 3 Moore P. C. 79, 13 Eng. Reprint 37 (holding that a bottomry bond given by a master upon a threat of arrest for supplies previously furnished on his personal credit is void); The Lochiel, 2 W. Rob. 34. But see Atlantic Ins. Co. *v.* Conard, 2 Fed. Cas. No. 627, 4 Wash. 662 [*affirmed* in 1 Pet. 386, 7 L. ed. 189]; The Vibilia, 1 W. Rob. 1, holding that small ad-

the whole sum should be ultimately thus secured;[27] and it has been held that it matters not at what time the loan is made if the risk of the voyage be subsequently taken and if the transaction be not a cloak to cover usury, gaming, or fraud, and if the advance be in good faith for a maritime premium;[28] and bottomry bonds given by successive masters for repairs done by order of their predecessors who had died are valid;[29] but a bottomry bond executed by the master is invalid as to items for advances made without an agreement or reasonable expectation that they were to be secured by bottomry;[30] and where moneys for necessary repairs have been advanced on the credit of the vessel owners, a bottomry bond subsequently given therefor by the master is void;[31] and the same rule applies where the advances were on the credit of the consignees;[32] and generally goods supplied in the first instance on personal security alone cannot afterward be made the subject of bottomry;[33] but the fact that the moneys loaned on a bottomry bond were on the personal credit of the master has been held to make no difference if the advance was made on a contract for a bottomry bond.[34] A bottomry bond given to pay a former one must stand or fall with the first hypothecation, and the subsequent lender can claim only on the same ground with the former,[35] and thus the payment of a hypothecation is not a valid consideration for a new hypothecation, unless it appears that the former one was valid.[36]

F. Capacity or Authority to Take Bond — 1. General Rules. Where a consignee is bound to advance freight due on the cargo, he cannot, before payment

vances made without express reference to bottomry may be included in a subsequent bond.

The master, who is also a part-owner, has no power to hypothecate the vessel after she has arrived in her home port, for advances made abroad for necessary repairs for which a draft was made on some of the owners, where the same was subsequently protested. Sloan *v.* The A. E. I., 22 Fed. Cas. No. 12,946, Bee 250.

Debts incurred on previous voyage.— Money lent for the payment of debts incurred in a previous voyage is not a matter for bottomry (The Lochiel, 2 W. Rob. 34); but the amount of a previous bond given in the same voyage having been paid off may be included in a new bond given on the same but not on a subsequent voyage (The Toivo, 1 Spinks 185), and payment of one bottomry bond is a good consideration for a new bottomry bond (Dobson *v.* Lyall, 8 Jur. 969, 11 Jur. 179 note, 6 L. J. Ch. 115, 3 Myl. & C. 453 note, 14 Eng. Ch. 453 note, 40 Eng. Reprint 1003 note, 2 Phil. 323 note, 22 Eng. Ch. 323 note, 41 Eng. Reprint 967 note).

27. The Virgin, 8 Pet. (U. S.) 538, 8 L. ed. 1036; The Edward Albro, 8 Fed. Cas. No. 4,290, 10 Ben. 668; Hurry *v.* The John and Alice, 12 Fed. Cas. No. 6,923, 1 Wash. 293; The Yuba, 30 Fed. Cas. No. 18,193, 4 Blatchf. 352.

Waiver of right to bond.—Where money is advanced on an agreement for a bottomry bond, and the ship is permitted to go on sea without any attempt to enforce the agreement, it is a waiver of the right, and the party cannot, on a subsequent voyage, insist on such bond for such advances. The Aurora, 1 Wheat. (U. S.) 96, 4 L. ed. 45.

28. Conrad *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189 [*affirming* 2 Fed. Cas. No. 627, 4 Wash. 662], holding that it is no objection that a respondentia bond was made after the voyage was commenced.

29. The Wakefield [*cited* in The Kennersley Castle, 3 Hagg. Adm. 1, 8].

30. The Circassian, 5 Fed. Cas. No. 2,724, 3 Ben. 398; Gardner *v.* The White Squall, 9 Fed. Cas. No. 5,239, holding that the master cannot make a loan on bottomry to pay purchasers of claims for repairs in a foreign port, contracted five months prior thereto under no expectation of bottomry security.

31. The Edward Albro, 8 Fed. Cas. No. 4,290, 10 Ben. 668; The Hunter, 12 Fed. Cas. No. 6,904, 1 Ware 251 (holding that where a merchant advances money toward repairing a vessel on the personal credit of the owner, he cannot, after it is expended, demand the security of a bottomry bond with maritime interest); Pickersgill *v.* Williams, 19 Fed. Cas. No. 11,123; Rucker *v.* Conyngham, 20 Fed. Cas. No. 12,106, 2 Pet. Adm. 295. And see *supra*, VI, C, 2.

32. Liebart *v.* The Emperor, 15 Fed. Cas. No. 8,340, Bee 339, holding that where a ship was forced into an intermediate port by sea damage, and was there repaired on credit furnished by her consignees at the port of destination, where she afterward arrived, a bottomry bond executed by the master to third persons to enable him to repay the consignees was not valid.

33. The Augusta, 1 Dods. 283.

Debts owing upon personal credit bought up from ship's creditors by the lender cannot be the subject of bottomry. The Ocean, 2 W. Rob. 429.

34. The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

35. The Aurora, 1 Wheat. (U. S.) 96, 4 L. ed. 45.

36. Walden *v.* Chamberlain, 28 Fed. Cas.

thereof, advance money to the owner on maritime interest;[37] nor can a consignee who has funds in his hand to secure advances made by him for the vessel;[38] and generally, if a consignee or agent has funds in his hands, or if the money can be raised in any other way, he cannot, by a bottomry bond, burden his principal with marine interest,[39] and although there may be a state of facts under which consignees may advance on bottomry;[40] and the consignee of a vessel may apply the proceeds of a cargo and the freight to pay sums due on account of its purchase, without affecting his right to take a bottomry bond from the master for supplies subsequently furnished,[41] such loans are not regarded favorably by the courts.[42] But the objection to a bottomry bond that the holders were consignees of the ship is obviated by proof that they were not so by the appointment of the owner; that the owner and consignees did not know each other, and had no commercial relations; and that the owner had no funds in their hands.[43] If the owner of the cargo is on board of a vessel at the time of a disaster requiring that money shall be obtained by the master to enable the vessel to prosecute the voyage, he is not bound to advance funds; and if he does so, he is entitled to satisfactory security, and an extra and adequate compensation for the advance;[44] but one part-owner cannot take from the master a bottomry bond, on the share of another part-owner, for repairs done to the vessel.[45] A bottomry bond taken in a foreign country, by an agent of the charterers of the ship, in the name of the charterers, is good,[46] and the agent of the owner may take a bond,[47] but not without inquiry as to the necessity or application.[48] A debtor to the ship cannot lend to the ship on bottomry,[49] but the bond is bad *pro tanto* only.[50] Money may be borrowed by one on board ship at sea from another on board the same ship for the necessary use of the ship.[51]

No. 17,055, 3 Wash. 290 [*affirmed* in 1 Wheat. 96, 4 L. ed. 45].

37. The Lavinia *v.* Barclay, 15 Fed. Cas. No. 8,125, 1 Wash. 49, holding that if a consignee is directed by the owner of ship and cargo to apply the whole proceeds of the cargo to discharge engagements made on the owner's account, he is not bound to apply those proceeds to discharge expenses of the ship, and may lend his own money to the owner on marine interest.

38. Hurry *v.* The John & Alice, 12 Fed. Cas. No. 6,923, 1 Wash. 293.

39. Descadillas *v.* Harris, 8 Me. 298.

40. See Clark *v.* The Leopard, 5 Fed. Cas. No. 2,828; The Lavinia *v.* Barclay, 15 Fed. Cas. No. 8,125, 1 Wash. 49; The St. Catherine, 3 Hagg. Adm. 250; The Nelson, 1 Hagg. Adm. 169, upholding a bond given to a consignee of cargo, there being a consignee of ship in the place, it not being shown that the lender was aware that bottomry was not necessary.

41. Thomas *v.* Gittings, 23 Fed. Cas. No. 13,897, Taney 472.

42. Rucher *v.* Conyngham, 20 Fed. Cas. No. 12,106.

Where the consignee of a vessel employs her as he sees fit, without accounting for her earnings, he cannot enforce bonds on the vessel taken by him for wages, port charges, insurance, and the like. Clark *v.* The Leopard, 5 Fed. Cas. No. 2,828.

43. Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

44. Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226, holding, however, that the transaction will be closely scanned to preclude the possibility of fraud.

45. Patton *v.* The Randolph, 18 Fed. Cas. No. 10,837, Gilp. 457.

Agreement that third party should pay the loan.—A bottomry bond may be valid notwithstanding an alleged agreement with the owner that the charterer, a partner of the bondholder, should pay the bond. The Huntcliff, 2 Hagg. Adm. 281.

46. Breed *v.* The Venus, 4 Fed. Cas. No. 1,827.

47. The Staffordshire, L. R. 4 P. C. 194, 1 Aspin. 365, 41 L. J. Adm. 49, 27 L. T. Rep. N. S. 46, 8 Moore P. C. N. S. 443, 20 Wkly. Rep. 557, 17 Eng. Reprint 378 (holding that the bond is not invalid under these circumstances, provided the agents could not be expected to advance on the personal credit of the owners and give the master an opportunity of obtaining an advance elsewhere by refusing such an advance); The Hersey, 3 Hagg. Adm. 404; The Tartar, 1 Hagg. Adm. 1; The Lord Cochrane, 3 Notes of Cas. 172, 2 W. Rob. 320; The Vibilia, 1 W. Rob. 1. But see The Wave, 15 Jur. 518; The Empire of Peace, 39 L. J. Adm. 12, 21 L. T. Rep. N. S. 763.

48. The Royal Stuart, 2 Spinks 258.

The agent must see to the application of the money. The Roderick Dhu, Swab. 177, 5 Wkly. Rep. 168.

49. The Hebe, 7 Jur. 564, 4 Notes of Cas. 361, 2 W. Rob. 146.

50. The Hebe, 10 Jur. 227, 2 W. Rob. 412

51. Scarreborrow *v.* Lyrius, Noy. 95, 74 Eng. Reprint 1061.

2. Duty of Lender to Ascertain and Show Authority. The lender on bottomry must inform himself whether the alleged necessity exists;[52] and he is bound to ascertain that the money is necessary for the particular voyage as well as that the master has no other resources on hand;[53] and if the fact of such necessity be left unproved, evidence is necessary to show due inquiry and reasonable grounds of belief that the necessity was real,[54] and the necessity of raising the funds advanced upon it by such means,[55] the lender being chargeable with notice of the necessities which develop and limit the master's power to act;[56] and he must judge for himself whether if the owner were present he would do what the master is undertaking to do for him.[57] But while the lender is bound to exercise reasonable diligence in order to ascertain whether the supplies and alleged necessaries for which he has advanced money are necessary and proper, he is not bound to show that there was a positive necessity, it being sufficient if there is an apparent necessity, so far as the lender is able, upon due inquiry and due diligence, to ascertain the facts;[58] and when there is an apparent necessity for repairs the lender on bottomry is under no obligation to inquire as to the best mode of making repairs, or whether they are made in the most judicious manner,[59] and the lender upon bottomry in good faith, and under circumstances which justified the loan, cannot be held

52. Merwin *v.* Shailer, 16 Conn. 489; The Grapeshot, 9 Wall. (U. S.) 129, 19 L. ed. 651; Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55; Putnam *v.* The Polly, 20 Fed. Cas. No. 11,482, Bee 157; Walden *v.* Chamberlain, 28 Fed. Cas. No. 17,055, 3 Wash. 290 [*affirmed* in 1 Wheat. 96, 4 L. ed. 45]; The William & Emmeline, 29 Fed. Cas. No. 17,687, Blatchf. & H. 66; The Orelia, 3 Hagg. Adm. 75.

The burden of proof is on the lender to show that the necessity for the repairs or supplies existed (Merwin *v.* Shailer, 16 Conn. 489; The Bridgewater, 4 Fed. Cas. No. 1,865, Olcott 35; Crawford *v.* The William Penn, 6 Fed. Cas. No. 3,373, 3 Wash. 484; Walden *v.* Chamberlain, 28 Fed. Cas. No. 17,055, 3 Wash. 290 [*affirmed* in 1 Wheat. 96, 4 L. ed. 45); but where the necessity for the repairs is shown, claimant has the burden of showing that the money could have been obtained otherwise than by bottomry (The Wyandotte, 145 Fed. 321, 75 C. C. A. 117 [*affirming* 136 Fed. 470]; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; The Kathleen, 14 Fed. Cas. No. 7,624, 2 Ben. 458); and where, a bottomry bond having been given to a party in consideration of his assuming the debts due by a vessel, she left the port without opposition, and payment of the bond was afterward contested on the ground of the debts not being satisfied, this defense was required to be clearly made out, in order to contradict the *prima facie* proof afforded by the bond; the mere presentation of the bills without receipts was held not sufficient. Cohen *v.* The Amanda Frances Myrick, 6 Fed. Cas. No. 2,962, Crabbe 277. A regular survey by competent and skilful persons, and repairs made pursuant to their recommendations, is *prima facie* evidence of the propriety of making the repairs, to justify the master and lender on bottomry. The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228.

Such facts are never presumed. Walden *v.* Chamberlain, 28 Fed. Cas. No. 17,055, 3 Wash. 290 [*affirmed* in 1 Wheat. 96, 4 L. ed. 45]. But see The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228, holding that the lender is *prima facie* presumed to have made inquiries as to the apparent necessity of repairs, and to have acted upon the facts and circumstances as made known by the survey to the master.

Libellant must exhibit an account of particulars. The William & Emmeline, 29 Fed. Cas. No. 17,687, Blatchf. & H. 66.

53. The Boston, 3 Fed. Cas. No. 1,669, Blatchf. & H. 309.

But transactions between the owner and mortgagee of the vessel which might render the voyage illegal cannot invalidate a bottomry bond given by the master to a *bona fide* lender, who has only to look to the facts, that is, distress, absence of credit, and necessity. The Mary Ann, L. R. 1 A. & E. 13.

54. St. Thomas Bank *v.* The Julia Blake, 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595 (holding that having made no inquiries of the shipper through a period of two months, pending the repairs, during which time the shipper was in reach by mail and telegraph, the lender was not entitled to recover); The Grapeshot *v.* Wallerstein, 9 Wall. (U. S.) 129, 19 L. ed. 651 (holding, however, that the ordering of supplies and repairs by the master on the credit of the ship is sufficient proof of necessity to support an implied hypothecation in favor of the materialman, as showing that in lending the money he acts in good faith).

55. The Lavinia *v.* Barclay, 15 Fed. Cas. No. 8,125, 1 Wash. 49. See Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55.

56. St. Thomas Bank *v.* The Julia Blake, 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595.

57. St. Thomas Bank *v.* The Julia Blake, 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595.

58. The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228.

59. The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; The Vibilia, 1 W. Rob. 1. See The Orelia, 3 Hagg. Adm. 75.

responsible for the reasonableness of the charges in the repair of the vessel;[60] and where the necessities of the vessel for want of repairs and supplies, and the fact that the master had no means of his own and had in vain resorted to others for raising money were facts of notoriety, a person was justified in loaning money to the master on a bottomry bond without requiring positive proof that the necessity was absolute, and remediless but by a bottomry bond.[61] The lenders of money on a bottomry bond are presumed to have acted in good faith,[62] and are not in the absence of proof to be charged with knowledge that the master had disregarded instructions from the owners;[63] and the validity of a hypothecation is not affected by the master's previous or subsequent irregular conduct toward his owner, if the lender be not privy thereto.[64]

G. Duration and Termination. A bottomry bond may be upon time as well as upon a specific voyage;[65] and a bond which hypothecates the vessel for a particular voyage, and a specific period beyond its termination, is good as a bottomry bond, the money loaned having been put at risk under the contract;[66] and the bond may be valid whatever the number of voyages the adventure includes, provided such voyages are intended or consented to by the owner.[67] If, after the risk on a bottomry bond has commenced, a sale or transfer of the vessel takes place,[68] or the voyage is in any manner broken up by the borrower,[69] or by the negligence and omission of the master,[70] the maritime risk terminates as in the case of a policy of insurance and the bond becomes immediately payable; and the fact that the obligee of a bottomry bond had attached the ship on another debt of the obligor before the expiration of the term for which the bond was to run, whereby the obligor was prevented from employing her, did not excuse him from performing the condition of the bond, since it was his own fault that the other debt was not paid.[71]

H. Payment and Satisfaction. The obligee in a bottomry bond, who is also the ship's agent, has a right to use money received for freight after the date of the bond in payment of wages and other expenses incident to a projected voyage, and to meet other debts contracted for by him for the benefit of the

60. The Archer, 15 Fed. 276 (holding that the bills for repairs having been paid by the lenders in bottomry in good faith, upon the master's certificate, it was too late to consider whether the prices charged were excessive); The Yuba, 30 Fed. Cas. No. 18,193, 4 Blatchf. 352.

61. Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

62. The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

63. Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55, holding that, although the master of a vessel had deviated from instructions, if there was no connivance on the part of one loaning money on a bottomry bond, he will not be affected by the fact.

64. The Virgin *v.* Vyfhius, 8 Pet. (U. S.) 538, 8 L. ed. 1036; Canizares *v.* The Santissima Trinidad, 5 Fed. Cas. No. 2,383, Bee 353.

65. Thorndike *v.* Stone, 11 Pick. (Mass.) 183; Cole *v.* White, 26 Wend. (N. Y.) 511; The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157.

66. Eneas *v.* The Charlotte Minerva, 8 Fed. Cas. No. 4,483.

67. The Mary Ann, 10 Jur. 253, holding a bond given in payment of repairs rendered necessary by an accident which occurred before the commencement of the voyage and dated after the termination of the voyage valid.

68. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157.

But an agreement by the bondholder for the purchase of the ship does not affect a bottomry bond originally valid. The Helgoland, 5 Jur. N. S. 1179, Swab. 491.

69. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465.

The bond is payable where the ship is lost through deviation. Anonymous, 2 Ch. Cas. 130, 22 Eng. Reprint 880; Williams *v.* Steadman, Holt K. B. 126, 90 Eng. Reprint 968, Skin. 345, 90 Eng. Reprint 153; Western *v.* Wildy, Skin. 152, 90 Eng. Reprint 71.

The borrowers' fault must be pleaded. Boddington *v.* Wootton, 2 Keb. 768, 84 Eng. Reprint 486.

Abandonment of voyage.—A bond becomes payable upon the abandonment of the voyage agreed upon in the bond. The Helgoland, 5 Jur. N. S. 1179, Swab. 491.

70. Force *v.* The Pride of the Ocean, 3 Fed. 162; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465; The Dante, 4 Notes of Cas. 408, 2 W. Rob. 427.

71. Thorndike *v.* Stone, 11 Pick. (Mass.) 183.

vessel, and not secured by the bond;[72] and where the agents of ship-owners pay a bottomry bond with their own money, and the bond is a valid lien in their hands, freight moneys may be applied first to the payment of unsecured disbursements of such agents, leaving the surplus only to be credited on the bond.[73] A ship-owner who recovers damages for the tortious destruction of his vessel is liable to the cargo owner for his *pro rata* share of the amount of a bottomry bond covering both vessel and cargo, which the cargo owner has paid in full, in order to recover possession of part of the cargo, which was saved;[74] but where the loss of vessel and cargo is total, and both belong to the same owner, the doctrine of contribution in payment of the bottomry bond does not apply, as in case of separate owners;[75] and where the bond is upon the ship and cargo only, the freight must be applied in discharge of the bond before the cargo is resorted to.[76] Where according to the form of bond used, payment of the debt and marine interest depends on the safe return of the goods, and not on that of the ship, the borrower is obliged to pay, if he receives his goods safely, although by another ship;[77] and a loss not strictly total cannot be turned into a technical total loss by abandonment, so as to excuse the borrower from payment, even though the expense of repairing the ship exceeds her value;[78] and a bond conditioned to be void in case of "utter loss" of the vessel during a certain voyage is not discharged by the stranding of the vessel during the voyage, and abandonment to insurers as a total loss, and sale by them at the place of stranding, as not worth repairing, if the vessel exists in specie at the time of the sale,[79] for the words "an utter loss of the ship" in a bottomry bond means an actual total loss, and not a constructive one.[80] A bottomry bond will be void, if the voyage on which payment depends be lost in consequence of any of the accidents within the condition, although the borrower eventually lose nothing.[81] Suit against one who has fraudulently substituted himself as borrower on a bottomry bond is not an acquittance of the bond as against the real debtor.[82]

I. Lien — 1. Existence and Extent; Lien on Proceeds. A hypothecation of a vessel, on maritime risks, draws after it a maritime lien;[83] and where a bond is

72. Oliver *v.* The Sirius, 54 Fed. 188, 4 C. C. A. 273.

73. Johnson *v.* The Belle. of the Sea, 13 Fed. Cas. No. 7,372 [*affirmed* in 20 Wall. 421, 22 L. ed. 362].

74. Miller *v.* O'Brien, 59 Fed. 621 [*reversed* in 67 Fed. 605, 14 C. C. A. 566 (*reversed* in 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469)].

75. Delaware Ins. Co. *v.* Winter, 38 Pa. St. 176.

76. The Dowthorpe, 2 Notes of Cas. 264, 2 W. Rob. 73.

77. Commonwealth Ins. Co. *v.* Duval, 8 Serg. & R. (Pa.) 138.

78. Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465; The Great Pacific, L. R. 2 P. C. 516, 38 L. J. Adm. 45, 21 L. T. Rep. N. S. 38, 6 Moore P. C. N. S. 151, 17 Wkly. Rep. 933, 16 Eng. Reprint 683. See Delaware Mut. Safety Ins. Co. *v.* Gossler, 96 U. S. 645, 24 L. ed. 863; Morrison *v.* The Unicorn, 17 Fed. Cas. No. 9,849, 5 Hughes 79.

Ship arriving, but of no value.—Where a bottomried ship was captured, recaptured, repaired, salved, and then arrived at her destination, but was not worth the amount of the bond, repairs, and salvage, the holder could recover upon the bond. Joyce *v.* Williamson, 3 Dougl. 164, 26 E. C. L. 116, 99 Eng. Reprint 593.

79. Delaware Mut. Safety Ins. Co. *v.* Gossler, 7 Fed. Cas. No. 3,766, Holmes 475 [*affirmed* in 96 U. S. 645, 24 L. ed. 863], holding also that the holder of such a bond, in case of shipwreck of the vessel not amounting to an utter loss within the meaning of the bond, is entitled to the proceeds of the cargo saved, as against insurers of the cargo, who have accepted abandonment, and paid the owners as for a total loss.

80. Commonwealth Ins. Co. *v.* Duval, 8 Serg. & R. (Pa.) 138; The Great Pacific, L. R. 2 P. C. 516, 38 L. J. Adm. 45, 21 L. T. Rep. N. S. 38, 6 Moore P. C. N. S. 151, 17 Wkly. Rep. 933, 16 Eng. Reprint 683; Broomfield *v.* Southern Ins. Co., L. R. 5 Exch. 192, 39 L. J. Exch. 186, 22 L. T. Rep. N. S. 371, 18 Wkly. Rep. 810; The Armadillo, 1 Notes of Cas. 75, 1 W. Rob. 251.

81. Appleton *v.* Crowninshield, 3 Mass. 443.

82. Herwig *v.* Oakley, 12 Fed. Cas. No. 6,435, Taney 389.

83. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157. And see Bolten *v.* The James L. Pendergast, 30 Fed. 717, where this lien was held to cover expenses, the vessel being released upon agreement.

But to impound a fund in admiralty until a decision can be had upon the validity of a contested claim, the creditor must have sued out attachment or pleaded his lien to an ante-

given in the nature of a bottomry, but the circumstances under which it was executed were not such as to warrant the captain in executing a maritime hypothecation, yet the captain having had a power of attorney from the owner of the vessel to borrow money upon the vessel, such a contract, if made by the captain, may create a lien on the vessel, in a court of common law;[84] but in the absence of a stipulation to that effect in the bottomry bond no lien is created on the freight thereby.[85] A mortgage on the vessel taken solely to secure money loaned by an assignee of a bottomry bond will not affect its lien,[86] and the lien is not discharged by a payment of the debt by the agents of the ship-owners with their own money, where they take an assignment thereof.[87] It is a rule of the general maritime law that, if there be any salvage or proceeds of the effects covered by a bottomry bond, the bondholder's lien attaches thereto, although the ship be lost,[88] and the lien is held to extend to the fund recoverable for the ship's tortious destruction.[89]

2. PRIORITIES. A bottomry bond lien is inferior to a lien for seamen's wages,[90]

cedent action. The presentation of a bottomry bond and petition under it is not sufficient. French *v.* The Superb, 9 Fed. Cas. No. 5,103*a*.

Agreement held too indefinite to constitute lien.— Where a steamship company, to obtain letters of credit to disburse their ships, hypothecated all freights, and agreed to give "further security when required," the agreement for further security was too indefinite to constitute any lien on the vessels themselves or their proceeds. Brown *v.* The Allianca, 63 Fed. 726 [*affirmed* in 73 Fed. 503, 19 C. C. A. 541].

The lien of the bottomry bond attaches from date, although by default of the parties procuring the loan the ship does not perform the voyage described in the bond, but undertakes a different voyage. Wilmer *v.* The Smilax, 30 Fed. Cas. No. 17,777, 2 Pet. Adm. 295.

In Louisiana a steamboat is not an object susceptible of hypothecation. Broderick's Succession, 12 La. Ann. 521.

84. Hurry *v.* Hurry, 12 Fed. Cas. No. 6,922, 2 Wash. 145.

85. Kelly *v.* Cushing, 48 Barb. (N. Y.) 269. But see The Jacob, 4 C. Rob. 245, commented on in The Staffordshire, L. R. 4 P. C. 194, 1 Aspin. 365, 41 L. J. Adm. 49, 27 L. T. Rep. N. S. 46, 8 Moore P. C. N. S. 443, 20 Wkly. Rep. 557, 17 Eng. Reprint 378, where freight earned on a subsequent voyage was held liable to satisfy a bottomry bond given on a previous voyage.

Freight prepaid is not liable to the bottomry holder. The Eureka, 8 Fed. Cas. No. 4,547, 2 Lowell 417.

Voyage held continuous with respect to liability of freight money.—A voyage to a foreign port, there to discharge cargo; thence to another foreign port, there to take cargo; thence to a domestic port, is continuous with respect to liability of freight moneys to satisfy a bottomry bond given for repairs in the first part of the voyage. Fish *v.* The George Thomas, 9 Fed. Cas. No. 4,813*b*.

Freight unearned when the bond is payable is not bound. The Staffordshire, L. R. 4 P. C. 194, 1 Aspin. 365, 41 L. J. Adm. 49, 27 L. T. Rep. N. S. 46, 8 Moore P. C. N. S. 443, 20 Wkly. Rep. 557, 17 Eng. Reprint 378.

Liability of freight earned from subshippers.— Freight earned from subshippers of goods by permission of charterers of the whole ship is liable, as against the charterers, in payment of a bottomry bond given at the charterer's port for advances subsequent to the charter-party. The Eliza, 3 Hagg. Adm. 87.

86. Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308.

87. The Belle of the Sea *v.* Johnson, 20 Wall. (U. S.) 421, 22 L. ed. 362.

88. Miller *v.* O'Brien, 59 Fed. 621 [*affirmed* in 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469] (holding that it is virtually a part of the bond by implication and not necessary to be expressly reserved in the bond); Force *v.* Providence Washington Ins. Co., 35 Fed. 767. And see Appleton *v.* Crowninshield, 3 Mass. 443, 8 Mass. 340; Delaware Mut. Safety Ins. Co. *v.* Gossler, 96 U. S. 645, 24 L. ed. 863; The Eliza Lines, 61 Fed. 308 (holding that where, after bottomry of a ship and freight, she became derelict, and was taken by salvors into a port distant from her destination, and the cargo was unloaded and sold, by order of court, on application of its owners; and the vessel was repaired by her owners, and proceeded on another voyage, the bottomry became a lien on the net salvage of vessel and freight, but was not entitled to the benefit of the repairs). *Compare* Thorndike *v.* Stone, 11 Pick. (Mass.) 183; Giro *v.* The Alexander Wise, 10 Fed. Cas. No. 5,463 (holding that the borrower on a bottomry and respondentia bond of moneys advanced on the risk of the voyage, payable by its terms on the arrival of the vessel at her port of discharge, and conditioned to be void if the vessel is utterly lost, is discharged, and the bond rendered void, by the total loss of the vessel on her voyage, although part of her tackle and cargo is saved).

89. Miller *v.* O'Brien, 59 Fed. 621 [*affirmed* in 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469].

90. The Virgin *v.* Vyfhius, 8 Pet. (U. S.) 538, 8 L. ed. 1036; Furniss *v.* The Magoun,

for materialmen's liens, advances, or a claim for general average;[91] and for freight[92] and salvage claims;[93] and a claim for damages caused by a collision occurring during the voyage is entitled to preference over a bottomry loan made upon the same voyage, prior to the happening of such collision.[94] But a bottomry bond outranks a prior mortgage,[95] or a mortgage given during the voyage for

9 Fed. Cas. No. 5,163, Olcott 55; Pitman *v.* Hooper, 19 Fed. Cas. No. 11,185, 3 Sumn. 50; The Union, 30 L. J. Adm. 17, 3 L. T. Rep. N. S. 280, Lush. 128. But see Hanschall *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42, holding that where a draft on the owners for money advanced for wages and supplies is but an abbreviated form of bottomry, it is inferior to a subsequent bottomry given during the same voyage upon the vessel becoming disabled.

One who has paid wages at the master's request is preferred to the bond (The William F Safford, 29 L. J. Am. 109, 2 L. T. Rep. N. S. 301, Lush. 69. And see The Mary Ann, 9 Jur. 94); but a bottomry bondholder paying wages of the crew in order to save expenses of their detention by order of court is given priority in respect of such payment over all other claims (The Kammerhevie Rosenkrantz, 1 Hagg. Adm. 62. But see The Cornelia Henrietta, L. R. 1 A. & E. 51, 12 Jur. N. S. 396, 14 Wkly. Rep. 502, holding that the court will not, unless upon application being made to it, sanction the repayment of wages to bondholders out of the proceeds of the sale of the ship).

Where a ship-owner paid wages for a ship without leave of court, upon which a bottomry bond had been given, the ship-owner was not entitled to priority over the bottomry bond. The Janet Wilson, 6 Wkly. Rep. 329.

Master's wages.—The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond had been given on his ship, takes priority over the claim of a bondholder (The Hope, 1 Aspin. 563, 28 L. T. Rep. N. S. 287); but a bottomry bondholder is entitled to priority over the claim of a master for wages earned on previous voyages (The Eugenie, L. R. 4 A. & E. 123, 2 Aspin. 104, 29 L. T. Rep. N. S. 314, 21 Wkly. Rep. 957; The Hope, *supra*); and the master of a foreign ship having by the bottomry bond bound himself as well as the ship and freight cannot enforce his lien for wages as against the bondholder (The Jonathan Goodhue, Swab. 524); but the general rule that a master who has bound himself as well as ship and freight for the payment of a bottomry bond is not entitled to payment of his own claims in priority will not be acted upon where the bottomry bondholder will not be prejudiced by the master being paid before him (The Edward Oliver, L. R. 1 A. & E. 379, 36 L. J. Adm. 13, 16 L. T. Rep. N. S. 575); and so it has been held that, although the master bound himself by the bond, and was also a part-owner of the vessel, the owners of part of the cargo cannot expose his right to be paid his wages and disbursements in priority to the bondholder (The Daring, L. R. 2 A. & E. 260, 37 L. J. Adm. 29). A covenant by the master that he had authority to charge the vessel, and that the vessel and cargo, with the freight, should at all times after the voyage be liable for the payment of the amount due under the bond, does not affect his right to be paid his wages in priority to the bondholder. The Salacia, 9 Jur. N. S. 27, 32 L. J. Adm. 41, 7 L. T. Rep. N. S. 440, 11 Wkly. Rep. 189.

The viaticum of master and seamen of a foreign ship arrested in this country by bottomry bondholder is paid before the bond. The Constancia, 15 Wkly. Rep. 183.

91. See MARITIME LIENS, 26 Cyc. 807.

Advances under charter-party.—A bottomry bond cannot affect a previous contract in a charter-party so as to take precedence of money advances made subsequently to the bond under the authority of the charter-party. The Salacia, 32 L. J. Adm. 43, 8 L. T. Rep. N. S. 91, Lush. 578; The Standard, 6 Weekly. Rep. 222.

A person who has advanced money for dock dues stands in the same position as the dock company, and his claim ranks with pilotage and towage and has priority over a bottomry bond of previous date. The St. Lawrence, 5 P. D. 250, 49 L. J. Adm. 82.

92. *In re* Cargo *ex* Galam, Brown & L. 167, 10 Jur. N. S. 477, 33 L. J. Adm. 97, 9 L. T. Rep. N. S. 550, 2 Moore P. C. N. S. 216, 3 New Rep. 254, 12 Wkly. Rep. 495, 15 Eng. Reprint 883.

93. The Launberga, 154 Fed. 959; Giro *v.* The Alexander Wise, 10 Fed. Cas. No. 5,463.

94. Force *v.* The Pride of the Ocean, 3 Fed. 162.

95. Bolton *v.* The James L. Pendergast, 30 Fed. 717; The Mary, 16 Fed. Cas. No. 9,187, 1 Paine 671 (holding that where the owner of a vessel gave a bill of sale of her in the nature of a mortgage, but was suffered to remain in possession and act as absolute owner, and her register and all her papers remained unaltered, and subsequently he gave a bottomry bond abroad for money advanced to purchase a cargo for the vessel without notice to the lender of the mortgage, upon common-law principles the claim of the lender was to be preferred to that of the mortgagee); The Duke of Bedford, 2 Hagg. Adm. 294 (bottomry by owner). But see Dobson *v.* Lyall, 8 Jur. 969, 11 Jur. 179 note, 6 L. J. Ch. 115, 3 Myl. & C. 453 note, 40 Eng. Reprint 1003 note, 2 Phil. 323 note, 22 Eng. Ch. 323 note, 41 Eng. Reprint 967 note; The Dunvegan Castle, 3 Hagg. Adm. 331.

Estoppel of mortgagee to set up title to ship.—Whatever mode of procedure is pursued, a party, proved to be a mortgagee, after

which the bond was executed,[96] or a draft for advances for wages and supplies, payable after arrival and discharge,[97] and the claim of a wharfinger who makes an express contract with the owner after the giving of the bond.[98] Similarly a bottomry bond is preferred to a claim of necessaries previously pronounced for, the necessaries having been supplied before the bond,[99] and takes precedence over a purchaser without notice,[1] and will be upheld where there are no laches on the part of the lender, even against a *bona fide* purchaser, without notice,[2] although the rule is otherwise where there is laches;[3] and although the lien of a bottomry bond will not be affected by the mere departure of the vessel from the return port, with or without the knowledge of the holder of the bond,[4] if the obligee of a bottomry bond permit the ship to make several voyages without asserting his lien, and executions are levied on her, his lien is lost.[5] But a delay of a few weeks after the right to enforce a bottomry bond has accrued does not impair the remedy, or enable a junior creditor to take precedence by reason of a prior attachment.[6] Bottomry bonds take priority in the inverse order of their execution,[7] but bonds of different dates granted to creditors upon one advertisement for tenders are paid *pro rata*.[8]

admitting in his answer to the original action that the bottomry security is valid, and consenting to a decree of sale of the ship under it, cannot set up a title to the ship in himself as absolute owner and not mortgagee, in bar of the claim of the bottomry borrower to a share in the remnants remaining in court. The Panama, 18 Fed. Cas. No. 10,703, Olcott 343.

Communication of bond to mortgagees.— A bottomry bondholder is under no obligation to communicate the existence of the bond to the mortgagees of the ship, and is not affected by the owner concealing it from the mortgagees. The Helgoland, 5 Jur. N. S. 1179, Swab. 491, holding that a mortgagee cannot set up as a defense to the bond laches of the bondholder unless his position has been thereby prejudiced.

Priority of maritime liens generally as against mortgages see MARITIME LIENS, 25 Cyc. 802.

96. The Royal Arch, Swab. 269, 6 Wkly. Rep. 191, holding, however, that when due the bond should be enforced within reasonable time, and a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, and substitutes a contract over which the admiralty court at least has no jurisdiction.

97. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42, holding that where the master of a ship pledged his vessel, freight, and owners for the payment of money advanced for wages, supplies, etc., giving a draft payable after arrival and discharge; and before reaching its destination the ship became disabled, and was repaired by money raised upon bottomry, and was sold to satisfy same and suit was instituted on the draft, by the creation of the prior liens the holder of the draft lost his lien upon the vessel and freight.

98. *Ex p.* Lewis, 1 Fed. Cas. No. 8,310, 2 Gall. 483.

99. The William F. Safford, 29 L. J. Adm. 109, 2 L. T. Rep. N. S. 301, Lush. 69.

A broker procuring necessaries to be supplied to a ship and paying for them gives credit to the master and owners, and stands in a different position from a tradesman supplying, and his claim does not take precedence as a claim under a bottomry bond. The Flor de Funchal, 35 L. J. Adm. 119, 13 Wkly. Rep. 1000.

1. Herwig *v.* Oakley, 12 Fed. Cas. No. 6,435, Taney 389; Wilmer *v.* The Smilax, 30 Fed. Cas. No. 17,777, 2 Pet. Adm. 295. But see Webb *v.* Walker, 7 Cush. (Mass.) 46.

2. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157. See The Belle of the Sea *v.* Johnson, 20 Wall. (U. S.) 421, 22 L. ed. 362; The Catherine, 15 Jur. 231.

A fraudulent sale of a ship by the master in a foreign port for necessary charges does not affect the lien arising upon a prior bottomry bond. Riley *v.* The Obell Mitchell, 20 Fed. Cas. No. 11,839.

The lien exists as much against the government, becoming proprietors, as against private persons. U. S. *v.* Wilder, 28 Fed. Cas. No. 16,694, 3 Sumn. 308.

Trover would lie, at common law, in favor of the lender on bottomry, against the vendee of the vessel, who, after the commencement of the maritime risk, and before the satisfaction of the bond, had taken possession of the vessel. The Draco, 7 Fed. Cas. No. 4,057, 2 Sumn. 157.

3. Persee *v.* The Clarence, 19 Fed. Cas. No. 11,016.

4. Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308.

5. Blaine *v.* The Charles Carter, 4 Cranch (U. S.) 328, 2 L. ed. 636.

6. Eneas *v.* The Charlotte Minerva, 8 Fed. Cas. No. 4,483.

7. Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55; The Sydney Cove, 2 Dods. 201; The Betsey, 1 Dods. 289; The Rhadamanthe, 1 Dods. 201; The Eliza, 3 Hagg. Adm. 87; The Constancia, 10 Jur. 845, 4 Notes of Cas. 285, 2 W. Rob. 404.

8. The Exeter, 1 C. Rob. 173, 176. And see The Dora, 34 Fed. 343, holding that where, in a question as to the rank of two

J. Enforcement of Bond — 1. Nature and Form of Remedy; Procedure. Bottomry bonds are enforceable in admiralty,[9] whether the bond is given on land or sea, and although under seal;[10] and if they become void by reason of the voyage being lost in consequence of an accident within the condition of the bond, and the borrower eventually loses nothing, the lender may recover in an action for money had and received;[11] and if a vessel on which money is loaned does not undertake the voyage described in the bottomry bond by default of the persons obtaining the loan, but undertakes a different voyage, the principal of the loan may be recovered in an action *in rem* after such voyage, against a claimant who purchased the ship with knowledge;[12] but questions as to the validity of bottomry claims will not be entertained on motion and notice,[13] and the holder of a bottomry bond has no interest that he can assert in a prize court.[14] The premium paid on bottomry will be included in the amount of the decree,[15] and the sum lent and the premium are considered as the principal, common interest on that sum for the delay of payment after it is due being allowed,[16] although the bond contained no stipulation for ordinary interest.[17] Where various demands are mixed up in bottomry bond, part only of which will sustain a hypothecation, the obligee must exhibit them to the court in such manner that they may be separately considered,[18] and should exhibit an account of the items of expense covered, that the court may judge whether they were necessary for effectuating the objects of the voyage.[19] If the vessel is sought to be sequestered, and it has been since sold, there must be a personal service of citation on the new owner if a resident, as the proceeding is not strictly *in rem*; and service on the master of the vessel, as agent of the owner, is not sufficient.[20]

2. Marshaling Assets. Assets will be marshaled by courts of admiralty, in

bottomry bonds on the same ship, the obligations, although dated, one, one day, and the other, the next day, were for moneys expended during the same period and to relieve the same necessity, the priority must be determined according to the necessity at the time of the advances; as these advances were contemporaneous, and furnished relief from the same wants, the obligations must rank as of the same date.

9. See Admiralty, 1 Cyc. 827.

A suit in the name of an assignor of a bottomry bond may be maintained, where the assignee appeared and filed a supplemental libel, which was duly answered. Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308.

Admiralty will order a referee to ascertain and report the actual constituents of a bottomry lien, the validity of which is contested. Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55.

A mortgagee of a vessel can intervene in a suit by a bottomry holder against the vessel, and contest the validity of the bottomry or its priority of lien as against his mortgage (Furniss *v.* The Magoun, 9 Fed. Cas. No. 5,163, Olcott 55); and creditors, having obtained decrees against the proceeds of a vessel, where bottomry creditors come in and arrest the fund, may make themselves parties and contest the bottomry claims (French *v.* The Superb, 9 Fed. Cas. No. 5,103*a*).

Proof of good faith.— In disputed cases of bottomry bonds the court expects that, where it is practicable, the master will, by his affidavit, show affirmatively the good faith of his own transaction, and the circumstances relating to it. The Faithful, 31 L. J. Adm. 81.

Parties who have abandoned proceedings upon an alleged bottomry bond will not be allowed, except upon strong grounds shown, to institute fresh proceedings upon the same bond. The Fortitudo, 2 Dods. 58.

10. Meneton *v.* Gibbons, 3 T. R. 267, 100 Eng. Reprint 568. But see Anonymous, 1 Keb. 520, 83 Eng. Reprint 1088.

11. Appleton *v.* Crowninshield, 3 Mass. 443.

12. Wilmer *v.* The Smilax, 30 Fed. Cas. No. 17,777, 2 Pet. Adm. 295.

13. French *v.* The Superb, 9 Fed. Cas. No. 5,103*a*.

14. The Mary, 9 Cranch (U. S.) 126, 3 L. ed. 678.

15. The Grapeshot, 10 Fed. Cas. No. 5,703, 2 Woods 42.

16. The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; The Edmond, 30 L. J. Adm. 128, 2 L. T. Rep. N. S. 394, Lush. 211.

17. The Grapeshot, 10 Fed. Cas. No. 5,703, 2 Woods 42.

18. The Aurora, 1 Wheat. (U. S.) 96, 4 L. ed. 45. And see The Edward Albro, 8 Fed. Cas. No. 4,290, 10 Ben. 668, holding that where, in a suit on a bottomry bond, libellant included unauthorized charges and insisted on its payment in full, and filed his libel without affording the owner of the vessel a reasonable time to examine into the question of the amount really due, the court would not award him costs.

19. The Bridgewater, 4 Fed. Cas. No. 1,865, Olcott 35.

20. Gazzam *v.* Wright, 3 La. 449.

case of bottomry, so as to give the proper priorities in favor of shippers against the property of the master and owner,[21] and so also as to the freight and proceeds of the ship.[22] If a bottomry bond covers both ship and cargo, and these are owned by different persons, the cargo is liable only secondarily;[23] but if both belong to the same owner, and are both hypothecated, there is no equity which prevents the owner of the bond from resorting to either; so also where the ship and freight have the same owner, and are included in the same hypothecation;[24] and where there are two bottomry bonds, the first in date on ship and freight only, and the other or last bond on ship, freight, and cargo, and ship and freight are insufficient to discharge both bonds, the last bond, which is entitled to priority, must be paid out of ship and freight.[25] Where a ship and freight are bottomried, the owners being different, the ordinary rule is that they pay ratably;[26] and similarly where there is a bottomry bond upon the ship alone, and another upon the cargo alone, claims for pilotage, towage, and wages are satisfied out of proceeds of the ship and freight *pro rata*, and not out of the freight only;[27] but the court, acting upon equitable principles, will not direct assets to be marshaled except in cases where the two funds to which one of the creditors can resort belong to the same person.[28] Where a part only of goods hypothecated by a respondentia bond reaches its destination, such part is only liable to pay a proportionate part of the money secured by the bond, according to the proportion that the value of the goods brought to their destination bears to the total value of the property on which the bond was given.[29]

VII. CARRIAGE OF GOODS.

[EDITED BY ROBERT M. HUGHES, ESQ., OF THE NORFOLK BAR]

A. Nature of Liability — 1. GENERAL RULES. The owner of a general ship carrying goods or merchandise for hire,[1] in the usual course of business,[2] whether for an ocean voyage,[3] or for a voyage on inland waters,[4] and whether in sail-

21. The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255.

22. Welsh *v.* Cabot, 39 Pa. St. 342.

23. Welsh *v.* Cabot, 39 Pa. St. 342; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255.

24. Welsh *v.* Cabot, 39 Pa. St. 342.

25. The Mary Ann, 9 Jur. 94; The Priscilla, 5 Jur. N. S. 1421, 2 L. T. Rep. N. S. 272, Lush. 1; The Trident, 1 W. Rob. 29.

Where the master gave bonds on ship, cargo, and freight, his claim for wages and disbursements have priority over those of the bondholders, and the assets should be marshaled accordingly. The Salacia, 9 Jur. N. S. 27, 32 L. J. Adm. 41, 7 L. T. Rep. N. S. 440, 11 Wkly. Rep. 189.

26. The Dowthorpe, 2 Notes of Cas. 264, 2 W. Rob. 73.

27. La Constancia, 10 Jur. 845, 4 Notes of Cas. 285, 2 W. Rob. 404, where there were three bonds of bottomry granted upon the same vessel, and two of the bonds granted upon the ship alone, the third bond being the cargo only, and in marshaling the assets the court directed the two bonds upon the ship to be paid out of the proceeds of the ship exclusively, the hond upon the cargo to be paid out of the proceeds of the freight in the first instance, and the cargo only held liable if the proceeds of the freight should be insufficient.

In bottomry, ship and freight are to be exhausted before the cargo. La Constancia, 10 Jur. 845, 4 Notes of Cas. 285, 2 W. Rob. 404; The Dowthorpe, 2 Notes of Cas. 264, 2 W. Rob. 73.

28. The Chioggia, [1898] P. 1, 8 Aspin. 352, 66 L. J. P. D. & Adm. 174, 77 L. T. Rep. N. S. 472, 14 T. L. R. 27, 46 Wkly. Rep. 253 [*distinguishing* The Edward Oliver, L. R. 1 A. & E. 379, 36 L. J. Adm. 13, 16 L. T. Rep. N. S. 575].

29. *In re* Cargo *ex* Sultan, 5 Jur. N. S. 1060, Swab. 504.

1. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Story Bailm. § 495.

2. Mosely *v.* Lord, 2 Conn. 389; Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268.

3. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422.

4. Bennett *v.* Filyaw, 1 Fla. 403; Faulkner *v.* Wright, Rice (S. C.) 107; Porterfield *v.* Humphreys, 8 Humphr. (Tenn.) 497.

Rule determining liability on inland waters. — Where a general ship employed by the owners in transporting goods under contracts for freight, upon navigable waters between ports and places in different states, receives goods under a contract of shipment corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, her liability must be determined by the rules of law applicable to carriers of goods on such inland waters. The Niagara *v.* Cordes, 21 How. (U. S.) 7,

boats,[5] steamboats,[6] or canal-boats,[7] is a common carrier and subject to a common carrier's liability to shippers,[8] when that responsibility is not qualified by an express contract or reservation,[9] or by a custom or usage of established notoriety,[10] although there is no specific agreement of carriage entered into,[11] and independently of any bill of lading.[12] Except as his liability is modified by the Harter act of Feb. 13, 1893,[13] the owner is bound absolutely to deliver the cargo as required unless prevented by the act of God or public enemies;[14] and the liability of a carrier under a bill of lading continues until the merchandise is safely delivered to the consignee at the port of discharge, or placed in such a situation there as to be equivalent to a safe delivery, and the carrier is not discharged of the custody of the goods until this is done;[15] but where the owner of a vessel agrees, for a single price, to transport a cargo from one port to another, and allow storage thereof in the vessel following the voyage, his liability as carrier ceases on arrival at the port of destination, and he is thereafter liable as a warehouseman only;[16] and similarly, where a vessel is detained, after the expiration of the time for unloading, by the act of the consignee, her strict liability as a carrier ceases, and she is liable as a warehouseman only for reasonable care in keeping the cargo.[17] On the other hand, a ship chartered for a special cargo or to a special person is not a common carrier, but only an ordinary bailee for hire.[18] Although the master and owner of a vessel are both liable to the merchant as carrier, they are liable severally, not jointly.[19]

2. Conflict of Laws. The carrier's liability and construction of the shipping

16 L. ed. 41. But see Eveleigh *v.* Sylvester, 2 Brev. (S. C.) 178.

Ferry as common carrier see Ferries, 19 Cyc. 508.

5. Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422.

6. Bennett *v.* Filyaw, 1 Fla. 403; Faulkner *v.* Wright, Rice (S. C.) 107; Patton *v.* Magrath, Dudley (S. C.) 159, 31 Am. Dec. 552; Porterfield *v.* Humphreys, 8 Humphr. (Tenn.) 497; The Huntress, 12 Fed. Cas. No. 6,914, 2 Ware 89.

7. Arnold *v.* Habenhake, 5 Wend. (N. Y.) 33; Spencer *v.* Daggett, 2 Vt. 92.

8. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788. But see Haynie *v.* Waring, 29 Ala. 263, holding that the United States statutes (4 U. S. St. at L. 104, c. 64, § 6; 5 U. S. St. at L. 736, c. 43, § 13), concerning the duties and liabilities of steamboats engaged in carrying the mail, do not impose upon the owners of steamboats the responsibilities of common carriers, in favor of a third person who has contracted for no more than the diligence of a mandatary in the carrying of bank-bills.

Consignment to master.—Where goods in the usual course of business are shipped on freight, consigned to the master for sale and returns, and the master gives a bill of lading with the assent of the owner of the vessel, such owner is liable to account for the goods to the shipper (Mosely *v.* Lord, 2 Conn. 389. *Compare* Morton *v.* Day, 6 La. Ann. 762), as well for the payment of the proceeds as for the safe carriage of the goods (Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268).

Joint liability of two shippers.—Two steamboat companies so conducting themselves with reference to the general public as to induce a shipper acting with reasonable caution to believe that they had formed a combination in the nature of a partnership are jointly liable for loss of cargo. Sun Mut. Ins. Co. *v.* Kountz Line, 122 U. S. 583, 7 S. Ct. 1278, 30 L. ed. 1137 [*reversing* 10 Fed. 768].

Who are common carriers generally see Carriers, 6 Cyc. 365.

9. Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422.

10. Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422.

11. Brower *v.* The Water Witch, 4 Fed. Cas. No. 1,971, 19 How. Pr. (N. Y.) 241 [*affirmed* in 1 Black 494, 17 L. ed. 155].

12. The T. A. Goddard, 12 Fed. 174.

13. See *infra*, VII, B, 13, b.

14. Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422. And see *infra*, VII, C.

15. Vose *v.* Allen, 28 Fed. Cas. No. 17,005 [*affirmed* in 28 Fed. Cas. No. 17,006].

16. Norton *v.* The Richard Winslow, 67 Fed. 259 [*affirmed* in 71 Fed. 426, 18 C. C. A. 344].

17. The M. C. Currie, 132 Fed. 125.

18. The Dan, 40 Fed. 691; Lamb *v.* Parkman, 14 Fed. Cas. No. 8,020, 1 Sprague 343; Nugent *v.* Smith, 1 C. P. D. 423, 3 Aspin. 198, 45 L. J. C. P. 697, 34 L. T Rep. N. S. 827, 24 Wkly. Rep. 237.

A lighter hired exclusively to convey the goods of one person to a particular place for an agreed compensation is not a "common carrier" with respect to such goods, but a "private carrier," and liable only as a bailee for hire. The Wildenfels, 161 Fed. 864.

For form of bill of lading to be partly performed on land and partly on water see Liverpool, etc., Steamship Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788.

19. Patton *v.* Magrath, Rice (S. C.) 162, 33 Am. Dec. 98.

contract is as a general rule governed by the law of the flag,[20] unless the parties expressly stipulate that the contract of shipment or bill of lading shall be governed by some other law;[21] and a contract of affreightment made in one country between citizens or residents thereof and the performance of which begins there is governed by the law of that country unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country;[22] and a contract in one state for the carriage of goods from there to a point in another state is governed by the laws of the former unless a different intention clearly appears.[23] But the law of the flag so far as it differs from the general maritime law is but a mere municipal law of the ship's home and has no authority abroad except by comity and will not be adopted in a foreign forum when against the policy or prejudicial to the citizens of the country of the forum,[24] even though the parties have so stipulated in the shipping contract,[25] this rule being especially applicable to contracts exempting the carrier from liability for negligence and also providing that the stipulation shall be governed by the law of a country where such a stipulation is sustained;[26] but where a bill of lading, besides the ordinary exception of the perils of the sea, contains an exception against liability for loss occasioned by leakage or stowage, or by negligence of any person in the service of the ship, and this latter exception is valid both by the law of the flag and the law of the place of shipment, the foreign law governs as to any negligence within the foreign jurisdiction, and whether the damage was occasioned by perils of the sea, or by negligent stowage at the place of shipment, the shipper cannot recover, there being no negligence shown or presumed, in this country, or from acts committed on the high seas.[27]

20. Wupperman *v.* The Carib Prince, 63 Fed. 266 [*reversed* on other grounds in 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181]; The Titania, 19 Fed. 101, holding that on a shipment of goods in England, upon an English vessel, on an ordinary bill of lading, the liability of the vessel is to be determined according to the law of the place of shipment, as the law of the flag. But see The State of Virginia, 60 Fed. 1018, holding that where the British owner of a British ship is proceeded against in an American court by both British and American cargo-owners in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the statutes of the United States, and not those of Great Britain.

Foreign vessels being entitled to the benefit of the Harter Act (2 U. S. Rev. St. Suppl. (1892–1899) 81), they will be held subject to its limitations by courts of the United States in suits for damages to cargo arising on the high seas on voyages to this country. The Frey, 92 Fed. 667. And see The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181. See, generally, *infra*, VII, D, 13, b, (II).

21. The Oranmore, 92 Fed. 396 [*affirming* 24 Fed. 922], holding that where a bill of lading of an English ship provided that all questions arising thereunder against the ship or her owners should be determined by English law, such provision was valid, and that the English law governed a libel in admiralty for the loss of property under such bill of lading by the shipper, who was a resident of the United States.

22. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788 [*affirming* 22 Fed. 715, 22 Blatchf. 372]; The Brantford City, 29 Fed. 373. And see Hampton *v.* The Thaddeus, 4 Mart. (La.) 582.

23. Montague *v.* The Henry B. Hyde, 82 Fed. 681.

24. The Kensington, 183 U. S. 263, 269, 22 S. Ct. 102, 46 L. ed. 190; The Brantford City, 29 Fed. 373.

25. Lewisohn *v.* National Steamship Co., 56 Fed. 602; Monroe *v.* The Iowa, 50 Fed. 561. See Doherr *v.* The Etona, 64 Fed. 880 [*affirmed* in 71 Fed. 895, 18 C. C. A. 380].

26. Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326 [*affirming* 76 Fed. 582, and *following* Lewisohn *v.* National Steamship Co., 56 Fed. 602] (holding that a provision in a bill of lading, containing an exception of damage from negligent stowage, that the contract should be governed by the law of the flag, is not enforceable in our courts, being against the public policy of this country); Spreckels Sugar-Refining Co. *v.* The Glenmavis, 69 Fed. 472 (holding that where a bill of lading made in Germany in behalf of a British ship, prior to the Harter Act, relating to the liability of ship-owners, contained a clause exempting the ship and carrier from liability for negligence in the navigation of the vessel, and a further provision that the law of the flag should govern, the courts of the United States would refuse to enforce the stipulation respecting negligence, although it was valid under the laws of both England and Germany); The Victory, 63 Fed. 631 [*affirmed* on other grounds in 168 U. S. 410, 18 S. Ct. 149, 42 L. ed. 519]; The Guildhall, 58 Fed. 796, 64 Fed. 867, 12 C. C. A. 445; The Hugo, 57 Fed. 403.

27. The Trinacria, 42 Fed. 863. And see

B. Contracts of Affreightment[28] — **1. In General — a. Nature, Construction, and Effect.** The rules governing the operation and effect of bills of lading[29] apply to contracts of affreightment in general.[30] Thus a contract of affreightment in order to bind the ship must be executed by a person authorized by the owner,[31] and neither party is at liberty to abandon the contract but for legal cause or with the consent of the other.[32] The contract is broken by a change

Baetjer *v.* La Compagnie Generale Transatlantique, 59 Fed. 789, holding that where a bill of lading stamped at an interior town of France, for transportation of goods from there to New York, *via* Havre, exempted the carrier from liability for negligence of its servants and agents, which is valid by the French law, the carrier could not be held liable for breakage occurring before the goods reach Havre; for, if the land carriage was by contract outside the bill of lading, admiralty has no jurisdiction, and if under the bill of lading, being wholly in French territory, it was governed by French law, and the exemption applies.

28. **Power of master to execute** see *supra*, IV, B, 2, c.

29. See *infra*, VII, B, 2.

30. See cases cited *infra*, this note, and the following notes.

The contract is not one of affreightment where the owner of a steamboat, which is disabled so that she cannot make her trip, hires another boat in her place to take her tows, freight, and passengers to a designated point, the officers and crew of the latter boat remaining in the exclusive control of her during that trip, and being paid therefor by her general owner. Sherman *v.* Fream, 30 Barb. (N. Y.) 478.

Particular contracts of shipment construed see Rhodes *v.* Newhall, 12 N. Y. Suppl. 669 [*affirmed* in 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859] (holding that a provision in a shipping contract that "all the deficiency in cargo to be paid by the carrier, and deducted from the freight," is conclusive against the carrier in an action against the consignee for the freight, where the carrier was represented at the lading by its own weighmaster, and the amount of goods laden was agreed to; and it is immaterial that the goods delivered to the consignee were worth more than the amount advanced by him thereon); Scott *v.* U. S., 12 Wall. (U. S.) 443, 20 L. ed. 438 [*affirming* 4 Ct. Cl. 241]; Canada Shipping Co. *v.* Acer, 26 Fed. 874.

Transfer of contract.—A contract of carriage, signed by the agent of a steamship line, and reciting that two hundred bales of cotton had been received "on dock" to be transported by the C, "or by any other steamship of the line," is only an executory contract to ship, and a transferee of such contract is affected with notice that the ship C was liable for only so much cotton as might be actually laden on board. Forwood *v.* The Caroline Miller, 53 Fed. 136.

31. The Madison *v.* Wells, 14 Mo. 360, holding that if one takes possession of a boat without the consent of the owner, makes a contract of affreightment, and violates it, the boat is not liable. See Crenshawe *v.* Pearce, 37 Fed. 432. *Compare* 26 Cyc. 750 note 10, 784 note 81. Nor can the master himself bind the ship by receipting for goods not actually received. Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599; American Sugar Refining Co. *v.* Maddock, 93 Fed. 980, 36 C. C. A. 42; McLean *v.* Fleming, L. R. 2 H. L. Sc. App. 128, 1 Aspin. 160, 25 L. T. Rep. N. S. 317; Brown *v.* Powell Coal Co., L. R. 10 C. P. 562, 2 Aspin. 578, 44 L. J. C. P. 289, 32 L. T. Rep. N. S. 621, 23 Wkly. Rep. 549.

The second clerk of a steamer cannot, by virtue of his position, make a special contract, so as to bind the boat for articles not delivered, but his authority must be shown. Kirkman *v.* Bowman, 8 Rob. (La.) 246.

An unauthorized contract may be ratified. Morris *v.* Alvah, 59 Fed. 630, holding that a contract for transportation of goods binds the ship when it is confirmed by those who have authority, and the ship has actually entered upon the performance of it, although it may have been a contract preliminary to a maritime contract, or made by brokers acting without sufficient authority.

Estoppel of owner to deny authority.— If the owner leaves another in such control over the vessel as to enable him to start her on a voyage, thus placing it in such person's power to deceive the public, the vessel may be held liable for the loss of goods shipped. Dunn *v.* Branner, 13 La. Ann. 452.

32. Clark *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 104, 13 Am. Dec. 400, holding that where a ship was so damaged that it would require two months to repair her, her master may retain the cargo and earn his freight.

Where a vessel, before she breaks ground for a voyage, is injured by fire, so that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment for carrying cotton to a foreign port, and providing for the payment of the freight money on the delivery of the cotton at that port, is dissolved. The Tornado, 108 U. S. 542, 2 S. Ct. 746, 27 L. ed. 747.

Writing held to be mere offer of owner to receive goods on board and not to amount to contract of affreightment as lacking mutuality see White *v.* North German Lloyd Steamship Co., 61 Misc. (N. Y.) 268, 113 N. Y. Suppl. 805.

Contract of affreightment with connecting carrier.—An engagement of cargo space from a steamship line for a shipment of cotton at an agreed rate of freight, made by a company operating a connecting line, constitutes

of destination made without the assent of the other party,[33] or by a voluntary abandonment of the voyage;[34] but the involuntary abandonment of a vessel under stress of weather, without any actual intention to renounce the contract of affreightment between the ship and cargo-owners, does not terminate such contract, but on the bringing of the ship into port by salvors in a condition to resume her voyage without unreasonable delay the master is entitled within a reasonable time to reclaim the vessel and cargo, and on indemnity to the salvors to take the cargo to the stipulated port of destination.[35] A contract of affreightment takes effect from the loading of the vessel, from which time each party is bound to the other for the full performance of the contract;[36] and when the time of the arrival of the vessel at port of shipment is specified in the contract and both parties contract with regard to it, it is in the nature of a condition precedent to the enforcement of the contract by the owner.[37]

b. Delivery of Cargo to Vessel. What is a sufficient delivery to the vessel depends in general on the facts in each case.[38] Delivery of cargo to a lighter in charge of a vessel for shipment on the vessel, where it is the custom to deliver in that way, is a good delivery and binds the vessel receiving the freight, the liability of the vessel commencing at the time of delivery to the lighter,[39] and the same rule applies to delivery at a wharf;[40] but such delivery on the dock must be accompanied with notice to the master in order to render him liable for failure to deliver the goods at their destination.[41] Where goods are delivered at the

a contract, which binds the latter to furnish the cargo, or respond in damages, although it was in fact made in behalf of a third party intending to make a through shipment over both lines, where such fact was not disclosed. Baltimore Steam-Packet Co. *v.* Patterson, 106 Fed. 736, 45 C. C. A. 575, 66 L. R. A. 193.

33. Boyle *v.* Dickenson, 6 Mart. N. S. (La.) 100.

But not when it is made with the shipper's consent.— Thatcher *v.* McCulloh, 23 Fed. Cas. No. 13,862, Olcott 365.

34. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195.

35. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195.

36. Leonard *v.* Bosch, 72 N. J. Eq. 131, 64 Atl. 1001 [*affirmed* in (1908) 71 Atl. 1134].

37. Gray *v.* Moore, 37 Fed. 266.

38. See Fearn *v.* Richardson, 12 La. Ann. 752. And see cases cited *infra*, this section.

Giving goods to the mate of a vessel for transportation and taking his signed receipt therefor is a good delivery to, and binds, the vessel. Burdoin *v.* The Harriet Smith, 4 Fed. Cas. No. 2,147*a*.

Delivery from grain elevator.—Where wheat was weighed by the warehousemen in the elevator into cars drawn by horses to the edge of the dock, and discharged through a spout into the ship, the upper end tended by the warehousemen and the lower by the crew, although each car was tallied by an officer of the ship in the elevator, it was held that there was no delivery to the ship-master of any wheat which failed to pass over the rail of the ship. Glass *v.* Goldsmith, 22 Wis. 488.

39. Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599 [*affirming* 8 Fed. Cas. No. 4,300, 1 Sprague 477] (holding that at a port where it was necessary for a vessel to lie outside the bar and have her cargo brought to her in lighters by lightermen employed by the master, delivery of cotton to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master had engaged to carry the cotton to Boston); Campbell *v.* The Sunlight, 4 Fed. Cas. No. 2,368, 2 Hughes 9; The Oregon, 18 Fed. Cas. No. 10,553, Deady 179 (holding that when an ocean steamer is making regular voyages to a port, and for any reason is unable to reach such port, and the agent of her owner charters a steamboat to take the passengers and freight down a river to such steamer and bring back her cargo, a delivery of goods under such circumstances to the steamboat for the purpose of being conveyed by such steamer is a delivery to the latter, and she is thenceforth bound for their safe carriage and timely delivery).

Where the lighter is employed by the shipper, and cargo is transferred from the lighter to the ship by slings and horses belonging to the ship, or the stevedores in the employ of the ship, the responsibility of the lightermen ceases, as a general rule, when the cargo is properly placed on the slings and hooked to the tackle; and the duty of the ship begins with the hoisting of it to the deck of the ship. The Cordillera, 6 Fed. Cas. No. 3,229*a*, 5 Blatchf. 518.

40. The Oregon, 18 Fed. Cas. No. 10,553, Deady 179, holding that where a vessel is discharging and taking on cargo at a wharf, a delivery of goods thereon by the direction of the master, for the purpose of carriage upon the same, is a delivery to such vessel, and her responsibility for their carriage and delivery commences from that time.

41. Packard *v.* Getman, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475.

vessel's dock for shipment, and it is thereafter found necessary to transport the goods to the steamer on a lighter, and they are damaged by the sinking of the lighter before reaching the steamer, the steamer is liable for the loss;[42] and similarly where there is a contract to carry goods from one port to another, and they cannot be loaded directly on the vessel, and lighters are sent by it to bring the goods to it, the lighters are for the time its substitutes, so that the bill of lading is applicable to the goods as soon as they are placed on the lighters.[43] Authority to accept delivery for, and to bind, the vessel, may be conferred by express grant; or the conduct and relations of the parties may establish such an apparent authority that the carrier will be estopped from denying its existence to a shipper who has been misled thereby;[44] but such apparent authority to accept delivery must be actually shown; delivery to an unauthorized person will not bind the boat.[45] Upon the issue whether the goods claimed to have been shipped in a foreign port, but which were not delivered by the carrier, were in fact received on board, the act of the ship's officers, whose customary duty it is to check off merchandise received aboard, is received as evidence of great importance.[46]

c. Performance and Breach — (i) *GENERAL RULES.* An owner is held strictly to his contract of affreightment.[47] An unusual difficulty in obtaining a master and crew to navigate a vessel will not excuse him from performing a contract of affreightment for the conveyance of goods;[48] nor is the owner excused by the freezing in of the vessel and the death of the master, but is entitled to a reasonable time to procure a new master and to await the relief of the vessel.[49] Similarly a strict performance is demanded of the shipper;[50] but where a person contracts to ship goods on a vessel on or before a certain day, and, before the day arrives, sees that the vessel cannot be ready in time, and gives notice that he will not make the shipment, he is not liable for breach of the contract, if it is shown that the vessel could not have been, and was not in fact ready to receive the goods on the day specified,[51] and, similarly, if a part of a ship's load is to be delivered on or about a given day, and the ship's arrival at port is delayed by an accident so that the shipper had to employ another vessel, he will be released from his obligation to comply with the contract of affreightment, unless he has voluntarily continued it, and has waived his right to a release by demanding compliance

42. The Pokanoket, 161 Fed. 383 [*affirmed* in 172 Fed. 321].

43. Ins. Co. of North America *v.* North German Lloyd Co., 106 Fed. 973 [*affirmed* in 110 Fed. 420, 49 C. C. A. 1].

44. The City of Alexandria, 28 Fed. 202.

45. Trowbridge *v.* Chapin, 23 Conn. 595; Suarez *v.* The George Washington, 23 Fed. Cas. No. 13,585, 1 Woods 96.

In contracts of affreightment which do not stipulate a time for delivery, the merchant or shipper is entitled to a reasonable time after the ship or other vessel is ready to receive on board the goods to make a delivery of the same. Williams *v.* Dolsen, 15 La. Ann. 94.

46. Kelley *v.* Cunard Steamship Co., 120 Fed. 536 [*reversed* on other grounds in 126 Fed. 610, 61 C. C. A. 532, and *following* Smith *v.* Bedouin Steam Nav. Co., [1896] A. C. 70, 65 L. J. P. C. 8].

47. The Eliza, 8 Fed. Cas. No. 4,348, 2 Ware 318.

A contract for shipment of cattle implies that there shall be sufficient ventilation, and where the vessel is bound to provide insurance, but fails to do so on cattle to be placed in one part of her, for want of additional ventilation, which she refuses to provide, the shipper is justified in refusing to fill that part, and the ship is liable for failure to transport the cattle thus shut out. Morris *v.* The Alvah, 59 Fed. 630.

48. The Eliza, 8 Fed. Cas. No. 4,348, 2 Ware 318.

49. The Flash, 9 Fed. Cas. No. 4,858, Abb. Adm. 119. And see West *v.* The Berlin, 3 Iowa 532.

50. Hassett *v.* McArdle, 7 Misc. (N. Y.) 710, 28 N. Y. Suppl. 48, holding that where defendant agrees to furnish cargo for plaintiff's boat, and to load it three days after it is in the dock, he is not excused from performance because plaintiff did not keep the boat at the dock for three days, in consequence of the dock-master ordering the boat to give place to other boats that were ready to load, as it would be presumed the contract was made with reference to the rock regulations.

Notices of a steamer's departure by advertisements, and the posting of hand-bills, is not sufficient to charge the shipper in damages for failing to deliver a cargo as agreed. Jones *v.* Smalley, 5 La. 28.

51. Russell *v.* Allerton, 8 N. Y. Suppl. 688.

therewith by the ship.[52] If a shipper contracts to furnish a certain number of cargoes of freight at a distant port, and the vessel pursues its voyage, but the shipper has no freight at the port designated, the master cannot recover for failure to furnish the freight merely by showing that no other freight was offered to him; it must appear that none was to be had at that port; but the master is not bound to go to another port in search of freight.[53]

(II) *REMEDIES FOR BREACH AND DAMAGES.* An action *in rem* will lie against the vessel for breach of the contract of affreightment;[54] but a libel *in rem* against a vessel will not lie to recover damages caused by the refusal to receive on board the vessel goods which its agents had agreed should be received and carried as freight; for, in order to subject a vessel through a process *in rem*, the goods must have been actually delivered and received on board.[55] Where ship-owners without legal justification refuse to perform the voyage, the damage to the owners of the goods is the difference in value between the goods at the port of shipment and the price they would have commanded at the port of destination, if the contract had been performed;[56] but where a vessel is to arrive at a port and receive

52. La Compagnie Commerciale de Transports a Vapeur Francais *v.* Gomila, 36 La. Ann. 280.

53. Bradley *v.* Denton, 3 Wis. 557.

54. Irvine *v.* The Hamburg, 3 Minn. 192 (holding that under Rev. St. c. 86, providing for the collection of demands against boats and vessels, an action may be maintained against a vessel for a failure to perform an agreement made without the state for the delivery of goods in the state); Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599; The Flash, 9 Fed. Cas. No. 4,857, Abb. Adm. 119; The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187.

In an action under Wis. Rev. St. c. 116, for non-performance of a contract to transport freight, the complaint must aver that the boat is used in navigating the waters of the state. It is not sufficient to allege merely that it is a boat "navigating the Mississippi river." The Galena *v.* Beals, 5 Wis. 91.

Unseaworthiness of vessel.—A shipper, after discovering that the vessel upon which the cargo was laden is unseaworthy, may maintain a libel *in rem* for the non-performance of the contract. The Director, 26 Fed. 708.

Interest of consignee to support suit.—Where, by a contract for the sale of goods to be delivered at a distant port, a part of the price is to be paid on delivery, and on shipment of the goods a bill of lading is issued, by the terms of which delivery is to be made to the consignor or order, and such bill is forwarded, with a draft for the price attached, which is not paid by the purchaser, and the goods therefore not delivered to him, he never becomes the owner of the consignment, so as to sustain any contract relation with the carrier which would support a suit *in rem* against the vessel for a breach of the contract of affreightment contained in the bill of lading. The Prussia, 100 Fed. 484.

55. Dewitt *v.* The St. Lawrence, 3 Ohio St. 325; The Montgomery *v.* Kent, 20 Ohio 54; Herbert *v.* The James Leakman, 12 Fed. Cas. No. 6,397*a* (holding that the contract of the master, duly authorized by the vessel owners to sell the cargo and transmit the proceeds to the shipper, as a part of the contract of shipment, for which service he is compensated in the freight received, is not a maritime contract, and not binding on the vessel, where the proceeds are not actually placed on board the vessel); Rynaud *v.* The Richard Cobden, 21 Fed. Cas. No. 12,191. And see 26 Cyc. 752 note 30. *Compare* The Flash, 9 Fed. Cas. No. 4,857, Abb. Adm. 67. See, generally, *infra*, VII, D, 12, e, (III).

Refusal to receive cargo from broker.—A ship is not liable for refusing to receive lumber on a contract of affreightment made by brokers in their own names, although in fact for a principal, when they refuse to ship it in their own names and to be responsible for the freight. The A. Cheesebrough, 1 Fed. Cas. No. 25, 3 Blackf. 305.

Under the Missouri statute relating to vessels (Rev. Code, 1845) a party might proceed against a boat *in rem* for the non-performance of a future contract for the transportation of freight, entered into by the captain of the boat. Taylor *v.* The Robert Campbell, 20 Mo. 254. But this is subject to the doctrine that a state statute cannot give a procedure *in rem* in a state court against a vessel for a maritime cause of action. See MARITIME LIENS, 26 Cyc. 769.

56. Harrison *v.* Stewart, 11 Fed. Cas. No. 6,145, Taney 485, holding, however, that profits that the shippers might have made by ulterior speculations, or by shipping them from the port of destination to other places and better markets, are too remote to be considered.

Measure of damages for refusal to take on board part of cargo or deliver cargo already loaded.—Where the master of a vessel had a contract for the transportation of a cargo, and performance was interrupted while the loading was going on by the death of the master and by the freezing up of the vessel, and the owner repudiated the contract, refusing to take on board the residue or deliver up that already loaded, the shipper could recover damages for value of the goods taken on board and withheld, and for the

a cargo by a certain day specified, and she does not arrive until after the appointed time, the only damages that can be recovered on account of the delay, when the vessel is accepted and the cargo shipped, is such expense as may have been incurred for keeping the cargo during the period of delay and the additional insurance the shipper may have had to pay by reason of the increased risk caused thereby.[57] On the other hand, where an owner had a contract to transport a cargo at an agreed price to a designated point, and the shipper fails to deliver the cargo, the owner's measure of damages is the difference between the cost of transportation and the contract price;[58] and where goods are wrongfully taken from a vessel by the shipper before she has broken ground on the voyage, if the vessel is a general ship, and the goods removed form only part of her cargo, and the ship-owner, being bound by contracts with other shippers to perform the proposed voyage, does perform it, the measure of damages is the stipulated freight, less the substituted freight actually made, or which might have been made by reasonable diligence.[59] The measure in all cases where the shipper breaks the contract to furnish freight is the actual loss, and not the contract price, and the shipper may reduce the damages by showing that the owner received freight from others in lieu of that which the shipper failed to furnish, or by proving in any other way that the injury was less than the contract price;[60] and when the ship, after receiving goods for a particular port, changes her destination and refuses to deliver them up, she is liable at least for their full value.[61]

(III) *LIEN OF SHIPPER.* The shipper has a lien on the vessel for the execution of the contract which may be enforced by process *in rem* in admiralty,[62] and which attaches at the time of the delivery of such goods to her agents and owners;[63] but the owner of a cargo has no lien upon the vessel until the cargo or some portion has been laden on board or delivered to the master,[64] for it is a broad

cost of transporting the residue from the storehouse to the dock, and for injuries received by them while they lay there awaiting the owner's acceptance, and for the difference between the contract price of transportation and any greater expense incurred in obtaining another mode of conveyance, but could not recover for injuries received by the property after notice of the owner's refusal to complete the contract. The Flash, 9 Fed. Cas. No. 4,858, Abb. Adm. 119.

57. The J. C. Stevenson, 17 Fed. 540, cargo of cattle.

58. Boland *v.* Northwestern Fuel Co., 34 Fed. 523, holding also that in an action for damages against a shipper for breach of a contract of affreightment in failing to furnish a cargo, evidence to show, in mitigation of damages, what plaintiff's boat "was said to have earned," but not showing freight actually earned, was not admissible.

Effect of embargo.—Where, after a vessel has taken on board a cargo to be carried, the embargo law prevents her from sailing, and the cargo remains on board upward of a year, when it is sold at the place of shipment, the owner of the vessel can recover nothing in the way of damages, on the theory that had it not been for her possession of this cargo she might have been employed in the coast trade. Kelly *v.* Johnson, 14 Fed. Cas. No. 7,672, 3 Wash. 45.

Burden of proving seaworthiness of vessel.—Every freight contract of a carrier by river implies that his boat is riverworthy at the time for its performance, and it is incumbent on him, in bringing an action for breaking such contract, to prove that at such time his boat was capable of performing it. McClintock *v.* Lary, 23 Ark. 215.

59. Bailey *v.* Damon, 3 Gray (Mass.) 92.

60. Shannon *v.* Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262.

61. Boyle *v.* Dickenson, 6 Mart. N. S. (La.) 100.

62. Turner *v.* Lewis, 2 Mich. 350 (holding, however, that in order that a lien may attach under the provisions of Mich. Rev. St. c. 122, in reference to proceedings for the collection of demands against ships, boats, and vessels, for the breach of a contract of affreightment, the contract must arise in the state and that the lien does not attach, where there is a breach of contract, which, although to be performed within the state, was made in another state); The Flash, 9 Fed. Cas. No. 4,857, Abb. Adm. 67; The Phebe, 19 Fed. Cas. No. 11,064, 1 Ware 265.

Lien of ship-owner for freight see *infra*, VII, E, 6.

Lien of shipper for loss of or injury to goods see *infra*, VII, D, 12, e, (III).

Maritime liens generally see MARITIME LIENS, 26 Cyc. 743.

Where there is no agreement or contract of affreightment between the parties, a vessel is not subject to a maritime lien as security for the performance of a contract to transport a cargo. The Keokuk, 9 Wall. (U. S.) 517, 19 L. ed. 744.

63. Pearce *v.* The Thomas Newton, 41 Fed. 106.

64. The City of Baton Rouge, 19 Fed. 461.

general rule that an unexecuted contract of affreightment gives no lien in admiralty on the vessel.[65]

2. Bills of Lading[66] — a. General Nature; Duty of Carrier to Execute. The bill of lading is in substance a written acknowledgment by the master or owner that he has received such goods as it describes for the voyage stated, to be carried on the terms stated, and delivered to the persons specified in the bill,[67] and is a document to which a shipper of goods on a vessel is entitled as a matter of right;[68] and the master is bound to give a bill of lading when goods are laden on board, even if the freight is not agreed on, or there is a dispute about it;[69] and the master has been held liable for conversion where after refusal to give a bill of lading he sails away with the cargo;[70] but where the quantity of a cargo is uncertain, the master is not bound to sign bills of lading stipulating freight on a fixed amount, but may tender the usual bill of lading, specifying the quantity of the cargo as "more or less";[71] and although when true bills of lading are presented the master cannot make any indorsement impairing their negotiability, he may, before signing, indorse a correction of any errors in bills of lading presented to him.[72] The bill of lading must be given to the person entitled to it, who is ordinarily the owner of the cargo;[73] and it does not represent goods or merchandise, when

65. Scott *v.* The Ira Chaffee, 2 Fed. 401, 2 Flipp. 650. And see Maritime Liens, 26 Cyc. 752 note 30.

66. "Bill of lading" defined see 5 Cyc. 707. General principles applicable to all bills of lading see Carriers, 6 Cyc. 316.

67. Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335; O'Brien *v.* Gilchrist, 34 Me. 554, 56 Am. Dec. 676; Dickerson *v.* Seelye, 12 Barb. (N. Y.) 99; Ward *v.* Whitney, 3 Sandf. (N. Y.) 399 [*affirmed* in 8 N. Y. 442]; Wolfe *v.* Myers, 3 Sandf. (N. Y.) 7; Babcock *v.* May, 4 Ohio 334; Knox *v.* The Ninetta, 14 Fed. Cas. No. 7,912, Crabbe 534.

Consideration for change in bill.— Receiving freight in advance is a sufficient consideration to render a change in the original bill of lading binding on the parties. Baker *v.* The Milwaukee, 14 Iowa 214.

Bills of lading are often drawn in sets of three, one retained by the master, the others delivered to the shipper. See Glyn *v.* East India, etc., Dock Co., 7 App. Cas. 591, 4 Aspin. 580, 52 L. J. Q. B. 146, 47 L. T. Rep. N. S. 309, 31 Wkly. Rep. 206 (commenting adversely upon the practice); Sanders *v.* Maclean, 11 Q. B. D. 327, 5 Aspin. 160, 52 L. J. Q. B. 481, 49 L. T. Rep. N. S. 462, 31 Wkly. Rep. 698.

Documents held not bills of lading see Babcock *v.* Orbison, 25 Ind. 75; Forwood *v.* The Caroline Miller, 53 Fed. 136 holding that a contract of carriage, signed by the agent of a steamship line and reciting that two hundred bales of cotton had been received "on dock," to be transported by the C, "or by any other steamship of the line," is not a bill of lading, but a contract to ship in future, either on the C or any other steamer of the line, and that on this option no lien on the ship could arise on such contract alone, and that fact being patent on the face of the document a transferee for value was chargeable with notice that the ship could be held only for such bales as were actually laden on board.

When the charterer of a vessel is the shipper of the cargo, a bill of lading given by the master operates merely as a receipt for the goods and a document of title, and never, as between the ship-owner and charterer, affects the terms of the charter-party. The Fri, 154 Fed. 333, 83 C. C. A. 205 [*reversing* 140 Fed. 123].

68. Watt *v.* Cargo of Lumber, 161 Fed. 104, 88 C. C. A. 268, holding, however, that where the master claims demurrage he has the right to give notice of the claim in, or by indorsement upon, such bill, so as to charge a transferee with such notice.

69. The May Flower, 16 Fed. Cas. No. 9,346, 3 Ware 300.

The fourth section of the Harter Act, Feb. 13, 1893, requires the issue of a bill of lading to shippers. See *infra*, VII, D, 13, b.

70. Falk *v.* Fletcher, 18 C. B. N. S. 403, 11 Jur. N. S. 176, 34 L. J. C. P. 146, 13 Wkly. Rep. 346, 114 E. C. L. 403. But see Jones *v.* Hough, 5 Ex. D. 115, 4 Aspin. 248, 49 L. J. Exch. 211, 42 L. T. Rep. N. S. 108, where wrongful refusal to give a bill of lading under circumstances which showed no intention to deprive the shipper of his property was held not to constitute conversion, but to give a right to damages if any shown. *Compare* Rayner *v.* Rederiaktiebolaget Condor, [1895] 2 Q. B. 289, 8 Aspin. 43, 64 L. J. Q. B. 540, 73 L. T. Rep. N. S. 96, 15 Reports 542.

71. The Alonzo, 1 Fed. Cas. No. 257, 1 Hask. 184; The May Flower, 16 Fed. Cas. No. 9,346, 3 Ware 300. And see McKay *v.* Ennis, 37 Fed. 229, holding that a master who is in doubt as to the weight of cargo received, and who consequently inserts in the bill of lading, "vessel not responsible for difference in weight," is not chargeable with misconduct in signing such bill of lading, although it eventually appears that it calls for more cargo than was actually on board.

72. Lightburne *v.* The Tongoy, 55 Fed. 329, holding that shippers do not prejudice their right to redress by accepting under protest bills of lading wrongfuly indorsed by the master.

73. Hathesing *v.* Laing, L. R. 17 Eq. 92, 2

shipped on board a vessel, unless it has been delivered to the true owner of the merchandise.[74] A printed paper, pasted on the back of a bill of lading, prescribing the number of lay days and the rate of demurrage to be paid by the "cargo, consignee, or assignee," after their expiration, of which the consignee received a duplicate, with a similar printed paper pasted on it, thereafter receiving the cargo without objection, is part of the bill of lading.[75]

b. Who May Execute. A bill of lading may in general be executed by the owner,[76] or by any one duly authorized by the owner.[77] Thus, although it has been held that the captain of a vessel cannot bind the owner, by signing bills of lading, unless he is clothed with express authority for that purpose, or authority implied by the usual course of employment or a subsequent assent,[78] masters are commonly held to be authorized to execute bills of lading, binding on the owner and the vessel;[79] and a bill of lading, signed by the master of a vessel in

Aspin. 170, 43 L. J. Ch. 233, 29 L. T. Rep. N. S. 734.

Possession of the mate's receipt is evidence that the possessor claiming the bill of lading is either the shipper or acting under the shipper's authority, and non-possession is evidence to the contrary. See Ruck *v.* Hatfield, 5 B. & Ald. 632, 24 Rev. Rep. 507, 7 E. C. L. 345; Schuster *v.* McKellar, 7 E. & B. 704, 3 Jur. N. S. 1320, 26 L. J. Q. B. 281, 5 Wkly. Rep. 656, 90 E. C. L. 704; Craven *v.* Ryder, Holt N. P. 100, 3 E. C. L. 48, 2 Marsh. 127, 6 Taunt. 433, 1 E. C. L. 690, 16 Rev. Rep. 644. But the mere possession alone of the mate's receipt does not give the holder the right to claim the bill, and if the bill is given to the one in fact entitled to control of the goods, the owner is discharged, although the mate's receipt be in the possession of another. Hathesing *v.* Laing, L. R. 17 Eq. 92, 2 Aspin. 170, 43 L. J. Ch. 233, 29 L. T. Rep. N. S. 734; Cowas-jee *v.* Thompson, 3 Moore Indian App. 422, 18 Eng. Reprint 560, 5 Moore P. C. 165, 13 Eng. Reprint 454.

74. Blossom *v.* Champion, 37 Barb. (N. Y.) 554.

75. Falkenburg *v.* Clark, 11 R. I. 278.

Introduction of novel clause.— If the owner wishes to introduce in his bill of lading so novel a clause as one exempting him from general average contribution, he must not only make it clear in words but also conspicuous by inserting it in such type and in such part of the document that a person of ordinary capacity and care could not fail to see it. Crocks *v.* Allan, 5 Q. B. D. 38, 4 Aspin. 216, 49 L. J. Q. B. 201, 41 L. T. Rep. N. S. 800.

76. Dows *v.* Greene, 32 Barb. (N. Y.) 490, 16 Barb. 72 [*affirmed* in 24 N. Y. 638].

When the owner signs, the signature of the master is unnecessary. Dows *v.* Greene, 32 Barb. (N. Y.) 490, 16 Barb. 72 [*affirmed* in 24 N. Y. 638]. But see The Princess, 7 Aspin. 432, 70 L. T. Rep. N. S. 388, 6 Reports 723, holding that where a charter-party requires that the master shall sign, it is not sufficient for the owner to sign or to be willing to sign.

77. Kirkman *v.* Bowman, 8 Rob. (La.) 246, holding that the second clerk of a steamer may execute a bill of lading in the ordinary way.

Conversely a bill of lading issued by an unauthorized person is invalid. Crenshawe *v.* Pearce, 37 Fed. 432.

78. Nichols *v.* De Wolf, 1 R. I. 277, holding also that proof of a practice of the captain of a vessel to sign bills of lading for articles delivered at one port is no proof of authority to sign bills for a different port.

79. Moseley *v.* Lord, 2 Conn. 389; Babcock *v.* Orbison, 25 Ind. 75; Slark *v.* Broom, 7 La. Ann. 337 (holding that in ordinary cases a captain, signing a bill of lading in the usual form, signs as agent of the owners; and the contract, being within scope of his authority, binds them); Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558 (holding that where a vessel had been employed in carrying from one state to a port outside of that state, and had been accustomed to take return cargoes, for which the master executed contracts of affreightment, and this practice was known to the owner, the vessel, as to these return cargoes, was a general freighting vessel, and the master might bind the owners for the carriage of goods by signing a bill of lading).

The fact that the master does not place the word "master" after his signature does not affect the validity of the bill. Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

Limitations of master's authority.— The master cannot be required to state in his bill of lading the precise chemical character of the cargo, having no authority to do so (The Kate V. Aitkin, 39 Fed. 328), nor has he authority to estimate and determine and state in the bill of lading the particular mercantile quality of the goods before they are put aboard (The Kate V. Aitkin, *supra* [*citing* Cox *v.* Bruce, 18 Q. B. D. 147, 6 Aspin. 152, 56 L. J. Q. B. 121, 57 L. T. Rep. N. S. 128, 6 Wkly. Rep. 207, and in turn *quoted* and *followed* in St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 7 S. Ct. 1132, 30 L. ed. 1077]); but the shipper may require the master to state on the bill the condition of the cargo ascertainable by the senses (The Kate V. Aitkin, *supra*, as whether it was wet or dry, or wet or damp, or wet to the eye or touch. And see Cox *v.* Bruce, 18 Q. B. D. 147, 6 Aspin. 152, 56 L. J. Q. B. 121, 57 L. T. Rep. N. S. 128, 6 Wkly. Rep. 207).

his own name in the usual course of employment, will bind the owner,[80] although the vessel at the time is under a charter under which there is no provision for the signing of such bills by him.[81] But he has no implied authority to sign a blank bill of lading, and one so signed is not binding on the owner;[82] and under no circumstances can a master of a vessel charge the vessel or her owner by signing a bill of lading for goods which are not on board,[83] and the owner is not estopped by the signature of the master to the bill to show that the goods were never actually on board;[84] but bills of lading signed by the master before the goods are on board operate on the goods as received, as against the shipper and master, by way of relation and estoppel;[85] and thus if in anticipation of the delivery of goods to the vessel the master signs a bill of lading and goods are subsequently delivered as and for the goods intended to be embraced in it, if there be no intervening title to the goods between the issuing of the bill of lading and the delivery on board, the bill of lading will cover the goods.[86] A bill signed by the agent of the consignor is not ordinarily a good bill of lading;[87] and a bill of lading signed only by the brokers who procured the cargo is of no effect as against a prior regular bill of lading signed by the master and owner of the boat.[88]

c. Construction, Operation, and Effect — (i) *General Rules.* The contract between a ship and the shipper is that which is contained in the bills of lading delivered to the shipper;[89] and a bill of lading, when signed by the carrier,

Rate of freight.— A master has no authority to sign bills of lading for a lower rate of freight than that for which the owner has contracted. Pickernell *v.* Jauberry, 3 F. & F. 217.

Where a captain signs bills for a cargo his power is exhausted and he cannot charge the owner by giving a second set of bills of lading for the same goods. Hubbersty *v.* Ward, 8 Exch. 330, 22 L. J. Exch. 113.

80. McTyer *v.* Steele, 26 Ala. 487.

81. The Mary Bradford, 18 Fed. 189, 23 Fed. 733.

82. The Joseph Grant, 13 Fed. Cas. No. 7,538, 1 Biss. 193.

83. Fellows *v.* Powell, 16 La. Ann. 316, 79 Am. Dec. 581; American Sugar Refining Co. *v.* Maddock, 93 Fed. 980, 36 C. C. A. 42 (holding that the rule that the master of a vessel has no authority by virtue of his position, either actual or apparent, to sign a bill of lading for cargo not actually received on board, applies when there is only a deficiency in part through mistake, and the owner cannot be held liable, either by the original consignee or an indorsee of the bill of lading, for such a shortage, where the quantity actually received is delivered); The Loon, 15 Fed. Cas. No. 8,499, 7 Blatchf. 244; Montell *v.* The Wm. H. Rutan, 16 Fed. Cas. No. 9,724; Smith *v.* Bedouin, [1896] A. C. 70, 65 L. J. P. C. 8; McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 1 Aspin. 160, 25 L. T. Rep. N. S. 317; Brown *v.* Powell Coal Co., L. R. 10 C. P. 562, 44 L. J. C. P. 289, 32 L. T. Rep. N. S. 621, 23 Wkly. Rep. 549; Grant *v.* Mowry, 10 C. B. 665, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665 [*followed* in Cox *v.* Bruce, 18 Q. B. D. 147, 6 Aspin. 152, 56 L. J. Q. B. 121, 57 L. T. Rep. N. S. 128, 6 Wkly. Rep. 207]; Hubbersty *v.* Ward, 8 Exch. 330, 22 L. J. Exch. 113. And see The Freeman *v.* Buckingham, 18 How. (U. S.) 182, 15 L. ed. 341, holding that where the general owner of a vessel allowed another to have the control and management thereof for a certain time, and the latter induced the master whom he has appointed to sign bills of lading for property which was not actually put on board, no lien was created by such bills.

A master has no power to bind the owners or the ship by a false bill of lading, whether the falsity is in relation to the amount of goods shipped or the date of the shipment, and this rule is not changed by the provisions of the Harter Act, 27 U. S. St. at L. 445, c. 105 [U. S. Comp. St. (1901) p. 2946], which subjects a person guilty of a violation of its provisions respecting bills of lading to a fine, which is made a lien on the vessel, but does not make the vessel liable for the damages occasioned thereby. The Isola di Procida, 124 Fed. 942.

84. Brown *v.* Powell Coal Co., L. R. 10 C. P. 562, 2 Aspin. 578, 44 L. J. C. P. 289, 32 L. T. Rep. N. S. 621, 23 Wkly. Rep. 549.

85. The L. J. Farwell, 15 Fed. Cas. No. 8,426, 8 Biss. 61.

86. The Idaho, 93 U. S. 575, 23 L. ed. 978; The J. K. Shaw, 32 Fed. 491.

87. Covill *v.* Hill, 4 Den. (N. Y.) 323 [*reversed* on other grounds in 1 N. Y. 522]. And see Wolfe *v.* Myers, 3 Sandf. (N. Y.) 7.

88. Vandover *v.* Wilmot, 28 Fed. Cas. No. 16,848, 10 Ben. 223.

89. The Thames *v.* Seaman, 14 Wall. (U. S.) 98, 20 L. ed. 804 (holding that the bill retained by the ship or "ship's bill," as it is sometimes called, is designed only for its own information and convenience, not for evidence as between the parties of what their agreement was, and if it differs from a bill of lading the latter controls); The Eva D. Rose, 151 Fed. 704, 153 Fed. 912 (holding that in the absence of a charter-party, the bills of lading delivered to the shipper are taken as the best evidence of the contract of carriage); The Sidonian, 35 Fed. 534, 34 Fed. 805 (hold-

and delivered to and accepted by the shipper without objection, in the absence of fraud, constitutes the contract of carriage, and binds the shipper, although not signed by him.[90] Bills of lading, like other commercial instruments, when indefinite in their terms, are to be construed reasonably according to the presumed intention, to be gathered from the situation of the parties and their relations to the ship and to each other;[91] and in construing and giving effect to the provisions,

ing that where the shipper of a cargo took a bill of lading containing a permission to the vessel to call at any port or ports, and one port, at which the ship was accustomed to call, was known to all parties to be quarantined, although evidence was given that the agent of the ship let the shipper understand that the vessel would not call at the quarantined port, the shipper having thereafter accepted the bill of lading without objection, the bill of lading governed and the shipper could not recover for damages to the cargo occasioned by the vessel being delayed at the quarantined port).

Where two bills of lading are executed, one of which is delivered to the master and the voyage performed thereunder, and the second not seen by him till the end of the voyage, the former is the contract binding on the parties. Costello *v.* 734,700 Laths, 44 Fed. 105.

Bills of lading construed with charter-party.— Acceptance of a bill of lading containing the words "freights and all other conditions as per charter party," brings into the contract, not only all conditions of the charter-party which relate to the payment of freight strictly so called, but all that are referable to the subject-matter of the receipt, the carriage, and the discharge of the cargo. O'Connell *v.* One Thousand and Two Bales of Sisal Hemp, 75 Fed. 408, holding, however, that the shipper, who, supposing the vessel to be under charter, but being ignorant of the terms of the charter-party, refused to accept the bills in this form, and in the presence of the master, and with his acquiescence, struck out the words, notwithstanding a subsequent protest by the master, the contract of carriage was controlled by the bills of lading alone, independently of the terms of the charter-party.

90. Montague *v.* The Henry B. Hyde, 82 Fed. 681.

Stipulations stamped on the face of a bill of lading before its delivery to the shipper, and by express terms included therein, become a part of the contract (Montague *v.* The Henry B. Hyde, 82 Fed. 681); and where a regular shipper delivers goods to a vessel before sailing and receives a shipping receipt, stating that the goods are subject to the conditions expressed in the company's form of bill of lading, but does not receive the bill of lading until after the vessel sails, he must be deemed to have full knowledge of the conditions indorsed on the back of the bill of lading and referred to in the body of it, and to have acquiesced in and agreed to those conditions so far as they were lawfully inserted and legally valid (Calderon *v.* Atlas Steamship Co., 64 Fed. 874 [*affirmed* in 69 Fed. 574, 16 C. C. A. 332 (*reversed* on other grounds in 170 U. S. 272, 18 S. Ct. 588, 42 L. ed. 1033)].

Change of contract by delivery of subsequent bill of lading.— Where goods were delivered to and laden upon a vessel for shipment, and a receipt given therefor, under a written contract for their carriage between the shipper and carrier, the terms of such contract cannot be changed, and new conditions and limitations favorable to the carrier added, by a bill of lading subsequently delivered by it to the shipper, and accepted by him without reading, unless it is shown that his attention was called to such changes, so that he may be presumed to have assented thereto (The Arctic Bird, 109 Fed. 167); and where a bill of lading does not conform to the original contract of shipment, it must yield, in the absence of proof that the parties intended thereby to create a new agreement (The Citta di Palermo, 153 Fed. 378 [*affirmed* in 165 Fed. 437, 91 C. C. A. 592], holding that where a bill of lading presented by the carrier to the shipper for signature, after the shipment has been made, does not conform to the original contract, but includes cargo not taken by the vessel as agreed, it is a proper course for the shipper to sign the same under protest, and such protest will preserve its rights).

A shipping bill, executed by an owner of merchandise and of the canal-boat on which the same was placed for carriage, stating that it was to be delivered according to the marginal address, has the legal force and effect of a regular bill of lading. Dows *v.* Greene, 24 N. Y. 638.

91. Gronstadt *v.* Witthoff, 15 Fed. 265, holding that they should not be construed unnecessarily so as to make different consignees responsible for each other's faults, nor for delays of the vessel if they have no control of her movements or in selecting a dock.

Particular clauses in bills of lading construed.— A clause giving the ship liberty "to tow and assist vessels in all situations," authorizes her to go to the assistance of a vessel in distress and tow her to such place of safety, as, under the circumstances, is most reasonably accessible. Morris Beef Co. *v.* The Wells City, 61 Fed. 857, 10 C. C. A. 123 [*affirming* 57 Fed. 317]; Stuart *v.* British, etc., Nav. Co., 2 Aspin. 497, 32 L. T. Rep. N. S. 257. A provision in a bill of lading for a cargo of coal to be delivered at Portland, Me., which required the consignee "to tow vessel in and out of Back Bay free," is not a contract to pay for the towage merely, but to provide the same. Thompson *v.* Winslow, 130 Fed. 1001 [*affirmed* in 134 Fed. 546, 67 C. C. A. 470]. The clause, "the freight pay-

the conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it are to be taken into consideration.[92] It is the intention of the parties as expressed in the contract which must be regarded, and no exception of a private nature not contained in the contract itself or arising therefrom by implication of law can be engrafted upon it,[93] nor can parol evidence be admitted to vary the bill in so far as it is a contract;[94] but it may explain any ambiguity in them,[95] and furthermore as a receipt a bill of lading is subject to explanation.[96] If nothing is expressed to the contrary in the bill of lading, established usages relating to a voyage are impliedly made part of the contract,[97] and may be shown by parol evidence,[98] but not usages or customs inconsistent with the written contract.[99] Where a loss has occurred to a cargo

able after receipt of the whole in good order," contained in a bill of lading, has reference to the place of delivery and receipt, while the words "in good order" relate to the external appearance of the things received. Gauche *v.* Storer, 14 La. Ann. 411.

92. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 33 C. C. A. 625.

93. Byrne *v.* Weeks, 4 Abb. Dec. (N. Y.) 657 (holding that in an action for freight money by the owner of a vessel against the assignee of a bill of lading, which the owner had signed, he is estopped from setting up a state of facts different from that set forth in the bill of lading, and in reliance on which the assignee has paid for the property described therein); Spence *v.* Chodwick, 10 Q. B. 517, 11 Jur. 872, 16 L. J. Q. B. 313, 59 E. C. L. 517; Atkinson *v.* Ritchie, 10 East 533, 10 Rev. Rep. 372, 103 Eng. Reprint 877.

94. The Wellington, 29 Fed. Cas. No. 17,384, 1 Biss. 279 (holding that inasmuch as a "clear" bill of lading, that is to say, a bill of lading which is silent as to the place of stowage, imports a contract that the goods are to be stored under deck, parol evidence of an agreement that they were to be stored on deck is inadmissible); Leduc *v.* Ward, 20 Q. B. D. 475, 6 Aspin. 290, 57 L. J. Q. B. 379, 58 L. T. Rep. N. S. 908, 36 Wkly. Rep. 537. But see Two Hundred and Sixty Hogsheads of Molasses, 24 Fed. Cas. No. 14,296, 1 Hask. 24 [*following* Vernard *v.* Hudson, 28 Fed. Cas. No. 16,921, 3 Sumn. 405], holding that, although a bill of lading silent as to the place of stowage of cargo carries with it a presumption that the cargo is to be stowed under deck, such silence is not an express contract upon that point, but the owner may prove an agreement to carry on deck.

Thus parol evidence is not admissible to prove representations made by the consignor of goods as to the depth of water at the place of landing named in the bill of lading (Shaw *v.* Gardner, 12 Gray (Mass.) 488); nor to show a different destination and consignee (Wolfe *v.* Myers, 3 Sandf. (N. Y.) 7); nor an agreement that the vessel might deviate (May *v.* Babcock, 4 Ohio 334); nor an agreement to go by a special route (White *v.* Van Kirk, 25 Barb. (N. Y.) 16).

95. Butler *v.* The Arrow, 5 Fed. Cas. No. 2,237, 6 McLean 470, 1 Newb. Adm. 59; Bradley *v.* Dunipace, 1 H. & C. 521, 32 L. J. Exch. 22.

Construction of bill of lading as affected by prior parol contract.—A parol contract for the shipment of goods pursuant to which they were laden on board may be shown to affect the construction of bills of lading signed and delivered after the goods were loaded and when the vessel was about to sail, and, in order that provisions of such bills shall override the prior agreement, the burden rests on the carrier to show that they were called to the attention of the shipper and assented to by him. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

96. The Wellington, 29 Fed. Cas. No. 17,384, 1 Biss. 279.

Twofold nature of bill of lading as contract or receipt see CARRIERS, 6 Cyc. 420.

97. Hostetter *v.* Gray, 11 Fed. 179 [*affirmed* in 137 U. S. 30, 11 S. Ct. 1, 34 L. ed. 568].

Particular clauses of a bill of lading should be construed with references to its general purposes, as indicated by its various clauses, taken together, as well as the surrounding circumstances, and the usages and customs of business. Marx *v.* Nat. Steamship Co., 22 Fed. 680.

98. McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552 (holding that the words "on the steamer," in the bill of lading, may be explained by parol proof of a general usage by which steamboats have barges in tow, at certain stages of water, and lade their goods on the barges); Lowry *v.* Russell, 8 Pick. (Mass.) 360 (holding that where a bill of lading shows goods are to be carried from one port to another, the presumption that a direct voyage was intended may be controlled by evidence of a usage to stop at intermediate ports, or by evidence of personal knowledge on the part of the shipper that course is to be pursued); Falkner *v.* Earle, 3 B. & S. 360, 9 Jur. N. S. 847, 32 L. J. Q. B. 124, 7 L. T. Rep. N. S. 672, 11 Wkly. Rep. 307, 113 E. C. L. 360; Russian Steam-Nav. Trading Co. *v.* Silva, 13 C. B. N. S. 610, 106 E. C. L. 610; Brown *v.* Byrne, 2 C. L. R. 1599, 3 E. & B. 703, 18 Jur. 700, 23 L. J. Q. B. 313, 2 Wkly. Rep. 471, 77 E. C. L. 703. See Aste *v.* Stumore, Cab. & E. 319; Hall *v.* Janson, 3 C. L. R. 737, 4 E. & B. 500, 1 Jur. N. S. 571, 24 L. J. Q. B. 97, 3 Wkly. Rep. 213, 82 E. C. L. 500.

99. Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145; Simmons *v.* Law, 8 Bosw. (N. Y.) 213 [*affirmed* in 4 Abb. Dec. 241, 3 Keyes

before the signing of the bill of lading by the master, it is inoperative as to the liability of the vessel, the rights of the parties having been previously fixed at the time the damage occurred;[1] but where a bill of lading is signed by the master after the damage to the cargo, and the owner repudiates its validity for that reason, the latter cannot deny the liability of the vessel upon the ground that the contract under which the goods were received by the vessel was merged in such bill of lading, the validity of which he denies.[2] A recital in the bill of lading that goods are received in good condition puts upon the carrier the burden of proving loss by excepted perils in case the goods when delivered are in a damaged condition;[3] but the legal presumption which, as between the shipper and master, arises from the bill of lading that the goods were in good condition, cannot affect third persons.[4] Where through bills of lading for railroad and steamship transportation are signed by an agent of the connecting lines as agent severally, but not jointly, a provision in the land-transportation clause giving the carrier full benefit of any insurance effected on the goods does not apply to the ocean carriage.[5]

(11) *Effect of Recitals as to Quantity and Weight.* Bills of lading signed by the master are *prima facie* evidence that the quantities named therein were received on board by him, and the onus of rebutting this presumption and showing that a less quantity than that specified was received lies on the owner;[6] but upon the ground that, as to matters relating to the quantity of goods shipped, a bill of lading operates merely as a receipt,[7] and upon the further ground that a bill of lading cannot be given by an agent of the owner for goods not actually received,[8] it is held that an ordinary bill of lading is not conclusive as between the original parties as to the quantity of goods shipped, and is open to explanation like other receipts,[9] and there can be no recovery for goods indicated in the bill

217]; The Reeside, 20 Fed. Cas. No. 11,657, 2 Sumn. 567.

1. The Edwin, 7 Fed. Cas. No. 4,300, 1 Sprague 477.

2. The Edwin, 7 Fed. Cas. No. 4,300, 1 Sprague 477.

3. Nelson *v.* Woodruff, 1 Black (U. S.) 156, 17 L. ed. 97; Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177; The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)]; The T. A. Goddard, 12 Fed. 174 (holding that the scent of camphor in teas so strong as to be readily perceived in handling the packages is an external mark of their condition; and the recital in the bill of lading that such teas were "received in good order" is therefore *prima facie* evidence that they were not so scented when shipped aboard). And see *infra*, VII, D, 12, d, (1).

4. Brousseau *v.* The Hudson, 11 La. Ann. 427; Compania *v.* Naviera Vascowzada Churchill, [1906] 1 K. B. 237, 10 Aspin. 177, 11 Com. Cas. 49, 75 L. J. K. B. 94, 94 L. T. Rep. N. S. 59, 22 T. L. R. 85, 54 Wkly. Rep. 406.

5. The Montana, 22 Fed. 715, 22 Blatchf. 372 [*affirmed* in 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788].

6. Smith *v.* Bedouin Steam Nav. Co., [1896] A. C. 70, 65 L. J. P. C. 8 (holding that when the master signs a bill acknowledging the receipt of a specific quantity of goods, the ship-owner is bound to deliver the full amount specified, unless he can show that the whole, or some part of it, was in fact not shipped); McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 1 Aspin. 160, 25 L. T. Rep. N. S. 317. And see *infra*, VII, D, 12, d, (1).

7. Myer *v.* Peck, 28 N. Y. 590; Sawyer *v.* Cleveland Iron Min. Co., 69 Fed. 211, 16 C. C. A. 191; Bates *v.* Todd, 1 M. & Rob. 106.

8. Kirkman *v.* Bowman, 8 Rob. (La.) 246. And see *supra*, VII, B, 2, b.

The master of a vessel has no power to bind it by an agreement in a bill of lading that the same shall be conclusive as between the shippers and carrier as to the quantity of cargo to be delivered to the consignees. Law *v.* Botsford, 26 Fed. 651.

9. Kirkman *v.* Bowman, 8 Rob. (La.) 246; Meyer *v.* Peck, 28 N. Y. 590; The J. W. Brown, 14 Fed. Cas. No. 7,590, 1 Biss. 76 (holding that the fact that shippers gave an order to the warehouseman for a cargo, and then settled with him on the faith of the bill of lading, which for some cause was erroneous, does not take the case out of the general rule); Manchester *v.* Milne, 16 Fed. Cas. No. 9,006, Abb. Adm. 115 (holding that a variance between the amount of a cargo as stated in the bill of lading and the amount of such cargo as ascertained at the port of consignment may be explained by showing that the mode of ascertaining the quantity is such that similar variations are necessarily of frequent occurrence); Brown *v.* Powell Coal Co., L. R. 10 C. P. 562, 2 Aspin. 578, 44 L. J. C. P. 289, 32 L. T. Rep. N. S. 621, 23 Wkly. Rep. 549; Bates *v.* Todd, 1 M. & Rob. 106.

The receipt of a lighterman, given upon the count or weighing of the officers of the vessel, is not conclusive as to the delivery of all

of lading but not actually laden on board;[10] and where the cargo as received is all delivered by the carrier at the port of destination, the weight officially ascertained at that place is the conclusive measure of the carrier's accountability, and the fact that the bill of lading calls for a greater tonnage is immaterial.[11] *A fortiori* a bill of lading which states that the vessel is not responsible for the number of pieces, or the weight, removes the ship's presumptive liability for the weight stated therein, and leaves her liable only for what is actually put on board;[12] and she cannot be held liable for shortage, without further proof than the statements of the bill as to the actual amount delivered by the shipper;[13] and similarly when the bill of lading states "weights unknown," in the absence of proof of the weight shipped on a vessel, other than the recitals of the bill of lading, the vessel cannot be held for shortage;[14] and a bill of lading stating that goods were shipped in good order and condition, but also containing an indorsement by the master, "quantity and quality unknown," does not admit as against the owners that the goods were shipped in good order and condition.[15] But a carrier may agree that he will be bound by the quantity specified or that the bill shall furnish the only evidence of the quantity, and in that case will be liable.[16]

the cargo shipped. Perry *v.* Barney, 19 Fed. Cas. No. 11,013.

10. Clark *v.* Clyde Steamship Co., 148 Fed. 243 (holding that a steamship carrier cannot be held liable for non-delivery of goods not actually received for shipment, although it issued bills of lading therefor upon receipts purporting to have been signed by its shipping clerks at the wharf, but which were in fact forged); The Asphodel, 53 Fed. 835 (holding that a ship does not guaranty that the amount of cargo recited in her bills of lading as received on board, and based on her tally, has been actually so shipped and received, and is not absolutely liable if the delivery is short of the amount in the bills of lading; nor can the vendor and vendee of such goods, by any private arrangement, make the ship an insurer of the correctness of her tally, as against fraud or mistake, for their benefit, and as a fulfilment of the vendor' contract, when not fulfilled in fact; and where there is proof of fraud or mistake the ship and owners cannot be held accountable to the consignee beyond the number actually received on board); Hopkins *v.* Wood, 12 Fed. Cas. No. 6,693 (holding that the shippers of a cargo are to be considered as agents of the consignees for the purpose of guaranteeing the amount and quantity of such cargo to the master of a vessel at the point of departure); Thorman *v.* Burt, Cab. & E. 596, 54 L. T. Rep. N. S. 349, 5 Aspin. 563. But see Creighton *v.* The George's Creek, 6 Fed. Cas. No. 3,382, holding that a vessel giving a clean bill of lading for a specified number of bushels of corn is liable for any deficiency, although she proves that she delivered all she received.

The rule applies notwithstanding a custom to deduct from the freight earned the value of any deficiency between the quantity delivered and that stated in the bill of lading Law *v.* Botsford, 26 Fed. 651.

The owner's liability is not increased by the Bill of Lading Act, 18 & 19 Vict. c. 111, making bills of lading conclusive evidence of the shipment, unless he has himself signed the bill. The owners of a ship are not estopped from showing that a statement of freight contained in a bill signed by the ship's agent is incorrect (Jessel *v.* Bath, L. R. 2 Exch. 267, 36 L. J. Exch. 149, 15 Wkly. Rep. 1041), and notwithstanding the act the master can show that the cargo actually received by him differs from that signed for in the bill of lading, when the weight mentioned in the bill is mere matter of measurement (Blanchet *v.* Powell, L. R. 9 Exch. 74, 2 Aspin. 224, 43 L. J. Exch. 50, 30 L. T. Rep. N. S. 28, 22 Wkly. Rep. 490). But the statute operates where a bill of lading is signed by the master who is part-owner and who sues on behalf of himself and his coöwner. Meyer *v.* Dresser, 16 C. B. N. S. 646, 33 L. J. C. P. 289, 10 L. T. Rep. N. S. 612, 12 Wkly. Rep. 983, 111 E. C. L. 646.

But where a master, who is also owner of a vessel, gives a shipper a bill of lading, reciting receipt of a certain amount of cargo, and agreeing to deliver it to the consignees, he is liable for damages to the consignees, who, relying on the correctness of the recital, pay the shipper for more cargo than was actually on board. Relyea *v.* New Haven Rolling-Mill Co., 75 Fed. 420, 42 Conn. 579.

11. Cafiero *v.* Welsh, 4 Fed. Cas. No. 2,286, 8 Phila. (Pa.) 130.

12. Eaton *v.* Neumark, 33 Fed. 891.

13. Abbott *v.* National Steamship Co., 33 Fed. 895, holding that where the evidence shows that respondent's steamship delivered all the bars of iron loaded upon her, and on which a shortage is claimed by reason of the statement in the bill of lading of the number shipped, respondent is not liable.

14. The Timor, 61 Fed. 631; The Pietro, 38 Fed. 148. But see Lebeau *v.* General Steam Nav. Co., L. R. 8 C. P. 88, 1 Aspin. 435, 42 L. J. C. P. 1, 27 L. T. Rep. N. S. 447, 21 Wkly. Rep. 146.

15. The Prosperpino Palasso, 2 Aspin. 158, 29 L. T. Rep. P. S. 622; The Ida, 2 Aspin. 551, 32 L. T. Rep. N. S. 541.

16. Sawyer *v.* Cleveland Iron Min. Co., 69 Fed. 211, 16 C. C. A. 191.

d. Negotiability and Transfer. Bills of lading are assignable and quasi-negotiable, passing title to the property.[17] The assignment and delivery of a bill of lading and invoice of goods *in transitu* for a valuable consideration conveys the legal title, and the goods cannot be attached,[18] or replevied,[19] as the property of the assignor, and the indorsee of a bill of lading may libel the vessel on which the goods are shipped for failure to deliver them, although he may be but an agent or trustee of the goods for others.[20] But a bill of lading is negotiable only in a qualified sense, transferring title but not shutting out any defenses as between the carrier and the original holder,[21] and as the master cannot bind the vessel's owner in receipting for goods not actually in his custody,[22] this defense can be set up against a *bona fide* holder of the bill of lading,[23] and against one who in reliance on the bill of lading had loaned money on the cargo;[24] but the title of a person who makes a *bona fide* advance on a bill of lading of goods subsequently delivered alongside the vessel is not affected by the removal of the goods by the owner from the custody of the vessel, and shipping it in another vessel under a new bill of lading.[25] The general owner of a vessel is not estopped to deny the validity of bills of lading fraudulently signed by the master of a vessel,

17. Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189 (holding that a consignee is the authorized agent of the owner to receive the goods, and his indorsement of the bill of lading to a *bona fide* purchaser for a valuable consideration passes the property); Munroe *v.* Philadelphia Warehouse Co., 75 Fed. 545; The Mary Ann Guest, 16 Fed. Cas. No. 9,196, 1 Blatchf. 358 [*affirming* 16 Fed. Cas. No. 9,197, Olcott 498]. See Dawes *v.* Cope, 4 Binn. (Pa.) 258 (holding that the delivery of the bill of lading and policy of insurance is a sufficient assignment of goods shipped to a foreign port, provided the assignee follows up his claim with due diligence); The Mary Bradford, 18 Fed. 189, 23 Fed. 733. But see The J. K. Shaw, 32 Fed. 491, holding the rule to be otherwise where the bill was signed in blank by the master, filled by the intended shipper, and money loaned on it.

An indorsement by the master on a bill of lading, "Signed under protest," prevents assignees of the bill from claiming as *bona fide* holders, as such words put the holders on inquiry, and they are chargeable with notice that the bill of lading does not contain the contract under which the goods were shipped. Nine Hundred and Seventy-Nine Boxes of Sugar, 18 Fed. Cas. No. 10,271, 7 Ben. 242.

Bills of lading issued at different times for goods not then delivered become concurrently operative as the goods are placed on board, and, in the absence of appropriation by the shipper, where only a part is shipped, *bona fide* holders are entitled to the *pro rata* quantity called for by their bills. The L. J. Farwell, 15 Fed. Cas. No. 8,426, 8 Biss. 61.

Assignment made after sailing of vessel.—Where it was agreed, before the sailing of a vessel, that the bill of lading of the cargo should be assigned as security for a debt; but the assignment was not made till after she sailed, although, by being antedated, it appeared to have been made before, and no possession of the property was taken, the assignment was good between the parties and others having notice. Peters *v.* Ballister, 3 Pick. (Mass.) 495.

It is not necessary that a bill of lading should have been actually indorsed or delivered to the buyer to make him assignee of the same. Philadelphia, etc., R. Co. *v.* Barnard, 19 Fed. Cas. No. 11,086, 3 Ben. 391.

18. Balderston *v.* Manro, 2 Fed. Cas. No. 793, 2 Cranch C. C. 623.

19. The Mary Ann Guest, 16 Fed. Cas. No. 9,196, 1 Blatchf. 358 [*affirming* 16 Fed. Cas. No. 9,197, Olcott 498].

20. The Thames, 14 Wall. (U. S.) 98, 20 L. ed. 804.

21. The Treasurer, 24 Fed. Cas. No. 14,159, 1 Sprague 473.

22. See *supra*, VII, B, 2, b.

23. Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 14 S. Ct. 990, 38 L. ed. 944; Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. (U. S.) 386, 16 L. ed. 599; American Sugar Refining Co. *v.* Maddock, 93 Fed. 980, 36 C. C. A. 42; Brown *v.* Powell Coal Co., L. R. 10 C. P. 562, 2 Aspin. 578, 44 L. J. C. P. 289, 32 L. T. Rep. N. S. 621, 23 Wkly. Rep. 549; Jessel *v.* Bath, L. R. 2 Exch. 267, 36 L. J. Exch. 149, 15 Wkly. Rep. 1041; Grant *v.* Norway, 10 C. B. 665, 20 L. J. C. P. 93, 15 Jur. 296, 70 E. C. L. 665 [*followed* in Cox *v.* Bruce, 18 Q. B. D. 147, 6 Aspin. 152, 56 L. J. Q. B. 121, 57 L. T. Rep. N. S. 128, 6 Wkly. Rep. 207]; Grieve *v.* König, 7 Ct. of Sess. Cas. 521.

Mississippi act of March 10, 1880, making "every bill of lading acknowledging the receipt" of goods conclusive evidence, in the hands of *bona fide* holders, that the goods were actually received for transportation, does not apply to bills of lading issued for a steamboat line, but not naming or designating any particular boat. The Guiding Star, 62 Fed. 407, 10 C. C. A. 454 [*affirming* 53 Fed. 936].

24. The Loon, 15 Fed. Cas. No. 8,499, 7 Blatchf. 244.

25. The Idaho, 12 Fed. Cas. No. 6,997, 5 Ben. 280 [*affirmed* in 93 U. S. 575, 23 L. ed. 978].

appointed by a special owner, in a suit against the vessel by a *bona fide* holder of the bills, who has made advances on the faith of them.[26]

C. Transportation and Delivery — 1. Transhipping and Forwarding. Where a vessel is disabled in the course of the voyage and cannot be seasonably repaired, the master is bound to tranship the goods and send them forward in another vessel if one can be had in the same or any reasonably contiguous port;[27] and his duty as carrier is not ended until they are delivered at its place of destination, or are returned to the possession of the owner, or kept safely until the owner can resume them, or otherwise lawfully disposed of;[28] and where a bill of lading shows that a voyage to a particular place named on it is but part of a longer transit, which it is understood is to be made by the cargo shipped, and that the cargo is to be carried forward in a continuous way on its further voyage, the master

26. The Freeman *v.* Buckingham, 18 How. (U. S.) 182, 15 L. ed. 341.

27. Hugg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425; Rogers *v.* Murray, 3 Bosw. (N. Y.) 357; Saltus *v.* Ocean Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290; Schieffelin *v.* New York Ins. Co., 9 Johns. (N. Y.) 21; Searle *v.* Scovell, 4 Johns. Ch. (N. Y.) 218; McLoon *v.* Cummings, 73 Pa. St. 98 (holding that in so doing, if he can save a part to the owner, he will be considered his agent as well as the shipper's, otherwise, the shipper's alone; for an authority arising from implication only will not be presumed where the act of the master is clearly injurious to the owner); Adams *v.* Haught, 14 Tex. 243; The Maggie Hammond, 9 Wall. (U. S.) 435, 19 L. ed. 772; Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834; Phelan *v.* Alvarado, 19 Fed. Cas. No. 11,067 (where the vessel was compelled to lie in a foreign port for five months waiting for means to procure repairs, and it was held that the voyage was in effect broken up, and the vessel owner should have transhipped the cargo). But see Silver *v.* Hale, 2 Mo. App. 557 (holding that where goods are to be transported by water, and, owing to the state of the river, cannot be taken by water to their destination, the carrier is not bound to forward them overland, and, if there has been no want of diligence, is not answerable for delay, if the goods finally arrived safely); The Bahia, Brown. & L. 292, 11 Jur. N. S. 90, 12 L. T. Rep. N. S. 145; De Cuadra *v.* Swann, 16 C. B. N. S. 772, 111 E. C. L. 772.

Additional freight for transhipment or forwarding see *infra*, VII, C, 1.

A moral necessity is sufficient to justify transhipment, and such a moral necessity exists where the circumstances are such that a master of reasonable prudence and discretion, acting upon the pressure of the occasion, would have made the transhipment from a firm opinion that the vessel could not be delivered from the peril at all or not without the hazard of an expense utterly disproportionate to her real value (Cox *v.* Foscue, 37 Ala. 505, 79 Am. Dec. 69; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; The Sarah Ann. 21 Fed. Cas. No. 12,342, 2 Sumn. 206), and where goods are properly transhipped from one boat to another under circumstances which justify such transhipment, the owners of the first boat are not liable for the subsequent loss of the goods on the other boat, although they could have received them again on their own boat after the danger which caused the transhipment was passed (Cox *v.* Foscue, 33 Ala. 713). The acts of a master in such a case will be upheld by law, if he act as a prudent owner would have done. Rogers *v.* Murray, 3 Bosw. (N. Y.) 357.

Law by which duty is ascertained.— The duty of a master to carry on, tranship, or deliver the cargo at an intermediate port of refuge, implied in a bill of lading given by the master of a foreign vessel, will be ascertained by reference to the law of the flag which the vessel carries, not by reference to the *lex loci contractus* or the *lex fori*, or the law of the place where the alleged breach of contract by the master is committed. The Bahia, Brown. & L. 292, 11 Jur. N. S. 90, 12 L. T. Rep. N. S. 145.

Vessel liable to capture.— By German law, if a vessel is liable to risk of capture, either party may withdraw from the contract of affreightment, but the master is not obliged to part with the cargo or to tranship it, unless distance freight, as well as all other claims of the ship-owner and the contributions due from the cargo for general average, have been paid or secured, and a demand upon the master to tranship at his own risk and expense is not such a compliance with the German law as obliges him to tranship. The Express, L. R. 3 A. & E. 597, 1 Aspin. 355, 41 L. J. Adm. 79, 26 L. T. Rep. N. S. 956.

Repairing instead of transhipment.— If in the course of a voyage a ship carrying cargo is damaged by perils of the sea, the ship-owner intending to carry the cargo to its destination is entitled to a reasonable time for repairing his ship or for transhipping, and for this purpose to retain the cargo. Cargo ex Galam, Brown, & L. 167, 10 Jur. N. S. 477, 33 L. J. Adm. 97, 9 L. T. Rep. N. S. 550, 2 Moore P. C. N. S. 216, 3 New Rep. 254, 12 Wkly. Rep. 495, 15 Eng. Reprint 883.

On a temporary detention a vessel is not bound to transhipp cargo, unless damage is to be expected from the probable delay. The Bohemia, 38 Fed. 756.

28. King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349.

must be presumed to have contracted in reference to the course of trade connected with getting the cargo forward;[29] and the general course of business in forwarding when the ship of the signer of a through bill of lading does not go all the way to the port of ultimate destination, of which fact the shipper has knowledge, or is given notice by the through bill of lading, and the manifest necessity of transhipment by the through undertaker under such contract as it can reasonably make, justifies the presumption of its authority to make such contract, and to bind the shipper thereby, although the terms of the new contract may not be in all respects the same as its own; but, in any event, the undertaking and liability of the second carrier are measured by its own contract, provided its terms are reasonable, and not in contravention of the maritime law.[30] But when a question is raised as to the duty of the master in a port of distress to have transhipped the cargo, it must be considered that his first duty is to carry his cargo to its port of destination in the same bottom;[31] and if the vessel is laid up by stress of weather, it is her duty to complete the voyage when the weather permits, and carry the cargo to its destination;[32] and where a master has a reasonable opportunity, according to the circumstances of the case, of communicating from the port of distress with the owners of the cargo and receiving directions from them, it is his first duty to endeavor to obtain such directions;[33] and he has no right, without necessity, to tranship goods shipped for the voyage on freight;[34] and a transhipment without legal excuse, however competent and safe the vessel into which the transfer is made, is a violation of the contract and subjects the carrier to liability if the freight be lost.[35] Privilege to reship may, however, be reserved in the contract of carriage, and while it has been held that the words "privilege of reshipping," in a bill of lading, are for the benefit of the carrier, and place no obligations upon him to reship,[36] other cases hold that the phrase is to be con-

29. The Convoy, 3 Wall. (U. S.) 225, 18 L. ed. 194; Woodward *v.* Illinois Cent. R. Co., 30 Fed. Cas. No. 18,006, 1 Biss. 403, 30 Fed. Cas. No. 18,007, 1 Biss. 447, holding that a steamboat bill of lading for the delivery of goods at a certain point, specifying the rate of freight to a more distant point, is a through contract, and binds the carrier to deliver at the latter point.

30. The St. Hubert, 102 Fed. 362, holding that where, in such case, the goods are shipped on through bills of lading which authorize the initial carrier to tranship and forward by steamer, "subject to the terms and conditions of local bills of lading issued by the agents of such steamer," or contain other equivalent provisions, the owners of the goods are bound by the provisions of bills of lading issued by the connecting carrier to the first carrier therefor on their transhipment, so far as such provisions are lawful and enforceable.

31. The Hamburg, Brown & L. 253, 10 Jur. N. S. 600, 33 L. J. Adm. 116, 10 L. T. Rep. N. S. 206, 2 Moore P. C. N. S. 289, 12 Wkly. Rep. 628, 15 Eng. Reprint 911. And see Harrison *v.* Stewart, 11 Fed. Cas. No. 6,145, Taney 485, holding that where goods are shipped on board a vessel advertised to sail for a particular port, and a bill of lading is signed for their delivery at that port, the ship-owners are bound to carry the goods by that ship to the port of destination, and it is no defense, in an action for breach of the contract, that the ship-owners offered to carry the goods on another ship at no additional risk or cost.

32. Murray *v.* Ætna Ins. Co., 17 Fed. Cas. No. 9,955, 4 Biss. 417.

33. The Hamburg, Brown. & L. 253, 10 Jur. N. S. 600, 33 L. J. Adm. 116, 10 L. T. Rep. N. S. 206, 2 Moore P. C. N. S. 289, 12 Wkly. Rep. 628, 15 Eng. Reprint 911, holding that the master only becomes agent for the owners of the cargo *ex necessitate rei*.

34. Cox *v.* Foscue, 37 Ala. 505, 79 Am. Dec. 69 (holding that a charge that the transhipment was improper, unless there was no other reasonable way of lightening the boat, is not objectionable; and that the grounding of a steamboat on a river, whence she could have been removed by temporarily landing a part of her cargo, and afterward taking it on board again and finishing her voyage, is not such a case of necessity as will justify a transhipment); Marx *v.* National Steamship Co., 22 Fed. 680 (holding that a ship's contract is to be strictly construed in favor of the shipper, in respect to the vessel designated to carry the goods, and transhipment in a vessel not permitted by the bill of lading will be at the risk of the carriers).

Transhipment held justifiable see Marx *v.* National Steamship Co., 22 Fed. 680.

35. Cox *v.* Foscue, 37 Ala. 505, 79 Am. Dec. 69; Stinson *v.* The Pennsylvania, 12 La. 332; Trodd *v.* Wood, 24 Fed. Cas. No. 14,190, 1 Gall. 443 (holding that if the owner of a vessel who receives goods for transportation tranship them without necessity, he is answerable for a loss of them by capture by public enemies).

36. Sturgess *v.* The Columbus, 23 Mo. 230 (holding that the power of reshipping, con-

strued as granting to the vessel the privilege of reshipping during the voyage, according as its interest or convenience may advise, and is at the same time imposing upon it the duty to do so when practicable and necessary;[37] but he is not bound to tranship on any other vessels than his own, although he must avoid unreasonable delay, and is liable for damages caused thereby.[38] A carrier or forwarder of goods is not the general agent of the owner, and after delivery, pursuant to contract, to another carrier, he has no authority subsequently to dispense with any of the conditions for safe transportation, and the shipper will not be bound thereby;[39] nor does the privilege of reshipping reserved in a bill of lading discharge the boat from any liability not excepted in the contract; and although the right is secured of transhipping on another boat, the liability continues until the goods are safely delivered at the port of destination, if under like circumstances the carrier would be liable had the loss occurred on his own boat;[40] and the master by reshipping under such a clause does not lessen his liability to transport to the port named in the bill, and must show that the goods were put in a good boat.[41] Where goods were to be shipped by water, the mere transhipment by rail and deposit in a warehouse subject to charges, and without notice to the consignee, is not a conversion by the carrier, entitling the consignee to recover the full value of the goods.[42]

2. Goods Sent C. O. D. Bills of lading C. O. D. are not a lien on the vessel to secure payment of the money collected from the consignee on delivery of the goods, in the absence of statute;[43] but statutes regulating the matter in some states otherwise provide.[44]

3. Delivery — a. Mode; Notice to Shipper or Consignee. It is the duty of a vessel and its owners to make delivery of its cargo[45] at the port of deliv-

tained in a bill of lading, is a privilege reserved to the boat, and not an additional undertaking of the carrier, and that it is not therefore a breach of his contract, if, by reason of low water, his boat is obstructed, and he fail to deliver the goods, which by reshipping he might have delivered); Broadwell *v.* Butler, 4 Fed. Cas. No. 1,910, 6 McLean 296, Newb. Adm. 171 (holding that where goods were shipped under bills of lading in the usual form, containing the words "privilege of reshipping," and the boat is detained by the want of sufficient water to carry her over, it is competent to show by usage, in an action for the recovery of freight, that it was not the carrier's duty to reship, instead of waiting for a rise). And see McGregor *v.* Kilgore, 6 Ohio 358, 27 Am. Dec. 260, holding that since a stipulation in a bill of lading that the carrier, in case of low water, may reship in another boat, was for the carrier's benefit, it did not release the carrier from liability for goods damaged by falling in the river while being transferred from a boat which could not proceed further because of low water.

Such privilege cannot be exercised before the voyage has been undertaken or commenced by the original vessel. Dorris *v.* Copelin, 7 Fed. Cas. No. 4,011.

37. Hatchett *v.* The Compromise, 12 La. Ann. 783, 68 Am. Dec. 782 (holding that the clause implies an obligation on the part of the boat to reship if the low water necessitates it and the reshipment is possible); Dorris *v.* Copelin, 7 Fed. Cas. No. 4,011.

38. Mina *v.* I. & V. Florio Steamship Co., 23 Fed. 915.

39. The T. A. Goddard, 12 Fed. 174.

40. Carr *v.* The Michigan, 27 Mo. 196, 72 Am. Dec. 257 (holding also that where the right of reshipping is reserved in a bill of lading, it confers only the simple right to transfer from one boat to another); Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44.

41. Dunseth *v.* Wade, 3 Ill. 285.

42. Howe *v.* Lexington, 12 Fed. Cas. No. 6,767*a*, holding also that where, under a bill of lading, goods are to be shipped by water, and the carrier, without notice to the shipper, tranships them by rail, a custom of the vessel to land and store goods without notice to the consignee is not applicable. And see The Thomas McManus, 24 Fed. 509, holding that there must be clear and satisfactory evidence of a special contract to extend the liability of a steamboat to the transportation and delivery of goods by a railroad beyond the place of the boat's destination, in order to charge the boat with a lien for damages caused by the wrong delivery by the railroad.

43. The Illinois, 12 Fed. Cas. No. 7,005, 2 Flipp. 383 [*disapproving* after careful discussion The Emma, 30 Fed. Cas. No. 18,218, which held *contra*].

44. See the statutes of the several states. And see The Reveille *v.* Landreth, 2 Minn. 175; The John Owen *v.* Johnson, 2 Ohio St. 142.

45. Irzo *v.* Perkins, 10 Fed. 779.

A mere unlivery of the cargo during the voyage, occasioned by an overruling calamity, does not absolve the carrier ship from the obligation to carry the goods to the port of destination. The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

ery;[46] and where the bill of lading is silent as to the delivery, it must be according to the usages and regulations of the port,[47] or according to the custom of trade between the parties,[48] within a reasonable time,[49] and in proper landing

46. The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

Reclamation or delivery at intermediate port.— Where a cargo-owner finds a vessel, with his cargo on board, at a port of refuge, needing repairs which cannot be effected without a cost to him of more than he would lose by taking his property at that place and paying the vessel all her lawful charges against him, he may pay the charges and reclaim the property (The Julia Blake, 107 U. S. 418, 2 S. Ct. 692, 27 L. ed. 595); but the master, although agent for the ship and cargo to the extent of being empowered, in a case of extreme urgency, to sell either or both, is not authorized to accept the cargo on behalf of its owner short of the port of delivery (The Ann D. Richardson, 7 Fed. Cas. No. 410, Ahb. Adm. 499, holding also that laying claim to the proceeds of a sale of a cargo made by the master at an intermediate port, or the bringing suit for such proceeds, does not amount, in law, to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage); and even a shipper, after the goods are once shipped, and the bill of lading delivered, can remove them only on payment of the unavoidable and necessary expenses of unloading, and also indemnifying the party for the difference, if any, between the value of the goods where they were loaded, and what the master or ship-owner is obliged to pay at the port of destination, to an assignee of the bill of lading (Bartlett *v.* Carnley, 6 Duer (N. Y.) 194). As to necessity of paying full freight upon reclaiming goods at intermediate port see *infra*, VII, E, 2, b.

Although provisions in a bill of lading permit the discharge of cargo at other ports than that to which it is consigned in case of circumstances of war, which, in the opinion of the master, render it unsafe to enter or discharge there, the master, as agent of all concerned, is bound to exercise prudence to protect the interests of the cargo as well as the vessel, and the discharge of cargo by him at another port, as being contraband of war, is not justified unless the facts show that there was reasonable necessity therefor. The Styria, 93 Fed. 474 [*reversed* in 101 Fed. 728, 41 C. C. A. 639 (*modified* in 186 U. S. 1, 22 S. Ct. 731, 46 L. ed. 1027) on the ground that such necessity did exist under the circumstances]. But an exception that, in case of blockade or interdict of the port of discharge, or if the entering of or discharging in the port be considered by the master unsafe by reason of war disturbances, he may land the goods at the nearest safe and convenient port, at the expense of the owners, operates as soon as the master, having a reasonable and well-grounded fear of seizure, considers the limit of safety has been reached, and justifies him in landing goods contraband of war at a port neither near nor convenient to the port of destination. Nobel's Explosives Co. *v.* Jenkins, [1896] 2 Q. B. 326, 8 Aspin. 181, 65 L. J. Q. B. 638, 75 L. T. Rep. N. S. 163, holding also that the exception — restraint of princes — in a bill of lading under which the owner of a general ship contracts to carry goods contraband of war, entitles him, upon war being declared, to break his contract, although executed and not merely executory, and to discharge the goods before reaching the port of destination, without any direct or specific act of interference by sovereign authority.

47. Croucher *v.* Wilder, 98 Mass. 322 (holding that where the custom of a certain port authorized a particular mode of discharging cargoes, a ship-owner who lands at that port is entitled to assume, in the absence of notice to the contrary, that his ship will be discharged according to that custom); Jameson *v.* Sweeney, 32 Misc. (N. Y.) 645, 66 N. Y. Suppl. 494; The Mill Boy, 13 Fed. 181, 4 McCrary 383; Irzo *v.* Perkins, 10 Fed. 779; Field *v.* The Lovett Peacock, 9 Fed. Cas. No. 4,768.

A discharge by night under a permit from the collector, in accordance with long-established usage, is as lawful and valid as a discharge by day, and is not *ipso facto* negligence, any more than a discharge by day. The Egypt, 25 Fed. 320.

A consignee cannot force upon a vessel a substituted mode of discharge, involving delay or increased cost. The Dictator, 30 Fed. 637.

Evidence held to show a custom at the port of New Orleans that, in delivering coffee, the ship is to unload it on the wharf, pile it on skids in separate lots according to the bills of lading, and there make delivery to the several consignees; but held further that there was no sufficient proof of any custom as to the length of time that the coffee shall be allowed to remain upon the wharves after unloading. See The Iona, 80 Fed. 933, 26 C. C. A. 261.

48. Jameson *v.* Sweeney, 32 Misc. (N. Y.) 645, 66 N. Y. Suppl. 494.

49. Fowler *v.* Knoop, 4 Q. B. D. 299, 4 Aspin. 68, 48 L. J. Q. B. 333, 40 L. T. Rep. N. S. 180, 27 Wkly. Rep. 299.

Delay caused by vis major.— When a charter-party is silent as to the time within which the cargo is to be unloaded at the port of destination, the contract implied by law is that the ship-owner and the charterer shall each perform his part, and neither is answerable for delay caused by *vis major*. Ford *v.* Cotesworth, L. R. 5 Q. B. 544, 10 B. & S. 991, 39 L. J. Q. B. 188, 23 L. T. Rep. N. S. 165, 18 Wkly. Rep. 1169. See Cunningham *v.* Dunn, 3 C. P. D. 443, 3 Aspin. 359, 48 L. J. C. P. 62, 38 L. T. Rep. N. S. 631.

Risk of capture.— An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary cour-

order;[50] and where a consignee refuses to pay the freight the carrier must land the goods and store them with a competent third party, subject to the consignee's order on payment of the freight.[51] In the absence of a special contract goods will be regarded as properly delivered when deposited upon the proper wharf at their place of destination, at a proper time, and notice given to the consignee, after which he has had a reasonable time and opportunity to remove them.[52] The different consignments must be properly separated, so as to be open to inspection by their respective owners, and a fair opportunity afforded the consignee to remove his goods,[53] and notice, or a valid excuse for not giving it, followed by a

age, judgment, and experience will justify delay in the prosecution of a voyage; and a ship is not answerable in a suit under the Admiralty Court Act (1861), § 6, for damage to cargo caused by such delay. The San Roman, L. R. 5 P. C. 301, 1 Aspin. 603, 42 L. J. Adm. 46, 28 L. T. Rep. N. S. 381, 21 Wkly. Rep. 393.

50. The Harold Haarfager, 11 Fed. Cas. No. 6,083, 8 Ben. 216, holding that the ship must put casks containing cement in proper landing order before discharging them, and recooper them in the hold, if necessary to save their contents, although their insufficiency was caused by shrinkage in the hold because made of green staves.

A stipulation in the bill that cotton should be received as unloaded, package by package, and thereafter should not be at the expense or risk of the vessel, is not unreasonable, and will be enforced. The Santee, 21 Fed. Cas. No. 12,328, 2 Ben. 519 [*affirmed* in 21 Fed. Cas. No. 12,330, 7 Blatchf. 186].

51. The Adella S. Hills, 47 Fed. 76; Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

If there is no such competent party at the port of discharge, the master should land the goods at the nearest port where such a competent party can be found. Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

52. Stone *v.* Clyde Steamship Co., 139 N. C. 193, 51 S. E. 894 (holding a carrier not guilty of actionable negligence in permitting goods to be injured by the elements after arrival and pending removal by the consignees, where the latter had been notified of the arrival of the goods, had paid the freight, and had permitted a portion of the goods to remain on the carrier's uninclosed platform or shed, according to custom); Scott *v.* Province, 1 Pittsb. (Pa.) 189 (holding that where the carrier places the goods upon the wharf, and gives such a description as will enable the consignee, with ordinary diligence, to find them, and the consignee agrees to accept them, this is a good delivery); Farmers' etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; The Grafton, 10 Fed. Cas. No. 5,656, Olcott 43; Kennedy *v.* Dodge, 14 Fed. Cas. No. 7,701, 1 Ben. 311; Leaning *v.* Standish, 15 Fed. Cas. No. 8,161; The Middlesex, 17 Fed. Cas. No. 9,533, Brunn. Col. Cas. 605; Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,266, 1 Cliff. 396; Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,267, 3 Ware 110; The Santee, 21 Fed. Cas. No. 12,328, 2 Ben. 519; The Tybee, 24 Fed. Cas. No. 14,304, 1 Woods 358; Warner *v.* The Illinois, 29 Fed. Cas. No. 17,184*a*.

Placing goods in a public storehouse without notice to the consignee, when he is known, does not release the liability of the ship for their safe-keeping and ultimate safe delivery. Snow *v.* The Inca, 22 Fed. Cas. No. 13,145*a*, holding also that publication of notice in a newspaper, requiring consignees to present their permit within five days, or the goods will be sent to the public store, is not sufficient to charge a consignee with notice, in the absence of positive provision of law to that effect, or proof that the notice actually reached him.

Delivery held sufficient see Mayell *v.* Potter, 2 Johns. Cas. (N. Y.) 371 (holding that where a master signed a bill of lading for goods to be delivered to a transient person who had no place of business at the port of destination, and the master, on arriving, inquired for such person, and, being unable to find him, delivered to merchants there for him, the master was not liable to the consignor on the bill of lading; he having acted *bona fide* according to the usage of trade); Willis *v.* The City of Austin, 2 Fed. 412; Ellsworth *v.* The Wild Hunter, 8 Fed. Cas. No. 4,411, 2 Woods 315.

Delivery held insufficient see The St. Laurent, 21 Fed. Cas. No. 12,231, 7 Ben. 7; The Ville de Paris, 28 Fed. Cas. No. 16,942, 3 Ben. 276, where a case of goods put over the vessel's side upon a truck and wheeled to the place where it was inspected and marked for the public store, and then wheeled further up the wharf according to the usual course of business, and disappeared within a half hour within the inclosure.

53. The Titania, 131 Fed. 229, 65 C. C. A. 215 [*affirming* 124 Fed. 957]; The Boskenna Bay, 22 Fed. 662; Dibble *v.* Morgan, 7 Fed. Cas. No. 3,881, 1 Woods 406 (holding that where the goods of several consignees were piled together in one bulk upon the wharf during a rainy and stormy day and covered with tarpaulins, so as not to be fairly open to the inspection of consignees and a fair chance afforded to remove them, this was no delivery); The Santee, 21 Fed. Cas. No. 12,330, 7 Blatchf. 186 [*affirming* 21 Fed. Cas. No. 12,328, 2 Ben. 519] (holding that when a bill of lading provides that goods should be received as unloaded, and the full number of packages are discharged on the wharf, the ship is not liable, although they were not

reasonable time for removal, is indispensable;[54] and a mere deposit of goods,

all received by the consignee, where he had previous notice of the unloading, and the ship did not deliver to another, and the fact that the consignee was obliged to receive the cargo as landed on the wharf, package by package, does not dispense with the necessity of due notice to the consignee, and a reasonable opportunity to identify the goods and receive them into his custody).

54. *Illinois.*— Crawford *v.* Clark, 15 Ill. 561 (applying the rule to coasting vessels); Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

Louisiana.— Kennedy *v.* Roman, 19 La. Ann. 519; Barstow *v.* Murison, 14 La. Ann. 335.

Massachusetts.— Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202.

New York.— Rosenstein *v.* Vogemann, 184 N. Y. 325, 77 N. E. 625 [*affirming* 102 N. Y. App. Div. 39, 92 N. Y. Suppl. 86] (where in an action against a carrier for damage to goods which were unloaded upon a pier, which collapsed, the evidence was held to justify a finding that sufficient notice of the arrival of the ship and a reasonable time to appear and take charge of the freight was not given to the consignee); Barclay *v.* Clyde, 2 E. D. Smith 95; Rowland *v.* Miln, 2 Hilt. 150. But see Ely *v.* New Haven Steamboat Co., 53 Barb. 207, 6 Abb. Pr. N. S. 72, holding that where goods were landed on a wharf on the fourth of July, and it appeared that the store of the consignee was closed the whole of the day on which the goods arrived, it was held that the carrier was excused from giving notice of the arrival of the goods.

Tennessee.— Dean *v.* Vaccaro, 2 Head 488, 75 Am. Dec. 744, holding that the usage or custom of a port cannot dispense with delivery, or notice of the landing, of the goods; nor will the fact that the consignee and others had submitted to a delivery of goods to a drayman before, when no loss occurred, bind him to yield his legal right to notice when it is for his interest to assert it.

United States.— The Titania, 131 Fed. 229, 65 C. C. A. 215 [*affirming* 124 Fed. 957] (holding that to establish a constructive delivery by a ship of goods deposited on the wharf, it is necessary for the carrier to show that he separated the goods from the general bulk of the cargo, designated them, and gave due notice to the consignees of the time and place of their deposit, and a reasonable time for their removal); The Nail City, 22 Fed. 537; Germania Ins. Co. *v.* La Crosse, etc., Packet Co., 10 Fed. Cas. No. 5,361, 3 Biss. 501 (holding that it is not a sufficient delivery of a cargo of wheat in bulk to moor the vessel at the dock of the consignee's elevator during bad weather, without notice to him); The Peytona, 19 Fed. Cas. No. 11,058, 2 Curt. 21 [*affirming* 19 Fed. Cas. No. 11,059, 1 Ware 541] (holding also that, although ordinarily the master is not bound to seek out the consignor for the purpose of signing bills of lading, if, when they are presented to him by an agent of the consignor, he objects to one of their stipulations, and says he will call on the consignor, and sails without doing so, he is in fault, and cannot have any advantage from the non-existence of bills of lading, and claim such non-existence as an excuse for not giving notice to the consignee of the landing of the cargo); Vose *v.* Allen, 28 Fed. Cas. No. 17,005.

See 44 Cent. Dig. tit. "Shipping," § 426.

Where the unloading is temporarily interrupted by the crowded state of the wharf, on account of other consignees not removing their goods, no new notice need be given on resumption of the work. Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,267, 3 Ware 110, 21 Fed. Cas. No. 12,266, 1 Cliff. 396.

Advertising the arrival of a ship, which advertisement is not seen by the consignee, is not legal notice to him. Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474; Caruana *v.* British, etc., Royal Mail Steam-Packet Co., 5 Fed. Cas. No. 2,484, 6 Ben. 517. But see Medley *v.* Hughes, 11 La. Ann. 211; The Boskenna Bay, 40 Fed. 91, 6 L. R. A. 172 [*reversing* 22 Fed. 662].

Posting on bulletin board.— Notice to consignees of the time and place of discharge of cargo, when required, may be given by posting on a bulletin board at the custom-house at a port where it is usual to post such notices, and not to publish them in the newspapers. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903.

Casual knowledge of the vessel's arrival and purpose to discharge it at a certain wharf does not dispense with notice (The Middlesex, 17 Fed. Cas. No. 9,533, Brunn. Col. Cas. 605); and does not impose upon the consignee the duty of waiting at the vessel till his merchandise is discharged (Robinson *v.* Chittenden, 7 Hun (N. Y.) 133 [*reversed* on other grounds in 69 N. Y. 525]; nor does the mere fact that the libellant's agent knew of the arrival of the ship (Unnevehr *v.* The Hindoo, 1 Fed. 627; The Mary Washington, 16 Fed. Cas. No. 9,229, 1 Abb. 1, Chase 125). But on the other hand it is held that if a consignee has actual notice of the arrival of the vessel containing the consignment, the master is not bound to give him further notice thereof. Thebaud *v.* The Ravensdale, 75 Fed. 413.

Under a bill of lading requiring the goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, otherwise they will be deposited, at the risk of the consignee, in the warehouse provided for that purpose, personal notice to the consignee of the time and place of discharge is not necessary. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903 [*affirming* 29 Fed. 184].

Where discharge at a wharf other than the vessel's usual wharf is allowable and proper under the usages of trade or the necessities of the case, the obligation of the carrier to

upon the carrier's own wharf, the goods not being separated and set apart from the rest of the cargo, and there being no acceptance by the consignee, and no reasonable time or opportunity for their removal, is not a delivery to the consignee.[55] The notice to take the place of actual delivery must be a reasonable one,[56] properly directed to the consignee's business address,[57] unless the bill of lading provides that the consignee is bound to be ready to receive his goods on the ship's readiness to discharge, otherwise that they may be landed without notice, and at his risk, after they leave the deck of the ship, in which case, if the consignee is not ready to receive on the ship's readiness to discharge, the ship may land the goods without notice; and if landed in suitable weather, with opportunity to remove them without injury, the vessel is absolved from all further liability;[58] but even under such a clause if they are discharged at an improper time, or exposed to known and imminent peril of loss, without due notice, the ship will be held liable for breach of duty,[59] and any right of the carrier under the contract to compel consignees to take goods shipped "from alongside" is waived by the carrier unloading the goods on to the dock.[60] Although the liability of a ship as common carrier ends after reasonable notice to the consignee to remove the goods, and failure to do so, a liability as bailee follows until the consignee accepts the goods, and if the goods have been discharged upon a wharf, the latter liability relates back to and includes any negligence in the selection of the wharf;[61] and thus where freight is landed from the vessel at its destination on its platform or wharf, and the consignees are notified of its arrival, pay the freight, and remove part of the goods, although the carrier's responsibility is terminated, an obligation remains with reference to goods not removed of a warehouseman or wharfinger.[62]

b. Place. The place of delivery of a cargo depends much on the usage of the port.[63] Although it has been held that *prima facie* there can be no delivery

give notice to the consignees of the time and place of discharge is not increased or modified thereby if the consignees are not prejudiced by the change. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903 [*affirming* 29 Fed. 184].

A master who has wrongfully omitted to sign bills of lading, and sailed without learning the names of the consignees, cannot avail himself of this ignorance as an excuse for not giving notice of the landing of the goods. The Peytona, 19 Fed. Cas. No. 11,058, 2 Curt. 21.

55. Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390; Price *v.* Powell, 3 N. Y. 322; Warner *v.* The Illinois, 29 Fed. Cas. No. 17,184*a*, 18 Reporter 11.

56. Crawford *v.* Clark, 15 Ill. 561; Rosenstein *v.* Vogemann, 102 N. Y. App. Div. 39, 92 N. Y. Suppl. 86 [*affirmed* in 184 N. Y. 325, 77 N. E. 625]; Atlantic Nav. Co. *v.* Johnson, 4 Rob. (N. Y.) 474; Addicks *v.* Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 727; The Middlesex, 17 Fed. Cas. No. 9,533, Brunn. Col. Cas. 605.

Notice held sufficient see The Kate, 12 Fed. 881; The Iddo Kimball, 12 Fed. Cas. No. 7,000, 8 Ben. 297.

In the case of vessels arriving from foreign voyages or long coasting voyages, the master, on mooring his vessel, must give early notice to the consignees of his arrival and readiness to deliver the goods, after which he may proceed to unload, and the consignee should be promptly on hand to receive delivery. Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,267, 3 Ware 110.

57. Union Steamboat Co. *v.* Knapp, 73 Ill. 506.

58. The Boskenna Bay, 40 Fed. 91, 6 L. R. A. 172 (holding that under such provision, the consignee is bound to watch for the ship's arrival, and be ready to receive the goods at the time and place they are deliverable; and, in default, the ship may land the cargo without previous notice); The Surrey, 40 Fed. 90 [*reversing* 26 Fed. 791].

"Ready to discharge."—A vessel is not ready to discharge, within the meaning of a provision in the bill of lading that all goods are to be taken from alongside immediately the vessel is ready to discharge, when it is impossible for her to discharge without destroying the cargo. The Aline, 19 Fed. 875.

59. The Surrey, 26 Fed. 791 [*reversed* in 40 Fed. 90, on the ground that the weather was not unsuitable for discharging].

60. The Titania, 131 Fed. 229, 65 C. C. A. 215 [*affirming* 124 Fed. 975], holding also that the question of the duty of the carrier to deliver goods carried is to be determined by the bill of lading, without regard to the charter-party, of which the shipper had no notice till after the terms of his contract with the ship had been unalterably fixed.

61. The City of Lincoln, 25 Fed. 835, holding that for the selection of a wharf which is known to be weak for the discharge of the cargo the vessel is liable. And see *infra*, VII, C, 3, b.

62. Stone *v.* Clyde Steamship Co., 139 N. C. 193, 51 S. E. 894.

63. Dalzell *v.* The Saxon, 10 La. Ann. 280 (holding that where defendant received on

except a personal delivery to the agreed consignee or his agents,[64] the general rule is that in the absence of a clearly defined usage or provision in the bill of lading the goods need not be tendered personally to the consignee,[65] or delivered at his warehouse [66] or residence;[67] nor is the ship obliged to deliver freight at a pier nearest to the address of the consignee as given in the bill of lading.[68] Under a bill of lading requiring goods to be landed at a certain place, the goods must be landed there from the ship, if it can be done with safety to her;[69] and a vessel must deliver her cargo within such parts of the port as have become fixed by established usage, if a customary berth can be obtained there within a reasonable time, and if she goes elsewhere must make good the additional expense thereby caused to the consignee;[70] and in the absence of any different usage of the port, or other indication in the bill of lading, a vessel is bound to land her cargo at some suitable wharf,[71] which must if possible be the customary

board a cargo, to be delivered at the port of Louisville and reshipped thence to Pittsburg, a delivery thereof on the wharf at Portland within the corporate limits of, but about two miles below, Louisville, was a satisfaction of the bill of lading under the usage existing); Shepherd *v.* Lanfear, 5 La. 336, 25 Am. Dec. 181 (holding that if the general laws of the country change the place of delivery in case of quarantine the freighter is bound to receive it there); Riddick *v.* Dunn, 145 N. C. 34, 58 S. E. 439 (holding that where a consignee of goods did not inform a transportation company of his intention not to be bound by the established custom at a certain port to make wharfage charges against consignees and not against the carrier, the carrier was entitled to unload the goods at the wharf, which was the usual place of deposit, instead of delivering them out of the ship or at its side). But see Wayne *v.* The Albatross, 1 Ohio Dec. (Reprint) 219, 4 West. L. J. 528, holding that, however general the custom at a port for steamboats to deliver goods to the wharf boat, such delivery, unless authorized by the owner, does not discharge the carrier.

Effect of quarantine.— A usage of consignees at a particular port to receive shipments during the quarantine season at the quarantine grounds, as being a compliance with the engagement of the bill of lading to deliver at such port, is valid; and the bill of lading should be construed with reference to it (Bradstreet *v.* Heran, 3 Fed. Cas. No. 1,792, 1 Abb. Adm. 209 [*affirmed* in 3 Fed. Cas. No. 1,792*a*, 2 Blatchf. 116]); and if the general laws of the country change the place of delivery in case of quarantine, the freighter is bound to receive it there (Shepherd *v.* Lanfear, 5 La. 336, 25 Am. Dec. 181); and the shipper or consignee is bound to pay the expenses of unloading (Rice *v.* Clendining, 3 Johns. Cas. (N. Y.) 183); but where the bill of lading specifies that the cargo is to be delivered at a certain wharf, and the quarantine officials require the ship to undergo quarantine, permitting at the same time the cargo to be removed from the ship, the owners of the ship are not relieved from the obligation to deliver the cargo as specified in the bill of lading (Leland *v.* Agnew, 15 Fed. Cas. No. 8,236).

Expense of delivery.— Ship-owners can recover from the consignees the expense incurred by them in unloading the vessel, where the bill of lading provides that the cargo should be delivered from the ship's deck, when the ship's responsibility should cease. Turnbull *v.* Eighty-Seven Blocks of Marble, 9 Fed. 320.

64. The Emilien Marie, 2 Aspin. 514, 44 L. J. Adm. 9, 32 L. T. Rep. N. S. 435; Gatliffe *v.* Bourne, 4 Bing. N. Cas. 314, 7 L. J. C. P. 172, 5 Scott 667, 33 E. C. L. 729; Howard *v.* Shepherd, 9 C. B. 297, 19 L. J. C. P. 249, 67 E. C. L. 297.

65. Chickering *v.* Fowler, 4 Pick. (Mass.) 371; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657 [*affirming* 2 Sweeny 623]; Cope *v.* Cordova, 1 Rawle (Pa.) 203; The Grafton, 10 Fed. Cas. No. 5,656, Olcott 43, holding that a delivery of a cargo on the wharf in New York, with notice to the owners of the time and place of unlading, places the goods at their risk, and discharges the ship from liability. But see Hemphill *v.* Chenie, 6 Watts & S. (Pa.) 62.

66. Dibble *v.* Morgan, 7 Fed. Cas. No. 3,881, 1 Woods 406.

67. Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453.

68. Western Transp. Co. *v.* Hawley, 1 Daly (N. Y.) 327.

69. Shaw *v.* Gardner, 12 Gray (Mass.) 488.

70. The Port Adelaide, 38 Fed. 753.

71. Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510 (holding that where cargo is, by the bill of lading, to be delivered at a designated port of wide extent, without naming the particular place within the port, delivery must be made according to the established custom and usage of the port, and in that part of it customarily used in the discharge of similar goods, and to ascertain this, proof of usage, either general or in particular lines of trade, is competent); Gronstadt *v.* Witthoff, 15 Fed. 265; Higgins *v.* U. S. Mail Steamship Co., 12 Fed. Cas. No. 6,569, 3 Blatchf. 282 (as at the shipper's wharf).

The legal limits of a port are such as are fixed or recognized by the statutes of the state or of the United States. Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 20 Fed. 510, holding that various

wharf,[72] and the master is bound not only to select a customary wharf for the delivery of the cargo, but the place selected must be fit and safe for its deposit; [73] but where the carrier agreed to transport a cargo of goods and deliver them at a certain wharf, and on arrival at the designated place no wharf exists, the refusal of the carrier to build one constitutes no defense to an action for the freight.[74] While the master may, in the absence of instructions, lawfully proceed to any usual and convenient wharf at the port of discharge, without consulting the shippers,[75] the sole consignee, or all the consignees, if unanimous, may direct the master to unlade at any usual and convenient wharf at the port of discharge,[76] but not at a wharf which is unreasonably inconvenient, inaccessible, or extrahazardous to the vessel; [77] nor can the consignor name an unsafe port of delivery under a charter-party permitting him to designate a good safe port.[78] Where a cargo is sent to a foreign country, and the consignor does not designate any particular port of delivery, the presumption is that the general port of delivery of such cargoes was intended.[79]

state statutes recognize a part of the western shore of Long Island, including Brooklyn, as a part of the port of New York.

The customary discharge of goods by a carrier at its own wharf raises no liability for loss occasioned solely by the discharge of goods at another wharf, unless the custom is clearly long established, and without exception; and, in the absence of contract stipulations, a vessel is not responsible for goods discharged at a certain wharf by her, when the evidence to sustain the custom of discharging at another wharf consisted of proving six such discharges, and there was evidence showing that, for convenience, the carrier sometimes discharges its goods at other wharves. Arnold *v.* National Steamship Co., 29 Fed. 184 [*affirmed* in 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903].

72. The Port Adelaide, 38 Fed. 753. But see Carter *v.* The Mascotte, 51 Fed. 606, 2 C. C. A. 400 [*reversing* 48 Fed. 119], holding that the custom of the port of New York requiring cargoes of tea to be discharged in the "tea district," on the New York side of the East river, does not apply to a general ship, a minor portion of whose cargo consists of tea; and where such a ship endeavored, without success, to obtain a berth in such district, and afterward secured a berth elsewhere, acceptable to consignees of the rest of the cargo, she was not liable for the increased cost caused by discharging the tea there.

73. Stone *v.* Rice, 58 Ala. 95 (holding that a steamboat carrier, having goods consigned to a consignee at a landing where there had been a warehouse keeper who usually received and took care of goods landed there, cannot avoid liability by proving a delivery of goods at the usual place on the river bank, without any protection or guard, when the landing had in the meantime been broken up by inundation, and the washing away of the buildings and the removal of the persons which constituted it a landing); Sleade *v.* Payne, 14 La. Ann. 453; Wodruff *v.* Havemeyer, 106 N. Y. 129, 12 N. E. 628; The Majestic, 12 N. Y. Leg. Obs. 100 (holding that a sea carrier is bound to select a safe wharf for the discharge of cargo, and is not discharged from its duty to the consignee of the cargo by a direction of the consignee of the ship to use a wharf which was insufficient).

The words, "to be taken free from on board," in a bill of lading, do not import any obligation to discharge the cargo on lighters, rather than on a wharf. Gronstadt *v.* Witthoff, 15 Fed. 265.

Where the contract declares that the consignees are to take the cargo "from alongside," that means that it is to be taken from where the ordinary appliances of the ship would leave it in discharging, "at the end of the ship's tackle," on a wharf, if the ship was discharging at a wharf; on a lighter, if the ship could not reach a wharf and was discharging in the stream. Turnbull *v.* Citizens' Bank, 16 Fed. 145, 4 Woods 193; Vose *v.* Allen, 28 Fed. Cas. No. 17,006, 3 Blatchf. 289.

74. McCaughn *v.* Milliot, 78 Miss. 976, 29 So. 818.

75. The E. H. Fittler, 8 Fed. Cas. No. 4,311, 1 Lowell 114.

76. Richmond *v.* Union Steamboat Co., 87 N. Y. 240; Devato *v.* Eight Hundred and Twenty-Three Barrels of Plumbago, 30 Fed. 510 (holding that a usage is valid for a majority of the consignees of the cargo of a general ship to name the place of discharge, provided it be a suitable place and within the limits ordinarily used for the discharge of similar goods); The Cervin, 17 Fed. 462 (holding that a steamship having accepted a pier on the East river, New York, as a suitable pier designated by the owners of the majority of the cargo for discharging, is in fault in leaving the pier with part of the cargo on board, and going to a pier in Brooklyn and there discharging the balance); The Boston, 3 Fed. Cas. No. 1,671, 1 Lowell 464; The E. H. Fittler, 8 Fed. Cas. No. 4,311, 1 Lowell 114; The Felix, L. R. 2 A. & E. 273, 37 L. J. Adm. 48, 18 L. T. Rep. N. S. 587, 17 Wkly. Rep. 102.

77. O'Rourke *v.* Two Hundred and Twenty One Tons of Coal, 1 Fed. 619 (holding also that a private wharf is a proper place to discharge a cargo, where it can be used by strangers upon the payment of compensation); Robbins *v.* Welsh, 20 Fed. Cas. No. 11,887, 9 Phila. (Pa.) 409.

78. Evans *v.* Bullock, 3 Aspin. 552, 38 L. T. Rep. N. S. 34.

79. Smith *v.* Davenport, 34 Me. 520.

c. To Whom; Misdelivery. His proper share of the cargo [80] must be delivered to the consignee or to one duly authorized by him to receive it,[81] the primary duty of the carrier being to deliver the goods to the right person.[82] Delivery to the master of the wharf at the port of delivery does not constitute a delivery to the consignee unless the master was specially authorized by the consignee to receive the goods, or unless his receipt for the property was ratified; [83] and a wharfinger to whom a ship delivers goods with instructions not to deliver them to the consignee except on payment of freight is agent of the ship until the freight is paid, and delivery to him is not delivery to the consignee, binding as an acceptance of the goods; [84] and similarly if a vessel delivers goods on the wharf, and gives notice to the consignee of its arrival, its liability to the latter is not discharged by employing a clerk to deliver the cargo to the proper parties, but it is liable to the consignee for a misdelivery by the clerk.[85] There being conflicting claims, the carrier must at his peril deliver to the person rightfully entitled.[86] Thus when different parts of bills of lading drawn in different sets are presented by different holders, although it was formerly held that the captain is not concerned to examine who has the best right but might deliver the goods upon any one of them,[87] this is not now the rule, but the duty is upon the master to ascertain the rightful owner and deliver to him or to interplead; [88] but if only one part of the bill of lading be presented, and if the master has no knowledge that any other part has been indorsed, he may properly and safely deliver in accordance with the indorsement and holding of the part presented, without inquiry as to the other; [89] and it is not necessary to the effectiveness of a conclusive delivery of the goods that more than one part of the set should be indorsed or delivered, and where one part has passed the indorsed title to the goods under the assignment

80. The Pietro G., 38 Fed. 148.

81. Brower *v.* Peabody, 18 Barb. (N. Y.) 599 [*reversed* on other grounds in 13 N. Y. 121].

An officer of the custom-house, on board a ship in the discharge of his official duty to care for the lawful unloading of the cargo, is not, as such, authorized to receive the goods; and a discharge, with his knowledge and assent, is not such a delivery as relieves the carrier from liability. McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657. But when the duties on dutiable goods are not paid upon their arriving at the port of New York, under the laws of congress and the treasury regulations of that port, the custom-house officers are the only persons authorized to receive such goods on the wharf; and when they do so receive them, day or night, the liability of the carrier terminates (Redmond *v.* Liverpool, etc., Steamship Co., 56 Barb. (N. Y.) 320 [*reversed* on other grounds in 46 N. Y. 578, 7 Am. Rep. 390]; and generally where, by the local law and usage, dutiable goods imported are required to be delivered to the customs authorities, who assume the responsibility of thereafter making delivery to the proper person on payment of the duty, a delivery by the ship to such authorities is a good delivery as between carrier and shipper (The Asiatic Prince, 97 Fed. 343 [*affirmed* in 108 Fed. 287, 47 C. C. A. 325]).

Usage requiring receipt from consignee.— A usage of a port that in order to constitute a delivery of goods it is necessary for a receipt to be given by the consignee or his agent, and that until then the liability of the carrier continues, is unreasonable and illegal. Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155.

Delay in presenting manifest.— A delay of the master to present to the custom-house officers at the port of consignment a proper manifest, by which delay the owner of goods shipped on board is unable to pass them through the custom-house, is a neglect of his duty as master, for which the vessel is responsible. The Zenobia, 30 Fed. Cas. No. 18,209, Abb. Adm. 80.

82. McKeon *v.* McIver, 18 L. T. Rep. N. S. 410 [*affirmed* in L. R. 6 Exch. 36, 40 L. J. Exch. 30, 24 L. T. Rep. N. S. 559].

83. Harkness *v.* Church, 10 La. Ann. 64, holding, however, that the authority of a wharf master to receive goods for the consignee may be inferred from the fact that the consignee paid to the wharf master money advanced by him for freight.

84. Williams *v.* The Columbia, 1 Wash. Terr. 95.

85. The Ben Adams, 3 Fed. Cas. No. 1,289, 2 Ben. 445.

86. Batut *v.* Hartley, L. R. 7 Q. B. 594, 1 Aspin. 337, 41 L. J. Q. B. 273, 26 L. T. Rep. N. S. 968, 20 Wkly. Rep. 899; Hiort *v.* Bott, L. R. 9 Exch. 86, 43 L. J. Exch. 81, 30 L. T. Rep. N. S. 25, 22 Wkly. Rep. 414; Wilson *v.* Anderton, 1 B. & Ad. 450, 9 L. J. K. B. O. S. 48, 20 E. C. L. 555.

87. Fearon *v.* Bowers, 1 H. Bl. 364 note.

88. Glyn *v.* East India, etc., Dock Co., 7 App. Cas. 591, 4 Aspin. 580, 52 L. J. Q. B. 146, 47 L. T. Rep. N. S. 309, 31 Wkly. Rep. 206. And see Webb *v.* Winter, 1 Cal. 417.

89. Glyn *v.* East India, etc., Dock Co., 7 App. Cas. 591, 4 Aspin. 580, 52 L. J. Q. B.

to him, it is perfected so far as consecutive delivery can make it so as against a subsequent indorsee of another part or parts of the set, although the latter may obtain actual possession of the goods.[90] Where a vessel goes aground not far from a port of delivery, consignees who received cargo where she lay thereby waived a delivery in strict compliance with the contract;[91] but if the vessel strands on a voyage near her port of delivery, and on being released starts back with the intention of delivering the cargo back to the consignors, in violation of the contract of carriage, the consignees are entitled to sue the vessel in admiralty to recover the cargo and damages for its non-delivery.[92]

d. Failure or Refusal to Deliver. The carrier's primary duty is to carry and deliver, and failure or refusal to deliver will render him liable,[93] unless justified by some legal excuse;[94] and even a carrier who contracted to carry under an agreement that it should not be liable for loss or damage to the goods is liable for failure to deliver, unless it shows that such failure was caused by the goods being lost.[95] But the carrier is not liable for failure to deliver where upon notice no one appears to accept delivery,[96] or where the consignee's agent refuses to receive;[97] and where shippers abandon to their insurers a cargo damaged by the fault of the carrier before its arrival at the place of destination, and the insurers take possession and sell the goods at the port of disaster, such action terminates the responsibility of the carrier, and he cannot be held liable for non-delivery.[98]

e. Failure or Refusal to Receive; Storage of Goods. Consignees cannot decline to receive cargo in apprehension of bad weather, so as to compel a ship to lie idle if the weather is reasonably fit for unloading;[99] and a refusal to receive cargo after due notice, and after the lapse of a reasonable time given the consignee to accept, dispenses with the necessity of a formal tender;[1] but the vessel must unlade the cargo where she can, and store it suitably for the shipper's

146, 47 L. T. Rep. N. S. 309, 31 Wkly. Rep. 206.

90. Barber *v.* Meyerstein, L. R. 4 H. L. 317, 39 L. J. C. P. 187, 22 L. T. Rep. N. S. 808, 18 Wkly. Rep. 1041 [*affirming* L. R. 2 C. P. 661, 36 L. J. C. P. 289, 16 L. T. Rep. N. S. 569, 15 Wkly. Rep. 998 (*affirming* L. R. 2 C. P. 38, 36 L. J. C. P. 48, 15 L. T. Rep. N. S. 355, 15 Wkly. Rep. 173)]; Gilbert *v.* Guignon, L. R. 8 Ch. 16, 1 Aspin. 498, 27 L. T. Rep. N. S. 733, 21 Wkly. Rep. 281. See Caldwell *v.* Ball, 1 T. R. 205, 1 Rev. Rep. 87, 99 Eng. Reprint 1053.

91. The Eva D. Rose, 151 Fed. 704, 153 Fed. 912, holding also that the going aground of the vessel is not *ipso facto* negligence which gives a lien in admiralty on the vessel for non-delivery of cargo in accordance with the contract.

92. The Eva D. Rose, 153 Fed. 912, 151 Fed. 704.

93. The Robert Morris *v.* Williamson, 6 Ala. 50 (decided under the act of 1836 (Clay Dig. p. 139), giving a lien on steamboats or other water craft for failure to deliver goods); Wright *v.* Baldwin, 18 N. Y. 428; Boschert *v* The Wyoming, 36 Fed. 493 (holding also that a claim for merchandise, for which a steamer issued its bill of lading, but which it failed to deliver, may be classified and paid as an affreightment claim).

A privilege on a steamboat for damages, caused by non-delivery of freight, is lost at the expiration of sixty days from the date of the default and consequent liability. Van Wickle *v.* The Belle Gates, 12 La. Ann. 270.

94. See *infra*, VII, D, 2.

95. Newstadt *v.* Adams, 5 Duer (N. Y.) 43. And see *infra*, VII, D, 14.

96. The Hattie Palmer, 68 Fed. 380, 15 C. C. A. 479 [*affirming* 63 Fed. 1015].

97. Blossom *v.* Smith, 3 Fed. Cas. No. 1,565, 3 Blatchf. 316 [*reversing* 3 Fed. Cas. No. 1,566], holding that the vessel is not liable for failure to deliver according to the bill of lading, where the regular warehouseman, because of personal difficulties with the consignee, would not receive the goods, and the master caused them to be stored with another.

98. The Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406.

99. The Grafton, 10 Fed. Cas. No. 5,656, Olcott 43. And see Liverpool, etc., Steam Co. *v.* Suitter, 17 Fed. 695, holding that a contention that the consignee was not bound to receive a shipment of fruits on a given day, because the weather on that day was too cold, is untenable where other fruit was discharged on such day without being injured by frost.

1. O'Rourke *v.* Two Hundred and Twenty One Tons of Coal, 1 Fed. 619.

Refusal by the consignee to receive made before the arrival of the ship is not in itself a breach of the contract, but a refusal at any time, unretracted up to the time of the arrival of the vessel, was evidence of a continuing refusal down to and inclusive of the time when he was bound to receive the cargo, and a continuing refusal was a breach of the contract. Ripley *v.* McClure, 4 Exch. 345, 18 L. J. Exch. 419.

account,[2] or deliver the goods to the owner,[3] and having done this it has fulfilled its full duty as carrier,[4] and if the consignee is bound to receive them the goods are thereafter at his risk.[5] Similarly where consignees do not appear to claim goods at the port of discharge, the master may still land the cargo without losing his possession and control over it, placing the goods in a warehouse belonging to or hired for the owners, and so preserve his lien,[6] and the consignee will be liable for wharfage and other expenses properly incurred in doing so,[7] the carrier's only duty with regard to the goods being to use reasonable care and prudence; [8] and if in consequence of the consignee's failure to appear the goods are lost without the fault of the carrier, the latter is not liable,[9] the obligation of the carrier being then that of an ordinary bailee.[10] If the goods are damaged or deteriorated the consignee cannot refuse to receive them and then sue for conversion, but must accept the tender and claim for the difference in quality or quantity; [11] and similarly where the consignees refuse to receive except upon conditions which they are not entitled to make, they cannot sue for conversion for non-delivery.[12]

f. Short Delivery. The carrier is liable for a short delivery,[13] in the absence of a valid exception in the bill of lading,[14] unless shrinkage of cargo is owing to its own inherent nature and the quality of the article itself, and not to any negligence of the owners of the ship,[15] and cannot avoid liability by a provision in the

2. Crawford *v.* Clark, 15 Ill. 561; Collins *v.* Burns, 36 N. Y. Super. Ct. 518 [*affirmed* in 63 N. Y. 1]; Hirsch *v.* Steamboat Quaker City, 2 Disn. (Ohio) 144; The Captain John, 33 Fed. 927; Irzo *v.* Perkins, 10 Fed. 779; Arthur *v.* Cassius, 1 Fed. Cas. No. 564, 2 Story 81. But see Strong *v.* Certain Quantity of Wheat, 23 Fed. Cas. No. 13,541.

3. Wilson *v.* Royal Exch. Shipping Co., 24 Fed. 815.

4. Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177 (holding that the ship is not bound to land an entire shipment in a day; and if landed on different days, and the shipper, being notified thereof, does not receive the goods, and has made no arrangement to secure payment of the freight, they may be stored for safe-keeping) Knott *v.* One Hundred Bales of Rags, 60 Fed. 634; The Kathleen Mary, 14 Fed. Cas. No. 7,625, 8 Ben. 165.

5. Chickering *v.* Fowler, 4 Pick. (Mass.) 371; Knott *v.* One Hundred Bales of Rags, 60 Fed. 634.

6. Gaudet *v.* Brown, L. R. 5 P. C. 134, 2 Aspin. 6, 42 L. J. Adm. 1, 28 L. T. Rep. N. S. 77, 21 Wkly. Rep. 420 [*affirmed* in L. R. 5 P. C. 155, 42 L. J. Adm. 49, 28 L. T. Rep. N. S. 745, 21 Wkly. Rep. 707] (holding that where no application for delivery is made the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but in the absence of advices he may take it to such a place as in his judgment is most convenient, and may charge to the merchant all expenses properly incurred). Mors-le-Blanch *v.* Wilson, L. R. 8 C. P. 227, 1 Aspin. 605, 42 L. J. C. P. 70, 28 L. T. Rep N. S. 415. And see *infra*, VII, E, 6, h.

Late delivery.— Under the Merchant Shipping Act, Amendm. Act (1862) (25 & 26 Vict. c. 63), § 67, a ship-owner may land goods whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the owner is or is not to blame. The Energie, L. R. 6 P. C. 306, 2 Aspin. 555, 44 L. J. Adm. 25, 32 L. T. Rep. N. S. 579, 23 Wkly. Rep. 932.

7. Mors-le-Blanch *v.* Wilson, L. R. 8 C. P. 227, 1 Aspin. 605, 42 L. J. C. P. 70, 28 L. T. Rep. N. S. 415; Meyerstern *v.* Barber, L. R. 2 C. P. 38, 36 L. J. C. P. 48, 15 L. T. Rep. N. S. 355, 15 Wkly. Rep. 173 [*affirmed* in L. R. 2 C. P. 661, 36 L. J. C. P. 289, 16 L. T. Rep. N. S. 569, 15 Wkly. Rep. 998 (*affirmed* in L. R. 4 H. L. 317, 39 L. J. C. P. 187, 22 L. T. Rep. N. S. 808, 18 Wkly. Rep. 1041]; Houlder *v.* General Steam Nav. Co., 3 F. & F. 170. But see Stewart *v.* Rogerson, L. R. 6 C. P. 424.

8. Hudson *v.* Baxendale, 2 H. & N. 575, 27 L. J. Exch. 93, 6 Wkly. Rep. 83; Great Western R. Co. *v.* Crouch, 3 H. & N. 183, 4 Jur. 457, 27 L. J. Exch. 345, 6 Wkly. Rep. 391.

9. Shirwell *v.* Shaplock, 2 Chit. 396, 18 E. C. L. 702.

10. Chapman *v.* Great Western R. Co., 5 Q. B. D. 278, 44 J. P. 363, 49 L. J. Q. B. 420, 42 L. T. Rep. N. S. 252, 28 Wkly. Rep. 566. See Smith *v.* Britain Steamship Co., 123 Fed. 176. And see *supra*, VII, C, 3, e.

11. The Timor, 61 Fed. 633.

12. Jones *v.* Hough, 5 Ex. D. 115, 4 Aspin. 248, 49 L. J. Exch. 211, 42 L. T. Rep. N. S. 108.

13. The Seneca, 163 Fed. 591; The Nora, 14 Fed. 429. But see Starin's City, etc., Transp. Co. *v.* The Daniel Burns, 52 Fed. 159.

14. The Seneca, 163 Fed. 591.

15. Janney *v.* Tudor Co., 3 Fed. 814. And see Glasgow Steam Shipping Co. *v.* Tweedie Trading Co., 154 Fed. 84, holding that the owners of a vessel are not liable to a time charterer for a shortage in delivery of cargo which was received, tallied in, and stowed, and also taken out by the charterer's agents, and none of which was lost, jettisoned, or

bill of lading that weight, contents, and material are unknown;[16] but a vessel is not liable for a shortage in the number of packages set out in the bill of lading signed by the master, although such bill and the cargo represented by it have passed to a *bona fide* purchaser, where no fraud is charged, and it is conceded that all the cargo actually received on board, or which came into the hands of the master, was delivered;[17] and bills of lading which, although containing formal recitals of the weight of a commodity received, also contain a clause, weight, measure, and contents unknown, are not conclusive against the vessel as to the exact weight; and the uncontradicted testimony of the master and mate that the commodity was not weighed when taken on board, and that all that was actually received was delivered, is sufficient to exonerate the ship from liability for a *prima facie* shortage.[18] In determining whether there is a shortage of cargo, both the consignee's output count and the intake counts as shown by the bill of lading are controlled by proof that the hatches were sealed after the cargo was in, and opened only by the port wardens on the vessel's arrival, and that there was no opportunity for loss or abstraction;[19] and in determining a question of shortage of weight of cargo the custom-house weight is entitled to superior credit as against a subsequent unofficial weight, taken after the cargo had been stored for months.[20]

4. Deviation and Delay. The general rule, in the absence of a clear agreement, as to when a vessel for hire shall proceed from her port of loading is that she is to deliver the goods carried or fulfil her engagement within a reasonable time;[21] and although it has been held that delay in discharging through default of the vessel does not entitle the charterer or consignee to damages, in the absence of a contract for delivery by a particular day, but simply extends the time within which the discharge may be made without liability of the charterer or consignee for demurrage,[22] the general rule is that the carrier is liable for loss caused by unjustifiable delay in transportation and delivery of the goods,[23] and shippers have

used during the voyage, although at the charterer's request the master gave a general receipt for the cargo.

16. The Nora, 14 Fed. 429.

17. Maddock *v.* American Sugar Refining Co., 91 Fed. 166. *Compare* Dowgate Steamship Co. *v.* Arbuckle, 158 Fed. 179, holding that the *prima facie* case made by a bill of lading signed by the master of a vessel as to the number of bags of coffee received on board at a loading port, corroborated by the testimony of the charterer's agent and others having occasion to keep track of such number, is not overcome by testimony from the ship as to a mistake in the bill of lading, or that she delivered all taken on board so as to exonerate her from liability for an apparent shortage in delivery.

18. The Seefahrer, 133 Fed. 793.

19. The Ethel, 59 Fed. 473.

20. Linklater *v.* Howell, 88 Fed. 526.

21. Hostetter *v.* Park, 137 U. S. 30, 11 S. Ct. 1, 34 L. ed. 568; The Gordon Campbell, 141 Fed. 435; The Prussia, 100 Fed. 484.

22. Milburn *v.* Federal Sugar Refining Co., 161 Fed. 717, 88 C. C. A. 577 [*reversing* 155 Fed. 368].

23. The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 (holding that a carrier is liable for losses incurred on a shipment of cattle through a fall in their market value, where the delay is occasioned by breach of the warranty of seaworthiness, although such breach was due to a hidden defect in the propeller shaft, not attributable to the carrier's negligence); La Conner Trading, etc., Co. *v.* Widmer, 136 Fed. 177, 69 C. C. A. 193; Smith *v.* Lee, 66 Fed. 344, 13 C. C. A. 506; Crenshaw *v.* Pearce, 43 Fed. 803 [*reversing* 37 Fed. 432].

When from the low stage of water a steamer cannot take a whole shipment of cotton, and the shipper is so informed, but taking all she can carry she returns for the rest, which nothing shows could by other means have been transported any sooner, the steamer is not liable (Pearl River Nav. Co. *v.* Douglass, 7 La. Ann. 631); and where the officers of a steamboat navigating a river have done everything required by reasonable care and skill in such navigation, neither the vessel nor her owners are liable for damage resulting to freighters from delay caused by the grounding of the boat (Levy *v.* The Great Republic, 15 Fed. Cas. No. 8,302, 2 Woods 33. But see Broadwell *v.* Butler, 4 Fed. Cas. No. 1,910, 6 McLean 296, Newb. Adm. 171, holding that the subsidence of the water in a river, preventing a boat from passing up the falls with its cargo, is not, in the absence of a usage to the contrary, within any of the reasons which excuse a carrier for the failure to deliver goods within a reasonable time). But where the river, in the meantime, was navigable by smaller boats, the master was not excused for delaying to transport the merchandise until the river was navigable by

a lien on the vessel for the loss occasioned thereby;[24] but while it may be the duty of a common carrier receiving freight for transportation by rail and beyond the seas ordinarily to provide for the clearance of the vessel in which the goods are to be shipped, the shipper cannot complain of failure to obtain such clearance when it is prevented by the nature of the shipment.[25] Similarly, a bill of lading for the transportation of goods from one port to another *prima facie* imports a direct voyage,[26] unless there is a known usage of trade to touch at intermediate ports,[27] or deviation is permitted in the contract of affreightment,[28] and an unjustifiable deviation renders the carrier liable for the delay.[29] But the master may deviate where stress of weather makes it apparently necessary for a reasonable mariner to lay in,[30] or to make necessary repairs,[31] or in putting into port and delaying where he has reasonable fear of damages from capture by enemies,[32] and the same rule applies to delay caused by actual capture.[33]

his own boat. Collier *v.* Swinney, 16 Mo. 484.

The freezing of canals or rivers excuses the delay of a common carrier by water, but he is bound to exercise ordinary forecast in anticipating the obstruction, and must use the proper means to overcome it, and to send the goods forward as soon as the obstruction is removed, and, in the meantime, must take due care of the property. Bowman *v.* Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562. And see Philadelphia, etc., R. Co. *v.* Peale, 135 Fed. 606. *Compare* Hills Bros. Co. *v.* The Britannia, 87 Fed. 495.

24. The J. C. Stevenson, 17 Fed. 540; Hatton *v.* The Melita, 11 Fed. Cas. No. 6,218, 3 Hughes 494, so holding, although the delay was owing to the act that she was attached and sold in admiralty proceedings after the cargo was loaded, and holding also that the shippers were not obliged to remove the cargo at once on the attachment where they had reason to believe from the representations of the master that the vessel would be released and proceed on her voyage, nor were they obliged to remove their goods after the sale and ship them by another vessel, where it appeared that no time could be gained thereby.

25. Farmers' L. & T. Co. *v.* Northern Pac. Co., 112 Fed. 829 [*reversed* in 120 Fed. 873, 57 C. C. A. 533 (*affirmed* in 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269) on the ground that the carrier had not been sufficiently diligent see that the vessel cleared and was therefore liable for resulting damage].

26. Lowry *v.* Russell, 8 Pick. (Mass.) 360.

27. Thatcher *v.* McCulloh, 23 Fed. Cas. No. 13,862, Olcott 365.

28. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316, holding that a bill of lading, describing flour as shipped for "Valparaiso and a market," authorized the ship to visit such other ports beyond the one named as the consignee might judge expedient. But see Hurlbut *v.* Turnure, 76 Fed. 587 (holding that a clause in a bill of lading, authorizing the vessel "to call at any port or ports for whatever purpose," does not release the vessel from taking the customary supply of coal, nor from loss by the resulting necessity for calling at a port for coal); McIver *v.* Tate Steamers, [1903] 1 K. B. 362, 9 Aspin. 362, 8 Com. Cas. 124, 72 L. J. Q. B. 253, 88 L. T. Rep. N. S. 182, 19 T. L. R. 217, 51 Wkly. Rep. 393.

A provision of bills of lading giving the vessel the right to deviate does not authorize her, after arriving at the port of delivery, to return to the port of shipment with the goods on board, and thence make a second voyage to the port of delivery, which is not a deviation, but an abandonment of the voyage so far as relates to such shipment. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625.

29. Robinson *v.* Holst, 96 Ga. 19, 23 S. E. 76; Schwarzchild *v.* National Steamship Co., 74 Fed. 257; Thorley *v.* Orchis Steamship Co., [1907] 1 K. B. 660, 12 Com. Cas. 251, 76 L. J. K. B. 595, 96 L. T. Rep. N. S. 488, 23 T. L. R. 338; Davis *v.* Garrett, 6 Bing. 716, 8 L. J. C. P. O. S. 253, 4 M. & P. 540, 31 Rev. Rep. 524, 19 E. C. L. 321; Ellis *v.* Turner, 8 T. R. 531, 5 Rev. Rep. 441, 101 Eng. Reprint 1529. See Balian *v.* Joly, 6 T. L. R. 345.

30. Wilcox *v.* Five Hundred Tons of Coal, 14 Fed. 49, holding that the fact that other vessels made the passage did not *ipso facto* render the vessel liable for the delay, but the question was whether the master was in point of fact guilty of negligence in wintering the vessel there in view of the tempestuous weather and other surrounding circumstances.

31. Rathbone *v.* Neal, 4 La. Ann. 563, 50 Am. Dec. 579, holding, however, that a ship, forced into an intermediate port for repairs, must make them without unnecessary delay to proceed to the port of destination, and if she wait for orders from the owners they will be liable for any damages from the delay.

32. The Teutonia, L. R. 4 P. C. 171, 41 L. J. Adm. 57, 26 L. T. Rep. N. S. 48, 8 Moore P. C. N. S. 411, 20 Wkly. Rep. 421, 17 Eng. Reprint 366; The San Roman, L. R. 5 P. C. 301, 1 Aspin. 603, 42 L. J. Adm. 46, 28 L. T. Rep. N. S. 381, 21 Wkly. Rep. 393. But see Nohel's Explosive Co. *v.* Jenkins, [1896] 2 Q. B. 326, 8 Aspin. 181, 65 L. J. Q. B. 638, 75 L. T. Rep. N. S. 163; Russell *v.* Niemann, 17 C. B. N. S. 163, 34 L. J. C. P. 10, 10 L. T. Rep. N. S. 786, 13 Wkly. Rep. 93, 112 E. C. L. 163.

33. Dunn *v.* Bucknall, [1901] 2 K. B. 614, 9 Aspin. 336, 8 Com. Cas. 33, 71 L. J. K. B. 963, 87 L. T. Rep. N. S. 497, 18 T. L. R. 807, 51 Wkly Rep. 100.

5. Remedies of Shipper — a. General Rules; Procedure. The holder of a bill of lading has a remedy in admiralty against the master on his undertaking, or personally against the owners of the vessel, or against the vessel *in rem*, where the goods shipped on board are not delivered;[34] and the acceptance of the cargo by a consignee, with knowledge that there has been a deviation of the vessel during the voyage, does not deprive him of a right of action for any special damages which he may have sustained because of the deviation on account of depreciation of market prices.[35] The general rules governing actions for loss or injury to the goods carried[36] apply to actions by shippers against carriers by water for breach of the contract to transport and deliver, as to parties,[37] pleading,[38] burden of proof,[39]

34. The Leonidas, 15 Fed. Cas. No. 8,262, Olcott 12.

The water craft law of Indiana, providing for the enforcement of liens on vessels, does not extend to contracts made and broken out of the state; and hence, where plaintiff shipped certain articles at Cincinnati to be delivered in the state of Arkansas, and the articles were not so delivered, but were taken and left at New Orleans, an attachment suit would not lie in Indiana therefor (Coplinger *v.* The David Gibson, 14 Ind. 480); but where a steamboat contracted in Wheeling, Va., to carry merchandise to Cincinnati, part of which only was delivered in Cincinnati, and in an action against the boat by name for non-delivery, the boat was seized under the water craft law in Ohio, although she belonged to another state, it was held that the proceeding was to enforce a contract, and hence the remedy was applicable to any boat within the Ohio jurisdiction, regardless of the question of non-resident ownership (The Steamboat Baltimore *v.* Levi, 12 Ohio Dec. (Reprint) 314, 2 Handy 30).

Under the provisions of the Iowa statute in relation to steamboats, in a proceeding against a boat for failure to deliver goods under a contract of affreightment, it does not matter where the contract was made. If violated within the waters of the state the party injured can have his remedy if he can have the boat seized under a warrant properly issued. Baker *v.* The Milwaukee, 14 Iowa 214.

La. Civ. Code, art. 312, fixing the time at which a ship is considered to have made a voyage, refers alone to the privileges given, by the articles which precede it, to creditors upon a ship, and does not govern the time when a shipper may bring an ordinary action, asking no privilege, for the failure to deliver goods. Pitkin *v.* Rousseau, 14 La. Ann. 511.

35. Thatcher *v.* McCulloh, 23 Fed. Cas. No. 13,862, Olcott 365.

36. See *infra*, VII, D, 12.

37. See *infra*, this note.

It is not necessary to make all of the joint owners of a boat parties to an action to recover of the owners of a boat for neglect to deliver bank-notes received by the boat for carriage, for the action is based on a breach of the customary duties of carriers, and is an action in tort. Orange County Bank *v.* Brown, 3 Wend. (N. Y.) 158.

38. **Under the general issue** defendants may show, in an action for non-delivery of freight, that the goods delivered by plaintiff were shipped by another person, who took a bill of lading therefor. Evart *v.* Lowndes, 5 La. Ann. 426.

A plea of "not guilty" in a suit on a contract against a steamboat for non-delivery of goods shipped is bad, since the plea must correspond to the nature of the complaint. Erskine *v.* The Thames, 6 Mo. 371.

A complaint under Mo. Dig. (1835) p. 102, concerning boats and vessels, for non-delivery of goods shipped under a contract of affreightment, must allege that suit was commenced within six months after the cause of action accrued (Perpetual Ins. Co. *v.* The Detroit, 6 Mo. 374); but a complaint against a steamboat, filed under the statute, for non-delivery of goods shipped under a contract of affreightment, need not describe the property with any greater degree of particularity than is set out in the bill of lading (Camden *v.* The Georgia, 6 Mo. 381).

Where a paragraph of a bill avers delivery of the whole cargo taken on board, and the answer acknowledges that the paragraph containing this averment is true, a claim for shortage of cargo cannot be allowed. Muller *v.* Spreckels, 48 Fed. 574.

39. The Galena *v.* Beals, 5 Wis. 91 (holding that under a complaint for failure to deliver merchandise by a boat, it should be proved that it was delivered into the hands of the master, agent, or consignee of the boat, and that they failed to deliver it where it was consigned); Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310 (holding that the questions of the agent's authority to issue the bills, and whether there was an actual delivery of the goods to defendant, were under the evidence both questions for the jury, upon which plaintiff had the burden of proof).

Where the defense to an action for freight is short delivery the burden of proof is on respondent to prove shortage. Kerruish *v.* Havemeyers, etc., Sugar Refining Co., 49 Fed. 280, 1 C. C. A. 243 [*affirming* 42 Fed. 511].

The burden is on the vessel where all of the cargo taken on board is not delivered to account for it (Tygert Co. *v.* The Charles P. Sinnickson, 24 Fed. 304; The Saragossa, 21 Fed. Cas. No. 12,336, 2 Ben. 544, holding that where a libel alleged that three hundred and three bales of cotton were shipped on board a steamer to be carried to New York, and that a bill of lading therefor was signed by the agents of the vessel, and that seven of the bales were not delivered, the burden of proof was on the vessel to show that the bill of

presumptions,[40] and as to the weight and sufficiency[41] of the evidence introduced.

b. Damages. A maritime lien arises in favor of the shipper for damages upon the refusal of the vessel to fulfil its contract of affreightment, and the measure of damages for the refusal of the vessel to meet its contract is the difference necessarily paid by the shipper to procure an equal service in advance of the contract price, and such other damage as unavoidably flows from the breach of the carrier's contract.[42] The general rules governing the measure of damage for loss or injury to cargo[43] apply to actions for failure on the part of the carrier

lading was signed for bales of cotton that were never received on board); and in an action against the owners of a ship to recover for the non-delivery of a part of the cargo placed on board, it is incumbent on such owners to show that the missing cargo was placed with the other part of the cargo upon the wharf which had been selected for the deposit of libellant's goods (Carey *v.* Atkins, 5 Fed. Cas. No. 2,399, 6 Ben. 562); and in an action against it for alleged failure to deliver goods, which the ship had in fact discharged, but which the consignee had not received, to show that notice was given to the consignee of the place where the ship was to discharge, and failing to prove the giving of such notice, the consignee is entitled to recover the value of the goods (The Prince Albert, 19 Fed. Cas. No. 11,426, 5 Ben. 386); and where a carrier takes goods, giving a receipt excluding liability "for the dangers of navigation, fire, collision, or delivery, except to land goods on dock or pier," and fails to deliver them to the consignee, the burden is upon it to show that the goods were landed on the dock or pier (Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415).

In an action by a shipper for non-delivery of goods, the burden rests upon plaintiff to prove delivery of the goods to defendant for carriage; and bills of lading, signed for the master, and acknowledging the receipt of goods on the ship, even though shown to have been executed by a duly authorized agent of defendant, are insufficient for that purpose, where plaintiff's evidence further shows that when they were executed the goods had not been received on board ship, or consigned to the care of a master, but were in a public warehouse, registered in the name of a third party, and that there was no vessel in port. Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310.

40. The prima facie presumption as to the weight shipped which otherwise arises from the statement of the weight in the margin of the bill of lading is repelled by the stamping of the bill of lading by the master with the words "weight unknown," and, in case of alleged short delivery in weight, other proof of the weight shipped must be made (Matthiessen, etc., Sugar Refining Co. *v.* Gusi, 29 Fed. 794); and there can be no recovery for short delivery where the bill of lading says "weight and contents unknown," and no testimony is offered to show how much cargo was shipped, while the testimony from the ship is that all taken on board was delivered (The Venner, 27 Fed. 523; The Ismaele, 14 Fed. 491 [*affirmed* in 22 Fed. 559]; Campart *v.* The Prior, 2 Fed. 819. And see Eaton *v.* Neumark, 37 Fed. 375), and where two lots were delivered to a ship under different bills of lading, each containing the clause, "I do not know the weight," and no evidence was given to show how much was originally delivered under each bill of lading to the ship, the consignee of one lot cannot recover on a libel for a shortage without showing that less was delivered to him than was delivered to the ship under his bill of lading, although he shows that the consignee of the other lot received the whole quantity mentioned in his bill of lading (Schultz *v.* The Pietro, 40 Fed. 497).

41. The Ione *v.* Davis, 13 Fed. Cas. No. 7,058; Struver *v.* The Roderick, Dhu, 23 Fed. Cas. No. 13,552, holding that the wharf being the place of delivery, evidence that thirty-eight hogsheads of sugar, the full number called for by the bill of lading, were placed thereon, will exonerate the ship, as against evidence that only thirty-seven hogsheads were received at the consignee's storehouse, whither his own cartmen conveyed them.

Where different weights are put in evidence on a claim for short delivery, the greater cannot be adopted without preponderating proof. Eaton *v.* Neumark, 33 Fed. 891.

The mere statement of the purser that the number of bales was received, but part of them left behind, is not sufficient to sustain the burden of showing that the vessel did not receive the number of bales receipted for. The Saragossa, 21 Fed. Cas. No. 12,336, 2 Ben. 544.

Evidence held insufficient: To prove quantity put on board see The Daniel Burns, 56 Fed. 605, 6 C. C. A. 49 [*affirming* 52 Fed. 159]. To show that the carrier had received the goods claimed in the libel to have been received and lost by him see Stuart *v.* Boyer, 23 Fed. Cas. No. 13,553. To sustain a libel charging that the master of a vessel had converted the cargo, refusing to deliver it, the evidence being that the master had refused to deliver at a particular wharf, where he would be bound by the certificate of a particular weigher, selected by the libellant, as to the quantity of the cargo see The Treasurer, 24 Fed. Cas. No. 14,159, 1 Sprague 473. To prove a shortage of one thousand and thirty-two cases out of five thousand cases of oil shipped see The Seguranca, 68 Fed. 1014.

42. Miners' Co-Operative Assoc. *v.* The Monarch, 2 Alaska 383. But *compare ante*, VII, B, 1, c, (II).

43. See *infra*, VII, D, 12, e.

to deliver according to the contract of affreightment.[44] Thus in an action against a carrier for the non-delivery of a cargo, the measure of damages is the value of the articles at the port of delivery,[45] with interest from the time the delivery ought to have been made,[46] and failure of the master to deliver cargo in accordance with the terms of the bill of lading renders the vessel liable for the agreed value less freight and charges.[47] Where the master by his agreement with the shipper is to deliver the cargo at a certain port, but upon his arrival there the consignee refuses to receive it, and the master, instead of landing the cargo and storing it for the shipper's benefit at such port, carries it to another port, and sells it, the measure of damage, in an action by the shipper to recover damages for the non-delivery by the master, is the actual value of the cargo at the port where the master agreed to deliver it at the time when it might have been landed, deducting all duties and charges and freight for the voyage;[48] and similarly on a libel for not delivering according to the bill of lading, the goods being landed at a wrong wharf, the measure of damages is the value of the cargo less the freight charges;[49] and if, on reaching port, the master refuses to deliver the goods until he has been paid excessive charges and the consignee, after tendering what was due, notifies the master that he abandons the goods to the vessel, the consignee is entitled to recover from the vessel the value of the goods less the lawful charges.[50] In the ordinary case of delay by a common carrier in delivering goods, the measure of damages is the difference in their market value at the time when actually delivered and when they should have been delivered;[51] and this measure of damages is not changed by a stipulation in the bill of lading that the ship-owner is not to be liable in any case for more than the invoiced or declared value of the goods, the purpose of which is only to fix the outside limit of liability;[52] but where no time is fixed for the delivery of cargo, a claim for compensation because of the depressed state of the market when the goods were delivered, compared with its

44. The Tangier, 44 Fed. 692 (holding that upon a shortage in the delivery of a cargo of fruit, consisting of boxes of many grades, of different values, the libellant is entitled to the value of the particular grade to which his fruit belonged, if the grade of the missing fruit is identified; but where its grade is not established by any marks or numbers, through the failure of the bills of lading to specify the marks and numbers, the custom of merchants should be adopted of giving the average value per box of the whole cargo); Holland *v.* Seven Hundred and Twenty-Five Tons of Coal, 36 Fed. 784.

45. The Nith, 36 Fed. 86, 13 Sawy. 368 [*affirmed* in 36 Fed. 383, 13 Sawy. 481]; Greenway *v.* The Griffin, 10 Fed. Cas. No. 5,789.

46. The Nith, 36 Fed. 86, 13 Sawy. 368 [*affirmed* in 36 Fed. 383, 13 Sawy. 481].

47. Atlantic, etc., Guano Co. *v.* The Robert Center, 2 Fed. Cas. No. 630.

48. Arthur *v.* The Cassius, 1 Fed. Cas. No. 564, 2 Story 81.

49. The Boston, 3 Fed. Cas. No. 1,671, 1 Lowell 464.

The counsel fees of a replevin suit by the shipper to recover the cargo are not to be included in the damages assessed in the action for non-delivery. The Boston, 3 Fed. Cas. No. 1,671, 1 Lowell 464, holding, however, that where a master has failed to deliver a cargo according to the terms of his contract, and the vessel is libeled in admiralty, and it appears that since the libel was brought the shipper has replevied the cargo, the assessment of damages will be postponed until the replevin suit shall be determined.

50. Hoxsie *v.* The Reuben Doud, 46 Fed. 800. And see The Suffolk, 31 Fed. 835.

51. The Styria, 101 Fed. 728, 41 C. C. A. 639 [*modified* in 186 U. S. 1, 22 S. Ct. 731, 46 L. ed. 1027]; The Golden Rule, 9 Fed. 334. But see The George Dumois, 115 Fed. 65, 52 C. C. A. 659 [*reversing* 88 Fed. 537].

Stoppage in transitu.— Where the master of a vessel refuses to deliver goods shipped under a bill deliverable to the order of the shipper, in consequence of directions received from the shipper to stop the goods, which stoppage is subsequently withdrawn by the shipper, the vessel is liable *in rem* to the holder for the value of the bill of lading indorsed by the shipper, for the damages sustained by a fall in value of the goods between the time of demand and the time of actual delivery (Schmidt *v.* The Pennsylvania, 4 Fed. 548); and if, in consequence of the refusal to deliver, the holder of the bill of lading loses the benefit of a sale which he had made of the goods to arrive, and of which he had notified the master of the vessel at the time of demand, the measure of damages is the difference between the price at which such sale was made and the market price at the time of the actual delivery by the master (Schmidt *v.* The Pennsylvania, *supra*).

52. The Styria, 101 Fed. 728, 41 C. C. A. 639 [*modified* in 186 U. S. 1, 22 S. Ct. 731, 46 L. ed. 1027].

condition when it was alleged they ought to have arrived, is too speculative and vague to be made a ground for adjudging damages;[53] and the value of goods damaged through the neglect of the ship is best determined by a public sale within a reasonable time after arrival, and intermediate market fluctuations are not to be regarded.[54] Where but a portion of the cargo stated on a false bill of lading was actually shipped, and the owner of the vessel is not shown to have been a party to the fraud, the only damages to be found in an action *in rem* against the vessel are for the non-delivery of the cargo shown to have been put on board.[55] If the owner of a cargo of a sunken vessel raises it, after notice to the owner of the vessel, the expense of such raising, with interest, may be allowed as damages in a suit for non-delivery.[56]

D. Loss of or Injury to Cargo — 1. Grounds of Liability in General. The rule that a carrier is responsible for all losses except such as are inevitable or arise from the act of God or the public enemy applies to carriers by water,[57]

53. The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,323, 1 Blatchf. 196].

54. The Earnwood, 83 Fed. 315.

55. The Alice, 12 Fed. 496.

56. The Sunswick, 23 Fed. Cas. No. 13,625, 5 Blatchf. 280.

57. *Alabama.*— Jones *v.* Pitcher, 3 Stew. & P. 135, 24 Am. Dec. 716.

Connecticut.— Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Richards *v.* Gilbert, 5 Day 415.

Missouri.— Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439.

South Carolina.— Harrington *v.* Lyles, 2 Nott & M. 88; McClures *v.* Hammond, 1 Bay 99, 1 Am. Dec. 598.

United States.— The Maggie Hammond *v.* Morland, 9 Wall. 435, 19 L. ed. 772; La Tourette *v.* Burton, 1 Wall. 43, 17 L. ed. 609; Clifton *v.* Sheldon, 1 Black 494, 17 L. ed. 155; The Niagara *v.* Cordes, 21 How. 7, 16 L. ed. 41; Ames Mercantile Co. *v.* Kimball Steamship Co., 125 Fed. 332; The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)]; Tygert Co. *v.* The Charles P. Sinnickson, 24 Fed. 304; The Colina, 19 Fed. 131 (where the owners of the steamship contracted to supply ample condensed water for a cargo of cattle, and the water furnished was unfit and caused the death of some and deterioration in the value of all the remainder); The Centennial, 7 Fed. 601 (damage to a cargo of sugar which may have occurred through a neglect to pump out the ship, or through a clogging of the limbers by coal dust, or by sugar, or by both coal dust and sugar); May *v.* The Powhatan, 5 Fed. 375 (injury to cattle on hot day by failure to use wind sails); Hoboken Land, etc., Co. *v.* The Sunswick, 12 Fed. Cas. No. 6,552 (loss caused by the capsizing of the vessel due solely to improper stowage); The Shand, 21 Fed. Cas. No. 12,702, 10 Ben. 294 (damage caused by failure to properly work pump after springing leak); Tompkins *v.* The Dutchess of Ulster, 24 Fed. Cas. No. 14,087*a*. But see Thoron *v.* The Mississippi, 76 Fed. 375; British, etc., Marine Ins. Co. *v.* The Annie Harjes, 45 Fed. 900; The Flash, 9 Fed. Cas. No. 4,858, Abb. Adm. 119.

See 44 Cent. Dig. tit. "Shipping," § 440.

Liability for loss of money carried.— The fact that boats customarily carried money for hire, but did not charge their regular customers, does not make a case of liability against a boat, as carrier, for loss of money taken by its captain to be carried as an act of courtesy (Chouteau *v.* The St. Anthony, 16 Mo. 216; Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16. But see Carey *v.* Meagher, 33 Ala. 630, holding that the owners of a steamboat are responsible as common carriers for the loss of a cash letter delivered to the clerk, if the jury find that it is the general custom of steamboats to carry such letters, although they are delivered to the clerk and carried without charge), nor is money "goods" within the meaning of a statute imposing liability for loss of goods (Pumphry *v.* Steamboat Perkersburgh, 2 Ohio Dec. (Reprint) 356, 2 West. L. Month. 492 (Swan St. p. 185, § 1), nor "merchandise" within the meaning of a charter granting the right to carry merchandise (Citizens' Bank *v.* Nantucket Steamboat Co., *supra*).

Some early American cases did not hold the carrier by water to such strict accountability. See Aymar *v.* Astor, 6 Cow. (N. Y.) 266; King *v.* Lenox, 19 Johns. (N. Y.) 235; Ogden *v.* Barker, 18 Johns. (N. Y.) 87; Palmer *v.* Lorillard, 16 Johns. (N. Y.) 348 [*reversing* 15 Johns. 14]; Barnwell *v.* Hussy, 1 Mill (S. C.) 114.

Under the English statutes relating to pilotage the owners of the vessel cannot escape liability for injury to her cargo by reason of the presence of a licensed pilot on board, if at the time when the injury occurred it was not obligatory on the owners of the vessel to put her in charge of such pilot, and the pilot was in charge by the voluntary act of the owners. Guiterman *v.* Liverpool, etc., Mail Steamship Co., 9 Daly (N. Y.) 119 [*reversed* on other grounds in 83 N. Y. 358], holding also that a steamship company is not relieved from liability to shippers, for loss of goods, by the compulsory presence of a pilot on board, where the negligence resulting in the accident was not exclusively that of the pilot.

When a carrier employs a towboat to tow

and as well to inland as to other waters,[58] and whether on coasting or ocean voyages.[59] A carrier by water is not, however, liable for the destruction of or injury to goods due solely to their inherent nature and qualities or defects,[60] or from

his vessel, and by the negligence of those in charge of the towboat damage is done to the cargo, and the carrier has not in his contract excepted such risks, he is liable to the owners of the property. Merrick *v.* Brainard, 38 Barb. (N. Y.) 574 [*affirmed* in 34 N. Y. 208]. The rule is of course of greater force where the owner of the tug is the owner of the tow. Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426 [*affirming* 145 Fed. 569]. But the board rule laid down in Merrick *v.* Brainard, *supra*, would seem to be of rather doubtful application, the view being taken in America that the tug is an independent contractor and not an agent of the tow, and that the latter is not liable for the tug's acts. In England the rule is otherwise. See Hughes Adm. 119 *et seq.* [*citing* The Virginia Ehrman, 97 U. S. 309–315, 24 L. ed. 890; The Clarita, 23 Wall. (U. S.) 1, 23 L. ed. 146; Sturgis *v.* Boyer, 24 How. (U. S.) 110, 16 L. ed. 591; The America, 102 Fed. 767, 42 C. C. A. 617; The Isaac H. Tillyer, 101 Fed. 478; Pederson *v.* Spreckles, 87 Fed. 938, 31 C. C. A. 308; The Imperial, 38 Fed. 614, 3 L. R. A. 234; Dutton *v.* The Express, 8 Fed. Cas. No. 4,209, 3 Cliff. 462; The America, L. R. 6 P. C. 127, 2 Aspin. 350, 43 L. J. Adm. 30, 31 L. T. Rep. N. S. 42, 22 Wkly. Rep. 927; Smith *v.* St. Lawrence Towboat Co., L. R. 5 P. C. 308, 2 Aspin. 41, 28 L. T. Rep. N. S. 885, 21 Wkly. Rep. 569; The Quickstep, 15 P. D. 196, 6 Aspin. 603, 59 L. J. P. D. & Adm. 65, 63 L. T. Rep. N. S. 713; The Niobe, 13 P. D. 55, 6 Aspin. 300, 57 L. J. P. D. & Adm. 33, 59 L. T. Rep. N. S. 257, 36 Wkly. Rep. 812; The Isca, 12 P. D. 34, 6 Aspin. 63, 56 L. J. P. D. & Adm. 47, 55 L. T. Rep. N. S. 779, 35 Wkly. Rep. 382; Quarman *v.* Burnett, 4 Jur. 969, 9 L. J. Exch. 308, 6 M. & W. 499].

Whenever delivery to a lighter boat engaged in carrying goods from the harbor out to the steamship is equivalent to delivery to a steamship, the latter is liable *in rem* for the loss of goods on the lighter boat before delivery on board the steamship. Clark *v.* Richards, 1 Conn. 54; Richards *v.* Gilbert, 5 Day (Conn.) 415; Schulze-Berge *v.* The Guildhall, 58 Fed. 796 (holding that it is negligence in a ship-owner to appoint as captain a man known to be intemperate, or whose intemperate habits might have been ascertained on reasonable inquiry, and, if loss of goods shipped is attributable to the master's inefficiency, the owners are liable); The City of Alexandria, 28 Fed. 202.

The rule applies to damage before actually shipping but after delivery to the carrier. Chubb *v.* New York Cent., etc., R. Co., 116 Fed. 902. Thus where cotton sent by plaintiffs to be shipped on board a vessel was suffered to remain on the levee during the night following its delivery, and was burned, the vessel was liable therefor (Fisher *v.* The Norval, 8 Mart. N. S. (La.) 120); and where goods left on the levee to be shipped were exposed to rain, and the shipper subsequently proposed to the master to ascertain the damage from the exposure before the voyage, and the latter declined to do so, the vessel was responsible for any increase in damage resulting from the voyage and the delay to which the goods were necessarily exposed in the foreign port before they could be examined (Barrett *v.* Salter, 10 Rob. (La.) 434); but not before actual delivery to the carrier (see Barrett *v.* Salter, *supra*).

Goods taken on board clandestinely.— Where a ship-owner is present, and has the conducting of the voyage, or has an agent for that business, he is not liable for loss of goods taken on board clandestinely by the master; *aliter* if he assents to and adopts the master's act, or knows, before the ship sails, that the goods have been received on board. Walter *v.* Brewer, 11 Mass. 99.

Conversely where a person undertakes to load a boat, and by his negligence he injures the boat, he is liable in damages to the owner. Pate *v.* Greenville, etc., R. Co., 35 N. C. 325, holding, however, that where the person did not act as agent of the owner of the goods, but for another person who had undertaken the loading, the owners of the goods were not liable for injuries to the boat caused by such person permitting the goods to fall.

58. The Belfast *v.* Boon, 41 Ala. 50; Stephens, etc., Transp. Co. *v.* Tuckerman, 33 N. J. L. 543 (holding that in an action to recover for goods lost by the sinking of defendant's vessel, on which they were being carried, under special contract, to a point above that to which defendants usually carried goods, the fact that the vessel sunk above the point usually navigated by defendant did not relieve defendant of its liability as a common carrier); McArthur *v.* Sears, 21 Wend. (N. Y.) 190 (navigation on Lake Erie); Southcote's Case, 4 Coke 83*b*, 76 Eng. Reprint 1061.

59. Gage *v.* Tirrell, 9 Allen (Mass.) 299; Elliott *v.* Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Hill *v.* Scott, [1895] 2 Q. B. 371, 64 L. J. Q. B. 635, 73 L. T. Rep. N. S. 210 [*affirmed* in [1895] 2 Q. B. 713, 8 Aspin. 109, 65 L. J. Q. B. 87, 73 L. T. Rep. N. S. 458]; Nugent *v.* Smith, 1 C. P. D. 423, 3 Aspin. 198, 45 L. J. C. P. 697, 34 L. T. Rep. N. S. 827, 24 Wkly. Rep. 237; Benett *v.* Peninsular, etc., Steamboat Co., 6 C. B. 775, 18 L. J. C. P. 85, 60 E. C. L. 775; Barclay *v.* Cuculla, 3 Dougl. 389, 26 E. C. L. 256, 99 Eng. Reprint 711; Laveroni *v.* Drury, 8 Exch. 166, 16 Jur. 1024, 22 L. J. Exch. 2, 1 Wkly. Rep. 55; Dale *v.* Hall, 1 Wils. C. P. 282, 95 Eng. Reprint 619. And see cases cited *infra*, the following notes.

60. Clark *v.* Barnwell, 12 How. (U. S.)

their having been shipped in an unfit condition;[61] but, although the carrier is exempt from liability for damage or deterioration arising from the nature of the goods or of the voyage, yet, if there has been a want of proper care or skill on his part in guarding against such damages, the injury will be ascribed to his negligence.[62] The burden is upon the carrier to show loss or damage by such a cause as excuses him from liability,[63] and he will not be excused by showing that the navigation was difficult or dangerous, or that skilful and competent persons were employed to conduct the boat; but, to avoid liability, must show that the loss occurred in a manner and from a cause that will acquit him.[64]

2. Act of God; Perils of the Sea. It is a general rule that carriers by water, like other carriers,[65] are not liable for loss or damage arising from acts of God, or such perils of the sea or of navigation as come within the meaning of that term.[66]

272, 13 L. ed. 985; Choate *v.* Crowninshield, 5 Fed. Cas. No. 2,691, 3 Cliff. 184 (damage resulting to a cargo of cotton in bales, from moisture of the contents of the bales received previous to the time of lading, which could not have been discovered by the master. The vessel was in all respects seaworthy, and there appeared to be no want of ordinary care, skill, and energy on the part of the master, to protect the goods against such injury, while on board the vessel); Ordt *v.* Ocean Steam Nav. Co., 18 Fed. Cas. No. 10,551 (ribbons packed damp whereby they became discolored); Nugent *v.* Smith, 45 L. J. C. P. 697, 1 C. P. D. 423, 34 L. T. Rep. N. S. 827, 24 Wkly. Rep. 237 [*reversing* 1 C. P. D. 19, 45 L. J. C. P. 19, 33 L. T. Rep. N. S. 731]. But see The Freedom, L. R. 3 P. C. 594, 1 Aspin. 136, 24 L. T. Rep. N. S. 452 [*affirming* L. R. 2 A. & E. 346, 38 L. J. Adm. 25, 20 L. T. Rep. N. S. 229, 1018, 18 Wkly. Rep. 48], holding that where the ordinary consequence of the inherent defect has been aggravated by the manner of stowing them, the owner is liable, although guilty of no negligence in their storage.

61. The Barcore, [1896] P. 294, 8 Aspin. 189, 65 L. J. P. D. & Adm. 97, 75 L. T. Rep. N. S. 168; The Ida, 2 Aspin. 551, 32 L. T. Rep. N. S. 541.

62. The Invincible, 13 Fed. Cas. No. 7,056, 3 Sawy. 176.

63. Whitney *v.* Gauche, 11 La. Ann. 432; Barrett *v.* Salter, 10 Rob. (La.) 434 (holding that the ship, receipting for goods as in good order, is liable for any damage subsequently discovered, unless clearly proved to have occurred before the delivery); The D. Harvey, 139 Fed. 755 (holding that a vessel is liable for damage to a cargo of cement which was received in good condition, but was lumpy and set when delivered, due to its having been wet, in the absence of explanation of the manner in which it became wet); Insurance Co. of North America *v.* Easton, etc., Transp. Co., 97 Fed. 653 (holding that where a common carrier assumes to deliver a cargo in good order, "the dangers of the seas only excepted," the failure to do so casts upon him the burden of proving that the loss was caused by the excepted risk; and, in the absence of satisfactory proof thereof, the court is justified in finding for the libellant, even if the cause of the disaster does not clearly appear); Tygert Co. *v.* The Charles P. Sinnickson, 24 Fed. 304.

64. Hill *v.* Sturgeon, 28 Mo. 323.

65. See Carriers, 6 Cyc. 377 *et seq.*

66. Colt *v.* McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200 (where the officer navigating the vessel became unable to control her by reason of a sudden cessation of the wind and she was wrecked on the shore); American Sugar Refining Co. *v.* The Euripides, 71 Fed. 728, 18 C. C. A. 226; Pearce *v.* The Thomas Newton, 41 Fed. 106 (damages directly resulting from a tidal wave and flood, such as had occurred but twice before in forty years); Higgins *v.* Watson, 12 Fed. Cas. No. 6,470 (holding that the vessel owner is not liable for the loss by sea perils of goods laden on deck with the shipper's consent, in the absence of culpable neglect or misconduct in their destruction); Tompkins *v.* The Dutchess of Ulster, 24 Fed. Cas. No. 14,087*a*; Nugent *v.* Smith, 1 C. P. D. 19, 45 L. J. C. P. 19, 33 L. T. Rep. N. S. 731 [*reversed* on other grounds in 1 C. P. D. 423, 3 Aspin. 198, 45 L. J. C. P. 697, 34 L. T. Rep. N. S. 827, 24 Wkly. Rep. 237].

Such as a violent and unusual storm or gale. Clyde Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. 349 (fish received for transportation by a vessel, which spoiled on account of the vessel's encountering a heavy gale and dangerous seas, which displaced the rudder post, and required the vessel to put in at a port where no ice could be obtained in which to repack the fish); Medina *v.* Hanson, 17 La. Ann. 290; Cochran *v.* The Cleopatra, 17 La. Ann. 270; Letchford *v.* The Golden Eagle, 17 La. Ann. 9; The Tennessee *v.* Tardos, 7 La. Ann. 28 (holding that where a boat on her outward voyage carried a cargo of lard, was scraped and limed on discharging her cargo, and was loaded for the return voyage with casks of wine, and on the return she encountered a rough sea, causing her to leak, so that the casks were discolored and soiled by grease and sea water, the vessel was not liable for the damage done by the sea water, that being a peril of the sea, but the injury from the grease was not ascribable to the same cause, and for such injury the vessel was liable); Leamaitre *v.* Merle, 2 Rob. (La.) 402; The Langfond, 143 Fed. 150; Munson Steamship Line *v.* Steiger, 132 Fed. 160 [*affirmed* in 136 Fed. 772, 69 C. C. A. 492]

Nor is the carrier, in the absence of contract to the contrary, liable for loss

(holding that the loss of logs which broke loose from a raft by reason of a high wind, after they had been towed out to a steamer for loading in the open sea, was due to a peril of the sea, and the steamer is not liable therefor); Graves *v.* The Calvin S. Edwards, 50 Fed. 477, 1 C. C. A. 533 [*affirming* 46 Fed. 815] (a severe storm, which caused the abandonment of the vessel after sixteen hours); The Zealandia, 48 Fed. 697 (holding that where a cask of oil, which is lashed securely as against all ordinary weather, breaks loose during an extremely violent gale, and causes injury to other goods, the damage must be attributed to a peril of the sea, especially when it appears that such accidents are not infrequent); The J. C. Stevenson, 17 Fed. 540 (holding that where a vessel on which a load of cattle was shipped encountered a storm of unusual severity, in which many of the cattle were injured, she is not liable, where the contrivances on board the vessel were such as were then customarily used in vessels of that character, and it appeared that other steamships, carrying cattle, which encountered the same hurricane, also sustained heavy losses); Nugent *v.* Smith, 1 C. P. D. 19, 45 L. J. C. P. 19, 33 L. T. Rep. N. S. 731 [*reversed* in 1 C. P. D. 423, 3 Aspin. 198, 45 L. J. C. P. 697, 34 L. T. Rep. N. S. 827, 24 Wkly. Rep. 237]; The Thrunscoe, [1897] P. 301, 8 Aspin. 313, 66 L. J. P. D. & Adm. 173, 77 L. T. Rep. N. S. 407, 13 T. L. R. 566, 46 Wkly. Rep. 175; Anmies *v.* Stevens, Str. 127, 93 Eng. Reprint 428 (a sudden gust of wind). But storms encountered during a voyage, although they may have been an adequate cause for an injury to the vessel resulting in leakage and damage to the cargo, are not sufficient to relieve the carrier from liability for such damage, nor from the burden of proving seaworthiness, where they were not of such an unusual character but that they should have been anticipated, and it is not shown that the injury could not have been provided against by proper inspection and care with respect to the part injured before sailing, and such inspection was not made, nor care exercised. The Aggi, 93 Fed. 484.

Damage or loss held not to be caused by such a peril of the sea as absolves the carrier. See Bason *v.* Charleston, etc., Steamboat Co., Harp. (S. C.) 262 (where defendant's steamboat in going through an inland passage in which grounding from reflux of the tide was unavoidable, grounded on an uneven surface so that she heeled to starboard, and the bilge water settled aft and injured a box of books stowed in the cabin); American Sugar Refining Co. *v.* The Euripides, 71 Fed. 728, 18 C. C. A. 226 [*reversing* 52 Fed. 161] (the water which did the damage appeared to have escaped during flushings through a hole gnawed by rats); The Mangalore, 23 Fed. 462 (for injury to the cargo caused by a faulty hatch being stove in by a sea); The Costa Rica, 6 Fed. Cas. No. 3,261, 3 Sawy. 538 (where the master of a steamer attempted to come up the bay of San Francisco in a dense fog, the vessel being in comparative safety, and the master not being compelled by any exigency to make the attempt, and the vessel was stranded and the cargo damaged); Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422 (damages from blowing of the vessel).

Blowing of a vessel is not like sweating, an incident to navigation which cannot be prevented or avoided by human means. Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422.

Running against rocks on the shore renders the owner liable in the absence of contract restrictions. Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582; McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Craig *v.* Childress, Peck (Tenn.) 270, 14 Am. Dec. 751.

Running against a hidden obstacle in the water has been held not to come within the exceptions absolving the owner of the vessel. Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292 (a submerged mast visible at low water); Friend *v.* Woods, 6 Gratt. (Va.) 189, 52 Am. Dec. 119 (holding that where the boat of a common carrier upon a river is stranded upon a recently formed bar, of which he was ignorant, he will be liable for damage thereby caused to the goods; such accident not being referable to the act of God); Trent Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127, 26 E. C. L. 479, 99 Eng. Reprint 884 (a hidden anchor). Thus the owner has been held for steering on a shoal in a fog (Liver Alkali Co. *v.* Johnson, L. R. 9 Exch. 338, 2 Aspin. 332, 43 L. J. Exch. 216, 31 L. T. Rep. N. S. 95), or because of changes in the channel of the river (Trent Nav. Co. *v.* Wood, 4 Dougl. 287, 3 Esp. 127, 26 E. C. L. 479, 99 Eng. Reprint 884). But there are cases to the contrary holding that if the vessel struck a snag or rock not hitherto known and not actually known to the master, the owner is not liable (Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235; Pennewill *v.* Cullen, 5 Harr. (Del.) 238; Boyce *v.* Welch, 5 La. Ann. 623; Deaver *v.* Bedford, 5 Rob. (La.) 245, 39 Am. Dec. 535; Smyrl *v.* Niolon, 2 Bailey (S. C.) 421, 23 Am. Dec. 146; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340); but the rule is otherwise if the obstacle is known or laid down on any chart (Pennewill *v.* Cullen, *supra*; Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561; Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582, rock marked by buoy and generally known).

Damage by rats is held not to come within the exception to the carrier's liability (American Sugar-Refining Co. *v.* The Euripides, 71 Fed. 728, 18 C. C. A. 226; Dale *v.* Hall, 1 Wils. C. P. 281, 95 Eng. Reprint 619 (a famous case); particularly where they have done similar damage to the vessel before (The Italia, 59 Fed. 617); and in a voyage from a port known by the master to be infested with rats, the keeping of cats on board

caused by the public enemy,[67] or inevitable accident caused without fault of the carrier or his agents or servants;[68] but where an accident on a boat, causing injury to goods being transported thereon, could have been avoided by using such precautions as are actually used on many boats, the injury was not caused by

is not a sufficient exercise of diligence to excuse the carrier from liability from damage from that cause (Kirkland *v.* The Fame, 14 Fed. Cas. No. 7,845).

Sweating of vessel or cargo.— Although a dampness or sweating of the hold of a vessel is not a "peril of the sea," the vessel is not liable for injury to the cargo thereby if the sweating is not augmented by improper stowage (Baxter *v.* Leland, 2 Fed. Cas. No. 1,124, Abb. Adm. 348 [*affirmed* in 2 Fed. Cas. No. 1,125, 1 Blatchf. 526]; McCullough *v.* The Echo, 16 Fed. Cas. No. 8,740*a*. See The Martha, 16 Fed. Cas. No. 9,145, Olcott 140), and in an action against a vessel for damages to the cargo caused by "sweat," where it appears that the goods were stowed in the usual and proper manner, it will not be held negligence in the carrier to have failed to adopt a certain system of ventilation, the utility and efficacy of which as a preventive of a "sweat" is a matter of doubt and dispute (Adrain *v.* The Live Yankee, 1 Fed. Cas. No. 88).

Custom of trade will control where it is doubtful whether injury is caused by excusable perils of the seas, or by dangers for which carriers are responsible (Baxter *v.* Leland, 2 Fed. Cas. No. 1,124, Abb. Adm. 348); but a carrier cannot show that a usage exists that the dangers of navigation and unavoidable accident are excepted from the risks of common carriers (Coxe *v.* Heisley, 19 Pa. St. 243).

Damage or loss held not to result from act of God see Tompkins *v.* The Dutchess of Ulster, 24 Fed. Cas. No. 14,087*a*, where it appeared that the boiler leaked so badly as to prevent maintaining a fire to propel the boat against a strong head wind, and she was obliged to come to anchor during the storm, and sank after two days and a half.

Human agency must not have in any way intervened to produce the loss. Forward *v.* Pittard, 1 T. R. 27, 1 Rev. Rep. 142, 99 Eng. Reprint 953. Thus where the vessel was being towed and the towboat stopped to make way for another vessel, in consequence of which the vessel towed was driven against the tug, the damage was not attributable to an act of God (Oakley *v.* Portsmouth, etc., Steam Packet Co., 11 Exch. 618, 25 L. J. Exch. 99, 4 Wkly. Rep. 236); nor is a mistake caused by mistaking a light on a stranded vessel to be a beacon light (McArthur *v.* Sears, 21 Wend. (N. Y.) 190).

Act of God defined see CARRIERS, 6 Cyc. 377.

67. Hedricks *v.* The Morning Star, 18 La. Ann. 353; The Teutonia, L. R. 4 P. C. 171, 41 L. J. Adm. 57, 26 L. T. Rep. N. S. 48, 8 Moore P. C. N. S. 411, 20 Wkly. Rep. 421, 17 Eng. Reprint 366; The San Roman, L. R. 5 P. C. 301, 1 Aspin. 603, 42 L. J. Adm. 46, 28 L. T. Rep. N. S. 381, 21 Wkly. Rep. 393. But see Russell *v.* Nieman, 17 C. B. N. S. 163, 34 L. J. C. P. 10, 10 L. T. Rep. N. S. 786, 13 Wkly. Rep. 93, 112 E. C. L. 163.

68. Hennen *v.* Munroe, 11 Mart. (La.) 579; Morrison *v.* McFadden, 5 Pa. L. J. Rep. 23, holding that accidents arising from the breaking of dams in canals are such inevitable accidents as furnish an excuse to common carriers for the loss of goods.

Fire.— In the absence of contract stipulations (Singleton *v.* Hilliard, 1 Strobh. (S. C.) 203), or well-defined usage exempting the carrier (Singleton *v.* Hilliard, *supra*; Patton *v.* Magrath, Dudley (S. C.) 159, 31 Am. Dec. 552), the liability of common carriers by water extends to the loss by fire of goods shipped on board them (Louisville, etc., Packet Co. *v.* Rogers, 20 Ind. App. 594, 49 N. E. 970; Hunt *v.* Morris, 6 Mart. (La.) 676, 12 Am. Dec. 489, holding that where a steamboat was destroyed by fire at night, while returning from a trip to procure wood, and while it was aground, the carrier was not liable, in the absence of proof of negligence); Miller *v.* Steam Nav. Co., 10 N. Y. 431; Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75; Harrington *v.* McShane, 2 Watts (Pa.) 443, 27 Am. Dec. 321; Singleton *v.* Hilliard, *supra*; Patton *v.* Magrath, *supra*). And see, generally, CARRIERS, 6 Cyc. 378 text and note 14, 376 text and note 91.

Theft of goods while in the carrier's hands renders him liable for the loss (The Belfast *v.* Boon, 41 Ala. 50, 40 Ala. 184, 88 Am. Dec. 761, holding that robbery is no defense to a common carrier by water on an inland river for the loss of goods; and that this principle was not changed by the act of congress which declared robbery on any river where the tide ebbs and flows to be piracy, which would be a good defense for the lost goods; The Saratoga, 20 Fed. 869); although there be no fault or negligence imputed to him (Schieffelin *v.* Harvey, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206). Thus plundering by a customs-house officer having charge of a vessel is within the risks assumed by the owner under a bill of lading. Schieffelin *v.* Harvey, Anth. N. P. (N. Y.) 76.

A carrier by boat losing goods by a collision with another boat is liable therefor, in the absence of stipulations, although the collision occurred without fault on his part (Plaisted *v.* Boston, etc., Steam Nav. Co., 27 Me. 132, 46 Am. Dec. 587; Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439; Mershon *v.* Hobensack, 22 N. J. L. 372; Hays *v.* Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627. But see The New Jersey, 18 Fed. Cas. No. 10,162, Olcott 444); and the owners of a vessel, the negligence or want of skill of whose officers causes it to collide with another vessel, are liable for the injuries sustained by the cargo of the other vessel (Blythe *v.* Marsh, 1 McCord (S. C.) 360. And see COLLISION, 7 Cyc. 372),

a danger of navigation, and the carrier is liable.[69] And if the carrier relies upon one of these accepted causes he must show that it was the proximate cause of the injury; and if his own act intervenes as the proximate cause of the damage, he cannot escape liability;[70] and in seeking to be relieved from liability for damage to cargo in transit, under the exceptions of perils of the sea, the ship-owner, as carrier, is bound to prove that the injuries were the result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence.[71]

3. JETTISON.[72] In cases of extreme necessity and danger the master may jettison cargo.[73] He may select what articles he pleases, and whatever propor-

and if goods are injured by the wanton or careless collision of boats, the carrier is liable to the shipper, and must seek his remedy from the aggressor (Lawrence *v.* McGregor, Wright (Ohio) 193). A custom among navigators of steamboats on a river to observe particular situations in ascending and descending will bind such navigators to its observance, and a failure to do so will be at the peril of the owners, in respect to goods lost in a collision caused by failure to follow the custom. Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

69. Haughton *v.* The Memphis, 1 Ohio Dec. (Reprint) 403, 1 West. L. J. 562.

70. Corsar *v.* J. D. Spreckles, etc., Co., 141 Fed. 260, 72 C. C. A. 378 (holding that if the jettison of cargo or damage thereto is rendered necessary by or due to any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the sea peril, although that may enter into the case); The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)] (holding that where a steamer was run upon the beach solely because a leak had been discovered which endangered the vessel and which could not be controlled, and water immediately came in over her deck, so that merchandise was injured, the proximate cause of the injury was the leak, and not the stranding of the vessel).

Doctrine of proximate cause see *infra*, VII, D, 10.

71. The Westminster, 127 Fed. 680, 62 C. C. A. 406 [*affirming* 116 Fed. 123].

72. "Jettison" defined see 23 Cyc. 373.

Jettison of cargo for claim for contribution in general average see *infra*, X, D, 5, i.

73. Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645 [*affirming* 44 Barb. 655] (holding that bill of lading requiring a vessel to deliver goods at the place of destination without delay, damage, or deficiency in quantity specified, if any, to be deducted from charges by consignee, did not change the liability of the owner of the vessel, and make him liable as an insurer for loss of goods by jettison rendered necessary by a violent storm); Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655; Mouse's Case, 12 Coke 63, 77 Eng. Reprint 1341 (cited in Carver Carriage by Sea (5th ed.) 17); The Gratitudine, 3 C. Rob. 240.

The rules applicable to an alleged excuse for a jettison at sea, where the perils of the sea are excepted, govern in case of a jettison on the Ohio and Mississippi rivers, where the dangers of the river are excepted. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

It is not necessary to throw overboard to constitute jettison, any means for getting rid of a cargo as by knocking in the heads of casks of wine and letting the liquor flow away, is permissible. Vansyckle *v.* The Thomas Ewing, 5 Pa. L. J. 231.

A jettison made in a smooth sea when the ship was in no immediate danger was lawful, where it appeared that the articles jettisoned could not be thrown overboard in any considerable sea without the greatest risk, that they were of great weight and had severely strained the vessel in a previous storm, and that the master in making his decision for the jettison acted in an emergency, with due deliberation, with no unreasonable timidity, with an honest intention to do his duty, and in the fair exercise of his skill and discretion. Lawrence *v.* Minturn, 17 How. (U. S.) 100, 15 L. ed. 58.

Circumstances justifying jettison see Van Syckel *v.* The Thomas Ewing, 28 Fed. Cas. No. 16,877, Crabbe 405, 5 Pa. L. J. 231, holding that where a vessel arrived at the mouth of a bay when the weather was threatening, and the captain, being unable to obtain a pilot, determined to follow a pilot boat up the bay, the persons on board such boat having told him, on learning his draught of water, that he might do so in safety, his act was not negligence rendering the owners liable for goods which it became necessary to throw overboard to save the ship and cargo on the vessel becoming grounded.

When goods carried on deck by the shipper's consent, and not by reason of any usage, are jettisoned for the common safety, the vessel being seaworthy to carry a cargo under deck, but so injured by a storm that she cannot carry freight on deck, the owner has no remedy against the vessel, master, or owners for the loss by jettison (Dodge *v.* Bartol, 5 Me. 296, 17 Am. Dec. 233; Smith *v.* Wright, 1 Cai. (N. Y.) 43, 2 Am. Dec. 162; Lawrence *v.* Minturn, 17 How. (U. S.) 100, 15 L. ed. 58; The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 188), but the rule is otherwise where the goods are so stowed without consent of the shipper (Dodge *v.* Bartol, *supra*; The Delaware, 14 Wall. (U. S.) 579, 20

tion he deems proper, and thus if necessary he may jettison the whole cargo.[74] While hazard of life is not absolutely essential to justification of the jettison,[75] the carrier is responsible if the jettison is made without good cause;[76] and where a jettison of cargo becomes necessary for the safety of the vessel, the owner and vessel are liable for the loss, if the peril of the ship is directly attributable to the want of diligence or skill upon the part of the master or crew,[77] and the vessel is liable for a jettison of a cargo which the master might have saved by lighters.[78] Jettison is not justifiable if made only to prevent harm to the boat, or to expedite the voyage.[79]

4. Seizure of Goods Under Legal Authority.[80] Where the goods are taken from the carrier by valid legal process against the owner, if the carrier acts in good faith he is not liable;[81] but he must immediately notify the owner,[82] and

L. ed. 779; The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware (U. S.) 188), unless when whether stowed above or below hatches the jettison is necessary to the safety of the ship (Gillett *v.* Ellis, 11 Ill. 579); and thus it has been held that under an ordinary bill of lading the carrier is liable for goods stowed on deck and necessarily jettisoned (The Wellington, 29 Fed. Cas. No. 17,384, 1 Biss. 279. And see also The Gran Canaria, 16 Fed. 868)). As to carriage of cargo on deck see *infra*, VII, D, 6, b.

Consumption of cargo in emergency if justifiable acts similarly upon the owner's liability as jettison does. Bursley *v.* The Marlborough, 47 Fed. 667.

74. The Gratitudine, 3 C. Rob. 240.

75. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

76. Notara *v.* Henderson, L. R. 7 Q. B. 225, 1 Aspin. 278, 41 L. J. Q. B. 158, 26 L. T. Rep. N. S. 442, 20 Wkly. Rep. 443; Whitecross Wire, etc., Co. *v.* Savill, 8 Q. B. D. 653, 4 Aspin. 531, 51 L. J. Q. B. 426, 46 L. T. Rep. N. S. 643, 30 Wkly. Rep. 588; The Norway, 12 L. T. Rep. N. S. 57, 13 Wkly. Rep. 296.

77. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561 (holding that in order to make an act so obviously injurious to the shipper, and apparently so contrary to the undertaking and duty of the carrier, as a jettison, operative in itself as an excuse for the non-delivery, and a defense to the shipper's action for the apparent breach of contract, the act itself must be shown to have been caused by one of the dangers which could not have been avoided, and to have been rendered necessary by circumstances over which defendants, and their agents and servants employed in the navigation of the boat, had no control, which they could not have foreseen and guarded against, by the exercise of that vigilance which was appropriate to their respective stations, and called for by the character of the navigation in which they were engaged, and which, when they actually occurred, left no reasonable means of escaping a total loss but by sacrificing a part of the property at risk for the safety of the residue, and that if an obstruction in the river be known, and a vessel runs upon it, or on shore, without being driven by force of wind or stream, which might have been prevented by reasonable care and skill, a jettison is not justifiable, known obstructions being such as were known to navigators of the particular boat, or discoverable by them by the exercise of reasonable vigilance); The Jenny Jones, 13 Fed. Cas. No. 7,286, Deady 82; The Portsmouth, 19 Fed. Cas. No. 11,295, 2 Biss. 56 (holding that where the master of a vessel, by reason of a fog, is not certain of his location, and he attempts to enter a harbor at ordinary speed when not compelled by necessity, he is guilty of negligence, and the vessel is liable to the owners of the cargo which is jettisoned on stranding of the vessel in such attempt).

Consultation with the officers on board may be shown by the carrier and their opinions then expressed, to be proved by them, if accessible, with respect to the condition of the boat and probable means of relief, but only to show that the jettison was deliberately made, and in reference to the actual circumstances of the case, as understood by those best acquainted with them. But these opinions are not conclusive as to the necessity of the jettison. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

78. The Portsmouth, 19 Fed. Cas. No. 11,295, 2 Biss. 56.

79. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

80. **Effect of legal process on liability of carriers generally** see Carriers, 6 Cyc. 462, 463.

81. Wells *v.* Maine Steamship Co., 29 Fed. Cas. No. 17,401, 4 Cliff. 228. And see The Vidette, 34 Fed. 396.

Ratification.— The acceptance, by the ship-owner, of the letters and invoices sent him by the consignees is not such a ratification of their acts as to throw a loss, arising from the seizure of merchandise exported against the laws of the place of shipment for his account, upon such ship-owner. Pawson *v.* Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

82. Spiegel *v.* Pacific Mail Steamship Co., 26 Misc. (N. Y.) 414, 56 N. Y. Suppl. 171.

Where a cargo is attached, the carrier is bound to interpose in the suit, and protect the interest of a foreign cargo owner, by all appropriate means under the local law, until the consignee is properly informed, and has reasonable opportunity to take on himself the burden of litigation, and to give prompt notice of the attachment, and any other

legal process will not furnish an excuse unless the goods are actually taken from the carrier,[83] and an illegal seizure will not absolve the carrier.[84]

5. UNSEAWORTHINESS OR FITNESS OF VESSEL — a. In General. Unless otherwise expressly stipulated, there is an implied absolute warranty of seaworthiness of the vessel at the commencement of the voyage on the part of the carrier,[85] and

necessary information. The M. M. Chase, 37 Fed. 708.

83. The Mary Ann Guest, 16 Fed. Cas. No. 9,197, Olcott 498. But see The Lord, 15 Fed. Cas. No. 8,504, Chase 527.

84. The Matilda A. Lewis, 16 Fed. Cas. No. 9,281, 5 Blatchf. 520.

85. *Connecticut.*— Clark *v.* Richards, 1 Conn. 54; Scovel *v.* Chapman, 2 Root 315, applying the rule to owners of coasting vessels.

Louisiana.— Mississippi Agricultural Bank *v.* Jones, 19 La. 1.

Michigan.— Lyon *v.* Tiffany, 76 Mich. 158, 42 N. W. 1098.

Pennsylvania.— Bell *v.* Reed, 4 Binn. 127, 5 Am. Dec. 398.

South Carolina.— Purvis *v.* Tunno, 2 Bay 492.

Vermont.— Day *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

United States.— The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181; The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567]; The Northern Belle *v.* Robson, 154 U. S. 571, 14 S. Ct. 1166, 19 L. ed. 748 (holding that the owners of a barge are liable for damages to the cargo caused by the barge striking a sand bar and leaking, where her inability to withstand the ordinary pressure of such accidents is due to their negligent failure to properly repair the barge); Work *v.* Leathers, 97 U. S. 379, 24 L. ed. 1012; Corsar *v.* J. D. Spreckles, etc., Co., 141 Fed. 260, 72 C. C. A. 378; The Willie, 134 Fed. 759; The G. B. Boren, 132 Fed. 887; Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22, 75 C. C. A. 180]; Bush Co. *v.* New Jersey Cent. R. Co., 130 Fed. 222; The Nellie Floyd, 116 Fed. 80 [*affirmed* in 122 Fed. 617, 60 C. C. A. 175]; Nord-Deutscher Lloyd *v.* Insurance Co. of North America, 110 Fed. 420, 49 C. C. A. 1; The Arctic Bird, 109 Fed. 167; The Palmas, 108 Fed. 87, 47 C. C. A. 220; The Hiram, 101 Fed. 138; The New York, 93 Fed. 495; The British King, 92 Fed. 1018, 35 C. C. A. 159 [*affirming* 89 Fed. 872]; Leiter *v.* Ronalds, 84 Fed. 894; The Colima, 82 Fed. 665; The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 40, 21 S. Ct. 278, 45 L. ed. 419)]; Spreckels Sugar-Refining Co. *v.* The Glenmavis, 69 Fed. 472 (holding that where, at the end of a voyage, the water pipe leading to one of the water ballast tanks was broken, so that in an attempt to fill the tank the water ran into the hold, and damaged the cargo, there was a breach of the implied warranty of seaworthiness, in that, at the beginning of the voyage, the casing inclosing the pipe consisted only of a long board box, without corner posts or other means of preventing it from working loose, and was fastened at the bottom, and probably at the top, merely by cleats); Howell *v.* The Mary L. Peters, 68 Fed. 919 [*affirmed* in 79 Fed. 998, 25 C. C. A. 681]; Bowring *v.* Thebaud, 56 Fed. 520, 5 C. C. A. 640 [*affirming* 42 Fed. 794]; Monroe *v.* The Iowa, 50 Fed. 561; The Bergenseren, 36 Fed. 700; The Director, 34 Fed. 57, 13 Sawy. 172; The Brantford City, 29 Fed. 373; The Edwin I. Morrison, 27 Fed. 136; Sumner *v.* Caswell, 20 Fed. 249; The Lillie Hamilton, 18 Fed. 327; The William Murtagh, 17 Fed. 259; The Hadji, 16 Fed. 861; Hubert *v.* Recknagel, 13 Fed. 912; The Lizzie W. Virden, 11 Fed. 903; Ye Seng Co. *v.* Corbitt, 9 Fed. 423, 7 Sawy. 368; Standard Sugar Refinery *v.* The Centennial, 2 Fed. 409; Bowie *v.* Wheelright, 3 Fed. Cas. No. 1,733, 2 Cranch C. C. 167; Bucknor *v.* The Gilbert Green, 4 Fed. Cas. No. 2,099; Kellogg *v.* La Crosse, etc., Packet Co., 14 Fed. Cas. No. 7,663, 3 Biss. 496; Thomas Jefferson, 23 Fed. Cas. No. 13,923, 3 Ben. 302; Tudor *v.* The Eagle, 24 Fed. Cas. No. 14,230; The Vivid, 28 Fed. Cas. No. 16,978, 4 Ben. 319; Wilson *v.* Griswold, 30 Fed. Cas. No. 17,806, 9 Blatchf. 267.

England.—Weir *v.* Steamship Co., [1900] A. C. 525, 9 Aspin. 111, 5 Com. Cas. 363, 69 L. J. Q. B. 809, 83 L. T. Rep. N. S. 91; Steel *v.* State Line Steamship Co., 3 App. Cas. 72, 3 Aspin. 516, 37 L. T. Rep. N. S. 333; McFadden *v.* Blue Star Line, [1905] 1 K. B. 697, 10 Aspin. 55, 10 Com. Cas. 123, 74 L. J. K. B. 423, 93 L. T. Rep. N. S. 52, 21 T. L. R. 345, 53 Wkly. Rep. 576; Kopitoff *v.* Wilson, 1 Q. B. D. 377, 3 Aspin. 163, 45 L. J. Q. B. 436, 34 L. T. Rep. N. S. 677, 24 Wkly. Rep. 706; The Vortigern, [1899] P. 140, 8 Aspin. 523, 4 Com. Cas. 152, 68 L. J. P. D. & Adm. 49, 80 L. T. Rep. N. S. 382, 15 T. L. R. 259, 47 Wkly. Rep. 437; The Glenfruin, 10 P. D. 103, 5 Aspin. 413, 54 L. J. P. D. & Adm. 49, 52 L. T. Rep. N. S. 769, 33 Wkly. Rep. 826; Lyon *v.* Mells, 5 East 428, 102 Eng. Reprint 1134. See Readhead *v.* Midland R. Co., L. R. 2 Q. B. 412, 36 L. J. Q. B. 181, 16 L. T. Rep. N. S. 485, 15 Wkly. Rep. 831.

See 44 Cent. Dig. tit. "Shipping," § 449 *et seq.*

The presence of a leak in a vessel's hold, and injury to the cargo in consequence, is sufficient to charge the carrier with negligence, unless it can be shown that the direct cause of the damage was a peril of the sea. The ship is bound to provide the means necessary to enable her hold to be kept free from water, and will be liable for the failure in this regard, from whatever other cause it may occur. The Samuel E. Spring, 29 Fed. 397; Kellogg *v.* La Crosse, etc., Packet Co., 14 Fed. Cas. No. 7,663, 3 Biss. 496.

Where a voyage has several stages as to which standards of seaworthiness will differ, the ship must be fit for each subsequent stage

the warranty is a continuing one,[86] and he can avoid liability only by showing that the loss would have happened without such unseaworthiness;[87] but the

as entered upon. Quebec Mar. Ins. Co. *v.* Commercial Bank, L. R. 3 P. C. 234, 39 L. J. P. C. 53, 22 L. T. Rep. N. S. 559, 18 Wkly. Rep. 769; Worms *v.* Storey, 11 Exch. 427, 25 L. J. Exch 1; Dixon *v.* Saddler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895]; Commercial Mar. Co. *v.* Namagna Min. Co., 5 L. T. Rep. N. S. 504, 14 Moore P. C. 471, 10 Wkly. Rep. 136, 15 Eng. Reprint 383. Thus the vessel must have at the commencement of each stage sufficient fuel for that stage. Thin *v.* Richards, [1892] 2 Q. B. 141, 7 Aspin. 165, 62 L. J. Q. B. 39, 66 L. T. Rep. N. S. 584, 40 Wkly. Rep. 617; The Vortigern, [1899] P. 140, 8 Aspin. 523, 4 Com. Cas. 152, 68 L. J. P. D. & Adm. 49, 80 L. T. Rep. N. S. 382, 15 T. L. R. 259, 47 Wkly. Rep. 437. The rule does not apply to each of the several voyages which a vessel may take under a time charter, and there is no new implied warranty of seaworthiness at the beginning of each voyage, it being sufficient if the vessel is seaworthy at the commencement of the hiring for the whole period. Giertsen *v.* Turnbull, [1908] Ct. Sess. 1101.

Criterion of seaworthiness.—Absolute perfection is not required in the vessel, it being sufficient that she have that degree of fitness which an ordinarily careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it (Readhead *v.* Midland R. Co., L. R. 2 Q. B. 412, 36 L. J. Q. B. 181, 16 L. T. Rep. N. S. 485, 15 Wkly. Rep. 831; Burges *v.* Wickham, 3 B. & S. 669, 33 L. J. Q. B. 17, 8 L. T. Rep. N. S. 47, 11 Wkly. Rep. 992, 113 E. C. L. 669; Gibson *v.* Small, 1 C. L. R. 363, 4 H. L. Cas. 353, 17 Jur. 1131, 10 Eng. Reprint 499), and although the ship could not safely perform her voyage in the exact condition in which she sailed she may still be seaworthy, as where hatches are off or port holes are open, which will, however, in the ordinary course of business be closed (Farr, etc., Mfg. Co. *v.* International Nav. Co., 94 Fed. 675 [*affirmed* in 98 Fed. 636, 39 C. C. A. 197, 181 U. S. 218, 21 S. Ct. 591, 45 L. ed. 830]; The Silvia, 68 Fed. 230, 15 C. C. A. 362 [*affirming* 64 Fed 607, and *affirmed* in 171 U. S. 462, 19 S Ct. 7, 43 L. ed. 241], holding that the fact that ports eight inches in diameter, situated eight or nine feet above the water, were closed at the commencement of the voyage, only by heavy glass covers, set in brass frames, without closing additional iron covers with which they were provided, did not constitute unseaworthiness); Gilroy *v.* Price, [1893] A. C. 56, 7 Aspin. 314, 68 L. T. Rep N. S. 302, 1 Reports 76; Steel *v.* State Line Steamship Co., 3 App. Cas. 72, 3 Aspin. 516, 37 L. T. Rep. N. S. 333; Hedley *v.* Pinkney, etc., Steamship Co., [1892] 1 Q. B. 58, 7 Aspin. 135, 56 J. P. 308, 61 L. J. Q. B. 179, 66 L. T. Rep. N. S. 71, 40 Wkly. Rep. 113 [*affirmed* in [1894] A. C. 222, 7 Aspin. 483, 63 L. J. Q. B. 419, 70 L. T. Rep. N. S. 630, 6 Reports 106, 42 Wkly. Rep. 497]. But see Putnam *v.* The Manitoba, 104 Fed. 145 [*affirmed* in 171 U. S. 462, 19 S. Ct. 7, 43 L. ed. 241] (holding that an open port at the beginning of the voyage, the condition of which was unknown to the officers of the ship, made the ship unseaworthy as to cargo stowed in that compartment, since knowledge that such a port is open is one of the indispensable requisites and conditions for closing it when necessary during the voyage); The Phœnicia, 99 Fed. 1005, 40 C. C. A. 221 [*affirming* 90 Fed. 116]; and under the act of Feb. 13, 1893, a ship-owner who equips his vessel with proper iron covers for her ports is not liable for damages to cargo, resulting from the omission of the officers of the vessel to close such iron covers, in consequence of which water breaks through the glass (The Silvia, 64 Fed. 607 [*affirmed* in 68 Fed. 230, 15 C. C. A. 362]; nor does a warranty of seaworthiness require that the vessel shall be such that insurance companies shall be willing to insure her (Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22, 75 C. C. A. 180]; The Vincennes, 28 Fed. Cas. No. 16,945, 3 Ware 171. But see The Vesta, 6 Fed. 532).

The fact that a vessel is not a common carrier does not relieve her from the warranty implied in a contract of affreightment that she is sound, stanch, and seaworthy. The Planter, 19 Fed. Cas. No. 11,207*a*, 2 Woods 490.

The owner of a ship carrying goods or freight on a circuitous voyage is bound to put her into a state of repair at any port where she may be, and must answer for damage to goods arising for want of such repairs, whether or not the defect was known. Putnam *v.* Woods, 3 Mass. 48, 3 Am. Dec. 179.

Mere inequality in the strength of the rivets used in a ship does not amount to unseaworthiness or a violation of a charter provision that the ship shall be "tight, staunch and strong." The Ontario, 106 Fed. 324; American Sugar Refining Co. *v.* The Sandfield, 79 Fed. 371.

86. Kimball *v.* Tucker, 10 Mass. 192; Putnam *v.* Wood, 3 Mass. 481, 3 Am. Dec. 179; Purvis *v.* Tunno, 1 Brev. (S. C.) 260, 2 Am. Dec. 664; Wood *v.* The Wilmington, 48 Fed. 566; Whipple *v.* Mississippi, etc., Packet Co., 34 Fed. 54; The Francis Wright, 9 Fed. Cas. No. 5,044, 7 Ben. 88.

87. Smith *v.* Whitman, 13 Mo. 352; The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567].

The owner of a chartered ship, in herself seaworthy, but rendered unseaworthy by the improper loading of cargo and ballast which is carried out under his orders, is liable for damage occasioned by his personal negligence. The City of Lincoln *v.* Smith, [1904] A. C. 250, 9 Aspin. 586, 73 L. J. P. C. 45, 91 L. T. Rep. N. S. 206.

Where it satisfactorily appears that sea perils have been encountered adequate to

warranty that the vessel is fit at the beginning of a voyage, which is implied if the bill of lading is silent, cannot be implied if the parties have contracted otherwise.[88] The implied warranty is an absolute undertaking, not dependent on the owner's knowledge or ignorance, his care or negligence, that the ship is in fact fit to undergo the perils of the sea and other incidental risks;[89] and it covers latent defects not ordinarily susceptible of detection as well as those which are known or discoverable by inspection,[90] although just prior to the voyage the vessel was put in what seemed to be perfect repair,[91] for it is the duty of the carrier to know, at his own peril, the condition of the vessel in which he proposes to carry goods; while the owner of the cargo is under no obligation to look into the matter,[92] and his rights are not affected by failure to do so, unless her unfitness was actually known to him, or was a matter of such general notoriety that his knowledge or negligence is presumed;[93] but although ship-owners are liable for latent defects, this principle does not affect the seaworthiness of the vessel where, if all the facts were known at the time she sails, she would still be regarded by competent persons as reasonably fit for the voyage, according to the existing knowledge and usages.[94]

cause damage to a seaworthy ship, and there is general proof of seaworthiness, the damage is presumptively due to such perils. American Sugar Refining Co. *v.* The Sandfield, 79 Fed. 371, holding that damage to cargo by sea water entering the hold around a loose rivet, which has been fractured by perils of the sea, is a loss by perils of the sea within the exceptions of a charter-party and bill of lading.

88. The Tjomo, 115 Fed. 919.

89. Whitall *v.* William Henry, 4 La. 223, 23 Am. Dec. 483; The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567]. And see cases cited *supra*, note 85.

But under a provision of a bill of lading for goods to be carried by water, limiting the warranty of seaworthiness of the vessel to the exercise of reasonable efforts by the carrier to make them seaworthy, such carrier is not liable for the loss of the goods, through the unseaworthiness of a barge which it had built, where it exercised reasonable care in the selection of the materials, and the designer and workmen by whom it was built (The Arctic Bird, 109 Fed. 167. But see The Friesland, 104 Fed. 99, where the evidence did not show reasonably careful inspection, such as was incumbent upon the owners under a provision of the bill of lading requiring them to exercise due diligence to make the vessel seaworthy, in order to exempt them from liability), but clauses in a bill of lading exempting the owner from the general obligation of furnishing a seaworthy vessel must, however, be confined within strict limits, and are not to be extended by latitudinarian construction or forced implication, so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage (Wuppermann *v.* The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181).

90. Backhouse *v.* Sneed, 5 N. C. 173; The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed 644 [*affirming* 43 Fed. 681, 50 Fed. 567] (holding a carrier liable for losses incurred on a shipment of cattle through shrinkage in weight and fall in market value, by delay occasioned by breach of the warranty of seaworthiness, and holding that this warranty extended to the case of a propeller shaft, which broke, in ordinary weather, from weakness existing at the commencement of the voyage; not by reason of any flaw or other defect discoverable by any usual or reasonable means, even if the shaft were taken out, but rather from a weakening due to encountering extraordinary storms on previous voyages); Work *v.* Leathers, 97 U. S. 379, 24 L. ed. 1012; The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)]; The Bergenseren, 36 Fed. 700; The Hadji, 16 Fed. 861; Hubert *v.* Recknagel, 13 Fed. 912.

An open bolt hole in the water ballast tank (Williams *v.* The Exe, 52 Fed. 155 [*reversed* on other grounds in 57 Fed. 399, 6 C. C. A. 410]), or in a bulkhead (The Bergenseren, 36 Fed. 700), through which water flows and injures goods renders the carrier liable.

91. Backhouse *v.* Sneed, 5 N. C. 173; Hubert *v.* Recknagel, 13 Fed. 912.

92. The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567]; The Northern Belle, 9 Wall. (U. S.) 526, 19 L. ed. 746, 748 [*affirming* 18 Fed. Cas. No. 10,319, 1 Biss. 529]; Kellogg *v.* La Crosse, etc., Packet Co., 14 Fed. Cas. No. 7,663, 3 Biss. 496.

93. The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567]; The Presque Isle, 140 Fed. 202; Glasgow Shipowners Co. *v.* Bacon, 132 Fed. 881; Cornwall *v.* Moore, 132 Fed. 868 [*affirmed* in 144 Fed. 22, 75 C. C. A. 180]; Waterhouse *v.* Rock Island Alaska Min. Co., 97 Fed. 466, 38 C. C. A. 281; The Wm. Murtagh, 17 Fed. 259. But see Lengsfield *v.* Jones, 11 La. Ann. 624, holding that the fact that a shipper inspected defendant's steamboat and knew of its condition before allowing defendant to ship his goods does not preclude him from recovering for damages to the goods occasioned by the unseaworthiness of the boat.

94. The Titania, 19 Fed. 101; The J. C. Stevenson, 17 Fed. 540.

This liability for failure to provide a seaworthy vessel is not lessened by the Harter Act.[95]

b. What Constitutes Unseaworthiness. It is the duty of the ship-owner to provide a ship fit and competent for the kind of cargo and particular service for which she is engaged; [96] and to constitute seaworthiness the hull must be so tight,

95. Flint *v.* Christall, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130 [*affirming* 82 Fed. 472] (holding that section 3 of the Harter Act, which provides that if the ship-owner exercised due diligence to make the vessel seaworthy, etc., neither the vessel nor her owner shall be responsible for faults or errors in her navigation or management, does not give an owner who has exercised such diligence a right to contribution in general average for sacrifices made to save vessel and cargo, when stranded through negligence of the ship's officers); Wupperman *v.* The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181 (holding that the provisions of the Harter Act making it unlawful to insert in the contract a provision exempting from liability for damage from unseaworthiness where due diligence has not been used (section 2), and also exempting from loss from faults or errors in the navigation or management of the vessel, if due diligence has been used to furnish a seaworthy ship properly managed, equipped, and supplied (section 3), do not so change the general maritime law as to relieve the owner from his obligation to provide a seaworthy ship, and substitute therefor an obligation merely to use due diligence to see that she is seaworthy).

For a full discussion of the Harter Act see *infra*, VII, D, 13, b.

96. The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567]; Dene Steam Shipping Co. *v.* Tweedie Trading Co., 133 Fed. 589 [*affirmed* in 143 Fed. 854, 74 C. C. A. 606]; The C. W. Elphicke, 117 Fed. 279 [*affirmed* in 122 Fed. 439, 58 C. C. A. 421]; The Nellie Floyd, 116 Fed. 80 [*affirmed* in 122 Fed. 617, 60 C. C. A. 175]; The New York, 93 Fed. 495; The Thames, 61 Fed. 1014, 10 C. C. A. 232; Premuda *v.* Goepel, 23 Fed. 410; Sumner *v.* Caswell, 20 Fed. 249; The Regulus, 18 Fed. 380; The Lizzie W. Virden, 8 Fed. 624, 18 Blatchf. 340; The Vesta, 6 Fed. 532; Kellogg *v.* La Crosse, etc., Packet Co., 14 Fed. Cas. No. 7,663, 3 Biss. 496; *In re* Nine Hundred and Twenty-Eight Barrels of Salt, 18 Fed. Cas. No. 10,272, 2 Biss. 319; The Northern Belle, 18 Fed. Cas. No. 10,319, 1 Biss. 529 [*affirmed* in 9 Wall. (U. S.) 526, 19 L. ed. 746, 748]. But see McFadden *v.* Blue Star Line, [1905] 1 K. B. 697, 10 Aspin. 55, 10 Com. Cas. 123, 74 L. J. K. B. 423, 93 L. T. Rep. N. S. 52, 21 T. L. R. 345, 53 Wkly. Rep. 576, holding that, although at the time of loading there is an absolute warranty by the ship-owner, who has agreed to take a particular cargo, that his ship is fit to receive a cargo, but this warranty is not a continuing warranty, and defaults occurring after the period of loading are not breaches of this warranty.

Fitness for special cargo.— The implied warranty of seaworthiness extends not only to fitness to encounter perils of the sea, but to fitness for the service of carrying the particular goods accepted. The Thames, 61 Fed. 1014, 10 C. C. A. 232; Borthwick *v.* Ederslie Steamship Co., [1904] 1 K. B. 319, 9 Aspin. 513, 9 Com. Cas. 126, 73 L. J. K. B. 240, 90 L. T. Rep. N. S. 187, 20 T. L. R. 184, 52 Wkly. Rep. 439 [*affirmed* in [1905] A. C. 93, 10 Aspin. 25, 10 Com. Cas. 109, 74 L. J. Q. B. 338, 92 L. T. Rep. N. S. 274, 21 T. L. R. 277, 53 Wkly. Rep. 401]; Rathbone *v.* MacIver, [1903] 2 K. B. 378, 9 Aspin. 467, 8 Com. Cas. 303, 72 L. J. K. B. 703, 89 L. T. Rep. N. S. 378, 19 T. L. R. 590, 52 Wkly. Rep. 68; Stanton *v.* Richardson, 3 Aspin. 23, 45 L. J. C. P. 78, 33 L. T. Rep. N. S. 193, 24 Wkly. Rep. 324. Thus where cattle are shipped on board a vessel, and the cattle fittings prove to be insufficient in material and strength, the insufficiency of the fittings is a breach of the implied warranty that the ship should be fit for the voyage and for the cargo (Monroe *v.* The Iowa, 53 Fed. 561; The Brantford City, 29 Fed. 373), and in a contract to transport cattle it is implied that there shall be sufficient ventilation; and if there is not, so that insurance cannot be procured upon the cattle, the shipper may refuse to ship, and recover for breach of the contract (Morris *v.* The Alvah, 77 Fed. 315, 23 C. C. A. 181, holding, however, that the fact that a single underwriter refused to insure cattle for the voyage because of alleged insufficiency of ventilation does not of itself prove a breach of contract on the vessel's part, warranting refusal to ship the cattle); and a contract by a steamship company for the carriage of cattle on certain specified vessels, "all sailing" during certain months, imports a warranty that all the vessels named will sail during such months (Morris *v.* Chesapeake, etc., Steamship Co., 125 Fed. 62 [*affirmed* in 148 Fed. 11]). Upon a contract to carry frozen meat in a refrigerating ship there is an implied agreement that the ship and refrigerating machinery are fit to carry the meat (The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. ed. 65; Nelson *v.* Nelson Line, [1907] 1 K. B. 788 note; Rowson *v.* Atlantic Transp. Co., [1903] 1 K. B. 114, 9 Aspin. 347, 8 Com. Cas. 74, 72 L. J. K. B. 87, 87 L. T. Rep. N. S. 717, 19 T. L. R. 67, 52 Wkly. Rep. 85 [*affirmed* in [1903] 2 K. B. 666, 9 Aspin. 458, 9 Com. Cas. 33, 72 L. J. K. B. 811, 89 L. T. Rep. N. S. 204, 19 T. L. R. 668]; Maori King *v.* Hughes, 64 L. J. Q. B. 744 [*affirmed* in [1895] 2 Q. B. 550, 8 Aspin. 65, 65 L. J. Q. B. 168, 73 L. T. Rep. N. S. 141, 14 Reports 646, 44 Wkly. Rep. 2], and where specie is to be carried in a ship with a strong room there is an implied warranty that the room is strong enough to resist thieves (Queensland

stanch, and strong as to be competent to resist all ordinary action of the sea,

Nat. Bank *v.* Peninsular, etc., Steam Nav. Co., [1898] 1 Q. B. 567, 8 Aspin. 338, 3 Com. Cas. 51, 67 L. J. Q. B. 402, 78 L. T. Rep. N. S. 67, 14 T. L. R. 166, 46 Wkly. Rep. 324). The vessel must, moreover, be cleansed to receive the cargo. Lizzie W. Virden, 11 Fed. 903.

Vessels held seaworthy see The America, 174 Fed. 724; Davidson Steamship Co. *v.* 119,254 Bushels of Flaxseed, 117 Fed. 283 (the vessel, which was new, had been recently overhauled, and was in every respect in the best condition and properly equipped, having the highest rating, it being further shown that on the voyage she encountered unusually severe gales and heavy seas, which caused her seams to start from the strain); The Marechal Suchet, 112 Fed. 440; The Samuel F. Houseman, 108 Fed. 875, 48 C. C. A. 120; The Homeric, 106 Fed. 960 (holding that, where the vessel was new and of the highest class, it could not be inferred from the facts shown that the propeller key had sustained any injury prior to the voyage, but that such injury should, rather, be referred to the nearer and adequate cause of sea perils); The Ontario, 106 Fed. 324 [*affirmed* in 115 Fed. 769, 53 C. C. A. 199]; Memphis, etc., Packet Co. *v.* Overman Carriage Co., 93 Fed. 246 (holding that a court cannot find that the sinking of a steamer by collision with the pier of a bridge was due to unseaworthiness, merely from doubtful inferences, where there is direct and positive evidence of other facts which would alone account for the disaster); The Guadeloupe, 92 Fed. 670; The British King, 89 Fed. 872 [*affirmed* in 92 Fed. 1018, 35 C. C. A. 159] (holding that evidence that damage to chemicals and rags in a cargo from sea water resulted from leaks in the steamer's ballast tank, which was found after heavy weather to be sprung, and the rivets started and broken, is not sufficient to establish unseaworthiness where first-class construction, careful inspection, and good stowage are shown); Steinwender *v.* The Mexican Prince, 82 Fed. 484 [*affirmed* in 91 Fed. 1003, 34 C. C. A. 168] (holding that an obstruction in a water pipe passing through a cargo compartment by a piece of wood, at the outset of a voyage, so that water gets into the compartment, does not amount to unseaworthiness, because incidental and temporary in character); Bursley *v.* The Marlborough, 47 Fed. 667 (holding that a vessel built in 1877, kept in good repair, and rated, when she started on her voyage, in highest class English iron steamers in Lloyd's register, is reasonably safe for a voyage with a cargo of sugar from Iloilo to the Delaware breakwater by way of Colombo, Aden, and Gibraltar, and is seaworthy); The Northumbria, [1906] P. 292, 10 Aspin. 328, 75 L. J. P. D. & Adm. 101, 95 L. T. Rep. N. S. 618 (crack in plate).

Vessels held unseaworthy see Sanbern *v.* Wright, etc., Lighterage Co., 171 Fed. 449 (injury to cargo with no storm or other *vis major* to account for it); The Willie, 134 Fed. 759 (a barge held liable in damages for dumping a large part of her cargo of copper ore which she was discharging from a steamship, and for injury to the ship, on the ground of unseaworthiness, due to weakness from long use in the same business, which caused her to careen after she had taken on her load, although the weather was calm and the water smooth); The G. B. Boren, 132 Fed. 887 (a barge which sank at a dock, after loading a cargo of brick, held liable for the damage to the cargo on the ground of unseaworthiness due to overloading); Bush Co. *v.* New Jersey Cent. R. Co., 130 Fed. 222 (unseaworthy condition of a float); The Germanic, 124 Fed. 1, 59 C. C. A. 521 [*affirmed* in 196 U. S. 589, 25 S. Ct. 317, 49 L. ed. 610] (vessel while discharging careened from accumulation of ice); The Nellie Floyd, 116 Fed. 80 [*affirmed* in 122 Fed. 617, 60 C. C. A. 175] (where cement stowed between decks was found to have been rendered worthless by water, either sea water or rain water, which entered through the upper deck, the seams in which had not been calked for some eight or nine years, and which were in such condition as to permit any water falling on the deck to leak through); Nord-Deutscher Lloyd *v.* Insurance Co. of North America, 110 Fed. 420, 49 C. C. A. 1 (a lighter, so constructed that the presence of any water in the hold rendered it unstable when loaded, which overturned shortly after being loaded, when the weather was clear, the wind light, and the water smooth except from a slight swell caused by a passing steamer, by reason of water entering her hold through seams which were insufficiently calked); The Arctic Bird, 109 Fed. 167 (holding that the sinking of a barge, with her cargo, six hours after starting on a voyage, having been towed in smooth water during that time, cannot be attributed to a "peril of the sea," which has reference to such extraordinary perils as cannot be guarded against by the ordinary exertions of human skill and prudence, but must be presumed to have resulted from unseaworthiness at the beginning of the voyage); The Palmas, 108 Fed. 87, 47 C. C. A. 220 (the ends of pipes on the forecastle deck had been stopped or covered at the beginning of the voyage, but not sufficiently to withstand the action of the seas which broke over such deck, although the weather was no worse than should reasonably have been anticipated at that season of the year); The Colima, 82 Fed. 665 (a steamship of a very tender model, being unusually narrow in proportion of her depth, with a "tumble-home," materially increasing her disadvantage, so loaded as to have an excessive roll, from which she recovered slowly, and in a storm of no extraordinary severity, it was found that she was neither able to keep out of the trough of the sea, nor to ride safely in it; and she was finally thrown on her beams and sunk by three successive heavy seas); The Edwin I. Morrison, 27 Fed. 136 (a schooner having a bilge pump hole on each side of her deck, intended to be used in pumping out water, but which were

and to prosecute and complete the voyage without damage to the cargo;[97] and the ship must be fit in design, structure, condition, and equipment to encounter the ordinary perils of the voyage,[98] properly ballasted,[99] well manned and officered,[1]

dangerous unless their covers were kept tight, which negligently sailed with a heavy cargo without seeing that these covers were secure against ordinary accidents; and heavy seas washing one of them away, and letting water in through the hole on to the cargo, the schooner was liable for the resulting injury to the cargo); Hubert *v.* Recknagel, 13 Fed. 912; Standard Sugar Refinery *v.* The Centennial, 2 Fed. 409 (a vessel sent upon a voyage with her limbers in such defective condition as to prevent the water, coming in at a leak opened during the voyage, from passing to the pumps, until a large quantity of water had collected in the hold); Bucknor *v.* The Gilbert Green, 4 Fed. Cas. No. 2,099 (a vessel on her first voyage, which encountered no unusual gales or stress of weather, but took to leaking spontaneously, and whose bottom, on examination, disclosed an open knot hole and a loose tree nail); Tudor *v.* The Eagle, 24 Fed. Cas. No. 14,230; McFadden *v.* Blue Star Line, [1905] 1 K. B. 697, 10 Aspin. 55, 10 Com. Cas. 123, 74 L. J. K. B. 423, 93 L. T. Rep. N. S. 52, 21 T. L. R. 345 53 Wkly. Rep. 576 (insufficient packing of the joint in the tube communicating with the ballast-tank was a breach of the warranty of seaworthiness, as that defect existed before the loading was commenced; but that the failure to close the sluice door in the bulkhead was not a breach of this warranty, as the door had not been opened until after the cargo had been loaded).

Grain cargo.—A provision giving the shippers the right to cancel the contract for shipment of a cargo of grain if the ship be not ready on a certain date requires a practical and substantial readiness to receive the cargo such as would insure the underwriters' inspector's approval, and obtain his pass, and would gratify the usual and reasonable requirements for avoiding injury to the commercial value of the grain (Disney *v.* Furness, 79 Fed. 810); but failure of the ship to have up the top board of the shifting boards, where the board and the slots for receiving it are fitted and prepared, is not a want of readiness to receive grain cargo, such as would authorize the cancellation of the contract of affreightment. Nor is cancellation authorized by failure to have up the shifting boards in the hatch combings, as these, if used at all, are better put in when the cargo is partly loaded (Disney *v.* Furness, *supra*, holding also that a practice peculiar to the port of lading, which requires battening of the seams even when not needed, and merely out of abundant caution, cannot, without previous notice, authorize the shipper to cancel the contract for want of such necessary battening).

97. Corsar *v.* J. D. Spreckels, etc., Co., 141 Fed. 260, 72 C. C. A. 378 (holding that this includes seaworthiness as to stowage); The Lillie Hamilton, 18 Fed. 327.

The failure of so essential a portion of the mechanism as the rudder, in a gale of no extraordinary violence, is sufficient evidence that the vessel was unseaworthy in this regard. Nine Hundred and Twenty-Eight Barrels of Salt, 18 Fed. Cas. No. 10,272, 2 Biss. 319.

98. Pickup *v.* Thames Mar. Ins. Co., 3 Q. B. D. 594, 4 Aspin. 43, 47 L. J. Q. B. 749, 39 L. T. Rep. N. S. 341, 26 Wkly. Rep. 689; Stanton *v.* Richardson, 3 Aspin. 23, 45 L. J. C. P. 78, 33 L. T. Rep. N. S. 193, 24 Wkly. Rep. 324.

99. Sumner *v.* Caswell, 20 Fed. 249; The City of Lincoln *v.* Smith, [1904] A. C. 250, 9 Aspin. 586, 73 L. J. P. C. 45, 91 L. T. Rep. N. S. 206; Weir *v.* Union Steamship Co., [1900] A. C. 525, 9 Aspin. 111, 5 Com. Cas. 363, 69 L. J. Q. B. 809, 83 L. T. Rep. N. S. 91. But see The Hiram, 101 Fed. 138.

1. *Connecticut.*— Clark *v.* Richards, 1 Conn. 54.

Louisiana.— Mahoney *v.* Martin, 35 La. Ann. 29.

New York.— Tebo *v.* Jordan, 67 Hun 392, 22 N. Y. Suppl. 156.

Pennsylvania.— Bell *v.* Reed, 4 Binn. 127, 5 Am. Dec. 398.

United States.— Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230 (holding that not only must the vessel have a full complement of licensed officers and adequate crew with reference to all the exigencies of the intended route under such section, but the officers and crew must be competent for any exigency that is likely to happen); The Giles Loring, 48 Fed. 463; The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,323, 1 Blatchf. 196] (holding that it is a breach of the warranty of seaworthiness for a vessel to leave her port of lading abroad, or any intermediate return port, with a crew inadequate to man or sail her, although it be exceedingly difficult or even impossible to procure competent hands to man her, the obligation to supply a sufficient crew being absolute on the owner and master, and continuing during the voyage); The Vincennes, 28 Fed. Cas. No. 16,945, 3 Ware 171.

England.— Forshaw *v.* Chabert, 3 B. & B. 258, 6 Moore C. P. 369, 23 Rev. Rep. 596, 7 E. C. L. 659; Clifford *v.* Hunter, 3 C. & P. 16, M. & M. 103, 14 E. C. L. 427.

See 44 Cent. Dig. tit. "Shipping," § 450.

The fact that a vessel runs in a fog and in calm weather on a well-known cape, resulting in loss of cargo, is strong proof of her unseaworthiness, and is not rebutted by the admitted fact that she was perfectly new, well built, well rigged, well manned, and in charge of a captain of reputed skill and experience. The conclusion remains that her compass had not been sufficiently tested, or that she was not well commanded, and for either of these deficiencies she would be un-

furnished with proper supplies[2] and sails,[3] and fuel sufficient for the voyage contemplated;[4] and the requirement of seaworthiness at the beginning of a voyage includes, not only seaworthiness in hull and equipment, but also in the stowage of the cargo;[5] and if the nature of the navigation requires a pilot, and the vessel sails from a port where a pilot may be procured, she is not seaworthy without a pilot.[6] The seaworthiness of a vessel is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is really attributable to the ship or her owners.[7]

6. Improper Stowage — a. General Rules. The carrier must exercise due care and diligence in the stowing of cargo, and if damage results from negligent stowage he is liable,[8] particularly where he has been notified of the fragility of

seaworthy. Bazin *v.* Steamship Co., 2 Fed. Cas. No. 1,152, 3 Wall. Jr. 229. But see Manegold *v.* The E. A. Shores, Jr., 73 Fed. 342, holding that where a vessel deviated from her course in the night, and ran upon a well known reef, the existence of a deflection of her compass of about one eighth of a point was not sufficient ground for finding her unseaworthy, especially in the absence of any showing of its continuance for sufficient time to require notice.

An unusual procrastination in a voyage is not in itself evidence of incompetency in the crew to navigate the vessel but is admissible in corroboration of the opinion and judgment of witnesses that the crew was insufficient. The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,323, 1 Blatchf. 196].

The absence of a crew at night with the consent of the master, who remained on board alone while the ship was anchored in a harbor, renders the vessel unseaworthy; and she is liable for damages to cargo where she is driven ashore by a gale arising after the crew left. The Sarah, 21 Fed. Cas. No. 12,338, 2 Sprague 31.

2. Clark *v.* Richards, 1 Conn. 54; Bell *v.* Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398.

3. The Thomas Jefferson, 23 Fed. Cas. No. 13,923, 3 Ben. 302.

4. Bursley *v.* The Marlborough, 47 Fed. 667 (holding, however, that where the supply of fuel for a steamer, although not sufficing to carry a vessel through an unusual gale or to a port not contemplated, for which she was forced to make, was equal, both in quantity and quality, to that usually taken, and more than sufficient for the voyage contemplated in usual weather, it must be deemed sufficient on a libel for damages to cargo caused by alleged unseaworthiness); McIver *v.* Tate Steamers, [1903] 1 K. B. 362, 9 Aspin. 362, 8 Com. Cas. 124, 72 L. J. K. B. 253, 88 L. T. Rep. N. S. 182, 19 T. L. R. 217, 51 Wkly. Rep. 393; The Vortigern, [1899] P. 140, 8 Aspin. 523, 4 Com. Cas. 152, 68 L. J. P. D. & Adm. 49, 60 L. T. Rep. N. S. 382, 15 T. L. R. 259, 47 Wkly. Rep 437. And see The Abbazia, 127 Fed. 495.

5. Harloff *v.* Barber, 150 Fed. 185; Corsar *v.* J. D. Spreckles, etc., Co., 141 Fed. 260, 72 C. C. A. 378; The Titania, 19 Fed. 101. But see Steinwender *v.* The Mexican Prince, 82 Fed. 484, holding that a vessel is not unseaworthy in respect of her cargo by reason of the stowage of coffee in a compartment adjoining that in which water ballast is carried, although the water pipe connected with the tank passes through the compartment containing the coffee.

Liability for improper loading or stowage generally, see *infra*, VII, D, 6.

An overloaded vessel is unseaworthy under the warranty. The Willie, 134 Fed. 759; The G. B. Boren, 132 Fed. 887; The Colima, 82 Fed. 665. See Nord-Deutscher Lloyd *v.* North America Ins. Co., 110 Fed. 420, 49 C. C. A. 1; Barker *v.* The Swallow, 44 Fed. 771; Astrup *v.* Lewy, 19 Fed. 536.

6. Phillips *v.* Headlam, 9 L. J. K. B. O. S. 238, 2 B. & Ad. 380, 22 E. C. L. 163; Dixon *v.* Sadler, 9 L. J. Exch. 48, 5 M. & W. 405 [*affirmed* in 11 L. J. Exch. 435, 8 M. & W. 895].

7. The Titania, 19 Fed. 101.

For a similar warranty of seaworthiness in marine insurance see Marine Insurance, 26 Cyc. 644 *et seq.* And see Hughes Adm. 56.

8. Rochereau *v.* Hausa, 14 La. Ann. 431; Dowgate Steamship Co. *v.* Arbuckle, 158 Fed. 179; The Persiana, 156 Fed. 1019; Harloff *v.* Barber, 150 Fed. 185; Lazarus *v.* Barber, 124 Fed. 1007 [*affirmed* in 136 Fed. 534, 69 C. C. A. 310]; Doherr *v.* Houston, 123 Fed. 334 [*affirmed* in 128 Fed. 594, 64 C. C. A. 102]; The Orcadian, 116 Fed. 930; The Victoria, 114 Fed. 962; The Mississippi, 113 Fed. 985 [*affirmed* in 120 Fed. 1020, 56 C. C. A. 525]; Franklin Sugar Refining Co. *v.* The Earnwood, 83 Fed. 315; The Glide, 78 Fed. 152, 24 C. C. A. 46; Botany Worsted Mills *v.* Knott, 76 Fed. 582, 82 Fed. 471, 27 C. C. A. 326, 179 U. S. 69, 21 S. Ct. 36, 45 L. ed. 90 (damage held due to negligence in the general loading and stowage of cargo, within section 1 of the Harter Act, and not "in the management of the vessel," within the third section of that act); The Burgundia, 29 Fed. 607; The Geiser, 19 Fed. 877 (where cabbages were stowed in the between decks of a steamship, and were injured by

the cargo;[9] and as the master designates the place within the ship where each kind of cargo is to go, when such place is improper the ship is liable for consequent damages to the cargo, although it was stowed by another's stevedore,[10] but not

heat from steam pipes placed around the room where the cabbages were, for the purpose of warming the room when used, as it was intended, for steerage passengers, the vessel was liable); The Tommy, 16 Fed. 601; Brower *v.* The Water Witch, 4 Fed. Cas. No. 1,971, 19 How. Pr. (N. Y.) 241 [*affirmed* in 1 Black 494, 17 L. ed. 155] (where a cargo of cotton was badly stowed, and insufficient attention paid to the sea water in the vessel by using the pumps, thus damaging the cotton); Fleishman *v.* The John P. Best, 9 Fed. Cas. No. 4,861, 14 Phila. (Pa.) 527, 8 Wkly. Notes Cas. 30 (holding that where live stock was carried on the deck of a vessel, and the under deck cargo consisted of grain, and in the lower hold there were no shifting boards, and as a result the cargo shifted and contributed to produce the "list" of the ship whereby a number of cattle were lost by being thrown overboard, the stowage was improper, and that the vessel was liable for the loss of such cattle); The Star of Hope, 22 Fed. Cas. No. 13,313, 2 Sawy. 15 [*affirmed* in 17 Wall. 651, 21 L. ed. 719] (holding that where goods were received on board a vessel marked "in cabin stateroom," and an extra freight paid in consideration of their being so carried, and the goods were not stowed in the cabin, and sustained damage in consequence, the shipper was entitled to recover); Hutchinson *v.* Guion, 5 C. B. N. S. 149, 4 Jur. N. S. 1149, 28 L. J. C. P. 63, 6 Wkly. Rep. 757, 94 E. C. L. 149; Gillespie *v.* Thompson, 6 E. & B. 477 note, 2 Jur. N. S. 712, 88 E. C. L. 477; Swainston *v.* Garrick, 2 L. J. Exch. 255.

Extra care must be taken where the vessel by reason of age and construction is apt to leak. Lorentzen *v.* The Johanne, 48 Fed. 733.

Where a usage exists as to the stowage of a general ship, a shipper who is chargeable with notice thereof, and gives no special instructions, and whose goods are stowed in accordance with the usage, is deemed to have assented to the mode of stowage, and cannot, in case his goods are injured on the voyage in consequence of the mode of stowage, set it up as a ground of complaint. The Titania, 19 Fed. 101 (holding that stowage according to custom and usage and the best judgment of experienced persons is sufficient to protect the ship from the charge of negligence as against insurers); Baxter *v.* Leland, 2 Fed. Cas. No. 1,125, 1 Blatchf. 526 [*affirming* 2 Fed. Cas. No. 1,124, Abb. Adm. 348]; The Colonel Ledyard, 6 Fed. Cas. No. 3,027, 1 Sprague 530; Williams *v.* Mora, 29 Fed. Cas. No. 17,730 (holding that stowage of hogsheads of sugar upon their heads is sanctioned by usage). But see The G. R. Booth, 171 U. S. 450, 19 S. Ct. 9, 43 L. ed. 234, 91 Fed. 164, 33 C. C. A. 430 [*reversing* 64 Fed. 878], holding that where the stowage of detonators as ordinary merchandise was in accordance with the custom of the country, and although defendant ship's officers had no knowledge of their dangerous character, the ship was liable for loss to cargo for an explosion. But there is no such general custom of stowing macaroni and green fruit together as to constitute a usage exempting the ship from the consequences of damage arising therefrom in the existing state of knowledge. Paturzo *v.* Compagnie Francaise, 31 Fed. 611.

Stowage held proper see The Niceto, 134 Fed. 655; The Frey, 106 Fed. 319, 45 C. C. A. 309; Darragh *v.* The Dunbritton, 73 Fed. 352, 19 C. C. A. 449 (cocoanut between decks, over dry cargo in the hold, provided the decks are permanently laid, in thorough order, well calked and tight, and provided with sufficient scuppers for the escape of leaking oil); The Etona, 71 Fed. 895, 18 C. C. A. 380 [*affirming* 64 Fed. 880] (the stowage of hides beneath sugar stowed on a perfectly tight iron between decks); The Burswell, 13 Fed. 904 (caustic soda in iron drums, with iron cotton ties); The Viscount, 11 Fed. 168 (holding that under the stringer of an iron ship, in the between decks, is a proper place for the stowage of skins when so dunnaged as to be fully protected from the moisture on the sides of the ship); The Neptune, 18 Fed. Cas. No. 10,118, 6 Blatchf. 193 (holding that the main deck of a steam propeller, bulwarked entirely around and covered by the upper deck, and constructed specially for the purpose of carrying cargo, so that the cargo placed there is as completely protected from the weather and from storms as if it were in the hold, is a proper place in which to stow oil in casks).

A jettison of cargo, made necessary by top heavy loading of a new ship on her first voyage, combined with insufficient ballasting, is a loss which must fall on the owner, and not on the charterer or shipper, who are guaranteed seaworthiness in all respects at the time of sailing. The Whitlieburn, 89 Fed. 526.

Section 3 of the Harter Act (2 U. S. Rev. St. Suppl. (1892–1899) 81), which does not cover negligence in loading, stowing, or ballasting the ship. The Frey, 92 Fed. 667. And see, generally, *infra*, VII, D, 13, b.

Stowage under circumstances of difficulty held not to render the carrier liable see Zipsy *v.* Hill, 1 F. & F. 570.

9. Doherr *v.* Houston, 123 Fed. 334 [*affirmed* in 128 Fed. 594, 64 C. C. A. 102] (holding that it is incumbent upon a carrier who accepts goods knowing them to be of a character requiring special care in stowing to exercise such care, and he is liable for damage resulting from a failure to stow them in such place and in such manner that they will not be injured by the ordinary contingencies of the voyage); The Victoria, 114 Fed. 962.

10. The Thames, 61 Fed. 1014, 10 C. C. A. 232.

where the goods were stored by stevedores employed, directed, and paid by the shipper;[11] and it has been held that even if paid by the carrier if the stevedore is appointed by the shipper the carrier is absolved;[12] but although the stevedore is appointed by the shipper, if the contract of affreightment provides that the master shall direct the stevedore and the carrier be liable for the stowage the carrier will be responsible for improper stowage;[13] and where goods are stowed in the customary way, and according to the best judgment of experienced stevedores, the fact that if they had been stowed differently the injury sustained might have been avoided does not make the carrier liable, as he is not required to take such extraordinary precautions.[14] Different parts of the cargo must be so stowed as not unnecessarily to injure one another;[15] and a vessel is liable for damages caused to goods of one shipper by those of another, although the goods are stowed in the usual way, if the injury is caused by the goods of the third party being in bad condition when put on board,[16] or of such a nature as naturally to cause damage;[17] and where the vessel carries different kinds of cargo, which are liable to damage each other, special care must be taken that they be so stowed that damage shall not result,[18] and with as much skill as a competent stevedore could

11. The Diadem, 7 Fed. Cas. No. 3,875, 4 Ben. 247. And see Munson Steamship Line *v.* Steiger, 136 Fed. 772, 69 C. C. A. 492 [*affirming* 132 Fed. 160].

12. Blaikie *v.* Stembridge, 6. C. B. N. S. 894, 5 Jur. N. S. 1128, 28 L. J. C. P. 329, 8 Wkly. Rep. 24, 95 E. C. L. 894 [*affirmed* in 6 C. B. N. S. 911, 6 Jur. N. S. 825, 29 L. J. C. P. 212, 2 L. T. Rep. N. S. 570, 8 Wkly. Rep. 239, 95 E. C. L. 911]; The Catherine Chalmers, 2 Aspin. 598, 32 L. T. Rep. N. S. 847.

13. Ohrloff *v.* Briscall, L. R. 1 P. C. 231, 12 Jur. N. S. 675, 35 L. J. P. C. 63, 14 L. T. Rep. N. S. 873, 4 Moore P. C. N. S. 70, 15 Wkly. Rep. 202, 16 Eng. Reprint 90; Sack *v.* Ford, 13 C. B. N. S. 90, 9 Jur. N. S. 750, 32 L. J. C. P. 12, 106 E. C. L. 90. But see The Catherine Chalmers, 2 Aspin. 598, 32 L. T. Rep. N. S. 847.

14. Montague *v.* The Isaac Reed, 82 Fed. 566.

Degree of care required.—A ship is bound to the exercise of reasonable care and skill only in the stowage of cargo, and to render her liable for damage to cargo on the ground that she was unseaworthy by reason of improper stowage it must be shown that the manner of stowage was such as would not have been approved at the time by a stevedore or master of ordinary skill and judgment, knowing the voyage to be made and the weather and sea conditions which the vessel might reasonably be expected to encounter. The Musselcrag, 125 Fed 786.

15. The Excellent, 16 Fed. 148, 4 Woods 246 (holding that where the great bulk of the cargo of a vessel consisted of iron rails, steel, and tin in boxes, and that was stowed in the bottom of the vessel, the iron rails being stowed first and in block, fore and aft, and locked together, such stowage was bad, and increased the labor and strain of the vessel in heavy weather, and the vessel is liable for damages resulting therefrom to other cargo); The Cimbria, 13 Fed. 89 (holding that in the stowage of drums of glycerine care must be taken to prevent working of the tiers in case of springing of the ship, and the vessel will be liable for loss or damage where the exercise of proper care would have prevented any injury arising from any springing of the ship); The Pharos, 9 Fed. 912; The St. Patrick, 7 Fed. 125.

16. The Cheshire, 5 Fed. Cas. No. 2,658, 2 Sprague 28.

17. Wiggin *v.* The Glamorganshire, 50 Fed. 840, holding that where tea and camphor were carried on the same vessel, there being no general usage to carry the two together, but this vessel being especially fitted with an air-tight compartment for the camphor, in spite of which the tea was delivered impregnated with the fumes of camphor, the inference of want of care was irresistible, and the ship was liable. See also Church Cooperage Co. *v.* Pinkney, 170 Fed. 266.

18. Cranwell *v.* The Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190 (where flour was stowed on a vessel, either improperly, or in such proximity to an offensive and injurious oil as to suffer damage); Browning *v.* The Ship St. Patrick, 14 Phila. (Pa.) 596; The Persiana, 156 Fed. 1019; Lazarus *v.* Barber, 124 Fed. 1007 [*affirmed* in 136 Fed. 534, 69 C. C. A. 310]; The Mississippi, 120 Fed. 1020, 56 C. C. A. 525 [*affirming* 113 Fed. 985]; The Orcadian, 116 Fed. 930; Darragh *v.* The Dunbritton, 73 Fed. 352, 19 C. C. A. 449 (holding that when packages susceptible to damage from oil are taken as "broken stowage," the ship is not entitled to use them as dunnage for casks of oil which are known to be liable to leak, or to stow them in immediate physical contact with such casks, where it is almost inevitable that they will be soaked with oil before the end of the voyage); The Thames, 61 Fed. 1014, 10 C. C. A. 232; The Bitterne, 35 Fed. 927 (holding that it is negligence to stow bags of rape seed over chalk in the hold of a vessel, in view of the certainty of damage to the chalk if the bags of seed should be broken); Paturzo *v.* Compagnie Francaise, 31 Fed. 611 (holding that where the vessel delivered macaroni damaged by the fumes of heated and decaying green

show;[19] and where the different parts of the cargo are such as are very probable to injure each other, the carrier is liable, although they be well stowed, if injury result,[20] without proof of any wilful or negligent default on his part;[21] and for goods saved from a cargo partly destroyed by inherent defect.[22] But the carrier is not responsible for injury necessarily resulting to the goods of one shipper, from their being carried in the same vessel with the goods of other shippers, which, by usage, are a proper part of the same general cargo, unless such injury could have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods;[23] and although badly stowed if the carrier can show that damage to the goods must have happened anyhow, so that the bad stowing is not the proximate cause of the loss he is not liable.[24] It is not sufficient, however, to exonerate the carrier that the loss might have otherwise occurred.[25] The handling and loading of goods shipped is part

fruit, stowed in the same compartment, although the bills of lading excepted "damage from other goods by sweating or otherwise," the vessel was liable for negligence in stowing the two articles in the same compartment); The Marinin S., 28 Fed. 664 (holding that where licorice in bundles stowed with other cargo, consisting of fine iron ore, was found more or less damaged from the dust of the iron ore, which was scattered among the bundles, and adhered to the sticks, and the ore was insufficiently covered to prevent dust arising, as it is common for licorice to become damp during a voyage, and thus attract dust, the vessel was liable for the damage); The Pharos, 9 Fed. 912 (holding the vessel liable for damages to wool caused by contact with wet redwood lumber, a part of the cargo, from steaming); The St. Patrick, 7 Fed. 125 (lima wood, a delicate wood, peculiarly liable to injury from chemicals and soda ash and bleaching powder); Hamilton *v.* The Kate Irving, 5 Fed. 630, 5 Hughes 253 (iron cotton ties and bleaching powders); Mainwaring *v.* The Carrie Delap, 1 Fed. 874 (bales of empty bags and bleaching powder); Bearse *v.* Ropes, 2 Fed. Cas. No. 1,192, 1 Sprague 331 (hemp and oil); The Colonel Ledyard, 6 Fed. Cas. No. 3,027, 1 Sprague 530 (holding that a general ship is liable for the injury to flour from the effluvium from turpentine carried in the cargo, in the absence of an established usage to carry such articles in the same cargo); The Sabioncello, 21 Fed. Cas. No. 12,198, 7 Ben. 357 (holding that a vessel which carries paper stock and petroleum in the same cargo is bound to use especial care in stowing them with reference to each other). But see The Fern Holme, 24 Fed. 502 (holding that the fact that during an unusually rough and stormy voyage two or three barrels of Venetian red powder broke open, scattering the powder over other merchandise stowed near it, does not of itself show improper stowage); The Fanny Fosdick, 8 Fed. Cas. No. 4,641, 4 Blatchf. 374, 18 How. Pr. (N. Y.) 328 (where a libel for injury to wheat from odors of kerosene oil, near which it was stowed in a general ship, was dismissed, it not appearing that the odors would not disappear on proper ventilation).

Salt should never be stowed near iron, where there is any chance that water may come through from above on to the salt.

Marsh *v.* The Switzerland, 5 La. Ann. 111; The Nith, 36 Fed. 383, 13 Sawy. 481 [*affirming* 36 Fed. 86, 13 Sawy. 368]; Gillespie *v.* Thompson, 6 E. & B. 477 note, 2 Jur. N. S. 712, 88 E. C. L. 477.

19. Anglo-African Co. *v.* Lamzed, L. R. 1 C. P. 226, Harr. & R. 216, 12 Jur. N. S. 294, 35 L. J. C. P. 145, 13 L. T. Rep. N. S. 796, 14 Wkly. Rep. 477.

20. Braker *v.* The H. G. Johnson, 48 Fed. 696.

21. Gillespie *v.* Thompson, 6 E. & B. 477 note, 2 Jur. N. S. 712, 88 E. C. L. 477.

22. The Gomez de Castro, 10 Fed. Cas. No. 5,525, 10 Ben. 540, holding that while a shipper is not entitled to recover for loss and injury to green sugar by the breaking of the bags in which it was shipped, where it appears that the drainage from the sugar was excessive during the voyage, he may still be entitled to recover for the portion swept up and sold by the crew with the knowledge of the master. But see Hewat *v.* Havemyer, 1 Fed. 47, holding that a shipper of a cargo of sugar was not entitled to damages on the sweepings where it appeared that whatever consisted of sweepings might be fairly attributed to the condition of the bags and the discription of sugar they contained, and it was no part of the carrier's contract that sugar which necessarily runs out because the bags are not strong enough to withstand ordinary handling must be swept up and delivered clean.

23. Mainwaring *v.* The Carrie Delap, 1 Fed. 874.

24. Hastings *v.* Pepper, 11 Pick. (Mass.) 41; Rich *v.* Lambert, 12 How. (U. S.) 347, 13 L. ed. 1017; Clark *v.* Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; The Casco, 5 Fed. Cas. No. 2,486, 2 Ware 188; The Newark, 18 Fed. Cas. No. 10,141, 1 Blatchf. 203; The Reeside, 20 Fed. Cas. No. 11,657, 2 Sumn. 567.

Where a loss traced to an inherent defect has been aggravated by improper stowage, the carrier is responsible for the consequent loss. The Freedom, L. R. 3 P. C. 594, 1 Aspin. 136, 24 L. T. Rep. N. S. 452 [*affirming* L. R. 2 A. & E. 346, 38 L. J. Adm. 25, 20 L. T. Rep. N. S. 229, 1018, 18 Wkly. Rep. 48]. But see Clark *v.* Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985.

25. Gardner *v.* Smallwood, 3 N. C. 349.

of the stowage for negligence in which the vessel is liable;[26] but as a contract of affreightment becomes effective, so as to render the carrier liable for its breach, only from the time the goods are delivered for shipment the owner of a cargo has no lien upon a vessel for injury to such cargo resulting from delay in preparing the vessel for loading which occurred before the cargo was received by the owners or their agents.[27] Where weather encountered on a voyage is not more severe than is to be expected from the season of the year and in the locality traversed, peril of the sea is no defense to an action for injuries to goods from improper stowage.[28]

b. Stowage on Deck. Where goods are shipped under a clean bill of lading the presumption is that the goods are to be put under deck, there being no positive agreement to the contrary, or circumstances from which it might be inferred;[29] and stowage on deck without consent of the shipper renders the carrier liable for loss resulting therefrom,[30] even as against damages of the sea,[31] unless they would have been equally fatal if the goods had been under deck;[32] but as silence

See The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165. And see *infra*, VII, D, 10.

26. The D. Harvey, 139 Fed. 755; The Black Hawk, 3 Fed. Cas. No. 1,469, 9 Ben. 207; The R. G. Winslow, 20 Fed. Cas. No. 11,736, 4 Biss. 13. But see Wilson *v.* The Belvidere, 30 Fed. Cas. No. 17,790, 1 Pet. Adm. 258, holding that it is not the duty of a mate in loading casks from a lighter, either to work at the fall, or bear off with his own hands the casks from the side as it is about to come aboard, although both duties are sometimes performed by mates from commendable motives, and hence a vessel will not be liable for injury or loss of goods in loading caused by his failure to perform these duties.

The failure of the owner to maintain a watch on the ports during loading, and the negligence by which the port was suffered to remain open when the ship sailed, was a failure "in proper stowage, care and custody" within the first section of the Harter Act. Putnam *v.* The Manitoba, 104 Fed. 145.

27. The Hiram, 101 Fed. 138.

28. The Orcadian, 116 Fed. 930.

29. Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103; The Water Witch, 1 Black (U. S.) 494, 17 L. ed. 155; The Kirkhill, 99 Fed. 575, 39 C. C. A. 658 (holding the master of the ship justified in refusing to give a clean bill of lading for cotton stored in alley ways, under the general rule that a clean bill of lading negatives any carriage except under deck); The New Orleans, 26 Fed. 44; The Gran Canaria, 16 Fed. 868; Chubb *v.* Seven Thousand Eight Hundred Bushels of Oats, 5 Fed. Cas. No. 2,709; Clifton *v.* Quantity of Cotton, 5 Fed. Cas. No. 2,895; Two Hundred and Sixty Hogsheads of Molasses, 24 Fed. Cas. No. 14,296, 1 Hask. 24; Vernard *v.* Hudson, 28 Fed. Cas. No. 16,921, 3 Sumn. 405.

30. *Alabama.*— Hihler *v.* McCartney, 31 Ala. 501; Waring *v.* Morse, 7 Ala. 343.

Connecticut.— Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

Louisiana.— Shackleford *v.* Wilcox, 9 La. 33; Dorsey *v.* Smith, 4 La. 211.

Maine.— Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103.

Massachusetts.— Sayward *v.* Stevens, 3 Gray 97. See Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108.

North Carolina.— Gardner *v.* Smallwood, 3 N. C. 349.

United States.— The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 771; The Waterwitch, 1 Black 494, 17 L. ed. 155; Crooks *v.* The Fanny Skolfield, 65 Fed. 814; The New Orleans, 26 Fed. 44; The Gran Canaria, 16 Fed. 868; Clifton *v.* Quantity of Cotton, 5 Fed. Cas. No. 2,895; The Peytona, 19 Fed. Cas. No. 11,059, 1 Ware 541 [*affirmed* in 19 Fed. Cas. No. 11,058, 2 Curt. 21]; Stinson *v.* Wyman, 23 Fed. Cas. No. 13,460, 2 Ware 176; Talbot *v.* Wakeman, 23 Fed. Cas. No. 13,731, 19 How. Pr. (N. Y.) 36; Vernard *v.* Hudson, 28 Fed. Cas. No. 16,921, 2 Sumn. 405; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165.

See 44 Cent. Dig. tit. "Shipping," § 452 *et seq.*

Stowage held not to be on deck see Merryman *v.* The William Crane, 50 Fed. 444, where cotton was stowed on the main deck of a large coasting steamship, under the upper deck, in a space between the main deck and the upper deck, inclosed by iron bulwarks and by strong shutters and bulkheads, although not under the hatches of the main deck, the stowage being in a protected place.

Cargo stowed on deck in violation of contract is at the vessel's risk, unless clearly shown that it would have been destroyed if it had been loaded below deck. The Governor Carey, 10 Fed. Cas. No. 5,645*a*, 2 Hask. 487.

31. Chubb *v.* Seven Thousand Eight Hundred Bushels of Oats, 5 Fed. Cas. No. 2,709; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165.

32. The Governor Carey, 10 Fed. Cas. No. 5,645*a*, 2 Hask. 487; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165.

Whether stowage of goods within a poop deck is a stowage under deck, within the meaning of a bill of lading, is not dependent upon whether or not the poop deck was built when the ship was originally constructed, but upon whether it afforded sufficient protection to the goods. Williams *v.* Mora, 29 Fed. Cas. No. 17,730.

in a bill of lading as to stowage is not an express contract upon that point, the ship-owner may prove an agreement to carry on deck, where a claim for loss is made,[33] or usage to that effect;[34] and a shipper who agrees that his goods shall be carried on deck, and assents to the manner of stowing and protecting them, cannot recover for an injury through natural causes where all reasonable care was taken of them during the voyage.[35] A vessel is not liable for loss or damage to a cargo by reason of its having been stowed on deck, if it must have been contemplated from the nature of the cargo that it should be so stowed;[36] but even though a cargo was of such character as to be properly stowed on the deck, the vessel is liable for damages caused by its being insufficiently secured,[37] or covered,[38] or for an unnecessary jettison.[39] Taking a full price for stowing on deck will subject the owner of the vessel to damages, if the freight placed on deck is thereby lost or damaged;[40] but any inference that the cargo may be carried on deck, implied by a reference in the contract to the capacity of the vessel, is repelled by the fact that the shipper refused to insert leave to carry on deck in the bills of lading proposed to be signed, and paid under deck freight;[41] and a shipper who sees goods deck-stowed without objection cannot claim damages for injury to them occurring without fault of the carrier.[42]

c. Dunnage. Lack of sufficient dunnage to protect cargo is bad stowage, for which the vessel is liable,[43] and a ship must be dunnaged so as to protect the

33. The Delaware *v.* Oregon Iron Co., 14 Wall. (U. S.) 579, 20 L. ed. 779; Clifton *v.* Quantity of Cotton, 5 Fed. Cas. No. 2,895; Two Hundred and Sixty Hogsheads of Molasses, 24 Fed. Cas. No. 14,296, 1 Hask. 24; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165. But see The New Orleans, 26 Fed. 44, holding that the shipper cannot prove by parol a consent of the shipper to stow on deck the bill of lading being silent.

34. Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149 (holding that a commercial usage to stow gin on deck having existed for a sufficient length of time to have become generally known rebuts a presumption of negligence arising from the loss of gin so stowed); Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103; Clifton *v.* Quantity of Cotton, 5 Fed. Cas. No. 2,895; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165. But see The Colima, 82 Fed. 665 (holding that no custom allowing the loading of lumber on deck can validate navigation by an unstable ship, or excuse the neglect to load sufficiently heavy weights below, especially where the ship is naturally of a tender model); The Gran Canaria, 16 Fed. 868 (holding that it being claimed that by custom the owners of the vessel had a right to carry goods on deck by submitting to a charge for the extra insurance, and giving a rebate for difference of freight, the custom, if proved, would be invalid and illegal, as unreasonable and in conflict with the terms of the contract).

Liability under usage.—With reference to cargo stowed on deck in pursuance of a custom of similar vessels to so carry like goods, the ship is liable as a common carrier, but its liability in this case is limited to ordinary care, that is, such degree of care as a prudent owner would exercise. If the loss was the result of the negligence, want of skill and care, of the master, the liability of the vessel is established. The Hettie Ellis, 20 Fed. 507 [*affirmed* in 20 Fed. 393 (*following* Lawrence *v.* Minturn, 17 How. (U. S.) 100, 15 L. ed. 58)].

35. The Thomas P. Thorn, 23 Fed. Cas. No. 13,927, 8 Ben. 3.

36. Talbot *v.* Wakeman, 23 Fed. Cas. No. 13,731, 19 How. Pr. (N. Y.) 36.

37. Talbot *v.* Wakeman, 23 Fed. Cas. No. 13,731, 19 How. Pr. (N. Y.) 36.

38. Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415.

39. Compania de Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398.

40. Gardner *v.* Smallwood, 3 N. C. 349.

41. The Water Witch, 1 Black (U. S.) 494, 17 L. ed. 155.

42. Van Horn *v.* Taylor, 2 La. Ann. 587, 46 Am. Dec. 558; Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103. But see Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415, holding that a shipper, by consenting that his goods may be carried on deck, does not thereby assume the risk of their loss or injury, and if the carrier has contracted to cover and protect them, he is liable for damage from rain, occasioned by the want of such protection; and the fact that the shipper knew that the goods were not covered when the boat departed is immaterial.

43. The Victoria, 114 Fed. 962; Franklin Sugar-Refining Co. *v.* The Earnwood, 83 Fed. 315; Crooks *v.* The Fanny Skofield, 65 Fed. 814; Marx *v.* The Britannia, 34 Fed. 906; The Tommy, 16 Fed. 601; Crocket *v.* Brower, 6 Fed. Cas. No. 3,401 (holding it bad stowage to place hogsheads of sugar on barrels of whisky, without dunnage and beds at the bottom); The Sloga, 22 Fed. Cas. No. 12,955, 10 Ben. 315 (where the stowage was insufficient to protect cargo from water in the hilges when the vessel rolled).

Cargo stowed around the mast ought to be dunnaged away from the mast, so that if any water comes through the mast coat it will not come in contact therewith. Steinwender

cargo even in rough weather, if the vessel springs no serious leak;[44] but if the vessel has met with extraordinary sea peril upon proof of usual good dunnage the carrier will not be liable.[45]

7. Negligent Management or Navigation. The owner of a vessel is answerable for injury to cargo resulting from the carelessness or unskilfulness of his master or crew.[46] Thus in a contract by a common carrier by water, he impliedly undertakes that his captain and sailors have a competent knowledge of the navigation, and he will be liable for a loss occasioned by the want of such knowledge,[47] or by negligent management of the ship,[48] as by carelessly running the vessel in a

v. The Aspasia, 79 Fed. 91; The Nith, 36 Fed. 383, 13 Sawy. 481, holding the rule particularly applicable to a cargo of salt.

44. Endicott *v.* Renauld, 8 Fed. Cas. No. 4,482, 10 Ben. 582; The Howden, 12 Fed. Cas. No. 6,765, 5 Sawy. 389.

45. Steinwender *v.* The Aspasia, 79 Fed. 91.

46. Guiterman *v.* Liverpool, etc., Mail Steamship Co., 9 Daly (N. Y.) 119 [*reversed* on other grounds in 83 N. Y. 358] (holding that, under the statutory regulations applicable to the port of Liverpool, an ocean steamship need not take on a licensed pilot while she is in the river, at anchor, coaling preparatory to a voyage; and hence, if the pilot is on board, it is by the voluntary act of the owner, and as his servant, so as to make the owner answerable for any loss to the cargo arising from the pilot's negligence); Scruggs *v.* Davis, 5 Sneed (Tenn.) 261; Houston, etc., Nav. Co. *v.* Dwyer, 29 Tex. 376; Dusar *v.* Murgatroyd, 8 Fed. Cas. No. 4,199, 1 Wash. 13; The Griffin, 11 Fed. Cas. No. 5,814, 4 Blatchf. 203 [*affirming* 10 Fed. Cas. No. 5,789, and *affirmed* in 22 How. (U. S.) 491, 16 L. ed. 391] (holding the vessel liable for the loss of goods seized by customs officers and forfeited for the neglect of the master to enter them on the manifest). See Johnson *v.* The Arabia, 24 Mo. 86.

Where the vessel is laid up for the winter with cargo on board, the master must take precautions to prevent injury from damages or mold, and to protect the deck load from the effects of snow and ice; and the vessel is liable where, by the negligence of the master, the cargo is exposed to injury by an excepted peril. The Tan Bark Case, 23 Fed. Cas. No. 13,742, Brown Adm. 151.

The vessel is liable where barratrously run ashore by the master, for the loss of cargo, and for injury to the portion saved. The William Taher, 30 Fed. Cas. No. 17,757, 2 Ben. 329.

La. Civ. Code, art. 2299, releasing an employer from liability for torts of servants which he could not have prevented, does not release the owners of a steamboat from liability for injury to horses carried on the boat, caused by an explosion of the boiler through the negligence of the captain, although the owners were not present on board to prevent the accident. Kelly *v.* Benedict, 5 Rob. 138, 39 Am. Dec. 530.

47. Morel *v.* Roe, R. M. Charlt. (Ga.) 19; The Montana, 17 Fed. 377 [*affirmed* in 22 Fed. 715 (*affirmed* in 129 U. S. 397, 464, 9 S. Ct. 469, 32 L. ed. 788)]; The Jenny Jones, 13 Fed. Cas. No. 7,286, Deady 82; The Northern Belle, 18 Fed. Cas. No. 10,319, 1 Biss. 529 (holding that where a vessel is well acquainted with the danger of a channel and bar at low water, and she is sunk and her cargo injured while towing two barges around a point where such channel is narrow and the water shallow, she is liable for the injury to cargo); The Thomas Jefferson, 23 Fed. Cas. No. 13,923, 3 Ben. 302.

48. Hill *v.* Sturgeon, 28 Mo. 323; The Gladys, 159 Fed. 698, 86 C. C. A. 566 (the careening of a lighter proceeding up a river in tow, by which she dumped overboard her cargo of wine in barrels, held not due to her unseaworthiness, but to a swell caused by a meeting steamer, for which her owners were liable because of her negligent navigation); Bradley *v.* Lehigh Valley R. Co., 145 Fed. 569 [*affirmed* in 153 Fed. 350, 82 C. C. A. 426]; Northwestern Transp. Co. *v.* Leiter, 107 Fed. 953, 47 C. C. A. 97; The Hiram, 101 Fed. 138; Memphis, etc., Packet Co. *v.* Overman Carriage Co., 93 Fed. 246; The Fred H. Rice, 40 Fed. 690; The Costa Rica, 6 Fed. Cas. No. 3,261, 3 Sawy. 538; The Jenny Jones, 13 Fed. Cas. No. 7,286, Deady 82; The Rocket, 20 Fed. Cas. No. 11,975, 1 Biss. 354.

Snags, rocks, or shoals in western rivers.— The rule which imputes carelessness to a captain whose boat strikes a known rock or shoal, unless driven by a tempest, is held to be only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of the western rivers. There each case must be governed by its own circumstances, and be tested by the course usually pursued by skilful pilots in such cases. Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81. But although a snag in a western river may be a peril of navigation within that exception in a receipt by a carrier for goods, the carrier is not absolved from liability for their loss where the vessel is wrecked on a snag through the negligence of the carrier or of those whom he employs. Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122. And see Ready *v.* The Highland Mary, 17 Mo. 461, holding that where plaintiff's horse, which was placed on the guard of a boat, was lost by being thrown from the boat by the tearing away of the guard by a snag, the fact that at the time of the accident the boat was at night attempting to pass a point difficult for boats to navigate did not of itself establish the

fog,[49] or selecting an improper mooring,[50] or failing to take soundings;[51] and as an owner of cargo has a right to assume that necessary care and caution will be exercised in not going out in extrahazardous weather, if the carrier does so, and the owner is not privy or consenting thereto, he may recover his whole damage.[52] But the carrier may absolve himself by showing that he navigated in the way customary in the waters he was navigating.[53] The third section of the Harter Act[54] changes the law radically and, in cases to which it applies, exempts the vessel from liability to cargo for negligent navigation.[55]

8. Delay or Deviation — a. Effect of in General. A common carrier of goods by water is liable for loss caused to goods by unnecessary delay,[56] particularly

negligence of the carrier. See, generally, *supra*, VII, D, 1.

Negligence must be presumed where a steamboat proceeding quietly up the Ohio river was run into the bank by the pilot so hard as to knock a hole into the bottom of the boat big enough to sink it, and there was light enough to see, and no reason shown for the accident. Louisville, etc., Packet Co. *v.* Smith, 60 S. W. 524, 22 Ky. L. Rep. 1323.

Where a master and crew abandoned their vessel, claiming that she was sinking, but she was afterward found riding safely and not leaking seriously, and the circumstances were such as to raise a grave suspicion that she had been purposely dismasted, and an attempt made to scuttle her, because of bad seamanship and negligence the ship was liable for the amounts paid for salvage of, and as damages to, the cargo, by the insurers. The James Martin, 88 Fed. 649.

49. The Montana, 17 Fed. 377 [*affirmed* in 22 Fed. 715 (*affirmed* in 129 U. S. 397, 464, 9 S. Ct. 469, 32 L. ed. 788)] (where in an action to recover the value of goods lost by the stranding of a vessel, it appeared that the vessel was running near a dangerous coast, and that there was a fog on land); The Costa Rica, 6 Fed. Cas. No. 3,261, 3 Sawy. 538 (where the master attempted to come up the bay of San Francisco in a dense fog, the vessel being in comparative safety, and the master not being compelled by any exigency to make the attempt); The Rocket, 20 Fed. Cas. No. 11,975, 1 Biss. 354 (holding that the necessity to keep schedule time will not justify a vessel in running at full speed in a fog alongshore, and the ship is liable for injury to goods caused by running aground).

50. The John Cottrell, 34 Fed. 907.

51. *In re* The City of Para, 44 Fed. 689; The Alpin, 23 Fed. 815, where the master was negligent in failing to sound. But see Bursley *v.* The Marlborough, 47 Fed. 667, holding that where a vessel ran at night on a coral reef and the evidence showed that stranding at that point was not uncommon, through suddenly arising unusual currents, that carry a vessel imperceptibly off her course; and that the nearness of the reef could not be discovered by sounding, it was not negligence not to sound.

52. The Wm. Murtagh, 17 Fed. 259, holding also that the shipper can recover his damages from the owner of a tug who towed the boat out in dangerous weather.

53. Johnson *v.* Lightsey, 34 Ala. 169, 73 Am. Dec. 450.

54. See *infra*, VII, D, 13, b.

55. See *infra*, the following notes.

56. *Louisiana.*— The Olive Branch, 20 La. Ann. 258.

Missouri.— Smith *v.* Whitman, 13 Mo. 352.

New York.— Sherman *v.* Inman Steamship Co., 26 Hun 107.

United States.— The Prussia, 100 Fed. 484 (holding that promptness in the transportation of merchandise is a substantial condition of a contract of affreightment, and where ship-owners fail to deliver cargo within the time reasonably necessary to make the voyage, and the delay is not due to stress of weather or any of the causes for which they do not assume liability, they are liable to the shipper for losses resulting to him from such delay, although no time for delivery was fixed by the bill of lading); The James Platt, 13 Fed. Cas. No. 7,199, 9 Ben. 491.

England.— Thirley *v.* Orchis Steamship Co., [1907] 1 K. B. 660, 12 Com. Cas. 251, 76 L. J. K. B. 595, 96 L. T. Rep. N. S. 488, 23 T. L. R. 338.

See 44 Cent. Dig. tit. "Shipping," § 459.

Where a vessel delays to aid another boat in distress, it is not such a deviation as to render the owners liable for a loss of goods, even though there was not danger of loss of life on the boat in distress (Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342); and the rule applies with greater force where the bill of lading permits the vessel to tow and assist vessels in distress (Morris Beef Co. *v.* The Wells City, 61 Fed. 857, 10 C. C. A. 123 [*affirming* 57 Fed. 317]); but the clause does not justify an unnecessary deviation in rendering a salvage service by going to a distant port instead of to the one most reasonably accessible in the particular circumstances of the case (Schwarzchild *v.* National Steamship Co., 74 Fed. 257); and where, although the weather was good and the crew might have been taken off a disabled vessel, she was towed a great distance, and both vessels wrecked, the deviation was not justifiable (Scaramanga *v.* Stamp, 5 C. P. D. 295, 4 Aspin. 295, 49 L. J. C. P. 674, 42 L. T. Rep. N. S. 840, 28 Wkly. Rep. 691 [*affirming* 4 C. P. D. 316, 48 L. J. C. P. 478, 41 L. T. Rep. N. S. 191].

Under 4 Curwen St. Ohio, p. 3399, which makes all steamboats liable "for damages arising out of any contract for the transportation of any goods or persons," an action

where the delay is occasioned by breach of the warranty of seaworthiness,[57] and can only avoid this liability by showing that the loss would have happened without such delay,[58] or was due to the condition of the weather, and not to any negligence in her navigation.[59] A ship is liable if from her failure to sail on the day advertised a perishable cargo on board be spoiled; [60] but a ship is not answerable for damages to a perishable cargo, occasioned by an unusually protracted voyage, unless the delay is owing to the fault of the master or owner; [61] and where a ship trading between two ports is loaded with reference to the ordinary condition of the entrance of the port of destination, this is all that can be demanded; and her owners cannot be held liable for injury to cargo from her detention on account of exceptional and unusual circumstances which render her draft of water too great for her to cross the bar.[62] Carriers by water are bound to pursue the usual course of navigation, and if they deviate, and a loss ensue while they are out of the course, they are responsible, even though it be caused by inevitable accident; [63] and a deviation so far displaces the special contract of carriage that the carrier cannot claim the benefit of stipulations in his favor contained in the bill of lading,[64] even as to losses before the deviation.[65] But it is not a deviation where the course pursued was in conformity with the usage of the trade.[66]

b. Detention For Repairs. Where a seaworthy vessel is so disabled in a severe gale as to require her to put into the nearest port for repairs, her owners are not liable for damage to perishable goods caused by the necessary delay for repairs,[67] if the master was justified in putting into the port for repairs, used proper diligence in getting repairs made, exerted himself to preserve the cargo, under the best advice he could get, and was unable to send the cargo forward by another vessel; [68] and the owners are not liable even if the means used by the

lies against a steamboat upon a special contract signed by the owner for the transportation of goods upon the boat to the end of its route and beyond, although the delay complained of as injuring the goods occurred beyond. The Jonas Powell *v.* Thompson, 16 Ohio St. 98.

57. The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567], holding the rule to apply, although the breach was due to a hidden defect in the propeller shaft not attributable to the carrier's negligence.

58. Smith *v.* Whitman, 13 Mo. 352.

59. The Hiram, 101 Fed. 138.

60. Reardon *v.* Zacharie, 6 Mart. N. S. (La.) 644.

61. The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,323, 1 Blatchf. 196].

62. Lewis *v.* The Success, 18 La. Ann. 1.

63. *Connecticut.*—Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235, holding that where the shipper's goods were lost by the vessel striking a rock the situation of which was not generally known and not actually known to the master, the carrier is liable if the vessel was unnecessarily exposed to the peril by a deviation from the regular course and an attempt to navigate an unknown channel without a pilot, and where a pilot was generally employed.

Ohio.— Lawrence *v.* M'Gregor, Wright 193.

Pennsylvania.— Hand *v.* Baynes, 4 Whart. 204, 33 Am. Dec. 54.

United States.— Calderon *v.* Atlas Steamship Co., 64 Fed. 874 [*reversed* on other grounds in 170 U. S. 272, 18 S. Ct. 588, 42 L. ed. 1033].

England.— Davis *v.* Garrett, 6 Bing. 716, 8 L. J. C. P. O. S. 253, 4 M. & P. 540, 31 Rev. Rep. 524, 19 E. C. L. 321; Ellis *v.* Turner, 8 T. R. 531, 5 Rev. Rep. 441, 101 Eng. Reprint 1529.

See 44 Cent. Dig. tit. "Shipping," § 459.

The words "with liberty . . . to make deviation," in a bill of lading, give the carrier the right to make only such departures from the voyage as are necessary and reasonable. Swift *v.* Furness, 87 Fed. 345.

64. Thorley *v.* Orchis Steamship Co., [1907] 1 K. B. 660, 12 Com. Cas. 251, 76 L. J. K. B. 595, 96 L. T. Rep. N. S. 488, 23 Wkly. Rep. 338.

65. International Guano, etc. *v.* Macandrew, [1909] 2 K. B. 360, 14 Com. Cas. 194, 78 L. J. K. B. 691, 100 L. T. Rep. N. S. 850, 25 T. L. R. 529.

66. Hostetter *v.* Gray, 11 Fed. 179 [*affirmed* in 137 U. S. 30, 11 S. Ct. 1, 34 L. ed. 568]. And see Robertson *v.* National Steamship Co., 139 N. Y. 416, 34 N. E. 1053 [*reversing* 60 N. Y. Super. Ct. 132, 17 N. Y. Suppl. 459]. *Compare* the analogous doctrine of deviation in marine insurance. MARINE INSURANCE, 26 Cyc. 625; Maritime Ins. Co. *v.* Stearns, [1901] 2 K. B. 912, 6 Com. Cas. 182, 71 L. J. K. B. 86, 17 T. L. R. 613, 50 Wkly. Rep. 238; Hughes Adm. 60.

67. Cochran *v.* The Cleopatra, 17 La. Ann. 270; The Jason, 28 Fed. 323.

68. The Collenberg, 1 Black (U. S.) 170, 17 L. ed. 89; The Jason, 28 Fed. 323, where the expense of forwarding would have been unreasonable.

master to preserve it, under the advice of experienced and competent persons, were not the most suitable and well judged;[69] but where a vessel is compelled to lie in a foreign port for a long time waiting for means to procure repairs, the voyage is in effect broken up, and the disabling of the master and mate by sickness from attending to the duties of the ship will not exonerate the owner from responsibility for the loss of the cargo by lack of proper attention,[70] and the carrier is liable also for delaying longer than was necessary to make proper temporary repairs,[71] or for refusing to deliver the cargo to the consignee at the port of delay upon tender of full freight and a general average bond.[72]

9. Discharging and Caring For Cargo — a. Negligent Discharge in General. The carrier is liable for loss of goods through negligent discharging,[73] and is liable for the loss of goods delivered to him as such where a portion of them were transferred to a float belonging to such carrier preparatory to their delivery, and were there destroyed by fire;[74] but where consignees, although having given notice to the ship that they will not receive the cargo because of the unfavorable state of the weather, do accept and remove it in part as delivered from the ship, they

69. Lawrence *v.* The Lieutenant Admiral Callomberg, 15 Fed. Cas. No. 8,139 [*affirming* 7 Fed. Cas. No. 3,716, 18 How. Pr. 141, and *affirmed* in 1 Black 170, 17 L. ed. 89].

70. Phelan *v.* The Alvarado, 19 Fed. Cas. No. 11,067.

71. The Queen, 28 Fed. 755.

72. The Martha, 35 Fed. 313.

73. Knowles *v.* Dabney, 105 Mass. 437 (holding the carrier liable for loss of a portion of the cargo by the breaking up of the tackle of a crane used for transferring the goods upon lighters, and standing on the pier); McAllister *v.* Southern Pac. Co., 111 Fed. 938; The Germanic, 107 Fed. 294 [*affirmed* in 124 Fed. 1, 59 C. C. A. 521 (*affirmed* in 196 U. S. 589, 25 S. Ct. 317, 49 L. ed. 610)]; Hills *v.* The Florida, 69 Fed. 159 (holding that where bags of filberts, in the course of discharging, were placed so near the coal bunkers that dust from the coal blew on and through them, the ship was liable for the damage); The Aline, 19 Fed. 875 (holding that a vessel is not "ready to discharge," within the meaning of a provision in the bill of lading that all goods are "to be taken from along-side immediately the vessel is ready to discharge," when it is impossible for her to discharge without destroying the cargo, and therefore the vessel is liable to the owner of goods for loss occasioned by improperly unloading at such time). But see Brand *v.* New Jersey Steamboat Co., 10 Misc. (N. Y.) 128, 30 N. Y. Suppl. 903.

Where the part-owner of a ship, who is also master and consignee, sells the ship before he has sold or satisfactorily delivered the cargo, and, in consequence of taking out the cargo in order to deliver the ship, it was damaged, he will be liable, although the shipper knew that the ship might be sold at some time during the voyage. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

Liability of lighterman.—A ship acts at her own risk in loading the lighter in the absence of the lighter's crew, without their knowledge or authority, and the cargo so put aboard without authority is not in law received by the lighterman, nor is he accountable for it as a bailee to its owner. Jarvis *v.* The Iniziativa, 50 Fed. 229.

A discharge by night under a permit from the collector, in accordance with long established usage, is as lawful and valid as a discharge by day, and is not *ipso facto* negligence, rendering the vessel liable for a loss of goods by fire during the unloading, any more than a discharge by day. The Egypt, 25 Fed. 320.

Insufficiency of wharf.—The carrier by water is liable for loss of goods from the breaking down of a wharf, upon which the master had been ordered not to unload by the carrier (Vose *v.* Allen, 28 Fed. Cas. No. 17,006, 3 Blatchf. 289 [*affirming* 28 Fed. Cas. No. 17,005, 12 N. Y. Leg. Obs. 100]); and the act of the master in overloading a pier renders the ship liable for resulting injury to cargo which she had already deposited thereon, even if such deposit was under circumstances rendering it equivalent to delivery to the consignee (Kennedy *v.* Dodge, 14 Fed. Cas. No. 7,701, 1 Ben. 311), particularly after warning by the dock master that the dock could not carry the weight of the cargo (Vose *v.* Allen, *supra*); and where a carrier did not give proper notice to the consignee to appear and take charge of the freight, and allow reasonable time thereafter for him to do so, but unloaded the freight upon a pier, which collapsed, so as to injure the goods, the carrier was liable, irrespective of the question whether it was guilty of negligence in failing to exercise reasonable care in selecting a safe place to unload (Rosenstein *v.* Vogemann, 184 N. Y. 325, 77 N. E. 625 [*affirming* 102 N. Y. App. Div. 39, 92 N. Y. Suppl. 86]).

A consignee who has made advances on account of a shipment of iron may hold the owner of the vessel liable in admiralty for a loss of the iron, caused by the act of the master in unloading on an insufficient wharf. Vose *v.* Allen, 28 Fed. Cas. No. 17,006, 3 Blatchf. 289.

74. Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398; Miller *v.* Steam Nav. Co., 10 N. Y. 431 [*affirming* 13 Barb. 361].

cannot claim indemnity from the ship for injury to the cargo by a storm to which it was exposed while on conveyance to its place of storage.[75]

b. Loss or Injury After Discharge or Tender. The liability as carrier of a carrier by water continues until delivery of the goods actual or constructive, even after the goods have been taken from the vessel,[76] and the liability continues until notice of the arrival of the goods and a reasonable opportunity to remove them;[77] and thus a carrier who, without notice to the consignee of the arrival of the goods, turns them out on the wharf,[78] or places them in a public store,[79] is liable for their subsequent loss, and where a consignee presents himself in reasonable time, and at a proper place, to receive the goods, or until he has had opportunity to do so, there is no ground for reducing the liability of the carrier to that of a warehouseman, and relieving the carrier from liability for loss by fire on the dock.[80] Failure to give actual notice to consignees of the time and place of discharge of cargo unloaded at a wharf, other than the vessel's usual wharf, at which the goods, before delivery to the consignees, are destroyed by fire, does not render the carrier liable for the loss, where the consignees, had they received notice, could not have removed their goods before the fire, and where they took no steps on the faith of the cargo being discharged at the usual place;[81] but if the consignee

75. The Grafton, 10 Fed. Cas. No. 5,656, Olcott 43 [*affirming* 10 Fed. Cas. No. 5,655, 1 Blatchf. 173].

76. Tarbell *v.* Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350 [*reversing* 53 N. Y. Super. Ct. 190]; Gleadell *v.* Thomson, 56 N. Y. 194 [*affirming* 35 N. Y. Super. Ct. 232]; Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264; Higgins *v.* Hamburg-American Packet Co., 145 Fed. 24, 76 C. C. A. 24; Jarvis *v.* Iniziativa, 50 Fed. 229; The Aline, 25 Fed. 562, 23 Blatchf. 335; Warner *v.* The Illinois, 29 Fed. Cas. No. 17,184*a*, 18 Reporter 11, holding that where a carrier suffers goods of a consignee on being discharged from the vessel to become mingled with the rest of the cargo, and to be carried off by persons claiming to be entitled to similar goods, he is liable to the owner of the goods carried off, whether by fraud or mistake.

Where the bill of lading provides that the lighterage shall be at shipper's risk, and the consignees, although duly notified, delay to pay the duties and take the cargo, the ship is liable for loss by breakage and leakage while on board, and for a reasonable time, after discharge into the lighters, in which to pay duties. Guimaraes *v.* The Seguranca, 68 Fed. 1014.

77. Solomon *v.* Philadelphia, etc., Express Steamboat Co., 2 Daly (N. Y.) 104. And see *supra*, VII, C, 3, a.

Where it has been the long continued practice of a company to ship its goods daily by a regular line of steamboats, consigned to its agent for sale, and it has been part of the regular routine of the agent, without notice, to call for and receive the goods on their arrival each day, at the place of destination, and remove them, the duty of the carrier is performed when the goods are landed at the accustomed place, and the consignee has had a reasonable time to remove them, and the carrier is not liable for their subsequent destruction. J. Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121, 52 N. Y. 657.

Rule modified as to river carriage.— But the rules regulating the liability of a carrier of goods by water to landings where there are wharves and warehouses, and where the consignee resides or may be found, are not applicable to neighborhood or way landings on river banks, where there is no wharf and no warehouse, and where the consignee does not reside, and is not to be found; and a boat is not liable for the loss of goods put ashore at such landing, where the master, as is the usual custom, notified a citizen of the place, leaving the freight bill with him and requesting him to notify the consignee. The Mill Boy, 13 Fed. 181, 4 McCrary 383. And see Turner *v.* Huff, 46 Ark. 222, 55 Am. Rep. 580 (holding that a carrier by water cannot be held for loss of goods delivered at the proper landing place, although there is no warehouse there, and he gives no notice to the consignee, if such is the uniform usage, although neither shipper nor consignee knows the usage); Dalzell *v.* The Saxton, 10 La. Ann. 280.

78. Dean *v.* Vaccaro, 2 Head (Tenn.) 488, 75 Am. Dec. 744 (where the carrier also placed the goods in possession of a drayman not authorized to receive them); Dibble *v.* Morgan, 7 Fed. Cas. No. 3,881, 1 Woods 406.

A vessel which having accepted a suitable pier designated by the owners of a majority of the cargo for discharge leaves that pier with part of her cargo on board and goes to another pier and there discharges the balance, which is injured by exposure to the sun on an unsheltered pier, will be liable. The Cervin, 17 Fed. 462.

In case of goods landed on the steamship's own inclosed wharf, the liability of the steamship as carrier continues until the expiration of a reasonable time. The St. Laurent, 21 Fed. Cas. No. 12,231, 7 Ben. 7.

79. The George Skolfield, 4 Fed. Cas. No. 2,155.

80. Graves *v.* Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369.

81. Constable *v.* National Steamship Co.,

is notified, and is present while the goods are being discharged upon an uncovered wharf, and makes no objection to the time, manner, or place of delivery, there is an actual delivery and acceptance when they are so placed on the wharf, and the ship cannot be held liable for their subsequent damage by rain before their removal from the wharf by the consignee.[82] The carrier is not liable for a loss of part of the cargo on the pier, after actual receipt by the consignees of all the cargo shipped;[83] and liability as a common carrier ceases when the cargo is unladen on a wharf by direction of the consignee, and he is not liable for injuries subsequently sustained thereby;[84] and where the consignee is not present to receive the goods as they are unloaded, pursuant to a notice, the carrier is thereafter liable only as an ordinary bailee for hire or warehouseman;[85] charged with the duty to take ordinary care of the property for a reasonable length of time, and not to abandon it, or negligently expose it to injury,[86] and as such liable for goods

154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903, holding also that where the wharf of a steamship company, at which its vessels usually discharge, is so blocked that one of them cannot obtain access to it, the discharge of her cargo, for the mutual advantage of ship and consignees, at a neighboring wharf, which is a fit and proper place therefor, is not a deviation such as to render the company an insurer or cargo there discharged without notice to the consignee, until its actual delivery to him and liable for its loss by fire; the bill of lading providing that the goods shall be at the consignee's risk of fire after discharge.

82. The St. Georg, 104 Fed. 898, 44 C. C. A. 246.

83. Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457 [*reversing* 58 Barb. 195]; Dike *v.* Von Lefferl Lahsen, 6 Fed. Cas. No. 3,909; Ellsworth *v.* The Wild Hunter, 8 Fed. Cas. No. 4,411, 2 Woods 315 (holding the ship not liable for damage by rain to cargo delivered on the wharf, at request of consignee, whose clerk assumed charge thereof, but failed to employ sufficient drays to remove them before night); Field *v.* The Lovett Peacock, 9 Fed. Cas. No. 4,768 (holding that the vessel is not responsible *in rem* for cargo lost from the pier through negligence of her officers, but after delivery to the consignee, the remedy being against the officers personally); The Iddo Kimhall, 12 Fed. Cas. No. 7,000, 8 Ben. 297 (destruction by fire).

84. Howland *v.* The Henry Hood, 12 Fed. Cas. No. 6,795.

85. Tarbell *v.* Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350 [*reversing* 53 N. Y. Super. Ct. 190]; Hathorn *v.* Ely, 28 N. Y. 78; The Titania, 124 Fed. 975 [*affirmed* in 131 Fed. 229, 65 C. C. A. 215]; The City of Lincoln, 25 Fed. 835; De Grau *v.* Wilson, 17 Fed. 698; Liverpool, etc., Steam Co. *v.* Suitter, 17 Fed. 695; The Bobolink, 3 Fed. Cas. No. 1,588, 6 Sawy. 146; Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,267, 3 Ware 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,494, Brunn. Col. Cas. 602 (*reversed* in 23 How. 28, 16 L. ed. 412)]. And see The Tybee, 24 Fed. Cas. No. 14,304, 1 Woods 358. *Compare* Segura *v.* Reed, 3 La. Ann. 695, holding that while, in general, placing goods on a wharf, with notice to the consignee, constitutes delivery and discharges the carrier, it is nevertheless liable where the consignee made repeated calls during the day, and the goods were not placed on the wharf until an advanced hour of the day, and lost through inattention or negligence of the carrier's servants.

Where there is no such general custom to abstain from labor on an annual fast day as forbids the master, in a case where he has previously commenced to discharge his vessel, from completing the unlading and delivering the consignment on such day, the vessel is not liable, where the unlading being completed on such day, and the consignee being notified that delivery would be made on such day, the cargo is destroyed by fire without fault on the part of the vessel. Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,267, 3 Ware 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,494, Brunn. Col. Cas. 602 (*reversed* in 23 How. 28, 16 L. ed. 412)].

But where a bill of lading stipulated that the consignee should take the goods from the ship immediately she was ready to discharge, and notice was sent the consignee that she would discharge, the carrier was not liable for damage caused by the consignee's failure to remove or to protect the goods (The Boskenna Bay, 40 Fed. 91, 6 L. R. A. 172 [*reversing* 22 Fed. 662]; The Kate, 12 Fed. 881); but such a provision requiring the consignee to be ready to receive the cargo, in default of which she was authorized to land, warehouse, or lighter the same at the consignee's risk, does not relieve her from liability for damages arising from her failure to reasonably protect perishable goods landed on a dock upon a claim of delivery, where she refused to permit the consignee's agents to remove them, although having no claim thereon for freight (The Alnwick, 135 Fed. 88. And see The Surrey, 26 Fed. 791, holding a vessel liable for the value of the cargo, notwithstanding a stipulation that the goods might be delivered without notice to the consignee, having been brought by a different boat than shipped on).

86. Smith *v.* Britain Steamship Co., 123 Fed. 176.

stolen through negligence, while still in the custody of the owners of the ship, after being discharged on a pier, and waiting to be conveyed to the public warehouse by the public carman,[87] or after being actually placed in the warehouse.[88]

10. Doctrine of Proximate Cause; Contributory Negligence. In order that a carrier may be absolved from liability for loss upon the ground of one of the excepted perils, it must have been the proximate cause. If human agency or fault or some other not excepted cause has intervened he is not as a general rule excused;[89] and where, although a peril of the sea has arisen, the damage might have been avoided by the use of ordinary care and diligence on the part of the ship, the negligence, and not the peril of the seas, is then considered the proximate cause of the loss;[90] on the other hand, although the carrier may not have fulfilled all his duty, if loss is not proximately due to his delinquency as a carrier, it cannot be made a ground of recovery;[91] and, although the master may have been derelict in his duty, if the proximate cause of the loss is attributable to the shipper, the carrier is not liable,[92] nor can a consignee whose own fault was the proximate

87. Unnevehr *v.* The Hindoo, 1 Fed. 627.

88. Evans *v.* New York, etc., Steamship Co., 163 Fed. 405.

89. Packard *v.* Taylor, 35 Ark. 402, 37 Am. Rep. 37 (holding that a carrier by water is not excused from liability for loss by the act of God operating upon an unseaworthy vessel, when such act would have proved harmless to a seaworthy vessel); New Brunswick Steamboat, etc., Transp. Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Astsrup *v.* Lewy, 19 Fed. 536 (where improper stowage was held proximate cause and not perils of the sea owing to gale); Richards *v.* Hensen, 1 Fed. 54 (holding that a bill of lading against perils of the sea does not relieve a carrier from liability where a cargo of iron was injured by salt water, owing to improper stowage and the defective construction of the vessel); The City of Norwich, 5 Fed. Cas. No. 2,760, 3 Ben. 575 (holding that where a vessel takes fire in consequence of a collision caused by the negligence of those having her in charge, and the cargo is lost, the owners of the cargo may recover, even though the bills of lading expressly except the vessel and her owners from liability for loss in case of fire; the fire in such case being a mere incident of the collision); King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349 (holding that where a vessel on which gold coin was shipped was wrecked, and the captain then removed the box containing the coin from the stateroom, where it could be locked up, and placing it where the crew had access, and it was lost while wreckers were on board, the dangers of the sea were not the proximate cause of the loss, but it was occasioned solely by embezzlement or theft. And see *supra*, VII, D, 1, 2.

If goods are gnawed by rats (Kay *v.* Wheeler, L. R. 2 C. P. 302, 36 L. J. C. P. 180, 16 L. T. Rep. N. S. 66, 15 Wkly. Rep. 495; Laveroni *v.* Drury, 8 Exch. 166, 16 Jur. 1024, 22 L. J. Exch. 2, 1 Wkly. Rep. 55. And see Hamilton *v.* Pandorf, 12 App. Cas. 518, 6 Aspin. 212, 52 J. P. 196, 57 L. J. Q. B. 624, 57 L. T. Rep. N. S. 726, 36 Wkly. Rep. 369), or cockroaches (The Miletus, cited 1 Parson Shipping 258 note 4), the carrier is liable, neither being perils of the sea. But if rats cause a leak in a vessel and goods are damaged by water the carrier is not liable, the water being the proximate cause (Hamilton *v.* Pandorf, *supra*), although a contrary stand was taken in an earlier case (Aymar *v.* Astor, 6 Cow. (N. Y.) 266). And see *infra*, VII, D, 14, b, (II).

90. Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; Braker *v.* The Gloaming, 46 Fed. 671; The Titania, 19 Fed. 101; The Rocket, 20 Fed. Cas. No. 11,975, 1 Biss. 354, holding that, although a dense fog is a danger of navigation, within an exception in a bill of lading, yet the carrier is not excused from liability for injury to the goods if the loss was occasioned by a peril which might have been avoided by the exercise of reasonable skill and diligence.

91. Hastings *v.* Pepper, 11 Pick. (Mass.) 41; Gardner *v.* Smallwood, 3 N. C. 349 (holding that the owners of a vessel are not liable for the loss of goods which had been stowed on deck and the full price charged therefor, if such stowage was not the cause of the loss); Souter *v.* Baymore, 7 Pa. St. 415, 47 Am. Dec. 518 (holding that an unnecessary deviation, and a breach of agreement not to carry any other goods except those of defendant, on the part of the carrier, and a subsequent injury to defendant's goods, does not render the carrier liable unless the injury was occasioned by such deviation or breach of agreement); Clark *v.* Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985; Scott *v.* Baltimore, etc., Steam-Boat Co., 19 Fed. 56; The Morning Mail, 17 Fed. 545; The Blue Jacket, 3 Fed. Cas. No. 1,569, 10 Ben. 248; The Casco, 5 Fed. Cas. No. 2,486, 2 Ware 188; The Newark, 18 Fed. Cas. No. 10,141, 1 Blatchf. 203; The Planter, 19 Fed. Cas. No. 11,207*a*, 2 Woods 490 (holding that, although a vessel not manned by the necessary officers and crew is unseaworthy, yet no recovery can be had against her on that account for a loss that was not attributable to such deficiency); The Reeside, 20 Fed. Cas. No. 11,657, 2 Sumn. 567. See 44 Cent. Dig. tit. "Shipping," §§ 466–468.

92. The M. C. Currie, 132 Fed. 125; The

cause recover.[93] But while it is competent for the carrier to show that the loss was in fact occasioned by the excepted perils, and not by the unseaworthiness of the boat, and must have happened if that defect had not existed, a delinquency which might have contributed to the disaster occasioning the loss, or negligence or carelessness at the time of its occurrence which might have had an agency in producing it, will render him liable.[94] If the loss might have happened without the carrier's fault, this does not excuse him;[95] but if it must have happened without his fault, he is absolved.[96]

11. Duties of Carrier After Disaster or Injury to Cargo — a. General Rules. After a vessel is wrecked, stranded, disabled, or injured, the master is still under obligation to take all possible care of the goods, and he is bound to show that human diligence, skill, or care could not save the property from being lost by the disaster;[97] but as the master of a vessel is quasi-agent for both parties, owner or consignee of the cargo and the owner of the vessel, in respect to the cargo found in a perishable condition on board the ship, his acts, honestly put forth in an emergency, even if not the most suitable and well judged, with the intent to the best interests of all concerned are to be indulgently considered;[98] and thus a master is not negligent so as to render the vessel liable for damages to the cargo, if in preserving the cargo after damage by storm he pursues the course deemed most expedient in the exercise of a sound discretion.[99]

Oranmore, 92 Fed. 396 [*affirming* 24 Fed. 922]; The Powhattan, 12 Fed. 876, 21 Blatchf. 18; The Viscount, 11 Fed. 168.

Where there is mutual fault the shipper may recover half his loss. Stillwell *v.* The J. D. Hall, 34 Fed. 904.

93. Northern *v.* Williams, 6 La. Ann. 578.

94. Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

Where sea damage may arise from different causes, either with or without negligence in the ship, the nature and extent of the damage may be material in determining to which cause it should be assigned. F. O. Matthiessen, etc., Sugar Refining Co. *v.* Gusi, 29 Fed. 794.

95. Hill *v.* Sturgeon, 28 Mo. 323; Collier *v.* Valentine, 11 Mo. 299, 49 Am. Dec. 81.

96. Gardner *v.* Smallwood, 3 N. C. 349.

97. Bason *v.* Charleston, etc., Steamboat Co., Harp. (S. C.) 262; The Niagara *v.* Cordes, 21 How. (U. S.) 7, 16 L. ed. 41; Schulze-Berge *v.* The Guildhall, 58 Fed. 796 [*affirmed* in 64 Fed. 867]; Bixby *v.* Deemar, 54 Fed. 718, 4 C. C. A. 559 (holding that where it appears that a part of the cargo of a wrecked vessel was so stored that it might have easily been saved, and that several opportunities to reship what was saved were neglected, the carrier is responsible to the shipper for his loss, although the shipment was at the owner's risk, and "dangers of the river" were excepted); The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,323, 1 Blatchf. 196]; King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349; The Ocean Wave, 18 Fed. Cas. No. 10,416, 3 Biss. 317, 6 Alb. L. J. (N. Y.) 407. And see Pearce *v.* The Thomas Newton, 41 Fed. 106, holding that ship-owners are liable for the damage that results from their failure to dry goods safely stowed but wet by an extraordinary tide wave, even where they could not do so, if they have refused to deliver the goods to the owner at his request. *Compare* Payne *v.* Ralli, 74 Fed. 563.

Where the master of a wrecked vessel abandons her to the underwriters without exercising due diligence to save the cargo, the fact that the underwriters take possession, and sell a part of the cargo which is not insured, does not exempt the carrier from liability to the shipper (Bixby *v.* Deemar, 54 Fed. 718, 4 C. C. A. 559), and a carrier who without necessity abandons plaintiff's goods to a wrecking vessel is liable for their value (Isenberg *v.* St. Louis, etc., Anchor Line, 13 Mo. App. 415).

Owners, who supervise the repair of a vessel after a collision, are personally negligent in failing to make an examination of the cargo for damage caused by the shock, and are liable for damage arising from causes which an examination would have revealed, notwithstanding a clause in the bill of lading exempting them from liability for damage from collision. The Guildhall, 64 Fed. 867, 12 C. C. A. 445 [*affirming* 58 Fed. 796].

Consignees are not bound to overhaul and repair damaged goods for the ship's benefit, rather than sell them at auction as damaged goods, where the ship's agents have opportunity to do the same work. Hills *v.* Mackill, 36 Fed. 702.

98. De Bruns *v.* Lawrence, 7 Fed. Cas. No. 3,716, 18 How. Pr. (N. Y.) 141 [*affirming* 15 Fed. Cas. No. 8,139, and *affirmed* in 1 Black 170, 17 L. ed. 89].

99. Soule *v.* Rodocanachi, 22 Fed. Cas. No. 13,178, Newb. Adm. 504. And see Pennewill *v.* Cullen, 5 Harr. (Del.) 238, holding that if water is taken in by running on a hidden post, not known to persons navigating there, the carrier is not liable for injury to cargo if ordinary care is used to prevent the effects of the accident.

b. Sale of Cargo.[1] Where a cargo of goods is in part damaged, the master may sell it for the good of the cargo and the ship, upon the shipper's refusal to receive it,[2] and the same rule applies where the master attempts to communicate with the owner of the damaged cargo and receives no reply;[3] but the master has no authority to sell damaged cargo, without notice to the owner or shipper, when there is abundant time and means for communicating with him,[4] and such a sale is a conversion of the goods.[5] Where a cargo of goods is in part damaged, it is the duty of the master and not of the consignee to separate the goods for auction sale.[6]

12. Actions For Damages — a. General Rules; Right of Action; Jurisdiction; Parties. Loss or damage accruing from negligent handling of goods by the ship gives the shipper a right, if he does so elect, to sue on the contract of affreightment, and he is not restricted to an action of tort,[7] and a libel for damages done to the cargo may be filed even after the vessel has made one or two voyages subsequent to the injury being received;[8] and the libel against the vessel may be brought either in the name of the shipper or of an insurance company which has paid the loss or accepted an abandonment;[9] and as a carrier of merchandise by water is a bailee, he has a special property therein which entitles him to maintain a suit for its loss or injury in behalf of all the parties in interest, and such right is not defeated by the fact that the loss has been paid by an insurer;[10] but a charterer of a vessel to carry a cargo of which he is not the owner, but merely the agent for its sale on commission, has no legal interest therein which will support an action against the vessel for its loss or damage; nor can he maintain such action as trustee for the owner, who was not a party to the charter.[11] The shipper is not bound to send the damaged goods to auction to be sold, as a prerequisite to his right of action;[12] and the fact that owners of a vessel may compel the crew to make good from their wages a deficiency in the cargo probably caused by embezzlement by them does not render it necessary that the freighter in bringing an action on the case against the owner for the loss should give notice of such damages previous to the discharge of the crew.[13] Where a disaster happens to a cargo in consequence of a peril or accident not within the exceptions in the bill of lading, a mere acceptance of the goods by the owner, at the place of the disaster or an intermediate port, will not preclude him from his remedy. It must appear that the acceptance was intended as a discharge of the vessel and her owner from

If merchandise on board a boat gets wet by accident, and no exertion is made to dry it, the carrier is liable for the damage, although his engagement was to deliver safely, "the dangers of the river excepted." Blocker *v.* Wittenburg, 12 La. Ann. 410; Bird *v.* Cromwell, 1 Mo. 81, 13 Am. Dec. 470; Chouteaux *v.* Leech, 18 Pa. St. 224, 57 Am. Dec. 602; The Niagara *v.* Cordes, 21 How. (U. S.) 7, 16 L. ed. 41. But in the absence of contract he is not bound to delay the voyage to the injury of the shipper for the purpose of preserving damaged goods from still further damage. The Lynx *v.* King, 12 Mo. 272, 49 Am. Dec. 135; Notara *v.* Henderson, L. R. 5 Q. B. 346, 39 L. J. Q. B. 167, 22 L. T. Rep. N. S. 577 [*affirmed* in L. R. 7 Q. B. 225, 1 Aspin. 278, 41 L. J. Q. B. 158, 26 L. T. Rep. N. S. 442, 20 Wkly. Rep. 443]. And see Soule *v.* Rodocanachi, 22 Fed. Cas. No. 13,178, Newb. Adm. 504.

1. Right of master to dispose of cargo in general see *supra*, IV, B, 5.
2. The Brewster, 95 Fed. 1000.
3. Astsrup *v.* Lewy, 19 Fed. 536.
4. Astsrup *v.* Lewy, 19 Fed. 536.
5. The Joshua Barker, 13 Fed. Cas. No. 7,547, Abb. Adm. 215.
6. The Columbus, 6 Fed. Cas. No. 3,041, Abb. Adm. 37.
7. The Queen of the Pacific, 61 Fed. 213.
8. Knox *v.* The Ninetta, 5 Pa. L. J. 33.
9. The Keokuk, 14 Fed. Cas. No. 7,721, 1 Biss. 522.

A lighterman, who has given a full receipt for cargo where only part was delivered, and elects to pay the loss to his employer, may maintain an action against the carrier in his own name. Perry *v.* Bangs, 19 Fed. Cas. No. 11,013.

10. The Nonpariel, 149 Fed. 521, holding that the fact that the owner of a vessel is doing business under a fictitious or trade-name, and that contracts of affreightment are made in such name, will not defeat his right to maintain an action in his own name to recover for damage to a cargo.
11. The Ask, 156 Fed. 678.
12. Elkin *v.* New York, etc., Steamship Co., 14 La. Ann. 647.
13. Schieffelin *v.* Harvey, Anth. N. P. (N. Y.) 76.

any further responsibility;[14] but where a ship is detained and her cargo damaged before she proceeds, although she subsequently delivers it to the consignees, a shipper cannot, without rescinding the contract, sustain a libel *in rem* for a breach of the bill of lading, until the term for the performance of the contract has expired.[15] Consignees can maintain a suit against the vessel for damages to the goods, although there were no bills of lading executed;[16] and may maintain an action against the owners of a vessel which collided with the vessel on which their goods were shipped, for the loss sustained by reason of the collision;[17] and where a general bill of lading is given, but separate bills are delivered to the owners of the cargo for their respective portions, the several holders thereof may libel the vessel for damages to the cargo, although the consignment is to one party in bulk.[18]

b. Persons or Vessels Liable. A carrier by water is liable to the owner for the safe transportation of goods received on board, independent of any bill of lading; and the owner may proceed directly against the vessel or her owners, through whom the loss or injury occurs, although the latter have a contract with an intermediate party;[19] and a vessel receiving goods from a connecting carrier under a through bill of lading, and delivering a part of the goods, and demanding freight, may be sued primarily for goods lost by her;[20] and the general rule is, whenever the owners of a ship are liable for injury to her cargo, the ship is also liable;[21] but the owner of a vessel is never liable as a carrier merely by virtue of his ownership. The vessel must also have been in his employment, so as to make him a party to the contract for carriage. The party having the control of the vessel, and in whose business it is engaged, is regarded as the owner *pro hac vice*,

Liability of crew for embezzlement generally see SEAMEN, 35 Cyc. 1217.

14. Home Ins. Co. *v.* Western Transp. Co., 51 N. Y. 93.

15. Jones *v.* The Floating Zephyr, 13 Fed. Cas. No. 7,462.

The payment of the loss by the underwriters after a libel has been filed by the owners of the cargo, under an agreement that the libellants should repay to the underwriters any sum or sums which they might recover by decree or settlement, in virtue of the unseaworthiness of the vessel or the negligence of her officers or crew, does not afford a defense to the action for the loss. The Centennial, 7 Fed. 601.

16. Brower *v.* The Water Witch, 4 Fed. Cas. No. 1,971, 19 How. Pr. (N. Y.) 241 [*affirmed* in 1 Black 494, 17 L. ed. 155]; Clifton *v.* Quantity of Cotton, 5 Fed. Cas. No. 2,895.

Laches.—Where consignees, on discovering that goods received by them from a vessel were damaged, instead of resorting to the usual practice of calling for a board of survey for the assessment of damages, and offering the goods for sale on account of whom it might concern, had the damages assessed by one of their own clerks, they must exercise the greatest diligence as to the time in bringing suit against the vessel, and if they were guilty of laches, they, and not the vessel, must suffer. Williams *v.* The Columbia, 1 Wash. Terr. 95.

Jurisdiction under state statutes.—Mo. Rev. Code (1845), p. 180, authorizing persons having claims against vessels to commence proceedings against the vessels themselves instead of against the owners, gives the court jurisdiction of an action against a vessel for the loss by another boat of a cargo, through the negligent management of the former, although the boat causing the injury was owned by persons residing outside of the state. Yore *v.* The C. Bealer, 26 Mo. 426. Under the Wisconsin statute providing for a proceeding *in rem* against "boats and vessels used in navigating the waters of this state," an action can be maintained against a vessel for goods lost by negligence of its sailors, although the boat was going to and from other states, but crossed the waters of this state. The Sultana *v.* Chapman, 5 Wis. 454. But in this connection it must be borne in mind that a state statute cannot confer on a state court jurisdiction *in rem* for a maritime cause of action. See MARITIME LIENS, 26 Cyc. 269.

17. Dollner *v.* Garcia, 7 Fed. Cas. No. 3,970, holding that it is no bar to such action that there is an action *in rem* pending in another district prosecuted by such consignees against the vessel.

18. Bucknor *v.* The Gilbert Green, 4 Fed. Cas. No. 2,099.

19. The T. A. Goddard, 12 Fed. 174.

20. Maxwell *v.* The Powell, 16 Fed. Cas. No. 9,324, 1 Woods 99.

21. The Huron *v.* Simmons, 11 Ohio 458. And see Bennitt *v.* The Guiding Star, 53 Fed. 936 [*affirmed* in 62 Fed. 407, 10 C. C. A. 454].

Where a tug wilfully abandoned a barge, which sank in consequence, damaging its cargo, the barge, as coinsurer with the insurance company, was liable for damages done to the cargo by the fault of the tug. The Snap, 28 Fed. 527. And similarly where an ocean carrier undertook to tranship goods, and employed a lighterage company for the service, they are jointly liable for a loss of the goods through the negligence of the lighterage company. Smith *v.* Booth, 122

and as such is answerable to the freighter.[22] For a wrongful conversion of the goods carried all the owners may be sued jointly in trover;[23] but a shipper cannot recover of all the owners of a boat carrying goods for hire, where he makes a special contract with some of the joint owners, without the knowledge of the others, by which the freight is to go in extinguishment of a demand of a shipper against the owners with whom the contract was made.[24] If any part of the cargo be missing, all the seamen must contribute to make it good, unless the guilt can be proved upon particular persons.[25]

c. Pleading; Issues, Proof, and Variance. The general rules of pleading,[26] and in so far as applicable rules of pleading in admiralty,[27] apply to actions against carriers by water for loss or injury to goods,[28] and the complaint for losses of or injury to goods shipped is governed by rules which apply to declarations at common law or similar causes of action, in respect to the character of the averments,[29] and the joinder and misjoinder of counts,[30] and may be amended,[31] and the general rules as to issues, proof, and variance [32] apply.[33] Where a bill of lading provides

Fed. 626, 58 C. C. A. 479 [*affirming* 110 Fed. 680].

Stipulations in bills of lading that the carrier shall not be liable for any damage to goods which is capable of being covered by insurance will not relieve the vessel from liability for loss due to the carrier's negligence. The Seaboard, 119 Fed. 375.

22. Tuckerman *v.* Brown, 17 Barb. (N. Y.) 191.

23. Taylor *v.* Brigham, 23 Fed. Cas. No. 13,781, 3 Woods 377.

24. Jones *v.* Sims, 9 Port. (Ala.) 236, 33 Am. Dec. 313.

25. Frederick *v.* The Fanny, 9 Fed. Cas. No. 5,077, Bee 262. And see, generally, SEAMEN, 35 Cyc. 1217.

26. See PLEADING, 31 Cyc. 1.

27. See ADMIRALTY, 1 Cyc. 853 *et seq.*

28. Guiterman *v.* Liverpool, etc., Mail Steamship Co., 9 Daly (N. Y.) 119 [*reversed* on other grounds in 83 N. Y. 358], holding that where in an action by a shipper for injuries to his goods while on board defendant steamship for transportation, the defense that at the time of the accident the vessel was, in consequence of a public regulation of the port, exclusively in charge of a licensed pilot, over whom defendant had no control, and whose orders defendant's officers and servants were bound to obey, and that the accident was due to his negligence, must be specially pleaded.

29. The Milwaukie *v.* Hale, 1 Dougl. (Mich.) 306; Perpetual Ins. Co. *v.* The Detroit, 6 Mo. 374 (holding that a complaint under Dig. (1835) p. 102, providing for the collection of demands against boats and vessels for nonperformance of a contract of affreightment, should set out the terms of the contract of affreightment under which the goods alleged to have been lost were shipped); Kirkpatrick *v.* The American Steamship Co., 14 Fed. Cas. No. 7,846 (holding that where a stipulation in a bill of lading provided for shipment on the succeeding vessel on the same line, if prevented "by any cause" from going in the ship specified, and the goods were not shipped until a week after the vessel specified, and were lost in transit, in an action therefor the vessel owner must aver in his answer that he was prevented from carrying the goods on the vessel specified, by some particular cause, of which the shippers were notified); Montell *v.* The William H. Rutan, 17 Fed. Cas. No. 9,724 (holding that on a libel against a vessel and her master, who was a part-owner, by the assignee of a fraudulent bill of lading issued by him, where there is no allegation of joint ownership in the vessel and her business by the intervening part-owners, there can be no recovery against them and their interest in the vessel).

30. The Milwaukie *v.* Hale, 1 Dougl. (Mich.) 306.

In a suit in rem to recover for injury to goods shipped, it is not necessary to charge defendant as a common carrier, but the rule is otherwise where the suit is *in personam*. Seller *v.* The Pacific, 21 Fed. Cas. No. 12,644, Deady 17, 1 Oreg. 409.

31. Camden *v.* The Georgia, 6 Mo. 381; McCullough *v.* The Echo, 16 Fed. Cas. No. 8,740*a*, as where, in an action on a bill of lading, the answer fails to allege that the damages to the goods carried accrued from the sweating of the vessel, and that she was not answerable for such accident of navigation.

32. See PLEADING, 31 Cyc. 670 *et seq.*

33. Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342 (holding that in an action against the owners of a steamboat for a loss by a sinking of the boat after a deviation, it is not necessary to prove that the deviation caused the loss, but only a deviation and subsequent loss); Guiterman *v.* Liverpool, etc., Mail Steamship Co., 9 Daly (N. Y.) 119; Reed *v.* Dick, 8 Watts (Pa.) 479 (holding that in an action for damage to goods, the fact that the sails were insufficient cannot be given in evidence, where the loss is charged upon a bad cable); The Egypt, 25 Fed. 320 (holding that where a bill of lading contained an exemption from loss capable of being covered by insurance, proof that insurance is procurable is necessary to make the exemption available in an action against the ship for damages to cargo).

Negligence.—Where a vessel is properly protected from fire, it is necessary, in an action to recover damages for injury to a

that notice of any claim for loss or damage to the property must be given to the carrier within a stated time after delivery, the failure to give such notice is a matter of defense in a suit to recover for such loss or damage, and performance of the requirement need not be alleged in the libel.[34]

d. Evidence — (i) *Presumptions and Burden of Proof* — (A) *General Rules.* As in other actions,[35] the burden is on the party who has the affirmative of the issue,[36] and the general rules as to presumptions[37] apply.[38] Thus the burden is upon libellant to show that the goods were in good condition when delivered to the vessel and were delivered damaged,[39] and this being sustained the burden of accounting for such damage is on the claimants.[40] A ship defend-

cargo by fire while on board, to prove negligence (The Buckeye, 4 Fed. Cas. No. 2,084, 7 Biss. 23); but a shipper will not be required to prove negligence on the part of a master until evidence is given tending to show that the injury complained of came within an excepted clause in the bill of lading (The Ocean Wave, 18 Fed. Cas. No. 10,416, 3 Biss. 317). Where a bill of lading for a cask of wine receipted for it "in good order and condition," and excepted "the dangers of the seas," and on arrival in port, and before being moved from its place in the vessel, it was found to be leaking, with one of its heads crushed in, and a large proportion of the wine had leaked out, in a suit *in rem*, against the vessel, to recover for the value of the lost wine, libellant must show negligence in the handling or stowage of the casks. The Black Hawk, 3 Fed. Cas. No. 1,469, 9 Ben. 207.

34. The Tampico, 151 Fed. 689.

35. See, generally, Evidence, 16 Cyc. 926 *et seq.*

36. Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760 (holding that the onus of showing a special contract restricting the carrier's liability is upon the carrier); American Transp. Co. *v.* Moore, 5 Mich. 368 (holding that in an action to recover for loss of goods shipped with defendant, he must show affirmatively the terms of the contract which he claims lessens his common-law liability); The Nith, 36 Fed. 86, 13 Sawy. 368.

Where bills of lading specify the quantity, but contain the further statements, "Weight and quantity unknown," or "Weight unknown," the burden rests upon the ship-owners to account for any discrepancy between the quantity delivered and that specified; but this is met by proof that the full quantity loaded was delivered, and this may be shown as against a consignee who has paid drafts drawn by the shippers for the full quantity specified, where the bills of lading were attached to the drafts. Planters' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130.

37. See Evidence, 16 Cyc. 1050 *et seq.*

38. Lowry *v.* Russell, 8 Pick. (Mass.) 360, holding that, in an action by the owner of goods, against the owner of a vessel, for loss of cargo sustained by a deviation of the master, a bill of lading, showing that the goods are to be carried from one port to another, raises the presumption that a direct voyage was intended.

Failure to produce witnesses on the boat to explain stranding warrants a presumption that the stranding was the result of negligence in navigating the ship (The Alpin, 23 Fed. 815), and where the master and crew have abandoned their vessel under circumstances raising a grave suspicion that they dismasted and scuttled her, but, on a libel by the cargo-owners and their insurers, the master and claimants assert that the injury was caused by collision, the failure of the latter to examine several members of their crew, who were disinterested, or to libel the vessel with which they pretend to have collided, the collision being denied, or examine any members of her crew in regard to the alleged collision, is prejudicial to the case of the carrier (The James Martin, 88 Fed. 649; The Alpin, *supra*).

Where the goods are receipted for by the consignee as in good order, in an action for damages to the goods, the jury cannot presume that the damage was caused by defendant. Ocean Steamship Co. *v.* McAlpin, 69 Ga. 437.

39. The Vincenzo T., 28 Fed. Cas. No. 16,948, 10 Ben. 228.

40. Shackleford *v.* Wilcox, 9 La. 33 (holding that after the damage is proved the ship must show that it did not happen on board); Price *v.* Powell, 3 N. Y. 322 (holding that where the master of a vessel signs the usual bills of lading, stating that the property was "shipped in good order and well conditioned," in an action brought against the owners of the vessel for injury to the goods, the burden of proof is on them to show that the injury happened before the goods came to their hands); The Zone, 30 Fed. Cas. No. 18,220, 2 Sprague 19.

Where the bill of lading stipulates against liability for "average leakage or breakage," the burden is on the claimants to prove a greater than average leakage or breakage. *In re* Six Hundred and Thirty Casks of Sherry, 22 Fed. Cas. No. 12,918, 14 Blatchf. 517.

But where it is claimed by owners that their goods were damaged in a particular manner, and such goods have been exclusively under their control, or that of their vendees after their discharge from the ship, the burden of proof is upon such owners to show by satisfactory evidence that the goods were actually damaged on the voyage as claimed, as well as the amount of loss or injury. The Carlotta, 5 Fed. Cas. No. 2,413*a*.

ing against a claim for damage to cargo in shipment, under a clause in the bill of lading exempting it from liability "for any claim, notice of which is not given before the removal of the goods," has the burden of proving that the notice was not given, to bring itself within the exception; but, when it has produced sufficient testimony to justify the inference that no claim was made, it is incumbent on the libellant to rebut such inference by evidence, since, if the claim was made, it is within libellant's power to prove the fact.[41]

(B) *As to Particular Questions* — (1) LOADING, STOWAGE, AND DISCHARGE. Where goods shipped under an ordinary bill of lading are damaged by ordinary occurrences upon a sea voyage, the burden of proof is upon the owners of the vessel to show that proper precautions in the matter of stowage were taken to avoid the danger,[42] and to prove that the shipper agreed that his property might be carried on deck.[43] If sufficiently heavy weather is experienced by a vessel to account for damage to cargo by motion of the ship, the presumption is that the damage was so caused, and not by bad stowage;[44] and the fact that part of a cargo endures the voyage without damage raises no presumption that damage to other parts was caused by bad stowage;[45] and where, in an action to recover for the loss of cargo, occasioned by leakage caused by excessive heat, the carrier shows that the cargo was stored in the proper and coolest part of the ship, the burden of proof is on the shipper to show either that the place of storage was not suitable, or not the most suitable place on the ship.[46]

(2) CAUSE OF LOSS OR INJURY. Carriers by water being quasi-insurers of goods intrusted to them,[47] the burden is on them to show that they fully performed their contract.[48] Cargo is presumed to have been shipped in good condition,[49] and when goods are damaged while in possession of the carrier, there is a *prima facie* presumption that the injury is occasioned by the carrier's fault rather than by perils of the sea,[50] unless the facts are such as to manifestly point to a different con-

41. The Westminster, 116 Fed. 123 [*affirmed* in 127 Fed. 680, 62 C. C. A. 406].

42. The Wilhelmina, 29 Fed. Cas. No. 17,658, 3 Ben. 110.

Where a ship receives a cargo under a bill of lading "not accountable for breakage," and on delivery of the goods some are found to be broken, in an action against the carrier to recover their value, it is incumbent upon plaintiff to prove negligence in stowing or landing the cargo (Carey *v.* Atkins, 5 Fed. Cas. No. 2,399, 6 Ben. 562), but if the bill reads not accountable for breakers, if properly stowed, the burden of proof is upon the carrier to show proper stowage (Edwards *v.* The Cahawba, 14 La. Ann. 224; Montague *v.* The Isaac Reed, 82 Fed. 566).

43. The Peytona, 19 Fed. Cas. No. 11,058, 2 Curt. 21 [*affirming* 19 Fed. Cas. No. 11,059, 1 Ware 541].

44. The Connaught, 32 Fed. 640; The Polynesia, 30 Fed. 210. But see The Maggie M., 30 Fed. 692.

45. The Polynesia, 30 Fed. 210.

46. Lambert *v.* Benner, 1 Sweeny (N. Y.) 665.

47. Hill *v.* Sturgeon, 28 Mo. 323. And see, generally, *supra*, VII, D, 1, 2.

48. Hill *v.* Sturgeon, 28 Mo. 323.

49. The Alice, 12 Fed. 496.

50. Montgomery *v.* The Abby Pratt, 6 La. Ann. 410, 54 Am. Dec. 562; Ewart *v.* Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 131; The Asiatic Prince, 103 Fed. 676 (holding that the breaking of a greatly unusual number of the bags in which a cargo of sugar was shipped in discharging raises a presumption of negligence on the part of the ship in handling, and, if unexplained, renders the carrier liable to the shipper for the loss and expense resulting); Ceballos *v.* The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; The Timor, 46 Fed. 859 [*reversed* on other grounds in 67 Fed. 356, 46 C. C. A. 412]; Christie *v.* The Craigton, 41 Fed. 62; The Giglio *v.* The Britannia, 31 Fed. 432; The E. M. Norton, 15 Fed. 686; The Alice, 12 Fed. 496; Bazin *v.* Liverpool, etc., Steamship Co., 2 Fed. Cas. No. 1,152, 3 Wall. Jr. 229; The Black Hawk, 3 Fed. Cas. No. 1,469, 9 Ben. 207; The Live Yankee, 15 Fed. Cas. No. 8,409, Deady 420; The Mollie Mohler, 17 Fed. Cas. No. 9,701, 2 Biss. 505; Muller *v.* The Iginia, 17 Fed. Cas. No. 9,917.

The admission of the owner of the vessel that the loss was occasioned by the boiler exploding raises a presumption of negligence. The Sydney, 27 Fed. 119.

But a clause "not responsible for leakage or breakage," in a bill of lading, changes the general rule that the acknowledgment of goods being received in good order casts the burden on the carrier of showing want of negligence, and the burden of proof is on the shipper, in order to recover therefor, to show that the carrier's negligence contributed to or coöperated in the loss (Crowell *v.* Union Oil Co., 107 Fed. 302, 46 C. C. A. 296, holding that where a charter-party and a bill of lading contain exceptions in behalf of the vessel of breakage and leakage and of dangers of the sea, and the cargo owner maintains that

clusion;[51] and when the damage or loss is established, the burden lies upon the carrier to show that it was proximately occasioned by one of the perils from which they are exempted in the contract of shipment or bill of lading,[52] or from

the true cause of injury to the cargo was improper stowage, the burden of maintaining this proposition rests on the cargo owner; Puget Sound Mach. Depot *v.* The Guy C. Goss, 53 Fed. 826; The Jefferson, 31 Fed. 489; The Invincible, 13 Fed. Cas. No. 7,055, 1 Lowell 225; The Pereire, 19 Fed. Cas. No. 10,979, 8 Ben. 301; Vaughan *v.* Six Hundred and Thirty Casks of Sherry Wine, 28 Fed. Cas. No. 16,900, 7 Ben. 506); and negligence will not be presumed from the mere fact that breakage or leakage occurred (Roth *v.* Hamburg-American Packet Co., 59 N. Y. Super. Ct. 49, 12 N. Y. Suppl. 460). But in Alabama it is held that the doctrine that a carrier may restrict his liability by a special contract does not extend to changing the rules as to the burden of proof of negligence. Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49. Where a bill of lading exempts the vessel from losses from inherent deterioration, and upon delivery of a cargo of fruit it is found to be decayed, it is not incumbent on the libellants, in an action against the vessel to recover for the loss of the fruit, to prove that there was no inherent deterioration in it. The America, 1 Fed. Cas. No. 283, 8 Ben. 491.

51. Western Transp. Co. *v.* Downer, 11 Wall. (U. S.) 129, 20 L. ed. 160 (holding that where, in an action to recover damages for the loss of goods shipped by defendant's vessel, it appeared that the steamer was seaworthy and well equipped and was under the command of a competent and experienced master, but on entering the harbor of Chicago in the evening she grounded, there was no presumption that there was any negligence on the part of defendant); Williams *v.* The Exe, 57 Fed. 399, 6 C. C. A. 410 [*reversing* 52 Fed. 155]. And see De Grau *v.* Wilson, 22 Fed. 560 [*affirming* 17 Fed. 698].

52. *Illinois.*—Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Louisiana.— Price *v.* The Uriel, 10 La. Ann. 413; Montgomery *v.* The Abby Pratt, 6 La. Ann. 410, 54 Am. Dec. 562; Hunt *v.* Morris, 6 Mart. 676, 12 Am. Dec. 489, holding that if the loss happen in a case not readily occurring without negligence, as by fire, robbery, etc., the carrier must prove due diligence.

Massachusetts.— Shaw *v.* Gardner 12 Gray 488; Alden *v.* Pearson, 3 Gray 342.

Missouri.— Hill *v.* Sturgeon, 28 Mo. 323.

New York.— Arend *v.* Liverpool, etc., Steamship Co., 6 Lans. 457, 64 Barb. 118.

Ohio.— Graham *v.* Davis, 4 Ohio St. 362, 62 Am. Dec. 285 (holding that the burden of proof is on the carrier to show, not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent it); Davidson *v.* Graham, 2 Ohio St. 131.

South Carolina.— Baker *v.* Brinson, 9 Rich. 201, 67 Am. Dec. 548 (holding that where a common carrier expressly limits his liability by special contract, the burden of proving, not only due care, but also that the cause of the loss fell within the express stipulations, is on him); Ross *v.* English, 2 Speers 393; Ewart *v.* Street, 2 Bailey 157, 23 Am. Dec. 131.

Tennessee.— Turney *v.* Wilson, 7 Yerg. 340, 27 Am. Dec. 515.

United States.— The Niagara *v.* Cordes, 21 How. 7, 16 L. ed. 41; The La Kroma, 138 Fed. 936; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135 [*affirming* 78 Fed. 155 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)]; Ceballos *v.* The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; Schulze-Berge *v.* The Guildhall, 58 Fed. 796 [*affirmed* in 64 Fed. 867, 12 C. C. A. 445] (holding that in an action to recover the value of goods lost by reason of a collision of the vessel, the burden of proof is on the owner to prove due diligence in employing a master who was competent and trustworthy); Serio *v.* The Giava, 56 Fed. 243; The Beeche Done, 55 Fed. 525, 5 C. C. A. 207; Carter *v.* The Maseotte, 48 Fed. 119 [*affirmed* in 51 Fed. 605, 2 C. C. A. 399]; Christie *v.* The Craigton, 41 Fed. 62; Cumming *v.* The Barracouta, 40 Fed. 498; The Charles J. Willard, 38 Fed. 759; The Thomas Melville, 31 Fed. 486; The Polynesia, 16 Fed. 702; The E. M. Norton, 15 Fed. 686; The Pharos, 9 Fed. 912; Bazin *v.* Liverpool, etc., Steamship Co., 2 Fed. Cas. No. 1,152, 3 Wall. Jr. 229; Bearse *v.* Ropes, 2 Fed. Cas. No. 1,192, 1 Sprague 331; The Black Hawk, 3 Fed. Cas. No. 1,469, 9 Ben. 207; The Compta, 6 Fed. Cas. No. 3,069, 4 Sawy. 375; The Emma Johnson, 8 Fed. Cas. No. 4,465, 1 Sprague 527; Hooper *v.* Rathbone, 12 Fed. Cas. No. 6,676, Taney 519; Hunt *v.* The Cleveland, 12 Fed. Cas. No. 6,885, 6 McLean 76, Newb. Adm. 221; The Juniata Paton, 14 Fed. Cas. No. 7,584, 1 Biss. 15; The Keokuk, 14 Fed. Cas. No. 7,721, 1 Biss. 522; King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349; The Live Yankee, 15 Fed. Cas. No. 8,409, Deady 420; The Martha, 16 Fed. Cas. No. 9,145, Olcott 140; The Mollie Mohler, 17 Fed. Cas. No. 9,701, 2 Biss. 505; The Moravian, 17 Fed. Cas. No. 9,789, 2 Hask. 157; Muller *v.* Iginia, 17 Fed. Cas. No. 9,917; The Ocean Wave, 18 Fed. Cas. No. 10,416, 3 Biss. 317, 6 Alb. L. J. (N. Y.) 407; The Sabioncello, 21 Fed. Cas. No. 12,198, 7 Ben. 357; Soule *v.* Rodoeanaehi, 22 Fed. Cas. No. 13,178, Newb. Adm. 504; Vaughan *v.* Six Hundred and Thirty Casks of Sherry Wine, 28 Fed. Cas. No. 16,900, 7 Ben. 506; The William Taber, 30 Fed. Cas. No. 17,757, 2 Ben. 329. But see The Patria, 125 Fed. 425 [*affirmed* in 132 Fed. 971, 68 C. C. A. 397] (holding, however, that, although where the evidence shows that a ship received goods on board in good condition, and delivered them damaged, it has the burden of proving that

inherent defect;[53] but where it appears that the damage in question was caused by an excepted peril, the shipper must affirmatively show that it was proximately caused by the carrier's negligence, or could have been avoided by the exercise of reasonable care and skill,[54] and the same rule applies where the carrier shows inherent defect.[55] Where damage is caused by sea water, the burden rests on the vessel to show sufficient stress of weather to warrant the inference that such water found access to the cargo through a peril of the sea, and the carrier must show not merely that the damage could have been caused by a sea peril, but that it could not have been caused otherwise.[56] But where the ship has shown a sea peril which might reasonably be expected to cause the damage found to exist, it will be presumed to have produced it, if there is satisfactory proof that any or all other suggested causes did not produce it;[57] and thus where it appears that the vessel encountered an unusually violent storm, which fully accounted for the damage within an exception in the bill of lading, the burden is on the shipper to show carelessness or negligence on the part of the vessel leading to the loss.[58]

the damage was due to a risk excepted in the bill of lading, although if it is manifestly so, as from breakage or decay which are excepted generally, the ship need not show the cause of the breakage or decay, but the cargo owner can only recover by proof of negligence); The Strathdon, 101 Fed. 600, 41 C. C. A. 515 [*affirming* 94 Fed. 206].

See 44 Cent. Dig. tit. "Shipping," § 481.

When the carrier's default in delivering only part of the goods has been proved, he must show that the rest were lost by one of the excepted perils. Grieff *v.* Switzer, 11 La. Ann. 324.

53. Doherr *v.* Houston, 128 Fed. 594, 64 C. C. A. 102 [*affirming* 123 Fed. 334].

Sustaining burden by circumstantial evidence.—A ship may sustain the burden of proof resting on her to show that cargo damage was due to a cause for which she is not liable by circumstantial evidence as to the manner in which the water causing the damage entered the hold, and in the absence of direct evidence the court is justified in adopting her theory in that respect, where the facts and circumstances shown are consistent with such theory and not consistent with any other. The Wildcroft, 130 Fed. 521, 65 C. C. A. 145 [*affirmed* in 201 U. S. 378, 26 S. Ct. 467, 50 L. ed. 794].

54. Kirk *v.* Folsom, 23 La. Ann. 584; Price *v.* The Uriel, 10 La. Ann. 413; Patterson *v.* Clyde, 67 Pa. St. 500; Western Transp. Co. *v.* Downer, 11 Wall. (U. S.) 129, 20 L. ed. 160; New Jersey Steam Nav. Co. *v.* Merchants Bank, 6 How. (U. S.) 344, 12 L. ed. 465; Lazarus *v.* Barber, 136 Fed. 534, 69 C. C. A. 310 [*affirming* 124 Fed. 1007]; Ceballos *v.* The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; The Flintshire, 69 Fed. 471; The Hindoustan, 67 Fed. 794, 14 C. C. A. 650; American Sugar Refining Co. *v.* The G. R. Booth, 64 Fed. 878 [*reversed* on other grounds in 91 Fed. 164, 33 C. C. A. 430, thereafter the question was certified to the United States supreme court whether the loss was in fact due to an excepted peril, which was answered in the negative in 171 U. S. 450, 19 S. Ct. 9, 43 L. ed. 234]; The Barracouta, 39 Fed. 288; The Portuense, 35 Fed. 670; The Thomas Melville, 31 Fed. 486; The Montana, 17 Fed. 377; The Powhattan, 12 Fed. 876, 21 Blatchf. 18 (holding that on a shipment of cattle in an iron ship in hot weather in July, the burden of proof of negligence on the part of the carrier by not providing sufficient ventilation is on the shipper); Hunt *v.* The Cleveland, 12 Fed. Cas. No. 6,885, 6 McLean 76, Newb. Adm. 221; The Live Yankee, 15 Fed. Cas. No. 8,409, Deady 420; The Rocket, 20 Fed. Cas. No. 11,975, 1 Biss. 354.

Where the bill of lading or receipt admits that the goods were shipped in good condition, and they are not so delivered, the carrier is bound to prove that the damage resulted from one of the causes excepted against, the presumption being against the carrier. Bernadon *v.* Nolte, 7 Mart. (La.) 278; The Presque Isle, 140 Fed. 202; The Patria, 125 Fed. 425 [*affirmed* in 132 Fed. 971, 68 C. C. A. 397]; The Titania, 124 Fed. 975 [*affirmed* in 131 Fed. 229, 65 C. C. A. 215]; Argo Steamship Co. *v.* Seago, 101 Fed. 999, 42 C. C. A. 128; The Mascotte, 51 Fed. 605, 2 C. C. A. 399; The Historian, 28 Fed. 336; The Lydian Monarch, 23 Fed. 298; The Invincible, 13 Fed. Cas. No. 7,055, 1 Lowell 225; The Live Yankee, 15 Fed. Cas. No. 8,409, Deady 420; Llado *v.* Tritone, 15 Fed. Cas. No. 8,427, 8 Reporter 165; Nordlinger *v.* The Catherina, 18 Fed. Cas. No. 10,295; Turner *v.* The Black Warrior, 24 Fed. Cas. No. 14,253, McAllister 181.

55. Atkins *v.* Horrman, 2 Fed. Cas. No. 602*a*.

56. Darragh *v.* The Dunbritton, 73 Fed. 352, 19 C. C. A. 449. See The Mollie Mohler, 17 Fed. Cas. No. 9,701, 2 Biss. 505. And see *supra*, VII, D, 10.

57. Darragh *v.* The Dunbritton, 73 Fed. 352, 19 C. C. A. 449.

58. Kelham *v.* The Kensington, 24 La. Ann. 100; Hunt *v.* Morris, 6 Mart. (La.) 676, 12 Am. Dec. 489; The Neptune, 18 Fed. Cas. No. 10,118 6 Blatchf. 193. But see Arend *v.* Liverpool, etc., Steamship Co., 6 Lans. (N. Y.) 457, 64 Barb. 118 (holding that proving that the ship had a tempestuous voyage, that the cargo was well stowed, and that the hatches were properly secured, etc., did not tend to shift the burden of proof); The Sloga, 22 Fed. Cas. No. 12,955, 10 Ben. 315 (holding that

(3) SEAWORTHINESS. Where the proof shows damage to the cargo, the burden is cast upon the ship to establish the fact of seaworthiness, and to show due diligence in ascertaining whether or not she was in fact seaworthy, and in making her so at the beginning of the voyage,[59] particularly where the vessel was very old,[60] and the burden of proving that a vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so, rests upon the ship-owner claiming the benefit of the exemption provided in Harter Act, against errors of management or navigation, whether or not there is any evidence to the contrary.[61] Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unseaworthy before setting sail;[62] and upon proof of injury to cargo by seawater leaking through the burden of proof is upon the ship to show a sea peril adequate to cause such leaks to a seaworthy ship;[63] and that burden is not discharged by simply showing that the ship was in a seaworthy condition at the commencement of the voyage, and presenting evidence which merely leaves the question as to how the leak arose.[64] But when she encounters severe marine perils calculated to disable a seaworthy vessel, the presumption is overthrown,[65]

where a cargo is found on arrival to have suffered from water, and it appears that, although the vessel met with heavy weather, she was kept free from water by her pumps, the burden is on the vessel to show that the loss was caused by a peril of the sea, the consequences of which could not have been guarded against with the means available to the officers and crew).

59. The Ninfa, 156 Fed. 512; The Oneida, 128 Fed. 687, 63 C. C. A. 239.

60. Forbes *v.* Merchants' Express, etc., Co., 111 Fed. 796 [*affirmed* in 120 Fed. 1019, 56 C. C. A. 681].

61. The Wildcroft, 130 Fed. 521, 65 C. C. A. 145 [*affirmed* in 201 U. S. 378, 26 S. Ct. 467, 50 L. ed. 794], holding, however, that the casting of the burden of proof on one party or the other in a given case does not destroy the presumptions in favor of a party which exist under the general law of evidence, and that so while a ship-owner, claiming exemption from liability for cargo damage under the act, has the burden of proving the seaworthiness of the vessel, in the absence of evidence to the contrary, such burden is not *prima facie* by the presumption that he performed his duty in making her seaworthy at the commencement of the voyage.

62. Cameron *v.* Rich, 4 Strobh. (S. C.) 168, 53 Am. Dec. 670; The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)]; The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; The Planter, 19 Fed. Cas. No. 11,207*a*, 2 Woods 490.

Defective port.—Where a cargo is injured by a leak caused by the defective fitting of a port, the burden is on the ship to show that the port was tight at the time of sailing. The Phœnicia, 90 Fed. 116 [*affirmed* in 99 Fed. 1005, 40 C. C. A. 221). Defective port as bearing on the question of seaworthiness generally see *infra*, VII, D, 13, b, (III), (C), note 71.

Where the vessel sinks at a dock from being subjected only to the swells from passing vessels the presumption is that she was unseaworthy. Forbes *v.* Merchants' Express, etc., Co., 111 Fed. 796 [*affirmed* in 120 Fed. 1019, 56 C. C. A. 681].

63. The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)]; The Thomas Melville, 31 Fed. 486, holding that this is done *prima facie* by general proof of seaworthiness and that there was no leak until after stress of very severe weather, and the burden of proof then returns to libellant to rebut this presumption or to show some fault in the ship that made the sea peril efficient.

64. The Queen, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)], holding that, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, without the ship having encountered a peril sufficient to account for it, the presumption is that she was not seaworthy when she sailed.

65. The Musselcrag, 125 Fed. 786 (holding that where a ship during the voyage encountered storms of such violence as to reasonably account for the opening of her deck seams and the consequent damage to her cargo from water, the burden of proof rests upon the cargo owner to establish a claim made by him that improper stowage of the cargo caused or contributed to the strain on the vessel's deck and the resulting injury thereto); The Sandfield, 79 Fed. 371 [*affirmed* in 92 Fed. 663, 34 C. C. A. 612] (holding that a vessel is not required to be impregnable to the assaults of the elements to be seaworthy, but the test is whether or not she is reasonably fit for the contemplated voyage, and the fact that a single rivet, among many thousands used in the construction of her hull, was not as strong as the average, and parted under the stress of extraordinary stormy weather, does not raise a presumption of unseaworthiness, rendering the owner liable for a resulting damage to

particularly where for a considerable time she successfully combats them;[66] and the burden is put upon libellant of proving that the losses sued for were occasioned by the want of due care in providing a proper ship, and suitable fittings, for carrying the cargo.[67] A provision of a bill of lading exempting the carrier from liability for loss or damage occasioned by unseaworthiness, provided the owners had exercised due diligence to make the vessel seaworthy, leaves upon the owners the burden of proving such due diligence, which includes thorough and careful inspection;[68] but the warranty that the ship is fit at the beginning of a voyage to safely carry the cargo received by her, which is implied where the bill of lading is silent, cannot be implied if the parties have contracted otherwise; and in such case the burden of proof is not upon the carrier, but upon the shipper, who must show the carrier's negligence to entitle him to recover for loss or damage to cargo.[69]

(II) *ADMISSIBILITY*. The rules governing the admissibility of evidence in actions generally,[70] and particularly in actions against other carriers,[71] apply to actions for loss or injury to goods by carriers by water.[72] Thus parol evidence of an agreement that goods shipped under a clean bill of lading should be carried on deck is inadmissible in a libel for injury to cargo,[73] but may be received to show a supplemental agreement for a particular mode of storage under deck;[74] and parol evidence is admissible to show that, by a custom existing on a particular river, flat-boat men were not responsible for a loss caused by dangers of the river, although the bill of lading contained no such exception;[75] and evidence that it was usual and customary for one boat on a voyage to stop and aid another boat in distress is competent to show that such act is not a deviation, where the loss occurred by the sinking of the boat after such aid was rendered.[76] In an action against the owners of a vessel for loss of goods, an allegation that the vessel

the cargo); Ceballos *v.* The Warren Adams, 74 Fed. 413, 20 C. C. A. 486; Bursley *v.* The Marlborough, 47 Fed. 667; The Rover, 33 Fed. 515.

66. Ceballos *v.* The Warren Adams, 74 Fed. 413, 20 C. C. A. 486.

67. The J. C. Stevenson, 17 Fed. 540.

68. The Friesland, 104 Fed. 99.

69. The Tjomo, 115 Fed. 919.

70. See EVIDENCE, 12 Cyc. 821.

71. See CARRIERS, 6 Cyc. 517 *et seq.*

72. McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Reed *v.* Dick, 8 Watts (Pa.) 479 (holding that in an action for damage to goods occasioned by a storm, evidence that other vessels driven into a port by the same storm were staunch and strong as any employed in the trade was competent to show the violence of the storm; and that where a loss of goods has been occasioned by the breaking of a cable and the loss of the vessel, the declarations of the crew, when they were paying out the cable, may be given in evidence as to its soundness); Farmers', etc., Bank *v.* Champlain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491; Donaldson *v.* J. W. Perry Co., 138 Fed. 643, 71 C. C. A. 93 (holding that, in an action to recover for damage to cargo from leakage of the vessel, evidence that directions as to the manner of loading were given the agents by libellant, which directions were not followed, was competent); The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110; Merriman *v.* The May Queen, 17 Fed. Cas. No. 9,481, Newb. Adm. 464 (holding that in an action against a vessel by a shipper for the loss of goods, the protest of the master of a vessel, being a mere narration of the bad weather he has met with, cannot be received as evidence for himself or his owners).

The evidence must be relevant.—Agnew *v.* The Contra Costa, 27 Cal. 425, 87 Am. Dec. 87 (holding that in an action against a common carrier for a loss occasioned by the bursting of the boiler of a steamboat during a race, evidence of the good condition of the boiler and of the exercise of all possible care is irrelevant, both on the question of liability and damages); A. J. Tower Co. *v.* Southern Pac. Co., 195 Mass. 157, 80 N. E. 809; Costigan *v.* Michael Transp. Co., 33 Mo. App. 269 (holding that in an action against a steamboat for the loss of goods in transportation, evidence that the license of the pilot in charge has been revoked since the happening of the accident is inadmissible, when it does not appear that such revocation bore any relation to the accident); Richardson *v.* Young, 38 Pa. St. 169; Nimick *v.* Holmes, 25 Pa. St. 366, 64 Am. Dec. 710; Dean *v.* Swoop, 2 Binn. (Pa.) 72.

73. The Star of Hope, 22 Fed. Cas. No. 13,313, 2 Sawy. 15 [*affirmed* in 17 Wall. 651, 21 L. ed. 719]. But see *supra*, VII, D, 6, b.

74. The Star of Hope, 22 Fed. Cas. No. 13,313, 2 Sawy. 15 [*affirmed* in 17 Wall. 651, 21 L. ed. 719].

75. Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516.

76. Walsh *v.* Homer, 10 Mo. 6, 45 Am. Dec. 342.

was wrecked and the merchandise lost on account of defendant's negligence, and without fault on plaintiff's part, raises the issue of defendant's negligence, and authorizes the admission of evidence that the vessel was being operated without the full complement of officers [77] required by statute.[78]

(III) *WEIGHT AND SUFFICIENCY.* The general rules governing the weight and sufficiency of evidence [79] are applicable to actions against carriers by water for loss of or injury to goods.[80] Thus where cargo shipped in a tight, stanch, and

77. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

78. See U. S. Rev. St. (1878) § 4463 [U. S. Comp. St. (1901) p. 3045].

79. See EVIDENCE, 17 Cyc. 753.

80. Howland *v.* Greenway, 22 How. (U. S.) 491, 16 L. ed. 391 (holding that in proceedings against the owners of a vessel to recover for goods confiscated by the authorities at a foreign port by failure of the captain to enter the goods on his manifest, where one witness testified to the market value of the goods at the port of delivery, and another approximated their cost at the point from which they were shipped, this was sufficient to support a decree in respect to the amount of damages assessed); The Rose Innes, 122 Fed. 750 (holding that where a ship is liable for loss in a cargo of coffee by reason of rats having eaten holes in the mats in which it was packed during the voyage, the weight of the coffee when placed in the mats at interior plantations is sufficient *prima facie* to establish the amount of the shortage); The Minnie E. Kelton, 109 Fed. 164, 48 C. C. A. 271 (holding that where the testimony of the officers and crew of a steamer concurred that all the lumber loaded by a charterer was delivered at the end of the voyage, a shortage cannot be established by testimony on behalf of the charterer as to the quantity loaded, based entirely on an estimate of the total quantity on the dock, from which the witnesses deducted the quantity carried by two other vessels); The Longfellow, 104 Fed. 360, 45 C. C. A. 379 (holding that where all the direct evidence was to the effect that a steamer was seaworthy when she entered on her voyage, it cannot be inferred from the fact that a short time before she had met with two accidents, in one of which she was slightly injured, that her seaworthiness was thereby impaired, in the absence of affirmative evidence that she was in fact injured thereby in her hull or machinery); Putnam *v.* The Manitoba, 104 Fed. 145; Beach *v.* The America, 59 Fed. 787 (holding that inferences arising from failure to produce to consignees remains of casks broken in transit are overcome by explicit testimony that the casks were received and well stored, and were broken by heavy weather); Morris Beef Co. *v.* The Wells City, 57 Fed. 317; The Mondego, 56 Fed. 268 (holding that the mere fact that a very unusual number of cattle died while in transit from no apparent cause is not of itself sufficient proof of defective ventilation, as against the fact that the ship was provided with so many air spaces as to lead all the inspectors and experts to pronounce the ventilation sufficient, and the further fact that both before and after the voyage she had carried a greater number of cattle with scarcely any mortality); The City of Lincoln, 25 Fed. 835; The Gentleman, 10 Fed. Cas. No. 5,323, 1 Blatchf. 196 [*reversing* 10 Fed. Cas. No. 5,324, Olcott 110] (holding that in an action against a vessel for damages to a cargo caused by delay of the vessel by reason of its having a sick and incompetent crew, the evidence of the crew as to their own health must control, in opposition to the testimony of persons experienced in the particular trade, as to the effect of the given sickness upon the crew).

Evidence held insufficient to prove: Damage from bad stowage and leakage. See McKinlay *v.* Morrish, 21 How. (U. S.) 355, 16 L. ed. 100. In an action against a ship for injuries to a cargo of firecrackers, alleged to have been caused by defective stowage, that the damage was the result of insufficient or defective coverings on the packages. Doherr *v.* Houston, 128 Fed. 594, 64 C. C. A. 102 [*affirming* 123 Fed. 334]. Negligence in calking and unseaworthiness in that respect when the ship sailed. The Thomas Melville, 31 Fed. 486. That damage was caused by bad stowage and negligence of the master and crew. The Amsterdam, 156 Fed. 850; Puget Sound Mach. Depot *v.* The Guy C. Goss, 53 Fed. 826; The Delhi, 7 Fed. Cas. No. 3,770, 4 Ben. 345. That the full quantity received on board was not delivered. The Charles Tiberghien, 147 Fed. 307; The Patria, 118 Fed. 109. That the goods were damaged while on board of the steamer. The George Heaton, 20 Fed. 323; The Adriatic, 1 Fed. Cas. No. 90, 16 Blatchf. 424. Damage to cargo. The Venner, 27 Fed. 523. Damage by peril of the sea. The Charles J. Willard, 38 Fed. 759. Negligence on the part of the ship. The Barracouta, 39 Fed. 288. Damage to the goods by unseaworthiness of the ship, bad stowage, want of proper dunnage, negligence, and improper conduct of the master and crew. The Tjomo, 115 Fed. 919; E. Lobe Co. *v.* The Guy C. Goss, 53 Fed. 839. That the sinking of a lighter at her pier was due to unseaworthiness. National Bd. of Marine Underwriters *v.* Bowring, 148 Fed. 1010.

Evidence held sufficient to prove: The implied warranty of seaworthiness. The Patria, 118 Fed. 109; Ceballos *v.* The Warren Adams, 74 Fed. 413, 20 C. C. A. 486. That the injury was to be attributed to defective material and calking of the decks, and not to perils of the seas. The Compta, 6 Fed. Cas. No. 3,069, 4 Sawy. 375. That the vessel was not seaworthy. The Lillie Hamilton, 18 Fed. 327. That the propeller was stowed and secured in a manner judged safe by com-

well manned vessel arrives in a damaged condition, the burden of showing that the damage was within the exception of dangers of navigation is sustained by proof that the vessel encountered a storm, shipped water, and leaked; [81] but the burden is not sustained by showing that the damage was occasioned by a leak, and suggesting that it arose from some inexplicable action of the elements, without negativing other causes for the leak, which would leave the carrier liable,[82] nor by evidence that heavy seas were encountered, and much water taken over all, and perhaps through the seams, but none down the hatches.[83] The defense that the loss of cargo arose partly from a necessary jettison on account of perils of the sea and partly from a sale for necessaries must be established by clear and conclusive proof; [84] and similarly, where goods are carried under a bill of lading exempting the carrier from liability for unavoidable dangers, it is not sufficient for the carrier to show merely that the vessel was stranded, but it must be shown that she was stranded by an unavoidable danger; [85] but in an action against a common carrier for a loss, by the perils of navigation within the exceptions of the bill of lading, it is sufficient for defendant to prove that fact generally, and he is not obliged to show affirmatively the particular and identical cause of

petent persons, and that the loss was fairly attributable to perils of the sea. The Titania, 19 Fed. 101. Proper communication with the shipper. Astsrup *v.* Lewy, 19 Fed. 536. Negligent stowage. Corsar *v.* J. D. Spreckels, etc., Co., 141 Fed. 260, 72 C. C. A. 378; Lazarus *v.* Barber, 124 Fed. 1007 [*affirmed* in 136 Fed. 534, 69 C. C. A. 310]. Injury to cargo to have been due to her having been unseaworthy and not in good condition for the carriage of such cargo when the voyage was begun, owing to her defective decks and the careless handling of the pump during her detention, by reason of which water leaked through into the hold. The Gordon Campbell, 141 Fed. 435. Loss to have been due to leakage, owing to the inability of the vessel to carry the cargo for which she was chartered without straining, which rendered her unseaworthy. The William Power, 131 Fed. 136. That damage to a cargo resulted from the defective condition of the hatch coverings, which rendered the vessel unseaworthy at the commencement of the voyage, having in view the nature of the cargo, the time of the year, and the weather to be fairly anticipated. The C. W. Elphicke, 117 Fed. 279 [*affirmed* in 122 Fed. 439, 58 C. C. A. 421]. That damage by water to a cargo of cement carried between decks on a voyage was due to the defective condition of the calking at the commencement of the voyage, and rendered the vessel unseaworthy with reference to the particular cargo. The Nellie Floyd, 116 Fed. 80 [*affirmed* in 122 Fed. 617, 60 C. C. A. 377]. That loss of cargo from a lighter, which was being loaded from a ship, due to the rolling of the lighter, was not caused by its negligent handling or defective condition, but by some external cause for which it was not liable. The Wildenfels, 161 Fed. 864. On conflicting evidence, that damage to a cargo was caused by a peril of the sea, and not by neglect on the part of the ship. Fowler *v.* Bertram L. Townsend, 35 Fed. 797. That damage was largely due to the negligent use or condition of a valve by which ice had become "steam struck," through steam escaping into the hold. Smith *v.* Saugerties, 44 Fed. 625. That the vessel was in a condition, when she sailed, to encounter the ordinary perils of her voyage, which was sufficient to make her seaworthy, and her loss was due to the mistake or carelessness of the captain, without the fault, knowledge, or privity of the owners, in attempting to cross the bar on an ebb tide. *In re* Meyer, 74 Fed. 881. That the fire was caused by the negligence of the carrier. Hill Mfg. Co. *v.* Providence, etc., Steamship Co., 125 Mass. 292. Negligence on the carrier's part. Costigan *v.* Michael Transp. Co., 33 Mo. App. 269. An apparent shortage, as shown by the tally made at the time of discharge, arose from the fact that in many cases two bales were trussed together in one package and such packages were erroneously counted as one bale. The Charles Tiberghien, 147 Fed. 307. That the sinking of a lighter was caused by a blow received from some unknown vessel in collision with her, or from swells causing her to collide with a vessel or wharf alongside. National Bd. of Marine Underwriters *v.* Bowring, 148 Fed. 1010.

81. Hunt *v.* The Cleveland, 12 Fed. Cas. No. 6,885, 6 McLean 76, Newb. Adm. 221.

82. Bancroft-Whitney Co. *v.* The Queen of the Pacific, 78 Fed. 155 [*affirmed* in 94 Fed. 180, 36 C. C. A. 135 (*reversed* on other grounds in 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419)] (holding that a ship-owner against whom a *prima facie* case of negligence has been made out does not discharge the burden of bringing himself within the exceptions of perils of the sea by simply showing that the ship was in a seaworthy condition at the commencement of the voyage, and presenting evidence which merely leaves in doubt the question as to how the leak arose which caused the damage); The Emma Johnson, 8 Fed. Cas. No. 4,465, 1 Sprague 527.

83. Serio *v.* The Giava, 56 Fed. 243.

84. Talbot *v.* Wakeman, 23 Fed. Cas. No 13,731*a*.

85. The Keokuk, 14 Fed. Cas. No. 7,721, 1 Biss. 522.

loss.[86] In an action to recover damages for injury to goods by reason of bad stowage, the mere fact of the sale of the injured goods at auction, without proof of the price they brought, is no ground for disregarding the evidence of experts as to their value.[87]

e. Damages — (I) *MEASURE.* In a libel on a contract of affreightment, to recover for damages to the cargo, the object of the law is to make the parties as nearly whole as possible for the damages sustained by reason of the breach of contract.[88] Thus the damages recoverable against a vessel which has been negligently stranded, and hence damaged her cargo, include the loss of perishable cargo rendered worthless by delay, the partial damage to such cargo as has been brought into port, the costs and charges attending the salvage of the cargo, and damage by reason of differences in market prices from the delay in arrival;[89] and where goods arrive in a damaged condition, and it is apparent that the damage was in great part caused by the carrier's fault, although to some extent it would probably have been caused by the perils of the sea encountered by the vessel, but to what extent the carrier is unable to show, he will be held liable for the whole;[90] and where goods damaged in shipment, for which damage the ship is liable, the invoice value being made the basis of settlement by the bill of lading, are sold on their arrival, the freight paid thereon or due should be deducted from the proceeds, and the remainder only credited to the carrier against the invoice value, to determine the amount of his liability.[91] When the loss of or injury to cargo occurs at the place where it is laden, and before the voyage begins, the carrier is liable for its value at such port,[92] in the absence of special circumstances making him liable for the value at the port of delivery;[93] and although it is held that the ordinary measure of damages for the breach of a contract of affreightment, where the goods have been unlawfully disposed of at an intermediate port,

86. Hill *v.* Sturgeon, 35 Mo. 212, 86 Am. Dec. 149.

87. The Sabioncello, 21 Fed. Cas. No. 12,199, 8 Ben. 90.

88. The Lillie Hamilton, 18 Fed. 327; Jackson *v.* The Julia Smith, 13 Fed. Cas. No. 7,136, 6 McLean 484, Newb. Adm. 61.

Measure where owner of vessel acted as supercargo.— It was agreed, in a bill of lading, that the net proceeds, at the port of destination abroad, of goods shipped, should be paid to the shippers in ninety days after the return of the vessel to her home port. The ship arrived out and the goods were sold, invested by the owners of the ship, on their own account, in return cargo. The ship met with disaster on her return, and the cargo was damaged fifty per cent. She, however, arrived at her home port. It was held that the shippers were entitled to recover the whole net amount for which their adventure was sold in the foreign port. Winchester *v.* Patterson, 17 Mass. 62; Wallis *v.* Cook, 10 Mass. 510.

The consignee of a cargo may maintain an action in admiralty against the vessel for an injury to his interest therein, and, when he is vested with the legal ownership by an assignment of the bill of lading, he may recover for any breach of the contract made by such bill of lading; but where there was no bill of lading, and he has no interest in the cargo, if he is, in any event, authorized to recover against the vessel, on behalf of the consignor, it can only be such damages as result from a breach of the contract between the shipper and carrier, and arising after the cargo has been received on board. The Habil, 100 Fed. 120.

89. The City of Para, 44 Fed. 689.

90. Speyer *v.* The Mary Belle Roberts, 22 Fed. Cas. No. 13,240, 2 Sawy. 1.

91. The Styria, 95 Fed. 698.

92. Rogers *v.* West, 9 Ind. 400; Krohn *v.* Oechs, 48 Barb. (N. Y.) 127; Lakeman *v.* Grinnell, 5 Bosw. (N. Y.) 625; Dusar *v.* Murgatroyd, 8 Fed. Cas. No. 4,199, 1 Wash. 13, holding that when goods are destroyed or materially injured on board a vessel in the port where they are shipped, the damages must be ascertained by the difference between the prime cost and charges and the sales at the port of shipment, and not by the probable profits if the goods had gone safe to the port of destination.

93. The Joshua Barker, 13 Fed. Cas. No. 7,547, Abb. Adm. 215, holding that where a vessel having on board a cargo of flour for transportation capsized at her wharf before sailing, and the cargo was much damaged, and the carriers might easily have communicated with the owners of the cargo, but without seeking instructions from the owners of the cargo they sold it upon their own authority at auction, and completed the voyage, the owners of the cargo were entitled to recover from the vessel its value at the port of delivery, such value to be ascertained by the market price at the port of delivery at the time of the arrival of the vessel, deducting freight charges and adding interest to the balance.

is their prime cost, with interest, and charges of shipment and transportation,[94] the general rule is, in the absence of special circumstances, such as misconduct on the part of the carrier,[95] or the impossibility of showing the value of the cargo at the port of delivery,[96] that where the loss occurred after leaving the place of shipment the damages are to be estimated as of the port of delivery,[97] and the measure is the market value,[98] at the port of destination, at the time they should have been delivered,[99] with interest from the time delivery should have been

94. The Harriet, 11 Fed. Cas. No. 6,094. And see King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349. *Compare* O'Connell *v.* The Tally Ho, 18 Fed. Cas. No. 10,418, where a vessel laden with corn put in at an intermediate port in distress, and a part of the cargo, which was unfit for further transportation, was taken charge of by the American consul who, being advised by the governor of the island that because of the scarcity of provisions at that port an attempt to reload the corn would be resisted by force, sold the corn, the shippers were not bound by such sale, and might recover, at their election, the value of the cargo at the point of destination, deducting freight, or the proceeds of the sale, with interest, free of freight.

Where a vessel, bound by a contract of affreightment, was, during the voyage, taken in replevin by the owner, brought into another port, where the goods, being landed, were seized by the revenue officers, sold and bought in by the owner subject to the order of the shipper, the measure of damages, as against the vessel, was the value of the goods at the time of the contract, without deducting the expenses incurred by the owner, and without allowing those of the libellant in search of his property and defending the same in court. The Julia Smith, 13 Fed. Cas. No. 7,136, 6 McLean 484, Newb. Adm. 61.

95. Edminson *v.* Baxter, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751. See The Olympia, 156 Fed. 252; The Joseph Oteri, Jr., 66 Fed. 581, 13 C. C. A. 645.

96. Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230 (holding that in an action against a vessel for loss of miners' outfits destined to a place on the coast of Alaska, where there was no market in which such goods could be bought, the goods being intended for consumption and not for sale, the measure of damages was the market value of the goods lost at the place of destination at the time when they should have been delivered, which the jury was authorized to ascertain by taking the price at the place of shipment and adding thereto the cost of carriage and interest at the legal rate); The Protection, 102 Fed. 516, 42 C. C. A. 489 (where, because of the impossibility of showing the value of a machine at the port of destination, libellant was allowed as damages its cost at the port of shipment, together with his expenses in going to receive it and the freight paid).

97. The Emily *v.* Carney, 5 Kan. 645.

98. The Arctic Bird, 109 Fed. 167.

Mode of determining market value.— The market value of damaged goods is to be determined by the price they actually produced when sold, and not by the testimony of experts. *In re* The Boskenna Bay, 31 Fed. 612 (holding that in ascertaining the amount of damage sustained by a cargo of fruit, the best method, in the absence of direct evidence, is by a comparison of the price brought by the damaged fruit at a fair sale, with the market value of sound fruit of the same brands, sold at the same time; or if that is not obtainable, then by a comparison of the price brought by the damaged goods with the prices brought within a week before or after by other brands of the same invoice at the place of export as the damaged fruit; or next, proof of the value abroad would be competent, with additions for differences in market, the average values of all the fruit arriving about the time of the arrival of the damaged fruit, from the same port as the latter, is only a reasonable test as a last resort); Hamilton *v.* The Bark Kate Irving, 5 Fed. 630, 5 Hughes 253. But a sale of a damaged cargo by consignees is not binding on the vessel so as to fix its liability as to the amount of damage, and such sale should be made with notice to the ship-owner, or there should be an appraisement with notice. Crosby *v.* Grinnell, 6 Fed. Cas. No. 3,422.

A rebate of duty for damage to goods obtained by the consignee is not to be considered in computing the damage recoverable by the consignee against the ship, and as an element of market value it has no place. The Eroe, 8 Fed. Cas. No. 4,521, 9 Ben. 191 [*affirmed* in 8 Fed. Cas. No. 4,522, 17 Blatchf. 16]. And similarly where the amount of rebate of duties allowed to the libellant at the custom-house, on a cargo of fruit which respondent had negligently failed to deliver in time, was the customary one allowed on all fruit cargoes, and had no reference to the damages caused by respondent's negligence, respondent was not entitled to the benefit of it. Morrison *v.* I. & V. Florio Steamship Co., 36 Fed. 569.

99. *Kansas.*— The Emily *v.* Carney, 5 Kan. 645.

Louisiana.— Burke *v.* Clarke, 11 La. 206 (holding that a steamer undertaking, but failing to bring a slave to New Orleans, and retaining him for the next trip, when he was lost, was liable for his value at the time and place of delivery, but not for wages subsequent thereto, or damages); St. Marc *v.* La. Chapella, 1 Mart. 36.

New York.— Krohn *v.* Oechs, 48 Barb. 127; Watkinson *v.* Laughton, 8 Johns. 213.

North Carolina.— Howard *v.* Ross, 3 N. C. 333.

Tennessee.— Edminson *v.* Baxter, 4 Hayw. 112, 9 Am. Dec. 751, holding that in an ac-

made;[1] and, in the absence of proof of such value, it will be presumed to have been their value at the place of shipment, with the freight added;[2] and if the goods are merely injured on shipboard the measure of damages is the difference between their value in their damaged state and their value at the port of destination if they had been delivered in good order,[3] with interest from the time of delivery and other items of expenditure made necessary by reason of the damage;[4] but it has been held that where the cargo of a vessel has been sold by order of the court in a port to which it was brought by salvors, in proceedings regularly instituted by the owners to recover possession, the proceeds of the sale may properly be taken as its value for the purpose of making adjustment between the several parties in interest, although the proceeding by the cargo owners was unwarranted, and the cargo was sold for less than its actual value.[5] But the shipper or owner cannot recover for loss of a profit he would have made by delivery of the steel on a prior contract of sale, which delivery was refused by the purchaser on account of its damaged condition, the vessel having no relation to such contract;[6] and where goods are delivered in a damaged condition it is immaterial, on the question of damages, what disposition the shipper has made of them since the breach of contract occurred. If he has chosen to hold them for a better market, it is at his own risk and for his own account. The liability of the carrier is in no way affected by the result of the speculation. A rise in the price of the goods will not diminish his liability, nor a fall increase it.[7] In any event the liability of an owner of a vessel engaged in carrying goods for freight for cargo lost without his fault is limited to the value of the ship and freight; and even though the master execute a bottomry bond, hypothecating as well the cargo as the ship and freight, and the cargo is afterward sold on such bond, the owner's personal liability will be no greater.[8] It is the duty of a carrier of cargo which meets with disaster through the fault of the vessel to do what he can to minimize the damage, by which he profits as well as the cargo owner, and he is not entitled to a deduction of expenses so incurred from the damages recoverable by the cargo owner by reason of his loss.[9]

(II) *APPORTIONMENT OF DAMAGES, AND DEDUCTIONS.* Where damage to goods is attributable partly to the fault of the carrier and partly to the fault of the shipper, and it is impossible to ascertain for what proportion each is responsible, the loss will be equally divided between them;[10] but where a cargo has

tion against a carrier by water, the value of the goods at the port of reception is the proper measure of damages, unless some fault or misconduct on the part of the carrier should require the application of a different rule.

United States.— The Oneida, 128 Fed. 687, 63 C. C. A. 239; The Arctic Bird, 109 Fed. 167; The Nith, 36 Fed. 86, 13 Sawy. 368; Dusar *v.* Murgatroyd, 8 Fed. Cas. No. 4,199, 1 Wash 13.

And see 44 Cent. Dig. tit. "Shipping," § 485.

1. The Emily *v.* Carney, 5 Kan. 645; The Arctic Bird, 109 Fed. 167.

2. The Arctic Bird, 109 Fed. 167.

3. Henderson *v.* The Maid of Orleans, 12 La. Ann. 352; The Bérengére, 155 Fed. 439; The Niagara, 18 Fed. Cas. No. 10,221, 16 Blatchf. 516. See The Augusto, 29 Fed. 334. But see Foster *v.* The British Oak, 9 Fed. Cas. No. 4,966, holding that the measure of damages for negligence causing injury to cargo is the difference between the cost of the damaged goods and the proceeds received from the sale thereof.

4. The Bérengére, 155 Fed. 439.

But expenses incident to the auction sale of a damaged cargo, and for the services of experts employed by the libellant, are not elements of damage against the vessel. The Marinin, 32 Fed. 918.

5. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195.

6. The Bérengére, 155 Fed. 439; The Compta, 6 Fed. Cas. No. 3,070, 5 Sawy. 137.

7. The Compta, 6 Fed. Cas. No. 3,070, 5 Sawy. 137. But see Morrison *v.* I. & V. Florio Steamship Co., 36 Fed. 569.

8. Naylor *v.* Baltzell, 17 Fed. Cas. No. 10,061, Taney 55. And see, generally, as to statutory limitations, *infra*, XI.

9. Ralli *v.* New York, etc., Steamship Co., 154 Fed. 286, 83 C. C. A. 290.

10. Stillwell *v.* The J. D. Hall, 34 Fed. 904; Snow *v.* Carruth, 22 Fed. Cas. No. 13,144, 1 Sprague 324.

If the owner of goods employ a boat obviously unfit for the trip, and loss happens thereby, as against third persons also chargeable with negligence, he can recover but half his damages. The Wm. Murtagh, 17 Fed. 259.

been damaged by independent causes, for only a part of which the ship is liable, the loss will not be equally divided, nor cast wholly upon the ship, except as a last resort and when all means fail of making an approximate apportionment of the loss to the several causes of damage.[11] Where it appears that the greater part of the damage to a cargo resulted from sea perils for which the ship is not liable, but further damage occurred through the negligence of the master in failing to put into port to make repairs, it would be inequitable to hold the ship liable for the entire damage, although it cannot be separated, and the loss should be divided;[12] and on the same principle the owner of a boat liable for wrongful jettison is entitled to a deduction for loss occurring without his fault, before the jettison;[13] and where animals injured by perils of the sea are thrown overboard with others not injured, the failure of respondent to prove the precise number injured does not render him responsible for all that were lost.[14] On a libel against a ship for injury to goods by improper stowage, libellant's damages cannot be reduced because the consignees sold the goods at auction as damaged goods, instead of overhauling and repairing the damage, where the ship's agents had the same opportunity to perform the work of overhauling as had the consignees.[15]

(III) *LIEN;*[16] *PRIORITIES.* A maritime contract for the transportation of goods on board a vessel operates reciprocally as a tacit pledge or mortgage to the shipper for the conveyance and delivery of the goods according to the contract;[17] and a maritime lien arises in favor of the shipper upon the refusal or failure of the vessel to fulfil its contract of affreightment;[18] and thus a merchant who ships goods in a vessel on freight has a lien on the vessel for the loss of his goods, or any damage they may sustain, from the fault or neglect of the master or the insufficiency of the vessel,[19] which may be enforced by process *in rem* against the vessel in admiralty,[20] and which is preferred to the right of the general creditors of the owners;[21] and to a mortgage on the vessel for labor and material furnished

11. The Shand, 16 Fed. 570.

12. The Musselcrag, 125 Fed. 786.

13. Bentley *v.* Bustard, 16 B. Mon. (Ky.) 643, 63 Am. Dec. 561.

14. Brauer *v.* Campania Navigacion La Flecha, 66 Fed. 776, 14 C. C. A. 88 [*affirming* 61 Fed. 860, and *affirmed* in 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398].

15. Hills *v.* Mackill, 36 Fed. 702.

16. **Maritime liens in general** see MARITIME LIENS, 26 Cyc. 743.

Disability of states to pass statutes giving pure proceeding in rem see MARITIME LIENS, 26 Cyc. 770 *et seq.*

17. Miners' Co-operative Assoc. *v.* The Monarch, 2 Alaska 383.

18. Miners' Co-operative Assoc. *v.* The Monarch, 2 Alaska 383; The J. C. Stevenson, 17 Fed. 540 (holding that where cattle were actually laden on board a vessel under a contract of shipment, and the ship obtained the benefit of the contract, the shipper has a lien on the vessel for damages suffered by the cattle for failure of the vessel to arrive and receive the cattle at the date provided in the contract).

19. The Belfast *v.* Boon, 41 Ala. 50 (holding that a shipper has a lien on the vessel for any damage to his goods for which by the common law he could maintain an action); The Casco, 5 Fed. Cas. No. 2,486, 2 Ware 188; The Gold Hunter, 10 Fed. Cas. No. 5,513, 1 Blatchf. & H. 300 (holding that the owner of a cargo, part of which is sold by the master to raise money for the necessary repairs of the vessel, and part of which is consumed by the crew and passengers on the voyage, has a lien on the vessel for the value of what is so sold and consumed); The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165.

The French code de commerce does not differ from the general maritime law in respect to liens on the ship for damage to the cargo. The Zone, 30 Fed. Cas. No. 18,220, 2 Sprague 19.

A lien created by the delivery of damaged goods is not waived by their acceptance by the consignee, nor by a receipt specifying that they had been received in good order; but, to constitute a waiver, there must be a knowledge of the injury, coupled with an intention to abandon the remedy, or some contract inconsistent with the lien. The Robert Morris *v.* Williamson, 6 Ala. 50, holding that Act (1836), § 2 (Clay Dig. p. 139), giving a lien on a boat for its failure to deliver goods as specified by the bill of lading, applies to injury to goods, and was not intended to provide only for a lien in case of total loss of the cargo.

Where goods on board of a ship are sold by the master in a foreign port for the repairs of the ship, a person to whom those goods were hypothecated has a lien upon the ship for the goods sold, if the residue proves insufficient to discharge his claim. American Ins. Co. *v.* Coster, 3 Paige (N. Y.) 323.

20. The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187.

21. The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187.

in her home port in fitting her for a voyage, notice whereof is entered on the register;[22] and the lien operates alike whether the contract of affreightment be by charter-party, bill of lading, or parol;[23] and the fact that a vessel is being operated under a charter, even if known to shippers, does not relieve her from a lien arising from default in her obligation to the cargo.[24] But a lien created by the shipment and loss of goods vests no absolute, indefeasible interest in the ship or vessel,[25] and may be lost by unreasonable delay;[26] but it is not defeated by a *bona fide* sale before the shipper has had an opportunity for enforcing it,[27] particularly where the purchaser has knowledge of the claim;[28] and thus a purchaser of a vessel cannot invoke the defense of laches to defeat a suit by an insurer to enforce a lien for the negligent loss of cargo, occurring before the purchase, where the suit was commenced within a year after the loss, and it does not appear that he bought without knowledge of the lien.[29] Where a lien is under the general admiralty law, and not under the state law, for materials or repairs furnished, it is not subject to a requirement of a state law that the libel should be filed before the vessel make another voyage.[30] There is no lien upon a vessel in respect to goods for which her agents have issued a bill of lading, but which are destroyed while in custody of the keeper of the landing before being received on board or coming under the control of the master.[31]

f. Trial and Review. The general rules of procedure,[32] and in as far as applicable the rules governing procedure in admiralty,[33] apply to actions against carriers by water for loss or injury to goods.[34] Questions of law are for the court; and questions of fact for the jury,[35] under proper instructions.[36] Thus the question whether the goods were lost or injured through negligence of the carriers is for the jury;[37] and where, although the answer denies negligence, it yet admits facts which raise a presumption of negligence, and the apostles indicate that the

22. Justi Pon *v.* Arbustci, 14 Fed. Cas. No. 7,589.

23. Miners' Co-operative Assoc. *v.* The Monarch, 2 Alaska 383.

24. The Seaboard, 119 Fed. 375.

25. The Favorite, 8 Fed. Cas. No. 4,696, 1 Biss. 525.

26. The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187.

27. The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187.

28. The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187.

29. The Seaboard, 119 Fed. 375.

30. Knox *v.* Ninetta, 14 Fed. Cas. No. 7,912, Crabbe 534, 5 Pa. L. J. 33.

31. The Guiding Star, 53 Fed. 936 [*affirmed* in 62 Fed. 407, 10 C. C. A. 454], holding also that where several steamboats, associated under one name, ran regularly between the same points under an agreement as to rates and sailing days, but each kept its own earnings, and paid its own expenses, and the masters of all the boats executed a writing authorizing a person named to sign bills of lading, and to represent their boats, as agents, on a libel to enforce a claim of goods alleged to have been destroyed while in the possession of the steamers' agents, that bills of lading signed by such agent could not bind all the boats jointly, and thus create a maritime lien against them all for each shipment, without regard to whether one or the other carried the goods, for the masters had no power to grant such authority.

32. See TRIAL.

33. See ADMIRALTY, 1 Cyc. 846 *et seq.*

34. Clyde Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. 349.

35. Knox *v.* Rives, 14 Ala. 249, 48 Am. Dec. 97; Bassett *v.* Aberdeen Coal, etc., Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. L. Rep. 1122 (whether defendant held itself as a common carrier); Northern Commercial Co. *v.* Lindblom, 162 Fed. 250, 89 C. C. A. 230.

36. Bassett *v.* Aberdeen Coal, etc., Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. L. Rep. 1122; Ross *v.* English, 2 Speers (S. C.) 393.

37. Goodwin *v.* Baltimore, etc., R. Co., 58 Barb. (N. Y.) 195 [*reversed* on other grounds in 50 N. Y. 154]; Colt *v.* McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200 (holding that where defendant's vessel was beating up the river against a light and variable wind, and while near the shore and changing her tack the wind suddenly fell, causing her to run aground and sink, in an action to recover for damage to plaintiff's goods, the question whether the master was negligent was for the jury); Humphreys *v.* Reed, 6 Whart. (Pa.) 435 (whether a cargo of nails was damaged by negligence, or whether the damage resulted from a danger of navigation, within the meaning of an exception in a contract of affreightment); Ross *v.* English, 2 Speers (S. C.) 393; Blyth *v.* Marsh, 1 Nott & M. (S. C.) 170 (question whether in an action against the carriers of a cargo which was lost at sea, owing to the vessel having been run down by another, the loss happened by the perils of the sea or negligence of the carriers); Johnson *v.* Friar, 4 Yerg. (Tenn.) 48, 26 Am. Dec. 215.

question of negligence has not been fully entered into, and the claimant has relied upon the theory that the facts found did not make out a *prima facie* case against him, he may be permitted to apply for leave to introduce further evidence in this regard.[38] In a case in admiralty, where the shipper has been prejudiced by the jettison of his goods, the court may look into the facts of the case and determine whether the owners have appointed a competent master, and whether that master had used reasonable skill and judgment in encountering the peril of the sea that has made the jettison necessary; and where a jettison has been necessary through the conduct of the master, concurring with the peril of the sea, whether that conduct was reasonably skilful, judicious, and prudent.[39] The appellate court will not as a general rule revise on appeal the findings of fact based on the conflicting testimony of witnesses.[40]

13. Statutory Exemption From Liability — a. In General. There have from time to time been passed in the United States statutes limiting in greater or less degree the absolute quasi-insurance liability of the carrier by water.[41] One of the earliest of the important statutes of this kind was the act of congress of March 3, 1851, entitled "An Act to limit the Liability of Ship-Owners, and for other Purposes," which by section 1 exempts the owners of vessels, in cases of loss by fire, from liability for the negligence of their officers or agents in which the owners have not directly participated;[42] and by section 2 discharges the

38. The Sydney, 27 Fed. 119 [appeal *dismissed* for want of jurisdiction in 139 U. S. 331, 11 S. Ct. 620, 35 L. ed. 177].

39. The Hettie Ellis, 22 Fed. 350 [*affirming* 20 Fed. 393].

40. The Marinin, 32 Fed. 918.

41. See the statutes. And see cases cited *infra*, this and the following notes.

Where a statute of the state where the owners of a vessel reside provides that such owners shall not be liable for the wrongful acts of the master beyond the value of their interests in the vessel and freight, and the master, after the execution of a bottomry bond greater than the value of the owners' interests above mentioned, sells a portion of the cargo which is sound and might have been transhipped, the owners are not liable to the shippers for the cargo sold by such wrongful act of the master. Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465.

La. Civ. Code, art. 2725, exempting a common carrier from liability for a loss or damage to goods occasioned by accident or uncontrollable events applies where the collision of a steamboat with another boat, which injured plaintiff's goods shipped on the steamboat, was without the fault or negligence of the owners of the steamboat or their agents, and the disaster was an "unavoidable accident," within the meaning of the code. Van Hern *v.* Taylor, 7 Rob. 201, 41 Am. Dec. 279. Similarly a loss of goods is occasioned by "accidental and uncontrollable events," within Civ. Code, art. 2754, if they were in a carrier's steamboat, which sank, after striking an unknown object, without any negligence on the part of the carrier. Kirk *v.* Folsom, 23 La. Ann. 584. And under Civ. Code, art. 2723, providing that the lessee can only be liable for destruction occasioned by fire when it was proved that the same happend by his neglect, the burden was on the lessor to show such neglect. D'Echaux *v.* Gibson Cypress Lumber Co., 114 La. 626, 38 So. 476, holding that under a contract of lease of a pull boat to return the same at the end of the lease in good order, ordinary wear and tear excepted, and the property was destroyed by fire, the lessee is not liable where he used the usual care, and the manner in which the property was cared for received the express sanction of the owner. The limited liability legislation does not, however, exempt carriers by water from loss occurring through the contact of a vessel with pile structures negligently placed by the owner of the vessel in navigable waters. Darrall *v.* Southern Pac. Co., 47 La. Ann. 1455, 17 So. 884.

Under the English statutes in relation to compulsory pilotage, in the port of Liverpool, an owner of a vessel is not relieved from liability for damage to freight, unless a pilot was in charge under the act, and was actually and necessarily engaged in the discharge of his duty. Where therefore a vessel had left its dock in charge of a pilot, and anchored in the river to finish loading and to receive coal for a voyage, and while at anchor an accident occurred, causing the loss, the owner was not excused from liability by said statutes. Guiterman *v.* Liverpool, etc., Steamship Co., 83 N. Y. 358.

42. Headrick *v.* Virginia, etc., Air Line R. Co., 48 Ga. 545 (holding that under the act the owners of a steamer, engaged in the carrying trade between Baltimore, Norfolk, and Portsmouth, are not liable for the loss of goods by the destruction of the vessel and cargo by fire, unless caused by the design or neglect of the owners; nor does the fact that such owners have formed an association with other companies as carriers, extending their business as carriers into the interior, affect the question of liability for such loss); Rice *v.* Ontario Steamboat Co., 56 Barb. (N. Y.) 384 (holding that a steamboat company, receiving goods at A to be transported to B,

ship-owner from liability for certain enumerated classes of valuables, such as precious metals, jewelry, and the like, unless the shipper at the time of lading gives a note in writing stating their character and value;[43] and by section 3 limits

and carrying them part of the distance to C, where they were delivered to a boat owned by other parties to be carried the remainder of the distance to B, is not the owner or charterer of the latter boat, in the spirit or letter of the act so as to be entitled to claim the exemption provided therein for losses occasioned by actual fire); Walker *v.* Western Transp. Co., 3 Wall. (U. S.) 150, 18 L. ed. 172.

Cargo delivered on a wharf into the charge of the officers of a vessel is "shipped," so as to free the ship-owners, under U. S. Rev. St. (1878) § 4282 [U. S. Comp. St. (1901) p. 2943], from liability for loss by a fire occurring without their design or neglect, although the loss was caused by the negligence of the ship's officers in not promptly putting the goods on board. Dill *v.* The Bertram, 7 Fed. Cas. No. 3,910.

Where a fire was caused by the negligence of the master who is a part-owner, the other innocent part-owners are not liable, nor is the vessel liable *in rem*, but the master is liable personally. Keene *v.* The Whistler, 14 Fed. Cas. No. 7,645, 2 Sawy. 348. The English statute is construed the same way. Wilson *v.* Dickson, 2 B. & Ald. 13, 20 Rev. Rep. 331; The Volant, 1 W. Rob. 383.

This exemption does not extend to a carrier by a vessel which ne neither owns nor charters. Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202.

The object of the section was to exempt ship-owners from common liability as carriers for acts of agents and servants, and not to diminish their responsibility for their own wilful or negligent acts. If the fire was caused by the design or neglect of the owners themselves, the section does not apply. Hill Mfg. Co. *v.* Providence, etc., Steamship Co., 113 Mass. 495, 18 Am. Rep. 527, holding that in the case of the loss by fire of a vessel owned by a corporation, the president and directors are regarded not merely as agents of the corporation, but as immediately representing the corporation; and their act or neglect, causing the fire, is the act or neglect of the ship-owner, taking the case out of the operation of the section.

Vessels navigating Long Island sound, and constructed for ocean or coastwise navigation, are within the provisions of the act and the owners thereof are not liable to answer for loss or damage by fire to any merchandise shipped in the same, unless such fire was caused by the design or neglect of such owner or owners. The fact that such a vessel, in her voyage, entered and passed through or into any bays or rivers, does not bring the same within the exception, in the act, of vessels "used in rivers, or inland navigation." Knowlton *v.* Providence, etc., Steamship Co., 33 N. Y. Super. Ct. 370.

This provision is incorporated in U. S. Rev. St. (1878) § 4282 [U. S. Comp. St. (1901) p. 2943], which relieves the owner, who is not himself guilty, of liability for loss by reason of a fire happening on the ship. Deming *v.* The Rapid Transit, 52 Fed. 320, holding that where a steamer with a cargo, chiefly of lime, took fire, and was scuttled by the city fire department, whereby the lime was destroyed, a purchaser of the vessel had a complete defense under the statute against an action *in rem* against the vessel. A fire occurring from a heated flue in the ship built by reputable builders was not from the "design or neglect of the ship owners." The Strathdon, 89 Fed. 374. The statute has no application to a case where goods were destroyed by fire after they had been unloaded from the vessel on to a wharf boat (The City of Clarksville, 94 Fed. 201; The Egypt, 25 Fed. 320), and does not relieve the owner from any consequence of his own neglect, but only from the negligence of his servants (Woodhouse *v.* Cain, 95 N. C. 113). Horses and trucks which are taken aboard a ferry-boat by their drivers who are passengers and remain in their charge upon the trip are not "merchandise" within the meaning of the statute. The Garden City, 26 Fed. 766. And an action arising from independent acts of negligence on the part of the ship and from the breach of a maritime duty in failing to enforce a general average contribution is not within the provisions of U. S. Rev. St. (1878) § 4282 [U. S. Comp. St. (1901) p. 2943]. Heye *v.* North German Lloyd, 33 Fed. 60, 2 L. R. A. 287.

A provision in the charter of a carrier by water, created by and operating entirely within a state, that it shall be liable to all common-law liabilities, does not conflict with the section. Houston Direct Nav. Co. *v.* Insurance Co. of North America, (Tex. Civ. App. 1895) 31 S. W. 560 [*reversed* on other grounds in 89 Tex. 1, 32 S. W. 889, 59 Am. St. Rep. 17, 30 L. R. A. 713].

43. The Island Queen, 13 Fed. Cas. No. 7,110, Brown Adm. 279 (where libellant's agent, who was intending to take passage on a steamboat from Detroit to a Canadian port, intrusted a quantity of gold coin to the master before the vessel started without taking a bill of lading or delivering a note in writing, and on returning on board the coin was missing, and it was held that the vessel was not liable under the act); Wattson *v.* Marks, 29 Fed. Cas. No. 17,296 (holding that this section does not make the absence of such "note in writing" a discharge of the ship-owner's liability on a contract of affreightment, where the true character and value of the enumerated articles have been fairly and clearly set down in the bill of lading, whether before or after the actual shipment).

This section now constitutes U. S. Rev. St. (1878) § 4281 [U. S. Comp. St. (1901) p. 2942].

the liability of ship-owners to the amount or interest in the vessel and the freight then pending.[44]

b. The Harter Act — (1) *General Nature and Purpose of the Act.* By far the most important statute in the United States affecting the liability of a carrier of goods by water is the act of February 13, 1893,[45] commonly referred to and referred to hereinafter in this section as the Harter Act, and entitled, "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property."[46] The general

44. Wattson *v.* Marks, 29 Fed. Cas. No. 17,296, holding that under this section the personal liability of ship-owners on a contract of affreightment ceases upon a total destruction of the vessel and loss of freight before the completion of her voyage, although the actual damage to or loss of the goods to be carried, as in the case of theft, has taken place prior to the time of the destruction of the vessel.

For discussion of this act as limiting the liability of the owner to the value of the vessel and freight pending see *infra*, XI.

45. 27 U. S. St. at L. 445, c. 105, § 3 [U. S. Comp. St. (1901) p. 2946].

46. The act is as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided.

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

"Sec. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

"Sec. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

"Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

"Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

"Sec. 8. That this act shall take effect

policy of the law is that the vessel owner must take the care required of experts in that business in all matters relating to the loading, stowage, custody, care, and proper delivery of the goods intrusted to it, and must exercise due diligence to make the vessel seaworthy in all the particulars which have been held to constitute seaworthiness; and that, if these requirements are met entirely, neither the vessel nor her owners shall be responsible even for faults or errors in navigation, nor for such accidents as have been held by the American decisions to be validly stipulated against in bills of lading.[47] The trend of judicial decision in the United States has been to construe the Harter Act strictly, and not to extend the carrier's exemption from liability to doubtful and uncertain cases, but to leave such liability as it was defined and enforced by the law maritime and by the common law, unless the act plainly and unequivocally asserts a different liability.[48] The act has no retroactive effect, so as to apply to damages occasioned before its passage,[49] and does not affect the relations of either the shipper or carrier to third persons.[50]

(II) *Vessels to Which Act Applies.* The act is applicable to foreign as well as American vessels,[51] the test as to vessels which come under the act being based not upon their nationality but upon their voyages;[52] and the act applies not only to voyages between American and foreign ports, but to all voyages from American ports, even though to other American ports;[53] and it seems that where a cargo is shipped on a vessel, properly manned and equipped, for transportation to another port and storage there, on board, even if the contract is maritime, the act would protect the owner from liability for damage caused by negligent management of the vessel while used for storage.[54]

(III) *Section 3* — (A) *Effect in General.* The greatest amount of litigation under the act has centered around the third section.[55] This section does not relieve the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage, or affect his liability for damages to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy;[56] and the section cannot be invoked to relieve a vessel from liability for loss of cargo resulting from the gross fault or negligence of the master, sufficient to raise a presumption of his incompetency, merely upon a showing that the owners had no knowledge or reason to believe that he was incompetent, that being insufficient to establish the "due diligence" required by the statute, the burden of proving which, under such state of facts, rests on the vessel,[57] there being no expressed intention in the statute to replace the carrier's obligation under the general maritime law to furnish a seaworthy vessel by the less extensive obligation to exercise due diligence to that end and it cannot be extended by

from and after the first day of July, eighteen hundred and ninety-three. Approved, February 13, 1893."

47. Hughes Adm. § 91. And see The Irrawady, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130; The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 771.

48. The Germanic, 124 Fed. 1, 59 C. C. A. 521 [*affirming* 107 Fed. 294, and *affirmed* in 196 U. S. 589, 25 S. Ct. 317, 49 L. ed. 610].

49. Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 48, 46 L. R. A. 264.

50. The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130; The Delaware, 161 U. S. 459, 16 S. Ct. 516, 40 L. ed. 771, holding that the act did not exempt a vessel from liability for collision with another vessel.

51. The Chattahoochee, 173 U. S. 540, 19 S. Ct. 491, 43 L. ed. 801 [*affirming* 74 Fed. 899, 21 C. C. A. 162] (holding that the third section of the act includes a foreign vessel carrying cargo from a foreign to an American port); Doherr *v.* The Etona, 64 Fed. 880.

52. Hughes Adm. § 93.

53. *In re* Piper Aden Goodall Co., 86 Fed. 670 (holding that the act applies to vessels engaged in commerce on the bay of San Francisco, and between different ports on the bay); The E. A. Shores, Jr., 73 Fed. 342.

54. Norton *v.* The Richard Winslow, 67 Fed. 259 [*affirmed* in 71 Fed. 426, 18 C. C. A. 344].

55. See *supra*, note 46.

56. Farr, etc., Mfg. Co. *v.* International Nav. Co., 94 Fed. 675 [*affirmed* in 98 Fed. 636, 39 C. C. A. 197 (*affirmed* in 181 U. S. 218, 21 S. Ct. 591, 45 L. ed. 830)]; The Sandfield, 92 Fed. 663, 34 C. C. A. 612 [*affirming* 79 Fed. 371].

57. The Cygnet, 126 Fed. 742, 61 C. C. A. 348.

construction beyond its terms;[58] and stipulations in a bill of lading cannot relieve a carrier from the discharge of his initial duty under the act, to use due diligence to furnish a seaworthy vessel.[59] But while the act does not by the force of its own terms reduce the warranty of seaworthiness to the duty to exercise due diligence,[60] the owner may by proper stipulation so reduce the warranty.[61]

(B) *"Due Diligence"* — (1) CONSTRUCTION OF TERM. To constitute due diligence on the part of a ship-owner to make the vessel in all respects seaworthy at the beginning of a voyage so as to entitle him to the benefit of the exemption contained in section 3, it is not sufficient to provide her with proper structures and equipment, but due diligence must also be exercised by the owner's servants in the use of such equipment before and up to the time of the beginning of the voyage;[62] and the statute does not require merely due diligence in respect to construction only, but also to inspection, maintenance, and repair;[63] and due diligence

Burden of proving due diligence see *infra*, VII, D, 13, b, (III), (B), (2).

58. The Ninfa, 156 Fed. 512 (holding that the section does not exempt the vessel or owner from liability for the consequences of unseaworthiness, even though due diligence was exercised to make her seaworthy); The C. W. Elphicke, 117 Fed. 279 [*affirmed* in 122 Fed. 439] (holding that a ship-owner is not exempted by the Harter Act from liability for damages to cargo resulting from her unseaworthy condition at the commencement of the voyage, although it is shown that he exercised due diligence to make her in all respects seaworthy); The Catania, 107 Fed. 152; Insurance Co. of North America *v.* North German Lloyd Co., 106 Fed. 973; Farr, etc., Mfg. Co. *v.* International Nav. Co., 94 Fed. 675 [*affirmed* in 98 Fed. 636, 39 C. C. A. 197 (*affirmed* in 181 U. S. 218, 21 S. Ct. 591, 45 L. ed. 830)].

59. Martin *v.* The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. ed. 65 [*reversing* 108 Fed. 880, 48 C. C. A. 123].

60. The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181. And see cases cited *supra*, note 58.

61. See The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181. And see Hughes Adm. § 95.

62. The Ninfa, 156 Fed. 512; The Manitou, 127 Fed. 554, 63 C. C. A. 109 [*affirming* 116 Fed. 60] (where in a suit against a steamship to recover for damage to cargo during a voyage from London to New York, caused by the escape of steam through partially open valves, the finding of the trial court that the evidence on behalf of the claimant was insufficient to show that the valves were closed when the steamer sailed affirmed); The C. W. Elphicke, 117 Fed. 279 [*affirmed* in 122 Fed. 279] (holding that a ship-owner does not comply with the requirement of section 3 of the Harter Act, so as to be entitled to the exemptions therein provided, by merely furnishing proper equipment of the vessel prior to the commencement of the voyage, but he is bound to see that his servants exercise due diligence in its use to make the vessel seaworthy at the time the voyage commences).

The furnishing of a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which a vessel has undertaken to carry, is within the obligation to use due diligence to provide a seaworthy vessel. Martin *v.* The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. ed. 65 [*reversing* 108 Fed. 880, 48 C. C. A. 123]; Nelson *v.* Nelson Line, [1907] 1 K. B. 788 note. But where butter was shipped upon defendant's vessel for carriage under bills of lading incorporating section 3 of the act, and was damaged on the voyage through negligent user of the refrigerating apparatus by some of the crew, the refrigerating apparatus was part of the vessel, and negligence in its management was a "fault or error in the management of the vessel," and therefore defendants were relieved from liability by the act. Rowson *v.* Atlantic Transport Co., [1903] 2 K. B. 666, 9 Aspin. 458, 9 Com. Cas. 33, 72 L. J. K. B. 811, 89 L. T. Rep. N. S. 204, 19 T. L. R. 668. It is competent for the parties, by express contract, to stipulate for the exemption of the carrier from liability for loss or damage to the cargo in consequence of latent defects in such apparatus which are not due to any fault or negligence on his part, or on the part of those for whom he is responsible. The Prussia, 93 Fed. 837, 35 C. C. A. 625.

Acts held not to constitute due diligence see The Brilliant, 159 Fed. 1022, 86 C. C. A. 671 [*affirming* 138 Fed. 743] (holding that failure to place a rose or screen on the lower end of the pipe to the water ballast tank to prevent the entrance of foreign substances which might foul the valve was a failure to exercise due diligence in equipment to make the ship seaworthy at the beginning of the voyage, and rendered her liable for the damage); The Ninfa, 156 Fed. 512; The Valentine, 131 Fed. 352 (holding that where the owner of a vessel, while in her home port, permitted all of her crew to leave for the night, except the fireman, cook, and a deck hand, and permitted them to sleep without maintaining a proper watch, and the fires to be banked so that no steam was available to work the pumps in case of an emergency, he was guilty of negligence, rendering the vessel liable for loss of cargo by the sinking of the vessel from injuries caused by an ice jam, notwithstanding the act); The Catania, 107 Fed. 152.

63. The Ninfa, 156 Fed. 512; The Tenedos,

to make a vessel seaworthy at the commencement of her voyage which will entitle the carrier to the exemption given by the section must be exercised in the work itself, and not merely in the selection of agents to do the work, and must be adequate to accomplish the result intended, except as to latent defects not discoverable by the utmost diligence.[64] Although the owners of a vessel have been adjudged exempt from liability for damage to the cargo resulting from a fire due to the negligence of one of the crew, under section 3 of the act, on the ground that they exercised due diligence to make the vessel seaworthy and in fit condition for the voyage, and were without personal negligence or fault, they cannot maintain an affirmative action against the owners of the cargo for contribution in general average to the ship's loss. But where they are invited to such an adjustment by an action brought by the sole owner of the cargo, the ship's loss must be taken into consideration, as the effect of excluding it would be to make the same act for which they are acquitted of responsibility by the statute the basis of an indirect recovery of a part of the damage which was in issue in the direct action.[65]

(2) Burden of Proof. The burden is on the ship-owner setting up exemption from liability, under the act, to prove that he exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied at the commencement of the voyage,[66] and such affirmative proof cannot be supplied by inference or presumptions;[67] and in order to absolve themselves from liability on the ground that they exercised due diligence to make the vessel in all respects seaworthy and "properly manned," to show that the master was not only competent, but that he was habitually diligent in attending to his duties, or that they had the right to so believe after the exercise of due diligence to ascertain his qualifications. There is no presumption that they exercised the required diligence, and, in the absence of any evidence on the subject, the vessel is liable for the consequences of the master's negligence or incompetency.[68]

(c) *"Fault or Error in Navigation or Management of Vessel."* The main question which has been litigated under the section is what acts constitute a fault in navigation or management of the ship and what acts do not, for the former relieve the owner from liability under the section,[69] and the latter do

151 Fed. 1022, 82 C. C. A. 671 [*affirming* 137 Fed. 443] (holding it failure to exercise due diligence where no inspection was made of a submerged port hole before leaving); Welsh *v.* The Alvena, 79 Fed. 973, 25 C. C. A. 261 [*affirming* 74 Fed. 252] (holding that, in the inspection prior to the voyage, a failure to take up one of four ceiling boards in a passageway over the limber spaces, underneath which a leak occurred, in order to examine the cement, was a lack of "due diligence" and "reasonable means" to make the ship seaworthy, and the carrier was not exempted either under the statute or bill of lading).

64. Nord-Deutscher Lloyd *v.* Insurance Co. of North America, 110 Fed. 420, 49 C. C. A. 1, holding that due diligence was not exercised to make a lighter seaworthy and fit for the business in which it was employed, where the seams were so improperly calked that they opened and admitted water into the hold when the boat was rocked by a slight swell from a passing steamer, the defect being one which could have been discovered by examination.

65. The Strathdon, 94 Fed. 206. See also The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130. *Compare* The Chattahoochee, 173 U. S. 540, 19 S. Ct. 491, 43 L. ed. 801.

66. Levy *v.* Gibson Steamer Line, 130 Ga. 581, 61 S. E. 484; The Folmina, 212 U. S. 354, 29 S. Ct. 363, 53 L. ed. 546; The Wildcroft, 201 U. S. 378, 26 S. Ct. 467, 50 L. ed. 794; Martin *v.* The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. ed. 65 [*reversing* 108 Fed. 880, 48 C. C. A. 123]; The C. W. Elphicke, 117 Fed. 279 [*affirmed* in 122 Fed. 439, 58 C. C. A. 421].

67. Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426 [*affirming* 145 Fed. 569].

68. The Fri, 140 Fed. 123 [*reversed* on other grounds in 154 Fed. 333, 83 C. C. A. 205].

69. See cases cited *infra*, this note.

Injury to cargo has been held due to fault or error in navigation or in the management of the vessel in the case of damage to a cargo of molasses, through its dilution by sea water while being pumped out at the port of destination, it being affirmatively shown that the valve was in good condition and that it was properly closed when the cargo was loaded and at the commencement of the voyage (Sun Co. *v.* Healy, 163 Fed. 48, 89 C. C. A. 300); damage to a sugar cargo from fresh water which escaped into the hold where the sugar was stowed while the cargo was

not.[70] The navigation and management of a vessel within the meaning of section 3 includes the determination of the time and manner of leaving port, which is the prerogative of the master; and where a vessel is seaworthy and in all respects properly manned, equipped, and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through

being discharged, by reason of a valve having been improperly left open while water from the river was being pumped into the engine tank (The Wildcroft, 130 Fed. 521, 65 C. C. A. 145 [*affirmed* in 201 U. S. 378, 26 S. Ct. 467, 50 L. ed. 794]; injury to goods by reason of the barge on which they were loaded striking an obstruction in the river, the loss in such case resulting either from a danger of the river or from a fault or error in navigation or in the management of the vessel (The Nettie Quill, 124 Fed. 667); leakage caused by leaving the sea valve open (American Sugar Refining Co. *v.* Rickinson, 124 Fed. 188, 59 C. C. A. 604 [*reversing* 120 Fed. 591]); failure to use the pumps (The Merida, 107 Fed. 146, 46 C. C. A. 208); lack of proper attention to a vessel's pumps, which might have disclosed a leak, and prevented damage which resulted therefrom to the cargo (The British King, 92 Fed. 1018, 35 C. C. A. 159 [*affirming* 89 Fed. 872]; failure of those in charge of a vessel, before removing water ballast through a pipe passing through cargo compartments, to test the valves by the means provided to ascertain whether they were closed (The Mexican Prince, 91 Fed. 1003, 34 C. C. A. 168 [*affirming* 82 Fed. 484]); or an error of judgment of the master in a port of distress as to the extent of repairs necessary, where he exercised diligence and care, and acts in good faith (The Guadeloupe, 92 Fed. 670). The loss has also been held attributable to this cause, where during the discharge of a cargo water was admitted into one of the water-ballast tanks of the vessel in order to stiffen her, but, owing to straining during exceptionally heavy weather on the voyage, a sounding pipe communicating with the tank had been broken, and the water, forcing its way up the sounding pipe, escaped into the hold, and damaged the cargo through omission of the engineer (The Glenochil, [1896] p. 10, 8 Aspin. 219, 65 L. J. Adm. 1, 73 L. T. Rep. N. S. 1); where opening of a sluice gate designed to empty the bilges was neglected for days during heavy weather, and the accumulating water overflowed the bilges, and damaged the cargo properly stowed in the hold (The Sandfield, 92 Fed. 663, 34 C. C. A. 612 [*affirming* 79 Fed. 371]); where the ballast tank of an ocean steamer sprang a leak during a voyage, and the water accumulated in the hold above in sufficient quantity to damage the cargo stowed therein, and the leak was known to the engineer and carpenter, who failed to report it to the chief officer, to give it a proper examination, or to use the pumps with sufficient frequency to prevent the accumulation of water in the hold, and the pump was sufficient, and the proper use of it would have prevented injury to the cargo (The Ontario, 106 Fed. 324). A change of course and the determination of the master to proceed without putting in for repairs are matters pertaining to the "navigation and management of the vessel," and assuming the vessel to have been in all respects seaworthy, and properly manned, equipped, and supplied at the beginning of the voyage, she was exempted by the act from liability for the damage caused or contributed to by the failure to repair. Corsar *v.* J. D. Spreckels, etc., Co., 141 Fed. 260, 72 C. C. A. 378.

70. See cases cited *infra*, this note.

Injury to cargo has been held not due to fault or error in navigation or management of the vessel in the case of damage from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the center of gravity of the ship too high for safety (The Germanic, 124 Fed. 1, 59 C. C. A. 521 [*affirmed* in 196 U. S. 589, 25 S. Ct. 317, 49 L. ed. 610]) where, during the unloading of a barge in the usual manner, which caused an uneven keel for a few hours, she sprang a leak, and the remaining cargo was damaged by water (Donaldson *v.* J. W. Perry Co., 138 Fed. 643, 71 C. C. A. 93). Failure to have a mechanical fog horn in good condition for use at the commencement of a voyage shows want of due diligence in equipping the vessel, and is not a fault in her management. Stahl *v.* The Niagara, 84 Fed. 902, 28 C. C. A. 528 [*affirming* 77 Fed. 329].

Where a ship starts on a voyage with a port negligently left open, causing damage to cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished (The Tenedos, 151 Fed. 1022, 82 C. C. A. 671 [*affirming* 137 Fed. 443]; The Manitoba, 104 Fed. 145; Farr, etc., Mfg. Co. *v.* International Nav. Co., 98 Fed. 636, 39 C. C. A. 197 [*affirmed* in 181 U. S. 218, 21 S. Ct. 591, 45 L. ed. 830]), and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded (The Tenedos, *supra*), or where the port hole is left open and goods so packed against it as to make its closing impossible without moving cargo (Dobell *v.* The Rossmore, [1895] 2 Q. B. 408, 8 Aspin. 83, 64 L. J. Q. B. 777, 73 L. T. Rep. N. S. 74, 14 Reports 558, 44 Wkly. Rep. 37); but where a port hole itself without defect is designedly left open while the vessel is loading and care taken not to block it with cargo, so that it can if necessary be closed at sea and the crew forget to close it in consequence of which the cargo is injured, the fault is one of navigation and does not render the vessel unseaworthy or the owner liable (The Silvia, 171 U. S. 462, 19 S. Ct. 7, 43 L. ed. 241). An

the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage;[71] but this provision of the act does not concern the proper stowage of cargo at the port of lading,[72] or failure to properly cover a hatch to prevent leakage,[73] or to use proper care for the protection of the cargo,[74] or improper loading,[75] or unloading and delivery,[76] nor to the manner of construction,[77] or the careening and sinking of a vessel at the pier before she was fully loaded, due to the negligence of a watchman in failing to adjust her lines to permit her to drop with the tide;[78] and robbery or theft of cargo by those on board cannot be made a ground of exemption from liability of a vessel under the act;[79] but thefts by persons not connected with the vessel may be stipulated against if no negligence in watching appears.[80] The section relieves the owner from liability for injury arising from an inherent defect of the thing carried,[81] and applies in a case where the question of liability arises in a proceeding by the owner for limitation of liability as well as in a direct action against him;[82] but to entitle the ship-owner to exemption from liability under the third section of the act the damage must have resulted from the causes therein specified; and if the causes of the loss are several, one of which is negligence of the carrier not within that section, and that negligence, and not the sea peril, would, under the settled rules of construction as between ship and shipper, be deemed the efficient cause of the loss, then the exemption of the statute does not apply.[83]

open port is a latent defect within the meaning of a bill of lading. See *infra*, VII, D, 14, a, (I), and cases there cited.

71. Hanson *v.* Haywood Bros., etc., Co., 152 Fed. 401, 81 C. C. A. 527.

72. The Palmas, 108 Fed. 87, 47 C. C. A. 220; The Catania, 107 Fed. 152.

A stipulation in a bill of lading that, if any goods cannot be found during the steamer's stay at the port of delivery, they should be forwarded at the earliest opportunity, without liability of the ship for delay or otherwise, is invalid, under the act, as applied to a case where goods were negligently stowed and no effort was made to find them, and they were subsequently lost at sea. Calderon *v.* Atlas Steamship Co., 170 U. S. 272, 18 S. Ct. 588, 42 L. ed. 1033 [*reversing* 69 Fed. 574, 16 C. C. A. 332]; The Mississippi, 120 Fed. 1020, 56 C. C. A. 525 [*affirming* 113 Fed. 985].

73. The Mississippi, 120 Fed. 1020, 56 C. C. A. 525 [*affirming* 113 Fed. 985].

74. The Musselcrag, 125 Fed. 786.

75. The Oneida, 128 Fed. 687, 63 C. C. A. 239 [*reversing* 108 Fed. 886] (holding that where a ship started on her voyage with a list of eight or nine degrees, which increased to such an extent, in consequence of her improper loading, that it was imprudent to proceed, and she put in at an intermediate port, and having opened a port to readjust the cargo while lying at a pier, the ship gave a sudden lurch, which brought the port under water, and she sank, damaging her cargo, the damage was attributable to her initial instability, which rendered her unseaworthy at the beginning of the voyage, and for the consequences of which the owners were not exempted from liability by the act).

76. Donaldson *v.* J. W. Perry Co., 138 Fed. 643, 71 C. C. A. 93; The Germanic, 124 Fed. 1, 59 C. C. A. 521 [*affirming* 107 Fed. 294, and *affirmed* in 196 U. S. 589, 25 S. Ct. 317, 49 L. ed. 610].

It is the duty of a ship to pay attention to any extraordinary circumstances that evidently affect her stability while discharging, and to regulate her mode of discharge accordingly, so as not to endanger the cargo, and negligence in such regard, which results in damage to cargo, is not a fault in the "management of the ship," within the exemption of the third section of the act, but rather in the care or proper delivery of the cargo, within the meaning of the first section, from which she is not exempt from liability. The Germanic, 107 Fed. 294 [*affirmed* in 124 Fed. 1, 59 C. C. A. 521 (*affirmed* in 196 U. S. 589, 25 S. Ct. 317, 49 L. ed. 610)].

77. Parsons *v.* Empire Transp. Co., 111 Fed. 202, 49 C. C. A. 302, where a barge was held unseaworthy, from the manner of her construction, for a voyage between St. Michael and Nome, Alaska, in October, and her owner for that reason not entitled to exemption under section 3 of the Harter Act, from liability for the loss of cargo taken on board for such a voyage.

78. Ralli *v.* New York, etc., Steamship Co., 154 Fed. 286, 83 C. C. A. 290.

79. The Seneca, 163 Fed. 591.

80. Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579; Cunard Steamship Co. *v.* Kelly, 115 Fed. 678, 53 C. C. A. 310; The Saratoga, 20 Fed. 869; Taylor *v.* Liverpool, etc., Steamship Co., L. R. 9 Q. B. 546, 2 Aspin. 275, 43 L. J. Q. B. 205, 30 L. T. Rep. N. S. 714, 22 Wkly. Rep. 752.

81. The M. C. Currie, 132 Fed. 125.

82. *In re* California Nav., etc., Co., 110 Fed. 678.

83. Putnam *v.* The Manitoba, 104 Fed. 145, holding that where a bill of lading adopted the exemptions from liability for loss contained in the act, a provision that the exemptions therein "shall apply not only during

14. Limitation of Liability by Contract or Bill of Lading — a. Power to Limit and Matters to Which Limitation May Extend — (i) *General Rules.* The general rules governing the limiting of a carrier's liability [84] apply to water carriage of goods, and thus the rule is that by special agreement with the shipper or his agent,[85] or by notice to the shipper acquiesced in by him,[86] the common carrier may limit his liability to a reasonable extent,[87] as against fire happening after unloading,[88] jettison,[89] collisions,[90] leakage and break-

the loading and voyage, but during the discharge and until the goods are actually delivered to the consignee," did not extend the ship-owner's exemptions so as to exclude liability for losses resulting from the unseaworthy condition of the ship, this not being an exemption under the statute.

84. See Carriers, 6 Cyc. 385.

85. Hus *v.* Kempf, 12 Fed. Cas. No. 6,943, 10 Ben. 231, holding that where the owner of goods instructs a broker to ship the goods by the first steamer going to a particular port, but gives no instructions as to the contract of shipment, such broker may bind the owner to the usual stipulation in the bill of lading limiting the carrier's liability.

86. Merriman *v.* The May Queen, 17 Fed. Cas. No. 9,481, Newb. Adm. 464 (holding that where glass cases were safely placed on board by the maker, not the shipper, to whom one of the ship's officers remarked that the ship would not be liable for breakage, and on the bill of lading was stamped these words: "Goods to be receipted for on the levee — not responsible for rust, breakage, leakage, cooperage — weight and contents unknown," there was not such a special agreement between the carrier and shipper as would limit the former's responsibility); Borthwick *v.* Elderslie Steamship Co., [1904] 1 K. B. 319, 9 Aspin. 513, 9 Com. Cas. 126, 73 L. J. K. B. 240, 90 L. T. Rep. N. S. 187, 20 T. L. R. 184, 52 Wkly. Rep. 439 [*affirmed* in [1905] A. C. 93, 10 Aspin. 25, 10 Com. Cas. 109, 74 L. J. K. B. 338, 92 L. T. Rep. N. S. 274, 21 T. L. R. 277, 53 Wkly. Rep. 401]. See, generally, Carriers, 6 Cyc. 403 *et seq.*

87. Adams Express Co. *v.* Fendrick, 38 Ind. 150; Gordon *v.* Littel, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632; Montague *v.* The Henry B. Hyde, 82 Fed. 681 [*affirmed* in 90 Fed. 114, 32 C. C. A. 534] (holding that, in the absence of statutory provisions to the contrary, a carrier of goods may, by special contract, contained in the bill of lading, stipulate for a more limited liability than that which the law would otherwise impose upon him).

Act Cong. March 3, 1851, entitled "An act to limit the liability of ship-owners and for other purposes," permitting parties to make their own contracts in regard to liabilities of the owners, refers to express contracts, and not to those implied by usage or custom. Walker *v.* Western Transp. Co., 3 Wall. (U. S.) 150, 18 L. ed. 172. The proviso in the act that nothing contained in the act should prevent parties contracting as they pleased as to extending or limiting ship-owners' liability as carriers, is not reënacted in the Revised Statutes; and, as a portion of the section is embraced in a section of the Revision, the said proviso is repealed by force of the general repealing section (section 5596). The Montana, 22 Fed. 715, 22 Blatchf. 372 [*affirmed* in 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788].

A ship is relieved from liability for a shortage in weight of a shipment in bales under a bill of lading containing the clause, "Not responsible for weight, nor quality, nor for loose bales," where it shows that all the bales were delivered. The La Kroma, 138 Fed. 936.

The dressed meat clause in a bill of lading for dressed meats to be transported across the Atlantic, which provides that the carrier shall not be responsible for any loss or damage arising from break-down or injury to the ship's refrigerator or machinery, even though arising from defect existing at or previous to the commencement of the voyage, is in violation of the Harter Act and does not relieve the carrier from liability arising from such causes unless the latter proves that he has exerted all due diligence to make the vessel seaworthy and the refrigerating apparatus fit for the purpose for which intended. The burden of proving such seaworthiness and fitness at the commencement of the voyage rests upon the owner, and if the apparatus suddenly breaks down within three hours after the boat sails this raises a presumption that it was not fit at the time the ship sailed. The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. ed. 65.

A stipulation that the carrier may convey goods in lighters to and from the ship at the risk of the owner of the goods does not apply to risks arising out of the unfitness of a lighter. Insurance Co. of North America *v.* North German Lloyd Co., 106 Fed. 973.

88. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903 [*affirming* 29 Fed. 184], holding that where a steamship company provides a wharf with a covered warehouse into which cargo is discharged, and the time and place of discharge are easily ascertainable by consignees, an exemption in its bills of lading from liability for fire happening after unloading is reasonable and valid.

89. Antola *v.* Gill, 7 Fed. 487, 5 Hughes 284, holding that with regard to a deck load of live cattle this limitation of the ship-owner's liability was not unreasonable or against public policy.

90. Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78; The Victory, 168 U. S. 410, 18 S. Ct. 149, 42 L. ed. 519, holding also that the burden was on the shipper

age,[91] rust or corrosion,[92] heating,[93] improper stowage, unless negligent,[94] thieves or robbers,[95] latent defects,[96] perils of navigation,[97] or any loss capable of being covered by insurance;[98] and a provision in a contract of affreightment relieving the carrier from all liability unless notice of the loss is presented[99] or suit

to defeat the operation of the exception in the bills of lading by proof of such negligence on her part as would justify a decree against her.

91. The Claverburn, 147 Fed. 850 (holding that a provision of a bill of lading that the ship-owner shall not be liable for loss by leakage protects him as to all leakage, however great, unless caused by negligence); The Lennox, 90 Fed. 308; The Henry B. Hyde, 90 Fed. 114, 32 C. C. A. 534 [*affirming* 82 Fed. 681]; The Jefferson, 31 Fed. 489.

The burden of proof under a libel alleging injury to goods in shipment from breakage, where the bill of lading exempted the carrier from liability from breakage, is on the libellant to show that the breakage occurred through negligence. The Lennox, 90 Fed. 308; The Henry B. Hyde, 90 Fed. 114, 32 C. C. A. 534 [*affirming* 82 Fed. 681].

92. Wolff *v.* The Vanderland, 18 Fed. 733.

93. The New Orleans, 26 Fed. 44.

94. Bond *v.* Federal Steam Nav. Co., 21 T. L. R. 438 [*affirmed* in 22 T. L. R. 685]; Glengoil Steamship Co. *v.* Pilkington, 28 Can. Sup. Ct. 146; Trainor *v.* Black Diamond Steamship Co., 16 Can. Sup. Ct. 156. See Rubens *v.* Ludgate Hill Steamship Co., 20 N. Y. Suppl. 481. But see The Orcadian, 116 Fed. 930, holding that a ship-owner is not relieved from liability for injury to goods caused by improper stowage by a limitation of liability in the bill of lading declaring that the vessel shall not be answerable for damage caused by any act or omission, negligence, malfeasance, default, or error of judgment of the stevedores or other persons in the service of the ship-owners; improper stowage, whether due to carelessness or a mistake in judgment on the part of the stevedores, being a fault in improperly loading the cargo for which the vessel is liable.

95. The Saratoga, 20 Fed. 869.

96. The Prussia, 93 Fed. 837, 35 C. C. A. 625.

Patent defects are not excepted under a bill of lading excepting latent defects. The Waikato *v.* New Zealand Shipping Co., [1899] 1 Q. B. 56, 8 Aspin. 442, 4 Com. Cas. 10, 68 L. J. Q. B. 1, 79 L. T. Rep. N. S. 326, 15 T. L. R. 33.

97. The Montana, 22 Fed. 715, 22 Blatchf. 372.

98. The Egypt, 25 Fed. 320; The Titania, 19 Fed. 101, holding that a clause in a bill of lading that the ship-owner shall "not be liable for any damage to goods capable of being covered by insurance" refers only to insurance obtainable of the ordinary insurance companies, in the usual course of business, or on special application, and not to insurance which might possibly be obtained in special or peculiar insurance associations, and is a valid exception. But see Price *v.* Union Lighterage Co., [1903] 1 K. B. 750, 9 Aspin. 398, 8 Com. Cas. 155, 72 L. J. K. B. 374, 88 L. T. Rep. N. S. 428, 19 T. L. R. 328, 51 Wkly. Rep. 477 [*affirmed* in [1904] 1 K. B. 412, 9 Com. Cas. 120, 73 L. J. K. B. 222, 89 L. T. Rep. N. S. 731, 20 T. L. R. 177, 52 Wkly. Rep. 325], holding that where goods belonging to plaintiffs were carried in one of defendant's barges under a contract containing a clause that defendant would not be liable "for any loss or damage to goods which can be covered by insurance," and owing to negligence on the part of defendants' lighterman, the barge sank and plaintiffs' goods were lost, the exemption, being in general terms, did not relieve defendants from the duty of exercising reasonable skill and care, and that they were therefore liable.

99. The Queen of the Pacific, 180 U. S. 49, 21 S. Ct. 278, 45 L. ed. 419 [*reversing* 94 Fed. 180, 36 C. C. A. 135] (holding that a stipulation, in a bill of lading for goods carried by ship, that all claims for damages against the steamship company or its stock-holders must be presented within thirty days, applies to a libel against the ship itself, as well as to claims *in personam* against the owners, and that the stipulation in a bill of lading for goods carried by ship from San Francisco to San Pedro is not unreasonable as applied to a loss which was known to the consignors more than three weeks before the expiration of the stipulated time, since the enforcement of the stipulation in such a case would not work a manifest injustice); The Niceto, 134 Fed. 655 (holding that a provision of a bill of lading that the carrier shall not be liable for any claim for loss or damage "unless presented within 48 hours after landing of, or failure to deliver, the goods" does not preclude a recovery for shortage of cargo, although no claim therefor was made within the specified time after discharge, where the ship placed the cargo in store, taking receipts therefor, and as soon as the shortage came to the attention of the consignee it presented a claim therefor to the agent of the line in whose name the bill of lading was issued, who admitted liability); The Arctic Bird, 109 Fed. 167 (holding that a provision of a bill of lading requiring such presentation within ten days after the shipper has notice of the loss or injury is reasonable, and will be enforced); The Naranja, 104 Fed. 160 (stipulation that notice of claim should be given twenty-four hours after discharge); Angel *v.* Cunard Steamship Co., 55 Fed. 1005.

Notice of damage by water held sufficient to cover damage by odor of oil see The Thames, 61 Fed. 1014, 10 C. C. A. 232.

Sufficient compliance with condition.—A provision of a bill of lading that the vessel should not be liable for damage to the cargo unless written claim for the loss should be made within thirty days is sufficiently com-

brought [1] within a specified time is valid unless the time named is so short as to be against public policy,[2] as is also a provision that inflammable goods may be transported on deck at shipper's risk.[3] But like other carriers,[4] a carrier of goods by water cannot lawfully stipulate for exemption from responsibility for his own negligence or the negligence of his servants,[5] such as negligent naviga-

plied with by a letter sent to the carrier within thirty days by the proctor for the cargo owner, stating that he held a claim for damage to the cargo for collection, where both parties had actual knowledge of the damage at the time of discharge (The D. Harvey, 139 Fed. 755); and notice of a claim for damage to cargo given by the consignee as soon as the cargo was delivered and the damage was known, and while the vessel was still in port, is sufficient where the damage was already known to the owners of the vessel or their agents, notwithstanding a provision of the bill of lading that the owners should not be liable "for any damage to any goods . . . notice of which is not given before the removal of the goods," such provision not being binding unless under the circumstances it was reasonable (The Persiana, 156 Fed. 1019).

A provision releasing the owners from any claim, notice of which is not given before the removal of the goods, is to be construed as requiring such notice to be given before the removal of the goods from the dock, and imposes a valid condition precedent to the right to recover for damage to cargo either against the owners personally, or by a suit *in rem*, where, under the circumstances of the case, such condition is just and reasonable, as where the damage was known when the cargo was discharged (The Westminster, 127 Fed. 680, 62 C. C. A. 406 [*affirming* 116 Fed. 123]; The St. Hubert, 107 Fed. 727, 46 C. C. A. 603); and a failure to comply with such condition is not excused by the fact that the ship had knowledge of the damage, the purpose of the requirement being to advise the owners that they are charged with liability therefor (The St. Hubert, *supra*); and when the failure to give such notice is set up by the owner as a defense, the burden rests upon libellant to prove the notice, as a condition to the right of recovery, it being an affirmative fact peculiarly within his knowledge (The Westminster, *supra*). The failure of the owners to insist on the condition in other cases does not constitute a waiver in favor of libellant, where it is not shown that he knew and was misled by it. The Westminster, *supra*.

Where a vessel was being operated by time charterers and bills of lading were issued by the master under the terms of the charter, the charterers became agents of the owners for the purpose of receiving notice of a claim for damage to cargo required to be given by a bill of lading. The Persiana, 156 Fed. 1019.

1. Ginn *v.* Ogdensburg Transit Co., 85 Fed. 985, 29 C. C. A. 521, holding a stipulation in a bill of lading against liability for loss or damage unless suit shall be brought within three months valid.

Limitation of rule; waiver.— Provisions of bills of lading requiring claims for loss or damage to cargo to be presented to the carrier within a stated time, and barring any suit for such loss or damage unless commenced within a further stated time, will be enforced by the courts only so far as they are reasonable under the circumstances of the particular case, and such requirements may also be waived by the carrier by his conduct. Pacific Coast Co. *v.* Yukon Independent Transp. Co., 155 Fed. 29, 83 C. C. A. 625, where it was held that libellant had made reasonable compliance with the terms of the bills of lading as to notice, and that the delay in bringing suit was waived by the carrier by entertaining the claim and continuing negotiations for its settlement.

2. The Queen of the Pacific, 61 Fed. 213.

3. A. J. Tower Co. *v.* Southern Pac. Co., 195 Mass. 157, 80 N. E. 809, holding that where the evidence showed a custom to treat oil clothing as inflammable, and when carried by water to transport it on deck, the carrier was not liable for the loss of the goods in consequence of the same being washed overboard.

4. See CARRIERS, 6 Cyc. 387 *et seq.*

5. The Orcadian, 116 Fed. 930 (holding that a provision in a bill of lading relieving a ship-owner from liability for the negligence of stevedores and persons in his employ is ineffective, and will not be enforced in the federal courts of admiralty); The Manitou, 116 Fed. 60 [*affirmed* in 127 Fed. 554, 63 C. C. A. 109] (holding that exemptions in a bill of lading which are brought into operation by the negligence of the ship-owner or his servants are not enforceable in the courts of this country); Schulze-Berge *v.* The Guildhall, 58 Fed. 796; The Hugo, 57 Fed. 403 [*modified* on other grounds in 61 Fed. 860]; The Montana, 22 Fed. 715, 22 Blatchf. 372; The Hadji, 20 Fed. 875 (holding that public policy demands that the right of the shipper to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any arrangement or agreement between the parties to the service); The Isabella, 13 Fed. Cas. No. 7,099, 8 Ben. 139 (holding that therefore a stipulation for exemption from liability from damages by rats, where due diligence is not used to guard against injury, will be disregarded).

Negligence of master or mariner.—An exception in bills of lading against loss "by any act, neglect, or default of the master or mariners" is invalid. The Saratoga, 20 Fed. 869; The Hindoo, 1 Fed. 627.

Exemptions for negligence, contracted for in a foreign port on a foreign vessel, although valid where made, will not excuse torts and consequent damage occurring within our ter-

tion,[6] or negligent stowage;[7] and where the liability of the vessel is limited by a condition impossible of execution, such condition becomes nugatory, and the general liability of carriers for the non-delivery of freight attaches.[8] A stipulation in a bill of lading exempting the carrier, although valid under the law of the flag, will not be upheld by the courts of this country if against our public policy;[9] but although a stipulation for exemption from liability be in part in contravention of law, yet such portion as is otherwise valid may be enforced.[10]

(II) *Under Harter Act Sections 1 and 2.* Under the first two sections of the Harter Act[11] it is unlawful to insert in bills of lading provisions releasing from liability for negligence or lack of due care.[12] This includes negligent loading,[13] or stowage of the cargo;[14] and if taking a cargo to a vessel in lighters be part of the loading of a vessel, a stipulation in the bill of lading relieving the carrier from failure to provide a fit lighter is prohibited;[15] and the parties cannot insert stipulations determining what shall constitute a proper delivery any further than shall appear reasonable under the circumstances, and no such stipulation could cover negligence in receiving and stowing the goods, or in making a search for them at the port of delivery, whereby the goods are carried past the port and not delivered.[16] The act is broad enough to render void a clause of a bill of lading by which the shipper waives any lien upon the vessel for any breach thereof, where it is attempted to set up such clause as a defense to a libel *in rem* to recover for loss or damage to cargo arising from negligence of the carrier;[17] and a stipulation that the law of the ship's flag shall govern, in a bill of lading for goods in a foreign vessel on a voyage from a foreign port to the United States, is nullified and overridden by the section of the act which prohibits contracts against liability for negligence in loading and stowing the cargo.[18] The act does not prevent an owner from stipulating against liability for loss by latent defects, provided he

ritorial jurisdiction. The Kensington, 88 Fed. 331 [*reversed* on other grounds in 183 U. S. 263, 22 S. Ct. 102, 46 L. ed. 190].

Burden of proof.—Where injury to cargo resulted from a clause excepted in the bill of lading, the carrier cannot be held responsible, unless his negligence is affirmatively shown (The St. Quentin, 162 Fed. 883, 89 C. C. A. 573, holding that where a shipment of shellac made under a bill of lading, excepting liability for loss or damage from heat, was injured by being subjected to an unusually high degree of heat, which caused it to fuse together, such fact alone is not sufficient to establish the negligence of the vessel, it being shown that it might occur without negligence, especially during the particular passage, and that the shellac was stowed in a particularly well-ventilated part of the vessel; The Claverburn, 147 Fed. 850. But see The Southwark, 191 U. S. 1, 24 S. Ct. 1, 48 L. ed. 65 [*reversing* 108 Fed. 880, 48 C. C. A. 123]); but the burden rests upon the carrier to prove that damage to cargo, occurring after its receipt and before its delivery, was due to a peril of the sea, within the exemption contained in its bills of lading (The Frey, 106 Fed. 319, 45 C. C. A. 309).

6. The Brantford City, 29 Fed. 373.

7. The Brantford City, 29 Fed. 373.

8. Turnbull *v.* Citizens' Bank, 16 Fed. 145, 4 Woods 193.

9. The Brantford City, 29 Fed. 373. And see, generally, *supra*, VII, A, 2.

10. The Prussia, 88 Fed. 531.

11. See *supra*, VII, D, 13, b, (I) note 46.

12. The Seaboard, 119 Fed. 375.

A bill of lading held to contain no provisions violative of sections 1 and 2 of the act see U. S. *v.* Cobb, 163 Fed. 791.

13. Bethel *v.* Mellor, etc., Co., 131 Fed. 129.

14. The Hudson, 122 Fed. 96; The Mississippi, 120 Fed. 1020, 56 C. C. A. 525 [*affirming* 113 Fed. 985] (holding a ship liable for damages to cargo, resulting from negligence in stowage, or in failing to properly cover a hatch to prevent leakage, notwithstanding any stipulations to the contrary in the bills of lading); Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326 [*affirmed* in 179 U. S. 69, 21 S. Ct. 30, 45 L. ed. 90].

15. The Seaboard, 119 Fed. 375; Insurance Co. of North America *v.* North German Lloyd Co., 106 Fed. 973.

16. Calderon *v.* Atlas Steamship Co., 64 Fed. 874 [*affirmed* on this point but *reversed* on other grounds in 170 U. S. 272, 18 S. Ct. 588, 42 L. ed. 1033].

17. The Tampico, 151 Fed. 689, holding also that such a provision of a bill of lading is void, independently of statute, as against public policy, in that it would deprive the shipper in advance of one of the remedies given him by the law for a breach of the contract.

18. The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. ed. 190; Botany Worsted Mills *v.* Knott, 82 Fed. 471, 27 C. C. A. 326 [*affirmed* in 179 U. S. 69, 21 S. Ct. 30, 45 L. ed. 90]. And see, generally, *supra*, VII, D, 6.

uses due diligence at the commencement of the voyage to make the vessel seaworthy;[19] and a general clause in a bill of lading, exempting a ship-owner from liability for loss of goods while on the quay, or loss by thieves, is not to be construed as applying to cases where such loss arises through the carrier's negligence or failure in proper custody or care, so as to render it invalid under the act, nor is it rendered void, under such provision, by a subsequent clause extending all exemption provisions to cases of negligence, the two clauses being separable; but the carrier is entitled to the benefit of the exemption, unless it is found that its negligence or fault contributed to the loss.[20] When a charter-party gives to the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire, and a condition in such a contract, to which the Harter Act has no application, exempting the ship-owner from liability on account of the carelessness of its employees, is not contrary to public policy.[21] The Harter Act, making it unlawful to insert in bills of lading provisions relieving from liability for negligence, or to refuse to issue bills of lading containing certain statements, and subjecting violators to a fine, is a criminal statute, and such violators may be prosecuted by indictment;[22] but a suit for the penalty will only lie for the party injured.[23]

(III) *Limitation of Amount of Liability.*[24] A provision in a bill of lading that the ship-owner is not to be liable for any damage to the goods in any case for more than the invoice or declared value of the goods is reasonable, and will be enforced in case of damage to the goods;[25] and in accepting the bills of lading, the shipper accepts the terms of the contract they contain;[26] and a stipulation that the carrier will not be responsible for certain specified articles of value contained in any package shipped under the bill of lading, unless the value thereof be expressed and extra freight paid therefor, being expressly authorized by statute,[27] will be upheld if reasonable;[28] but a provision in a bill of lading limiting a carrier's liability to the value of the goods at the place of shipment does not

19. The Prussia, 93 Fed. 837, 35 C. C. A. 625 (holding that a stipulation in a contract for the transportation of frozen meat, exempting the carrier from liability for loss or damage to the cargo in consequence of latent defects in such apparatus, which is not due to any fault or negligence on his part, is not in violation of section 2 of the act); Wuppermann *v.* The Carib Prince, 68 Fed. 254, 15 C. C. A. 385 [*reversed* in 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181, but upon the ground no such contract was in fact proved].

The act has no retroactive effect, so as to affect bills of lading executed at a time when the law declared stipulations against liability for negligent navigation to be void as against public policy. The Energia, 66 Fed. 604, 13 C. C. A. 653.

20. Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310.

21. The Maine, 161 Fed. 401 [*reversed* on other grounds in 170 Fed. 915]; The Fri, 154 Fed. 333, 83 C. C. A. 205 [*reversing* 140 Fed. 123]. See also McCormick *v.* Shippy, 124 Fed. 48, 59 C. C. A. 568; Golcar Steamship Co. *v.* Tweedie Trading Co., 146 Fed. 563.

22. U. S. *v.* Cobb, 163 Fed. 791, holding that an indictment under such act averring that such bill was issued by defendant, and setting out a copy of such bill, from which it appears that defendant's name was signed thereto "per" another, it is unnecessary to allege that it was so signed, by defendant's authority; that being matter of proof.

23. The Minnehaha, 114 Fed. 672.

24. See, generally, Carriers, 6 Cyc. 398 *et seq.*

25. U. S. Lace Curtain Mills *v.* Oceanic Steam Nav. Co., 145 Fed. 701; Pearse *v.* Quebec Steamship Co., 24 Fed. 285 (holding that the clause should be construed, not as a condition of any liability at all, but as a limitation of the extent of the carrier's liability, and as applying distributively upon each article damaged, and he is to be held liable in the sense of being accountable, for no more than the invoice value of the goods damaged); The Lydian Monarch, 23 Fed. 298 [*following* The Hadji, 18 Fed. 459]; Hart *v.* Pennsylvania R. Co., 7 Fed. 630, 2 McCrary 333 [*affirmed* in 112 U. S. 331, 5 S. Ct. 151, 28 L. ed. 717]. See also The Styria, 101 Fed. 728, 41 C. C. A. 639 [*modified* on other grounds in 186 U. S. 1].

26. The Aline, 25 Fed. 562, 23 Blatchf. 335.

27. U. S. Rev. St. (1878) § 4281 [U. S. Comp. St. (1901) p. 2942].

28. Calderon *v.* Atlas Steamship Co., 69 Fed. 574, 16 C. C. A. 332 [*affirming* 64 Fed. 874, but *reversed* in 170 U. S. 272, 18 S. Ct. 588, 42 L. ed. 1033, because the clause was construed as attempting to exempt entirely from loss of packages over one hundred dollars and not merely as limiting recovery to one hundred dollars]; The Bermuda, 29 Fed. 399, 23 Blatchf. 554; The Denmark, 27 Fed. 141.

relieve it from a greater liability for a loss occurring through the negligence of the shipper in using an unseaworthy vessel;[29] and a stipulation exempting the carrier from liability for loss of goods which are above a specified value per package, unless their value is expressed in the bill of lading, is intended to release the carrier from any liability for packages worth more than the specified value, and not merely for the excess over the specified value, and is therefore void under the Harter Act as well as the general maritime law.[30]

b. Construction, Operation, and Effect — (i) *General Rules.* The rules governing the construction of contracts generally[31] apply to contracts limiting liability of ship-owners.[32] Stipulation will not be construed to protect

29. Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. 44 [*reversing* 17 N. Y. App. Div. 408, 45 N. Y. Suppl. 286].

30. Calderon *v.* Atlas Steamship Co., 170 U. S. 272, 18 S. Ct. 588, 42 L. ed. 1033 [*reversing* 69 Fed. 574, 16 C. C. A. 332]; U. S. Lace Curtain Mills *v.* Oceanic Steam Nav. Co., 145 Fed. 701.

31. See Contracts, 9 Cyc. 577 *et seq.*

32. See cases cited *infra*, this and the following notes.

Particular stipulations construed see Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579 [*reversing* 14 Hun 100] (holding that under a steamship bill of lading for a quantity of gold coin, which exempted the carrier from liability for any loss from "barratry of master or mariners," the purser was a "mariner," so that the exemption clause as to "barratry" applied to him); Compania de Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398 (where an exception, in a bill of lading of cattle, "On deck at owner's risk; steamer not to be held accountable for accident to, or mortality of the animals, from whatever cause arising," was construed not to cover a jettison of uninjured cattle, in rough weather, by order of the master, from unfounded apprehension, in the absence of any pressing perils of the ship, and without any attempt to separate them from cattle previously injured); The Exmoor, 163 Fed. 642 (a stipulation providing that, "should it be necessary to complete the loading in the lower bay at Mobile, same to be at steamer's risk and expense"); Swift *v.* Furness, 87 Fed. 345 (holding that a provision in a bill of lading that meat "is to be shipped wholly at the risk of the shipper, and that the owners assume no responsibility therefor during the voyage," refers only to the voyage contemplated by the parties, and not to an additional voyage arbitrarily made by order of the owner of the ship); Hard *v.* The Enchantress, 58 Fed. 910 [*affirmed* in 63 Fed. 272, 11 C. C. A. 180] (holding that under a bill of lading excepting liability for obliteration or inaccuracy of marks the ship is not concluded by the marks stated in the bill of lading without further proof of the actual marks shipped, and is *prima facie* acquitted by the delivery of all the goods taken aboard); The Britannic, 39 Fed. 395 (holding that exceptions in the bills of lading of damage "by collision . . . even when occasioned by negligence of the master or other servants of the shipowners" apply only to negligence of the master or ship-owners' servants connected with the vessel on which the goods were shipped, or with the performance of the contract of transportation, and do not exempt the owners from liability for the negligence of another ship belonging to the same owners by which the goods were damaged); The Hadji, 16 Fed. 861 (where a clause in the bill of lading excepting "risk of craft or hulk or transhipment," etc., was held not to refer to any risk of the hull of the vessel, but to small craft used in transhipment of the goods from the ship to shore); The Colon, 6 Fed. Cas. No. 3,023, 9 Ben. 354 (holding that the exception in a bill of lading of "any act, neglect, or default whatsoever" of the master or mariners, and of liability of leakage or breakage, "when properly stowed," does not exempt the vessel from responsibility for leakage and breakage from bad stowage by the master or mariners); Mendelsohn *v.* The Louisiana, 17 Fed. Cas. No. 9,421, 3 Woods 46 (holding that damage, from humidity of the hold, to soda shipped by an iron steamer from Liverpool to New Orleans, and transported through the gulf in the warm weather of early spring is within the exceptions in the bill of lading of heat and sweating).

Fruit shipped being inherently subject to decay, and the bill of lading being qualified with that condition, the vessel is not responsible for its sound delivery, without evidence of some misfeasance of the master which set in action or aggravated such tendency. The Collenberg, 1 Black (U. S.) 170, 17 L. ed. 89; De Bruns *v.* Lawrence, 7 Fed. Cas. No. 3,716, 18 How. Pr. (N. Y.) 141 [*affirming* 15 Fed. Cas. No. 8,139 (*affirmed* in 1 Black 170, 17 L. ed. 89)]. Thus a vessel, detained fourteen days at quarantine, and afterward delivering her cargo damaged by rot, whose bill of lading excepted liability for "decay," for damage caused by "restraint of princes, rulers, or people," and "loss or damage caused by the prolongation of the voyage, or by causes beyond the carrier's control," is not liable for such damage to her cargo, unless caused by negligence. The Bohemia, 38 Fed. 756. But the vessel is liable for unexplained loss of fruit from boxes notwithstanding exceptions in bill of lading of loss by breakage of boxes (The Bellona, 3 Fed. Cas. No. 1,277, 4 Ben. 503), and a vessel is liable for rotting of fruit unduly hastened by stowage which did not permit proper ventilation, although bill of lading excepts losses by inherent deteriora-

the carrier against negligence unless the language necessitates such a construction;[33] and exceptions in bills of lading are not to be construed as affecting the implied warranty of seaworthiness at the commencement of the voyage unless that intention clearly appears;[34] but rather as applying only to matters arising after commencement of the voyage.[35] Thus exceptions in a bill of lading of

tion (The America, 1 Fed. Cas. No. 283, 8 Ben. 491).

"Effect of climate," used in a bill of lading, does not apply to the effect of a temporary frost, but means the effect of climate in the passage of the vessel from a tropical climate northward or *vice versa* during the voyage, in its action on cargo in the vessel, and not such exposure as occurred when the cargo was landed in freezing weather, against the protest of the owner, whereby the fruit which composed the cargo was destroyed. The Aline, 25 Fed. 562, 23 Blatchf. 335.

A bill of lading exempting from "damage done by vermin" does not exonerate the owners from responsibility for injuries by rats, resulting from their negligence in omitting to fumigate the ship before loading, and the burden of proving that the injuries were not the result of such negligence is on the owners. Stevens *v.* Navigazione Generale Italiana, 39 Fed. 562. And where, on discharge of a cargo of beans after a voyage of thirty-four days, an extraordinary and almost unheard-of amount of damage from rats appeared, the ship would be held liable, although an exception of liability by reason of "vermin" in the bill of lading included rats, since the exception, even if valid, could not excuse the lack of preliminary precautions against rats through a proper previous examination of the ship, thorough washing out or fumigating, or a sufficient supply of cats. Kanter *v.* The Italia, 59 Fed. 617; The Timor, 46 Fed. 859 [*reversed* in 67 Fed. 356, 46 C. C. A. 412, on the ground that the supply of cats was sufficient]; but where it is shown that precautions were taken which ordinarily prove sufficient to prevent damage by rats, the vessel owners are not liable for damages thus occasioned. The Timor, 67 Fed. 356, 46 C. C. A. 412 [*reversing* 46 Fed. 859].

A bill of lading exempting the carrier from responsibility for leakage relieves him from responsibility for ordinary leakage merely, and does not authorize him to deliver empty casks. Brauer *v.* The Almoner, 18 La. Ann. 266. Nor does it relieve the carrier where it appears that the leaks were caused by some persons tampering with the cases while in the carrier's custody. The Giglio *v.* The Britannia, 31 Fed. 432.

Rust.— Ship-owners are not liable for damage to iron shipped under a bill of lading exempting the ship from accountability for rust, unless the rust was received on board and through want of proper stowage and care. The Bristol, 6 Fed. 638; Zerega *v.* Gee, 30 Fed. Cas. No. 18,211.

Fire.—A bill of lading exempting the shipowner from liability for loss from "damage by fire" includes loss by fire while the goods were on the wharf awaiting transportation as well as when on board the vessel. Scott *v.* Baltimore, etc., Steam-Boat Co., 19 Fed. 56. And "dangers of fire" and "unavoidable accidents of fire" meant the same thing, and the term "fire" means any fire, and is not restricted to fire originating from the furnace of the boat. Swindler *v.* Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732. The failure of a steamboat carrying passengers and freight on an inland river to have the cotton on its decks covered to prevent its taking fire from sparks, as required by the Passenger Act (14 U. S. St. at L. 227), is negligence, and renders the carrier liable for a loss by fire, even though the bill of lading excepts "dangers of fire." Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

33. Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177 (holding that a bill of lading containing an exemption from any loss capable of being covered by insurance does not cover a loss by carrier's negligence); The Egypt, 25 Fed. 320 (holding that a provision in a bill of lading exempting the vessel from any loss capable of being covered by insurance would not include loss by the carrier's negligence); The Delhi, 7 Fed. Cas. No. 3,770, 4 Ben. 345 (holding that, although a bill of lading provides that the vessel shall not be accountable for leakage, breakage, or rust, the vessel is liable for negligence or want of skill or care in the stowage or delivery of the cargo). And see Zung *v.* Howland, 5 Daly (N. Y.) 136, holding that a clause in a bill of lading exempting the owners from negligence or default of the pilot, master, and mariners does not exempt them from liability for negligence of stevedores employed by them to unload the vessel.

34. The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567] (holding that exception in a bill of lading of loss or damage "from delays . . . steam boilers and machinery or defects therein" are not to be construed as affecting the implied warranty of seaworthiness, especially when they form part of a long list of excepted causes, all the rest of which relate to matters arising after the commencement of the voyage); The Aggi, 107 Fed. 300, 46 C. C. A. 276 [*following* The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181, and The Caledonia, *supra*] (holding that a provision of a bill of lading that the ship is not to be answerable for loss through any "latent defect in the machinery or hull not resulting from want of due diligence by the owners" does not cover a condition of unseaworthiness existing at the commencement of the voyage, but applies only to a state of unseaworthiness arising during the voyage).

35. The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644 [*affirming* 43 Fed. 681, 50 Fed. 567].

damage from "latent defects in hull" do not include unseaworthiness existing at the inception of the voyage, and at the time the bill of lading was signed, and resulting from a latent defect in a rivet in a water tank;[36] nor is an open port-hole, although unknown to the master of a vessel before sailing, a "latent defect," within a bill of lading exempting the carrier from loss occasioned by "latent defects, even existing before shipment or sailing on the voyage;"[37] and exceptions in a bill of lading that a steamer shall not be accountable for a breakdown of machinery, nor for accidents to or defects in machinery, nor for neglect of engineers, do not abrogate the implied warranty that the vessel is fit to carry the particular cargo in accordance with the contract contained in the bill of lading.[38] A stipulation in a bill of lading that "the ship is warranted seaworthy only to the extent that the owners shall exercise due diligence to make it so," being ambiguous and uncertain in its meaning, can have no effect.[39]

(II) *"PERILS OF THE SEA AND OF NAVIGATION."* By dangers or perils of the sea or of navigation, as these terms are used in bills of lading, are meant those accidents incident to navigation which are unavoidable by the use of ordinary care;[40] accidents peculiar to navigation that are of an extraordinary nature, or arise from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence;[41] and the term includes all

36. Wuppermann *v.* The Carib Prince, 170 U. S. 655, 18 S. Ct. 753, 42 L. ed. 1181 [*applying* the principles laid down in The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. ed. 644].

37. Putnam *v.* The Manitoba, 104 Fed. 145.

38. Maori King *v.* Hughes, [1895] 2 Q. B. 550, 8 Aspin. 65, 65 L. J. Q. B. 168, 73 L. T. Rep. N. S. 141, 14 Reports 646, 44 Wkly. Rep. 2.

39. Insurance Co. of North America *v.* North German Lloyd Co., 106 Fed. 973.

40. Hughes Adm. 154.

41. Tuckerman *v.* Stephens, etc., Transp. Co., 32 N. J. L. 320; The Northern Belle, 18 Fed. Cas. No. 10,319, 1 Biss. 529.

"Dangers of navigation" defined see 13 Cyc. 257.

"Dangers of lake navigation" defined see 13 Cyc. 257.

"Dangers of river navigation" defined see 13 Cyc. 257.

"Dangers of the river" defined see 13 Cyc. 257.

"Dangers of the road" defined see 13 Cyc. Cyc. 258.

"Dangers of the seas" defined see 13 Cyc. 258.

Injury held due to peril or danger of sea: Damage to cargo caused by sea water which entered through a hatch during a voyage across the Atlantic by a new steamer, it being shown that the tarpaulin hatch covers were new and sufficient and properly secured, but that the one above libellant's goods was injured by a cut through the breaking loose of a derrick at night during a very severe storm. Gough *v.* Hamburg Amerikanische Packetfahrt Aktiengesellschaft, 158 Fed. 174. Injury to goods shipped in the hold of a vessel, resulting from an intrinsic principle of decay inherent in the goods themselves, or from the natural closeness and dampness of the hold, on a voyage delayed by boisterous weather and adverse winds. Rich *v.* Lambert, 12 How. (U. S.) 347, 13 L. ed. 1017; Clark *v.* Barnwell, 12 How. (U. S.) 272, 13 L. ed. 985. The leaking of a vessel through stress of weather. Faber *v.* The Newark, 8 Fed. Cas. No. 4,602. An extraordinarily rough passage, the vessel being thrown more than once on her beam ends, so that her cargo shifted. Barstow *v.* Wilmot, 2 Fed. Cas. No. 1,066. A stranding caused by mistaking a shore light for a pier light on entering on a dark night, with a heavy sea and high wind, a harbor to which access was not usually dangerous or difficult. The Juniata Paton, 14 Fed. Cas. No. 7,584, 1 Biss. 15. Breakage caused by dangers of the sea, and shown not to be attributable to negligence in storing or unloading. *In re* Twelve Hundred and Sixty-five Vitrified Stoneware Sewer Pipes, 24 Fed. Cas. No. 14,280, 5 Ben. 402. Where, being driven ashore by a peril of the sea, and the master being unable to raise money to pay salvage claims, a portion of the cargo was sold for that purpose. The Wiley Smith, 29 Fed. Cas. No. 17,657, 6 Ben. 195. The goods lost by the boat striking a bridge pier, and the court finding that the boat was properly navigated. The Morning Mail, 17 Fed. 545. Capture by a pirate. Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; Gage *v.* Tirrell, 9 Allen (Mass.) 299. Where a vessel, on arriving at the entrance of Mobile bay in the evening, endeavored to get a pilot, and, failing, followed the advice of those on board a pilot boat which was conducting another vessel, and attempted to follow such boat, but was grounded and compelled to sacrifice a part of her cargo. Vansycle *v.* The Schooner Thomas Ewing, 5 Pa. L. J. 231. Provisions stowed in a water ballast tank damaged in several feet of water, which got into the tank either by some opening of the water pipe which led to the tank or through an empty rivet hole in the bulkhead carrier boat. Hayes *v.* Kennedy, 2 Pittsb. (Pa.) 262. And see Blackburn *v.* Liverpool, etc., Steam Nav. Co., [1902] 1 K. B. 290, 9 Aspin. 263, 7 Com. Cas. 10, 71 L. J. K. B. 177, 85

marine casualties resulting from the violent action of the elements, as distin-

L. T. Rep. N. S. 783, 18 T. L. R. 121, 50 Wkly. Rep. 272. Sinking by unavoidable accident. Hostetter *v.* Park, 137 U. S. 30, 11 S. Ct. 1, 34 L. ed. 568 [*affirming* 11 Fed. 179]. Damage to a cargo of maize and oats shipped, by heat proceeding from the bulkheads inclosing the engine and boiler space, which was unable to escape owing to the necessary closing of the ventilators for a period of seven days during a storm of exceptional severity and duration. The Thrunscoe, [1897] p. 301, 66 L. J. Adm. 172, 77 L. T. Rep. N. S. 407.

Injuries held not due to peril or danger of sea: A loss by fire, although it occur without the negligence or fault of the carrier. Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312, 15 L. ed. 656. The explosion of a boiler on a steam vessel. The Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406. The explosion of a box of detonators stowed in the hold of a vessel, as a part of the cargo, tearing a hole in the side of the vessel, through which the sea water immediately entered, and penetrating into the next compartment, damaging a consignment of sugar, the explosion, and not the inflow of water being held to be the proximate and responsible cause of the damage was therefore not occasioned by a peril of the sea. The G. R. Booth, 171 U. S. 450, 19 S. Ct. 9, 43 L. ed. 234 (a much discussed case). Damage caused by sea water which entered through the deck by reason of its defective condition, which rendered the vessel unseaworthy for the particular voyage and cargo. The Nellie Floyd, 116 Fed. 80 [*affirmed* in 122 Fed. 617, 60 C. C. A. 175]. Fire occurring on the wharf. Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,265. Loss of cargo by collision with a pier by a vessel which during a high wind approached part of the river obstructed by the piers of a bridge, which she could not pass in such weather without danger, and she neglected to lie by until the wind went down. The Mobler, 21 Wall. (U. S.) 230, 22 L. ed. 485. Loss of goods which have been stowed on deck without consent of the owner. The Paragon, 18 Fed. Cas. No. 10,708, 1 Ware 326; The Rebecca, 20 Fed. Cas. No. 11,619, 1 Ware 187. Depredations on a ship's cargo, committed by her passengers or crew, in consequence of a short allowance made necessary by the length of a voyage. The Gold Hunter, 6 Fed. Cas. No. 5,513, Blatchf. & H. 300. The mere rolling of a vessel by a cross sea is not such a danger. The Reeside, 20 Fed. Cas. No. 11,657, 2 Sumn. 567. Embezzlement or theft, except where it amounts to piracy, which is not the case when committed by persons coming on the ship when she is not on the high seas. King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349. Pressure of one part of a cargo upon another. Muller *v.* The Iginia, 17 Fed. Cas. No. 9,917. Damages occasioned by cockroaches on board of a ship, to a cargo, in the course of a voyage. The Miletus, 17 Fed. Cas. No. 9,545, 5 Blatchf. 335 [*affirming* 29 Fed. Cas. No. 17,461]. Water which coming into the hold of a vessel from the deck and waterways rotted casks which contained bleaching powder and were stowed without dunnage against the skin of the vessel, and the casks were thereby stove in and the bleaching powder spilled and mixed with the water, which reached bundles of bags and injured them. The Antoinetta C., 1 Fed. Cas. No. 491, 5 Ben. 564. Where cattle were shipped on board the vessel, and the cattle fittings prove to be insufficient in material and strength. Hills *v.* Mackill, 36 Fed. 702; The Brantford City, 29 Fed. 373. Unskilfulness of the pilot. Harvey *v.* Pike, 4 N. C. 519, 7 Am. Dec. 693. Loss resulting from the plug coming out of the cold-water pipe and letting water into the hold, it appearing that no precaution was taken to keep the plug tight. Haughton *v.* The Steamboat Memphis, 1 Ohio Dec. (Reprint) 403, 8 West. L. J. 562. Damages to a cargo in a towboat, occasioned by bilging in a lock which was entered in contravention of the rules of the canal. Atwood *v.* Reliance Transp. Co., 9 Watts (Pa.) 87, 34 Am. Dec. 503. A loss of goods by a vessel caused by the shifting of a buoy which had been placed in a particular position to indicate a particular channel. Reaves *v.* Waterman, 2 Speers (S. C.) 197, 42 Am. Dec. 364. Where lard was pumped from the vessel and tobacco was damaged by the lard running into it. The Newark, 18 Fed. Cas. No. 10,141, 1 Blatchf. 203.

Damage by rats is not a "peril of seas and navigation," within the clause of a bill of lading exempting the carrier from liability for such perils. The Carlotta, 5 Fed. Cas. No. 2,413, 9 Ben. 1; The Isabella, 13 Fed. Cas. No. 7,099, 8 Ben. 139; Kirkland *v.* The Fame, 14 Fed. Cas. No. 7,845. But see McArthur *v.* Sears, 21 Wend. (N. Y.) 190. But a distinction was made in a famous English case, and it was there held that damage to cargo by sea water entering a leak made by rats in the ship is a sea peril within the exception. Hamilton *v.* Pandorf, 12 App. Cas. 518, 6 Aspin. 212, 52 J. P. 196, 57 L. J. Q. B. 24, 57 L. T. Rep. N. S. 726, 36 Wkly. Rep. 369.

Collision.— The words in an exception in a bill of lading, "perils of the sea," although generally referable to accidents peculiar to that element, are sometimes extended to collision of vessels when no blame attaches to either, but more especially to the one injured. Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; General Mut. Ins. Co. *v.* Sherwood, 14 How. (U. S.) 351, 14 L. ed. 452. But where cargo is damaged by reason of the shock of a collision caused by the negligence of the ship-owner, such owner cannot rely on the exceptions of the bill of lading, exempting the ship from liability for damage caused by collisions and perils of the seas. Schulze-Berge *v.* The Guildhall, 58 Fed. 796. And see Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 14 Fed. 699, 4 McCrary 636.

The exception in a bill of lading of "dangers of the river," or "danger of river navigation," releases the carrier from losses

guished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must, occur;[42] and the phrases,

caused by hidden obstructions newly placed in the river, such as human foresight could not discover and avoid (Redpath *v.* Vaughan, 52 Barb. (N. Y.) 489, a hidden stump; Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71; Hostetter *v.* Gray, 11 Fed. 179 [*affirmed* in 137 U. S. 30, 11 S. Ct. 1, 34 L. ed. 568], an unknown and concealed obstruction); and covers loss caused, without negligence on the part of the carrier's agents or servants, by striking, under water, a tree which had, unknown to them, shortly before fallen into the river (Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 120 U. S. 166, 7 S. Ct. 550, 30 L. ed. 621 [*affirming* 17 Fed. 478, 5 McCrary 397]); and loss of cargo by reason of a sand reef which had recently formed in the channel of a river, and which the pilot of a towboat had no reason to suppose was there (Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., *supra*); and relieves the carrier from liability for loss of the contents of a barge broken into by a sunken log or stump, concealed from view, and not even marked by a ripple in the water, the steamboat and barge in tow pursuing the usual and proper course, no obstruction at that point being known to river pilots, and there being no proof of negligence or unskilfulness on the part of the master or crew, or of any unseaworthiness of the steamboat or barge (The Favorite, 8 Fed. Cas. No. 4,697, 2 Biss. 502); but if the master knows of a new obstruction before an injury is caused by it he must use increased caution and if he could by any means have removed it he will be chargeable (Turney *v.* Wilson, 7 Yerg. (Tenn.) 340; Gordon *v.* Buchanan, 5 Yerg. (Tenn.) 71); and where a steamboat on a river ran upon a stone and knocked a hole in her bottom, the carrier was not discharged from liability by virtue of the clause in the bill of lading, but in order to relieve himself from responsibility it was incumbent on him to prove that due diligence and proper skill were used to avoid the accident, and that it was unavoidable (Whitesides *v.* Russell, 8 Watts & S. (Pa.) 44). But a loss of goods caused by the skipper's attempting to pass a dangerous bend in a river is not within the exception, as such exception signifies the natural accidents incident to the navigation of the river, and not such as might have been avoided by the exercise of proper discretion and foresight (Williams *v.* Branson, 5 N. C. 417, 4 Am. Dec. 562); and a snag which is well known to persons whose business it is to navigate a river is not such a danger of navigation, within the exception in a bill of lading, as will exempt a common carrier on such river from liability for the loss of goods occasioned thereby (Costigan *v.* Michael Transp. Co., 38 Mo. App. 219). But the exception covers a loss occasioned by a collision with another boat, and the carrier will not be liable, in case of such exception, unless the loss occurred by his negligence or that of the hands employed on the boat, or might have been prevented by reasonable skill and diligence. Van Horn *v.* Taylor, 2 La. Ann. 587, 46 Am. Dec. 558; Whitesides *v.* Turlkill, 12 Sm. & M. (Miss.) 599, 51 Am. Dec. 128. In an action for a breach of a contract to transport "unavoidable dangers of the river and fire only excepted," the fact that a river on the route became, until after such day, unnavigable by reason of low water, constitutes no defense, such contingency not having been expressly excepted therein (Mahon *v.* The Olive Branch, 18 La. Ann. 107; Hatchett *v.* The Compromise, 12 La. Ann. 783, 68 Am. Dec. 782; Cowley *v.* Davidson, 13 Minn. 92), danger of navigation not being equivalent to want of navigation (Cowley *v.* Davidson, *supra*).

Evidence of usage, fixing a construction of the words "inevitable dangers of the river," in a bill of lading for transportation of goods by inland navigation is admissible. Gordon *v.* Little, 8 Serg. & R. (Pa.) 533, 11 Am. Dec. 632. Thus parol evidence is admissible to show that the words "dangers of the river," as used in a bill of lading, by usage and custom include dangers by accidental fire occurring without negligence or fault of the carrier. Hibler *v.* McCartney, 31 Ala. 501; Ezell *v.* English, 6 Port. (Ala.) 311; Sampson *v.* Gazzam, 6 Port. (Ala.) 123, 30 Am. Dec. 578. But see Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312, 15 L. ed. 656, holding that the testimony of a witness claiming to be familiar with the usages of the Mississippi is not admissible to show that the exception in a bill of lading of a steamboat on that river of "perils of the river" is generally understood to include fire.

Dangers of lake navigation.—Where a steamer which might have safely remained outside until daylight on a foggy night mistook a harbor and, entering it, found out the mistake too late, and grounded, this was not one of the "dangers of lake navigation," within the exception in the bills of lading, such as would exempt the steamer from liability for damage to the cargo. The Portsmouth, 9 Wall. (U. S.) 682, 19 L. ed. 754.

42. Ceballos *v.* The Warren Adams, 74 Fed. 413, 20 C. C. A. 486.

Jettison.—A wrongful jettison of sound cattle by order of the master, from unfounded apprehensions during rough weather, is not a peril of the sea. Compania de Navigacion la Flecha *v.* Brauer, 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398 [*affirming* 66 Fed. 776, 14 C. C. A. 88]. But where to lighten a vessel aground, the deck load of brandy was jettisoned by knocking in the heads of the casks, it being impossible to throw them overboard whole, it was held to be a loss by a peril of the sea, within the exception in the bill of lading. Van Syckel *v.* The Thomas Ewing, 28 Fed. Cas. No. 16,877, Crabbe 405, 5 Pa. L. J. 231.

Generally speaking, the words have the same meaning in a bill of lading as in a

"the dangers of the seas," "the dangers of navigation," and "the perils of the seas," employed in bills of lading, are convertible terms,[43] equivalent to inevitable accident.[44] The expressions all cover heavy and unusually severe storms and gales,[45] or sudden and unexpected gust of wind or squall;[46] and "perils of the sea," as used in exceptions in bills of lading, cover, in addition to those injuries contemplated by the term "act of God," injuries partly due to the intervention of human agency, such as loss by robbery,[47] pirates,[48] and unavoidable collision;[49] and a loss by collision without fault on the part of the carrier boat is covered by the exception in the bill of lading of "unavoidable dangers of the river navigation;" and the carrier is not liable, even though the collision was caused by the negligence of those navigating the other vessel.[50] But a collision at sea, in order to be a "danger of the sea," within a bill of lading exempting the owners from liability as carriers, must be such as could not be avoided by either ship by human prudence and skill.[51] If the claimant shows that the ship encountered such bad weather as warrants the conclusion that the loss was due to the motion caused by the sea, this is a peril of the sea, within the meaning of the exception in the bill of lading, and exempts the carrier from liability, unless libellant shows that the loss would have been prevented by proper stowage.[52] By the law of both England and America the ordinary contract of a common carrier by sea involves an obligation to use due care and skill in navigating the vessel and carrying the goods; and an exception, in the bill of lading, of perils of the sea, or other specified peril, does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed,[53] and does not include such as may be avoided by the

policy of insurance, although the effect of negligence of the master or crew contributing to the loss by a peril of the sea may be different on the two contracts. The G. R. Booth, 171 U. S. 450, 19 S. Ct. 9, 43 L. ed. 234. Construction of the phrases in marine policies see MARINE INSURANCE, 26 Cyc. 652 *et seq.*

43. Baxter *v.* Leland, 2 Fed. Cas. No. 1,124, Abb. Adm. 348 [*affirmed* in 2 Fed. Cas. No. 1,125, 1 Blatchf. 526].

44. Blythe *v.* Marsh, 1 McCord (S. C.) 360.

45. Cook *v.* Southeastern Lime, etc., Co., 146 Fed. 101; Southerland-Innes Co. *v.* Thynas, 128 Fed. 42, 64 C. C. A. 116; Mosle *v.* The Sintram, 64 Fed. 884 (where a ship generally stanch and of high rating was carefully inspected before the voyage commenced, both by the owners and by the insurers of cargo, and in passing around Cape Horn she had for twenty days rough seas, aft gales, and much rolling and shipping of water, during which the seams of her waterways began working, and took in some water, causing a comparatively small amount of damage to her cargo of tea stowed in the between-decks); The Titania, 19 Fed. 101 (where goods in one of the compartments of the steamer were injured by a spare propeller, which was stowed and fastened in the same compartment, and on the vessel's sixth voyage broke loose during a severe gale, and, in being tossed about, broke through the sides of the ship, whereby water was taken aboard); The Pharos, 9 Fed. 912; Barstow *v.* Wilmot, 2 Fed. Cas. No. 1,066; The Blue Jacket, 3 Fed. Cas. No. 1,569, 10 Ben. 248; Hooper *v.* Rathbone, 12 Fed. Cas. No. 6,676, Taney 519; The Juniata Paton, 14 Fed. Cas. No. 7,584, 1 Biss. 15. But see Bazin *v.* Liverpool, etc., Steamship Co., 2 Fed. Cas. No. 1,152, 3 Wall. Jr. 229, holding that a carrier, shipping goods by a different vessel and at an earlier date than that specified in the bill of lading, is liable for loss or damage occasioned by shipwreck, notwithstanding the exception of "accidents of the seas," etc., in such bill of lading.

Where the excessive violence of the sea is the efficient cause of the shifting of cargo, causing breakage and leakage, by which other portions of the cargo are damaged, without which the damage would not have occurred, it is the proximate cause of such damage; and whether it constitutes a peril of the sea, within the exception in the bills of lading, is a question of fact, to be determined upon the circumstances of each case, depending upon whether a seaworthy vessel, properly trimmed, and with the cargo properly stowed, would ordinarily go through such seas without material injury to its cargo. The Frey, 106 Fed. 319, 45 C. C. A. 309.

46. Bregaro *v.* The Centurion, 68 Fed. 382, 15 C. C. A. 480; The City of Alexandria, 23 Fed. 826; The Lady Pike, 14 Fed. Cas. No. 7,985, 2 Biss. 141 [*reversed* on other grounds in 21 Wall. 1, 22 L. ed. 499].

47. McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

48. McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

49. McArthur *v.* Sears, 21 Wend. (N. Y.) 190.

50. Hays *v.* Kennedy, 41 Pa. St. 378, 80 Am. Dec. 627, 3 Grant 351.

51. Blythe *v.* Marsh, 1 McCord (S. C.) 360.

52. Christie *v.* The Craigton, 41 Fed. 62.

53. Compania de Navigacion La Flecha *v.*

exercise of skill, judgment, and foresight demanded of the carrier.[54] If the unseaworthiness of the vessel at the time of sailing on the voyage caused or contributed to produce the necessity for a jettison, the loss is not within the exception in the bill of lading of perils of the seas, and the carrier is liable for non-delivery of the goods.[55]

E. Freight[56] **— 1. Right to Freight — a. General Rules; When Earned; Necessity and Sufficiency of Delivery.** The general rule is that a carrier of goods by water is entitled to freight when,[57] and only when,[58] he has properly fulfilled his contract of carriage. A vessel, in delivering cargo, is not bound to look beyond the owner and holder of the bill of lading, and as he has the control of the delivery and acceptance of the goods, he is responsible, on accepting the goods under the bill of lading, for freight according to its terms;[59] and an owner of goods sent by a general ship is liable for the freight, independent of the bill of lading, and it is immaterial whether the ownership appears on the bill of lading or not.[60] In the absence of a contract making freight payable upon shipment,[61] delivery of the cargo at the port of destination is a condition precedent to the right to freight,[62] and without such delivery the acceptance of the cargo at an intermediate place

Brauer, 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788 [*affirming* 22 Fed. 715, 22 Blatchf. 372]; The Bergenseren, 36 Fed. 700; Dibble *v.* Morgan, 7 Fed. Cas. No. 3,881, 1 Woods 406.

An exception of "the dangers on the lake," in a contract to convey goods from New York to Ogdensburg, does not exempt the carrier from liability for loss happening through want of ordinary care. Fairchild *v.* Slocum, 19 Wend. (N. Y.) 329 [*affirmed* in 7 Hill 292].

54. Costigan *v.* Michael Transp. Co., 33 Mo. App. 269.

55. Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162, 15 L. ed. 584.

56. **Freight** defined see 20 Cyc. 844.

57. Hughes *v.* Sun Mut. Ins. Co., 100 N. Y. 58, 2 N. E. 901, 3 N. E. 71 [*affirming* 12 Daly 45]; Blowers *v.* One Wire Rope Cable, etc., Co., 21 Fed. 352; Hopkins *v.* Wood, 12 Fed. Cas. No. 6,693; Sutton *v.* Hennell, 23 Fed. Cas. No. 13,646.

His right to freight is not affected by the outcome of a prior suit, instituted by a third person against the consignee, after the termination of the voyage, to determine the ownership of the cargo. Crapo *v.* The Arctic, 6 Fed. Cas. No. 3,361.

58. Nelson *v.* Stephenson, 5 Duer (N. Y.) 538 (holding that where bill of lading of a cargo of casks of molasses is unqualified, if the casks are delivered empty or nearly so, and the actual cause of leakage be unknown or conjectural, the owners of the vessel lose their freight, not having performed their engagement); Lacombe *v.* Waln, 4 Binn. (Pa.) 299; The Excelsior, 8 Fed. Cas. No. 4,592, 2 Ben. 434.

A vessel contracting to carry merchandise in violation of statute earns no freight by executing the contract. Petrel Guano Co. *v.* Jarnette, 25 Fed. 675.

59. Neilsen *v.* Jesup, 30 Fed. 138.

60. Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162.

61. See *infra*, this note.

Although freight is made payable by the shipper on the shipment of the goods, it is not merely on that account earned without a performance of the voyage. Mashiter *v.* Buller, 1 Campb. 84; Clark *v.* Druisina, 1 Marsh. 123.

62. *Pennsylvania.*— Richardson *v.* Young, 38 Pa. St. 169.

South Carolina.— Halwerson *v.* Cole, 1 Speers 321, 40 Am. Dec. 603.

Texas.— Adams *v.* Haught, 14 Tex. 243.

United States.— The Mary Riley *v.* Three Thousand Railroad Ties, 38 Fed. 254; The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358]; Hart *v.* Shaw, 11 Fed. Cas. No. 6,155, 1 Cliff. 358; Hurtin *v.* Union Ins. Co., 12 Fed. Cas. No. 6,942, 1 Wash. 530.

England.— Brown *v.* Tanner, L. R. 3 Ch. 597, 37 L. J. Ch. 923, 18 L. T. Rep. N. S. 624, 16 Wkly. Rep. 882; Metcalf *v.* Britannia Ironworks Co., 2 Q. B. D. 423, 3 Aspin. 407, 46 L. J. Q. B. 443, 36 L. T. Rep. N. S. 451, 25 Wkly. Rep. 720; Osgood *v.* Groning, 2 Campb. 466, 11 Rev. Rep. 765; Penrose *v.* Wilkes [*cited* in Shepard *v.* De Bernales, 13 East 565, 570, 12 Rev. Rep. 442, 104 Eng. Reprint 490]; Blank *v.* Solly, Holt N. P. 554, 1 Moore C. P. 531, 19 Rev. Rep. 469, 3 E. C. L. 218; Anonymous, 1 Sid. 236, 82 Eng. Reprint 1079.

See 44 Cent. Dig. tit. "Shipping," § 502.

A stamp put by the ship-owner upon the back of a bill of lading, stating that the entire freight was payable "prior to delivery, if required," but not signed by the parties, there being no proof that it was ever recognized by the shipper as a part of his contract, did not vary the obligations of the contract, so as to authorize a demand for freight before the goods were ready for delivery. Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177.

Delivery held sufficient to entitle the carrier to freight see The Adella S. Hills, 47 Fed. 76; Carao *v.* Guimaraes, 10 Fed. 783; Donovan *v.* Cargo of Two Hundred and Forty Tons of Coal, 8 Fed. 368.

by the owner of the cargo is necessary to enable the ship-owner to recover either full or *pro rata* freight;[63] but if the owner of the cargo is the cause of its not being transported to the port of destination full freight may be recovered;[64] and after the cargo is on board, the shippers cannot demand it short of the port of destination without payment of full freight for the whole voyage;[65] and thus where a ship grounds a short distance down a river from the port of departure, and the shipper, alleging the consignee's failure, withdraws the cargo under legal process, he will be liable for the whole freight, the ship soon after the disaster being ready to continue her voyage;[66] but the rule is otherwise where the vessel sinks in the port of departure and the goods are rescued by the insurers and turned over to

Where perishable cargo is sold at a port of distress, at which a vessel lays up for repairs on account of injuries due to perils of the seas, no freight is recoverable. The Velona, 28 Fed. Cas. No. 16,912, 3 Ware 139. But where perishable cargo is sold by the master on the consignee's refusal to receive it, the vessel owners may recover from the shippers the stipulated freight, less net proceeds from the sale of the cargo. The Maria White, 16 Fed. Cas. No. 9,083, 1 Hask. 204.

63. Richardson *v.* Young, 38 Pa. St. 169; Adams *v.* Haught, 14 Tex. 243; The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358]; The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542; Osgood *v.* Groning, 2 Campb. 466, 11 Rev. Rep. 765.

If a cargo is received at a port other than the place of destination by compulsion, and the supercargo or captain, acting for the benefit of all, receives the proceeds thereof, no freight is earned or due (Hurtin *v.* Union Ins. Co., 12 Fed. Cas. No. 6,942, 1 Wash. 530); and the master having failed to deliver the cargo according to the bill of lading, and there having been no waiver of performance, either express or implied, by the shipper or his agent at the port of distress, the owner of the vessel is not entitled to freight, notwithstanding the damaged state of the cargo justified its sale by the master at the port of distress (The Ann D. Richardson, 1 Fed. Cas. No. 411, 1 Blatchf. 358 note [*affirming* 1 Fed. Cas. No. 410, Abb. Adm. 499]. But see Murray *v.* Ætna Ins. Co., 17 Fed. Cas. No. 9,955, 4 Biss. 417, holding that where a vessel on the Lakes, late in the season, is laid up by stress of weather, and the cargo is necessarily unloaded, and the master sells it, although the vessel might have completed the transportation in the spring, she is entitled to full freight).

Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of the cargo has been restored and sold at the same port, no freight is due for the part so restored. The Harriet, 11 Fed. Cas. No. 6,094; Sampayo *v.* Salter, 21 Fed. Cas. No. 12,277, 1 Mason 43.

64. Adams *v.* Haught, 14 Tex. 243; Hart *v.* Shaw, 11 Fed. Cas. No. 6,155, 1 Cliff. 358; Cargo ex Galam, Brown. & L. 167, 10 Jur. N. S. 477, 33 L. J. Adm. 97, 9 L. T. Rep. N. S. 550, 2 Moore P. C. N. S. 216, 3 New Rep. 254, 12 Wkly. Rep. 495, 15 Eng. Reprint 883. But see Bailey *v.* Damon, 3 Gray (Mass.) 92, holding that where goods are wrongfully taken from a vessel by the shipper before she has broken ground on the voyage, the ship-owner is not entitled to the stipulated freight as such.

Where goods are sold and shipped on board a vessel of the vendee, and are stopped *in transitu* by the vendor, the vendee is entitled to receive payment of the freight and charges on the goods reclaimed. Newhall *v.* Vargas, 15 Me. 314, 33 Am. Dec. 617.

If the owner prevents the master from forwarding the goods from an intermediate port to their destination. The Soblomsten, L. R. 1 A. & E. 293, 36 L. J. Adm. 51, 15 L. T. Rep. N. S. 393, 15 Wkly. Rep. 591; Christy *v.* Row, 1 Taunt. 300, 9 Rev. Rep. 776.

Where a vessel is abandoned at sea under circumstances which rendered such abandonment excusable, so that it did not operate to terminate the contract of affreightment, and is brought into port by salvors, but by the action of the cargo-owners the resumption of the voyage is prevented, the ship-owner is entitled to be compensated for his loss of freight on principles of equity; but under such principles his damages cannot go beyond compensation, and he is not entitled to recover the gross freight he would have earned under the contract, but only the estimated net freight, and from that should be deducted the net amount the ship earned, or should reasonably have earned, during the time it would have taken her to complete the voyage. The Eliza Lines, 114 Fed. 307, 52 C. C. A. 195.

65. Bartlett *v.* Carnley, 6 Duer (N. Y.) 194; Braithwaite *v.* Power, 1 N. D. 455, 48 N. W. 354 (holding that where the master of a vessel agreed to carry goods for a stipulated price, no time for delivery being specified, and the closing of navigation interrupted the voyage, and while the master was unloading and preparing to complete the transportation by land the consignee took the goods by force, the master could recover full freight from the consignor, and that he could rightfully have held the goods until the opening of navigation, and then earned full freight by completing the navigation by water); Jordan *v.* Warren Ins. Co., 13 Fed. Cas. No. 7,524, 1 Story 342; Seaman *v.* The Crescent City, 21 Fed. Cas. No. 12,581, 1 Bond 105.

66. Blake *v.* Morgan, 3 Mart. (La.) 375; Merchants' Mut. Ins. Co. *v.* Butler, 20 Md. 41.

the owner,[67] or where a vessel, before she breaks ground for a voyage, is so injured that the cost of her repairs would exceed her value when repaired, and is thus rendered unseaworthy and incapable of earning freight;[68] and where, after a vessel has taken on board a cargo to be carried, an embargo prevents her from sailing, and the cargo is sold at the port of shipment, the owner of the vessel can recover nothing in the way of freight from the shipper;[69] and the same rule applies if a ship is obliged by perils of the sea to put back to her port of departure, and her cargo is there sold by the master;[70] and when a vessel and cargo are abandoned at sea by the master and crew, without intention to retake them.[71] Violation of a shipping contract, by deviation from the course and taking additional cargo, does not of itself forfeit freight, but merely authorizes a distinct action for damages against the vessel;[72] and a temporary retardation and subsequent sale of the cargo by the owner does not constitute an abandonment, nor deprive the carrier of his right to the freight money;[73] and even where there is a deviation during a voyage which avoids the contract of affreightment, the acceptance of the cargo by the freighter, with full knowledge of the deviation, restores to the ship-owner his right to freight.[74] A provision in a bill of lading that the freight shall be considered as earned, steamer or goods lost or not lost at any stage of the entire transit, is valid and enforceable.[75]

b. Effect of Loss of or Injury to Goods. The parties may so contract that freight is payable whether or not the cargo is lost or injured,[76] or otherwise regulate the matter by contract, in which case the contract governs.[77] In the absence of such a contract, however, where goods are lost otherwise than by a peril of the sea or a cause excepted in the contract of affreightment the carrier is not entitled to freight;[78] and if goods are improperly stowed on deck, and a part lost in consequence of greater value than the freight of the remainder, the carrier

67. Rogers *v.* West, 9 Ind. 400, holding that even if the owners did take the property from the possession of the carrier against its consent, it was not equal to a delivery of the cargo at the place of delivery in the same condition as when the owners so took it, entitling him to the price of the carriage.

68. The Tornado, 108 U. S. 342, 2 S. Ct. 746, 27 L. ed. 747.

69. Kelly *v.* Johnson, 14 Fed. Cas. No. 7,672, 3 Wash. 45.

70. Lord *v.* Neptune Ins. Co., 10 Gray (Mass.) 109.

71. The James Martin, 88 Fed. 649.

72. Knox *v.* The Ninetta, 14 Fed. Cas. No. 7,912, Crabbe 534, 5 Pa. L. J. 33.

73. Murray *v.* Ætna Ins. Co., 17 Fed. Cas. No. 9,955, 4 Biss. 417.

74. Thatcher *v.* McCulloh, 23 Fed. Cas. No. 13,862, Olcott 365, holding also that an intention of the master of a ship to depart from her direct voyage and stop at an intermediate port for the purpose of taking in additional cargo, if assented to or made known to a shipper when bills of lading are executed to him, is not a deviation which affects the right to recover freight.

75. Portland Flouring Mills *v.* British, etc., Mar. Ins. Co., 130 Fed. 860, 65 C. C. A. 344 [*affirming* 124 Fed. 855].

76. Myers *v.* The Queensmore, 53 Fed. 1022, 4 C. C. A. 157 [*affirming* 51 Fed. 250].

77. Libby *v.* Gage, 14 Allen (Mass.) 261; Taylor *v.* Insurance Co. of North America, 6 Fed. 410; The Muriel, 17 Fed. Cas. No. 9,944, 7 Wkly. Notes Cas. (Pa.) 147.

Freight payable on gross gauge.— Under a special contract, by which the amount of freight was made to depend on the gross gauge of the casks of molasses delivered, it is immaterial how the loss was occasioned, whether by ordinary leakage or the dangers of the seas (The Cuba, 6 Fed. Cas. No. 3,458, 3 Ware 260); and such a contract of freightage of molasses which provided that the freight should be estimated "gross custom-house gauge of cask," where upon arrival of cargo it was found that some of the casks were empty, and some broken, in view of the fact that casks of molasses are often carried at sea with their bungs out to allow fermentation, freight was allowed on all the casks (The Juliet C. Clark *v.* Welsh, 14 Fed. Cas. No. 7,580, 9 Phila. (Pa.) 469).

78. *Indiana.*— Holliday *v.* Coe, 3 Ind. 26.

Louisiana.— Northern *v.* Williams, 6 La. Ann. 578; Glover *v.* Dufour, 6 La. Ann. 490, where casks of wine were so badly stowed that in a gale of no great violence they were turned so as to cause leakage through the vents left for fermentation.

Massachusetts.— Sayward *v.* Stevens, 3 Gray 97.

New York.— Palmer *v.* Lorillard, 16 Johns. 348 [*reversing* 15 Johns. 14].

United States.— British, etc., Mar. Ins. Co. *v.* Southern Pac. Co., 55 Fed. 82.

See 44 Cent. Dig. tit. "Shipping," § 535.

The consignee's receipt of goods without objection as to apparent damage makes him liable for freight. Shackleford *v.* Wilcox, 9 La. 33.

cannot recover for the freight of those delivered; [79] but full freight may be recovered for the transportation of goods mentioned in a bill of lading, notwithstanding a loss in quantity on the voyage due to an intrinsic vice of the goods; [80] and the same rule applies where the inherent condition of the cargo prevents delivery without the carrier's fault,[81] and where the loss of a portion of a cargo is caused by a "danger of navigation or peril of the sea," the carrier is entitled to freight upon the portion of the cargo actually delivered; [82] and freight is payable, in the case of wreck, on each package landed, if equal in value to the freight,[83] but no freight is due for the goods which perish by perils of the sea during the course of the voyage; [84] and thus where a voyage is broken up by an overwhelming calamity and the vessel is taken to an intermediate port by salvors, and a portion of her cargo is sold to pay salvage, the portion sold is to be treated as lost, and no freight is recoverable for its carriage; [85] and the same rule applies upon a proper jettison of part of the cargo.[86] Where a vessel puts in at an intermediate port in distress, and it is there found that a portion of the cargo has been rendered worthless by perils of the sea, while the residue is not of sufficient value to warrant continuing the voyage, and such portion is therefore sold by the master and the voyage broken up, no claim for freight can be maintained by the ship-owner; [87] and similarly, where cargo is destroyed in specie by a peril of the sea, which causes the vessel to put into a port of distress, so that such cargo loses its original character at the port of distress, or where the damage to it is such that, if reshipped, a total destruction of it in specie will be inevitable before it can arrive at its port of destination, the shipper is not liable for the freight.[88]

c. Right to Tranship and Forward to Earn Freight. Where a vessel is disabled on the voyage, the master is allowed a reasonable time to reship and tranship so as to earn his full freight; [89] and if the master transhipps the cargo, he may charge the excess of the cost of transhipment over his freight to the owner of the goods; [90] but the owner of the goods cannot be held both for the whole freight originally contracted for and the freight paid on the transhipped goods; [91] and if the master declines or is unable to either repair or tranship, he may be

79. Waring *v.* Morse, 7 Ala. 343.

80. Griswold *v.* New York Ins. Co., 3 Johns. (N. Y.) 321, 3 Am. Dec. 490; Steelman *v.* Taylor, 22 Fed. Cas. No. 13,349, 3 Ware 52.

The consignee of merchandise, who is also owner, is liable for the freight thereon, although without fault of the ship's crew it has, by exposure to severe weather before shipment, become worthless at the time of delivery. Hugg *v.* Augusta Ins., etc., Co., 7 How. (U. S.) 595, 12 L. ed. 834; Seaman *v.* Adler, 37 Fed. 268.

81. The Fortuna, Edw. Adm. 56.

82. Edward Hines Lumber Co. *v.* Chamberlain, 118 Fed. 716, 55 C. C. A. 236; Chubb *v.* Seven Thousand Eight Hundred Bushels of Oats, 5 Fed. Cas. No. 2,709.

83. Smith *v.* Welsh, 22 Fed. Cas. No. 13,126.

84. Frith *v.* Barker, 2 Johns. (N. Y.) 327.

85. The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

86. The Cuba, 6 Fed. Cas. No. 3,458, 3 Ware 260.

87. The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358 note].

88. Ridyard *v.* Phillips, 20 Fed. Cas. No. 11,820, 4 Blatchf. 443.

89. Bradhurst *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 17; The Soblomsten, L. R. 1 A. & E. 293, 36 L. J. Adm. 5, 15 L. T. Rep. N. S. 393, 15 Wkly. Rep. 591. But see Lemont *v.* Lord, 52 Me. 365.

By German law, if a vessel is liable to risk of capture, either party may withdraw from the contract of affreightment; but the master is not obliged to part with the cargo or to tranship it, unless distance freight, as well as all other claims of the ship-owner and the contributions due from the cargo for general average, have been paid or secured. It was held that a demand upon the master to tranship at his own risk and expense was not such a compliance with the German law as obliged him to tranship. The Express, L. R. 3 A. & E. 597, 1 Aspin. 355, 41 L. J. Adm. 79, 26 L. T. Rep. N. S. 956.

The master, who is also consignee of the cargo, cannot charge for freight and charges of landing and reshipment, incurred to forward the cargo to market on another vessel, unless necessity excuses the performance of the contract. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

90. Hugg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425; Searle *v.* Scovell, 4 Johns. Ch. (N. Y.) 218.

91. Hugg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425. And see Crawford *v.* Williams, 1 Sneed (Tenn.) 205, 60 Am. Dec. 146.

called upon to deliver without payment of freight;[92] but before a reasonable time has elapsed he cannot be required to deliver except on payment of full freight and waiver of delivery.[93] The freighter of goods on which freight was to be paid on delivery at the port of destination is bound to pay the whole freight originally contracted for, where transhipment has been found necessary, and the goods have been delivered at the port of destination, although the master consigned the goods under fresh bills of lading in the second vessel to his own agent, and the freight was at a much lower rate than that originally contracted for.[94]

2. Amount and Rate — a. General Rules. The amount and rate of freight is almost universally provided for in the contract of carriage, in which case the contract governs.[95] In the absence of an express contract, the owner of a vessel is entitled to reasonable freight only;[96] and where no provision for freight is made,

92. Bradhurst *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 17; The Bahia, Brown. & L. 292, 11 Jur. N. S. 90, 12 L. T. Rep. N. S. 145.

93. The Bahia, Brown. & L. 292, 11 Jur. N. S. 90, 12 L. T. Rep. N. S. 145.

94. Shipton *v.* Thornton, 9 A. & E. 314, 8 L. J. Q. B. 73, 1 P. & D. 216, 36 E. C. L. 179.

95. Lamar *v.* New York, etc., Steamship Nav. Co., 16 Ga. 558; Philadelphia, etc., R. Co. *v.* Peale, 135 Fed. 606; Blackshere *v.* Patterson, 72 Fed. 204, 18 C. C. A. 508; Gibson *v.* Brown, 44 Fed. 98; Holland *v.* Seven Hundred and Twenty-Five Tons of Coal, 36 Fed. 784; The Querini Stamphalia, 19 Fed. 123; The Defiance, 7 Fed. Cas. No. 3,740, 6 Ben. 162; Keith *v.* Burrows, 2 App. Cas. 636, 3 Aspin. 481, 46 L. J. C. P. 801, 37 L. T. Rep. N. S. 291, 25 Wkly. Rep. 831]; Weguelin *v.* Collier, L. R. 6 H. L. 286, 42 L. J. Ch. 758, 22 Wkly. Rep. 26; Weir *v.* Girvin, [1899] 1 Q. B. 193, 8 Aspin. 470, 4 Com. Cas. 56, 63 L. J. Q. B. 170, 79 L. T. Rep. N. S. 596, 15 T. L. R. 69, 47 Wkly. Rep. 365 [*affirmed* in [1900] 1 Q. B. 45, 9 Aspin. 7, 5 Com. Cas. 40, 69 L. J. Q. B. 168, 81 L. T. Rep. N. S. 687, 16 T. L. R. 31, 48 Wkly. Rep. 179]; Brown *v.* North, 8 Exch. 1, 22 L. J. Exch. 49; Southampton Steam Collier Co. *v.* Clarke, L. R. 6 Exch. 53, 40 L. J. Exch. 8, 19 Wkly. Rep. 214; Mercantile, etc., Bank *v.* Gladstone, L. R. 3 Exch. 233, 37 L. J. Exch. 130, 18 L. T. Rep. N. S. 641, 17 Wkly. Rep. 11; Gibbens *v.* Buisson, 1 Bing. N. Cas. 283, 4 L. J. C. P. 11, 1 Scott 133, 27 E. C. L. 641; Cockburn *v.* Alexander, 6 C. B. 791, 18 L. J. C. B. 74, 60 E. C. L. 791.

The bill of lading is not conclusive evidence of such a contract. Simmes *v.* Marine Ins. Co., 22 Fed. Cas. No. 12,862, 2 Cranch C. C. 618.

A contract to carry, although in writing, does not preclude the showing of the existence of a custom on the river to charge lighterage, in addition to freight, whenever the water is so low throughout the season as to make the use of lighters necessary. Andrews *v.* Roach, 3 Ala. 590, 37 Am. Dec. 718.

Authority of agent of carrier to fix rate. If the shipper of goods on freight contracts for the amount of freight to be charged with the general agent of the owner of the vessel, having reason to know that, although his agency might be general, yet his authority was restricted in that particular instance, the shipper cannot claim to have the terms of the contract fulfilled, as against the principal of such agent. Barnard *v.* Wheeler, 24 Me. 412. But where an advertisement in a newspaper names persons as agents to contract for carriage, a person contracting with one of them is bound to pay freight only to the amount stipulated in such contract, and not to the amount stated in a bill of lading. Trask *v.* Jones, 5 Bosw. (N. Y.) 62.

Where a carrier breaks an entire contract of affreightment by refusing to transport all of an amount of goods contracted to be carried, he is nevertheless entitled to recover for the goods carried, less the damages sustained by the owner of the lumber by reason of the breach of contract. Edward Hines Lumber Co. *v.* Chamberlain, 118 Fed. 716, 55 C. C. A. 236.

96. Simmes *v.* Marine Ins. Co., 22 Fed. Cas. No. 12,862, 2 Cranch C. C. 618.

Mortgagee or purchaser. A mortgagee of the vessel taking possession after shipment is limited to the freight contracted for by the parties (Keith *v.* Burrows, 2 App. Cas. 636, 3 Aspin. 481, 46 L. J. C. P. 801, 37 L. T. Rep. N. S. 291, 25 Wkly. Rep. 831; Brown *v.* North, 8 Exch. 1, 22 L. J. Exch. 49), and the same rule applies to the purchaser of the vessel (Mercantile, etc., Bank *v.* Gladstone, L. R. 3 Exch. 233, 37 L. J. Exch. 130, 18 L. T. Rep. N. S. 641, 17 Wkly. Rep. 11).

Where goods are shipped at an under-deck freight, but are carried on deck and finally delivered without damage, the ship-owner is entitled only to a deck freight. The Water Witch, 4 Fed. Cas. No. 1,971 [*affirmed* in 1 Black 494, 17 L. ed. 155]; Vernard *v.* Hudson, 28 Fed. Cas. No. 16,921, 3 Sumn. 405.

If the consignee agrees to pay the owner of a canal-boat wharfage as part of the freight, he is only liable for the actual wharfage charges incurred. Compton *v.* Heissenbuttel, 16 N. Y. Suppl. 524.

Compensation for carting to the consignee's yard, for which there is no lien in admiralty, may be charged against advances made by consignee. Gaughran *v.* One Hundred and Fifty-One Tons of Coal, 10 Fed. Cas. No. 5,273 [*affirmed* in 18 Fed. Cas. No. 10,520].

Receiving part of the cargo by the assignee of a bill of lading is not an acceptance of the goods not enumerated in the bill of lading, and does not render him liable for freight

but it was evidently the intention of the parties that freight should be paid, it is payable at the general rate prevailing at the time of shipment.[97] Statements in the bill of lading in regard to the weight or quantity of the goods are not conclusive on a question of freight unless expressly made so by the parties,[98] nor are statements in the invoice and entry.[99] As a general principle freight is payable only on so much of a cargo as is delivered, and there is an equitable presumption that such is the contract of the parties, to overcome which a contrary intent must be expressed with reasonable clearness and certainty;[1] and the ship being entitled to freight only on the weight delivered, whenever weighing is necessary in order to compute freight charges, the ship is bound to weigh the cargo;[2] and the evidence showing that the cargo as received was all delivered at the port of destination, the official weight at that place is conclusive of the extent of the carrier's right to freight;[3] but in the absence of contract stipulation or custom to the contrary, if the weight or measurement at the port of departure and the port of delivery differ, the lower rate is to be taken,[4] this rule not being applicable, however, if the parties contract otherwise.[5] The ship-owner in addition to his claim for damages for delay caused by loading the ship in excess of the amount called for by the contract may not recover freight for the transportation of the additional weight;[6] and similarly the owners of a vessel cannot recover dead freight from a shipper on account of his failure to load the full quantity contracted to be carried where there were no facilities for weighing the cargo, and the shipper accepted the estimate of the master that the full quantity had been loaded.[7] Where the cargo

on the whole cargo, but only for freight on the portion actually received by him under the bill of lading. Byrne *v.* Weeks, 4 Abb. Dec. (N. Y.) 657.

97. Guinn *v.* Tyrie, 4 B. & S. 681, 33 L. J. Q. B. 97, 116 E. C. L. 681.

It is not a deviation, increasing the amount of compensation, for receiving and carrying a box of bullion that had been taken from an abandoned vessel, for a vessel to go out of her course to speak another at sea, on seeing a signal for that purpose nor to delay three hours, to take from a foreign ship, bound to a foreign port, shipwrecked mariners of the United States, for the purpose of bringing them direct to the United States. Williams *v.* Box of Bullion, 29 Fed. Cas. No. 17,717, 1 Sprague 57.

98. Cafiero *v.* Welsh, 4 Fed. Cas. No. 2,286, 8 Phila. (Pa.) 130; Brown *v.* Powell Coal Co., L. R. 10 C. P. 562, 2 Aspin. 578, 44 L. J. C. P. 289, 32 L. T. Rep. N. S. 621, 23 Wkly. Rep. 549 (holding that a ship-owner is not estopped by the signature of the bill of lading by the master from showing that the goods or some of them were never actually put on board); Blanchet *v.* Powell's Llantivit Collieries Co., L. R. 9 Exch. 74, 2 Aspin. 224, 43 L. J. Exch. 50, 30 L. T. Rep. N. S. 28, 22 Wkly. Rep. 490 (holding that in an action for freight the master is at liberty, notwithstanding the terms of 18 & 19 Vict. c. 111, § 3 (the Bills of Lading Act), to show that the cargo actually received by him differs in weight from that signed in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of measurement); Hedley *v.* Lapage, Holt 392, 17 Rev. Rep. 649, 3 E. C. L. 158; Geraldes *v.* Donison, Holt N. P. 346, 17 Rev. Rep. 645, 3 E. C. L. 141.

Burden of showing less quantity.— Bills of lading signed by the master are *prima facie* evidence that the quantities named therein were received by him; the onus of rebutting this presumption and of showing that a less quantity than that specified was received lies on the ship-owner. McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 1 Aspin. 160, 25 L. T. Rep. N. S. 317.

Where it is stipulated in the bill of lading that additional freight is to be paid on the goods should their actual value prove to be greater than that stated in the bill, the consignee who pays the stated freight, but knows that the value of the goods is greatly in excess of that stipulated in the bill, is liable for the additional freight, although he is only employed by the consignor to sell the goods on commission. North German Lloyd *v.* Heule, 44 Fed. 100, 10 L. R. A. 814.

99. Nine Thousand Six Hundred and Eighty-One Dry Ox Hides, 18 Fed. Cas. No. 10,273, 6 Ben. 199.

1. Clancy *v.* Dutton, 129 N. Y. App. Div. 23, 113 N. Y. Suppl. 124; Christie *v.* Davis Coal, etc., Co., 95 Fed. 837 [*affirmed* in 110 Fed. 1006, 49 C. C. A. 170].

2. Nine Thousand Six Hundred and Eighty-One Dry Ox Hides, 18 Fed. Cas. No. 10,273, 6 Ben. 199.

3. Cafiero *v.* Welsh, 4 Fed. Cas. No. 2,286, 8 Phila. (Pa.) 130.

4. Gibson *v.* Sturge, L. R. 10 Exch. 622, 1 Jur. N. S. 259, 24 L. J. Exch. 121, 3 Wkly. Rep. 165 [*followed* and *approved* in Buckle *v.* Knopp, L. R. 2 Exch. 333, 36 L. J. Exch. 223, 16 L. T. Rep. N. S. 571, 15 Wkly. Rep. 999].

5. Coulthurst *v.* Sweet, L. R. 1 C. P. 649.

6. Shaw *v.* Folsom, 38 Fed. 356.

7. Barber *v.* Vlasto, 104 Fed. 101.

owner takes the cargo from a vessel before the completion of her voyage, under circumstances which do not entitle her to exemplary damages, she can recover only such damages as will compensate her for the net injury suffered, and from the estimated net freight she would have earned is to be deducted the net amount she earned, or should reasonably have earned, during the time it would have taken her to complete the voyage.[8]

b. Freight Pro Rata. If a cargo is voluntarily accepted by the owner or his agent at any port other than the place of destination, freight *pro rata* is due in proportion to the voyage actually performed.[9] Conversely, freight *pro rata itineris* is not due, unless the owner of the cargo voluntarily agrees to receive it at a place short of its ultimate destination.[10] What amounts to voluntary accept-

8. The Eliza Lines, 102 Fed. 184.

9. *Connecticut.*— Escopiniche *v.* Stewart, 2 Conn. 391.

Louisiana.—Vance *v.* Clark, 1 La. 324.

Michigan.— Rossiter *v.* Chester, 1 Dougl. 154.

New York.— Welch *v.* Hicks, 6 Cow. 504, 16 Am. Dec. 443; Robinson *v.* Marine Ins. Co., 2 Johns. 323; Post *v.* Robertson, 1 Johns. 24.

Texas.—Adams *v.* Haught, 14 Tex. 243.

United States.— The Mohawk, 8 Wall. 153, 19 L. ed. 406; British, etc., Ins. Co. *v.* Southern Pac. Co., 72 Fed. 285, 18 C. C. A. 561 [*affirming* 55 Fed. 82]; Bork *v.* Norton, 3 Fed. Cas. No. 1,659, 2 McLean 422; Hurtin *v.* Union Ins. Co., 12 Fed. Cas. No. 6,942, 1 Wash. 530; The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542; Two Hundred and Thirteen Tons of Coal, 24 Fed. Cas. No. 14,298, 7 Ben. 15.

See 44 Cent. Dig. tit. "Shipping," § 508.

Where there has been a voluntary acceptance by the insurers of a damaged cargo at an intermediate place, before its arrival at the place of destination, the master is entitled to freight *pro rata itineris.* McKibbin *v.* Peck, 39 N. Y. 262; Smyth *v.* Wright, 15 Barb. (N. Y.) 51; Van Norden *v.* Littlejohn, 4 N. C. 457; The Mohawk, 8 Wall. (U. S.) 153, 19 L. ed. 406; British, etc., Mar. Ins. Co. *v.* Southern Pac. Co., 72 Fed. 285, 18 C. C. A. 561 [*affirming* 55 Fed. 82]. But see Atlantic Mut. Ins. Co. *v.* Bird, 2 Bosw. (N. Y.) 195.

Where a vessel is taken to an intermediate port by salvors, she having encountered an overwhelming calamity, her owners may recover *pro rata* freight as to the portion of the cargo not sold for salvage or for other purposes, where there has been a mutual dispensation by both parties of any further prosecution of the voyage. The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542. And see Smyth *v.* Wright, 15 Barb. (N. Y.) 51; The Leptir, 5 Aspin. 411, 52 L. T. Rep. N. S. 768.

Where property is transported on freight which is captured on the voyage and afterward recaptured, and restored upon payment of salvage, freight is to be paid in proportion to the voyage performed and the property saved, after deducting the salvage (Pinto *v.* Atwater, 1 Day (Conn.) 193); and where the vessel is captured and the cargo condemned as enemy's property, freight *pro rata itineris* was allowed on the outward voyage, as on a *quantum meruit* (Hooe *v.* Mason, 1 Wash. (Va.) 207; The Societe, 9 Cranch (U. S.) 209, 3 L. ed. 707. But see New York Mar. Ins. Co. *v.* United Ins. Co., 9 Johns. (N. Y.) 186).

10. *Louisiana.*— Vance *v.* Clark, 1 La. 324.

Michigan.— Rossiter *v.* Chester, 1 Dougl. 154.

New York.— New York Mar. Ins. Co. *v.* United Ins. Co., 9 Johns. 186; Scott *v.* Libby, 2 Johns. 336, 3 Am. Dec. 431.

Ohio.—Whitney *v.* Rogers, 2 Disn. 421.

United States.— Caze *v.* Baltimore Ins. Co., 7 Cranch 358, 3 L. ed. 370; The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf 358 note]; The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

England.— Metcalfe *v.* Britannia Ironworks Co., 2 Q. B. D. 423, 3 Aspin. 407, 46 L. J. Q. B. 443, 36 L. T. Rep. N. S. 451, 25 Wkly. Rep. 720; The Soblomsten, L. R. 1 A. & E. 293, 36 L. J. Adm. 5, 15 L. T. Rep. N. S. 393, 15 Wkly. Rep. 591; Castel *v.* Trechman, Cab. & E. 276; The Newport, Swab. 335, 6 Wkly. Rep. 310. And see Osgood *v.* Groning, 2 Campb. 466, 11 Rev. Rep. 765.

See 44 Cent. Dig. tit. "Shipping," § 508.

Where a cargo is sold at an intermediate port on account of its perishable nature, the voyage having been defeated by an overwhelming calamity, *pro rata* freight is not recoverable (The Nathaniel Hooper, 17 Fed. Cas. No. 10,032, 3 Sumn. 542); and the same rule applies where goods are sold to pay for repairs to the vessel (Hopper *v.* Burness, 1 C. P. D. 137, 3 Aspin. 149, 45 L. J. C. P. 377, 34 L. T. Rep. N. S. 528, 24 Wkly. Rep. 612); and where goods damaged on the voyage are landed at an intermediate port, and sold without the assent of their owner, the shipowners are not entitled to freight *pro rata itineris* (Acatos *v.* Burns, 3 Ex. D. 282, 47 L. J. Exch. 566, 26 Wkly. Rep. 624; Hunter *v.* Prinsep, 10 East 378, 10 Rev. Rep. 328, 103 Eng. Reprint 818; Vlierboorn *v.* Chapman, 8 Jur. 811, 13 L. J. Exch. 384, 13 M. & W. 230. And see Morris *v.* Robinson, 3 B. & C. 196, 5 D. & R. 35, 27 Rev. Rep. 322, 10 E. C. L. 97); and to entitle a ship-owner, in the absence of a special contract, to demand *pro rata* freight, where the goods have been sold at an intermediate port, being so much damaged as not to be worth forwarding, it must be shown that the owner of the goods had an option of having them sent on or of

ance depends largely upon the facts and circumstances of each particular case,[11] and may be inferred from the shipper's or consignee's actions,[12] it being essential to sustain a claim for *pro rata* freight that there be such a voluntary acceptance of the goods by their owner at an intermediate port as to raise a fair inference that further carriage of the goods was dispensed with.[13] In the case of a general ship, the contract is divisible in its nature, and freight is only due for what is delivered.[14]

c. Deductions and Offsets. Any damage in regard to the carriage of the goods may be deducted by way of recoupment,[15] which may embrace whatever

accepting them at such intermediate port (Hill *v.* Wilson, 4 C. P. D. 329, 4 Aspin. 198, 48 L. J. C. P. 764, 41 L. T. Rep. N. S. 412).

The master, although agent for the ship and cargo to the extent of being empowered, in a case of extreme urgency, to sell either or both, is not authorized to accept the cargo on behalf of its owner short of the port of delivery, and cannot thereby bind him for *pro rata* freight (The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358 note]); and laying claim to the proceeds of a sale of a cargo made by the master at an intermediate port, or bringing suit for such proceeds, does not amount, in law, to a voluntary acceptance of the cargo, or to a ratification of the act of the master in breaking up the voyage, binding the shipper to pay *pro rata* freight (The Ann D. Richardson, *supra*).

The act of congress exempting owners of vessels as common carriers from responsibility for the accidental destruction of goods by fire does not entitle the carrier to *pro rata* freight for goods so destroyed. Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75.

11. See cases cited *infra*, this note.

Facts held to constitute voluntary acceptance see Rossiter *v.* Chester, 1 Dougl. (Mich.) 154, holding that where the owner of goods, knowing that the voyage had been abandoned, its further prosecution having become impossible or extremely hazardous, demanded his goods at an intermediate port from the agent of the forwarders with whom they were stored, tendered payment of their charges for storage, and brought replevin to recover possession, on the refusal of such agent to deliver them, he was deemed to have voluntarily accepted them at such port, and the carrier was entitled to freight *pro rata itineris*.

Facts held not to constitute voluntary acceptance see Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75; Adams *v.* Haught, 14 Tex. 243, holding that where the master refuses to repair his ship and send on the goods, or to procure other means for the purpose, and the owner of the goods then receives them, this is not such an acceptance of the goods as will entitle the ship-owner to a *pro rata* freight.

12. Gray *v.* Waln, 2 Serg. & R. (Pa.) 229, 7 Am. Dec. 642.

13. The Soblomsten, L. R. 1 A. & E. 293, 36 L. J. Adm. 5, 15 L. T. Rep. N. S. 393, 15 Wkly. Rep. 591.

Acceptance of the proceeds of goods sold at an intermediate port does not amount to voluntary acceptance within the meaning of the rule. Escopiniche *v.* Stewart, 2 Conn. 391 (holding that where goods shipped on freight to a certain port were carried to a different port, where they were taken and sold by a stranger, who remitted the proceeds to the shipper, the acceptance of such proceeds was not equivalent to a voluntary acceptance of the goods, so as to render him liable for proportional freight); The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358 note].

14. Vance *v.* Clark, 1 La. 324. And see Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177.

15. Aldrich *v.* Cargo of 246-5/20 Tons of Egg Coal, 117 Fed. 757 (holding that where a canal-boat laden with coal filled and sank, after reaching her dock, through leakage, and the negligence of her captain, and the consignee, whose duty it was to discharge the cargo, did so after waiting two days, being put to additional expense because the boat was under water, he was justified in such action to save the cargo from further damage and possible loss, and was entitled to offset the increased cost of discharging against the carrier's claim for freight); Relyea *v.* New Haven Rolling-Mill Co., 75 Fed. 420, 42 Conn. 579 (holding that where a master who is also owner of a vessel gives a shipper a bill of lading, reciting the receipt of a certain amount of iron, and an agreement to deliver it to the consignees who, relying on the correctness of the recital, pay the shipper for more iron than is actually on board, their loss may be recouped against a claim for the freight, which was to be paid by the consignees, subject, however, to limitation to the amount claimed for freight); The Gwalia's Cargo, 26 Fed. 919; Dedekam *v.* Vose, 7 Fed. Cas. No. 3,732 [*affirmed* in 7 Fed. Cas. No. 3,729, 3 Blatchf. 44]; The Governor Carey, 10 Fed. Cas. No. 5,645*a*, 2 Hask. 487 (in case of wreck from the fault of the master in carrying cargo on deck, amounts paid by the owners of the cargo in recovering their property); Leland *v.* Agnew, 15 Fed. Cas. No. 8,236 (holding that where, upon the refusal of a ship's owners to deliver tobacco at the wharf specified in the bill of lading, the owners of the tobacco sent lighters, and had the tobacco removed to the wharf at their own expense, they might properly offset the freight charges); Thatcher *v.*

could be recovered in a cross action for breach of the contract of affreightment;[16] and where the injury done by the carrier to the cargo exceeded the freight, to that extent the carrier's right to freight will be defeated.[17] But to sustain the offset the damage must be clearly shown,[18] and the demands must be mutual,[19] and to be recouped must be a part of the transaction sued on.[20] The owners of the cargo cannot split up their demand for loss and damage and apply part of it as an offset to the freight;[21] and thus a libellant who insists upon recovering damages to a cargo in an independent suit cannot apply any portion of same by way of abatement in a suit for the recovery of freight, although he has set up, in his answer to the latter suit, such damages by way of abatement.[22] When a bill of lading recites a shipment in bulk as so many tons, at so much freight per ton, it will be construed as a contract for carriage in bulk, and the freight is not subject to reduction because the cargo when delivered does not weigh out the quantity stated.[23]

McCulloh, 23 Fed. Cas. No. 13,862, Olcott 365 (holding that where a consignee receives a cargo with knowledge of a deviation of the vessel during the voyage, and the ship-owners bring an action to recover freight, the court will not require the consignee to bring a cross action, but may adjust and recompense, by way of recoupment, any special damage which has been sustained by the consignee because of the deviation). And see Humphreys *v.* Reed, 6 Whart. (Pa.) 435.

Claim for goods never actually put on board.—In an action by the owners of a vessel, of whom the master is one, to recover freight for goods actually carried, delivered, and accepted by the consignee, the latter cannot recoup in damages a loss sustained by him by reason of a failure to deliver cargo never actually put on board the vessel, but which the master, without other authority than that which belonged to him in that capacity, improperly receipted for in the bill of lading, for the owners cannot be bound by such actions of the master (Sears *v.* Wingate, 3 Allen (Mass.) 103); and a custom to deduct from the freight earned by a vessel in carrying goods the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the carrier shall not be permitted to show that he delivered all he received, is unreasonable and invalid (Law *v.* Botsford, 26 Fed. 651).

Deductions disallowed see Costello *v.* 734,700 Laths, etc., 44 Fed. 105 (holding that where the bill of lading contains no provision requiring the vessel to pile her cargo of laths in the yard of the consignee, the expense of piling them cannot be allowed the consignee in reduction in an action for freight); Martin *v.* 182,259 Feet of Hemlock Lumber, 37 Fed. 415; Eaton *v.* Neumark, 33 Fed. 891.

But in England where the question arose in a law court it was held that the person liable for the freight cannot set off unliquidated damages to which he claims to be entitled as against the carrier, although arising from breaches of the contract of affreightment as for goods lost or injured. Seeger *v.* Duthie, 8 C. B. 45, 6 Jur. N. S. 1095, 29 L. J. C. P. 253, 2 L. T. Rep. N. S. 483, 98 E. C. L. 45; Meyer *v.* Dresser, 16 C. B. N. S. 646, 33 L. J. C. P. 289, 10 L. T. Rep. N. S. 612, 12 Wkly. Rep. 983, 111 E. C. L. 646, holding that a consignee of goods, or an indorser of a bill of lading, has no right to set off the value of missing goods against the freight payable in respect to the goods delivered.

Under code practice the damages may be counter-claimed (Byrne *v.* Weeks, 4 Abb. Dec. (N. Y.) 657), particularly where the contract so provides (The Garston *v.* Hickie, 18 Q. B. D. 17, 6 Aspin. 71, 56 L. J. Q. B. 38, 55 L. T. Rep. N. S. 879, 35 Wkly. Rep. 33).

16. Thatcher *v.* McCulloh, 23 Fed. Cas. No. 13,862, Olcott 365.

17. Ewart *v.* Kerr, 2 McMull. (S. C.) 141; Bradstreet *v.* Heran, 3 Fed. Cas. No. 1,792*a*, 2 Blatchf. 116 [*affirming* 3 Fed. Cas. No. 1,792, 1 Abb. Adm. 209], holding that upon a libel *in personam* by the master against the consignee to recover freight, where the damages to the cargo exceed the freight, the libel will be dismissed.

18. Nye *v.* Ayres, 1 E. D. Smith (N. Y.) 532; Brouty *v.* Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves, 21 Fed. 590 [*affirmed* in 23 Fed. 106].

19. Hatch *v.* Tucker, 12 R. I. 501, 34 Am. Rep. 707; Sumner *v.* Walker, 30 Fed. 261, holding that a through bill of lading, providing for a transhipment to another vessel at an intermediate port, and for payment of the whole freight at the port of discharge, does not import the joint liability of each, or that the latter carrier is the agent of the former, but independent rights of the latter ship, and does not impose upon the latter vessel any liability for damages occasioned by prior negligence, and she is therefore entitled to collect her just freight upon delivery of the goods, without offset or deduction for prior damages without her fault.

20. Ryder *v.* Hall, 7 Allen (Mass.) 456; Sears *v.* Wingate, 3 Allen (Mass.) 103.

21. The Ethel, 8 Fed. Cas. No. 4,540, 5 Ben. 154.

22. Brower *v.* The Water Witch, 4 Fed. Cas. No. 1,971, 19 How. Pr. (N. Y.) 241 [*affirmed* in 1 Black (U. S.) 494, 17 L. ed. 155].

23. Planters' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130.

3. Payment and Tender — a. General Rules; When Payable; Medium of Payment. Payment of freight cannot be demanded before the consignee has had opportunity to examine the goods;[24] and although the holder of the bill of lading cannot require delivery of the cargo without paying freight, he may require it to be discharged so that it can be inspected by him.[25] In the absence of agreement to the contrary freight is payable in cash; but the parties may regulate the matter between themselves and arrange for another medium of payment, such as commercial paper,[28] in which case, however, if the paper is dishonored upon maturity the payer is not discharged from his original liability.[27] Where the bill of lading is silent as to the time for payment of the freight, the law implies that it is to be paid on delivery of the goods at the port of discharge;[28] and a tender of the freight at the port of discharge will relieve the shipper or consignee from liability for costs or expenses subsequent thereto,[29] to which a refusal to pay would subject him;[30] but the master, on a tender of freight at the ship, may take a reasonable time to ascertain the correct amount from the consignees of the ship, but cannot in the meantime order the goods to be stored at the expense of the owner.[31]

b. To Whom Payable. The freight is payable primarily to the person with whom the contract was made,[32] usually the owner or any one duly authorized by him to receive it.[33] The master as a general rule represents the owner so that

24. Lanata *v.* The Henry Grinnell, 13 La. Ann. 24; Brittan *v.* Barnaby, 21 How. (U. S.) 527, 10 L. ed. 177.

25. The Treasurer, 24 Fed. Cas. No. 14,159, 1 Sprague 473.

26. The Bird of Paradise, 5 Wall. (U. S.) 545, 18 L. ed. 662.

The insolvency of a shipper, occurring while the goods are in transit or before they are delivered, will not absolve the carrier from an agreement to take an acceptance on time instead of cash for the freight, or authorize him when he has made such agreement to retain the goods until the freight is paid. The Bird of Paradise, 5 Wall. (U. S.) 545, 18 L. ed. 662.

27. Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162. And see Bacon *v.* Westervelt, 29 Conn. 591.

28. British, etc., Mar. Ins. Co. *v.* Southern Pac. Co., 72 Fed. 285 [*affirming* 55 Fed. 82].

A general but not universal practice in a particular port of ship-owners to allow goods brought on their vessels to be transported to the warehouse of the consignee and inspected before freight is paid is not such a custom as will displace the ordinary maritime right to demand freight on the delivery of the goods on the wharf. The Eddy, 5 Wall. (U. S.) 481, 18 L. ed. 486.

29. Dedekam *v.* Vose, 7 Fed. Cas. No. 3,732 [*affirmed* in 7 Fed. Cas. No. 3,729, 3 Blatchf. 44], where an offer by a shipper to pay a balance of freight, deducting damages to the goods, to be ascertained by arbitration or sale at auction, was held a sufficient tender to relieve him from payment of costs.

The refusal of the ship's agents to deliver cargo partly damaged, except on the payment of a precise sum by consignee, which is in excess of the amount due, dispenses with the necessity of a tender by the consignee. The Tangier, 32 Fed. 230. Similarly where a larger sum was demanded for freight by the master than was due, and the demand was so made as to amount to an announcement by the master that it was useless to tender a smaller sum, as it would be refused, these facts amounted to a dispensation of a tender. The Norway, Brown. & L. 404, 11 Jur. N. S. 892, 13 L. T. Rep. N. S. 50, 3 Moore P. C. N. S. 245, 13 Wkly. Rep. 1085, 16 Eng. Reprint 92.

Tender held sufficient see Luard *v.* Butcher, 2 C. & K. 29, 61 E. C. L. 29.

30. Brittan *v.* The Alboni, 4 Fed. Cas. No. 1,902 [*reversed* on other grounds in 21 How. 527, 16 L. ed. 177].

31. The Diadem, 7 Fed. Cas. No. 3,875, 4 Ben. 247.

32. Carver Carriage by Sea (5th ed.), § 588.

33. Bixby *v.* Adams, 2 Brev. (S. C.) 352 (holding that where, by a covenant, a ship is to be given up to defendant, as owner, upon a certain event, he paying the sailing expenses, the freight earned by the voyage in question belongs to defendant); Boyd *v.* Mangles, 3 Exch. 387, 18 L. J. Exch. 273; Fox *v.* Nott, 6 H. & N. 630, 7 Jur. N. S. 663, 30 L. J. Exch. 259. See Walshe *v.* Provan, 1 C. L. R. 823, 8 Exch. 843, 22 L. J. Exch. 355; Mangles *v.* Dixon, 3 H. L. Cas. 702, 10 Eng. Reprint 278. But see Johnson *v.* Strader, 3 Mo. 359, holding that the law concerning ships and seagoing vessels is not applicable to flat-boats and fresh-water craft. The person making the contract for freight in flat-boats, and not the owner of the boats is entitled to it.

Obligee of bottomry bond.— The receipt of freight by the obligee of a bottomry bond is in law a receipt of it by the ship-owner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship. Benson *v.* Chapman, 8 C. B. 950, 2 H. L. Cas. 696, 13 Jur. 969, 65 E. C. L. 950, 9 Eng. Reprint 1256.

payment of freight to him is equivalent to payment to the owner in the absence of notice from the owner not to pay him;[34] and the master, having a special property

A ship's husband is entitled to receive freight, and to deduct his disbursements therefrom. Harris *v.* Reynolds, 4 Wkly. Rep. 278.

Part-owner.—An action for freight may be brought by a part-owner on behalf of himself and the other part-owners. De Hart *v.* Stevenson, 1 Q. B. D. 313, 45 L. J. Q. B. 575, 24 Wkly. Rep. 367. And where one coöwner assigns his interest in the ship and voyage to another coöwner, the assignee can maintain an action in admiralty to recover freight on property transported on such voyage. Swett *v.* Black, 23 Fed. Cas. No. 13,690, 1 Sprague 574. But it is held that a part-owner is not entitled to any part of the freight earned upon a voyage from the setting out of which he dissents. Boson *v.* Sandford, Carth. 58, 90 Eng. Reprint 638, 3 Lev. 258, 83 Eng. Reprint 678.

Assignee of freight.—The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, without the mention of the word "freight." Lindsay *v.* Gibbs, 22 Beav. 522, 2 Jur. N. S. 1039, 4 Wkly. Rep. 788, 52 Eng. Reprint 1209. But an asssignment of the freight and profits of a ship does not extend to profits not in existence, actual or potential, at the time of the assignment. Robinson *v.* McDonnell, 2 B. & Ald. 134, 5 M. & S. 228. Although an express assignment by the owners of a ship of freight to be earned is good (Douglas *v.* Russell, 4 Sim. 524, 6 Eng. Ch. 524, 58 Eng. Reprint 196 [*affirmed* in 1 Myl. & K. 488, 7 Eng. Ch. 488, 39 Eng. Reprint 766]), an assignment to a third party of freight, or a fixed sum out of freight, passes, as between part-owners, only net freight, but a mortgagee, not in possession when the freight was received, has no *locus standi* afterward to insist on such a construction (The Edmund, 29 L. J. Adm. 76, 2 L. T. Rep. N. S. 192, Lush. 57). The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods who was also the assignor of the freight. Weguelin *v.* Collier, L. R. 6 H. L. 286, 42 L. J. Ch. 758, 22 Wkly. Rep. 26.

Assignee of ship.—The transfer of a ship before delivery of the cargo passes the right to sue for the freight; and the law implies a promise to pay by the consignee receiving the goods (Pelayo *v.* Fox, 9 Pa. St. 489; Lindsay *v.* Gibbs, 2 De G. & J. 690, 5 Jur. N. S. 376, 28 L. J. Ch. 692, 7 Wkly. Rep. 320, 60 Eng. Ch. 533, 44 Eng. Reprint 1435; Case *v.* Davidson, 5 M. & S. 79); and if the owner of a ship, having chartered her for a voyage, assigns her before its completion, and afterward assigns the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight as incident to the ship (Morrison *v.* Parsons, 2 Taunt. 407, 11 Rev. Rep. 622); but he cannot sue on the charter-party otherwise than in the name of the assignor (Morrison *v.* Parsons, *supra*). A covenant in a charter-party to pay freight to the owner for the hire of the vessel is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterward becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. Splidt *v.* Bowles, 10 East 279, 10 Rev. Rep. 296, 103 Eng. Reprint 781.

A mortgagee of a ship does not ordinarily speaking obtain by the mortgage alone a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains dominus of the ship, with regard to everything relating to its employment or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession (Keith *v.* Burrows, 2 App. Cas. 636, 3 Aspin. 481, 46 L. J. C. P. 801, 37 L. T. Rep. N. S. 291, 25 Wkly. Rep. 831); and a mere mortgage of a ship does not give a mortgagee a right to the earnings of a ship received by the mortgagor after the execution of the mortgage, but before the mortgagee takes possession (Willis *v.* Palmer, 7 C. B. N. S. 340, 6 Jur. N. S. 732, 29 L. J. C. P. 194, 2 L. T. Rep. N. S. 626, 8 Wkly. Rep. 295, 97 E. C. L. 340); the mortgagee on taking possession, however, becomes the owner and by virtue of that ownership is entitled to receive the freight which, by contract or otherwise, is lawfully payable (Keith *v.* Burrows, *supra*; Rusden *v.* Pope, L. R. 3 Exch. 269, 37 L. J. Exch. 137, 18 L. T. Rep. N. S. 651, 16 Wkly. Rep. 1122; Dean *v.* McGhie, 4 Bing. 45, 13 E. C. L. 392, 2 C. & P. 387, 12 E. C. L. 632, 5 L. J. C. P. O. S. 44, 12 Moore C. P. 185; Kerswell *v.* Bishop, 2 Cromp. & J. 529, 1 L. J. Exch. 227, 2 Tyrw. 602); and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property, and to require the freight to be paid to him (Wilson *v.* Wilson, L. R. 14 Eq. 32, 1 Aspin. 265, 41 L. J. Ch. 423, 26 L. T. Rep. N. S. 346, 20 Wkly. Rep. 436). When the entire ship is mortgaged, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of the voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight. Beynon *v.* Godden, 3 Ex. D. 263, 4 Aspin. 10, 48 L. J. Exch. 80, 39 L. T. Rep. N. S. 82, 26 Wkly. Rep. 672. A claimant for necessaries has no equity to precede the mortgagee. The Two Ellens, L. R. 4 P. C. 161, 1 Aspin. 208, 41 L. J. Adm. 33, 26 L. T. Rep. N. S. 1, 8 Moore P. C. N. S. 398, 20 Wkly. Rep. 592, 17 Eng. Reprint 361.

34. Atkinson *v.* Cotesworth, 3 B. & C. 647,

in the vessel, may declare for the freight of goods as carried in his vessel, although he is not owner;[35] and a master with whom a contract is made in his own name may sue for freight under it;[36] but a payment to the owner absolves the shipper,[37] for the master has no right to freight as against the owner, although the latter may be in debt;[38] and where the bill of lading provides that freight shall be payable to a third party, and not to the ship-owner, payment for freight to the master or ship-owner affords no answer to an action by the third party in the name of the ship-owner for the non-payment of freight.[39]

c. Persons Liable. Primarily the liability for freight is on the person who makes the contract;[40] that is to say, where there is no charter-party the shipper of the goods or the person on whose behalf they were shipped;[41] and the shipper, being the owner of the goods sent by a general ship, is liable for the freight, at all events, independently of the bill of lading; and it is immaterial whether the ownership appears on the bill of lading or not;[42] and the actual shipper is liable, although acting in fact only as agent for another, unless he made it clear in contracting that he did not intend to be bound;[43] and although the master signs a bill of lading, expressing that upon the delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor, but may hold the latter liable as upon an ordinary bill of lading.[44] The consignee of cargo and holder of the bill of lading is also liable for freight,[45]

10 E. C. L. 294, 1 C. & P. 339, 12 E. C. L. 203, 5 D. & R. 552, 3 L. J. K. B. O. S. 104, 27 Rev. Rep. 450; Guion *v.* Trask, 1 De G. F. & J. 373, 6 Jur. N. S. 185, 29 L. J. Ch. 337, 1 L. T. Rep. N. S. 469, 8 Wkly. Rep. 266, 62 Eng. Ch. 286, 45 Eng. Reprint 403. And see Carver Carriage by Sea (5th ed.), § 589.

If the owner appoints an agent to collect the freight the master's authority is superseded. The Edmond, 29 L. J. Adm. 76, 2 L. T. Rep. N. S. 192, Lush. 57.

35. Shields *v.* Davis, 4 Campb. 119, 6 Taunt. 65, 1 E. C. L. 510.

36. Seeger *v.* Duthie, 8 C. B. N. S. 72, 7 Jur. N. S. 239, 30 L. J. C. P. 65, 3 L. T. Rep. N. S. 478, 9 Wkly. Rep. 166, 98 E. C. L. 72.

37. Atkinson *v.* Cotesworth, 3 B. & C. 647, 10 E. C. L. 294, 1 C. & P. 339, 12 E. C. L. 203, 5 D. & R. 552, 3 L. J. K. B. O. S. 104, 27 Rev. Rep. 450.

38. Smith *v.* Plummer, 1 B. & Ald. 575, 19 Rev. Rep. 391; Atkinson *v.* Cotesworth, 3 B. & C. 647, 10 E. C. L. 294, 1 C. & P. 339, 12 E. C. L. 203, 5 D. & R. 552, 3 L. J. K. B. O. S. 104, 27 Rev. Rep. 450; Gibson *v.* Ingo, 6 Hare 112, 31 Eng. Ch. 112, 67 Eng. Reprint 1103. And see Carver Carriage by Sea (5th ed.), § 589.

39. Kirchner *v.* Venus, 5 Jur. N. S. 395, 12 Moore P. C. 361, 7 Wkly. Rep. 455, 14 Eng. Reprint 948.

40. Carver Carriage by Sea (5th ed.), § 602.

41. Cawthron *v.* Trickett, 15 C. B. N. S. 754, 33 L. J. C. P. 182, 9 L. T. Rep. N. S. 609, 71 Wkly. Rep. 311, 109 E. C. L. 754; Dickenson *v.* Lano, 2 F. & F. 188; Fox *v.* Nott, 6 H. & N. 630, 7 Jur. N. S. 663, 30 L. J. Exch. 259.

Equity jurisdiction.— A court of equity will not entertain a bill by a ship-owner against a freighter for an account of what is due in respect of freight, although the charter-party expressed that the freight was to be paid according to the quantity of the cargo, and it was charged that in the bill of lading that quantity was stated untruly. Long *v.* Young, 2 L. J. Ch. O. S. 139. But the court will entertain a suit for an account of the freight of a ship grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognized or enforced as a whole, for want of being registered, provided the title to the freight is distinct from, and does not necessarily depend upon, a title to the ship claimed under such contract. Davenport *v.* Whitmore, 6 L. J. Ch. 58, 2 Myl. & C. 177, 14 Eng. Ch. 177, 40 Eng. Reprint 608.

42. Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162.

43. Carver Carriage by Sea (5th ed.) § 602. And see Kennedy *v.* Gouveia, 3 D. & R. 503, 26 Rev. Rep. 616, 16 E. C. L. 174.

44. Christy *v.* Row, 1 Taunt. 300, 9 Rev. Rep. 776.

45. Hairy *v.* Dennistoun, 5 Rob. (La.) 130; Smith *v.* Flowers, 6 Mart. (La.) 12; Gates *v.* Ryan, 37 Fed. 154.

Effect of clause "He or they paying freight."— The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, "he or they paying freight for the said goods," is introduced for the benefit of the master only, and not for the benefit of the consignor; and therefore the master is not bound to the consignor to withhold the delivery of the goods, unless the consignee or his assigns pay the freight (Shepard *v.* De Bernales, 13 East 565, 12 Rev. Rep. 442, 104 Eng. Reprint 490 [*followed* in Domett *v.* Beckford, 5 B. & Ad. 521, 2 N. & M. 374, 3 L. J. K. B. 10, 27 E. C. L. 223], holding that

although but an agent to sell,[46] as is also the assignee of the bill of lading, who received the goods,[47] unless the assignor is bound by charter-party to pay it,[48] or unless the assignee had bound himself by an express agreement to pay it as surety for the assignor;[49] and the indorsee of a bill of lading which directs the goods to be delivered to order or to assigns, paying freight, is liable for the freight, although he is only acting as broker for the consignee; and although a long period has elapsed since the landing of the goods without any demand of freight, he is bound not to deliver the goods till he knows that freight has been paid,[50] such liability resulting not from the original contract of affreightment, but from a new contract, the consideration for which is the delivery of the goods;[51] and, further, an implied undertaking by one who receives the goods to pay the freight may be inferred from the mere receipt, although he has not presented any bill of lading or asked for delivery, if the course of business between the parties on previous occasions has been for him to receive goods consigned to him and pay the freight on them;[52] and it is held generally that whoever

it does not vary the rule that the consignor was also the charterer of the ship); and if goods shipped by a general ship by a bill of lading to be delivered to a certain consignee "on paying the freight" are delivered to the consignee without freight being paid, the owner is not thereby discharged from his liability for the freight (Grant *v.* Wood, 21 N. J. L. 292, 47 Am. Dec. 162; Jobbitt *v.* Goundry, 29 Barb. (N. Y.) 509; Barker *v.* Havens, 17 Johns. (N. Y.) 234, 8 Am. Dec. 393). The rule had been previously held to be otherwise. Drew *v.* Bird, M. & M. 156, 22 E. C. L. 492.

The consignee of goods, where there is no bill of lading, is not in general liable for the freight; but prior dealings with him, and payments by him of the freight on former occasions of the same kind, are evidence to show that in the particular case he contracted on the receipt of the goods to pay the freight. Coleman *v.* Lambert, 9 L. J. Exch. 43, 5 M. & W. 502.

46. Gates *v.* Ryan, 37 Fed. 154.

Ship-brokers who have no connection with a cargo, except as brokers to sell same, collect the amounts due, and pay the freight, are not as a general rule liable for the freight. Damora *v.* Craig, 48 Fed. 736.

In England where a ship-owner has, under section 67 of the Merchant Shipping Act, Amendm. Act (1862) (25 & 26 Vict. c. 63), deposited goods with a warehouseman, and the consignee for sale has deposited the amount of freight under section 70 of the same act, the ship-owner's lien is discharged, and the consignee may obtain delivery of the goods *ex* warehouse without a contract being implied on his part to undertake any personal liability for the amount of the freight. White *v.* Furness, [1895] A. C. 40, 7 Aspin. 574, 64 L. J. Q. B. 161, 72 L. T. Rep. N. S. 157, 11 Reports 53.

47. Trask *v.* Duvall, 24 Fed. Cas. No. 14,144, 4 Wash. 181; Stindt *v.* Roberts, 5 D. & L. 460, 12 Jur. 518, 17 L. J. Q. B. 166, 2 Saund. & C. 212 (holding that an assignee of a bill of lading who claims and receives goods under it is bound by the terms of the bill of lading not only as to the amount of freight, but also for demurrage, if he does not unload the ship within the time limited by the bill of lading, according to its terms, and there is a sufficient consideration arising on the claim of the goods by the consignee, from which the law will infer a promise by the consignee to pay such demurrage as well as the freight); Renteria *v.* Ruding, Mont. & M. 511, 22 E. C. L. 575.

48. Trask *v.* Duvall, 24 Fed. Cas. No. 14,144, 4 Wash. 181.

49. Dayton *v.* Parke, 67 Hun (N. Y.) 137, 22 N. Y. Suppl. 613 [*reversed* on other grounds in 142 N. Y. 391, 37 N. E. 642]; Trask *v.* Duvall, 24 Fed. Cas. No. 14,144, 4 Wash. 181.

50. Bell *v.* Kymer, 3 Campb. 545, 1 Marsh. 146, 5 Taunt. 477, 1 E. C. L. 247.

But an indorsee of a bill of lading who has indorsed the same over before the arrival of the vessel and delivery of the cargo does not, under 18 & 19 Vict. c. 111, § 1, remain liable for the freight. Smurthwaite *v.* Wilkins, 11 C. B. N. S. 842, 31 L. J. C. P. 214, 5 L. T. Rep. N. S. 842, 7 L. T. Rep. N. S. 65, 10 Wkly. Rep. 386, 103 E. C. L. 842.

51. Kemp *v.* Clark, 12 Q. B. 647, 12 Jur. 676, 17 L. J. Q. B. 305, 64 E. C. L. 647.

52. Pinder *v.* Wilks, 1 Marsh. 248, 5 Taunt. 612, 1 E. C. L. 314 (holding that an implied assumpsit for freight, upon the delivery of goods without first receiving the freight, will not lie against three persons for whose use the cargo was purchased, but who are not the consignees or holders of the bills of lading, and who have assigned all their effects to a trustee for the benefit of their creditors and themselves, receiving the goods as agents for that trustee); Wilson *v.* Kymer, 1 M. & S. 157. *Compare* Moorsom *v.* Kymer, 3 Campb. 549 note, 2 M. & S. 303, 15 Rev. Rep. 261.

Receiving goods as evidence of promise to pay.— The master having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, is evidence of a new contract and promise on the part of such purchaser, as

receives cargo from a vessel under a bill of lading, in the absence of a different understanding, is liable for the freight;[53] and although freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order;[54] but where goods are delivered to persons who are neither assignees of the bills of lading nor owners of the cargo until after delivery, they are not liable for the freight;[55] and no contract to accept the cargo, or any part of it, within a reasonable time, and to pay the freight, can be inferred from the mere fact of the assignee of the bill of lading presenting it to the captain and demanding the delivery of the cargo.[56] Captors substitute themselves in the place of the original owners, and take the property *cum onere*. They are therefore responsible for the freight which then attached upon the property.[57]

d. Advance Freight and the Recovery Back Thereof. Where freight is paid in advance and the voyage is not performed or the contract of affreightment not fulfilled, the ship-owner cannot without an express agreement to this effect retain it;[58] and such agreement must be clear and unambiguous in its terms;[59] and this rule cannot be overcome by proof of a local custom that freight prepaid is not to be returned in case the vessel is lost on the voyage.[60] Thus if goods are lost through improper storage, advance freight paid is recoverable;[61] and generally where goods are lost at sea through the negligence of the ship, the shipper may recover the freight paid in advance;[62] and the shipper is entitled to recover back freight which he had advanced on goods shipped even though the voyage was broken up and the delivery of the goods prevented by the dangers of the sea, there being no evidence of a special contract varying that contained in the bill

the ultimate appointee of the shippers for the purpose of delivery, to pay the freight. Cock *v.* Taylor, 2 Camph. 587, 13 East 399, 12 Rev. Rep. 378, 104 Eng. Reprint 424.

53. Dayton *v.* Parke, 67 Hun (N. Y.) 137, 22 N. Y. Suppl. 613 [*reversed* on other grounds in 142 N. Y. 391, 37 N. E. 642] (holding that where a cargo is consigned to defendants and they are notified of its arrival and make no objection, and they accept the inspector's certificate that the cargo has been discharged, they are *prima facie* the owners, and are liable for the freight); Philadelphia, etc., R. Co. *v.* Barnard, 19 Fed. Cas. No. 11,086, 3 Ben. 39.

54. Weguelin *v.* Cellier, L. R. 6 H. L. 286, 42 L. J. Ch. 758, 22 Wkly. Rep. 26.

55. The Syskonen *v.* Logan, 28 Fed. 335.

56. Young *v.* Meller, 5 E. & B. 755, 3 Jur. N. S. 393, 25 L. J. Q. B. 94, 4 Wkly. Rep. 149, 85 E. C. L. 755.

57. The Antonia Johanna, 1 Wheat. (U. S.) 159, 4 L. ed. 60.

58. The Schooner Arthur B., 1 Alaska 403 (holding that on the total failure of the voyage the shippers are entitled to have the return of their freight money); Wirgman *v.* Mactier, 1 Gill & J. (Md.) 150; Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311; Burn Line *v.* U. S., etc., Steamship Co., 162 Fed. 298, 89 C. C. A. 278 [*reversing* on other grounds 150 Fed. 423]; Pitman *v.* Hooper, 19 Fed. Cas. No. 11,185, 3 Sumn. 50.

Where the consideration is the receiving of the goods on board and not transportation of them advanced payment therefor cannot be recovered, the vessel being wrecked soon after commencement of the voyage. Watson *v.* Duykinck, 3 Johns. (N. Y.) 335.

59. Chase *v.* Alliance Ins. Co., 9 Allen (Mass.) 311.

An agreement making the shipment at shipper's risk will relieve the carrier from refunding advance freight upon loss by peril of the sea (Phœnix Ins. Co. *v.* Liverpool, etc., Steam Co., 18 Fed. 192 [*affirming* 12 Fed. 77]; and the general rule that freight prepaid, but which is not earned by delivery of the goods, must be refunded, does not apply as between owner and charterer, where by reference in the charter-party the bills of lading are incorporated therein, and they contain a provision that freight prepaid shall be considered as earned, ship lost or not lost (Burn Line *v.* U. S., etc., Steamship Co., 150 Fed. 423 [*reversed* on other grounds in 162 Fed. 298, 89 C. C. A. 278]. And see British, etc., Mar. Ins. Co. *v.* Portland Flouring Mills Co., 124 Fed. 855 [*affirmed* in 130 Fed. 860, 65 C. C. A. 344]).

60. De Sola *v.* Pomares, 119 Fed. 373, holding that bills of lading in the ordinary form, which show prepayment of the freight, in connection with the established rules of law, constitute a completed contract, binding the carrier to refund the freight, if not earned; and, in the absence of fraud or mistake, parol evidence is not admissible to change the conditions of such contract.

61. Fleishman *v.* The John P. Best, 9 Fed. Cas. No. 4,861, 14 Phila. (Pa.) 527, 8 Wkly. Notes Cas. (Pa.) 30.

62. Brauer *v.* Compagnia De Navigacion La Flechs, 61 Fed. 860 [*affirmed* in 66 Fed. 776, 14 C. C. A. 88].

of lading, which was in the usual form.[63] Where a steamer is paid in advance for the transportation of certain goods, and compels the consignee to pay a further amount on delivery of the goods to him, a claim for the amount so paid is allowable against the vessel.[64]

4. Assignment or Hypothecation.[65] The master may bind the freight as well as the vessel on a bottomry bond;[66] but he has no more authority to pledge unearned freight for money borrowed in a foreign port than to pledge the vessel herself, and in either case he has such power only when the necessities of the vessel require it.[67] Where freight is hypothecated, it means the freight of the whole voyage, and not merely for that part of the voyage unperformed at the execution of the bond;[68] and where the contract for the carriage of the goods made by an unauthorized person differs from that specified in the bill of lading signed by the master, and the freight due by the bill of lading is assigned by indorsement on the bill, made with the assent of the owners, to parties who have furnished supplies to the vessel, they will be entitled to recover in an action on the assignment whatever may be due under the actual contract.[69]

5. Actions; Nature; Procedure. An action for the recovery of freight lies in admiralty in favor of the carrier by ship against the consignee of cargo, equally *in personam* and *in rem*;[70] but a claim for dead freight is not recoverable in an action *in rem* against the cargo;[71] and a claim by a vessel owner for the extra cost of handling timber of larger dimensions than that specified in the contract can only be recovered *in rem* against the cargo in so far as it is a claim for the services of stevedores who would be entitled to a lien, and is not so recoverable where the stevedores were furnished by the shipper.[72] Actions for freight are governed by the general rules relating to the time of bringing suit,[73] the

63. Phelps *v.* Williamson, 5 Sandf. (N. Y.) 578; Emery *v.* Dunbar, 1 Daly (N. Y.) 408, holding that, in the absence of a special agreement to the contrary, freight paid in advance may be recovered back, where by reason of the capture or shipwreck of the vessel, or for any other cause, the goods are not carried to their destination; and this rule of law cannot be controlled by proof of any other usage to the contrary.

64. The Wyoming, 36 Fed. 493.

65. Bottomry of vessel and freight see, generally, *supra*, VI.

66. Kelly *v.* Cushing, 48 Barb. (N. Y.) 269. And see *infra*, VI, D, 2, b.

A draft given for advances for repairs in a foreign port, expressed to be "for value received in disbursements, and repairs" of a certain brig, with directions to charge the same to her account, is neither a hypothecation of the freight nor an assignment thereof. Murray *v.* Lazarus, 17 Fed. Cas. No. 9,962, 1 Paine 572.

Contract held bottomry of freight only and not vessel see Banca di Genova *v.* The Sophie Wilhelmine, 58 Fed. 890, 7 C. C. A. 569.

Contract by hypothecating freight construed see Gray *v.* Freights of The Kate, 63 Fed. 707.

67. George W. Bush, etc., Co. *v.* Fitzpatrick, 73 Fed. 501.

68. The Zephyr, 30 Fed. Cas. No. 18,210, 3 Mason 341.

69. Trask *v.* Jones, 5 Bosw. (N. Y.) 62.

70. Thatcher *v.* McCulloh, 23 Fed. Cas. No. 13,862, Olcott 365.

The part-owners of a vessel may jointly maintain a suit to recover the freight, notwithstanding the contract of one of the part-owners to apply the freight earned in carrying goods to the payment of an individual debt due the shipper from such part-owner without the consent of the other. Donovan *v.* Dymond, 7 Fed. Cas. No. 3,993, 3 Woods 141. But one of two or more joint owners of a vessel cannot maintain an action in his name alone for freight, although he be also master. Robinson *v.* Cushing, 11 Me. 480. The several owners of a vessel owned in shares, although tenants in common as to the ownership, are partners as to its earnings, and must join in an action for the recovery of freight. Merritt *v.* Walsh, 32 N. Y. 685.

A libel against a cargo for freight may be joined with a suit against the consignees therefor. Six Hundred and Thirty Casks of Sherry, 22 Fed. Cas. No. 12,918, 14 Blatchf. 517 [*affirming* 28 Fed. Cas. No. 16,900, 7 Ben. 506].

71. Hagan *v.* Cargo of Lumber, 163 Fed. 657.

72. Hagan *v.* Cargo of Lumber, 163 Fed. 657.

73. Henderson *v.* Three Hundred Tons of Iron Ore, 38 Fed. 36; One Thousand Two Hundred and Sixty-Five Pipes, 18 Fed. Cas. No. 10,536, 14 Blatchf 274, 5 N. Y. Wkly. Dig. 194 [*reversing* 24 Fed. Cas. No. 14,280, 5 Ben. 402], holding that a suit for freight is prematurely brought where no notice of unloading and of readiness to deliver is given the consignee, who refused the master's demand of freight before the goods were discharged, the action being properly maintained only upon delivery.

admissibility,[74] and weight and sufficiency,[75] of evidence,[76] burden of proof,[77] trial,[78] and costs.[79]

74. Krohn *v.* Oechs, 48 Barb. (N. Y.) 127 (holding that in an action by a common carrier for freight on a cargo of wine, where defendants sets up a counter-claim for loss by leakage of the casks, and there is no evidence that the loss occurred before the commencement of the voyage, it is error in the court to reject evidence of the value of the wine at the port of destination); Zimmerman *v.* Rainey, 26 Misc. (N. Y.) 795, 56 N. Y. Suppl. 199 (holding that where the defense to an action for the freight of a cargo is that it was carried under special charter by the day, and a bill of lading of the cargo has been introduced, evidence that it is not customary to give a bill of lading where the boat is chartered by the day is admissible); Eaton *v.* Neumark, 33 Fed. 891 (holding that, where a clause in a bill of lading stated that the vessel was not to be responsible for the weight, and in an action for freight the shipper set up shortage in the quantity delivered as an offset to the demand, where different weights were put in evidence, the greater could not be adopted without preponderating proof in its support).

75. Murray *v.* George W. Jump Co., 148 Fed. 123 (holding that an estimate of the quantity of lumber in a cargo, based on the carrying capacity of the vessel, should not be accepted in an action for the freight as against what appears to have been a reasonably accurate tally, made when the lumber was loaded; but such tally may be corrected by evidence that the shipper received a greater quantity from the vessel at the place of delivery); McLaren *v.* Standard Oil Co., 124 Fed. 958 (evidence held, in the absence of other evidence, to establish a *prima facie* case of delivery of the entire cargo); The L. F. Munson, 124 Fed. 478; Astsrup *v.* Lewy, 19 Fed. 536 (where evidence was held to show that the cargo must have been in bad condition when shipped); Hewat *v.* Havemyer, 1 Fed. 47; The Isaac Newton, 13 Fed. Cas. No. 7,089, Abb. Adm. 11.

76. **Where a supplemental cross libel set up a proper tender** made after the weight was ascertained, and the vessel's refusal to deliver, such refusal was not evidence of any conversion of the ore, and would not sustain an action of trover, or any cross libel, as the ore was at the time in the custody of the law, in a court of competent jurisdiction, and in a *bona fide* suit brought without malice in the prosecution of the ordinary right of suit; and that the consignee's remedy was in the original suit only. Henderson *v.* Three Hundred Tons of Iron Ore, 38 Fed. 36.

For matters relating to evidence generally see EVIDENCE, 16 Cyc. 821.

For matters relating to evidence in proceedings in admiralty see ADMIRALTY, 1 Cyc. 882 *et seq.*

77. Nelson *v.* Stephenson, 5 Duer (N. Y.) 538 (holding that where the bill of lading is so qualified as to avoid any acknowledgment of the good order of casks shipped, or the quality or quantity of the contents, the burden of proof in an action for freight is thrown upon the shipper to establish the truth of his statements); Petrie *v.* Heller, 35 Fed. 310; Six Hundred and Thirty Casks of Sherry, 22 Fed. Cas. No. 12,918, 14 Blatchf. 517 [*affirming* 28 Fed. Cas. No. 16,900, 7 Ben. 506] (holding that upon a libel against casks of wine by the master of a vessel for the freight money, where a defense is interposed by the claimants that injury to the casks was caused by the negligence of the vessel, proof of the inferior quality of the casks casts the burden of proof on the claimants to show that the injury was caused by the negligence of the vessel.

Burden of proof in actions generally see EVIDENCE, 16 Cyc. 926.

78. Welch *v.* Hicks, 6 Cow. (N. Y.) 504, 16 Am. Dec. 443, holding that where a vessel was disabled from prosecuting her voyage by the perils of the sea, and put into an intermediate port, and the master made an offer to proceed, under circumstances calculated to excite doubts of his sincerity; in assumpsit for freight, it should have been left to the jury to say whether the proposition to repair and proceed was made *bona fide*, and whether the acceptance of the goods by the shipper was voluntary, so as to entitle the ship-owner to *pro rata* freight.

Immaterial error.— In an action for freight, the weight of the cargo having been established by plaintiff's undisputed testimony, the introduction in evidence of a weigh-master's certificate is not reversible error, although that mode of proving the weight is incompetent. Doty *v.* Thomson, 116 N. Y. 515, 22 N. E. 1089.

For matters relating to trials generally see TRIAL.

For matters relating to trials in admiralty see ADMIRALTY, 1 Cyc. 887 *et seq.*

Counter-claim.— In an action for freight on a cargo, a claim for advancements paid by the shipper for plaintiff's benefit on a similar cargo, never delivered, without the fault of the carrier, which, according to custom, the carrier, after paying, would have collected with his freight charges, cannot be set up as a counter-claim, the money paid by the shipper being paid for his own benefit. Neville *v.* Pennsylvania, etc., Co., 113 N. Y. App. Div. 768, 99 N. Y. Suppl. 270.

79. Dedekam *v.* Vose, 7 Fed. Cas. No. 3,732, holding that where during the voyage a part of the cargo is damaged by reason of improper stowage, and an offer is made by the owner of the cargo to pay the freight, deducting the amount of such damage to the cargo, the cargo-owners are entitled to costs in an action to recover freight on a recovery by the ship-owners of the amount actually tendered and paid into court by the owners of the cargo.

6. Lien — a. Existence, Nature, and Priorities. A common carrier by sea has, in like manner as carriers generally,[80] a lien on goods carried by him for the payment of their freight irrespective of any express contract,[81] which arises when and only when the vessel has earned or commenced to earn freight,[82] and which attaches to property shipped by one authorized by the owner of the cargo as well

Costs in action generally see Costs, 11 Cyc. 1.

Costs in admiralty see Admiralty, 1 Cyc. 908 *et seq.*

80. See Carriers, 6 Cyc. 501 *et seq.*

81. *Alaska.*— Miners' Co-operative Assoc. *v.* The Monarch, 2 Alaska 383, holding that a maritime contract for the transportation of goods operates as a pledge or mortgage of the goods to the shipper to secure payment of the freight earned.

Louisiana.— Deaver *v.* Bedford, 5 Rob. 245, 39 Am. Dec. 535.

Maine.— Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387.

Massachusetts.— Cowing *v.* Snow, 11 Mass. 415; Lewis *v.* Hancock, 11 Mass. 72; Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151; Lane *v.* Penniman, 4 Mass. 91.

North Carolina.—Spencer *v.* White, 23 N. C. 236.

Pennsylvania.—Fuller *v.* Bradley, 25 Pa. St. 120, holding that in case of a carrier, by boat, of freight to a specified place and back, taking in and putting out freight at different places, as the shipper might direct, for a stipulated sum per day, the carrier has a lien on the freight remaining on board on the return of the boat for the whole unpaid freight.

United States.— The Eddy, 5 Wall. 481, 18 L. ed. 486; Blowers *v.* One Wire Rope Cable, 19 Fed. 444; Drinkwater *v.* The Spartan, 7 Fed. Cas. No. 4,085, 1 Ware 145; Six Hundred and Four Tons of Coal, 22 Fed. Cas. No. 12,917, 7 Ben. 525; The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551. But see Smith *v.* The Mansanito, 22 Fed. Cas. No. 13,075.

England.— The Blenheim, 10 P. D. 167, 5 Aspin. 522, 54 L. J. P. D. & Adm. 81, 53 L. T. Rep. N. S. 916, 34 Wkly. Rep. 154; Campion *v.* Colvin, 3 Bing. N. Cas. 17, 2 Hodges 116, 5 L. J. C. P. 317, 3 Scott 338, 32 E. C. L. 18; Swan *v.* Barber, 5 Ex. D. 130, 4 Aspin. 264, 49 L. J. Exch. 253, 42 L. T. Rep. N. S. 490, 28 Wkly. Rep. 563.

See 44 Cent. Dig. tit. "Shipping," § 516.

But for transporting goods landwise after voyage completed, not expressly contracted for in the shipping contract, there is no lien in admiralty (Gaughran *v.* One Hundred and Fifty-One Tons of Coal, 10 Fed. Cas. No. 5,273); and thus a common carrier by water whose duty of transportation is fulfilled upon landing goods at a wharf in a city, and who, without express authority, causes them to be carried from the wharf to the place of business of the consignee in the city, has no lien on them for such additional transportation, whether performed by the carrier's own servants or not. The consignor's mere marking on the goods the place of business of the consignee does not import such authority so to transport them (Richardson *v.* Rich, 104 Mass. 156, 6 Am. Rep. 210).

Where goods sold and shipped on board a vessel of the vendee are stopped in transitu by the vendor, the vendee has a lien on them for freight. Newhall *v.* Vargas, 15 Me. 314, 33 Am. Dec. 617.

Tender — estoppel.— In an action of replevin to recover from the owner of a vessel a cargo detained by him under a claim of a lien thereon for freight, the issue is whether he has such lien; and plaintiff, by offering him a sum less than is claimed by him for freight, and by depositing such sum in court, is not estopped from denying such lien. The offer is not technically a tender, but an effort to compromise a matter not involved in the suit; and, the offer not being accepted by defendant, the trial court may properly allow the money to be withdrawn by plaintiff. McCullough *v.* Hellwig, 66 Md. 269, 7 Atl. 455.

As affected by custom.— Where, by the contract between the owner of a vessel and a shipper, as shown by the bill of lading, the former is to deliver cargo shipped in his vessel at the shipper's wharf, in a port where it appears that there is an established custom requiring cargo to be unloaded on the wharf of the owner in suitable form for measurement and inspection, before freight can be demanded, the vessel owner has no lien on the wood for freight, until it is so delivered. McCullough *v.* Hellwig, 66 Md. 269, 7 Atl. 455. And see The Andover, 1 Fed. Cas. No. 366, 3 Blatchf. 303.

Where goods are detained in port by a blockade, the master of the vessel cannot withhold them from the shipper till indemnity or compensation for freight is made. He must resort to his action if he is entitled to anything. Stoughton *v.* Rappallo, 3 Serg. & R. (Pa.) 559.

Priority.— In ordinary cases of the hypothecation of a cargo, the lien for freight takes precedence. Gracie *v.* Palmer, 8 Wheat. (U. S.) 605, 5 L. ed. 696.

The master has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side. Bishop *v.* Ware, 3 Campb. 360, 14 Rev. Rep. 755.

Lien for general average.— The master has at common law a possessory lien on the cargo, not only for freight, but also for general average. Cargo *ex* Galam, Brown. & L. 167, 10 Jur. N. S. 477, 33 L. J. Adm. 97, 9 L. T. Rep. N. S. 550, 2 Moore P. C. N. S. 216, 3 New Rep. 254, 12 Wkly. Rep. 495, 15 Eng. Reprint 883.

82. *Ex p.* Nyholm, 2 Aspin. 165, 43 L. J. Bankr. 21, 29 L. T. Rep. N. S. 634, 22 Wkly. Rep. 174.

as by the owner himself,[83] and is not affected by any indebtedness incurred by the captain to the consignees on his personal account;[84] and the carrier may retain all the goods until all the freight be paid, every part of them being liable for the whole debt, to which any portion retained as security may be applied.[85] Where the consignee and owner of a cargo fails to pay or tender the freight due on the discharge of the cargo, the carrier, to preserve its lien, is authorized to retain and store sufficient of the cargo to pay such freight, and the expense of storage and loss of use of the commodity must be borne by the owner;[86] but where a vessel delivers a consignment, a portion of which is damaged, it is incumbent upon her to ascertain the amount of damage before retaining a part of the consignment for balance of freight, in order that she may not, by retaining an unreasonable amount, become liable for the storage and selling charges.[87] Where parties, instead of trusting to the general rule of law with respect to freight, made a special contract for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist,[88] and when the contract made gives no lien a court of law will not supply one by implication.[89] A sea carrier under a common bill of lading cannot enforce a lien for freight by a sale of the goods on his own motion without a decree.[90]

b. Waiver, Loss, or Discharge. The carrier may waive or lose his lien on the goods.[91] Thus the lien may be waived or displaced by any special agreement

83. Green *v.* Campbell, 52 Cal. 586.

84. Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558.

85. Wilson *v.* Bannen, 1 Rob. (La.) 556; The Norway, Brown. & L. 404, 11 Jur. N. S. 892, 13 L. T. Rep. N. S. 50, 3 Moore P. C. N. S. 245, 13 Wkly. Rep. 1085, 16 Eng. Reprint 92; Sodergren *v.* Flight [*cited* in Hanson *v.* Meyer, 6 East 614, 622 note, 8 Rev. Rep. 578, 102 Eng. Reprint 1425, holding that a master may detain any part of the merchandise for the freight of all that is consigned to the same person, although some part has been removed into a lighter alongside of the ship which was sent by the consignee]. And see Lamb *v.* Kaselack, 9 Ct. of Sess. Cas. 482; Ward *v.* Felton, 1 East 507, 102 Eng. Reprint 195.

In Louisiana, under Civ. Code, art. 3213, the captain has a privilege for freight during fifteen days after delivery of the merchandise, if it has not passed into the hands of third persons. Hairy *v.* Dennistoun, 5 Rob. 130; Wilson *v.* Bannen, 1 Rob. 556. And may keep the goods unless the shipper or consignee shall give him security for the paymcnt of the freight. Lanata *v.* The Henry Grennell, 13 La. Ann. 24.

Where the bill of lading does not incorporate the stipulation in a charter-party as to the payment of freight, no right of lien exists for the freight mentioned in the charter-party, and the shipper is entitled to delivery of the goods upon payment of the freight specified in the bill of lading. Gardner *v.* Trechmann, 15 Q. B. D. 154, 5 Aspin. 553, 54 L. J. Q. B. 515, 53 L. T. Rep. N. S. 518.

If a shipment is large, or from the master's storage of it it cannot be landed in a day, if he lands a part of it his lien on the whole gives him a right to ask satisfactory security for the entire freight. Brittan *v.* Barnaby, 21 How. (U. S.) 527, 16 L. ed. 177.

86. The Asiatic Prince, 103 Fed. 676.

87. The Tangier, 32 Fed. 230.

88. Kirchner *v.* Venus, 5 Jur. N. S. 395, 12 Moore P. C. 361, 7 Wkly. Rep. 455, 14 Eng. Reprint 948.

Contracts construed as not giving lien see Gray *v.* Carr, L. R. 6 Q. B. 522, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173; Phillips *v.* Rodie, 15 East 547, 13 Rev. Rep. 528, 104 Eng. Reprint 950.

No consideration of inconvenience can prevent a right of lien where a contract has expressly created that right. McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, 1 Aspin. 160, 25 L. T. Rep. N. S. 317.

89. Kirschner *v.* Venus, 5 Jur. N. S. 395, 12 Moore P. C. 361, 7 Wkly. Rep. 455, 14 Eng. Reprint 948.

90. Sullivan *v.* Park, 33 Me. 438; Hunt *v.* Haskell, 24 Me. 339, 41 Am. Dec. 387.

91. Shatzell *v.* Hart, 2 A. K. Marsh. (Ky.) 191; Western Transp. Co. *v.* Barber, 56 N. Y. 544; Allen *v.* Three Thousand One Hundred and Eighty-Three Bushels of Potatoes, 8 Fed. 763.

Lien discharged by negotiation of bill.— Where the ship-owner, having a lien on the cargo for freight until the delivery of good and approved bills in payment, takes a bill which he objected to, but afterward negotiated, by negotiating the bill he approved of it, and his lien is thereupon gone. Horncastle *v.* Farran, 3 B. & Ald. 497, 5 E. C. L. 288, 2 Stark. 590, 3 E. C. L. 542, 22 Rev. Rep. 461.

The master being turned out of possession upon the vessel's being captured does not deprive him of his lien for the freight in case of her recapture. *Ex p.* Cheesman, 2 Eden 181, 28 Eng. Reprint 866.

When ship is lost.— When money for the carriage of goods by sea is payable at the port of destination, "ship lost or not lost," and the ship is wrecked upon the voyage, the ship-owner has no lien upon the goods, although the money to be paid for the car-

inconsistent therewith,[92] as where freight is made payable after delivery of the cargo;[93] but the lien is not waived by any provisions of the contract of hire not absolutely incompatible with the enforcement of the lien at the time of delivery;[94] and thus a stipulation for the payment of the freight after the return of the vessel is held not necessarily inconsistent with a lien,[95] nor is the lien divested by assignment.[96] Delivery without condition or qualification is a waiver of the lien, the latter being incident to the possession;[97] and the lien for freight is discharged by delivery to the consignee without demanding freight or notifying him of a lien therefor, in the absence of a special agreement or local usage to the contrary, irrespective of the intentions of the master;[98] but part delivery does not waive the lien on the remainder of the goods,[99] although if the carrier waives his right to lien as to part of the cargo which is landed, he cannot afterward claim possession of it to enforce its lien;[1] and manual delivery of the cargo by the ship-owners to the consignees does not of itself operate necessarily to discharge their lien for freight, where the intent of the ship-owners in making such delivery is to merely discharge the cargo, and not to deliver it,[2] for there is a well defined difference

riage is described as freight in the bills of lading. Nelson *v.* Association for Protection of Commercial Interests, 43 L. J. C. P. 218.

92. The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551; How *v.* Kirchner, 11 Moore P. C. 21, 6 Wkly. Rep. 198, 14 Eng. Reprint 602.

93. Lucas *v.* Nockells, 4 Bing. 729, 13 E. C. L. 713, 1 Cl. & F. 438, 6 Eng. Reprint 980, 1 M. & P. 783, 2 Y. & J. 304, 29 Rev. Rep. 721; How *v.* Kirchner, 11 Moore P. C. 21, 6 Wkly. Rep. 198, 14 Eng. Reprint 602.

94. Portland Flouring Mills Co. *v.* Portland, etc., Steamship Co., 145 Fed. 687 (holding that a provision of a bill of lading issued by a steamship company that "the carrier shall have a lien on the goods for all freights, primages, and charges" does not affect or change the nature of the lien, which is simply the maritime lien as understood in the jurisprudence of the United States, to preserve which the retaining possession is essential, although such provision may in some cases preserve the lien where it would otherwise be deemed waived by other provisions relating to the time and manner of paying the freight); Blowers *v.* One Wire Rope Cable, 19 Fed. 444.

An offer to give security does not affect the lien. Frothingham *v.* Jenkins, 1 Cal. 42, 52 Am. Dec. 286.

95. The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551.

96. Everett *v.* Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551, holding that, where the master of a vessel has assigned his lien on the cargo for freight and charges, trover cannot be maintained against the assignee, unless the lien be first discharged or a tender in satisfaction made.

97. Portland Flouring Mills Co. *v.* Portland, etc., Steamship Co., 145 Fed. 687; Egan *v.* A Cargo of Spruce Lath, 43 Fed. 480 [*affirming* 41 Fed. 830]; Gring *v.* A Cargo of Lumber, 38 Fed. 528 (holding that where a vessel discharged a cargo and during the delivery some portions were carted away by persons to whom it had been sold, without objection from the vessel, and no notice was given to the consignee or his vendee of any intention to hold the cargo for freight, and no steps were taken to enforce a lien for freight until a month later, the lien had been waived); The Giulio, 34 Fed. 909; Cranston *v.* A Cargo of Two Hundred and Fifty Tons of Coal, 22 Fed. 614 (holding that a ship-owner or master's lien for his freight depends upon his detention of the goods until the payment is made, and if he deliver them to the consignee voluntarily, and without notice that he looks to them for the freight and charges against them, he loses all right to enforce a lien upon them by a proceeding *in rem*); Wilcox *v.* Five Hundred Tons of Coal, 14 Fed. 49; *In re* Cargo of Brimstone, 5 Fed. Cas. No. 2,405, 8 Ben. 45; Kimball *v.* The Anna Kimball, 14 Fed. Cas. No. 7,772, 2 Cliff. 4 [*reversing* 1 Fed. Cas. No. 404]; Bernal *v.* Pim, 1 Gale 17; Black *v.* Rose, 10 Jur. N. S. 1009, 11 L. T. Rep. N. S. 31, 2 Moore P C. N. S. 277, 12 Wkly. Rep. 1132, 15 Eng. Reprint 906.

98. The Tan Bark Case, 23 Fed. Cas. No. 13,742, Brown Adm. 151.

99. Frothingham *v.* Jenkins, 1 Cal. 42, 52 Am. Dec. 286; Fox *v.* Holt, 9 Fed. Cas. No. 5,012, 4 Ben. 278, 36 Conn. 558 (holding that, where the owner detained a sufficient amount of a cargo to cover the amount of the freight, they may satisfy their whole freight out of the amount detained, as they do not surrender or extinguish their lien by the delivery of a part).

Freight is not a charge upon the salvage of cargo in the hands of the insurer, whether the insurer is owner of the ship or not. Columbian Ins. Co. *v.* Catlett, 12 Wheat. (U. S.) 383, 6 L. ed. 664.

Part taken on part payment.— The lien of ship-holder for freight being entire is not lost or waived by allowing part of the goods to be taken away on payment of a portion only of the freight without some express contract with the expressed or implied authority of the ship-owner. Perez *v.* Alsop, 3 F. & F. 188.

1. Hammond *v.* McCrie, 3 C. L. R. 1198.

2. Six Hundred Tons of Iron Ore, 9 Fed. 595.

in law between the discharge of a cargo and its delivery. It may be discharged, but cannot be delivered, unconditionally, without divesting the vessel's lien thereon for freight;[3] and while the lien for freight depends upon possession, the court of admiralty not being bound by the technical rules of the common law, will not regard a transfer of possession as necessarily amounting to a delivery; but if it is clear from the agreement of the parties, either express or implied by the local usage of the port, that the transfer was only for certain purposes, presumably for the benefit of both parties, as for examination or storing for a brief period, it will deem the possessor as a depositary for both parties, and the master as still constructively in possession, so far as to preserve his lien and his remedy *in rem*.[4] Thus a delivery of cargo subject to a lien for freight, made to a person liable to pay the freight, will not be held to be a waiver of the lien for freight unless facts appear from which it can be found that the act of delivering the cargo was accompanied with an intention to waive the lien for freight;[5] and where delivery is made upon an understanding between the parties that the transfer of the goods shall not be regarded as a waiver, no such consequence follows;[6] and a delivery made under the expectation that the freight will be paid at the time is not such a delivery as parts with the lien, and the carrier may afterward libel the article *in rem*, in admiralty, for the freight;[7] nor is cargo divested of a lien for freight by merely being discharged into a warehouse and placed with the consignee, without other evidence of the carrier's intention to waive the lien;[8] and a delivery to a wharfinger or warehouseman on the consignee's account, accompanied by a notice of lien, is no waiver, even if the notice is served an hour or two after the last of the cargo is delivered, so slight a delay not necessarily indicating an intent to unconditionally deliver;[9] nor is the lien divested by delivery where it is the notorious usage of the port where the cargo is detained that the lien shall remain.[10]

3. Cranston *v.* A Cargo of Two Hundred and Fifty Tons of Coal, 22 Fed. 614.

4. Sears *v.* Wills, 1 Black (U. S.) 108, 17 L. ed. 35.

The burden of proof is on the carrier seeking to enforce a lien on the cargo to show that the delivery was not absolute, but qualified by some condition. Cranston *v.* A Cargo of Two Hundred and Fifty Tons of Coal, 22 Fed. 614.

5. McBrier *v.* A Cargo of Hard Coal, 69 Fed. 469, holding that an allegation that, before discharge of cargo, libellants notified the consignee that they would look to the cargo for freight, shows that their lien therefor was not waived by such discharge.

6. Wilcox *v.* Five Hundred Tons of Coal, 14 Fed. 49; Kimball *v.* The Anna Kimball, 14 Fed. Cas. No. 7,772, 2 Cliff. 4 [*reversing* 1 Fed. Cas. No. 404, 2 Sprague 33].

7. Costello *v.* 734,700 Laths, 44 Fed. 105 (holding that where a ship-master discharged a cargo, according to the direction of the consignee named in the bill of lading, which was received and piled in the yard of the purchaser, about three hundred feet from the vessel, and after the completion of the discharge demand was made for the freight, but, owing to disputes as to the amount, the purchaser refused to pay the freight called for by the bill of lading, and the master immediately served notice that his lien for freight had never been abandoned, and afterward seized the cargo under process, the lien had not been abandoned); Wilcox *v.* Five Hundred Tons of Coal, 14 Fed. 49; One Hundred and Fifty-One Tons of Coal, 18 Fed. Cas. No. 10,520, 4 Blatchf. 368 [*affirming* 10 Fed Cas. No. 5,273]. And see Cuff *v.* Ninety-Five Tons of Coal, 46 Fed. 670, holding that when a master began to deliver cargo, but demanded his freight before the unloading of the cargo was completed, and when the freight was not paid stopped the delivery, and then, continuing, made special delivery of the remainder subject to the lien for freight, it was not sufficient to show an intent to abandon the lien on the cargo for freight.

8. Davidson Steamship Co. *v.* 119,254 Bushels of Flaxseed, 117 Fed. 283 (holding that a vessel, by delivering her cargo of flaxseed in a warehouse at the end of the voyage, and taking a receipt therefor, which was retained until a libel was filed, did not thereby lose her lien on the cargo for freight); Crapo *v.* The Arctic, 6 Fed. Cas. No. 3,361.

Where consignees do not appear to claim goods at the port of discharge and there is no suitable warehouse, *semble* that the master may still land the cargo without losing his possession and control over it, placing the goods in a warehouse belonging to, or hired for, his owners, and so preserve his lien. Mors le-Blanch *v.* Wilson, L. R. 8 C. P. 227, 1 Aspin. 605, 42 L. J. C. P. 70, 28 L. T. Rep. N. S. 415.

9. The Giulio, 34 Fed. 909.

10. Wilcox *v.* Five Hundred Tons of Coal, 14 Fed. 49; Donovan *v.* Cargo of Two Hundred and Forty Tons of Coal, 8 Fed. 368; The Tan Bark Case, 23 Fed. Cas. No. 13,742, Brown Adm. 151.

F. Supercargo — 1. Definition; Nature of Duties. A supercargo is a person specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes and to receive freight, as he may be authorized.[11] He has complete control over the cargo and everything which immediately concerns it, unless his authority is either expressly or impliedly restrained;[12] and goes out and returns home with the ship, thus differing from a factor, who has a residence in the country of exportation, and who only receives and deals with the goods after their arrival out;[13] and he may sell or pledge the cargo if necessary before it has arrived at its destination.[14] The principles which regulate the conduct of factors abroad[15] apply to supercargoes;[16] and they are liable for injuries to the employer occasioned by the want of reasonable skill or ordinary diligence and are bound to use good faith and must exercise their judgment after proper precautions and inquiries;[17] but a supercargo is not bound to observe the exact terms of his instructions, if thereby the interests of the owner would be sacrificed or his objects frustrated. In cases of necessity or urgency, it is only necessary that he act *bona fide* and with reasonable discretion, in order to bind the owner.[18] But where he makes a shipment of merchandise on his principal's account, the exportation of which is prohibited, it is at his own risk; and, if seized and condemned at the place of exportation, he must bear the loss,[19] unless the shipper has ratified the sale by retaining

11. Bouvier L. Dict. [*quoted* in Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316, 325 note].

Another definition is: "Persons employed by commercial companies or by private merchants to take charge of the cargoes they export to foreign countries, and to sell them there to the best advantage, and to purchase proper commodities to relade the ships on their return home. They usually go out with the ships on board of which the goods are embarked, and return home with them, and in this differ from factors, who reside abroad." Beawes' Lex. Merc. 47 [*quoted* in Gaither *v.* Myrick, 66 Am. Dec. 316, 325 note]. To the same effect see Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621; Williams *v.* Nichols, 13 Wend. (N. Y.) 58; Taylor *v.* Wells, 3 Watts (Pa.) 65; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165; Davidson *v.* Gwynne, 12 East 381, 11 Rev. Rep. 420, 104 Eng. Reprint 149.

12. Davidson *v.* Gwynne, 12 East 381, 11 Rev. Rep. 420, 104 Eng. Rep. 149.

13. 2 Abbott L. Dict. 522.

14. Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43.

If the supercargo represents several shippers he cannot pledge their goods as an entirety but must pledge each part separate. Newbold *v.* Wright, 4 Rawle (Pa.) 195.

The validity of a sale on credit by a supercargo depends upon the usage of trade in the place where the sale is made, such usage being a question of fact for the jury. Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43, holding that, in the absence of a special contract, a credit sale by a supercargo is at the risk of the shipper, where the usage of trade allows discretionary sales on cash or credit and that all sales by a supercargo, except those by *del credere* commission, are at the risk of the shipper. And see Elliott *v.* Walker, 1 Rawle (Pa.) 126.

15. See Factors and Brokers, 19 Cyc. 109.

16. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

Liability of supercargo under special contract.—A supercargo who for a valuable consideration, in the nature of a commission, undertakes to be responsible for all risks except danger of the seas, is liable to the owner for the value of goods which are stolen after being landed at the port of discharge, and before any sale. Bridge *v.* Austin, 4 Mass. 115.

17. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316, holding that when they have a venture in the same ship they are bound to exercise at least as much diligence and care as to their factorage transactions as they do as to their own private concerns.

18. Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43. But see Maxwell *v.* Evans, 2 Bibb (Ky.) 399, holding that a supercargo, promising to sell the goods at the same price he sold his own, retaining freight, etc., and to pay over the balance to his employer, was not justified in storing the goods with a commission merchant to sell, unless the supercargo was unable to make a sale himself.

If the supercargo violates the laws of a foreign country by making short entries of the homeward bound cargo pursuant to the instructions of the owners, and thereby subjects the vessel and cargo to seizure and condemnation, and pays a sum of money to obtain the release of the property, such violation of the laws of the foreign country will not prevent the supercargo from recovering from the owners the sum of money thus paid for the release of the property, unless it was paid in violation also of the laws of that country. Peyton *v.* Veitch, 19 Fed. Cas. No. 11,057, 2 Cranch C. C. 123.

19. Pawsons *v.* Donnell, 1 Gill & J. (Md.) 1, 19 Am. Dec. 213.

the proceeds after knowledge of the facts.[20] As a general rule they cannot delegate their authority any more than other agents, but exception may arise where the power of delegation is conferred by the necessity of the case, the usages of trade, or the law and customs of the country where the agency is to be executed.[21]

2. Master as Supercargo. While a master has, as such, no implied powers of a supercargo,[22] he may have them conferred upon him by express authority of the shipper;[23] and sometimes the circumstances are such that the necessity devolves upon him to act as supercargo to protect the property and interests intrusted to him.[24] Where the master is supercargo his duties and liabilities are as distinct as if confined to different persons;[25] and in dealing under his powers of supercargo he acts as agent of the shipper, not the owner of the vessel, and the former, not the latter, is liable for his acts.[26] But where, in pursuance of a general usage, goods shipped on a vessel are consigned to the master to sell and make returns, the owner of the vessel is liable for the safe transportation of the goods.[27]

3. Compensation; Lien. Upon a valid sale the supercargo has a right to retain proceeds of a cargo for a general balance due to him by the owners;[28] and, if he receives his instructions from the ostensible owners of the whole cargo, he has a right to retain, out of the whole proceeds of the cargo, the amount of a general balance due to him from such ostensible owners, although there may be another part-owner, whose interest was not disclosed to him until he had settled his account

20. Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43.

21. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316. See Warner *v.* Martin, 11 How. (U. S.) 209, 13 L. ed. 667.

Where the supercargo is unable to dispose of the cargo at the place of sale, he may delegate his authority by confiding the goods to the care of a responsible person who thereafter becomes liable. Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621; Merrick *v.* Bernard, 17 Fed. Cas. No. 9,464, 1 Wash. 479; Day *v.* Noble, 2 Pick. (Mass.) 615, 13 Am. Dec. 463; Lawler *v.* Keaquick, 1 Johns. Cas. (N. Y.) 174.

22. Rapp *v.* Palmer, 3 Watts (Pa.) 178; Taylor *v.* Wells, 3 Watts (Pa.) 65.

23. *Connecticut.*— Moseley *v.* Lord, 2 Conn. 389.

Maine.— Smith *v.* Davenport, 34 Me. 520; Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621; Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268.

Maryland.— Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

Massachusetts.— Day *v.* Noble, 2 Pick. 615, 13 Am. Dec. 463.

New York.— Kemp *v.* Coughtry, 11 Johns. 107; Lawler *v.* Keaquick, 1 Johns. Cas. 174; Williams *v.* Nichols, 13 Wend. 58.

Pennsylvania.— Harrington *v.* McShane, 2 Watts 443, 27 Am. Dec. 321.

United States.— Smedley *v.* Yeaton, 22 Fed. Cas. No. 12,965, 3 Cranch C. C. 181.

24. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316; Douglas *v.* Moody, 9 Mass. 548; The Collenberg, 1 Black (U. S.) 170, 17 L. ed. 89; The Gentleman, 10 Fed. Cas. No. 5,324, Olcott 110 [*reversed* on other grounds in 10 Fed. Cas. No. 5,323, 1 Blatchf. 196]; The Velona, 28 Fed. Cas. No. 16,912, 3 Ware 139; Vleierboorn *v.* Chapman, 8 Jur. 811, 13 L. J. Exch. 384, 13 M. & W. 230; The Gratitudine, 3 C. Rob. 240. See Gillett *v.* Ellis, 11 Ill. 579.

25. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

26. *Maine.*— Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

Maryland.— Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

New York.— Williams *v.* Nichols, 13 Wend. 58.

Pennsylvania.— Taylor *v.* Wells, 3 Watts 65; Dusar *v.* Perit, 4 Binn. 361.

United States.— The St. Nicholas, 1 Wheat. 417, 4 L. ed. 125; The Maiden City, 33 Fed. 715; The Waldo, 28 Fed. Cas. No. 17,056, 2 Ware 165.

England.— Earle *v.* Rowcroft, 8 East 126, 9 Rev. Rep. 385, 103 Eng. Reprint 292.

27. Emery *v.* Hersey, 4 Me. 407, 16 Am. Dec. 268; Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316, holding that goods consigned to the master under a bill of lading, describing goods as shipped for "Valparaiso and a market," must be carried by the ship until a market is found, or the goods left for sale on deposit under circumstances authorizing such a departure from the original contract.

28. Luckett *v.* West, 15 Fed. Cas. No. 8,593, 4 Cranch C. C. 101; Vowell *v.* West, 28 Fed. Cas. No. 17,024, 4 Cranch C. C. 100, holding this to be true notwithstanding assignment of the cargo and bill of lading to a trustee for the benefit of creditors.

Delivery of cargo as evidence of payment of commissions.— Delivery of the cargo to the owners by the supercargo is evidence of his receipt of his commissions in an action against him by a third person who is entitled to a share of those commissions. Manning *v.* Lowdermilk, 16 Fed. Cas. No. 9,046, 1 Cranch C. C. 282.

Particular contracts with supercargoes construed see Franklin *v.* Robinson, 1 Johns. Ch. (N. Y.) 157; Welsh *v.* Dusar, 3 Binn. (Pa.) 329.

with the ostensible owners;[29] and he has a lien on a return cargo to reimburse himself for advances made by him and to satisfy any balance due him on the final adjustment of the transaction between him and the consignor,[30] and has also a lien on the indemnity fund provided for by treaty with a foreign nation for sequestration of a cargo.[31] Upon his death during the voyage, after he appoints substitutes, his representatives are entitled to full compensation stipulated for the whole voyage.[32]

VIII. CARRIAGE OF PASSENGERS.

[EDITED BY JOHN M. WOOLSEY, ESQ., OF THE NEW YORK BAR]

A. Nature of Liability of Vessel or Owner; What Law Governs. The general rules governing the rights, duties, and liabilities of carriers of passengers by land[33] apply to carriers of passengers by water, and ships carrying passengers for hire stand upon the same footing in respect to their responsibility *in rem* for the performance of the passenger contract with those carrying merchandise on freight.[34] A contract for the conveyance of passengers by water is as a general rule governed by the law of the place where it is made,[35] and not that of the ship-owner's domicile.[36] Where both carrier and passengers are citizens of the United States, and the place of completion of the contract of carriage is within this country, a stipulation for exemption from liability in the contract authorized by the law of a foreign country by which the contract is by its terms to be governed, but which is contrary to the public policy of this country, is not enforceable in our courts,[37] and an action in the admiralty court of the United States to recover for injuries sustained by an American passenger on a foreign ship on the high seas is governed by the general maritime law as administered in this country, which gives a remedy against the ship's owners where the injury was due to the negligence of those in charge of her navigation.[38]

B. Statutory Regulation — 1. NATURE AND DEVELOPMENT OF LEGISLATION. The carriage of passengers on vessels in the United States has been regulated largely by federal statutes having as an object protection of the lives of the pas-

29. Luckett *v.* West, 15 Fed. Cas. No. 8,593, 4 Cranch C. C. 101.

30. Karthaus *v.* Owings, 4 Harr. & J. (Md.) 263.

31. Stewart *v.* Callaghan, 23 Fed. Cas. No. 13,423, 4 Cranch C. C. 594.

32. Gray *v.* Murray, 3 Johns. Ch. (N. Y.) 167.

33. See CARRIERS, 6 Cyc. 533.

34. The Aberfoyle, 1 Fed. Cas. No. 16, Abb. Adm. 242; The Pacific, 18 Fed. Cas. No. 10,643, 1 Blatchf. 569, holding that a maritime contract depends upon its subject-matter, and, when entered into for the conveyance of persons in a particular ship, her obligation results directly from the contract and not from the performance, and the liability of the owner and that of the ship attach at the same time.

When a vessel carries passengers under tickets issued by another vessel, pursuant to an agreement fixing a tariff therefor, a lien arises under Ohio Rev. St. § 5880, against the latter vessel for the tariff price. Eley *v.* The Shrewsbury, 69 Fed. 1017.

Liability of vessel carrying goods on freight see *supra*, VII, A.

35. Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286; Potter *v.* The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746, holding that a written agreement, executed in England, whereby an English corporation agrees to transport a citizen of the United States from England to this country, is to be construed according to the English law. And see The European, 120 Fed. 776, 57 C. C. A. 140.

36. Arayo *v.* Currel, 1 La. 528, 20 Am. Dec. 286.

37. The Kensington, 94 Fed. 885, 36 C. C. A. 533 [*affirming* 88 Fed. 331].

38. Pouppirt *v.* Elder Dempster Shipping Co., 122 Fed. 983 [*reversed* on other grounds in 125 Fed. 732, 60 C. C. A. 500].

The locus of a tort committed in the carriage of passengers is determined by the place where the injury and damage arose, rather than where the negligent act which produced such injury was committed; and a libel to recover damages for the death by drowning of libellant's intestate, as the result of a collision and the sinking upon the high seas of a vessel sailing under the French flag, and on which the deceased was a passenger, alleged to have been due to negligent navigation, which does not allege that the drowning occurred upon the vessel, fails to show that the cause of action arose upon French territory, so as to render the law of France applicable thereto, conceding that the carrying of the French flag extended the jurisdiction of such law to the ship. Rundell *v.* La Campagnie Generale Transatlantique, 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92.

sengers and insurance of suitable accommodations and proper transportation, and passed under the power of congress to regulate commerce.[39] These statutes provide in general for an inspection and supervision of steam vessels carrying passengers,[40] prohibit the carriage on passenger vessels of dangerous articles, such as camphene, nitroglycerine, benzine, benzole, coal oil, crude or refined petroleum, or other like explosive burning fluids or like dangerous articles,[41]

39. See the statutes. And see the cases cited *infra*, this and the following notes.

The Harter Act of Feb. 13, 1893 (27 U. S. St. at L. 445 [U. S. Comp. St. (1901) p. 2946]), does not apply to passengers or their baggage (La Bourgogne, 144 Fed. 781, 75 C. C. A. 647 [*affirmed* in 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973]; *In re* California Nav., etc., Co., 110 Fed. 678; The Kensington, 94 Fed. 885, 36 C. C. A. 533 [*reversed* on other grounds in 183 U. S. 263, 22 S. Ct. 102, 46 L. ed. 190]; Moses *v.* Hamburg-American Packet Co., 88 Fed. 329; The Rosedale, 88 Fed. 324); and thus injuries to passengers and claims for loss or damage to their personal baggage, not shipped as merchandise and not paying freight, are not within the exemptions of the act (The Oregon, 92 Fed. 1021, 35 C. C. A. 167 [*affirming* 88 Fed. 324]).

40. **Act July 7, 1838** (5 U. S. St. at L. 304) was the first statute to regulate the matter, and provided for inspection of machinery and boilers in all vessels driven in whole or in part by steam, and provided that licenses could be had only on a certificate by an inspector. The act was obligatory in all its provisions, except as it was altered by the act of March 3, 1843 (5 U. S. St. at L. 626), upon all owners and masters of steamers navigating the waters of the United States, whether navigating on waters within a state, or between states, or waters running from one state into another state, or on the coast of the United States between the ports of the same state or different states (Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226), and was not limited to vessels at sea or on the Great Lakes (U. S. *v.* Jackson, 26 Fed. Cas. No. 15,458, 4 N. Y. Leg. Obs. 450); but was not intended by congress to apply to all steamboats, but only to such as before the passage of that act were required to be enrolled and licensed for the coasting trade (U. S. *v.* The William Pope, 29 Fed. Cas. No. 16,703, Newb. Adm. 256). Subsequent legislation enlarged the policy of the act and extended its benefits, the more important amendment being the act of Aug. 30, 1852 (10 U. S. St. at L. 62, c. 106, §§ 3–5), providing that vessels propelled by steam and carrying passengers shall be provided with certain pumps, life-preservers, etc. It was held to apply to a vessel so propelled which actually carried passengers, although not usually and regularly engaged in that business (U. S. *v.* The Thomas Swan, 28 Fed. Cas. No. 16,480); but a steam boat built for a ferry-boat, used in her daily employment as such and occasionally as a tugboat, was held to be within the exception of the act, as a boat used as a ferry-boat or tugboat, although she was employed one day in carrying passengers three miles distant to a state fair; and was not liable to the penalties of the act for not being provided with the safety appliances therein provided as a steamboat carrying passengers (U. S. *v.* The Ottawa, 27 Fed. Cas. No. 15,976, Newb. Adm. 536), and a vessel engaged in carrying freight between ports in different states, which on one occasion carried a load of passengers between ports in the same state, was not engaged in interstate commerce in respect to the carrying of such passengers, and was not subject to a penalty for failure to comply with the provision of the act requiring steam vessels carrying passengers to be inspected and provided with life-preservers (The Thomas Swan, 23 Fed. Cas. No. 13,931, 6 Ben. 42). A still later amendment was passed in 1864 (13 U. S. St. at L. 390) by which the owners of steamboats must, at their peril, procure copies of the synopsis of laws required by the act to be posted on board (The Lewellen, 15 Fed. Cas. No. 8,307, 4 Biss. 156), and the whole matter was regulated with great particularity in the act of Feb. 28, 1871 (16 U. S. St. at L. 440).

Inspection of repaired boiler.— It is as much the duty of an owner of a steamship, under U. S. Rev. St. (1878) § 4418, to cause an inspection of a boiler which has been repaired in a substantial part, as to cause an inspection of a new boiler, before using the same; and a failure to cause such inspection will render the owner of the vessel liable, under U. S. Rev. St. (1878) § 4493 [U. S. Comp. St. (1901) p. 3058], to a passenger injured in consequence of the explosion of the boiler. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366.

A canal-boat laden with coal for transportation, having on board the master, with his family, is not a "barge carrying passengers," within the meaning of U. S. Rev. St. (1878) § 4492 [U. S. Comp. St. (1901) p. 3058], which requires that such a barge, while in tow of a steamer, shall be provided with "fire-buckets, axes, life-preservers, and yawls." Eastern Transp. Line *v.* Cooper, 99 U. S. 78, 25 L. ed. 382.

41. The James D. Parker, 13 Fed. Cas. No. 7,193, holding that the Revised Statutes not being enacted until June 22, 1874, the carrying of petroleum upon passenger steamers in April, 1874, could not be punished thereunder; but that the act of Feb. 28, 1871 (16 U. S. St. at L. 440), was applicable to such a case.

U. S. Rev. St. (1878) § 4472 [U. S. Comp. St. (1901) p. 3050], prohibits the carrying of pe-

regulate the accommodations to be accorded passengers on vessels carrying passengers from foreign ports to the United States,[42] limit the number of passengers to be carried on passenger vessels[43] on navigable waters of the United

troleum and other dangerous articles upon passenger vessels, but excepts petroleum which will not ignite at a temperature less than one hundred and ten degrees Fahrenheit, upon routes where there is no other practicable mode of transportation. Under this act if there is an all-rail route over which the oil may be carried with any profit, it is a practicable mode of transportation; but if the rate of freight by rail is so high as to prevent any profit upon the sale of the oil, or to destroy the trade between the points in question, it is not a practicable mode of transportation between those points. U. S. *v.* Thornburg, 6 Fed. 41 [*affirmed* in 7 Fed. 190]. But petroleum of the required test cannot be carried on a passenger steamer to a point of transhipment, when it is practicable to transport such petroleum by rail for about the same rate, although there was no rail route from the point of transhipment to the point of consignment. The Benton, 51 Fed. 302. The word "practicable" as used in the act means commercially practicable, as distinguished from physically or mechanically practicable. The Benton, *supra*.

Illuminating gas, compressed into steel cylinders of insufficient strength to hold it, although liable to explode by its tendency to expand when heated, is not within U. S. Rev. St. (1878) § 4472, as the danger lies not in the gas itself, but in the weakness of the vessel containing it. Egan *v.* New Jersey Steamboat Co., 86 Hun (N. Y.) 542, 33 N. Y. Suppl. 791 [*affirmed* in 154 N. Y. 777, 49 N. E. 1096]; Russell *v.* New Jersey Steamboat Co., 10 Misc. (N. Y.) 593, 32 N. Y. Suppl. 824.

Exception as to automobile.— U. S. Rev. St. (1878) § 4472 was amended by Act Feb. 20, 1901 (31 U. S. St. at L. 799, c. 386 [U. S. Comp. St. (1901) p. 3050]), to allow the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles), using the same as a source of motive power; provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel and the same be not relighted until after said vehicle shall have left the same. It was held that gasoline contained in the tank of an automobile being transported on a steam vessel is carried as freight, within the meaning of the statute; that an automobile in which the motive power is generated by passing an electric spark through a compressed mixture of gasoline and air in the cylinder, causing intermittent explosions, carries a fire while the vehicle was under motion from its own motive power; and that the carrying by a steam ferry-boat of such a vehicle, which was run on and off the boat under its own power, is a violation of the statute. The Texas, 134 Fed. 909.

42. U. S. Rev. St. (1878) § 4255, which provided the mode and manner of construction of berths in passenger vessels and for a penalty for its violation, did not apply to steam vessels. The Devonshire, 13 Fed. 39, 8 Sawy. 209; U. S. *v.* The Manhattan, 26 Fed. Cas. No. 15,715 [*affirming* 16 Fed. Cas. No. 9,020, 2 Ben. 88].

The word "territory," as used in the act of Aug. 2, 1882 (22 U. S. St. at L. 186, c. 374, § 1 [U. S. Comp. St. (1901) p. 2931]), prohibiting the carrying of emigrant passengers from a foreign country, except places in foreign territory contiguous to the United States, unless certain accommodations be provided, is not limited to the line of high-water mark along the shores of navigable rivers or bays or straits separating different countries, but the territory of a country extends to its boundaries. U. S. *v.* The Danube, 35 Fed. 993, holding that Vancouver's Island, B. C., is territory contiguous to the United States, and the transportation of passengers therefrom to Astoria, Oreg., is within the exception.

Head money duty.— The act of Aug. 2, 1882 (22 U. S. St. at L. 186, c. 6, § 1 [U. S. Comp. St. (1901) p. 2932]), providing that, in calculating the number of cubic feet to be allowed for each passenger, children under one year of age are not included, does not affect the act of Aug. 3, 1882, imposing upon the owners of vessels bringing passengers from foreign ports a duty of fifty cents for every such passenger not a citizen of this country and each child under one year of age is to be counted as a passenger in fixing the amount of such duty. Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798 [*affirming* 18 Fed. 135, 21 Blatchf. 460].

An indictment against the master of a vessel, transporting immigrants to a port of discharge within the United States, charging that there were no sufficient tables and seats provided for the use of such passengers, in violation of the act of congress of Aug. 2, 1882 (22 U. S. St. at L. 186, c. 374 [U. S. Comp. St. (1901) p. 2931]), although objectionable for failure to allege in what respects the insufficiency consisted, was not fatally defective. It was held that the charge should be made more definite and certain by a bill of particulars or by a new indictment. U. S. *v.* Lavarrello, 149 Fed. 297.

43. The Idaho, 29 Fed. 187 (holding that the penalty provided by U. S. Rev. St. (1878) § 4499 [U. S. Comp. St. (1901) p. 3060], if any steam vessel "be navigated" without complying with the terms of the title concerning the regulations of steam vessels of which this section is a part, is not confined to matters of technical "navigation," such as equipment and furnishing of vessels, but includes all the topics embraced in the title, among them the provision forbidding the carrying of more than a certain number of passengers); The Geneva, 26 Fed. 647 (holding that in a

States,[44] require a license and impose the condition upon which one may be obtained,[45] require a certificate of seaworthiness to be displayed in a conspicuous

suit against a steamboat to enforce the penalties prescribed by U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], for carrying an unlawful number of passengers, inasmuch as it appeared that the persons in excess of the allowed number aboard the boat were intruders against the will of her officers, and that the boat moved from her landing to another convenient place to avoid a crowd of people who it was feared might force their way upon her and endanger her, the penalties were not incurred); The Laura M. Starin, 11 Fed. 177; Pollock *v.* The Sea Bird, 3 Fed. 573 (both holding that U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], providing for a penalty for taking on board a steamer a greater number of passengers than stated in the certificate of inspection, gives a separate penalty for each violation of the act); Passenger Act, March 3, 1855, 18 Fed. Cas. No. 10,791 (holding that under the Passenger Act of March 3, 1855 (10 U. S. St. at L. 715), the number of steerage passengers which a steamer is entitled to transport is to be estimated exclusively by the proportion of space, and not by the proportion of one passenger to two tons of the vessel); U. S. *v.* The Anna, 24 Fed. Cas. No. 14,457 (holding that the limitation of two passengers for every five tons of a vessel's measurement, by Passenger Act (1819), §§ 1, 2 (3 U. S. St. at L. 488), has been repealed by the tenth section of the act of 1848 (9 U. S. St. at L. 220); U. S. *v.* The Anna, 24 Fed. Cas. No. 14,458, Taney 549 [*affirming* 24 Fed. Cas. No. 14,457]; U. S. *v.* The Louisa Barbara, 26 Fed. Cas. No. 15,632, Gilp. 332 (holding that to subject a vessel to forfeiture according to the provisions of the act of March 2, 1819, regulating passenger ships and vessels, there must be an excess of twenty passengers beyond the proportion of two to every five tons of the vessel).

In estimating the number of passengers in a vessel against which an information is filed, no deduction is to be made for children or persons not paying; but those employed in navigating the vessel are not to be included. U. S. *v.* The Louisa Barbara, 26 Fed. Cas. No. 15,632, Gilp. 332.

In estimating the tonnage, the measurement of the custom-house in the port of the United States at which the vessel arrives is to be taken. U. S. *v.* The Louisa Barbara, 26 Fed. Cas. No. 15,632, Gilp. 332.

Where the wife and neighbors of a tug owner go upon the tug during a trial trip, merely to witness the test of her machinery, they are not passengers, within the meaning of the statute requiring passenger boats to be inspected and licensed; and the owner is not liable to the penalty imposed by U. S. Rev. St. (1878) § 4499 [U. S. Comp. St. (1901) p. 3060], for navigating any vessel contrary to the shipping regulations. U. S. *v.* Guess, 48 Fed. 587.

44. The City of Salem, 38 Fed. 762, 13 Sawy. 607, 4 L. R. A. 125 [*affirming* 37 Fed. 846, 13 Sawy. 607, holding that the regulation contained in U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], forbidding a steamboat to carry more passengers than are authorized by the local inspectors, is applicable to a steamboat engaged in carrying passengers on a navigable water of the United States between ports of the same state only.

The waters of Jamaica bay, N. Y., are public navigable waters of the United States, within the meaning of U. S. Rev. St. (1878) § 4400 [U. S. Comp. St. (1901) p. 3015], and are under the direct control of congress in the exercise of the power to regulate interstate and foreign commerce; and the statute forbidding the transportation in a steamboat of passengers in excess of her capacity is a regulation calculated to promote convenient and safe navigation on such waters, and is applicable to all vessels navigating such waters, although it is not shown that they were engaged in transporting passengers or freight between places outside the state of New York and places within that state. The Hazel Kirke, 25 Fed. 601, 23 Blatchf. 292.

45. Elizabethport, etc., Ferry Co. *v.* U. S., 8 Fed. Cas. No. 4,362, 5 Blatchf. 198 (holding that the penalties imposed by the act of July 7, 1838 (5 U. S. St. at L. 304, c. 191, § 2), referred to and adopted by the act of Aug. 30, 1852 (10 U. S. St. at L. 61), do not apply to steam vessels used on the ferry between New York city and Elizabethport, N. J., which was established more than eighty years ago, inasmuch as it was declared by section 42 of the act of 1852 that the act shall not apply to steamers used as ferry-boats); U. S. *v.* The Echo, 25 Fed. Cas. No. 15,021, 4 Blatchf. 446, 20 How. Pr. (N. Y.) 517 (holding that a steam vessel usually employed as a towboat which transported passengers from Buffalo to Canada and back, a distance of twelve or fifteen miles each way, for pay, was liable to the penalty imposed for a violation of the act of July 7, 1838 (5 U. S. St. at L. 304, c. 191, § 2), in transporting passengers without a license, and that she was not entitle to the benefit of the exemption created by the act of Aug. 30, 1852 (10 U. S. St. at L. 75, c. 107, § 2), in favor of a steamer used as a tugboat or a towboat, such exemption applying only to a steamer while engaged in towing, or in the business of towing, and not to a steamer usually engaged in towing).

"Space appropriated to use."—A space upon a vessel bringing passengers into the United States, under U. S. Rev. St. (1878) § 4252, is not "appropriated" to their use, within the meaning of the term, or the object and policy of the statute, unless it is given up to their exclusive use. U. S. *v.* Nicholson, 12 Fed. 522, 8 Sawy. 162, holding that the dining saloon of a steamship carrying Chinese passengers from Hong Kong to

place,[46] and also a synopsis of the laws concerning carriage of passengers.[47] These various statutes do not lessen the responsibility of the carrier, but are additional protection to passengers, and mere compliance with the statute does not relieve the carrier from liability,[48] nor can the responsibilities and duties devolving upon vessels and their masters under the passenger statutes regulating the carriage of passengers by sea be evaded by a contract of charter.[49] The secretary of the treasury may in certain cases remit fines and penalties incurred for violation of the acts,[50] and a court of admiralty may, in the exercise of a judicial discretion, refuse to impose on the owner of a steamboat the penalty prescribed by the statute [51] for carrying more passengers than the number allowed by the vessel's inspection certificate, where, because of extraordinary conditions existing, such imposition would be inequitable.[52]

Portland, Oregon, in which such passengers were allowed to go and come during the day, but to which no number of them were allotted or assigned, and in which they neither ate nor slept, was not a space appropriated to their use.

A steamboat employed by a railroad company to transport passengers on Jamaica bay, L. I., which is an inlet of the Atlantic ocean entirely within the state of New York, in connection with a railroad forming a part of the railroad system of the whole country, is engaged in interstate commerce to an extent sufficient to bring her within U. S. Rev. St. (1878) §§ 4465, 4469 [U. S. Comp. St. (1901) pp. 3046, 3048], prescribing penalties for steamers carrying more passengers than allowed by their certificates of inspection. The Hazel Kirke, 25 Fed. 601, holding also that a steamboat, having obtained a certificate as a general passenger boat, cannot be held to be a ferry-boat, within the exception in U. S. Rev. St. (1878) § 4464 [U. S. Comp. St. (1901) p. 3045], although running upon a ferry route, but is subject to the statutory limitation as to the number of passengers.

The application for a use of the certificate of inspection, required by the statute, is sufficient to require the conclusion that the steamboat is subject to the provisions of the federal statutes, and is therefore liable for a violation of them. The Hazel Kirke, 25 Fed. 601.

Excursion permits are allowed under ordinary conditions and are authorized by statute. But under U. S. Rev. St. (1878) § 4466 [U. S. Comp. St. (1901) p. 3046], where a passenger steamer does not carry or purpose to carry a number of passengers additional to the number authorized by its certificate, and does not go or purpose to go out of the waters where it is authorized by its certificate to ply, it is not an "excursion," in the meaning of the statute, and no special permit in writing is necessary (The Pope Catlin, 31 Fed. 408); and the statute has no application to a ferry-boat, although temporarily employed as an excursion boat (Schwerin *v.* North Pac. R. Co., 36 Fed. 710, 13 Sawy. 507). An excursion permit, given by the proper inspectors, for an additional number of passengers for a period of twenty days, is not so clearly void on its face as to exclude the additional number from the lawful count. The Harlem, 27 Fed. 236.

46. U. S. *v.* The Manhattan, 26 Fed. Cas. No. 15,714, 3 Blatchf. 270, holding, however, that the only penalty for taking passengers on a steam vessel which has not in a conspicuous place the certificate of seaworthiness required by the act of Aug. 30, 1852 (10 U. S. St. at L. c. 106, § 25), is the penalty of one hundred dollars given by that section; and neither the vessel nor her owner is liable to the penalty of five hundred dollars given by the first section.

47. The Lewellen, 15 Fed. Cas. No. 8,307, 4 Biss. 156, holding that it is no defense, to a prosecution under the act of July 4, 1864 (13 U. S. St. at L. 391, § 8), requiring the posting of two copies of a synopsis of the laws concerning carriage of passengers, that one copy was posted.

48. Simmons *v.* New Bedford Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282.

49. The Prinz Georg, 23 Fed. 906.

50. The Laura, 8 Fed. 612, 19 Blatchf. 562 [*affirmed* in 114 U. S. 411, 5 S. Ct. 881, 29 L. ed. 147], holding that U. S. Rev. St. (1878) § 5294 [U. S. Comp. St. (1901) p. 3607], providing that the secretary of the treasury may, in certain cases, remit fines and penalties, etc., is not unconstitutional and does not infringe the pardoning power of the president, and that a remission by the secretary of the treasury of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, granted before trial of a suit *in rem* brought for the penalties against the vessel by an informer, discharges all liability in the suit.

51. U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046].

52. The Charles Nelson, 149 Fed. 846, where a steamship which left San Francisco for Seattle a few days after the destruction of the former city by earthquake and fire was held not subject to the penalty or liable to such passengers in damages for the inconvenience and privation resulting to them from the overcrowding and from a shortage of water, where the excess of passengers was due to the confusion caused by the destruction of the city and the steamship company's office and occurred notwithstanding the efforts of the company to prevent it, and where

2. Penalties and Forfeitures For Violations — a. Manner of Collection; Procedure. The manner in which penalties for violation of the various passenger statutes may be collected depends upon the construction of the particular clauses in the statutes.[53] Under some it is held that the penalty is recoverable only in an action of debt,[54] while in others a proceeding *in rem* is held the proper mode of presenting the claim,[55] in which case any court, within whose territorial jurisdiction the vessel may be at the time of the commencement of the suit, has juris-

the shortage was due to the company's inability to procure water or sufficient coal for its condenser in San Francisco, and to bad weather which prolonged the voyage.

53. See cases cited *infra*, this section.

The United States is not a necessary party to a suit instituted under U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], which imposes certain penalties for taking on board of any steamer a greater number of passengers than is stated in the certificate of inspection (The Laura M. Starin, 11 Fed. 177; The Sea Bird, 3 Fed. 573), nor need a suit in admiralty to enforce the lien given by U. S. Rev. St. (1878) § 4469 [U. S. Comp. St. (1901) p. 3048], for the penalty imposed by U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], be prosecuted in the name of the United States (Hatch *v.* The Boston, 3 Fed. 807).

54. The Nashville, 17 Fed. Cas. No. 10,023, 4 Biss. 188 (holding that a prosecution for a penalty under the act of July 4, 1864 (13 U. S. St. at L. 390, c. 249, § 83), regulating the carriage of passengers on steamships, etc., must be by action of debt, and not a libel *in rem*, and that the phrase "revenue laws," as used in the act of congress of July 18, 1866, authorizing proceedings *in rem* for a violation of the revenue laws, means laws relating to the income of the government, arising from duties, taxes, and the like, and does not extend to a law, the general purpose of which is unconnected with revenue, such as the laws regulating the carriage of passengers in steamboats, merely because they contain requirements, such as imposing license-fees, penalties, and the like, which may incidentally produce money payable into the United States treasury); U. S. *v.* The C. B. Church, 25 Fed. Cas. No. 14,762, 1 Woods 275 (holding that the penalty for a violation of the act of Feb. 28, 1871 (16 U. S. St. at L. 441, c. 100, § 4), which forbids a steamer engaged in carrying passengers from carrying as freight any burning and explosive fluid, cannot be recovered by a proceeding *in rem*, but that an action of debt against the offending parties is the proper action); U. S. *v.* The Neptune, 27 Fed. Cas. No. 15,865 (holding that the penalties provided for by the Passenger Act of 1848 can only be recovered by an action of debt on the common-law side of the court). See M'Afee *v.* The Barque Creole, 8 Leg. Int. (Pa.) 82, holding that the sum given by the act of congress of May, 1848, to passengers who have been placed on short allowance, where the vessel has sailed with less than the amount of provisions prescribed by the act, must be sued for at common law.

A ferry-boat plying between two ports in the same state upon a navigable river is within the admiralty jurisdiction of the United States, and her owners may therefore be proceeded against *in personam*, under the provisions of U. S. Rev. St. (1878) § 4500 [U. S. Comp. St. (1901) p. 3060], for carrying passengers on an excursion in excess of the number allowed to be carried by her permit. U. S. *v.* Burlington, etc., Ferry Co., 21 Fed. 331.

Passenger Act, Aug. 2, 1882 (22 U. S. St. at L. 186, c. 374, § 1 [U. S. Comp. St. (1901) p. 2931]), which provides that if the master of a vessel shall carry more than the number of passengers prescribed by the act, "he shall be guilty of a misdemeanor, and fined fifty dollars for each passenger in excess, and may also be imprisoned," cannot be enforced against the master of a vessel by a civil proceeding in admiralty. The Scotia, 39 Fed. 429.

55. The Prinz Georg, 23 Fed. 906 (where it is held that the penalty of three dollars *per diem* for each passenger put upon short allowance for food and water, given by Passenger Act of Aug. 2, 1889, c. 374, § 4 (22 U. S. St. at L. 188, c. 374, § 4 [U. S. Comp. St. (1901) p. 2935]), constitutes a claim against the vessel, and may be enforced by proceedings *in rem*); The Arctic, 11 Fed. 177 (holding that a libel *in rem* may be maintained in the district court in admiralty for the penalty imposed by U. S. Rev. St. (1878) § 4469 [U. S. Comp. St. (1901) p. 3048], for overcrowding a passenger vessel); Pollock *v.* The Sea Bird, 3 Fed. 573 (holding that U. S. Rev. St. (1878) § 4469 [U. S. Comp. St. (1901) p. 3048], providing that the penalty imposed by U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], "shall be a lien upon the vessel in each case, but a bond may, as provided in other cases, be given to secure the satisfaction of the judgment," furnishes a direct remedy against the vessel in admiralty for the recovery of the penalty); The Lewellen, 15 Fed. Cas. No. 8,307, 4 Biss. 156 (holding a proceeding *in rem* to be the proper mode of prosecution for the violation of the act of July 4, 1864 (13 U. S. St. at L. 391, c. 249, § 8), in neglecting to post up in a conspicuous place in a steamer synopses of the laws relating to the carriage of passengers); The Lewellen, 15 Fed. Cas. No. 8,308, 4 Biss. 167 (holding that a proceeding *in rem* is a proper remedy for a violation of the act of May 5, 1864 [13 U. S. St. at L. 390], requiring steamers to have their names painted conspicuously on their wheel-houses and pilot-houses).

diction of the cause, and the vessel may be seized by the marshal of that court.[56] But even if fines imposed by the statute for acts which are therein described to be misdemeanors are made a lien upon the vessel, it is held that an action against her to recover them cannot be maintained before the amount thereof, and the master's liability, has been fixed by his trial, conviction, and sentence.[57] The libel need not allege that the libellant was a passenger, or that he was an informer, or that he sued as such, nor need it set out the names of the passengers taken on board,[58] and the general rules of evidence [59] as to weight and sufficiency,[60] presumptions,[61] and burden of proof [62] apply, as do also the general rules governing

56. Pollock *v.* The Sea Bird, 3 Fed. 573.

57. U. S. *v.* The Nellie May, 50 Fed. 605 (holding that a libel against a ship to recover the penalties for violation of the act of Aug. 2, 1882 (22 U. S. at L. 186, c. 374 [U. S. Comp. St. (1901) p. 293]), making it an offense to carry passengers without the accommodations required by the act, can only be maintained after the shipmaster's trial and conviction of the same offense, and for the purpose of enforcing payment of the fine imposed upon him); The Sidonian, 38 Fed. 440; U. S. *v.* The Ethan Allen, 25 Fed. Cas. No. 15,059. But see The Scotia, 39 Fed. 429, holding that in a proceeding against a vessel, under Passenger Act, Aug. 2, 1882 (22 U. S. St. at L. 186, c. 374 [U. S. Comp. St. (1901) p. 2931]), to recover a penalty for carrying an excess of passengers, it is not necessary, in order to create a liability on the part of the vessel, to allege and prove that in a criminal proceeding instituted under the statutes the master has been convicted, and a fine imposed upon him equal to the sum claimed against the vessel.

58. Pollock *v.* The Laura, 5 Fed. 133; Pollock *v.* The Sea Bird, 3 Fed. 573.

Admiralty rule 31, providing that defendant may object by his answer to answer any allegation or interrogatory contained in the libel, which will expose him to any prosecution or punishment for a crime or for any penalty or any forfeiture of his property for any equal offense, applies to a libel to impose a penalty. Pollock *v.* The Laura, 5 Fed. 133, holding that where claimant pleaded, in his answer to a libel filed under U. S. Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], an oral permission to carry additional passengers on excursions, under U. S. Rev. St. (1878) § 4466, which requires that the permission should be in writing, this defense could not avail the claimant, and that part of the answer must be stricken out upon exception as immaterial.

59. See EVIDENCE, 16 Cyc. 821.

60. U. S. *v.* The Columbia, 50 Fed. 441, 1 C. C. A. 526 [*reversing* 39 Fed. 617] (holding that evidence of the officers of an excursion steamer that the steamer carried less than the number called for by her certificate, based on the number of tickets and coupons collected on her trip, is not overborne by the testimony of two persons on the wharf who counted the passengers as they hastily entered the boat over a narrow gang plank; and that where, on the evidence, the court found that the steamboat Columbia, libeled by the government for carrying passengers in excess of the number stated in her certificate of inspection, and held in default by the district court, did not, on the trip in question, carry more passengers than her certificate allowed, the decree of the district court should be reversed, and the libel dismissed); O'Carroll *v.* The Havre, 45 Fed. 764 (holding that on libel by passengers against the master of a steamship for failure to furnish wholesome and proper food, equal in value to one and a half navy rations of the United States, as required by the Passenger Act, Aug. 2, 1882 (22 U. S. St. at L. 188, c. 374, § 4 [U. S. Comp. St. (1901) p. 2935]), libellants cannot recover if the evidence does not show the money or nutritive value of the provisions furnished, or that they were not equal in value to one and a half navy rations, although they may have been poor in quality); The Harlem, 27 Fed. 236 (holding that while the penalties imposed by law for overcrowding steamboats must be adjudged without hesitation, where the provisions designed for the security of life are violated, the court ought to be satisfied that the violation is clearly made out before finding defendants liable, and that on the evidence in this case, showing but a single count made at dusk, amid a rush of the passengers, unverified by any other evidence, and other circumstances making the excess improbable, the libellant had not satisfactorily proved that the vessel had more passengers than were allowed under her excursion permit, and the libel should therefore be dismissed); U. S. *v.* The Anna, 24 Fed. Cas. No. 14,458, Taney 549 [*affirming* 24 Fed. Cas. No. 14,457] (holding that a measurement of the vessel, and a statement placed on the files of the custom-house, specifying the number of passengers she is entitled to transport, is not conclusive upon the government, as evidence of the capacity of the vessel, in a proceeding under the act of Feb. 22, 1847).

61. U. S. *v.* Thomson, 12 Fed. 245, 8 Sawy. 122, holding that passengers who go on board a vessel openly and in the usual manner are presumed to have been taken on board by the master within the purview of U. S. Rev. St. (1878) §§ 4252, 4253, prescribing a penalty for carrying passengers in excess of the number allowed by law.

62. Lawrence *v.* Small, 48 Me. 468 (holding that to recover, under Rev. St. (1841) c. 32, § 56, of a master of a vessel for his neglect to give bonds "before passengers shall

trials,[63] and thus the amount of the judgment is measured by the allegations of the libel,[64] and questions not presented in the inferior court cannot be urged on appeal.[65] An information for forfeiture of a vessel for a violation of the passenger act of 1847 was sufficient if it described the offense in the words of the statute with certainty of time and place.[66]

b. Lien. The penalties imposed by the various passenger statutes are generally made liens on the vessels guilty,[67] but not always.[68] Such a lien is not released

come on shore" who have no residence in the state, it must be shown that there has been an actual landing of such passengers); U. S. *v.* The Anna, 24 Fed. Cas. No. 14,458, Taney 549 [*affirming* 24 Fed. Cas. No. 14,457] (holding that where the space occupied by certain boxes on the berth deck of a passenger vessel was lawfully so occupied if the boxes contained luggage belonging to the passengers, and it was unlawfully so occupied if they did not, it is incumbent on the United States, in a proceeding for the forfeiture of the vessel, to show what was the contents of such boxes, in order that it may be known whether the offense operating the forfeiture has been committed).

63. See TRIALS.

Trials in admiralty see ADMIRALTY, 1 Cyc. 887.

64. The Columbia, 39 Fed. 617 [*reversed* on other grounds in 50 Fed. 441, 1 C. C. A. 526], holding that where it is found that a steamboat carried seven hundred and seventy-seven passengers more than the number allowed by law, but the libel, in an action to enforce the penalty therefor, only charges an excess of six hundred and seventy-seven, and no application is made to amend the libel, the steamboat will be liable to a penalty only for each of six hundred and seventy-seven passengers referred to in the libel.

65. U. S. *v.* The Anna, 24 Fed. Cas. No. 14,458, Taney 549 [*affirming* 24 Fed. Cas. No. 14,457], holding that in a proceeding for the forfeiture of a vessel under the passenger acts, a cause of forfeiture, which was not made a charge against the master and ship-owners, which is not one of the grounds upon which the forfeiture is claimed, and which was not noticed in the district court, is not properly before the circuit court on appeal.

Conclusiveness of judgment.—A verdict and judgment against the owners of a vessel in a suit to charge them personally with the penalties incurred under U. S Rev. St. (1878) § 4465 [U. S. Comp. St. (1901) p. 3046], for carrying a greater number of passengers than was stated in the certificate of inspection, is not conclusive against their vendees in a subsequent suit *in rem* in admiralty to enforce against the vessel the lien of the penalties, under U. S. Rev. St. (1878) § 4469 [U. S. Comp. St. (1901) p. 3048]. The Boston, 8 Fed. 628, holding also that the title to the vessel not being involved in the former suit, nor any questions of lien, the new owners were not privies to the suit against their vendors, and they might show in the suit *in rem* that the number of passengers illegally carried was less than the jury found in the first suit.

66. U. S. *v.* The Neurea, 19 How. (U. S.) 92, 15 L. ed. 531. But see Milne *v.* New York, 17 Fed. Cas. No. 9,618, 2 Paine 429.

67. The Strathairly, 124 U. S. 558, 8 S. Ct 609, 31 L. ed. 580 (holding that U. S. Rev. St. (1878) § 4270, which provides that the penalties imposed by the foregoing provisions, regulating the carriage of passengers in merchant vessels, shall be liens on such vessels, applies to those sections which declare a "fine" for the violation of its provisions, as well as those which declare a penalty *eo nomine*; and that a fine incurred by a violation of U. S. Rev. St. (1878) § 4252, which prohibits carrying any greater number of passengers than is allowed by U. S. Rev. St. (1878) § 4252, is therefore a lien on the vessel, but that the lien cannot exceed the fine imposed on the master in a criminal prosecution for the offense); The Arctic, 11 Fed. 177 (holding that U. S. Rev. St. (1878) § 4469 [U. S. Comp. St. (1901) p. 3048], imposing a penalty for overcrowding a vessel provides that the penalty shall be a lien on the vessel, and authorizes a bond to be given to secure the judgment). See The Candace, 5 Fed. Cas. No. 2,379, 1 Lowell 126 (holding that Passenger Act, March 3, 1855 (10 U. S. St. at L. 720, c. 273, § 15), which enacts "that the amount of the several penalties imposed by the foregoing provisions . . . shall be liens on the vessel or vessels violating those provisions," does not apply to the fine, imposed on the master by section 1 of that act, upon his conviction of a misdemeanor, but only to the civil penalties imposed on owners, as well as masters, by sections 2 and 8 of the act, for a violation of sections 2–5, 7); U. S. *v.* The Ethan Allen, 25 Fed. Cas. No. 15,059 (holding that under the act of March 3, 1855, known as the "Passenger Act," the fines imposed upon the master by sections 1 and 6 for acts which are therein declared to be misdemeanors are not made a lien upon the vessel. The provisions in the fifteenth section, that the "amount of the several penalties" imposed by the foregoing provisions shall constitute a lien, refers only to the penalties imposed by sections 2, 5, 7, and 14, upon both the master and owners, and which are expressly made recoverable by suit).

68. U. S. *v.* The Laurel, 26 Fed. Cas. No. 15,569, Newb. Adm. 269, holding that no forfeiture of the boat is declared, and no express lien given for the penalty, for a violation of the act of July 7, 1838 (5 U. S. St. at L. 304, c. 191, § 2), providing for a license

by the bringing of an action of debt against the master and owners of the boat, and prosecuting the same to judgment nor divested by a sale to a *bona fide* purchaser, and a mere clerical error in docketing such case will not oust the jurisdiction of the court.[69]

3. Crimes and Offenses Incident to the Carriage of Passengers. The various passenger statutes provide that the violation thereof by the officers of the boat shall constitute a crime on their part,[70] and a violation resulting in loss of life is made manslaughter.[71] Intent or malice is not an element of such an offense, and proof that accused was the captain of the vessel; that he was guilty of misconduct, negligence, or inattention to his duties thereon; and that by reason thereof human life was destroyed is sufficient to sustain a conviction,[72] destruction of life being

for passenger steamboats. The expression "for which sum or sums the steamboat or vessel so engaged shall be liable," merely gives a remedy against the boat by libel.

69. Hatch *v.* The Boston, 3 Fed. 807, holding that it is not necessary that the vessel should have been attached, before the filing of the libel, to enforce the statutory lien, and that the fact that the libellant does not proceed against the vessel until the recovery of the judgment, in the personal action against the master and owners, does not constitute laches.

70. See the several statutes. And see Van Schaick *v.* U. S., 159 Fed. 847, 87 C. C. A. 27, holding that under U. S. Rev. St. (1878) § 4471 [U. S. Comp. St. (1901) p. 3049], which provides for the maintenance of a steam fire pump and two hand pumps with pipes, one on each side of the vessel, to convey water to the upper decks to which suitable hose shall be attached and kept in good order at all times and ready for immediate use, and U. S. inspectors' rule 5, section 15, which provides for a fire drill at least once a week, and U. S. Rev. St. (1878) § 4482 [U. S. Comp. St. (1901) p. 3054], which requires good life-preservers in sufficient numbers, kept in accessible places for immediate use, it is the statutory duty of the captain to maintain an efficient fire drill, to see that the proper apparatus for extinguishing fire is provided and maintained in proper order, and to exercise ordinary care to see that the life-preservers are in fit condition for use.

Where a station bill posted on a vessel assigning the crew to quarters in case of fire referred to the crew by number instead of names, but the members of the crew were not numbered, the posting of the bill did not constitute a compliance with the law requiring the posting of a station bill assigning the crew to quarters in case of fire. Van Schaick *v.* U. S., 159 Fed. 847, 87 C. C. A. 27.

71. Van Schaick *v.* U. S., 159 Fed. 847, 87 C. C. A. 27, which was decided under U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629], providing that every captain on any steamboat or vessel by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, shall be guilty of manslaughter, and in which in a prosecution of the captain of a vessel for misconduct and inattention to duty, resulting in loss of life from a fire started in the forward hold of the vessel, the evidence was held to justify a finding that the captain was negligent in failing to provide, preserve, and inspect necessary fire appliances and life-preservers.

72. Van Schaick *v.* U. S., 159 Fed. 847, 87 C. C. A. 27 (holding also that where an excursion steamer in New York harbor had been inspected early in May, 1904, and was ready for navigation about May 15, she having been out but nine times prior to June 15, when she was lost by fire, it was no excuse for the captain's failure to maintain fire drills as required by inspectors' rule 5, section 15, that he had had no time or opportunity therefor, or that his crew was composed of raw material, and was constantly changing); U. S. *v.* Kellar, 19 Fed. 633.

The act of July 7, 1838 (5 U. S. St. at L. 306, c. 192, § 12), which declared that every captain, engineer, pilot, or other person employed on board of any steam vessel, by whose misconduct, negligence, or inattention to duty the lives of any persons on board may be destroyed, should be deemed guilty of manslaughter, made the negligence, etc., a crime, when followed by the consequences named, without regard to the question of motive or intent on the part of the persons charged. U. S. *v.* Farnham, 25 Fed. Cas. No. 15,071, 2 Blatchf. 528; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,253, Newb. Adm. 323. The essence of the crime of manslaughter under the act consisted in the fact of there being "misconduct, negligence, or inattention" in such degree and of such a character as to have produced the result set forth in the indictment, irrespective of the intention of the person charged (U. S. *v.* Collyer, 25 Fed. Cas. No. 14,838; U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463, holding the captain of a steamboat responsible where he failed at once, after a collision, to ascertain the extent of the injuries, and to run his vessel ashore if he found she would probably go down); and thus every person who assumed to perform the duties of an important officer on board a steamboat was guilty of manslaughter if loss of life occurred through his ignorance or negligence in respect of his duties (The Henry Clay, 11 Fed. Cas. No. 6,375; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,441, 5 McLean 242). Under section 3 of the act which made it the duty of the

the essence of the offense.[73] It is no defense that the government inspectors had failed in their duty properly to inspect the vessel and its safety appliances, and had wrongfully issued a certificate of inspection.[74]

C. Fares and Tickets; Limitations and Conditions. The general rules relating to fares, tickets, and special contracts for carrying passengers[75] apply to carriers of passengers by water.[76] Thus passage-money is not due before the passenger arrives at the port of destination, unless compensation *pro rata itineris*

master to see that the safety valve was raised when the boat stopped it was not sufficient to raise the safety valve only when the boiler had acquired, during the stoppage, a higher pressure of steam than before, or higher than that named in the certificate of the inspectors as the pressure the boiler may be subject to; nor could other means be employed for effecting the same end, as opening the furnace doors, instead of raising the safety valve (U. S. *v.* Farnham, *supra*), and the master was guilty of misconduct if he left it to the discretion of the engineer to raise the safety valve during a stoppage or not, the captain being responsible for the proper performance by the engineer, the pilot, and all the other officers of their duties on board, unless their authority was expressly made independent of him (U. S. *v.* Farnham, *supra*). The omission of the captain to give the proper orders for the safety valve to be raised when the boat was stopped was legal evidence of misconduct, negligence, and inattention, and tended to support an indictment for manslaughter, under the act, if such omission was the proximate cause of the explosion, and of the death of the persons destroyed. U. S. *v.* Farnham, *supra*. It was not sufficient, however, to sustain a conviction, under the statute, to show misconduct, negligence, or inattention on the part of the accused, and that there was a burning of the vessel, which caused loss of life; but it must further be shown that such burning and loss of life were the direct consequences of the negligence or misconduct shown. U. S. *v.* Collyer, 25 Fed. Cas. No. 14,838, 4 Blatchf. 142. By "misconduct, negligence, or inattention" in the management of a steam vessel the statute was held to mean the omission or commission of any act which may naturally lead to the consequences made criminal; and it is immaterial what may be the degree of misconduct, whether slight or serious, if the proofs show that the destruction of the lives of persons on board was the necessary or most probable consequence of it. U. S. *v.* Collyer, *supra*.

To be a person "employed on board" within the meaning of the act of July 7, 1838 (5 U. S. St. at L. 306, c. 192, § 12), it is not necessary that one should be employed under pay to perform any particular duty; but the statute applies to any one actually engaged in performing the duties of an officer or employee, as where, the captain being sick, another takes his place, and acts as captain, exercising the authority and control, and discharging the duties of that officer. U. S. *v.* Collyer, 25 Fed. Cas. No. 14,838.

In an indictment for manslaughter, under the act of July 7, 1838 (5 U. S. St. at L. 306, c. 192, § 12), providing that any act of "misconduct, negligence, or inattention" on the part of persons employed in steamboat navigation, producing death as a result, should be deemed manslaughter, it was unnecessary to aver or prove malicious intent in the persons charged. U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463. The indictment was sufficient if it charged them substantially in the language of the statute, with misconduct, negligence, or inattention to their respective duties, whereby the lives of passengers were destroyed, and it was not necessary that the particular acts of misconduct, negligence, etc., should be specifically set forth, or that the acts should be charged to have been committed feloniously. U. S. *v.* Collyer, 25 Fed. Cas. No. 14,838. In such an indictment, several defendants occupying different stations of employment, such as captain, engineer, pilot, etc., might be joined, without showing that their acts were jointly destructive of the lives of those on board or were joint in their commission. U. S. *v.* Collyer, *supra*.

In a prosecution under U. S. Rev. St. (1878) § 5344 [U. S. Comp. St. (1901) p. 3629], an indictment is held to be sufficient if it charges that the accused took on board the vessel more passengers than were allowed by law, by reason of which it became unmanageable, and that decedent's death by drowning was caused thereby. U. S. *v.* Holtzhauer, 40 Fed. 76.

73. *In re* Doig, 4 Fed. 193.

74. Van Schaick *v.* U. S., 159 Fed. 847, 87 C. C. A. 27, holding also that where an excursion steamboat was burned while plying on quiet inland waters on a pleasant day with no *vis major* or unusual disturbance of the elements, and within half an hour after the fire broke out ninety per cent of the passengers had been drowned or burned to death, such catastrophe was not the result of inevitable accident, but was itself evidence of negligence and inattention to duty on the part of the master and crew.

75. See CARRIERS, 6 Cyc. 570 *et seq.*

76. See cases cited *infra*, this and the following notes.

Special contracts of transportation construed see O'Regan *v.* Cunard Steamship Co., 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484; Barrow Steamship Co. *v.* Mexican Cent. R. Co., 134 N. Y. 15, 31 N. E. 261, 17 L. R. A. 359 [*reversing* 10 N. Y. Suppl. 804]; Dennison *v.* The Wataga, 7 Fed. Cas. No. 3,799, 1 Phila. (Pa.) 468.

is agreed to be paid,[77] and where a vessel takes passengers for a specified port, but wholly fails to make the voyage, and discharges the passengers at the sailing point, and they are not afterward forwarded, on the failure of the voyage, the passengers are entitled to have the return of their passage-money,[78] and passengers who have paid their passage on a vessel cannot be held to their contract, but are entitled to rescind and recover their passage-money, where, before sailing, the vessel is reported in the press as rotten and unsafe, and they are justified by their information and her appearance in believing her so, although she may in fact have been staunch and seaworthy.[79] A provision in a passenger ticket relating to a limitation of the carrier's liability for loss of baggage, plainly printed in the face of the ticket above the signature of the ship's agent and the passenger, is a part of the contract;[80] but a notice or memorandum printed on the back of a steamship ticket purporting to limit the liability of the carrier for loss of baggage, not referred to in the body of the ticket nor called to the attention of the purchaser, is simply a notice, and forms no part of the contract;[81] nor does a condition in a steamship ticket limiting the liability of the carrier for loss of baggage to a stated sum apply to extra baggage taken and paid for as such under a subsequent agreement, nor will such a condition be enforced where the sum named bears such relation to the quantity of the baggage and the sum paid for its carriage as to render the limitation manifestly unreasonable,[82] and conditions printed inconspicuously upon a steamship ticket, providing that the ship-owner shall not be liable for any loss of the passenger's baggage through theft, or any act, neglect, or default of the ship-owner's servants or others, which were not known to the passenger or called to his attention, are invalid and constitute no defense to an action by the passenger to recover for the loss of valuables stolen by one of the ship's employees.[83] Nor does a condition on a ticket limiting loss to a named sum relieve the carrier from full liability where it was not read by or made known to the passenger.[84] It is the primary duty of the carrier to transport goods or passengers,[85] but a ticket to be binding on the carrier as a contract of carriage must be sold by an agent of the owner.[86] The holder of a steamship ticket cannot

77. Howland *v.* The Lavinia, 12 Fed. Cas. No. 6,797, Pet. Adm. 123.

Detention of passenger on board.—An agreement between the master of a vessel and a passenger that the latter shall remain on board until he has paid his passage in money is lawful, and it is not sufficient cause to discharge a passenger from restraint that the master did not furnish the provisions which he stipulated to furnish. Com. *v.* Schultz, 6 Am. L. J. (Pa.) 123.

78. The Schooner Arthur B., 1 Alaska 403.

79. The Guardian, 89 Fed. 998.

80. The Kensington, 88 Fed. 331 [*affirmed* in 94 Fed. 885, 36 C. C. A. 533].

The provisions of section 2 of the Harter Act, the act of Feb. 13, 1893 (27 U. S. St. at L. 445, c. 105 [U. S. Comp. St. (1901) p. 2946]), do not apply to passenger tickets. La Bourgogne, 144 Fed. 781, 75 C. C. A. 647 [*affirmed* in 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973]. And see *supra*, VII, D, 13, b.

81. La Bourgogne, 144 Fed. 781, 75 C. C. A. 647 [*affirmed* in 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973]; Potter *v.* The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746 [*affirmed* in 166 U. S. 375, 17 S. Ct. 597, 41 L. ed. 1039], holding that a condition on the back of a steamship passenger ticket, relieving the carrier from its common-law liability for perils at sea, referred to merely by notice on the face of the ticket to "see back," is not binding on the passenger.

A clause of a steamship ticket headed "notice," limiting the liability of the vessel or owners to one hundred dollars for the loss of the passenger's personal effects, is not a part of the contract, and does not relieve the owner from full liability, where it was not read by or made known to the passenger. Smith *v.* North German Lloyd Steamship Co., 142 Fed. 1032 [*affirmed* in 151 Fed. 222, 80 C. C. A. 574].

82. La Bourgogne, 144 Fed. 781, 75 C. C. A. 647 [*affirmed* in 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973].

83. The Minnetonka, 132 Fed. 52 [*affirmed* in 146 Fed. 509, 77 C. C. A. 217].

84. Smith *v.* North German Lloyd Steamship Co., 151 Fed. 222, 80 C. C. A. 574 [*affirming* 142 Fed. 1032].

85. See, generally, CARRIERS, 6 Cyc. 581 *et seq.*

86. Mills *v.* Shult, 2 E. D. Smith (N. Y.) 139.

Whether a shipping agent has authority to take a note as payment for a ticket is for the jury. Holmes *v.* Doane, 9 Cush. (Mass.) 135.

Where a part-owner of a steamboat invites a person to take a passage therein, the part-owner, and not the person invited, will

recover in tort from the steamship company by reason of the vessel leaving before the agreed time, by which the ticket-holder is prevented from taking passage thereon, when such act is the result of the act of the government inspector.[87] There can be no maritime lien against a vessel for breach of a contract of carriage where she never in fact entered on the performance thereof, and neither the libellants nor their baggage were ever received on board, or placed in the care or control of the master.[88]

D. Performance and Breach of Contract of Carriage — 1. General Rules; Deviation, and Delay. Passage-money is on a like basis with freight, in that to entitle the ship-owner to it he must fulfil his contract by carrying the passenger to the destination,[89] for it is the primary duty of the carrier to carry safely,[90] to his passenger's destination,[91] and if he cannot do so within a reasonable time he must bring the passenger home;[92] and a vessel which contracts to carry passengers to a port, where they are to procure boats to land themselves and their stores, is bound, on reaching such port, to remain a reasonable length of time to enable the passengers to procure boats and to make their landing, and is only excused from so remaining by the act of God or the public enemies.[93] But although a contract to convey a passenger between certain ports on a certain vessel is not satisfied by an offer to furnish passage in a different vessel,[94] or in a different month,[95] if the voyage be interrupted by shipwreck or other disaster the owner may hire another vessel or repair his own and so fulfil his contract, and if he determine to repair, the passenger is bound to wait a reasonable time for such repairs to be made.[96] If, however, the voyage be interrupted in consequence of an original defect or unseaworthiness of the vessel, the passenger is not bound to wait for

be liable for the passage to the other owners. Frazer *v.* Yeatman, 10 Mo. 501.

87. Hughson *v.* Winthrop Steamboat Co., 181 Mass. 325, 64 N. E. 74, 58 L. R. A. 432.

88. The Eugene, 87 Fed. 1001, 31 C. C. A. 345 [*affirming* 83 Fed. 222].

89. Stone *v.* Relampago, 23 Fed. Cas. No. 13,486.

90. The Valencia, 110 Fed. 221 [*affirmed* in 117 Fed. 68, 54 C. C. A. 454], holding that where a steamship company having accommodation for and authorized to carry only three hundred and seventy-five steerage passengers sells tickets to and receives four hundred and seventy-five such passengers, and by reason of such overcrowding the passengers are delayed and injured, the company is responsible for such damage, since such crowding beyond the point at which the passengers could be safely carried is a breach of the contract safely to carry them, and an indorsement on an inspector's certificate that a steamship had been provided with accommodations for additional passengers should be rejected as evidence of the fact that such accommodations had been provided, when all the testimony shows conclusively that there were no such accommodations on the ship; for the permission of the inspector to crowd a vessel beyond the limit of accommodations provided for passengers is not a defense to an action for damages to passengers sustained by reason of such overcrowding.

91. Smith *v.* North American Transp., etc., Co., 20 Wash. 580, 56 Pac. 372, 44 L. R. A. 557, holding that low water in a river is no defense to a failure of a carrier to carry a passenger to his destination, where the carrier could have informed itself and anticipated such condition, and that where the undisputed testimony was that a river steamer abandoned its voyage on account of low water, and the controversy was whether this was caused by the act of God, a requested charge was not appropriate which stated that, if the carrier carried its passenger till it was forced to stop by low water, this constituted the "act of God," and excused it from carrying him further until the stage of water should be sufficient.

92. Smith *v.* North American Transp., etc., Co., 20 Wash. 580, 56 Pac. 372, 44 L. R. A 557, holding that where a carrier agreed to take a passenger to Dawson, Alaska, via the Yukon river, but his steamer proceeded no further than Ft. Yukon, because of low water, and the carrier did not contend that it could have got him through before the following summer, it was bound to bring him home.

93. The President, 92 Fed. 673, holding that in an action against a vessel for damages by reason of a failure to afford passengers an opportunity to land on reaching their port of destination, the measure of recovery is the actual damage sustained, which includes the fare paid, and, where the passenger returns to the port at which he took passage, the cost of such return, together with a reasonable sum as compensation for the loss of time necessarily resulting from the breach of the contract.

94. Cobb *v.* Howard, 5 Fed. Cas. No. 2,925

95. Cobb *v.* Howard, 5 Fed. Cas. No. 2,925, 10 N. Y. Leg. Obs. 353 [*affirmed* in 5 Fed. Cas. No. 2,924, 3 Blatchf. 524].

96. Stone *v.* Relampago, 23 Fed. Cas. No. 13,486.

repairs to be made, but may treat the contract as bad *ab initio*, and demand a return of passage-money paid in advance,[97] and where a carrier of passengers undertook to carry a passenger in a vessel which is wrecked before he took passage, it is the duty of the carrier to provide another vessel as a substitute as soon as it can be done by reasonable diligence, so that the passenger may be forwarded within a reasonable time, if he desires.[98] A contract of passage is broken, if any member of the crew be allowed to molest a cabin passenger and if he do not enjoy that ease and comfort for which the passage-money is the consideration; and for such breach of contract the captain and owners are liable.[99] A deviation is a breach of the contract,[1] for which the passenger may recover his passage-money,[2] and passengers, conveyed without their consent to a port different from that agreed on, are not liable for the passage-money;[3] but a carrier agreeing to transport a passenger to a certain port, and then to convey him by steamboat to the place of destination, is not liable for delay occasioned by the failure of the steamboat to reach the point at the stipulated time, caused by an unusual storm,[4] and the contract is also broken by unnecessary delay in transportation,[5] although it is no excuse for breach of a contract to have a vessel at a certain place at a certain time to carry passengers from thence to another place that the vessel did not arrive on time, because she was disabled by mere stress of weather.[6] The taking of steerage passengers from an infected port, on a regular passenger steamship accustomed to carry steerage, is no breach of the ship's contract of carriage with a cabin passenger, or a breach of any duty that the ship owes to him.[7]

2. Accommodations and Provisions.[8] The carrier must furnish proper accommodations, and a passenger on a steamship, whether in first cabin, second cabin, or steerage, is entitled to such accommodations and conveniences as the exercise of reasonable care and the adoption of reasonable means of securing them can afford,[9] and the ship-owner is bound to furnish all reasonable and proper accommodations usually afforded to passengers of similar class on similar voyages in similar vessels, and such as are necessary to a reasonable degree of comfort and to physical health and safety,[10] and for failure to furnish proper accommodations a passenger

97. Stone *v.* Relampago, 23 Fed. Cas. No. 13,486.

98. Williams *v.* Vanderbilt, 29 Barb. (N. Y.) 491 [*affirmed* in 28 N. Y. 217, 84 Am. Dec. 333].

99. Keene *v.* Lizardi, 5 La. 431, 25 Am. Dec. 197, 6 La. 315, 26 Am. Dec. 478.

1. De Colange *v.* The Chateau Margaux, 37 Fed. 157.

2. De Colange *v.* The Chateau Margaux, 37 Fed. 157.

3. McGloin *v.* Henderson, 6 La. 715.

The carrier's failure, under a penal contract, to deliver passengers at the port of destination without their fault, forfeits the penalty, but not his right to retain the passage-money advanced. McGloin *v.* Henderson, 6 La. 715.

4. Van Horn *v.* Templeton, 11 La. Ann. 52

5. See Van Horn *v.* Templeton, 11 La. Ann. 52.

6. Cobb *v.* Howard, 5 Fed. Cas. No. 2,925, 10 N. Y. Leg. Obs. 353 [*affirming* 5 Fed. Cas. No. 2,924, 3 Blatchf. 524].

7. The Normannia, 62 Fed. 469, holding, however, that where a passenger who had purchased passage on defendant's ship, but had determined to forfeit it on the subsequent outbreak of cholera, was induced to take the passage on the false representation of defendant's agent that no steerage passengers would be carried, he may recover from defendant actual damages resulting from the ship being quarantined at the port of destination because of existence of cholera on board among steerage passengers carried.

8. Who are passengers see Carriers, 6 Cyc. 536 *et seq.*

9. Bailey *v.* The Sonora, 13 Fed. Cas. No. 746, where the discomfort suffered by the women because of the insufficiency of the accommodations being greater than that experienced by the men, a discrimination was made in the amount of damages; and the female passengers recovered the full amount paid for their passage, and the male passengers one half of that sum.

10. North Coast Lighterage Co. *v.* Greenwood, 162 Fed. 25, 89 C. C. A. 65; Sparks *v.* The Sonora, 22 Fed. Cas. No. 13,212, holding that a stateroom constantly filled with heated and somewhat offensive air, issuing directly from the boiler, to such an extent as to raise the temperature of the room from twenty-five to forty degrees, with air and light somewhat obstructed by guards on which the portholes opened, and with the berth and bedding constantly wet, though defect in the arrangement of a pump, from which a pipe ran through the stateroom, did not afford reasonable accommodations to a first-class passenger.

may sue the vessel *in rem* in admiralty for damages.[11] But when it cannot be determined that the unhealthiness or discomfort of the accommodations was the cause of the illness for which the passenger is claiming damages, the expenses of his illness, and delays caused thereby, cannot be considered as part of the damages arising from the breach of the contract of carriage.[12] The ship's agents, when the comfortable staterooms are disposed of, must inform the passenger of the nature of the accommodations to be afforded him, and allow him to determine for himself whether he will take the risk of such accommodations as are left available;[13] and a steamship company is liable to a passenger for failure to furnish the latter with a berth on a steamer running at night, where it fails to notify the passenger of its inability to supply such berth on his application therefor at the time of purchasing his ticket;[14] and is moreover liable to passengers who, although they were sold second-class tickets, were given only the accommodation of steerage passengers.[15] An undertaking to carry a passenger on a long journey includes the furnishing of such passenger with a berth, unless there is an understanding to the contrary;[16] but a passenger who purchases a ticket entitling him to a berth is not entitled to the exclusive use of a stateroom containing two berths, although there are some vacant staterooms,[17] and passengers who board a vessel mainly engaged in the carriage of freight, after the cabin room is all taken, and while loading is going on, and make no claim to cabin accommodations or for bedding, are to be considered as impliedly agreeing that their ship-room and quarters are to be on deck, and that such accommodations are to be deemed reasonable;[18] and where a passenger finding the berths too small demands a stateroom in exchange for the berth, and upon refusal demands and receives his money back, he cannot recover for refusal to furnish accommodations.[19] In the absence of special contract to the contrary, a vessel is bound to furnish a sufficient quantity of suitable food for passengers, and is liable in damages for the master's failure to do so when it is within his power.[20] It is the duty of the owners to supply the vessel with sufficient food and provisions to meet the contingencies of accident to the vessel and the resulting delay in the voyage, from whatever cause such accident and delay may arise.[21] Inasmuch as the furnishing bad or improper

11. The Vueltabajo, 163 Fed. 594; North Coast Lighterage Co. *v.* Greenwood, 162 Fed. 25, 89 C. C. A. 65.

The owners are responsible for the master's excluding a cabin passenger from the use of the cabin (St. Amand *v.* Lizardi, 4 La. 243), and the fact that a passenger on a vessel enjoyed first-class accommodation for a part of the voyage before objection was made to his doing so, or that he failed to accept such accommodation when tendered him on condition of paying full fare, did not affect his right to recover for the tort of the vessel's officers in wrongfully excluding him from such accommodation during the latter part of the voyage (Gleason *v.* The Willamette Valley, 71 Fed. 712).

12. Sparks *v.* The Sonora, 22 Fed. Cas. No. 13,212.

13. Sparks *v.* The Sonora, 22 Fed. Cas. No. 13,212.

14. Patterson *v.* Old Dominion Steamship Co., 140 N. C. 412, 53 S. E. 224, 111 Am. St. Rep. 848, 5 L. R. A. N. S. 1012, holding also that where there was evidence that subsequent to plaintiff's purchase of his ticket and application for a berth on defendant's steamer, and defendant's refusal to furnish the berth, other parties were given berths, and that by reason of defendant's refusal plaintiff was compelled to sit up all night, the granting of a nonsuit was error.

15. The Valencia, 110 Fed. 221 [*affirmed* in 117 Fed. 68, 54 C. C. A. 454], holding that while the obtaining of an inspector's certificate permitting the vessel to take more passengers than she actually carried may relieve her from prosecution for the statutory penalty for carrying an excessive number, it does not relieve her from liability to passengers for a violation of her implied agreement to furnish them with reasonable accommodations.

16. The Oriflamme, 18 Fed. Cas. No. 10,572, 3 Sawy. 397.

17. Basnight *v.* Norfolk, etc., R. Co., 147 N. C. 169, 60 S. E. 899.

18. Defrier *v.* The Nicaragua, 81 Fed. 745, holding that a vessel is not bound, in the absence of special contract, to furnish bedding for steerage or deck passengers.

19. Miller *v.* New Jersey Steam-Boat Co., 58 Hun (N. Y.) 424, 12 N. Y. Suppl. 301 [*affirmed* in 135 N. Y. 612, 32 N. E. 645].

20. North Coast Lighterage Co. *v.* Greenwood, 162 Fed. 25, 89 C. C. A. 65; Defrier *v.* The Nicaragua, 81 Fed. 745.

21. The Oregon, 133 Fed. 609, 68 C. C. A. 603, holding that it is the duty of a passenger steamer making a voyage between Nome,

food to passengers, or food unfit to eat, is equivalent to putting them on short allowance within the statute [22] providing a penalty for the latter offense, the carrier is subjected to the penalty if he furnishes such food; [23] but where the fare furnished passengers on a long sea voyage is such as is usually provided, and is sufficient in quantity, and properly cooked, and the passengers do not really suffer, they have no ground for the recovery of damages because it is not so good as might have been furnished or as is provided on vessels making short voyages.[24] The duties which the law imposes on common carriers of passengers by water in relation to the treatment and accommodation of passengers during the voyage necessarily cease on the termination of the voyage.[25]

3. Care Required of Carrier — a. General Rules; Gratuitous Passengers; Children; Visiting Friends. A very high degree of care for the safety of a passenger is required of a ship; [26] even a person carried gratuitously, if lawfully on board,

Alaska, and Seattle, by the outside course, which is in the open sea, without a stopping place for seventeen hundred miles of the way, to carry provisions sufficient for her passengers for at least twenty or thirty days in addition to the usual time required for the voyage, to provide against the contingency of accident and the resulting delays.

A stipulation in a contract for transportation across the ocean, that "during the whole journey . . . passengers will be supplied with good and sufficient food as well as with suitable lodging, and this arrangement stands equally good in the event of any unavoidable delay or accident interrupting the journey," covers delay required by quarantine regulations; and the carrier is liable for injuries to the health of a passenger, resulting from its failure to provide sufficient and suitable food and lodging during the quarantine. Larsen *v.* Allan Line Steamship Co., 37 Wash. 555, 80 Pac. 181, holding also that the provision in the contract for ocean transportation that the carrier will not be liable for delay from "restraints of princes, rulers, and peoples" does not exempt the carrier from liability for negligence in failing to furnish sufficient and suitable food and lodging, which it undertook to furnish, during a quarantine required by the government.

22. 22 U. S. St. at L. 186 [U. S. Comp. St. (1901) p. 2931], to regulate the carriage of passengers by sea from a foreign port to a port of the United States, which provides in section 4, that if any such passengers shall at any time during the voyage be put on short allowance for food and water, except in cases of necessity, the master shall pay each passenger three dollars for each and every day of such short allowance.

23. The European, 120 Fed. 776, 57 C. C. A. 140.

24. The President, 92 Fed. 673.

Food held unsuitable see The D. C. Murray, 89 Fed. 508, where evidence was that the beef and pork was bad and the other stores inferior, and the rice sometimes had weevils in it.

Food held suitable see The Centennial, 131 Fed. 816, where allegations of a libel by steerage passengers on a voyage from Seattle to San Francisco to recover damages for breach of contract on the ground that the ship failed to furnish them with proper food, quarters, and bedding was held not sustained by the evidence.

25. New Orleans *v.* The Windermere, 12 La. Ann. 84, holding that if, during the voyage, a contagious disease breaks out in the vessel, and on her arrival at port city authorities find it necessary, in order to prevent the spreading of the infection, to have her sick passengers sent to the hospital to be treated, the owners of the vessel cannot be made liable for the expenses incurred thereby.

Hospital money.— When the consignees of the ship have paid the contribution imposed by the statute as hospital money, and the act of introducing the passengers is not in violation of any prohibitory law, an action for damages arising from a quasi offense will not lie. New Orleans *v.* The Windermere, 12 La. Ann. 84.

26. Pouppirt *v.* Elder Dempster Shipping, 125 Fed. 732, 60 C. C. A. 500 [*reversing* 122 Fed. 983]. And see *infra*, this, and the following notes.

A carrier of slaves, who were drowned by an accident to the carrier's steamboat, was not liable as a common carrier of freight, but as a carrier of passengers (Williams *v.* Taylor, 4 Port. (Ala.) 234; McDonald *v.* Clark, 4 McCord (S. C.) 223; Boyce *v.* Anderson, 2 Pet. (U. S.) 150, 7 L. ed. 379. But see Lobdell *v.* Bullitt, 13 La. 348, 33 Am. Dec. 567); and since a carrier of slaves was not an insurer but only liable for injuries as in the case of passengers, defendant, whose servant, acting outside of the scope of his duties, shot plaintiff's slave while he was being transported on defendant's boat, was not liable for the injury (McClenaghan *v.* Brocks, 5 Rich. (S. C.) 17).

Duty where passenger falls overboard.— The carrier is liable for the death of a passenger due to failure to stop the boat to rescue him after he fell overboard. Melhado *v.* Poughkeepsie Transp. Co., 27 Hun (N. Y.) 99.

Children.— Injury to a child, resulting proximately from the fault of his nurse, is not ground for an action against the vessel. The Burgundia, 29 Fed. 464. Similarly where plaintiff's child was on board defendant's tugboat with their consent, it was held that they could not recover for his death by drowning.

may recover for want of due care;[27] and it is also the duty of the ship's officers to take reasonable precautions to avoid risk of injury on board to visiting friends of passengers.[28]

b. Appliances, Equipment, Loading, and Management. A carrier of passengers by water is liable for failure to observe a very high degree of care for a passenger's safety.[29] His duty to protect the passenger requires him to take great pre-

Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52. But if the crew permitted the child to come on board without the consent of plaintiffs, the fact that it was against the orders of defendant, and without the knowledge of the officer in charge of the boat, was not sufficient to relieve defendant from liability. Cook *v.* Houston Direct Nav. Co., *supra*, holding also that where the petition alleged that defendant company was guilty of negligence in receiving plaintiff's child on board of defendant's tugboat without their consent, and the answer averred that the boat was not a passenger boat, and that defendant's employees were forbidden to carry passengers, it was error to charge that plaintiffs could not recover unless the child was a passenger on defendant's boat.

27. Cleveland *v.* New Jersey Steamboat Co., 68 N. Y. 306 (holding that one who enters upon a passenger steamboat in good faith, to take passage thereon, is there in the relation and character of a passenger, and the owner of the boat owes to him the duty of a carrier of passengers, although no fare has been paid); The New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019 (where the injured passenger was on board under a custom to permit persons usually employed on steamboats to go free of charge from place to place, and it was held that negligence in the care or management of the boilers of the steamboat was culpable negligence, rendering the owners and the boat liable for damages, even in the case of gratuitous carriage passengers).

28. Unitus *v.* The Dresden, 62 Fed. 438, holding also that stevedores bringing passengers' baggage on board of a steamship and placing it where requested by passengers for their convenience are not exercising an independent employment, but are performing a duty which rests on the ship, and it is the duty of the ship's officers to see that injury by them to visiting friends is avoided.

Sailing with person visiting passenger on board.— There is no presumption that a person who comes on board a steamboat to see a friend at a landing comes as a passenger, and intends to sail in her, so as to relieve the owners of the boat from the duty of providing reasonable means and opportunity of leaving the boat before she starts, in case such person wishes to do so (Keokuk Packet Co. *v.* Henry, 50 Ill. 264); but where plaintiff went on board a steamboat at one of her intermediate landings, and, while transacting business with the boat, was taken off to a landing below against his remonstrance, it was held that he was entitled to a reasonable time within which to transact the business upon which he went on board (in this case to take charge of a lady passenger), and was entitled to damages amounting to the reasonable value of the time lost and expense incurred in being taken to and returning from the place at which he was landed (Stoneseifer *v.* Sheble, 31 Mo. 243).

29. Hill *v.* Starin, 173 N. Y. 632, 66 N. E. 1110 [*affirming* 65 N. Y. App. Div. 361, 73 N. Y. Suppl. 91]; White *v.* Seattle, etc., Nav Co., 36 Wash. 281, 78 Pac. 909, 104 Am. St. Rep. 948 (holding a carrier by boat negligent toward its passengers in leaving unguarded a hole in the floor of its deck two feet long and four inches wide); The Erastus Corning, 158 Fed. 452 (holding that where a steamer ran upon a rock in the night, it was negligence for those in charge to permit passengers to leave in a small boat without a competent seaman in charge, which rendered the vessel liable to one of such passengers for the loss of his effects, and for physical injuries resulting from his exposure for several hours in the open boat, with only his underclothing to protect him from the cold); The Prinzess Irene, 139 Fed. 810 [*affirmed* in 151 Fed. 17, 80 C. C. A. 483]; Northern Commercial Co. *v.* Nestor, 138 Fed. 383, 70 C. C. A. 523 (holding that a passenger on a vessel, injured while on a voyage, without his fault, through the negligence of the officers, is entitled to no less care from the ship than a seaman, and its duty is not fulfilled by giving him such care as an ordinary unskilled person could afford him, and further that the carrier was liable for failure to exercise the utmost vigilance and care in maintaining order on its vessel and to protect its passengers against injury by the careless use of firearms); *In re* Kimball Steamship Co., 123 Fed. 838 [*reversed* on other grounds in 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84] (holding also that the liability of a steamship for the safe carriage of persons whom she undertakes to convey on board from the shore in her boats as passengers is the same whether such persons had previously engaged passage or were going on board for that purpose); The Nederland, 7 Fed. 926, 14 Phila. (Pa.) 601. But see Ganguzza *v.* Anchor Line, 97 N. Y. App. Div. 352, 89 N. Y. Suppl. 1049 [*affirmed* in 184 N. Y. 545, 76 N. E. 1095], holding that where a steerage passenger on an ocean steamship was injured by the parting of a wire rope used in hoisting ashes from the hold, while he was leaning against the jamb of a door leading to what was known as the "stokehole fidley," watching the hoisting of the ashes, and it was not usual for passengers to be in such position, plaintiff was not entitled to the exercise of

caution to furnish safe appliances,[30] and to provide the ship with safe machinery,[31]

the utmost human care, vigilance, and foresight to protect him, but was only entitled to the exercise of ordinary care to guard him from injury.

Liability of carrier of passengers compared with liability of carrier of goods.— While a carrier of passengers by sea is bound to exercise a very high degree of care, prudence, and foresight, it is not an insurer of their safety, and there is no implied warranty, as in case of the carriage of goods, that the ship was seaworthy at the beginning of the voyage, and whether she was technically so or not is immaterial in a suit by passengers to recover for injuries received. The Oregon, 133 Fed. 609, 68 C. C. A. 603, Ross, circuit judge, dissenting. But while a ship is not bound to the same strict responsibility for the safety of passengers as in the case of goods, it is bound to exercise a high degree of care, while the passenger is also required to exercise reasonable care for his own safety. Elder Dempster Shipping Co. *v.* Pouppirt, 125 Fed. 732, 60 C. C. A. 500 [*reversing* 122 Fed. 983]. And see Mulvana *v.* The Anchoria, 83 Fed. 847, 27 C. C. A. 650 [*affirming* 77 Fed. 994], holding that the existence of a wet place on the floor about the water cooler in the steerage, caused by carelessness of passengers in using the cooler, is not proof of such negligence as will render the ship liable for personal injuries caused by the slipping of the steward thereon so as to spill hot gruel upon a passenger. The probability of such an accident is too remote to make the failure to keep the floor constantly dry negligence in the protection of passengers.

Evidence held not to show negligence on the ship-owner's part see Dougan *v.* Champlain Transp. Co., 56 N. Y. 1 [*affirming* 6 Lans. 430]; The Caracas, 163 Fed. 662; The City of Boston, 159 Fed. 261; Elder Dempster Shipping Co. *v.* Pouppirt, 125 Fed. 732, 60 C. C. A. 500 [*reversing* 122 Fed. 983]; Van Anda *v.* Ontario Northern Nav. Co., 111 Fed. 765, 49 C. C. A. 506, 55 L. R. A. 544; Mulvana *v.* The Anchoria, 77 Fed. 994 [*affirmed* in 83 Fed. 847, 27 C. C. A. 650]; Cleveland *v.* New Jersey Steamboat Co., 68 N. Y. 306 [*reversing* 5 Hun 523]; Crocheron *v.* North Shore Staten Island Ferry Co., 56 N. Y. 656 [*reversing* 1 Thomps. & C. 446].

The owners of excursion boats used for night excursions are bound to use proper precautions to guard against the natural mistakes of passengers while on board. The Pilot Boy, 23 Fed. 103.

Parties jointly owning and navigating a boat, the boiler of which explodes through the negligent act of the engineer, are jointly and severally liable, in an action of tort by a passenger, for injuries resulting from such explosion. Fay *v.* Davidson, 13 Minn. 523.

Where a vessel was sunk as the result of a collision those in charge were bound to use the utmost exertions in their power to avert injury to the passengers from the impending peril, which duty continued until the passengers were safely landed, but the vessel is not liable for injuries resulting from errors of judgment in the emergency on the part of those in charge, provided they were competent seamen. The City of Boston, 159 Fed. 261.

A provision of a steamship ticket exempting the carrier from responsibility for its own or its agent's negligence, provided it has used due diligence to make the vessel seaworthy, is void, as against public policy. The Oregon, 133 Fed. 609, 68 C. C. A. 603. And a provision that neither the ship, the ship-owner, nor the agent is responsible, beyond the amount of one hundred dollars, for loss of or injury to passengers arising from latent defects in the steamer, or default or negligence of the ship-owner's servants, is unreasonable and invalid. Moses *v.* Hamburg-American Packet Co., 88 Fed. 329.

30. Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37 (holding that where a ferry company has a gate in the front of its boat so insecurely fastened that any person can open it, it is no defense to an action by a passenger, for injuries caused by the opening of the gate, that it was not opened by an employee); Cleveland *v.* New Jersey Steamboat Co., 5 Hun (N. Y.) 523 [*reversed* on other grounds in 68 N. Y. 306]; The Nederland, 7 Fed. 926 [*affirmed* in 14 Fed. 63].

31. Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; The Nederland, 7 Fed. 926 [*affirmed* in 14 Fed. 63].

Inspection of boilers, etc.— Under U. S. Rev. St. (1878) § 4426, requiring the hull and boilers of every ferry-boat to be inspected, and U. S. Rev. St. (1878) § 4470 [U. S. Comp. St. (1901) p. 3049], requiring certain provisions to be made for protection against fire, on every steamer carrying freight or passengers, the steamboat inspectors may require ferry-boats to be provided with the same precautions against fire, so far as applicable, as are expressly provided in reference to any other steam vessels carrying passengers; and when the boat passes inspection on the basis of having a steam pump provided in accordance with U. S. Rev. St. (1878) § 4471 [U. S. Comp. St. (1901) p. 3049], the boat is bound to maintain it in the condition required by that section. The Garden City, 26 Fed. 766. And it is as much the duty of an owner of a steamship under U. S. Rev. St. (1878) § 4418, to cause an inspection of a boiler which has been repaired in a substantial part, as to cause an inspection of a new boiler, before using the same; and a failure to cause such inspection will render the owner of the vessel liable, under U. S. Rev. St. (1878) § 4493 [U. S. Comp. St. (1901) p. 3058], to a passenger injured in consequence of the explosion of the boiler. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366. Nor does a compliance with the provisions of the act exempt a party from liability which the law otherwise imposes. Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282; Swarthout *v.* New Jersey

equipment,[32] loading,[33] stowage,[34] mooring,[35] and management [36] of the vessel, and its seaworthiness,[37] provided it contributes to the injury suffered, and passenger vessels must be furnished with whatever is requisite or usual for the safety of those on board,[38] including a safe means of passage from the boat to the pier;[39] and the carrier is

Steamboat Co., 46 Barb. (N. Y.) 222 [*affirmed* in 48 N. Y. 209, 8 Am. Rep. 541], holding that where a passenger was injured by an explosion of a boiler on a steamboat, the steamboat's owners were liable for damages, although the inspector, exercising his office in pursuance of the above act, had certified that the conditions of the act were complied with.

32. Mellquist *v.* The Wasco, 53 Fed. 546, holding the carrier liable for injury to a passenger on a steamer, while on the stairway from the main deck to the cabin deck, by the fall of a heavy lantern, caused by the breaking of a halyard by which it was being hoisted to its place, although the cause of such breaking did not appear.

33. Unitus *v.* The Dresden, 62 Fed. 438, holding that the use, for lowering baggage into a steamship, of the same companionway used by passengers and their friends in passing up and down, where the ship has more than one companionway that could be used for baggage, is want of care for which the ship is liable to a passenger injured by the fall of a trunk, caused by its handle breaking while being so lowered.

34. The Oriflamme, 18 Fed. Cas. No. 10,572, 3 Sawy. 397, holding that a steerage passenger is entitled to the use of the steerage room to walk about or sit down in during the voyage, without the risk or inconvenience of freight therein; and if freight is stowed therein it is at the risk of the carrier, and he must so stow it and secure it that no harm will be caused to the passengers by it; nor can the carrier impose any arbitrary regulation upon the passengers with a view of diminishing such risk — such that they must remain in their berths during the whole voyage, or any unusual portion of it.

35. The City of Portsmouth, 125 Fed. 264, holding a steam ferry-boat which, while discharging passengers on a dock or float, by reason of being insufficiently secured, swung away from the float, leaving a space of several inches, liable for an injury to a passenger, who in attempting to pass from the vessel, and in the exercise of due care, stepped into such space, or was thrown by the lurching of the vessel, and fell between the vessel and dock.

36. Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221 (holding the owners of a boat liable for injuries to a passenger resulting from the explosion of a boiler which at the time carried steam in excess of the pressure allowed by the inspector's certificate); The Annie L. Vansciver, 161 Fed. 640 (holding those operating the vessel chargeable with negligence which rendered it liable for injuries suffered owing to their permitting the passengers to crowd without warning, within coils of the lines, or in not so coiling or handling the lines as to remove the danger); The Prinzess Irene, 151 Fed. 17, 80 C. C. A. 483 [*affirming* 139 Fed. 17] (holding a steamship negligent in requiring steerage passengers to come on to the upper deck to receive their food while crossing the ocean in weather so stormy as to render it dangerous, and liable for the injury of a passenger while so on deck caused by being thrown down by a wave, or by reason of the wet and slippery condition of the deck); Jones *v.* The St. Nicholas, 49 Fed. 671 (holding that it is negligence for a river passenger steamer to approach the locality of a railroad drawbridge at night at such a rate of speed as to prevent her complete control by the master, especially where there is no uniformity in the method of placing lights to indicate whether the draw is open or closed); Ladd *v.* Foster, 31 Fed. 827, 12 Sawy. 547.

37. *In re* Myers Excursion, etc., Co., 57 Fed. 240 [*affirmed* in 61 Fed. 109, 9 C. C. A. 386], holding that a barge used to carry excursion parties on New York harbor and neighboring waters is unseaworthy when not in a condition to withstand without serious injury to her passengers the violent thunder storms which are of frequent occurrence in that locality.

38. Lobdell *v.* Bullitt, 13 La. 348, 33 Am. Dec. 567; The Pilot Boy, 23 Fed. 103, holding the carrier liable for failure to have a light at a steep stairs resulting in injury.

39. Croft *v.* Northwestern Steamship Co., 20 Wash. 175, 55 Pac. 42 (holding that a steamboat company is liable for an injury to a passenger caused by a loose gang-plank, although it had securely fastened the plank, and there was a reasonable opportunity for persons other than its employees to loosen it); The Ocracoke, 159 Fed. 552; Burrows *v.* Lownsdale, 133 Fed. 250, 66 C. C. A. 650 (holding that a gang-plank consisting of a plank ten feet long, sixteen inches wide, and one inch thick, with cleats nailed on one side, but having no railing, rope, or other guard, and which, when extended from the deck of a steamer to a wharf, sloped downward at an angle of about thirty degrees, does not furnish a reasonably safe means for discharging passengers, nor can its use be justified by custom; and the vessel is liable in damages for the injury of a passenger by falling from it into the water); Hrebrik *v.* Carr, 29 Fed. 298 (holding that a passenger on board a vessel, before her departure from the wharf, has the right to go ashore for his own purposes, and the vessel is liable for failure to provide a safe means of passage from the steamer to the pier). But see Plant Inv. Co. *v.* Cook, 85 Fed. 611, 29 C. C. A. 377, holding that where in descending a slippery incline at a boat landing, instead of walking on a rough gang-plank or a row of cleats

liable for injuries due to its negligently leaving a hatch open into which a passenger falls.[40] But the carrier is not responsible for accidents resulting from latent defects in machinery or equipment not avoidable by a very high degree of care;[41] and, although the breaking of the machinery of a steamboat, whereby a passenger was injured, sometimes raises a presumption of negligence on the part of the carrier,[42] to overcome such presumption it is not necessary to show that the machinery was constructed of the most perfect material and in the most perfect manner care and diligence can suggest.[43] But in an action to recover for injuries to a passenger resulting from the explosion of a boiler on defendant's ship, the fact that skilful manufacturers of machinery used in such ships did not use certain safety appliances, which science had made known and demonstrated to be useful, is not conclusive on the question of the carrier's freedom from negligence.[44] A ship-owner is liable to a passenger on his vessel for injuries sustained in a collision caused by the concurrent negligence of the colliding ships.[45]

c. Acts or Omissions of Officers or Crew; Assault; Medical Treatment. It is the duty of a vessel to protect a passenger from harm or injury through the acts of officers, employees, or other passengers, and a failure to do so renders it liable for the resulting damages,[46] whether the injury be due to negli-

with which the incline was provided, plaintiff walked between them and was injured by a fall, it was the result of her own negligence.

A steamboat is affected with notice of the insecure condition of a gangway by complaint made to longshoremen engaged in carrying freight and baggage aboard her, whom the captain did not deny were servants of the boat, for they are regarded for this purpose as agents of the boat. Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449.

40. Behrens *v.* The Furnessia, 35 Fed. 798.

41. Simmons *v.* New Bedford, etc., Steamboat Co., 100 Mass. 34 (holding that on the trial of an action by a passenger against a steamboat company for injury by the fall of a small boat which was hung over the deck, an instruction which allowed the jury to hold defendant responsible if the fastenings were not strong enough, although defendant might not have had any notice of their weakness, and might not with the utmost care have ascertained it, was erroneous); The Nederland, 7 Fed. 926 [*affirmed* in 14 Fed. 63] (holding that where a passenger on a steamship was injured by the fall of a boom caused by the drawing out of the shoulder of a swivel hook from the band surrounding the block to which it was attached, and where it appeared that the accident must have resulted from a defect in the shoulder not discoverable by inspection of the block, the steamship was not liable).

42. Yerkes *v.* Keokuk Northern Line Packet Co., 7 Mo. App. 265, a paddle wheel.

43. Yerkes *v.* Keokuk Northern Line Packet Co., 7 Mo. App. 265.

44. Caldwell *v.* New Jersey Steamboat Co., 47 N. Y. 282.

45. Jung *v.* Starin, 12 Misc. (N. Y.) 362, 33 N. Y. Suppl. 650.

46. Keene *v.* Lizardi, 5 La. 431, 23 Am. Dec. 197; New Jersey Steam-Boat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049; The City of Panama, 101 U. S. 453, 25 L. ed. 1061; The Western States, 151 Fed. 929 [*affirmed* in 159 Fed. 354, 86 C. C. A. 354]; The Yankee *v.* Gallagher, 30 Fed. Cas. No. 18,124, McAllister 467.

The act of March 30, 1852, "for the better security of the lives of passengers on steam vessels," does not exempt the owners and masters of a steam vessel, and the vessel, from liability for injuries caused by the negligence of its pilot or engineer, but makes them liable for all damages sustained by a passenger or his baggage from neglect to comply with the provisions of the law, no matter where the fault may lie; and, in addition to this remedy, any person injured by the negligence of the pilot or engineer may have his action directly against those officers. Sherlock *v.* Alling, 93 U. S. 99, 23 L. ed. 819.

Injury by ship's surgeon.— Under the act of Aug. 2, 1882, 22 U. S. St. at L. 188, c. 374, § 5 [U. S. Comp. St. (1901) p. 2395], which provides that steamships shall carry competent surgeons, who shall be supplied with proper instruments and medicines, etc., it is the duty of the ship-owner to provide a competent surgeon, who may be employed by the passengers if they choose; but the owner is not liable for injury caused by failure of the surgeon to exercise care in performing a surgical operation. O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329 (vaccination); Laubheim *v.* De Koninglyke, etc., Steamship Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815 (unskilful treatment of bruised knee-cap, evidence held insufficient to prove negligence in selection of surgeon); The Napolitan Prince, 134 Fed. 159. And under the Passengers Act of Great Britain, passed Aug. 14, 1855, which provides that every passenger ship shall carry a duly qualified medical practitioner, and that the owner shall furnish a proper and necessary supply of medicines, to be properly packed and placed under the medical practitioner's control, the ship-owner has no supervision over the medical practitioner, and its duty ceases on complying with such requirements. It is not therefore liable

gence[47] or wilful misconduct, such as wanton assault and battery,[48] false arrest and imprisonment,[49] threats,[50] or the exercise of unnecessary and excessive force in enforcing a regulation,[51] but not for necessary and not excessive force in enforcing a valid regulation,[52] and the vessel is not liable for errors of judgment on the part of employees in an emergency, provided they are competent men for their positions.[53] The master of a steamship employed as a common carrier of passengers cannot lawfully remove from his vessel a passenger whose behavior is proper, and who has tendered his fare;[54] but he may exclude therefrom one who takes passage for the purpose of soliciting passengers for a connecting line running in opposition to a connecting line with which the steamboat proprietors have a contract to carry passengers through to a distant port.[55]

4. Actions For Breach — a. Nature and General Rules. A contract to transport a passenger in a vessel on the high seas is a maritime contract, and within the jurisdiction of admiralty,[56] and the maritime law gives to passengers a lien on the ship after the performance of the contract has begun, as security, and they

for injuries incurred by a passenger by taking calomel furnished by the medical practitioner through negligence or mistake, in response to a request for quinine. Allan *v.* State Steamship Co., 132 N. Y. 91, 30 N. E. 482, 28 Am. St. Rep. 556, 15 L. R. A. 166 [*reversing* 5 Silv. Sup. 235, 8 N. Y Suppl. 803].

47. Doherty *v.* California Nav., etc., Co., 6 Cal. App. 131, 91 Pac. 419 (holding that where the captain of a steamship discovered a passenger lying in a drunken and helpless condition on the floor, and, with knowledge of his helplessness, lifted him to his feet, and left him without any support, whereupon he fell and broke his arm, the captain did not exercise the full degree of care required by rendering assistance sufficient in the case of a sober man, but was bound to exercise such care as he could to avoid an accident in the situation presented to him); Smith *v.* British, etc., Royal Mail Steam Packet Co., 46 N. Y. Super. Ct. 86 [*affirmed* in 86 N. Y. 408] (negligent injury to female passenger due to steward trying to pull her from her berth); Ryall *v.* Kennedy, 40 N. Y. Super. Ct. 347 [*affirmed* in 67 N. Y. 379] (negligence in failing to remove poison from drinking cup whereby a child of a passenger died).

48. Levidow *v.* Starin, 77 Conn. 600, 60 Atl. 123; Sherley *v.* Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; McGuire *v.* The Golden Gate, 16 Fed. Cas. No. 8,815, McAllister 104, allowing, however, only actual not punitive damages.

Under Ill. Rev. St. c. 102, providing that steamboats navigating the rivers within and bordering on this state shall be liable for any injury done by the captain or other officer thereof to a passenger on such steamboat, an action of trespass will lie against a steamboat for an assault and battery committed by the mate of the boat on a passenger. The F. X. Aubury, 28 Ill. 412, 81 Am. Dec. 292.

49. Ragland *v.* Norfolk, etc., Steamboat Co., 163 Fed. 376 [*modified* in 169 Fed. 286], holding that where a passenger on a steamship was arrested by a watchman, without justification, dragged down the saloon stairway by the collar, pushed inside the freight room, and kept there in custody of another watchman for an hour, the ship-owners were liable.

50. Levidow *v.* Starin, 77 Conn. 600, 60 Atl. 123.

51. New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 7 S. Ct. 1039, 30 L. ed. 1049, holding that where a deck passenger has notice of, and has contracted to observe, a regulation restricting deck passengers to a particular part of the boat, and the steamboat hands, in removing him from a place in which he had no right to be, used unnecessary and excessive force, the company is liable for the injuries caused to the passenger thereby. See Levidow *v.* Starin, 77 Conn. 600, 60 Atl. 123.

Under the Ohio Water Craft Law an action for an assault and battery, committed by the clerk of a vessel upon a passenger at a point on a navigable river outside the territory of the state, cannot be maintained in Ohio, unless it appears that the assault and battery was committed within the scope of the clerk's employment. The Ocean *v.* Marshall, 11 Ohio St. 379.

52. Ellis *v.* Narragansett Steamship Co., 111 Mass. 146, holding that the officers of a steamship have a right to reserve a table in the dinner cabin for their own use, and to cause an intruder thereat to be removed by force, so far as force may be necessary.

Vaccination.—Where one on shipboard voluntarily submits to vaccination by the ship's physician in order to obtain the proper certificate to pass quarantine, she cannot maintain an action against the ship-owner for assault by the physician for performing such operation. O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

53. The City of Boston, 159 Fed. 261.

54. Pearson *v.* Duane, 4 Wall. (U. S.) 605, 18 L. ed. 447 (applying the rule, although the removal was for the purpose of preventing the passenger from proceeding to a place under a revolutionary government by which he has been sentenced to death in case of his return); La Gascogne, 135 Fed. 577.

55. Jencks *v.* Coleman, 13 Fed. Cas. No. 7,258, 2 Sumn. 321.

56. Stone *v.* The Relampago, 23 Fed. Cas. No. 13,486.

may maintain a suit *in rem* as well as *in personam*.[57] The owner is subject to the same responsibility for a breach of duty by the master toward the passengers as for his misconduct in regard to merchandise;[58] and as the master may sue in a foreign port in behalf of the owners, when by his act or contract a right accrues in their favor, so may he be sued in their behalf when a liability is incurred by them from his act within the scope of his employment.[59] The general rules governing actions against carriers for personal injuries to passengers [60] apply to actions of this kind against carriers by water, as to process,[61] pleading,[62] evidence,[63] and

57. Stone *v.* Relampago, 23 Fed. Cas. No. 13,486; The Zenobia, 30 Fed. Cas. No. 18,208, Abb. Adm. 48.

58. Fellows *v.* High, 7 La. Ann. 451.

Liability for injury by carrier of goods see *supra*, VII, D.

The act of Aug. 3, 1852, entitled, "An act for the better security of the lives of persons on vessels navigated in whole or in part by steam," may be invoked as the basis of a civil action to remedy a wrong caused by a failure of the carrier to comply with its provisions. England *v.* Gripon, 15 La. Ann. 304.

La. Civ. Code, art. 3237, subd. 12, does not create a lien or privilege upon a vessel for the loss of life of a passenger and was not intended to apply to actions for damages resulting in death. The Albert Dumois, 177 U. S. 240, 20 S. Ct. 595, 44 L. ed. 751 [*affirming* 87 Fed. 948], holding, however, that valid claims may be asserted under a limited liability act for damages on account of the loss of life of passengers in a collision, although there may be no lien or privilege upon the vessel given therefor by local law.

Analogy between carrier of goods and of merchandise.— Ships engaged in carrying passengers on the high seas for hire stand on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandise, the passage-money being the equivalent for the freight, and therefore on a breach of a passenger contract, and damage resulting, the ship as well as the owner is bound to respond. The Aberfoyle, 1 Fed. Cas. No. 17, 1 Blatchf. 360 [*affirming* 1 Fed. Cas. No. 16, Abb. Adm. 242]; The Pacific, 18 Fed. Cas. No. 10,643, 1 Blatchf. 569.

59. Fellows *v.* High, 7 La. Ann. 451.

60. See CARRIERS, 6 Cyc. 626 *et seq.*

61. Fellows *v.* High, 7 La. Ann. 451, holding that in an action of damages by a passenger for ill-usage by the master of a vessel, the owners, although non-residents, cannot be made liable when citation is served only on the master and consignees.

62. Cook *v.* Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52 (holding that where the petition alleges that defendant company was a common carrier of passengers, and that plaintiff's child was killed while a passenger on defendant's tugboat, an answer averring that the boat was not a passenger boat, and that defendant's employees were forbidden to carry passengers, is sufficient); Freeman *v.* Engelmann Transp. Co., 36 Wis. 571 (holding that where in an action for negligence in the management of a steamboat, causing the death of plaintiff's intestate by drowning, the answer averred substantially that all the passengers were urged by the officers to take to the small boats, and that some, including such intestate, refused to do so, whereby he was lost, it stated a defense).

Sufficiency of complaint.—A complaint, in an action for permanent injuries to plaintiff's health, which alleges that because of defendant's failure to furnish him, as a passenger, sufficient wholesome food and clean, warm quarters, with bedding, during his journey across the ocean, he suffered great pain from cold and hunger, and became sick; that by reason of said suffering his health has been permanently injured; that he has lost the power of hearing in both ears, and has been rendered entirely deaf for the balance of his life, states a cause of action. Larsen *v.* Allan Line Steamship Co., 37 Wash. 555, 80 Pac. 181. And a petition for an injury to a passenger caused by the falling of a gangplank, alleging that the plank was negligently supported on defendant's boat, and was not properly fastened thereto, is sufficiently definite and certain. Croft *v.* Northwestern Steamship Co., 20 Wash. 175, 55 Pac. 42.

63. *Connecticut.*— Levidow *v.* Starin, 77 Conn. 600, 60 Atl. 123, holding that in an action by a passenger on a steamboat for an assault committed by the captain the burden of proving the facts set up by way of justification rests on defendant.

Indiana.— Memphis, etc., Packet Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71, holding that in an action by a passenger on a steamboat against the owners thereof to recover for injuries alleged to have been sustained by reason of the negligence of defendant's servant in allowing a bale of cotton to fall upon and injure plaintiff, evidence to show defects in the construction of the boat is irrelevant and should be rejected.

Massachusetts.— Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99, holding that in an action for injuries received by the fall of a small boat, suspended over the deck of a steamboat, evidence that passengers had been accustomed to sit in the boat was admissible to show that the officers must have known of the practice, but not to show that the officers had reason to suppose such occupation was dangerous.

New York.—Miller *v.* Ocean Steam-Ship Co., 118 N. Y. 199, 23 N. E. 462 (holding that in an action for injury evidence is admissible that immediately after the accident a capstan bar was substituted for a broken stick,

trial.[64] Thus questions of fact,[65] such as negligence of defendant[66] and contributory negligence of plaintiff,[67] are for the jury, unless the evidence is so manifestly insufficient that a finding based thereon could not be sustained,[68] and the parties are upon request entitled to full instructions correctly stating the law.[69]

b. Defenses; Contributory Negligence. The general doctrine of contributory

and the turning of the vessel completed by its use); Cleveland *v.* New Jersey Steamboat Co., 5 Hun 523 [*reversed* on other grounds in 68 N. Y. 306] (holding that evidence of a custom on other passenger boats on the river to wait for the departure of the boat before putting up the gates at the gangway entrance was inadmissible, for a negligent custom of others is not a defense).

United States.— Jones *v.* The St. Nicholas, 49 Fed. 671 [*distinguishing* The Farragut, 10 Wall. 334, 19 L. ed. 946], holding that where a river steamboat which carries no lookout at the bow, as required by rule 10 of the board of supervisors' regulations, collides with a drawbridge at night, and thus causes injuries to her passengers, the burden is upon her to show that the want of a lookout did not in any manner contribute to the accident, and that the fact that other boats running on the same rivers did not carry any lookout except the pilot or helmsman, is immaterial, since no practice which is contrary to a rule having the force of a statute can create a valid custom.

See 44 Cent. Dig. tit. "Shipping," § 545 *et seq.*

Evidence held sufficient to show negligence on carrier's part see Miller *v.* Ocean Steam-Ship Co., 118 N. Y. 199, 23 N. E. 462.

By the act of July 7, 1838, for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, masters and owners, neglecting to comply with its conditions, are liable to a penalty of two hundred dollars, to be recovered by suit or indictment; and if neglect or disobedience of the law shall be proved to exist, when injury shall occur to persons or property, it throws upon the master and owner of a steamer the burden of proof to show that the injury done was not the consequence of it. Poree *v.* Cannon, 14 La. Ann. 501; Waring *v.* Clarke, 5 How. (U. S.) 441, 12 L. ed. 226.

64. Evers *v.* Wiggin Ferry Co., 127 Mo. App. 236, 105 S. W. 306.

65. Miller *v.* Ocean Steam-Ship Co., 118 N. Y. 199, 23 N. E. 462 (whether the management of a hawser was negligent); Cleveland *v.* New Jersey Steamboat Co., 7 N. Y. St. 598 (whether gangway gate was placed in position).

66. American Steam-Ship Co. *v.* Landreth, 102 Pa. St. 131, 108 Pa. St. 264, 48 Am. Rep. 196 (whether the company was negligent in failing to provide railings along the side of the cabin); Coney Island Co. *v.* Dennan, 149 Fed. 687, 79 C. C. A. 375; International Mercantile Marine Co. *v.* Smith, 145 Fed. 891, 76 C. C. A. 423.

67. Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37; Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; Gannon *v.* Union Ferry Co., 29 Hun (N. Y.) 631; American Steam-Ship Co. *v.* Landreth, 108 Pa. St. 264; International Mercantile Mar. Co. *v.* Smith, 145 Fed. 891, 76 C. C. A. 423.

68. Hughes *v.* New Jersey Steamboat Co., 11 Misc. (N. Y.) 65, 31 N. Y. Suppl. 1012.

Evidence held sufficient to warrant submission to the jury of the question whether, notwithstanding deceased's negligence, defendant could, by the exercise of reasonable care, have prevented his death. Pate *v.* Tar Heel Steamboat Co., 148 N. C. 571, 62 S. E. 614.

69. Hampton *v.* Occidental, etc., Steam-Ship Co., 139 Cal. 706, 73 Pac. 579; Dodge *v.* Boston, etc., Steam-Ship Co., 148 Mass. 207, 19 N. E. 373, 12 Am. St. Rep. 541, 2 L. R. A. 83 (holding that defendant was entitled to an instruction as to the rights of a passenger acting in disobedience of reasonable orders or regulations of the carrier); Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99 (holding that in an action for injuries received by the fall of a small boat suspended over the deck of a steamboat, defendants were entitled to an instruction that evidence of disregard by passengers of other rules of the steamboat in no way showed an acquiescence in the use of such small boat in a manner dangerous to passengers).

The charge of a trial court as to the degree of care required from a steamship company for the safety of a passenger considered and approved in an action for the passenger's injury see International Mercantile Mar. Co. *v.* Smith, 145 Fed. 891, 76 C. C. A. 423.

Peremptory instruction in favor of defendant refused see Louisville, etc., Mail Co. *v.* Barnes, 117 Ky. 860, 79 S. W. 261, 25 Ky. L. Rep. 2036, 111 Am. St. Rep. 273, 64 L. R. A. 574.

Instruction held not objectionable as ignoring the defense of contributory negligence and telling the jury that, after going on the deck, plaintiff might shut his eyes as to its apparent physical condition see Evers *v.* Wiggins Ferry Co., 127 Mo. App. 236, 105 S. W. 306.

The act of Feb. 28, 1871 (16 U. S. St. at L. 440, c. 100), as to the inspection and licensing of steam vessels, was intended to provide for the better security of life, and comes in aid of the common law, and to carry more steam than allowed under that act is negligence as a matter of law. Landers *v.* Staten Island R. Co., 13 Abb. Pr. N. S. (N. Y.) 338 [*reversed* on other grounds in 53 N. Y. 450, 14 Abb. Pr. N. S. 346].

negligence in regard to carriage of passengers [70] applies to carriers of passengers by water, and thus contributory negligence of the passenger proximately causing the injury will bar a recovery,[71] unless the concurrent negligence of those in charge of the boat is the proximate cause of the accident,[72] for the contributory negligence of the passengers, if conceded, constitutes no defense to the carrier's liability,

70. See CARRIERS, 6 Cyc. 635 *et seq.*

71. *Illinois.*— Keokuk Packet Co. *v.* Henry, 50 Ill. 264, holding that a passenger who wishes to leave a steamboat is guilty of contributory negligence in jumping ashore, under circumstances rendering it unsafe, and that he is not excused by the fact that those in charge of the boat have not given sufficient time or proper facilities, such as landing planks, to enable those wishing to go ashore to leave the boat otherwise.

Kentucky.— Reed *v.* Covington, etc., Bridge Co., 28 S. W. 149, 16 Ky. L. Rep. 379.

Massachusetts.—Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

New York.— Bartlett *v.* New York, etc., Transp. Co., 57 N. Y. Super. Ct. 348, 8 N. Y. Suppl. 309 [*affirmed* in 130 N. Y. 659, 29 N. E. 1033]; Fogassi *v.* New York Cent., etc., R. Co., 13 Misc. 102, 34 N. Y. Suppl. 116; McKenna *v.* East River Ferry Co., 8 N. Y. St. 802 [*affirmed* in 113 N. Y. 636, 21 N. E. 413].

United States.— The Southside, 155 Fed. 364; Elder Dempster Shipping Co. *v.* Pouppirt, 125 Fed. 732, 60 C. C. A. 500 [*reversing* 122 Fed. 983] (holding that a passenger who voluntarily leaves a place of safety on a ship without necessity, and goes to a part of the ship where there is danger, of which he has knowledge, or which is obvious, assumes the increased risk therefrom, and he cannot recover from the ship or its owners for an injury so received, because he was not given warning, which, under such circumstances, was unnecessary); *In re* Kimball Steamship Co., 123 Fed. 838 [*reversed* on other grounds in 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84] (holding that where the officer in charge of a boat sent ashore by a steamship to bring off passengers stated to those who came into the boat that she was overloaded, and asked that some of them get out and wait until the boat could return, which they refused to do, and the boat capsized, the passengers were guilty of contributory negligence); Graham *v.* Pennsylvania R. Co., 39 Fed. 596 (where a ferryboat had two gangways by which passengers could leave, and a passenger who attempted to leave by the gangway intended for teams was injured by the guard chain for such gangway dropping on his leg while he was astride of it); The Anglo Norman, 1 Fed. Cas. No. 393, 4 Sawy. 185 (holding that, although a carrier of passengers is bound to use care in providing proper means for approaching his vessel, he is not liable for an injury sustained by a passenger, from the insufficiency of the plank due to its narrowness and absence of rails, if the passenger attempts to board the vessel while she is lying at a wharf to receive cargo only, when it was her known custom to proceed to another wharf to receive passengers).

See 44 Cent. Dig. tit. "Shipping," § 551.

A passenger was held not necessarily guilty of contributory negligence because he was upon the main deck of a steamboat looking for his baggage when, by falling down a hatchway, he sustained the injury for which he sued (Bowman *v.* California Steam Nav. Co., 63 Cal. 181); nor is it necessarily negligent for a passenger on a ferry-boat to stand near the bow while the boat is landing (Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37).

Facts held not to show contributory negligence see Doherty *v.* California Nav., etc., Co., 6 Cal. App. 131, 91 Pac. 419; Evers *v.* Wiggins Ferry Co., 116 Mo. App. 130, 92 S. W. 118 (holding that a passenger is not negligent in remaining on the hurricane deck after the captain of the boat has given general orders to the passengers on that deck to go below, when he does not hear such orders, and has no information that they have been given); Watson *v.* Camden, etc., R. Co., 55 N. J. L. 125, 26 Atl. 136, 39 Am. St. Rep. 624, 19 L. R. A. 487; Palmer *v.* New Jersey R. Co., 33 N. J. L. 90; Cleveland *v.* New Jersey Steamboat Co., 68 N. Y. 306; Bartlett *v.* New York, etc., Transp. Co., 57 N. Y. Super. Ct. 348, 8 N. Y. Suppl. 309 [*affirmed* in 130 N. Y. 659, 29 N. E. 1033]; Hawks *v.* Winans, 42 N. Y. Super. Ct. 451 [*affirmed* in 74 N. Y. 609] (holding that where the bridge connecting a ferry-boat with the pier had been fastened by one chain to the boat, and a passenger stepped upon it, while it was ten inches above the deck, and just before it was lowered, she was not guilty of negligence as a matter of law); Snelling *v.* Brooklyn, etc., Ferry Co., 13 N. Y. Suppl. 398; Cleveland *v.* New Jersey Steamboat Co., 7 N. Y. St. 598; Miller *v.* Ocean Steamship Co., 6 N. Y. St. 664 [*affirmed* in 118 N. Y. 199, 23 N. E. 462]; Gillum *v.* New York, etc., Steamship Co., (Tex. Civ. App. 1903) 76 S. W. 232; White *v.* Seattle, etc., Nav. Co., 36 Wash. 281, 78 Pac. 909, 104 Am. St. Rep. 948 (holding a passenger who was injured by stepping into a hole in the floor of a dock while waiting for a boat not guilty of contributory negligence because she did not remain in the waiting room until the boat arrived, nor because she deviated some thirty feet from a straight line in going between the waiting room and the entrance to the boat); De Graf *v.* Seattle, etc., Nav. Co., 10 Wash. 468, 38 Pac. 1006; The Annie L. Vansciver, 161 Fed. 640; The Ocracoke, 159 Fed. 552.

72. See Keokuk Packet Co. *v.* Henry, 50 Ill. 264.

and will not defeat the action when it is shown that defendant might, by the exercise of proper and reasonable care, have avoided the consequences thereof.[73]

c. Recovery of Passage-Money; Damages. If the contract for the conveyance of passengers be not fulfilled, they may recover back the passage-money on the ground of failure of consideration,[74] and any additional damage resulting from the breach,[75] and as a contract to carry passengers is a contract to carry within a reasonable time, in case of failure to do so, the passage-money may be recovered;[76] and where the non-fulfilment of a contract to transport a passenger is caused by shipwreck or other casualty, the passenger may recover back passage-money paid in advance, or damages, unless he has contracted to take upon himself

73. Weisshaar *v.* Kimball Steamship Co., 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84 [*reversing* 123 Fed. 838], holding that where the president of a steamship company was present in a small boat sent ashore by one of the company's ships, and acquiesced in the action of the officer in charge in negligently permitting the boat to be overloaded, in consequence of which it was swamped, and a number of the passengers were drowned, such negligence of the officer was with "the privity or knowledge" of the company, which is not entitled to a limitation of its liability for claims arising out of the disaster, under U. S. Rev. St. (1878) §§ 4283–4285 [U. S. Comp. St. (1901) pp. 2943–2944]. See Bartlett *v.* New York, etc., Transp. Co., 57 N. Y. Super. Ct. 348, 8 N. Y. Suppl. 309, holding that the fact that plaintiffs descended the stairway, without taking hold of the railing, at the time the boat was entering the slip, does not constitute contributory negligence. *Compare* Hart *v.* North German Lloyd Steamship Co., 92 N. Y. Suppl. 338 [*affirmed* in 108 N. Y. App. Div. 279, 95 N. Y. Suppl. 733].

74. Howard *v.* Astor Mut. Ins. Co., 5 Bosw. (N. Y.) 38; Cope *v.* Dodd, 13 Pa. St. 33; Sparks *v.* The Sonora, 22 Fed. Cas. No. 13,212. But see Watson *v.* Duykinck, 3 Johns. (N. Y.) 335, holding that where A, in consideration of a sum to be paid in advance, agreed that he would permit B to go in his vessel as a passenger and to take on board certain goods, and B paid the amount in advance, and went on board with his goods, and the vessel was shipwrecked and lost, but the goods were saved and delivered to B, B cannot recover back the money advanced for the freight and passage.

Where carriers agree to transport a passenger to a particular place in a particular vessel, which was lost at the time, although not known to either party, the carriers' only obligation is to return the money paid, with interest, because the condition on which it had been paid had wholly failed; and if plaintiff sets forth such a contract and alleges for a breach that he was not carried in that vessel, and does not aver an obligation on the carriers to provide a substitute, and does not claim damage for their neglect to provide such substitute, he is confined to the particular breach alleged and cannot recover on other grounds. Briggs *v.* Vanderbilt, 19 Barb. (N. Y.) 222. For the sale of a passage ticket by a certain steamer does not constitute an agreement to carry the person buying such ticket unconditionally and at all hazards, but only gives him a right to passage on that steamer; and if, at the time of such sale and unknown to both parties to the transaction, the steamer had been lost at sea, the holder of the ticket can recover only the amount he has paid for the same. Bonsteel *v.* Vanderbilt, 21 Barb. (N. Y.) 26.

75. The Canadian, 5 Fed. Cas. No. 2,376, Brown Adm. 11 (holding that where the master of a schooner, who took passage on a steamer to rejoin his vessel, was carried past the place for which he had bought his ticket and at which the steamer usually stopped, he is entitled to recover, not only for his personal expenses and loss of time, but damages in the nature of demurrage for the detention of his vessel); The Zenobia, 30 Fed. Cas. No. 18,209, Abb. Adm. 80 (holding that where libellant contracted with the master in a foreign port for a passage to this country in the vessel, and paid a part of his passage-money in advance, but the master failed to fulfil his contract, and libellant was obliged in consequence to take passage in another vessel, the vessel was responsible for the fulfilment of the agreement, and that the libellant was entitled to recover from her the passage-money paid in advance, the expenses incurred by him in awaiting the sailing of another ship, and the sum paid by him to such second ship for his passage in her).

Pleading special damage.— In a libel against a vessel for breach of a passenger contract, alleging detention, loss of time, and subjection to exposure and risk in a place designated as dangerous to human life, special damages need not be laid as in a common-law declaration; but, under the general allegation, proof may be given of the detention, loss of time, and other facts showing the exposure and suffering of libellant and wife. West *v.* The Uncle Sam, 29 Fed. Cas. No. 17,427, McAllister 505.

Evidence.— In an action brought by a passenger to recover back his passage-money, the vessel having been prevented by an act of God from proceeding to her destination according to agreement, evidence is inadmissible to show that the captain laid in the usual provisions for the voyage. Cope *v.* Dodd, 13 Pa. St. 33.

76. Howard *v.* Astor Mut. Ins. Co., 5 Bosw. (N. Y.) 38.

the risk of the voyage;[77] and passage-money, paid in advance, may be recovered back, on the breaking up of the voyage by a peril of the sea and the failure of the owner of the ship to send the passenger to his destination,[78] and in such cases the passenger is obliged to wait a reasonable time for repairs only where the interruption was not caused by an original defect and unseaworthiness in the vessel;[79] but where the passengers by their own act deprive the captain of an election to repair and continue the voyage, commenced but interrupted by perils of the sea, the owner may retain the passage-money advanced;[80] and where a passenger determined before the date of sailing not to take passage in the ship, he cannot complain that the ship did not sail on the day as agreed, and recover back his passage-money paid.[81] The general rules of damages in actions against carriers of passengers for personal injuries[82] apply to carriers of passengers by water.[83] Punitive damages will not ordinarily be allowed for unauthorized misconduct of an employee of the carrier;[84] but as it is the duty of a vessel to accord to a passenger respectful treatment by its officers and servants, disrespectful treatment by a master of a woman passenger on her making complaint that she had been assaulted and robbed in her stateroom may properly be considered in aggravation of the damages,[85] as may be the indignity and inconvenience imposed upon a passenger for false arrest and imprisonment by an employee of the boat,[86] or threat to arrest upon the charge of seeking to defraud the vessel in regard to payment of fare,[87] or the indignity suffered by a wrongful expulsion.[88] Passengers recover full damages for loss suffered by collision in which both the ships are at fault, one half of which is deductable by the vessel sued from the amount payable to the other vessel in respect of her damages.[89]

E. Passengers' Effects; Limitations of Liability by Contract. The general rules regulating the liability of carriers for baggage and personal effects of passengers[90] apply to carriers of passengers by water, and they are liable for loss of a passenger's baggage, attributable to their fault or the fault of the servants and employees,[91] unless the proximate cause of the loss is the passenger's own

77. Stone *v.* The Relampago, 23 Fed. Cas. No. 13,486.

78. Brown *v.* Harris, 2 Gray (Mass.) 359

79. Stone *v.* The Relampago, 23 Fed. Cas. No. 13,486. And see *supra*, VIII, D, 1.

80. Marks *v.* Nashville M. & F. Ins. Co., 6 La. Ann. 126; Detouches *v.* Peck, 9 Johns. (N. Y.) 210.

81. Zellweger *v.* The Robert Cooper, 30 Fed. Cas. No. 18,207.

82. See CARRIERS, 6 Cyc. 632 *et seq.*

83. The Joseph Stickney, 31 Fed. 156 [*following* The Max Morris, 28 Fed. 881], where only expenses and disbursements were allowed the injured passengers under the circumstances of the case.

Act Aug. 30, 1852, c. 106, § 30, providing "that whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner . . . and the vessel, shall be liable . . . to the full amount of damage, if it happens through any neglect to comply with the provisions of law," etc., is limited to damage sustained by the "passenger or his baggage." The damage to the passenger, intended by the act, is the injury to the person. Chisholm *v.* Northern Transp. Co., 61 Barb. (N. Y.) 363.

84. The Normannia, 62 Fed. 469, holding that where the false representations of defendant's agent, inducing libellant to take passage on its steamship which was infected with cholera, were unauthorized, defendant is not liable for punitive damages.

85. The Western States, 151 Fed. 929 [*affirmed* in 159 Fed. 354, 86 C. C. A. 354].

86. Ragland *v.* Norfolk, etc., Steamboat Co., 163 Fed. 376 [*modified* in 169 Fed. 286], where a passenger being greatly humiliated, but no serious harm having been done him further than the indignity and inconvenience imposed for the time being, was allowed damages in the sum of one thousand dollars.

87. Levidow *v.* Starin, 77 Conn. 600, 60 Atl. 123.

88. La Gascogne, 135 Fed. 577. And see Levy *v.* Providence, etc., Steamship Co., 123 Fed. 347, holding that a verdict awarding a passenger the nominal sum of one dollar as damages for his expulsion from a boat cannot be sustained where to authorize any recovery the jury must have found that his removal was not justified, or that unnecessary force was used, and that he was also subsequently imprisoned for half an hour.

89. The Queen, 40 Fed. 694.

90. See CARRIERS, 6 Cyc. 661 *et seq.*

91. North German Lloyd Steamship Co. *v.* Bullen, 111 Ill. App. 426 (holding that a transatlantic steamship company is liable as a common carrier for the loss of baggage, destroyed by fire, which, pursuant to the advice of its agent, has been sent by the prospective passenger in advance of the time of expected passage, and which has been re-

contributory negligence.[92] A ship-owner is entitled to limit his liability in respect

ceived by such company at its docks in advance of such time, and is there kept, and, for the steamship company's own convenience, is not immediately placed on the steamship on which the passage was to be taken); Hart *v.* North German Lloyd Steamship Co., 92 N. Y. Suppl. 338 [*affirmed* in 108 N. Y. App. Div. 279, 95 N. Y. Suppl. 733] (holding that where shirt studs were taken from the cabin of a passenger on a steamship, the carrier's liability was that of an insurer, in the absence of negligence on the part of the passenger); Reed *v.* Compagnie Generale Trans-Atlantique, 1 N. Y. City Ct. 16 (holding that where a ship, during a heavy gale, while filling with water, was abandoned by its officers, but did not sink, and was found by another vessel and towed to port, the owners are liable for property of a passenger stolen, and that nothing short of an actual sinking of the vessel would have excused them from liability); The Minnetonka, 146 Fed. 509, 77 C. C. A. 217 [*affirming* 132 Fed. 52] (holding a ship-owner liable to a passenger for the value of jewelry stolen during the voyage by a steward employed to perform the duties which the carrier owed to the passenger under the contract of carriage); Walsh *v.* The H. M. Wright, 29 Fed. Cas. No. 17,115, Newb. Adm. 494 (holding the vessel liable for loss of baggage by theft from a stateroom in the ladies' cabin which was properly fastened, where time and opportunity were given for a thief to enter such room without detection). And see The Elvira Harbeck, 8 Fed. Cas. No. 4,424, 2 Blatchf. 336 [*reversing* 4 Fed. Cas. No. 2,005].

The words "personal goods," on the margin of a receipt or bill of lading given for personal baggage which was put on board another vessel, it not arriving in time to accommodate the owner, are but a description of the character of the goods, and do not exempt the owner from freight, or the vessel from responsibility. The Elvira Harbeck, 8 Fed. Cas. No. 4,424, 2 Blatchf. 336 [*reversing* 4 Fed. Cas. No. 2,005], holding also that a receipt having gone directly into the possession of the shipper's agents and remained there until the trial, the shipper could not object that the insertion of the words "personal baggage" in the receipt was improper and not binding on her, and further that the fact that the owners of the vessel and her officers treated the receipt as genuine and authentic, is sufficient evidence that the mate signed it and gave it by authority.

Effects of deceased passenger.—Whether the master and ship-owners be responsible for money in a passenger's baggage or not before his death, yet after it the master, to whom knowledge is brought home by examining the effects of the deceased, should take and deliver them to his representatives. Malpica *v.* McKown, 1 La. 248, 20 Am. Dec. 279, holding that by the laws of Spain the captain must take an inventory of the effects of a passenger who dies on board and deliver them at the place of destination. When the clerk of a steamer takes possession of the effects of a deceased passenger on his own responsibility, without being authorized or directed by the master, the latter is not liable. Walker *v.* Goslee, 11 La. Ann. 389.

A ship-owner who refuses to carry a passenger whom he has engaged to carry, and proceeds on the voyage without giving the passenger reasonable opportunity to remove his luggage, or with the intention to carry it beyond his reach, thereby terminates the contract of carriage, and is liable in trespass for the carrying away of the luggage. Holmes *v.* Doane, 3 Gray (Mass.) 328.

The baggage of passengers is not "merchandise," within U. S. Rev. St. (1878) § 4282 [U. S. Comp. St. (1901) p. 2943], exempting the owners of vessels from liability for loss of merchandise in case of fire occurring without their design or neglect. Dunlap *v.* International Steamboat Co., 98 Mass. 371; The Marine City, 6 Fed. 413. But see Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 4 Am. Rep. 681 [*reversing* 45 Barb. 218].

Facts held to show negligence on the carrier's part see The Western States, 159 Fed. 354, 86 C. C. A. 354 [*affirming* 151 Fed. 929], holding that where a passenger steamboat on the Great Lakes was equipped with three hundred and forty-three staterooms on two decks in two rows, with a passageway between them, the boat was negligent in failing to provide a sufficient watch; one man only being provided for that purpose, and that the vessel was negligent in failing to provide the door of the stateroom with bolts or inside protection other than a lock which could be operated from outside, and was not excused by the fact that such inside securities might embarrass the passengers in case of fire or sudden danger.

92. See The Minnetonka, 132 Fed. 52 [*affirmed* in 146 Fed. 509, 77 C. C. A. 217]; The John Brooks, 13 Fed. Cas. No. 7,335, 1 Hask. 439, holding that where the money of a passenger on a steamboat is stolen from his stateroom by reason of his negligence in failing to secure his stateroom by a lock and bolt, where both are provided, the owners of the vessel are not liable, where it appears that they have done all that could be reasonably demanded of them to prevent the loss, and that a carrier has a right to expect that a passenger will use, in such a case, the appliances provided for securing the stateroom door.

Facts held not to constitute contributory negligence see Hart *v.* North German Lloyd Steamship Co., 46 Misc. (N. Y.) 426, 92 N. Y. Suppl. 338 [*affirmed* in 108 N. Y. App. Div. 279, 95 N. Y. Suppl. 733]; The Minnetonka, 132 Fed. 52 [*affirmed* in 146 Fed. 509, 77 C. C. A. 217] (where a passenger had not finally retired for the night at the time her stateroom was entered and her jewelry stolen, but she was expecting the purser, so

to the loss of passengers' personal effects by stipulation,[93] but such a limitation to be applied must be reasonable and not against public policy,[94] and an arbitrary limitation of value for the baggage of any steamship passenger, unaccompanied

that she could place the jewels in his charge, and it was necessary that the door should be left open for ventilation, her failure to shut and bolt the same was not contributory negligence).

Deck passengers, whose baggage is not in trunks, and who keep it in their own possession, cannot hold the ship liable for its loss or damage. Defrier *v.* The Nicaragua, 81 Fed. 745.

93. Lindsey *v.* Maine Steamship Co., 88 N. Y. Suppl. 371; The Bermuda, 29 Fed. 399, 23 Blatchf. 554 [*affirming* 27 Fed. 476], holding valid a stipulation that the carrier would not be responsible for the loss of valuables, unless the value thereof was expressed in the bill of lading, and extra freight paid therefor.

Facts held to show substantial compliance with a condition of a ticket requiring claims to be presented within forty-eight hours after the passengers are landed see The Minnetonka, 132 Fed. 52 [*affirmed* in 146 Fed. 509, 77 C. C. A. 217].

Even under a provision absolving the carrier if he exercises due diligence to provide a seaworthy boat, he will be liable if he fails to fulfil the condition. Upperton *v.* Union-Castle Mail Steamship Co., 9 Aspin. 475, 9 Com. Cas. 50, 89 L. T. Rep. N. S. 289, 19 T. L. R. 687 (damage to baggage by overflowing lavatory); U. S. Rev. St. (1878) § 4281 [U. S. Comp. St. (1901) p. 2942], providing that shippers of jewelry, including precious stones, shall, when lading the same as freight or baggage, give to the agent of the ship a written notice of the true character and value thereof, and have the same entered on the bill of lading, otherwise the owner of the vessel shall not be liable as carrier beyond the value according to the notice, does not apply to a case where a passenger took such of her jewels as she was accustomed to wear aboard, and was robbed thereof the first night out, before she succeeded in depositing them with the purser, without any fault on her part. The Minnetonka, 132 Fed. 52 [*affirmed* in 146 Fed. 509, 77 C. C. A. 217]. And where Indian curios, having no market value in the usually accepted sense, taken on board a transatlantic steamship by a passenger for transportation from New York to Havre, and paid for as extra baggage, were lost on the voyage through the sinking of the vessel, their value in New York, as shown by the opinions of experts, was properly taken as the measure of damages for the loss in a suit against the owners of the vessel. La Bourgogne, 144 Fed. 781, 75 C. C. A. 649 [*affirmed* in 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973]. Nor does the act exonerate a carrier from liability for jeweled dental instruments contained in a valise carried by a passenger, and through the negligence of the carrier lost from a seat where it was deposited by the passenger, as such instruments are ordinarily peraonal baggage, to which the act has no application. Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356. And the act has no application to an emigrant carrying as baggage articles of jewelry and silverware such as would ordinarily be regarded as proper baggage (Carlson *v.* Oceanic Steam Nav. Co., 109 N. Y. 359, 16 N. E. 546); nor to loss of pictures shipped as baggage, without the required notice, caused by his own and his employee's negligence (Wheeler *v.* Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729 [*reversing* 52 Hun 75, 5 N. Y. Suppl. 101].

In England the carrier is permitted to relieve himself of all responsibility for the safety of the luggage, including all risks of loss from negligent or wrongful acts of the master or crew. The Stella, 8 Aspin. 605, 81 L. T. Rep. N. S. 235; Haigh *v.* Royal Mail Steam Packet Co., 5 Aspin. 189, 48 J. P. 230, 52 L. J. Q. B. 640, 49 L. T. Rep. N. S. 802; Taubman *v.* Pacific Steam Nav. Co., 1 Aspin. 336, 26 L. T. Rep. N. S. 704; Wilton *v.* Royal Atlantic Mail Steam-Nav. Co., 10 C. B. N. S. 453, 8 Jur. N. S. 232, 30 L. J. C. P. 369, 4 L. T. Rep. N. S. 706, 9 Wkly. Rep. 748, 100 E. C. L. 453; Peninsular, etc., Steam Nav. Co. *v.* Shand, 11 Jur. N. S. 771, 12 L. T. Rep. N. S. 808, 3 Moore P. C. N. S. 272, 6 New Rep. 387, 13 Wkly. Rep. 1049, 16 Eng. Reprint 103. Where, however, the contract is "for or in respect of a passage as a steerage passenger in any ship, or of a passage as a cabin passenger in any emigrant ship, proceeding from the British Islands to any port out of Europe and not within the Mediterranean sea" the ticket is to be "in a form approved by the Board of Trade and published in the London Gazette." Merchant Shipping Act (1894), § 320 [*quoted* in Carver Carriage by Sea, § 111]. The forms which have been approved are nearly identical with those set out in the schedule to the Passengers Act, 18 & 19 Vict. c. 119. Carver Carriage by Sea, § 111.

In the federal courts and most of the states exemptions of negligence are not sustained. The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. ed. 190.

In New York a clear exemption from negligence is sustained. Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 36 Am. Rep. 579.

94. Weinberger *v.* Compagnie Generale Transatlantique, 146 Fed. 516 (holding that a provision printed in a steamship ticket for the carriage of six passengers, limiting the liability of the carrier for loss or damage to baggage of one hundred dollars, not read by or called to the attention of the passengers, is unreasonable and void); The Minnetonka, 132 Fed. 52 [*affirmed* in 146 Fed. 509, 77 C. C. A. 217]; The Valencia, 110 Fed. 221 (holding that a provision in a

by any right to increase the amount by adequate and reasonable proportional payment, is void as against public policy.[95] Proof that a passenger's baggage was delivered to a vessel in good condition, and was damaged by sea-water at the end of the voyage, is sufficient *prima facie* to establish the negligence of the carrier,[98] and similarly a *prima facie* case is established by non-delivery,[97] and, although extraordinary rough weather warrants a finding of damage to cargo or baggage by sea perils, provided proof of ordinary good stowage is first given by the ship, this preliminary burden is on the ship, and cannot rest in mere presumption.[98] As regards liens upon a vessel for breach of contract of affreightment, there is no distinction in principle between a contract for the transportation of a passenger with his baggage and one for the transportation of merchandise, and, by analogy with the rule in the latter case, no lien arises for loss of baggage unless at the time of such loss either the passenger had been received on board, or his baggage had been put into the custody or control of the vessel.[99]

IX. DEMURRAGE.[1]

[EDITED BY JOHN M. WOOLSEY, ESQ. OF THE NEW YORK BAR]

A. Liability — 1. Necessity and Sufficiency of Contract — a. In General. Ordinarily demurrage is expressly stipulated for by contract, and, strictly speaking, is only payable when so stipulated,[2] being in the nature of additional or extended freight payable on the undue detention of the vessel in loading or unloading goods, whether carried under a charter-party or a bill of lading, and intended as a compensation to the vessel for the freight she might have earned during the period of detention,[3] yet, in a broader sense of the term, demurrage covers dam-

contract between a ship and its passengers that the landing shall not be deemed a part of the voyage is contrary to public policy and void, and does not relieve the carrier from liability for loss of baggage or delay in delivery).

95. The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 L. ed. 190 [*reversing* 94 Fed. 885, 36 C. C. A. 533], holding that a stipulation in a steamship passenger's ticket, which compels him to value his baggage at a certain sum, far less than it is worth, or, in order to have a higher value put upon it, to subject it to the provisions of the Harter Act, by which the carrier would be exempted from all liability therefor from errors in navigation or management of the vessel or other negligence, is unreasonable and in conflict with public policy.

96. Weinberger *v.* Compagnie Generale Transatlantique, 146 Fed. 516.

97. Cosnier *v.* Golding, 6 Rob. (La.) 297; Holmes *v.* North German Lloyd Steamship Co., 184 N. Y. 280, 77 N. E. 21, 5 L. R. A. N. S. 650 [*affirming* 100 N. Y. App. Div. 36, 90 N. Y. Suppl. 834].

98. The Kensington, 88 Fed. 331 [*affirmed* in 94 Fed. 885, 36 C. C. A. 533 (*reversed* on other grounds in 183 U. S. 263, 22 S. Ct. 102, 46 L. ed. 190)].

Evidence held insufficient to prove that damage to baggage resulted from inevitable accident see The Majestic, 166 U. S. 375, 17 S. Ct. 597, 41 L. ed. 1039, where the defense that damage to baggage by water entering through a broken port was the result of an inevitable accident was held not sustained by evidence that, a short time before the injury was discovered, the ship, during a rough sea, passed through some floating wreckage, for there was no evidence directly tending to prove that the port was broken by the wreckage, nor any attempt to show why the ship did not steer away from it or reduce its speed while passing through it, nor any satisfactory proof that the ports were properly closed when the vessel sailed or properly inspected afterward.

99. The Priscilla, 114 Fed. 836, 52 C. C. A.

1. Demurrage defined see DEMURRAGE, 13 Cyc. 783.

2. Blake *v.* Morgan, 3 Mart. (La.) 375; Morse *v.* Pesant, 3 Abb. Dec. (N. Y.) 321 [*affirming* 7 Bosw. 199]; Morgan *v.* Garfield, etc., Coal Co., 113 Fed. 520 (holding that, in ordinary cases, demurrage is not damages for breach of contract, but is the agreed additional payment for an allowed detention beyond the period specified in the contract); Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565; Nielson *v.* Wait, 16 Q. B. D. 67, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 529, 34 Wkly. Rep. 33; Harris *v.* Jacobs, 15 Q. B. D. 247, 5 Aspin. 530, 54 L. J. Q. B. 492, 54 L. T. Rep. N. S. 61; Lockhart *v.* Falk, L. R. 10 Exch. 132, 3 Aspin. 8, 44 L. J. Exch. 105, 33 L. T. Rep. N. S. 96, 23 Wkly. Rep. 753.

3. Hall *v.* Barker, 64 Me. 339; The J. E. Owen, 54 Fed. 185; Two Hundred and Seventy-Five Tons of Mineral Phosphates, 9 Fed. 209; Harris *v.* Jacobs, 15 Q. B. D. 247, 5 Aspin. 530, 54 L. J. Q. B. 492, 54 L. T. Rep. N. S. 61; Lockhart *v.* Falk, L. R. 10 Exch. 132, 3 Aspin. 8, 44 L. J. Exch. 105,

ages for any unreasonable detention of the vessel, and, in the absence of express contract, damages in the nature of demurrage are recoverable for a breach of the implied obligation to load or unload the cargo with reasonable despatch.[4] When an express contract is relied on as defining a charterer's liability for demurrage or as exempting him from it, it is essential to its validity that it be executed by mutual assent.[5] If the contract with regard to demurrage was made through agents it must be shown that they were duly authorized, or that it has been ratified expressly or by implication by the party whom it is sought to hold bound.[6]

b. As to Charterer. Although the shipper or charterer is primarily liable for demurrage, regardless of the existence or non-existence of an express contract,[7]

33 L. T. Rep. N. S. 96, 23 Wkly. Rep. 753; Jesson *v.* Solly, 4 Taunt. 52, 13 Rev. Rep. 557. And see DEMURRAGE, 13 Cyc. 783.

"Detention and demurrage mean the same thing." Bannister *v.* Breslauer, L. R. 2 C. P. 497, 501, 36 L. J. C. P. 195, 16 L. T. Rep. N. S. 418, 15 Wkly. Rep. 840; Benson *v.* Hippins, 4 Bing. 455, 459, 13 E. C. L. 586, 3 C. & P. 186, 14 E. C. L. 518, 6 L. J. C. P. O. S. 64, 1 M. & P. 246.

4. *Connecticut.*— Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255, holding, however, that the rule is confined to detention in unloading.

Maine.—Hayden *v.* Whitmore, 74 Me. 230; Hall *v.* Barker, 64 Me. 339.

New York.— Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630 [*affirming* 15 Daly 538, 6 N. Y. Suppl. 531, 7 N. Y. Suppl. 663, 8 N. Y. Suppl. 478]; Morse *v.* Pesant, 3 Abb. Dec. 321 [*affirming* 7 Bosw. 199]; Clendaniel *v.* Tuckerman, 17 Barb. 184; Jameson *v.* Sweeney, 29 Misc. 584, 61 N. Y. Suppl. 498; Shaver *v.* Gillespie, 19 N. Y. Suppl. 237; Fisher *v.* Abeel, 44 How. Pr. 432.

United States.— Price *v.* Morse Ironworks, etc., Co., 120 Fed. 445; Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Randall *v.* Sprague, 74 Fed. 247, 21 C. C. A. 334 [*reversing* 67 Fed. 604]; Melloy *v.* Lehigh, etc., Coal Co., 37 Fed. 377; The M. S. Bacon *v.* Erie, etc., Transp. Co., 3 Fed. 344, 17 Fed. Cas. No. 9,898*a*, 5 Cinc. L. Bul. 637; Fulton *v.* Blake, 9 Fed. Cas. No. 5,153, 5 Biss. 371; One Hundred and Seventy-Five Tons of Coal, 18 Fed. Cas. No. 10,522, 9 Ben. 400; Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548.

England.— Hick *v.* Raymond, [1893] A. C. 29, 7 Aspin. 233, 62 L. J. Q. B. 98, 68 L. T. Rep. N. S. 175, 41 Wkly. Rep. 384; Ford *v.* Coatesworth, L. R. 4 Q. B. 137, 9 B. & S. 559, 38 L. J. Q. B. 52, 19 L. T. Rep. N. S. 634, 17 Wkly. Rep. 282 [*affirmed* in L. R. 5 Q. B. 544, 10 B. & S. 991, 39 L. J. Q. B. 188, 23 L. T. Rep. N. S. 165, 18 Wkly. Rep. 1169]; Wright *v.* New Zealand Shipping Co., 4 Ex. D. 165, 4 Aspin. 118, 40 L. T. Rep. N. S. 413; Thompson *v.* Ingles, 3 Camph. 428; Cawthron *v.* Trickett, 15 C. B. N. S. 754, 33 L. J. C. P. 182, 9 L. T. Rep. N. S. 609, 12 Wkly. Rep. 311, 109 E. C. L. 754; Tillett *v.* Cwm Avon Works, 2 T. L. R. 675.

Canada.— Canadian Locomotive Co. *v.* Copeland, 16 Ont. App. 322 [*reversing* 14 Ont. 170].

See 44 Cent. Dig. tit. "Shipping," § 565. And see *infra*, IX, A, 2, a; IX, A, 2, b, (II), (A).

Rule in case of subcharter.—Where the original charterers charter the vessel to other parties, the latter are not strictly assignees of the original charter, but are freighters or shippers, and while they are not bound by the stipulation in the original charter as to the rate of demurrage, they are liable in damages for detention of the vessel due to their fault. Keyser *v.* Jurvelius, 122 Fed. 218, 58 C. C. A. 664.

5. Burns *v.* Burns, 131 Fed. 238 [*affirming* 125 Fed. 432], holding that a change made in the demurrage rate of the contract by the shipper without the authority or knowledge of the charterer is not binding on the latter as consignee of the cargo.

Likewise a statement placed on the back of a bill of lading by a shipper to the effect that all detention was for the vessel's account was held not binding on the ship-owners, although the master had signed the bill of lading because it was not proved that his attention had been called to the provision on its back. Rackett *v.* Stickney, 27 Fed. 878, 23 Blatchf. 566. And see Melloy *v.* Lehigh, etc., Coal Co., 37 Fed. 377.

The erasure, before execution, from a printed form of a charter-party, of the clauses relating to demurrage, or failure to fill blanks in the printed form, leaves the rights of the parties with respect to demurrage for damages for detention to be determined by the general rule as to reasonable despatch. Donnell *v.* Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178.

6. Fisher *v.* Abeel, 66 Barb. (N. Y.) 381, 44 How. Pr. 432; The Hamilton J. Mills, 22 Fed. 790; The Maggie Moore, 8 Fed. 620, 5 Hughes 287; Cargo of Salt, 5 Fed. Cas. No. 2,406, 4 Blatchf. 224. And see Forsyth *v.* Sutherland, 31 Nova Scotia 391.

Ratification of contract executed without authority.—An owner who has knowledge of what had been done by the master, and has proceeded in recognition of it, will not be allowed to object to the authority of the master to execute the bill of lading under which the cargo was carried. Brown *v.* Certain Tons of Coal, 34 Fed. 913.

7. Hall *v.* Barker, 64 Me. 339; Robbins *v.* Codman, 4 E. D. Smith (N. Y.) 315; Jame-

his liability cannot be based upon a mere expression of opinion in a letter written by him,[8] nor upon a charter-party which was canceled before the delay arose.[9]

c. As to Consignee or Assignee of Bill of Lading — (I) *In General.* Acceptance by the consignee of a cargo delivered under a bill of lading containing stipulations as to demurrage imposes on him a liability for any demurrage accruing under those stipulations,[10] and the same liability is imposed upon an assignee or indorsee of the bill.[11] However, the rule imposing liability in the absence of express contract is largely confined in its application to the freighter or shipper,[12] and does not apply to the consignee or his assignee before acceptance of the cargo,[13] and not afterward, except where the delay is clearly due to his fault;[14] but there

son *v.* Sweeney, 29 Misc. (N. Y.) 584, 61 N. Y. Suppl. 498.

Where the master is the agent of the charterer in performing a duty devolving upon the latter, any delay arising from his act is imputable to the charterer, so as to impose liability upon him. Hammett *v.* Chase, 158 Fed. 203.

An exception exists where, under the agreement, the duty of loading or unloading rests upon the ship or a third person (West Hartlepool Steam Nav. Co. *v.* Virginia-Carolina Chemical Co., 164 Fed. 836, 90 C. C. A. 288 [*affirming* 151 Fed. 886]; The Schmidt *v.* Bright, 27 Fed. 671), or where the delay arises from the act of the master following the directions of the consignee (Robertson *v.* Bethune, 3 Johns. (N. Y.) 342; Seagar *v.* New York, etc., Mail Steamship Co., 55 Fed. 324 [*affirmed* in 55 Fed. 880, 5 C. C. A. 290].

8. Eleven Hundred Tons of Coal, 12 Fed. 185.

9. Morgan *v.* Garfield, etc., Coal Co., 113 Fed. 520.

10. *Maryland.*— Jones *v.* Freeman, 29 Md. 273.

New York.— Morse *v.* Pesant, 3 Abb. Dec. 321 [*affirming* 7 Bosw. 199]; Gabler *v.* McChesney, 60 N. Y. App. Div. 583, 70 N. Y. Suppl. 191.

Rhode Island.— Falkenburg *v.* Clark, 11 R. I. 278.

United States.— Sutton *v.* Housatonic R. Co., 45 Fed. 507; Gates *v.* Ryan, 37 Fed. 154; Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565.

England.— Fowler *v.* Knoop, 47 L. J. Q. B. 473 [*affirmed* in 4 Q. B. D. 299, 48 L. J. Q. B. 333, 40 L. T. Rep. N. S. 180, 27 Wkly. Rep. 299]; Scitson *v.* Pegg, 6 H. & N. 295, 30 L. J. Exch. 225, 3 L. T. Rep. N. S. 753, 9 Wkly. Rep. 280; Jesson *v.* Solly, 4 Taunt. 52, 13 Rev. Rep. 557.

See 44 Cent. Dig. tit. "Shipping," §§ 567, 571.

11. Gronn *v.* Woodruff, 19 Fed. 143; Allen *v.* Coltart, 11 Q. B. D. 782, 5 Aspin. 104, 52 L. J. Q. B. 686, 48 L. T. Rep. N. S. 994, 31 Wkly. Rep. 841 (holding that a person in possession of a bill of lading as security becomes liable for demurrage on his presenting the bill and demanding delivery); Palmer *v.* Zarifi, 3 Aspin. 540, 37 L. T. Rep. N. S. 790; Stindt *v.* Roberts, 5 D. & L. 460, 12 Jur. 518, 17 L. J. Q. B. 166, 2 Saund. & C. 212; Dobbin *v.* Thornton, 6 Esp. 16.

12. Tweedie Trading Co. *v.* Pitch Pine Lumber Co., 146 Fed. 612.

13. Gage *v.* Morse, 12 Allen (Mass.) 410, 90 Am. Dec. 155; Conkling *v.* Brooklyn Lumber Co., 10 N. Y. App. Div. 404, 41 N. Y. Suppl. 801; Falkenburg *v.* Clark, 11 R. I. 278; Barker *v.* Torrence, 30 U. C. Q. B. 43 [*affirmed* in 31 U. C. Q. B. 561].

An acceptance of part of cargo imposes *per se* no liability for demurrage on the consignee or the indorsee of the bill of lading. Steamship County of Lancaster *v.* Sharpe, 24 Q. B. D. 158, 6 Aspin. 448, 59 L. J. Q. B. 22, 61 L. T. Rep. N. S. 692; Young *v.* Moeller, 5 E. & B. 755, 2 Jur. N. S. 393, 25 L. J. Q. B. 94, 4 Wkly. Rep. 149, 85 E. C. L. 755, 30 Eng. L. & Eq. 345 [*reversing* 5 E. & B. 7, 85 E. C. L. 7]. In Smith *v.* Sieveking, 5 E. & B. 589, 1 Jur. N. S. 1135, 24 L. J. Q. B. 257, 4 Wkly. Rep. 25, 85 E. C. L. 589, a consignee receiving goods under a bill of lading making them deliverable on his "paying for them as per charter-party" was held not liable to pay demurrage for a detention at port of loading occurring before the bill of lading was signed.

14. Gage *v.* Morse, 12 Allen (Mass.) 410, 90 Am. Dec. 155; Dayton *v.* Parke, 142 N. Y. 391, 37 N. E. 642 [*reversing* 67 Hun 137, 22 N. Y. Suppl. 613]; Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630 [*affirming* 15 Daly 538, 6 N. Y. Suppl. 531, 7 N. Y. Suppl. 663, 8 N. Y. Suppl. 478]; Cross *v.* Beard, 26 N. Y. 85; Riley *v.* A Cargo of Iron Pipes, 40 Fed. 605; The Pietro G., 39 Fed. 366; The Z. L. Adams, 26 Fed. 655; Fish *v.* One Hundred and Fifty Tons of Brown Stone, 20 Fed. 201; Coombs *v.* Nolan, 6 Fed. Cas. No. 3,189, 7 Ben. 301; The Glover, 10 Fed. Cas. No. 5,488, Brown Adm. 166; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548. And see Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565.

In England it was formerly held that an implied promise by the consignee or assignee to be bound by the terms of a bill of lading might be inferred from acceptance of goods under it (Evans *v.* Forster, 1 B. & Ad. 118, 8 L. J. K. B. O. S. 348, 20 E. C. L. 420; Wegener *v.* Smith, 15 C. B. 285, 3 C. L. R. 47, 24 L. J. C. P. 25, 80 E. C. L. 285; Smith *v.* Sieveking, 5 E. & B. 589, 1 Jur. N. S. 1135, 24 L. J. Q. B. 257, 4 Wkly. Rep. 25, 85 E. C. L. 589; Leer *v.* Yates, 3 Taunt. 386, 12 Rev. Rep. 671; The Woodbine, 1 L. T.

is no doubt of the applicability of the rule to the consignee or person accepting the goods, when he is the owner thereof.[15] In some instances the consignee has been made liable by estoppel;[16] and where by acceptance of the cargo or otherwise his liability has attached, he cannot relieve himself therefrom by subcontracts to others who do not act directly under the bill of lading,[17] or by claiming that the cargo was ordered for an undisclosed principal,[18] or that other cargo was shipped by the same vessel to other consignees.[19]

(II) *Incorporation of Terms of Charter-Party in Bill of Lading.* Provisions in the charter-party relating to demurrage are binding on the consignee or on the assignee or indorsee of the bill of lading only when referred to and adopted in the bill of lading.[20] Such adoption is effected when the bill of lading specifically refers to provisions in a charter-party in such manner that such provisions are made a part thereof;[21] but mere notice that a charter exists is not sufficient to

O. S. 200), but it is now provided by statute (Bills of Lading Act of 1855, 18 & 19 Vict. c. 111, § 1) that every consignee or assignee of the bill of lading shall be subject to the same liability in respect to the cargo as if the contract in the bill of lading had been made with him (Donaldson *v.* McDowell, 7 Fed. Cas. No. 3,985, Holmes 290 [*affirming* 12 Fed. Cas. No. 6,987, 2 Lowell 93]; Steamship County of Lancaster *v.* Sharp, 24 Q. B. D. 158, 6 Aspin. 448, 59 L. J. Q. B. 22, 61 L. T. Rep. N. S. 692; Allen *v.* Coltart, 11 Q. B. D. 782, 5 Aspin. 104, 52 L. J. Q. B. 686, 48 L. T. Rep. N. S. 944, 31 Wkly. Rep. 841; Fowler *v.* Knoop, 47 L. J. Q. B. 473 [*affirmed* in 4 Q. B. D. 299, 48 L. J. Q. B. 333, 40 L. T. Rep. N. S. 180, 27 Wkly. Rep. 299]).

A person who buys cargo on board ship after her arrival, taking no transfer of the bill of lading or charter-party, and having no knowledge of either, is bound only to the use of reasonable diligence in discharging. Houge *v.* Woodruff, 19 Fed. 136.

A railroad company which receives a bill of lading for the purpose of transportation and as agent for another is not the consignee and is not liable for demurrage, in the absence of any stipulation to that effect in the bill of lading. Miner *v.* Norwich, etc., R. Co., 32 Conn. 91.

15. Scholl *v.* Albany, etc., Iron, etc., Co., 101 N. Y. 602, 5 N. E. 782; The Mary Riley *v.* Three Thousand Railroad Ties, 38 Fed. 254; Crawford *v.* Mellor, 1 Fed. 638; Sheppard *v.* Philadelphia Butchers' Ice Co., 5 Fed. Cas. No. 2,757, 3 Wkly. Notes Cas. (Pa.) 565; Donaldson *v.* McDowell, 7 Fed. Cas. No. 3,985, Holmes 290 [*affirming* 12 Fed. Cas. No. 6,987, 2 Lowell 93] (in which case the consignee was also the shipper); Barker *v.* Torrance, 30 U. C. Q. B. 43 [*affirmed* in 31 U. C. Q. B. 561]. And see Robbins *v.* Codman, 4 E. D. Smith (N. Y.) 315.

16. Taylor *v.* Fall River Ironworks, 124 Fed. 826; Irzo *v.* Perkins, 10 Fed. 779.

17. Neilsen *v.* Jesup, 30 Fed. 138.

Necessity of notice of transfer.— To relieve the owner of a cargo after he has transferred it, from responsibility for demurrage, he must show that notice of such transfer was given to the master of the ship. The Elida, 31 Fed. 420.

18. Falkenburg *v.* Clark, 11 R. I. 278.

19. Morse *v.* Pesant, 3 Abb. Dec. (N. Y.) 321 [*affirming* 7 Bosw. 199]; Porteous *v.* Watney, 3 Q. B. D. 534, 4 Aspin. 342, 47 L. J. Q. B. 643, 39 L. T. Rep. N. S. 195, 27 Wkly. Rep. 30; Dobson *v.* Droop, 4 C. & P. 112, M. & M. 441, 19 E. C. L. 432; Leer *v.* Yates, 3 Taunt. 387, 12 Rev. Rep. 671. See also Hill *v.* Idle, 4 Campb. 327, 16 Rev. Rep. 797; Fowler *v.* Knoop, 47 L. J. Q. B. 473 [*affirmed* in 4 Q. B. D. 299, 4 Aspin. 68, 48 L. J. Q. B. 333, 40 L. T. Rep. N. S. 180, 27 Wkly. Rep. 290].

20. Dayton *v.* Parke, 142 N. Y. 391, 37 N. E. 642 [*reversing* 67 Hun 137, 22 N. Y. Suppl. 613]; Crossman *v.* Burrill, 179 U. S. 100, 21 S. Ct. 38, 45 L. ed. 106; Graham *v.* Planters' Compress Co., 129 Fed. 253; Taylor *v.* Fall River Ironworks, 124 Fed. 826; The Pietro G., 39 Fed. 366; Gronn *v.* Woodruff, 19 Fed. 143; One Hundred and Twelve Sticks of Timber, 18 Fed. Cas. No. 10,524, 8 Ben. 214; Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565; Maclay *v.* U. S., 43 Ct. Cl. 90; Porteous *v.* Watney, 3 Q. B. D. 534, 4 Aspin. 34, 47 L. J. Q. B. 643, 39 L. T. Rep. N. S. 195, 27 Wkly. Rep. 30; Gray *v.* Carr, L. R. 6 Q. B. 538, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173; Wegener *v.* Smith, 15 C. B. 285, 3 C. L. R. 47, 24 L. J. C. P. 25, 80 E. C. L. 285; Chappel *v.* Comfort, 10 C. B. N. S. 802, 8 Jur. N. S. 177, 31 L. J. C. P. 58, 4 L. T. Rep. N. S. 448, 9 Wkly. Rep. 694, 100 E. C. L. 802; Young *v.* Moller, 5 E. & B. 755, 2 Jur. N. S. 393, 25 L. J. Q. B. 94, 85 E. C. L. 755, 30 Eng. L. & Eq. 345; Smith *v.* Sieveking, 5 E. & B. 589, 1 Jur. N. S. 1135, 4 Wkly. Rep. 25, 85 E. C. L. 589 [*affirming* 4 E. & B. 945, 82 E. C. L. 945]; Oliver *v.* Muggeridge, 7 Wkly. Rep. 164. The consignee of a cargo, under bills of lading which obligate him only to receive the cargo as delivered by the vessel, does not incorporate the provisions of the charter-party respecting the time for discharging or demurrage. West Hartlepool Steam Nav. Co. *v.* 450 Tons of Kainit, 151 Fed. 886.

21. Payne *v.* Ralli, 74 Fed. 563, where it was held that the ship had a lien for reconditioning the cargo under a general lien clause of the charter to which the bills of lading referred.

incorporate the terms thereof into a bill of lading subsequently executed,[22] and if it is wished to include the terms of the charter-party words ought to be introduced into the bill of lading which plainly show that intention.[23] The phrases, "paying freight as per charter-party,"[24] "paying for the said goods as per charter-party,"[25] "he or they paying freight for the said goods as per charter-party, with primage and average accustomed,"[26] have been held to impose none of the stipulations of the charter-party except such as pertain to the payment of freight, and not to render one who receives goods under the bill of lading liable for demurrage provided for in the charter.[27] Similarly, and upon the same grounds, the phrase, "paying freight for the said goods and all other conditions as per charter-party," is held not to incorporate an exception in the charter-party as to "acts of enemies" and "restraints of princes;"[28] and in like manner the words "all other conditions as per charter-party" are held not to incorporate into the bill of lading an exception contained in the charter of "strandings occasioned by the negligence of the master," it being held that the words "all other conditions" were to be connected with the words "paying freight," and include only such conditions as are *ejusdem generis*.[29] On the other hand, the acceptance of a cargo by the indorsee of a bill of lading, whereby the goods are deliverable to order "against payment of the agreed freight and other conditions as per charter-party," has been held

22. Turner *v.* Haji Goolam Mahomed Azam, [1904] A. C. 826.

23. Fry *v.* Mercantile Bank, L. R. 1 C. P. 689, 35 L. J. C. P. 306, 14 L. T. Rep. N. S. 709, 14 Wkly. Rep. 920.

24. Burrill *v.* Crossman, 65 Fed. 104 [*reversed* on other grounds in 69 Fed. 747, 16 C. C. A. 381 (*reversed* on other grounds in 179 U. S. 1007, 21 S. Ct. 38, 45 L. ed. 106) (holding that under this bill of lading the vendee was entitled to take the goods within a reasonable time according to the circumstances of arrival and under the ordinary rules of law as to liability for damages for detention such as apply in the absence of any specific agreement, a very different liability from a specific agreement that assumes all risks of detention from whatever cause and agrees upon a specific rate of damage); Chappel *v.* Comfort, 10 C. B. N. S. 802, 8 Jur. N. S. 177, 31 L. J. C. P. 58, 4 L. T. Rep. N. S. 448, 9 Wkly. Rep. 694, 100 E. C. L. 802.

25. Smith *v.* Sieveking, 4 E. & B. 945, 82 E. C. L. 945 [*affirmed* in 5 E. & B. 589, 1 Jur. N. S. 1135, 4 Wkly. Rep. 25, 85 E. C. L. 589], where defendant was holder of a bill of lading for the entire cargo of the wheat expressed to be shipped by M deliverable at L unto defendant or assigns "he or they paying for the said goods as per charty-party, with primage and average accustomed," and the charter-party mentioned the rates of freight and contained a stipulation that "for the payment of all freight and demurrage the captain shall have an absolute lien and charge of the said cargo," and it was held that the terms of the bill of lading and charter-party did not import that the person receiving the goods was to pay demurrage accrued at the outport, although the captain has a lien for it.

26. Dayton *v.* Parke, 142 N. Y. 391, 37 N. E. 642.

27. Burrill *v.* Crossman, 65 Fed. 104 [*reversed* on other grounds in 69 Fed. 747, 16 C. C. A. 381 (*reversed* on other grounds in 179 U. S. 100, 21 S. Ct. 38, 45 L. ed. 106), and *distinguishing* McLean *v.* Fleming, L. R. 2 H. L. Sc. 128, on which the charterers relied, upon the ground that the sole ground on which the indorsees of the bill of lading were held to be bound by the provisions of the charter-party in that case was that they were the persons who had originally authorized the charter of the ship]. See also Fry *v.* Mercantile Bank, L. R. 1 C. P. 689, 35 L. J. C. P. 306, 14 L. T, Rep. N. S. 709, 14 Wkly. Rep. 920, where a charter-party contained the following clause: "Ship to have a lien on cargo for freight 3£ 10s. a ton of 50 cubic feet measure in Shanghai, to be paid to the captain or his agents on right delivery in port of discharge, the freight to be paid on unloading and right delivery of the cargo," and the charterers shipped part of the cargo themselves under a bill of lading containing the following clause: "Freight for the said goods payable in Liverpool as per charter-party," and the charterers having indorsed the bill of lading to A for a valuable consideration, it was held that as against A the ship-owner had a lien only for the freight due for the goods included in the bill of lading at the rate of 3£ 10s. a ton and not a lien for the whole chartered freight. The court said that it would require very strong words to render defendants liable for the freight payable to the charter-party for the whole cargo.

28. Russell *v.* Niemann, 17 C. B. N. S. 163, 34 L. J. C. P. 10, 10 L. T. Rep. N. S. 786, 13 Wkly. Rep. 93, 112 E. C. L. 163.

29. Serraino *v.* Campbell, 25 Q. B. D. 501, 59 L. J. Q. B. 452, 63 L. T. Rep. N. S. 107, 39 Wkly. Rep. 112 [*affirmed* in [1891] 1 Q. B. 283, 7 Aspin. 48, 60 L. J. Q. B. 303, 64 L. T. Rep. N. S. 615, 39 Wkly. Rep. 356, and *following* Russell *v.* Niemann, 17 C. B. N. S. 163, 34 L. J. C. P. 10, 10 L. T. Rep. N. S. 786, 13 Wkly. Rep. 93, 112 E. C. L. 163].

to be a circumstance from which the jury may imply a contract on his part to pay demurrage stipulated for by the charter-party notwithstanding his refusal at the time of receiving the goods to pay the demurrage;[30] and a bill of lading providing for the payment of freight and "all other conditions as per charter-party" is construed *ejusdem generis* as imposing upon the consignee the payment of something more than freight, and including the obligation referred to in the charter-party in respect to the rate of delivery and the payment of the demurrage specified, although not necessarily including an independent provision of the charter-party relating to different subjects.[31]

d. Particular Contracts Considered. A contract to pay for the use of a vessel every day she is employed does not cover demurrage,[32] but provisions exempting the charterer from liability for delay not due to his fault extend only to causes beyond his control and do not relieve him from liability for detention caused by failure to perform his covenants;[33] and, conversely, provisions relating to demurrage and the time allowed for loading and unloading will not be extended by construction beyond the clear purport of their language.[34] A clause known as "the cesser clause" is sometimes inserted in the charter-party. It usually provides that the charterer's responsibility shall cease where the vessel is loaded and bills of lading are signed, and although this clause will ordinarily be given effect and exempt the charterer from responsibility for delay occurring subsequent to loading,[35]

30. Wegener *v.* Smith, 15 C. B. 285, 3 C. L. R. 47, 24 L. J. C. P. 25, 80 E. C. L. 285.

31. Burrill *v.* Crossman, 65 Fed. 104 [*reversed* on other grounds in 67 Fed. 747, 16 C. C. A. 381 (*reversed* on other grounds in 179 U. S. 100, 21 S. Ct. 38, 45 L. ed. 106)]; Serraino *v.* Campbell, 25 Q. B. D. 501, 59 L. J. Q. B. 452, 63 L. T. Rep. N. S. 107, 39 Wkly. Rep. 112 [*affirmed* in [1891] 1 Q. B. 283, 7 Aspin. 48, 60 L. J. Q. B. 303, 64 L. T. Rep. N. S. 615, 39 Wkly. Rep. 356]; Portens *v.* Watney, 3 Q. B. D. 534, 4 Aspin. 34, 47 L. J. Q. B. 643, 39 L. T. Rep. N. S. 195, 27 Wkly. Rep. 30 (holding the true result of the authorities to be that a bill of lading in which the words "and all other conditions as per charter-party," following the expression "on paying freight," or "paying freight for the said goods," or similar expressions, import a liability on the part of the consignee of goods under the bill of lading to pay the demurrage stipulated for by the terms of the charter-party to which it refers); Wegener *v.* Smith, 15 C. B. 285, 3 C. L. R. 47, 24 L. J. C. P. 25, 80 E. C. L. 285; Russell *v.* Niemann, 17 C. B. N. S. 163, 34 L. J. C. P. 10, 10 L. T. Rep. N. S. 786, 13 Wkly. Rep. 93, 112 E. C. L. 163. And see Young *v.* Moeller, 5 E. & B. 755, 2 Jur. N. S. 393, 25 L. J. Q. B. 94, 4 Wkly. Rep. 149, 85 E. C. L. 755, 30 Eng. L. & Eq. 345, which, however, is based more upon the ground that the demurrage charge was caused by the consignee's refusal to perform another part of the contract in the hill of lading as to payment of delivery.

32. Mitchell *v.* U. S., 96 U. S. 162, 24 L. ed. 702.

The detention of a vessel in order to take on cargo cannot be made the basis of a valid claim for demurrage, where the charter-party provides for its being taken free, and no more than a reasonable time is consumed in loading. Pearson *v.* Grice, 8 Fla. 214.

33. Sixteen Hundred Tons of Nitrate of Soda *v.* McLeod, 61 Fed. 849, 10 C. C. A. 115; Thacher *v.* Boston Gaslight Co., 23 Fed. Cas. No. 13,850, 2 Lowell 361. And see Melloy *v.* Lehigh, etc., Coal Co., 37 Fed. 377, holding that an exemption from liability for delay or failure to load does not cover any delay or failure due to the party's wilful neglect or fault.

34. Durchmann *v.* Dunn, 106 Fed. 950, 46 C. C. A. 62; The James Baird, 90 Fed. 669.

A special provision of a charter-party that the freight on the dressed lumber shipped should be subject to a deduction of one fifth cannot extend to the construction of maritime rules relating to demurrage, so as to entitle the consignee to a deduction in measurement for dressed lumber in computing the demurrage due, except on clear evidence that it was so intended. Bowen *v.* Sizer, 93 Fed. 227.

Where the contract is terminated by circumstances which render performance impossible, and a new implied contract arises, the stipulations of the charter respecting demurrage and the rate of discharge will not necessarily be deemed preserved by mere implication. The Spartan, 25 Fed. 44.

Conflicting stipulations.—A provision for demurrage for delay caused by a failure to discharge the vessel in her turn controls a provision fixing the time allowed for lay days. Evans *v.* Blair, 114 Fed. 616, 52 C. C. A. 396.

35. The Maggie Moore, 8 Fed. 620, 5 Hughes 287; French *v.* Gerber, 2 C. P. D. 247, 3 Aspin. 574, 46 L. J. C. P. 320, 36 L. T. Rep. N. S. 350, 25 Wkly. Rep. 355; Oglesby *v.* Yglesias, E. B. & E. 930, 27 L. J. Q. B. 356, 6 Wkly. Rep. 690, 96 E. C. L. 930.

The fact that the charterer and the consigee are the same person does not affect the application of the rule, so far as an action

but not before,[36] it is always subject to and controlled by the other provisions of the charter-party and bill of lading, and will not be construed to exonerate him from a liability created by other clauses, and it is operative only in so far as the bill of lading substitutes a lien on the goods shipped for the charterer's personal liability.[37] A bill of lading supersedes and takes precedence over a prior parol agreement as to the rate of discharge, on the principle that preliminary negotiations are merged in a written contract.[38]

2. What Delay Creates — a. In Loading. In general, demurrage is recoverable for delay in loading the vessel,[39] and this is true even in the absence of a specific agreement, as in such case the vessel owner may legally assume that the chartered ship will be loaded in accordance with the prevailing custom of the port, and with such reasonable promptitude as the situation and circumstances allow.[40] The right to recover exists where the delay is caused by the failure of the charterer to have the entire cargo ready for delivery at the port of loading;[41]

on the charter-party is concerned. Sanguinetti *v.* Pacific Steam Nav. Co., 2 Q. B. D. 238, 3 Aspin. 300, 46 L. J. Q. B. 105, 35 L. T. Rep. N. S. 658, 25 Wkly. Rep. 150.

36. Schmidt *v.* Keyser, 88 Fed. 799, 32 C. C. A. 121; Lister *v.* Van Haansbergen, 1 Q. B. D. 269, 3 Aspin. 145, 45 L. J. Q. B. 495, 34 L. T. Rep. N. S. 446, 24 Wkly. Rep. 395; Christofferson *v.* Hansen, L. R. 7 Q. B. 509, 1 Aspin 305, 41 L. J. Q. B. 217, 26 L. T. Rep. N. S. 547, 20 Wkly. Rep. 626; Lockhart *v.* Falk, L. R. 10 Exch. 132, 3 Aspin. 8, 44 L. J. Exch. 105, 33 L. T. Rep. N. S. 96, 23 Wkly. Rep. 753.

37. Crossman *v.* Burrill, 179 U. S. 100, 21 S. Ct. 38, 45 L. ed. 106 [*reversing* 91 Fed. 543, 33 C. C. A. 663]; Dunlop *v.* Balfour, [1892] 1 Q. B. 507, 7 Aspin. 181, 61 L. J. Q. B. 354, 66 L. T. Rep. N. S. 455, 40 Wkly. Rep. 371; Clink *v.* Radford, [1891] 1 Q. B. 625, 7 Aspin. 10, 60 L. J. Q. B. 388, 64 L. T. Rep. N. S. 491, 39 Wkly. Rep. 355; Gullichsen *v.* Stewart, 13 Q. B. D. 317, 5 Aspin. 200, 53 L. J. Q. B. 173, 50 L. T. Rep. N. S. 47, 32 Wkly. Rep. 763; Barwick *v.* Burnyeat, 3 Aspin. 376, 36 L. T. Rep. N. S. 250, 25 Wkly. Rep. 395; Gardiner *v.* Macfarlane, 16 Sc. Sess. Cas. 658. *Compare* Kish *v.* Cory, L. R. 10 Q. B. 553, 2 Aspin. 593, 44 L. J. Q. B. 205, 32 L. T. Rep. N. S. 670, 23 Wkly. Rep. 880; Bannister *v.* Breslauer, L. R. 2 C. P. 497, 36 L. J. C. P. 195, 16 L. T. Rep. N. S. 418, 15 Wkly. Rep. 840.

38. Brown *v.* Certain Tons of Coal, 34 Fed. 913.

39. Aalholm *v.* A Cargo of Iron Ore, 23 Fed. 620; Two Hundred and Thirteen Tons of Coal, 24 Fed. Cas. No. 14,298, 7 Ben. 15; Ardan Steamship Co. *v.* Weir, [1905] A. C. 501, 10 Aspin. 135, 11 Com. Cas. 26, 74 L. J. P. C. 143, 93 L. T. Rep. N. S. 559, 21 T. L. R. 723; Potter *v.* Burrell, [1897] 1 Q. B. 97, 8 Aspin. 200, 66 L. J. Q. B. 63, 75 L. T. Rep. N. S. 491, 45 Wkly. Rep. 145 (holding that the charterer takes the risk of finding labor to load the ship); Seeger *v.* Duthie, 8 C. B. N. S. 72, 7 Jur. N. S. 239, 30 L. J. C. P. 66, 3 L. T. Rep. N. S. 478, 9 Wkly. Rep 166, 98 E. C. L. 72; Lord *v.* Davidson, 13 Can. Sup. Ct. 166.

The refusal of the master to permit loading at night or on Sunday does not vary the charterer's liability for delay. Creighton *v.* Dilks, 49 Fed. 107.

Detention of vessel from other causes immaterial.— The fact that ice would have prevented the ship from sailing earlier than she did does not excuse an unreasonable delay in loading. Randall *v.* Sprague, 74 Fed. 247, 21 C. C. A. 334 [*reversing* 67 Fed. 604].

Assent to delay.—A freighter is liable for delay produced in part by an inability to enter the vessel at the port where the cargo was to be loaded, if the agent of the freighter assents to the delay, and directs the captain to go to another port to make such entry. Rupp *v.* Lobach, 4 E. D. Smith (N. Y.) 69.

The obligation of the charterer does not end on a delivery of the cargo alongside, under a charter-party providing for such delivery but also naming a certain number of days for loading the vessel. Baldwin *v.* Sullivan Timber Co., 142 N. Y. 279, 36 N. E. 1060 [*affirming* 65 Hun 625, 20 N. Y. Suppl. 496]; Hagerman *v.* Norton, 105 Fed. 996, 46 C. C. A. 1.

40. Williscroft *v.* Cargo of the Cyrenian, 123 Fed. 169; Nichols *v.* Tremlett, 18 Fed. Cas. No. 10,247, 1 Sprague 361.

Where the contract is repudiated, but the ship is loaded in less time than was allowed by the charter-party, there can be no recovery for delay. Greenwell *v.* Ross, 34 Fed. 656.

Under a general contract for the season, in which it is stipulated that a certain specified number of tons of cargo shall be furnished during the season and that approximately a specified number of tons shall be furnished each montb, no demurrage is recoverable for delay in waiting for a cargo at any particular time. Corrigan *v.* Iroquois Furnace Co., 100 Fed. 870, 41 C. C. A. 102. *Compare* Kelly *v.* Fall Brook Coal Co., 67 Barb. (N. Y.) 183, holding damages recoverable for delay in waiting for a load where the charterer did not notify the owner that he did not intend to abide by the contract.

The loading of another vessel first does not necessarily render the charterer liable for demurrage, where the contract contains no definite statement as to the time of loading. Kimball *v.* Tudor Co., 2 Fed. 51.

41. Pregenzer *v.* Burleigh, 6 Misc. (N. Y.)

by a variation in the character of cargo from that specified in the charter-party;[42] by the failure of the charterer to provide the vessel a safe berth at which she can be loaded within a reasonable time;[43] or by the failure of the charterer to promptly supply the requisite number of lighters to convey the cargo to the ship, where delivery by this means is contemplated.[44] On the other hand, the right does not exist where the delay complained of happens before the time for loading commences, under the terms of the contract;[45] where the nature of the cargo is such as to render a more rapid delivery impracticable;[46] where the delay is caused by the vessel being compelled without her fault to wait her turn in loading,[47] or by

140, 26 N. Y. Suppl. 35; Stoomvart Maatschaffy Nederlandsche Lloyd *v.* Lind, 170 Fed. 918, 96 C. C. A. 134; Atlantic, etc., Steamship Co. *v.* Guggenheim, 147 Fed. 103, 77 C. C. A. 329 [*affirming* 123 Fed. 330]; Schooner Mahukona Co. *v.* 180,000 Feet of Lumber, 142 Fed. 578; Ardan Steamship Co. *v.* Weir, [1905] A. C. 501, 10 Aspin. 135, 11 Com. Cas. 26, 74 L. J. P. C. 143, 93 L. T. Rep. N. S. 559, 21 T. L. R. 723; Elliott *v.* Lord, 5 Aspin. 63, 52 L. J. P. C. 23, 48 L. T. Rep. N. S. 542; Lord *v.* Davidson, 13 Can. Sup. Ct. 166. But see Little *v.* Stevenson, [1896] A. C. 108, 8 Aspin. 162, 65 L. J. P. C. 69, 74 L. T. Rep. N. S. 529; Jones *v.* Green, [1904] 2 K. B. 275, 9 Aspin. 600, 9 Com. Cas. 20, 73 L. J. K. B. 601, 90 L. T. Rep. N. S. 768.

This rule is modified when there is a usage at the port that the cargo is not stored there but is loaded from cars (Randall *v.* Sprague, 74 Fed. 247, 21 C. C. A. 334 [*reversing* 67 Fed. 604]) or boats (Hudson *v.* Ede, L. R. 3 Q. B. 412, 8 B. & S. 640, 37 L. J. Q. B. 166, 18 L. T. Rep. N. S. 764, 16 Wkly. Rep. 940).

A delay in transportation to the port of loading does not exonerate the charterer from demurrage where it causes delay in loading (Peck *v.* U. S., 152 Fed. 524; Ashcroft *v.* Crow Orchard Colliery Co., L. R. 9 Q. B. 540, 2 Aspin. 397, 43 L. J. Q. B. 194, 31 L. T. Rep. N. S. 266, 22 Wkly. Rep. 825; Kearon *v.* Pearson, 7 H. & N. 387, 31 L. J. Exch. 1, 10 Wkly. Rep. 12; Cushing *v.* McLeod, 2 N. Brunsw. Eq. 63), except where delay from such cause is excepted in the charter-party (*In re* Richardson, 1 Q. B. 261, 66 L. J. Q. B. 868, 77 L. T. Rep. N. S. 479; Furness *v.* Forwood, 77 L. T. Rep. N. S. 95).

The fact that the shipper resides at a distance from the shipping port does not relieve him from the obligation to have the cargo ready at the port of shipment. Wade *v.* Russell, 18 N. C. 542.

42. Hagan *v.* Cargo of Lumber, 163 Fed. 657; McCaldin *v.* Cargo of Scrap Iron, 111 Fed. 411; Swan *v.* Five Hundred and Fifty Tons Reserve Coal, 35 Fed. 307, holding that under a general charter for a cargo of coal, the charterers were not entitled to subject the ship to the delays incident to loading a special kind of selected coal.

Wrong cargo.—A delay caused by the loading by mistake and the unloading of material which was not intended to be shipped renders the charterer liable to demurrage. Creighton *v.* Dilks, 49 Fed. 107.

43. Constantine, etc., Steamship Co. *v.* Auchinclos, 161 Fed. 843, 88 C. C. A. 661; Belmont *v.* Tyson, 3 Fed. Cos. No. 1,281, 3 Blatchf. 530; Stephens *v.* Macleod, 19 Sc. Sess. Cas. 38.

A delay in towing the vessel out to sea, after the weather is such as to permit it, renders the charterer liable for demurrage, under a charter-party providing for such towage. Actieselskabet Barfod *v.* Hilton, etc., Lumber Co., 125 Fed. 137.

44. McCaldin *v.* Cargo of Scrap Iron, 111 Fed. 411. *Compare* Hagan *v.* Cargo of Lumber, 163 Fed. 657, holding that under a charter for the carriage of lumber to be loaded at two ports, requiring the charterer to pay the towage between the two, the time of such towage cannot be charged in the lay days for loading, nor the time lost in obtaining a tug not due to any default of the charterer.

A breakdown in one of the lighters does not exempt the charterer from liability. James *v.* Brophy, 71 Fed. 310, 18 C. C. A. 49.

An owner of lighters cannot recover demurrage from the agent of steamships for delay in receiving the cargo, where the cargo was received and stowed as rapidly as possible, considering its character. Merritt, etc., Derrick, etc., Co. *v.* Vogeman, 143 Fed. 142.

45. Shamrock Steamship Co. *v.* Storey, 8 Aspin. 590, 5 Com. Cas. 21, 81 L. T. Rep. N. S. 413, 16 T. L. R. 6.

46. Uren *v.* Hagar, 95 Fed. 493; Eleven Hundred Tons of Coal, 12 Fed. 185.

47. Fisher *v.* Abeel, 66 Barb. (N. Y.) 381, 44 How. Pr. 432; Williscroft *v.* Cargo of the Cyrenian, 123 Fed. 169.

Construction of term.—The phrase "in turn" must be strictly construed. It shuts out a practice of the charterer to give preference to its own vessels (Donnell *v.* Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178), and the vessel takes its turn with other vessels carrying the same kind of cargo, and not with a class of vessels over which it has preference (Eleven Hundred Tons of Coal, 12 Fed. 185; King *v.* Hinde, L. R. 12 Ir. 113), but the vessel is not entitled to take her place in turn until her entire cargo is ready (Melloy *v.* Lehigh, etc., Coal Co., 37 Fed. 377). The expression "regular turn" means the order of readiness and not the order in which the vessels are entered in the books of a loading company (Lawson *v.* Burness, 1 H. & C. 396, 2 F. & F. 793, 10 Wkly. Rep. 733), and, when used in a charter-party providing for the reception of coal from a colliery, means regular colliery turn, and not port turn (Quilpue *v.* Brown, [1904] 2 K. B.

the failure of the parties to the contract of affreightment to agree on the selection of a stevedore.[48]

b. In Unloading — (i) *Breach of Express Obligation* — (a) *Despatch.* The charterer is liable in damages for a breach of an express provision of the contract relating to despatch in unloading the vessel, and where the words "despatch," "prompt despatch" or "quick despatch" are employed, they mean without delay. They obligate the charterer to receive the cargo as fast as the vessel can deliver it,[49] and they are not in any way controlled by the rules, usages, or customs of the port,[50] such as a custom that the vessel shall take her turn at the wharf.[51] Although the same meaning and effect attaches to the term "customary quick despatch,"[52] the expressions "customary despatch" or "customary time" contemplate usual, rather than quick, despatch, and a contract containing such a provision is fulfilled if the vessel is afforded the customary facilities for speedy discharge.[53] These expressions include the lawful, reasonable, and well-known

264, 9 Aspin. 596, 9 Com. Cas. 264, 73 L. J. K. B. 596, 90 L. T. Rep. N. S. 765).

The rule is otherwise where the charter contains express provisions to the contrary (Constantine, etc., Steamship Co. *v.* Auchinclos, 161 Fed. 843, 88 C. C. A. 661), or stipulations for the delivery of the cargo with all possible despatch (Moody *v.* Five Hundred Thousand Laths, 2 Fed. 607. And see Read *v.* Delaware, etc., Canal Co., 3 Lans. (N. Y.) 213; Ashcroft *v.* Crow Orchard Colliery Co., L. R. 9 Q. B. 540, 2 Aspin. 397, 43 L. J. Q. B. 194, 31 L. T. Rep. N. S. 266, 22 Wkly. Rep. 825), or the vessel is compelled to wait for another vessel sent out by the charterer after the making of the engagement with the first ship (Atlantic, etc., Guano Co. *v.* The Robert Center, 2 Fed. Cas. No. 630), or where the ship loses its turn through the default of the charterer (Jones *v.* Adamson, 1 Ex. D. 60, 3 Aspin. 253, 45 L. J. Exch. 64, 35 L. T. Rep. N. S. 287).

An interruption in loading by reason of preference being given to another vessel in accordance with certain regulations to which the parties are subject under the terms of the charter-party is not ground for demurrage. Swan *v.* Five Hundred and Fifty Tons Reserve Coal, 35 Fed. 307.

A delay of the vessel after awaiting its turn imposes liability for damages. Kelly *v.* Fall Brook Coal Co., 67 Barb. (N. Y.) 183; Nichols *v.* Tremlett, 18 Fed. Cas. No. 10,247, 1 Sprague 361.

48. Portland Shipping Co. *v.* The Alex Gibson, 44 Fed. 371.

49. Mitchell *v.* Langdon, 9 Fed. 472, 10 Biss. 527; Bjorkquist *v.* Certain Steel Rail Crop Ends, 3 Fed. 717, 5 Hughes 194 (holding that the charterers are liable for demurrage where the vessel is, from the crowded condition of the port, delayed in procuring a berth); Sleeper *v.* Puig, 22 Fed. Cas. No. 12,941, 17 Blatchf. 36 [*affirming* 22 Fed. Cas. No. 12,940, 10 Ben. 181].

Equivalent words.—A provision for delivery "as soon as possible" is equivalent to a provision for quick despatch in unloading and requires the consignee to make use of all the means of discharge that are readily available. Egan *v.* Barclay Fibre Co., 61 Fed. 527.

Failure to furnish weighers.—Delay arising from the fact that the charterers have a number of other vessels in port, whose cargoes they are unloading, and to which they choose to furnish all the available weighers, constitutes a failure to discharge "with all despatch." Smith *v.* Roberts, 67 Fed. 361, 14 C. C. A. 417.

Delay in giving security for the payment of freight has been held to create a liability for demurrage under an agreement for "quick despatch." Isham *v.* A Cargo of Pine Piles, 46 Fed. 403.

50. Mott *v.* Frost, 47 Fed. 82; Sleeper *v.* Puig, 22 Fed. Cas. No. 12,941, 17 Blatchf. 36 [*affirming* 22 Fed. Cas. No. 12,940, 10 Ben. 181]. *Compare* Cargo of the Joseph W. Brooks, 122 Fed. 881 (holding that the expression "despatch in discharging" is indefinite and uncertain, and should be construed with reference to the custom of the port); Mitchell *v.* Langdon, 9 Fed. 472, 10 Biss. 527.

51. Ten Thousand and Eighty-Two Oak Ties, 87 Fed. 935; Davis *v.* Wallace, 7 Fed. Cas. No. 3,657, 3 Cliff. 123; Keen *v.* Audenried, 14 Fed. Cas. No. 7,639, 5 Ben. 525; Thacher *v.* Boston Gaslight Co., 23 Fed. Cas. No. 13,850, 2 Lowell 361.

52. Freeman *v.* Wellman, 67 Fed. 796; Harrison *v.* Smith, 67 Fed. 354, 14 C. C. A. 656 [*affirming* 50 Fed. 565], holding that the stipulation contemplates haste. *Compare* Terjesen *v.* Carter, 9 Daly (N. Y.) 193, holding that the term means as quick despatch as is customary at the port of delivery.

53. Seagar *v.* New York, etc., Mail Steamship Co., 55 Fed. 324 [*affirmed* in 55 Fed. 880, 5 C. C. A. 290]; The Spartan, 25 Fed. 44 (holding further that where the port is an extemporized one and there is no custom obtaining at that place, the obligation of the consignee is to discharge the vessel with reasonable diligence); Lindsay *v.* Cusimano, 12 Fed. 503, 504 [*affirming* in part 10 Fed. 302]; Castlegate Steamship Co. *v.* Dempsey, [1892] 1 Q. B. 854, 7 Aspin. 186, 61 L. J. Q. B. 620, 66 L. T. Rep. N. S. 742, 40 Wkly. Rep. 533; Rodgers *v.* Forresters, 2 Camp. 483, 11 Rev. Rep. 773; Cushing *v.* McLeod, 2 N. Brunsw. Eq. 63. And see Eleven Hundred Tons of Coal, 12 Fed. 185.

customs of the port of discharge,[54] but they do not do away with the obligation of the charterer to provide a berth where the vessel may be promptly discharged.[55]

(B) *Other Matters.* The plain and express provisions of the contract as to the time and manner of unloading are binding so as to render the charterer or consignee accepting the cargo liable in damages for delay caused by non-compliance,[56] and although they will not be construed as contemplating impossible things,[57]

The expression is not equivalent to an absolute stipulation to discharge in a limited time. Huthen *v.* Stewart, [1903] A. C. 389, 8 Com. Cas. 297, 72 L. J. K. B. 917, 88 L. T. Rep. N. S. 702, 19 T. L. R. 513.

54. Gates *v.* Ryan, 37 Fed. 154; Lindsay *v.* Cusimano, 12 Fed. 503 [*affirming* in part 10 Fed. 302]; Smith *v.* Sixty Thousand Feet of Yellow Pine Lumber, 2 Fed. 396; Lyle Shipping Co. *v.* Cardiff, [1900] 2 Q. B. 638, 9 Aspin. 128, 5 Com. Cas. 397, 69 L. J. Q. B. 889, 83 L. T. Rep. N. S. 329, 49 Wkly. Rep. 85; Good *v.* Isaacs, [1892] 2 Q. B. 555, 7 Aspin. 212, 61 L. J. Q. B. 649, 67 L. T. Rep. N. S. 450, 40 Wkly. Rep. 629.

Custom as to sale.— The term does not include a custom which has its origin in the sale, and not in the discharge, of cargoes. Milburn *v.* Thirty-Five Thousand Boxes of Oranges, etc., 57 Fed. 236, 6 C. C. A. 317.

55. Leary *v.* Talbot, 160 Fed. 914, 88 C. C. A. 96 [*affirming* 151 Fed. 355]; The Giulio, 34 Fed. 909; Lindsay *v.* Cusimano, 12 Fed. 503, 504 [*affirming* in part 10 Fed. 302]; Smith *v.* Sixty Thousand Feet of Yellow Pine Lumber, 2 Fed. 396.

56. Wiles *v.* New York Cent., etc., R. Co., 4 Thomps. & C. (N. Y.) 264; Pioneer Fuel Co. *v.* McBrier, 84 Fed. 495, 28 C. C. A. 466 (holding that, although when the shipment is to a particular party having no special conveniences for unloading, that fact enters into the contract and determines the question of reasonableness in the discharge of the cargo, the express provisions of the contract are not affected by matters between the shippers and the consignee); New York, etc., R. Co. *v.* Church, 58 Fed. 600, 7 C. C. A. 384 (holding that a breach of a stipulation in a bill of lading giving the vessel precedence in discharging, under pain of double demurrage during time lost by failure to do so, entitles the vessel if time is so lost to such demurrage, although she is not detained, altogether, beyond the lay days allowed in the preceding part of the bill); Hine *v.* Perkins, 55 Fed. 996, 5 C. C. A. 377 [*reversing* 48 Fed. 758, 1 C. C. A. 85]; Sutton *v.* Housatonic R. Co., 45 Fed. 507; The Dictator, 30 Fed. 637; The Arne, [1904] P. 154, 9 Aspin. 565, 73 L. J. P. D. & Adm. 34, 90 L. T. Rep. N. S. 517, 20 T. L. R. 221; Randall *v.* Lynch, 2 Campb. 352, 11 East 179, 11 Rev. Rep. 727; Cawthorn *v.* Trickett, 15 C. B. N. S. 754, 33 L. J. C. P. 182, 9 L. T. Rep. N. S. 609, 12 Wkly. Rep. 311.

Designating place of discharge.—A provision in a bill of lading that twenty-four hours after notice of arrival in port there shall be allowed a fixed rate of unloading per day, and that the consignee shall pay demurrage for any excess of time required, casts on the consignee liability for loss of time resulting from delay in pointing out the place of discharge (Smith *v.* Lee, 66 Fed. 344, 13 C. C. A. 506), especially when coupled with a provision that, after arrival, notice, and expiration of the stipulated time, the vessel shall have precedence over all other vessels arriving, or giving notice, after her arrival (Smith *v.* New York Granite Paving Block Co., 56 Fed. 525 [*affirmed* in 56 Fed. 527, 5 C. C. A. 672]), but the charterer is not bound to designate a place of discharge under a charter simply obligating him to receive the cargo as fast as the vessel can deliver "after ship is in a proper discharging berth" (Carsanego *v.* Wheeler, 16 Fed. 248). Where the contract expressly obligates the consignee to designate a wharf, he is liable for any delay arising from the crowded (Constantine, etc., Steamship Co. *v.* Auchinclos, 161 Fed. 843, 847, 88 C. C. A. 661; Williams *v.* Theobald, 15 Fed. 465, 8 Sawy. 445; Futterer *v.* Abenheim, 9 Fed. Cas. No. 5,164, 10 Phila. (Pa.) 225; The Carisbrook, 15 P. D. 98, 6 Aspin. 507, 59 L. J. P. D. & Adm. 37, 62 L. T. Rep. N. S. 843, 38 Wkly. Rep. 543. *Contra*, Tharsis Sulphur Co. *v.* Morel, [1891] 2 Q. B. 647, 7 Aspin. 106, 61 L. J. Q. B. 11, 65 L. T. Rep. N. S. 659, 40 Wkly. Rep. 58), or dangerous condition of the wharf which he selects (Carroll *v.* Holway, 158 Fed. 328; Sutton *v.* Housatonic R. Co., 45 Fed. 507. And see The Swallow, 27 Fed. 316), or from its being difficult to reach by the use of reasonable means (The Henry Sutton, 26 Fed. 923 [*affirmed* in 31 Fed. 297, 24 Blatchf. 448]; Clayton *v.* Four Hundred and Ten Tons of Coal, 20 Fed. 799); but he is not required to make more than one tender of a berth (McLaughlin *v.* Albany, etc., Iron, etc., Co., 8 Fed. 447, 61 How. Pr. (N. Y.) 439), and the master of the vessel is responsible for delay in taking the berth assigned, where the delay does not arise from the unsuitableness of the berth or its approaches (Carroll *v.* Holway, 158 Fed. 328 [*following* Smith *v.* Lee, *supra*]; Hine *v.* Perkins, 55 Fed. 996, 5 C. C. A. 377 [*affirming* 50 Fed. 434]).

Obligation of vessel.— Under a bill of lading providing that iron rails should be discharged "at the same place as the other cargo, only one place," it is the duty of the ship to go to a berth where the rails can be discharged on the wharf, and the consignees cannot be charged with delay unless the ship is so berthed. Teilman *v.* Plock, 17 Fed. 268 [*affirmed* in 21 Fed. 349].

57. Tweedie Trading Co. *v.* Pitch Pine Lumber Co., 156 Fed. 88 (holding that in a provision of a bill of lading which entitled the ship to discharge "continuously," the word must be construed to mean continuously dur-

their effect cannot be changed by usage and custom,[58] unless such custom is expressly made a part of the contract.[59] Clauses which are in effect merely permissive are not binding, when not in fact observed;[60] and, on the other hand, a construction of the contract which has been acted on by the parties and which is in itself reasonable will be sustained by the courts.[61]

(II) *Breach of Implied Obligation* — (A) *Discharge Within Reasonable Time.* One who charters a vessel, under a contract that is silent as to the time of unloading and discharge, contracts by implication that he will unload and discharge her within a reasonable time, and is liable in damages for a breach of this implied obligation.[62] What constitutes a reasonable time varies with the facilities of the port for discharging and the circumstances of the case,[63] and although it has been frequently stated that the obligation is to discharge in a reasonable time according to the custom of the port,[64] this has been qualified in other cases which

ing working days); U. S. Shipping Co. *v.* U. S., 146 Fed. 914 (also holding that the word "continuous" must be given a reasonable interpretation).

A clause in the nature of a penalty will not be given effect unless the case comes clearly within the purpose intended. Continental Coal Co. *v.* Bowne, 115 Fed. 945, 53 C. C. A. 427.

58. The Glenfinlas, 48 Fed. 758, 1 C. C. A. 85; Philadelphia, etc., R. Co. *v.* Northam, 19 Fed. Cas. No. 11,090, 2 Ben. 1.

59. Smith *v.* Sizer, 134 Fed. 928; Bertellote *v.* Part of Cargo of Brimstone, 3 Fed. 661, 5 Hughes 201; Harrowing *v.* Dupre, 7 Com. Cas. 157, 18 T. L. R. 594.

Charter provisions incorporating the custom of the port as to the process of discharging have been held not to apply to the time the discharge of the vessel is to be begun (Futterer *v.* Abenheim, 9 Fed. Cas. No. 5,164, 10 Phila. (Pa.) 225), or to the question whether the vessel is justly required to wait her turn at the wharf where she is ordered to discharge by the consignees (Davis *v.* Wallace, 7 Fed. Cas. No. 3,657, 3 Cliff. 123).

60. Tweedie Trading Co. *v.* Strong, etc., Co., 157 Fed. 304; McLaughlin *v.* Albany, etc., Iron, etc., Co., 8 Fed. 447, 61 How. Pr. (N. Y.) 439; Tuttle *v.* Albany, etc., Iron, etc., Co., 24 Fed. Cas. No. 14,276, 10 Ben. 449.

Where there is an alternative provision in the contract, which is fulfilled by the vessel owner, the charterer is liable for any delay ensuing thereafter. Dahl *v.* Nelson, 6 App. Cas. 38, 4 Aspin. 392, 50 L. J. Ch. 411, 44 L. T. Rep. N. S. 381, 20 Wkly. Rep. 543.

61. Smith *v.* New York Granite Paving Block Co., 56 Fed. 525 [*affirmed* in 56 Fed. 527, 5 C. C. A. 672].

62. U. S. Shipping Co. *v.* U. S., 146 Fed. 914; Empire Transp. Co. *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 [*affirming* 70 Fed. 268]; Fish *v.* One Hundred and Fifty Tons of Brown Stone, 20 Fed. 201; Fulton *v.* Blake, 9 Fed. Cas. No. 5,153, 5 Biss. 371; Henley *v.* Brooklyn Ice Co., 11 Fed. Cas. No. 6,364, 14 Blatchf. 522 [*affirming* 11 Fed. Cas. No. 6,363, 8 Ben. 471]; Postlethwaite *v.* Freeland, 5 App. Cas. 599, 7 Aspin. 302, 49 L. J. Exch. 630, 42 L. T. Rep. N. S. 845, 28 Wkly. Rep. 833; Hick *v.* Rodocanachi, [1891] 2 Q. B. 626, 7 Aspin. 97, 56 J. P. 54, 61 L. J. Q. B. 42, 40 Wkly. Rep. 161; Fowler *v.* Knoop, 4 Q. B. D. 229, 4 Aspin. 68, 48 L. J. Q. B. 333, 40 L. T. Rep. N. S. 180, 27 Wkly Rep. 299; Ford *v.* Cotesworth, L. R. 5 Q. B. 544, 10 B. & S. 991, 39 L. J. Q. B. 188, 23 L. T. Rep. N. S. 165, 18 Wkly. Rep. 1169; Barker *v.* Torrance, 30 U. C. Q. B. 43 [*affirmed* in 31 U. C. Q. B. 561] (wherein liability was imposed on persons who were substantially the charterers); Kemp *v.* McDougall, 23 U. C. Q. B. 380.

Notice to discharge within reasonable time. — It has been held to be competent for the master of the boat, whenever he is dissatisfied with the rate of discharge, after being sent to a berth, to give notice, claiming demurrage unless discharge is completed within a reasonable time thereafter. Young *v.* One Hundred and Forty Thousand Hard Brick, 78 Fed. 149.

63. U. S. Shipping Co. *v.* U. S., 146 Fed. 914; The James Baird, 90 Fed. 669 (holding that where the wharves at a port are not all equally convenient for the discharge of every sort of cargo, a reasonable rate of discharge is not necessarily the same at all wharves); Brown *v.* Certain Tons of Coal, 34 Fed. 913 (holding that six days, including Sunday, is a reasonable time for unloading three barges carrying coal); Esseltyne *v.* Elmore, 8 Fed. Cas. No. 4,531, 7 Biss. 69 (holding that five days is a reasonable time in which to unload a vessel laden with five hundred and sixty-seven tons of coal).

64. Whitehouse *v.* Halstead, 90 Ill. 95; Bellatty *v.* Curtis, 41 Fed. 479; Gronn *v.* Woodruff, 19 Fed. 143; Houge *v.* Woodruff, 19 Fed. 136; Higgins *v.* U. S. Mail Steamship Co., 12 Fed. Cas. No. 6,469, 3 Blatchf. 282; Two Hundred and Thirteen Tons of Coal, 24 Fed. Cas. No. 14,298, 7 Ben. 15; Burmester *v.* Hodgson, 2 Campb. 488, 11 Rev. Rep. 776.

The custom of the trade has, in some cases, been held to fix the obligation of the consignee or his vendee. The Z. L. Adams, 26 Fed. 655.

Requisites of valid custom.—A custom of a port as to the rate of discharging a certain kind of cargo from a vessel, to govern the

hold it to mean that under ordinary circumstances the customary time becomes the reasonable time;[65] but that this test will not be employed when the circumstances are extraordinary, as the court will, in all instances, consider all the facts and circumstances, ordinary and extraordinary, which have a legitimate bearing on the question of the reasonableness of the time occupied.[66]

(B) *Providing Berth.* In the absence of a specific agreement or usage to the contrary, it is the duty of the charterer or consignee, as the case may be, to designate and provide a suitable wharf or berth for the vessel within a reasonable time after her arrival, and he is liable for delay resulting from failure to do so;[67] but when he has fulfilled this obligation it is the duty of the master of the vessel to proceed to the place designated.[68] After designating an available discharging berth the charterer or consignee is not liable for delay caused by the crowded condition of the dock or by the vessel being compelled to wait its turn, especially when such waiting is required by the custom of the port.[69]

rights of parties under a contract otherwise indeterminate, must not only be established and reasonable, but also certain and definite. The James Baird, 90 Fed. 669; Young *v.* One Hundred and Forty Thousand Hard Brick, 78 Fed. 149; The Innocenta, 13 Fed. Cas. No. 7,050, 10 Ben. 410.

65. McArthur Bros. Co. *v.* 622,714 Feet of Lumber, 131 Fed. 389; Empire Transp. Co. *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 [*affirming* 70 Fed. 268]; Hick *v.* Rodocanachi, [1891] 2 Q. B. 626, 7 Aspin. 97, 56 J. P. 54, 61 L. J. Q. B. 626, 40 Wkly. Rep. 161.

66. Ionia Transp. Co. *v.* 2,098 Tons of Coal, 128 Fed. 514 [*affirmed* in 135 Fed. 317, 67 C. C. A. 671]; Williscroft *v.* Cargo of The Cyrenian, 123 Fed. 169; The Viola, 90 Fed. 750; Empire Transp. Co. *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 [*affirming* 70 Fed. 268]; Green *v.* Cargo of The Lewiston, 77 Fed. 321.

Rule when delay attributable to strike see *infra*, IX, A, 3, a, (II), (B).

67. Hodgdon *v.* New York, etc., R. Co., 46 Conn. 277, 33 Am. Rep. 21; Roney *v.* Chase, 161 Fed. 309, 88 C. C. A. 389 [*reversing* 160 Fed. 268] (holding that damages in the nature of demurrage are recoverable for delay resulting from the vessel being ordered by the cargo owner to discharge at a berth, which she could not then reach, because of dredging work being done by the government); Bowen *v.* Decker, 18 Fed. 751; Fulton *v.* Blake, 9 Fed. Cas. No. 5,153, 5 Biss. 371; Stewart *v.* Rogerson, L. R. 6 C. P. 424. *Contra*, Jameson *v.* Sweeney, 32 Misc. (N. Y.) 645, 66 N. Y. Suppl. 494.

Safe place of delivery must be designated. — Mecke *v.* The Antonio Zambrana, 70 Fed. 320.

An exception is said to exist in the case of a general ship carrying a mixed cargo. Teilman *v.* Plock, 17 Fed. 268; Gronstadt *v.* Witthoff, 15 Fed. 265; Irzo *v.* Perkins, 10 Fed. 779.

What constitutes reasonable time.—A designation of a berth for a vessel is given within a reasonable time when delivered within two or three hours after notice of arrival. The St. Bernard, 105 Fed. 994.

A stoppage in discharging to permit the passage of canal-boats past the vessel renders the charterer liable for the delay as it results from his selection of an improper place of discharge. Olivari *v.* Merchant, 18 Fed. 554.

68. Hodgdon *v.* New York, etc., R. Co., 46 Conn. 277, 33 Am. Rep. 21.

Change of berth.— In the absence of an established usage to the contrary, after the vessel has taken the designated berth, the owner of the cargo has no right to send her to another berth except at his own expense and is liable for any delay arising therefrom. Gronn *v.* Woodruff, 19 Fed. 143; Houge *v.* Woodruff, 19 Fed. 136.

69. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255; Fisher *v.* Abeel, 66 Barb. (N. Y.) 381, 44 How. Pr. 432; The Convoy's Wheat, 3 Wall. (U. S.) 225, 18 L. ed. 194 [*affirming* 23 Fed. Cas. No. 13,541]; Bartlett *v.* A Cargo of Lumber, 41 Fed. 890; Bellatty *v.* Curtis, 41 Fed. 479; The Mary Riley *v.* Three Thousand Railroad Ties, 38 Fed. 254; The Z. L. Adams, 26 Fed. 655; Crawford *v.* Jessup, etc., Paper Co., 24 Fed. 303; Fish *v.* One Hundred and Fifty Tons of Brown Stone, 20 Fed. 201; Finney *v.* Grand Trunk R. Co., 14 Fed. 171, 11 Biss. 370; The M. S. Bacon *v.* Erie, etc., Transp. Co., 3 Fed. 344, 17 Fed. Cas. No. 9,898*a* (holding that the effect of the rule is not changed by the vessel owner giving notice to the consignee that the cargo must be discharged within a specified period); Henley *v.* Brooklyn Ice Co., 11 Fed. Cas. No. 6,364, 14 Blatchf. 522 [*affirming* 11 Fed. Cas. No. 6,363, 8 Ben. 471]; One Hundred and Seventy-Five Tons of Coal, 18 Fed. Cas. No. 10,522, 9 Ben. 400; Wright *v.* New Zealand Shipping Co., 4 Ex. D. 165, 4 Aspin. 118, 40 L. T. Rep. N. S. 413. And see Higgins *v.* U. S. Mail Steamship Co., 12 Fed. Cas. No. 6,469, 3 Blatchf. 282. *Contra*, Esseltyne *v.* Elmore, 8 Fed. Cas. No. 4,531, 7 Biss. 69.

The rule has its limits and will not extend to a case where the accumulation of vessels is wholly due to the fault of the consignee. However, it will be applied to a case where the wharf provided is large enough for the ordinary business of the owner, and it does not appear that he has wilfully or negligently permitted a large number of vessels

(c) *Facilities For Discharge.* Where there is no specific agreement on the subject, and no known custom of the port to the contrary, it is the duty of the shipper or other contracting party, for which he is liable for delay resulting from non-fulfilment, to be not only ready to receive the cargo on notice of the arrival of the vessel, but to receive it as delivered from the vessel,[70] and to furnish sufficient dockage room and means for transportation away from the dock so that the cargo will not accumulate in such a way as to impede the delivery.[71] In addition to the above-mentioned implied obligation relating to the furnishing of facilities for discharge, the customs and usages of the port, when not inconsistent with the provisions of the charter-party or bill of lading, are binding on the parties, and render the charterer or other contracting party liable for delay resulting from failure to conform to them,[72] and excuse him when the delay is attributable to a proper observance of them.[73]

c. Delay Between Loading and Unloading. It has been held that demurrage is recoverable for a detention of the vessel after loading and before unloading which is not due to the fault of the master,[74] such as a failure of the charterer to

to collect for discharging at the same time. The Viola, 90 Fed. 750; Fulton *v.* Blake, 9 Fed. Cas. No. 5,153, 5 Biss. 371. It has been held that a usage by which vessels, after reporting themselves to the consignee, allow two or three days for a sale of the cargo, and, if directed to another wharf, go there at their own expense, will not deprive a vessel of the right to demurrage, where her cargo was sold before arrival, and she gave immediate notice of readiness to discharge. Forshay *v.* Du Fais, 9 Fed. Cas. No. 4,947.

Waiting for elevator.— Under a bill of lading containing no stipulation as to lay days or demurrage, but consigning the grain to an elevator having certain railroad connection, there is no liability for a necessary delay in procuring another elevator, where, on account of extraordinary conditions, it is impossible to unload at the elevator named in the bill of lading. The J. E. Owen, 54 Fed. 185.

70. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255; Jameson *v.* Sweeney, 29 Misc. (N. Y.) 584, 61 N. Y. Suppl. 498; Bowen *v.* Decker, 18 Fed. 751; Olivari *v.* Merchant, 18 Fed. 554 (holding that where the charterer chooses to have the cargo landed directly into lighters, he is bound to provide lighters capable of receiving it); Dow *v.* Hare, 7 Fed. Cas. No. 4,037*a*; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548.

The shipper is liable for demurrage on account of delay in discharging caused by the refusal of the consignee to receive the cargo (Sheridan *v.* Penn Collieries Co., 128 Fed. 204), especially where, upon such refusal, he orders the vessel owner to unload cargo at another place (Ide *v.* Sadler, 18 Barb. (N. Y.) 32).

71. Williscroft *v.* Cargo of The Cyrenian, 123 Fed. 169; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548; Krunse *v.* Dryman, 18 Ct. of Sess. Cas. 1110 [*distinguishing* 13 Ct. of Sess. Cas. 92]. And see The Favorite, 27 Fed. 474, holding the charterer liable for delay in unloading the cargo into vessels, when it could have been unloaded more expeditiously into railroad cars which were at hand.

72. Seager *v.* New York, etc., Mail Steamship Co., 55 Fed. 880, 5 C. C. A. 290 [*affirming* 55 Fed. 324]; Addicks *v.* Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 727. See also Evans *v.* Blair, 114 Fed. 616, 52 C. C. A. 396.

Custom incorporated in contract see *supra*, IX, A, 2, b, (I), (B).

73. The Elida, 31 Fed. 420.

74. Guinan *v.* Weaver Coal, etc., Co., 128 Fed. 203; Shaw *v.* Folsom, 38 Fed. 356 [*affirmed* on other grounds in 40 Fed. 511] (detention caused by overloading); New Haven Steam-Boat Co. *v.* New York, 36 Fed. 716 (collision); Reed *v.* Weld, 6 Fed. 304 (voyage suspended while consignee found purchaser for cargo). *Contra*, Jamieson *v.* Laurie, 6 Bro. P. C. 474, 3 Rev. Rep. 725, 2 Eng. Reprint 1209.

Construction of charter provision.—A stipulation in the charter-party concerning detention during the voyage does not embrace detention at the port of shipment (Valente *v.* Gibbs, 6 C. B. N. S. 270, 5 Jur. N. S. 1213, 28 L. J. C. P. 229, 7 Wkly. Rep. 500, 95 E. C. L. 270), nor does a provision for the payment of towage by the charterer obligate him to furnish a towboat (Keen *v.* Audenried, 14 Fed. Cas. No. 7,639, 5 Ben. 535). However, under a charter-party providing for demurrage at the place of shipment and discharge, no demurrage is recoverable for delay at intervening ports. Stevenson *v.* York, 2 Chit. 570, 18 E. C. L. 791; Marshal *v.* De la Torre, 1 Esp. 367.

Where the delay is within the contemplation of both parties to the contract, at the time of the making thereof, the charterer is not liable for demurrage. Green *v.* Cargo of the Lewiston, 77 Fed. 321.

Loss of vessel after accrual of demurrage.— Demurrage for extra detention at an intermediate port becomes absolutely due at such port, and is recoverable, although the vessel is lost on the return voyage. The Caroline A. White, 5 Fed. Cas. No. 2,421, 5 Phila. (Pa.) 112.

Demurrage for enforced idleness of ship after collision see COLLISION, 7 Cyc. 394.

procure clearance papers,[75] but is not, where the delay is caused by the wrongful acts of the owner or master.[78]

d. Subsequent to Unloading. Upon completion of the unloading, the liability of the consignee for demurrage terminates, and he is not responsible for any subsequent detention of the vessel.[77]

3. Circumstances Excusing — a. Acts of Persons Other Than Charterer — (i) *Master and Ship-Owner.* The rule that the charterer is not liable for delay due to the wrongful, negligent, or unreasonable acts of the owner or master of the vessel, or any of their agents,[78] has been applied in cases presenting a variety of circumstances, including cases of delay caused by the failure of the vessel to arrive on scheduled time,[79] the failure of the master to have the vessel in readiness to receive or discharge the cargo,[80] refusal to berth at a suitable wharf selected by the charterer,[81] errors of judgment in navigation,[82] and negotiations entered

75. Bixby *v.* Bennett, 3 Daly (N. Y.) 225; Rumball *v.* Puig, 34 Fed. 665. *Contra*, Towle *v.* Kettell, 5 Cush. (Mass.) 18.

Papers for discharge.— Demurrage is recoverable for a delay in procuring the papers necessary for the unloading of the cargo, when such delay is at the request of the charterer. Furnell *v.* Thomas, 5 Bing. 188, 30 Rev. Rep. 568, 15 E. C. L. 535.

76. See *infra*, IX, A, 3, a, (I).

77. Gabler *v.* McChesney, 60 N. Y. App. Div. 590, 70 N. Y. Suppl. 195.

78. Doherty *v.* Peal, 25 Misc. (N. Y.) 487, 54 N. Y. Suppl. 1054; The Convoy's Wheat, 3 Wall. (U. S.) 225, 18 L. ed. 194 [*affirming* 23 Fed. Cas. No. 13,541]; Murray *v.* George W. Jump Co., 148 Fed. 123; Whitman *v.* Vanderbilt, 75 Fed. 422, 21 C. C. A. 422 (holding that the charterer is not responsible for delay in discharging caused by the master's absence from the vessel); Seager *v.* New York, etc., Mail Steamship Co., 55 Fed. 880, 5 C. C. A. 290 [*affirming* 55 Fed. 324]; Riley *v.* A Cargo of Iron Pipes, 40 Fed. 605; Hall *v.* Eastwick, 11 Fed. Cas. No. 5,930, 1 Lowell 456; Benson *v.* Blunt, 1 Q. B. 870, 1 G. & D. 449, 10 L. J. Q. B. 333, 41 E. C. L. 816; Blight *v.* Page, 3 B. & P. 295 note, 6 Rev. Rep. 795; Moller *v.* Jecks, 19 C. B. N. S. 332, 115 E. C. L. 332; Seeger *v.* Duthie, 8 C. B. N. S. 45, 6 Jur. N. S. 1095, 29 L. J. C. P. 253, 2 L. T. Rep. N. S. 483, 98 E. C. L. 45; Frichsen *v.* Barkworth, 3 H. & N. 601, 27 L. J. Exch. 472.

The delay of a stevedore employed by the owner of the ship or his agent is not chargeable to the charterer. L. N. Dantzler Lumber Co. *v.* Churchill, 136 Fed. 560, 69 C. C. A. 270; 2,000 Tons of Coal, 135 Fed. 734, 68 C. C. A. 372; Harris *v.* Best-Ryley, 7 Aspin. 272, 68 L. T. Rep. N. S. 76, 4 Reports 222.

79. McArthur Bros. Co. *v.* 622,714 Feet of Lumber, 131 Fed. 389.

Indirect route.—Where, by reason of a vessel not having proceeded directly to her port of destination, she is subjected to greater detention after her arrival, the charterer is liable for no more demurrage than he would have been if she had proceeded directly. Nichols *v.* Tremlett, 18 Fed. Cas. No. 10,247, 1 Sprague 361.

Where there is no scheduled time, and the voyage was not unusually long, it is no defense that the consignee expected that the vessel would arrive two days earlier than she did. Whitehouse *v.* Halstead, 90 Ill. 95.

80. Donaldson *v.* Severn River Glass Sand Co., 138 Fed. 691; Roman *v.* 155,453 Feet of Lumber, 131 Fed. 345; Ewan *v.* Tredegar Co., 88 Fed. 703; Gould *v.* Grafflin, 62 Fed. 605 (where the vessel was not in condition to take a full cargo); The Scandinavia, 49 Fed. 658 (where the buckets of the ship were insufficient for the discharge of the cargo); Ray *v.* One Block of Marble, 19 Fed. 525; The Norman, 16 Fed. 879; The Innocenta, 13 Fed. Cas. No. 7,050, 10 Ben. 410.

A request to be discharged, which is declined, is sufficient to put the owner of the cargo in default in case he thereafter unreasonably delays the discharge of the cargo. Scholl *v.* Albany, etc., Iron, etc., Co., 101 N. Y. 602, 5 N. E. 782.

An unreasonable refusal to take in tow a launch for discharge, which is tendered by the charterer's agents, bars any claim for delay in procuring launches for discharge at the port of delivery. The Spartan, 25 Fed. 44.

81. 2,000 Tons of Coal *ex* The Michigan, 135 Fed. 734, 68 C. C. A. 372; Robbins *v.* McDonald, 20 Fed. Cas. No. 11,884, 2 Lowell 140.

Delay in getting in the berth, after it has been properly pointed out, imposes no liability on the consignee. Smith *v.* Lee, 66 Fed. 344, 13 C. C. A. 506.

Where the vessel takes the berth selected by the consignee and delay thereafter ensues, the consignee is liable (Lake *v.* Hurd, 38 Conn. 536; Gronstadt *v.* Withoff, 21 Fed. 253); and the master may properly refuse to berth at an unsuitable wharf, selected by the consignee, and the consignee is liable for the delay resulting therefrom (The Swallow, 27 Fed. 316 [*affirmed* in 30 Fed. 204]).

82. The Ottawa, 33 Fed. 52 (error of judgment in anticipating storm); Holloway *v.* Lancy, 27 Fed. 877; Wall *v.* Ninety-Five Thousand Feet of Lumber, 26 Fed. 716; One Hundred Tons of Coal, 14 Fed. 878; Moody *v.* Five Hundred Thousand Laths, 2 Fed. 607 (where the vessel became tide bound through lack of diligence on the part of the master); General Steam Nav. Co. *v.* Slipper, 11 C. B. N. S. 493, 8 Jur. N. S. 821, 31 L. J.

into and disputes fostered by the master or ship-owner,[83] such as an improper refusal to sign bills of lading.[84]

(II) *THIRD PERSONS* — (A) *In General.* As to other persons, it may be stated generally that the charterers are liable for delay caused by the acts or omissions of third persons within their control, such as agents,[85] but they are not liable where such third persons are not within their control.[86] A consignee of part

C. P. 185, 5 L. T. Rep. N. S. 641, 10 Wkly. Rep. 316, 103 E. C. L. 493.

Fault of consignee.— However, where the accident of navigation which prevents the vessel from reaching the designated dock is encountered on account of the master's following the direction of the consignee, the latter is liable for the delay caused thereby. The Henry Sutton, 26 Fed. 923 [*affirmed* in 31 Fed. 297, 24 Blatchf. 448].

A delay in towing is imputable to the master of the vessel and not the consignee. Smith *v.* Lee, 66 Fed. 344, 13 C. C. A. 506.

83. Blossom *v.* Champion, 37 Barb. (N. Y.) 554; Hagan *v.* Cargo of Lumber, 163 Fed. 657; Murray *v.* George W. Jump Co., 148 Fed. 123; Sewall *v.* Wood, 135 Fed. 12, 67 C. C. A. 580 [*affirming* 128 Fed. 141]; Wellman *v.* Morse, 76 Fed. 573, 22 C. C. A. 318; Teilman *v.* Plock, 17 Fed. 268; Sleeper *v.* Puig, 22 Fed. Cas. No. 12,941, 17 Blatchf. 36 [*affirming* 22 Fed. Cas. No. 12,940, 10 Ben. 181]; Moeller *v.* Young, 5 E. & B. 755, 3 Jur. N. S. 393, 25 L. J. Q. B. 94, 4 Wkly. Rep. 149, 85 E. C. L. 755; Thorsen *v.* McDowell, 19 Ct. of Sess. Cas. 743.

84. Pendleton *v.* Atlantic Lumber Co., 3 Ga. App. 714, 60 S. E. 377; Wood *v.* Sewell, 128 Fed. 141; The Assyria, 98 Fed. 316, 39 C. C. A. 97; Three Hundred and Ninety-Three Tons of Guano, 23 Fed. Cas. No. 14,011, 6 Ben. 533; Cushing *v.* McLeod, 2 N. Brunsw. Eq. 63.

The rule is otherwise where the refusal of the master was rightful (Balfour *v.* Wilkins, 2 Fed. Cas. No. 807, 5 Sawy. 429), such as a refusal to sign a second set after having signed a proper set (The Alonzo, 1 Fed. Cas. No. 257, 1 Hask. 184).

85. Van Etten *v.* Newton, 15 Daly (N. Y.) 538, 6 N. Y. Suppl. 531, 7 N. Y. Suppl. 663, 8 N. Y. Suppl. 478 [*affirmed* in 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630]; Pregenzer *v.* Burleigh, 6 Misc. (N. Y.) 140, 26 N. Y. Suppl. 35; Sutton *v.* Housatonic R. Co., 45 Fed. 507.

The accumulation of other vessels at the same port and consigned or under charter to the same party is not the result of causes beyond his control so as to exempt him from liability for delay. Constantine, etc., Steamship Co. *v.* Auchinclos, 161 Fed. 843, 847; W. K. Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. N. S. 126 [*affirming* 124 Fed. 937]; The William Marshall, 29 Fed. 328.

Delay in performance of duties by custom officials.— It has been held that the charterer is liable for delay due to custom-house inspectors and weighers not attending and performing their duties promptly (Hine *v.* Perkins, 55 Fed. 996, 5 C. C. A. 377 [*reversing* 50 Fed. 434]; Carsanego *v.* Wheeler, 16 Fed. 248), or to their making an illegal seizure of the cargo, it being afterward restored (The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111; Bessey *v.* Evans, 4 Campb. 131), even though the delay is due in part to an erroneous construction of a foreign law by the customs officers (Snow *v.* 350 Tons of Mahogany, etc., 46 Fed. 129). However, where the owners of the cargo contract to transport it in their lighters on discharge, they are not liable for delays occurring from the loss of the custom-house permit to discharge, and from the neglect of the custom-house weighers to weigh the ore when delivered to the lighters (Davidson *v.* Four Hundred Tons Iron Ore, 18 Fed. 94), nor is there any liability for the delay attending upon the seizure of the vessel for a violation of revenue laws by the master (Elwell *v.* Skiddy, 77 N. Y. 282 [*reversing* 8 Hun 73].

86. Fisher *v.* Abeel, 66 Barb. (N. Y.) 381; Pyman Steamship Co. *v.* Mexican Cent. R. Co., 169 Fed. 281, 94 C. C. A. 557 [*reversing* 164 Fed. 441] (holding that the arbitrary action of the railroad company controlling the loading pier in postponing admission to a berth was beyond the control of the charterers); The Jaedere, [1892] P. 351, 7 Aspin. 260, 61 L. J. P. D. & Adm. 89, 68 L. T. Rep. N. S. 266, 1 Reports 545 (holding that there is no liability for demurrage under a charter-party providing for discharge as fast as the vessel can deliver, where the vessel puts itself in the hands of a dock company for delivery, the dock company acting for both the vessel owner and the charterer).

Where "detention by railways" is one of the excepted liabilities in the charter-party, demurrage is not recoverable for delay in unloading caused by the railway not supplying trucks to receive the cargo. Letricheux *v.* Dunlop, 19 Ct. Sess. Cas. 209. Likewise, where by the custom of a port cargoes are discharged into railway wagons, the consignees are not liable for demurrage under a bill of lading providing for discharge "with all despatch as customary," when without negligence on their part but owning to pressure of work on the railway it cannot supply sufficient wagons, and the discharge of the ship is thereby delayed. Lyle Shipping Co. *v.* Cardiff Corp., [1900] 2 Q. B. 638, 9 Aspin. 128, 5 Com. Cas. 397, 69 L. J. Q. B. 889, 83 L. T. Rep. N. S. 329, 16 T. L. R. 536, 49 Wkly. Rep. 85.

Legal seizure.— The shipper is not liable for delay resulting from his libeling the vessel, provided he acts in good faith (Watt *v.* Cargo of Lumber, 161 Fed. 104, 88 C. C. A. 268), or delay resulting from an illegal attachment sued out by a third person (Has-

of the cargo is not liable for demurrage where the delay is caused by the dilatory action of the other consignees whose goods are stowed on top of his,[87] unless he has made an absolute contract to discharge within a specified number of days.[88]

(B) *Strikes.* A strike among the laborers usually employed to unload the ship does not excuse the delay resulting therefrom under an express contract for the unloading of the ship within a specified number of days, when the contract contains no exception for delay caused by strikes.[89] However, an exception of delay caused by strikes is frequently incorporated in the demurrage clause of the contract, and in such cases the delay is excused when entirely attributable to a strike,[90] but not when the strike is only the remote cause.[91]

b. Act of God or Vis Major. The rule is well established that where the freighter or charterer agrees absolutely to load or unload the ship within a specified number of days, the fact that subsequent events, such as natural causes or governmental restraints, render performance impossible, is immaterial;[92] but that where

luck *v.* Salkeld, 12 Mart. (La.) 663), but demurrage is recoverable for detention by writs of attachment issued by claimants of the cargo (The Malta, 34 Fed. 144).

87. Dobson *v.* Droop, 4 C. & P. 112, M. & M. 441, 19 E. C. L. 432; Lamb *v.* Kaselack, 9 Ct. Sess. Cas. 482.

88. Porteus *v.* Watney, 3 Q. B. D. 534, 4 Aspin. 34, 47 L. J. Q. B. 643, 39 L. T. Rep. N. S. 195, 27 Wkly. Rep. 30; Straker *v.* Kidd, 3 Q. B. D. 223, 4 Aspin. 34, 47 L. J. Q. B. 365, 26 Wkly. Rep. 511; Rogers *v.* Hunter, 2 C. & P. 601, 12 E. C. L. 756; Harman *v.* Gandolph, Holt. N. P. 35, 17 Rev. Rep. 598, 3 E. C. L. 24; Leer *v.* Yates, 3 Taunt. 387, 12 Rev. Rep. 671.

89. Budgett *v.* Binnington, [1891] 1 Q. B. 35, 6 Aspin. 592, 60 L. J. Q. B. 1, 39 Wkly. Rep. 131.

90. Actieselskabet Barfod *v.* Hilton, etc., Lumber Co., 125 Fed. 137; Wood *v.* Keyser, 84 Fed. 688 [*affirmed* in 87 Fed. 1007, 31 C. C. A. 358]; Dobell *v.* Green, [1900] 1 Q. B. 526, 9 Aspin. 52, 5 Com. Cas. 161, 69 L. J. Q. B. 454, 82 L. T. Rep. N. S 314; Bulman *v.* Fenwick, [1894] 1 Q. B. 179, 7 Aspin. 388, 63 L. J. Q. B. 123, 69 L. T. Rep. N. S. 651, 9 Reports 227, 42 Wkly. Rep. 326 (holding that where the charterers have named the place of discharge, under a charter-party giving them that privilege, they are not bound to alter their orders on obtaining knowledge of a strike at the place named that will interfere with the unloading); The Alne Holme, [1893] P. 173, 7 Aspin. 344, 62 L. J. P. D. & Adm. 51, 68 L. T. Rep. N. S. 862, 1 Reports 607, 41 Wkly. Rep. 572; Saxon Ship Co. *v.* Union Steamship Co., 8 Aspin. 574, 4 Com. Cas. 298, 68 L. J. Q. B. 914, 81 L. T. Rep. N. S. 246, 15 T. L. R. 477 [*reversing* 8 Aspin. 449]; Lilly *v.* Stevenson, 22 Ct. Sess. Cas. 278; Peterson *v.* Dunn, 43 Wkly. Rep. 349.

The term "strike," when used in a charter-party, means a strike against employers in the strict sense of the word, and not a mere neglect or refusal on the part of the men to work (Hagerman *v.* Norton, 105 Fed. 996, 46 C. C. A. 1; Stephens *v.* Harris, 6 Aspin. 192, 56 L. J. Q. B. 516, 57 L. T. Rep. N. S. 618 [*affirmed* on other grounds in 57 L. J. Q. B. 203]), or a failure of their employers to have work for them to do (*In re* Richardson, 66 L. J. Q. B. 868, 77 L. T. Rep. N. S. 479 [*affirming* 66 L. J. Q. B. 579]). It includes the refusal of a combination of all available workingmen to work under certain reasonable rules and regulations prescribed by the charterers. Hawkhurst Steamship Co. *v.* Keyser, 84 Fed. 693 [*affirmed* in 87 Fed. 1005, 31 C. C. A. 347].

91. W. K. Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. N. S. 126 [*affirming* 124 Fed. 937] (holding that where, in consequence of a strike of coal miners in the United States, large quantities of coal were brought to American ports from Wales and other coal mining regions by vessels, and because of the arrival of a large number of such vessels at a given port at about the same time, delay was caused to so many of the vessels in discharging, the strike cannot be held to be a proximate cause of such delay); The Lismore, Gardiner *v.* Macfarlane, 20 Ct. Sess. Cas. 414; Granite City Steamship Co. *v.* Ireland, 19 Ct. Sess. Cas. 124.

In the absence of express stipulations as to the time to be consumed in discharging, there is no liability for delay caused by a strike, because it is then one of the elements to be taken into consideration in determining the reasonableness of the time occupied, and is an excuse for delay. Empire Transp. Co. *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 [*affirming* 70 Fed. 268]; Hick *v.* Raymond, [1893] A. C. 22, 7 Aspin. 233, 62 L. J. Q. B. 98, 68 L. T. Rep. N. S. 175, 1 Reports 125, 41 Wkly. Rep. 384; Castlegate Steamship Co. *v.* Dempsey, [1892] 1 Q. B. 854, 7 Aspin. 186, 61 L. J. Q. B. 620, 66 L. T. Rep. N. S. 742, 40 Wkly. Rep. 533.

92. Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611; Cross *v.* Beard, 26 N. Y. 85; Huron Barge Co. *v.* Turney, 71 Fed. 972; Booye *v.* A Cargo of Dry Boards, 42 Fed. 335; Manson *v.* New York, etc., R. Co., 31 Fed. 297, 24 Blatchf. 448 [*affirming* 26 Fed. 923]; Davis *v.* Wallace, 7 Fed. Cas. No. 3,657, 3 Cliff. 123; Thiis *v.* Byers, 1 Q. B. D. 244, 3 Aspin. 147, 45 L. J. Q. B. 511, 34 L. T. Rep. N. S. 526, 24 Wkly. Rep. 611; Waugh *v.* Morris, L. R. 8 Q. B. 202, 1 Aspin. 573, 42 L. J.

no time is mentioned in the contract, or where the contract provides against delay due to the fault of the charterer, delay is excused when caused by political or naval disturbances,[93] bad weather,[94] fire,[95] or an epidemic or quarantine.[96] There is no liability when the cause of the delay is one of the natural causes or *vis major* expressly excepted by the terms of the charter-party;[97] but a charter provision that delay by reason of natural causes shall be excused does not apply to natural causes which merely prevent the cargo being brought to the port of shipment, but do not prevent its being loaded on the ship;[98] and likewise the owner of the vessel must bear the loss consequent upon a delay of the vessel caused by natural causes before she reaches the wharf or other designated place for loading or unloading, and before the obligation of the charterer begins,[99]

Q. B. 57, 28 L. T. Rep. N. S. 265, 21 Wkly. Rep. 438; Barrett *v.* Dutton, 4 Campb. 333, 16 Rev. Rep. 798 (holding further that where it is the duty of the ship-owner to obtain clearances, the charterer is not liable for a detention due to the impossibility of obtaining clearance papers on account of the burning of the custom-house); Holman *v.* Peruvian Nitrate Co., 5 Ct. Sess. Cas. 657; Sjoerds *v.* Luscombe, 16 East 201, 104 Eng. Reprint 1065; Barker *v.* Hodgson, 3 M. & S. 267, 15 Rev. Rep. 485. And see Duff *v.* Lawrence, 3 Johns. Cas. (N. Y.) 162; Gaudet *v.* Brown, L. R. 5 P. C. 134, 2 Aspin. 6, 42 L. J. Adm. 49, 28 L. T. Rep. N. S. 745, 21 Wkly. Rep. 707.

Usual despatch.—The same rule applies where the contract is to load with "usual despatch" (Kearon *v.* Pearson, 7 H. & N. 386, 31 L. J. Exch. 1, 10 Wkly. Rep. 12), or as fast as the vessel can receive the cargo (Atlantic, etc., Steamship Co. *v.* Guggenheim, 123 Fed. 330).

93. Douglas *v.* Moody, 9 Mass. 548 (in which case, the detention was due to capture); Crossman *v.* Burrill, 179 U. S. 100, 21 S. Ct. 38, 45 L. ed. 106 [*reversing* 91 Fed. 543, 33 C. C. A. 663 (*distinguishing* Sixteen Hundred Tons of Nitrate of Soda *v.* McLeod, 61 Fed. 849, 10 C. C. A. 115]; Burrill *v.* Crossman, 130 Fed. 763, 65 C. C. A. 189 [*reversing* 124 Fed. 838]; The Spartan, 25 Fed. 44; Paquette *v.* A Cargo of Lumber, 23 Fed. 301 (holding that delay due to the orders of a fire department is excusable); Ford *v.* Cotesworth, L. R. 4 Q. B. 127 [*affirmed* in L. R. 5 Q. B. 544, 10 B. & S. 991, 39 L. J. Q. B. 188, 23 L. T. Rep. N. S. 165, 18 Wkly. Rep. 1169].

94. Cross *v.* Beard, 26 N. Y. 85 (storm); Houge *v.* Woodruff, 19 Fed. 136 (ice arising from extreme and unusual cold); Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548; Pringle *v.* Mollett, 9 L. J. Exch. 148, 6 M. & W. 80 (frost).

Where it is the fault of the consignee that the unloading was delayed by rain, when it might otherwise have been finished within the time allowed by the custom of the port, he must bear the loss, although it might be otherwise had the rain alone caused delay. Whitehouse *v.* Halstead, 90 Ill. 95.

95. Paquette *v.* A Cargo of Lumber, 23 Fed. 301.

96. Towle *v.* Kettell, 5 Cush. (Mass.) 18; Coombs *v.* Nolan, 6 Fed. Cas. No. 3,189, 7 Ben. 301. *Compare* Esseltyne *v.* Elmore, 8 Fed. Cas. No. 4,531, 7 Biss. 69.

97. Adamson *v.* 4,300 Tons Pyrites Ore, 137 Fed. 998; Aalholm *v.* A Cargo of Iron Ore, 23 Fed. 620; Ladd *v.* Wilson, 14 Fed. Cas. No. 7,976, 1 Cranch C. C. 293.

A snow storm is not within the meaning of a clause exempting the charterer from liability for delay due to "accidents." Fenwick *v.* Schmalz, L. R. 3 C. P. 313, 37 L. J. C. P. 78, 18 L. T. Rep. N. S. 27, 16 Wkly. Rep. 481.

Proximate cause essential.—Hughes *v.* J. S. Hoskins Lumber Co., 136 Fed. 435.

98. Jonasen *v.* Keyser, 112 Fed. 443, 50 C. C. A. 334; Sorensen *v.* Keyser, 52 Fed. 163, 2 C. C. A. 650, 51 Fed. 30, 2 C. C. A. 92; The India, 49 Fed. 76, 1 C. C. A. 174; Grant *v.* Coverdale, 9 App. Cas. 470, 5 Aspin. 353, 53 L. J. Q. B. 462, 51 L. T. Rep. N. S. 472, 32 Wkly. Rep. 831; Kay *v.* Field, 10 Q. B. D. 241, 4 Aspin. 558, 52 L. J. Q. B. 17, 47 L. T. Rep. N. S. 423, 31 Wkly. Rep. 332; Stephens *v.* Harris, 57 L. J. Q. B. 203. And see Durchman *v.* Dunn, 101 Fed. 606, holding that a provision in a charter, that the cargo should be furnished "as fast as vessel can receive and properly stow same in suitable hours and weather," has reference to the hours and weather suitable for loading and stowage, and does not exclude time lost by reason of the cargo becoming wet in distant yards, and unfit for loading, before it is forwarded to the ship.

The contrary has been held in a few cases, where, by usage and necessity, the cargo had to be transported by rail or water to the place of loading. Paterson *v.* Dakin, 31 Fed. 682; Hudson *v.* Ede, L. R. 3 Q. B. 412, 8 B. & S. 640, 37 L. J. Q. B. 166, 18 L. T. Rep. N. S. 764, 16 Wkly. Rep. 940 [*followed* in Smith *v.* Rosario Phosphate Co., [1894] 1 Q. B. 174, 7 Aspin. 417, 70 L. T. Rep. N. S. 68, 9 Wkly. Rep. 776].

99. Hodgdon *v.* New York, etc., R. Co., 46 Conn. 277, 33 Am. Rep. 21; Kane *v.* Penney, 5 Fed. 830; Aylward *v.* Smith, 2 Fed. Cas. No. 688, 2 Lowell 192; Parker *v.* Winlow, 7 E. & B. 942, 4 Jur. N. S. 84, 27 L. J. Q. B. 49, 90 E. C. L. 942.

Delay in getting from one place to another, caused by the weather, does not render the charterer liable under a charter providing for demurrage for delay caused by him, if the custom of the trade requires the vessel to deliver at different places in the same port.

unless the vessel delays reaching the designated place for unloading at the request of the consignee.[1]

c. Lay Days[2] — (i) *FUNCTION.* The purpose of stipulating in the charter-party for a certain number of days, called lay days, for loading and discharging, is to allow the charterer that length of time during which he may detain the ship without paying for her use, and to make him liable for any detention thereafter.[3]

(ii) *COMMENCEMENT* — (A) *General Rules.* Where the contract is express as to the time the lay days are to commence, it controls,[4] even though loading or discharging is actually begun before the stipulated time.[5] In the absence of anything in the contract indicating a contrary intention, the lay days do not begin to run until the vessel is in her berth or otherwise in actual readiness to discharge,[6]

The Mary E. Taber, 16 Fed. Cas. No. 9,209, 1 Ben. 105.

Effect of notice.— It has been held in a case where the consignee's wharf was inaccessible on account of ice and lack of sufficient water, and where the master took his vessel to the only accessible wharf in the port, and notified the consignee, and offered to deliver the cargo, that on the consignee's refusal to accept delivery, the lay days began to run twenty-four hours after notice to him. Choate *v.* Meredith, 5 Fed. Cas. No. 2,692, Holmes 500.

1. Manson *v.* New York, etc., R. Co., 31 Fed. 297, 24 Blatchf. 448 [*affirming* 26 Fed. 923].

2. "Lay days" defined see LAY DAYS, 25 Cyc. 169.

Time allowed when no lay days stipulated see *supra*, IX, A, 2, a; IX, A, 2, b, (II), (A).

3. Leary *v.* Talbot, 160 Fed. 914, 88 C. C. A. 96; Nielsen *v.* Wait, 16 Q. B. D. 67, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33.

4. Elder Dempster Steamship Co. *v.* Earn Line Steamship Co., 168 Fed. 50, 93 C. C. A. 472 [*reversing* 163 Fed. 868]; Earn Line Steamship Co. *v.* Ennis, 157 Fed. 941 [*affirmed* in 165 Fed. 633, 91 C. C. A. 611]; The St. Bernard, 105 Fed. 994; Manchisa *v.* Card, 39 Fed. 492 (holding that the master cannot vary the terms of the charter-party); Monsen *v.* Macfarlane, [1895] 2 Q. B. 562, 8 Aspin. 93, 65 L. J. Q. B. 57, 73 L. T. Rep. N. S. 548; Davies *v.* McVeagh, 4 Ex. D. 265, 4 Aspin. 149, 48 L. J. Exch. 686, 41 L. T. Rep. N. S. 308, 28 Wkly. Rep. 143; Jackson *v.* Galloway, 5 Bing. N. Cas. 71, 8 L. J. C. P. 29, 6 Scott 786, 35 E. C. L. 48. And see Bryden *v.* Niebuhr, 1 Cab. & E. 241; Dickinson *v.* Martini, 1 Ct. Sess. Cas. 1185.

Where two bills of lading are given requiring delivery of part of a cargo at different ports, they constitute independent contracts, and should be so construed in arriving at the commencement of the lay lays. Bowen *v.* Sizer, 93 Fed. 227.

A provision which is negative in form but positive in effect governs the rights of the parties. Carbon Slate Co. *v.* Ennis, 114 Fed. 260, 52 C. C. A. 146 [*reversing* 110 Fed. 404].

Effect of substitution of place.—When parties stipulate that lay days shall count from a certain time, at a certain place, and another place is afterward substituted, the stipulation as to time applies to the substituted place, in the absence of an agreement to the contrary. Reed *v.* Weld, 6 Fed. 304.

Estoppel.— It has been held that the action of charterers in furnishing cargo and receiving bills of lading therefor on a certain day estops them from denying that the lay days for loading had then commenced. The Cyprus, 20 Fed. 144.

Provision as to one clear day.— The object of providing in a charter-party for one clear day after notice of the readiness of the vessel to receive cargo before the lay days shall commence is to allow the charterer such time for preparation, and, unless made so by the terms of the charter or custom of the port, Sunday is not to be counted as such a day. The Assyria, 98 Fed. 316, 39 C. C. A. 97.

5. Elder Dempster Steamship Co. *v.* Earn Line Steamship Co., 168 Fed. 50, 93 C. C. A. 472 [*reversing* 163 Fed. 868]; Earn Line Steamship Co. *v.* Ennis, 157 Fed. 941 [*affirmed* in 165 Fed. 633, 91 C. C. A. 611].

Where the contract does not definitely fix the commencement of the lay days, the parties by agreeing to and beginning delivery on a certain day thereby fix that day as the commencement (The Katy, [1895] P. 56, 7 Aspin. 527, 64 L. J. P. D. & Adm. 49, 71 L. T. Rep. N. S. 709, 11 Reports 683, 43 Wkly. Rep. 290), and it has been held that a custom of the port relating to the commencement of the days is binding when not inconsistent with the provisions of the charter-party (Barker *v.* Borzone, 48 Md. 474).

6. Rowe *v.* Smith, 10 Bosw. (N. Y.) 268 (where it is said: "Lay days, by the general rule, commence to run from the time the vessel enters the dock"); Constantine, etc., Steamship Co. *v.* Auchincloss, 161 Fed. 843, 88 C. C. A. 661; The St. Bernard, 105 Fed. 994; Aalholm *v.* A Cargo of Iron Ore, 23 Fed. 620; Gronstadt *v.* Witthoff, 15 Fed. 265 (holding that a custom or usage, to dispense with this legal obligation, must be so fixed and well understood as to be presumed to be part of the contract).

The English rule is that, in the absence of any stipulation to the contrary, the lay days do not commence to run until the ship arrives at the customary place of discharge in the port of delivery. Sanders *v.* Jenkins, [1897] 1 Q. B. 93, 66 L. J. Q. B. 40; Tapscott *v.* Balfour, L. R. 8 C. P. 46, 1 Aspin.

and where it is provided that the vessel shall proceed to a certain specified wharf or jetty, or one to be selected by the charterer, the arrival of the ship at that wharf or jetty is a condition precedent to the commencement of the running of the time,[7] unless she is prevented from reaching the designated place through the active fault of the charterer, in which case the days begin to count at the time she would have reached it, but for such fault.[8]

(B) *Notice.* Ordinarily, in addition to the ship proceeding to the place assigned, she must give formal notice of her readiness to proceed to an appropriate unloading place before her laying time begins,[9] and the notice, to be effective,

501, 42 L. J. C. P. 16, 27 L. T. Rep. N. S. 710, 21 Wkly. Rep. 245; Brereton *v.* Chapman, 7 Bing. 559, 5 M. & P. 526, 20 E. C. L. 251; Brown *v.* Johnson, C. & M. 440, 11 L. J. Exch. 373, 10 M. & W. 331, 41 E. C. L. 242. *Compare In re* Pyman and Dreyfur, 24 Q.B. D. 152, 6 Aspin. 444, 59 L. J. Q. B. 13, 61 L. T. Rep. N. S. 724, 38 Wkly. Rep. 447 (holding that under the charter-party in that case, the lay days were to be calculated from the arrival of the ship at the outer harbor of the designated port and her giving notice of readiness to load); Caffarini *v.* Walker, Ir. R. 10 C. L. 250. Where, by the usage of a port, a cargo is to be discharged within the port at two different places, both places taken together constitute the usual place of discharge, and the lay days commence to run from arrival at the first (McIntosh *v.* Sinclair, Ir. R. 11 C. L. 456), but are suspended while the ship is proceeding from the first to the second (Nielsen *v.* Wait, 16 Q. B. D. 67, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33).

Particular stipulations construed.—A stipulation that the vessel shall commence discharging upon arrival means arrival at a place where discharge is possible (Tweedie Trading Co. *v.* Pitch Pine Lumber Co., 156 Fed. 88. And see Kenyon *v.* Tucker, 17 R. I. 529, 23 Atl. 61), and is fulfilled so that the lay days then commence, when the vessel arrives in the immediate vicinity of the consignee's dock and offers to deliver the cargo (Wiles *v.* New York Cent., etc., R. Co., 4 Thomps. & C. (N. Y.) 264). Where it is agreed that the time shall begin to run when the vessel is ready to receive or discharge cargo, the obligation is fulfilled when the vessel is ready to go to her berth and not when she actually gets in. Swan *v.* Wiley, etc., Co., 161 Fed. 905, 88 C. C. A. 510. *Compare* Brett *v.* Harlan, etc., Co., 83 Hun (N. Y.) 555, 31 N. Y. Suppl. 1113, holding that under the contract in that case it was necessary for the vessel to be completely berthed. Flood *v.* Crowell, 92 Fed. 402, 34 C. C. A. 415, holds complete berthing unnecessary, but in that case the wharves were public and ships were compelled to wait their turn.

The unreadiness of the shippers to assign the vessel a berth does not stop the running of the days, where the vessel is in readiness to take a berth. Carbon Slate Co. *v.* Ennis, 114 Fed. 260, 52 C. C. A. 146 [*reversing* 110 Fed. 404].

7. *In re* 2,098 Tons of Coal, 135 Fed. 317, 67 C. C. A. 671 [*affirming* 128 Fed. 514]; Ewan *v.* Tredegar Co., 88 Fed. 703 (holding further that, after the ship gets into dock, the fact that the crowded condition of the harbor prevents her from securing a fit place for discharging the cargo does not prevent the lay days from running); Gronstadt *v.* Withoff, 21 Fed. 253; Cain *v.* Garfield, 4 Fed. Cas. No. 2,293, 1 Lowell 483; Little *v.* Stevenson, [1896] A. C. 108, 8 Aspin. 162, 65 L. J. P. C. 69, 74 L. T. Rep. N. S. 529; Murphy *v.* Coffin, 12 Q. B. D. 87, 32 Wkly. Rep. 616; Tapscott *v.* Balfour, L. R. 8 C. P. 46, 1 Aspin. 501, 42 L. J. C. P. 16, 27 L. T. Rep. N. S. 710, 21 Wkly. Rep. 245; Aktieseskabet Inglewood *v.* Millar's Karri, etc., Forests, 9 Aspin. 411, 8 Com. Cas. 196, 88 L. T. Rep. N. S. 559, 19 T. L. R. 405 (holding that the fact that the ship cannot fully load at the designated place does not alter the rule); Pineiro *v.* Dupre, 9 Aspin. 297, 7 Com. Cas. 105, 86 L. T. Rep. N. S. 560, 18 T. L. R. 351; Watson *v.* Borner, 5 Com. Cas. 377, 16 T. L. R. 524; Bastifell *v.* Lloyd, 1 H. & C. 388, 31 L. J. Exch. 413, 10 Wkly. Rep. 721; Shadforth *v.* Cory, 32 L. J. Q. B. 379, 8 L. T. Rep. N. S. 736, 11 Wkly. Rep. 918. *Compare* Bremner *v.* Burrell, 4 Ct. Sess. Cas. 934; Cushing *v.* McLeod, 2 N. Brunsw. Eq. 63, holding that the lay days do not begin until delivery of the cargo actually begins.

Removal from dock during lay days.—Where the contract requires the boat to be brought to the dock of the consignee, and requires the payment of demurrage on the failure to unload within three days, the removal of the boat from the consignee's dock within the three days by the public authorities, caused by the temporary closing of the canal, will prevent a recovery of demurrage for the time the boat is prevented from returning to the dock. Gabler *v.* McChesney, 60 N. Y. App. Div. 583, 70 N. Y. Suppl. 191.

8. *In re* 2,098 Tons of Coal, 135 Fed. 317, 67 C. C. A. 671 [*affirming* 128 Fed. 514]; Aktieselskabet Inglewood *v.* Millar's Karri, etc., Forests, 9 Aspin. 411, 8 Com. Cas. 196, 88 L. T. Rep. N. S. 559, 19 T. L. R. 405; Dall' Orso *v.* Mason, 3 Ct. Sess. Cas. 419.

9. Barker *v.* Borzone, 48 Md. 474; Tweedie Trading Co. *v.* Pitch Pine Lumber Co., 156 Fed. 88; The Rocky City, 33 Fed. 556.

When unnecessary.—A formal notice to the consignees that the vessel is ready to receive cargo is not necessary where they know that she is ready (Two Hundred and Sixty-Eight Logs of Cedar, 24 Fed. Cas. No. 14,295, 2 Lowell 378); and in England and Canada it seems that notice is unnecessary (Harman *v.* Mant, 4 Campb. 161, 16 Rev. Rep. 768; Harman *v.* Clarke, 4 Campb. 159, 16 Rev.

must reach the shipper,[10] and begins only when the ship is in actual readiness,[11] but it need not be in any particular form.[12]

(III) *COMPUTATION.* Where the contract simply mentions "days" or "running days" and there is no custom to the contrary, all running or successive days are to be counted,[13] but where the phrase "working days" is used, all calendar days on which the law permits work to be done are intended. This excludes Sundays and legal holidays, but not stormy days,[14] unless the expression "weather working days" is used.[15] In general, whole days only, and not hours or fractions

Rep. 768; Kemp *v.* McDougall, 23 U. C. Q. B. 380), unless provided for by contract (Bradley *v.* Goddard, 3 F. & F. 638).

Effect.—A provision in a charter that the time for discharging shall commence when the vessel is ready to unload and written notice given, "whether in berth or not," must be given effect in accordance with its plainly expressed meaning, and the lay days for discharging commence when the vessel gives notice that she is ready to unload and is ready, whether at her designated berth or not. W. K. Niver Coal Co. *v.* Cheronea Steamship Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. N. S. 126 [*affirming* 124 Fed. 937].

10. The India, etc. *v.* Donald, 49 Fed. 76, 1 C. C. A. 174.

Where there is no agent on hand at the port of discharge to receive the notice, it will not prevent the commencement of the running of the lay days. Brown *v.* Ralston, 9 Leigh (Va.) 532; Hatton *v.* De Belaunzaran, 26 Fed. 780.

Giving of notice on holidays and Sundays. — Under a charter providing that holidays shall not count as lay days, notice cannot be given on a holiday (Perry *v.* Spreckles' Sugar Refining Co., 110 Fed. 777), but on the other hand, it has been held that notice given on Sunday is sufficient (Lake *v.* Hurd, 38 Conn. 536; Carroll *v.* Holway, 158 Fed. 328).

11. L. N. Dantzler Lumber Co. *v.* Churchill, 136 Fed. 560, 69 C. C. A. 270; Pierson *v.* Ogden, 19 Fed. Cas. No. 11,160; Cushing *v.* McLeod, 2 N. Brunsw. Eq. 63. And see Addicks *v.* Three Hundred and Fifty-Four Tons Crude Kainit, 23 Fed. 727.

12. Carroll *v.* Holway, 158 Fed. 328.

13. *California.*— Brooks *v.* Minturn, 1 Cal. 481.

Massachusetts.— Crowell *v.* Barreda, 16 Gray 471.

New York.— Field *v.* Chase, Labor 50.

United States.— Hughes *v.* J. S. Hoskins Lumber Co., 136 Fed. 435; Pedersen *v.* Eugster, 14 Fed. 422.

England.— Nielsen *v.* Wait, 16 Q. B. D. 67, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33 (where it is said that running days "are the days, during which, if the ship were at sea, she would be running. That means every day"); Brown *v.* Johnson, C. & M. 440, 11 L. J. Exch. 373, 10 M. & W. 331, 41 E. C. L. 242; Niemann *v.* Moss, 6 Jur. N. S. 775, 29 L. J. Q. B. 266.

See 44 Cent. Dig. tit. "Shipping," § 590.

Usage has, in some cases, determined that the word "days" means working, and not running, days, so as to exclude Sundays and holidays. Cochran *v.* Retberg, 3 Esp. 121.

14. Brooks *v.* Minturn, 1 Cal. 481; Hughes *v.* J. S. Hoskins Lumber Co., 136 Fed. 435; Hagerman *v.* Norton, 105 Fed. 996, 46 C. C. A. 1; Sorensen *v.* Keyser, 52 Fed. 163, 2 C. C. A. 650; Pedersen *v.* Eugster, 14 Fed. 422; Nielsen *v.* Wait, 16 Q. B. D. 67, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33, holding further that the meaning of the term varies in different ports. See also Commercial Steam Ship Co. *v.* Boulton, L. R. 10 Q. B. 346, 3 Aspin. 111, 44 L. J. Q. B. 219, 33 L. T. Rep. N. S. 707, 23 Wkly. Rep. 854

"As "working days" cover all days, except Sundays and holidays, it includes a day lost in putting up the gear of a vessel, preparatory to taking her cargo, that work being, under the terms of the charter-party, a part of the charterer's duty. Wood *v.* Keyser, 84 Fed. 688 [*affirmed* in 87 Fed. 1007, 31 C. C. A. 358].

The express exception of Sunday in the charter-party clearly shows the intention of the parties to exclude that day (Benson *v.* Atwood, 13 Md. 20, 71 Am. Dec. 611), but not other days, such as holidays and rainy days (James *v.* Brophy, 71 Fed. 310, 18 C. C. A. 49; The Cyprus, 20 Fed. 144); and the fact that cargo is in fact discharged on Sundays does not affect their exclusion (Houlder *v.* Weir, [1905] 2 K. B. 267, 10 Aspin. 81, 10 Com. Cas. 228, 74 L. J. K. B. 729, 92 L. T. Rep. N. S. 861, 21 T. L. R. 503).

Half-holidays.—Where a state statute relating to half-holidays does not make them obligatory, and where it is not shown that the stevedores engaged in loading a vessel refused to work on Saturday afternoon because of the statute, such half holidays are not to be excluded. Holland Gulf Steamshipping Co. *v.* Hagar, 124 Fed. 460; Uren *v.* Hagar, 95 Fed. 493.

15. Pyman Steamship Co. *v.* One Hundred Tons of Kainit, 164 Fed. 364 (holding that, under the circumstances of the case, rain during the working hours of any day before noon prevented that day from counting); The India, etc. *v.* Donald, 49 Fed. 76, 1 C. C. A. 174 (holding that the term means a day, otherwise a working day, when the weather will reasonably permit the carrying on of the work contemplated); Pedersen *v.* Eugster, 14 Fed. 422.

The phrase "rainy days," when used in the exception of a charter-party, applies to the days on which the rainfall is such as to prevent the loading of the vessel with safety and convenience, the actual facilities of the

of days, are considered in the computation,[16] an exception existing under the particular provisions of some charter-parties,[17] and the lay days for loading and discharging are considered separately, and not together,[18] unless the contract stipulates otherwise.[19]

4. Waiver and Indemnity.[20] A person compelled to pay demurrage may recover the same from the person primarily liable,[21] but only upon clear proof that such demurrage has been or must be paid[22] and that responsibility therefor rests upon the person from whom indemnity is sought.[23] A master can properly discontinue unloading until security for demurrage is given, only upon giving timely notice to the charterer.[24] In many cases the provisions of the contract

port being considered. Balfour *v.* Wilkins, 2 Fed. Cas. No. 807, 5 Sawy. 429.

Where the vessel is to be unloaded at a certain rate per day, only days on which work can be done are contemplated; stormy days are to be excluded. Harper *v.* M'Carthy, 2 B. & P. N. R. 258.

16. Houlder *v.* Weir, [1905] 2 K. B. 267, 10 Aspin. 81, 10 Com. Cas. 228, 74 L. J. K. B. 729, 92 L. T. Rep. N. S. 861, 21 T. L. R. 503; The Katy, [1905] P. 56, 7 Aspin. 527, 64 L. J. P. D. & Adm. 49, 71 L. T. Rep. N. S. 709, 11 Reports 683, 43 Wkly. Rep. 290; Hough *v.* Athya, 6 Ct. Sess. Cas. 961.

Exclusion of days of readiness and despatch.—Where the contract provides for lay days, "counting from the day of readiness until the day of despatch," and where it is not one by which a present interest is vested, the "day of despatch" and "day of readiness" are to be excluded. Merritt *v.* Ona, 44 Fed. 369, 11 L. R. A. 724.

17. Yeoman *v.* Regem, [1904] 2 K. B. 429, 9 Com. Cas. 269, 73 L. J. K. B. 905, 20 L. T. Rep. N. S. 524, 52 Wkly. Rep. 627; Branckelow Steamship Co. *v.* Lamport, [1897] 1 Q. B. 570, 66 L. J. Q. B. 382 (holding, however, that no smaller fraction than half a day should be considered); Laing *v.* Holloway, 3 Q. B. D. 437, 47 L. J. Q. B. 512, 26 Wkly. Rep. 769.

Where the lay days are dependent upon the amount of cargo delivered or discharged, the contracts have been held to contemplate a day of twenty-four working hours and to permit the counting of fractional parts of days. Weir *v.* Northwestern Commercial Co., 134 Fed. 991; Forest Steamship Co. *v.* Iberian Iron-Ore Co., 9 Aspin. 1, 5 Com. Cas. 83, 81 L. T. Rep. N. S. 563, 16 T. L. R. 59 [*affirming* 8 Aspin. 438, 3 Com. Cas. 316, 79 L. T. Rep. N. S. 240, 14 T. L. R. 560]. Under such contracts, the lay days are computed on the amount of cargo actually loaded and stowed, and not that furnished to the vessel (The Assyria, 98 Fed. 316, 39 C. C. A. 97); but where the cargo is lumber, and a deduction in freight is made for that part of it which is dressed, a proportionately greater amount of it is required to be discharged during a day (Randolph *v.* Wiley, 118 Fed. 77).

18. Baldwin *v.* Stamford Mfg. Co., 56 N. Y. Super. Ct. 1, 2 N. Y. Suppl. 13; Marshall *v.* Bolckow, 6 Q. B. D. 231, 29 Wkly. Rep. 792; Avon Steamship Co. *v.* Leask, 18 Ct. Sess. Cas. 280.

Unloading at intermediate and final ports. — It has been held that a provision for a certain number of days "for loading, discharging and re-loading" applies only to the ports of loading, intermediate discharge, and reloading, and not to the ultimate discharge at the end of the voyage, and that consequently the charterer, under such a contract, is entitled to a reasonable time for unloading at the final port of discharge. Sweeting *v.* Darthez, 14 C. B. 538, 2 C. L. R. 1375, 18 Jur. 958, 23 L. J. C. P. 131, 2 Wkly. Rep. 414, 78 E. C. L. 538.

19. Elwell *v.* Skiddy, 77 N. Y. 282 (holding that, under a charter-party providing for three voyages, and giving the charterer a specified number of lay days, with liberty to use any portion thereof on either of the voyages, the fact that the third voyage was abandoned in accordance with provisions of the charter-party did not affect the right of the charterer to use the whole number of days at his option, upon the two voyages made); Duffy *v.* Miller, 1 Phila. (Pa.) 334.

Exercise of privilege.—Where the contract confers the privilege of averaging days for loading and discharging in order to avoid demurrage, the charterer, by settling for despatch money after loading, elects not to average and will not be permitted to again exercise the option. Oakville Steamship Co. *v.* Holmes, 5 Com. Cas. 48, 16 T. L. R. 54, 48 Wkly. Rep. 152.

20. **Waiver of lien** see *infra*, IX, B, 4.

21. Miner *v.* Blume, 64 N. Y. App. Div. 511, 72 N. Y. Suppl. 320; Snell *v.* The Independence, 22 Fed. Cas. No. 13,139, Gilp. 140; Burstall *v.* Cave, 14 Quebec Super. Ct. 110. And see Durchman *v.* Dunn, 101 Fed. 606.

22. Wilkesbarre Coal, etc., Co., 29 Fed. Cas. No. 17,661, 5 Ben. 482.

23. Furness *v.* Leyland Shipping Co., 134 Fed. 815, 67 C. C. A. 461; Salisbury *v.* Seventy Thousand Feet of Lumber, 68 Fed. 916.

A delay of the discharge by the vessel's failing to give the winches a sufficient supply of steam does not make it responsible for demurrage paid by the consignee to another vessel awaiting for the same berth, as the payment of such demurrage is not the natural and proximate result of the vessel's delay. Milburn *v.* Federal Sugar Refining Co., 161 Fed. 717, 88 C. C. A. 577 [*reversing* 155 Fed. 368].

24. *In re* Ten Thousand and Eighty-Two Oak Ties, 87 Fed. 935.

relating to demurrage or the right to demurrage after it has accrued have been held to be waived,[25] but only upon clear evidence.[26]

B. Collection of Claim — 1. Rate and Amount[27] — a. Measure of Damages. As a general rule, courts of admiralty have allowed the demurrage stipulated in contracts of charter-party and bills of lading, except in cases where the loss of the ship-owner has been shown to be greater or less,[28] and, where no rate is stip-

25. Cargo of The Joseph W. Brooks, 122 Fed. 881; Hagan *v.* Tucker, 118 Fed. 731, 55 C. C. A. 521 [*affirming* 112 Fed. 546] (failure to include demurrage claim in monthly statements and settlements); McKeen *v.* Morse, 49 Fed. 253, 1 C. C. A. 237 (lack of formal protest and long delay in bringing suit); Arreco *v.* Pope, 36 Fed. 606 (acceptance of delivery at a point other than that specified in the charter-party); The Spartan, 25 Fed. 44 (acquiescence of captain in order which conflicts with provisions of charter-party); Fish *v.* One Hundred and Fifty Tons of Brown Stone, 20 Fed. 201 (knowledge by those in charge of vessel of crowded condition of pier); McGovern *v.* Heissenbuttel, 16 Fed. Cas. No. 8,805, 8 Ben. 46 (acceptance of reconsignment without objection).

Time spent in moving from one place of discharge to another cannot be made the basis of a claim for demurrage, where neither the vessel owner nor master made any objection at the time to unloading at more than one place. Moody *v.* Five Hundred Thousand Laths, 2 Fed. 607; Two Hundred and Sixty-Eight Logs of Cedar, 24 Fed. Cas. No. 14,295, 2 Lowell 378.

26. Henningsen *v.* Watkins, 110 Fed. 574; The Dictator, 30 Fed. 637.

What constitutes waiver as against the shipper.—Where a bill of lading expressly gives the ship-owner the right to hold the shipper for any charge under the contract, the fact that such owner does not enforce its right to collect demurrage from the consignee does not estop him from collecting such demurrage from the shipper, especially where the shipper consigned the cargo to itself, and remained the owner until actual delivery to an indorsee of the bill of lading. Tweedie Trading Co. *v.* Pitch Pine Lumber Co., 146 Fed. 612.

Delay not accompanied by claim of right. — Demurrage is recoverable where it does not appear that the delay was claimed as a matter of right by the consignee, but rather as a request voluntarily acceded to by the master. Davis *v.* Wallace, 7 Fed. Cas. No. 3,657, 3 Cliff. 123.

Effect of negligence of consignee.—Where a ship has two hatches from which cargo can be discharged into two lighters of proper size on one side, but the consignee does not provide lighters capable of taking cargo from both hatches at the same time, the ship did not lose her right to demurrage by not breasting out, so as to admit of discharge from both sides of the vessel. The Glenfinlas, 48 Fed. 758, 1 C. C. A. 85 [*modifying* 42 Fed. 232].

A receipt in full for all claims under a charter on payment of only the freight due does not release the charterers from a claim for demurrage which was made at the time by the master, and rejected, where the master was compelled to give such receipt in order to collect the freight, and did so under protest. Durchman *v.* Dunn, 101 Fed. 606. Likewise, it has been held that the delivery of cargo and collection of freight money is not a waiver of a claim for demurrage. Iroquois Furnace Co. *v.* Elphicke, 200 Ill. 411, 65 N. E. 784 [*affirming* 102 Ill. App. 138].

27. **Amount allowable for detention resulting from collision** see Collision, 7 Cyc. 395.

28. Benson *v.* Atwood, 13 Md. 20, 71 Am Dec. 611 (holding that the demurrage stipulated in the contract included the hire and maintenance of the crew); Baldwin *v.* Sullivan Timber Co., 142 N. Y. 279, 36 N. E. 1060 [*affirming* 65 Hun 625, 20 N. Y. Suppl. 496]; Jonasen *v.* Keyser, 112 Fed. 443, 50 C. C. A. 334; New York, etc., R. Co. *v.* Church, 58 Fed. 600, 7 C. C. A. 384; The C. P. Raymond, 28 Fed. 765 (holding that when the rate named in the charter-party is adopted, it includes wharfage and watchman's fees); Moorsom *v.* Bell, 2 Campb. 616, 12 Rev. Rep. 755. See Maclay *v.* The United States, 43 Ct. Cl. 90, 103, where the value of the vessel during the period of detention beyond the ten demurrage days named in the charter was found to be £20 per day greater than the rate named for the demurrage days.

Under a contract providing for the customary rate the amount recoverable is not governed by the rules of a maritime association of the port, in the absence of proof that the rate thereby fixed is the customary rate. Randolph *v.* Wiley, 118 Fed. 77.

A technical violation of the charter-party, otherwise fully executed, does not entitle the vessel owner to claim the full penalty named in the contract. The Cyprus, 20 Fed. 144.

Detention at place other than stipulated port of discharge.— It has been held that the demurrage stipulated in the charter-party is the proper measure of damage only for detention at the port of discharge; that where the freighter compels the vessel to sail for a different port and detains her there, the risk of the voyage and wear and tear of the vessel are proper subjects of consideration. Shepherd *v.* Lanfear, 5 La. 336, 25 Am. Dec. 181.

The expense of carting away and cording up wood, which is being landed from a vessel, cannot be charged separately to the charterer, unless notice is given to him by the master of the vessel that he intends to land the wood at his expense, where the charter-party provides for demurrage at a specified rate for all delay caused by the

ulated, courts have considered all the circumstances of the case in determining the amount recoverable.[29] It has been held that where there is an agreed rate of demurrage for vessels of that class, that controls,[30] but that where there is no agreed rate, the ship-owner is *prima facie* entitled to recover the probable net earnings of the vessel during the period of undue detention,[31] and that inquiry into a subsequent period is not permissible.[32] Interest is recoverable when the amount of demurrage is liquidated by contract.[33]

b. Computation of Time. Demurrage commences to run after the expiration of the time allowed by the contract for detention, or in case there is no time limited after the expiration of a reasonable time,[34] and is recoverable for every day of detention thereafter, with no exception of rainy days, or Sundays,[35] although in some cases it has been held that working days only are contemplated.[36] In computing the time, twenty-four hours are to be considered as a day.[37]

2. SETTLEMENT. A clause in the charter-party providing for arbitration of demurrage claims is binding on the parties in England,[38] but not in the United States;[39] and settlements made by the master will generally be held to be conclusive as to the owners.[40]

charterer. The Mary E. Taber, 16 Fed. Cas. No. 9,209, 1 Ben. 105.

29. Keyser *v.* Jurvelius, 122 Fed. 218, 58 C. C. A. 664, holding that where no employment could have been obtained no damages are sustained, but that where the vessel is detained with full cargo and crew on board, and with all expenses going on, the earnings of the vessel furnish decided assistance in ascertaining the damages.

All damages which the ship-owner naturally and necessarily sustain by the default of the shipper may be recovered (Starbird *v.* Barrons, 38 N. Y. 230), and where the cargo ultimately given the vessel is more profitable than that promised, the extra profit must be allowed in reduction of damages for demurrage (Pregenzer *v.* Burleigh, 6 Misc. (N. Y.) 140, 26 N. Y. Suppl. 35). However, no more than actual damages are recoverable for the detention of a vessel by a libel which was without foundation in law, unless malice and want of probable cause in instituting the action are shown. Carter *v.* Tufts, 15 La. Ann. 16.

30. Thompson *v.* Winslow, 130 Fed. 1001 [*affirmed* in 134 Fed. 546, 67 C. C. A. 470]. And see Bowen *v.* Sizer, 93 Fed. 227, where a construction is given to the agreed rate in that case.

31. Kelly *v.* Fall Brook Coal Co., 67 Barb (N. Y.) 183; Bixby *v.* Bennett, 3 Daly (N. Y.) 225 (holding that the loss sustained may be ascertained by showing the usual earnings of the vessel *per diem*); The Gazelle, 128 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496 [*affirming* 11 Fed. 429, 5 Hughes 391]; Huron Barge Co. *v.* Turney, 79 Fed. 109; Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565; Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548; Stewart *v.* Rogerson, L. R. 6 C. P. 424; The Gazelle, 2 W. Rob. 279.

Detention of yacht.—Demurrage may be recovered for the detention of a yacht, at the market rate of such craft, although the yacht was never let for hire, and no substitute was employed during the detention. The Lagonda, 44 Fed. 367.

32. Huron Barge Co. *v.* Turney, 79 Fed. 109.

33. Milburn *v.* Thirty-Five Thousand Boxes of Oranges, etc., 57 Fed. 236, 6 C. C. A. 317 [*followed* in The M. Kalbfleisch, 59 Fed. 198]. But see The New Orleans, 18 Fed. Cas. No. 10,178.

34. Creighton *v.* Dilks, 49 Fed. 107; Stepanovit *v.* Gillibrand, etc., 22 Fed. Cas. No. 13,360. See also Beard *v.* Rhodes, 1 Aspin. 537, 28 L. T. Rep. N. S. 168; Connor *v.* Smythe, 1 Marsh. 276, 5 Taunt. 654, 1 E. C. L. 336.

35. Burton *v.* Butler, 2 Root (Conn.) 214; Baldwin *v.* Sullivan Timber Co., 142 N. Y. 279, 36 N. E. 1060 [*affirming* 65 Hun 625, 20 N. Y. Suppl. 496]; The Oluf, 19 Fed. 459 [*following* Lindsay *v.* Cushimano, 12 Fed. 503]; Gibbon *v.* Michael's Bay Lumber Co., 7 Ont. 746.

The exact time of detention may be shown, even though the ship-owner may have previously presented a bill for a shorter time. Eikrem *v.* New England Briquette Coal Co., 125 Fed. 987.

36. Whitehouse *v.* Halstead, 90 Ill. 95; Rigney *v.* White, 4 Daly (N. Y.) 400; The Mary E. Taber, 16 Fed. Cas. No. 9,209, 1 Ben. 105.

37. Wiles *v.* New York Cent., etc., R. Co., 4 Thomps. & C. (N. Y.) 264; Hull *v.* A Cargo of Pig Iron, etc., 37 Fed. 124.

38. Temperley Steam Shipping Co. *v.* Smyth, [1905] 2 K. B. 791, 10 Aspin. 123, 10 Com. Cas. 301, 74 L. J. K. B. 876, 93 L. T. Rep. N. S. 471, 21 L. T. Rep. 739, 54 Wkly. Rep. 150.

39. Straits of Dover S. S. Co. *v.* Munson, —— Fed. ——.

40. Burrill *v.* Crossman, 65 Fed. 104; Alexander *v.* Dowie, 1 H. & N. 152, 25 L. J. Exch. 281. *Contra*, where the master simply accepts demurrage under protest. Holland Gulf Steamshipping Co. *v.* Hagar, 124 Fed. 460.

A time charterer who has compromised and

3. ACTIONS [41] — a. Remedy and Pleadings. Claims for demurrage and for damages in the nature of demurrage are enforceable by actions *in rem*,[42] as well as by actions *in personam*,[43] and where the action is for damages in the nature of demurrage, special assumpsit or other form of action in which the implied promise is specially pleaded is proper and necessary.[44] An action on a bill of lading for demurrage is an action on a contract within the meaning of a statute regulating the trial of actions on contracts.[45] Although, when the vessel is let on shares, the master is *pro hac vice* owner and entitled to sue,[46] the libel is properly filed in the name of the ship-owner,[47] and should state a cause of action in contract,[48] without an improper joinder of counts,[49] or a statement of evidentiary matters.[50]

b. Evidence, Proof, and Questions For Jury. Although libellant is entitled to the presumption that the judgment of the master as to the anchorage of the vessel during the loading was properly exercised,[51] the burden is upon him to show the default of respondent in detaining the vessel beyond the time specified in the charter-party or, in case no time is specified, beyond the customary and reasonable time;[52] but when such detention is shown, it devolves upon respondent to prove circumstances which excuse the delay.[53] Parol evidence is inadmissible to vary or add to the written contract of the parties as respects delivery and demurrage,[54]

settled a claim for demurrage against a consignee cannot assert a claim for the balance which was in dispute, against the vessel, on the ground that he could have recovered in full but for the master's misconduct. The Buckingham, 129 Fed. 975.

41. Jurisdiction of admiralty courts over actions for demurrage see ADMIRALTY, 1 Cyc. 830.

42. Riley *v.* A Cargo of Iron Pipes, 40 Fed. 605, holding, however, that no action *in rem* can be maintained when no notice of any claim or lien for demurrage is made at the time of delivery of the cargo, or before the commencement of suit.

A supplementary libel may be filed for detention subsequent to the original libel, where only part of the cargo was seized under the first libel. Eight Hundred and Forty-One Tons of Iron Ore, 25 Fed. 864.

43. The William Marshall, 29 Fed. 328.

44. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255; Horn *v.* Bensusan, 9 C. & P. 709, 2 M. & Rob. 326, 38 E. C. L. 411; Harrison *v.* Wilson, 2 Esp. 709; Brown *v.* Ross, 5 U. C. Q. B. 469.

Where liability is created by an express contract, suit should be brought upon the contract, and not upon an implied promise. Atty *v.* Parish, 1 B. & P. N. R. 104; Cropton *v.* Pickernell, 16 M. & W. 829.

45. Jones *v.* Freeman, 29 Md. 273.

46. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255; Hunt *v.* Barker, 64 Me. 344. And see Hill *v.* Stetson, 39 N. J. L. 84, where it is stated broadly that the master of a vessel is entitled to the demurrage, but it appears that the master in that case was also part-owner of the vessel.

The right does not exist when the vessel is not let on shares, and the action is upon an implied promise to pay demurrage. Brouncker *v.* Scott, 4 Taunt. 1.

47. Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565.

48. Merritt, etc., Derrick, etc., Co. *v.* Vogeman, 127 Fed. 770, holding that as a consignee is ordinarily not liable for demurrage, a libel against him must state such facts as impose a liability upon him.

49. Temperley *v.* Brown, 6 Jur. 150; Mathewson *v.* Ray, 16 L. J. Exch. 288, 16 M. & W. 329.

50. Mott *v.* Frost, 45 Fed. 897.

51. Three Hundred and Ninety-Three Tons of Guano, 23 Fed. Cas. No. 14,011, 6 Ben. 533.

52. Williscroft *v.* Cargo of the Cyrenian, 123 Fed. 169; Empire Transp. Co. *v.* Philadelphia, etc., Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 [*affirming* 70 Fed. 268]; Riley *v.* A Cargo of Iron Pipes, 40 Fed. 605; Levech *v.* A Cargo of Wooden Posts, 34 Fed. 917; Paquette *v.* A Cargo of Lumber, 23 Fed. 301. And see Van Etten *v.* Newton, 15 Daly (N. Y.) 538, 6 N. Y. Suppl. 531, 7 N. Y. Suppl. 663, 8 N. Y. Suppl. 478, holding that a rehearing will be granted, where it appears after judgment that the delay was due to third persons.

53. Harding *v.* 4,698 Tons of New Rivers Steam Coal, 147 Fed. 971; Hagar *v.* Elmslie, 107 Fed. 511, 46 C. C. A. 446; Empire Transp. Co. *v.* Philadelphia, etc., Coal, etc., Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 [*affirming* 70 Fed. 268]; Sheppard *v.* Philadelphia Butchers' Ice Co., 21 Fed. Cas. No. 12,757, 3 Wkly. Notes Cas. (Pa.) 565.

An alleged breach of the charter-party by the ship-owner, which did not cause or contribute to the delay, constitutes no defense. Atlantic, etc., Steamship Co. *v.* Guggenheim, 147 Fed. 103, 77 C. C. A. 329 [*affirming* 123 Fed. 330].

54. Sorensen *v.* Keyser, 51 Fed. 30, 2 C. C. A. 92; Barclay *v.* Holm, 2 Fed. Cas. No. 974; Higgins *v.* U. S. Mail Steamship Co., 12 Fed. Cas. No. 6,469, 3 Blatchf. 282.

The amount of demurrage demanded by the master cannot be shown by a witness. Delafield *v.* De Grauw, 9 Bosw. (N. Y.) 1.

Where both parties allege that important provisions of the contract of transportation

except in cases of ambiguity;[55] but the question of whether there has been an unreasonable delay in loading or discharging is a question of fact for the jury.[56] To be entitled to recover, plaintiff or libellant must prove not only undue detention of the vessel but also damage ensuing therefrom,[57] and to do this, he must present evidence of sufficient weight to establish both propositions.[58]

4. LIEN.[59] Although in England and Canada, the ship-owner has a lien for demurrage only where given by the charter-party and incorporated in the bill of lading,[60] it is well settled in the United States that the vessel owner has a maritime lien for demurrage on the cargo of a person responsible for a detention, enforceable in admiralty, regardless of the existence or non-existence of an express contract for a lien or even for demurrage.[61] This lien is lost by an unconditional

were not embraced in the bills of lading, it is competent for plaintiff to testify that it was orally agreed that the cargo should be unloaded alongside, and that if plaintiff's canal-boat was sent beyond a certain place, defendant should pay the expense of towing it. Doty *v.* Thomson, 116 N. Y. 515, 22 N. E. 1089 [*reversing* 39 Hun 243].

55. The Wanderer, 29 Fed. 260.

56. Scholl *v.* Albany, etc., Iron, etc., Co., 101 N. Y. 602, 5 N. E. 782; Fulton *v.* Blake, 9 Fed. Cas. No. 5,153, 5 Biss. 371.

57. Chicago *v.* Hawgood, etc., Transit Co., 110 Ill. App. 34; Dayton *v.* Parke, 142 N. Y. 391, 37 N. E. 642.

Method of computation.— It has been held that libellants must give satisfactory proof as to a method of computation by which the court can ascertain the damages with reasonable precision. Sprague *v.* West, 22 Fed. Cas. No. 13,255, Abb. Adm. 548.

More than the amount claimed may be awarded, upon a proper showing of facts, as in admiralty the court may award any relief which the law applicable to the case warrants. The Gazelle, 128 U. S. 474, 9 S. Ct. 139, 32 L. ed. 496.

58. The Joseph W. Brooks, 122 Fed. 881.

Evidence held sufficient to show: That the delay was due to causes which entitled the libellant to recover (see Taylor *v.* Fall, River Ironworks, 124 Fed. 826); that the failure of the charterer to furnish cargo caused delay (see Henningsen *v.* Watkins, 110 Fed. 574); that the charterer refused to load suitable barges which were tendered (see Guinan *v.* Weaver Coal, etc., Co., 128 Fed. 203); and that the delay was due to the fact that the stevedore employed by the master to stow the cargo did not have men to do the work (see L. N. Dantzler Lumber Co. *v.* Churchill, 136 Fed. 560, 69 C. C. A. 270).

Evidence held insufficient to establish: The failure to furnish sufficient lighters to discharge cargo on both sides of the vessel was due to the fault of the charterer (see 2,000 Tons of Coal, 135 Fed. 734, 68 C. C. A. 372); an agreement for quick despatch (see Benedict *v.* Cargo of 6,086 Railroad Ties, 151 Fed. 366); a defense that the agreement upon which the action is based was in fact made with third persons (see Johnson *v.* Ocean Steamship Co., 43 Fed. 801). A custom to discharge certain kinds of a cargo on lighters is not shown by evidence that, in the majority of cases, they are so discharged, where it also appears that it is not unusual to discharge on the dock. Gronstadt *v.* Witthoff, 15 Fed. 265.

59. Lien for freight see *supra*, VII, E, 6.

60. Gray *v.* Carr, L. R. 6 Q. B. 522, 1 Aspin. 115, 40 L. J. Q. B. 257, 25 L. T. Rep. N. S. 215, 19 Wkly. Rep. 1173; Gladstone *v.* Birley, 2 Merw. 401, 15 Rev. Rep. 465, 35 Eng. Reprint 993; Land *v.* Woodward, 5 U. C. Q. B. 190; The Cargo *ex* Drake, 5 Can. L. T. Occ. Notes 471.

Construction of charters conferring lien.— See Sanguinetti *v.* Pacific Steam Nav. Co., 2 Q. B. D. 238, 3 Aspin. 300, 46 L. J. Q. B. 105, 35 L. T. Rep. N. S. 658, 25 Wkly. Rep. 150; Kish *v.* Corey, L. R. 10 Q. B. 553, 2 Aspin. 593; 44 L. J. Q. B. 205, 32 L. T. Rep. N. S. 670, 23 Wkly. Rep. 880; Lockhart *v.* Falk, L. R. 10 Exch. 132, 3 Aspin. 8, 44 L. J. Exch. 105, 33 L. T. Rep. N. S. 96, 23 Wkly. Rep. 753; Francesco *v.* Massey, L. R. 8 Exch. 101, 42 L. J. Exch. 75, 21 Wkly. Rep. 440.

61. Warehouse, etc., Supply Co. *v.* Galvin, 96 Wis. 523, 71 N. W. 804, 65 Am. St. Rep. 57 (holding that it is incompetent for a state court to prevent the vessel from enforcing such lien in admiralty, or to deprive the owners of the vessel of their possession of the cargo, so long as the lien continues); Hawgood *v.* One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. 681; Two Hundred and Seventy-Five Tons of Mineral Phosphates, 9 Fed. 209; Donaldson *v.* McDowell, 7 Fed. Cas. No. 3,985, Holmes 290 [*affirming* 12 Fed. Cas. No. 6,987, 2 Lowell 93].

Authority to create.— The owner of the cargo may of course contract for a lien thereon, and even after parting with the title, may do so, provided he is acting as agent of the purchaser in arranging means for transportation. Plummer *v.* Two Hundred Tons of Rails, 149 Fed. 887; Taylor *v.* Fall River Ironworks, 124 Fed. 826.

A lien created by the charter-party applies only to goods shipped under it, and does not attach to other goods shipped under bills of lading (Fargo *v.* Milburn, 100 N. Y. 94, 2 N. E. 278), or to freight money which has been collected and which belongs to other persons (Hatton *v.* De Belaunzgaran, 26 Fed. 780).

Enforcement against third party.— No lien created by the charter-party can be enforced

delivery of the cargo to the claimant thereof,[62] but not by a discharge, accompanied by a claim of lien.[63]

X. GENERAL AVERAGE.

[EDITED BY J. PARKER KIRLIN, ESQ., OF THE NEW YORK BAR]

A. Definition. General average is a contribution by the several interests engaged in a maritime adventure to make good the loss of one of them for voluntary sacrifices of part of the ship or cargo to save the residue of the property and the lives of those on board [64] from an impending peril, or for extraordinary expenses necessarily incurred for the common benefit and safety of all the interests in the adventure.[65]

B. Origin, Nature, and Elements — 1. IN GENERAL. The principle of

against the goods of a third party, without a meritorious claim for liability against such goods or such party, unless that party is clearly shown to be privy to the contract creating the lien. West Hartlepool Steam Nav. Co. *v.* 450 Tons of Kainit, 151 Fed. 886 [*affirmed* in 164 Fed. 836, 90 C. C. A. 288].

62. Two Hundred and Sixteen Loads and Six Hundred and Seventy-Eight Barrels of Fertilizer, 88 Fed. 984, 5 Hughes 310; Egan *v.* A Cargo of Spruce Lath, 43 Fed. 480 [*affirmed* in 41 Fed. 830]; One Hundred and Eighteen Sticks of Timber, 18 Fed. Cas. No. 10,519, 10 Ben. 86; Winslow *v.* Four Hundred Barrels of Salt, 30 Fed. Cas. No. 17,881, 1 Biss. 459.

When the master sells the cargo, by virtue of authority conferred upon him by the shippers, the lien is at an end. Allen *v.* Three Thousand One Hundred and Eighty-Three Bushels of Potatoes, 8 Fed. 763.

After abandonment of the lien, the vessel owner cannot maintain an action for damages against shippers who are merely agents. Stafford *v.* Watson, 22 Fed. Cas. No. 13,276, 1 Biss. 437.

63. Pioneer Fuel Co. *v.* McBrier, 84 Fed. 495, 28 C. C. A. 466; McBrier *v.* A Cargo of Hard Coal, 69 Fed. 469. And see Salisbury *v.* Seventy Thousand Feet of Lumber, 68 Fed. 916.

64. The Star of Hope, 9 Wall. (U. S.) 203, 236, 19 L. ed. 638; The Strathdon, 94 Fed. 206, 208; The Roanoke, 59 Fed. 161, 163, 8 C. C. A. 67; Montgomery *v.* Indemnity Mut. Mar. Ins. Co., [1901] 1 Q. B. 147, 9 Aspin. 141, 6 Com. Cas. 19, 70 L. J. Q. B. 45, 84 L. T. Rep. N. S. 57, 17 T. L. R. 59, 49 Wkly. Rep. 221 [*affirmed* in [1902] 1 K. B. 734, 9 Aspin. 289, 7 Com. Cas. 120, 71 L. J. K. B. 467, 86 L. T. Rep. N. S. 462, 18 T. L. R. 479, 50 Wkly. Rep. 440].

65. *California.*— Wilson *v.* Cross, 33 Cal. 60, 69.

Connecticut.— Lyon *v.* Alvord, 18 Conn. 66, 74.

Kentucky.— Louisville Underwriters *v.* Pence, 93 Ky. 96, 102, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176; Louisville M. & F. Ins. Co. *v.* Bland, 9 Dana 143, 147.

Louisiana.— Barelli *v.* Hagan, 13 La. 580, 581.

Massachusetts.— Emery *v.* Huntington, 109 Mass. 431, 435, 437, 12 Am. Rep. 725; Padelford *v.* Boardman, 4 Mass. 548, 550.

New York.— Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33, 39; Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. 385, 395; Lee *v.* Grinnell, 5 Duer 400, 410.

Pennsylvania.— Broadnax *v.* Cheraw, etc., R. Co., 157 Pa. St. 140, 148, 27 Atl. 412, 413; Cheraw, etc., R. Co. *v.* Broadnax, 109 Pa. St. 432, 439, 1 Atl. 228, 58 Am. Rep. 733; McLoon *v.* Cummings, 73 Pa. St. 98, 104; May *v.* Delaware Ins. Co., 19 Pa. St. 312, 315; The Bevan *v.* U. S. Bank, 4 Whart. 301, 308, 33 Am. Dec. 64; Sanson *v.* Ball, 4 Dall. 459, 462, 1 L. ed. 908.

United States.— Ralli *v.* Troop, 157 U. S. 386, 395, 15 S. Ct. 657, 39 L. ed. 742 [*reversing* 37 Fed. 888]; The Star of Hope, 9 Wall. 203, 228, 19 L. ed. 638; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 342, 10 L. ed. 186; McAndrews *v.* Thatcher, 3 Wall. 347, 370, 18 L. ed. 155; Dupont de Nemours *v.* Vance, 19 How. 162, 176, 15 L. ed. 584; The Strathdon, 94 Fed. 206, 208; The Roanoke, 59 Fed. 161, 163, 8 C. C. A. 67; Bowring *v.* Thebaud, 42 Fed. 794, 797; The Joseph Farwell, 31 Fed. 844; Caze *v.* Reilly, 5 Fed. Cas. No. 2,538, 3 Wash. 298, 310; Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27, 39; Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. Nos. 17,738, 17,739, 3 Sumn. 270, 510, 513.

England.— Steamship Carisbrook Co. *v.* London, etc., Mar., etc., Ins. Co., [1902] 2 K. B. 681, 687, 9 Aspin. 332, 7 Com. Cas. 235, 71 L. J. K. B. 978, 87 L. T. Rep. N. S. 418, 18 T. L. R. 783, 50 Wkly. Rep. 691; Price *v.* Al Ships' Small Damage Ins. Assoc., 22 Q. B. D. 580, 584, 6 Aspin. 435, 58 L. J. Q. B. 269, 61 L. T. Rep. N. S. 278, 37 Wkly. Rep. 566; Kemp *v.* Halliday, L. R. 1 Q. B. 520, 527, 6 B. & S. 723, 12 Jur. N. S. 582, 35 L. J. Q. B. 156, 14 L. T. Rep. N. S. 762, 14 Wkly. Rep. 697, 118 E. C. L. 723; The Bona, [1895] P. 125, 7 Aspin. 557, 64 L. J. P. D. & Adm. 62, 71 L. T. Rep. N. S. 870, 11 Reports 707, 43 Wkly. Rep. 290; The Brigella, [1893] P. 189, 194, 7 Aspin. 337, 62 L. J. P. D. & Adm. 81, 69 L. T. Rep. N. S. 834, 1 Reports 616; Birkley *v.* Presgrave, 1 East 220, 228, 6 Rev. Rep. 256, 102 Eng. Reprint 86.

See 44 Cent. Dig. tit. "Shipping," § 604; and Carver Carriage by Sea, § 361 *et seq.*; Lowndes General Average, p. 19 *et seq.*

Contribution was formerly also called "gross, or extraordinary; average." The Strathdon, 94 Fed. 206, 208.

contribution in general average is older than the common law.[66] It is derived from the Rhodian law, was adopted into the Roman jurisprudence, and thence entered into the general maritime law.[67] The rule appears to have been adopted into English law without the intervention of any statute.[68] It applies only to shipping.[69] Some authorities assert that it depends upon natural justice and an equity arising out of the relation of the parties, and not upon the contract of carriage,[70] while others hold that it arises out of the contract of affreightment, and that the obligation to contribute is implied by law.[71] The right to contribution rests upon the principle that whatever is sacrificed for the common safety of the associated interests shall be made good by all the interests which were exposed to the common peril, and were saved from the common danger by the sacrifice.[72] But this does not mean that the right is extended to strangers or that the law would not imply a contract for the purpose of a remedy.[73] The spirit and intendment of the law of contribution in general average is to place the persons interested, as near as may be, in the same relative position which they occupied before the peril was met, and this object necessarily involves reciprocity of obligation and right.[74]

2. Common Adventure. The principle of general average is not applied except as between those engaged in a common maritime adventure.[75] A tug towing barges from one port to another is not bound up with them into a single maritime adventure, so as to be subject to the law of general average.[76]

3. Common Peril, Voluntary Sacrifice or Expenditure, and Attainment of Purpose. The three leading elements recognized and enforced by the Roman

66. The Roanoke, 59 Fed. 161, 8 C. C. A. 67.

67. *Connecticut.*— Slater *v.* Hayward Rubber Co., 26 Conn. 128.

Kentucky.— Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176.

Massachusetts.— Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436; Gage *v.* Libby, 14 Allen 261.

United States.— McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. ed. 155; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. ed. 186; The Roanoke, 59 Fed. 161, 8 C. C. A. 67. General average has never been extended beyond the spirit and principles of the Rhodian and Roman laws. Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742.

England.— Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655.

See 44 Cent. Dig. tit. "Shipping," § 598.

Part of maritime law.— General average is a part of the maritime, as distinguished from the municipal law. Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742.

68. The Roanoke, 59 Fed. 161, 8 C. C. A. 67.

69. Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742 [*reversing* 37 Fed. 888]; The Roanoke, 59 Fed. 161, 8 C. C. A. 67.

70. See *infra*, X, E, 3, a. And see the cases cited *infra*, this note.

The safety of the property, not the voyage, is the foundation of general average and the question of contribution does not depend on the amount of the damage sustained by the sacrifice of the property. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; The Roanoke, 59 Fed. 161, 8 C. C. A. 67.

Effect of insurance.— The right to recover general average is not defeated by the fact that the owner had effected insurance. Price *v.* Noble, 4 Taunt. 123, 13 Rev. Rep. 566.

71. Ralli *v.* Troop, 157 U. S. 386, 397-401, 15 S. Ct. 657, 39 L. ed. 742; Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Steam Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64; Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655.

72. Meeker *v.* Klemm, 11 La. Ann. 104; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671 [*reversed* on other grounds in 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292].

73. The John Perkins, 13 Fed. Cas. No. 7,360. See also *infra*, X, F, 10, a.

74. The Jason, 178 Fed. 414; The Strathdon, 94 Fed. 206; Heye *v.* North German Lloyd, 33 Fed. 60; Svensden *v.* Wallace, 13 Q. B. D. 69, 53 L. J. Q. B. 385, 50 L. T. Rep. N. S. 799 [*affirmed* in 10 App. Cas. 404, 5 Aspin. 453, 54 L. J. Q. B. 497, 52 L. T. Rep. N. S. 901, 34 Wkly. Rep. 369]; Birkley *v.* Presgrave, 1 East 220, 6 Rev. Rep. 256, 102 Eng. Reprint 86; Lowndes General Average (4th ed.), pp. 19-24. There are occasional exceptions to this reciprocity of right and obligation, however, as for example in the case of cargo carried on deck, and of passengers' baggage. The Strathdon, *supra*; Heye *v.* North German Lloyd, *supra*. See also *infra*, X, D, 5, i.

75. The J. P. Donaldson, 167 U. S. 599, 17 S. Ct. 954, 42 L. ed. 292. And see this case below in 21 Fed. 671; The John Perkins, 13 Fed. Cas. No. 7,360.

76. The J. P. Donaldson, 167 U. S. 599,

law as limitations and conditions requisite to a case for average general contribution, and since steadily adhered to by maritime nations,[77] are: (1) That a condition of imminent peril, common to the ship and the cargo existed;[78] (2) that a voluntary sacrifice of property has been made, or an extraordinary expense incurred to avert the peril; a deliberate and intentional act of the master of the vessel or other representative of the joint enterprise in sacrificing a portion of the marine adventure, or in incurring an extraordinary expenditure, for the joint benefit of all interests to avert the peril;[79] (3) that by that sacrifice or expense the safety of the other property has been secured.[80] The expense or consequence of an

17 S. Ct. 951, 42 L. ed. 292 [*affirming* 19 Fed. 264, and *reversing* 21 Fed. 671].

77. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

78. *Connecticut.*— Slater *v.* Hayward Rubber Co., 26 Conn. 128.

Indiana.— British-American Assur. Co. *v.* Wilson, 132 Ind. 278, 31 N. E. 938.

Kentucky.— Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep 21, 40 Am. St. Rep. 176.

Massachusetts.— Whitteridge *v.* Norris, 6 Mass. 125.

New York.— Lee *v.* Grinnell, 5 Duer 400.

Ohio.— Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75.

Pennsylvania.— Nimick *v.* Holmes, 25 Pa. St. 366, 64 Am. Dec. 710; Sims *v.* Gurney, 4 Binn. 513.

United States.— Barnard *v.* Adams, 10 How. 270, 13 L. ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. ed. 186; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671 [*reversed* on other grounds in 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292]; The Congress, 6 Fed. Cas. No. 3,099, 1 Biss. 42; Delano *v.* The Gallatin, 7 Fed. Cas. No. 3,751, 1 Woods 642.

England.— Johnson *v.* Chapman, 19 C. B. N. S. 563, 35 L. J. C. P. 23, 15 L. T. Rep. N. S. 70, 14 Wkly. Rep. 264, 115 E. C. L. 563.

See 44 Cent. Dig. tit. "Shipping," § 598.

Ship and cargo owned by same person.— As against an insurer a general average act is not affected by the consideration whether there will be a contribution or not. Therefore it is no defense to a claim on the underwriter that the ship and cargo belong to the same person. Montgomery *v.* Indemnity Mut. Mar. Ins. Co., [1901] 1 K. B. 147, 9 Aspin. 141, 6 Com. Cas. 19, 70 L. J. Q. B. 45, 84 L. T. Rep. N. S. 57, 17 T. L. R. 59, 49 Wkly. Rep. 221 [*affirmed* in [1902] 1 K. B. 734, 9 Aspin. 289, 7 Com. Cas. 120, 71 L. J. K. B. 467, 86 L. T. Rep. N. S. 462, 18 T. L. R. 479, 50 Wkly. Rep. 440].

Vessel in ballast.— So the cutting away of the masts, with the consequent damage, are none the less general average charges against the underwriters on the vessel because the vessel was in ballast at the time, and therefore there was neither cargo nor freight to contribute. Greely *v.* Tremont Ins. Co., 9 Cush. (Mass.) 415.

79. *Connecticut.*— Slater *v.* Hayward Rubber Co., 26 Conn. 128.

Indiana.— British American Assur. Co. *v.* Wilson, 132 Ind. 278, 31 N. E. 938.

Massachusetts.— Greely *v.* Tremont Ins. Co., 9 Cush. 415; Nickerson *v.* Tyson, 8 Mass. 467; Whitteridge *v.* Norris, 6 Mass. 125.

New York.— Lee *v.* Grinnell, 5 Duer 400.

North Carolina.— Irving *v.* Glazier, 4 N. C. 406.

Ohio.— Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month 75.

Pennsylvania.— Nimick *v.* Holmes, 25 Pa. St. 366, 64 Am. Dec. 710; Meech *v.* Robinson, 4 Whart. 360, 34 Am. Dec. 514; Sims *v.* Gurney, 4 Binn. 513.

United States.— Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742 [*reversing* 37 Fed. 888]; Barnard *v.* Adams, 10 How. 270, 303, 13 L. ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. ed. 186; Minneapolis, etc., Steamship Co. *v.* Manistee Transit Co., 156 Fed. 424; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671 [*reversed* on other grounds in 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292]; The Congress, 6 Fed. Cas. No. 3,099, 1 Biss. 42; Delano *v.* The Gallatin, 7 Fed. Cas. No. 3,751, 1 Woods 642; The Mary, 16 Fed. Cas. No. 9,188, 1 Sprague 17; Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,034, 1 Story 463; Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. No. 17,739, 3 Sumn. 510.

England.— Iredale *v.* China Traders' Ins. Co., [1900] 2 Q. B. 515, 9 Aspin. 119, 5 Com. Cas. 337, 69 L. J. Q. B. 738, 83 L. T. Rep. N. S. 299, 49 Wkly. Rep. 107; Walthew *v.* Mavrojani, L. R. 5 Exch. 116, 39 L. J. Exch. 81, 22 L. T. Rep. N. S. 310; Johnson *v.* Chapman, 19 C. B. N. S. 563, 35 L. J. C. P. 23, 15 L. T. Rep. N. S. 70, 14 Wkly. Rep. 264, 115 E. C. L. 563; The Copenhagen, 1 C. Rob. 289.

See 44 Cent. Dig. tit. "Shipping," § 598.

80. *Connecticut.*— Slater *v.* Hayward Rubber Co., 26 Conn. 128.

Indiana.— British-American Assur. Co. *v.* Wilson, 132 Ind. 278, 31 N. E. 938.

New York.— Lee *v.* Grinnell, 5 Duer 400.

Ohio.— Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75.

Pennsylvania.— Nimick *v.* Holmes, 25 Pa. St. 366, 64 Am. Dec. 710; Sims *v.* Gurney, 4 Binn. 513.

United States.— Barnard *v.* Adams, 10 How. 270, 13 L. ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. 331, 10 L. ed. 186; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671 [*reversed* on other grounds in 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292]; Caze *v.* Reilly, 5 Fed. Cas. No. 2,538, 3 Wash. 298; The Congress, 6 Fed. Cas. No. 3,099, 1 Biss. 42;

act or of a series of acts, or the loss occasioned by such acts, for the benefit of the ship alone, or for the benefit of the cargo alone, is not to be contributed for in general average. The acts must be done for the common good.[81]

C. Ordering General Average Act — 1. Authority to Order. A loss which gives rise to contribution in general average must have resulted from the will and act of the master of the ship, or of some other person charged with the control and protection of the common adventure,[82] and not by the act of a stranger or the interposition of municipal authority without the sanction of the master.[83] When the captain or master determines on the general average act, he is the agent for all parties interested; the emergency makes him their agent.[84]

2. Exercise of Judgment. Ordinarily the course to be pursued rests in the master's sound discretion;[85] if he is a competent master, and an emergency existed calling for a decision whether a sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent

Delano *v.* The Gallatin, 7 Fed. Cas. No. 3,751, 1 Woods 642; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. No. 17,739, 3 Sumn. 510.

See 44 Cent. Dig. tit. "Shipping," § 598.

The mere fact that an apportionment is made of a loss between the parties in interest does not make it a case of general average if there was no voluntary sacrifice or expense. Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,035, 3 Sumn. 389.

The success need not result directly and solely, by logical necessity, from the sacrifice, but must be reasonably contributed to by it, or must be as consistent with it as with any hypothesis that the circumstances will allow. Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

Meaning of "voluntary."— But this does not take out of the case the imminent necessity which impels the resort to the act in order to escape the peril. In other words, while the agency and consent of man must intervene, such agency and consent, although in one sense voluntary, are, upon the whole, involuntary. Sansom *v.* Ball, 4 Dall. (Pa.) 459, 461, 1 L. ed. 908, where by way of illustration it is said: "When life is at stake the mariner willingly throws gold and diamonds into the sea. But was he willing to encounter the storm which produced this dire necessity? General average always arises from actions produced by necessity."

Intention to destroy not foundation of right.— The right to contribution does not depend on any real or presumed intention to destroy the thing cast away. Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417.

81. Rogers *v.* Murray, 3 Bosw. (N. Y.) 357; Wightman *v.* Macadam, 2 Brev. (S. C.) 230; Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349; Sparks *v.* Kittredge, 22 Fed. Cas. No. 13,210. See, however, an apparent exception to the rule in the case of vessels in ballast, *ante*, p. 374 note 78.

Damage to cargo after landing.— In The Mary, 16 Fed. Cas. No. 9,188, 1 Sprague 17, it was held that where the cargo was landed and stored because it was damaged by sea perils, and was destroyed by fire while thus stored, it was not to be paid for in general average. The *dictum* in the opinion that where cargo is necessarily landed in order to repair the vessel, and while stored it is destroyed by fire, the loss should be made good in general average is not followed in practice.

82. Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742 [*reversing* 37 Fed. 888].

83. Wamsutta Mills *v.* Old Colony Steamboat Co., 137 Mass. 471, 50 Am. Rep. 325 (fire extinguished by city fire department without direction of the master, and cargo saved held not liable to contribute); Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742 [*reversing* 37 Fed. 888] (fire extinguished and ship run aground and scuttled by harbor authorities, and cargo saved held not bound to contribute); Minneapolis, etc., Steamship Co. *v.* Manistee Transit Co., 156 Fed. 424 (owner of cargo injured by water poured into a burning vessel cannot recover contribution in general average from the vessel where the act was not done by or under the direction of the master, but by the fire department of a city acting on its own authority. If, however, the master or person in charge of the vessel sanctions or participates in any way in the action of local authorities in the putting out of a fire in the vessel or cargo the case is treated, in practice, as one of general average.

84. Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742; Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162, 15 L. ed. 584; Lawrence *v.* Minturn, 17 How. (U. S.) 100, 15 L. ed. 58; The John Perkins, 13 Fed. Cas. No. 7,360; Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64 (where it is said that in doing the act which causes the loss to any one of the parties it must be taken that the others then and there promise to contribute to make it good); Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655.

85. Shepherd *v.* Kottgen, 2 C. P. D. 578, 583, 3 Aspin. 546 note [*citing* Corry *v.* Coulthard].

to do his duty, it is presumed, in the absence of proof to the contrary, that his decision was wisely and properly made.[86] There may be a choice of perils when there is no possibility of perfect safety,[87] or where inevitable danger is impending but may be met with different degrees of peril to life or property.[88] Consultation is presumptive proof that the act was voluntary. If it sufficiently appears that the act occasioning the loss was the effect of reasonably sound judgment, it is enough, for in time of imminent danger immediate action may be necessary and delay may render consultation impracticable.[89]

D. Perils, Acts, and Losses Giving Rise to General Average — 1. In General. All losses which arise in consequence of sacrifices made or extraordinary expense incurred for the preservation of the ship and cargo from imminent common peril during the voyage constitute charges in general average, and must be borne proportionately by all the interests which are benefited by them.[90] Sacrifices are often made in specie, as by casting overboard a part of the ship or of her cargo, or by voluntarily stranding both ship and cargo.[91] But the payment by any party in interest of extraordinary expenses, or the appropriation of the ship's appliances to extraordinary use for the safety of the imperiled interests, are equally to be regarded and treated as sacrifices. Extraordinary expenses, in this sense, include all beyond those which the party making the expenditure has undertaken to bear under the contract of affreightment.[92] The danger encountered by the election of the master may be either of a different kind from the danger avoided, or of the same kind; but it must not be the very same danger, merely modified by acts of the master in the performance of his ordinary duty in the navigation or management of the vessel, so as to diminish its effects.[93] And the question as respects general average is not, what was the extent of the danger, supposing the sacrifice to have been made, but what would the danger have been if the sacrifice had not been made.[94]

86. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638. But see Nine Hundred and Twenty-Eight Barrels of Salt, 18 Fed. Cas. No. 10,272, 2 Biss. 319.

Mistake as to nature of danger.—Where a vessel's fore peak suddenly filled with water, which was believed by the master and officers to come from a hole below the water line, endangering the safety of ship and cargo, and they thereupon opened the sluices to the next compartment, knowing that goods therein would necessarily be damaged, in order to discover and repair the leak, it was held that this was a case for general average, although the leak turned out to be in the hawse pipe, and was easily repaired, and the voyage continued. The Wordsworth, 88 Fed. 313.

87. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Norwich, etc., Transp. Co. *v.* Insurance Co. of North America, 129 Fed. 1006, 64 C. C. A. 610 [*affirming* 118 Fed. 307]. See also *infra*, X, D, 5, h.

88. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; Rea *v.* Cutler, 20 Fed. Cas. No. 11,599, 1 Sprague 135.

89. Sims *v.* Gurney, 4 Binn. (Pa.) 513; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

90. Sansom *v.* Ball, 4 Dall. (Pa.) 459, 1 L. ed. 908; U. S. *v.* Cornell Steamboat Co., 202 U. S. 184, 26 S. Ct. 648, 50 L. ed. 987; Ralli *v.* Troop, 157 U. S. 386, 395, 39 L. ed. 742; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 348, 366, 18 L. ed. 155; Birkley *v.* Presgrave, 1 East 219, 6 Rev. Rep. 256, 102 Eng. Reprint 86.

91. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Norwich, etc., Transp. Co. *v.* New Haven Security Ins. Co., 129 Fed. 1006, 64 C. C. A. 610.

92. Providence, etc., Steamship Co. *v.* Phœnix Ins. Co., 89 N. Y. 559; Watson *v.* Marine Ins. Co., 7 Johns. (N. Y.) 57; Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 348, 366, 18 L. ed. 155; International Nav. Co. *v.* Atlantic Mut. Ins. Co., 100 Fed. 304; Hurlbut *v.* Turnure, 76 Fed. 587 [*affirmed* in 81 Fed. 208, 26 C. C. A. 335]; Robinson *v.* Price, 2 Q. B. D. 91, 46 L. J. Q. B. 22, 35 L. T. Rep. N. S. 806, 25 Wkly. Rep. 112 [*affirmed* in 2 Q. B. D. 295, 3 Aspin. 407, 46 L. J. Q. B. 551, 36 L. T. Rep. N. S. 354, 25 Wkly. Rep. 469]; The Bona, [1895] P. 125, 7 Aspin. 557, 64 L. J. P. D. & Adm. 62, 71 L. T. Rep. N. S. 870, 11 Reports 707, 43 Wkly. Rep. 290; Birkley *v.* Presgrave, 1 East 220, 6 Rev. Rep. 256, 102 Eng. Reprint 86.

93. Emery *v.* Huntington, 109 Mass. 431, 12 Am. Rep. 725; Meech *v.* Robinson, 4 Whart. (Pa.) 360, 34 Am. Dec. 523; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638.

94. Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287]; Stewart *v.* West India, etc., Steamship Co., L. R. 8 Q. B. 88, 42 L. J. Q. B. 84, 27 L. T. Rep. N. S. 820, 21 Wkly. Rep. 381 [*affirmed*

2. Duty to Make Vessel Seaworthy. The ship-owner cannot maintain a claim for contribution to sacrifices or expenses which result from unseaworthiness of his vessel.[95] It is his duty to have the vessel seaworthy when she breaks ground for the voyage, and expenses arising from a breach of that duty, although made necessary by some harbor peril causing damage in loading, cannot be made a general average charge against the cargo.[96]

3. Perils and Losses Arising From Fault or Negligence. No one is entitled to a contribution on general average, if the danger, to avert which the sacrifice was made, has arisen from a fault for which the claimant has made himself, or is made by law responsible to the co-contributors.[97] Under this principle the owner of the ship is not entitled to a general average contribution, apart from contract, where the loss is occasioned by the fault of the master or crew.[98] But if the fault which makes the sacrifice necessary is excepted under the contract of carriage, and the exception is valid and enforceable, a contribution can be claimed as though no fault had been committed.[99] If the ship is unseaworthy at the inception of the voyage the ship-owner is not entitled to contribution in general average on account of sacrifices made necessary by reason of such condition when she encounters the perils of the sea.[1] Unseaworthiness does not, however, relieve the cargo from the duty to contribute to sacrifices that do not arise from the

in L. R. 1 Q. B. 362, 1 Aspin. 528, 42 L. J. Q. B. 191, 28 L. T. Rep. N. S. 742, 21 Wkly. Rep. 953].

95. Hurlbut *v.* Turnure, 76 Fed. 587 [*affirmed* in 81 Fed. 208, 26 C. C. A. 335]; Gardner *v.* One Thousand Four Hundred and Sixty-Seven Bales of Cotton, 20 Fed. 529.

96. Bowring *v.* Thebaud, 42 Fed. 794 [*affirmed* in 56 Fed. 520, 5 C. C. A. 640]. See also *infra*, X, D, 3.

97. Wilson *v.* Cross, 33 Cal. 60; The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130; The Nicanor, 44 Fed. 504; The Governor Carey, 10 Fed. Cas. No. 5,645*a*, 2 Hask. 487; Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452.

Port of refuge expenses in such cases are chargeable to the ship. Hurlbut *v.* Turnure, 81 Fed. 208, 26 C. C. A. 335 [*affirming* 76 Fed. 587] (failure to take sufficient supply of coal); Grace *r.* The Mauna Loa, 76 Fed. 829; Gardner *v.* One Thousand Four Hundred and Sixty-Seven Bales of Cotton, 20 Fed. 529 (taking vessel into port and charges those of discharging, storing, and reshipping cargo, the vessel being unseaworthy when she started on her voyage).

98. Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714; The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130; Tarabochia *v.* American Sugar Refining Co., 135 Fed. 424 (error or negligence of mate in overrunning course); Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226.

Stranding.— If the stranding of a vessel is due to negligence of the owner or in navigation, the owner cannot have contribution in general average. Trindad Shipping, etc., Co. *v.* Frame, etc., Co., 88 Fed. 528 (holding that a steamship company which directs its steamers to skirt the Windward Islands for the entertainment of passengers, but fails to supply the vessel with proper charts, is itself in fault for a stranding from going too close inshore, and is not entitled to general average contribution from the cargo); Snow *r.* Perkins, 39 Fed. 334 (stranding necessitated by negligence). See also The Jason, 178 Fed. 414.

Effect of contract see *infra*, X, E, 3.

99. *England.*— Carver Carriage by Sea (5th ed.), § 373*b*; Milburn *v.* Jamaica Fruit Importing, etc., Co., [1900] 2 Q. B. 540, 9 Aspin. 122, 5 Com. Cas. 346, 69 L. J. Q. B. 860, 83 L. T. Rep. N. S. 321, 16 T. L. R. 515.

France.— Le Normand *v.* La Compagne, etc., 1 Dalloz 479; Crowley *v.* Saint Frères, 10 Rev. Int. Dr. Mar. 147.

Germany.— Navire Rossija, 21 Rev. Int. Dr. Mar. 215.

Italy.— Compagne, etc. *v.* De Giovanni, 21 Rev. Int. Dr. Mar. 689.

Belgium.— Navire Llansannor, 22 Rev. Int. Dr. Mar. 534.

The circuit court of appeals for the second circuit held that a specific agreement to pay general average even though the sacrifices should be occasioned by negligence in the navigation of the vessel was unenforceable where the vessel was used as a general ship; but on a reargument certified the question to the supreme court of the United States for decision. The Jason, 178 Fed. 414.

1. Wilson *v.* Cross, 33 Cal. 60; Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714; Irving *v.* Glazier, 4 N. C. 406 (where a vessel capsized in a sudden flaw of wind because it was not provided with shifting boards necessary to its safety); Hurlbut *v.* Turnure, 81 Fed. 208, 26 C. C. A. 335 [*affirming* 76 Fed. 587]; Schloss *v.* Heriot, 14 C. B. N. S. 59, 10 Jur. N. S. 76, 32 L. J. C. P. 211, 8 L. T. Rep. N. S. 246, 11 Wkly. Rep. 596, 108 E. C. L. 59.

If she is competent to encounter ordinary perils of the sea the vessel is not unseaworthy. Fitzpatrick *v.* Eight Hundred Bales of Cotton, 9 Fed. Cas. No. 4,843, 3 Ben. 42 [*affirmed* in 8 Fed. Cas. No. 4,319, 8 Blatchf. 221].

Question of fact.— The question of sea-

unseaworthiness.[2] Under the provision of the Harter Act relieving a ship-owner, when he has exercised due diligence to make his vessel seaworthy, from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel, a ship-owner is not permitted, apart from contract, to claim in an action brought by himself a general average contribution to meet his own losses occasioned by faults in the navigation and management of the ship.[3] But where a cargo owner institutes an action to recover a general average contribution it has been held that since the statute prevents a recovery of damages based upon the alleged negligence of the ship-owner, the cargo owner may not derive any benefit from such alleged negligence, and that under the usual rule of reciprocity of right and obligation the adjustment should be made as if there were no negligence in the case.[4] The negligent navigation of the master cannot in any event afford a pretext for depriving those shippers whose goods have been sacrificed of their claim to a general average contribution from other shippers. They are not privy to the master's acts, and are under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault.[5] Under the rule that fault bars a claim

worthiness is one of fact. Sherwood *v.* Ruggles, 2 Sandf. (N. Y.) 55; Broadnax *v.* Cheraw, etc., R. Co., 157 Pa. St. 140, 27 Atl. 412.

2. Hurlbut *v.* Turnure, 76 Fed. 587 [*affirmed* in 81 Fed. 208, 26 C. C. A. 335]. See also Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452; The Europa, [1908] P. 84, 11 Aspin. 19, 77 L. J. P. D. & Adm. 26, 98 L. T. Rep. N. S. 246, 24 T. L. R. 151; Schloss *v.* Heriot, 14 C. B. N. S. 59, 10 Jur. N. S. 76, 32 L. J. C. P. 211, 8 L. T. Rep. N. S. 240, 11 Wkly. Rep. 596, 108 E. C. L. 59; Carver Carriage by Sea (5th ed.), § 177.

3. The Irrawaddy, 171 U. S. 187, 18 S. Ct. 831, 43 L. ed. 130 (where it is held that in determining the effect of the Harter Act in this respect, the proper course is to treat the settled principles as still existing and to limit the relief from their operation to that called for by the express language of the statute); Tarabochia *v.* American Sugar Refining Co., 135 Fed. 424; Trinidad Shipping, etc., Co. *v.* Frame, etc., Co., 88 Fed. 528.

4. The Strathdon, 94 Fed. 206 [*affirmed* in 101 Fed. 600, 41 C. C. A. 515]. *Compare* The Jason, 178 Fed. 414, holding that there can be no recovery in general average in such case.

In the later case of The Jason, 178 Fed. 414, the same court apparently reached the conclusion that the better and more logical rule is that where the ship-owner is relieved by the Harter Act from liability for the disaster which occasions the sacrifice, as for example a stranding, the cargo owner is debarred from recovering anything from the ship-owner indirectly through the medium of a general average contribution for sacrifices occasioned by it. On reargument, however, this question was certified to the Supreme Court for decision.

Under English limited liability laws.— In The Ettrick, 6 P. D. 127, 4 Aspin. 465, 45 L. T. Rep. N. S. 399, where the ship-owner claimed the benefit of a general average contribution rendered necessary by reason of negligence in navigation, and put his claim on the ground that, having availed himself of the limited liability laws by paying into court the £8 a ton, which is the limitation fixed by the statutes of Great Britain, he was thereby relieved from his liability on account of the negligence in the navigation, and stood in the position of an innocent party entitled to share in the contribution, his claim was not allowed, the court of appeals, Sir George Jessel, M. R., saying: "I cannot read the Act so. All that it says is that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. It does not give him any new rights as far as I can see. . . . It seems to me he would have no such right, for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages."

5. Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349 [*citing* The Carron Park, 15 P. D. 203, 6 Aspin. 543, 59 L. J. P. D. & Adm. 74, 63 L. T. Rep. N. S. 356, 39 Wkly. Rep. 191, to the same effect]; Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452.

The earlier view seems to have been that in such case the sacrifice was not the subject of general average in any event. See The Strathdon, 94 Fed. 206; Carver Carriage by Sea (5th ed.), § 373*a*.

After the Harter Act.— Since the cargo owner has his action even if the carrier is free from negligence, it follows that the owner's negligence does not protect him from an action for contribution by the cargo owner. The Strathdon, 94 Fed. 206, where it is said by Judge Thomas that if it were otherwise it would be better to be negligent than unoffending. See, however, the contrary view of the court of appeals in The Jason, 178 Fed. 414.

Effect of limited liability proceeding.— Where a general average loss was incurred through a danger caused by the negligence of

for contribution it has been held that a cargo owner cannot recover contribution for sacrifices made necessary by the wrongful shipment of cargo in an improper condition.[6] This doctrine does not apply, however, to cases where sacrifices have been made to extinguish fires arising from the spontaneous condition of cargo owing to its well-known inherent quality, provided there has been no neglect in the preparation of it for shipment.[7]

4. Condition of and Particular Danger to Property Sacrificed. In order to justify an allowance in general average, it is not necessary that the particular property sacrificed should have been exposed to greater danger by encountering the loss than it would otherwise have been,[8] nor does it make any difference that the danger was greatest to the property cast away.[9] But there is some discord in the authorities as to the extent of this rule. Cases may be found which attempt to qualify the rule, and assert that where the situation of the ship was such that the whole adventure would certainly and unavoidably have been lost, if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because a thing cannot be regarded as having been sacrificed which had already ceased to have any value.[10] According to the best considered cases, however, the right to contribution is denied only in those circumstances in which the property sacrificed must inevitably,[11] or at least in all reasonable probability,[12] have been lost, not through the common peril, but owing to some situation or condition peculiar to itself, and independent of the peril, and whether the vessel and the rest of the cargo survive or not.[13] But if the special danger is only a circumstance in the common peril

the master, and the proceeds of the vessel, in proceedings for limitation of liability, were distributed among the cargo owners, on a subsequent adjustment in general average, cargo owners who had filed claims in the limited liability proceedings were held entitled, with the others, to the benefit of the adjustment. Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349.

6. The Wm. J. Quillan, 175 Fed. 207; Pirie *v.* Middle Dock Co., 4 Aspin. 388, 44 L. T. Rep. N. S. 426; Carver Carriage by Sea (5th ed.), § 366.

7. Greenshields *v.* Stephens, [1908] 1 K. B. 51, 10 Aspin. 597, 13 Com. Cas. 91, 77 L. J. K. B. 124, 98 L. T. Rep. N. S. 89, 52 Sol. J. 727 [*affirmed* in [1908] A. C. 431, 11 Aspin. 167, 14 Com. Cas. 41, 77 L. J. K. B. 985, 99 L. T. Rep. N. S. 597, 24 T. L. R. 880. And see the opinion of Adams, J., on exceptions in The Wm. J. Quillan, 168 Fed. 407. In a later case the right to contribution was denied on a trial of the merits. The Wm. J. Quillan, 175 Fed. 207.

8. Greely *v.* Tremont Ins. Co., 9 Cush. (Mass.) 415; Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Sims *v.* Gurney, 4 Binn. (Pa.) 513.

9. The Margarethe Blanca, 12 Fed. 728 [*affirmed* in 14 Fed. 59].

But as to deck cargo see *infra*, X, D, 5, i, (II).

A forcible illustration of this principle is given in Barnard *v.* Adams, 10 How. (U. S.) 270, 305, 13 L. ed. 417: "If a cargo of cotton, about to be captured or sunk, be thrown overboard in part or in whole, and the ship thus saved, the fact that the cotton floated to the shore and was saved, and therefore was in a better condition by being cast away than if it had remained to be captured or sunk, cannot affect its right to contribution, though it may diminish its amount."

10. Crockett *v.* Dodge, 12 Me. 190, 28 Am. Dec. 170 (jettison); The Adele Thackera, 24 Fed. 809 (where lumber on deck was washed overboard in a gale, some of it remaining attached to the vessel by its lashings being cut loose, it was held that the part so cut loose was of no pecuniary value in its then condition and the loss was not a general average one).

11. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638 (holding that contribution is proper unless it appears that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo); Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417; Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287]; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671, 19 Fed. 264, 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292 (jettison); The Margarethe Blanca, 12 Fed. 728 [*affirmed* in 14 Fed. 59] (jettison of part of cargo displaced by storm); Johnson *v.* Chapman, 19 C. B. N. S. 563, 35 L. J. C. P. 23, 15 L. T. Rep. N. S 70, 14 Wkly. Rep. 264, 115 E. C. L. 563.

12. Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287].

13. Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287]; Shepherd *v.* Kottgen, 2 C. P. D. 585, 3 Aspin. 544, 47 L. J. C. P. 67, 37 L. T. Rep. N. S. 618, 26 Wkly. Rep. 120, which cases hold that in the contingency mentioned in the text the destruction cannot be called a sacrifice.

The sacrifice of property on fire which is the cause of the peril to the vessel and cargo

and the sacrifice had been made in saving the balance of the venture from the common peril, contribution is allowed.[14]

5. Sacrifice or Extraordinary Expense — a. In General. Losses or damages arising from ordinary perils of the voyage do not give rise to claims in general average. The general rule requires that there shall be an intentional and voluntary sacrifice to avoid a common peril,[15] and that loss without design and as a mere incident of the voyage, as where a ship is injured or disabled in a storm, without any voluntary sacrifice,[16] or founders or is shipwrecked, without design is not

is not a general average loss. Slater *v.* Hayward Rubber Co., 26 Conn. 128 (goods on fire thrown overboard, being themselves certain to be consumed, the court holding that the goods had ceased to be of value unless the fire upon them could be extinguished by the water, and that could be done only by casting them into it, as was in fact done, and that they were thrown overboard not from choice but that they might be saved from themselves); Crockett *v.* Dodge, 12 Me. 190, 28 Am. Dec. 170 (where a vessel laden with lime which was on fire was scuttled so that the lime was destroyed at once but the ship was saved, the ship was held not liable to contribute to the lime as it was certain to be lost in any event); Lee *v.* Grinnell, 5 Duer (N. Y.) 400 (cutting away masts which had accidentally caught fire); Iredale *v.* China Traders Ins. Co., [1899] 2 Q. B. 356, 4 Com. Cas. 256, 68 L. J. Q. B. 1021, 81 L. T. Rep. N. S. 231, 15 T. L. R. 460, 48 Wkly. Rep. 48 [*affirmed* in [1900] 2 Q. B. 515, 9 Aspin. 119, 5 Com. Cas. 337, 69 L. J. Q. B. 783, 83 L. T. Rep. N. S. 299, 16 T. L. R. 484, 49 Wkly. Rep. 107] (where it was held that putting into a port of refuge and unloading a cargo of coal which had become so heated that it could not be safely carried to destination, was not a sacrifice of freight, as owing to the condition of the cargo the freight would inevitably have been lost, and nothing of value therefore was sacrificed); Pirie *v.* Middle Dock Co., 4 Aspin. 388, 44 L. T. Rep. N. S. 426.

14. See the cases cited *supra*, note 11.

Where property that has been displaced by a storm, although valuable and capable of being saved if the storm abates, is, from its position, an especial source of danger to the vessel, its sacrifice in order to save the vessel is a voluntary sacrifice, and its loss the subject of general average. May *v.* Keystone Yellow Pine Co., 117 Fed. 287; The Margarethe Blanca, 12 Fed. 728 [*affirmed* in 14 Fed. 59].

Cutting away masts, etc.— *In general.*— In Shepherd *v.* Kottgen, 2 C. P. D. 585, 3 Aspin. 544, 47 L. J. C. P. 67, 37 L. T. Rep. N. S. 618, 26 Wkly. Rep. 120 [*distinguishing* Corry *v.* Coulthard (*cited* in Shepherd *v.* Kottgen, 3 Aspin. 546 note, 2 C. P. D. 578, 583), in that there it was found that the mast could have been saved] the mainmast, before the giving way of the rigging in a heavy gale, was lurching dangerously, and liable to cause the ship to founder; it would not break, and was therefore cut away. The jury found that the mainmast, in its condition immediately before it was cut away, was "hopelessly lost," that is, lost whether the vessel survived the gale or not, and it was held to be no sacrifice. So it has been held that where the master of a vessel, which was dragging her anchors toward the shore, cut away the masts, to prevent her drifting, and thereupon she brought up, but after about an hour she drifted again, and was wrecked upon the shore, the cargo which was saved was not liable, in general average, for the value of the masts. Scudder *v.* Bradford, 14 Pick. (Mass.) 13, 25 Am. Dec. 355. But where the master, to prevent the vessel from being lost, cuts away a mast in the belief that it is already a hopeless wreck, there is a general average sacrifice, if such belief proves to have been unfounded. Montgomery *v.* Indemnity Mut. Mar. Ins. Co., [1901] 1 Q. B. 147, 9 Aspin. 141, 6 Com. Cas. 19, 70 L. J. Q. B. 45, 84 L. T. Rep. N. S. 57, 17 T. L. R. 59, 49 Wkly. Rep. 221 [*affirmed* in [1902] 1 K. B. 734, 9 Aspin. 289, 7 Com. Cas. 120, 71 L. J. K. B. 467, 86 L. T. Rep. N. S. 462, 18 T. L. R. 479, 50 Wkly. Rep. 440, and *distinguishing* Shepherd *v.* Kottgen, *supra*].

Where the vessel's spars are broken, or its sails, spars, etc., are forced overboard, by the violence of a storm, and lay alongside pounding against the vessel, thus furnishing an especial source of danger, cutting them adrift is a general average act. Teetzman *v.* Clamageran, 2 La. 195, 22 Am. Dec. 127; The Mary Gibbs, 22 Fed. 463; The Margarethe Blanca, 14 Fed. 59 [*affirming* 12 Fed. 728]. So where the rudder of a ship partly torn loose in a gale is cut away to prevent its pounding a hole in the ship. May *v.* Keystone Yellow Pine Co., 117 Fed. 287. But on the other hand it has been considered that while all of such cumber cut loose cannot as a matter of law be said to be wreck, yet if it was virtually lost and not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost, it would properly be called wreck, and not the subject of general average; but if, instead of cutting away what is virtually lost, only a portion of what is still on board and safe, except for the common danger, is cut away, for instance, a mast or bowsprit, for the purpose of facilitating the getting rid of the wreck which is only encumbering the vessel, general average in respect of the portion so cut away is proper because that was sacrificed. Johnson *v.* Chapman, 19 C. B. N. S. 563, 35 L. J. C. P. 23, 15 L. T. Rep. N. S. 70, 14 Wkly. Rep. 264, 115 E. C. L. 563. See also Nickerson *v.* Tyson, 8 Mass. 467.

15. See *supra*, X, B, 3.

16. Hassam *v.* St. Louis Perpetual Ins. Co., 7 La. Ann. 11, 56 Am. Dec. 591; Shiff *v.*

the subject of general average.[17] Losses which give rise to a claim in general average are usually divided into two classes: (1) Those which arise from sacrifice of part of the ship or cargo; (2) those which arise from extraordinary expenses incurred for the common safety of ship, cargo, and freight.[18] There need be no design, however, to destroy or sacrifice any particular property. It is enough that there be a general design to pursue a particular course for the common safety, which results in loss. The design need not be to destroy specially selected property; in many cases it is to save the very property which is lost,[19] as is shown by the instances of goods exposed in barges to float a stranded ship and lost in consequence;[20] or of goods brought upon deck in order to get at others for the purpose of a *jactus*, and washed overboard, etc.[21]

b. Property Sacrificed — No Distinction Between Ship and Cargo. The Roman law does not proceed on any distinction as to the property sacrificed, whether it be ship or cargo, a part or the whole; but solely on the ground that the sacrifice is voluntary, to avert an imminent peril; and that it is in the event successful, by accomplishing that purpose.[22] The right to general average extends to the loss of the ship, when the cargo is saved in whole or in part, as well as to the loss of the cargo when the ship is saved.[23]

Louisiana State Ins. Co., 6 Mart. N. S. (La.) 629 (damage occasioned by carrying a press of sail); Sims *v.* Gurney, 4 Binn. (Pa.) 513; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; Taylor *v.* Curtis, 4 Campb. 337, Holt N. P. 192, 3 E. C. L. 82, 2 Marsh. 309, 6 Taunt. 608, 1 E. C. L. 776, 16 Rev. Rep. 686 (damage sustained by a ship, and the cost of powder and shot used in defending an attack by a privateer); Rathbone *v.* Fowler, 20 Fed. Cas. No. 11,584, 6 Blatchf. 294 [*affirmed* in 12 Wall. (U. S.) 102, 20 L. ed. 281] (damage to vessel caused by swelling of linseed in cargo by being wet by water coming in through holes made in the vessel by ice in the bay); Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226; Power *v.* Whitmore, 4 M. & S. 141, 16 Rev. Rep. 416, 105 Eng. Reprint 787 (damage to the ship caused by the carrying of a press of sail to keep off a lee shore).

17. Minnesota Min. Co. *v.* Chapman, 2 Ohio Dec. (Reprint) 207, 2 West. L. Month. 75 (holding that an owner of a vessel destroyed by accidental fire is not entitled to a contribution in the nature of a general average toward the expense of raising, with the hulk of such vessel, a quantity of copper which was on board as part of the cargo); Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

18. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155; Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64.

19. Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417; The Roanoke, 46 Fed. 297; Caze *v.* Reilly, 5 Fed. Cas. No. 2,538, 3 Wash. 298; Atwood *v.* Sellar, 5 Q. B. D. 286, 4 Aspin. 283, 49 L. J. Q. B. 515, 42 L. T. Rep. N. S. 644, 28 Wkly. Rep. 604.

20. See *infra*, X, D, 5, h.

21. See *infra*, X, D, 5, i.

22. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

Loss of tackle.—An action lies by a shipowner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to the ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. Birkley *v.* Presgrave, 1 East 220, 6 Rev. Rep. 256, 102 Eng. Reprint 86.

Extraordinary use of machinery.—The same rule applies in case of damage due to the extraordinary use of the engines and of fuel, in removing a vessel from a strand. The Bona, [1895] P. 125, 7 Aspin. 557, 64 L. J. P. D. & Adm. 62, 71 L. T. Rep. N. S. 870, 11 Reports 707, 43 Wkly. Rep. 290. See also *supra*, X, D, 4.

Spars used for fuel.—Where a ship met with very heavy weather and sprang a leak, and in order to keep her afloat it became necessary to use the engine for pumping, and the coals running short, the captain burnt with the coals the ship's spare spars and some of her cargo, it was held that the sacrifice of the spars and cargo was general average. Robinson *v.* Price, 2 Q. B. D. 295, 3 Aspin. 407, 46 L. J. Q. B. 551, 36 L. T. Rep. N. S. 354, 25 Wkly. Rep. 469.

Cargo used for fuel.—Where a ship failed to take the customary supply of coal for the voyage, and encountered a hurricane which protracted the voyage so that she was obliged to burn ship's materials and cargo, she must bear, as particular average, the loss of such materials during the time the coal she ought to have taken would have lasted, and the residue of the loss of such material is chargeable to the hurricane alone, and constitutes a general average charge. Hurlbut *v.* Turnure, 76 Fed. 587 [*affirmed* in 81 Fed. 208, 26 C. C. A. 335].

23. McLoons *v.* Cummings, 73 Pa. St. 98; Gray *v.* Waln, 2 Serg. & R. (Pa.) 229, 7 Am. Dec. 642; Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417.

c. Baggage. Loss of or injury to passengers' baggage is the proper subject of contribution in general average,[24] although such baggage does not contribute.[25]

d. Consequential Damage Resulting From Acts of Sacrifice. General average comprises not only the damage purposely done to ship and cargo, by the sacrificial act, but also all damages or expenses which were to be foreseen as the natural consequence of the first sacrifice, since those unmistakably form part of that which was given for the common safety; and also all damage or expense which, although not to be foreseen, stands to the sacrifice in the relation of effect to cause, or, in other words, was a necessary consequence of it.[26] When a voluntary act intervenes, which in itself is a cause of loss, such act being substituted for the original danger of loss with a design of averting it, the substituted act should be regarded as the proximate cause for general average purposes;[27] but it is otherwise as to those losses or expenses which, although they would not have occurred but for the sacrifice, yet likewise would not have occurred but for some intervening act or cause.[28]

e. Collision. Damage sustained by collision is not ordinarily a subject for general average contribution.[29] A sacrifice made by one vessel to avoid collision

24. Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287].

25. See *infra*, X, E, 1.

26. Lee *v.* Grinnell, 5 Duer (N. Y.) 400; Nelson *v.* Belmont, 5 Duer (N. Y.) 310 [*affirmed* in 21 N. Y. 36] (which cases are as to the damage to the ship by the swelling of the cargo on account of water let in); Norwich, etc., Transp. Co. *v.* Insurance Co. of North America, 129 Fed. 1006, 64 C. C. A. 610 [*affirming* 118 Fed. 307]; Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64 [*quoting* Ulrich Grosse-Haverei, p. 5]; McCall *v.* Houlder, 66 L. J. Q. B. 408, 76 L. T. Rep. N. S. 469 (damage to cargo by water which was taken in the ship to tip her into a tank in order to tip the ship so as to repair the propeller at a port of refuge, and which passed from the tank into the hold through an accidental break in a pipe that the master did not know of but feared the possibility of); Atwood *v.* Sellar, 5 Q. B. D. 286, 4 Aspin. 283, 49 L. J. Q. B. 515, 42 L. T. Rep. N. S. 644, 28 Wkly. Rep. 604.

Damage by cutting away masts.— Damage to the cargo caused by cutting away a mast for safety of the ship and cargo must be included in a general contribution. Maggrath *v.* Church, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173; The Mary, 16 Fed. Cas. No. 9,188, 1 Sprague 17, where the deck was ripped up by the cutting away of the masts, and water entered and injured the cargo. So damage to the ship by the falling of spars which are cut away. Patten *v.* Darling, 18 Fed. Cas. No. 10,812, 1 Cliff. 254.

Loss on sale of live stock due to deviation to a port of refuge.—Where a cargo of live stock was shipped under a contract providing that the steamer should not call at Brazilian ports before landing, and that average, if any, should be adjusted according to the York-Antwerp rules, and on the voyage the vessel sprang a leak, and for safety the captain put into a Brazilian port for repairs, and the landing of the stock at its destination was rendered impossible under the foreign animals order, prohibiting the landing of animals if the steamer conveying them had touched at a Brazilian port, and they were sent on to Antwerp and there sold at a less price than they would have realized at the port of their destination, and plaintiffs also incurred expense in respect to extra wages for their cattlemen and the cost of feed and water while at the Brazilian port, it was held that putting into such port was a general average act, and the loss on the sale of the live stock, and the extraordinary expenses being direct consequences of such act, were admissible in general average. Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64.

Damage to ice cargo by delay and by opening hold of ship for the purpose of making repairs is held to be the subject of general average allowance. Libby *v.* Gage, 14 Allen (Mass.) 261.

Where incipient decay was increased by removal of perishable fruit for the purpose of repairing the vessel, and the fruit was entirely lost, it was held that the loss was not caused by removal, and was not general average. Bond *v.* The Superb, 3 Fed. Cas. No. 1,624, 1 Wall. Jr. 355.

27. Norwich, etc., Transp. Co. *v.* Insurance Co. of North America, 129 Fed. 1006, 64 C. C. A. 610 [*affirming* 118 Fed. 307].

28. Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64 [*quoting* Ulrich Grosse-Haverei, p. 5].

29. Emery *v.* Huntington, 109 Mass. 431, 12 Am. Rep. 725 (where a sailing vessel, in order to lessen the danger of an inevitable collision with a steamer, ran into the steamer); Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,035, 3 Sumn. 389 (although the loss has been apportioned between the parties); Peters

with another does not give rise to a claim for contribution from the other, as both are not engaged in a common adventure.[30]

f. Fire and Water Damage. Damage done by water,[31] or by steam,[32] or by scuttling the ship,[33] in order to extinguish a fire, is the subject of contribution in general average.[34] Flooding a compartment to extinguish fire is to be considered as equivalent *pro tanto* to scuttling a ship without compartments for the same purpose. All water damage so caused is generally treated as analogous to scuttling, and is for that reason entitled to contribution.[35] But damage caused by fire[36] or smoke[37] is not allowed in general average. And likewise injury to that part

v. Warren Ins. Co., 19 Fed. Cas. No. 11,034, 1 Story 463.

30. The John Perkins, 13 Fed. Cas. No. 7,360.

31. Lee *v.* Grinnell, 5 Duer (N. Y.) 400; Nelson *v.* Belmont, 5 Duer (N. Y.) 310 [*affirmed* in 21 N. Y. 36]; Nimick *v.* Holmes, 25 Pa. St. 366, 64 Am. Dec. 710; Reliance Mar. Ins. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183 [*affirming* 70 Fed. 262]; The Roanoke, 59 Fed. 161, 8 C. C. A. 67; Deming *v.* The Rapid Transit, 52 Fed. 320; Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287] (*citing* Gourlie Gen. Av. 160–164; Desjardin Traite de Droit Com. Mar. §§ 994, 995; Valroger Droit Mar. § 2047); Whitecross Wire, etc., Co. *v.* Savill, 8 Q. B. D. 653, 4 Aspin. 531, 51 L. J. Q. B. 426, 46 L. T. Rep. N. S. 643, 30 Wkly. Rep. 588; Stewart *v.* West India, etc., Steamship Co., L. R. 8 Q. B. 88, 42 L. J. Q. B. 84, 27 L. T. Rep. N. S. 820, 21 Wkly. Rep. 381 [*affirmed* in L. R. 8 Q. B. 362, 1 Aspin. 528, 42 L. J. Q. B. 191, 28 L. T. Rep. N. S. 742, 21 Wkly. Rep. 953]. *Contra,* The Buckeye, 4 Fed. Cas. No. 2,084, 7 Biss. 23.

32. Reliance Mar. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183 [*affirming* 70 Fed. 262].

33. Achard *v.* Ring, 2 Aspin. 422, 31 L. T. Rep. N. S. 647.

British custom as affecting such loss.— Under a bill of lading by which average, if any, was to be adjusted according to British custom, the shipper made the practice of British average adjusters a part of the contract, and it being found that by such practice damage to cargo by admitting water to extinguish a fire was not a general average loss, the shipper was bound and was not entitled to contribution in general average, although by the general law such loss was general average. Stewart *v.* West India, etc., Steamship Co., L. R. 8 Q. B. 362, 1 Aspin. 528, 42 L. J. Q. B. 191, 28 L. T. Rep. N. S. 742, 21 Wkly. Rep. 953.

The rule of practice referred to was changed after the decision. Lowndes General Average (4th ed.), p. 71. The rule in England is now the same as in the United States. Carver Carriage by Sea (5th ed.), § 390. In Achard *v.* Ring, 2 Aspin. 422, 31 L. T. Rep. N. S. 647, a charter-party provided that "all questions of general average to be settled according to the custom of the London underwriters at Lloyds," and the ship having been scuttled to extinguish a fire, the question of the existence of a custom excluding from general average the loss by reason of damage to the cargo was submitted to the jury, found not to exist, and the claim allowed.

34. Lowndes General Average (4th ed.), p. 68; Carver Carriage by Sea (5th ed.), § 390. And see Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742. The rule does not, however, apply to damage caused by scuttling a ship to extinguish fire in a cargo of lime, it being considered that the cargo was inevitably doomed to destruction. Crockett *v.* Dodge, 12 Me. 190, 28 Am. Dec. 170.

35. The Wordsworth, 88 Fed. 313; Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287]; Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349 [*reversing* upon other grounds 69 Fed. 414] (flooding of stranded vessel to prevent total loss from founding before relief could be obtained); McCall *v.* Houlder, 66 L. J. Q. B. 408, 76 L. T. Rep. N. S. 469 (holding that a ship, laden with perishable cargo which could not be discharged, having become unnavigable through damage to her propeller, is with her cargo in peril, and damage to the cargo from salt water getting in when the ship is tipped down to be repaired in general average).

But where water gets in through the ordinary perils of the sea, as through holes made in the vessel by ice in the bay, the damage caused thereby is not allowed in general average. Rathbone *v.* Fowler, 20 Fed. Cas. No. 11,584, 6 Blatchf. 294 [*affirmed* in 12 Wall. (U. S.) 102, 20 L. ed. 281].

36. Reliance Mar. Ins. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183 [*affirming* 70 Fed. 262].

Damage to cargo while stored at port of refuge.—There is a *dictum* by Sprague, J., in The Brig Mary, 1 Spr. 17, that damage to cargo while stored at a port of refuge to permit the vessel to make general average repairs should be made good in general average. Carver Carriage by Sea (5th ed.), § 413*a*, expresses the same view, but concedes that there is little authority for it. The Danish Code (1892), § 189, seems to disallow such damage as not caused proximately by the General Average Act. The American rule of practice also disallows it for the same reason. York Antwerp Rule XII is silent with regard to it.

37. Reliance Mar. Ins. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183 [*affirming* 70 Fed. 262].

of the cargo which is afire, caused by water admitted to extinguish the fire, is held not to be a general average loss.[38]

g. Stranding or Running Ashore. Where a ship and cargo are exposed to a common danger and imminent peril by the involuntary stranding of the vessel, the expense of saving them is a proper subject of contribution in general average [39] by the vessel, cargo, and freight when they have been saved by a continuous series of measures taken for their safety during the continuance of the common peril which created the necessity for the sacrifices or expenditures.[40] But if the stranding is due to negligent navigation, the vessel is not entitled, apart from contract, to contribution in general average from the cargo owners on account of salvage expenses; [41] and if the object of the sacrifice is not attained and the ship is not got off no contribution is due.[42] When a ship is voluntarily run ashore to escape an enemy,[43] or is stranded or run ashore to avoid impending damage of shipwreck,[44]

Where the smoke and steam damage cannot be distinguished, increased damage by smoke caused by attempts to extinguish a fire by turning steam into the hold, is not a proper claim in general average. Reliance Mar. Ins. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183 [*affirming* 70 Fed. 262].

38. Lee *v.* Grinnell, 5 Duer (N. Y.) 400; Nelson *v.* Belmont, 5 Duer (N. Y.) 310 [*affirmed* in 21 N. Y. 36].

39. Bedford Commercial Ins. Co. *v.* Parker, 2 Pick. (Mass.) 1, 13 Am. Dec. 457; Dilworth *v.* McKelvy, 30 Mo. 149 (expense for taking care of property, unloading and reloading); McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155; Magdala Steamship Co. *v.* H. Baars Co., 101 Fed. 303, 41 C. C. A. 377 (expense of tugboats and lighters, unloading and reloading); Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349 [*affirming* 69 Fed. 414]; Pacific Mail Steamship Co. *v.* Dupre, 74 Fed. 250; Steamship Carisbrook Co. *v.* London, etc., Mar., etc., Ins. Co., [1902] 2 K. B. 681, 9 Aspin. 332, 7 Com. Cas. 235, 71 L. J. K. B. 978, 87 L. T. Rep. N. S. 418, 18 T. L. R. 783, 50 Wkly. Rep. 691. But see Blake *v.* Morgan, 3 Mart. (La.) 375; Backus *v.* Coyne, 45 Mich. 584, 8 N. W. 694, holding that cargo lightered off a grounded vessel is not liable to contribute to subsequent expenses in saving vessel and balance of cargo.

40. Bevan *v.* U. S. Bank, 4 Whart. (Pa.) 301, 33 Am. Dec. 64; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155; Mitchell *v.* Patterson, 22 Fed. 49.

Liability of goods discharged, where operations are continuous.— The American rule is that the cargo discharged must contribute to the general average expenses, provided it is constructively in the ship's possession, or remains in the master's control for the purpose of prosecuting the voyage. Nelson *v.* Belmont, 21 N. Y. 36; Reliance Mar. Ins. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183 [*affirming* 70 Fed. 262]; The L'Amerique, 35 Fed. 835.

Where the voyage is abandoned upon stranding at its commencement, and the cargo is sold, it is held that there is no such sacrifice in the face of impending danger as will make the freight a charge in general average. Earnmoor Steamship Co. *v.* New Zealand Ins. Co., 73 Fed. 867 [*affirmed* in 79 Fed. 368, 24 C. C. A. 644].

Where there is no danger from the position of a vessel stranded upon the bank of a river or harbor, the expense of getting her off is not the subject of general average. The Alcona, 9 Fed. 172.

Where the cargo is removed to lighten the boat and not because of danger no question of general average arises. Louisville Underwriters *v.* Pence, 93 Ky. 96, 19 S. W. 10, 14 Ky. L. Rep. 21, 40 Am. St. Rep. 176.

Incidental injury to tugs in pulling off a stranded ship under a contract of hiring by the day is not allowed in general average against the various interests in the stranded ship and cargo. Earnmoor Steamship Co. *v.* New Zealand Ins. Co., 73 Fed. 867 [*affirmed* in 79 Fed. 368, 24 C. C. A. 644].

41. See *supra*, X, D, 3.

42. See also *supra*, X, B, 3; and *infra*, X, D, 5, h.

Where the ship is totally lost the owners cannot claim a contribution from the owners of the cargo, for the destruction of the masts and rigging, by the master, in order to save the ship and cargo, and the lives of the crew, as general average. Marshall *v.* Garner, 6 Barb. (N. Y.) 394.

43. See *infra*, X, D, 5, l.

44. Merithew *v.* Sampson, 4 Allen (Mass.) 192; Fowler *v.* Rathbone, 12 Wall. (U. S.) 102, 20 L. ed. 281; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; Norwich, etc., Transp. Co. *v.* Insurance Co. of North America, 118 Fed. 307 [*affirmed* in 129 Fed. 1006, 64 C. C. A. 610] (to avoid sinking in deep water); Northwestern Transp. Co. *v.* Continental Ins. Co., 24 Fed. 171 (repairs rendered necessary by stranding); O'Connor *v.* The Ocean Star, 18 Fed. Cas. No. 10,419, Holmes 248.

Where loss probable or inevitable — *In general.*— In accordance with the rule above stated (see *supra*, X, D, 4), it is no answer to say that the vessel in all probability would have sunk at her anchors, or would have parted her cables and driven ashore if the cables had not been cut, if the cable was vol-

the damage suffered on this account is a general average loss. While there is some disagreement as to the effect of the total loss of the ship by reason of such stranding, the better rule would seem to be that if the stranding resulted in saving the cargo, the loss is the proper subject of general average.[45] If goods are exposed in barges or on the beach in order to float a stranded ship and are lost or injured in consequence, the loss is general average.[46]

h. Jettison — (i) *GENERAL RULE.* If goods are thrown overboard for the purpose of lightening the ship in time of common peril, the loss is to be made good by the contribution of all, because it was incurred for the benefit of all.[47]

untarily cut and the vessel run ashore as the best expedient for saving life and property (Reynolds *v.* Ocean Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Sturgis *v.* Cary, 23 Fed. Cas. No. 13,572, 2 Curt. 59), or to say that the loss was inevitable and that she was in a better position on the beach than in the hands of the enemy or at the bottom of the sea or wrecked upon the rocks (Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; Fitzpatrick *v.* Eight Hundred Bales of Cotton, 9 Fed. Cas. No. 4,843, 3 Ben. 42 [*affirmed* in 8 Fed. Cas. No. 4,319, 8 Blatchf. 221]).

Selection of place to run ashore or strand. — So if from the violence of the winds, a ship must go ashore somewhere, and she chooses a place, where she will be at least as safe as she could be elsewhere, still if she selects her place, and incurs a certain loss thereby for the common benefit, it is general average. Merithew *v.* Sampson, 4 Allen (Mass.) 192; Sims *v.* Gurney, 4 Binn. (Pa.) 513; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417; Norwich, etc., Transp. Co. *v.* Insurance Co. of North America, 118 Fed. 307 [*affirmed* in 129 Fed. 1006, 64 C. C. A. 610]; Rea *v.* Cutler, 20 Fed. Cas. No. 11,599, 1 Sprague 135 [*reversed* upon other grounds in 7 How. 729, 12 L. ed. 890]. But see Meech *v.* Robinson, 4 Whart. (Pa.) 360, 34 Am. Dec. 514, *infra*, this note.

Place of stranding inevitable.— But on the other hand it is held that where a vessel, being in a position where she is certain to run ashore and be wrecked, is voluntarily headed for the shore and beached by the captain, in order that the lives of the crew and the cargo may be better saved, no case of general average can arise. Meech *v.* Robinson, 4 Whart. (Pa.) 360, 34 Am. Dec. 514; The Major Wm. H. Tatum, 49 Fed. 252, 1 C. C. A. 236 [*affirming* 46 Fed. 125]. See also Emery *v.* Huntington, 109 Mass. 431, 12 Am. Rep. 725.

45. Merithew *v.* Sampson, 4 Allen (Mass.) 192; Gray *v.* Waln, 2 Serg. & R. (Pa.) 229, 7 Am. Dec. 642; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186 (where the subject is critically examined and the interpretation of the Roman law as expounded in Bradhurst *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 9, upon which a contrary conclusion was based, is disapproved; and the case is likened to the sacrifice of the entire cargo, in which event the ship must contribute); Fitzpatrick *v.* Eight Hundred Bales of Cotton, 9 Fed. Cas. No. 4,843, 3 Ben. 42 [*affirmed* in 8 Fed. Cas. No. 4,319, 8 Blatchf. 221]; Mutual Safety Ins. Co. *v.* The George, 17 Fed. Cas. No. 9,981, Olcott 89, 3 N. Y. Leg. Obs. 260; Patten *v.* Darling, 18 Fed. Cas. No. 10,812, 1 Cliff. 254. And if the exposure of the vessel be made for the common safety, and be successful in relation to a part of the cargo, it is immaterial, so far as relates to contribution, whether her total loss was produced immediately by the stranding, or consequentially, by placing her in a situation which effected her destruction. Caze *v.* Reilly, 5 Fed. Cas. No. 2,538, 3 Wash. 298.

Contra.— Bradhurst *v.* Columbian Ins. Co., 9 Johns. (N. Y.) 9; Eppes *v.* Tucker, 4 Call (Va.) 346, running ashore to prevent capture.

46. Hennen *v.* Monro, 4 Mart. N. S. (La.) 449; The Roanoke, 46 Fed. 297 (under the rule that the particular sacrifice need not have been designed if it results from the act designed for the common safety); Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

Damage before lighter reaches port.— Lewis *v.* Williams, 1 Hall (N. Y.) 430, holding that goods taken from a vessel stranded near her port of destination and placed in lighters, and damaged before the lighters reach port, are subjects of general average.

Separation of interests see *infra*, X, E, 2.

Unloading and reloading for repairs see *infra*, X, D, 5, l, (I).

47. Rossiter *v.* Chester, 1 Dougl. (Mich.) 154; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; Christie *v.* Davis Coal, etc., Co., 95 Fed. 837; The Margarethe Blanca, 12 Fed. 728 [*affirmed* in 14 Fed. 59] (where it is said that the language of the text is the language of the old Rhodian ordinance, and that no subsequent statement has improved upon this concise definition of the general doctrine); Dike *v.* The St. Joseph, 7 Fed. Cas. No. 3,908, 6 McLean 573; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,016, 1 Story 603; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226 (thrown over in storm); Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29 Wkly. Rep. 673; Price *v.* Noble, 4 Taunt. 123, 13 Rev. Rep. 566.

Particular danger to part sacrificed or loss of value before sacrifice see *supra*, X, D, 4.

The same principle applies to the jettison

The rule of general average in the Rhodian law applied especially to such instances,[48] and controversies respecting the allowance or adjustment of general average arose more frequently in the earlier cases where the sacrifice consisted of a jettison of a portion of the cargo than in respect of any other kind of disaster in navigation.[49] Under the rule governing general average sacrifices,[50] the goods must have been thrown overboard voluntarily,[51] in the face of a peril which reasonably called for the sacrifice [52] and for the common safety of the adventure.[53] If there be no imminent danger or necessity for the sacrifice, as if the jettison is made in a tranquil sea merely to lighten a ship too heavily laden, by the fault of the master, no contribution is due; [54] and if the object of the sacrifice is not attained, as if there be a jettison to prevent shipwreck, or to get the ship off the strand, and in either case, the object is not attained, no contribution is due.[55] It is not necessary, however, that the goods shall have been thrown over with the intention of abandoning them. A case may arise requiring contribution where cargo is put off the ship but not in the sea, as where it is placed on a raft or lighter or on the beach for the general safety, and is lost by the extraordinary exposure.[56]

of the ship's stores. Price *v.* Noble, 4 Taunt. 123, 13 Rev. Rep. 566.

48. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

Not confined to jettison.—Although the Rhodian law did not in terms make provision for any case of general average except for that of jettison of goods as a means of lightening the vessel, the rule as there laid down has never been understood to be confined to that particular case, but has always been regarded as a general regulation applicable in all cases falling within the principle on which it is founded. Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

49. Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Birkley *v.* Presgrave, 1 East 220, 6 Rev. Rep. 256, 102 Eng. Reprint 86.

50. See *supra*, II, B,

51. See the cases cited *infra*, this note.

Goods washed overboard are not ordinarily a general average loss. Irving *v.* Glazier, 4 N. C. 406. But if goods are brought on deck in order to get at others for the purpose of a *jactus* and are washed overboard, the loss is general average. The Roanoke, 46 Fed. 297.

It is for the master to decide what part of the cargo is to be sacrificed by the jettison. The Gratitudine, 3 C. Rob. 240, 258.

An intention to destroy the goods thrown overboard forms no part of the reasons assigned by the Rhodian law for contribution in general average. Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671, 19 Fed. 264, 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292; Caze *v.* Reilly, 5 Fed. Cas. No. 2,538, 3 Wash. 298.

52. Lawrence *v.* Minturn, 17 How. (U. S.) 100, 15 L. ed. 58. The urgency of the situation, and the necessity of making the jettison is subject to review by the court. The Hettie Ellis, 22 Fed. 350; The Santa Anna Maria, 49 Fed. 878 (where it is found that the master did not exercise reasonable skill in encountering the peril, the shipper can recover from the ship-owner the value of the cargo improperly thrown over); The Brantford City, 29 Fed. 373. To the same effect see Compania La Flecha *v.* Brauer, 168 U. S. 104, 18 S. Ct. 12, 42 L. ed. 398.

53. Whitteridge *v.* Norris, 6 Mass. 125, where a vessel, having run aground, was forsaken, through fear of perishing, by the master and crew, who took with them into the boat certain property, in order to save it; but they were afterward obliged to throw a part thereof overboard, to save their lives, and the vessel was afterward saved, with the rest of the cargo, and it was held that the owners of the property lost by jettison were not entitled to contribution either from the goods saved in the boat or in the ship, as the jettison was made without any view to the common benefit.

Cargo removed for its own safety.—If the cargo be removed from the ship for its own safety, and is damaged by the exposure, the loss is not made good in general average. Lowndes General Average (4th ed.) 83; Carver Carriage by Sea (5th ed.), § 376.

Jettison of cargo to save lines on another vessel is not general average. Dabney *v.* New England Mut. Mar. Ins. Co., 14 Allen (Mass.) 300.

54. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

55. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; Caze *v.* Reilly, 5 Fed. Cas. No. 2,538, 3 Wash. 298.

56. Hennen *v.* Monro, 4 Mart. N. S. (La.) 449; Whitteridge *v.* Norris, 6 Mass. 125; Lewis *v.* Williams, 1 Hall (N. Y.) 430; Carver Carriage by Sea (5th ed.), § 376.

Damage to discharged cargo by delay during repairs.—Where a fruit cargo was discharged as a general average act and rotted during the delay, it was held that the proximate cause of the damage was the inherent quality of the cargo, and no contribution was due. Bond *v.* The Superb, 3 Fed. Cas. No. 1,624, 1 Wall. Jr. 355. Where ice was unloaded and melted, contribution was allowed for so much of the damage as resulted from the extraordinary exposure. Gage *v.* Libby, 14 Allen (Mass.) 261.

(II) *Deck Cargo Excepted From Rule*[57] — (A) *Statement of Exception.* To the rule allowing contribution in general average for cargo jettisoned there is an exception which ordinarily excludes from general average allowance loss by jettison of deck cargo.[58] But deck cargo is not exempt from contributing its share of the expense of a general average act.[59]

(B) *Qualification of Exception.* The exception to the rule of general average which excludes loss by jettison of deck cargo from contribution in general average is itself subject to qualification. It is held that the exception does not apply to coasting vessels;[60] nor does it apply to those cases in which the carriage of cargo on deck is according to the custom and usage of the particular trade,[61]

57. See *supra*, X, D, 5, i, (I).

58. *Indiana.*— Toledo F. & M. Ins. Co. *v.* Speares, 16 Ind. 52.

Louisiana.— Hampton *v.* The Thaddeus, 4 Mart. 582, as to the rule under the law of England and New York.

Maine.— Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103; Cram *v.* Aiken, 13 Me. 229, 29 Am. Dec. 503; Dodge *v.* Bartol, 5 Me. 286, 17 Am. Dec. 233, non-liability of vessel owner to contribute.

Massachusetts.— Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108 (non-liability of cargo in hold to contribute); Walcott *v.* Eagle Ins. Co., 4 Pick. 429.

New York.— Atkinson *v.* Great Western Ins. Co., 4 Daly 1 [*reversed* in 65 N. Y. 531]; Lenox *v.* United Ins. Co., 3 Johns. Cas. 178; Smith *v.* Wright, 1 Cai. 43, 2 Am. Dec. 162.

Ohio.— Sizer *v.* Barney, 2 Ohio Dec. (Reprint) 177, 2 West. L. Month. 10.

Texas.— Meaher *v.* Lufkin, 21 Tex. 383.

Virginia.—Doane *v.* Keating, 12 Leigh 391, 37 Am. Dec. 671.

United States.— The John H. Cannon, 51 Fed. 46 (holding that there was no such usage to carry the particular cargo on deck at the particular port there involved as to justify a claim for contribution on the ground of custom); The Paragon, 18 Fed. Cas. No. 10,708, 1 Ware 326 (non-liability of cargo in hold); Triplet *v.* Van Name, 24 Fed. Cas. No. 14,176, 2 Cranch C. C. 332 (non-liability of vessel and cargo in hold to contribute); The Watchful, 29 Fed. Cas. No. 17,250, Brown Adm. 469; Wood *v.* The Sallie C. Morton, 30 Fed. Cas. No. 17,962, 2 N. J. L. J. 301.

England.— Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452; Appollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, 9 Aspin. 526, 9 Com. Cas. 91, 73 L. J. K. B. 62, 89 L. T. Rep. N. S. 670, 20 T. L. R. 79, 52 Wkly. Rep. 174; Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29 Wkly. Rep. 673.

See 44 Cent. Dig. tit. "Shipping," § 611.

The reason why relief by general contribution is denied to the owners of goods stowed on deck is that according to the rules of maritime law the placing of goods on the deck of a sea-going ship is improper stowage and a hindrance to the navigation of the vessel (Gillett *v.* Ellis, 11 Ill. 579; Cram *v.* Aiken, 13 Me. 229, 29 Am. Dec. 503; Harrison *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375; Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452) and that deck cargo is a dangerous cargo, certain to be jettisoned before any other, and liable to be unduly jettisoned owing to the facility of doing it when cargo under hatches would not be (Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29 Wkly. Rep. 673).

Exception to "reciprocity of right and obligation."— The rule of the text is an exception to the intendment of reciprocity of right and obligation which is the spirit of the rule of general average. The Strathdon, 94 Fed. 206.

What law governs as to contribution for deck cargo.— If the rule of contribution to a loss of deck cargo is not the same at the port of shipment as at the port of destination, it has been held in Louisiana that the law of the former port will govern. Hampton *v.* The Thaddeus, 4 Mart. (La.) 582.

59. Jones *v.* Bridge, 2 Sweeny (N. Y.) 431.

60. Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29 Wkly. Rep. 673.

61. *Connecticut.*— Brown *v.* Cornwell, 1 Root 60, live stock carried on deck.

Indiana.— See Toledo F. & M. Ins. Co. *v.* Speares, 16 Ind. 52.

New York.— Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375 [*affirming* 4 Bosw. 210], custom of trade as to boats navigating Long Island sound.

Texas.— Meaher *v.* Lufkin, 21 Tex. 383.

United States.— The Hettie Ellis, 20 Fed. 507 (where a vessel was built with a view of carrying the major part of her cargo on deck, and ran in a trade where it was customary and necessary to load the major part of the cargo on deck); Hazleton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210; Wood *v.* Phœnix Ins. Co., 8 Fed. 27, 14 Phila. (Pa.) 483; Goddefroy *v.* The Live Yankee, 10 Fed. Cas. No. 5,496 (holding that if the usage of trade only authorizes the stowage of certain kinds of goods on deck, then, to make the other shippers liable, it must appear that such goods form a usual and customary part of the cargo of vessels in the trade); The William Gillum, 29 Fed. Cas. No. 17,693, 2 Lowell 154.

England.— Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452; Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29

nor to river craft;[62-63] nor where the other cargo owners have consented that the goods jettisoned should be carried on the deck of the ship.[64] And where a cargo is shipped on deck by agreement between the shipper and the vessel owner, the rule against the allowance of a deck cargo loss as general average does not apply so as to relieve the vessel or vessel owner from liability for contribution.[65] The exception which disallows contribution to the jettison

Wkly. Rep. 673; Milward *v.* Hibbert, 3 Q. B. 120, 2 G. & D. 142, 6 Jur. 706, 11 L. J. Q. B. 137, 43 E. C. L. 659; Gould *v.* Oliver, 5 Bing. N. Cas. 115, 3 Hodges 307, 7 L. J. C. P. 68, 5 Scott 445, 35 E. C. L. 71 (contribution recovered from ship-owner).

See 44 Cent. Dig. tit. "Shipping," § 611.

Contra, see Sproat *v.* Donnell, 26 Me. 185, 45 Am. Dec. 103; Cram *v.* Aiken, 13 Me. 229, 29 Am. Dec. 503; Sizer *v.* Barney, 2 Ohio Dec. (Reprint) 177, 2 West. L. Month. 10; Providence Washington Ins. Co. *v.* Bradley Fertilizer Co., 33 Fed. 685.

The evidence of custom should be clear and the burden of proving it is upon the party alleging it. Wood *v.* Phœnix Ins. Co., 1 Fed. 235 [*reversed* upon other grounds in 8 Fed. 27, 14 Phila. (Pa.) 483].

Customs and usages generally see CUSTOMS AND USAGES, 12 Cyc. 1028.

These two qualifications are said to resolve themselves into one.—Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29 Wkly. Rep. 673, per Bramwell, L. J. This is explained in Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, 259, 9 Aspin. 526, 9 Com. Cas. 91, 73 L. J. K. B. 62, 89 L. T. Rep. N. S. 670, 20 T. L. R. 79, 52 Wkly. Rep. 174, where it is said: "The exception of coasting vessels, apart from custom, is intelligible only on the ground that in the short trips made by coasting vessels deck cargo is not exposed to peculiar danger, at all events to an appreciable extent. And when Lord Bramwell says that the two exceptions resolve themselves into one, I think he means that when the voyage is such that the cargo is carried on deck without peculiar risk, it will in practice be so carried whenever it is convenient."

62-63. Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375, referring to the exception made by Valin of small coasting vessels or river craft, which usually carry a part of their cargoes on deck, as demonstrating that the rule, as he understood it, applied only to sea voyages.

As to underwriters' liability the court said in Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, 262, 9 Aspin. 526, 9 Com. Cas. 91, 73 L. J. K. B. 62, 89 L. T. Rep. N. S. 670, 20 T. L. R. 79, 52 Wkly. Rep. 174: "I am satisfied that it does not apply to an inland voyage by canal and river plainly contemplated by the policy, on which voyage it is and has been for many years the practice and usage for steamers and other vessels to carry cargoes on deck."

64. Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452.

65. Wood *v.* Phœnix Ins. Co., 1 Fed. 235; The Milwaukee Belle, 17 Fed. Cas. No. 9,627, 2 Biss. 197 [*criticized* in The Watchful, 29 Fed. Cas. No. 17,250, Brown Adm. 469]; Johnson *v.* Chapman, 19 C. B. N. S. 563, 35 L. J. C. P. 23, 15 L. T. Rep. N. S. 70, 14 Wkly. Rep. 264, 115 E. C. L. 563. *Contra*, Sizer *v.* Barney, 2 Ohio Dec. (Reprint) 177, 2 West. L. Month. 10.

Lower freight rate charged.—Where a cargo of lumber is taken to be carried "on deck and under deck," at a uniform rate for the entire lot, with the understanding that part is to be laden on deck, the rate being less than if the load were all carried under deck, and it is the established usage to carry deck loads by express consent of owners, the shipper is not entitled to general average contribution for a jettison of the deck load. Goddefroy *v.* The Live Yankee, 10 Fed. Cas. No. 5,496.

The liability has been called general contribution, as distinguished from general average, in which all the parties contribute, since other cargo owners do not contribute where they have not assented to the carrying of deck cargo. The Watchful, 29 Fed. Cas. No. 17,250, Brown Adm. 469. And it is said that the vessel is not liable for the entire loss, because the carrying of the goods on deck cannot be attributed as a fault, but if liable at all, it is for contribution, or general average merely. The Watchful, 29 Fed. Cas. No. 17,250, Brown Adm. 469 [*criticizing* The Milwaukee Belle, 17 Fed. Cas. No. 9,627, 2 Biss. 197, where the court dismissed the libel for the principal reason that the libellants by knowingly shipping the goods on deck had consented "that the vessel might thereby be rendered less manageable, and more liable to labor in a storm," in that it was overlooked that the master was equally consenting, and, the sacrifice being for the salvation of the vessel, that which was thus saved should contribute to make up the loss made necessary by mutual consent]. So in Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29 Wkly. Rep. 673, it is pointed out that recovery of contribution by the charterer for cargo which was stowed on deck under the charter, as in Johnson *v.* Chapman, 19 C. B. N. S. 563, 35 L. J. C. P. 23, 15 L. T. Rep. N. S. 70, 14 Wkly. Rep. 264, 115 E. C. L. 562, is not general average; that contribution by the ship-owner in such a case is with good reason, for he shared the benefit and ought to share the risk of the deck cargo.

"At merchant's risk" in charter-party.—In Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655, it was stipu-

of deck cargo should, probably, be confined to sailing vessels. The reason for its application does not apply to vessels propelled by steam.[66] Nor does the exception apply to the jettison of ship's property, usually carried on deck, such as a boat.[67]

i. Putting Into a Port of Refuge. If a ship is in distress from dangers of navigation the act of putting into a port of refuge is a general average act,[68] as where she has sprung a leak,[69] and requires repairs on account of damages suffered in encountering such dangers.[70]

j. Sale For Vessel's Necessities at Port of Refuge. Where injury is sustained by a course pursued for the common safety of the ship and cargo, and the master has neither means nor credit to enable him to make the necessary repairs to continue the voyage, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo to meet the necessity of raising the means to make the repairs, and such sacrifice is the subject of general aver-

lated in a charter-party that the "ship should be provided with a deck-cargo, if required, at full freight, but at merchant's risk," and it was held that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution from the ship-owners in respect of deck cargo shipped by the charterers and necessarily jettisoned to save the ship and the rest of the cargo.

So as against underwriters it is held that goods loaded on deck, although expressly mentioned in a policy of insurance, cannot be brought into general average, when thrown overboard for the preservation of the ship and cargo, and that the shipper is entitled only to partial loss. Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 178.

66. Gillett *v.* Ellis, 11 Ill. 579; Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375; Merchants', etc., Ins. Co. *v.* Shillito, 15 Ohio St. 559, 86 Am. Dec. 491; The Hettie Ellis, 20 Fed. 507 [*affirmed* in 22 Fed. 350]; Hurley *v.* Milward, J. & C. 224 [*cited* in 1 Parson Shipping & Adm. 355]. See also *dictum* in Wood *v.* Phœnix Ins. Co., 1 Fed. 235; The Watchful, 29 Fed. Cas. No. 17,250, Brown Adm. 469.

Cargo in the between decks of a double decker propeller is in the same situation as cargo under deck. Gillett *v.* Ellis, 11 Ill. 579.

67. Lenox *v.* United Ins. Co., 3 Johns. Cas. (N. Y.) 178.

Contribution to freight lost on jettisoned goods.—Whenever a jettison of cargo from the deck or from the holds is made under circumstances which call for a contribution to the loss of the goods, the ship-owner is entitled to a contribution to the net freight lost by reason of the jettison of the goods. Griswold *v.* Union Mut. Ins. Co., 11 Fed. Cas. No. 5,840, 3 Blatchf. 231; Iredale *v.* China Traders Ins. Co., [1899] 2 Q. B. 356, 4 Com. Cas. 256, 68 L. J. Q. B. 1021, 81 L. T. Rep. N. S. 231, 15 T. L. R. 460, 48 Wkly. Rep. 48 [*affirmed* in [1900] 2 Q. B. 515, 9 Aspin. 119, 5 Com. Cas. 337, 69 L. J. Q. B. 783, 83 L. T. Rep. N. S. 299, 16 T. L. R. 484, 49 Wkly. Rep. 107]. And see Christie *v.* Davis Coal, etc., Co., 95 Fed. 837. See further on this subject *infra*, X, F, 4, d.

68. Hassan *v.* St. Louis Perpetual Ins. Co., 7 La. Ann. 11, 56 Am. Dec. 591; Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 45 Wkly. Rep. 64.

General average charges at a port of refuge include the expenses of delay, the charges of entering (Padelford *v.* Boardman, 4 Mass. 548; Vowell *v.* Columbian Ins. Co., 28 Fed. Cas. No. 17,019, 3 Cranch C. C. 83), and leaving the harbor, as pilotage (Padelford *v.* Boardman, *supra*) and towage (The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638), health dues (Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33; Hugg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425), quarantine dues (The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271), tonnage dues (The Star of Hope, *supra*), docking, wharfage (Padelford *v.* Boardman, *supra*), surveys on the ship and cargo, and consular charges (The Star of Hope, *supra*), so far as for mutual benefit; cost of unloading, storing, and reloading cargo, and the damage incident thereto; as also the wages of men employed for the necessary pumping of the vessel (Orrok *v.* Commonwealth Ins. Co., *supra*), while entering port (The Star of Hope, *supra*), or during the discharge and reloading (The Star of Hope, *supra*), and the survey, port charges, unloading and docking for temporary repairs (Hobson *v.* Lord, 92 U. S. 397, 23 L. ed. 613; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; The Mary, 16 Fed. Cas. No. 9,188, 1 Sprague 17; Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27; Vowell *v.* Columbian Ins. Co., 28 Fed. Cas. No. 17,019, 3 Cranch C. C. 83), and any and all charges directly and immediately a consequence of the determination taken in the common interest.

69. The Brewster, 95 Fed. 1000; Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64.

70. Libby *v.* Gage, 14 Allen (Mass.) 261. See also *infra*, X, D, 5, l, (I).

age.[71] And where the goods of one shipper are sold by the master for the ship's necessities, such shipper may have contribution from the other cargo owners and is not restricted to his remedy against the ship or ship-owner.[72]

k. Extraordinary Expenses and Services — (1) *In General.* All extraordinary expenses reasonably incurred in saving a vessel and her cargo from common peril resulting from the dangers of navigation encountered during the voyage are the subject of general average.[73] In the United States, it is very well settled that whenever it becomes necessary to enter a port of refuge because the vessel, in consequence of damage sustained on the voyage, is unfit to proceed to her destination, as when masts, sails, or other requisite apparel are lost in a storm, or the vessel has sprung a dangerous leak, the expenses of entering the port and while there are subjects of contribution in general average,[74] and every expense necessarily incurred during the detention, for the benefit of all concerned;[75] and in making such temporary repairs as are necessary to remove the inability of the vessel to proceed on her voyage, are proper subjects of contribution.[76] Hire of anchors, cables, boats, and all other apparatus required for

71. Hassam *v.* St. Louis Perpetual Ins. Co., 7 La. Ann. 11, 56 Am. Dec. 591; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638 [*reversing* upon other grounds 1 Fed. Cas. No. 405].

Any sale for good of ship and cargo.— In The Brewster, 95 Fed. 1000, the ship having sprung a leak in a storm returned to port for repairs, where the cargo was unloaded and stored, and when ready for sea the master refused to reship certain coal which formed part of the cargo because it had become wet and was liable to ignite spontaneously, and on the shipper's refusal to receive it, it was sold for less than its value. It was held that the loss was general average, the sale being a lawful one for the general good of ship and cargo.

72. The Leonidas, 15 Fed. Cas. No. 8,262, Olcott 12; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255 (where the question did not arise and the court did not determine whether this right of contribution would entitle the party to the full benefit of having it deemed a general average for all purposes, or whether the loss by such a sale would be recoverable under a common policy of insurance); The Gratitudine, 3 C. Rob. 240. See also The Wiley Smith, 29 Fed. Cas. No. 17,657, 6 Ben. 195.

To repair injury which is the subject of general average.—Where cargo is sold to raise funds for the repair of injuries which are the subject of general average, the loss on cargo is the subject of general average. The Constancia, 10 Jur. 845, 4 Notes of Cas. 677, 2 W. Rob. 487. If, however, a sale is made to obtain funds to repair a particular average loss (Hassam *v.* St. Louis Perpetual Ins. Co., 7 La. Ann. 11, 56 Am. Dec. 591), or to execute repairs rendered necessary by the ordinary perils of the sea (Hallett *v.* Wigram, 9 C. B. 580, 19 L. J. C. P. 281, 67 E. C. L. 580), the loss is not the subject of general average contribution; and so of a sale to raise funds for the purpose of procuring the liberation of the master who had been arrested on process in a foreign port (Dobson *v.* Wilson, 3 Campb. 480, 14 Rev. Rep. 817).

73. *Connecticut.*— Lyon *v.* Alvord, 18 Conn. 66.

Illinois.— Goodwillie *v.* McCarthy, 45 Ill. 186.

Louisiana.— Hance *v.* New Orleans M. & F. Ins. Co., 10 La. 1, 29 Am. Dec. 456.

Missouri.— Dilworth *v.* McKelvy, 30 Mo. 149; Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

United States.— McAndrews *v.* Thatcher, 3 Wall. 347, 18 L. ed. 155; Magdala Steamship Co. *v.* H. Baars Co., 101 Fed. 303, 41 C. C. A. 377; Hurlbut *v.* Turnure, 76 Fed. 587 [*affirmed* in 81 Fed. 208, 26 C. C. A. 335]; Northwestern Transp. Co. *v.* Continental Ins. Co., 24 Fed. 171; Mitchell Transp. Co. *v.* Patterson, 22 Fed. 49.

England.—Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., (1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64.

See 44 Cent. Dig. tit. "Shipping," § 613.

74. Hassam *v.* St. Louis Perpetual Ins. Co., 7 La. Ann. 11, 56 Am. Dec. 591; Rogers *v.* Murray, 3 Bosw. (N. Y.) 357; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638 (surveys, port charges, etc.); Grace *v.* The Mauna Loa, 76 Fed. 829; The Joseph Farwell, 31 Fed. 844 (pilotage, towage, quarantine dues, docking, wharfage, and surveys); Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908 (pilotage, custom-house and notary's fees, surveyor's and diver's charges); Vowell *v.* Columbian Ins. Co., 28 Fed. Cas. No. 17,019, 3 Cranch C. C. 83 (surveyor's bill and port charges); Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226; Atwood *v.* Sellar, 5 Q. B. D. 286, 4 Aspin. 283, 49 L. J. Q. B. 515, 42 L. T. Rep. N. S. 644, 28 Wkly. Rep. 604 (pilotage).

75. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638.

76. Libby *v.* Gage, 14 Allen (Mass.) 261; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Hobson *v.* Lord, 92 U. S. 397, 23 L. ed. 613; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; The Brewster, 95 Fed. 1000; The Queen, 28 Fed. 755; Gregory *v.* Orrall, 8 Fed. 287; Patten

the purpose of making the repairs are properly taken into account,[77] as well as the expenses of unloading, warehousing the cargo, and reloading it after the repairs are completed,[78] or the necessary expense of forwarding the cargo when such a course was one of the measures properly adopted for the safety of the joint venture.[79] But expenses not incurred for the safety of all interests are not general average charges;[80] so expenses incurred in order to make repairs beyond what are reasonably necessary for that purpose are not regarded as general average.[81] Outlays made for the benefit of one interest only must be borne by that interest.[82] Expenses incurred after putting in at a port of refuge are not allowed as general average where the voyage is abandoned.[83] The performance of the ordinary duty of repair does not give rise to general average.[84]

(II) *TOWAGE AND SALVAGE.* Towage incurred for the purpose of taking the ship into a port of refuge for repairs on account of a general average act or damage, and extra expenses necessarily incurred in pumping to keep her afloat,[85]

v. Darling, 18 Fed. Cas. No. 10,812, 1 Cliff. 254; Plummer *v.* Wildman, 3 M. & S. 482, 16 Rev. Rep. 334, 105 Eng. Reprint 691.

Duty of master to communicate with owner.— In case a vessel is disabled, it is the duty of the master to communicate with his owners before making repairs, where it can be done in a reasonable time, and delay for this purpose will not relieve a shipper from liability for average. Sherwood *v.* Ruggles, 2 Sandf. (N. Y.) 55.

77. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638.

Pumping.— Extra expense necessarily incurred in pumping to keep the ship afloat until leaks can be stopped is properly allowed as a general average charge. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

78. Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Grace *v.* The Mauna Loa, 76 Fed. 829; The Joseph Farwell, 31 Fed. 844; Campbell *v.* Alknomac, 4 Fed. Cas. No. 2,350, Bee 124; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; Atwood *v.* Sellar, 5 Q. B. D. 286, 4 Aspin. 283, 49 L. J. Q. B. 515, 42 L. T. Rep. N. S. 644, 28 Wkly. Rep. 604; Plummer *v.* Wildman, 3 M. & S. 482, 16 Rev. Rep. 334, 105 Eng. Reprint 691; Da Costa *v.* Newnham, 2 T. R. 407, 100 Eng. Reprint 219. See also Hagg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425.

Unloading for benefit of cargo.— In Fireman's Ins. Co. *v.* Fitzhugh, 4 B. Mon. (Ky.) 160, it is held that if unloading is necessary to the raising of a vessel for repair, the expense is general average; but, on the other hand, if the cargo was unloaded for its own benefit it is held that it is not a proper general average charge.

79. See *infra*, X, E, 2, c.

Unloading to set afloat stranded boat see *supra*, X, D, 5, h.

80. Wightman *v.* Macadam, 2 Brev. (S. C.) 230; Sparks *v.* Kittredge, 22 Fed. Cas. No. 13,210.

81. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; The Queen, 28 Fed. 755, holding that a ship is not justified in discharging a large amount of cargo, or in incurring long delay, for the purpose of making permanent repairs, when comparatively slight and temporary repairs, reasonably sufficient to complete the voyage, could be made speedily and with small change in the cargo.

Caring for passengers.— The law of average has no application to the expense of caring for and maintaining passengers at a port of distress. Weston *v.* Train, 29 Fed. Cas. No. 17,456, 2 Curt. 49.

82. See *supra*, X, B, 3.

Ordinary decay.—Where, in the course of a voyage, a ship, from ordinary decay, requires to be repaired at an intermediate port, the expenses of such repairs are not the subject of general average. Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226.

83. The Joseph Farwell, 31 Fed. 844 (expenses of repairs, the voyage being subsequently abandoned); The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358 note]; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; Williams *v.* Suffolk Ins. Co., 29 Fed. Cas. No. 17,739, 3 Sumn. 510.

So where the cargo is sold to obtain funds for repairing the vessel, general average against the cargo owners for such repairs is not allowed. Myers *v.* The Harriet, 17 Fed. Cas. No. 9,992; Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465.

Expense of the master's passage home should not be borne by the cargo when a voyage is abandoned in a port of distress. Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

Where the charterers break up the voyage of a vessel which has been abandoned and then saved and towed to a port of safety, when they should have permitted her to reload and complete the voyage, they are liable to make contribution as though the voyage had been completed. The Eliza Lines, 102 Fed. 184 [*affirmed* in 114 Fed. 307, 52 C. C. A. 195 (*reversed* in 199 U. S. 119, 26 S. Ct. 8, 50 L. ed. 115)].

84. Van Den Toorn *v.* Leeming, 70 Fed. 251 [*affirmed* in 79 Fed. 107, 24 C. C. A. 461].

85. Lyon *v.* Alvord, 18 Conn. 66; Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638.

and salvage charges voluntarily incurred for the common safety of the adventure,[86-87] are proper subjects of general average.

(III) *Wages and Provisions.* The American and English decisions are conflicting in respect of wages and provisions of the master, officers, and crew during delay for the purpose of repairs, which in England have been held to follow the expenses of the repairs themselves,[88] while in this country they are allowed as general average.[89] Such allowances cover the entire period of detention for repairs until the ship is ready to resume her voyage,[90] such period commencing when she alters her course for the purpose of putting into a port of refuge.[91]

(IV) *Commissions.* It has been held that the owners of the vessel may

Although the port of refuge is the port of destination, the expense of towing her into such port when she has lost her motive power and is in a leaky condition and not in any port or harbor forms the base of a general average. Sweeney *v.* Thompson, 39 Fed. 121.

Towage to port of destination after the ship has been towed to a port of safety has been held not to be the subject of general average. Swan *v.* Chandler, 36 Hun (N. Y.) 192. *Contra*, Goodwillie *v.* McCarthy, 45 Ill. 186.

And where after a ship had worked her own way to a port of safety thirty-two miles distant, her rudder having been split in a gale of no extraordinary violence, and it appeared that the necessary repairs might have been made at another port seventeen miles distant, but instead of proceeding there she employed a tug to tow her to her destination, it was held that the injury was not within the exception of the bill of lading, but was chargeable to the common perils of the sea, and the expense of towage was unreasonable and unnecessary, and the cargo was not liable to contribute in general average. Nine Hundred and Twenty-Eight Barrels of Salt, 18 Fed. Cas. No. 10,272, 2 Biss. (U. S.) 319.

Where a ship declined towage and made temporary repairs to its shaft, in order to avoid salvage, and then proceeded under its own steam, when the shaft broke and caused great damage to the ship, it was held that no intent to make a general average sacrifice was shown. Van Den Toorn *v.* Leeming, 70 Fed. 251 [*affirmed* in 79 Fed. 107, 24 C. C. A. 461].

86-87. Heyliger *v.* New York Firemen Ins. Co., 11 Johns. (N. Y.) 85; The Jason, 178 Fed. 414; The Eliza Lines, 102 Fed. 184; The Queen of the Pacific, 18 Fed. 700, 9 Sawy. 421; Gregory *v.* Orrall, 8 Fed. 287; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908. See also Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

It is only when incurred for the benefit of all interests that salvage charges are considered proper for general average. Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,034, 1 Story 463. And see The C. M. Titus, 11 Fed. 442, holding that the absence of immediate necessity for the service rendered qualifies the power of the carrier.

88. Power *v.* Whitmore, 4 M. & S. 141, 16 Rev. Rep. 416, 105 Eng. Reprint 787; Plummer *v.* Wildman, 3 M. & S. 482, 16 Rev. Rep. 334, 105 Eng. Reprint 691. See also Union Bank *v.* Union Ins. Co., Dudley (S. C.) 171, under a marine policy of insurance which was made subject to the usages of trade in city of London. But see Da Costa *v.* Newnham, 2 T. R. 407, 100 Eng. Reprint 219.

89. Union Ins. Co. *v.* Cole, 18 Ill. App. 413; Hassam *v.* St. Louis Perpetual Ins. Co., 7 La. Ann. 11, 56 Am. Dec. 591; Hause *v.* New Orleans M. & F. Ins. Co., 10 La. 1, 29 Am. Dec. 456; Rogers *v.* Murray, 3 Bosw. (N. Y.) 357; Walden *v.* Le Roy, 2 Cai. (N. Y.) 263, 2 Am. Dec. 236; Hobson *v.* Lord, 92 U. S. 397, 23 L. ed. 613; Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Campbell *v.* The Alknomac, 4 Fed. Cas. No. 2,350, Bee 124; The Mary, 16 Fed. Cas. No. 9,188, 1 Sprague 17; Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27. But see Wightman *v.* Macadam, 2 Brev. (S. C.) 230.

Detention after delivery of cargo.— In Dunham *v.* Commercial Ins. Co., 11 Johns. (N. Y.) 315, 6 Am. Dec. 374, a vessel having arrived at her outward port of destination and having delivered her cargo and earned her freight was detained for repairs on account of injuries received by tempests on the outward voyage, and it was held that wages and provisions during such detention were not general average.

90. Rogers *v.* Murray, 3 Bosw. (N. Y.) 357; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Campbell *v.* The Alknomac, 4 Fed. Cas. No. 2,350, Bee 124.

91. Hanse *v.* New Orleans M. & F. Ins. Co., 10 La. 1, 29 Am. Dec. 456; Thornton *v.* U. S. Insurance Co., 12 Me. 150; Walden *v.* Le Roy, 2 Cai. (N. Y.) 263, 2 Am. Dec. 236; The Joseph Farwell, 31 Fed. 844; Campbell *v.* The Alknomac, 4 Fed. Cas. No. 2,350, Bee 124; The Mary, 16 Fed. Cas. No. 9,188, 1 Sprague 17, holding further that where masts are cut away at sea, and the vessel lies for a time disabled, and afterward alters her course and puts away for a port of safety to refit, wages and provisions are not allowed in general average during the time of such detention, but only from the time of altering her course.

Repairs at sea.— The wages and provisions of a crew during the time they were engaged at sea in constructing a jury rudder after it became necessary to cut away the broken rudder to save the ship in a storm are proper

reasonably be allowed a commission of two and one-half per cent for collecting the general average.[92]

1. Embargo, Capture, and Escaping Capture. While the expenses of detention by embargo are not allowed as general average,[93] sacrifice or loss incurred in escaping capture,[94] as if the ship is run ashore and part of the cargo is saved,[95] or part of the cargo is thrown overboard and the ship is thereby enabled to escape,[96] and the costs and expenses incurred in procuring the release of a captured vessel, are the subjects of general average.[97]

E. Liability to Contribute and Right to Contribution — 1. In General. The obligation to contribute in general average rests upon the vessel, the cargo, and the freight, and the owners of such interests.[98] All property saved con-

items for allowance in general average. May *v.* Keystone Yellow Pine Co., 117 Fed. 287.

Voyage abandoned.—When a vessel puts into a port of necessity, the wages and provisions of the crew are not chargeable upon the cargo in general average if the voyage is there abandoned, but they are so chargeable if it is resumed, and the cargo delivered at the port of destination. Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908.

92. Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417. But in Dodge *v.* Union Mar. Ins. Co., 17 Mass. 471, it was held that neither the master's commissions or disbursements, nor premium of exchange, are subjects of general average.

Right based on maritime law see Sturgis *v.* Cary, 23 Fed. Cas. No. 13,573, 2 Curt. 382.

93. Harrod *v.* Lewis, 3 Mart. (La.) 311; McBride *v.* Marine Ins. Co., 7 Johns. (N. Y.) 431.

94. Emery *v.* Huntington, 109 Mass. 431, 12 Am. Rep. 725; Ross *v.* The Active, 20 Fed. Cas. No. 12,071, 2 Wash. 226.

Where money shipped was surrendered by the master to prevent the ship's capture and burning by a privateer, the shipper is entitled to reimbursement upon libel of the vessel. Hunter *v.* The Hannah, 12 Fed. Cas. No. 6,905, Bee 154.

Fighting off enemy.— But in the absence of statute or ordinance upon the subject, under the principle that the damage encountered by the election of the master must not be the very same as that to be avoided, merely modified by acts done by the master in the performance of his ordinary duty in the navigation of the vessel so as to diminish the effect of an impending peril, damages incurred or ammunition expended by a private armed vessel in fighting off an enemy are not the subjects of general average. Emery *v.* Huntington, 109 Mass. 431, 12 Am. Rep. 725 [*citing* Emérigon, c. 12, § 41, § 8]; Taylor *v.* Curtis, 4 Campb. 337, Holt N. P. 192, 3 E. C. L. 82, 2 Marsh. 309, 6 Taunt. 608, 1 E. C. L. 776, 16 Rev. Rep. 686, expenditure of ammunition in resisting capture and expense of curing wounded sailors.

95. Emery *v.* Huntington, 109 Mass. 431, 12 Am. Rep. 725; Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

Loss of ship by stranding see *supra*, X, D, 5, h.

96. Emery *v.* Huntington, 109 Mass. 431, 12 Am. Rep. 725; Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417. So the owners of a ship's cargo are liable to contribution for ship's stores necessarily thrown overboard, after a vessel was captured, and while she was in the hands of an enemy. Price *v.* Noble, 4 Taunt. 123, 13 Rev. Rep. 566.

But where light cargo was sent ashore and the ship was captured with the balance of the cargo it was held that there was no case for general average contribution as between the owner of the ship and that part of the cargo captured and the owner of the cargo sent ashore. Sheppard *v.* Wright, Show. P. C. 18, 1 Eng. Reprint 13.

97. Spafford *v.* Dodge, 14 Mass. 66; Dorr *v.* Union Ins. Co., 8 Mass. 494; Delaware Ins. Co. *v.* Delaunie, 3 Binn. (Pa.) 295; Kern *v.* Groning, 1 Brev. (S. C.) 506; Woods *v.* Alsen, 99 Fed. 451, 39 C. C. A. 595; Hurtin *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 6,941, 1 Wash. 400.

But wages and provisions of the crew during detention are held not to be allowable as general average. Spafford *v.* Dodge, 14 Mass. 66. *Contra*, Leavenworth *v.* Delafield, 1 Cai. (N. Y.) 573, 2 Am. Dec. 201.

Partial loss by capture on account of cargo. — In Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,034, 1 Story 463, it was held that if there should be a capture of a neutral ship, solely on account of the cargo, which is owned by different persons, who are shippers, and the proceedings are not had against the ship but are against the cargo only, the expenses occasioned thereby will be apportioned upon the owners of the cargo, and are but a partial loss thereof, and not a general average; for such expenses are not for the benefit of the ship or freight, which therefore do not contribute thereto.

98. Lyon *v.* Alvord, 18 Conn. 66; Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436; Orrok *v.* Commonwealth Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Bedford Commercial Ins. Co. *v.* Parker, 2 Pick. (Mass.) 1, 13 Am. Dec. 388 (freight); McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155; The Strathdon, 94 Fed. 206; Utpadel *v.* Fears, 28 Fed. Cas. No. 16,808, 1 Sprague 559.

But where the owner engaged to keep his ship in repair during the voyage for which he let it to another, freight to be paid on the

tributes,[99] except such as is attached to the persons of passengers,[1] or baggage in daily use by them [2] and provisions,[3] and the property sacrificed, upon its value as ascertained, contributes in common with that which is saved.[4] There is no contribution from those whose lives have been saved,[5] and seaman's wages are

return of the ship, and it becomes necessary for the safety of the ship during the voyage to put into a port to refit, the expense must be borne by the owner. Jackson *v.* Charnock, 8 T. R. 509, 5 Rev. Rep. 425, 101 Eng. Reprint 1517.

Freight — *In general.*— Freight and the owner thereof should contribute in general average when both the ship and freight were in peril and were saved. Steamship Carisbrook Co. *v.* London, etc., Mar. Ins. Co., [1892] 2 K. B. 681, 9 Aspin. 332, 7 Com. Cas. 235, 71 L. J. K. B. 978, 87 L. T. Rep. N. S. 418, 18 T. L. R. 783, 50 Wkly. Rep. 691; Moran *v.* Jones, 7 E. & B. 523, 3 Jur. N. S. 663, 26 L. J. Q. B. 187, 2 Wkly. Rep. 503, 90 E. C. L. 523; Williams *v.* London Assur. Co., 1 M. & S. 318, 14 Rev. Rep. 441, 105 Eng. Reprint 119.

And where the vessel is lost freight ought to be allowed to the owner of the vessel as the subject of general average, the cargo having been saved by the stranding. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186; Mutual Safety Ins. Co. *v.* The George, 17 Fed. Cas. No. 9,981, Olcott 89, 3 N. Y. Leg. Obs. 260. And see Nelson *v.* Belmont, 5 Duer (N. Y.) 310 [*affirmed* in 21 N. Y. 36], holding that as a general rule, if a vessel is lost under circumstances which make her loss a case of general average, the freight is to be contributed for, but when the ship is not to be allowed for neither can the freight.

Freight actually earned and not what would have been earned if the voyage had been completed is held to be the rule of contribution by or to freight. Tudor *v.* Macomber, 14 Pick. (Mass.) 34; Lee *v.* Grinnell, 5 Duer (N. Y.) 400 (where the voyage was not commenced at the time of a disaster which required the scuttling of the ship at her wharf); Maggrath *v.* Church, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173; The Joseph Farwell, 31 Fed. 844; The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499. And where freight was paid in advance and the vessel was lost during the voyage, and the cargo was not delivered or shown to have been accepted, so that it did not appear that *pro rata* freight was earned, it was held that there was no contribution for freight in general average. Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33.

Where the charter is in the nature of a lump-sum charter and binds the charterer for the payment of freight on the entire cargo intaken, if any part of the cargo is delivered, although a portion is jettisoned during the voyage, the consignee is entitled to allowance therefor in general average adjustment and is assessed on the foreign value of the goods less the freight which is assessed to the vessel. Christie *v.* Davis Coal, etc., Co., 95 Fed. 837. See also *infra*, X, F. 4, d. And see MARINE INSURANCE, 26 Cyc. 672.

A part-owner of a vessel is liable *in solido* for a balance due on an average adjustment. National Bd. of Mar. Underwriters *v.* Melchers, 45 Fed. 643.

A consignee, not the owner, who receives the goods under a bill of lading which does not provide for general average, is not liable for general average, the master not having exercised his right to a lien on the goods. Scaife *v.* Tobin, 3 B. & Ad. 523, 1 L. J. K. B. 183, 23 E. C. L. 233. If the consignee is the owner he will be liable to contribute. Backus *v.* Coyne, 35 Mich. 5 [*citing* Scaife *v.* Tobin, 3 B. & Ad. 523, 1 L. J. K. B. 183, 23 E. C. L. 233, *supra*, this note].

Lenders on bottomry and respondentia.— In Chandler *v.* Garnier, 6 Mart. N. S. (La.) 599, it was held that lenders on bottomry and respondentia are liable to general average, at least if, after deducting the ratable contribution, the value of the vessel and freight be sufficient to pay the money borrowed.

Effect of limited liability proceeding see *supra*, X, D, 3, note 5.

Owners of cargo liable on implied promise see *infra*, X, F, 10, a.

Statutory exemption under Harter Act see *supra*, X, D, 3.

99. Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375 [*affirming* 4 Bosw. 210]; Jones *v.* Bridge, 2 Sweeny (N. Y.) 431; Nelson *v.* Belmont, 5 Duer (N. Y.) 310 [*affirmed* in 21 N. Y. 36].

No exemption in favor of government.— U. S. *v.* Wilder, 28 Fed. Cas. No. 16,694, 3 Sumn. 308; Brown *v.* U. S., 15 Ct. Cl. 392.

1. Harris *v.* Moody, 30 N. Y. 266, 86 Am. Dec. 375 [*affirming* 4 Bosw. 210].

2. Heye *v.* North German Lloyd, 33 Fed. 60 [*affirmed* in 36 Fed. 705, 2 L. R. A. 287], holding further that baggage stored in the ship's compartments and not in use contributes.

3. Brown *v.* Stapleton, 4 Bing. 119, 5 L. J. C. P. O. S. 121, 12 Moore C. P. 334, 29 Rev. Rep. 524, 13 E. C. L. 428, although the cargo consists only of passengers.

4. Lee *v.* Grinnell, 5 Duer (N. Y.) 400. If the freight is brought into the account as a part of the loss, as where the vessel is sacrificed to save the cargo, it ought also to contribute. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

5. Montgomery *v.* Indemnity Mut. Mar. Ins. Co., [1901] 1 Q. B. 147, 9 Aspin. 141, 6 Com. Cas. 19, 70 L. J. K. B. 45, 84 L. T. Rep. N. S. 57, 17 T. L. R. 59, 49 Wkly. Rep. 221 [*affirmed* in [1902] 1 K. B. 734, 9 Aspin. 289, 7 Com. Cas. 120, 71 L. J. K. B. 467, 86 L. T. Rep. N. S. 462, 18 T. L. R. 479, 50 Wkly. Rep. 440].

But owners of slaves have been held to be liable to contribute. Barelli *v.* Hagan, 13 La. 580.

not subject to general average contribution, as the seaman does not stand on an equality of risk with those who have property on board the vessel.[6]

2. Separation of Interests and Termination of Danger — a. In General. The liability of every portion of the cargo to contribute to general average continues until it has been completely separated from the rest of the cargo, and from the whole adventure, so as to leave no community of interest remaining.[7] When the common danger[8] has ceased to exist no further sacrifice can be the subject of a general average contribution,[9] and when the community of interest between the ship and cargo has been destroyed by a separation of the cargo from the ship liability of the cargo to contribute in general average in favor of the ship is at an end.[10] The tendency of the English decisions is in favor of a strict adherence to the idea that contribution should cease when common danger has ceased, and they regard danger to the saved cargo as having ceased when it has been taken ashore to a place of safety,[11] while generally in this country a broader rule is applied, under which it is held that cargo, although actually separated from the imperiled ship, may still, for the purpose of average, be constructively within it.[12] Separation may be made while the rest of the property is still in

6. Utpadel *v.* Fears, 28 Fed. Cas. No. 16,808, 1 Sprague 559, where the reasons for and against the rule are mentioned, the principle and better one in favor of the rule being that the seamen do not stand on an equality of risk with those who have property in or on board of the vessel, and it is held that the shares of fishermen who sail under agreements usual in such voyages are subject to contribution and are not in the nature of wages.

7. Nelson *v.* Belmont, 21 N. Y. 36; Whitecross Wire Co. *v.* Savill, 8 Q. B. D. 653, 4 Aspin. 531, 51 L. J. Q. B. 426, 46 L. T. Rep. N. S. 643, 30 Wkly. Rep. 588.

8. See *supra*, X, B, 3.

9. The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358 note]; Iredale *v.* China Traders Ins. Co., [1901] 2 Q. B. 515, 9 Aspin. 119, 5 Com. Cas. 337, 69 L. J. Q. B. 783, 83 L. T. Rep. N. S. 299, 16 T. L. R. 484, 49 Wkly. Rep. 107.

10. Backus *v.* Coyne, 45 Mich. 584, 8 N. W. 694 (part of cargo lightered off a grounded vessel not liable to contribute to expenses incurred subsequently in saving the vessel and balance of cargo); McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155 (where the vessel stranded near the port of destination and cargo was taken off, sent ashore to destination, and the master and crew left the ship, which was afterward floated by the underwriters); The L'Amerique, 35 Fed. 835 (where the cargo of a stranded ship is unloaded with no intention of reloading it in same vessel, subsequent expense of floating her not general average charge); Smith *v.* Welsh, 22 Fed. Cas. No. 13,126, 4 Wkly. Notes Cas. (Pa.) 383; Walthew *v.* Mavrojani, L. R. 5 Exch. 116, 39 L. J. Exch. 81, 22 L. T. Rep. N. S. 310.

11. See Reliance Mar. Ins. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183; Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349 [*citing* Royal Mail Steam Packet Co. *v.* Rio de Janeiro English Bank, 19 Q. B. D. 362, 57 L. J. Q. B. 31, 36 Wkly. Rep. 105; Walthew *v.* Mavrojani, L. R. 5 Exch. 116, 39 L. J. Exch. 81, 22 L. T. Rep. N. S. 310] (where it is said that there is also authority in England harmonizing with the rule in this country, as in Moran *v.* Jones, 7 El. & B. 523, *infra*, this note); Job *v.* Langton, 6 E. & B. 779, 3 Jur. N. S. 109, 26 L. J. Q. B. 97, 4 Wkly. Rep. 641, 88 E. C. L. 779.

Where the cargo lightered remains under the control of the master and is reloaded in the ship and the voyage continued, the expense incurred after the goods were put on the lighter is held to be general average. Moran *v.* Jones, 7 E. & B. 523, 3 Jur. N. S. 663, 26 L. J. Q. B. 187, 5 Wkly. Rep. 503, 90 E. C. L. 523 [*distinguishing* Job *v.* Langton, 6 E. & B. 779, 3 Jur. N. S. 109, 26 L. J. Q. B. 97, 4 Wkly. Rep. 641, 88 E. C. L. 779 *supra*, this note].

12. Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349 [*affirming* 69 Fed. 414]; The Joseph Farwell, 31 Fed. 844. See also in this connection the cases cited *supra*, X, D, 5, h; X, D, 5, l, (I).

Where the different means constitute an unbroken series of operations to avert a common danger, in the course of which a part of the cargo is removed, with the expectation of raising the vessel and finishing the voyage, there is no separation. Sherwood *v.* Ruggles, 2 Sandf. (N. Y.) 55 (expense of lightering off cargo); Reliance Mar. Ins. Co. *v.* New York, etc., Mail Steamship Co., 77 Fed. 317, 23 C. C. A. 183 (expense of lightering off cargo); Coast Wrecking Co. *v.* Phœnix Ins. Co., 7 Fed. 236 (where cargo was saved by wreckers, and by them transported in different lots and different vessels to a place of safety, and there stored, such service was a continuous service, and all property saved was liable to contribute, although part of the service was performed after part of the cargo had been stored in a place of safety). So where the interests are temporarily separated, by unloading and storing the cargo in order to repair

danger, and not rescued from the common peril.[13] The delivery of a part of the cargo to its owner at any time before the peril has occurred will discharge it from liability to contribute for a subsequent loss;[14] but after measures have been commenced to avert a common peril there can be no such separation of any portion of the property from the residue as will exempt it from contribution to the entire loss.[15]

b. Termination of Adventure. Whilst the cargo remains on board a ship after her arrival at the port of destination, the maritime adventure is not terminated so as to absolve the owners of the cargo and the ship from mutual rights and liabilities.[16]

c. Transhipment. Expense of transhipment at a port of refuge is not allowed in general average where the master reships in order to earn the original freight,[17]

the vessel, and it is expected to reload the cargo and complete the voyage, then, even though by reason of unforeseen circumstances, as the inability to repair the vessel, and make her seaworthy again, this expectation is not realized, the entire expenses of saving and protecting the different interests, until the hope of reuniting them is abandoned, are chargeable to general average. The Joseph Farwell, 31 Fed. 844.

Where specie was landed and forwarded it was held that the owners were liable to contribute to the expenses incurred in securing the vessel and the rest of the cargo, after the landing of the specie. Bevan *v.* U. S. Bank, 4 Whart. (Pa.) 301, 33 Am. Dec. 64. So in Nelson *v.* Belmont, 21 N. Y. 36, a vessel on a voyage from New Orleans to Havre, and having a quantity of specie on board, caught on fire in the Gulf Stream and was towed or accompanied by another vessel to Charleston. The specie was put on board this vessel, but was subsequently taken back by the master, and deposited in a bank. The burning vessel was so much injured that she sank after she reached the wharf, and expenses were incurred to enable her to prosecute the voyage. General average contribution was claimed by the master from the owner of the specie, and it was held that the specie was liable upon the ground that the property was all the time under the control of the master, and liable to be taken on board again for the purpose of being carried to its port of destination. But under the stricter English rule see Royal Mail Steam Packet Co. *v.* Rio de Janeiro English Bank, 19 Q. B. D. 362, 57 L. J. Q. B. 31, 36 Wkly. Rep. 105. Where, after a stranding, and before salvage operations were begun, specie was sent back to the port of shipment, and thence sent forward by another vessel of the same line, and delivered to the consignees, such a separation was thereby effected from the rest of the adventure that the specie was not bound to contribute to the salvage expenses. Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349. And where specie was taken by the master and crew from a stranded vessel and buried on shore, and afterward stolen before it could be reclaimed, it was held that the expense incurred by the master in searching for the same should be apportioned on the money alone. Bridge *v.* Niagara Ins. Co., 1 Hall (N. Y.) 467.

Damage to goods taken off stranded vessel see *supra*, X, D, 5, h.

13. Nelson *v.* Belmont, 21 N. Y. 36.

14. Nelson *v.* Belmont, 21 N. Y. 36.

15. Nelson *v.* Belmont, 21 N. Y. 36; Wheeler *v.* Continental Ins. Co., 55 Hun (N. Y.) 612, 9 N. Y. Suppl. 142 (where the expense is incurred after the cargo is substantially all delivered, but before the vessel is in a place of safety); Bevan *v.* U. S. Bank, 4 Whart. (Pa.) 301, 33 Am. Dec. 64; Moran *v.* Jones, 7 E. & B. 523, 3 Jur. N. S. 663, 26 L. J. Q. B. 187, 5 Wkly. Rep. 503, 90 E. C. L. 523.

If the shipper takes his goods at the port of necessity he cannot thereafter resist an average claim on the ground that there was no delivery according to contract, there having been no unnecessary delay at the port of necessity. Sherwood *v.* Ruggles, 2 Sandf. (N. Y.) 55.

16. Whitecross Wire, etc., Co. *v.* Savill, 8 Q. B. D. 653, 4 Aspin. 531, 51 L. J. Q. B. 426, 46 L. T. Rep. N. S. 643, 30 Wkly. Rep. 588.

17. Lyon *v.* Alvord, 18 Conn. 66; Hugg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425; The L'Amerique, 35 Fed. 835; Roberts *v.* The Ocean Star, 20 Fed. Cas. No. 11,908; Smith *v.* Welsh, 22 Fed. Cas. No. 13,126; Svendsen *v.* Wallace, 10 App. Cas. 404, 5 Aspin. 453, 54 L. J. Q. B. 497, 52 L. T. Rep. N. S. 901, 34 Wkly. Rep. 369.

If a higher freight than that originally contracted for is charged for the transhipment the cargo is answerable for the increased freight, that is, the hire of the new vessel, but not for the old and new freight combined. Hugg *v.* Baltimore, etc., Smelting, etc., Co., 35 Md. 414, 6 Am. Rep. 425; The L'Amerique, 35 Fed. 835. And if the master of the new vessel will not deliver the cargo except upon payment of the freight and the indorsee of the bill of lading refuses to receive it and it is sold for less than the freight and expenses, there is nothing upon which general average can be charged. McLoon *v.* Cummings, 73 Pa. St. 98.

The ship-owner can earn only the original freight by transhipment. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L. ed. 186.

but the expense of transhipping the cargo, as a measure adopted to avoid a peril to the joint adventure, is a general average charge against the interests saved.[18]

3. Effect of Contract — a. In General. It has been held in some cases that the right to and liability for contribution in general average grows out of and depends upon a contract implied by law from the relation created by the contract of affreightment,[19] under which distinct properties of several persons are placed in a community of interest in a joint adventure,[20] while other authorities hold that the right to and liability for contribution in general average is not based upon the contract of carriage, but depends upon natural justice and an equity arising out of the relation of the parties,[21] and that the law will imply a contract from the relation of the parties for the purpose of providing a remedy.[22]

b. Exemption From Liability. The parties to a shipping contract may, by clearly expressed terms, enlarge or limit the carrier's liability in respect to general average;[23] but it has been held that stipulations exempting the carrier from damages or losses arising from specified causes do not affect his liability in general average, such provisions relating to the duties of carriage.[24] It has also been held that a stipulation in a bill of lading providing that in the event of danger arising

18. Mitchell Transp. Co. *v.* Patterson, 22 Fed. 49. In Heyliger *v.* New York Fireman Ins. Co., 11 Johns. (N. Y.) 85, a ship bound for New York was stranded on the coast of New Jersey, and in the effort to save the ship and cargo, lighters were procured; the ship was lost, but the cargo was saved, and sent to New York in the lighters, and it was held that the cost of the lighters was chargeable in general average, it being an expense incurred for the common benefit, although it does not appear that the item of transportation in the lighters was itself considered a proper charge.

19. Ralli *v.* Troop, 157 U. S. 386, 15 S. Ct. 657, 39 L. ed. 742; The John Perkins, 13 Fed. Cas. No. 7,360 [*citing* to the early conception Pothier Traite des Contrats de Louages Mar. pt. 2, art. Prelim., of Pardessus, Droit Com. pt. 3, tit. 4, c. 4, § 2]; Anglo-Argentine Live Stock, etc., Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 8 Aspin. 595, 4 Com. Cas. 281, 68 L. J. Q. B. 900, 81 L. T. Rep. N. S. 296, 15 T. L. R. 472, 48 Wkly. Rep. 64; Wright *v.* Marwood, 7 Q. B. D. 62, 4 Aspin. 451, 50 L. J. Q. B. 643, 45 L. T. Rep. N. S. 297, 29 Wkly. Rep. 673.

20. See Whitteridge *v.* Norris, 6 Mass. 125.

21. *Connecticut.*— Slater *v.* Hayward Rubber Co., 26 Conn. 128.

Massachusetts.— Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436.

Pennsylvania.— Nimick *v.* Holmes, 25 Pa. St. 366, 64 Am. Dec. 710.

United States.— Hobson *v.* Lord, 92 U. S. 397, 404, 23 L. ed. 613; Fowler *v.* Rathbone, 12 Wall. 102, 114, 20 L. ed. 281; The Star of Hope, 9 Wall. 203, 228, 19 L. ed. 638; The Eagle, 8 Wall. 15, 19 L. ed. 365; McAndrews *v.* Thatcher, 3 Wall. 347, 366, 18 L. ed. 155; Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349; The Roanoke, 59 Fed. 161, 8 C. C. A. 67; Sonsmith *v.* The J. P. Donaldson, 21 Fed. 671 [*reversed* on other grounds in 167 U. S. 599, 17 S. Ct. 951, 42 L. ed. 292]; Sturgis *v.* Cary, 23 Fed. Cas. No. 13,573, 2 Curt. 382.

England.— Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655.

A stipulation by consignees to pay the average on goods is a personal obligation, not binding on the owners, and does not, without satisfaction, discharge the owner from contribution. Eckford *v.* Wood, 5 Ala. 136.

22. The John Perkins, 13 Fed. Cas. No. 7,360.

Owners of cargo are liable on an implied promise for contribution in general average. Eckford *v.* Wood, 5 Ala. 136; Wellman *v.* Morse, 76 Fed. 573, 22 C. C. A. 318; The Congress, 6 Fed. Cas. No. 3,099, 1 Biss. 42, promise implied upon the principles of the common-law courts, not by the maritime law which gives the lien.

23. Fowler *v.* Rathbone, 12 Wall. (U. S.) 102, 2 L. ed. 281; The Bodo, 156 Fed. 980; The Santa Ana, 154 Fed. 800, 84 C. C. A. 312 (*dictum*); Hazleton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210; The Enrique, 7 Fed. 490, 5 Hughes 275 (efficacy of exempting owners of ship from contribution to loss arising by jettison of cattle, thrown overboard because during a prolonged storm they had got loose and were imperiling the ship). De Hart *v.* Compania, etc., [1903] 1 K. B. 109, 9 Aspin. 345, 8 Com. Cas. 42, 72 L. J. K. B. 64, 87 L. T. Rep. N. S. 716, 19 T. L. R. 16, 51 Wkly. Rep. 318 [*affirmed* in [1903] 2 K. B. 503, 9 Aspin. 454, 8 Com. Cas. 314, 72 L. J. K. B. 818, 87 L. T. Rep. N. S. 154, 19 T. L. R. 642, 52 Wkly. Rep. 36]; Stewart *v.* West India, etc., Steamship Co., L. R. 8 Q. B. 362, 1 Aspin. 528, 42 L. J. Q. B. 191, 28 L. T. Rep. N. S. 742, 21 Wkly. Rep. 953; Harris *v.* Scaramanga, L. R. 7 C. P. 481, 1 Aspin. 339, 41 L. J. C. P. 170, 26 L. T. Rep. N. S. 797, 20 Wkly. Rep. 777; Simonds *v.* White, 2 B. & C. 805, 4 D. & R. 375, 2 L. J. K. B. O. S. 159, 26 Rev. Rep. 560, 9 E. C. L. 348, 107 Eng. Reprint 582; 5 Valroger Droit Maritime 9, 4 Desjardin Droit Maritime 121, 122.

Deck cargo see *supra*, X, D, 5, i, (II).

24. Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436; The Santa

from faults in navigation the cargo owner should nevertheless contribute to expenses incurred to save the joint interests from common peril is invalid.[25]

F. Adjustment and Enforcement — 1. In General. It is the duty of the master to cause an average adjustment to be made[26] and to hold the cargo until the amount payable by each contributor is paid or secured.[27]

2. Place and Time of Adjustment. The place of adjustment of general average is a question of convenience rather than of theory or duty.[28] Formerly it was the practice to have it prepared at the port of destination;[29] but when the voyage was broken up and ended and a final separation between vessel and cargo had taken

Ana, 154 Fed. 800, 84 C. C. A. 312; The Roanoke, 59 Fed. 161, 8 C. C. A. 67; Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655; Schmidt *v.* Royal Mail Steamship Co., 4 Aspin. 217 note, 45 L. J. Q. B. 646; Crooks *v.* Allan, 5 Q. B. D. 38, 4 Aspin. 216, 49 L. J. Q. B. 201, 41 L. T. Rep. N. S. 800, 28 Wkly. Rep. 304.

Deck cargo.—A provision in a charter-party for the carriage of a deck cargo at full freight "at merchants risk" was held not to exclude the right of the charterer to general average contribution from the ship-owner in respect of deck cargo shipped by the charter. Burton *v.* English, 12 Q. B. D. 218, 5 Aspin. 187, 53 L. J. Q. B. 133, 49 L. T. Rep. N. S. 768, 32 Wkly. Rep. 655.

The Harter Act does not apply to a charter of a ship to be "fitted with shifting boards and bulkheads . . . to be done by owner's agents, but at charterer's expense," so as to permit the owner to recover a general average expense caused by insufficient fittings. Hine *v.* New York, etc., Co., 68 Fed. 920 [*affirmed* in 73 Fed. 852, 20 C. C. A. 63].

The right to call at any port, under a provision in the bill of lading, does not relieve the vessel of the expense of putting into a port of refuge in consequence of taking an inadequate coal supply. Hurlbut *v.* Turnure, 81 Fed. 208, 26 C. C. A. 335.

25. New York, etc., Mail Steamship Co. *v.* Ansonia Clock Co., 139 Fed. 894 (holding that the Harter Act does not render valid a contract which entitles the ship-owner to share in general average made necessary by negligence in navigation); The Jason, 178 Fed. 414.

In England a contrary rule prevails. Milburn *v.* Jamaica Fruit Importing, etc., Co., [1900] 2 Q. B. 540, 9 Aspin. 122, 5 Com. Cas. 346, 69 L. J. Q. B. D. 860, 83 L. T. Rep. N. S. 321, 16 T. L. R. 515; The Carron Park, 15 P. D. 203, 6 Aspin. 543, 59 L. J. P. D. & Adm. 74, 63 L. T. Rep. N. S. 356, 39 Wkly. Rep. 191.

26. Gillett *v.* Ellis, 11 Ill. 579.

Provision for designation of adjuster by insurer.— In Hazleton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210, it is held that where the policy provides that it is "subject to the usages and regulations of the ports of New York on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided for, to be stated by a competent adjuster of marine losses designated by the insurers," it is to be construed only to refer to the manner of making the adjustment when liability exists, and does not control the question of the extent of the liability of the underwriter upon his contract; and where the underwriter had ample notice of the loss, and neglected or refused to designate an adjuster, he cannot object that the adjuster who made the general average was not designated by the company.

27. Gillett *v.* Ellis, 11 Ill. 579; Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436; Heye *v.* North German Lloyd, 33 Fed. 60. See also *infra*, X, F, 8.

Discharge of cargo to permit inspection.— Cargo owners are entitled to an opportunity to inspect the cargo for the purpose of determining its contributory value, so that practically a discharge of the cargo is necessary to enable the owner of the vessel to collect the amount due for general average. Wellman *v.* Morse, 76 Fed. 573, 22 C. C. A. 318.

28. The Eliza Lines, 102 Fed. 184 [*affirmed* in 114 Fed. 307, 52 C. C. A. 195 (*reversed* on other grounds in 199 U. S. 119, 26 S. Ct. 8, 50 L. ed. 115)].

No implied condition as to place of adjustment.—In Wavertree Sailing Ship Co. *v.* Love, [1897] A. C. 373, 8 Aspin. 276, 66 L. J. P. C. 77, 76 L. T. Rep. N. S. 576, 13 T. L. R. 419, it was held that where the parties to an average bond agreed to pay their proper and respective proportions of any general average charges to which they might be liable, and forthwith to furnish to the captain or owners of the ship a correct account and particular of the value of the goods delivered to them respectively, in order that any such general average charges might be ascertained and adjusted in the usual manner, there was no implied condition to employ an average stater residing at the port of discharge.

29. Thornton *v.* U. S. Insurance Co., 12 Me. 150; Loring *v.* Neptune Ins. Co., 20 Pick. (Mass.) 411; Hobson *v.* Lord, 92 U. S. 397, 23 L. ed. 613; Dalglish *v.* Davidson, 5 D. & R. 6, 27 Rev. Rep. 519, 16 E. C. L. 229.

If the vessel is abandoned and the cargo is sent to destination the adjustment is ordinarily made at that port. McLoon *v.* Cummings, 73 Pa. St. 98; Hobson *v.* Lord, 92 U. S. 397, 23 L. ed. 613; Olivari *v.* Thames, etc., Mar. Ins. Co., 37 Fed. 894.

The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the ship-owner and the owner of cargo, warrant an average adjustment at the intermediate port. Hill *v.* Wilson, 4 C. P. D. 329, 4 Aspin. 198, 48 L. J. C. P. 764, 41 L. T. Rep. N. S. 412.

place, it was common practice to have it made up at the port where the adventure came to an end.[30] In more recent practice the adjustment is prepared at whatever place the ship-owner, whose duty it is to have it made, considers most convenient. The place where it is made is unimportant, provided it is prepared within a reasonable time and according to the laws and usages which prevail at the time and place where the community of interest ends, at the port of destination if the voyage is completed; at the place of termination of the adventure if the voyage is broken up.

3. What Law Governs. Ordinarily the average is computed and adjusted according to the law of the port of discharge.[31] When the voyage is broken up and abandoned, the adjustment should be made according to the law prevailing at the port where the adventure is actually terminated, even though no demand for an adjustment may have been made there.[32] The general maritime law governs, so far as it determines the rules of apportionment, where the parties have bound themselves for an adjustment in accordance with the laws and usage of a state in which there are no statutes or practice under them different from the general maritime law of the country but they may contract for the application of special rules or usages.[33]

4. Basis and Mode of Adjustment — a. In General. When a general average sacrifice or expense is incurred, the owners of the several interests in the joint adventure are bound to make contribution in the proportion of the value of their interests.[34] The whole law on the subject is founded on the principle that the loss to the individual whose property is sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand, and the benefit derived on the other.[35] The values at destination afford the proper

30. Loring *v.* Neptune Ins. Co., 20 Pick. (Mass.) 411; McLoon *v.* Cummings, 73 Pa. St. 98; National Bd. of Mar. Underwriters *v.* Melchers, 45 Fed. 643. The place where the average shall be stated is always dependent, more or less, on accidental circumstances, affecting not the technical termination of the voyage but the actual and practical closing of the adventure. Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417; Wavetree Sailing-Ship Co. *v.* Love, [1897] A. C. 373, 8 Aspin. 276, 66 L. J. P. C. 77, 76 L. T. Rep. N. S. 576, 13 T. L. R. 419.

31. Thornton *v.* U. S. Insurance Co., 12 Me. 150; Loring *v.* Neptune Ins. Co., 20 Pick. (Mass.) 411; Minor *v.* Commercial Union Assur. Co., 58 Fed. 801; National Bd. of Mar. Underwriters *v.* Melchers, 45 Fed. 643; Olivari *v.* Thames, etc., Mar. Ins. Co., 37 Fed. 894; Sturgess *v.* Cary, 23 Fed. Cas. No. 13,572, 2 Curt. 59; Wavetree Sailing-Ship Co. *v.* Love, [1897] A. C. 373, 8 Aspin. 276, 66 L. J. P. C. 77, 76 L. T. Rep. N. S. 576, 13 T. L. R. 419; Simonds *v.* White, 2 B. & C. 805, 4 D. & R. 375, 2 L. J. K. B. O. S. 159, 26 Rev. Rep. 560, 9 E. C. L. 348, 107 Eng. Reprint 582; Dalglish *v.* Davidson, 5 D. & R. 6, 27 Rev. Rep. 519, 16 E. C. L. 229.

32. National Bd. of Mar. Underwriters *v.* Melchers, 45 Fed. 643.

Where the voyage is interrupted without right by the charterers the court may properly direct the adjustment to be made in accordance with the customs of the port where the voyage actually terminated, and where the adjustment is in fact made; the question of what custom shall be adopted being one of convenience, rather than of theory. The Eliza Lines, 102 Fed. 184.

Presumption.—It will be presumed that the laws and usages of the port of disaster and those where the adjustment is made are the same in the absence of averment and proof to the contrary. Olivari *v.* Thames, etc., Mar. Ins. Co., 37 Fed. 894.

33. The L'Amerique, 35 Fed. 835, holding that under a bond providing for such adjustment the cargo-owner might inquire whether the rule of apportionment adopted was in accordance with the maritime law.

Contract for foreign custom, custom of Lloyds, or usage of foreign port.— If there be an agreement between the parties that general average shall be payable according to foreign statement (De Hart *v.* Campania, etc., (1903) 1 K. B. 109, 9 Aspin. 345, 8 Com. Cas. 42, 72 L. J. K. B. 64, 87 L. T. Rep. N. S. 716, 19 T. L. R. 16, 51 Wkly. Rep. 318 [*affirmed* in (1903) 2 K. B. 503, 9 Aspin. 454, 8 Com. Cas. 314, 72 L. J. K. B. 818, 87 L. T. Rep. N. S. 154, 19 T. L. R. 642, 52 Wkly. Rep. 36]); or the custom of Lloyds (Stewart *v.* West India, etc., Steamship Co., L. R. 8 Q. B. 362, 1 Aspin. 528, 42 L. J. Q. B. 191, 28 L. T. Rep. N. S. 742, 21 Wkly. Rep. 953); or the usages of New York (Fowler *v.* Rathbone, 12 Wall. (U. S.) 102, 20 L. ed. 281; Hazleton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210); or the York Antwerp rules (De Hart *v.* Campania, etc., *supra*), the adjustment must be prepared according to the agreement and when so prepared is binding on them.

34. Meeker *v.* Klemm, 11 La. Ann. 104; Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436; McAndrews *v.* Thatcher, 3 Wall. (U. S.) 347, 18 L. ed. 155.

35. Fletcher *v.* Alexander, L. R. 3 C. P. 375, 37 L. J. C. P. 193, 18 L. T. Rep. N. S. 432, 16 Wkly. Rep. 803.

basis for contribution, but in the absence of other evidence, the values may be taken as those given in policies of insurance covering the property,[36] and in invoices and bills of lading.[37]

b. As to Cargo. In computing contributory values for the purpose of a general average adjustment the value of the cargo is taken as of the time of its arrival at the port of destination,[38] and property lost is estimated at the price it would have brought at that port.[39] If the goods are sold at the place to which the apportionment relates, the amount of the proceeds is the basis on which their value is fixed,[40] and if damaged goods are sold the difference between the sales and the valuation if sound is the amount to be allowed.[41] In the absence of better proof the damage to the cargo to be allowed for may be ascertained by a comparison of the proceeds of sale with the invoice cost,[42] or if the vessel has arrived at her port of destination, with its value at such port.[43] If the ship is unable to return to port or to reach an intermediate port, the cargo contributes at its invoice value, deducting therefrom salvage and other necessary expenses incurred in consequence of the wreck.[44] In case of total loss of the ship voluntarily stranded for the safety of the cargo, all the property exposed to the risk must contribute, and be contributed for at its value, when the sacrifice was made.[45] So in the case of jettison the value of the goods thrown overboard is taken at the prime cost or original value if the vessel does not arrive, or at their value at the port of destination if she does arrive. The latter rule is inapplicable where the article is not at the time of its jettison in the perfect state in which it is to be delivered.[46]

36. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638, value of ship as given in policy, less reasonable amount for deterioration.

When the value so given is disputed and discredited by evidence creating a reasonable probability of its incorrectness, it is held that it cannot be taken as an arbitrary basis. Meeker *v.* Klemm, 11 La. Ann. 104; Wheeler *v.* Curtis, 11 Wend. (N. Y.) 653.

Only auxiliary evidence.— It has been held, however, that while, as between the parties to the policy, the value of the vessel in the policy may be taken, as against cargo owners such evidence is only auxiliary and the value must be established in the ordinary way. Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. Nos. 9,981, 9,982, Olcott 89, 157.

37. Tudor *v.* Macomber, 14 Pick. (Mass.) 34; Mutual Safety Ins. Co. *v.* Cargo of The George 17 Fed. Cas. Nos. 9,981, 9,982, Olcott 89, 157.

38. Gillett *v.* Ellis, 11 Ill. 579; Lee *v.* Grinnell, 5 Duer (N. Y.) 400; Barnard *v.* Adams, 10 How. (U. S.) 270, 13 L. ed. 417; The Eliza Lines, 102 Fed. 184; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,017, 2 Story 173. But see Leavenworth *v.* Delafield, 1 Cai. (N. Y.) 573, 2 Am. Dec. 201.

As against lender on respondentia.—Where the parties to a respondentia bond agree that the lender "shall be liable to average, and entitled to the benefit of salvage, in the same manner as underwriters on a policy of insurance, according to the usages and practices of the city of P.," the borrower is not entitled to calculate an average loss on the whole amount of the money loaned and the marine interest, but only on the cost and charges of the goods on board, and the premium of insurance. Gibson *v.* Philadelphia Ins. Co., 1 Binn. (Pa.) 405. See also Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50. If the vessel is forced to return to her loading port, and the average is immediately adjusted, the goods only contribute according to the invoice price. Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

39. Gillett *v.* Ellis, 11 Ill. 579.

Profits on specie to be invested in a return cargo are not allowed. The Mary, 16 Fed. Cas. No. 9,189, 1 Sprague 51.

40. Lee *v.* Grinnell, 5 Duer (N. Y.) 400; Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. No. 9,981, Olcott 89; Richardson *v.* Nourse, 3 B. & Ald. 237. But if there is no sale at the port of disaster the value at the place of shipment controls. Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. No. 9,981, Olcott 89.

When the cargo was injured and sold the prices may be taken as a fair test of the value of what was saved. Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

If there is no market at port of destination, at which the ship arrives, and she conveys the cargo to another point at the instance of the owners, the price obtained at the latter point, less the charges and expenses, is taken in estimating liability. Wheaton *v.* China Mut. Ins. Co., 39 Fed. 879.

41. Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

42. Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

43. Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

44. Lee *v.* Grinnell, 5 Duer (N. Y.) 400.

45. Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. No. 9,982, Olcott 157.

46. Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. Nos. 9,981, 9,982, Olcott 89, 157; Rogers *v.* Mechanics' Ins. Co., 20 Fed. Cas. No. 12,017, 2 Story 173. And anciently, it is said, the usage was to take the value of the goods jettisoned and those liable to contribution at the prime cost when

c. As to Vessel. The value of the ship is to be taken as it exists at her destination if she arrives, otherwise as it was at her port of departure, making reasonable allowance for wear and tear on the voyage up to the time of the disaster.[47] The owners contribute according to her value and the net amount of her earnings for the voyage.[48] If the ship has encountered particular average damage that will be deducted from her value just before the general average sacrifice took place,[49] and if the voyage is terminated at an intermediate port because of injuries sustained by the cargo, the charges of repairing the vessel subsequently may be referred to for the purpose of determining the value of the injuries sustained by her for the common benefit.[50] The owners of a cargo being liable to contribute in general average for masts, spars, rigging, etc., cut away for the purpose of saving the vessel and cargo, the value of such material should be estimated as if it had been recovered from the sea and stowed in safety on board the vessel.[51]

d. As to Freight — (i) *In General.* The cargo owners contribute according to the value of their property saved at the port of delivery after deducting freight due thereon.[52] The cargo lost is taken at its value less the amount of

the accident happened before the voyage was half performed. Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50.

Where the ship returns home the actual price of replacing the goods thrown overboard, or, if they cannot be replaced, the cost price, including shipping charges and premium of insurance, should be the rule by which to estimate their value. Tudor *v.* Macomber, 14 Pick. (Mass.) 34.

47. Gray *v.* Waln, 2 Serg. & R. (Pa.) 229, 7 Am. Dec. 642 (deterioration and expense of carrying vessel to place of stranding); The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638; Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. Nos. 9,981, 9,982, Olcott 89, 157.

If the ship has been repaired before her arrival at the termination of her voyage on account of damage sustained by perils of the sea, her value will be taken as her worth before the repairs were made. The Star of Hope, 9 Wall. (U. S.) 203, 19 L. ed. 638.

Value at the time stranding is determined upon is taken as her value without regard to her then peril, when the cargo is saved and the vessel goes to pieces. Eight Hundred Bales of Cotton, 8 Fed. Cas. No. 4,319, 8 Blatchf. 221.

Sale on execution.— The sum for which a vessel is sold on execution must be accepted as its true value in a suit for contribution on a claim for general average, unless the claimant caused it to be sold for less than its value. Backus *v.* Coyne, 45 Mich. 584, 8 N. W. 694.

That an arbitrary percentage of the original cost is sometimes adopted see Leavenworth *v.* Delafield, 1 Cai. (N. Y.) 573, 2 Am. Dec. 201.

48. Gillett *v.* Ellis, 11 Ill. 579.

Value at port of refuge plus amount made good.— In The Eliza Lines, 102 Fed. 184, it is held that in computing contributory values for the purpose of a general average adjustment it is not necessary that they should all be taken at the same time and place, but, according to the custom of Boston, the value of the vessel is obtained by taking her value at the port of refuge, and adding to it the benefit she received from the general average.

Insurance should not be added to what was saved, for the purpose of increasing the fund to be distributed, not being a part of the owner's interest in the ship. Deming *v.* The Rapid Transit, 52 Fed. 320 [*following* Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. C. 612, 32 L. ed. 1017; The Great Western, 118 U. S. 520, 6 S. Ct. 1172, 30 L. ed. 156; The Scotland, 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153; The City of Norwich, 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134].

49. Henderson *v.* Shankland, [1896] 1 Q. B. 525, 8 Aspin. 136, 65 L. J. Q. B. 340, 74 L. J. Q. B. 340, 74 L. T. Rep. N. S. 238, 44 Wkly. Rep. 401, holding that where the ship has been sold as a constructive total loss, the value of such ship is her value at the time immediately preceding the general average sacrifice in respect of which contribution is to be made, and such value is to be ascertained by deducting from the value of the ship at the time she left port the amount which it would have cost to repair the particular average damage, and also the amount for which she was sold as a constructive total loss; but that where no repairs have in fact been done, the ship-owners are not entitled to the one third "new for old" allowance in estimating the value of a ship, for the purpose of ascertaining the amount to be contributed to in such general average. See also as to deducting cost of repairs or particular average charges. The Eliza Lines, 102 Fed. 184.

50. The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358 note].

If the vessel is sold on account of injuries to herself by perils of the sea, the amount of her value is the amount she sold for. Bell *v.* Smith, 2 Johns. (N. Y.) 98.

51. Teetzman *v.* Clamageran, 2 La. 195, 22 Am. Dec. 127; May *v.* Keystone Yellow Pine Co., 117 Fed. 287 (rudder partly torn loose in a gale and subsequently cut away); The Mary Gibbs, 22 Fed. 463.

52. Gillett *v.* Ellis, 11 Ill. 579.

freight thereon.[53] When freight is not payable upon goods not delivered, the owner of goods jettisoned must deduct any expense from their value which the jettison has saved him, and therefore freight is deducted;[54] but in that case the whole freight on the jettisoned goods is allowed to the master.[55] On the other hand, where part of the cargo has been sacrificed, contribution is made to the vessel on total freight lost, which also contributes,[56] and if the freight has been paid in advance or secured absolutely, or where the consignee has become bound for full payment, although only a part of the cargo is delivered in consequence of a lawful jettison, the consignee is not saved that item of expense and is not disallowed freight, but may prove both the value of the goods and freight paid or secured.[57] The cost of earning the freight saved is deducted,[58] and under rules adopted at some ports the contributory value of freight has been taken at a certain percentage of that contracted to be paid.[59]

(II) *ROUND VOYAGE.* Where one gross sum is to be paid under charter-party as freight for a round voyage out and home, and a general average sacrifice occurs on the outward voyage, the whole freight must contribute; [60] so also where there is a continuous voyage, under a charter-party which binds the vessel to go

Deduction of particular average.— No deduction is made from freight charged against cargo on account of particular average charges to which the cargo has been subjected. The Eliza Lines, 102 Fed. 184.

As regards contributory values on the other hand, the charterer, as under the European codes, although entitled to prove his claim for contribution for both the goods and the freight, is assessed only upon the foreign value less the freight, for the reason that at the time of the jettison the entire freight was at the risk of the ship and not of the respondent, as it was not then certain that the ship would arrive, or that any freight would ever become chargeable against the charterer. Christie *v.* Davis Coal, etc., Co., 95 Fed. 837.

53. Gillett *v.* Ellis, 11 Ill. 579.

54. Christie *v.* Davis Coal, etc., Co., 95 Fed. 837.

55. Christie *v.* Davis Coal, etc., Co., 95 Fed. 837.

56. Columbian Ins. Co. *v.* Ashby, 13 Pet. (U. S.) 331, 10 L ed. 186; Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. No. 9,982, Olcott 157. See also Pirie *v.* Middle Dock Co., 4 Aspin. 388, 44 L. T. Rep. N. S. 426. And see *supra*, X, D, 5, n.

Voyage voluntarily abandoned.—Where a voyage is voluntarily abandoned at a port of refuge, the part of the cargo which was saved being sold because it was not of sufficient value to warrant the continuance of the voyage, full freight should not be allowed, but only freight earned on the part of the cargo which was jettisoned, and that value should be made contributable to the general average. The Ann D. Richardson, 1 Fed. Cas. No. 410, Abb. Adm. 499 [*affirmed* in 1 Fed. Cas. No. 411, 1 Blatchf. 358 note].

Where the vessel was sold in admiralty proceedings after she was abandoned and then saved by salvors, it was held that freight on cargo jettisoned prior to the abandonment should contribute as an interest at risk. The Nathaniel Hooker, 17 Fed. Cas. No. 10,032, 3 Sumn. 542.

57. Christie *v.* Davis Coal, etc., Co., 95 Fed. 837.

58. Leavenworth *v.* Delafield, 1 Cai. (N. Y.) 573, 2 Am. Dec. 201; Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429; Rathbone *v.* Fowler, 20 Fed. Cas. No. 11,584, 6 Blatchf. 294.

59. Leavenworth *v.* Delafield, 1 Cai. (N. Y.) 573, 2 Am. Dec. 201 (where it was held that freight should be taken at one half of that contracted to be paid); Humphreys *v.* Union Ins. Co., 12 Fed. Cas. No. 6,871, 3 Mason 429 (one third deducted); Rathbone *v.* Fowler, 20 Fed. Cas. No. 11,584, 6 Blatchf. 294 [*affirmed* in 12 Wall. 102, 20 L. ed. 281] (construing an average bond in which consignees agreed to pay, provided the losses and expenses were adjusted in accordance with the established usages and laws of New York, to render it proper to take one half of the gross freight agreed to be paid for the voyage as the contributory value of the freight).

By statute.— In California it is provided by statute that freight should be valued at "one half the amount due on delivery." Minor *v.* Commercial Union Assur. Co., 58 Fed. 801, holding that an agreement that an adjustment, in general average, shall be made on the "following basis," followed by a statement of the amount to be contributed for the valuation of the ship after collision, and the valuation of the freight and the cargo, does not mean that the freight shall be assessed on its gross valuation, but merely that such valuation shall be taken as the foundation upon which the adjustment shall be made according to law; and if the law applicable prescribes that the freight shall be assessed at one half its gross value, as in California, this will prevail.

The more ancient method is preferred, that is, to estimate freight at its gross value both when contributed to and when contributory. Mutual Safety Ins. Co. *v.* Cargo of The George, 17 Fed. Cas. No. 9,982, Olcott 157.

60. The Mary, 16 Fed. Cas. No. 9,188, 1 Sprague 17.

out to a port of loading, load there, and return with a cargo from that port, which is the only cargo that is carried for a freight, and the freight is only payable upon the safe delivery of that cargo, the charter freight must under English law be taken into consideration as a contributing interest where the loss occurs on the outward voyage.[61]

e. Amount Paid in Limited Liability Proceedings. A distribution under a decree in limited liability proceedings, and a general average adjustment, relate to different subjects, and the amount paid under the decree is properly reapportioned in general average, because the adjustment is to ascertain the contribution which must be made by each toward the losses of all.[62]

5. Interest. Interest may be allowed upon the amount of a general average contribution.[63]

6. Validity and Effect of Adjustment. The statement of average adjusters in making up an average pursuant to average bonds is not an award made upon a submission to arbitrators, and, as such, conclusive.[64] But an average adjustment will generally be taken as the proper basis for determining the rights of the parties in subsequent litigation between them, in the absence of fraud, error, or unfairness.[65] It will be conclusive between the owner of the ship and the owner of the cargo to the extent that the former will be bound to deliver the goods upon payment or tender according to the adjustment.[66] When a case of general average is settled in a foreign port where it should be settled, the adjustment will be conclusive as to the items as well as the apportionment thereof, upon the various interests, although it may be different from that which the law of the home port would have required.[67]

7. Lien. When a general average sacrifice is made or expense incurred, the property saved is subject to a lien for contribution.[68] The master may retain the

61. Steamship Carisbrook Co. *v.* London, etc., Mar., etc., Ins. Co., [1902] 2 K. B. 681, 9 Aspin. 332, 7 Com. Cas. 235, 71 L. J. K. B. 978, 87 L. T. Rep. N. S. 418, 18 T. L. R. 783, 50 Wkly. Rep. 691 (where the outward voyage is made in ballast); Moran *v.* Jones, 7 E. & B. 523, 26 L. J. Q. B. 187, 5 Wkly. Rep. 503, 90 E. C. L. 523; Williams *v.* London Assur. Co., 1 M. & S. 318, 14 Rev. Rep. 441, 105 Eng. Reprint 119.

62. Pacific Mail Steamship Co. *v.* New York, etc., Min. Co., 74 Fed. 564, 20 C. C. A. 349, holding that the divided proceeds of the ship diminish the losses, and must be taken into account, as they would have been if they had not been paid out, but were in the registry of the court awaiting payment.

63. Sims *v.* Willing, 8 Serg. & R. (Pa.) 103, from time money was advanced upon which the average arose.

Specie shipped for purchase of return cargo being sold by the master on the outward voyage to make repairs at a port of refuge, the shipper will be allowed interest from the time the specie could have been used at the outward port, and not profits that might have been made. The Mary, 16 Fed. Cas. No. 9,189, 1 Sprague 51.

64. The Santa Anna Maria, 49 Fed. 878; The Alpin, 23 Fed. 815; Wavetree *v.* Love, [1897] A. C. 373, 8 Aspin. 276, 66 L. J. P. C. 77, 76 L. T. R. N. S. 576, 13 T. L. R. 419. But see Richardson *v.* Nourse, 3 B. & Ald. 237. An adjustment and general average of loss made on the protest and representation of the master does not preclude the owner of cargo from showing non-liability of cargo to contribution because the loss was occasioned by the master's negligence. Chamberlain *v.* Reed, 13 Me. 357, 29 Am. Dec. 506.

65. Gillett *v.* Ellis, 11 Ill. 579.

A libellant seeking to enforce an adjustment cannot complain that a readjustment was not made where he asked for a readjustment only in the event that objections made by defendant to the validity of the award should be sustained and such objections were overruled. The Santa Ana, 154 Fed. 800, 84 C. C. A. 312.

66. Thornton *v.* U. S. Insurance Co., 12 Me. 150.

Upon liability on marine policy see Marine Insurance, 26 Cyc. 671.

67. *Maine.*— Thornton *v.* U. S. Insurance Co., 12 Me. 153.

Massachusetts.— Loring *v.* Neptune Ins. Co., 20 Pick. 411.

New York.— Strong *v.* New York Firemen Ins. Co., 11 Johns. 323.

Pennsylvania.— McLoon *v.* Cummings, 73 Pa. St. 98.

United States.— National Bd. of Mar. Underwriters *v.* Melchers, 45 Fed. 643; Peters *v.* Warren Ins. Co., 19 Fed. Cas. No. 11,034, 1 Story 463.

England.— Dalglish *v.* Davidson, 5 D. & R. 6, 27 Rev. Rep. 519, 16 E. C. L. 229.

See 44 Cent. Dig. tit. "Shipping," § 629.

In the case of fraud or gross mistake the rule that the parties are bound by an adjustment made at the port of destination does not apply. McLoon *v.* Cummings, 73 Pa. St. 98.

68. *Illinois.*— Gillett *v.* Ellis, 11 Ill. 579.

Maine.— Chamberlain *v.* Reed, 13 Me. 357, 29 Am. Dec. 506.

property saved until contribution is paid or secured.[69] The lien on cargo is dependent on possession and is lost by its delivery to the owner or consignee.[70] The lien is not necessarily lost as against a subsequent mortgagee by a delay in asserting the claim.[71]

8. EXACTING BOND OR SECURITY. The master may retain all property saved until the shares of the owners toward the average contribution are paid or secured.[72] The usual method of enforcing the lien for such contribution is by requiring a deposit of money or the execution of an average bond before delivery, the latter being the more common practice.[73] Parties who voluntarily avail themselves of such bonds to obtain possession are bound by the obligations so assumed;[74] but the bond should not require more than that the obligors shall pay their share of

Massachusetts.— Loring *v.* Neptune Ins. Co., 20 Pick. 411.

Missouri.— Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

United States.— Dupont de Nemours *v.* Vance, 19 How. 162, 15 L. ed. 584; Wellman *v.* Morse, 76 Fed. 573, 22 C. C. A. 318; The Dora, 34 Fed. 343; The Packet, 18 Fed. Cas. No. 10,654, 3 Mason 255; U. S. *v.* Wilder, 28 Fed. Cas. No. 16,694, 3 Sumn. 308.

England.— Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452; Hallett *v.* Bousfield, 18 Ves. Jr. 187, 11 Rev. Rep. 184, 34 Eng. Reprint 288.

See 44 Cent. Dig. tit. "Shipping," § 635.

Property of the United States is subject to such lien. U. S. *v.* Wilder, 28 Fed. Cas. No. 16,694, 3 Sumn. 308.

The lien continues as against assignees of the interests saved. Dike *v.* The St. Joseph, 7 Fed. Cas. No. 3,908, 6 McLean 573.

There is no lien on the ship for sums collected by the ship-owner from the owners of cargo saved, in behalf of the insurer of cargo jettisoned, but the lien of such insurer is limited to the ship's share as adjusted. The Allianca, 64 Fed. 871 [*affirmed* in 79 Fed. 989, 24 C. C. A. 676].

69. See *infra*, X, F, 8.

70. Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162, 15 L. ed. 584; Cutler *v.* Rae, 7 How. (U. S.) 729, 12 L. ed. 890; Beane *v.* The Mayurka, 2 Fed. Cas. No. 1,175, 2 Curt. 72; The Congress, 6 Fed. Cas. No. 3,099, 1 Biss. 42.

A qualified or conditional discharge of the cargo may be made so as to preserve the lien. Wellman *v.* Morse, 76 Fed. 573, 22 C. C. A. 318.

71. The Allianca, 64 Fed. 871 [*affirmed* in 79 Fed. 989, 25 C. C. A. 292], where the completion of a general average adjustment for a jettison was delayed two years, and the presentation of the claim against the vessel was further delayed by the loss of the bill of lading as a necessary voucher.

As against mortgage security substituted for maritime lien.— In Wood *v.* The Sallie C. Morton, 30 Fed. Cas. No. 17,962, 2 N. J. L. J. 301, it is held that libellants' claim for contribution may be lost by laches as against a mortgagee whose debt was a maritime lien before he waived it for a mortgage security.

72. *Alabama.*— Eckford *v.* Wood, 5 Ala. 136.

Illinois.— Gillett *v.* Ellis, 11 Ill. 579.

Missouri.—Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

United States.— U. S. *v.* Wilder, 28 Fed. Cas. No. 16,694, 3 Sumn. 308.

England.— Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452.

See 44 Cent. Dig. tit. "Shipping," § 624.

73. Cole *v.* Bartlett, 4 La. 130; Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714; The Santa Ana, 154 Fed. 800, 84 C. C. A. 312; Heye *v.* North German Lloyd, 33 Fed. 60.

The custom of requiring such a bond developed from the fact that when a rescued vessel arrives at destination, where the cargo ought to be delivered, the amount of contribution due from the different owners of the cargo cannot be ascertained at once, so that payment may be made before delivery. The amount due from each must be computed; and in order to retain to the ship-owner the benefit of his lien pending the computation and to allow the consignees to get their goods at once, an average bond is taken from the consignees, by which they agree to pay their several portions of the expense when ascertained according to the rules governing general average. Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

Where a shipment over various lines is not under a through bill of lading, and the different carriers do not constitute a connecting line by virtue of any traffic arrangement or association, the final carrier may demand of the consignee a general average bond required by a previous carrier without regard to the merits of the claim of such previous carrier. Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714. And where there was a privilege of reshipping, and the goods were damaged while in the possession of one of the connecting lines, making a general average necessary, such connecting carrier can hold the goods until the average contribution is paid or secured. The Morning Mail, 17 Fed. 545.

After an adjustment has been made the master is not bound to accept an average bond. The Water Witch's Cargo, 29 Fed. 159.

74. Morse *v.* Pomroy Coal Co., 75 Fed. 428 (holding that where a stranded vessel was rescued by other vessels, cargo owners who give a bond covering "losses and ex-

the general average for which they are legally liable, nor impose unreasonable terms or conditions which exclude the methods afforded by law for determining the existence and extent of liability,[75] nor can unreasonable conditions of a deposit be imposed.[76] A party is not precluded by the execution of a general average bond from defending against any general average liability.[77]

9. Effect of Payment. Money voluntarily paid upon a claim for general average cannot be recovered back;[78] but if money is paid under protest to the master in order to obtain possession of cargo held upon an unfounded claim of general average, it may be recovered back.[79]

10. Action or Suit to Enforce — a. Remedy and Jurisdiction. Even though general average may not depend upon contract,[80] yet from the relation of the parties to a common adventure the law will imply a contract for the purpose of affording a remedy.[81] Each owner of goods sacrificed has a claim against each of the owners of ship and cargo for *pro rata* contribution, which he may enforce by direct action[82] at law, the common-law courts having jurisdiction to enforce the promise by the owner of goods which is implied upon their delivery to him.[83] The ship-owner may also maintain an action against the cargo for contribution or may set up his claim by way of counter-claim to a claim for damage to the cargo.[84] If the master fails to perform the duty of retaining the cargo until the amount payable by each contributor is paid or secured, an action lies in favor of those entitled to contribution against the master, the ship, and her owners to recover the amount of the average.[85] Equity also has jurisdiction to

penses incurred or to be incurred, which may be a charge by way of general average or otherwise, and providing that claims for tug services or otherwise are subject to approval of an insurance company, or settled by arbitration to which they are a party for us," such owners are liable for their proportion of a sum which the owner of the vessel, upon a settlement approved by the insurance company, has paid to the owners of the rescuing vessels for their services); The John M. Chambers, 24 Fed. 383.

75. Conrad *v.* De Montcourt, 138 Mo. 311, 39 S. W. 805; Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714; Wollman *v.* Morse, 76 Fed. 573, 22 C. C. A. 318 (holding that cargo owners cannot require a provision for postponement of any suit against the sureties until the end of litigation with the consignees); Huth *v.* Lamport, 16 Q. B. D. 735, 5 Aspin. 593, 55 L. J. Q. B. 239, 54 L. T. Rep. N. S. 663, 34 Wkly. Rep. 386.

76. Huth *v.* Lamport, 16 Q. B. D. 735, 5 Aspin. 593, 55 L. J. Q. B. 239; 54 L. T. Rep. N. S. 663, 34 Wkly. Rep. 386.

77. Conrad *v.* De Montcourt, 138 Mo. 311, 39 S. W. 805 (showing that loss resulted from negligence); Berry Coal, etc., Co. *v.* Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714 (showing that loss resulted from negligence); Broadnax *v.* Cheraw, etc., R. Co., 157 Pa. St. 140, 27 Atl. 412 (unseaworthiness of vessel); Bowring *v.* Thebaud, 56 Fed. 520, 5 C. C. A. 640; The Nicanor, 40 Fed. 361.

78. Martin *v.* The Agathe, 71 Fed. 528; Phipps *v.* The Nicanor, 44 Fed. 504, where a marine protest, showing that the stranding of a vessel was caused by negligence, was open to the inspection of underwriters and there was no misrepresentation or concealment by the ship's owners or agents, and payment by the underwriters was held to be voluntary.

79. Chamberlain *v.* Reed, 13 Me. 357, 29 Am. Dec. 506; Martin *v.* The Agathe, 71 Fed. 528.

80. See *supra*, X, E, 3, a.

81. The John Perkins, 13 Fed. Cas. No. 7,360.

82. Strang *v.* Scott, 14 App. Cas. 601, 6 Aspin. 419, 59 L. J. P. C. 1, 61 L. T. Rep. N. S. 597, 38 Wkly. Rep. 452; Dobson *v.* Wilson, 2 Camph. 480, 14 Rev. Rep. 817, action by one shipper against another.

An action against the United States government will lie to recover its just proportion of a general average adjustment. Brown's Case, 15 Ct. Cl. 392; Cornell Steamboat Co. *v.* U. S., 130 Fed. 480 [*affirmed* in 137 Fed. 445, 69 C. C. A. 603 (*affirmed* in 202 U. S. 184, 26 S. Ct. 648, 50 L. ed. 987)].

Adjustment considered condition precedent to the maintenance of an action for a general average charge on a jettison see The Allianca, 64 Fed. 871 [*affirmed* in 79 Fed. 989, 25 C. C. A. 292]. But where a counter-claim of general average is set up against a claim for damage to cargo, it is not necessary that there should have been an adjustment. The Oquendo, 3 Aspin. 558, 38 L. T. Rep. N. S. 151.

83. Backus *v.* Coyne, 35 Mich. 5 [*overruling dictum* in Rossiter *v.* Chester, 1 Dougl. (Mich.) 154]; Birkley *v.* Presgrave, 1 East 220, 6 Rev. Rep. 256, 102 Eng. Reprint 86.

84. The Oquendo, 3 Aspin. 558, 38 L. T. Rep. N. S. 151.

85. Gillett *v.* Ellis, 11 Ill. 579; Marwick *v.* Rogers, 163 Mass. 50, 39 N. E. 780, 47 Am. St. Rep. 436; The Santa Ana, 154 Fed. 800, 84 C. C. A. 312; Heye *v.* North German Lloyd, 33 Fed. 60; Crooks *v.* Allan, 5 Q. B. D. 38, 4 Aspin. 216, 49 L. J. Q. B. 201, 41 L. T. Rep. N. S. 800, 28 Wkly. Rep. 304.

enforce a claim for contribution.[86] It is the most common practice to sue for contribution in admiralty which has general jurisdiction to entertain such claims.[87]

b. Parties. In an action to compel contribution, an objection that there are other owners subject to the claim cannot avail unless the plea discloses the omitted parties.[88]

c. Pleading and Proof. In an action to recover general average contribution, defendant should plead any matter which he relies upon to relieve him from liability;[89] and the burden of proving such defense rests upon him, as where the cargo owner seeks to escape contribution on the ground that the casualty was due to the master's negligence[90] or the unseaworthiness of the vessel.[91] But if it appears that the disaster was occasioned by a tardy response of the crew in working the ship, and that they were probably delayed by the fact that goods were stowed on the deck, the burden is on the master to show that the deck load

If the master pays their part of the contribution after he delivers the goods an implied assumpsit by the owners to reimburse him is raised. Eckford *v.* Wood, 5 Ala. 136.

Duty of charterer to proceed before separation of interests.— In Woods *v.* Olsen, 99 Fed. 451, 39 C. C. A. 595, the charterer of a steamship under a time charter, subchartered her, and upon her seizure as prize the charterer paid a draft drawn by the master, at the owner's request, for the amount of the expense incurred in procuring the ship's discharge, and it was held that the charterer, having neglected to have the expense apportioned between the ship, cargo, and freight until the contributing interests had been separated, could not recover the amount in a suit *in personam* against the owner.

86. Sturgis *v.* Cary, 23 Fed. Cas. No. 13,572, 2 Curt. 59, jurisdiction to take an account of a general average loss and decree contribution. See also Backus *v.* Coyne, 35 Mich. 5.

87. Dupont de Nemours *v.* Vance, 19 How. (U. S.) 162, 15 L. ed. 584.

The lien of a ship's agent for money advanced to pay her part of a general average charge is enforceable in admiralty by a proceeding *in rem*. The Dora, 34 Fed. 343. But see The Soblomsten, L. R. 1 A. & E. 293, 36 L. J. Adm. 5, 15 L. T. Rep. N. S. 393, 15 Wkly. Rep. 591.

Action on promise.— In Cutler *v.* Rae, 7 How. (U. S.) 729, 12 L. ed. 890, it was decided that when cargo subject to contribution in general average is delivered to the consignee, discharged of the maritime lien for such contribution, the maritime law does not, and the common law does, imply a promise to pay the contribution; and that hence an action on such implied promise is not a case of admiralty and maritime jurisdiction. But that case is considered to have been overruled by New England Mar. Ins. Co. *v.* Dunham, 11 Wall. (U. S.) 1, 20 L. ed. 90. See National Bd. of Mar. Underwriters *v.* Melchers, 45 Fed. 643; The San Fernando *v.* Jackson, 12 Fed. 341; Coast Wrecking Co. *v.* Phœnix Ins. Co., 7 Fed. 236.

Services performed by average adjusters, including expenses, disbursements, and charges incidental to ascertaining and adjusting the proportionate share chargeable to the cargo of the expense incurred in saving and discharging the cargo, and delivering it, are maritime in their nature; and an express contract for such services is a maritime contract, and cognizable in the admiralty. Coast Wrecking Co. *v.* Phœnix Ins. Co., 7 Fed. 236, 13 Fed. 127, 20 Blatchf. 557.

Admiralty jurisdiction generally see ADMIRALTY, 1 Cyc. 809 *et seq.*

88. Hennen *v.* Monro, 4 Mart. N. S. (La.) 449.

But in admiralty the court will not entertain jurisdiction in cases of general average, unless all the parties in interest are before it. The Congress, 6 Fed. Cas. No. 3,099, 1 Biss. 42.

Parties generally see PARTIES, 30 Cyc. 1.

Parties in admiralty see ADMIRALTY, 1 Cyc. 850 *et seq.*

Parties in equity see EQUITY, 16 Cyc. 181.

89. Schloss *v.* Heriot, 14 C. B. N. S. 59, 10 Jur. N. S. 76, 32 L. J. C. P. 211, 8 L. T. Rep. N. S. 246, 11 Wkly. Rep. 596, 108 E. C. L. 59, holding that a plea of unseaworthiness of the vessel should allege that the loss was caused thereby.

Want of consideration in action on bond.— In an action on a general average bond it may be shown that the vessel was unseaworthy under a plea of want of consideration. Cheraw, etc., R. Co. *v.* Broadnax, 109 Pa. St. 432, 1 Atl. 228, 58 Am. Rep. 733.

90. Gregory *v.* Orrall, 8 Fed. 287.

91. Broadnax *v.* Cheraw, etc., R. Co., 157 Pa. St. 140, 27 Atl. 412, in action on general average bond.

Presumptions.— In Broadnax *v.* Cheraw, etc., R. Co., 157 Pa. St. 140, 27 Atl. 412, it is held that if it is shown that shortly after the commencement of the voyage, the vessel, without encountering any stress of weather or any unusual perils of the sea, became so leaky as to be obliged to put into a port of refuge for repairs, the presumption then is that she was unseaworthy when she sailed, and the burden of proving the contrary is then on plaintiffs. But see Sherwood *v.* Ruggles, 2 Sandf. (N. Y.) 55. On the other hand where the general average bond contained a recital that the ship had "encountered strong winds and a heavy sea, which caused the vessel to labor severely," the libellant was entitled to a *prima facie* pre-

was not the cause of disaster.[92] The adjustment in general average, as has been pointed out in a previous section of this article, is not conclusive,[93] and when it is impeached the libellant is required to make out his case by a preponderance of the proof.[94]

XI. STATUTORY LIMITATION OF SHIP-OWNER'S LIABILITY.[95]

[EDITED BY J. PARKER KIRLIN, ESQ., OF THE NEW YORK BAR.]

A. Statutory Provisions — 1. THE ACTS OF 1851, 1854, AND 1886 CONSIDERED. In the absence of statute the owner's liability is not limited to the value of the vessel and freight earned.[96] But the liability of the owner of a vessel has been so limited in the United States by federal statutes, the most important being the act passed March 3, 1851,[97] which has been amended from time to time, the most

sumption that the ship was seaworthy at the commencement of the voyage. Franklin Sugar Refining Co. *v.* Funch, 73 Fed. 844, 20 C. C. A. 61.

Where there was no issue as to seaworthiness, on a question as to liability of cargo to contribute for damage to the ship caused by the breaking of her shaft, after repairs had once been made and towage declined, the crack in the shaft having appeared after encountering heavy weather, seaworthiness at the commencement of the voyage should be assumed. Van den Toorn *v.* Leeming, 70 Fed. 251 [*affirmed* in 79 Fed. 107, 24 C. C. A. 461].

That a certificate of the bureau veritas had just expired was held, under all the circumstances, not conclusive as to the seaworthiness of the vessel. Grace *v.* The Mauna Loa, 76 Fed. 829.

And a certificate of classification showing that the vessel had been classed as A No. 1, when built, for a period of seven years, and that such period had not expired when the voyage commenced, is admissible in evidence. Broadnax *v.* Cheraw, etc., R. Co., 157 Pa. St. 140, 27 Atl. 412.

Evidence showing seaworthiness see Sweeney *v.* Thompson, 39 Fed. 121.

92. The Governor Carey, 10 Fed. Cas. No. 5,645*a*, 2 Hask. 487.

If deck cargo is shown to have been properly stowed and respondent, who was the insurer of the hull, offers no proof that it could have been stowed there in a safer manner, he will be liable. Hazleton *v.* Manhattan Ins. Co., 12 Fed. 159, 11 Biss. 210.

93. See *supra*, X, F, 6.

Evidence of acquiescence. — In Sherwood *v.* Ruggles, 2 Sandf. (N. Y.) 55, it was held that in an action against a shipper it may be shown that he received a certain sum from his underwriters in full for his loss and average, as bearing upon his acquiescence in the adjustment.

94. The Santa Anna Maria, 49 Fed. 878.

95. **The origin, history, and development of the rule limiting liability** under both the United States and English statutes is treated at length in COLLISION, 7 Cyc. 383 *et seq.*

96. Malpica *v.* McKown, 1 La. 248, 20 Am. Dec. 279.

97. U. S. Rev. St. (1878) §§ 4282–4289 [U. S. Comp. St. (1901) pp. 2943, 2944].

The act provides (section 3) that the liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction by the master, officers, marines, passengers, or any other person or persons, of any property, goods or merchandise shipped or put on board of said ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, gained, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending (see Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585; Allen *v.* Mackay, 1 Fed. Cas. No. 228, 1 Sprague 219); and provides further (section 4) that if any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses, and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the same, for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act on the part of such owner or owners that he or they shall transfer his or their interest in such vessel and freight, for the benefit of said claimants, to the trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto therein, after which transfer all claims and proceedings against the owner or owners shall cease (see Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585). Section 6 provides that the charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the pro-

important amendments being those of June 19, 1886,[98] and June 26, 1884.[99] The English Merchant Shipping Act contains similar provisions, limiting the liability of ship-owners to an amount calculated at a specified number of pounds per ton of the vessel.[1] The act of 1851 had no retroactive effect,[2] nor had the amendment of 1886.[3] A state constitution prohibiting limitation of amount of recovery for injuries resulting in death cannot be set up against the federal acts limiting liability of the owner of a ship, including one used in inland navigation, to the value of his interest therein, for any injury by collision or any act done without his privity or knowledge.[4]

visions of this title relating to the limitations of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. See Thorp *v.* Hammond, 12 Wall. (U. S.) 408, 20 L. ed. 419. It was further originally provided in section 7 that the act should not apply to the owner or owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in river or inland navigation; but this provision was repealed by the amendment of June 19, 1886, which extended the operation of the act to all vessels used on lakes or rivers on any inland navigation. See *infra*, the following note.

98. 24 U. S. St. at L. 80, c. 421, § 4 [U. S. Comp. St. (1901) p. 2945].

This amendment provides that the act shall apply to all sea-going vessels and also to all vessels used on lakes or rivers or any inland navigation, incuding canal-boats, barges, and lighters.

99. 23 U. S. St. at L. 57, c. 121, § 18 [U. S. Comp. St. (1901) p. 2945].

This act provides that the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending; provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act nor prevent any claimant from joining all the owners in one action, nor shall the same apply to wages due to persons employed by said ship-owners.

Interpretation.—Although it has been held that this act is not to be controlled in its interpretation by the act of 1851 relating to kindred subjects, the language of the two statutes and the state of facts to which they apply being different, and that each is to be construed according to its terms (Warner *v.* Boyer, 74 Fed. 873), it is held in later cases that the two statutes are *in pari materia*, and to be construed together, and that the provision of the older act by which the limitation of liability therein provided for is confined to things "done, occasioned or incurred without the privity of knowledge of such owner or owners," also qualifies the latter act, which was not intended to apply to liabilities of the owners of vessels for the consequences of their personal faults or upon obligations personally contracted by them (O. S. Richardson Fueling Co. *v.* Seymour, 235 Ill. 319, 85 N. E. 496; Great Lakes Towing Co. *v.* Mill Transp. Co., 155 Fed. 11, 83 C. C. A. 607); the act does not, however, apply to personal contracts, so as to exempt a part-owner from full liability for supplies purchased by his authority, or with his knowledge and consent (Rudolf *v.* Brown, 137 Fed. 106); and contemplates only liabilities incurred during the last or pending voyage, allowing a reasonable time after knowledge of the liability within which to surrender, in practically the same condition as at the close of such voyage; and a vessel owner cannot incur indebtedness for supplies furnished to a vessel during an indefinite number of voyages, and then, after the vessel has been lost or destroyed, relieve himself from personal liability therefor by offering to surrender its remains to the creditor (The Puritan, 94 Fed. 365).

U. S. Rev. St. (1878) § 4493 [U. S. Comp. St. (1901) p. 3058], is not repealed by the act of June 26, 1884 (1 U. S. Rev. St. Suppl. 440). The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366.

A part-owner may, under Act Cong. (1884) 23 U. S. St. at L. 57, c. 121, § 18 [U. S. Comp. St. (1901) p. 2945], fixing the liability of ship-owners, having a claim presented against him, bring in all creditors, and distribute to them his proportion of their demands, and may have an injunction to restrain future suits. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42.

1. The Merchant Shipping Act (1894), 57 & 58 Vict. c. 60. See Clarke *v.* Dunraven, [1897] A. C. 59, 8 Aspin. 190, 66 L. J. Adm. 1, 75 L. T. Rep. N. S. 337 [*affirming* [1895] P. 248, 72 L. T. Rep. N. S. 316, 43 Wkly. Rep. 498].

2. Kelley *v.* Kelso, 5 Ohio St. 198, so holding in a case where a part-owner of a steamboat was sued to recover the balance of the price of coal which had been furnished to the boat without his knowledge or privity.

3. Chappell *v.* Bradshaw, 35 Fed. 923, holding therefore that as the act of 1851 excepted lighters from its operation, the owner of a lighter causing damage by collision prior to the passage of the act of 1886 was not protected by that act.

4. Loughlin *v.* McCaulley, 186 Pa. St. 517, 40 Atl. 1020, 65 Am. St. Rep. 872, 48 L. R. A. 33, decided under Const. art. 3, § 21, and holding that the limitation of a ship-owner's liability to value of his interest in the vessel may be set up as a defense in an action in a

2. Authority of Congress to Grant the Right. That congress has power to grant the right of limitation of liability as given in the act of 1851 and subsequent statutes upon the subject is clearly established. It exists under the constitutional power of congress to regulate commerce;[5] but it rests also upon the power derived from the admiralty clause of the constitution and is not limited to its power to regulate commerce.[6] This has been held to be true both as to the original act[7] and as to the amendment of 1886,[8] extending the benefit of the limited liability act to inland navigation;[9] and even though the subjects of the extended limitation or the territory in which it is effective are partially within the region of state control, yet, where the subjects are separable, and are partly under the national control, the act will be sustained by the courts wherever the power of congress extends, and as to all those objects to which it attaches.[10]

B. Vessels and Interests to Which Limitation Applies — 1. General Rules. The act in its original form[11] did not apply to any canal-boat, barge, or lighter or to any vessel of any description whatsoever used in rivers or inland navigation;[12] but the operation of the act was greatly extended by the amendment of 1886,[13] and now applies to all seagoing vessels and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters;[14]

state court, being general and absolute, and there being no restriction as to how it may be availed of.

5. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 589, 3 S. Ct. 379, 617, 27 L. ed. 1038; Lord *v.* Goodall Steamship Co., 102 U. S. 541, 26 L. ed. 224. See Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

6. Rounds *v.* Providence, etc., Steamship Co., 14 R. I. 344; *Ex p.* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 589, 3 S. Ct. 379, 617, 27 L. ed. 1038; The Katie, 40 Fed. 480, 7 L. R. A. 55; *In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599. See Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

7. The Garden City, 26 Fed. 766. See Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

8. See *supra*, XI, A, 1.

9. *Ex p.* Garnett, 141 U. S. 1, 11 S. Ct. 840, 35 L. ed. 631; The Katie, 40 Fed. 480, 7 L. R. A. 55. See Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

10. The Katie, 40 Fed. 480, 7 L. R. A. 55. See Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

11. See *supra*, XI, A, 1.

12. U. S. Rev. St. (1878) § 4289 [U. S. Comp. St. (1901) p. 2945].

For cases decided under this act see Chisholm *v.* Northern Transp. Co., 61 Barb. (N. Y.) 363 (holding the act not applicable to vessels enrolled and licensed for the coasting trade, and engaged in the transportation of freight and passengers on the rivers and lakes); Woodhouse *v.* Cain, 95 N. C. 113 (holding that the act did not embrace the case of a vessel on a sound of limited area lying entirely within a state; Currituck Sound, N. C., for example); The Mamie, 5 Fed. 813 [*affirmed* in 8 Fed. 367]; The War Eagle, 29 Fed. Cas. No. 17,173, 6 Biss. 364.

A vessel employed in navigation upon the Hudson river, and not elsewhere, was held not within the class excepted by the provisions of U. S. Rev. St. (1878) § 4289 [U. S. Comp. St. (1901) p. 2945], limiting the liability of the owners of vessels used in river or inland navigation. The Sears, 8 Fed. 365.

Navigation on Long Island sound was held not to be inland navigation within the meaning of section 7 of the act. Wallace *v.* Providence, etc., Steamship Co., 14 Fed. 56.

The East river, so called in New York, is not a "river" but a mere gut or strait, and belongs to the "coast waters" of the country, as distinguished from "inland navigation," and navigation on the East river was therefore not included in the exception as to inland navigation in the original act. The Garden City, 26 Fed. 766.

A steamer used in the upper Mississippi river was not within the act of March 3, 1851 (9 U. S. St. at L. 635), limiting the liability of ship-owners, and the federal district court would not therefore restrain claimants from suing the owner at common law to recover the full value of freight lost by fire. The War Eagle, 29 Fed. Cas. No. 17,173, 6 Biss. 364.

Chicago harbor.— The owner of a tugboat engaged in towing vessels into and out of Chicago harbor, and sometimes going into the waters and ports of other states, is entitled to the limited liability provided by U. S. Rev. St. (1878) § 4283 [U. S. Comp. St. (1901) p. 2943]. *In re* Vessel Owners' Towing Co., 26 Fed. 169.

13. See *supra*, XI, A, 1.

14. See Chappell *v.* Bradshaw, 35 Fed. 923, holding that, although the amendment of 1886 extended the act to all vessels, it was not retroactive so as to apply to a collision by a lighter in 1885.

A scow one hundred and ten feet long, employed in carrying mud, is a "vessel" for the purposes of admiralty jurisdiction and the maritime law, and her owner may maintain proceedings for limitation of liability on account of collision under U. S. Rev. St. (1878) §§ 4282, 4289, as amended by 24 U. S. St.

to a vessel in a wrecked condition, although she may be incapable of self-propulsion or of carrying a cargo;[15] to a traveling steam-hoist or derrick, mounted upon a fuel scow specially designed to be used with such a hoist;[16] to owners of vessels where routes are partly by land and partly by water;[17] and to a barge without motive power, which is used for transporting excursion parties on New York harbor and adjacent waters.[18] Where the owner of a tug is without fault, he may limit his liability for the loss of the tow.[19] The section is applicable to a vessel, running upon the ocean between ports of the same state, which carries merchandise or passengers on through bills or tickets destined to points in other states; and the provisions of the section apply to such a vessel, in respect to merchandise which is carried from one port to another in the same state, as well as to merchandise destined to other states or foreign countries.[20]

2. Foreign Vessels. The United States limited liability acts are applicable to owners of foreign as well as domestic vessels when liability for a loss is sought to be enforced or limitation of liability is sought to be availed of in courts of the United States,[21] except perhaps when two vessels colliding are of the same foreign nation or of two foreign nations having the same maritime law.[22] But where a collision at sea occurs between two vessels of the same or of different foreign nations, and no law of either country is proved as a fact, the provisions of the

at L. 80, c. 421, § 4 [U. S. Comp. St. (1901) pp. 2943, 2945]. *In re* Eastern Dredging Co., 138 Fed. 942.

The English statute is applicable to ships and other seagoing vessels only. Hunter *v.* McGown, 1 Bligh 573, 20 Rev. Rep. 198, 4 Eng. Reprint 210. See The Mamie, 5 Fed. 813 [*affirmed* in 8 Fed. 367].

Pleasure yacht.— The owners of a pleasure yacht were held to be not entitled to the benefits of the original act, although at the time of the loss out of which the cause of action arose she was chartered to a third person for hire, as it was only vessels engaged in what is ordinarily known as maritime commerce which were subject to the act as originally passed, and the facts that they were duly enrolled, licensed, and inspected, and otherwise subject to the navigation laws of the United States were immaterial (The Mamie, 5 Fed. 813 [*affirmed* in 8 Fed. 367]); but as the amendment of 1886 (see *supra*) expressly covers barges, and as a pleasure yacht is held to be a barge (The Mamie, 8 Fed. 367 [*affirming* 5 Fed. 813]) the owner of such a yacht is now entitled to the benefit of the act as broadened by the amendment.

Great Lakes.— The statutory restriction limiting the liability to vessels not used in rivers or inland navigation was held not to apply to a vessel used on the Great Lakes (American Transp. Co. *v.* Moore, 5 Mich. 368, so holding as to the vessels employed upon Lake Erie and that chain of Great Lakes; Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886; Moore *v.* American Transp. Co., 24 How. (U. S.) 1, 16 L. ed. 674. And see Cuddy *v.* Horn, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178, holding that the original act does not apply to boats navigating streams connecting the Great Lakes); but as the benefit of the act has been extended to all vessels used on lakes or rivers or in inland navigation (see the amendment of 1886, *supra*), the question is no longer open to adjudication.

15. Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886 [*affirming* 26 Fed. 798], holding that where a steam propeller was wrecked and abandoned to the underwriter as a total loss, and the propeller was subsequently taken in tow by a wrecking master, together with her cargo and crew, but sank in about twenty-two hours, and one of the crew was drowned, the propeller was still a "vessel" at the time of sinking, within the meaning of the statute.

16. The Buffalo, 154 Fed. 815, 83 C. C. A. 531 [*affirming* 148 Fed. 331].

17. Wallace *v.* Providence, etc., Steamship Co., 14 Fed. 56.

18. *In re* Myers Excursion, etc., Co., 57 Fed. 240 [*affirmed* in 61 Fed. 109, 9 C. C. A. 386].

19. *In re* Moran, 120 Fed. 556.

20. Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292 [*affirmed* in 102 U. S. 541, 26 L. ed. 224].

The original act applied to vessels navigating the waters of the East river and Long Island sound between ports of the state of New York, and not engaged in foreign or interstate commerce. *In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599. And see *supra*, note 12.

21. La Bourgogne, 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973 [*citing* and *approving* The Scotland, 105 U. S. 24, 26 L. ed. 1001]; *In re* Leonard, 14 Fed. 53; The John Bramall, 13 Fed. Cas. No. 7,334, 10 Ben. 495 (holding that an English vessel stranded in American waters is within the operation of the statutes of the United States as to the limitation of the liability of owners of vessels, and the liability of such owners must be decreed according to such statutes, and not according to the rule of the general maritime law); Levinson *v.* Oceanic Steam Nav. Co., 15 Fed. Cas. No. 8,292.

22. The Scotland, 105 U. S. 24, 26 L. ed. 1001 [*cited* and *approved* in La Bourgogne, 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973].

statutes of the United States are ordinarily applied.[23] In England the statutes prior to 1862 which in general terms were similar to our own do not apply to foreign ships.[24] The question, however, has ceased to be of practical importance in England since the act of 1862,[25] by which the owners of any ship, British or foreign, were granted a limitation of liability.[26]

C. Persons Entitled to the Benefit of the Limitation. The benefits of the act are by its terms extended to owners of vessels.[27] An underwriter to whom a stranded vessel has been abandoned as a total loss is an "owner," within the meaning of the statutes.[28] The right of the owners to proceed under this statute was held to exist even though they had so let the vessel that the charterers became owners *pro hac vice*.[29] The act further provides [30] that the charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense and by his own procurement, shall be deemed the owner of such vessel within the act limiting the liability of such owners of vessels.[31] But a lighterage company which contracts to transfer cargo from one ship to another, and for that purpose charters a lighter whose owner employs the stevedores and superintends the work, is not entitled to a limitation of liability for a loss of cargo by the capsizing of the lighter through negligent loading.[32] The benefit of the limitation may be availed of by a foreign owner.[33] All owners of vessels indiscriminately are not, however, entitled to the privileges of the limitation, but only such as fall within the description of the statute; that is, those who have had no privity with or knowledge of the damage incurred.[34] A ship-owner, by defending an action brought against him in a state court to recover damages for injury to a passenger, and by appealing from the judgment rendered against him therein, does not waive his right to petition a court of admiralty for a limitation of liability; nor is he debarred of the right to invoke such remedy because there is but a single claimant.[35] Where the petition seeks a limitation of liability as owner of a vessel sunk in a collision, and it is found on the hearing, on appropriate allegations in the answer, that the petitioner is

23. Thommasen *v.* Whitwell, 12 Fed. 891, 21 Blatchf. 45 [*affirming* 23 Fed. Cas. No. 13,929, 9 Ben. 403].

In an early case it was held that the act cannot be resorted to for the purpose of limiting the liability of a foreigner for a collision between an American and a foreign vessel, occurring on the high seas and beyond the territorial limits of the United States. Churchill *v.* The British America, 5 Fed. Cas. No. 2,715, 9 Ben. 516. This case, however, is not followed in the later cases cited on this phase of the subject in the immediately preceding notes.

24. The Scotland, 105 U. S. 24, 26 L. ed. 1001; The Nostra Signora de los Dolores, 1 Dods. 290; The Girolamo, 3 Hagg. Adm. 169, 186; The Carl Johan [*cited* in The Dundee, 1 Hagg. Adm. 109, 113; General Iron Screw Collier Co. *v.* Schurmanns, 1 Johns. & H. 180, 6 Jur. N. S. 883, 29 L. J. Ch. 877, 4 L. T. Rep. N. S. 138, 8 Wkly. Rep. 732, 70 Eng. Reprint 712; The Wild Ranger, 9 Jur. N. S. 134, 32 L. J. Adm. 49, 7 L. T. Rep. N. S. 725, Lush. 553, 11 Wkly. Rep. 255; The Zolverein, 2 Jur. N. S. 429, Swab. 96, 4 Wkly. Rep. 555; Cope *v.* Doherty, 4 Kay & J. 367, 70 Eng. Reprint 154 [*affirmed* in 2 De G. & J. 614, 4 Jur. N. S. 699, 27 L. J. Ch. 600, 6 Wkly. Rep. 695, 59 Eng. Ch. 482, 44 Eng. Reprint 1127].

25. St. 25 & 26 Vict. 63, and later acts.

26. The Scotland, 105 U. S. 24, 26 L. ed. 1001.

27. See *supra*, XI, A, 1, note 97.

Part-owners under the statute are severally liable, to the extent of the value of their interest in the ship and jointly liable for the freight pending, in actions for embezzlement or loss of goods resulting from the acts of the master. Spring *v.* Haskell, 14 Gray (Mass.) 309. Thus where the master, a part-owner, or the managing owner, is privy to the negligence which caused the loss and hence cannot limit his liability, the other innocent part-owners may have the benefit of the statute, they themselves not being in privity. The S. A. McCaulley, 99 Fed. 302; Warner *v.* Boyer, 74 Fed. 873; Dorse *v.* Sargent, 48 Fed. 695; *In re* Leonard, 14 Fed. 53. As the right of limitation is absolute and not dependent on the joinder of all the part-owners in the petition, the right may be availed of by any one or more of them. The S. A. McCaulley, *supra*.

28. Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886.

29. Quinlan *v.* Pew, 56 Fed. 111, 5 C. C. A. 438.

30. 9 U. S. St. at L. 636, c. 44, § 5.

31. Thorp *v.* Hammond, 12 Wall. (U. S.) 408, 20 L. ed. 419.

32. Smith *v.* Booth, 110 Fed. 680 [*affirmed* in 122 Fed. 626, 58 C. C. A. 479].

33. The Scotland, 105 U. S. 24, 26 L. ed. 1001. And see *supra*, XI, A, 1.

34. The Maria and Elizabeth, 11 Fed. 520. And see *infra*, XI, F.

35. *In re* Starin, 124 Fed. 101.

also owner of the other vessel concerned, and that both were in fault for the collision, it is a condition precedent to the granting of the relief sought that both vessels and their pending freight be surrendered.[36]

D. Extent of Liability — 1. Amount or Value of Interest in Vessel; How Ascertained When Voyage Broken Up and When Voyage Completed. Under the English act the value of the vessel is taken just before the accident, and the owner can thus limit his liability only to the value of the vessel at that time, estimated at eight pounds per ton upon the gross tonnage less deduction of certain spaces.[37] Under the United States acts, however, the value of the owner's interest is taken as it exists immediately after the loss.[38] The exact time of estimating the value of the vessel is the termination of the voyage on which the liability is incurred or the loss is sustained, in respect of which the limitation of liability is sought.[39] If the ship is lost at sea or the voyage is otherwise broken up before arriving at the port of destination, the voyage is considered as terminated for the purpose of fixing the owner's liability, at the time of her loss, or of the breaking up of the voyage.[40] In a proceeding for limitation of liability arising out of an accident which occurred a long time before the proceeding, deductions from the present value of the vessel on account of additions made since the accident should be made at their present value, and not at their cost, in appraising the value at the time of the accident.[41] If the vessel is sunk and the voyage thus terminated before the actual end of the trip, the owner's liability is measured by the value of the vessel in her sunken condition, and is not extended by the fact that she has been raised and repairs made on her;[42] and where a ship is stranded on a reef and so injured as to terminate her voyage, in order to secure the statutory limitation of liability, the owner, when the vessel is not actually surrendered, must pay her value as she lay upon the rocks and the amount of her freight then pending, if any.[43] Her value for such purpose is not affected by the result of any subsequent salvage operation, whether undertaken by the owner or others.[44] Where a vessel, after having been in collision, was afterward, and before arriving at her destination, stranded and sunk by the negligence of her crew, the subsequent disaster in no way resulting from the former collision, it was held that her owners' liability was limited to the value of the vessel after she was stranded, with the pending freight; that it was not affected by the fact that the vessel was then abandoned to the underwriters; and that the amount realized by the underwriters from the

36. The San Rafael, 141 Fed. 270, 72 C. C. A. 388 [*reversing* 134 Fed. 749].

37. The Merchant Shipping Act (1894), 57 & 58 Vict. c. 60. See The Scotland, 105 U. S. 24, 26 L. ed. 1101.

38. The City of Norwich, 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; The Alpena, 8 Fed. 280, 10 Biss. 436.

For two early Massachusetts cases to the contrary see Spring *v.* Haskell, 14 Gray 309 (holding that the time at which the value of the interest of the owners of a vessel is to be taken, in computing their liability for any embezzlement, loss, or destruction by the master or other person, of property on board their ship, is just before the tort complained of, although the ship is subsequently totally destroyed before reaching her port of final destination); Walker *v.* Boston Ins. Co., 14 Gray 288.

39. The Scotland, 118 U. S. 507, 6 S. Ct. 1174, 30 L. ed. 153, 105 U. S. 24, 26 L. ed. 1001; The City of Norwich, 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585; The Giles Loring, 48 Fed. 463; The Anna, 47 Fed. 525; The Abbie C. Stubbs, 28 Fed. 719; Wattson *v.* Marks, 29 Fed. Cas. No. 17,296, 2 Pa. L. J. 254.

40. The City of Norwich, 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134. See The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123; The Giles Loring, 48 Fed. 463; The Anna, 47 Fed. 525.

41. The Captain Jack, 162 Fed. 808.

42. The City of Norwich, 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134.

43. Pacific Coast Co. *v.* Reynolds, 114 Fed. 877, 52 C. C. A. 497.

44. Pacific Coast Co. *v.* Reynolds, 114 Fed. 877, 52 C. C. A. 497, holding that where at great risk, hazard, and expense the owner succeeds in releasing her and having her towed to a port where she is valued, there must be deducted from such valuation, for the purpose of fixing the measure of his liability in limitation proceedings, not only the expense incurred in her rescue, but also an allowance on account of the risk and hazard of the salvage undertaking, which clearly affected her value as she lay before such operations were commenced.

sale of the wreck was the proper measure of the value of the ship for the purpose of the act.[45] The damages recoverable by the owner from another vessel or her owner for injury to his vessel in collision constitute an interest in and stand in the place of the vessel, and are included in the value which must be surrendered.[46]

2. Ascertainment of Interest in Freight; What Included in Term "Freight Pending." The word "freight," as used in the provisions of the act which limits the liability of ship-owners to the value of the ship and the freight then pending, includes fare for passengers;[47] freight prepaid at the port of departure, as well as all freight subsequently earned;[48] and the earnings of the vessel in transporting the goods of her owner.[49] The interest of the owners in a vessel and her freight then pending is intended to include their entire interest or investment in the adventure; they are not entitled to make any deduction from the gross amount of freight and passage-money pending on account of any expenses incurred for the voyage;[50] nor any deduction for expenditures for provisions or for wages of the crew except extraordinary expenses incurred after a disaster, in order to earn the freight, which may be deducted from the gross freight earned to arrive at the value of the freight within the meaning of the act.[51] The words "freight pending," as used in the act, include demurrage due at the termination of the voyage;[52] but freight pending does not ordinarily include salvage earned during the voyage.[53] The whaling equipment, provisions, and supplies of a whaling ship are not within the meaning of the words "ship or vessel," as used in the act;[54] nor is there any "freight pending" on a whaling voyage within the meaning of the act.[55] Where

45. Thommessen *v.* Whitwill, 118 U. S. 520, 6 S. Ct. 1172, 30 L. ed. 156.

46. O'Brien *v.* Miller, 168 U. S. 287, 18 S. Ct. 140, 42 L. ed. 469 [*reversing* 67 Fed. 605, 14 C. C. A. 566 (*affirming* 59 Fed. 621)].

47. The Main *v.* Williams, 152 U. S. 122, 14 S. Ct. 486, 38 L. ed. 381; Pacific Coast Co. *v.* Reynolds, 114 Fed. 877, 52 C. C. A. 497 (holding that where a ship, at the time she was stranded and the voyage terminated, was carrying passengers, who had prepaid their passage under contracts providing that in case of the loss of the vessel the passage-money should not be refunded, such passage-money must be considered the same as freight earned, and surrendered by the owner in proceedings for the limitation of liability; and no deduction can be made because certain of the tickets were given to the passengers by the ship-owner, nor on account of a sum paid by such owner for the transportation of the passengers from the place of the stranding to their port of destination); *In re* Meyer, 74 Fed. 881.

48. The Main *v.* Williams, 152 U. S. 122, 14 S. Ct. 486, 38 L. ed. 381; La Bourgogne, 144 Fed. 781, 75 C. C A. 647 [*affirmed* in 210 U. S. 95].

The law is that freight pending is freight earned; and when the voyage is broken up by the wrecking of the ship before reaching her destination there is ordinarily no freight earned, for, even though prepaid, in the absence of special contract, it may be recovered back by the shipper. Pacific Coast Co. *v.* Reynolds, 114 Fed. 877, 52 C. C. A. 497. See also *In re* Liverpool, etc., Steam Co., 3 Fed. 168.

Pending freight is limited to that due to or earned by the particular vessel through whose fault the loss occurred. The fact that goods, when lost or injured, were being transported under through bills of lading upon different vessels of the same owner does not require a surrender of the freight earned by a different vessel in the course of such shipment (Ralli *v.* New York, etc., Steamship Co., 154 Fed. 286, 83 C. C. A. 290, holding also that where a lighter sank at a pier while being loaded, injuring a large part of her cargo, the fact that the uninjured cargo was then transferred by her owner to another vessel, and that such lighter did not deliver any part of it, does not relieve the owner in proceedings for limitation of his liability from the necessity of surrendering as "pending freight" the freight which she would have earned if she had carried the cargo), and generally if the voyage is broken up, resulting in no freight being earned, the owner is not liable for freight (The City of Norwich, 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134).

49. Allen *v.* MacKay, 1 Fed. Cas. No. 228, 1 Sprague 219.

50. The Jane Gray, 99 Fed. 582.

51. The Jose E. More, 37 Fed. 122.

52. The Giles Loring, 48 Fed. 463.

53. *In re* Meyer, 74 Fed 881. And see The Jane Gray, 99 Fed. 582. *Compare* The Captain Jack, 162 Fed. 808, holding that where, at the time of an injury which gave rise to proceedings, the vessel surrendered was employed in raising a sunken vessel under a contract by which the petitioner received a stated sum for the service, such sum may properly be considered as "freight pending," within the meaning of the statute, which must also be surrendered, and no deduction can be made therefrom on account of other vessels or appliances also used in the service, but which the petitioner did not surrender.

54. Swift *v.* Brownell, 23 Fed. Cas. No. 13,695, Holmes 467 [*reversing* 18 Fed. Cas. No. 10,543, 2 Lowell 40].

55. Swift *v.* Brownell, 23 Fed. Cas. No.

a vessel is sailed by the master, who is not one of the owners, on half shares, the interest of the owners in the freight, which must be surrendered, is one half of the freight after deducting the port charges.[56] Insurance effected by the owners on the vessel and her freight is not an "interest in such vessel and freight" which they are bound to surrender for the benefit of claimants for injuries.[57]

E. Liabilities Subject to Limitation — 1. Losses and Injuries Arising From Acts of Master, Crew, Etc. The limited liability act extends to liability for every kind of loss, damage, and injury resulting from the acts of the master or crew.[58] It applies to cases of personal injury and death as well as to cases of loss of or injury to property,[59] and to loss of baggage.[60] Where the owner has taken appropriate proceedings to obtain the benefit of the act, a person injured is barred from maintaining a separate action for such injuries;[61] and the right of the owners to a limitation of their liability is not defeated by the fact that a claim for personal injuries was the only claim pending against the vessel;[62] nor can it be defeated on the ground that there was a contract, express or implied, on the part of the owners that the vessel was seaworthy.[63] The right of the owner to a limitation of liability does not depend on the fact that the vessel is actually engaged on a voyage at the time of the doing of the act or the happening of the event against which the owner seeks to limit his liability. The statute applies equally to a vessel at a dock in her home port.[64] The acts limit the recovery in case of collision to the amount of the interest of the owners in the colliding vessel and her pending freight, and the power of the court to award greater damage is abolished, except in cases where the owner is in privity with the loss,[65] and includes damage, by

13,695, Holmes 467 [*reversing* on other grounds 18 Fed. Cas. No. 10,543, 2 Lowell 40].

Liability of season's earning of fishing vessel.— Where a fishing vessel is run under an agreement by which the cost of repairs is deducted from the proceeds of the entire catch before division, a season's cruising is to be counted as a single voyage, and the earnings for the whole season's fishing are, equally with the vessel, liable for the costs of the repairs contracted on the vessel's account; and, when such vessel is wrecked, her owners, in a suit by a materialman, are liable to the extent of the season's earnings, added to the value of the wreck. Whitcomb *v.* Emerson, 50 Fed. 128.

56. *In re* Wright, 30 Fed. Cas. No. 18,066, 10 Ben. 14.

57. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017; The Great Western, 118 U. S. 520, 6 S. Ct. 1172, 30 L. ed. 156; The City of Norwich, 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; The City of Columbus, 22 Fed. 460.

58. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 549, 9 S. Ct. 612, 32 L. ed. 1017.

59. Rounds *v.* Providence, etc., Steamship Co., 14 R. I. 344; Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886 [*affirming* 8 Fed. Cas. No. 4,506, 6 Ben. 378]; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017; The Southside, 155 Fed. 364; The City of Columbus, 22 Fed. 460.

Limitation against liability for costs in state court.— Where a passenger injured through the negligence of those engaged in the navigation of a tug and barge, without the privity of the owner, recovered judgment therefor and for costs against such owner in the state courts, the owner is entitled to a limitation of his liability to the value of the two vessels and, pending freight, with interest thereon from the time of the injury to the time of payment, as against the judgment for damages, but he cannot limit his liability for the costs taxed against him in the litigation in the state courts. *In re* Starin, 124 Fed. 101.

60. Chamberlain *v.* Western Transp. Co., 44 N. Y. 305, 4 Am. Rep. 681; *In re* Louisville, etc., Packet Co., 95 Fed. 996 (holding that baggage delivered by the purchaser of a ticket and placed upon a wharf-boat to which the steamer was moored was "shipped" within the meauing of the act); Wallace *v.* Providence, etc., Steamship Co., 14 Fed. 56.

61. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017.

62. Quinlan *v.* Pew, 56 Fed. 111, 5 C. C. A. 438.

63. Quinlan *v.* Pew, 56 Fed. 111, 5 C. C. A. 438.

64. *In re* Michigan Steamship Co., 133 Fed. 577 [*reversed* on other grounds in 144 Fed. 788, 75 C. C. A. 518].

65. Cook *v.* Mallory, 6 Fed. Cas. No. 3,163.

A claim for injury to a passenger resulting from the negligence of a vessel after a collision is within the scope of the proceedings and may be proved therein in a proceeding by a vessel owner for limitation of liability growing out of the sinking of a vessel in a collision, although she is exonerated from fault for the collision. The City of Boston, 159 Fed. 261. The Saginaw and The Hamilton belonging to different owners came into collision as the result of fault on the part

collision, to other vessels and cargoes as well as to the vessel's own cargo.[66] Claims for damages for personal injuries arising out of the stranding of a vessel are within the provisions of the statute.[67] The acts apply to an unjustifiable sale of cargo by the master in a foreign country after his vessel has been condemned as unseaworthy.[68] Claims for personal injury caused by fire and explosion on board a steamboat prosecuting her voyage are claims the liability for which is limited by the statute.[69] Claims for damage to cargo by fire are liabilities from which the owner is absolutely exonerated by statute if the fire occurs without his personal fault.[70] Although the statutory rule of limited liability has been held to embrace all damages done by the vessel without the privity or knowledge of the owner, whether consummated on water or land,[71] it is now well established that the act does not include liability for the destruction of buildings and goods on the land by fire communicated by a vessel. If the owners are liable in such case the liability extends to the whole value of the property destroyed; [72] nor apparently does the limitation or exemption extend to a loss by fire of goods after they are landed on the wharf,[73] and similarly in an action against a ship-owner for injuries to a person while standing on a pier, caused by a collision of the vessel with the pier, defendant cannot enforce the limitation of liability, as such action is not within

of both, and the owners of both brought proceedings in admiralty to limit their liability. The Saginaw was a total loss. It was held that claims for damages were maintainable against The Hamilton by the personal representatives of the passengers and crew of The Saginaw who died or were injured as the result of the collision to the extent of her owner's liability under the statutes. The Hamilton, 146 Fed. 724, 77 C. C. A. 150 [*affirmed* in 207 U. S. 398, 28 S. Ct. 133, 52 L. ed. 264].

Under a through ticket for land and water carriage the claim of a passenger on a steam ferry-boat for damages growing out of a collision is one for a maritime tort within the jurisdiction of a court of admiralty, and against which the owner of the vessel is entitled to a limitation of liability, although such owner is a railroad company operating the vessel in connection with its road, and the passenger was being carried on a ticket which entitled him to both land and water carriage. The San Rafael, 134 Fed. 749 [*reversed* on other grounds in 141 Fed. 270, 72 C. C. A. 388].

66. Norwich, etc., Trans. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

67. The Amsterdam, 23 Fed. 112.

68. The Giles Loring, 48 Fed. 463.

69. *In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599.

U. S. Rev. St. (1878) § 4493 [U. S. Comp. St. (1901) p. 3058], which provides that the owner shall be liable for injuries to the person and baggage for full damages in case the explosion, fire, etc., happens through any neglect or failure to comply with the provisions of law for the regulation of steam vessels, or through known defects of the steaming apparatus or of the hull, does not take claims for personal injury or loss of baggage out of the limited liability statute, but merely imposes a further condition of the limitation of liability in those classes of cases that the injury did not happen by reason of any of the causes mentioned in section 4493. The Annie Faxon, 66 Fed. 575; *In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599.

Claims for damages given by a state statute to the administrators of relatives of a person killed by a fire or explosion occurring on board a vessel navigating the East river are cases of marine tort, cognizable in the courts of admiralty, and are among the claims the liability for which is limited by the statute. *In re* Long Island North Shore Pass., etc., Transp. Co., 5 Fed. 599. But personal representatives of a passenger and of members of a crew who were drowned as the result of the collision of a Delaware vessel with another vessel on the high seas may recover in proceedings for the limitation of liability of such other vessel upon a cause of action for death created by Del. Act, Jan. 26, 1886, as amended by the act of March 9, 1901, in favor of the personal representatives of a person whose death is caused by violence or negligence, subject to the owner's right of limitation of liability. The Hamilton, 146 Fed. 724, 77 C. C. A. 150 [*affirmed* in 207 U. S. 398, 28 S. Ct. 133, 52 L. ed. 264].

70. The Strathdon, 89 Fed. 374, holding that under U. S. Rev. St. (1878) § 4282 [U. S. Comp. St. (1901) p. 2943], ship-owners are not liable for injury to the cargo by fire, unless the cargo owners prove by a preponderance of evidence that the fire was caused by the design or neglect of the ship-owners personally. But see Elwell *v.* Bender, 79 Hun (N. Y.) 243, 29 N. Y. Suppl. 357.

71. *In re* Goodrich Transp. Co., 26 Fed. 713. See *In re* Vessel Owners' Towing Co., 26 Fed. 172.

72. *Ex p.* Phenix Ins. Co., 118 U. S. 610, 7 S. Ct. 25, 30 L. ed. 274; Goodrich Transp. Co. *v.* Gagnon, 36 Fed. 123; King *v.* American Transp. Co., 14 Fed. Cas. No. 7,787, 1 Flipp. 1.

73. Salmon Falls Mfg. Co. *v.* The Tangier, 21 Fed. Cas. No. 12,265. But see Constable *v.* National Steamship Company, 154 U. S. 51, 14 S. Ct. 1062, 38 L. ed. 903.

the admiralty jurisdiction;[74] nor does the limited liability legislation extend protection against loss occasioned by the contact of the vessel with a pile structure attached to the land but extending into navigable waters without due precautions to guard against accidents.[75] But where claims for damages consummated on the water and claims for damage done on land arise from the same maritime tort, the court, having jurisdiction in admiralty by virtue of the strictly maritime claims, has power to award a limitation as to all the claims.[78]

2. Debts and Contracts. The limited liability act of 1884[77] does not affect contracts made by the owner personally, but applies only to liability for the master's acts and contracts which are imposed by law on the owner as principal, and on account of his ownership;[78] nor does the act embrace such contracts as the owners have adopted as their personal liability.[79] The act does not affect the right of materialmen, having claims against the vessel libeled, to bring actions *in personam* against the owner to collect them;[80] but to the extent of the fund representing their liability thereunder owners are bound, not *in solido*, but only in proportion to their respective interests in the vessel.[81]

F. "Privity or Knowledge" of Owner or Charterer Which Will Defeat Claim of Limitation. In order that the owner may be entitled to limitation of liability the statutes[82] provide that the injury, damage, or loss must have been occasioned "without the privity or knowledge of such owner or owners;" and if this condition is not fulfilled the owner is liable.[83] The owner

74. Elwell *v.* Bender, 79 Hun (N. Y.) 243, 29 N. Y. Suppl. 357. But see Petition of Vessel Owners' Towing Co., 26 Fed. 169.

75. Darrall *v.* Southern Pac. Co., 47 La. Ann. 1455, 17 So. 884.

76. The Epsilon, 8 Fed. Cas. No. 4,506.

77. See *supra*, XI, A, 1.

78. Great Lakes Towing Co. *v.* Mill Transp. Co., 155 Fed. 11, 83 C. C. A. 607; Gokey *v.* Fort, 44 Fed. 364; McPhail *v.* Williams, 41 Fed. 61; Laverty *v.* Clausen, 40 Fed. 542 (holding that where a carrier contracts to insure cargo, and fails to do so, and the cargo is lost by the sinking of the vessel, the carrier cannot limit his liability to the value of the vessel); The Amos D. Carver, 35 Fed. 665.

Contracts of part-owner.— A part-owner having agreed with the other owners to run the vessel on shares, and pay her disbursements, and the vessel being lost, the act applies in favor of the other part-owners as to the master's disbursements, but not as to the master's wages; but the other owners are entitled to indemnity from the owner *pro hac vice*. Douse *v.* Sargent, 48 Fed. 695. Similarly where repairs were ordered by a ship-master, who was also one of three equal part-owners of a vessel, without the privity or knowledge of the other owners, he is liable for the whole debt, and the other two owners are each liable to him for one third of it. Whitcomb *v.* Emerson, 50 Fed. 128. And the act applies in favor of part-owners who have committed the management of the vessel to another part-owner, in respect to debts for coal furnished at the instance of the latter and without their previous knowledge. Warner *v.* Boyer, 74 Fed. 873.

A party advancing money to the master of a ship without its owner's knowledge would not have a personal claim against the owners, but a claim in the proportion that each individual share bore to the whole liability, as provided by 23 U. S. St. at L. 57, c. 121, § 18 [U. S. Comp. St. (1901) p. 2945]. Hanschell *v.* Swan, 23 Misc. (N. Y.) 304, 51 N. Y. Suppl. 42.

Mass. Rev. St. (1835) (ed. 1836) p. 295, c. 32, § 1, which provides that "no ship-owner shall be answerable beyond the amount of his interest in the ship and freight, for any embezzlement, loss, or detention by the master, or mariners, of any goods, wares, or merchandise, or any property put on board of such ship or vessel, nor for any act, matter, or thing, damage, or forfeiture, done, occasioned, or incurred by the said master or mariners, without the privity or knowledge of such owner," applies only to cases where the master is guilty of tort or misconduct, and not to cases of contracts by the master made lawfully and within the scope of his authority. Pope *v.* Nickerson, 19 Fed. Cas. No. 11,274, 3 Story 465.

1 U. S. Rev. St. Suppl. (1874–1891) p. 443, § 18, limiting the individual liability of shipowners to the proportion of the ship owned by them, restricts the liability imposed on them by law as the result of such ownership, and does not limit their liability on contracts made by them. Kerry *v.* Pacific Mar. Co., 121 Cal. 564, 54 Pac. 89, 66 Am. St. Rep. 65.

79. Gokey *v.* Fort, 44 Fed. 364.

80. The Leonard Richards, 41 Fed. 818.

81. The Giles Loring, 48 Fed. 463.

82. See *supra*, XI, A, 1.

83. Darrall *v.* Southern Pac. Co., 47 La. Ann. 1455, 17 So. 884 (holding that the limited liability legislation does not exempt carriers by water from loss occurring through the contract of a vessel with pile structures negligently placed by the owner of the vessel in navigable waters); Knowlton *v.* Providence, etc., Steamship Co., 53 N. Y. 76;

is in privity with a loss which occurs by reason of failure to exercise the utmost care in selecting a competent master and crew and in providing a seaworthy vessel,[84] or in providing a competent superintendent to overlook alterations in a vessel; [85] but mere negligence of itself does not necessarily establish the existence on the part of the owner of a vessel of privity or knowledge; [86] and if the owner exercises due care in the selection of the master and crew, and in providing a seaworthy vessel, and a loss afterward occurs, without his privity or knowledge, through

Oregon Round Lumber Co. *v.* Portland, etc., Steamship Co., 162 Fed. 912.

"Privity" and "knowledge" defined.— The word "privity" means some fault or neglect in which the owner of the vessel personally participates; and "knowledge," as used, means some personal cognizance or means of knowledge, of which he is bound to avail himself, of a contemplated loss, or of a condition of things likely to produce or contribute to a loss, without adopting appropriate means to prevent it. Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292, 300 [*affirmed* in 102 U. S. 541, 26 L. ed. 224], holding that if a vessel is not furnished with a suitable compass, she is not seaworthy, so as to bring the owner's liability within U. S. Rev. St. (1878) § 4383 [U. S. Comp. St. (1901) p. 2943], limiting such owner's liability in certain cases to the amount or value of his interest in the vessel and her freight then pending; but, where a deviating compass may be corrected by other correct compasses on board, the vessel is not to be deemed unseaworthy in that respect. And see COLLISION, 7 Cyc. 389 text and note 53 *et seq.*

Occurrences held to be without the knowledge or privity of the owner see *In re* Eastern Dredging Co., 159 Fed. 541; The Tommy, 151 Fed. 570, 81 C. C. A. 50; The Longfellow, 104 Fed. 360, 45 C. C. A. 379; *In re* Louisville, etc., Packet Co., 95 Fed. 996; Memphis, etc., Packet Co. *v.* Overman Carriage Co., 93 Fed. 246; Quinlan *v.* Pew, 56 Fed. 111, 5 C. C. A. 438; The City of Para, 44 Fed. 689, where ship-owners, not being privy to faults which brought about the stranding of a ship, were held entitled to a limitation of their liability.

A failure to comply with the steamboat inspection law may be invoked to prove that a ship-owner is not entitled to a limitation of liability under U. S. Rev. St. (1878) § 4283 [U. S. Comp. St. (1901) p. 2043], although it is not set up in the pleadings of the parties to the proceeding for limitation. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366.

The privity or knowledge of a wrecking master employed by the agent of the underwriter is not the privity or knowledge of the owner, within the meaning of the statute limiting the liability, so as to charge the owner with responsibility for the negligence of the wrecking master beyond the value of the vessel. Craig *v.* Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. ed. 886 [*affirming* 26 Fed. 798].

In the case of a vessel owned by a corporation, privity or knowledge of the managing officers of the corporation is privity or knowledge of the owner, within the meaning of the statute (Haegi *v.* Providence, etc., Steamship Co., 54 How. Pr. (N. Y.) 145; Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292 [*affirmed* in 102 U. S. 541, 26 L. ed. 224]. But see *In re* Old Dominion Steamship Co., 115 Fed. 845), and in a suit by a corporation for limitation of liability as owner of a vessel for a loss due to unseaworthiness, the privity of libellant with its condition is measured by that of its managing officers (Oregon Round Lumber Co. *v.* Portland, etc., Steamship Co., 162 Fed. 912). Where it appears that such owner is a railroad corporation, having its home office a long distance from the place where the vessel was operated, it is not necessary to show by direct testimony that the principal officers of such corporation at such home office had no personal knowledge of the conditions of such vessel, or of the steps taken to inspect and repair her. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366.

A loss by fire on board a vessel is not necessarily occasioned with the owner's privity or knowledge, so as to deprive him of the limited liability given by the act of 1851, section 3. *In re* Providence, etc., Steamship Co., 20 Fed. Cas. No. 11,451, 6 Ben. 124.

One of several joint owners who has knowledge of or is privy to an unjustifiable deviation of such vessel from her voyage is liable for any loss or damage to property shipped on board which occurs subsequently, during the same voyage, in the proportion which his share of the vessel, at the time of the affreightment, bears to the whole loss or damage; but such of the joint owners as had no knowledge of or privity to such deviation are entitled to avail themselves of the provisions of the statutes of limitation of their liability to the value of the vessel at the end of the voyage. *In re* Meyer, 74 Fed. 881.

84. *In re* Pacific Mail Steamship Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71; Lord *v.* Goodall Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292 [*affirmed* in 102 U. S. 541, 26 L. ed. 224].

85. *In re* Michigan Steamship Co., 144 Fed. 788, 75 C. C. A. 518 [*reversing* 133 Fed. 577].

But an allegation that the vessel was in charge of the second mate, who was not a licensed pilot, is not sufficient to show that the loss was occasioned with the fault, privity, or knowledge of the owners, as by the maritime rules the captain has charge of the vessel, and it is his duty, and not that of the owners, to see that a qualified pilot is in charge. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017.

86. Deslions *v.* La Compagnie Générale Transatlantique, 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973.

the negligence of the master or crew, or from some secret defect in the ship or its equipments, which could not have been discovered or avoided by the exercise of proper care on his part, the owner's liability is within the limitation of the statute.[87] Where the unseaworthy condition of a vessel would be shown by a proper examination, her owners are chargeable with knowledge thereof, and any injury to passengers resulting therefrom is not without the privity or knowledge of the owners so as to entitle them to the benefit of the limited liability acts of the United States,[88] for there can be no limitation of personal liability for damage by breach of warranty of seaworthiness, where the failure is due to the owner's personal default.[89] Conversely, if the vessel is in a condition, when she sails, to encounter the ordinary perils of her voyage, this is sufficient to make her seaworthy; and if loss is due to the mistake or carelessness of the captain, without the fault, knowledge, or privity of the owners, the latter are entitled to limitation of liability.[90] An owner who, after a general inspection, purchases a vessel from a shipbuilder of recognized standing and reputation, who equips her with machinery, means, and appliances which are suitable and sufficient, if properly used, may limit his liability for injuries occasioned by the negligent use of such appliances by his employees;[91] and similarly a ship-owner who has provided a suitable person as his agent to inspect or provide for the proper equipment of the vessel is not deprived of the benefit of the statute limiting liability by proof of negligence of such agent in failing to provide such equipment or to maintain it in good condition, of which the owner had no knowledge or notice.[92] A vessel-owner which employs competent persons to perform the duties imposed upon it as such owner, and to determine what such duties are, may limit its liability in respect to damage caused by a collision which resulted from the failure of such persons to make or require proper inspection of the vessel, where such owner has no actual knowledge of the neglect, or the defect arising from it, although such lack of knowledge arises from inattention, or from necessity, owing to the magnitude of the owner's business.[93] A steamship company which in good faith makes rules and regulations requiring the officers of all vessels to maintain only a moderate speed during foggy weather, and take all the precautions required by the international rules to prevent collisions, and exercises due diligence and care in the selection of competent officers, is not debarred from the right to a limitation of its liability for damages caused by a collision for which its vessel was in fault by reason of maintaining excessive speed in a fog, even though it had knowledge that such rules were habitually violated in that respect, where it appears to have done all that could practically be done to secure their enforcement.[94]

G. Proceedings to Obtain Limitation — 1. Nature. A proceeding to obtain the benefit of the limited liability statute is not an action *in rem*, but is a proceeding *sui generis*, which partakes rather of the character of a suit *in personam*;[95] and admiralty rules 54–57, governing proceedings to limit liability,

87. The George W. Roby, 111 Fed. 601, 49 C. C. A. 481; Lord *v.* Goodall, etc., Steamship Co., 15 Fed. Cas. No. 8,506, 4 Sawy. 292 [*affirmed* in 102 U. S. 541, 26 L. ed. 224].

88. *In re* Myers Excursion, etc., Co., 57 Fed. 240 [*affirmed* in 61 Fed. 109, 9 C. C. A. 386].

Vessel held not unseaworthy or leaky within the means of knowledge of the owner see The Anna, 47 Fed. 525.

89. *In re* Sinclair, 22 Fed. Cas. No. 12,895.

90. *In re* Meyer, 74 Fed. 881.

91. The Harry Hudson Smith, 142 Fed. 724, 74 C. C. A. 56 [*affirming* 136 Fed. 271].

92. The Tommy, 151 Fed. 570, 81 C. C. A. 50; The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366.

93. Van Eyken *v.* Erie R. Co., 117 Fed. 712.

94. Deslions *v.* La Compagnie Générale Transatlantique, 210 U. S. 95, 28 S. Ct. 664, 52 L. ed. 973, holding also that privity and knowledge of the habit of running its vessels at an immoderate speed in a fog cannot be imputed to a steamship company so as to defeat its right to limit its liability for claims arising out of a collision in a fog, from the provisions of a contract for subsidy with the French government, requiring vessels that are only obliged to develop, under forced draft, on their trial, a maximum speed of seventeen and one-half knots, to maintain a mean average annual speed of fifteen knots, with a premium for exceeding that speed, and a penalty for a failure to maintain it.

95. The City of Norwich, 5 Fed. Cas. No. 2,762, 6 Ben. 330.

do not require, as a condition to proceedings, that there should have been a prior suit by one or more of the sufferers by the disaster.[96] Interrogatories annexed to an answer in a proceeding for limitation of liability, which are directed solely

Any damage creditor may institute proceedings to arrest the offending vessel, and to have the amount of all damages, as well as the value of the vessel, judicially ascertained, and the proceeds of the vessel and freight distributed *pro rata* among all claimants. The H. F. Dimock, 52 Fed. 598.

Notice.— In order to sustain the proceedings for limiting liability, it is not necessary that the owner and captain of the steam yacht, who were damaged by the collision, should be personally served with notice within the district, or that the steamship should be taken and held by the court until the owner or captain of the steam yacht appears in the cause. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60.

96. The Alpena, 8 Fed. 280, 10 Biss. 436.

Admiralty Rule 54.— When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury done by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act March 3, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes," embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel for the petitions to the proper district court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in said ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with surety, for payment thereof into court when the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, a trustee being appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; public notice of such monition shall be given as in other cases, and such other notice reserved to the post-office or otherwise, as the court in its discretion may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against such owner or owners in respect to any said claim or claims.

Admiralty Rule 55.— Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner, to be designated by the court, subject to the rights of any person interested to question or controvert the same; and upon the completion of said proofs the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exception thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight, after payment of costs and expenses, shall be divided *pro rata* amongst the several claimants, in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priorities to which they may be legally entitled.

Admiralty Rule 56.— In the proceedings aforesaid the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel, for said embezzlement, loss, destruction, damage, or injury, independently of the limitation of liability claimed under said act, provided that in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of congress, or both.

Admiralty Rule 57.— The said libel or petition shall be filed and the said proceedings had in any district of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libeled, then in the district court of any jurisdiction in which said vessel or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matter aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in the district other than that in which the said ship or vessel may be, the said proceedings may be had in the district in which the said ship or vessel may be, and where it may be subject to the control of

to the discovery of assets of the petitioner, are immaterial to the issues, and subject to exception.[97]

2. ABANDONMENT OR SURRENDER OF VESSEL. Under the act the liability of owners may be discharged by surrendering and assigning to a trustee, for the benefit of the parties injured, the vessel and freight, although these may have been diminished in value by the collision or other casualty during the voyage;[98] and if they are totally lost the owners will be entirely discharged from losses occurring on the voyage,[99] although the actual damage to or loss of the goods to be carried, as in the case of theft, has taken place prior to the time of the destruction of the vessel; and the limitation of liability is not affected by the fact that the vessel has been insured and the insurance has been paid or become payable.[1] The liability of the ship-owner being limited to the value of the ship and freight, the necessity of an abandonment thereof, in order to entitle him to the benefit of the exemption from further liability, follows from the rule;[2] and furthermore the owner must surrender the vessel free from liens accrued subsequent to the voyage on which losses have occurred.[3] The court may direct the marshal to take the vessel and wreckage into his custody.[4] Where ship-owners who have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, and have secured a stay of proceedings by libellants, surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may, by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper and only equitable course where, by reason of the proceedings, suits by libellants have been delayed

said court for the purposes of the case as hereinafter provided. If the ship has already been libeled and sold the proceeds shall represent the same for the purposes of this rule.

97. *In re* Knickerbocker Steamboat Co., 136 Fed. 956.

98. Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

Surrender held to be in such form or at such time as to effect the owner's release from liability see Thomassen *v.* Whitwell, 23 Fed. Cas. No. 13,929, 9 Ben. 403 [*affirmed* in 12 Fed. 891, 21 Blatchf. 45]. And see *In re* Meyer, 74 Fed. 881.

99. Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

1. Wattson *v.* Marks, 29 Fed. Cas. No. 17,296.

2. The Bordentown, 40 Fed. 682; Sumner *v.* Caswell, 20 Fed. 249 (holding that the provision which requires the surrender of pending freight includes at least the freight earned up to the time of the loss); Dyer *v.* National Steam Nav. Co., 8 Fed. Cas. No. 4,225, 14 Blatchf. 483; Thomassen *v.* Whitwell, 23 Fed. Cas. No. 13,929, 9 Ben. 403 [*affirmed* in 12 Fed. 891, 21 Blatchf. 45].

Barge and tug considered as one vessel.— Where the owner of a barge which has no motive power undertakes to transport freight by means of the barge, such barge and a tug, belonging to the same owner by which the motive power is supplied, becomes one vessel for the purposes of the voyage, and the owner is not entitled to limit his liability for damage caused by the negligence of the crew of either craft, without surrendering both. Short *v.* The Columbia, 73 Fed. 226, 19 C. C. A. 436 [*reversing* 67 Fed. 942, 15 C. C. A. 91]. As opposed to this view it has been held that a barge without motive power, which is used for carrying excursion parties about New York harbor and adjacent waters, may be surrendered by her owners, under the limited liability acts of the United States, without the surreuder of the tug towing the barge at the time of the loss, although the tug belongs to the same owners. *In re* Myers Excursion, etc., Co., 57 Fed. 240 [*affirmed* in 61 Fed. 109, 9 C. C. A. 386].

Damage by two tugs belonging to same owner.— Where an injury is caused to a tow by the negligence of the captain in control of two tugs belonging to the same owner, both tugs must be surrendered as a limitation of the owner's liability. The Bordentown, 40 Fed. 682. But see The Scotland, 105 U. S. 24, 26 L. ed. 1001, holding that a surrender is not necessary where the ship-owners interpose their limitation as a defense and by a decree entered against them for the amount of the value of the vessel and pending freight.

3. The U. S. Grant, 45 Fed. 642 (holding that in order to obtain a limitation of liability with respect to claims arising upon a voyage subsequent to the accruing of previous liens, the ship-owner must surrender the vessel, or her proceeds, free from such previous liens); The Leonard Richards, 41 Fed. 818. See Gokey *v.* Fort, 44 Fed. 364.

The liability of the owners is not lessened by the ship being under mortgage.— Spring *v.* Haskell, 14 Gray (Mass.) 309.

4. The John Bramall, 13 Fed. Cas. No. 7,334, 10 Ben. 495.

for a number of years, during which the ship-owners have become insolvent.[5] In case of a total loss of vessel and cargo, no formal abandonment is necessary to entitle the owners to the benefit of the act.[6]

3. Giving Stipulation For Appraised Value. Under admiralty rule 54,[7] a surrender to a trustee is optional with the owner. He may if he chooses give a stipulation for the appraised value and pending freight.[8] The giving by the owner of a stipulation for the value of his interest in a vessel and her freight, without a judicial determination of such value after a hearing of the persons interested, is equivalent under the rule, to a "transfer" of his interest in the vessel and her freight.[9] In proceedings for limitation of liability under admiralty rule 54, prior notice to damage creditors of an appraisement is not necessary, and an *ex parte* appraisement is not void.[10] It is competent for a court, having ordered an *ex parte* appraisement, to order a reappraisement and further security on cause shown by any creditor. The mere fact that the first appraisement and giving of the stipulation were *ex parte* does not render the proceeding void, or invalidate an *ex parte* injunction against other suits; and a subsequent suit in another district, for the same cause, should be dismissed.[11] The price realized at a marshal's sale of the vessel, although *prima facie* fixing the value for which a bond will be required, is not conclusive; and the court, upon cause shown, may require a bond for the actual value as proved.[12] Owners who surrender a vessel for the purpose of limiting liability cannot be required to add interest on her appraised value from the time the liability was incurred, although they have long delayed the surrender;[13] but interest will be allowed on the appraised value only from the date of the decree until payment, and in the event of an appeal by the owners, which is unsuccessful, such interest will be decreed against them, *in personam*, and not against the stipulators;[14] but if a bond is given instead it should include a stipulation for interest from its date,[15] in which case the owners are liable for interest on the bond at the legal rate from the date of its execution.[16] Where a ship-owner in a suit *in personam* sets up his statutory limitation of liability in his answer, but the vessel is not surrendered, or an appraisement had or bond given, he is chargeable with interest on the value of the vessel as it was at the time of or immediately after the injury sued for.[17]

4. Jurisdiction and Venue — a. General Rules. The limited liability act being a part of the maritime code is coextensive with the territorial operation of the general admiralty and maritime jurisdiction,[18] and applies notwithstanding the facts that the injury sued for happened within the technical limits of a county of a state, and that the liability sought to be enforced arose from a state statute.[19]

5. Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57, holding also that it is not material in such case, where the vessel has been brought into court, and her owner has stipulated to pay her appraised value, whether or not she was brought in by the appropriate process.

6. The Peshtigo, 19 Fed. Cas. No. 11,018, 2 Flipp. 466. See Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585.

7. See *supra*, XI, G, 2.

8. Ohio Transp. Co. *v.* Davidson Steamship Co., 148 Fed. 185, 78 C. C. A. 319.

9. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60.

10. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60, holding that the making of an *ex parte* appraisement and the taking of a stipulation thereon under admiralty rule 57 are at most irregularities which the district court can correct, since the stipulation stands in place of the vessel and her freight, and the court can stay further proceedings, deny all relief, and dismiss the libel and petition on failure of the owner to comply with an order to give a new stipulation on a further appraisement.

11. The H. F. Dimock, 52 Fed. 598.

12. The U. S. Grant, 45 Fed. 642.

13. The Battler, 58 Fed. 704.

14. The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123.

15. The Battler, 58 Fed. 704; *In re* Harris, 57 Fed. 243, 6 C. C. A. 320.

16. The George W. Roby, 111 Fed. 601, 49 C. C. A. 481.

17. Smith *v.* Booth, 112 Fed. 553.

18. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017. See The Epsilon, 8 Fed. Cas. No. 4,506, 6 Ben. 378. And see Admiralty, 1 Cyc. 839.

19. Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. ed. 1017; The Tolchester, 42 Fed. 180, holding that the act of congress limiting the liability of ship-

Admiralty has exclusive jurisdiction.[20] In the United States the district courts sitting in admiralty have jurisdiction of cases instituted by owners of vessels under the acts of congress to obtain limitation of liability,[21] and the filing of the libel and petition by the owner of the steamship, with the offer to give a stipulation, confers jurisdiction on the court, which no subsequent irregularity of procedure can take away.[22] The district court does not lose jurisdiction by allowing the steamship, after giving a stipulation for her value under admiralty rule 54, to go into another district in the ordinary course of her business, since the proceeding to limit liability is an equitable action, and not against the vessel and her freight.[23] It is not necessary to the jurisdiction of the district court that the court should have possession of the vessel or her proceeds, or of a fund representing the proceeds, over which the court has obtained control through the exercise of its ordinary jurisdiction;[24] nor is the court ousted of jurisdiction by a recovery by a claimant of less than the stipulated value of the vessel, where his original claim was greater than its value.[25] The district court cannot take jurisdiction in admiralty of a petition for limitation of liability, where it would not have cognizance in admiralty, originally, of the cause of action involved.[26] The jurisdiction of the district court is exclusive and the circuit court has not original jurisdiction of proceedings to limit the liability of ship-owners. The proceedings must originate in the district court of one of the districts specified in Admiralty Rule 57.[27] The jurisdiction belongs primarily to the district court of the district in which the vessel was stranded, where the liability arises from such stranding.[28] Proceedings to limit the liability of ship-owners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, although the petitioners reside in another district.[29] Where the owner of a vessel has been sued on a claim for damages against which he is entitled to a limitation of his liability under the statute, but the vessel has not been libeled, a proceeding for limitation of liability may be brought in the district court either of the district in which the owner has been sued or in that of the district in which the vessel may be, and an allegation in the petition that the vessel

owners in certain cases is not referable to that clause in the constitution giving power to regulate commerce, but is a rule of admiralty procedure enacted under the clause granting admiralty jurisdiction, and therefore the district court has jurisdiction of a proceeding to limit the liability of the owners of a ship for a maritime tort, customarily employed within the navigable waters of a state.

Whether an action against the owner of a vessel in a state court for wrongful death is one of limited liability is a question of admiralty and maritime jurisdiction, which must be determined by the federal courts. The Lotta, 150 Fed. 219.

20. *In re* Providence, etc., Steamship Co., 20 Fed. Cas. No. 11,451, 6 Ben. 124.

21. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60; Place *v.* Norwich, etc., Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. ed. 134; Norwich, etc., Transp. Co. *v.* Wright, 13 Wall. (U. S.) 104, 20 L. ed. 585; The Tolchester, 42 Fed. 180; *In re* Leonard, 14 Fed. 53.

Where a British ship has been proceeded against in a federal district court for a loss happening on the high seas, and the parties affected have appeared, such district court has jurisdiction to decree the owners of such ships to be entitled to the benefit of a rule of the general maritime law permitting vessel owners to abandon their vessel and freight, and thereupon to be exempted from further responsibility for the loss. Churchill *v.* The British America, 5 Fed. Cas. No. 2,715, 9 Ben. 516.

22. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60.

23. Morrison *v.* U. S. District Ct., 147 U. S. 14, 13 S. Ct. 246, 37 L. ed. 60.

24. The City of Norwich, 5 Fed. Cas. No. 2,762, 6 Ben. 330.

The possession of the vessel by the marshal or trustee is not necessary for the purposes of limited liability proceedings. The Mendota, 14 Fed. 358.

Effect of departure of vessel after stipulation given see ADMIRALTY, 1 Cyc. 839.

25. Briggs *v.* Day, 21 Fed. 727.

26. *Ex p.* Phenix Ins. Co., 118 U. S. 610, 7 S. Ct. 25, 30 L. ed. 274.

27. Black *v.* Southern Pac. R. Co., 39 Fed. 565; Elwell *v.* Geibel, 33 Fed. 71; The Mary Lord, 31 Fed. 416. See Rule 57, *ante* p. 419.

28. The John Bramall, 13 Fed. Cas. No. 7,334, 10 Ben. 495, holding that a proceeding to limit the liability of a ship-owner is properly brought in the district where the stranding, out of which the liability arose, occurred, where the property which such owner seeks to abandon is within such district, and no suit has been instituted in any other district.

29. *In re* Leonard, 14 Fed. 53.

is within the district gives the court jurisdiction.[30] Furthermore the proceeding may be brought in the district court for any district in which the owner may be sued in that behalf, on payment into court of, or stipulation to pay, the appraised value of the vessel, or upon the transfer of his interest to a trustee; and the presence of the vessel within the district is not essential to the court's jurisdiction;[31] but it has been held that an owner who fails to institute proceedings until after a suit has been brought by a claimant must commence them in the same district court as that in which such suit was brought.[32]

b. Enjoining Other Proceedings. Proceedings to limit the liability of a vessel supersede other proceedings against the owner or vessel,[33] and other proceedings will be stayed whether in the court where such proceedings are pending or in the state courts,[34] and an injunction may issue to restrain the prosecution of suits in a state court,[35] or the enforcement of a decree.[36]

5. Time For Commencing Proceedings; Waiver or Loss of Right. The owner of a vessel may, before he or it is sued, institute appropriate proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability;[37] and proceedings by the owners of a vessel to limit liability in respect to a collision may be instituted, even after the giving of a stipulation in an action *in rem* for the full value of the vessel.[38] The owners of a vessel do not waive their right to institute proceedings for a limitation of their liability for the loss of property shipped on board her, by waiting to do so until after proceedings have been commenced in a state court to recover damages;[39] nor is a ship-owner who, on the trial of the issue as to the cause of the injury, contests all liability whatever, thereby precluded from claiming the benefit of the limitation of liability.[40] It was held in an early case under the act that the right of the owners of a vessel to proceed for limitation of liability cannot be exercised after final hearing in an action *in rem* to recover on claims in respect to which limitation of liability is sought;[41] and in another that the owners, by allowing a final decree for damages

30. The John K. Gilkinson, 150 Fed. 454, holding also that where a district court has acquired jurisdiction of a proceeding for limitation of liability for a claim of damages on which the owner has been sued in another district, the claimant cannot defeat such jurisdiction by appearing specially and offering or attempting to reduce the amount of his claim below the appraised value of the vessel, and her pending freight.

31. Gleason *v.* Duffy, 116 Fed. 298, 54 C. C. A. 100.

32. The Alpena, 8 Fed. 280, 10 Biss. 436. And see *In re* The Luckenback, 26 Fed. 870.

33. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. ed. 1038; New York, etc., Steamship Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351; Black *v.* Southern Pac. R. Co., 39 Fed. 565.

34. Seese *v.* Monongahela River Consol. Coal, etc., Co., 155 Fed. 507 (holding that as a court of admiralty in which proceedings are instituted by a vessel owner for limitation of liability has exclusive jurisdiction to settle in such proceedings all claims arising out of the matters on which they are based, an order made therein restraining all persons elsewhere is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed); *In re* Whitelaw, 71 Fed. 733; *In re* Humboldt Lumber Mfg. Assoc., 60 Fed. 428; The Tolchester, 42 Fed. 180; Black *v.* Southern Pac. R. Co., 39 Fed. 565; The City of Columbus, 22 Fed. 460; Churchill *v.* The British America, 5 Fed. Cas. No. 2,715, 9 Ben. 516; *In re* Providence, etc., Steamship Co., 20 Fed. Cas. No. 11,451, 6 Ben. 124.

35. The Amsterdam, 23 Fed. 112.

36. New York, etc., Steamship Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351.

37. *Ex p.* Slayton, 105 U. S. 451, 26 L. ed. 1066; Black *v.* Southern Pac. R. Co., 39 Fed. 565.

38. The Rose Culkin, 52 Fed. 328 (holding that the giving of a stipulation for the value of a vessel, on libel in collision, is no bar to a subsequent proceeding in limitation of liability, nor any bar to the surrender of the vessel herself in that proceeding; and although the vessel may have made several short voyages after the giving of such stipulation, and before the surrender, she may still be surrendered in exoneration of liability, provided her value has not in the meantime become impaired, and the circumstances show that no waiver of the right of surrender was intended); City of Norwich, 5 Fed. Cas. No. 2,762, 6 Ben. 330; *In re* New York, etc., Steamship Co., 18 Fed. Cas. No. 10,200, 9 Ben. 44 [*reversed* on other grounds in 103 U. S. 239, 26 L. ed. 351].

39. *In re* Meyer, 74 Fed. 881.

40. New York, etc., Steamship Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351 [*reversing* 18 Fed. Cas. No. 10,200, 9 Ben. 44]; The John Bramall, 13 Fed. Cas. No. 7,334, 10 Ben. 495.

41. *In re* New York, etc., Steamship Co.,

in the federal district court, waive their right to institute proceedings to limit their liability.[42] Proceedings for a limitation of liability, if not instituted until after a party has obtained satisfaction of his demand, are ineffectual as to him.[43] A ship-owner is not debarred from instituting proceedings in a court of admiralty for the limitation of his liability on an account of an alleged maritime tort by the fact that he has permitted an action for damages for such tort to be prosecuted to a judgment against him in a state court, which has been reversed on appeal, and the cause remanded for a new trial; but in such case his laches in invoking the admiralty jurisdiction warrants the court in requiring him, as a condition to the granting of the relief sought, to pay the costs incurred by the plaintiff in the state court.[44] In a proceeding in admiralty for a limitation of liability, the court has discretionary power to permit the filing of a claim for damages after the expiration of the time fixed in the monition, in a proper case;[45] but if the proceedings have been terminated, so far as the parties before the court are concerned, by a final decree, the court has no power to reopen the proceedings for the purpose of allowing other claimants, who have not appeared therein, to come into the case and prove their claims; if for any reason the decree is not binding on such claimants their remedy is by an independent suit.[46]

6. Pleading, Issues, and Evidence. Where an application made for the limitation of liability of a ship-owner to the value of the vessel and freight does not present facts entitling the application to be considered under said act, it may nevertheless be treated as an application for a release of the vessel on bail, addressed to the ordinary discretion of the court.[47] A failure to comply with the steamboat inspection law may be invoked to prove that a ship-owner is not entitled to a limitation of liability, although it is not set up in the pleadings of the parties to the proceeding for limitation.[48] The libel in a proceeding of this kind may be amended.[49] It is not necessary to aver in the petition, or to prove, that the claims against the vessel are in excess of her value to found jurisdiction in the district court to entertain the proceeding.[50] But the petition must allege the facts necessary to entitle the petitioner, under the statute, to the relief sought. A damage claimant contesting the right must take issue by answer, which must be full and explicit and distinct to each separate article and separate allegation, as required by admiralty rule 27. The proof required in support of the petition that any liability incurred was without the privity or knowledge of the petitioner does not reach the subsequent issue of liability for the vessel for individual claims sought to be proved under rule 55, the right to contest which is reserved to the petitioner by rule 56. The issue as to liability should be presented by appropriate pleadings conforming to the general practice in admiralty, the claimant being required to allege and prove a cause of action as in an original suit.[51] The petition in an admiralty court to limit liability and to restrain the

18 Fed. Cas. No. 10,200, 9 Ben. 44 [*reversed* on other grounds in 103 U. S. 239, 26 L. ed. 351].

42. Dyer *v.* National Steamship Nav. Co., 8 Fed. Cas. No. 4,225, 14 Blatchf. 483 [*reversed* on other grounds in 105 U. S. 24, 26 L. ed. 1001].

43. New York, etc., Steamship Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351 [*reversing* 18 Fed. Cas. No. 10,200, 9 Ben. 44].

44. The Ocean Spray, 117 Fed. 971.

45. The City of Boston, 159 Fed. 257, holding that such permission will be granted where the claim forwarded by mail to the clerk on the last day of such time and was received before any action was or could have been taken respecting the claims.

46. Dowdell *v.* U. S. District Ct., 139 Fed. 444, 71 C. C. A. 288.

47. Place *v.* The City of Norwich, 19 Fed. Cas. No. 11,202, 1 Ben. 89.

48. The Annie Faxon, 75 Fed. 312, 21 C. C. A. 366, holding that in a proceeding for the limitation of the liability of a ship-owner, where it appears that such owner is a railroad corporation, having its home officers a long distance from the place where the vessel was operated, it is not necessary to show by direct testimony that the principal offices of such corporation at such home office had no personal knowledge of the condition of such vessel, or of the steps taken to repair.

49. The John Bramall, 13 Fed. Cas. No. 7,334, 10 Ben. 495, so as to show for instance the residence of libellant.

50. The Garden City, 26 Fed. 766.

51. *In re* Davidson Steamship Co., 133 Fed. 411.

prosecution of an action in a state court need not show the existence, or probability of existence, of more than one damage claimant.[52] The petitioners for limitation of liability may litigate in the same proceeding the question of any liability;[53] but where the vessel has been decreed liable for damages sustained by a collision, the question of liability is *res adjudicata*, and in no way involved, and the losing party cannot revive and retry the case upon its merits.[54] Under the 57th rule in admiralty providing that any person who shall have presented his claim to the commissioner under oath may contest the right of the owner to the limitation claimed, claimant cannot, without so first presenting his claim, file exceptions and answer.[55]

7. Apportionment and Distribution of Proceeds. A decree declaring a ship to be in fault and fixing the damages which the respective parties sustain is *res adjudicata* and, until reversed, must stand as the basis for determining their *pro rata* share of the fund substituted by stipulation for the ship and freight.[56] In case the fund provided for by the limited liability act is insufficient to satisfy the demands against it, the claimants must share *pro rata*[57] the costs and expenses of a proceeding to limit the liability of a ship-owner being first paid out of the fund.[58] Where, in proceedings on the petition of ship-owners to limit their liability to libellants of a vessel, the petition is granted, and the fund in court is insufficient to pay in full the amount found due to one claimant, the petitioners cannot complain that a portion of it is erroneously distributed to other claimants.[59] Holders of maritime liens of the same class are entitled to *pro rata* distribution, without regard to the dates of issuing process or obtaining decrees, unless their rights have been forfeited.[60] The owners of a vessel cannot determine for themselves the priority of liens upon the fund representing their liability under the limited liability act. The fact that they have volunterily paid out parts of the fund in discharge of liens supposed to be superior to the claims provided for in the statute does not reduce their liability to discharge those claims to the full extent of the fund as it originally existed.[61]

8. Costs. Where, in a proceeding for limitation of liability, the owners of the vessel unsuccessfully litigate the question of any liability on her part, they are chargeable with the costs of such litigation,[62] and are liable therefor *in solido*.[63] Generally the costs arising on every contested issue should fall on the losing party; but the expenses of administration, including the fees and other charges of the officers of the court and of the commissioner, should be paid from the fund, unless and in so far as parties have made issues, and as to this exception the owner stands in the same condition as any other party. All such costs of adverse issues should be taxed without reference to the fund or its existence, the same as the costs of any entirely independent litigation;[64] and a vessel owner who, in proceedings for limitation of liability, desires to give a stipulation in lieu of transferring the

52. Quinlan *v.* Pew, 56 Fed. 111, 5 C. C. A. 438 [*disapproving* The Rosa, 53 Fed. 132, which held that more than one claim must be shown]. See also The Eureka, 108 Fed. 672; The M. Moran, 107 Fed. 526.

53. The Annie Faxon, 66 Fed. 575 [*following* Providence, etc, Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. ed. 1038; The Benefactor, 103 U. S. 239, 26 L. ed. 466].

54. The Maria and Elizabeth, 12 Fed. 627.

55. *In re* Providence, etc., Steamship Co., 20 Fed. Cas. No. 11,452, 6 Ben. 258.

56. New York, etc., Steamship Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351.

57. The Epsilon, 8 Fed. Cas. No. 4,506, 6 Ben. 378.

58. *In re* Norwich, etc., Transp. Co., 18 Fed. Cas. No. 10,361, 10 Ben. 193.

59. Oregon R., etc., Co. *v.* Balfour, 90 Fed. 295, 33 C. C. A. 57.

60. The Battler, 67 Fed. 251.

61. The Giles Loring, 48 Fed. 463.

62. *In re* Harris, 57 Fed. 243, 6 C. C. A. 320. Proceedings for a limitation of liability, not instituted until after a party has obtained satisfaction of his demand, are ineffectual as to him, and a return of the money should not be compelled, or, in general, should relief be granted, except upon condition of compensating the party for any costs and expenses to which he may have been subjected by reason of the delay of the ship-owner in claiming the benefit of the statute. New York, etc., Steamship Co. *v.* Mount, 103 U. S. 239, 26 L. ed. 351.

63. The Giles Loring, 48 Fed. 463.

64. The Harry Hudson Smith, 124 Fed. 724,

vessel to a trustee, must pay the taxable costs incident to giving the stipulation, including the expense of the appraisal.[65] The act does not release the owners from the payment of costs in the district court beyond the amount of the stipulation filed therefor, if they appear and make defense; or in case they appeal to the circuit court from the payment of the cost taxable there, or of interest in the nature of damages occasioned by the appeal.[66] The costs of the circuit and district courts rest in the discretion of those courts.[67] Petitioner is entitled to a docket fee for each creditor who comes in and proves his claim, but has no preference for his costs over those of the creditor; [68] and where there is an appraisal, and a stipulation for value given, the petitioner is entitled to a single docket fee, and may deduct from the fund the expenses of administration, but this may not include the cost of procuring the stipulation, or the expense of giving the same, or of the appraisal. Each person claiming damages, and recovering the same, is entitled to a separate proctor's fee, payable herein by the stipulators for costs, and not out of the fund.[69] The injunction granted in a proceeding to limit the liability of a ship-owner, restraining the prosecution of suits pending against the ship-owner, should not prohibit the collection of the taxable costs in such suits.[70]

XII. WRECK.

A. Definition and Nature. Wreck is defined to be such goods as after a shipwreck are cast upon land by the sea and left there; [71] but they are not wrecks

74 C. C. A. 56; The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123, holding also that a vessel owner who, in proceedings for limitation of liability, desires to give a stipulation in lieu of transferring the vessel to a trustee must pay the taxable costs incident to giving the stipulation, including the expense of the appraisal.

65. The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123.

66. The Wanata, 95 U. S. 600, 24 L. ed. 461.

67. The Maggie J. Smith, 123 U. S. 349, 8 S. Ct. 159, 31 L. ed. 175.

68. *In re* Norwich, etc., Transp. Co., 18 Fed. Cas. No. 10,361, 10 Ben. 193.

69. *In re* Excelsior Coal Co., 136 Fed. 271 [*affirmed* in 142 Fed. 724, 74 C. C. A. 56].

70. *In re* Norwich, etc., Transp. Co., 18 Fed. Cas. No. 10,361, 10 Ben. 193. And see The Garden City, 27 Fed. 234.

71. Baker *v.* Hoag, 7 N. Y. 555, 558, 59 Am. Dec. 431, Seld. 45.

To the same effect see Chase *v.* Corcoran, 106 Mass. 286, 289; Lacaze *v.* State, 1 Add. (Pa.) 59, 64.

Other definitions are: "That which has been rendered useless or irrecoverable, by peril of the sea." Gibson *v.* Jessup, etc., Paper Co., 15 Phila. (Pa.) 447, 450; Johnson *v.* Chapman, 19 C. B. N. S. 563, 578, 35 L. J. C. P. 23, 15 L. T. Rep. N. S. 70, 14 Wkly. Rep. 264, 115 E. C. L. 563.

"The ruins of a ship which has been stranded or dashed to pieces on a shelf, rock, or lee shore by tempestuous weather." Respublica *v.* Le Caze, 1 Yeates (Pa.) 55, 59 [*citing* Wesket Ins. 606; 1 Blackstone Comm. 292, 293].

The words "wrecks and shipwrecked goods" in their ordinary legal meaning are confined to ships and goods cast on shore by the sea, and cannot be extended to a boat or other property afloat not appearing to have ever been cast ashore or thrown overboard or lost from a vessel in distress. Chase *v.* Corcoran, 106 Mass. 286, 288.

The term "wreck of the sea" as used in the common law excluding the jurisdiction of admiralty over the wreck of the sea does not mean what in the sense of the maritime and commercial law is deemed wreck or shipwreck property, but wreck of the sea in the purely technical sense of the common law constituting a royal franchise, and a part of the revenue of the crown in England; and often granted, as such a royal franchise, to lords of manors. U. S. *v.* Coombs, 12 Pet. (U. S.) 72, 77, 9 L. ed. 1004.

"Wrecked in the United States."—A Swedish vessel abandoned at sea and picked up by a steamer and towed into New York is not a "vessel wrecked in the United States" so as to be entitled to an American register under the act of Dec. 23, 1852. In order for a vessel to be considered as wrecked in the United States it must be actually wrecked within the waters of the United States. U. S. *v.* The Victoria Perex, 28 Fed. Cas. No. 16,620, 8 Ben. 109, 110, holding that such has long been the construction put upon the act by the department of the treasury, and this construction appears in the treasury regulation.

"Wrecking."— One who stated in his application therefor, and was insured as a farmer and who was drowned by the capsizing of a boat while rescuing the crew of a shipwrecked vessel, was not employed in wrecking, within the insurance policy providing that the benefit should not extend to death caused while employed in wrecking. Tucker *v.* Mutual Ben. L. Ins. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505 [*affirmed* in 121 N. Y. 718, 24 N. E. 1102].

A vessel's spars and sails blown overboard by a gale and lying alongside of the vessel is

so long as they remain afloat in the sea in the jurisdiction of admiralty,[72] and thus none of the goods coming under the definition of flotsam,[73] jetsam,[74] or ligan [75] can be called or deemed wrecks so long as they remain on or in the sea, but if they are cast on the land by the sea they can then become wrecks and are then subject to common-law jurisdiction only, but if they are taken up at sea and brought on shore they are subject to admiralty jurisdiction.[76] But while wreck or wrecks of the sea, in a strict technical sense, are wrecked goods which the sea casts upon land, and excluded from admiralty jurisdiction, there is another more loose sense in which it is used for shipwrecked goods in general and in this sense it includes flotsam, jetsam, and ligan, which are subjects of admiralty jurisdiction.[77] The condition of the ship must be by reason of some injury received from some peril and not the result of age or natural decay, and, although the material of which she is composed may remain, yet if the ship is so disabled that she can no longer retain her character as a navigable vessel she is a wreck.[78]

B. Right of Property in Wrecks, Their Protection, and Disposition of Proceeds. No length of time will divest the owner of property found derelict upon the sea. It will be restored upon the payment of salvage according to the circumstances.[79] By the common law a wreck belonged to the crown until reclaimed by its rightful owner,[80] which must be within a year and a day, otherwise

not a wreck. The Margarethe Blanca, 12 Fed. 728, 732 [*affirmed* in 14 Fed. 59].

Distinguished from "lost."— There is a difference in the words "lost" and "wrecked" in their marine signification. A vessel lost is one that is totally gone from the owners against their will, so that they know nothing concerning it either whether still existing or not, or one which they do not know, as to them is no longer within their use or control, either from capture by enemies, by unknown foundering, or by a sinking by a storm or collision, or by a total destruction or shipwreck. But a vessel is wrecked by being stranded or cast upon the shores and rocks. The vessel may be a total loss or a partial loss or temporary disability. Collard *v.* Eddy, 17 Mo. 354, 355, holding that a steamboat, lying at the levee, having no person on board, and which breaks loose from her moorings in broad daylight, but is not secured before it had drifted sixty feet, without injury, is not lost or wrecked within the meaning of the statute making vessels lost or wrecked the subject of salvage.

In marine insurance a ship becomes a wreck when, in consequence of the injury she has received, she is rendered absolutely unnavigable, or unable to pursue her voyage without repairs exceeding the half of her value. Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 482, 4 Am. Dec. 163; Peele *v.* Merchants' Ins. Co., 19 Fed. Cas. No. 10,905, 3 Mason 27, 43. See, generally, MARINE INSURANCE, 26 Cyc. 689.

"Wrecked property," as used in 1 N. Y. Rev. St. § 690, declaring that no vessel that shall be cast by the sea upon the land shall be deemed to belong to the people of the state as wrecked property, but may be recovered by the owner on the payment of salvage, relates exclusively to such property as in the common law is known as wrecks, and the charges on such property are salvage. Whatever was wrecked property at common law is wrecked property under the statute. Baker *v.* Hoag, 7 N. Y. 555, 558, 59 Am. Dec. 431, 3 Seld. 45 [*reversing* 7 Barb. 113, 115].

Coal lying in a sunken ship at the bottom of Lake Michigan is not, by common law, wreck of the sea. Murphy *v.* Dunham, 38 Fed. 503. The United States has no title to such property as the proprietorship of the state extends to the center of the lake, subject only to the right of congress to control its navigation. Murphy *v.* Dunham, *supra*.

72. Chase *v.* Corcoran, 106 Mass. 286, 288; Baker *v.* Hoag, 7 N. Y. 555, 558, 59 Am. Dec. 431, 3 Seld. 45.

73. **Flotsam defined** see 19 Cyc. 1080.

74. **Jetsam defined** see 23 Cyc. 373.

75. **Ligan defined** see 25 Cyc. 958.

76. Chase *v.* Corcoran, 106 Mass. 286, 288; Lacaze *v.* State, Add. (Pa.) 59, 64.

77. Lacaze *v.* State, Add. (Pa.) 59, 64.

78. Wood *v.* Lincoln, etc., Ins. Co., 6 Mass. 479, 4 Am. Dec. 163, holding that a vessel which is driven on the rocks and overturned and was filled with water and sunk but soon after was righted and made navigable and carried to the port of her destination and made fast to a wharf was not a wreck.

79. Wilkie *v.* Two Hundred and Five Boxes of Sugar, 29 Fed. Cas. No. 17,662, Bee 82.

But the owner of a vessel wrecked on a desert island has no title to a small vessel built from her remnants by the master and crew, as the only means of escaping from the island. The Holder Borden, 12 Fed. Cas. No. 6,600, 1 Sprague 144.

Where the owner of a vessel sunk by a collision recovers the full value of the vessel in admiralty, on the ground that the vessel is totally lost, and is actually paid the amount of such decree, the title of the submerged vessel passes to the party paying its value. Fox *v.* The Lucy A. Blossom, 9 Fed. Cas. No. 5,013.

80. Baker *v.* Hoag, 7 N. Y. 555, 59 Am. Dec. 431, 3 Seld. 45; Lacaze *v.* State, Add. (Pa.) 59; Rex *v.* Two Casks of Tallow, 3 Hagg.

it belonged to the crown absolutely,[81] the year and a day beginning to run from the day the goods were actually taken and seized by the finder.[82] In several of the United States similar statutes are in force providing that wrecked property shall vest in the state; [83] and furthermore the protection of wreck and disposition thereof or of the proceeds is regulated in the United States largely by statutes passed in the several states.[84] These statutes generally name officers, ordinarily designated wreck masters or commissioners of wrecks, whose duty it is to care for wrecks,[85] and after specified steps to sell and apply the proceeds as provided in the statutes.[86] The owner of a wreck may recover for unnecessary injury, wilful or negligent thereto by another vessel; [87] and by various federal statutes passed from time to time in the United States it is a felony to despoil, steal from, or plunder a wrecked or stranded vessel.[88] Under such a statute it is a felony for the master of a ship to embezzle money belonging to the ship, on deserting it when

Adm. 294; Augusta *v.* Eugenie, 1 Hagg. Adm. 16.

81. Rex *v.* Two Casks of Tallow, 3 Hagg. Adm. 294; Augusta *v.* Eugenie, 1 Hagg. Adm. 16.

82. Murphy *v.* Dunham, 38 Fed. 503, containing a full description of the history of this custom.

83. See the statutes. And see Chase *v.* Corcoran, 106 Mass. 286; Grant *v.* McLaughlin, 4 Johns. (N. Y.) 34 (holding that a purchase of vessels or goods wrecked or abandoned, at a sale made according to the municipal regulations, in such cases, of the country where found, divests all previous titles, and changes the property, although the goods were, previous to abandonment, in the possession of pirates or captors before adjudication).

A vessel to be subject to the jurisdiction of the state water craft law must be one in use or capable of use at the time of seizure, and not a wreck, incapable of service. Baker *v.* Casey, 19 Mich. 220.

84. See the statutes. And see cases cited *infra*, this section.

85. Etheridge *v.* Jones, 30 N. C. 100 (holding that under the statute of wrecks, the commissioner of wrecks is not entitled to his commissions or to damages, where the property of the wrecked vessel was saved and taken possession of by the shipmaster, and not by the commissioner); The Margaretta, 29 Fed. 324 (under N. Y. Rev. St. pt. 1, c. 20, tit. 12, providing for the appointment of a wreck master).

86. The Margaretta, 29 Fed. 324 (holding that where a vessel, having taken fire, is scuttled and sunk, and the owner sells her as she lies to a person who begins operations to raise her, there is no abandonment by the owner such as will authorize the wreck master of a county to take possession of her, under N. Y. Rev. St. pt. 1, c. 20, tit. 12, providing that, when no owner or other person entitled to the possession of such property shall appear, it shall be the duty of the wreck master to save and secure such property, apply to the county judge for an order of sale, and have her sold; and possession taken under such circumstances is wrongful, and the sale invalid); The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465 (holding that a wreck sale, made by authority of the statute laws of a state, is valid to pass the title to the property, where there is no owner or agent present to protect or claim the property, but that a statutory wreck sale, if fraudulent, will not bind the owner, unless in favor of a *bona fide* purchaser, for a valuable consideration, without notice, actual or constructive, of the fraud).

Admiralty has authority to order sale of a wrecked ship, on the master's application; but the sale is not conclusive, on the owner, or on third persons, although a survey has been made. The Tilton, 23 Fed. Cas. No. 14,054, 5 Mason 465.

87. The Fred Schlesinger, 71 Fed. 747; The Brinton, 66 Fed. 71, 13 C. C. A. 331. See The Atlee, 12 Fed. 734.

88. See the statutes. And see U. S. *v.* Coombs, 12 Pet. (U. S.) 72, 9 L. ed. 1004, holding that Act (1825), c. 276, § 9, making it felonious to steal from stranded vessels, is not authorized by the constitutional provision extending the admiralty jurisdiction to the federal courts.

U. S. Rev. St. (1878) § 5358 [U. S. Comp. St. (1901) p. 3639], is a comprehensive statute, affording extraordinary protection to property within the admiralty and maritime jurisdiction of the United States, by creating and punishing a substantive and distinct offense for all acts of spoliation upon the property belonging to a vessel wrecked or in distress. It is not alone the crime of larceny that is punished by the statute, but any act of depredation, whether it be of the character that would be piracy, if committed on the high seas, robbery or other forcible taking, theft, trespass, malicious mischief, or any fraudulent or criminal breach of trust if committed on land or property solely under the protection of the common or statutory law of the state within which the offense is committed; and no specific intent, as in larceny, is necessary to constitute the offense. Any intent except that of restoring the goods to the vessel or owner is unlawful, under this statute, and whether conceived at the time of the taking or subsequently thereto, if carried out by a wrongful appropriation or destruction of the property the offense is complete. Nor is it material whether the property is taken from off the wrecked vessel itself, or out of the water while floating

stranded;[89] but it is held that the statutes do not apply to property which has been abandoned by the owners.[90]

SHIPPING-ARTICLES. See SEAMEN, 35 Cyc. 1183.

SHIPPING BUSINESS. Any and every kind of business relating to ships.[1] (See, generally, SHIPPING.)

SHIPPING COMMISSIONER. See SEAMEN, 35 Cyc. 1261.

SHIPPING COTTON. Putting the cotton on board of a ship to be transported.[2]

SHIPPING FACILITIES. See CARRIERS, 6 Cyc. 372.

SHIPPING PRICE. A term said not to be equivalent to reasonable price.[3] (See PRICE, 31 Cyc. 1171.)

SHIP RECEIPT. The written acknowledgment of the mate, receiving cargo, acknowledging the receipt of the goods on board, describing them by the marks on them or the packages.[4] (See, generally, SHIPPING.)

SHIP'S AGENT. See SHIPPING.

SHIP'S BILL. A bill of lading retained by a ship, designed only for information and convenience, and not for evidence as between the parties of what constituted their agreement.[5] (See, generally, SHIPPING.)

SHIP'S COMPANY. A term said to mean the same as the crew of a ship.[6] (See, generally, SEAMEN, 35 Cyc. 1176.)

SHIP'S HUSBAND. An agent of the owner of the ship;[7] the general agent of the owner in regard to all the affairs of the ship in the home port;[8] the person who in the home port, where the vessel belongs, does what the owner would otherwise do.[9] (Ship's Husband: Generally, see SEAMEN, 35 Cyc. 1176; SHIPPING. Insurable Interest of, see MARINE INSURANCE, 26 Cyc. 557. Lien of, see MARITIME LIENS, 26 Cyc. 757.)

away, or while cast upon the shore. Nor is the value material; all property belonging to the vessel, of any value, in any situation or condition, being under the protection of the statute. U. S. *v.* Stone, 8 Fed. 232. It is not necessary in an indictment charging the offense declared by the statute to distinguish between acts supposed to be characterized as "plundering" and those supposed to be characterized as "stealing" or "destroying." It may well be charged, in the language of the statute, as a single offense, and will be supported by proof of any act that could be denominated plundering, stealing, or destroying. Nor is it necessary to distinguish between acts of depredation committed on the wreck, and those on property belonging to it, but separated from it. If the indictment be so drawn, the separation may be disregarded, and a general verdict had upon the whole indictment. U. S. *v.* Stone, *supra*.

89. U. S. *v.* Pitman, 27 Fed. Cas. No. 16,051, 1 Sprague 196.

90. U. S. *v.* Smiley, 27 Fed. Cas No. 16,317, 6 Sawy. 640.

An owner does not abandon a wreck by employing an independent contractor to raise it, although the person so employed be placed in the actual physical control of the wreck. The Snark, [1899] P. 74, 8 Aspin. 183, 68 L. J. P. D. & Adm. 22, 80 L. T. Rep. N. S. 25, 15 T. L. R. 170, 47 Wkly. Rep. 398 [*affirmed* in [1900] P. 105, 9 Aspin. 50, 69 L. J. P. D. & Adm. 41, 82 L. T. Rep. N. S. 42, 16 T. L. R. 160].

1. De Wolf *v.* Crandall, 1 Sweeny (N. Y.) 556, 566, where it was said that it may include shipbuilding.

2. Lesesne *v.* Young, 33 S. C. 543, 552, 12 S. E. 414, where it is distinguished from "landing."

3. Aceval *v.* Levy, 10 Bing. 376, 383, 3 L. J. C. P. 98, 4 Moore & S. 217, 25 E. C. L. 180.

4. People *v.* Bradley, 4 Park. Cr. (N. Y.) 245, 247, Sheld. 576.

5. The Thames, 14 Wall. (U. S.) 98, 105, 20 L. ed. 804.

6. U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209, 212, where it is said to embrace all the officers as well as the common seamen.

A mere passenger has not been considered one of the crew or ship's company. U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221.

7. Webster *v.* The Andes, 18 Ohio 187, 213.

8. Mitchell *v.* Chambers, 43 Mich. 150, 160, 5 N. W. 57, 38 Am. Rep. 167.

9. Gillespie *v.* Winberg, 4 Daly (N. Y.) 318, 322. See also McCready *v.* Thorn, 51 N. Y. 454, 457; Chase *v.* McLean, 42 N. Y. St. 599, 601.

His chief employment is, among other things, to purchase ship's stores for her voyage, and to make disbursements for the ship's use, and to make out an account of these transactions for their employers, the owners of the ship, to whom they are, as it were, stewards on land, as the officer bearing that name is on board the ship when at sea. Muldon *v.* Whitlock, 1 Cow. (N. Y.) 290, 307, 13 Am. Dec. 533.

SHIP'S KEEPER. Ordinarily nothing more than a watchman having guard of a vessel anchored in harbor, or lying at a wharf or in a dock.[10]

SHIP'S PAPERS. See SHIPPING.

SHIP TIMBER. Among those who deal in the article, a term which has a somewhat definite meaning, as much so as "cord wood," or the like.[11]

SHIPWRECK. See COLLISION, 7 Cyc. 301; MARINE INSURANCE, 25 Cyc. 692; SHIPPING.

SHIPWRECKED GOODS. A term said to be confined to goods cast on shore.[12] (See, generally, COLLISION, 7 Cyc. 301; SHIPPING.)

SHIPWRIGHT. See SHIP CARPENTER, 35 Cyc. 2015.

SHIPYARD. A yard bounded by lines exactly defined, and limited by streets or other lineal land-marks, or a yard as it was in fact used by ship builders in conducting the business.[13]

SHIRRED. A technical term meaning wrinkled or contracted.[14]

SHOCK.[15] A sudden agitation of body or mind;[16] a sudden depression of the vital functions, due to the nervous exhaustion following an injury or a sudden violent emotion, resulting either in immediate death or in prolonged prostration.[17]

SHODDY. The refuse thrown off in the shearing of woolen goods.[18]

SHOES. An article ordinarily composed of uppers, soles, and heels, sewed or otherwise joined together in such manner as to constitute an article of apparel for the feet.[19]

SHOOK. A set of staves sufficient in number for one hogshead, cask, barrel, and the like, trimmed and ready to be put together; a set of boards for a sugar box.[20]

SHOOT. A word which is said to frequently, perhaps usually, be employed in the sense of KILL,[21] *q. v.* (Shoot: In General, see HOMICIDE, 21 Cyc. 646. As Special Form of Assault, see ASSAULT AND BATTERY, 3 Cyc. 1027. At or Into Railroad Train, see RAILROADS, 33 Cyc. 688. Betting on, see GAMING, 20 Cyc. 884. Liability of Master For Shooting of Third Person by Servant, see MASTER AND SERVANT, 26 Cyc. 1541. Pigeon Shooting, see ANIMALS, 2 Cyc. 343.)

10. Gurney *v.* Crockett, 11 Fed. Cas. No. 5,874, 1 Abb. Adm. 490 [*quoted* in The Sirius, 65 Fed. 226, 230].

11. Pillsbury *v.* Locke, 33 N. H. 96, 102, 66 Am. Dec. 711.

12. Chase *v.* Corcoran, 106 Mass. 286, 288, where it is said not to be extended to boats or other property afloat, not appearing to have ever been cast ashore, or thrown overboard, or lost from a vessel in distress.

13. Webb *v.* National F. Ins. Co., 2 Sandf. (N. Y.) 497, 505.

14. Day *v.* Stellman, 7 Fed. Cas. No. 3,690, 1 Fish. Pat. Cas. 487, where the court said: "I looked through all the French and English dictionaries in vain for the word 'shirred.' I could not find it. The nearest word I have found resembling it . . . was a word in the dictionary of the Scotch language, which is 'to shirp,' which means to 'shrivel' or 'shrink up.' Probably when the word crossed the Tweed and came south, they dropped the 'p' and called it 'shir.'"

15. "Shock of wheat" is the term applied to the small collection and arrangement of a few sheaves together in the field, in such manner as to protect them against the weather for a few days, until the farmer has time to gather them into his barn or place them in the large conical pile called a "stack." Denbow *v.* State, 18 Ohio 11, 12.

16. Haile's Curator *v.* Texas, etc., R. Co., 60 Fed. 557, 559, 9 C. C. A. 134, 23 L. R. A. 774.

17. Charles L. Dana, M. D. [*quoted* in Maynard *v.* Oregon R. Co., 43 Oreg. 63, 71, 72 Pac. 590].

18. Lenning *v.* Maxwell, 15 Fed. Cas. No. 8,243, 3 Blatchf. 125, 126, taken from statement of facts.

19. Ricks *v.* Board of Assessors, 43 La. Ann. 1075, 10 So. 202.

"Shoes" when meaning shoes for human feet only see Com. *v.* Shaw, 145 Mass. 349, 350, 14 N. E. 159.

"Shoes" when not including boots see Lindsay *v.* State, 19 Ala. 560, 561.

20. U. S. *v.* Dominici, 78 Fed. 334, 335, 24 C. C. A. 116. See also Washburn *v.* New Orleans, 43 La. Ann. 226, 229, 9 So. 37, where it is said that "shooks" are boxes knocked down. They are pieces of wood which are cut and sawed into sizes and shapes by machinery to take in bundles either for shipment or manufacture into boxes.

21. Winn *v.* State, 82 Wis. 571, 578, 52 N. W. 775.

"Shooting" is a word said sometimes to mean the same as "playing." See Sims *v.* State, 1 Ga. App. 776, 777, 57 S. E. 1029, where it is said that shooting craps means playing craps.

"Shooting a person" is a phrase which is said to mean that the person was hit by the substance with which the gun or pistol was loaded. Voght *v.* State, 145 Ind. 12, 13, 43 N. E. 1049, in which case the information charged not only a "shooting" but also a "wounding."

SHOOTER. In coal mining parlance, the man whose duty it is to shoot down the coal after it has been mined by the machines.[22]

SHOP. A building inside of which a mechanic carries on his work;[23] a building in which goods are kept and used for sale;[24] a building in which goods are offered openly for sale;[25] a building in which mechanics work and where are kept their manufactures for sale;[26] a building or an apartment in which goods, wares, drugs, etc., are sold by retail;[27] a building or a room or suite of rooms appropriated to the sale of wares at retail;[28] any building or room used for carrying on any trade or business adapted to be carried on in a building or room and employing a stock in trade;[29] a house or building in which small quantities of goods, wares, or drugs, and the like, are sold, or in which mechanics labor, and sometimes keep their manufactures for sale;[39] a place, building or room in which things are sold — a store;[31] a place for the purpose of containing merchandise for sale protected from the weather;[32] a place kept and used for the sale of goods;[33] a place in which a mechanic pursues his trade;[34] a place for the sale of goods;[35] a place not only for selling but for storing goods;[36] a place where goods are sold[37] at retail;[38] a place where things are publicly sold; a room where manufactures of some kind are carried on.[39] Sometimes used as synonymous with "store,"[40] "storehouse,"[41] or "warehouse."[42] (Shop: Adjacent to Dwelling as Subject of Burglary, see BURGLARY, 6 Cyc. 190. Junk-Shop as Subject of License-Tax, see LICENSES, 25 Cyc. 619. Larceny From Shop as Special Statutory Offense, see LARCENY, 25 Cyc. 65.)

22. St. Louis Consol. Coal Co. *v.* Young, 31 Ill. App. 417, 418.

23. Chicago, etc., R. Co. *v.* Denver, etc., R. Co., 45 Fed. 304, 314.

24. Com. *v.* Riggs, 14 Gray (Mass.) 376, 378, 77 Am. Dec. 333.

25. State *v.* Sandy, 25 N. C. 570, 573.

26. Imperial Dict. [*quoted* in Miles *v.* Hall, 1 Ont. El. Cas. 41, 67]; Webster Dict. [*quoted* in Salomon *v.* Pioneer-Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667; State *v.* O'Connell, 26 Ind. 266, 267].

27. State *v.* Canney, 19 N. H. 135, 137; Imperial Dict. [*quoted* in Miles *v.* Hall, 1 Ont. El. Cas. 41, 67]; Webster. Dict. [*quoted* in Petty *v.* State, 58 Ark. 1, 2, 22 S. W. 654; Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667; State *v.* O'Connell, 26 Ind. 266, 267; State *v.* Smith, 5 La. Ann. 340, 341].

28. State *v.* Sprague, 149 Mo. 409, 419, 50 S. W. 901.

29. Boston Loan Co. *v.* Boston, 137 Mass. 332, 336.

30. State *v.* Morgan, 98 N. C. 641, 643, 3 S. E. 927.

31. Worcester Dict. [*quoted* in Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667].

32. Richardson Dict. [*quoted* in State *v.* Canney, 19 N. H. 135, 137].

33. Anderson L. Dict. [*quoted* in Petty *v.* State, 58 Ark. 1, 2, 22 S. W. 654].

34. Sparrenberger *v.* State, 53 Ala. 481, 483, 25 Am. Rep. 643, where it is distinguished from "store."

35. Reg. *v.* Sanders, 9 C. & P. 79, 38 E. C. L. 58, where it is said not to be a mere work shop.

36. Pope *v.* Whalley, 6 B. & S. 303, 313, 11 Jur. N. S. 444, 34 L. J. M. C. 76, 11 L. T. Rep. N. S. 769, 13 Wkly. Rep. 402, 118 E. C. L. 303.

37. St. Albans *v.* Battersby, 3 Q. B. D. 359, 362, 47 L. J. Q. B. 571, 38 L. T. Rep. N. S. 685, 26 Wkly. Rep. 678.

38. Com. *v.* Annis, 15 Gray (Mass.) 197, 199 (where it is said that in this country, shops for the sale of goods are frequently called "stores"); London, etc., Land, etc., Co. *v.* Field, 16 Ch. D. 645, 648, 50 L. J. Ch. 549, 44 L. T. Rep. N. S. 444.

39. McNab *v.* McGrath, 5 U. C. Q. B. O. S. 516, 520.

40. Rapalje & L. L. Dict.; Webster Dict. [both *quoted* in Petty *v.* State, 58 Ark. 1, 2, 22 S. W. 654].

"Store" distinguished see State *v.* Canney, 19 N. H. 135, 137; State *v.* Hanlon, 32 Oreg. 95, 100, 48 Pac. 353.

Used in a statute the word has been said to have no broader meaning than "store." Martin *v.* Portland, 81 Me. 293, 297, 17 Atl. 72; Hittinger *v.* Westford, 135 Mass. 258, 262.

41. State *v.* Sandy, 25 N. C. 570, 573.

42. Webster Dict. [*quoted* in Petty *v.* State, 58 Ark. 1, 2, 22 S. W. 654].

Applies to structures which are in the nature of permanent structures. Smith *v.* Kyle, [1902] 1 K. B. 286, 289, 66 J. P. 101, 71 L. J. K. B. 16, 85 L. T. Rep. N. S. 428, 18 T. L. R. 32.

Includes the cabin of a vessel. State *v.* Carrier, 5 Day (Conn.) 131, 132; Rex *v.* Humphrey, 1 Root (Conn.) 63.

Does not include an inclosed park under statute making it criminal to keep open on Sunday any shop, house, etc., in which liquor is reputed to be sold. State *v.* Barr, 39 Conn. 40, 44.

In England the word is understood to be a structure or room in which goods are kept and sold at retail. State *v.* Hanlon, 32 Oreg. 95, 100, 48 Pac. 353. See also Richards *v.* Washington F. & M. Ins. Co., 60 Mich. 420, 425, 27 N. W. 586, where the word in England

SHOPKEEPER. A small dealer;[43] one who keeps a shop for the sale of goods; a trader who sells goods in a shop at retail.[44] (See DEALER, 13 Cyc. 286; MERCHANT, 27 Cyc. 478.)

SHOP STEWARD. An officer of a labor union, whose duty is to keep a record of all non-union men on works where he is employed, and present their names at the branch meeting.[45] (See, generally, LABOR UNIONS, 24 Cyc. 825.)

SHORE. That ground that is between the ordinary high and low water mark;[46] that part of the land covered by water in its greatest ordinary flux;[47] that portion of the land at the water's edge which is daily covered and daily left bare by the rising and falling of the tides;[48] that space which is alternately covered and exposed by the flow and ebb of the tide;[49] that specific portion of the soil by which the sea is confined to certain limits;[50] the land that is periodically covered and uncovered by the tide;[51] the part of the sea covered by water, whether in winter or summer;[52] the pebbly, sandy, or rocky space between the bank and low-water mark;[53] the portion of the land which is alternately covered by the water and left bare by the flux and reflux of the tide;[54] the space between high and low water marks;[55] the space between the margin of the water at a low stage and the banks which contain it at its greatest flow;[56] land on the margin of the sea, lake, or river;[57] land on the side of the sea or a lake or river;[58] the coast of

was further said to mean the building itself as distinguished from a place of sale which is open like a stall.

In western and Pacific coast states the word is understood to mean a building in which an artisan carries on his business, or laborers, workmen, or mechanics by the use of tools or machinery manufacture, alter, or repair articles of trade. State *v.* Hanlon, 32 Oreg. 95, 100, 48 Pac. 353.

43. Sparrenberger *v.* State, 53 Ala. 481, 484, 25 Am. Rep. 643, where it was so used to distinguish it from "merchant."

Distinguished from "merchant" who is said to be one who sells at wholesale. See State *v.* Cohen, 73 N. H. 543, 544, 33 Atl. 928.

44. Century Dict. [*quoted* in State *v.* Cohen, 73 N. H. 543, 544, 63 Atl. 928].

45. State *v.* Dyer, 67 Vt. 690, 704, 32 Atl. 814, where it is also said to be his duty to notify every non-union man to report at such meeting and take the obligation of the organization.

46. Dana *v.* Jackson St. Wharf Co., 31 Cal. 118, 122, 89 Am. Dec. 164; East Haven *v.* Hemingway, 7 Conn. 186, 198; Bainbridge *v.* Sherlock, 29 Ind. 364, 367, 95 Am. Dec. 644; Dunton *v.* Parker, 97 Me. 461, 467, 54 Atl. 1115; Abbott *v.* Treat, 78 Me. 121, 123, 3 Atl. 44; Montgomery *v.* Reed, 69 Me. 510, 514; Pike *v.* Munroe, 36 Me. 309, 313, 58 Am. Dec. 751; Gerrish *v.* Union Wharf, 26 Me. 384, 396, 46 Am. Dec. 568; Potomac Dredging Co. *v.* Smoot, 108 Md. 54, 60, 69 Atl. 507; Hathaway *v.* Wilson, 123 Mass. 359, 361; Doane *v.* Willcutt, 5 Gray (Mass.) 328, 335, 66 Am. Dec. 369; Lorman *v.* Benson, 8 Mich. 18, 27, 77 Am. Dec. 435; Morris Canal, etc., Co. *v.* Brown, 27 N. J. L. 13, 17; Bell *v.* Gough, 23 N. J. L. 624, 683; Atty.-Gen. *v.* New Jersey Cent. R. Co., 68 N. J. Eq. 198, 210, 59 Atl. 348; East Hampton *v.* Kirk, 68 N. Y. 459, 463; Oakes *v.* De Lancey, 71 Hun (N. Y.) 49, 50, 24 N. Y. Suppl. 539; Andrus *v.* Knott, 12 Oreg. 501, 503, 8 Pac. 763; McBurney *v.* Young, 67 Vt. 574, 576, 32 Atl. 492, 29 L. R. A. 539; French *v.* Bankhead, 11 Gratt. (Va.) 136, 160; Maynard *v.* Puget Sound Nat. Bank, 24 Wash. 455, 459, 64 Pac. 754; Shively *v.* Bowlby, 152 U. S. 1, 12, 14 S. Ct. 548, 38 L. ed. 331; U. S. *v.* Pacheco, 2 Wall. (U. S.) 587, 590, 17 L. ed. 865; Sullivan Timber Co. *v.* Mobile, 110 Fed. 186, 196; Doe *v.* Hill, 7 N. Brunsw. 587, 588; Burrill L. Dict. [*quoted* in Stillman *v.* Burfeind, 21 N. Y. App. Div. 13, 15, 47 N. Y. Suppl. 280].

47. United Land Assoc. *v.* Knight, (Cal. 1890) 23 Pac. 267, 270.

48. Axline *v.* Shaw, 35 Fla. 305, 310, 17 So. 411, 28 L. R. A. 391.

49. Mobile Dry-Docks Co. *v.* Mobile, 146 Ala. 198, 207, 40 So. 205, 3 L. R. A. N. S. 822; Morrison *v.* Skowhegan First Nat. Bank, 88 Me. 155, 160, 33 Atl. 782; Elliott *v.* Stewart, 15 Oreg. 259, 261, 14 Pac. 416.

50. Mellor *v.* Walmesley, [1905] 2 Ch. 164, 177, 74 L. J. Ch. 475, 93 L. T. Rep. N. S. 574, 21 T. L. R. 591, 53 Wkly. Rep. 581; Scratton *v.* Brown, 4 B. & C. 485, 496, 6 D. & R. 536, 28 Rev. Rep. 344, 10 E. C. L. 670.

51. Freeman *v.* Bellegarde, 108 Cal. 179, 187, 41 Pac. 289, 49 Am. St. Rep. 76.

52. Sullivan *v.* Richardson, 35 Fla. 1, 114, 14 So. 692.

53. McCullough *v.* Wainright, 14 Pa. St. 171, 174, where it was so used in regard to a stream.

54. Child *v.* Starr, 4 Hill (N. Y.) 369, 375.

55. Mobile Dry-Docks Co. *v.* Mobile, 146 Ala. 198, 207, 40 So. 205, 3 L. R. A. N. S. 822; Elliott *v.* Stewart, 15 Oreg. 259, 261, 14 Pac. 416.

56. Alabama *v.* Georgia, 23 How. (U. S.) 505, 513, 16 L. ed. 556; Howard *v.* Ingersoll, 13 How. (U. S.) 381, 391, 14 L. ed. 189.

57. Mobile Dry-Docks Co. *v.* Mobile, 146 Ala. 198, 207, 40 So. 205, 3 L. R. A. N. S. 822; Elliott *v.* Stewart, 15 Oreg. 259, 261, 14 Pac. 416.

58. Bouvier L. Dict. [*quoted* in Mather *v.* Chapman, 40 Conn. 382, 400, 16 Am. Rep. 46].

In its popular and more extended sense the term is not limited to the land between high and low water, but a city may be built

the sea; the bank of a river; that part of the bed lying between the top of the bank and that part of the bed where the water actually flows, and which, as the water rises or falls is land or water;[59] the coast or land adjacent to the ocean, sea, or a large lake or river.[60] Sometimes used as synonymous with BANK,[61] *q. v.*, BEACH,[62] *q. v.*, or FLAT,[63] *q. v.* (Shore: Of Navigable Waters, see NAVIGABLE WATERS, 29 Cyc. 355. Riparian Rights in General, see WATERS AND WATERCOURSES. Use of For Logging Purposes, see LOGGING, 25 Cyc. 1568. Waters and Watercourses as Boundaries, see BOUNDARIES, 5 Cyc. 891. See also SEASHORE, 35 Cyc. 1278.)

SHORE-LINE. The edge of the water at ordinary high water.[64] (See BOUNDARIES, 5 Cyc. 891; NAVIGABLE WATERS, 29 Cyc. 333.)

SHORE OWNER. The owner of the lands above and adjoining the shore line.[65] (See NAVIGABLE WATERS, 29 Cyc. 333.)

SHORT.[66] A word which when used in relation to a sale of stock refers to a sale in which the seller does not at the time possess the stock sold but which, by the future date or time agreed upon for its delivery to the purchaser under the terms of the contract, the seller must in some way acquire for the purpose of such delivery.[67] (See LONG, 25 Cyc. 1603; LONGS, 25 Cyc. 1603.)

SHORTAGE. Any deficiency in a quantity warranted.[68]

SHORT CAUSE. A cause which is not likely to occupy a great portion of the time of the court, and which may be entered on the list of short causes upon the application of one of the parties, and will then be heard more speedily than it would in its regular order.[69] (Short Cause: Calendar, see TRIAL.)

SHORT ENTRY. The custom of bankers in London, on receiving bills for collection, to enter them immediately in their customer's accounts, but never to carry out the proceeds in the column to their credit until actually collected.[70]

on the shore of a river. Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 38 N. J. L. 548, 563].

In the commonly accepted use of the word, the "shore" of a river is the land adjacent to the water-line, and is applied in the same general sense in which the same term is popularly applied to the land adjacent to the water of an inland sea or to one of the great American lakes. Lacy *v.* Green, 84 Pa. St. 514, 519.

59. Johnson Dict. [*quoted* in Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435, 463].

60. Webster Dict. [*quoted* in Mather *v.* Chapman, 40 Conn. 382, 400, 401, 16 Am. Rep. 46; Littlefield *v.* Littlefield, 28 Me. 180, 184].

61. Morrison *v.* Skowhegan First Nat. Bank, 88 Me. 155, 160, 33 Atl. 782; Bradford *v.* Cressey, 45 Me. 9, 12; Starr *v.* Child, 20 Wend. (N. Y.) 149, 153.

62. Mobile Dry-Docks Co. *v.* Mobile, 146 Ala. 198, 207, 40 So. 205, 3 L. R. A. N. S. 822; Elliott *v.* Stewart, 15 Oreg. 259, 261, 14 Pac. 416.

63. Storer *v.* Freeman, 6 Mass. 435, 440, 4 Am. Dec. 155.

Includes the ports, bays, roadsteads, gulfs, rivers, though not navigable, their beds, mouths, and the salt marshes. United Land Assoc. *v.* Knight, 85 Cal. 448, 482, 23 Pac. 267, 24 Pac. 818.

Generally has application only to large bodies of water, as lakes, and large rivers. Axline *v.* Shaw, 35 Fla. 305, 310, 17 So. 411, 28 L. R. A. 391.

Inapplicable to river in which the tide does not ebb and flow. Child *v.* Starr, 4 Hill (N. Y.) 369, 375. But see Freeman *v.* Bellegarde, 108 Cal. 179, 187, 41 Pac. 289, 49 Am. St. Rep. 76, where it is said to be sometimes applied to a river or pond as synonymous with "bank."

Lord Hale gives three kinds of shore, one of which is the space between high and low water mark, but both the other kinds embrace portions of the land above ordinary high water mark. Mather *v.* Chapman, 40 Conn. 382, 400, 16 Am. Rep. 46 [*citing* Hale de Jure Maris, c. 6].

The rule of the civil law made the shore of the ocean extend to the line of the highest tide in winter. Galveston *v.* Menard, 23 Tex. 349, 399.

64. Morris Canal, etc., Co. *v.* Brown, 27 N. J. L. 13, 17.

65. Morris Canal, etc., Co. *v.* Brown, 27 N. J. L. 13, 17.

66. "Short time"— two weeks — see Smith *v.* Fairchild, 7 Colo. 510, 511, 4 Pac. 757.

67. Boyle *v.* Henning, 121 Fed. 376, 380. To the same effect see Appleman *v.* Fisher, 34 Md. 540, 549; Baldwin *v.* Flagg, 36 N. J. Eq. 48, 57; *In re* Taylor, 192 Pa. St. 304, 306, 43 Atl. 973, 73 Am. St. Rep. 812.

The term "sold short," in the language of the board of trade, indicates the sale of grain that the seller is not possessed of and has no contract by which he is entitled to such grain. Watte *v.* Costello, 40 Ill. App. 307, 311.

68. Parker *v.* Barlow, 93 Ga. 700, 704, 21 S. E. 213.

In charter-parties the term is intended to apply to either short loading or short delivery. Otis Mfg. Co. *v.* The Ira B. Ellems, 50 Fed. 934, 940, 2 C. C. A. 85.

69. Black L. Dict.

70. Blaine *v.* Bourne, 11 R. I. 119, 121, 23

SHORT FORM. One of the methods of bringing a case before the supreme court.[71]

SHORTHAND. See STENOGRAPHER; and, generally, COURTS, 11 Cyc. 722.

SHORTLY. Within a reasonable time.[72]

SHORT RATES. The various rates of premium on policies of insurance for specified short times, or premiums at short-time rates.[73]

SHORT-SHIPPED. An expression in a bill of lading said to mean a deduction from the amount or number previously stated.[74]

SHORT SUMMONS. A process, authorized in some of the states, to be issued against an absconding, fraudulent or non-resident debtor, which is returnable in a less number of days than the ordinary writ.[75]

SHORT SWINGS. A term used in the postal service to designate intervals of short duration between the close of one mail delivery by carrier and the commencement of the next subsequent delivery.[76]

SHORT YEARLING. Cattle about or proximately near one year old.[77]

SHOULD. The past tense of the verb SHALL,[78] *q. v.* (See SHALL, 35 Cyc. 1451.

SHOW. As a noun, a sight or spectacle; an exhibition; a pageant; a play.[79] As a verb, to exhibit or present to view; to cause to see; to make apparent or clear by evidence, testimony, or reasoning; to prove; to give the reason and explanation of; to manifest; to evince;[80] to prove, to manifest, to prove by evidence;[81] to make apparent or clear by evidence.[82] Sometimes used as synonymous with REPRESENT,[83] *q. v.* (See, generally, THEATERS AND SHOWS.)

SHRINES. Images or statues of virgins, saints, martyrs, etc.[84]

SHRUB. A low, small plant, whose branches grow directly from the earth without any supporting trunk or stem.[85]

Am. Rep. 429; Giles *v.* Perkins, 9 East 12, 103 Eng. Reprint 477; *Ex p.* Thompson, Mont. & M. 102, 110.

71. Lyndon *v.* Georgia R., etc., Co., 129 Ga. 353, 358, 58 S. E. 1047, where it is said to be accomplished by excepting to the judgment decree or verdict, segregating a certain ruling, assigning error on it, and bringing it up as a necessarily controlling ruling.

72. Cincinnati Glass, etc., Co. *v.* Stephens, 3 Ga. App. 766, 768, 60 S. E. 360.

73. Burlington Ins. Co. *v.* McLeod, 34 Kan. 189, 192, 8 Pac. 124.

74. Abbott *v.* National Steamship Co., 33 Fed. 895, 896.

75. Black L. Dict. See 32 Cyc. 456 note 22.

76. King *v.* U. S., 32 Ct. Cl. 234, 238, where such interval is said to be the carrier's own time, for which he is entitled to receive no compensation.

77. Sparks *v.* Paris Deposit Bank, 115 Ky. 461, 465, 74 S. W. 185, 78 S. W. 171, 24 Ky. L. Rep. 2333.

78. Webster Dict., where it is said to be used as an auxillary verb either in the past tense or conditional present.

More imperative than "may."— Smith *v.* State, 142 Ind. 288, 293, 41 N. E. 595; Lynch *v.* Bates, 139 Ind. 206, 210, 38 N. E. 806.

Imports same meaning as "would" see Southern R. Co. *v.* King, 160 Fed. 332, 336, 87 C. C. A. 284; Blyth *v.* Birmingham Waterworks, 11 Exch. 781, 784, 2 Jur. N. S. 333, 25 L. J. Exch. 212, 4 Wkly. Rep. 294.

Use of for "might" (see State *v.* Renfrow, 111 Mo. 589, 598, 20 S. W. 299) or "ought" (see Godchaux *v.* Carpenter, 19 Nev. 415, 420, 14 Pac. 140).

May imply a duty see Durand *v.* New York, etc., R. Co., 65 N. J. L. 656, 657, 48 Atl. 1013. But whether it may relate to a duty to be performed in the future see Toner *v.* Taggart, 5 Binn. (Pa.) 490, 496. "There should be" held not to mean "there must be" see Wallace *v.* Boston, etc., R. Co., 72 N. H. 504, 512, 57 Atl. 913.

Used in an affidavit of attachment stating that plaintiff "should" recover may be merely the expression of the affiant's opinion, and hence is not of the same force that plaintiff is "entitled" to recover. Sommers *v.* Allen, 44 W. Va. 120, 122, 28 S. E. 787.

79. Century Dict. [*quoted* in People *v.* Hemleb, 127 N. Y. App. Div. 356, 360, 111 N. Y. Suppl. 690].

80. Webster Dict. [*quoted* in Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 362, 23 Pac. 743].

81. Webster Dict. [*quoted* in Spalding *v.* Spalding, 3 How. Pr. (N. Y.) 297, 301].

82. Webster Int. Dict. [*quoted* in Coyle *v.* Com., 104 Pa. St. 117, 133; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 362, 23 Pac. 743].

83. Lincoln *v.* Territory, 8 Okla. 546, 550, 58 Pac. 730.

"'Stating' a case to be within the purview of a statute is simply alleging that it is — while 'showing' it to be so, consists of a disclosure of the facts which bring it within the statute." Spalding *v.* Spalding, 3 How. Pr. (N. Y.) 297, 301. See also Meadow Valley Min. Co. *v.* Dodds, 7 Nev. 143, 148, 8 Am. Rep. 709, where the distinction is made between "showing" a fact and "stating" it.

84. Com. *v.* Gombert, 11 Pa. Dist. 435, 439.

85. Clay *v.* Postal Tel. Cable Co., 70 Miss.

SHUNPIKE. A road intended to furnish a way of evading a tollgate and constructed for that special purpose.[86] (See, generally, TOLL-ROADS.)

SHUNT. A turn-off to a side or short rail that the principal rail may be left free.[87]

SHUTTLE GUARD. A steel rod fixed to the "reed cap," directly over the shuttle as it passes from side to side of the loom.[88]

SHYSTER. A trickish knave; one who carries on any business, especially a legal business, in a dishonest way.[89] (See LIBEL AND SLANDER, 25 Cyc. 334.)

SI A JURE DISCEDAS, VAGUS ERIS, ET ERUNT OMNIA OMNIBUS INCERTA. A maxim meaning "If you depart from the law, you will go astray, and all things will be uncertain to everybody." [90]

SI ALICUJUS REI SOCIETAS SIT ET FINIS NEGOTIO IMPOSITUS EST, FINITUR SOCIETAS. A maxim meaning "If there is a partnership in any matter, and the business is ended, the partnership ceases." [91]

SI ALIQUID EX SOLEMNIBUS DEFICIAT, CUM ÆQUITAS POSCIT SUBVENIENDUM EST. A maxim meaning "If any one of certain required forms be wanting, when equity requires, it will be aided." [92]

SI ALIQUIS MULIERUM PREGNANTEM PERCUSSERIT, VEL EI VEN ENUM DEDERIT, PER QUOD FECERIT ABORTIVAM, SI PUERPERIUM JAM FORMATUM FUERIT, ET MAXIME SI FUERIT ANIMATUM, FACIT HOMICIDUM. A Latin phrase meaning "If any person strike a pregnant woman, or give her poison, by which she miscarry, if the embryo has been already formed, and particularly if it has quickened, he is guilty of murder." [93]

SI ASSUETIS MEDERI POSSIS, NOVA NON SUNT TENTANDA. A maxim meaning "If you can be relieved by accustomed remedies, new ones should not be tried." [94]

SIC ENIM DEBERE QUEM MELIOREM AGRUM SUUM FACERE NE VICINI DETERIOREM FACIAT. A maxim meaning "Every one ought so to improve his land as not to injure his neighbor's." [95]

SIC INTERPRETANDUM EST UT VERBA ACCIPIANTUR CUM EFFECTU. A maxim meaning "[A statute] is to be so interpreted that the words may be taken with effect, [that its words may have effect.]" [96]

SICK. Affected with or attended by nausea, inclined or inclining to vomit; having a strong dislike, disgust with, of; affected with diseases of any kind, ill, indisposed, not in health;[97] weak; ailing; diseased; disordered; nauseated; disgusted.[98] (See ILL, 21 Cyc. 1727; ILLNESS, 21 Cyc. 1728; SICKNESS.)

SICK BENEFITS. See MUTUAL BENEFIT INSURANCE, 29 Cyc. 142.

406, 611, 11 So. 658, where it is said not to include a young tree, for a tree is a woody plant, whose branches spring from and are supported upon a trunk or body.

86. Clarksville, etc., Turnpike Co. *v.* Clarksville, (Tenn. Ch. App. 1896) 36 S. W. 979, 982.

87. Webster Dict. [*quoted* in Carson *v.* Central R. Co., 35 Cal. 325, 334, where it is so used with reference to a street railway].

88. Vinson *v.* Willingham Cotton Mills, 2 Ga. App. 53, 54, 58 S. E. 413.

89. Webster Dict. [*quoted* in Gribble *v.* Pioneer Press Co., 34 Minn. 342, 343, 25 N. W. 710].

90. Black L. Dict. [*citing* Coke Litt. 227*b*].

Applied in Godbe *v.* Salt Lake City, 1 Utah 68, 77.

91. Bouvier L. Dict.

Applied in Griswold *v.* Waddington, 16 Johns. (N. Y.) 438, 489.

92. Peloubet Leg. Max. [*citing* 1 Kent Comm. 157].

93. Morgan Leg. Max. [*citing* Tayler L. Gloss. 403].

94. Burrill L. Dict. [*citing In re* Isle of Ely, 10 Coke 141*a*, 142*b*, 77 Eng. Reprint 1139].

95. Black L. Dict. [*citing* 3 Kent Comm. 441].

Applied in Embrey *v.* Owen, 6 Exch. 353, 371, 15 Jur. 633, 20 L. J. Exch. 212; Howatt *v.* Laird, 1 Pr. Edw. Isl. 157, 160.

96. Burrill L. Dict. [*citing* 3 Inst. 80].

97. Kelly *v.* Ancient Order of Hibernians, 9 Daly (N. Y.) 289, 291.

98. Richardson New Dict. [*quoted* in Reg. *v.* Huddersfield, 7 E. & B. 794, 797, 3 Jur. N. S. 718, 26 L. J. M. C. 169, 5 Wkly. Rep. 629, 90 E. C. L. 794].

As used in an application to revive a life policy which states that the applicant has not been sick since his policy lapsed, is not to be construed "as importing an absolute freedom from any bodily ailment, but rather of freedom from such ailments as would ordinarily be called disease or sickness." Metropolitan L. Ins. Co. *v.* McTague, 49 N. J. L. 587, 591, 9 Atl. 766, 60 Am. Rep. 661.

SICKNESS. The state of being sick or diseased; a disease or malady;[99] any affection of the body which deprives it temporarily of the power to fulfil its usual functions.[1] (See ILL, 21 Cyc. 1727; ILLNESS, 21 Cyc. 1728; SICK, *ante*, p. 435; and, generally, BAIL, 25 Cyc. 57, 134; DEPOSITIONS, 13 Cyc. 869.)

SICUT AD QUÆSTIONEM FACTI, NON RESPONDENT JUDICES, ITA AD QUÆSTIONEM JURIS, NON RESPONDENT JURATORES. A maxim meaning "Inasmuch as the judges do not decide on questions of fact, so the jury do not decide on questions of law."[2]

SICUT BEATIUS EST, ITA MAJUS EST, DARE QUAM ACCIPERE. A maxim meaning "It is a more pleasant task, and also a more magnanimous one, to give than to receive."[3]

SIC UTERE TUO UT ALIENUM NON LÆDAS. A maxim meaning "So use your own as not to injure another's property."[4]

99. Kelly *v.* Ancient Order of Hibernians, 9 Daly (N. Y.) 289, 291.

1. Bouvier L. Dict. [*quoted* in Reg. *v.* Huddersfield, 7 E. & B. 794, 797, 3 Jur. N. S. 718, 26 L. J. M. C. 169, 5 Wkly. Rep. 629, 90 E. C. L. 794].

Term held to include: Incurable blindness. Reg. *v.* Bucknell, 3 E. & B. 587, 595, 18 Jur. 533, 23 L. J. M. C. 129, 2 Wkly. Rep. 427, 77 E. C. L. 587, 28 Eng. L. & Eq. 176. Insanity. McCullough *v.* Expressman's Mut. Ben. Assoc., 133 Pa. St. 142, 150, 19 Atl. 355, 7 L. R. A. 210; Union Tp. *v.* Lawrence County, 13 Pa. Dist. 646, 648; Robillard *v.* Société St. Jean Baptiste de Centreville, 21 R. I. 348, 350, 43 Atl. 635, 97 Am. St. Rep. 806, 45 L. R. A. 559.

Term held not to include: Any slight ill in no way seriously affecting the applicant's health or interfering with his usual avocations. Manhattan L. Ins. Co. *v.* Francisco, 17 Wall. (U. S.) 672, 680, 21 L. ed. 698. Bodily injury unless the general health is impaired. Kelly *v.* Ancient Order of Hibernians, 9 Daly (N. Y.) 289, 292. Pregnancy. Reg. *v.* Huddersfield, 7 E. & B. 794, 796, 3 Jur. N. S. 718, 26 L. J. M. C. 169, 5 Wkly. Rep. 629, 90 E. C. L. 794.

2. Peloubet Leg. Max. [*citing* Coke Litt. 295*b*].

3. Morgan Leg. Max. [*citing* Brediman's Case, 6 Coke 56*b*, 57*b*, 77 Eng. Reprint 339].

4. Bouvier L. Dict. [*citing* 1 Blackstone Comm. 306].

Applied in: Kinney *v.* Koopman, 116 Ala. 310, 319, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497; St. Louis, etc., R. Co. *v.* Yonley, 53 Ark. 503, 507, 14 S. W. 800, 9 L. R. A. 604; Bannon *v.* State, 49 Ark. 167, 169, 4 S. W. 655; Martin *v.* Ogdon, 41 Ark. 186, 193; Little Rock, etc., R. Co. *v.* Chapman, 39 Ark. 463, 476, 480, 43 Am. Rep. 280; St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357, 367; Simmons *v.* Camden, 26 Ark. 276, 278, 7 Am. Rep. 620; Wood *v.* Moulton, 146 Cal. 317, 319, 80 Pac. 92; Parker *v.* Larsen, 86 Cal. 236, 238, 24 Pac. 989, 21 Am. St. Rep. 30; Lux *v.* Haggin, 69 Cal. 255, 397, 4 Pac. 919, 10 Pac. 674; Gibson *v.* Puchta, 33 Cal. 310, 316; Smith Canal, etc., Co. *v.* Colorado Ice, etc., Co., 34 Colo. 485, 491, 82 Pac. 940, 3 L. R. A. N. S. 1148; State *v.* Sargent, 45 Conn. 358, 374; Bishop *v.* Banks, 33 Conn. 118, 122, 87 Am. Dec. 197; Norwich *v.* Breed, 30 Conn. 535, 547; Brown *v.* Illius, 27 Conn. 84, 95, 97, 71 Am. Dec. 49; Brown *v.* Illius, 25 Conn. 583, 591; Parker *v.* Griswold, 17 Conn. 288, 308, 42 Am. Dec. 739; Linsley *v.* Bushnell, 15 Conn. 225, 238, 38 Am. Dec. 79; Cheeseborough *v.* Green, 10 Conn. 318, 321, 26 Am. Dec. 396; Strong *v.* Benedict, 5 Conn. 210, 221; Austin *v.* Augusta Terminal R. Co., 108 Ga. 671, 699, 34 S. E. 852, 47 L. R. A. 755; Whistenant *v.* Southern States Portland Cement Co., 2 Ga. App. 598, 606, 59 S. E. 920; Hill *v.* Standard Min. Co., 12 Ida. 223, 85 Pac. 907, 910; Chicago *v.* Gunning System, 114 Ill. App. 377, 382, 387; Aiken *v.* Columbus, 167 Ind. 139, 145, 78 N. E. 657, 12 L. R. A. N. S. 416; Parks *v.* State, 159 Ind. 211, 220, 64 N. E. 862, 59 L. R. A. 190; Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433, 436; Talcott *v.* Des Moines, 134 Iowa 113, 123, 109 N. W. 311, 12 L. R. A. N. S. 696; McGuire *v.* Chicago, etc., R. Co., 131 Iowa 340, 354, 108 N. W. 902; Pohlman *v.* Chicago, etc., R. Co., 131 Iowa 89, 94, 107 N. W. 1025, 6 L. R. A. N. S. 146; Jackson *v.* Bruns, 129 Iowa 616, 620, 106 N. W. 1, 3 L. R. A. N. S. 510; Fowler *v.* Wood, 73 Kan. 511, 542, 85 Pac. 763, 117 Am. St. Rep. 534, 6 L. R. A. N. S. 162; Culp *v.* Atchison, etc., R. Co., 17 Kan. 475, 477; Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224, 229; Lobenstein *v.* McGraw, 11 Kan. 645, 649; Union Pac. R. Co. *v.* Rollins, 5 Kan. 167, 173; Heywood *v.* Tillson, 75 Me. 225, 235, 46 Am. Rep. 373; Jones *v.* Skinner, 61 Me. 25, 26; Lawler *v.* Baring Boom Co., 56 Me. 443, 447; Barnes *v.* Hathorn, 54 Me. 124, 125, 130; Davis *v.* Winslow, 51 Me. 264, 291, 81 Am. Dec. 573; Veazie *v.* Dwinel, 50 Me. 479, 487; Stone *v.* Augusta, 46 Me. 127, 140; Baltimore *v.* Warren Mfg. Co., 59 Md. 96, 106; Woodyear *v.* Schaefer, 57 Md. 1, 13, 40 Am. Rep. 419; Short *v.* Baltimore City Pass. R. Co., 50 Md. 73, 88, 33 Am. Rep. 298; Adams *v.* Michael, 38 Md. 123, 125, 17 Am. Rep. 516; Gilmore *v.* Driscoll, 122 Mass. 199, 204, 23 Am. Rep. 312; Boston, etc., R. Co. *v.* Shanly, 107 Mass. 568, 576; Shipley *v.* Fifty Associates, 101 Mass. 251, 253, 3 Am. Rep. 346; McDonald *v.* Snelling, 14 Allen (Mass.) 290, 294, 92 Am. Dec. 768; Carson *v.* Western R. Co., 8 Gray (Mass.) 423, 424; Shaw *v.* Boston, etc., R. Corp., 8 Gray (Mass.) 45, 66; Shrewsbury *v.* Smith, 12 Cush. (Mass.) 177, 180; Com. *v.* Alger, 7 Cush. (Mass.) 53, 86; Chandler *v.* Worcester Mut. F. Ins. Co., 3 Cush. (Mass.) 328, 330; Hill *v.* Sayles, 12

SIC UT NATURA NIL FACIT PER SALTUM, ITA NEC LEX. A maxim meaning

Metc. (Mass.) 142, 148; Com. *v.* Tewksbury, 11 Metc. (Mass.) 55, 57; Howland *v.* Vincent, 10 Metc. (Mass.) 371, 373, 43 Am. Dec. 442; Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 30, 34 Am. Dec. 33; Com. *v.* Kneeland, 20 Pick. (Mass.) 206, 237; Com. *v.* Chapin, 5 Pick. (Mass.) 199, 203, 16 Am. Dec. 386; Marcy *v.* Clark, 17 Mass. 330, 334; People's Ice Co. *v.* Steamer Excelsior, 44 Mich. 229, 236, 6 N. W. 636, 38 Am. Rep. 246; Stillwater Water Co. *v.* Farmer, 89 Minn. 58, 64, 93 N. W. 907, 99 Am. St. Rep. 541, 60 L. R. A. 875; Krueger *v.* Ferrant, 29 Minn. 385, 388, 13 N. W. 158, 43 Am. Rep. 223; Fleming *v.* Lockwood, 36 Mont. 384, 92 Pac. 962, 122 Am. St. Rep. 375, 14 L. R. A. N. S. 628; Driscoll *v.* Clark, 32 Mont. 172, 186, 80 Pac. 1, 373; Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271, 285, 53 Am. Rep. 581; Shane *v.* Kansas City, etc., R. Co., 71 Mo. 237, 244, 36 Am. Rep. 480; Wheeler *v.* St. Joseph Stock-Yards, etc., Co., 66 Mo. App. 260, 267; Springfield Waterworks Co. *v.* Jenkins, 62 Mo. App. 74, 82; Whitfield *v.* Carrollton, 50 App. 98, 105; Knapp *v.* Kansas City, 48 Mo. App. 485, 493; Collier *v.* Chicago, etc., R. Co., 48 Mo. App. 398, 402; Schneider *v.* Missouri Pac. R. Co., 29 Mo. App. 68, 73; Ward *v.* Fagan, 28 Mo. App. 116, 129; Quay *v.* Lucas, 25 Mo. App. 4, 8; St. Louis *v.* Green, 7 Mo. App. 468, 474; *Ex p.* Boyce, 27 Nev. 299, 308, 75 Pac. 1, 65 L. R. A. 47; Boynton *v.* Longley, 19 Nev. 69, 74, 6 Pac. 437, 3 Am. St. Rep. 781; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271, 299; Horan *v.* Byrnes, 72 N. H. 93, 54 Atl. 945, 101 Am. St. Rep. 670, 62 L. R. A. 602; Gilman *v.* Laconia, 55 N. H. 130, 131, 20 Am. Rep. 175; Garland *v.* Towne, 55 N. H. 55, 58, 20 Am. Rep. 164; Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238; Schultz *v.* Byers, 53 N. J. L. 442, 449, 22 Atl. 514, 26 Am. St. Rep. 435, 13 L. R. A. 569; State *v.* Wheeler, 44 N. J. L. 88, 91; Weller *v.* Snover, 42 N. J. L. 341, 344; McGuire *v.* Grant, 25 N. J. L. 356, 361, 67 Am. Dec. 49; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243, 247; Sinnickson *v.* Johnson, 17 N. J. L. 129, 144, 34 Am. Dec. 184; Cape May First M. E. Church *v.* Cape May Grain, etc., Co., (N. J. Ch. 1907) 67 Atl. 613, 614; Booth *v.* Burgess, 72 N. J. Eq. 181, 199, 65 Atl. 226, 233; Seligman *v.* Victor Talking Mach. Co., 71 N. J. Eq. 697, 701, 63 Atl. 1093; Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452, 458; Demarest *v.* Hardham, 34 N. J. Eq. 469, 474; Thomas Iron Co. *v.* Allentown Min. Co., 28 N. J. Eq. 77, 85; Ross *v.* Butler, 19 N. J. Eq. 294, 298, 97 Am. Dec. 654; Davidson *v.* Isham, 9 N. J. Eq. 186, 189; McCarty *v.* Natural Carbonic Gas Co., 189 N. Y. 40, 81 N. E. 549, 550, 13 L. R. A. N. S. 465; Pierson *v.* Spcyer, 178 N. Y. 270, 273, 70 N. E. 799, 102 Am. St. Rep. 499; Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 24, 25 N. E. 246, 9 L. R. A. 711; Edwards *v.* New York, etc., R. Co., 98 N. Y. 245, 249, 50 Am. Rep. 659; Bertholf *v.* O'Reilly, 74 N. Y. 509, 524, 30 Am. Rep. 323; Prentice *v.* Geiger, 74 N. Y. 341, 345; Brown *v.* Mohawk, etc., R. Co., How. App. Cas. (N. Y.) 52, 68; Butler *v.* White Plains, 59 N. Y. App. Div. 30, 34, 60 N. Y. Suppl. 193; Merrick Water Co. *v.* Brooklyn, 32 N. Y. App. Div. 454, 456, 53 N. Y. Suppl. 10; Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 337, 47 N. Y. Suppl. 788; Smith *v.* Brooklyn, 18 N. Y. App. Div. 340, 344, 46 N. Y. Suppl. 141; Hill *v.* Schneider, 13 N. Y. App. Div. 299, 304, 43 N. Y. Suppl. 1; Newell *v.* Woolfolk, 91 Hun (N. Y.) 211, 212, 36 N. Y. Suppl. 327; People *v.* Rosenberg, 67 Hun (N. Y.) 52, 56, 22 N. Y. Suppl. 56; Ordway *v.* Canisteo, 66 Hun (N. Y.) 569, 572, 21 N. Y. Suppl. 835; Timlin *v.* Standard Oil Co., 54 Hun (N. Y.) 44, 49, 7 N. Y. Suppl. 158; Tillinghast *v.* Troy, etc., R. Co., 48 Hun (N. Y.) 420, 425, 1 N. Y. Suppl. 243; Campbell *v.* Seaman, 2 Thomps. & C. (N. Y.) 231, 235; Ogdensburg *v.* Lovejoy, 2 Thomps. & C. (N. Y.) 83, 85; Rowland *v.* Miller, 61 N. Y. Super. Ct. 163, 165, 18 N. Y. Suppl. 793; Van Nostrand *v.* New York Guaranty, etc., Co., 39 N. Y. Super. Ct. 73, 80; Walker *v.* Gilbert, 2 Rob. (N. Y.) 214, 224; Gilbert *v.* Beach, 4 Duer (N. Y.) 423, 428; Worthington *v.* Parker, 11 Daly (N. Y.) 545, 551; Greco *v.* Bernheimer, 17 Misc. (N. Y.) 592, 596, 40 N. Y. Suppl. 677; O'Neill *v.* Breese, 3 Misc. (N. Y.) 219, 222, 23 N. Y. Suppl. 526; Rowland *v.* Miller, 15 N. Y. Suppl. 701, 702; Paine *v.* Chandler, 5 N. Y. Suppl. 739, 742; Brennan *v.* Schreiner, 20 N. Y. Suppl. 130, 28 Abb. N. Cas. (N. Y.) 481; Buffalo East Side R. Co. *v.* Buffalo St. R. Co., 19 N. Y. St. 574, 579; Simons *v.* Seward, 7 N. Y. St. 55, 57; Heeg *v.* Licht, 8 Abb. N. Cas. (N. Y.) 355, 360; Benson *v.* Suarez, 19 Abb. Pr. (N. Y.) 61, 65; Bush *v.* Brainard, 1 Cow. (N. Y.) 78, 13 Am. Dec. 513; Panton *v.* Holland, 17 Johns. (N. Y.) 92, 99, 8 Am. Dec. 369; Platt *v.* Johnson, 15 Johns. (N. Y.) 213, 218, 8 Am. Dec. 233; Lasala *v.* Holbrook, 4 Paige Ch. (N. Y.) 169, 171, 25 Am. Dec. 524; Crump *v.* Com., 6 N. Y. Cr. 342, 361; Matter of Annan, 6 N. Y. Cr. 57, 72; Matter of Jacobs, 2 N. Y. Cr. 539, 545; The Scioto, 5 N. Y. Leg. Obs. 442, 446; Stewart *v.* Cary Lumber Co., 146 N. C. 47, 107, 59 S. E. 545; Goforth *v.* Southern R. Co., 144 N. C. 569, 571, 57 S. E. 209; Staton *v.* Norfolk, etc., R. Co., 111 N. C. 278, 280, 16 S. E. 181, 17 L. R. A. 838; Carroll *v.* Rye Tp., 13 N. D. 458, 467, 101 N. W. 894; Columbus, etc., Coal, etc., Co. *v.* Tucker, 48 Ohio St. 41, 61, 26 N. E. 630, 29 Am. St. Rep. 528, 12 L. R. A. 577; Marmet *v.* State, 45 Ohio St. 63, 70, 12 N. E. 463; Crawford *v.* Rambo, 44 Ohio St. 279, 282, 7 N. E. 429; Tiffin *v.* McCormack, 34 Ohio St. 638, 644, 32 Am. Rep. 408; Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152, 158; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604, 617; Pittsburg, etc., R. Co. *v.* Bingham, 29 Ohio St. 364, 369; Burdick *v.* Cheadle, 26 Ohio St. 393, 396, 20 Am. Rep. 767; Clark *v.* Fry, 8 Ohio St. 358, 383, 72 Am. Dec. 590; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 558, 67 Am. Dec. 312; Carman *v.* Steubenville, etc., R. Co., 4 Ohio

"Just as nature does nothing by a leap, so neither does the law," or

St. 399, 416; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, 200, 62 Am. Dec. 246; Chicago, etc., R. Co. *v.* Groves, 20 Okla. 101, 112, 93 Pac. 755; Morton *v.* Oregon Short Line R. Co., 48 Oreg. 444, 451, 87 Pac. 151, 1046, 7 L. R. A. N. S. 344; Youghiogheny River Coal Co. *v.* Allegheny Nat. Bank, 211 Pa. St. 319, 324, 60 Atl. 924, 69 L. R. A. 637; Hague *v.* Wheeler, 157 Pa. St. 324, 339, 27 Atl. 714, 37 Am. St. Rep. 736, 22 L. R. A. 141; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 127, 25 Atl. 780; Collins *v.* Chartiers Valley Gas Co., 139 Pa. St. 111, 124, 21 Atl. 147; Briegel *v.* Philadelphia, 135 Pa. St. 451, 459, 19 Atl. 1038, 20 Am. St. Rep. 885; Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, 143, 6 Atl. 126, 57 Am. Rep. 445; Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 127, 42 Am. Rep. 534; Brown *v.* Torrence, 88 Pa. St. 186, 189; Pittsburg, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445, 450, 94 Am. Dec. 98; Stephens *v.* Martin, 1 Mona. (Pa.) 376, 381, 17 Atl. 242; Hasting's Case, 10 Watts (Pa.) 303, 305; Richart *v.* Scott, 7 Watts (Pa.) 460, 461, 32 Am. Dec. 779; Kyner *v.* Kyner, 6 Watts (Pa.) 221, 225; Hoy *v.* Sterrett, 2 Watts (Pa.) 327, 329, 27 Am. Dec. 313; Taylor *v.* Maris, 5 Rawle (Pa.) 51–56; Com. *v.* Fourteen Hogs, 10 Serg. & R. (Pa.) 393, 396; Central Pennsylvania Tel. Co. *v.* Wilkes-Barre, etc., R. Co., 1 Pa. Dist. 628–631; Williams *v.* Union Imp. Co., 1 Pa. Dist. 288, 291; Com. *v.* Devine, 31 Pa. Co. Ct. 108, 112; Getting *v.* Union Imp. Co., 7 Kulp (Pa.) 493, 495; Williams *v.* Union Imp. Co., 6 Kulp (Pa.) 417, 421; Central Pennsylvania Tel., etc., Co. *v.* Wilkes-Barre, etc., R. Co., 6 Kulp (Pa.) 383, 389; Matter of Churchman, 17 Phila. (Pa.) 118, 120; Harrison *v.* St. Mark's Church, 12 Phila. (Pa.) 259, 262; Com. *v.* Bonnell, 8 Phila. (Pa.) 534, 536; Galbraith *v.* Oliver, 3 Pittsb. (Pa.) 78–80; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 31 Wkly. Notes Cas. (Pa.) 311, 316; McIlvain *v.* Mutual Assur. Co., 8 Wkly. Notes Cas. (Pa.) 260, 262; Philadelphia Hydraulic Works Co. *v.* Orr, 3 Wkly. Notes Cas. (Pa.) 552, 553; Franks *v.* Southern Cotton Oil Co., 78 S. C. 10, 19, 58 S. E. 960, 12 L. R. A. N. S. 468; Louisville, etc., Terminal Co. *v.* Jacobs, 109 Tenn. 727, 741, 72 S. W. 954, 61 L. R. A. 188; Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 527, 49 Am. Rep. 666; Teel *v.* Rio Bravo Oil Co., 47 Tex. Civ. App. 153, 160, 104 S. W. 420; McLellan *v.* Brownsville Land, etc., Co., 46 Tex. Civ. App. 249, 256, 103 S. W. 206; Block *v.* Schwartz, 27 Utah 387, 401, 76 Pac. 22, 101 Am. St. Rep. 971; Lawrence *v.* Rutland R. Co., 80 Vt. 370, 383, 67 Atl. 1091, 15 L. R. A. N. S. 350; Gifford *v.* Hulett, 62 Vt. 342, 347, 19 Atl. 230; Roxbury *v.* Central Vermont R. Co., 60 Vt. 121, 137, 14 Atl. 92; Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 240, 4 Atl. 868; Mann *v.* Central Vermont R. Co., 55 Vt. 484, 487, 45 Am. Rep. 628; Canfield *v.* Andrew, 54 Vt. 1, 14, 41 Am. Rep. 828; Winn *v.* Rutland, 52 Vt. 481, 493; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140, 153, 62 Am. Dec. 625; Nelson *v.* Vermont, etc., R. Co., 26 Vt. 717, 719, 62 Am. Dec. 614; White *v.* Twitchell, 25 Vt. 620, 624, 60 Am. Dec. 294; Walkers *v.* Potomac, etc., R. Co., 105 Va. 226, 233, 53 S. E. 113, 115, 115 Am. St. Rep. 871, 4 L. R. A. N. S. 80; Rankin *v.* Harrisonburg, 104 Va. 524, 528, 52 S. E. 555, 113 Am. St. Rep. 1050, 3 L. R. A. N. S. 919; Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 753, 14 S. E. 163; Placker *v.* Rhodes, 30 Gratt. (Va.) 795, 798; Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. (Va.) 83, 103; Burwell *v.* Hobson, 12 Gratt. (Va.) 322, 325, 65 Am. Dec. 247; Conrad *v.* Baltimore, etc., R. Co., 64 W. Va. 176, 178, 61 S. E. 44; Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 417, 21 S. E. 1035, 52 Am. St. Rep. 890; State *v.* Peel Splint Coal Co., 36 W. Va. 802, 842, 15 S. E. 1000, 17 L. R. A. 385; State *v.* Goodwill, 33 W. Va. 179, 185, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621; State *v.* Gilman, 33 W. Va. 146, 148, 10 S. E. 283, 6 L. R. A. 847; Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 46, 10 S. E. 29; Laurel Fork, etc., R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324, 349; State *v.* Baltimore, etc., R. Co., 24 W. Va. 783, 795, 49 Am. Rep. 290; Green Bay, etc., Canal Co. *v.* Kaukauna Water Power Co., 90 Wis. 370, 404, 61 N. W. 1121, 63 N. W. 1019, 48 Am. St. Rep. 937, 28 L. R. A. 443; Brunswick-Balke-Collender Co. *v.* Rees, 69 Wis. 442, 450, 34 N. W. 732, 2 Am. St. Rep. 748; Donnelly *v.* Decker, 58 Wis. 461, 469, 17 N. W. 389, 46 Am. Rep. 637; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, 234, 7 Am. Rep. 69; Goodall *v.* Milwaukee, 5 Wis. 32, 42; The China *v.* Walsh, 7 Wall. (U. S.) 53, 68, 19 L. ed. 67; The Marianna Flora, 11 Wheat. (U. S.) 1, 42, 6 L. ed. 405; Exley *v.* Southern Cotton Oil Co., 151 Fed. 101, 103; U. S. *v.* Union Bridge Co., 143 Fed. 377, 389; U. S. *v.* Luce, 141 Fed. 385, 408, 415; American Bell Tel. Co. *v.* U. S., 68 Fed. 542, 563, 15 C. C. A. 569; The Brooklyn, 4 Fed. Cas. No. 1,938, 2 Ben. 547; Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,989, 1 Sawy. 470; The Marianna Flora, 16 Fed. Cas. No. 9,080, 3 Mason 116; Silliman *v.* Hudson River Bridge Co., 22 Fed. Cas. No. 12,852, 4 Blatchf. 395; Canadian Pac. R. Co. *v.* Roy, [1902] A. C. 220, 231, 71 L. J. P. C. 51, 86 L. T. Rep. N. S. 127, 18 T. L. R. 200, 50 Wkly. Rep. 415; Madras R. Co. *v.* Zemindar of Carvatenagarum, L. R. 1 Indian App. 364, 385; Snow *v.* Whitehead, 27 Ch. D. 588, 589, 53 L. J. Ch. 885, 51 L. T. Rep. N. S. 253, 33 Wkly. Rep. 128; Rex *v.* Ward, 4 A. & E. 384, 406, 1 Harr. & W. 703, 5 L. J. K. B. 221, 6 N. & M. 38, 31 E. C. L. 180; Bird *v.* Holbrook, 4 Bing. 628, 637, 6 L. J. C. P. O. S. 146, 1 M. & P. 607, 29 Rev. Rep. 657, 13 E. C. L. 667; Bnsh *v.* Steinman, 1 B. & P. 404, 407; Hodgkinson *v.* Ennor, 4 B. & S. 229, 241, 9 Jur. N. S. 1152, 32 L. J. Q. B. 231, 8 L. T. Rep. N. S. 451, 11 Wkly. Rep. 775, 116 E. C. L. 229; Bamford *v.* Turnley, 3 B. & S. 66, 82, 9 Jur. N. S. 377, 31 L. J. Q. B. 286, 10 Wkly. Rep. 803, 113 E. C. L. 66; Imperial Gas Light, etc., Co. *v.* Broad-

"In the same way as nature does nothing by a bound, so neither does the law." [5]

SICUT PŒNA EX DELICTO DEFUNCTI HÆRES TENERI NON DEBET, ITA NEC LUCRUM FACERE SI QUID AD EUM PERVENISSET. A maxim meaning "Just as an heir ought not to be punished for his ancestor's transgression, so he ought not to make any gain out of an ancestor's advantage." [6]

SICUT SUBDITUS REGI TENETUR AD OBEDIENTIAM, ITA REX SUBDITO TENETUR AD PROTECTIONEM. A maxim meaning "Inasmuch as a subject is bound to obey the king, so the king is bound to protect the subject." [7]

SIDE. A word often used to express the idea of a line, edge, or surface; [8] a word which may be used either of all the bounding surfaces of an object, or as exclusive of parts that may be called top, bottom, edge, end, etc.; [9] the margin, edge, verge, or border of a surface; the bounding line of a geometrical figure, as the side of a field; [10] one half of the body (human or otherwise), considered as opposite to the other half; especially one of the halves of the body lying on either side of the mesial plane; that is, of a plane passing from front to back through the spine.[11]

SIDE-BAR RULE. In English law, a rule of court;—so called because anciently moved for by attorneys at the "side bar" of the court.[12]

SIDE-LINES. See MINES AND MINERALS, 27 Cyc. 538; STREETS AND HIGHWAYS.

SIDE SET. A tool made purposely to cut rivets off boilers.[13]

bent, 7 H. L. Cas. 600, 607, 5 Jur. N. S. 1319, 29 L. J. Ch. 377, 11 Eng. Reprint 239; Chasemore *v.* Richards, 7 H. L. Cas. 349, 388, 5 Jur. N. S. 873, 29 L. J. Exch. 81, 7 Wkly. Rep. 685, 11 Eng. Reprint 140; Egerton *v.* Brownlow, 4 H. L. Cas. 1, 195, 18 Jur. 71, 23 L. J. Ch. 348, 10 Eng. Reprint 359; Jones *v.* Powell, Hutt 135, 136; Alston *v.* Grant, 18 Jur. 332, 333, 23 L. J. Q. B. 163, 2 Wkly. Rep. 161, 24 Eng. L. & Eq. 122; Humfries *v.* Brogden, 15 Jur. 124, 125, 20 L. J. Q. B. 10, 1 Eng. L. & Eq. 241; Deane *v.* Clayton, 7 Taunt. 489, 498, 18 Rev. Rep. 553, 2 E. C. L. 461; Wright *v.* Simpson, 6 Ves. Jr. 714, 731, 31 Eng. Reprint 1272; Tonson *v.* Collins, W. Bl. 321, 341, 96 Eng. Reprint 180; Palmer *v.* Stone, 2 Wils. C. P. 96, 99, 95 Eng. Reprint 705; Cope *v.* Marshall, 2 Wils. C. P. 51, 57, 95 Eng. Reprint 680; Brown *v.* Best, 1 Wils. C. P. 174, 175, 95 Eng. Reprint 557; Canadian Pac. R. Co. *v.* McBryan, 6 Brit. Col. 136, 141; Canadian Pac. R. Co. *v.* McBryan, 5 Brit. Col. 187, 208; Clarke *v.* Portland, 19 N. Brunsw. 189, 195; Francklyn *v.* People's Heat, etc., Co., 32 Nova Scotia 44, 62; Holmes *v.* Roblins, 21 Nova Scotia 434, 440; Roberts *v.* Mitchell, 21 Ont. App. 433, 440; Bonisteel *v.* Saylor, 17 Ont. App. 505, 518; Clouse *v.* Canada Southern R. Co., 11 Ont. App. 287, 299; Hilliard *v.* Thurston, 9 Ont. App. 514, 522; Rosenberger *v.* Grand Trunk R. Co., 8 Ont. App. 482, 488; Kerchhoffer *v.* Sanbury, 25 Grant Ch. (U. C.) 413, 422; Wilkins *v.* Row, 15 U. C. C. P. 325, 326; Reg. *v.* Bryans, 12 U. C. C. P. 161, 164; McLean *v.* Crosson, 33 U. C. Q. B. 448, 456; Adamson *v.* McNab, 6 U. C. Q. B. 113, 128; Larkin *v.* McNutt, 2 Pr. Edw. Isl. 300, 303; Carpentier *v.* La Ville de Maisonneuve, 11 Quebec Super. Ct. 242, 244; Perrault *v.* Gauthier, 10 Quebec Super. Ct. 224, 238.

5. Black L. Dict. [*citing* Coke Litt. 238].

6. Morgan Leg. Max.

7. Peloubet Leg. Max.

8. Winslow *v.* Cooper, 104 Ill. 235, 243.

9. Century Dict. [*quoted* in Koerner *v.* Deuther, 143 Fed. 544, 545].

10. People *v.* Ohio, etc., R. Co., 21 Ill. App. 23, 27.

11. Webster Dict. [*quoted* in Winslow *v.* Cooper, 104 Ill. 235, 243].

Used in connection with other words.—"Side of building" see Center St. Church *v.* Machias Hotel Co., 51 Me. 413, 414; Millett *v.* Fowle, 8 Cush. (Mass.) 150, 151. "Side of highway or road" see Low *v.* Tibbetts, 72 Me. 92, 93, 39 Am. Rep. 303; Baltimore, etc., R Co. *v.* Gould, 67 Md. 60, 64, 8 Atl. 754; O'Connell *v.* Bryant, 121 Mass. 557, 558; Blackman *v.* Riley, 138 N. Y. 318, 324, 34 N. E. 214; Pell *v.* Pell, 65 N. Y. App. Div. 388, 391, 73 N. Y. Suppl. 81; De Peyster *v.* Mali, 27 Hun (N. Y.) 439, 444; Augustine *v.* Britt, 15 Hun (N. Y.) 395, 398; Beckett *v.* Upton, 5 E. & B. 629, 638, 1 Jur. N. S. 1136, 25 L. J. Q. B. 70, 4 Wkly. Rep. 52, 85 E. C. L. 629. "Side of the lane" see Mott *v.* Mott, 68 N. Y. 246, 255. "Side of said lead, lode, or ledge" see Foote *v.* National Min. Co., 2 Mont. 402, 403. "Side of the pond" see Lowell *v.* Robinson, 16 Me. 357, 361, 33 Am. Dec. 671. "Side" of railroad see Gould *v.* Great Northern R. Co., 63 Minn. 37, 39, 65 N. W. 125, 56 Am. St. Rep. 453, 30 L. R. A. 590; Marshall *v.* St. Louis, etc., R. Co., 51 Mo. 138, 139; Ferris *v.* Van Buskirk, 18 Barb. (N. Y.) 397, 399. "Side of stream" see Erskine *v.* Moulton, 84 Me. 243, 247, 24 Atl. 841. "Side of street" see Dale *v.* Travellers' Ins. Co., 89 Ind. 473, 475; Graham *v.* Stern, 51 N. Y. App. Div. 406, 407, 64 N. Y. Suppl. 728; Hobson *v.* Philadelphia, 150 Pa. St. 595, 596, 24 Atl. 1048; Cox *v.* Freedley, 33 Pa. St. 124, 127, 75 Am. Dec. 584.

12. Webster New Int. Dict.

"Side bar remarks" see Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 224, 13 S. W. 194.

13. El Paso Southwestern R. Co. *v.* Barrett, 46 Tex. Civ. App. 14, 16, 101 S. W. 1025, 121 S. W. 570.

SIDE-TRACK. A connection with some railroad affording communication with the market.[14] (Side-Track: Construction, Equipment, and Operation of, see RAILROADS, 33 Cyc. 231. Mandamus to Compel Railroad to Furnish, see MANDAMUS, 26 Cyc. 369. Right of Railroad to Condemn Land For, see EMINENT DOMAIN, 15 Cyc. 590.)

SIDEWALK.[15] A footwalk by the side of a street or road;[16] a foot way for passengers at the side of a street or road;[17] that part of the street intended only for pedestrians;[18] that part of the street of a municipality which has been set apart and used for pedestrians;[19] that part of a street which the municipal authorities have prepared for the use of pedestrians;[20] a paved way;[21] a paved or otherwise prepared way for pedestrians in a town, usually separated from the roadway by a curb or gutter;[22] a pavement or something in the nature of a pavement, laid or constructed on the portion of the street set apart for travelers on foot;[23] a place set apart at the side of the street for the use of that portion of the public that travel on foot;[24] a portion of a public highway appropriated to pedestrians alone;[25] that portion of the public highway which is set apart by dedication, ordinance, or otherwise, for the use of pedestrians;[26] the portion of the street set aside for the exclusive use of pedestrians;[27] a raised way for foot passengers at the side of a street or road; a foot pavement;[28] a walk along a highway;[29] a way for foot passengers.[30] Sometimes used as synonymous with PAVEMENT,[31] *q. v.* (Sidewalk: Damages For Destruction of in Making Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1077. Improvement of — Mechanics' Liens For, see MECHANICS' LIENS, 27 Cyc. 40; Power of City to Make, see MUNICIPAL CORPORATIONS, 28 Cyc. 949. Lease of Store and Stands on, see LANDLORD AND TENANT, 24 Cyc. 1344. Obstructions or Defects in — Liability of City, see MUNICIPAL CORPORATIONS, 28 Cyc. 1373; Liability of Landlord, see LANDLORD AND TENANT, 24 Cyc. 1118. Ordinances Against Permitting Animals on, see ANIMALS, 2 Cyc. 446. Use of, see MUNICIPAL CORPORATIONS, 28 Cyc. 911.)

SIDEWALK SPACE. The space from the lot line to the curb.[32]

14. Southern Pine Fibre Co. *v.* North Augusta Land Co., 50 Fed. 26, 27.

15. The word is said to have no strict legal interpretation, and its meaning and import must be governed by facts showing the limits and extent of the same in the street where it is located. Porter *v.* Waring, 69 N. Y. 250, 253, 2 Abb. N. Cas. 230. But see Salisbury *v.* Andrews, 19 Pick. (Mass.) 250, 258, holding directly *contra*, that is, that the term has a definite meaning.

16. Century Dict. [*quoted* in Denver Public Works *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201, 204].

17. Marion Trust Co. *v.* Indianapolis, 37 Ind. App. 672, 75 N. E. 834, 836.

18. Little Rock *v.* Fitzgerald, 59 Ark. 494, 499, 28 S. W. 32, 28 L. R. A. 496.

It is the public way, generally somewhat raised, especially intended for pedestrians, and adapted to their use. Wabash R. Co. *v.* De Hart, 32 Ind. App. 62, 65 N. E. 192, 193.

19. Graham *v.* Albert Lea, 48 Minn. 201, 205, 50 N. W. 1108, where it is said not to mean a walk or way constructed of any particular material or in any special manner.

20. Koblhof *v.* Chicago, 192 Ill. 249, 250, 61 N. E. 446, 85 Am. St. Rep. 335.

21. Asphalt, etc., Constr. Co. *v.* Haeussler, (Mo. App. 1904) 80 S. W. 5, 7.

22. Century Dict. [*quoted* in Denver Public Works *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201, 204].

23. Denver Public Works *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201, 204.

24. Oklahoma City *v.* Meyers, 4 Okla. 686, 700, 46 Pac. 552, where it is said to consist of a walk made of boards, or a place paved or otherwise improved.

25. Chicago *v.* Noonan, 121 Ill. App. 185, 188, where it is said nevertheless to be open and free to all persons desiring to use and enjoy it as a public highway.

26. Ord *v.* Nash, 50 Nebr. 335, 338, 69 N. W. 964.

27. Streeter *v.* Breckenridge, 23 Mo. App. 244, 250.

28. Porter *v.* Waring, 51 How. Pr. (N. Y.) 295, 296; Webster Dict. [*quoted* in Denver Public Works *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201, 204; Challiss *v.* Parker, 11 Kan. 384, 391].

29. People *v.* Meyer, 26 Misc. (N. Y.) 117, 120, 56 N. Y. Suppl. 1097, 14 N. Y. Cr. 57, where this meaning is given to the term as used in the penal code of New York forbidding the riding of bicycles upon sidewalks.

30. Salisbury *v.* Andrews, 19 Pick. (Mass.) 250, 258.

Includes a dirt approach to a bridge, with a stone wall on each side, stringers laid on the dirt, and a plank walk laid on the stringers for foot passengers. Saunders *v.* Gun Plains Tp., 76 Mich. 182, 183, 42 N. W. 1088.

31. Little Rock *v.* Fitzgerald, 59 Ark. 494, 499, 28 S. W. 32, 28 L. R. A. 496.

32. Chicago Cold Storage Warehouse Co. *v.* People, 127 Ill. App. 179, 182.

SIDING. The turnout of a railroad.[33] (See SIDE-TRACK.)

SI DUO IN TESTAMENTO PUGNANTIA REPERIENTUR, ULTIMUM EST RATUM. A maxim meaning "If two conflicting provisions are found in a will, the last is observed."[34]

SIERRA. A ridge of mountains and craggy rocks with a serrated or irregular outline.[35]

SIGHT. A word when used in connection with a bill payable at so many days sight, is said to mean payable so many days next after the bill shall be accepted, or else protested for non-acceptance.[36] (See, generally, COMMERCIAL PAPER, 7 Cyc. 601, 889 note 31.)

SIGILLUM. Literally, "seal."[37] A word said to be synonymous with "*signum*."[38] (See L. S., 25 Cyc. 1658.)

SIGILLUM EST CERA IMPRESSA, QUIA CERA SINE IMPRESSIONE NON EST SIGILLUM. A maxim meaning "A seal is a piece of wax impressed, because wax without an impression is not a seal."[39]

SIGN. As a noun, that by which anything is made known or represented; that which furnishes evidence; a mark; a token; an indication; a proof.[40] As a verb, to show or declare assent, or attestation, by some sign or mark;[41] to write one's name on paper, or to show or declare assent or attestation by some sign or mark;[42] to affix a signature to; to ratify by hand or seal;[43] to subscribe in one's own handwriting.[44] (See, generally, SIGNATURES.)

SIGNAL. A sign which has been agreed upon to give notice of some occurrence, command, or danger, to a person at a distance.[45] (Signal: At Railroad Crossing, see RAILROADS, 33 Cyc. 941. Between Vessels, see COLLISION, 7 Cyc. 338, 367. For Precaution Against Injury to — Employee, see MASTER AND SERVANT, 26 Cyc. 1264, 1271; Persons or Property From Trains, see CARRIERS, 6 Cyc. 587, 611; RAILROADS, 33 Cyc. 665; STREET RAILROADS. Of Carrier Given at Starting, or on Approaching Stopping Place, see CARRIERS, 6 Cyc. 587, 611. Warning of Defect or Obstruction in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 1384.)

33. Philadelphia *v.* River Front R. Co., 133 Pa. St. 134, 139, 19 Atl. 356.

By "blind siding" is meant a side track to a railroad where there is no telegraphic station. Galveston, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1900) 59 S. W. 930, 932.

34. Bouvier L. Dict. [*citing* Lofft 251].

35. Webster New Int. Dict. See also U. S. *v.* Fossat, 25 Fed. Cas. No. 15,139, Hoffm. Land Cas. 376.

36. Campbell *v.* French, 6 T. R. 200, 212, 3 Rev. Rep. 154, 101 Eng. Reprint 510.

37. Grattan L. Gloss.

38. Relph *v.* Gist, 4 McCord (S. C.) 267, 270 [*citing* 1 Reeve 11], where it is said that it did not mean a seal of wax, but denominated the sign of the cross and other symbols made use of in ancient times.

39. Bouvier L. Dict. [*citing* 3 Inst. 169].

Applied in Pierce *v.* Indseth, 106 U. S. 546, 548, 1 S. Ct. 418, 27 L. ed. 254; *Re* Bell, 1 Ont. 125, 126.

40. Webster Dict.

Sign of a shoe store may include a wooden elephant kept in the store at night, but standing in front thereof in daytime, decorated with shoes. Curtis *v.* Martz, 14 Mich. 506, 512.

41. Davis *v.* Shields, 26 Wend. (N. Y.) 341, 356.

42. Atty.-Gen. *v.* Clarke, 26 R. I. 470, 474, 59 Atl. 395.

43. Webster Dict. [*quoted* in Knox's Estate, 131 Pa. St. 220, 230, 18 Atl. 1021, 17 Am. St. Rep. 798, 6 L. R. A. 353].

44. Bouvier L. Dict.; Webster Dict. [*quoted* in Brems *v.* Sherman, 158 Ind. 300, 301, 63 N. E. 571; Knox's Estate, 131 Pa. St. 220, 230, 18 Atl. 1021, 17 Am. St. Rep. 798, 6 L. R. A. 353].

"Signing" not synonymous with "execution" see Hayes *v.* Ammon, 90 N. Y. App. Div. 604, 85 N. Y. Suppl. 607.

45. Webster Dict.

"A signal of distress is a request for assistance. And, if competent persons, upon such request, subject themselves to labor and danger, and expense, to get on board of the vessel, and there offer their services for such reward as the law will give them, if such offer be rejected, it would seem that some compensation should be made for the labor, expense, and danger so incurred; at least, in cases where the vessel subsequently comes to a place of safety." The Susan, 23 Fed. Cas. No. 13,630, 1 Sprague 499.

Does not include an interlocking system as used in a contract allowing one railroad to cross the tracks of another railroad, imposing upon it the expense of all watchhouses, signal stations, signals, and other similar appliances that may be required. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 171, 87 N. W. 1085, 89 N. W. 180.

Used in connection with the operation of a cage in a mine this word is said to have a technical signification. Zeller *v.* Wright, 41 Ind. App. 403, 83 N. E. 1030, 1031.

"Signal of distress," in admiralty law, is a request for assistance. The Susan, 23 Fed. Cas. No. 13,630, 1 Sprague 499.

SIGNATURES

By James W. Osborne

CROSS-REFERENCES

For Matters Relating to:

Approval of Statute, see Statutes.

Changes Not Affecting Parties Who Have Signed Instrument, see Alterations of Instruments, 2 Cyc. 145.

Countersigning:

Insurance Policy by Agent, see Fire Insurance, 19 Cyc. 601; Life Insurance, 25 Cyc. 716.

Municipal Contract, see Municipal Corporations, 28 Cyc. 666.

Effect of:

Alteration on Prior and Subsequent Signers, see Alterations of Instruments, 2 Cyc. 223.

Failure of:

Affiant to Sign, see Affidavits, 2 Cyc. 34.

Principal to Sign, see Principal and Surety, 32 Cyc. 41.

Failure of Trial Judge to Sign Instructions, see Appeal and Error, 2 Cyc. 726.

Handwriting Experts, see Evidence, 17 Cyc. 155.

Presumption From Signing, see Commercial Paper, 7 Cyc. 612, 654.

Proof of Ancient Document, see Evidence, 17 Cyc. 431.

Signature:

Adoption of, see Acknowledgments, 1 Cyc. 540.

Alteration or Erasure of, see Alterations of Instruments, 2 Cyc. 207.

Amendment to, see Pleading, 31 Cyc. 546.

Assent to or Ratification of, see Estoppel, 16 Cyc. 754.

By Attorney or Agent of Petitioners For Public Improvement, see Municipal Corporations, 28 Cyc. 977.

Conditional, see Guaranty, 20 Cyc. 1412.

Denial of:

Genuineness of, see Commercial Paper, 8 Cyc. 156, 186.

Under Oath, see Alterations of Instruments, 2 Cyc. 230.

Effect of Omission of Judge's, see Appeal and Error, 2 Cyc. 814.

Forgery of, see Forgery, 19 Cyc. 1411.

For Matters Relating to — (*continued*)
Signature — (*continued*)
Judicial Notice of Official, see EVIDENCE, 16 Cyc. 902.
Of Agent, see COMMERCIAL PAPER, 7 Cyc. 549, 951; CONTRACTS, 9 Cyc. 301; CORPORATIONS, 10 Cyc. 1027, 1043; FRAUDS, STATUTE OF, 20 Cyc. 275; PRINCIPAL AND AGENT, 31 Cyc. 1381.
Of Decree in Chancery Before Appeal, see APPEAL AND ERROR, 2 Cyc. 617.
Of Instrument on Sunday, see SUNDAY.
Of Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1293.
Of Mayor, see MUNICIPAL CORPORATIONS, 28 Cyc. 357.
Of Officer to Acknowledgment, see ACKNOWLEDGMENTS, 1 Cyc. 577.
Of Principal by Agent, see FRAUDS, STATUTE OF, 20 Cyc. 276; PRINCIPAL AND AGENT, 31 Cyc. 1231.
Place of, on Affidavit, see AFFIDAVITS, 2 Cyc. 27.
Placing of by Mistake in Wrong Place, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 206.
Position of, see COMMERCIAL PAPER, 7 Cyc. 614.
Procurement of by Fraud, see FALSE PRETENSES, 19 Cyc. 409 note 21; PRINCIPAL AND SURETY, 32 Cyc. 59.
Ratification of Agent's, see PRINCIPAL AND AGENT, 31 Cyc. 1249.
Remedy For Defect in, see PLEADING, 31 Cyc. 546.
Showing Genuineness of, see ACKNOWLEDGMENTS, 1 Cyc. 615.
Sufficiency of to Satisfy Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 274.
Words Appended to on Commercial Paper, see COMMERCIAL PAPER, 8 Cyc. 103.
Signatures to Particular Instruments:
Acknowledgment of Debt or New Promise, see LIMITATIONS OF ACTIONS, 25 Cyc. 1337.
Affidavit:
In General, see AFFIDAVITS, 1 Cyc. 26, 30.
For Attachment, see ATTACHMENT, 4 Cyc. 515.
In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 291.
Agricultural Lien, see AGRICULTURE, 2 Cyc. 61.
Amended Pleading, see PLEADING, 31 Cyc. 434.
Appeal-Bond, see APPEAL AND ERROR, 2 Cyc. 841.
Application For Appeal, see APPEAL AND ERROR, 2 Cyc. 811.
Appraisement and Inventory of Attached Property, see ATTACHMENT, 4 Cyc. 602.
Articles of Association, see ASSOCIATIONS, 4 Cyc. 302.
Assessment Roll, see TAXATION.
Assignment:
For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 155.
Of Errors, see APPEAL AND ERROR, 2 Cyc. 986, 1002.
Of Mortgage, see MORTGAGES, 27 Cyc. 1283.
Attachment Bond, see ATTACHMENT, 4 Cyc. 530.
Award of Arbitrators, see ARBITRATION AND AWARD, 3 Cyc. 668.
Bail-Bond, see BAIL, 5 Cyc. 22.
Bill in Equity, see EQUITY, 16 Cyc. 227.
Bill of Exceptions, see APPEAL AND ERROR, 3 Cyc. 25, 43; CRIMINAL LAW, 12 Cyc. 850.
Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 612.
Bond, see BONDS, 5 Cyc. 735.
Brief on Appeal, see APPEAL AND ERROR, 2 Cyc. 1018.
Building Contract, see BUILDERS AND ARCHITECTS, 6 Cyc. 11.

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Signatures to Particular Instruments — (*continued*)
Case or Statement of Facts on Appeal, see APPEAL AND ERROR, 2 Cyc. 1076, 3 Cyc. 53; CRIMINAL LAW, 12 Cyc. 855.
Certificate:
Of Acknowledgment, see ACKNOWLEDGMENTS, 1 Cyc. 577.
Of Evidence, see APPEAL AND ERROR, 3 Cyc. 76.
To Transcript on Appeal, see APPEAL AND ERROR, 3 Cyc. 110.
Certified Copy of Private Instrument, see EVIDENCE, 17 Cyc. 340.
Charter-Party, see SHIPPING, *ante*, p. 56.
Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1003.
Claim of Lien, see MECHANICS' LIENS, 27 Cyc. 123, 193.
Commercial Paper:
In General, see COMMERCIAL PAPER, 7 Cyc. 612.
Of Corporation, see CORPORATIONS, 10 Cyc. 1049.
Commission to Take Deposition, see DEPOSITIONS, 13 Cyc. 888.
Complaint in:
Bastardy Proceedings, see BASTARDS, 5 Cyc. 652.
Divorce Proceedings, see DIVORCE, 14 Cyc. 677.
Summary Criminal Trial, see CRIMINAL LAW, 12 Cyc. 293.
Compromise, see COMPROMISE AND SETTLEMENT, 8 Cyc. 513.
Contract:
In General, see CONTRACTS, 9 Cyc. 299.
For Sale of Land, see VENDOR AND PURCHASER.
Of City, see MUNICIPAL CORPORATIONS, 28 Cyc. 666.
Of Corporation, see CORPORATIONS, 10 Cyc. 1018, 1049.
Of School-District, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 957.
Of Storage, see WAREHOUSEMEN.
Of Street Railway, see STREET RAILROADS.
Of Suretyship, see PRINCIPAL AND SURETY, 32 Cyc. 43.
Of Territory, see TERRITORIES.
Of Town, see TOWNS.
Of United States, see UNITED STATES.
Relating to Waters and Watercourses, see WATERS AND WATERCOURSES.
Decree in Equity, see EQUITY, 16 Cyc. 474.
Deed, see DEEDS, 13 Cyc. 540, 554.
Deposition, see DEPOSITIONS, 13 Cyc. 904, 939, 953.
Election Returns, see ELECTIONS, 15 Cyc. 376.
Findings:
By Court, see TRIAL.
By Jury, see TRIAL.
Forgery, see FORGERY, 19 Cyc. 1367.
Guaranty, see GUARANTY, 20 Cyc. 1413.
Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 251, 279.
Indorsement or Entry of Levy, see EXECUTIONS, 17 Cyc. 1101.
Inquisition by Coroner, see CORONERS, 9 Cyc. 991.
Instructions, see CRIMINAL LAW, 12 Cyc. 646; TRIAL.
Inventory or Appraisal on Attachment, see ATTACHMENT, 4 Cyc. 602.
Judgment:
In General, see JUDGMENTS, 23 Cyc. 850.
Establishing Highway, see STREETS AND HIGHWAYS.
In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 603.
On Complaint on Summary Criminal Trial, see CRIMINAL LAW, 12 Cyc. 330.
Judgment Record, see CRIMINAL LAW, 12 Cyc. 786.
Jurat to Affidavit For Attachment, see ATTACHMENT, 4 Cyc. 515.
Lease, see LANDLORD AND TENANT, 24 Cyc. 904.

For Matters Relating to — (*continued*)
Signatures to Particular Instruments — (*continued*)
Lien Claim, see MECHANICS' LIENS, 27 Cyc. 123, 193.
Memorandum Required by Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 272
Mining Lease, Etc., see MINES AND MINERALS, 27 Cyc. 692.
Mortgage, see MORTGAGES, 27 Cyc. 1105.
Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 554, 729.
Notice:
In General, see NOTICE, 29 Cyc. 1118.
Of Appeal, see APPEAL AND ERROR, 2 Cyc. 812, 862, 867.
Of Dishonor, see COMMERCIAL PAPER, 7 Cyc. 1111.
Of Lien Claim, see MECHANICS' LIENS, 27 Cyc. 123, 193.
Of Lis Pendens, see LIS PENDENS, 25 Cyc. 1468.
Nuncupative Will, see WILLS.
Offer of Judgment, see COSTS, 11 Cyc. 78.
Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 357.
Petition:
By Guardian For Sale of Ward's Estate, see GUARDIAN AND WARD, 21 Cyc. 126.
For Alteration of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 202.
For Establishment of Drain, see DRAINS, 14 Cyc. 1032.
For Prohibition of Sale of Intoxicating Liquor, see INTOXICATING LIQUORS, 23 Cyc. 96.
For Removal of Cause, see REMOVAL OF CAUSES, 34 Cyc. 1285.
For Removal of County-Seat, see COUNTIES, 11 Cyc. 371.
For Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 723.
In Bankruptcy, see BANKRUPTCY, 5 Cyc. 306.
In Quo Warranto Proceedings, see QUO WARRANTO, 32 Cyc. 1457.
Pleading:
In General, see PLEADING, 31 Cyc. 524.
In Action For Partition, see PARTITION, 30 Cyc. 220.
In Equity, see EQUITY, 16 Cyc. 227, 365.
In Mandamus Proceedings, see MANDAMUS, 26 Cyc. 431, 451.
Power of Sale, see MORTGAGES, 27 Cyc. 1470.
Preliminary Examination, see CRIMINAL LAW, 12 Cyc. 325.
Process:
In General, see PROCESS, 32 Cyc. 440.
In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 520.
Promissory Note, see COMMERCIAL PAPER, 7 Cyc. 612.
Recognizance, see RECOGNIZANCES, 34 Cyc. 546.
Records:
In Civil Cases in Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 703.
In Criminal Prosecutions, see CRIMINAL LAW, 12 Cyc. 850, 856.
Of County Boards, see COUNTIES, 11 Cyc. 398 note 96.
Release, see RELEASE, 34 Cyc. 1047.
Return of:
Attachment, see ATTACHMENT, 4 Cyc. 614.
Process, see PROCESS, 32 Cyc. 500.
Writ of Mandamus, see MANDAMUS, 26 Cyc. 451.
Shipping Articles, see SEAMEN, 35 Cyc. 1183.
State Bond, see STATES.
State Contract, see STATES.
Statement of:
Facts, see APPEAL AND ERROR, 3 Cyc. 68.
Indebtedness For Confession of Judgment, see JUDGMENT, 23 Cyc. 711.

For Matters Relating to — (*continued*)
Signatures to Particular Instruments — (*continued*)
Statute, see STATUTES.
Statutory Petition to Allow Election Contest, see ELECTIONS, 15 Cyc. 410.
Subpœna, see WITNESSES.
Subscription, see SUBSCRIPTIONS.
Subscription Paper to Corporate Stock, see CORPORATIONS, 10 Cyc. 519.
Summons, see PROCESS, 32 Cyc. 440.
Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1425.
Tax Deed, see TAXATION.
Transcript From Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 703.
Verdict, see CRIMINAL LAW, 12 Cyc. 689; TRIAL.
Verification, see PLEADING, 31 Cyc. 545.
Warrant of Arrest, see CRIMINAL LAW, 12 Cyc. 301.
Will, see WILLS.
Within Meaning of Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 272.
Writ of Attachment, see ATTACHMENT, 4 Cyc. 550.
Writing Creating Trusts, see TRUSTS.
Signing of Judgment as Subject to Mandamus, see MANDAMUS, 26 Cyc. 210.
Writing Submitted For Comparison of Signatures, see EVIDENCE, 17 Cyc. 163.

I. DEFINITION.

The verb "to sign" is defined "to affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting." [1] A "signature" has been defined as "a sign, stamp, or mark impressed, as by a seal, especially the name of any person written with his own hand, employed to signify that the writing which precedes accords with his wishes or intention; a sign manual." [2]

1. Webster Dict. [*quoted* in Hansen *v.* Owens, 133 Ga. 648, 64 S. E. 800, 803; Knox's Estate, 131 Pa. St. 220, 230, 18 Atl. 1021, 17 Am. St. Rep. 798, 6 L. R. A. 353].

"To sign, in the primary sense of the word, is to make any mark." *In re* Walker, 110 Cal. 387, 393, 42 Pac. 815, 52 Am. St. Rep. 104, 30 L. R. A. 460; Cummings *v.* Landes, 140 Iowa 80, 82, 117 N. W. 22.

"To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation." *In re* Walker, 110 Cal. 387, 393, 42 Pac. 815, 52 Am. St. Rep. 104, 30 L. R. A. 460.

"To sign a paper is to subscribe one's own name to it." Sinnott *v.* Louisville, etc., R. Co., 104 Tenn. 233, 56 S. W. 836.

The word "sign" in the English statute of frauds means the making of some mark upon the paper so as to identify and give efficacy to it by some act, and not by words merely. *In re* McElwaine, 18 N. J. Eq. 499, 503.

Distinguished from "subscribe" see *infra*, III, B.

"Signing" means marking in some way by the party himself. Toms *v.* Cuming, B. & Arn. 347, 9 Jur. 90, 14 L. J. C. P. 67, 1 Lutw. Reg. Cas. 200, 7 M. & G. 88, 8 Scott N. R. 910, 49 E. C. L. 88.

Intent.— The actual signing of a written instrument in a legal sense may imply more than the clerical act of writing the name. The element of intent may enter into the act, not the intent merely to place the name on the paper, but to affix it to the instrument in token of an intention to be bound by its conditions; for a signing consists of both the act of writing a person's name and the intention in doing this to execute, authenticate, or to sign as a witness. U. S. Fidelity, etc., Co. *v.* Siegmann, 87 Minn. 175, 178, 91 N. W. 473.

2. Webster Dict. [*quoted* in Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800, 803; Knox's Estate, 131 Pa. St. 220, 230, 18 Atl. 1021, 17 Am. St. Rep. 798, 6 L. R. A. 353].

A signature is not limited to a written name, and includes a mark. "There can be no doubt that historically, and down to very modern times, the ordinary signature was the mark of a cross; and there is perhaps as little question that in the general diffusion of education at the present day the ordinary use of the word implies the written name. . . . Even in the now usual acceptation of a written name, signature still does not imply the whole name." Knox's Estate, 131 Pa. St. 220, 230, 18 Atl. 1021, 17 Am. St. Rep. 798, 6 L. R. A. 353.

According to Greenleaf, a signature consists both of the act of writing the party's name and of the intention of thereby finally authenticating the instrument. Vines *v.* Cling-

II. NECESSITY.

It is not essential to the validity of a sealed bond that the obligor sign it; sealing it is sufficient.[3] A deed, however, must be signed.[4] When a signature is

fost, 21 Ark. 309, 312; Seventh St. Colored M. E. Church *v.* Campbell, 48 La. Ann. 1543, 1546, 21 So. 184; Watson *v.* Pipes, 32 Miss. 451, 466; Davis *v.* Sanders, 40 S. C. 507, 510, 19 S. E. 138.

Other definitions are: "A person's name as set down by himself." Mills *v.* Howland, 2 N. D. 30, 34, 49 N. W. 413 [*citing* Anderson L. Dict.].

"The act of putting down a man's name at the end of an instrument, to attest its validity." Bouvier L. Dict. [*quoted* in Wade *v.* State, 22 Tex. App. 256, 257, 2 S. W. 594].

Autograph.— In *In re* Walker, 110 Cal. 387, 393, 42 Pac. 815, 52 Am. St. Rep. 104, 30 L. R. A. 460, after pointing out the primary meaning of the verb "to sign" the court said: "And while, by long usage and custom, signature has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of autograph, that signification is derivative, and is not inherent in the word itself any more than it is in autograph, which strictly conveys no more than the idea of a specimen of an individual's writing." "Looking at the original meaning of the word, in connection with the usage since the people generally have become able to write their own names, we have no trouble in reaching the conclusion that, as employed in the statute, no more is exacted than that the name of plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service. Cummings *v.* Landes, 140 Iowa 80, 83, 117 N. W. 22 [*citing* Hamilton *v.* State, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491, and note; Loughren *v.* Bonniwell, 125 Iowa 518, 101 N. W. 287, 106 Am. St. Rep. 319; Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841; Mezchen *v.* More, 54 Wis. 214, 11 N. W. 534].

An indorsement to a negotiable promissory note is a signature to a written instrument within an act making it criminal to obtain the signature of any person to a written instrument by false token or pretense. People *v.* Chapman, 4 Park. Cr. (N. Y.) 56, 58.

As inclusive of "mark" see *infra*, III, F.

3. Parks *v.* Hazlerigg, 7 Blackf. (Ind.) 536, 43 Am. Dec. 106; Curd *v.* Forts, 2 A. K. Marsh. (Ky.) 119; *Ex p.* Hodgkinson, Coop. 99, 35 Eng. Reprint 492, 19 Ves. Jr. 296, 34 Eng. Reprint 525, 13 Rev. Rep. 199. See BONDS, 5 Cyc. 735 text and note 46. See also Jeffery *v.* Underwood, 1 Ark. 108, where, in an action on a note of hand, defendant objected to the instrument's introduction in evidence, on the ground of variance, defendant contending that the instrument was a written obligatory and not a note of hand, and the court, in passing upon that objection, said that it was not essential to the validity of a bond that it be signed, that sealing was sufficient. The remark, however, seems to have been unnecessary to the decision for the instrument appears to have been signed.

But where a scroll or printed impression is used instead of a seal, it is essential to the validity of the bond that the obligor adopt the scroll or impression as his seal by signing the instrument. State *v.* Martin, 56 Miss. 108, where in an action on a bond the following facts appeared: The obligor who had been elected sheriff was brought to the sheriff's office, in feeble health, to qualify before entering upon the duties of his office. A clerk presented to him for his signature, a sheriff's bond, and a tax collector's bond with an official oath indorsed upon it. He signed the sheriff's bond and the oath of office, but did not sign the tax collector's bond. That bond had been previously signed by those intending to become sureties thereon, and opposite each of their signatures was a printed impression for a seal. The blank line opposite the first printed impression was left, the sureties signing below it. The obligor did not write the paper purporting to be his bond as tax collector, nor did he read it, nor did he know what it was. He did not make the seal, nor know what it was intended for. But he thought, after signing the sheriff's bond on official oath, as stated, that he had done all that was necessary to qualify him for his office; and he proceeded to act as tax collector. The tax collector's bond contained the formula, "Signed, sealed and delivered," etc. In that case the court held that there was no evidence that the obligor had adopted the scroll printed on the bond as his seal, and for that reason neither he nor his sureties were liable upon the bond.

4. See DEEDS, 13 Cyc. 554 text and note 34; CORPORATIONS, 10 Cyc. 1012 text and note 45. See also Clark *v.* Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256. But see Sheehan *v.* Davis, 17 Ohio St. 571, where it was held that a deed of a corporation, sealed with the corporate seal, signed by the cashier in his own name, not that of the corporation, was a valid deed.

At common law the seal was the sign, and a sealing was regarded as a signing, as the act evidencing the intention of a maker to give vitality to the instrument; and where a deed is wholly written by another at the grantor's request, and not subscribed by the grantor, his name only appearing in the granting clause, but it is acknowledged by him before the proper officer, it is signed so as to be valid and operative. Newton *v.* Emerson, 66 Tex. 142, 18 S. W. 348.

essential to the validity of an instrument, an acknowledgment is not a substitute therefor, nor is it proof that it has been signed.[5]

III. REQUISITES AND SUFFICIENCY.

A. In General. Signatures adopted by persons are sufficient to give validity to instruments even though they are illegible[6] or defective;[7] or contain only the christian name of the person signing;[8] or made with a lead pencil;[9] or typewritten,[10] or printed;[11] or even cut from another instrument and attached to

5. Jones *v.* Gurlie, 61 Miss. 423.

6. Hinsaman *v.* Hinsaman, 52 N. C. 510 (holding in an action on a bond that a signature of defendant which was illegible, so illegible in fact that the subscribing witness asked permission to write defendant's name below it, and did so, was sufficient to give validity to the bond); Trotter *v.* Walker, 13 C. B. N. S. 30, 9 Jur. N. S. 603, K. & G. 534, 32 L. J. C. P. 60, 106 E. C. L. 30.

Exactly what constitutes a signing has never been reduced to a judicial formula, but it has usually been regarded that whatever is intended as a signature is valid signing, no matter how imperfect or unfinished or fantastic or illegible or even false the separate characters or symbols used may be. Sheehan *v.* Kearney, 82 Miss. 688, 691, 21 So. 41, 35 L. R. A. 102.

7. See COMMERCIAL PAPER, 7 Cyc. 613 text and note 98; DEEDS, 13 Cyc. 554 text and notes 39, 40. In Middleton *v.* Findla, 25 Cal. 76, a deed executed by Edward Jones, the name Edward appearing both in the body of the deed and in the certificate of acknowledgment, was not invalidated because of the fact that it is subscribed Edmund Jones.

8. Zann *v.* Haller, 71 Ind. 136, 36 Am. Rep. 193 (holding that the signing of a mortgage by a married woman by her christian name only was sufficient, where her name appeared in full, with that of her husband, in the premises and in the certificate of acknowledgment); Knox's Estate, 131 Pa. St. 220, 18 Atl. 1021, 17 Am. Rep. 798, 6 L. R. A. 353 (holding that a signature by the first name was a valid execution of a will if the intent to execute was apparent). But see Sinnott *v.* Louisville, etc., R. Co., 104 Tenn. 233, 56 S. W. 836, holding that a railroad ticket requiring the signature of the original purchaser on the back thereof contemplated that the purchaser would use his real name, not his given name alone, and that, when signed by a person's first initial and his middle name, his surname having been left off, the railroad company was justified in refusing to accept the ticket for transportation.

9. Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 41 N. Y. Suppl. 507 (holding that a signature with a lead pencil is sufficient, although other signatures to the same instrument are in ink); Clason *v.* Bailey, 14 Johns. (N. Y.) 484; Merritt *v.* Clason, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286 [*affirmed* in 14 Johns. 484] (where a memorandum in pencil containing the names of the parties in the body of the writing, but not subscribed, was deemed a sufficient memorandum within the statute of frauds); Myers *v.* Vanderbelt, 84 Pa. St. 510, 24 Am. Rep. 227; *In re* Schoner, 8 Pa. Co. Ct. 453 [*overruling In re* Smith, 3 Pa. Co. Ct. 314]. See also Drefahl *v.* Security Sav. Bank, 132 Iowa 563, 107 N. W. 179, where, in an action by the administrator of a depositor against the payee of certain checks signed by the mark of depositor made with a lead pencil, in which the validity of the check was attacked, it was contended that the fact that the mark was made by a lead pencil instead of in ink was a suspicious circumstance, the court said that it was immaterial with what kind of an instrument a signature was made.

An indorsement of a negotiable instrument with a lead pencil is sufficient. Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; Closson *v.* Stearns, 4 Vt. 11, 23 Am. Dec. 245; Geary *v.* Physic, 5 B. & C. 234, 7 D. & R. 653, 4 L. J. K. B. O. S. 147, 29 Rev. Rep. 225, 111 E. C. L. 442.

10. Bridges *v.* Center First Nat. Bank, 47 Tex. Civ. App. 454, 105 S. W. 1018; Degginger *v.* Martin, 48 Wash. 1, 92 Pac. 674.

Estoppel.— A signature to an attachment bond signed by a typewriter, if adopted by the party whose name is signed, is sufficient; for applying the doctrine of estoppel, after a plaintiff had sued out an attachment, he would be estopped to deny that he had signed the bond. Bridges *v.* Center First Nat. Bank, 47 Tex. Civ. App. 454, 105 S. W. 1018.

Firm-name.— The signature of a contract to sell land by the vendor's agent was sufficient where the firm-name under which he did business was typewritten and followed by his initials, written by himself. Degginger *v.* Martin, 48 Wash. 1, 92 Pac. 674.

11. Williams *v.* McDonald, 58 Cal. 527; Weston *v.* Myers, 33 Ill. 424; Hamilton *v.* State, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491. See COMMERCIAL PAPER, 7 Cyc. 613 text and note 3; FRAUDS, STATUTE OF, 20 Cyc. 275 text and note 91. See also Grieb *v.* Cole, 60 Mich. 397, 27 N. W. 579, 1 Am. St. Rep. 533, an action in assumpsit on a written order for a mowing machine, given by defendant to plaintiff, where defendant objected to the order being received in evidence upon the ground that a blank warranty which was printed across the back of it and signed by plaintiff's printed signature,

another.[12] And it is sufficient signature to satisfy the statute of frauds if a contract be signed by both parties separately upon separate sheets,[13] or if a telegram be sent accepting an offer that has been made;[14] but a resolution of a corporation accepting a lease has been held not sufficient to satisfy the statute requiring a signature.[15] So too one signature may be sufficient for two instruments which appear on the same sheet.[16]

B. Location of Signature. When a signature is essential to the validity of an instrument it is not necessary that the signature appear at the end of the instrument. If the name of the party whose signature is required is written by him in any part of the instrument, for the purpose of authenticating it, it is a sufficient signature.[17] But when a statute requires that an instrument be sub-

was not filled up, and the court in sustaining the order's validity on the ground that as reference was made to the warranty in the order, and as the order contained such statements that when read together with the warranty there was no ambiguity, said that plaintiff's printed signature on the back of the warranty would bind him as fully as though it had been in his own handwriting. But see Vielie *v.* Osgood, 8 Barb. (N. Y.) 130, where it was held that the names of vendors of a pew in a contract for the conveyance of pews were not sufficient as signatures to satisfy the statute of frauds when they were printed and not written.

Attorney's printed name on a summons is a sufficient signature to satisfy the statute requiring summons to be subscribed by plaintiff or his attorney. Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841 [*overruling* Ames *v.* Schurmeier, 9 Minn. 221]; Barnard *v.* Heydrick, 49 Barb. (N. Y.) 62 [*overruling* Farmers' L. & T. Co. *v.* Dickson, 9 Abb. Pr. (N. Y.) 61, 17 How. Pr. 477]; New York *v.* Eisler, 2 N. Y. Civ. Proc. 125; Mezchen *v.* More, 54 Wis. 214, 11 N. W. 534. But see Nightingale *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338, where on a motion to set aside an order of continuance, signed by two counsel for plaintiff, the court said that the printed names of counsel were not their signatures. This, however, was not necessary to the decision of the motion.

A printed letter-head containing the name of a party to a memorandum of a contract is sufficient as signature to satisfy the requirements of the statute of frauds. Drury *v.* Young, 58 Md. 546, 42 Am. Rep. 343; Saunderson *v.* Jackson, 3 Esp. 180.

Facsimile.— Coupons of bonds are not invalid because signed by a printed facsimile of the maker's autograph, if adopted by the maker for that purpose, although such signing is not expressly authorized by statute. Pennington *v.* Baehr, 48 Cal. 565.

Lithographic signatures of a secretary of an irrigation district, adopted by him and appearing on the interest coupons on irrigation bonds issued by the district, were sufficient evidence of his signature to such bonds. Hewel *v.* Hogin, 3 Cal. App. 248, 84 Pac. 1002. But see Reg. *v.* Cowper, 24 Q. B. D. 60, 59 L. J. Q. B. 26, 38 Wkly. Rep. 207 [*affirmed* in 24 Q. B. D. 533, 59 L. J. Q. B. 265, 62 L. T. Rep. N. S. 583, 38 Wkly. Rep. 408], where it is held that a lithographed statement of a solicitor's name on the particulars is an insufficient signature to satisfy a requirement that the particulars be signed by the solicitor in order to entitle plaintiff to costs.

Stamp.— A letter which was dictated to and typewritten by a stenographer, and was signed by the latter with the decedent's name by means of a rubber stamp furnished by him for that purpose, sufficiently complied with the terms of the statute that required that a new promise to take a case out of the statute of limitations should be in writing and be signed by the party to be charged thereby. Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675. A document purporting to be the order of a judge at chambers for the removal of a cause for trial in a county court, and stamped with the judge's signature according to the usual practice, is binding upon the county court judge, and that the circumstances under which it was made are not the subject of inquiry. Blades *v.* Lawrence, L. R. 9 Q. B. 374, 43 L. J. Q. B. 133, 30 L. T. Rep. N. S. 378, 22 Wkly. Rep. 643. See COMMERCIAL PAPER, 7 Cyc. 613 text and note 2; FRAUDS, STATUTE OF, 20 Cyc. 275 text and note 9. But see Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196, where it is held that a bill of goods, sent to a purchaser and stamped with his name and a date, and retained in his possession, is not such a note or memorandum in writing of the bargain, signed by the party to be charged, as will take the sale out of the statute of frauds, when there is no evidence to show when or for what purpose the bill was stamped, or that the stamp had been adopted as a signature.

12. Lee County *v.* Welsing, 70 Iowa 198, 30 N. W. 481.

13. Spear *v.* Hart, 3 Rob. (N. Y.) 420.

14. Trevor *v.* Wood, 36 N. Y. 307, 93 Am. Dec. 511 [*reversing* 41 Barb. 255].

15. Wade *v.* Newbern, 77 N. C. 460, 465.

16. See PRINCIPAL AND SURETY, 32 Cyc. 44.

17. *Massachusetts.*— Penniman *v.* Hartshorn, 13 Mass. 870.

Missouri.— State *v.* Wilcox, 59 Mo. 176; Schmidt *v.* Schmaelter, 45 Mo. 502.

New Jersey.— Smith *v.* Howell, 11 N. J. Eq. 349, 355.

New York.— People *v.* Murray, 5 Hill 468; Clason *v.* Bailey, 14 Johns. 484 [*affirming* 12 Johns. 102, 7 Am. Dec. 286].

scribed, the writing of the name in the body of the instrument is not sufficient.[18] A signature placed between two parts of an instrument will apply to the whole instrument if it is shown to have been so intended.[19] Where a person intends to sign as a witness to an instrument, but signs it in the place for the principal to

North Carolina.— Smithdeal *v.* Smith, 64 N. C. 52.

Ohio.— Anderson *v.* Harold, 10 Ohio 399, 402.

Texas.— Lawson *v.* Dawson, 21 Tex. Civ. App. 361, 53 S. W. 64, holding that where a statute requires an instrument to be "signed" if the party writes his name either in the body or at the foot or end with the intent to execute the instrument, it is signed within the meaning of the statute, and in that respect a difference is made between the terms "signed" and "subscribed," that to constitute an execution where the instrument is to be subscribed it is necessary that the signature be at the end or foot of the instrument.

See 43 Cent. Dig. tit. "Signatures," § 3. See also BONDS, 5 Cyc. 735 text and note 45; COMMERCIAL PAPER, 7 Cyc. 614 text and note 567; CONTRACTS, 9 Cyc. 301 text and note 17; DEEDS, 13 Cyc. 554 text and note 35; FRAUDS, STATUTE OF, 20 Cyc. 274 text and notes 83–86.

Contra.— Davis *v.* Sanders, 40 S. C. 507, 19 S. E. 138, holding that a warrant of arrest issued by the trial justice with the names of the trial justice written by himself in the body of the warrant and on its back but inadvertently omitted to be signed at the foot is not a valid warrant, and cannot be relied upon by the sheriff to whom it was issued.

The etymology of the word "sign" does not necessarily require that the signature be placed at the bottom of an instrument, but it is much a matter of taste as to the place of signing. Adams *v.* Field, 21 Vt. 256, 264. See also Atty.-Gen. *v.* Clarke, 26 R. I. 470, 474, 59 Atl. 395.

In common parlance, however, "signing" means the writing of the name at the bottom of the paper or instrument, thereby formally authenticating it; and not a mere recital of the name in any part of the instrument. Evans *v.* Ashley, 8 Mo. 177, 181.

Signature in wrong place.— The signature to a deposition is good, even if inadvertently put in the wrong place. Moss *v.* Booth, 34 Mo. 316.

Signature at end of officer's certificate, and above his attestation, is a sufficient signature of a deposition. Read *v.* Patterson, 11 Lea (Tenn.) 430.

18. Wild Cat Branch *v.* Ball, 45 Ind. 213. See FRAUDS, STATUTE OF, 20 Cyc. 274 text and note 87.

"Signed" construed to mean subscribed.— The word "signed" as used in the codes providing for the signatures of pleadings has the same import as the word "subscribe," and that a pleading that was not signed at the end was defective. Ashbrook *v.* Roberts, 82 Ky. 298. The word "sign" as used in Tex. Rev. St. art 1378, providing that where the parties do not agree to a statement of facts the judge shall "make out and sign, and file with the clerk, a correct statement of the facts proven on the trial," which shall constitute a part of the record, is synonymous with the word "subscribed," which means to place a signature at the bottom of a written instrument. Wade *v.* State, 22 Tex. App. 256, 2 S. W. 594. See also Catlett *v.* Catlett, 55 Mo. 330, 331.

"Subscribed" not interpreted literally.— The signature of a seller, written across the face of the memorandum, for want of sufficient place at the bottom of the paper to contain it, would be deemed to have been subscribed at the end of the memorandum, within the meaning of the authorities requiring such a subscription. The court said: "The words 'signed' and 'subscribed,' although of different derivations, and although their literal meanings have a shade or two of difference, are substantially, both in common and in law language, the same — except where in a statute, or in connection with a context, some peculiar or additional meaning to either of the words is indicated" California Canneries Co. *v.* Scotena, 117 Cal. 447, 449, 49 Pac. 462. A memorandum of a contract for purchase of goods, made by a broker employed to make the purchase in his book in the presence of the vendor, the names of the vendor and the vendee and the terms of purchase being in the body of the memorandum, was a sufficient memorandum within the statute, although it was not subscribed by the parties. Clason *v.* Bailey, 14 Johns. (N. Y.) 484 [*affirming* 12 Johns. 102, 7 Am. Dec. 286]. In James *v.* Patten, 6 N. Y. 9, 55 Am. Dec. 376.

19. McQuaid *v.* Powers, 46 Ala. 44 (where the validity of a written contract executed by mark was sustained, under a statute prescribing that contracts so executed should be attested by a subscribing witness, where the instrument contained two contracts, and the position of the names of subscribing witnesses on the paper indicated that their signatures applied to the first only, but the parol evidence showed that they intended to sign as witnesses to both); Armant's Succession 43 La. Ann. 310, 9 So. 50, 26 Am. St. Rep. 183; Warren *v.* Chapman, 115 Mass. 584. But see Cabot *v.* Haskins, 3 Pick. (Mass.) 83, where it appeared that, at the foot of a mortgage deed, which was not accompanied by any note or bond, and which proved, owing to a prior mortgage, to be of no value, a memorandum was written, with the assent of the mortgagors, by the attorney of both parties, and signed by the mortgagees only, stating that the sum due on the mortgage was reduced to one thousand dollars, payable in five years, and it was held that the signatures of the mortgagors to the deed could not relate to the memorandum, and that this was not a memorandum signed, within the statute, sufficient to charge them for the one thousand dollars.

sign, the fact that he signed as a witness may be shown;[20] and where he intends to sign as a principal but signs in the place of a witness, that fact may be shown.[21] The fact that the name of an officer is near the word "countersigned" does not render the signature insufficient.[22]

C. Use of Initials and Abbreviations. Instruments are properly signed, although only the initial letter of christian names, with the surname written in full, are used.[23] And where a person abbreviates his christian name he is estopped to deny the validity of his signature.[24] The initials alone, if used as a signature, are as efficacious as a signature as the whole name at length.[25] So too is their use sufficient under the statute of frauds.[26]

D. By Hand of Party. Where the maker of an instrument in signing his name is assisted by another's guiding or steadying his hand, the signature thus made is the act of the maker and not the act of the person assisting him.[27]

E. By Hand of Another. Where a person's name is signed for him at his direction and in his presence by another, the signature becomes his own, and is sufficient to give the same validity to an instrument as though written by the person himself.[28] The signature is sufficient, although it purports to have been

20. Palmer *v.* Stephens, 1 Den. (N. Y.) 471; U. S. Fidelity, etc., Co. *v.* Siegmann, 87 Minn. 175, 91 N. W. 473.

21. Richardson *v.* Boynton, 94 Mass. 138, 90 Am. Dec. 141.

22. Gurnee *v.* Chicago, 40 Ill. 165.

23. *Georgia.*— Feagin *v.* Beasley, 23 Ga. 17.

Indiana.— Collins *v.* Marvil, 145 Ind. 531, 44 N. E. 487; Payne *v.* June, 92 Ind. 252; State *v.* Beck, 81 Ind. 500; Vanderkarr *v.* State, 51 Ind. 91; Wessels *v.* State, 26 Ind. 30.

Maine.— Strout *v.* Bradbury, 5 Me. 313.

Massachusetts.— Com. *v.* Wallace, 14 Gray 382; Clark *v.* Paine, 11 Pick. 66. See also Chadwick *v.* Upton, 3 Pick. 442.

Michigan.— Rice *v.* People, 15 Mich. 9, where it is held that an officer's signature to the jurat of an affidavit by writing his initials and surname is sufficient. This case limits People *v.* Tisdale, 1 Dougl. 59, and People *v.* Higgins, 3 Mich. 233, 61 Am. Dec. 491, both holding that a ballot which contains only the initials of a voter cannot be counted.

England.— Bowden *v.* Besley, 21 Q. B. D. 309, 52 J. P. 536, 57 L. J. Q. B. 473, 59 L. T. Rep. N. S. 219, 36 Wkly. Rep. 889.

Canada.—Crépeau *v.* Beauchesne, 14 Quebec Super. Ct. 495.

See 44 Cent. Dig. tit. "Signatures," § 4. See also COMMERCIAL PAPER, 7 Cyc. 613 text and note 96; CONTRACTS, 9 Cyc. 301 text and note 19.

24. Kemp *v.* McCormick, 1 Mont. 420.

25. Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13; Smith *v.* Howell, 11 N. J. Eq. 349. See COMMERCIAL PAPER, 7 Cyc. 613 text and note 96; CONTRACTS, 9 Cyc. 301 text and note 19; DEPOSITIONS, 13 Cyc. 900 text and note 35. See also Wimberly *v.* Dallas, 52 Ala. 196.

26. Sanborn *v.* Flagler, 9 Allen (Mass.) 474. See FRAUDS, STATUTE OF, 20 Cyc. 274 text and note 88.

27. *Alabama.*— Mash *v.* Daniel, 105 Ala. 393, 18 So. 8.

Arkansas.— Vines *v.* Clingfost, 21 Ark. 309.

Mississippi.— Watson *v.* Pipes, 32 Miss. 451.

North Carolina.— Carroll *v.* McGee, 25 N. C. 13.

Pennsylvania.— Vandruff *v.* Rinehart, 29 Pa. St. 232.

United States.— Stevens *v.* Van Cleve, 23 Fed. Cas. No. 13,412, 4 Wash. 262.

See 44 Cent. Dig. tit. "Signatures," § 5.

28. *Arkansas.*— Clark *v.* Latham, 25 Ark. 16.

Illinois.— Handyside *v.* Cameron, 21 Ill. 588, 74 Am. Dec. 119.

Indiana.— Croy *v.* Busenbark, 72 Ind. 48; Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322; Kennedy *v.* Graham, 9 Ind. App. 624, 35 N. E. 925, 37 N. E. 25. See also Carver *v.* Carver, 97 Ind. 497.

Iowa.— Reed *v.* Cedar Rapids, 138 Iowa 366, 116 N. W. 140.

Kentucky.— Irvin *v.* Thompson, 4 Bibb 295.

Maine.— Stevens *v.* Getchell, 11 Me. 443. But see Chapman *v.* Limerick, 56 Me. 390, where it is held that under a statutory rule of construction, directing that "when the signature of a person is required, he must write it or his mark," a public officer cannot authorize another person to affix the officer's name to an official document, which the law requires shall be signed by the officer himself, and that a signature so made is not sufficient, although the name is written at the officer's request, and in his immediate presence, after his having heard the document read.

Michigan.— Just *v.* Wise Tp., 42 Mich. 573, 4 N. W. 298.

Minnesota.— Hotchkiss *v.* Cutting, 14 Minn. 537.

Mississippi.— Watkins *v.* McDonald, (1906) 41 So. 376; Sheehan *v.* Kearney, (1896) 21 So. 4.

Missouri.— State *v.* Carlisle, 57 Mo. 102.

New Jersey.— Johnson *v.* Buck, 35 N. J. L. 338, 10 Am. Rep. 243, holding that the signature of the purchaser to the conditions of sale made by the auctioneer's clerk, as the bids are publicly announced, is a sufficient signing within the statute of frauds. But see *In re* McElwaine, 18 N. J. Eq. 499, holding that under the New Jersey statute regulating the

signed by another; thus the form, "A. for B., at his request," is sufficient.[29] It is not a sufficient signature, however, where the name of the person whose signature is required is written in that person's absence, although the writing of his name may have been authorized by him,[30] unless he subsequently acknowledges and adopts the signature as his own.[31]

F. Use of Mark — 1. In General. In many of the jurisdictions the term "signature" is defined by statute as inclusive of a mark. The language of the statutes vary, some providing that the term shall include any mark, name, or sign written with intent to authenticate any instrument or writing;[32] others providing that it shall include the mark of a person unable to write;[33] and others providing that it shall include the mark where a person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness.[34] In the absence of statute defining the term "signature," when a signature is necessary to give authenticity to an instrument, a signature

execution of wills, where the testator's signature is written by another at the testator's request, it is not a sufficient signing.

New Hampshire.— Lord *v.* Lord, 58 N. H. 7, 42 Am. Rep. 565.

New York.— Harris *v.* Story, 2 E. D. Smith 363, holding that an instrument to which the signature of a party is affixed by another at the party's request is valid, although it is not read to the party so signing.

Pennsylvania.— Fitzpatrick *v.* Engard, 175 Pa. St. 393, 34 Atl. 803; Vernon *v.* Kirk, 30 Pa. St. 218.

Wisconsin.— *In re* Jenkins, 43 Wis. 610.

England.— King *v.* Longnor, 4 B. & Ad. 647, 2 L. J. M. C. 62, 1 N. & M. 576, 24 E. C. L. 284; Ball *v.* Dunsterville, 4 T. R. 313, 2 Rev. Rep. 394, 100 Eng. Reprint 1038.

See 44 Cent. Dig. tit. "Signatures," § 6. See also Contracts, 9 Cyc. 301 text and note 22; Deeds, 13 Cyc. 554 text and note 41; Frauds, Statute of, 20 Cyc. 276 text and note 95; Wills.

But this is not true where a statute requires that a signature be made with a person's own hand or mark. Linsley *v.* Brown, 13 Conn. 192. See *infra*, III, F.

Affixed by other party to contract.— Where a written instrument is not essential to the validity of the contract, one of the parties may, on request, and in the other's presence, affix the latter's signature to the instrument. Crow *v.* Carter, 5 Ind. App. 169, 31 N. E. 937. The maker of a note whose signature was affixed by the nominal payee at his request is bound thereby. Haven *v.* Hobbs, 1 Vt. 238, 18 Am. Dec. 678.

Husband and wife.— Where a husband, in the presence of his wife and with her express consent, signs her name to a promissory note which she knows is to be delivered to the payee in settlement of an existing indebtedness for which she is individually liable, and such note is delivered in the cancellation of the indebtedness, the mere fact that she remarked to her husband at the time of authorizing him to sign the papers, "You may sign my name to them, but I will not have anything to do with them," the same not being heard or communicated to the payee, does not relieve her from liability on the note. Wyatt *v.* Walton Guano Co., 114 Ga. 375, 40 S. E. 237. So where a husband at his wife's request and in her presence signed her name to a release of dower, the signature was sufficient. Frost *v.* Deering, 21 Me. 156. And where a husband signs his wife's name to a mortgage purporting to be executed by her in her immediate presence and by her direction, the effect of the signature is the same as if she had signed the mortgage herself. Hawes *v.* Glover, 126 Ga. 305, 55 S. E. 62. But see Linsley *v.* Brown, 13 Conn. 192, where it was held that under a statute that required a deed to be signed by the grantor "with his own hand or mark" a deed, signed by a husband who then, in her presence and by her direction, signed his wife's name, was not sufficiently executed.

29. Gardner *v.* Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Vernon *v.* Kirk, 30 Pa. St. 218.

30. Com. *v.* Connelly, 163 Mass. 539, 60 N. E. 862; Mericle *v.* Mulks, 1 Wis. 366.

31. Hall *v.* Hall, 17 Pick. (Mass.) 373. See Acknowledgments, 1 Cyc. 540 text and note 51; Contracts, 9 Cyc. 301 text and note 21; Deeds, 13 Cyc. 555 text and note 42; Wills.

32. Geraghty *v.* Kilroy, 103 Minn. 286, 114 N. W. 838. See also the statutes of the several states.

33. Harwell *v.* Zimmerman, 157 Ala. 473, 47 So. 722; Gillis *v.* Gillis, 96 Ga. 1, 23 S. E. 107, 51 Am. St. Rep. 121, 30 L. R. A. 143, holding that a person signing by a mark, if competent in other respects, is a competent witness to the execution of a will. See also the statutes of the several states.

Ga. Pol. Code (1895), § 5, provides that "signature, or subscription, includes the mark of an illiterate or infirm person." Hansen *v.* Owens, 132 Ga. 648, 64 S. E. 800, 803.

34. *In re* Guilfoyle, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370 (holding that the statute is satisfied when the name of a person is written so near as to show that the mark is intended to represent it); Terry *v.* Johnson, 109 Ky. 589, 60 S. W. 300, 22 Ky. L. Rep. 1210; Iowa Loan, etc., Co. *v.* Greenman, 63 Nebr. 268, 88 N. W. 518; Sivils *v.* Taylor, 12 Okla. 47, 69 Pac. 867; Simmons *v.* Leonard,

by a mark is sufficient.[35] Where, however, a statute requires that persons write their names, signatures by mark are not sufficient.[36]

2. Sufficiency. Where a signature is by a mark, the mark itself made by the person whose signature it is to become, and not his name written by another near it, is the signature.[37] And the validity of the signature is not affected by the fact that the name is written by the other party to the contract.[38] Nor is it affected, in the absence of a statute requiring a name to accompany the mark, by the fact that no name accompanies it;[39] nor by the fact that a wrong name is

91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875; Brown *v.* McClanahan, 9 Baxt. (Tenn.) 347. See also Ford *v.* Ford, 7 Humphr. (Tenn.) 92, holding that under Acts (1878), c. 22, § 11, requiring wills to be subscribed by two witnesses, witnesses may sign by mark. *Compare* Derry's Estate, Myr. Prob. (Cal.) 202, holding that a will was sufficiently witnessed when a witness to a will did not sign his name, being unable to write, and the other witness, besides signing as such, wrote the name of his associate witness, and wrote his own name as witness to the associate's mark, no reference in this case, however, being made to the statute.

35. *Georgia.*— Larkin *v.* Darien, 69 Ga. 727.

Kentucky.— See Com. *v.* Campbell, 45 S. W. 89, 20 Ky. L. Rep. 54.

Louisiana.— Seventh St. Colored M. E. Church *v.* Campbell, 48 La. Ann. 1543, 21 So. 184 (holding that a signature by a mark was a sufficient compliance with the terms of a statute, Rev. St. § 677, requiring incorporators to sign the act of incorporation); Tagiasco *v.* Molinari, 9 La. 512.

Mississippi.— See Sheehan *v.* Kearney, 82 Miss. 688, 21 So. 41, 35 L. R. A. 102.

Nebraska.— Iowa Loan, etc., Co. *v.* Greenman, 63 Nebr. 268, 88 N. W. 518; Britton *v.* Berry, 20 Nebr. 325, 30 N. W. 254.

New York.— Palmer *v.* Stephens, 1 Den. 471; Jackson *v.* Van Dusen, 5 Johns. 144, 4 Am. Dec. 330.

North Carolina.— Taton *v.* White, 95 N. C. 453.

Pennsylvania.— Com. *v.* Scanlon, 21 Pa. Co. Ct. 665.

United States.— Zacharie *v.* Franklin, 12 Pet. 151, 9 L. ed. 1035, where it is held by the decisions of Louisiana that a mark by one who cannot write is a sufficient signature.

England.— Baker *v.* Dening, 8 A. & E. 94, 2 Jur. 775, 7 L. J. Q. B. 137, 3 N. & P. 228, 1 W. W. & H. 148, 35 E. C. L. 497.

See 44 Cent. Dig. tit. "Signatures," § 7. See also Commercial Paper, 7 Cyc. 613 text and note 1; Contracts, 9 Cyc. 301 text and note 19; Deeds, 13 Cyc. 554 text and notes 37, 44; Depositions, 13 Cyc. 940 text and note 36; Frauds, Statute of, 20 Cyc. 274 text and note 89; Mortgages, 27 Cyc. 1106 text and note 4; Wills.

Signatures by marks are treated as original signatures, and are a signing or subscription within the terms of statutes regulating the making of deeds, wills, or written instruments. Robins *v.* Coryell, 27 Barb. (N. Y.) 556, 560.

36. Stewart *v.* Beard, 69 Ala. 470.

37. *Alabama.*— McGowan *v.* Collins, 154 Ala. 299, 46 So. 228; Johnson *v.* Davis, 95 Ala. 293, 10 So. 911; Bailey *v.* Bailey, 35 Ala. 687.

Arkansas.— *In re* Cornelius, 14 Ark. 675.

Kentucky.— Staples *v.* Bedford Loan, etc., Bank, 98 Ky. 451, 33 S. W. 403, 17 Ky. L. Rep. 1035 (holding that the statute providing that a person who cannot write shall not be bound as surety by the act of an agent unless the agent's authority is in writing, signed by the principal's mark in the presence of one credible witness, does not apply to a surety who signed a note by making his mark, his name being written by the witness to his signature); Overfield *v.* Overfield, 30 S. W. 994, 17 Ky. L. Rep. 313.

Louisiana.—Agurs *v.* Belcher, 111 La. 378, 35 So. 607, 100 Am. St. Rep. 485.

New York.— Conroy *v.* Bigg, 109 N. Y. Suppl. 914.

North Carolina.— Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917; State *v.* Byrd, 93 N. C. 624.

Pennsylvania.— Long *v.* Zook, 13 Pa. St. 400.

South Carolina.— Zimmerman *v.* Sale, 3 Rich. 76.

See 44 Cent. Dig. tit. "Signatures," § 7.

38. McGowan *v.* Collins, 154 Ala. 299, 46 So. 228; Johnson *v.* Davis, 95 Ala. 293, 10 So. 911, holding that a note and mortgage are properly signed where the mortgagee writes the obligor's name to each instrument, the latter affixes his mark, and a disinterested witness attests the subscription. This case distinguishes Carlisle *v.* Campbell, 76 Ala. 247, concerning which it says that a promissory note was held insufficiently executed for the reason that the promisee not only wrote the promisor's name but also made his mark. *Contra*, Finlay *v.* Prescott, 104 Wis. 614, 80 N. W. 930, 47 L. R. A. 695.

39. Conroy *v.* Bigg, 109 N. Y. Suppl. 914; Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755 (holding that the figures "1, 2, 8," as a substitute for the indorser's name, is a good indorsement of a bill, although the indorser could write); Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205; State *v.* Byrd, 93 N. C. 624; Zimmerman *v.* Sale, 3 Rich. (S. C.) 76 (holding that a contract signed by a person with his mark, his name nowhere appearing in the contract, is binding on the person so signing); Gervais *v.* Baird, 2 Brev. (S. C.) 37. See also Horton *v.* Murden, 117 Ga. 72, 43 S. E. 786, holding that a signature in the

written near the mark;[40] nor by the fact that words indicating that it is intended as a mark are omitted.[41]

3. Attestation — a. Not Required by Statute. A signature by mark, although not attested by a witness, is valid at common law,[42] and in those jurisdictions whose statutes, in defining the term "signature" as inclusive of mark, do not require attestation.[43]

b. Required by Statute — (i) *In General.* In jurisdictions where statutes define the term "signature" as inclusive of a mark when a person cannot write, his name being written near it, and written by a person who writes his own name as a witness, it is essential to the validity of a signature by a mark that it be witnessed,[44] unless such statutory provisions have been construed to apply only to the signature to instruments required by statute to be in writing, and when such is the case the signatures by mark to such instrument as are required by statute to be in writing must be witnessed;[45] but the signature by mark to those instruments not required by statute to be in writing need not be witnessed.[46]

(ii) *Acknowledgment in Lieu of Attestation.* Where a signature

following form is sufficient, "I Julie Reynolds sign my hand to it + here."

40. Bailey *v.* Bailey, 35 Ala. 687; Agurs *v.* Belcher, 111 La. 378, 35 So. 607, 100 Am. St. Rep. 485; Long *v.* Zook, 13 Pa. St. 400. See also Main *v.* Ryder, 84 Pa. St. 217, where a mark was held a sufficient signature to a will, although it appeared that the name accompanying the mark was not the testator's real name, but a name by which he had been known for a long time, which point, however, was not raised and was not discussed.

41. Harwell *v.* Zimmerman, 157 Ala. 473, 47 So. 722; Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917.

Absence of "his mark" is immaterial.— Gardner *v.* Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917. Especially where the instrument is executed under the maker's directions and in his presence. Harwell *v.* Zimmerman, 157 Ala. 473, 47 So. 722 [*following* Lewis *v.* Watson, 98 Ala. 479, 13 So. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297]; Weaver *v.* Carnall, 35 Ark. 198, 37 Am. Rep. 22; Jansen *v.* McCahill, 22 Cal. 563, 83 Am. Dec. 84; Crumrine *v.* Crumrine, 14 Ind. App. 641, 43 N. E. 322; Lovejoy *v.* Richardson, 68 Me. 386; Finnegan *v.* Lucy, 157 Mass. 439, 32 N. E. 656; Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193.

Absence of any mark.— A demurrer to a complaint, on the ground that it did not state a cause of action, was dismissed, the court holding that where the complaint alleged that a will was duly signed and further stated that it was signed in the following manner

his
"John Spilman" without any mark, that a
mark

cause of action was stated by the allegation to the effect that the will was duly signed. Cleveland *v.* Spilman, 25 Ind. 95. But see Simmons *v.* Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875.

42. *Alabama.*— McGowan *v.* Collins, 154 Ala. 299, 46 So. 228; Bates *v.* Harte, 124 Ala. 427, 26 So. 898, 82 Am. St. Rep. 186; Bickley *v.* Keenan, 60 Ala. 293; Alabama Warehouse Co. *v.* Lewis, 56 Ala. 514; Bailey *v.* Bailey, 35 Ala. 687.

Illinois.— Handyside *v.* Cameron, 21 Ill. 588, 74 Am. Dec. 119.

Nebraska.— Iowa L. & T. Co. *v.* Greenman, 63 Nebr. 268, 88 N. W. 518.

New Hampshire.— Willoughby *v.* Moulton, 47 N. H. 205.

New York.— Brown *v.* Butchers', etc., Bank, 6 Hill 443, 41 Am. Dec. 755.

North Carolina.— See State *v.* Byrd, 93 N. C. 624.

Oklahoma.— Sivils *v.* Taylor, 12 Okla. 47, 69 Pac. 867.

Wisconsin.— Finlay *v.* Prescott, 104 Wis. 614, 80 N. W. 930, 47 L. R. A. 695.

See 44 Cent. Dig. tit. "Signatures," § 7.

43. Shank *v.* Butsch, 28 Ind. 19; Finlay *v.* Prescott, 104 Wis. 614, 80 N. W. 930, 47 L. R. A. 695.

44. Watson *v.* Billings, 38 Ark. 278, 42 Am. Rep. 1; Sivils *v.* Taylor, 12 Okla. 47, 69 Pac. 867. *Compare* Davis *v.* Semmes, 51 Ark. 48, 9 S. W. 434, where it is held that the attestation of a will is good, although the person writing the name of the witness fails to sign his name to that fact. But see Iowa L. & T. Co. *v.* Greenman, 63 Nebr. 268, 88 N. W. 518, where the opposite view is taken, and it is held that a signature without an attesting witness is valid.

45. Houston *v.* State, 114 Ala. 15, 21 So. 813 (holding that the signature by mark to a chattel mortgage, after the statute requiring chattel mortgages to be in writing had been passed, should be witnessed); Doe *v.* Richardson, 76 Ala. 329.

46. McGowan *v.* Collins, 154 Ala. 299, 46 So. 228; Penton *v.* Williams, 150 Ala. 153, 43 So. 211; Bates *v.* Harte, 124 Ala. 427, 26 So. 898, 82 Am. St. Rep. 186; Bickley *v.* Keenan, 60 Ala. 293; Alabama Warehouse Co. *v.* Lewis, 56 Ala. 514 (holding that a chattel mortgage executed before the statute requiring chattel mortgages to be in writing was passed was sufficiently signed, although signed by a mark without an attesting witness); Flowers *v.* Bitting, 45 Ala. 448; Bailey *v.* Bailey, 35 Ala. 687. See also Wim-

by mark has been acknowleged before an officer competent to take acknowledgments, there is no necessity for an attesting witness to the mark;[47] and this is true in jurisdictions where the statute defines a signature as inclusive of a mark when the name of the person is written near it by a person who writes his name as a witness.[48]

(III) *EFFECT OF FAILURE TO ATTEST.* Statutes requiring attestation have been construed as not having the effect of declaring an instrument that is signed by a mark without a witness to the mark void, but of providing that the mark should not be considered *prima facie* a genuine signature without proof.[49]

4. EVIDENCE. A signature by mark must be proved as any other signature.[50] A signature by mark may be proved by one who witnessed it, although he is not named as a subscribing witness.[51] When the subscribing witnesses to a signature by a mark are dead, proof of their handwriting is sufficient proof of an execution of the instrument;[52] so is this true when the subscribing witness is out of the state;[53] and where the witness is incompetent, repeated acknowledgments by the person signing are admissible to show the execution of the instrument.[54] The signature of a witness attests the execution of a note, although signed by the maker's mark.[55] The attestation of a note by the payee after the death of the alleged maker, signed by mark only, without attesting witnesses, is of no effect to prove execution of the note.[56]

SIGNIFY. To make known by signs, speech, or action; communicate; give notice of; announce; declare.[1]

SIGNING JUDGMENT. At common law, the allowance or permission by the master, prothonotary, or other proper officer, to plaintiff or defendant, to have judgment entered in his favor when the cause had reached such a stage that he was entitled to have a judgment rendered in his favor.[2] (See JUDGMENTS, 23 Cyc. 850.)

SI INGRATUM DIXERIS, OMNIA DIXERIS. A maxim meaning "If you affirm that one is ungrateful, in that you include every charge."[3]

berly *v.* Dallas, 52 Ala. 196; Hinkle *v.* Dodge, 7 Ky. L. Rep. 526; Maupin *v.* Berkley, 3 Ky. L. Rep. 617.

47. Elston *v.* Roop, 133 Ala. 331, 32 So. 129; Com. *v.* Sullivan, 14 Gray (Mass.) 97; State *v.* Depoister, 21 Nev. 107, 25 Pac. 1000.

48. Hailey First Nat. Bank *v.* Glenn, 10 Ida. 224, 77 Pac. 623, 109 Am. St. Rep. 204.

49. *Ex p.* Miller, 49 Ark. 18, 3 S. W. 883, 4 Am. St. Rep. 17 (where a petition was presented to the county court, containing some signatures by mark, not attested by any witness, and the petitioners tendered evidence that these signatures were genuine, and that the persons who wrote the names of the signers by mark were authorized to do so, it was held that, under the statute which defined a signature or subscription, the evidence was competent); Vanover *v.* Murphy, 15 S. W. 61, 12 Ky. L. Rep. 733. See also Kessel *v.* Austin Min. Co., 144 Fed. 859, holding that a signature to a contract by the mark of the party, opposite which were the words, "Signed in the presence of J. E. Cox — O. A. Murdock," was witnessed as prescribed by the statute, and the question whether the mark was made by the party to the instrument or the person who wrote his own name thereto as a witness was simply a matter of evidence.

50. Paisley *v.* Snipes, 2 Brev. (S. C.) 200.

51. Robinson *v.* Robinson, 20 S. C. 567; Gervais *v.* Baird, 2 Brev. (S. C.) 37, holding that such evidence was sufficient without producing the subscribing witness.

52. Chaffe *v.* Cupp, 5 La. Ann. 684; Lyons *v.* Holmes, 11 S. C. 429, 32 Am. Rep. 483. *Compare* Tagiasco *v.* Molinari, 9 La. 512, where it was said that while proof of signatures of witnesses to a signature by mark where the witnesses were dead did not establish the genuineness of the signature by mark, yet if taken together with proof of the good character of the witnesses and proof that they would not attest a forgery, it was held sufficient to establish the genuineness of the signature.

53. Shiver *v.* Johnson, 2 Brev. (S. C.) 397.

54. Lopez *v.* Berghel, 15 La. 42.

55. McDermott *v.* McCormick, 4 Harr. (Del.) 543.

56. Chadwell *v.* Chadwell, 98 Ky. 643, 33 S. W. 1118, 17 Ky. L. Rep. 1207.

1. Century Dict.

As used in a lease providing for the renewal thereof provided the lessees signified their acceptance in writing to the lessor, the term means that the lessees were to make known, manifest, notify, or express in writing their acceptance. Wiener *v.* Graff, 7 Cal. App. 580, 583, 95 Pac. 167.

2. French *v.* Pease, 10 Kan. 51, 55 [*citing* Bouvier L. Dict.].

3. Black L. Dict. [*citing* Trayner Leg. Max.].

SI JUDICAS, COGNOSCE. A maxim meaning "If you judge, understand." [4]

SILD. A Norwegian word said to be synonymous with "herring." [5]

SILENCE. The state of a person who does not speak, or who refrains from speaking.[6] (Silence: As Admission — In General, see EVIDENCE, 16 Cyc. 956; In Criminal Case, see CRIMINAL LAW, 12 Cyc. 956. As Authorization or Adoption of Another's Fraud, see FRAUD, 20 Cyc. 86. As False Representation, see FRAUD, 20 Cyc. 15, 63. As Ruling by Court on Objection of Counsel, see APPEAL AND ERROR, 2 Cyc. 712 note 69. Effect of as Fraudulent Concealment of Cause of Action, see LIMITATIONS OF ACTIONS, 25 Cyc. 1218. Ground of Estoppel — In General, see ESTOPPEL, 16 Cyc. 681, 759; Against Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1347, 1400; Of Owner on Claim For Value of Improvements by Occupant of Premises, see IMPROVEMENTS, 22 Cyc. 25. Instructions of Court to Jury as to, of Defendant, see CRIMINAL LAW, 12 Cyc. 630. Of Principal as Implied Ratification of Act of Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1275. Of Record as to Jurisdiction of Court as Ground For Collateral Impeachment of Judgment, see JUDGMENTS, 23 Cyc. 1085.)

SILENTIUM IN SENATU EST VITIUM. A maxim meaning "Silence in the senate is a fault." [7]

SILENT LEGES INTER ARMA. A maxim meaning "The power of law is suspended during war." [8]

SILENT PARTNER. See PARTNERSHIP, 30 Cyc. 397, 532.

SILHOUETTE. A shadowgraph, a shadow picture which may be made by photographic process or cut out of a piece of black paper with scissors;[9] originally a portrait in black or some other uniform tint, sometimes varied as to the hair or other parts by lighter lines or a lightening of shade, showing the profile as cast by a candle on a sheet of paper, hence any opaque portrait, design, or image in profile; opaque representation or exhibition in profile; the figure made by the shadow or a shadowy outline of an object; shadow;[10] a representation of the outline of an object filled in with a black color; a profile portrait in black, such as a shadow appears to be.[11]

SILICA. A silicic acid in a state of purity.[12]

SILICIOUS MARL. A fine sandy, or earthy material, consisting of clay, silica, in the two forms of sand, and so-called infusorial shields, which are the skeletons of microscopic plants.[13] (See MARLE, 26 Cyc. 819.)

SILICIUM. The name formerly applied to silicon, when it was classed with the metals.[14]

SILICON. A dark, nut-brown, elementary substance, destitute of metallic lustre, and a non-conductor of electricity; the base of silax or silica.[15]

SILK. See CUSTOMS DUTIES, 12 Cyc. 1125.

4. Peloubet Leg. Max. [*citing* Bouvier L. Dict.].

5. Reiss *v.* U. S., 113 Fed. 1001.

6. Black L. Dict.

Where there is no obligation to speak, silence cannot be termed suppression of a fact. Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144, 159, 46 Atl. 347, 50 L. R. A. 401.

"**Mere silence is quite different from concealment.**"— Stewart *v.* Wyoming Cattle Ranch Co., 128 U. S. 383, 388, 9 S. Ct. 101, 32 L. ed. 439.

7. Peloubet Leg. Max. [*citing* Sbrewsbury's Case, 12 Coke 94, 95, 77 Eng. Reprint 1369].

8. Black L. Dict. [*citing* Bacon Leg. Max.].

Applied in Pennywit *v.* Foote, 27 Ohio St. 600, 629, 22 Am. Rep. 340.

9. Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 55, 97 S. W. 961.

10. Century Dict. [*quoted* in Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 55, 97 S. W. 961].

11. Webster Dict. [*quoted* in Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 55, 97 S. W. 961].

12. Webster Dict. [*quoted* in Electro-Silicon Co. *v.* Hazard, 29 Hun (N. Y.) 369, 373].

13. Bridgeport Wood Finishing Co. *v.* Hooper, 5 Fed. 63, 69, 18 Blatchf. 459, where it is said that the term is considerably indefinite, and a large variety of different materials may be classed under the name.

14. Worcester Dict. [*quoted* in Electric Smelting, etc., Co. *v.* Carborundum Co., 102 Fed. 618, 620, 42 C. C. A. 537].

"**The name silicium was given by those who supposed it to be a metal like sodium.**" Electric Smelting, etc., Co. *v.* Carborundum Co., 102 Fed. 618, 620, 42 C. C. A. 537.

15. Webster Dict. [*quoted* in Electro-Silicon Co. *v* Hazard, 29 Hun (N. Y.) 369, 373.

SILT. Mud, or fine earth, deposited from running or standing water.[16]

SILVA CÆDUA. Coppice; every manner of wood which can be cut down and will grow again;[17] a term including wood of every description which, after the tree has been cut, grows from the stool or root.[18]

SILVER-BEARING ORE. A portion of vein matter which has been extracted from a lode and assorted, separated from the mass of waste rock and earth, and thrown aside for milling or smelting purposes, or taken away from the ledge.[19]

SI MELIORES SUNT QUOS DUCIT AMOR, PLURES SUNT QUOS CORRIGIT TIMOR. A maxim meaning "If those are better who are led by love, those are the greater number who are corrected by fear."[20]

SIMILAR. Exactly corresponding, resembling in all respects; precisely like; nearly corresponding; resembling in many respects; somewhat like; having a general likeness; homogeneous; uniform.[21] (Similar: Acts, Evidence of, see EVIDENCE, 17 Cyc. 279. Occurrence, Evidence of, see EVIDENCE, 17 Cyc. 283.)

SIMILARITY. Resemblance between different things.[22]

SIMILITER. A term used in pleading which expresses the concurrence of the party to whom issue is tendered, with his adversary, in referring the trial to the jury.[23]

SIMILITUDE. Likeness in constitution, qualities, or appearance; similarity; resemblance.[24] (Similitude: Allegation of in Indictment or Information, see COUNTERFEITING, 11 Cyc. 315. Customs Duties on Articles Similar to Enumerated Articles, see CUSTOMS DUTIES, 12 Cyc. 1128. Of Counterfeit to Obligation or Security Counterfeited, see COUNTERFEITING, 11 Cyc. 305.)

SIMILITUDO LEGALIS EST CASUUM DIVERSORUM INTER SE COLLATORUM SIMILIS RATIO; QUOD IN UNO SIMILIUM VALET, VALEBIT IN ALTERO, DISSIMILIUM, DISSIMILIS EST RATIO. A maxim meaning "Legal similarity is a similar reason which governs various cases when compared with each other; or what avails in one similar case will avail in the other. Of things dissimilar, the reason is dissimilar."[25]

16. Webster Int. Dict. [*quoted* in State *v.* New Orleans Water Works Co., 107 La. 1, 15, 31 So. 395].

17. Dashwood *v.* Magniac, [1891] 3 Ch. 306, 382, 60 L. J. Ch. 809, 65 L. T. Rep. N. S. 811.

18. Dashwood *v.* Magniac, [1891] 3 Ch. 306, 384, 60 L. J. Ch. 809, 65 L. T. Rep. N. S. 811.

Means the same thing as "seasonable wood." Dashwood *v.* Magniac, [1891] 3 Ch. 306, 382, 60 L. J. Ch. 809, 65 L. T. Rep. N. S. 811.

19. State *v.* Berryman, 8 Nev. 262, 270, where it is said that such is the meaning of the term as used in an indictment for grand larceny of silver-bearing ore.

20. Black L. Dict. [*citing* Coke Litt. 392].

21. Webster Dict. [*quoted* in Frankel *v.* German Tyrolean Alps Co., 121 Mo. App. 51, 56, 97 S. W. 961].

"Accurately speaking, 'similar' does not mean the same; in fact, it would mean that while it resembled, it was not the same." Mitchell *v.* McCullough, 12 Ohio Cir. Ct. 763, 764, 4 Ohio Cir. Dec. 471.

"The word is often used to denote a partial resemblance only. But it is also often used to denote sameness in all essential particulars." Com. *v.* Fontain, 127 Mass. 452, 454.

Does not mean identical in form and substance; but having characteristics in common. State *v.* Weston, 29 Mont. 125, 132, 74 Pac. 415. See also Standard Fireproofing Co. *v.* St. Louis, etc., Fireproofing Co., 177 Mo. 559, 575, 76 S. W. 1008.

"Similar description," construction of phrase in tariff act see CUSTOMS DUTIES, 12 Cyc. 1115 note 41.

Used in connection with other words.—"Similar cases" see Smith *v.* Newark, 33 N. J. Eq. 545, 551. "Similar jurisdiction" see Chahoon *v.* Com., 21 Gratt. (Va.) 822, 826. "Similar officers" see Weld *v.* May, 9 Cush. (Mass.) 181, 191. "Similar purposes" see Oteiza *v.* Cortes, 136 U. S. 330, 337, 10 S. Ct. 1031, 34 L. ed. 464; *In re* McPhun, 30 Fed. 57, 59. "Similar services" see U. S. *v.* Morton, 65 Fed. 204, 208, 13 C. C. A. 151.

22. Rhode Island Hospital Trust Co. *v.* Olney, 16 R. I. 184, 185, 13 Atl. 118, where it is said it is not identity, for a thing, strictly speaking, cannot be similar to itself.

"Includes only the idea of casual likeness." Crabbe Synonyms [*quoted* in Mitchell *v.* McCullough, 12 Ohio Cir. Ct. 763, 764, 4 Ohio Cir. Dec. 471].

23. Solomons *v.* Chesley, 57 N. H. 163, 164, where it is said: "It is, however, in strictness, no part of the pleadings, since it neither affirms nor denies any fact in maintenance of the action or the defence."

24. Century Dict.

It is derived from the Latin similitudo, which is translated "similitude, likeness, resemblance." State *v.* McKenzie, 42 Me. 392, 394.

Synonymous with the words "forged" or "counterfeit" see State *v.* McKenzie, 42 Me. 392, 394.

25. Black L. Dict. [*citing* Coke Litt. 191].

SIMONIA EST VOLUNTAS SIVE DESIDERIUM EMENDI VEL VENDENDI SPIRITUALIA VEL SPIRITUALIBUS ADHÆRENTIA. A maxim meaning "Simony is the will or desire or buying or selling spiritualities, or things pertaining thereto." [26]

SIMONY. In English law the crime of buying or selling ecclesiastical preferment or the corrupt presentation of anyone to an ecclesiastical benefice for money or reward.[27]

SIMPLE. Pure; unmixed; not compounded; not aggravated; not evidenced by sealed writing or record.[28]

SIMPLEX COMMENDATIO NON OBLIGAT. A maxim meaning "Mere commendation does not bind." [29]

SIMPLEX ET PURA DONATIO DICI POTERIT, UBI NULLA EST ADJECTA CONDITIO NEC MODUS. A maxim meaning "A gift is said to be pure and simple when no condition or qualification is annexed." [30]

SIMPLICITAS EST LEGIBUS AMICA, ET NIMIA SUBTILITAS IN JURE REPROBATUR. A maxim meaning "Simplicity is a favorite of the laws, and too great subtlety in law is reprobated." [31]

SIMULATED. Assuming the mere appearance without the reality;[32] counterfeited; feigned; pretended.[33]

26. Peloubet Leg. Max.

27. State *v.* Buswell, 40 Nebr. 158, 167, 58 N. W. 728, 24 L. R. A. 68. See also Fletcher *v.* Sondes, 3 Bing. 501, 582, 11 E. C. L. 247, 1 Bligh N. S. 144, 4 Eng. Reprint 826.

An offense by the canon law, of which the common law does not take notice to punish it. Satterlee *v.* Williams, 20 App. Cas. (D. C.) 393, 412.

28. Black L. Dict.

"Simple accident" see Fidelity, etc., Co. *v.* Cutts, 95 Me. 162, 164, 49 Atl. 673.

Simple assault see ASSAULT AND BATTERY, 3 Cyc. 1020.

Simple blockade see BLOCKADE, 5 Cyc. 717 note 4.

"Simple bond" is, at common law, an obligation whereby the obligee bound himself, his heirs, executors and administrators to pay a certain sum of money to a named obligee, on demand or on a day certain. Burnside *v.* Wand, 170 Mo. 531, 566, 71 S. W. 337, 62 L. R. A. 427 [*citing* 2 Blackstone Comm. 340].

Simple "confession" is a plea of guilt (State *v.* Willis, 71 Conn. 293, 309, 41 Atl. 820), where defendant upon hearing of his indictment without any other respect confesseth it (Hale P. C. [*quoted* in Bram *v.* U. S., 168 U. S. 532, 545, 18 S. Ct. 183, 42 L. ed. 568).

"Simple contract" is a contract whose validity does not depend upon its form, but upon the presence of a consideration (Corcoran *v.* New York, etc., R. Co., 20 Misc. (N. Y.) 197, 200, 45 N. Y. Suppl. 861); an agreement between two parties, a drawing together of two minds to a common intent, and must be voluntary as well as mutual Cashion *v.* Western Union Tel. Co., 124 N. C. 459, 466, 32 S. E. 746, 45 L. R. A. 160); a bargain or agreement voluntarily made upon good consideration, between two or more persons capable of contracting, to do, or to forbear to do, some lawful act (Comyn Contr. [*quoted* in Justice *r.* Lang, 42 N. Y. 493, 497, 1 Am. Rep. 576]. At common law the term included written as well as oral agreements, and is distinguished from special contract simply by the fact that it is not under seal. Webster *v.* Fleming, 178 Ill. 140, 151, 52 N. E. 975. See also Perrine *v.* Cheeseman, 11 N. J. L. 174, 177, 19 Am. Dec. 388. As defined in the Georgia code the term embraces all other contracts than contracts of record and specialties. Western Union Tel. Co. *v.* Taylor, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189.

"Simple contract creditor" is a creditor who has not reduced his demand to a judgment at law, or who has not acquired or does not possess a lien for the enforcement of such demand; one who has not established his debt by a judgment rendered, or has not an acknowledged debt with an interest in the property of the debtor, or a lien thereon created by contract, or by some distinct legal proceeding, or by law. U. S. *v.* Ingate, 48 Fed. 251, 254. See CREDITOR AT LARGE, 11 Cyc. 1196.

Simple interest see INTEREST, 22 Cyc. 1470.

Simple larceny see LARCENY, 25 Cyc. 12.

"Simple license" is an authority, without reward or consideration, to do a particular act, or series of acts upon another's land, without passing any interest or estate in the soil. Wynn *v.* Garland, 19 Ark. 23, 32, 68 Am. Dec. 190. See EASEMENTS, 14 Cyc. 1144.

Simple trust see TRUSTS.

29. Burrill L. Dict. [*citing* 2 Kent Comm. 485].

Applied in: Duggan *r.* Cureton, 1 Ark. 31, 41, 31 Am. Dec. 727; Taymon *v.* Mitchell, 1 Md. Ch. 496, 499; Anderson *r.* McPike, 86 Mo. 293, 300; Lander *r.* Sheehan, 32 Mont. 25, 31, 79 Pac. 406; Quintard *v.* Newton, 5 Rob. (N. Y.) 72, 85; Adams *v.* Soule, 33 Vt. 538, 544; Shoemaker *v.* Cake, 83 Va. 1, 8, 1 S. E. 387; McRae *v.* Froom, 17 Grant Ch. (U. C.) 357, 358.

30. Bouvier L. Dict. [*citing* Bracton].

31. Burrill L. Dict. [*citing* Vernon's Case, 4 Coke 1*a*, 5*b*, 76 Eng. Reprint 845].

32. Webster Dict. [*quoted* in Cartwright *v.* Bamberger, 90 Ala. 405, 410, 8 So. 264].

33. Worcester Dict. [*quoted* in Cartwright *r.* Bamberger, 90 Ala. 405, 410, 8 So. 264].

SIMULATION. In the civil law, misrepresentation or concealment of the truth; as where parties pretend to perform a transaction different from that in which they really are engaged.[34] In French law, collusion; a fraudulent arrangement between two or more persons to give a false or deceptive appearance to a transaction in which they engage.[35] (Simulation: Conveyance or Transaction in Fraud — Of Creditors, see FRAUDULENT CONVEYANCES, 20 Cyc. 323; Of Heirs, see DESCENT AND DISTRIBUTION, 14 Cyc. 90.)

SIMULTANEOUS. A term meaning that two or more occurrences or happenings are identical in time.[36] (Simultaneous: Actions, Abatement of, see ABATEMENT AND REVIVAL, 1 Cyc. 44. Attachments — In General, see ATTACHMENTS, 4 Cyc. 553; Priorities, see ATTACHMENTS, 4 Cyc. 642 note 98. Conveyances, as Creating Easement by Implication, see EASEMENTS, 14 Cyc. 1167. Executions, see EXECUTIONS, 17 Cyc. 933. Suits in Equity and at Law, Compelling Election Between, see EQUITY, 16 Cyc. 34 note 31. Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1431. Terms of Court, see COURTS, 11 Cyc. 735.)

SIMULTANEOUSLY. At the same time.[37]

SINCE. In the time passed, counting backward from the present; before this or now; from any time forward to the present; [38] after; from the time that; [39] from the time of.[40]

SINE ANIMO REVERTENDI. Literally "Without the intention of returning." [41]

SINECURE. An office which has revenue without employment.[42]

SINE DIE. Literally "Without day." A final adjournment.[43]

SINE POSSESSIONE USUCAPIO PROCEDERE NON POTEST. A maxim meaning "There can be no prescription without possession." [44]

SINE QUA NON. Literally "Without which not." That without which the thing cannot be; an indispensable requisite or condition.[45]

SINGER. "A term which, *eo nomine*, has come to be suggestive not merely of the manufacturer, but of sewing machines of a certain mechanism, character

34. Black L. Dict. [*citing* Mackeldey Rom. L. 181].

35. Black L. Dict. See also Hoffmann *v.* Ackermann, 110 La. 1070, 1073, 35 So. 293.

36. Brush Electric Co. *v.* Western Electric Co., 69 Fed. 240, 244, where it is said to be a word of comparison.

37. United Shirt, etc., Co. *v.* Beattie, 149 Fed. 736, 742, 79 C. C. A. 442.

Under the rule of law that in order for the joinder of a number of persons as plaintiffs, the wrongful act for which they sue must be of such a character as to necessarily fall upon all the plaintiffs "simultaneously," the term means not at the very same instant, but at substantially the same time. Cloyes *v.* Middlebury Electric Co., 80 Vt. 109, 119, 66 Atl. 1039, 11 L. R. A. N. S. 693.

38. Webster Dict. [*quoted* in Smith *v.* State Auditors, 85 Mich. 407, 409, 48 N. W. 627, where it is said the term necessarily refers to the past, and never extends into the future].

39. Webster Dict. [*quoted* in *In re* Cretiew, 6 Fed. Cas. No. 3,390, 5 Nat. Bankr. Reg. 423].

40. Worcester Dict. [*quoted* in *In re* Rosenfeld, 20 Fed. Cas. No. 12,057, 2 Nat. Bankr. Reg. 116].

It is similar in meaning to "subsequently" but not identical. *In re* Rosenfeld, 20 Fed. Cas. No. 12,058, 2 Nat. Bankr. Reg. 116. *Contra*, *In re* Cretiew, 6 Fed. Cas. No. 3,390, 5 Nat. Bankr. Reg. 423.

"The proper signification of 'since' is, after, and its appropriate sense includes the whole period between an event and the present time." Webster Dict. [*quoted* in *In re* Rosenfeld, 20 Fed. Cas. No. 12,057, 2 Nat. Bankr. Reg. 116]. See also *In re* Cretiew, 6 Fed. Cas. No. 3,390, 5 Nat. Bankr. Reg. 423.

But it has been held that the term as used in a statute providing that a merchant or trader who has failed to keep a cash book or other proper books of account since a certain date shall not be entitled to a discharge in bankruptcy, the term means any time after the passage of the act, though the neglect may not cover the whole period. Jones *v.* First Nat. Bank, 79 Me. 191, 195, 9 Atl. 22.

"Since October 5th" would not ordinarily include that day. Monroe *v.* Acworth, 41 N. H. 199, 201.

"Since the first day of last year" see Matter of Duffy, 125 N. Y. App. Div. 406, 408, 109 N. Y. Suppl. 979.

41. Black L. Dict. See also The Myrtle Tunnel, 146 Fed. 324, 327.

42. Johnson Dict. [*quoted* in Faulkner *v.* Upper Boddington, 3 C. B. N. S. 412, 417, 4 Jur. N. S. 692, 27 L. J. C. P. 20, 6 Wkly. Rep. 101, 91 E. C. L. 412].

43. Grattan L. Gloss.

44. Black L. Dict.

45. Black L. Dict. See also Brazell *v.* Cohn, 32 Mont. 556, 563, 81 Pac. 339; Adams *v.* Washington Brick, etc., Co., 38 Wash. 243, 248, 80 Pac. 446; Chauncey *v.* Dyke, 119 Fed. 1, 23, 55 C. C. A. 579, 9 Am. Bankr. Rep. 444.

or quality, distinct in construction and mode of operation from the 'Home,' 'Grover & Baker,' 'Wheeler & Wilson,' or other machines known to the public;" [46] a machine manufactured by the Singer Company.[47]

SINGLE. Alone; by one's self or by itself; separate or apart from others; unaccompanied or unaided; detached; individual; particular;[48] unmarried, or not having been married.[49]

SINGLINGS. See DISTILLATION, 14 Cyc. 521 note 99.

SINGULAR. Each; individual.[50] (See PLURAL, 31 Cyc. 891.)

SINGULI IN SOLIDUM TENENTUR. A maxim meaning "Each is bound for the whole." [51]

SINKING-FUND. A fund created for extinguishing or paying a funded debt;[52] the aggregate of sums of money, as those arising from particular taxes or sources of revenue, set apart and invested, usually at fixed intervals, for the extinguishment of the debt of a government or corporation, by the accumulation of interest;[53] a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal.[54] (Sinking-Fund: For Corporate Indebtedness, see CORPORATIONS, 10 Cyc. 1178. For County Indebtedness, see COUNTIES, 11 Cyc. 508. For Municipal Indebtedness, see MUNICIPAL CORPORATIONS, 28 Cyc. 1640. For Railroad Indebtedness, see RAILROADS, 33 Cyc. 549. For State Indebtedness, see STATES. For United States Indebtedness, see UNITED STATES. To Provide For Depreciations in Trust Securities, see TRUSTS.)

SINKING-FUND TAX. A tax raised to be applied to the payment of the principal and interest of a public loan.[55]

SI NON APPAREAT QUID ACTUM EST, ERIT CONSEQUENS UT ID SEQUAMUR QUOD IN REGIONE IN QUA ACTUM EST FREQUENTATUR. A maxim meaning

46. Brill *v.* Singer Mfg. Co., 41 Ohio St. 127, 134, 52 Am. Rep. 74.

47. Singer Mfg. Co. *v.* Wilson, 2 Ch. D. 434, 459, 45 L. J. Ch. 490, 34 L. T. Rep. N. S. 858, 24 Wkly. Rep. 1023.

48. Century Dict.

Single bill see BILL OBLIGATORY, 5 Cyc. 706.

Single larceny see LARCENY, 25 Cyc. 12.

Used in connection with other words.— "Single article" see Kibble *v.* Butler, 14 Sm. & M. (Miss.) 207, 209. "Single cross X mark" see Thacher *v.* Lent, 71 N. Y. App. Div. 483, 485, 75 N. Y. Suppl. 732. "Single dwelling-house" see Gillis *v.* Bailey, 21 N. H. 149, 157. "Single lot" see Pepper *v.* O'Dowd, 39 Wis. 538, 547. "Single package" see Read *v.* Spalding, 5 Bosw. (N. Y.) 395, 401. "Single private drain" see Thompson *v.* Eccles, [1905] 1 K. B. 110, 119, 69 J. P. 45, 74 L. J. K. B. 130, 3 Loc. Gov. R. 20, 91 L. T. Rep. N. S. 750, 21 T. L. R. 49, 53 Wkly. Rep. 211; Seal *v.* Merthyr-Tydfil Urban Dist. Council, [1897] 2 Q. B. 543, 545, 61 J. P. 551, 67 L. J. Q. B. 37, 77 L. T. Rep. N. S. 304, 13 T. L. R. 509. "Single ship" see U. S. *v.* Steever, 113 U. S. 747, 752, 5 S. Ct. 765, 28 L. ed. 1133. "Single tenement" see Finney *v.* Somerville, 80 Pa. St. 59, 65.

49. Davison's Appeal, 1 Mona. (Pa.) 185, 188.

"Single and unmarried" do not mean never married. Reg. *v.* Wymondham, 2 Q. B. 541, 545, 42 E. C. L. 798.

"Single man" see State *v.* St. Paul, etc., R. Co., 98 Minn. 380, 397, 108 N. W. 261; Hill *v.* Moore, 85 Tex. 335, 341, 19 S. W. 162; Silver *v.* Ladd, 7 Wall. (U. S.) 219, 226, 19 L. ed. 138.

"Single person" see *In re* Lentz, 97 Fed. 486, 488.

"Single" woman see Jones *v.* Davies, [1901] 1 K. B. 118, 64 J. P. 39, 70 L. J. Q. B. 38, 83 L. T. Rep. N. S. 412, 49 Wkly. Rep. 136; Reg. *v.* Pilkington, 2 E. & B. 546, 554, 17 Jur. 554, 1 Wkly. Rep. 410, 75 E. C. L. 546. When applied to a woman, the term, in its strict literal sense, means without a husband; but in its ordinary sense, and as used in common parlance, it denotes a class; those who have never married, as distinguished from married women and widows. Lashley *v.* Lashley, 48 N. C. 414, 415.

50. Webster New Int. Dict.

"'A word importing the singular number only, may extend and be applied to several "persons" or things as well as to one "person" or thing,' and *vice versa*." Com. *v.* Gabbert, 5 Bush (Ky.) 438, 446.

51. Peloubet Leg. Max.

Applied in Kirby *v.* Taylor, 6 Johns. Ch. (N. Y.) 242, 252.

52. Chicago, etc., R. Co. *v.* Pyne, 30 Fed. 86, 89.

53. Black L. Dict. [*quoted* in Elser *v.* Ft. Worth, (Tex. Civ. App. 1894) 27 S. W. 739, 740].

54. Bouvier L. Dict. [*quoted* in Union Pac. R. Co. *v.* Buffalo County, 9 Nebr. 449, 453, 4 N. W. 53; Brooke *v.* Philadelphia, 162 Pa. St. 123, 128, 29 Atl. 387, 24 L. R. A. 781].

The object of every sinking fund is to diminish the debt whose existence warranted its foundation. New York Sav. Bank *v.* Grace, 102 N. Y. 313, 325, 7 N. E. 162.

55. Union Pac. R. Co. *v.* Dawson County, 12 Nebr. 254, 256, 11 N. W. 307.

"If it does not appear what was agreed upon, the consequence will be that we must follow that which is the usage of the place where the agreement was made." [56]

SI NULLA SIT CONJECTURA QUÆ DUCAT ALIO, VERBA INTELLIGENDA SUNT EX PROPRIETATE, NON GRAMMATICA SED POPULARI EX USU. A maxim meaning "If there be no conjecture which leads to a different result, [if there be no reasonable ground for a different interpretation,] words are to be understood according to their proper meaning, not in a grammatical but in the popular and ordinary sense." [57]

SIPING or SEEPING. To ooze or distil very gently as liquids do through a cask which is not quite tight.[58]

SI PLURES CONDITIONES ASCRIPTÆ FUERUNT DONATIONI CONJUNCTIM, OMNIBUS EST PARENDUM, ET AD VERITATEM COPULATIVE REQUIRITUR QUOD UTRAQUE PARS SIT VERA SI DIVISIM; CUILIBET VEL ALTERI EORUM SATIS EST OBTEMPERARE; ET IN DISJUNCTIVIS SUFFICIT ALTERAM PARTEM ESSE VERAM. A maxim meaning "When conditions are written conjunctively in a gift, the whole are to be complied with, and it is necessary that every part be true taken jointly; if the conditions are separate, it is sufficient to comply with either one of them; or if disjunctive, that one or the other of them be true." [59]

SI PLURES SUNT FIDEJUSSORES, QUODQUIT ERUNT NUMERO, SINGULI IN SOLIDUM TENENTUR. A maxim meaning "If there are more sureties than one, however many they may be, they shall each be held for the whole." [60]

SI QUIDEM IN NOMINE, COGNOMINE, PRÆNOMINE LEGATARII TESTATOR ERRAVERIT, CUM DE PERSONA CONSTAT, NIHILOMINUS VALET LEGATUM. A maxim meaning "Although a testator may have mistaken the *nomen*, *cognomen*, or *prænomen* of a legatee, yet, if it be certain who is the person meant, the legacy is valid." [61]

SI QUID UNIVERSITATI DEBETUR SINGULIS NON DEBETUR, NEC QUOD DEBET, UNIVERSITAS SINGULI DEBENT. A maxim meaning "If anything is due to a corporation, it is not due to the individual members of it, nor do the members individually owe what the corporation owes." [62]

SI QUIS CUSTOS FRAUDEM PUPILLO FECERIT, A TUTELA REMOVENDUS EST. A maxim meaning "If a guardian behave fraudulently to his ward, he shall be removed from the guardianship." [63]

SI QUIS PRÆGNANTEM UXOREM RELIQUIT, NON VIDETUR SINE LIBERIS DECESSISSE. A maxim meaning "If a man leave his wife pregnant, he shall not be considered to have died without children." [64]

SI QUIS QUID DE REPUBLICA, SINISTRIS, RUMORE, AUT FAMA ACCIPERIT, NEVE CUM ALIO COMMUNICET. A maxim meaning "If a person hear any thing affecting the republic, by omens, rumors, or report, let him lay it before the magistrate, and not convey it to another person." [65]

SI QUIS UNUM PERCUSSERIT, CUM ALIUM PERCUTERE VELLET, IN FELONIA TENETUR. A maxim meaning "If a man kill one, meaning to kill another, he is held guilty of felony." [66]

SISTER. A term used to designate a woman who has the same father and mother with another, or one of them only; [67] one born of the same parents; cor-

56. Bouvier L. Dict. [*citing* Dig. 50, 17, 34].

57. Burrill L. Dict. [*citing* 2 Kent Comm. 555].

58. Jameson Dict. [*quoted* in McNab *v.* Robertson, [1897] A. C. 129, 138, 61 J. P. 468, 66 L. J. P. C. 27, 75 L. T. Rep. N. S. 666].

59. Morgan Leg. Max. appendix [*citing* Coke Litt. 225].

60. Peloubet Leg. Max. [*citing* Inst. 3, 21, 4].

61. Black L. Dict. [*citing* Inst. 2, 20, 29; Broom Leg. Max.].

62. Peloubet Leg. Max. [*citing* Dig. 3, 4, 7].

Applied in *In re* Higginson, [1899] 1 Q. B. 325, 330, 68 L. J. Q. B. 198, 75 L. T. Rep. N. S. 673, 5 Manson 289, 15 T. L. R. 135, 47 Wkly. Rep. 285].

63. Bouvier L. Dict. [*citing* Jenkins Cent. 39].

64. Peloubet Leg. Max. [*citing* Bouvier L. Dict.].

65. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

66. Black L. Dict. [*citing* 3 Inst. 51].

67. Bouvier L. Dict. [*quoted* in Wood *v.*

relative to brother;[68] female by the same parents;[69] a female who has the same parents with another person, or who has one of them only;[70] a female whose parents are the same as those of another person;[71] a female born of the same parents.[72] (Sister: As Heir, see DESCENT AND DISTRIBUTION, 14 Cyc. 43. See also BROTHER, 5 Cyc. 1118.)

SISTER-HOOK. A pair of hooks so mounted that they face and overlap each other; matched hooks.[73]

SI SUGGESTIO NON SIT VERA, LITERÆ PATENTES VACUÆ SUNT. A maxim meaning "If the suggestion of a patent is false, the patent itself is void."[74]

SIT. To hold court;[75] to hold a session, as of a court.[76]

SITE. A seat or ground plot.[77] (Site: Of School Building, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 925.)

SIT FINIS LITIUM, INTEREST REIPUBLICAE. See INTEREST REIPUBLICAE UT SIT FINIS LITIUM, 22 Cyc. 1586.

SITIO GANADO MAYOR. A square, four sides of which measure five thousand varas.[78]

SITTING. See COURTS, 11 Cyc. 726 note 2.

SITUATION. The state of being placed; posture.[79]

SITUS. SITE, *q. v.*; POSITION, *q. v.*; LOCATION, *q. v.*; the place where a thing is, considered, for example, with reference to jurisdiction over it.[80] (Situs: Of Assets of Decedent's Estate, Ground For Jurisdiction of Administration, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 69. Of Property — As Affecting Judgment Lien, see JUDGMENTS, 23 Cyc. 1366; As Affecting Taxation, see TAXATION; As Determining Jurisdiction of Court, see COURTS, 11 Cyc. 669; GARNISH-

Mitcham, 92 N. Y. 375, 379; Wood *v.* Mitchell, 61 How. Pr. (N. Y.) 48, 52, where it is said: "In the first case she is called sister, simply; in the second, half sister"]. See also *In re* Oliver, 8 Brit. Col. 91, 94.

68. Johnson Dict. [*quoted* in Lawson *v.* Perdriaux, 1 McCord (S. C.) 456, 458; Grieves *v.* Rawley, 10 Hare 63, 64, 22 L. J. Ch. 625, 44 Eng. Ch. 61, 68 Eng. Reprint 840].

69. Richardson Dict. [*quoted* in Bridgman *v.* London L. Assur. Co., 44 U. C. Q. B. 536, 540].

70. Webster Dict. [*quoted* in Anderson *v.* Bell, 140 Ind. 375, 379, 39 N. E. 735, 29 L. R. A. 541].

71. Webster Dict. [*quoted* in Wood *v.* Mitcham, 92 N. Y. 375, 379].

72. Worcester Dict. [*quoted* in Wood *v.* Mitcham, 92 N. Y. 375, 379].

73. Standard Dict. [*quoted* in Louden Mach. Co. *v.* Janesville Hay Tool Co., 141 Fed. 975, 985 (*affirmed* in 148 Fed. 686, 693, 78 C. C. A. 548)].

74. Bouvier L. Dict.

75. Anderson L. Dict. [*quoted* in Allen *v.* State, 102 Ga. 619, 623, 29 S. E. 470].

76. Black L. Dict. [*quoted* in Allen *v.* State, 102 Ga. 619, 623, 29 S. E. 470].

In this sense the term is synonymous with "preside." Allen *v.* State, 102 Ga. 619, 623, 29 S. E. 470.

The constitutional provision declaring that no judge shall sit in any case wherein he has been of counsel means "try the case," and does not disqualify a judge who has been of counsel for accused from receiving an indictment from the grand jury and making orders preliminary to the trial. Cock *v.* State, 8 Tex. App. 659, 666.

As used in a statute providing that a judge shall not sit in a case where the accused is connected with him within the third degree, the term means make any orders in or try the case. Reed *v.* State, 11 Tex. App. 587, 606.

77. Webster Dict. [*quoted* in Miller *v.* Alliance Ins. Co., 7 Fed. 649, 651, 19 Blatchf. 308].

The term does not of itself necessarily mean a place or tract of land fixed by definite boundaries. Petersburg School Dist. *v.* Peterson, 14 N. D. 344, 348, 103 N. W. 765.

As used in a statute empowering a board of public works to purchase the sites for a city hall, schoolhouses, etc., the term means only so much land as is reasonably required or needed for the location and convenient use of some particular necessary building. State *v.* Jersey City, 36 N. J. L. 166, 168.

78. U. S. *v.* Cameron, 3 Ariz. 100, 105, 21 Pac. 177.

It is a technical Spanish and Mexican legal term, as well established, defined, and known as a section or township in the surveys of the United States. U. S. *v.* Cameron, 3 Ariz. 100, 105, 21 Pac. 177.

79. Webster Dict. [*quoted* in Jones *v.* Tuck, 48 N. C. 202, 205].

A synonym of "position" see Jones *v.* Tuck, 48 N. C. 202, 205.

As used in an instruction that ordinary care means that degree of care which may reasonably be expected of a person in the "situation" of the person injured at the time of the accident the term is not understood as denoting the physical and mental condition of the person injured, but as referring to his probable surroundings at the time of the accident. Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219, 234, 39 Am. Rep. 503.

80. Black L. Dict.

MENT, 20 Cyc. 1036; As Determining What Law Governs Contracts in Respect Thereto, see CONTRACTS, 9 Cyc. 690.)

SIVE TOTA RES EVINCATUR, SIVE PARS, HABET REGRESSUM EMPTOR IN VENDITOREM. A maxim meaning "Where the property sold has been evicted in whole or in part, the purchaser has recourse against the seller." [81]

SKELETON BILL. See APPEAL AND ERROR, 3 Cyc. 27.

SKID. A small contrivance used for handling heavy articles under many conditions.[82]

SKILL. The familiar knowledge of any art or science, united with readiness and dexterity in execution or performance, or in the application of the art or science to practical purposes.[83] (Skill: Evidence of, Relevancy, see EVIDENCE, 17 Cyc. 286. Involved in Patentable Invention, Nature and Degree of, see PATENTS, 30 Cyc. 849. Required — Of Abstractor of Title, see ABSTRACTS OF TITLE, 1 Cyc. 214; Of Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1456, 1459; Of Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 956; Of Broker, see FACTORS AND BROKERS, 19 Cyc. 204; Of Factor, see FACTORS AND BROKERS, 19 Cyc. 118; Of Physician or Surgeon, see PHYSICIANS AND SURGEONS, 30 Cyc. 1570; Of Pilot, see PILOTS, 30 Cyc. 1622; Of Servant, see MASTER AND SERVANT, 26 Cyc. 1019. Skilled Witness, see EVIDENCE, 17 Cyc. 36.)

SKIMMED MILK. Milk from which its natural cream has been taken in part or in whole; [84] the milk from which cream is separated; [85] milk from which the cream has been taken; [86] milk from which the cream has been removed.[87] (See MILK, 27 Cyc. 508.)

SKIN FIRE. A term which has been applied to a fire that runs around a room very rapidly and destroys light material.[88]

SKINS. A term used in the fur trade to designate those skins which are valuable chiefly for the skin.[89] (See CUSTOMS DUTIES, 12 Cyc. 1126; FUR, 20 Cyc. 862; HIDE, 21 Cyc. 435.)

SKIP. A wooden box in which concrete mixed is transported to the place of deposit.[90]

SLANDER. See LIBEL AND SLANDER, 25 Cyc. 225.

SLANDER OF TITLE. See LIBEL AND SLANDER, 25 Cyc. 225.

SLANG. Colloquial words and phrases which have originated in the cant or rude speech of the vagabond or unlettered classes, or, belonging in form to standard

81. Morgan Leg. Max. [*citing* Broom Leg. Max.].

82. Beckman *v.* Anheuser-Busch Brewing Assoc., 98 Mo. App. 555, 560, 72 S. W. 710, where it is said: "It is probably used more often in connection with the loading and unloading of wagons and freight cars than for any other purpose."

83. Webster Dict. [*quoted* in Akridge *v.* Noble, 114 Ga. 949, 958, 41 S. E. 78; Dole *v.* Johnson, 50 N. H. 452, 454].

In its broadest signification, the term includes every subject susceptible of special or peculiar knowledge derived from experience and is not limited to mechanical or professional knowledge. Schwantes *v.* State, 127 Wis. 160, 186, 106 N. W. 237.

The term does not necessarily include diligence or care. Graham *v.* Gautier, 21 Tex. 111, 119.

Due skill which a surgeon must use in the exercise of his profession includes not only the knowledge or information which the surgeon has in reference to the propriety or desirability of a given operation, but also the ability to perform the operation in a proper and approved way. Akridge *v.* Noble, 114 Ga. 949, 958, 41 S. E. 78.

"Skilled workmen" see Haworth *v.* Seever Mfg. Co., 87 Iowa 765, 772, 51 N. W. 68, 62 N. W. 325.

84. Com. *v.* Hufnal, 185 Pa. St. 376, 380, 39 Atl. 1052.

85. Century Dict. [*quoted* in Com. *v.* Hufnal, 185 Pa. St. 376, 380, 39 Atl. 1052].

86. Webster Dict. [*quoted* in Com. *v.* Hufnal, 185 Pa. St. 376, 380, 39 Atl. 1052].

87. Standard Dict. [*quoted* in Com. *v.* Hufnal, 185 Pa. St. 376, 380, 39 Atl. 1052].

Skimmed milk is not adulterated milk.— Com. *v.* Hufnal, 185 Pa. St. 376, 39 Atl. 1052.

88. Pulver *v.* Rochester German Ins. Co., 35 Ill. App. 24, 25.

89. Astor *v.* Union Ins. Co., 7 Cow. (N. Y.) 202, 214; Seeberger *v.* Schlesinger, 152 U. S. 581, 585, 14 S. Ct. 729, 38 L. ed. 560, where the term is held to mean skins with the hair removed.

"Skins dressed and finished" see Seeberger *v.* Schlesinger, 152 U. S. 581, 585, 14 S. Ct. 729, 38 L. ed. 560.

"Skins for morocco" see Helmrath *v.* U. S., 125 Fed. 634, 635.

90. U. S. *v.* Venable Constr. Co., 124 Fed. 267, 271.

speech, have acquired or have had given them restricted, capricious, or extravagantly metaphorical meanings, and are regarded as vulgar or inelegant.[91]

SLATE. See NATURAL SLATE, 29 Cyc. 283.

SLATE ROCK. A term universally used by geologists and practical quarrymen to indicate an argillaceous rock, or a rock in which alumina or the silicate (clay) is a characteristic constituent.[92]

SLAUGHTER-HOUSE. A house where beasts are slaughtered for market.[93] (Slaughter-House: As Nuisance, see NUISANCES, 29 Cyc. 1181. Constitutional Guaranty — Against Deprivation of Property as Applied to Statutes Granting Exclusive Privileges to, see CONSTITUTIONAL LAW, 8 Cyc. 1114; Of Equal Protection of Laws as Applied to Statutes Granting Exclusive Rights to, see CONSTITUTIONAL LAW, 8 Cyc. 1063. Granting of Monopolies in Respect of Slaughtering, see MONOPOLIES, 27 Cyc. 895. Involuntary Servitude by Act Giving Exclusive Rights to, see CONSTITUTIONAL LAW, 8 Cyc. 878. Power of Board of Health to Forbid the Carrying on, see HEALTH, 21 Cyc. 399 note 31. Regulation by City, see MUNICIPAL CORPORATIONS, 28 Cyc. 730. Regulation of Slaughtering, see ANIMALS, 2 Cyc. 451. Statutes — Granting Exclusive Privilege of Slaughtering Not Within Constitutional Guaranty Against Special Privileges, see CONSTITUTIONAL LAW, 8 Cyc. 1039; Regulating Not Violative of Constitutional Guaranty Against Abridgment of Privileges of Citizens, see CONSTITUTIONAL LAW, 8 Cyc. 1044.)

91. Century Dict.

"There is no real difference in kind between the processes of slang and those of legitimate speech. Slang is only the rude luxuriance of the uncared-for soil, knowing not the hand of the gardener." State *v.* Sheridan, 14 Ida. 222, 231, 93 Pac. 656, 658, 15 L. R. A. N. S. 497.

92. Plastic Slate-Roofing Joint-Stock Co. *v.* Moore, 19 Fed. Cas. No. 11,209, Holmes 167, 168.

93. Worcester Dict. [*quoted* in Thibaut *v.* Hebert, 45 La. Ann. 838, 12 So. 931]. See also Ford *v.* State, 112 Ind. 373, 378, 14 N. E. 241.

"Slaughter house business" means the slaughtering of animals "the meat whereof is destined for sale," and the facts that the business is conducted in a shed instead of a house, that the animals slaughtered belong to the party and that the meat is sold in a public store carried on by him, do not seem to affect the case. Thibaut *v.* Hebert, 45 La. Ann. 838, 12 So. 931.

SLAVES

By Alexander Karst*

CROSS-REFERENCES

For Matters Relating to:

Civil Rights of Negro, see Civil Rights, 7 Cyc. 160.

Constitutionality of Law Preventing the Emigration of Negro, see Constitutional Law, 8 Cyc. 878.

* Author of "Real Actions," 33 Cyc. 1541. Joint author of "Religious Societies," 34 Cyc. 1112. Editor of "Seamen," 35 Cyc. 1176.

For Matters Relating to — (*continued*)
Engaging in Slave Trade as Piracy, see PIRACY, 30 Cyc. 1629.
Freed Slave as Property Recoverable in Detinue, see DETINUE, 14 Cyc. 243.
Imputation of Negro Blood in White Person as Constituting Slander, see LIBEL AND SLANDER, 25 Cyc. 264.
Miscegenation, see MISCEGENATION, 27 Cyc. 798.
Peonage, see PEONAGE, 30 Cyc. 1382.
Power of Congress to Regulate Slave Trade, see COMMERCE, 7 Cyc. 436.
Sale of Intoxicants to Slave, see INTOXICATING LIQUORS, 23 Cyc. 197.
Slave, Freedman, or Free Negro as Witness, see WITNESSES.
Slave or Former Slave as Pauper, see PAUPERS, 30 Cyc. 1083.
Taxation of Slave, see TAXATION.

I. DEFINITIONS.

"Slavery" is defined as "the state of entire subjection of one person to the will of another." [1] The term implies the relation of two persons in the character of master and slave,[2] the former being defined as one who has another or others under his immediate control, a lord paramount or employer of slaves,[3] and the latter as a person who is the chattel or property of another and is wholly subject to his will; a bond servant; a serf.[4]

II. NATURE, ORIGIN, AND LEGALITY OF SLAVERY.

A. In General. Our American law of African slavery was a system of customary law; that is, of rules and principles applicable to the institution, at first introduced and observed by the people in their practical dealing with the subject, and subsequently recognized by the courts as the grounds of judicial decision. Very few of these principles were the result of written law, but had been developed from time to time by the actual working of the system in the several slave states, and successively adopted by the courts as they had been found by experience to be proper and effective in making the institution answer the purpose for which it existed,[5] and it was held that slavery could legally exist without any positive law authorizing it, its very existence in fact being presumptive evidence of its legality.[6] While slavery as between the separate states was a municipal

1. Webster Dict. [*quoted* in Hodges *v.* U. S., 203 U. S. 1, 17, 27 S. Ct. 6, 51 L. ed. 65].
"Servitude [is] the state of voluntary or compulsory subjection to a master." Webster Dict. [*quoted* in Hodges *v.* U. S., 203 U. S. 1, 17, 27 S. Ct. 6, 51 L. ed. 65].
Slavery was a relation founded in force, not in right; existing where it did exist by force of positive law, and not recognized as founded in natural right. Com. *v.* Aves, 18 Pick. (Mass.) 193.

2. De Lacy *v.* Antoine, 7 Leigh (Va.) 438, 445.

3. Century Dict.
Master defined with respect to the relation of master and servant see MASTER AND SERVANT, 26 Cyc. 965.

4. Century Dict.
Slave as one of the several classes of servants see MASTER AND SERVANT, 26 Cyc. 965 note 3.
In the broadest sense one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition. Hodges *v.* U. S., 203 U. S. 1, 17, 27 S. Ct. 6, 51 L. ed. 65.

5. Douglass *v.* Ritchie, 24 Mo. 177.

6. Charlotte *v.* Chouteau, 25 Mo. 465 (holding that if slavery actually existed in Canada under the French government, whether introduced by legislative enactment or not, it continued to exist, and was lawful until abolished); Charlotte *v.* Chouteau, 11 Mo. 193 (holding that it was not necessary to show any general custom of holding negroes in slavery, to prove its legality, and that if it be found to exist in fact, even to a limited extent, and no positive law prohibiting it be shown, it was deemed legal). But see Windsor *v.* Jacoh, 2 Tyler (Vt.) 192, holding that the relation of slavery was not legal in Vermont so that an inhabitant could not be charged with the maintenance of another as his slave on a bill of sale which was valid in the state where it was made.
The origin and character of property in slaves in Georgia discussed see Neal *v.* Farmer, 9 Ga. 555.
In New Jersey slavery existed prior to the adoption of the constitution of 1844, and was not abolished by that constitution, and that constitution did not destroy that relation, abolish slavery, or affect the laws in relation

regulation,[7] and by the law of nations no state was bound to recognize slavery in another state, it being a matter of comity,[8] still the constitution of the United States recognized a property in this class of persons, and the institution of slavery was to this extent also a political institution.[9] Our system resembled that of the Romans rather than the villeinage of the ancient common law, and the courts have looked to the Roman rather than to the old common law of England for rules applicable to it,[10] and the common law of England was held to be inapplicable to the institution of slavery, except to protect the rights of masters, for African slavery never existed in the island of Great Britain by the common law, by statute, or by the law of nations.[11] Under the Roman law slavery could originate in three ways, namely, by birth, when the mother was a slave; by captivity, in war; and by the voluntary sale of himself, as a slave, by a freeman, above the age of twenty, for the sake of sharing the price.[12] In the United States slavery by captivity in war was unknown [13] except in the instance of Indians taken in combat,[14] and a free negro could not sell himself into slavery,[15] the chief means of perpetuating slavery being by birth.[16]

B. Slave Trade. Although the slave trade was in some states recognized as a lawful commerce, under the law of nations, and that law was held obligatory on the states, unless repudiated by treaty or positive law,[17] persons imported as slaves contrary to law, against their will, were still subject to federal control, although mingled with persons in the states; [18] and in many states statutes were passed prohibiting slave trade and the importation of slaves, and providing that upon the importation of a slave into the state he became free; [19] and similar acts were passed by the federal government making the engaging in the slave trade

to that subject existing at the time of its adoption. It was abolished, however, by the statute of April 16, 1846. State *v.* Post, 20 N. J. L. 368.

In Illinois under the ordinance of 1787 and the constitution of Illinois, no person could be held as a slave, although a descendant of one of the slaves of the old French settlers, if born since the adoption of the ordinance. Jarrot *v.* Jarrot, 7 Ill. 1.

In New York slavery could not exist except in the single instance of fugitives from service, under the constitution of the United States. People *v.* Lemmon, 5 Sandf. 681 [*affirmed* in 26 Barb. 270 (*affirmed* in 20 N. Y. 562)].

In Texas.— Negroes could be lawfully held and transferred as slaves in the states of Coahuila and Texas in 1834. Calvit *v.* Cloud, 14 Tex. 53.

7. *In re* Perkins, 2 Cal. 424; *In re* Opinion of Judge Appleton, 44 Me. 521, 525; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469.

8. Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060.

9. *In re* Perkins, 2 Cal. 424 (holding that the political character of the institution of slavery went with the extent of the national territory wherever that was; and the constitutional rights and eminency of the republic prevail at the moment of the accession of new territory, and thus when the United States acquired the territory of California it became the common property of all the people of all the states, and the right of emigration, with every species of property belonging to the citizens, was inherent with its use and possession); Parr *v.* Gibbons, 27 Miss. 375.

10. Neal *v.* Farmer, 9 Ga. 555 (holding that even if the law of villeinage were not obsolete in England, but in force in 1732, when the colony of Georgia was settled, it had no application to African slavery in England or in Georgia); Douglass *v.* Ritchie, 24 Mo. 177.

11. Neal *v.* Farmer, 9 Ga. 555.

12. Westbrook *v.* Mitchell, 24 Tex. 560, 562 [*citing* 2 Kent Comm. 274].

13. Westbrook *v.* State, 24 Tex. 563.

14. See *infra*, note 28.

15. Westbrook *v.* State, 24 Tex. 563, so decided on the ground of public policy in direct contravention of a statute specifically permitting a negro to sell himself into servitude.

The analogous system of peonage has been discussed in a separate article. See PEONAGE, 30 Cyc. 1382.

16. See *infra*, note 29.

17. Neal *v.* Farmer, 9 Ga. 555.

18. U. S. *v.* Gould, 25 Fed. Cas. No. 15,239.

19. See the statutes of the several states. And see State *v.* Caroline, 20 Ala. 19; Jackson *v.* Bulloch, 12 Conn. 38; Anderson *v.* Thoroughgood, 5 Harr. (Del.) 199; Taylor *v.* Horsey, 5 Harr. (Del.) 131; Com. *v.* Griffin, 3 B. Mon. (Ky.) 208.

"Employed in slave trade" defined see 15 Cyc. 1031.

Power of congress prior to the thirteenth amendment to the constitution to prohibit the foreign slave trade and of the states to regulate commerce in slaves see COMMERCE, 7 Cyc. 436.

Constitutionality of law preventing the immigration of negroes see CONSTITUTIONAL LAW, 8 Cyc. 878.

an indictable offense against the United States, and forfeiting the vessel,[20] the acts prohibiting not merely the transportation of slaves, but the being employed in the business of the slave trade or serving on such a voyage,[21] or fitting vessels for use in the trade,[22] and it was unlawful to hold, sell, or dispose of an African illegally brought into the country from any foreign kingdom, place, or country,[23] and engaging in such commerce was under certain circumstances made piracy by federal statutes.[24] The acts were not, however, intended to apply to cases where slaves were carried from one foreign port to another as passengers and not for sale;[25] and were not applicable to negroes domiciled in the United States and brought back to the United States after a temporary absence.[26] One held in slavery in a foreign country who became free by being brought into the United States in violation of statute, and afterward remained in the service of his previous owner, both owner and slave believing that the latter had not obtained his freedom, could not recover compensation for such service on an implied promise, but only on an express promise, to pay.[27]

III. WHO WERE SLAVES OR SUBJECT TO BE MADE SLAVES.

A. In General. Slavery being the subject of statutory enactment in many of the states, what persons were slaves or subject to be made such depended largely upon the construction of those statutes.[28] The children of a slave followed

20. U. S. *v.* Morris, 14 Pet. (U. S.) 464, 10 L. ed. 543; U. S. *v.* The Ship Garanne, 11 Pet. (U. S.) 73, 9 L. ed. 637; U. S. *v.* Preston, 3 Pet. (U. S.) 57, 7 L. ed. 601; U. S. *v.* Gooding, 12 Wheat. (U. S.) 460, 6 L. ed. 693; The Merino, 9 Wheat. (U. S.) 391, 6 L. ed. 118; The Porpoise, 19 Fed. Cas. No. 11,284, 2 Curt. 307; Strohm *v.* U. S., 23 Fed. Cas. No. 13,539, Taney 413; U. S. *v.* Andrews, 24 Fed. Cas. No. 14,454, Brunn. Col. Cas. 422; U. S. *v.* The Francis F. Johnson, 25 Fed. Cas. No. 15,157*a*; U. S. *v.* Gould, 25 Fed. Cas. No. 15,239; U. S. *v.* Kennedy, 26 Fed. Cas. No. 15,525, 4 Wash. 91; U. S. *v.* La Coste, 26 Fed. Cas. No. 15,548, 2 Mason 129; U. S. *v.* La Jeune Eugenie, 26 Fed. Cas. No. 15,551, 2 Mason 409; U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221; U. S. *v.* Malebran, 26 Fed. Cas. No. 15,711, Brunn. Col. Cas. 426; U. S. *v.* Naylor, 27 Fed. Cas. No. 15,858; U. S. *v.* Smith, 27 Fed. Cas. No. 16,332, Brunn. Col. Cas. 82; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269*a*, 3 Phila. (Pa.) 527.

For a detailed history of the legislation prohibiting the slave trade see U. S. *v.* Libby, 26 Fed. Cas. No. 15,597, 1 Woodb. & M. 221.

Although the ship's master did not know or believe persons to be slaves such transportation worked a forfeiture. The Porpoise, 19 Fed. Cas. No. 11,284, 2 Curt. 307.

21. The Alexander, 1 Fed. Cas. No. 165, 3 Mason 175; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269*a*, 3 Phila. 527.

No action could be maintained between parties engaged in the slave trade on any right of property growing out of their transportation therein. Fales *v.* Mayberry, 8 Fed. Cas. No. 4,622, 2 Gall. 560.

22. The Caroline, 5 Fed. Cas. No. 2,418, 1 Brock. 384; Strohm *v.* U. S., 23 Fed. Cas. No. 13,539, Taney 413; U. S. *v.* The Augusta, 24 Fed. Cas. No. 14,477; U. S. *v.* The Catharine, 25 Fed. Cas. No. 14,755, 2 Paine 721; U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,269*a*, 3 Phila. (Pa.) 527 (holding that a vessel became liable to forfeiture because built or equipped in the United States for use in transporting slaves from one foreign country to another, under the act of March 22, 1794, as soon as any preparation of it for such purpose was made, a completion of the equipment not being necessary).

23. U. S. *v.* Haun, 26 Fed. Cas. No. 15,329.

24. See PIRACY, 30 Cyc. 1629.

25. Tryphenia *v.* Harrison, 24 Fed. Cas. No. 14,209, 1 Wash. 522; U. S. *v.* Kennedy, 26 Fed. Cas. No. 15,525, 4 Wash. 91.

26. U. S. *v.* The Ohio, 27 Fed. Cas. No. 15,914, Newb. Adm. 409, holding that the act of April 20, 1818, section 1 (3 U. S. St. at L. 450), punishing as an offense the bringing of a colored person into the United States, did not apply to a case of a colored person, born and reared within the United States, sailing to a foreign port or place on an American ship, and returning to a port of the United States.

27. Curranee *v.* McQueen, 6 Fed. Cas. No. 3,488, 2 Paine 109.

28. See the statutes of the several states. And see *infra*, this and the following notes.

By the territorial laws of Indiana and Illinois the children of negroes and mulattoes registered thereunder were free. Boon *v.* Juliet, 2 Ill. 258.

A descendant of a Spanish woman whose daughter was born before she came into the state, and was of a yellow complexion with long black hair, was adjudged to be free in Maryland. Rawlings *v.* Boston, 3 Harr. & M. (Md.) 139.

Slaves born in the states of Coahuila and Texas before the promulgation of the constitutions, or introduced into the state within

the condition of the mother at the time of the birth, according to the maxim *partus sequitur ventrem*;[29] and the law did not contemplate that any number of crosses between the negro and the white should emancipate the offspring of the slave.[30] Although some cases seemed to lean to a different doctrine,[31] it was generally held that children born of a slave mother entitled to or promised her freedom at the end of a fixed time were born slaves and so continued even after the mother obtained her freedom,[32] and the issue of manumitted slaves born after the manumission, before the period of its taking full effect, were slaves for life,[33] and the cases in which children, born before their mothers' right to freedom accrued, have been adjudged to be free, were held to be so decided, not because of a prospective gift or bequest of freedom to the mothers, but because of some

six months after that time, could be held in slavery (Clapp *v.* Walters, 2 Tex. 130); and under Tex. Const. § 9, providing that all persons who were slaves before their emigration to Texas, and who "are now held in bondage, shall remain in the like state of servitude," that relation where it existed *de facto* at the time of the adoption of the constitution was recognized and continued (Guess *v.* Lubbock, 5 Tex. 535); and negroes in this state were *prima facie* slaves, and where held as such they were slaves *de facto*, whether so *de jure* or not (Boulware *v.* Hendricks, 23 Tex. 667); but in Texas none but Africans could legally be slaves (Gaines *v.* Ann, 17 Tex. 211).

Indians as slaves.— In some states under the early condition of the law Indians might be slaves. This was true in New Jersey (State *v.* Van Waggoner, 6 N. J. L. 374, 376); and under a very early statute in Virginia, repealed shortly after its passage, it was provided that Indians at war with this country when taken prisoners became slaves, and under this statute many Indians were made slaves and their descendants followed their state (Jenkins *v.* Tom, 1 Wash. (Va.) 123). But in Virginia after 1705, no American Indian could be held as a slave, but foreign Indians coming within the description of the act of 1705, chapter 49, might be. Coleman *v.* Dick, 1 Wash. (Va.) 233. See Hudgins *v.* Wright, 1 Hen. & M. (Va.) 134, placing the date at which American Indians could not be made slaves as early as 1691. And to the same effect see Pallas *v.* Hill, 2 Hen. & M. (Va.) 149. *Compare* Robin *v.* Hardaway, Jeff. (Va.) 109, holding that the act of assembly of 1682, in relation to the sale of Indians as slaves, was repealed by the act of 1705, and not by those of 1684 or 1691. Indians taken captive in war, prior to the year 1769, by the French, and held or sold as slaves in the province of Louisiana while the same was held by the French, were held to be lawful slaves, and, if females, their descendants likewise (Marguerite *v.* Chouteau, 3 Mo. 540 [*overruling* Marguerite *v.* Chouteau, 2 Mo. 71]); and those of the Indians who were formerly held in slavery during the French government in Louisiana did not become free by the subsequent changes of government (Seville *v.* Chretien, 5 Mart. (La.) 275. But see Ulzire *v.* Poeyfarre, 2 Mart. N. S. (La.) 504, holding that the issue of an Indian woman were slaves). In South Carolina act of 1740, excepting "free Indians in amity with this government" from the presumption of being slaves, the phrase "free Indians" included all Indians and their descendants domiciled in this state, although disconnected with any tribe of Indians, and not merely preserving a national character. State *v.* Belmont, 4 Strobh. (S. C.) 445.

29. Jones *v.* Wootten, 1 Harr. (Del.) 77; Jane *v.* Prater, 2 Metc. (Ky.) 453; Lee *v.* Sprague, 14 Mo. 476; State *v.* Scott, 1 Bailey (S. C.) 270; McCutchen *v.* Marshall, 8 Pet. (U. S.) 220, 8 L. ed. 923.

The maxim translated see 30 Cyc. 768.

30. Morrison *v.* White, 16 La. Ann. 100; Scott *v.* Raub, 88 Va. 721, 14 S. E. 178.

31. Gaudet *v.* Gourdain, 3 La. Ann. 136 (holding that a child born of a woman after she has acquired the right of being free at a future time follows the condition of its mother, becoming free at the time fixed for enfranchisement); Harris *v.* Clarissa, 6 Yerg. (Tenn.) 227. See Sarah *v.* Taylor, 21 Fed. Cas. No. 12,339, 2 Cranch C. C. 155.

32. *Alabama.*— Sidney *v.* White, 12 Ala. 728.

Delaware.— Jones *v.* Wootten, 1 Harr. 77.

Kentucky.— Spurrier *v.* Parker, 16 B. Mon. 274; Stewart *v.* Wyatt, 8 B. Mon. 475; Johnson *v.* Johnson, 8 B. Mon. 470; Esther *v.* Akins, 3 B. Mon. 60.

Louisiana.— Catin *v.* D'Orgenoy, 8 Mart. 218.

North Carolina.— Mayho *v.* Sears, 25 N. C. 224.

Virginia.— Ellis *v.* Jenny, 2 Rob. 597; Henry *v.* Bradford, 1 Rob. 53; Crawford *v.* Moses, 10 Leigh 277; Maria *v.* Surbaugh, 2 Rand. 228.

United States.— McCutchen *v.* Marshall, 8 Pet. 220, 8 L. ed. 923; Brooks *v.* Nutt, 4 Fed. Cas. No. 1,958, 4 Cranch C. C. 470; Fanny *v.* Kell, 8 Fed. Cas. No. 4,639, 2 Cranch C. C. 412; Samuel *v.* Childs, 21 Fed. Cas. No. 12,287, 4 Cranch C. C. 189.

See 44 Cent. Dig. tit. "Slaves," §§ 7, 8.

Effect of repeal of statute.—Where an act making the issue of a free born white woman, intermarrying with a slave, slaves, was repealed, it was held that issue born after the repealing law were slaves where the marriage took place before the repeal. Butler *v.* Boarman, 1 Harr. & M. (Md.) 371.

33. Jones *v.* Wootten, 1 Harr. (Del.) 77; McCutchen *v.* Marshall, 8 Pet. (U. S.) 220, 8 L. ed. 923. But see Elliot *v.* Twilley, 5 Harr. (Del.) 192.

clause in the instrument being construed as extending the gift or bequest of freedom to the children themselves.[34] Conversely, the child of a free woman was free;[35] and where a female slave was emancipated, with a reservation that her future increase should be slaves, such reservation was void, and the woman and her increase were absolutely free;[36] and in some states statutes were passed providing that children born after its passage were free, although born of slaves.[37] Furthermore, where a person was born free no length of illegal and usurped dominion over him could make him a slave,[38] and although a free negro sold his services by deed for ninety-nine years, for a valuable consideration, he did not thereby cease to be a free man.[39] A father could not hold his own children in slavery, or sell them as slaves, although he might have rescued them from the condition of slavery.[40]

B. Evidence as to Condition of Being Free or Slave — 1. Presumption Arising From Color and Burden of Proof. In slave states color indicating African descent gave rise to a presumption that the person was a slave;[41] and every negro

34. Taylor *v.* Cullins, 12 Gratt. (Va.) 394.

35. Tom *v.* Daily, 4 Ohio 368.

36. Fulton *v.* Shaw, 4 Rand. (Va.) 597.

37. See the statutes of the several states. And see Jones *v.* Wootten, 1 Harr. (Del.) 77; Merry *v.* Chexnaider, 8 Mart. N. S. (La.) 699 (holding that a negro born in the Northwestern territory after the ordinance of 1787 was free); Merry *v.* Tiffin, 1 Mo. 725 (holding that the children of a negro slave, in Illinois, born after the ordinance of 1787, abolishing slavery, were entitled to their freedom).

In Pennsylvania persons born subsequent to 1780 were free, although subject to apprenticeship till twenty-eight years old (Gentry *v.* McMinnis, 3 Dana (Ky.) 382; Barrington *v.* Logan, 2 Dana (Ky.) 432), and the child of one who was a servant until the age of twenty-eight could not be held to servitude for the same period and on the same conditions as its mother, who was the daughter of a registered slave (Miller *v.* Dwilling, 14 Serg. & R. (Pa.) 442). One begotten of a fugitive slave mother, but born within the state, was free (Com. *v.* Auld, 9 Pa. L. J. 521), and if a pregnant slave absconded from another state and gave birth to a child in Pennsylvania, the child was free (Com. *v.* Holloway, 2 Serg. & R. (Pa.) 305).

38. Bookfield *v.* Stanton, 51 N. C. 156. See Anderson *v.* Poindexter, 6 Ohio St. 622, holding that there was no law, either in Kentucky or Ohio, by which a man, once free, could afterward be enslaved, except for the violation of some municipal law.

39. Casey *v.* Robards, 60 N. C. 434.

40. Wilson *v.* Waples, 3 Harr. (Del.) 270; Tindal *v.* Hudson, 2 Harr. (Del.) 441.

41. *Alabama.*— Becton *v.* Ferguson, 22 Ala. 599 (holding, however, that this presumption, like all others, might be rebutted by proof); Field *v.* Walker, 17 Ala. 80.

Arkansas.— Daniel *v.* Guy, 19 Ark. 121.

Georgia.— Macon, etc., R. Co. *v.* Holt, 8 Ga. 157.

Kentucky.— Davis *v.* Curry, 2 Bibb 238.

North Carolina.—Bookfield *v.* Stanton, 51 N. C. 156; State *v.* Miller, 29 N. C. 275; Gober *v.* Gober, 3 N. C. 170.

Tennessee.— Bennett *v.* State, 1 Swan 411.

United States.—Mandeville *v.* Cookenderfer, 16 Fed. Cas. No. 9,009, 3 Cranch C. C. 257; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469.

See 44 Cent. Dig. tit. "Slaves," § 9.

Conversely where a person held as a slave sued for freedom, and it appeared that he belonged to the white race, he was presumed to be free. Daniel *v.* Guy, 19 Ark. 121. Hook *v.* Pagee, 2 Munf. (Va.) 379. In Kentucky all persons of blood not less than one-quarter African were *prima facie* deemed slaves; and whites, and those less than one-quarter African, were *prima facie* free (Gentry *v.* McMinnis, 3 Dana (Ky.) 382); and Indians or white persons were *prima facie* free (Gatliff *v.* Rose, 8 B. Mon. (Ky.) 629). Negroes in North Carolina were presumed to be slaves until the contrary appeared; but it was otherwise as to persons of mixed blood. Nichols *v.* Bell, 46 N. C. 32; Scott *v.* Williams, 12 N. C. 376; Gobu *v.* Gobu, 1 N. C. 100.

On the trial of a petition for freedom by a negro, the presumption was against him that he was a slave, that being the condition of the negro race generally; and he must prove his right to freedom, either that he was born free, or had been emancipated according to law (Jackson *v.* Bob, 18 Ark. 399; Davis *v.* Curry, 2 Bibb (Ky.) 238); or he must prove his descent from a free ancestor, or that he has been manumitted by deed or will (Hughes *v.* Jackson, 12 Md. 450; Anderson *v.* Garrett, 9 Gill (Md.) 120; Burke *v.* Negro Joe, 6 Gill & J. (Md.) 136; Hall *v.* Mullin, 5 Harr. & J. (Md.) 190; Charlotte *v.* Chouteau, 25 Mo. 465; Chouteau *v.* Pierre, 9 Mo. 3); and no presumption arose in suits for freedom that plaintiff was free from the fact that he was less than one fourth negro (Daniel *v.* Guy, 19 Ark. 121).

In Louisiana the presumption was that a black man was a slave, but the burden of proof was on him who claimed the colored person as a slave. Miller *v.* Belmonti, 11 Rob. 339; Pilie *v.* Lalande, 7 Mart. N. S. 648; State *v.* Cecil, 2 Mart. 208. Thus where persons of color sued for freedom, the burden of proving them slaves was on defendant; otherwise in case of negroes. Adelle *v.* Beauregard, 1 Mart. 183. Similarly, where a black person in the enjoyment of liberty sued and

was *prima facie* to be considered as a slave and the property of somebody; and he who acted in respect to him, as if he were a free man, acted at his peril, and the burden of proof was on him to show that the negro was not a slave, or at least to show such circumstances as would rebut the presumption arising from color,[42] and possession of, and acts of ownership over, a colored person, was *prima facie* evidence of slavery and ownership.[43] This, however, was not the rule in non-slave states, and in these every person, although colored, was *prima facie* presumed to be free;[44] and a negro was presumed to be free, although purchased as a slave, if the purchase was made in a state in which slavery was not tolerated, unless it was shown that he had previously inhabited one in which it was.[45] A deed or act of manumission of a slave might be presumed from such acts of the master as afforded a sufficient ground for the presumption,[46] as where the master allowed him to act as a freeman without molestation for over twenty years;[47] but the rule was that the presumption of a deed of manumission must be founded on acts inconsistent with a state of slavery, known to the owner, and which could only be accounted for on a supposition that he intended to free his slave.[48] A deed of emancipation, executed in a state where slavery did not exist, was *prima facie* good, and entitled the negroes to freedom wherever they went; and the proof of its invalidity must come from those who disputed the act and attempted to hold against it.[49]

2. Competency and Weight and Sufficiency. Upon an issue of slavery or freedom the general rules of evidence[50] applied,[51] as to admissibility.[52] And

defendant pleaded that he was a slave, the burden of proof was on defendant; but it was otherwise where a slave sued for freedom. Mary *v.* Morris, 7 La. 135 (where plaintiff in a suit for freedom had the burden of proving freedom when the question was *libera vel non*); Hawkins *v.* Vanwickle, 6 Mart. N. S. 418.

The presumption also is that a person who was a slave was a negro.— McMillan *v.* Croatan Dist. No. 4 School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823.

42. Mandeville *v.* Cookenderfer, 16 Fed. Cas. No. 9,009, 3 Cranch C. C. 257.

43. Trongott *v.* Byers, 5 Cow. (N. Y.) 480; William *v.* Van Zandt, 29 Fed. Cas. No. 17,685, 3 Cranch C. C. 55. *Contra*, Gatliff *v.* Rose, 8 B. Mon. (Ky.) 629.

44. State *v.* Dillahunt, 3 Harr. (Del.) 551; Kinney *v.* Cook, 4 Ill. 232; Stoutenborough *v.* Haviland, 15 N. J. L. 266; Le Grand *v.* Darnall, 2 Pet. (U. S.) 664, 7 L. ed. 555; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469; Wood *v.* Ward, 30 Fed. Cas. No. 17,965.

45. Forsyth *v.* Nash, 4 Mart. (La.) 385.

46. Lewis *v.* Hart, 33 Mo. 535.

47. Bookfield *v.* Stanton, 51 N. C. 156; Jarman *v.* Humphrey, 51 N. C. 28; State *v.* Hill, 2 Speers (S. C.) 150; Miller *v.* Reigne, 2 Hill (S. C.) 592. But see Lyons *v.* Holmes, 19 S. C. 406 [*following* Vinyard *v.* Passalaigue, 2 Strobh. (S. C.) 536].

48. Burke *v.* Negro Joe, 6 Gill & J. (Md.) 136.

The abandonment of a slave by the owner affords no presumption of the execution of a deed of manumission (Anderson *v.* Garrett, 9 Gill (Md.) 120), and no presumption of a deed of manumission was authorized on the mere ground that a slave has gone at large, and acted as a freeman with his master's knowledge, unless such going at large and acting as if free was for at least twenty years' uninterrupted duration (Anderson *v.* Garrett, *supra*).

49. Blackmore *v.* Phill, 7 Yerg. (Tenn.) 452.

50. See Evidence, 16 Cyc. 821.

51. Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

The question of slavery arising in a proceeding other than a suit involving freedom, in a court in one state, was partly a question of status and partly a question of property, and in either aspect evidence that the person was in point of fact held and treated as a slave in another state was admissible, and might be sufficient evidence to require the jury to find that he was held to service under the laws of the latter state. U. S. *v.* Morris, 26 Fed. Cas. No. 15,815, 1 Curt. 23.

52. *Alabama.*— Farrelly *v.* Maria Louisa, 34 Ala. 284; Fields *v.* Walker, 23 Ala. 155; Becton *v.* Ferguson, 22 Ala. 599.

Arkansas.— Daniel *v.* Guy, 23 Ark. 50; Jackson *v.* Bob, 18 Ark. 399.

California.— *In re* Perkins, 2 Cal. 424.

Delaware.— Thoroughgood *v.* Anderson, 5 Harr. 97; State *v.* Harten, 4 Harr. 582.

Georgia.— Candler *v.* Hammond, 23 Ga. 493.

Kentucky.— Tevis *v.* Eliza, 7 Dana 394; Nancy *v.* Snell, 6 Dana 148.

Louisiana.— Rosine *v.* Bonnabel, 5 Rob. 163.

Maryland.— Cornish *v.* Willson, 6 Gill 299; Wilson *v.* Barnett, 9 Gill & J. 158; Shorter *v.* Rozier, 3 Harr. & M. 238.

Missouri.— Charlotte *v.* Chouteau, 21 Mo. 590; Ralph *v.* Duncan, 3 Mo. 194.

North Carolina.— Bookfield *v.* Stanton, 51 N. C. 156.

South Carolina.— Guillemette *v.* Harper, 4 Rich. 186.

similarly the weight and sufficiency [53] of the evidence presented under such an issue were controlled by the general rules.

IV. PROPERTY IN SLAVES.

A. General Nature; Rights, Powers, and Duties of Owner; Actions.

Slaves were considered as property [54] and recognized as such by the constitution of the United States,[55] being for some purposes in some states considered as real property,[56] particularly for purposes of descent;[57] but the law, which to some

Tennessee.— Miller *v.* Denman, 8 Yerg. 233; Vaughan *v.* Phebe, Mart. & Y. 5, 17 Am. Dec. 770.

Virginia.— Fulton *v.* Gracey, 15 Gratt. 314; Unis *v.* Charlton, 12 Gratt. 484; Givens *v.* Manns, 6 Munf. 191.

See 44 Cent. Dig. tit. "Slaves," § 10.

53. *Arkansas.*— Gary *v.* Stevenson, 19 Ark. 580; Daniel *v.* Guy, 19 Ark. 121.

Kentucky.—Mullins *v.* Wall, 8 B. Mon. 445; Nancy *v.* Snell, 6 Dana 148; Boyce *v.* Nancy, 4 Dana 236.

Louisiana.—Morrison *v.* White, 16 La. Ann. 100; Jackson *v.* Bridges, 1 Rob. 172; Simmins *v.* Parker, 4 Mart. N. S. 200.

Maryland.— Henderson *v.* Jason, 9 Gill 483; Bland *v.* Dowling, 9 Gill & J. 19; Baptiste *v.* De Volunbrun, 5 Harr. & J. 86.

Mississippi.— Shaw *v.* Brown, 35 Miss. 246.

Missouri.—Durham *v.* Durham, 26 Mo. 507; Amy *v.* Ramsey, 4 Mo. 505.

New Jersey.— Perth Amboy Tp. Overseers of Poor *v.* Piscataway Tp. Overseers of Poor, 19 N. J. L. 173; State *v.* McDonald, 1 N. J. L. 332.

North Carolina.— Jarman *v.* Humphrey, 51 N. C. 28; Stringer *v.* Burcham, 34 N. C. 41; Sampson *v.* Burgwin, 20 N. C. 21.

South Carolina.— Dingle *v.* Mitchell, 20 S. C. 202.

Texas.— Gaines *v.* Ann, 17 Tex. 211.

Virginia.— Fulton *v.* Gracey, 15 Gratt. 314; Nicholas *v.* Burruss, 4 Leigh 289; Gregory *v.* Baugh, 4 Rand. 611.

United States.— Le Grand *v.* Darnall, 2 Pet. 664, 7 L. ed. 555; Bell *v.* Hogan, 3 Fed. Cas. No. 1,253, 2 Cranch C. C. 21; Drayton *v.* U. S., 7 Fed. Cas. No. 4,074, 1 Hayw. & H. 369; Minchin *v.* Docker, 17 Fed. Cas. No. 9,628, 1 Cranch C. C. 370; U. S. *v.* Bruce, 24 Fed. Cas. No. 14,676, 2 Cranch C. C. 95; U. S. *v.* Fisher, 25 Fed. Cas. No. 15,101, 1 Cranch C. C. 244; U. S. *v.* West, 28 Fed. Cas. No. 16,667, 5 Cranch C. C. 35; William *v.* Van Zandt, 29 Fed. Cas. No. 17,685, 3 Cranch C. C. 55.

See 44 Cent. Dig. tit. "Slaves," § 11.

54. *Alabama.*— Rose *v.* Pearson, 41 Ala. 687; Durden *v.* McWilliams, 36 Ala. 345; Atwood *v.* Beck, 21 Ala. 590.

Arkansas.— Whitfield *v.* Browder, 13 Ark. 143.

California.— *In re* Perkins, 2 Cal. 424.

Georgia.— Drumright *v.* State, 29 Ga. 430; Bryan *v.* Walton, 20 Ga. 480; Macon, etc., R. Co. *v.* Davis, 13 Ga. 68.

Kentucky.— Orr *v.* Pickett, 3 J. J. Marsh. 269; Gaunt *v.* Brockman, Hard. 331.

Louisiana.— Dickinson *v.* Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Bisland *v.* Provosty, 14 La. Ann. 169; King *v.* Neely, 14 La. Ann. 165; Johnson *v.* Imhoden, 4 La. Ann. 178; Waters *v.* Grayson, 3 La. Ann. 595; McCargo *v.* New Orleans Ins. Co., 10 Rob. 202, 43 Am. Dec. 180; Lewis *v.* Cartwright, 7 Rob. 186; Kemper *v.* Hulick, 19 La. 349; Berard *v.* Berard, 9 La. 156; Bradford *v.* Clark, 7 La. 147; Moosa *v.* Allain, 4 Mart. N. S. 99; Ulzere *v.* Poeyfarre, 8 Mart. 155.

Maryland.— Belt *v.* Marriott, 9 Gill 331; Crapster *v.* Griffith, 6 Harr. & J. 144; Crapster *v.* Griffith, 2 Bland 5.

Mississippi.— Turner *v.* Herron, 34 Miss. 460; Covington *v.* Arrington, 32 Miss. 144; Newell *v.* Newell, 9 Sm. & M. 56.

New York.— Trongott *v.* Byers, 5 Cow. 480.

North Carolina.— Caffey *v.* Rankin, 33 N. C. 449; Locke *v.* Gibbs, 26 N. C. 42.

South Carolina.— Mays *v.* Gillam, 2 Rich. 160; Ford *v.* Aiken, 1 Strohh. 93; Rhame *v.* Ferguson, Rice 196; State *v.* Singletary, Dudley 220; Cline *v.* Caldwell, 1 Hill 423; Horry *v.* Glover, 2 Hill Eq. 515.

Tennessee.— Seay *v.* Bacon, 4 Sneed 99, 67 Am. Dec. 601; Womack *v.* Smith, 11 Humphr. 478, 54 Am. Dec. 51; Stevens *v.* Bomar, 9 Humphr. 546; McCollum *v.* Smith, Meigs 342, 33 Am. Dec. 147; State *v.* Cooper, 2 Overt. 96, 5 Am. Dec. 656.

Virginia.— Poindexter *v.* Davis, 6 Gratt. 481.

United States.— Love *v.* Boyd, 15 Fed. Cas. No. 8,546, 2 Cranch C. C. 156.

See 43 Cent. Dig. tit. "Slaves," § 12 *et seq.*

Free negroes could not own or hold slaves (Tindal *v.* Hudson, 2 Harr. (Del.) 441; Davis *v.* Evans, 18 Mo. 249), but a colored man who had bought his children, who were born slaves, could maintain a bill in equity for the recovery of the children when they had been wrongfully taken from him by one claiming under the original owner (Jones *v.* Bennet, 9 Dana (Ky.) 333).

Offspring of slaves belonged to the owner of the mother.— Patterson *v.* Bonner, 19 La. 508; Merrill *v.* Dawson, 17 Fed. Cas. No. 9,469, Hempst. 563 [*affirmed* in 11 How. 375, 13 L. ed. 736]; Peter *v.* Cureton, 17 Fed. Cas. No. 11,019, 2 Cranch C. C. 561.

As far as it relates to the usufruct, the children were natural fruits. Patterson *v.* Bonner, 19 La. 508.

55. *In re* Perkins, 2 Cal. 424.

56. Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41.

57. **Whether real or personal property for purposes of inheritance** see DESCENT AND DISTRIBUTION, 14 Cyc. 18; PROPERTY, 32 Cyc. 661 note 86.

extent imparted to slaves the fictitious quality of realty, for most purposes, and to a greater extent, considered them personalty.[58] In fact the master's property in his slave was *sui generis*, the slave being considered in the law in many respects in the light of a human being entitled to the law's protection.[59] Thus, although unconditional submission on the part of the slave was due to the lawful authority of the master, and the master might therefore use just such force and means in reducing his rebellious slave to lawful submission to his authority as were necessary to effect his purpose, even to the destruction of the life or limb of the slave,[60] yet he might not deprive the slave of life or limb unless impelled to such an act by necessity;[61] and he had no right to inflict on him such cruel and inhuman punishment, even with the purpose of securing service and obedience, as must result in death as a consequence of the punishment inflicted.[62] Nor did the law subject the female slave to an involuntary and illicit connection with her master, and it would protect her against such a misfortune,[63] and the owner of a slave was under a legal obligation to supply his necessary wants and protect and preserve his life,[64] his duty to protect him terminating only with his life, and even after emancipation he was bound not only to protect but to maintain them when they were no longer able to maintain themselves.[65] An action would lie by the owner against one who held his slave wrongfully,[66] or enticed,[67] harbored or concealed,[68]

58. Easley *v.* Easley, 18 B. Mon. (Ky.) 86; Sneed *v.* Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Plumpton *v.* Cook, 2 A. K. Marsh. (Ky.) 450 (holding that slaves properly came under the appellation of "personal estate," and, as such, were liable to an attachment).

59. Craig *v.* Lee, 14 B. Mon. (Ky.) 119.

60. Dave *v.* State, 22 Ala. 23; State *v.* Abram, 10 Ala. 928; Gillian *v.* Senter, 9 Ala. 395; Poydras *v.* Mourain, 9 La. 492; Oliver *v.* State, 39 Miss. 526; State *v.* David, 49 N. C. 353.

61. Askridge *v.* State, 25 Ala. 30; Oliver *v.* State, 39 Miss. 526; Worley *v.* State, 11 Humphr. (Tenn.) 172, holding that a master had no right to maim his slave, as by castrating him, for the purpose of his moral reform.

62. Craig *v.* Lee, 14 B. Mon. (Ky.) 119.

63. Vail *v.* Bird, 6 La. Ann. 223.

64. *Alabama.*— Gibson *v.* Andrews, 4 Ala. 66; Meeker *v.* Childress, Minor 109.

Georgia.— Latimer *v.* Alexander, 14 Ga. 259.

Indiana.— Grover *v.* Sims, 5 Blackf. 498.

Kentucky.— Kellar *v.* Bate, 3 Metc. 130; Meredith *v.* Wood, 3 Dana 456.

Louisiana.— Tom *v.* Ernest, 15 La. Ann. 44.

Missouri.— Douglass *v.* Ritchie, 24 Mo. 177.

South Carolina.— Fairchild *v.* Bell, 2 Brev. 129, 3 Am. Dec. 702.

See 44 Cent. Dig. tit. "Slaves," § 12 *et seq.*

65. Baker *v.* Tabor, 7 La. Ann. 556.

66. Gentry *v.* Barnett, 6 T. B. Mon. (Ky.) 113; Mulhollan *v.* Johnson, 1 Mart. N. S. (La.) 579; Marshall *v.* Penington, 8 Yerg. (Tenn.) 424.

Trover would lie for conversion of a slave in some states (Drumright *v.* State, 29 Ga. 430; Terrell *v.* McKinny, 26 Ga. 447; Newton *v.* Turpin, 8 Gill & J. (Md.) 433; Polk *v.* Allen, 19 Mo. 467; Fanshaw *v.* Jones, 33 N. C. 154; Lewis *v.* Mobley, 20 N. C. 467, 34 Am. Dec. 379; Robertson *v.* Wurdeman, Dudley (S. C.) 234; Craig *v.* Todd, 2 Treadw. (S. C.) 757; Bedford *v.* Flowers, 11 Humphr. (Tenn.) 242); but not in all (Daggs *v.* Frazer, 6 Fed. Cas. No. 3,538), particularly not where, at the time of the conversion, by the laws of the state in which action was brought, plaintiff could have had no property in him (Rodney *v.* Illinois Cent. R. Co., 19 Ill. 42).

67. *Georgia.*— Dacy *v.* Gay, 16 Ga. 203.

Kentucky.— Tyson *v.* Ewing, J. J. Marsh. 185.

Louisiana.— Vinot *v.* Bertrand, 6 La. Ann. 474.

Mississippi.— Jones *v.* Donald, 26 Miss. 461.

New Jersey.— Boice *v.* Gibbons, 8 N. J. L. 324.

New York.— Scidmore *v.* Smith, 13 Johns. 322.

South Carolina.— Lamar *v.* Taylor, 3 Brev. 99.

Tennessee.— Miller *v.* Denman, 8 Yerg. 233.

See 44 Cent. Dig. tit. "Slaves," § 12 *et seq.*

68. *Alabama.*— Kennedy *v.* McArthur, 5 Ala. 151.

North Carolina.— Young *v.* McDaniel, 50 N. C. 103.

South Carolina.— State *v.* Arnold, 8 Rich. 39; State *v.* Stein, 1 Rich. 189; Johnson *v.* Lemons, 2 Bailey 392; La Mar *v.* Roundtree, 1 Brev. 164.

Tennessee.— Cain *v.* Kelly, 4 Humphr. 472.

Texas.— Browne *v.* Johnson, 29 Tex. 40.

United States.— Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,505, 5 McLean 214; Oliver *v.* Kaufman, 18 Fed. Cas. No. 10,497; Oliver *v.* Weakley, 18 Fed. Cas. No. 10,502, 2 Wall. Jr. 324; Ray *v.* Donnell, 20 Fed. Cas. No. 11,590, 4 McLean 504; Stanback *v.* Waters, 22 Fed. Cas. No. 13,284, 4 Cranch C. C. 2; Van Metre *v.* Mitchell, 28 Fed. Cas. No. 16,865*a*; Washington *v.* Wilson, 29 Fed. Cas. No. 17,240, 2 Cranch C. C. 153; Weimer *v.* Sloane, 29 Fed. Cas. No. 17,363, 6 McLean 259.

See 44 Cent. Dig. tit. "Slaves," § 12 *et seq.*

or rescued him,[69] or who aided or allowed him to escape;[70] and trespass or other appropriate action would lie for the master against one who beat, injured, or caused the death of his slave;[71] and it was a crime, generally felony, to steal, kidnap, or harbor or conceal a slave with the intent to deprive the owner of his possession.[72] The responsibility of a common carrier in transporting slaves was of the nature of that assumed in carrying passengers, and not goods or property. If loss occurred, the carrier was responsible only for negligence or unskilful-

69. Giltner *v.* Gorham, 10 Fed. Cas. No. 5,453, 4 McLean 402; Ray *v.* Donnell, 20 Fed. Cas. No. 11,590, 4 McLean 504; Van Metre *v.* Mitchell, 28 Fed. Cas. No. 16,865, 2 Wall. Jr. 311; Weimer *v.* Sloane, 29 Fed. Cas. No. 17,363, 6 McLean 259.

70. *Louisiana.*— Owen *v.* Brown, 12 La. Ann. 172.

Maryland.— Slemaker *v.* Marriott, 5 Gill & J. 406.

New Jersey.— Boice *v.* Gibbons, 8 N. J. L. 324.

Virginia.— Law *v.* Law, 2 Gratt. 366; Burley *v.* Griffith, 8 Leigh 442.

United States.— Giltner *v.* Gorham, 10 Fed. Cas. No. 5,453, 4 McLean 402; Jones *v.* Vanzandt, 13 Fed. Cas. No. 7,501, 2 McLean 596, 13 Fed. Cas. No. 7,502, 2 McLean 611; Ray *v.* Donnell, 20 Fed. Cas. No. 11,590, 4 McLean 504; Weimer *v.* Sloane, 29 Fed. Cas. No. 17,363, 6 McLean 259.

See 44 Cent. Dig. tit. "Slaves," § 12 *et seq.*

71. *Alabama.*— Morton *v.* Bradley, 27 Ala. 640; Townsend *v.* Jeffries, 24 Ala. 329; Gillian *v.* Senter, 9 Ala. 395 (even against the master's overseer); Gray *v.* Crocheron, 8 Port. 191; Middleton *v.* Holmes, 3 Port. 424.

Arkansas.— Hervy *v.* Armstrong, 15 Ark. 162.

Georgia.— Holmes *v.* Central R., etc., Co., 37 Ga. 593; Mitchell *v.* Western, etc., R. Co., 30 Ga. 22; Macon, etc., R. Co. *v.* Holt, 8 Ga. 157.

Kentucky.— Hord *v.* Crimes, 13 B. Mon. 188; King *v.* Shanks, 12 B. Mon. 410; Gray *v.* Combs, 7 J. J. Marsh. 478, 23 Am. Dec. 431; Smith *v.* Hancock, 4 Bibb 222.

Louisiana.— Gardiner *v.* Thibodeau, 14 La. Ann. 732; McCutcheon *v.* Angelo, 14 La. Ann. 34; Laparouse *v.* Rice, 13 La. Ann. 567; Duperrier *v.* Dautrive, 12 La. Ann. 664; Griffing *v.* Routh, 11 La. Ann. 135; Kennedy *v.* Mason, 10 La. Ann. 519; Kemp *v.* Hutchinson, 10 La. Ann. 494; Benjamin *v.* Davis, 6 La. Ann. 472; Buddy *v.* The Vanleer, 6 La. Ann. 34; Arnandez *v.* Lewes, 5 La. Ann. 127; Blanchard *v.* Dixon, 4 La. Ann. 57; Bibb *v.* Hebert, 3 La. Ann. 132.

Mississippi.— Lamar *v.* Williams, 39 Miss. 342; Thompson *v.* Young, 30 Miss. 17.

Missouri.— Morgan *v.* Cox, 22 Mo. 373, 66 Am. Dec. 623; Garneau *v.* Herthel, 15 Mo. 191.

North Carolina.— Smith *v.* Cameron, 33 N. C. 572; Pierce *v.* Myrick, 12 N. C. 345.

South Carolina.— Arnold *v.* Loveless, 6 Rich. 511; Priester *v.* Augley, 5 Rich. 44; Harrison *v.* Berkley, 1 Strobh. 525, 47 Am. Dec. 578; Felder *v.* Louisville, etc., R. Co., 2 McMull. 403; Langford *v.* Caldwell, 1 McMull. 275; Ivy *v.* Wilson, Cheves 74; McDonald *v.* Clark, 4 McCord 223; Witsell *v.* Earnest, 1 Nott & M. 182; White *v.* Chambers, 2 Bay 70.

Tennessee.— Kirkwood *v.* Miller, 5 Sneed 455, 73 Am. Dec. 134; James *v.* Drake, 3 Sneed 340; Polk *v.* Fancher, 1 Head 336; Walker *v.* Brown, 11 Humphr. 179.

Texas.— Brady *v.* Price, 19 Tex. 285; Hedgepeth *v.* Robertson, 18 Tex. 858.

United States.— Garey *v.* Johnson, 10 Fed. Cas. No. 5,240.

See 44 Cent. Dig. tit. "Slaves," § 12 *et seq.*

72. *Alabama.*— Spivey *v.* State, 26 Ala. 90; Spencer *v.* State, 20 Ala. 24; Williams *v.* State, 15 Ala. 259; State *v.* Adams, 14 Ala. 486; Mooney *v.* State, 8 Ala. 328; Nabors *v.* State, 6 Ala. 200; State *v.* Wisdom, 8 Port. 511; Prince *v.* State, 3 Stew. & P. 253.

Arkansas.— State *v.* Cadle, 19 Ark. 613.

Georgia.— Cook *v.* State, 26 Ga. 593; Hudgins *v.* State, 26 Ga. 350.

Louisiana.— State *v.* Gore, 15 La. Ann. 79.

Mississippi.— Coon *v.* State, 13 Sm. & M. 246.

Missouri.— State *v.* Rector, 11 Mo. 28.

North Carolina.— State *v.* Martin, 34 N. C. 157; State *v.* Williams, 31 N. C. 140; State *v.* Hardin, 19 N. C. 407; State *v.* Haney, 19 N. C. 390; State *v.* Edmund, 15 N. C. 340; State *v.* Jernigan, 7 N. C. 12; State *v.* Jernagan, 4 N. C. 483; State *v.* Davis, 4 N. C. 271.

South Carolina.— State *v.* Gossett, 9 Rich. 428; State *v.* Kinman, 7 Rich. 497; State *v.* Brown, 3 Strobh. 508; State *v.* McCoy, 2 Speers 711; State *v.* La Creux, 1 McMull. 488; State *v.* Covington, 2 Bailey 569; State *v.* Whyte, 2 Nott & M. 174.

Tennessee.— Kemp *v.* State, 11 Humphr. 320; Carey *v.* State, 7 Humphr. 499 [*following* Tyner *v.* State, 5 Humphr. 383]; State *v.* Curtis, 5 Humphr. 601; State *v.* Watkins, 4 Humphr. 256; State *v.* Jones, 2 Yerg. 22; Gordon *v.* Farquhar, Peck 155; State *v.* Thompson, 2 Overt. 96.

Texas.— Lovett *v.* State, 19 Tex. 174; Cain *v.* State, 18 Tex. 387; Martin *v.* State, 16 Tex. 240.

Virginia.— Com. *v.* Peas, 4 Leigh 692, 2 Gratt. 629; Thomas *v.* Com., 2 Leigh 741; Com. *v.* Hays, 1 Va. Cas. 122.

United States.— U. S. *v.* Godley, 25 Fed. Cas. No. 15,221, 2 Cranch C. C. 153.

See 44 Cent. Dig. tit. "Slaves," § 19.

A runaway slave might be the subject of a larceny. Murray *v.* State, 18 Ala. 727; Reid *v.* State, 20 Ga. 681; Randal *v.* State, 4 Sm. & M. (Miss.) 349; State *v.* Clayton, 11 Rich. (S. C.) 581; Cash *v.* State, 10 Humphr. (Tenn.) 111.

Assisting a slave to escape from his master in order to obtain his freedom was not lar-

ness;[73] but carriers were liable in many states, under statute, to the master of a slave for taking him as a passenger without his owner's consent or unaccompanied by the owner, and thus aiding his escape;[74] and in some cases the carrier was liable to fine and imprisonment.[75] Slaves were subject to attachment.[76]

B. Transfer of Slaves. Slaves could be transferred by will,[77] or by gift,[78] which under some statutes was sufficient if by parol accompanied with delivery,[79] but which might be,[80] and in some instances must be, in writing, and recorded,

ceny. State *v.* Hawkins, 8 Port. (Ala.) 461, 33 Am. Dec. 294; Drayton *v.* U. S., 7 Fed. Cas. No. 4,074, 1 Hayw. & H. 369.

73. Folse *v.* New Orleans Coast, etc., Transp. Co., 19 La. Ann. 199; Scruggs *v.* Davis, 3 Head (Tenn.) 664.

74. *Alabama.*— Bell *v.* Chambers, 38 Ala. 660; Mangham *v.* Cox, 29 Ala. 81.

Delaware.— Page *v.* Vandegrift, 5 Harr. 176; Collins *v.* Bilderback, 5 Harr. 133; Redeen *v.* Spruance, 4 Harr. 217.

Georgia.— Brown *v.* South Western R. Co., 36 Ga. 377; South Western R. Co. *v.* Pickett, 36 Ga. 85; Wallace *v.* Spullock, 32 Ga. 488.

Kentucky.— Louisville, etc., R. Co. *v.* Young, 1 Bush 401; Bracken *v.* The Culnare, 16 B. Mon. 444; McFarland *v.* McKnight, 6 B. Mon. 500; Graham *v.* Strader, 5 B. Mon. 173; Strader *v.* Fore, 2 B. Mon. 123; Johnson *v.* Bryan, 1 B. Mon. 292; Watham *v.* Oldham, 9 Dana 50; Church *v.* Chambers, 3 Dana 274.

Louisiana.— Chaffe *v.* The St. Charles, 13 La. Ann. 415; Daret *v.* Gray, 12 La. Ann. 394; Barry *v.* Kimball, 12 La. Ann. 372; Farwell *v.* Harris, 12 La. Ann. 50; Rountree *v.* Brilliant Steamboat Co., 8 La. Ann. 289; Williamson *v.* Norton, 7 La. Ann. 393; Winston *v.* Foster, 5 Rob. 113; Duncan *v.* Hawks, 18 La. 548; Buel *v.* New York Steamer, 17 La. 541; Goldenbow *v.* Wright, 13 La. 371; Hurst *v.* Wallace, 5 La. 98; McMaster *v.* Beckwith, 2 La. 329.

Maryland.—Northern Cent. R. Co. *v.* Scholl, 16 Md. 331; Pennsylvania, etc., Steam Nav. Co. *v.* Hungerford, 6 Gill & J. 291.

Missouri.— Withers *v.* The El Paso, 24 Mo. 204; Calvert *v.* Rider, 20 Mo. 146; Calvert *v.* The Timoleon, 15 Mo. 595; Lee *v.* Sparr, 14 Mo. 370; Price *v.* Thornton, 10 Mo. 135; Eaton *v.* Vaughan, 9 Mo. 743; Russell *v.* Taylor, 4 Mo. 550.

New Jersey.— Cutter *v.* Moore, 8 N. J. L. 219; Gibbons *v.* Morse, 7 N. J. L. 253.

North Carolina.— Harriss *v.* Mabry, 23 N. C. 240.

South Carolina.— Josey *v.* Wilmington, etc., R. Co., 11 Rich. 399; O'Neall *v.* South Carolina R. Co., 9 Rich. 465; Ellis *v.* Welsh, 4 Rich. 468; Sill *v.* South Carolina R. Co., 4 Rich. 154.

Tennessee.— Western, etc., R. Co. *v.* Fulton, 4 Sneed 589.

United States.— Harrison *v.* Evans, 11 Fed. Cas. No. 6,135, 1 Cranch C. C. 364; Mandeville *v.* Cookenderfer, 16 Fed. Cas. No. 9,009, 3 Cranch C. C. 257; Washington *v.* Wilson, 29 Fed. Cas. No. 17,240, 2 Cranch C. C. 153.

See 44 Cent. Dig. tit. "Slaves," § 17.

75. Botts *v.* Cochrane, 4 La. Ann. 35.

76. Weathers *v.* Mudd, 12 B. Mon. (Ky.) 112; Plumpton *v.* Cook, 2 A. K. Marsh. (Ky.) 450.

77. *Alabama.*— Roberson *v.* Roberson, 21 Ala. 273.

Kentucky.— Wood *v.* Wickliffe, 5 B. Mon. 187.

Louisiana.— Poydras *v.* Taylor, 18 La. 12.

Maryland.— Jones *v.* Earle, 1 Gill 395.

North Carolina.— Reeves *v.* Long, 58 N. C. 355; Harrison *v.* Everett, 58 N. C. 163; Kirkpatrick *v.* Rogers, 41 N. C. 130; Gibbons *v.* Dunn, 18 N. C. 446.

Virginia.— Wynn *v.* Carrell, 2 Gratt. 227; Adams *v.* Gilliam, 1 Patt. & H. 161.

United States.— Williams *v.* Ash, 1 How. 1, 11 L. ed. 25; Williamson *v.* Daniel, 12 Wheat. 568, 6 L. ed. 731; Ramsay *v.* Lee, 4 Cranch 401, 2 L. ed. 660; Bazil *v.* Kennedy, 3 Fed. Cas. No. 1,151, 1 Cranch C. C. 199.

See 44 Cent. Dig. tit. "Slaves," § 29.

Slaves passed by devise under the general application of personal estate unless a different intention was indicated. Chinn *v.* Respass, 1 T. B. Mon. (Ky.) 25.

78. *Alabama.*— Michan *v.* Wyatt, 21 Ala. 813; Catterlin *v.* Hardy, 10 Ala. 511.

Delaware.— Smith *v.* Milman, 2 Harr. 497.

Georgia.— Spalding *v.* Grigg, 4 Ga. 75.

Kentucky.— Pate *v.* Barrett, 2 Dana 426.

Maryland.— Isaac *v.* Williams, 3 Gill 278; Clagett *v.* Salmon, 5 Gill & J. 314.

See 44 Cent. Dig. tit. "Slaves," § 28.

79. *Alabama.*— Twelves *v.* Nevill, 39 Ala. 175; Adams *v.* McMichael, 37 Ala. 432; Henderson *v.* Adams, 35 Ala. 723; Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413; Crabb *v.* Thomas, 25 Ala. 212.

Georgia.— Turner *v.* Thurmond, 28 Ga. 174.

Maryland.— Nickerson *v.* Nickerson, 28 Md. 327; Chew *v.* Beall, 13 Md. 348; Worthington *v.* Shipley, 5 Gill 449.

Mississippi.— Thompson *v.* Thompson, 2 How. 737.

Missouri.— Pemberton *v.* Pemberton, 22 Mo. 338; Jones *v.* Covington, 22 Mo. 163.

Tennessee.— Hill *v.* McDonald, 1 Head 383.

See 44 Cent. Dig. tit. "Slaves," § 28.

In Virginia the gift was void as between donor and donee unless in writing or accompanied by actual possession. Patterson *v.* Franklin, 7 Leigh 590; Merrit *v.* Smith, 6 Leigh 486; Anglin *v.* Bottom, 3 Gratt. 1; Shirley *v.* Long, 6 Rand. 764; Durham *v.* Dunkly, 6 Rand. 135.

80. Twelves *v.* Nevill, 39 Ala. 175; Gaunt *v.* Tucker, 18 Ala. 27; Strong *v.* Brewer, 17 Ala. 706; Lyde *v.* Taylor, 17 Ala. 270; Adams *v.* Broughton, 13 Ala. 731; Spalding *v.* Grigg, 4 Ga. 75; Banks *v.* Marksberry, 3 Litt. (Ky.) 275; Alexander *v.* Burnet, 5 Rich. (S. C.)

or accompanied with actual delivery;[81] and slaves could also be mortgaged.[82] Slaves could be sold,[83] under some statutes by sale and delivery without deed or writing,[84] while under others a deed or writing was necessary,[85] which must be recorded to have effect against third persons,[86] but not as between the par-

189; Brown *v.* Wood, 6 Rich. Eq. (S. C.) 155; Miller *v.* Anderson, 4 Rich. Eq. (S. C.) 1.

81. *Alabama.*— McCullough *v.* Walker, 20 Ala. 389.

Kentucky.— Overfield *v.* Sutton, 1 Metc. 621; Enders *v.* Williams, 1 Metc. 346; Chadoin *v.* Carter, 12 B. Mon. 383; Mahan *v.* Mahan, 7 B. Mon. 579; Adair *v.* Smith, 5 B. Mon. 426; Howard *v.* Samples, 5 Dana 306; Pyle *v.* Maulding, 7 J. J. Marsh. 202; Worthington *v.* Kennedy, 1 A. K. Marsh. 163; Robinson *v.* Pitman, 2 Bibb 55; Gaunt *v.* Brockman, Hard. 331.

North Carolina.— Buie *v.* Parker, 63 N. C. 131; Branch *v.* Goddin, 60 N. C. 493; Cox *v.* Humphrey, 51 N. C. 405; Gordon *v.* Wilson, 49 N. C. 64; Roe *v.* Lovick, 43 N. C. 88; Overby *v.* Harris, 38 N. C. 253; Knight *v.* Wall, 19 N. C. 125; Alston *v.* Hamlin, 19 N. C. 115; Thompson *v.* Todd, 19 N. C. 63; Bennett *v.* Flowers, 18 N. C. 467; Hamlin *v.* Alston, 18 N. C. 479; Hill *v.* Hughes, 18 N. C. 336; Bullock *v.* Bullock, 17 N. C. 307; Dawson *v.* Dawson, 16 N. C. 93, 18 Am. Dec. 573; Morrow *v.* Williamson, 14 N. C. 263; Atkinson *v.* Clarke, 14 N. C. 171; Palmer *v.* Faucett, 13 N. C. 240; Justice *v.* Cobbs, 12 N. C. 469; Smith *v.* Yeates, 12 N. C. 302; Skinner *v.* Skinner, 7 N. C. 535.

Tennessee.— Overton *v.* Allen, 3 Head 440; Lawrence *v.* Lawrence, 2 Swan 141; Turner *v.* Grainger, 5 Humphr. 347; Deer *v.* Devin, 1 Humphr. 66; McKisick *v.* McKisick, Meigs 427; Neely *v.* Wood, 10 Yerg. 486; Davis *v.* Mitchell, 5 Yerg. 281; Hardeson *v.* Hays, 4 Yerg. 507; Batte *v.* Stone, 4 Yerg. 168.

Virginia.— Turner *v.* Turner, 1 Wash. 139.

United States.— Ramsay *v.* Lee, 4 Cranch 401, 2 L. ed. 660; Spiers *v.* Willison, 4 Cranch 398, 2 L. ed. 659.

See 44 Cent. Dig. tit. "Slaves," § 28.

In Louisiana a donation of slaves without estimation was void. Nor was the omission cured by delivery. Harlin *v.* Léglise, 3 Rob. 194; Williams *v.* Horton, 4 Mart. N. S. 464; Penny *v.* Toulouse, 11 La. 109.

82. *Alabama.*— Smith *v.* Pearson, 26 Ala. 603.

Kentucky.— Harris *v.* Hill, 11 B. Mon. 199.

Louisiana.— Fernandez *v.* Bein, 1 La. Ann. 32.

Maryland.— Clagett *v.* Salmon, 5 Gill & J. 314.

Missouri.— Dean *v.* Davis, 12 Mo. 112.

South Carolina.— Jaudon *v.* Gourdin, Rich. Eq. Cas. 246.

Tennessee.—Abram *v.* Johnson, 1 Head 120.

Texas.— Brightman *v.* Word, 37 Tex. 310.

See 44 Cent. Dig. tit. "Slaves," § 27.

83. *Alabama.*— Stone *v.* Watson, 37 Ala. 279.

Kentucky.— Jackson *v.* Holliday, 3 T. B. Mon. 363; Butt *v.* Caldwell, 4 Bibb 458.

Louisiana.— Thompson *v.* Touriac, 13 La. Ann. 605; Sémère *v.* Sémère, 12 La. Ann. 681; Carson *v.* Dwight, 5 Rob. 484; Dussin *v.* Charles, 1 Rob. 195; Gaillard *v.* Labat, 9 La. 17; Gottschalk *v.* De la Rosa, 6 La. 219; Smoot *v.* Baldwin, 1 Mart. N. S. 528.

Maryland.— Bayne *v.* Suit, 1 Md. 80.

Mississippi.— Fox *v.* Matthews, 33 Miss. 433; Cowen *v.* Boyce, 5 How. 769.

Missouri.— Amy *v.* Ramsey, 4 Mo. 505.

New York.— Kettletas *v.* Fleet, Anth. N. P. 52.

North Carolina.— McLean *v.* Nelson, 46 N. C. 396.

South Carolina.— Nowell *v.* O'Hara, 1 Hill 150.

Virginia.— Rives *v.* Farish, 24 Gratt. 125; Shue *v.* Turk, 15 Gratt. 256; Baird *v.* Bland, 5 Munf. 492.

United States.— Harris *v.* Runnels, 12 How. 79, 13 L. ed. 901; Corcoran *v.* Jones, 6 Fed. Cas. No. 3,229, 5 Cranch C. C. 607.

See 44 Cent. Dig. tit "Slaves," § 21.

An agreement with a slave to emancipate him for a certain sum was a sale.— Pauline *v.* Hubert, 14 La. Ann. 161.

In Mississippi it was unlawful to bring slaves into the state and sell them as merchandise. Doughty *v.* Owen, 24 Miss. 404; Brien *v.* Williamson, 7 How. 14; Martin *v.* Broadus, Freem. 35.

No particular words were legally requisite for the conveyance of a slave by a bill of sale. If the words clearly evidenced a sale, it was sufficient. Respass *v.* Lanier, 43 N. C. 281.

84. *Arkansas.*—Anderson *v.* Mills, 28 Ark. 175; Sadler *v.* Sadler, 16 Ark. 628.

Kentucky.— Logan *v.* Vance, Litt. Sel. Cas. 161; Defour *v.* Bourne, 4 Bibb 345.

Massachusetts.— Milford *v.* Bellingham, 16 Mass. 108.

North Carolina.— Mushat *v.* Brevard, 15 N. C. 73; Eppes *v.* McLemore, 14 N. C. 345; Choat *v.* Wright, 13 N. C. 289; Bateman *v.* Bateman, 6 N. C. 97.

Texas.— Castleman *v.* Sherry, 42 Tex. 59; McKinney *v.* Fort, 10 Tex. 220.

See 44 Cent. Dig. tit. "Slaves," § 21 *et seq.*

A parol sale without delivery was generally held invalid as to third persons (Hill *v.* McDonald, 1 Head (Tenn.) 383; Payne *v.* Lassiter, 10 Yerg. (Tenn.) 507), but as between the parties, actual delivery was not essential to the validity of a sale of a slave (Griffin *v.* Chubb, 7 Tex. 603, 58 Am. Dec. 85).

85. Pelham *v.* The Messenger, 16 La. Ann. 99; Barbin *v.* Gaspard, 15 La. Ann. 539; Gill *v.* Phillips, 6 Mart. N. S. (La.) 298; Adams *v.* Gaynard, 5 Mart. N. S. (La.) 248; Harper *v.* Destrehan, 2 Mart. N. S. (La.) 389; Miltenberger *v.* Canon, 10 Mart. (La.) 85.

86. Buel *v.* New York Steamer, 17 La. 541; Armistead *v.* Bowden, 5 La. 263, 25 Am. Dec. 178; Williams *v.* Hagan, 2 La. 122; Cheney *v.* Duke, 10 Gill & J. (Md.) 11; Dorsey *v.*

ties,[87] and the general rules governing warranties, latent defects, and rescission of sales[88] applied.[89] A sale of slaves after slavery was abolished was an absolute nullity;[90] but no retroactive force was attributed to the subsequent emancipation of slaves and abolition of slavery, so as to make a prior sale unlawful.[91]

C. Hiring and Loan. Slaves could be loaned,[92] or hired out,[93] or pledged

Gassaway, 2 Harr. & J. (Md.) 402, 3 Am. Dec. 557.

87. Goodwin *v.* Morgan, 1 Stew. (Ala.) 278.

88. See SALES, 35 Cyc. 1.

89. Coulon *v.* Semmes, 17 La. Ann. 119; Carreta *v.* Lopez, 15 La. Ann. 64; Roquest *v.* Boutin, 14 La. Ann. 44; Thompson *v.* Touriac, 13 La. Ann. 605; Cornish *v.* Shelton, 12 La. Ann. 415; McCay *v.* Chambliss, 12 La. Ann. 412; White *v.* Hill, 10 La. Ann. 189; Terrebonne *v.* Walsh, 7 La. Ann. 61; Hough *v.* Vickers, 6 La. Ann. 724; Taylor *v.* Rostrop, 3 La. Ann. 100; Robert *v.* De St. Romes, 2 La. Ann. 135; Johnson *v.* Johnson, 2 La. Ann. 67; Musson *v.* Clayton, 1 La. Ann. 122; Kettletas *v.* Fleet, Anth. N. P. (N. Y.) 52; Ketletas *v.* Fleet, 7 Johns. (N. Y.) 324.

For cases relating to warranty as to personal qualities or character of slaves sold see Athey *v.* Olive, 34 Ala. 711; Caldwell *v.* Wallace, 4 Stew. & P. (Ala.) 282; Thompson *v.* Bertrand, 23 Ark. 730; Tatum *v.* Mohr, 21 Ark. 349; Hambright *v.* Stover, 31 Ga. 300; Dean *v.* Traylor, 8 Ga. 169; Nelson *v.* Biggers, 6 Ga. 205; Banfield *v.* Bruton, 7 B. Mon. (Ky.) 108; Brownston *v.* Cropper, 1 Litt. (Ky.) 173; McAllister *v.* Burton, 20 La. Ann. 205; Buie *v.* Kendig, 15 La. Ann. 440; McLean *v.* Fulford, 14 La. Ann. 711; Deloach *v.* Elder, 14 La. Ann. 662; Riggin *v.* Kendig, 12 La. Ann. 451; McCay *v.* Chambliss, 12 La. Ann. 412; McLellan *v.* Williams, 11 La. Ann. 721; Buhler *v.* McHatton, 9 La. Ann. 192; Demoruelle *v.* Sugg, 7 La. Ann. 42; Walker *v.* Ferriere, 6 La. Ann. 278; Bertrand *v.* Arcueil, 4 La. Ann. 430; Anderson *v.* Dacosta, 4 La. Ann. 136; Lobdell *v.* Burke, 5 Rob. (La.) 93; Lyons *v.* Kenner, 2 Rob. (La.) 50; Briant *v.* Marsh, 19 La. 391; Herries *v.* Botts, 14 La. 432; Behan *v.* Faures, 12 La. 211; Ory *v.* David, 9 La. 59; Icar *v.* Suares, 7 La. 517; Lewis *v.* Casenave, 6 La. 437; Xenes *v.* Taquino, 7 Mart. N. S. (La.) 678; Thompson *v.* Milburn, 1 Mart. N. S. (La.) 468; Reynaud *v.* Guillotte, 1 Mart. N. S. (La.) 227; St. Romes *v.* Pore, 10 Mart. (La.) 30, 203; Maurin *v.* Martinez, 5 Mart. (La.) 432; Zanico *v.* Habine, 5 Mart. (La.) 372; Dewees *v.* Morgan, 1 Mart. (La.) 1; Herndon *v.* Bryant, 39 Miss. 335; Shewalter *v.* Ford, 34 Miss. 417; James *v.* Herring, 12 Sm. & M. (Miss.) 336; Thompson *v.* Botts, 8 Mo. 710; Sloan *v.* Gibson, 4 Mo. 32; March *v.* Phelps, 61 N. C. 560; McLean *v.* Waddill, 50 N. C. 137; Harrell *v.* Norvill, 50 N. C. 29; Bell *v.* Jeffreys, 35 N. C. 356; Simpson *v.* McKay, 34 N. C. 141; Sloan *v.* Williford, 25 N. C. 307; Ayres *v.* Parks, 10 N. C. 59; Stucky *v.* Clyburn, Cheves (S. C.) 186, 34 Am. Dec. 590; Venning *v.* Gantt, Cheves (S. C.) 87; Lyles *v.* Bass, Cheves (S. C.) 85; Owens *v.* Ford, Harp. (S. C.) 25; Piper *v.* Stinson, 3 McCord (S. C.) 251; Smith *v.* McCall, 1 McCord (S. C.) 220, 10 Am. Dec. 666; Lowry *v.* McBurney, 1 Mill (S. C.) 237; Limehouse *v.* Gray, 3 Brev. (S. C.) 231; Farnsworth *v.* Earnest, 7 Humphr. (Tenn.) 24; Gilliam *v.* Bransford, 4 Humphr. (Tenn.) 398; Howell *v.* Cowles, 6 Gratt. (Va.) 393.

The subsequent emancipation of slaves by statute was not a breach of warranty of title. — Fitzpatrick *v.* Hearne, 44 Ala. 171, 6 Am. Rep. 128; Haskill *v.* Sevier, 25 Ark. 152; Walker *v.* Gatlin, 12 Fla. 9; Bass *v.* Ware, 34 Ga. 386; Hand *v.* Armstrong, 34 Ga. 232; Porter *v.* Ralston, 6 Bush (Ky.) 665; Wilkinson *v.* Cook, 44 Miss. 367; Blewett *v.* Evans, 42 Miss. 804; Phillips *v.* Evans, 38 Mo. 305; West *v.* Hall, 64 N. C. 43; Johnson *v.* Johnson, 2 Heisk. (Tenn.) 521; Curd *v.* Bonner, 4 Coldw. (Tenn.) 632; McDaniel *v.* White, 32 Tex. 488.

90. Smith *v.* Henderson, 23 La. Ann. 649; Satterfield *v.* Spurlock, 21 La. Ann. 771; Fenn *v.* Carr, 19 La. Ann. 106. But see Harrell *v.* Watson, 63 N. C. 454.

91. Harrell *v.* Watson, 63 N. C. 454. And see Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25.

92. Farrow *v.* Bragg, 30 Ala. 261; Stubblefield *v.* Oden, 9 Ala. 651; Hallum *v.* Yourie, 1 Sneed (Tenn.) 369; Finch *v.* Rogers, 11 Humphr. (Tenn.) 559; Wade *v.* Green, 3 Humphr. (Tenn.) 547.

93. *Alabama.*— Buford *v.* Tucker, 44 Ala. 89; Jemison *v.* Dearing, 41 Ala. 283; Leslie *v.* Langham, 40 Ala. 524; Tillman *v.* Chadwick, 37 Ala. 317; Harris *v.* Maury, 30 Ala. 679; Farrow *v.* Bragg, 30 Ala. 261; Smith *v.* Pearson, 26 Ala. 603; Petty *v.* Gayle, 25 Ala. 472; McNeill *v.* Easley, 24 Ala. 455; Seay *v.* Marks, 23 Ala. 532; Nesbitt *v.* Drew, 17 Ala. 379; Leach *v.* West, 16 Ala. 250; Wier *v.* Buford, 8 Ala. 134; Hogan *v.* Carr, 6 Ala. 471; Ricks *v.* Dillahunty, 8 Port. 133; Perry *v.* Hewlett, 5 Port. 318; Outlaw *v.* Cook, Minor 257; Meeker *v.* Childress, Minor 109.

Arkansas.— Rheubottom *v.* Sadler, 19 Ark. 491; Alston *v.* Balls, 12 Ark. 664; Collins *v.* Woodruff, 9 Ark. 463.

Georgia.— Wilkes *v.* Hughes, 37 Ga. 361; Middlebrook *v.* Nelson, 34 Ga. 506; Brooks *v.* Cook, 20 Ga. 87; Curry *v.* Gaulden, 17 Ga. 72; Latimer *v.* Alexander, 14 Ga. 259; Lennard *v.* Boynton, 11 Ga. 109.

Kentucky.— Mundy *v.* Robinson, 4 Bush 342; Noland *v.* Golden, 3 Bush 84; Hughes *v.* Todd, 2 Duv. 188; Carney *v.* Walden, 16 B. Mon. 388; Moore *v.* Foster, 10 B. Mon. 255; Swigert *v.* Graham, 7 B. Mon. 661; Lexington, etc., R. Co. *v.* Kidd, 7 Dana 245.

Mississippi.— Harmon *v.* Fleming, 25 Miss. 135.

Missouri.— Caldwell *v.* Dickson, 17 Mo. 575; Dudgeon *v.* Teass, 9 Mo. 867.

New York.— Livingston *v.* Bain, 10 Wend.

as security for a debt,[94] in like manner as other chattels,[95] and the hiring might similarly be rescinded or terminated.[96] The borrower or hirer was responsible for loss [97] or conversion of the slave,[98] or for wrongfully chastising or injuring,[99]

384; Demyer *v.* Souzer, 6 Wend. 436; Cook *v.* Husted, 12 Johns. 188.

North Carolina.— Woodfin *v.* Sluder, 61 N. C. 200; Hurdle *v.* Richardson, 52 N. C. 16; Johnson *v.* Dunn, 51 N. C. 122; Poyner *v.* McRae, 50 N. C. 276; Green *v.* Dibble, 46 N. C. 332; Sample *v.* Bell, 44 N. C. 338; Abrams *v.* Suttles, 44 N. C. 99; Jones *v.* Allen, 27 N. C. 473; Williams *v.* Jones, 6 N. C. 54; Ragland *v.* Cross, 4 N. C. 219.

South Carolina.— Muldrow *v.* Wilmington, etc., R. Co., 13 Rich. 69; Peake *v.* Scaife, 11 Rich. 672; Gourdin *v.* West, 11 Rich. 288; White *v.* Arnold, 6 Rich. 138; Antonio *v.* Clissey, 3 Rich. 201; Wilder *v.* Richardson, Dudley 323; Corley *v.* Cleckley, Dudley 35; Wells *v.* Kennerly, 4 McCord 123; Colcock *v.* Goode, 3 McCord 513; Manning *v.* Norwood, 2 Mill 374.

Tennessee.— Topp *v.* White, 12 Heisk. 165; Taylor *v.* Mayhew, 11 Heisk. 596; Wiseman *v.* Russey, 7 Coldw. 233; Gholson *v.* Blackman, 4 Coldw. 580; Coward *v.* Thompson, 4 Coldw. 442; Abernathy *v.* Black, 2 Coldw. 314; Memphis, etc., R. Co. *v.* Jones, 2 Head 517; Dickinson *v.* Cruise, 1 Head 258; Price *v.* Allen, 9 Humphr. 703; Wharton *v.* Thompson, 9 Yerg. 45; Hicks *v.* Parham, 3 Hayw. 224, 9 Am. Dec. 745.

Texas.— Tobler *v.* Stubblefield, 32 Tex. 188; Johnston *v.* Davis, 32 Tex. 250; Scherer *v.* Upton, 31 Tex. 617; Eborn *v.* Chote, 22 Tex. 32; Townsend *v.* Hill, 18 Tex. 422; McLemore *v.* McClellan, 17 Tex. 122.

Virginia.— Harvey *v.* Skipworth, 16 Gratt. 410; Howell *v.* Cowles, 6 Gratt. 393; Isbell *v.* Norvell, 4 Gratt. 176; George *v.* Elliott, 2 Hen. & M. 5.

United States.— Janes *v.* Buzzard, 13 Fed. Cas. No. 7,206*a*, Hempst. 240; Martin *v.* Bartow Iron Works, 16 Fed. Cas. No. 9,157, 35 Ga. 320; Scott *v.* Bartleman, 21 Fed. Cas. No. 12,524, 2 Cranch C. C. 313.

See 44 Cent. Dig. tit. "Slaves," § 30 *et seq.*

But not after emancipation.— Wise *v.* Hill, 22 La. Ann. 469.

94. Houton *v.* Holliday, 6 N. C. 111, 5 Am. Dec. 522.

95. The bailee of a slave on hire was bound to bestow that degree of care and attention which a humane master would bestow on his own servant under like circumstances (Tallahassee R. Co. *v.* Macon, 8 Fla. 299; Trotter *v.* McCall, 26 Miss. 410; Dement *v.* Scott, 2 Head (Tenn.) 367, 75 Am. Dec. 747; Lunsford *v.* Baynham, 10 Humphr. (Tenn.) 267; McGee *v.* Currie, 4 Tex. 217), and the hirer must supply all necessaries, including medical aid, which a good master ought to furnish (Tillman *v.* Cbadwick, 37 Ala. 317; Alabama, etc., R. Co. *v.* Burke, 27 Ala. 535; Sims *v.* Knox, 18 Ala. 236; Gibson *v.* Andrews, 4 Ala. 66; Watkins *v.* Bailey, 21 Ark. 274; Brooks *v.* Cook, 20 Ga. 87; Latimer *v.* Alexander, 14 Ga. 259; Redding *v.* Hall, 1 Bibb (Ky.) 536; Jones *v.* Allen, 27 N. C. 473; Haywood *v.* Long, 27 N. C. 438; Tennant *v.* Dendy, Dudley (S. C.) 83; James *v.* Carper, 4 Sneed (Tenn.) 397; Young *v.* Forgey, 4 Hayw. (Tenn.) 10); but where there was a general hiring of a slave for a particular employment, no more particular superintendency was due from the hirer than a prudent man would use to his own slave (Kelly *v.* White, 17 B. Mon. (Ky.) 124).

96. *Alabama.*—McGehee *v.* Mahone, 37 Ala. 258; Wilkinson *v.* Moseley, 30 Ala. 562; Rasco *v.* Willis, 5 Ala. 38.

Georgia.— Crook *v.* Garrett, 20 Ga. 664.

Kentucky.— Reading *v.* Price, 3 J. J. Marsh. 61, 19 Am. Dec. 162; James *v.* Neal, 3 T. B. Mon. 369.

Mississippi.— Trotter *v.* McCall, 26 Miss. 410.

Tennessee.— Dement *v.* Scott, 2 Head 367, 75 Am. Dec. 747.

See 44 Cent. Dig. tit. "Slaves," § 32.

97. *Georgia.*— Curry *v.* Gaulden, 17 Ga. 72.

Kentucky.— Meekin *v.* Thomas, 17 B. Mon. 710; Swigert *v.* Graham, 7 B. Mon. 661; Bakewell *v.* Talbot, 4 Dana 216.

Louisiana.— Beverley *v.* The Empire, 15 La. Ann. 432.

Mississippi.— Young *v.* Thompson, 3 Sm. & M. 129.

Missouri.— Beardslee *v.* Perry, 14 Mo. 88; Ellett *v.* Bobb, 6 Mo. 323.

Tennessee.—Bowling *v.* Stratton, 8 Humphr. 430.

See 44 Cent. Dig. tit. "Slaves," § 33 *et seq.*

If the bailment was advantageous to the bailor only, gross negligence on the part of the bailee must be shown to make him liable. Bakewell *v.* Talbot, 4 Dana (Ky.) 216.

98. Fail *v.* McArthur, 31 Ala. 26; Moseley *v.* Wilkinson, 24 Ala. 411; Parker *v.* Thompson, 5 Sneed (Tenn.) 349; Bedford *v.* Flowers, 11 Humphr. (Tenn.) 242; Lunsford *v.* Baynham, 10 Humphr. (Tenn.) 267.

99. *Alabama.*— Jones *v.* Fort, 36 Ala. 449; Nelson *v.* Bondurant, 26 Ala. 341; Williams *v.* Taylor, 4 Port. 234.

Florida.— Kelly *v.* Wallace, 6 Fla. 690; Forsyth *v.* Perry, 5 Fla. 337.

Georgia.— Latimer *v.* Alexander, 14 Ga. 259; Gorman *v.* Campbell, 14 Ga. 137.

Kentucky.— Louisville, etc., R. Co. *v.* Vandell, 17 B. Mon. 586; Kelly *v.* White, 17 B. Mon. 124; Craig *v.* Lee, 14 B. Mon. 119; Hawkins *v.* Phythian, 8 B. Mon. 515; Swigert *v.* Graham, 7 B. Mon. 661.

North Carolina.— Lane *v.* Washington, 53 N. C. 248; State *v.* Mann, 13 N. C. 263.

Tennessee.— Parker *v.* Thompson, 5 Sneed 349; James *v.* Carper, 4 Sneed 397; Yeatman *v.* Hart, 6 Humphr. 375.

Texas.— Pridgen *v.* Buchannon, 24 Tex. 655; Mims *v.* Mitchell, 1 Tex. 443.

Virginia.— Harvey *v.* Skipworth, 16 Gratt. 393.

See 44 Cent. Dig. tit. "Slaves," § 35.

or killing or causing the death of the slave;[1] and the hirer was responsible for the hire of the slave and for breach of his contract of hiring in like manner as in any case of hiring of chattels.[2]

V. FUGITIVE SLAVE LAWS.

In many states statutes were passed known generally as fugitive slave laws having for an object the prevention of the escape of slaves and their reclamation, and the punishment of those who aided or assisted a slave to escape or harbored him.[3] Furthermore the United States constitution[4] guaranteed to the owner of an escaped slave the right of reclamation,[5] and the constitution did not leave the enforcement of the provisions for the reclamation of slaves solely with the states, but it vested that power in the federal government.[6] Thus similar statutes were passed by the federal government, the principal ones in 1793 and 1850, the latter known specifically as The Fugitive Slave Law,[7] and these were held not repugnant

This was a kind of bailment where the greatest care and attention were necessary to discharge the bailee in case of loss. De Tollenere *v.* Fuller, 1 Mill (S. C.) 117, 12 Am. Dec. 616.

1. *Alabama.*—Wilkinson *v.* Moseley, 30 Ala. 562; Hooks *v.* Smith, 18 Ala. 338; Wilkinson *v.* Moseley, 18 Ala. 288; Williams *v.* Taylor, 4 Port. 234.

Florida.— Pensacola, etc., R. Co. *v.* Nash, 12 Fla. 497; Kelly *v.* Wallace, 6 Fla. 690.

Georgia.— Collins *v.* Hutchins, 21 Ga. 270; Latimer *v.* Alexander, 14 Ga. 259; Gorman *v.* Campbell, 14 Ga. 137.

Kentucky.— Craig *v.* Lee, 14 B. Mon. 119.

Louisiana.— Hudson *v.* Grout, 5 Rob. 499; Taylor *v.* Andrus, 16 La. 15; Niblett *v.* White, 7 La. 253.

Maryland.— Clagett *v.* Speake, 4 Harr. & M. 162.

Mississippi.— Wallace *v.* Seales, 36 Miss. 53.

North Carolina.— Allison *v.* Western North Carolina R. Co., 64 N. C. 382; Couch *v.* Jones, 49 N. C. 402; Bell *v.* Bowen, 46 N. C. 316; Biles *v.* Holmes, 33 N. C. 16.

South Carolina.— Richardson *v.* Dingle, 11 Rich. 405; Duncan *v.* South Carolina R. Co., 2 Rich. 613; McDaniel *v.* Emanuel, 2 Rich. 455; McLauchlin *v.* Lomas, 3 Strobh. 85; Wise *v.* Freshly, 3 McCord 547; De Tollenere *v.* Fuller, 1 Mill 117, 12 Am. Dec. 616.

Tennessee.— Dement *v.* Scott, 2 Head 367, 75 Am. Dec. 747; White *v.* Harmond, 3 Sneed 322.

Texas.— Callihan *v.* Johnson, 22 Tex. 596; Echols *v.* Dodd, 20 Tex. 190; Robinson *v.* Varnell, 16 Tex. 382; Mills *v.* Ashe, 16 Tex. 295; Mitchell *v.* Mims, 8 Tex. 6; Sims *v.* Chance, 7 Tex. 561.

Virginia.— Harvey *v.* Epes, 12 Gratt. 153; Spencer *v.* Pilcher, 8 Leigh 565.

See 44 Cent. Dig. tit. "Slaves," § 35.

2. *Alabama.*— Tilman *v.* Chadwick, 37 Ala. 317; Howard *v.* Coleman, 36 Ala. 721; Jones *v.* Fort, 36 Ala. 449; Hall *v.* Goodson, 32 Ala. 277; Alabama, etc., R. Co. *v.* Burke, 27 Ala. 535; Nelson *v.* Bondurant, 26 Ala. 341.

Georgia.— Brooks *v.* Cook, 20 Ga. 87.

Kentucky.— Griswold *v.* Taylor, 1 Metc. 228; Craig *v.* Lee, 14 B. Mon. 119; Swigert *v.* Graham, 7 B. Mon. 661.

Louisiana.— Ross' Succession, 22 La. Ann. 480; Lytle *v.* Whicher, 21 La. Ann. 182; Thomas *v.* Hacket, 21 La. Ann. 164; Ford *v.* Simmons, 13 La. Ann. 397; Downey *v.* Stacey, 1 La. Ann. 426.

Mississippi.— Trotter *v.* McCall, 26 Miss. 410.

Missouri.— Peters *v.* Clause, 37 Mo. 337; Major *v.* Harrison, 21 Mo. 441; Adams *v.* Childers, 10 Mo. 778.

North Carolina.—Bond *v.* McBoyle, 52 N. C. 1; Knox *v.* North Carolina R. Co., 51 N. C. 415; Slocumb *v.* Washington, 51 N. C. 357; White *v.* Brown, 47 N. C. 403.

South Carolina.— Bailey *v.* Greenville, etc., R. Co., 2 S. C. 312; Richardson *v.* Dingle, 11 Rich. 405; Knight *v.* Knotts, 8 Rich. 35; Helton *v.* Caston, 2 Bailey 95.

Tennessee.— Traynor *v.* Johnson, 3 Head 44; Runyan *v.* Caldwell, 7 Humphr. 134; Horsely *v.* Branch, 1 Humphr. 199.

Texas.— Hall *v.* Keese, 31 Tex. 504; Pridgen *v.* Buchannon, 27 Tex. 589; Willis *v.* Harris, 26 Tex. 136; Southern Pac. R. Co. *v.* Dial, 25 Tex. 681; Birge *v.* Wanhop, 21 Tex. 478; Young *v.* Lewis, 9 Tex. 73; Alford *v.* Cochrane, 7 Tex. 485.

Virginia.— Harvey *v.* Epes, 12 Gratt. 153; Isbell *v.* Norvell, 4 Gratt. 176; Spencer *v.* Pilcher, 8 Leigh 565.

United States.— Emerson *v.* Howland, 8 Fed. Cas. No. 4,441, 1 Mason 45; Janes *v.* Buzzard, 13 Fed. Cas. No. 7,206*a*, Hempst. 240.

See 44 Cent. Dig. tit. "Slaves," § 36.

3. See the statutes. And see *In re* Perkins, 2 Cal. 424; Elliott *v.* Gibson, 10 B. Mon. (Ky.) 438; Church *v.* Chambers, 3 Dana (Ky.) 274; State *v.* Fuller, 14 La. Ann. 720; Landry *v.* Klopman, 13 La. Ann. 345; *In re* Opinions of Justices, 46 Me. 561; Shelton *v.* Baldwin, 26 Miss. 439; Lemmon *v.* People, 20 N. Y. 562; Righton *v.* Wood, Dudley (S. C.) 164; State *v.* Brown, 2 Speers (S. C.) 129.

4. U. S. Const. art. 4, § 2.

5. *Ex p.* Bushnell, 9 Ohio St. 77.

6. Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469.

7. See *In re* Martin, 16 Fed. Cas. No. 9,154, 2 Paine 348; *Ex p.* Simmons, 22 Fed. Cas. No. 12,863, 4 Wash. 396; U. S. *v.* Morris, 26 Fed. Cas. No. 15,811; *Ex p.* Van Orden, 28

to the constitution;[8] and, indeed, in many instances, the state laws facilitating the recapture of fugitive slaves found within the limits of that state were held void because they assumed to legislate on subject-matter over which congress had exclusive jurisdiction,[9] although in others similar acts not in conflict with the United States legislation were upheld.[10] The citizen of a slave state had a right, under the constitution and laws of the Union, to have his fugitive slave delivered upon claim being made, and no state could defeat or obstruct this right,[11] and no person had a right to oppose the master in reclaiming his slave, or to demand proof of his property;[12] and under the constitution the master or his agent had a right to seize, without warrant, his slave in any state where he might be found, if he could do so without a breach of the peace,[13] using as much force as was necessary to carry him back to his residence,[14] or he could enforce his right in the appropriate court, usually a magistrate's court, by warrant and commitment or certificate;[15] and some statutes provided for the sale of appre-

Fed. Cas. No. 16,870, 3 Blatchf. 166; Worthington *v.* Preston, 30 Fed. Cas. No. 18,055, 4 Wasb. 461.

Act Cong. (1850) c. 60, § 7, provided that any person who should harbor or conceal any fugitive from service or labor, escaping from one state into another, so as to prevent his discovery and arrest, after notice or knowledge that he was such a fugitive, should be subject to a fine not exceeding one thousand dollars, and, on indictment and conviction, to imprisonment not exceeding six months, and should forfeit and pay, by way of civil damages, to the party injured, the sum of one thousand dollars for each fugitive so lost, to be recovered by action of debt. This statute repealed by implication Act (1793), c. 7, § 4, which provided that any person who should harbor or conceal any such fugitive after notice that he was such a fugitive from labor should forfeit and pay to the claimant the sum of five hundred dollars, to be recovered by action of debt, saving also to the claimant his right of action for any damages sustained, and barred all actions pending under said act of 1793 at the time of the repeal. Norris *v.* Crocker, 13 How. (U. S.) 429, 14 L. ed. 210.

The law of 1850 was applicable to the District of Columbia.— U. S. *v.* Copeland, 25 Fed. Cas. No. 14,865*a*, 2 Hayw. & H. 402.

8. *Massachusetts.*— *In re* Sims, 7 Cush. 285.
New York.— Henry *v.* Lowell, 16 Barb. 268.
Ohio.— *Ex p.* Bushnell, 9 Ohio St. 77.
Pennsylvania.—Com. *v.* Clellans, 4 Pa. L. J. Rep. 92.
United States.— Ableman *v.* Booth, 21 How. 506, 16 L. ed. 169; Moore *v.* Illinois, 14 How. 13, 14 L. ed. 306; Jones *v.* Van Zandt, 5 How. 215, 12 L. ed. 122; Prigg *v.* Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Jones *v.* Van Zandt, 10 Fed. Cas. No. 7,502, 2 McLean 611; *In re* Long, 15 Fed. Cas. No. 8,478; *In re* Martin, 16 Fed. Cas. No. 9,154, 2 Paine 348; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469; *In re* Susan, 23 Fed. Cas. No. 13,632, 2 Wheeler Cr. Cas. (N. Y.) 594; U. S. *v.* Scott, 27 Fed. Cas. No. 16,240*b* [*following* Prigg *v.* Pennsylvania, 16 Pet. 539, 10 L. ed. 1060]; Vaughan *v.* Williams, 28 Fed. Cas. No. 16,903, 3 McLean 530; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,261, 1 Blatchf. 635.
See 44 Cent. Dig. tit. "Slaves," § 39 *et seq.*
But see *In re* Booth, 3 Wis. 1.

The provisions of Fugitive Slave Act, Sept. 18, 1850, § 10 (9 U. S. St. at L. 462), was clearly prospective, and inapplicable to the case of an escape occurring before the passage of the act. *Ex p.* Davis, 7 Fed. Cas. No. 3,613.

9. *Illinois.*— Thornton's Case, 11 Ill. 332.
Indiana.— Donnell *v.* State, 3 Ind. 480; Graves *v.* State, 1 Ind. 368; Graves *v.* State, Smith 258.
New York.— Matter of Kirk, 1 Edm. Sel. Cas. 315; Jack *v.* Martin, 12 Wend. 311 [*affirmed* in 14 Wend. 507]; Matter of Kirk, 1 Park. Cr. 67.
Ohio.— Vaughan *v.* Williams, 1 Ohio Dec. (Reprint) 160, 3 West. L. J. 65.
Pennsylvania.— Von Metre *v.* Mitchell, 7 Pa. L. J. 115.
See 44 Cent. Dig. tit. "Slaves," § 39 *et seq.*

10. *In re* Opinion of Justices, 41 N. H. 553; *Ex p.* Ammons, 34 Ohio St. 518.

11. Neal *v.* Farmer, 9 Ga. 555; Jack *v.* Martin, 12 Wend. (N. Y.) 311 [*affirmed* in 14 Wend. 507]; Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469.

12. Reeder *v.* Anderson, 4 Dana (Ky.) 193; Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

13. Com. *v.* Aves, 18 Pick. (Mass.) 193; Com. *v.* Griffith, 2 Pick. (Mass.) 11; Com. *v.* Taylor, 10 Pa. L. J. 258; Com. *v.* Wilson, 10 Pa. L. J. 90; *Ex p.* Garnett, 10 Fed. Cas. No. 5,243; Prigg *v.* Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; Giltner *v* Gorham, 10 Fed. Cas. No. 5,453, 4 McLean 402; *In re* Martin, 16 Fed. Cas. No. 9,154, 2 Paine 348; Norris *v.* Newton, 18 Fed. Cas. No. 10,307, 5 McLean 92; Weimer *v.* Sloane, 29 Fed. Cas. No. 17,363, 6 McLean 259. But see Matter of Belt, 1 Park. Cr. (N. Y.) 169.

It was lawful to track runaway negroes with dogs provided it be done with a due degree of caution and circumspection. Moran *v.* Davis, 18 Ga. 722.

14. Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

15. *Alabama.*— Turner *v.* Thrower, 5 Port. 43.

hended fugitive slaves after a stated period and upon publication of their commitment, the sale being for the benefit of the owner and to pay for the slave's keep.[16]

VI. REGULATION OF SLAVES, FREEDMEN, AND OTHER NEGROES.

A. Exclusion and Importation. Many statutes were passed to prevent the immigration of free negroes into the several states, and making the coming into the state a penal offense,[17] and the importation of slaves into many of the states was a punishable offense even though from one state to another,[18] the provision of the United States constitution[19] which restrained congress from prohibiting the importation of slaves not applying to the state governments.[20]

Kentucky.— Jones *v.* Com., 2 Duv. 81; Bullitt *v.* Clement, 16 B. Mon. 193; Jarrett *v.* Higbee, 5 T. B. Mon. 546.

Maryland.— Somervell *v.* Hunt, 3 Harr. & M. 113.

Pennsylvania.— Morgan *v.* Reakirt, 6 Pa. L. J. 228, 4 Pa. L. J. Rep. 6.

Tennessee.— Sidney *v.* White, 1 Sneed 91.

Virginia.— Dabney *v.* Taliaferro, 4 Rand. 256.

United States.— *Ex p.* Davis, 7 Fed. Cas. No. 3,613; *Ex p.* Garnet, 10 Fed. Cas. No. 5,243; *In re* Martin, 16 Fed. Cas. No. 9,154, 2 Paine 348; Miller *v.* McQuerry, 17 Fed. Cas. No. 9,583, 5 McLean 469; Norris *v.* Newton, 18 Fed. Cas. No. 10,307, 5 McLean 92; Richardson's Case, 20 Fed. Cas. No. 11,778, 5 Cranch C. C. 338; U. S. *v.* Morris, 26 Fed. Cas. No. 15,811; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,261, 1 Blatchf. 635.

See 44 Cent. Dig. tit. "Slaves," § 40 *et seq.*

A search warrant could not be issued to seize slaves which another had enticed away and was harboring. Cohoon *v.* Speed, 47 N. C. 133; State *v.* Mann, 27 N. C. 45; State *v.* McDonald, 14 N. C. 468.

16. See the statutes. And see Fields *v.* Walker, 23 Ala. 155; Turner *v.* Thrower, 5 Port. (Ala.) 43; Landry *v.* Klopman, 13 La. Ann. 345; Wright *v.* Harman, 5 Mart. N. S. (La.) 235; Morgan *v.* Mitchell, 3 Mart. N. S. (La.) 576; Labranche *v.* Watkins, 4 Mart. (La.) 391; Hutchins *v.* Lee, Walk. (Miss.) 293.

17. See the statutes. And see the following cases:

Delaware.— Socum *v.* State, 1 Houst. 204 (Rev. Code, p. 144, c. 52, § 2); Proctor *v.* State, 5 Harr. 387 (Act March 15, 1851); *In re* Burr, 5 Harr. 351; Sipple *v.* Adams, 5 Harr. 149 (St. (1841) Dig. p. 410.

Georgia.— Ponder *v.* Cox, 26 Ga. 485.

Illinois.— Nelson *v.* People, 33 Ill. 390 (Act Feb. 12, 1853); Glenn *v.* People, 17 Ill. 105.

Indiana.— State *v.* Curzy, 19 Ind. 430; Bowles *v.* State, 13 Ind. 427; Barkshire *v.* State, 7 Ind. 389, 65 Am. Dec. 738 (Const. (1851) art. 13); Hickland *v.* State, 8 Blackf. 365 (Act Sept. 1, 1831); Baptiste *v.* State, 5 Blackf. 283.

Mississippi.— Heirn *v.* Bridault, 37 Miss. 209.

North Carolina.— State *v.* Jacobs, 47 N. C. 52, penalty five hundred dollars.

South Carolina.— Calder *v.* Deliesseline, Harp. 186.

Virginia.— *Ex p.* Morris, 11 Gratt. 292; Com. *v.* Pleasant, 10 Leigh 697.

United States.— The Wilson *v.* U. S., 30 Fed. Cas. No. 17,846, 1 Brock. 423.

See 44 Cent. Dig. tit. "Slaves," § 43 *et seq.*

18. *Georgia.*— State *v.* Couper, T. U. P. Charlt. 306.

Kentucky.— Com. *v.* Young, 7 B. Mon. 1; Com. *v.* Griffin, 3 B. Mon. 208; Com. *v.* Jackson, 2 B. Mon. 402; Com. *v.* Greathouse, 7 J. J. Marsh. 590; Com. *v.* Griffin, 7 J. J. Marsh. 588; Speaks *v.* Adam, 2 Bibb 305.

Louisiana.— Cotton *v.* Brien, 6 Rob. 115.

Maryland.— Negro Peggy *v.* Wilson, 9 Gill & J. 169; Baptiste *v.* De Volumbrun, 5 Harr. & J. 86; Negro Harry *v.* Lyles, 4 Harr. & M. 215.

Mississippi.— Holman *v.* Murdock, 34 Miss. 275; Planters' Bank *v.* Conger, 12 Sm. & M. 527; James *v.* Herring, 12 Sm. & M. 336; Wooten *v.* Miller, 7 Sm. & M. 380; Hope *v.* Evans, 4 Sm. & M. 321; Green *v.* Robinson, 5 How. 80.

New York.— Dubois *v.* Allen, Anth. N. P. 128.

Virginia.—Montgomery *v.* Fletcher, 6 Rand. 612; McMichen *v.* Amos, 4 Rand. 134; Sallust *v.* Ruth, 4 Rand. 67; South *v.* Solomon, 6 Munf. 12; Murray *v.* McCarty, 2 Munf. 393.

United States.— Bell *v.* Rhodes, 3 Fed. Cas. No. 1,264, 1 Hayw. & H. 103 [*affirmed* in 2 How. 397, 11 L. ed. 314]; Crawford *v.* Slye, 6 Fed. Cas. No. 3,371, 4 Cranch C. C. 457; Daniel *v.* Kincheloe, 6 Fed. Cas. No. 3,561, 2 Cranch C. C. 295; Davis *v.* Baltzer, 7 Fed. Cas. No. 3,625, 1 Cranch C. C. 482; Delilah *v.* Jacobs, 7 Fed. Cas. No. 3,773, 4 Cranch C. C. 238; Penwick *v.* Tooker, 8 Fed. Cas. No. 4,735, 4 Cranch C. C. 641; Foster *v.* Simmons, 9 Fed. Cas. No. 4,983, 1 Cranch C. C. 316; Harris *v.* Alexander, 11 Fed. Cas. No. 6,113, 4 Cranch C. C. 1; Jordan *v.* Sawyer, 13 Fed. Cas. No. 7,521, 2 Cranch C. C. 373; Lee *v.* Lee, 15 Fed. Cas. No. 8,194, 4 Cranch C. C. 643; Maria *v.* White, 16 Fed. Cas. No. 9,076, 3 Cranch C. C. 663.

See 44 Cent. Dig. tit. "Slaves," § 44 *et seq.*

Particularly criminal slaves.— State *v.* Williams, 7 Rob. (La.) 252; Deans *v.* McLendon, 30 Miss. 343.

19. U. S. Const. art. 1, § 9.

20. Butler *v.* Hopper, 4 Fed. Cas. No. 2,241, 1 Wash. 499.

B. Police of Slaves; Sales; Intoxicating Liquor Laws. In some states the slave was required to be registered,[21] and slave patrols were authorized with a general police power over slaves,[22] an overseer being also required by law on slave plantations to each specified number of slaves;[23] and the slaves were very generally prohibited from carrying arms, as indeed were free negroes.[24] It was criminal to trade or deal with a slave without his master's consent;[25] to sell him intoxicants or to employ or to allow him in a place where intoxicants were sold, without his master's consent;[26] to incite in slaves a spirit of insurrection, rebellion, conspiracy, or discontent;[27] or to permit slaves to go at large and hire themselves out or to engage in business.[28]

VII. STATUS AND CIVIL RIGHTS AND LIABILITIES.

A. In General. With the exception of his right to protection from personal injury,[29] and the liability of a carrier for injury to slaves,[30] and the relation of a slave to the criminal law,[31] a slave in all relations and in all matters was regarded by the law as property.[32] He had no civil, social, or political rights or capacity whatever, except such as were bestowed on him by statute,[33] and every attempt to extend to a slave positive rights was held to be an attempt to reconcile inherent contradictions; for, in the very nature of things, he was held subject to despotism.[34]

21. See Cobean *v.* Thompson, 1 Penr. & W. (Pa.) 93; Jacob *v.* Pierce, 2 Rawle (Pa.) 204; Com. *v.* Barker, 11 Serg. & R. (Pa.) 360; Stiles *v.* Nelly, 10 Serg. & R. (Pa.) 366; Com. *v.* Greason, 4 Serg. & R. (Pa.) 425; Wilson *v.* Belinda, 3 Serg. & R. (Pa.) 396; Marchand *v.* Peggy, 2 Serg. & R. (Pa.) 18; Com. *v.* Craig, 1 Serg. & R. (Pa.) 23; Elson *v.* McColloch, 4 Yeates (Pa.) 115; Respublica *v.* Findlay, 3 Yeates (Pa.) 261; Cook *v.* Neaff, 3 Yeates (Pa.) 259.

22. State *v.* Hailey, 28 N. C. 11; Richardson *v.* Saltar, 4 N. C. 505; Graham *v.* Bell, 1 Nott & M. (S. C.) 278, 9 Am. Dec. 687.

23. Molett *v.* State, 33 Ala. 408; State *v.* Thomas, 12 Rob. (La.) 48; State *v.* Thompson, 10 La. Ann. 122; State *v.* Linton, 3 Rob. (La.) 55; State *v.* Blythe, 3 McCord (S. C.) 363; State *v.* Mazyck, 2 McCord (S. C.) 473.

24. State *v.* Hannibal, 51 N. C. 57; State *v.* Chavers, 50 N. C. 11; State *v.* Cattell, 2 Hill (S. C.) 291; Carter *v.* State, 20 Tex. 339.

25. *Alabama.*— Devaughn *v.* Heath, 37 Ala. 595; Schwartz *v.* State, 37 Ala. 460; Sterrett *v.* Kaster, 37 Ala. 366; Shuttleworth *v.* State, 35 Ala. 415; Eberlin *v.* Mobile, 30 Ala. 548; Starr *v.* State, 25 Ala. 38.

Florida.— Donaldson *v.* State, 9 Fla. 402; Harrison *v.* State, 9 Fla. 156.

Georgia.— Stringfield *v.* State, 25 Ga. 474; Dunn *v.* State, 15 Ga. 418.

Kentucky.— Barnett *v.* Powell, Litt. Sel. Cas. 409.

Mississippi.— Murphy *v.* State, 24 Miss. 590; State *v.* Borroum, 23 Miss. 477.

Missouri.— State *v.* Rohlfing, 34 Mo. 348; State *v.* Guyott, 26 Mo. 62; Markley *v.* State, 10 Mo. 291.

New Jersey.— —— *v.* Gaston, 1 N. J. L. 52.

North Carolina.— State *v.* Honeycutt, 60 N. C. 446; State *v.* Johnston, 51 N. C. 485; State *v.* Privett, 49 N. C. 100; McRae *v.* Keller, 32 N. C. 398; State *v.* Cozens, 28 N. C. 82; State *v.* Hart, 26 N. C. 246.

South Carolina.— State *v.* Farr, 12 Rich. 24; State *v.* Chandler, 2 Strobh. 266; State *v.* Bowers, 2 Speers 671; State *v.* Meyer, 1 Speers 305; State *v.* Von Glon, 1 McMull. 187; State *v.* Behrman, Riley 82; State *v.* Fife, 1 Bailey 1; State *v.* Anone, 2 Nott & M. 27; State *v.* Thornton, 2 Brev. 408; State *v.* Stroud, 1 Brev. 551; State *v.* May, 1 Brev. 160.

Tennessee.— Kelly *v.* Davis, 1 Head 71.

Texas.— State *v.* Wupperman, 13 Tex. 33; Kingston *v.* State, 25 Tex. Suppl. 166.

See 44 Cent. Dig. tit. "Slaves," § 50.

26. See INTOXICATING LIQUORS, 23 Cyc. 197.

27. State *v.* McDonald, 4 Port. (Ala.) 449; State *v.* Read, 6 La. Ann. 227; State *v.* Worth, 52 N. C. 488; Bacon *v.* Com., 7 Gratt. (Va.) 602; Com. *v.* Barrett, 9 Leigh (Va.) 665.

28. *Florida.*— Miller *v.* Gaskins, 11 Fla. 73.

Georgia.— Drane *v.* Beall, 21 Ga. 21.

Kentucky.— Parker *v.* Com., 8 B. Mon. 30; Com. *v.* Gilbert, 6 J. J. Marsh. 184; Jarman *v.* Patterson, 7 T. B. Mon. 644.

Maryland.— Cox *v.* Harris, 17 Md. 23.

North Carolina.— State *v.* Brown, 60 N. C. 448; State *v.* Duckworth, 60 N. C. 240; Lea *v.* Brown, 58 N. C. 379; State *v.* Nat, 35 N. C. 154; State *v.* Clarissa, 27 N. C. 221; State *v.* Woodman, 10 N. C. 384.

Tennessee.— Macon *v.* State, 4 Humphr. 421.

Texas.— Rawles *v.* State, 15 Tex. 581.

Virginia.—Abrahams *v.* Com., 1 Rob. 675.

See 44 Cent. Dig. tit. "Slaves," § 54.

29. See *supra*, IV, A.

30. See *supra*, IV, A.

31. See *infra*, VIII.

32. Forsyth *v.* Perry, 5 Fla. 337; Marshall *v.* Watrigant, 13 La. Ann. 619.

33. Bryan *v.* Walton, 14 Ga. 185; State *v.* Van Lear, 5 Md. 91.

34. *Ex p.* Boylston, 2 Strobh. (S. C.) 41.

B. Rights of Property of Slaves. As to property rights the rule was that the possession of the slave was the possession of the master, and any property which the former acquired belonged to the latter;[35] and a slave could acquire no rights under a deed which either a court of law or of equity could enforce.[36] A devise or bequest to a slave was very generally held to be void;[37] and a bequest in trust for a slave was not enforced for his benefit, but the bequest lapsed and fell into the general residuum of the estate for distribution,[38] except as otherwise provided by positive statute,[39] and a slave could not inherit,[40] nor could his owners derive title to any property bequeathed or devised to a slave;[41] but in some states the highly prized devise of freedom was upheld,[42] but not the bequest of freedom to a slave after the determination of a life-estate in the slave.[43] In some cases a legacy given to a slave was held not void; but it could not be recovered of the executor by the slave or his master, and it escheated to the state.[44]

C. Inheritance From or Through. The children of a slave, born during slavery, were not such heirs as would prevent the escheat of his property in the event of his death intestate after he had obtained his freedom;[45] but after their

35. *Alabama.*— Devaughn *v.* Heath, 37 Ala. 595; Webb *v.* Kelly, 37 Ala. 333; Shanklin *v.* Johnson, 9 Ala. 271 (holding, however, that where a slave, who was permitted by his master to retain a portion of his earnings, placed the part yielded up to him in the hands of a third person to be invested in real estate, and title was taken in the name of such person that the slave might have the benefit of the purchase, there was no resulting trust in favor of the master); Brandon *v.* Planters', etc., Bank, 1 Stew. 320, 18 Am. Dec. 48.

Louisiana.— Francois *v.* Lobrano, 10 Rob. 450.

North Carolina.— White *v.* Cline, 52 N. C. 174.

South Carolina.— Gist *v.* Toohey, 2 Rich. 424; Carmille *v.* Carmille, 2 McMull. 454; Hobson *v.* Perry, 1 Hill 277; Blake *v.* Clarke, 3 McCord 179; Fable *v.* Brown, 2 Hill Eq. 378.

Tennessee.— Jenkins *v.* Brown, 6 Humphr. 299; North Carolina University *v.* Cambreling, 6 Yerg. 79.

See 44 Cent. Dig. tit. "Slaves," § 59.

A master might sue for a debt due his slave (Livaudais *v.* Fon, 8 Mart. (La.) 161), and a master who had possession of his slave's property might maintain trespass for an injury to it (Hobson *v.* Perry, 1 Hill (S. C.) 277).

In Louisiana slaves were entitled to the fruits of their labor on Sunday, and even the master should remunerate them if he employ them. Rice *v.* Cade, 10 La. 288.

Wardens of the poor could seize any horses, cattle, etc., belonging to a slave, in some states by statute (McNamara *v.* Kerns, 24 N. C. 66), and in other states any person could do so (Richardson *v.* Broughton, 3 Strobh. (S. C.) 1; Blake *v.* Clarke, 3 McCord (S. C.) 179).

36. State *v.* Van Lear, 5 Md. 91.

37. *Alabama.*—Abercrombie *v.* Abercrombie, 27 Ala. 489; Trotter *v.* Blocker, 6 Port. 269.

Georgia.— Curry *v.* Curry, 30 Ga. 253; Lamb *v.* Girtman, 26 Ga. 625.

Kentucky.— Powell *v.* Conn, 88 Ky. 689, 11 S. W. 814, 11 Ky. L. Rep. 590; Taylor *v.* Embry, 16 B. Mon. 340; Jones *v.* Lipscomb, 14 B. Mon. 296; Graves *v.* Allan, 13 B. Mon. 190.

Louisiana.— Barrow *v.* Bird, 22 La. Ann. 407.

Mississippi.— Hinds *v.* Brazealle, 2 How. 837, 32 Am. Dec. 307.

New York.— Jackson *v.* Lervey, 5 Cow. 397.

North Carolina.— Cunningham *v.* Cunningham, 1 N. C. 432.

See 44 Cent. Dig. tit. "Slaves," § 59.

A bequest to slaves of the proceeds of their sale, which the will directed to be made, was void because of the incapacity of the slaves to take. Kirkpatrick *v.* Rogers, 41 N. C. 130.

38. *Alabama.*— Pool *v.* Harrison, 18 Ala. 514; Alston *v.* Coleman, 7 Ala. 795; Trotter *v.* Blocker, 6 Port. 269.

Kentucky.— Taylor *v.* Embry, 16 B. Mon. 340; Graves *v.* Allan, 13 B. Mon. 190.

Mississippi.— Hinds *v.* Brazealle, 2 How. 837, 32 Am. Dec. 307.

North Carolina.— Cunningham *v.* Cunningham, 1 N. C. 432.

South Carolina.— Craig *v.* Beatty, 11 S. C. 375.

Virginia.— Smith *v.* Betty, 11 Gratt. 752.

See 44 Cent. Dig. tit. "Slaves," § 59.

39. Jackson *v.* Lervey, 5 Cow. (N. Y.) 397, where by statute he was allowed to take lands granted to him for military services during the revolutionary war.

40. Woods *v.* Pearce, 68 Ga. 160; Turner *v.* Smith, 12 La. Ann. 417; Livaudais *v.* Fon, 8 Mart. (La.) 161; Hereford *v.* Rabb, (Miss. 1896) 19 So. 201.

41. Graves *v.* Allan, 13 B. Mon. (Ky.) 190.

By the law of Spain a legacy to a slave inured to the benefit of the owner. Valsain *v.* Cloutier, 3 La. 170, 22 Am. Dec. 179.

42. Graves *v.* Allan, 13 B. Mon. (Ky.) 190; Leiper *v.* Hoffman, 26 Miss. 615. And see *infra*, IX, B.

43. Alston *v.* Coleman, 7 Ala. 795.

44. Fable *v.* Brown, 2 Hill Eq. (S. C.) 378.

45. Malinda *v.* Gardner, 24 Ala. 719.

emancipation inheritance could be had through slaves;[46] and the issue of a slave marriage, although the parents died before the emancipation, were lawful heirs of their father.[47]

D. Contracts By or With Slaves. A slave could not contract, and an attempted contract neither imposed obligations nor conferred rights on either party,[48] unless made with the consent of his master,[49] and a contract made by a slave could not be enforced on his becoming a freedman.[50] But where a slave was permitted by his owner to exercise his own discretion in the employment of his time, acting really as a freeman, such owner could not recover from a third person the proceeds of property which the slave had acquired, and which had come into the hands of such third person as the agent of a slave;[51] nor could his master compel performance of a contract made by a slave with a third person.[52]

E. Torts by Slaves. The owner of a slave was not answerable for a wilful and unauthorized trespass committed by his slave;[53] nor for injuries caused by the negligent conduct of the slave while not acting in his employment or under his authority,[54] and the converse of both rules was also true;[55] and if a slave committed a wrong for his master's benefit, but not at his command or request, and

46. Jackson *v.* Collins, 16 B. Mon. (Ky.) 214; Jameson *v.* McCoy, 5 Heisk. (Tenn.) 108; Nelson *v.* Smithpeter, 2 Coldw. (Tenn.) 13. And see *infra*, X.

47. Morris *v.* Williams, 39 Ohio St. 554.

48. *Alabama.*— Broadhead *v.* Jones, 39 Ala. 96; Martin *v.* Reed, 37 Ala. 198; Stanley *v.* Nelson, 28 Ala. 514.

Kentucky.— Bigstaff *v.* Lumkins, 16 S. W. 449, 13 Ky. L. Rep. 248.

Maryland.— State *v.* Van Lear, 5 Md. 91; Hall *v.* Mullin, 5 Harr. & J. 190.

North Carolina.— Love *v.* Brindle, 52 N. C. 560.

South Carolina.— Gist *v.* Toohey, 2 Rich. 424.

Tennessee.— Embry *v.* Morrison, 1 Tenn. Ch. 434.

Texas.— Sanders *v.* Devereux, 25 Tex. Suppl. 1.

United States.— Woodland *v.* Newhall, 31 Fed. 434.

See 44 Cent. Dig. tit. "Slaves," § 61.

But see Maillon *v.* Lynch, 15 La. Ann. 547 (holding that the engagement and stipulations made in favor of a slave were not absolutely null and void, and could not be utterly disregarded and treated as pure and simple nullities by all mankind, but only by such persons as had an adverse interest); Folden *v.* Hendrick, 25 Mo. 411 (holding that, although a transfer of property from one slave to another was invalid as against their masters, yet, if their masters made no objection, third parties will not set up the invalidity of such a transfer).

A contract made between a slave and his master was void (Bland *v.* Dowling, 9 Gill & J. (Md.) 19; Hall *v.* U. S., 92 U. S. 27, 23 L. ed. 597; Fanny *v.* Kell, 8 Fed. Cas. No. 4,639, 2 Cranch C. C. 412), and unenforceable either at law or in equity (Richard *v.* Van Meter, 20 Fed. Cas. No. 11,763, 3 Cranch C. C. 214). A slave could not bind himself at law to pay money to his master, even for his freedom. Anderson *v.* Poindexter, 6 Ohio St. 622; Contee *v.* Garner, 6 Fed. Cas. No. 3,139, 2 Cranch C. C. 162.

A bond given by a slave, with a freeman as surety, was against the policy of the country, and void as to both. Batten *v.* Faulk, 49 N. C. 233.

49. Hall *v.* Mullin, 5 Harr. & J. (Md.) 190.

The owner could not adopt the unauthorized contract of his slave, so as to give it any vitality as to the person contracting with the slave. Sanders *v.* Devereux, 25 Tex. Suppl. 1.

50. Lucy *v.* Denham, 4 T. B. Mon. (Ky.) 167; Crease *v.* Parker, 6 Fed. Cas. No. 3,376, 1 Cranch C. C. 448, 6 Fed. Cas. No. 3,377, 1 Cranch C. C. 506.

51. Barker *v.* Swain, 57 N. C. 220.

52. Gregg *v.* Thompson, 2 Mill (S. C.) 331.

53. *Alabama.*— Lindsay *v.* Griffin, 22 Ala. 629.

Arkansas.— McConnell *v.* Hardeman, 15 Ark. 151.

Louisiana.— Boulard *v.* Calhoun, 13 La. Ann. 445; Gaillardet *v.* Demaries, 18 La. 490.

Mississippi.— Newell *v.* Cowan, 30 Miss. 492; Leggett *v.* Simmons, 7 Sm. & M. 348.

Missouri.— Armstrong *v.* Marmaduke, 31 Mo. 327; Stratton *v.* Harriman, 24 Mo. 324; Ewing *v.* Thompson, 13 Mo. 132.

North Carolina.— Parham *v.* Blackwelder, 30 N. C. 446.

Tennessee.— Wright *v.* Weatherly, 7 Yerg. 367.

Texas.— Ingram *v.* Atkinson, 4 Tex. 270.

See 44 Cent. Dig. tit. "Slaves," § 62.

54. Cawthorn *v.* Deas, 2 Port. (Ala.) 276; Wingis *v.* Smith, 3 McCord (S. C.) 400; Snee *v.* Trice, 2 Bay (S. C.) 345.

55. Bell *v.* Troy, 35 Ala. 184; Pinkston *v.* Greene, 9 Ala. 19; Leggett *v.* Simmons, 7 Sm. & Mm. (Miss.) 348; Sweat *v.* Rogers, 6 Heisk. (Tenn.) 117; Byram *v.* McGuire, 3 Head (Tenn.) 530; Wilkins *v.* Gilmore, 2 Humphr. (Tenn.) 140; Hedgepeth *v.* Robertson, 18 Tex. 858.

Where offenses were committed by slaves belonging to several masters by their order, the masters were liable *in solido*. Hart *v.* St. Romes, 7 La. 586.

the master afterward ratified it, the master was liable;[56] but in some states the master might exonerate himself by surrendering the slave to be sold.[57]

F. Actions By or Against Slaves. A slave could not be a party in any civil action either as plaintiff or defendant, except when he had to claim or prove his freedom,[58] and then he must sue by guardian.[59]

VIII. CRIMES AND OFFENSES BY OR AGAINST SLAVES.

A. Crimes of Slaves — 1. In General. Slaves were treated as persons by the criminal law,[60] and were legally punishable for their crimes.[61] Slaves were thus punishable for assault and battery,[62] larceny,[63] mayhem,[64] rape,[65] and homicide.[66] But the slave undoubtedly had the natural right of self-preservation or self-defense,[67] although facts which as between whites might excuse or mitigate the offense did not so operate in the case of slaves;[68] and it was no justification of a slave, indicted for a criminal offense, that it was committed by his master's command.[69] In some states criminal statutes were passed specially applicable to slaves.[70] For an offense committed when a slave a man could not be legally convicted and punished as a freeman.[71]

2. Punishment, and Indemnification of Owner Therefor. The punishment of slaves was in general severer than the punishment of whites for like offenses, this of course being necessitated by their numbers, and general uncontrollable and

56. Caldwell *v.* Sacra, Litt. Sel. Cas. (Ky.) 118, 12 Am. Dec. 285.

57. Arnoult *v.* Deschapelles, 4 La. Ann. 41; Hynson *v.* Meuillon, 2 La. Ann. 798; Guerrier *v.* Lambeth, 9 La. 339.

58. Amy *v.* Smith, 1 Litt. (Ky.) 326; Jamison *v.* Bridge, 14 La. Ann. 31; State *v.* Van Lear, 5 Md. 91; Catiche *v.* St. Louis County Cir. Ct., 1 Mo. 608.

He could appear as a suitor neither in courts of law nor equity.— Bland *v.* Dowling, 9 Gill & J. (Md.) 19.

A judgment against a slave was null and void, although he appeared in the action, and a judgment where there were two defendants, and one was a slave, was void as to both. Stenhouse *v.* Bonum, 12 Rich. (S. C.) 620.

59. Susan *v.* Wells, 3 Brev. (S. C.) 11.

60. State *v.* Moore, 8 Rob. (La.) 518; Nix *v.* State, 13 Tex. 575.

61. Luke *v.* State, 5 Fla. 185; State *v.* Wright, 4 McCord (S. C.) 358.

Insolence of a slave toward a white person was an offense for which he might be tried and punished. *Ex p.* Boylston, 2 Strobh. (S. C.) 41.

62. Bone *v.* State, 18 Ark. 109.

It was an offense if one slave commit an assault and battery on another.— Bob *v.* State, 29 Ala. 20.

63. Munford *v.* Taylor, 2 Metc. (Ky.) 599; State *v.* Hall, 1 N. C. 76.

Such as larceny of another slave.— State *v.* Whyte, 2 Nott & M. (S. C.) 174.

64. State *v.* Abram, 10 Ala. 928; State *v.* Nicholas, 2 Strobh. (S. C.) 278.

65. State *v.* Bill, 8 Rob. (La.) 527.

66. *Alabama.*— Isham *v.* State, 38 Ala. 213; Bob *v.* State, 29 Ala. 20; Dave *v.* State, 22 Ala. 23.

Arkansas.— Austin *v.* State, 14 Ark. 555.

Georgia.— Thornton *v.* State, 25 Ga. 301; John *v.* State, 16 Ga. 200.

Louisiana.— State *v.* Jack, 14 La. Ann. 385.

Mississippi.— Jeff *v.* State, 37 Miss. 321.

North Carolina.— State *v.* Brodnax, 61 N. C. 41; State *v.* Cæsar, 31 N. C. 391.

Tennessee.— Nelson *v.* State, 10 Humphr. 518.

See 44 Cent. Dig. tit. "Slaves," § 65.

67. Dave *v.* State, 22 Ala. 23.

68. Dave *v.* State, 22 Ala. 23 (holding that if a slave stab his master with intent to kill, while resisting his authority in a personal collision with him, it was no justification of the act that the slave was impressed at the time with a reasonable sense of imminent danger to his own life); Alfred *v.* State, 37 Miss. 296; State *v.* David, 49 N. C. 353 (holding that there was no analogy to be drawn between cases where a free person was on trial for homicide and a slave for slaying his master); State *v.* Jarrott, 23 N. C. 76 (holding that the rule that where parties become suddenly heated and engage immediately in a mortal conflict, fighting upon equal terms, and one kills the other, the homicide is mitigated to manslaughter, applied only to equals, and not to the case of a white man and a slave, if the slave kill the white man while fighting under such circumstances); Nelson *v.* State, 10 Humphr. (Tenn.) 518 (holding that an act constituting a provocation which would mitigate a homicide committed by a white man, to manslaughter, would not necessarily have the same effect when the homicide was committed on a white man by a slave); Jacob *v.* State, 3 Humphr. (Tenn.) 493. But see Jim *v.* State, 15 Ga. 535, holding that where a slave killed his master, overseer, or lawful employer, in resistance to an assault made on him, such killing must be justifiable homicide or murder.

69. Sarah *v.* State, 18 Ark. 114.

70. See the statutes of the several states. And see Frances *v.* State, 6 Fla. 306; William *v.* State, 18 Ga. 356; State *v.* Kitty, 12 La. Ann. 805.

71. Owens *v.* Com., 2 Duv. (Ky.) 349.

frequently savage disposition;[72] and when slaves committed crimes and were prosecuted in the name of the state, they were regarded as accountable beings, and not as things; and they might be punished as the law directed, irrespective of the wishes of the master,[73] for when a slave committed a crime, the private rights of the master yielded to the superior rights of the state, and he could not legally obstruct his arrest, or assist his escape,[74] although under some statutes the master was entitled to compensation for the loss of the slave.[75] A slave convicted of manslaughter might be punished by burning in the hand and whipping,[76] and murder was punishable by death,[77] as was attempted murder,[78] and a slave accessory before the fact to murder was liable to the death penalty.[79] A slave convicted of murder was put to death in the same manner as a white person.[80]

B. Offenses Against Slaves. As has been seen above,[81] although slaves were for most purposes regarded as property their lives and safety were guarded and they were entitled to the protection of the criminal law, and an offense against their life or limb was punishable criminally.[82] Thus assault and battery of a slave was a criminal offense,[83] as it was to cruelly and inhumanly cut, slash, beat, or ill-treat a slave,[84] or to inflict other cruel or unusual punishment,[85] or to neglect to provide proper food, clothes, or shelter,[86] or to kill him unjustifiably.[87] If the offense was dismemberment, the indictment was for mayhem, and if it was a killing, the indictment was for murder;[88] but a simple assault and battery on a slave was not an indictable offense, and such an assault, even with intent to murder him, was not an offense at common law,[89] although the owner of a slave who beat him cruelly, and exposed him, so beaten, to public view, was guilty of a misdemeanor even at common law.[90] An indictment would lie against any person who removed or attempted to remove from the state any slave having a suit pending for freedom.[91]

72. Isham *v.* State, 38 Ala. 213; Nancy *v.* State, 6 Ala. 483 (holding an assault on a white person by a slave, with intent to kill, a capital offense, although in a case where, if the intent should be consummated, the offense would be manslaughter only); State *v.* Jack, 14 La. Ann. 385; State *v.* Adeline, 11 La. Ann. 736.

73. McDowell *v.* Couch, 6 La. Ann. 365; State *v.* Dick, 4 La. Ann. 182.

74. Doughty *v.* Owen, 24 Miss. 404.

75. State *v.* Dick, 10 La. Ann. 461.

76. State *v.* Peter, 1 Stew. (Ala.) 38; U. S. *v.* Clark, 25 Fed. Cas. No. 14,802, 2 Cranch C. C. 620; U. S. *v.* Frye, 25 Fed. Cas. No. 15,173, 4 Cranch C. C. 539; U. S. *v.* Tom, 28 Fed. Cas. No. 16,531, 2 Cranch C. C. 114.

77. Hamilton *v.* Auditor, 14 B. Mon. (Ky.) 230.

78. Sarah *v.* State, 28 Ga. 576; Com. *v.* Anthony, 2 Metc. (Ky.) 399.

79. Thornton *v.* State, 25 Ga. 301.

80. Charles *v.* State, 11 Ark. 389.

81. See *supra*, IV, A.

82. State *v.* Davis, 14 La. Ann. 678 (holding that slaves were regarded in our law both as property and persons, and an act relative to crimes and offenses, which punished an assault on a person by "wilfully shooting at him," etc., applied to an assault on a slave as well as a free person); Nix *v.* State, 13 Tex. 575 (holding that slaves were persons within the meaning of the statutes concerning crimes; and where not otherwise provided, or where the relations arising out of the institution of slavery did not imply the reverse, the statutes enacted for the punishment of crimes applied to crimes committed by or on the person of a slave).

83. State *v.* Hale, 9 N. C. 582; U. S. *v.* Butler, 25 Fed. Cas. No. 14,697, 1 Cranch C. C. 373.

84. *Louisiana.*— Ney *v.* Richard, 15 La. Ann. 603; State *v.* White, 13 La. Ann. 573; Markham *v.* Close, 2 La. 581.

Mississippi.— Scott *v.* State, 31 Miss. 473.

Missouri.— State *v.* Peters, 28 Mo. 241; Grove *v.* State, 10 Mo. 232.

South Carolina.— State *v.* Harlan, 5 Rich. 470; State *v.* Bowen, 3 Strobh. 573; State *v.* Wilson, Cheves 163.

Virginia.— Com. *v.* Howard, 11 Leigh 631.

United States.— U. S. *v.* Brockett, 24 Fed. Cas. No. 14,651, 2 Cranch C. C. 441.

See 44 Cent. Dig. tit. "Slaves," § 75 *et seq.*

85. Eskridge *v.* State, 25 Ala. 30; Turnipseed *v.* State, 6 Ala. 664.

86. Cheek *v.* State, 38 Ala. 227; State *v.* Bowen, 3 Strobh. (S. C.) 573.

87. State *v.* Jones, 5 Ala. 666; State *v.* Flanigan, 5 Ala. 477; State *v.* Boon, 1 N. C. 103; State *v.* Toomer, Cheves (S. C.) 106; State *v.* Taylor, 2 McCord (S. C.) 483; State *v.* Smith, 1 Nott & M. (S. C.) 13; Callihan *v.* Johnson, 22 Tex. 596.

88. State *v.* Coleman, 5 Port. (Ala.) 32.

89. U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,617, 4 Cranch C. C. 468.

90. U. S. *v.* Cross, 25 Fed. Cas. No. 14,894, 4 Cranch C. C. 603; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,618, 4 Cranch C. C. 470.

91. Com. *v.* Stout, 7 B. Mon. (Ky.) 247.

IX. THE RIGHT TO FREEDOM.

A. Acquirement of Right — 1. In General. The attitude of the several states toward slavery makes any generalization on the subject of the freedom of slaves hazardous. Some states leaning toward the abolition of slavery endeavored to facilitate the process of obtaining freedom, while others, fearing the effect of the letting loose of such a body of ungovernable blacks, passed stringent laws to prevent it. In some states failure to register slaves under the statute had the effect of freeing them,[92] in others they could become free by purchase,[93] and in many freedom was allowed to be acquired by prescription;[94] but the master must know of the slave's place of residence during the period of prescription.[95] A slave could not become partially free.[96]

2. By Exportation or Removal From State or by Violation of Laws Relating to Importation and Sale. In many states statutes were passed prohibiting the exportation or removal of slaves from the state, and under these in the event of such removal the slave became free,[97] while under other statutes slaves brought into the several states to reside or for sale in violation of or non-compliance with laws governing importation were free;[98] but such residence in a non-slaveholding state as would entitle a slave to freedom could not be acquired without the connivance or consent of the legal owner,[99] and the statutes did not generally apply to slaves brought in by travelers or temporary sojourners;[1] but the traveler bringing slaves into a state must pursue his journey with no unnecessary delay, and to excuse any delay some necessity must exist;[2] and in some jurisdictions

92. Griffin *v.* Potter, 14 Wend. (N. Y.) 209; Giles *v.* Meeks, Add. (Pa.) 384; Lucy *v.* Pumfrey, Add. (Pa.) 380; Respublica *v.* Betsey, 1 Dall. (Pa.) 469, 1 L. ed. 227; Com. *v.* Hester, 1 Browne (Pa.) 369.

93. Letty *v.* Lowe, 15 Fed. Cas. No. 8,285, 2 Cranch C. C. 634.

94. George *v.* Demouy, 14 La. Ann. 145; Eulalie *v.* Long, 11 La. Ann. 463; Verdun *v.* Splane, 6 Rob. (La.) 530; Metayer *v.* Noret, 5 Mart. (La.) 566; Stringer *v.* Burcham, 34 N. C. 41; Cully *v.* Jones, 31 N. C. 168.

95. Wilson *v.* Barnet, 8 Gill & J. (Md.) 159.

96. Francois *v.* Lobrano, 10 Rob. (La.) 450.

97. State *v.* Turner, 5 Harr. (Del.) 501; Anderson *v.* Thoroughgood, 5 Harr. (Del.) 199; Allen *v.* Negro Sarah, 2 Harr. (Del.) 434; Frank *v.* Milam, 1 Bibb (Ky.) 615; Hart *v.* Cleis, 8 Johns. (N. Y.) 41.

98. *Connecticut.*— Jackson *v.* Bulloch, 12 Conn. 38.

Kentucky.— Davis *v.* Tingle, 8 B. Mon. 539.

Louisiana.— Josephine *v.* Poultney, 1 La. Ann. 329.

Maryland.— Bland *v.* Dowling, 9 Gill & J. 19; Newton *v.* Turpin, 8 Gill & J. 433; Pocock *v.* Hendricks, 8 Gill & J. 421; Stewart *v.* Oakes, 5 Harr. & J. 107 note; Davis *v.* Jaquin, 5 Harr. & J. 100; Sprigg *v.* Negro Presly, 3 Harr. & J. 493; Boisneuf *v.* Lewis, 4 Harr. & M. 414.

Missouri.— Rachael *v.* Walker, 4 Mo. 350; Vincent *v.* Duncan, 2 Mo. 214; La Grange *v.* Chouteau, 2 Mo. 20.

New York.— People *v.* Lemmon, 5 Sandf. 681 [*affirmed* in 26 Barb. 270 (*affirmed* in 20 N. Y. 562)].

Pennsylvania.— Respublica *v.* Smith, 4 Yeates 204; John *v.* Dawson, 2 Yeates 449; Pennsylvania *v.* Blackmore, Add. 284; Com. *v.* Smyth, 1 Browne 113.

Virginia.— Betty *v.* Horton, 5 Leigh 615; Hunter *v.* Fulcher, 1 Leigh 172; George *v.* Parker, 4 Rand. 659; McMichen *v.* Amos, 4 Rand. 134; Barnett *v.* Sam, Gilmer 232; Wilson *v.* Isbell, 5 Call 425.

United States.— Rhodes *v.* Bell, 2 How. 397, 11 L. ed. 314; Scott *v.* Ben, 6 Cranch 3, 3 L. ed. 135; Burr *v.* Dunnahoo, 4 Fed. Cas. No. 2,189, 1 Cranch C. C. 370; Emanuel *v.* Ball, 8 Fed. Cas. No. 4,433, 2 Cranch C. C. 101; Jordan *v.* Sawyer, 13 Fed. Cas. No. 7,521, 2 Cranch C. C. 373; Sylvia *v.* Coryell, 23 Fed. Cas. No. 13,712, 1 Cranch C. C. 32.

See 44 Cent. Dig. tit. "Slaves," § 76 *et seq.*

99. Milly *v.* Smith, 2 Mo. 171.

1. *Kentucky.*— Smith *v.* Adam, 18 B. Mon. 685; Anderson *v.* Crawford, 15 B. Mon. 328; Graham *v.* Strader, 5 B. Mon. 173.

Maryland.— Cross *v.* Black, 9 Gill & J. 198; Baptiste *v.* De Volumbrun, 5 Harr. & J. 86.

Missouri.— La Grange *v.* Chouteau, 2 Mo. 20.

Pennsylvania.— Butler *v.* Delaplaine, 7 Serg. & R. 378.

Virginia.— Lewis *v.* Fullerton, 1 Rand. 15.

United States.— Henry *v.* Ball, 1 Wheat. 1, 4 L. ed. 21; Amelia *v.* Caldwell, 1 Fed. Cas. No. 278, 2 Cranch C. C. 418; Gardner *v.* Simpson, 9 Fed. Cas. No. 5,237, 2 Cranch C. C. 405; Johnson *v.* Mason, 13 Fed. Cas. No. 7,396, 3 Cranch C. C. 294; Violette *v.* Ball, 28 Fed. Cas. No. 16,954, 2 Cranch C. C. 102.

See 44 Cent. Dig. tit. "Slaves," §§ 77, 78.

2. *Ex p.* Archy, 9 Cal. 147.

the presence, although but momentary, of a slave in a free state with the master's consent created *per se* the condition of freedom;[3] and under some,[4] but not all,[5] statutes a slave became free by merely being transported through the state. The owner could in some instances bring the slave into the state upon taking a statutory oath.[6] Illegal sales of slaves entitled them to their freedom.[7]

3. Actions or Proceedings For Freedom. The method of enforcing the right to freedom was provided for in the statutes, which were to be strictly followed.[8] In some instances habeas corpus would lie;[9] and in some states an action of assumpsit for services rendered might be maintained by a person claimed as a slave, for the purpose of trying the question of freedom,[10] or trespass in the nature of ravishment of ward,[11] or bill in equity.[12] The cases relating to jurisdiction and venue,[13] procedure,[14] right to sue and leave of court,[15] parties,[16] pleadings,[17] or trial judgment and review[18] are of little more than historical interest. The

3. Thomas *v.* Generis, 16 La. 483; Smith *v.* Smith, 13 La. 441; Marie Louise *v.* Marot, 9 La. 473; Anderson *v.* Poindexter, 6 Ohio St. 622.

4. Lemmon *v.* People, 26 Barb. (N. Y.) 270 [*affirmed* in 20 N. Y. 562].

5. Willard *v.* People, 5 Ill. 461.

6. Butler *v.* Duvall, 4 Fed. Cas. No. 2,239, 4 Cranch C. C. 167; Keziah *v.* Slye, 14 Fed. Cas. No. 7,752, 4 Cranch C. C. 463; Lucy *v.* Slade, 15 Fed. Cas. No. 8,595, 1 Cranch C. C. 422, under Act Va. Dec. 17, 1792.

7. Skinner *v.* Fleet, 14 Johns. (N. Y.) 263; Caesar *v.* Peabody, 11 Johns. (N. Y.) 68.

8. *Alabama.*— Union Bank *v.* Benham, 23 Ala. 143.

Delaware.— State *v.* Turner, 5 Harr. 501.

Georgia.— Cone *v.* Force, 31 Ga. 328.

Mississippi.— Sam *v.* Fore, 12 Sm. & M. 413; Thornton *v.* Demoss, 5 Sm. & M. 609.

United States.— Fenwick *v.* Chapman, 9 Pet. 461, 9 L. ed. 193.

See 44 Cent. Dig. tit. "Slaves," § 81 *et seq.*

9. Guilford *v.* Hicks, 36 Ala. 95 (holding that white persons held as slaves could try their right to freedom on habeas corpus); Union Bank *v.* Benham, 23 Ala. 143; Shue *v.* Turk, 15 Gratt. (Va.) 256.

10. Jarrot *v.* Jarrot, 7 Ill. 1.

11. Huger *v.* Barnwell, 5 Rich. (S. C.) 273; Brister *v.* Wesner, 1 McMull. (S. C.) 135.

12. Stephenson *v.* Harrison, 3 Head (Tenn.) 728; Doran *v.* Brazelton, 2 Swan (Tenn.) 149.

13. *Arkansas.*— Aramynta *v.* Woodruff, 7 Ark. 422.

Georgia.— Knight *v.* Hardeman, 17 Ga. 253.

Kentucky.— Nancy *v.* Snell, 6 Dana 148.

Louisiana.—Logan *v.* Hickman, 14 La. Ann. 300; Brown *v.* Raby, 14 La. Ann. 41.

Maryland.— Townshend *v.* Townshend, 5 Md. 287; Anderson *v.* Garrett, 9 Gill 120; Queen *v.* Neale, 3 Harr. & J. 158.

Tennessee.— Isaac *v.* McGill, 9 Humphr. 616; Sylvia *v.* Covey, 4 Yerg. 297.

Virginia.— Ratcliff *v.* Polly, 12 Gratt. 528.

United States.— Butler *v.* Duvall, 4 Fed. Cas. No. 2,238, 3 Cranch C. C. 611.

See 44 Cent. Dig. tit. "Slaves," § 82.

14. *Alabama.*— Jones *v.* Covey, 26 Ala. 464.

Arkansas.— Phebe *v.* Quillin, 21 Ark. 490.

Georgia.— Knight *v.* Hardeman, 17 Ga. 253.

Kentucky.—Warfield *v.* Davis, 14 B. Mon. 40.

Louisiana.— Logan *v.* Hickman, 14 La. Ann. 300.

Maryland.— Townshend *v.* Townshend, 5 Md. 287.

Missouri.—Anderson *v.* Brown, 9 Mo. 646.

New York.— Skinner *v.* Fleet, 14 Johns. 263.

South Carolina.— Carpenter *v.* Coleman, 2 Bay 436.

Virginia.— Sarah *v.* Henry, 2 Hen. & M. 19.

United States.— Moses *v.* Dunnaho, 17 Fed. Cas. No. 9,873, 1 Cranch C. C. 315; Nan *v.* Moxley, 17 Fed. Cas. No. 10,007, 1 Cranch C. C. 523; Richard *v.* Van Meter, 20 Fed. Cas. No. 11,763, 3 Cranch C. C. 214.

15. *Alabama.*— Farrelly *v.* Maria Louisa, 34 Ala. 284.

Arkansas.— Daniel *v.* Guy, 19 Ark. 121.

Kentucky.— Henry *v.* Nunn, 11 B. Mon. 239.

Louisiana.— Foster *v.* Mish, 15 La. Ann. 199.

Missouri.— Joshua *v.* Purse, 34 Mo. 209.

United States.— Lee *v.* Preuss, 15 Fed. Cas. No. 8,199, 3 Cranch C. C. 112.

See 44 Cent. Dig. tit. "Slaves," § 85.

16. *Arkansas.*— Phebe *v.* Quillin, 21 Ark. 490.

Kentucky.— John *v.* Walker, 8 B. Mon. 605.

Louisiana.— Bob *v.* Nugent, 15 La. 63.

Maryland.— Cox *v.* Harris, 17 Md. 23.

Tennessee.— Harris *v.* Clarissa, 6 Yerg. 227.

Texas.— Moore *v.* Minerva, 17 Tex. 20.

Virginia.— Reid *v.* Blackstone, 14 Gratt. 363.

See 44 Cent. Dig. tit. "Slaves," § 88.

17. *Delaware.*— Thoroughgood *v.* Anderson, 5 Harr. 97.

Louisiana.— Maranthe *v.* Hunter, 11 La. Ann. 734.

Maryland.— Jerry *v.* Townshend, 9 Md. 145.

Missouri.— Susan *v.* Hight, 1 Mo. 118.

Texas.— Moore *v.* Minerva, 17 Tex. 20.

Virginia.— Hudgins *v.* Wright, 1 Hen. & M. 134.

United States.— Butler *v.* Duvall, 4 Fed. Cas. No. 2,238, 3 Cranch C. C. 611.

See 44 Cent. Dig. tit. "Slaves," § 89.

18. *Alabama.*— Becton *v.* Ferguson, 22 Ala. 599.

Arkansas.— Daniel *v.* Guy, 19 Ark. 121.

Delaware.— State *v.* Turner, 5 Harr. 501.

general rule was that a slave upon securing his freedom was not entitled to damages or to recover for his services while a slave,[19] unless he showed that defendant knew he was a free man.[20]

B. Manumission[21] — **1. Right to Manumit; How Exercised.** The question of the right of owners to manumit their slaves is considerably obscured by the wide diversity of statutes in the several states and the varying attitudes of the laws of particular states at various stages of their history, some statutes permitting manumission,[22] others forbidding it,[23] and under the latter a bequest to slaves or a direction or trust in a will for their emancipation was void;[24] and it was held that a slave could not be the *cestui que trust* of his own freedom, under a bequest of freedom, where a direct emancipation of the slave by will would be invalid.[25] Other statutes permitted manumission, the legislature or court assenting.[26] When manumission was permitted it could be by deed or

Kentucky.— Dunlap *v.* Archer 7 Dana 30.
Maryland.— Reynolds *v.* Lewis, 14 Md. 116.
Missouri.— Charlotte *v.* Chouteau, 33 Mo. 194.
North Carolina.— Scott *v.* Williams, 12 N. C. 376.
Pennsylvania.—Wood *v.* Stephen, 1 Serg. & R. 175.
Texas.— Boulware *v.* Hendricks, 23 Tex. 667.
Virginia.— Betty *v.* Horton, 5 Leigh 615.
United States.—Adams *v.* Roberts, 2 How. 486, 11 L. ed. 349; Menard *v.* Aspasia, 5 Pet. 505, 8 L. ed. 207.
See 44 Cent. Dig. tit. "Slaves," § 90.

19. Dowrey *v.* Logan, 12 B. Mon. (Ky.) 236; Hundley *v.* Perry, 7 Dana (Ky.) 359; Phillis *v.* Gentin, 9 La. 208; Griffin *v.* Potter, 14 Wend. (N. Y.) 209; Urie *v.* Johnston, 3 Penr. & W. (Pa.) 212.

20. Hundley *v.* Perry, 7 Dana (Ky.) 359; Phillis *v.* Gentin, 9 La. 208; Jason *v.* Henderson, 7 Md. 430.
In Virginia he could not recover profits or damages even under these circumstances. Peter *v.* Hargrave, 5 Gratt. 12; Henry *v.* Bollar, 7 Leigh 19; Paup *v.* Mingo, 4 Leigh 163.

21. **"Manumission"** defined see 26 Cyc. 534.

22. Campbell *v.* Campbell, 13 Ark. 513; Smithwick *v.* Evans, 24 Ga. 461; Donaldson *v.* Jude, 2 Bibb (Ky.) 57; William *v.* Reynolds, 14 Md. 109; Tongue *v.* Crissy, 7 Md. 453; Spencer *v.* Dennis, 8 Gill (Md.) 314; Cornish *v.* Willson, 6 Gill (Md.) 299.
Manumission of slaves held in common destroyed the tenancy (Davis *v.* Tingle, 8 B. Mon. (Ky.) 539; Nunnally *v.* White, 3 Metc. (Ky.) 584; Oatfield *v.* Waring, 14 Johns. (N. Y.) 188), and was effectual *pro tanto* (Thompson *v.* Thompson, 4 B. Mon. (Ky.) 502); but notwithstanding a deed of emancipation by a minority of the part-owners of a slave was valid *pro tanto*, he was still a slave, until, by the act of the other part-owners, the manumission became complete (Davis *v.* Tingle, *supra*); but the emancipation of a slave by two or three joint owners, or by any majority in interest of the joint owners, made him a freeman, and was considered a conversion of the slave, so far as the other proprietors were concerned (Davis *v.* Tingle, *supra*; Oatfield *v.* Waring, 14 Johns. (N. Y.) 188).

23. *Alabama.*— Hall *v.* Hall, 38 Ala. 131; Jones *v.* Jones, 37 Ala. 646; Hunter *v.* Green, 22 Ala. 329.
Arkansas.— Phebe *v.* Quillin, 21 Ark. 490.
Louisiana.— Deshotels *v.* Soileau, 14 La. Ann. 745; Price *v.* Ray, 14 La. Ann. 697; Pauline *v.* Hubert, 14 La. Ann. 161; Turner *v.* Smith, 12 La. Ann. 417.
Mississippi.— Cowan *v.* Stamps, 46 Miss. 435; Garnett *v.* Cowles, 39 Miss. 60; Shaw *v.* Brown, 35 Miss. 246; Read *v.* Manning, 30 Miss. 308; Mahorner *v.* Hooe, 9 Sm. & M. 247, 48 Am. Dec. 706.
Missouri.— Charlotte *v.* Chouteau, 11 Mo. 193; Rennick *v.* Chloe, 7 Mo. 197.
North Carolina.— Mordecai *v.* Boylan, 59 N. C. 365.
South Carolina.— Linam *v.* Johnson, 2 Bailey 137; Blackman *v.* Gordon, 2 Rich. Eq. 43, 44 Am. Dec. 241; Finley *v.* Hunter, 2 Strobh. Eq. 208.
Tennessee.— Bridgewater *v.* Pride, 1 Sneed 195.

24. *Alabama.*— Trotter *v.* Blocker, 6 Port. 269.
Georgia.— Pinckard *v.* McCoy, 22 Ga. 28; Robinson *v.* King, 6 Ga. 539; Vance *v.* Crawford, 4 Ga. 445.
Louisiana.— Barrow *v.* Bird, 22 La. Ann. 407; Delphine *v.* Guillet, 13 La. Ann. 248.
Mississippi.— Garnett *v.* Cowles, 39 Miss. 60; Mahorner *v.* Hooe, 9 Sm. & M. 247, 48 Am. Dec. 706.
North Carolina.—Miller *v.* London, 60 N. C. 628; Dunlap *v.* Ingram, 57 N. C. 178; Lea *v.* Brown, 56 N. C. 141; Thompson *v.* Newlin, 38 N. C. 338, 42 Am. Dec. 169; White *v.* Green, 36 N. C. 45; Pendleton *v.* Blount, 21 N. C. 491; White *v.* White, 18 N. C. 260; Redmond *v.* Coffin, 17 N. C. 437; Turner *v.* Whitted, 9 N. C. 613.
South Carolina.— Ford *v.* Dangerfield, 8 Rich. Eq. 95; Morton *v.* Thompson, 6 Rich. Eq. 370; Lanham *v.* Meacham, 4 Strobh. Eq. 203; Bynum *v.* Bostick, 4 Desauss. Eq. 266.
Texas.— Purvis *v.* Sherrod, 12 Tex. 140.
Virginia.— Moses *v.* Denigree, 6 Rand. 561.
See 44 Cent. Dig. tit. "Slaves," § 92 *et seq.*

25. Trotter *v.* Blocker, 6 Port. (Ala.) 269.

26. See the statutes. And see Spencer *v.* Amy, R. M. Charlt. (Ga.) 178; Fanchonette

will,[27] although if by deed it must be recorded,[28] and some laws even permitted the slave to contract with his master for his freedom;[29] and an owner of a slave, by voluntarily putting him as a substitute into the federal army in 1864, thereby emancipated him by his own act, and the slave thereby became free.[30] The statutes were generally held to prohibit only the manumission of slaves within the state and to permit the sending of slaves out of the state to be manumitted;[31] and the owner of slaves might voluntarily take them to another state and emancipate and leave them there.[32] But even in states where manumission was allowed the law permitted manumission only of such slaves as could work and gain a livelihood and often required security for their support, the requirement of security being, however, only a police regulation not affecting their freedom.[33] Furthermore, where the owner was permitted by law to manumit his slave, he must conform strictly to the formalities prescribed, otherwise the act was void,[34] and slaves in many states could not be manumitted to the prejudice of existing creditors.[35] Generally no consent by the slave was necessary to the gift of freedom;[36] but in some states he could elect to accept or reject the act of manumission,[37] while in others no such right of election was recognized.[38] Judicial proceedings for the purpose of manumission were provided, the general method being upon petition by the master to the county court or to a magistrate.[39]

v. Grange, 5 Rob. (La.) 510; Abram *v.* Johnson, 1 Head (Tenn.) 120; John *v.* Tate, 7 Humphr. (Tenn.) 388; Blackmore *v.* Phill, 7 Yerg. (Tenn.) 452; Fishers' Negroes *v.* Dabbs, 6 Yerg. (Tenn.) 119.

27. Cox *v.* Williams, 39 N. C. 15.

28. *Arkansas.*— Harriet *v.* Swan, 18 Ark. 495.

Kentucky.— Smith *v.* Adam, 18 B. Mon. 685; *In re* Bodine, 4 Dana 476; Black *v.* Meaux, 4 Dana 188; Fanny *v.* Dejarnet, 2 J. J. Marsh. 230.

Maryland.— Wicks *v.* Chew, 4 Harr. & J. 543.

Missouri.— Maria *v.* Atterberry, 9 Mo. 369.

South Carolina.— Monk *v.* Jenkins, 2 Hill Eq. 9.

Virginia.— Manns *v.* Givens, 7 Leigh 689; Thrift *v.* Hannah, 2 Leigh 300; Shue *v.* Turk, 15 Gratt. 256.

United States.— Miller *v.* Herbert, 5 How. 72, 12 L. ed. 55.

See 44 Cent. Dig. tit. "Slaves," § 105.

29. Virginia *v.* Himel, 10 La. Ann. 185; Trahan *v.* Trahan, 8 La. Ann. 455.

30. Payne *v.* Richardson, 4 Bush (Ky.) 207.

31. *Alabama.*— Pool *v.* Pool, 35 Ala. 12.

Florida.— Bryan *v.* Dennis, 4 Fla. 445.

Georgia.— Green *v.* Anderson, 38 Ga. 655; Myrick *v.* Vineburgh, 30 Ga. 161; Sanders *v.* Ward, 25 Ga. 109; Cleland *v.* Waters, 19 Ga. 35; Cooper *v.* Blakey, 10 Ga. 263; Jordan *v.* Bradley, Dudley 170.

Louisiana.— Barclay *v.* Sewell, 12 La. Ann. 262.

Mississippi.— Leech *v.* Cooley, 6 Sm. & M. 93; Ross *v.* Vertner, 5 How. 305.

North Carolina.—Redding *v.* Long, 57 N. C. 216; Thomas *v.* Palmer, 54 N. C. 249; Green *v.* Lane, 43 N. C. 70; Wooten *v.* Becton, 43 N. C. 66.

South Carolina.— Frazier *v.* Frazier, 2 Hill Eq. 304.

Tennessee.— Cochreham *v.* Kirkpatrick, 1 Heisk. 327.

Texas.— Philleo *v.* Holliday, 24 Tex. 38.

Virginia.— Forward *v.* Thamer, 9 Gratt. 537.

See 44 Cent. Dig. tit. "Slaves," § 107 *et seq.*

32. Berry *v.* Alsop, 45 Miss. 1; Shaw *v.* Brown, 35 Miss. 246; Frazier *v.* Frazier, 2 Hill Eq. (S. C.) 304; Foster *v.* Foster, 10 Gratt. (Va.) 485.

33. *Kentucky.*— Hill *v.* Squire, 12 B. Mon. 557; Black *v.* Meaux, 4 Dana 188.

Maryland.— Anderson *v.* Baily, 8 Gill & J. 32; Burroughs *v.* Anna, 4 Harr. & J. 262.

Missouri.— Milton *v.* McKarney, 31 Mo. 175.

New Jersey.— State *v.* Pitney, 1 N. J. L. 165.

New York.— Warren *v.* Brooks, 7 Cow. 218.

Tennessee.— Reuben *v.* Parrish, 6 Humphr. 122.

United States.—Le Grand *v.* Darnall, 2 Pet. 664, 7 L. ed. 555.

See 44 Cent. Dig. tit. "Slaves," § 98.

34. State *v.* Baillio, 15 La. Ann. 555; Maria *v.* Edwards, 1 Roh. (La.) 359; Smith *v.* Smith, 13 La. 441; Monk *v.* Jenkins, 2 Hill Eq. (S. C.) 9.

35. Boh *v.* Powers, 19 Ark. 424; Chambers *v.* Davis, 15 B. Mon. (Ky.) 522; Wood *v.* Wickliffe, 5 B. Mon. (Ky.) 187; Cornish *v.* Willson, 6 Gill (Md.) 299; Thomas *v.* Wood, 1 Md. Ch. 296; Jincey *v.* Winfield, 9 Gratt. (Va.) 708; Dunn *v.* Amey, 1 Leigh (Va.) 465; Woodley *v.* Abby, 5 Call. (Va.) 336.

36. Tongue *v.* Crissy, 7 Md. 453.

37. Adams *v.* Adams, 10 B. Mon. (Ky.) 69; Graham *v.* Sam, 7 B. Mon. (Ky.) 403; Maddox *v.* Price, 17 Md. 413; Clark *v.* Bell, 59 N. C. 272; Hogg *v.* Capehart, 58 N. C. 71 note; Redding *v.* Long, 57 N. C. 216.

38. Creswell *v.* Walker, 37 Ala. 229; Carroll *v.* Brumby, 13 Ala. 102; Williamson *v.* Coalter, 14 Gratt. (Va.) 394; Bailey *v.* Poindexter, 14 Gratt. (Va.) 132.

39. Jarman *v.* Humphrey, 51 N. C. 28; Allen *v.* Allen, 44 N. C. 60; Wooten *v.* Becton, 43 N. C. 66; Bryan *v.* Wadsworth, 18

2. Status and Right of Manumitted Slaves. The status of manumitted slaves and slaves having the inchoate right of freedom was a condition *sui generis* regulated by statutes in the several states.[40] Manumission did not confer citizenship, or any of its incidents,[41] the emancipation of a slave being merely a donation to himself of his value.[42] But a slave with inchoate right to freedom had the right to own and possess property,[43] and a slave who was emancipated might hold lands.[44] A devise to emancipated slaves by their former master was valid,[45] as was also a bequest or devise to a slave to take effect when emancipated;[46] and a bequest of property for the benefit of slaves directed to be removed to a foreign country for the purpose of their manumission was held good as a bequest to charitable uses.[47] A slave who had acquired the right of freedom at a future time was from that time capable of receiving property by testament or donation, and it must be preserved for him, in order to be delivered in kind when his emancipation should take place. In the meantime it must be administered by a trustee.[48]

C. Emancipation, Abolition of Slavery, and the Effect Thereof. In Great Britain slavery was abolished August 28, 1833;[49] in the United States slavery was abolished and slaves emancipated both by state[50] and United States

N. C. 384; Abram *v.* Johnson, 1 Head (Tenn.) 120; Laura Jane *v.* Hagen, 10 Humphr. (Tenn.) 332; Lewis *v.* Simonton, 8 Humphr. (Tenn.) 185; Hartsell *v.* George, 3 Humphr. (Tenn.) 255; Greenlow *v.* Rawlings, 3 Humphr. (Tenn.) 90; McCullough *v.* Moore, 9 Yerg. (Tenn.) 305.

40. See the statutes. And see Charles *v.* Sheriff, 12 Md. 274; Rozier *v.* Holliday, 8 Md. 381; State *v.* Van Lear, 5 Md. 91; Young *v.* Cavitt, 7 Heisk. (Tenn.) 18; Bedford *v.* Williams, 5 Coldw. (Tenn.) 202; Gray's Case, 9 Humphr. (Tenn.) 513.

41. Bryan *v.* Walton, 14 Ga. 185.

42. Prudence *v.* Bermodi, 1 La. 234.

43. Malinda *v.* Gardner, 24 Ala. 719; Jameson *v.* McCoy, 5 Heisk. (Tenn.) 108.

44. Tannis *v.* Doe, 21 Ala. 449.

In Louisiana a *statu liber*, while such, could not inherit. Lange *v.* Richoux, 6 La. 560. But while a person continued a *statu liber*, he was capable of receiving by donation or testament. Lange *v.* Richoux, *supra*. A *statu liber* had no action for relief for ill treatment. He was a slave until his emancipation and could only sue for his freedom (Dorothee *v.* Coquillon, 7 Mart. N. S. (La.) 350), and after the act of 1857, prohibiting the emancipation of slaves, even the right of a *statu liber* to freedom was not recognized (Marshall *v.* Watrigant, 13 La. Ann. 619).

45. Mathews *v.* Springer, 16 Fed. Cas. No. 9,277, 2 Abb. 283.

46. *Alabama.*— Hooper *v.* Hooper, 32 Ala. 669; Abercrombie *v.* Abercrombie, 27 Ala. 489.

Kentucky.— Monohon *v.* Caroline, 2 Bush 410 (holding that a devise to slaves who by the will are to be freed at a future date was valid); Bigstaff *v.* Lumkins, 16 S. W. 449, 13 Ky. L. Rep. 248.

Mississippi.— Wade *v.* American Colonization Soc., 7 Sm. & M. 663, 45 Am. Dec. 324; Leech *v.* Cooley, 6 Sm. & M. 93.

North Carolina.— Robinson *v.* McIver, 63 N. C. 645; Whedbee *v.* Shannonhouse, 62 N. C. 283; Hayley *v.* Hayley, 62 N. C. 180.

Tennessee.— Reuben *v.* Parrish, 6 Humphr. 122; Hinklin *v.* Hamilton, 3 Humphr. 569; Hope *v.* Johnson, 2 Yerg. 123.

Texas.— Webster *v.* Corbett, 34 Tex. 263; Purvis *v.* Sherrod, 12 Tex. 140.

Virginia.— Shue *v.* Turk, 15 Gratt. 256; Hepburn *v.* Dundas, 13 Gratt. 219; Taylor *v.* Cullins, 12 Gratt. 394; Osborne *v.* Taylor, 12 Gratt. 117.

See 44 Cent. Dig. tit. "Slaves," § 111.

47. Cameron *v.* Raleigh, 36 N. C. 436.

48. Chappel's Succession, 17 La. Ann. 174.

49. St. 3 & 4 Wm. IV, c. 73.

50. In Alabama the ordinance of Sept. 22, 1865, declaring slavery abolished, abrogated all the criminal laws of the state which were applicable exclusively to slaves. George *v.* State, 39 Ala. 675.

In Connecticut, by the statute of 1774, prohibiting the importation of slaves into the state, and the statute of 1784, declaring that no persons of color born after that time should be held in servitude after they arrived at the age of twenty-five years, the legislature intended to provide for the final extinction of slavery. Jackson *v.* Bulloch, 12 Conn. 38.

In Indiana, under Const. art. 1, § 1, declaring that all men are born equally free, with the same inalienable rights, and section 24, providing that those rights shall remain inviolable, and art. 11, § 7, providing that neither slavery nor involuntary servitude, except as punishment for crime, shall exist, slavery was entirely prohibited within the limits of the state. State *v.* Lasselle, 1 Blackf. 60.

In North Carolina the institution of slavery was held not to be abolished or made unlawful either by the act of congress of July, 1862, or by the proclamation of the president, or by the military order of Gen. Schofield after the surrender. They merely freed certain slaves. Harrell *v.* Watson, 63 N. C. 454.

Pennsylvania act of 1780, for the gradual abolition of slavery, included all negro and mulatto children born of slave mothers after its passage, except in the cases excepted by section 10, such as domestic slaves attending on delegates to congress, etc. Spotts *v.* Gillaspie, 6 Rand. (Va.) 566. On an indictment

laws. The emancipation proclamation of 1863 was regarded simply as an advertisement of what would be a sure consequence of conquest; it did not, either in law or fact, emancipate the slaves at that time,[51] and was held to be a war measure, and had no operative effect until carried into execution by force of arms.[52] It did not therefore take effect to destroy property in slaves except so far as it was carried into effect, in the various portions of the territory described in it, by the actual suppression of hostility.[53] The act emancipating slaves in the hostile states was constitutional, as the United States and the confederate states were at that time belligerent powers, and by the law of nations a belligerent party is justified in resorting to any measure to strengthen itself or weaken its adversary.[54] The thirteenth amendment to the United States constitution, abolishing slavery, equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude;[55] and a custom prevailing among the uncivilized tribes of Indians in Alaska, whereby slaves are bought, sold, and held in servitude against their will, and subjected to ill-treatment at the pleasure of the owner, is contrary to the thirteenth amendment and to the civil rights bill of 1866;[56] but when the state as *parens patriæ* in a proper case through its constituted officers or agencies takes under its control an infant, the law authorizing such child to be bound to service under proper restrictions is not a violation of those provisions of the constitutions of the state and of the United States which prohibit slavery and involuntary servitude, except as a punishment for crime after conviction thereof.[57] In becoming freedmen, slaves became "persons," and were punishable under the criminal law for all offenses committed by them in such personal status;[58] and a freedman of legal age might commence proceedings to enforce in the state courts any existing legal or equitable right, created in his favor while he was a slave, that did not then contravene the policy or violate the laws of the state.[59] After the abolition of slavery all obligations given as the evidence of contracts relating thereto became null and void,[60] and the emancipation act necessarily annulled the laws under which contracts relating to the ownership of slaves were previously enforced;[61] but the liability of a person to pay the value of slaves wrongfully appropriated was not affected by the fact of the subsequent abolition of slavery.[62]

under the seventh section of the act supplemental to the act for the gradual abolition of slavery, it was held that the owner of a slave had a right to carry him out of the state, and was entitled to the aid of the magistrates for that purpose. Republica *v.* Richards, 2 Dall. (Pa.) 224, 1 L. ed. 358.

In Rhode Island the daughter of a man alleged to be a slave was free born, as were all persons born after March 1, 1784. Exeter *v.* Warwick, 1 R. I. 63.

The right to hold slaves in Texas ceased on the proclamation of General Granger, dated June 19, 1865, declaring President Lincoln's emancipation proclamation. Garrett *v.* Brooks, 41 Tex. 479. But see Dowell *v.* Russell, 39 Tex. 400, holding that African slavery had been abolished in the United States on June 15, 1865.

Slavery was abolished in Virginia by the Alexandria constitution, adopted April 7, 1864. Woodland *v.* Newhalls, 31 Fed. 434.

51. Logan *v.* State, 40 Ala. 733; Leslie *v.* Langham, 40 Ala. 524; Pickett *v.* Wilkins, 13 Rich. Eq. (S. C.) 366; Andrews *v.* Page, 3 Heisk. (Tenn.) 653.

52. McElvain *v.* Mudd, 44 Ala. 48, 4 Am. Rep. 106; Weaver *v.* Lapsley, 42 Ala. 601, 94 Am. Dec. 671; Leslie *v.* Langham, 40 Ala. 524; Slaback *v.* Cushman, 12 Fla. 472; West *v.* Jones, 85 Va. 616, 8 S. E. 468; Rives *v.* Farish, 24 Gratt. (Va.) 125.

53. McElvain *v.* Mudd, 44 Ala. 48, 4 Am. Rep. 106; Graves *v.* Pinchback, 47 Ark. 470, 1 S. W. 682; Kaufman *v.* Barb, 26 Ark. 24; Dorris *v.* Grace, 24 Ark. 326; Vicksburg, etc., R. Co. *v.* Green, 42 Miss. 436.

54. Buie *v.* Parker, 63 N. C. 131.

55. Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394. And see PEONAGE, 30 Cyc. 1382.

56. *In re* Sah Quah, 31 Fed. 327.

57. Kennedy *v.* Meara, 127 Ga. 68, 56 S. E. 243.

58. Ferdinand *v.* State, 39 Ala. 706; Witherby *v.* State, 39 Ala. 702; Eliza *v.* State, 39 Ala. 693.

59. Green *v.* Anderson, 38 Ga. 655.

60. Rodriquez *v.* Bienvenu, 22 La. Ann. 300, 2 Am. Rep. 728.

61. Wainwright *v.* Bridges, 19 La. Ann. 234.

In Mississippi the act of the convention abolishing slavery did not affect the validity of contracts made before that time. Bradford *v.* Jenkins, 41 Miss. 328.

62. Calhoun *v.* Burnett, 40 Miss. 599.

X. LEGITIMIZING ISSUE.

In addition to the curative legislation passed in a majority of the states legalizing cohabitation between slaves before emancipation,[63] statutes were passed legitimizing the recognized offspring of negroes who had cohabited as man and wife,[64] and prescribing the legal steps to be taken to this end; [65] and the legitimization generally conferred the right of inheritance and descent; [66] and it was held

63. See MARRIAGE, 26 Cyc. 869.

64. See the statutes. And see Gregley *v.* Jackson, 38 Ark. 487, holding that the act of Feb. 6, 1867, legitimizing the recognized offspring of negroes who have cohabited as husband and wife, included the offspring of parents then dead, as well as of those living.

A customary slave marriage of a free man of color and a slave woman, no other marriage or other legal impediment intervening, confirmed after emancipation of the woman by cohabitation as husband and wife, or by any other plainly established assent by both parties to the continued existence of the antecedent relation of husband and wife, renders the issue born in slavery legitimate. Daniel *v.* Sams, 17 Fla. 487.

65. See cases cited *infra*, this note.

In Louisiana slaves could only legitimate their children born before marriage by a declaration before a notary and two witnesses, if not made in a registry of birth or baptism. Thomassin *v.* Raphael, 11 La. 128. But a bastard, born in Louisiana of a slave mother, need not have been legally "acknowledged" by her, in order to enable her, when emancipated, to inherit from him. Neel *v.* Hibard, 30 La. Ann. 808.

66. White *v.* Ross, 40 Ga. 339; Davenport *v.* Caldwell, 10 S. C. 317.

Under the act of congress of Feb. 6, 1879, which provides "that the issue of any marriage of colored persons, contracted and entered into, according to any custom prevailing at the time in any of the States wherein the same occurred, shall, for all purposes of descent and inheritance . . . be deemed to be legitimate," the living together of slaves in the state of Maryland as husband and wife, with the consent of their masters, was sufficient, according to the customs of that state, within the meaning of said act of congress, to make the issue legitimate for the purposes of descent. Thomas *v.* Holtzman, 7 Mackey (D. C.) 62.

Tennessee act of May 26, 1866, providing that "all free persons of color, who were living together as husband and wife in this state while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may hereafter be acquired, by said parents, to as full an extent as the children of white citizens are now entitled by the existing laws of this state," makes legitimate and capable of inheriting the child of slave parents, whose marriage was void under the restrictions growing out of the institution of slavery, although one of the parents may have died during slavery. Wallace *v.* Godfrey, 42 Fed. 812.

N. C. Code, § 1281, provides that the children of colored persons living together as man and wife, born before Jan. 1, 1868, shall be considered legitimate, with all the rights of heirs at law and next of kin, with respect to the estates of such parents or either of them. Under this provision persons born before the time specified could not inherit from an aunt. Tucker *v.* Bellamy, 98 N. C. 31, 4 S. E. 34. Furthermore the right of inheritance is confined to parents and children, and the illegitimate children of the mother by another husband do not inherit from her children by the husband with whom she was cohabiting at the time of the passage of Laws (1866), c. 40, which legalized such cohabitation. Jones *v.* Hoggard, 108 N. C. 178, 12 S. E. 906, 907. The rights given by the code are not abridged by rule 13, same section, permitting such children to inherit from both parents, but not collaterally, and brothers, therefore, born of parents who lived together as man and wife prior to 1868, may inherit from each other. Tucker *v.* Tucker, 108 N. C. 235, 13 S. E. 5. Laws (1866), c. 40, § 5, providing that where a man and woman, who had been slaves, now cohabit together as man and wife, they shall be deemed to have been lawfully married at the time of such cohabitation, applies only to such persons as were cohabiting together when the act was passed, and their children are legitimate, and inherit from their parents to the exclusion of the children of the mother by another husband, with whom she had ceased to cohabit prior to its passage. The act of 1879 (Code, § 1281, rule 13), providing that children born prior to Jan. 1, 1868, of colored persons living together as husband and wife, are legitimate, and inherit from either or both their parents, is not retroactive, and cannot divest an estate which became vested by the death of the parents prior to its passage. Jones *v.* Hoggard, 108 N. C. 178, 12 S. E. 906, 907. But the act of 1879 applies to the children of all colored parents, whether slaves or free, and whether the parents were incapable of entering into the marriage relation by virtue of positive law or their status as slaves. Woodard *v.* Blue, 103 N. C. 109, 9 S. E. 492. Both cohabitation subsisting at the birth of the child and paternity of the person under whom the property is claimed are essential to the right of inheritance. Cohabitation alone, although it furnishes presumptive evidence of paternity, is not conclusive, where no valid marriage between the parents could have been contracted. Woodard *v.* Blue, *supra*; Spaugh *v.* Hartman, 150 N. C. 454, 64 S. E. 198. Moreover an exclusive cohabitation must be shown, as signified by the ex-

that on the emancipation of the children of a slave as a result of the war of secession, their heritable blood was restored, and they were consequently entitled to inherit the estate of their father, who died a freedman;[67] but the offspring of slave marriages which terminated before the emancipation of the parties thereto could now inherit;[68] and children of slaves who, after their emancipation, failed to recognize or consummate the previous customary marriage, were held to occupy

pression "living together as man and wife." Casual sexual intercourse is insufficient. Spaugh *v.* Hartman, *supra*. The purpose and effect of the act of 1866 (*supra*) are to legalize and give validity to a single relation formed and maintained among the slave population, possessing the features and conditions of marriage, and to render offspring legitimate; but no relief was intended for polygamous relations. Branch *v.* Walker, 102 N. C. 34, 8 S. E. 896.

South Carolina act of 1865 (known as the "Enabling Act"), section 4, provides that every colored child heretofore born shall be the legitimate child of his "colored father, if he is acknowledged by such father." A free negro married a slave, and subsequently a free negress, having children by both. He acknowledged the children by the slave, thereby legitimating them under the act, and by his will he directed that his estate should stand "just as it is until my youngest child comes 21 years old," and it was held that the first marriage being void, and the second valid, the children of the second marriage were entitled to share in his estate, and partition and distribution would not be made when the youngest of such children was not twenty-one years old, although the other children were of age. Callahan *v.* Callahan, 36 S. C. 454, 15 S. E. 727. And see Clement *v.* Riley, 33 S. C. 66, 11 S. E. 699. Rev. St. (1872) p. 842, repeals the act of 1865, subject to the provisions on page 766, section 4, declaring that such repeal shall not affect any act done, or right accruing, accrued, or established, before the repeal takes effect, and therefore children born prior to 1872, who were the issus of an invalid marriage between a free negro man and a slave, and who were acknowledged by such father, were entitled to share as his heirs in his intestate property. Callahan *v.* Callahan, 36 S. C. 454, 15 S. E. 727. The act of 1872 (Gen. St. § 2031), legitimizing the issue of slave marriages, applies to the issue of a marriage of a free person of color with a slave; and their property descends as in other cases, a wife and child being preferred to sisters and their children. Dingle *v.* Mitchell, 20 S. C. 202.

Milliken & V. Code Tenn. §§ 3303, 3304, declaring to be husband and wife all colored persons living as such while in slavery, and conferring right of inheritance on children of such persons, does not apply to marriages contracted without consent of the owner of the contracting parties. Brown *v.* Cheatham, 91 Tenn. 97, 17 S. W. 1033.

Tex. Const. (1869) art. 12, § 27, legitimized the offspring of such negroes as had lived together while in slavery, on the terms and under the conditions described in that section. Hill *v.* Fairfax, 38 Tex. 220. The object was to legitimize the offspring of those whose bondage had disabled them from legal marriage until the death of one of them or until the adoption of the constitution (Clements *v.* Crawford, 42 Tex. 601); and the completion of a marriage of slaves after emancipation, and the husband's subsequent recognition of their child who was born in slavery, rendered the child legitimate, and capable of inheriting from either of them under Rev. St. art. 1656 (Cumby *v.* Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673). But this section of the constitution did not make persons husband and wife who were at the time cohabiting, and who had previously cohabited while slaves, when the relation of husband and wife was not recognized between them while they were slaves, and when the man at that time was cohabiting with another woman, formerly a slave, who was recognized as his wife, both before and after emancipation. Livingston *v.* Williams, 75 Tex. 653, 13 S. W. 173.

Va. Const. art. 11, § 7, provides that the child of parents, one or both of whom were slaves at and during the period of their cohabitation, and which was recognized by the father as his child, and whose mother was recognized by such father as his wife, shall inherit his estate as though born in lawful wedlock. The act of Feb. 27, 1866, section 2, provides that when colored persons, before the passage of the act, shall have undertaken and agreed to occupy the relation of husband and wife, and as such cohabit together at the time of its passage, they shall be deemed husband and wife, although the marriage rites have not been celebrated, and their children be deemed legitimate; and where such cohabitation ceased by the death of the mother before the passage of the act, such children shall be deemed legitimate. Thus where plaintiff was born in 1862, her mother being a slave and her father a free colored man, which parents lived together as husband and wife from 1861 to 1864, when the mother died, and plaintiff was recognized by the father as his child, and by him reared to womanhood, she was entitled by inheritance to a share of her intestate father's real estate. Scott *v.* Raub, 88 Va. 721, 14 S. E. 178 [*following* Francis *v.* Francis, 31 Gratt. (Va.) 283]. So also under the act of 1866 (*supra*) the children of such persons are legitimate, whether born before or after the passage of the act, and whether any sort of marriage ceremony had taken place between the parents or not. Smith *v.* Perry, 80 Va. 563. And see Fitchett *v.* Smith, 78 Va. 524.

67. Stikes *v.* Swanson, 44 Ala. 633.

68. Williams *v.* Kimball, 35 Fla. 49, 16 So. 783, 48 Am. St. Rep. 238, 26 L. R. A. 746.

the legal position of bastards.[69] A colored child, born before emancipation, of parents living in what was regarded as wedlock, and who had been acknowledged by the father as his child, was the legitimate child of the father, and he was entitled as a parent to right of possession as against the mother.[70]

SLAY. Synonymous with KILL,[1] *q. v.*

SLEEPING-CAR. See CARRIERS, 6 Cyc. 656.

SLEEPING ON RIGHTS. See LACHES, 24 Cyc. 840.

SLEEPING PARTNER. See PARTNERSHIP, 30 Cyc. 397.

SLEIGHT OF HAND. The tricks of the juggler; jugglery; legerdemain; prestidigitation.[2]

SLEUTH. The track of an animal as the same may be known by the scent;[3] the track of man or beast as followed by the scent.[4]

SLICE. To cut into parts; to cut off a thin, broad piece; to cut into pieces broad and flat.[5]

SLICK EAR. A term which, applied to a horse, alleged to have been stolen, means that the real ownership was unknown.[6]

SLIGHT. Inconsiderable; unimportant.[7]

SLIP. An opening between two pieces of land or wharves.[8]

SLIPPERY. When used as descriptive of a person, a term said to mean that the person to whom it is applied cannot be depended on or trusted; that he is dishonest, and apt to play one false.[9]

69. Allen *v.* Allen, 8 Bush (Ky.) 490.

70. Pascal *v.* Jones, 41 Ga. 220.

1. People *v.* McArron, 121 Mich. 1, 6, 79 N. W. 944. See also State *v.* Thomas, 32 La. Ann. 349, 351.

2. Century Dict.

Within the meaning of the statute providing that whoever, by means of three-card monte or any other form or device, sleight of hand, or other means whatever, by the use of cards or other instruments of like character, obtains from another person any money or other property, shall be deemed guilty of swindling, the term is not limited to sleight of hand by means of cards, but includes sleight of hand by the use of other devices. State *v.* Quinn, 47 Iowa 368, 369.

3. Munro *v.* Beadle, 8 N. Y. Suppl. 414, 415.

4. Webster Dict. [*quoted* in Munro *v.* Beadle, 2 N. Y. Suppl. 314].

"The word 'sleuth' or 'sleuth-hound' does not appear in the first edition of Webster's Unabridged Dictionary, or in any edition of Worcester until after 1880, and then only in the supplement thereto. Its derivation is probably Icelandic, or at least northern, and comes from the word 'slot' which was used in Scotland and the northern countries to indicate, primarily, a track in the snow, and afterwards a track in the earth as well. It did not find its way into the English dictionaries until very recently, and there is said to be pronounced as though spelled 'sloth.'" Munro *v.* Beadle, 8 N. Y. Suppl. 414, 415.

The term as employed to designate a collection of serial stories is held to be a fanciful and arbitrary word, not descriptive of the subject-matter of the publication, and therefore a trade-mark which could be infringed. Munro *v.* Beadle, 8 N. Y. Suppl. 414, 415 [*reversing* 2 N. Y. Suppl. 314].

5. Selchow *v.* Baker, 11 Daly (N. Y.) 353, 357, holding that the terms "sliced animals," "sliced birds," or "sliced objects" applied to card-boards on which pictures of animals, birds, or objects were printed and which were cut into strips constituting games or puzzles, were arbitrary words not descriptive of the articles and not protected as trade-marks.

6. State *v.* Eddy, 46 Wash. 494, 495, 90 Pac. 641.

7. Webster Dict. [*quoted* in Janesville *v.* Carpenter, 77 Wis. 288, 297, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808, holding that a threatened injury sought to be enjoined was too slight for legal cognizance].

"Slight care" see BAILMENTS, 5 Cyc. 183.

"Slight negligence" see NEGLIGENCE, 29 Cyc. 422.

8. Thompson *v.* New York, 11 N. Y. 115, 120; Thompson *v.* New York, 3 Sandf. (N. Y.) 487, 499; New York *v.* Scott, 1 Cai. (N. Y.) 543, 549. See also New York *v.* Rice, 4 E. D. Smith (N. Y.) 604, 608.

The term is said to be peculiar to New York.— Thompson *v.* New York, 3 Sandf. (N. Y.) 487, 499; New York *v.* Scott, 1 Cai. (N. Y.) 543.

In a less general sense the term is used to designate the docks which form the intermediate space between the wharves or land. Thompson *v.* New York, 11 N. Y. 115, 120.

As used in connection with dangers incident to a furnace stack a "slip" is caused by a part of the materials with which the furnace was charged adhering to the sides until the molten mass below it has settled down, and then making a slip or fall, so as to produce an explosion. Giles *v.* Jones, 204 Pa. St. 444, 446, 54 Atl. 280.

9. Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 23, 67 N. W. 646, 33 L. R. A. 302, where the term is held to be libelous.

SLIT. To cut lengthwise; to cut into long pieces or strips; to cut or make a long fissure; to cut in general; to rend; to split.[10]

SLOP-FED HOGS. A term used to designate hogs fattened at a still.[11]

SLOT MACHINE. A term having reference to that numerous class of catch-penny contrivances, of more or less real use or amusement, where by depositing a penny or other small coin one may secure the identical object advertised.[12] (Slot Machine: As Lottery, see LOTTERIES, 25 Cyc. 1638. Keeping as Criminal Offense, see GAMING, 20 Cyc. 883. Violation of Sunday Laws, see SUNDAY.)

SLOT RAILS. Those which form the sides of the slot or orifice through which passes the shank of the grip used in the operation of a cable.[13]

SLOUGH. A term used in the Western States in reference to rivers, meaning a channel diverging from the main channel, and returning into it again at a lower point.[14]

SLOW-UP. In reference to a train, to diminish its speed.[15]

SLUICE DAM. A dam for the purpose of utilizing the water of a stream by raising a head sufficient to float logs and lumber over obstructions and shoal places down to the dam; and then, by letting it out, flood the stream below so as to carry the logs down to their destination.[16] (See, generally, LOGGING, 25 Cyc. 1541.)

SLUSHING. The process of filling up the interstices of a brick wall accomplished by the pouring in of a very thin mortar, so as to run into the spaces and fill them.[17] (See FLUSH, 19 Cyc. 1081.)

SLUT. An untidy woman, a slattern; a female dog.[18] (See BITCH, 5 Cyc. 708; and, generally, LIBEL AND SLANDER, 25 Cyc. 225.)

SLY. Awfully dextrous in doing things secretly; cunning in evading notice or detection; done with or marked by artful secrecy.[19]

SMALLPOX. An acute, highly contagious disease, fatal in between one-third and one-fourth of unvaccinated cases.[20] (Smallpox: Liability For Expense — Of Preventing, see HEALTH, 21 Cyc. 389; Of Treating Patients, see HEALTH, 21 Cyc. 391. Vaccination — In General, see HEALTH, 21 Cyc. 393; Of School Children, see HEALTH, 21 Cyc. 393.)

SMART-MONEY. A term sometimes applied to such damages as are in excess of the actual loss, and are allowed in theory when a tort is aggravated by evil motive, actual malice, deliberate violence, or oppression or fraud.[21] (See DAMAGES, 13 Cyc. 105; MALICIOUS PROSECUTION, 26 Cyc. 64.)

10. Webster Dict. [*quoted* in State *v.* Cody, 18 Oreg. 506, 519, 23 Pac. 891, 24 Pac. 895].

11. Bartlett *v.* Hoppock, 34 N. Y. 118, 119, 88 Am. Dec. 428.

12. State *v.* Vasquez, 49 Fla. 126, 129, 38 So. 830.

13. Johnson *v.* Pennsylvania Steel Co., 62 Fed. 156, 157.

14. Black River Imp. Co. *v.* La Crosse Boom, etc., Co., 54 Wis. 659, 673, 11 N. W. 443, 41 Am. Rep. 66. See also Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 565, 8 N. W. 443, where the term is distinguished from the main channel of the river.

Sloughs are not recognized as watercourses, which a railroad company, in the construction of its road-bed may not fill up without openings for water which may seek an outlet in times of extraordinary rainfalls. Hagge *v.* Kansas City, etc., R. Co., 104 Fed. 391, 392. See also St. Louis, etc., R. Co. *v.* Schneider, 34 Mo. App. 620, 623; Jones *v.* Wabash, etc., R. Co., 18 Mo. App. 251, 257.

15. Louisville, etc., R. Co. *v.* McKenna, 13 Lea (Tenn.) 280, 288.

16. Anderson *v.* Munch, 29 Minn. 414, 417, 13 N. W. 192, where the words "to sluice" and "sluicing," as used in a statute with reference to the operation of such dam, are construed.

17. Laycock *v.* Parker, 103 Wis. 161, 173, 79 N. W. 327.

18. Webster Dict. [*quoted* in Roby *v.* Murphy, 27 Ill. App. 394, 398].

19. Standard Dict. [*quoted* in Cannon *v.* Merry, 116 Ga. 291, 294, 42 S. E. 274].

20. Century Dict.

21. Springer *v.* J. H. Somers Fuel Co., 196 Pa. St. 156, 159, 46 Atl. 370. See also Day *v.* Woodworth, 13 How. (U. S.) 363, 371, 14 L. ed. 181.

A term frequently used to designate punitive, exemplary, or vindictive damages. Hendle *v.* Geiler, (Del. 1895) 50 Atl. 632, 633; Dirmeyer *v.* O'Hern, 39 La. Ann. 961, 964, 3 So. 132; Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 91, 57 S. W. 153, 49 L. R. A. 451; Brewer *v.* Jacobs, 22 Fed. 217, 224. But see Stuyvesant *v.* Wilcox, 92 Mich. 233, 241, 52 N. W. 465, 31 Am. St. Rep. 580, holding that the payment of smart money cannot be compelled as exemplary damages.

SMELL THE LAND. In sailor parlance, an expression used to describe the approach of a vessel too near the bank or bottom.[22]

SMELTER RETURNS. See MINES AND MINERALS, 27 Cyc. 710.

SMELTING. See MINES AND MINERALS, 27 Cyc. 541.

SMOKE. The visible exhalation, vapor, or substance that escapes or is expelled from a burning body.[23] (Smoke: As Nuisance, see NUISANCES, 29 Cyc. 1188. Duty of Person Injured at Railroad Crossing Where View Is Obstructed by, see RAILROADS, 33 Cyc. 1024. Injury From — As Element of Compensation, see EMINENT DOMAIN, 15 Cyc. 753; Caused by Animals Frightened by Smoke of Train, see RAILROADS, 33 Cyc. 1149. Municipal Regulations as to, see MUNICIPAL CORPORATIONS, 28 Cyc. 717.)

SMOKE-HOUSE. A building in which meats or fish are cured by smoking; also, one in which smoked meats are stored.[24]

SMOKER'S ARTICLES. As used in the Federal Customs laws, a term said to include articles chiefly used for the convenience of smokers.[25] (See, generally, CUSTOMS DUTIES, 12 Cyc. 1104.)

SMOLDERING. Being in a state of suppressed activity; quiet but not dead.[26]

SMUGGLE. A term conveying the idea of a secret introduction of goods with intent to avoid payment of duty.[27]

SMUGGLING. The difference of importing prohibited articles, or defrauding the revenue by the introduction of articles into consumption without paying the duties chargeable thereon;[28] the offense of importing goods without paying the duties imposed thereon by the laws of the customs and excise;[29] the fraudulent taking into a country or out of it, merchandise which is lawfully prohibited;[30] the offense of importing or exporting prohibited goods, or other goods, without paying the customs; the offense of defrauding the revenue, by the clandestine introduction of articles into consumption, without paying the duties chargeable upon them.[31] (Smuggling: In General, see CUSTOMS DUTIES, 12 Cyc. 1166. Accusation of, see LIBEL AND SLANDER, 25 Cyc. 286.)

Formerly the term was used as indicating compensation for the smarts of the injured person, and not as now, money required by way of punishment, and to make the wrong-doer smart. Murphy *v.* Hobbs, 7 Colo. 541, 547, 5 Pac. 119, 49 Am. Rep. 366; Fay *v.* Parker, 53 N. H. 342, 355, 16 Am. Rep. 270.

22. The Alexander Folsom, 52 Fed. 403, 413, 3 C. C. A. 165.

23. Webster Dict. [*quoted* in St. Paul *v.* Haugbro, 93 Minn. 59, 62, 100 N. W. 470].

24. Century Dict. [*quoted* in Wait *v.* State, 99 Ala. 164, 165, 13 So. 584, where it is said that the term in common parlance embraces any out-building, appended to a dwelling, in which the family supply of meat is habitually kept and stored for use, and where the meat may be smoked when necessary]. See also Ford *v.* State, 112 Ind. 373, 378, 14 N. E. 241.

25. Steinhardt *v.* U. S., 126 Fed. 443, 444, where it is held that smoker's tables, having affixed thereto at the top a wooden jar, brass cup, ash tray, and cigar cutter, an ornamental wooden automobile for the use of smokers, were properly assessed as smoker's articles and could not be classed as house or cabinet furniture.

Cigarette papers are within the term. Isaacs *v.* Jonas, 148 U. S. 648, 653, 13 S. Ct. 677, 37 L. ed. 596.

26. Webster Dict. [*quoted* in Sun Ins. Office *v.* Western Woolen-Mill Co., 72 Kan. 41, 52, 82 Pac. 513].

27. U. S. *v.* Dunbar, 60 Fed. 75, 77; U. S. *v.* Claflin, 25 Fed. Cas. No. 14,798, 13 Blatchf. 178, where it is said to be a technical word having a known and accepted meaning, "a necessary meaning in a bad sense."

28. Grinnell *v.* Reg., 16 Can. Sup. Ct. 119, 135.

29. Blackstone Comm. [*quoted* in Keck *v.* U. S., 172 U. S. 434, 446, 19 S. Ct. 254, 43 L. ed. 505; Reg. *v.* Cassidy, 9 N. Brunsw. 623, 625].

30. Bouvier L. Dict. [*quoted* in Dunbar *v.* U. S., 156 U. S. 185, 193, 15 S. Ct. 325, 39 L. ed. 390; U. S. *v.* Mitchell, 141 Fed. 666, 670].

31. Imperial Dict. [*quoted* in Reg. *v.* Cassidy, 9 N. Brunsw. 623, 625].

By the established definition of the word both in English and American law, to constitute the offense, the goods must be unladen and brought on shore. Keck *v.* U. S., 172 U. S. 434, 446, 19 S. Ct. 254, 43 L. ed. 505.

To constitute smuggling for which an indictment may be sustained, it is necessary that the property should have been brought in a secret and clandestine manner, with the intent to defraud the revenue; and the non-payment of or accounting for the duties prior to the importation will not constitute the offense. U. S. *v.* Thomas, 28 Fed. Cas. No. 16,473, 2 Abb. 114, 4 Ben. 370.

SNARE. A device said not to be *ejusdem generis* with "net." [32]

SNATCH-BLOCK. A heavy block of wood attached to an upright stanchion by a line used to draw the grain into the leg extending from the hold of the boat to the elevator and up which the grain is drawn.[33]

SNEAK. As a verb, to creep or steal away privately; to withdraw meanly, as a person afraid, or ashamed to be seen; to behave with meanness, servility, to crouch, to truckle; to hide, especially in a mean and covertly manner. As a noun, a mean, sneaking fellow.[34]

SNEAKING. Marked by cowardly concealment; deficient in openness and courage; mean, servile, crouching.[35]

SNOW. The aqueous vapor of the atmosphere precipitated in a crystalline form, and falling to the earth in flakes, each flake consisting of a distinct crystal, or more commonly of combinations of separate crystals.[36] (Snow: Accumulation of — On Station Platform, see CARRIERS, 6 Cyc. 608, 610 note 33. Injury to — Employee in Removing, see MASTER AND SERVANT, 26 Cyc. 1195; To Tenant or Occupier Due to Ice or Snow on Walks or Steps, see LANDLORD AND TENANT, 24 Cyc. 1118. On City Street — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 1372; As Concurrent Cause of Injury Received, see MUNICIPAL CORPORATIONS, 28 Cyc. 1410; Liability of Abutting Owner For Injuries Caused by, see MUNICIPAL CORPORATIONS, 28 Cyc. 1438; Notice of, see MUNICIPAL CORPORATIONS, 28 Cyc. 1376; Removal, see MUNICIPAL CORPORATIONS, 28 Cyc. 856.)

SNOWFLAKE. In its common and ordinary sense, a word understood to be descriptive of whiteness, lightness, and purity.[37]

SO. Hence; therefore; [38] in the same manner; as has been stated; in this or that condition or state; under these circumstances; in this way; with reflex reference to something just asserted.[39]

SOAP. Any of the compounds of alkali with oil or fat which are known and used in the arts under that name.[40]

32. Jones *v.* Davies, [1898] 1 Q. B. 405, 407, 18 Cox C. C. 706, 62 J. P. 182, 67 L. J. Q. B. 294, 78 L. T. Rep. N. S. 44, 14 T. L R. 180.

33. Connors *v.* Great Northern El. Co., 90 N. Y. App. Div. 311, 312, 85 N. Y. Suppl. 644.

34. Webster Dict. [*quoted* in Byrnes *v.* Mathews, 12 N. Y. St. 74, 82].

Such a designation of a person in a newspaper article tends to bring him into contempt, to degrade and disgrace him, and if untrue is a most scandalous libel. Byrnes *v.* Mathews, 12 N. Y. St. 74, 82.

35. Webster Dict. [*quoted* in Byrnes *v.* Mathews, 12 N. Y. St. 74, 82].

36. Century Dict.

37. Larrabee *v.* Lewis, 67 Ga. 561, 564, 44 Am. Rep. 735, where it is said to be a descriptive term which all the public have a right to use, hence it cannot be used as an exclusive trade-mark by a manufacturer of crackers or biscuits.

38. Clem *v.* State, 33 Ind. 418, 431, where it is said that the word is thus understood whenever what follows is an illustration of or conclusion from what has gone before.

39. Webster Dict. [*quoted* in Blanton *v.* State, 1 Wash. 265, 269, 24 Pac. 439].

"Cash or money so called" see Beales *v.* Beales, 7 Jur. 1076, 1077, 13 L. J. Ch. 26, 13 Sim. 592, 36 Eng. Ch. 592, 60 Eng. Reprint 230.

In connection with other words.—"For so long as she may be and remain sole and unmarried" see Storey *v.* Storey, 125 Ill. 608, 611, 18 N. E. 329, 8 Am. St. Rep. 417, 1 L. R. A. 320. "So delivered" see The Santee, 21 Fed. Cas. No. 12,328, 2 Ben. 519, 524. "So due" see Smith *v.* Weaver, 75 N. J. L. 31, 33, 66 Atl. 941. "So far intemperate as to impair his health" see Ætna L. Ins. Co. *v.* Ward, 140 U. S. 76, 84, 11 S. Ct. 720, 35 L. ed. 371; Ætna L. Ins. Co. *v.* Davey, 123 U. S. 739, 744, 8 S. Ct. 331, 31 L. ed. 315. "So gave" see Terrel *v.* Sayre, 3 N. J. L. 598, 603. "So long as she remains my widow" see Summit *v.* Yount, 109 Ind. 506, 509, 9 N. E. 582. "So made" see Broughton *v.* Sherman, 21 Minn. 431, 433; Elmer *v.* Burgin, 2 N. J. L. 186, 193. "So much . . . as remains her property at her death" see McClellan *v.* Larchar, 45 N. J. Eq. 17, 23, 16 Atl. 269. "So much thereof as shall remain undisposed of and unspent" see Mills *v.* Newberry, 112 Ill. 123, 130, 1 N. E. 156, 54 Am. Rep. 213. "So near thereto" see *Ex p.* McLeod, 120 Fed. 130, 141. "So offending" see U. S. *v.* One Thousand Four Hundred and Twelve Gallons Distilled Spirits, 27 Fed. Cas. No. 15,960, 10 Blatchf. 428. "So present" see Com. *v.* Smith, 166 Mass. 370, 374, 44 N. E. 503. "So sold" see Tomkinson *v.* Staight, 17 C. B. 697, 705, 2 Jur. N. S. 354, 25 L. J. C. P. 85, 4 Wkly. Rep. 299, 84 E. C. L. 697. "So soon as" see Toland *v.* Toland, 123 Cal. 140, 145, 55 Pac. 681. "To remain hers so long as she shall be or remain unmarried after my decease" see Nash *v.* Simpson, 78 Me. 142, 147, 3 Atl. 53.

40. Buckan *v.* McKesson, 7 Fed. 100, 103, 18 Blatchf. 485.

SOAPSTONE. A soft magnesium rock, having a soapy feeling, presenting grayish green, brown, and whitish shades of color.[41]

SOBER. Temperate in the use of spirituous liquors; not overpowered by spirituous liquors.[42]

SOBRANTE. In a Mexican land grant, the technical term for surplus.[43]

SOBRE. Upon; above; over; at the top; near something else, but with a greater elevation and power.[44]

SOCAGIUM IDEM EST QUOD SERVITIUM SOCÆ. A maxim meaning "Socage is the same as service of the plough." [45]

SOCIAL ENJOYMENTS. A term which includes balls, parties, dances, horse-races, gambling, feasting and drinking.[46]

SOCIETY. Fellowship; companionship; company; those persons collectively who are united by a common bond of neighborhood and intercourse, and who recognize one another as associates, friends, and acquaintances; [47] the relationship of men to one another when associated in any way; companionship; fellowship; company; the persons collectively considered, who live in any region or in any period; any community of individuals which unite together by a common bond of nearness or intercourse; those who recognize each other as friends and acquaintances.[48] In a narrow sense, an association or company of persons (generally not incorporated) united together for any mutual or common purpose.[49] (Society: In General, see ASSOCIATIONS, 4 Cyc. 299; BUILDING AND LOAN SOCIETIES, 5 Cyc. 117; CLUBS, 7 Cyc. 258; RELIGIOUS SOCIETIES, 34 Cyc. 1112. Agricultural, see AGRICULTURE, 2 Cyc. 72. Charitable, see CHARITIES, 6 Cyc. 974. For Care and Protection of Children, see INFANTS, 22 Cyc. 522. For Prevention of Cruelty to Animals, see ANIMALS, 2 Cyc. 352. Medical, see PHYSICIANS AND SURGEONS, 30 Cyc. 1604. Mutual Benefit, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 7.)

SOCII MEI SOCIUS MEUS SOCIUS NON EST. A maxim meaning "The partner of my partner is not my partner." [50]

41. Webster Dict. [*quoted* in Okey *v.* Moyers, 117 Iowa 514, 515, 91 N. W. 771, where it is said: "It is a variety of talc, which consists of silica and magnesium. It forms extensive beds, and is quarried for fireplace and for coarse utensils"]. See also Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516.

It is a staetite, and is so called from its soapy feeling. Okey *v.* Moyers, 117 Iowa 514, 515, 91 N. W. 771.

42. Webster Dict. [*quoted* in Wolf *v.* Mutual Ben. L. Ins. Co., 30 Fed. Cas. No. 17,925*a*].

Does not imply total abstinence from intoxicating liquors. The moderate, temperate use of intoxicating liquors is consistent with sobriety. Brockway *v.* New Jersey Mut. Ben. L. Ins. Co., 9 Fed. 249, 253.

43. U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 287, 8 S. Ct. 850, 31 L. ed. 747.

44. Ruis *v.* Chambers, 15 Tex. 586, 592, where it is said: "The general idea conveyed to the mind by the word is that of something over or above or upon another."

45. Pelouhet Leg. Max. [*citing* Coke Litt. 86*a*].

46. *In re* Nether Providence Assoc. Charter, 12 Pa. Co. Ct. 666, 667.

47. Century Dict. [*quoted* in Flood *v.* News, etc., Co., 71 S. C. 112, 118, 50 S. E. 637].

48. Webster Dict. [*quoted* in Flood *v.* News, etc., Co., 71 S. C. 112, 118, 50 S. E. 637].

As used in connection with a husband's right to the enjoyment of his wife's society, the term means such capacities for usefulness, aid, and comfort as the wife possessed. Furnish *v.* Missouri Pac. R. Co., 102 Mo. 669, 676, 15 S. W. 315, 22 Am. St. Rep. 800.

In the statement that society should be able to rely upon the judgments and decrees of its courts, and, although it knows they are liable to be reversed, yet it has a right so long as they stand, to presume that they have been properly rendered, the term means third persons, or strangers to the decree. Hay *v.* Bennett, 153 Ill. 271, 287, 38 N. E. 645.

49. Black L. Dict.

"Association and society are convertible terms." New York County Medical Assoc. *v.* New York, 32 Misc. (N. Y.) 116, 117, 65 N. Y. Suppl. 531. See also State *v.* Steele, 37 Minn. 428, 429, 34 N. W. 903; Price *v.* Maxwell, 28 Pa. St. 23, 38.

The terms "church" and "society" are popularly used to express the same thing. Josey *v.* Union L. & T. Co., 106 Ga. 608, 611, 32 S. E. 628; Greeland Church, etc., Soc. *v.* Hatch, 48 N. H. 393, 396. See also CHURCH, 7 Cyc. 129.

"Society instituted for purposes of . . . fine arts exclusively" see Royal College of Music *v.* St. Westminster Vestry, [1898] 1 Q. B. 809, 817, 62 J. P. 357, 67 L. J. Q. B. 540, 78 L. T. Rep. N. S. 441, 14 T. L. R. 350.

"Society purposes" see Sommers *v.* Reynolds, 103 Mich. 307, 312, 61 N. W. 501.

50. Bouvier L. Dict. [*citing* Dig. 50, 17, 47; Lindley Partn.].

Applied in Fitch *v.* Harrington, 13 Gray (Mass.) 468, 472, 74 Am. Dec. 641.

SODALES LEGEM QUAM VOLENT, DUM NE QUID EX PUBLICA LEGE CORRUMPANT, SIBI FERUNTO. A maxim meaning "Let companions make for themselves what law they please, so they do not abuse any thing of the public law." [51]

SOD OIL. The oil which has been fulled into skins during the operation of tanning, and has been subsequently washed out with soda.[52]

SODOMIE EST CRIME DE MAJESTIE VERS LE ROY CELESTRE. A maxim meaning "Sodomy is high treason against the King of Heaven." [53]

51. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

52. U. S. *v.* Leonard, 100 Fed. 288.

53. Peloubet Leg. Max. [*citing* 3 Inst. 58].

SODOMY

By Alexander Karst*

CROSS-REFERENCES

For Matters Relating to:

Fornication, see FORNICATION, 19 Cyc. 1433.

Imputation of Sodomy as Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 324.

Indecent Assault, see ASSAULT AND BATTERY, 3 Cyc. 1027.

Lewdness, see LEWDNESS, 25 Cyc. 209.

Sodomy as Ground For Divorce, see DIVORCE, 14 Cyc. 609.

I. DEFINITION.

Sodomy, in its broadest meaning, is the carnal copulation by human beings with each other against nature, or with a beast,[1] in which sense it includes the

1. Anderson L. Dict.; Bishop New Cr. L. § 503; 4 Blackstone Comm. 216; 1 Hawkins P. C. c. 4.

With human being.— Copulation of a man with a woman *per anum* is sodomy. The term "mankind," used in defining sodomy, includes woman. Lewis *v.* State, 36 Tex. Cr. 37, 35 S. W. 372, 61 Am. St. Rep. 831.

With beast.— Carnal copulation with a sow (Langford *v.* State, 48 Tex. Cr. 561, 89 S. W. 830), with a cow (Bradford *v.* State, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24),

* Author of "Real Actions," 33 Cyc. 1541; "Slaves," *ante*, p. 465. Joint author of "Religious Societies," 3 Cyc. 1112. Editor of "Seamen," 35 Cyc. 1176.

crime against nature,[2] bestiality,[3] and buggery.[4] In its narrower sense sodomy is the carnal copulation between two male human beings *per anum*.[5]

II. NATURE AND ELEMENTS OF OFFENSE.

A. At Common Law — 1. In General. Sodomy was a felony at common law punishable by death.[6]

2. Assault. Assault is an element of the offense of sodomy only when perpetrated upon an unwilling human being,[7] and is not an element if the other party consents.[8] Nor is it an element if the offense is committed with a beast.[9]

3. Penetration. Penetration was an essential element of the crime of sodomy at common law.[10]

4. Emission of Seed. Emission of seed has been variously held to have been essential [11] or non-essential [12] to the commission of the crime at common law.[13]

B. By Statute — 1. In General; Penetration. The majority of states have enacted statutes defining and punishing the crime of sodomy, and these almost

with a ewe (Rex *v.* Cozins, 6 C. & P. 351, 25 E. C. L. 469), with a mare (Cross *v.* State, 17 Tex. App. 476), or with a jennet (Almendaris *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1055) is sodomy. Sexual connection between a dog and a woman is sodomy. Ausman *v.* Veal, 10 Ind. 355, 71 Am. Dec. 331.

With fowl.— Carnal copulation with a domestic fowl is sodomy (Reg. *v.* Brown, 24 Q. B. D. 357, 16 Cox C. C. 715, 54 J. P. 408, 59 L. J. M. C. 47, 61 L. T. Rep. N. S. 594, 38 Wkly. Rep. 95); but not when the fowl's private parts are too small to admit those of a man (Rex *v.* Mulreaty, (Hil. T. 1812) [*cited* in Bishop Crimes (Int. ed.) vol. 3, p. 250)].

Otherwise than per anum.— The crime may be committed otherwise than *per anum*. Herring *v.* State, 119 Ga. 709, 46 S. E. 876.

Sex is immaterial to the commission of the crime. Adams *v.* State, 48 Tex. Cr. 90, 86 S. W. 334, 122 Am. St. Rep. 733.

2. People *v.* Williams, 59 Cal. 397; People *v.* Carroll, 1 Cal. App. 2, 81 Pac. 680; Ausman *v.* Veal, 10 Ind. 355, 71 Am. Dec. 331; Prindle *v.* State, 31 Tex. Cr. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

"The infamous crime against nature with man or beast" made a penal offense by Ill. Cr. Code, § 47, embraces sodomy and other bestial and unnatural copulation. Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323; Honselman *v.* People, 168 Ill. 172, 58 N. E. 304.

3. Ausman *v.* Veal, 10 Ind. 355, 71 Am. Dec. 331.

Bestiality is defined as a sexual connection between a human being and a brute of the opposite sex. Ausman *v.* Veal, 10 Ind. 355, 71 Am. Dec. 331.

4. People *v.* Williams, 59 Cal. 397; Com. *v.* Thomas, 1 Va. Cas. 307.

5. Ausman *v.* Veal, 10 Ind. 355, 71 Am. Dec. 331.

Sodomy is with mankind.— 12 Coke 37, 77 Eng. Reprint 1318.

The act must be per anum.— Prindle *v.* State, 31 Tex. Cr. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

Use of the mouth does not constitute sodomy. People *v.* Boyle, 116 Cal. 658, 48 Pac. 800; Mitchell *v.* State, 49 Tex. Cr. 535, 95 S. W. 500; Rex *v.* Jacobs, R. & R. 246.

6. State *v.* Vickman, 52 La. Ann. 1921, 28 So. 273; 4 Blackstone Comm. 215; 1 Hawkins P. C. c. 4.

7. People *v.* Hickey, 109 Cal. 275, 41 Pac. 1027; Darling *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1005.

8. People *v.* Hickey, 109 Cal. 275, 41 Pac. 1027.

A minor of tender years cannot consent to the commission of the offense. Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; Means *v.* State, 125 Wis. 650, 104 N. W. 815; Reg. *v.* Lock, L. R. 2 C. C. 10, 12 Cox C. C. 244, 42 L. J. M. C. 5, 27 L. T. Rep. N. S. 661, 21 Wkly. Rep. 144. And although he submit willingly and without resistance the act is still by force and includes assault. Mascalo *v.* Monestanto, *supra*; Reg. *v.* Lock, *supra*.

9. People *v.* Oates, 142 Cal. 12, 75 Pac. 337; People *v.* Hickey, 109 Cal. 275, 41 Pac. 1027; Com. *v.* J——, 21 Pa. Co. Ct. 625.

10. State *v.* Vickman, 52 La. Ann. 1921, 28 So. 273; Green *v.* State, (Tex. Cr. App. 1904) 79 S. W. 304; Cross *v.* State, 17 Tex. App. 476; Com. *v.* Thomas, 1 Va. Cas. 307; 12 Coke 37, 77 Eng. Reprint 1318; 1 Hawkins P. C. c. 4.

11. People *v.* Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321; Rex *v.* Cozins, 6 C. & P. 35, 25 E. C. L. 469; 12 Coke 37, 77 Eng. Reprint 1318; 2 Bishop Cr. L. § 1127 *et seq.*; 1 Hawkins P. C. 4.

12. *Kentucky.*—White *v.* Com., 115 Ky. 473, 73 S. W. 1120, 24 Ky. L. Rep. 2349.

Louisiana.— State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

Texas.— Almendaris *v.* State, (Cr. App. 1903) 73 S. W. 1055; Cross *v.* State, 17 Tex. App. 476.

Virginia.— Com. *v.* Thomas, 1 Va. Cas. 307.

England.— 1 Hale P. C. 628.

See 44 Cent. Dig. tit. "Sodomy," § 1.

13. The conflict of cases in regard to the essentiality of emission is fully discussed in State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

universally agree in making the offense a felony,[14] and agree generally, as do likewise the opinions construing them, in including within their provisions all acts of unnatural copulation whether with mankind or beast.[15] The statutes in the various states make penetration an essential of the crime.[16]

2. Emission of Seed. Emission of seed is very generally declared by statute to be unnecessary to the commission of the offense of sodomy.[17]

III. Parties Liable.

The agent and the pathic are both liable as principals, if each is adult and consents to the commission of the offense;[18] but if either the agent or the pathic be a boy of tender age the adult alone is liable,[19] and although the minor consent the act is still by force.[20]

IV. Indictment and Information.

A. In General. An indictment for sodomy need not define the crime or charge with certainty the separate elements;[21] but should sufficiently apprise

14. *Georgia.*— Herring *v.* State, 119 Ga. 709, 46 S. E. 876.

Illinois.— Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323; Honselman *v.* People, 168 Ill. 172, 48 N. E. 304.

Louisiana.— State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273; State *v.* Williams, 34 La. Ann. 87.

Ohio.— Foster *v.* State, 1 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261.

Pennsylvania.— Com. *v.* J——, 21 Pa. Co. Ct. 625.

Texas.— Fennel *v.* State, 32 Tex. 378; Lewis *v.* State, 36 Tex. Cr. 37, 35 S. W. 372, 61 Am. St. Rep. 831; *Ex p.* Bergen, 14 Tex. App. 52.

Wisconsin.— Means *v.* State, 125 Wis. 650, 104 N. W. 815.

England.— Rex *v.* Reekspear, 1 Moody C. C. 342.

In states in which the statutes or codes provide that no act shall be a crime if not contained in the statutes sodomy of course is not a crime if omitted therefrom. Estes *v.* Carter, 10 Iowa 400; Melvin *v.* Weiant, 36 Ohio St. 184, 38 Am. Rep. 572; Davis *v.* Brown, 27 Ohio St. 326; State *v.* Rohl, 33 Tex. 76; State *v.* Smith, 32 Tex. 167; State *v.* Foster, 31 Tex. 578; Wolff *v.* State, 6 Tex. App. 195. These three states, however, have subsequently enacted statutes making sodomy a crime.

15. Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323; Honselman *v.* People, 168 Ill. 172, 48 N. E. 304; State *v.* Williams, 34 La. Ann. 87.

Act in the mouth is sodomy. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273; Means *v.* State, 125 Wis. 650, 104 N. W. 815. *Contra,* Prindle *v.* State, 31 Tex. Cr. 551, 21 S. W. 360, 37 Am. St. Rep. 833.

Per anum.— Sodomy may be committed otherwise than *per anum.* Herring *v.* State, 119 Ga. 709, 46 S. W. 876.

Offense with animal is not sodomy within the statute. Com. *v.* J——, 21 Pa. Co. Ct. 625.

"Mankind" used in statutes defining sodomy includes woman. Lewis *v.* State, 36 Tex. Cr. 37, 35 S. W. 372, 61 Am. St. Rep. 831. The statute must clearly define the crime. Frazier *v.* State, 39 Tex. 390; Fennell *v.* State, 32 Tex. 378.

16. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273; Foster *v.* State, 1 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261; Rex *v.* Reekspear, 1 Moody C. C. 342.

17. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273; Foster *v.* State, 1 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261; Rex *v.* Cozins, 6 C. & P. 351, 25 E. C. L. 469; Rex *v.* Reekspear, 1 Moody C. C. 342.

18. Reg. *v.* Allen, 2 C. & K. 869, 3 Cox C. C. 270, 1 Den. C. C. 364, 13 Jur. 108, 18 L. J. M. C. 72, T. & M. 55, 61 E. C. L. 869; 1 Hale P. C. 669.

19. Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; Means *v.* State, 125 Wis. 650, 104 N. W. 815; Reg. *v.* Allen, 2 C. & K. 869, 3 Cox C. C. 270, 1 Den. C. C. 364, 13 Jur. 108, 18 L. J. M. C. 72, T. & M. 55, 61 E. C. L. 869; 1 Hale P. C. 669.

20. Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; Reg. *v.* Lock, L. R. 2 C. C. 10, 12 Cox C. C. 244, 42 L. J. M. C. 5, 27 L. T. Rep. N. S. 661, 21 Wkly. Rep. 144.

21. Davis *v.* State, 3 Harr. & J. (Md.) 154.

Mere naming in an indictment of the crime of sodomy is sufficient, the offense being too well known and too disgusting to be further defined. Davis *v.* State, 3 Harr. & J. (Md.) 154; State *v.* Chandonette, 10 Mont. 280, 25 Pac. 438; Cross *v.* State, 17 Tex. App. 476; *Ex p.* Bergen, 14 Tex. App. 52.

The "crime against nature" in an indictment is by the use of that term sufficiently described. State *v.* Williams, 34 La. Ann. 87.

An indictment charging defendant with "divers nasty, lewd, and sodomitical practices" "contrary to the order of nature" was too general. Reg. *v.* Rowed, 3 Q. B. 180, 2 G. & D. 518, 6 Jur. 396, 11 L. J. M. C. 74, 43 E. C. L. 688.

Carnal copulation.— A common-law indictment for sodomy must allege carnal copulation. 1 Hawkins P. C. c. 4.

defendant of the charge against him,[22] and an indictment charging the offense in the language of the statute is usually sufficient.[23]

B. Particular Averments. Particular averments of the elements of the offense are generally unnecessary in an indictment.[24]

V. DEFENSES.[25]

Irresistible insane impulse is a defense to a prosecution for sodomy;[26] and similarly mental disability is a defense if defendant was unable to comprehend the nature and consequences of the act.[27] Unreasonable lapse of time between the commission of the offense and complaint thereof is likewise a defense.[28] But unlike the case of rape,[29] consent is no defense to a prosecution for sodomy.[30]

22. State *v.* Campbell, 29 Tex. 44, 94 Am. Dec. 251.

An information charging the commission of the crime "upon the person of Carl K" sufficiently indicates that it was committed with a human being, as distinguished from an animal. People *v.* Moore, 103 Cal. 508, 37 Pac. 510. But see People *v.* Carroll, 1 Cal. App. 2, 81 Pac. 680, which held that an information charging that defendant committed the crime against nature on and had "carnal knowledge" of the body of one Frank D was fatally defective for failure to allege that Frank D was a male person, since the words "carnal knowledge" refer to sexual connection.

An indictment charging copulation with a "sow" sufficiently described the character of the animal. Langford *v.* State, 48 Tex. Cr. 561, 89 S. W. 830. Also "with a mare, same being a beast." Cross *v.* State, 17 Tex. App. 476. An indictment that "Wallace Bradford, against the order of nature, attempted to carnally know a certain beast, to-wit, a cow," sufficiently charges the crime against nature (Bradford *v.* State, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24), and an indictment describing the animal as "a certain animal called a bitch" is sufficiently certain, although the female of several animals are so designated (Reg. *v.* Allen, 1 C. & K. 495, 47 E. C. L. 495).

In an opening of the body other than sexual parts.— An indictment which alleged the commission of the crime against nature by carnal copulation "in an opening of the body other than the sexual parts" was not insufficient on the ground that the particular opening was not designated. State *v.* McGruder, 125 Iowa 741, 101 N. W. 646.

23. Honselman *v.* People, 168 Ill. 172, 48 N. E. 304; Com. *v.* Dill, 160 Mass. 536, 36 N. E. 472.

Particular indictments considered.— An indictment charging that J W against the order of nature had a venereal affair and did carnally know H A sufficiently defined the crime. Reg. *v.* Allen, 2 C. & K. 869, 3 Cox C. C. 270, 1 Den. C. C. 364, 13 Jur. 108, 18 L. J. M. C. 72, T. & M. 55, 61 E. C. L. 869. An indictment charging in the words of the statute that defendant at a time and place named "did unlawfully and feloniously commit a certain unnatural and lascivious act" with a person named is sufficient. Com. *v.* Dill, 160 Mass. 536, 36 N. E. 472. An information charging that defendant made an assault upon a male person and against the order of nature had a venereal affair and committed the infamous crime against nature of buggery is sufficient. State *v.* Romans, 21 Wash. 284, 57 Pac. 819. An indictment charging defendant with committing sodomy and the crime against nature with a "mare, same being a beast," is sufficient. Foster *v.* State, 1 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261; Cross *v.* State, 17 Tex. App. 476.

Words of statute not sufficient.— An indictment for sodomy must describe the offense charged with certainty sufficient to apprise defendant of the charge against him, and it is not enough to charge this offense in the very words of the statute. State *v.* Campbell, 29 Tex. 44, 94 Am. Dec. 251.

24. See *infra*, this note.

Agent or pathic.— In the indictment of an adult for the crime against nature it is immaterial whether he is charged as agent or pathic, so long as the act charged be within the statutory definition of the crime. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

Sex.— An indictment charging sodomy is good, although it does not state the sex of defendants, where the names of defendant and the pathic are names usually applied to male persons. Foster *v.* State, 10 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261. An indictment for sodomy need not allege the sex of the pathic; sex is immaterial in this respect. Adams *v.* State, 48 Tex. Cr. 90, 86 S. W. 334, 122 Am. St. Rep. 733.

25. **Defenses to crimes generally** see CRIMINAL LAW, 12 Cyc. 155.

26. State *v.* McGruder, 125 Iowa 741, 101 N. W. 646.

27. State *v.* McGruder, 125 Iowa 741, 101 N. W. 646. And see, generally, CRIMINAL LAW, 12 Cyc. 164 *et seq.*

28. Reg. *v.* Robins, 1 Cox C. C. 114.

Delay of less than a year by a boy fifteen years of age in bringing a charge against a mature man was not unreasonable. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

Delay of two years in making complaint was unreasonable, defendant being under twelve years of age. Williams *v.* Com., (Va. 1895) 22 S. E. 859.

29. **Consent as a defense to prosecution for rape** see RAPE, 33 Cyc. 1423.

30. Territory *v.* Mahaffey, 3 Mont. 112; Reg. *v.* Allen, 2 C. & K. 869, 3 Cox C. C.

VI. EVIDENCE.

A. Presumptions and Burden of Proof. Upon a prosecution for sodomy penetration must be proven by the state,[31] although to no particular depth,[32] and the proof may be circumstantial,[33] and thus emission of seed is *prima facie* proof of penetration.[34] But emission of seed being now in most jurisdictions unnecessary to the consummation of the crime,[35] proof of emission is unnecessary in a prosecution for the offense.[36]

B. Admissibility. The general rules governing the admissibility of evidence in criminal prosecutions[37] apply in prosecutions for this offense.[38] Declarations of the assaulted party made subsequent to the offense are inadmissible to prove the substantive case,[39] and will be admitted only to corroborate his testimony when that has been impeached.[40]

C. Weight and Sufficiency. The evidence to sustain a conviction must of course as in other crimes be sufficient to establish guilt beyond a reasonable doubt.[41] The uncorroborated testimony of a participant in the offense has been held sufficient to convict,[42] but the general rule is that corroboration is necessary.[43]

VII. TRIAL AND VERDICT.

A. Instructions. The rules governing instruction of the jury in criminal prosecutions generally[44] apply to prosecutions for sodomy.[45]

270, 1 Den. C. C. 364, 13 Jur. 108, 18 L. J. M. C. 72, T. & M. 55, 61 E. C. L. 869; Reg. *v.* Jellyman, 8 C. & P. 604, 34 E. C. L. 916. And see *supra*, III.

Consent is impossible by a minor of tender years. A boy seven years old cannot consent (Means *v.* State, 125 Wis. 650, 104 N. W. 815; Reg. *v.* Lock, L. R. 2 C. C. 10, 12 Cox C. C. 244, 42 L. J. M. C. 5, 27 L. T. Rep. N. S. 661, 21 Wkly. Rep. 144), nor a boy of twelve, and although he submits without resistance the act is still by force (Mascolo *v.* Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170).

31. Langford *v.* State, 48 Tex. Cr. 561, 89 S. W. 830; Green *v.* State, (Tex. Cr. App. 1904) 79 S. W. 304; Cross *v.* State, 17 Tex. App. 476.

32. Cross *v.* State, 17 Tex. App. 476.

33. Cross *v.* State, 17 Tex. App. 476; Almendaris *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1055.

34. 1 Hawkins P. C. c. 4.

35. See *supra*, II, B.

36. State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273. *Contra*, People *v.* Hodgkin, 94 Mich. 27, 153 N. W. 794, 34 Am. St. Rep. 321, holding that emission is necessary for the completion of the crime of sodomy, and while it may be inferred from proof of penetration and other circumstances yet it is a fact indispensable to conviction.

37. See CRIMINAL LAW, 12 Cyc. 87 *et seq.*

38. See cases cited *infra*, this, and the following notes.

Good character.— If defendant denies committing the crime and having ever seen the alleged pathic, testimony as to defendant's good character should be admitted. People *v.* Bahr, 74 N. Y. App. Div. 117, 77 N. Y. Suppl. 443.

39. Foster *v.* State, 1 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261.

40. State *v.* Gruso, 28 La. Ann. 952.

In a prosecution for sodomy with a boy, J S, evidence that a week after the alleged crime defendant in soliciting another boy to commit a like offense said he had done it with other boys was admissible if defendant meant to include J S. Com. *v.* Snow, 111 Mass. 411.

Emission.— Mother's testimony as to dry substance on boy's clothing was admissible evidence of emission. People *v.* Swist, 136 Cal. 520, 69 Pac. 223.

41. Langford *v.* State, 48 Tex. Cr. 561, 89 S. W. 830; Mullins *v.* State, 45 Tex. Cr. 465, 76 S. W. 560.

For evidence held not to prove guilt beyond reasonable doubt see Hodges *v.* State, 94 Ga. 593, 19 S. E. 758.

Lapse of a year between the commission and complaint by a participant does not cast doubt upon the truth of his testimony. Honselman *v.* People, 168 Ill. 172, 48 N. E. 304.

42. Honselman *v.* People, 168 Ill. 172, 48 N. E. 304.

Uncorroborated testimony of a boy was held sufficient to convict in Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323.

43. People *v.* Deschessere, 69 N. Y. App. Div. 217, 74 N. Y. Suppl. 761; Medis *v.* State, 27 Tex. App. 194, 11 S. W. 112, 11 Am. St. Rep. 192; Reg. *v.* Jellyman, 8 C. & P. 604, 34 E. C. L. 916.

Evidence of a demented youth alone is insufficient to convict of sodomy. People *v.* Deschessere, 69 N. Y. App. Div. 217, 74 N. Y. Suppl. 761.

For evidence sufficiently corroborating testimony of participant see Com. *v.* Snow, 111 Mass. 411.

44. See CRIMINAL LAW, 12 Cyc. 928.

45. See cases cited *infra*, this note.

Failure to give instructions covering the law of assault and battery was not error

B. Bill of Particulars; Verdict. Defendant in a prosecution is entitled to a bill of particulars only where he cannot prepare his defense without it.[46] Upon a prosecution for sodomy defendant may be convicted of simple assault.[47]

VIII. PUNISHMENT.

Sodomy was punishable at common law by death, sometimes by burning, sometimes by burying alive.[48] Punishment is, however, almost universally regulated by statutes in the several states, which very generally impose long terms in state prison, in some instances for life.[49]

IX. ATTEMPT OR ASSAULT WITH INTENT TO COMMIT SODOMY.

An attempt or assault with intent to commit sodomy is very generally made a crime by statutes which forbid the crime of sodomy itself,[50] and in the absence of

where no assault and battery was charged except as part of the assault to commit the crime of sodomy. White *v.* Com., 115 Ky. 473, 24 Ky. L. R. 2349, 73 S. W. 1120. But where the evidence might show simple assault it was held error to refuse to charge that defendant might be convicted of that crime. People *v.* Hickey, 109 Cal. 275, 41 Pac. 1027. In defining assault as an element of the crime of sodomy the court need not charge the penalty for assault and battery. Darling *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1005.

Circumstantial evidence.—Penetration being proven only by circumstantial evidence, the court should, if requested, instruct on the law of circumstantial evidence. Almendaris *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1055.

Copulation.— Instructions that there must have been some penetration, although to no particular depth, and also that emission was necessary, defined with sufficient particularity the copulation sufficient to constitute the crime of sodomy. State *v.* McGruder, 125 Iowa 74, 101 N. W. 646.

Emission.— Defendant could not complain of instruction requiring emission. State *v.* McGruder, 125 Iowa 741, 101 N. W. 646.

Corroboration.— The jury should be instructed that the testimony of a person upon whom the crime was committed must be corroborated, if the question of his consent to the offense be in doubt. Medis *v.* State, 27 Tex. App. 194, 11 S. W. 112, 11 Am. St. Rep. 192.

Punishment.— If defendant was under sixteen, the court should instruct that punishment might be in the reformatory. Brown *v.* State, 49 Tex. Cr. 626, 99 S. W. 1001.

If the crime is charged in clear language, although not by name, it is not error to instruct that the crime charged is synonymous with sodomy. People *v.* Williams, 59 Cal. 397.

46. Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323, holding that defendant under an indictment charging him with the infamous crime against nature with and upon a certain person was not entitled to a bill of particulars, the indictment sufficiently apprising him of the offense charged to enable him to prepare his defense.

47. People *v.* Hickey, 109 Cal. 275, 41 Pac. 1027; State *v.* Frank, 103 Mo. 120, 15 S. W. 330.

48. 1 Hawkins P. C. c. 4 [*citing* Britt. lib. 6, c. 9; Mirr. c. 4, § 14; 3 Inst. 58].

49. See the statutes of the several states. And see the following cases:

California.— People *v.* Oates, 142 Cal. 12, 75 Pac. 337; People *v.* Wilson, 119 Cal. 384, 51 Pac. 639; People *v.* Erwin, 4 Cal. App. 394, 88 Pac. 371; People *v.* Carroll, 1 Cal. App. 2, 81 Pac. 680.

Illinois.— Honselman *v.* People, 168 Ill. 172, 48 N. E. 304.

Iowa.— State *v.* McGruder, 125 Iowa 741, 101 N. W. 646.

Louisiana.— State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273.

Missouri.— State *v.* Frank, 103 Mo. 120, 15 S. W. 330.

North Dakota.— State *v.* King, 9 N. D. 149, 82 N. W. 423.

Pennsylvania.— Com. *v.* J——, 21 Pa. Co. Ct. 625.

Texas.— Brown *v.* State, 49 Tex. Cr. 626, 99 S. W. 1001; Cross *v.* State, 17 Tex. App. 476.

Washington.— State *v.* Romans, 21 Wash. 284, 57 Pac. 819.

No punishment being prescribed by statute for the crime of sodomy punishment is by imprisonment or fine, or both, but imprisonment if imposed must be in the house of correction under Vt. St. § 5170. State *v.* La Forrest, 71 Vt. 311, 45 Atl. 225.

Punishment of a minor, if imprisonment, may be in the reformatory. Brown *v.* State, 49 Tex. Cr. 626, 99 S. W. 1001.

In the entire absence of statute the crime may be punished under a statute adopting as much of the common law as is applicable to local conditions. State *v.* La Forrest, 71 Vt. 311, 41 Atl. 225.

50. See the statutes of the several states. And see Romans *v.* State, 21 Wash. 284, 57 Pac. 819; Davis *v.* State, 3 Harr. & J. (Md.) 154.

Consent robs an assault to commit sodomy of the element of simple assault; and consent is a question of fact for the jury. People *v.* Hickey, 109 Cal. 275, 41 Pac. 1027.

Sodomy with animal.— A statute which provides punishment for a person who assaults another with intent to commit sodomy

special statutes, general statutes providing that a person who attempts to commit a crime is punishable for the attempt apply to sodomy.[51] An indictment for attempt or assault with intent to commit sodomy must state clearly the offense prohibited by the statute and some act committed toward its perpetration.[52] The punishment for attempt or assault with intent to commit sodomy is regulated entirely by statute in the various states,[53] and in the absence of special statutes, punishment is prescribed by statutes which declare that an attempt to commit a crime is itself an offense.[54] The punishment prescribed is often one half the punishment prescribed for the crime of sodomy itself.[55]

SOFT. In some connections a relative term.[1]

SOFT ENGLISH LEAD. A term which may mean lead made wholly of English ores, or soft lead made in England, no matter from what ores.[2]

SOFT HOGS. A term used to designate hogs fed upon mast, such as beech nuts and acorns.[3]

SOFT WOOD. A term said to be probably intended to represent what in commerce has been applied to certain kinds of wood to distinguish it from other kinds.[4]

SOIL. In reference to a navigable river, the *alveus* or bed of the river.[5]

SOJOURN. As a noun, a temporary residence, as that of a traveler in a foreign land; a SOJOURNER,[6] *q. v.* As a verb, to have a temporary abode; to live as not at home.[7] (See RESIDE, 34 Cyc. 1645; RESIDENCE, 34 Cyc. 1647.)

does not apply to an offense with a domestic animal. Com. *v.* J——, 21 Pa. Co. Ct. 625.

Mere overtures to commit sodomy do not constitute a crime. Rex *v.* Hickman, 1 Moody C. C. 34. There must be an overt act. People *v.* Wilson, 119 Cal. 384, 51 Pac. 639; State *v.* Hefner, 129 N. C. 548, 40 S. E. 2.

Facts held to constitute an attempt see People *v.* Wilson, 119 Cal. 384, 51 Pac. 639; State *v.* Smith, 137 Mo. 25, 38 S. W. 717; Anonymous, 1 B. & Ad. 382, 20 E. C. L. 527; Reg. *v.* Middleditch, 2 Cox C. C. 313, 1 Den. C. C. 92.

After acquittal upon an indictment for sodomy defendant may be tried upon a charge of attempt to commit that crime. Reg. *v.* Eaton, 8 C. & P. 417, 34 E. C. L. 812.

51. State *v.* Romans, 21 Wash. 284, 57 Pac. 819 (holding that a statute providing that an attempt to commit a crime is punishable is not rendered inapplicable to an attempt to commit sodomy, by the enactment of a statute prescribing punishment for assault with intent to commit sodomy, as the latter is a substantive offense entirely distinct from an attempt to commit a crime); People *v.* Oates, 142 Cal. 12, 75 Pac. 337; State *v.* Frank, 103 Mo. 120, 15 S. W. 330; Davis *v.* State, 3 Harr. & J. (Md.) 154.

Attempt with domestic fowl to commit sodomy is a crime. Reg. *v.* Brown, 24 Q. B. D. 357, 16 Cox C. C. 715, 54 J. P. 408, 59 L. J. M. C. 47, 61 L. T. Rep. N. S. 594, 38 Wkly. Rep. 95.

52. State *v.* Smith, 137 Mo. 25, 38 S. W. 717; State *v.* Hefner, 129 N. C. 548, 40 S. E. 2.

An information is good which charges defendant with wilfully, unlawfully, and feloniously making an assault upon Harry G with intent in and upon the person of said Harry G the infamous crime against nature (People *v.* Williams, 59 Cal. 397), as is also an indictment designating the offense as an attempt to commit the infamous crime against nature with and upon a male human being named therein by attempting to have carnal knowledge of his body (People *v.* Ervin, 4 Cal. App. 394, 88 Pac. 371), and an indictment charging an attempt to commit an unnatural offense with a domestic fowl (Reg. *v.* Brown, 24 Q. B. D. 357, 16 Cox C. C. 715, 54 J. P. 408, 59 L. J. M. C. 47, 61 L. T. Rep. N. S. 594, 38 Wkly. Rep. 95).

53. See the statutes of the several states. And see Com. *v.* J——, 21 Pa. Co. Ct. 625.

54. Davis *v.* State, 3 Harr. & J. (Md.) 154.

55. State *v.* King, 9 N. D. 149, 82 N. W. 423.

1. Cimiotti Unhairing Co. *v.* American Unhairing Mach. Co., 115 Fed. 498, 504.

"Soft bristles" see Cimiotti Unhairing Co. *v.* American Unhairing Mach. Co., 115 Fed. 498, 504.

"Soft wax" see A. B. Dick Co. *v.* Pomeroy Duplicator Co., 117 Fed. 154, 155.

2. Pollen *v.* Le Roy, 30 N. Y. 549, 563.

3. Bartlett *v.* Hoppock, 34 N. Y. 118, 119, 88 Am. Dec. 428.

4. Darling *v.* Dodge, 36 Me. 370, 374, where it is said: "The term is not one, to which the law has attached a specific meaning, and therefore the Court cannot with propriety expound it."

5. People *v.* Gold Run Ditch, etc., Co., 66 Cal. 138, 146, 4 Pac. 1152, 56 Am. Rep. 80.

Is not "compost."—Marrack *v.* Ellis, 1 M. & R. 511, 514, 17 E. C. L. 682.

6. Wittenbrock *v.* Mabins, 57 Hun (N. Y.) 146, 148, 10 N. Y. Suppl. 733.

7. Wittenbrock *v.* Mabins, 57 Hun (N. Y.) 146, 148, 10 N. Y. Suppl. 733.

One who lives in New Jersey and does business in New York "sojourns" in such city.

SOJOURNER. One who dwells for a time as a temporary resident.[8] (See RESIDENT, 34 Cyc. 1655.)

SOLA AC PER SE SENECTUS DONATIONEM, TESTAMENTUM AUT TRANSACTIONEM NON VITIAT. A maxim meaning "Old age does not alone and of itself vitiate gift, will or transaction." [9]

SOLA INNOCENTIA LIBERA. A maxim meaning "Innocence alone is free." [10]

SOLARES. A term used in the Spanish law to denote house lots of a small size, upon which dwellings, shops, stores, etc., are built.[11]

SOLATIUM. In reference to damages, a compensation as a soothing to the affections or wounded feelings, and for loss of the comfort and social pleasure there is in the association between members of a family.[12]

SOLA VESTURA. An exclusive right of pasturage.[13]

SOLD. A term which indicates a consummated sale;[14] in an executory contract of sale, contracted to sell;[15] a term which imports a contract of sale for a valuable consideration.[16] (See, generally, SALES, 35 Cyc. 1; VENDOR AND PUCHASER.)

Wittenbrock *v.* Mabins, 57 Hun (N. Y.) 146, 148, 10 N. Y. Suppl. 733.

The expressions "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," "coming to reside and dwell," in the provincial statutes relative to settlements in the poor laws, have been held to be used indiscriminately, and to mean the same thing, namely, to designate the place of a person's domicile. Ahington *v.* North Bridgewater, 23 Pick. (Mass.) 170, 176.

"'Sojourning' means something more than 'travelling,' and applies to a temporary, as contra-distinguished from a permanent, residence." Henry *v.* Ball, 1 Wheat (U. S.) 1, 5, 4 L. ed. 21.

8. Webster Dict. [*quoted* in McManigle *v.* Crouse, 1 Walk. (Pa.) 43, 44].

A physician residing and practising medicine in one county but having an office in another county, to which he makes stated trips and there receives and prescribes for patients, is a sojourner within the meaning of a statute requiring sojourners practising medicine to be registered. Ege *v.* Com., 6 Pa. Cas. 583, 9 Atl. 471.

9. Bouvier L. Dict.

Applied in Van Alst *v.* Hunter, 5 Johns. Ch. (N. Y.) 148, 158.

10. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

11. Hart *v.* Burnett, 15 Cal. 530, 554.

12. Marshall *v.* Consolidated Jack Mines Co., 119 Mo. App. 270, 274, 95 S. W. 972, where it is said: "'*Solatium*,' is sentiment, love, or affection as distinguished from a property loss."

13. Johnson *v.* Barnes, L. R. 8 C. P. 527, 528, 42 L. J. C. P. 259, 29 L. T. Rep. N. S. 65.

14. Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 218, 18 Pac. 248, 9 Am. St. Rep. 199. See also Forthman *v.* Deters, 206 Ill. 159, 166, 69 N. E. 97, 99 Am. St. Rep. 145; Memory *v.* Niepert, 131 Ill. 623, 630, 23 N. E. 431, both holding that the term does not import a mere proposition to sell. But this is not conclusive (Blackwood *v.* Cutting Packing Co., *supra*; Anderson *v.* Read, 106 N. Y. 333, 351, 13 N. E. 292; Gallup *v.* Sterling, 22 Misc. (N. Y.) 672, 675, 49 N. Y. Suppl. 942); and the term does not necessarily and in all connections mean that the conveyance must be made, or that the title must pass (Shainwald *v.* Cady, 92 Cal. 83, 85, 28 Pac. 101; Eaton *v.* Richeri, 83 Cal. 185, 186, 23 Pac. 286). The term may mean only "bargained." Brooks *v.* Libby, 89 Me. 151, 153, 33 Atl. 66. It is not always the equivalent of "conveyed." Bradish *v.* Yocum, 130 Ill. 386, 391, 23 N. E. 114.

The term does not always import a delivery.—Kilpatrick-Koch Dry-Goods Co. *v.* Box, 13 Utah 494, 498, 45 Pac. 629. Although in reference to a completed contract of sale the term implies delivery. Jacobs *v.* Sellmyer Mercantile Co., (Ark. 1900) 57 S. W. 932, 933.

15. Russell *v.* Nicoll, 3 Wend. (N. Y.) 112, 119, 20 Am. Dec. 670.

A letter promising commissions to a broker on a sale of land, "if sold through your agency," must be understood as meaning if a valid agreement for the sale of the property has been entered into between the owner and the person or persons ready or willing to purchase, and with whom the owner was satisfied. Condict *v.* Cowdrey, 57 N. Y. Super. Ct. 66, 68, 5 N. Y. Suppl. 187. See also Sanderson *v.* Wellsford, (Tex. Civ. App. 1909) 116 S. W. 383, 384.

16. Anderson L. Dict. [*quoted* in Radebaugh *v.* Scanlan, 41 Ind. App. 109, 82 N. E. 544, 547]. See also State *v.* Lavake, 26 Minn. 526, 528, 6 N. W. 339, 37 Am. Rep. 415; Reaves *v.* Ore Knob Copper Co., 74 N. C. 593, 596.

As used in a statute relative to the sale of land for taxes, the term is held to embrace the bidding at public sale — the payment of the money by the purchaser, and the giving of the certificate by the county treasurer, to the bidder or purchaser. Sibley *v.* Sibley, 2 Mich. 486, 491.

Used in connection with other words.—"Not to be sold from her" see Mathews *v.* Paradise, 74 Ga. 523, 524. "Sold and conveyed" see Champaign County *v.* Reed, 100 Ill. 304, 307; Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 400, 37 N. W. 949; State *v.* Winona, etc., R. Co., 21 Minn.

SOLDERING THE JOINT. In the specification of a patent for cans, a means of joining the top and bottom of the can to the sides.[17]

SOLDIER. One who belongs to a regularly organized body of combatants, and as such is engaged in military service, either as an officer or private.[18] (Soldier: In General, see ARMY AND NAVY, 3 Cyc. 812; MILITIA, 27 Cyc. 489; WAR. Bequest For Benefit of Disabled Soldiers, see CHARITIES, 6 Cyc. 922. Bounty, see BOUNTIES, 5 Cyc. 977. Civil Status of, see ARMY AND NAVY, 3 Cyc. 862. Emancipation of Child by Enlistment in Army or Navy, see PARENT AND CHILD, 29 Cyc. 1674 note 72. Establishment of Domicile by, see DOMICILE, 14 Cyc. 849. Exemption — From Arrest, see ARREST, 3 Cyc. 921; From Service of Process, see EXECUTIONS, 17 Cyc. 1503; PROCESS, 32 Cyc. 495; Of Old Soldiers From License-Tax, see LICENSES, 25 Cyc. 621; Of Pension and Bounty Money From Taxation, see TAXATION; Of Property From Levy, see EXEMPTIONS, 18 Cyc. 1409. Killing by as Justifiable Homicide, see HOMICIDE, 21 Cyc. 798. Land Grants and Warrants, see PUBLIC LANDS, 32 Cyc. 865. Mandamus as Remedy to Compel Preference, see MANDAMUS, 26 Cyc. 254. Nuncupative Wills, see WILLS. Pension, see PENSIONS, 30 Cyc. 1366. Preference of Discharged Soldiers in Appointment to or Removal From Office, see MUNICIPAL CORPORATIONS, 28 Cyc. 404, 444; OFFICERS, 29 Cyc. 1374. Residence For Purpose of Voting, see ELECTIONS, 15 Cyc. 301. Settlement and Support Under Poor Laws, see PAUPERS, 30 Cyc. 1091. War Claims, see UNITED STATES.)

SOLDIERS' HOMES. See ARMY AND NAVY, 3 Cyc. 864.

SOLD NOTE. A note of sale given by a broker employed to buy, to the buyer.[19] (See BOUGHT AND SOLD NOTES, 5 Cyc. 860.)

SOLE. Single, individual, separate, the opposite of joint;[20] being alone, existing or acting without another; individuals.[21]

472, 477; Washington Ins. Co. *v.* Hayes, 17 Ohio St. 432, 436, 93 Am. Dec. 628. "Sold and disposed of" see Cone *v.* Ivinson, 4 Wyo. 203, 215, 33 Pac. 31, 35 Pac. 933. "Sold but not removed" see Waring *v.* Indemnity F. Ins. Co., 45 N. Y. 606, 609, 6 Am. Rep. 146. "Sold in said city" see Shriver *v.* Pittsburg, 66 Pa. St. 446, 448.

17. Combined Patents Can Co. *v.* Lloyd, 15 Phila. (Pa.) 485.

18. Vaughn *v.* State, 3 Coldw. (Tenn.) 102, 107.

"A soldier in the military service, on the contrary, means one belonging to the soldiery, militia or 'army' of the nation or State." Abrahams *v.* Bartlet, 18 Iowa 513, 514, where it is held that a person in the naval service is not included.

As used in a statute relating to who may make nuncupative wills, the term embraces every grade, from the private to the highest officer, and includes the gunner, the surgeon, or the general. *Ex p.* Thompson, 4 Bradf. Surr. (N. Y.) 154, 159; *In re* Donaldson, 2 Curt. Eccl. 386, 387. See also Kirkman *v.* McClaughry, 160 Fed. 436, 440, 90 C. C. A. 86.

It includes "militiamen."— Horton *v.* Leed, 5 E. & B. 595, 598, 1 Jur. N. S. 1162, 25 L. J. M. C. 38, 85 E. C. L. 595.

"Soldiers' Additional Homestead Scrip" see Macintosh *v.* Renton, 2 Wash. Terr. 121, 129, 3 Pac. 830.

19. Saladin *v.* Mitchell, 45 Ill. 79, 83. See also 5 Cyc. 860 text and note 36.

20. Black L. Dict. [*quoted* in Seitz *v.* Seitz, 11 App. Cas. (D. C.) 358, 369], brief of counsel.

Feme sole see HUSBAND AND WIFE, 21 Cyc. 1119 *et seq.*

"Sole legatee" is a term generally used to describe those to whom there has been a bequest of personal property. Bell *v.* Welch, 38 Ark. 139, 147, where it is said: "But it may include a devise of real estate also." "A sole legatee takes all that remains after satisfying all charges, losses and expenses." Matter of Goggin, 43 Misc. (N. Y.) 233, 237, 88 N. Y. Suppl. 557.

21. Standard Dict. [*quoted* in Seitz *v.* Seitz, 11 App. Cas. (D. C.) 358], brief of counsel.

Does not mean "several" see Seitz *v.* Seitz, 11 App. Cas. (D. C.) 358.

Where a statute provides that a city council shall be judge of the qualifications, elections and returns of its own members, the power given is simply cumulative, and the concurrent jurisdiction of the courts is maintained, but if the word "sole" is added to the foregoing, the power of the courts is divested. Darrow *v.* People, 8 Colo. 426, 427, 8 Pac. 924.

Used in connection with other words.— "Sole and exclusive" see Watts *v.* U. S., 1 Wash. Terr. 288, 296. "Sole and exclusive fishery" see Holford *v.* Bailey, 8 Q. B. 1000, 1018, 10 Jur. 822, 16 L. J. Q. B. 68, 55 E. C. L. 1000, 13 Q. B. 426, 445, 13 Jur. 278, 18 L. J. Q. B. 109, 66 E. C. L. 426]. "Sole and unconditional owner" see Rosenstock *v.* Mississippi Home Ins. Co., 82 Miss. 674, 686, 35 So. 309. "A sole interest and absolute interest mean the same thing." Garver *v.* Hawkeye Ins. Co., 69 Iowa 202, 204, 28 N. W. 555. "Sole management" see Bledsoe *v.* Fitts, 47 Tex. Civ. App. 578, 581, 105 S. W.

SOLE CORPORATION. A corporation consisting only of one person, to whom and his successors belongs that legal perpetuity, the enjoyment of which is denied to all natural persons.[22] (See CORPORATIONS, 10 Cyc. 148.)

SOLELY. A word of restriction or exclusion.[23]

SOLEMN. Formal; regular.[24] (Solemn: Admission, see EVIDENCE, 16 Cyc. 964. Form, Probate in, see WILLS. Oath, see CORPORAL OATH, 9 Cyc. 997; OATHS AND AFFIRMATIONS, 29 Cyc. 1298 note 5. War, see WAR.)

SOLEMNITAS INTERVENIRE DEBET IN MUTATIONE LIBERI TENEMENTI, NE CONTINGAT DONATIONEM DEFICERE PRO DEFECTU PROBATIONIS. A maxim meaning "Solemnity ought to be observed in an exchange of free tenement, lest it happen that the gift fail through want of proof."[25]

SOLEMNITATES JURIS SUNT OBSERVANDÆ. A maxim meaning "The solemnities of law are to be observed."[26]

SOLEMNIZE. To be present at a marriage contract, in order that it may have due publication, before a third person or persons, for the sake of notoriety and the certainty of its being made.[27] (See MARRIAGE, 26 Cyc. 856.)

SOLE OWNER. In reference to real estate, one who has the fee simple title.[28]

SOLE TRADER. See HUSBAND AND WIFE, 21 Cyc. 1335.

SOLICIT. To importune, to entreat, to implore, to ask, to attempt, to try to obtain;[29] to importune, entreat, implore, ask, attempt, try to obtain.[30]

1142. "Sole privilege of grinding grain" see Hartwell *v.* Mutual L. Ins. Co., 50 Hun (N. Y.) 497, 503, 3 N. Y. Suppl. 452. "Sole use" see HUSBAND AND WIFE, 21 Cyc. 1359. "To the sole and proper use, benefit and behoof" see Smith *v.* McGuire, 67 Ala. 34, 36.

22. Thomas *v.* Dakin, 22 Wend. (N. Y.) 9, 101 [*citing* Angel & A. Corp. 18, 19; 1 Blackstone Comm. 469].

23. Horner *v.* Chicago, etc., R. Co., 38 Wis. 165, 175.

"One act cannot 'contribute' solely to effect a given result, but only in connection with some other act; and there can be no sole contributory cause of an accident." Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 473, 75 S. W. 713.

A case rests "solely" on circumstantial evidence where the main fact, or, as one case puts it, where the gravamen of the offense, or, as another case has it, where the act of the crime, rests solely upon circumstantial evidence. Beason *v.* State, 43 Tex. Cr. 442, 447, 67 S. W. 96, 98, 69 L. R. A. 193.

"Are used solely in the admixture of necessary remedial compounds" see State *v.* Wilson, 80 Mo. 303, 306.

"Solely to sell" see Smith *v.* Schiele, 93 Cal. 144, 149, 28 Pac. 857.

24. Anderson L. Dict.; Burrill L. Dict.; Century Dict. [all *quoted* in Opinion of Justices, 95 Me. 564, 576, 51 Atl. 224].

"Solemn occasion" see Opinion of Justices, 95 Me. 564, 567, 51 Atl. 224.

25. Peloubet Leg. Max. [*citing* Coke Litt. 48*a*].

26. Black L. Dict. [*citing* Jenkins Cent. 13].

27. Dyer *v.* Brannock, 66 Mo. 391, 410, 27 Am. Rep. 359 (where it is said it may be done before parents, friends, or strangers, able to testify to the fact); Pearson *v.* Howey, 11 N. J. L. 12, 19.

"Solemnized" within the meaning of a statute authorizing divorce is construed as meaning not only a ceremonial solemnization, but that a marriage may be self-solemnized by the parties thereto. Bowman *v.* Bowman, 24 Ill. App. 165, 172.

28. Garver *v.* Hawkeye Ins. Co., 69 Iowa 202, 204, 28 N. W. 555, where it is said: "If one should covenant in a deed that he was the sole owner of the real estate, such a covenant would be broken if he owned a life-estate only. There is no distinction between 'sole owner' and the owner of an 'absolute interest' in real estate."

The phrase "or, if the assured shall not be the sole and unconditional owner in fee simple of said property," in an insurance policy, aptly refers to real estate, and not to personalty. German Ins. Co. *v.* Miller, 39 Ill. App. 633, 635.

One who holds property under a contract with an owner in fee simple, that said owner will make a quitclaim deed to the land on payment of a named amount, and who has paid the specified amount without receiving the deed, is the "sole and unconditional" owner thereof. Lewis *v.* New England F. Ins. Co., 29 Fed. 496, 497. See also Milwaukee Mechanics' Ins. Co. *v.* Rhea, 123 Fed. 9, 10, 60 C. C. A. 103.

An owner of property covered by a chattel mortgage is "sole and unconditional owner" thereof. Hubbard *v.* Hartford F. Ins. Co., 33 Iowa 325, 333, 11 Am. Rep. 125.

29. Reg. *v.* Most, 7 Q. B. D. 244, 258, 14 Cox C. C. 583, 45 J. P. 696, 50 L. J. M. C. 113, 116, 44 L. T. Rep. N. S. 823, 29 Wkly. Rep. 760.

30. Anderson L. Dict. [*quoted* in Carter *v.* State, 81 Ark. 37, 38, 98 S. W. 704].

As used in pleading in actions for the abduction of children the term imports an initial, active, and wrongful effort. Nash *v.* Douglass, 12 Abb. Pr. N. S. (N. Y.) 187, 190.

"Taking" and "soliciting" do not mean the same thing and are not convertible terms.

SOLICITA ATQUE ANXIA ETIAM IN SOLITUDINE MALA CONSCIENTIA EST. A maxim meaning "An evil conscience even in peace is anxious and solicitous." [31]

SOLICITATION. Asking; enticing; urgent request.[32] (Solicitation: In General, see BRIBERY, 5 Cyc. 1038. As Constituting an Attempt to Commit Incest, see INCEST, 22 Cyc. 59. Indictment For, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 364. Of Thief as Consent to Taking Property, see LARCENY, 25 Cyc. 44. To Commit — Adultery, see ADULTERY, 1 Cyc. 952 note 6; Crime in General, see CRIMINAL LAW, 12 Cyc. 176; Crime, Words Charging as Actionable Per Se, see LIBEL AND SLANDER, 25 Cyc. 278; Embracery, see EMBRACERY, 15 Cyc. 540; Larceny, see LARCENY, 25 Cyc. 63; Murder, see HOMICIDE, 21 Cyc. 778.)

SOLICITOR. A term which applies to all individuals who are engaged or employed specially for the purpose of soliciting, importuning, or entreating for the purchase of goods, etc.[33] (Solicitor: In General, see ATTORNEY AND CLIENT, 4 Cyc. 898. As Mortgagee, see MORTGAGES, 27 Cyc. 1100 note 93. Notice to of Prior Encumbrance as Notice to Mortgagee, see MORTGAGES, 27 Cyc. 1201 note 9.)

SOLICITOR-GENERAL. See ATTORNEY-GENERAL, 4 Cyc. 1025 note 2.

SOLID. Having the constituent parts so firmly adhering as to resist the impression or penetration of other bodies; hard, firm, compact, opposed to fluid and liquid, or to plastic, like to clay or to incompact, like sand.[34]

SOLIDARY OBLIGATION. In the law of Louisiana, an obligation which binds each of the obligors for the whole debt.[35] (See OBLIGATION, 29 Cyc. 1308.)

SOLITARY CONFINEMENT. A term which was usually applied to a mode of imprisonment consisting of the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction.[36] (Solitary Confinement: Of Party to Civil Case as Ground For Continuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 98 note 30.)

A violation of a statute, prohibiting a person or corporation to solicit orders for intoxicating liquors, is not shown by proof that orders were taken for liquors. Sandefur-Julian Co. *v.* State, 72 Ark. 11, 13, 77 S. W. 596.

Soliciting agent.— An insurance agent who receives an application and has a policy issued thereon is a "soliciting agent" within the meaning of a statute providing "any person who shall hereafter solicit insurance or procure applications therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or a renewal thereof, any thing in the application or policy to the contrary notwithstanding." St. Paul F. & M. Ins. Co. *v.* Sharer, 76 Iowa 282, 286, 41 N. W. 19. "A soliciting agent who takes orders subject to the approval of his principal is not ordinarily regarded as a vendor." State *v.* Bristow, 131 Iowa 664, 667, 109 N. W. 199.

31. Morgan Leg. Max. [*citing* Riley Leg. Max.].

32. Black L. Dict.

33. *Ex p.* Siebenhauer, 14 Nev. 365, 369.

34. Webster Dict. [*quoted* in Fruin *v.* Crystal R. Co., 89 Mo. 397, 403, 14 S. W. 557].

The description of a bottle stopper, in a claim for a patent as "solid," does not mean that the cork shall be of "one part" or one material, "homogeneous throughout." That is not among the definitions of the word. De la Vergne Bottle, etc., Co. *v.* Valentine Blatz Brewing Co., 66 Fed. 765, 775, 14 C. C. A. 77.

"Solid assurance" see De Tastett *v.* Crousillat, 7 Fed. Cas. No. 3,828, 2 Wash. 132.

"Solid matter" in printing is a term meaning "that there shall be no 'leading' between the lines, and no 'padding' beyond the usual and ordinary spacing between the words." Hobe *v.* Swift, 58 Minn. 84, 89, 59 N. W. 831.

"Solid rock" is all rock found in mass containing more than one cubic yard, and which must be removed by blasting. Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399, 417, where the term was so used in a contract for the removal of rock. "It is plain as English words can make it, that no rock can be too hard to be classified as 'solid rock.'" Osborne *v.* O'Reilly, 43 N. J. Eq. 647, 650, 12 Atl. 377. In its plain and ordinary, and popular sense, the term includes "flint rock." Fruin *v.* Crystal R. Co., 89 Mo. 397, 403, 14 S. W. 557. In the trade of boring artesian wells, it is a technical term meaning rock which is found below the loam, gravel, etc.; that is, rock which will neither cave in when drilled nor yield nor move under the drill. Gregory *v.* U. S., 33 Ct. Cl. 434, 436.

35. Groves *v.* Sentell, 153 U. S. 465, 476, 14 S. Ct. 898, 38 L. ed. 785.

36. Leach *v.* Whitbeck, 151 Mich. 327, 115 N. W. 253, 254; *In re* Medley, 134 U. S. 160, 168, 10 S. Ct. 384, 33 L. ed. 835.

Not synonymous with "close confinement" see State *v.* Rooney, 12 N. D. 144, 152, 95 N. W. 513.

SOLO CEDIT QUOD SOLO IMPLANTATUR. A maxim meaning "What is planted in the soil belongs to the soil." [37]

SOLO CEDIT QUOD SOLO INÆDIFICATUR. A maxim meaning "That which is built upon the soil belongs to the soil." [38]

SOL SINE HOMINE GENERAT HERBAM. A maxim meaning "The sun makes the grass grow without man's assistance." [39]

SOLUBLE CREOSOTE. A substance produced by various additional processes and ingredients from coal tar dead oil, which by such additions it has ceased to be.[40]

SOLUM REX HOC NON FACERE POTEST — QUOD NON POTEST INJUSTE AGERE. A maxim meaning "One thing alone the king can not do — he can not act unjustly." [41]

SOLUS CUM SOLA IN LOCO SUSPECTO SUSPECTUS. A maxim meaning "A man alone with a woman in a suspicious place is to be suspected." [42]

SOLUS DEUS FACIT HÆREDEN, NON HOMO. A maxim meaning "God alone makes the heir, not man." [43]

SOLUTIO PRETII EMPTIONIS LOCO HABETUR. A maxim meaning "The payment of the price [of a thing] is held to be in place of a purchase, [operates as a purchase]." [44]

SOLVENCY. Ability to pay all debts or just claims; [45] the ability to pay one's debts; [46] the present ability of the debtor to pay out of his estate all his debts.[47] (Solvency: Evidence of Insolvency — In Proceedings by Creditors' Suits, see CREDITORS' SUITS, 12 Cyc. 52; Of Defendant Under General Issue in Assumpsit, see ASSUMPSIT, ACTION OF, 4 Cyc. 355. Evidence of Pecuniary Condition in General, see EVIDENCE, 17 Cyc. 92. Of Insolvency — Of Debtor, What Constitutes, see BANKRUPTCY, 5 Cyc. 238 note 8; BANKS AND BANKING, 5 Cyc. 559; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 847; INSOLVENCY, 22 Cyc. 1256; Of Grantor as Affecting Validity of Conveyance in Respect to Creditors, see FRAUDULENT CONVEYANCE, 20 Cyc. 453, 455.)

37. Bouvier L. Dict. [*citing* Inst. 2, 1, 32; 2 Bouvier Inst. n. 1572].

38. Black L. Dict. [*citing* Mackeldey Rom. L. § 275].

39. Peloubet Leg. Max. [*citing* Wentworth Off. Ex. 57].

40. Schoellkopf *v.* U. S., 124 Fed. 89.

41. Morgan Leg. Max. [*citing* Magdalen College's Case, 11 Coke 66*b*, 72*a*, 77 Eng. Reprint 1235].

42. Peloubet Leg. Max. [*citing* Trayner Leg. Max.].

43. Peloubet Leg. Max. [*citing* Coke Litt. 5*a*]. See also Allan *v.* Evans, 9 Quebec Q. B. 257, 266.

44. Burrill L. Dict. [*citing* Jenkins Cent. 56 Case 2; 2 Kent Comm. 387].

Applied in Campbell *v.* Phelps, 1 Pick. (Mass.) 62, 70, 11 Am. Dec. 139 (dissenting opinion); Skeen *v.* Springfield Engine, etc., Co., 42 Mo. App. 158, 166; Smith *v.* Smith, 50 N. H. 212, 217; Fox *v.* Prickett, 34 N. J. L. 13, 17; Smith *v.* Alexander, 4 Sneed (Tenn.) 482, 486; Fox *v.* The Lucy A. Blossom, 9 Fed. Cas. No. 5,013; Murray *v.* Lovejoy, 17 Fed. Cas. No. 9,963, 2 Cliff. 191.

45. McKown *v.* Furgason, 47 Iowa 636, 637.

The term imports adequate means of a party to pay his debts, which embraces within its meaning the opportunity, by reasonable diligence, to convert and apply to such purpose. Sterrett *v.* Buffalo Third Nat. Bank, 46 Hun (N. Y.) 22, 26; *In re* Doscher, 120 Fed. 408, 9 Am. Bankr. Reg. 547, 556.

46. State Nat. Bank *v.* New Orleans Brewing Assoc., 49 La. Ann. 934, 944, 22 So. 48; State *v.* Lewis, 42 La. Ann. 847, 850, 8 So. 602; Kennedy *v.* New Orleans Sav. Inst., 36 La. Ann. 1, 8, where it is said: "He who cannot pay all that he owes, is not solvent."

47. Oliver-Finnie Grocer Co. *v.* Miller, 53 Mo. App. 107, 111. See also Ring *v.* Chas. Vogel Paint, etc., Co., 44 Mo. App. 111, 116.

Distinguished from "ability to purchase property" see Colburn *v.* Seymour, 32 Colo. 430, 435, 76 Pac. 1058.

A person is solvent who has sufficient property to pay all his debts and all his debts can be collected by legal process. Johanson *v.* Hoff, 70 Minn. 140, 142, 72 N. W. 965; Daniels *v.* Palmer, 35 Minn. 347, 29 N. W. 162; McDonald *v.* Cash, 45 Mo. App. 66, 76; Marsh *v.* Dunckel, 25 Hun (N. Y.) 167, 169; Herrick *v.* Borst, 4 Hill (N. Y.) 650, 652; Osborne *v.* Smith, 18 Fed. 126, 130, 5 McCrary 487. See also Pelham *v.* Chattahoochie Grocery Co., 156 Ala. 500, 47 So. 172, 175; Camp *v.* Thompson, 25 Minn. 175, 181; Hoffman *v.* Nolte, 127 Mo. 120, 137, 29 S. W. 1006; Eddy *v.* Baldwin, 32 Mo. 369, 374; Reid *v.* Lloyd, 52 Mo. App. 278, 282; Young *v.* Young, 127 N. Y. App. Div. 130, 133, 111 N. Y. Suppl. 341; *In re* Randall, 20 Fed. Cas. No. 11,551, Deady 557, 3 Nat. Bankr. Reg. 18.

As applied to a new insurance company about to begin business in a state, the term "solvency" means a statutory one namely — a compliance with the conditions upon which

SOLVENDO ESSE NEMO INTELLIGITUR NISI QUI SOLIDUM POTEST SOLVERE. A maxim meaning "No one is understood [or considered] to be solvent, but him who can pay the whole." [48]

SOLVENT DEBTOR. A person who has sufficient property to pay all his debts, and against whom the collection of such debts may be enforced, out of his property, by due process of law; [49] one who has sufficient property which, if converted into money, will pay all his debts and obligations.[50] In the more restricted sense of the term, one who is able to meet all his debts and obligations as they mature.[51]

SOLVIT POST DIEM. Literally "He paid after the day." The plea in an action of debt on bond that the defendant paid the money after the day named for the payment, and before the commencement of the suit.[52]

SOLVITUR ADHUC SOCIETAS ETIAM MORTE. A maxim meaning "A partnership is moreover dissolved by the death of a partner." [53]

SOLVITUR EO LIGAMINE QUO LIGATUR. A maxim meaning "In the same manner that a thing is bound it is unloosed." [54]

SOMATOSE. A preparation of meat or of the carcass of an animal.[55]

SOME. Two or more; [56] a certain indefinite or indeterminate quantity or part of; more or less; often so used as to denote a small quantity or deficiency; [57] consisting of a greater or less portion or sum; composed of a quantity or number which is not stated; used to express an indefinite quantity or number; and also not much; a little; [58] denoting a certain but indeterminate number of, more or less as to number.[59]

it is permitted to do business. Bankers' L. Ins. Co. *v.* Howland, 73 Vt. 1, 6, 48 Atl. 435, 57 L. R. A. 374.

"**Solvent credits**" see Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499, 506; San Francisco *v.* Mackey, 22 Fed. 602, 608.

"**Solvent notes and accounts**" see Williams *v.* Sims, 22 Ala. 512, 516.

48. Burrill L. Dict. [*citing* Dig. 50, 16, 114].

49. People *v.* Halsey, 36 How. Pr. (N. Y.) 487, 505. See also Kingsley *v.* Merrill, 122 Wis. 185, 195, 99 N. W. 1044, 67 L. R. A. 200.

50. *In re* Queenston Heights Bridge Assessment, 1 Ont. L. Rep. 114, 115.

51. *In re* Queenston Heights Bridge Assessment, 1 Ont. L. Rep. 114, 115.

52. Black L. Dict. [*citing* Archbold N. P. 222]. See also Evans *v.* Shaw, Draper (U. C.) 14, 31.

53. Black L. Dict. [*citing* Inst. 3, 26, 5; Dig. 17, 2].

54. Bouvier L. Dict.

Applied in Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573, 582.

55. *In re* Farbenfabriken, [1894] 1 Ch. 645, 656, 63 L. J. Ch. 257, 70 L. T. Rep. N. S. 186, 7 Reports 439, 42 Wkly. Rep. 488.

It is a descriptive word and cannot be registered as a trade-mark. "The words 'soma' and 'somatic' occur in some English dictionaries. They are words derived from the Greek 'soma,' which means the body, or, applied to animals, the carcass of an animal; and the English words mean the body or carcass, and relating to the body or carcass respectively. The Greek word makes '*somatos*' in the genitive. 'Somatose,' then, is body or carcass with the addition of 'ose.' This suffix is common, as in the words 'comatose,' 'glucose,' 'cellulose,' and many others. 'Comatose' is the condition of coma; 'glucose' and 'cellulose' are certain preparations derived from the substances indicated in the earlier part of the words." *In re* Farbenfabriken, [1894] 1 Ch. 645, 655, 63 L. J. Ch. 257, 70 L. T. Rep. N. S. 186, 7 Reports 439, 42 Wkly. Rep. 488.

56. Hurn *v.* Olmstead, 55 Misc. (N. Y.) 504, 506, 105 N. Y. Suppl. 1091.

"**Some days**" in a complaint against a city for allowing ice and snow to remain on a sidewalk may mean two days or more. Chase *v.* Cleveland, 44 Ohio St. 505, 513, 9 N. E. 225, 58 Am. Rep. 843.

57. Century Dict. [*quoted* in Missouri Pac. R. Co. *v.* Dorr, 73 Kan. 486, 490, 85 Pac. 533; St. Louis Paper-Box Co. *v.* Hubinger Bros. Co., 100 Fed. 595, 598, 40 C. C. A. 577].

58. Webster Dict. [*quoted* in Missouri Pac. R. Co. *v.* Dorr, 73 Kan. 486, 490, 85 Pac. 533].

"**Some injury**" implies not a great deal. Mitchell *v.* Lea Lumber Co., 43 Wash. 195, 204, 86 Pac. 405 (dissenting opinion).

59. Worcester Dict. [*quoted* in St. Louis Paper-Box Co. *v.* Hubinger Bros. Co., 100 Fed. 595, 598, 40 C. C. A. 577].

"**Any**" distinguished see ANY, 2 Cyc. 473.

As used in a contract for the sale of paper cartons, providing that if the vendee should receive "some" that are not up to the sample he should return them to the vendor, who would replace them, the term means a small or inconsiderable number. St. Louis Paper-Box Co. *v.* Hubinger Bros. Co., 100 Fed. 595, 598, 40 C. C. A. 577.

"**A term too uncertain in its signification** to sustain a verdict for any definite amount," and evidence that a party to a suit fed "some" grain to his horses may mean a single ounce or several tons, "a single quart, or twenty thousand bushels." Lewis *v.* Jones, 17 Pa. St. 262, 267, 55 Am. Dec. 550.

SOMETIME. At a time undefined.[60]

SOMEWHAT. In some degree or measure; a little.[61]

SOMNAMBULISM. See CRIMINAL LAW, 12 Cyc. 168; HOMICIDE, 21 Cyc. 668, 950.

SOMNOLENTIA. See CRIMINAL LAW, 12 Cyc. 168.

SON. An immediate male descendant; the correlative of "father."[62]

SON ASSAULT DEMESNE. Literally "His own assault." A plea which occurs in the actions of trespass and trespass on the case, by which the defendant alleges that it was the plaintiff's own original assault that occasioned the trespass for which he has brought the action, and that what the defendant did was merely in his own defense.[63] (Son Assault Demesne: Pleading Defense to Action For Assault, see ASSAULT AND BATTERY, 4 Cyc. 1073.)

SOON. Within a reasonable time.[64]

SOOT. A black substance formed by combustion, or disengaged from fuel in the process of combustion, rising in fine particles and adhering to the sides of the chimney or pipe conveying the smoke.[65] (Soot: As Nuisance, see NUISANCES, 29 Cyc. 1188. Injuries From as Constituting Element of Compensation Under Law of Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 753.)

SORT. Characteristic mode of being; nature; quality; character.[66]

SOUND. As an adjective a plain English word, which, unless restricted by the adjunct "body" or "mind," is considered as embracing both;[67] in reference

May mean indefinite or indeterminate as opposed to definite or determinate. Lee *v.* Sterling Silk Mfg. Co., 115 N. Y. App. Div. 589, 591, 101 N. Y. Suppl. 78.

Used in connection with other words.— "'Some disposition'" see Hough *v.* Loring, 24 Pick. (Mass.) 254, 256. "Some evidence" see Lee *v.* Sterling Silk Mfg. Co., 47 Misc. (N. Y.) 182, 184, 93 N. Y. Suppl. 560. "Some means" see Elfelt *v.* Snow, 8 Fed. Cas. No. 4,342, 2 Sawy. 94. "Some one" see Vogel *v.* State, 138 Wis. 315, 355, 119 N. W. 190. "Some other" see Neill *v.* United Friends, 149 N. Y. 430, 431, 44 N. E. 145, 52 Am. St. Rep. 738. "Some part of the purchase money" see Artcher *v.* Zeh, 5 Hill (N. Y.) 200, 205. "Some writing" see McClellan *v.* McClellan, 65 Me. 500, 506.

60. Webster New Int. Dict. See also Marquette, etc., R. Co. *v.* Spear, 44 Mich. 169, 172, 6 N. W. 202, 38 Am. Rep. 242.

61. Webster Dict. [*quoted* in Atchison, etc., R. Co. *v.* Van Ordstrand, 67 Kan. 386, 391, 73 Pac. 113].

62. Black L. Dict.

The term "may be used to mean a male child, issue, or offspring, but also may be applied to a distant male descendant, or any young male person may be so designated, as a pupil, a ward, an adopted male child or dependent." Lind *v.* Burke, 56 Nebr. 785, 790, 77 N. W. 444.

"The description 'child,' 'son,' 'issue,' every word of that species, must be taken *prima facie* to mean legitimate child, son, issue." Flora *v.* Anderson, 67 Fed. 182, 185; Wilkinson *v.* Adam, 1 Ves. & B. 422, 462, 35 Eng. Reprint 163.

63. Black L. Dict. [*citing* Stephens Pl. 186]. See also State *v.* Wood, 1 Bay (S. C.) 351, 352.

64. Sanford *v.* Shepard, 14 Kan. 228, 232, where it is said that an instruction reading, "If there is no time specified for the performance of an act, or if it is specified that it is to be performed 'soon,' the law implies that it is to be performed within a 'reasonable time,'" is no error sufficient to reverse the judgment.

"Sooner" appears to have been used as a noun designating a person who enters upon government lands before they are open to the public (Parryman *v.* Cunningham, 16 Okla. 94, 95, 82 Pac. 822); and the term "soonerism" appears to have been applied to the practice of entering upon such lands before they are open (Parryman *v.* Cunningham, 16 Okla. 94, 98, 82 Pac. 822).

"And sooner" in the clause of a will directing the executors to sell testator's real estate in one year after his decease, "and sooner if deemed desirable by them," is construed as used to prevent the executors from construing the limitation of one year, as it would have stood without those words, as postponing the sale for the year, or in other words as prohibiting them from selling at any time within the year, Marsh *v.* Love, 42 N. J. Eq. 112, 115, 6 Atl. 889.

65. Century Dict.

66. Century Dict.

As used in a statute prohibiting any person from throwing into a river "refuse wood or timber of any sort," the term refers to the form or shape of the refuse, wood, or timber, and not the different kinds of wood. State *v.* Howard, 72 Me. 459, 464.

"Sorting" see *In re* Higgins, 50 Fed. 910, 912 [*affirmed* in 55 Fed. 278, 5 C. C. A. 104].

67. Hogan *v.* Bowlware, 3 McCord (S. C.) 251, 254.

It is more comprehensive than the term "healthy."— Nelson *v.* Biggers, 6 Ga. 205, 206.

Sound "discretion" is an impartial discretion, guided and controlled in its execution by fixed legal principles; a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to defeat, the ends of substantial justice.

to animals, whole; right; nothing wrong; nothing the matter with it; free from any defect by which it is unfitted for the services usually performed by animals of the like kind;[68] in reference to wood or vegetables, or other inanimate substances, free from decay or rottenness.[69] As a noun, a tone; noise; report.[70] (See SANE, 35 Cyc. 792.)

SOUNDING. A usual method of testing to find out whether a piece of wood is solid to the core when it appears to be solid on the outside.[71]

SOUNDING IN DAMAGES. A term said to include that class of demands where, when the facts are ascertained, the law is incapable of measuring the damages by a pecuniary standard.[72]

SOUNDINGS. An engineering term indicating tests made at intervals by driving a bar into the earth.[73]

SOURCE. In a general sense, that from which anything comes forth, regarded as its cause or origin; the person from whom anything originates; first cause.[74] In reference to a stream, the spring or fountainhead from which its supply of water proceeds; any collection of water within or upon the surface of the earth from which the stream originates;[75] the rising from the ground, or beginning of a stream of water or the like; a spring; a fountain.[76]

SOUTH. That one of the four cardinal points of the compass which is directly

Hanthorn *v.* Oliver, 32 Oreg. 57, 62, 51 Pac. 440, 67 Am. St. Rep. 518; Thompson *v.* Connell, 31 Oreg. 231, 235, 48 Pac. 467, 65 Am. St. Rep. 818. A sound discretion of the court in reference to the payment of costs by a party to the suit on amendment of the bill, and not a mere capricious exercise of power or will, but the exercise of a right judgment in determining which of the parties have alone been in default. Cabeen *v.* Gordon, 1 Hill Eq. (S. C.) 51, 54. See DISCRETION, 14 Cyc. 382; DISCRETION OF COURT, 14 Cyc. 383; JUDICIAL DISCRETION, 23 Cyc. 1617; LEGAL DISCRETION, 25 Cyc. 174.

"Sound health" in the construction of life insurance policies is a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously. Atlantic, etc., R. Co. *v.* Douglas, 119 Ga. 658, 661, 46 S. E. 867; Clover *v.* Modern Woodmen of America, 142 Ill. App. 276, 280; Plum *v.* Penn. Mut. L. Ins. Co., 108 Mich. 94, 99, 65 N. W. 611; Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 314, 32 N. W. 610, 8 Am. St. Rep. 894; French *v.* Fidelity, etc., Co., 135 Wis. 259, 273, 115 N. W. 869, 17 L. R. A. N. S. 1011; Boyle *v.* Northwestern Mut. L. Assoc., 95 Wis. 312, 318, 70 N. W. 351; Manhattan L. Ins. Co. *v.* Carder, 82 Fed. 986, 989, 27 C. C. A. 344. And is of the same import as "good health." Clover *v.* Modern Woodmen of America, 142 Ill. App. 276, 280. See LIFE INSURANCE, 25 Cyc. 814 note 22.

"Sound memory and discretion," in the common law definition of murder, is a technical expression for a sound mind. Guiteau's Case, 10 Fed. 161, 165. "'A person of sound memory and discretion is one who has sufficient knowledge to know and understand the nature of the act, and that it is a violation of his moral and social duty, and will subject him to punishment.'" Com. *v.* Moore, 2 Pittsb. (Pa.) 502, 503.

"Sound mind" is a phrase of two significations. In common parlance it means a mind of more than ordinary strength, discreet and well balanced. In law it means a mind not affected with insanity in any form. Delafield *v.* Parish, 25 N. Y. 9, 102. See also INSANE PERSONS, 22 Cyc. 1004; WILLS.

68. Bell *v.* Jeffreys, 35 N. C. 356, 357.

"When used in reference to animals, and applied to the mind, it means, that neither from nature or disease, or other causes, the mind is incapable of performing its ordinary functions." Bell *v.* Jeffreys, 35 N. C. 356, 357.

69. Bell *v.* Jeffreys, 35 N. C. 356, 357.

The term applies to condition only, not quality or kind, and is opposed to defective, decayed, or injured. Hawkins *v.* Pemberton, 5 Rob. (N. Y.) 42, 52, 35 How. Pr. 376.

70. Webster New Int. Dict. See also Dolbear *v.* American Bell Tel. Co., 126 U. S. 1, 531, 8 S. Ct. 778, 31 L. ed. 863.

71. McGrath *v.* Delaware, etc., R. Co., 69 N. J. L. 331, 333, 55 Atl. 242.

72. Nelms *v.* Hall, 85 Ala. 583, 584, 5 So. 344. See also Rosser *v.* Bunn, 66 Ala. 89, 93.

The term is applied to that class of claims for which the law furnishes no standard of measurement, even when the facts are ascertained. Johnson *v.* Aldridge, 93 Ala. 77, 9 So. 513; Collins *v.* Greene, 67 Ala. 211, 215, where it is said: "Actions of trespass, assault and battery, actions for slander, malicious prosecution, &c., are of this class."

A prosecution for contempt of court in order to compel obedience to an order made in a chancery proceeding is not a case "sounding in damages." Leopold *v.* People, 140 Ill. 552, 557, 30 N. E. 348.

73. Kelly *v.* New York, 87 N. Y. App. Div. 299, 300, 84 N. Y. Suppl. 349.

74. Webster Dict. [*quoted* in Queens County Water Co. *v.* O'Brien, 131 N. Y. App. Div. 91, 94, 115 N. Y. Suppl. 495].

75. New Rev. Encyclopedic Dict. [*quoted* in Sierra County *v.* Nevada County, 155 Cal. 1, 14, 99 Pac. 371].

76. Webster Dict. [*quoted* in Queens County Water Co. *v.* O'Brien, 131 N. Y. App. Div. 91, 94, 115 N. Y. Suppl. 495].

opposite north, and is on the left of one when faced in the direction of the setting sun.[77] (See EAST, 14 Cyc. 1226; NORTH, 29 Cyc. 1064.)

SOUTHERLY. As applied to a course, nearly south.[78] (See EASTERLY, 14 Cyc. 1226; NORTHERLY, 29 Cyc. 1064; NORTHWARDLY, 29 Cyc. 1065.)

SOUTHWEST. As used in descriptions of land in deeds, a course equally diverging from south and west, or south forty-five degrees west.[79]

SOUVENIR. A keepsake or remembrance.[80]

SOVEREIGN. As an adjective, supreme, PARAMOUNT,[81] *q. v.* As a noun, a supreme ruler.[82] (Sovereign: As Party to Private Action, see INTERNATIONAL LAW, 22 Cyc. 1717 note 61. As Used to Describe International Person, see INTERNATIONAL LAW, 22 Cyc. 1708. Averment as to Authority of Sovereign in Caption of Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 240. Power—Necessary For Creation of Corporation, see CORPORATIONS, 10 Cyc. 201; Validity of Statute Divesting, see CONSTITUTIONAL LAW, 8 Cyc. 975 note 87. State Subscription by to Shares of Private Corporation, see CORPORATIONS, 10 Cyc. 380.)

SOVEREIGNTY. The supreme power which governs the body politic or society that constitutes the state;[83] a term used to express the supreme political authority of an independent state or nation;[84] the aggregate of all civil and political power;[85] the supreme, absolute, uncontrollable power by which any state is governed;[86] that public authority which directs or orders what is to be done by each member associated, in relation to the end of the association.[87] (Sov-

77. Century Dict. See also Stager *v.* Harrington, 27 Kan. 414, 424.

As used in a deed describing the granted premises in general terms as reserving the wood and timber on the premises south of the meadow or lowland, the term should be construed as not designating the course of a boundary line, but to indicate the position of the reserved wood and timber, as compared with the meadow and lowland, and to except out of the grant all wood and timber growing southerly of, or more to the southward than the lowland between the two ascents. Cronin *v.* Richardson, 8 Allen (Mass.) 423, 424.

78. Scraper *v.* Pipes, 59 Ind. 158, 164, where it is said: "But how near, and whether east or west of south, it is impossible to tell without the use of other qualifying words." See also Spaulding *v.* Groton, 68 N. H. 77, 84, 44 Atl. 88, where it is said the term does not necessarily mean southeast or southwest.

"There are very few words in our language more indefinite or uncertain in their meaning than the words 'southerly,' 'easterly,' and 'northerly.'" Scraper *v.* Pipes, 59 Ind. 158, 164.

In the absence of monuments in a deed "southerly" means due south. Rowe *v.* Smith, 48 Conn. 444, 447; Smith *v.* Newell, 86 Fed. 56, 58. See also Howard *v.* Holy Cross College, 116 Mass. 117, 120.

79. Holden *v.* Alexander, 82 S. C. 441, 454, 62 S. E. 1108, 64 S. E. 400.

"Southwesterly course" is a term which may mean any direction between south and west lines. Sime *v.* Spencer, 30 Oreg. 340, 343, 47 Pac. 919.

80. *In re* Glaenzer, 67 Fed. 532, 533, holding that the term will not include pieces of tapestry and paintings.

81. Webster New Int. Dict.

"Sovereign people" is a term which describes the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct of the government through their representatives. Scott *v.* Sandford, 19 How. (U. S.) 393, 404, 15 L. ed. 691.

"Sovereign power" refers to the people of the state in their sovereign capacity, acting through their representatives, the legislature. Kennebec Water Dist. *v.* Waterville, 96 Me. 234, 242, 52 Atl. 774. All the powers necessary to accomplish the legitimate ends of government must be sovereign, and therefore must exist in all practical governments. Boggs *v.* Merced Min. Co., 14 Cal. 279, 309. "In all governments of constitutional limitations, sovereign power manifests itself in but three ways: By exercising the right of taxation; the right of eminent domain; and through its police power." U. S. *v.* Douglas-Willan Sartoris Co., 3 Wyo. 287, 297, 22 Pac. 92.

"Sovereign" right is a right which the state alone, or some of its governmental agencies, can possess. St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 397, 48 N. W. 17.

"Sovereign state" is a term said to be appropriate when applied to an absolute despotism. Doe *v.* Buford, 1 Dana (Ky.) 481, 501, where it is said: "'Sovereign state' are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools."

82. Atty.-Gen. *v.* Barstow, 4 Wis. 567, 675.

83. Gilmer *v.* Lime Point, 18 Cal. 229, 250, where it is said: "And this power is independent of the particular form of government, whether monarchial, aristocratic, or democratic."

84. Moore *v.* Smaw, 17 Cal. 199, 218, 79 Am. Dec. 123.

85. State *v.* Hunt, 2 Hill (S. C.) 1, 250.

86. Cooley Const. Lim. [*quoted* in People *v.* Pierce, 18 Misc. (N. Y.) 83, 86, 41 N. Y. Suppl. 858].

87. Vattel L. Nat. [*quoted* in Cherokee

ereignty: Attributes of, see CONSTITUTIONAL LAW, 8 Cyc. 934. Effect of Change of, see INTERNATIONAL LAW, 22 Cyc. 1729. Exercise of in General, see INTERNATIONAL LAW, 22 Cyc. 1716.)

SOW. The female of the hog kind or swine.[88]

SPACE. The interval between any two or more objects, or between terminal points; distance; extent, as of surface.[89] (Space: Opinion Evidence as to, see EVIDENCE, 17 Cyc. 102.)

SPAN. In reference to a bridge, a term which may mean the measure of the distance between the piers of the bridge — the measure of the space left open for navigation purposes.[90]

SPANIARD. A term which embraces 1st. All persons born in the dominions of Spain. 2d. The children of a Spanish father or mother, though born without the kingdom. 3d. Foreigners who may have obtained letters of naturalization.[91] (See MEXICAN, 27 Cyc. 486.)

SPANISH GRANT. See PUBLIC LANDS, 32 Cyc. 1159.

SPARE. Supernumerary; held in reserve, to be used in an emergency.[92]

SPARRING. See PRIZE-FIGHTING, 32 Cyc. 396.

SPAT. The name given by fishermen to young oysters when expelled.[93]

SPEAKING A VESSEL. A plain and distinct offer by a pilot of his services.[94]

SPEAKING DEMURRER. A demurrer which introduces some new fact, or averment, which is necessary to support the demurrer, and which does not appear upon the face of the bill;[95] one that sets up grounds of demurrer *dehors* the declaration.[96] (See EQUITY, 16 Cyc. 265; PLEADING, 31 Cyc. 322.)

SPEAKING ORDER. An order which contains matter which is explanatory and illustrative of the mere direction which is given by it.[97]

SPECIAL. Designating a species or sort; PARTICULAR, *q. v.*; PECULIAR, *q. v.*; noting something more than ordinary; appropriate; designed for a particular purpose; extraordinary and uncommon;[98] particular; peculiar; different from

Nation *v.* Southern Kansas R. Co., 33 Fed. 900, 906].

For other definitions of the term see INTERNATIONAL LAW, 22 Cyc. 1716 note 59.

"**Sovereignty of a state** embraces the power to execute its laws and the right to exercise supreme dominion and authority, except as limited by the fundamental law." People *v.* Tool, 35 Colo. 225, 234, 86 Pac. 224, 229, 231, 117 Am. St. Rep. 198, 6 L. R. A. N. S. 822.

"**Boundary** means sovereignty, since in modern times sovereignty is mainly territorial, unless a different meaning clearly appears." New Jersey Cent. R. Co. *v.* Jersey City, 209 U. S. 473, 479, 28 S. Ct. 592, 52 L. ed. 896.

88. Shubrick *v.* State, 2 S. C. 21, 23.

As description of animal see ANIMALS, 2 Cyc. 431 note 26.

89. Century Dict.

As used in an affidavit that on a certain page of a bill of exceptions a "space" was left for depositions, etc., the word has reference to the paper on which the bill of exceptions was written; that is, that there was a space left on that paper. Pennsylvania Co. *v.* Sears, 136 Ind. 460, 477, 34 N. E. 15, 36 N. E. 353.

"**Space of intersection**" **in mining law** see Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 14, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209; Branagan *v.* Dulaney, 8 Colo. 408, 413, 8 Pac. 669.

90. Hannibal, etc., R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 270, 8 S. Ct. 874, 31 L. ed. 731, where it is said: "The word 'span' does not, even in architecture, always mean a part of a structure. It is, perhaps, as often used to denote the distance or space between two columns."

"'**A span of horses**' is two animals which may be connected together or united for the purpose of a team." Ames *v.* Martin, 6 Wis. 361, 362, 70 Am. Dec. 468.

91. Ruis *v.* Chambers, 15 Tex. 586, 589, under the constitution of the Spanish monarchy of 1837.

92. Webster Dict.; Worcester Dict. [both *quoted* in Aldrich *v.* Mercantile Mut. Acc. Assoc., 149 Mass. 457, 459, 21 N. E. 873].

"**Spare**" **conductor** would properly distinguish one occasionally employed from one regularly and continuously employed, and as used to describe an applicant for accident insurance the term gives no intimation that he was engaged or desired to be insured in the performance of any other duties than those of a conductor. Aldrich *v.* Mercantile Mut. Acc. Assoc., 149 Mass. 457, 459, 21 N. E. 873.

93. McCarty *v.* Holman, 22 Hun (N. Y.) 53, 55.

94. The Mascotte, 39 Fed. 871, 873.

95. Brooks *v.* Gibbons, 4 Paige (N. Y.) 374, 375.

96. Wright *v.* Weber, 17 Pa. Super. Ct. 451, 455. See also Walker *v.* Conant, 65 Mich. 194, 197, 31 N. W. 786; Davison *v.* Gregory, 132 N. C. 389, 394, 43 S. E. 916; Von Glahn *v.* De Rossett, 76 N. C. 292, 294.

97. Duff *v.* Duff, 101 Cal. 1, 3, 35 Pac. 437.

98. Kundolf *v.* Thalheimer, 12 N. Y. 593. 596. See also Arnold *v.* Rees, 18 N. Y. 57,

others; designed for a particular purpose, occasion, or person; limited in range; confined to a definite field of action.[99] (Special: Acceptance of Bill of Exchange, see COMMERCIAL PAPER, 7 Cyc. 775. Act, see STATUTES. Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 108. Agent — In General, see PRINCIPAL AND AGENT, 31 Cyc. 1339; Notice to as Notice to Corporation, see CORPORATIONS, 10 Cyc. 1060. Allowance, see COSTS, 11 Cyc. 134. Appearance — In General, see APPEARANCES, 3 Cyc. 502; In Case Appealed From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 694. Arbitrator or Umpire, see ARBITRATION AND AWARD, 3 Cyc. 655. Assessment — As Deprivation of Property Without Due Process of Law, see CONSTITUTIONAL LAW, 8 Cyc. 1108; As Exercise of Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 560; By District of Columbia, see DISTRICT OF COLUMBIA, 14 Cyc. 534; For Drain, see DRAINS, 14 Cyc. 1058; For Levee, see LEVEES, 25 Cyc. 200; For Municipal Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1102; For Street or Highway, see STREETS AND HIGHWAYS; Mandamus to Compel Levy, see MUNICIPAL CORPORATIONS, 28 Cyc. 330. Assistant to Attorney-General, see ATTORNEY-GENERAL, 4 Cyc. 1026. Assumpsit, see ASSUMPSIT, ACTION OF, 4 Cyc. 320. Attachment, see ATTACHMENT, 4 Cyc. 548 note 94. Bail, Necessity and Entry in Civil Action, see BAIL, 5 Cyc. 11, 13. Benefits, see BENEFITS, 5 Cyc. 682 note 16. Case, see ACTIONS, 1 Cyc. 715 note 14; COURTS, 11 Cyc. 767; SUBMISSION OF CONTROVERSY. Charge, see CRIMINAL LAW, 12 Cyc. 611. Charter, see CORPORATIONS, 10 Cyc. 201. Circumstances, see COSTS, 11 Cyc. 134. Commissioners — In Admiralty, see ADMIRALTY, 1 Cyc. 887; In Chancery, see EQUITY, 16 Cyc. 429; To Assess Compensation For Local Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1142; To Assess Compensation For Property Taken For Public Use, see EMINENT DOMAIN, 15 Cyc. 883; To Determine Necessity, Place, Mode, and Expense of Crossing Other Railroad or Highway, see RAILROADS, 33 Cyc. 256; To Establish, Alter, and Vacate Street or Highway, see STREETS AND HIGHWAYS; To Examine Claims Against Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 522; To Make Partition, see PARTITION, 30 Cyc. 253; To Take Deposition, see DEPOSITIONS, 13 Cyc. 850. Constable, see SPECIAL CONSTABLE, *post*, p. 521. Contract, see SPECIAL CONTRACT, *post*, p. 521. Count — In Assumpsit, see ASSUMPSIT, ACTION OF, 4 Cyc. 345; Joinder of Money Counts in Action on Commercial Paper, see COMMERCIAL PAPER, 8 Cyc. 146. Court, see COURTS, 11 Cyc. 656, 693. Custom, see

64; Gracie *v.* Freeland, 1 N. Y. 228, 232 (where, as applied to jurisdiction, the term is distinguished from "general"); Zulich *v.* Bowman, 42 Pa. St. 83, 88; *In re* Jeannette Borough School Directors, 14 Pa. Dist. 352, 355.

In legal phrases, the word "special" is most frequently used as denoting something particular or limited, in contradistinction to general or permanent. *In re* Senate Bill, 12 Colo. 188, 192, 21 Pac. 481.

99. Platt *v.* Craig, 66 Ohio St. 75, 78, 63 N. E. 594.

"Special services," as used in a will directing the payment to one of the executors named therein of a yearly compensation for his special services, means something more than the ordinary services which the other executors would be required to perform personally. Clinch *v.* Eckford, 8 Paige Ch. (N. Y.) 412, 414.

With reference to legislation the term is synonymous with "local" (People *v.* Wilcox, 237 Ill. 421, 424, 86 N. E. 672; Eckerson *v.* Des Moines, 137 Iowa 452, 468, 115 N. W. 177; Acme Dairy Co. *v.* Astoria, 49 Oreg. 520, 523, 90 Pac. 153), or "private" (Allen *v.* Hirsch, 8 Oreg. 412, 415).

"A 'special' word used as a trade-mark" see *In re* Hopkinson, [1892] 2 Ch. 116, 121, 61 L. J. Ch. 387, 66 L. T. Rep. N. S. 487. See also TRADE-MARKS AND TRADE-NAMES.

"Special care and diligence" see Brady *v.* Jefferson, 5 Houst. (Del.) 60, 79.

"Special commission" in state constitution see *In re* Senate Bill, 12 Colo. 188, 191, 21 Pac. 481.

"Special commissioner" in a statute see McRaven *v.* McGuire, 9 Sm. & M. (Miss.) 34, 53.

"Special provision" see People *v.* Herlihy, 35 Misc. (N. Y.) 711, 716, 72 N. Y. Suppl. 389; State *v.* Burns, 73 S. C. 194, 196, 52 S. E. 960; Dean *v.* Spartanburg County, 59 S. C. 110, 113, 37 S. E. 226.

"Special reason" see *In re* Solomons, [1904] 1 K. B. 106, 115, 73 L. J. K. B. 55, 89 L. T. Rep. N. S. 673, 10 Manson 369, 52 Wkly. Rep. 473; *In re* Stevens, [1898] 2 Q. B. 495, 498, 67 L. J. Q. B. 932, 79 L. T. Rep. N. S. 80, 5 Manson 223, 14 T. L. R. 556, 47 Wkly. Rep. 61; *In re* Peel, 19 T. L. R. 207, 208.

"Special superintendence" see Pressey *v.* H. B. Smith Mach. Co., 45 N. J. Eq. 872, 878, 19 Atl. 618.

CUSTOMS AND USAGES, 12 Cyc. 1031. Damages — In General, see DAMAGES, 13 Cyc. 13; In Action For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 454. Defense, Necessity For Request For Instruction as to, see CRIMINAL LAW, 12 Cyc. 659. Demurrer, see EQUITY, 16 Cyc. 272; PLEADING, 31 Cyc. 271. Deposit, see BANKS AND BANKING, 5 Cyc. 513. Election — In General, see ELECTIONS, 15 Cyc. 279; As Delegation of Legislative Power, see CONSTITUTIONAL LAW, 8 Cyc. 840; For Adoption of Stock Laws, see ANIMALS, 2 Cyc. 440; For Adoption or Repeal of Local Option Laws, see INTOXICATING LIQUORS, 23 Cyc. 95; For Constitutional Amendment, see CONSTITUTIONAL LAW, 8 Cyc. 723; For Creation, Alteration, or Abolition of Counties, see COUNTIES, 11 Cyc. 351; For Creation, Alteration, or Abolition of School-Districts, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 839; For Incurring Indebtedness by County, see COUNTIES, 11 Cyc. 507; For Incurring Indebtedness by Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1548; For Issue of County Bonds, see COUNTIES, 11 Cyc. 556; For Issue of Municipal Bonds, see MUNICIPAL CORPORATIONS, 28 Cyc. 1588; For Issue of School Bonds, see SCHOOLS AND SCHOOL-DISTRICTS; For Levy of Municipal Taxes, see MUNICIPAL CORPORATIONS, 28 Cyc. 1662; For Levy of School Tax, see SCHOOLS AND SCHOOL-DISTRICTS; For Removal of County-Seat, see COUNTIES, 11 Cyc. 374. Execution, see SPECIAL EXECUTION, *post*, p. 522. Findings — In General, see CRIMINAL LAW, 12 Cyc. 690; EQUITY, 16 Cyc. 422; TRIAL; Necessity For After Dissolution of Attachment on Merits, see ATTACHMENT, 4 Cyc. 799 note 27. Funds — Of City, see MUNICIPAL CORPORATIONS, 28 Cyc. 1563; Of County, see COUNTIES, 11 Cyc. 509; Of Insurance Company, see INSURANCE, 22 Cyc. 1399; Of School-District, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 822; Of State, see STATES; Of Town, see TOWNS. Grand Jury, see GRAND JURIES, 20 Cyc. 1323. Guaranty, see GUARANTY, 20 Cyc. 1399. Guardian, see INFANTS, 22 Cyc. 634. Imparlance, see PLEADING, 31 Cyc. 137. Indorsement — In General, see COMMERCIAL PAPER, 7 Cyc. 805; Admissibility of Note Specially Indorsed to Support Action in Name of Original Payee, see COMMERCIAL PAPER, 8 Cyc. 70 note 17; Erasure of, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 239. Injunction, see INJUNCTIONS, 22 Cyc. 744. Instruction, see CRIMINAL LAW, 12 Cyc. 679; TRIAL. Interrogatories, see TRIAL. Issue, see SPECIAL ISSUE, *post*, p. 522. Judge — In General, see JUDGES, 23 Cyc. 601; Jurisdiction to Punish For Contempt, see CONTEMPT, 9 Cyc. 31. Jurisdiction — In General, see ADMIRALTY, 1 Cyc. 797; COURTS, 11 Cyc. 656, 771; Appeal From Exercise, see APPEAL AND ERROR, 2 Cyc. 540; Collateral Impeachment of Judgment of Court of Special Jurisdiction, see JUDGMENTS, 23 Cyc. 1060; Judgment of Court of Special Jurisdiction Operative as Bar, see JUDGMENTS, 23 Cyc. 1114. Jury, see SPECIAL JURY, *post*, p. 522. Law, see STATUTES. Legacy, see WILLS. Legislation, Right of Person Procuring to Question Constitutionality of, see CONSTITUTIONAL LAW, 8 Cyc. 795 note 32. Letter of Credit, see GUARANTY, 20 Cyc. 1397 note 17. Lien, see LIENS, 25 Cyc. 663. Master, see EQUITY, 16 Cyc. 429. Matter, see PLEADING, 31 Cyc. 190. Meeting — Of City Council, see MUNICIPAL CORPORATIONS, 28 Cyc. 327; Of Corporate Directors, see CORPORATIONS, 10 Cyc. 782; Of Corporate Stock-Holders, see CORPORATIONS, 10 Cyc. 323; Of County Board, see COUNTIES, 11 Cyc. 394. Mercantile Agency, see MERCANTILE AGENCIES, 27 Cyc. 473 note 1. Messenger, Sending Notice of Dishonor by, see COMMERCIAL PAPER, 7 Cyc. 1088, 1102. Mortgage, see SPECIAL MORTGAGE, *post*, p. 523. Motion, see MOTIONS, 28 Cyc. 4 note 1. Officer, see SHERIFFS AND CONSTABLES. Order, Appealability After Final Judgment, see APPEAL AND ERROR, 2 Cyc. 600. Owner, see SPECIAL OWNER, *post*, p. 523. Partner, see PARTNERSHIP, 30 Cyc. 751. Plea, see PLEADING, 31 Cyc. 126. Policeman, see SPECIAL POLICEMAN, *post*, p. 523. Power, see POWERS, 31 Cyc. 1040; PRINCIPAL AND AGENT, 31 Cyc. 1345. Privileges, Immunities, or Class Legislation, see CONSTITUTIONAL LAW, 8 Cyc. 1038. Proceedings — In General, see ADOPTION OF CHILDREN, 1 Cyc. 926; ARBITRATION AND AWARD, 3 Cyc. 568; ARREST, 3 Cyc. 867; ATTACHMENT, 4 Cyc. 368; BASTARDS, 5 Cyc. 644; BOUNDARIES, 5 Cyc. 930; CERTIORARI, 6 Cyc. 730; DEPOSITIONS, 13 Cyc. 822; DISCOVERY, 14 Cyc. 301;

EMINENT DOMAIN, 15 Cyc. 543; EXECUTIONS, 17 Cyc. 878; HABEAS CORPUS, 12 Cyc. 279; INTERPLEADER, 23 Cyc. 1; MANDAMUS, 26 Cyc. 125; MARSHALING ASSETS AND SECURITIES, 26 Cyc. 927; MOTIONS, 28 Cyc. 1; NE EXEAT, 29 Cyc. 382; PROHIBITION, 32 Cyc. 596; QUO WARRANTO, 32 Cyc. 1410; SUBROGATION; Abatement on Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 59; Appealability of Order Affecting Substantial Rights, see APPEAL AND ERROR, 2 Cyc. 613; Application of General Statutes of Limitation, see LIMITATIONS OF ACTIONS, 25 Cyc. 1061; As Distinguished From Civil Action, see ACTIONS, 1 Cyc. 721; APPEAL AND ERROR, 2 Cyc. 509; Costs in, see COSTS, 11 Cyc. 53, 127, 207; Depositions in, see DEPOSITIONS, 13 Cyc. 844; For Assignment of Dower, see DOWER, 14 Cyc. 973; For Construction of Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 971; For Damages For Injury to Animals, see ANIMALS, 2 Cyc. 427; For Limitation of Liability of Ship-Owner, see SHIPPING, *ante*, p. 407; For Naturalization of Alien, see ALIENS, 2 Cyc. 113; For Violation of Injunction, see INJUNCTIONS, 22 Cyc. 1021; Inquisition of Insanity, see INSANE PERSONS, 22 Cyc. 1123; Judgment in, see JUDGMENTS, 23 Cyc. 768; Right of Appeal in, see APPEAL AND ERROR, 2 Cyc. 520; Supplementary to Execution, see EXECUTIONS, 17 Cyc. 1402; To Alter or Create New Municipalities, see MUNICIPAL CORPORATIONS, 28 Cyc. 198; To Contest Elections, see ELECTIONS, 15 Cyc. 393; To Deport Chinese, see ALIENS, 2 Cyc. 128; To Determine Necessity, Location, and Mode of Constructing Street Railway, see STREET RAILROADS; To Determine Necessity, Mode, and Expense of Crossing Other Railroad or Highway by Railroad, see RAILROADS, 33 Cyc. 252, 294; To Disbar Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 912; To Discharge Poor Debtor, see EXECUTIONS, 17 Cyc. 1541; To Enforce Lien, see LIENS, 25 Cyc. 683; MARITIME LIENS, 26 Cyc. 810; MECHANICS' LIENS, 27 Cyc. 317; To Establish, Alter, or Vacate Street or Highway, see STREETS AND HIGHWAYS; To Establish and Determine Claims to Property Seized Under Judicial Process, see ATTACHMENT, 4 Cyc. 735; EXECUTIONS, 17 Cyc. 1206; GARNISHMENT, 20 Cyc. 1134; To Establish and Enforce Exemption, see EXEMPTIONS, 18 Cyc. 1485; To Establish and Enforce Homestead, see HOMESTEADS, 21 Cyc. 633; To Establish Bridge, see BRIDGES, 5 Cyc. 1054; To Establish Drain, see DRAINS, 14 Cyc. 1029; To Establish Levee, see LEVEES, 25 Cyc. 190; To Incorporate Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 158; To Procure Liquor License, see INTOXICATING LIQUORS, 23 Cyc. 125; To Remove Pauper, see PAUPERS, 30 Cyc. 1113; To Remove Public Officer, see OFFICERS, 29 Cyc. 1406; To Sell Decedent's Property, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 699; To Take Property and Assess Compensation, see EMINENT DOMAIN, 15 Cyc. 805. Promise, see FRAUDS, STATUTE OF, 20 Cyc. 147. Property, see SPECIAL PROPERTY, *post*, p. 523. Rates, see CARRIERS, 6 Cyc. 427. Relief, see EQUITY, 16 Cyc. 224; PLEADING, 31 Cyc. 110. Replication, see EQUITY, 16 Cyc. 323; PLEADING, 31 Cyc. 241. Restraint of Trade, see CONTRACTS, 9 Cyc. 523. Retainer, see SPECIAL RETAINER, *post*, p. 524. Rule, see SPECIAL RULE, *post*, p. 524. Services or Expenses by Sheriff or Constable, Compensation For, see SHERIFFS AND CONSTABLES. Sessions, see COURTS, 11 Cyc. 948. Sheriff, see SHERIFFS AND CONSTABLES. Statute, see STATUTES. Stock, see SPECIAL STOCK, *post*, p. 524. Tail, see ESTATES, 16 Cyc. 609. Tax — For Bridges, see BRIDGES, 5 Cyc. 1058; For Levee, see LEVEES, 25 Cyc. 200; For Municipal Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1102; For School Purposes, see SCHOOLS AND SCHOOL-DISTRICTS; For Street or Highway, see STREETS AND HIGHWAYS. Term of Court, see COURTS, 11 Cyc. 729, 964. Train, see CARRIERS, 6 Cyc. 370. Traverse, see PLEADING, 31 Cyc. 192. Tribunal — Appeal From, see APPEAL AND ERROR, 2 Cyc. 540; Judgment of, see JUDGMENTS, 23 Cyc. 1060, 1113, 1219. Trust, see TRUSTS. Venire, see JURIES, 24 Cyc. 230. Verdict — In General, see CRIMINAL LAW, 12 Cyc. 690; TRIAL; On Good Counts in Indictment Containing Bad Counts, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 490; Sufficiency of to Authorize Judgment, see COMMERCIAL PAPER, 8 Cyc. 299 note 93. Warranty, see COVENANTS, 11 Cyc. 1077; SALES, 35 Cyc. 365.)

SPECIAL ACCEPTANCE. See COMMERCIAL PAPER, 7 Cyc. 775.

SPECIAL ACT. See STATUTES.

SPECIAL ADMINISTRATION. Administration where only specific effects of the deceased are committed to the administrator.[1]

SPECIAL ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 108.

SPECIAL AGENT. One whose authority is confined to a particular or individual instance.[2] (See PRINCIPAL AND AGENT, 31 Cyc. 1339.)

SPECIAL ALLOWANCE. See COSTS, 11 Cyc. 134.

SPECIAL APPEARANCE. See APPEARANCES, 3 Cyc. 502; JUSTICES OF THE PEACE, 24 Cyc. 694.

SPECIAL ARBITRATOR. See ARBITRATION AND AWARD, 3 Cyc. 655.

SPECIAL ASSESSMENT. See SPECIAL, *ante*, p. 517.

SPECIAL ASSISTANT ATTORNEY-GENERAL. See ATTORNEY-GENERAL, 4 Cyc. 1026.

SPECIAL ASSUMPSIT. See ASSUMPSIT, ACTION OF, 4 Cyc. 320.

SPECIAL ATTACHMENT. See ATTACHMENT, 4 Cyc. 548 note 94.

SPECIAL BAIL. At common law, a term used as denoting security taken in civil actions, for appearance and surrender of the body of the debtor or defendant in satisfaction of judgment.[3]

SPECIAL CASE. See ACTIONS, 1 Cyc. 715 note 14; COURTS, 11 Cyc. 767; SUBMISSION OF CONTROVERSY.

SPECIAL CHARGE. See CRIMINAL LAW, 12 Cyc. 611.

SPECIAL CHARTER. See CORPORATIONS, 10 Cyc. 201.

SPECIAL CIRCUMSTANCES. See COSTS, 11 Cyc. 134.

SPECIAL CONSTABLE. One who has been appointed a constable for a particular occasion.[4] (See, generally, SHERIFFS AND CONSTABLES, 35 Cyc. 1516.)

SPECIAL CONTRACT. A contract with peculiar provisions or stipulations not found in the ordinary contract relating to the same subject-matter.[5] (Special Contract: In General, see CONTRACTS, 9 Cyc. 213. Effect of on Right to Recover in Assumpsit, see ASSUMPSIT, ACTION OF, 4 Cyc. 326. Effect of on Right to Recover on Quantum Meruit For Work and Labor, see WORK AND LABOR. For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1025.)

SPECIAL COUNT. A count in which plaintiff's claim is set forth with all needed particularity.[6] (See ASSUMPSIT, ACTION OF, 4 Cyc. 345; COMMERCIAL PAPER, 8 Cyc. 146; PLEADING, 31 Cyc. 100.)

SPECIAL COURT. See COURTS, 11 Cyc. 656, 693.

SPECIAL CURATOR. A CURATOR AD HOC,[7] *q. v.*

SPECIAL CUSTOM. See CUSTOMS AND USAGES, 12 Cyc. 1031.

SPECIAL DAMAGES. See DAMAGES, 13 Cyc. 13.

SPECIAL DANGER. Uncommon and extraordinary danger.[8]

SPECIAL DEMURRER. See EQUITY, 16 Cyc. 272; PLEADING, 31 Cyc. 271.

SPECIAL DEPOSIT. See BANKS AND BANKING, 5 Cyc. 513.

SPECIAL ELECTION. See SPECIAL, *ante*, p. 517.

1. Blackstone Comm. [*quoted* in *In re* Senate Bill, 12 Colo. 188, 193, 21 Pac. 481]. See also EXECUTORS AND ADMINISTRATORS, 18 Cyc. 108.

2. Bouvier L. Dict. [*quoted* in *In re* Senate Bill, 12 Colo. 188, 192, 21 Pac. 481].

3. Jack *v.* People, 19 Ill. 57, 58 [*citing* 3 Blackstone Comm. 287; 1 Bacon Abr.; 1 Viner Abr.]. See also BAIL, 5 Cyc. 11, 13.

4. Bouvier L. Dict. [*quoted* in *In re* Senate Bill, 12 Colo. 188, 193, 21 Pac. 481].

5. Indianapolis Coal Traction Co. *v.* Dalton, (Ind. App. 1909) 87 N. E. 552, 554. See Pence *v.* Beckman, 11 Ind. App. 263, 39 N. E. 169, 170, 54 Am. St. Rep. 505.

A contract is special only as it alters general terms and conditions. Ward *v.* Missouri Pac. R. Co., 158 Mo. 226, 234, 58 S. W. 28.

It is always express.— Indianapolis Coal Traction Co. *v.* Dalton, (Ind. App. 1909) 87 N. E. 552, 554; Pence *v.* Beckman, 11 Ind. App. 263, 39 N. E. 169, 170, 54 Am. St. Rep. 505.

6. Wertheim *v.* Fidelity, etc., Co., 72 Vt. 326, 328, 47 Atl. 1071.

7. Sallier *v.* Rosteet, 108 La. 378, 380, 32 So. 383.

8. Ward *v.* Chicago, etc., R. Co., 85 Wis. 601, 607, 55 N. W. 771.

SPECIAL ENTRY. An entry in which the calls are such as will make the place entered to be known as the land entered, when the objects called for are seen;[9] in reference to public lands, an entry which truly describes the objects for which it calls.[10]

SPECIAL EXECUTION. A copy of a judgment with direction to the sheriff to execute it indorsed thereon.[11]

SPECIAL FINDINGS. See CRIMINAL LAW, 12 Cyc. 690; EQUITY, 16 Cyc. 422; TRIAL.

SPECIAL FRANCHISE. The right granted by the public, to use public property for a public use, but with private profit.[12]

SPECIAL FUND. See SPECIAL, *ante*, p. 517.

SPECIAL GRAND JURY. See GRAND JURIES, 20 Cyc. 1323.

SPECIAL GUARANTY. See GUARANTY, 20 Cyc. 1399.

SPECIAL GUARDIAN. See INFANTS, 22 Cyc. 634.

SPECIALIA GENERALIBUS DEROGANT. A maxim meaning "Special words derogate from general words."[13]

SPECIAL IMPORTANCE. See PLEADING, 31 Cyc. 137.

SPECIAL INDORSEMENT. See COMMERCIAL PAPER, 7 Cyc. 805.

SPECIAL INJUNCTION. See INJUNCTIONS, 22 Cyc. 744.

SPECIAL INSTRUCTION. See CRIMINAL LAW, 12 Cyc. 679; TRIAL.

SPECIAL INSURANCE. In marine insurance, an insurance where, in addition to the implied perils, farther perils are expressed in the policy.[14]

SPECIAL INTERROGATORIES. See TRIAL.

SPECIAL ISSUE. In pleading, an issue which consists of a direct denial of some material and traversible allegation, never advances new matter, and concludes to the country.[15] (See PLEADING, 31 Cyc. 192, 670.)

SPECIALIST. More especially, a physician or surgeon who applies himself to the study and practice of some particular branch of his profession.[16] (See, generally, PHYSICIANS AND SURGEONS, 30 Cyc. 1539.)

SPECIAL JUDGE. See JUDGES, 23 Cyc. 601.

SPECIAL JURISDICTION. See SPECIAL, *ante*, p. 517.

SPECIAL JURY. One selected in a particular way by the parties.[17] (See JURIES, 24 Cyc. 255.)

SPECIAL LAW. See STATUTES.

SPECIAL LEGACY. See WILLS.

SPECIAL LEGISLATION. See CONSTITUTIONAL LAW, 8 Cyc. 795 note 32, 1036; STATUTES.

SPECIAL LETTER OF CREDIT. See GUARANTY, 20 Cyc. 1397 note 17.

SPECIAL LIEN. See LIENS, 25 Cyc. 663

SPECIAL LIMITATION. A qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry,

9. Rogers *v.* Burton, Peck (Tenn.) 108, 116. See also Barnes *v.* Sellars, 2 Sneed (Tenn.) 33, 35.

10. Simms *v.* Dickson, 22 Fed. Cas. No. 12,869, Brunn. Col. Cas. 196, 197, Cooke (Tenn.) 137.

Distinguished from "vague entry" see Philips *v.* Robertson, 2 Overt. (Tenn.) 399, 415.

11. Crombie *v.* Little, 47 Minn. 581, 589, 50 N. W. 823.

12. Lord *v.* Equitable L. Assur. Soc., 194 N. Y. 212, 225, 87 N. E. 443.

Distinguished from "general franchise" see FRANCHISES, 19 Cyc. 1458 note 34.

13. Black L. Dict., adding: "A special provision as to a particular subject-matter is to be preferred to general language, which might have governed in the absence of such special provision."

Applied in Brophy *v.* Atty.-Gen., 22 Can. Sup. Ct. 577, 679, 5 Cartwr. Cas. 156.

14. Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. (N. Y.) 127, 150, 1 Am. Dec. 180.

15. Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 127, 39 Atl. 771. See also Kimball *v.* Boston, etc., R. Co., 55 Vt. 95, 97.

16. Standard Dict. [*quoted* in Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38, where it was held that the question of whether a person is or is not a specialist is a question of fact to be submitted to the jury for its determination].

17. Bouvier L. Dict. [*quoted* in *In re* Senate Bill, 12 Colo. 188, 192, 21 Pac. 481].

or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation.[18] (See, generally, ESTATES, 16 Cyc. 595.)

SPECIALLY. For a particular purpose.[19]

SPECIAL MATTER. See PLEADING, 31 Cyc. 190.

SPECIAL MEETING. See EXTRAORDINARY AND SPECIAL MEETING, 19 Cyc. 102.[20]

SPECIAL MERCANTILE AGENCY. See MERCANTILE AGENCIES, 27 Cyc. 473 note 1.

SPECIAL MORTGAGE. A mortgage which binds only certain specified property.[21]

SPECIAL MOTION. See MOTIONS, 28 Cyc. 4 note 1.

SPECIAL NEWSPAPER. A newspaper in which some particular subject, as religion, temperance, literature, law, etc., has prominence, general news occupying only a secondary place.[22]

SPECIAL OWNER. A person holding property for the actual owner.[23] (See BAILMENTS, 5 Cyc. 171.)

SPECIAL PARTNER. See PARTNERSHIP, 30 Cyc. 751.

SPECIAL PLEA. See PLEADING, 31 Cyc. 126.

SPECIAL POLICEMAN. A term ordinarily used to designate one who is not a member of a permanent and organized police force, but who merely engages to do temporary police duty in a particular place or on a special occasion.[24] (See POLICEMAN, 31 Cyc. 901.)

SPECIAL POWER. See POWERS, 31 Cyc. 1040; PRINCIPAL AND AGENT, 31 Cyc. 1345.

SPECIAL PRIVILEGE. In constitutional law, a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of the common right.[25] (See CONSTITUTIONAL LAW, 8 Cyc. 1038.)

SPECIAL PROCEEDINGS. See SPECIAL, *ante*, p. 517.

SPECIAL PROMISE. See FRAUDS, STATUTE OF, 20 Cyc. 147; LIMITATIONS OF ACTIONS, 25 Cyc. 1325.

SPECIAL PROPERTY. A property said to consist in the lawful custody of the goods with right of detention against the genuine or absolute owner;[26] property where he who has the possession holds it subject to the claims of other persons;[27] some fixed interest or right in a thing, distinct from, and subordinate to, the

18. Henderson *v.* Hunter, 59 Pa. St. 335, 340.

19. Zulich *v.* Bowman, 42 Pa. St. 83, 88. See also U. S. *v.* One Hundred and Ninety-six Mares, 29 Fed. 139, 140.

"Specially authorized" see Com. *v.* Ducey, 126 Mass. 269, 273.

"Specially excepted" see Williamsburg City F. Ins. Co. *v.* Willard, 164 Fed. 404, 409, 90 C. C. A. 392.

"Specially set up or claimed" see San José Land, etc., Co. *v.* San José Ranch Co., 189 U. S. 177, 179, 23 S. Ct. 487, 47 L. ed. 765; Union Mut. L. Ins. Co. *v.* Kirchoff, 169 U. S. 103, 110, 18 S. Ct. 260, 42 L. ed. 677; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 654, 17 S. Ct. 709, 41 L. ed. 1149; Sayward *v.* Denny, 158 U. S. 180, 183, 15 S. Ct. 777, 39 L. ed. 941.

20. See also Zulich *v.* Bowman, 42 Pa. St. 83, 89; and *ante*, SPECIAL, p. 517.

21. Barnard *v.* Erwin, 2 Rob. (La.) 407, 416.

22. Century Dict. [*quoted* in Williams *v.* Colwell, 18 Misc. (N. Y.) 399, 401, 43 N. Y. Suppl. 720].

23. Frazier *v.* State, 18 Tex. App. 434, 441.

24. People *v.* York, 43 N. Y. App. Div. 433, 436, 60 N. Y. Suppl. 352.

25. Plattsmouth *v.* Nebraska Tel. Co., 80 Nebr. 460, 464, 114 N. W. 588, 127 Am. St. Rep. 779, 14 L. R. A. N. S. 654; Black L. Dict. [*quoted* in Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 689, 41 Pac. 635].

As used in the act of congress prohibiting any territorial legislative authority from granting any private charter or special privilege, the term refers to the granting of monopolies such as ferries, trade-marks, the exclusive right to manufacture certain articles, or to carry on certain business in a particular locality to the exclusion of others. (Elk Point *v.* Vanghan, 1 Dak. 113, 46 N. W. 577, 578), and does not include the power granted to a municipal corporation to pass an ordinance punishing parties convicted of keeping gaming houses (*Ex p.* Douglass, 1 Utah 108, 111).

26. Pease *v.* Ditto, 189 Ill. 456, 465, 59 N. E. 983; Greenleaf Ev. [*quoted* in Eisendrath *v.* Knauer, 64 Ill. 396, 402], where such is said to be the strict sense of the term.

27. Moulton *v.* Witherell, 52 Me. 237, 242.

absolute property or interest in the general owner;[28] a qualified or limited right, such as a bailee has.[29] (See BAILMENTS, 5 Cyc. 171; and, generally, PROPERTY, 32 Cyc. 639.)

SPECIAL PURPOSE. See EXTRAORDINARY AND SPECIAL PURPOSE, 19 Cyc. 102.

SPECIAL RATES. See CARRIERS, 6 Cyc. 427.

SPECIAL RELIEF. See EQUITY, 16 Cyc. 224; PLEADING, 31 Cyc. 110.

SPECIAL REPLICATION. See EQUITY, 16 Cyc. 323; PLEADING, 31 Cyc. 241.

SPECIAL RESERVE. In reference to Canadian Indian reservations, any tract or tracts of land, and everything belonging thereto set apart for the use or benefit of any band or irregular band of Indians, the title to which is vested in a society, corporation, or community legally established, and capable of suing and being sued, or in a person or persons of European descent, but which land is held in trust for or benevolently allowed to be used by such band or irregular band of Indians.[30]

SPECIAL RESTRAINT OF TRADE. See CONTRACTS, 9 Cyc. 523.

SPECIAL RETAINER. A retainer which has reference to a particular case, or to a particular service.[31] (See ATTORNEY AND CLIENT, 4 Cyc. 926.)

SPECIAL RULE. An order of court made in a particular case, for a particular purpose.[32]

SPECIAL SESSIONS. See COURTS, 11 Cyc. 948.

SPECIAL SHERIFF. See SHERIFFS AND CONSTABLES, 35 Cyc. 1516.

SPECIAL STATUTE. See STATUTES.

SPECIAL STOCK. A particular kind of stock provided for by statute in Massachusetts.[33] (See CORPORATIONS, 10 Cyc. 568.)

SPECIAL TAIL. See ESTATES, 16 Cyc. 609.

SPECIAL TAX. See SPECIAL, *ante*, p. 517.

SPECIAL TERM. See COURTS, 11 Cyc. 729, 964.

SPECIAL TRAIN. See CARRIERS, 6 Cyc. 370.

SPECIAL TRAVERSE. See PLEADING, 31 Cyc. 192.

SPECIAL TRUST. See TRUSTS.

SPECIALTY. In law, an instrument under seal;[34] a writing under hand and seal of a party;[35] a writing sealed and delivered which is given as a security for the payment of a debt in which such debt is particularly specified;[36] a writing sealed and delivered;[37] a bond, bill or such like instrument, writing or deed under

28. Story [*quoted* in Moulton *v.* Witherell, 52 Me. 237, 242].

29. Phelps *v.* People, 72 N. Y. 334, 357.

"The words 'general property,' and 'special property' are constantly used in the books to denote, not the chattel itself, but the different interests which several persons may have in it." Stief *v.* Hart, 1 N. Y. 20, 25.

30. Reg. *v.* St. Catharines Milling, etc., Co., 13 Ont. App. 148, 163 [*affirming* 10 Ont. 196].

31. Agnew *v.* Walden, 84 Ala. 502, 505, 4 So. 672, where it is said: "It, however, imposes obligations, *pro hac vice*, equally binding with those enjoined by a general retainer. It forbids the acceptance of adversary employment, or the performance of adversary services. It exacts undivided loyalty and allegiance to the client, equal to that demanded by the veriest despot that ever scourged a people. In that particular service his talents and skill are not his own; they are bought with a price. These he must bestow with all the zeal and earnestness of his nature, and in all the methods which truth and honesty can sanction. The obligation hath this extent; no greater."

32. Bouvier L. Dict. [*quoted* in Clarke *v.* Gonu, 2 Mont. 538, 539, where it is distinguished from a "general rule"].

33. American Tube-Works *v.* Boston Mach. Co., 139 Mass. 5, 9, 29 N. E. 63, where, distinguishing it from "preferred stock," its characteristics are said to be, that it is limited in amount to two fifths of the actual capital; it is subject to redemption by the corporation at par after a fixed time, to be expressed in the certificates; the corporation is bound to pay a fixed half-yearly sum or dividend upon it, as a debt; the holders of it are in no event liable for the debts of the corporation beyond their stock; and the issue of special stock makes all the general stockholders liable for all contracts of the corporation until the special stock is fully redeemed.

34. Doyle *v.* West, 60 Ohio St. 438, 447, 54 N. E. 469. See also Beekman *v.* Hamlin, 19 Oreg. 383, 385, 24 Pac. 195, 20 Am. St. Rep. 827, 10 L. R. A. 454.

35. Halnon *v.* Halnon, 55 Vt. 321, 322.

36. Bacon Abr. [*quoted* in Seymour *v.* Street, 5 Nebr. 85, 87].

37. Bouvier L. Dict. [*quoted* in Brainerd *v.* Stewart, 33 Vt. 402, 404]. See also Helm *v.* Eastland, 2 Bibb (Ky.) 193, 194; Taylor *v.* Glaser, 2 Serg. & R. (Pa.) 502, 503.

the hand and seal of the parties;[38] a writing or deed under the hand and seal of the parties;[39] a contract by deed;[40] a contract, or obligation under such a contract, by deed or instrument in writing sealed and delivered.[41] In reference to a profession, one branch of a profession.[42] (Specialty: In General, see BONDS, 5 Cyc. 721; DEEDS, 13 Cyc. 505; RELEASE, 34 Cyc. 1039; SEALS, 35 Cyc. 1165. Action of Debt on, see DEBT, ACTION OF, 13 Cyc. 409. Assumpsit on Contract Under Seal, see ASSUMPSIT, ACTION OF, 4 Cyc. 323. Determination of Whether an Instrument Is, see CONTRACTS, 9 Cyc. 693. Instrument Constituting, see BONDS, 5 Cyc. 734, 736. Liability of Heirs on, Extent of, see DESCENT AND DISTRIBUTION, 14 Cyc. 198. Priorities and Payment of Specialty Debts of Decedent, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 542.)

SPECIALTY BY STATUTE. Some right or cause of action given by statute which does not exist at common law.[43]

SPECIAL UMPIRE. See ARBITRATION AND AWARD, 3 Cyc. 655.

SPECIAL VENIRE. See JURIES, 24 Cyc. 230.

SPECIAL VERDICT. See CRIMINAL LAW, 12 Cyc. 690; TRIAL.

SPECIAL WARRANTY. See COVENANTS, 11 Cyc. 1077; SALES, 35 Cyc. 365.

SPECIE. Gold or silver;[44] such coin as constitutes a legal tender;[45] a coin of the precious metals, of a certain weight and fineness, with the government stamp thereon, denoting its value as a medium of exchange, or currency;[46] metallic money issued by public authority.[47] (Specie: Destruction in, as Total Loss in Marine Insurance Policy, see MARINE INSURANCE, 26 Cyc. 687. Effect of Arrival in, on Right to Abandon Under Marine Insurance Policy, see MARINE INSURANCE, 26 Cyc. 696. Medium of Payment in General, see PAYMENT, 30 Cyc. 1210. Requiring Payment of Statutory Deposit in, in Subscriptions to Corporate Stock, see CORPORATIONS, 10 Cyc. 396. Suspension of Payment in as Ground For Forfeiture of Bank Charter, see BANKS AND BANKING, 5 Cyc. 557 note 6; CORPORATIONS, 10 Cyc. 1290.)

SPECIE PAYMENT. See BANKS AND BANKING, 5 Cyc. 557 note 6; PAYMENT, 30 Cyc. 1210.

SPECIES. A sort; a kind; a class subordinate to a genus.[48] (See GENUS, 20 Cyc. 1187.)

38. Broughton *v.* Badgett, 1 Ga. 75, 77.

39. Tomlin L. Dict. [*quoted* in Brainerd *v.* Stewart, 33 Vt. 402, 404].

40. Wharton L. Lex. [*quoted* in Lawrence *v.* McDonald, 7 Nova Scotia 413, 414].

41. Worcester Dict. [*quoted* in Lawrence *v.* McDonald, 7 Nova Scotia 413, 414].

In its technical signification, the term imports an instrument under seal for the payment of money. The term, it is true, is sometimes employed in a loose way of being invested with a more extensive meaning (Seymour *v.* Street, 5 Nebr. 85, 87; Doyle *v.* West, 60 Ohio St. 438, 447, 54 N. E. 469; Stockwell *v.* Coleman, 10 Ohio St. 33, 36); but, where precision is important, the term is used with the limited force just assigned to it (Elsasser *v.* Haines, 52 N. J. L. 10, 23, 18 Atl. 1095).

Stautory definition see Van Dyke *v.* Van Dyke, 123 Ga. 686, 691, 51 S. E. 582.

Under the common-law rule a seal made the instrument a specialty, and removed it from that class of writings known as "simple contracts." J. B. Streeter Co. *v.* Janu, 90 Minn. 393, 395, 96 N. W. 1128.

"There are two classes of specialty contracts in the English law — common-law specialities and mercantile specialties. The first class includes bonds and covenants, i. e., instruments under seal; the second class includes bills and notes and policies of insurance, and possibly other mercantile instruments." Ames Bills and Notes [*quoted* in *In re* Weisenberg, 131 Fed. 517, 522].

Debt by specialty see 13 Cyc. 424.

42. *In re* Hunter, 60 N. C. 372, 374.

43. Wardle *v.* Hudson, 96 Mich. 432, 435, 55 N. W. 992.

44. Webb *v.* Moore, 4 T. B. Mon. (Ky.) 483, where such is said to be the popular acceptation of the term. See also Miller *v.* Lacy, 33 Tex. 351, 353.

45. Bryant *v.* Damariscotta Bank, 18 Me. 240, 244.

46. Henry *v.* Salina Bank, 5 Hill (N. Y.) 523, 536.

47. Walkup *v.* Houston, 65 N. C. 501, 502.

Distinguished from "currency" see Trebilcock *v.* Wilson, 12 Wall. (U. S.) 687, 695, 20 L. ed. 460. See also Belford *v.* Woodward, 158 Ill. 122, 130, 41 N. E. 1097, 29 L. R. A. 593; Walkup *v.* Houston, 65 N. C. 501, 502; Hartley *v.* McAnulty, 4 Yeates (Pa.) 95, 96, 2 Am. Dec. 396.

"Payable in specie" see Glover *v.* Robbins, 49 Ala. 219, 222, 20 Am. Rep. 272.

As meaning "appearance" in marine insurance see Wallerstein *v.* Columbian Ins. Co., 3 Rob. (N. Y.) 528, 538.

"Specie value" see Blackwell *v.* Auditor Public Accounts, 1 Ill. 196.

48. Webster Dict. [*quoted* in Smythe *v.*

SPECIFIC. As an adjective, tending to specify or make particular; DEFINITE, *q. v.*; LIMITED, *q. v.*; PRECISE,[49] *q. v.* As a noun in medicine, a substance to which is attributed the property of removing directly one disease rather than any other.[50] (Specific: Denial in Pleading, see PLEADING, 31 Cyc. 197. Devise, Construction of, see WILLS. Legacy — Abatement or Preference, see WILLS; Construction of Will, see WILLS. Objection or Exception — For Purpose of Review, see APPEAL AND ERROR, 2 Cyc. 989; To Evidence or Instructions, see CRIMINAL LAW, 12 Cyc. 564, 566; TRIAL.)

SPECIFICALLY. In a specific manner; according to the nature of the species or of the case; definitely; particularly; explicitly; in a particular sense, or with a particularly differentiated application.[51]

SPECIFIC APPROPRIATION. An act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand;[52] a particular, a definite, a limited, a precise appropriation;[53] an appropriation expressly providing funds for a particular purpose.[54]

SPECIFICATIO. Literally "A making of form; a giving of form to materials." In the civil law, the mode of acquiring property through which a person, by transforming a thing belonging to another, especially by working up his materials into a new species, becomes proprietor of the same.[55]

SPECIFICATION. Distinct notation; determination by a particular mark of distinction; particular mention.[56] In the civil law, a method of acquiring property, when without the accession of any other material, that of another person which has been used by the operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities, which identify it.[57] (Specification: Of Errors — In Application in Probate Court, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1210; In Briefs, see APPEAL AND ERROR, 2 Cyc. 1014; In Motion For New Trial, see NEW TRIAL, 29 Cyc. 942; In Notice of

State, 17 Tex. App. 244, 251, where the term is distinguished from "genus"].

"A species . . . embraces individuals of the same kind, and all of the individuals having the same characteristics. It embraces all individuals that are precisely alike in every character, and not capable of change by any accidental circumstances, and capable of uniform, invariable and permanent continuance by natural propagation. Or, it is founded on identity of form and structure, both external and internal — the principal characteristic of species in animals being the power to produce beings like themselves, and who are themselves also naturally productive." Oil *v.* Rowley, 69 Ill. 469, 471.

49. Webster Dict. [*quoted* in Peters *v.* Banta, 120 Ind. 416, 424, 22 N. E. 95].

A relative term see Liscomb *v.* Eldredge, 20 R. I. 335, 336, 38 Atl. 1052.

Very opposite of "general" see Smith *v.* McCoole, 5 Kan. App. 713, 46 Pac. 988, 989.

"A specific deposit" see Officer *v.* Officer, 120 Iowa 389, 392, 94 N. W. 947, 98 Am. St. Rep. 365.

"Specific documents" see White *v.* Spafford, [1901] 2 K. B. 241, 247, 70 L. J. K. B. 658, 84 L. T. Rep. N. S. 574; Graves *v.* Heinemann, 18 T. L. R. 115.

50. Humphrey's Specific Homeopathic Medicine Co. *v.* Wenz, 14 Fed. 250, 253.

51. Century Dict. See also Emack *v.* Campbell, 14 App. Cas. (D. C.) 186, 190, where the term is said to be the equivalent of "definite" or "precise."

"Specifically charged," in reference to a charge which a married woman was allowed to make on her separate estate, was construed as synonymous with "'expressly charged,'" and not that the charge must be upon specific property. Flaum *v.* Wallace, 103 N. C. 296, 312, 9 S. E. 567.

"Specifically devised" see Homer *v.* Shelton, 2 Mete. (Mass.) 194, 208.

"Specifically disposed of" see Roberts *v.* Cooke, 16 Ves. Jr. 451, 453, 33 Eng. Reprint 1055.

"Specifically insured" see Firemen's Fund Ins. Co. *v.* Western Refrigerating Co., 162 Ill. 322, 325, 44 N. E. 746.

52. Stratton *v.* Green, 45 Cal. 149, 150; State *v.* Moore, 50 Nebr. 86, 96, 69 N. W. 373, 61 Am. St. Rep. 538; State *v.* LaGrave, 23 Nev. 25, 28, 41 Pac. 1075, 62 Am. St. Rep. 764.

53. State *v.* Moore, 50 Nebr. 86, 97, 69 N. W. 373, 61 Am. St. Rep. 538; State *v.* Wallichs, 16 Nebr. 679, 680, 21 N. W. 397, 12 Nebr. 407, 408, 11 N. W. 860.

54. State *v.* Wallichs, 15 Nebr. 609, 610, 20 N. W. 110.

55. Black L. Dict. [*citing* Mackeldey Rom. L. § 271]. See also South Australian Ins. Co. *v.* Randell, L. R. 3 P. C. 101, 105, 22 L. T. Rep. N. S. 843, 6 Moore P. C. N. S. 341, 16 Eng. Reprint 755.

56. Walker Dict. [*quoted* in Seward *v.* Miller, 6 How. Pr. (N. Y.) 312].

57. Lampton *v.* Preston, 1 J. J. Marsh. (Ky.) 454, 462, 19 Am. Dec. 104, where it is said: "Such is the conversion of corn into meal, of grapes into wine, &c." See also ACCESSION, 1 Cyc. 222; CONFUSION OF GOODS, 8 Cyc. 570.

Appeal, see APPEAL AND ERROR, 2 Cyc. 867; In Notice of Motion or Intention to Apply For New Trial, see NEW TRIAL, 29 Cyc. 938; In Return to Writ of Certiorari, see CERTIORARI, 6 Cyc. 807; On Appeal or Error, see APPEAL AND ERROR, 2 Cyc. 986; CRIMINAL LAW, 12 Cyc. 875. Of Grounds of Demurrer, see PLEADING, 31 Cyc. 311. Of Interlocutory Judgments or Orders in Notice of Appeal, see APPEAL AND ERROR, 2 Cyc. 867. Of Items on Confession of Judgment in Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 592. Of Objections to Discharge of Bankruptcy, see BANKRUPTCY, 5 Cyc. 391. Of Return-Day — In Civil Process, see PROCESS, 32 Cyc. 431; In Writ of Error, see APPEAL AND ERROR, 2 Cyc. 856. Of Termini and Principal Place of Business in Articles of Incorporation of Railroad Companies, see RAILROADS, 33 Cyc. 59.)

SPECIFICATIONS. In architecture, a detailed and particular account of the structure to be built, including the manner of its construction and the materials to be used;[58] a specific and detailed statement of the materials to be used in the building and the manner of performing the work;[59] a particular and detailed account of a thing;[60] a particular or detailed statement of the various elements involved;[61] an accurate description of the materials and work to be used and performed in the execution of a building;[62] a written instrument containing an exact and minute description, account, or enumeration of particulars.[63] In the procedure of courts martial, the part of the charge which sets forth the acts or omissions of the accused which form the legal constituents of the offense.[64] (Specifications: Accompanying — Claim For Patent, see PATENTS, 30 Cyc. 938; Documents and Proceedings in Patent Office, Construction and Operation of, see PATENTS, 30 Cyc. 935. Character of Required in Advertising For Bids, see COUNTIES, 11 Cyc. 481. Description of Invention in, see PATENTS, 30 Cyc. 883. In Building Contract — In General, see BUILDERS AND ARCHITECTS, 6 Cyc. 9; Discharge of Surety of Building Contractor by Change in, see PRINCIPAL AND SURETY, 32 Cyc. 188; Lien of Architect For Preparation of, see MECHANICS' LIENS, 27 Cyc. 32; Reference to in Contract For Materials and Services as Determining Right to Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 69 note 93. Of Patent as Subjects of Copyright, see COPYRIGHT, 9 Cyc. 898 note 9. Of Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1011.)

SPECIFIC CONCLUSION. In parliamentary law, the report of a committee concluding with a resolution, or series of resolutions, or some other specific proposition.[65]

SPECIFIC GRAVITY. The ratio of the weight of a body to the weight of an equal volume of some other body, taken as the standard or unit.[66]

SPECIFIC LEGACY. See WILLS.

SPECIFIC LIEN. A charge upon a particular piece of property, by which it is held for the payment or discharge of a particular debt or duty, in priority to the general debts or duties of the owner;[67] a lien that attaches to certain property, or to some particular piece of property.[68] (See LIENS, 25 Cyc. 663.)

58. Woollacott *v.* Meekin, 151 Cal. 701, 708, 91 Pac. 612 (dissenting opinion); Baltimore, etc., R. Co. *v.* Stewart, 79 Md. 487, 497, 29 Atl. 964.

59. State *v.* Kendall, 15 Nebr. 262, 273, 18 N. W. 85.

60. Bouvier L. Dict. [*quoted* in Gilbert *v.* U. S., 1 Ct. Cl. 28, 34].

61. Black L. Dict. [*quoted* in Jenney *v.* Des Moines, 103 Iowa 347, 350, 72 N. W. 550].

62. Gwilt Encyc. Architecture [*quoted* in Gilbert *v.* U. S., 1 Ct. Cl. 28, 34].

63. Worcester Dict. [*quoted* in Gilbert *v.* U. S., 1 Ct. Cl. 28, 34].

A letter specifying the quality of materials and the mode of doing the work annexed to the contract may be sufficient as "specifications." McGeragle *v.* Broemel, 53 N. J. L. 59, 61, 20 Atl. 857.

"They embrace . . . not only the dimensions and mode of construction, but a description of every piece of material — its kind, length, breadth, and thickness — the manner of joining the separate parts together." Gilbert *v.* U. S., 1 Ct. Cl. 28, 34.

64. Carter *v.* McClaughry, 183 U. S. 365, 386, 22 S. Ct. 181, 46 L. ed. 236. See also ARMY AND NAVY, 3 Cyc. 853.

65. Cushing's Manual [*quoted* in Matter of Matthews, 59 N. Y. App. Div. 159, 163, 69 N. Y. Suppl. 203].

66. Louisville Public Warehouse Co. *v.* Collector of Customs, 49 Fed. 561, 568, 1 C. C. A. 371.

67. Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 56, 20 Am. Rep. 451.

68. Gross *v.* Daly, 5 Daly (N. Y.) 540, 546.

SPECIFIC PERFORMANCE

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CROSS-REFERENCES

For Matters Relating to:

Abatement of Action or Suit, see ABATEMENT AND REVIVAL, 1 Cyc. 40, 99.

Cancellation or Rescission of Contract, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

Election of Other Remedy, see ELECTION OF REMEDIES, 15 Cyc. 251.

Reformation of Contract, see REFORMATION OF INSTRUMENTS, 34 Cyc. 899.

Requisites, Validity, and Construction of Contract:

In General, see CONTRACTS, 9 Cyc. 213.

To Convey Land, see VENDOR AND PURCHASER.

Revival of Action or Suit, see ABATEMENT AND REVIVAL, 1 Cyc. 91, 97 note 74, 98 note 79.

Specific Performance:

As Relief in Suit to Reform, see REFORMATION OF INSTRUMENTS, 34 Cyc. 995.

By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 314.

Compared With Injunctive Relief, see INJUNCTIONS, 22 Cyc. 844, 857.

Conclusiveness of Decree of, see JUDGMENTS, 23 Cyc. 1327.

In Admiralty, see ADMIRALTY, 1 Cyc. 825 note 21.

Instead of Reformation, see REFORMATION OF INSTRUMENTS, 34 Cyc. 904 note 7.

Joined With Other Actions, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 384 note 15, 387, 423, 426 note 55.

Jurisdiction:

Beyond Territorial Limits, see COURTS, 11 Cyc. 686.

Of Justices of Peace, see JUSTICES OF THE PEACE, 24 Cyc. 477 note 85.

Mere Refusal no Ground For Cancellation, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 289.

Of Acceptance of Tender, see ACCORD AND SATISFACTION, 1 Cyc. 315 note 58

Of Award in Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 993.

Of Composition, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 489.

Of Compromise, see COMPROMISE AND SETTLEMENT, 8 Cyc. 536 note 46.

Of Contract:

Between Husband and Wife, see HUSBAND AND WIFE, 21 Cyc. 1283 note 55, 1426 note 13, 1523 note 94, 1578 note 97.

Building Contract, see BUILDERS AND ARCHITECTS, 6 Cyc. 7 note 7.

Of Agency, see PRINCIPAL AND AGENT, 31 Cyc. 1300.

Of Alien, see ALIENS, 2 Cyc. 106 note 72.

Of Broker, see FACTORS AND BROKERS, 19 Cyc. 293.

Of Corporation, see CORPORATIONS, 10 Cyc. 1341.

Of Decedent, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 314.

Of Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1331, 1346.

Of Infant, see INFANTS, 22 Cyc. 538.

Of Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1023 note 2, 1493 note 37.

Of Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 685.

To Adopt Child, see ADOPTION OF CHILDREN, 1 Cyc. 936.

To Convey Homestead, see HOMESTEADS, 21 Cyc. 555.

To Give Time to Accept Offer, see CONTRACTS, 9 Cyc. 387 note 19.

To Release Ground-Rent, see GROUND-RENTS, 20 Cyc. 1380.

To Renew Lease, see LANDLORD AND TENANT, 24 Cyc. 1005.

To Supply Gas, see GAS, 20 Cyc. 1164 note 50.

To Write a Book, see COPYRIGHT, 9 Cyc. 936.

Right of Purchaser Pending Action For, see LIS PENDENS, 25 Cyc. 1455.

Upon Ground of Account, Remedy at Law Being Adequate, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 426 note 40.

I. PRELIMINARY MATTERS.

A. Definition and Outline of the Subject — 1. DEFINITION. Specific performance of contracts is an equitable remedy by which a party to a contract is compelled to do or omit [1] the very acts which he has undertaken to do or omit.[2]

2. ORIGIN. Specific performance of contracts is often spoken of as one of the most ancient heads of equity jurisdiction, but recent investigations have shown that only one undoubted instance of specific performance is to be found earlier than the middle of the fifteenth century.[3] It is ancient in a sense, however, as compared with many other branches of equity, in that the greater part of its rules were developed in much detail, and settled nearly in their present form, during the eighteenth century or within a few years after its close.

3. THE SUBJECT OUTLINED — a. Legal Essentials of the Contract. In general, the contract must have the essentials of a contract valid and binding at law in order to be enforceable in equity.[4] It must be a concluded contract;[5] there must have been a clear mutual understanding and a positive assent on both sides as to the terms of the contract;[6] it must be sufficiently definite and certain;[7] the parties must have the capacity to contract;[8] it must be upon a valuable consideration;[9] and it must not be illegal.[10]

b. Equitable Essentials. The general principle that equity will not exercise

1. **Injunction.**— The specific enforcement of contracts, express or implied, to refrain from doing acts is treated elsewhere. See INJUNCTIONS, 22 Cyc. 724.

2. **Other definitions.**— "Specific performance is a remedy for enforcing the equitable duties growing out of the alleged agreement." Smith *v.* Bradhurst, 18 Misc. (N. Y.) 546, 549, 41 N. Y. Suppl. 1002.

"Specific performance is an equitable remedy, which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice between the parties under the circumstances of the case." Rison *v.* Newberry, 90 Va. 513, 521, 18 S. E. 916.

"'Specific performance,' as applied to contracts, has been defined: 'The actual accomplishment of a contract by the party bound to fulfill it; performance of a contract in the precise terms agreed upon; strict performance.'" Burton *v.* Vessels, 5 Del. Ch. 568, 572. And see Comer *v.* Bankhead, 70 Ala. 496, 496; Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 176, 14 Atl. 27.

Specific performance distinguished from redemption.— "Specific performance enforces a contract by giving a party something to which he had not title before. Redemption gives a party nothing new, but enforces his right to repurchase his own, incumbered for a debt. Redemption restores the parties to their former rights of property. Specific performance gives them new rights of property." Ryan, C. J., in Williams *v.* Williams, 50 Wis. 311, 316, 6 N. W. 814.

3. Professor James Barr Ames in 1 Green Bag 26, 1 Ames Cas. Eq. Jur. 37. The early case referred to dates from 1458.

4. **Contracts of corporations.**— A parol agreement with the vice-president of a corporation for the purchase of a lot, which was never ratified or acquiesced in by its board of directors in such a way as to create an estoppel, does not entitle the other party to have such agreement performed by the corporation in equity. Jennings *v.* Brown, 20 Okla. 294, 94 Pac. 557. See Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 9 S. Ct. 286, 32 L. ed. 673.

5. Corbett *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Levin *v.* Dietz, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. N. S. 251 [*reversing* 119 N. Y. App. Div. 875, 104 N. Y. Suppl. 1131 (*affirming* 48 Misc. 593, 96 N. Y. Suppl. 468)]. And see *infra*, III, D, 1; CONTRACTS, 9 Cyc. 213; VENDOR AND PURCHASER.

Mere declaration of intention.— A statement, in a general conversation, that the party making it had made up his mind to give a child a particular tract of land if she would stay with him, does not amount to a contract to convey, capable of being specifically enforced, but is no more than a declaration of an intention subject to change or abandonment. Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432. See CONTRACTS, 9 Cyc. 276.

6. *California.*— German Sav., etc., Soc. *v.* McLellan, 154 Cal. 710, 99 Pac. 194.

New York.— Coles *v.* Bowne, 10 Paige 526.

Pennsylvania.— Cortelyou's Appeal, 102 Pa. St. 576.

South Dakota.— Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142.

Virginia.— Creecy *v.* Grief, 108 Va. 320, 61 S. E. 769; Colonna Dry Dock Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770.

And see *infra*, IV, B.

7. Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432; Stanton *v.* Driffkorn, 83 Nebr. 36, 118 N. W. 1092. And see *infra*, III, D.

8. See DRUNKARDS, 14 Cyc. 1089; HUSBAND AND WIFE, 21 Cyc. 1119; INFANTS, 22 Cyc. 503; INSANE PERSONS, 22 Cyc. 1104.

9. See *infra*, I, B.

10. See *infra*, I, C.

its jurisdiction when there is an adequate and complete remedy at law applies to the remedy of specific performance,[11] although in respect to the contract which furnishes the subject-matter of most specific performance suits it is taken for granted that the legal remedy is inadequate.[12] The exercise of the jurisdiction is further limited by a considerable number of equitable essentials or elements either in the contract itself or in the relations of the parties, which are broadly indicated by the phrase that specific performance, as distinguished from legal actions, rests in the sound judicial discretion of the court.[13] Several of these elements depend upon the nature of the decree, as contrasted with the legal remedy of damages. Thus the decree will not be granted, although plaintiff has a perfectly good cause of action for legal relief, when the situation is such that the decree is impossible of execution;[14] when it would be useless and nugatory, since defendant may by the terms of the contract at any time free himself from its obligation;[15] when it could not be enforced without taxing unduly the time of the court;[16] or when the court is unable to frame a decree, because the terms of the contract are so uncertain or incomplete that the court is unable to determine, with exactness, what relief is called for.[17] The equitable maxims, "He who seeks equity must do equity," and, "He who comes into equity must come with clean hands," give rise to a considerable number of defenses. The contract must not have been induced by fraud, actual[18] or constructive,[19] by misrepresentation,[20] or mistake;[21] it must not be unfair,[22] and the remedy must not be harsh in its operation upon defendant[23] or others.[24] The first maxim has a special application in the rule that the court, in making its decree, must be able to award its relief to defendant as well as to plaintiff;[25] and in the rule that the vendor, when plaintiff, must be able to convey a title to the vendee which will not expose the latter to litigation in its defense.[26]

c. Legal Requisites Relaxed. In several important respects the legal requisites to a legal remedy upon a contract are relaxed in equity. Equity often enforces contracts in the teeth of the statute of frauds, basing its action in such case on the supposed equities growing out of plaintiff's change of position in reliance on the contract.[27] It habitually gives the remedy to the plaintiff who has lost his legal remedy by a failure to perform his part at the date set by the contract,[28] applying in such case its own standards to measure the effect of the delay.[29] It dispenses with the legal essentials of a tender, wholly or partly.[30] In general it requires only a substantial, and not a literal, performance on plaintiff's part.[31]

B. Valuable Consideration[32] **— 1. In General.** As a general rule the contract must be founded upon a valuable consideration. A voluntary executory agreement is not enforced in equity. And the fact that the memorandum of the contract states a consideration is immaterial; the fact that no consideration exists may always be shown.[33] An apparent exception exists in the case of a promise

11. See *infra*, II.
12. See *infra*, II, A.
13. See *infra*, I, D.
14. See *infra*, III, A.
15. See *infra*, III, B.
16. See *infra*, III, C.
17. See *infra*, III, D.
18. See *infra*, IV, A.
19. See *infra*, IV, D, 6, 7.
20. See *infra*, IV, A.
21. See *infra*, IV, B.
22. See *infra*, IV, D, 1–3.
23. See *infra*, IV, D, 4, 5.
24. See *infra*, IV, D, 8, 9.
25. See *infra*, IV, E.
26. See *infra*, IV, F.
27. See *infra*, V.
28. See *infra*, VI, D.
29. See *infra*, VI, F.
30. See *infra*, VI, C.
31. See *infra*, VI, A, 4; VII, B, 1.
32. **Inadequacy of consideration** as a ground for refusing specific performance see *infra*, IV, D, 1.
33. *Alabama.*—Alabama Cent. R. Co. *v.* Long, 158 Ala. 301, 48 So. 363; Tolleson *v.* Blackstock, 95 Ala. 510, 11 So. 284; Moon *v.* Crowder, 72 Ala. 79; Borum *v.* King, 37 Ala. 606; Morris *v.* Lewis, 33 Ala. 53; Gould *v.* Womack, 2 Ala. 83.
Colorado.— Winter *v.* Geobner, 21 Colo. 279, 40 Pac. 570 [*affirming* 2 Colo. App. 259, 30 Pac. 51].
Connecticut.— Dodd *v.* Seymour, 21 Conn. 476.
Florida.— Maloy *v.* Boyett, 53 Fla. 956, 43 So. 243.
Georgia.— Swan Oil Co. *v.* Linder, 123 Ga.

to give land, where the promisee has taken possession and made valuable improvements; but relief in such cases is based, not on the contract, but on the equities

550, 51 S. E. 622. And see Reese *v.* Kirby, 71 Ga. 780.

Illinois.— Corbett *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709; Stubbings *v.* Durham, 210 Ill. 542, 71 N. E. 586; Montgomery Palace Stock Car Co. *v.* Street Stable Car Line, 142 Ill. 315, 31 N. E. 434 [*affirming* 37 Ill. App. 289] (failure of consideration); Temple *v.* Johnson, 71 Ill. 13; Holmes *v.* Holmes, 44 Ill. 168; Stone *v.* Pratt, 25 Ill. 25; Lear *v.* Chouteau, 23 Ill. 39; Webb *v.* Alton M. & F. Ins. Co., 10 Ill. 223; Hamilton *v.* Ryan, 103 Ill App. 212 [*reversed* on other grounds in 205 Ill. 191, 68 N. E. 781]. *Compare* Fleming *v.* Carter, 87 Ill. 565.

Indiana.— Modisett *v.* Johnson, 2 Blackf. 431.

Iowa.— McDanields *v.* Whitney, 38 Iowa 60; Holland *v.* Hensley, 4 Iowa 222; Lucas *v.* Barrett, 1 Greene 510.

Kentucky.— Berry *v.* Frisbie, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724; Blackburn *v.* Collins, 12 B. Mon. 16; Buford *v.* McKee, 1 Dana 107; McKean *v.* Read, Litt. Sel. Cas. 395, 12 Am. Dec. 318; Banks *v.* May, 3 A. K. Marsh. 435; Ormsby *v.* Hunton, 3 Bibb 298; Northup *v.* Standifer, 23 S. W. 348, 15 Ky. L. Rep. 740; Northup *v.* Ward, 15 S. W. 247, 12 Ky. L. Rep. 735.

Maine.— Higgins *v.* Butler, 78 Me. 520, 7 Atl. 276; Robinson *v.* Robinson, 73 Me. 170.

Maryland.— Cox *v.* Hill, 6 Md. 274; Griffith *v.* Frederick County Bank, 6 Gill & J. 424; Black *v.* Cord, 2 Harr. & G. 100; Shepherd *v.* Shepherd, 1 Md. Ch. 244; Tyson *v.* Watts, 1 Md. Ch. 13.

Minnesota.— Lamprey *v.* Lamprey, 29 Minn. 151, 12 N. W. 514; Towlerton *v.* Davidson, 7 Minn. 408.

Mississippi.— Daniel *v.* Frazer, 40 Miss. 507; Vasser *v.* Vasser, 23 Miss. 378; Mercer *v.* Stark, Walk. 451, 12 Am. Dec. 583.

Missouri.— Kirk *v.* Middlebrook, 201 Mo. 245, 100 S. W. 450; Lipscomb *v.* Adams, 193 Mo. 530, 91 S. W. 1046; Brevator *v.* Creech, 186 Mo. 558, 85 S. W. 527; Bosley *v.* Bosley, 85 Mo. App. 424.

New Hampshire.— Eaton *v.* Eaton, 64 N. H. 493, 14 Atl. 867; Doe *v.* Doe, 37 N. H. 268.

New Jersey.—Tunison *v.* Bradford, 49 N. J. Eq. 210, 22 Atl. 1073; Wittingham *v.* Lighthipe, 46 N. J. Eq. 429, 19 Atl. 611.

New York.— Cowles *v.* Rochester Folding Box Co., 179 N. Y. 87, 71 N. E. 468; Russell *v.* Nelson, 99 N. Y. 119, 1 N. E. 314 (holding that the delivery of a satisfaction piece, executed in consideration of a mortgage given for the debt covered thereby, would not be enforced in favor of the mortgagor after he had his mortgage declared void for usury); Geer *v.* Clark, 83 N. Y. App. Div. 292, 82 N. Y. Suppl. 87; Hermann *v.* Passmore, 72 Hun 526, 25 N. Y. Suppl. 773; Burling *v.* King, 66 Barb. 633; Pullman *v.* Johnson, 8 N. Y. Suppl. 775; Acker *v.* Phœnix, 4 Paige 305; Washington, etc., Bank *v.* Farmers' Bank, 4 Johns. Ch. 62.

North Carolina.— Hardy *v.* Ward, 150 N. C. 385, 64 S. E. 171; Littlejohn *v.* Patillo, 9 N. C. 302.

Ohio.— State *v.* Baum, 6 Ohio 383.

Pennsylvania.— Henrici *v.* Davidson, 149 Pa. St. 323, 24 Atl. 334.

Rhode Island.— Taylor *v.* Staples, 8 R. I. 170, 5 Am. Rep. 556.

South Carolina.— Cabeen *v.* Gordon, 1 Hill Eq. 51.

Tennessee.— McCarty *v.* Kyle, 4 Coldw. 348.

Texas.— Curlin *v.* Hendricks, 35 Tex. 225; Tumlinson *v.* York, 20 Tex. 694; Short *v.* Price, 17 Tex. 397; Mead *v.* Randolph, 8 Tex. 191; Williams *v.* Graves, 7 Tex. Civ. App. 356, 26 S. W. 334.

Virginia.— Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133; Smith *v.* Phillips, 77 Va. 548; Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171; Reed *v.* Vannorsdale, 2 Leigh 569; Darlington *v.* McCoole, 1 Leigh 36. And see Colonna Dry Dock Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770.

Washington.— See Coleman *v.* Larson, 49 Wash. 321, 95 Pac. 262.

Wisconsin.— Hibbert *v.* Mackinnon, 79 Wis. 673, 49 N. W. 21; Hay *v.* Lewis, 39 Wis. 364; Hanson *v.* Michelson, 19 Wis. 498; Smith *v.* Wood, 12 Wis. 382.

United States.— Smith *v.* Reynolds, 8 Fed. 696, 3 McCrary 157; Chapman *v.* School Dist., 5 Fed. Cas. No. 2,608, Deady 139; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*c*, Hempst. 251.

England.— Robertson *v.* St. John, 2 Bro. Ch. 140, 29 Eng. Reprint 81; Jefferys *v.* Jefferys, Cr. & Ph. 138, 18 Eng. Ch. 138, 41 Eng. Reprint 443; Wycherley *v.* Wycherley, 2 Eden 176, 28 Eng. Reprint 864; Hervey *v.* Audland, 9 Jur. 419, 14 Sim. 531, 37 Eng. Ch. 531, 60 Eng. Reprint 463; Williamson *v.* Codrington, 1 Ves. 511, 27 Eng. Reprint 1174; Rohson *v.* Collins, 7 Ves. Jur. 130, 6 Rev. Rep. 92, 32 Eng. Reprint 53.

Canada.— Barr *v.* Hatch, 9 Grant Ch. (U. C.) 312.

See 44 Cent. Dig. tit. "Specific Performance," § 140 *et seq.*

Sufficient consideration see Goodlett *v.* Hansell, 66 Ala. 151; Kelly *v.* Keith, 77 Ark. 31, 90 S. W. 150; Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414; Raymond *v.* Pritchard, 24 Ind. 318 (consideration need not move from promisee); Allen *v.* Davison, 16 Ind. 416; Allender *v.* Evans-Smith Drug Co., 3 Indian Terr. 628, 64 S. W. 558; Dewey *v.* Life, 60 Iowa 361, 14 N. W. 347; Shipley *v.* Fink, 102 Md. 219, 62 Atl. 360; Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401 (consideration was relinquishment of part of debt payable in instalments); Atkinson *v.* Whitney, 67 Miss. 655, 7 So. 644; Blake *v.* McMurtry, 25 Nebr. 290, 41 N. W. 172; Law

arising from the promisee's change of position and expenditures.[34] And a voluntary deed or obligation to convey intended as a voluntary settlement on the grantor's wife or child, although not delivered by the grantor during his lifetime, will be specifically enforced after his death.[35]

2. Voluntary Sealed Agreement. In a suit for specific performance the fact that the contract is under seal does not import a consideration; but in accordance with the principle that equity looks at the intent and not the form, the absence of a consideration may be shown, notwithstanding the seal.[36]

C. Illegality. Equity will not give its aid to enforce a contract which is illegal, immoral, or against public policy, but will leave both parties in the con-

v. Smith, 68 N. J. Eq. 81, 59 Atl. 327; Goldstein *v.* Curtis, 63 N. J. Eq. 454, 52 Atl. 218; Robb *v.* Washington, etc., College, 103 N. Y. App. Div. 327, 93 N. Y. Suppl. 92 [*reversed* on other grounds in 185 N. Y. 485, 78 N. E. 359]; Healy *v.* Healy, 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927 [*affirming* 31 Misc. 636, 66 N. Y. Suppl. 82] (surrender of control of child); Phillips *v.* Berger, 8 Barb. (N. Y.) 527 [*affirming* 2 Barb. 608] (compromise); Woodcock *v.* Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; Clark *v.* Hindman, 46 Oreg. 67, 79 Pac. 56; Williams *v.* Lewis, 5 Leigh (Va.) 686. See 44 Cent. Dig. tit. "Specific Performance," § 140 *et seq.* See also Contracts, 9 Cyc. 308 *et seq.*; Vendor and Purchaser. That the vendee's promise to pay was, by the intention of the parties, not to be enforced against him, although legally binding, and that the vendor subsequently made a binding gift to the vendee of the debt for the purchase-price are not facts rendering the contract voluntary. Ferry *v.* Stephens, 66 N. Y. 321.

A consideration of one dollar has been held sufficient. Alabama Cent. R. Co. *v.* Long, 158 Ala. 301, 48 So. 363. But see Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123. See also *infra*, IV, D, 1, a; IV, E, 6, b.

Evidence of consideration from recital in the instrument see South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5.

Want of mutuality see *infra*, IV, E.

34. See *infra*, V, K. This doctrine applies to written as well as to oral promises to give. See Leforce *v.* Robinson, Litt. Sel. Cas. (Ky.) 22; Haines *v.* Haines, 6 Md. 435; Hagar *v.* Hagar, 71 Mo. 610.

35. Jones *v.* Jones, 6 Conn. 111, 16 Am. Dec. 35, holding that where a parent, in consideration of affection, conveys property to his child, but retains the deed, directing his wife to deliver it after his death to the county clerk for record, which is done, a court of equity will specifically enforce the settlement contained in the deed. See also McCall *v.* McCall, 3 Day (Conn.) 402; McIntire *v.* Hughes, 4 Bibb (Ky.) 186 (holding that an obligation to convey land given by a father to his son will be specifically enforced after the father's death, although founded on the consideration of blood only. Bunn *v.* Winthrop, 1 Johns. Ch. (N. Y.) 329; Souverbye *v.* Arden, 1 Johns. Ch. (N. Y.) 240; Boughton *v.* Boughton, 1 Atk. 625, 26 Eng. Reprint 393; Clavering *v.* Clavering, 7 Bro. P. C. 410, 3 Eng. Reprint 267, Prec. Ch. 235, 24 Eng. Reprint 114, 2 Vern. Ch. 473, 23 Eng. Reprint 904; Johnson *v.* Smith, 1 Ves. 314, 27 Eng. Reprint 1053.

36. *Colorado.*— Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123; Winter *v.* Geobner, 21 Colo. 279, 40 Pac. 570 [*affirming* 2 Colo. App. 259, 30 Pac. 51].

Illinois.— Corbett *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755. And see Poe *v.* Ulrey, 233 Ill. 56, 84 N. E. 46.

Kentucky.— Buford *v.* McKee, 1 Dana 107; Ormsby *v.* Hunton, 3 Bibb 298.

Maryland.— Cox *v.* Hill, 6 Md. 274; Black *v.* Cord, 2 Harr. & G. 100.

Minnesota.— Lamprey *v.* Lamprey, 29 Minn. 151, 12 N. W. 514.

Missouri.— Bosley *v.* Bosley, 85 Mo. App. 424, applying Rev. St. (1899) § 893, as to effect of a seal.

New Jersey.—Tunison *v.* Bradford, 49 N. J. Eq. 210, 22 Atl. 1073.

Pennsylvania.— Lennig's Estate, 6 Pa. Dist. 249, 19 Pa. Co. Ct. 289.

Texas.— Tumlinson *v.* York, 20 Tex. 694; Short *v.* Price, 17 Tex. 397.

Virginia.— Grayhill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133.

Wisconsin.— Hanson *v.* Michelson, 19 Wis. 498 (defective deed sought to be enforced as contract); Smith *v.* Wood, 12 Wis. 382.

England.— Jefferys *v.* Jefferys, Cr. & Ph. 138, 18 Eng. Ch. 138, 41 Eng. Reprint 443; Harvey *v.* Audland, 9 Jur. 419, 14 Sim. 531, 37 Eng. Ch. 531, 60 Eng. Reprint 463; Williamson *v.* Codrington, 1 Ves. 511, 27 Eng. Reprint 1174.

See 44 Cent. Dig. tit. "Specific Performance," § 140 *et seq.*

Contra.— The following early cases which have been overruled: Warwick *v.* Edwards, 1 Bro. P. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 171, 24 Eng. Reprint 687; Husband *v.* Pollard [*cited in* Randal *v.* Randal, 2 P. Wms. 464, 467, 24 Eng. Reprint 816]; Beard *v.* Nutthall, 1 Vern. Ch. 427, 23 Eng. Reprint 564.

As to statutes making a seal or writing prima facie evidence of consideration see Holman *v.* Norfolk Bank, 12 Ala. 369; Mills *v.* Larrance, 186 Ill. 635, 58 N. E. 219; Cone *v.* Cone, 118 Iowa 458, 92 N. W. 665, Iowa Code, § 3069.

Effect of seal in rendering option binding see *infra*, IV, E, 6, c.

dition in which it finds them; and where the contract is not divisible, the valid part will not be enforced.[37] Contracts contrary to the policy of the public land laws of the United States or of the state will not be specifically enforced.[38] And

37. *Alabama.*— Moses *v.* Scott, 84 Ala. 608, 4 So. 742 (agreement to form a voting trust of stock); Smith *v.* Johnson, 37 Ala. 633; Evans *v.* Kittrell, 33 Ala. 449 (contract to emancipate a slave); Cothran *v.* McCoy, 33 Ala. 65; Bogan *v.* Camp, 30 Ala. 276 (in violation of statute).

Arkansas.— Livingston *v.* Cochran, 33 Ark. 294.

California.— Kreamer *v.* Earl, 91 Cal. 112, 27 Pac. 735.

Connecticut.— Driscoll *v.* New Haven, 75 Conn. 92, 52 Atl. 618, a contract which contemplated unauthorized use of eminent domain in condemning property for a private use.

Illinois.— South Chicago City R. Co. *v.* Calumet Electric St. R. Co., 171 Ill. 391, 49 N. E. 576 [*affirming* 70 Ill. App. 254] (a contract preventing a public service corporation from discharging its duty to the public); Chicago Gas-Light, etc., Co. *v.* People's Gas Light, etc., Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124 [*reversing* 20 Ill. App. 473] (to the same effect).

Indian Territory.— Sayer *v.* Brown, 7 Indian Terr. 675, 104 S. W. 877, and a sum of money paid as part of the consideration cannot be recovered under the prayer for general relief.

Kansas.— Clay Center *v.* Clay Center Light, etc., Co., 78 Kan. 390, 97 Pac. 377, 800, illegal agreement by city to purchase electric light plant.

Maine.— Phillips Village Corp. *v.* Phillips Water Co., 104 Me. 103, 71 Atl. 474, *ultra vires* contract by municipality not specifically enforceable at its suit.

Missouri.— Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505 (contract in violation of the intention of a statute, to rent or sell a house for immoral purposes); Louthan *v.* Stillwell, 73 Mo. 492 (contract in violation of bankrupt laws).

New Jersey.— Volney *v.* Nixon, 68 N. J. Eq. 605, 60 Atl. 189 [*affirming* 67 N. J. Eq. 457, 58 Atl. 75], contract in violation of the statutory policy as to the issue of stock.

New York.— Armstrong *v.* Armstrong, 1 N. Y. St. 529, separation agreement between husband and wife. And see New York, etc., Ferry Co. *v.* New York, 146 N. Y. 145, 40 N. E. 785, renewal of lease by city to ferry company.

Pennsylvania.— Foll's Appeal, 91 Pa. St. 434, 36 Am. Rep. 671, contract to sell shares of national bank in order to give control of the bank, against public policy

South Carolina.— Baggott *v.* Sawyer, 25 S. C. 405, conspiracy to chill bidding at a judicial sale.

Vermont.— Sawyer *v.* Churchill, 77 Vt. 273, 59 Atl. 1014, agreement, contemporaneous with marriage, looking to a future separation.

Washington.— Hampton *v.* Buchanan, 51 Wash. 155, 98 Pac. 374, contract giving promoter rights as to management of corporation.

West Virginia.—Dodson *v.* Swan, 2 W. Va. 511, 98 Am. Dec. 787, purchase of land, to enable the vendor to leave the state and thus evade prosecution for a felony.

United States.— Mundy *v.* Shellaberger, 153 Fed. 219 [*affirmed* in 161 Fed. 503, 88 C. C. A. 445].

See 44 Cent. Dig. tit. "Specific Performance," § 173 *et seq.*

The court may of its own motion raise the question of the illegality of the contract. Kreamer *v.* Earl, 91 Cal. 112, 27 Pac. 735, where a decree for specific performance was reversed on appeal, although defendant had never questioned the illegality of the contract. *Compare*, however, Rasch *v.* Jensen, (Iowa 1909) 120 N. W. 662, holding that in an action for specific performance of a contract to purchase land at a judicial sale and convey part thereof to plaintiff, the supreme court would not take note of the fact that the contract was against public policy because plaintiff was the referee at whose sale defendant purchased, where the parties themselves had not raised the point. Evans, C. J., dissented.

The court will not aid in the enforcement of an illegal contract, "even although the objectionable feature has been accomplished, and there remains only the distribution of the proceeds among the contracting parties." Volney *v.* Nixon, 68 N. J. Eq. 605, 60 Atl. 189 [*affirming* 67 N. J. Eq. 457, 58 Atl. 75].

Intention as to use of property.— It has been held that the purchaser's intention to use the premises contracted to be sold in the conduct of a business, lawful in itself, in an immoral manner, cannot be shown to defeat specific performance. Hamilton *v.* Bell, 37 Tex. Civ. App. 456, 84 S. W. 289.

Public necessity.—An illegal contract conferring a monopoly on plaintiff was nevertheless enforced for a limited time because of public necessity in Seattle Electric Co. *v.* Snoqualmie Falls Power Co., 40 Wash. 380, 82 Pac. 713, 1 L. R. A. N. S. 1032.

Conflict of laws.— The court may refuse to enforce a contract, although lawful and enforceable in the courts of the state or country in which it is entered into and to be performed, if it is against the public policy of the state in which it is sought to enforce it. Logan *v.* Postal Tel., etc., Co., 157 Fed. 570.

As to what constitutes illegality see CONTRACTS, 9 Cyc. 465 *et seq.*

Breach of trust see *infra*, IV, D, 6.

Enforcement of contracts detrimental to the public welfare see *infra*, IV, D, 9.

Fraud on third persons see *infra*, IV, D, 7.

Injustice to third persons see *infra*, IV, D, 8.

38. Smith *v.* Johnson, 37 Ala. 633; Kreamer *v.* Earl, 91 Cal. 112, 27 Pac. 735; Hudson *v.* Johnson, 45 Cal. 21; McDermed *v.* McCast-

the courts sometimes refuse to enforce specifically contracts tainted with champerty, although they may not be such as are prohibited by statute, or although an action might lie at law for a breach.[39] Where under the statute a bond given by a husband obligating himself to convey part of his homestead is void because not signed and separately acknowledged by his wife, it cannot be specifically enforced by the purchaser even as to the husband's interest.[40]

D. Discretion of the Court — 1. General Rule. The jurisdiction of a court of equity to decree the specific performance of contracts is not a matter of right in the parties to be demanded *ex debito justitiæ*, but applications invoking this power of the court are addressed to its sound and reasonable discretion, and are granted or rejected according to the circumstances of each case.[41] Specific

land, Hard. (Ky.) 18; Prince *v.* Gosnell, 19 Okla. 175, 92 Pac. 164; Week *v.* Bosworth, 61 Wis. 78, 20 N. W. 657.

39. Bowman *v.* Cunningham, 78 Ill. 48; Burling *v.* King, 46 How. Pr. (N. Y.) 452; Casserleigh *v.* Wood, 119 Fed. 308, 56 C. C. A. 212.

40. Clark *v.* Bird, 158 Ala 278, 48 So. 359; Moses *v.* McClain, 82 Ala. 370, 2 So. 741. See Homesteads, 21 Cyc. 529.

41. *Alabama.*—Alabama Cent. R. Co. *v.* Long, 158 Ala. 301, 48 So. 363; Pulliam *v.* Owen, 25 Ala. 492; Blackwilder *v.* Loveless, 21 Ala. 371.

Arkansas.— Shields *v.* Trammell, 19 Ark. 51.

California.— Bruck *v.* Tucker, 42 Cal. 346.

Connecticut.—Quinn *v.* Roath, 37 Conn. 16; Meeker *v.* Meeker, 16 Conn. 403.

Delaware.— Hudson *v.* Layton, 5 Harr. 74, 48 Am. Dec. 167; Godwin *v.* Collins, 3 Del. Ch. 189.

Idaho.— Vincent *v.* Larson, 1 Ida. 241.

Illinois.— Corbett *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Ulrey *v.* Keith, 237 Ill. 284, 86 N. E. 696; Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Godwin *v.* Springer, 233 Ill. 229, 84 N. E. 234; Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709; Chicago, etc., R. Co. *v.* Reno, 113 Ill. 39; Beach *v.* Dyer, 93 Ill. 295; Ralls *v.* Ralls, 82 Ill. 243; Iglehart *v.* Vail, 73 Ill. 63; Hoyt *v.* Tuxbury, 70 Ill. 331; McCabe *v.* Crosier, 69 Ill. 501; Fish *v.* Leser, 69 Ill. 394; Stone *v.* Pratt, 25 Ill. 25; Gillespie *v.* Fulton Oil, etc., Co., 140 Ill. App. 147 [*reversed* on other grounds in 236 Ill. 188, 86 N. E. 219]; Launtz *v.* Vogt, 133 Ill. App. 255.

Indiana.— Ash *v.* Daggy, 6 Ind. 259.

Iowa.— New York Brokerage Co. *v.* Wharton, (1909) 119 N. W. 969; Thurston *v.* Arnold, 43 Iowa 43; Sweeney *v.* O'Hara, 43 Iowa 34; Auter *v.* Miller, 18 Iowa 405; Rudolph *v.* Covell, 5 Iowa 525; Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477.

Kansas.— Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202; Fowler *v.* Marshall, 29 Kan. 665.

Kentucky.— Turner *v.* Clay, 3 Bibb 52; Hart *v.* Scheible, 14 Ky. L. Rep. 527.

Maine.— Telegraphone Corp. *v.* Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767; Mansfield *v.* Sherman, 81 Me. 365, 17 Atl. 300; Snell *v.* Mitchell, 65 Me. 48.

Maryland.— Lanahan *v.* Cockey, 108 Md. 620, 71 Atl. 314; Newman *v.* Johnson, 108 Md. 367, 70 Atl. 116; Whalen *v.* Baltimore, etc., R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. N. S. 130; George Gunther, Jr., Brewing Co. *v.* Brywczynski, 107 Md. 696, 69 Atl. 514; Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232; Thomas *v.* Gottlieb, etc., Brewing Co., 102 Md. 417, 62 Atl. 633; Horner *v.* Woodland, 88 Md. 511, 41 Atl. 1079; Shriver *v.* Seiss, 49 Md. 384; Smoot *v.* Rea, 19 Md. 398; Wadsworth *v.* Manning, 4 Md. 59; Duvall *v.* Myers, 2 Md. Ch. 401; Waters *v.* Howard, 1 Md. Ch. 112 [*affirmed* in 8 Gill 262]; Tyson *v.* Watts, 1 Md. Ch. 13.

Massachusetts.— Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. N. S. 871.

Michigan.— Chicago, etc., R. Co. *v.* Lane, 150 Mich. 162, 113 N. W. 22; Rust *v.* Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720.

Mississippi.— Aston *v.* Robinson, 49 Miss. 348; Daniel *v.* Frazer, 40 Miss. 507; Clement *v.* Reid, 9 Sm. & M. 535; Hester *v.* Hooker, 7 Sm. & M. 768.

Missouri.— Paris *v.* Haley, 61 Mo. 453; Fish *v.* Lightner, 44 Mo. 268.

Montana.— Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115.

Nebraska.— Lopeman *v.* Colburn, 82 Nebr. 641, 118 N. W. 116.

New Hampshire.— Pickering *v.* Pickering, 38 N. H. 400.

New Jersey.— Plummer *v.* Keppler, 26 N. J. Eq. 481; Smith *v.* McVeigh, 11 N. J. Eq. 239.

New York.— Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261 [*affirming* 6 N. Y. Suppl. 955]; Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 7 N. E. 404; Peters *v.* Delaplaine, 49 N. Y. 362; Sherman *v.* Wright, 49 N. Y. 227; Pickett *v.* Michaels, 120 N. Y. App. Div. 357, 105 N. Y. Suppl. 411; Davidson *v.* Cannabis Mfg. Co., 113 N. Y. App. Div. 664, 99 N. Y. Suppl. 1018; Jones *v.* Barnes, 105 N. Y. App. Div. 287, 94 N. Y. Suppl. 695; Hoch *v.* Cocks, 78 Hun 253, 28 N. Y. Suppl. 952; Clarke *v.* Rochester, etc., R. Co., 18 Barb. 350; Seymour *v.* Delancey, 3 Cow. 445, 15 Am. Dec. 270.

North Carolina.— Pearson *v.* Millard, 150 N. C. 303, 63 S. E. 1053; Jones *v.* Jones, 148 N. C. 358, 62 S. E. 417; Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824; Herren *v.* Rich, 95 N. C. 500; Lloyd *v.* Wheatley, 55 N. C. 267; Leigh *v.* Crump, 36 N. C. 299; Prater *v.* Miller, 10 N. C. 628.

Pennsylvania.— Friend *v.* Lamb, 152 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672;

performance is frequently refused, although the defense is not such as would warrant the rescission of the contract at the suit of the defendant.[42]

2. Discretion Not Arbitrary. This discretion is not an arbitrary or capricious one, but a sound judicial discretion, regulated by the established principles of equity.[43] Specific performance is not a matter of discretion in any peculiar sense, as contrasted with many other equitable remedies. While the relief is discretionary, "so are very many of the powers which courts of equity possess and exercise." [44] "The exercise of such discretionary powers by a court of equity is so far from being an objection, that it lies at the very foundation of all equity, and forms its most peculiar and excellent characteristic, as contradistinguished from the strict, precise and unyielding principles which govern in the courts of common law." [45]

Backus' Appeal, 58 Pa. St. 186 (the rule applies to awards); Pennock *v.* Freeman, 1 Watts 401; Dalzell *v.* Crawford, 1 Pars. Eq. Cas. 37, 2 Pa. L. J. 17; Alexander's Appeal, 4 Montg. Co. Rep. 33.

South Carolina.— Barksdale *v.* Payne, Riley Eq. 174.

Tennessee.— Humbard *v.* Humbard, 3 Head 100; Howard *v.* Moore, 4 Sneed 317.

Virginia.— Creecy *v.* Grief, 108 Va. 320, 61 S. E. 769; Colonna Dry Dock Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770; Shenandoah Valley R. Co. *v.* Lewis, 76 Va. 833; Hale *v.* Wilkinson, 21 Gratt. 75; McComas *v.* Easley, 21 Gratt. 23.

Washington.— Voight *v.* Fidelity Inv. Co., 49 Wash. 612, 96 Pac. 162.

West Virginia.— Abbott *v.* L'Hommedieu, 10 W. Va. 677; Lowry *v.* Buffington, 6 W. Va. 249.

Wisconsin.— Menasha *v.* Wisconsin Cent. R. Co., 65 Wis. 502, 27 N. W. 169; Smith *v.* Wood, 12 Wis. 382.

United States.— Mississippi, etc., R. Co. *v.* Cromwell, 91 U. S. 643, 23 L. ed. 367; King *v.* Hamilton, 4 Pet. 311, 7 L. ed. 869; Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509; Jones *v.* Byrne, 149 Fed. 457 [*reversed* on other grounds in 159 Fed. 321]; Federal Oil Co. *v.* Western Oil Co., 121 Fed. 674, 57 C. C. A. 428; Marr *v.* Shaw, 51 Fed. 860; McNeil *v.* Magee, 16 Fed. Cas. No. 8,915, 5 Mason 244; Roundtree *v.* McLain, 20 Fed. Cas. No. 12,084*a*, Hempst. 245; Tobey *v.* Bristol County, 23 Fed. Cas. No. 14,065, 3 Story 800.

Canada.— Harris *v.* Robinson, 21 Can. Sup. Ct. 390.

See 44 Cent. Dig. tit. "Specific Performance," §§ 17, 18.

A statute declaratory of the general rule that the court of equity is presumed to have jurisdiction to decree specific performance of contracts for the sale of land (S. D. Civ. Code, § 2341) does not affect the discretionary character of the remedy. Nelson *v.* Lybeck, 21 S. D. 223, 111 N. W. 546.

42. Knott *v.* Giles, 27 App. Cas. (D. C.) 581; Barksdale *v.* Payne, Riley Eq. (S. C.) 174; Clitherall *v.* Ogilvie, 1 Desauss. Eq. (S. C.) 250; Humbard *v.* Humbard, 3 Head (Tenn.) 100.

43. *Alabama.*— Pulliam *v.* Owen, 25 Ala. 492.

Connecticut.— Quinn *v.* Roath, 37 Conn. 16.

Illinois.— Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197; Godwin *v.* Springer, 233 Ill. 229, 84 N. E. 234.

Indiana.— Ash *v.* Daggy, 6 Ind. 259.

Iowa.— Thurston *v.* Arnold, 43 Iowa 43; Sweeney *v.* O'Hora, 43 Iowa 34.

Kentucky.— Edelen *v.* Samuels, 126 Ky. 295, 103 S. W. 360, 31 Ky. L. Rep. 731; Turner *v.* Clay, 3 Bibb 52.

Maryland.— Griffith *v.* Frederick County Bank, 6 Gill & J. 424; Tyson *v.* Watts, 1 Md. Ch. 13.

Mississippi.— Aston *v.* Robinson, 49 Miss. 348.

Missouri.— Kirkpatrick *v.* Pease, 202 Mo. 471, 101 S. W. 651.

Montana.— Long *v.* Needham, 37 Mont. 408, 96 Pac. 731; Stevens *v.* Trafton, 36 Mont. 520, 93 Pac. 810.

New Jersey.— King *v.* Morford, 1 N. J. Eq. 274.

New York.— Bowen *v.* Irish Presb. Cong., 6 Bosw. 245; Seymour *v.* Delancey, 6 Johns. Ch. 222 [*reversed* on other grounds in 3 Cow. 445, 15 Am. Dec. 270]; St. John *v.* Benedict, 6 Johns. Ch. 111; McWhorter *v.* McMahan, Clarke 400.

North Carolina.— Pearson *v.* Millard, 150 N. C. 303, 63 S. E. 1053; Jones *v.* Jones, 148 N. C. 358, 62 S. E. 417.

Pennsylvania.—Dalzell *v.* Crawford, 1 Pars. Eq. Cas. 37, 2 Pa. L. J. 17.

Tennessee.— Howard *v.* Moore, 4 Sneed 317.

West Virginia.— Abbott *v.* L'Hommedieu, 10 W. Va. 677; Lowry *v.* Buffington, 6 W. Va. 249.

England.— Haywood *v.* Cope, 25 Beav. 140, 4 Jur. N. S. 227, 27 L. J. Ch. 468, 6 Wkly. Rep. 304, 53 Eng. Reprint 589.

Canada.— Harris *v.* Robinson, 21 Can. Sup. Ct. 390.

See 44 Cent. Dig. tit. "Specific Performance," §§ 17, 18.

"It is always desirable to make the least draft which is possible upon this undefined power of discretion, and to determine causes upon established rules." Sweeney *v.* O'Hora, 43 Iowa 34; Rudolph *v.* Covell, 5 Iowa 525.

44. Bowen *v.* Irish Presb. Cong., 6 Bosw. (N. Y.) 245.

45. Bomier *v.* Caldwell, 8 Mich. 463. "While the remedy of specific performance is generally spoken of as resting in the discre-

3. When the Remedy a Matter of Course. When a contract of which equity has jurisdiction conforms with certain equitable principles, which are quite limited in number, it is as much a matter of course for a court of equity to decree specific performance as for a court of law to give damages for breach of the contract.[46]

4. Application of the Principle — a. In General. The formula as to discretion therefore is habitually used by the courts simply to indicate that the case before the court is governed not by legal rules but by some equitable principle.[47] Thus the formula is frequently applied where the defense is plaintiff's fraud or misrepresentations,[48] or defendant's mistake;[49] or where the contract is incomplete or uncertain;[50] where enforcement of the contract in specie would be detrimental to the public welfare;[51] where the contract or the remedy lacks mutuality;[52] and where plaintiff has been guilty of laches.[53] It is also used more loosely in the

tion or grace of the chancellor, this is more a form of expression than of accurate definition of the rights of the injured party." Edelen *v.* Samuels, 126 Ky. 295, 303, 103 S. W. 360, 31 Ky. L. Rep. 731. Such expressions as that the relief of specific performance is "altogether exceptional" (Rust *v.* Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720, Cooley, J.), or is "of grace" (Pennock *v.* Freeman, 1 Watts (Pa.) 401), are utterly extravagant and misleading. As a matter of fact, specific performance is far less "discretionary" than are several other equitable remedies; for instance, a preliminary injunction, or the appointment of a receiver. The body of precedents is so great, and the special rules deduced from them so numerous, that the cases are relatively infrequent in which the court is obliged to fall back upon general notions of abstract justice. See *infra*, I, D, 4, b.

46. *Alabama.*— Bogan *v.* Daughdrill, 51 Ala. 312.

Georgia.— Forsyth *v.* McCauley, 48 Ga. 402.

Illinois.— Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523.

Kentucky.— Faraday Coal, etc., Co. *v.* Owens, 80 S. W. 1171, 26 Ky. L. Rep. 243.

Maine.— Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635.

Maryland.— Poppelein *v.* Foley, 61 Md. 381.

Mississippi.— Yazoo, etc., R. Co. *v.* Southern R. Co., 83 Miss. 746, 36 So. 74.

Nebraska.— Shuman *v.* Willets, 17 Nebr. 478, 23 N. W. 358.

New York.— Losee *v.* Morey, 57 Barb. 561.

Tennessee.— Howard *v.* Moore, 4 Sneed 317.

Virginia.— Steadman *v.* Handy, 102 Va. 382, 46 S. E. 380; Hale *v.* Wilkinson, 21 Gratt. 75.

England.— Hall *v.* Warren, 9 Ves. Jr. 605, 7 Rev. Rep. 306, 32 Eng. Reprint 738.

47. See Pomeroy Spec. Perf. § 35 *et seq.*

48. *Illinois.*— Maltby *v.* Thews, 171 Ill. 264, 49 N. E. 486.

Mississippi.— Daniel *v.* Frazer, 40 Miss. 507; Clement *v.* Reid, 9 Sm. & M. 535.

New Jersey.— Plummer *v.* Keppler, 26 N. J. Eq. 481.

New York.— St. John *v.* Benedict, 6 Johns. Ch. 111, fraud on creditors.

Wisconsin.— Engberry *v.* Rousseau, 117 Wis. 52, 93 N. W. 824, fraud of agent.

Fraud or misrepresentation as a defense see *infra*, IV, A.

49. *Maine.*— Mansfield *v.* Sherman, 81 Me. 365, 17 Atl. 300.

Maryland.— Somerville *v.* Coppage, 101 Md. 519, 61 Atl. 318.

Missouri.— Gottfried *v.* Bray, 208 Mo. 652, 106 S. W. 639.

North Carolina.— Lloyd *v.* Wheatly, 55 N. C. 267 (compromise in ignorance of rights); Leigh *v.* Crump, 36 N. C. 299.

United States.— Newton *v.* Wooley, 105 Fed. 541.

England.— Clowes *v.* Higginson, 1 Ves. & B. 524, 12 Rev. Rep. 284, 35 Eng. Reprint 204.

Mistake as a defense see *infra*, IV, B.

50. *Alaska.*— Marks *v.* Gates, 2 Alaska 519.

Delaware.— Hudson *v.* Layton, 5 Harr. 74, 48 Am. Dec. 167.

Illinois.— Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414; Hamilton *v.* Ryan, 103 Ill. App. 212 [*reversed* on other grounds in 205 Ill. 191, 68 N. E. 781].

Iowa.— Auter *v.* Miller, 18 Iowa 405.

Maryland.— Offuth *v.* Offuth, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232.

North Carolina.— Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824.

Incompleteness or uncertainty of contract see *infra*, III, D.

51. Chicago, etc., R. Co. *v.* Reno, 113 Ill. 39; East St. Louis Connecting R. Co. *v.* East St. Louis, 81 Ill. App. 109; Menasha *v.* Wisconsin Cent. R. Co., 65 Wis. 502, 27 N. W. 169.

Public welfare see *infra*, IV, D, 9.

52. Duvall *v.* Myers, 2 Md. Ch. 401; Rust *v.* Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720; Hocter-Johnson Co. *v.* Billings, 65 Nebr. 214, 91 N. W. 183.

Want of mutuality see *infra*, IV, E.

53. *Connecticut.*—Quinn *v.* Roath, 37 Conn. 16.

Delaware.— Hudson *v.* Layton, 5 Harr. 74, 48 Am. Dec. 167.

Illinois.— Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019; Beach *v.* Dyer, 93 Ill. 295; Iglehart *v.* Vail, 73 Ill. 63; Hoyt *v.* Tuxbury, 70 Ill. 331; McCabe *v.* Crosier, 69 Ill. 501; East St. Louis Connecting R. Co. *v.* East St. Louis, 81 Ill. App. 109.

sense that care and discrimination must be used is weighing the evidence.[54] Discretion, it is said, must be used, in determining whether the legal remedy is inadequate,[55] and whether the acts of part performance of a parol contract are sufficient.[56] Other defenses which are said to involve the exercise of discretion, some of them purely legal, are that the vendee plaintiff has elected to pursue his legal remedy for damages,[57] that the decree would call for an undue amount of supervision by the court;[58] non-performance by plaintiff;[59] that time is essential;[60] that the contract has been abandoned;[61] that the contract is a breach of trust;[62] or that the transaction is based on an illegal consideration.[63]

b. In Cases of Unfairness and Hardship. Where the ground of defense is the unfairness of the contract or the hardship of the remedy of specific performance, the court frequently exercises a discretion in the truest sense, since the great variety in the forms of unfairness and of hardship which have arisen for the consideration of the courts has prevented the establishment of many special rules or lines of precedent.[64]

Indiana.— Boldt *v.* Early, 33 Ind. App. 434, 70 N. E. 271, 104 Am. St. Rep. 255.
Iowa.— Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477.
Kansas.—Reid *v.* Mix, 63 Kan. 745, 66 Pac. 1021, 55 L. R. A. 706; Fowler *v.* Marshall, 29 Kan. 665.
New Hampshire.— Pickering *v.* Pickering, 38 N. H. 400.
New York.— Peters *v.* Delaplaine, 49 N. Y. 362.
Ohio.— Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.
South Carolina.— Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630.
Utah.— Roberts *v.* Braffett, 32 Utah 51, 92 Pac. 789.
West Virginia.— Abbott *v.* L'Hommedieu, 10 W. Va. 677.
United States.— King *v.* Hamilton, 4 Pet. 311; 7 L. ed. 869.

Laches of plaintiff see *infra*, VI, F.

54. *Illinois.*— Sugar *v.* Froehlich, 229 Ill. 397, 82 N. E. 414; Ralls *v.* Ralls, 82 Ill. 243.
Iowa.— Zundelowitz *v.* Webster, 96 Iowa 587, 65 N. W. 835.
Maryland.— Shriver *v.* Seiss, 49 Md. 384; Smith *v.* Crandall, 20 Md. 482.
Missouri.— Paris *v.* Haley, 61 Mo. 453.
New York.— Hoch *v.* Cocks, 78 Hun 253, 28 N. Y. Suppl. 952.
Virginia.— Shenandoah Valley R. Co. *v.* Lewis, 76 Va. 833.
Wisconsin.— Dewey *v.* Spring Valley Land Co., 98 Wis. 83, 73 N. W. 565.
Canada.— Calhoun *v.* Brewster, 1 N. Brunsw. Eq. 529.

55. Goddard *v.* American Queen, 44 N. Y. App. Div. 454, 61 N. Y. Suppl. 133; Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360.

56. Ash *v.* Daggy, 6 Ind. 259; Smith *v.* McVeigh, 11 N. J. Eq. 239. See *infra*, V.

57. Sutton *v.* Miller, 219 Ill. 462, 76 N. E. 838.

58. Edelen *v.* Samuels, 126 Ky. 295, 103 S. W. 360, 31 Ky. L. Rep. 731. See *infra*, III, C.

59. Turner *v.* Clay, 3 Bibb (Ky.) 52. See *infra*, VI.

60. Hollman *v.* Conlon, 143 Mo. 369, 45 S. W. 275. See *infra*, VI, D.

61. Herran *v.* Rich, 95 N. C. 500. See *infra*, VI, E.

62. Jones *v.* Byrne, 149 Fed. 457 [*reversed* on other grounds in 159 Fed. 321]. See *infra*, IV, D, 6.

63. Washington Irr. Co. *v.* Krutz, 119 Fed. 279, 56 C. C. A. 1. See *supra*, I, C.

64. *Alabama.*— Blackwilder *v.* Loveless, 21 Ala. 371.
District of Columbia.— Knott *v.* Giles, 27 App. Cas. 581.
Illinois.— Fish *v.* Leser, 69 Ill. 394; Stone *v.* Pratt, 25 Ill. 25; India Tea Co. *v.* Petersen, 108 Ill. App. 16.
Iowa.— New York Brokerage Co. *v.* Wharton, (1909) 119 N. W. 969.
Kansas.— Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202.
Kentucky.— Ratterman *v.* Campbell, 80 S. W. 1155, 26 Ky. L. Rep. 173.
Maryland.— Whalen *v.* Baltimore, etc., R. Co., 108 Md. 11, 69 Atl. 390, 11 L. R. A. N. S. 130; Tyson *v.* Watts, 1 Md. Ch. 13.
Massachusetts.— Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. N. S. 87.
Mississippi.— Aston *v.* Robinson, 49 Miss. 348.
New York.— Sherman *v.* Wright, 49 N. Y. 227; Clarke *v.* Rochester, etc., R. Co., 18 Barb. 350.
North Carolina.— Shakespeare *v.* Caldwell Land, etc., Co., 144 N. C. 516, 57 S. E. 213; Prater *v.* Miller, 10 N. C. 628.
Pennsylvania.— Friend *v.* Lamb, 152 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672; Henderson *v.* Hays, 2 Watts 148.
South Carolina.— Clitherall *v.* Ogilvie, 1 Desauss. Eq. 250.
West Virginia.— Johnson *v.* Ohio River R. Co., 61 W. Va. 141, 56 S. E. 200.
Wisconsin.—Menasha *v.* Wisconsin Cent. R. Co., 65 Wis. 502, 27 N. W. 169.
United States.— Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501; Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509; Newton *v.* Wooley, 105 Fed. 541; Marr *v.* Shaw, 51 Fed. 860; Roundtree *v.* McLain, 20 Fed. Cas. No. 12,084*a*, Hempst. 245.

5. Review by Appellate Court. The exercise of the court's discretion is subject to review by the appellate court.[65]

II. JURISDICTION IN GENERAL.

A. Contracts Concerning Land[66] — 1. In General. Where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case.[67] It is as much a matter of course for courts of equity to decree a specific performance of a contract for the conveyance of real estate, which is in its nature unobjectionable, as it is for courts of law to give damages for its breach.[68] Equity adopts this principle, not because the land is fertile, or rich in minerals, but because it is land, a favorite and favored subject in England and every country of Anglo-Saxon origin. Land is assumed to have a peculiar value, so as to give an equity for specific performance, without reference to its quality or quantity.[69]

65. Ullsperger *v.* Meyer, 217 Ill. 262, 75 N. E. 462, 2 L. R. A. N. S. 221; Rochester, etc., Land Co. *v.* Roe, 8 N. Y. App. Div. 360, 40 N. Y. Suppl. 799; Leicester Piano Co. *v.* Front Royal, etc., Imp. Co., 55 Fed. 190, 5 C. C. A. 60. And see the cases cited *supra*, I, D, 2, 3.

66. Vendor of land entitled to specific performance see *infra*, II, B, 10, h.

Specific performance of compromise see Compromise and Settlement, 8 Cyc. 535, 536.

67. *Alabama.*— Stone *v.* Gover, 1 Ala. 287.

Illinois.— Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197.

Kansas.— Waynick *v.* Richmond, 11 Kan. 488; Slicer *v.* Adams, 10 Kan. App. 377, 59 Pac. 1100.

Maryland.— Maryland Clay Co. *v.* Simpers, 96 Md. 1, 53 Atl. 424.

Missouri.— Eggert *v.* Charles H. Heer Dry-Goods Co., 102 Mo. 512, 15 S. W. 65.

Nebraska.— Fred Gorder *v.* Pankonin, 83 Nebr. 204, 119 N. W. 449; Morgan *v.* Hardy, 16 Nebr. 427, 20 N. W. 337.

New Jersey.— Repetto *v.* Baylor, 61 N. J. Eq. 501, 48 Atl. 774.

New York.— Jones *v.* Barnes, 105 N. Y. App. Div. 287, 94 N. Y. Suppl. 695.

North Carolina.— Combes *v.* Adams, 150 N. C. 64, 63 S. E. 186; Rudisill *v.* Whitener, 146 N. C. 403, 59 S. E. 995, 15 L. R. A. N. S. 81; Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682; Boles *v.* Candle, 133 N. C. 528, 45 S. E. 835; Whitted *v.* Fuquay, 127 N. C. 68, 37 S. E. 141; Stamper *v.* Stamper, 121 N. C. 251, 28 S. E. 20; Barnes *v.* Barnes, 65 N. C. 261.

Pennsylvania.— Conover *v.* Wright, 9 Pa. Dist. 688.

Tennessee.—Buchanan *v.* Brown, Cooke 185.

Virginia.— Hoover *v.* Buck, (1895) 21 S. E. 474. And see Tidewater R. Co. *v.* Hurt, 109 Va. 204, 63 S. E. 421.

United States.— Wilhite *v.* Skelton, 149 Fed. 67, 78 C. C. A. 635 [*reversing* 5 Indian Terr. 621, 82 S. W. 932]; Pensacola Provisional Municipality *v.* Lehman, 57 Fed. 324, 6 C. C. A. 349.

Canada.— McDonald *v.* Elder, 1 Grant Ch. (U. C.) 513, wild land, notwithstanding its slight value.

68. St. Paul Division No. 1, S. T. *v.* Brown, 9 Minn. 157. And see Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197; Gorder *v.* Pankonin, 83 Nebr. 204, 119 N. W. 449; Morgan *v.* Hardy, 16 Nebr. 427, 20 N. W. 337.

Although damages nominal.— That land is worth the exact contract price, so that for refusal by the vendor to perform the vendee's damages would be but nominal, is no ground for refusing specific performance. Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377.

Where vendee has agreed to sell.— But it has been held that where plaintiff (the vendee) alleges that he has entered into a binding contract to convey the land to another for a specified price, and seeks conveyance from defendant, who is solvent, for that sole purpose, he shows that the legal remedy of damages is adequate, and his bill should be dismissed. Hazleton *v.* Miller, 25 App. Cas. (D. C.) 337 [*affirmed* in 202 U. S. 71, 26 S. Ct. 567, 50 L. ed. 939]; Thweatt *v.* Jones, 87 Fed. 268, 30 C. C. A. 636. And see Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360.

Contra, Solomon Mier Co. *v.* Hadden, 148 Mich. 488, 111 N. W. 1040.

69. Kitchen *v.* Herring, 42 N. C. 190.

There is probably more historical accuracy in this explanation (see Pomeroy Eq. Jur. § 1250, as to the origin of the grantor's lien) than in the following often quoted passages: "A court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money-value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value." Adderley *v.* Dixon, 2 L. J. Ch. O. S. 103, 1 Sim. & St. 607, 610, 24 Rev. Rep. 254, 1 Eng. Ch. 607, 57 Eng. Reprint 239. "One parcel of land may vary from, be more commodious, pleasant, or convenient than another parcel." Cud *v.* Rutter, 1 P. Wms. 570, 571, 5 Vin. Abr. 538, pl. 21, 24 Eng. Reprint 521. The failure of these reasons in the individual instance does not affect the rule. See cases

2. Illustrations — a. Kinds of Contracts Enforced. Subject to the requirements enumerated later,[70] the form of the instrument embodying the contract is wholly unimportant.[71] Bonds conditioned to convey land, or "title bonds," are a common form in this country and will be specifically enforced, although they contain no express covenant or agreement to convey.[72] So a contract to purchase land, made by a bid at an auction sale and evidenced by the auctioneer's memorandum, will be enforced;[73] likewise partition agreements among coöwners;[74] a partnership agreement under which one partner is entitled to a conveyance from the other of his interest in partnership property;[75] contracts for the exchange of lands;[76] compromise agreements concerning land;[77] an option in the purchaser of land to purchase adjacent lands;[78] a covenant to reconvey on the grantee's failure to perform certain conditions;[79] an agreement by a mortgagee to reconvey;[80] or a contract to make a specified final disposition of property by will.[81] A defective deed is frequently treated as a contract to convey.[82]

cited *supra*, note 67; and *infra*, note 72 *et seq.*

70. See *infra*, III.

Requirements of completeness, certainty, etc., see *infra*, III, D.

Requisites of the memorandum under the statute of frauds see Frauds, Statute of, 20 Cyc. 252.

71. St. Paul Div. No. 1 S. T. *v.* Brown, 9 Minn. 157.

72. *Illinois.*— Fitzpatrick *v.* Beatty, 6 Ill. 454.

Maine.— Handy *v.* Rice, 98 Me. 504, 57 Atl. 847; Hubbard *v.* Johnson, 77 Me. 139.

Maryland.— Saunders *v.* Simpson, 2 Harr. & J. 81.

Massachusetts.— Dooley *v.* Watson, 1 Gray 414; Plunkett *v.* North Adams M. E. Soc., 3 Cush. 561.

Minnesota.— St. Paul Division No. 1 S. T. *v.* Brown, 9 Minn. 157.

Montana.— Thornburgh *v.* Fish, 11 Mont. 53, 27 Pac. 381.

New Hampshire.— Ewins *v.* Gordon, 49 N. H. 444.

New York.— Martin *v.* Colby, 42 Hun 1.

Texas.— Peters *v.* Phillips, 19 Tex. 70, 70 Am. Dec. 319; Hemming *v.* Zimmerschitte, 4 Tex. 159.

United States.— Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120 [*affirmed* in 9 Pet. 62, 9 L. ed. 51].

England.— Anonymous, Mosely 37, 25 Eng. Reprint 255.

73. Jackens *v.* Nicolson, 70 Ga. 198.

74. *Georgia.*— Fortner *v.* Wiggins, 121 Ga. 26, 48 S. E. 694.

Maryland.— Hardy *v.* Summers, 10 Gill & J. 316, 32 Am. Dec. 167.

Nebraska.— English *v.* Milligan, 27 Nebr. 326, 43 N. W. 120.

New Jersey.— Soper *v.* Kipp, 5 N. J. Eq. 383.

North Carolina.— Sumner *v.* Early, 134 N. C. 233, 46 S. E. 492.

Parol partition see *infra*, V, O.

75. Whitney *v.* Dewey, 158 Fed. 385, 86 C. C. A. 21.

76. Goodlett *v.* Hansell, 66 Ala. 151; Park *v.* Johnson, 4 Allen (Mass.) 259; Bowman *v.* Gork, 106 Mich. 163, 63 N. W. 998; McAlpine *v.* Union Pac. R. Co., 23 Fed. 168.

Parol agreements to exchange see *infra*, V, N.

77. See Compromise and Settlement, 8 Cyc. 536.

78. Noyes *v.* Schlegel, 9 Cal. App. 516, 99 Pac. 726.

79. Robinson *v.* Robinson, 9 Gray (Mass.) 447, 69 Am. Dec. 301; Stamper *v.* Stamper, 121 N. C. 251, 28 S. E. 20.

By mortgagee to reconvey to mortgagor after foreclosure sale see Nunez *v.* Morgan, 77 Cal. 427, 19 Pac. 753.

For enforcement of such contracts when parol see *infra*, V.

80. Porter *v.* Farmers', etc., Sav. Bank, (Iowa 1909) 120 N. W. 633, holding that a mortgagor, who has conveyed the premises to the mortgagee, under an agreement for a reconveyance within a year if the mortgagor succeeded in selling them during that time, could compel the reconveyance, although the money with which to pay the mortgage debt was to be derived from the sale of the property, as by the terms of the contract to reconvey their reconveyance depended on the success of the mortgagor in finding a purchaser.

81. See *infra*, VII, A.

82. *Alabama.*— Hollis *v.* Harris, 96 Ala. 288, 11 So. 377; Sparks *v.* Woodstock Iron, etc., Co., 87 Ala. 294, 6 So. 195.

California.—Heinlen *v.* Martin, 53 Cal. 321.

Maryland.— Tiernan *v.* Poor, 1 Gill & J. 216, 19 Am. Dec. 225; Browne *v.* Browne, 1 Harr. & J. 430; Somerville *v.* Trueman, 4 Harr. & M. 43, 1 Am. Dec. 389.

Missouri.— Kirkpatrick *v.* Pease, 202 Mo. 471, 101 S. W. 651.

New York.— Wendell *v.* Wadsworth, 20 Johns. 659 [*affirming* 5 Johns. Ch. 224].

Oregon.— South Portland Land Co. *v.* Munger, 36 Oreg. 45, 54 Pac. 815, 60 Pac. 5; Hill *v.* Cooper, 6 Oreg. 181.

Rhode Island.— Mudge *v.* Hammill, 21 R. I. 463, 44 Atl. 595, 21 R. I. 283, 43 Atl. 540, 79 Am. St. Rep. 802.

Wisconsin.— Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423; Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395.

But see McCall *v.* McCall, 3 Day (Conn.) 402; Overman *v.* Kerr, 17 Iowa 485, if the instrument was not sufficiently delivered to

b. Interests in Land. Among the contracts enforced besides the ordinary contract for sale and purchase of the fee are those for the sale or grant of easements, as a right of way,[83] or the right to work minerals in the land;[84] sale of trees growing on a certain tract of land,[85] of the undivided moiety of a tenant in common,[86] of an equitable interest,[87] of a right of preëmption,[88] of an expectancy;[89] and, it seems, of a mere possessory interest.[90] Agreements to give or renew a lease are of frequent enforcement.[91] And a contract to assign the good-will of a lease, that is, the reasonable expectation of its renewal, has been enforced.[92] An agreement for the digging of stone will be specifically enforced, whether it be a mere license to dig or a lease.[93] Where a deed contains a building line restriction, based on a valuable consideration, and intended to be for the benefit of the promisees as owners of the neighboring land and the subsequent owners thereof, the restriction is a right in the nature of an easement, and is a proper subject of specific performance.[94]

B. Contracts Not Concerning Land[95] — **1. In General Not Specifically Enforced — a. General Rule.** As a general rule specific performance is not decreed where the subject-matter of the contract is personal property; since the compensation which would be recovered in an action at law is deemed to be an

be valid as a deed, it cannot be treated as sufficiently delivered to be valid as a contract.

83. Coy *v.* Minneapolis, etc., R. Co., 116 Iowa 558, 90 N. W. 344; Tidewater R. Co. *v.* Hurt, 109 Va. 204, 63 S. E. 421, railroad right of way.

An agreement to open streets in land conveyed, although the dedication of the streets to public use has not yet been accepted by the public authorities, comes within this rule and its performance may be enforced. Edwards *v.* Moundsville Land Co., 56 W. Va. 43, 48 S. E. 754; Cook *v.* Totten, 49 W. Va. 177, 38 S. E. 491, 87 Am. St. Rep. 792.

84. Campbell *v.* Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716; Oakford *v.* Hackley, 92 Fed. 38; Hexter *v.* Pearce, [1900] 1 Ch. 341, 69 L. J. Ch. 146, 82 L. T. Rep. N. S. 109, 16 T. L. R. 94, 48 Wkly. Rep. 330.

85. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (holding that a sale of pulp wood to be taken from a tract of land, defendant agreeing not to sell the land, gives plaintiff rights in the land); Stuart *v.* Pennis, 91 Va. 688, 22 S. E. 509. And see Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360.

As sale of personalty.— Such a contract is often considered one for a sale of personalty see *infra*, II, B, 1, a.

86. Underhill *v.* Howard, 20 Ark. 663.

Undivided share; sale or lease of right to work minerals, etc.— A lease by a tenant in common to work the minerals in his undivided share will be enforced in a proper case, notwithstanding that some inconvenience may be caused to the other tenant in common. Hexter *v.* Pearce, [1900] 1 Ch. 341, 69 L. J. Ch. 146, 82 L. T. Rep. N. S. 109, 16 T. L. R. 94, 48 Wkly. Rep. 330; Price *v.* Griffith, 1 De G. M. & G. 80, 15 Jur. 1093, 21 L. J. Ch. 78, 50 Eng. Ch. 63, 42 Eng. Reprint 482. So a vendor may enforce specific performance of a contract to purchase his undivided interest in land and an ice crop, notwithstanding defendant's apprehension of hostility of the tenant in common. Young *v.* Collier, 31 N. J. Eq. 444.

87. Borders *v.* Murphy, 78 Ill. 81; Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681; Sayward *v.* Gardner, 5 Wash. 247, 33 Pac. 389, 31 Pac. 761, unpatented land.

88. Myers *v.* Metzger, 61 N. J. Eq. 522, 48 Atl. 1113.

89. Galbraith *v.* McLain, 84 Ill. 379; Boles *v.* Caudle, 133 N. C. 528, 45 S. E. 835.

90. Johnson *v.* Rickett, 5 Cal. 218.

91. Clark *v.* Clark, 49 Cal. 586; Gonder *v.* Pankonin, 83 Nebr. 204, 119 N. W. 449 (holding that a purchaser of a stock of goods and the good-will of a business, who, at the same time, took a lease of the premises in which the business had been carried on, for a term of years with an option to renew, is not confined to an action for damages on refusal to renew, but may sue for specific performance); Lever *v.* Koffler, [1901] 1 Ch. 543, 70 L. J. Ch. 395, 84 L. T. Rep. N. S. 584, 49 Wkly. Rep. 506; Moss *v.* Barton, L. R. 1 Eq. 574, 35 Beav. 197, 13 L. T. Rep. N. S. 623, 55 Eng. Reprint 870 (renewal of lease); Haywood *v.* Cope, 25 Beav. 140, 4 Jur. N. S. 227, 27 L. J. Ch. 468, 6 Wkly. Rep. 304, 53 Eng. Reprint 589 (coal mining lease); Butler *v.* Powis, 2 Coll. 156, 9 Jur. 959, 33 Eng. Ch. 156, 63 Eng. Reprint 679. But see Booth *v.* Pollard, 4 Y. & C. Exch. 61.

Tenancy from year to year.— In Clayton *v.* Illingworth, 10 Hare 451, 44 Eng. Ch. 436, 68 Eng. Reprint 1003, the court refused to enforce specific performance of an agreement for a mere tenancy from year to year on the ground that the remedy at law was adequate.

92. Bennett *v.* Vansyckel, 4 Duer (N. Y.) 462, holding that if the assignor obtains a renewal of the lease to himself, he holds it as trustee and may be compelled to assign it to plaintiff.

93. Nelson *v.* Bridges, 1 Jur. 753.

94. Codman *v.* Bradley, 201 Mass. 361, 87 N. E. 591. And see Deeds, 13 Cyc. 719.

95. Compromise agreements see Compromise and Settlement, 8 Cyc. 536.

adequate remedy for the breach of the contract. In the case of ordinary chattels, the recovery of damages calculated upon the market price of the goods places the purchaser in as advantageous a position as would a decree in equity; inasmuch as, with the damages, he may purchase the same quantity of the like goods.[96] A court of equity therefore will not, unless there is some special reason, specifically enforce a contract for the sale of ordinary articles of commerce, such as cotton,[97] cattle,[98] logs or lumber,[99] whisky,[1] bar-room fixtures,[2] or a fruit business and stock in trade.[3] A contract for the sale of growing timber is sometimes treated as one for an interest in land.[4] If timber be considered personal property, damages

96. Adderley *v.* Dixon, 2 L. J. Ch. O. S. 103, 1 Sim. & St. 607, 24 Rev. Rep. 254, 1 Eng. Ch. 607, 57 Eng. Reprint 239. And see the following cases:

Alabama.— Savery *v.* Spence, 13 Ala. 561. And see Andrews *v.* Andrews, 28 Ala. 432.

Arkansas.— Block *v.* Shaw, 78 Ark. 511, 95 S. W. 806; Collins *v.* Karatopsky, 36 Ark. 316.

California.— Sentér *v.* Davis, 38 Cal. 450; McLaughlin *v.* Piatti, 27 Cal. 451; McGarvey *v.* Hall, 23 Cal. 140.

Connecticut.— Cowles *v.* Whiteman, 10 Conn. 121, 25 Am. Dec. 60.

Florida.— Hendrey *v.* Whidden, 48 Fla. 268, 37 So. 571; Dorman *v.* McDonald, 47 Fla. 252, 36 So. 52.

Georgia.— Carolee *v.* Handelis, 103 Ga. 299, 29 S. E. 935; Justices Dougherty County Inferior Ct. *v.* Croft, 18 Ga. 473.

Illinois.— Grape Creek Coal Co. *v.* Spellman, 39 Ill. App. 630.

Iowa.— Decorah First Nat. Bank *v.* Day, 52 Iowa 680, 3 N. W. 728.

Kentucky.— Simon *v.* Wildt, 84 Ky. 157; Madison *v.* Chinn, 3 J. J. Marsh. 230.

Maryland.— Neal *v.* Parker, 98 Md. 254, 57 Atl. 213; Waters *v.* Howard, 1 Md. Ch. 112; Sullivan *v.* Tuck, 1 Md. Ch. 59.

Mississippi.— Scott *v.* Billgerry, 40 Miss. 119; Hoy *v.* Hansborough, Freem. 533.

New Jersey.— Furman *v.* Clark, 11 N. J. Eq. 306.

New York.— Harle *v.* Brennig, 131 N. Y. App. Div. 742, 116 N. Y. Suppl. 51; Phillips *v.* Berger, 2 Barb. 608 [*affirmed* in 8 Barb. 527]; Lochman *v.* Meehan, 21 N. Y. Suppl. 389 [*affirmed* in 142 N. Y. 666, 37 N. E. 570].

North Carolina.— Branch *v.* Tomlinson, 77 N. C. 388, agreement by debtor not to claim exemption of his personal property from execution.

Ohio.— Mossman *v.* Schulter, 5 Ohio Dec. (Reprint) 404, 5 Am. L. Rec. 425.

Pennsylvania.— Meehan *v.* Owens, 196 Pa. St. 69, 46 Atl. 263; Sunberry, etc., R. Co. *v.* Cooper, 33 Pa. St. 278; Nestel *v.* Knickerbocker L. Ins. Co., 12 Phila. 477.

Porto Rico.— See Central Altagracia *v.* Javierre, 3 Porto Rico 256.

South Dakota.— Lumley *v.* Miller, (1909) 119 N. W. 1014.

Virginia.— Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223; Stuart *v.* Pennis, 91 Va. 688, 22 S. E. 509.

West Virginia.— Burke *v.* Parke, 5 W. Va. 122.

Wisconsin.— Glassbrenner *v.* Groulik, 110 Wis. 402, 85 N. W. 962.

United States.— Mechanics' Bank *v.* Seton, 1 Pet. 299, 7 L. ed. 152; Bernier *v.* Griscom-Spencer Co., 161 Fed. 438; Sugar Beets Product Co. *v.* Lyons Beet Sugar Refining Co., 161 Fed. 215; Kane *v.* Luckman, 131 Fed. 609; Rollins Inv. Co. *v.* George, 48 Fed. 776; Rountrees *v.* McLain, 20 Fed. Cas. No. 12,084*a*, Hempst. 245.

England.— Fothergill *v.* Rowland, L. R. 17 Eq. 132, 43 L. J. Ch. 252, 29 L. T. Rep. N. S. 414, 22 Wkly. Rep. 42.

See 44 Cent. Dig. tit. "Specific Performance," § 199 *et seq.*

Statutes.—Cal. Civ. Code, § 3384, provides that except as otherwise provided in this article, specific performance of an obligation may be compelled. Section 3387 provides that it is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved. See Fleishman *v.* Woods, 135 Cal. 256, 67 Pac. 276; Krouse *v.* Woodward, 110 Cal. 638, 42 Pac. 1084. See also S. D. Rev. Civ. Code, § 2341; Lumley *v.* Miller, (S. D. 1909) 119 N. W. 1014. Ga. Civ. Code, § 4036, provides that specific performance of a contract, if within the power of the party, will be decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for the non-performance. See Carolee *v.* Handelis, 103 Ga. 299, 29 S. E. 935.

Contract to furnish employment.— A condition of a sale of mining claims that the purchaser should furnish employment to the seller at the mines cannot be specifically enforced, there being a clear remedy at law in damages for its breach. Mallory *v.* Globe-Boston Copper Min. Co., (Ariz. 1908) 94 Pac. 1116.

97. Block *v.* Shaw, 78 Ark. 511, 95 S. W. 806.

98. McLaughlin *v.* Piatti, 27 Cal. 451; Hendrey *v.* Whidden, 48 Fla. 268, 37 So. 571; Lumley *v.* Miller, (S. D. 1909) 119 N. W. 1014; Kane *v.* Luckman, 131 Fed. 609.

99. Dorman *v.* McDonald, 47 Fla. 252, 36 So. [illegible]; Neal *v.* Parker, 98 Md. 254, 57 Atl. 21[illegible] Flint *v.* Corby, 4 Grant Ch. (U. C.) 45.

1. Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223.

2. Meehan *v.* Owens, 196 Pa. St. 69, 46 Atl. 263; Effinger *v.* Hain, 10 Pa. Dist. 107.

3. Carolee *v.* Handelis, 103 Ga. 299, 29 S. E. 935.

4. See *supra*, A, 2, b.

are usually an adequate relief;[5] but under some circumstances such contracts have been enforced.[6] Jurisdiction to compel specific performance does not rest upon any distinction between real and personal estate, but on the ground that damages at law will not afford a complete remedy.[7] An agreement to pay for an article in the products thereof will not generally be specifically enforced, but the remedy is by an action at law to recover the price in money.[8]

b. To Borrow or Lend Money. An agreement to borrow a sum of money and give security for it cannot be specifically enforced, since plaintiff's loss by failure to get as good an investment for his money as that contracted for is a mere matter of calculation for a jury.[9] And an agreement to lend money, whether on security or not, cannot be specifically enforced.[10]

c. To Pay Money.[11] Contracts which are essentially for the payment of money merely, and therefore not within the jurisdiction,[12] include an agreement to give plaintiff a written statement as evidence of his right to recover money;[13] to pay money in gold or silver coin;[14] or to pay money in instalments.[15] Where the charter of a corporation requires its contracts to be sealed, the fact that for want of this formality a contract for the payment of money is not enforceable at law does not give rise to an equity for its specific performance.[16] Where the court has jurisdiction on other grounds it may order payment of money in pursuance of a contract by way of complete relief.[17]

d. Where Plaintiff Has Put His Price on the Article. Where the party who seeks to recover a chattel of such a character that a court of equity would ordinarily decree its delivery to him has himself set a price upon it in dealings with another the ground of equity jurisdiction fails.[18]

5. Bomer *v.* Canaday, 79 Miss. 222, 30 So. 638, 89 Am. St. Rep. 593, 55 L. R. A. 328 (contract does not savor of the realty since the trees were to be delivered as lumber); Paddock *v.* Davenport, 107 N. C. 710, 12 S. E. 464.

6. See *infra*, II, B, 3, a.

7. Telegraphone Corp. *v.* Canadian Telegraphone, Co., 103 Me. 444, 69 Atl. 767.

8. Sugar Beets Product Co. *v.* Lyons Beet Sugar Refining Co., 161 Fed. 215, agreement to pay for a beet pulp drier in dried pulp at a certain price per ton.

9. Rogers *v.* Challis, 27 Beav. 175, 6 Jur. N. S. 334, 29 L. J. Ch. 240, 54 Eng. Reprint 68.

10. Conklin *v.* People's Bldg. Assoc., 41 N. J. Eq. 20, 2 Atl. 615; Bradford, etc., R. Co. *v.* New York, etc., R. Co., 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116; South African Territories *v.* Wallington, [1898] A. C. 309, 67 L. J. Q. B. 470, 78 L. T. Rep. N. S. 426, 14 T. L. R. 298, 46 Wkly. Rep. 545; Larios *v.* Gurety, L. R. 5 P. C. 346; Western Wagon etc., Co. *v.* West, [1892] 1 Ch. 271, 275, 61 L. J. Ch. 244, 66 L. T. Rep. N. S. 402, 40 Wkly. Rep. 182; Sichel *v.* Mosenthal, 30 Beav. 371, 8 Jur. N. S. 275, 31 L. J. Ch. 38[illegible] 5 L. T. Rep. N. S. 784, 10 Wkly. Rep. 283[illegible]54 Eng. Reprint 932.

11. **Action by vendor of land** see *infr*[illegible] B, 10, b.

12. *Illinois.*— Boomer *v.* Cunningham, 22 Ill. 320, 74 Am. Dec. 155.

Iowa.—Hull *v.* Hull, 117 Iowa 63, 90 N. W. 496.

South Carolina.— Miller *v.* Newell, 20 S. C. 123, 47 Am. Rep. 833, to pay attorney out of a verdict to be recovered.

West Virginia.— Burke *v.* Parke, 5 W. Va. 122, partner to pay firm debts.

United States.— Raton Waterworks Co. *v.* Raton, 174 U. S. 360, 19 S. Ct. 719, 43 L. ed. 1005 [*reversing* 9 N. M. 70, 49 Pac. 898], to pay town warrants.

13. Morgenstern *v.* Burkhardt, 9 Misc. (N. Y.) 417, 30 N. Y. Suppl. 190. *Contra*, see Dilworth *v.* Nicola, 213 Pa. St. 315, 62 Atl. 909, to compel written assignment of interest in the profits of a transaction, where there could be no severance of interest until the transaction was closed, twenty-five years thereafter.

14. Howe *v.* Nickerson, 14 Allen (Mass.) 400; Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 1 Abb. Pr. N. S. 174, 30 How. Pr. 386. *Contra*, Hall *v.* Hiles, 2 Bush (Ky.) 532.

15. Brough *v.* Oddy, 8 L. J. Ch. O. S. 23, 5 Eng. Ch. 55, 39 Eng. Reprint 22, 1 Russ. & M. 55, Taml. 215, 12 Eng. Ch. 215, 48 Eng. Reprint 86.

16. Crampton *v.* Varna R. Co., L. R. 7 Ch. 562, 41 L. J. Ch. 817, 20 Wkly. Rep. 713.

17. Livingston *v.* Painter, 43 Barb. (N. Y.) 270, 19 Abb. Pr. 28, 28 How. Pr. 517. See also Bauer *v.* International Waste Co., 201 Mass. 197, 87 N. E. 637; and *infra*, II, B, 9.

18. Ryan *v.* McLane, 91 Md. 175, 46 Atl. 340, 80 Am. St. Rep. 438, 50 L. R. A. 501 (stock); Gillett *v.* Warren, 10 N. M. 523, 62 Pac. 975; Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360; Dowling *v.* Betjemann, 2 Johns. & H. 544, 8 Jur. N. S. 538, 6 L. T. Rep. N. S. 512, 10 Wkly. Rep. 574, 70 Eng. Reprint 1175. See also Kane *v.* Luckman, 131 Fed. 609.

2. Where the Specific Thing Is Desired — a. In General. If the specific thing contracted for is desired by plaintiff, if it cannot be duplicated, and if his reason for desiring it or the other circumstances of the case are such that money damages would not be an adequate compensation to him for its loss, equity will decree its delivery to him. The jurisdiction for this purpose is an outgrowth of, and closely connected with, the remedy for the delivery up of chattels of this special nature tortiously withheld from their owners. In such cases the legal remedies of replevin and detinue are subject to defects of procedure which prevent the successful plaintiff from invariably recovering possession of the chattel.[19] As the equitable remedies, whether for tort or breach of contract, are of the same nature and governed by the same rules, cases illustrating them will be cited indiscriminately.[20]

b. Chattels Having a Sentimental Value — (i) *In General.* A chattel may have a special value to the owner because of his sentimental interest in it — a *pretium affectionis*. The verdict of a jury in such a case for the value of the chattel to the ordinary person is obviously an inadequate remedy. "It would be great injustice, if an individual cannot have his property without being liable to the estimate of people, who have not his feelings upon it." [21]

(ii) *Slaves.* The principle was well illustrated by cases in the southern states for the recovery of slaves. The rule became well established in several of the states that *prima facie* the slave had a *pretium affectionis* in the eyes of his owner, and that equity would entertain jurisdiction of a suit for the recovery of a slave as a matter of course, unless it were shown that he was desired as a chattel simply, and had no value to plaintiff other than his market value.[22] In other states plaintiff was compelled, as in the case of other chattels, to show circumstances rendering the legal remedy inadequate.[23]

c. Unique or Rare Chattels. Chattels, such as valuable paintings and works of art, curiosities, antiquities, etc., which by their nature cannot be duplicated, have frequently been decreed to be delivered in specie.[24]

19. Gough *v.* Crane, 3 Md. Ch 119; Strause *v.* Berger, 220 Pa. St. 367, 69 Atl. 818; Beasley *v.* Allyn, 15 Phila. (Pa.) 97. And see Central Altagracia *v.* Javierre, 3 Porto Rico 256.

20. See *infra*, II, B, 2, b–f, and cases there cited.

21. Fells *v.* Read, 3 Ves. Jr. 70, 71, 30 Eng. Reprint 899, silver tobacco box belonging to a club. See also Sloane *v.* Clauss, 64 Ohio St. 125, 59 N. E. 884 (family relics, ornaments, heirlooms); Beasley *v.* Allyn, 15 Phila. (Pa.) 97 (a wooden bowl, a memento belonging to a college society); Pusey *v.* Pusey, 1 Vern. Ch. 273, 23 Eng. Reprint 465 (an ancient horn which time out of mind had gone along with plaintiff's estate); Macclesfield *v.* Davis, 3 Ves. & B. 16, 35 Eng. Reprint 385 (heirlooms); Lloyd *v.* Loaring, 6 Ves. Jr. 773, 31 Eng. Reprint 1302 (dresses, decorations, etc., belonging to a lodge of freemasons).

22. *Mississippi.*— Hull *v.* Clark, 14 Sm. & M. 187; Butler *v.* Hicks, 11 Sm. & M. 78; Murphy *v.* Clark, 1 Sm. & M. 221.

North Carolina.— Jones *v.* Baird, 57 N. C. 167; Williams *v.* Howard, 7 N. C. 74.

South Carolina.—Sims *v.* Shelton, 2 Strobh. Eq. 221; Ellis *v.* Commander, 1 Strobh. Eq. 188; Young *v.* Burton, McMull. Eq. 255; Sarter *v.* Gordon, 2 Hill Eq. 121 [*overruling* Farley *v.* Farley, 1 McCord Eq. 506; Rees *v.* Parish, 1 McCord Eq. 56].

Tennessee.— Henderson *v.* Vaulx, 10 Yerg. 30, 37 (where it was said: "A court of chancery will protect the possession and enjoyment of this peculiar property — a property in intellectual and moral and social qualities, in skill, in fidelity, and in gratitude, as well as in their capacity for labor"); Womack *v.* Smith, 11 Humphr. 478, 54 Am. Dec. 51.

Virginia.—Summers *v.* Bean, 13 Gratt. 404; Randolph *v.* Randolph, 6 Rand. 194.

See 44 Cent. Dig. tit. "Specific Performance," § 201.

Importance of these cases.— It should be remarked that these cases are by no means obsolete. The general discussions in several of them of the grounds of the jurisdiction in suits to compel specific performance of contracts are most exhaustive, interesting, and instructive.

Where the slaves were claimed merely as merchandise, a bill for their specific delivery would not lie. Bryan *v.* Robert, 1 Strobh. Eq. (S. C.) 334; Horry *v.* Glover, 2 Hill Eq. (S. C.) 515; Skrine *v.* Walker, 3 Rich. Eq. (S. C.) 262. And see Allen *v.* Freeland, 3 Rand. (Va.) 170.

23. Savery *v.* Spence, 13 Ala. 561; Dudley *v.* Mallery, 4 Ga. 52; Caldwell *v.* Myers, Hard. (Ky.) 551.

24. Anonymous [*cited* in Murphy *v.* Clark, 1 Sm. & M. (Miss.) 235] (a madstone); Falcke *v.* Gray, 4 Drew. 651, 5 Jur. N. S. 645,

d. Ships. Contracts for the sale of ships have been enforced specifically both in England and in the United States.[25]

e. Documents. The jurisdiction extends to the delivery of deeds, title-papers, private letters, promissory notes, and other documents of special value to the complainant.[26]

f. Patent Rights and Copyrights. It is well established that an agreement to assign or reassign a patent right or an interest therein will be specifically enforced. The grounds of the jurisdiction are that a patent is in its very nature a unique thing which money compensation would not enable plaintiff to duplicate; and that damages for breach of the contract would often be difficult to estimate.[27] Courts

29 L. J. Ch. 28, 7 Wkly. Rep. 535, 62 Eng. Reprint 250 (two very valuable jars); Somerset *v.* Cookson, 2 Eq. Cas. Abr. 164, 22 Eng. Reprint 140, 3 P. Wms. 390, 24 Eng. Reprint 1114 (a silver altar-piece with a Greek inscription which had been unearthed in plaintiff's estate); Lowther *v.* Lowther, 13 Ves. Jr. 95, 33 Eng. Reprint 230 (a painting).

25. Hurd *v.* Groch, (N. J. Ch. 1898) 51 Atl. 278; Hart *v.* Herwig, L. R. 8 Ch. 860, 866, 29 L. T. Rep. N. S. 47, 21 Wkly. Rep. 663; Batthyany *v.* Bouch, 4 Aspin. 380, 50 L. J. Q. B. 421, 44 L. T. Rep. N. S. 177, 29 Wkly. Rep. 665; Claringbould *v.* Curtis, 21 L. J. Ch. 541, a barge.

26. *Colorado.*— O'Donnell *v.* Chamberlain, 36 Colo. 395, 91 Pac. 39 (contract to assign notes secured by mortgage and a decree foreclosing the mortgage); Williams *v.* Carpenter, 14 Colo. 477, 24 Pac. 558; Henderson *v.* Johns, 13 Colo. 280, 22 Pac. 461.

Idaho.— Robbins *v.* Porter, 12 Ida. 738, 88 Pac. 86.

Illinois.— McMullen *v.* Van Zant, 73 Ill. 190, promissory note.

New Jersey.— Fred *v.* Fred, (Ch. 1901) 50 Atl. 776 (to compel delivery of notes deposited with a third person, on the consideration of plaintiff having satisfied a judgment); Schrafft *v.* Wolters, 61 N. J. Eq. 467, 48 Atl. 782; Pattison *v.* Skillman, 34 N. J. Eq. 344 (letters and documents valuable in establishing heirship).

New York.— Stanton *v.* Miller, 65 Barb. 58, 1 Thomps. & C. 23 [*reversed* on other grounds in 58 N. Y. 192], deed in escrow, the condition having been fulfilled.

Oregon.— Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061, 102 Am. St. Rep. 639, benefit certificate.

Pennsylvania.— Dock *v.* Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617 (private letters); Baum's Appeal, 113 Pa. St. 58, 4 Atl. 461 (deed in escrow); McGowin *v.* Remington, 12 Pa. St. 56, 51 Am. Dec. 584 (private maps, plans, etc., made by plaintiff and essential to his business as a surveyor).

England.— Jackson *v.* Butler, 2 Atk. 306, 26 Eng. Reprint 587 (mortgage deeds); Beresford *v.* Driver, 14 Beav. 387, 20 L. J. Ch. 476, 51 Eng. Reprint 335, 16 Beav. 134, 22 L. J. Ch. 407, 51 Eng. Reprint 728; Gibson *v.* Ingo, 6 Hare 112, 31 Eng. Ch. 112, 67 Eng. Reprint 1103 (certificate of register of a ship); Doloret *v.* Rothschild, 2 L. J. Ch. O. S. 125, 1 Sim. & St. 590, 24 Rev. Rep. 243, 1 Eng. Ch. 590, 57 Eng. Reprint 233 (certificate giving legal title to government stock — an extreme case); Lingen *v.* Simpson, 1 Sim. & St. 600, 24 Rev. Rep. 249, 1 Eng. Ch. 600, 57 Eng. Reprint 236 (book of dissolved partnership, containing plates of articles manufactured by the firm, and necessary in filling orders); Lloyd *v.* Loaring, 6 Ves. Jr. 773, 31 Eng. Reprint 1302 (books and papers of a lodge of masons).

See 44 Cent. Dig. tit. "Specific Performance," §§ 200, 202.

27. *Arkansas.*— Blackmer *v.* Stone, 51 Ark. 489, 11 S. W. 693.

Connecticut.— Corbin *v.* Tracy, 34 Conn. 325, 328, where it is said: "All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand, it may be so simple in its principle and construction as to defy all competition, and give its owner a practical monopoly of all branches of business to which it is applicable. In any event its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages."

Delaware.— Satterthwait *v.* Marshall, 4 Del. Ch. 337.

District of Columbia.— Runstetler *v.* Atkinson, MacArthur & M. 382.

Illinois.—Whitney *v.* Burr, 115 Ill. 289, 3 N. E. 434; Greer *v.* Sellers, 64 Ill. App. 505.

Iowa.— Searle *v.* Hill, 73 Iowa 367, 35 N. W. 490, 5 Am. St. Rep. 688.

Maine.— Telegraphone Corp. *v.* Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767.

Massachusetts.—Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; Somerby *v.* Buntin, 118 Mass. 279, 19 Am. Rep. 459; Binney *v.* Annan, 107 Mass. 94, 9 Am. Rep. 10.

Michigan.— Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988.

Missouri.— Electric Secret Service Co. *v.* Gill-Alexander Elec. Mfg. Co., 125 Mo. 140, 28 S. W. 486.

New Jersey.— Domestic Tel., etc., Co. *v.* Metropolitan Tel., etc., Co., 39 N. J. Eq. 160.

New York.— Spears *v.* Willis, 151 N. Y. 443, 45 N. E. 849, 69 Hun 408, 23 N. Y.

of equity have also compelled specific performance of agreements to reassign patent rights [28] and other agreements relating to patents.[29] For similar reasons agreements to assign copyrights have been specifically enforced.[30]

3. Where Articles of the Desired Kind Cannot Be Obtained Elsewhere — a. In General. In the foregoing examples the contract related to a specific or identified subject-matter.[31] Where, on the other hand, the contract would be substantially satisfied by the delivery of any articles of a particular class, kind, or description, specific performance is not readily obtained.[32] The legal remedy ceases to be adequate, however, in many cases where, so far as plaintiff is concerned, defendant has a practical monopoly of the kind of article which plaintiff desires.[33]

b. Defendant Having Practical Monopoly of Necessary Articles. If the articles are necessary to plaintiff's business and defendant has a practical monopoly of them in the locality, and they cannot be obtained elsewhere save at a considerable expense or loss, the amount of which cannot be estimated in advance, the case is a proper one for specific performance.[34]

Suppl. 549; Young *v.* Gilmore, 59 N. Y. App. Div. 612, 69 N. Y. Suppl. 191.

Pennsylvania.— Hepworth *v.* Henshall, 153 Pa. St. 592, 25 Atl. 1103; Reese's Appeal, 122 Pa. St. 392, 15 Atl. 807.

Tennessee.— McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729.

Wisconsin.— Valley Iron Works Mfg. Co. *v.* Goodrick, 103 Wis. 436, 78 N. W. 1096; Fuller, etc., Mfg. Co. *v.* Bartlett, 68 Wis. 73, 31 N. W. 747, 60 Am. Rep. 838.

United States.— Fairchild *v.* Dement, 164 Fed. 200 (agreement by the assignor of a patent to convey to the assignee any future inventions made by him relating to the device of the patent or to improvements thereon); McDuffee *v.* Hestonville, etc., Pass. R. Co., 158 Fed. 827 [*reversed* on other grounds in 162 Fed. 36, 89 C. C. A. 76]; Thompson *v.* Automatic Fire Protection Co., 155 Fed. 548; Mississippi Glass Co. *v.* Frauzen, 143 Fed. 501, 74 C. C. A. 135; Pressed Steel Car Co. *v.* Hansen, 128 Fed. 444 [*affirmed* in 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. N. S. 1172]; Thibodeau *v.* Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180; Hull *v.* Pitrat, 45 Fed. 94; New York Paper Bag Mfg. Co. *v.* Union Paper Bag Mfg. Co., 32 Fed. 783; Hapgood *v.* Rosenstock, 23 Fed. 86, 23 Blatchf. 95; Nesmith *v.* Calvert, 18 Fed. Cas. No. 10,123, 1 Woodb. & M. 34; Newell *v.* West, 18 Fed. Cas. No. 10,150, 2 Ban. & A. 113, 13 Blatchf. 114, 8 Off. Gaz. 598, 9 Off. Gaz. 1110.

England.— Printing, etc., Co. *v.* Sampson, L. R. 19 Eq. 462, 44 L. J. Ch. 705, 32 L. T. Rep. N. S. 354, 23 Wkly. Rep. 463; Cogent *v.* Gibson, 33 Beav. 557, 55 Eng. Reprint 485.

See 44 Cent. Dig. tit. "Specific Performance," § 204.

28. Telegraphone Corp. *v.* Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767.

29. Agreements to make application for a foreign patent and assign it, when obtained (Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679), to assign the right to obtain a patent (Pressed Steel Car Co. *v.* Hansen, 128 Fed. 444 [*affirmed* in 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. N. S. 1172], to assign rights in a patented invention (Valley Iron Works Mfg. Co. *v.* Goodrich, 103 Wis. 436, 78 N. W. 1096), for accounting by a sole licensee, the relation of plaintiff and defendant being confidential (Ball, etc., Fastener Co. *v.* Ball Glove Fastening Co., 58 Fed. 818, 7 C. C. A. 498), and not to infringe (American Box Mach. Co. *v.* Crosman, 57 Fed. 1021), have been enforced. An agreement by one employed as a machinist to invent, perfect, and improve lubricating valves, force-feed oil pumps, etc., which his employer is engaged in manufacturing, and that whatever inventions or devices may result from such employment in the nature of tools, machinery, etc., to be used in connection with the employer's business shall, at the employer's request, be protected by patents and become the employer's property, will be specifically enforced. Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988. And see Mississippi Glass Co. *v.* Franzen, 143 Fed 501, 74 C. C. A. 135; Thibodeau *v.* Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180. But an agreement by a licensee to account for royalties and to permit inspection of his books was not specifically enforced, as there was an adequate remedy at law, and under U. S. Rev. St. § 724, a production of the books could be had. Brewster *v.* Tutbill Spring Co., 34 Fed. 769.

An oral assignment of an interest in an invention expected to be patented is valid and enforceable specifically. McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729.

30. Thombleson *v.* Black, 1 Jur. 198.

31. See *supra*, II, B, 2, a–f.

32. Subject to one qualification, viz., the English rules relating to the sale of shares of stock which is an almost arbitrary exception see *infra*, II, B, 4, e.

33. See *infra*, II, B, 3, b.

34. *Maryland.*— Equitable Gaslight Co. *v.* Baltimore Coal-Tar, etc., Co., 63 Md. 285.

Massachusetts.— Gloucester Isinglass, etc., Co. *v.* Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 26 Am. St. Rep. 214, 12 L. R. A. 563; Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679, contract by a patentee to furnish patented articles.

c. As to Convenience of Location. The mere fact, however, that the articles are more conveniently located for plaintiff's purposes than are other sources of supply does not afford a ground for the jurisdiction.[35]

4. Shares of Stock — a. Stock Readily Procured in Market. By the rule in this country, specific performance will not be decreed if the stock is one which is the subject of every-day sale in the market, so that its value can be readily and certainly ascertained.[36]

b. Stock Having no Market Value and Not Readily Procurable. When, however, this is not the case, where the stock has no market value and cannot be readily obtained except from a party to the contract, by the prevailing rule in this country specific performance may be had.[37]

New Jersey.— Curtice Bros. Co. *v.* Catts, 72 N. J. Eq. 831, 66 Atl. 935.

Oregon.— St. David's Parish *v.* Wood, 24 Oreg. 396, 34 Pac. 18, 41 Am. St. Rep 860. In this case defendant agreed to furnish from his quarry the necessary stone for a church building, but after the building was two-thirds completed, discontinued performance. To use stone from any other quarry would destroy the beauty of the building. It was held that defendant should be compelled to furnish the stone necessary to complete the building.

Pennsylvania.— Strause *v.* Berger, 220 Pa. St. 367, 69 Atl. 818, holding that specific performance of an oral contract for the sale of standing timber would be enforced where the timber had a special value to the purchaser because of the difficulty of procuring such timber in the locality in which his business is conducted.

Porto Rico.—Central Altagracia *v.* Javierre, 3 Porto Rico 256, holding that a contract to deliver to a sugar factory sugar cane growing on a near-by tract, the loss of which would cause the factory to close down, would be specifically enforced.

England.— Buxton *v.* Lister, 3 Atk. 383, 26 Eng. Reprint 1020 [*explained* in Pollard *v.* Clayton, 1 Jur. N. S. 342, 1 Kay & J. 462, 3 Wkly. Rep. 349, 69 Eng. Reprint 540]; North *v.* Great Northern R. Co., 2 Giff. 64, 6 Jur. N. S. 244, 29 L. J. Ch. 301, 1 L. T. Rep. N. S. 510, 66 Eng. Reprint 28.

Canada.— Saw logs, necessary in plaintiff's business as a mill owner, there being no general market for such logs, but each mill owner supplying himself by private contract with a particular lumberman. Farwell *v.* Walbridge, 6 Grant Ch. (U. C.) 634; Fuller *v.* Richmoud, 4 Grant Ch. (U. C.) 657, 2 Grant Ch. (U. C.) 24; Stevenson *v.* Clarke, 4 Grant Ch. (U. C.) 540. *Compare* Flint *v.* Corby, 4 Grant Ch. (U. C.) 45.

Sale of interest in business.— For similar reasons, a contract by the administrators of plaintiffs' deceased partner in a manufacturing business to sell them his interest in the business was specifically enforced, as enabling plaintiffs to continue without interruption a business to which they had contributed most of the capital. Ralston *v* Ihmsen, 204 Pa. St. 588, 54 Atl. 365. See also Brady *v.* Yost, 6 Ida 273, 55 Pac. 542, sale of material and fixtures constituting a newspaper publishing plant.

Award of personal property used in the business.—An award divided the assets of a partnership in the tanning business, giving plaintiff one half the skins in the yard, one half the leather, and the use of one half the vats, things essential to the prosecution of plaintiff's business. A bill for specific performance was sustained, since a court of law could not look to the loss of profits which plaintiff might sustain by a failure to perform in specie. Kirksey *v.* Fike, 27 Ala. 383, 62 Am. Dec. 768.

Sale of stock of goods for a lump sum.— With these cases may, perhaps, be classed a peculiar case of the purchase of a stock of merchandise for a lump sum, which was paid, where defendant delivered two thirds of the goods, but refused to deliver and secreted the remainder, thereby making the remedy of replevin impossible. The court decreed specific performance, rejecting any possible reasons for its decision other than the reasons that the sale was for a lump sum and had been partly carried out. Raymond Syndicate *v.* Brown, 124 Fed. 80.

35. Lewman *v.* Ogden, 143 Ala. 351, 42 So. 102; Paddock *v.* Davenport, 107 N. C. 710, 12 S. E. 464 (since convenience of transportation may be considered in estimation of damages); Pollard *v.* Clayton, 1 Jur. N. S. 342, 1 Kay & J. 462, 3 Wkly. Rep. 349, 69 Eng. Reprint 540.

36. *Connecticut.*— Cowles *v.* Whitman, 10 Conn. 121, 25 Am. Dec. 60, bank stock.

Florida.— Graham *v.* Herlong, 50 Fla. 521, 39 So. 111.

Maryland.— Ryan *v.* McLane, 91 Md. 175, 46 Atl. 340, 80 Am. St. Rep. 438, 50 L. R. A. 501.

Oregon.— Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803.

Wisconsin.— Avery *v.* Ryan, 74 Wis. 591, 43 N. W. 317.

United States.—Bernier *v.* Griscom-Spencer Co., 161 Fed. 438; Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woolw. 26.

Special circumstances may give equity jurisdiction. Thus relief was given to one who had subscribed for stock in a railroad project, against parties who had agreed to take a portion off his hands; since subscribers to such a project "were taking upon themselves very heavy burdens, with a dim prospect of future advantage." Austin *v.* Gillaspie, 54 N. C. 261.

37. *California.*— Fleishman *v.* Woods, 135

c. More Stringent Rule in Some States. In a number of jurisdictions a more stringent rule has been announced; and it is held that plaintiff must show some special circumstances rendering the legal remedy inadequate, over and above the mere fact that the stock has no quotable commercial value and is seldom for

Cal. 256, 67 Pac. 276; Krouse *v.* Woodward, 110 Cal. 638, 42 Pac. 1084; Treasurer *v.* Commercial Coal Min. Co., 23 Cal. 390.

Colorado.— True *v.* Houghton, 6 Colo. 318.

Illinois.— Ames *v.* Witbeck, 179 Ill. 458, 53 N. E. 969.

Iowa.—Schmidt *v.* Pritchard, 135 Iowa 240, 112 N. W. 801.

Massachusetts.— New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679.

Missouri.— Baumhoff *v.* St. Louis, etc., R. Co., 205 Mo. 248, 104 S. W. 5; Dennison *v.* Keasby, 200 Mo. 408, 98 S. W. 546 [*affirming* (App. 1904) 78 S. W. 1041]; Butler *v.* Murphy, 106 Mo. App. 287, 80 S. W. 337.

Nevada.— Turley *v.* Thomas, (1909) 101 Pac. 568.

New Jersey.— Safford *v.* Barber, (Ch. 1908) 70 Atl. 371.

New York.— Butler *v.* Wright, 186 N. Y. 259, 78 N. E. 1002 [*reversing* 103 N. Y. App. Div. 463, 93 N. Y. Suppl. 113]; Johnson *v.* Brooks, 93 N. Y. 337 [*affirming* 46 N. Y. Super. Ct. 13]; White *v.* Schuyler, 1 Abb. Pr. N. S. 300, 31 How. Pr. 38.

North Carolina.—Ashe *v.* Johnson, 55 N. C. 149.

Oregon.—Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803.

Pennsylvania.— Northern Cent. R. Co. *v.* Walworth, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. Rep. 683; Goodwin Gas Stove, etc., Co.'s Appeal, 117 Pa. St. 514, 12 Atl. 736, 2 Am. St. Rep. 696; Bartol *v.* Shaffer, 7 North. Co. Rep. 217. A contract to purchase shares of stock, providing that either party might purchase, and that the stock procured and the cost thereof should be divided between the parties, may be specifically enforced when the stock is not procurable in the open market and its pecuniary value is not readily ascertainable. Sherman *v.* Herr, 220 Pa. St. 420, 69 Atl. 899.

Rhode Island.— Manton *v.* Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811.

United States.— Altoona Electrical Engineering, etc., Co. *v.* Kittanning, etc., St. R. Co., 126 Fed. 559; Newton *v.* Wooley, 105 Fed. 541; Krohn *v.* Williamson, 62 Fed. 869.

See 44 Cent. Dig. tit. "Specific Performance," § 203.

"The allegation that the value of the stock is uncertain and not easily ascertainable brings the case within the class of exceptional cases where there is not an adequate remedy at law. The true standing of a corporation is seldom known outside of its own officers. A stranger would, in most cases, find it difficult, if not impossible, to prove the real value of its stock, unless it is one that is rated and for sale in the market. He has no access to its books; he cannot know its assets and liabilities; and, although he is willing to take the stock for a price, he might be quite unable to prove that it was worth that or any other price." Manton *v.* Ray, 18 R. I. 672, 674, 29 Atl. 998, 49 Am. St. Rep. 811.

"If it be assumed that the stock cannot be obtained elsewhere than of the respondent, and that he has made a valid contract for this particular stock, it is also to be assumed that he wants this stock in specie." Manton *v.* Ray, 18 R. I. 672, 674, 29 Atl. 998, 49 Am. St. Rep. 811.

The contract will be enforced where there is none of the stock on the market and no available way of proving the value of the stock or the amount of damages from the breach of contract (Dennison *v.* Keasby, 200 Mo. 408, 98 S. W. 546 [*affirming* (App. 1904) 78 S. W. 1041]); or where the stock has no quoted value or any definite market price, or any certain value capable of exact ascertainment, and cannot be obtained except from defendant (Butler *v.* Wright, 186 N. Y. 259, 78 N. E. 1002 [*reversing* 103 N. Y. App. Div. 463, 93 N. Y. Suppl. 113], apparently relaxing the stringency of the rule laid down in a number of decisions by inferior courts, for which see next note).

In Pennsylvania the test laid down in Rigg *v.* Reading, etc., St. R. Co., 191 Pa. St. 298, 43 Atl. 212 (see next note) seems to be abandoned. If defendant owns or controls nearly all the stock, that is a sufficient ground for the relief (Northern Cent. R. Co. *v.* Walworth, 193 Pa. St. 207, 44 Atl. 253, 74 Am. St. Rep. 683, ignoring the Rigg case decided five months before); or where the stock, having no ascertainable market value, specific performance of the contract will give plaintiff control of the corporation (Rumsey *v.* New York, etc., R. Co., 203 Pa. St. 579, 53 Atl. 495); or the stock, having no such value, yet has a special value to plaintiff (Eichbaum *v.* Sample, 213 Pa. St. 216, 62 Atl. 837).

Mining stock.— Stocks of mining corporations in the western states are as a class a fit subject-matter for specific performance, owing to their great fluctuations in value, the difficulty of substantiating that value by competent evidence, etc. Treasurer *v.* Commercial Coal Min. Co., 23 Cal. 390; Frue *v.* Houghton, 6 Colo. 318; Rau *v.* Seidenberg, 53 Misc. (N. Y.) 386, 104 N. Y. Suppl. 798. See also Johnson *v.* Brooks, 93 N. Y. 337 [*affirming* 46 N. Y. Super. Ct. 13].

Presumption and proof.— It will not be presumed that the shares of stock in what is known as a close corporation can either be procured in the market, or that they have any market value, and, where their procurement and market value comes in question, proof of those facts will be required. Safford *v.* Barber, (N. J. Ch. 1908) 70 Atl. 371.

It is not essential to the statement of a good cause of action for specific performance

sale in the market, as that the stock is of peculiar value to him, or that he needs it in specie, or that its value cannot be estimated in damages.[38]

d. Plaintiff Desiring Control of Corporation. Where the contract calls for the transfer of sufficient stock to make plaintiff the owner of one half of the entire stock, so that its chief value to him is the power and influence given in the management of the corporation, this, in connection with the uncertain value of the stock, is a sufficient ground for specific performance.[39]

e. English Rule. In England the rule is more liberal; contracts for the sale of shares in private companies, even though such shares are constantly dealt with in the market and their price is thus ascertainable, are specifically enforced.[40]

of a contract to assign corporate stock that the bill show that the complainant is entitled to an accounting for the amount of dividends the stock has earned. Bernier *v.* Griscom-Spencer Co., 161 Fed. 438.

38. *Illinois.*— Barton *v.* De Wolf, 108 Ill. 195; Pierce *v.* Plumb, 74 Ill. 326; Johnson *v.* Stratton, 109 Ill. App. 481.

Minnesota.— Moulton *v.* Warren Mfg. Co., 81 Minn. 259, 83 N. W. 1082; Northern Trust Co. *v.* Markell, 61 Minn. 271, 63 N. W. 735.

New Hampshire.— Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404.

New York.— Harle *v.* Brennig, 131 N. Y. App. Div. 742, 116 N. Y. Suppl. 51; Ehrich *v.* Grant, 111 N. Y. App. Div. 196, 97 N. Y. Suppl. 600; Clements *v.* Sherwood-Dunn, 108 N. Y. App. Div. 327, 95 N. Y. Suppl. 766 [*affirmed* in 187 N. Y. 521, 79 N. E. 1102]; Butler *v.* Wright, 103 N. Y. App. Div. 463, 93 N. Y. Suppl. 113 [*reversed* on other grounds in 186 N. Y. 259, 78 N. E. 1002]; Kennedy *v.* Thompson, 97 N. Y. App. Div. 296, 89 N. Y. Suppl. 963; Gilbert *v.* Bunnell, 92 N. Y. App. Div. 284, 86 N. Y. Suppl. 1123; Bateman *v.* Straus, 86 N. Y. App. Div. 540, 83 N. Y. Suppl. 785. A complaint alleging that plaintiff employed defendants as his brokers to purchase certain railroad stock which they purchased for him on margin; that plaintiff demanded delivery of the certificates and offered to pay the balance of the purchase-price, but defendants refused to deliver the stock or any part thereof; that the value fluctuates greatly, and is continually changing; and that an action at law would not give plaintiff adequate relief — did not state facts sufficient to justify specific performance. Morrison *v.* Chapman, 63 Misc. 195, 116 N. Y. Suppl. 522. And see Dingwall *v.* Chapman, 63 Misc. 193, 116 N. Y. Suppl. 520.

Pennsylvania.— Rigg *v.* Reading, etc., R. Co., 191 Pa. St. 298, 43 Atl. 212. See the preceding note.

United States.—Hyer *v.* Richmond Traction Co., 168 U. S. 471, 18 S. Ct. 114, 42 L. ed. 547.

See 44 Cent. Dig. tit. "Specific Performance," § 203.

Review of authorities.— In Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404, specific performance was refused because there was no evidence that plaintiff had any wish to become owner of the stock in question rather than any other stock of equal value, or a sum of money. In Rigg *v.* Reading, etc., R. Co., 191 Pa. St. 298, 304, 43 Atl. 212, the court says: "But it was not intended to hold [in Foll's Appeal, 91 Pa. St. 437] that there was no certainty as to price, except when established by a stock board or auctioneer's sale. The value of a corporation's stock not listed or otherwise offered at public sale depends upon the value of the franchise, improvements, and earning power, present and future, of the corporate property. There is no inadequacy of remedy at law because of mere conflict of testimony as to value; in all such cases, proximate truth or fact is deducible from evidence. Not so with the value of a picture, heir-loom, ancient manuscript or the like." In Hyer *v.* Richmond Traction Co., 168 U. S. 471, 18 S. Ct. 114, 42 L. ed. 547, also, it was said that the value of stock may be estimated from the present value of the franchise. Later cases, both in New York and Pennsylvania, seem to have returned to the less stringent test. See *supra*, note 37.

Where the stock has never been sold and hence has no market value whatever, an action for damages at law is an inadequate remedy. Selover *v.* Isle Harbor Land Co., 91 Minn. 451, 98 N. W. 344. *Contra*, Butler *v.* Wright, 103 N. Y. App. Div. 463, 93 N. Y. Suppl. 113 [*reversed* on other grounds in 186 N. Y. 259, 78 N. E. 1002].

39. *California.*—Sherwood *v.* Wallin, 1 Cal. App. 532, 82 Pac. 566.

Missouri.— O'Neill *v.* Webb, 78 Mo. App. 1.

New York.— See Scruggs *v.* Cotterill, 67 N. Y. App. Div. 583, 73 N. Y. Suppl. 882. *Contra*, Butler *v.* Wright, 103 N. Y. App. Div. 463, 93 N. Y. Suppl. 113 [*reversed* on other grounds in 186 N. Y. 259, 78 N. E. 1002].

Pennsylvania.— Rumsey *v.* New York, etc., R. Co., 203 Pa. St. 579, 53 Atl. 495.

West Virginia.— Bumgardner *v.* Leavitt, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776.

United States.— Perin *v.* Megibben, 53 Fed. 86, 3 C. C. A. 443 [*affirming* 49 Fed. 183].

But where the control of a public corporation is sought, some courts, on grounds of public policy, have refused to enforce the contract, whether or not the contract was actually illegal. Ryan *v.* McLane, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501; Foll's Appeal, 91 Pa. St. 434, 36 Am. Rep. 671. See *infra*, IV, D, 9, a.

40. Duncuft *v.* Albrecht, 12 Sim. 189, 35 Eng. Ch. 162, 59 Eng. Reprint 1104. See also the early cases: Colt *v.* Netervill, 2

5. Government Bonds and Stocks. Both in England and in this country an agreement to sell government bonds or stocks will not be enforced specifically, since such securities are always for sale and their prices known.[41]

6. Where Damages Are Conjectural — a. In General. It is also a ground of jurisdiction to decree specific performance that there is no basis on which a jury can estimate the damages,[42]

b. Delivery in Instalments. A contract for the sale of articles to be delivered in instalments extending over a considerable time has been thought to fall within this principle; but the *dicta* to that effect have been severely criticized.[43]

c. Sale of a Debt. Where the amount that can be realized against the debtor is conjectural, because of his insolvency or for other reasons, a contract to sell or purchase a debt is one which may be specifically enforced.[44]

d. Annuities. An agreement to sell an annuity may be specifically enforced,

P. Wms. 304, 24 Eng. Reprint 741; Gardener *v.* Pullen, 2 Vern. Ch. 394, 23 Eng. Reprint 853.

In Massachusetts *dicta* in a few early cases follow the English rule. Holmes *v.* Winchester, 133 Mass. 140; Leach *v.* Fobes, 11 Gray 506, 71 Am. Dec. 732. But see in accord with the prevailing American rule *dicta* in New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679.

41. Mossman *v.* Schulter, 5 Ohio Dec. (Reprint) 404, 5 Am. L. Rec. 425; Rollins Inv. Co. *v.* George, 48 Fed. 776 (city bonds); Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, 4 Woolw. 26; Cappur *v.* Harris, Bunb. 135; Cud *v.* Rutter, 1 P. Wms. 570, 5 Vin. Abr. 538, pl. 21, 24 Eng. Reprint 521.

But it is held in England that the bill lies where it prays for the delivery of certificates which give the legal title to the stock. Doloret *v.* Rothschild, 2 L. J. Ch. O. S. 125, 1 Sim. & St. 590, 24 Rev. Rep. 243, 1 Eng. Ch. 590, 57 Eng. Reprint 233.

42. See *supra*, II, B, 2, f; *infra*, II, B, 6, c, d; St. Regis Paper Co. *v.* Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967; Pelmer *v.* Graham, 1 Pars. Eq. Cas. (Pa.) 476 (agreement to surrender appliances of a trade and its good-will); Stuart *v.* Pennis, 91 Va. 688, 22 S. E. 509; Summers *v.* Bean, 13 Gratt. (Va.) 404 (purchase of slaves during the life or widowhood of the vendor); Oakford *v.* Hackley, 92 Fed. 38 (uncertain royalties on a mining lease). Stuart *v.* Pennis, *supra*, was a case of the sale of all the growing timber of a certain kind on a specified tract. Damages were impossible of ascertainment because it was impossible for plaintiff to count the trees. St. Regis Paper Co. *v.* Santa Clara Lumber Co., *supra*, involved the sale of a certain quantity of pulp wood annually from a certain tract. The possibilities of destruction of the timber by fire or the taking of the land by the state in the exercise of eminent domain prevented an accurate computation of the damages.

43. Furman *v.* Clark, 11 N. J. Eq. 306; St. Regis Paper Co. *v.* Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967 (to deliver to plaintiff annually a fixed quantity of pulp wood; but the decision also rested on the ground that a right in connection with land was involved); Stuart *v.* Pennis, 91 Va. 688, 22 S. E. 509 (sale of growing trees; but contract may also be viewed as one for a sale of an interest in land); Taylor *v.* Neville [*cited* in Buxton *v.* Lister, 3 Atk. 383, 384, 26 Eng. Reprint 1020].

This view is criticized in Pollard *v.* Clayton, 1 Jur. N. S. 342, 1 Kay & J. 462, 3 Wkly. Rep. 349, 69 Eng. Reprint 540; Fry Spec. Perf. (3d ed.) 39, 40. In Fothergill *v.* Rowland, L. R. 17 Eq. 132, 140, 43 L. J. Ch. 252, 29 L. T. Rep. N. S. 414, 22 Wkly. Rep. 42, Jessel, M. R., remarks: "To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years . . . is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practise on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing."

Other contracts lasting over a long period. — A contract to give plaintiff, owner of a grain elevator, the handling of all through grain carried by defendant railroad, and pay a specified commission per bushel, was not specifically enforced, since plaintiff's damages could easily be computed by ascertaining the amount of grain carried by defendant. Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422. And a contract to ship a certain percentage of defendant's freight over plaintiff's road presented a case where the damages could be computed from data easily accessible. Lone Star Salt Co. *v.* Texas Short Line R. Co., 99 Tex. 434, 90 S. W. 863, 3 L. R. A. N. S. 828.

44. Gottschalk *v.* Stein, 69 Md. 51, 13 Atl. 625; Cutting *v.* Dana, 25 N. J. Eq. 265; Adderley *v.* Dixon, 2 L. J. Ch. O. S. 103, 1 Sim. & St. 607, 24 Rev. Rep. 254, 1 Eng. Ch. 607, 57 Eng. Reprint 239; Wright *v.* Bell, 5 Price 325.

But a contract for the purchase of a mortgage will not be specifically enforced when it is not shown that the claim is doubtful, the debtor irresponsible, or the mortgage security insufficient, so that plaintiff has not an adequate remedy at law. Lochman *v.* Meehan, 21 N. Y. Suppl. 389 [*affirmed* in 142 N. Y. 666, 37 N. E. 570].

since the amount involved, depending upon the uncertain duration of a life, is wholly conjectural.[45]

7. Where Defendant Is a Quasi-Trustee. If the person holding the chattel occupies a fiduciary relation toward plaintiff as agent, trustee, or the like, with reference to the chattel, specific performance or delivery will be enforced, even though the chattel is of a sort that can readily be procured elsewhere.[46]

8. Where Defendant Is Insolvent. The fact that damages cannot be collected because of defendant's insolvency is mentioned in a few cases as a ground for relief, but in very few of them has it been the only ground.[47]

9. Where There Is Jurisdiction Over Part of Subject-Matter. Where part of an entire contract relates to personal property, and the rest to a subject-matter, such as land, over which the jurisdiction is ordinarily exercised, specific performance may be had of the contract as a whole, including the clause relating to personal property.[48]

45. Pritchard *v.* Ovey, 1 Jac. & W. 396, 21 Rev. Rep. 195, 37 Eng. Reprint 426; Aubin *v.* Holt, 2 Kay & J. 66, 25 L. J. Ch. 36, 69 Eng. Reprint 696; Withey *v.* Cottle, 1 L. J. Ch. O. S. 117, 1 Sim. & St. 174, 1 Eng. Ch. 174, 57 Eng. Reprint 70, Turn. & R. 78, 12 Eng. Ch. 78, 37 Eng. Reprint 1024; Kenney *v.* Wexham, 6 Madd. 355, 56 Eng. Reprint 1126.

An agreement to pay an annuity is a proper subject for specific performance. Harris *v.* Parry, 215 Pa. St. 174, 64 Atl. 334; Mutual L. Ins. Co. *v.* Blair, 130 Fed. 971.

46. *Colorado.*— Henderson *v.* Johns, 13 Colo. 280, 22 Pac. 461.

New York.— Johnson *v.* Brooks, 93 N. Y. 337 [*affirming* 46 N. Y. Super. Ct. 13].

Oregon.— Livesley *v.* Heise, 45 Oreg. 148, 76 Pac. 952; Livesley *v.* Johnston, 45 Oreg. 30, 76 Pac. 946, 106 Am. St. Rep. 647, 65 L. R. A. 783. In the latter case a buyer advanced money to defendant for the cultivation of his crop and took a lien thereon; it was held that plaintiff became a quasi-trustee for the buyer, and specific performance was decreed partly on that ground and partly on the ground of defendant's insolvency.

Pennsylvania.— McGowin *v.* Remington, 12 Pa. St. 56, 51 Am. Dec. 584.

United States.— Krohn *v.* Williamson, 62 Fed. 869.

England.— Pooley *v.* Budd, 14 Beav. 34, 51 Eng. Reprint 200; Wood *v.* Rowcliffe, 3 Hare 304, 25 Eng. Ch. 304, 67 Eng. Reprint 397 [*affirmed* in 2 Phil. 382, 17 L. J. Ch. 83, 11 Jur. 915, 22 Eng. Ch. 382, 41 Eng. Reprint 990]; Fells *v.* Read, 3 Ves. Jr. 70, 30 Eng. Reprint 899.

An agreement by a fiduciary to account may be specifically enforced. Ball, etc., Fastener Co. *v.* Ball Glove Fastening Co., 58 Fed. 818, 7 C. C. A. 498.

47. *Illinois.*— Parker *v.* Garrison, 61 Ill. 250. And see Tiernan *v.* Granger, 65 Ill. 351.

Massachusetts.— Clark *v.* Flint, 22 Pick. 231, 33 Am. Dec. 733, insolvency alone.

New Jersey.— See Rothholz *v.* Schwartz, 46 N. J. Eq. 477, 19 Atl. 312, 19 Am. St. Rep. 409, a suit by vendor of chattels where the remedy at law was inadequate because defendant has no property outside of the goods sold, and pending suit might move them beyond the jurisdiction.

Oregon.— Brett *v.* Warnick, 44 Oreg. 511, 75 Pac. 1061, 102 Am. St. Rep. 639.

United States.— McNamara *v.* Home Land, etc., Co., 105 Fed. 202.

England.— *Ex p.* Masterman, 1 Deac. & C. 751, 4 L. J. Bankr. 54, 2 Mont. & A. 209.

Insolvency is not alone a ground for specific performance, but insolvency combined with some other cause for equitable interposition may become a potent or even controlling factor. Ridenbaugh *v.* Thayer, 10 Ida. 662, 80 Pac. 229 (a contract to deliver certain wood, where, if the wood were not delivered, it would be lost through the breaking of a boom); Livesley *v.* Heise, 45 Oreg. 148, 76 Pac. 952 (where defendant by the contract became a quasi-trustee for plaintiff); Livesley *v.* Johnston, 45 Oreg. 30, 76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783. And see Hendry *v.* Whidden, 48 Fla. 268, 37 So. 571; Gillett *v.* Warren, 10 N. M. 523, 62 Pac. 975.

Insolvency is a statutory ground in Maryland. Acts (1888), p. 415, c. 263 (Code Pub. Gen. Laws, art. 16, § 199) provide that specific performance shall not be refused on the ground of an adequate remedy in damages, unless the resisting party shows property from which the damages may be made, and gives a prescribed bond. Neal *v.* Parker, 98 Md. 254, 57 Atl. 213.

Defendant's insolvency ground for refusing specific performance.—A strong reason against admitting defendant's insolvency as a ground of jurisdiction is that such a rule results in making plaintiff in the suit against the insolvent a preferred creditor. For this reason a number of cases have taken a different view of defendant's insolvency from that stated in the text, and have made it a reason for refusing specific performance, in a case where it would have been granted against a solvent defendant. City F. Ins. Co. *v.* Olmstead, 33 Conn. 476; Chafee *v.* Sprague, 16 R. I. 189, 13 Atl. 121; Rountree *v.* McLain, 20 Fed. Cas. No. 12,084*a*, Hempst. 245.

In Virginia, by statute (Code, § 2907), detinue is made an adequate remedy in case of defendant's insolvency, since on plaintiff's affidavit of such insolvency the clerk of the court is required to issue an order to seize the property. Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223.

48. *California.*— Fleishman *v.* Woods, 135

10. Jurisdiction Taken Because Defendant Entitled to the Remedy — a. In General. Although the substantial relief actually sought by plaintiff is a recovery of money, still, if the subject-matter of the contract is such that defendant may have it specifically enforced against plaintiff, then plaintiff is entitled to specific performance against defendant, since upon a contract mutually binding "there ought to be mutual remedies." [49]

b. Vendor of Lands. Chiefly upon this ground it is the rule in nearly all jurisdictions that specific performance may be had at the suit of the vendor of lands, the vendee being decreed to accept the deed and pay the purchase-price.[50]

Cal. 256, 67 Pac. 276 (land and shares of stock); Duff *v.* Fisher, 15 Cal. 375.

Massachusetts.— Leach *v.* Fobes, 11 Gray 506, 71 Am. Dec. 732, land and shares of stock.

Pennsylvania.— McGowin *v.* Remington, 12 Pa. St. 56, 51 Am. Dec. 584, chattels of peculiar value and ordinary chattels which were part of the subject-matter of the transaction.

Vermont.— Fowler *v.* Sands, 73 Vt. 236, 50 Atl. 1067, house and furniture.

Virginia.— Clarke *v.* Curtis, 11 Leigh 559, 37 Am. Dec. 625.

Washington.— Young *v.* Porter, 27 Wash. 551, 68 Pac. 362.

United States.— Brown *v.* Smith, 109 Fed. 26 (plantation with stock, implements, and supplies); Perin *v.* Megibben, 53 Fed. 86, 3 C. C. A. 443 [*affirming* 49 Fed. 183] (stock and real estate of a corporation).

England.— Marsh *v.* Milligan, 3 Jur. N. S. 979; Nuthrown *v.* Thornton, 10 Ves. Jr. 159, 32 Eng. Reprint 805.

Money recovered by way of complete relief see *supra*, II, B, 1, c.

49. Lewis *v.* Lechmere, 10 Mod. 503, 88 Eng. Reprint 828. The validity of this principle, although supported by innumerable *dicta*, has sometimes been denied, and the cases attributed to it referred to other grounds. See *infra*, II, B, 10, b, note.

50. *Georgia.*— Jackens *v.* Nicholson, 70 Ga. 198; Forsyth *v.* McCauley, 48 Ga. 402.

Illinois.— Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761; Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53.

Indiana.— Migatz *v.* Stieglitz, 166 Ind. 361, 77 N. E. 400; Conwell *v.* Claypool, 8 Blackf. 124.

Kentucky.— McKee *v.* Beall, 3 Litt. 190.

Louisiana.— Robinson Mineral Spring Co. *v.* De Bautte, 50 La. Ann. 1281, 23 So. 865.

Maryland.— Maryland Clay Co. *v.* Simpers, 96 Md. 1, 53 Atl. 424; Maryland Constr. Co. *v.* Kuper, 90 Md. 529, 45 Atl. 197.

Massachusetts.— Staples *v.* Mullen, 196 Mass. 132, 81 N. E. 877; Revere Water Co. *v.* Winthrop, 192 Mass. 455, 78 N. E. 497 (sale of water company's "plant"); Conley *v.* Finn, 171 Mass. 70, 50 N. E. 460; Jones *v.* Newhall, 115 Mass. 244, 15 Am. Rep. 97; Old Colony R. Corp. *v.* Evans, 6 Gray 25, 66 Am. Dec. 394; Hilliard *v.* Allen, 4 Cush. 532.

Minnesota.—Freeman *v.* Paulson, 107 Minn. 64, 119 N. W. 651.

Mississippi.— Dollahite *v.* Orne, 2 Sm. & M. 590.

Missouri.— Paris *v.* Haley, 61 Mo. 453.

New Jersey.— Moore *v.* Baker, 62 N. J. Eq. 208, 49 Atl. 836; Hopper *v.* Hopper, 16 N. J. Eq. 147.

New York.— Rindge *v.* Baker, 57 N. Y. 209, 15 Am. Rep. 475; Crary *v.* Smith, 2 N. Y. 60; Viele *v.* Troy, etc., R. Co., 21 Barb. 381 [*affirmed* in 20 N. Y. 184] (award); Boehly *v.* Mansing, 52 Misc. 382, 102 N. Y. Suppl. 171; Lighton *v.* Syracuse, 48 Misc. 134, 96 N. Y. Suppl. 692 [*affirmed* in 112 N. Y. App. Div. 589, 98 N. Y. Suppl. 792]; Brown *v.* Haff, 5 Paige 235, 28 Am. Dec. 425; Bouck *v.* Wilber, 4 Johns. Ch. 405; McWhorter *v.* McMahan, Clarke 400.

North Carolina.— Springs *v.* Sanders, 62 N. C. 67; White *v.* Hooper, 59 N. C. 152.

South Carolina.— Hammond *v.* Foreman, 48 S. C. 175, 26 S. E. 212; Gregorie *v.* Bulow, Rich. Eq. Cas. 235.

Washington.—Anderson *v.* Wallace Lumber, etc., Co., 30 Wash. 147, 70 Pac. 247. And see Wiley *v.* Verhaest, 52 Wash. 475, 100 Pac. 1008.

Wisconsin.— Curtis Land, etc., Co. *v.* Interior Land Co., 137 Wis. 341, 118 N. W. 853; Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

United States.— Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120; Raymond *v.* San Gabriel Valley, etc., Co., 53 Fed. 883, 4 C. C. A. 89; McConville *v.* Howell, 17 Fed. 104, 5 McCrary 319 (vendor may sue vendee who has accepted option to purchase); Bronson *v.* Cahill, 4 Fed. Cas. No. 1,926, 4 McLean 19.

England.— Walker *v.* Eastern Counties R. Co., 6 Hare 594, 12 Jur. 787, 5 R. & Can. Cas. 469; 31 Eng. Ch. 594, 67 Eng. Reprint 1300; Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331, 24 L. J. Ch. 601, 3 Wkly. Rep. 609, 10 Eng. Reprint 928; Lewis *v.* Lechmere, 10 Mod. 503, 88 Eng. Reprint 828.

See 44 Cent. Dig. tit. "Specific Performance," § 197.

Damages an inadequate remedy to vendor.— It is sometimes urged as an explanation of the rule of the text that the vendor's remedy at law is inadequate, since it consists in the recovery of damages, often more or less conjectural because of the frequent difficulty of proving the actual value of land, representing the difference between the stipulated price and the market value of the land; whereas in equity the complainant recovers the whole purchase-money. Fry Spec. Perf. § 23; Hodges *v.* Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Maryland Clay Co. *v.* Simpers, 96 Md. 1, 53 Atl. 424; Old Colony R. Corp. *v.* Evans, 6

And on the same ground the relief by specific performance is given to a vendor of leasehold interests,[51] or of an undivided interest.[52] In a few states, where the general jurisdiction of equity is restricted by statute to cases where the legal remedy is inadequate, it has been held that a vendor of land cannot sue for specific performance unless he shows that for some reason he has no adequate remedy at law.[53] By the practice in many states, the decree is in the alternative, that if the vendee refuses to accept a conveyance and pay the purchase-price, the land shall be sold to satisfy the vendor's so-called "lien," and that execution shall issue for any unsatisfied balance of the purchase-money remaining after the sale of the land.[54]

c. Vendor of Chattels, Etc. Specific performance may also be had in many jurisdictions of contracts for the sale of chattels,[55] things in action, etc., in those

Gray (Mass.) 25, 66 Am. Dec. 394; Eckstein *v.* Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404; Johnston *v.* Wadsworth, 24 Oreg. 494, 34 Pac. 13; Finley *v.* Aiken, 1 Grant (Pa.) 83; Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331, 360, 377, 24 L. J. Ch. 601, 3 Wkly. Rep. 609; Lewis *v.* Lechmere, 10 Mod. 503, 88 Eng. Reprint 828. One objection to this reason is, that it would apply with equal reason to nearly all contracts for the sale and purchase of ordinary chattels and render them a subject of equity jurisdiction. Another objection is, that it would not apply to the numerous cases in this country, where notes for the purchase-money have been given, and where the remedy at law upon the notes would seem to be complete. Paris *v.* Haley, 61 Mo. 453, 458. Other reasons why the vendor's legal remedy is inadequate are stated in Gregorie *v.* Bulow, Rich. Eq. Cas. (S. C.) 235. A city contracted to purchase plaintiff's waterworks at a price named on their productive worth to be determined by appraisers. An action at law for the price was not an adequate remedy: (1) Because it would involve an accounting of the income and expenses of the company, which a court of equity is alone competent to take; and (2) because the company could not abandon the works and bring its action at law, since that would be against public interest. Castle Creek Water Co. *v.* Aspen, 146 Fed. 8, 76 C. C. A. 516.

The doctrine of "equitable conversion," by which the vendee is deemed a "trustee" of the purchase-price for the vendor, while the vendor's position has analogies to that of trustee of the land, in some respects, and to that of a mortgagee, in many respects, furnishes a further reason for the rule. Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331, 24 L. J. Ch. 601, 3 Wkly. Rep. 609, 10 Eng. Reprint 928; Lewis *v.* Lechmere, 10 Mod. 503, 88 Eng. Reprint 828. But the doctrine of equitable conversion not applying to a contract for the sale of chattels, it furnishes no explanation of the numerous cases which enforce specific performance of such contracts. It is more accurate to consider equitable conversion as springing from the right to specific performance than as giving rise to that right. See Pooley *v.* Budd, 14 Beav. 34, 51 Eng. Reprint 200.

51. Covert *v.* Brinkerhoff, 41 Misc. (N. Y.) 230, 84 N. Y. Suppl. 4.

52. Young *v.* Collier, 31 N. J. Eq. 444.

53. Porter *v.* Frenchman Bay, etc., Land, etc., Co., 84 Me. 195, 24 Atl. 814 (specific performance only on allegations showing lack of adequate remedy at law); Smaltz's Appeal, 99 Pa. St. 310; Dech's Appeal, 57 Pa. St. 467; Kauffman's Appeal, 55 Pa. St. 383. But see Larison *v.* Burt, 4 Watts & S. (Pa.) 27 (holding that the vendor is entitled to specific performance where he has performed so much of his part of the agreement that he cannot be put *in statu quo*); Dalzell *v.* Crawford, 1 Pars. Eq. Cas. (Pa.) 37, 2 Pa. L. J. 17 (legal remedy inadequate, where price payable in instalments).

Under such a restrictive statute specific performance was refused to the vendor of a contract by which the vendee was to pay instalments of the purchase-money, and the vendor to convey a proportionate part of the property, since the remedy at law would be the same as in equity, and not a mere recovery of damages. Jones *v.* Newhall, 115 Mass. 244, 15 Am. Rep. 97.

Apart from such a statute, it has been held that the contract of a bidder at a foreclosure sale should not be enforced by an action but by a motion to complete the sale, which is, in substance, a summary process to compel specific performance. Burton *v.* Linn, 21 N. Y. App. Div. 609, 47 N. Y. Suppl. 835; Miller *v.* Collyer, 36 Barb. (N. Y.) 250.

54. *Illinois.*— Robinson *v.* Appleton, 124 Ill. 276, 15 N. E. 761; Corpus *v.* Teed, 69 Ill. 205; Burger *v.* Potter, 32 Ill. 66; Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53.

Michigan.— Loveridge *v.* Shurtz, 111 Mich. 618, 70 N. W. 132.

Minnesota.—Abbott *v.* Moldestad, 74 Minn. 293, 77 N. W. 227, 73 Am. St. Rep. 348.

Missouri.— Paris *v.* Haley, 61 Mo. 453.

Nebraska.— Hendrix *v.* Barker, 49 Nebr. 369, 68 N. W. 531.

New York.— State *v.* Sheridan, Clarke 533.

Virginia.—Wade *v.* Greenwood, 2 Rob. 474, 40 Am. Dec. 759.

Washington.—Anderson *v.* Wallace, etc., Mfg. Co., 30 Wash. 147, 70 Pac. 247, decree may be for collection of the money from any of defendant's property, or order of sale as upon execution.

55. Young *v.* Collier, 31 N. J. Eq. 444 and cases cited in the following notes. *Contra*, Anderson *v.* Olsen, 188 Ill. 502, 59 N. E. 239 [*affirming* 90 Ill. App. 189]; Eckstein *v.*

instances where the vendee, if plaintiff, might have enforced a similar remedy. Such relief has been given in the cases of sale of judgments,[56] stock,[57] patents,[58] copyrights,[59] annuities,[60] debts,[61] and a bond and mortgage.[62]

11. Legal Remedy Inadequate For Various Reasons — a. Contract to Indemnify. Agreements to indemnify plaintiff have been enforced specifically.[63]

b. To Pay Off a Lien. Agreements to pay off a lien by mortgage, judgment, or otherwise, held by a third person on plaintiff's property or on property contracted to be conveyed, have been enforced.[64]

c. To Give a Mortgage or Other Security. The courts have frequently enforced agreements to give a mortgage. An agreement to give a mortgage of land [65]

Downing, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404, since by statute equity jurisdiction depends on inadequacy of the legal remedy.

A vendor of a stock of goods could maintin his bill on the ground of the inadequacy of his legal remedy, where the vendee had no property outside of the goods sold and pending suit might move them beyond the jurisdiction. Rothholz *v.* Schwartz, 46 N. J. Eq. 477, 19 Atl. 312, 19 Am. St. Rep. 409.

56. Phillips *v.* Berger, 8 Barb. (N. Y.) 527 [*affirming* 2 Barb. 608].

57. *Illinois.*— Hills *v.* McMunn, 232 Ill. 488, 83 N. E. 963.

North Carolina.—Austin *v.* Gillaspie, 54 N. C. 261.

West Virginia.— Bumgardner *v.* Leavitt, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776. *Contra,* Hissam *v.* Parish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892.

United States.— Perin *v.* McGibben, 53 Fed. 86, 3 C. C. A. 443 [*affirming* 49 Fed. 183].

England.— Cheale *v.* Kenward, 3 De G. & J. 27, 27 L. J. Ch. 784, 4 Jur. N. S. 984, 6 Wkly. Rep. 810, 60 Eng. Ch. 21, 44 Eng. Reprint 1179.

Contra.— Noyes *v.* Marsh, 123 Mass. 286.

58. Cogent *v.* Gibson, 33 Beav. 557, 55 Eng. Reprint 485. *Contra,* Anderson *v.* Olsen, 188 Ill. 502, 59 N. E. 239 [*affirming* 90 Ill. App. 189].

59. Thombleson *v.* Black, 1 Jur. 198.

60. Withy *v.* Cottle, 1 L. J. Ch. O. S. 117, 1 Sim. & St. 174, 1 Eng. Ch. 174, 57 Eng. Reprint 70, Turn. & R. 78, 12 Eng. Ch. 78, 37 Eng. Reprint 1024; Kenney *v.* Wexham, 6 Madd. 355, 56 Eng. Reprint 1126.

61. Adderley *v.* Dixon, 2 L. J. Ch. O. S. 103, 1 Sim. & St. 607, 24 Rev. Rep. 254, 1 Eng. Ch. 607, 57 Eng. Reprint 239.

62. Law *v.* Smith, 68 N. J. Eq. 81, 59 Atl. 327.

63. *Delaware.*— Reybold *v.* Herdman, 2 Del. Ch. 34.

Georgia.— Shockley *v.* Davis, 17 Ga. 177, 63 Am. Dec. 233.

Indiana.— Chamberlain *v.* Blue, 6 Blackf. 491.

New York.— Champion *v.* Brown, 6 Johns. Ch. 398, 404, 10 Am. Dec. 343, where it is said: "Equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the Court entertains bills *quia timet.*"

Tennessee.—Wilson *v.* Davidson County, 3 Tenn. Ch. 536.

England.— Pember *v.* Mathers, 1 Bro. Ch. 52, 28 Eng. Reprint 979, Dick. 550, 21 Eng. Reprint 384; Anglo-Australian L. Assur. Co. *v.* British Provident Life, etc., Soc., 3 Giff. 521, 66 Eng. Reprint 515, 4 De G. F. & J. 341, 8 Jur. N. S. 628, 6 L. T. Rep. N. S. 517, 10 Wkly. Rep. 588, 65 Eng. Ch. 264, 45 Eng. Reprint 1215; Ranelagh *v.* Hayes, 1 Vern. Ch. 189, 23 Eng. Reprint 405.

Canada.— Horsman *v.* Burke, 4 Manitoba 245.

Contra.— On the ground of the adequacy of the legal remedy. Pierce *v.* Plumb, 74 Ill. 326; Foote *v.* Garland, Sm. & M. Ch. (Miss.) 95; Hoy *v.* Hansborough, Freem. (Miss.) 533.

64. Reilley *v.* Roberts, 34 N. J. Eq. 299; Malins *v.* Brown, 4 N. Y. 403; Bennett *v.* Abrams, 41 Barb. (N. Y.) 619; Weir *v.* Mundell, 3 Brewst. (Pa.) 594. *Contra,* Blood *v.* Crew Levick Co., 171 Pa. St. 339, 33 Atl. 348, on the ground that the remedy at law was adequate.

65. *Arkansas.*— Lowe *v.* Walker, 77 Ark. 103, 91 S. W. 22.

Georgia.— Storey *v.* Weaver, 66 Ga. 296, security deed.

Michigan.— Fletcher *v.* Hagerman, 120 Mich. 466, 79 N. W. 690; Hicks *v.* Turck, 72 Mich. 311, 40 N. W. 339.

Minnesota.— Irvine *v.* Armstrong, 31 Minn. 216, 17 N. W. 343.

New Jersey.— Clark *v.* Van Cleef, (Ch. 1908) 71 Atl. 260; Dean *v.* Anderson, 34 N. J. Eq. 496.

New York.— De Pierres *v.* Thorn, 4 Bosw. 266.

Ohio.— Ogden *v.* Ogden, 4 Ohio St. 182.

Pennsylvania.— Morris *v.* McCutcheon, 213 Pa. St. 349, 62 Atl. 982; Corkin *v.* Blake, 4 Phila. 10.

England.— Hermann *v.* Hodges, L. R. 16 Eq. 18, 43 L. J. Ch. 192, 21 Wkly. Rep. 571; Ashton *v.* Corrigan, L. R. 13 Eq. 76, 41 L. J. Ch. 96.

See 44 Cent. Dig. tit. "Specific Performance," § 212. And see Mortgages, 27 Cyc. 985.

Specific performance is necessary in such cases, not only because the contract affects the realty, but because the agreement for security *ipso facto* shows that plaintiff was unwilling to trust to defendant's personal responsibility, and to deprive him of the security bargained for is to leave him to a

or chattels [66] creates an equitable lien, and specific performance of the agreement may be decreed against the contracting party or his creditors.[67]

d. To Insure. An agreement to issue a policy of insurance may be specifically enforced,[68] although the loss has already occurred; and in the latter case, the court, having acquired jurisdiction of the cause, will retain it for the purpose of adjusting the loss and awarding damages.[69]

e. Various Contracts Relating to Judgments. The agreement of a judgment creditor of a third person, for a consideration, to satisfy and discharge his judgment, is capable of specific enforcement; [70] and the same is true of an agreement to apply on a judgment debt uncertain and unascertained items of set-off,[71] or to accept chattels in satisfaction of a judgment at an agreed valuation, and credit them on the judgment.[72]

remedy to which he was unwilling to trust. Dean *v.* Anderson, 34 N. J. Eq. 496.

Specific performance of a contract to secure a debt by mortgage is not a matter of course, but plaintiff must show facts calling for equitable interposition in the given case. Brown *v.* E. Van Winkle Gin, etc., Works, 141 Ala. 580, 39 So. 243, 6 L. R. A. N. S. 585. In this case the mortgage, if it had been made, would be overdue, so that the bill was substantially merely a bill to collect a debt.

66. *Connecticut.*— City F. Ins. Co. *v.* Olmsted, 33 Conn. 476.

Maryland.—Alexander *v.* Ghiselin, 5 Gill 138.

Nebraska.— Ryan *v.* Donley, 69 Nebr. 623, 96 N. W. 234; Sporer *v.* McDermott, 69 Nebr. 533, 96 N. W. 232, 659.

New York.— Hale *v.* Omaha Nat. Bank, 49 N. Y. 626, 634.

Pennsylvania.— Morris *v.* McCutcheon, 213 Pa. St. 349, 62 Atl. 982.

Rhode Island.— Chafee *v.* Sprague, 16 R. I. 189, 13 Atl. 121.

Canada.— Jones *v.* Brewer, 1 N. Brunsw. 620.

Contra.— Glesenkamp *v.* Radel, 10 Ohio S. & C. Pl. Dec. 559, 8 Ohio N. P. 276.

An agreement to give a pledge of chattels as security for plaintiff's advances, it is held, may be enforced, wherever violation of the agreement cannot be correctly estimated in damages. Sullivan *v.* Tuck, 1 Md. Ch. 59.

67. Alexander *v.* Ghiselin, 5 Gill (Md.) 138.

An agreement to pledge all one's estate to a trustee to secure certain creditors was enforced in Morris *v.* McCutcheon, 213 Pa. St. 349, 62 Atl. 982.

68. **Fire or marine insurance.**— Chase *v.* Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595; Lightbody *v.* North American Ins. Co., 23 Wend. (N. Y.) 18, 25; Mead *v.* Davidson, 3 A. & E. 303, 308, 1 H. & W. 156, 4 L. J. K. B. 193, 4 N. & M. 701, 30 E. C. L. 153. See FIRE INSURANCE, 19 Cyc. 597, 898 note 34.

Life insurance.— Hughes *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 111. *Contra*, Nestel *v.* Knickerbocker L. Ins. Co., 12 Phila. (Pa.) 477.

69. **Fire or marine insurance.**— Security F. Ins. Co. *v.* Kentucky M. & F. Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; Franklin F. Ins. Co. *v.* Taylor, 52 Miss. 441; Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371; Carpenter *v.* Mut. Safety Ins. Co., 4 Sandf. Ch. (N. Y.) 408; Palm *v.* Medina County Mut. F. Ins. Co., 20 Ohio 529; Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. (Va.) 362, 31 Am. Rep. 732; Croft *v.* Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636 (marine insurance); Tayloe *v.* Merchants' F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187 (leading case). See 44 Cent. Dig. tit. "Specific Performance," § 213.

Life insurance.— Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96; Hebert *v.* Mut. L. Ins. Co., 12 Fed. 807, 8 Sawy. 198.

Reasons given for the rule are that in an action at law plaintiff would recover only nominal damages for the failure to issue the policy (Carpenter *v.* Mutual Safety Ins. Co., 4 Sandf. Ch. (N. Y.) 408); and that proceedings at law, if loss has occurred, would be more complicated and embarrassing than upon the policy (Tayloe *v.* Merchants F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187).

Contract to issue policy must be clearly proved.— Neville *v.* Merchants', etc., Mut. Ins. Co., 19 Ohio 452; Suydam *v.* Columbus Ins. Co., 18 Ohio 459.

Agreement to renew not shown see Dodd *v.* Home Mut. Ins. Co., 22 Oreg. 3, 28 Pac. 881, 29 Pac. 3.

Failure to disclose loss.—Where insured property is burned on the day that the policy expires, and the assured, without disclosing the fact of the loss, sends the policy to the company for the purpose of procuring an indorsement showing a renewal, a court of equity will not enforce the delivery of the policy. Dodd *v.* Home Mut. Ins. Co., 22 Oreg. 3, 28 Pac. 881, 29 Pac. 3.

70. Phillips *v.* Berger, 8 Barb. (N. Y.) 527 [*affirming* 2 Barb. 608].

To discharge a judgment.—An agreement to discharge a judgment was enforced on the ground that an action for damages would leave the judgment in full force. Brown *v.* Arnold, 131 Fed. 723, 67 C. C. A. 125 [*reversing* 127 Fed. 387].

To discharge judgment lien see *supra*, II, B, 11, b.

71. Kennedy *v.* Davisson, 46 W. Va. 433, 33 S. E. 291.

72. Apperson *v.* Gogin, 3 Ill. App. 48; Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144

f. Contracts Between Husband and Wife. Antenuptial or post-nuptial contracts between husband and wife invalid at law but valid in equity may be specifically enforced, although relating to personal property.[73] And separation agreements have also been enforced.[74]

g. Miscellaneous Contracts. The following contracts, not readily admitting of classification, have been specifically enforced: A contract giving the right of preëmption of a share in a partnership;[75] an agreement to deliver up and cancel certain promissory notes made by plaintiff, although they were overdue and incapable of transfer to his prejudice;[76] a contract for the settlement of pending suits between the parties;[77] an agreement to indorse part payments made by plaintiff on a promissory note not yet due;[78] the contract of a city to convert its coupon bonds into registered bonds at the option of the holder;[79] a creditor's agreement to compromise actions against an estate on payment of a sum of money, such agreement not being a legal defense to such actions;[80] an agreement to consent to the sale of property owned in common by plaintiff and defendant;[81] a contract between an executor and the legatees for a division of the estate, the giving of receipts, and the discharge of the executor;[82] an agreement to levy assessments on the members of a mutual benefit association for the beneficiaries of deceased members;[83] and an agreement to furnish a certain quantity of water necessary for irrigation purposes, regardless of the question whether the contract concerned land or not.[84] Citizens of a city may sue to compel a telephone company to exercise its franchise by operating its plant; the franchise being granted by the city for the citizens' benefit and in consideration of the service to be furnished them, and the remedy at law in behalf of the citizens for the company's breach of contract being inadequate.[85]

C. Awards. As respects the jurisdiction of equity for their enforcement, awards stand upon the same footing as contracts. An award supposes an agreement between the parties, and contains no more than the terms of that agreement as ascertained by a third person.[86] A party may therefore obtain the specific per-

46 Atl. 347, 50 L. R. A. 401; Very *v.* Levy, 13 How. (U. S.) 345, 14 L. ed. 173.

73. *Alabama.*—Andrews *v.* Andrews, 28 Ala. 432.

Kentucky.— Culver *v.* Culver, 8 B. Mon. 128

Maryland.— Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232.

Michigan.— Thompson *v.* Tucker-Osborn, 111 Mich. 470, 69 N W. 730.

New York.— White *v.* White, 20 N. Y. App. Div. 560, 47 N. Y. Suppl. 273.

74. Greenleaf *v.* Blakeman, 25 Misc. (N. Y.) 564, 56 N. Y. Suppl. 76 [*modified* in 40 N. Y. App. Div. 371, 58 N. Y. Suppl. 76] (enforcing contract of husband in separation agreement to secure the payment of an annual allowance to the wife); Gibbs *v.* Harding, L. R. 5 Ch. 336, 39 L. J. Ch. 374, 18 Wkly. Rep. 361 (where an agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement and deed should be borne equally by the husband and the father, was decreed to be specifically performed).

75. Homfray *v* Fothergill, L. R. 1 Eq. 567, 14 L. T. Rep. N. S. 49.

76. Tuttle *v.* Moore, 16 Minn. 123.

To deliver documents, including notes see *supra*, II, B, 2, e.

77. Burton *v.* Landon, 66 Vt. 361, 29 Atl. 374.

78. Kopplin *v.* Kopplin, 8 Tex. Civ. App. 625, 28 S. W. 220.

79. Benwell *v.* Newark, 55 N. J. Eq. 260, 36 Atl. 668. The remedy by an action for damages was inadequate, and the duty to register the bonds being purely contractual, was not enforceable by mandamus.

As to government bonds see *supra*, II, B, 5.

80. Cook *v.* Richardson, 178 Mass. 125, 59 N. E. 675.

81. Biggi *v.* Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141.

82. Norwood *v.* Tyson, 138 Ala. 269, 36 So 370.

83. Covenant Mut. Ben. Assoc. *v.* Sears, 114 Ill. 108, 29 N. E. 480.

84. Colorado Land, etc., Co. *v.* Adams, 5 Colo. App. 190, 37 Pac. 39; Bay City Irr. Co. *v.* Sweeney, (Tex. Civ. App. 1904) 81 S. W. 545.

Easements see *supra*, II, A, 2, b.

Parol easements and licenses see *infra*, V.

85. Cumberland Tel., etc., Co *v.* Hickman, 129 Ky. 220, 111 S. W. 311, 33 Ky L. Rep. 730 See TELEGRAPHS AND TELEPHONES.

86. Ballance *v.* Underhill, 4 Ill. 453; Nickels *v.* Hancock, 7 De G. M. & G. 300, 3 Eq. Rep. 689, 1 Jur. N. S. 1149, 56 Eng. Ch. 232, 44 Eng. Reprint 117; Wood *v* Griffith, 1

formance of an award, whenever he cannot obtain at law all that was intended to be given him by the award,[87] as where the award directs the conveyance or adjusts the boundaries of land,[88] or is for the distributing or partitioning of an estate.[89] On the other hand, an award directing the payment of money merely will not be specifically enforced.[90]

D. Effect of Stipulated Damages or Penalty — 1. PENALTY. As a rule a contract requiring the performance of certain acts, and adding a penalty or forfeitures to secure the performance, will be specifically enforced if the contract is in other respects within the jurisdiction. The court will not suffer the party

Swanst. 43, 36 Eng. Reprint 291, 1 Wils. Ch. 34, 37 Eng. Reprint 16, 18 Rev. Rep. 18. Where, by an arbitration agreement, one party agreed to offset claims found in favor of the adverse party against her husband, against claims found in her favor against the adverse party, her agreement could be specifically enforced. Webb *v.* Parker, 130 N. Y. App. Div. 92, 114 N. Y. Suppl. 489.

That the award has not been made a rule or order of a court is immaterial (Pawling *v.* Jackman, Litt. Sel. Cas. (Ky.) 1; Norton *v.* Mascall, 2 Vern. Ch. 24, 23 Eng. Reprint 626); and it may be enforced in equity notwithstanding the submission has been made a rule of a common-law court (Hawksworth *v.* Brammall, 5 Myl. & C. 281, 46 Eng. Ch. 254, 41 Eng. Reprint 377; Wood *v.* Griffith, 1 Swanst. 43, 36 Eng. Reprint 291, 1 Wils. Ch. 34, 37 Eng. Reprint 16, 18 Rev. Rep. 18. *Contra,* Bubier *v.* Bubier, 24 Me. 42, under the limited equity jurisdiction in Maine).

If the acts done by the arbitrators are void at law, equity will not enforce the award, unless there has been acquiescence or part performance. Raisin *v.* Wood, 1 Del. Ch. 57; Blundell *v.* Brettargh, 17 Ves. Jr. 232, 34 Eng. Reprint 90. *Contra,* Norton *v.* Mascall, 2 Vern. Ch. 24, 23 Eng. Reprint 626.

87. Jones *v.* Blalock, 31 Ala. 180; Kirksey *v.* Fike, 27 Ala. 383, 62 Am. Dec. 768 (in which case the award gave plaintiff personal property which was essential to the prosecution of his business; and a court of law could not look to the loss of profits which plaintiff might sustain by a failure to perform the award in specie); Story *v.* Norwich, etc., R. Co., 24 Conn. 94. See *supra,* II, B, 3, b, note.

Discretion of court see Backus' Appeal, 58 Pa. St. 186.

88. *Kentucky.*— Brown *v.* Burkenmeyer, 9 Dana 159, 33 Am. Dec. 541; Pawling *v.* Jackman, Litt. Sel. Cas. 1.

Maine.— Philbrick *v.* Preble, 18 Me. 255, 36 Am. Dec. 718; McNear *v.* Bailey, 18 Me. 251.

Maryland.— Somerville *v.* Trueman, 4 Harr. & M. 43, 1 Am. Dec. 389.

Massachusetts.— Caldwell *v.* Dickinson, 13 Gray 365 (adjusting boundaries); Penniman *v.* Rodman, 13 Metc. 382; Hodges *v.* Saunders, 17 Pick. 470; Jones *v.* Boston Mill Corp., 6 Pick. 148, 4 Pick. 507, 16 Am. Dec. 358.

Michigan.— Buys *v.* Eberhardt, 3 Mich. 524.

Mississippi.— Memphis, etc., R. Co. *v.* Scruggs, 50 Miss. 284; Cook *v.* Vick, 2 How. 882.

New York.— Maury *v.* Post, 55 Hun 454, 8 N. Y. Suppl. 714 (right of way); Viele *v.* Troy, etc., R. Co., 21 Barb. 381 [*affirmed* in 20 N. Y. 184] (at suit of vendor); Bouck *v.* Wilber, 4 Johns. Ch. 405 (at suit of vendor).

North Carolina.— Thompson *v.* Deans, 59 N. C. 22, adjusting boundaries.

Pennsylvania.— Davis *v.* Havard, 15 Serg. & R. 165, 16 Am. Dec. 537, fixing boundaries.

Virginia.— Boyd *v.* Magruder, 2 Rob. 761; Wood *v.* Shepherd, 2 Patt. & H. 442.

United States.— McNeil *v.* Magee, 16 Fed. Cas. No. 8,915, 5 Mason 244.

England.— Hall *v.* Hardy, 3 P. Wms. 187, 24 Eng. Reprint 1023.

See 44 Cent. Dig. tit. "Specific Performance," § 215.

Award not constituting a contract.— But it has been held that an award whereby an uncertain division line between adjoining tracts is identified and made certain as to its location is not a contract for the sale of land, since it does not call for any conveyance, and that there is no jurisdiction in equity to decree its specific performance. Orr *v.* Cox, 61 W. Va. 361, 56 S. E. 522.

Delay in making award.—An agreement for the conveyance of land at a price to be fixed by an arbitrator named in the agreement will not be specifically enforced unless the award is made within a reasonable time; and a delay of six months in making the award when the value of the land is rapidly increasing is unreasonable. Chicago, etc., R. Co. *v.* Stewart, 19 Fed. 5.

Defects in appraisement.— Specific performance will not be decreed of an agreement to convey a tract of land by warranty deed, with covenants against encumbrances, at a price to be appraised by an arbitrator, unless the award of the arbitrator appraises the entire tract without reference to easements and other encumbrances thereon. Chicago, etc., R. Co. *v.* Stewart, 19 Fed. 5.

89. Jones *v.* Blalock, 31 Ala. 180; Whitney *v.* Stone, 23 Cal. 275; Smith *v.* Smith, 4 Rand. (Va.) 95, partition in kind of personal property, viz., slaves.

90. Turpin *v.* Banton, Hard. (Ky.) 312; Howe *v.* Nickerson, 14 Allen (Mass.) 400 (payment in gold); Burke *v.* Parke, 5 W. Va. 122 (between partners, award directing defendant to pay firm debts); Hall *v.* Hardy, 3 P. Wms. 187, 24 Eng. Reprint 1023.

But under the peculiar circumstances of the case, a money decree was made, on an award directing that judgment should be entered in a pending suit, but by defendant's

to escape performance by offering to pay the penalty or submit to the forfeiture.[91] But it has been held that where a condition in a deed, as distinguished from a covenant, is secured by a provision for a forfeiture in case of non-performance, it cannot be specifically enforced, as the grantor has fixed his remedy and must avail himself of it.[92] If plaintiff has claimed the forfeit on breach by defendant, he is not entitled to also have specific performance.[93]

2. Liquidated Damages. Although the contract contains a provision for liquidated damages in case of a breach, where such provision is intended merely to secure performance, and not to give an option either to perform or to pay damages, the court, as in the case of a penalty, will disregard the provision and enforce performance, if the contract is one that falls within its jurisdiction.[94] But plaintiff is not entitled to both the stipulated damages and specific performance.[95]

3. Alternative Contract. Where, however, the contract was intended to give defendant the choice between two courses, the performance of certain acts or the payment of a sum of money, equity will not decree the performance of the acts, but will leave plaintiff to his legal remedy for the recovery of the money.[96]

fraud the suit was dismissed. Story *v.* Norwich, etc., R. Co., 24 Conn. 94.

91. *California.*—Whitney *v.* Stone, 23 Cal. 275, award.

Colorado.— Amanda Gold Min., etc., Co. *v.* People's Min., etc., Co., 28 Colo. 251, 64 Pac. 218.

Illinois.— Broadwell *v.* Broadwell, 6 Ill. 599; Fitzpatrick *v.* Beatty, 6 Ill. 454.

Indiana.— Chamberlain *v.* Blue, 6 Blackf. 491, contract to indemnify.

Maine.— Hubbard *v.* Johnson, 77 Me. 139; Fisher *v.* Shaw, 42 Me. 32.

Massachusetts.— Dooley *v.* Watson, 1 Gray 414. And see Hooker *v.* Pynchon, 8 Gray 550.

Michigan.— Powell *v.* Dwyer, 149 Mich. 141, 112 N. W. 499, 11 L. R. A. N. S. 978; Daily *v.* Litchfield, 10 Mich. 29.

Montana.— Thornburgh *v.* Fish, 11 Mont. 53, 27 Pac. 381.

New Hampshire.— Ewins *v.* Gordon, 49 N. H. 444.

North Carolina.— Gordon *v.* Brown, 39 N. C. 399.

Pennsylvania.— Reed *v.* Hendricks, 2 Leg. Gaz. 204, 1 Leg. Gaz. Rep. 79.

Rhode Island.— Dike *v.* Greene, 4 R. I. 285.

South Carolina.— Moorer *v.* Kopmann, 11 Rich. Eq. 225; Telfair *v.* Telfair, 2 Desauss. Eq. 271. But see McCarter *v.* Armstrong, 32 S. C. 203, 10 S. E. 953, 8 L. R. A. 625, 32 S. C. 601, 11 S. E. 634.

Texas.— Moss *v.* Wren, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847, certified from (Civ. App. 1908), 118 S. W. 149; Newton *v.* Dickson, (Civ. App. 1909) 116 S. W. 143.

See 44 Cent. Dig. tit. "Specific Performance," §§ 179, 180.

92. Woodruff *v.* Trenton Water Power Co., 10 N. J. Eq. 489.

93. Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103.

94. *Illinois.*— Koch *v.* Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. N. S. 210; Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

Iowa.— Kettering *v.* Eastlack, 130 Iowa 498, 107 N. W. 177.

Maine.— Hull *v.* Sturdivant, 46 Me. 34.

Massachusetts.—Hooker *v.* Pynchon, 8 Gray 550.

New Jersey.— Brown *v.* Norcross, 59 N. J. Eq. 427, 45 Atl. 605; O'Connor *v.* Tyrrell, 53 N. J. Eq. 15, 30 Atl. 1061.

New York.— Palmer *v.* Gould, 18 N. Y. Suppl. 638 [*reversed* on other grounds in 144 N. Y. 671, 39 N. E. 378].

Ohio.— Egle *v.* Morrison, 27 Ohio Cir. Ct. 497.

Pennsylvania.— Gillis *v.* Hall, 2 Brewst. 342, 7 Phila. 422.

South Carolina.— Moorer *v.* Kopmann, 11 Rich. Eq. 225.

Texas.— Moss *v.* Wren, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847 [*certified* from (Civ. App. 1908) 118 S. W. 149]; Hemming *v.* Zimmerschitte, 4 Tex. 159; Lone Star Salt Co. *v.* Texas Short Line R. Co., (Civ. App. 1905) 86 S. W. 355.

England.— Long *v.* Bowring, 33 Beav. 585, 10 Jur. N. S. 668, 10 L. T. Rep. N. S. 683, 12 Wkly. Rep. 972, 55 Eng. Reprint 496.

See 44 Cent. Dig. tit. "Specific Performance," §§ 179, 180.

95. Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103.

96. *Arizona.*— Mallory *v.* Globe-Boston Copper Min. Co., (1908) 94 Pac. 1116, holding that a sale of mining claims declaring that, on non-compliance of the purchaser with any of its terms, the purchaser should forfeit all machinery and appliances placed on the claims, and declaring that such forfeiture should be in full liquidation of all claims and demands, provided for the measure of damages, for a breach and the means of satisfying such damages, to the exclusion of a remedy by cancellation of the sale or specific performance.

Connecticut.—Goodale *v.* Hill, 42 Conn. 311.

Illinois.— Barrett *v.* Geisinger, 179 Ill. 240, 53 N. E. 576, agreement to devise land or to repay the rent paid therefor during the promisor's lifetime.

Kansas.— Barker *v.* Critzer, 35 Kan. 459, 11 Pac. 382.

Whether the contract gives defendant this choice of alternatives is a question of intent, to be ascertained from the whole instrument.[97]

III. JURISDICTION LIMITED BY NATURE OF DECREE.

A. Impossibility of Performance — 1. IN GENERAL. The total incapacity of defendant to perform the relief sought is a defense. The court from motives of expediency and policy will not render a decree which defendant is unable to obey.[98] A contract, to be specifically enforceable, must be such as can be enforced in its entirety; a partial enforcement by piecemeal not sufficing.[99]

2. CONTRACTS OF MARRIED WOMEN. Equity will not enforce the contract of a married woman which she has no power under statutes or general principles of equity to make.[1]

3. SUBJECT-MATTER NOT IN EXISTENCE. The court will not make a decree where

Maine.— Fisher *v.* Shaw, 42 Me. 32.

Montana.—Kleinschmidt *v.* Kleinschmidt, 9 Mont. 477, 24 Pac. 266.

New Jersey.— Armour *v.* Connolly, (Ch. 1901) 49 Atl. 1117.

Ohio.— Allison *v.* Luhrig Coal Co., 22 Ohio Cir. Ct. 489, 12 Ohio Cir. Dec. 504, liquidated damages.

Pennsylvania.— Bodine *v.* Glading, 21 Pa. St. 50, 59 Am. Dec. 749, where the parties stipulated that on failure of the purchaser to pay by a given date the property should be resold at the expense of the purchaser, and it was held that they had in view only this consequence of a breach of the contract.

United States.— See Smith *v.* Washington Gas-Light Co., 154 U. S. 559, 14 S. Ct. 1164, 19 L. ed. 187.

See 44 Cent. Dig. tit. "Specific Performance," §§ 179, 180.

97. Amanda Gold Min., etc., Co. *v.* People's Min, etc., Co., 28 Colo. 251, 64 Pac. 218; Brown *v.* Norcross, 59 N. J. Eq. 427, 45 Atl. 605.

98. *Illinois.*—Werden *v.* Graham, 107 Ill. 169, agreement to sell a certain number of patented machines each year; expiration of patent.

Iowa.— Ferrier *v.* Buzick, 2 Iowa 136.

Kansas.— Neuforth *v.* Hall, 6 Kan. App. 902, 51 Pac. 573.

Kentucky.— Burton *v.* Shotwell, 13 Bush 271; May *v.* Fenton, 7 J. J. Marsh. 306.

Louisiana.— Knight *v.* Heinnes, 9 Rob. 377; Garcia *v.* Champonier, 8 La. 519; Lynch *v.* Postlethwaite, 7 Mart. 69, 12 Am. Dec. 495.

Maryland.— Whalen *v.* Baltimore, etc., R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. N. S. 130.

New Jersey.— Danforth *v.* Philadelphia, etc., R. Co., 30 N. J. Eq. 12, will not compel performance of act prohibited by penal statute, although the statute may be unconstitutional.

New York.— Doll *v.* Ingram, 8 N. Y. St. 253, 26 N. Y. Wkly. Dig. 565.

North Carolina.— Hardy *v.* Ward, 150 N. C. 385, 64 S. E. 171.

Oklahoma.— Saxon *v.* White, 21 Okla. 194, 95 Pac. 783.

Pennsylvania.— Rommel *v.* Summit Branch Coal Co., 18 Pa. Super. Ct. 482.

Washington.— Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

United States.— Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576; Bickford *v.* Davis, 11 Fed. 549.

See 44 Cent. Dig. tit. "Specific Performance," § 30.

Mere pecuniary inability to fulfil a contract does not constitute a defense. Hopper *v.* Hopper, 16 N. J. Eq. 147.

That defendants have been collusively enjoined, in another suit, from conveying, is not a defense. Bowen *v.* Irish Presb. Cong., 6 Bosw. (N. Y.) 245.

Encumbrance.—Where an owner of mortgaged premises contracted to convey the same to another free of encumbrance, and was unable to discharge the mortgage and purchaser insisted on a conveyance free of encumbrance, and expressed no willingness to accept the encumbered title, specific performance was properly refused. Saxon *v.* White, 21 Okla. 194, 95 Pac. 783. *Compare* Roche *v.* Osborne, (N. J. Ch. 1905) 69 Atl. 176.

Construction of siding by railroad company. — In Whalen *v.* Baltimore, etc., R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. N. S. 130, a railroad company covenanted to construct and maintain a siding at a designated place, and to stop its trains there for passengers and freight. The company, for the purpose of straightening its main line and bettering its road-bed and service, changed the location of its main line, and thereby left the siding a quarter of a mile from the main line. It was impossible to construct a siding on the new line. It was held that equity would not compel the company to maintain a train service over the abandoned line past the siding, and relief must be sought in a court of law for damages.

99. Tombigbee Valley R. Co. *v.* Fairford Lumber Co., 155 Ala. 575, 47 So. 88; Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803; Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woodw. 26.

1. Ridley *v.* Ennis, 70 Ala. 463; Pinner *v.* Sharp, 23 N. J. Eq. 274. See HUSBAND AND WIFE, 21 Cyc. 1310 *et seq.*

the subject-matter is not in existence, or has been destroyed, so that performance by defendant is physically impossible.[2]

4. Consent of Third Person Necessary. Where defendant cannot perform without obtaining the consent of a third person, who is free to withhold his consent, and does withhold it, the decree will not be made.[3] This rule applies where the contract calls for acts to be done on the land of another than the vendor.[4] But it is no objection to the specific enforcement of a contract that consent of a third person is necessary to its performance, where it shows that he does or will consent.[5]

2. Smith *v.* Pacific Bank, 137 Cal. 363, 70 Pac. 184 (assignment of a judgment which is not shown to be still in existence); Roanoke St. R. Co. *v.* Hicks, 96 Va. 510, 32 S. E. 295 (agreement to deliver bonds which have been destroyed); Waite *v.* O'Neil, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550 (to make repairs on property which has been washed away by an extraordinary flood). See Burton *v.* Shotwell, 13 Bush (Ky.) 271, holding that defendant's agreement to accept complainant's land and pay for it in stock of a company to be formed could not be specifically enforced, if the organization of the company had been abandoned without defendant's fault; but if he were in fault, he should be decreed to pay a sum of money to be ascertained as the equivalent of the stock.

3. *Illinois.*— Hurlbut *v.* Kantzler, 112 Ill. 482 (lessee's contract to assign, lessor's consent being necessary); Tascher *v.* Timerman, 67 Ill. App. 568 (contract in regard to management of a corporation to be formed, not assented to by persons who subsequently acquire interests in the corporation).

Kansas.— Musgrove *v.* Hodges, 46 Kan. 764, 27 Pac. 121.

Michigan.— Weed *v.* Terry, 2 Dougl. 344, 45 Am. Dec. 257, holding that equity will not compel the specific performance by a husband of his agreement to procure his wife to join him in the conveyance of real estate.

New York.— Cuban Production Co. *v.* Rodriguez, 124 N. Y. App. Div. 363, 108 N. Y. Suppl. 785 (will not make decree requiring defendant to institute legal proceedings in a foreign country, and be responsible for the final determination thereof); Beattie *v.* Burt, 122 N. Y. App. Div. 473, 107 N. Y. Suppl. 153 (consent of defendant's wife necessary); Martin *v.* Colby, 42 Hun 1 (holding that in a suit to compel a conveyance defendant may show that his wife refuses to join in the deed); Woodward *v.* Aspinwall, 3 Sandf. 272 (to assign contract unassignable without consent of United States); Pratt *v.* Clark, 49 Misc. 146, 98 N. Y. Suppl. 700 [*affirmed* in 118 N. Y. App. Div. 633, 103 N. Y. Suppl. 612].

Tennessee.— Pillow *v.* Pillow, 3 Humphr. 644, holding that a contract between complainant and defendant to settle the indebtedness of defendant to complainant by a transfer of lands, to be appraised by three named persons, could not be specifically enforced, as the court had no authority over the appraisers.

Virginia.— Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223, will not decree transfer of whisky stored in a United States warehouse.

West Virginia.— See Henking *v.* Anderson, 34 W. Va. 709, 12 S. E. 869, as to an agreement by husband to give conveyance of land by himself and wife.

United States.— Roundtree *v.* McLain, 20 Fed. Cas. No. 12,084*a*, Hempst. 245, holding that A's agreement with B to procure C's note and assign it to B would not be specifically enforced.

England.— Bermingham *v.* Sheridan, 33 Beav. 660, 10 Jur. N. S. 415, 33 L. J. Ch. 571, 10 L. T. Rep. N. S. 256, 12 Wkly. Rep. 658, 55 Eng. Reprint 525. *Compare* Poole *v.* Middleton, 29 Beav. 646, 54 Eng. Reprint 778, 7 Jur. N. S. 1262, 4 L. T. Rep. N. S. 631, 9 Wkly. Rep. 758, where it was held that the consent of a board of directors to the transfer of shares in a company could not be arbitrarily refused, and a contract for such transfer was specifically enforced.

Canada.— Bell *v.* Northwood, 3 Manitoba 514; Arnold *v.* Hull, 7 Grant Ch. (U. C.) 47.

See 44 Cent. Dig. tit. "Specific Performance," § 33.

Agreement that another shall convey.— Where A enters into an obligation that B shall convey a tract of land, A cannot, by any construction of the bond, be held to a specific performance by a conveyance of his own land, on default of B; the remedy, if any, is at law. Johnson *v.* Hobson, 1 Litt. (Ky.) 314.

4. *Arkansas.*— Hemphill *v.* Miller, 16 Ark. 271, to sell an improvement upon government land.

Illinois.— Farson *v.* Fogg, 205 Ill. 326, 68 N. E. 755 [*reversing* 105 Ill. App. 572], where a street railway agreed with property-owners to pave a street, to do which required consent of the city.

Louisiana.— Caperton *v.* Forrey, 49 La. Ann. 872, 21 So. 600, where contract called for closing of door on premises of a third party.

Maine.— Smith *v.* Kelley, 56 Me. 64.

Massachusetts.— Sears *v.* Boston, 16 Pick. 357.

See 44 Cent. Dig. tit. "Specific Performance," § 31 *et seq.*

5. Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871 (where, on a bill for the specific performance of a contract for the sale and exchange of city property, it appeared that complainant was to have certain policies of insurance on the buildings held by him assigned to defendant, who repudiated the contract, but the evidence showed that the insurance agent consented to the transfers, and it was held that, in the absence of proof to the contrary, it would be presumed

5. Where Defendant Has no Title — a. In General. The plaintiff cannot have a decree for specific performance of a contract to convey when defendant, at the time of the hearing, has no title or means of compelling a conveyance of the title. The court cannot compel defendant to purchase a title from a stranger.[6] The rule applies where the vendor has a legal but no equitable title, having made a prior valid and recorded contract to sell to another.[7] But it does not apply

the agent was willing to make the necessary indorsements of consent to their transfer); Bennett *v.* Abrams, 41 Barb. (N. Y.) 619; Jacobson *v.* Rechnitz, 46 Misc. (N. Y.) 135, 93 N. Y. Suppl. 173 (holding that where, in a suit for specific performance of a contract to convey real estate or, if that turn out on the trial to be impossible, for other equitable relief if any there be, it appeared that defendant had agreed to procure the cancellation of a lease that was on the property before a day certain, and that the lessee would vacate before that time, the fact that the cancellation of the lease must be by act of the lessee did not make the complaint bad); Arnold *v.* Hull, 7 Grant Ch. (U. C.) 47. In the case last cited, in a contract for the sale of property, it was agreed to be paid for, in part, by an assignment of a mortgage to be obtained from a third party. Afterward the purchaser alleged the refusal of the mortgagee to assign. The court, under the circumstances, refused to decree specific performance, but directed an inquiry, whether or not the mortgagee was still willing and able to assign the mortgage.

Demurrer to complaint.— The fact that a complaint shows that full performance depends on the consent of a third person does not render it demurrable, since *non constat* but such consent may be obtained. Bennett *v.* Abrams, 41 Barb. (N. Y.) 619; Jacobson *v.* Rechnitz, 46 Misc. (N. Y.) 135, 93 N. Y. Suppl. 173; Arnold *v.* Hull, 7 Grant Ch. (U. C.) 47.

6. *Alabama.*— Fitzpatrick *v.* Featherstone, 3 Ala. 40.

Arkansas.— Gaines *v.* Molen, 41 Ark. 232; Shields *v.* Trammell, 19 Ark. 51.

Florida.— Knox *v.* Spratt, 19 Fla. 817 (holding that specific performance of a contract to sell and convey land will not be decreed where the bill shows that the vendor cannot make a good title, and the purchaser does not ask for such title as the vendor may have, but only for a good title); Williams *v.* Mansell, 19 Fla. 546.

Illinois.— Sauer *v.* Ferris, 145 Ill. 115, 34 N. E. 52; Lane *v.* Crossman, 58 Ill. App. 386.

Indiana.— Louisville, etc., R. Co. *v.* Bodenschatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703; Wingate *v.* Hamilton, 7 Ind. 73; Compton *v.* Nuttle, 2 Ind. 416.

Iowa.— Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724.

Maine.— Hill *v.* Fiske, 38 Me. 520.

New Hampshire.— Chartier *v.* Marshall, 51 N. H. 400.

New Jersey.— Public Service Corp. *v.* Hackensack Meadows Co., 72 N. J. Eq. 285, 64 Atl. 976, although defendant can purchase at a reasonable price.

New York.— Ellis *v.* Salomon, 57 N. Y. App. Div. 118, 67 N. Y. Suppl. 1025 (where the land has been sold on foreclosure); Messenger *v.* Chambers, 53 Misc. 117, 103 N. Y. Suppl. 1100.

North Carolina.— Swepson *v.* Johnston, 84 N. C. 449; Pack *v.* Gaither, 73 N. C. 95; Love *v.* Cobb, 63 N. C. 324.

Oregon.— Adair *v.* Adair, 22 Oreg. 115, 29 Pac. 193, grantee in deed intended as mortgage has no title but only a lien.

Texas.— Clifton *v.* Charles, (Civ. App. 1909) 116 S. W. 120.

Virginia.— Cales *v.* Miller, 8 Gratt. 6.

United States.— Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576 [*affirming* 33 Fed. 293]; Hildreth *v.* Thibordeau, 117 Fed. 146 [*affirmed* in 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480].

See 44 Cent. Dig. tit. "Specific Performance," §§ 31, 32.

One who agrees to assign to another any patents that he may obtain for improvements in certain machines, and who afterward invents such an improvement, and, with intent to evade his agreement and to defraud the other party, procures a patent for his invention to be obtained upon the application of a third person, and to be issued to him as assignee of that person, cannot be compelled in equity to assign the patent, for in such case the patent confers no title on him. Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576.

Damages in equity where defendant cannot convey see *infra*, VIII, A.

Compensation or abatement of price for partial failure of title see *infra*, VII, B, 2.

Vendee may take such title as vendor is able to convey see *infra*, VII, B, 5.

7. Flattau *v.* Logan, 72 N. J. Eq. 338, 65 Atl. 714. And see Dowling *v.* Bergin, 47 Mich. 188, 10 N. W. 194. But it has been held that when a party has given his obligation for a conveyance of land, he cannot set up an executory contract, in which he was the obligor, and which he has never executed, as a ground for refusing specific performance. Oldham *v.* Faris, 3 A. K. Marsh. (Ky.) 405.

Prior sale or contract known to plaintiff.— An agreement to convey land made by one who has previously bound himself by contract, of which the purchaser has notice, to convey the same land to another, will not be specifically enforced. Abbott *v.* Baldwin, 61 N. H. 583. And see White *v.* Gilbert, 39 Miss. 802.

Legal title held by defendant as security only.— Where a party purchasing land of one clothed with the legal title has notice, actual or constructive, that another owns it, and that the vendor holds the legal title as a

where the vendor is the equitable owner, as where he holds the agreement of the owner of the legal title to convey to him, and such owner is joined as a party to the suit.[8] A contract for the purchase of standing timber cannot be specifically enforced by the purchaser, where the owner has parted with title before suit was brought.[9]

b. Subsequent Bona Fide Purchase. No decree for specific performance can be rendered where defendant, after the contract, has conveyed the legal title to a *bona fide* purchaser for value.[10]

c. Title Acquired After Contract. The vendor, if he is able to convey a title at the time of the hearing, will not be heard to say that he had no title at the time of the contract. The vendee may have the benefit of his after-acquired title.[11]

6. Alternative Contracts — a. One Alternative Impossible. Where a contract gives defendant the choice of two alternatives, and one of them is void for uncertainty,[12] or fails by reason of defendant's having disabled himself from performing it,[13] or fails by the act of a third party without collusion with plaintiff,[14] equity will enforce the other alternative, if in its nature it is a fit subject for the exercise of equitable jurisdiction.

b. Where Defendant Fails to Elect. If the contract is in the alternative, and the party having the right of election fails, for a considerable length of time to exercise it, the right to elect shifts to the other party; and if such other party elects to receive land or a mortgage on land, he may have specific performance.[15]

7. Where Term of Contract Has Expired. If the contract calls for acts to be done by defendant within a limited time, and this time limit is an essential part of the contract, specific performance will not be granted, if the time has expired before the decree can be made. This rule is applied to contracts to lease, or to assign an interest in a patent, etc.[16]

security for money owing him and others, he cannot be placed in a better position than the vendor, and a court of equity will refuse to enforce the execution of his contract of purchase. Franz *v.* Orton, 75 Ill. 100.

8. Shreck *v.* Pierce, 3 Iowa 350; East River, etc., Land Co. *v.* Kindred, 128 N. Y. App. Div. 146, 112 N. Y. Suppl. 540; McDonald *v.* Yungbluth, 46 Fed. 836, owner holds title in trust for vendors and subject to their direction and control. And see Slaughter *v.* Nash, 1 Litt. (Ky.) 322.

9. Hardy *v.* Ward, 150 N. C. 385, 64 S. E. 171.

10. *Arkansas.*— Shields *v.* Trammell, 19 Ark. 51.

Illinois.— Boone *v.* Graham, 215 Ill. 511, 74 N. E. 559; Saur *v.* Ferris, 145 Ill. 115, 34 N. E. 52; Wollensak *v.* Briggs, 119 Ill. 453, 10 N. E. 23.

Iowa.— Ferrier *v.* Buzick, 2 Iowa 136.

Maine.— Coleman *v.* Dunton, 99 Me. 121, 58 Atl. 430.

Michigan.— Youell *v.* Allen, 18 Mich. 107.

Missouri.— Brueggeman *v.* Jurgensen, 24 Mo. 87.

Nebraska.— Weaver *v.* Snively, 73 Nebr. 35, 102 N. W. 77.

New York.— Woodward *v.* Harris, 2 Barb. 439; Doll *v.* Ingram, 8 N. Y. St. 253, 26 N. Y. Wkly. Dig. 565.

South Carolina.— Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630.

United States.— Kennedy *v.* Hazelton, 128 U. S. 667, 9 S. Ct. 202, 32 L. ed. 576 [*affirming* 33 Fed. 293], assignment of patent. And see Bickford *v.* Davis, 11 Fed. 549.

See 44 Cent. Dig. tit. "Specific Performance," § 32.

Relief against purchasers with notice see *infra*, X, B, 1.

Compelling effort to reacquire title.— Occasionally, however, it has been held that vendee is entitled to a decree requiring the vendor to make reasonable efforts to reacquire the title and convey it to him. See Wellborn *v.* Sechrist, 88 N. C. 287.

In Kentucky it has been held that complainant is entitled to a decree for a deed in order that he may proceed against the defendant on the warranty. Craigs *v.* Sidwell, Litt. Sel. Cas. 285.

11. Thompson *v.* Myrick, 20 Minn. 205; Showalter *v.* Sorensen, 39 Wash. 621, 81 Pac. 1054; U. S. *v.* Alexandria, 19 Fed. 609, 4 Hughes 545.

12. Greenleaf *v.* Blakeman, 25 Misc. (N. Y.) 564, 56 N. Y. Suppl. 76 [*modified* in 40 N. Y. App. Div. 371, 58 N. Y. Suppl. 76].

13. Jones *v.* Dale, 16 Ont. 717.

14. Fleming *v.* Harrison, 4 Bibb (Ky.) 525.

15. Amanda Gold Min., etc., Co. *v.* People's Min., etc., Co., 28 Colo. 251, 64 Pac. 218; Coles *v.* Peck, 96 Ind. 333, 49 Am. Rep. 161; Allender *v.* Evans-Smith Drug Co., 3 Indian Terr. 628, 64 S. W. 558; Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120 [*affirmed* in 9 Pet. 62, 9 L. ed. 51].

That defendant may be compelled to elect where both alternatives are certain, feasible, and proper see Taylor *v.* Mathews, 53 Fla. 776, 44 So. 146.

16. Cochrane *v.* Justice Min. Co., 4 Colo.

B. Where Decree Would Be Nugatory — 1. In General. The court will not make a decree to establish any given relation between two parties which either party has the power immediately to put an end to, and so make the order nugatory.[17]

2. Partnership at Will. An agreement to enter into a partnership at will or for an indefinite period will not be enforced in equity, since such partnership may be immediately dissolved by either party.[18]

3. Contract to Take Shares in Joint Stock Company. In analogy to the case of a partnership at will, an agreement to take shares in a joint stock company, where the shareholder may immediately retire from the company and thus "annihilate" his shares, will not be specifically enforced.[19] It is otherwise if the shareholder has no power to "annihilate" his shares but can get rid of them only by transferring them to another.[20]

C. Where Decree Could Not Conveniently Be Enforced — 1. In General. In all the preceding instances of specific performance the court is called upon to decree the performance of a single, definite act, or at most a small number of definite acts. The court can have no difficulty in deciding, once for all, whether, for instance, its decree ordering the execution and delivery of a deed with prescribed covenants, or the transfer of a chattel, or the payment of a sum of money, has been properly performed. There remains a wide range of contracts, the specific performance of which is usually denied, because to determine whether its decree has been, or is being, properly obeyed would impose upon the court an amount of labor and investigation that would interfere with its duties to other

App. 234, 35 Pac. 752; Werden *v.* Graham, 107 Ill. 169 (where the rule was applied in case of an assignment of an interest in a patent, on a bill filed a short time before the patent expired); Welty *v.* Jacobs, 64 Ill. App. 285; Brown *v.* Britton, 41 N. Y. App. Div. 57, 58 N. Y. Suppl. 353; Meehan *v.* Owens, 196 Pa. St. 69, 46 Atl. 263 (refusing to enforce a contract for the sale of a liquor license, lease, and good-will).

17. Andrews *v.* Andrews, 28 Ala. 432 (will not enforce voluntary post-nuptial agreement by husband to make a settlement, since it is revocable until it is executed); State *v.* Cadwallader, (Ind. 1909) 87 N. E. 644, 89 N. E. 319 (where either party to a contract may abandon it at will, specific performance cannot be compelled); Fowler Utilities Co. *v.* Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. N. S. 726; Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030 (agency which defendant may terminate at any time); Snyder *v.* Greaves, (N. J. Ch. 1891) 21 Atl. 291 (specific performance not enforced of agreement to accept a mortgage not specifying any time for payment, since it will be due immediately upon execution); New Brunswick, etc., R. Co. *v.* Muggeridge, 4 Drew. 686, 698, 62 Eng. Reprint 263; Wheeler *v.* Trotter, 3 Swanst. 174 note, 19 Rev. Rep. 195, 36 Eng. Reprint 819; Jones *v.* Jones, 12 Ves. Jr. 186, 10 Rev. Rep. 77 note, 33 Eng. Reprint 71 (lease terminable because covenants already broken). So, where a contract stipulates that it should cease upon the payment of twenty thousand dollars and interest by defendant, and this payment might be made immediately upon the rendition of the decree, specific performance will be refused. Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319.

Lease.—A lease of land to another to prospect for oil or gas, which provides that the lessee, upon payment of a dollar, may surrender the lease, although not void *ab initio* for want of mutuality, deprives the party for whose benefit it is made of relief in the nature of specific performance, since, if such relief were granted, the lessee could nullify the decree by exercising his option, and equity will not do a vain thing by settling the rights of parties which one of them may set aside at will. Watford Oil, etc., Co. *v.* Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144. And see Ubrey *v.* Keith, 237 Ill. 284, 86 N. E. 696.

Specific performance useless because subject-matter valueless see *infra*, IV, D, 4 note 88.

18. Truitt *v.* Clark, 81 Ill. App. 652 [*affirmed* in 183 Ill. 239, 55 N. E. 683]; Buck *v.* Smith, 29 Mich. 166, 18 Am. Rep. 84; Wilcox *v.* Williams, 92 Hun (N. Y.) 250, 36 N. Y. Suppl. 944; Hercy *v.* Birch, 9 Ves. Jr. 357, 32 Eng. Reprint 640.

But in exceptional cases execution of an agreement or of a conveyance under the agreement may be necessary to invest complainant with the legal rights for which he contracted. Whitworth *v.* Harris, 40 Miss. 483. And see Whistler *v.* MacDonald, 167 Fed. 477, 93 C. C. A. 113.

Partnership for a fixed term see *infra*, III, C, 3, b, (I).

19. Sheffield Gas Consumers' Co. *v.* Harrison, 17 Beav. 294, 51 Eng. Reprint 1047; Oriental Inland Steam Co. *v.* Briggs, 2 Johns. & H. 625, 70 Eng. Reprint 1209.

20. New Brunswick, etc., R. Co. *v.* Muggeridge, 4 Drew. 686, 698, 62 Eng. Reprint 263; Oriental Inland Steam Co. *v.* Briggs, 2 Johns. & H. 625, 70 Eng. Reprint 1209.

suitors, and in some instances would call for a degree of expert knowledge which neither the court nor its officers can be expected to possess.[21] In other instances the acts, although not necessarily numerous or complicated, are of such a kind, so dependent upon the will or good faith of the contracting party, that their proper performance cannot, in view of the ordinary motives governing human conduct, be expected of a defeated suitor acting under the compulsory process of the court.[22] Except in this last class of cases, however, the court may waive these considerations of inconvenience in exceptional instances, where to refuse a decree of specific performance would work a flagrant injustice.[23] The difficulties which confront the court in all these cases are well explained in a leading case. "The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise, not only the question, whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefor as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable." [24]

2. Arbitration or Valuation — a. General Rule. An agreement to submit a matter to arbitration or valuation, or an agreement, an essential part of which is that a matter shall be submitted to arbitration, or valuation as for a sale or lease at a price or rent to be fixed by valuers, will not, as a general rule, be specifically enforced; nor will the court itself fix the price or substitute other valuers, since that would be to make a new contract for the parties.[25]

21. As in the case of the contract of an opera singer. De Rivafinoli *v.* Corsetti, 4 Paige (N. Y.) 264, 270, 25 Am. Dec. 532, where it is said by Walworth, Ch.: "I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent," etc.

22. As in contracts to arbitrate and in most contracts for personal services. See *infra*, III, C, 2, 3.

23. See for example *infra*, III, B, 4, c.

24. Beck *v.* Allison, 56 N. Y. 366, 370, 15 Am. Rep. 430, contract to make repairs. See also Port Clinton R. Co. *v.* Cleveland, etc., R. Co., 13 Ohio St. 544, 556, a leading case concerning a contract involving the operation of a railroad, where it is said: "Even if the contract was sufficiently specific, so that the party, when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution, not once . . . but in instances innumerable, and for an indefinite time. Instead of the final order being the end of the litigation, it would be its fruitful and continuous source, and that, too, of litigation not in the regular course of judicial proceedings, but irregularly, on a summary application. And such application to be made by either party, one when he conceived there had not been a faithful compliance with the order, and the other when exemption from some provision might be claimed, on the ground of inability or unforeseen events."

25. *Alabama.*— Caldwell *v.* Caldwell, 157 Ala. 119, 47 So. 268.

Connecticut.— See Meeker *v.* Meeker, 16 Conn. 403.

Iowa.— Kennedy *v.* Monarch Mfg. Co., 123 Iowa 344, 98 N. W. 796.

Maryland.— Griffith *v.* Frederick County Bank, 6 Gill & J. 424; Wallingsford *v.* Wallingsford, 6 Harr. & J. 485.

Massachusetts.— Miles *v.* Schmidt, 168 Mass. 339, 47 N. E. 115 (agreement to submit to arbitration illegal); Noyes *v.* Marsh, 123 Mass. 286.

Missouri.— St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, 113, 126 [*reversing* 5 Mo. App. 484]; Hug *v.* Van Burkleo, 58 Mo. 202; Biddle *v.* Ramsey, 52 Mo. 153; King *v.* Howard, 27 Mo. 21; Lasar *v.* Baldridge, 32 Mo. App. 362.

New Jersey.— Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Copper *v.* Wells, 1 N. J. Eq. 10.

New York.— Greason *v.* Keteltas, 17 N. Y. 491; Robinson *v.* Kettletas, 4 Edw. 67.

North Carolina.— Norfleet *v.* Southall, 7 N. C. 189.

Ohio.— Conner *v.* Drake, 1 Ohio St. 166.

Tennessee.— Pillow *v.* Pillow, 3 Humphr. 644.

b. Valuation or Arbitration an Unessential Part of Contract. Where the agreement to submit to valuers or arbitrators is a subordinate or unessential part of the contract, it may be disregarded and the rest of the contract specifically enforced, if the refusal to submit was by fault of defendant;[26] or the court itself in such a case may make the valuation by reference to a master or otherwise.[27]

c. Defendant Estopped by Plaintiff's Expenditures. And where plaintiff has gone to great expense in reliance upon the agreement and defendant then refuses to appoint a valuer, the court, by the better considered authorities, may itself make the valuation, and decree specific performance, on the ground that defendant is estopped by his conduct to set up the want of an appraisal caused by himself.[28] This rule has been frequently applied in cases of covenants to renew a long term lease at a rent to be fixed by valuers appointed by the parties, where the lessee has made valuable improvements on the strength of the covenant for renewal, and a failure to secure a renewal will work an injustice for which an action for damages is not a complete remedy.[29]

Virginia.— Baker *v.* Glass, 6 Munf. 212; Smallwood *v.* Mercer, 1 Wash. 290.

Wisconsin.— Schneider *v.* Reed, 123 Wis. 488, 101 N. W. 682; Hopkins *v.* Gilman, 22 Wis. 476.

United States.— Tobey *v.* Bristol County, 23 Fed. Cas. No. 14,065, 3 Story 800.

England.— Vickers *v.* Vickers, L. R. 4 Eq. 529, 36 L. J. Ch. 946; Mitchell *v.* Harris, 4 Bro. Ch. 311, 29 Eng. Reprint 908, 2 Ves. Jr. 129, 30 Eng. Reprint 557; Gervais *v.* Edwards, 1 C. & L. 242, 2 Dr. & War. 80, 4 Ir. Eq. 555; South Wales R. Co. *v.* Wythes, 5 De G. M. & G. 880, 5 Eq. Rep. 153, 24 L. J. Ch. 87, 3 Wkly. Rep. 133, 54 Eng. Ch. 690, 43 Eng. Reprint 1112; Darbey *v.* Whitaker, 4 Drew. 134, 5 Wkly. Rep. 772, 62 Eng. Reprint 52; Agar *v.* Macklew, 4 L. J. Ch. O. S. 16, 2 Sim. & St. 418, 1 Eng. Ch. 418, 57 Eng. Reprint 405; Gourlay *v.* Somerset, 19 Ves. Jr. 431, 13 Rev. Rep. 234, 34 Eng. Reprint 576; Milnes *v.* Gery, 14 Ves. Jr. 400, 33 Eng. Reprint 574; Street *v.* Rigby, 6 Ves. Jr. 815, 31 Eng. Reprint 1323; Price *v.* Williams [*cited* in Street *v.* Rigby, *supra*].

See 44 Cent. Dig. tit. "Specific Performance," § 214.

Refusal of relief is based on two grounds: Inadequacy of means at disposal of the court to enforce due performance of the agreement; and that arbitrators have limited powers of doing justice, and have no authority to administer oaths and compel the attendance of witnesses. Tobey *v.* Bristol County, 23 Fed. Cas. No. 14,065, 3 Story 800, per Story, J.

Refusal to allow valuer to proceed.— The rule has been applied, although with great reluctance, in the case where, after valuers are appointed, defendant refuses to allow his valuer to proceed. Vickers *v.* Vickers, L. R. 4 Eq. 529, 535, 36 L. J. Ch. 946, per Wood, V. C.

26. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69; Columbia Water Power Co. *v.* Columbia, 5 S. C. 225; Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174]; Richardson *v.* Smith, L. R. 5 Ch. 648, 39 L. J. Ch. 877, 19 Wkly. Rep. 81.

27. *Indiana.*— Coles *v.* Peck, 96 Ind. 333, 49 Am. Rep. 161.

Rhode Island.—Grosvenor *v.* Flint, 20 R. I. 21, 37 Atl. 304; Bristol *v.* Bristol, etc., Water Works, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740; Dike *v.* Greene, 4 R. I. 285.

Texas.— Schneider *v.* Hildenbrand, 14 Tex. Civ. App. 34, 36 S. W. 784, to sell on expiration of lease.

Vermont.— Burton *v.* Landon, 66 Vt. 361, 29 Atl. 374.

United States.— Castle Creek Water Co. *v.* Aspen, 146 Fed. 8, 76 C. C. A. 516.

England.— Gourlay *v.* Somerset, 19 Ves. Jr. 431, 13 Rev. Rep. 234, 34 Eng. Reprint 576; Milnes *v.* Gery, 14 Ves. Jr. 400, 33 Eng. Reprint 574.

Surveyor.—When the price was to depend on the acreage, and that was to be determined "by a competent surveyor, to be mutually agreed upon," the provision for a survey was held merely incidental, and the failure to agree upon a surveyor did not defeat specific performance. Howison *v.* Bartlett, 141 Ala. 593, 37 So. 590, 147 Ala. 408, 40 So. 757.

28. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69; Castle Creek Water Co. *v.* Aspen, 146 Fed. 8, 76 C. C. A. 516. And see Gunton *v.* Carroll, 101 U. S. 426, 25 L. ed. 985, where defendant has had all the benefits of the contract.

29. *Indiana.*— Coles *v.* Peck, 96 Ind. 333, 49 Am. Rep. 161.

Missouri.— Strohmaier *v.* Zeppenfeld, 3 Mo. App. 429.

New York.— Johnson *v.* Conger, 14 Abb. Pr. 195.

Ohio.— Lowe *v.* Brown, 22 Ohio St. 463.

United States.— Tscheider *v.* Biddle, 24 Fed. Cas. No. 14,210, 4 Dill. 58.

For other cases in which the court fixed the value of rental at the suit of the lessor see Springer *v.* Borden, 154 Ill. 668, 39 N. E. 603 [*affirming* 54 Ill. App. 557]; Kelso *v.* Kelly, 1 Daly (N. Y.) 419.

Valuation refused, but case retained for other relief.— In some jurisdictions the court refuses to appraise the rental and decree renewal of the lease; but if the lease gives the lessor the option of taking the improvements

3. Personal Services or Business Employment — a. In General. In cases of this character a decree for specific performance is open not only to the objection that it calls for an undue amount of supervision by the court, but to still graver objections, which are well stated in a very recent case: "Any system or plan by which the court could order or direct the physical coercion of the laborer would be wholly out of harmony with the spirit of our institutions, and his imprisonment would take away his power to make specific performance. Even if such authority existed its exercise would be undesirable. If the relation of employer and employee is to be of value or profit to either it must be marked by some degree of mutual confidence and satisfaction, and when these are gone and their places usurped by dislike and distrust, it is to the advantage of all concerned that their relations be severed." [30]

b. Instances — (I) *Partnership For a Fixed Term.* As a general rule, performance of an agreement to enter into a partnership for a fixed term will not be decreed, on the ground that to perform the duties of a partner calls for the exercise of personal skill and judgment.[31] But where there has been part performance on plaintiff's part, and it is essential to the ends of justice that the status of the parties be fixed by the execution of the partnership articles, this may be decreed, although the court cannot compel the parties to act under them after execution.[32] Or, in case of such part performance, defendants may be compelled, under the articles, to convey property to the firm.[33]

(II) *Other Business Employment.* On the same principle the direct specific performance has been refused of contracts to act as agent,[34] manager,[35] or

at the expiration of the term at a valuation to be fixed by arbitration, the court retains the case and itself appraises the value of the improvements. Hopkins *v.* Gilman, 22 Wis. 476. And see Copper *v.* Wells, 1 N. J. Eq. 10; Dunnell *v.* Keteltas, 16 Abb. Pr. (N. Y.) 205.

30. H. W. Gossard Co. *v.* Crosby, 132 Iowa 155, 163, 109 N. W. 483, 6 L. R. A. N. S. 1115. For strong statements to the same effect see *In re* Clark, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213; Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 22 L. J. Ch. 921, 17 Jur. 1015, 52 Eng. Ch. 710, 43 Eng. Reprint 358. And see Ohio Pail Co. *v.* A. W. Cork & Co., 222 Pa. St. 487, 71 Atl. 1051.

For the indirect enforcement of such contracts by injunction against engaging in other employment see Injunctions, 22 Cyc. 856.

31. *Illinois.*— Clark *v.* Truitt, 183 Ill. 239, 55 N. E. 683 [*affirming* 81 Ill. App. 652].

Michigan.— Buck *v.* Smith, 29 Mich. 166, 18 Am. Rep. 84.

New York.— Goldberg *v.* Kirschstein, 36 Misc. 249, 73 N. Y. Suppl. 358.

Pennsylvania.— Meason *v.* Kaine, 63 Pa. St. 335.

West Virginia.—Cross *v.* Hopkins, 6 W. Va. 323.

United States.— Hyer *v.* Richmond Traction Co., 168 U. S. 471, 18 S. Ct. 114, 42 L. ed. 547; Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484.

England.— Scott *v.* Rayment, L. R. 7 Eq. 112, 38 L. J. Ch. 48, 19 L. T. Rep. N. S. 481; Sichel *v.* Mosenthal, 30 Beav. 371, 8 Jur. N. S. 275, 31 L. J. Ch. 386, 5 L. T. Rep. N. S. 784, 10 Wkly. Rep. 283, 54 Eng. Reprint 932.

See 44 Cent. Dig. tit. "Specific Performance," § 189.

Partnership at will see *supra*, III, B, 2.

32. Satterthwait *v.* Marshall, 4 Del. Ch. 337; England *v.* Curling, 8 Beav. 129, 50 Eng. Reprint 51; Hibbert *v.* Hibbert [*cited* Colly. Partn. § 203].

33. Tilman *v.* Cannon, 3 Humphr. (Tenn.) 637.

34. *Alabama.*—Kelly *v.* Browning, 113 Ala. 420, 21 So. 928, 124 Ala. 645, 27 So. 391, contract to "endeavor to reorganize" a corporation.

Indiana.— Dukes *v.* Bash, 29 Ind. App. 103, 64 N. E. 47, to secure right of way.

Minnesota.— Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030, real estate agent.

New Jersey.— Young Lock Nut Co. *v.* Brownley Mfg. Co., (Ch. 1896) 34 Atl. 947, business capacity.

United States.— General Electric Co. *v.* Westinghouse Electric, etc., Co., 144 Fed. 458, agent to sell patented articles.

England.— Ogden *v.* Fossick, 4 De G. F. & J. 426, 9 Jur. N. S. 288, 32 L. J. Ch. 73, 7 L. T. Rep. N. S. 515, 1 New Rep. 143, 11 Wkly. Rep. 128, 65 Eng. Ch. 331, 45 Eng. Reprint 1249; Brett *v.* East India, etc., Shipping Co., 2 Hem. & M. 404, 10 L. T. Rep. N. S. 187, 3 New Rep. 688, 12 Wkly. Rep. 596, 71 Eng. Reprint 520 (broker); Chinnock *v.* Sainsbury, 6 Jur. N. S. 1318, 30 L. J. Ch. 409, 3 L. T. Rep. N. S. 258, 9 Wkly. Rep. 7 (auctioneer); Stocker *v.* Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 Wkly. Rep. 671, 69 Eng. Reprint 1162 (agent to sell patented articles); White *v.* Boby, 37 L. T. Rep. N. S. 652, 26 Wkly. Rep. 133 (agent for sale).

35. Seiler *v.* Fairex, 23 La. Ann. 397; Shubert *v.* Woodward, 167 Fed. 47, 92

superintendent,[36] or in other business capacity;[37] although the employment may not be one calling for skill and judgment.[38]

(III) *Personal, Professional, and Other Services.* Other instances where direct specific performance is refused on the principle above stated are agreements to support or care for the other party to the contract;[39] services calling for intellectual or artistic skill, as of a singer,[40] an actor,[41] an inventor,[42] or other professional person;[43] contracts requiring mechanical skill;[44] a contract for menial

C. C. A. 509 (management of theater); Gillig *v.* McGhee, 13 Ir. Ch. 48.

36. Miller *v.* Warner, 42 N. Y. App. Div. 208, 59 N. Y. Suppl. 956; Bronk *v.* Riley, 50 Hun (N. Y.) 489, 3 N. Y. Suppl. 446.

37. Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98 [*affirming* 64 Ill. App. 285] (theatrical manager, to furnish a company of actors); Roberts *v.* Kelsey, 38 Mich. 602 (logging contract); Bomer *v.* Canady, 79 Miss. 222, 30 So. 638, 89 Am. St. Rep. 593, 55 L. R. A. 328 (to cut timber and saw it into lumber); Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. N. S. 1015, 22 L. J. Ch. 921, 52 Eng. Ch. 710, 43 Eng. Reprint 358 (railway contractor, relation confidential); Horne *v.* London, etc., R. Co., 10 Wkly. Rep. 170 (railway contractor, relation confidential).

38. H. W. Gossard Co. *v.* Crosby, 132 Iowa 155, 109 N. W. 483, 6 L. R. A. N. S. 1115 (saleswoman); Healy *v.* Allen, 38 La. Ann. 867 (sexton); Harlow *v.* Oregonian Pub. Co., 45 Oreg. 520, 78 Pac. 737 (newspaper carrier); Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. N. S. 1015, 22 L. J Ch. 921, 52 Eng. Ch. 710, 43 Eng. Reprint 358 (railway contractor, relation confidential); Pickering *v.* Ely, 7 Jur. 1479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109 (receiver of rents); Chaplin *v.* Northwestern R. Co., 5 L. T. Rep. N. S. 601 (loading and unloading goods at railway stations, relation confidential); Horne *v.* London, etc., R. Co., 10 Wkly. Rep. 170 (railway contractor).

Cultivation and sale of crop.— A court of equity has no jurisdiction to enforce the specific execution of a contract to cultivate a particular crop in a designated mode, and to cut, cure, and deliver it in a certain prescribed manner; nor to estimate damages for its breach. Starnes *v.* Newsom, 1 Tenn. Ch. 239.

39. Gardner *v.* Knight, 124 Ala. 273, 27 So. 298; Chadwick *v.* Chadwick, 121 Ala. 580, 25 So. 631; Waters *v.* Howard, 1 Md. Ch. 112; Bourget *v.* Monroe, 58 Mich. 563, 25 N. W. 514; Mowers *v.* Fogg, 45 N. J. Eq. 120, 17 Atl. 296, where, in denying specific performance of an agreement to take care and provide for complainant in case of her "general debility or sickness" it is said that the court could not "from time to time, determine what is meant by general debility and sickness." But see Hackett *v.* Hackett, 67 N. H. 424, 40 Atl. 434; Chubb *v.* Peckham, 13 N. J. Eq. 207.

40. Sanquirico *v.* Benedetti, 1 Barb. (N. Y.) 315; Mapleson *v.* Del Puente, 13 Abb. N. Cas. (N. Y.) 144.

41. Hamblin *v.* Dinneford, 2 Edw. (N. Y.) 529; Ford *v.* Jermon, 6 Phila. (Pa.) 6.

42. Wollensak *v.* Briggs, 119 Ill. 453, 10 N. E. 23; Firth *v.* Ridley, 33 Beav. 516, 55 Eng. Rep. 468; Stocker *v.* Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 Wkly. Rep. 671, 69 Eng. Reprint 1162.

Contract in relation to patent.—A contract by which defendant gave plaintiff one-half interest in a patent of an invention completed by defendant, in consideration of defendant paying the expense of making a model, securing the patent, etc., being in effect an assignment of an interest therein, was not an agreement for personal services, so as to prevent the specific performance thereof. McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729.

43. *Alabama.*— Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758, plaintiff to act as news correspondent, defendant to furnish press despatches.

Indiana.— Schwier *v.* Zitike, 136 Ind. 210, 36 N. E. 30, school-teacher.

New York.— Martin *v.* Platt, 5 N. Y. St. 284, attorney.

United States.—Adams *v.* Murphy, 165 Fed. 304, 91 C. C. A. 272 [*reversing* 7 Indian Terr. 395, 104 S. W. 658], attorney.

England.— Baldwin *v.* Society for Diffusion of Useful Knowledge, 2 Jur. 961, 9 Sim. 393, 16 Eng. Ch. 393, 59 Eng. Reprint 409 (mapmaker); Clarke *v.* Price, 2 Wils. Ch. 157, 18 Rev. Rep. 159, 37 Eng. Reprint 270 (law reporter).

For indirect enforcement of these and similar contracts by injunction against engaging in other employment see Injunctions, 22 Cyc. 856.

44. *Alabama.*— Electric Lighting Co. *v.* Mobile, etc., R. Co., 109 Ala. 190, 19 So. 721, 55 Am. St. Rep. 927.

California.— Wakeham *v.* Barker, 82 Cal. 46, 22 Pac. 1131, painter.

Illinois.— Wollensak *v.* Briggs, 119 Ill. 453, 10 N. E. 23.

Kentucky.— Edelen *v.* Samuels, 126 Ky. 295, 103 S. W. 360, 31 Ky. L. Rep. 731, to manufacture and bottle whisky.

Tennessee.— Starnes *v.* Newson, 1 Tenn. Ch. 239, to cultivate a particular crop, and cut, cure, and deliver it in a designated manner.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955 (to deliver marble of certain kinds, and in blocks of such a kind that the court cannot determine whether they accord with the contract or no); Allegheny Basehall Club *v.* Bennett, 14 Fed. 257 (baseball player).

But *compare* Neal *v.* Parker, 98 Md. 254,

services;[45] and other contracts of service and employment.[46] In a few states the rule is expressly declared by statute.[47]

c. Where Services Are to Be Rendered by Plaintiff. Although the contract may be one that is otherwise proper to be specifically enforced, if, at the time of the decree, there remain to be done, on plaintiff's side, personal services or other acts of a kind which, in accordance with the general rule, the court cannot compel to be done, specific performance is usually refused on the principle that the remedies in equity must be mutual.[48] The rule does not apply, however, where the services have been rendered.[49]

4. Building or Construction Contracts — a. General Rule. The general rule is well settled that contracts for building or construction will not be enforced specifically.[50] Where the person employed to build is complainant and the work

57 Atl. 213 (contract for manufacture and sale of ordinary pine lumber of specified dimensions, specific performance not impracticable); Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679 (manufacture of patented articles, details of which are given in the patents, enforceable). In these last cases the court would have comparatively little difficulty in determining whether its decree was obeyed see *supra*, III, C, 1; *infra*, III, C, 5, b.

45. *In re* Clark, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213 (servant discharged on writ of habeas corpus); Ryan *v.* Mutual Tontine Westminster Chambers Assoc., [1893] 1 Ch. 116, 62 L. J. Ch. 252, 67 L. T. Rep. N. S. 820, 2 Reports 156, 41 Wkly. Rep. 146 (porter).

46. Willingham *v.* Hooven, 74 Ga. 233, 58 Am. Rep. 435; Wood *v.* Iowa Bldg., etc., Assoc., 126 Iowa 464, 102 N. W. 410; Webb *v.* England, 29 Beav. 44, 7 Jur. N. S. 153, 30 L. J. Ch. 222, 3 L. T. Rep. N. S. 574, 9 Wkly. Rep. 183, 54 Eng. Reprint 541 (apprenticeship); Brett *v.* East India, etc., Shipping Co., 2 Hem. & M. 404, 10 L. T. Rep. N. S. 187, 3 New Rep. 688, 12 Wkly. Rep. 596, 71 Eng. Reprint 520; Fitzpatrick *v.* Nolan, 1 Ir. Ch. 671; Stocker *v.* Brockelbank, 15 Jur. 591, 20 L. J. Ch. 401, 3 Macn. & G. 250, 49 Eng. Ch. 189, 42 Eng. Reprint 257. But that the court may direct the execution of a written agreement containing a stipulation for personal services see Granville *v.* Betts, 18 L. J. Ch. 32.

Management of theater see Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509.

47. See Jolliffe *v.* Steele, 9 Cal. App. 212, 98 Pac. 544, agreement to use best endeavors to sell land not specifically enforceable under Civ. Code, § 3390, subd. 1, providing that an obligation to render personal service cannot be specifically enforced.

48. See *infra*, IV, E, 12. And see the following cases:

Alabama.—Chadwick *v.* Chadwick, 121 Ala. 580, 25 So. 631; Electric Lighting Co. *v.* Mobile, etc., R. Co, 109 Ala. 190, 19 So. 721, 55 Am. St. Rep. 927; Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758.

California.— Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Wakeham *v.* Barker, 82 Cal. 46, 22 Pac. 1131.

Illinois.— Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98 [*affirming* 64 Ill. App. 285]; Truitt *v.* Clark, 81 Ill. App. 652; Reid Ice Cream Co. *v.* Stephens, 62 Ill. App. 334.

Indiana.— Schwier *v.* Zitike, 136 Ind. 210, 36 N. E. 30.

Louisiana.— Healy *v.* Allen, 38 La. Ann. 867; Seiler *v.* Fairex, 23 La. Ann. 397.

Michigan.— Bourget *v.* Monroe, 58 Mich. 563, 25 N. W. 514.

Minnesota.— Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030.

Nevada.— Turley *v.* Thomas, (1909) 101 Pac. 568.

New York.— Miller *v.* Warner, 42 N. Y. App. Div. 208, 59 N. Y. Suppl. 956; Bronk *v.* Riley, 50 Hun 489, 3 N. Y. Suppl. 446; Martin *v.* Platt, 5 N. Y. St. 284.

Oregon.—Harlow *v.* Oregonian Pub. Co., 45 Oreg. 520, 78 Pac. 737.

United States.—General Electric Co. *v.* Westinghouse Electric, etc., Co., 144 Fed. 458.

England.— Brett *v.* East India, etc., Shipping Co. 2 Hem. & M. 404, 10 L. T. Rep. N. S. 187, 3 New Rep. 688, 12 Wkly. Rep. 596, 71 Eng. Reprint 520; Gillig *v.* McGhee, 13 Ir. Ch. 48; Fitzpatrick *v.* Nolan, 1 Ir. Ch. 671; Stocker *v.* Brockelbank, 15 Jur. 591, 20 L. J. Ch. 401, 3 Macn. & G. 250, 49 Eng. Ch. 189, 42 Eng. Reprint 257; Pickering *v.* Ely, 7 Jur. N. S. 479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109; Chinnock *v.* Sainsbury, 6 Jur. N. S. 1318, 30 L. J. Ch. 409, 3 L. T. Rep. N. S. 258, 9 Wkly. Rep. 7; Stocker *v.* Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 Wkly. Rep. 671, 69 Eng. Reprint 1162; White *v.* Boby, 37 L. T. Rep. N. S. 652, 26 Wkly. Rep. 133; Chaplin *v.* Northwestern R. Co., 5 L. T. Rep. N. S. 601; Horne *v.* London, etc., R. Co., 10 Wkly. Rep. 170.

See 44 Cent. Dig. tit. "Specific Performance," §§ 9, 206–208.

49. See *infra*, IV, E, 12.

50. *Alabama.*— Bromberg *v.* Eugenotto Constr. Co., 158 Ala. 323, 48 So 60, 19 L. R. A. N. S. 1175, erection of building. And see Bridgeport Land, etc., Co. *v.* American Fire-Proof Steel Car Co., 94 Ala. 592, 10 So. 704.

Arkansas.— Leonard *v.* Plum Bayou Levee Dist., 79 Ark. 42, 94 S. W. 922, construction of a levee.

is not yet completed, on the principle of mutuality, that the court must be able to enforce its decree specifically against complainant as well as defendant, specific performance is refused.[51]

b. Covenants by Lessor or Lessee. A lessee's covenant to build, as distinguished from his covenant to repair, has been enforced specifically.[52] Specific per-

California.—Pacific Electric R. Co. *v.* Camphell-Johnson, 153 Cal. 106, 94 Pac. 623, railroad.

Georgia.— Justices Dougherty County Inferior Ct. *v.* Croft, 18 Ga. 473.

Illinois.— Henry County *v.* Winnehago Swamp Drainage Co., 52 Ill 454, to drain swamp lands.

Iowa.— Robinson *v.* Luther, 134 Iowa 463, 109 N. W. 775, ditch.

Louisiana.— New Orleans *v.* New Orleans, etc., R. Co., 44 La. Ann. 64, 10 So. 401, levee and canal.

New Jersey.— Madison Athletic Assoc. *v.* Brittin, 60 N. J. Eq. 160, 46 Atl. 652; Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

New York.— Beck *v.* Allison, 56 N. Y. 366, 15 Am. Rep. 430.

Ohio.— Great Southern Hotel Co. *v.* McClain, 4 Ohio S. & C. Pl. Dec. 309, 3 Ohio N. P. 247.

Pennsylvania.— Dove *v.* Com. Title Ins., etc., Co., 6 Pa. Dist. 263.

South Carolina.— McCarter *v.* Armstrong, 32 S. C. 203, 10 S. E. 953, 8 L. R. A. 625, 32 S. C. 601, 11 S. E. 634 (drain); Reed *v.* Vidal, 5 Rich. Eq. 289 (to repair).

Virginia.— Ewing *v.* Litchfield, 91 Va. 575, 22 S. E. 362, railroad.

Wisconsin.— Kendall *v.* Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118, to erect city hall.

United States.—Oregonian R. Co. *v.* Oregon R., etc., Co., 37 Fed. 733, 11 Sawy. 33 (to build and repair a railroad); Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woolw. 26 (to build railroad).

England.—Errington *v.* Aynesly, 2 Bro. Ch. 341, 29 Eng. Reprint 191, Dick. 692, 21 Eng. Reprint 440; Holt *v.* Holt, 1 Ch. Cas. 190, 22 Eng. Reprint 756, 2 Vern. Ch. 322, 23 Eng. Reprint 808; South Wales R. Co. *v.* Wythes, 1 Kay & J. 186, 69 Eng. Reprint 422 [*affirmed* in 5 De G. M. & G. 880, 3 Eq. Rep. 153, 24 L. J. Ch. 87, 3 Wkly. Rep. 133, 54 Eng. Ch. 690, 43 Eng Reprint 1112], railway. *Contra*, Allen *v.* Harding, 2 Eq. Cas. Abr. 17, pl. 6, 22 Eng. Reprint 14; Hepburn *v.* Leather, 50 L. T. Rep. N. S. 660; Pembroke *v.* Thorpe, 3 Swanst. 437 note, 19 Rev. Rep. 254, 36 Eng. Reprint 939, per Lord Hardwicke.

See 44 Cent. Dig. tit. "Specific Performance." § 209. See also the views of Mr. Justice Story, 2 Story Eq. Jur. § 728.

The reasons for the rule are well stated in the extract from Beck *v.* Allison, 56 N. Y. 366, 15 Am. Rep. 430, *supra*, III, C, 1.

The statement that courts of equity "have enforced such contracts from the earliest days to the present time" (Jones *v.* Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485) is extravagant; the cases from the fifteenth century which are cited to substantiate the statement being wholly silent as to the nature of the relief sought (1 Ames Cas. Eq. Jur. 68, note 4).

It has been suggested (Blair *v.* St. Louis, etc., R. Co., 92 Mo. App. 538) that the rule of the text has been repudiated by implication in the decisions of the United States courts referred to *infra*, III, C, 5, c, (IV), but it is probable that these decisions, difficult as they may be to reconcile with the rule, were not intended to abrogate it entirely.

A contract to take down or remove a building was not specifically enforced, for the alleged reason of the court's inability to see that the work was carried out. Armour *v.* Connolly, (N. J. Ch. 1901) 49 Atl. 1117. *Sed quære?* The court was not called upon in executing its decree to superintend details of work, but merely to assure itself that the work, a definite act, was completed. Mandatory injunctions for the destruction of buildings are frequent, and the courts have experienced no difficulty in determining whether they were carried out.

Erection of building and lease.—A contract to lease a certain amount of floor space in a building being erected will not be specifically enforced, where the erection of the building will extend over a considerable period of time and will require the exercise of skil. and discretion in placing the beams, etc. Bromberg *v.* Eugenotto Constr. Co., 158 Ala. 328, 48 So. 60, 19 L. R. A. N. S. 1175.

51. See *infra*, IV, E, 12. And see the following cases:

Illinois.— Suburban Constr. Co. *v.* Naugle, 70 Ill. App. 384; Harley *v.* Chicago Sanitary Dist., 54 Ill. App. 337, canal.

Massachusetts.— Kansas, etc., R. Constr. Co. *v.* Topeka, etc., R. Co., 135 Mass. 34, 46 Am. Rep. 439.

New Jersey.— Danforth *v.* Philadelphia, etc., R. Co., 30 N. J. Eq. 12, to build and equip railroad.

United States.— Strang *v.* Richmond, etc., R. Co., 101 Fed. 511, 41 C. C. A. 474 (railroad); Fallon *v.* Missouri, etc., R. Co., 8 Fed. Cas. No. 4,629, 1 Dill. 121 (railroad); Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woolw. 26 (railroad).

England.— Peto *v.* Brighton, etc., R. Co., 1 Hem. & M. 468, 32 L. J. Ch. 677, 9 L. T. Rep. N. S. 227, 11 Wkly. Rep. 874, 71 Eng. Reprint 205; Greenhill *v.* Isle of Wight R. Co., 23 L. T. Rep. N. S. 885, 19 Wkly. Rep. 345.

See 44 Cent. Dig. tit. "Specific Performance," §§ 209, 210.

52. London *v.* Nash, 3 Atk. 512, 515, 26 Eng. Reprint 1095, 1 Ves. 12, 27 Eng. Reprint 859; Cubitt *v.* Smith, 10 Jur. N. S. 1123, 11 L. T. Rep. N. S. 298; Mosely *v.* Virgin, 3 Ves. Jr. 184, 30 Eng. Reprint 959 (if sufficiently certain). In the first case,

formance of a landlord's covenant to make repairs is rarely decreed, since the lessee has his remedy by recovery of damages at law, and may then lay out the money on the land in such manner as he thinks proper.[53]

c. Exception to Rule Where Building to Be Done on Defendants' Land, Etc.— (I) *In General.* The court has jurisdiction to grant specific performance of a contract for building or construction where three things concur: (1) Where the work to be done is defined; (2) where plaintiff has a substantial interest in its execution which cannot adequately be compensated for by damages; and (3) where defendant has by the contract obtained from plaintiff possession of the land on which the work is to be done.[54]

Lord Hardwicke said: "The plaintiffs are clearly entitled to come into this court for a specific performance, otherwise on a covenant to repair; for to build is one entire single thing, and if not done prevents that security which the [plaintiff] has for the rent, by virtue of the lease." This distinction between an agreement to build and to repair has been followed in a few cases. Columbus, etc., R. Co. *v.* Watson, 26 Ind. 50. *Contra*, Lucas *v.* Commerford, 3 Bro. Ch. 166, 29 Eng. Reprint 469, 1 Ves. Jr. 235, 30 Eng. Reprint 318; Kay *v.* Johnson, 2 Hem. & M. 118, 71 Eng. Reprint 406.

Lessee's covenant to repair a railroad, extending over a period of many years, not specifically enforced see Oregonian R. Co. *v.* Oregon R., etc., Co., 37 Fed. 733.

Decree refused where performance physically impossible see Waite *v.* O'Neil, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550.

53. Beck *v.* Allison, 56 N. Y. 366, 15 Am. Rep. 430 [*reversing* 4 Daly 421]. See Flint *v.* Brandon, 8 Ves. Jr. 159, 32 Eng. Reprint 314, agreement to fill up gravel pits.

Exception where irreparable injury if repairs not made see Valloton *v.* Seignett, 2 Abb. Pr. (N. Y.) 121.

Performance indirectly enforced by injunction see Lane *v.* Newdigate, 10 Ves. Jr. 192, 7 Rev. Rep. 381, 32 Eng. Reprint 818.

Execution of a lease or other instrument containing covenant to repair may be decreed. Paxton *v.* Newton, 2 Smale & G. 437, 65 Eng. Reprint 470.

A landlord's covenant "reasonably to heat and light the demised premises," part of the basement of a building, involving the construction of apparatus for the purpose, was specifically enforced, the court being of the opinion that a judge, by the aid of an expert, would find it easy to frame a scheme for doing the work, and that to determine what was reasonable heating and lighting was a matter of no difficulty. Jones *v.* Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485.

54. In Wilson *v.* Furness R. Co., L. R. 9 Eq. 28, 33, 39 L. J. Ch. 19, 21 L. T. Rep. N. S. 416, 553, 18 Wkly. Rep. 89, it is said: "It would be monstrous if the company, having got the whole benefit of the agreement, could turn round and say, 'This is a sort of thing which the Court finds a difficulty in doing, and will not do.' Rather than allow such a gross piece of dishonesty to go unredressed the Court would struggle with any amount of difficulties in order to perform the agreement." See also Gregory *v.* Ingwersen, 32 N. J. Eq. 199; Stuyvesant *v.* New York, 11 Paige (N. Y.) 414 (to improve and maintain land conveyed to city as a public square); Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784 (to construct water pipe for plaintiff's benefit); Birchett *v.* Bolling, 5 Munf. (Va.) 442 (to build a tavern for joint benefit of the parties on land furnished by plaintiff for the purpose); Wolverhampton *v.* Emmons, [1901] 1 K. B. 515, 70 L. J. K. B. 429, 84 L. T. Rep. N. S. 407, 17 T. L. R. 234, 49 Wkly. Rep. 553; Cooke *v.* Chilcott, 3 Ch. D. 694, 34 L. T. Rep. N. S. 207 (to construct pump and reservoir for water-supply); Storer *v.* Great Western R. Co., 12 L. J. Ch. 65, 3 R. & Can. Cas. 106, 2 Y. & Coll. C. C. 48, 21 Eng. Ch. 48, 63 Eng. Reprint 21 (the leading case). In most of the cases the building was to be done on land conveyed by plaintiff to defendant, but this does not appear to be essential, if the construction is to be on defendant's land, and there has been performance by plaintiff so that defendant is enjoying the benefit thereof in specie. Columbus *v.* Cleveland, etc., R. Co., 25 Ohio Cir. Ct. 663 (an instructive case); Greene *v.* West Cheshire R. Co., L. R. 13 Eq. 44, 41 L. J. Ch. 17, 25 L. T. Rep. N. S. 409, 20 Wkly. Rep. 54. See also South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 98 Ala. 400, 13 So. 682, 39 Am. St. Rep. 74, agreement by railroads, each to build and maintain for benefit of the other crossings over its own tracks.

But specific performance of defendant's agreement to build a drain on his land has been refused, the legal remedy of damages being deemed adequate. Robinson *v.* Luther, 134 Iowa 463, 109 N. W. 775; McCarter *v.* Armstrong, 32 S. C. 203, 10 S. E. 953, 8 L. R. A. 625, 32 S. C. 601, 11 S. E. 634, also because the drain was to be maintained forever.

Requisite of certainty in this class of cases see *infra*, III, D, 10, a.

Building on plaintiff's land adjoining the land conveyed.— The principle of the text was extended to compel the building of a retaining wall along the line of grantor's lots, by the grantee of a right of way, in Flege *v.* Covington, etc., El. R., etc., Co., 122 Ky. 348, 91 S. W. 738, 28 Ky. L. Rep. 1257, 121 Am. St. Rep. 463.

(II) *By Railroad Acquiring Right of Way From Plaintiff.* This rule has most frequently been applied to the case of an agreement by a railroad company acquiring a right of way from a landowner on the faith of its promise to construct some work for the owner's convenience, as a crossing or a passageway beneath its tracks;[55] to fence its right of way;[56] to build a station;[57] to bridge its tracks;[58] to put in a side-track for plaintiff's accommodation;[59] or to build a road, a wharf,[60] or drain.[61]

(III) *Defense of Hardship or Public Inconvenience.* Where the construction of such works by a railroad company for the benefit of a grantor of the right of way confers a benefit on plaintiff that is slight in comparison with the additional burden placed upon the company,[62] or considerably increases the danger in operating the road,[63] specific performance has been refused.

5. Other Contracts Requiring Continuous Acts — a. In General. The general rule as to the difficulty of superintending the execution of the decree [64] applies to a great variety of other contracts where the acts to be done are continuous, lasting over a considerable period of time, especially if they involve the exercise of skill and judgment.[65] Thus the court will not enforce a contract to work a mine,

Public policy may prevent the application of the rule of the text. Thus where plaintiff sold a lot, adjoining his other land, to a city on faith of an agreement of the city to build the city hall on the lot conveyed, specific performance was refused, since a court of equity should not control the discretion of a municipal council in such a matter as the proper location of a public building. Kendall *v.* Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118.

55. *Illinois.*— Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523, company ordered to restore crossings which it had filled up.

Missouri.— Owens *v.* Carthage, etc., R. Co., 110 Mo. App. 320, 85 S. W. 987; Blair *v.* St. Louis, etc., R. Co., 92 Mo. App. 538.

Nebraska.— Gloe *v.* Chicago, etc., R. Co., 65 Nebr. 680, 91 N. W. 547.

New York.— Post *v.* West Shore R. Co., 123 N. Y. 580, 26 N. E. 7; Aikin *v.* Albany, etc., R. Co., 26 Barb. 289.

West Virginia.— Johnson *v.* Ohio River R. Co., 61 W. Va. 141, 56 S. E. 200.

England.— Storer *v.* Great Western R. Co., 12 L. J. Ch. 65, 3 R. & Can. Cas. 106, 2 Y. & Coll. 48, 21 Eng. Ch. 48, 63 Eng. Reprint 21.

56. Lane *v.* Pacific, etc., R. Co., 8 Ida. 230, 67 Pac. 656; Kelly *v.* Nypano R. Co., 23 Pa. Co. Ct. 177. *Contra,* Columbus, etc., R. Co. *v.* Watson, 26 Ind. 50; Cincinnati, etc., R. Co. *v.* Washburn, 25 Ind. 259.

57. Hubbard *v.* Kansas City, etc., R. Co., 63 Mo. 68; Lawrence *v.* Saratoga Lake R. Co., 36 Hun (N. Y.) 467 (a most instructive case); Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617. But see Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43, 18 Am. Rep. 142, to build a depot suitable for the convenience of the public; too vague.

58. Lawrence *v.* Saratoga Lake R. Co., 36 Hun (N. Y.) 467; Raphael *v.* Thames Valley R. Co., L. R. 2 Ch. 147, 36 L. J. Ch. 209, 16 L. T. Rep. N. S. 1, 15 Wkly. Rep. 322.

59. Lane *v.* Pacific, etc., R. Co., 8 Ida. 230, 67 Pac. 656; Greene *v.* West Cheshire R. Co., L. R. 13 Eq. 44, 41 L. J. Ch. 17, 25 L. T. Rep. N. S. 409, 20 Wkly. Rep. 54; Todd *v.* Midland Great Western R. Co., L. R. 9 Ir. 85; Lytton *v.* Great Northern R. Co., 2 Jur. N. S. 436, 2 Kay & J. 394, 4 Wkly. Rep. 441, 69 Eng. Reprint 836.

60. Raphael *v.* Thames Valley R. Co., L. R. 2 Ch. 147, 36 L. J. Ch. 209, 16 L. T. Rep. N. S. 1, 15 Wkly. Rep. 322; Wilson *v.* Furness R. Co., L. R. 9 Eq. 28, 39 L. J. Ch. 19, 21 L. T. Rep. N. S. 416, 553, 18 Wkly. Rep. 89; Sanderson *v.* Cockermouth, etc., R. Co., 11 Beav. 497, 50 Eng. Reprint 909.

61. Bell *v.* Dayton, etc., R. Co., 3 Ohio Cir. Ct. 31, 2 Ohio Cir. Dec. 19. *Compare,* however, Yazoo, etc., R. Co. *v.* Payne, 93 Miss. 50, 46 So. 405, holding that a provision of a deed to a railroad of right of way through a farm that the railroad will from year to year give the grantor sufficient ditch to perfectly drain all his land and whatever crossings he needs will not be specifically performed; the remedy at law being adequate, and such superintendence of ditching farms and erecting crossings not being within the province of equity.

62. Goding *v.* Bangor, etc., R. Co., 94 Me. 542, 48 Atl. 114 (grade-crossing); Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 7 N. E. 404 (passage under tracks); Johnson *v.* Ohio River R. Co., 61 W. Va. 141, 56 S. E. 200. See also *infra,* IV, D, 4. But the defense of hardship and expense in maintaining farm crossings does not avail the company, when they are necessary to the convenient use of plaintiff's farm. Baltimore, etc., R. Co. *v.* Bruhaker, 217 Ill. 462, 75 N. E. 523.

63. Goding *v.* Bangor, etc., R. Co., 94 Me. 542, 48 Atl. 114, grade crossing. See also *infra,* IV, D, 9.

64. See *supra,* III, C, 1.

65. *Alabama.*— Tombigbee Valley R. Co. *v.* Fairford Lumber Co., 155 Ala. 575, 47 So. 88 (operation of sawmill); Electric Lighting Co. *v.* Mobile, etc., R. Co., 109 Ala. 190, 19 So. 721, 55 Am. St. Rep. 927 (continuous mechanical service requiring highest degree of skill, maintaining costly machinery, and daily use of cars moved by electricity).

or to sell all the product of a mine, since that involves the operation of the mine.[66]

b. Exception Where Breaches of the Contract Will Be Infrequent. Contracts have been held not to fall within the rule, although lasting over a considerable period, where violations of the decree could only occur at considerable intervals, and each violation would be a single completed act.[67]

c. Railway Operating Contracts — (i) *GENERAL RULE.* Apart from the special cases mentioned in the next paragraph, the cases were very few, until quite recent years, in which the courts had undertaken to enforce contracts by decrees which called for any supervision by the court of the operating of railroads. Generally they have been refused.[68]

California.—Pacific Electric R. Co. *v.* Campbell-Johnston, 153 Cal. 106, 94 Pac. 623.

Illinois.— Hernreich *v.* Lidberg, 105 Ill. App. 495, to form a corporation.

Indiana.—Thiebaud *v.* Union Furniture Co., 143 Ind. 340, 42 N. E. 741, pumping water.

North Dakota.— Kidd *v.* McGinnis, 1 N. D. 331, 48 N. W. 221, to maintain a public park.

Pennsylvania.— Pittsburg, etc., R. Co.'s Appeal, 99 Pa. St. 177, to use a telegraph line built by plaintiff along defendant's railroad, and pay plaintiff half of the earnings.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955 (to furnish a perpetual supply of marble from defendant's quarry); Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509 (management of theater); Berliner Gramophone Co. *v.* Seaman, 110 Fed. 30, 49 C. C. A. 99 (contract establishing business relations between the parties, containing mutual covenants to be performed by each, and having several years to run).

England.— Keith *v.* National Telephone Co., [1894] 2 Ch. 147, 58 J. P. 573, 63 L. J. Ch. 373, 70 L. T. Rep. N. S. 276, 8 Reports 776, 42 Wkly. Rep. 380 (to maintain telephonic apparatus upon plaintiff's premises; specific performance refused, but injunction against cutting wires); Phipps *v.* Jackson, 56 L. J. Ch. 550, 35 Wkly. Rep. 378 (to keep a farm stocked with horses and cattle); Hooper *v.* Broderick, 9 L. J. Ch. 321, 11 Sim. 47, 34 Eng. Ch. 47, 59 Eng. Reprint 791 (to keep the demised property open as an inn).

Injunction.— The substance of the relief sought in such cases may sometimes be obtained by injunction against disturbing an existing condition. Maryland, Tel., etc., Co. *v.* Charles Simons' Sons Co., 103 Md. 136, 63 Atl. 314, 115 Am. St. Rep. 346 (injunction against discontinuing telephone service; but the point that the contract called for continuous acts and skilled service seems not to have been raised); Western Union Tel. Co. *v.* Pennsylvania Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968 [*reversing* 125 Fed. 67] (injunction against disturbance of plaintiff's telegraph wires on defendant's right of way and poles); Keith *v.* National Telephone Co., [1894] 2 Ch. 147, 58 J. P. 573, 63 L. J. Ch. 373, 70 L. T. Rep. N. S. 276, 8 Reports 776, 42 Wkly. Rep. 380 (injunction against cutting telephone wires).

Rule disregarded because of grave public necessity.— Defendant's agreement to maintain its waterworks system for a long term of years, with fire hydrants, was enforced, because of the necessity to plaintiff city of fire protection. The decree was thought to require neither exercise of skill and judgment, nor undue supervision by the court. Hubbard City *v.* Bounds, (Tex. Civ. App. 1906) 95 S. W. 69. And see Bounds *v.* Hubbard City, 46 Tex. Civ. App. 233, 105 S. W. 56.

66. *Illinois.*—Grape Creek Coal Co. *v.* Spellman, 39 Ill. App. 630.

Indian Territory.— Wilhite *v.* Skelton, 5 Indian Terr. 621, 82 S. W. 932.

Oregon.— Clarno *v.* Grayson, 30 Oreg. 111, 46 Pac. 426, purchaser of mine to operate it and pay net proceeds to be applied upon the price.

Pennsylvania.— Koch's Appeal, 93 Pa. St. 434.

Virginia.— Campbell *v.* Rust, 85 Va. 653, 8 S. E. 664.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955.

England.— Wheatley *v.* Westminster Brymbo Coal Co., L. R. 9 Eq. 538, 39 L. J. Ch. 175, 22 L. T. Rep. N. S. 7, 18 Wkly. Rep. 162; Pollard *v.* Clayton, 1 Jur. N. S. 342, 1 Kay & J. 462, 3 Wkly. Rep. 349, 69 Eng. Reprint 540; Booth *v.* Pollard, 4 Y. & C. Exch. 61.

Lease may be executed.— But where there is a contract for a lease of mines, to be worked in a specified manner, there may be a decree to execute the lease, leaving the lessor to his legal remedies for future breaches of covenants therein. Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

67. Chubb *v.* Peckham, 13 N. J. Eq. 207 (to pay a weekly sum for support of parents); Goddard *v.* American Queen, 44 N. Y. App. Div. 454, 61 N. Y. Suppl. 133 [*reversing* 27 Misc. 482, 59 N. Y. Suppl. 46] (to insert plaintiff's advertisements in defendant's monthly magazine).

68. *California.*— Pacific Electric R. Co. *v.* Campbell-Johnston, 153 Cal. 106, 94 Pac. 623.

New York.— Fargo *v.* New York, etc., R. Co., 3 Misc. 205, 209, 23 N. Y. Suppl. 360, refusing to specifically enforce performance of a contract between a railroad company and an express company, granting to the latter the exclusive privilege, for a term of years, of transporting express matter on the railroad company's passenger trains, and requiring the railroad company to at all times fur-

(II) *To Maintain a Station and Stop Trains Thereat.* In extension of a rule already discussed, well considered cases have established the rule that an agreement by a railway company in consideration of the conveyance to it of land, to maintain a station at a certain place for the grantor's convenience, and to stop trains thereat, may be enforced against the company.[69]

(III) *Other Contracts With Vendors or Shippers.* Whether a contract by which a railroad company agrees with a city which has given it land and money to maintain its general offices and machine shop in the city is enforceable in equity is more doubtful.[70] Other contracts between shippers and railways, calling for continuous acts, have in a number of instances been refused enforcement.[71]

nish a "sufficient" space in its cars, and providing for special and varying contingencies. The court said: "A decree for specific performance couched in the precise terms of the contract itself, would be but the beginning of the judicial work."

Ohio.— Port Clinton R. Co. *v.* Cleveland, etc., R. Co., 13 Ohio St. 544; Matthews *v.* Southern Ohio Traction Co., 25 Ohio Cir. Ct. 652, holding that ordinances which required a street railway company to announce the names of streets and the crossings of other railroads, and to keep for sale tickets on the cars, to keep within a prescribed speed limit, and to operate a sufficient number of cars necessary for the public convenience and demand, could not be specifically enforced.

Tennessee.— McCann *v.* South Nashville St. R. Co., 2 Tenn. Ch. 773, operating street railroad.

Texas.— Lone Star Salt Co. *v.* Texas Short Line R. Co., 99 Tex. 434, 90 S. W. 863, 3 L. R. A. N. S. 828.

United States.— Pullman's Palace Car Co. *v.* Texas, etc., R. Co., 11 Fed. 625, 4 Woods 317, contract with a sleeping-car company, containing continuous covenants, with intricate detail, running through a period of nine years, over a vast system of railways.

England.— Powell Duffryn Steam Coal Co. *v.* Taff Vale R. Co., L. R. 9 Ch. 331, 43 L. J. Ch. 575, 30 L. T. Rep. N. S. 208 (statutory duty to permit plaintiff to run its cars and engines over defendant's tracks not specifically enforced, since it involved the services of defendant's signalmen, although the road in question was but two miles in length, and the framing of sufficient regulations probably an easy matter); Blackett *v.* Bates, L. R. 1 Ch. 117, 12 Jur. N. S. 151, 35 L. J. Ch. 324, 13 L. T. Rep. N. S. 656, 14 Wkly. Rep. 319 (plaintiff to furnish engine power and repair the railway); Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 22 L. J. Ch. 921, 17 Jur. 1015, 52 Eng. Ch. 710, 43 Eng. Reprint 358 (plaintiffs to work the line and keep engine and rolling-stock in repair).

Specific performance granted.— Niagara Falls International Bridge Co. *v.* Great Western R. Co., 39 Barb. (N. Y.) 212 (contract by defendant, crossing plaintiff's bridge, to collect and make proper regulations for collecting bridge tolls from local passengers on defendant's trains; but the point that the decree involved continuous supervision was not discussed); Wolverhampton, etc., R. Co. *v.* London, etc., R. Co., L. R. 16 Eq. 433, 43 L. J. Ch. 131 (contract to carry certain specified traffic over plaintiff's line; injunction against diverting this traffic to other lines; on demurrer; no decree unless the court should see its way to define what defendants ought, or ought not, to do).

Statutory jurisdiction in Pennsylvania relating to grade crossings see Cornwall, etc., R. Co.'s Appeal, 125 Pa. St. 232, 17 Atl. 427, 11 Am. St. Rep. 889.

69. See *supra*, III, C, 4, e, (II). And see Taylor *v.* Florida East Coast R. Co., 54 Fla. 636, 45 So. 574, 127 Am. St. Rep. 155, 16 L. R. A. N. S. 307; Minneapolis, etc., R. Co. *v.* Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. Rep. 216; Lawrence *v.* Saratoga Lake R. Co., 36 Hun (N. Y.) 467, 3 N. Y. St. 743; Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617; Phillips *v.* Great Western R. Co., L. R. 7 Ch. 409, 41 L. J. Ch. 614, 26 L. T. Rep. N. S. 532, 20 Wkly. Rep. 562; Hood *v.* Northeastern R. Co., L. R. 8 Eq. 666, 20 L. T. Rep. N. S. 970, 17 Wkly. Rep. 1085 [*affirmed* in 5 Ch. 525, 23 L. T. Rep. N. S. 206, 18 Wkly. Rep. 473]. *Contra*, Atlanta, etc., R. Co. *v.* Speer, 32 Ga. 550, 79 Am. Dec. 305 (to receive and deliver grantor's freight at a freight platform); Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43, 18 Am. Rep. 142 (to stop one train each way daily); Willson *v.* Winchester, etc., R. Co., 99 Fed. 642, 41 C. C. A. 215 [*affirming* 82 Fed. 15].

70. That it is not enforceable, partly because it calls for continuous acts, and partly because the public interest might at some time demand the removal of the shops and offices see Texas, etc., R. Co. *v.* Marshall, 136 U. S. 393, 10 S. Ct. 846, 34 L. ed. 385. But in the well-considered case of Tyler *v.* St. Louis South Western R. Co., 99 Tex. 491, 91 S. W. 1, 93 S. W. 997 [*reversing* (Civ. App. 1905) 87 S. W. 238], such a contract was enforced by injunction. The contract in the latter case could not be considered against public policy, since it was in accordance with a statute.

71. Louisville, etc., R. Co. *v.* Bodenschatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703 (a contract with a quarry "to furnish facilities for shipping stone"); Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422 (a contract to give the owner of a grain elevator the handling of all through grain transported

(IV) *Recent Wide Departure From the Rule.* But in a remarkable series of cases, beginning with the year 1890, contracts involving the operation of railroads, often of the utmost complexity and extending over a very long term of years, or perpetually, have been enforced specifically. In the leading case of the series a controlling reason for the decision was that the interests of the general public would have been injuriously affected by a failure to make the decree;[72] but this reason appears to have dropped out of sight in the cases following this precedent.[73]

D. Where Decree Cannot Be Framed; Completeness and Certainty[74] **— 1. In General.** The contract must be complete in all its parts; that is to say, it must contain all the material terms, and none of these terms must be left to be settled by future negotiation.[75] It must also be certain; that is to say, each of

on the railroad); Lone Star Salt Co. *v.* Texas Short Line R. Co., 99 Tex. 434, 90 S. W. 863 [*reversing* (Civ. App. 1905) 86 S. W. 355] (a contract to ship and receive and forward a certain percentage of defendant's freight over plaintiff railroad); Wilson *v.* West Hartlepool R. Co., 2 De G. J. & S. 475, 34 L. J. Ch. 241, 11 Jur. N. S. 124, 11 L. T. Rep. N. S. 692, 13 Wkly. Rep. 361, 7 Eng. Ch. 371, 46 Eng. Reprint 459 (holding that where plaintiff, a manufacturer, in a contract by which defendant railroad sold him land, stipulated that he would use that railroad in preference to others, this stipulation could not be specifically enforced; but a covenant containing the stipulation was decreed to be inserted in the deed to plaintiff).

72. Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546], such failure would have resulted in cutting up the chief public park of St. Louis with the tracks of other railroads, to the great detriment of its usefulness to the public.

73. *Kentucky.*— Schmidt *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809, contract to operate a railroad for a term of thirty years for the benefit of mortgage bondholders.

New York.— Prospect Park, etc., R. Co. *v.* Coney Island, etc., R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610, contract to run street cars to plaintiff's depot to connect with plaintiff's trains.

Pennsylvania.— Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952, contract for interchange of traffic between railroads.

Tennessee.— Louisville, etc., R. Co. *v.* Mississippi, etc., R. Co., 92 Tenn. 681, 22 S. W. 920, agreement to lay tracks through a city and allow their use by any other road terminating in the city.

Virginia.— Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297, contract to operate a leased road.

United States.— Union Pac. R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265 [*affirming* 51 Fed. 309, 2 C. C. A. 174, 47 Fed. 15] (where the U. P. Co. granted to the R. I. Co. the right to use its bridge and Omaha terminals jointly, under regulations for the movement of trains of both companies to be carried out under the direction of an officer of the U. P. Co.); Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546] (where defendant railroad agreed to allow the use of its tracks and terminals in St. Louis to other companies, under the operating control of defendant company); Grand Trunk Western R. Co. *v.* Chicago, etc., R. Co., 141 Fed. 785, 73 C. C. A. 43 (contract by a lessee railroad to run its trains over the tracks and use terminal facilities of the lessor during a lease for nine hundred and ninety-nine years).

Compare Lone Star Salt Co. *v.* Texas Short Line R. Co., 99 Tex. 434, 90 S. W. 863, 3 L. R. A. N. S. 828, distinguishing some of the cases cited above and refusing specific performance.

74. Discretion of court see *supra*, I, D, 4, a.

75. *Illinois.*— Corbett *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Lombard *v.* Chicago Sinai Cong., 64 Ill. 477.

Indiana.— New Albany Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660, 39 N. E. 462.

Kentucky.— Madox *v.* McQuean, 3 A. K. Marsh. 400.

Louisiana.— Blanks *v.* Sutcliffe, 122 La. 448, 47 So. 765.

Maryland.— Canton Co. *v.* Northern Cent. R. Co., 21 Md. 383.

Massachusetts.— Callanan *v.* Chapin, 158 Mass. 113, 32 N. E. 941.

Michigan.— Munro *v.* Edwards, 86 Mich. 91, 48 N. W. 689.

Missouri.— Huff *v.* Shepard, 58 Mo. 242 (manner or terms of payment); Wiley *v.* Robert, 31 Mo. 212.

New Jersey.— Domestic Tel., etc., Co. *v.* Metropolitan Tel., etc., Co., 40 N. J. Eq. 287, 39 N. J. Eq. 160; Potts *v.* Whitehead, 20 N. J. Eq. 55; Camden, etc, R. Co. *v.* Stewart, 18 N. J. Eq. 489; McKibbin *v.* Brown, 14 N. J. Eq. 13.

New York.— Pullman *v.* Johnson, 8 N. Y. Suppl. 775 (mere declarations by a father of an intention to give his daughter certain land not sufficient to create an enforceable obligation in her favor); Kayser *v.* Arnold, 1 N. Y. Suppl. 412 [*affirmed* in 124 N. Y. 674, 27 N. E. 360]; Mayer *v.* McCreery, 9 N. Y. St. 114 [*affirmed* in 119 N. Y. 434, 23 N. E. 1045].

North Carolina.— Cobb *v.* Cromwell, 62 N. C. 18.

the material terms must be expressed with sufficient clearness and definiteness to enable the court to ascertain the intent of the parties and to frame its decree in accordance with such intent. The court cannot make a contract for the parties, *ex æquo et bono*.[76] These two requirements of completeness and certainty, while logically distinct, may conveniently be treated together.

Pennsylvania.— Stein *v.* North, 3 Yeates 324.

Utah.—Whitehill *v.* Lowe, 10 Utah 419, 37 Pac. 589.

Virginia.— Creecy *v.* Grief, 108 Va. 320, 61 S. E. 769 (where it is said that specific performance of a contract will not be decreed in the absence of proof of a clear mutual understanding and a positive assent to the contract on the part of each party; and, where the court is unable from the circumstances to say whether the minds of the parties met on the essential particulars of the contract, or cannot say exactly on what substantial terms they agreed, specific performance will be refused); Colonna Dry Dock Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770; Berry *v.* Wortham, 96 Va. 87, 30 S. E. 443; Baker *v.* Glass, 6 Munf. 212; Graham *v.* Call, 5 Munf. 396.

Wisconsin.— Hopkins *v.* Gilman, 22 Wis. 476.

United States.— Kane *v.* Luckman, 131 Fed. 609; Manning *v.* Ayers, 77 Fed. 690, 23 C. C. A. 405, terms of payment.

England.—White *v.* McMahon, L. R. 18 Ir. 460; Callaghan *v.* Callaghan, 8 Cl. & F. 374, 4 Ir. Eq. 441, 8 Eng. Reprint 145.

See 44 Cent. Dig. tit. "Specific Performance," §§ 86–88.

A contract to make a contract on performance of certain conditions is enforceable. Noyes *v.* Schlegel, 9 Cal. App. 516, 99 Pac. 726.

Essential requisite of all contracts that there must be a concluded contract, a "meeting of the minds," a sufficient offer and acceptance see CONTRACTS, 9 Cyc. 213; VENDOR AND PURCHASER.

Requirements of the written memorandum necessary to satisfy the statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 252.

Essential terms must not be left for future settlement see *infra*, III, D, 2 *et seq.*

76. *Alabama.*— Alabama Cent. R. Co. *v.* Long, 158 Ala. 301, 48 So. 363; Christian, etc., Grocery Co. *v.* Bienville Water Supply Co., 106 Ala. 124, 17 So. 352; Nelson *v.* Kelly, 91 Ala. 569, 8 So. 690.

Arizona.— Mallory *v.* Globe-Boston Copper Min. Co., 9 Ariz. 104, 94 Pac. 1116.

Arkansas.— Jordan *v.* Deaton, 23 Ark. 704; Johnson *v.* Craig, 21 Ark. 533.

California.— Berry *v.* Woodburn, 107 Cal. 504, 40 Pac. 802; Magee *v.* McManus, 70 Cal. 553, 12 Pac. 451; Los Angeles Immigration, etc., Co-op. Assoc. *v.* Phillips, 56 Cal. 539; Minturn *v.* Baylis, 33 Cal. 129; Morrison *v.* Rossignol, 5 Cal. 64; Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163.

Colorado.— Winter *v.* Geobner, 21 Colo. 279, 40 Pac. 570 [*affirming* 2 Colo. App. 259, 30 Pac. 51].

Connecticut.— Platt *v.* Stonington Sav. Bank, 46 Conn. 476.

Dakota.— Buttz *v.* Colton, 6 Dak. 306, 43 N. W. 717; Peck *v.* Levinger, 6 Dak. 54, 50 N. W. 481.

Delaware.— Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 14 Atl. 27; Crockett *v.* Green, 3 Del. Ch. 466.

District of Columbia.— Waters *v.* Ritchie, 3 App. Cas. 379; Repetti *v.* Maisak, 6 Mackey 366.

Florida.— Edwards *v.* Rives, 35 Fla. 89, 17 So. 416; Patrick *v.* Sears, 19 Fla. 856.

Georgia.— Grizzle *v.* Gaddis, 75 Ga. 350.

Illinois.— Hamilton *v.* Harvey, 121 Ill. 469, 13 N. E. 210, 2 Am. St. Rep. 118; Bowman *v.* Cunningham, 78 Ill. 48; Lear *v.* Chouteau, 23 Ill. 39; Fitzpatrick *v.* Beatty, 6 Ill. 454; Campbell *v.* Timmerman, 139 Ill. App. 151; Danforth *v.* Perry, 20 Ill. App. 130.

Indiana.— Louisville, etc., R. Co. *v.* Boden-Schatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703; Island Coal Co. *v.* Streitlemier, 139 Ind. 83, 37 N. E. 340.

Iowa.— McDaniels *v.* Whitney, 38 Iowa 60; Olive *v.* Dougherty, 3 Greene 371.

Louisiana.— New Orleans *v.* New Orleans, etc., R. Co., 44 La. Ann. 64, 10 So. 401.

Maine.— Higgins *v.* Butler, 78 Me. 520, 7 Atl. 276; Jordan *v.* Fay, 40 Me. 130.

Maryland.— Lanahan *v.* Cockey, 108 Md. 620, 71 Atl. 314; Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232; Horner *v.* Woodland, 88 Md. 511, 41 Atl. 1079; Schwanebeck *v.* Smith, 77 Md. 314, 26 Atl. 409, 24 L. R. A. 168; Wilks *v.* Burns, 60 Md. 64; Shriver *v.* Seiss, 49 Md. 384; Smith *v.* Crandall, 20 Md. 482; Griffith *v.* Frederick County Bank, 6 Gill & J. 424; Tyson *v.* Watts, 1 Md. Ch. 13.

Massachusetts.— Fogg *v.* Price, 145 Mass. 513, 14 N. E. 741; Lynes *v.* Hayden, 119 Mass. 482; Pray *v.* Clark, 113 Mass. 283.

Michigan.— Walker *v.* Kelly, 91 Mich. 212, 51 N. W. 934; Shipman *v.* Campbell, 79 Mich. 82, 44 N. W. 171; McMurtrie *v.* Bennette, Harr. 124.

Minnesota.— Ham *v.* Johnston, 55 Minn. 115, 56 N. W. 584; Olson *v.* Erickson, 42 Minn. 440, 44 N. W. 317; Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

Mississippi.— Barnett *v.* Nichols, 56 Miss. 622; Daniel *v.* Frazer, 40 Miss. 507; Montgomery *v.* Norris, 1 How. 499.

Missouri.— Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432; Wendover *v.* Baker, 121 Mo. 273, 25 S. W. 918; Paris *v.* Haley, 61 Mo. 453; Foster *v.* Kimmons, 54 Mo. 488.

Nebraska.— Stanton *v.* Driffkorn, 83 Nebr. 36, 118 N. W. 1092; Clarke *v.* Koenig, 36 Nebr. 572, 54 N. W. 842; Gamble *v.* Wilson, 33 Nebr. 270, 50 N. W. 3; Baker *v.* Wiswell,

2. Greater Degree of Certainty Required Than at Law. An action at law for breach of contract can often be maintained, although some of the terms of the contract are not established with exactness. It is otherwise where specific performance is required. The court, in order that it may frame a decree in accordance with the intent of the parties, must be clearly apprised of that intent in all essential respects. A greater degree of certainty is required than in actions at law for

17 Nebr. 52, 22 N. W. 111; Dickman *v.* Birkhauser, 16 Nebr. 686, 21 N. W. 396.

New Jersey.—Krah *v.* Wassmer, (Ch. 1908) 71 Atl. 404; Brown *v.* Brown, 33 N. J. Eq. 650; Clow *v.* Taylor, 27 N. J. Eq. 418; McKibbin *v.* Brown, 14 N. J. Eq. 13; Rockwell *v.* Lawrence, 6 N. J. Eq. 190.

New York.— Stanton *v.* Miller, 58 N. Y. 192; Buckmaster *v.* Thompson, 36 N. Y. 558; Tousey *v.* Hastings, 127 N. Y. App. Div. 94, 111 N. Y. Suppl. 344 [*affirmed* in 194 N. Y. 79, 86 N. E. 831]; Maher *v.* Garry, 3 N. Y. App. Div. 480, 38 N. Y. Suppl. 436; Ladd *v.* Stevenson, 43 Hun 541 [*affirmed* in 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748]; Smith *v.* Bradhurst, 18 Misc. 546, 41 N. Y. Suppl. 1002; Jones *v.* Andreas, 13 N. Y. St. 363.

North Carolina.—Hardy *v.* Ward, 150 N. C. 385, 64 S. E. 171 (option contract to sell standing timber); Breaid *v.* Munger, 88 N. C. 297; Capps *v.* Holt, 58 N. C. 153; Prater *v.* Miller, 10 N. C. 628.

Ohio.— Maud *v.* Maud, 33 Ohio St. 147; Columbus, etc., R. Co. *v.* Ohio Southern R. Co., 1 Ohio Cir. Ct. 275, 1 Ohio Cir. Dec. 151.

Oregon.— Wagonblast *v.* Whitney, 12 Oreg. 83, 6 Pac. 399; Brown *v.* Lord, 7 Oreg. 302; Odell *v.* Morin, 5 Oreg. 96.

Pennsylvania.—La Belle Coke Co. *v.* Smith, 221 Pa. St. 642, 70 Atl. 894; James *v.* Penn Tanning Co., 221 Pa. St. 634, 70 Atl. 885; Weaver *v.* Shenk, 154 Pa. St. 206, 26 Atl. 811; Hammer *v.* McEldowney, 46 Pa. St. 334.

Tennessee.—McCarty *v.* Kyle, 4 Coldw. 348; Knuckolls *v.* Lea, 10 Humphr. 577.

Texas.— Jones *v.* Carver, 59 Tex. 293; Bracken *v.* Hambrick, 25 Tex. 408; Taylor *v.* Ashley, 15 Tex. 50.

Utah.— Whitehill *v.* Lowe, 10 Utah 419, 37 Pac. 589.

Vermont.— Olmstead *v.* Abbott, 61 Vt. 281, 18 Atl. 315.

Virginia.— Colonna Dry Dock Co. *v.* Colonna, 168 Va. 230, 61 S. E. 770; Litterall *v.* Jackson, 80 Va. 604; Shenandoah Valley R. Co. *v.* Lewis, 76 Va. 833; Pigg *v.* Corder, 12 Leigh 69.

Washington.— Rochester *v.* Yesler, 6 Wash. 114, 32 Pac. 1057.

West Virginia.—Guinn *v.* Warbutton, 64 W. Va. 76, 60 S. E. 1100; Crawford *v.* Workman, 64 W. Va. 10, 61 S. E. 319; Hissam *v.* Parish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892; Mathews *v.* Jarrett, 20 W. Va. 415.

Wisconsin.—Poole *v.* Tannis, 137 Wis. 363, 118 N. W. 188, 864; Smith *v.* Wood, 12 Wis. 382.

Wyoming.— Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

United States.— Preston *v.* Preston, 95 U. S. 200, 24 L. ed. 494; Carr *v.* Duval, 14 Pet. 77, 10 L. ed. 361; Bradley *v.* Hayward, 164 Fed. 107; Davis, etc., Temperature Controlling Co. *v.* Tagliabue, 159 Fed. 712, 86 C. C. A. 466; Walcott *v.* Watson, 53 Fed. 429; Bowen *v.* Waters, 3 Fed. Cas. No. 1,725, 2 Paine 1; Kendall *v.* Almy, 14 Fed. Cas. No. 7,690, 2 Sumn. 278; Smith *v.* Burnham, 22 Fed. Cas. No. 13,019, 3 Sumn. 435; Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120.

England.— Oxford *v.* Crow, [1893] 3 Ch. 535, 69 L. T. Rep. N. S. 228, 8 Reports 279, 42 Wkly. Rep. 279; Callaghan *v.* Callaghan, 8 Cl. & F. 374, 4 Ir. Eq. 441, 8 Eng. Reprint 145; Taylor *v.* Portington, 7 De G. M. & G. 328, 1 Jur. N. S. 1057, 3 Eq. Rep. 781, 56 Eng. Ch. 253, 44 Eng. Reprint 128 (condition as to repairs and decorations of house in a permit for lease); Price *v.* Griffith, 1 De G. M. & G. 80, 15 Jur. 1093, 21 L. J. Ch. 78, 50 Eng. Ch. 63, 42 Eng. Reprint 482 (contract for a lease of coals, etc., "or minerals"); Thellusson *v.* Rendlasham, 11 Jur. 29 (holding that an agreement between members of a family to grant a lease from year to year at a fair annual rent, for so long as the lessee should choose, was so vague and uncertain that the court could not execute it); Lancaster *v.* De Trafford, 8 Jur. N. S. 873, 31 L. J. Ch. 554, 7 L. T. Rep. N. S. 40, 10 Wkly. Rep. 474 (agreement for a lease of mineral lands not clearly defining the mineral area to be comprised in the lease); Gardner *v.* Fooks, 15 Wkly. Rep. 388 (hotel lessee's undertaking to improve premises); Price *v.* Assheton, 1 Y. & C. Exch. 441 (agreement to renew lease).

See 44 Cent. Dig. tit. "Specific Performance," § 61 *et seq.* And see Contracts, 9 Cyc. 248; and the cases cited under the sections following.

Extrinsic evidence.— Where, by the aid of evidence of the situation and surroundings of the parties at the time of the execution of a contract which is indefinite or ambiguous, together with proof of their subsequent acts in construing the written instrument, the court can with reasonable certainty determine the intention of the parties, the contract will be enforced as so construed, in the absence of other fatal objections. Inglis *v.* Fohey, 136 Wis. 28, 116 N. W. 857. See also Skinner *v.* McDouall, 2 De G. & Sm. 265, 12 Jur. 741, 17 L. J. Ch. 347, 64 Eng. Reprint 120.

Agreement as to inventions and patents.— An agreement by one employed as a machinist to invent, perfect, and improve lubricating valves, force-feed oil pumps, etc., which his employer is engaged in manufacturing, and that whatever inventions or devices may

damages.[77] The terms must not be ambiguous, so that either party may reasonably misunderstand them,[78] or so obscure or self-contradictory that the court cannot interpret them.[79]

3. Only Essentials of Contract Need Appear in Writing; Reasonable Certainty. Terms which the law implies by legal presumption need not be expressly stated; and a statement of a term in general language is sufficient when the law will supply the details.[80] The certainty that is required is not a technical but only a reasonable one.[81]

result from such employment in the nature of machinery, tools, etc., to be used in connection with the employer's business, shall at the employer's request be protected by patents and become the employer's property, is sufficiently definite and certain to be specifically enforced. Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988. See also McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729, holding sufficiently definite a contract to give plaintiff a half interest in a mechanical device.

Agreement to devise or bequeath sufficiently certain to be specifically enforced see Sarasohn *v.* Kamaiky, 93 N. Y. 203, 86 N. E. 20.

Contract to purchase stock.— Where an oral contract to purchase shares of stock of a corporation provides that the purchase may be made by either of the parties as opportunity offers for their mutual benefit, the stock purchased to be equally divided, each paying one half of the purchase-price, either party has the right, acting in good faith, to pay what he deems proper for the stock, and the other must pay one half of the cost; and hence the contract does not lack certainty so as to preclude specific performance. Sherman *v.* Herr, 220 Pa. St. 420, 69 Atl. 899.

Time of performance.— The fact that the time of performance of an agreement was not fixed therein does not prevent specific performance thereof, the legal implication being that performance was to take place within a reasonable time. Inglis *v.* Fohey, 136 Wis. 28, 116 N. W. 857.

77. See Pomeroy Spec. Perf. § 159. And see Stanton *v.* Singleton, 126 Cal. 657, 59 Pac 146, 47 L. R. A. 334; Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43, 18 Am. Rep. 142; Foster *v.* Kimmous, 54 Mo. 488; Soloman *v.* Wilmington Sewerage Co., 142 N. C. 439, 55 S. E. 300, 6 L. R. A. N. S. 391.

Statutory definition.— By Cal. Civ. Code, § 3390, an agreement cannot be enforced specifically the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable. See Meyer *v.* Quiggle, 140 Cal. 495, 74 Pac. 40.

The contract must be certain as to plaintiff's duty, since the decree affects plaintiff as well as defendant. Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880.

Against assignee and representatives of the contracting parties, it is said that the requirement of certainty is more than ordinarily stringent. Odell *v.* Morin, 5 Oreg. 96.

Miscellaneous examples of uncertainty.— In addition to the cases in the following notes see Winter *v.* Goebner, 21 Colo. 279, 40 Pac. 570 [*affirming* 2 Colo. App. 259, 30 Pac. 51]; Hudson *v.* Layton, 5 Harr. (Del.) 74, 48 Am. Dec. 167; Long *v.* Long, 118 Ill. 638, 9 N. E. 247 [*affirming* 19 Ill. App. 383] (agreement to release a distributive share); Waters *v.* Brown, 7 J. J. Marsh. (Ky.) 123; Burke *v.* His Creditors, 9 La. Ann. 56, 59; Heinisch *v.* Pennington, 73 N. J. Eq. 456, 68 Atl. 233 (promise to make one a devisee); Ensminger *v.* Peterson, 53 W. Va. 324, 44 S. E. 218; Colson *v.* Thompson, 2 Wheat. (U. S.) 336, 4 L. ed. 253.

Reformation for uncertainty.— If by mutual mistake the contract is uncertain, the proper practice is to sue for reformation and specific performance in the same suit and not to seek specific performance, leaving the uncertainty to be corrected by another action brought for that purpose. Bacon *v.* Leslie, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134. See Vail *v.* Tillman, 2 Wash. 476, 27 Pac. 76. And see Reformation of Instruments, 34 Cyc. 899.

78. McDaniels *v.* Whitney, 38 Iowa 60; Wilks *v.* Burns, 60 Md. 64 (contract to make a will); Jones *v.* Wells, 31 Mich. 170 (that vendee shall pay "all" taxes); Minnesota Tribune Co. *v.* Associated Press, 83 Fed. 350, 27 C. C. A. 542 [*affirming* 77 Fed. 354]; Bowen *v.* Waters, 3 Fed. Cas. No. 1,725, 2 Paine 1.

79. Wendover *v.* Baker, 121 Mo. 273, 25 S. W. 918; Buckmaster *v.* Thompson, 36 N. Y. 558; Mehl *v.* Von der Wulbeke, 2 Lans. (N. Y.) 267 [*affirmed* in 46 N. Y. 539].

80. Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918 (contract complete, although other terms might properly have been incorporated); McAllen *v.* Raphael, (Tex. Civ. App. 1906) 96 S. W. 760.

81. Work *v.* Welsh, 160 Ill. 468, 43 N. E. 719; Bull *v.* Bell, 4 Wis. 54, contract may be inartificially drawn.

Implied terms.— Among such terms are plaintiff's promise to buy. Lawson *v.* Mullinix, 104 Md. 156, 64 Atl. 938; Munro *v.* Edwards, 86 Mich. 91, 48 N. W. 689. The transfer of possession need not be provided for (Munro *v.* Edwards, *supra*); but it has been held in California, that an express promise to convey is essential (Minturn *v.* Baylis, 33 Cal. 129). Plaintiff's acceptance of defendant's offer need not appear in the written memorandum; it may be shown by parol. Graule *v.* Warner, 140 Ill. 123, 29 N. E. 1118; Lawson *v.* Mullinix, 104 Md.

4. Uncertainty in Separable Part of Contract. If specific performance of a separable part is sought, uncertainty or indefiniteness in the part of the contract not sought to be enforced is no defense.[82]

5. Description of the Land — a. In General. The description must be such as to enable the court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby. The description need not be given with such particularity as to make a resort to extrinsic evidence unnecessary. Reasonable certainty is all that is required. Extrinsic proof is allowed in order to apply, not to alter or vary, the written agreement.[83] That the description of the property

156, 64 Atl. 938. See *infra*, IV, E, 4; and Frauds, Statute of, 20 Cyc. 272.

Terms to be "as usual," etc.— A provision that the contract or lease, or some of its terms, are to be in "the usual form," or "as usual," is not necessarily uncertain. Cochrane *v.* Justice Min. Co., 16 Colo. 415, 26 Pac. 780 ("settlement as usual" of royalty in a mining lease); Scannell *v.* American Soda Fountain Co., 161 Mo. 606, 61 S. W. 889 (lease in the "usual form"); Hebert *v.* New York Mut. L. Ins. Co., 12 Fed. 807, 8 Sawy. 198 (policy of insurance to be according to the form in use by the company).

82. Price *v.* McKay, 53 N. J. Eq. 588, 32 Atl. 130; Sarter *v.* Gordon, 2 Hill Eq. (S. C.) 121. See Livingston *v.* Koenig, 20 Tex. Civ. App. 398, 50 S. W. 463, uncertainty in reservation of right of way; vendor's offer to convey without the reservation.

83. *Arkansas.*— Graham *v.* Graham, 85 Ark. 442, 108 S. W. 835, agreement for dissolution of partnership, by which the retiring partner was to turn over to the other partner all partnership property, including real estate, and execute a deed for the same, which did not describe any real estate, required to be specifically enforced as to real estate which was bought with partnership funds, the deed of which to the retiring partner was turned over to the other when the contract was executed.

California.— Carr *v.* Howell, 154 Cal. 372, 97 Pac. 885; Towle *v.* Carmelo Land, etc., Co., 99 Cal. 397, 33 Pac. 1126.

Illinois.— Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197.

Indiana.—Warner *v.* Marshall, 166 Ind. 88, 75 N. E. 582.

Kansas.— Bacon *v.* Leslie, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134; Hollis *v.* Burgess, 37 Kan. 487, 15 Pac. 536.

Minnesota.— Ham *v.* Johnson, 55 Minn. 115, 56 N. W. 584.

Mississippi.— Kyle *v.* Rhodes, 71 Miss. 487, 15 So. 40.

New Jersey.— Brooks *v.* Wentz, 61 N. J. Eq. 474, 49 Atl. 147; Riley *v.* Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099.

New York.— Waring *v.* Ayres, 40 N. Y. 357.

Texas.—Watson *v.* Baker, 71 Tex. 739, 9 S. W. 867.

West Virginia.— Kight *v.* Kight, 64 W. Va. 519, 63 S. E. 335. And see Guinn *v.* Warbutton, 64 W. Va. 76, 60 S. E. 1100; Crawford *v.* Workman, 64 W. Va. 10, 61 S. E. 319.

United States.— Bradley *v.* Heyward, 164 Fed. 107, holding that an option to purchase all phosphate rock and phosphate deposit contained on or in all of the Middleton lands on Ashley river, described in a specified plat, containing five thousand five hundred and seven acres, for twenty thousand dollars, to include a right of way over vendor's other lands to the river, and a site on the river for a washer, followed by the payment of the money, although the right of way and washer site were not located, was not so vague or uncertain as to be incapable of specific performance.

See 44 Cent. Dig. tit. "Specific Performance," § 72 *et seq.*

Surrounding circumstances may be shown by parol, to aid the description, and connect it with the subject-matter. Preble *v.* Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301.

Where the uncertainty is patent, parol proof cannot be permitted to show what was intended. Rampke *v.* Beuhler, 203 Ill. 384, 67 N. E. 796.

Abbreviations in general use, relating to government surveys, as "Tp." for township, and "R." for range, do not cause uncertainty. Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 32 N. W. 315. And see Bacon *v.* Leslie, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134.

"Block."— But there is no such governmental subdivision of a section as a "block." Glos *v.* Wilson, 198 Ill. 44, 64 N. E. 734.

No description at all.— In the following cases there was no description at all: Alba *v.* Strong, 94 Ala. 163, 10 So. 242; Meyer *v.* Quiggle, 140 Cal. 495, 74 Pac. 40; Ferris *v.* Irving, 28 Cal. 645 ("some city lots"); Reed *v.* Hornback, 4 J. J. Marsh. (Ky.) 375; Welsh *v.* Bayaud, 21 N. J. Eq. 186; Camden, etc., R. Co. *v.* Stewart, 18 N. J. Eq. 489; James *v.* Penn Tanning Co., 221 Pa. St. 634, 70 Atl. 885 (agreement relating to sale of bark or timber not describing any particular tract of land from which the same is to be taken); Crawford *v.* Workman, 64 W. Va. 10, 61 S. E. 319; Auer *v.* Mathews, 129 Wis. 143, 108 N. W. 45; Freeburgh *v.* Lamoureux, 15 Wyo. 22, 85 Pac. 1054 (lot to be selected from vendor's lands in a certain town, but no statement of dimensions or area).

Description uncertain.— In the following miscellaneous instances the description was

in a lease is indefinite will not defeat specific performance of a covenant to renew the lease, where both parties have without question acted under the lease.[84]

b. By Quantity — (I) *In General.* A mere designation of the quantity of land to be conveyed is not a description of the land.[85]

(II) *Part of Described Tract.* A designation of the land as a certain quantity out of a larger described tract, as of so many acres out of a specified tract, is insufficient, where the boundaries of the part are not stated or the part has not been carved out.[86]

c. Town, County, and State. Ordinarily the town, county, and state need not be mentioned, since it is an inference that the property is in the town, county, and state in which the instrument is dated or where the parties were dealing.[87] But

uncertain: Whatley *v.* Strong, 23 Ark. 421; Berry *v.* Woodburn, 107 Cal. 504, 40 Pac. 802 (to convey an "interest" in a certain mine, the amount of interest not being stated); Willmon *v.* Peck, 5 Cal. App. 665, 91 Pac. 164; Thompson *v.* Weeks, 32 Ill. App. 642; Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89; Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647; Reilly *v.* Gautschi, 174 Pa. St. 80, 34 Atl. 576 (description ambiguous; may apply to a larger or a smaller lot); Guinn *v.* Warbutton, 64 W. Va. 76, 60 S. E. 1100; Park *v.* Minneapolis, etc., R. Co., 114 Wis. 347, 89 N. W. 532 (vendee cannot be compelled to make a selection); Preston *v.* Preston, 95 U. S. 200, 24 L. ed. 494 (witnesses did not know property by the name given to it in the writing).

Allowing purchaser to determine line.— That the contract permitted the purchaser to determine the location of the west line of the tract by the determination of the height of the dam did not render it too uncertain to warrant specific performance. Wilkins *v.* Hardaway, 159 Ala. 565, 48 So. 678.

84. Gorder *v.* Pankonin, 83 Nebr. 204, 119 N. W. 449.

85. *Alabama.*— Thompson *v.* Gordon, 72 Ala. 455.

Arkansas.— Fordyce Lumber Co. *v.* Wallace, 85 Ark. 1, 107 S. W. 160.

Illinois.— Hamilton *v.* Harvey, 121 Ill. 469, 13 N. E. 210, 2 Am. St. Rep. 118, "five acres located near" a certain factory.

Indiana.— Miller *v.* Campbell, 52 Ind. 125, "the one hundred and twenty acres of land in Shannon county, Missouri."

Maryland.— Gorter *v.* Gale, 86 Md. 687, 39 Atl. 527, so many acres in a certain county.

Missouri.— Shelton *v.* Church, 10 Mo. 774, a quantity of any land which the vendor may own.

New Jersey.— Carr *v.* Passaic Land Imp., etc., Co., 22 N. J. Eq. 85.

North Carolina.— Breaid *v.* Munger, 88 N. C. 297.

Pennsylvania.— Barnes *v.* Rea, 219 Pa. St. 287, 68 Atl. 839.

Texas.— Jones *v.* Carver, 59 Tex. 293.

Washington.— Rochester *v.* Yesler, 6 Wash. 114, 32 Pac. 1057.

See 44 Cent. Dig. tit. "Specific Performance," §§ 72, 77.

86. *Delaware.*— Crockett *v.* Green, 3 Del. Ch. 466.

Illinois.— Rampke *v.* Beuhler, 203 Ill. 384, 67 N. E. 796 ("four lots 25 feet by 150 feet deep," out of a certain tract, which in fact had not been subdivided into lots); Brix *v.* Ott, 101 Ill. 70.

Michigan.— See Wiegert *v.* Frank, 56 Mich. 200, 22 N. W. 303.

Minnesota.— Nippolt *v.* Kammon, 39 Minn. 372, 40 N. W. 266; Pierson *v.* Ballard, 32 Minn. 263, 20 N. W. 193, "first half" of a larger tract, ambiguous on its face.

Nebraska.— Omaha L. & T. Co. *v.* Goodman, 62 Nebr. 197, 86 N. W. 1082.

North Carolina.— Grier *v.* Rhyne, 69 N. C. 346.

Oregon.— Knight *v.* Alexander, 42 Oreg. 521, 71 Pac. 657.

Utah.— See Reed *v.* Lowe, 8 Utah 39, 29 Pac. 740.

West Virginia.— Blankenship *v.* Spencer, 31 W. Va. 510, 7 S. E. 433 ("67½ acres, being the lower end" of a certain tract); Westfall *v.* Cottrills, 24 W. Va. 763 ("forty acres off the Spring Fork end" of a certain tract); Mathews *v.* Jarrett, 20 W. Va. 415.

Wisconsin.—See Auer *v.* Mathews, 129 Wis. 143, 108 N. W. 45, to convey a certain number of tracts out of a larger number.

See 44 Cent. Dig. tit. "Specific Performance," §§ 72, 75, 80.

Compare, however, Fleishman *v.* Woods, 135 Cal. 256, 67 Pac. 276, holding that where the contract was that the vendee should have a certain number of acres out of a certain tract, to be selected by the vendor, the court had power to compel the selection to be made. In Preble *v.* Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301, where a contract was to sell half of a certain tract, the circumstance that the vendor had sold half to a third party sufficiently identified the remaining half as that intended to be conveyed. In Ring *v.* Ashworth, 3 Iowa 452, where a contract was to convey fifty-nine acres of an eighty-acre tract, and the vendee asked a decree in the words of the contract, the relief was granted. In McCarty *v.* May, (Tex. Civ. App. 1903) 74 S. W. 804, it was held, generally, that a contract to convey a certain number of acres in a certain tract confers a right of selection on the vendee. In Baldwin *v.* Winslow, 2 Minn. 213, "the half" was held to mean an undivided half.

87. Ross *v.* Purse, 17 Colo. 24, 28 Pac. 473; Kraft *v.* Egan, 76 Md. 243, 25 Atl. 469; Pelletreau *v.* Brennan, 113 N. Y. App. Div. 806, 99 N. Y. Suppl. 955; Levin *v.*

this is not necessarily true in all cases. There may be cases in which failure to give the town, county, or state will render the description uncertain.[88]

d. Description by Boundaries. A designation of one boundary merely, as that the land is a certain quantity lying on a certain stream, road, street, etc., or adjoining a certain tract,[89] or of two boundaries, as that the land is a certain quantity at the intersection of specified streets,[90] is generally insufficient.[91]

e. By Landmarks or Natural Features. Landmarks or natural features of the land which would not appear on a map may aid in identifying the land to be conveyed.[92]

f. By Number of Lot. A reference to lots by number or by corner on public roads and streets is *prima facie* sufficient; the dimensions or boundaries of the lots need not be mentioned. The depth of a city lot is seldom essential to be stated.[93]

g. Vendor's Ownership. Where ownership of the tract is not mentioned, the fact that the vendor owns but one tract does not, according to the weight of authority, identify such tract as the one intended. *Non constat* but that he may have intended to procure and convey another tract. It cannot be presumed that the parties intended the vendor's ownership as an item of the description.[94] Other

Dietz, 48 Misc. (N. Y.) 593, 96 N. Y. Suppl. 468. And see Riley *v.* Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099.

Other data in the writing may render the mention of city, county, and state unnecessary. Engler *v.* Garrett, 100 Md. 387, 59 Atl. 648 (street number and name of occupant given); Robeson *v.* Hornbaker, 3 N. J. Eq. 60 (reference to well-known surveys and watercourses); Brainard *v.* Jordan, (Tex. Civ. App. 1901) 60 S. W. 784.

88. In Waters *v.* Ritchie, 3 App. Cas. (D. C.) 379, if the contract were read with the caption it would locate the property in the wrong city; and since the writing did not indicate the city intended, it was too indefinite to be enforced.

Government township.— In Johnson *v.* Craig, 21 Ark. 533, a description by section only, without the township, was held not to furnish a sufficient identification. But a failure to specify the "range" of the township was aided by other means of identification in Baldwin *v.* Winslow, 2 Minn. 213.

89. Caskey *v.* Williams, 11 S. W. 11, 10 Ky. L. Rep. 877; Jordan *v.* Fay, 40 Me. 130; Reed *v.* Reed, 93 N. C. 462; Grier *v.* Rhyne, 69 N. C. 346; Capps *v.* Holt, 58 N. C. 153; Guinn *v.* Warbutton, 64 W. Va. 76, 60 S. E. 1100. But see Baker *v.* Hathaway, 5 Allen (Mass.) 103 ("the lot of land containing fourteen acres, more or less, which lies on the northerly side and adjoining" a certain estate; description sufficient on demurrer); Watson *v.* Baker, 71 Tex. 739, 9 S. W. 867.

90. Island Coal Co. *v.* Streitlemier, 139 Ind. 83, 37 N. E. 340 (east and west boundaries and quantity undetermined); Lynes *v.* Hayden, 119 Mass. 482 (contract looked to fixing of other boundaries by the laying out of streets, which was not done); Holthouse's Appeal, 9 Pa. Cas. 193, 12 Atl. 340. And see Winter *v.* Trainor, 151 Ill. 191, 37 N. E. 869; Felty *v.* Calhoun, 139 Pa. St. 378, 21 Atl. 19, where the contract fixed a frontage of four hundred feet, and described the lot as extending back along another line to a "line to be fixed, sufficient, with said frontage, to make two acres;" and it was held to mean a uniform width of four hundred feet and a depth sufficient to make two acres; and that the real line therefore was capable of being exactly located.

91. Mention of several boundaries held sufficient to allow the description to be aided by parol testimony see Sherman *v.* Simpson, 121 N. C. 129, 28 S. E. 186 ("a certain tract or parcel of land lying between P's. land and C's. Creek and the old mill land"); Kitchen *v.* Herring, 42 N. C. 190 ("lying on the South west side of Black River, adjoining the lands of William Hofford and Martial"). And see Carr *v.* Howell, 154 Cal. 372, 97 Pac. 885; Kight *v.* Kight, 64 W. Va. 519, 63 S. E. 335.

92. Hooper *v.* Laney, 39 Ala. 338; Minneapolis, etc., R. Co. *v.* Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. Rep. 216 (part of a described tract "lying south of the grove thereon"); Whitworth *v.* Harris, 40 Miss. 483 ("lands upon which the college is erected;" not too indefinite for parol proof); Smith *v.* Wilson, 160 Mo. 657, 61 S. W. 597 ("five acres in the southwest corner" of a certain tract, "inside the fence," sufficient). See also Kight *v.* Kight, 64 W. Va. 519, 63 S. E. 335.

93. Ochs *v.* Kramer, 107 S. W. 260, 32 Ky. L. Rep. 762, 108 S. W. 235, 32 Ky. L. Rep. 1205; Riley *v.* Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099; Pelletreau *v.* Brennan, 113 N. Y. App. Div. 806, 99 N. Y. Suppl. 955; Forsyth *v.* Leslie, 74 N. Y. App. Div. 517, 77 N. Y. Suppl. 826. And see Carr *v.* Howell, 154 Cal. 372, 97 Pac. 885, identification by parol evidence.

By number of lot and block as shown on a map or plat of the town, especially if such map or plat is a matter of public record, is sufficient. Ross *v.* Purse, 17 Colo. 24, 28 Pac. 473; Guillaume *v.* K. S. D. Land Co., 48 Oreg. 400, 86 Pac. 883, 88 Pac. 586, reference to private map in vendor's office.

94. Bartlett *v.* Williams, 27 Ind. App. 637,

cases hold that, although the contract does not state the vendor's ownership of the tract, such a statement is implied, and parol evidence is admissible to establish that he owned only one tract answering the rest of the description.[95]

h. Statement of Ownership, Occupation, Mode of Acquisition. The land may be identified by a statement of the vendor's ownership, if the evidence shows that the vendor owns only one tract which answers to the rest of the description;[96] or by a statement that it is the land or property which the vendor or another acquired in a specified manner;[97] or that it is the land occupied at the time of the contract or any specified time by the vendor or any other specified party.[98]

i. By Popular Name. The land may be described and sufficiently identified by its popular designation or name, where that distinguishes the premises from other property, and the boundaries are well defined by reputation.[99]

60 N. E. 715; Nippolt *v.* Kammon, 39 Minn. 372, 40 N. W. 266; Knight *v.* Alexander, 42 Oreg. 521, 71 Pac. 657; Hammer *v.* McEldowney, 46 Pa. St. 334.

95. Bacon *v.* Leslie, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134; White *v.* Mooers, 86 Me. 62, 29 Atl. 936; Champion *v.* Genin, 51 N. J. Eq. 38, 27 Atl. 817.

96. *Illinois.*— Guyer *v.* Warren, 175 Ill. 328, 51 N. E. 580, "our farm" in L's reserve, Rock Island county. And see Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197, undivided interest in city lots.

Indiana.— Torr *v.* Torr, 20 Ind. 118 ("all my interest" in a described tract); Colerick *v.* Hooper, 3 Ind. 316, 56 Am. Dec. 505 ("my lot" on the plat in the town of S on the river bank).

Minnesota.— Sanborn *v.* Nockin, 20 Minn. 178, the five acres owned by vendor in a designated section.

Nebraska.— Ballou *v.* Sherwood, 32 Nebr. 666, 49 N. W. 790, 50 N. W. 1131.

New York.—Waring *v.* Ayres, 40 N. Y. 357, "two lots owned by me in 116th street, New York, between 8th & 9th avenues."

Texas.— Ragsdale *v.* Mays, 65 Tex. 255, "my interest in my lands in" two named counties.

Utah.— Easton *v.* Thatcher, 7 Utah 99, 25 Pac. 728, "one-half interest of [the vendor] in horses and ranch;" description not demurrable, since it is competent to show that the vendor owned one, and only one, half interest in a ranch.

See 44 Cent. Dig. tit. "Specific Performance," § 72 *et seq.*

Compare, however, Barnett *v.* Nichols, 56 Miss. 622, holding "my land, the entire tract, 728 acres," too ambiguous.

Lands of a specified quality owned by the vendor in a locality described, if the lands are capable of identification, is a sufficient description. Howison *v.* Bartlett, 147 Ala. 408, 40 So. 757, 141 Ala. 593, 37 So. 590, "the virgin growth, long leaf, yellow pine timber land and rights" so owned.

97. *Alabama.*— Farmer *v.* Sellers, (1905) 39 So. 772, the land purchased by the vendor at a certain sheriff's sale.

Illinois.— Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414, "my interest in my mother's estate."

Indiana.—Warner *v.* Marshall, 166 Ind. 88, 75 N. E. 582, "the three lots in this half block that your uncle traded for."

Massachusetts.—Ryder *v.* Loomis, 161 Mass. 161, 36 N. E. 836, "my right in Benjamin Ryder's (my father) estate."

Mississippi.— Connell *v.* Mulligan, 13 Sm. & M. 388, where the contract showed that the lot was one, the purchase-money for which was advanced by defendant on behalf of plaintiff.

New Jersey.— Clawson *v.* Brewer, 67 N. J. Eq. 201, 58 Atl. 598 [*affirmed* in 70 N. J. Eq. 803, 67 Atl. 1102] (the property received by the owner from her husband's will); Lewis *v.* Reichey, 27 N. J. Eq. 240 ("held by said Reichey by declaration of sale from mayor and common council of Newark").

Wisconsin.— Stout *v.* Weaver, 72 Wis. 148, 39 N. W. 375, "ten acres of land bought of T. Bardon and now in my possession."

98. *Alabama.*— Angel *v.* Simpson, 85 Ala. 53, 3 So. 758.

California.— Towle *v.* Carmelo Land, etc., Co., 99 Cal. 397, 33 Pac. 1126.

Connecticut.— Hodges *v.* Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87, vendor's "place" at S, means "place of residence," or "homestead."

Maryland.—Engler *v.* Garrett, 100 Md. 387, 59 Atl. 648, "house No. 2035 N. Fulton ave. . . . rented by Samuel S. Linthicum," although city and state are not specified.

North Carolina.— Simmons *v.* Spruill, 56 N. C. 9, the land "whereon the vendor resides."

South Carolina.— Kennedy *v.* Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676, where it appeared from the correspondence between the parties that the property in question was that rented by one party from the other.

Texas.— Brainard *v.* Jordan, (Civ. App. 1901) 60 S. W. 784.

Wisconsin.— Docter *v.* Hellberg, 65 Wis. 415, 27 N. W. 176.

Compare, however, Edwards *v.* Rives, 35 Fla. 89, 17 So. 416 ("place of which Adam Rives is in possession" too indefinite); Fisher *v.* Kuhn, 54 Miss. 480 (holding that "the lot of ground formerly occupied by A. J. Ward," not stating town, county, or state, was insufficient, since he might at several times have occupied lots at different places).

99. *Illinois.*— Koch *v.* Streuter, 218 Ill.

j. Description Aided by Subsequent Selection. Although the description is insufficient in itself, it is competent to show that the particular land sued for was pointed out and designated, and plaintiff put in possession. The parties thus give a construction to their contract by the manner in which they execute it.[1] A contract giving one of the parties the right of selection of the lot or lots to be conveyed is not incapable of specific performance.[2] And it seems that an agreement to grant at a future time a lease of a described tract "except" a certain number of acres, which are not specified, is not too uncertain to be enforced, since it is for the lessor to select the acres excepted.[3]

6. Parties. The memorandum of the contract must contain the names of the parties, or a sufficient description of them to enable them to be identified.[4]

7. Price or Consideration — a. In General. A contract is too incomplete or uncertain for specific performance if it does not fix the price or consideration

546, 75 N. E. 1049, 2 L. R. A. N. S. 210 (the "Ideal Fruit Farm," near a certain town); Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555 ("familiarly known as the 'Old Merchant Farm,'" in a certain county).

Kansas.— Bacon *v.* Leslie, 50 Kan. 494, 31 Pac. 1066, 34 Am. St. Rep. 134; Hollis *v.* Burgess, 37 Kan. 487, 15 Pac. 536.

Kentucky.— Winn *v.* Henry, 84 Ky. 48, "Silver Lake Place," near a certain town.

Michigan.— Goodenow *v.* Curtis, 18 Mich. 298.

North Carolina.— Simmons *v.* Spruill, 56 N. C. 9, "the A. B. farm."

Compare Cortelyou's Appeal, 102 Pa. St. 576, holding that a description of property as known as "the ferry property" was too indefinite, where the proof showed that it was not well defined by reputation.

1. *Alabama.*— Meyer *v.* Mitchell, 77 Ala. 312.

Illinois.—Work *v.* Welsh, 160 Ill. 468, 43 N. E. 719; Purinton *v.* Northern Illinois R. Co., 46 Ill. 297, holding that an agreement to convey a right of way eighty feet wide over a tract of land becomes sufficiently definite if the vendee enters and lays out its road with acquiescence of the vendor.

Indiana.—Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146.

Iowa.— Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 32 N. W. 315 (agreement to convey right of way of necessary width, not less than fifty feet, through described tract, where plaintiff afterward constructed its road); Collins *v.* Vandever, 1 Iowa 573 (contract for an acre, to be laid out; where vendee had entered and the land had been laid out).

Kentucky.— Curry *v.* Kentucky Western R. Co., 78 S. W. 435, 25 Ky. L. Rep. 1372, agreement to convey right of way, where vendee afterward enters.

Michigan.— Chicago, etc., R. Co. *v.* Lane, 150 Mich. 162, 113 N. W. 22.

Minnesota.— Baldwin *v.* Winslow, 2 Minn. 213.

Montana.— Cobban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805.

Oregon.— Richards *v.* Snider, 11 Oreg. 197, 3 Pac. 177.

Wisconsin.— Inglis *v.* Fohey, 136 Wis. 28, 116 N. W. 857, line of division marked by surveyor at the request of both parties after execution of the contract.

See 44 Cent. Dig. tit. "Specific Performance," §§ 72, 76, 82.

Compare, however, Patrick *v.* Sears, 19 Fla. 856. Delivery of possession does not invariably identify the parcel intended. See for example Hollenbeck *v.* Prior, 5 Dak. 298, 40 N. W. 347.

Tender of quitclaim deed.— That the alleged vendor tendered the alleged vendee a quitclaim deed of certain land was held insufficient in Brix *v.* Ott, 101 Ill. 70.

2. Brown *v.* Munger, 42 Minn. 482, 44 N. W. 519; Repetto *v.* Baylor, 61 N. J. Eq. 501, 48 Atl. 774; Prater *v.* Miller, 10 N. C. 628, as much of a tract as the vendee should be able to pay for.

3. Jenkins *v.* Green, 27 Beav. 437, 5 Jur. N. S. 304, 28 L. J. Ch. 817, 54 Eng. Reprint 172.

4. *Illinois.*— Winter *v.* Trainor, 151 Ill. 191, 37 N. E. 869.

Michigan.— Shipman *v.* Campbell, 79 Mich. 82, 44 N. W. 171.

New Jersey.— Myers *v.* Metzger, 63 N. J. Eq. 779, 52 Atl. 274, uncertainty as to which of the parties to a contract are bound by a certain provision.

New York.— Stanton *v.* Miller, 58 N. Y. 192, A's agreement to convey to such members of B's family as A might choose, not enforceable where A dies without making a selection.

Pennsylvania.— James *v.* Penn Tanning Co., 221 Pa. St. 634, 70 Atl. 885, agreement relating to sale of bark or timber.

South Dakota.— Chambers *v.* Roseland, 21 S. D. 298, 112 N. E. 148.

Tennessee.— See Lee *v.* Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800, vendee sufficiently described as "Mr. Lea"; a latent ambiguity which may be explained by parol.

West Virginia.— See Hissam *v.* Parish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892.

England.— Commins *v.* Scott, L. R. 20 Eq. 11, 44 L. J. Ch. 563, 32 L. T. Rep. N. S. 420, 23 Wkly. Rep. 498; Potter *v.* Duffield, L. R. 18 Eq. 4, 43 L. J. Ch. 472, 22 Wkly. Rep. 585; Sale *v.* Lambert, L. R. 18 Eq. 1, 43 L. J. Ch. 470, 22 Wkly. Rep. 478.

or provide a way in which it can be fixed.[5] But the statement of the consideration is sufficient if a way be clearly pointed out for determining the same.[6]

b. Rental. Certainty in the amount of rental is essential in a contract to give a lease.[7]

c. "Fair Price," "Market Price," Etc. An agreement to sell at a "fair price," the "fair market price," or a "fair valuation," etc., is not uncertain, within the meaning of the rule, since the intention of the parties is held to be that on their failure to agree upon the price it shall be determined by the court. To direct a valuation by a master in such a case does not conflict either with the letter or the spirit of the agreement.[8]

5. *California.*— Reymond *v.* Laboudigue, 148 Cal. 691, 84 Pac. 189, uncertainty.

District of Columbia.— Repetti *v.* Maisak, 6 Mackey 366, uncertainty.

Florida.— Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

Georgia.— Grizzle *v.* Gaddis, 75 Ga. 350, uncertainty.

Illinois.— Folsom *v.* Harr, 218 Ill. 369, 75 N. E. 987, 109 Am. St. Rep. 297; Carson *v.* Davis, 171 Ill. 497, 49 N. E. 701, uncertain and contradictory.

Massachusetts.— Fogg *v.* Price, 145 Mass. 513, 14 N. E. 741.

Missouri.— Wiley *v.* Robert, 31 Mo. 212, price left to be afterward agreed upon. *Compare,* however, Kelly *v.* Thuey, (1896) 37 S. W. 516, amount of price may be shown by outside evidence.

Nebraska.—Clarke *v.* Koenig, 36 Nebr. 572, 54 N. W. 842, doubt as to manner in which price was to be fixed.

New Jersey.— Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; Welsh *v.* Bayaud, 21 N. J. Eq. 186.

New York.— Milliman *v.* Huntington, 68 Hun 258, 22 N. Y. Suppl. 997.

Pennsylvania.—La Belle Coke Co. *v.* Smith, 221 Pa. St. 642, 70 Atl. 894 (bond for title); Weaver *v.* Shenk, 154 Pa. St. 206, 26 Atl. 811 (agreement to assign interest in a patent, assignee to furnish "all moneys necessary to procure the patent and to put the same into practical operation," uncertain); Soles *v.* Hickman, 20 Pa. St. 180.

Wyoming.—Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

United States.— Manning *v.* Ayres, 77 Fed. 690, 23 C. C. A. 405.

See 44 Cent. Dig. tit. "Specific Performance," § 61 *et seq.*

Compare, however, Collins *v.* Vandever, 1 Iowa 573; Berry *v.* Wortham, 96 Va. 87, 30 S. E. 443.

Amount of cash payment.— If the contract shows that part of the price is to be paid in cash, and part at a future time, but furnishes no data for determining the amount of the cash payment, it is too uncertain. Grace *v.* Denison, 114 Mass. 16; Krum *v.* Chamberlain, 57 Nebr. 220, 77 N. W. 665.

6. Ross *v.* Purse, 17 Colo. 24, 28 Pac. 473; Chicago, etc., R. Co. *v.* Lane, 150 Mich. 162, 113 N. W. 22; Walker *v.* Kelly, 91 Mich. 212, 51 N. W. 934 (provision that defendant is to receive one third of the crops of farm sold not indefinite); Wilbourns *v.* Bishop, 62 Miss. 341 (vendor to be made whole for all expenses incurred in a pending suit).

With reference to the consideration, greater liberty is recognized than in connection with the other elements of the contract. Ross *v.* Purse, 17 Colo. 24, 28 Pac. 473.

Contract giving lessee refusal to purchase. — A stipulation in a lease that in case of a sale of the premises the lessee shall have the privilege of purchasing upon such terms and at the same price as any other person may have offered sufficiently designates a means of fixing the price, and may be specifically enforced. Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, (1891) 26 N. E. 601. Otherwise where the lessee is to have the "refusal" or "first chance" to buy, but no method of ascertaining the price was fixed. Folsom *v.* Herr, 218 Ill. 369, 75 N. E. 987, 109 Am. St. Rep. 297; Fogg *v.* Price, 145 Mass. 513, 14 N. E. 741, merely giving the "refusal" does not contemplate a sale to a third party as a means of ascertaining the price.

An agreement to renew a lease for as much as any one else would pay is uncertain. Gelston *v.* Sigmund, 27 Md. 334. But see Arnot *v.* Alexander, 44 Mo. 25, 100 Am. Dec. 252.

Price to be fixed by valuers see *supra,* III, C, 2.

7. Morrison *v.* Rossignol, 5 Cal. 64 (rent to be stipulated according to value of the property); Gelston *v.* Sigmund, 27 Md. 334 (agreement to renew lease for as much as any one else would pay); Howard *v.* Carpenter, 11 Md. 259; Pray *v.* Clark, 113 Mass. 283 (rent to be proportioned to valuation of premises at time of renewal, but no provision for determining the valuation); Baurman *v.* Binzen, 16 N. Y. Suppl. 342. But see Arnot *v.* Alexander, 44 Mo. 25, 100 Am. Dec. 252, holding that on an agreement to renew a lease for "as much as any other responsible party will agree to give," the court may hear evidence and fix the amount of rent.

8. Meyer *v.* Jenkins, 80 Ark. 209, 96 S. W. 991 (to sell for a certain sum and the value of the improvements not uncerain); Estes *v.* Furlong, 59 Ill. 298; Lister Agricultural Chemical Works *v.* Selby, 68 N. J. Eq. 271, 59 Atl. 247; Myers *v.* Metzger, 61 N. J. Eq. 522, 48 Atl. 1113 ("fair market price"); Duffy *v.* Kelly, 55 N. J. Eq. 627, 37 Atl. 597; Van Doren *v.* Robinson, 16 N. J. Eq. 256.

"Market value."— In Maryland, however, it was held that agreement to sell at "mar-

8. Payment, Security, and Interest — a. Time of Payment — (I) *In General.* The time of payment is not an essential term, since, if no time is specified, a reasonable time is generally implied.[9]

(II) *Deferred Payment.* Where payment by the terms of the contract is to be deferred, especially where such deferred payment is to be secured by mortgage, but the time of payment is not specified, the uncertainty is fatal. A provision for interest shows that payment is to be deferred.[10]

(III) *Contract to Give Mortgage.* Under such a contract, not specifying the time of payment, it has been variously held that the mortgage is payable on demand, or immediately, or in a reasonable time, or that the agreement is too indefinite.[11]

ket value" is too indefinite, since the opinions of witnesses as to market value are notoriously conflicting. Schwaneback *v.* Smith, 77 Md. 314, 26 Atl. 409, 24 L. R. A. 168.

Future agreement.— It has been held that because the compensation which was to be the subject of future agreement was to be "fair and equitable," such compensation, under the spirit of the rule of the text, might be determined by the court; but the case was in many circumstances an exceptional one. Joy *v.* St. Louis, 138 U. S. 1, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546].

9. *Alabama.*— Ashurst *v.* Peck, 101 Ala. 499, 14 So. 541.

Illinois.— Ullsperger *v.* Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. N. S. 221.

New Jersey.— Reynolds *v.* O'Neil, 26 N. J. Eq. 223; Green *v.* Richards, 23 N. J. Eq. 32, although part of price is to remain on mortgage, this is held payable on demand.

North Carolina.— White *v.* Butcher, 59 N. C. 231.

South Carolina.— McMillan *v.* McMillan, 77 S. C. 511, 58 S. E. 431.

Compare, however, Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

In California, if the time of payment is not specified, the price is payable on delivery of the deed. Civ Code, § 1657; Whittier *v.* Gormley, 3 Cal. App. 489, 86 Pac. 726.

Under the New York statute requiring the consideration to be expressed in the written memorandum, a stipulation as to the time of payment cannot be supplied by parol evidence. 2 N. Y. Rev. St. p. 135, § 8; Wright *v.* Weeks, 3 Bosw. 372 [*affirmed* in 25 N. Y. 153].

The vendor may be estopped, by accepting payments, from setting up the indefiniteness of the contract as to time of payment. Tingue *v.* Patch, 93 Minn. 437, 101 N. W. 792.

10. *California.*—Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401.

Connecticut.— Platt *v.* Stonington Sav. Bank, 46 Conn. 476.

Illinois.— Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998.

Minnesota.—Williams *v.* Stewart, 25 Minn. 516.

New Jersey.—Moore *v.* Galupo, 65 N. J. Eq. 194, 55 Atl. 628; Potts *v.* Whitehead, 20 N J. Eq. 55; McKibbin *v.* Brown, 14 N. J. Eq. 13.

New York.— Milliman *v.* Huntington, 68 Hun 258, 22 N. Y. Suppl. 997 ("not less than three years"); Foot *v.* Webb, 59 Barb. 38; Jones *v.* Andreas, 13 N. Y. St. 363 (time for payment left for future determination).

Ohio.— Bentley *v.* Miller, 18 Ohio Cir. Ct. 865, 9 Ohio Cir. Dec. 851.

Virginia.— Berry *v.* Wortham, 96 Va. 87, 30 S. E. 443.

Wisconsin.— Buck *v.* Pond, 126 Wis. 382, 105 N. W. 909; Schmeling *v.* Kriesel, 45 Wis. 325.

See 44 Cent. Dig. tit. "Specific Performance," §§ 84, 85.

But where an auction sale was advertised to be on credit, but the memorandum omitted the time of credit, it was held to be a sale for cash. Smith *v.* Jones, 7 Leigh (Va.) 165, 30 Am. Dec. 498.

Where part of the consideration was a joint arrangement for lumbering the land, and there was no agreement or usage as to the time to be allowed for lumbering, the contract was held too indefinite. Gates *v.* Gamble, 53 Mich. 181, 18 N. W. 631.

Price to be paid "when contract is given" is not indefinite. Stout *v.* Weaver, 72 Wis. 148, 39 N. W. 375.

Where an ascertainable sum, viz., one half of the value of the crops, was to be paid annually until the full amount of the price was paid, the contract was held not to be too indefinite. Strandberg *v.* Rossman, 59 Minn. 509, 61 N. W. 675.

That the price is payable "in the fall" means that it is payable on the last day of the fall. Dark *v.* Bagley, 7 N. C. 33.

But a payment on a specified total of a specified sum "per year" was held too uncertain as to dates. Meyer Land Co. *v.* Pecor, 18 S. D. 466, 101 N. W. 39.

11. Not indefinite; reasonable time implied.— Triebert *v.* Burgess, 11 Md. 452.

Not indefinite; due immediately or on demand.— Snyder *v.* Greaves, (N. J. Ch. 1891) 21 Atl. 291; Green *v.* Richards, 23 N. J. Eq. 32.

Too indefinite; but in the cases cited there were also other elements of uncertainty. Magee *v.* McManus, 70 Cal. 553, 12 Pac. 451; McClintock *v.* Laing, 22 Mich. 212; Nichols *v.* Williams, 22 N. J. Eq. 63. See also Poole *v.* Tannis, 137 Wis. 363, 118 N. W. 188, 864.

That the mortgagor may "from time to time" make payments on the mortgage debt before maturity does not render the agreement too indefinite. Lankton *v.* Stewart, 27 Minn. 346, 7 N. W. 360.

b. Security For Deferred Payments. A contract providing that the deferred payments are to be secured, but not specifying in what manner, is too indefinite.[12]

c. Rate of Interest. A provision as to the rate of interest has been held an essential term of a contract to give a mortgage, or to secure deferred payments by a mortgage, but in the cases cited there were other elements of uncertainty.[13]

9. Duration of Lease, License, or Contract For Services. The term or duration of a lease is an essential part of it, and specific performance cannot be decreed of a contract to give or renew a lease which does not specify the commencement or the term for which it is to be given or renewed.[14] The duration of a license or of a contract for services may be an essential element of such agreements.[15]

An agreement to substitute a good mortgage in place of a worthless one implies that the new mortgage is to run for the same period of time as the old. Roberge *v.* Winne, 144 N. Y. 709, 39 N. E. 631 [*affirming* 71 Hun 172, 24 N. Y. Suppl. 562].

12. Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163 (nothing to show in what the balance of the price should be evidenced, or by what means the owner's interest should be protected from default in the payment of taxes, etc.); Holliday *v.* Hubbard, 45 Minn. 333, 47 N. W. 1134; Ladd *v.* Stevenson, 43 Hun (N. Y.) 541 [*affirmed* in 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748] ("satisfactory security" too uncertain); Foot *v.* Webb, 59 Barb. (N. Y.) 38; Greenleaf *v.* Blakeman, 25 Misc. (N. Y.) 564, 56 N. Y. Suppl. 76 [*modified* in 40 N. Y. App. Div. 371, 58 N. Y. Suppl. 76] ("collateral security of suitable character" too vague; "bond of sufficient surety, individual or corporate," not too uncertain); Meyer Land Co. *v.* Pecor, 18 S. D. 466, 101 N. W. 39 (although the vendee offered to execute promissory notes secured by mortgage on the premises); Johnson *v.* Plotner, 15 S. D. 154, 87 N. W. 926. But see Annan *v.* Merritt, 13 Conn. 478 (to give a mortgage means a mortgage on the land conveyed); Horton *v.* McKee, 68 Fed. 404 (to secure deferred payment "by mortgage on property worth at least two for one," not too indefinite).

As an essential term.— In Delaware it appears to be held that security for deferred payments is an essential term of a contract of sale, in the absence of which the contract will not be enforced. See Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 14 Atl. 27 (sale of personal property); Godwin *v.* Collins, 3 Del. Ch. 189 [*affirmed* in 4 Houst. 28]. *Contra*, Libby *v.* Parry, 98 Minn. 366, 108 N. W. 299.

Agreement sufficiently certain.— In Carr *v.* Howell, 154 Cal. 372, 97 Pac. 885, a contract for the sale of real estate stipulated for a cash payment, and for the delivery of a purchase-money mortgage to secure the payment of notes for the balance of the price. The contract definitely fixed the amount of the notes, the rate of interest they were to bear, the time they were to run, and the rebate to be allowed for payment of mortgage taxes by the mortgagor. It was held that the agreement sufficiently stated the terms of the mortgage to authorize specific performance.

13. Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401; Magee *v.* McManus, 70 Cal. 553, 12 Pac. 451; McClintock *v.* Laing, 22 Mich. 212.

14. Nelson *v.* Kelly, 91 Ala. 569, 8 So. 690 (that lessee may occupy as long as he desires too indefinite); Lanahan *v.* Cockey, 108 Md. 620, 71 Atl. 314; Myers *v.* Forbes, 24 Md. 598; Allen *v.* Burke, 2 Md. Ch. 534; Baurman *v.* Binzen, 16 N. Y. Suppl. 342; Oxford *v.* Crow, [1893] 3 Ch. 535, 69 L. T. Rep. N. S. 228, 8 Reports 279, 42 Wkly. Rep. 279; Marshall *v.* Berridge, 19 Ch. D. 233, 46 J. P. 279, 51 L. J. Ch. 329, 45 L. T. Rep. N. S. 599, 30 Wkly. Rep. 93 [*disapproving* Jaques *v.* Millar, 6 Ch. Div. 153, 47 L. J. Ch. 544, 37 L. T. Rep. N. S. 151, 25 Wkly. Rep. 846, and *explaining* Blore *v.* Sutton, 3 Meriv. 237, 17 Rev. Rep. 74, 26 Eng. Reprint 91] (holding also that the mere fact that the agreement itself is dated does not fix the time for commencement of the lease); White *v.* McMahon, L. R. 18 Ir. 460; Wyse *v.* Russell, L. R. 11 Ir. 173 (and date of agreement does not fix time of commencement); Rock Portland Cement Co. *v.* Wilson, 52 L. J. Ch. 214, 48 L. T. Rep. N. S. 386, 31 Wkly. Rep. 193; Dolling *v.* Evans, 36 L. J. Ch. 474, 15 L. T. Rep. N. S. 604, 15 Wkly. Rep. 394; Cartwright *v.* Miller, 36 L. T. Rep. N. S. 398.

Sufficiently certain.— An agreement to lease a building for "one or more years" is sufficiently definite as to the duration of the lease to support a suit for specific performance of the agreement, the term "one or more years," in the absence of any stipulation of option of determination, creating a term of two years. Boston Clothing Co. *v.* Solberg, 28 Wash. 262, 68 Pac. 715. And a letting, in 1845, to a yearly tenant, and if he should wish a lease, that the lessor would grant the same for seven, fourteen, or twenty-one years, at the same rent, was held sufficiently certain to be specifically performed, as it was to be construed an optional lease for twenty-one years from 1845, determinable at the end of seven or fourteen years, at the option of the tenant. Hersey *v.* Giblett, 18 Beav. 174, 23 L. J. Ch. 818, 2 Wkly. Rep. 206, 52 Eng. Reprint 69.

A mining lease "to date from time of commencing work" is sufficiently definite as to time for beginning of the term. Cochrane *v.* Justice Min. Co., 16 Colo. 415, 26 Pac. 780.

15. Christian, etc., Grocery Co. *v.* Bienville Water Supply Co., 106 Ala. 124, 17 So. 352 (holding that an agreement to supply water "for the term of three years or longer," at the option of one of the parties,

10. Uncertainty in Other Contracts or Stipulations — a. Building and Construction. Agreements for building or construction are frequently open to the objection of uncertainty as well as of the difficulty of enforcement of the decree.[16]

b. Support. A contract, the consideration of which is plaintiff's care for and support of the other party, is not usually considered objectionable for vagueness of the consideration.[17] Where the consideration has not been fully performed the contract may of course be open to the objection that it is unenforceable in equity against plaintiff.[18]

c. Personal Services. Specific performance of contracts calling for personal

at a fixed compensation per annum, is not void for indefinitness as to duration, and constitutes one contract which can be specifically enforced; but that an election to continue the service from "month to month" or "for three years, reserving the right to elect, to continue the service for a further period," is too indefinite to be specifically enforced); Soloman *v.* Wilmington Sewerage Co., 142 N. C. 439, 55 S. E. 300, 6 L. R. A. N. S. 391 (holding that a contract between citizens and a public sewerage corporation by which the latter agrees to furnish sewerage service for two and four dollars per year, respectively, dependent on whether the customer pays fifty or twenty-five dollars as an entrance fee for connections, etc., but containing no provision fixing the time for the duration of the contract, cannot be specifically enforced as against the corporation because of uncertainty as to duration); Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030 (holding that equity would not decree specific performance of an oral contract for the use of a ditch through defendant's land, where the duration of the license was material and was in doubt).

16. *California.*— Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334.

Illinois.—Barnes *v.* Ludington, 51 Ill. App. 90, to build a house of a specified value on the premises.

Kentucky.— Ecton *v.* Lexington, etc., R. Co., 59 S. W. 864, 22 Ky. L. Rep. 1133, agreement to establish and maintain a railroad station on land conveyed.

Michigan.— Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43, 18 Am. Rep. 142, agreement to build on land conveyed a depot "suitable for the convenience of the public."

Missouri.— Mastin *v.* Halley, 61 Mo. 196, vendee to erect "a certain building," not otherwise described, on the premises.

New York.— Mayer *v.* McCreery, 119 N. Y. 434, 23 N. E. 1045, building to be altered according to plans to be mutually agreed on.

United States.— Strang *v.* Richmond, etc., R. Co., 93 Fed. 71 (railroad construction contract); Zeringue *v.* Texas, etc., R. Co., 34 Fed. 239 (vendee to "build and keep in repair such bridges as may be necessary" over the land conveyed).

England.— Brace *v.* Wehnert, 25 Beav. 348, 4 Jur. N. S. 549, 27 L. J. Ch. 572, 6 Wkly. Rep. 425, 53 Eng. Reprint 670, to build a house of a certain value, not otherwise described.

Agreements sufficiently certain.— In the following cases the agreement was held sufficiently certain and definite: Ross *v.* Purse, 17 Colo. 24, 28 Pac. 473 (vendor's agreement to dig a well on premises calls for a well so constructed as to be suitable for the usual and ordinary purposes of such an improvement in the particular locality); Lawrence *v.* Saratoga Lake R. Co., 36 Hun (N. Y.) 467 [*affirming* 3 N. Y. St. 743] (a most instructive case, where the vendee railroad agreed to build a "neat and good bridge," and a "neat and tasteful station building"); Columbus *v.* Cleveland, etc., R. Co., 25 Ohio Cir. Ct. 663 (railroad company's agreement with city to erect neat and ornamental buildings so as to obstruct the view of cars and engines); Southern Pine Fibre Co. *v.* North Augusta Land Co., 50 Fed. 26 (agreement to build a side-track). See also *supra*, III, C. 4.

Improvements by vendee.— If the consideration of the contract is the making of improvements, but the stipulation as to these is so vague that the court cannot tell whether it has been performed, relief will be refused. Wright *v.* Wright, 31 Mich. 380; Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

Right to flow land of defendant by a dam to be erected by plaintiff is sufficiently definite as to the extent of flowage if the location and height of the dam is prescribed. Olmstead *v.* Abbott, 61 Vt. 281, 18 Atl. 315. *Compare* Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

17. Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; Stillings *v.* Stillings, 67 N. H. 584, 42 Atl. 271. See, however, Braun *v.* Ochs, 77 N. Y. App. Div. 20, 79 N. Y. Suppl. 100. And see *supra*, III, C, 3; *infra*, V, H.

A man in proposing marriage to a woman in writing made her the following promise: "What I have tolde you and rote to you you are first with me above all others you are one that my honner before God that I have pledged myself to take care of and support you as long as you live." They were married in consideration of the promise, but the husband died without fulfilling it. It was held that the letter containing the offer of marriage and promise was evidence of a contract sufficiently certain and unambiguous to entitle the promisee to a specific performance of the contract. Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232.

18. See *infra*, IV, E, 12.

services or continuous acts has frequently been refused because the contracts were objectionable on the score of uncertainty.[19]

IV. DEFENSES DEPENDING ON EQUITABLE MAXIMS.

A. Misrepresentation, Concealment, Fraud[20] **— 1. MISREPRESENTATION — a. In General.** That the contract was procured by the false representation of a material fact is a defense to specific performance at the suit of the party who made the representation.[21] In general a less flagrant case of fraud is required to prevent specific performance than to recover damages or to obtain rescission.[22]

19. *Illinois.*— Wollensak *v.* Briggs, 20 Ill. App. 50, contract to manufacture speaking tubes, not specifying their form, material, or principle of operation.

Michigan.— Bumpus *v.* Bumpus, 53 Mich. 346, 19 N. W. 29, where the consideration was to furnish another a legal education and start him in business.

Mississippi.— Bomer *v.* Canaday, 79 Miss. 222, 30 So. 638, 89 Am. St. Rep. 593, 55 L. R. A. 328, contract to cut and saw timber from a certain tract.

New York.— Rudiger *v.* Coleman, 112 N. Y. App. Div. 279, 98 N. Y. Suppl. 461, contract to form a corporation.

Ohio.— Columbus, etc., R. Co. *v.* Ohio Southern R. Co., 1 Ohio Cir. Ct. 275, 1 Ohio Cir. Dec. 151, contract to maintain railroad crossing.

Contracts sufficiently certain.— Schmidtz *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809 (contract to operate a railroad; details may be arranged by the court as the business interests of the community from time to time require); Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232 (antenuptial contract to take care of and support plaintiff); Neal *v.* Parker, 98 Md. 254, 57 Atl. 213 (contract to manufacture lumber of specified dimensions); Jones *v.* Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485 (lessor's covenant to "reasonably" heat and light the demised premises; the court, with expert assistance, can frame a decree for doing the work); Thompson *v.* Tucker-Osborn, 111 Mich. 470, 69 N. W. 730 (antenuptial contract to support plaintiff); Healy *v.* Healy, 31 Misc. (N. Y.) 636, 66 N. Y. Suppl. 82 [*affirmed* in 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927, 8 N. Y. Annot. Cas. 325 [*affirmed* in 167 N. Y. 572, 60 N. Y. 1112)] (parol agreement to adopt child, etc., and give her a child's share in promisor's estate). See *supra*, III, C, 3, 5.

20. Discretion of court see *supra*, I, D, 4, a.

21. *Illinois.*— Kelly *v.* Kendall, 118 Ill. 650, 9 N. E. 261.

Maryland.— George Gunther, Jr., Brewing Co. *v.* Brywczynski, 107 Md. 696, 69 Atl. 514.

Mississippi.— Clement *v.* Reid, 9 Sm. & M. 535.

Nebraska.— Stanton *v.* Driffkorn, 83 Nebr. 36, 118 N. W. 1092.

New Hampshire.— Rogers *v.* Mitchell, 41 N. H. 154.

Pennsylvania.— Orne *v.* Kittanning Coal Co., 114 Pa. St. 172, 6 Atl. 358.

South Carolina.—Barksdale *v.* Payne, Riley Eq. 174.

Tennessee.— Harris *v.* Smith, 2 Coldw. 306.

Texas.— Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918, on exchange of lands.

West Virginia.— Cleavenger *v.* Sturm, 59 W. Va. 658, 53 S. E. 593.

United States.— Engelstad *v.* Dufresne, 116 Fed. 582, 54 C. C. A. 38 (on exchange); Davis *v.* Read, 37 Fed. 418; Thompson *v.* Tod, 23 Fed. Cas. No. 13,978, Pet. C. C. 380.

England.— Higgins *v.* Samels, 2 Johns. & H. 460, 7 L. T. Rep. N. S. 240, 70 Eng. Reprint 1139.

See 44 Cent. Dig. tit. "Specific Performance," § 160 *et seq.*

Misrepresentations by vendor see Maltby *v.* Thews, 171 Ill. 264, 49 N. E. 486 [*affirming* 69 Ill. App. 30]; Nichols *v.* Colgan, 130 Ind. 341, 30 N. E. 301; Brown *v.* Smith, (Iowa 1902) 89 N. W. 1097; Warfield *v.* Erdman, 43 S. W. 708, 19 Ky. L. Rep. 1559; Crane *v.* Judik, 86 Md. 63, 38 Atl. 129, 131; Boynton *v.* Hazelboom, 14 Allen (Mass.) 107, 92 Am. Dec. 738; Hicks *v.* Turck, 86 Mich. 214, 49 N. W. 44; Rogers *v.* Mitchell, 41 N. H. 154; King *v.* Spaeth, 50 N. J. Eq. 378, 25 Atl. 257; Lennon *v.* Stiles, 4 N. Y. Suppl. 487 [*affirmed* in 2 Silv. Sup. 145, 5 N. Y. Suppl. 870]; Holmes' Appeal, 77 Pa. St. 50; Fisher *v.* Worrall, 5 Watts & S. (Pa.) 478; Holley *v.* Anness, 41 S. C. 349, 19 S. E. 646; Harris *v.* Smith, 2 Coldw. (Tenn.) 306.

Misrepresentations by vendee see Cowan *v.* Curran, 216 Ill. 598, 75 N. E. 322; Clement *v.* Evans, 15 Ill. 92 (vendee attempted to defraud); Louisville, etc., R. Co. *v.* Boden-Schatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703; Bird *v.* Logan, 35 Kan. 228, 10 Pac. 564; Barnett *v.* McCarty, 6 S. W. 153, 9 Ky. L. Rep. 638 (breach of warranty as to the consideration); Fuller *v.* Perkins, 7 Ohio, Pt. II, 106 (misrepresenting means of payment); Hanna *v.* Phillips, 1 Grant (Pa.) 253; Ratliff *v.* Vandikes, 89 Va. 307, 15 S. E. 864; Wells *v.* Millet, 23 Wis. 64; Kelley *v.* Sheldon, 8 Wis. 258.

Misrepresentations by lessor see Higgins *v.* Samels, 2 Johns. & H. 460, 7 L. T. Rep. N. S. 240, 70 Eng. Reprint 1139, of quarry.

22. Schneider *v.* Schneider, 125 Iowa 1, 98 N. W. 159; Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918. *Compare* Hannah *v.* Graham, 17 Manitoba 532.

Degree of proof.— The fraud to defeat a claim for specific performance need not be proved with the degree of certainty necessary

b. Must Be Affirmation of a Fact. The statement to amount to a misrepresentation must be the positive affirmation of a fact,[23] not the mere expression of an opinion, or a promise or statement of intention or expectation, or other statement as to the future.[24]

c. Must Be Untrue. The statement must of course be untrue.[25]

d. May Be an Honest Misrepresentation. That the person making the false statement had no knowledge of its untruth, or honestly believed it to be true, is immaterial, when the misrepresentation is set up as a defense to specific performance.[26]

to authorize a decree of rescission or defeat a recovery at law. Race *v.* Weston, 86 Ill. 91; Friend *v.* Lamb, 152 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672, specific performance refused, although there is a doubt whether the representations were in fact made.

But the burden of proof is on defendant to establish the misrepresentation. Park *v.* Johnson, 4 Allen (Mass.) 259.

In case of a family settlement, the evidence of fraud in procuring it must be very clear. Chandler *v.* Pomeroy, 143 U. S. 318, 12 S. Ct. 410, 36 L. ed. 169 [*reversing* 46 Fed. 533]; Clermont *v.* Tasburgh, 1 Jac. & W. 112, 20 Rev. Rep. 243, 37 Eng. Reprint 318; Wamsley *v.* Griffith, 10 Ont. App. 327.

Waiver of fraud.— One who affirms the contract after discovery of the facts cannot afterward avail himself of the fraud in defense. Balheimer *v.* Reichardt, 55 How. Pr. (N. Y.) 414, affirmed by executing an extension of time for performance.

23. Stull *v.* Hurtt, 9 Gill (Md.) 446, no misrepresentation of quantity, where vendor said that he had heard another say that the land was of a certain acreage, but he himself did not know the quantity.

24. Zemple *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346 (representation as to the probability of future action on plaintiff's part); Scott *v.* Hanson, 5 L. J. Ch. O. S. 67, 1 Sim. 13, 2 Eng. Ch. 13, 57 Eng. Reprint 483 [*affirmed* in 1 Russ. & M. 128, 27 Rev. Rep. 141, 5 Eng. Ch. 128, 39 Eng. Reprint 49] (statement that land is "uncommonly rich," is a statement of opinion merely); Trower *v.* Newcome, 3 Meriv. 704, 17 Rev. Rep. 171, 36 Eng. Reprint 270 (statement that an event affecting the value was "likely to occur soon" too vague to amount to a representation). And see CONTRACTS, 9 Cyc. 416, 418; VENDOR AND PURCHASER.

Misrepresentation as to plaintiff's intention, or a promise made with no intention at the time of performing it, may be a misrepresentation of fact. Rudisill *v.* Whitener, 146 N. C. 403, 59 S. E. 995, 15 L. R. A. N. S. 81. See Brown *v.* Pitcairn, 148 Pa. St. 387, 24 Atl. 52, 33 Am. St. Rep. 834; Miller *v.* Fulmer, 25 Pa. Super. Ct. 106. And see CONTRACTS, 9 Cyc. 419.

Misrepresentations of value, when the party making them did not have better opportunity of estimating values than the adverse party had or which are mere "dealers' talk" are not sufficient to defeat specific performance. Zemple *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Flynn *v.* Finch, 137 Iowa 378, 114 N. W. 1058; Hallinger *v.* Zimmerman, 58 N. J. Eq. 217, 220, 42 Atl. 726 [*affirmed* in 59 N. J. Eq. 644, 44 Atl. 1100] ("each knew the capacity of the other to paint with an attractive hue the merits of the property he offered in trade"); McRae *v.* Froom, 17 Grant Ch. (U. C.) 357. And see Hannah *v.* Graham, 17 Manitoba 532. But a representation of value may sometimes amount to a statement of fact, not of opinion merely. Merritt *v.* Wassenich, 49 Fed. 785; Wall *v.* Stubbs, 1 Madd. 80, 15 Rev. Rep. 210, 56 Eng. Reprint 31. And see CONTRACTS, 9 Cyc. 416, 417. Referring to statements of value made by a third person as if he were disinterested, when in fact he made them at the instigation of plaintiff, is fraudulent. Smith *v.* Shepherd, 36 Iowa 253. A representation as to the cost of property is a representation of fact. Race *v.* Weston. 86 Ill. 91; Plummer *v.* Keppler, 26 N. J. Eq. 481. See CONTRACTS, 9 Cyc. 417.

25. In the following cases there was no misrepresentation, the property being as represented: Warren *v.* Daniels, 72 Ill. 272; Hallinger *v.* Zimmerman, 58 N. J. Eq. 217, 42 Atl. 726 [*affirmed* in 59 N. J. Eq. 644, 44 Atl. 1100]; Broyles *v.* Bee, 18 W. Va. 514. See CONTRACTS, 9 Cyc. 411.

26. *Iowa.*— New York Brokerage Co. *v.* Wharton, (1909) 119 N. W. 969; Flynn *v.* Finch, 137 Iowa 378, 114 N. W. 1058.

Massachusetts.— Boynton *v.* Hazleboom, 14 Allen 107, 92 Am. Dec. 738. But see Powers *v.* Mayo, 97 Mass. 180.

Missouri.— Isaacs *v.* Skrainka, 95 Mo. 517, 8 S. W. 427.

New Jersey.— Hess *v.* Evans, (Ch. 1888) 15 Atl. 310.

New York.— Best *v.* Stow, 2 Sandf. Ch. 298.

Pennsylvania.— Allen *v.* Kirk, 219 Pa. St. 574, 69 Atl. 50 (specific performance for exchange of lands refused where one of the parties innocently misled the other as to the size of the lot he was to receive); Tyson *v.* Passmore, 2 Pa. St. 122, 44 Am. Dec. 181; Fisher *v.* Worrall, 5 Watts & S. 478.

Texas.— Riggins *v.* Trickey, 46 Tex. Civ. App. 569, 102 S. W. 918.

England.— Lamare *v.* Dixon, L. R. 6 H. L. 414, 43 L. J. Ch. 203, 22 Wkly. Rep. 49; Wauton *v.* Coppard, [1899] 1 Ch. 92, 68 L. J. Ch. 8, 79 L. T. Rep. N. S. 467, 47 Wkly. Rep. 72; *In re* Banister, 12 Ch. D. 131, 48 L. J. Ch. 837, 40 L. T. Rep. N. S. 828, 27

e. Must Be Relied Upon. In order to claim the misrepresentation as a defense, the party to whom it was made must have relied upon it and not upon his own judgment or information.[27] A vendee may, however, as a general rule, rely on the vendor's representations concerning the property, if he believes them to be true, although he has opportunities for discovering the truth for himself, and even though he has made a partial examination but without discovering the truth.[28]

f. Must Be Material and Cause Damage. The misrepresentation, to be a defense to a suit for specific performance, must be material,[29] and it must produce damage to defendant and operate to his prejudice; that is, he must be in a worse condition pecuniarily as a result of enforcing the contract than he would be in if the representation were true. Fraud without damage is no defense.[30] But

Wkly. Rep. 826; Higgins *v.* Samels, 2 Johns. & H. 460, 7 L. T. Rep. N. S. 240, 70 Eng. Reprint 1139; Wall *v.* Stubbs, 1 Madd. 80, 15 Rev. Rep. 210, 56 Eng. Reprint 31.

See 44 Cent. Dig. tit. "Specific Performance," §§ 165, 166, 168. And see CONTRACTS, 9 Cyc. 408.

Partial specific performance with abatement of the price when the statement is not wilfully false see *infra*, VII, B, 2.

A wilful misrepresentation prevents such partial specific performance. See Clermont *v.* Tasburgh, 1 Jac. & W. 112, 20 Rev. Rep. 243, 37 Eng. Reprint 318.

27. *Alabama.*—Homan *v.* Stewart, 103 Ala. 644, 16 So. 35.

Illinois.— Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Jobbins *v.* Gray, 34 Ill. App. 208.

Pennsylvania.— Phipps *v.* Buckman, 30 Pa. St. 401.

West Virginia.— Crotty *v.* Effler, 60 W. Va. 258, 54 N. E. 345.

United States.— McIver *v.* Kyger, 3 Wheat. 53, 4 L. ed. 332.

England.— Clapham *v.* Shillito, 7 Beav. 146, 29 Eng. Ch. 146, 49 Eng. Reprint 1019; Clarke *v.* Mackintosh, 4 Giffard 134, 9 Jur. N. S. 114, 7 L. T. Rep. N. S. 558, 1 New Rep. 160, 11 Wkly. Rep. 183, 66 Eng. Reprint 651; Cook *v* Waugh, 2 Giffard 201, 6 Jur. N. S. 596, 8 Wkly. Rep. 458, 66 Eng. Reprint 85.

Canada.— See Hannah *v.* Graham, 17 Manitoba 532.

And see CONTRACTS, 9 Cyc. 426.

Patent defects.— Instances where the falsity of the representations were apparent to the casual observer see Dyer *v.* Hargrave, 10 Ves. Jr. 505, 8 Rev. Rep. 36, 32 Eng. Reprint 941; Bowles *v.* Round, 5 Ves. Jr. 508, 5 Rev. Rep. 107, 31 Eng. Reprint 707; Crooks *v.* Davis, 6 Grant Ch. (U. C.) 317.

28. *Illinois.*— Race *v.* Weston, 86 Ill. 91.

Missouri.— Isaacs *v.* Strainka, 95 Mo. 517, 8 S. W. 427, misrepresentation a defense, although land is sold "with all its faults."

New Jersey.— Miller *v.* Chetwood, 2 N. J. Eq. 199.

Washington.— O'Connor *v.* Lighthizer, 34 Wash. 152, 75 Pac. 643.

West Virginia.— Cleavenger *v.* Sturm, 59 W. Va. 658, 53 S. E. 593.

United States.— Leicester Piano Co. *v.* Front Royal, etc., Imp. Co., 55 Fed. 190, 5 C. C. A. 60.

England.— Smith *v.* Land, etc., Corp., 28 Ch. D. 7, 49 J. P. 182, 51 L. T. Rep. N. S. 718; Redgrave *v.* Hurd, 20 Ch. D. 1, 51 L. J. Ch. 113, 45 L. T. Rep. N. S. 485, 30 Wkly. Rep. 251, the leading modern case.

And see CONTRACTS, 9 Cyc. 428.

Compare, however, Hannah *v.* Graham, 17 Manitoba 532, applying the doctrine of *caveat emptor*.

Representation at public auction so vague and indefinite that it ought to have put the purchaser on inquiry see Trower *v.* Newcome, 3 Meriv. 704, 17 Rev. Rep. 171, 36 Eng. Reprint 270.

29. Wilson *v.* McLaughlin, 11 Colo. 465, 18 Pac. 739; Meyer *v.* Yesser, 32 Ind. 294; Scott *v.* Shiner, 27 N. J. Eq. 185 (holding that to constitute a misrepresentation which will prevent a decree for specific performance, the statement in question must be so material to the contract built on it that, if the statement be false, the contract becomes one which it would be unconscionable for the party who made the statement to enforce); Wuesthoff *v.* Seymour, 22 N. J. Eq. 66 (holding that a representation to the purchaser of land to the effect that an alley on the premises was only a private right of way in a few persons, when in fact the alley was a public one, was not such a misrepresentation as would bar a decree for specific performance, the rights in the property in either case being substantially the same). See CONTRACTS, 9 Cyc. 425.

30. *California.*— Morrison *v.* Lods, 39 Cal. 381.

Indiana.— Meyer *v.* Yesser, 32 Ind. 294.

New Jersey.— Scott *v.* Shiner, 27 N. J. Eq. 185; Wuesthoff *v.* Seymour, 22 N. J. Eq. 66, an extreme and probably erroneous application of the rule.

Pennsylvania.— Evans *v.* Fox, 8 Pa. Dist. 383, 22 Pa. Co. Ct. 537.

England.— Goddard *v.* Jeffreys, 51 L. J. Ch. 57, 45 L. T. Rep. N. S. 674, 30 Wkly. Rep. 269; Fellowes *v.* Gwydyr, 1 Russ. & M. 83, 5 Eng. Ch. 83, 39 Eng. Reprint 32.

See 44 Cent. Dig. tit. "Specific Performance," § 161. And see CONTRACTS, 9 Cyc. 431.

The principle of the text is denied in Kelly *v.* Central Pac. R. Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470.

Misrepresentation as to party to the contract.—Where A, a vendee, was induced by B to enter into the contract by B's false representations that B was agent for C, whereas

the extent of the injury to defendant, in order that it may have the effect of defeating specific performance, may be slight.[31]

2. Non-Disclosure — a. In General. A vendee's failure to disclose a fact known to him but unknown to the vendor, which enhances the value of the property, while it may not be a ground for rescission of the contract, has been repeatedly held, in this country, to be a defense to a suit for specific performance.[32] And plaintiff's failure to disclose a material fact known to him has been held a defense in other cases than where plaintiff is a purchaser of land.[33] In England, however, it is held that, if there is no fiduciary relation between vendor and vendee, the latter is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the thing to be sold. In general mere silence as regards a material fact which one party is under no duty to disclose to the other cannot be a ground for rescission or a defense to specific performance, according to the English doctrine.[34]

B himself was the real party in interest, it was held that the misrepresentation was not a defense, in the absence of proof that A suffered loss thereby, or that he would not have contracted on the same terms with B as principal. Fellowes *v.* Gwydyr, 1 Russ. & M. 83, 5 Eng. Ch. 83, 39 Eng. Reprint 32. This decision, however, has been frequently criticized. For cases where misrepresentations as to the identity of a party have been held a good defense see Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101; Mitchell *v.* King, 77 Ill. 462; New York Brokerage Co. *v.* Wharton, (Iowa 1909) 119 N. W. 969; Ellsworth *v.* Randall, 78 Iowa 141, 42 N. W. 629, 16 Am. St. Rep. 425. And see *infra*. IV, A, 2, h.

31. Flynn *v.* Finch, 137 Iowa 378, 114 N. W. 1058 (difference in quantity, one acre out of twenty-one, substantial); Cleavenger *v.* Sturm, 59 W. Va. 658, 53 S. E. 593; Cadman *v.* Horner, 18 Ves. Jr. 10, 11 Rev. Rep. 135, 34 Eng. Reprint 221.

32. *Alabama.*— Byars *v.* Stubbs, 85 Ala. 256, 4 So. 755, where the vendee failed to disclose a great rise in value to an absent vendor.

Delaware.— Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 14 Atl. 27.

Kansas.— Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202 (non-disclosure by vendee in connection with other circumstances); Missouri River, etc., R. Co. *v.* Brickley, 21 Kan. 275 (where the vendee knew of a coal mine on the land).

Kentucky.— Woollums *v.* Horsley, 93 Ky. 582, 20 S. W. 781, 14 Ky. L. Rep. 642; Bowman *v.* Irons, 2 Bibb 78, 4 Am. Dec. 686 (vendee knew of salt spring on the land); Wolford *v.* Steele, 87 S. W. 1071, 27 Ky. L. Rep. 1177, 84 S. W. 327, 27 Ky. L. Rep. 88.

Massachusetts.— Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. N. S. 871, where, however, there were other elements of unfairness.

Mississippi.— Daniel *v.* Frazer, 10 Miss. 507, vendee knew of fact which depreciated the consideration.

Missouri.— Bean *v.* Valle, 2 Mo. 126, where vendee knew of a valuable mine on the land.

New Jersey.— Corby *v.* Drew, 55 N. J. Eq. 387, 36 Atl. 827, but not shown that the land was worth more than the price.

New York.— Margraf *v.* Muir, 57 N. Y. 155; Lynch *v.* Bischoff, 15 Abb. Pr. 357 note; Livingston *v.* Peru Iron Co., 2 Paige 390, per Walworth, Ch. [*reversed* on other grounds in 9 Wend. 511].

Wisconsin.— See Engberry *v.* Rousseau, 117 Wis. 52, 93 N. W. 824.

England.— See Falcke *v.* Gray, 4 Drew. 651, 664, 5 Jur. N. S. 645, 29 L. J. Ch. 28, 7 Wkly. Rep. 535, 62 Eng. Reprint 256.

See 44 Cent. Dig. tit. "Specific Performance," §§ 166, 167. And see Contracts, 9 Cyc. 412, 413 note 75.

But where the vendor had notice of facts sufficient to put him on inquiry as to the enhanced value of the property, this was held to deprive him of the defense. Whitted *v.* Fuquay, 127 N. C. 68, 37 S. E. 141.

33. *Alabama.*— Cowan *v.* Sapp, 81 Ala. 525, 8 So. 212, agreement to compromise a debt, the debtor knowing and the creditor being ignorant that there was a judgment, execution, and levy for the debt upon the debtor's property.

Illinois.— Hetfield *v.* Willey, 105 Ill. 286, non-disclosure by a vendor of a partnership interest of a large number of partnership debts which were not shown by the firm's books.

Maryland.— Shea *v.* Evans, 109 Md. 229, 72 Atl. 600, contract to purchase not specifically enforced where the property is subject to various restrictions as to use and buildings, not shown to have been brought to the purchaser's attention before the contract was made.

Oregon.— Dodd *v.* Home Mut. Ins. Co., 22 Oreg. 3, 28 Pac. 881, 29 Pac. 3, where plaintiff procured renewal of an insurance policy without disclosing loss of the property.

Tennessee.— Trigg *v.* Read, 5 Humphr. 529, 42 Am. Dec. 447, agreement to rescind a purchase on the ground of no title in vendor, who did not disclose the fact that his title had become perfect by operation of the statute of limitations.

England.— Ellard *v.* Llandaff, 1 Ball & B. 241, 12 Rev. Rep. 23.

See Contracts, 9 Cyc. 412.

34. Fry Spec. Perf. (3d ed.) par. 705; Greenhalgh *v.* Brindley, [1901] 2 Ch. 324, 70 L. J. Ch. 740, 84 L. T. Rep. N. S. 763, 17

b. Concealed Agency. If the contract was made by defendant through an agent who concealed the fact that he was also agent for the other party, such concealment constitutes a defense.[35] It is no defense that plaintiff purchased for another, to whom he is bound to convey, as this does not concern the vendor.[36] But it has been held a good defense that the contract was negotiated by plaintiffs' agent in his own name without disclosing that plaintiffs were the real parties.[37]

B. Mistake [38] — **1. Mutual Mistake.** Mistake about the same matter common to both parties is a ground for reformation or rescission of the contract, and is therefore a defense to a suit for specific performance. The mistake may occur in reducing the agreement to writing so that the written instrument does not express the real agreement of the parties,[39] or it may consist in an erroneous belief or assumption as to the existence or non-existence of a material fact,[40] as, for

T. L. R. 574, 49 Wkly. Rep. 597 (but costs refused); Turner *v.* Green, [1895] 2 Ch. 205, 64 L. J. Ch. 539, 72 L. T. Rep. N. S. 763, 13 Reports 551, 43 Wkly. Rep. 537 (doubting and distinguishing Ellard *v.* Llandaff, 1 Ball & B. 241, 12 Rev. Rep. 23, where solicitors of plaintiff in negotiating a compromise had advance information of a judicial decision in the case); Haywood *v.* Cope, 25 Beav. 140, 4 Jur. N. S. 227, 27 L. J. Ch. 468, 6 Wkly. Rep. 304, 53 Eng. Reprint 589 (lease of mine); Walters *v.* Morgan, 3 De G. F. & J. 718, 4 L. T. Rep. N. S. 758, 64 Eng. Ch. 561, 45 Eng. Reprint 1056 (but plaintiff's conduct, in addition to his reticence, may render the contract unfair; contrivance to "hurry the vendor into an agreement"). But the purchaser's failure to disclose that he has committed trespass on the property, giving rise to a large claim for damages against him, presents a different case. Phillips *v.* Hompray, L. R. 6 Ch. 770. Specific performance was refused where there was an "industrious" concealment on the part of the vendor. Shirley *v.* Stratton, 1 Bro. Ch. 440, 28 Eng. Reprint 1226.

35. *Illinois.*— Fish *v.* Leser, 69 Ill. 394; Hunter *v.* Griffin, 19 Ill. 251.

Missouri.— McElroy *v.* Maxwell, 101 Mo. 294, 14 S. W. 1.

Nebraska.— Morgan *v.* Hardy, 16 Nebr. 427, 20 N. W. 337.

New Jersey.— Marsh *v.* Buchan, 46 N. J. Eq. 595, 22 Atl. 128 (although the price is a fair one); Young *v.* Hughes, 32 N. J. Eq. 372.

New York.— Palmer *v.* Gould, 144 N. Y. 671, 39 N. E. 378; York *v.* Searles, 97 N. Y. App. Div. 331, 90 N. Y. Suppl. 37 [*affirmed* in 189 N. Y. 573, 82 N. E. 1134].

England.— Hesse *v.* Briant, 6 De G. M. & G. 623, 5 Wkly. Rep. 108, 55 Eng. Ch. 485, 43 Eng. Reprint 1375.

See 44 Cent. Dig. tit. "Specific Performance," § 170.

Although the fact of common agency is known to both parties, the contract must be entered into with perfect fairness. Andrew *v.* Whitwer, 3 Nebr. (Unoff.) 55, 90 N. W. 924.

An agent suing for his commission (certain stock), who had concealed the fact that he was acting as agent of the other party, does not come into equity with clean hands, and will be refused relief. York *v.* Searles, 97 N. Y. App. Div. 331, 90 N. Y. Suppl. 37 [*affirmed* in 189 N. Y. 573, 82 N. E. 1134].

36. Girault *v.* Feucht, 120 La. 1070, 46 So. 26. See also *supra*, IV, A, 1, f, note 30. And see Principal and Agent, 31 Cyc. 1619.

37. New York Brokerage Co. *v.* Wharton, (Iowa 1909) 119 N. W. 969. And see *supra*, IV, E, 1, f, note 30.

38. Discretion of court see *supra*, I, D, 4, a.

39. *Iowa.*—Wilkin *v.* Voss, 120 Iowa 500, 94 N. W. 1123.

Maine.— Bradbury *v.* White, 4 Me. 391.

Maryland.— Popplein *v.* Foley, 61 Md. 381.

Michigan.— Chambers *v.* Livermore, 15 Mich. 381.

Montana.— Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450.

New Jersey.— McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

New York.— Mathews *v.* Terwilliger, 3 Barb. 50; Morganthau *v.* White, 1 Sweeny 395; Best *v.* Stow, 2 Sandf. Ch. 298.

Ohio.— Hunt *v.* Freeman, 1 Ohio 490.

United States.— Woodworth *v.* Cook, 30 Fed. Cas. No. 18,011, 2 Blatchf. 151, Fish. Pat. Rep. 423.

England.— Joynes *v.* Statham, 3 Atk. 387, 26 Eng. Reprint 1023 (where the agreement was drawn by plaintiff and omitted a stipulation); Ramsbottom *v.* Gosden, 1 Ves. & B. 165, 12 Rev. Rep. 207, 35 Eng. Reprint 65.

See 44 Cent. Dig. tit. "Specific Performance," §§ 155, 159. And see Contracts, 9 Cyc. 392; Reformation of Instruments, 34 Cyc. 899.

Term omitted by negligence of defendant, and by mistake, no defense see Krah *v.* Wassmer, (N. J. Ch. 1908) 71 Atl. 404.

40. *Alabama.*— James *v.* State Bank, 17 Ala. 69.

Illinois.— Hatch *v.* Kizer, 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258 (both parties believed that vendor had title); Frisby *v.* Ballance, 5 Ill. 287, 39 Am. Dec. 409 (agreement to divide land which both parties supposed they owned in common); Hay *v.* Kirk, 116 Ill. App. 45 (mutual mistake as to title).

Kentucky.— Greer *v.* Boone, 5 B. Mon. 554.

Minnesota.— Thwing *v.* Hall, etc., Lumber Co., 40 Minn. 184, 41 N. W. 815, mutual mistake as to existence of timber on the land.

Pennsylvania.— People's Sav. Bank *v.* Alexander, 2 Pa. Cas. 287, 3 Atl. 821; Miles *v.*

example, in the case of a mutual mistake as to the amount or quantity of the land or other subject-matter of the contract.[41]

2. Mistake of Defendant Induced by Plaintiff's Conduct. A mistake of defendant, caused or contributed to or made natural and probable by plaintiff's acts, is a well-established ground of defense. This species of mistake most frequently arises when there is in the description or plan of the property a matter on which a person might *bona fide* make a mistake, but it may arise in other cases.[42]

3. Ambiguity in Contract. Where the contract contains an ambiguous expression, the court has sometimes refused to enforce it against defendant in a sense in which he did not understand it, even though the contract is legally binding in the sense in which it was understood by plaintiff. In such case there is no real meeting of minds.[43]

4. Unilateral Mistake. Unilateral mistake of defendant not caused or con-

Stevens, 3 Pa. L. J. Rep. 434 [*affirmed* in 3 Pa. St. 21, 45 Am. Dec. 621], where passage of legislation which would enhance the value of the land was contemplated.

Virginia.— Graham *v.* Hendren, 5 Munf. 185, misunderstanding as to the land embraced in the contract.

See 44 Cent. Dig. tit. "Specific Performance," §§ 155, 159. And see Contracts, 9 Cyc. 397 *et seq.*

Sale of property which already belonged to buyer.— Cochrane *v.* Willis, L. R. 1 Ch. 58, 11 Jur. 870, 35 L. J. Ch. 36, 13 L. T. Rep. N. S. 339, 14 Wkly. Rep. 19; Jones *v.* Clifford, 3 Ch. D. 779, 45 L. J. Ch. 809, 32 L. T. Rep. N. S. 93.

Mining lease is specifically enforceable by the lessor, although the supposed vein does not exist, there being no warranty that such vein would be found. Jefferys *v.* Faris, 4 Ch. D. 448, 46 L. J. Ch. 113, 36 L. T. Rep. N. S. 10, 25 Wkly. Rep. 227. A person contracting for the lease of a mine cannot resist its performance on the ground of his ignorance of mining matters and of the mine turning out worthless. Haywood *v.* Cope, 25 Beav. 140, 4 Jur. N. S. 227, 27 L. J. Ch. 468, 6 Wkly. Rep. 304, 53 Eng. Reprint 589. See Mines and Minerals, 27 Cyc. 692.

41. *Iowa.*— Gilroy *v.* Alis, 22 Iowa 174.

Kentucky.— Fannin *v.* Bellomy, 5 Bush 663; Smith *v.* Smith, 4 Bibb 81. But see Yancey *v.* Green, 6 Dana 444.

Maryland.— Carberry *v.* Tannehill, 1 Harr. & J. 224.

New Jersey.— Planer *v.* Equitable L. Assur. Soc., (Ch. 1897) 37 Atl. 668.

New York.— Schmidt *v.* Livingston, 3 Edw. 213.

North Carolina.— Leigh *v.* Crump, 36 N. C. 299.

Washington.— Reid *v.* Slocum, 34 Wash. 173, 75 Pac. 629.

United States.— King *v.* Hamilton, 4 Pet. 311, 7 L. ed. 869, tract larger than either party thought; decree only on condition that vendee, plaintiff, pay *pro rata* for the surplus land.

England.— See Baxendale *v.* Seale, 19 Beav. 601, 1 Jur. N. S. 581, 24 L. J. Ch. 385, 52 Eng. Reprint 484.

See 44 Cent. Dig. tit. "Specific Performance," §§ 155, 159. And see Contracts, 9 Cyc. 397 *et seq.*

42. *Alabama.*— Campbell *v.* Durham, 86 Ala. 299, 5 So. 507, where a fence, which included land not sold, was, in absence of other visible boundaries, assumed by defendant to be the boundary.

Maryland.— Ellicott *v.* White, 43 Md. 145.

New York.— Crouch *v.* Meyer, 18 N. Y. Suppl. 65.

North Carolina.— Rudisill *v.* Whitener, 149 N. C. 439, 63 S. E. 101.

Pennsylvania.— Allen *v.* Kirk, 219 Pa. St. 574, 69 Atl. 50, holding that specific performance for the exchange of lands will not be granted, where one of the parties innocently misleads the other as to the size of the lot he is to receive.

England.— Denny *v.* Hancock, L. R. 6 Ch. 1, 23 L. T. Rep. N. S. 686, 19 Wkly. Rep. 54 (a much cited case; where the boundary of the estate was marked by stumps concealed by shrubbery, and the vendee inspecting the premises with the plan in hand naturally supposed that an iron fence just outside the shrubbery was the boundary); Jones *v.* Rimmer, 14 Ch. D. 588, 49 L. J. Ch. 775, 43 L. T. Rep. N. S. 111, 29 Wkly. Rep. 165 (where the "particulars" of the sale were misleading and conduced to defendant's mistake); Baskcomb *v.* Beckwith, L. R. 8 Eq. 100, 38 L. J. Ch. 536, 20 L. T. Rep. N. S. 862, 17 Wkly. Rep. 812; Swaisland *v.* Deansley, 29 Beav. 430, 7 Jur. N. S. 984, 30 L. J. Ch. 652, 4 L. T. Rep. N. S. 432, 9 Wkly. Rep. 526, 54 Eng. Reprint 694; Higginson *v.* Clowes, 15 Ves. Jr. 516, 10 Rev. Rep. 112, 33 Eng. Reprint 850; Mason *v.* Armitage, 13 Ves. Jr. 25, 9 Rev. Rep. 131, 33 Eng. Reprint 204 (where plaintiff induced defendant vendor to think that he would not bid, and so put defendant off his guard).

See Contracts, 9 Cyc. 395, 396.

43. Canterbury Aqueduct Co. *v.* Ensworth, 22 Conn. 608; Burkhalter *v.* Jones, 32 Kan. 5, 3 Pac. 559 (ambiguity as to the price offered); Covart *v.* Johnston, 15 N. Y. Suppl. 785 [*affirmed* in 137 N. Y. 560, 33 N. E. 338] (vendor's agreement to convey "all the real estate owned by him" in a certain town, not intended by him to embrace his interest in a cemetery).

tributed to by plaintiff has frequently been admitted as a defense, when to enforce the contract would be harsh and unreasonable. In many but not all of the cases defendant's mistake is that of his agent.[44] But where the unilateral mistake was not induced or contributed to in any way by plaintiff, the defense is confined to cases where to grant specific performance would be "highly unreasonable."[45] A mistake which was solely the result of defendant's inexcusable carelessness is not a defense to a suit for specific performance.[46]

The fact that plaintiff has insisted upon an erroneous construction of the contract does not prevent him from afterward waiving the question of construction and obtaining specific performance according to what defendant admits to be the true construction. Preston *v.* Luck, 27 Ch. D. 497.

44. *Maine.*— Kelley *v.* York Cliffs Imp. Co., 94 Me. 374, 47 Atl. 898 (where the vendor sold in forgetfulness that the vendee had the right to pay in worthless stock); Mansfield *v.* Sherman, 81 Me. 365, 17 Atl. 300 (where the vendor, relying on a negligent agent, offered a lot for a grossly inadequate price, under mistake as to its extent and boundaries).

Maryland.— See Shea *v.* Evans, 109 Md. 229, 72 Atl. 600 (property subject to restrictions not known to the purchaser); Somerville *v.* Coppage, 101 Md. 519, 61 Atl. 318.

Massachusetts.—Chute *v.* Quincy, 156 Mass. 189, 30 N. E. 550, where, by mistake of the vendor's surveyor, a lot containing nine thousand two hundred and thirty square feet was sold as containing three thousand two hundred and thirty, and the price was fixed accordingly. The vendee, plaintiff, knew that a mistake had been made.

New York.— Cuff *v.* Dorland, 50 Barb. 438 [*reversed* in 55 Barb. 481 (*reversed* in 57 N. Y. 560)]; Mathews *v.* Terwilliger, 3 Barb. 50 (mistake of vendor, acting hastily, as to contents of contract); Bowman *v.* McClenahan, 19 Misc. 438, 44 N. Y. Suppl. 482 [*affirmed* in 20 N. Y. App. Div. 346, 46 N. Y. Suppl. 945] (vendee bought for immediate use, under belief that property was not subject to a lease); Coles *v.* Bowne, 10 Paige 526 (vendee thought he was bidding for whole tract instead of for a lot).

Pennsylvania.— Galloway *v.* Horne, 2 Del. Co. 515.

United States.— Rushton *v.* Thompson, 35 Fed. 635, vendor's agent failed to notify vendor that vendee's offer was to buy a perfect title; vendor accepted in belief that he was selling only such title as he had.

England.— Day *v.* Wells, 30 Beav. 220, 7 Jur. N. S. 1004, 9 Wkly. Rep. 857, 54 Eng. Reprint 872 (property sold at auction for one hundred and sixty-two pounds instead of two hundred and forty pounds, owing to misunderstanding between vendor and auctioneer as to the latter's authority with respect to reserved bidding); Webster *v.* Cecil, 30 Beav. 62, 54 Eng. Reprint 812 (by blunder in computation vendor added up prices of lots as amounting to one thousand one hundred pounds instead of two thousand one hundred and offered them to plaintiff at former sum, having already refused to sell them to plaintiff for two thousand pounds); Neap *v.* Abbott, Coop. Pr. Cas. 333, 47 Eng. Reprint 531; Leslie *v.* Tompson, 9 Hare 268, 15 Jur. 717, 20 L. J. Ch. 561, 41 Eng. Ch. 268, 68 Eng. Reprint 503 (vendor's solicitor copied description made by surveyor of previous owner, which was erroneous as to quantity); Alvanley *v.* Kinnaird, 14 Jur. 897, 2 Macn. & G. 1, 48 Eng. Ch. 1, 42 Eng. Reprint 1 (property not intended to be sold included in the contract by ignorance or neglect of vendor's agent); Wood *v.* Scarth, 1 Jur. N. S. 1107, 2 Kay & J. 33, 4 Wkly. Rep. 31, 69 Eng. Reprint 682 (party held entitled to resist a suit for specific performance of an agreement to let a public house by proving that he had made a mistake in his letter of offer); Malins *v.* Freeman, 2 Keen 25, 6 L. J. Ch. 133, 15 Eng. Ch. 25, 48 Eng. Reprint 537 (vendee's agent inadvertently bid off the wrong lot).

See 44 Cent. Dig. tit. "Specific Performance," § 155 *et seq.* And see CONTRACTS, 9 Cyc. 394 *et seq.*

45. Dewey *v.* Whitney, 93 Fed. 533, 35 C. C. A. 414; Stewart *v.* Kennedy, 15 App. Cas. 75, 105; Tamplin *v.* James, 15 Ch. D. 215, 43 L. T. Rep. N. S. 520, 29 Wkly. Rep. 311; Dyas *v.* Stafford, L. R. 7 Ir. 590; Goddard *v.* Jeffreys, 51 L. J. Ch. 57, 45 L. T. Rep. N. S. 674, 30 Wkly. Rep. 269; Miller *v.* Dahl, 9 Manitoba 444. And see Bradley *v.* Heyward, 164 Fed. 107. See also CONTRACTS, 9 Cyc. 394 *et seq.*

Disappointed expectations.— Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346 (where vendor sold to railroad in belief that they would choose another route than the one they adopted); Morley *v.* Clavering, 29 Beav. 84, 7 Jur. N. S. 904, 54 Eng. Reprint 558 (where purchaser of leaseholds intended to apply the property to a purpose which it turned out was prohibited by the lease). And see CONTRACTS, 9 Cyc. 395.

46. *Minnesota.*— Caldwell *v.* Depew, 40 Minn. 528, 42 N. W. 479.

New Jersey.— Krah *v.* Wassmer, (Ch. 1908) 71 Atl. 404 (term omitted by negligence of defendant, and not by mistake); Campbell *v.* Parker, 59 N. J. Eq. 342, 45 Atl. 116 (bidder at auction negligent in not examining title before bidding).

South Carolina.— Cape Fear Lumber Co. *v.* Matheson, 69 S. C. 87, 48 S. E. 111.

Virginia.— Kemper *v.* Ewing, 25 Gratt. 427; Luckett *v.* Luckett, 10 Leigh 50.

United States.— Bradley *v.* Heyward, 164 Fed. 107.

England.— Tamplin *v.* James, 15 Ch. D. 215, 43 L. T. Rep. N. S. 520, 29 Wkly. Rep. 311; Swaisland *v.* Dearsley, 29 Beav. 433, 7 Jur. N. S. 984, 30 L. J. Ch. 652, 4 L. T. Rep. N. S. 432, 9 Wkly. Rep. 526, 54 Eng. Reprint

5. Mistake of Law. As a rule a mere mistake of law, including mistake as to the legal effect of the contract, without any element of fraud or inequitable conduct, is no ground of defense.[47] But mistake as to foreign law is a mistake of fact, and may be a defense.[48] The same is true of a mistake of law, not in making the contract, but in reducing it to writing.[49] And a mistake of law as to a party's existing rights or interests has so much in common with a mistake of fact that it has frequently been admitted as a defense.[50]

6. Immaterial Mistake. If the conduct of the mistaken party was not in reality determined or influenced by the mistake, it is not a ground of defense.[51]

7. Proof of Mistake. The burden of proof is on defendant to make out his

694; Goddard *v.* Jeffreys, 51 L. J. Ch. 57, 45 L. T. Rep. N. S. 674, 30 Wkly. Rep. 269.

Canada.— Hobbs *v.* Esquimalt, etc., R. Co., 29 Can. Sup. Ct. 450.

See 44 Cent. Dig. tit. "Specific Performance," § 155 *et seq.*

Ignorance of contents of contract or legal effect.— It is not a defense to an action to specifically enforce a contract executed by one since deceased that decedent was not informed of, and did not know, the true contents or legal effect of the contract when she signed it, where there is no claim that it was the purpose of the other party to the contract to take some unfair advantage of her by fraudulent means, especially where it is not claimed that decedent was mentally weak, or that duress was practised upon her. Ellis *v.* Keeler, 126 N. Y. App. Div. 343, 110 N. Y. Suppl. 542. And see Contracts, 9 Cyc. 388. As to mistake as to the legal effect see *infra*, IV, B, 5.

47. Pomeroy Eq. Jur. § 843. And see the following cases:

Colorado.— Wilson *v.* McLaughlin, 11 Colo. 465, 18 Pac. 739.

Minnesota.— Caldwell *v.* Depew, 40 Minn. 528, 42 N. W. 479.

New Jersey.— Zane *v.* Cawley, 21 N. J. Eq. 130; Hawralty *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613. But see Sullivan *v.* Jennings, 44 N. J. Eq. 11, 14 Atl. 104.

New York.— Ellis *v.* Keeler, 126 N. Y. App. Div. 343, 110 N. Y. Suppl. 542; Greenleaf *v.* Blakeman, 25 Misc. 564, 56 N. Y. Suppl. 76.

England.— Hart *v.* Hart, 18 Ch. D. 670, 50 L. J. Ch. 697, 45 L. T. Rep. N. S. 13, 30 Wkly. Rep. 8; Powell *v.* Smith, L. R. 14 Eq. 85, 41 L. J. Ch. 734, 20 Wkly. Rep. 602. But see Watson *v.* Marston, 4 De G. M. & G. 230, 53 Eng. Ch. 179, 43 Eng. Reprint 495.

See 44 Cent. Dig. tit. "Specific Performance," § 157. And see Contracts, 9 Cyc. 403 *et seq.*

Contract in unambiguous language.— In Hobbs *v.* Esquimalt, etc., R. Co., 29 Can. Sup. Ct. 450 [*reversing* 6 Brit. Col. 228], a railroad company executed an agreement to sell certain lands to H, who entered into possession, made improvements, and paid the purchase-money, whereupon a deed was delivered to him, which he refused to accept, as it reserved the minerals on the land while the agreement was for an unconditional sale. In an action by H for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals. It was held that the contract for sale being expressed in unambiguous language, and H having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance.

48. Patterson *v.* Bloomer, 35 Conn. 57, 95 Am. Dec. 218; Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. And see Contracts, 9 Cyc. 406.

49. See Pomeroy Eq. Jur. § 845; Hopwood *v.* McCausland, 120 Iowa 218, 94 N. W. 469.

50. See Pomeroy Eq. Jur. § 849. And see the following cases:

Kentucky.— Greer *v.* Boone, 5 B. Mon. 554. *Contra,* Kennedy *v.* Campbell, Litt. Sel. Cas. 41.

Maine.— Higgins *v.* Butler, 78 Me. 520, 7 Atl. 276, with grossly inadequate considerations.

Tennessee.— Trigg *v.* Read, 5 Humphr. 529, 42 Am. Dec. 447.

Washington.— Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

United States.— See Brewster *v.* Tuthill Spring Co., 34 Fed. 769.

Canada.— Earley *v.* McGill, 11 Grant Ch. (U. C.) 75.

And see Contracts, 9 Cyc. 405.

51. Davis *v.* Parker, 14 Allen (Mass.) 94; Lighton *v.* Syracuse, 48 Misc. (N. Y.) 134, 96 N. Y. Suppl. 392 [*affirmed* in 112 N. Y. App. Div. 589, 98 N. Y. Suppl. 792 (*reversed* on other grounds in 188 N. Y. 499, 81 N. E. 464)]. And see Homan *v.* Stewart, 103 Ala. 644, 16 So. 35; McFerran *v.* Taylor, 3 Cranch (U. S.) 270, 2 L. ed. 436. Where, in a suit for specific performance of a land contract, there was no dispute as to the extra property, which was the subject of the contract, it was no defense that the contract misdescribed the land as located in Suffolk, instead of Nassau, county. Robbins *v.* Clock, 59 Misc. (N. Y.) 289, 112 N. Y. Suppl. 246.

New contract after discovery of mistake.— Mutual mistake as to the quality of land from which one party has agreed to dig gravel for the benefit of the other is no ground for dismissing a bill by the latter for the specific performance of a subsequent written agreement by which other land was substituted by the parties, after the discovery of the mistake, and the former agreed to pay for the first land. Old Colony R. Co. *v.* Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394.

defense of mistake.[52] It is variously held that the same degree of proof is not required as would justify setting aside a contract for mistake,[53] and that the evidence of mistake must be very strong.[54]

C. Parol Variation — 1. Parol Evidence of Mistake, Fraud, Etc., in Defense. The defendant in a suit on a written contract may show by parol evidence that, by reason of fraud, accident, surprise, or mistake the contract does not truly exhibit the actual agreement of the parties.[55]

2. Omission of Parol Term of Contract a Defense. That the agreement embodied in the writing is different from the agreement actually made, because the parties intentionally left some of the provisions of the agreement to rest in parol, is also a good defense to the enforcement in equity of the written agreement, according to the prevailing rule unless plaintiff is willing to accept an enforcement of the whole agreement.[56]

3. When Omitted Term May Be Enforced. If the omitted term or provision of the contract is one that is favorable to defendant, its omission from the writing is not a defense, if plaintiff is willing and ready to perform the whole agreement, including the omitted term. This is true whether the omission was intentional[57] or by mistake.[58]

52. Cawley *v.* Jean, 189 Mass. 220, 75 N. E. 614; Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346; Palouse City Christ Church *v.* Beach, 7 Wash. 65, 33 Pac. 1053.

53. Clark *v.* Maurer, 77 Iowa 717, 42 N. W. 522.

54. Rogers *v.* Odell, 36 Mich. 411; Masterton *v.* Beers, 1 Sweeny (N. Y.) 406.

55. *Maine.*— Bradbury *v.* White, 4 Me. 391.

Michigan.— Berry *v.* Whitney, 40 Mich. 65; Chambers *v.* Livermore, 15 Mich. 381.

Missouri.— Jasper County Electric R. Co. *v.* Curtis, 154 Mo. 10, 55 S. W. 222.

New Jersey.— Miller *v.* Chetwood, 2 N. J. Eq. 199.

New York.—Best *v.* Stow, 2 Sandf. Ch. 298.

North Carolina.— Pendleton *v.* Dalton, 62 N. C. 119.

United States.— Woodworth *v.* Cook, 30 Fed. Cas. No. 18,011, 2 Blatchf. 151, 1 Fish. Pat. Rep. 423.

England.— Clowes *v.* Higginson, 1 Ves. & B. 524, 12 Rev. Rep. 284, 35 Eng. Reprint 204; Clarke *v.* Grant, 14 Ves. Jr. 519, 9 Rev. Rep. 336, 33 Eng. Reprint 620.

Canada.— Gould *v.* Hamilton, 5 Grant Ch. (U. C.) 192.

And see Evidence, 17 Cyc. 695, 702, 749.

56. *Connecticut.*—Quinn *v.* Roath, 37 Conn. 16.

Illinois.— Grand Tower, etc., R. Co. *v.* Walton, 150 Ill. 428, 37 N. E. 920; Worden *v.* Crist, 106 Ill. 326.

Maryland.— Dixon *v.* Dixon, 92 Md. 432, 48 Atl. 152.

Massachusetts.— Ely *v.* McKay, 12 Allen 323.

Michigan.— Hall *v.* Loomis, 63 Mich. 709, 30 N. W. 374.

North Carolina.— Where plaintiff induced defendant to sign a contract to sell his home by causing a well-grounded belief in defendant's mind that plaintiff was to transfer to him an option on certain other land, plaintiff, having refused to transfer the option, could not maintain specific performance, although he had no intention of misleading defendant, but would be limited to an action for damages. Rudisill *v.* Whitener, 149 N. C. 439, 63 S. E. 101.

England.— *In re* Hare, [1901] 1 Ch. 93, 70 L. J. Ch. 45, 83 L. T. Rep. N. S. 672, 17 T. L. R. 46, 49 Wkly. Rep. 202; Bayly *v.* Tyrrell, 2 Ball & B. 363, 12 Rev. Rep. 99; Barnard *v.* Cave, 26 Beav. 253, 53 Eng. Reprint 895; Martin *v.* Pycroft, 2 De G. M. & G. 785, 22 L. J. Ch. 94, 16 Jur. 1125, 1 Wkly. Rep. 58, 51 Eng. Ch. 615, 42 Eng. Reprint 1079, "the defendant in equity may call upon the Court to be neutral unless the plaintiff will consent to the omitted term."

Canada.— Needler *v.* Campbell, 17 Grant Ch. (U. C.) 592.

Contra.— Morgan *v.* Porter, 103 Mo. 135, 15 S. W. 289; Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332; Ferussac *v.* Thorn, 1 Barb. (N. Y.) 42; Ratcliffe *v.* Allison, 3 Rand. (Va.) 537. See Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.

Degree of evidence to support the defense see Reed *v.* Whitney, 7 Gray (Mass.) 533.

Negligence.—One cannot defeat specific performance of a contract because of the omission of terms therefrom resulting from his own negligence. Krah *v.* Wassmer, (N. J. Ch. 1908) 71 Atl. 404.

57. *Massachusetts.*—Park *v.* Johnson, 4 Allen 259.

Michigan.— Anderson *v.* Kennedy, 51 Mich. 467, 16 N. W. 816.

New Jersey.— Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063.

Rhode Island.— Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500.

West Virginia.— See Norfolk, etc., R. Co. *v.* McGarry, 52 W. Va. 547, 44 S. E. 236.

England.— Barnard *v.* Cave, 26 Beav. 253, 53 Eng. Reprint 895; London, etc., R. Co. *v.* Winter, 1 Cr. & Ph. 57, 18 Eng. Ch. 57, 41 Eng. Reprint 410.

Compare, however, Richardson *v.* Godwin, 59 N. C. 229.

58. Baxter *v.* Brand, 6 Dana (Ky.) 296;

4. When Omitted Term Cannot Be Enforced. The plaintiff cannot have specific performance of a written contract with a parol modification or variation in his favor, where that modification or variation is intentional.[59]

5. Reformation and Specific Performance. By the English rule, which has some following in this country, plaintiff cannot show by parol that by mistake the written agreement does not express the intention of the parties, and have reformation and specific performance of the agreement as thus varied in his favor by parol.[60] The general rule in the United States is otherwise.[61] By the weight of authority in this country also plaintiff may, notwithstanding the statute of frauds, have specific performance of the true contract for the conveyance of land, although a portion of the land was by mistake or fraud omitted from the description in the written instrument.[62]

D. Unfairness, Hardship, Inadequate Consideration, Constructive Fraud, Etc.— 1. Inadequacy of Consideration — a. Standing Alone. In the language of a leading case, "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance;"[63] or, to state the rule more in accordance with modern conceptions of fraud, inadequacy of consideration or of the subject-matter, standing alone as a defense, must be so gross as to lead to an inference, satisfactory to the court, of fraud or mistake in the making of the contract.[64] The rule of

McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840; Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744; Whiteside *v.* Winans, 29 Pa. Super. Ct. 244. That defendant may in such case have specific performance of the agreement as proved by him even against the claim of plaintiff to have the bill dismissed see Bradford *v.* Union Bank, 13 How. (U. S.) 57, 14 L. ed. 49.

59. Hall *v.* Chelsea First Nat. Bank, 173 Mass. 16, 53 N. E. 154, 73 Am. St. Rep. 255, 44 L. R. A. 319; Brooks *v.* Wheelock, 11 Pick. (Mass.) 439 (subsequent parol modification); Whiteaker *v.* Vanschoiack, 5 Oreg. 113.

60. Climer *v.* Hovey, 15 Mich. 18; Long *v.* Dooley, 4 Hayw. (Tenn.) 128, 9 Am. Dec. 754; Woollam *v.* Hearn, 7 Ves. Jr. 211, 6 Rev. Rep. 113, 32 Eng. Reprint 86.

61. See Reformation of Instruments, 34 Cyc. 981, 982. And see Philpot *v.* Elliott, 4 Md. Ch. 273, as to the degree of proof.

Counter-claim by defendant for reformation see Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744. And see *infra*, IX, A, 3; XI, D, 3, a.

62. Winans *v.* Huyck, 71 Iowa 459, 32 N. W. 422; Beardsley *v.* Duntley, 69 N. Y. 577; Creigh *v.* Boggs, 19 W. Va. 240; McDonald *v.* Yungbluth, 46 Fed. 836. *Contra*, Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418. See Reformation of Instruments, 34 Cyc. 981, 982.

63. Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 246, 7 Rev. Rep. 167, 32 Eng. Reprint 592, per Lord Eldon.

64. Pomeroy Spec. Perf. § 194; Pomeroy Eq. Jur. §§ 926, 927. As so defined, instances of inadequacy alone as a sufficient defense are exceedingly rare. See Harrison *v.* Town, 17 Mo. 237. And see the following cases:

Alabama.— Alabama Cent. R. Co. *v.* Long, 158 Ala. 301, 48 So. 363 (holding that a contract for the conveyance of land to a railroad for a right of way in consideration of one dollar was, in the absence of fraud or fiduciary relation, supported by a sufficient consideration to authorize its specific performance); South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 98 Ala. 400, 13 So. 682, 39 Am. St. Rep. 74; Goodlett *v.* Hansell, 66 Ala. 151; Andrews *v.* Andrews, 28 Ala. 432.

Arkansas.— Morrison *v.* Peay, 21 Ark. 110.

District of Columbia.— Knott *v.* Giles, 27 App. Cas. 581.

Illinois.— Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Koch *v.* Streuter, 232 Ill. 594, 83 N. E. 1072 (specific performance of a contract for exchange of farms refused where defendant's farm was worth twenty-five thousand dollars and plaintiff's farm was worth but little, if anything, above the encumbrance upon it, which encumbrance defendant assumed); Ullsperger *v.* Meyer, 217 Ill. 262, 75 N. E. 482, 2 L. R. A. N. S. 221; Watson *v.* Doyle, 130 Ill. 415, 22 N. E. 613; Temple *v.* Johnson, 71 Ill. 13.

Indiana.— Warner *v.* Marshall, 166 Ind. 88, 75 N. E. 582; Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535; Watson *v.* Mahan, 20 Ind. 223.

Iowa.— Union Coal Min. Co. *v.* McAdam, 38 Iowa 663.

Kentucky.— Cox *v.* Burgess, 96 S. W. 577, 29 Ky. L. Rep. 972.

Maryland.— Lawson *v.* Mullinix, 104 Md. 156, 64 Atl. 938; Maryland Clay Co. *v.* Simpers, 96 Md. 1, 53 Atl. 424 (excessive price); Shepherd *v.* Bevin, 9 Gill 32; Young *v.* Frost, 5 Gill 287.

Massachusetts.— O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602; New England Trust Co. *v.* Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Lee *v.* Kirby, 104 Mass. 420;

the earlier English cases was otherwise; inadequacy of the consideration, standing alone, was a defense to specific performance; and this earlier rule has had

Park *v.* Johnson, 4 Allen 259; Leach *v.* Fobes, 11 Gray 506, 71 Am. Dec. 732; Western R. Corp. *v.* Babcock, 6 Metc. 346.

Michigan.—Hunt *v.* Thorn, 2 Mich. 213; Burtch *v.* Hogge, Harr. 31.

Missouri.—Harrison *v.* Town, 17 Mo. 237; Bean *v.* Valle, 2 Mo. 126.

New Jersey.—Worth *v.* Watts, (Ch. 1908) 70 Atl. 357; Ketcham *v.* Owen, 55 N. J. Eq. 344, 36 Atl. 1095; Shaddle *v.* Disborough, 20 N. J. Eq. 370; Ready *v.* Noakes, 29 N. J. Eq. 497; Chubb *v.* Peckham, 13 N. J. Eq. 207; Rodman *v.* Zilley, 1 N. J. Eq. 320.

New York.—Losee *v.* Morey, 57 Barb. 561; Viele *v.* Troy, etc., R. Co., 21 Barb. 381 [*affirmed* in 20 N. Y. 184]; Robbins *v.* Clock, 59 Misc. 289, 112 N. Y. Suppl. 246; Bush *v.* Whitaker, 45 Misc. 74, 91 N. Y. Suppl. 616; Northrup *v.* Gibbs, 1 N. Y. Suppl. 465; Seymour *v.* Delancy, 3 Cow. 445, 15 Am. Dec. 270 [*reversing* 6 Johns. Ch. 222 (the leading case)]; Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339 [*reversed* on the facts in 17 Johns. 405] (alleged overvaluation by arbitrators); Westervelt *v.* Matheson, Hoffm. Ch. 36.

North Carolina.—Combes *v.* Adams, 150 N. C. 64, 63 S. E. 186; Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682; Whitted *v.* Fuquay, 127 N. C. 68, 37 S. E. 141; White *v.* Thompson, 21 N. C. 493.

Pennsylvania.—Kramer *v.* Dinsmore, 152 Pa. St. 264, 25 Atl. 789.

South Carolina.—Fripp *v.* Fripp, Rice Eq. 84; Sarter *v.* Gordon, 2 Hill Eq. 121.

Tennessee.—Russell *v.* Stinson, 3 Hayw. 1, sale on execution; rule said to be different in case of private contracts.

Virginia.—Stearns *v.* Beckham, 31 Gratt. 379, 390; White *v.* McGannon, 29 Gratt. 511; Booten *v.* Scheffer, 21 Gratt. 474; Hale *v.* Wilkinson, 21 Gratt. 75.

West Virginia.—Conaway *v.* Sweeney, 24 W. Va. 643.

Wisconsin.—Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395.

United States.—Erwin *v.* Parham, 12 How. 197, 13 L. ed. 952 (bill to enforce sheriff's sale, for six hundred dollars, of notes to the amount of two hundred and sixty thousand dollars, not dismissed on demurrer for inadequacy of price); Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120 (exorbitancy of price); Bradley *v.* Heyward, 164 Fed. 107; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

England.—Callaghan *v.* Callaghan, 8 Cl. & F. 374, 4 Ir. Eq. 441, 8 Eng. Reprint 145; Collier *v.* Brown, 1 Cox Ch. 428, 1 Rev. Rep. 70, 29 Eng. Reprint 1234; Griffith *v.* Spratley, 1 Cox Ch. 383, 29 Eng. Reprint 1213; Abbott *v.* Sworder, 4 De G. & Sm. 448, 22 L. J. Ch. 235, 64 Eng. Reprint 907 (excessive price); Borell *v.* Dann, 2 Hare 440, 24 Eng. Ch. 440, 67 Eng. Reprint 181 (auction sale); Bower *v.* Cooper, 2 Hare 408, 6 Jur. 681, 11 L. J. Ch. 287, 24 Eng. Ch. 408, 67 Eng. Reprint 168; Coote *v.* Coote, 2 Ir. Eq. 159, 1 Sau. & Sc. 693 (extravagant bid at auction); Weeks *v.* Gallard, 21 L. T. Rep. N. S. 655, 18 Wkly. Rep. 331 (consideration fixed by valuers); Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 246, 7 Rev. Rep. 167, 32 Eng. Reprint 592; Lowther *v.* Lowther, 13 Ves. Jr. 95, 33 Eng. Reprint 230; Burrowes *v.* Lock, 10 Ves. Jr. 470, 8 Rev. Rep. 33, 856, 32 Eng. Reprint 927; Underhill *v.* Horwood, 10 Ves. Jr. 209, 32 Eng. Reprint 824; White *v.* Damon, 7 Ves. Jr. 30, 6 Rev. Rep. 71, 32 Eng. Reprint 13 (auction sale).

Canada.—Dodge *v.* Turner, 5 Nova Scotia 1.

See 44 Cent. Dig. tit. "Specific Performance," §§ 142–146, 151.

The rule is specially applicable to compromise agreements (Leach *v.* Fobes, 11 Gray (Mass.) 506, 71 Am. Dec. 732; Hunt *v.* Thorn, 2 Mich. 213; Houghton *v.* Lees, 1 Jur. N. S. 862, 3 Wkly. Rep. 135), or where defendant with full knowledge of the facts has elected to abide by the contract (Galloway *v.* Barr, 12 Ohio 354), or declared himself satisfied (Woodruff *v.* Hargrave, Wright (Ohio) 555).

Consideration adequate.—In the following cases, the question of adequacy of the consideration being raised, it was held not to be inadequate: Watson *v.* Mahan, 20 Ind. 223; Townsend *v.* Blanchard, 117 Iowa 36, 90 N. W. 519; Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 32 N. W. 315; Thomas *v.* Gottlieb, etc., Brewing Co., 102 Md. 417, 62 Atl. 633; Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. 213; Evans *v.* Evans, 196 Mo. 1, 93 S. W. 969; Rice *v.* Gibbs, 33 Nebr. 460, 50 N. W. 436; Rodman *v.* Zilley, 1 N. J. Eq. 320 (price not exorbitant); Williston *v.* Williston, 41 Barb. (N. Y.) 635; Cady *v.* Gale, 5 W. Va. 547; Chicago, etc., R. Co. *v.* Union Pac. R. Co., 47 Fed. 15 [*affirmed* in 51 Fed. 309, 2 C. C. A. 174, and 163 U. S. 564, 16 S. Ct. 1173, 41 L. ed. 265].

Agreement by employee as to inventions.—An agreement by one employed as a machinist to invent, perfect, and improve lubricating valves, force-feed oil pumps, etc., which his employer is engaged in manufacturing, and that whatever inventions or devices may result from such employment in the nature of machinery, tools, etc., to be used in connection with the employer's business, shall at the employer's request be protected by patents and become the employer's property, is based on a sufficient consideration to be specifically enforced. Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988. And see Mississippi Glass Co. *v.* Franzen, 143 Fed. 501, 74 C. C. A. 135; Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180.

Circumstances repelling inference of fraud.—Reaffirmance by vendor of the original contract of sale on six several occasions, extending over a period of eighteen months, and receipt by him, in the aggregate, of all but two hundred dollars of the price, cannot be

some following in the courts of this country.[65] It has been adopted in a few states by statute.[66]

b. With Other Circumstances. But inadequacy or exorbitancy of the consideration, accompanied with other inequitable circumstances, is often of decisive influence in determining the unfairness of the contract. The weight of each circumstance is greatly increased by its conjunction with the other.[67] Such circumstances are undue influence,[68] mental weakness,[69] ignorance of one's legal rights,[70] misrepresentation,[71] intoxication,[72] or a marked inequality in the parties.[73]

properly disregarded, where presented, in specific performance, to repel a presumption of fraud which might arise from inadequacy of price. Worth *v.* Watts, (N. J. Ch. 1908) 70 Atl. 357.

65. *Connecticut.*— Dodd *v.* Seymour, 21 Conn. 476.

District of Columbia.— Riordan *v.* Stout, 17 App. Cas. 397.

Georgia.— Christian *v.* Ransome, 46 Ga. 138.

Indiana.— Thayer *v.* Younge, 86 Ind. 259; Modisett *v.* Johnson, 2 Blackf. 431.

Iowa.— Lucas *v.* Barrett, 1 Greene 510.

Mississippi.— Clement *v.* Reid, 9 Sm. & M. 535.

New Hampshire.— See Norris *v.* Clark, 72 N. H. 442, 57 Atl. 334.

South Carolina.—Gasque *v.* Small, 2 Strobh. Eq. 72 (exorbitant price); Clitherall *v.* Ogilvie, 1 Desauss. Eq. 250.

England.— Day *v.* Newman, 2 Cox Ch. 77, 2 Rev. Rep. 1, 30 Eng. Reprint 36 (excessive price); Savile *v.* Savile, 1 P. Wms. 744, 24 Eng. Reprint 596 (excessive price); Underwood *v.* Hitchcox, 1 Ves. 279, 27 Eng. Reprint 1031; Tilly *v.* Peers [*cited* in Mortlock, *v.* Buller, 10 Ves. Jr. 301, 7 Rev. Rep. 417, 32 Eng. Reprint 857].

66. **In California** see Civ. Code, § 3391; Stein *v.* Archibald, 151 Cal. 220, 90 Pac. 536; White *v.* Sage, 149 Cal. 613, 87 Pac. 193 (court must find value of the land); Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148; Newman *v.* Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548 (excessive consideration); Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689; Ward *v.* Yorba, 123 Cal. 447, 56 Pac. 58; Morrill *v.* Everson, 77 Cal. 114, 19 Pac. 190 (one thousand three hundred dollars for property worth one thousand six hundred dollars not adequate); Valentine *v.* Streeton, 9 Cal. App. 640, 99 Pac. 1107; Cummings *v.* Roeth, 9 Cal. App. 144, 101 Pac. 434; Kerr *v.* Moore, 6 Cal. App. 305, 92 Pac. 107.

In Montana see Civ. Code, § 4417; Traphagen *v.* Kirk, 30 Mont. 562, 77 Pac. 58.

In South Dakota see Rev. Civ. Code, § 2345; Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142.

Consideration for option.— Cal. Civ. Code, § 3391, subd. 1, making an adequate consideration for a contract a condition for the specific enforcement thereof, has reference to the consideration to be paid for the property, and has no application to the sufficiency of the consideration paid for an option to purchase the property at a stipulated price. Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163.

A vendor who has accepted and retained the agreed consideration cannot question its adequacy. Nicholson *v.* Tarpey, 70 Cal. 608, 12 Pac. 778; Meridian Oil Co. *v.* Dunham, 5 Cal. App. 367, 90 Pac. 469.

The complaint must show that the consideration is adequate in California (Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148; Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689); but it is otherwise now in Montana (Finlen *v.* Heinze, 28 Mont. 548, 73 Pac. 123. But see Mayger *v.* Cruse, 5 Mont. 485, 6 Pac. 333). See *infra*, XI, C, 3, b.

67. *Iowa.*— Lucas *v.* Barrett, 1 Greene 510.

Kansas.— Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202.

New Hampshire.— See Norris *v.* Clark, 72 N. H. 442, 57 Atl. 334, if there is evidence of other circumstances, the decree will not be reversed on appeal.

New Jersey.— Worth *v.* Watts, (Ch. 1908) 70 Atl. 357.

Virginia.— Grizzle *v.* Sutherland, 88 Va. 584, 14 S. E. 332.

United States.— Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120 [*reversing* 20 Fed. Cas. No. 11,947, 3 Cranch C. C. 377].

Canada.— Gough *v.* Bench, 6 Ont. 699.

68. Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750. See *infra*, IV, D, 3, a.

69. Ratterman *v.* Campbell, 80 S. W. 1155, 26 Ky. L. Rep. 173. See *infra*, IV, D, 3, a.

70. Greer *v.* Boone, 5 B. Mon. (Ky.) 554; Higgins *v.* Butler, 78 Me. 520, 7 Atl. 276. See *supra*, IV, B, 5.

71. Powers *v.* Hale, 25 N. H. 145. See *supra*, IV, A, 1.

72. Knott *v.* Giles, 27 App. Cas. (D. C.) 581 (habitual drunkenness); Reinicker *v.* Smith, 2 Harr. & J. (Md.) 421; Wingart *v.* Fry, Wright (Ohio) 105; Schofield *v.* Tummonds, 6 Grant Ch. (U. C.) 568. See *infra*, IV, D, 3, b.

73. Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202; Wolford *v.* Steele, 84 S. W. 327, 27 Ky. L. Rep. 88 (vendee an alert real estate man, vendor old, uneducated, and afflicted); Clitherall *v.* Ogilvie, 1 Desauss. Eq. (S. C.) 250 (vendor an inexperienced young man, ignorant of the value of the land); Gough *v.* Bench, 6 Ont. 699. See *infra*, IV, D, 3, c, d. "When you see distress on the one side and money on the other, and a wish on the one side to press that distress into a submission to his own terms, inadequacy of price goes a great way in warranting the court to infer from this, that some sort of fraud was used to draw the party into the bargain; it may be such an ingredient of fraud as to make the Court presume more

2. Unconscionable or Unfair Contracts — a. In General. There is a wide range of contracts which in their inherent nature, and apart from any special relation of the parties, are so unfair, one-sided, and inequitable that, notwithstanding their legal validity, a court of conscience must decline to give its active aid in their enforcement. The great variety of the forms in which such unfairness may occur renders any classification of such contracts difficult. Each case must depend upon its own circumstances. It is in reference to contracts of this sort that a court of equity must exercise a genuine "discretion," with little guide from precedents or special rules.[74] In some states it is expressly provided by

than is in actual proof." Griffith *v.* Spratley, 1 Cox 383, 389, 29 Eng. Reprint 1213.

74. *Alabama.*—Alabama Cent. R. Co. *v.* Long, 158 Ala. 301, 48 So. 363; Thompson *v.* Jones, (1905) 39 So. 983; Sanders *v.* Newton, 140 Ala. 335, 37 So. 340; Andrews *v.* Andrews, 28 Ala. 432; Casey *v.* Holmes, 10 Ala. 776.

Delaware.— Godwin *v.* Collins, 3 Del. Ch. 189.

Georgia.— Swint *v.* Carr, 76 Ga. 322, 2 Am. St. Rep. 44.

Idaho.— Bear Track Min. Co. *v.* Clark, 6 Ida. 196, 54 Pac. 1007.

Illinois.— Godwin *v.* Springer, 233 Ill. 229, 84 N. E. 234; Koch *v.* Streuter, 232 Ill. 594, 83 N. E. 1072; Bowman *v.* Cunningham, 78 Ill. 48; Temple *v.* Johnson, 71 Ill. 13; Taylor *v.* Merrill, 55 Ill. 52; Stone *v.* Pratt, 25 Ill. 25; Lear *v.* Chouteau, 23 Ill. 39; Silberschmidt *v.* Silberschmidt, 112 Ill. App. 58; India Tea Co. *v.* Petersen, 108 Ill. App. 16; Bates Mach. Co. *v.* Bates, 87 Ill. App. 225; Beach Gravel, etc., Co. *v.* Simmons, 62 Ill. App. 646; Dreyer *v.* Goldy, 62 Ill. App. 347.

Iowa.— New York Brokerage Co. *v.* Wharton, (1909) 119 N. W. 969; Wilson *v.* Larson, 138 Iowa 708, 116 N. W. 703; Lucas *v.* Barrett, 1 Greene 510.

Kansas.— Work *v.* Fidelity Oil, etc., Co., 79 Kan. 118, 98 Pac. 801; Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202.

Kentucky.— Jones *v.* Prewitt, 128 Ky. 496, 108 S. W. 867, 33 Ky. L. Rep. 358; Berry *v.* Frisbie, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724; Eastland *v.* Vanarsdel, 3 Bibb 274.

Maryland.— George Gunther, Jr., Brewing Co. *v.* Brywczynski, 107 Md. 696, 69 Atl. 514; Tyson *v.* Watts, 1 Md. Ch. 13.

Massachusetts.— Western R. Corp. *v.* Babcock, 6 Metc. 346. And see Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. N. S. 871.

Michigan.— Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. 660.

Missouri.—Aiple-Hemmelmann Real Estate Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480.

Nebraska.— Cooper *v.* Chittenden, 33 Nebr. 313, 50 N. W. 2.

New Jersey.— Lyle *v.* Addicks, 62 N. J. Eq. 123, 49 Atl. 1121; Crane *v.* Decamp, 21 N. J. Eq. 414.

New York.— Hall *v.* Hartford, 50 Misc. 133, 100 N. Y. Suppl. 392.

Ohio.— Columbus, etc., R. Co. *v.* Ohio Southern R. Co., 1 Ohio Cir. Ct. 275, 1 Ohio Cir. Dec. 151.

Pennsylvania.— Latta *v.* Hax, 219 Pa. St. 483, 68 Atl. 1016.

Tennessee.— Rice *v.* Rawlings, Meigs 496.

Virginia.— Clinchfield Coal Co. *v.* Clintwood Coal, etc., Co., 108 Va. 433, 62 S. E. 329; Colonna Dry Dock Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770.

Wisconsin.— Mulligan *v.* Albertz, 103 Wis. 140, 78 N. W. 1093.

United States.— Mississippi, etc., R. Co. *v.* Cromwell, 91 U. S. 643, 23 L. ed. 367; Marks *v.* Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. N. S. 317; Federal Oil Co. *v.* Western Oil Co., 112 Fed. 373 [*affirmed* in 121 Fed. 674, 57 C. C. A. 428]; Newton *v.* Wooley, 105 Fed. 541; Nevada Nickel Syndicate *v.* National Nickel Co., 96 Fed. 133; Bowen *v.* Waters, 3 Fed. Cas. No. 1,725, 2 Paine 1.

England.— Tildersley *v.* Clarkson, 30 Beav. 419, 8 Jur. N. S. 163, 31 L. J. Ch. 362, 6 L. T. Rep. N. S. 98, 10 Wkly. Rep. 328, 54 Eng. Reprint 951, agreement to take lease.

Canada.— McDonald *v.* Rose, 17 Grant Ch. (U. C.) 657.

See 44 Cent. Dig. tit. "Specific Performance," §§ 153, 154.

Unfairness or oppression.—"The Court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression." Agard *v.* Valencia, 39 Cal. 292, 302; Winchester *v.* Becker, 8 Cal. App. 362, 97 Pac. 74.

An agreement among cotenants to abide by the result of a partition to be made by the majority of them, which put the rights of the minority entirely at their mercy, was held unconscionable. Harkness *v.* Remington, 7 R. I. 154.

That the contract allowed one creditor to gain an undue advantage over others was one element of unfairness in Roundtree *v.* McLain, 20 Fed. Cas. No. 12,084*a*, Hempst. 245.

Contract by which trustees, joining in the sale of the trust estate, inadvertently bound themselves personally to exonerate the estate from large encumbrances see Wedgwood *v.* Adams, 6 Beav. 600, 49 Eng. Reprint 958.

Contract to purchase land to which there was no access, so that the purchaser could have no substantial enjoyment of it see Denne *v.* Light, 8 De G. M. & G. 774, 3 Jur. N. S. 627, 26 L. J. Ch. 459, 5 Wkly. Rep. 430, 57 Eng. Ch. 598, 44 Eng. Reprint 588.

Covenant in a lease of a mine, so incautiously worded that the lessor, at any time after beginning of lease, could prohibit the removal of the lessee's machinery and stock

statute that specific performance cannot be enforced against a party to a contract if it is not, as to him, just and reasonable.[75]

b. Where Defendant "Strips Himself." Among the contracts too unconscientious for enforcement in equity are those in which defendant agrees to give up, for an inadequate consideration, all or a great part of his future acquisitions,[76] or relinquishes his entire fortune for a worthless consideration.[77]

c. Where Performance Involves a Forfeiture. Specific performance is usually refused where enforcement of the contract would result in a forfeiture.[78] But the liability to a forfeiture is no defense where it results from defendant's own acts or defaults subsequent to the contract.[79]

in trade, and thus prevent the working of the mine to advantage see Talbot *v.* Ford, 13 Sim. 173, 36 Eng. Ch. 173, 60 Eng. Reprint 66.

Agreements held not unfair or unreasonable see Prichard *v.* Mulhall, 140 Iowa 1, 118 N. W. 43 (contract to purchase land); Telegraphone Corp. *v.* Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767; Sarasohn *v.* Kamaiky, 193 N. Y. 203, 86 N. E. 20 [*reversing* 120 N. Y. App. Div. 110, 105 N. Y. Suppl. 53] (father's agreement to devise to son); Eau Claire *v.* Eau Claire Water Co., 137 Wis. 317, 119 N. W. 555 (holding that a contract by which a city granted a water company the right to construct waterworks was not too unreasonable to be enforced specifically because the city reserved the right to purchase the works without a right on the part of the company to enforce a sale); Bradley *v.* Heyward, 164 Fed. 107 (holding that where defendant, by the advice of her husband, who was a lawyer, contracted to sell to plaintiffs for twenty thousand dollars, all the phosphate rock underlying certain land subject to timber rights which might prevent plaintiffs from mining a large part of the land until 1923 and explorations disclosed that the phosphate rock was worth seventy thousand dollars, the contract was not so unconscionable as to impute fraud and justify denial of specific performance; and farther that the court would not deny specific performance on the ground that performance would result in hardship to defendant); Cook *v.* Waugh, 2 Giffard 201, 6 Jur. N. S. 596, 8 Wkly. Rep. 458, 66 Eng. Reprint 85 (agreement to take lease).

Employee's contract as to inventions.—An agreement by one employed as a machinist to invent, perfect, and improve lubricating valves, force-feed oil pumps, etc., which his employer is engaged in manufacturing, and that whatever inventions or devices may result from such employment in the nature of machinery, tools, etc., to be used in connection with the employer's business, shall at the employer's request be protected by patents and become the employer's property, is not unconscionable. Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988. And see Thibodeau *v.* Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180.

75. Cal. Civ. Code, § 3391, subd. 2; Herzog *v.* Atchison, etc., R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. N. S. 428 (complaint must show this); Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163 (option to purchase land for one hundred thousand dollars, payable thirty thousand dollars cash, balance on or before a certain time, vendor to convey free of encumbrance, etc, the contract being signed by owner only); S. D. Rev. Civ. Code, § 2345; Phelan *v.* Neary, 22 S. D. 265, 117 N. W. 142.

76. *Alaska.*— Marks *v.* Gates, 2 Alaska 519.

Illinois.— Bates Mach. Co. *v.* Bates, 87 Ill. App. 225, agreement to assign all future inventions made by defendant.

New York.— Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903.

Oklahoma.— Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647, agreement, in consideration of a small loan, to give half of all profits defendant might make in his business during the remainder of his life.

United States.— Marks *v.* Gates, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. N. S. 317, agreement, for a small consideration, to give plaintiff a large interest in all after-acquired property of defendant.

77. McCarty *v.* Kyle, 4 Coldw. (Tenn.) 348.

78. Sease *v.* Cleveland Co-operative Stove, etc., Foundry Co., 141 Mo. 488, 42 S. W. 1084; Lasar *v.* Baldridge, 32 Mo. App. 362; Oil Creek R. Co. *v.* Atlantic, etc., R. Co., 57 Pa. St. 65; Peacock *v.* Penson, 11 Beav. 355, 14 Jur. 518, 18 L. J. Ch. 57, 50 Eng. Reprint 854; Faine *v.* Brown [*cited* in Ramsden *v.* Hylton, 2 Ves. 304, 307, 22 Eng. Reprint 196].

79. Helling *v.* Lunley, 3 De G. & J. 493, 5 Jur. N. S. 301, 28 L. J. Ch. 249, 7 Wkly. Rep. 152, 60 Eng. Ch. 383, 44 Eng. Reprint 1358.

Contract as to patents and patent rights. — In Telegraphone Corp. *v.* Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767, plaintiff assigned a patent right to defendant, and received therefor twenty-five thousand dollars in cash and one hundred and five thousand dollars in notes, and also retained a beneficial interest in the development of the patent by an agreement that it should receive twenty per cent of the capital stock of defendant. It was also agreed that defendant should raise a working capital of fifty thousand dollars or give plaintiff thirty-four per cent of its capital stock and the resulting control. On defendant's failure to perform

d. Where Performance Subjects Defendant to Danger, Etc. It is a good defense that performance by defendant would endanger his life [80] or expose him to criminal prosecution [81] or obloquy; [82] but it is not generally a defense that it would expose him to the possible inconvenience of sharing his property or business with an undesirable person.[83]

3. Inequality of the Parties — a. Duress, Undue Influence, Mental Weakness. Duress, undue influence, and mental weakness of a degree which would warrant the setting aside of a contract are of course a defense to its specific performance.[84]

b. Intoxication. It is the rule laid down by many cases that defendant's intoxication, of such a degree that he is incapable of giving an intelligent assent, even though it is not unfairly taken advantage of by the other party, and may not be a ground for rescission of the contract, is nevertheless a defense to its specific enforcement. It is certainly a matter to be given great weight in connection with other inequitable incidents.[85]

either of these agreements on or before the times specified in the contract, it was agreed that plaintiff should repossess the patent right, and it was also agreed that time should be of the essence of the contract. Defendant failed to perform the agreements within the times specified, and plaintiff brought a bill in equity to compel defendant to specifically perform the contract by transferring the patent right to plaintiff. It was held that the liability to any forfeiture either of the patent right or of the consideration paid for it was not the necessary result of the contract when originally made, but arose from the subsequent default of defendant, and that any apparent hardship on defendant arising from its failure to perform its agreements must be presumed to have been in the contemplation of the parties as the direct result of such default by defendant, and be deemed an insufficient cause for refusing specific performance of the contract.

80. Williamson *v.* Dils, 114 Ky. 962, 72 S. W. 292, 24 Ky. L. Rep. 1792.

81. Hope *v.* Walter, [1900] 1 Ch. 257, 69 L. J. Ch. 166, 82 L. T. Rep. N. S. 30, 16 T. L. R. 160.

82. Hope *v.* Walter, [1900] 1 Ch. 257, 69 L. J. Ch. 166, 82 L. T. Rep. N. S. 30, 16 T. L. R. 160, where defendant purchased a brothel, neither he nor the vendor knowing the character of the property.

83. Moayon *v.* Moayon, 114 Ky. 855, 72 S. W. 33, 24 Ky. L. Rep. 1641, 102 Am. St. Rep. 303, 60 L. R. A. 415, as result of sale of an undivided interest. But see where the difficulties with the cotenant were caused by plaintiff's acts (Dech's Appeal, 57 Pa. St. 467), and where plaintiff knowingly sold to parties hostile to defendants (Rigg *v.* Reading, etc., R. Co., 191 Pa. St. 298, 43 Atl. 212).

84. *Illinois.*— Leonard *v.* Crane, 147 Ill. 52, 35 N. E. 474.

Kentucky.— Ratterman *v.* Campbell, 80 S. W. 1155, 26 Ky. L. Rep. 173.

Massachusetts.— Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. N. S. 821.

Missouri.— McElroy *v.* Maxwell, 101 Mo. 294, 14 S. W. 1.

Nebraska.— No presumptions will be indulged in favor of the execution of a contract, by which an aged widow consents to the distribution of her portion of the estate among her children. *In re* Panko, 83 Nebr. 145, 119 N. W. 224.

Pennsylvania.— Brady's Appeal, 66 Pa. St. 277.

And see Cancellation of Instruments, 6 Cyc. 286; Contracts, 9 Cyc. 443, 454.

Compare Ellis *v.* Keeler, 126 N. Y. App. Div. 343, 110 N. Y. Suppl. 542, holding that it is not a defense to an action to enforce a contract executed by one since deceased that decedent was eighty-three years old at the time the contract was executed, and had no one present to consult or advise with, such facts not raising any presumption against the contract.

85. *Iowa.*— Moetzel *v.* Koch, 122 Iowa 196, 97 N. W. 1079 (improvident contract); Smith *v.* Shepherd, 36 Iowa 253 (with other circumstances).

Kentucky.— Byrne *v.* Long, 15 S. W. 778, 12 Ky. L. Rep. 910, may be considered in determining whether deceit was practised or unfair advantage taken.

North Carolina.—Whitesides *v.* Greenlee, 17 N. C. 152, intoxication which plaintiff was instrumental in bringing about.

Ohio.—Wingart *v.* Fry, Wright 105, contract unfair, and strong suspicion that plaintiff produced the intoxication.

England.— Nagle *v.* Baylor, 3 Dr. & War. 60; Shaw *v.* Thackray, 17 Jur. 1045, 1 Smale & G. 537, 65 Eng. Reprint 235 (but a subsequent grantee of the vendor, with notice of the contract, cannot set up the intoxication in defense to a suit by the first purchaser); Cooke *v.* Clayworth, 18 Ves. Jr. 12, 11 Rev. Rep. 137, 34 Eng. Reprint 222; Cragg *v.* Holme, [*cited* in Cooke *v.* Clayworth, *supra*].

But it is held in a few cases that intoxication, although rendering the party incapable of judging correctly or acting prudently, is not a defense, unless procured or taken undue advantage of by the other party. Maxwell *v.* Pettinger, 3 N. J. Eq. 156; Rodman *v.* Zilley, 1 N. J. Eq. 320.

That defendant is frequently or daily intoxicated does not invalidate a contract otherwise fair. Reinicker *v.* Smith, 2 Harr & J. (Md.) 421.

c. Defendant's Ignorance and Inexperience. A marked and striking inequality in the business experience and capacity of the parties, resulting in a highly improvident contract, has furnished the chief or sole reason for defeating specific performance in several cases.[86]

d. "Sharp Practice," Etc. Although the contract may be valid and binding at law, where plaintiff's case is tainted with fraud or strong suspicion of fraud or unscrupulous or "sharp" practices, or the contract is extorted from defendant's necessities, the court may, in the exercise of its discretion, refuse specific performance.[87]

4. No Benefit to Plaintiff, Injury to Defendant. The rule has come into favor, especially in recent cases, that specific performance will be refused when it would be of little or no benefit to plaintiff, and work serious injury to defendant.[88]

Effect of intoxication generally see DRUNKARDS, 14 Cyc. 1103 *et seq.*

86. *Iowa.*—Wilson *v.* Larson, 138 Iowa 708, 116 N. W. 703.

Kansas.— Shoop *v.* Burnside, 78 Kan. 871, 98 Pac. 202.

Massachusetts.— Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, holding that specific performance of a contract to convey was properly refused, although the contract was good on its face, the vendor was legally competent to make it, and it was not obtained by such fraud as would entitle her to avoid it, where she was aged, inexperienced, and ignorant, plaintiff's agent was of superior mental ability, and persuaded her to refrain from consulting an adviser upon whom she was disposed to rely, and wrought upon her racial prejudices to persuade her to make the agreement, and did not disclose circumstances leading him to believe that a higher price could be obtained, although he was under no fiduciary obligation to her.

New York.— Cuff *v.* Dorland, 50 Barb. 438 [*reversed* on other grounds in 55 Barb. 481 (*reversed* in 57 N. Y. 560)], defendant, a widow, living alone, in embarrassed circumstances and depressed in mind; plaintiff should have suggested independent advice.

Pennsylvania.— Friend *v.* Lamb, 152 Pa. St. 529, 25 Atl. 577, 34 Am. St. Rep. 672 (improvident purchase by a married woman, involving annual payments of large sums, secured on her separate estate, which payments she had no resources to meet); Henderson *v.* Hays, 2 Watts 148 (very improvident bargain by spendthrift of intemperate habits); Spotts *v.* Eisenhauer, 31 Pa. Super. Ct. 89 (contract of a widow to pay nine hundred dollars for a probably worthless judgment).

South Dakota.— Miller *v.* Tjexhus, 20 S. D. 12, 104 N. W. 519, vendor mentally incapable of dealing with discretion and ignorant of English.

Canada.— Gough *v.* Beuch, 6 Ont. 699.

And see *supra*, IV, A, 2; IV, D, 1, b.

"The judicial tendency of this enlightened age is against the enforcement of executory contracts procured by a shrewd man of affairs from one known to be mentally incapable of dealing with judgment and discretion." Miller *v.* Tjexhus, 20 S. D. 12, 17, 104 S. W. 519.

87. *Arkansas.*— Roundtree *v.* McLain, 20 Fed. Cas. No. 12,084*a*, Hempst. 245, extorted from defendant's necessities.

Maryland.— George Gunther, Jr., Brewing Co. *v.* Brywczynski, 107 Md. 696, 69 Atl. 514.

Minnesota.— Evans *v.* Folsom, 5 Minn. 422.

Nebraska.— Blondel *v.* Bolander, 80 Nebr. 531, 114 N. W. 574.

North Carolina.— Lloyd *v.* Wheatly, 55 N. C. 267, contract unfairly obtained from defendant under circumstances of surprise and alarm, by which he relinquished part of his land by way of compromise of an unfounded claim.

Pennsylvania.— Miller *v.* Fulmer, 25 Pa. Super. Ct. 106; Kern's Estate, 8 Pa. Dist. 709, 23 Pa. Co. Ct. 317, suspicion that defendant's attorney acted in collusion with plaintiff.

Wisconsin.— Engberry *v.* Rousseau, 117 Wis. 52, 93 N. W. 824 (defendant justified in supposing that plaintiff was acting in former's interest); Hay *v.* Lewis, 39 Wis. 364 (where defendant's agent was instructed to sell to the highest bidder, and plaintiff procured the withdrawal of a higher bid than his own).

England.— Twining *v.* Morrice, 2 Bro. Ch. 326, 29 Eng. Reprint 182, unintentional "chilling" of bidding at auction.

"Boom" contracts.— That contracts are made in a time of great speculative activity, in the excitement of a land or mining "boom," is a fact which, with others, has weight against them. McCarty *v.* Kyle, 4 Coldw. (Tenn.) 348; Leicester Piano Co. *v.* Front Royal, etc., Imp. Co., 55 Fed. 190, 5 C. C. A. 60.

88. *Alabama.*— South, etc., R. Co. *v.* Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114.

California.— Herzog *v.* Atchison, etc., R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. N. S. 428.

Illinois.— Chicago Sanitary Dist. *v.* Martin, 227 Ill. 260, 81 N. E. 417 [*affirming* 129 Ill. App. 308], contract to maintain ditch and levee.

Kentucky.— McCutcheon *v.* Rawleigh, 76 S. W. 50, 25 Ky. L. Rep. 549.

Maryland.— See Wadsworth *v.* Manning, 4 Md. 59. In Whalen *v.* Baltimore, etc., R. Co., (1908) 69 Atl. 390, a railroad company covenanted to construct and maintain a siding at a designated place, and to stop its trains there for passengers and freight. The

5. Subsequent Events — a. Which Might Have Been Anticipated. The fairness of a contract, in general, is to be judged as of the date of the contract. The happening of subsequent events injurious to defendant which may reasonably be supposed to have been in the contemplation of the parties as events possible to happen is not a defense.[89]

company, for the purpose of straightening its main line and bettering its road-bed and service, changed the location of its main line, and thereby left the siding a quarter of a mile from the main line. It was impossible to construct a siding on the new line. It was held that equity would not compel the company to maintain a train service over the abandoned line past the siding, and relief must be sought in a court of law for damages.

New Jersey.— Society for Establishing Useful Manufactures *v.* Butler, 12 N. J. Eq. 498.

New York.— Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261 [*affirming* 6 N. Y. Suppl. 955], lease of lower workings of a mine refused, where it would be unprofitable to lessee and ruinous to the rest of the mine.

North Carolina.— Prater *v.* Miller, 10 N. C. 628. In this case defendant agreed to convey so much of a tract as plaintiff should be able to pay for. After ten years' possession plaintiff was able to pay for only a small fraction of the tract, which, if segregated, would cut off ninety acres from the rest of the tract. On this ground the relief was refused.

United States.— Leicester Piano Co. *v.* Front Royal, etc., Imp. Co., 55 Fed. 190, 5 C. C. A. 60. And see Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509.

England.— London *v.* Nash, 3 Atk. 512, 26 Eng. Reprint 1095, 1 Ves. 12, 27 Eng. Reprint 859, although the hardship was the result of defendant's own acts. But it is said that the comparative convenience or inconvenience of the parties is not by itself a sufficient ground for refusing specific performance. Hexter *v.* Pearce, [1900] 1 Ch. 341, 69 L. J. Ch. 146, 82 L. T. Rep. N. S. 109, 16 T. L. R. 94, 48 Wkly. Rep. 330.

That the costs of the suit exceed the price of the land has been held a sufficient reason for refusing specific performance. Blake *v.* Flatley, 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886.

Subject-matter of no value.— Specific performance has occasionally been refused on this ground. See Carolee *v.* Handelis, 103 Ga. 299, 29 S. E. 935 (subject-matter, viz., fruit, would become worthless before decree could be made); McTammany *v.* Munroe Organ Reed Co., 155 Mass. 88, 29 N. E. 52 (license for patent must by its terms remain inoperative and useless).

89. *Indiana.*— Warner *v.* Marshall, 166 Ind. 88, 75 N. E. 582, contract to devise, in consideration of services.

New York.— Prospect Park, etc., R. Co. *v.* Coney Island, etc., R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610.

Pennsylvania.— Corson *v.* Mulvany, 49 Pa. St. 88, 88 Am. Dec. 485 (price to be secured by mortgage on the land, vendor cannot set up a defense that intended removal of ore by vendee would destroy value of the security since that was contemplated by the contract); Morgan *v.* Scott, 23 Pa. St. 51 (laying out of streets after date of contract, thus cutting the land into less desirable shapes for subdivision, not a defense on behalf of vendee).

England.— Morley *v.* Clavering, 29 Beav. 84, 7 Jur. N. S. 904, 54 Eng. Reprint 558 (purchaser of lease intended to apply property to a purpose which, it turned out, was prohibited by the lease); Adams *v.* Weare, 1 Bro. Ch. 567, 28 Eng. Reprint 1301 (mill-site purchased, vendee expecting to obtain the necessary consent of a third party; although this consent was refused, and vendee's speculation was a total loss, specific performance was enforced); Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331, 10 Eng. Reprint 928 [*affirming* 1 De G. M. & G. 736, 16 Jur. 1051, 22 L. J. Ch. 77, 7 R. & Can. Cas. 188, 1 Wkly. Rep. 25, 41, 50 Eng. Ch. 570, 42 Eng. Reprint 739] (contract to purchase land enforced against railroad, although its statutory powers have expired). But see —— *v.* White, 3 Swanst. 108 note, 19 Rev. Rep. 182, 36 Eng. Reprint 792, where defendant agreed to take a lease of a right of way to be used in connection with a colliery which he expected, and failed, to lease; specific performance refused since the right of way would be useless to him.

Canada.— Hickson *v.* Clarke, 25 Grant Ch. (U. C.) 173 (inability to accomplish the purpose for which a purchase has been made is no reason why it should not be carried into execution); Commercial Bank *v.* McConnell, 7 Grant Ch. (U. C.) 323; James *v.* Freeland, 5 Grant Ch. (U. C.) 302.

But *compare* Stone *v.* Pratt, 25 Ill. 25, where plaintiff, by proceedings subsequent to the contract, obtained an unconscientious advantage, and, if specific performance were decreed, would obtain title for a small consideration, while defendant would receive nothing. See also Dech's Appeal, 57 Pa. St. 467, where, because of plaintiff's conduct, vendee of an undivided share could not obtain possession without resorting to force or litigation.

Performance of consideration cut short by death of promisor.— In case of an agreement to devise or bequeath in consideration of rendering of services to the promisor during the remainder of the promisor's life, where plaintiff enters on the performance of the services, but the promisor dies a few days later, the contract by the better view will be enforced, since the chance of an early death was one of the contingencies which the parties must have contemplated. Howe *v.* Watson, 179 Mass. 30, 60 N. E. 415; Brinton *v.* Van Cott,

b. Change in Value; Losing Bargain. Mere increase or decrease in value subsequent to the contract is not a defense in the absence of unreasonable delay by plaintiff; nor is the mere fact that the contract turns out to be a losing investment.[90]

c. Subsequent Events Not Anticipated. But subsequent events which the parties cannot reasonably be supposed to have had in mind when the contract was made, and which work a hardship to defendant, have frequently furnished a sufficient reason for refusing specific performance.[91]

8 Utah 480, 33 Pac. 218. *Contra*, Ramsay *v.* Gheen, 99 N. C. 215, 6 S. E. 75.

90. *Arizona.*—Walton *v.* McKinney, (1908) 94 Pac. 1122.

Kentucky.— Schmidtz *v.* Louisville, etc., R. Co., 101 Ky. 441, 41 S. W. 1015, 19 Ky. L. Rep. 666, 38 L. R. A. 809; Cox *v.* Burgess, 96 S. W. 577, 29 Ky. L. Rep. 972.

Maine.— Low *v.* Treadwell, 12 Me. 441.

Michigan.— Nims *v.* Vaughn, 40 Mich. 356, where mortgagee agreed to release part of mortgaged land, on request of mortgagor, and it was held that the fact that the remainder of the land, by decline of values, was an insufficient security was no defense.

New Jersey.— Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063, 1084, increase in value, plaintiff not being responsible for delay, and land being on outskirts of growing town.

Virginia.— Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 699, 32 S. E. 485, 44 L. R. A. 297 (defendant railroad company compelled to operate leased line, although at a loss); Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469.

West Virginia.— Cady *v.* Gale, 5 W. Va. 547.

Wisconsin.— Peterson *v.* Chase, 115 Wis. 239, 91 N. W. 687; Young *v.* Wright, 4 Wis. 144, 65 Am. Dec. 303.

United States.— Franklin Tel. Co. *v.* Harrison, 145 U. S. 459, 12 S. Ct. 900, 36 L. ed. 776; Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501; Mechan *v.* Nelson, 137 Fed. 731, 70 C. C. A. 165.

England.— Haywood *v.* Cope, 25 Beav. 140, 4 Jur. N. S. 227, 27 L. J. Ch. 468, 6 Wkly. Rep. 304, 53 Eng. Reprint 589, cannot resist contract to take lease of mine, because the mine turns out worthless.

But *compare* Hart *v.* Brown, 6 Misc. (N. Y.) 238, 27 N. Y. Suppl. 74, grantor covenanted to open a street through his land to grantee's lot; the street would, incidentally, benefit grantor's other lots; these lots subsequently became less valuable, rendering the covenant very burdensome to grantor; specific performance refused, although the street was important to the successful conduct of grantee's business.

In Maryland the rule seems otherwise, if defendant is so fortunate as to be a public service corporation. In a suit to enforce specific performance of an ordinance requiring telephone service at specified rates, it was held a good defense that with the increase in number of telephones the operation of a telephone exchange becomes disproportionately more expensive. The court ignored the fact that this well-known peculiarity of the telephone business must have been present in the minds of the officials when the contract with the city was made. Maryland Tel., etc., Co. *v.* Charles Simons Sons Co., 103 Md. 136, 63 Atl. 314.

Depreciating currency.— The specific performance of contracts payable in a greatly inflated and rapidly depreciating currency, made during the Revolutionary war, or in the confederate states during the Civil war, gave rise to some conflict of decision. In a series of early Maryland cases the courts refused to enforce such contracts. Hopkins *v.* Stump, 2 Harr. & J. (Md.) 301; Lawrence *v.* Dorsey, 4 Harr. & M. (Md.) 205; Chaplin *v.* Scott, 4 Harr. & M. (Md.) 91; Perkins *v.* Wright, 3 Harr. & M. (Md.) 324. And see Hudson *v.* King, 2 Heisk. (Tenn.) 560, for a strong statement against the policy of enforcement. Where payment had already been made and accepted while the currency had some value, the land was decreed to be conveyed after the currency had become worthless (Turley *v.* Nowell, 62 N. C. 301); and the same result was reached in a carefully considered case where a prompt tender had been made, although the value of the money had, between the time of the contract and the tender, greatly decreased (Hale *v.* Wilkinson, 21 Gratt. (Va.) 75). The vendee's laches required a different result in Booten *v.* Scheffer, 21 Gratt. (Va.) 474; White *v.* Atkinson, 2 Wash. (Va.) 94, 1 Am. Dec. 470. Where payment did not become due until the currency was wholly worthless, specific performance was refused. Daughdrill *v.* Edwards, 59 Ala. 424; Love *v.* Cobb, 63 N. C. 324, the first case holding that the court could, and the second case that it could not, enforce performance on payment of the value of the land at the time of the contract.

Effect of unreasonable delay see *infra*, VI, F, 4, b, (VI), (VII), (VIII).

91. King *v.* Raab, 123 Iowa 632, 99 N. W. 306 (necessity of paving street in a town where there were no pavements at the time of the contract); Pingle *v.* Conner, 66 Mich. 187, 33 N. W. 385 (all hotels in a town agree not to compete with plaintiff's omnibus line; opening of a new hotel, not a party to the contract, so changes situation as to make the contract unfair); Wadick *v.* Mace, 191 N. Y. 1, 83 N. E. 571 [*reversing* 118 N. Y. App. Div. 777, 103 N. Y. Suppl. 889] (boundary would extend a few feet beyond a newly opened street, cutting off egress to the street from abutting lots of vendor); Gotthelf *v.* Stranahan, 138 N. Y. 345, 34 N. E. 286, 20

6. Contracts of Trustees and Others in Confidential Relation — a. Breach of Trust, in General. The court will not grant a decree for specific performance where to do so would be to assist in a breach of trust or official duty, or a perversion of trust funds.[92]

b. Trustee With no Power to Contract. That defendant is a trustee who, under the terms of his trust, has no power to make the contract is a good defense.[93]

c. Price Must Be Adequate. In case of a sale of property by a trustee in pursuance of the trust the price must be adequate; and especially if the beneficiary is an infant, the contract must be such as the trustee, acting for the best interest of the beneficiary, may properly make.[94]

d. Trustee Purchasing Trust Property. The contract of a trustee or other fiduciary purchasing the trust property in his individual capacity from himself as trustee is voidable in equity, and of course will not be specifically enforced.[95]

e. Contracts Between Trustee and Beneficiary and Others in Confidential Relation. Contracts between trustee and beneficiary, guardian and ward, hus-

L. R. A. 455 (assessment for street improvements laid upon the land after the contract; defendant not bound to covenant against it); Bradford, etc., R. Co. *v.* New York, etc., R. Co., 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116 (agreement to make advances to a railroad; its failure to meet operating expenses not contemplated by the parties); Huntington *v.* Titus, 50 N. Y. App. Div. 468, 64 N. Y. Suppl. 58 [*affirmed* in 169 N. Y. 579, 61 N. E. 1135] (grant by town on condition that grantee build and repair a certain way; after one hundred and twenty-five years, to comply with condition would practically amount to confiscation of defendant's property); Finkel *v.* Kohn, 38 N. Y. App. Div. 199, 56 N. Y. Suppl. 569; Fitzpatrick *v.* Dorland, 27 Hun (N. Y.) 291 (conveyance postponed until suit against vendor should be terminated; suit lasted fifteen years, expenses of the property meanwhile nearly equaling the contract price and the land trebling in value). See Waters *v.* Howard, 8 Gill (Md.) 262.

Option accepted after introduction of paper currency.— In the leading and often cited case of Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501, an option to purchase in a lease made in 1854 was accepted in 1864, and payment tendered in legal tender notes which had been introduced into the currency meanwhile and were greatly depreciated. Specific performance was decreed only on condition of payment in coin. Whether a contract payable in gold could be enforced on payment in currency had been a subject of some conflict in state courts. *Compare* Humphrey *v.* Clement, 44 Ill. 299, with Hall *v.* Hiles, 2 Bush (Ky.) 532, and Hord *v.* Miller, 2 Duv. (Ky.) 103.

92. *Georgia.*— Bagwell *v.* Bagwell, 72 Ga. 92, contract to apply individual assets of a partner of an insolvent firm to firm debts instead of individual debts.

Illinois.— Tamm *v.* Lavalle, 92 Ill. 263. And see Franz *v.* Orton, 75 Ill. 100.

Kentucky.— Cyrus *v.* Holbrook, 106 S. W. 300, 32 Ky. L. Rep. 466.

Oregon.— Deitz *v.* Stephenson, (1908) 95 Pac. 803.

Wisconsin.— Rodman *v.* Rodman, 112 Wis. 378, 88 N. W. 218, contract tending to disregard of his duty by officer of corporation.

United States.— McDuffee *v.* Hestonville, etc., Pass. R. Co., 162 Fed. 36, 89 C. C. A. 76 [*reversing* 158 Fed. 827], holding that a contract made by one to whom the legal title of a patent had been conveyed in trust for himself and others named, without power to sell, by which as trustee he agreed to sell and convey the patent, could not be specifically enforced even as to his own equitable interest by the purchaser, who was charged with notice of the trust and its limited character and of the rights of the other joint owners thereunder which would be destroyed by such sale.

See also Contracts, 9 Cyc. 470.

93. Repetto *v.* Baylor, 61 N. J. Eq. 501, 48 Atl. 774; Barry *v.* Deloach, 2 Overt. (Tenn.) 395; Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841 (to transfer stock which stood in defendant's name, but was the property of a partnership); Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635 [*affirming* on this point 18 App. Cas. (D. C.) 438].

But specific performance by a trustee will be decreed where the contract conforms to his duty under the trust. Internal Imp. Fund *v.* Gleason, 15 Fla. 384.

94. Jones *v.* Holladay, 2 App. Cas. (D. C.) 279; Sherman *v.* Wright, 49 N. Y. 227; Lynch *v.* Buckley, 82 N. Y. App. Div. 614, 81 N. Y. Suppl. 1070; Goodwin *v.* Fielding, 4 De G. M. & G. 90, 1 Wkly. Rep. 255, 343, 53 Eng. Ch. 71, 43 Eng. Reprint 441. "The court will not enforce, as against a person selling in a fiduciary character, a contract which any party interested in the trust is entitled to complain of." Osborne *v.* Farmers', etc., Bldg. Soc., 5 Grant Ch. (U. C.) 326, 331.

95. Livingston *v.* Cochran, 33 Ark. 294 (purchaser was probate judge who had made the order of sale); Shelton *v.* Homer, 5 Metc. (Mass.) 462; Rochevot *v.* Rochevot, 74 N. Y. App. Div. 585, 77 N. Y. Suppl. 788 (contract among trustees to purchase trust property). But a trustee so purchasing cannot set up the fraudulent origin of his title in defense to a suit by one to whom he has subsequently sold the property. Pingree *v.* Coffin, 12 Gray (Mass.) 288.

band and wife, or other persons in confidential relations must be marked by the utmost good faith or they will not be specifically enforced.[96]

7. Fraud on Third Parties — a. In General. Where the contract grows out of or is a part of a scheme for defrauding third persons, the court, in obedience to the maxim, "He who comes into equity must come with clean hands," will not grant specific performance.[97]

b. Suppressing Bidding at Auction. An arrangement among persons desiring to purchase property at a public auction, not to bid against each other or otherwise interfering with free competition, is usually a fraud upon the vendor, and a contract involving such an arrangement will not be enforced in equity.[98]

c. Fraud on Creditors. Contracts in fraud of creditors and contracts directly connected with a scheme to defraud creditors cannot be specifically enforced.[99] But the rule does not apply to subsequent contracts not tainted with the fraud of the first transaction.[1]

8. Injustice to Third Parties — a. In General. The rights of third persons who are not parties to the contract may properly be considered by the court in determining whether the contract should be specifically enforced even where such rights become vested after the contract is made.[2]

96. *Illinois.*— See Stubbings *v.* Durham, 210 Ill. 542, 71 N. E. 586.

Iowa.— Noecker *v.* Wallingford, 133 Iowa 605, 111 N. W. 37, brother and sister.

Mississippi.— Millsaps *v.* Shotwell, 76 Miss. 923, 25 So. 359.

Nebraska.— Greene *v.* Greene, 42 Nebr. 634, 60 N. W. 937, 47 Am. St. Rep. 724, husband and wife.

United States.— Jones *v.* Byrne, 149 Fed. 457 [*reversed* in 159 Fed. 321], attorney purchasing from client without full disclosure. See also *supra*, IV, A, 2.

97. *Arizona.*— Jacobs *v.* George, 3 Ariz. 9, 20 Pac. 183.

Indiana.— Kitchen *v.* Coffyn, 4 Ind. 504, where plaintiff was a party to a scheme to defraud a mortgagee of his security.

Pennsylvania.— Reynolds *v.* Boland, 202 Pa. St. 642, 52 Atl. 19.

Texas.— Prude *v.* Campbell, 85 Tex. 4, 19 S. W. 890.

Washington.— Hampton *v.* Buchanan, 51 Wash. 155, 98 Pac. 374, contract giving promoters rights as to management of corporation, thus depriving stock-holders of the right to elect their trustees.

And see Contracts, 9 Cyc. 468, 470.

Illegality in general see *supra*, I, C.

98. Whitaker *v.* Bond, 63 N. C. 290; Ralphsnyder *v.* Shaw, 45 W. Va. 680, 31 S. E. 953. See also Contracts, 9 Cyc. 470. But see Smith *v.* Ruohs, (Tenn. Ch. App. 1899) 54 S. W. 161.

Puffers see Jennings *v.* Hart, 10 Nova Scotia 15.

99. *Delaware.*— McFarland *v.* Reeve, 5 Del. Ch. 118.

Georgia.— Parrott *v.* Baker, 82 Ga. 364, 9 S. E. 1068.

Illinois.— Boomer *v.* Cunningham, 22 Ill. 320, 74 Am. Dec. 155.

Kentucky.— Smith *v.* Smith, 9 S. W. 402, 10 Ky. L. Rep. 437.

Missouri.— Taylor *v.* Von Schraeder, 107 Mo. 206, 16 S. W. 675; Louthan *v.* Stillwell, 73 Mo. 492.

New Jersey.— Tillotson *v.* Gesner, 33 N. J. Eq. 313; Baldwin *v.* Campfield, 8 N. J. Eq. 600. And see Muiford *v.* Runk, 8 N. J. Eq. 188.

New York.— St. John *v.* Benedict, 6 Johns. Ch. 111.

Pennsylvania.— McBrerty *v.* Hyde, 211 Pa. St. 123, 60 Atl. 507.

South Carolina.— McGuire *v.* Jefferys, 6 Rich. Eq. 361.

United States.—Dent *v.* Ferguson, 132 U. S. 50, 10 S. Ct. 13, 33 L. ed. 242; Allen *v.* Simons, 1 Fed. Cas. No. 237, 1 Curt. 122.

See 44 Cent. Dig. tit. "Specific Performance," § 176. See also Contracts, 9 Cyc. 470.

Compare Gentry *v.* Gentry, 87 Va. 478, 12 S. E. 966; Welfley *v.* Shenandoah Iron, etc., Co., 83 Va. 768, 3 S. E. 376.

Agreement not in fraud of creditors.—A contract by a person to pay for certain lands for the benefit of a nephew if the nephew will improve them cannot be said to be in fraud of the nephew's creditors, so as to preclude his right to specific performance. Hunter *v.* Mills, 29 S. C. 72, 6 S. E. 907.

1. Songer *v.* Patridge, 107 Ill. 529. And see Contracts, 9 Cyc. 556, 563.

2. *California.*— Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334 (vendee of a half interest not decreed to be let into possession with one who was not a party to contract); Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369 (contract to devise all promisor's property not enforced, where promisor subsequently married, the wife having no notice of the contract); Kelly *v.* Central Pac. R. Co., 74 Cal. 557, 16 Pac. 386, 5 Am. St. Rep. 470.

Maine.— Marston *v.* Humphrey, 24 Me. 513.

Maryland.—See George Gunther, Jr., Brewing Co. *v.* Brywczynski, 107 Md. 696, 69 Atl. 514.

Massachusetts.— Curran *v.* Holyoke Water Power Co., 116 Mass. 90.

Michigan.— Rathbone *v.* Groh, 137 Mich.

b. Vendor's Prior Contract. The defendant vendor's prior unexecuted contract of sale to a third party has been held to be a defense.[3]

9. Detriment to Public[4] — a. In General. The fact that the contract, although not illegal, is nevertheless detrimental to the public welfare is often a ground for refusing its enforcement in equity.[5]

b. Contracts Interfering With Operation of Railroads. Contracts by railroad companies to maintain stations, sidings, crossings, etc., for the benefit of private persons have often been held to be a detriment to the public by delaying traffic

373, 100 N. W. 588; Booth *v.* Murdock, 132 Mich. 608, 94 N. W. 177; Eames *v.* Eames, 16 Mich. 348, one purchasing subject to certain encumbrances, although these are void, can only have conveyance subject thereto.

Missouri.— Brevator *v.* Creech, 186 Mo. 558, 85 S. W. 527.

New Jersey.— Johnson *v.* Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773.

New York.— Healy *v.* Healy, 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927, 8 N. Y. Annot. Cas. 325 [*affirming* 31 Misc. 636, 66 N. Y. Suppl. 82]; Goddard *v.* The American Queen, 44 N. Y. App. Div. 454, 61 N. Y. Suppl. 133 [*reversing* 27 Misc. 482, 59 N. Y. Suppl. 46] (injury to third persons must be proved, not left to inference); Gall *v.* Gall, 64 Hun 600, 19 N. Y. Suppl. 332, 29 Abb. N. Cas. 19 [*affirmed* in 138 N. Y. 675, 34 N. E. 515] (agreement to leave greater part of estate to adopted child not enforced, where promisor afterward marries and has children; but where the contract is to give the adopted child the same share as an own child, the mere fact that children are subsequently born to the adopting parent is no defense); Fremont *v.* Stone, 42 Barb. 169 (where agreement, if carried out, would be a fraud on stock-holders).

Pennsylvania.— Patterson *v.* Martz, 8 Watts 374, 34 Am. Dec. 474, a prior parol sale by the vendor, although it was one that could not be enforced, and plaintiff bought in ignorance of it, a good defense.

England.—The interest which a third party may have against the specific performance of a contract may preclude the execution of it, as between trustees and *cestui que trust*; as, where an insolvent tenant made over his lease to another, who treated for a renewal under a secret agreement, in trust for the original tenant. Featherstonhaugh *v.* Fenwick, 17 Ves. Jr. 298, 313, 11 Rev. Rep. 77, 34 Eng. Reprint 115.

Where a contract gave plaintiff the right to a perpetual lease of a portion of defendant's land, and plaintiff selected a part owned jointly by defendant and his wife, against his protest, it was held that this selection was a surprise on defendant, and specific performance was refused Canterbury Aqueduct Co. *v.* Ensworth, 22 Conn. 608.

3. White *v.* Gilbert, 39 Miss. 802; Gallaher *v.* Hunter, 5 Mo. 507; Abbott *v.* Baldwin, 61 N. H. 583. In accordance with the principle "he who seeks must do equity" defendant's prior oral and unenforceable contract to convey to a third party is a moral obligation which a court of equity will recognize as a defense, even though plaintiff had no knowledge of the prior contract. Maguire *v.* Heraty, 163 Pa. St. 381, 30 Atl. 151, 43 Am. St. Rep. 800; Patterson *v.* Martz, 8 Watts (Pa.) 374, 34 Am. Dec. 474. But see Howe *v.* Howe, etc., Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536, where defendant's prior agreement to convey a part of the property, a patent, to one not a party to the suit was held no defense since the decree could not affect the rights of such absent third party.

The defense in such case is not impossibility, since the vendor has not parted with the legal title, but holds it as trustee for the prior vendee. See *supra*, III, A.

4. Discretion of court see *supra*, I, D, 4, a.

5. Palo Alto County *v.* Harrison, 68 Iowa 81, 26 N. W. 16 (contract with county, ratification of which was secured by promise of private advantage to voters); Ryan *v.* McLane, 91 Md. 175, 46 Atl. 340, 80 Am. St. Rep. 438, 50 L. R. A. 501 (contract to buy stock for the purpose of obtaining control of a quasi-public corporation like a railroad company); Foll's Appeal, 91 Pa. St. 434, 36 Am. Rep. 671 (contract concentrating majority of stock of national bank in hands of one person, detrimental to depositors and the public); Kendall *v.* Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118 (contract by vendee city to erect city hall on lot conveyed; court of equity will not control discretion of municipal council in such a matter as the proper location of a public building). But the fact that plaintiff, anticipating that a certain lot would be required for city purposes, bought it and then resold it to the city for nearly twice what it cost, but still at a price not exorbitant, does not show that the contract would operate as a fraud on the public. McManus *v.* Boston, 171 Mass. 152, 50 N. E. 607.

Inventions and patents.—An employee's agreement to invent, perfect, and improve a certain device, and that the patents therefor shall become the property of his employer, is not contrary to public policy. Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988. And see Thibodeau *v.* Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; Hulse *v.* Bonsack Mach. Co., 65 Fed. 864, 13 C. C. A. 180. A written contract by which the assignor of a patent agreed to convey to the assignee any future inventions made by him relating to the device of the patent or to improvements thereon is not in violation of public policy, and may be specifically enforced, where necessary to secure to the assignee the value of the patent purchased. Fairchild *v.* Dement, 164 Fed. 200.

or in some cases rendering the operation of the road dangerous; or to impose a burden upon the railroad out of proportion to the convenience to plaintiff. For one or both of these reasons specific performance has been refused.[6] In other cases it was held that there was no inconvenience or danger to the company or public sufficient to require refusal of specific performance.[7]

E. Want of Mutuality[8] — **1. Vagueness of the Rule as Commonly Stated.** The general statement that as a requisite to specific performance there must be mutuality of obligation and of remedy has been made in innumerable cases and is accepted by the text-books as a cardinal principle.[9] The vagueness, obscurity, and artificiality of the rule have frequently been commented upon.[10] Much of the difficulty in which the subject has been involved has arisen from the habit of the courts in using the phrase "lack of mutuality" loosely to indicate a wide range of defects. Thus the meaning sometimes is, that one party has not accepted the other's offer, so that there is no contract to enforce;[11] that the agreement

6. *California.*— Herzog *v.* Atchison, etc., R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. N. S. 428, location of stations, etc.

Connecticut.—Windham Cotton Mfg. Co. *v.* Hartford, etc., R. Co., 23 Conn. 373, dangerous siding.

Illinois.— Chicago, etc., R. Co. *v.* Reno, 113 Ill. 39; Chicago, etc., R. Co. *v.* Schoeneman, 90 Ill. 258, drawbridge.

Iowa.— Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422, contract with elevator company would prevent through shipments of grain.

Maine.— Goding *v.* Bangor, etc., R. Co., 94 Me. 542, 48 Atl. 114, dangerous grade crossing.

Maryland.—Whalen *v.* Baltimore, etc., R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. N. S. 130.

New Jersey.— Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 456 (contract for private siding conflicted with subsequent contract with city abolishing grade crossings); Coe *v.* New Jersey, etc., R. Co., 31 N. J. Eq. 105.

New York.— Conger *v.* New York, etc., R. Co., 120 N. Y. 29, 23 N. E. 986 [*affirming* 45 Hun 296] (to maintain expensive station at inconvenient point, thus delaying trains for benefit of individual); Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 7 N. E. 404 (to construct expensive and useless underneath crossing); Clarke *v.* Rochester, etc., R. Co., 18 Barb. 350 (farm crossing, expensive and of little use to plaintiff).

See *supra*, III, C, 4, c, (III).

Compare, however, Lloyd *v.* London, etc., R. Co., 2 De G. J. & S. 568, 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698, 67 Eng. Ch. 444, 46 Eng. Reprint 496, company's agreement with adjoining landowner, strictly construed, prevented it from widening its viaduct so as to accommodate four tracks, enforced by divided court, holding that the detriment to the public was not to be considered.

7. Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 127 Am. St. Rep. 155, 16 L. R. A. N. S. 307 (contract to run all trains up a spur track to plaintiff's tourist hotel not a hardship, since hotels owned by the company received similar accommodations; an instructive case); Baltimore, etc., R. Co. *v.* Brubaker, 217 Ill. 462, 75 N. E. 523 (railroad farm crossing, necessary to convenient use of farm); Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289 (farm crossings); Raphael *v.* Thames Valley R. Co., L. R. 2 Ch. 147, 36 L. J. Ch. 209, 16 L. T. Rep. N. S. 1, 15 Wkly. Rep. 322 (suspension of traffic while alteration was being made not a defense, where the company had been allowed to complete the road on its undertaking to abide by the direction of the court as to altering its works). See also *supra*, III, C, 4, c, (II).

8. Discretion of court see *supra*, I, D, 4, a.

9. As examples of cases stating the rule in the broadest terms see Oswald *v.* Nehls, 233 Ill. 438, 84 N. E. 619; Garrick *v.* Garrick, (Ind. App. 1909) 87 N. E. 696, 88 N. E. 104; Duvall *v.* Myers, 2 Md. Ch. 401; Colonna Dry Dock Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770; Lawrenson *v.* Butler, 1 Sch. & Lef. 13.

10. Obscurity of the rule.—"The rule . . . is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency; and the arguments in its support are often mere repetitions of time-honored verbal formulas, which, when closely analyzed, are found to have little or no real force and meaning." Pomeroy Spec. Perf. 237; Lamprey *v.* St. Paul, etc., R. Co., 89 Minn. 187, 94 N. W. 555. "The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and to remember." Prof. Langdell in 1 Harvard L. Rev. 104. In Bacon *v.* Kentucky Cent. R. Co., 95 Ky. 373, 382, 25 S. W. 747, 16 Ky. L. Rep. 77, the rule is aptly referred to as "the somewhat ambiguous, though euphonistic, doctrine." The obscurity in which the doctrine has hitherto been involved has been, to a large extent, removed by a careful and exhaustive historical investigation of all the English and American cases on the subject, by Prof. William Draper Lewis, of the University of Pennsylvania, in 49 Am. L. Reg. O. S. 270, 383, 447, 507, 559, 50 Am. Law Reg. O. S. 65, 251, 329, 394, 523, 51 Am. Law Reg. O. S. 591. See also Prof. James Barr Ames, in 3 Columbia L. Rev. 1.

11. *California.*— Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163.

Illinois.— Tryce *v.* Dittus, 199 Ill. 189, 65

was made without authority and was therefore illegal;[12] that plaintiff has not complied with a condition precedent;[13] that the memorandum is defective, in not mentioning plaintiff as a party;[14] or that there is no consideration to support defendant's promise;[15] or still more vaguely, in the sense that the contract is unfair and unequal.[16] "Mutuality," in such senses as these, is more appropriately treated elsewhere in this article.

2. Mutuality of Obligation. Taking the phrase "mutuality of obligation" as meaning that the contract must be binding upon plaintiff to a greater extent or in a greater degree than is necessary to support an action at law upon the contract, it will be seen that in every class of cases, with one possible exception, in which such defense has been raised, the courts have finally ruled against it.[17] It may therefore be taken as established that there is no special requisite of "mutuality of obligation" peculiar to the action for specific performance, as distinguished from other actions.[18]

3. Mutuality of Remedy. The requisite of "mutuality of remedy," that is, that the remedy of specific performance must be available against plaintiff in order that complete relief may be given in the single suit stands upon a firmer footing. The court will not grant specific performance to plaintiff and at the same time leave defendant to the legal remedy of damages for possible future breaches of the contract on plaintiff's part.[19] The rule is enacted by statute in

N. E. 220, writing signed but not considered at the time to be binding.

Michigan.— Hawley *v.* Sheldon, Harr. 420.

Nebraska.— Rank *v.* Garvey, 66 Nebr. 767, 92 N. W. 1025, 99 N. W. 666, acceptance by ratification of agent's acts.

New Jersey.— Cavagnaro *v.* Johnson, (Ch. 1908) 70 Atl. 995; Stengel *v.* Sergeant, (Ch. 1908) 68 Atl. 1106.

Ohio.— State *v.* Baum, 6 Ohio 383, no acceptance in manner prescribed by statute.

South Carolina.— Campbell *v.* Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716.

12. Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105.

13. Hutcheson *v.* McNutt, 1 Ohio 14.

14. Winter *v.* Trainor, 151 Ill. 191, 37 N. E. 869.

15. *Colorado.*— Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123.

Nebraska.— Cooper *v.* Chittenden, 33 Nebr. 313, 50 N. W. 2.

New Jersey.— Law *v.* Smith, 68 N. J. Eq. 81, 59 Atl. 327.

New York.— Levin *v.* Dietz, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. N. S. 251 [*reversing* 119 N. Y. App. Div. 875, 104 N. Y. Suppl. 1131 (*affirming* 48 Misc. 593, 96 N. Y. Suppl. 468)].

North Carolina.— Brewer *v.* Church, 57 N. C. 418.

Pennsylvania.— Sherman *v.* Herr, 220 Pa. St. 420, 69 Atl. 899.

United States.— Dorsey *v.* Packwood, 12 How. 126, 13 L. ed. 921.

16. Brinton *v.* Van Cott, 8 Utah 480, 33 Pac. 218. Possibly this is also the meaning of the word as used in Ducie *v.* Ford, 8 Mont. 233, 19 Pac. 414.

17. See *infra*, IV, E, 4, 5, 6. For the exception mentioned of recent origin and very doubtful validity see *infra*, IV, E, 14

That goods sold are subject to the judgment of vendee's agent as to their being of proper quality does not render the contract lacking in "mutuality," at law or in equity. Livesley *v.* Haise, (Oreg. 1904) 76 Pac. 1134; Livesley *v.* Johnston, 45 Oreg. 30, 76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783.

Mutual promises.—Where an oral contract for the purchase of shares of stock in a corporation provided that the purchase might be made by either of the parties as opportunity might offer for their mutual benefit, and that, after the shares were purchased, they should be equally divided between the parties, each paying one half of the purchase-price, the contract does not lack mutuality so as to prevent the court from decreeing specific performance. Sherman *v.* Herr, 220 Pa. St. 420, 69 Atl. 899. See also National Light, etc., Co. *v.* Alexander, 80 S. C. 10, 61 S. E. 214, agreement for sale of mineral and mining rights.

Agreement as to inventions not lacking mutuality see McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729. An agreement by one employed as a machinist to invent, perfect, and improve lubricating valves, force-feed oil pumps, etc., which his employer is engaged in manufacturing, and that whatever inventions and devices may result from such employment in the nature of machinery, tools, etc., to be used in connection with the employer's business, shall at the employer's request be protected by patents and become the employer's property, is mutual. Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988. And see Mississippi Glass Co. *v.* Franzen, 143 Fed. 501, 74 C. C. A. 135.

18. See articles by Prof. W. D. Lewis referred to *supra*, IV, E, 1 note 10.

19. See *post*, IV, E, 12. And see Tombigbee Valley R. Co. *v.* Fairford Lumber Co., 155 Ala. 575, 47 So. 88; Pacific Electric R. Co. *v.* Campbell-Johnston, 153 Cal. 106, 94 Pac. 623; Jolliffe *v.* Steele, 9 Cal. App. 212,

a few states.[20] This mutuality of remedy, however, need not have existed prior to the time of the decree.[21]

4. Memorandum Not Signed by Plaintiff.[22] The rule was established soon after the enactment of the statute of frauds, that a contract, the memorandum of which was signed by defendant, may be specifically enforced by a plaintiff who has not signed, notwithstanding that for lack of such signature the contract could not be enforced against plaintiff, either in law or in equity, up to the time of the commencement of his suit. Any supposed requirement of mutuality is deemed to be supplied by the filing of the bill. "It is considered when the party files the bill he does an act that will bind him, and that from that time there is mutuality; . . . and that the other party cannot plead the statute, because the words only prevent an action from being brought where the agreement is not signed by the party to be charged or his agent."[23] In a number of states

98 Pac. 544; Ulrey *v.* Keith, 237 Ill. 284, 86 N. E. 696; Oswald *v.* Nehls, 233 Ill. 438, 84 N. E. 619; Newman *v.* French, 138 Iowa 482, 116 N. W. 468, 128 Am. St. Rep. 212, 18 L. R. A. N. S. 218; Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803; Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509.

Injunction.— In many cases where the contract is sought to be enforced by means of an injunction against its breach, the court may do substantial justice to the parties, notwithstanding it cannot directly enforce plaintiff's stipulations, by making the injunction conditional on continued performance on plaintiff's part. See *infra*, IV, E, 12, note 44; and Injunctions, 22 Cyc. 844 *et seq.*

20. Cal. Civ. Code, § 3386; Brown *v.* Sebastopol, 153 Cal. 704, 96 Pac. 363, 19 L. R. A. N. S. 178; Pacific Electric R. Co. *v.* Campbell-Johnston, 153 Cal. 106, 94 Pac. 623; Jolliffe *v.* Steele, 9 Cal. App. 212, 98 Pac. 544; Leuschner *v.* Duff, 7 Cal. App. 721, 95 Pac. 914; N. D. Rev. Code, § 5925; Knudtson *v.* Robinson, (N. D. 1908) 118 N. W. 1051; Pederson *v.* Dibble, 12 N. D. 572, 98 N. W. 411.

An offer to perform does not satisfy the requirement of Rev. Codes (1905), § 6610, providing that neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed or is compellable specifically to perform. Knudtson *v.* Robinson, (N. D. 1908) 118 N. W. 1051.

21. Brown *v.* Munger, 42 Minn. 482, 44 N. W. 519. And see Leuschner *v.* Duff, 7 Cal. App. 721, 95 Pac. 914. See also *infra*, IV, E, 9, 13.

22. See *supra*, III, D, 2.

23. Martin *v.* Mitchell, 2 Jac. & W. 413, 427, 22 Rev. Rep. 184, 37 Eng. Reprint 685. And see the following cases:

Alabama.— Ross *v.* Parks, 93 Ala. 153, 8 So. 368, 30 Am. St. Rep. 47, 11 L. R. A. 148; Davis *v.* Robert, 89 Ala. 402, 8 So. 114, 18 Am. St. Rep. 126; Moses *v.* McClain, 82 Ala. 370, 2 So. 741; Chambers *v.* Alabama Iron Co., 67 Ala. 353.

Arkansas.— Vance *v.* Newman, 72 Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42.

California.— Bird *v.* Potter, 146 Cal. 286, 79 Pac. 970; Vassault *v.* Edwards, 43 Cal. 458.

Connecticut.— Hodges *v.* Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87.

Georgia.— Perry *v.* Paschal, 103 Ga. 134, 29 S. E. 703; Lindsay *v.* Warnock, 93 Ga. 619, 21 S. E. 127.

Illinois.— Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; Guyer *v.* Warren, 175 Ill. 328, 51 N. E. 580; Gradle *v.* Warner, 140 Ill. 123, 29 N. E. 1118; Esmay *v.* Gorton, 18 Ill. 483; Farwell *v.* Lowther, 18 Ill. 252.

Indiana.— Shirley *v.* Shirley, 7 Blackf. 452.

Iowa.— Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247.

Maine.— Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635; Getchell *v.* Jewett, 4 Me. 350.

Massachusetts.— Slater *v.* Smith, 117 Mass. 96; Dresel *v.* Jordan, 104 Mass. 407; Old Colony R. Corp. *v.* Evans, 6 Gray 25, 66 Am. Dec. 394.

Minnesota.— Austin *v.* Wacks, 30 Minn. 335, 15 N. W. 409.

Mississippi.— Peevey *v.* Haughton, 72 Miss. 918, 17 So. 378, 18 So. 357, 48 Am. St. Rep. 592; Atkinson *v.* Whitney, 67 Miss. 655, 7 So. 644; Marqueze *v.* Caldwell, 48 Miss. 23, reviewing the history of the rule.

Missouri.— Aiple-Hemmelmann Real Estate Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480; Smith *v.* Wilson, 160 Mo. 657, 61 S. W. 597; Mastin *v.* Grimes, 88 Mo. 478; Luckett *v.* Williamson, 37 Mo. 388; Ivory *v.* Murphy, 36 Mo. 534.

Nebraska.— Gartrell *v.* Stafford, 12 Nebr. 545, 11 N. W. 732, 41 Am. Rep. 767.

New Jersey.— Krah *v.* Wassmer, (Ch. 1908) 71 Atl. 404; White *v.* Weaver, 68 N. J. Eq. 644, 61 Atl. 25; Dynan *v.* McCulloch, 46 N. J. Eq. 11, 18 Atl. 822 [*affirmed* in 46 N. J. Eq. 608, 22 Atl. 56]; Miller *v.* Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554; Carskaddon *v.* Kennedy, 40 N. J. Eq. 259; Richards *v.* Green, 23 N. J. Eq. 536; Laning *v.* Cole, 4 N. J. Eq. 229. *Contra*, under special circumstances see Stengel *v.* Sergeant, (Ch. 1908) 68 Atl. 1106.

New Mexico.— Jasper *v.* Wilson, 14 N. M. 482, 94 Pac. 951, 23 L. R. A. N. S. 982; Borel *v.* Mead, 3 N. M. 39, 2 Pac. 222.

New York.— Pettibone *v.* Moore, 75 Hun 461, 27 N. Y. Suppl. 455; Codding *v.* Wamsley, 1 Hun 585, 4 Thomps. & C. 49 [*affirmed*

the statute requires a signature by the vendor or lessor, and such signature renders the contract binding upon both parties; in these states therefore the objection that the contract lacks mutuality because plaintiff has not signed cannot properly arise.[24] A contract to convey lands can be specifically enforced, although signed by the vendor only, where the purchaser has paid all the price to be paid in cash and has entered into possession.[25]

5. Unilateral or Conditional Contracts. The fact that defendant's offer does not ripen into a binding contract until the performance of some act by plaintiff, which act constitutes both an acceptance of the offer and supplies a consideration, as in the case of an agreement to convey land on condition of plaintiff's performing certain work, does not, after the performance of such act, render the contract objectionable in equity on the score of lack of mutuality in obligation. There is no special equitable requirement of mutuality of obligation in such cases, beyond the legal requirement of a valid and binding contract.[26]

in 60 N. Y. 644]; Woodward *v.* Aspinwall, 3 Sandf. 272; White *v.* Schuyler, 1 Abb. Pr. N. S. 300, 31 How. Pr. 38; Clason *v.* Bailey, 14 Johns. 484; Matter of Hunter, 1 Edw. 1.

Pennsylvania.—Parker's Estate, 4 Pa. Dist. 221, 19 Pa. Co. Ct. 606, 36 Wkly. Notes Cas. 400.

Rhode Island.— Ives *v.* Hazard, 4 R. I. 14, 67 Am. Dec. 500.

South Dakota.— Gira *v.* Harris, 14 S. D. 537, 86 N. W. 624; McPherson *v.* Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723.

Virginia.— Burdine *v.* Burdine, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; Central Land Co. *v.* Johnston, 95 Va. 223, 28 S. E. 175.

Washington.— Western Timber Co. *v.* Kalama River Lumber Co., 42 Wash. 620, 85 Pac. 338, 114 Am. St. Rep. 137, 6 L. R. A. N. S. 397.

West Virginia.—Creigh *v.* Boggs, 19 W. Va. 240.

Wisconsin.— Wall *v.* Minneapolis, etc., R. Co., 86 Wis. 48, 56 N. W. 367; Docter *v.* Hellberg, 65 Wis. 415, 27 N. W. 176; Cheney *v.* Cook, 7 Wis. 413.

United States.— Woodward *v.* Davidson, 150 Fed. 840.

England.— Ormond *v.* Anderson, 2 Ball & B. 363, 12 Rev. Rep. 103; Hatton *v.* Gray, 2 Ch. Cas. 164, 22 Eng. Reprint 895; Martin *v.* Pycroft, 2 De G. M. & G. 785, 16 Jur. 1125, 22 L. J. Ch. 94, 1 Wkly. Rep. 58, 51 Eng. Ch. 615, 42 Eng. Reprint 1079; Buckhouse *v.* Crosby, 2 Eq. Cas. Abr. 32, pl. 44, 22 Eng. Reprint 29; Sutherland *v.* Briggs, 1 Hare 26, 5 Jur. 1151, 11 L. J. Ch. 36, 23 Eng. Ch. 26, 66 Eng. Reprint 936; Martin *v.* Mitchell, 2 Jac. & W. 413, 22 Rev. Rep. 184, 37 Eng. Reprint 685; Morgan *v.* Holford, 17 Jur. 225, 1 Smale & G. 101, 1 Wkly. Rep. 101, 65 Eng. Reprint 45; Palmer *v.* Scott, 8 L. J. Ch. O. S. 127, 1 Russ. & M. 391, 5 Eng. Ch. 391, 39 Eng. Reprint 151, Taml. 488, 12 Eng. Ch. 488, 48 Eng. Reprint 194; Allen *v.* Bennet, 3 Taunt. 169, 12 Rev. Rep. 633; Western *v.* Russell, 3 Ves. & B. 187, 35 Eng. Reprint 450; Fowle *v.* Freeman, 9 Ves. Jr. 351, 32 Eng. Reprint 638; Seton *v.* Slade, 7 Ves. Jr. 264, 6 Rev. Rep. 124, 32 Eng. Reprint 108; Coleman *v.* Upcot, 5 Vin. Abr. 527, pl. 17.

See 44 Cent. Dig. tit. "Specific Performance," §§ 9–11, 89 *et seq.*

Contra.— Lipscomb *v.* Watrous, 3 App. Cas. (D. C.) 1; Duvall *v.* Myers, 2 Md. Ch. 401. And see Jones *v.* Noble, 3 Bush (Ky.) 694. Chancellor Kent was opposed to the rule, but admitted that it was established by authority. See Clason *v.* Bailey, 14 Johns. (N. Y.) 484; Benedict *v.* Lynch, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484. The rule was criticized by Lord Redesdale, Ch., in the much cited Irish case of Lawrenson *v.* Butler, 1 Sch. & Lef. 13.

Statutes.— The rule of the text is embodied in the statutes of a few states: Cal. Civ. Code, § 3388; Bird *v.* Potter, 146 Cal. 286, 76 Pac. 970; S. D. Comp. Laws, § 4630; Gira *v.* Harris, 14 S. D. 537, 86 N. W. 624; McPherson *v.* Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723.

24. Mich. Comp. Laws (1897), § 9511; Maynard *v.* Brown, 41 Mich. 298, 2 N. W. 30; Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17 (a former statute); Nebr. Comp. Laws (1897), § 3179; Nebr. Comp. Laws (1883), c. 32, § 3; Ballou *v.* Sherwood, 32 Nebr. 666, 49 N. W. 790, 50 N. W. 1131; Gartrell *v.* Stafford, 12 Nebr. 545, 11 N. W. 732, 41 Am. Rep. 767; Cutting Comp. Laws Nev. (1900) § 2694; N. Y. Gen. Laws (1901), p. 3843, § 224; N. Y. Laws (1830), c. 7, tit. 1, § 8; Pa. St. (1772); Smith Laws Pa. 389, § 1; Sylvester *v.* Born, 132 Pa. St. 467, 19 Atl. 337; Smith's Appeal, 69 Pa. St. 474; Utah Rev. St. (1898) § 2463; Wis. St. (1898) § 2304; Docter *v.* Hellberg, 65 Wis. 415, 27 N. W. 176.

25. Krah *v.* Wassmer, (N. J. Ch. 1908) 71 Atl. 404. See *infra*, IV, E, 13; V, D, 2, a.

26. See 49 Am. Leg. Reg. 513–517; and the following cases:

Alabama.— Davis *v.* Williams, 121 Ala. 542, 25 So. 704; Wilks *v.* Georgia Pac. R. Co., 79 Ala. 180.

California.—Spires *v.* Urbahn, 124 Cal. 110, 56 Pac. 794.

Colorado.— Frue *v.* Houghton, 6 Colo. 318.

Illinois.— Perkins *v.* Hadsell, 50 Ill. 216.

Massachusetts.—Western R. Corp. *v.* Babcock, 6 Metc. 346.

Michigan.— Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810.

6. Options — a. In General. An option to purchase, given upon a valuable consideration, including an option to purchase contained in a lease, is a binding contract, and not a revocable offer from which the giver may withdraw before acceptance. Upon notice of acceptance, given within the time limited by the option, and upon the performance of the conditions precedent, if any, which are imposed, there arises an ordinary contract of sale and purchase, enforceable by either vendor or vendee. The fact that until such acceptance there was no mutuality of obligation — nothing which the vendee was bound to do — is no obstacle in the way of specific performance. This is now the settled rule in nearly all jurisdictions.[27] The same rule applies to options to give or renew a

Nebraska.— Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255.

See 44 Cent. Dig. tit. "Specific Performance," § 91 *et seq.*

Compare, however, Bear Track Min. Co. *v.* Clark, 6 Ida. 196, 54 Pac. 1007; Mayger *v.* Cruse, 5 Mont. 485, 6 Pac. 333.

27. *Alabama.*— Ross *v.* Parks, 93 Ala. 153, 8 So. 368, 30 Am. St. Rep. 47, 11 L. R. A. 148; Davis *v.* Robert, 89 Ala. 402, 8 So. 114, 18 Am. St. Rep. 126.

Arkansas.— Meyer *v.* Jenkins, 80 Ark. 209, 96 S. W. 991.

California.— Stanton *v.* Singleton, (1898) 54 Pac. 587; Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149; Hall *v.* Center, 40 Cal. 63; De Rutte *v.* Muldrow, 16 Cal. 505; Laffan *v.* Naglee, 9 Cal. 662, 70 Am. Dec. 678 (right of preëmption); Noyes *v.* Schlegel, 9 Cal. App. 516, 99 Pac. 726.

Colorado.— Byers *v.* Denver Circle R. Co., 13 Colo. 552, 22 Pac. 951. And see Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123.

Georgia.— Black *v.* Maddox, 104 Ga. 157, 30 S. E. 723; Perry *v.* Paschal, 103 Ga. 134, 29 S. E. 703 [*overruling dicta* in Grizzle *v.* Gaddis, 75 Ga. 350; Peacock *v.* Deweese, 73 Ga. 570].

Illinois.— Corbett *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Guyer *v.* Warren, 175 Ill. 328, 51 N. E. 580; Hawes *v.* Favor, 161 Ill. 440, 43 N. E. 1076; Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555 (right of preëmption); Estes *v.* Furlong, 59 Ill. 298.

Indiana.— Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535; Herrman *v.* Babcock, 103 Ind. 461, 3 N. E. 142; Souffrain *v.* McDonald, 27 Ind. 269.

Kentucky.— Bacon *v.* Kentucky Cent. R. Co., 95 Ky. 373, 25 S. W. 747, 16 Ky. L. Rep. 77; Louisville Bank *v.* Baumeister, 87 Ky. 6, 7 S. W. 170, 9 Ky. L. Rep. 845. *Contra*, Butt *v.* Bondurant, 7 T. B. Mon. 421; Boucher *v.* Van Buskirk, 2 A. K. Marsh. 345.

Maryland.— Thomas *v.* Gottlieb, etc., Brewing Co., 102 Md. 417, 62 Atl. 633; Maughlin *v.* Perry, 35 Md. 352; Stansbury *v.* Fringer, 11 Gill & J. 149. *Contra*, Rider *v.* Gray, 10 Md. 282, 69 Am. Dec. 135; Tyson *v.* Watts, 7 Gill 124; Geiger *v.* Green, 4 Gill 472.

Massachusetts.— Boston, etc., R. Co. *v.* Rosé, 194 Mass. 142, 80 N. E. 498; O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602.

Michigan.— Solomon Mier Co. *v.* Hadden, 148 Mich. 488, 111 N. W. 1040.

Missouri.— Aiple-Hemmelmann Real Estate Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480; Warren *v.* Costello, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669.

Montana.— Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

Nebraska.— Watkins *v.* Youll, 70 Nebr 81, 96 N. W. 1042; Donahue *v.* Potter, etc., Co., 63 Nebr. 128, 88 N. W. 171; Schields *v.* Horbach, 28 Nebr. 359, 44 N. W. 465.

Nevada.— Schroeder *v.* Gemeinder, 10 Nev. 355.

New Jersey.— White *v.* Weaver, 68 N. J. Eq. 644, 61 Atl. 25; McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840; Duffy *v.* Kelly, 55 N. J. Eq. 627, 37 Atl. 597 (contract giving landlord option to purchase tenant's building); Waters *v.* Bew, 52 N. J. Eq. 787, 29 Atl. 590; Page *v.* Martin, 46 N. J. Eq. 585, 20 Atl. 46; Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380 (option to repurchase); Hawralty *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; Van Doren *v.* Robinson, 16 N. J. Eq. 256; Laning *v.* Cole, 4 N. J. Eq. 229.

New Mexico.— Borel *v.* Mead, 3 N. M. 84, 2 Pac. 222.

New York.— Kerr *v.* Purdy, 50 Barb. 24; Matter of Hunter, 1 Edw. 1. But see Wadick *v.* Mace, 191 N. Y. 1, 83 N. E. 571 [*reversing* 118 N. Y. App. Div. 777, 103 N. Y. Suppl. 889], where there was a peculiarly worded contract, which was held by the court below to be an option to purchase. On appeal refusal to enforce specific performance of the contract was based partly on lack of mutuality, but chiefly on other grounds. Earlier New York cases enforcing options are not noticed.

Ohio.— Gilbert *v.* Port, 28 Ohio St. 276.

Oregon.— Clarno *v.* Grayson, 30 Oreg. 111, 46 Pac. 426; House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027.

Pennsylvania.— People's St. R. Co. *v.* Spencer, 156 Pa. St. 85, 27 Atl. 113, 36 Am. St. Rep. 22; Newell's Appeal, 100 Pa. St. 513; Napier *v.* Darlington, 70 Pa. St. 64; Smith's Appeal, 69 Pa. St. 474; Corson *v.* Mulvany, 49 Pa. St. 88, 88 Am. Dec. 485; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526; Parker's Estate, 4 Pa. Dist. 221, 36 Wkly. Notes Cas. 400.

Tennessee.— Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195.

Virginia.— Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33, 115 Am. St. Rep. 880, 5 L. R. A. N. S. 1194; Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep.

lease,[28] to options to sell real property,[29] and to options relating to personal property.[30]

b. Consideration For the Option. There must be some consideration for the option to render it more than an offer revocable before acceptance, but the amount of the consideration is generally immaterial.[31]

881. *Contra,* Wood *v.* Dickey, 90 Va. 160, 17 S. E. 818.

Washington.— Stevens *v.* Kittredge, 44 Wash. 347, 87 Pac. 484; Connor *v.* Clapp, 42 Wash. 642, 85 Pac. 342.

West Virginia.— Pollock *v.* Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. N. S. 403; Carnegie Natural Gas Co. *v.* South Penn. Oil Co., 56 W. Va. 402, 49 S. E. 548; Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220; Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Donnally *v.* Parker, 5 W. Va. 301.

Wisconsin.— Wall *v.* Minneapolis, etc., R. Co., 86 Wis. 48, 56 N. W. 367.

Wyoming.— Frank *v.* Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 110 Am. St. Rep. 963, 67 L. R. A. 571.

United States.— Willard *v.* Taylor, 8 Wall. 557, 19 L. ed. 501; Woodward *v.* Davidson, 150 Fed. 840 [*reversed* on other grounds in 156 Fed. 915]; Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360; Couch *v.* McCoy, 138 Fed. 696; Mathews Slate Co. *v.* New Empire Slate Co., 122 Fed. 972; Johnston *v.* Trippe, 33 Fed. 530; Waterman *v.* Waterman, 27 Fed. 827.

England.— Lawes *v.* Bennett, 1 Cox Ch. 167, 1 Rev. Rep. 10, 29 Eng. Reprint 1111, 7 Ves. 436. *Contra,* Bromley *v.* Jefferys, Prec. Ch. 138, 24 Eng Reprint 66, 2 Vern. Ch. 415, 23 Eng. Reprint 867, a case long since superseded.

Canada.— Casey *v.* Hanlon, 22 Grant Ch. (U. C.) 445.

See 44 Cent. Dig. tit. "Specific Performance," § 98.

Contra.— Jenkins *v.* Locke, 3 App. Cas. (D. C.) 485. And see Snell *v.* Mitchell, 65 Me. 48.

Revocation.— Since the option is more than a mere offer, it is not revoked by the death of the giver (Matter of Hunter, 1 Edw. (N. Y.) 1), or by his sale of the land (see *infra,* X, B, 1, as to enforcement against grantee of vendor).

That acceptance may be manifested by bringing suit within the term of the option to prevent a violation of the contract or by filing the bill for specific performance see Maughlin *v.* Perry 35 Md. 352; Buhl *v.* Stephens, 84 Fed. 922.

Perpetuities.— That an option without a time limit violates the rule against perpetuities see London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620 [*overruling* Birmingham Canal Co. *v.* Cartwright, 11 Ch. D. 432, 48 L. J. Ch. 552, 40 L. T. Rep. N. S. 784, 27 Wkly. Rep. 597]. And see Bauer *v.* Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634 (no time specified for exercising option. Language of the court would imply that an option is never to be enforced, since it gives an advantage to plaintiff; but it was probably not intended to overrule numerous previous Illinois cases enforcing options); Davis *v.* Petty, 147 Mo. 374, 48 S. W. 944; Starcher *v.* Duty, 61 W. Va. 373, 56 S. E. 524, 123 Am. St. Rep. 990, 9 L. R. A. N. S. 913.

28. *Arizona.*— Monihon *v.* Wakelin, 6 Ariz. 225, 56 Pac. 735.

California.— Swanston *v.* Clark, 153 Cal. 300, 95 Pac. 1117.

Illinois.— O'Connor *v.* Harrison, 132 Ill. App. 264.

Massachusetts.— Floyd *v.* Storrs, 144 Mass. 56, 10 N. E. 743.

Missouri.— Blount *v.* Connolly, 110 Mo. App. 603, 85 S. W. 605.

England.— Moss *v.* Barton, L. R. 1 Eq. 474, 35 Beav. 197, 13 L. T. Rep. N. S. 623, 55 Eng. Reprint 870; Hersey *v.* Giblett, 18 Beav. 174, 23 L. J. Ch. 818, 2 Wkly. Rep. 206, 52 Eng. Reprint 69.

Contra.— See Gelston *v.* Sigmund, 27 Md. 334.

29. Johnston *v.* Wadsworth, 24 Oreg. 494, 34 Pac. 13; Brown *v.* Slee, 103 U. S. 828, 26 L. ed. 618; Watts *v.* Kellar, 56 Fed. 1, 5 C. C. A. 394. *Contra,* see Maynard *v.* Brown, 41 Mich. 298, 2 N. W. 30; Hissam *v.* Parish, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892, to sell personal property.

"An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a lawsuit for an uncertain measure of damages as of any value." Watts *v.* Kellar, 56 Fed. 1, 4, 5 C. C. A. 394.

30. Sayward *v.* Houghton, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44 (stock); Buhl *v.* Stephens, 84 Fed. 922 (renewal of license to use patent). *Contra,* Ryan *v.* McLane, 91 Md. 175, 46 Atl. 340, 50 L. R. A. 501, stock.

31. *Alabama.*— Ross *v.* Parks, 93 Ala. 153, 8 So. 368, 30 Am. St. Rep. 47, 11 L. R. A. 148, fifty cents.

California.— Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163.

Colorado.— Gordon *v.* Darnell, 5 Colo. 302. And see Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123, where an option for the purchase of realty provided that, upon payment of a certain sum and receipt of the conveyance, plaintiff was to deliver to defendant a promissory note, secured by mortgage or trust deed, for the balance of the purchase-

c. Option Under Seal. Where the option is under seal, but is without actual consideration, and is attempted to be withdrawn by the giver before acceptance, there is a sharp conflict of authority as to the effect to be given to the seal in specific performance. It is held, on one hand, that the seal renders the offer irrevocable by the common-law rule, and that this rule should be followed by courts of equity. The court does not, in so doing, violate the doctrine that voluntary contracts under seal are not enforced, since the contract enforced is that created by the acceptance of the option or offer.[32] In other cases it is held that the court of equity should in this case as in others look at the substance and not the form and, disregarding the seal, treat the offer as revocable until acceptance.[33]

7. Vendor Plaintiff Need Not Perfect Title Before Decree. So far as the objection of lack of mutuality of remedy is concerned, it is not necessary that the vendor when suing for specific performance shall have been in a position to convey a good title at any time before the decree. The fact that if the vendee had sued for specific performance before that time he would not have obtained what his

price, but by a subsequent provision the only penalty for failure or refusal, at any time, to complete the purchase, was the forfeiture, as liquidated damages, of all sums previously paid. It was held that under the latter provision the element of mutuality would never attach until final payment of the full purchase-price, for until then plaintiff would not be bound; hence he could not maintain specific performance before final payment of the full purchase-price.

Georgia.— Peacock *v.* Deweese, 73 Ga. 570.

Illinois.— Corbitt *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Guyer *v.* Warren, 175 Ill. 328, 51 N. E. 580; Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755.

Kentucky.— Litz *v.* Goosling, 93 Ky. 185, 19 S. W. 527, 14 Ky. L. Rep. 91, 21 L. R. A. 127 [as *explained* in Bacon *v.* Kentucky Cent. R. Co., 95 Ky. 373, 25 S. W. 747, 16 Ky. L. Rep. 77].

Missouri.— Davis *v.* Petty, 147 Mo. 374, 48 S. W. 944; Warren *v.* Costello, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; Glass *v.* Rowe, 103 Mo. 513, 15 S. W. 334.

Montana.— Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

Nebraska.— Tidball *v.* Challburg, 67 Nebr. 524, 93 N. W. 679.

New York.— Pomeroy *v.* Newell, 117 N. Y. App. Div. 800, 102 N. Y. Suppl. 1098.

North Carolina.— Hardy *v.* Ward, 150 N. C. 385, 64 S. E. 171, option contract to sell standing timber.

Oregon.— Sprague *v.* Schotte, 48 Oreg. 609, 87 Pac. 1046; Clarno *v.* Grayson, 30 Oreg. 111, 46 Pac. 426.

Virginia.— Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133.

West Virginia.—Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94.

United States.— Smith *v.* Reynolds, 8 Fed. 696, 3 McCrary 157.

See 44 Cent. Dig. tit. "Specific Performance," §§ 95, 99. And see Contracts, 9 Cyc. 317, 327, 334.

A recited consideration of one dollar, either stipulated or paid, has been held insufficient. Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123.

Where the option is in a lease, there is a consideration, since it may be deemed a material inducement to the lease. Monihon *v.* Wakelin, 6 Ariz. 225, 56 Pac. 735. In Swanston *v.* Clark, 153 Cal. 300, 95 Pac. 1117, a lease gave the lessee an option to purchase the premises for a fixed price at any time during the term. The lessee agreed to pay a higher rent than he considered the premises worth, because he was obtaining an option. The rent was paid for one year in advance, the rent under a prior lease accruing after the beginning of the new lease was canceled, and rent accruing under the prior lease, prior to the new term, was paid in advance. It was held that the option to purchase was supported by a sufficient consideration, and the lessee, on election to purchase, could compel specific performance.

That an extension of time in which to exercise the option, without a new consideration, is not binding see Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881.

That the consideration for the option need not be paid at the time when the option is given see Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881.

Adequacy of consideration for option under the California statute see *supra*, IV, D, 1, a, note 66.

32. O'Brien *v.* Boland, 166 Mass. 481, 44 N. E. 602; Watkins *v.* Robertson, 105 Va. 269, 54 S. E. 33, 115 Am. St. Rep. 880, 5 L. R. A. N. S. 1194 [*overruling* Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133]; Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 13 Am. St. Rep. 94 (*dictum*); Donnally *v.* Parker, 5 W. Va. 301; Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501.

33. Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123; Gordon *v.* Darnell, 5 Colo. 302; Corbett *v.* Cronkhite, 239 Ill. 9, 87 N. E. 874; Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755; Smith *v.* Reynolds, 8 Fed. 696, 3 McCrary 157. But see Guyer *v.* Warren, 175 Ill. 328, 51 N. E. 580.

Demurrer to bill.— It has also been held that, although the want of consideration for

contract called for is no defense to the vendor's suit, if the vendor is finally able to convey a perfect title. This is the rule in nearly all jurisdictions.[34]

8. Remedy Not Mutual Because of Defendant's Default. It is no excuse that defendant, by delay or other conduct on his part subsequent to the contract, may have lost his right to the equitable relief against plaintiff. No one can take advantage of his own laches.[35]

9. Lack of Mutuality Because of Defendant's Constructive Fraud. A beneficiary can enforce a contract of sale between him and the trustee, although such contract is not binding upon the beneficiary. His exemption from liability is a personal one which he may waive.[36] In England a purchaser may enforce the contract against a vendor who has made a prior voluntary settlement,[37] although

the sealed option may be shown on the trial, a bill for specific performance is not demurrable for failure to show an actual consideration, since the seal *prima facie* imports a consideration. Borel *v.* Mead, 3 N. M. 84, 2 Pac. 222.

34. *Illinois.*— Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578; Mason *v.* Caldwell, 10 Ill. 196, 48 Am. Dec. 330.

Indiana.— Brumfield *v.* Palmer, 7 Blackf. 227.

Kansas.— Guild *v.* Atchison, etc., R. Co., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77.

Kentucky.— Logan *v.* Bull, 78 Ky. 607; Finnegan *v.* Summers, 91 S. W. 261, 28 Ky. L. Rep. 1180.

Maryland.—Maryland Constr. Co. *v.* Kuper, 90 Md. 529, 45 Atl. 197.

Massachusetts.— Dresel *v.* Jordan, 104 Mass. 407.

Missouri.— Isaacs *v.* Skrainka, 95 Mo. 517, 8 S. W. 427; Luckett *v.* Williamson, 37 Mo. 388.

Nebraska.— Johnson *v.* Higgins, 77 Nebr. 35, 108 N. W. 168.

New Jersey.— Oakey *v.* Cook, 41 N. J. Eq. 350, 7 Atl. 495.

New York.— Jenkins *v.* Fahey, 73 N. Y. 355; Bruce *v.* Tilson, 25 N. Y. 194; Baldwin *v.* Salter, 8 Paige 473; Garden City Reformed Protestant Dutch Church *v.* Mott, 7 Paige 77, 32 Am. Dec. 613; Brown *v.* Haff, 5 Paige 235, 28 Am. Dec. 425.

North Carolina.— Westall *v.* Austin, 40 N. C. 1.

Ohio.— Wilson *v.* Tappan, 6 Ohio 172.

Pennsylvania.— Mussleman's Appeal, 65 Pa. St. 480; Moss *v.* Hanson, 17 Pa. St. 379; Lesley *v.* Morris, 9 Phila. 110.

South Carolina.— Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657; Lyles *v.* Kirkpatrick, 9 S. C. 265.

Tennessee.— Fraker *v.* Brazelton, 12 Lea 278; McClure *v.* Harris, 7 Heisk. 379.

Texas.— Tison *v.* Smith, 8 Tex. 147.

Virginia.— Reeves *v.* Dickey, 10 Gratt. 138.

West Virginia.— Core *v.* Wigner, 32 W. Va. 277, 9 S. E. 36, title becomes good by vendor's adverse possession.

United States.— Hepburn *v.* Dunlop, 1 Wheat. 179, 4 L. ed. 65; Day *v.* Mountin, 137 Fed. 756, 70 C. C. A. 190; Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318 [*affirmed* in 149 Fed. 31], reviewing authorities.

England.— Wylson *v.* Dunn, 34 Ch. D. 569, 51 J. P. 452, 56 L. J. Ch. 855, 56 L. T. Rep. N. S. 192, 35 Wkly. Rep. 405; Murrell *v.* Goodyear, 1 De G. F. & J. 432, 6 Jur. N. S. 356, 29 L. J. Ch. 425, 2 L. T. Rep. N. S. 268, 8 Wkly. Rep. 398, 62 Eng. Ch. 331, 45 Eng. Reprint 426; Beaumont *v.* Dukes, Jac. 422, 23 Rev. Rep. 110, 4 Eng. Ch. 422, 37 Eng. Reprint 910; Boehm *v.* Wood, 1 Jac. & W. 419, 21 Rev. Rep. 213, 37 Eng. Reprint 435; Salisbury *v.* Hatcher, 6 Jur. 1051, 12 L. J. Ch. 68, 2 Y. & Coll. 54, 21 Eng. Ch. 54, 63 Eng. Reprint 24; Hoggart *v.* Scott, 8 L. J. Ch. O. S. 54, 1 Russ. & M. 293, 5 Eng. Ch. 293, 39 Eng. Reprint 113, Taml. 500, 12 Eng. Ch. 500, 48 Eng. Reprint 199, 31 Rev. Rep. 112; Langford *v.* Pitt, 2 P. Wms. 629, 24 Eng. Reprint 890; Coffin *v.* Cooper, 14 Ves. Jr. 205, 9 Rev. Rep. 274, 33 Eng. Reprint 499; Mortlock *v.* Buller, 10 Ves. Jr. 291, 7 Rev. Rep. 417, 32 Eng. Reprint 857.

See 44 Cent. Dig. tit. "Specific Performance," §§ 243, 244. And see *infra*, VI, D, 7.

Contra.— That the vendor must have title at the time of the contract see Gage *v.* Cummings, 209 Ill. 120, 70 N. E. 679 [*distinguished* in Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578]; Goodwine *v.* Kelley, 33 Ind. App. 57, 70 N. E. 832; Luse *v.* Deitz, 46 Iowa 205; Ten Eyck *v.* Manning, 52 N. J. Eq. 47, 27 Atl. 900 (*dictum*); Norris *v.* Fox, 45 Fed. 406. See this case, and Bronson *v.* Cahill, 4 Fed. Cas. No. 1,926, 4 McLean 19, explained in Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318 [*affirmed* in 149 Fed. 31].

35. Ochs *v.* Kramer, 107 S. W. 260, 32 Ky. L. Rep. 762; Hawkes *v.* Eastern Counties R. Co., 1 De G. M. & G. 736, 16 Jur. 1051, 22 L. J. Ch. 77, 7 R. & Can. Cas. 188, 1 Wkly. Rep. 25, 41, 50 Eng. Ch. 570, 42 Eng. Reprint 739 [*affirmed* in 5 H. L. Cas. 331, 10 Eng. Reprint 928]; South Eastern R. Co. *v.* Knott, 10 Hare 122, 44 Eng. Ch. 118, 68 Eng. Reprint 865.

Defendant's defective title.—It is a familiar rule that the vendee may have specific performance against a defendant whose title fails to part of the estate, or is defective, although the vendor in turn could not force the title upon the vendee. See *infra*, VII, B, 2, 5.

36. *Ex p.* Lacey, 6 Ves. Jr. 625, 6 Rev. Rep. 9, 31 Eng. Reprint 1228.

37. Rosher *v.* Williams, L. R. 20 Eq. 210, 44 L. J. Ch. 419, 32 L. T. Rep. N. S. 387, 23 Wkly. Rep. 561; Buckle *v.* Mitchell, 18 Ves.

the vendor in such case cannot maintain a suit for specific performance and force the title upon such purchaser.[38]

10. Infant Plaintiff. Specific performance of an infant's contract at his suit is refused, in England, on the ground that there is no mutuality of remedy;[39] but this ruling has not been universally followed in this country, since it enables the other party to the contract to take advantage of plaintiff's infancy, and thus contravenes the general policy of the law relating to infant's contracts.[40] After the infant becomes of age, he may enforce in equity contracts made by him during his minority; the fact that they were previously voidable by him is no defense.[41]

11. Married Woman Plaintiff. It has been frequently held that husband and wife may sue to enforce a contract made by the wife, since by bringing suit she submits to perform her part of the contract.[42] If she has fully performed her part, all objection on the ground of lack of mutuality in the remedy has disappeared.[43]

12. Plaintiff's Promise Unenforceable by Decree. If, after a decree against defendant, there remain to be done, under the contract, acts on plaintiff's part of such a character either that the court cannot frame a decree to enforce them, or that it cannot carry out such decree without unduly taxing the time and attention of the court, specific performance is usually refused.[44] Thus relief is refused

Jr. 100, 11 Rev. Rep. 155, 34 Eng. Reprint 255.

38. Smith *v.* Garland, 2 Meriv. 123, 16 Rev. Rep. 154, 35 Eng. Reprint 887; Johnson *v.* Legard, Turn. & R. 281, 18 Rev. Rep. 234, 12 Eng. Ch. 281, 37 Eng. Reprint 1107.

39. Flight *v.* Bolland, 4 Russ. 298, 28 Rev. Rep. 101, 4 Eng. Ch. 298, 38 Eng. Reprint 817. This decision has been cited with approval *arguendo* in a few American cases. See Ten Eyck *v.* Manning, 52 N. J. Eq. 47, 27 Atl. 900; Tarr *v.* Scott, 4 Brewst. (Pa.) 49.

40. "This right and prerogative [to avoid an infant's contracts] is personal, however, and attaches to the infant alone. Under no circumstances can it be available to or be taken advantage of by the other party to the contract." Seaton *v.* Tohill, 11 Colo. App. 211, 53 Pac. 170, 171 (in this case, however, the infant had fully performed, and there was nothing to enforce against him); Smith *v.* Smith, 36 Ga. 184, 91 Am. Dec. 761 (contract made by trustee of the infant). See Infants, 22 Cyc. 609, 610. A contract between adults, one of whom has died, may be enforced by an infant heir, although not enforceable against such heir; since the rule as to mutuality does not apply to cases in which mutuality existing at the time of the contract is taken away by a subsequent contingent event (Moore *v.* Randolph, 6 Leigh (Va.) 175, 29 Am. Dec. 208); and a contract made between adults for the benefit of infants may be enforced by them (Sarter *v.* Gordon, 2 Hill Eq. (S. C.) 121); as may a contract made by a party competent to contract in an infant's behalf (Guard *v.* Bradley, 7 Ind. 600).

41. Clayton *v.* Ashdown, 9 Vin. Abr. 393, pl. 1.

42. In the following cases the married woman plaintiff was vendor: Walker *v.* Owen, 79 Mo. 563; Freeman *v.* Stokes, 12 Phila. (Pa.) 219 (*semble*); Jarnigan *v.* Levisy, 6 Lea (Tenn.) 397; Mullens *v.* Big Creek Gap Coal, etc., Co., (Tenn. Ch. App. 1895) 35 S. W. 439; Fennelly *v.* Anderson, 1 Ir. Ch. 706. *Contra*, Williams *v.* Graves, 7 Tex. Civ. App. 356, 26 S. W. 334, married woman selling her homestead; since under the statute her freedom to retract must remain with her until the conclusion of her privy examination to her deed. But see the next note.

43. Chamberlin *v.* Robertson, 31 Iowa 408 (*dictum*); Seager *v.* Burns, 4 Minn. 141; Williams *v.* Graves, 7 Tex. Civ. App. 356, 26 S. W. 334 (married woman selling her homestead had given possession to defendant). *Contra*, Tarr *v.* Scott, 4 Brewst. (Pa.) 49, a case in which a married woman, vendee, had performed and tendered the purchase-money.

Where the contract is absolutely void.— In several cases the courts discuss the doctrine of mutuality with reference to a married woman's contracts unnecessarily it would appear, since under the statute of the states in question the contracts of a married woman being absolutely void there is, in reality, no contract for the court to enforce against defendants. See Prof. W. D. Lewis in 50 Am. L. Reg. 252 *et seq.* And see Banbury *v.* Arnold, 91 Cal. 606, 27 Pac. 934; Richards *v.* Green, 23 N. J. Eq. 536; Shenandoah Valley R. Co. *v.* Dunlop, 86 Va. 346, 10 S. E. 239; Cheatham *v.* Cheatham, 81 Va. 395; Chilhowie Iron Co. *v.* Gardiner, 79 Va. 305; Hoover *v.* Calhoun, 16 Gratt. (Va.) 109; Watts *v.* Kinney, 3 Leigh (Va.) 272, 23 Am. Dec. 266.

44. Tombigbee Valley R. Co. *v.* Fairford Lumber Co., 155 Ala. 575, 47 So. 88; Newman *v.* French, 138 Iowa 482, 116 N. W. 468, 128 Am. St. Rep. 212, 18 L. R. A. N. S. 218; Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803; Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509; and other cases cited in the notes following. And see *supra*, III, C, 3, c.

where plaintiff's promise is too indefinite to be enforced;[45] where the contract calls for strictly personal services on the part of plaintiff, such as care and support,[46] or business services, as agent, manager, surveyor, partner, attorney, etc.;[47] or

If an injunction is the relief sought, it is often possible to secure the performance of plaintiff's stipulations indirectly, by making the injunction conditional on continued performance by plaintiff, and dissolving the injunction when a breach on his part appears. See Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854 [*affirming* 30 N. Y. App. Div. 564, 52 N. Y. Suppl. 443]; Singer Sewing-Mach. Co. *v.* Union Button-Hole, etc., Co., 22 Fed. Cas. No. 12,904, Holmes 253, 4 Off. Gaz. 553, 6 Fish. Pat. Cas. 480; Stocker *v.* Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 Wkly. Rep. 671, 69 Eng. Reprint 1162.

In Iowa the rule of the text, while recognized (see Newman *v.* French, 138 Iowa 482, 116 N. W. 468, 128 Am. St. Rep. 212, 18 L. R. A. N. S. 218; Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422), seems not to be always applied. Thus, where defendants agreed to convey land to plaintiff railroad company, in consideration of its erecting and maintaining a depot, plaintiff's liability for future breaches of its contract to maintain the depot was held a sufficient security for the performance of its duty in this respect (Minneapolis, etc., R. Co. *v.* Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. Rep. 216). Similarly, defendant's agreement to convey in consideration of plaintiff's maintaining a college of standard grade for ten years was enforced, although the ten years had not expired. Des Moines University *v.* Polk County Homestead, etc., Co., 87 Iowa 36, 53 N. W. 1080. In this case, however, the performance by plaintiff was further secured by a condition subsequent in the contract, forfeiting the land on failure of such performance.

In Missouri the same is true of Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19.

In New Jersey also, where the vendor's security for the performance of plaintiff vendee's covenant to build on the land after conveyance was intended to rest upon the good faith of plaintiff and the obligation of his covenant to build, specific performance was not refused. Madison Athletic Assoc. *v.* Brittin, 60 N. J. Eq. 160, 46 Atl. 652.

In England see Wilson *v.* West Hartlepool R. Co., 2 De G. J. & S. 475, 11 Jur. N. S. 124, 34 L. J. Ch. 241, 11 L. T. Rep. N. S. 692, 5 New Rep. 289, 13 Wkly. Rep. 361, 67 Eng. Ch. 371, 46 Eng. Reprint 459.

45. Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Ballou *v.* March, 133 Pa. St. 64, 19 Atl. 304. See *supra*, III, D.

46. *Alabama.*— Chadwick *v.* Chadwick, 121 Ala. 580, 25 So. 631.

California.— O'Brien *v.* Perry, 130 Cal. 526, 62 Pac. 927.

Indiana.— Denlar *v.* Hile, 123 Ind. 68, 24 N. E. 170; Ikerd *v.* Beavers, 106 Ind. 483, 7 N. E. 326.

Iowa.— Newman *v.* French, 138 Iowa 482, 116 N. W. 468, 128 Am. St. Rep. 212, 18 L. R. A. N. S. 218.

Michigan.— Bourget *v.* Monroe, 58 Mich. 563, 25 N. W. 514.

Nevada.— Turley *v.* Thomas, (1909) 101 Pac. 568.

Texas.—Prusiecke *v.* Ramzinski, (Civ. App. 1904) 81 S. W. 771.

Contra.— Hackett *v.* Hackett, 67 N. H. 424, 40 Atl. 434, holding that plaintiff's promise to furnish a support and "comfortable home" is specifically enforceable.

47. *Alabama.*— Dimmick *v.* Stokes, 151 Ala. 150, 43 So. 854 (to employ plaintiff as general manager); Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758 (as agent and press correspondent).

California.— Civ. Code, § 3386; Los Angeles, etc., Oil, etc., Co. *v.* Occidental Oil Co., 144 Cal. 528, 78 Pac. 25 (developing oil lands); Stanton *v.* Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334 (developing mine); Wakeham *v.* Barker, 82 Cal. 46, 22 Pac. 1131 (painting and graining); King *v.* Gildersleeve, 79 Cal. 504, 21 Pac. 961 (as attorney); Sturgis *v.* Galindo, 59 Cal. 28, 43 Am. Rep. 239 (prospecting for coal); Cooper *v.* Pena, 21 Cal. 403 (as surveyor); Jolliffe *v.* Steele, 9 Cal. App. 212, 98 Pac. 544.

Illinois.— Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98 (furnishing a company of actors); Kennicott *v.* Leavitt, 37 Ill. App. 435 (as manager of theater).

Michigan.— Buck *v.* Smith, 29 Mich. 166, 18 Am. Rep. 84, as partner.

Minnesota.— Alworth *v.* Seymour, 42 Minn. 526, 44 N. W. 1030, as agents.

Oregon.— Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803.

United States.— Karrick *v.* Hannaman, 168 U. S. 328, 18 S. Ct. 135, 42 L. ed. 484 (partner); Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509 (management of theater); General Electric Co. *v.* Westinghouse Electric, etc., Co., 144 Fed. 458 (as agent to sell, etc.); Taussig *v.* Corbin, 142 Fed. 660, 73 C. C. A. 656 (same).

England.— Hills *v.* Croll, 1 Coop. t. Cott 83, 47 Eng. Reprint 758, 9 Jur. 645, 14 L. J. Ch. 444, 2 Phil. 60, 22 Eng. Ch. 60, 41 Eng. Reprint 864; Ogden *v.* Fossick, 4 De G. F. & J. 426, 9 Jur. N. S. 288, 32 L. J. Ch. 73, 7 L. T. Rep. N. S. 515, 1 New Rep. 143, 11 Wkly. Rep. 128, 65 Eng. Ch. 331, 45 Eng. Reprint 1249 (as agent); Pickering *v.* Ely, 7 Jur. 479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109; Baldwin *v.* Society for Diffusion of Useful Knowledge, 2 Jur. 161, 9 Sim. 393, 16 Eng. Ch. 393, 59 Eng. Reprint 409; Stocker *v.* Wedderburn, 3 Kay & J. 393, 26 L. J. Ch. 713, 5 Wkly. Rep. 671, 69 Eng. Reprint 671, 69 Eng. Reprint 1162 (as agent to sell, etc.).

Where services are to be performed by plaintiff see *supra*, III, C, 3, c.

where it calls for building or operation of a railroad, other construction work, or other continuous acts.[48]

13. Where Plaintiff Has Performed. If plaintiff has performed his unenforceable promise the fact that before such performance there was a lack of mutuality in the remedy is no defense.[49]

14. Contract Terminable by Plaintiff at Any Time. A rule, unknown to English equity, has in late years obtained a foothold in several jurisdictions, that a continuing contract will not be enforced, specifically, if it is one which by its terms plaintiff is permitted to terminate at will. A reason for the rule is supposed to be found in the well-established doctrine that a contract terminable at

48. *Alabama.*— Tombigbee Valley R. Co. *v.* Fairford Lumber Co., 155 Ala. 575, 47 So. 88, operations of a sawmill.

California.— Pacific Electric R. Co. *v.* Campbell-Johnston, 153 Cal. 106, 94 Pac. 623 (construction and operation of railroad); Lattin *v.* Hazard, 91 Cal. 87, 27 Pac. 515 (operating railroad).

Illinois.— Suburban Constr. Co. *v.* Naugle, 70 Ill. App. 384, building railroad.

Iowa.—Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422, maintaining grain elevator, etc. *Compare*, however, Des Moines University *v.* Polk County Homestead, etc., Co., 87 Iowa 36, 53 N. W. 1080; Minneapolis, etc., R. Co. *v.* Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. Rep. 216.

Missouri.— Mastin *v.* Halley, 61 Mo. 196, erecting a building. *Compare*, however, Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19.

United States.— Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woolw. 26, building railroad.

England.— Blackett *v.* Bates, L. R. 1 Ch. 117, 12 Jur. N. S. 151, 35 L. J. Ch. 324, 13 L. T. Rep. N. S. 656, 14 Wkly. Rep. 319; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 22 L. J. Ch. 921, 17 Jur. 1015, 52 Eng. Ch. 710, 43 Eng. Reprint 358; Waring *v.* Manchester, etc., R. Co., 7 Hare 482, 14 Jur. 613, 18 L. J. Ch. 450, 27 Eng. Ch. 482, 68 Eng. Reprint 199 [*affirmed* in Hall & T. 239, 47 Eng. Reprint 1672] (building railroad); Peto *v.* Brighton, etc., R. Co., 1 Hem. & M. 468, 32 L. J. Ch. 677, 9 L. T. Rep. N. S. 227, 11 Wkly. Rep. 874, 71 Eng. Reprint 205 (building railroad). *Compare*, however, Madison Athletic Assoc. *v.* Brittin, 60 N. J. Eq. 160, 46 Atl. 652.

And see *supra*, note 44.

Where defendant contracted to give plaintiff a privilege and has received full payment therefor, but cannot compel plaintiff to continue in its enjoyment, the rule requiring mutuality of remedy has no application. Defendant, in such case, obviously would be the gainer and not the loser by plaintiff's ceasing to use the privilege. Joy *v.* St. Louis, 138 U. S. 1, 50, 11 S. Ct. 243, 34 L. ed. 843 [*affirming* 29 Fed. 546], where defendant railroad agreed to permit other railroads to use its right of way.

Building or construction contracts see *supra*, III, C, 4, a.

A contract to convey land to a railroad company for a right of way is not lacking in mutuality because it contains an introductory recital that, "Whereas [the railroad company] proposes to build a line of railway," etc., where it is obvious that the recital is not a covenant to build a railroad, which covenant could not be specifically enforced, but only a representation as an inducement to the contract, the truth or falsity of which would influence the court in granting or refusing specific performance. Tidewater R. Co. *v.* Hurt, 109 Va. 204, 63 S. E. 421.

49. *Alabama.*— Lane *v.* May, etc., Hardware Co., 121 Ala. 296, 25 So. 809, building.

California.— Brown *v.* Sebastopol, 153 Cal. 704, 96 Pac. 363, 19 L. R. A. N. S. 178 (personal services); Thurber *v.* Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536 (improving fruit land); Howard *v.* Throckmorton, 48 Cal. 482 (legal services); Ballard *v.* Carr, 48 Cal. 74 (legal services); Owen *v.* Frink, 24 Cal. 171 (labor).

Georgia.— Lindsay *v.* Warnock, 93 Ga. 619, 21 S. E. 127, developing a mine.

Illinois.— Oswald *v.* Nehls, 233 Ill. 438, 84 N. E. 619, agreement to devise in consideration of personal care and attention.

Indiana.— Denlar *v.* Hile, 123 Ind. 68, 24 N. E. 170, care and support.

Kansas.— Burnell *v.* Bradbury, 67 Kan. 762, 74 Pac. 279; Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715, legal services.

Massachusetts.— French *v.* Boston Nat. Bank, 179 Mass. 404, 60 N. E. 793; Howe *v.* Watson, 179 Mass. 30, 60 N. E. 415.

Minnesota.— Brown *v.* Munger, 42 Minn. 482, 44 N. W. 519, where the party asking the relief had made a selection which he could not have been forced to make.

Montana.— Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918.

Nebraska.— Teske *v.* Dittberner, 70 Nebr. 544, 98 N. W. 57, 113 Am. St. Rep. 802, 65 Nebr. 167, 91 N. W. 181, 101 Am. St. Rep. 614, personal service.

Nevada.— Turley *v.* Thomas, (1909) 101 Pac. 568, personal services.

South Carolina.— Columbia Water Power Co. *v.* Columbia, 5 S. C. 225.

West Virginia.— Boyd *v.* Brown, 47 W. Va. 238, 34 S. E. 907, drilling oil well.

United States.— Mississippi Glass Co. *v.* Franzen, 143 Fed. 501, 74 C. C. A. 135 [*reversing* 138 Fed. 924].

England.— Wilkinson *v.* Clements, L. R. 8 Ch. 96, 42 L. J. Ch. 38, 27 L. T. Rep. N. S. 834, building.

Canada.— Jackson *v.* Jessup, 5 Grant Ch. (U. C.) 524, building.

will by defendant will not be the subject of a decree, since it is to be presumed that the decree will at once be nullified by defendant.[50]

F. Doubtful Title — 1. General Rules — a. Marketable Title. In a suit by the vendor to enforce performance of a contract for the sale of land, the vendee will not be compelled to accept the title unless it is a marketable one; that is, one which will not expose him to litigation. To force upon the vendee a title which he may be compelled to defend in the courts is to impose upon him a hard bargain; and this a court of equity, in the exercise of its discretion, will refuse to do, irrespective of the question whether the title is actually good or bad.[51]

50. See *supra*, III, B. And see the following cases:

Alabama.— Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758, one of several defenses.

California.— Sturgis *v.* Galindo, 59 Cal. 28, 43 Am. Rep. 239, among other defenses, although plaintiff's right to terminate had long since expired.

Illinois.— Ulrey *v.* Keith, 237 Ill. 284, 86 N. E. 696.

Indiana.— Fowler Utilities Co. *v.* Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. N. S. 726, to compel heating company to furnish heat, use of which rested in discretion of the consumer, plaintiff. Specific performance was refused, although plaintiff had paid a large sum for installing a plant. And see State *v.* Cadwallader, (1909) 87 N. E. 644, 89 N. E. 319.

Compare, however, St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995.

Kentucky.— Berry *v.* Frisbie, 120 Ky. 337, 86 S. W. 558, 27 Ky. L. Rep. 724, *dicta*.

Michigan.— Rust *v.* Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720, lease on royalties to enable plaintiff, lessee, to prospect for ore.

North Carolina.— Soloman *v.* Wilmington Sewerage Co., 142 N. C. 439, 55 S. E. 300, 6 L. R. A. N. S. 391.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955 (among other reasons); Brooklyn Baseball Club *v.* McGuire, 116 Fed. 782; Federal Oil Co. *v.* Western Oil Co., 112 Fed. 373 [*affirmed* in 121 Fed. 674, 57 C. C. A. 428]; Bickford *v.* Davis, 11 Fed. 549. *Compare*, however, Franklin Tel. Co. *v.* Harrison, 145 U. S. 459, 12 S. Ct. 900, 36 L. ed. 776 (which seems on its facts to be inconsistent with the rule; but is said (Brooklyn Baseball Club *v.* McGuire, 116 Fed. 782) not to have impliedly overruled Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955); Singer Sewing-Mach. Co. *v.* Union Button Hole, etc., Co., 22 Fed. Cas. No. 12,904, Holmes 253.

Compare, however, Rolfe *v.* Rolfe, 1 Coop. t. Cott. 87, 47 Eng. Reprint 760, 10 Jur. 61, 15 Sim. 88, 38 Eng. Ch. 88, 60 Eng. Reprint 550.

The rule originated in some remarks in the course of the opinion in Rutland Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, 19 L. ed. 955, in which case, however, there were several other defenses of undoubted validity. In Rust *v.* Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720, it was the ground of the decision; a natural decision, since the court had recently refused specific performance of an ordinary option. Later cases, relying on these, seem to accept the rule as well established by unquestionable authority. None of the opinions give evidence of having weighed the very serious objections to the policy of the rule. There is no real analogy between the position of a defendant, resisting specific performance, who may at will nullify the decree, and that of a plaintiff, who has given the most practical possible demonstration of his desire to carry out the contract by engaging in a lawsuit for the purpose. To call the decree in the latter case an "idle formality" (Federal Oil Co. *v.* Western Oil Co., 112 Fed. 373 [*affirmed* in 121 Fed. 674, 57 C. C. A. 428]) is to outrage common sense. To decline relief in these cases on a ground so technical as to outlaw a large species of most important contracts, in which it is necessary, for one party's protection, that the duration of the contract should be more or less indefinite. Rust *v.* Conrad, *supra*, for instance, dealt such a blow to the development of the mineral resources of Michigan that it was quickly overruled by statute. Laws (1883), Act No. 73; Grummett *v.* Gingrass, 77 Mich. 369, 43 N. W. 999. Several of the cases cited, where plaintiff, in reliance on the contract, had incurred large expenditures, can only be described as flagrant miscarriages of justice. See Fowler Utilities Co. *v.* Gray, 168 Ind. 1, 79 N. E. 897, 7 L. R. A. N. S. 726, ignoring the previous decision of the same court in St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995.

51. "If, therefore, there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court may consider this to be a circumstance which renders the bargain a hard one for the purchaser, and one which in the exercise of its discretion it will not compel him to execute." Fry Spec. Perf. § 862. And see the following cases:

California.— McCroskey *v.* Ladd, (1891) 28 Pac. 216.

District of Columbia.— American Security, etc., Co. *v.* Muse, 4 App. Cas. 12.

Illinois.— Maltby *v.* Thews, 171 Ill. 264, 49 N. E. 486 [*affirming* 69 Ill. App. 30]; Street *v.* French, 147 Ill. 342, 35 N. E. 814.

Iowa.— Brown *v.* Widen, (1905) 103 N. W. 158.

Louisiana.— Bodcaw Lumber Co. *v.* White, 121 La. Ann. 715, 46 So. 782; Michener *v.* Reinach, 49 La. Ann. 360, 21 So. 552; Lockhart *v.* Smith, 47 La. Ann. 121, 16 So. 660; Beer *v.* Leonard, 40 La. Ann. 845, 5 So. 257.

The rule also applies to an agreement for a lease.[52] The court will not compel performance by the lessee if the lessor's title is defective or doubtful.

b. Where Other Claimants Are Parties to Suit. If, however, the claimants or persons interested in the title, other than the vendor, are parties to the suit for specific performance, so that their claim may be settled by the decree therein, the objection cannot be raised that the title exposes the vendee to litigation.[53]

c. Mere Possibility of Litigation. The doubt, to avail as a defense, must be a reasonable one, and rest upon some debatable ground. A bare possibility of litigation does not render a title doubtful.[54]

Maryland.— Shea *v.* Evans, 109 Md. 229, 72 Atl. 600; Second Universalist Soc. *v.* Dugan, 65 Md. 460, 5 Atl. 415; Gill *v.* Wells, 59 Md. 492.

Massachusetts.— Newburyport Sav. Inst. *v.* Puffer, 201 Mass. 41, 87 N. E. 562; Daniell *v.* Shaw, 166 Mass. 582, 44 N. E. 991; Richmond *v.* Gray, 3 Allen 25.

Michigan.— Powell *v.* Conant, 33 Mich. 396.

New Jersey.— Fisher *v.* Eggert, (Ch. 1906) 64 Atl. 957; Zane *v.* Weintz, 65 N. J. Eq. 214, 55 Atl. 641; Richards *v.* Knight, 64 N. J. Eq. 196, 53 Atl. 452; Paulmier *v.* Howland, 49 N. J. Eq. 364, 24 Atl. 268; Dobbs *v.* Norcross, 24 N. J. Eq. 327 (land in possession of and claimed by third party); St. Mary's Church *v.* Stockton, 8 N. J. Eq. 520.

New York.— Fleming *v.* Burnham, 100 N. Y. 1, 2 N. E. 905; Downey *v.* Seib, 102 N. Y. App. Div. 317, 92 N. Y. Suppl. 431; Felix *v.* Devlin, 90 N. Y. App. Div. 103, 86 N. Y. Suppl. 12 [*affirmed* in 91 N. Y. App. Div. 613, 88 N. Y. Suppl. 1101]; Bullard *v.* Bicknell, 26 N. Y. App. Div. 319, 49 N. Y. Suppl. 666 (and in possession of third party); McGrane *v.* Kennedy, 16 Daly 241, 10 N. Y. Suppl. 119; Seymour *v.* Delancey, Hopk. 436, 4 Am. Dec. 552 [*affirmed* in 5 Cow. 714].

North Carolina.— Triplett *v.* Williams, 149 N. C. 394, 63 S. E. 79.

Ohio.— Kellerman *v.* Government Loan, etc., Co., 7 Ohio S. & C. Pl. Dec. 408, 39 Cinc. L. Bul. 203.

Pennsylvania.—Herman *v.* Somers, 158 Pa. St. 424, 27 Atl. 1050, 38 Am. St. Rep. 851; Holt's Appeal, 98 Pa. St. 257 (faulty surveys); Herzberg *v.* Irwin, 92 Pa. St. 48; Kostenbader *v.* Spotts, 80 Pa. St. 430; Freetly *v.* Barnhart, 51 Pa. St. 279; Speakman *v.* Forepaugh, 44 Pa. St. 363; Nicol *v.* Carr, 35 Pa. St. 381; People's Sav. Bank's Appeal, 2 Pa. Cas. 287, 3 Atl. 821; Wetherill *v.* Mecke, Brightly 135.

South Carolina.— Butler *v.* O'Hear, 1 Desauss. Eq. 382, 1 Am. Dec. 671.

Texas.— Littlefield *v.* Tilsley, 26 Tex. 353.

West Virginia.— Spencer *v.* Sandusky, 46 W. Va. 582, 33 S. E. 221.

United States.— Lindsey *v.* Humbrecht, 162 Fed. 548; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185.

England.— Pegler *v.* White, 33 Beav. 403, 10 Jur. N. S. 330, 33 L. J. Ch. 569, 10 L. T. Rep. N. S. 84, 3 New Rep. 557, 12 Wkly. Rep. 455, 55 Eng. Reprint 423; Cooper *v.* Denne, 4 Bro. Ch. 80, 29 Eng. Reprint 788, 1 Ves. Jr. 565, 30 Eng. Reprint 491; Shapland *v.* Smith, 1 Bro. Ch. 75, 28 Eng. Reprint 994 (1780); said by Lord Eldon to be the first modern case which established the principle); Marlow *v.* Smith, 2 P. Wms. 198, 24 Eng. Reprint 698; Sloper *v.* Fish, 2 Ves. & B. 145, 35 Eng. Reprint 274 (principle said to have been repeatedly acted upon by Lord Hendricke); Stapylton *v.* Scott, 16 Ves. Jr. 272, 10 Rev. Rep. 179, 33 Eng. Reprint 988 (Lord Eldon); Vancouver *v.* Bliss, 11 Ves. Jr. 458, 8 Rev. Rep. 227, 32 Eng. Reprint 1164 (Lord Eldon); Roake *v.* Kidd, 5 Ves. Jr. 647, 31 Eng. Reprint 785.

See 44 Cent. Dig. tit. "Specific Performance," § 257 *et seq.*

The title must be such that a purchaser will not have difficulty in reselling the land. Nicol *v.* Carr, 35 Pa. St. 381.

52. Baskcomb *v.* Phillips, 6 Jur. N. S. 363, 29 L. J. Ch. 380, 1 L. T. Rep. N. S. 288, holding that if a party agrees to let an estate, and files a bill for the specific performance of the agreement, it will be dismissed, with costs, if, in the course of the suit, it should appear that the intended lessor had a defective title; even though the objections on which the refusal to take the lease was grounded, were frivolous and untenable.

53. Early *v.* Douglass, 110 Ky. 813, 62 S. W. 860, 23 Ky. L. Rep. 298; Robinson *v.* Henning, 4 S. W. 322, 9 Ky. L. Rep. 141 (former owner made a party and ratifies his defective deed); Chesman *v.* Cummings, 142 Mass. 65, 7 N. E. 13 (no question of fact being involved; construction of will). See *infra*, X, F, 2.

54. *Illinois.*— Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753.

Iowa.— Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340.

Kentucky.— Senning *v.* Bush, 62 S. W. 489, 63 S. W. 284, 23 Ky. L. Rep. 65.

Louisiana.—Grasser *v.* Blank, 110 La. Ann. 493, 34 So. 648.

Massachusetts.— Conley *v.* Finn, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399; Batt *v.* Mallon, 151 Mass. 477, 25 N. E. 17, 7 L. R. A. 840; First African M. E. Soc. *v.* Brown, 147 Mass. 296, 17 N. E. 549; Dow *v.* Whitney, 147 Mass. 1, 16 N. E. 722; Hayes *v.* Harmony Grove Cemetery, 108 Mass. 400.

New Jersey.— Vreeland *v.* Blauvelt, 23 N. J. Eq. 483.

New York.— Cambrelling *v.* Purton, 125 N. Y. 610, 26 N. E. 907.

Pennsylvania.—Dalzell *v.* Crawford, 1 Pars. Eq. Cas. 37, 2 Pa. L. J. 17.

South Carolina.— Webb *v.* Chisolm, 24 S. C. 487; Laurens *v.* Lucas, 6 Rich. Eq. 217.

d. Doubtful, Although Court's Opinion Is Favorable. The opinion of the court in favor of the validity of the title is not decisive. It is the duty of the court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be. The court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well founded.[55]

e. Opinion of Attorneys. The opinion of an attorney, however eminent, that a title is bad is not sufficient of itself to compel the court to declare that the title is doubtful, although it may have the effect to cause the court to scrutinize the matter carefully.[56]

f. Opinion of Other Courts. The rule appears to be settled, in England, that the adverse opinion of the trial court does not necessarily render the title doubtful in the appellate court. A contrary rule would amount to leaving the ultimate decision to the lower court.[57] A decision by a court of coördinate jurisdiction, adverse to the principle on which the title rests, it has been held, will raise a sufficient doubt.[58] But it has been held that a judge may hold a title free from doubt, although another judge has decided it to be doubtful.[59]

g. Questions of General Law. If the doubts arise upon a question of general

England.— Cattell *v.* Corsall, 4 Y. & C. Exch. 228.

See 44 Cent. Dig. tit. "Specific Performance," § 262 *et seq.*

But a doubt was held to arise from the possibility of a woman seventy-five years old giving birth to a child, on account of presumption of law in List *v.* Rodney, 83 Pa. St. 483.

55. *Illinois.*— Street *v.* French, 147 Ill. 342, 35 N. E. 814.

Minnesota.— Townshend *v.* Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 Am. St. Rep. 736, 3 L. R. A. 739.

Missouri.— Hymers *v.* Branch, 6 Mo. App. 511.

New York.— Kilpatrick *v.* Barron, 125 N. Y. 751, 26 N. E. 925 [*affirming* 54 Hun 322, 7 N. Y. Suppl. 542] (majority of court thought the title good); Ferris *v.* Plummer, 42 Hun 440. But see Kullman *v.* Cox, 167 N. Y. 411, 60 N. E. 744, 53 L. R. A. 884, where title was forced on vendee, although three out of seven judges thought it bad.

Ohio.— Hopple *v.* Overbeck, 10 Ohio Dec. (Reprint) 296, 20 Cinc. L. Bul. 25.

Pennsylvania.— Speakman *v.* Forepaugh, 44 Pa. St. 363.

England.— Collier *v.* McBean, L. R. 1 Ch. 81, 12 Jur. N. S. 1, 35 L. J. Ch. 144, 13 L. T. Rep. N. S. 484, 14 Wkly. Rep. 156; Rogers *v.* Waterhouse, 4 Drew. 329, 6 Wkly. Rep. 823, 62 Eng. Reprint 127 (opinion must be so clear that court does not apprehend that another judge would differ); Pyrke *v.* Waddingham, 10 Hare 1, 44 Eng. Ch. 1, 68 Eng. Reprint 813 (a leading case); Price *v.* Strange, 6 Madd. 159, 22 Rev. Rep. 266, 56 Eng. Reprint 1052; Rose *v.* Calland, 5 Ves Jr. 186, 31 Eng. Reprint 537.

Canada.— Manson *v.* Howison, 4 Brit. Col. 404.

See 44 Cent. Dig. tit. "Specific Performance," § 258 *et seq.*

56. Atkinson *v.* Taylor, 34 Mo. App. 442; Dalzell *v.* Crawford, 1 Pars. Eq. Cas. (Pa.) 37, 2 Pa. L. J. 17; Hamilton *v.* Buckmaster, L. R. 3 Eq. 323, 12 Jur. N. S. 986, 36 L. J. Ch. 58, 15 L. T. Rep. N. S. 177, 15 Wkly. Rep. 149. It is not error to exclude evidence of attorneys that they regard the title as insecure. Moser *v.* Cochrane, 107 N. Y. 35, 13 N. E. 442 [*affirming* 12 Daly 292]. The opinion of an attorney that the title is marketable is immaterial. Murray *v.* Ellis, 112 Pa. St. 485, 3 Atl. 845. But in the earliest reported case "the opinion of learned men against the title" was relied upon by the court. Marlow *v.* Smith, 2 P. Wms. 198, 24 Eng. Reprint 698.

57. Alexander *v.* Mills, L. R. 6 Ch. 124, 40 L. J. Ch. 73, 24 L. T. Rep. N. S. 206, 19 Wkly. Rep. 310; Beioley *v.* Carter, L. R. 4 Ch. 230, 17 Wkly. Rep. 300; Sheppard *v.* Doolan, 3 Dr. & War. 1, 18, 5 Ir. Eq. 6, per Lord St. Leonards. But in Hamilton *v.* Buckmaster, L. R. 3 Eq. 323, 12 Jur. N. S. 986, 36 L. J. Ch. 58, 15 L. T. Rep. N. S. 177, 15 Wkly. Rep. 149, it was said by Page-Wood, V. C. (Lord Hatherly) that the trial court should be influenced by the fact that the expression of doubt by such court prevents, on appeal, the forcing of the title on the purchaser. The adverse opinion of the inferior court may of course be of weight. Collier *v.* McBean, L. R. 1 Ch. 81, 12 Jur. N. S. 1, 35 L. J. Ch. 144, 13 L. T. Rep. N. S. 484, 14 Wkly. Rep. 156, where, although the appellate court favored the title, specific performance was refused.

58. Ferris *v.* Plummer, 42 Hun (N. Y.) 440. See Cook *v.* Dawson, 3 De G. F. & J. 127, 30 L. J. Ch. 359, 4 L. T. Rep. N. S. 226, 9 Wkly. Rep. 434, 64 Eng. Ch. 100, 45 Eng. Reprint 826; Rose *v.* Calland, 5 Ves. Jr. 186, 31 Eng. Reprint 537.

59. Osborne *v.* Rowlett, 13 Ch. D. 774, 49 L. J. Ch. 310, 42 L. T. Rep. N. S. 650, 28 Wkly. Rep. 365 (Jessel, M. R.); Mullings *v.* Trinder, L. R. 10 Eq. 449, 39 L. J. Ch. 833, 23 L. T. Rep. N. S. 580, 18 Wkly. Rep. 1186 (Romilly, M. R.), same title which had been held doubtful in the leading case of Pyrke *v.* Waddingham, 10 Hare 1.

law, the court should judge whether the law upon the point is or is not settled, enforcing specific performance in the former case.[60] The result of modern English decisions seems to be that specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous authorities, or if there are decisions or *dicta* of weight which show that another judge or another court hearing the question before it might come to a different conclusion.[61]

h. Doubtful Construction of Instrument. Where the question is not one regarding a general principle of law, but the doubt arises concerning the construction of some "inartificial and illy expressed instrument" in the chain of title, specific performance should not be compelled, even though the court itself may lean in favor of the title.[62]

i. Doubtful Fact. Where the title depends on the existence of a fact which is not a matter of record, and the fact depends for its proof entirely upon oral

60. *Delaware.*— Diamond State Iron Co. *v.* Husbands, 8 Del. Ch. 205, 68 Atl. 240, constitutionality of enabling act under which plaintiff claimed title.

Illinois.— Street *v.* French, 147 Ill. 342, 35 N. E. 814.

Massachusetts.— Chesman *v.* Cummings, 142 Mass. 65, 7 N. E. 13.

Minnesota.— Fairchild *v.* Marshall, 42 Minn. 14, 43 N. W. 563, not a doubtful question when the rule has been settled by a decision of the court binding upon it in subsequent cases.

New Jersey.—Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 33 Atl. 305, construction of statute.

New York.— Ebling *v.* Dreyer, 149 N. Y. 460, 44 N. E. 155 [*reversing* 79 Hun 319, 29 N. Y. Suppl. 459], construction of statute; possibility that the court may in the future disregard the precedent is exceedingly remote.

Ohio.— Ludlow *v.* O'Neil, 29 Ohio St. 181, construction; doubt, however honestly entertained by the purchaser, will not justify him in refusing to execute his contract.

England.— Radford *v.* Willis, L. R. 7 Ch. 7, 41 L. J. Ch. 19, 25 L. T. Rep. N. S. 720, 20 Wkly. Rep. 132 [*reversing* L. R. 12 Eq. 105, 40 L. J. Ch. 484, 24 L. J. Ch. 484, 24 L. T. Rep. N. S. 574, 19 Wkly. Rep. 845] (a broad general principle of construction involved); Alexander *v.* Mills, L. R. 6 Ch. 124, 133, 40 L. J. Ch. 73, 24 L. T. Rep. N. S. 206, 19 Wkly. Rep. 310 (stating broadly that "as a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is"); Forster *v.* Abraham, L. R. 17 Eq. 351, 43 L. J. Ch. 199, 22 Wkly. Rep. 386 [*following* Alexander *v.* Mills, L. R. 6 Ch. 124, 40 L. J. Ch. 73, 24 L. T. Rep. N. S. 206, 19 Wkly. Rep. 310]; Bull *v.* Hutchens, 32 Beav. 615, 9 Jur. N. S. 954, 8 L. T. Rep. N. S. 716, 11 Wkly. Rep. 866, 55 Eng. Reprint 242; Pyrke *v.* Waddingham, 10 Hare 1, 44 Eng. Ch. 1, 68 Eng. Reprint 813 (if the law upon the point is settled).

"**The doubt suggested must raise a question of law that is fairly debatable,**— one upon which the judicial mind would hesitate before deciding it. If it depend on the construction of an act of the legislature or of a written instrument, and the construction is readily arrived at by the application of the well-known rules of interpretation, it ought not to be regarded as making the title doubtful." Hadderly *v.* Johnson, 42 Minn. 443, 445, 44 N. W. 527, 18 Am. St. Rep. 521.

61. Richards *v.* Knight, 64 N. J. Eq. 196, 53 Atl. 452; Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 120, 33 Atl. 305 (summing up the modern English cases); Paret *v.* Keneally, 30 Hun (N. Y.) 15 (interpretation of statutes); *In re* Thackwray, 40 Ch. D. 34, 58 L. J. Ch. 72, 59 L. T. Rep. N. S. 815, 37 Wkly. Rep. 74 (construction of general act of parliament); Palmer *v.* Locke, 18 Ch. D. 381, 51 L. J. Ch. 214, 45 L. T. Rep. N. S. 229, 30 Wkly. Rep. 419; Osborne *v.* Rowlett, 13 Ch. D. 774, 49 L. J. Ch. 310, 42 L. T. Rep. N. S. 650, 28 Wkly. Rep. 365; Blesse *v.* Clanmorris, 3 Bligh 62, 4 Eng. Reprint 527 (house of lords does not settle the question); Freer *v.* Hesse, 4 De G. M. & G. 495, 2 Eq. Rep. 13, 17 Jur. 703, 23 L. J. Ch. 338, 1 Wkly. Rep. 242, 487, 53 Eng. Ch. 386, 43 Eng. Reprint 600 (construction of act of parliament); Collard *v.* Sampson, 4 De G. M. & G. 224, 1 Eq. Rep. 262, 17 Jur. 641, 22 L. J. Ch. 729, 53 Eng. Ch. 174, 43 Eng. Reprint 493 [*reversing* 16 Beav. 543, 51 Eng. Reprint 889] (although a single decision favors the principle which would make the title good); Pyrke *v.* Waddingham, 10 Hare 1, 44 Eng. Ch. 1, 68 Eng. Reprint 813; Rose *v.* Calland, 5 Ves. Jr. 186, 31 Eng. Reprint 537; Manson *v.* Howison, 4 Brit. Col. 404.

62. Hunting *v.* Damon, 160 Mass. 441, 35 N. E. 1064 (a decision of the court would be authority but not *res adjudicata*); Jeffries *v.* Jeffries, 117 Mass. 184 (doubt whether proviso in a deed creates a condition or a restriction); Zane *v.* Weintz, 65 N. J. Eq. 214, 55 Atl. 641; Richards *v.* Knight, 64 N. J. Eq. 196, 53 Atl. 452; Paulmier *v.* Howland, 49 N. J. Eq. 364, 24 Atl. 268; Cornell *v.* Andrews, 35 N. J. Eq. 7 (doubt whether mortgage conveyed a fee or life-estate); Lincoln *v.* Arcedeckne, 1 Coll. 98, 28 Eng. Ch. 98, 63 Eng. Reprint 338 (private act of parliament); Jervoise *v.* Northumberland, 1 Jac. & W. 559, 21 Rev. Rep. 229, 37 Eng. Reprint 481 (per Lord Eldon); Sheffield *v.* Mulgrave, 2 Ves. Jr. 526, 30 Eng. Reprint 758. For further illustration see *infra*, IV, F, 2, a *et seq.*

evidence, the case must be made very clear by the vendor to warrant the court in ordering specific performance. The opinion of the chancellor or of the appellate court can have little if any curative effect upon a doubtful title where the doubt relates to a matter of fact; since a disputed fact may be proved in one litigation to-day and disproved in another between different parties to-morrow.[63] But "a title dependent on a fact must be regarded as marketable where (1) the fact is so conclusively proved in a suit by the vendor for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law, and (2) where there is no reasonable ground for apprehending that the same fact cannot be in like manner proved, if necessary, at any time thereafter for the protection of the purchaser."[64]

2. Instances of Doubtful or Defective Title[65] — a. Doubtful Construction of Will. A doubt fatal to the vendor's suit frequently arises on the construction of a will on which the title depends.[66]

63. Barger *v.* Gery, 64 N. J. Eq. 263, 53 Atl. 483; Fahy *v.* Cavanagh, 59 N. J. Eq. 278, 44 Atl. 154; Irving *v.* Campbell, 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620 [*reversing* 56 N. Y. Super. Ct. 224, 4 N. Y. Suppl. 103] (execution and delivery of recent deed in chain of title can be established only by parol); Moore *v.* Williams, 115 N. Y. 586, 22 N. E. 233, 12 Am. St. Rep. 844, 5 L. R. A. 654 (apparent encumbrance which can only be removed by resort to parol evidence); Kostenbader *v.* Spotts, 80 Pa. St. 430; Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535 (title depends on an estoppel *in pais*).

"If the evidence be not readily accessible to the vendee so that he can establish the fact at any time when called upon, it would certainly affect the marketable value of the title." Hedderly *v.* Johnson, 42 Minn. 443, 445, 44 N. W. 527, 18 Am. St. Rep. 521.

"It seems that a rational doubt may be said to exist when a court of law would not feel called upon to instruct a jury to find that the fact existed, on the existence of which the vendor's title depends." Shriver *v.* Shriver, 86 N. Y. 575, 584, Folger, C. J.

Doubts as to matters of fact fatal to the title see Calhoon *v.* Belden, 3 Bush (Ky.) 674 (secondary evidence, when records burned, insufficient); Emmert *v.* Stouffer, 64 Md. 543, 3 Atl. 293, 6 Atl. 177 (doubt as to existence of a will); Richmond *v.* Koenig, 43 Minn. 480, 45 N. W. 1093 (doubt whether the land is a homestead, so as to be free from judgments); Townshend *v.* Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 Am. St. Rep. 736, 3 L. R. A. 739 (doubt whether conditions calling for exercise of sale have arisen); Paulmier *v.* Howland, 49 N. J. Eq. 364, 24 Atl. 268; Dingley *v.* Bon, 130 N. Y. 607, 29 N. E. 1023 [*affirming* 5 Silv. Sup. 510, 8 N. Y. Suppl. 935] (deed, thirty years old, in chain of title, recited a previous conveyance of part of the land to a third person); Vought *v.* Williams, 120 N. Y. 253, 24 N. E. 195, 17 Am. St. Rep. 634, 8 L. R. A. 591 [*affirming* 46 Hun 638] (a much cited case; a question of fact whether a person is living; presumption of death not strong enough); Speakman *v.* Forepaugh, 44 Pa. St. 363 (title depended on proof that plaintiff was a *bona fide* purchaser without notice of outstanding title); Elliott *v.* Tyler, 3 Pa. Cas. 584, 6 Atl. 917; Griffin *v.* Cunningham, 19 Gratt. (Va.) 571; Smith *v.* Death, 5 Madd. 371, 21 Rev. Rep. 314, 56 Eng. Reprint 937; Lowes *v.* Lush, 14 Ves. Jr. 547, 9 Rev. Rep. 344, 33 Eng. Reprint 631 (that plaintiff has committed an act of bankruptcy raises a doubt; not necessary for vendee to show that there are actually any debts). But see Kullman *v.* Cox, 167 N. Y. 411, 60 N. E. 744, 53 L. R. A. 884, where title was forced on the purchaser, although there was a disputed question of fact, three out of seven judges dissenting; a revolutionary opinion by Parker, C. J.

Doubt as to the sanity of vendor's grantor has been held sufficient. Brokaw *v.* Duffy, 165 N. Y. 391, 59 N. E. 196.

64. Barger *v.* Gery, 64 N. J. Eq. 263, 53 Atl. 483, Stevenson, V. C. See also Potter *v.* Ogden, 68 N. J. Eq. 409, 59 Atl. 673.

Doubt amounting to a bare possibility insufficient to defeat specific performance see Batt *v.* Mallon, 151 Mass. 477, 25 N. E. 17, 7 L. R. A. 840; Dow *v.* Whitney, 147 Mass. 1, 7, 16 N. E. 722 (possible existence of unrecorded deed, but no evidence thereof); Cambrelleng *v.* Purton, 125 N. Y. 610, 26 N. E. 907 (presumption of death of person who disappeared seventeen years before; the important case of Vought *v.* Williams, 120 N. Y. 253, 24 N. E. 195, 17 Am. St. Rep. 634, 8 L. R. A. 591, *supra*, being ignored); Schermerhorn *v.* Niblo, 2 Bosw. (N. Y.) 161 (possible existence of a will).

65. In the following classification there will be included, for convenience, cases where the title was held not merely doubtful, but defective.

As to defect or failure of title see also *infra*, VI, A, 3.

66. *Massachusetts.*— Hunting *v.* Damon, 160 Mass. 441, 35 N. E. 1064; Butts *v.* Andrews, 136 Mass. 221; Cunningham *v.* Blake, 121 Mass. 333.

New Jersey.— Fisher *v.* Eggert, (Ch. 1906) 64 Atl. 957.

New York.— Kilpatrick *v.* Barron, 125 N. Y. 751, 26 N. E. 925 [*affirming* 54 Hun 322, 7 N. Y. Suppl. 542]; Bearns *v.* Mela, 10 N. Y. Suppl. 429.

North Carolina.— Batchelor *v.* Macon, 67 N. C. 181.

b. Doubt as to Power of Sale. A doubt, generally of law, sometimes of fact, frequently arises as to the existence, validity, or proper exercise of a power of sale by an executor or trustee, where the vendor's title is derived through such sale.[67]

c. Doubt From Defective Conveyance. The doubt may arise from some defect in a conveyance in the vendor's chain of title.[68]

Ohio.— Breuer *v.* Hayes, 10 Ohio Dec. (Reprint) 391, 21 Cinc. L. Bul. 29.

South Carolina.— Lowry *v.* Muldrow, 8 Rich. Eq. 241.

United States.— Sohier *v.* Williams, 22 Fed. Cas. No. 13,159, 1 Curt. 479.

England.— Collier *v.* McBean, L. R. 1 Ch. 81, 12 Jur. N. S. 1, 35 L. J. Ch. 144, 13 L. T. Rep. N. S. 484, 14 Wkly. Rep. 156; Sykes *v.* Sheard, 33 Beav. 114, 9 Jur. N. S. 886, 33 L. J. Ch. 181, 8 L. T. Rep. N. S. 820, 2 New Rep. 540, 11 Wkly. Rep. 1014, 55 Eng. Reprint 310 [*affirmed* in 2 De G. J. & S. 6, 9 Jur. N. S. 1262, 33 L. J. Ch. 183, 9 L. T. Rep. N. S. 430, 3 New Rep. 144, 12 Wkly. Rep. 117, 67 Eng. Ch. 5, 46 Eng. Reprint 276]; Cook *v.* Dawson, 3 De G. F. & J. 127, 30 L. J. Ch. 359, 4 L. T. Rep. N. S. 226, 9 Wkly. Rep. 434, 64 Eng. Ch. 100, 45 Eng. Reprint 826; Pyrke *v.* Waddingham, 10 Hare 1, 44 Eng. Ch. 1, 68 Eng. Reprint 813 (a leading case; specific performance refused, although court's opinion was strongly favorable); Sharp *v.* Adcock, 4 Russ. 374, 4 Eng. Ch. 374, 38 Eng. Reprint 846; Willcox *v.* Bellaers, Turn. & R. 491, 12 Eng. Ch. 491, 37 Eng. Reprint 1189.

See 44 Cent. Dig. tit. "Specific Performance," § 275.

Remand to make other claimants parties see Kornegay *v.* Morris, 123 N. C. 128, 31 S. E. 375.

There was no reasonable doubt and the vendee was compelled to accept the title in the following cases: Cushing *v.* Spalding, 164 Mass. 287, 41 N. E. 297; Ladd *v.* Whitney, 117 Mass. 201; Vreeland *v.* Blauvelt, 23 N. J. Eq. 483; Viele *v.* Keeler, 129 N. Y. 190, 29 N. E. 78 [*reversing* 13 N. Y. Suppl. 196]; Kelso *v.* Lorillard, 85 N. Y. 177; Davidson *v.* Jones, 112 N. Y. App. Div. 254, 98 N. Y. Suppl. 265; Heck *v.* Volz, 14 N. Y. St. 409; Macomb *v.* Miller, 9 Paige (N. Y.) 265; Hoeveler *v.* Hune, 138 Pa. St. 442, 21 Atl. 15.

67. **Title doubtful** see Townshend *v.* Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 Am. St. Rep. 736, 3 L. R. A. 739 (whether conditions, under which exercise of the power was authorized, had arisen, presented doubtful question of fact); Chambers *v.* Tulane, 9 N. J. Eq. 146 (executor had no power of sale); Abbott *v.* James, 111 N. Y. 673, 19 N. E. 434 (question as to the power depended partly on unknown facts); Fleming *v.* Burnham, 100 N. Y. 1, 2 N. E. 905 (faulty execution of power by executors caused doubt); Salisbury *v.* Ryon, 105 N. Y. App. Div. 445, 94 N. Y. Suppl. 352 (executors); Paget *v.* Melcher, 42 N. Y. App. Div. 76, 58 N. Y. Suppl. 913 (trustees); Holly *v.* Hirsch, 63 Hun 241, 17 N. Y. Suppl. 821 [*reversed* in 135 N. Y. 590, 32 N. E. 709, on the ground that the title was not doubtful] (executor); Paret *v.* Keneally, 30 Hun 15 (whether administrator with will annexed had power an unsettled question of law); Bearns *v.* Mela, 10 N. Y. Suppl. 429 (doubt whether trust with power of sale was an unlawful suspension of the power of alienation); Breuer *v.* Hayes, 10 Ohio Dec. (Reprint) 583, 22 Cinc. L. Bul. 144 [*affirming* 10 Ohio Dec. (Reprint) 391, 21 Cinc. L. Bul. 29] (per Taft, J., as to proper exercise of power by executors); Clouse's Appeal, 192 Pa. St. 108, 43 Atl. 413 (executors).

Doubt resolved in favor of sale see Leeds *v.* Sparks, 8 Del. Ch. 280, 68 Atl. 239; Harris *v.* Jackson, 17 S. W. 441, 13 Ky. L. Rep. 427 (sale such as court would order for benefit of *cestuis que trustent*); Hatt *v.* Rich, 59 N. J. Eq. 492, 45 Atl. 969; Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 33 Atl. 305; Cruikshank *v.* Parker, 52 N. J. Eq. 310, 29 Atl. 682 [*reversing* 51 N. J. Eq. 21, 26 Atl. 925]; Zabriskie *v.* Morris, etc., R. Co., 33 N. J. Eq. 22 (trust to sell descended to common law heir of survivor of trustee); Hutchings *v.* Baldwin, 7 Bosw. (N. Y.) 236; Hamilton *v.* Buckmaster, L. R. 3 Eq. 323, 12 Jur. N. S. 986, 36 L. J. Ch. 58, 15 L. T. Rep. N. S. 177, 15 Wkly. Rep. 149.

68. Black *v.* Aman, 6 Mackey (D. C.) 131 (imperfect acknowledgment); Smith *v.* Turner, 50 Ind. 367 (mistake in description); Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527 [*reversing* 9 N. Y. App. Div. 465, 41 N. Y. Suppl. 214] (misdescription); Irving *v.* Campbell, 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620 [*reversing* 56 N. Y. Super. Ct. 224, 4 N. Y. Suppl. 103] (insufficiently acknowledged deed); Bensel *v.* Gray, 80 N. Y. 517 [*affirming* 44 N. Y. Super. Ct. 372] [defective tax lease); Paolillo *v.* Faher, 56 N. Y. App. Div. 241, 67 N. Y. Suppl. 638 (defective acknowledgment of power of attorney); Tiffin *v.* Shawhan, 43 Ohio St. 178, 1 N. E. 581 (informal and defective conveyance by a city).

But the fact that a deed in the chain of title was not acknowledged or recorded until after the grantee's death does not give rise to a doubt whether it was delivered in his lifetime, since delivery is presumed to have been made at the time of execution. Conley *v.* Finn, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399.

A misdescription may be sufficiently cured by intrinsic evidence furnished by the deed, making the real meaning apparent. Brookman *v.* Kurzman, 94 N. Y. 272, 66 How. Pr. 237.

Misnomer in name of grantor cured by evidence see Hellreigel *v.* Manning, 97 N. Y. 56.

d. Doubt From Judicial Sale. The doubt or defect frequently arises where the title depends on the regularity or validity of a judicial sale, or of the proceedings leading to such sale, or of a transfer of title made by order of court.[69]

e. Encumbrances — (i) *In General.* A vendee who has a right to a good title cannot be compelled to accept a title which is defective because of outstanding, valid encumbrances, or which may expose him to litigation because clouded with encumbrances whose validity is a matter of dispute.[70] This applies where

69. *District of Columbia.*—American Security, etc., Co. *v.* Muse, 4 App. Cas. 12, question of jurisdiction of court to order sale.

Louisiana.— James *v.* Meyer, 41 La. Ann. 1100, 7 So. 618, minors parties to partition proceeding not represented by guardian.

Maryland.— Gill *v.* Wells, 59 Md. 492.

Massachusetts.— Martin *v.* Hamlin, 176 Mass. 180, 57 N. E. 381, foreclosure sale of doubtful validity.

Minnesota.— Williams *v.* Schembri, 44 Minn. 250, 46 N. W. 403, guardian's sale not in conformity with order of court.

New Jersey.— Young *v.* Rathbone, 16 N. J. Eq. 224, 84 Am. Dec. 151, will not force a title depending on illegal or invalid sale, while it remains open to revision at the discretion of a court of law, although the judgment unreversed might be conclusive of the parties' rights.

New York.— Palmer *v.* Morrison, 104 N. Y. 132, 10 N. E. 144 [*affirming* 51 N. Y. Super. Ct. 530] (defective sale by assignee in bankruptcy); Croshy *v.* Thedford, 13 Daly 150, 7 N. Y. Civ. Proc. 245 (foreclosure sale, court not having jurisdiction of the parties).

Pennsylvania.— Holmes *v.* Woods, 168 Pa. St. 530, 32 Atl. 54 (partition sale in which contingent interests were not represented); Swain *v.* Fidelity Ins., etc., Safe Deposit Co., 54 Pa. St. 455 (title founded upon irregular partition proceedings, from which minor parties may, after attaining their majority, take a writ of error).

See 44 Cent. Dig. tit. "Specific Performance," § 272.

Transfer of title by decree of foreign court. — A title depending on a decree of a foreign court ordering a transfer of land within the local jurisdiction is defective. Watts *v.* Waddle, 6 Pet. (U. S.) 389, 8 L. ed. 437 [*affirming* 29 Fed. Cas. No. 17,295, 1 McLean 200].

Title not doubtful see Small *v.* Marburg, 77 Md. 11, 25 Atl. 920; Day *v.* Kingsland, 57 N. J. Eq. 134, 41 Atl. 99 (title depended on partition proceedings, the record title being good on its face, burden was on vendee to show facts making title doubtful); Ebling *v.* Dreyer, 149 N. Y. 460, 44 N. E. 155 (alleged defects rested wholly on construction of statute and decree made thereunder); Greenblatt *v.* Hermann, 144 N. Y. 13, 38 N. E. 966 [*affirming* 69 Hun 298, 23 N. Y. Suppl. 565] (probate sale, petition for which was sufficient to give jurisdiction. "If defect or doubt . . . depends upon some extrinsic fact not disclosed by the record, [vendee] must show the fact"); Althause *v.* Radde, 3 Bosw. (N. Y.) 410 (although guardian for infants failed to answer or enter appearance in partition proceedings until after judgment); Sloane *v.* Martin, 24 N. Y. Suppl. 661 (legal presumption of regularity of judicial proceedings); Dalzell *v.* Crawford, 1 Pars. Eq. Cas. (Pa.) 37, 2 Pa. L. J. 17 (omissions in the judicial process through which the title passed, which omissions could be supplied by amendments by the court in which the proceeedings were had, not a sufficient objection).

Community property.—Where a grantee of community property acquiring title to an undivided half from the survivor of the community individually and to the other half from him as administrator of the deceased member of the community, in proceedings for the administration of the undivided half, contracted to sell the property to a third person, who took possession thereof and made a partial payment, and who refused either to accept a return of the price paid, or to yield his possession, the grantee was entitled to sue for specific performance. Wiley *v.* Verhaest, 52 Wash. 475, 100 Pac. 1008.

70. *Illinois.*— Harding *v.* Olson, 177 Ill. 298, 52 N. E. 482, clouded with adverse liens.

Louisiana.— Fitzpatrick *v.* Leake, 47 La. Ann. 1643, 18 So. 649, encumbered by mortgage of record.

Maryland.— Kraft *v.* Egan, 78 Md. 36, 26 Atl. 1082, land subject to ground-rent.

Massachusetts.— Loring *v.* Whitney, 167 Mass. 550, 46 N. E. 57 (encumbered by deed of trust of doubtful validity); Sturtevant *v.* Jacques, 14 Allen 523 (on the face of the title papers, property was subject to a trust, and there was no proof that the trust had been discharged); Park *v.* Johnson, 7 Allen 378 (subject to mortgages more onerous than those stated in the contract).

Minnesota.—Corey *v.* Clarke, 55 Minn. 311, 56 N. W. 1063, outstanding mechanic's lien claims.

New York.— Dyker Meadow Land, etc., Co. *v.* Cook, 159 N. Y. 6, 53 N. E. 690 [*affirming* 3 N. Y. App. Div. 164, 38 N. Y. Suppl. 222] (local assessment on the land which might be valid); Hinckley *v.* Smith, 51 N. Y. 21; Reeder *v.* Schneider, 3 Thomps. & C. 104.

Oregon.—Sanford *v.* Wheelan, 12 Oreg. 301, 7 Pac. 324.

Pennsylvania.— Mitchell *v.* Steinmetz, 97 Pa. St. 251 (municipal claims); Nicol *v.* Carr, 35 Pa. St. 381 (railroad mortgages, the validity of which presented grave questions).

United States.— Wesley *v.* Eells, 177 U. S. 370, 20 S. Ct. 661, 44 L. ed. 810 [*affirming* 90 Fed. 151] (mortgage); Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185. The last case points out the difference in the effect of an admitted charge, to which the purchase-money may be applied (see *infra*, IV, F, 2, e,

the title is encumbered or clouded by a judgment,[71] by an inchoate dower right,[72] by a right of homestead,[73] by community property rights,[74] or by an easement.[75]

(II) *Encumbrances Which Can Be Discharged From the Purchase-Money.* Mortgages or other encumbrances which can be discharged out of the purchase-money do not constitute a bar to the action.[76]

(III) *Dormant or Invalid Liens.* Liens which, beyond a reasonable doubt, are dormant or invalid, do not render the title unmarketable.[77]

(IV) *Restrictive Covenants or Conditions.* A vendee who has a right to a good title cannot be forced to take the property when it is subject to covenants or conditions restricting its use.[78]

(II)) and a contested charge which will involve the vendee in litigation.

See 44 Cent. Dig. tit. "Specific Performance," § 266 *et seq.*

71. Brown *v.* Barngrover, 82 Iowa 204, 47 N. W. 1082; Walsh *v.* Barton, 24 Ohio St. 28 (although there is other property sufficient to satisfy the lien); Newberry *v.* French, 98 Va. 479, 36 S. E. 519 (where the liens greatly exceeded the price).

But a judgment from which the vendor has appealed, with an appeal-bond and ample security against the amount of the judgment with costs, is not a defect. Brewer *v.* Herbert, 30 Md. 301, 96 Am. Dec. 582.

72. Parks *v.* Brooks, 16 Ala. 529; Beavers *v.* Baucum, 33 Ark. 722, where acknowledgment set forth relinquishment of dower, but deed itself contained no relinquishment. *Compare infra,* VII, B, 2, e.

Dower in land of intermediate grantor barred by widow in election to take under the will see Fairchild *v.* Marshall, 42 Minn. 14, 43 N. W. 563.

73. Castlebury *v.* Maynard, 95 N. C. 281, sale of homestead without joinder of wife; title defective.

74. In Louisiana, a married woman, vendor, must overcome the presumption that the property is community. Hero *v.* Block, 44 La. Ann. 1032, 11 So. 821; Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555.

75. McPherson *v.* Schade, 149 N. Y. 16, 43 N. E. 527 [*affirming* 8 Misc. 424, 28 N. Y. Suppl. 659] (right of way); Remsen *v.* Wingert, 112 N. Y. App. Div. 234, 98 N. Y. Suppl. 388 [*affirmed* in 188 N. Y. 632, 81 N. E. 1174] (easement of light).

But the right of an adjoining owner to use a party-wall did not constitute a defect, since the value of the premises was not diminished. Hendricks *v.* Stark, 37 N. Y. 106, 93 Am. Dec. 549.

76. *Kansas.*— Guild *v.* Atchison, etc., R. Co., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77.

Louisiana.— Grimshaw *v.* Hart, 6 Rob. 265, mortgagee's offer to release, on vendee's compliance with terms of the sale.

New York.— Frain *v.* Klein, 18 N. Y. App. Div. 64, 45 N. Y. Suppl. 394; Guynet *v.* Mantel, 4 Duer 86; Rinaldo *v.* Hausmann, 52 How. Pr. 190; Keating *v.* Gunther, 10 N. Y. Suppl. 734.

South Dakota.— Edmison *v.* Zborowski, 9 S. D. 40, 68 N. W. 288.

Texas.— Upton *v.* Maurice, (Civ. App. 1896) 34 S. W. 642.

United States.— Megibben *v.* Perin, 49 Fed. 183.

See 44 Cent. Dig. tit. "Specific Performance," § 267. See *infra,* VII, B, 4.

The possibility of claims by unknown assignees of the mortgage notes was met by a decree providing for indemnity out of the purchase-money in Rife *v.* Lybarger, 49 Ohio St. 422, 31 N. E. 768, 17 L. R. A. 403.

But where the cash payment is not adequate to discharge the mortgage, the case is otherwise; although the encumbrancers have verbally agreed to release their encumbrances and accept the mortgage to be given by the purchaser. Hinckley *v.* Smith, 51 N. Y. 21; Reeder *v.* Schneider, 3 Thomps. & C. (N. Y.) 104.

77. *Nebraska.*— Solt *v.* Anderson, 62 Nebr. 153, 86 N. W. 1076.

New Jersey.— Young *v.* Collier, 31 N. J. Eq. 444 (uncanceled mortgage, which appeared by the accounts of the administrator of the mortgagor, and by indorsements on the mortgage, to have been paid over sixty years; and lien for unpaid taxes which had been paid); Miller *v.* Miller, 25 N. J. Eq. 354 (judgments against heir of vendor, not a lien on the property).

New York.— See Falvey *v.* Bridges, 15 N. Y. Suppl. 848 (where the claim had been released); Seligman *v.* Sonneborn, 11 N. Y. St. 305; Doll *v.* Ingram, 8 N. Y. St. 253 (record of a contract to convey the land made by a person without authority, not a cloud on the title).

Pennsylvania.— Espy *v.* Anderson, 14 Pa. St. 308, sufficient for vendor to prove payment of judgment, although satisfaction was not entered on the docket.

Virginia.— Richards *v.* Mercer, 1 Leigh 125, strong reasons for believing that whole of mortgage debt had been paid.

See 44 Cent. Dig. tit. "Specific Performance," §§ 266–268.

78. Shea *v.* Evans, 109 Md. 229, 72 Atl. 600; Peabody Heights Co. *v.* Willson, 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393 (building restrictions); Newbold *v.* Peabody Heights Co., 70 Md. 493, 17 Atl. 372, 3 L. R. A. 579; Wetmore *v.* Bruce, 118 N. Y. 319, 23 N. E. 303 [*affirming* 54 N. Y. Super. Ct. 149] (the restriction impairs value of the land); Altman *v.* McMillin, 115 N. Y. App. Div. 234, 100 N. Y. Suppl. 970; Goodrich *v.* Pratt, 114 N. Y. App. Div. 771, 100 N. Y. Suppl. 187 (although the restriction does not lessen the value of the land); Ray-

f. Encroachments. Where the building sold encroaches upon the adjoining land of a stranger, and title to the part encroached upon has not been obtained by adverse possession, the defect is fatal, unless the encroachment is insignificant in extent.[79]

g. Suit Pending Against Vendor. That another suit for recovery of the land or an interest therein is pending against the vendor usually renders the title doubtful;[80] but title has been forced upon the vendee notwithstanding such pending suit, when it appeared to the satisfaction of the court that such suit could not succeed or where the complaint therein did not state a cause of action.[81]

h. Fraud or Breach of Trust Causing Doubt. A title is doubtful where it appears by inference from the record, or on facts shown outside of the record, that there is a reasonable chance that a conveyance in the vendor's chain of title may be avoided for fraud or breach of trust.[82] But such objection may be obviated by proof that the vendor was a *bona fide* purchaser, without notice, actual or constructive, of the fraud.[83]

nor *v.* Lyon, 46 Hun (N. Y.) 227; Post *v.* Bernheimer, 31 Hun (N. Y.) 247 (condition of doubtful validity); Post *v.* Weil, 8 Hun (N. Y.) 418; Batley *v.* Foerderer, 162 Pa. St. 460, 29 Atl. 868; Anders' Estate, 12 Phila. 45 (restrictions might affect value of property); National Waterworks Co. *v.* Kansas City, 65 Fed. 691 (sale of waterworks; company was under contract to supply water to a third party).

Immaterial reservation.— But it is no objection to the title that it is subject to a reservation of mines, water power, etc., where there is nothing in or upon the land to which the reservation can apply (Winne *v.* Reynolds, 6 Paige (N. Y.) 407); and it has been held that ordinary building restrictions applying to a whole neighborhood do not constitute encumbrances unless they affect the marketable quality of the title (Egle *v.* Morrison, 27 Ohio Cir. Ct. 497).

79. McPherson *v.* Schade, 149 N. Y. 16, 43 N. E. 527 [*affirming* 8 Misc. 424, 28 N. Y. Suppl. 659]; Spero *v.* Shultz, 14 N. Y. App. Div. 423, 43 N. Y. Suppl. 1016 [*affirmed* in 160 N. Y. 660, 55 N. E. 1101] (one wall on adjoining lot); McDonald *v.* Bach, 29 Misc. (N. Y.) 96, 60 N. Y. Suppl. 557 [*affirmed* in 51 N. Y. App. Div. 549, 64 N. Y. Suppl. 831] (plaintiff's wall overlapped three fourths of an inch; insignificant); Drake *v.* Shiels, 7 N. Y. Suppl. 209; Sassertah *v.* Metzgar, 30 Abb. N. Cas. (N. Y.) 407, 27 N. Y. Suppl. 959 (possible encroachment of one inch upon street; no risk to purchaser).

80. Linn *v.* McLean, 80 Ala. 360; Simon *v.* Vanderveer, 155 N. Y. 377, 49 N. E. 1043, 63 Am. St. Rep. 683 (adverse claimant had filed a complaint good on its face, vendee need not examine the evidence on which the suit was based); Ambrose *v.* Kuhn, 11 Ohio Dec. (Reprint) 338, 26 Cinc. L. Bul. 127 (other suit not frivolous); Hopple *v.* Overbeck, 10 Ohio Dec. (Reprint) 296, 20 Cinc. L. Bul. 25.

81. Owings *v.* Baldwin, 8 Gill (Md.) 337; Aldrich *v.* Bailey, 132 N. Y. 85, 30 N. E. 264 [*reversing* 8 N. Y. Suppl. 435], suit to set aside deed in chain of title did not show that present vendor purchased with notice of the fraud. See Bull *v.* Hutchens, 32 Beav. 615, 9 Jur. N. S. 954, 8 L. T. Rep. N. S. 716, 11 Wkly. Rep. 866, 55 Eng. Reprint 242, registered *lis pendens* does not create a lien, but merely puts purchaser on inquiry as to validity of the claim. But see Hopple *v.* Overbeck, 10 Ohio Dec. (Reprint) 296, 20 Cinc. L. Bul. 25, where specific performance was refused, although the court believed the pending suit to be groundless.

82. *Illinois.*— Close *v.* Stuyvesant, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161, fraud on land laws.

Michigan.— Ford *v.* Wright, 114 Mich. 122, 72 N. W. 197, title derived from a purchase by trustee of trust property.

Minnesota.—Williams *v.* Schembri, 44 Minn. 250, 46 N. W. 403, doubtful whether guardian's sale might not be set aside as breach of trust.

Mississippi.— Morrison *v.* Kinstra, 55 Miss. 71, where vendor purchased with funds of his *cestui que trust*.

New Jersey.— Tillotson *v.* Gesner, 33 N. J. Eq. 313, vendor's title liable to attack as in fraud of his grantor's creditors.

New York.— People *v.* Open Bd. of Stock Brokers Bldg. Co., 92 N. Y. 98 [*modifying* 28 Hun 274] (voidable sale by trustee to himself); Howell *v.* Donegan, 74 Hun 410, 26 N. Y. Suppl. 805 (plaintiff's deed showed on its face that it was in fraud of his grantor's creditors). But see Kullman *v.* Cox, 167 N. Y. 411, 60 N. E. 744, 53 L. R. A. 884.

Pennsylvania.— Elliott *v.* Tyler, 3 Pa. Cas. 584, 6 Atl. 917, purchase by attorney of property belonging to his clients.

Tennessee.— Collins *v.* Smith, 1 Head 251, trustee purchased for himself.

England.— Hartley *v.* Smith, Buck 368, that a deed may be impeached as in fraud of creditors.

See 44 Cent. Dig. tit. "Specific Performance," § 261 *et seq.*

Unsupported claim.— That a grantor of the vendor, six years before, filed a paper in the registry of deeds, alleging that the deed was obtained from him by fraud, is of no importance, when such claim is unsupported by evidence or by any subsequent action. First African M. E. Soc. *v.* Brown, 147 Mass. 296, 17 N. E. 549.

83. Levy *v.* Iroquois Bldg Co., 80 Md. 300,

i. Debts of Deceased Owner. A doubt may exist whether the land is free from claims of creditors of a former owner deceased.[84]

j. Other Heirs. A doubt may also arise, where the title is traced by inheritance, as to the non-existence of other heirs.[85]

k. Other Claim Barred by Laches. The title has been held marketable where the claim which is alleged to exist against the property cannot be asserted because of laches.[86]

l. Title by Adverse Possession. Where the vendor did not expressly contract for a good record title, a title depending upon adverse possession is often so free from doubt that it may be forced upon the purchaser.[87]

30 Atl. 707; Nicholson *v.* Condon, 71 Md. 620, 18 Atl. 812.. And see Aldrich *v.* Bailey, 132 N. Y. 85, 30 N. E. 264 [*reversing* 8 N. Y. Suppl. 435].

84. Chauncey *v.* Leominster, 172 Mass. 340, 52 N. E. 719 (where sufficient time had not elapsed to raise presumption that administration would not be granted; and mere failure of defendant to produce evidence of debts against the estate did not remove doubt); Mayer *v.* McCune, 59 How. Pr. (N. Y.) 78.

Bare possibility.— In the following cases there was only a bare possibility of such claims insufficient to defeat the title. Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753 (interpreting Michigan law); Van Bibber *v.* Reese, 71 Md. 608, 18 Atl. 892, 6 L. R. A. 332; Hayes *v.* Harmony Grove Cemetery, 108 Mass. 400; Moser *v.* Cochrane, 107 N. Y. 35, 13 N. E. 442 [*affirming* 12 Daly 292]; Schermerhorn *v.* Niblo, 2 Bosw. (N. Y.) 161.

85 Hays *v.* Tribble, 3 B. Mon. (Ky.) 106; Barnett *v.* Higgins, 4 Dana (Ky.) 565; Beckwith *v.* Marryman, 2 Dana (Ky.) 371.

There was no such doubt, sufficient to defeat the title, in the following cases: Greffet *v.* Willman, 114 Mo. 106, 21 S. W. 459; Day *v.* Kingsland, 57 N. J. Eq. 134, 41 Atl. 99; Greenblatt *v.* Hermann, 144 N. Y. 13, 38 N. E. 966.

86. Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578; First African M. E. Soc. *v.* Brown, 147 Mass 296, 17 N. E. 549; Kip *v.* Hirsh, 103 N. Y. 565, 9 N. E. 317 [*reversing* 53 N. Y. Super. Ct. 1] (defect in foreclosure sale in not making assignee for creditors of mortgagor party to the suit cured by lapse of forty-five years); Pangburn *v.* Miles, 10 Abb. N. Cas. (N. Y.) 42 (mortgage thirty years past due presumed to be satisfied). See also *supra*, IV, F, 2, e, (III).

87. Although the title depends upon matters of fact outside of the record (see *supra*, IV, F, 1, i), the nature of the facts is such that evidence of them is usually easily accessible to the vendee. See the following cases:

District of Columbia.— Cox *v.* Cox, 7 Mackey 1.

Illinois.— Crowell *v.* Druly, 19 Ill. App. 509; Parks *v.* Laroche, 15 Ill. App. 354, title is "good to a moral certainty."

Indiana.— Tewksbury *v.* Howard, 138 Ind 103, 110, 36 N. E. 355, "title by adverse possession is as high as any known to the law."

Iowa.— Stevenson *v.* Polk, 71 Iowa 278, 32 N. W. 340.

Kentucky.— Logan *v.* Bull, 78 Ky. 607; Watkins *v.* Pfeiffer, 92 S. W. 562, 29 Ky. L. Rep. 97.

Maryland.— Erdman *v.* Corse, 87 Md. 506, 40 Atl. 107; Foreman *v.* Wolf, (1894) 29 Atl. 837.

Massachusetts.— Conley *v.* Finn, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399.

Minnesota.—Hedderly *v.* Johnson, 42 Minn. 443, 44 N. W. 527, 18 Am. St. Rep. 521, *dictum*.

Nebraska.— Ballou *v.* Sherwood, 32 Nebr. 666, 49 N. W. 790, 50 N. W. 1131, statute of limitations not arrested by former owner's death and possibility of minor heirs.

New Jersey.— Barger *v.* Gery, 64 N. J. Eq. 263, 53 Atl. 483; Day *v.* Kingsland, 57 N. J. Eq. 134, 41 Atl 99.

New York.— Kahn *v.* Chapin, 152 N. Y. 305, 46 N. E. 489 [*affirming* 84 Hun 541, 32 N. Y. Suppl. 859] (*cestui's* right to avoid trustee's purchase barred by limitations); New York Steam Co. *v.* Stern, 46 Hun 206 (trust for creditors which had long ceased to be operative); Abrams *v.* Rhoner, 44 Hun 507; Ottinger *v.* Strasburger, 33 Hun 466 [*affirmed* in 102 N. Y. 692]; Falvey *v.* Bridges, 15 N. Y. Suppl. 878 (highway long discontinued); Bohm *v.* Fay, 18 Abb. N. Cas. 175; Seymour *v.* De Lancey, Hopk. 436, 14 Am. Dec. 552 [*affirmed* in 5 Cow. 714] (title not impeached by contingency that former owner might have died leaving heirs disabled from asserting their rights).

Pennsylvania.— Pratt *v.* Eby, 67 Pa. St. 396; Shober *v.* Dutton, 6 Phila. 185.

South Carolina.— Miller *v.* Cramer, 48 S. C. 282, 26 S. E. 657.

Virginia.— Peers *v.* Barnett, 12 Gratt. 410. See also Wade *v.* Greenwood, 2 Rob. 474, 40 Am. Dec. 759.

West Virginia.—Core *v.* Wigner, 32 W. Va. 277, 9 S. E. 36.

England.— Scott *v.* Nixon, 2 C. & L. 185, 3 Dr. & War. 388, 6 Ir. Eq. 8; Games *v.* Bonnor, 54 L. J. Ch. 517, 33 Wkly. Rep. 64.

See 44 Cent. Dig. tit. "Specific Performance," § 277

Title held insufficient.— In the following cases, recognizing the rule of the text, the title, for various reasons, was insufficient. Page *v.* Greeley, 75 Ill. 400 (since vendee contracted for a good record title); Brown *v.* Cannon, 10 Ill. 174 (time had not run

V. PART PERFORMANCE OF ORAL CONTRACTS, GIFTS, EASEMENTS, AND LICENSES.[88]

A. General Principles — 1. THE STATUTE OF FRAUDS. The clauses of the English statute of frauds which are affected by the doctrine of part performance are as follows: "No action shall be brought . . . (3) to charge any Person upon any Agreement made upon Consideration of Marriage; (4) or upon any Contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them; (5) or upon any Agreement that is not to be performed within the Space of one Year from the making thereof; (6) unless the Agreement upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing, and signed by the Party to be charged therewith, or some other Person thereunto by him lawfully authorized." [89]

2. STATUTE OF FRAUDS NOT AN INSTRUMENT OF FRAUD. It has been a fundamental principle of the courts of equity from the beginning, in dealing with the statute, that it shall not be made a means of committing a fraud, especially as its expressed purpose was the prevention of a large class of frauds and perjuries.[90] In particular the rule was early established that if plaintiff was induced by the actual fraud of defendant to dispense with a written memorandum of the contract, he may have specific performance notwithstanding the statute.[91] But the fact that defendant has promised to reduce the agreement to writing and afterward refuses to comply with the promise does not constitute such a fraud.[92]

3. ORIGIN OF DOCTRINE OF PART PERFORMANCE. The doctrine that certain acts

against possible claimants under disability to assert their rights); Tevis *v.* Richardson, 7 T. B. Mon. (Ky.) 654; Lewis *v.* Herndon, 3 Litt. (Ky.) 358, 14 Am. Dec. 68 (possession not long enough); Noyes *v.* Johnson, 139 Mass. 436, 31 N. E. 767 (since vendee contracted for a good record title); Heller *v.* Cohen, 154 N. Y. 299, 48 N. E. 527 [*reversing* 9 N. Y. App. Div. 465, 41 N. Y. Suppl. 214] (possession not shown to be adverse); Spero *v.* Shultz, 14 N. Y. App. Div. 423, 43 N. Y. Suppl. 1016 [*affirmed* in 160 N. Y. 660, 55 N. E. 1101] (not shown that there were not persons against whom the statute had not run); McCabe *v.* Kenny, 52 Hun (N. Y.) 514, 5 N. Y. Suppl. 678 (adverse possession not proved); Warner *v.* Will, 5 Misc. (N. Y.) 329, 25 N. Y. Suppl. 749 (adverse possession not proved); Boggs *v.* Bodkin, 32 W. Va. 566, 9 S. E. 891, 5 L. R. A. 245 (adverse possession not proved).

88. See, generally, FRAUDS, STATUTE OF, 20 Cyc. 147.

Specific performance of parol compromise see COMPROMISE AND SETTLEMENT, 8 Cyc. 546.

89. St. 29 Car. II, c. 3, § 4. See FRAUDS, STATUTE OF, 20 Cyc. 147. There is considerable variety in the wording of the statutes in the different states of this country, but this variety has not, in general, prevented the adoption of the English doctrine of part performance, which had been formulated before the enactment of the American statutes. See Pugh *v.* Good, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534.

For example of specific performance of a contract made before the adoption of the statute in Virginia see Zane *v.* Zane, 6 Munf. (Va.) 406.

Sufficiency of the memorandum under the statute see FRAUDS, STATUTE OF, 20 Cyc. 252 *et seq.*

Legal rights and remedies of parties to a contract within the statute see FRAUDS, STATUTE OF, 20 Cyc. 147.

90. A very large portion of American equity consists in the application of this principle: For example, to trusts *ex maleficio*. See TRUSTS.

Plaintiff may be compelled to comply with oral contract as condition of relief.— In pursuance of the general principle, and of the maxim, "He who seeks equity, must do equity," the court may indirectly enforce a contract not directly enforceable either in law or equity, by making plaintiff's relief conditional on his performing an agreement which failed to comply with the formalities of the statute of frauds. Kirkland *v.* Downing, 106 Ga. 530, 32 S. E. 632.

91. **For illustrations of this rule** see *infra*, V, C, 1, (b).

92. Box *v.* Stanford, 13 Sm. & M. (Miss.) 93, 51 Am. Dec. 142; Whitchurch *v.* Bevis, 2 Bro. Ch. 559, 29 Eng. Reprint 306; Wood *v.* Midgley, 5 De G. M. & G. 41, 2 Eq. Rep. 729, 23 L. J. Ch. 553, 2 Wkly. Rep. 301, 54 Eng. Ch. 34, 43 Eng. Reprint 784. *Contra*, Leak *v.* Morrice, 2 Ch. Cas. 135, 22 Eng. Reprint 883; Hollis *v.* Whiteing, 1 Vern. Ch. 151, 23 Eng. Reprint 380. And see Equitable Gas-Light Co. *v.* Baltimore Coal-Tar, etc., Co., 65 Md. 73, 3 Atl. 108, 63 Md. 285.

Accident.— Where the contract was written out and defendant promised to sign it but was prevented by his death, it was held that the accident made an exception to the statute of frauds. Finucane *v.* Kearney, Freem. (Miss.) 65.

by way of carrying out a parol contract for the sale of lands warrant a court of equity in decreeing specific performance, notwithstanding the statute of frauds, was established, in England, within less than a decade after the enactment of the statute.[93] It may be conjectured that the reluctance of the courts of equity to comply fully with the apparent prohibitions of the statute sprang from a fear that a radical change in the habits of an agricultural people, relating to so vital a matter as the sale and leasing of land, could not safely be effected by legislative enactment;[94] that a literal enforcement of the statute would result in frauds and hardships far more widespread than those which it was designed to suppress.[95]

4. Attitude of the Courts Toward the Doctrine. During the first century of its existence the doctrine was in several instances interpreted much more liberally in plaintiff's favor than at the present day.[96] By the beginning of the nineteenth century, however, a strong reaction had set in. By many of the American courts it was adopted with great reluctance;[97] and strong expressions in condemnation of the doctrine, and in praise of the general policy of the statute of frauds, are very frequent in the reports.[98] In somewhat recent years, however, these expressions appear to have become less frequent; and it is noteworthy that some of the most familiar applications of the doctrine in this country at the present day are almost unknown to or distinctly repudiated by the English courts.[99]

5. To What Contracts the Doctrine Applies — a. In General. The doctrine of part performance does not apply to contracts not to be performed within a year, and not relating to land;[1] nor to a promise, invalid because oral, to answer for the debt, default, or miscarriage of another.[2] The provision of the statute relating to contracts not to be performed within a year does not extend to contracts for the sale of land which have been partly performed. If the contract is for an

93. Butcher *v.* Stapely, 1 Vern. Ch. 363, 23 Eng. Reprint 524, at least as early as 1685, per Lord Jeffries, Ch.

94. "With a people most of whom were ignorant of the art of writing, and whose habit of seeing estates conveyed by parol, and livery of seisin, was inveterate, by at least four hundred years," the statute was likely to be productive of hardship. Purcell *v.* Coleman, 6 D. C. 59, 62 [*affirmed* in 4 Wall. (U. S.) 513, 18 L. ed. 435]. See also Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524.

95. For valuable observations on the relation of conveyance by livery of seizin to the doctrine of part performance of oral contracts for sale of land see Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391.

96. See *infra*, V, C, 2, f.

97. For states which have rejected the doctrine see *infra*, V, B, 2.

For states which accept the doctrine in a somewhat modified form see *infra*, V, D, 3.

98. See the leading cases in the states which reject the doctrine, and, among innumerable other cases, the following: German *v.* Machin, 6 Paige (N. Y.) 288, 293 (per Walworth, Ch.); Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 132, 147 (per Kent, Ch.); Lenington *v.* Campbell, Tapp. (Ohio) 137; Moore *v.* Small, 19 Pa. St. 461, 466 (per Woodward, J.); Garner *v.* Stubblefield, 5 Tex. 552; Lindsay *v.* Lynch, 2 Sch. & Lef. 1, 5, 9 Rev. Rep. 54 (per Ld. Redesdale: "That statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred," etc.). In Moore *v.* Small, *supra*, Woodward, J., in the course of very forcible observations on the statutes, says: "It is remarkable how completely, both in England and Pennsylvania, the public mind has acquiesced in these enactments. History tells of no popular movement in either of these representative governments, for the repeal or material modification of the statute of frauds and perjuries. Chancellors and judges have often manifested great uneasiness under its operation, and have expounded and refined until the rule has ceased to be looked for in the statute itself, but must be tracked through volumes of jarring and contradictory decisions. The people however, whose representatives furnished the rule, have indicated their willingness that it should have full course, by never calling on their representatives to repeal it."

99. See *infra*, V, H; V, K. Perhaps no other equity is more frequently applied by the American courts at present than that arising from part performance.

1. Osborne *v.* Kimball, 41 Kan. 187, 21 Pac. 163; Equitable Gas-Light Co. *v.* Baltimore Coal-Tar, etc., Co., 63 Md. 285; Britain *v.* Rossiter, 11 Q. B. D. 123, 48 L. J. Exch. 362, 40 L. T. Rep. N. S. 240, 27 Wkly. Rep. 482. But see Harwood *v.* Jones, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180.

2. Rowell *v.* Smith, 123 Wis. 510, 102 N. W. 1.

interest in land, the fact that it is not to be performed within a year is no obstacle to its specific performance, if there has been sufficient part performance to take it out of the clause of the statute relating to contracts for the sale of land.[3]

b. Sale of Equitable Interests. The doctrine of part performance applies to the sale of equitable interests, as of unpatented land.[4]

c. Contracts of Corporations. Acts of part performance are binding upon corporations equally as well as upon individuals.[5]

d. Parol Variation. The doctrine of part performance applies not only to a contract resting wholly in parol, but also to a parol variation of a written contract;[6] but the parol modification is not validated by part performance of the written contract, to which the act of part performance is referable.[7]

e. Sales Under Direction of Court Not Within Statute. While the statute of frauds applies to ordinary sales by auction, it does not apply, in England, to certain sales under the direction of the court.[8]

6. Fraud or Estoppel the Foundation of the Doctrine — a. In General. The "fraud" which is constantly said to be the foundation of the doctrine does not mean actual fraud, in the sense of conscious deceit. Defendant may have entered into the contract with the full intention of carrying it out. The word is used, in this connection, in the sense, familiar in the usage of courts of equity, of unjust or unconscientious conduct, working a detriment to plaintiff, for which the law affords no adequate remedy. "The fraud which will entitle the purchaser to a specific performance, is that which consists in setting up the statute against the performance, after the purchaser has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the vendor is held by force of his acts or silent acquiescence, which have misled the purchaser to his harm, to be estopped from setting up the statute of frauds."[9]

3. Blunt *v.* Tomlin, 27 Ill. 93; Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Stitt *v.* Rat Portage Lumber Co., 96 Minn. 27, 104 N. W. 561.

Doctrine not necessarily confined to land contracts.— In McManus *v.* Cooke, 35 Ch. D. 681, 697, 51 J. P. 708, 56 L. J. Ch. 662, 56 L. T. Rep. N. S. 900, 35 Wkly. Rep. 754, Kay, J., says: "The doctrine of part-performance of a parol agreement, which enables proof of it to be given notwithstanding the Statute of Frauds, though principally applied to the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing."

As to contracts in consideration of marriage see *infra*, V, C, 1.

4. Kay *v.* Watson, 17 Ohio 27; Cox *v.* Bray, 28 Tex. 247.

5. Howard *v.* Patent Ivory Mfg. Co., L. R. 38 Ch. D. 156, 57 L. J. Ch. 878, 58 L. T. Rep. N. S. 395, 36 Wkly. Rep. 801; Wilson *v.* West Hartlepool R. Co., 2 De G. J. & S. 475, 11 Jur. N. S. 124, 34 L. J. Ch. 241, 11 L. T. Rep. N. S. 692, 5 New Rep. 289, 13 Wkly. Rep. 361, 67 Eng. Ch. 371, 46 Eng. Reprint 459.

6. Moale *v.* Buchanan, 11 Gill & J. (Md.) 314; Roberge *v.* Winne, 144 N. Y. 709, 39 N. E. 631; Wall *v.* Minneapolis, etc., R. Co., 86 Wis. 48, 56 N. W. 367.

7. Buttz *v.* Colton, 6 Dak. 306, 43 N. W. 717.

8. *Ex p.* Cutts, 3 Deac. 242, 267; Atty.-Gen. *v.* Day, 1 Ves. 218, 27 Eng. Reprint 992; Blagden *v.* Bradbear, 12 Ves. Jr. 466, 8 Rev. Rep. 354, 33 Eng. Reprint 176.

9. Gallagher *v.* Gallagher, 31 W. Va. 9, 13, 5 S. E. 297. The cases in which this explanation of the doctrine has been given are innumerable. See among others the following:

Alabama.— Brewer *v.* Brewer, 19 Ala. 481.

Arkansas.— Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

California.— Eshleman *v.* Henrietta Vineyard Co., 102 Cal. 199, 36 Pac. 579; Weber *v.* Marshall, 19 Cal. 447; Arguello *v.* Edinger, 10 Cal. 150; Tohler *v.* Folsom, 1 Cal. 207; Stewart *v.* Smith, 6 Cal. App. 152, 91 Pac. 667.

Illinois.— Temple *v.* Johnson, 71 Ill. 13; Quinn *v.* Stark County Tel. Co., 122 Ill. App. 133.

Iowa.— Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Kansas.— Edwards *v.* Fry, 9 Kan. 417; Galbraith *v.* Galbraith, 5 Kan. 402.

Maine.— Green *v.* Jones, 76 Me. 563.

b. The Test of Each Act of Part Performance. The principle that plaintiff shall have suffered a detriment from his change of position in pursuance of the contract, which admits of no full and certain compensation in damages, is not only the general foundation of the doctrine, but the test by which each act of part performance is measured to determine its sufficiency to take the case out of the statute.[10]

c. Whether Acts Must Be Done by Plaintiff. It would seem to follow, as a corollary from the general rule, and it has sometimes been stated in broad terms, that the act relied on must have been done by plaintiff or the person under whom he claims.[11] But this rule is subject to qualification at least in the cases where the vendor or lessor is plaintiff.[12]

7. Act Must Be Unequivocally Referable to Contract — a. In General. Another test, which is applicable to nearly all, in the opinion of a few courts to absolutely all, alleged acts of part performance, is found in the rule that the act must be unequivocally referable to the contract; or that it must of itself give rise to the inference of some contract relating to the land. The rule was very clearly stated by an eminent English judge, as follows: "It is, in general, of the essence of such an act that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract. Of this, a common example is the delivery of possession. One man without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part-performance. . . . But an act which, though in truth done in performance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part-performance taking the case out of the Statute of Frauds; as, for example, the payment of a sum of money, alleged to be purchase-money. The fraud, in a moral point of view, may be as great in the one case

Maryland.— Semmes *v.* Worthington, 38 Md. 298.

Michigan.— McMurtric *v.* Bennette, Harr. 124.

Minnesota.— Jorgenson *v.* Jorgenson, 81 Minn. 428, 84 N. W. 221; Brown *v.* Hoag, 35 Minn. 373, 29 N. W. 135.

New Hampshire.— Ham *v.* Goodrich, 33 N. H. 32.

New Jersey.— Nihert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Brown *v.* Brown, 33 N. J. Eq. 650.

New York.— Wheeler *v.* Reynolds, 66 N. Y. 227.

Ohio.— Cooper *v.* Cooper, 8 Ohio S. & C. Pl. Dec. 35, 6 Ohio N. P. 99.

Pennsylvania.— Newkumet *v.* Kraft, 10 Phila. 127.

Texas.— Sullivan *v.* O'Neal, 66 Tex. 433, 1 S. W. 185; Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18; Dugan *v.* Colville, 8 Tex. 126.

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870.

Vermont.— Meach *v.* Stone, 1 D. Chipm. 182, 6 Am. Dec. 719.

Virginia.— Helton *v.* Johnson, (1897) 27 S. E. 579; Lester *v.* Lester, 28 Gratt. 737; Wright *v.* Pucket, 22 Gratt. 370.

West Virginia.— Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297.

United States.— *Ex p.* Storer, 23 Fed. Cas. No. 13,490; 2 Ware 298.

England.—Caton *v.* Caton, L. R. 1 Ch. 137, 12 Jur. N. S. 171, 35 L. J. Ch. 292, 14 L. T. Rep. N. S. 34, 14 Wkly. Rep. 267; Britain *v.* Rossiter, 11 Q. B. D. 123, 48 L. J. Exch. 362, 40 L. T. Rep. N. S. 240, 27 Wkly. Rep. 482 (by Thesiger, L. J.); McManus *v.* Cooke, 35 Ch. D. 681, 51 J. P. 708, 56 L. J. Ch. 662, 56 L. T. Rep. N. S. 900, 35 Wkly. Rep. 754; Wilson *v.* West Hartlepool R. Co., 2 De G. J. & S. 475, 11 Jur. N. S. 124, 11 L. T. Rep. N. S. 692, 13 Wkly. Rep. 361, 67 Eng. Ch. 371, 46 Eng. Reprint 459; Mundy *v.* Joliffe, 3 Jur. 1045, 9 L. J. Ch. 95, 5 Myl. & C. 167, 46 Eng. Ch. 152, 41 Eng. Reprint 334.

10. See *infra*, V, C, 2, a; V, D, 1, b; V, H, 3, etc.

11. Rathbun *v.* Rathbun, 6 Barb. (N. Y.) 98; Caton *v.* Caton, L. R. 1 Ch. 137, 12 Jur. N. S. 171, 35 L. J. Ch. 292, 14 L. T. Rep. N. S. 34, 14 Wkly. Rep. 267. See Pomeroy Spec. Perf. § 105. That plaintiff can set up the acts of the person under whom he claims see Brown *v.* Hoag, 35 Minn. 373, 29 N. W. 135. See also *infra*, X.

12. See *infra*, V, M. It appears to be entirely inconsistent with the late English case of Dickinson *v.* Barrow, [1904] 2 Ch. 339, 73 L. J. Ch. 701, 91 L. T. Rep. N. S. 161. And see Williams *v.* Evans, L. R. 19 Eq. 547, 44

as in the other; but in the latter cases the court does not in general give relief." [13]

b. But Not Necessarily to the Particular Contract. The rule has sometimes been so worded as to require the act of part performance to be unequivocal evidence of the particular agreement charged in the bill, not merely of some agreement concerning the land.[14] But this is to demand the impossible; since certain essential terms of a contract, such as the price, or the exact duration of a lease, are in their nature incapable of proof by circumstantial evidence.[15]

c. Rule Treated in England as Foundation of the Doctrine. Indications are not infrequent in the English cases that the rule in question is not merely a limiting principle on the operation of the doctrine of part performance, but may be taken to be the very foundation of the doctrine in all its branches.[16] This view was finally adopted by the house of lords, two centuries after the enactment of the statute. According to this theory, the doctrine does not depend upon any "fraud" wrought upon plaintiff and acting as an estoppel against defendant, but upon the fact that plaintiff's act affords strong circumstantial evidence of some contract

L. J. Ch. 319, 32 L. T. Rep. N. S. 359, 23 Wkly. Rep. 466. See also *infra*, V, J.

13. Dale *v.* Hamilton, 5 Hare 369, 381, 26 Eng. Ch. 369, 67 Eng. Reprint 955 [*quoted* in Maddison *v.* Alderson, L. R. 8 App. Cas. 467, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820 (per Wigram, V. C.); Frame *v.* Dawson, 14 Ves. Jr. 386, 387, 9 Rev. Rep. 304, 33 Eng. Reprint 569 (where the court, per Grant, M. R., said: "The principle of the cases is, that the act must be of such a nature, that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted, to shew, what the agreement is"). For application of the rule see *infra*, V, C, 2, a; V, D, 1, b; V, E, 1; V, F, 1; V, H, 4, etc. See also Keatts *v.* Rector, 1 Ark. 391; Van Epps *v.* Redfield, 69 Conn. 104, 36 Atl. 1011; Seitman *v.* Seitman, 204 Ill. 504, 68 N. E. 461 [*affirming* 106 Ill. App. 671]; Sands *v.* Thompson, 43 Ind. 18; Sweeney *v.* O'Hora, 43 Iowa 34; Bennett *v.* Dyer, 89 Me. 17, 35 Atl. 1004; Semmes *v.* Worthington, 38 Md. 298; Duvall *v.* Myers, 2 Md. Ch. 401; Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432; Emmel *v.* Hayes, 102 Mo. 186, 14 S. W. 209, 22 Am. St. Rep. 769, 11 L. R. A. 323; Ducie *v.* Ford, 8 Mont. 233, 19 Pac. 414; Neibert *v.* Baghurst, (N. J. Ch. 1892) 25 Atl. 474; Rathbun *v.* Rathbun, 6 Barb. (N. Y.) 98; Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131; Wolfe *v.* Frost, 4 Sandf. Ch. (N. Y.) 72; Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742; Bowen *v.* Warner, 1 Pinn. (Wis.) 600; Williams *v.* Morris, 95 U. S. 444, 24 L. ed. 360; Maddison *v.* Alderson, 8 App. Cas. 467, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820; Sutherland *v.* Briggs, 1 Hare 26, 5 Jur. 1151, 11 L. J. Ch. 36, 23 Eng. Ch. 26, 66 Eng. Reprint 936.

A text-book of authority, in an often quoted passage, states the rule thus: "He [plaintiff] must first prove acts done by himself, or on his behalf, which point unmistakably to a contract between himself and the defendant, which cannot, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract," etc. Pomeroy Spec. Perf. § 108. This statement of the necessity of probative force in the act of part performance is possibly too emphatic. It seems to have been interpreted, in one case, as equivalent to saying that the act must be such as could be explained on no other possible hypothesis than that of a contract. Van Epps *v.* Redfield, 69 Conn. 104, 36 Atl. 1011. The facts of that case would certainly suggest, to the average non-judicial mind, the probability of some contract. The case in question, with its interpretation of the rule, would seem to render oral contracts between parent and child, or other persons in any domestic relation, almost impossible of specific enforcement. It is perhaps more accurate to say that the act of part performance must be such as, in connection with evidence of all the circumstances and relations of the parties except the fact of the oral contract, would naturally give rise to the inference that some contract relating to the land probably exists.

Order of introduction of evidence.— The logic of the rule would seem to require that the acts of part performance be proved first, as a foundation for evidence of the terms of the contract (see Pomeroy Spec. Perf. § 108); but the cases do not insist on this (see Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; Barrett *v.* Schleich, 37 Oreg. 613, 62 Pac. 792; Minn *v.* Fabian, L. R. 1 Ch. 35, 11 Jur. N. S. 868, 35 L. J. Ch. 140, 13 L. T. Rep. N. S. 343).

14. Semmes *v.* Worthington, 38 Md. 298; Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131 (per Kent, Ch.); Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742; Williams *v.* Morris, 95 U. S. 444, 24 L. ed. 360.

15. Sweeney *v.* O'Hora, 43 Iowa 34 (parol evidence admissible to connect the acts with contract alleged, instead of the contract set up by defendant); Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517. See also Fry Spec. Perf. § 558; Pomeroy Spec. Perf. § 107.

16. Sutherland *v.* Briggs, 1 Hare 26, 5 Jur. 1151, 11 L. J. Ch. 36, 23 Eng. Ch. 26, 66 Eng. Reprint 936. And see Britain *v.* Ros-

relating to land between the parties. An act therefore which is trivial in itself may amount to a part performance if it clearly indicates such contract;[17] while acts not complying with this rule have no such effect, although refusal of relief may result in the greatest hardship to plaintiff.[18] Few American courts have committed themselves to this somewhat artificial theory of the doctrine of part performance.[19]

8. Acts Must Be in Pursuance Of, Result From, and Be Connected With the Contract. It is also an independent rule, sometimes confused with the preceding rule, that when both the oral contract and the alleged acts of part-performance have been proved, the acts must, as a matter of fact, clearly appear to have been done in pursuance of the contract, and to result from the contract and not from some other relation.[20] They must, further, be done in execution of the contract, and be connected with it. Acts relating to some purely collateral matter, although

siter, 11 Q. B. D. 123, 48 L. J. Exch. 362, 40 L. T. Rep. N. S. 240, 27 Wkly. Rep. 482, per Cotton, L. J.

17. See Dickinson *v.* Barrow, [1904] 2 Ch. 339, 73 L. J. Ch. 701, 91 L. T. Rep. N. S. 161, where at the suit of a vendor, who had agreed to build a house on the lot, his building the house was not of itself an unequivocal act, as not necessarily implying a contract to sell; but defendant's act in inducing slight alterations in the building imply an agreement, and were therefore a part performance.

18. Maddison *v.* Alderson, L. R. 8 App. Cas. 467, 474, 488, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820, per Selborne, Lord Ch.: "That equity [part performance] has been stated by high authority to rest upon the principle of fraud. . . . By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it . . . this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds, or of the established limits, of the equitable doctrine of part performance," etc., per Lord Blackburn: "It was thought by many very high authorities that the statute did not apply when, from the nature of the proof, there could be no risk of perjury. . . . And there are indications that great equity judges on a similar principle thought that whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute and the only question was the sufficiency of the proof of what the contract was," etc. For the facts of this case see *infra*, V, H, 4, a, note 44. See also Pomeroy Eq. Rem. § 817.

19. See, however, Green *v.* Groves, 109 Ind. 519, 10 N. E. 401; Sands *v.* Thompson, 43 Ind. 18. Since the rules concerning the common acts of part performance — payment, possession, improvements — are capable of explanation on either theory, it did not become apparent that the "fraud" theory and the "evidence" theory were inconsistent until cases arose involving acts such as the rendering of peculiar services, which clearly called for relief under the former theory, but also clearly did not point to a contract concerning land. See *infra*, V, H, 3, 4. See also V, I, 2, where numerous miscellaneous acts have been deemed a part performance, nearly all of which violate this rule.

20. *California.*— Pearsall *v.* Henry, 153 Cal. 314, 95 Pac. 154, 159; Senior *v.* Anderson, 115 Cal. 496, 47 Pac. 454.

Dakota.— Buttz *v.* Colton, 6 Dak. 306, 43 N. W. 717.

Delaware.— Carlisle *v.* Fleming, 1 Harr. 421.

Illinois.— Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210; Seitman *v.* Seitman, 204 Ill. 504, 68 N. E. 461 [*affirming* 106 Ill. App. 671].

Maine.— Bennett *v.* Dyer, 89 Me. 17, 35 Atl. 1004.

Michigan.— Millerd *v.* Ramsdell, Harr. 373.

Missouri.— Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432; Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200.

Oregon.— Jenning *v.* Miller, 48 Oreg. 201, 85 Pac. 517; Reynolds *v.* Scriber, 41 Oreg. 407, 69 Pac. 48.

Virginia.— Crane's Nest Coal, etc., Co. *v.* Virginia Iron, etc., Co., 108 Va. 862, 62 S. E. 954, 1119.

Wisconsin.— Bowen *v.* Warner, 1 Pinn. 600.

England.— Gunter *v.* Halsey, Ambl. 586, 27 Eng. Reprint 381 (acts "must be such as could be done with no other view or design than to perform the agreement"); Price *v.* Salusbury, 32 Beav. 446, 55 Eng. Reprint 175 [*affirmed* in 9 Jur. N. S. 838, 32 L. J. Ch. 441, 8 L. T. Rep. N. S. 810]; Brennan *v.* Bolton, 2 Dr. & War. 349.

New agreement.— Possession given and payment of rent under one agreement cannot be considered as a part performance of that agreement as substantially varied subsequently. Price *v.* Salusbury, 32 Beav. 446, 55 Eng. Reprint 175 [*affirmed* in 9 Jur. N. S. 838, 32 L. J. Ch. 441, 8 L. T. Rep. N. S. 810]. See *supra*, V, A, 8.

The fact that the vendor had not yet acquired title is immaterial. Coleridge Creamery Co. *v.* Jenkins, 66 Nebr. 129, 92 N. W. 123.

Question of fact.— Whether acts were done with a view to carry out a parol contract unenforceable under the statute of frauds, so as to constitute a part performance thereof, is

done in reliance on the contract and prejudicial to plaintiff, do not suffice.[21] But while the acts must be in pursuance of the contract, they need not be expressly stipulated for by the contract itself.[22]

B. Rejection or Statutory Recognition of the Doctrine — 1. Statutory Recognition. The doctrine of part performance is recognized by the statutes of frauds in several of the states as an exception to the general operation of the statute.[23] By statute the ordinary acts of part performance have been added to in one state,[24] and somewhat restricted in two states.[25]

2. Doctrine Rejected in Certain States. In four states the doctrine of part performance is wholly rejected. These states are Kentucky, Mississippi, North Carolina, and Tennessee.[26] But in at least two of those states the vendee under the oral contract may enforce in equity a lien for the purchase-money paid and for the value of his improvements, after accounting for rents and profits.[27]

C. Acts Which Are Not Ordinarily Sufficient Part Performance — 1. Marriage — a. Marriage Alone Not Part Performance. Marriage alone does not take a contract made in consideration of marriage out of the clause of the

a question of fact. Pearsall *v.* Henry, 153 Cal. 314, 95 Pac. 154, 159.

21. Graves *v.* Goldthwait, 153 Mass. 268, 26 N. E. 860, 10 L. R. A. 763; Jennings *v.* Miller, 48 Oreg. 201, 85 Pac. 517. See *infra*, V, I, 2, e, (II), i, (I).

22. Brown *v.* Hoag, 35 Minn. 373, 29 N. W. 135. See also *infra*, V, E, 3, b; V, F, 2. See, however, Black *v.* Black, 15 Ga. 445.

23. *California.*— Civ. Code, § 1741. See Arguello *v.* Edinger, 10 Cal. 150.

Colorado.— Gen. St. § 1519. See Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410.

Idaho.— Code, § 6008. See Francis *v.* Green, 7 Ida. 668, 65 Pac. 362; Male *v.* Leflang, 7 Ida. 348, 63 Pac. 108.

Indiana.— Burns Rev. St. (1894) § 6633; Rev. St. (1881) § 4908; Horner Rev. St. (1897) § 4908. See St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995.

Michigan.— Howell Annot. St. § 6183. See Bushnell *v.* Rowland, 118 Mich. 618, 77 N. W. 271.

Montana.— Civ. Code, § 2342. See Stevens *v.* Trafton, 36 Mont. 520, 93 Pac. 810.

Nebraska.— Comp. St. (1905) c. 32, § 6. See Harrison *v.* Harrison, 80 Nebr. 103, 113 N. W. 1042.

North Dakota.— Rev. Code (1905), § 5407. See Muir *v.* Chandler, 16 N. D. 551, 113 N. W. 1038.

Wisconsin.— Rev. St. § 2305. See McWhinne *v.* Martin, 77 Wis. 182, 46 N. W. 118.

24. In Iowa. See *infra*, V, C, 2, g.

25. In Alabama and Virginia. See *infra*, V, D, 3, a, e.

26. Dean *v.* Cassiday, 88 Ky. 572, 11 S. W. 601, 11 Ky. L. Rep. 105; Usher *v.* Flood, 83 Ky. 552; Worley *v.* Tuggle, 4 Bush (Ky.) 168; Rucker *v.* Abell, 8 B. Mon. (Ky.) 566, 48 Am. Dec. 406; Hawkins *v.* King, 2 A. K. Marsh. (Ky.) 108; Letcher *v.* Cosby, 2 A. K. Marsh. (Ky.) 106; Hayden *v.* McIlvain, 4 Bibb (Ky.) 57; Grant *v.* Craigmiles, 1 Bibb (Ky.) 203; Barnes *v.* Beverly, 32 S. W. 174, 17 Ky. L. Rep. 586; Blackburn *v.* Blackburn, 11 S. W. 712, 10 Ky. L. Rep. 161; Washington *v.* Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555; Niles *v.* Davis, 60 Miss. 750; Fisher *v.* Kuhn, 54 Miss. 480; McGuire *v.* Stevens, 42 Miss. 724, 2 Am. Rep. 649; Hairston *v.* Jaudon, 42 Miss. 380; Catlett *v.* Bacon, 33 Miss. 269; Box *v.* Stanford, 13 Sm. & M. (Miss.) 93, 51 Am. Dec. 142; Beaman *v.* Buck, 9 Sm. & M. (Miss.) 207; Pass *v.* Brooks, 125 N. C. 129, 34 S. E. 228; North *v.* Bunn, 122 N. C. 766, 29 S. E. 776; Barnes *v.* Brown, 71 N. C. 507; Barnes *v.* Teague, 54 N. C. 277, 62 Am. Dec. 200; Allen *v.* Chambers, 39 N. C. 125; Dunn *v.* Moore, 38 N. C. 364; Albea *v.* Griffin, 22 N. C. 9; Ellis *v.* Ellis, 16 N. C. 341, 180; Ridley *v.* McNairy, 2 Humphr. (Tenn.) 174; Patton *v.* McClure, Mart. & Y. (Tenn.) 333.

27. Dean *v.* Cassiday, 88 Ky. 572, 11 S. W. 601, 11 Ky. L. Rep. 105; Usher *v.* Flood, 83 Ky. 552; Bogard *v.* Turner, 63 S. W. 426, 23 Ky. L. Rep. 625; Blackburn *v.* Blackburn, 11 S. W. 712, 10 Ky. L. Rep. 161; Pass *v.* Brooks, 125 N. C. 129, 34 S. E. 228; Barnes *v.* Brown, 71 N. C. 507; Albea *v.* Griffin, 22 N. C. 9; Baker *v.* Carson, 21 N. C. 381; Ridley *v.* McNairy, 2 Humphr. (Tenn.) 174, donee by parol entitled to value of his improvements. That the vendee is not entitled to this relief if the vendor denies the contract see Allen *v.* Chambers, 39 N. C. 125; Dunn *v.* Moore, 38 N. C. 364. That the vendor may be enjoined from dispossessing the vendee until the betterments are paid for see Baker *v.* Carson, 21 N. C. 381.

Formerly rejected in other states.— Under the equity jurisdiction, strictly limited by statute, in Maine and Massachusetts during the first seven decades of the last century, the doctrine of part performance was rejected; but the courts of these states now have full equity powers. Patterson *v.* Yeaton, 47 Me. 308. See St. (1874) c. 175; Rev. St. (1883) c. 77, § 6; Woodbury *v.* Gardner, 77 Me. 68; Pulsifer *v.* Waterman, 73 Me. 233. In Massachusetts see *infra*, V, D, 3, b.

In Ohio under an early decision (1817) the doctrine was rejected (Lenington *v.* Campbell, Tapp. 137), but this case was soon overruled.

statute relating to such contracts. By its very definition such a contract could not become binding until the marriage; and to hold that the very act which brings the contract into existence also removes it from the operation of the statute would be to nullify this clause of the statute in every instance.[28]

b. Marriage Obtained by Actual Fraud. But where, by fraudulent contrivances, by false excuses, by trick or stratagem, plaintiff is prevailed upon to have the ceremony performed without waiting for the promised execution of the conveyance or written contract, specific performance may be had because of the fraud.[29]

c. Marriage With Other Acts of Part Performance. An agreement in consideration of marriage may be part performed, so as to authorize enforcement of specific performance, by other acts on the part of the promisee, in addition to the marriage; as by possession of the land agreed to be conveyed,[30] especially if

28. *California.*— Peek *v.* Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185.

Illinois.— Keady *v.* White, 168 Ill. 76, 48 N. E. 314; Richardson *v.* Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; McAnnulty *v.* McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552.

Kansas.— Green *v.* Green, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256.

Kentucky.— Petty *v.* Petty, 4 B. Mon. 215, 30 Am. Dec. 501.

Maryland.— Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232; Crane *v.* Gough, 4 Md. 316; Stoddert *v.* Tuck, 4 Md. Ch. 475.

Massachusetts.— Deshon *v.* Wood, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518.

Michigan.— Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810; Wood *v.* Savage, 2 Dougl. 316.

New Jersey.— Manning *v.* Riley, 52 N. J. Eq. 39, 27 Atl. 810.

New York.— Dygert *v.* Remerschnider, 32 N. Y. 629; Hunt *v.* Hunt, 55 N. Y. App. Div. 430, 66 N. Y. Suppl. 957 [*affirmed* in 171 N. Y. 396, 64 N. E. 159]; Reade *v.* Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520; Brown *v.* Conger, 8 Hun 625.

Ohio.— Henry *v.* Henry, 27 Ohio St. 121; Finch *v.* Finch, 10 Ohio St. 501.

Oregon.— Adams *v.* Adams, 17 Oreg. 247, 20 Pac. 633.

Tennessee.— Hackney *v.* Hackney, 8 Humphr. 452.

Virginia.— Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157.

United States.— Lloyd *v.* Fulton, 91 U. S. 479, 23 L. ed. 363.

England.— Caton *v.* Caton, L. R. 1 Ch. 137, 147, 12 Jur. N. S. 171, 35 L. J. Ch. 292, 14 L. T. Rep. N. S. 34, 14 Wkly. Rep. 267 (where it is said, per Ld. Cranworth: "Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity"); Redding *v.* Wilkes, 3 Bro. Ch. 400, 29 Eng. Reprint 609; Warden *v.* Jones, 2 De G. & J. 76, 4 Jur. N. S. 269, 27 L. J. Ch. 190, 6 Wkly. Rep. 180, 59 Eng. Ch. 61, 44 Eng. Reprint 916; Lassence *v.* Tierney, 2 Hall & T. 115, 47 Eng. Reprint 1620, 14 Jur. 182, 1 Macn. & G. 551, 47 Eng. Ch. 440, 41 Eng. Reprint 1379; Bawdes *v.* Amhurst, Prec. Ch. 402, 24 Eng. Reprint 180; Montacute *v.* Maxwell, 1 P. Wms. 618, 24 Eng. Reprint 541.

Contra.— Allen *v.* Moore, 30 Colo. 307, 70 Pac. 682 (probably, the facts being meagerly reported); Nowack *v.* Berger 133 Mo. 24, 34 S. W. 489, 54 Am. St. Rep. 663, 31 L. R. A. 810 (*dicta*).

Promise made without intention of performance, etc.— That defendant at the time of making the promise had no intention of carrying it out is immaterial. Hackney *v.* Hackney, 8 Humphr. (Tenn.) 452.

Cohabitation with her husband by a wife who had been suing for divorce has been held a part performance of his agreement to give land to her, being a valuable consideration and one impossible to measure. Barbour *v.* Barbour, 49 N. J. Eq. 429, 24 Atl. 227. See also Webster *v.* Webster, 4 De G. M. & G. 437, 22 L. J. Ch. 837, 1 Wkly. Rep. 509, 53 Eng. Ch. 341, 43 Eng. Reprint 577; Webster *v.* Webster, 3 Jur. N. S. 655, 27 L. J. Ch. 115, 5 Wkly. Rep. 725.

29. Peek *v.* Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185; Allen *v.* Moore, 30 Colo. 307, 70 Pac. 682, 26 Colo. 197, 57 Pac. 698, 77 Am. St. Rep. 255; Green *v.* Green, 34 Kan. 740, 10 Pac. 156, 55 Am. Rep. 256 (plaintiff was the husband); Halfpenny *v.* Ballet, 2 Vern. Ch. 373, 23 Eng. Reprint 836 [*cited* in Bawdes *v.* Amherst, Prec. Ch. 402, 404, 24 Eng. Reprint 181]; Cookes *v.* Mascall, 2 Vern. Ch. 200, 23 Eng. Reprint 730. In Montacute *v.* Maxwell, 1 P. Wms. 618, 620, 24 Eng. Reprint 541, the court says: "In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honour, word or promise of the defendant, the statute making those promises void, equity will not interfere."

30. Dugan *v.* Gittings, 3 Gill (Md.) 138, 157, 43 Am. Dec. 306 (gift from parent); Hart *v.* Hart, 3 Desauss. Eq. (S. C.) 592 (gift); Ungley *v.* Ungley, 5 Ch. D. 887, 46 L. J. Ch. 854, 37 L. T. Rep. N. S. 52, 25

valuable improvements be made thereon;[31] or in a state where services of a personal character count as part performance, the rendering of such services by the wife's illegitimate child.[32]

2. PAYMENT — a. General Rule; Reasons. In most jurisdictions payment of the purchase-money, in full or in part, is not a sufficient act of part performance to take the contract out of the operation of the statute.[33] Three reasons have

Wkly. Rep. 733 (the promise being to give the house free from encumbrances, a charge thereon was held payable out of the donor's estate); Sharman *v.* Sharman, 67 L. T. Rep. N. S. 834, 4 Reports 124. See Offutt *v.* Offutt, 106 Md. 236, 67 Atl. 138, 124 Am. St. Rep. 491, 12 L. R. A. N. S. 232.

31. White *v.* Ingram, 110 Mo. 474, 19 S. W. 827; Surcome *v.* Pinniger, 3 De G. M. & G. 571, 17 Jur. 196, 22 L. J. Ch. 419, 52 Eng. Ch. 444, 43 Eng. Reprint 224.

32. Nowack *v.* Berger, 133 Mo. 24, 34 S. W. 489, 54 Am. St. Rep. 663, 31 L. R. A. 810.

Acts not referable to the agreement.— It has been held that an agreement by the intended wife to deed her lands to her husband was not taken from the statute by the marriage and his subsequent entry and improvements on the lands, such acts being referable to his tenancy by the curtesy. Henry *v.* Henry, 27 Ohio St. 121. And where the wife agreed to relinquish her dower in consideration of her retaining her personal property and the rents of her land after marriage, these acts were not a part performance. Finch *v.* Finch, 10 Ohio St. 501.

33. *Alabama.*— Robinson *v.* Driver, 132 Ala. 169, 31 So. 495.

Arkansas.— Underhill *v.* Allen, 18 Ark. 466; Keatts *v.* Rector, 1 Ark. 391.

California.— Fulton *v.* Jansen, 99 Cal. 587, 34 Pac. 331; Forrester *v.* Flores, 64 Cal. 24, 28 Pac. 107.

Connecticut.— Lester *v.* Kinne, 37 Conn. 9; Kimberly *v.* Fox, 27 Conn. 307.

District of Columbia.— Townsend *v.* Vanderwerker, 20 D. C. 197 [*reversed* on other grounds in 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383].

Florida.— Neal *v.* Gregory, 19 Fla. 356; Price *v.* Price, 17 Fla. 605.

Georgia.— Black *v.* Black, 15 Ga. 445.

Illinois.— Rogan *v.* Arnold, 233 Ill. 19, 84 N. E. 58 [*affirming* 135 Ill. App. 281]; Temple *v.* Johnson, 71 Ill. 13; Hawkins *v.* Hunt, 14 Ill. 42, 56 Am. Dec. 487.

Indiana.— Puterbaugh *v.* Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341; Green *v.* Groves, 109 Ind. 519, 10 N. E. 401; Suman *v.* Springate, 67 Ind. 115; Carlisle *v.* Brennan, 67 Ind. 12; Gossard *v.* Ferguson, 54 Ind. 519; Cuppy *v.* Hixon, 29 Ind. 522; Stafford *v.* Bartholomew, 2 Ind. 153; Johnston *v.* Glancy, 4 Blackf. 94, 28 Am. Dec. 45.

Kansas.— Guthrie *v.* Anderson, 47 Kan. 383, 28 Pac. 164; Goddard *v.* Donaha, 42 Kan. 754, 22 Pac. 708; Nay *v.* Mograin, 24 Kan. 75.

Maine.— Douglass *v.* Snow, 77 Me. 91.

Maryland.— Washington Brewery Co. *v.* Carry, (1892) 24 Atl. 151.

Massachusetts.— Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418.

Michigan.— Grindling *v.* Rehyl, 149 Mich. 641, 113 N. W. 290, 15 L. R. A. N. S. 466; Peckham *v.* Balch, 49 Mich. 179, 13 N. W. 506.

Minnesota.— Townsend *v.* Fenton, 32 Minn. 482, 21 N. W. 726, 30 Minn. 528, 16 N. W. 421; Lanz *v.* McLaughlin, 14 Minn. 72.

Mississippi.— Hood *v.* Bowman, Freem. 290.

Missouri.— Parke *v.* Leewright, 20 Mo. 85; Bean *v.* Valle, 2 Mo. 126.

Montana.— Boulder Valley Ditch Min., etc., Co. *v.* Farnham, 12 Mont. 1, 29 Pac. 277; Ducie *v.* Ford, 8 Mont. 233, 240, 19 Pac. 414.

Nebraska.— Baker *v.* Wiswell, 17 Nebr. 52, 22 N. W. 111; Poland *v.* O'Connor, 1 Nebr. 50, 93 Am. Dec. 327.

New Hampshire.— Brown *v.* Drew, 67 N. H. 569, 42 Atl. 177; Peters *v.* Dickinson, 67 N. H. 389, 32 Atl. 154; Kidder *v.* Barr, 35 N. H. 235; Ham *v.* Goodrich, 33 N. H. 32.

New Jersey.— Titus *v.* Taylor, (Ch. 1907) 65 Atl. 1003; Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660; Shipman *v.* Shipman, 65 N. J. Eq. 556, 56 Atl. 694; Cochrane *v.* McEntee, (Ch. 1896) 51 Atl. 279; Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. 732; Lippincott *v.* Bridgewater, 55 N. J. Eq. 208, 36 Atl. 672; Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Brown *v.* Brown, 33 N. J. Eq. 650; Campbell *v.* Campbell, 11 N. J. Eq. 268; Cole *v.* Potts, 10 N. J. Eq. 67.

New York.— Russell *v.* Briggs, 165 N. Y. 500, 59 N. E. 303 [*reversing* 44 N. Y. Suppl. 1128]; Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783; Miller *v.* Ball, 64 N. Y. 286; Cooley *v.* Lobdell, 82 Hun 98, 31 N. Y. Suppl. 202 [*affirmed* in 153 N. Y. 596, 47 N. E. 783]; Haight *v.* Child, 34 Barb. 186; Rosen *v.* Rose, 13 Misc. 565, 34 N. Y. Suppl. 467, 2 N. Y. Annot. Cas. 194; Schoonmaker *v.* Bonny, 6 N. Y. St. 122 [*reversed* on other grounds in 119 N. Y. 565, 23 N. E. 1106].

Ohio.— Pollard *v.* Kinner, 6 Ohio 528; Sites *v.* Keller, 6 Ohio 483.

Oklahoma.— Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118.

Pennsylvania.— Miller *v.* Specht, 11 Pa. St. 449; Sage *v.* McGuire, 4 Watts & S. 228; Parker *v.* Wells, 6 Whart. 153; McKee *v.* Phillips, 9 Watts 85; Newkumet *v.* Kraft, 10 Phila. 127.

South Carolina.— Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551; Smith *v.* Smith, 1 Rich. Eq. 130; Hatcher *v.* Hatcher, McMull. Eq. 311; Anderson *v.* Chick, Bailey Eq. 118; Hall *v.* Hall, 2 McCord Eq. 269.

Tennessee.— Townsend *v.* Sharp, 2 Overt. 192.

been assigned for this rule. First: "Payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land." [34] Second: Payment does not work a fraud upon the vendee if the vendor refuses to perform his part. The remedy at law for a recovery of the money paid with interest is a complete and adequate remedy, since it restores the vendee to the exact position in which he was before the contract.[35] Third: A third but less satisfactory reason was advanced in an early and leading case, that the statute of frauds, in the clause respecting the sale of goods, has expressly provided that payment of the price, or a part thereof, shall render the contract binding, but contains no such provision in the clause concerning the sale of lands.[36]

b. Examples. Thus payment of rent is not part performance of an agreement to make a written lease; [37] nor a loan of money, of an agreement to execute a mortgage to secure its repayment.[38]

c. Although Vendor Insolvent. The fact that the vendor is insolvent so that the vendee cannot be restored to his original position is immaterial.[39]

Texas.— Bradley *v.* Owsley, 74 Tex. 69, 11 S. W. 1052, (1892) 19 S. W. 340; Sullivan *v.* O'Neal, 66 Tex. 433, 1 S. W. 185; Ward *v.* Stuart, 62 Tex. 333; Jones *v.* Carver, 59 Tex. 293; Wood *v.* Jones, 35 Tex. 64; Neatherly *v.* Ripley, 21 Tex. 434; Dugan *v.* Colville, 8 Tex. 126; Garner *v.* Stubblefield, 5 Tex. 552; McCarty *v.* May, (Civ. App. 1903) 74 S. W. 804; Wright *v.* Bearrow, 13 Tex. Civ. App. 146, 35 S. W. 190; Munk *v.* Weidner, 9 Tex. Civ. App. 491, 29 S. W. 409.

Utah.— Maxfield *v.* West, 6 Utah 327, 23 Pac. 754.

Vermont.— Meach *v.* Stone, 1 D. Chipm. 182, 6 Am. Dec. 719.

Virginia.— Jackson *v.* Cutright, 5 Munf. 308.

West Virginia.— Biern *v.* Ray, 49 W. Va. 129, 38 S. E. 530; Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391; Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297.

Wisconsin.— Horn *v.* Ludington, 32 Wis. 73; Starin *v.* Newcomb, 13 Wis. 519; Brandeis *v.* Neustadtl, 13 Wis. 142; Smith *v.* Finch, 8 Wis. 245; Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458.

United States.— Franklin *v.* Matoa Gold Min. Co., 158 Fed. 941, 86 C. C. A. 145, 16 L. R. A. N. S. 381; Duff *v.* Hopkins, 33 Fed. 599; Small *v.* Northern Pac. R. Co, 20 Fed. 753.

England.— Hughes *v.* Morris, 2 De G. M. & G. 349, 51 Eng. Ch. 273, 42 Eng. Reprint 907; Clinan *v.* Cooke, 1 Sch. & Lef. 22, 9 Rev. Rep. 3 (leading case); Frame *v.* Dawson, 14 Ves. Jr. 386, 9 Rev. Rep. 304, 33 Eng. Reprint 569.

Canada.— Harding *v.* Starr, 21 Nova Scotia 121.

See 44 Cent. Dig. tit. "Specific Performance," § 125 *et seq.*

Tender of the puchase-money has no effect, in connection with other acts, as an act of part performance. Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18. And see Wisconsin, etc., R. Co. *v.* McKenna, 139 Mich. 43, 102 N. W. 281.

34. Maddison *v.* Alderson, 8 App. Cas. 467, 479, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820. See also Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391; Clinan *v.* Cooke, 1 Sch. & Lef. 22, 9 Rev. Rep. 3. The reason is sometimes given in this form: That payment does not indicate any contract between the parties. Thus stated, the reason is hardly in accord with common experience, as respects payment between strangers. See Frame *v.* Dawson, 14 Ves. Jr. 386, 9 Rev. Rep. 304, 33 Eng. Reprint 569.

35. McKee *v.* Phillips, 9 Watts (Pa.) 85; Clinan *v.* Cooke, 1 Sch. & Lef. 22, 9 Rev. Rep. 3; Frame *v.* Dawson, 14 Ves. Jr. 386, 9 Rev. Rep. 304, 33 Eng. Reprint 569.

36. Clinan *v.* Cooke, 1 Sch. & Lef. 22, 9 Rev. Rep. 3.

37. Rosen *v.* Rose, 13 Misc. (N. Y.) 565, 34 N. Y. Suppl. 467, 2 N. Y. Annot. Cas. 194; Townsend *v.* Sharp, 2 Overt. (Tenn.) 192.

38. Washington Brewery Co *v.* Carry, (Md. 1892) 24 Atl. 151; Brown *v.* Drew, 67 N. H. 569, 42 Atl. 177; Bernheimer *v.* Verdon, 63 N. J. Eq. 312, 49 Atl. 732.

Other instances.— Payment is not part performance, even in the case of an execution sale of land (Gossard *v.* Ferguson, 54 Ind. 519); release of dower is not part performance (Hall *v.* Hall, 2 McCord Eq. (S. C.) 269); nor payment of encumbrances on premises to be conveyed (Starin *v.* Newcomb, 13 Wis. 519); nor payment in chattels (Neal *v.* Gregory, 19 Fla. 356). For special cases in which payment or its equivalent is sufficient see *infra*, V, H, 3; V, I.

39. Townsend *v.* Fenton, 32 Minn. 482, 21 N. W. 726; McKee *v.* Phillips, 9 Watts (Pa.) 85 (*dictum*); Bradley *v.* Owsley, 74 Tex. 69, 11 S. W. 1052, (1892) 19 S. W. 340; Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391. *Contra*, Fannin *v.* McMullen, 2 Abb. Pr. N. S. (N. Y.) 224, in case of payment in full. But the case, although treated as one of part performance, seems to have involved a resulting trust. See also Chastian *v.* Smith, 30 Ga. 96.

That the insolvency existed at the time of the agreement, so that, presumably, the vendee would not have paid except in reliance on

d. Payment of Auction Duty. Similarly payment of an auction duty required by statute does not satisfy the statute of frauds, although the money paid cannot be recovered.[40]

e. Recovery of Payment Barred by Statute of Limitations. But the fact that recovery of the payment is barred by the statute of limitations has been thought to be of controlling force, when it was accompanied by other circumstances not of themselves amounting to part performance.[41]

f. Payment of Whole or Substantial Part of Price. The rule as to payment was not fully established in England until more than a century after the enactment of the statute of frauds. The distinction was made, in most of the cases in the eighteenth century, that payment of the whole or of a substantial part [42] of the purchase-money would take the case out of the statute, while payment of a small part would not.[43] The same distinction has been made in a few American cases.[44]

g. In Delaware, Iowa, and Georgia. The rule that payment, in part or in full, is a sufficient part performance, is established in Delaware by an early decision,[45] and in Iowa by statute.[46] In Georgia also payment appears to be recognized by some of the cases as a sufficient act of part performance.[47]

D. The Usual Acts of Part Performance — 1. English Rule; Possession Is Part Performance — a. Rule Stated. The rule was established in England shortly after the enactment of the statute of frauds, and has since been steadily maintained, that possession of the land, delivered by the vendor or lessor to the vendee or lessee, or taken by the vendee or lessee in pursuance of the contract, is in itself a sufficient act of part performance to take the case out of the statute. Such possession, to have this effect, need not be accompanied or followed by payment, in full or in part, or by improvements made upon the land.[48]

the promise to convey, is immaterial. Townsend *v.* Fenton, 32 Minn. 482, 21 N. W. 726.

The insolvency of the vendor is not a fraud upon the vendee.— "The vendee could easily have guarded against such a contingency by not paying the consideration until he had first obtained some written evidence of the contract. Having by the verbal agreement acquired no interest in the land itself, his attitude and rights are not materially different from that of any other creditor who may be unable to collect his debt on account of the insolvency of the debtor." Bradley *v.* Owsley, (Tex. 1892) 19 S. W. 340.

40. Buckmaster *v.* Harrop, 13 Ves. Jr. 456, 6 Rev. Rep. 132, 33 Eng. Reprint 365.

41. See Jorgenson *v.* Jorgenson, 81 Minn. 428, 84 N. W. 221; Cooper *v.* Monroe, 77 Hun (N. Y.) 1, 28 N. Y. Suppl. 222, payment in services. See also *infra*, V, I.

42. Child *v.* Comber, 3 Swanst. 427, 36 Eng. Reprint 934 (1723); Main *v.* Melbourne, 4 Ves. Jr. 720, 31 Eng. Reprint 372 (1799, *dictum*); Dickinson *v.* Adams [*cited* in Main *v.* Melbourne, *supra*].

43. Pengall *v.* Ross, 2 Eq. Cas. Abr. 46, 22 Eng. Reprint 40 (earnest money); Seagood *v.* Meale, Prec. Ch. 560, 24 Eng. Reprint 251 (1721, given as earnest money); Main *v.* Melbourne, 4 Ves. Jr. 720, 31 Eng. Reprint 372 (one-twentieth part).

Lord Hardwicke, however, was of the opinion that a part payment is sufficient, since it is an "act done, as appears to the court would not have been done, unless on account of the agreement." Lacon *v.* Mertins, 3 Atk. 1, 4, 26 Eng. Reprint 803, Dick. 664, 21 Eng. Reprint 430, 1 Ves. 312, 27 Eng. Reprint 1051; Owen *v.* Davies, 1 Ves. 82, 27 Eng. Reprint 905.

44. McMurtrie *v.* Bennette, Harr. (Mich.) 124 (*dictum*; slight payment not part performance); Fannin *v.* McMullen, 2 Abb. Pr. N. S. (N. Y.) 224 (which, however, seems to have involved a resulting trust).

45. Houston *v.* Townsend, 1 Del. Ch. 416, 12 Am. Dec. 109 [*affirmed* in 1 Harr. 532, 27 Am. Dec. 732]. But payment not being of itself an unequivocal act, the fact that it was made in execution of the contract must either be admitted by the answer, or, if denied, must be proved by writing, as, by receipts or letters from the vendor. Houston *v.* Townsend, *supra*.

46. The statute of frauds does not apply "where the purchase money, or any portion thereof, has been received by the vendor." Iowa Code, § 4626. And see Yule *v.* Fell, 123 Iowa 662, 99 N. W. 559; Harlan *v.* Harlan, 102 Iowa 701, 72 N. W. 286; Mitchell *v.* Colby, 95 Iowa 202, 63 N. W. 769; Query *v.* Liston, 92 Iowa 288, 60 N. W. 524; Stem *v.* Nysonger, 69 Iowa 512, 29 N. W. 433; Throckmorton *v.* Davidson, 68 Iowa 643, 27 N. W. 794; Franklin *v.* Tuckerman, 68 Iowa 572, 27 N. W. 759; Nau *v.* Jackman, 58 Iowa 359, 12 N. W. 312; Hotchkiss *v.* Cox, 47 Iowa 655; Sykes *v.* Bates, 26 Iowa 521.

47. Rawlins *v.* Shropshire, 45 Ga. 182. And see Freeman *v.* Cooper, 14 Ga. 238. *Contra*, Black *v.* Black, 15 Ga. 445.

48. Cole *v.* Pilkington, L. R. 19 Eq. 174, 44 L. J. Ch. 381, 31 L. T. Rep. N. S. 423, 23 Wkly. Rep. 41; Lacon *v.* Mertins, 3 Atk. 1, 26 Eng Reprint 803, Dick. 664, 21 Eng. Reprint 430, 1 Ves. 312, 27 Eng. Reprint 1051;

b. Reasons For the Rule. Several reasons have been assigned for the rule: (1) "The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms." [49] (2) Since evidence of the contract is permissible and necessary to shield the purchaser from liability as a trespasser, that evidence, being before the court for such a purpose, may, it is argued, be used to establish the contract for the purpose of its enforcement, without doing violence to the peculiar wording of the statute.[50] (3) The act of taking possession frequently, or generally, effects a change of condition on the part of the vendee, such that eviction would produce conditions of loss and damage, the computation of which by a pecuniary standard would be largely matter of conjecture.[51] (4) It is argued, with much force, that if the doctrine of part performance is to be admitted at all, it is necessary to establish some definite measure or standard, for the sake of stability of decision and security of title; and that "nothing seems so well adapted to the end, or so little susceptible of perjury as the notorious and unequivocal act of parting with possession." [52]

c. Status of the Rule in the United States. It is impossible to affirm, with confidence, that the English rule, stated in the last paragraph and generally adopted by the text-books, is the generally prevailing rule in the United States. The cases are surprisingly few, in this country, in which the question of part performance turned upon the fact of the vendee's possession alone. The decisions are but a handful in which possession is recognized as a sufficient ground and appears, on examination of the reported facts, to be the only ground.[53] Cases

Savage *v.* Carroll, 1 Ball & B. 451; Pain *v.* Coombs, 1 De G. & J. 34, 3 Jur. N. S. 847, 58 Eng. Ch. 26, 44 Eng. Reprint 634; Wilson *v.* West Hartlepool R. Co., 2 De G. J. & S. 475, 11 Jur. N. S. 124, 34 L. J. Ch. 241, 11 L. T. Rep. N. S. 692, 13 Wkly. Rep. 361, 67 Eng. Ch. 371, 46 Eng. Reprint 459; Stewart *v.* Denton, Fonbl. 187; Neale *v.* Neale, 1 Keen 672, 15 Eng. Ch. 672, 48 Eng. Reprint 466; Reddin *v.* Jarman, 16 L. T. Rep. N. S. 449; Miller *v.* Finlay, 5 L. T. Rep. N. S. 510; Butcher *v.* Stapely, 1 Vern. Ch. 363, 23 Eng. Reprint 524; Buckmaster *v.* Harrop, 13 Ves. Jr. 456, 6 Rev. Rep. 132, 33 Eng. Reprint 365; Boardman *v.* Mostyn, 6 Ves. Jr. 467, 31 Eng. Reprint 1147.

49. Morphett *v.* Jones, 1 Swanst. 172, 181, 36 Eng. Reprint 344, 1 Wils. Ch. 100, 37 Eng. Reprint 45, 18 Rev. Rep. 48, per Sir T. Plumer.

50. Clinan *v.* Cooke, 1 Sch. & Lef. 22, 9 Rev. Rep. 3. See Purcell *v.* Coleman, 6 D. C. 59; *In re* Allen, 1 Watts & S. (Pa.) 383; *Ex p.* Storer, 23 Fed. Cas. No. 13,490, 2 Ware 298.

This reason is criticized in a number of American cases, on the ground that, since the parol contract operates as a license to enter, and thus shields the vendee from liability as a trespasser, no fraud or hardship is wrought upon him by a refusal of specific performance. Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418; *In re* Allen, 1 Watts & S. (Pa.) 383; Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18. But this criticism misses the point of the argument in Clinan *v.* Cooke, 1 Sch. & Lef. 22, 9 Rev. Rep. 3, as stated in the text; viz., that evidence of the contract, being admissible for one purpose, is admissible for all purposes. See Pomeroy Spec. Perf. § 104 note. Whether that argument is a valid one, or, as it is characterized in the Texas case, a mere "pretext," is a different question.

51. Lamb *v.* Hinman, 46 Mich. 112, 116, 6 N. W. 675, 8 N. W. 709. And see Cherry *v.* Whalen, 25 App. Cas. (D. C.) 537.

52. Pugh *v.* Good, 3 Watts & S. (Pa.) 56, 63, 37 Am. Dec. 534, per Gibson, C. J., who further says: "As a criterion, no objection can be made to it which may not as plausibly be made to possession with payment of purchase money or expenditure in improvements superadded. Though the possession be shown to have been given in reference to some existing contract, it is true that the terms of the bargain must still be proved by parol; and hence the fears of perjury which were entertained by the framers of the statute. But would not the same necessity for parol proof of terms, and the same danger of perjury exist, if the purchase money were paid or improvements were made? If loss of possession may be compensated, so may expenditure, the difference being only in the degree; and it is conceded on all hands that it is proper to go beyond compensation wherever a rescission of the contract would be a fraud."

53. *Arkansas.*— Pindall *v.* Trevor, 30 Ark. 249; Blakeney *v.* Ferguson, 8 Ark. 272.

Maryland.— Morris *v.* Harris, 9 Gill 19.

New Jersey.— Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

New York.—Lowry *v.* Tew, 3 Barb. Ch. 407.

Pennsylvania.— Pugh *v.* Good, 3 Watts & S. 56, 37 Am. Dec. 534.

United States.— Conway *v.* Sherron, 6 Fed. Cas. No. 3,147, 2 Cranch C. C. 80.

are more numerous in which the English rule is recognized by way of *dictum*, other acts of part performance appearing in the report.[54] On the other hand, in a considerable number of states, including a group of the largest and most influential commonwealths, the English rule has been distinctly repudiated; and the further act of part payment or the making of improvements is required in order to validate, as an act of part performance, the taking of possession.[55] In a majority of the states therefore it is fair to assume, in view of this conflict in the American authorities, that the question is an open one whether taking possession in pursuance of the contract is in itself a sufficient act of part performance.

2. American Rule; Possession With Payment or Improvements — a. Possession and Payment. Taking possession in pursuance of the contract, together with payment, in full or in part, of the purchase-price, is recognized, in nearly all the jurisdictions, as a sufficient part performance; and the amount of the part payment appears to be immaterial.[56]

b. Possession and Improvements. If possession taken in pursuance of the

Cases overruled.—It should be noticed that the Pennsylvania case cited above has been repeatedly overruled, and the New York case has been superseded by decision of the highest court. See *infra*, note 55.

Possession alone a statutory ground in Iowa.— The English rule on this subject was adopted in Iowa by an early statute. Agne *v.* Seitsinger, 85 Iowa 305, 52 N. W. 228; Sweeney *v.* O'Hora, 43 Iowa 34; Anderson *v.* Simpson, 21 Iowa 399; Mahana *v.* Blunt, 20 Iowa 142; Baldwin *v.* Thompson, 15 Iowa 504.

54. A frequent formula in these cases is that possession is a sufficient act, "especially if" accompanied by payment or improvements.

Alabama.— Heflin *v.* Milton, 69 Ala. 354; Danforth *v.* Laney, 28 Ala. 274.

Arkansas.— Pledger *v.* Garrison, 42 Ark. 246; McNeill *v.* Jones, 21 Ark. 277; Keatts *v.* Rector, 1 Ark. 391.

California.— Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149.

Connecticut.— Andrew *v.* Babcock, 63 Conn. 109, 26 Atl. 715; Green *v.* Finin, 35 Conn. 178; Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586.

Delaware.— Pleasanton *v.* Raughley, 3 Del. Ch. 124.

District of Columbia.— Cherry *v.* Whalen, 25 App. Cas. 537.

Indiana.— Coe *v.* Johnson, 93 Ind. 418; Johnston *v.* Glancy, 4 Blackf. 94, 28 Am. Dec. 45.

Michigan.— Weed *v.* Terry, 2 Dougl. 344, 45 Am. Dec. 257 [*affirming* Walk. 501].

Missouri.— Young *v.* Montgomery, 28 Mo. 604.

New Hampshire.— Kidder *v.* Barr, 35 N. H. 235.

North Dakota.— See Muir *v.* Chandler, 16 N. D. 551, 113 N. W. 1038.

Oregon.— Sprague *v.* Jessup, 48 Oreg. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. N. S. 410.

Pennsylvania.— Reed *v.* Reed, 12 Pa. St. 117; *In re* Allen, 1 Watts & S. 383.

South Carolina.— Coney *v.* Timmons, 16 S. C. 378.

Texas.— Neatherly *v.* Ripley, 21 Tex. 434, overruled.

Washington.— Jomsland *v.* Wallace, 39 Wash. 487, 81 Pac. 1094.

West Virginia.— Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1.

Changed by statute or overruled.— But in Alabama a different rule has been established by statute. See *infra*, V, D, 3, a. And in California, Pennsylvania, and Texas these *dicta* have been overruled. See *infra*, note 55.

55. *California.*— Eshleman *v.* Henrietta Vineyard Co., 102 Cal. 199, 36 Pac. 579.

District of Columbia.— Purcell *v.* Coleman, 6 D. C. 59.

Idaho.— Howes *v.* Barmon, 11 Ida. 64, 81 Pac. 48, 114 Am. St. Rep. 255, 69 L. R. A. 568.

Illinois.— Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998; Holmes *v.* Holmes, 44 Ill. 168.

Indiana.— Ash *v.* Daggy, 6 Ind. 259.

Maine.— Bennett *v.* Dyer, 89 Me. 17, 35 Atl. 1004.

Massachusetts.— Burns *v.* Daggett, 141 Mass. 368, 6 N. E. 727; Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418.

Michigan.— Wisconsin, etc., R. Co. *v.* McKenna, 139 Mich. 43, 102 N. W. 281.

New York.— Miller *v.* Ball, 64 N. Y. 286.

Oregon.— Pulse *v.* Hamer, 8 Oreg. 251.

Pennsylvania.— Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524; Dougan *v.* Blocher, 24 Pa. St. 28; Moore *v.* Small, 19 Pa. St. 461; Woods *v.* Farmare, 10 Watts 195; Galbreath *v.* Galbreath, 5 Watts 146.

Texas.—Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18.

Virginia.— Henley *v.* Cottrell Real Estate, etc., Co., 101 Va. 70, 43 S. E. 191.

See 44 Cent. Dig. tit. "Specific Performance," § 128 *et seq.*

Dicta contra.— But in the District of Columbia, Indiana, and Oregon there are later *dicta* affirming the English rule. See note 54.

56. *Alabama.*— Rovelsky *v.* Scheuer, 114 Ala. 419, 21 So. 785; Trammell *v.* Craddock,

contract is followed by the making of valuable improvements on the land by the vendee, there is a sufficient part performance, according to the rule in nearly all jurisdictions. These acts, as a usual thing, satisfy both tests of part performance, since they indicate by themselves that a contract relating to the specific land

100 Ala. 266, 13 So. 911; McLure *v.* Tennille, 89 Ala. 572, 8 So. 60; Shakespeare *v.* Alba, 76 Ala. 351; Brewer *v.* Brewer, 19 Ala. 481.

Arkansas.— Arkadelphia Lumber Co. *v.* Thornton, 83 Ark. 403, 104 S. W. 169; Webb *v.* Marlar, 83 Ark. 340, 104 S. W. 144; Cross *v.* Johnston, 76 Ark. 363, 88 S. W. 945; Cooper *v.* Newton, 68 Ark. 150, 56 S. W. 867; Kellums *v.* Richardson, 21 Ark. 137.

California.— McCarger *v.* Rood, 47 Cal. 138.

Connecticut.— Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586.

Delaware.— Pleasanton *v.* Raughley, 3 Del. Ch. 124.

District of Columbia.— Cherry *v.* Whalen, 25 App. Cas. 537; Whitney *v.* Hay, 15 App. Cas. 164 [*affirmed* in 181 U. S. 77, 21 S. Ct. 537, 45 L. ed. 758].

Florida.— Demps *v.* Hogan, 57 Fla. 60, 48 So. 998.

Georgia.— Morgan *v.* Battle, 95 Ga. 663, 22 S. E. 689; Blalock *v.* Waggoner, 82 Ga. 122, 8 S. E. 48; Simpson *v.* Fox, 69 Ga. 753.

Illinois.— Wilke *v.* Miller, 171 Ill. 556, 49 N. E. 484; Fleming *v.* Carter, 87 Ill. 565; Rutherford *v.* Sargent, 71 Ill. 339; Deniston *v.* Hoagland, 67 Ill. 265; Fitzsimmons *v.* Allen, 39 Ill. 440; Ramsey *v.* Liston, 25 Ill. 114; Shirley *v.* Spencer, 9 Ill. 583; Thornton *v.* Vaughan, 3 Ill. 218.

Indiana.— Denlar *v.* Hile, 123 Ind. 68, 24 N. E. 170; Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647; Mauck *v.* Melton, 64 Ind. 414; Watson *v.* Mahan, 20 Ind. 223; Tibbs *v.* Barker, 1 Blackf. 58.

Iowa.— Caldwell *v.* Drummond, (1903) 96 N. W. 1122; Renwick *v.* Bancroft, 56 Iowa 527, 9 N. W. 367; Chamberlin *v.* Robertson, 31 Iowa 408; Collins *v.* Vandever, 1 Iowa 573.

Maine.— Green *v.* Jones, 76 Me. 563.

Maryland.— Moale *v.* Buchanan, 11 Gill & J. 314; Drury *v.* Conner, 6 Harr. & J. 288.

Michigan.— Ayres *v.* Short, 142 Mich. 501, 105 N. W. 1115; Sigler *v.* Sigler, 108 Mich. 591, 66 N. W. 489; Bomier *v.* Caldwell, 8 Mich. 463 [*affirming* Harr. 67].

Minnesota.—Atkins *v.* Little, 17 Minn. 342.

Missouri.— Simmons *v.* Headlee, 94 Mo. 482, 7 S. W. 20; Walker *v.* Owen, 79 Mo. 563; Adair *v.* Adair, 78 Mo. 630; Tatum *v.* Brooker, 51 Mo. 148; Young *v.* Montgomery, 28 Mo. 604; Dickerson *v.* Chrisman, 28 Mo. 134.

Montana.— Southmayd *v.* Southmayd, 4 Mont. 100, 5 Pac. 318.

Nebraska.— Morrison *v.* Gosnell, 76 Nebr. 539, 107 N. W. 753; Lipp *v.* Hunt, 25 Nebr. 91, 41 N. W. 143; Haines *v.* Spanogle, 17 Nebr. 637, 24 N. W. 211; Hanlon *v.* Wilson, 10 Nebr. 138, 4 N. W. 1031.

New Jersey.— Krah *v.* Wassmer, (Ch. 1908) 71 Atl. 404; Winfield *v.* Bowen, 65 N. J. Eq 636, 56 Atl. 728; Cramer *v.* Mooney, 59 N. J. Eq. 164, 44 Atl. 625; Coggswell, etc., Co. *v.* Coggswell, (Ch. 1898) 40 Atl. 213; Borden *v.* Curtis, 46 N. J. Eq. 468, 19 Atl. 127; Ashmore *v.* Evans, 11 N. J. Eq. 151.

New York.— Dunckel *v.* Dunckel, 141 N. Y. 427, 36 N. E. 405 [*affirming* 65 Hun 622, 21 N. Y. Suppl. 474 (*affirming* 56 Hun 25, 8 N. Y. Suppl. 888)]; Miller *v.* Ball, 64 N. Y. 286; Quinn *v.* Quinn, 69 N. Y. App. Div. 598, 75 N. Y. Suppl. 83; Agan *v.* Barry, 66 N. Y. App. Div. 101, 72 N. Y. Suppl. 667 [*affirmed* in 175 N. Y. 521, 67 N. E. 1080]; Pawling *v.* Pawling, 86 Hun 502, 33 N. Y. Suppl. 780 [*affirmed* in 150 N. Y. 574, 44 N. E. 1127]; Wendell *v.* Stone, 39 Hun 382; Merithew *v.* Andrews, 44 Barb. 200; Traphagen *v.* Traphagen, 40 Barb. 537; Astor *v.* L'Amoreux, 4 Sandf. 524 [*reversed* on other grounds in 8 N. Y. 107]; Biden *v.* James, 3 N. Y. St. 734 [*affirmed* in 111 N. Y. 680, 19 N. E. 284]; Harris *v.* Knickerbacker, 5 Wend. 638 [*reversing* 1 Paige 209]; Smith *v.* Underdunck, 1 Sandf. Ch. 579.

Ohio.— Grant *v.* Ramsey, 7 Ohio St. 157; O'Hara *v.* O'Hara, 16 Ohio Cir. Ct. 367, 9 Ohio Cir. Dec. 293.

Oregon.— Sprague *v.* Jessup, 48 Oreg. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. N. S. 410.

Pennsylvania.— Graft *v.* Loucks, 138 Pa. St. 453, 21 Atl. 203; Jamison *v.* Dimock, 95 Pa. St. 52; Richards *v.* Elwell, 48 Pa. St. 361; Lee *v.* Lee, 9 Pa. St. 169; Williams *v.* Landman, 8 Watts & S. 55; Gilday *v.* Watson, 2 Serg. & R. 407; Bassler *v.* Niesly, 2 Serg. & R. 352.

South Carolina.— Peay *v.* Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731; Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680; Watts *v.* Witt, 39 S. C. 356, 17 S. E. 822; Sweatman *v.* Edmunds, 28 S. C. 58, 5 S. E. 165; Humbert *v.* Brisbane, 25 S. C. 506; Roberts *v.* Smith, 21 S. C. 455; Smith *v.* Smith, 1 Rich. Eq. 130; Massey *v.* McIlwain, 2 Hill Eq. 421.

Vermont.— Holmes *v.* Caden, 57 Vt. 111; Pike *v.* Morey, 32 Vt. 37.

Virginia.— Franklin *v.* Salem Bldg. Assoc., (1896) 25 S. E. 97; Reynolds *v.* Necessary, 88 Va. 125, 13 S. E. 348; Neel *v.* Neel, 80 Va. 584; Wilde *v.* Fox, 1 Rand. 165. But see Venable *v.* Stamper, 102 Va. 30, 45 S. E. 738.

West Virginia.— Bryson *v.* McShane, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527; Middleton *v.* Selby, 19 W. Va. 167.

Wisconsin.— Hege *v.* Thorsgaard, 98 Wis. 11, 73 N. W. 567; Bartz *v.* Paff, 95 Wis. 95, 69 N. W. 297, 37 L. R. A. 848; Frede *v.* Pflugradt, 85 Wis. 119, 55 N. W. 159; Littlefield *v.* Littlefield, 51 Wis. 25, 7 N. W. 773; Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458.

United States.— Brown *v.* Sutton, 129 U. S.

has been made, and since they frequently, if not generally, involve a change of condition on the vendee's part which could not adequately be compensated in damages, if specific performance were to be refused.[57]

c. Possession, Payment, and Improvements. Possession taken in pursuance of the contract and payment of the purchase-price in full or in part, followed by valuable improvements, together constitute a part performance which is recognized

238, 9 S. Ct. 273, 32 L. ed. 664; Bigelow *v.* Armes, 108 U. S. 10, 1 S. Ct. 83, 27 L. ed. 631.

See 44 Cent. Dig. tit. "Specific Performance," § 130 *et seq.*

For exceptional jurisdictions see *infra*, V, D, 3, b, c, d; Massachusetts, Texas, and Pennsylvania.

Why it is that payment of purchase-money, in itself of no validity as an act of part performance, should have this controlling force when added to the act of possession, is a natural query, which, apparently, has received no answer whatever from the bench. See *supra*, V, D, 1, b, note 52; quotation from Pugh *v.* Good, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534. It is probably this lack of any authoritative reason for giving to possession with payment any efficacy that is denied to possession alone, which has led the commentators to cite many of the cases in this note as exemplifying the general English rule that possession is part performance. See for example 1 Ames Cas. Eq. Jur. 279 note.

57. *Alabama.*— Brock *v.* Cook, 3 Port. 464.

Arkansas.— Moore *v.* Gordon, 44 Ark. 334; Morrison *v.* Peay, 21 Ark. 110.

California.— Moulton *v.* Harris, 94 Cal. 420, 29 Pac. 706; Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149; Tohler *v.* Folsom, 1 Cal. 207.

Colorado.— Von Trotha *v.* Bamberger, 15 Colo. 1, 24 Pac. 883; Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410.

District of Columbia.— McCormick *v.* Hammresley, 1 App. Cas. 313.

Georgia.— White *v.* Mitchell, 69 Ga. 759; Steel *v.* Payne, 42 Ga. 207.

Idaho.— Barton *v.* Dunlap, 8 Ida. 82, 66 Pac. 832.

Illinois.— Telford *v.* Chicago, etc., R. Co., 172 Ill. 559, 50 N. E. 105; Chicago, etc., R. Co. *v.* Boyd, 118 Ill. 73, 7 N. E. 487.

Indiana.— Starkey *v.* Starkey, 136 Ind. 349, 36 N. E. 287; Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146; Drum *v.* Stevens, 94 Ind. 181; Armstrong *v.* Fearnaw, 67 Ind. 429; Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Moreland *v.* Lemasters, 4 Blackf. 383.

Iowa.— McCoy *v.* Hughes, 1 Greene 370.

Kansas.— Burnell *v.* Bradbury, 67 Kan. 762, 74 Pac. 279; Bard *v.* Elston, 31 Kan. 274, 1 Pac. 565; Holcomb *v.* Dowell, 15 Kan. 378.

Maine.— Pulsifer *v.* Waterman, 73 Me. 233.

Michigan.— Felt *v.* Felt, 155 Mich. 237, 118 N. W. 953; Weed *v.* Terry, 2 Dougl. 344, 45 Am. Dec. 257 [*affirming* Walk. 501]; Shearer *v.* Gibson, 123 Mich. 467, 82 N. W. 206.

Minnesota.— Mournin *v.* Trainor, 63 Minn. 230, 65 N. W. 444; Evans *v.* Miller, 38 Minn. 245, 36 N. W. 640.

Missouri.— Hays *v.* Kansas City, etc., R. Co., 108 Mo. 544, 18 S. W. 1115.

Montana.— Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918.

New York.— McFadden *v.* Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446; Veeder *v.* Horstmann, 85 N. Y. App. Div. 154, 83 N. Y. Suppl. 99; Luessen *v.* Morich, 72 N. Y. App. Div. 443, 76 N. Y. Suppl. 663; Lawrence *v.* Saratoga Lake R. Co., 36 Hun 467; Williston *v.* Williston, 41 Barb. 635; Van Epps *v.* Clock, 3 Silv. Sup. 500, 7 N. Y. Suppl. 21; Schirmer *v.* Rehill, 57 Misc. 439, 109 N. Y. Suppl. 745; Parkhurst *v.* Van Cortland, 14 Johns. 15, 7 Am. Dec. 427.

Ohio.— Kelley *v.* Stanberg, 13 Ohio 408.

Oregon.— Ready *v.* Schmith, 52 Oreg. 196, 95 Pac. 817.

Pennsylvania.— Eberly *v.* Lehman, 100 Pa. St. 542; Hart *v.* Carroll, 85 Pa. St. 508; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23; McGibbeny *v.* Burmaster, 53 Pa. St. 332; Zimmerman *v.* Wengert, 31 Pa. St. 401.

Texas.— Cox *v.* Bray, 28 Tex. 247; Taylor *v.* Rowland, 26 Tex. 293; Reynolds *v.* Johnston, 13 Tex. 214; Anderson *v.* Anderson, 13 Tex. Civ. App. 527, 36 S. W. 816.

Virginia.— Neece *v.* Neece, 104 Va. 343, 51 S. E. 739; Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919.

Washington.— Peterson *v.* Hicks, 43 Wash. 412, 86 Pac. 634; McKay *v.* Calderwood, 37 Wash. 194, 79 Pac. 629; Mudgett *v.* Clay, 5 Wash. 103, 31 Pac. 424.

Wisconsin.— Wall *v.* Minneapolis, etc., R. Co., 86 Wis. 48, 56 N. W. 367.

United States.— *Ex p.* Storer, 23 Fed. Cas. No. 13,490, 2 Ware 298.

England.— Toole *v.* Medlicott, 1 Ball & B. 401; Floyd *v.* Buckland, 2 Freem. 268, 22 Eng. Reprint 1202; Norris *v.* Jackson, 3 Giffard 396, 8 Jur. N. S. 930, 5 L. T. Rep. N. S. 576, 10 Wkly. Rep. 228, 66 Eng. Reprint 464; Reddin *v.* Jarman, 16 L. T. Rep. N. S. 449; Savage *v.* Foster, 9 Mod. 35, 88 Eng. Reprint 299; Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184, 35 Eng. Reprint 9; Gregory *v.* Mighell, 18 Ves. Jr. 328, 11 Rev. Rep. 207, 34 Eng. Reprint 341; Anonymous, 5 Vin. Abr. 523, pl. 40.

See 44 Cent. Dig. tit. "Specific Performance," § 132 *et seq.*

For exceptional states see *infra*, V, D, 3, a; Alabama and Illinois, requiring payment; *infra*, V, D, 3, b, d, e; Massachusetts, Pennsylvania, and probably Virginia, requiring that the improvements be such that the vendee cannot be compensated.

Parol gift, possession, and improvements see *infra*, V, K.

as sufficient whenever the doctrine is not wholly rejected; subject only to some qualification in a very few states as to the extent and value of the improvements required.[58]

58. *Alabama.*— Price *v.* Bell, 91 Ala. 180, 8 So. 565; Byrd *v.* Odem, 9 Ala. 755; Cummings *v.* Gill, 6 Ala. 562.

Arkansas.— Mooney *v.* Rowland, 64 Ark. 19, 40 S. W. 259; Hinkle *v.* Hinkle, 55 Ark. 583, 18 S. W. 1049.

California.— Manning *v.* Franklin, 81 Cal. 205, 22 Pac. 550; Day *v.* Cohn, 65 Cal. 508, 4 Pac. 511; Hoffman *v.* Fett, 39 Cal. 109; Arguello *v.* Edinger, 10 Cal. 150; Meridian Oil Co. *v.* Dunham, 5 Cal. App. 367, 90 Pac. 469.

Connecticut.— Green *v.* Finin, 35 Conn. 178; Downey *v.* Hotchkiss, 2 Day 225.

Florida.— Taylor *v.* Mathews, 53 Fla. 776, 44 So. 146 (payment in full not necessary); Tate *v.* Jones, 16 Fla. 216.

Georgia.— Scott *v.* Newsom, 27 Ga. 125.

Illinois.— Baker *v.* Allison, 186 Ill. 613, 58 N. E. 233; Hall *v.* Peoria, etc., R. Co., 143 Ill. 163, 32 N. E. 598; Smith *v.* Yocum, 110 Ill. 142; Gudgel *v.* Kitterman, 108 Ill. 50; McNamara *v.* Garrity, 106 Ill. 384; Smith *v.* West, 103 Ill. 332; McDowell *v.* Lucas, 97 Ill. 489; Laird *v.* Allen, 82 Ill. 43; Northrop *v.* Boone, 66 Ill. 368; De Wolf *v.* Pratt, 42 Ill. 198; Keys *v.* Test, 33 Ill. 316; Mason *v.* Bair, 33 Ill. 194; Blunt *v.* Tomlin, 27 Ill. 93; Stevens *v.* Wheeler, 25 Ill. 300.

Indiana.— Puterbaugh *v.* Puterbaugh, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341; Swales *v.* Jackson, 126 Ind. 282, 26 N. E. 62; Cutsinger *v.* Ballard, 115 Ind. 93, 17 N. E. 206; Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Armstrong *v.* Fearnaw, 67 Ind. 429; Winslow *v.* Winslow, 52 Ind. 8; Lafollett *v.* Kyle, 51 Ind. 446; Haddon *v.* Haddon, 42 Ind. 378; Pearson *v.* East, 36 Ind. 27; Watson *v.* Mahan, 20 Ind. 223; Stater *v.* Hill, 10 Ind. 176; Atkinson *v.* Jackson, 8 Ind. 31; Underhill *v.* Williams, 7 Blackf. 125; Moreland *v.* Lemasters, 4 Blackf. 383.

Iowa.— Wamsley *v.* Lincicum, 68 Iowa 556, 27 N. W. 740; Collins *v.* Vandever, 1 Iowa 573.

Kansas.— Taylor *v.* Taylor, 79 Kan. 161, 99 Pac. 814 (agreement to devise); Everett *v.* Dilley, 39 Kan. 73, 17 Pac. 661; Gregg *v.* Hamilton, 12 Kan. 333; Edwards *v.* Fry, 9 Kan. 417.

Maine.— Goodwin *v.* Smith, 89 Me. 506, 36 Atl. 997; Woodbury *v.* Gardner, 77 Me. 68.

Maryland.— Shepherd *v.* Bevin, 9 Gill 32 [*reversing* 1 Md. Ch. 244].

Massachusetts.— Low *v.* Low, 173 Mass. 580, 54 N. E. 257; Potter *v.* Jacobs, 111 Mass. 32.

Michigan.— Putnam *v.* Tinkler, 83 Mich. 628, 47 N. W. 687; Murphy *v.* Stever, 47 Mich. 522, 11 N. W. 368; Burtch *v.* Hogge, Harr. 31.

Minnesota.— Veum *v.* Sheeran, 95 Minn. 315, 104 N. W. 135; Jorgenson *v.* Jorgenson, 81 Minn. 428, 84 N. W. 221; Gill *v.* Newell, 13 Minn. 462.

Missouri.— Johnson *v.* Hurley, 115 Mo. 513, 22 S. W. 492; Price *v.* Hart, 29 Mo. 171; Despain *v.* Carter, 21 Mo. 331; Johnson *v.* McGruder, 15 Mo. 365.

Montana.— Stevens *v.* Trafton, 36 Mont. 520, 93 Pac. 810; Cobban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805.

Nevada.— Dutertre *v.* Shallenberger, 21 Nev. 507, 34 Pac. 449.

New Hampshire.— Stillings *v.* Stillings, 67 N. H. 584, 42 Atl. 271; Hunkins *v.* Hunkins, 65 N. H. 95, 18 Atl. 655; Kidder *v.* Barr, 35 N. H. 235; Newton *v.* Swazey, 8 N. H. 9.

New Jersey.— Fee *v.* Sharkey, 59 N. J. Eq. 284, 44 Atl. 673 [*affirmed* in 60 N. J. Eq. 446, 45 Atl. 1091]; Casler *v.* Thompson, 4 N. J. Eq. 59.

New York.— Winchell *v.* Winchell, 100 N. Y. 159, 2 N. E. 897; Gibbs *v.* J. M. Horton Ice Cream Co., 61 N. Y. App. Div. 621, 71 N. Y. Suppl. 193; Jeremiah *v.* Pitcher, 26 N. Y. App. Div. 402, 49 N. Y. Suppl. 788 [*affirmed* in 163 N. Y. 574, 57 N. E. 1113]; Dana *v.* Wright, 23 Hun 29; Richmond *v.* Foote, 3 Lans. 244; McCray *v.* McCray, 30 Barb. 633; Wetmore *v.* White, 2 Cai. Cas. 87, 2 Am. Dec. 323; Town *v.* Needham, 3 Paige 545, 24 Am. Dec. 246; Harder *v.* Harder, 2 Sandf. Ch. 17; Winans *v.* Le Grange, 3 City Hall Rec. 155.

Ohio.— Cooper *v.* Cooper, 8 Ohio S. & C. Pl. Dec. 35, 6 Ohio N. P. 99.

Oklahoma.— Sutherland *v.* Taintor, 17 Okla. 427, 87 Pac. 900.

Oregon.— Cooper *v.* Thomason, 30 Oreg. 161, 45 Pac. 296; Wallace *v.* Scoggins, 17 Oreg. 476, 21 Pac. 558.

Pennsylvania.— Piatt *v.* Seif, 207 Pa. St. 614, 57 Atl. 68; Derr *v.* Ackerman, 182 Pa. St. 591, 38 Atl. 475; Sample *v.* Horlacher, 177 Pa. St. 247, 35 Atl. 615; Schuey *v.* Schaeffer, 130 Pa. St. 16, 18 Atl. 544, 549; Anderson *v.* Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205; Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Hart *v.* Carroll, 85 Pa. St. 508; Milliken *v.* Dravo, 67 Pa. St. 230; Reed *v.* Reed, 12 Pa. St. 117; Aurand *v.* Wilt, 9 Pa. St. 54; Smith *v.* Patton, 1 Serg. & R. 80.

South Carolina.— Martin *v.* Patterson, 27 S. C. 621, 2 S. E. 859; Mims *v.* Chandler, 21 S. C. 480.

Texas.— Hickman *v.* Withers, 83 Tex. 575, 19 S. W. 138; Castleman *v.* Sherry, 42 Tex. 59; Robinson *v.* Davenport, 40 Tex. 333; Schrimpf *v.* Settegast, 38 Tex. 96; Johnson *v.* Bowden, 37 Tex. 621; Clayton *v.* Frazier, 33 Tex. 91; Howe *v.* Rogers, 32 Tex. 218; Cottrell *v.* Teagarden, 25 Tex. 99; Neatherly *v.* Ripley, 21 Tex. 434; Ottenhouse *v.* Burleson, 11 Tex. 87; Dugan *v.* Colville, 8 Tex. 126; Babcock *v.* Lewis, (Civ. App. 1908) 113 S. W. 584; Kuteman *v.* Carroll, (Civ. App. 1904) 80 S. W. 842.

Vermont.— Griffith *v.* Abbott, 56 Vt. 356.

Virginia.— Fishburne *v.* Ferguson, 85 Va. 321, 7 S. E. 361; Barrett *v.* Forney, 82 Va.

3. More Stringent Requirements in Certain States — a. Alabama and Illinois; Payment Required. In Alabama, by statute, and in Illinois, by decision, there must be, in addition to possession, payment or part payment of the purchase-money.[59] A parol gift of land, followed by possession and improvements, will not be enforced, in Alabama;[60] but in Illinois an exception is made in the case of oral gifts from parent to child, followed by part performance.[61]

b. Massachusetts. In Massachusetts it is clearly held that there is no part performance where the part payment and the expenditures for improvements together were less than the value of the use and occupation; and the trend of several opinions is toward a strict and literal interpretation of the rule that plaintiff's change of position must be such that he could not be compensated for his loss if specific performance should be refused.[62]

c. Texas; Improvements Necessary; Missouri and Kansas. By an early ruling in Missouri, part payment accompanied by possession appears to have been insufficient;[63] but this decision has frequently been tacitly overruled.[64] In Texas the rule is firmly established that possession together with payment in full or in part is insufficient; there must be, both in case of a sale and of a gift, permanent and valuable improvements;[65] but it is not required by the later cases that the improvements exceed the rental value of the land.[66]

269; Bowman *v.* Wolford, 80 Va. 213; Lester *v.* Lester, 28 Gratt. 737; Rhea *v.* Jordan, 28 Gratt. 678.

Washington.— Jomsland *v.* Wallace, 39 Wash. 487, 81 Pac. 1094; McKay *v.* Calderwood, 37 Wash. 194, 79 Pac. 629; Menger *v.* Schulz, 28 Wash. 329, 68 Pac. 875; Peck *v.* Stanfield, 12 Wash. 101, 40 Pac. 635.

West Virginia.— Ratliff *v.* Sommers, 55 W. Va. 30, 46 S. E. 712; Campbell *v.* Fetterman, 20 W. Va. 398; Tracy *v.* Tracy, 14 W. Va. 243; Vickers *v.* Sisson, 10 W. Va. 12; Lowry *v.* Buffington, 6 W. Va. 249.

Wisconsin.— McWhinne *v.* Martin, 77 Wis. 182, 46 N. W. 118; Ingles *v.* Patterson, 36 Wis. 373; Fisher *v.* Moolick, 13 Wis. 321; Janesville School Dist. No. 3, etc. *v.* Macloon, 4 Wis. 79.

United States.— Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 9 S. Ct. 286, 32 L. ed. 673 [*affirming* 23 Fed. 168]; People's Pure Ice Co. *v.* Trumbull, 70 Fed. 166, 17 C. C. A. 43.

See 44 Cent. Dig. tit "Specific Performance," § 135 *et seq.*

For the exceptional states referred to in the text see *infra*, V, D, 3, b, d, e; Massachusetts, Pennsylvania, and probably Virginia.

Payment and improvements, without actual occupancy, held sufficient. Stewart *v.* Tomlinson, 21 S. D. 337, 112 N. W. 849.

59. Alabama.— Code (1896), § 2152; Nelson *v.* Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116; Heflin *v.* Milton, 69 Ala. 354. The payment need not be made at the same time as the letting into possession. Louisville, etc., R. Co. *v.* Philyaw, 94 Ala. 463, 10 So. 83.

Illinois.—Wright *v.* Raftree, 184 Ill. 464, 54 N. E. 998; Holmes *v.* Holmes, 44 Ill. 168. But in case of an oral agreement to convey land for the right of way of a railroad, the company's promise, which has been performed, to locate its depot and construct its tracks at certain points, is a sufficient consideration, within the meaning of the rule. Telford *v.* Chicago, etc., R. Co., 172 Ill. 559, 50 N. E. 105; Chicago, etc., R. Co. *v.* Boyd, 118 Ill. 73, 7 N. E. 487. So in case of an agreement to convey to a church, in consideration of its building on the land. Whitsitt *v.* Pre-emption Presbyterian Church, 110 Ill. 125.

60. Tolleson *v.* Blackstock, 95 Ala. 510, 11 So. 284; Pinckard *v.* Pinckard, 23 Ala. 649; Evans *v.* Battle, 19 Ala. 398; Forward *v.* Armstead, 12 Ala. 124, 46 Am. Dec. 246.

61. Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998.

For numerous instances of such gifts see *infra*, V, K, 1, a.

62. Burns *v.* Daggett, 141 Mass. 368, 6 N. E. 727; Potter *v.* Jacobs, 111 Mass. 32; Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418.

At an earlier day, when the equity jurisdiction in Massachusetts was entirely dependent upon statute, the courts had no power, under the statutes, to enforce specific performance of any but written contracts. Jacobs *v.* Peterborough, etc., R. Co., 8 Cush. 223.

63. Parke *v.* Leewright, 20 Mo. 85.

64. See *supra*, V, D, 2, a, and cases there cited.

Kansas.— For *dicta* to the effect that there should be the same requirement of improvements in the case of sales as in the case of gifts see Baldwin *v.* Baldwin, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. N. S. 957.

65. Cobb *v.* Johnson, 101 Tex. 440, 108 S. W. 811 [*reversing* (Civ. App. 1907) 105 S. W. 847]; Bradley *v.* Owsley, 74 Tex. 69, 72, 11 S. W. 1052, 19 S. W. 340; Jones *v.* Carver, 59 Tex. 293. *Contra*, Neatherly *v.* Ripley, 21 Tex. 434, *dicta*.

66. Johnson *v.* Townsend, 77 Tex. 639, 14 S. W. 233; Wells *v.* Davis, 77 Tex. 636, 14 S. W. 237; Baker *v.* Clark, 2 Tex. Civ. App. 530, 21 S. W. 966; Baker *v.* De Freese, 2 Tex. Civ. App. 524, 21 S. W. 963. But see Wool-

d. Pennsylvania; Must Be Non-Compensable Improvements or Full Payment. The course of adjudication in Pennsylvania has been a varied one. After some conflicting *dicta*, the English rule that taking possession under the contract is by itself a sufficient act of part performance was adopted;[67] but this holding, although distinct and emphatic, was ignored in subsequent decisions and finally abandoned.[68] The rule as now formulated and adopted by numerous recent decisions is a stringent one. "The evidence must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, the fact that the possession was notorious, and the fact that it has been exclusively continuous and maintained. And it must show performance or part performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust."[69] Improvements, therefore, must exceed in value the rents and profits.[70] Payment in full, however, coupled with taking possession, dispenses with proof of improvements or other acts of part performance incapable of compensation;[71] and parol partition, followed by possession of the parcels allotted, is not a sale within the statute of frauds.[72]

e. Virginia. In Virginia also the rule as stated by the recent cases is in a somewhat more stringent form than in the majority of the states.[73] The doctrine as to parol gifts has been abolished by a recent statute.[74]

E. Nature of the Possession Required — 1. Must Be in Pursuance of and Exclusively Referable to the Contract — a. In General. Possession, in order to be an act of part performance, either alone or in connection with other acts, is subject to several requirements. First, it must have been taken in pursuance of the contract.[75] Further, it must be exclusively referable to the con-

dridge *v.* Hancock, 70 Tex. 18, 6 S. W. 818; Eason *v.* Eason, 61 Tex. 225; Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18.

67. Pugh *v.* Good, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534, per Gibson, C. J. See also Reed *v.* Reed, 12 Pa. St. 117; Allen's Estate, 1 Watts & S. (Pa.) 383.

68. Ackerman *v.* Fisher, 57 Pa. St. 457 (payment necessary); Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524; Dougan *v.* Blocher, 24 Pa. St. 28; Moore *v.* Small, 19 Pa. St. 461.

69. Hart *v.* Carroll, 85 Pa. St. 508. See also Piatt *v.* Seif, 207 Pa. St. 614, 57 Atl. 68; Derr *v.* Ackerman, 182 Pa. St. 591, 38 Atl. 475; Sample *v.* Horlacher, 177 Pa. St. 247, 35 Atl. 615; Schuey *v.* Shaeffer, 130 Pa. St. 16, 18 Atl. 544, 549; Anderson *v.* Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205; Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Detrick *v.* Sharrar, 95 Pa. St. 521; Ballard *v.* Ward, 89 Pa. St. 358; McKowen *v.* McDonald, 43 Pa. St. 441, 82 Am. Dec. 576; Dougan *v.* Blocher, 24 Pa. St. 28; Moore *v.* Small, 19 Pa. St. 461.

70. Hart *v.* Carroll, 85 Pa. St. 508; Toe *v.* Toe, 3 Grant (Pa.) 74; Eckert *v.* Eckert, 3 Penr. & W. (Pa.) 332, 362. The early case of Young *v.* Glendenning, 6 Watts (Pa.) 509, 31 Am. Dec. 492, appears to be overruled on this point.

71. Graft *v.* Loucks, 138 Pa. St. 453, 21 Atl. 203; Jamison *v.* Dimock, 95 Pa. St. 52. By the act of April 28, 1899, the orphans' court is empowered to decree specific performance of parol contracts between certain parties, when "such parol contract may have been so far executed by possession, by improvements, or by partial payments of the purchase money that it would be against equity to rescind the same." *In re* Fay, 213 Pa. St. 428, 62 Atl. 991.

72. McKnight *v.* Bell, 135 Pa. St. 358, 19 Atl. 1036. See *infra*, V, O, 1.

73. Wright *v.* Pucket, 22 Gratt. (Va.) 370, leading case. "The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation." This requirement has received much the same interpretation as in Pennsylvania. See Venable *v.* Stamper, 102 Va. 30, 45 S. E. 738; Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742; Henley *v.* Cottrell Real Estate, etc., Co., 101 Va. 70, 43 S. E. 191; Helton *v.* Johnson, (Va. 1897) 27 S. E. 579. See also Cranes Nest Coal, etc., Co. *v.* Virginia Iron, etc., Co., 108 Va. 862, 62 S. E. 954, 1119; Hoover *v.* Baugh, 108 Va. 695, 62 S. E. 968, 128 Am. St. Rep. 985. In Venable *v.* Stamper, *supra*, the vendee gave up his position as a farm laborer, took possession, gave the vendor board and lodging, and spent money and labor on the land in the ordinary course of husbandry; these acts together did not amount to a sufficient part performance.

74. Va. Code, § 2413; Trout *v.* Trout, (Va. 1896) 25 S. E. 98.

75. *Alabama.*— Danforth *v.* Laney, 28 Ala. 274, burden is on plaintiff to show that possession was under the contract if that is denied.

Arkansas.— Moore *v.* Gordon, 44 Ark. 334;

tract; that is to say, it must be such a possession that an outsider, knowing all the circumstances attending it save only the one fact, the alleged oral contract, would naturally and reasonably infer that some contract existed relating to the land, of the same general nature as the contract alleged.[76]

b. Not Referable to Another Title or Relation. If the possession, therefore, could be accounted for just as well by some other right or title actually existing in the vendee's favor, or by some relation between him and the vendor other than the alleged oral contract, it is not such a possession as the doctrine requires.[77]

McNeill *v.* Jones, 21 Ark. 277. And see Keatts *v.* Rector, 1 Ark. 391.

Illinois.— Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210. And see Gorham *v.* Dodge, 122 Ill. 528, 14 N. E. 44.

Indiana.— Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523; Judy *v.* Gilbert, 77 Ind. 96, 40 Am. Rep. 289; Rucker *v.* Steelman, 73 Ind. 396; Neal *v.* Neal, 69 Ind. 419; Moore *v.* Higbee, 45 Ind. 487.

Iowa.— Carrolls *v.* Cox, 15 Iowa 455. See Wilmer *v.* Farris, 40 Iowa 309.

Maryland.— Worley *v.* Walling, 1 Harr. & J. 208.

Minnesota.— See Place *v.* Johnson, 20 Minn. 219.

Missouri.— Gibbs *v.* Whitwell, 164 Mo. 387, 64 S. W. 110. See Charpiot *v.* Sigerson, 25 Mo. 63.

New Hampshire.— Abbott *v.* Baldwin, 61 N. H. 583; Ham *v.* Goodrich, 33 N. H. 32.

Pennsylvania.— See Mohan *v.* Butler, 112 Pa. St. 590, 4 Atl. 47; Sage *v.* McGuire, 4 Watts & S. 228; Fussell *v.* Rhodes, 2 Phila. 165.

Rhode Island.— See Peckham *v.* Barker, 8 R. I. 17.

South Carolina.—Anderson *v.* Chick, Bailey Eq. 118. See Davis *v.* Moore, 9 Rich. 215.

Virginia — Pierce *v.* Catron, 23 Gratt. 588; Wright *v.* Pucket, 22 Gratt. 370. See Griggsby *v.* Osborn, 82 Va. 371.

Wisconsin.— Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458.

United States.—Purcell *v.* Coleman, 4 Wall. 513, 18 L. ed. 435.

England.—Price *v.* Salusbury, 32 Beav. 446, 55 Eng. Reprint 175 [*affirmed* in 9 Jur. N. S. 838, 32 L. J. Ch. 441, 8 L. T. Rep. N. S. 810], possession given and payment of rent under one agreement not to be considered part performance of that agreement as substantially varied subsequently. Any act which may be referred to a title distinct from the verbal agreement of which specific performance is sought cannot be considered as a part performance thereof, to take the case out of the statute of frauds. Brennan *v.* Bolton, 2 Dr. & War. 349.

See 44 Cent. Dig. tit. "Specific Performance," § 129.

If improvements are alleged to have been pursuant to the agreement it will be inferred that possession also was pursuant to the agreement. Barrett *v.* Schleich, 37 Oreg. 613, 62 Pac. 792.

76. See the cases in the preceding note and in the notes following.

Need not be unequivocal evidence of the particular contract.— In a few cases it is asserted that the possession must be unequivocal evidence of the particular contract charged in the bill, not merely of some contract. Semmes *v.* Worthington, 38 Md. 298; Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131. See also Peckham *v.* Barker, 8 R. I. 17. But this, as has been repeatedly pointed out, is to set up an impossible test. No act of part performance can indicate or be satisfactory evidence of certain terms which are essential to a complete contract, such as the price. Even the making of valuable improvements cannot of itself indicate whether the contract was one of sale or for a long term lease. See Fry Spec. Perf. § 558; Pomeroy Spec. Perf. § 107 and note. And see *supra*, V, A, 7, b.

Possession of other land.— The vendee seeking specific performance of the vendor's parol contract to convey land, and relying on possession to take the contract out of the statute of frauds, must show possession of such land, delivered to him by the vendor pursuant to the contract, and it is not enough to show possession by the vendor of land which the vendor agreed to convey in exchange. Garrick *v.* Garrick, (Ind. App. 1909) 87 N. E. 696, 88 N. E. 104.

77. See the cases cited *infra*, this note.

Illustrations.— Thus where the possession was taken, not under the contract, but under a subsequent arrangement, it is insufficient. Von Trotha *v.* Bamberger, 15 Colo. 1, 24 Pac. 883. And see Bennett *v.* Dyer, 89 Me. 17, 35 Atl. 1004. And the same is true where the persons taking possession had the power of eminent domain, and the possession might be referred to the exercise of that power (Haisten *v.* Savannah, etc., R. Co., 51 Ga. 199; Jacobs *v.* Peterborough, etc., R. Co., 8 Cush. (Mass.) 223; Phillips *v.* Thompson, 1 Johns. Ch. (N. Y.) 131); where possession was taken not under the contract, but under a lessee from a former owner, with whom defendants could not interfere (Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133); where it is doubtful whether possession was taken under the contract of purchase, or under an agreement to enter as tenant and pay rent (Owings *v.* Baldwin, 1 Md. Ch. 120); where possession was held under another, written, contract (Bunton *v.* Smith, 40 N. H. 352; Rankin *v.* Simpson, 19 Pa. St. 471, 57 Am. Dec. 668, under subsequent lease from vendor. But see Harman *v.* Harman, 70 Fed. 894, 17 C. C. A. 479, where the fact that plaintiffs received a written lease from their uncle contemporaneously with his oral agreement to devise the land to them was held not to prevent specific performance of

c. Continued Possession — (i) *In General.* The most important application of this rule relates to a possession begun before, and continuing after, the making of the oral contract. Such continuance in possession does not satisfy the tests of an effective act of part performance, since it does not point to a new contract but may be accounted for by reference to the former right or title; also since there has been no change of position on plaintiff's part which could work a fraud upon him on refusal of specific performance.[78]

(ii) *Continued Possession by Tenant.* Thus the continuance in

the oral agreement); where possession is referable, not to the alleged contract for a lease, but to a tenancy from year to year (Peckham *v.* Barker, 8 R. I. 17); and where it is referable to the alleged vendee's relation as agent (Crawford *v.* Crawford, 77 S. C. 205, 57 S. E. 837).

Possession held under a life-tenant is not part performance of a contract for sale of the reversion. Pickerell *v.* Morss, 97 Ill. 220; German *v.* Machin, 6 Paige (N. Y.) 288.

Where a deed made in pursuance of the oral contract omits a part of the land agreed to be conveyed, it has been held that possession of the part actually conveyed is not part performance as to the part omitted. Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Broughton *v.* Coffer, 18 Gratt. (Va.) 184. *Contra*, Metropolitan Lumber Co. *v.* Lake Superior Ship Canal, etc., Co., 101 Mich. 577, 60 N. W. 278.

Referable to a domestic relationship.—The possession must be referable to the promise, not to some domestic relationship of the vendee or donee to the vendor or donor. Lay *v.* Lay, 75 Ark. 526, 87 S. W. 1026 (doubtful whether the son took possession of the land as owner, or as agent for his father); Meigs *v.* Morris, 63 Ark. 100, 37 S. W. 302; Van Epps *v.* Redfield, 69 Conn. 104, 36 Atl. 1011 (promise by a man to his mistress to give her a dwelling-house, in consideration of her support of their illegitimate child; fully performed by the woman, but her possession of the house for ten years was an insufficient possession, since of itself, without evidence of the contract, such possession does not exclude the possibility that it was held permissively and not under a contract. See *supra*, V, A, 7, a, note 13); Henry *v.* Henry, 27 Ohio St. 121 (possession by husband of his wife's lands referable to his tenancy by the curtesy, not to her oral agreement before marriage to deed the lands to him). As to necessity of strong proof of the promise where the agreement is between parent and child see *infra*, V, Q, 2.

78. *Alabama.*— Trammell *v.* Craddock, 93 Ala. 450, 9 So. 587; Linn *v.* McLean, 85 Ala. 250, 4 So. 777; Danforth *v.* Laney, 28 Ala. 274.

California.— Anson *v.* Townsend, 73 Cal. 415, 15 Pac. 49.

Dakota.— Hollenbeck *v.* Prior, 5 Dak. 298, 40 N. W. 347.

Delaware.— Carlisle *v.* Fleming, 1 Harr. 421.

Illinois.— Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998; Barrett *v.* Geisinger, 148 Ill. 98, 35 N. E. 354; Koch *v.* National Union Bldg. Assoc., 137 Ill. 497, 27 N. E. 530; Padfield *v.* Padfield, 92 Ill. 198; Wood *v.* Thornly, 58 Ill. 464.

Indiana.— Swales *v.* Jackson, 126 Ind. 282, 26 N. E. 62; Green *v.* Groves, 109 Ind. 519, 10 N. E. 401; Railsback *v.* Walke, 81 Ind. 409; Carlisle *v.* Brennan, 67 Ind. 12; Cuppy *v.* Hixon, 29 Ind. 522; Johnston *v.* Glancy, 4 Blackf. 94, 28 Am. Dec. 45.

Iowa.— Recknagle *v.* Schmaltz, 72 Iowa 63, 33 N. W. 365; Wilmer *v.* Farris, 40 Iowa 309; Mahana *v.* Blunt, 20 Iowa 142; Olive *v.* Dougherty, 3 Greene 371.

Maryland.—Billingslea *v.* Ward, 33 Md. 48; Rosenthal *v.* Freeburger, 26 Md. 75; Wingate *v.* Dail, 2 Harr. & J. 76.

Massachusetts.— Barnes *v.* Boston, etc., R. Co., 130 Mass. 388.

Michigan.— Messmore *v.* Cunningham, 78 Mich. 623, 44 N. W. 145; Peckham *v.* Balch, 49 Mich. 179, 13 N. W. 506; Moote *v.* Scriven, 33 Mich. 500.

Minnesota.— Snow *v.* Snow, 98 Minn. 348, 108 N. W. 295; Bresnahan *v.* Bresnahan, 71 Minn. 1, 73 N. W. 515; Wentworth *v.* Wentworth, 2 Minn. 277, 72 Am. Dec. 97.

Mississippi.—Hood *v.* Bowman, Freem. 290.

Missouri.— Taylor *v.* Von Schraeder, 107 Mo. 206, 16 S. W. 675; Emmel *v.* Hayes, 102 Mo. 186, 14 S. W. 209, 22 Am. St. Rep. 769, 11 L. R. A. 323; Underwood *v.* Underwood, 48 Mo. 527; Spalding *v.* Conzelman, 30 Mo. 177.

Montana.— Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298.

Nebraska.— Steger *v.* Kosch, (1906) 108 N. W. 165; Lewis *v.* North, 62 Nebr. 552, 87 N. W. 312; Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255; Bradt *v.* Hartson, 4 Nebr. (Unoff.) 889, 96 N. W. 1008.

New Hampshire.— Peters *v.* Dickinson, 67 N. H. 389, 32 Atl. 154.

New Jersey.— Cole *v.* Potts, 10 N. J. Eq. 67.

New York.— Dunckel *v.* Dunckel, 56 Hun 25, 8 N. Y. Suppl. 888.

Ohio.— Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Armstrong *v.* Kattenhorn, 11 Ohio 265.

Oregon.— Jenning *v.* Miller, 48 Oreg. 201, 85 Pac. 517.

Pennsylvania.— Whiting *v.* Pittsburgh Opera House Co., 88 Pa. St. 100; Ackerman *v.* Fisher, 57 Pa. St. 457; Dougan *v.* Blocher, 24 Pa. St. 28; Greenlee *v.* Greenlee, 22 Pa. St. 225; Christy *v.* Barnhart, 14 Pa. St. 260, 52 Am. Dec. 538; Aitkin *v.* Young, 12 Pa. St. 15; Eckert *v.* Eckert, 3 Penr. & W. 332; Jones *v.* Peterman, 3 Serg. & R. 543, 8 Am. Dec. 672; Birkbeck *v.* Kelly, 6 Pa. Cas. 343, 9 Atl. 313; Donnelly's Estate, 3 Pa. Dist. 381;

possession of a tenant will be referred to his original tenancy, even though the original term has expired, since it is a frequent and natural thing to find a tenant holding over after the expiration of his term, calling for no contract to explain it. A tenant's continued possession therefore is not an act of part performance of his contract to purchase from his landlord,[79] nor of his contract for a renewal of the lease.[80]

(III) *CONTINUED POSSESSION BY MORTGAGOR, ETC., AFTER JUDICIAL SALE.* In some states, but not in others, it is held that where defendant has agreed to buy in plaintiff's land at execution or foreclosure sale and reconvey it to plaintiff, plaintiff's continued occupancy of the land is not a sufficient possession

Lund *v.* Brown, 2 Chest. Co. Rep. 221, 14 Wkly. Notes Cas. 489; Shelly's Estate, 4 Lanc. L. Rev. 186; Fussell *v.* Rhodes, 2 Phila. 165.

South Carolina.— McMillan *v.* McMillan, 77 S. C. 511, 58 S. E. 431; Poag *v.* Sandifer, 5 Rich. Eq. 170; Hatcher *v.* Hatcher, McMull. Eq. 311.

Virginia.— Anthony *v.* Leftwich, 3 Rand. 238.

Wisconsin.— Knoll *v.* Harvey, 19 Wis. 99; Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458; Bowen *v.* Warner, 1 Pinn. 600.

United States.— Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635 [*reversing* 18 App. Cas. (D. C.) 438]; Ducie *v.* Ford, 138 U. S. 587, 11 S. Ct. 417, 34 L. ed. 1091.

England.—Brennan *v.* Bolton, 2 Dr. & War. 349; Morphett *v.* Jones, 1 Swanst. 172, 36 Eng. Reprint 344, 1 Wils. Ch. 100, 37 Eng. Reprint 45, 18 Rev. Rep. 48; Frame *v.* Dawson, 14 Ves. Jr. 386, 9 Rev. Rep. 304, 33 Eng. Reprint 569; Wills *v.* Stradling, 3 Ves. Jr. 378, 4 Rev. Rep. 26, 30 Eng. Reprint 1063; Smith *v.* Turner [*cited* in Seagood *v.* Meale, Prec. Ch. 560, 561, 24 Eng. Reprint 251].

Where a railroad company agreed to reconvey to the owner a portion of the land taken from him by the company, in consideration of his refraining from demanding damages for the taking, his continuing in possession and refraining from demanding damages did not constitute such part performance as to remove the agreement from the statute. Barnes *v.* Boston, etc., R. Co., 130 Mass. 388.

Possession delivered to the lessee one day before the agreement was concluded, and in anticipation of the agreement being concluded, has been held a sufficient part performance, if there was nothing else to which the possession could be referred. Hodson *v.* Heuland, [1896] 2 Ch. 428, 65 L. J. Ch. 754, 74 L. T. Rep. N. S. 811, 44 Wkly. Rep. 684.

79. *Alabama.*— Linn *v.* McLean, 85 Ala. 250, 4 So. 777; Danforth *v.* Laney, 28 Ala. 274.

Indiana.—Johnston *v.* Glancy, 4 Blackf. 94, 28 Am. Dec. 45.

Iowa.— Mahana *v.* Blunt, 20 Iowa 142.

Maryland.—Billingslea *v.* Ward, 33 Md. 48.

Michigan.— Messmore *v.* Cunningham, 78 Mich. 623, 44 N. W. 145.

Montana.— Lamme *v.* Dodson, 4 Mont. 560, 2 Pac. 298.

Nebraska.— Steger *v.* Kosch, (1906) 108 N. W. 165; Lewis *v.* North, 62 Nebr. 552, 87 N. W. 312; Bigler *v.* Baker, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255.

New Jersey.— Cole *v.* Potts, 10 N. J. Eq. 67.

Pennsylvania.— Greenlee *v.* Greenlee, 22 Pa. St. 225; Donnelly's Estate, 3 Pa. Dist. 381.

Wisconsin.— Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458.

80. *Illinois.*— Koch *v.* National Union Bldg. Assoc., 137 Ill. 497, 27 N. E. 530.

Maryland.— Rosenthal *v.* Freeburger, 26 Md. 75.

Missouri.— Spalding *v.* Conzelman, 30 Mo. 177.

Ohio.— Crawford *v.* Wick, 18 Ohio St. 190, 98 Am. Dec. 103; Armstrong *v.* Kattenhorn, 11 Ohio 265.

Oregon.— Jenning *v.* Miller, 48 Oreg. 201, 85 Pac. 517.

Pennsylvania.— Jones *v.* Peterman, 3 Serg. & R. 543, 8 Am. Dec. 672.

United States.—Winslow *v.* Baltimore, etc., R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. ed. 635.

England.— Frame *v.* Dawson, 14 Ves. Jr. 386, 9 Rev. Rep. 304, 33 Eng. Reprint 569. And see Hodson *v.* Heuland, [1896] 2 Ch. 428, 65 L. J. Ch. 754, 74 L. T. Rep. N. S. 811, 44 Wkly. Rep. 684.

Where the lessor of a saloon orally promised plaintiff to renew to him the lease for a term of years if he purchased the unexpired term, fixtures, and stock from the lessee in possession; which plaintiff did and continued in possession, it was held no sufficient part performance. Koch *v.* National Union Bldg. Assoc., 137 Ill. 497, 27 N. E. 530.

The oral agreement to give a new lease will not be enforced, although on the faith of it the tenant has abandoned an option which he had secured on another building; since the act, although done in reliance on the agreement, was not connected with the agreement. Jenning *v.* Miller, 48 Oreg. 201, 85 Pac. 517.

Sufficient when referable to the agreement. — But possession by a lessee continued after, although taken previously to, a parol agreement for a lease exceeding three years, is a sufficient act of part performance to take the case out of the statute of frauds, provided the continuance in possession is unequivocally referable to the agreement. Hodson *v.* Heuland, [1896] 2 Ch. 428, 65 L. J. Ch. 754, 74 L. T. Rep. N. S. 811, 44 Wkly. Rep. 684.

under the doctrine of part performance to justify the enforcement of the agreement to reconvey.[81]

(IV) *Exceptions to Rule as to Continued Possession* — (A) *In General.* A continuance in possession, if accompanied by other acts which can only naturally be accounted for by the existence of a new contract concerning the land, is, by the great weight of authority, sufficient part performance of that contract.[82]

(B) *Continued Possession and Payment of Increased Rent.* If a tenant continues in possession after the expiration of his lease, and pays an increased rent, these circumstances, it is held, constitute part performance of the agreement for a new lease; at any rate if the rent is accepted by the landlord on the basis of the agreement.[83] This rule, while well established in England, has been criticized as a departure from the accepted theory of part performance.[84]

(C) *Continued Possession and Payment of Purchase-Price.* Payment of the purchase-price by a vendee who was already in possession at the time of the contract has been considered an insufficient act of part performance in some of the states;[85] but in others, in analogy with the English rule stated in the last paragraph, it has been accepted as sufficient.[86]

81. Green *v.* Groves, 109 Ind. 519, 10 N. E. 401; Railsback *v.* Walke, 81 Ind. 409; Carlisle *v.* Brennan, 67 Ind. 12; Wheeler *v.* Reynolds, 66 N. Y. 227; Birkbeck *v.* Kelly, 6 Pa. Cas. 343, 9 Atl. 313. *Contra,* see Phillips *v.* Jones, 79 Ark. 100, 95 S. W. 164; Morgan *v.* Battle, 95 Ga. 663, 22 S. E. 689; Gilmore *v.* Johnston, 14 Ga. 683; Potter *v.* Brown, 50 Mich. 436, 15 N. W. 540; Cutler *v.* Babcock, 81 Wis. 195, 51 N. W. 420, 29 Am. St. Rep. 882, but decision rested also upon other grounds than part performance.

Constructive trust.— If under the circumstances of the text there was fraud on the part of the purchaser, he may be held as a constructive trustee. See 3 Pomeroy Eq. Jur. §§ 1055, 1056; and Trusts.

82. See the following paragraphs, and cases there cited.

But it has been held that a tenant in possession cannot be a purchaser by parol without a formal surrender of his possession under the lease, and a resumption of it under the contract of purchase. Greenlee *v.* Greenlee, 22 Pa. St. 225. See, however, to the contrary, Aurand *v.* Wilt, 9 Pa. St. 54.

83. Spear *v.* Orendorf, 26 Md. 37; Nunn *v.* Fabian, L. R. 1 Ch. 35, 11 Jur. N. S. 868, 35 L. J. Ch. 140, 13 L. T. Rep. N. S. 343; Humphreys *v.* Green, 10 Q. B. D. 148, 47 J. P. 244, 52 L. J. Q. B. 140, 48 L. T. Rep. N. S. 60 (per Bagallay, J.); Miller *v.* Sharp, [1899] 1 Ch. 622, 68 L. J. Ch. 322, 80 L. T. Rep. N. S. 77, 47 Wkly. Rep. 268; Williams *v.* Evans, L. R. 19 Eq. 547, 44 L. J. Ch. 319, 32 L. T. Rep. N. S. 359, 23 Wkly. Rep. 466 (*dictum*); Lanyon *v.* Martin, L. R. 13 Ir. 297; Conner *v.* Fitzgerald, L. R. 11 Ir. 106; Howe *v.* Hall, Ir. R. 4 Eq. 242; Wills *v.* Stradling, 3 Ves. Jr. 378, 4 Rev. Rep. 26, 30 Eng. Reprint 1063; Desart *v.* Goddard, Wallis 347 (tenant's possession continued for twenty-seven years). *Contra,* Humphreys *v.* Greer, *supra,* per Brett, J.

84. The above cases form a departure from the accepted theory of part performance, in that the payment of the increased rent is *per se* an equivocal act (Spear *v.* Orendorf, 26 Md. 37; Wills *v.* Stradling, 3 Ves. Jr. 378, 4 Rev. Rep. 26, 30 Eng. Reprint 1063), since it is consistent with a tenancy from year to year. In the leading case of Nunn *v.* Fabian, L. R. 1 Ch. 35, 11 Jur. N. S. 868, 35 L. J. Ch. 140, 13 L. T. Rep. N. S. 343, per Cranworth, L. C., it is accepted as a sufficient act of part performance merely because it was proved to be in pursuance of the agreement. Whether the act *ipso facto* indicates an agreement is not discussed. If this criterion of the sufficiency of acts of part performance were to be adopted, the logical conclusion is that mere payment ought frequently or generally, to be a sufficient act; and this logical conclusion from Nunn *v.* Fabian is accepted by Bagallay, J., in Humphreys *v.* Green, 10 Q. B. D. 148, 47 J. P. 244, 52 L. J. Q. B. 140, 48 L. T. Rep. N. S. 60. It is noteworthy that Nunn *v.* Fabian is not mentioned by Selborne, L. C., in his exhaustive review of cases in Maddison *v.* Alderson, 8 App. Cas. 467, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820. If the rule were generally adopted in this country, it should follow (Pomeroy Spec. Perf. § 124) that continued possession with payment of the purchase-money takes a contract of purchase out of the statute, which is not a universally accepted doctrine. See the next paragraph.

85. *Indiana.*— Railsback *v.* Walke, 81 Ind. 409; Carlisle *v.* Brennan, 67 Ind. 12; Johnston *v.* Glancy, 4 Blackf. 94, 28 Am. Dec. 45.

Maryland.—Wingate v. Dail, 2 Harr. & J. 76.

Missouri.— Emmel *v.* Hayes, 102 Mo. 186, 14 S. W. 209, 22 Am. St. Rep. 769, 11 L. R. A. 323 [*overruling* Simmons *v.* Headlee, 94 Mo. 482, 7 S. W. 20].

New Hampshire.— Peters *v.* Dickinson, 67 N. H. 389, 32 Atl. 154.

South Carolina.— McMillan *v.* McMillan, 77 S. C. 511, 58 S. E. 431.

See also cases cited *supra,* V, E, 1, c, (I).

86. *Arkansas.*— Phillips *v.* Jones, 79 Ark. 100, 95 S. W. 164.

(D) *Continued Possession With Improvements.* The making of valuable and permanent improvements on the premises by a vendee or lessee whose possession antedated the new contract, of such a character and magnitude as cannot reasonably and naturally be accounted for by his original tenancy or title, has frequently been adjudged to be a sufficient part performance.[87] But in order to render improvements made by one in possession at the time of the contract of much weight as bearing upon his right to specific performance, they must be of such a character as to be decidedly inconsistent with the continuance of the old relation.[88] Slight improvements considerably less than the annual rental,[89] or not beyond the requirements of ordinary husbandry,[90] will not suffice. Not only in magnitude

Maryland.— Drury *v.* Conner, 6 Harr. & J. 288, life-tenant purchasing from remainderman.

New York.— Pawling *v.* Pawling, 86 Hun 502, 33 N. Y. Suppl. 780 [*affirmed* in 150 N. Y. 574, 44 N. E. 1127].

South Carolina.— Smith *v.* Smith, 1 Rich. Eq. 130, where possession is such as to make purchaser a trespasser.

Virginia.—Wilde *v.* Fox, 1 Rand. 165.

But where payment was to be made by delivery of chattels from time to time, and plaintiff had furnished such chattels from time to time prior to the contract, and it did not appear that the subsequent deliveries were under the contract, there was no sufficient part performance. Billingslea *v.* Ward, 33 Md. 48.

87. *Arkansas.*— Moore *v.* Gordon, 44 Ark. 334. And see Phillips *v.* Jones, 79 Ark. 100, 95 S. W. 164.

Florida.— Tate *v.* Jones, 16 Fla. 216.

Illinois.— Morrison *v.* Herrick, 130 Ill. 631, 22 N. E. 537.

Indiana.— Pearson *v.* East, 36 Ind. 27, divided court.

Kansas.— Edwards *v.* Fry, 9 Kan. 417.

Minnesota.— Pfiffner *v.* Stillwater, etc., R. Co., 23 Minn. 343.

New York.— Brown *v.* Jones, 46 Barb. 400.

Pennsylvania.—Aurand *v.* Wilt, 9 Pa. St. 54, improvements, ceasing to pay rent, and part payment of purchase-money.

Texas.— Hibbert *v.* Aylott, 52 Tex. 530.

West Virginia.— Campbell *v.* Fetterman, 20 W. Va. 398; Vickers *v.* Sisson, 10 W. Va. 12.

Wisconsin.—Wall *v.* Minneapolis, etc., R. Co., 86 Wis. 48, 56 N. W. 367; Fisher *v.* Moolick, 13 Wis. 321.

England.—Williams *v.* Evans, L. R. 19 Eq. 547, 44 L. J. Ch. 319, 32 L. T. Rep. N. S. 359, 23 Wkly. Rep. 446; Sutherland *v.* Briggs, 1 Hare 26, 5 Jur. 1151, 11 L. J. Ch. 36, 23 Eng. Ch. 26, 66 Eng. Reprint 936; Mundy *v.* Joliffe, 3 Jur. 1045, 9 L. J. Ch. 95, 5 Myl. & C. 167, 46 Eng. Ch. 152, 41 Eng. Reprint 334; Wills *v.* Stradling, 3 Ves. Jr. 378, 4 Rev. Rep. 26, 30 Eng. Reprint 1063.

See 44 Cent. Dig. tit. "Specific Performance," § 134 *et seq.*

Contra.— Carlisle *v.* Fleming, 1 Harr. (Del.) 421.

Improvements made by a sublessee under the lessee's authority are equivalent to improvements made by the lessee himself. Williams *v.* Evans, L. R. 19 Eq. 547, 44 L. J. Ch. 319, 32 L. T. Rep. N. S. 359, 23 Wkly. Rep. 466.

Valuable and permanent.— No definite rule can be laid down as to the value of the improvements. It is enough if they are of such character and made under such circumstances that it will be inferred that they were made because of the contract. Tate *v.* Jones, 16 Fla. 216, erecting a dwelling-house, enlarging the inclosures, setting out many fruit trees. See also Moore *v.* Gordon, 44 Ark. 334 (improvements of more value than any proved benefit resulting from the possession); Morrison *v.* Herrick, 130 Ill. 631, 22 N. E. 537 (improvements costing as much as two years' rent); Brown *v.* Jones, 46 Barb. (N. Y.) 400 (improvements adding fifty per cent to value of the land); Sutherland *v.* Briggs, 1 Hare 26, 5 Jur. 1151, 11 L. J. Ch. 36, 23 Eng. Ch. 26, 66 Eng. Reprint 936 (extension of house over the land).

88. *Illinois.*— Barrett *v.* Geisinger, 148 Ill. 98, 35 N. E. 354; Padfield *v.* Padfield, 92 Ill. 198; Wood *v.* Thornly, 58 Ill. 464.

Michigan.— Messmore *v.* Cunningham, 78 Mich. 623, 44 N. W. 145.

Minnesota.— Bresnahan *v.* Bresnahan, 71 Minn. 1, 73 N. W. 515.

Missouri.— Spalding *v.* Conzelman, 30 Mo. 177.

New York.— Bevans *v.* Young, 13 N. Y. Suppl. 497 [*affirmed* in 135 N. Y. 631, 34 N. E. 645]; Byrne *v.* Romaine, 2 Edw. 445, repairs which tenant was bound by original lease to make.

Pennsylvania.—Whiting *v.* Pittsburgh Opera House Co., 88 Pa. St. 100; Donnelly's Estate, 3 Pa. Dist. 381, ordinary repairs.

South Carolina.— McMillan *v.* McMillan, 77 S. C. 511, 58 S. E. 431.

But although the improvements were of no great value, where the vendee, continuing in possession and paying the purchase-money, had lost his right to reimbursement because of the statute of limitations, it was held that he might have specific performance. Veum *v.* Sheeran, 95 Minn. 315, 104 N. W. 135. The court admits that it construes the doctrine very liberally.

89. Barrett *v.* Geisinger, 148 Ill. 98, 35 N. E. 354; Spalding *v.* Conzelman, 30 Mo. 177.

90. Padfield *v.* Padfield, 92 Ill. 198; Wood *v.* Thornly, 58 Ill. 464; Bresnahan *v.* Bresnahan, 71 Minn. 1, 73 N. W. 515.

and value, but in other respects, the improvements must unequivocally refer to and result from the agreement.[91]

(E) *Continued Possession and Other Acts.* Other acts than improvements or payment have occasionally been held to be a sufficient part performance in connection with a continued possession.[92]

2. Must Be Exclusive — a. Not Shared With Vendor. Where the vendee continues to occupy or control the land in part, merely sharing the occupancy or control of it with the vendor, the mixed possession so resulting does not satisfy the requirements of the doctrine.[93] But it has been held that where it is sought to enforce a parol contract to convey land, and possession is relied on as part

91. The following acts of improvement therefore were insufficient: Repairs which plaintiff was under a statutory duty to make. Frame *v.* Dawson, 14 Ves. Jr. 386, 9 Rev. Rep. 304, 33 Eng. Reprint 569. The improvement of an adjoining tract, although useful in connection with the land in question. Barrett *v.* Geisinger, 148 Ill. 98, 35 N. E. 354. Improvements made before the contract. Eckert *v.* Eckert, 3 Penr. & W. (Pa.) 332.

92. Where the vendee, who had been in possession as tenant of part of the tract sold, continued that possession, paid part of the purchase-money, and took possession of and made improvements upon the remainder of the tract, it was held that there was sufficient part performance as to the whole of the land. Cross *v.* Johnston, 76 Ark. 363, 88 S. W. 945. And where a tenant held over, under a verbal contract of sale, and applied for a deed and abstract, there was held to be a manifest change in the relations of the parties such as to warrant specific performance. Place *v.* Johnson, 20 Minn. 219. A mother conveyed to her son, on his oral agreement to reconvey in a certain event, which event took place. By the agreement she was to continue in possession. It was held that by virtue of this agreement her possession was under the agreement, and therefore a sufficient possession within the doctrine of part performance. Simonton *v.* Godsey, 174 Ill. 28, 51 N. E. 75. This reasoning ignores the principle that the act should not only be under and in pursuance of the contract, but should *ipso facto* point to a contract. The decision would probably be warranted on the theory of a constructive trust between persons in a confidential relation. See 3 Pomeroy Eq. Jur. § 1056 note. See also *infra*, V, I, 2.

93. *Alabama.*— Trammell *v.* Craddock, 93 Ala. 450, 9 So. 587.

Arkansas.— McNeill *v.* Jones, 21 Ark. 277.

California.— Peek *v.* Peek, 77 Cal. 106, 19 Pac. 227, 11 Am. St. Rep. 244, 1 L. R. A. 185.

Illinois.— Standard *v.* Standard, 223 Ill. 255, 79 N. E. 92; Gorham *v.* Dodge, 122 Ill. 528, 14 N. E. 44; Cuddy *v.* Brown, 78 Ill. 415; Crank *v.* Trumble 66 Ill. 428.

Indiana.— Johns *v.* Johns, 67 Ind. 440; Cuppy *v.* Hixon, 29 Ind. 522.

Kansas.— Baldwin *v.* Baldwin, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. N. S. 957; Baldwin *v.* Squier, 31 Kan. 283, 1 Pac. 591.

Minnesota.— Bresnahan *v.* Bresnahan, 71 Minn. 1, 73 N. W. 515.

New Jersey.— Brewer *v.* Wilson, 17 N. J. Eq. 180.

New York.— Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783; Devinney *v.* Corey, 1 Silv. Sup. 148, 5 N. Y. Suppl. 289 [*affirmed* in 127 N. Y. 655, 28 N. E. 254].

Oregon.— Brown *v.* Lord, 7 Oreg. 302.

Pennsylvania.— Moore *v.* Small, 19 Pa. St. 461; Frye *v.* Shepler, 7 Pa. St. 91; Wible *v.* Wible, 1 Grant 406; Haslet *v.* Haslet, 6 Watts 464.

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870.

Virginia.— Wright *v.* Pucket, 22 Gratt. 370.

West Virginia.—Woods *v.* Stevenson, 43 W. Va. 149, 27 S. E. 309; Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297.

Thus there is no exclusive possession where the vendee merely lived on the land as a member of the vendor's family (Cuddy *v.* Brown, 78 Ill. 415. But see Warren *v.* Warren, 108 Ill. 568, *dicta*); where his possession was of a small portion of the premises, the rest remaining in the actual occupation of the vendor (Brewer *v.* Wilson, 17 N. J. Eq. 180); or where some of the tenants paid rent to the vendor (Price *v.* Lloyd, 31 Utah 86. 86 Pac. 767, 8 L. R. A. N. S. 870). In Michigan, however, in cases usually of a promise to make a gift to a near relative, followed by services rendered by the donee to the donor in care and support or in labor on the land, and by improvements made upon the land by the donee, his joint occupancy with the donee is held to be a sufficient possession. "A purchaser who takes possession of land under an oral purchase is likely in so doing to change very considerably — perhaps wholly — the general course of his life as previously planned by him; and if he is evicted on a repudiation of the contract, any estimate of his loss by others must, in many cases, be mere guess-work. The rule, therefore, rests upon the element of uncertainty, and not upon any technical ground of exclusiveness in the possession." Lamb *v.* Hinman, 46 Mich. 112, 116, 6 N. W. 675, 8 N. W. 709, per Cooley, J. See also Lloyd *v.* Hollenback, 98 Mich. 203, 57 N. W. 110; Kinyon *v.* Young, 44 Mich. 339, 6 N. W. 835; Twiss *v.* George, 33 Mich. 253. And see Stratton *v.* Stratton, 58 N. H. 473, 42 Am. Rep. 604. In Bushnell *v.* Rowland, 118 Mich. 618, 77 N. W. 271, the vendee's joint occupancy of

performance, the rule that possession must be exclusive is satisfied where the possession was as exclusive as the terms of the contract would permit.[94] Receiving the vendor or donor into the vendee's or donee's family as a boarder and other like acts do not constitute a divided or mixed possession within the meaning of this rule, if the vendee or donee has the "dominant" possession.[95]

b. Possession of Tenant in Common Purchasing From Cotenant. Since the actual possession of one tenant in common is the constructive possession of all, the possession of the whole tract by a tenant in common who has orally agreed to buy his cotenant's shares is an inadequate act of possession. It falls within the condemnation of two rules; since it is not, technically, at any rate, an exclusive possession, and since it may be accounted for by his preëxisting relation as cotenant as well as by a contract.[96] But where plaintiff has not only actually taken possession to the exclusion of the other tenants, but has also made payment and valuable improvements, these acts together, in most jurisdictions, make a sufficient part performance.[97]

3. Must Be With Consent — a. In General. The possession must be taken with the consent of the vendor, actual or implied; since in the absence of such consent there can be no estoppel against defendant or fraud upon plaintiff, which is the foundation of the doctrine of part performance.[98] A forcible, "scrambling,"

the premises with the vendor, and his expenditure of money and labor for the betterment of the place, was held sufficient part performance of an agreement to convey a life-interest.

Sale of undivided share by owner of the whole.— In such a case a joint possession with the vendor is all the possession which the vendee can take, and, if accompanied by valuable improvements by the vendee, is a sufficient part performance. McKay *v.* Calderwood, 37 Wash. 194, 79 Pac. 629. The situation is a different one from that where a tenant in common purchases his cotenant's undivided share. See *infra*, V, E, 2, b.

94. Taylor *v.* Taylor, 79 Kan. 161, 99 Pac. 814.

95. *Indiana.*— Watson *v.* Mahan, 20 Ind. 223.

Maine.—Woodbury *v.* Gardner, 77 Me. 68.

Michigan.—Ayres *v.* Short, 142 Mich. 501, 105 N. W. 1115.

Ohio.— Cooper *v.* Cooper, 8 Ohio S. & C. Pl. Dec. 35, 6 Ohio N. P. 99.

Texas.— Where plaintiff, a contract purchaser of land, took possession, dug a well thereon, and put in the foundation of a stable, it was held that he was in exclusive possession so as to entitle him to specific performance of a parol contract for its sale to him, although he afterward allowed the vendor to occupy the property with him, if the vendor's possession was subordinate to plaintiff's. Babcock *v.* Lewis, (Civ. App. 1908) 113 S. W. 584.

Vermont.— Smith *v.* Pierce, 65 Vt. 200, 25 Atl. 1092.

96. *Arkansas.*—Haines *v.* McGlone, 44 Ark. 79.

Kansas.— Nay *v.* Mograin, 24 Kan. 75.

Michigan.— Peckham *v.* Balch, 49 Mich. 179, 13 N. W. 506.

New Jersey.— Campbell *v.* Campbell, 11 N. J. Eq. 268.

New York.—Wainman *v.* Hampton, 110 N. Y. 429, 18 N. E. 234.

Pennsylvania.— Spencer's Appeal, 80 Pa. St. 317; McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654; Galbreath *v.* Galbreath, 5 Watts 146; Small *v.* Ehrgood, 1 Lack. Leg. N. 167, partner.

Texas.—Munk *v.* Weidner, 9 Tex. Civ. App. 491, 29 S. W. 409.

Parol partition among tenants in common has nothing to do with the rule of the text. See *infra*, V, O, 1.

97. Town *v.* Needham, 3 Paige (N. Y.) 545, 24 Am. Dec. 246; Barrett *v.* Forney, 82 Va. 269; Rhea *v.* Jordan, 28 Gratt. (Va.) 678; Peck *v.* Stanfield, 12 Wash. 101, 40 Pac. 635; Littlefield *v.* Littlefield, 51 Wis. 25, 7 N. W. 773. In Pennsylvania, however, it is said that part performance of a parol sale by one cotenant to another is impossible. Spencer's Appeal, 80 Pa. St. 317; McCormick's Appeal, 57 Pa. St. 54, 98 Am. Dec. 191; Workman *v.* Guthrie, 29 Pa. St. 495, 72 Am. Dec. 654. And see Nay *v.* Mograin, 24 Kan. 75.

Whether the making of valuable improvements is always indispensable is a matter of some doubt. In Littlefield *v.* Littlefield, 51 Wis. 25, 7 N. W. 773, there was payment in the nature of support given to the vendor, and improvements made after the vendor's death; and these acts, coupled with the vendee's possession of the land, were held to be sufficient.

98. *Arkansas.*— McNeill *v.* Jones, 21 Ark. 277.

California.— Eshleman *v.* Henrietta Vineyard Co., 102 Cal. 199, 36 Pac. 579; Foster *v.* Maginnis, 89 Cal. 264, 26 Pac. 828.

Indiana.— Moore *v.* Higbee, 45 Ind. 487; Barnett *v.* Washington Glass Co., 12 Ind. App. 631, 40 N. E. 1102.

Iowa.— Lowery *v.* Lowery, 117 Iowa 704, 89 N. W. 1118.

Missouri.— Bean *v.* Valle, 2 Mo. 126.

Montana.—Boulder Valley Ditch Min., etc., Co. *v.* Farnham, 12 Mont. 1, 29 Pac. 277.

or litigious possession will not answer;[99] nor will possession taken after the death of the vendor, without the consent of his heirs.[1]

b. Implied Consent. The vendor's consent, however, may be inferable from circumstances;[2] and it seems that in all cases where the vendee has paid the purchase-money there is an implied agreement that the vendee may at once take possession.[3] The objection that the possession was taken without consent is obviated by the vendor's acquiescence in the possession for a long term of years.[4]

4. Must Not Have Been Abandoned — a. In General. The possession once taken must not be abandoned or surrendered;[5] and if the vendee, after taking possession, attorns to the vendor as landlord, his possession will be referred to the lease and not to the contract of sale.[6]

b. What Is Not an Abandonment. But temporary cessation of possession,

Nebraska.— Poland *v.* O'Connor, 1 Nebr. 50, 93 Am. Dec. 327.

New Jersey.— Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Chamberlain *v.* Manning, 41 N. J. Eq. 651, 7 Atl. 634; Camden, etc., R. Co. *v.* Stewart, 18 N. J. Eq. 489.

New York.— Czermak *v.* Wetzel, 114 N. Y. App. Div. 816, 100 N. Y. Suppl. 167; Jervis *v.* Smith, Hoffm. 470.

Oklahoma.— Halsell *v.* Renfrow, 14 Okla. 674, 78 Pac. 118.

Oregon.— Pulse *v.* Hamer, 8 Oreg. 251.

Pennsylvania.— Sage *v.* McGuire, 4 Watts & S. 228.

South Carolina.— Thomson *v.* Scott, 1 McCord Eq. 32; Givens *v.* Calder, 2 Desauss. Eq. 171, 2 Am. Dec. 686.

Texas.— Ryan *v.* Wilson, 56 Tex. 36.

West Virginia.— Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391.

United States.—Purcell *v.* Coleman, 4 Wall. 513, 18 L. ed. 435.

England.— Cole *v.* White [*cited* in Whithread *v.* Brockhurst, 1 Bro. Ch. 404, 409, 28 Eng. Reprint 1205].

Thus possession is insufficient if received from one who acted without the owner's authority (Chamberlain *v.* Manning, 41 N. J. Eq. 651, 7 Atl. 634), or taken while the vendors have no control over the land (Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133). The rule has been stated in the form that possession must be taken at the request of the vendor (Pulse *v.* Hamer, 8 Oreg. 251), but this requirement appears to be too strict.

In Alabama the statute (Code (1896), § 2152, subd. 5) requires that the vendee be put in possession by the vendor. Robinson *v.* Driver, 132 Ala. 169, 31 So. 495.

99. Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Camden, etc., R. Co. *v.* Stewart, 18 N. J. Eq. 489; Purcell *v.* Coleman, 4 Wall. (U. S.) 513, 18 L. ed. 435.

1. Sage *v.* McGuire, 4 Watts & S. (Pa.) 228; Ryan *v.* Wilson, 56 Tex. 36; Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391. *Contra*, Warren *v.* Warren, 105 Ill. 568, *dicta*.

2. Smith *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 579. And see Gregory *v.* Mighell, 18 Ves. Jr. 328, 11 Rev. Rep. 207, 34 Eng. Reprint 341.

But the vendee's cultivation of the land for two years with the vendor's knowledge thereof does not necessarily imply the consent of the vendor. Eshleman *v.* Henrietta Vineyard Co., (Cal. 1894) 36 Pac. 775.

3. Miller *v.* Ball, 64 N. Y. 286. And see Richmond *v.* Foote, 3 Lans. (N. Y.) 244. *Compare* Pulse *v.* Hamer, 8 Oreg. 251, where the purchase-money had not been paid. See also Ham *v.* Goodrich, 33 N. H. 32. In this case an agreement by a father to give his farm to his son, if the son would come and live with the father and take care of him and the farm during the father's lifetime, was construed to mean an agreement to convey by some instrument to take effect after the father's death, and not to imply that possession was to be delivered during the father's lifetime; such possession, therefore, taken by the son during the father's lifetime was not in part execution of the contract. But it is believed that on substantially similar facts many cases of oral gifts and of agreements in consideration of services have reached the opposite conclusion. See *infra*, V, K, 1, a.

4. Gregory *v.* Mighell, 18 Ves. Jr. 328, 11 Rev. Rep. 207, 34 Eng. Reprint 341. But not by mere occupancy for a few months. Jervis *v.* Smith, Hoffm. (N. Y.) 470.

Protest of vendors against a retention by the vendee of a disputed strip of land, included in the contract of sale, but not in the description in the conveyance, not having been made until two months after the vendee had entered into possession thereof, constituted no defense to a suit to compel specific performance. Starrett *v.* Boynton, 73 N. J. Eq. 669, 70 Atl. 183.

5. *Alabama.*— Chambliss *v.* Smith, 30 Ala. 366.

California.— Eshleman *v.* Henrietta Vineyard Co., (1894) 36 Pac. 775.

Indiana.—McDaneld *v.* McDaneld, 136 Ind. 603, 36 N. E. 286.

Iowa.— Williamson *v.* Williamson, 4 Iowa 279.

Michigan.— Dragoo *v.* Dragoo, 50 Mich. 573, 15 N. W. 910.

Missouri.—White *v.* Watkins, 23 Mo. 423; Porter *v.* Citizens' Bank, 73 Mo. App. 513.

New York.— Haight *v.* Child, 34 Barb. 186.

That an oral waiver or abandonment of the contract, without a surrender of the possession, will not defeat specific performance see Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

6. Rankin *v.* Simpson, 19 Pa. St. 471, 57 Am. Dec. 668.

without intent to surrender, does not destroy the vendee's right to specific performance;[7] nor does the fact that the vendee, after sufficient performance, is ousted from his possession by the vendor.[8]

5. Must Be Actual and Notorious — a. In General. There must be an actual and notorious, and not merely a constructive, possession. A mere technical possession, not open to the observation of the neighborhood, is insufficient. This is a result of the general rule that the evidence of part performance must be clear and convincing.[9]

b. Possession of Part of Premises; Sale of Distinct Parcels. Where there is an entire contract for the sale of distinct parcels to the vendee for a gross price, his possession of one of the parcels is deemed to be a possession of all.[10] On the other hand, where the contract is not for a gross price, but the price is apportioned among the several parcels, possession and improvement of one of the parcels is not a part performance as to the others.[11]

c. Possession Through Tenant or Other Third Party. Possession may be taken by the vendee through a tenant;[12] and possession taken by another party

7. Drum *v.* Stevens, 94 Ind. 181; Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383. In the last case the vendee of a half interest in the property subsequently relinquished possession to the other half owner; and this was held to show no intention to abandon the interest the vendee had acquired.

8. Winchell *v.* Winchell, 100 N. Y. 159, 2 N. E. 897; O'Hara *v.* O'Hara, 16 Ohio Cir. Ct. 367, 9 Ohio Cir. Dec. 293.

9. Charpiot *v.* Sigerson, 25 Mo. 63; Evergreen Cemetery Assoc. *v.* Armstrong, 37 Minn. 259, 34 N. W. 32; Ackerman *v.* Fisher, 57 Pa. St. 457; Huntington, etc., Land Development Co. *v.* Thornburg, 46 W. Va. 99, 33 S. E. 108. Using a vacant lot for storage (Hunt *v.* Lipp, 30 Nebr. 469, 46 N. W. 632, storage of building material not to be used on the lot; Poland *v.* O'Connor, 1 Nebr. 50, 93 Am. Dec. 327, storage of wagons, lumber, etc., used in connection with vendee's warehouse adjoining the lot) has been held insufficient, since the act was equivocal, pointing rather to a permissive use than to a contract; and so of digging a trench for the foundation of a house (Chamberlain *v.* Manning, 41 N. J. Eq. 651, 7 Atl. 634). But it appears to be held, in a case where plaintiff agreed to pay half the cost of erecting a house, and a half interest in the property was to be conveyed to him, that giving his personal attention to the erection of the house was a sufficient taking of possession. Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383.

Cutting wood for lumber or fuel on a tract of wild land has been held not to constitute an actual and notorious possession in the following cases: Fulton *v.* Jansen, 99 Cal. 587, 34 Pac. 331; Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Gangwer *v.* Fry, 17 Pa. St. 491, 55 Am. Dec. 578 (although that is all the possession usually taken of such land); Miller *v.* Lorentz, 39 W. Va. 160, 19 S. E. 391. See *infra*, V, F, 3, a.

Merely walking over a tract of uncleared and uninclosed land, and offering it for sale, is not such a notorious possession as will take the case out of the statute. Frostburg Coal Co. *v.* Thistle, 20 Md. 186.

But where, on sale of wild land several miles distant from a highway, the vendee cut a road from the land to the highway, made roads on the land, underbrushed it, cut up fallen trees, preparatory to clearing about a quarter of an acre, erected a bough shanty, drew from the lot wood and timber and paid the taxes thereon, he "took all the possession of such a lot which is ordinarily practicable," and that possession therefore was sufficient. Miller *v.* Ball, 64 N. Y. 286.

10. *Georgia.*— Blalock *v.* Waggoner, 82 Ga. 122, 8 S. E. 48.

Iowa.— Sweeney *v.* O'Hora, 43 Iowa 34.

New York.—Smith *v.* Underdunck, 1 Sandf. Ch. 579.

West Virginia.— Bryson *v.* McShane, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527.

Wisconsin.— Bartz *v.* Paff, 95 Wis. 95, 69 N. W. 297, 37 L. R. A. 848; Jones *v.* Pease, 21 Wis. 644.

Contra.— *In re* Allen, 1 Watts & S. (Pa.) 383.

A fortiori taking possession of part of the land, and continuing in possession of the remainder, is a sufficient possession of the whole. Cross *v.* Johnston, 76 Ark. 363, 88 S. W. 945.

11. Small *v.* Northern Pac. R. Co., 20 Fed. 753.

12. Sweeney *v.* O'Hora, 43 Iowa 34; Shearer *v.* Gibson, 123 Mich. 467, 82 N. W. 206 (on sale of half interest, possession by receipt of share of rents); Williams *v.* Landman, 8 Watts & S. (Pa.) 55; Pugh *v.* Good, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534. *Contra*, Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87, *dictum*. In Williams *v.* Landman, 8 Watts & S. (Pa.) 55, attornment, by agreement with vendor, of vendor's tenant to the vendee was held to be a delivery of possession. But in the case of a partnership to deal in real estate, the facts of plaintiff's making repairs and receiving a share of rents from defendants, who collected the rents and managed the property, did not constitute a part performance. Scheuer *v.* Cochem, 126

acting under the vendee may, under some circumstances, count as the vendee's possession.[13]

F. Nature of Improvements — 1. Must Be Referable to the Contract — a. In General. Many of the tests which determine whether possession is an act of part performance apply also to improvements when those are relied upon. Thus the improvements should point to a contract of the character claimed, not to some other right or title.[14]

b. Not On or For Benefit of Other Land. Improvements made chiefly for the benefit of other land, or made on other land and not necessarily referable exclusively to the contract, are insufficient.[15]

2. Must Be by Consent. The improvements relied upon must be made with the consent of the vendor or lessor, or at least with his acquiescence; not after the contract has been repudiated. It is not necessary, however, that they should have been expressly authorized, since the yielding of possession to the vendee implies an authority in him to deal with the premises.[16]

Wis. 209, 105 N. W. 573, 4 L. R. A. N. S. 427.

13. Where a vendor agreed to convey to a third party a portion of the lot which was the subject of the prior oral contract, it was held that as conveyance to, and possession taken by, this third party of such portion, was only a variation in the mode of executing the original contract, his performance was equivalent to a performance by the vendee. Blalock *v.* Waggoner, 82 Ga. 122, 8 S. E. 48. And where a married woman contracted orally to purchase an undivided half of a tract, her husband being the coöwner with her vendor and in occupancy of the whole, it was held that, as the only change of possession which the facts permitted was in the husband's recognition of the wife's ownership, the possession of the husband counted as the possession of the wife, as regarded the undivided half purchased by her. Murphy *v.* Stever, 47 Mich. 522, 11 N. W. 368. It should be observed, however, that the Michigan decisions make no strict requirement as to exclusiveness of possession. See *supra*, V, E, 2, a, note.

14. *Arkansas.*— Morrison *v.* Peay, 21 Ark. 110.

California.— Weber *v.* Marshall, 19 Cal. 447, holding that they must have been made in reference to, or have been induced by, the contract.

Connecticut.— Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133.

Illinois.— Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210; Wood *v.* Thornly, 58 Ill. 464.

Michigan.— McMurtrie *v.* Bennette, Harr. 124, acts must unequivocally refer to and result from the agreement — such as the party would not have done unless on account of that very agreement and with a direct view to its performance.

Ohio.— Henry *v.* Henry, 27 Ohio St. 121.

Oregon.— Wallace *v.* Scoggins, 17 Oreg. 476, 21 Pac. 558.

Virginia.— Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742.

Thus making repairs and expenditures such as would not be made by a tenant from month to month (Wallace *v.* Scoggins, 17 Oreg. 476, 21 Pac. 558), or costing more than a year's rent (Morrison *v.* Peay, 21 Ark. 110), point to, and is an act of part performance of, an agreement for a written lease.

Improvement by husband under contract with wife.— An agreement by an intended wife to deed her lands to her husband is not part performed by marriage and his subsequent entry on and improvement of the land, such acts being referable to his tenancy by the curtesy. Henry *v.* Henry, 27 Ohio St. 121. The act of a husband in making improvements on the land of his wife while they were living together thereon, being such an act as might naturally be done by a husband without agreement, does not point to an agreement binding the wife to make compensation therefor by will or otherwise. Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742.

On the sale of a half interest in land it was held that payment of part of the cost of the improvements made, together with possession by receipt of a share of rents, constituted a part performance. Shearer *v.* Gibson, 123 Mich. 467, 82 N. W. 206. And where a wife, whose husband was owner of an undivided half of land and in occupancy of the whole, purchased the other undivided half, it was held that she would have the benefit of improvements subsequently made by her husband as her own acts of part performance. Murphy *v.* Stever, 47 Mich. 522, 11 N. W. 368.

Under a rule that a verbal contract to purchase is not assignable, and therefore that acts done by an assignee are not in pursuance of the contract, a purchaser by verbal contract who sells the land to a third person and subsequently repurchases it cannot in a suit for specific performance avail himself of improvements made by such third person as a partial performance of the contract. Abbott *v.* Baldwin, 61 N. H. 583.

15. Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133; Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998.

16. *Illinois.*— Wood *v.* Thornly, 58 Ill. 464, made with knowledge that defendant repudiated the contract.

Indiana.— Moore *v.* Higbee, 45 Ind. 487.

Kansas.— Baldwin *v.* Squier, 31 Kan. 283, 1 Pac. 591, made after death of promisor.

3. Must Be Valuable and Permanent — a. In General. If improvements are relied upon, not merely as evidence that an actual possession was taken, but as an additional, independent ground for specific performance, they must be both valuable and permanent. Slight expenditures for repairs, and the like, such as might naturally be made by any person as incident to an occupation of the premises, are insufficient.[17]

b. Whether Must Exceed Rental Value. It is the rule in a few states that if the improvements are exceeded in value by the rents or the use and occupation of the land during the time for which the vendee has been in possession, they are insufficient as an act of part performance, as not complying with the requirement in these states that the act must be one for which compensation cannot readily be made;[18] but this rule has been distinctly rejected in other states; and it is believed that a large proportion of the cases in which improvements have been held an act of part performance do not comply with the test.[19]

Missouri.— Parke *v.* Leewright, 20 Mo. 85, made after defendant had repudiated the contract.

Montana.—Boulder Valley Ditch Min., etc., Co. *v.* Farnham, 12 Mont. 1, 29 Pac. 277, made after defendant had repudiated the contract.

New Jersey.— Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252, improvements not based on rightful possession.

Pennsylvania.— Aurand *v.* Wilt, 9 Pa. St. 54, made after the controversy began.

Texas.—Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18, made after repudiation of the contract.

England.— Gregory *v.* Mighell, 18 Ves. Jr. 328, 11 Rev. Rep. 207, 34 Eng. Reprint 341, expenditures by lessee.

But that the improvements were made under protest of the vendor is immaterial, where he did not repudiate the contract, but his objections had reference to the vendee's neglect to make payments. Potter *v.* Jacobs, 111 Mass. 32.

The vendor need not expressly authorize the improvements; his assent to them is sufficient. Mournin *v.* Trainor, 63 Minn. 230, 65 N. W. 444. But see Black *v.* Black, 15 Ga. 445.

17. *California.*— Foster *v.* Maginnis, 89 Cal. 264, 26 Pac. 828, moving fence posts and loose lumber on the land.

Maine.— Bennett *v.* Dyer, 89 Me. 17, 35 Atl. 1004, plowing a driving park on the land.

Montana.— See Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918, on sale of a mine, improvements held sufficient under this rule.

New Hampshire.— Ham *v.* Goodrich, 33 N. H. 32, repairs of trifling value.

New York.— Cooley *v.* Lohdell, 153 N. Y. 596, 47 N. E. 783, on sale from husband to wife, trifling improvements, such as a wife would naturally make on husband's premises. See Van Epps *v.* Clock, 3 Silv. Sup. 500, 7 N. Y. Suppl. 21, repairing fences, removing brush, etc., sufficient.

Rhode Island.— Peckham *v.* Barker, 8 R. I. 17.

Texas.—Cobb *v.* Johnson, 101 Tex. 440, 108 S. W. 811 [*reversing* (Civ. App. 1907) 105 S. W. 847], fifteen-dollar henhouse. *Compare* Babcock *v.* Lewis, (Civ. App. 1908) 113 S. W. 584, holding that the payment of thirty-seven dollars of the contract purchase-price of one hundred dollars for land, and the digging of a well on the premises, and laying of the foundation for a stable by the contract purchaser was a sufficient part performance to entitle him to specific performance of an oral contract for the sale of the land.

West Virginia.— Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297, trifling repairs.

See also *supra*, V, E, 1, c, (IV), (D).

Improvements on wild land held sufficient see Miller *v.* Ball, 64 N. Y. 286; Parkhurst *v.* Van Cortland, 14 Johns. (N. Y.) 15, 7 Am. Dec. 427 (making the ordinary improvements necessary to transform a forest into a farm and home); Griffith *v.* Abbott, 56 Vt. 356.

Improvements on wild land held insufficient see Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350 (cutting and removing timber); Jones *v.* Carver, 59 Tex. 293 (cutting the hulk of the timber on the land). It should be noted that the requirements are in other respects more stringent in Pennsylvania and Texas than in other states. See also *supra*, V, E, 5, a.

18. *Massachusetts.*— Low *v.* Low, 173 Mass. 580, 54 N. E. 257 (improvements in excess of the value of the land sufficient); Burns *v.* Daggett. 141 Mass. 368, 6 N. E. 727; Potter *v.* Jacobs, 111 Mass. 32 (improvements far exceeding value of the land sufficient).

Minnesota.— Jorgenson *v.* Jorgenson, 81 Minn. 428, 84 N. W. 221, *dictum.*

Pennsylvania.— Hart *v.* Carroll, 85 Pa. St. 508; McGibbeny *v.* Burmaster, 53 Pa. St. 332, improvements far beyond value of land sufficient.

Texas.— Ann Berta Lodge No. 42 I. O. O. F. *v.* Leverton, 42 Tex. 18. But this test seems to have been abandoned by later cases. See the cases cited in the note following.

West Virginia.— Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297, *dictum.*

United States.— Where the value of the improvements was far exceeded by advances made to the vendee by the vendor, there was no equity in the vendee's favor because of the improvements. Marr *v.* Shaw, 51 Fed. 860.

19. See *supra*, V, D, 2, b, c; *infra*, V, K,

c. Rule in Pennsylvania and Virginia. In Pennsylvania the rule is well established that, in the absence of full payment, improvements must be of such a character that they cannot reasonably be compensated.[20] The same rule is established in Virginia;[21] and it has been there held, in case of improvements by a lessee, that where he has himself appraised them at a definite sum, they admit of compensation and therefore do not call for specific enforcement of the parol lease.[22]

G. Form of the Payment. Payment, when relied upon as an act of part performance in connection with other acts or, in Iowa,[23] alone, does not necessarily mean a money payment. Payment may be made in chattels,[24] by a conveyance of land to the vendor [25] or to a third person,[26] by personal services,[27] or by making improvements called for by the contract; [28] and in general, it would seem, by any such change of position at the request of the promisor and on the strength of the promise as constitutes a legal consideration.[29]

H. Services — 1. In Connection With Other Acts. Services rendered by the vendee to the vendor are a form of payment, and as such, in connection with possession, frequently give rise to a right to specific performance of an oral contract, and in Iowa where payment by itself is a statutory ground,[30] such payment has

1, a. And see Shepherd *v.* Bevin, 9 Gill (Md.) 32 [*reversing* 1 Md. Ch. 244]; Van Epps *v.* Clock, 3 Silv. Sup. (N. Y.) 500, 7 N. Y. Suppl. 21 (improvements not more than ten per cent of price); Wells *v.* Davis, 77 Tex. 636, 14 S. W. 237; Babcock *v.* Lewis, (Tex. Civ. App. 1908) 113 S. W. 584 (holding that a payment of one third of the price of the land and improvements were not so insignificant as to warrant a refusal of specific performance of the contract, even though the improvements did not equal in value what the purchaser had gained by his occupancy of the land).

An offer to repay the money expended on the land does not bar the promisee's right to specific performance. Gill *v.* Newell, 13 Minn. 462.

20. Piatt *v.* Seif, 207 Pa. St. 614, 57 Atl. 68; Schuey *v.* Schaeffer, 130 Pa. St. 16, 18 Atl. 544, 549; Anderson *v.* Brinser, 129 Pa. St. 376, 11 Atl. 809, 18 Atl. 520, 6 L. R. A. 205; Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Lord's Appeal, 105 Pa. St. 451; Moyer's Appeal, 105 Pa. St. 432; Detrick *v.* Sharrar, 95 Pa. St. 521; Jamison *v.* Dimock, 95 Pa. St. 52 (full payment dispenses with the rule); Hart *v.* Carroll, 85 Pa. St. 508; Dougan *v.* Blocher, 24 Pa. St. 28.

21. Crane's Nest Coal, etc., Co. *v.* Virginia Iron, etc., Co., 108 Va. 862, 62 S. E. 954, 1119 (holding that the fact that the purchaser of land under a verbal contract delivered a horse to the vendor, and cleared a small tract upon which he sowed crop, rented part of the land, and built a brush fence around the clearing, etc., did not show such part performance as entitled him to specific performance, since adequate compensation might be had in damages); Hoover *v.* Baugh, 108 Va. 695, 62 S. E. 968, 128 Am. St. Rep. 985 (holding that where complainant's only acts of part performance under an oral contract to convey were the cutting of briars off the land so as to pasture it, and, after taking possession, the making of costly improvements on his house on an adjoining lot, which would not have been made except on the expectation of acquiring title to the other lot, such acts were capable of compensation in damages, and specific performance was not necessary to give adequate relief).

22. Henley *v.* Cottrell Real Estate, etc., Co., 101 Va. 70, 43 S. E. 191.

23. For acts not satisfying the requirement of the Iowa statute (Code, § 4626) that the purchase-money or some part thereof must have been received by the vendor see Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724 (tender); Query *v.* Liston, 92 Iowa 288, 60 N. W. 524 (deposit in bank to be paid to vendor when title perfect); Auter *v.* Miller, 18 Iowa 405. On the other hand, surrender of possession and abandonment of lease were held sufficient part payments in Yule *v.* Fell, 123 Iowa 662, 99 N. W. 559.

24. Powell *v.* Higley, 90 Ala. 103, 7 So. 440; Castleman *v.* Sherry, 42 Tex. 59.

25. Hege *v.* Thorsgaard, 98 Wis. 11, 73 N. W. 567. And see *infra*, V, N.

26. Harder *v.* Harder, 2 Sandf. Ch. (N. Y.) 17.

27. See *infra*, V, H, 1.

28. Telford *v.* Chicago, etc., R. Co., 172 Ill. 559, 50 N. E. 105; Chicago, etc., R. Co. *v.* Boyd, 118 Ill. 73, 7 N. E. 487. See *infra*, V, K, 1, a.

29. Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49 (vendee's giving up his employment and moving on to the land); Shepherd *v.* Bevin, 9 Gill (Md.) 32 [*reversing* 1 Md. Ch. 244] (relinquishing share in father's estate); Moale *v.* Buchanan, 11 Gill & J. (Md.) 314 (granting indulgence by creditors); Schoonmaker *v.* Bonny, 6 N. Y. St. 122 [*reversed* on other grounds in 119 N. Y. 565, 23 N. E. 1106] (assumption of payment of mortgage on the premises which was being foreclosed). In Hart *v.* McClellan, 41 Ala. 251, the court was called upon to make the grave decision that "treating" the bystanders to drinks was not a part payment, since not in pursuance of the contract.

30. See *supra*, V, C, 2, g.

frequently been in the form of services.[31] Thus a parent's oral promise to convey or devise land to his son is often made in consideration of services to be rendered to the parent; such services, together with taking exclusive or "dominant" possession, entitle the son to specific performance.[32]

2. Ordinary Services Alone Not Part Performance. Ordinary personal or professional services, the value of which can be readily estimated, are not by themselves a sufficient act of part performance.[33] Of such nature are the vendee's

31. *Arkansas.*— Hinkle *v.* Hinkle, 55 Ark. 583, 18 S. W. 1049.

California.— Blankenship *v.* Whaley, 124 Cal. 300, 57 Pac. 79; Manning *v.* Franklin, 81 Cal. 205, 22 Pac. 550.

District of Columbia.— Cherry *v.* Whalen, 25 App. Cas. 537; Whitney *v.* Hay, 15 App. Cas. 164 [*affirmed* in 181 U. S. 77, 21 S. Ct. 537, 45 L. ed. 758].

Illinois.— McDowell *v.* Lucas, 97 Ill. 489.

Indiana.— Denlar *v.* Hile, 123 Ind. 68, 24 N. E. 170; Cutsinger *v.* Ballard, 115 Ind. 93, 17 N. E. 206; Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Mauck *v.* Melton, 64 Ind. 414; Lafollett *v.* Kyle, 51 Ind. 446; Watson *v.* Mahan, 20 Ind. 223; Stater *v.* Hill, 10 Ind. 176; Atkinson *v.* Jackson, 8 Ind. 31.

Iowa.— Caldwell *v.* Drummond, 127 Iowa 134, 102 N. W. 842; Harlan *v.* Harlan, 102 Iowa 701, 72 N. W. 286; Mitchell *v.* Colby, 95 Iowa 202, 63 N. W. 769; Stem *v.* Nysonger, 69 Iowa 512, 29 N. W. 433; Franklin *v.* Tuckerman, 68 Iowa 572, 27 N. W. 759; Wamsley *v.* Lincicum, 68 Iowa 556, 27 N. W. 740.

Maine.— Woodbury *v.* Gardner, 77 Me. 68.

Michigan.— Ayres *v.* Short, 142 Mich. 501, 105 N. W. 1115.

Missouri.— Gupton *v.* Gupton, 47 Mo. 37; Fuchs *v.* Fuchs, 48 Mo. App. 18.

New Hampshire.— Stillings *v.* Stillings, 67 N. H. 584, 42 Atl. 271.

New Jersey.— Winfield *v.* Bowen, 65 N. J. Eq. 636, 56 Atl. 728.

New York.— Dana *v.* Wright, 23 Hun 29; McCray *v.* McCray, 30 Barb. 633.

Ohio.— O'Hara *v.* O'Hara, 16 Ohio Cir. Ct. 367, 9 Ohio Cir. Dec. 293; Cooper *v.* Cooper, 8 Ohio S. & C. Pl. Dec. 35, 6 Ohio N. P. 99.

Vermont.— Smith *v.* Pierce, 65 Vt. 200, 25 Atl. 1092.

Virginia.— Fishburne *v.* Ferguson, 85 Va. 321, 7 S. E. 361; Neel *v.* Neel, 80 Va. 584; Bowman *v.* Wolford, 80 Va. 213; Lester *v.* Lester, 28 Gratt. 737.

Wisconsin.— Littlefield *v.* Littlefield, 51 Wis. 25, 7 N. W. 773.

United States.— Brown *v.* Sutton, 129 U. S. 238, 9 S. Ct. 273, 32 L. ed. 664.

32. *Indiana.*— Lafollett *v.* Kyle, 51 Ind. 446.

Michigan.— Twiss *v.* George, 33 Mich. 253.

Missouri.— Gupton *v.* Gupton, 47 Mo. 37; Fuchs *v.* Fuchs, 48 Mo. App. 18.

New Hampshire.— Stillings *v.* Stillings, 67 N. H. 584, 42 Atl. 271.

New York.— McCray *v.* McCray, 30 Barb. 633.

Ohio.— Cooper *v.* Cooper, 8 Ohio S. & C. Pl. Dec. 35, 6 Ohio N. P. 99.

Vermont.— Smith *v.* Pierce, 65 Vt. 200, 25 Atl. 1092.

United States.—Brown *v.* Sutton, 129 U. S. 238, 9 S. Ct. 273, 32 L. ed. 664.

Joint possession with parent.— In Michigan the possession is sufficient, although it is a joint possession with the parent. Lloyd *v.* Hollenback, 98 Mich. 203, 57 N. W. 110; Lamb *v.* Hinman, 46 Mich. 112, 6 N. W. 675, 8 N. W. 709; Kinyon *v.* Young, 44 Mich. 339, 6 N. W. 835. See *supra*, V, E, 2, a, note.

33. *California.*— Edwards *v.* Estell, 48 Cal. 194; Hayden *v.* Collins, 1 Cal. App. 259, 81 Pac. 1120.

District of Columbia.—Townsend *v.* Vanderwerker, 20 D. C. 197 [*reversed* on other grounds in 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383].

Illinois.— Cloud *v.* Greasley, 125 Ill. 313, 17 N. E. 826; Temple *v.* Johnson, 71 Ill. 13; Quinn *v.* Stark County Tel. Co., 122 Ill. App. 133.

Kansas.— Renz *v.* Drury, 57 Kan. 84, 45 Pac. 71; Baldwin *v.* Squier, 31 Kan. 283, 1 Pac. 591.

Michigan.— Webster *v.* Gray, 37 Mich. 37. But see Taft *v.* Taft, 73 Mich. 502, 41 N. W. 481.

Minnesota.— Stellmacher *v.* Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609.

New Hampshire.—Weeks *v.* Lund, 69 N. H. 78, 45 Atl. 249; Peters *v.* Dickinson, 67 N. H. 389, 32 Atl. 154; Ham *v.* Goodrich, 33 N. H. 32.

New Jersey.— Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660.

New York.— Russell *v.* Briggs, 165 N. Y. 500, 59 N. E. 303, 53 L. R. A. 556; Braun *v.* Ochs, 77 N. Y. App. Div. 20, 79 N. Y. Suppl. 100; Ludwig *v.* Bungart, 26 Misc. 247, 56 N. Y. Suppl. 51 [*reversed* on other grounds in 48 N. Y. App. Div. 613, 63 N. Y. Suppl. 91].

Pennsylvania.— Peifer *v.* Landis, 1 Watts 392.

Texas.— Ward *v.* Stuart, 62 Tex. 333.

West Virginia.— Reel *v.* Reel, 59 W. Va. 106, 52 S. E. 1023; Goodwin *v.* Bartlett, 43 W. Va. 332, 27 S. E. 325; Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297.

Wisconsin.—Horn *v.* Ludington, 32 Wis. 73.

Where plaintiff was the junior partner of the promisor in a medical practice, plaintiff's acts in attending to the correspondence and looking after the wants of the elder and caring for him when intoxicated, being such acts as would naturally be expected to be performed by a young physician in partnership with an elder, do not necessarily refer to or result from the elder's promise to devise.

services as a surveyor,[34] or real estate broker;[35] legal services;[36] furnishing room, board, washing, and nursing;[37] or performing manual labor.[38]

3. Peculiar Services Are Part Performance — a. In General. Certain kinds of services of a very personal nature have been recognized by a clear majority of the American cases as a sufficient act of part performance, unaided by possession or other act on plaintiff's part. Where the services rendered are of such a peculiar character that it is impossible to measure their value by any pecuniary standard, and where it is evident the parties did not intend to measure them by any such standard, it is impossible adequately to compensate the party performing the services except by a decree for specific performance.[39]

Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200.

When the services are understood to be a mere substitute for money, they fall within the rule of the text. Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297.

34. Edwards *v.* Estell, 48 Cal. 194; Webster *v.* Gray, 37 Mich. 37.

35. Russell *v.* Briggs, 165 N. Y. 500, 59 N. E. 303.

36. Temple *v.* Johnson, 71 Ill. 13; Horn *v.* Ludington, 32 Wis. 73. But see Chastain *v.* Smith, 30 Ga. 96, promisor became insolvent.

37. Stellmacher *v.* Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609; Weeks *v.* Lund, 69 N. H. 78, 45 Atl. 249. But see *contra*, Pflugar *v.* Pultz, 43 N. J. Eq. 440, 11 Atl. 123.

38. Peters *v.* Dickinson, 67 N. H. 389, 32 Atl. 154, cutting wood.

39. Weeks *v.* Lund, 69 N. H. 78, 45 Atl. 249; Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660; Pomeroy Spec. Perf. §§ 114, 135 "There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract." Sutton *v.* Hayden, 62 Mo. 101, 114. And see the following cases:

California.— Flood *v.* Templeton, 152 Cal. 148, 92 Pac. 78, 13 L. R. A. N. S. 579; McCabe *v.* Healy, 138 Cal. 81, 70 Pac. 1008; Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

Illinois.— Warren *v.* Warren, 105 Ill. 568.

Iowa.—Cook *v.* Ely, (1908) 116 N. W. 129.

Michigan.— Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

Minnesota.— Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420; Stellmacher *v.* Bruder, (1903) 95 N. W. 324 (*dictum*); Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St Rep. 490, 43 L. R. A. 427.

Missouri.— Berg *v.* Moreau, 199 Mo. 416, 97 S. W. 901; Grantham *v.* Gossett, 182 Mo. 651, 81 S. W 895; Hall *v.* Harris, 145 Mo. 614, 47 S. W. 506; Nowack *v.* Berger, 133 Mo. 24, 34 S. W. 489, 54 Am. St. Rep. 663, 31 L. R. A. 810; Carney *v.* Carney, 95 Mo. 353, 8 S. W. 729; Sharkey *v.* McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; Hiatt *v.* Williams, 72 Mo. 214, 37 Am. Rep. 438.

Nebraska.— Teske *v.* Dittberner, 70 Nebr. 544, 98 N. W. 57, 113 Am. St. Rep. 802, 65 Nebr. 167, 91 N. W. 181, 63 Nebr. 607, 88 N. W. 658; Best *v.* Gralapp, 69 Nebr. 811, 96 N. W. 641, 99 N. W. 837; Kofka *v.* Rosicky, 41 Nebr. 328, 59 N. W. 788, 43 Am. St. Rep. 685, 25 L. R. A. 207.

New Jersey.— Vreeland *v.* Vreeland, 53 N. J. Eq. 387, 32 Atl. 3; Pflugar *v.* Pultz, 43 N. J. Eq. 440, 11 Atl. 123; Davison *v.* Davison, 13 N. J. Eq. 246; Van Duyne *v.* Vreeland, 12 N. J. Eq. 142, 11 N. J. Eq. 370.

New York.— Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Suppl. 303; Brantingham *v.* Huff, 43 N. Y. App. Div. 414, 60 N. Y. Suppl. 157; Godine *v.* Kidd, 64 Hun 585, 19 N. Y. Suppl. 335, 29 Abb. N. Cas. 36; Thorp *v.* Stewart, 44 Hun 232; Healy *v.* Healy, 31 Misc. 636, 66 N. Y. Suppl. 82 [*affirmed* in 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927 (*affirmed* in 167 N. Y. 572, 60 N. E. 1112)]; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279.

Ohio.— Ewing *v.* Richards, 8 Ohio Dec. (Reprint) 357, 7 Cinc. L. Bul. 183.

South Dakota.— McCullom *v.* Mackrell, 13 S. D. 262, 83 N. W. 255; Lothrop *v.* Marble, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626; Quinn *v.* Quinn, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

Utah.— Brinton *v.* Van Cott, 8 Utah 480, 33 Pac. 218.

West Virginia.— Bryson *v.* McShane. 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527.

United States.— Jaffee *v.* Jacobson, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352, *dictum*.

If on account of the statute of limitations plaintiff could recover at law for a small portion only of the period for which the services were rendered, his equity is thereby strengthened. See Warren *v.* Warren, 105 Ill. 568.

California.— Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369.

Illinois.— Warren *v.* Warren, 105 Ill. 568, care of father for forty years.

Iowa.— Cook *v.* Ely, (1908) 116 N. W. 129.

Minnesota.— Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420.

Missouri.— Berg *v.* Moreau, 199 Mo. 416, 97 S. W 901; Hall *v.* Harris, 145 Mo. 614, 47 S W. 506; Carney *v.* Carney, 95 Mo. 353, 8 S. W. 729; Hiatt *v.* Williams, 72 Mo. 214, 37 Am. Rep. 438.

Nebraska.— Teske *v.* Dittberner, 70 Nebr. 544, 98 N. W. 57, 113 Am. St. Rep. 802, 65

b. Care of Aged Person. A contract to care for, give personal attention to, and make a home for an aged person, whether a relative or a stranger, in return for a promise of a testamentary gift or devise, is a common form of such contract.[40] If the performance of the contract involved the abandonment by plaintiff of his previous business or home, his equity is so much the stronger.[41]

c. Informal Adoption of Child. Another frequent type of contract is found in an informal agreement with the parents of a child to adopt the child and make it an heir of the promisor, or give it a child's portion of the promisor's estate. The total change of position on the part of the child and its natural parents, the assumption of the filial relation to the adopting parent, and the rendering of such services and duties of affection as naturally flow from that relation, present a case where the recovery of compensation for the pecuniary value of the services would be an utterly inadequate remedy.[42]

Nebr. 167, 91 N. W. 181, 63 Nebr. 607, 88 N. W. 658; Best *v.* Gralapp, 69 Nebr. 811, 96 N. W. 641, 99 N. W. 837.

New Jersey.— Vreeland *v.* Vreeland, 53 N. J. Eq. 387, 32 Atl. 3; Davison *v.* Davison, 13 N. J. Eq. 246.

New York.— Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Suppl. 303; Brantingham *v.* Huff, 43 N. Y. App. Div. 414, 60 N. Y. Suppl. 157; Godine *v.* Kidd, 64 Hun 585, 19 N. Y. Suppl. 335, 29 Abb. N. Cas. 36; Thorp *v.* Stewart, 44 Hun 232; Healy *v.* Healy, 31 Misc. 636, 66 N. Y. Suppl. 82 [*affirmed* in 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927 (*affirmed* in 167 N. Y. 572, 60 N. E. 1112)]; Rhodes *v.* Rhodes, 3 Sandf. Ch. 279, care of an epileptic brother; the leading case.

Ohio.— Ewing *v.* Richards, 8 Ohio Dec. (Reprint) 357, 7 Cinc. L. Bul. 183.

South Dakota.— McCullom *v.* Mackrell, 13 S. D. 262, 83 N. W. 255; Lothrop *v.* Marble, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626, care of a repulsive invalid.

Utah.— Brinton *v.* Van Cott, 8 Utah 480, 33 Pac. 218.

West Virginia.— Bryson *v.* McShane, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527.

40. "There are some services that are incapable of valuation in money; as to these the law permits individuals to make their own contracts. Old age is naturally repulsive. The hair grows gray, the eyes sunken, the skin wrinkled and brown, the flesh shrunken, the figure bent, the limbs weak and trembling, the will feeble, the tongue garrulous, the mouth toothless, the mind wandering, the habits careless and filthy, accompanied oftentimes with loathsome diseases needing all the care and attention of childhood without its purity, loveliness and affection as a compensation. To meet this condition of life a kind Providence has ordinarily provided the ties of blood and marriage and parental, fraternal and filial affection with their reciprocal duties and obligations of mutual care and support," etc. Bryson *v.* McShane, 48 W. Va. 126, 130, 35 S. E. 848, 49 L. R. A. 527.

41. Best *v.* Gralapp, 69 Nebr. 811, 96 N. W. 641, 99 N. W. 837; Vreeland *v.* Vreeland, 53 N. J. Eq. 387, 32 Atl. 3. It is not essential, however, that the performance should involve a pecuniary sacrifice on plaintiff's part; the fact that he was previously in humble circumstances, so that the position was in itself advantageous, is not sufficient to warrant denial of relief. Berg *v.* Moreau, 199 Mo. 416, 438, 97 S. W. 901 (probably overruling *dicta* to the contrary effect in Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200), where it is said that "services rendered by the poor and obscure are as full and rich in sentiment and as deserving of every remedy allowed by the courts as services rendered by the rich or the happily-circumstanced."

42. "In the case of a contract under which the relation of parent and child is assumed, under the agreement that the child shall receive all the property of the other at death, the consideration of the contract is not so much the personal service of the child as it is the assumption of the filial relation. In such case, it may be argued with great force that the value of that relation to the recipient of such services as naturally flow therefrom is not susceptible of measurement in money. The fact that the consideration for such services or the assumption of such relation is all of the property remaining at death, naturally an undetermined and indefinite amount, may also authorize the inference that the parties did not intend or expect remuneration for the services rendered according to their pecuniary value." Weeks *v.* Lund, 69 N. H. 78, 83, 45 Atl. 249. And see the following cases:

California.— McCabe *v.* Healy, 138 Cal. 81, 70 Pac. 1008.

Iowa.— Cook *v.* Ely, (1908) 116 N. W. 129.

Kansas.— Bichel *v.* Oliver, 77 Kan. 696, 95 Pac. 396.

Michigan.— Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

Minnesota.— Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 74 Am. St. Rep. 490, 43 L. R. A. 427.

Missouri.— Grantham *v.* Gossett, 182 Mo. 651, 81 S. W. 895; Nowack *v.* Berger, 133 Mo. 24, 34 S. W. 489, 54 Am. St. Rep. 663, 31 L. R. A. 810; Sharkey *v.* McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 245.

Nebraska.— Peterson *v.* Bauer, 83 Nebr. 405, 119 N. W. 764; Kofka *v.* Rosicky, 41 Nebr. 328, 59 N. W. 788, 43 Am. St. Rep. 685, 25 L. R. A. 207.

4. Peculiar Services Held Not Part Performance — a. In General. A few courts, considering the rule that the acts of part performance must of themselves clearly point or refer to some contract in relation to the subject-matter in dispute, to be of fundamental importance,[43] have refused to accept the rendering of services, of however personal and peculiar a character, as a sufficient part performance, notwithstanding that refusal of specific performance may result in a great injustice and hardship to plaintiff.[44]

b. Informal Adoption of Child. Specific performance has been refused in this class of cases not only on the ground that the acts on plaintiff's part do not point to a contract concerning land, but for the reason that no fraud is worked upon the child by refusal of relief, since its condition in life was improved by the adoption.[45]

5. Peculiar Services; Question Undecided. In several states the question whether peculiar services are a sufficient part performance has been left an open one by the courts.[46]

New Jersey.— Van Duyne *v.* Vreeland, 12 N. J. Eq. 142, 11 N. J. Eq. 370, the leading case.

South Dakota.— Quinn *v.* Quinn,, 5 S. D. 328, 58 N. W. 808, 49 Am. St. Rep. 875.

United States.— Jaffee *v.* Jacobson, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352.

That the contract to make the child an heir may be implied from adoption proceedings taken under an invalid statute but supposed by the adopting parent to be valid see Wright *v.* Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196.

43. See *supra*, V, A, 7, c.

44. *Connecticut.*—Grant *v.* Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379.

Illinois.— Dicken *v.* McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; Pond *v.* Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414; Wallace *v.* Rappleye, 103 Ill. 229; Cuddy *v.* Brown, 78 Ill. 415.

Indiana.— Austin *v.* Davis, 128 Ind. 472, 26 N. E. 890, 25 Am. St. Rep. 456, 12 L. R. A. 120; Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; Johns *v.* Johns, 67 Ind. 440.

Ohio.— Shahan *v.* Swan, 48 Ohio St. 25, 39, 26 N. E. 222, 29 Am. St. Rep. 517; Crabill *v.* Marsh, 38 Ohio St. 331. In Shahan *v.* Swan, *supra*, an adoption case, the court says: "Acts of this character are not usually the offspring of contractual relations. Would the ordinary observer infer from them any contract whatever? Would they not, rather, be attributed to higher motives? . . . Whether these acts of alleged part performance be taken singly or collectively, they do not indicate that they were done in performance of any contract or agreement respecting property rights of any kind, but rather were the manifestations of a benevolent and affectionate disposition on the part of a childless couple towards a gentle and affectionate child whose fate was placed in their keeping by a mother who was in destitute circumstances and homeless herself."

Wisconsin.— Rodman *v.* Rodman, 112 Wis. 378, 88 N. W. 218; Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55.

England.— Maddison *v.* Alderson, 8 App. Cas. 467, 480, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820. In this case a woman had been induced, by a promise to leave her an estate for life in land, to serve the intestate as his housekeeper, without wages, for many years, and to give up other prospects of an establishment in life. Selborne, L. C., says: "Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease." It is to be noted that the services rendered in this case were probably not of the peculiar and personal kind which, according to the majority of the American courts, warrants specific performance. The lord chancellor's argument, however, negatives the idea that services of any character can be an act of part performance.

The following were cases of the care of relatives or aged persons: Johns *v.* Johns, 67 Ind. 440; Crabill *v.* Marsh, 38 Ohio St. 331; Ellis *v.* Cary, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55.

45. Grant *v.* Grant, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379; Dicken *v.* McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; Pond *v.* Sheean, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414; Wallace *v.* Rappleye, 103 Ill. 229; Cuddy *v.* Brown, 78 Ill. 415; Austin *v.* Davis, 128 Ind. 472, 26 N. E. 890, 25 Am. St. Rep. 456, 12 L. R. A. 120; Wallace *v.* Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517.

Immaterial that there was a legal adoption.— Dicken *v.* McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471.

Such a contract has been deemed unreasonable in that it bound the promisor at his death to give the child all his after-acquired property. Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903.

46. Anderson *v.* Anderson, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. N. S. 229; Renz *v.* Drury, 57 Kan. 84, 45 Pac. 71 (does not lay down the hard-and-fast rule that a court of equity

6. Duration of Services. It is immaterial that the services, on account of the death of the promisor, lasted only a few months instead of many years.[47] But an agreement to make a testamentary gift in consideration of services will not be enforced until the services have been fully performed.[48]

I. Other Acts — 1. Preliminary Acts. Many acts preparatory to the completion of the contract have been denied the status of acts of part performance, for the reasons that they do not point to, and are not in pursuance of, a completed contract; are usually done without the other party's knowledge; and do not cause a serious change in plaintiff's condition to his detriment.[49] It has been so held of such acts as selecting the lot;[50] viewing the estate;[51] measuring the land;[52] making maps, surveys, and drafts of agreements,[53] and plans for improvements;[54] the lessor's putting the house in readiness for occupancy, papering it, etc.;[55] delivering the rent-roll and abstract of title to the vendee, and sending tenants to treat with him for a renewal of their leases;[56] the vendee's depositing a part payment with his agent;[57] giving instructions for a deed or lease;[58] executing[59] and registering[60] a deed, which was not accepted; and other prior or preliminary acts.[61]

2. Miscellaneous Acts — a. In General. In addition to the usual acts of money payment, possession, improvements, and services, a great variety of other acts have been successfully asserted as acts of part performance. While the reasons for considering them such are not always clearly explained, it will be found that most of them present circumstances where plaintiff's change of position is

should never compel specific performance of a parol contract of this character); Weeks *v.* Lund, 69 N. H. 78, 45 Atl. 249. "There might arise a case in which the services were of so singular character and the relation of the parties so peculiar that an action at law for the value of the services would not compensate the party." Russell *v.* Briggs, 165 N. Y. 500, 506, 59 N. E. 303 [*reversing* 17 N. Y. App. Div. 621, 44 N. Y. Suppl. 1128]. In the later case of Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903, the objection was to the unreasonableness of the contract in question. The leading case of Rhodes *v.* Rhodes, 3 Sandf. Ch. (N. Y.) 279, has not been overruled in New York. "We do not wish to be understood to hold that cases may not arise wherein specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services, not intended to be, and not susceptible of being measured by a pecuniary standard." Shahan *v.* Swan, 48 Ohio St. 25, 40, 26 N. E. 222, 29 Am. St. Rep. 517.

47. Harlan *v.* Harlan, 102 Iowa 701, 72 N. W. 286; Lothrop *v.* Marble, 12 S. D. 511, 81 N. W. 885, 76 Am. St. Rep. 626 (one month); Brinton *v.* Van Cott, 8 Utah 480, 33 Pac. 218.

48. Hayden *v.* Collins, 1 Cal. App. 259, 81 Pac. 1120; Cronk *v.* Trumble, 66 Ill. 428; Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126; Jaffee *v.* Jacobson, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352.

49. See Pomeroy Spec. Perf. § 110.

50. Barnett *v.* Washington Glass Co., 12 Ind. App. 631, 40 N. E. 1102.

51. Clerk *v.* Wright, 1 Atk. 12, 26 Eng. Reprint 9.

52. Pembroke *v.* Thorpe, 3 Swanst. 442, 19 Rev. Rep. 254, 36 Eng. Reprint 939.

53. Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Gratz *v.* Gratz, 4 Rawle (Pa.) 411.

54. Charlton *v.* Columbia Real Est. Co., 64 N. J. Eq. 631, 54 Atl. 444.

55. Burckhardt *v.* Greene, 26 Ohio Cir. Ct. 315 [*affirmed* in 68 Ohio St. 711, 70 N. E. 1116].

56. Whaley *v.* Bagnel, 1 Bro. P. C. 345, Wall. 12 note, 1 Eng. Reprint 611.

57. Lanz *v.* McLaughlin, 14 Minn. 72.

58. Gratz *v.* Gratz, 4 Rawle (Pa.) 411; Givens *v.* Calder, 2 Desauss. Eq. (S. C.) 171, 2 Am. Dec. 686; Cooke *v.* Tombs, Anstr. 420; Clerk *v.* Wright, 1 Atk. 12, 26 Eng. Reprint 9; Cole *v.* White [*cited* in Whitbread *v.* Brockhurst, 1 Bro. Ch. 404, 409, 28 Eng. Reprint 1205]; Redding *v.* Wilkes, 3 Bro. Ch. C. 400, 29 Eng. Reprint 609; Bawdes *v.* Amhurst, Prec. Ch. 402, 24 Eng. Reprint 180.

59. Reeves *v.* Pye, 20 Fed. Cas. No. 11,662, 1 Cranch C. C. 219; Phillips *v.* Edwards, 33 Beav. 440, 3 New Rep. 658, 55 Eng. Reprint 438; Hawkins *v.* Holmes, 1 P. Wms. 770, 24 Eng. Reprint 606.

60. Hawkins *v.* Holmes, 1 P. Wms. 770, 24 Eng. Reprint 606.

61. *Massachusetts.*— Fickett *v.* Durham, 109 Mass. 419.

Missouri.— Lydick *v.* Holland, 83 Mo. 703.

Montana.— Ducie *v.* Ford, 8 Mont. 233, 19 Pac. 414.

Oregon.— Reynolds *v.* Scriber, 41 Oreg. 407, 69 Pac. 48.

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870.

Virginia.— Helton *v.* Johnson, (1897) 27 S. E. 579.

Wisconsin.— J. L. Gates Land Co. *v.* Ostrander, 124 Wis. 287, 102 N. W. 558.

England.— Whitchurch *v.* Bevis, 2 Bro. Ch. 559, 29 Eng. Reprint 306.

See also *infra*, V, I, 2.

such that damages would be an inadequate or impossible remedy. They must be acts in pursuance of the contract, connected with [62] the contract and naturally flowing from it; [63] but they have very often failed to comply with the rule that the act must in itself indicate some contract concerning the land.[64]

b. Money Payment. Under some special circumstances, payment of the consideration has been treated as a sufficient act of part performance.[65]

c. Conveyance of Homestead. Conveyance of a homestead by husband and wife has been held to take an oral agreement to exchange lands out of the statute, since the parties, being deprived of their homestead, cannot be restored *in statu quo*.[66]

d. Breaking Off Negotiations With Third Party. Where defendant agreed to purchase certain land and sell it to plaintiff, if plaintiff would break off negotiations for its purchase with the owner, who was under no legal obligation to plaintiff, plaintiff's act of breaking off negotiations was not a sufficient part performance.[67]

e. Relinquishing a Right — (I) *Abstaining From Filing Adverse Mining Claim.* Where defendant agreed to obtain a patent to a mining claim and transfer an interest to plaintiff, a disputing claimant, plaintiff's abstention from filing an adverse claim was a mere preparatory act, not tending to prove the contract.[68]

(II) *Abandoning an Option.* Where plaintiff had an option on certain premises and abandoned it in reliance on defendant's oral agreement to lease to him other premises, such abandonment, not being connected with the contract, although done in reliance thereon, known to defendant, prejudicial to plaintiff, and incapable of adequate compensation in damages, did not suffice as part performance.[69] And where plaintiff relinquished an option on lands on faith of the agreement of defendant's agent, known to plaintiff to be unauthorized, that defendant would purchase the lands and convey them to plaintiff, the act of relinquishment, being a prior act in anticipation of acceptance, was insufficient.[70]

62. See *infra*, V, I, 2, e, (I), (i), (I).

63. See *infra*, V, I, 2, f.

64. For cases where relief was refused for failure to comply with this rule see *infra*, V, I, 2, h, i, (III), and Sands *v.* Thompson, 43 Ind. 18. Nearly all the cases in the following paragraphs where relief was granted seem implicitly to deny the validity of this test, where to insist upon the test would work a serious hardship.

65. Kincaid *v.* Kincaid, 85 Hun (N. Y.) 141, 32 N. Y. Suppl. 476 [*affirmed* in 157 N. Y. 715, 53 N. E. 1126] (plaintiff purchased land from a third person and had it conveyed to defendant, who verbally agreed to give plaintiff a life lease thereof. Plaintiff had no action for damages against defendant, and could not recover the price paid from his vendor); Korminsky *v.* Korminsky, 2 Misc. (N. Y.) 138, 21 N. Y. Suppl. 611 (plaintiffs bought and paid for land and had the conveyance made to their father on his agreement to will it to them at his death; but *quære* could not these cases be rested on the ground of a trust resulting from payment of the purchase-money?); Riggles *v.* Erney, 154 U. S. 244, 14 S. Ct. 1083, 38 L. ed. 976, an oral agreement for division of testator's property, between two sets of devisees, was fully performed on the part of the first set by conveyance of land to a trustee for sale and payment of a proportionate share of the proceeds to the second set, including defendant. The court relied on the analogy of cases of oral exchange of lands followed by conveyance by plaintiff and possession taken by defendant. In Humphreys *v.* Green, 10 Q. B. D. 148, 47 J. P. 244, 52 L. J. Q. B. 140, 48 L. T. Rep. N. S. 60, Bagallay, J., commenting on Nunn *v.* Fabian, L. R. 1 Ch. 35, 11 Jur. N. S. 868, 35 L. J. Ch. 140, 13 L. T. Rep. N. S. 343, where payment of an increased rent by a tenant continuing in possession with an option to purchase was held part performance of an oral agreement to renew the lease, declared that on the authority of that case the mere payment ought sometimes to be a part performance.

66. Farwell *v.* Johnston, 34 Mich. 342. But plaintiffs here appear also to have taken possession of the land to be conveyed to them.

67. Lyons *v.* Bass, 108 Ga. 573, 34 S. E. 721; Lamas *v.* Bayly, 2 Vern. Ch. 627, 23 Eng. Reprint 1011. *Contra*, Noble *v.* McGurk, 16 Misc. (N. Y.) 461, 39 N. Y. Suppl. 921, where defendant, about to bid on property, agreed to give plaintiff, a tenant of the property who wished to continue in business therein, a five-year lease on consideration of his refraining from bidding.

68. Ducie *v.* Ford, 8 Mont. 233, 19 Pac. 414 [*affirmed* in 138 U. S. 587, 11 S. Ct. 417, 34 L. ed. 1091].

69. Jenning *v.* Miller, 48 Oreg. 201, 85 Pac. 517.

70. J. L. Gates Land Co. *v.* Ostrander, 124 Wis. 287, 102 N. W. 558.

(III) *Dismissing Legal Proceedings, or Abandoning a Defense, Right of Appeal, Etc.* The compromise and dismissal of an action brought by plaintiff against defendant has been held a sufficient ground for enforcing defendant's oral agreement, where the action cannot be reinstated, or plaintiff's claim has become barred, or he has otherwise irretrievably changed his position in pursuance of the agreement.[71] Allowing foreclosure of plaintiff's land situated in another state has also been deemed an act of part performance, repayment being impossible.[72] Relinquishing a right to appeal from a judgment of foreclosure,[73] and relinquishing the statutory right of redemption from foreclosure until it has expired,[74] have also been held to be acts requiring the enforcement of the mortgagee's agreement.

f. Procuring Means For Performance. Also plaintiff's buying a building for the purpose of moving it on the land;[75] or, in a state where payment is part performance, procuring the personal property which was to be given in exchange for the land,[76] is not an act of part performance.

g. Compliance With Building Restriction. Where adjoining lot-owners orally agreed to set buildings to be placed by them on their lots a certain distance from the street, plaintiff's act in erecting his building in compliance with the agreement was held not a part performance rendering the agreement binding on the other party, since the act did not of itself point to any contract.[77]

h. Mutual Wills. Where two parties orally agree to make wills in each other's favor, plaintiff who has made a will in compliance with the agreement has not done an act of part performance, for the double reason that making a will is not of itself evidence of an agreement, and that plaintiff has not changed his position, the property being still in his control.[78]

71. Slingerland *v.* Slingerland, 39 Minn. 197, 39 N. W. 146 (some of plaintiff's actions could not be reinstated); Barbour *v.* Barbour, 49 N. J. Eq. 429, 24 Atl. 227 (wife agrees to dismiss divorce suit and cohabit with husband; this is a valuable consideration and one impossible to measure); Hancock *v.* Melloy, 187 Pa. St. 371, 41 Atl. 313 (abandoning claim to surcharge administrator's account, and consenting to confirm the account); Daniels *v.* Lewis, 16 Wis. 140 (claim had become barred).

Mere forbearance by a creditor has been held to take the debtor's agreement to secure the debt by mortgage out of the statute. Allender *v.* Evans-Smith Drug Co., 3 Indian Terr. 628, 64 S. W. 558.

72. Moore *v.* Gordon, 44 Ark. 334. See also Morris *v.* Gaines, 82 Tex. 255, 17 S. W. 538. But see Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148.

Mere forbearance by a mortgagor to assert a fixed monetary demand against a mortgagee's claim on foreclosure, in consideration of an agreement by the mortgagee to devise the mortgaged property to the mortgagor, does not warrant specific performance against the mortgagee's executors and heirs, since the mortgagor's remedy by action for damages is adequate. Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148.

In the case of a mortgagor's agreement not to bid at foreclosure sale, in consideration of the mortgagee's promise to bid in the property and reconvey it to the mortgagor, the mortgagor's act in refraining from bidding has sometimes been considered a part performance. Cutler *v.* Babcock, 81 Wis. 195, 51 N. W. 420, 29 Am. St. Rep. 882. *Contra*, Wheeler *v.* Reynolds, 66 N. Y. 227, act not a part performance, since it was as consistent with other circumstances as with the contract. This very common situation is usually worked out on the theory of a constructive trust. See Cutler *v.* Babcock, *supra*, and TRUSTS.

73. Paine *v.* Wilcox, 16 Wis. 202.

74. Williams *v.* Stewart, 25 Minn. 516.

75. Poland *v.* O'Connor, 1 Nebr. 50, 93 Am. Dec. 327, since the act does not "naturally flow" from the contract.

76. Wilson *v.* Chicago, etc., R. Co., 41 Iowa 443, holding that the act merely places plaintiff in a condition in which he is able to perform.

77. Smith *v.* McVeigh, 11 N. J. Eq. 239; Wolfe *v.* Frost, 4 Sandf. Ch. (N. Y.) 72. In the first case another reason for the decision was assigned by the court. A's, defendant's, building had at the time of the agreement already been built at the stipulated distance from the street. If the agreement therefore had been violated by B instead of by A, A having made no "change of position" in reliance on the agreement, could have asserted no act of part performance on his own part requiring enforcement against B. Hence, on the ground of lack of mutuality. A's violation of the agreement cannot be enjoined by B who has complied with the agreement. This view of the meaning of "mutuality" is not one that is generally entertained. See *infra*, IV, E.

78. Gould *v.* Mansfield, 103 Mass. 408, 4 Am. Rep. 573; Everdell *v.* Hill, 58 N. Y. App.

i. Acts Involving Third Persons — (i) *Acts Independent of Agreement With Defendant.* Plaintiff's purchase of the rights of other persons not parties to the contract, being purely a collateral matter, is not a part performance, although done in reliance on defendant's willingness to carry out his contract.[79] But plaintiff's sale of the land by warranty deed, in reliance on his belief that his own vendee had, as was promised, executed a deed to him, was held, in connection with payment by plaintiff to his vendee, to warrant specific performance against the latter.[80]

(ii) *Acts in Performance of Agreement With Defendant.* Defendant's oral agreement to convey a lot to plaintiff, in consideration of plaintiff's executing a conveyance to a stranger of the same or other premises, is not part performed, according to some authorities, by plaintiff executing such conveyance; plaintiff's act is equivalent to payment merely.[81] Similarly a vendor's agreement to convey to plaintiff on plaintiff's procuring a release from a third person was not part performed by plaintiff's procuring the release at a large expense.[82] Where plaintiff purchased land on defendant's oral agreement to release a mortgage or lien held by defendant on the land, and the purchase-money was paid accordingly, plaintiff was held entitled to specific performance of the agreement to release.[83]

(iii) *Three-Cornered Bargains.* By oral agreement between A, B, and C, A was to convey to B, and B was to give a lease to C. A conveyed to B, who took possession. It was held that C, although he had not done the act of part performance, might enforce the contract for a lease against B.[84] In a somewhat similar case, by written contracts, A was obliged to convey to B and B to C. There was an oral novation by which A agreed to convey to D and D to convey to C. D received his conveyance, and it was held that C might enforce the contract

Div. 151, 68 N. Y. Suppl. 719 [*reversing* 27 Misc. 285, 58 N. Y. Suppl. 447]; Hale *v.* Hale, 90 Va. 728, 19 S. E. 739. But *compare* Turnipseed *v.* Sirrine, 57 S. C. 559, 35 S. E. 757, 1035, 76 Am. St. Rep. 580, holding that where plaintiff has complied by making a will and not revoking it until the death of the other party, there is sufficient part performance.

Mutual wills; contract fully performed by party deceased.— Husband and wife orally agreed to make a certain testamentary disposition of their respective properties. The contract was fully performed by the husband on his part, and, after his death, the benefits provided by him in his will were accepted by his wife. This was held a sufficient part performance entitling the beneficiaries under will of the wife to sue in her lifetime to enjoin her from violating her part of the agreement by a conveyance in fraud of their rights. Carmichael *v.* Carmichael, 72 Mich. 76, 40 N. W. 173, 16 Am. St. Rep. 528, 1 L. R. A. 596. The case is analogous to that of an oral agreement for exchange of lands, partly performed by conveyance to, and possession taken by, defendant.

79. Graves *v.* Goldthwait, 153 Mass. 268, 26 N. E. 860, 10 L. R. A. 763, where plaintiff, a tenant in common, purchased the right of all her cotenants except defendant in a certain parcel, in reliance on defendant's oral agreement to convey his right also. Plaintiff's change of position, it was held, did not grow out of, nor was it exclusively referable to, the oral contract.

80. Stark *v.* Wilder, 36 Vt. 752, plaintiff's equity arising from the mistake of fact appears to reconcile this case with the one last cited.

81. Chambers *v.* Lecompte, 9 Mo. 575; Whitchurch *v.* Bevis, 2 Bro. Ch. 559, 29 Eng. Reprint 306. *Contra*, Brown *v.* Hoag, 35 Minn. 373, 29 N. W. 135 (where the value of the conveyance made was not intended to be measured by any fixed pecuniary standard); Johnson *v.* Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773 (a father's agreement to devise land to his son in consideration of the latter's immediately conveying certain land of his own to his sister was taken out of the statute by such conveyance on the son's part). A method of reconciling several of these cases is suggested in Pomeroy Spec. Perf. § 135 note. If plaintiff's conveyance to the third person was made before the agreement with defendant was completed, plaintiff's act is obviously merely a "preparatory" one. Lydick *v.* Holland, 83 Mo. 703.

82. O'Reilly *v.* Thompson, 2 Cox Ch. 271, 2 Rev. Rep. 41, 30 Eng. Reprint 126.

83. Malins *v.* Brown, 4 N. Y. 403; McKinley *v.* Wilson, (Tex. Civ. App. 1906) 96 S. W. 112, holding that plaintiff could not recover from his vendor, since he had received all he bargained for from the latter.

Release of one parcel.— Defendant mortgagee agreed to release one parcel from a mortgage covering plaintiff's two tracts, on plaintiff's execution of a second mortgage to defendant and consent to the assignment of the first mortgage to defendant; these acts and plaintiff's consequent change of position were a sufficient part performance. Gross *v.* Milligan, 176 Mass. 566, 58 N. E. 471.

84. Crocker *v.* Higgins, 7 Conn. 342.

against D [85] A agreed to convey his land to C and take C's lot in part payment, and then to convey such lot to B, who agreed to accept it and pay for it. A's transaction with C was completed, but B refused to perform. A then sued B for specific performance. It was held on these facts in one case that since A's *status quo* cannot be restored, he should succeed in his suit; [86] in a later case, that since A's transaction with C does not point to a contract with B, A should not succeed.[87] By agreement among A, a vendor, B, his vendee, who was insolvent and unable to pay, and C, the latter was to advance money to B to enable him to make the payment, and was to have a lien on the land for the advances. C advanced the money and the payment was made. This was held sufficient part performance on C's part of the agreement to give him a lien.[88] A landlord orally agreed with his tenants, four partners in a certain business, to give a new lease, if the firm should dissolve, two of the partners should retire, and the two remaining partners should carry on the business and assume all the liabilities of the old firm. These acts were fully performed by the partners, and the change of position and assumption of increased liability by the continuing partners were held to entitle them to specific performance of the agreement to give a lease.[89]

j. Agreements Among Cotenants. A number of parol agreements among tenants in common, not admitting of classification, are mentioned in the note.[90]

J. Part-Performance Doctrine Applies to a Lease. The doctrine of part performance applies to such contracts to lease premises or to renew a lease as fall within the statute of frauds, equally as well as to contracts of sale. Contracts to give a written lease therefore may be part performed by taking possession and paying rent,[91] or by taking possession and making valuable improve-

85. Boruff *v.* Hudson, 138 Ind. 280, 37 N. E. 786.

86. Eastburn *v.* Wheeler, 23 Ind. 305.

87. Sands *v.* Thompson, 43 Ind. 18, overruling the last case.

88. Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787, relying on Malins *v.* Brown, 4 N. Y. 403.

89. Parker *v.* Smith, 1 Coll. Ch. 608, 28 Eng. Ch. 608, 63 Eng. Reprint 564. This case, obviously inconsistent with the reasoning in Maddison *v.* Alderson, 8 App. Cas. 467, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820, was there criticized on the ground that the acts of part performance were done before the agreement was concluded. But this seems a mistaken criticism. There was a contract at the time of the acts, although some of its terms were left to arbitration.

90. Where it was part of the agreement for partition among tenants in common that one of them, defendant, shall procure the surrender of a lease to which plaintiff's, a cotenant, share is subject, and defendant received the stipulated consideration for the surrender, and complainant cannot be restored to her former position, defendant's agreement to procure the surrender is out of the statute. Borden *v.* Curtis, 46 N. J. Eq. 468, 19 Atl. 127. For an instructive case where the purchasing cotenant's acts in reliance on defendant's promise to convey his interest were merely collateral and not a part performance see Graves *v.* Goldthwait, 153 Mass. 268, 26 N. E. 860, 10 L. R. A. 763. Agreement not to assert the right to partition. In pursuance of such an agreement two coöwners joined in a lease and put tenants in possession; these acts were held a part performance, and an estoppel against asserting in equity the right to partition. Martin *v.* Martin, 170 Ill. 639, 48 N. E. 924, 62 Am. St. Rep. 411. In the peculiar case, Murphy *v.* Whitney, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123 [*affirming* 69 Hun 573, 23 N. Y. Suppl. 1134], there was an agreement among tenants in common to hold the land as joint tenants; that is, on the death of each his undivided share was to pass to the survivors, and ultimately from the last survivor to plaintiff, a child of one of the tenants in common. It was held that this agreement could not be repudiated by defendant — the last survivor — who had received all the benefit of it.

91. *Alabama.*— Trammell *v.* Craddock, 100 Ala. 266, 13 So. 911; Shakespeare *v.* Alba, 76 Ala. 351.

California.— McCarger *v.* Rood, 47 Cal. 138.

Connecticut.— Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586.

Idaho.— Deeds *v.* Stephens, 8 Ida. 514, 69 Pac. 534.

New York.— Wendell *v.* Stone, 39 Hun 382.

Ohio.— Grant *v.* Ramsey, 7 Ohio St. 157.

England.— Nunn *v.* Fabian, L. R. 1 Ch. 35, 11 Jur. N. S. 868, 35 L. J. Ch. 140, 13 L. T. Rep. N. S. 343; Lanyon *v.* Martin, L. R. 13 Ir. 297; Conner *v.* Fitzgerald, L. R. 11 Ir. 106; Kine *v.* Balfe, 2 Ball & B. 348; Powell *v.* Lovegrove, 8 De G. M. & G. 357, 2 Jur. N. S. 791, 57 Eng. Ch. 277, 44 Eng. Reprint 427.

Continuance in possession see *supra*, V, E, 1, c, (II).

Continued possession and payment of increased rent see *supra*, V, E, 1, c, (IV), (B).

ments;[92] or in England and in some of the United States by taking possession without further act.[93]

K. Oral Gifts — 1. In General — a. Rule Stated. The doctrine of part performance applies to gifts as well as to contracts. An oral gift of land, or promise to give[94] land, followed by the vendee's taking possession of the land in pursuance of the promise and making valuable and permanent improvements in reliance thereon, may be enforced by a court of equity against the donor or his heirs or grantees with notice. If the promise to give is conditioned on the vendee's making improvements, a compliance with the condition furnishes a consideration for the transaction.[95] But it is not necessary that there be a technical consideration. If the promise to give was wholly unconditional, the same relief will be given to the donee, based upon the same reasons of estoppel against the donor and virtual fraud upon the donee because of his change of condition as in the case of a parol sale with possession and improvements.[96] The making of the improvements is both an act of part performance and the equivalent, in the view of equity, of an actual consideration.[97]

92. Lease — possession and improvements. — Morrison *v.* Peay, 21 Ark. 110; Steel *v.* Payne, 42 Ga. 207; Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146; Bard *v.* Elston, 31 Kan. 274, 1 Pac. 565; Veeder *v.* Horstmann, 85 N. Y. App. Div. 154, 83 N. Y. Suppl. 99; Schirmer *v.* Rehill, 57 Misc. (N. Y.) 439, 109 N. Y. Suppl. 745; Clark *v.* Cincinnati, 1 Ohio Dec. (Reprint) 10, 1 West. L. J. 53; Anderson *v.* Anderson, 13 Tex. Civ. App. 527, 36 S. W. 816; Toole *v.* Mendlicott, 1 Ball & B. 393; Twyne's Case, 3 Coke 80*b*, 76 Eng. Reprint 809; Lister *v.* Foxcroft, Colles 108, 1 Eng. Reprint 205 [*cited* in Harris *v.* Horwell, Gilb. 11, 25 Eng. Reprint 8]; Guernsey *v.* Rodbridges, Gilb. 4, 25 Eng. Reprint 3; Shillibeer *v.* Jarvis, 8 De G. M. & G. 79, 57 Eng. Ch. 62, 44 Eng. Reprint 319; Butcher's Case, 1 Eq. Cas. Abr. 21, pl. 9, 21 Eng. Reprint 843; Floyd *v.* Buckland, 2 Freem. 268, 22 Eng. Reprint 1202; Farrall *v.* Davenport, 3 Giffard 363, 66 Eng. Reprint 450 [*affirmed* in 8 Jur. N. S. 1043, 5 L. T. Rep. N. S. 436]; Savage *v.* Foster, 9 Mod. 35, 88 Eng. Reprint 299; Gregory *v.* Mighell, 18 Ves. Jr. 328, 11 Rev. Rep. 207, 34 Eng. Reprint 341; Bowers *v.* Cator, 4 Ves. Jr. 91, 31 Eng. Reprint 47.

Possession, improvements, and payment.— Manning *v.* Franklin, 81 Cal. 205, 22 Pac. 550 (life lease); West *v.* Washington, etc., R. Co., 49 Oreg. 436, 90 Pac. 666; Wallace *v.* Scoggins, 17 Oreg. 476, 21 Pac. 558; People's Pure Ice Co. *v.* Trumbull, 70 Fed. 166, 17 C. C. A. 43; Howe *v.* Hall, Ir. R. 4 Eq. 244.

Expenditures by sublessee.— In Williams *v.* Evans, L. R. 19 Eq. 547, 44 L. J. Ch. 319, 32 L. T. Rep. N. S. 359, 23 Wkly. Rep. 466, a tenant in possession filed a bill against the lessor for the specific performance of a parol agreement for a lease of thirty years. The tenant had contracted to sublet, and his sublessee had expended money in alterations and repairs with the knowledge and approval of the lessor. It was held that the outlay by the sublessee was as much a part performance of the agreement as if made by the lessee, and the latter was therefore entitled to specific performance. See *supra*, V, A, 6, c.

93. Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266; Pain *v.* Coombs, 1 De G. & J. 34, 3 Jur. N. S. 847, 58 Eng. Ch. 26, 44 Eng. Reprint 634; Mortal *v.* Lyons, 8 Ir. Ch. 112; Burke *v.* Smyth, 9 Ir. Eq. 135, 3 J. & L. 193; Miller *v.* Finlay, 5 L. T. Rep. N. S. 510; Morphett *v.* Jones, 1 Swanst. 172, 36 Eng. Reprint 344, 1 Wils. Ch. 100, 37 Eng. Reprint 45, 18 Rev. Rep. 48.

94. In Burris *v.* Landers, 114 Cal. 310, 46 Pac. 162, a distinction was taken, for purposes of pleading, between a parol gift and a parol promise to give; but the court recognizes that each may be the subject of part performance in exactly the same way. See also Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870.

95. Or a consideration may be found in the donee's relinquishing his intention, at the donor's request, to remove to another place. White *v.* Poole, 74 N. H. 71, 65 Atl. 255.

96. The cause of action is not breach of contract, but the unjust infliction of loss or injury upon one party, and the consequent benefit and advantage resulting to the other, from the breach of a faith and confidence rightly reposed. Wainwright *v.* Talcott, 60 Conn. 43, 22 Atl. 484. See also Syler *v.* Eckert, 1 Binn. (Pa.) 378; Dillwyn *v.* Llewellyn, 31 L. J. Ch. 658, 10 Wkly. Rep. 742. Indeed the ground for equitable relief is often stronger in case of a family gift than in case of a sale, since the donee is more likely to have reposed confidence in the donor. Galbraith *v.* Galbraith, 5 Kan. 402. But see *contra*, that improvements must have been made at request of defendant. McClure *v.* McClure, 1 Pa. St. 374, a case that seems inconsistent with other decisions in the same state.

97. Seavey *v.* Drake, 62 N. H. 393; Freeman *v.* Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Moore *v.* Small, 19 Pa. St. 461; Dillwyn *v.* Llewellyn, 31 L. J. Ch. 658, 10 Wkly. Rep. 742, per Lord Westbury. In general see the following cases:

Arkansas.— Guynn *v.* McCauley, 32 Ark. 97.

California.— Burlingame *v.* Rowland, 77

b. Must Be Possession and Improvements. To authorize specific enforce-

Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Bakersfield Town Hall Assoc. *v.* Chester, 55 Cal. 98; Manly *v.* Howlett, 55 Cal. 94.

Colorado.— Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410.

Connecticut.—Wainwright *v.* Talcott, 60 Conn. 43, 22 Atl. 484.

Georgia.— Garbutt *v.* Mayo, 128 Ga. 269, 57 S. E. 495, 13 L. R. A. N. S. 58; Hadden *v.* Thompson, 118 Ga. 207, 44 S. E. 1001; Causey *v.* Causey, 106 Ga. 188, 32 S. E. 138; Floyd *v.* Floyd, 97 Ga. 124, 24 S. E. 451; Howell *v.* Ellsberry, 79 Ga. 475, 5 S. E. 96; Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92; Hamilton *v.* Price, 72 Ga. 214; Hughes *v.* Hughes, 72 Ga. 173; Porter *v.* Allen, 54 Ga. 623; Mims *v.* Lockett, 33 Ga. 9.

Illinois.— Clancy *v.* Flusky, 187 Ill. 605, 58 N. E. 594, 52 L. R. A. 277; Sanford *v.* Davis, 181 Ill. 570, 54 N. E. 977; Gaines *v.* Kendall, 176 Ill. 228, 52 N. E. 141; Dunn *v.* Berkshire, 175 Ill. 243, 51 N. E. 770; Fouts *v.* Roof, 171 Ill. 568, 50 N. E. 653; Irwin *v.* Dyke, 114 Ill. 302, 1 N. E. 913; Smith *v.* Yocum, 110 Ill. 142; Whitsitt *v.* Pre-emption Presbyterian Church, 110 Ill. 125; Bohanan *v.* Bohanan, 96 Ill. 591; Langston *v.* Bates, 84 Ill. 524, 25 Am. Rep. 466; Kurtz *v.* Hibner, 55 Ill. 514, 8 Am. Rep. 665; Bright *v.* Bright, 41 Ill. 97. But see *supra*, V, D, 3, a.

Indiana.— Swales *v.* Jackson, 126 Ind. 282, 26 N. E. 62; McFerran *v.* McFerran, 69 Ind. 29; Law *v.* Henry, 39 Ind. 414; Horner *v.* Clark, 27 Ind. App. 6, 60 N. E. 732. But see Winslow *v.* Winslow, 52 Ind. 8.

Iowa.— Bevington *v.* Bevington, 133 Iowa 351, 110 N. W. 840, 9 L. R. A. N. S. 508; Allbright *v.* Hannah, 103 Iowa 98, 72 N. W. 421; Campbell *v.* Mayes, 38 Iowa 9; Peters *v.* Jones, 35 Iowa 512; Hughes *v.* Lindsey, 31 Iowa 329; Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Kansas.— Bichel *v.* Oliver, 77 Kan. 696, 95 Pac. 396; Galbraith *v.* Galbraith, 5 Kan. 402.

Maryland.— Loney *v.* Loney, 86 Md. 652, 38 Atl. 1071; Hardesty *v.* Richardson, 44 Md. 617, 22 Am. Rep. 57; Haines *v.* Haines, 6 Md. 435.

Michigan.—Briggs *v.* Briggs, 113 Mich. 371, 71 N. W. 632; Russell *v.* Russell, 94 Mich. 122, 53 N. W. 920; Potter *v.* Smith, 68 Mich. 212, 35 N. W. 916; Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810; Fairfield *v.* Barbour, 51 Mich. 57, 16 N. W. 230.

Missouri.— Dozier *v.* Matson, 94 Mo. 328, 7 S. W. 268, 4 Am. St. Rep. 388; Anderson *v.* Shockley, 82 Mo. 250; West *v.* Bundy, 78 Mo. 407.

Montana.— Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37.

Nebraska.— Peterson *v.* Bauer, 83 Nebr. 405, 119 N. W. 764; Merriman *v.* Merriman, 75 Nebr. 222, 106 N. W. 174; Wylie *v.* Charlton, 43 Nebr. 840, 62 N. W. 220; Ford *v.* Steele, 31 Nebr. 521, 48 N. W. 271; Dawson *v.* McFaddin, 22 Nebr. 131, 34 N. W. 338.

New Hampshire.— White *v.* Poole, 74 N. H. 71. 65 Atl. 255; Seavey *v.* Drake, 62 N. H. 393.

New Jersey.— Tunison *v.* Bradford, 49 N. J. Eq. 210, 22 Atl. 1073; Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921; France *v.* France, 8 N. J. Eq. 650.

New York.— Young *v.* Overbaugh, 145 N. Y. 158, 39 N. E. 712 [*affirming* 76 Hun 151, 27 N. Y. Suppl. 553]; Freeman *v.* Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Lobdell *v.* Lobdell, 36 N. Y. 327; Schroder *v.* Wanzor, 36 Hun 423; Knapp *v.* Hungerford, 7 Hun 588; Erwin *v.* Erwin, 17 N. Y. Suppl. 442 [*affirmed* in 139 N. Y. 616, 35 N. E. 204]; White's Bank *v.* Farthing, 10 N. Y. St. 830; Patterson *v.* Copeland, 52 How. Pr. 460.

Ohio.— Hull *v.* Hull, 16 Ohio Cir. Ct. 688, 9 Ohio Cir. Dec. 19.

Oregon.— Barrett *v.* Schleich, 37 Oreg. 613, 62 Pac. 792.

Pennsylvania.— Allison *v.* Burns, 107 Pa. St. 50; Sower *v.* Weaver, 84 Pa. St. 262, 78 Pa. St. 443; McLain *v.* White Tp. School Directors, 51 Pa. St. 196; Moore *v.* Small, 19 Pa. St. 461; Beaver *v.* Filson, 8 Pa. St. 327; Young *v.* Glendenning, 6 Watts 509, 31 Am. Dec. 492; Martin *v.* McCord, 5 Watts 493, 30 Am. Dec. 342; Syler *v.* Eckhart, 1 Binn. 378.

South Carolina.— Hunter *v.* Mills, 29 S. C. 72, 6 S. E. 907.

Texas.— Wootters *v.* Hale, 83 Tex. 563, 19 S. W. 134; Wells *v.* Davis, 77 Tex. 636, 14 S. W. 237; Willis *v.* Matthews, 46 Tex. 478; Murphy *v.* Stell, 43 Tex. 123; Doyle *v.* Wamego First Nat. Bank, (Civ. App. 1899) 50 S. W. 480; Baker *v.* Clark, 2 Tex. Civ. App. 530, 21 S. W. 966; Baker *v.* De Freese, 2 Tex. Civ. App. 524, 21 S. W. 963. But see Boze *v.* Davis, 14 Tex. 331.

Utah.— Karren *v.* Rainey, 30 Utah 7, 83 Pac. 333; Darke *v.* Smith, 14 Utah 35, 45 Pac. 1006.

Virginia.— Halsey *v.* Peters, 79 Va. 60; Stokes *v.* Oliver, 76 Va. 72; Burkholder *v.* Ludlam, 30 Gratt. 255, 32 Am. Rep. 668; Shobe *v.* Carr, 3 Munf. 10.

Washington.—Coleman *v.* Larson, 49 Wash. 321, 95 Pac. 262.

West Virginia.— Crim *v.* England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826; Lorentz *v.* Lorentz, 14 W. Va. 761.

United States.— Neale *v.* Neale, 9 Wall. 1, 19 L. ed. 590.

England.— Dillwyn *v.* Llewellyn, 31 L. J. Ch. 658, 10 Wkly. Rep. 742. And see Cole *v.* Pilkington, L. R. 19 Eq. 174, 44 L. J. Ch. 381, 31 L. T. Rep. N. S. 423, 23 Wkly. Rep. 41.

See 44 Cent. Dig. tit. "Specific Performance," § 219 *et seq.*

Statutes.— In Georgia, if possession of lands has been given under a voluntary agreement upon a meritorious consideration, and valuable improvements have been made upon the faith thereof, equity will decree a performance of the agreement. Code (1895), § 4039; Garbutt *v.* Mayo, 128 Ga. 269, 57

ment of oral gifts there must be both possession taken [98] and improvements made [99] on the part of the donee.[1]

c. Donee's Change of Position. The fact that the donee, in these cases, often gives up other employment or opportunities for employment and changes the conditions and circumstances of his life is frequently spoken of as strengthening his equities.[2]

d. Charitable Gifts. Gifts for charitable purposes, as for a church [3] or for a school-house,[4] if followed by possession and improvements, may be enforced.

2. Improvements — a. Must Be on Faith of Gift. The improvements must have been made on the faith of the gift and be exclusively referable thereto.[5]

S. E. 495, 13 L. R. A. N. S. 58; Hadden *v.* Thompson, 118 Ga. 207, 44 S. E. 1001; Causey *v.* Causey, 106 Ga. 188, 32 S. E. 138; Floyd *v.* Floyd, 97 Ga. 124, 24 S. E. 451; Studer *v.* Seyer, 69 Ga. 125. The doctrine was abolished in Virginia by a recent statute. Code, § 2413; Trout *v.* Trout, (Va. 1896) 25 S. E. 98. See *supra*, V, D, 3, e.

In Alabama, under the statute, parol gifts of land followed merely by possession and improvements are not enforced. See *supra*, V, D, 3, a.

Donor's title.— In Kaufman *v.* Cook, 114 Ill. 11, 28 N. E. 378, specific performance was refused because the donor did not have title at the time when the donee took possession. But it is conceded that lack of title at the time of the contract would be immaterial in case of a sale. The ground for this distinction between a parol gift and a parol sale is not made clear.

98. Sloniger *v.* Sloniger, 161 Ill. 270, 43 N. E. 1111; Johnston *v.* Johnston, 19 Iowa 74; Wooldridge *v.* Hancock, 70 Tex. 18, 6 S. W. 818; Griggsby *v.* Osborn, 82 Va. 371.

Essential features of possession see *supra*, V, E.

99. *California.*— Anson *v.* Townsend, 73 Cal. 415, 15 Pac. 49.

Illinois.— Geer *v.* Goudy, 174 Ill. 514, 51 N. E. 623; Bright *v.* Bright, 41 Ill. 97.

Iowa.— Johnston *v.* Johnston, 19 Iowa 74.

Minnesota.— Snow *v.* Snow, 98 Minn. 348, 108 N. W. 295.

Missouri.— Brownlee *v.* Fenwick, 103 Mo. 420, 15 S. W. 611; Anderson *v.* Scott, 94 Mo. 637, 8 S. W. 235.

Pennsylvania.— Baldridge *v.* George, 216 Pa. St. 231, 65 Atl. 662.

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870.

Virginia.— Stokes *v.* Oliver, 76 Va. 72.

England.—Millard *v.* Harvey, 34 Beav. 237, 10 Jur. N. S. 1167, 13 Wkly. Rep. 125, 55 Eng. Reprint 626. But see Cole *v.* Pilkington, L. R. 19 Eq. 174, 44 L. J. Ch. 381, 31 L. T. Rep. N. S. 423, 23 Wkly. Rep. 41.

Compare, however, Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49.

1. **The improvements must be on the property.**— Expenditure of money on the faith of the gift, but not on the property, will not avail the donee. Swan Oil Co. *v.* Linder, 123 Ga. 550, 51 S. E. 622; Anderson *v.* Scott, 94 Mo. 637, 8 S. W. 235.

The improvements must be paid for with the donee's own funds, and not by the donor. Standard *v.* Standard, 223 Ill. 255, 79 N. E. 92.

2. Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810; White *v.* Poole, 74 N. H. 71, 65 Atl. 255; Halsey *v.* Peters, 79 Va. 60; Burkholder *v.* Ludlam, 30 Gratt. (Va.) 255, 32 Am. Rep. 668. Since such change of position, when made at the request of the promisor and on the strength of the promise, furnishes a consideration which, except for the statute of frauds, would render the agreement to give a legally binding contract, it has been held, in one case, to render the contract specifically enforceable, independent of any further equities arising from valuable improvements. Bigelow *v.* Bigelow, 95 Me. 17, 49 Atl. 49. The effect of this decision, if followed, would be to convert nearly every oral gift into a contract. Its reasoning seems to ignore the fundamental principle of part performance, that defendant is charged, not on the contract, but on the equities arising from plaintiff's acts. All other cases are uniform on the necessity of valuable improvements in the case of a gift. But see in partial accord Cole *v.* Pilkington, L. R. 19 Eq. 174, 44 L. J. Ch. 381, 31 L. T. Rep. N. S. 423, 23 Wkly. Rep. 41 [probably *overruled* by Maddison *v.* Alderson, 8 App. Cas. 467, 47 J. P. 821, 52 L. J. Q. B. 737, 49 L. T. Rep. N. S. 303, 31 Wkly. Rep. 820]. But a change of residence or occupation not involving any sacrifice on the part of the donee has been held, in Pennsylvania, not to assist his equities. McKowen *v.* McDonald, 43 Pa. St. 441, 82 Am. Dec. 576.

3. Whitsitt *v.* Pre-emption Presb. Church, 110 Ill. 125; Beaver *v.* Filson, 8 Pa. St. 327.

Burial lot.—A promise to give a share in a burial lot was part performed by burial of plaintiff's relatives and by improvements in which plaintiff shared in Schroder *v.* Wanzor, 36 Hun (N. Y.) 423. See also Beaver *v.* Filson, 8 Pa. St. 327, gift on condition that donees open a graveyard.

4. McLain *v.* White Tp. School Directors, 51 Pa. St. 196; Martin *v.* McCord, 5 Watts (Pa.) 493, 30 Am. Dec. 342.

5. *Iowa.*— Truman *v.* Truman, 79 Iowa 506, 44 N. W. 721.

Maine.— Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513.

Missouri.— Anderson *v.* Scott, 94 Mo. 637, 8 S. W. 235.

New Jersey.— Tunison *v.* Bradford, 49 N. J. Eq. 210, 22 Atl. 1073, expenditures by grantee of donee.

b. Must Be Valuable and Permanent. They must not be of trivial character in comparison with the value of the property, but valuable and permanent.[6]

c. Whether Must Be More Valuable Than Rental. It is the rule in a few states that if the improvements do not equal in value the rental value or the value of the use and occupation of the premises during plaintiff's occupancy, relief will be denied.[7] But this rule is generally rejected, for the reason, among others, that it makes the vendee's right to relief depend upon the time when he brings his suit.[8]

d. Rule in Pennsylvania. In Pennsylvania the rule requires the donee to show improvements for which he cannot be compensated.[9]

3. Compensation When Specific Performance Denied. When specific performance is refused because of uncertainty of the proofs, the court may nevertheless require the donor to pay for the improvements, and may establish a lien on the land therefor.[10]

New York.— Ogsbury *v.* Ogsbury, 115 N. Y. 290, 22 N. E. 219, possession and improvements consistent with a mere license to cut wood and make sugar.

Pennsylvania.— Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524, parent's promise to make a gift at his death; improvements might be referred to lease on shares for parent's life.

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870, improvements such as might have been made by a tenant at will.

6. *Arkansas.*— Young *v.* Crawford, 82 Ark. 33, 100 S. W. 87.

Illinois.— Woodard *v.* Woodard, 178 Ill. 295, 52 N. E. 1041.

Maine.— Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513.

New York.— Ogsbury *v.* Ogsbury, 115 N. Y. 290, 22 N. E. 219.

Pennsylvania.— Wack *v.* Sorber, 2 Whart. 387, 30 Am. Dec. 269.

Rhode Island.— Peckham *v.* Barker, 8 R. I. 17.

Texas.— West *v.* Webster, 39 Tex. Civ. App. 272, 87 S. W. 196.

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870.

Virginia.— Trout *v.* Trout, (1896) 25 S. E. 98; Darlington *v.* McCoole, 1 Leigh 36.

West Virginia.— Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87.

United States.— Logue *v.* Langan, 151 Fed. 455, 81 C. C. A. 271.

England.—Millard *v.* Harvey, 34 Beav. 237, 10 Jur. N. S. 1167, 13 Wkly. Rep. 125, 55 Eng. Reprint 626, repairs merely.

Compare Barrett *v.* Schleich, 37 Oreg. 613, 62 Pac. 792, where relief was not denied on account of the unsubstantial character of the improvements, it appearing that they afforded plaintiff a home and shelter for stock, and were as good as her means would build, "because they are poor is no reason why a court of equity should deny relief."

Permanent improvements costing one hundred and eighty-seven dollars on land worth four hundred dollars are sufficient. Wells *v.* Davis, 77 Tex. 636, 14 S. W. 237.

7. *California.*— Burris *v.* Landers, 114 Cal. 310, 46 Pac. 162.

New York.— Dunckel *v.* Dunckel, 56 Hun 25, 8 N. Y. Suppl. 888. But see *contra*, next note.

Pennsylvania.— Toe *v.* Toe, 3 Grant 74; Eckert *v.* Eckert, 3 Penr. & W. 332.

Texas.— Wooldridge *v.* Hancock, 70 Tex. 18, 6 S. W. 818; Eason *v.* Eason, 61 Tex. 225. But see *contra*, next note.

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870, *dictum*.

Virginia.— Trout *v.* Trout, (1896) 25 S. E. 98 (*dictum*); Darlington *v.* McCoole, 1 Leigh 36.

Compare Young *v.* Crawford, 82 Ark. 33, 100 S. W. 87, not a distinct ground for refusal of relief, but a fact to be considered by the court.

8. *Georgia.*— Mims *v.* Lockett, 33 Ga. 9.

Illinois.— Gaines *v.* Kendall, 176 Ill. 228, 52 N. E. 141.

New York.— Young *v.* Overbaugh, 145 N. Y. 158, 39 N. E. 712 [*affirming* 76 Hun 151, 27 N. Y. Suppl. 553].

Pennsylvania.— Young *v.* Glendenning, 6 Watts 509, 31 Am. Dec. 492. *Contra*, see last note.

Texas.— Wells *v.* Davis, 77 Tex. 636, 14 S. W. 237; Doyle *v.* Wamego First Nat. Bank, (Civ. App. 1899) 50 S. W. 480; Baker *v.* Clark, 2 Tex. Civ. App. 530, 21 S. W. 966; Baker *v.* De Freese, 2 Tex. Civ. App. 524, 21 S. W. 963.

The silence of the reports of the other states with respect to the rule thus criticized, although the facts of many of the cases come within it, should not be overlooked.

If the rule were accepted, that compensation by reception of profits is a bar, "on that ground, the equitable title would always be defeasible, for a time must come when compensation will be complete; and the right of the donee would depend on the time when he called for the conveyance." Young *v.* Glendenning, 6 Watts (Pa.) 509, 510, 31 Am. Dec. 492. And see Mims *v.* Lockett, 33 Ga. 9.

9. Jamison *v.* Dimock, 95 Pa. St. 52; Ballard *v.* Ward, 89 Pa. St. 358; McKowen *v.* McDonald, 43 Pa. St. 441, 82 Am. Dec. 576 (clearing land, planting orchard, and building house, not sufficient); Moore *v.* Small, 19 Pa. St. 461; Toe *v.* Toe, 3 Grant (Pa.) 74.

10. Worth *v.* Worth, 84 Ill. 442; Duckett *v.* Duckett, 71 Md. 357, 18 Atl. 535; King *v.*

L. Easements and Licenses — 1. In General. A "parol grant of an easement is, in equity, out of the statute when the circumstances are such that a contract for the conveyance of the fee would be taken out of it."[11] These circumstances are generally the construction of works or making of valuable improvements on the faith of the license or parol grant, together with user;[12] less frequently payment and user;[13] while in a few jurisdictions, possession and user is sufficient.[14]

2. Examples; Right of Way, Water-Rights, Etc. A license or a parol contract to grant an easement in land has been enforced by the courts in the following classes of cases: Right of way;[15] various water-rights,[16] including the right to maintain and use a ditch or watercourse on defendant's land,[17] an easement of

Thompson, 9 Pet. (U. S.) 204, 9 L. ed. 102. But see Millard *v.* Harvey, 34 Beav. 237, 10 Jur. N. S. 1167, 13 Wkly. Rep. 125, 55 Eng. Reprint 626.

11. Gilmore *v.* Armstrong, 48 Nebr. 92, 96, 66 N. W. 998. See also Craig *v.* Craig, 2 Ont. App. 583.

12. *Arkansas.*—Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

Georgia.—Cook *v.* Pridgen, 45 Ga. 331, 12 Am. Rep. 582.

Idaho.—Male *v.* Leflang, 7 Ida. 348, 63 Pac. 108.

Indiana.—St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995; Joseph *v.* Wild, 146 Ind. 249, 45 N. E. 467.

Michigan.—Norris *v.* Showerman, 2 Dougl. 16.

New Hampshire.—Uncanoonuck Road Co. *v.* Orr, 67 N. H. 541, 41 Atl. 665.

New York.—Murray *v.* Jayne, 8 Barb. 612.

Pennsylvania.—Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

South Carolina.—Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1.

Texas.—Texas, etc., R. Co. *v.* Jarrell, 60 Tex. 267.

Vermont.—Olmstead *v.* Abbott, 61 Vt. 281, 18 Atl. 315; Adams *v.* Patrick, 30 Vt. 516.

England.—McManus *v.* Cooke, 35 Ch. D. 681, 51 J. P. 708, 56 L. J. Ch. 681, 56 L. T. Rep. N. S. 900, 35 Wkly. Rep. 754.

13. *California.*—Blankenship *v.* Whaley, 124 Cal. 300, 57 Pac. 79, payment by work and labor.

Indiana.—Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647.

Michigan.—Kent Furniture Mfg. Co. *v.* Long, 111 Mich. 383, 69 N. W. 657.

Nevada.—Gooch *v.* Sullivan, 13 Nev. 78, payment partly in work and labor.

England.—East India Co. *v.* Vincent, 2 Atk. 83, 26 Eng. Reprint 451 [*cited* in McManus *v.* Cooke, 35 Ch. D. 681, 694, 51 J. P. 708, 56 L. J. Ch. 662, 56 L. T. Rep. N. S. 900, 35 Wkly. Rep. 754], payment by giving employment to defendant.

14. In Iowa under the statute see *supra*, V, D, 1, c. And see Agne *v.* Seitsinger, 85 Iowa 305, 52 N. W. 228; Anderson *v.* Simpson, 21 Iowa 399.

In England see Devonshire *v.* Eglin, 14 Beav. 530, 20 L. J. Ch. 495, 51 Eng. Reprint 389, license acted on for nine years.

Contra.—Howes *v.* Barmon, 11 Ida. 64, 81 Pac. 48, 114 Am. St. Rep. 255, 69 L. R. A. 568, as all acts of part performance had been by the licensor, refusing relief to licensee leaves latter absolutely *in statu quo*.

15. *Indiana.*—Joseph *v.* Wild, 146 Ind. 249, 45 N. E. 467 (stairway leading from plaintiff's building over defendant's land; erection and use); Robinson *v.* Thrailkill, 110 Ind. 117, 10 N. E. 647 (payment and constant use).

Iowa.—Agne *v.* Seitsinger, 85 Iowa 305, 52 N. W. 228, possession.

Michigan.—Kent Furniture Mfg. Co. *v.* Long, 111 Mich. 383, 69 N. W. 657, payment and use.

New Hampshire.—Uncanoonuck Road Co. *v.* Orr, 67 N. H. 541, 41 Atl. 665, improvement and possession.

New York.—Hay *v.* Knauth, 169 N. Y. 298, 62 N. E. 395.

Ohio.—France *v.* McKenzie, 20 Ohio Cir. Ct. 209, 11 Ohio Cir. Dec. 245.

Texas.—Texas, etc., R. Co. *v.* Jarrell, 60 Tex. 267, possession and clearing the land.

16. *Arkansas.*—Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

California.—Blankenship *v.* Whaley, 124 Cal. 300, 57 Pac. 79.

Georgia.—Cook *v.* Pridgen, 45 Ga. 331, 12 Am. Rep. 582.

Idaho.—Francis *v.* Green, 7 Ida. 668, 65 Pac. 362; Male *v.* Leflang, 7 Ida. 348, 63 Pac. 108.

Indiana.—St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995.

Michigan.—Norris *v.* Showerman, 2 Dougl. 16.

Nebraska.—Gilmore *v.* Armstrong, 48 Nebr. 92, 66 N. W. 998.

Nevada.—Gooch *v.* Sullivan, 13 Nev. 78.

New York.—Murray *v.* Jayne, 8 Barb. 612.

South Carolina.—Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1.

Vermont.—Olmstead *v.* Abbott, 61 Vt. 281, 18 Atl. 315; Adams *v.* Patrick, 30 Vt. 516.

Wisconsin.—Hazelton *v.* Putnam, 3 Pinn. 107, 54 Am. Dec. 158, 3 Chandl. 117.

England.—Devonshire *v.* Eglin, 14 Beav. 530, 20 L. J. Ch. 495, 51 Eng. Reprint 389.

17. Blankenship *v.* Whaley, 124 Cal. 300, 57 Pac. 79 (labor in construction and user); Gilmore *v.* Armstrong, 48 Nebr. 92, 66 N. W. 998; Adams *v.* Patrick, 30 Vt. 516 (to allow B to maintain a raceway across A's land in

drainage,[18] a license or parol easement to flow or back water over defendant's land,[19] and an agreement to permit the use of water for irrigation, domestic, or manufacturing purposes;[20] a license to occupy, followed by valuable improvements;[21] a license to dig minerals;[22] and in England, a parol easement of light.[23]

M. Vendor or Lessor Plaintiff — 1. In General. The vendor or lessor may have specific performance of a contract which has been part performed. This is in part because the delivery of possession by him to the vendor involves a change of condition on his part as well as on the part of the vendee, and points to a contract concerning the land; chiefly because, in cases where the remedy is available to the vendee it should, on the ground of mutuality, be available to the vendor likewise.[24]

2. What Acts Are Sufficient. Payment of course is insufficient.[25] Possession delivered by the vendor, or taken by the vendee with the vendor's consent, is recognized in a few states and in Canada, and of course in England, as a sufficient act of part performance.[26] Payment, in full, or in part, together with possession

consideration of B's building a retaining wall along other lands of A; performance on B's part requires specific performance against A).

A parol agreement to construct and keep in repair a ditch for the mutual benefit of several parties, enforced, if the parties have, in pursuance of such agreement, performed labor and paid their share of the expenses incurred in the construction of the ditch. Gooch *v.* Sullivan, 13 Nev. 78.

18. Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190 (improvement and user); Murray *v.* Jayne, 8 Barb. (N. Y.) 612.

19. Cook *v.* Pridgen, 45 Ga. 331, 12 Am. Rep. 582; Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1 (license to build a dam, part performance by constructing the dam); Olmstead *v.* Abbott, 61 Vt. 281, 18 Atl. 315 (part performance by erection of dam); Hazelton *v.* Putnam, 3 Pinn. (Wis.) 107, 54 Am. Dec. 158, 3 Chandl. 117 (*dictum*; proof insufficient).

20. Francis *v.* Green, 7 Ida. 668, 65 Pac. 362 (possession and user); Male *v.* Leflang, 7 Ida. 348, 63 Pac. 108 (payment, improvement, and user); St. Joseph Hydraulic Co. *v.* Globe Tissue Paper Co., 156 Ind. 665, 59 N. E. 995 (equipping a mill at large expense and commencing to operate the same in reliance on the contract).

21. Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

22. Anderson *v.* Simpson, 21 Iowa 399.

23. McManus *v.* Cooke, 35 Ch. D. 681, 51 J. P. 708, 56 L. J. Ch. 662, 56 L. T. Rep. N. S. 900, 35 Wkly. Rep. 754; East-India Co. *v.* Vincent, 2 Atk. 83, 26 Eng. Reprint 451 [*cited* in McManus *v.* Cooke, *supra*].

24. *Connecticut.*—Andrew *v.* Babcock, 63 Conn. 109, 26 Atl. 715.

Iowa.— Sweeney *v.* O'Hora, 43 Iowa 34.

Oregon.— Cooper *v.* Thomason, 30 Oreg. 161, 45 Pac. 296.

Wisconsin.— Seaman *v.* Aschermann, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849.

United States.— McCullough *v.* Sutherland, 153 Fed. 418.

Contra.— Luckett *v.* Williamson, 37 Mo. 388, overruled.

Specific performance will be refused of course in those few states where it is denied to the vendor in a written contract where his remedy at law by recovery of the price is adequate. Jacobs *v.* Peterborough, etc., R. Co., 8 Cush. (Mass.) 223. See *supra*, II, B, 10, b.

25. Guthrie *v.* Anderson, 47 Kan. 383, 28 Pac. 164; Brandeis *v.* Neustadtl, 13 Wis. 142. See *supra*, V, C, 2.

Contra in Iowa by statute. Neu *v.* Jackman, 58 Iowa 359, 12 N. W. 312.

26. *Arkansas.*— Keatts *v.* Rector, 1 Ark. 391.

New Jersey.— Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266.

West Virginia.— Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1.

United States.— Conway *v.* Sherron, 6 Fed. Cas. No. 3,147, 2 Cranch C. C. 80.

England.— Howard *v.* Patent Ivory Mfg. Co., 38 Ch. D. 156, 57 L. J. Ch. 878, 58 L. T. Rep. N. S. 395, 36 Wkly. Rep. 801; Kine *v.* Balfe, 2 Ball & B. 343; Aylesford's Case, Str. 783, 93 Eng. Reprint 845; Pyke *v.* Williams, 2 Vern. Ch. 455, 23 Eng. Reprint 891; Bowers *v.* Cator, 4 Ves. Jr. 91, 31 Eng. Reprint 47.

Canada.— O'Neal *v.* McMahon, 2 Grant Ch. (U. C.) 145.

In Iowa by statute see *supra*, V, D, 1, c; and Sweeney *v.* O'Hora, 43 Iowa 34.

In West Virginia it is held that the vendee's taking possession is not enough; the vendor must deliver possession, thus relying on his own act of part performance. Huntington, etc., Land Development Co. *v.* Thornburg, 46 W. Va. 99, 33 S. E. 108.

The vendee's possession is not recognized as enough in Maine (Bennett *v.* Dyer, 89 Me. 17, 35 Atl. 1004), nor by statute, in Alabama (Heflin *v.* Milton, 69 Ala. 354).

It must clearly appear that the possession was taken under the contract of purchase and not, for example, under an agreement to enter as tenant and pay rent (Owings *v.* Baldwin, 1 Md. Ch. 120 [*affirmed* in 8 Gill 337]); or under a preëxisting right of eminent domain (Haisten *v.* Savannah, etc., R. Co., 51 Ga. 199). See *supra*, V, E, 1, b.

delivered to or taken by the vendee, is treated as a sufficient part performance in several states;[27] or such possession coupled with the making of improvements by the vendee.[28] If the vendor, in reliance on the agreement, has not only delivered possession but has made extensive alterations in the premises for the vendee's accommodation, the vendor's equity for a specific performance is strengthened;[29] and the same result follows from such improvements upon or use of the land by the vendee that it cannot be restored to plaintiff in its original condition.[30]

N. Exchange — 1. Plaintiff's Double Position. In oral agreements for the exchange of lands, since plaintiff occupies the double position of vendee of one tract and vendor of another, he may have the benefit of acts of part performance appropriate to either relation.[31]

2. His Position as Vendee. Since conveyance by plaintiff is equivalent to payment, such conveyance, together with his taking possession of the land which he was to receive, satisfies the usual requirements of part performance;[32] and the same is true if plaintiff, without making or receiving a conveyance, takes possession and makes valuable improvements upon the lands which were to be conveyed to him.[33]

3. His Position as Vendor. If plaintiff has made a conveyance and defendant has taken possession thereunder, he not only has made the payment required of him but in his character as vendor can rely on his vendee's act of part performance and demand a conveyance, that is, payment from defendant.[34]

27. Walker *v.* Owen, 79 Mo. 563; Adair *v.* Adair, 78 Mo. 630; Tatum *v.* Brooker, 51 Mo. 148; Reynolds *v.* Reynolds, 45 Mo. App. 622 (payment of interest on the purchase-money); Cramer *v.* Mooney, 59 N. J. Eq. 164, 44 Atl. 625 (against vendee's assignee); Harris *v.* Knickerbacker, 5 Wend. (N. Y.) 638 [*reversing* 1 Paige 209]. *Contra*, Luckett *v.* Williamson, 37 Mo. 388. See *supra*, V, D, 2, a.

28. Murray *v.* Jayne, 8 Barb. (N. Y.) 612 (suit by vendor of an easement); Cooper *v.* Thomason, 30 Oreg. 161, 45 Pac. 296. See *supra*, V, D, 2, b, c.

29. Andrew *v.* Babcock, 63 Conn. 109, 26 Atl. 715 (vendor removed fixtures, machinery, etc., at great expense, and took steps to procure the release of encumbrances); Seaman *v.* Aschermann, 51 Wis. 678, 8 N. W. 818, 37 Am. Rep. 849 (lessors broke off pending negotiations for renting to a third person, and materially altered structure in order to adapt it to lessee's use).

30. Lawrence *v.* Saratoga Lake R. Co., 36 Hun (N. Y.) 467 (railroad tracks, structures, and excavations on the land); *In re* Fay, 213 Pa. St. 428, 62 Atl. 991 (vendee had quarried stone, depreciating the value of the land to an extent that could not be ascertained).

31. See the cases under the paragraphs following.

32. Fitzsimmons *v.* Allen, 39 Ill. 440; Farwell *v.* Johnston, 34 Mich. 342; Rhodes *v.* Frick, 6 Watts (Pa.) 315; Jones *v.* Pease, 21 Wis. 644, delivery of deed as part of consideration, and acceptance of deed of part of lands and possession thereunder. See *supra*, V, D, 2, a. In the following cases there were also valuable improvements made on the land received by plaintiff. Baker *v.* Allison, 186 Ill. 613, 58 N. E. 233; Hunkins *v.* Hunkins, 65 N. H. 95, 18 Atl. 655. See *supra*, V, D, 2, c. In a suit by a remainder-man for specific performance of an oral agreement for division of the land between himself and the life-tenant, a conveyance of one parcel by plaintiff to the life-tenant, and taking possession of the other parcel by plaintiff, was a part performance. Rhodes *v.* Frick, 6 Watts (Pa.) 315.

33. Evins *v.* Sandefur Julian Co., (Ark. 1906) 98 S. W. 677; Armstrong *v.* Fearnaw, 67 Ind. 429; Anderson *v.* Horn, 75 Tex. 675, 13 S. W. 24. See *supra*, V, D, 2, b.

34. *California.*— Stewart *v.* Smith, 6 Cal. App. 152, 91 Pac. 667, plaintiffs surrendered possession in consideration of agreement to devise. See Pearsall *v.* Henry, 153 Cal. 314, 95 Pac. 154, 159.

Connecticut.— Randall *v.* Latham, 36 Conn. 48, defendant agreed to give easement in the land conveyed.

Illinois.— McClure *v.* Otrich, 118 Ill. 320, 8 N. E. 784.

New Jersey.— Dean *v.* Anderson, 34 N. J. Eq. 496, defendant agreed to execute mortgage.

New York.— Roberge *v.* Winne, 144 N. Y. 709, 39 N. E. 631 [*affirming* 71 Hun 172, 24 N. Y. Suppl. 562], exchange of plaintiff's land for mortgage by defendant.

Texas.— Hunt *v.* Turner, 9 Tex. 385, 60 Am. Dec. 167.

United States.— Caldwell *v.* Carrington, 9 Pet. 86, 9 L. ed. 60.

See *supra*, V, M, 1, 2.

Compare, however, Riddell *v.* Riddell, 70 Nebr. 472, 97 N. W. 609, where, admitting the rule of the text "where both conveyances were intended to be contemporary and part of one transaction," the court distinguished the case where defendant's obligation is entirely future — to relinquish a possible interest by inheritance in the estate of the party who makes the conveyance.

4. Part Performance by Both Parties. If there has been conveyance by plaintiff and possession thereunder by defendant, and possession also taken by plaintiff of the land to be conveyed to him, the case presents acts of part performance appropriate to plaintiff's situation both as vendor and as vendee,[35] and it appears that the taking of possession by each party of the land contracted for by him is sufficient, independently of any conveyance by plaintiff.[36]

5. Conveyance Alone Insufficient. The fact that plaintiff has conveyed to defendant, should not, standing alone, be accepted as a part performance, since that act is merely equivalent to a payment by him.[37]

O. Parol Partition, Family Compromise, Etc. — 1. Parol Partition. Equity will enforce specific performance of a parol agreement for the division of land by those jointly interested, where there has been a part performance.[38] Taking possession of the respective parcels allotted to each is considered a sufficient part performance, even in states where the requirements for part performance between vendor and vendee are stringent.[39]

2. Family Arrangements and Compromises. Various arrangements for exchange of interests among members of a family, or for the compromise of disputed rights, when carried out by taking of possession, are governed by the same rule as parol partitions.[40]

35. Armes *v.* Bigelow, 3 MacArthur (D. C.) 442 [*affirmed* in 108 U. S. 10, 1 S. Ct. 83, 27 L. ed. 631]; Bennett *v.* Abrams, 41 Barb. (N. Y.) 619; Brennan *v.* Brennan, 21 N. Y. Suppl. 195; Wilkinson *v.* Wilkinson, 1 Desauss. Eq. (S. C.) 201; Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 9 S. Ct. 286, 32 L. ed. 673 [*affirming* 23 Fed. 168], also improvements made by each party.

36. *Alabama.*— McLure *v.* Tennille, 89 Ala. 572, 8 So. 60.

California.—Gilbert *v.* Sleeper, 71 Cal. 290, 12 Pac. 172, also improvements made by party who sues.

Iowa.— Baldwin *v.* Thompson, 15 Iowa 504, under code.

Pennsylvania.— Moss *v.* Culver, 64 Pa. St. 414, 3 Am. Rep. 601 (also improvements made by one party); Johnston *v.* Johnston, 6 Watts 370.

Virginia.— Parrill *v.* McKinley, 9 Gratt. 1, 58 Am. Dec. 212.

Compare infra, V, O, 1.

Under a parol agreement to make a lease of a tract of land to plaintiffs in consideration of their surrendering an existing lease of another tract, plaintiffs give up possession of the latter tract to the lessor, and removed to and continued in possession of the former tract; and it was held a sufficient part performance. Johnston *v.* Johnston, 6 Watts (Pa.) 370.

37. See *supra*, V, C, 2, a; and Wright *v.* Bearrow, 13 Tex. Civ. App. 146, 35 S. W. 190. The cases of Farrar *v.* Patton, 20 Mo. 81; and Alexander *v.* McDaniel, 56 S. C. 252, 34 S. E. 405, probably involved other additional acts. See also *supra*, V, I, 2. But see Pearsall *v.* Henry, 153 Cal. 314, 95 Pac. 154, 159.

38. *Arkansas.*— Petray *v.* Howell, 20 Ark. 615.

Indiana.— Green *v.* Vardiman, 2 Blackf. 324.

New Hampshire.— Tilton *v.* Tilton, 9 N. H. 385, where all parties exchanged deeds and took possession, but land was omitted from plaintiff's deed by mistake.

Pennsylvania.— McKnight *v.* Bell, 135 Pa. St. 358, 19 Atl. 1036; McMahan *v.* McMahan, 13 Pa. St. 376, 53 Am. Dec. 481.

South Carolina.—Kennemore *v.* Kennemore, 26 S. C. 251, 1 S. E. 881.

39. Green *v.* Vardiman, 2 Blackf. (Ind.) 324; Jones *v.* Jones, 118 N. Y. App. Div. 148, 103 N. Y. Suppl. 141; McKnight *v.* Bell, 135 Pa. St. 358, 19 Atl. 1036 (parol partition is not a "sale," within the statute of frauds); McMahan *v.* McMahan, 13 Pa. St. 376, 53 Am. Dec. 481; Kennemore *v.* Kennemore, 26 S. C. 251, 1 S. E. 881.

Consent.— Plaintiff's possession of his parcel must of course be with the consent of his cotenants. Gratz *v.* Gratz, 4 Rawle (Pa.) 411. See *supra*, V, E, 3.

Between life-tenant and remainder-man.— On a parol partition between a life-tenant and a remainder-man (plaintiff), conveyance of his interest in one parcel by the latter to the former, and taking possession of the other parcel by the latter, is a sufficient part performance. Rhodes *v.* Frick, 6 Watts (Pa.) 315.

40. *Georgia.*—Alderman *v.* Chester, 34 Ga. 152, where widow exchanged distributive interest for a larger life-interest.

Michigan.— Sigler *v.* Sigler, 108 Mich. 591, 66 N. W. 489, where husband exchanged personal property for a part of his wife's premises, of which he had been in joint possession.

New Jersey.— Clawson *v.* Brewer, 67 N. J. Eq. 201, 58 Atl. 598, where plaintiff relinquished claim on estate devised by his father to defendant; agreement enforced, although no change of possession.

United States.— Riggles *v.* Erney, 154 U. S. 244, 14 S. Ct. 1083, 38 L. ed. 976, although plaintiff's acts were in substance only a payment of money.

P. Contract to Give Mortgage. Equity will decree specific performance of a contract to give a mortgage on land, where the contract, although by parol, has been executed on complainant's part by payment of the money for which the mortgage was to be executed.[41]

Q. Evidence — 1. The Contract and Acts of Part Performance Must Be Clearly Proved — a. In General. Where a contract for the sale of land rests in parol, the evidence of the making of a contract must be clear and convincing, and all its terms must be fully, clearly, and satisfactorily proved, and the terms, as proved, must be certain and definite.[42] But it is not necessary that the contract

England.— Neale *v.* Neale, 1 Keen 672, 15 Eng. Ch. 672, 48 Eng. Reprint 466; Stockley *v.* Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184, 35 Eng. Reprint 9.

41. Clark *v.* Van Cleef, (N. J. Ch. 1908) 71 Atl. 260; Dean *v.* Anderson, 34 N. J. Eq. 496. See *supra*, II, B, 11, c.

42. *Alabama.*— Jones *v.* Jones, 155 Ala. 644, 47 So. 80; Daniel *v.* Collins, 57 Ala. 625; Aday *v.* Echols, 18 Ala. 353, 52 Am. Dec. 225; Goodwin *v.* Lyon, 4 Port. 297.

Arkansas.— Fielder *v.* Warner, 78 Ark. 158, 95 S. W. 452; Sutton *v.* Myrick, 39 Ark. 424; Whatley *v.* Strong, 23 Ark. 421.

Connecticut.— Cady *v.* Cadwell, 5 Day 67.

Florida.— Maloy *v.* Boyett, 53 Fla. 956, 43 So. 243.

Georgia.— Shropshire *v.* Brown, 45 Ga. 175.

Idaho.— Prairie Development Co. *v.* Leiberg, 15 Ida. 379, 98 Pac. 616.

Illinois.—White *v.* White, 231 Ill. 298, 83 N. E. 234; Standard *v.* Standard, 223 Ill. 255, 79 N. E. 92; Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998 (testimony should be of undoubted character); Cuppy *v.* Allen, 176 Ill. 162, 52 N. E. 61; Barrett *v.* Geisinger, 148 Ill. 98, 35 N. E. 354 (not enough to show that a contract of some kind exists, but all its material terms must be satisfactorily proved); Vose *v.* Strong, 144 Ill. 108, 33 N. E. 189 [*affirming* 45 Ill. App. 98]; Ralls *v.* Ralls, 82 Ill. 243; Gosse *v.* Jones, 73 Ill. 508; Danforth *v.* Perry, 20 Ill. App. 130. And Elwell *v.* Hicks, 238 Ill. 170, 87 N. E. 316.

Iowa.— Wills *v.* Westendorf, 140 Iowa 293, 118 N. W. 376; Rudolph *v.* Covell, 5 Iowa 525; Fairbrother *v.* Shaw, 4 Iowa 570; Olive *v.* Dougherty, 3 Greene 371.

Kansas.— Bichel *v.* Oliver, 77 Kan. 696, 95 Pac. 396; Long *v.* Duncan, 10 Kan. 294.

Maryland.— Shipley *v.* Fink, 102 Md. 219, 62 Atl. 360, 2 L. R. A. N. S. 1002; Ridgway *v.* Ridgway, 69 Md. 242, 14 Atl. 659; Hopkins *v.* Roberts, 54 Md. 312; Reese *v.* Reese, 41 Md. 554; Smith *v.* Crandall, 20 Md. 482; Stoddert *v.* Tuck, 5 Md. 18; Hall *v.* Hall, 1 Gill 383; Simmons *v.* Hill, 4 Harr. & M. 252, 1 Am. Dec. 398; Beard *v.* Linthicum, 1 Md. Ch. 345; Owings *v.* Baldwin, 1 Md. Ch. 120.

Michigan.— Millerd *v.* Ramsdell, Harr. 373; McMurtrie *v.* Bennette, Harr. 124.

Minnesota.— Burke *v.* Ray, 40 Minn. 34, 41 N. W. 240, as to terms of the contract.

Missouri.— Collins *v.* Harrell, 219 Mo. 279, 118 S. W. 432; McKee *v.* Higbee, 180 Mo. 263, 79 S. W. 407; Cherbonnier *v.* Cherbonnier, 108 Mo. 252, 18 S. E. 1083; Veth *v.* Gierth, 92 Mo. 97, 4 S. W. 432.

Nebraska.— Thompson *v.* Foken, 81 Nebr. 261, 115 N. W. 770; Worthington *v.* Worthington, 32 Nebr. 334, 49 N. W. 354.

New Jersey.—Wolfinger *v.* McFarland, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119; Banks *v.* Weaver, (Ch. 1901) 48 Atl. 515; Rutan *v.* Crawford, 45 N. J. Eq. 99, 16 Atl. 180 (uncertainty as to terms of a life lease); Clow *v.* Taylor, 27 N. J. Eq. 418; Green *v.* Richards, 23 N. J. Eq. 32; Petrick *v.* Ashcroft, 19 N. J. Eq. 339; Cooper *v.* Carlisle, 17 N. J. Eq. 525; Smith *v.* McVeigh, 11 N. J. Eq. 239.

New York.— Lobdell *v.* Lobdell, 36 N. Y. 327, 2 Transcr. App. 363, 4 Abb. Pr. N. S. 56, 33 How. Pr. 347; Jayne *v.* Brown, 93 N. Y. App. Div. 617, 88 N. Y. Suppl. 589; McIneres *v.* Hogan, 61 How. Pr. 446.

Oregon.— Odell *v.* Morin, 5 Oreg. 96.

Pennsylvania.— Miller *v.* Zufall, 113 Pa. St. 317, 6 Atl. 350; Greenlee *v.* Greenlee, 22 Pa. St. 225; Charnley *v.* Hansbury, 13 Pa. St. 16; Toe *v.* Toe, 3 Grant 74; Woods *v.* Farmare, 10 Watts 195; Fussell *v.* Rhodes, 2 Phila. 165; Fetterling's Estate, 1 Woodw. 169.

South Carolina.— McMillan *v.* McMillan, 77 S. C. 511, 58 S. E. 431; Church of the Advent *v.* Farrow, 7 Rich. Eq. 378.

Tennessee.— Morrison *v.* Searight, 4 Baxt. 476.

Texas.—Bracken *v.* Hambrick, 25 Tex. 408; Cook *v.* Embrey, 46 Tex. Civ. App. 128, 101 S. W. 844.

Virginia.— Cranes Nest Coal, etc., Co. *v.* Virginia Iron, etc., Co., 108 Va. 862, 62 S. E. 954, 1119; Creecy *v.* Grief, 108 Va. 320, 61 S. E. 769; Colonna Dry Dock Co. *v.* Colonna, 108 Va. 230, 61 S. E. 770; Venable *v.* Stamper, 102 Va. 30, 45 S. E. 738; Henley *v.* Cottrell Real Estate, etc., Co., 101 Va. 70, 43 S. E. 191 (uncertainty as to terms of lease); Pennybacker *v.* Maupin, 96 Va. 461, 31 S. E. 607; Wiley *v.* Colston, 86 Va. 520, 10 S. E. 507; Shenandoah Valley R. Co. *v.* Lewis, 76 Va. 833.

West Virginia.— Bell *v.* Whitesell, 64 W. Va. 1, 60 S. E. 879; Knight *v.* Knight, 51 W. Va. 518, 41 S. E. 905; McCully *v.* McLean, 48 W. Va. 625, 37 S. E. 559; Huntington, etc., Land Development Co. *v.* Thornburg, 46 W. Va. 99, 33 S. E. 108; Harris *v.* Elliott, 45 W. Va. 245, 32 S. E. 176; Gallagher *v.* Gallagher, 31 W. Va. 9, 5 S. E. 297; Patrick *v.* Horton, 3 W. Va. 23.

Wisconsin.— Dewey *v.* Spring Valley Land

be proved by direct evidence. Where the facts including the acts of the parties raise a convincing implication that the contract was actually made and satisfy the court of its terms and performance, it is sufficient to justify its enforcement.[43] The court should consider proof of surrounding circumstances which render the contract improbable,[44] or which may throw light on the true nature of the contract if its terms are in dispute.[45] The uncorroborated testimony of plaintiff or of a single witness, when contradicted, is insufficient;[46] but the mere fact that there is some conflicting testimony as to the making of the contract or its terms does not necessitate the refusal of the relief.[47] In a few states the rule has been announced in the form that the contract and its terms must be proved "beyond a reasonable doubt;"[48] but this statement of the rule has been criticized as too

Co., 98 Wis. 83, 73 N. W. 565 (mere preponderance of evidence insufficient); Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458; Hazelton *v.* Putnam, 3 Pinn. 107, 54 Am. Dec. 158, 3 Chandl. 117.

United States.— Rogers Locomotive, etc., Works *v.* Helm, 154 U. S. 610, 14 S. Ct. 1177, 22 L. ed. 562; Logue *v.* Langan, 151 Fed. 455, 81 C. C. A. 271; Jones *v.* Patrick, 145 Fed. 440; Walcott *v.* Watson, 53 Fed. 429; Kendall *v.* Almy, 14 Fed. Cas. No. 7,690, 2 Sumn. 278; Smith *v.* Burnham, 22 Fed. Cas. No. 13,019, 3 Sumn. 435.

England.— Mortal *v.* Lyons, 8 Ir. Ch. 112; Lindsay *v.* Lynch, 2 Sch. & Lef. 1, 9 Rev. Rep. 54; Pilling *v.* Armitage, 12 Ves. Jr. 78, 8 Rev. Rep. 295, 33 Eng. Reprint 31.

Canada.— Craig *v.* Craig, 2 Ont. App. 583; Jibb *v.* Jibb, 24 Grant Ch. (U. C.) 487.

See 44 Cent. Dig. tit. "Specific Performance," § 387 *et seq.*

Evidence held sufficient see White *v.* White, 231 Ill. 298, 83 N. E. 234; Cutsinger *v.* Ballard, 115 Ind. 93, 17 N. E. 206; Harrison *v.* Harrison, 80 Nebr. 103, 113 N. W. 1042; Sprague *v.* Jessup, 48 Oreg. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. N. S. 410; Schney *v.* Schaeffer, 130 Pa. St. 16, 18 Atl. 544, 549.

Review of evidence on appeal.— In some states the sufficiency of the proof is not a matter for the appellate court to consider, if the finding of the trial court is supported by any evidence, or is not against a clear preponderance of evidence. Lobdell *v.* Lobdell, 36 N. Y. 327, 2 Transcr. App. 363, 4 Abb. Pr. N. S. 56, 33 How. Pr. 347; Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; Rodman *v.* Rodman, 112 Wis. 378, 88 N. W. 218.

Submission to jury.— Under the Pennsylvania practice the judge should not submit the case to the jury if the evidence is not sufficient to warrant him, as chancellor, in decreeing specific performance. Reno *v.* Moss, 120 Pa. St. 49, 13 Atl. 716.

Iowa statute.— For a statute (Revision, § 4010) providing that a parol contract for the conveyance of land may be enforced against a defendant when established by his own testimony see Auter *v.* Miller, 18 Iowa 405.

Imperfect writing.— That an imperfect memorandum may be used to aid the proof of the parol contract see O'Neal *v.* McMahon, 2 Grant Ch. (U. C.) 145.

Corroboration by declarations.— In a suit for specific performance of testator's agreement to adopt another's child and leave her by will one half of his estate, direct evidence that he made such an agreement may be corroborated by his statements of his purpose to do so. Peterson *v.* Bauer, 83 Nebr. 405, 119 N. W. 764.

43. Bichel *v.* Oliver, 77 Kan. 696, 95 Pac. 396.

44. Marr *v.* Shaw, 51 Fed. 860.

45. Moulton *v.* Harris, 94 Cal. 420, 29 Pac. 706.

46. Phœnix Ins. Co. *v.* Rink, 110 Ill. 538; Patrick *v.* Horton, 3 W. Va. 23. And see Lindsay *v.* Lynch, 2 Sch. & Lef. 1, 9 Rev. Rep. 54; Pilling *v.* Armitage, 12 Ves. Jr. 78, 8 Rev. Rep. 295, 33 Eng. Reprint 31; Mortimer *v.* Orchard, 2 Ves. Jr. 242, 30 Eng. Reprint 615.

47. Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266; Mudgett *v.* Clay, 5 Wash. 103, 31 Pac. 424.

48. *Georgia.*— Redman Bros. *v.* Mays, 124 Ga. 435, 59 S. E. 212; Dwight *v.* Jones, 115 Ga. 744, 42 S. E. 48; Beall *v.* Clark, 71 Ga. 818; Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

Idaho.— Deeds *v.* Stephens, 10 Ida. 332, 79 Pac. 77.

Illinois.— Chicago, etc., R. Co. *v.* Chipps, 226 Ill. 584, 80 N. E. 1069; Seitman *v.* Seitman, 204 Ill. 504, 68 N. E. 461 [*affirming* 106 Ill. App. 671].

Missouri.— Kirk *v.* Middlebrook, 201 Mo. 245, 100 S. W. 450; Russell *v.* Sharp, 192 Mo. 270, 91 S. W. 134, 111 Am. St. Rep. 496; Rosenwald *v.* Middlebrook, 188 Mo. 58, 86 S. W. 200; Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197; Taylor *v.* Von Schraeder, 107 Mo. 206, 16 S. W. 675; Rogers *v.* Wolfe, 104 Mo. 1, 14 S. W. 805.

New Jersey.— Brewer *v.* Wilson, 17 N. J. Eq. 180.

Strong statements of the rule are found in the following cases also: Barbour *v.* Barbour, 51 N. J. Eq. 267, 271, 29 Atl. 148 ("proof of such contract must be of the most demonstrative character"); Schney *v.* Schaeffer, 130 Pa. St. 16, 18 Atl. 544, 549 (terms must be shown by "full, complete, satisfactory and unduitable proof"); Sage *v.* McGuire, 4 Watts & S. (Pa.) 228, 229 ("indispensable to prove, by the most clear and indisputable evidence, the precise terms and nature of the agreement").

exacting,[49] and appears to have been disregarded by many decisions even in the states which have announced it.[50]

b. Terms of the Contract. The land which is the subject-matter of the contract must be clearly identified,[51] the price or other consideration must not be uncertain;[52] and if the sale is on credit, the time for payment should be clearly proved.[53]

c. Acts of Part Performance. The acts of part performance relied on to escape the operation of the statute of frauds must be clearly, definitely, and satisfactorily proved; and not only the acts themselves, but their compliance with the rules which prescribe the necessary relation of the act to the contract, must be established.[54]

2. Evidence of Gift. The requisite of clear, conclusive, and unequivocal evidence is especially important in the case of a parol gift of land, since the fact that the parties are usually relatives tends to account for plaintiff's occupation of the land as permissive, not as the result of contract. The proof must indicate more than a vague intention to give, or a family arrangement resting upon the will of the parties.[55] In Pennsylvania the rule is well established that much

49. Moore *v.* Gordon, 44 Ark. 334 (contract need only be fairly made out by a decided preponderance of proof); Warren *v.* Gay, 123 Ga. 243, 51 S. E. 302 (reviewing Georgia cases on the subject); West *v.* Washington, etc., R. Co., 49 Oreg. 436, 90 Pac. 666.

50. See Warren *v.* Gay, 123 Ga. 243, 51 S. E. 302; and cases cited *supra*, note 42.

51. *Alabama.*— Brown *v.* Weaver, 113 Ala. 228, 20 So. 964.

Dakota.— Hollenbeck *v.* Prior, 5 Dak. 298, 40 N. W. 347.

Georgia.— Higginbotham *v.* Cooper, 116 Ga. 741, 42 S. E. 1000; Dwight *v.* Jones, 115 Ga. 744, 42 S. E. 48.

Iowa.—Kirkpatrick *v.* Pettis, 127 Iowa 611, 103 N. W. 956.

Missouri.— Paris *v.* Haley, 61 Mo. 453; Foster *v.* Kimmons, 54 Mo. 488, boundaries never agreed upon.

New Hampshire.— White *v.* Poole, 74 N. H. 71, 65 Atl. 255, land sufficiently identified.

Oregon.— Wagonblast *v.* Whitney, 12 Oreg. 83, 6 Pac. 399.

Texas.— Taylor *v.* Ashley, 15 Tex. 50.

The test of definiteness is said by some decisions to be the same as if the contract were in writing. White *v.* Poole, 74 N. H. 71, 65 Atl. 255; Blankenship *v.* Spencer, 31 W. Va. 510, 7 S. E. 433.

52. *Alabama.*— Brown *v.* Weaver, 113 Ala. 228, 20 So. 964, if the price is disputed, evidence that the value is much greater than the amount named is relevant.

Nebraska.— Baker *v.* Wiswell, 17 Nebr. 52, 22 N. W. 111.

Oregon.— Wagonblast *v.* Whitney, 12 Oreg. 83, 6 Pac. 399.

Pennsylvania.— Small *v.* Ehrgood, 1 Lack. Leg. N. 167; Fetterling's Estate, 1 Woodw. 169.

Wisconsin.— Eckel *v.* Bostwick, 88 Wis. 493, 60 N. W. 784.

Canada.— Calhoun *v.* Brewster, 1 N. Brunsw. Eq. 529.

53. Brown *v.* Weaver, 113 Ala. 228, 20 So. 964; Aday *v.* Echols, 18 Ala. 353, 52 Am. Dec. 225; Ash *v.* Daggy, 6 Ind. 259; Tiernan *v.* Gibney, 24 Wis. 190. But see Everett *v.* Dilley, 39 Kan. 73, 17 Pac. 661.

54. *Alabama.*— Pike *v.* Pettus, 71 Ala. 98.

Illinois.— Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210; Godschalk *v.* Fulmer, 176 Ill. 64, 51 N. E. 852.

Iowa.— Collins *v.* Collins, 138 Iowa 470, 114 N. W. 1069; Sweeney *v.* O'Hora, 43 Iowa 34 (sufficient if the connection of the acts with the contract is established by a preponderance of evidence); Fairbrother *v.* Shaw, 4 Iowa 570; Williamson *v.* Williamson, 4 Iowa 279.

Maryland.—Owings *v.* Baldwin, 8 Gill 337; Small *v.* Owings, 1 Md. Ch. 363.

Michigan.—Munsell *v.* Loree, 21 Mich. 491, as to proof of possession.

Nebraska.— Lewis *v.* North, 62 Nebr. 552, 87 N. W. 312.

New Jersey.— Eyre *v.* Eyre, 19 N. J. Eq. 102; Force *v.* Dutcher, 18 N. J. Eq. 401.

Texas.—Cobb *v.* Johnson, 101 Tex. 440, 108 S. W. 811 [*reversing* (Civ. App. 1907) 105 S. W. 847].

Utah.— Price *v.* Lloyd, 31 Utah 86, 86 Pac. 767, 8 L. R. A. N. S. 870.

Writing.— The evidence need not be in writing (Hall *v.* Hall, 1 Gill (Md.) 383); but a written memorandum of the contract, insufficient in itself, may be used for the purpose of showing that possession was taken by consent (Parkhurst *v.* Van Cortland, 14 Johns. (N. Y.) 15, 7 Am. Dec. 427).

55. *Arkansas.*—Young *v.* Crawford, 82 Ark. 33, 100 S. W. 87.

Illinois.— Woodard *v.* Woodard, 178 Ill. 295, 52 N. E. 1041; Wolfe *v.* Bradberry, 140 Ill. 578, 30 N. E. 665 (preponderance of evidence shows a tenancy at will); Clark *v.* Clark, 122 Ill. 388, 13 N. E. 553; Galloway *v.* Garland, 104 Ill. 275; Langston *v.* Bates, 84 Ill. 524, 25 Am. Rep. 466 (evidence sufficient); Worth *v.* Worth, 84 Ill. 442; Allen *v.* Webb, 64 Ill. 342.

Iowa.— Lich *v.* Lich, 81 Iowa 84, 46 N. W. 763; Truman *v.* Truman, 79 Iowa 506, 44 N. W. 721; Johnston *v.* Johnston, 19 Iowa 74, proof sufficient.

stronger evidence is required to support a gift from parent to child than a transaction between strangers, and statements to the same effect are found in other jurisdictions.[56]

3. Evidence of Agreement to Devise. The rules as to the weight of evidence are applied with the utmost strictness to oral contracts to devise the whole or part of an estate. Such contracts are viewed with suspicion by the courts, and must be established by the clearest and most convincing evidence. In these, as in other contracts, one party to which is deceased, the defendant heirs or devisees are under the disadvantage that they are deprived by his death of their most important testimony.[57] In such contracts the proof, in addition to inferences

Michigan.— Wright *v.* Wright, 31 Mich. 380; Jones *v.* Tyler, 6 Mich. 364.

Virginia.— Lightner *v.* Lightner, (1895) 23 S. E. 301.

West Virginia.— Stone *v.* Hill, 52 W. Va. 63, 43 S. E. 92.

United States.— Logue *v.* Langan, 151 Fed. 455, 81 C. C. A. 271.

56. *Arkansas.*— Meigs *v.* Morris, 63 Ark. 100, 37 S. W. 302.

Illinois.— Geer *v.* Goudy, 174 Ill. 514, 51 N. E. 623.

Oregon.— Brown *v.* Lord, 7 Oreg. 302.

Pennsylvania.— Erie, etc., R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250; Shellhammer *v.* Ashbaugh, 83 Pa. St. 24; Poorman *v.* Kilgore, 26 Pa. St. 365, 67 Am. Dec. 524; Ackerman *v.* Fisher, 57 Pa. St. 457 (sale); Eckert *v.* Eckert, 3 Penr. & W. 332, 362; Shelly's Estate, 4 Lanc. L. Rev. 186; Fetterling's Estate, 1 Woodw. 169.

West Virginia.— Meadows *v.* Meadows, 60 W. Va. 34, 53 S. E. 718.

Statement of rule and reason therefor.— "It is so natural for parents to help their children by giving them the use of a farm or house, and then to call it theirs, that no gift or sale of the property can be inferred from such circumstances. It is so entirely usual to call certain books, or utensils, or rooms, or houses, by the name of the children who use them, that it is no evidence at all of their title as against their parents, but only a mode of distinguishing the rights which the parents have allotted to the children as against each other, and in subjection to their own paramount right. The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous." Poorman *v.* Kilgore, 26 Pa. St. 365, 372, 67 Am. Dec. 524 [*quoted* in Rau *v.* Rau, 79 Nebr. 694, 113 N. W. 174].

57. *California.*— Barry *v.* Beamer, 8 Cal. App. 200, 96 Pac. 373, evidence held sufficient.

District of Columbia.— Coveney *v.* Conlin, 20 App. Cas. 303.

Illinois.— Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210; Shovers *v.* Warrick, 152 Ill. 355, 38 N. E. 792; Shaw *v.* Schoonover, 130 Ill. 448, 22 N. E. 589.

Iowa.— Collins *v.* Collins, 138 Iowa 470, 114 N. W. 1069; Briles *v.* Goodrich, 116 Iowa 517, 90 N. W. 354.

Maryland.— Semmes *v.* Worthington, 38 Md. 298; Mundorff *v.* Kilbourn, 4 Md. 459; Shepherd *v.* Shepherd, 1 Md. Ch. 244 [*reversed* on other grounds in 9 Gill 32].

Michigan.— Smith *v.* Lull, 152 Mich. 126, 115 N. W. 1002.

Missouri.— Russell *v.* Sharp, 192 Mo. 270, 91 S. W. 134, 111 Am. St. Rep. 496 (services); Asbury *v.* Hicklin, 181 Mo. 658, 81 S. W. 390 (adoption); Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197; Alexander *v.* Alexander, 150 Mo. 579, 52 S. W. 256; Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126; Sitton *v.* Shipp, 65 Mo. 297; Underwood *v.* Underwood, 48 Mo. 527.

Nebraska.— Rau *v.* Rau, 79 Nebr. 694, 113 N. W. 174.

New Jersey.— Haberman *v.* Kaufer, 70 N. J. Eq. 381, 61 Atl. 976 (services); McTague *v.* Finnegan, 54 N. J. Eq. 454, 35 Atl. 542 (adoption); Larison *v.* Polhemus, 36 N. J. Eq. 506; Ackerman *v.* Ackerman, 24 N. J. Eq. 315.

New York.— Tousey *v.* Hastings, 194 N. Y. 79, 86 N. E. 831 [*affirming* 127 N. Y. App. Div. 94, 111 N. Y. Suppl. 344]; Holt *v.* Tuite, 188 N. Y. 17, 80 N. E. 364 [*reversing* 110 N. Y. App. Div. 915, 96 N. Y. Suppl. 1126]; Hamlin *v.* Stevens, 177 N. Y. 39, 69 N. E. 118; Conlon *v.* Mission of Immaculate Virgin, 84 N. Y. App. Div. 507, 82 N. Y. Suppl. 998 [*modifying* 39 Misc. 215, 79 N. Y. Suppl. 406]; Braun *v.* Ochs, 77 N. Y. App. Div. 20, 79 N. Y. Suppl. 100; Ripsom *v.* Hart, 64 N. Y. App. Div. 593, 72 N. Y. Suppl. 791 (must be "abundant evidence of the most satisfactory and convincing character"); Gall *v.* Gall, 64 Hun 600, 19 N. Y. Suppl. 332, 29 Abb. N. Cas. 19 [*affirmed* in 138 N. Y. 675, 34 N. E. 515] (a much quoted opinion); Killian *v.* Heinzerling, 47 Misc. 511, 515, 95 N. Y. Suppl. 969 (evidence "should be given and corroborated in all substantial particulars by disinterested witnesses"); Spencer *v.* De Witt C. Hay Library Assoc., 37 Misc. 608, 76 N. Y. Suppl. 109.

Oregon.— Richardson *v.* Orth, 40 Oreg. 252, 66 Pac. 925, 69 Pac. 455.

Rhode Island.— Spencer *v.* Spencer, 26 R. I. 237, 58 Atl. 766.

Virginia.— Lightner *v.* Lightner, (1895) 23 S. E. 301.

If the deceased made a will in violation of the contract, the court in enforcing the con-

from the situation, circumstances, and relations of the parties, must generally consist of evidence of verbal declarations made by the deceased to third persons.[58] This is a kind of evidence which the law recognizes as weak and unsatisfactory, and to be scrutinized with care. Vague admissions, mere declarations of an intention to confer a benefit, loose and unconnected statements made to different persons at various times in chance conversations, do not, unless well corroborated, furnish proof of such a character as will warrant specific performance of an oral contract or gift.[59]

VI. PLAINTIFF'S DEFAULT.

A. Plaintiff Must Be Able, Ready, and Willing to Perform — 1. In General. In general plaintiff must show performance or ability, readiness, and willingness to perform all the provisions of the contract to be performed by him.[60] Save in the exceptional cases of immaterial default admitting of compensation,[61] relief must be denied to a plaintiff who is unable to perform his part of the contract.[62]

tract undertakes to set aside a testamentary act, and therefore weighs the evidence of the contract in the most scrupulous manner. Shaw *v.* Schoonover, 130 Ill. 448, 22 N. E. 589; Semmes *v.* Worthington, 38 Md. 298.

That the evidence should leave no reasonable doubt see Asbury *v.* Hicklin, 181 Mo. 658, 81 S. W. 390; Holt *v.* Tuite, 188 N. Y. 17, 80 N. E. 364 [*reversing* 110 N. Y. App. Div. 915, 96 N. Y. Suppl. 1126].

On the other hand it has been argued that the requirement of proof should be less stringent in the case of a contract with a person deceased, because of the statute preventing plaintiff's testimony in such suits. Taft *v.* Taft, 73 Mich. 502, 41 N. W. 481.

Where the agreement is thirty years old, precision of language is not to be expected. Van Duyne *v.* Vreeland, 12 N. J. Eq. 142.

That an invalid will made in the attempt to carry out the contract may be used to assist in the proof of the contract see Maddox *v.* Rowe, 23 Ga. 431, 68 Am. Dec. 535.

58. Cherry *v.* Whalen, 25 App. Cas. (D. C.) 537; Bevington *v.* Bevington, 133 Iowa 351, 110 N. W. 840, 9 L. R. A. N. S. 508; Shahan *v.* Swan, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517, agreement to devise proved by evidence of declaration made forty years before suit. See Lockhart *v.* White, 77 Ga. 786.

Corroboration by proof of declarations of intention see Peterson *v.* Bauer, 83 Nebr. 405, 119 N. W. 764.

59. *Illinois.*— Standard *v.* Standard, 223 Ill. 255, 79 N. E. 92; Shovers *v.* Warrick, 152 Ill. 355, 38 N. E. 792.

Iowa.— Recknagle *v.* Schmaltz, 72 Iowa 63, 33 N. W. 365; Wilmer *v.* Farris, 40 Iowa 309.

Minnesota.— Lowe *v.* Lowe, 83 Minn. 206, 86 N. W. 11.

Missouri.— McKee *v.* Higbee, 180 Mo. 263, 79 S. W. 407; Berry *v.* Hartzell, 91 Mo. 132, 3 S. W. 582; Underwood *v.* Underwood, 48 Mo. 527.

Nebraska.— Dickman *v.* Birkhauser, 16 Nebr. 686, 21 N. W. 396.

New Jersey.—Wolfinger *v.* McFarland, 67 N. J. Eq. 687, 54 Atl. 862, 63 Atl. 1119.

New York.— Killian *v.* Heinzerling, 47 Misc. 511, 95 N. Y. Suppl. 969.

Pennsylvania.— *In re* Shaffer, 205 Pa. St. 145, 54 Atl. 711; Rankin *v.* Simpson, 19 Pa. St. 471, 57 Am. Dec. 668; Moore *v.* Small, 19 Pa. St. 461; Hugus *v.* Walker, 12 Pa. St. 173; Toe *v.* Toe, 3 Grant 74.

Virginia.— Helton *v.* Johnson, (1897) 27 S. E. 579.

Wisconsin.— Bowen *v.* Warner, 1 Pinn. 600.

United States.— Purcell *v.* Miner, 4 Wall. 513, 18 L. ed. 435; Walcott *v.* Watson, 53 Fed. 429.

Such declarations are "the most unsatisfactory species of evidence, on account of the facility with which they may be fabricated, the impossibility of contradicting them, and the mistakes and failure of recollection. . . . The posthumous recollections of a neighborhood, as to the words of a testator, should weigh but little when set against his written will." Moore *v.* Small, 19 Pa. St. 461, 469, per Woodward, J.

60. *Florida.*— Pensacola Gas Co. *v.* Pensacola Provisional Municipality, 33 Fla. 322, 14 So. 826.

Idaho.— Olympia Min. Co. *v.* Kerns, 13 Ida. 514, 91 Pac. 92.

Illinois.— Launtz *v.* Vogt, 133 Ill. App. 255.

Louisiana.— Stafford *v.* Richard, 121 La. 76, 46 So. 107; Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007.

Pennsylvania.— Chandler *v.* Chandler, 220 Pa. St. 311, 69 Atl. 806.

Tennessee.— McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729.

Wisconsin.— Dickey *v.* Pugh, 110 Wis. 400, 85 N. W. 963.

Plaintiff's readiness and willingness need not be stated in the findings when the facts found show such readiness and willingness. Owen *v.* Frink, 24 Cal. 171.

61. See *infra*, VI, A, 4; VII, B, I.

62. *Alabama.*— Irwin *v.* Bailey, 72 Ala. 467.

California.— Sturgis *v.* Galindo, 59 Cal. 28, 43 Am. Rep. 239, where plaintiffs had assigned.

2. Plaintiff's Insolvency. Plaintiff's insolvency, making it doubtful whether he can perform his part of the contract, is sometimes a defense.[63]

3. Title of Vendor or Lessor Plaintiff — a. Must Make Good Title. A vendor or lessor suing for specific performance must be able to convey a good and indefeasible title, unless the vendee or lessee assumed the risk as to title; and this is true, although no provision was made in the contract for a warranty of title.[64] A contract for a "good and sufficient deed," or "warranty deed," or "deed of general warranty," calls for a marketable title; and a deed with covenants

Illinois.— See Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871, as to evidence of ability where that depends upon consent of third person.

Kentucky.— May *v.* Fenton, 7 J. J. Marsh. 306; Johnston *v.* Mitchell, 1 A. K. Marsh. 225, 10 Am. Dec. 727; Clay *v.* Turner, 3 Bibb 52.

Maryland.— Carswell *v.* Walsh, 70 Md. 504, 17 Atl. 335.

Massachusetts.— Rice *v.* D'Arville, 162 Mass. 559, 39 N. E. 180; Thaxter *v.* Sprague, 159 Mass. 397, 34 N. E. 541.

New York.— Buxbaum *v.* Devoe, 123 N. Y. App. Div. 653, 107 N. Y. Suppl. 1053; Hudson River Water Power Co. *v.* Glens Falls Portland Cement Co., 107 N. Y. App. Div. 548, 95 N. Y. Suppl. 481.

Washington.— Coonrod *v.* Studebaker, 53 Wash. 32, 101 Pac. 489.

West Virginia.— Henking *v.* Anderson, 34 W. Va. 709, 12 S. E. 869.

United States.— Slaughter *v.* La Compagnie Francaise Des Cables Telegraphiques, 113 Fed. 21 [*affirmed* in 119 Fed. 588, 57 C. C. A. 19]; Leicester Piano Co. *v.* Front Royal, etc., Imp. Co., 55 Fed. 190, 5 C. C. A. 60.

Ability need not exist at time of filing bill. — Moore's Estate, 8 Pa. Dist. 84.

Partial failure of consideration by reason of death of the other party making full performance impossible see Bartley *v.* Greenleaf, 112 Iowa 82, 83 N. W. 824; Jaffee *v.* Jacobson, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352.

Entire and divisible contracts.— Plaintiff must be willing to perform the whole of his share of an entire contract (Reynolds *v.* Hooker, 76 Vt. 184, 56 Atl. 988), but otherwise with a divisible contract (Bower *v.* Bagley, 9 Wash. 642, 38 Pac. 164).

63. Sims *v.* McEwen, 27 Ala. 184; Hernreich *v.* Lidberg, 105 Ill. App. 495 (agreement to organize a corporation, three of the four proposed incorporators being insolvent); Bradford, etc., R. Co. *v.* New York, etc., R. Co., 123 N. Y. 316, 25 N. E. 499, 11 L. R. A. 116 (objection not met by plaintiff having performed its part in the past); Brush-Swan Electric Light Co. *v.* Brush Electric Co., 52 Fed. 37, 2 C. C. A. 669 [*reversing* 49 Fed. 5].

But in an ordinary contract of sale plaintiff's insolvency is no objection to making a decree, since the decree may direct conveyance only on payment of the purchase-money. Sarter *v.* Gordon, 2 Hill Eq. (S. C.) 121.

Giving security.— The objection of insolvency may be met by giving security for payment. McFarlane *v.* Williams, 107 Ill. 33; Tyree *v.* Williams, 3 Bibb (Ky.) 365, 6 Am. Dec. 663. But see Rice *v.* D'Arville, 162 Mass. 559, 39 N. E. 180.

Insolvency or bankruptcy of lessee a defense in England see McNally *v.* Gradwell, 16 Ir. Ch. 512; Plunkett *v.* Dease, 10 Ir. Eq. 124; Neal *v.* Mackkenzie, 1 Keen 474, 15 Eng. Ch. 474, 48 Eng. Reprint 389; Crosby *v.* Tooke, 2 L. J. Ch. 83, 1 Myl. & K. 431, 7 Eng. Ch. 431, 39 Eng. Reprint 745; Morgan *v.* Rhodes, 1 Myl. & K. 435, 7 Eng. Ch. 435, 39 Eng. Reprint 746; Pearson *v.* Knapp, 1 Myl. & K. 312, 7 Eng. Ch. 312, 39 Eng. Reprint 699; De Minckwitz *v.* Udney, 16 Ves. Jr. 466, 33 Eng. Reprint 1061; Weatherall *v.* Geering, 12 Ves. Jr. 504, 8 Rev. Rep. 369, 33 Eng. Reprint 191; Buckland *v.* Hall, 8 Ves. Jr. 92, 7 Rev. Rep. 1, 32 Eng. Reprint 287; Boardman *v.* Mostyn, 6 Ves. Jr. 467, 31 Eng. Reprint 1147; Price *v.* Assheton, 1 Y. & C. Exch. 441.

64. *Florida.*— McKinnon *v.* Johnson, 54 Fla. 538, 45 So. 451.

Illinois.— Krause *v.* Kraus, 58 Ill. App. 559 [*affirmed* in 162 Ill. 328, 44 N. E. 736].

Kentucky.— Jarman *v.* Davis, 4 T. B. Mon. 115.

New York.— Delavan *v.* Duncan, 49 N. Y. 485; Groden *v.* Jacobson, 129 N. Y. App. Div. 508, 114 N. Y. Suppl. 183; Bates *v.* Delavan, 5 Paige 299.

North Carolina.— Triplett *v.* Williams, 149 N. C. 394, 63 S. E. 79; Trimmer *v.* Gorman, 129 N. C. 161, 39 S. E. 804, although he offers to give an indemnifying bond.

Texas.— Clifton *v.* Charles, (Civ. App. 1909) 116 S. W. 120.

Washington.— Coonrod *v.* Studebaker, 53 Wash. 32, 101 Pac. 489.

West Virginia.— Middleton *v.* Selby, 19 W. Va. 167.

United States.— Morgan *v.* Morgan, 2 Wheat. 290, 4 L. ed. 242; Lindsey *v.* Humbrecht, 162 Fed. 548.

England.— Hyde *v.* Warden, 3 Exch. D. 72, 47 L. J. Exch. 121, 37 L. T. Rep. N. S. 567, 26 Wkly. Rep. 201 (contract for grant of under-lease); Reeves *v.* Greenwich Tanning Co., 2 Hem. & M. 54, 71 Eng. Reprint 380; Leathem *v.* Allen, 1 Ir. Ch. 683 (agreement for lease).

See 44 Cent. Dig. tit. "Specific Performance," § 257 *et seq.* See also *supra*, IV, F.

A vendor conveying the land to a third person pending performance of the contract for the sale thereof is not entitled to specific performance of the contract against the purchaser. Groden *v.* Jacobson, 129 N. Y. App. Div. 508, 114 N. Y. Suppl. 183.

of title does not take the place of a good title.[65] The fact that a person contracting to convey land does not at the time have title to all of it does not render specific performance of the contract impossible, so as to deprive equity of jurisdiction, where it does not appear that he might not acquire title to the whole of it.[66]

b. Burden of Proof as to Title. The burden of proof is on the vendor to show a good title, where that is denied in the vendee's answer, or the vendee in his answer insists that the vendor exhibit his title, or the vendee refuses to perform on account of alleged defects.[67]

Leasehold interest.— In Bensel *v.* Gray, 44 N. Y. Super. Ct. 372 [*affirmed* in 80 N. Y. 517], plaintiffs, who held under certain tax leases, made a written agreement to assign them to defendant, "with all and singular the premises therein mentioned, and the buildings thereon, together with the appurtenances, to have and to hold the same" for the remainder of the term mentioned in the leases, with a covenant that the assigned premises were free from encumbrances. It was held that the agreement called for the conveyance of a leasehold interest, and, if the leases were invalid, plaintiffs could not enforce specific performance, even if defendant obtained possession under the agreement. See also Krause *v.* Kraus, 58 Ill. App. 559 [*affirmed* in 162 Ill. 328, 44 N. E. 736]; Hyde *v.* Warden, 3 Exch. D. 72, 47 L. J. Exch. 121, 37 L. T. Rep. N. S. 567, 26 Wkly. Rep. 201, contract for grant of under-lease.

Waiver of objections to title see Hyde *v.* Warden, 3 Exch. D. 72, 47 L. J. Exch. 121, 37 L. T. Rep. N. S. 567, 26 Wkly. Rep. 201, contract for grant of under-lease. See also Walton *v.* McKinney, (Ariz. 1908) 94 Pac. 1122; Secombe *v.* Fuller, 50 Wash. 666, 97 Pac. 805, where the evidence in a suit for specific performance was held to show a waiver by both parties to a contract for the sale of land of a provision terminating the contract if the abstract did not show a good title, or could not be made to do so within thirty days from notice of defects.

Constructive notice of terms of original lease.—A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. Flight *v.* Barton, 3 Myl. & K. 282, 10 Eng. Ch. 282, 40 Eng. Reprint 108. But it has been held that upon an agreement to grant an under-lease the grantee has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they were. Hyde *v.* Warden, 3 Exch. D. 72, 47 L. J. Exch. 121, 37 L. T. Rep. N. S. 567, 26 Wkly. Rep. 201. And it has also been held that where a party entered into an agreement with a lessee for an under-lease, and informed the lessee of the nature of the business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business, the silence of the lessee was equivalent to a representation that there was no such prohibitory covenant. Flight *v.* Barton, *supra*.

Rights under a sealed instrument may be waived by parol.—Where defendant seeks to defeat the complainant's right to specific performance upon the ground that there was an unpaid mortgage upon complainant's property about which nothing whatever was said in the contract, which was under seal, the complainant may show by parol that defendant had agreed to let the mortgage stand and receive the money from defendant instead of having defendant pay it off, as he had intended doing. Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641.

65. Horne *v.* Rodgers, 113 Ga. 224, 38 S. E. 768; Mead *v.* Fox, 6 Cush. (Mass.) 199; Luckett *v.* Williamson, 31 Mo. 54; Egle *v.* Morrison, 27 Ohio Cir. Ct. 497, but not necessarily for a title free from all encumbrances.

66. Krasnow *v.* Topp, 128 N. Y. App. Div. 156, 112 N. Y. Suppl. 546.

67. *Illinois.*— Pfaff *v.* Cilsdorf, 173 Ill. 86, 50 N. E. 670; Danforth *v.* Perry, 20 Ill. App. 130.

Kentucky.— Beckwith *v.* Kouns, 6 B. Mon. 222; Hightower *v.* Smith, 5 J. J. Marsh. 542; Tomlin *v.* McChord, 5 J. J. Marsh. 135; Bartlett *v.* Blanton, 4 J. J. Marsh. 426; Edwards *v.* Handley, Hard. 602, 3 Am. Dec. 745.

New Jersey.— Cornell *v.* Andrus, 36 N. J. Eq. 321.

New York.—Reydel *v.* Reydel, 10 Misc. 273, 31 N. Y. Suppl. 1.

Ohio.—Walsh *v.* Barton, 24 Ohio St. 28.

Pennsylvania.— Creigh *v.* Shatto, 9 Watts & S. 82.

Tennessee.— Topp *v.* White, 12 Heisk. 165.

Texas.— Maurice *v.* Upton, (Civ. App. 1897) 41 S. W. 504 (holding that plaintiff vendor had the burden of proof to show amount of encumbrances); Upton *v.* Maurice, (Civ. App. 1896) 34 S. W. 642.

But as to the rule in Michigan see Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753.

No title.— In the following cases the vendor was wholly unable to convey a title: White *v.* Morgan, 42 S. W. 403, 19 Ky. L. Rep. 844; Ten Eyck *v.* Manning, 52 N. J. Eq. 47, 27 Atl. 900 (title was in complainant's wife); Shelley *v.* Mikkelson, 5 N. D. 22, 63 N. W. 210 (vendor had conveyed to another); Shankland's Appeal, 47 Pa. St. 113 (plaintiff, a *cestui que trust*, forbidden to alienate his interest); Core *v.* Wigner, 32 W. Va. 277, 9 S. E. 36 (vendor had conveyed to another).

c. Legal Title in Fee. By the good title which the vendor is bound to convey is meant, in this country, the legal title in fee simple.[68]

d. Partial Failure. If the contract is an entire one, the vendor cannot succeed if his title fails as to part of the land, or a partial interest therein.[69]

e. Title Such as Contract Calls For. In all cases where the vendor is plaintiff, the title must be such as he contracted to convey.[70]

f. Defendant's Knowledge of Defects. If the contract stipulates for a good title, or for a warranty of the title, the vendee's knowledge of defects in the title

68. *Illinois.*— Thompson *v.* Shoemaker, 68 Ill. 256.

Kentucky.— Atcher *v.* Smith, 10 S. W. 636, 10 Ky. L. Rep. 757, where vendor was tenant by curtesy.

Missouri.—Thompson *v.* Craig, 64 Mo. 312, vendor had only life-estate.

New York.— Gilbert *r.* Peteler, 38 Barb. 488 [*affirmed* in 38 N. Y. 165, 97 Am. Dec. 785], estate upon condition.

North Carolina.— Motts *v.* Caldwell, 45 N. C. 289, determinable fee.

Ohio.— Bates *v.* Zinsmeister, 5 Ohio Dec. (Reprint) 297, 4 Am. L. Rec. 321, 26 Ohio St. 461, determinable fee.

Pennsylvania.— Murray *v.* Ellis, 112 Pa. St. 485, 3 Atl. 845, legal title outstanding in a naked trustee.

Rhode Island.— Van Zandt *v.* Garretson, 21 R. I. 418, 44 Atl. 221; Read *v.* Power, 12 R. I. 16.

South Carolina.— Lowry *v.* Muldrow, 8 Rich. Eq. 241, doubt whether plaintiff had more than a life-estate.

Tennessee.— Starnes *v.* Allison, 2 Head 221, life-estate.

Virginia.— Newberry *v.* French, 98 Va. 479, 36 S. E. 519, equitable title.

Washington.— Landers *v.* McIntyre, 8 Wash. 203, 35 Pac. 1095, equitable title under contract to purchase.

United States.— Adams *v.* Valentine, 33 Fed. 1, a base fee.

The fact that plaintiff has the right to call for the legal title is not enough; as where plaintiffs, beneficiaries under a will, are, under the doctrine of reconversion, entitled to take the land instead of the proceeds, but such election does not of itself give them the legal title (Van Zandt *v.* Garretson, 21 R. I. 418, 44 Atl. 221); or where plaintiffs are *cestuis que trustent* and the only remaining duty for the trustee to perform is to convey the legal title to them (Read *v.* Power, 12 R. I. 16). But see Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013, 13 Ky. L. Rep. 905; Foot *v.* Mason, 3 Brit. Col. 377.

Perpetual license.— In Horner *v.* Pleasants, 66 Md. 475, 7 Atl. 691, a perpetual license was held as good as a fee.

That the vendor, who did not have the legal title at the time of the contract, sufficiently complies with his contract if he is able to offer a conveyance from the legal owner to the vendee see McDonald *v.* Bach, 29 Misc. (N. Y.) 96, 60 N. Y. Suppl. 557 [*affirmed* in 51 N. Y. App. Div. 549, 64 N. Y. Suppl. 831]; Scott *v.* Thorp, 4 Edw. (N. Y.) 1]. *Compare* Bensel *v.* Gray, 80 N. Y. 517 [*affirming* 44 N. Y. Super. Ct. 372].

69. *Kentucky.*— Eversole *v.* Eversole, 85 S. W. 186, 27 Ky. L. Rep. 385, vendor had parted with mineral rights.

New York.— Nicklas *v.* Keller, 9 N. Y. App. Div. 216, 41 N. Y. Suppl. 172, strip one foot wide along the front of a city lot.

North Carolina.— Bird *v.* Bradburn, 127 N. C. 411, 37 S. E. 456; Mincey *v.* Foster, 125 N. C. 541, 34 S. E. 644.

Pennsylvania.—Freetly *v.* Barnhart, 51 Pa. St. 279, defect in one of several leases sold.

Tennessee.— Reed *v.* Noe, 9 Yerg. 283.

Texas.— Burwell *v.* Sollock, (Civ. App. 1895) 32 S. W. 844.

West Virginia.— Heavner *v.* Morgan, 30 W. Va. 335, 4 S. E. 406, 8 Am. St. Rep. 55.

Unless such failure is slight and immaterial, admitting of compensation, see *infra*, VII, B, 1.

70. *Arkansas.*— *Ex p.* Hodges, 24 Ark. 197.

Illinois.— Page *v.* Greeley, 75 Ill. 400, where vendee contracted for a good title of record, title depending on adverse possession, although good, is insufficient.

Massachusetts.— Noyes *v.* Johnson, 139 Mass. 436, 31 N. E. 767.

New York.— Winne *v.* Reynolds, 6 Paige 407.

Tennessee.— Nichol *v.* Nichol, 4 Baxt. 145.

See 44 Cent. Dig. tit. "Specific Performance," § 259.

Satisfactory title.— If the contract calls for a title "satisfactory" to the vendee or his attorney, and the vendee or his attorney, as the case may be, in good faith disapproves of the title, specific performance will not be decreed. Crigler *v.* Blair, 4 Ohio Cir. Ct. 324, 2 Ohio Cir. Dec. 573; Sargent *v.* Sibley, 6 Ohio Dec. (Reprint) 1219, 13 Am. L. Rec. 33, 11 Cinc. L. Bul. 145, 177; Boulton *v.* Bethune, 21 Grant Ch. (U. C.) 110, 478.

The vendee cannot claim a better title than contract calls for.— Beckwith *v.* Marryman, 2 Dana (Ky.) 371, where the vendee agreed to accept an infant's deed. In the following cases the vendee agreed to take such title as vendor had. Maxfield *r.* Bierbauer, 8 Minn. 413; Pillsbury *v.* Alexander, 40 Nebr. 242, 58 N. W. 859; Broyles *v.* Bee, 18 W. Va. 514.

But the express stipulation of the vendee that there should be no objections to the title does not oblige the court to grant specific performance. New York L. Ins. Co. *v.* Gilhooly, 61 N. J. Eq. 118, 47 Atl. 494; *In re* Scott, [1895] 2 Ch. 603, 64 L. J. Ch. 821, 73 L. T. Rep. N. S. 43, 12 Reports 474, 43 Wkly. Rep. 694.

at the time of entering into the contract does not deprive him of his right to insist upon a good title.[71]

4. Substantial Performance. The requirements of equity are satisfied by a substantial as distinguished from a literal performance. This principle, one of wide scope, is chiefly illustrated by the attitude of equity toward a default in respect of time.[72] While each case must depend on its own circumstances, plaintiff's failure to perform a useless act or his default in an incidental matter does not require the denial of relief.[73]

B. Performance by Plaintiff Before Suit — 1. Conditions Precedent — a. In General. A plaintiff seeking to enforce a contract depending on a condition precedent must show that the condition has been fully performed.[74] It is other-

71. *North Carolina.*—Mincey *v.* Foster, 125 N. C. 541, 34 S. E. 644.

Pennsylvania.— Speakman *v.* Forepaugh, 44 Pa. St. 363.

Tennessee.—Blakemore *v.* Kimmons, 8 Baxt. 470.

Virginia.— Jackson *v.* Ligon, 3 Leigh 161.

United States.— Farrington *v.* Tourtellot, 39 Fed. 738.

But where the contract is silent as to the character of the title, the legal implication that the vendor engages to furnish a good title may be overcome by proof of the vendee's knowledge of the defect or encumbrance. Leonard *v.* Woodruff, 23 Utah 494, 65 Pac. 199.

That the vendee might have discovered the defects by examination of the records does not excuse the vendor from furnishing a good title. Nichol *v.* Nichol, 4 Baxt. (Tenn.) 145.

Waiver of defects.—In a few cases the vendee has waived defects by taking possession or continuing in possession, committing acts of ownership without any agreement with the owner qualifying the acts, after the defect was known. Canton Co. *v.* Baltimore, etc., R. Co., 79 Md. 424, 29 Atl. 821; Guynet *v.* Mantel, 4 Duer (N. Y.) 86, the defects being such as may be removed or compensated.

Waiver by accepting a sum of money in pursuance of the contract after the defect was known see Stovall *v.* London, 5 Munf. (Va.) 299.

72. See *infra*, II, D.

73. *Alabama.*— Sims *v.* Knight, 71 Ala. 197, failure to give promised security for payments, when payments have been made as they fell due.

California.— Howard *v.* Throckmorton, 48 Cal. 482, legal services.

Iowa.— Fitzgerald *v.* Britt, 43 Iowa 498; Shaw *v.* Livermore, 2 Greene 338.

Kentucky.— Church *v.* Steele, 1 A. K. Marsh. 328; Peart *v.* Taylor, 2 Bibb 556, where the thing stipulated to be done by plaintiff has been rendered unnecessary by statute.

Maryland.— Coale *v.* Barney, 1 Gill & J. 324, failure to perform a merely nugatory act.

Mississippi.— McCorkle *v.* Brown, 9 Sm. & M. 167.

Nebraska.— Adams *v.* Thompson, 28 Nebr. 53, 44 N. W. 74.

New Jersey.— Hulmes *v.* Thorpe, 5 N. J. Eq. 415.

New York.— Klaweiter *v.* Hubner, 68 Hun 338, 22 N. Y. Suppl. 815.

Texas.— Campbell *v.* McFadin, 71 Tex. 28, 9 S. W. 138 (contract to locate lands; all steps performed except payment of fees for the patent); Bell *v.* Warren, 39 Tex. 106 (same).

Vermont.— Adams *v.* Patrick, 30 Vt. 516.

United States.—Secombe *v.* Steele, 20 How. 94, 15 L. ed. 833; Howe *v.* Howe, etc., Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536 (default in an incidental matter); German Sav. Inst. *v.* De la Vergne Refrigerating Mach. Co., 70 Fed. 146, 17 C. C. A. 34 (substantial performance by vendor and retention of benefits by vendee, so that original position cannot be restored); Holt *v.* Field, 25 Fed. 123.

Vendor's default admitting of compensation see *infra*, VII, B, 1.

74. *Alabama.*— Farmer *v.* Sellers, 137 Ala. 112, 33 So. 829 (election by plaintiff and another); Caller *v.* Vivian, 8 Ala. 903 (payment of judgment).

Arizona.— Costello *v.* Friedman, 8 Ariz. 215, 71 Pac. 935.

California.— Montgomery *v.* De Picot, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84, delivery of notes for deferred payments.

District of Columbia.— Where one party to a contract has been negligent in performing his part of a contract, he is estopped from coming into a court of equity when it is asked to specifically enforce the contract, and basing his defense upon contingencies that might have prevented the other party from keeping his agreement had he been called upon to do so. Griffith *v.* Stewart, 31 App. Cas. 29.

Illinois.— Robinson *v.* Yetter, 238 Ill. 320, 87 N. E. 363 [*affirming* 143 Ill. App. 172]; Cassel *v.* Cassel, 104 Ill. 361; Brink *v.* Steadman, 70 Ill. 241 (non-payment); Bates *v.* Wheeler, 2 Ill. 54; Launtz *v.* Vogt, 133 Ill. App. 255.

Iowa.— Venator *v.* Swenson, 100 Iowa 295, 69 N. W. 522 (contract conditioned on consent of vendor's wife); Matter of Smith, 56 Iowa 270, 9 N. W. 197. See also New York Brokerage Co. *v.* Wharton, (1909) 119 N. W. 969.

Kentucky.—Sprigg *v.* Albin, 6 J. J. Marsh. 158 (payment); Stevenson *v.* Dunlap, 7 T. B. Mon. 134; Campbell *v.* Harrison, 3 Litt. 292 (mutual and dependent covenants).

Louisiana.— Stafford *v.* Richard, 121 La.

wise with a condition subsequent,[75] or a covenant or stipulation which the plaintiff vendee is not obliged to perform until after conveyance.[76]

b. Personal Services. The plaintiff who has failed to perform personal

76, 46 So. 107; Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007.

Maine.— Glidden *v.* Korter, 90 Me. 269, 38 Atl. 159; McIntire *v.* Bowden, 61 Me. 153.

Massachusetts.— Putnam *v.* Grace, 161 Mass. 237, 37 N. E. 166, agreement to assign lease subject to obtaining consent of lessor. And see Washburn *v.* White, 197 Mass. 540, 84 N. E. 106, where the evidence, in an action by a lessee for specific performance of an option to purchase contained in the lease, was held to warrant findings that plaintiffs had failed to do what was necessary to preserve their rights as purchasers and were acting in bad faith.

Mississippi.— Tyler *v.* McCardle, 9 Sm. & M. 230.

Missouri.— Electric Secret Service Co. *v.* Gill-Alexander Electric Mfg. Co., 125 Mo. 140, 28 S. W. 486.

Montana.— *In re* Grogau, 38 Mont. 540, 100 Pac. 1044.

New York.— Lighton *v.* Syracuse, 188 N. Y. 499, 81 N. E. 464 [*reversing* 112 N. Y. App. Div. 589, 98 N. Y. Suppl. 792] (conditioned on passing of an act by the legislature); Pittsburgh Amusement Co. *v.* Ferguson, 115 N. Y. App. Div. 241, 101 N. Y. Suppl. 217 [*affirmed* in 193 N. Y. 635, 86 N. E. 1131] (agreement for long lease; default and delay of lessee); Leinhardt *v.* Solomon, 57 Misc. 238, 109 N. Y. Suppl. 144 (vendor's failure to place mortgage on the land as agreed); Beck *v.* Pinkney, 10 N. Y. Suppl. 932 (determination of pending suit in defendant's favor); Wales *v.* Stout, 3 N. Y. St. 299.

North Dakota.— Easton *v.* Lockhart, 10 N. D. 181, 86 N. W. 697, plaintiff, vendee, to obtain a loan of money.

Ohio.— Parry *v.* Tobacco Ins. Co., 1 Cinc. Super. Ct. 251, payment of rent and taxes a condition precedent to exercise of option. See George Wiedemann Brewing Co. *v.* Maxwell, 78 Ohio St. 54, 84 N. E. 595.

Oregon.— David *v.* Anderson, 34 Oreg. 439, 56 Pac. 523 (delivery of goods by vendee); Manaudas *v.* Heilner, 29 Oreg. 222, 45 Pac. 758 (payment). And see Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803.

Pennsylvania.— Chandler *v.* Chandler, 220 Pa. St. 311, 69 Atl. 806; Parker's Estate, 6 Pa. Dist. 139, 19 Pa. Co. Ct. 347, compliance with provisions of lease a condition to exercise of option to buy.

Tennessee.— McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729.

Texas.— Galbraith *v.* Reeves, 82 Tex. 357, 18 S. W. 696; Haldeman *v.* Chambers, 19 Tex. 1.

Virginia.— Harvie *v.* Banks, 1 Rand. 408; Jones *v.* Roberts, 3 Hem. & M. 436, 6 Call 187, 3 Am. Dec. 576.

Washington.— Voight *v.* Fidelity Inv. Co., 49 Wash. 612, 96 Pac. 162 (failure to make payments of instalments, taxes, etc.); Cook *v.* Dane, 43 Wash. 588, 86 Pac. 947.

Wyoming.— Frank *v.* Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 110 Am. St. Rep. 963, 67 L. R. A. 571.

United States.— Rogers Locomotive, etc., Works *v.* Helm, 154 U. S. 610, 14 S. Ct. 1177, 22 L. ed. 562; Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509; Bernier *v.* Griscom-Spencer Co., 161 Fed. 438.

England.— Lamare *v.* Dixon, L. R. 6 H. L. 414, 43 L. J. Ch. 203, 22 Wkly. Rep. 49 (agreement for lease; non-performance by lessor); Williams *v.* Brisco, 22 Ch. D. 441, 48 L. T. Rep. N. S. 198, 31 Wkly. Rep. 907 (agreement to grant a lease to nominee of plaintiff; appointment of nominee a condition); Bastin *v.* Bidwell, 18 Ch. D. 238, 44 L. T. Rep. N. S. 742 (to renew lease on performance of covenants to repair, etc.); Finch *v.* Underwood, 2 Ch. D. 310, 45 L. J. Ch. 522, 34 L. T. Rep. N. S. 779, 24 Wkly. Rep. 657 (same); Brace *v.* Wehnert, 25 Beav. 348, 4 Jur. N. S. 549, 27 L. J. Ch. 572, 6 Wkly. Rep. 425, 53 Eng. Reprint 670 (agreement for lease; no plan approved); Scott *v.* Liverpool, 3 De G. & J. 334, 5 Jur. N. S. 104, 28 L. J. Ch. 230, 7 Wkly. Rep. 153, 60 Eng. Ch. 261, 44 Eng. Reprint 1297 [*affirming* 1 Giffard 216, 65 Eng. Reprint 891] (payment of damages for breach of covenant as a third person shall award); Cheeke *v.* Lisle, 2 Freem. 302, 22 Eng. Reprint 1224, Rep. Cas. t. Finch 98, 23 Eng. Reprint 53; Feversham *v.* Watson, 2 Freem. 35, 22 Eng. Reprint 1042; Job *v.* Banister, 2 Kay & J. 374, 4 Wkly. Rep. 177, 69 Eng. Reprint 827 (to renew lease on condition that lessee shall have kept covenants); Parker *v.* Frith, 1 Sim. & St. 199, 1 Eng. Ch. 199, 57 Eng. Reprint 80 (agreement to take lease; default of lessor by delay in making title and giving possession).

Canada.— McDonald *v.* Rose, 17 Grant Ch. (U. C.) 657.

See 44 Cent. Dig. tit. "Specific Performance," § 233 *et seq.*

Furnishing abstract of title see Lillienthal *v.* Bierkamp, 133 Iowa 42, 110 N. W. 152; Pennsylvania Min. Co. *v.* Thomas, 204 Pa. St. 325, 54 Atl. 101.

The burden of proof is usually on plaintiff to show a performance of the condition. Hill *v.* Cheatham, 129 Mo. 71, 31 S. W. 261; Cook *v.* Roberson, (Tex. Civ. App. 1898) 46 S. W. 866. But see Crawford *v.* Paine, 19 Iowa 172; Wheeler *v.* Wheeler, 2 N. Y. Suppl. 496.

75. Des Moines University *v.* Polk County Homestead, etc., Co., 87 Iowa 36, 53 N. W. 1080; Minneapolis, etc., R. Co. *v.* Cox, 76 Iowa 306, 41 N. W. 24, 14 Am. St. Rep. 216.

76. Mitchell *v.* Long, 5 Litt. (Ky.) 71; Lloyd *v.* O'Rear, 59 S. W. 483, 22 Ky. L. Rep. 1000; Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19; Tidewater R. Co. *v.* Hurd, 109 Va. 204, 63 S. E. 421.

services which are a condition precedent cannot enforce the contract.[77] But when performance of such services is accepted by the vendor, his heirs cannot object that it was insufficient.[78]

c. Improvements. Plaintiff's failure to erect buildings or to make improvements on the property to be conveyed, or on other property, when such act is a condition precedent, defeats the relief.[79]

d. Claims of Third Persons. So, where plaintiff is required, as a condition precedent, to pay or extinguish claims of third persons, he must show performance.[80]

e. Performance Waived, Excused, or Impossible by Act of Other Party.[81] But plaintiff's failure to perform fully is not a defense, where the performance is made impossible by the act of the other party, for defendant cannot rely upon a default which he himself has caused.[82] Failure to perform may be waived or

77. *Alaska.*— McMahon *v.* Meehan, 2 Alaska 278.

Arkansas.— Armstrong *v.* Cashion, (1891) 16 S. W. 666, legal services.

California.— Moore *v.* Tuohy, 142 Cal. 342, 75 Pac. 896; Lattin *v.* Hazard, 91 Cal. 87, 27 Pac. 515 (operating railroad); Cooper *v.* Pena, 21 Cal. 403.

Georgia.— Brooks *v.* Miller, 118 Ga. 676, 45 S. E. 485, securing a partition of the land.

Illinois.—Hamilton *v.* Harvey, 121 Ill. 469, 13 N. E. 210, 2 Am. St. Rep. 118 (securing location of a factory); Weingaertner *v.* Pabst, 115 Ill. 412, 5 N. E. 385 (contract to support defendants during their lives); Hale *v.* Bryant, 109 Ill. 34 (to effect settlement with creditors); Stow *v.* Robinson, 24 Ill. 532.

Indiana.— Brewer *v.* Thorp, 3 Ind. 262.

Kentucky.— Breckenridge *v.* Clinkinbeard, 2 Litt. 127, 13 Am. Dec. 261, legal services.

Missouri.— Southworth *v.* Hopkins, 11 Mo. 331 (contract to support defendant); Ackerson *v.* Fly, 99 Mo. App. 116, 72 S. W. 706 (services prevented by death of party to whom they were to be rendered).

New York.—Burling *v.* King, 66 Barb. 633; Martin *v.* Platt, 5 N. Y. St. 284, legal services.

North Carolina.— Cabe *v.* Dixon, 57 N. C. 436.

Pennsylvania.— Naftzinger *v.* Roth, 93 Pa. St. 443 (support contract); Pierce *v.* McCracken, 3 Pa. Cas. 559, 6 Atl. 723 (support contracts); Stein *v.* North, 3 Yeates 324 (promisor impliedly reserved to himself sole right of judging of promisee's compliance).

Tennessee.— Hall *v.* Ross, 3 Hayw. 200, contract to locate land warrants.

Texas.—Cook *v.* Roberson, (Civ. App. 1898) 46 S. W. 866.

Virginia.— Cox *v.* Cox, 26 Gratt. 305, support; prevented by vendee's death.

Washington.— Page *v.* Carnine, 29 Wash. 387, 69 Pac. 1093, agreement to lease, on condition that plaintiff draw up the lease and pay the rental in advance.

Wisconsin.— Martin *v.* Veeder, 20 Wis. 466, legal services.

United States.— Colson *v.* Thompson, 2 Wheat. 336, 4 L. ed. 253 (making a survey); Denniston *v.* Coquillard, 7 Fed. Cas. No. 3,801, 5 McLean 253.

78. Mills *v.* McCaustland, 105 Iowa 187, 74 N. W. 930.

79. *Colorado.*— Boyes *v.* Green Mountain Falls Town, etc., Co., 3 Colo. App. 295, 33 Pac. 77.

Illinois.— Livingston County *v.* Henneberry, 41 Ill. 179.

Kentucky.— Enterprise Imp. Co. *v.* Wilson, 11 S. W. 437, 11 Ky. L. Rep. 4.

New York.— Flanders *v.* Rosoff, 111 N. Y. App. Div. 1, 97 N. Y. Suppl. 514 [*affirmed* in 188 N. Y. 616, 81 N. E. 1164], substantial structural defects in the building.

Pennsylvania.— Datz *v.* Phillips, 137 Pa. St. 462.

West Virginia.— Frame *v.* Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323.

United States.— Davis *v.* Read, 37 Fed. 418, building not done in a substantial and workmanlike manner.

Canada.—Allan *v.* Bown, 4 Grant Ch. (U. C.) 439.

See 44 Cent. Dig. tit. "Specific Performance," § 252.

80. *Alabama.*— Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343, mortgage.

California.— Porter *v.* Atherton, 32 Cal. 416.

Illinois.— Clark *v.* Jackson, 222 Ill. 13, 78 N. E. 6, payment of interest on mortgage.

Missouri.— Clay *v.* Mayer, 183 Mo. 150, 81 S. W. 1066, mortgage.

United States.— Potter *v.* Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. ed. 721; Wilson *v.* Union Sav. Assoc., 42 Fed. 421.

81. **Tender or offer before suit excused** see *infra*, VI, C, 1, e; VI, C, 2, g.

82. *Illinois.*— Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Clancy *v.* Flusky, 187 Ill. 605, 58 N. E. 594, 52 L. R. A. 277, to support.

Iowa.—Wisconsin, etc., R. Co. *v.* Braham, 71 Iowa 484, 32 N. W. 392, to locate a railroad.

Kansas.— Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715, legal services.

Pennsylvania.— Patterson *v.* Wilson, 19 Pa. St. 380, to pay in work.

Rhode Island.— Bristol *v.* Bristol, etc., Water Works, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740.

Contra.— Moore *v.* Tuohy, 142 Cal. 342, 75 Pac. 896; O'Brien *v.* Perry, 130 Cal. 526, 62 Pac. 927; King *v.* Gildersleeve, 79 Cal. 504,

excused by mutual consent,[83] or by repudiation of the contract by the other party;[84] and failure to make payment before suit by the vendee's mistaken construction of the contract.[85] A condition precedent will not be insisted upon when it is too vague,[86] and is waived where defendant himself has broken it.[87]

2. Breach of Essential Covenant. The plaintiff's wilful violation of an essential covenant, which was a material inducement to defendant to enter into the contract, is a defense to specific enforcement of the contract,[88] unless the equities of the case require its enforcement.[89] The rule is applied to a contract to lease, or to renew a lease, where plaintiff has broken an essential covenant,[90]

21 Pac. 961; Cooper *v.* Pena, 21 Cal. 403, in all of which cases the vendee was prevented from performing personal services by the vendor's act in repudiating the contract.

83. Portland, etc., R. Co. *v.* Grand Trunk R. Co., 63 Me. 90; Price *v.* Morgan, (N. J. Ch. 1887) 10 Atl. 663.

84. George Wiedemann Brewing Co. *v.* Maxwell, 78 Ohio St. 54, 84 N. E. 595.

85. Trimble *v.* Elliott, Wright (Ohio) 310.

86. Morris *v.* Hoyt, 11 Mich. 9.

87. Work *v.* Welsh, 160 Ill. 468 43 N. E. 719.

88. *Kentucky.*— Grundy *v.* Edwards, 7 J. J. Marsh. 368, 23 Am. Dec. 409, covenant not to carry on a trade.

New Jersey.— Young Lock Nut Co. *v.* Brownley Mfg. Co., (Ch. 1896) 34 Atl. 947; Thorp *v.* Pettit, 16 N. J. Eq. 488.

Pennsylvania.— Datz *v.* Phillips, 137 Pa. St. 203, 20 Atl. 426, 21 Am. St. Rep. 864.

Vermont.— Bodwell *v.* Bodwell, 66 Vt. 101, 28 Atl. 870.

Virginia.— Grubb *v.* Moore, 108 Va. 72, 60 S. E. 757, contract for sale of insurance agency.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955; Shubert *v.* Woodward, 167 Fed. 47, 92 C. C. A. 509; Ohio Steel Barb Fence Co. *v.* Washburn, etc., Mfg. Co., 26 Fed. 702. But see Southern Pine Fibre Co. *v.* North Augusta Land Co., 53 Fed. 318.

England.— Lamare *v.* Dixon, L. R. 6 H. L. 414, 43 L. J. Ch. 203, 22 Wkly. Rep. 49; Tildesley *v.* Clarkson, 30 Beav. 419, 8 Jur. N. S. 163, 31 L. J. Ch. 362, 6 L. T. Rep. N. S. 98, 10 Wkly. Rep. 328, 54 Eng. Reprint 951.

Separation agreement.—Where an agreement of separation provided that the husband should pay a certain sum monthly to the wife, and should receive the rentals from a house standing in the wife's name, and the wife persistently purchased goods at stores, and had the bills charged to the husband, and, after he had deducted such bills from his monthly payments, she notified the tenant of the house to pay the rent to her, it was held that she was not entitled to a decree against the husband for specific performance of his agreement. Chandler *v.* Chandler, 220 Pa. St. 311, 69 Atl. 866.

Performance of representations.— Failure of plaintiff to make good his representations as to future acts to be performed by him, which were a material inducement to defendant to enter into the contract, constitutes a defense to specific performance, although the representations were no part of the contract, and although there is no doubt as to plaintiff's legal right under the contract. Beaumont *v.* Dukes, Jac. 422, 23 Rev. Rep. 110, 4 Eng. Ch. 422, 37 Eng. Reprint 910; Myers *v.* Watson, 1 Sim. N. S. 523, 40 Eng. Ch. 523, 61 Eng. Reprint 202; Coventry *v.* McLean, 22 Ont. 1.

89. See Van Dyke *v.* Cole, 81 Vt. 379, 70 Atl. 593, 1103, where it was held that, although the vendee has not justified his cutting of timber on the land after notice that the assignees of the vendor intended to insist on their legal rights under the contract in case of future breaches, the contract giving the vendor a right to declare it forfeited in case of cutting of timber except for use on the premises, this will not deprive him of the right to specific performance; he having the equitable title and the rightful possession of the land, and, although the assignees of the vendor have the legal title, the extent of their interest in equity being as security for the amount due, and the right of forfeiture being only in aid of the security, and the value of the amount cut being only seventy dollars, and, while the amount due on the contract is seven hundred dollars, the place, with the improvements made by the vendee, being worth from two thousand five hundred dollars to three thousand dollars, and the vendee if denied specific performance, being without adequate remedy.

90. Bamberger *v.* Johnson, 86 Md. 38, 37 Atl. 900; Gannett *v.* Albree, 103 Mass. 372 (where plaintiff had, by taking boarders, broken a covenant to use the building strictly as a private dwelling); Lamare *v.* Dixon, L. R. 6 H. L. 414, 43 L. J. Ch. 203, 22 Wkly. Rep. 49 (breach by lessor); Lewis *v.* Bond, 18 Beav. 85, 52 Eng. Reprint 34 (breach by lessee); Nesbitt *v.* Meyer, 1 Swanst. 223, 36 Eng. Reprint 366, 1 Wils. Ch. 97, 37 Eng. Reprint 44, 5 Wkly. Rep. 340 (waste); Gourlay *v.* Somerset, 1 Ves. & B. 68, 13 Rev. Rep. 234, 35 Eng. Reprint 27; Hill *v.* Barclay, 18 Ves. Jr. 56, 11 Rev. Rep. 147, 34 Eng. Reprint 238 (waste). Where there is an agreement for a lease, of such a nature that, in the usual course, a certain covenant would be introduced in it, and the intended lessee has done that which would be a breach of such covenant, he cannot compel the specific performance of the agreement. Tunno *v.* Lewis, 1 L. J. Ch. 177. The breach by the lessee must be wilful and deliberate, and such as would work a forfeiture and render the

and to a contract to purchase contained in a lease.[91] But a breach of an independent covenant, as distinguished from a condition, which is not a material inducement to the contract, is not a bar to specific performance.[92]

C. Tender or Offer Before Suit — 1. Suit by Vendor — a. Tender of Deed Held Unnecessary. By the rule in some jurisdictions, a tender of a deed by the vendor is unnecessary as a prerequisite to a suit.[93]

b. Tender Held Necessary. By the rule in other jurisdictions a tender of a deed is a necessary prerequisite to the vendor's suit, unless some valid excuse is shown for failure to make a tender.[94]

c. Sufficiency of Tender. A literal and precise tender is not generally required,[95] but it should be an effort, in good faith, to comply with the requirements of the contract.[96] The tender is properly made to the person directed by the vendee to receive it; [97] in case of assignment of the contract, to the original

lease void had it been granted. Rankin *v.* Lay, 2 De G. F. & J. 65, 6 Jur. N. S. 685, 29 L. J. Ch. 734, 8 Wkly. Rep. 591, 63 Eng. Ch. 51, 45 Eng. Reprint 546. See also Pain *v.* Coombs, 3 Jur. N. S. 307, 3 Smale & G. 449, 65 Eng. Reprint 732. Specific performance of articles to grant a lease to plaintiff was decreed, although he had contracted to underlet contrary to those articles. Williams *v.* Cheney, 3 Ves. Jr. 59, 30 Eng. Reprint 893.

Acquiescence by tenant.—Where the subject of a contract was an agreement to take the lease of a house, and the proposed tenant went into possession at once, and occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, and paid rent, but always paid it under protest, it was held that these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use and occupation, and in no other character. Lamare *v.* Dixon, L. R. 6 H. L. 414, 43 L. J. Ch. 203, 22 Wkly. Rep. 49.

Decreeing performance and antedating lease.— In England it has been held that if there has been a breach of an agreement for a lease, or what would have amounted to a breach of the covenants which ought to have been introduced into the lease had it been granted, which would have worked a forfeiture, and that is clearly made out, a specific performance will not be decreed; but if there is a conflict of evidence as to whether any breach has been committed, the proper decree, on a suit for specific performance, is to direct the lease to be dated at a time antecedently to the alleged breach, and to require from plaintiff an undertaking to agree, in any action, that the lease was executed on that day. Rankin *v.* Lay, 2 De G. F. & J. 65, 6 Jur. N. S. 685, 29 L. J. Ch. 734, 8 Wkly. Rep. 591. See also Blackett *v.* Bates, 2 Hem. & M. 270, 11 Jur. N. S. 500, 34 L. J. Ch. 515, 12 L. T. Rep. N. S. 44, 13 Wkly. Rep. 736, 71 Eng. Reprint 467. And so in the United States. Noonan *v.* Orton, 21 Wis. 283.

91. Forbes *v.* Connolly, 5 Grant Ch. (U. C.) 657.

92. Grigg *v.* Landis, 21 N. J. Eq. 494 (covenant not to assign); Hunt *v.* Spencer, 13 Grant Ch. (U. C.) 225.

93. *Illinois.*—Boston *v.* Nichols, 47 Ill. 353.

Iowa.— Grimmell *v.* Warner, 21 Iowa 11; Winton *v.* Sherman, 20 Iowa 295; Rutherford *v.* Haven, 11 Iowa 587.

New Jersey.— Bidwell *v.* Garrison, (Ch. 1897) 36 Atl. 941.

New York.— Thomson *v.* Smith, 63 N. Y. 301; Freeson *v.* Bissell, 63 N. Y. 168; Stevenson *v.* Maxwell, 2 N. Y. 408; Beebe *v.* Dowd, 22 Barb. 255.

Tennessee.— Mullens *v.* Big Creek Gap Coal, etc., Co., (Ch. App. 1895) 35 S. W. 439.

Texas.— Bufford *v.* Ashcroft, 72 Tex. 104, 10 S. W. 346.

94. *Indiana.*— Mather *v.* Scoles, 35 Ind. 1; Cook *v.* Bean, 17 Ind. 504, not excused by the rule that title may be perfected before decree.

Kansas.— Soper *v.* Gabe, 55 Kan. 646, 41 Pac. 969.

Maine.— Counce *v.* Studley, 81 Me. 431, 18 Atl. 288; Howe *v.* Huntington, 15 Me. 350.

Mississippi.— Kimbrough *v.* Curtis, 50 Miss. 117; Mhoon *v.* Wilkerson, 47 Miss. 633; Klyce *v.* Broyles, 37 Miss. 524; Eckford *v.* Halbert, 30 Miss. 273.

Missouri.— Lanyon *v.* Chesney, 186 Mo. 540, 85 S. W. 568, defendants entitled to have the court pass on the issue as to tender.

New Jersey.— Miller *v.* Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554.

United States.— Martindale *v.* Waas, 8 Fed. 854, 3 McCrary 108.

See 44 Cent. Dig. tit. "Specific Performance," § 278 *et seq.*

95. Kentucky Distilleries, etc., Co. *v.* Blanton, 149 Fed. 31, 80 C. C. A. 343 [*affirming* 120 Fed. 318].

96. McDonald *v.* Minnick, 147 Ill. 651, 35 N. E. 367 (must be warranty deed); Pittsburg, etc., R. Co. *v.* Fischer Foundry, etc., Co., 208 Pa. St. 73, 57 Atl. 191 (unwarranted reservation); Alexander *v.* Wunderlich, 118 Pa. St. 610, 12 Atl. 580 (encumbrance larger than contract permitted); Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318 [*affirmed* in 149 Fed. 31, 80 C. C. A. 343] (defective tender, made in good faith, sufficient).

97. Grant *v.* Howard, 2 MacArthur (D. C.) 235.

vendee;[98] in case of his death, to his executor, since he represents the testator's means of paying the purchase-money.[99]

d. Objections to Tender. The vendee's objections to the tender should be stated at the time; a specific objection to the tender, it seems, cannot be set up in defense to the vendor's bill when the vendee refused the tender generally,[1] or where he objected to it on some other ground.[2]

e. Tender Excused.[3] Tender need not be made where the vendee has announced that he will not comply with his contract, so that tender would be a useless ceremony.[4] And tender is excused where the vendee evades it,[5] or where the deeds are to be drawn by the vendee, which he refuses to do on demand.[6] Parties who are permitted to sue in the vendor's right, but who are not clothed with the legal title, are not obliged to tender a deed before suit; as the vendor's administrator[7] or the assignee of a purchase-money note.[8]

2. Suit by Vendee — a. Tender or Offer Held Unnecessary. It is distinctly held in some cases that a tender or offer by the vendee before suit is unnecessary, his failure to make such tender or offer only affecting the question of costs;[9] since the right of action for specific performance grows out of the contract itself, and not out of a breach of the contract.[10]

b. Offer Before Suit Held Necessary. Other cases state that an offer, before

98. Corbus *v.* Teed, 69 Ill. 205.

99. Brinkerhoff *v.* Olp, 35 Barb. (N. Y.) 27.

1. Corbus *v.* Teed, 69 Ill. 205; McWhorter *v.* McMahan, 10 Paige (N. Y.) 386; Tiernan *v.* Roland, 15 Pa. St. 429.

2. Baker *v.* Hall, 158 Mass. 361, 33 N. E. 612. And see, generally, Tender.

3. See also *infra*, VI, C, 2, g.

4. *Illinois.*— Bucklen *v.* Hasterlik, 155 Ill. 423, 40 N. E. 561 [*affirming* 51 Ill. App. 132]; Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871.

Massachusetts.— Staples *v.* Mullen, 196 Mass. 132, 81 N. E. 877.

Montana.— Long *v.* Needham, 37 Mont. 408, 96 Pac. 731.

Nebraska.— Solt *v.* Anderson, 62 Nebr. 153, 86 N. W. 1076.

New Jersey.— Brown *v.* Norcross, 59 N. J. Eq. 427, 45 Atl. 605; Oakey *v.* Cook, 41 N. J. Eq. 350, 7 Atl. 495; Maxwell *v.* Pittenger, 3 N. J. Eq. 156.

New York.— Crary *v.* Smith, 2 N. Y. 60; Pittsburgh Amusement Co. *v.* Ferguson, 100 N. Y. App. Div. 453, 91 N. Y. Suppl. 666.

Ohio.— Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.

South Dakota.— Brace *v.* Doble, 3 S. D. 110, 52 N. W. 586.

United States.— McCullough *v.* Sutherland, 153 Fed. 418; Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318 [*affirmed* in 149 Fed. 31, 80 C. C. A. 343].

See 44 Cent. Dig. tit. "Specific Performance," § 283. And see, generally, Tender.

But a denial of the vendor's title made in the answer does not dispense with proof of tender. Lanyon *v.* Chesney, 186 Mo. 540, 85 S. W. 568.

The evidence of repudiation by vendees was insufficient in Soper *v.* Gabe, 55 Kan. 646, 41 Pac. 969.

5. Buess *v.* Koch, 10 Hun (N. Y.) 299, 53 How. Pr. 92. And see Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641.

6. Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318 [*affirmed* in 149 Fed. 51, 80 C. C. A. 343].

7. Faulkner *v.* Williman, 16 S. W. 352, 13 Ky. L. Rep. 106; Wheeler *v.* Crosby, 20 Hun (N. Y.) 140.

8. Boyce *v.* Francis, 56 Miss. 573; Kimbrough *v.* Curtis, 50 Miss. 117.

9. *Alabama.*— Taylor *v.* Newton, 152 Ala. 459, 44 So. 583; Ashurst *v.* Peck, 101 Ala. 499, 14 So. 541.

Iowa.— Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477, *dictum*.

Louisiana.— See Stafford *v.* Richard, 121 La. 76, 46 So. 107.

Maryland.— Maughlin *v.* Perry, 35 Md. 352 (option to buy exercised by filing bill); Smoot *v.* Rea, 19 Md. 398.

Michigan.— Morris *v.* Hoyt, 11 Mich. 9.

Minnesota.— Minneapolis, etc., R. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63; St. Paul Land Co. *v.* Dayton, 39 Minn. 315, 40 N. W. 66.

New York.— Andrews *v.* Davis, 5 N. Y. St. 859.

United States.— Hosmer *v.* Wyoming R., etc., Co., 129 Fed. 883, 65 C. C. A. 81.

10. Bruce *v.* Tilson, 25 N. Y. 194.

Demand for deed unnecessary see Gray *v.* Dougherty, 25 Cal. 266; St. Paul Div. No. 1 S. T. *v.* Brown, 11 Minn. 356; Bruce *v.* Tilson, 25 N. Y. 194. But see Goodale *v.* West, 5 Cal. 339.

Exchange of land for interest in fence.— Plaintiff agreed to transfer to defendant, an adjoining landowner, one-half interest in a fence on the line between them. Defendant agreed in consideration for such transfer to transfer to plaintiff an acre of land. It was held, in the absence of an agreement to transfer an interest in the fence by deed, that plaintiff could bring suit for the specific performance of defendant's agreement to

suit, to pay the unpaid purchase-money is essential to the maintaining of the suit.[11]

c. Tender Before Suit Held Necessary. In many cases it is stated broadly that the vendee must "tender" the unpaid purchase-money as a prerequisite to the suit.[12]

transfer the acre of land without tendering to defendant a deed of the interest in the fence. Ready *v.* Schmith, 52 Oreg. 196, 95 Pac. 817.

11. *Arkansas.*— Robbins *v.* Kimball, 55 Ark. 414, 18 S. W. 457, 29 Am. St. Rep. 45.

Florida.— Shouse *v.* Doane, 39 Fla. 95, 21 So. 807.

Indiana.— Vawter *v.* Bacon, 89 Ind. 565; West *v.* Chase, 3 Ind. 301; Slaughter *v.* Harris, 1 Ind. 238.

Kentucky.— Bearden *v.* Wood, 1 A. K. Marsh. 450.

North Dakota.— Kulberg *v.* Georgia, 10 N. D. 461, 88 N. W. 87.

See 44 Cent. Dig. tit. "Specific Performance," § 286.

Where time is essential, an actual tender of the price and demand for a deed within the time is necessary. Machold *v.* Farnan, 14 Ida. 258, 94 Pac. 170.

Demand for deed held necessary in Vennum *v.* Babcock, 13 Iowa 194; Wright *v.* LeClaire, 4 Greene (Iowa) 420.

In Indiana it is a prerequisite, when a time is not fixed for making the deed; and it must be averred in the complaint, or an excuse given for not making it (Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Reed *v.* Hodges, 80 Ind. 304; Mather *v.* Scoles, 35 Ind. 1); but not necessary when time is fixed (Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699), or where it is clear that it would be unavailing (see *infra*, VI, C, 2, g; Denlar *v.* Hile, 123 Ind. 68, 24 N. E. 170; Harshman *v.* Mitchell, 117 Ind. 312, 20 N. E. 228; Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287 (need not be made on vendor's subsequent grantee); Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042); or where the vendor is absent from the state (see *infra*, VI, C, 2, g, (III); and West *v.* Chase, 3 Ind. 301).

12. Whether the word "tender" was used in the sense of a mere offer, or how far it implied some further requisites of a valid legal tender, can usually be determined, for a given jurisdiction, only by a careful comparison of cases; and even then it is often left in great doubt. See the following cases:

Alabama.— Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473.

California.— Levy *v.* Lyon, 153 Cal. 213, 94 Pac. 881; Dorris *v.* Sullivan, 90 Cal. 279, 27 Pac. 216; Goodale *v.* West, 5 Cal. 339; Hoen *v.* Simmons, 1 Cal. 119, 52 Am. Dec. 291; Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163.

District of Columbia.— Jenkins *v.* Locke, 3 App. Cas. 485; Lipscomb *v.* Watrous, 3 App. Cas. 1.

Georgia.— Askew *v.* Carr, 81 Ga. 685, 8 S. E. 74.

Illinois.— Scott *v.* Shepherd, 8 Ill. 483 (although only a small sum was due); Doyle *v.* Teas, 5 Ill. 202.

Indiana.— Hills *v.* Hills, 94 Ind. 436; Hays *v.* Carr, 83 Ind. 275.

Iowa.— Vennum *v.* Babcock, 13 Iowa 194; Olive *v.* Dougherty, 3 Greene 371; Garretson *v.* Vanloon, 3 Greene 128, 54 Am. Dec. 492; Huff *v.* Jennings, Morr. 454.

Kansas.— Sanford *v.* Bartholomew, 33 Kan. 38, 5 Pac. 429, tender of amount slightly less than sum due ineffectual.

Kentucky.— Greenup *v.* Strong, 1 Bibb. 590.

Maine.— Furbish *v.* White, 25 Me. 219.

Mississippi.— Mhoon *v.* Wilkerson, 47 Miss. 633; Stewart *v.* Raymond R. Co., 7 Sm. & M. 568.

New Jersey.— Ware *v.* Lippincott, (Ch. 1887) 10 Atl. 404.

Pennsylvania.— Dwyer *v.* Wright, 162 Pa. St. 405, 29 Atl. 754; Chadwick *v.* Felt, 35 Pa. St. 305; Gregg *v.* Patterson, 9 Watts & S. 197; Gore *v.* Kinney, 10 Watts 139; Hughes *v.* Antill, 23 Pa. Super. Ct. 290.

Rhode Island.— Doyle *v.* Harris, 11 R. I. 539..

See 44 Cent. Dig. tit. "Specific Performance," § 286 *et seq.*

Tender of notes for deferred payments see Montgomery *v.* De Picot, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84.

Option.— The holder of an option for purchase of land cannot enforce specific performance by the vendor in the absence of a showing of the tender of the purchase-price. Levy *v.* Lyon, 153 Cal. 213, 94 Pac. 881. See also Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803, sale of stock. While there is a conflict of authority as to whether an actual tender, such as is required in actions at law, is a necessary prerequisite to specific performance in case of an option to purchase realty, based on an actual consideration, of whether a tender in the bill for relief is sufficient, jurisdiction to order specific performance of a mere naked option will not be entertained, even though it is in writing, where the only consideration shown is by the usual recital of one dollar consideration, and where further action of the vendee is required before the option is developed into a contract to buy, and in such case full and proper tender of the purchase-price or other consideration, in accordance with the terms of the instrument, is essential to maintenance of such a suit. Rude *v.* Levy, 43 Colo. 482, 96 Pac. 560, 127 Am. St. Rep. 123.

Other contracts than sale of land see National Oleo Meter Co. *v.* Jackson, 3 N. Y. Suppl. 826 (to assign patent); Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803 (sale of stock); Westcott *v.* Mulvane, 58 Fed. 305, 7 C. C. A. 242 (to sell stock); New York

d. Conditional Tender Held Sufficient. In many cases it is distinctly held that in case of mutual and dependent stipulations a strict tender on the vendee's part is not necessary. An offer to pay by the vendee, coupled with an ability to pay, on condition that the vendor concurrently performs his part by executing a deed, is a good and sufficient tender.[13]

e. Strict Tender Excused. It is generally held that where the vendee does not know the exact amount payable or an accounting is necessary to determine the amount, strict tender is excused; an offer to pay what is due is sufficient; or a tender of a less sum than is due, if the vendee supposes it to be the correct sum.[14]

f. Objection to Sufficiency of Tender. If the vendor objects to the tender at the time it is made on a specific ground, he waives possible objections to it on other grounds.[15] If no objections are made to the sufficiency of the tender or demand at the time,[16] or if defendant then repudiates the contract,[17] he cannot set up defects in the tender or demand as a defense to the suit.

Paper-Bag Mach. Co. *v.* Union Paper-Bag Mach. Co., 32 Fed. 783 (to assign patent).

13. *Florida.*— Shouse *v.* Doane, 39 Fla. 95, 21 So. 807.

Illinois.— Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145.

Indiana.— Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Lynch *v.* Jennings, 43 Ind. 276.

Iowa.— Lawson *v.* McKenzie, 44 Iowa 663.

New Jersey.— Worch *v.* Woodruff, 61 N. J. Eq. 78, 47 Atl. 725, sufficient if he was ready and willing to pay the contract price at the time fixed.

New York.— Murray *v.* Harbor, etc., Assoc., 91 N. Y. App. Div. 397, 86 N. Y. Suppl. 799 [*affirmed* in 184 N. Y. 596, 77 N. E. 1191]; Bennet *v.* Bennet, 10 N. Y. App. Div. 550, 42 N. Y. Suppl. 435; Bellinger *v.* Kitts, 6 Barb. 273.

Ohio.— Moore *v.* Moulton, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466.

See 44 Cent. Dig. tit. "Specific Performance," § 296.

Contra.— Terry *v.* Keim, 122 Ga. 43, 49 S. E. 736, conditional tender, or offer to pay on delivery of deed, insufficient.

"**In such case,** it is not necessary on the part of the purchaser to make a strict tender, and actually to deliver over the money unconditionally, without his deed; it is sufficient that upon reasonable notice to the owner he is ready and willing to perform, and when the performance is the payment of money, that he has the money and is able and prepared to pay, and demands the deed, and the other absolutely refuses to receive the money and execute the deed." Irvin *v.* Gregory, 13 Gray (Mass.) 215, 218, per Shaw, C. J. See also definition in Shouse *v.* Doane, 39 Fla. 95, 21 So. 807.

But the offer or tender, to be effective, must not impose a condition not warranted by the contract. Slater *v.* Howie, 49 Kan. 337, 30 Pac. 413; Cornell *v.* Hayden, 114 N. Y. 271, 21 N. E. 417; Sokolski *v.* Buttenwieser, 96 N. Y. App. Div. 18, 88 N. Y. Suppl. 973 [*affirmed* in 183 N. Y. 557, 76 N. E. 1108].

14. *Colorado.*—Rust *v.* Strickland, 21 Colo. 177, 40 Pac. 359 [*affirming* 1 Colo. App. 215, 28 Pac. 141]; Dargin *v.* Cranson, 12 Colo. App. 368, 55 Pac. 619.

District of Columbia.— Johnson *v.* Tribby, 27 App. Cas. 281.

Illinois.— Downing *v.* Plate, 90 Ill. 268, vendor had destroyed the contract on which the payments were indorsed.

Iowa.— Totty *v.* Harris, 82 Iowa 645, 48 N. W. 1050.

Massachusetts.— Irvin *v.* Gregory, 13 Gray 215.

New Jersey.— Worch *v.* Woodruff, 61 N. J. Eq. 78, 47 Atl. 725.

Oregon.— See Clarno *v.* Grayson, 30 Oreg. 111, 46 Pac. 426, tender not dispensed with because there is an unadjusted account.

And when plaintiff claimed to have fully paid, and this was disproved, the bill should not be dismissed, but he should be given an opportunity to pay the balance as condition of relief. Mason *v.* Atkins, 73 Ark. 491, 84 S. W. 630.

In a case which calls for specific performance with abatement of the price only a proportional part of the price need be tendered. Marshall *v.* Caldwell, 41 Cal. 611.

15. Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. 763 [*affirming* 117 Ill. App. 636]; Monson *v.* Bragdon, 152 Ill. 61, 42 N. E. 383; Boston, etc., R. Co. *v.* Rose, 194 Mass. 142, 80 N. E. 498. And see, generally, TENDER.

16. Morgan *v.* Herrick, 21 Ill. 481; Nilles *v.* Welsb, 89 Iowa 491, 56 N. W. 657; Pennsylvania Min. Co. *v.* Thomas, 204 Pa. St. 325, 54 Atl. 101; Fery *v.* Pfeiffer, 18 Wis. 510, as to demand for deed.

17. Chamberlain *v.* Black, 55 Me. 87; McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25 (as to demand for deed); Zeimantz *v.* Blake, 39 Wash. 6, 80 Pac. 822.

A vendee who has assigned the contract cannot object to the sufficiency of the assignee's tender to the vendor. Gill *v.* Newell, 13 Minn. 462.

Form and sufficiency of tender in general. — In the following cases the amount and form of the tender was held to be correct: Parker *v.* McAllister, 14 Ind. 12; West *v.* Chase, 3 Ind. 301 (payment to be in chattels; sufficient performance by setting

g. Tender or Offer Before Suit Excused[18] — (i) *By Vendor's Repudiation.* Where the vendor has repudiated the agreement, thus making it appear that if the tender were made its acceptance would be refused, tender or offer by the vendee before suit is unnecessary. Equity does not require a useless formality.[19]

apart chattels); Kepler *v.* Wright, 31 Ind. App. 512, 68 N. E. 618 (deed to be made on payment of first instalment, notes and mortgage to secure the balance need not be tendered); Clinton *v.* Shugart, 126 Iowa 179, 101 N. W. 785 (vendee may deduct the amount which vendor owes for taxes); McDaneld *v.* Kimbrell, 3 Greene (Iowa) 335 (vendee need not count out the money); Pickle *v.* Auble, 4 N. J. Eq. 315 (tender of specie instead of bank-bills excused by vendor's acts). In the following cases the tender was insufficient, as not complying with the terms of the contract: Barbour *v.* Hickey, 2 App. Cas. (D. C.) 207, 24 L. R. A. 763 (contract calls for cash and interest-bearing notes); Wilkin *v.* Voss, 120 Iowa 500, 94 N. W. 1123 (contract calls for cash).

Tender of moneys due, in addition to the purchase-price.— That the vendee should tender taxes which have been paid by the vendor after making the contract see Vance *v.* Newman, 72 Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42. *Contra,* Morgan *v.* Herrick, 21 Ill. 481. The tender should include the interest due (Webster *v.* Manning, 52 Iowa 738, 3 N. W. 454), and the costs and charges of the conveyance, when the vendee is required by the contract to pay these (Wright *v.* Le Claire, 4 Greene (Iowa) 420).

To whom and by whom tender or payment should be made.— Tender or payment may be made to an agent of the vendor designated to receive it. Hand *v.* Jacobus, 25 N. J. Eq. 154. A tender to an agent designated by the contract is sufficient, although the agency has been revoked by the death of the vendor. Mueller *v.* Nortmann, 116 Wis. 468, 93 N. W. 538, 96 Am. St. Rep. 997. A payment to an agent whose agency the vendee knows to be revoked is insufficient where the money never reaches the vendor. Clark *v.* Mullenix, 11 Ind. 532.

Tender on a sale by two tenants in common see Ledwith *v.* Reichard, 203 Pa. St. 277, 52 Atl. 251.

Tender of payment may be made by an assignee of the contract. Poehler *v.* Reese, 78 Minn. 71, 80 N. W. 847.

18. See also *supra,* VI, C, 1, e.

19. *Alabama.*— Campbell *v.* Lombardo, 153 Ala. 489, 44 So. 862; Root *v.* Johnson, 99 Ala. 90, 10 So. 293; Stewart *v.* Cross, 66 Ala. 22.

California.— Stanton *v.* Singleton, (1898) 54 Pac. 587; Sheplar *v.* Green, 96 Cal. 218, 31 Pac. 42 (vendor repudiated by bringing action against vendee to quiet title); Dowd *v.* Clarke, 54 Cal. 48; Civ. Code, § 1440.

Illinois.— Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197; Scott *v.* Beach, 172 Ill. 273, 50 N. E. 196; Dulin *v.* Prince, 124 Ill. 76, 16 N. E. 242; Mathison *v.* Wilson, 87 Ill. 51, vendor declined to give a deed as contracted, on the ground that an encumbrance prevented. But see Kimball *v.* Tooke, 70 Ill. 553.

Iowa.— Veeder *v.* McMurray, 70 Iowa 118, 29 N. W. 818; Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911.

Kentucky.— Harris *v.* Greenleaf, 117 Ky. 817, 79 S. W. 267, 25 Ky. L. Rep. 1940; Tyler *v.* Onzts, 93 Ky. 331, 20 S. W. 256, 14 Ky. L. Rep. 321.

Maine.— Jameson *v.* Head, 14 Me. 34, vendor refused to give assignee, plaintiff, information of the amount due.

Massachusetts.—Tobin *v.* Larkin, 183 Mass. 389, 64 N. E. 340.

Minnesota.— Brown *v.* Eaton, 21 Minn. 409.

Missouri.— Deichmann *v.* Deichmann, 49 Mo. 107.

Montana.— Long *v.* Needham, 36 Mont. 408, 96 Pac. 731; Finlen *v.* Heinze, 32 Mont. 354, 80 Pac. 918.

Nebraska.— Johnson *v.* Higgins, 77 Nebr. 35, 108 N. W. 168.

New Jersey.— McCormick *v.* Hickey, 56 N. J. Eq. 848, 42 Atl. 1019.

New York.— Baumann *v.* Pinckney, 118 N. Y. 604, 23 N. E. 916. And see Selleck *v.* Tallman, 87 N. Y. 106 [*affirming* 11 Daly 141], unwarranted demand on vendor's part.

Ohio.— George Wiedmann Brewing Co. *v.* Maxwell, 78 Ohio St. 54, 84 N. E. 595; Brock *v.* Hidy, 13 Ohio St. 306.

Oregon.— Merrill *v.* Hexter, 52 Oreg. 138, 94 Pac. 972, 96 Pac. 865; West *v.* Washington R. Co., 49 Oreg. 436, 90 Pac. 666; Guillaume *v.* K. S. D. Land Co., 48 Oreg. 400, 86 Pac. 883, 88 Pac. 586.

Pennsylvania.— Shattuck *v.* Cunningham, 166 Pa. St. 368, 31 Atl. 136; Whiteside *v.* Winans, 29 Pa. Super. Ct. 244; Minsker *v.* Morrison, 2 Yeates 344. As to tender in equitable ejectment under Pennsylvania practice *compare* Gregg *v.* Patterson, 9 Watts & S. 197, with Wykoff *v.* Wykoff, 3 Watts & S. 481; Harris *v.* Bell, 10 Serg. & R. 39.

South Dakota.— McPherson *v.* Fargo, 10 S. D. 611, 74 N. W. 1057, 66 Am. St. Rep. 723.

Tennessee.— Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195.

Texas.— Babcock *v.* Lewis, (Civ. App. 1908) 113 S. W. 584.

Vermont.— Van Dyke *v.* Cole, 81 Vt. 379, 70 Atl. 593, 1103.

Virginia.— White *v.* Dobson, 17 Gratt. 262.

Wisconsin.— Kreutzer *v.* Lynch, 122 Wis. 474, 100 N. W. 887; Cunningham *v.* Brown, 44 Wis. 72; Wright *v.* Young, 6 Wis. 127, 70 Am. Dec. 453.

United States.— Pollock *v.* Brainard, 26 Fed. 732.

See 44 Cent. Dig. tit. "Specific Performance," § 295.

(II) *Where Vendor Has Put It Out of His Power to Perform.* Tender to the vendor is not necessary where the vendor has conveyed to another or otherwise put it out of his power to perform.[20]

(III) *Other Excuses.* The vendee need not follow the vendor to his residence without the state for the purpose of making a tender.[21] Tender is excused where the vendor intentionally avoids giving the vendee an opportunity of making it,[22] or where the vendee is at the place where the conveyance is to be made, ready and willing to perform his part, but the vendor is not ready to perform his part.[23] On the death of the vendor, tender need not be made to the personal representative, since he cannot make a deed without order of court.[24]

h. Vendee Need Not Tender a Deed For Execution. By the practice in this country, it is not customary for the vendee to draw up the deed. In the absence therefore of any express stipulation on the subject, it is unnecessary for the vendee to tender a deed to the vendor to be executed by the latter.[25]

3. Deposit in Court. It is not, as a general rule, necessary for the vendee, plaintiff, to bring the purchase-money into court on filing the bill. His offer of payment in the bill is sufficient.[26] The rule in a few states is otherwise, and money

But repudiation of the contract by the vendor at time of tender of the first instalment of the price, it has been held, does not excuse the vendee from tendering subsequent instalments as they fall due. Kimball *v.* Tooke, 70 Ill. 553.

20. *California.*— Luchetti *v.* Frost, (1901) 65 Pac. 969.

Illinois.— Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Watson *v.* White, 152 Ill. 364, 38 N. E. 902. *Contra,* Doyle *v.* Teas, 5 Ill. 202.

Iowa.— Auxier *v.* Taylor, 102 Iowa 673, 72 N. W. 291; Laverty *v.* Hall, 19 Iowa 526.

Minnesota.— Smith *v.* Gibson, 15 Minn. 89.

Nebraska.— Kellogg *v.* Lavender, 9 Nebr. 418, 2 N. W. 748.

New Jersey.—Roche *v.* Osborne, (Ch. 1905) 69 Atl. 176.

Pennsylvania.— Baum *v.* Dubois, 43 Pa. St. 260.

See 44 Cent. Dig. tit. "Specific Performance," § 295.

Where vendor has assigned the purchase-money note see Williams *v.* Bentley, 29 Pa. St. 272.

For the remedies of the vendee where the vendor has conveyed see *infra,* X, B.

That a demand for conveyance need not be made upon the purchaser with notice from the vendor see Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287; Daily *v.* Litchfield, 10 Mich. 29.

That payment may properly be made to a purchaser with notice since he holds the land as trustee for the vendee see St. Paul Div. No. 1 S. T. *v.* Brown, 9 Minn. 157.

In general tender has been held unnecessary when vendor did not have in his power fully to perform in Conner *v.* Baxter, 124 Iowa 219, 99 N. W. 726; Delavan *v.* Duncan, 49 N. Y. 485; Prothro *v.* Smith, 6 Rich. Eq. (S. C.) 324.

21. Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477; Tyler *v.* Onzts, 93 Ky. 331, 20 S. W. 256, 14 Ky. L. Rep. 321; Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007. See Herman *v.* Winter, 20 S. D. 196, 105 N. W. 457, interpreting Rev. Civ. Code, §§ 1151, 1155, 1166, 1176.

22. Zempel *v.* Hughes, 235 Ill. 424, 85 N. E. 641; Connely *v.* Haggarty, 65 N. J. Eq. 596, 56 Atl. 371 [*affirmed* in 68 N. J. Eq. 794, 64 Atl. 1133]; Ohio, etc., R. Co. *v.* Crary, 1 Disn. (Ohio) 128; Hall *v.* Whittier, 10 R. I. 530.

Tender unnecessary where the relation of the parties is that of mortgagor and mortgagee rather than of vendee and vendor see Smith *v.* Sheldon, 65 Ill. 219.

23. Roche *v.* Osborne, (N. J. Ch. 1905) 69 Atl. 176.

24. Collins *v.* Vandever, 1 Iowa 573; Deglow *v.* Meyer, 15 S. W. 875, 12 Ky. L. Rep. 954.

25. *Alabama.*—Ashurst *v.* Peck, 101 Ala. 499, 14 So. 541.

California.— Goodale *v.* West, 5 Cal. 339.

Georgia.— Wellmaker *v.* Wheatley, 123 Ga. 201, 51 S. E. 436.

Iowa.— Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477.

Kansas.— Bell *v.* Wright, 31 Kan. 236, 1 Pac. 595, where vendor refused to execute any deed.

Michigan.— Daily *v.* Litchfield, 10 Mich. 29.

Minnesota.— St. Paul Div. No. 1 S. T. *v.* Brown, 9 Minn. 157.

United States.— Taylor *v.* Longworth, 14 Pet. 172, 10 L. ed. 405, Story, J.

Otherwise if the contract expressly calls for it (Lipscomb *v.* Watrous, 3 App. Cas. (D. C.) 1); but in such case it is held that his neglect only defeats his right to costs (Seeley *v.* Howard, 13 Wis. 336). In an action to enforce specific performance of a contract to sell standing timber, by which the owner was to immediately prepare and tender the deeds upon the acceptance of the option, the evidence was held to show that the parties subsequently modified the contract so as to require the purchaser to prepare the deeds. Hardy *v.* Ward, 150 N. C. 385, 64 S. E. 171.

26. *Alabama.*— Bass *v.* Gilliland, 5 Ala. 761.

admitted to be due should be brought into court,[27] except where plaintiff has right of possession before payment of the purchase-money.[28]

D. Time; When Essential — 1. Time Not Essential; General Rule. At law, time is always of the essence of the contract. Where any time is fixed for the completion of it, the contract must be completed on the day specified. But courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form. The principle has been firmly established from an early day in all ordinary contracts for the sale and purchase of land, that time is not, in equity, of the essence of the contract; that is to say, acts which plaintiff, by the terms of the contract, stipulated to perform on a given date, may be performed at a later date.[29] In particular, the vendee's delay in payment of

Georgia.— Kerr *v.* Hammond, 97 Ga. 567, 25 S. E. 337, unnecessary where amount is uncertain.

Illinois.— Webster *v.* French, 11 Ill. 254. But see Doyle *v.* Teas, 5 Ill. 202.

Indiana.— Fall *v.* Hazelrigg, 45 Ind. 576, 15 Am. Rep. 278; Lynch *v.* Jennings, 43 Ind. 276; Hunter *v.* Bales, 24 Ind. 299, amount uncertain.

Iowa.—McDaneld *v.* Kimbrell, 3 Greene 335.

Louisiana.—Anse La Butte Oil, etc., Co. *v.* Babb, 122 La. 415, 47 So. 754.

Minnesota.— Lamprey *v.* St. Paul, etc., R. Co., 86 Minn. 509, 91 N. W. 29.

Missouri.— Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19.

New York.— Birdsall *v.* Waldron, 2 Edw. 315.

Vermont.— Washburn *v.* Dewey, 17 Vt. 92.

United States.— Johnson *v.* Sukeley, 13 Fed. Cas. No. 7,414, 2 McLean 562.

See 44 Cent. Dig. tit. "Specific Performance," § 354.

27. Suydam *v.* Martin, Wright (Ohio) 384; Guillaume *v.* K. S. D. Land Co., 48 Oreg. 400, 86 Pac. 883, 88 Pac. 586; Dwyer *v.* Wright, 162 Pa. St. 405, 29 Atl. 754; Gore *v.* Kinney, 10 Watts (Pa.) 139; Inman *v.* Kutz, 10 Watts (Pa.) 90; Minsker *v.* Morrison, 2 Yeates (Pa.) 344.

That a non-resident purchaser who was in default may be compelled to pay the purchase-money into court see Binns *v.* Mount, 28 N. J. Eq. 24.

As to tender by check see Bradford *v.* Foster, 87 Tenn. 4, 9 S. W. 195.

Bringing deed into court, in suit by vendor, held necessary see Mason *v.* Richards, 8 Ill. 25. *Contra,* since he is allowed to make out his title during the suit, Vaught *v.* Cain, 31 W. Va. 424, 7 S. E. 9; Tavenner *v.* Barrett, 21 W. Va. 656.

28. D'Arras *v.* Keyser, 26 Pa. St. 249.

29. **Delay on part of purchaser.**— In the following cases the delay was on the part of the purchaser, plaintiff:

Arizona.— Walton *v.* McKinney, (1908) 94 Pac. 1122.

Arkansas.— Vance *v.* Newman, 72 Ark. 359, 80 S. W. 574, 105 Am. St. Rep. 42.

California.— Carr *v.* Howell, 154 Cal. 372, 97 Pac. 885; Miller *v.* Cox, 96 Cal. 339, 31 Pac. 161; Barsolou *v.* Newton, 63 Cal. 223; Steele *v.* Branch, 40 Cal. 3; Farley *v.* Vaughn, 11 Cal. 227.

Colorado.— Gumaer *v.* Draper, 33 Colo. 122, 79 Pac. 1040; Byers *v.* Denver Circle R. Co., 13 Colo. 552, 22 Pac. 951.

Connecticut.— Pritchard *v.* Todd, 38 Conn. 413; Quinn *v.* Roath, 37 Conn. 16.

Illinois.— Hanna *v.* Ratekin, 43 Ill. 462; Glover *v.* Fisher, 11 Ill. 666.

Indiana.— Stretch *v.* Schenck, 23 Ind. 77; Keller *v.* Fisher, 7 Ind. 718; Linton *v.* Potts, 5 Blackf. 396.

Iowa.— Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247; Des Moines University *v.* Polk County Homestead, etc., Co., 87 Iowa 36, 53 N. W. 1080; Presser *v.* Hildenbrand, 23 Iowa 483; Brink *v.* Morton, 2 Iowa 411; Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477.

Kentucky.— Tyler *v.* Onzts, 93 Ky. 331, 20 S. W. 256, 14 Ky. L. Rep. 321; Kercheval *v.* Swope, 6 T. B. Mon. 362.

Maine.— Hull *v.* Sturdivant, 46 Me. 34; Hull *v.* Noble, 40 Me. 459; Linscott *v.* Buck, 33 Me. 530; Getchell *v.* Jewett, 4 Me. 350.

Maryland.— Wilson *v.* Herbert, 76 Md. 489, 25 Atl. 685.

Massachusetts.— Barnard *v.* Lee, 97 Mass. 92.

Michigan.— Munro *v.* Edwards, 86 Mich. 91, 48 N. W. 689; Converse *v.* Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Richmond *v.* Robinson, 12 Mich. 193; Bomier *v.* Caldwell, 8 Mich. 463; Wallace *v.* Pidge, 4 Mich. 570

Minnesota.— Libby *v.* Parry, 98 Minn. 366, 108 N. W. 299; Austin *v.* Wacks, 30 Minn. 335, 15 N. W. 409.

Mississippi.— Jones *v.* Loggins, 37 Miss. 546; Runnels *v.* Jackson, 1 How. 358; Hines *v.* Baine, Sm. & M. Ch. 530.

Montana.— Stevens *v.* Trafton, 36 Mont. 520, 93 Pac. 810.

Nebraska.— Langan *v.* Thummel, 24 Nebr. 265, 38 N. W. 782; Willard *v.* Foster, 24 Nebr. 205, 38 N. W. 786; Kellogg *v.* Lavender, 9 Nebr. 418, 2 N. W. 748.

New Hampshire.— Pennock *v.* Ela, 41 N. H. 189.

New Jersey.— Jeffries *v.* Charlton, (1908) 70 Atl. 145; Zimmerman *v.* Brown, (Ch. 1897) 36 Atl. 675; Dynan *v.* McCulloch, 46 N. J. Eq. 11, 18 Atl. 822; King *v.* Ruckman, 21 N. J. Eq. 599 [*reversing* 20 N. J. Eq. 316]; Merritt *v.* Brown, 21 N. J. Eq. 401; De Camp *v.* Crane, 19 N. J. Eq. 166 (time for payment of interest); Huffman *v.* Hummer, 17 N. J. Eq. 263; New Barbadoes Toll Bridge Co. *v.* Vreeland, 4 N. J. Eq. 157.

New York.— Day *v.* Hunt, 112 N. Y. 191, 19 N. E. 414; Hubbell *v.* Von Schoening, 49

the purchase-price may usually be compensated by the payment of interest.[30] The doctrine finds support in the analogy of the relation between vendor and vendee to that between mortgagee and mortgagor; and in the general view of courts of equity that the equitable estate in the land passes to the vendee from the date of the contract of sale.[31] The rule of the text has also been applied to con-

N. Y. 326 [*reversing* 58 Barb. 498]; Leaird *v.* Smith, 44 N. Y. 618; Davies *v.* Collins, 25 N. Y. App. Div. 272, 50 N. Y. Suppl. 792; Van Campen *v.* Knight, 63 Barb. 205 [*affirmed* in 65 N. Y. 580]; Voorhees *v.* De Meyer, 2 Barb. 37; Waters *v.* Travis, 9 Johns. 450; Leggett *v.* Edwards, Hopk. 599.

North Carolina.—White *v.* Butcher, 59 N. C. 231; Taylor *v.* Kelly, 56 N. C. 240; Scarlett *v.* Hunter, 56 N. C. 84; Wells *v.* Wells, 38 N. C. 596; Falls *v.* Carpenter, 21 N. C. 237, 28 Am. Dec. 592.

Ohio.— Brock *v.* Hidy, 13 Ohio St. 306; Gibbs *v.* Champion, 3 Ohio 335.

Oregon.— Merrill *v.* Hexter, 52 Oreg. 138, 94 Pac. 972, 96 Pac. 865; Wright *v.* Astoria Co., 45 Oreg. 224, 77 Pac. 599; Knott *v.* Stephens, 5 Oreg. 235.

Pennsylvania.— Sylvester *v.* Born, 132 Pa. St. 467, 19 Atl. 337; Remington *v.* Irwin, 14 Pa. St. 143; Greaves *v.* Gamble, Leg. Gaz. Rep. 1.

South Dakota.— Hobart *v.* Frederiksen, 20 S. D. 248, 105 N. W. 168.

Texas.— Farris *v.* Bennett, 26 Tex. 568; Scarborough *v.* Arrant, 25 Tex. 129; Younger *v.* Welch, 22 Tex. 417; Walker *v.* Emerson, 20 Tex. 706, 73 Am. Dec. 207; Primm *v.* Barton, 18 Tex. 206.

Utah.— Roberts *v.* Braffett, 33 Utah 51, 92 Pac. 789.

Virginia.— Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

Washington.— Bower *v.* Bagley, 9 Wash. 642, 38 Pac. 164.

West Virginia.— Cosby *v.* Honaker, 57 W. Va. 512, 50 S. E. 610; Ballard *v.* Ballard, 25 W. Va. 470.

Wisconsin.— Durand *v.* Sage, 11 Wis. 151; Reed *v.* Jones, 8 Wis. 392; Hall *v.* Delaplaine, 5 Wis. 206, 68 Am. Dec. 57; Crittenden *v.* Drury, 4 Wis. 205.

United States.— Brown *v.* Guarantee Trust, etc., Co., 128 U. S. 403, 9 S. Ct. 127, 32 L. ed. 468; Ahl *v.* Johnson, 20 How. 511, 15 L. ed. 1005; Secombe *v.* Steele, 20 How. 94, 15 L. ed. 833; Taylor *v.* Longworth, 14 Pet. 172, 10 L. ed. 405 [*affirming* 15 Fed. Cas. No. 8,490, 1 McLean 395]; Brashier *v.* Gratz, 6 Wheat. 528, 5 L. ed. 322; Mason *v.* Wallace, 16 Fed. Cas. No. 9,255, 3 McLean 148.

See 44 Cent. Dig. tit. "Specific Performance," § 245 *et seq.*

Delay on part of vendor.— In the following cases the delay was on the part of the vendor, plaintiff:

Illinois.—Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53.

Indiana.— O'Kane *v.* Kiser, 25 Ind. 168; Emmons *v.* Kiger, 23 Ind. 483; Brumfield *v.* Palmer, 7 Blackf. 227.

Kentucky.— Tapp *v.* Nock, 89 Ky. 414, 12 S. W. 713, 11 Ky. L. Rep. 611; Boyce *v.* Pritchett, 6 Dana 231; Woodson *v.* Scott, 1 Dana 470.

Massachusetts.— Dresel *v.* Jordan, 104 Mass. 407.

Missouri.— Scannell *v.* American Soda Fountain Co., 161 Mo. 606, 61 S. W. 889.

New Jersey.— Sharp *v.* Trimmer, 24 N. J. Eq. 422.

New York.— Baumeister *v.* Demuth, 84 N. Y. App. Div. 394, 82 N. Y. Suppl. 831 [*reversing* 40 Misc. 22, 81 N. Y. Suppl. 148, and *affirmed* in 178 N. Y. 630, 71 N. E. 1128]; Hun *v.* Bourdon, 57 N. Y. App. Div. 351, 68 N. Y. Suppl. 112; Viele *v.* Troy, etc., R. Co., 21 Barb. 381 [*affirmed* in 20 N. Y. 184]; More *v.* Smedburgh, 8 Paige 600; Baldwin *v.* Salter, 8 Paige 473; Seymour *v.* Delancy, 3 Cow. 445, 15 Am. Dec. 270.

North Dakota.—Woodward *v.* McCollum, 16 N. D. 42, 111 N. W. 623; Arnett *v.* Smith, 11 N. D. 55, 88 N. W. 1037.

Ohio.—Wilson *v.* Tappan, 6 Ohio 172.

Pennsylvania.— Townsend *v.* Lewis, 35 Pa. St. 125; Tiernan *v.* Roland, 15 Pa. St. 429.

South Carolina.—Wightman *v.* Reside, 2 Desauss. Eq. 578; Osborne *v.* Bremar, 1 Desauss. Eq. 486.

Tennessee.— Mullens *v.* Big Creek Gap Coal, etc., Co. (Ch. App. 1895) 35 S. W. 439; Chadwell *v.* Winston, 3 Tenn. Ch. 110.

Virginia.— Mays *v.* Swope, 8 Gratt. 46.

United States.— Raymond *v.* San Gabriel Valley Land, etc., Co., 53 Fed. 883, 4 C. C. A. 89.

England.— Shepheard *v.* Walker, L. R. 20 Eq. 659, 44 L. J. Ch. 648, 33 L. T. Rep. N. S. 47, 23 Wkly. Rep. 903; Gibson *v.* Patterson, 1 Atk. 12, 26 Eng. Reprint 8 (said to be falsely reported; see Harrington *v.* Wheeler, 4 Ves. Jr. 689, 31 Eng. Reprint 354); Parkin *v.* Thorold, 16 Beav. 59, 16 Jur. 959, 22 L. J. Ch. 170, 51 Eng. Reprint 698; Taylor *v.* Brown, 2 Beav. 180, 9 L. J. Ch. 14, 17 Eng. Ch. 180, 48 Eng. Reprint 1149; Fordyce *v.* Ford, 4 Bro. Ch. 494, 29 Eng. Reprint 1007; Pincke *v.* Curteis, 4 Bro. Ch. 329, 29 Eng. Reprint 918; Radcliffe *v.* Warrington, 12 Ves. Jr. 326, 33 Eng. Reprint 124; Seton *v.* Slade, 7 Ves. Jr. 264, 6 Rev. Rep. 124, 32 Eng. Reprint 108; Wynn *v.* Morgan, 7 Ves. Jr. 202, 32 Eng. Reprint 82; Hertford *v.* Boore, 5 Ves. Jr. 719, 5 Rev. Rep. 149, 31 Eng. Reprint 823.

See 44 Cent. Dig. tit. "Specific Performance," § 245 *et seq.*

30. See the cases cited in the preceding note as to delay on the part of the purchaser.

31. "The principal grounds of the doctrine are that the rule of the common law, requiring performance of every contract at the appointed day, is often harsh and unjust in the operation; that although some time of performance by each party is usually named in

tracts other than for sale and purchase of land.[32] In a few states the rule is declared by statute.[33] A few cases appear to depart from the general rule, and to indulge the presumption that time is essential unless some definite excuse is shown for default.[34]

2. Time Essential by Implication — a. In General. Time may be of the essence, without express stipulation to that effect, by implication from the nature of the contract itself, or of the subject-matter, or of the circumstances under which the contract is made.[35]

any agreement for the sale of land, it is often not regarded by the parties as one of the essential terms of their contract; and that a court of chancery has the power of moulding the remedy according to the circumstances of each case, and of making due compensation for delay, without punishing it by a forfeiture of all right to relief." Barnard *v.* Lee, 97 Mass. 92, 93, per Gray, J. The complicated nature of titles in England, rendering the making out of an abstract of title a matter of much time and labor, is said to have been an important reason for the origin of the rule. See Scott *v.* Fields, 7 Ohio, Pt. II, 90; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124, 32 Eng. Reprint 108 (per Lord Eldon, explaining the rule on the ground that the effect of the contract in equity is to transfer the estate to the vendee); Leggett *v.* Edwards, Hopk. (N. Y.) 530 (explaining the rule on the analogy of the contract of sale to that of mortgage). But the analogy of the relation of vendor and vendee to that of mortgagee and mortgagor does not lead to the conclusion that the same time should be given to the vendee to perform that is given to a mortgagor to redeem. Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677. And see Williams *v.* Williams, 50 Wis. 311, 6 N. W. 814, per Ryan, J., clearly explaining the difference between specific performance and redemption.

32. Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776; Coe *v.* Bradley, 5 Fed. Cas. No. 2,941, 9 Off. Gaz. 541.

Contract for lease.— Time not of essence see Cartan *v.* Bury, 10 Ir. Ch. 387. And see Molloy *v.* Egan, 7 Ir. Eq. 590.

33. See Mont. Civ. Code, §§ 2223, 2027; Stevens *v.* Trafton, 36 Mont. 520, 93 Pac. 810.

34. Potter *v.* Tuttle, 22 Conn. 512; Howe *v.* Conley, 16 Gray (Mass.) 552; Russell *v.* Geyer, 4 Mo. 384; Rector *v.* Price, 1 Mo. 373; Babcock *v.* Emrich, 64 How. Pr. (N. Y.) 435; Whiteman *v.* Castlebury, 8 Tex. 441.

35. Purchaser plaintiff.—*California.*—Bennett *v.* Hyde, 92 Cal. 131, 28 Pac. 104; Brown *v.* Covillaud, 6 Cal. 566, very low rate of interest on deferred payment shows that time of payment was essential.

Idaho.— Durant *v.* Comegys, 3 Ida. 204, 28 Pac. 425.

Illinois.— Shortall *v.* Mitchell, 57 Ill. 161.

Indiana.— Longworth *v.* Conwell, 2 Blackf. 469.

Massachusetts.— Goldsmith *v.* Guild, 10 Allen 239.

Michigan.— Hawley *v.* Jelly, 25 Mich. 94.

New Hampshire.— Pickering *v.* Pickering, 38 N. H. 400.

New Jersey.— Nageli *v.* Lenimer, (Ch. 1888) 16 Atl. 205; King *v.* Ruckman, 20 N. J. Eq. 316; Grigg *v.* Landis, 19 N. J. Eq. 350.

Texas.— Abernathy *v.* Florence, (Civ. App. 1908) 113 S. W. 161, holding that specific performance of a contract to employ counsel and defray the expenses of litigation between the other party to the contract and a third person over school land, in consideration of a conveyance of a certain part of the land, if successful, and no appeal was taken, and a certain other part if an appeal was taken, could not be had, where such party did not pay the expenses of such litigation as they accrued, although he did offer to reimburse the other party after the litigation had terminated, as time was of the essence of the contract.

Virginia.— Booten *v.* Scheffer, 21 Gratt. 474.

United States.— Kentucky Distilleries, etc., Co. *v.* Warwick Co., 109 Fed. 280, 48 C. C. A. 363.

England.— Payne *v.* Banner, 7 Jur. 1051, 15 L. J. Ch. 227; Newman *v.* Rogers, 4 Bro. Ch. 391, 29 Eng. Reprint 950; Doloret *v.* Rothschild, 2 L. J. Ch. O. S. 125, 1 Sim. & St. 590, 24 Rev. Rep. 243, 1 Eng. Ch. 590, 57 Eng. Reprint 233; Coslake *v.* Till, 1 Russ. 376, 25 Rev. Rep. 75, 46 Eng. Ch. 335, 38 Eng. Reprint 146.

Canada.— Crossfield *v.* Gould, 9 Ont. App. 218.

See 44 Cent. Dig. tit. "Specific Performance," § 245 *et seq.*

Vendor plaintiff.— Ursuline Community *v.* Huneke, 11 Ohio Dec. (Reprint) 30, 24 Cinc. L. Bul. 153; Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479; Myers *v.* League, 62 Fed. 654, 10 C. C. A. 571; Cowles *v.* Gale, L. R. 7 Ch. 12, 41 L. J. Ch. 14, 25 L. T. Rep. N. S. 524, 20 Wkly. Rep. 70; Tilley *v.* Thomas, L. R. 3 Ch. 61, 17 L. T. Rep. N. S. 422, 16 Wkly. Rep 166; Day *v.* Luhke, L. R. 5 Eq. 336, 37 L. J. Ch. 330, 16 Wkly. Rep. 719; Patrick *v.* Milner, 2 C. P. D. 342, 46 L. J. C. P. 537, 36 L. T. Rep. N. S. 738, 25 Wkly. Rep. 790; Seaton *v.* Mapp, 2 Coll. 556, 33 Eng. Ch. 556, 63 Eng. Reprint 859; Arkwright *v.* Stoveld, 3 L. J. Ch. O. S. 49; Withey *v.* Cottle, 1 L. J. Ch. O. S. 117, 1 Sim. & St. 174, 1 Eng. Ch. 174, 57 Eng. Reprint 70, Turn. & R. 78, 12 Eng. Ch. 78, 37 Eng. Reprint 1024; Lewis *v.* Lechmere, 10 Mod. 503, 88 Eng. Reprint 828.

b. From Nature of the Property or Consideration. Thus time has been held essential where the nature of the estate sold is such that its value necessarily increases or diminishes with the lapse of time, as in the case of a reversion[36] or a life annuity,[37] or where the value of the property[38] or of the consideration[39] is necessarily uncertain and fluctuating.

c. From the Purpose of the Transaction. Time may be essential from the avowed objects of the sellers, purchasers, or lessees; as where it is important for the success of defendant's business undertakings that plaintiff comply with his contract promptly, and this was understood by the parties.[40]

In this country time is more important than in England, since the value of land is more fluctuating here than there. Barnard *v.* Lee, 97 Mass. 92; Goldsmith *v.* Guild, 10 Allen (Mass.) 239. See also *post*, VI, F, 4, b, (I), note.

Contract unreasonable.—That an unreasonable contract must be performed according to its letter or equity will not interfere see Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

Lease from ecclesiastical corporation see Carter *v.* Ely, 4 L. J. Ch. 241, 7 Sim. 211, 8 Eng. Ch. 211, 58 Eng. Reprint 817.

36. Pickering *v.* Pickering, 38 N. H. 400; Patrick *v.* Milner, 2 C. P. D. 342, 46 L. J. C. P. 537, 36 L. T. Rep. N. S. 738, 25 Wkly. Rep. 790; Newman *v.* Rogers, 4 Bro. Ch. 391, 29 Eng. Reprint 950.

Lease dependent on lives.— Time of essence see Ormond *v.* Anderson, 2 Ball & B. 370, 12 Rev. Rep. 103.

37. Withey *v.* Cottle, 1 L. J. Ch. O. S. 117, 1 Sim. & St. 174, 1 Eng. Ch. 174, 57 Eng. Reprint 70, Turn. & R. 78, 12 Eng. Ch. 78, 37 Eng. Reprint 1024.

38. Mining property.— Durant *v.* Comegys, 3 Ida. 204, 28 Pac. 425; Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479; Macbryde *v.* Weekes, 22 Beav. 533, 2 Jur. N. S. 918, 52 Eng. Reprint 1214, contract for lease of mines; time essential.

Timber lands.— Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635.

Lands rapidly rising in value and dealt with as speculation.— Myers *v.* League, 62 Fed. 654, 10 C. C. A. 571.

Government stock.— Doloret *v.* Rothschild, 2 L. J. Ch. O. S. 125, 1 Sim. & St. 590, 24 Rev. Rep. 243, 1 Eng. Ch. 590, 57 Eng. Reprint 233.

A stock of whisky.— Kentucky Distilleries, etc., Co. *v.* Warwick Co., 109 Fed. 280, 48 C. C. A. 363.

Property likely to increase greatly in value because of an expected public improvement. — Hawley *v.* Jelly, 25 Mich. 94.

39. Goldsmith *v.* Guild, 10 Allen (Mass.) 239 (contract made in war time, when the price of gold was subject to great fluctuation); Booten *v.* Scheffer, 21 Gratt. (Va.) 474 (payment to be in confederate currency, which was steadily depreciating); Lewis *v.* Lechmere, 10 Mod. 503, 88 Eng. Reprint 828 (consideration to be raised by sale of south sea stock, which greatly fluctuated in value).

40. *Alabama.*— Haggerty *v.* Elyton Land Co., 89 Ala. 428, 7 So. 651, improvements agreed to be made must be made promptly, to induce others to purchase from defendant land company.

Illinois.— Shortall *v.* Mitchell, 57 Ill. 161, where vendor's object was to raise a large sum of money immediately.

Indiana.— Longworth *v.* Conwell, 2 Blackf. 469.

Maryland.— North Ave. Land Co. *v.* Baltimore, 102 Md. 475, 63 Atl. 115, vendor plaintiff; land needed by vendee for immediate use for waterworks.

New Jersey.— King *v.* Ruckman, 20 N. J. Eq. 316 (where the vendor told vendee that he wanted the money in order to fulfil other contracts); Grigg *v.* Landis, 19 N. J. Eq. 350 (vendor's object being to secure improvement of building lots). A contract dated September 22 provided for a conveyance of vacant land on or before October 15, and that on the passing of title the purchaser might take possession. The purchaser intended to build and early possession was important, if not necessary, to effect the object of the purchase. Vendors knew that the purchaser intended to build, and that he desired immediate unclouded possession. It was held that while the contract itself did not make it so, considering its terms with the other facts stated, time of passing title was of the essence of the contract. Agens *v.* Koch, (Ch. 1908) 70 Atl. 348.

Ohio.— Ursuline Community *v.* Huneke, 11 Ohio Dec. (Reprint) 30, 24 Cinc. L. Bul. 153, defendant vendee's lease about to expire.

England.— It has frequently been held that on sale of a public house as a going concern, time is essential to the vendee (Cowles *v.* Gale, L. R. 7 Ch. 12, 41 L. J. Ch. 14, 25 L. T. Rep. N. S. 524, 20 Wkly. Rep. 70; Seaton *v.* Mapp, 2 Coll. 556, 33 Eng. Ch. 556, 63 Eng. Reprint 859); and may be to the vendor (Day *v.* Luhke, L. R. 5 Eq. 336, 37 L. J. Ch. 330, 16 Wkly. Rep. 719; Coslake *v.* Till, 1 Russ. 376, 25 Rev. Rep. 75, 46 Eng. Ch. 335, 38 Eng. Reprint 146. When the vendee desires the residence sold for immediate occupation, time is essential to him. Tilley *v.* Thomas, L. R. 3 Ch. 61, 17 L. T. Rep. N. S. 422, 16 Wkly. Rep. 166. Sale of a patent where prompt payment is necessary to obtain foreign patents see Payne *v.* Banner, 7 Jur. 1051, 15 L. J. Ch. 227.

See 44 Cent. Dig. tit. "Specific Performance," § 245 *et seq.*

Contract to take lease for purpose of trade. — Specific performance was refused because the lessor had long delayed to make title and give possession. Parker *v.* Frith, 1 Sim. & St. 199, 1 Eng. Ch. 199, 57 Eng. Reprint 80.

d. In Unilateral Contracts. In general time is of the essence where there are not mutual remedies or the contract is unilateral. If the performance of a certain condition is a prerequisite to the acquirement of a right to the subject-matter of the contract, time is of the essence of the contract.[41]

e. Options. If the right acquired by the terms of the contract is simply a privilege or option, and it is provided that the option must be accepted or that payment must be made within a prescribed time, then time is of the essence of the contract.[42] In a great majority of the cases, payment of all or a part of the price, as well as acceptance of the option, is treated as a condition precedent. Such payment therefore, or tender thereof, must be made within the time limited. In some cases, however, acceptance within the time limited was the only condition

41. *Connecticut.*— See Phipps *v.* Munson, 50 Conn. 267.

Illinois.— Lowery *v.* Niccolls, 11 Ill. App. 450.

Oregon.— Clarno *v.* Grayson, 30 Oreg. 111, 46 Pac. 426.

Pennsylvania.— Westerman *v.* Means, 12 Pa. St. 97.

South Carolina.— Doar *v.* Gibbes, Bailey Eq. 371.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171.

United States.— Prentice *v.* Betteley, 19 Fed. Cas. No. 11,381, 2 Lowell 289.

See 44 Cent. Dig. tit. "Specific Performance," § 247 *et seq.*

42. *Alabama.*— Christian, etc., Grocery Co. *v.* Bienville Water Supply Co., 106 Ala. 124, 17 So. 352.

Arizona.— Monihon *v.* Wakelin, 6 Ariz. 225, 56 Pac. 735.

Colorado.— Byers *v.* Denver Circle R. Co., 13 Colo. 552, 22 Pac. 951.

Connecticut.— Roberts *v.* Norton, 66 Conn. 1, 33 Atl. 532; Phipps *v.* Munson, 50 Conn. 267.

Illinois.— Bennett *v.* Giles, 220 Ill. 393, 77 N. E. 214; Dikeman *v.* Sunday Creek Coal Co., 184 Ill. 546, 56 N. E. 864; Harding *v.* Gibbs, 125 Ill. 85, 17 N. E. 60, 8 Am. St. Rep. 345; Longfellow *v.* Moore, 102 Ill. 289; Bostwick *v.* Hess, 80 Ill. 138.

Iowa.— Frey *v.* Camp, 131 Iowa 109, 107 N. W. 1106; Hopwood *v.* McCausland, 120 Iowa 218, 94 N. W. 469; Usher *v.* Livermore, 2 Iowa 117; Shuffleton *v.* Jenkins, Morr. 427.

Kentucky.— Stembridge *v.* Stembridge, 87 Ky. 91, 7 S. W. 611, 9 Ky. L. Rep. 948; Jones *v.* Noble, 3 Bush 694; Magoffin *v.* Holt, 1 Duv. 95 (option to sell); Brock *v.* Tennis Coal Co., 97 S. W. 46, 29 Ky. L. Rep. 1283, 101 S. W. 300, 30 Ky. L. Rep. 1370.

Maryland.— Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Maughlin *v.* Perry, 35 Md. 352.

Massachusetts.— Carter *v.* Phillips, 144 Mass. 100, 10 N. E. 500.

Minnesota.— Steele *v.* Bond, 32 Minn. 14, 18 N. W. 830.

Missouri.— Hollmann *v.* Conlon, 143 Mo. 369 45 S. W. 275; Glass *v.* Rowe, 103 Mo. 513, 15 S. W. 334; Mason *v.* Payne, 47 Mo. 517.

New Jersey.— Potts *v.* Whitehead, 20 N. J. Eq. 55.

New York.— Kerr *v.* Purdy, 51 N. Y. 629; Codding *v.* Wamsley, 1 Hun 585, 4 Thomps. & C. 49 [*affirmed* in 60 N. Y. 644].

North Carolina.— Willis *v.* Forney, 45 N. C. 256.

Ohio.— Longworth *v.* Mitchell, 26 Ohio St. 334.

Oregon.— Clarno *v.* Grayson, 30 Oreg. 111, 124, 46 Pac. 426.

Pennsylvania.— Patchin *v.* Lamborn, 31 Pa. St. 314. But see to the contrary *dicta* in Sylvester *v.* Born, 132 Pa. St. 467, 19 Atl. 337.

South Dakota.— Herman *v.* Winter, 20 S. D. 196, 105 N. W. 457.

Texas.— Killough *v.* Lee, 2 Tex. Civ. App. 260, 21 S. W. 970.

Utah.— Kelsey *v.* Crowther, 7 Utah 519, 27 Pac. 695.

Vermont.— Sowles *v.* Hall, 62 Vt. 247, 20 Atl. 810, 22 Am. St. Rep. 101.

West Virginia.— Pollock *v.* Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. N. S. 403.

Wisconsin.— Mueller *v.* Nortmann, 116 Wis. 468, 93 N. W. 538, 96 Am. St. Rep. 997.

United States.— Kelsey *v.* Crowther, 162 U. S. 404, 16 S. Ct. 808, 40 L. ed. 1017; Waterman *v.* Banks, 144 U. S. 394, 12 S. Ct. 646, 36 L. ed. 479; Richardson *v.* Hardwick, 106 U. S. 252, 1 S. Ct. 213, 27 L. ed. 145; Standiford *v.* Thompson, 135 Fed. 991, 68 C. C. A. 425; Woods *v.* McGraw, 127 Fed. 914, 63 C. C. A. 556; Pope *v.* Hoopes, 84 Fed. 927 [*affirmed* in 90 Fed. 451, 33 C. C. A. 595]; Duff *v.* Hopkins, 33 Fed. 599 [*explained* in Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318, 353].

England.— Nicholson *v.* Smith, 22 Ch. D. 640, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471; Ensworth *v.* Griffiths, 5 Bro. P. C. 184, 2 Eng. Reprint 615; Ranelagh *v.* Melton, 2 Dr. & Sm. 278, 10 Jur. N. S. 1141, 34 L. J. Ch. 227, 11 L. T. Rep. N. S. 409, 5 New Rep. 101, 13 Wkly. Rep. 150, 62 Eng. Reprint 627; Weston *v.* Collins, 11 Jur. N. S. 190, 34 L. J. Ch. 353, 15 New Rep. 345, 13 Wkly. Rep. 510; Davis *v.* Thomas, 9 L. J. Ch. O. S. 232, 1 Russ. & M. 506, 5 Eng. Ch. 506, 39 Eng. Reprint 195, Taml. 416, 12 Eng. Ch. 416, 48 Eng. Reprint 166.

See 44 Cent. Dig. tit. "Specific Performance," § 246 *et seq.*

precedent, in the contemplation of the parties, and the time for payment not being of the essence, payment might be delayed.[43]

3. Time Expressly Essential — a. In General. Where by the terms of the contract itself the parties agree that time shall be of the essence of the contract, either in these express words or in language equivalent, clearly indicating that it was so intended, plaintiff must perform or offer to perform within the time specified, unless his delay is sufficiently excused or waived.[44] A provision that "time is of

43. *Colorado.*— Byers *v.* Denver Circle R. Co., 13 Colo. 552, 22 Pac. 951.

New Jersey.— Zimmerman *v.* Brown, (Ch. 1897) 36 Atl. 675.

New York.— Reed *v.* St. John, 2 Daly 213, deposit of notice of acceptance in post-office a day before expiration of time sufficient.

West Virginia.— Barrett *v.* McAllister, 33 W. Va. 738, 11 S. E. 220 [*overruling* Weaver *v.* Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94].

England.— Nicholson *v.* Smith, 22 Ch. D. 640, 52 L. J. Ch. 191, 47 L. T. Rep. N. S. 650, 31 Wkly. Rep. 471.

44. Purchaser plaintiff.— *Alabama.*— Haggerty *v.* Elyton Land Co., 89 Ala. 428, 7 So. 651.

California.— Bennett *v.* Hyde, 92 Cal. 131, 28 Pac. 104; Martin *v.* Morgan, 87 Cal. 203, 25 Pac. 350, 22 Am. St. Rep. 240; Grey *v.* Tubbs, 43 Cal. 359.

Idaho.— Macbold *v.* Farnan, 14 Ida. 258, 94 Pac. 170.

Illinois.— Stow *v.* Russell, 36 Ill. 18; Heckard *v.* Sayre, 34 Ill. 142; Milnor *v.* Willard, 34 Ill. 38; Steele *v.* Biggs, 22 Ill. 643; Chrisman *v.* Miller, 21 Ill. 227; Kemp *v.* Humphreys, 13 Ill. 573; Smith *v.* Brown, 10 Ill. 309.

Indiana.— Ewing *v.* Crouse, 6 Ind. 312.

Iowa.— Auxier *v.* Taylor, 102 Iowa 673, 72 N. W. 291; Foot *v.* Bush, 100 Iowa 522, 69 N. W. 874; Miller *v.* Hughes, 95 Iowa 223, 63 N. W. 680; Carter *v.* Walters, 91 Iowa 727, 59 N. W. 201; Iowa R. Land Co. *v.* Mickel, 41 Iowa 402; Prince *v.* Griffin, 27 Iowa 514; Davis *v.* Stevens, 3 Iowa 158; Tomlinson *v.* Smith, 2 Iowa 39.

Kansas.— Missouri River, etc., R. Co. *v.* Brickley, 21 Kan. 275.

Massachusetts.— Garcin *v.* Pennsylvania Furnace Co., 186 Mass. 405, 71 N. E. 793.

Minnesota.— Judd *v.* Skidmore, 33 Minn. 140, 22 N. W. 183.

Missouri.— Glass *v.* Rowe, 103 Mo. 513, 15 S. W. 334; Russell *v.* Geyer, 4 Mo. 384.

Nebraska.— Bradley *v.* Union Pac. R. Co., 76 Nebr. 172, 107 N. W. 238; Jewett *v.* Black, 60 Nebr. 173, 82 N. W. 375; Whiteman *v.* Perkins, 56 Nebr. 181, 76 N. W. 547; Brown *v.* Ulrick, 48 Nebr. 409, 67 N. W. 168; Canfield *v.* Tillotson, 25 Nebr. 857, 41 N. W. 812; Morgan *v.* Bergen, 3 Nebr. 209.

New Jersey.— Collins *v.* Delaney Co., 71 N. J. Eq. 320, 64 Atl. 107; Grigg *v.* Landis, 19 N. J. Eq. 350.

New York.— Blanchard *v.* Archer, 93 N. Y. App. Div. 459, 87 N. Y. Suppl. 665; Baldwin *v.* McGrath, 90 N. Y. App. Div. 199, 85 N. Y. Suppl. 735 [*reversing* 41 Misc. 39, 83 N. Y. Suppl. 582]; Baumann *v.* Pinkney, 14 Daly 241, 8 N. Y. St. 370 [*reversed* on other grounds in 118 N. Y. 604, 23 N. E. 916]; Wells *v.* Smith, 7 Paige 22, 31 Am. Dec. 274 [*affirming* 2 Edw. Ch. 78]; Benedict *v.* Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484.

Ohio.— Brewer *v.* Connecticut, 9 Ohio 189; Scott *v.* Fields, 7 Ohio, Pt. II, 90.

Oregon.— Clarno *v.* Grayson, 30 Oreg. 111, 46 Pac. 426; Snider *v.* Lehnherr, 5 Oreg. 385.

Pennsylvania.— Axford *v.* Thomas, 160 Pa. St. 8, 28 Atl. 443; Reed *v.* Breeden, 61 Pa. St. 460; Dauchy *v.* Pond, 9 Watts 49.

Rhode Island.— Ives *v.* Armstrong, 5 R. I. 567.

South Carolina.— Doar *v.* Gibbes, Bailey Eq. 371.

South Dakota.— Chambers *v.* Roseland, 21 S. D. 298, 112 N. W. 148.

Virginia.— Keffer *v.* Grayson, 76 Va. 517, 44 Am. Rep. 171.

Washington.— Voight *v.* Fidelity Inv. Co., 49 Wash. 612, 93 Pac. 162.

Wisconsin.— Hall *v.* Delaplaine, 5 Wis. 206, 68 Am. Dec. 57.

United States.— Cheney *v.* Libby, 134 U. S. 68, 78, 10 S. Ct. 498, 33 L. ed. 818; Vint *v.* King, 28 Fed. Cas. No. 16,950.

England.— Barclay *v.* Messenger, 43 L. J. Ch. 449, 30 L. T. Rep. N. S. 350, 22 Wkly. Rep. 522; Honeyman *v.* Morryat, 21 Beav. 14, 3 Wkly. Rep. 502, 52 Eng. Reprint 763.

Canada.— Porter *v.* Hale, 23 Can. Sup. Ct. 265.

See 44 Cent. Dig. tit. "Specific Performance," § 245 *et seq.*

Vendor plaintiff.—Woodruff *v.* Semi-Tropic Land, etc., Co., 87 Cal. 275, 25 Pac. 354; Cleary *v.* Folger, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187; Skeen *v.* Patterson, 180 Ill. 289, 54 N. E. 196 (vendor's failure to pay back interest on an encumbrance, which it was his duty to pay, fatal); Westerman *v.* Means, 12 Pa. St. 97; Secton *v.* Mapp, 2 Coll. 556, 33 Eng. Ch. 556, 63 Eng. Reprint 859; Boehm *v.* Wood, 1 Jac. & W. 419, 21 Rev. Rep. 213, 37 Eng. Reprint 435; Hipwell *v.* Knight, 4 L. J. Exch. 52, 1 Y. & C. Exch. 401; Levy *v.* Lindo, 3 Meriv. 81, 36 Eng. Reprint 32; Lloyd *v.* Rippingdale, 1 Y. & C. Exch. 410.

Agreement for assignment of patents.— Telephone Corp. *v.* Canadian Telephone Co., 103 Me. 444, 69 Atl. 767.

The policy of the rule was well defended by Walworth, C. J., in Wells *v.* Smith, 7 Paige (N. Y.) 22, 24, 31 Am. Dec. 274: "Although in theory the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact, the person to whom it is due frequently sustains great losses in con-

the essence" has been held to be for the benefit of the vendor only, who may waive it and insist on performance by the vendee.[45]

b. What Language Insufficient. The intent to make time of the essence must be clearly and unmistakably shown. An intention to make time essential cannot be inferred from the mere appointment of a day for the delivery of a deed or the payment of the price.[46]

c. What Language Sufficient. It is not necessary that time be expressly declared in so many words to be of the essence of the contract. As against the vendee, it is often held sufficient if the contract declares that it shall be void in case the vendee fails in performance before a certain day.[47] And as against the vendor a provision that if title is not completed within a fixed time the vendee shall be released from his contract makes time of the essence.[48] Time is essential whenever that clearly appears to have been the intention of the parties.[49] Extrinsic evidence is admissible to show that time was intended to be essential, since such evidence does not vary the contract, but rather confirms it.[50]

d. Forfeiture of Payments and Improvements — (i) *In General.* A clause to the effect that on the vendee's failure to perform any or all of his stipulations within the time limited the contract shall be void and the vendee shall forfeit the payments and improvements already made is in many jurisdictions literally enforced. Notwithstanding the resulting hardship, specific performance is refused to the vendee whose default is not sufficiently excused.[51]

sequence of the disappointment, which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title and the delivery of possession of the premises at the time contemplated by the purchaser is of essential benefit, to him; which cannot be compensated by damages which are ascertainable by the ordinary rules of computing damages."

45. See Raymond *v.* San Gabriel Valley Land, etc., Co., 53 Fed. 883, 4 C. C. A. 89.

46. *California.*— Miller *v.* Cox, 96 Cal. 339, 31 Pac. 161.

Maine.— Jones *v.* Robbins, 29 Me. 351, 50 Am. Dec. 593.

Massachusetts.— Barnard *v.* Lee, 97 Mass. 92.

Mississippi.— Jones *v.* Loggins, 37 Miss. 546, "if the vendee complies promptly with his contract" vendor will make a deed does not make time essential.

Nebraska.— Langan *v.* Thummel, 24 Nebr. 265, 271, 38 N. W. 782, "this contract is to be construed strictly as to payments" does not make time essential. "It is usual," said the court, "if not absolutely necessary, when parties desire that time should be 'of the essence of a contract,' to use those words, or their equivalent, in framing the contract."

New York.— Hun *v.* Bourdon, 57 N. Y. App. Div. 351, 68 N. Y. Suppl. 112.

Virginia.— Smith *v.* Profitt, 82 Va. 832, 849, 1 S. E. 67.

United States.—Brashier *v.* Gratz, 6 Wheat. 528, 5 L. ed. 322.

England.—Roberts *v.* Berry, 3 De G. M. & G. 284, 22 L. J. Ch. 398, 52 Eng. Ch. 222, 43 Eng. Reprint 112 [*affirming* 16 Beav. 31, 51 Eng. Reprint 687]; Boehm *v.* Wood, 1 Jac. & W. 419, 21 Rev. Rep. 213, 37 Eng. Reprint 435.

See 44 Cent. Dig. tit. "Specific Performance," § 248 *et seq.*

Compare, however, Ives *v.* Armstrong, 5 R. I. 567.

47. *California.*— Martin *v.* Morgan, 87 Cal. 203, 25 Pac. 350, 22 Am. St. Rep. 240; Grey *v.* Tubbs, 43 Cal. 359.

Idaho.— Machold *v.* Farnan, 14 Ida. 258, 94 Pac. 170.

Illinois.— Kemp *v.* Humphreys, 13 Ill. 573.

Iowa.— Tomlinson *v.* Smith, 2 Iowa 39, vendor reserves right to resell on vendee's default.

Minnesota.— Judd *v.* Skidmore, 33 Minn. 140, 22 N. W. 183.

New York.—Wells *v.* Smith, 7 Paige 22, 24, 31 Am. Dec. 274; Benedict *v.* Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484.

Ohio.— Brewer *v.* Connecticut, 9 Ohio 189.

Pennsylvania.— Reed *v.* Breeden, 61 Pa. St. 460; Dauchy *v.* Pond, 9 Watts 49.

South Dakota.— Chambers *v.* Roseland, 21 S. D. 298, 112 N. W. 148.

United States.—Vint *v.* King, 28 Fed. Cas. No. 16,950.

See 44 Cent. Dig. tit. "Specific Performance," § 248.

That a stipulation making the contract void in case of default does not apply against one who is not in default see Baldwin *v.* McGrath, 41 Misc. (N. Y.) 39, 83 N. Y. Suppl. 582 [*reversed* on other grounds in 90 N. Y. App. Div. 199, 85 N. Y. Suppl. 735].

48. Hipwell *v.* Knight, 4 L. J. Exch. 52, 1 Y. & C. Exch. 401.

49. Smith *v.* Brown, 10 Ill. 309; Garretson *v.* Vanloon, 3 Greene (Iowa) 128, 54 Am. Dec. 492; Kentucky Distilleries, etc., Co. *v.* Warwick Co., 109 Fed. 280, 48 C. C. A. 363; Crossfield *v.* Gould, 9 Ont. App. 218.

50. Quinn *v.* Roath, 37 Conn. 16; Thurston *v.* Arnold, 43 Iowa 43.

51. *Illinois.*— Phelps *v.* Illinois Cent. R. Co., 63 Ill. 468; Stow *v.* Russell, 36 Ill. 18 (although one half the price had been paid);

(II) *Election to Forfeit.* In many cases the contract gives the vendor an election to declare a forfeiture on default by the vendee;[52] in this case the right to forfeit must be exercised promptly, or will be deemed to be waived.[53]

(III) *English Rule.* By the rule in England, which has considerable following in this country, the provision for a forfeiture of payments or improvements on default by the purchaser is held merely to impose a penalty to secure performance, and, in accordance with the usual rule as to penalties,[54] the purchaser is entitled to specific performance, notwithstanding his default, on making payment with interest.[55]

4. Time Made Essential by Notice — a. General Rule. Although time was not originally an essential part of the contract, still a party may, by a proper notice, bind the other party, who is in default, to perform his part of the contract within a reasonable time to be specified in such notice; and if the party receiving such notice does not perform within the time so specified, his right to specific performance is lost.[56]

Heckard *v.* Sayre, 34 Ill. 142 (six days' delay in final payment); Steele *v.* Biggs, 22 Ill. 643 (although one half the price had been paid and improvements made); Chrisman *v.* Miller, 21 Ill. 227 (although one third the price had been paid).

Indiana.— Ewing *v.* Crouse, 6 Ind. 312.

Iowa.— Foot *v.* Bush, 100 Iowa 522, 69 N. W. 874; Miller *v.* Hughes, 95 Iowa 223, 63 N. W. 680; Carter *v.* Walters, 91 Iowa 727, 59 N. W. 201.

Massachusetts.— Garcin *v.* Pennsylvania Furnace Co., 186 Mass. 405, 71 N. E. 793.

Minnesota.— Judd *v.* Skidmore, 33 Minn. 140, 22 N. W. 183.

Nebraska.— Jewett *v.* Black, 60 Nebr. 173, 82 N. W. 375; Brown *v.* Ulrick, 48 Nebr. 409, 67 N. W. 168 [*overruling* Merriam *v.* Goodlett, 36 Nebr. 384, 54 N. W. 686]; Patterson *v.* Murphy, 41 Nebr. 818, 60 N. W. 1 (nearly one half the price had been paid); Canfield *v.* Tillotson, 25 Nebr. 857, 41 N. W. 812.

New York.— Baumann *v.* Pinkney, 14 Daly 241, 8 N. Y. St. 370 [*reversed* on other grounds in 118 N. Y. 604, 23 N. E. 916].

Ohio.— Scott *v.* Fields, 7 Ohio, Pt. II, 90.

Oregon.— Snider *v.* Lehnherr, 5 Oreg. 385.

Pennsylvania.—Axford *v.* Thomas, 160 Pa. St. 8, 28 Atl. 443.

See 44 Cent. Dig. tit. "Specific Performance," § 245 *et seq.*

That such a clause is for the benefit of the vendor who may waive vendee's default and sue for specific performance see Dana *v.* St. Paul Inv. Co., 42 Minn. 194, 44 N. W. 55.

52. Kimball *v.* Tooke, 70 Ill. 553; Thompson *v.* Colby, 127 Iowa 234, 103 N. W. 117 (burden is on vendor to show a declaration of forfeiture); Iowa R. Land Co. *v.* Mickel, 41 Iowa 402; Prince *v.* Griffin, 27 Iowa 514; Whiteman *v.* Perkins, 56 Nebr. 181, 76 N. W. 547; Hall *v.* Delaplaine, 5 Wis. 206, 68 Am. Dec. 57. That such a clause does not work a forfeiture in the absence of a declaration of forfeiture by vendor see Auxier *v.* Taylor, 102 Iowa 673, 72 N. W. 291.

Statutes.— Iowa Code, §§ 4299, 4300, prescribes certain procedure in declaring a forfeiture, and gives the vendee thirty days to perform conditions, etc. See Rea *v.* Ferguson, 126 Iowa 704, 102 N. W. 778; Struble *v.* Allin, 110 Iowa 101, 81 N. W. 164, no notice given.

53. *Georgia.*— Fulcher *v.* Daniel, 80 Ga. 74, 4 S. E. 259.

Iowa.— Gaughen *v.* Kerr, 99 Iowa 214, 68 N. W. 694 (delay of more than a year); Armstrong *v.* Pierson, 5 Iowa 317; Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477.

Michigan.— Morris *v.* Hoyt, 11 Mich. 9.

Minnesota.—Coles *v.* Shepard, 30 Minn. 446, 16 N. W. 153.

Mississippi.— Burroughs *v.* Jones, 79 Miss. 214, 30 So. 605.

New Jersey.— Grigg *v.* Landis, 21 N. J. Eq. 494.

North Dakota.— Fargusson *v.* Talcott, 7 N. D. 183, 73 N. W. 207, delay of three months.

South Dakota.— Pier *v.* Lee, 14 S. D. 600, 86 N. W. 642, delay of three months.

Wisconsin.— Hall *v.* Delaplaine, 5 Wis. 206, 68 Am. Dec. 57.

United States.— Camp Mfg. Co. *v.* Parker, 91 Fed. 705, 34 C. C. A. 55.

See 44 Cent. Dig. tit. "Specific Performance," § 245 *et seq.*

Contra.— Missouri River, etc., R. Co. *v.* Brickley, 21 Kan. 275.

54. See *supra*, II, D.

55. Steele *v.* Branch, 40 Cal. 3 (provision for forfeiture of improvements intended as penalty merely); Richmond *v.* Robinson, 12 Mich. 193; Sylvester *v.* Born, 132 Pa. St. 467, 19 Atl. 337; Decamp *v.* Feay, 5 Serg. & R. (Pa.) 323, 9 Am. Dec. 372; *In re* Dagenham Dock Co., L. R. 8 Ch. 1022, 43 L. J. Ch. 261, 21 Wkly. Rep. 898; Cornwall *v.* Henson, [1900] 2 Ch. 298, 69 L. J. Ch. 581, 82 L. T. Rep. N. S. 735, 16 T. L. R. 422, 49 Wkly. Rep. 42; Vernon *v.* Stephens, 2 P. Wms. 66, 24 Eng. Reprint 642. But see Gram *v.* Wasey, 45 Mich. 223, 7 N. W. 84, 762, no relief from forfeiture when plaintiff's own conduct renders relief unjust.

Otherwise when the first payment is a "deposit," that is, "a guarantee that the purchaser means business." Soper *v.* Arnold, 14 App. Cas. 429, 59 L. J. Ch. 214, 61 L. T. Rep. N. S. 702, 38 Wkly. Rep. 449; Howe *v.* Smith, 27 Ch. D. 89, 48 J. P. 773, 53 L. J. Ch. 1055, 50 L. T. Rep. N. S. 573, 32 Wkly. Rep. 802.

56. Notice given to the purchaser, plaintiff.— *Florida.*—Asia *v.* Hiser, 38 Fla. 71, 20 So. 796; Chabot *v.* Winter Park Co., 34 Fla.

b. Notice Before Default. It has been held, apparently without much consideration of the subject, that the notice may be given in advance of any default by the other party.[57] These cases appear to overlook the result, that one party, of his own volition, is enabled to introduce a new term into the contract making time of the essence.[58]

c. Must Give Reasonable Time. The notice, to be effectual, must prescribe a reasonable time, or it may be disregarded, and what is a reasonable time will vary with the circumstances of the individual case.[59]

d. Notice of Immediate Abandonment. A notice to take effect immediately or a notice that the contract is now at an end is ineffectual for such purpose;[60]

258, 15 So. 756, 43 Am. St. Rep. 192, forty days reasonable.

Illinois.— Ditto *v.* Harding, 73 Ill. 117.

Indiana.— Boldt *v.* Early, 33 Ind. App. 434, 70 N. E. 271, 104 Am. St. Rep. 255.

Nebraska.— Foster *v.* Levy, 32 Nebr. 404, 49 N. W. 450, 15 L. R. A. 737.

New York.— Myers *v.* De Mier, 52 N. Y. 647 [*affirming* 4 Daly 343]; Pratt *v.* Clark, 118 N. Y. App. Div. 633, 103 N. Y. Suppl. 612 [*affirming* 49 Misc. 146, 98 N. Y. Suppl. 700]; Tibbs *v.* Morris, 44 Barb. 138; Klingenstein *v.* Alexander, 57 Misc. 236, 109 N. Y. Suppl. 143; Hatch *v.* Cobb, 4 Johns. Ch. 559.

Ohio.— Campbell *v.* Hicks, 19 Ohio St. 433.

Utah.— Roberts *v.* Braffett, 33 Utah 51, 92 Pac. 789.

Canada.— O'Keefe *v.* Taylor, 2 Grant Ch. (U. C.) 95.

Notice given to the vendor, plaintiff.— Schmidt *v.* Reed, 132 N. Y. 108, 30 N. E. 373; Dominick *v.* Michael, 4 Sandf. (N. Y.) 374; Leinhardt *v.* Solomon, 57 Misc. (N. Y.) 238, 109 N. Y. Suppl. 144; Macbryde *v.* Weekes, 22 Beav. 533, 2 Jur. N. S. 918, 52 Eng. Reprint 1214 (one month); Nott *v.* Riccard, 22 Beav. 307, 2 Jur. N. S. 1038, 25 L. J. Ch. 618, 4 Wkly. Rep. 269, 52 Eng. Reprint 1126 (two weeks); Benson *v.* Lamb, 9 Beav. 502, 15 L. J. Ch. 218, 50 Eng. Reprint 438 (ten days); Southcombe *v.* Exeter, 6 Hare 213, 11 Jur. 725, 16 L. J. Ch. 378, 31 Eng. Ch. 213, 67 Eng. Reprint 1145 (two months).

Agreement for lease see Sharp *v.* Wright, 28 Beav. 150, 54 Eng. Reprint 323 (lease of coal mine); Huxham *v.* Llewellyn, 28 L. T. Rep. N. S. 577, 21 Wkly. Rep. 776; Heophy *v.* Hill, 2 Sim. & St. 29, 1 Eng. Ch. 29, 57 Eng. Reprint 255.

Writing.— It has been held that the notice need not be in writing. Asia *v.* Hiser, 38 Fla. 71, 20 So. 796.

57. Asia *v.* Hiser, 38 Fla. 71, 20 So. 796 (time may, by notice, be made essential as to the payment of each and every successive instalment); Ditto *v.* Harding, 73 Ill. 117 (three days' notice); Schmidt *v.* Reed, 132 N. Y. 108, 30 N. E. 373 (three days' notice to vendor).

58. In England a party is not entitled to give notice unless there has been some default or unreasonable delay by the other party. Green *v.* Sevin, 13 Ch. D. 589, 44 J. P. 282, 49 L. J. Ch. 166, 41 L. T. Rep. N. S. 724, per Fry, J.

59. *Missouri.*— Mastin *v.* Grimes, 88 Mo. 478, five days to vendee insufficient.

New York.— See Williams *v.* Kierney, 6 N. Y. St. 560.

North Dakota.— Arnett *v.* Smith, 11 N. D. 55, 88 N. W. 1037.

South Carolina.— Thompson *v.* Dulles, 5 Rich. Eq. 370, nine days too short for vendor.

England.— Crawford *v.* Toogood, 13 Ch. D. 153, 49 L. J. Ch. 108, 41 L. T. Rep. N. S. 549, 28 Wkly. Rep. 248 (thirty-five days too short for vendee); McMurray *v.* Spicer, L. R. 5 Eq. 527, 37 L. J. Ch. 505, 16 Wkly. Rep. 332 (one week too short for vendor); Wells *v.* Maxwell, 32 Beav. 408, 55 Eng. Reprint 160 [*affirmed* in 9 Jur. N. S. 1021, 33 L. J. Ch. 44, 8 L. T. Rep. N. S. 713, 11 Wkly. Rep. 842] (one month too short for vendor); Pegg *v.* Wisden, 16 Beav. 239, 16 Jur. 1105, 1 Wkly. Rep. 43, 51 Eng. Reprint 770 (six weeks too short for vendee); Parkin *v.* Thorold, 16 Beav. 59, 16 Jur. 959, 22 L. J. Ch. 170, 51 Eng. Reprint 698 (fifteen days too short for vendor); King *v.* Wilson, 6 Beav. 124, 49 Eng. Reprint 772 (one week too short for vendor).

The question of the reasonableness of the notice must be judged of as of the date when it is given. "Such a notice ought to fix the longest time that could be reasonably required for the performance of the acts which remained to be done." Crawford *v.* Toogood, 13 Ch. D. 153, 158, 49 L. J. Ch. 108, 41 L. T. Rep. N. S. 549, 28 Wkly. Rep. 248, per Fry, J. It is plain that the notice in some of the American cases, *supra*, did not come up to this requirement.

The notice must be explicit, to the effect that the contract will be considered at an end if not completed within the time set. Cosby *v.* Honaker, 57 W. Va. 512, 50 S. E. 610; Reynolds *v.* Nelson, 6 Madd. 18, 22 Rev. Rep. 225, 56 Eng. Reprint 995.

Acquiescence in notice.— It is said that if the party to whom the notice is given makes no reply to it, he must be held to have acquiesced, but this is doubtful. Chabot *v.* Winter Park Co., 34 Fla. 258, 15 So. 756, 43 Am. St. Rep. 192.

The effect of the notice is waived by proceeding in the purchase after the expiration of the time fixed. King *v.* Wilson, 6 Beav. 124, 49 Eng. Reprint 772.

60. *Illinois.*— Watson *v.* White, 152 Ill. 364, 38 N. E. 902; Thayer *v.* Wilmington Star Min Co., 105 Ill. 540; Murphy *v.* Lockwood, 21 Ill. 611.

although it may have the effect of causing the court to scrutinize more carefully the subsequent delay of the party receiving the notice.[61]

5. Excuses For Default in Respect to Time. Non-performance at the contract time is excused when defendant himself was the cause of the delay,[62] as by evading tender or performance by plaintiff;[63] and it seems by accident or by an honest mistake on plaintiff's part.[64] His poverty and inability to pay is no excuse.[65] The vendor cannot insist upon a forfeiture for non-payment if he was unable to convey a perfect title according to the agreement;[66] and it seems in general that a well-founded objection to the vendor's title sufficiently excuses the vendee's default in respect to time of payment.[67] Whether a forfeiture will be relieved against on account of the vendee's long possession and expenditure in improvements is a question on which the cases are at variance.[68]

6. Waiver of Time Limit — a. By Agreement For Extension. Performance within the time specified by the contract may be waived by an oral or written agreement extending the time.[69]

New York.— Beebe *v.* Dowd, 22 Barb. 255; Dominick *v.* Michael, 4 Sandf. 374.
West Virginia.— Cosby *v.* Honaker, 57 W. Va. 512, 50 S. E. 610.
England.— Webb *v.* Hughes, L. R. 10 Eq. 281, 39 L. J. Ch. 606, 18 Wkly. Rep. 749; Taylor *v.* Brown, 2 Beav. 180, 9 L. J. Ch. 14, 17 Eng. Ch. 180, 48 Eng. Reprint 1149.
Canada.— McDonald *v.* Elder, 1 Grant Ch. (U. C.) 513.

As to right of the vendee to repudiate on discovering that the vendor has no title see *infra*, VI, D, 7, c, (II); and Robinson *v.* Harris, 21 Can Sup. Ct. 390 [*reversing* 19 Ont. App. 134 (*affirming* 21 Ont. 43)].

61. See *infra*, VI, F, 7.

62. *Alabama.*— Bass *v.* Gilliland, 5 Ala. 761.
Arizona.— Walton *v.* McKinney, (1908) 94 Pac. 1122.
Connecticut.— Potter *v.* Tuttle, 22 Conn. 512.
Delaware.— Wilkins *v.* Evans, 1 Del. Ch. 156.
Illinois.— Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211.
Iowa.— Clark *v.* Sears, 3 Iowa 104.
Kentucky.— Hart *v.* Brand, 1 A. K. Marsh. 159, 10 Am. Dec. 715.
Maine.— Hull *v.* Noble, 40 Me. 459, copy of agreement withheld by vendor.
Michigan.— Hickman *v.* Chaney, 155 Mich. 217, 118 N. W. 993.
Rhode Island.— Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717, defendant repudiated.
United States.— Cheney *v.* Libbey, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818.
England.— Burke *v.* Smyth, 9 Ir. Eq. 135, 3 J. & L. 193 (agreement for lease); Morse *v.* Merest, 6 Madd. 26, 22 Rev. Rep. 226, 56 Eng. Reprint 999 (arbitration delayed by defendant).
Canada.— McSweeney *v.* Kay, 15 Grant Ch. (U. C.) 432.

63. Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Dynan *v.* McCulloch, 46 N. J. Eq. 11, 18 Atl. 822; Baumann *v.* Pinckney, 118 N. Y. 604, 23 N. E. 916.

64. Mistake.— Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Todd *v.* Taft, 7 Allen (Mass.) 371; Pierce *v.* Morse, 65 N. H. 196, 18 Atl. 792; Shipman *v.* Cummins, 19 N. Y. Suppl. 974.

Accident preventing exercise of option to renew lease. Monihon *v.* Wakelin, 6 Ariz. 225, 56 Pac. 735.

65. Machold *v.* Farnan, 14 Ida. 258, 94 Pac. 170; Milner *v.* Willard, 34 Ill. 38.

That infancy and widowhood of the vendee's heirs does not extend the time of payment see Cornell *v.* Hayden, 114 N. Y. 271, 21 N. E. 417.

66. Walton *v.* McKinney, (Ariz. 1908) 94 Pac. 1122; Peck *v.* Brighton Co., 69 Ill. 200; Wallace *v.* McLaughlin, 57 Ill. 53; Mix *v.* Beach, 46 Ill. 311.

67. Farley *v.* Vaughn, 11 Cal. 227; Potter *v.* Tuttle, 22 Conn. 512; Derrett *v.* Bowman, 61 Md. 526; Hobart *v.* Frederiksen, 20 S. D. 248, 105 N. W. 168.

But that an unfounded objection to the title is a bar to the vendee's suit, since he cannot use the action of specific performance to gain time in which to make payment see Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 46 N. Y. Suppl. 707 [*affirmed* in 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357 (*affirmed* in 163 N. Y. 410, 57 N. E. 629)].

And a defect in title not discovered until after the default, and which is therefore not the reason for the default, cannot be urged in excuse. Shortall *v.* Mitchell, 57 Ill. 161.

And a failure of defendant to furnish an abstract of title, as agreed, does not excuse plaintiff's failure to tender payment within the time limited. Kelsey *v.* Crowther, 162 U. S. 404, 16 S. Ct. 808, 40 L. ed. 1017; Kentucky Distilleries, etc., Co. *v.* Warwick Co., 109 Fed. 280, 48 C. C. A. 363.

68. Relieved against.— Merriam *v.* Goodlett, 36 Nebr. 384, 54 N. W. 686; Edgerton *v.* Peckham, 11 Paige (N. Y.) 352.

Not relieved against.— Steele *v.* Biggs, 22 Ill. 643. See *supra*, VI, D, 3, d.

69. *Alabama.*— Bass *v.* Gilliland, 5 Ala. 761.
California.— Noyes *v.* Schlegel, 9 Cal. App. 516, 99 Pac. 726; Spencer *v.* McCament, 7 Cal. App. 84, 93 Pac. 682.
Illinois.— Kissack *v.* Bourke, 224 Ill. 352,

b. By Conduct. The default as to time may be waived by the conduct of the other party; as, by acts recognizing the contract as subsisting, by receiving payment, or by continuing the negotiations.[70]

79 N. E. 619; Carroll *v.* Tomlinson, 192 Ill. 398, 61 N. E. 484, 85 Am. St. Rep. 344; O'Neal *v.* Boone, 82 Ill. 589; Dement *v.* Bonham, 26 Ill. 158, no agreement but such assurances as were binding on vendor's conscience.

Maine.— Hull *v.* Sturdivant, 46 Me. 34.

Massachusetts.— Staples *v.* Mullen, 196 Mass. 132, 81 N. E. 877.

Michigan.— Kimball *v.* Goodburn, 32 Mich. 10. See Hickman *v.* Chaney, 155 Mich. 217, 118 N. W. 993.

Nebraska.— Izard *v.* Kimmel, 26 Nebr. 51, 41 N. W. 1068.

West Virginia.— Cosby *v.* Honaker, 57 W. Va. 512, 50 S. E. 610.

Wisconsin.— Benson *v.* Cutler, 53 Wis. 107, 10 N. W. 82.

England.— Parkin *v.* Thorold, 16 Beav. 59, 16 Jur. 959, 22 L. J. Ch. 170, 51 Eng. Reprint 698.

The language of such extension may of course be such that time is of the essence of the extension. Machold *v.* Farnan, 14 Ida. 258, 94 Pac. 170; Barclay *v.* Messenger, 43 L. J. Ch. 449, 30 L. T. Rep. N. S. 350, 22 Wkly. Rep. 522.

Extent of waiver.—A contract for the sale of designated real estate stipulated for payment in instalments, and provided that in consideration of the agreement the purchaser might exercise the option to purchase adjacent lands for a specified sum at any time within a time fixed, and provided for a forfeiture on his failure to comply with the contract. The vendor waived a forfeiture for non-payment of instalments when due. The adjacent lands were necessary to the purchaser's proper use of the designated real estate. It was held that the waiver of the forfeiture was not limited merely to the designated real estate, but went to the entire contract, and the purchaser might exercise his option to purchase the adjacent lands. Noyes *v.* Schlegel, 9 Cal. App. 516, 99 Pac. 726.

70. *Arkansas.*— Turpin *v.* Beach, 88 Ark. 604, 115 S. W. 404. In this case deferred payments on a contract for the sale of land were secured by small notes, running for a series of years. The contract provided for forfeiture on default, and that the amount paid should then be treated as rent, and contemplated a surrender of the notes if a forfeiture was declared. None of the notes but the first were paid on time, but payment of the first five, and part of the sixth, was received by the vendor when he declared a forfeiture, who offered to cancel the notes only on the vendee surrendering his copy of the contract properly assigned. The vendee instead assigned the contract to complainants, who immediately tendered the balance of the purchase-price, which was refused. It was held that complainants were entitled to specific performance.

California.— Noyes *v.* Schlegel, 9 Cal. App. 516, 99 Pac. 726.

Florida.— Shouse *v.* Doane, 39 Fla. 95, 21 So. 807, forfeiture waived by deliberate acts recognizing the contract as subsisting.

Georgia.— Moody *v.* Griffin, 60 Ga. 459.

Illinois.— Watson *v.* White, 152 Ill. 364, 38 N. E. 902; Lancaster *v.* Roberts, 144 Ill. 213, 33 N. E. 27 (where vendor promised to cure defects in title); Baker *v.* Bishop Hill Colony, 45 Ill. 264 (continuing to act on the contract).

Iowa.— Des Moines University *v.* Polk County Homestead, etc., Co., 87 Iowa 36, 53 N. W. 1080 (permitting vendee to expend money in reliance on the contract); Armstrong *v.* Pierson, 5 Iowa 317.

Maine.— Snowman *v.* Harford, 55 Me. 197; Low *v.* Treadwell, 12 Me. 441.

New Hampshire.— Pierce *v.* Morse, 65 N. H. 196, 18 Atl. 792.

New Jersey.— Keyport Brick, etc., Mfg. Co. *v.* Lorillard, (Ch. 1890) 19 Atl. 381.

New York.— McClaskey *v.* Albany, 64 Barb. 310 (by continuing negotiations); Schroeppel *v.* Hopper, 40 Barb. 425; Viele *v.* Troy, etc., R. Co., 21 Barb. 381 [*affirmed* in 20 N. Y. 184] (vendee waives by continuing to occupy the land).

Pennsylvania.— Sylvester *v.* Born, 132 Pa. St. 467, 19 Atl. 337, waived by vendor's continued recognition of the contract.

South Carolina.— Ramsay *v.* Brailsford, 2 Desauss. Eq. 582, 2 Am. Dec. 698.

Wisconsin.— Phillips *v.* Carver, 99 Wis. 561, 75 N. W. 432; Minert *v.* Emerick, 6 Wis. 355, vendor affirms contract by suing for price.

United States.— German Sav. Inst. *v.* De la Vergne Refrigerating Mach. Co., 70 Fed. 146, 17 C. C. A. 34.

England.— Hudson *v.* Bartram, 3 Madd. 440, 56 Eng. Reprint 566; Hipwell *v.* Knight, 4 L. J. Exch. 52, 1 Y. & C. Exch. 401 (continuing negotiations); Seton *v.* Slade, 7 Ves. Jr. 264, 6 Rev. Rep. 124, 32 Eng. Reprint 108.

Canada.— See Robinson *v.* Harris, 21 Can. Sup. Ct. 390 [*reversing* 19 Ont. App. 134 (*affirming* 21 Ont. 43)], continuing negotiations.

Waiver by receiving payments see *infra*, VI, F, 9, h, (II).

Waiver of laches see *infra*, VI, F, 9, h.

Waiver of time to exercise option to purchase.—Whether acts which would amount to a waiver of time in an ordinary contract of sale and purchase operate to extend the time for the exercise of an option is a matter of some doubt. See Coleman *v.* Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417 (verbal extension of time ineffectual); Codding *v.* Wamsley, 1 Hun (N. Y.) 585, 4 Thomps. & C. 49 [*affirmed* in 60 N. Y. 644] (same). On the other hand, see Keyport Brick, etc., Mfg. Co. *v.* Lorillard, (N. J. Ch.

7. Time For Vendor to Perfect Title — a. In General. For a vendor to enforce specific performance of a contract of sale, it is not essential that when he made the contract he should have had such title and capacity to convey the property, or such means and right to acquire it, as would have enabled him to fulfil it on his part. It is sufficient if he is able to convey the property when by the terms of the contract or the equities of the case he is required to do so in order to entitle himself to the consideration.[71]

b. When Contract Was to Be Performed. By the great weight of authority it is sufficient if the vendor was able to make a good title at the time when the contract was to be performed.[72] It is otherwise in a few states where the vendor had no interest in the land but entered into the contract as a mere speculation. But it is enough if at the time of the contract he had an equitable title, with the right to call for a conveyance and acquires the title legal before the time for completion.[73]

c. Where Time Is Not of the Essence — (i) *General Rule.* When time is not of the essence of the contract, and the vendor finds his title defective, he is entitled to a reasonable time and opportunity to obtain a perfect title.[74]

(ii) *Vendee May Rescind on Discovering Lack of Title.* But this right of the vendor to time in which to perfect his title is subject to the limitation, in England and in several of the states, that the vendee, on learning of the state of the title, may rescind the contract by seasonably insisting on his objection. He cannot be compelled to take a title acquired by the vendor after such repudiation.[75]

1890) 19 Atl. 381 (time waived by encouraging plaintiff in mistaken belief as to date of expiration of the option); D'Arras *v.* Keyser, 26 Pa. St. 249; Pegg *v.* Wisden, 16 Beav. 239, 16 Jur. 1105, 1 Wkly. Rep. 43, 51 Eng. Reprint 770.

Death of vendor.—Where the vendor of land died two days before the day fixed for consummation of the sale in the contract of sale, and the vendee made no tender of performance, and the executor of the vendor tendered performance within a reasonable time after obtaining authority to do so, it was held that the failure of each party to the contract to perform on the day fixed was a waiver by each of the default of the other, and the executor was entitled to specific performance of the contract. Griffith *v.* Stewart, 31 App. Cas. (D. C.) 29.

71. Dresel *v.* Jordan, 104 Mass. 407. See also *supra*, IV, E, 7.

72. *Illinois.*— Gibson *v.* Brown, 214 Ill. 330, 73 N. E. 578.

Kentucky.— Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013, 13 Ky. L. Rep. 905.

Maryland.—Maryland Constr. Co. *v.* Kuper, 90 Md. 529, 45 Atl. 197.

Massachusetts.— Dresel *v.* Jordan, 104 Mass. 407.

Minnesota.— Townshend *v.* Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 Am. St. Rep. 736, 3 L. R. A. 739.

Montana.— Cobban *v.* Hecklen, 27 Mont. 245, 70 Pac. 805.

Nebraska.— Johnson *v.* Higgins, 77 Nebr. 35, 108 N. W. 168.

United States.— Day *v.* Mountin, 137 Fed. 756, 70 C. C. A. 190. *Contra*, Norris *v.* Fox, 45 Fed. 406.

As to the objection of lack of mutuality see *supra*, IV, E, 7.

73. Townshend *v.* Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 Am. St. Rep. 736, 3 L. R. A. 739; Moss *v.* Hanson, 17 Pa. St. 379; Tiernan *v.* Roland, 15 Pa. St. 429; Ley *v.* Huber, 3 Watts (Pa.) 367. See the obsolete case of Tendring *v.* London, 2 Eq. Cas. Abr. 680, pl. 9, 22 Eng. Reprint 572.

74. Logan *v.* Bull, 78 Ky. 607; Gaither *v.* O'Doherty, 12 S. W. 306, 11 Ky. L. Rep. 594; Dresel *v.* Jordan, 104 Mass. 407; Reeves *v.* Dickey, 10 Gratt. (Va.) 138 (state of title being known by vendee at time of contract); Dodson *v.* Hays, 29 W. Va. 577, 2 S. E. 415 (vendee knew of defects).

If the rule were otherwise the vendor might be subjected to heavy costs in order to have his title cleared, and then not be able to require the purchaser to perform his part of the contract. Maryland Constr. Co. *v.* Kuper, 90 Md. 529, 45 Atl. 197.

Sufficient if vendor has title at commencement of action.—Wooding *v.* Crain, 10 Wash. 35, 38 Pac. 756; Williamson *v.* Neeves, 94 Wis. 656, 69 N. W. 806.

75. *Maryland.*— North Ave. Land Co. *v.* Baltimore, 102 Md. 475, 63 Atl. 115.

Massachusetts.— Richmond *v.* Gray, 3 Allen 25.

Virginia.— Jackson *v.* Ligon, 3 Leigh 161.

England.— Bellamy *v.* Debenham, [1891] 1 Ch. 412, 60 L. J. Ch. 166, 64 L. T. Rep. N. S. 478, 39 Wkly. Rep. 257; Wylson *v.* Dunn, 34 Ch. D. 569, 51 J. P. 452, 56 L. J. Ch. 855, 56 L. T. Rep. N. S. 192, 35 Wkly. Rep. 405; Brewer *v.* Broadwood, 22 Ch. D. 105, 52 L. J. Ch. 136, 47 L. T. Rep. N. S. 508, 31 Wkly. Rep. 115; Weston *v.* Savage, 10 Ch. D. 736, 48 L. J. Ch. 239, 27 Wkly. Rep. 654; Forrer *v.* Nash, 35 Beav. 167, 11 Jur. N. S. 789, 6 New Rep. 361, 14 Wkly. Rep. 8, 55 Eng. Reprint 858; Dowson *v.* Solomon, 1 Dr. & Sm. 1, 6 Jur. N. S. 33, 29 L. J. Ch. 129, 1 L. T. Rep. N. S. 246,

(III) *PERFECTING TITLE PENDING SUIT.* In accordance with the general rule, the vendor, bringing suit within a reasonable time, and using diligence in remedying the defects in his title, is allowed to perfect the title pending the suit.[76]

(IV) *BEFORE TRIAL OR DECREE.* It is therefore sufficient if the title is ready at the time of trial or hearing,[77] or, by the great weight of authority, if it is ready at the time of the decree.[78]

(V) *CONTINUANCE FOR PERFECTING TITLE.* The vendor may be allowed time after bringing suit to perfect his title or obtain evidence of its sufficiency, but such privilege is not granted as a matter of course.[79]

E. Parol Rescission or Abandonment — 1. BY EXPRESS AGREEMENT. A written contract may be rescinded or abandoned by parol by mutual agreement,[80]

8 Wkly. Rep. 123, 62 Eng. Reprint 278; Hoggart *v.* Scott, 9 L. J. Ch. O. S. 54, 1 Russ. & M. 293, 5 Eng. Ch. 293, 39 Eng. Reprint 113, Taml. 500, 12 Eng. Ch. 500, 48 Eng. Reprint 199, 31 Rev. Rep. 112.

Canada.— Robinson *v.* Harris, 21 Ont. 43 [*affirmed* in 19 Ont. App. 134 (*reversed* on other grounds in 21 Can. Sup. Ct. 390)]; Paisley *v.* Wills, 19 Ont. 303.

But that a vendee knowing, when he entered into the contract, the vendor's lack of title, cannot withdraw before the time fixed for completion see St. Denis *v.* Higgins, 24 Ont. 230.

76. Logan *v.* Bull, 78 Ky. 607; Finnegan *v.* Summers, 91 S. W. 261, 28 Ky. L. Rep. 1180; Hisle *v.* Witherspoon, 42 S. W. 842, 19 Ky. L. Rep. 1013; Gaither *v.* O'Doherty, 12 S. W. 306, 11 Ky. L. Rep. 594 (after suit is brought against vendor for rescission); Scannell *v.* American Soda Fountain Co., 161 Mo. 606, 61 S. W. 889; Oakey *v.* Cook, 41 N. J. Eq. 350, 7 Atl. 495; Second Union Co-operative Land, etc., Soc. *v.* Hardy, 31 N. J. Eq. 442; Reiners *v.* Niederstein, 55 N. Y. App. Div. 80, 67 N. Y. Suppl. 41. But see Meshaw *v.* Southworth, 133 Mich. 335, 94 N. W. 1047; Huber *v.* Burke, 11 Serg. & R. (Pa.) 238; Spencer *v.* Sandusky, 46 W. Va. 582, 33 S. E. 221, where vendor knowingly concealed or misrepresented the state of his title.

77. Hugel *v.* Habel, 56 Misc. (N. Y.) 402, 106 N. Y. Suppl. 581; Baldwin *v.* Salter, 8 Paige (N. Y.) 473; Pugh *v.* Chesseldine, 11 Ohio 109, 37 Am. Dec. 414; Wilson *v.* Tappan, 6 Ohio 172; McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381; Wynn *v.* Morgan, 7 Ves. Jr. 202, 32 Eng. Reprint 82. It is sufficient if it appears, by report of the master, that a good title can be given at the time of the report. Garden St. Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; Paisley *v.* Wills, 19 Ont. 303.

78. *Maryland.*— Maryland Constr. Co. *v.* Kuper, 90 Md. 529, 45 Atl. 197.

Missouri.— Luckett *v.* Williamson, 37 Mo. 388.

Nebraska.— Seaver *v.* Hall, 50 Nebr. 878, 70 N. W. 373.

New Jersey.— Agens *v.* Koch, (Ch. 1908) 70 Atl. 348.

New York.— Jenkins *v.* Fahey, 73 N. Y. 355 [*reversing* 11 Hun 351]; Seymour *v.* Delancy, 3 Cow. 445, 15 Am. Dec. 270 [*reversing* 6 Johns. Ch. 222]; Brown *v.* Haff, 5 Paige 235, 28 Am. Dec. 425; Pierce *v.* Nichols, 1 Paige 244.

Pennsylvania.— Moss *v.* Hanson, 17 Pa. St. 379; Tarr *v.* Glading, 1 Phila. 370.

South Carolina.— Lyles *v.* Kirkpatrick, 9 S. C. 265; Dubose *v.* James, McMull. Eq. 55.

Tennessee.— Fraker *v.* Brazelton, 12 Lea 278; Mullens *v.* Big Creek Gap, etc., Co., (Ch. App. 1895) 35 S. W. 409.

Virginia.— Peers *v.* Barnett, 12 Gratt. 410, title becomes good by lapse of time.

West Virginia.— Core *v.* Wigner, 32 W. Va. 277, 9 S. E. 36, title becomes good by lapse of time.

Wisconsin.— Gates *v.* Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

United States.— Hepburn *v.* Dunlop, 1 Wheat. 179, 4 L. ed. 65; Hepburn *v.* Auld, 5 Cranch 262, 3 L. ed. 96; Kentucky Distilleries, etc., Co. *v.* Blanton, 149 Fed. 31, 80 C. C. A. 343 [*affirming* 120 Fed. 218].

England.— Langford *v.* Pitt, 2 P. Wms. 629, 24 Eng. Reprint 890.

So where a contract provided for the satisfaction of a judgment by plaintiff, it was sufficient that he was able to enter satisfaction at the time of the decree. Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776.

79. Beckwith *v.* Marryman, 2 Dana (Ky.) 371; Grillenberger *v.* Spencer, 7 Misc. (N. Y.) 601, 27 N. Y. Suppl. 864. But the "courts have never gone so far as to hold the action open and undetermined to enable the seller to bring suit against other parties, and try the experiment of an effort to secure a good title at some uncertain date in the future." People *v.* Stock Brokers' Bldg. Co., 92 N. Y. 98 [*reversing* 28 Hun 274]. Granting time to perfect title is a matter of favor; it will not be granted where the vendor fraudulently concealed the defect. Christian *v.* Cabell, 22 Gratt. (Va.) 82. And see Jackson *v.* Ligon, 3 Leigh (Va.) 161.

80. *Arkansas.*—Walworth *v.* Miles, 23 Ark. 653.

Illinois.— Cuppy *v.* Allen, 176 Ill. 162, 52 N. E. 61; Crane *v.* Crane, 81 Ill. 165; Bowman *v.* Cunningham, 78 Ill. 48.

Indiana.— Jaques *v.* Vigo County, 2 Blackf. 403.

Kentucky.—Washington *v.* McGee, 7 T. B. Mon. 131.

Mississippi.— Perry *v.* McLain, 66 Miss. 145, 5 So. 518.

Missouri.— Tolson *v.* Tolson, 10 Mo. 736.

but by some authorities such parol waiver or rescission is not a bar until it is acted upon or partially carried out.[81]

2. Implied. Abandonment of the contract may be inferred from circumstances or the conduct of the parties inconsistent with an intention to perform.[82]

Nebraska.—Swanson *v.* James, 82 Nebr. 42, 116 N. W. 780, a vendee in a contract for the sale of real estate who in writing voluntarily relinquishes his rights therein and leases the land from his former vendor cannot thereafter maintain an action for specific performance.

New Jersey.— Ryno *v.* Darby, 20 N. J. Eq. 231, parol agreement to substitute a new contract.

New York.—Arnoux *v.* Homans, 25 How. Pr. 427.

Oklahoma.— Saxon *v.* White, 21 Okla. 194, 95 Pac. 783.

Pennsylvania. — Boyce *v.* McCulloch, 3 Watts & S. 429, 39 Am. Dec. 35.

Tennessee.—England *v.* Jackson, 3 Humphr. 584.

Rescission and novation.— For instances of rescission and novation see Harrison *v.* Polar Star Lodge, 116 Ill. 279, 5 N. E. 543; Price *v.* McGown, 10 N. Y. 465; McCully *v.* McLean, 48 W. Va. 625, 37 S. E. 559, parol contract.

Abandonment of oral contract.— For instances see Harrison *v.* Harrison, 36 W. Va. 556, 15 S. E. 87; York *v.* Passaic Rolling-Mill Co., 30 Fed. 471.

81. Wilkins *v.* Evans, 1 Del. Ch. 156; McDavid *v.* Sutton, 205 Ill. 544, 68 N. E. 1064 (conditions on which subsequent agreement was to take effect not complied with); Mathison *v.* Wilson, 87 Ill. 51; Walker *v.* Wheatly, 2 Humphr. (Tenn.) 119; Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 32 Eng. Reprint 921.

Rescission, being acted upon, a bar.— Maxfield *v.* Terry, 4 Del. Ch. 618; Huffman *v.* Hummer, 18 N. J. Eq. 83, where party induced by the waiver to enter into engagements inconsistent with the performance of the original contract.

A rescission obtained by fraud is no defense. Jones *v.* Booth, 38 Ohio St. 405.

The attempt of a party to a contract to rescind the contract without having any grounds therefor did not affect the right of the adverse party to specifically enforce the contract. Swanston *v.* Clark, 153 Cal. 300, 95 Pac. 1117.

Inconsistent findings.—A finding of fact that the contract sought to be enforced was terminated on a certain date is inconsistent with a conclusion of law that the vendee is entitled to performance. Whalen *v.* Stuart, 194 N. Y. 495, 87 N. E. 819 [*reversing* 105 N. Y. App. Div. 376, 94 N. Y. Suppl. 235, 123 N. Y. App. Div. 446, 108 N. Y. Suppl. 355].

82. *Arizona.*—Walton *v.* McKinney, (1908) 94 Pac. 1122.

California.— Conrad *v.* Lindley, 2 Cal. 173, vendee sets up hostile title.

Illinois.— Lasher *v.* Loeffler, 190 Ill. 150, 60 N. E. 85.

Kentucky.— McIntire *v.* Johnson, 4 Bibb 48 (agreement to compromise disputed claim to land by an equal division; abandonment shown by one party's sale of all the land); Hyden *v.* Perkins, 99 S. W. 290, 30 Ky. L. Rep. 583.

North Dakota.—Wadge *v.* Kittleson, 12 N. D. 452, 97 N. W. 856.

Pennsylvania. — Washabaugh *v.* Stauffer, 81* Pa. St. 497.

Washington.—Where a purchaser, under a contract for the sale of land which provides for the payment by him of the price in instalments and of taxes and assessment, and which made time of the essence of the contract, fails for three years to make any payments whatever either of the instalments or interest thereon, or of the taxes and assessments, and quits possession of the property, he abandons the contract, and cannot enforce specific performance thereof, especially where the property, being western land, was subject to "boom" fluctuations. Voight *v.* Fidelity Inv. Co., 49 Wash. 612, 96 Pac. 162.

Laches giving rise to a presumption of abandonment see *infra*, VI, F, 4, a.

Plaintiff's repudiation or disclaimer of interest in the agreement a bar to relief see Weir Inv. Co. *v.* Scattergood, 42 Colo. 54, 94 Pac. 19 (vendee); Tobey *v.* Foreman, 79 Ill. 489 (vendor); McClellan *v.* Darrah, 50 Ill. 249; Hough *v.* Coughlan, 41 Ill. 130 (for eight years vendee disclaimed all interest); Riley *v.* Allen, 71 Kan. 625, 81 Pac. 186; Williams *v.* Starke, 2 B. Mon. (Ky.) 196 (plaintiff, several years previously, had brought suit to rescind); Newman *v.* Johnson, 108 Md. 367, 70 Atl. 116 (refusal of vendee to accept title); Oliver Min. Co. *v.* Clark, 65 Minn. 277, 68 N. W. 23 (a person who has refused title because of alleged defects cannot afterward sue a purchaser from his vendor); Eastman *v.* Plumer, 46 N. H. 464; Pyatt *v.* Lyons, 51 N. J. Eq. 308, 27 Atl. 934 (vendor sold premises after plaintiff's refusal to perform); Monds *v.* Birchell, 59 Misc. (N. Y.) 287, 112 N. Y. Suppl. 249 (rescission by vendee for defect in title); May *v.* Getty, 140 N. C. 310, 53 S. E. 75; Mahon *v.* Leech, 11 N. D. 181, 90 N. W. 807 (plaintiff abandoned contract and surrendered possession); Porter *v.* Dougherty, 25 Pa. St. 405 (surrender of possession and eleven years' delay); Huber *v.* Burke, 11 Serg. & R. (Pa.) 238 (vendor's mortgaging the land); Gish *v.* Jamison, 96 Va. 312, 31 S. E. 521 (plaintiff sued for rescission); Johnson *v.* Lara, 50 Wash. 368, 97 Pac. 231 (termination by vendee for defects in title); Holgate *v.* Eaton, 116 U. S. 33, 6 S. Ct. 224, 29 L. ed. 538 (vendor). Where a vendee, with knowledge of the facts bearing upon the title of his vendor, declines to accept a warranty deed to the land agreed to be conveyed in a unilateral contract, and refuses to pay the price, he rescinds the agreement, and cannot thereafter recall his rescission and demand a conveyance

3. Proof. The proof of an oral waiver or abandonment must be clear.[83]

F. Laches[84] **— 1. In General.** Although time is not of the essence of the contract, plaintiff's delay for an unreasonable time either in performing its terms, or in prosecuting his claim for specific performance by filing a bill, may amount to such laches on his part as will disentitle him to the aid of the court.[85] In the oft

from his vendor of such title as the latter may possess. Walton *v.* McKinney, (Ariz. 1908) 94 Pac. 1122.

Building line restrictions.— Plaintiffs did not waive the right to enforce a building line restriction by failing to prosecute other owners who built out projections in some of the higher stories of their buildings. Codman *v.* Bradley, 201 Mass. 361, 87 N. E. 591.

Contract for lease.— Specific performance of an agreement for a lease will not be decreed in favor of a tenant, who shows by his conduct and representations that he has abandoned the agreement. Garrett *v.* Besborough, 2 Dr. & War. 441, 2 Ir. Eq. 180.

Waiver of option to take lease.—A tenant under an agreement, with an option of taking a lease, was held not to have waived the option by declining to take a lease when asked so to do, no step being taken to determine the tenancy. Hersey *v.* Giblett, 18 Beav. 174, 23 L. J. Ch. 818, 2 Wkly. Rep. 206, 52 Eng. Reprint 69.

83. *Indiana.*— Creamer *v.* Ogden, 16 Ind. 176, not inferred from fact that vendee leaves the state.

New Jersey.—Huffman *v.* Hummer, 18 N. J. Eq. 83.

North Carolina.— Robinett *v.* Hamby, 132 N. C. 353, 43 S. E. 907; Thornburgh *v.* Mastin, 93 N. C. 258.

Pennsylvania.— Tiernan *v.* Roland, 15 Pa. St. 429, vendor does not abandon by conveying to a purchaser on the understanding that the original contract is to be carried out.

South Carolina.— Palmer *v.* Richardson, 3 Strobh. Eq. 16.

West Virginia.— Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; Ballard *v.* Ballard, 25 W. Va. 470.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

Canada.— Harding *v.* Starr, 21 Nova Scotia 121.

84. See, generally, Equity, 16 Cyc. 150 *et seq.*

Discretion of court see *supra*, I, D, 4, a.

85. Laches of purchaser held fatal.— *Alabama.*— Gentry *v.* Rogers, 40 Ala. 442 (nine months); Goodwin *v.* Lyon, 4 Port. 297.

Arkansas.—Hemphill *v.* Miller, 16 Ark. 271.

California.— Eshleman *v.* Henrietta Vineyard Co., (1894) 36 Pac. 775 (three years); Seculovich *v.* Morton, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106; Requa *v.* Snow, 76 Cal. 590, 18 Pac. 862 (three years); Molaskey *v.* Peery, 76 Cal. 84, 18 Pac. 120 (nine years); O'Donnell *v.* Jackson, 69 Cal. 622, 11 Pac. 251 (three years); Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674 (two and one-quarter years); Henderson *v.* Hicks, 58 Cal. 364; Weber *v.* Marshall, 19 Cal. 447; Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725 (less than two years); Brown *v.* Covillaud, 6 Cal. 566.

Colorado.—Hagerman *v.* Bates, 5 Colo. App. 391, 38 Pac. 1100.

Connecticut.— Hurd *v.* Hotchkiss, 72 Conn. 472, 45 Atl. 11.

Delaware.—Kinney *v.* Redden, 2 Del. Ch. 46.

District of Columbia.— Barbour *v.* Hickey, 2 App. Cas. 207, 24 L. R. A. 763.

Florida.— Hathcock *v.* Société Anonyme la Floridienne, 54 Fla. 631, 45 So. 481; Asia *v.* Hiser, 38 Fla. 71, 20 So. 796; Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283; Chabot *v.* Winter Park Co., 34 Fla. 258, 15 So. 756, 43 Am. St. Rep. 192; Knox *v.* Spratt, 23 Fla. 64, 6 So. 924, two years and seven months.

Georgia.— Dukes *v.* Baugh, 91 Ga. 33, 16 S. E. 219 (four years); Brown *v.* Hayes, 33 Ga. Suppl. 136 (four months).

Illinois.— Bauer *v.* Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634 (five years); Crandall *v.* Willig, 166 Ill. 233, 46 N. E. 755; Morse *v.* Scibold, 147 Ill. 318, 35 N. E. 369 (four years); Hatch *v.* Kizer, 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258 (eight years); Walker *v.* Ray, 111 Ill. 315; Warder *v.* Cornell, 105 Ill. 169; Beach *v.* Dyer, 93 Ill. 295; Marshall *v.* Peck, 91 Ill. 187; Marshall *v.* Perry, 90 Ill. 289; McCornack *v.* Sage, 87 Ill. 484; O'Neal *v.* Boone, 82 Ill. 589; Roby *v.* Cossitt, 78 Ill. 638 (over six years); Hedenberg *v.* Jones, 73 Ill. 149 (four years); Fitch *v.* Willard, 73 Ill. 92; Iglehart *v.* Vail, 73 Ill. 63 (eleven years); McLaurie *v.* Barnes, 72 Ill. 73 (six years and nine months); Walker *v.* Douglas, 70 Ill. 445; Hoyt *v.* Tuxbury, 70 Ill. 33] (three and one-half years); Brink *v.* Steadman, 70 Ill. 241 (eight years); Alexander *v.* Hoffman, 70 Ill. 114 (twelve years); McCabe *v.* Crosier, 69 Ill. 501; Hallesy *v.* Jackson, 66 Ill. 139 (twenty years); Whitaker *v.* Robinson, 65 Ill. 411 (eight years); Mason *v.* Owens, 56 Ill. 259 (two months); Fitch *v.* Boyd, 55 Ill. 307 (thirteen years); Taylor *v.* Merrill, 55 Ill. 52 (two and one-half months); Thompson *v.* Bruen, 46 Ill. 125 (eight years); Hough *v.* Coughlan, 41 Ill. 130 (twelve years); Lake Shore, etc., R. Co. *v.* Hoffert, 40 Ill. App. 631.

Indiana.— Bennett *v.* Welch, 25 Ind. 140, 87 Am. Dec. 354.

Iowa.— Findley *v.* Koch, 126 Iowa 131, 101 N. W. 766 (eleven months); Henderson *v.* Beatty, 124 Iowa 163, 99 N. W. 716 (two years); Larimer *v.* Chicago, etc., R. Co., 38 Iowa 679 (fourteen years); Johnson *v.* Hopkins, 19 Iowa 49 (sixteen years).

Kentucky.— Cocanougher *v.* Green, 93 Ky. 519, 20 S. W. 542, 14 Ky. L. Rep. 507; Calvert *v.* Nichols, 8 B. Mon. 264; Dougherty *v.* Riddle, 5 B. Mon. 575; Williams *v.* Starke, 2 B. Mon. 196; Spriggs *v.* Albin, 6 J. J. Marsh.

repeated words of an English case plaintiff must show that he has been "ready,

158 (twenty years); Baird *v.* Baird, 5 J. J. Marsh. 580; Madox *v.* McQuean, 3 A. K. Marsh. 400; McClure *v.* Purcel, 3 A. K. Marsh. 61; Meaux *v.* Helm, Ky. Dec. 252, 2 Am. Dec. 716; McCracken *v.* Finley, Ky. Dec. 195 (fifteen years); Kentucky Iron, etc., Co. *v.* Adams, 106 S. W. 1198, 32 Ky. L. Rep. 823.

Louisiana.— Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007.

Maine.— Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635.

Maryland.— Penn *v.* McCullough, 76 Md. 229, 24 Atl. 424.

Massachusetts.— Ely *v.* McKay, 12 Allen 323; Boston, etc., R. Co. *v.* Bartlett, 10 Gray 384.

Michigan.— Cathro *v.* Gray, 108 Mich. 429, 66 N. W. 346; Van Buren *v.* Stocking, 86 Mich. 246, 49 N. W. 50 (thirty-five years); Cook *v.* Stafford, 86 Mich. 163, 48 N. W. 785 (thirty-six years); Webster *v.* Brown, 67 Mich. 328, 34 N. W. 676 (thirteen years); Russell *v.* Nester, 46 Mich. 290, 9 N. W. 420; Ritson *v.* Dodge, 33 Mich. 463 (thirty years).

Minnesota.—Anderson *v.* Luther Min. Co., 70 Minn. 23, 72 N. W. 820; Holingren *v.* Piete, 50 Minn. 27, 52 N. W. 266; Northrup *v.* Stevens, 39 Minn. 105, 38 N. W. 810; McDermid *v.* McGregor, 21 Minn. 111.

Mississippi.— Lewis *v.* Woods, 4 How. 86, 34 Am. Dec. 110.

Missouri.— Pomeroy *v.* Fullerton, 131 Mo. 581, 33 S. W. 173; O'Fallon *v.* Kennerly, 45 Mo. 124; Heuer *v.* Rutkowski, 18 Mo. 216; Broaddus *v.* Ward, 8 Mo. 217, eleven years.

Montana.— Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115.

Nebraska.— Bradley *v.* Union Pac. R. Co., 76 Nebr. 172, 107 N. W. 238.

New Hampshire.— Eastman *v.* Plumer, 46 N. H. 464; Pickering *v.* Pickering, 38 N. H. 400, ten years.

New Jersey.— Losier *v.* Hill, 68 N. J. Eq. 300, 59 Atl. 234; Ketcham *v.* Owen, 55 N. J. Eq. 344, 36 Atl. 1095; Meidling *v.* Trefz, 48 N. J. Eq. 638, 23 Atl. 824; Penrose *v.* Leeds, 46 N. J. Eq. 294, 19 Atl. 134; Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921 (nine years); Johnson *v.* Somerville, 33 N. J. Eq. 152 (sixty years); Johns *v.* Norris, 22 N. J. Eq. 102; Crane *v.* Decamp, 21 N. J. Eq. 414; Merritt *v.* Brown, 21 N. J. Eq. 401 [*modifying* 19 N. J. Eq. 286] (two years); Haughwout *v.* Murphy, 21 N. J. Eq. 118 [*affirmed* in 22 N. J. Eq. 531] (two and one-half years); Eyre *v.* Eyre, 19 N. J. Eq. 102; Cooper *v.* Carlisle, 17 N. J. Eq. 525; Van Doren *v.* Robinson, 16 N. J. Eq. 256 (sixteen years); Gariss *v.* Gariss, 16 N. J. Eq. 79; Earl *v.* Halsey, 14 N. J. Eq. 332; Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332.

New York.—Davison *v.* Jersey Co., 71 N. Y. 333 (four years); Boyd *v.* Schlesinger, 59 N. Y. 301; Delavan *v.* Duncan, 49 N. Y. 485 (three and one-half years); Peters *v.* Delaplaine, 49 N. Y. 362 (seventeen years); Finch *v.* Parker, 49 N. Y. 1 (three years); Woodenbury *v.* Spier, 122 N. Y. App. Div. 396, 106 N. Y. Suppl. 817; Darrow *v.* Bush, 45 N. Y. App. Div. 262, 61 N. Y. Suppl. 2; McWilliams *v.* Long, 32 Barb. 194, 19 How. Pr. 547 (five years); Van Zandt *v.* New York, 8 Bosw. 375; Platt *v.* Zimmermann, 13 Misc. 519, 34 N. Y. Suppl. 694; Jencks *v.* Kearney, 17 N. Y. Suppl. 143 [*affirmed* in 138 N. Y. 634, 33 N. E. 1084] (four years).

North Carolina.— Holden *v.* Purefoy, 108 N. C. 163, 12 S. E. 848 (twelve years); Love *v.* Welch, 97 N. C. 200, 2 S. E. 242 (thirty years); Francis *v.* Love, 56 N. C. 321 (six years); Lewis *v.* Coxe, 39 N. C. 198 (forty years); McGalliard *v.* Aikins, 37 N. C. 186 (twenty years); Deaver *v.* Parker, 37 N. C. 40 (nine years); Tate *v.* Conner, 17 N. C. 224 (thirty-four years).

North Dakota.— Mahon *v.* Leech, 11 N. D. 181, 90 N. W. 807.

Ohio.— Campbell *v.* Hicks, 19 Ohio St. 433; Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Mann *v.* Dun, 2 Ohio St. 187 (twenty-four years); Scott *v.* Barber, 14 Ohio 547 (twenty-one years); Ludlow *v.* Cooper, 13 Ohio 552; Henry *v.* Conn, 12 Ohio 193 (twenty-three years); Brown *v.* Haines, 12 Ohio 1 (two or three years); Brewer *v.* Connecticut, 9 Ohio 189 (ten years); Higby *v.* Whittaker, 8 Ohio 198; Rummington *v.* Kelley, 7 Ohio, Pt. II, 97; Hutcheson *v.* McNutt, 1 Ohio 14 (six years).

Pennsylvania.— Ruff's Appeal, 117 Pa. St. 310, 11 Atl. 553 (eight years); Rennyson *v.* Rozell, 106 Pa. St. 407 (three years); Russell *v.* Baughman, 94 Pa. St. 400 (fifteen years); Andrews *v.* Bell, 56 Pa. St. 343; Miller *v.* Henlan, 51 Pa. St. 265; Du Bois *v.* Baum, 46 Pa. St. 537 (fourteen years); Callen *v.* Ferguson, 29 Pa. St. 247 (twenty years); Porter *v.* Dougherty, 25 Pa. St. 405 (eleven years); Zeigler *v.* Houtz, 1 Watts & S. 533; Patterson *v.* Martz, 8 Watts 374, 34 Am. Dec. 474 (seven years); Chalfant *v.* Rocks, 30 Pa. Co. Ct. 81; Jones *v.* Jones, 11 Phila. 559.

Rhode Island.— Peckham *v.* Barker, 8 R. I. 17, four years.

South Carolina.— Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630 (two years); Hodge *v.* Weeks, 31 S. C. 276, 9 S. E. 953 (ten years); White *v.* Bennett, 7 Rich. Eq. 260 (twenty-seven months); Prothro *v.* Smith, 6 Rich. Eq. 324.

Tennessee.— Pillow *v.* Pillow, 3 Humphr. 644; Smith *v.* Christmas, 7 Yerg. 565 (eight months); Bracken *v.* Martin, 3 Yerg. 55.

Texas.— Taylor *v.* Campbell, 59 Tex. 315; McFaddin *v.* Williams, 58 Tex. 625; McKin *v.* Williams, 48 Tex. 89; Eppinger *v.* McGreal, 31 Tex. 147 (twenty years); Glasscock *v.* Nelson, 26 Tex. 150 (twelve years); Watson *v.* Inman, 23 Tex. 531 (eighteen years); Smith *v.* Hampton, 13 Tex. 459; De Cordova *v.* Smith, 9 Tex. 129, 58 Am. Dec. 136; Mead *v.* Randolph, 8 Tex. 191; Herman *v.* Gieseke, (Civ. App. 1895) 33 S. W. 1006.

Utah.— Roberts *v.* Braffett, 33 Utah 51; 92 Pac. 789, two and one-half years.

Vermont.— White *v.* Yaw, 7 Vt. 357.

Virginia.— Clinchfield Coal Co. *v.* Clintwood Coal, etc., Co., 108 Va. 433, 62 S. E. 320; Crawford *v.* Workman, (1908) 61 S. E.

desirous, prompt and eager" in complying with his part of the contract and in

319; Darling *v.* Cumming, 92 Va. 521, 23 S. E. 880; Bowles *v.* Woodson, 6 Gratt. 78 (nine years); Pigg *v.* Corder, 12 Leigh 69 (twelve years); Anthony *v.* Leftwich, 3 Rand. 238; Richardson *v.* Baker, 5 Call 514.

Washington.— Stewart *v.* Yesler, 46 Wash. 256, 89 Pac. 705.

West Virginia.— Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Clay *v.* Deskins, 36 W. Va. 350, 15 S. E. 85; Frame *v.* Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323, ninteen years.

Wisconsin.— Combs *v.* Scott, 76 Wis. 662, 45 N. W. 532; Williams *v.* Williams, 50 Wis. 311, 6 N. W. 814.

United States.— McCabe *v.* Matthews, 155 U. S. 550, 15 S. Ct. 190, 39 L. ed. 253 [*affirming* 40 Fed. 338] (nine years); Davison *v.* Davis, 125 U. S. 90, 8 S. Ct. 825, 31 L. ed. 635 [*affirming* 20 Fed. 353]; Holt *v.* Rogers, 8 Pet. 420, 8 L. ed. 995 (twenty-nine years); Brashier *v.* Gratz, 6 Wheat. 528, 5 L. ed. 322; Pratt *v.* Carroll, 8 Cranch 471, 3 L. ed. 627; Sharp *v.* West, 150 Fed. 458 (three years); Stevens *v.* McChrystal, 150 Fed. 85, 80 C. C. A. 39; Marr *v.* Shaw, 51 Fed. 860; Stewart *v.* Allen, 47 Fed. 399; Dudley *v.* Hayward, 11 Fed. 543 (five years); Thompson *v.* Tod, 23 Fed. Cas. No. 13,978, Pet. C. C. 380.

England.— Moore *v.* Blake, 1 Ball & B. 62; Hayes *v.* Caryll, 1 Bro. P. C. 126, 5 Vin. Abr. 538, pl. 18, 1 Eng. Reprint 462; Mackreth *v.* Marlar, 1 Cox Ch. 259, 29 Eng. Reprint 1156 (four or five years); Walker *v.* Jeffreys, 1 Hare 341, 6 Jur. 336, 11 L. J. Ch. 209, 23 Eng. Ch. 341, 66 Eng. Reprint 1064 (two years); Firth *v.* Greenwood, 1 Jur. N. S. 866, 3 Wkly. Rep. 358; Carter *v.* Ely, 4 L. J. Ch. 241, 7 Sim. 211, 8 Eng. Ch. 211, 58 Eng. Reprint 817 (two months); Huxham *v.* Llewellyn, 28 L. T. Rep. N. S. 577, 21 Wkly. Rep. 776; Spurrier *v.* Hancock, 4 Ves. Jr. 667, 31 Eng. Reprint 344.

Canada.—Wallace *v.* Hesslein, 29 Can. Sup. Ct. 171; Walker *v.* Brown, 14 Grant Ch. (U. C.) 237; Crawford *v.* Birdsall, 8 Grant Ch. (U. C.) 415; Young *v.* Bown, 6 Grant Ch. (U. C.) 402; Van Wagner *v.* Terryberry, 5 Grant Ch. (U. C.) 324; Hook *v.* McQueen, 4 Grant Ch. (U. C.) 231 [*affirming* 2 Grant Ch. (U. C.) 490].

See 44 Cent. Dig. tit. "Specific Performance," § 327 *et seq.*

Laches of vendor held fatal.— *Illinois.*— Tobey *v.* Foreman, 79 Ill. 489; Anderson *v.* Frye, 18 Ill. 94.

Iowa.— Chicago, etc., R. Co. *v.* Wisconsin, etc., R. Co., 76 Iowa 615, 41 N. W. 375; Parsons *v.* Gilbert, 45 Iowa 33, four months.

Kansas.— Johnson *v.* Burdett Town Co., 7 Kan. App. 134, 53 Pac. 87, five years.

Kentucky.— Smith *v.* Cansler, 83 Ky. 367; Ewing *v.* Beauchamp, 6 B. Mon. 422; Miller *v.* Johnson, 9 Dana 48; Funk *v.* McKeoun, 4 J. J. Marsh. 162; Craig *v.* Martin, 3 J. J. Marsh. 50, 19 Am. Dec. 157.

Massachusetts.— Williams *v.* Hart, 116 Mass. 513; Richmond *v.* Gray, 3 Allen 25, six months.

Minnesota.— Joslyn *v.* Schwend, 89 Minn. 71, 93 N. W. 705.

Missouri.— Brown *v.* Massey, 138 Mo. 519, 38 S. W. 939; Banks *v.* Burnam, 61 Mo. 76.

New Jersey.— Reddish *v.* Miller, 27 N. J. Eq. 514; Young *v.* Rathbone, 16 N. J. Eq. 224, 84 Am. Dec. 151.

New York.— Huntington *v.* Titus, 50 N. Y. App. Div. 468, 64 N. Y. Suppl. 58 [*affirmed* in 169 N. Y. 579, 61 N. E. 1135].

Ohio.— Breuer *v.* Hayes, 10 Ohio Dec. (Reprint) 583, 22 Cinc. L. Bul. 144.

Pennsylvania.— Cadwalader's Appeal, 57 Pa. St. 158 (thirteen years); Foster's Estate, 6 Pa. Co. Ct. 223; Tarr *v.* Glading, 1 Phila. 370 (one year).

Rhode Island.— Miller *v.* Bronson, 26 R. I. 62, 58 Atl. 257, six months.

South Carolina.— Blackwell *v.* Ryan, 21 S. C. 112; Gregorie *v.* Bulow, Rich. Eq. Cas. 235 (thirteen years); Colcock *v.* Butler, 1 Desauss. Eq. 307 (eight months).

Vermont.— Williams *v.* Mattocks, 3 Vt. 189.

Virginia.— McAllister *v.* Harman, 101 Va. 17, 42 S. E. 920 (eight years); Newberry *v.* French, 98 Va. 479, 36 S. E. 519; Gish *v.* Jamison, 96 Va. 312, 31 S. E. 521 (three years); Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469; Powell *v.* Berry, 91 Va. 568, 22 S. E. 365 (one and one-half years); Rison *v.* Newberry, 90 Va. 513, 18 S. E. 916 (over one year); Chilhowie Iron Co. *v.* Gardiner, 79 Va. 305 (five years); Hendricks *v.* Gillespie, 25 Gratt. 181 (eight years); Bryan *v.* Lofftus, 1 Rob. 12, 39 Am. Dec. 242; Moore *v.* Randolph, 6 Leigh 175, 29 Am. Dec. 208; Jackson *v.* Ligon, 3 Leigh 161; Vail *v.* Nelson, 4 Rand. 478.

Washington.— Hogan *v.* Kyle, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910, two years.

United States.— Holgate *v.* Eaton, 116 U. S. 33, 6 S. Ct. 224, 29 L. ed. 538 (two years); Fox *v.* Phelps, 18 Fed. 120 (two years); McKay *v.* Carrington, 16 Fed. Cas. No. 8,841, 1 McLean 50.

England.— Lloyd *v.* Collett, 4 Bro. Ch. 469, 29 Eng. Reprint 992, 4 Ves. Jr. 689 note, 31 Eng. Reprint 356 (eight months); Venn *v.* Cattell, 27 L. T. Rep. N. S. 469; Watson *v.* Reid, 1 Russ. & M. 236, 5 Eng. Ch. 236, 39 Eng. Reprint 91; Parker *v.* Frith, 1 Sim. & St. 199, 1 Eng. Ch. 199, 57 Eng. Reprint 80; Guest *v.* Homfray, 5 Ves. Jr. 818, 5 Rev. Rep. 176, 31 Eng. Reprint 875; Harrington *v.* Wheeler, 4 Ves. Jr. 686, 31 Eng. Reprint 354.

Canada.— Nixon *v.* Logie, 4 Manitoba 366.

See 44 Cent. Dig. tit. "Specific Performance," § 327 *et seq.*

Laches of lessee see Sharp *v.* Wright, 28 Beav. 150, 54 Eng. Reprint 323; Walker *v.* Jeffreys, 1 Hare 341, 6 Jur. 336, 11 L. J. Ch. 209, 23 Eng. Ch. 341, 66 Eng. Reprint 1064; Powis *v.* Dynevor, 35 L. T. Rep. N. S. 940;

filing his suit for relief, or else must show a good and sufficient reason for his delay.[86]

2. Where no Time Fixed For Performance. Plaintiff may be guilty of laches, although no time for performance was fixed in the contract. Such a contract, if not void in equity for uncertainty, implies an agreement to do the act in a reasonable time.[87]

3. In Prosecution of Suit. Plaintiff's laches may consist in a failure to prosecute with diligence the suit for specific performance, although the suit may have been seasonably begun.[88]

4. Elements of Laches — a. Indicating Abandonment. Unexplained laches or acquiescence for an unreasonable length of time after the party was in a situation to enforce his right is evidence of a waiver or abandonment of right.[89]

b. Change in Situation of Parties — (1) *In General.* Although plaintiff's delay has not persisted so long as to amount to an abandonment, the situation of the parties may have so changed that the specific enforcement of the contract would be inequitable. A hardship to defendant from change of circumstances, accompanied by unreasonable delay on plaintiff's part, is frequently a bar to the suit, although a similar hardship, in the absence of such delay, would not constitute a defense.[90]

Heaphy *v.* Hill, 2 Sim. & St. 29, 57 Eng. Reprint 255.

86. Milward *v.* Thanet [*cited* in Hertford *v.* Thanet, 5 Rev. Rep. 149, 5 Ves. Jr. 719, 720, 31 Eng. Reprint 823], per Lord Alvanley, M. R. This language has been well described, however, as "rhetorical" (Pomeroy Spec. Perf. § 403, note) and certainly exaggerates the general attitude of the courts on the subject of laches.

87. *Indiana.*— Horner *v.* Clark, 27 Ind. App. 6, 60 N. E. 732.

Maryland.— Lawson *v.* Mullinix, 104 Md. 156, 64 Atl. 938.

Massachusetts.— Williams *v.* Hart, 116 Mass. 513.

New Hampshire.— Pickering *v.* Pickering, 38 N. H. 400, holding that ten years' delay was unreasonable.

New Jersey.— Cramer *v.* Mooney, 59 N. J. Eq. 164, 44 Atl. 625, if defendant claims that date was fixed by subsequent agreement, he has burden of proof.

Virginia.— Fitzhugh *v.* Jones, 6 Munf. 83, payment to be made "immediately" means in a reasonable time.

Wisconsin.— Williamson *v.* Neeves, 94 Wis. 656, 69 N. W. 806.

As to uncertainty of certain agreements which fix no time for performance see *supra*, III, D, 8, a.

88. Hagerman *v.* Bates, 5 Colo. App. 391, 38 Pac. 1100; Hatch *v.* Kizer, 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258; Stewart *v.* Allen, 47 Fed. 399; Moore *v.* Blake, 1 Ball & B. 62.

89. *Illinois.*— McLaurie *v.* Barnes, 72 Ill. 73, six years and nine months.

Indiana.— Bennett *v.* Welch, 25 Ind. 140, 87 Am. Dec. 354.

Kentucky.— Cocanougher *v.* Green, 93 Ky. 519, 20 S. W. 542, 14 Ky. L. Rep. 507.

North Carolina.— Robinett *v.* Hamby, 132 N. C. 353, 43 S. E. 907; Love *v.* Welch, 97 N. C. 200, 2 S. E. 242, three years.

Texas.— De Cordova *v.* Smith, 9 Tex. 129, 58 Am. Dec. 136.

Virginia.— Anthony *v.* Leftwich, 3 Rand. 238.

Washington.— Hogan *v.* Kyle, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910.

See 44 Cent. Dig. tit. "Specific Performance," § 327 *et seq.*

Abandonment see *supra*, VI, E, 2.

90. McLaurie *v.* Barnes, 72 Ill. 73; Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007; Ely *v.* McKay, 12 Allen (Mass.) 323.

Illustrations.— Where vendee, relying on vendor's default, has tied up his money in another business. Tarr *v.* Glading, 1 Phila. (Pa.) 370; Miller *v.* Bronson, 26 R. I. 62, 58 Atl. 257. Where the nature of the property renders delay prejudicial. Stevens *v.* McChrystal, 150 Fed. 85, 80 C. C. A. 39 (mining property); Parker *v.* Frith, 1 Sim. & St. 199 note, 1 Eng. Ch. 199, 57 Eng. Reprint 80 (mines and blast furnaces). Where the land is of fluctuating value. Hathcock *v.* Société Anonyme la Floridienne, 54 Fla. 631, 45 So. 481; Breuer *v.* Hayes, 10 Ohio Dec. (Reprint) 583, 22 Cinc. L. Bul. 144, Taft, J. Where defendant vendor, believing the contract abandoned, gave up the purchase-money to agent. Meidling *v.* Trefz, 48 N. J. Eq. 638, 23 Atl. 824.

Strict view of laches in some communities. — The business and social conditions of a community may result in the necessity of holding parties to a stricter requirement of promptness in complying with their contracts than prevails elsewhere. Thus, speaking of California in the early fifties it was said: "This view of the materiality of time becomes stronger, when we consider that the whole policy of our State legislation is based on the difference of time here and in older communities. . . . This, indeed, was a necessity, arising from obvious causes — the want of confidence in men and titles, and the urgent demand for money to carry on busi-

(II) *Party's Purpose Fails.* Thus the delay is often fatal where the circumstances have so changed that the purpose of the other party in entering into the contract is defeated, as where the vendor delays to complete the contract, and the property was desired by the purchaser for immediate use.[91]

(III) *Loss or Obscuring of Evidence.* The fact that during plaintiff's delay defendant's evidence has been lost, or has become obscure or uncertain by lapse of time, thus putting him at a disadvantage in presenting his defense, is a circumstance of great weight against plaintiff.[92]

(IV) *Vendor or His Grantee Making Expenditures.* The fact that the vendor incurs large expense in connection with the property or makes extensive improvements thereon in reliance on the vendee's supposed abandonment of the contract is entitled to great weight in connection with the purchaser's delay,[93] and the same is true in regard to improvements put upon the premises by a third person to whom the vendor has made conveyance after the contract.[94]

ness. In California, where such rapid and sudden fluctuations in the affairs and fortunes of men occurred, as in all history is unexampled, and where the work of years was accomplished in months, it is impossible to hold that time, as an element of past contracts, should be measured by the standards which obtain in old and settled States, where everything is comparatively stable and permanent; where capital is abundant, titles ascertained, and interest is low." Green *v.* Covillaud, 10 Cal. 317, 331, 70 Am. Dec. 725, per Baldwin, J. See also as to the comparative speed with which business is done in this country thus requiring a stricter rule as to laches Richmond *v.* Gray, 3 Allen (Mass.) 25.

In Canada a half century ago, it was said that much less delay would suffice to bar specific performance, where the vendee was not in possession, than would suffice in England, since land in Canada had a small and fluctuating value. Hook *v.* McQueen, 4 Grant Ch. (U. C.) 231 [*affirming* 2 Grant Ch. (U. C.) 490]. On the other hand, the fact that much land was held under contract, and the peculiar conditions in a country which was being rapidly settled, called for a liberal rule as to laches, where the vendee was in possession. O'Keefe *v.* Taylor, 2 Grant Ch. (U. C.) 95.

91. Parsons *v.* Gilbert, 45 Iowa 33 (four months' delay); Powell *v.* Berry, 91 Va. 568, 22 S. E. 365 (sale during real estate "boom," delay of a year and a half). But see Tapp *v.* Nock, 89 Ky. 414, 12 S. W. 713, 11 Ky. L. Rep. 611.

Other illustrations are: Where the object of defendant vendor was to buy other lands with the purchase-money (Smith *v.* Christmas, 7 Yerg. (Tenn.) 565); where plaintiff vendee delayed to make stipulated improvements, thus defeating the vendor's object, the enhancing of the value of adjacent property (Pratt *v.* Carroll, 8 Cranch (U. S.) 471, 3 L. ed. 627); and where the contract was intended for the benefit of the vendor's daughter and was not sought to be enforced until after her death (Pigg *v.* Corder, 12 Leigh (Va.) 69).

Delay is fatal when material circumstances have so changed that the full benefit of the bargain will not be realized by defendant, if it is enforced, and he has not by his fault caused or contributed to the delay. Brashier *v.* Gratz, 6 Wheat. (U. S.) 528, 5 L. ed. 322; Davis *v.* Read, 37 Fed. 418.

92. *Connecticut.*— Hurd *v.* Hotchkiss, 72 Conn. 472, 45 Atl. 11.

Illinois.— Marshall *v.* Peck, 91 Ill. 187; McCornack *v.* Sage, 87 Ill. 484; Lake Shore, etc., R. Co. *v.* Hoffert, 40 Ill. App. 631.

Kentucky.— Calvert *v.* Nichols, 8 B. Mon. 264.

Michigan.— Cook *v.* Stafford, 86 Mich. 163, 48 N. W. 785, long delay and death of witness.

Missouri.— Wendover *v.* Baker, 121 Mo. 273, 25 S. W. 918, death of most important witnesses.

New Jersey.— Johnson *v.* Somerville, 33 N. J. Eq. 152; Eyre *v.* Eyre, 19 N. J. Eq. 102.

Virginia.— Anthony *v.* Leftwich, 3 Rand. 238.

West Virginia.— Frame *v.* Frame, 32 W. Va. 463, 9 S. E. 901, 5 L. R. A. 323, death of all parties.

See 44 Cent. Dig. tit. "Specific Performance," § 327 *et seq.*

A great lapse of time may of itself be a bar on account of the difficulty of obtaining trustworthy evidence. Johnson *v.* Somerville, 33 N. J. Eq. 152, sixty years.

93. *Iowa.*— Findley *v.* Koch, 126 Iowa 131, 101 N. W. 766, eleven months' delay.

Missouri.— Davis *v.* Petty, 147 Mo. 374, 48 S. W. 944.

New Jersey.— Penrose *v.* Leeds, 46 N. J. Eq. 294, 19 Atl. 134 (extensive improvements made by vendor); Merritt *v.* Brown, 21 N. J. Eq. 401.

New York.—Woodenbury *v.* Spier, 122 N. Y. App. Div. 396, 106 N. Y. Suppl. 817, eighteen months.

Pennsylvania.— Rennyson *v.* Rozell, 106 Pa. St. 407.

Virginia.— Bowles *v.* Woodson, 6 Gratt. 78.

94. Warder *v.* Cornell, 105 Ill. 169; Iglehart *v.* Vail, 73 Ill. 63; Whitaker *v.* Robinson, 65 Ill. 411; Hough *v.* Coughlan, 41 Ill. 130; Cathro *v.* Gray, 108 Mich. 429, 66 N. W. 346; Miller *v.* Henlan, 51 Pa. St. 265; Herman *v.* Gieseke, (Tex. Civ. App. 1895) 33 S. W. 1006.

(v) *Rights Acquired by Third Persons.* In general the intervening rights and equities of third persons are to be considered when plaintiff's conduct is such that he might reasonably have been supposed to have abandoned the contract, even though those rights are not such as to give rise to the defense of *bona fide* purchase for value.[95]

(vi) *Increase of Value.* The fact that the property has largely increased in value during the purchaser's delay is often mentioned as a circumstance rendering the delay prejudicial to the vendor, and therefore fatal to the purchaser's suit. This is especially true where the delay is speculative, that is, where the vendee purposely waits to see whether his bargain will prove to be an advantageous or a losing one.[96]

(vii) *Decrease of Value.* The same considerations apply to a suit by

Injury to public.— Where a city granted a right of way through its streets to a railroad, ten years' delay by the latter, during which residences and a school building were erected along right of way, was held fatal. East St. Louis Connecting R. Co. *v.* East St. Louis, 81 Ill. App. 109.

95. *Kentucky.*— Dougherty *v.* Riddle, 5 B. Mon. 575 (a subsequent vendee); McCracken *v.* Finley, Ky. Dec. 195 (devisees whose inheritance would be lessened by a decree, where it was the testator's intention to provide for all equally).

Michigan.— Russell *v.* Nestor, 46 Mich. 290, 9 N. W. 420, subsequent vendee.

New Jersey.— Haughwout *v.* Murphy, 22 N. J. Eq. 531 (subsequent vendee); Van Doren *v.* Robinson, 16 N. J. Eq. 256 (subsequent vendee).

Virginia.— Anthony *v.* Leftwich, 3 Rand. 238, specific performance would take from one of vendor's devisees, a child, the whole land devised.

Canada.— Langstaffe *v.* Mansfield, 4 Grant Ch. (U. C.) 607, apparent acquiescence in sale to third person.

See also *ante*, IV, D, 8.

96. *Alabama.*— Goodwin *v.* Lyon, 4 Port. 297.

California.— Requa *v.* Snow, 76 Cal. 590, 18 Pac. 862; Green *v.* Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Brown *v.* Covillaud, 6 Cal. 566, speculative delay.

Delaware.— Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 14 Atl. 27.

Florida.— Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283.

Illinois.— Morse *v.* Scibold, 147 Ill. 318, 35 N. E. 369; Marshall *v.* Perry, 90 Ill. 289 (speculative delay); Roby *v.* Cossitt, 78 Ill. 638; Hedenberg *v.* Jones, 73 Ill. 149 (speculative delay); Iglehart *v.* Vail, 73 Ill. 63; Hoyt *v.* Tuxbury, 70 Ill. 331 (speculative delay).

Indiana.— Boldt *v.* Early, 33 Ind. App. 434, 70 N. E. 271, 104 Am. St. Rep. 255.

Iowa.— Findley *v.* Koch, 126 Iowa 131, 101 N. W. 760; Henderson *v.* Beatty, 124 Iowa 163, 99 N. W. 716.

Kentucky.— Williams *v.* Starke, 2 B. Mon. 196 (speculative delay); McClure *v.* Purcel, 3 A. K. Marsh. 61 (speculative delay).

Louisiana.— Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007.

Maine.— Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635.

Massachusetts.—Boston, etc., R. Co. *v.* Bartlett, 10 Gray 384.

Michigan.—Van Buren *v.* Stocking, 86 Mich. 246, 49 N. W. 50.

Minnesota.— Anderson *v.* Luther Min. Co., 70 Minn. 23, 72 N. W. 820; Holingren *v.* Piete, 50 Minn. 27, 52 N. W. 266.

Montana.— Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115.

New Hampshire.— Pickering *v.* Pickering, 38 N. H. 400, speculative delay.

New York.— Peters *v.* Delaplaine, 49 N. Y. 362 (tenfold increase); Darrow *v.* Bush, 45 N. Y. App. Div. 262, 61 N. Y. Suppl. 2.

North Carolina.— Love *v.* Welch, 97 N. C. 200, 2 S. E. 242.

Pennsylvania.— Ruff's Appeal, 117 Pa. St. 310, 11 Atl. 553; Russell *v.* Baughman, 94 Pa. St. 400; Miller *v.* Henlan, 51 Pa. St. 265; Du Bois *v.* Baum, 46 Pa. St. 537; Dauchy *v.* Pond, 9 Watts 49; Patterson *v.* Martz, 8 Watts 374, 34 Am. Dec. 474.

Rhode Island.— Peckham *v.* Barker, 8 R. I. 17.

Tennessee.— Pillow *v.* Pillow, 3 Humphr. 644 (speculative delay); Smith *v.* Christmas, 7 Yerg. 565 (speculative delay).

Texas.— De Cordova *v.* Smith, 9 Tex. 129, 58 Am. Dec. 136.

Virginia.— Crawford *v.* Workman, (1908) 61 S. E. 319; Darling *v.* Cumming, 92 Va. 521, 23 S. E. 880.

Washington.— Stewart *v.* Yesler, 46 Wash. 256, 89 Pac. 705.

Wisconsin.— Combs *v.* Scott, 76 Wis. 662, 45 N. W. 532.

United States.— McCabe *v.* Matthews, 155 U. S. 550, 15 S. Ct. 190, 39 L. ed. 253 (speculative delay); Holt *v.* Rogers, 8 Pet. 420, 8 L. ed. 995; Brashier *v.* Gratz, 6 Wheat. 528, 5 L. ed. 322; Marr *v.* Shaw, 51 Fed. 860; Mundy *v.* Davis, 20 Fed. 353 [*affirmed* in 125 U. S. 90, 8 S. Ct. 825, 31 L. ed. 635]; Chicago, etc., R. Co. *v.* Stewart, 19 Fed. 5.

Canada.— Walker *v.* Brown, 14 Grant Ch. (U. C.) 237; Crawford *v.* Birdsall, 8 Grant Ch. (U. C.) 415; Longstaffe *v.* Mansfield, 4 Grant Ch. (U. C.) 607; Hook *v.* McQueen, 4 Grant Ch. (U. C.) 231 [*affirming* 2 Grant Ch. (U. C.) 490].

See 44 Cent. Dig. tit. "Specific Performance," § 327 *et seq.*

the vendor, after a delay during which the property has largely decreased in value.[97]

(VIII) *DEPRECIATING CURRENCY.* Similarly, where the price was payable in a currency which is rapidly depreciating, a comparatively slight delay in payment beyond the stipulated time has been held fatal to the vendee.[98]

(IX) *WHEN RISE IN VALUE IMMATERIAL.* The reasons for holding a rise in value a circumstance conclusive against the delaying purchaser are not always clear. As has been seen, such change, in the absence of delay, constitutes no defense.[99] The purchaser becomes by the contract the owner in equity, and should have the benefit of any ordinary enhancement in the market value of the property. The cases are numerous therefore which hold immaterial a mere increase in the value of the property, not due to any expenditure on the defendant's part [1] unless of course the delay was unreasonable, speculative, or otherwise prejudicial.[2]

5. DELAY IN UNILATERAL CONTRACTS. In the case of a mere option or other unilateral contract, or where the remedies are not mutual, delay is regarded with special strictness.[3]

97. *Illinois.*— Cohn *v.* Mitchell, 115 Ill. 124, 3 N. E. 420 (decrease in value of stock which plaintiff was to pledge); Tobey *v.* Foreman, 79 Ill. 489.

Kansas.— Johnson *v.* Burdett Town Co., 7 Kan. App. 134, 53 Pac. 87.

Kentucky.— Smith *v.* Cansler, 83 Ky. 367, changed condition resulting from accidental destruction of the buildings after long delay.

Missouri.— Brown *v.* Massey, 138 Mo. 519, 38 S. W. 939.

New Jersey.— Reddish *v.* Miller, 27 N. J. Eq. 514; Young *v.* Rathbone, 16 N. J. Eq. 224, 84 Am. Dec. 151, depression of value on account of war.

South Carolina.— Gregorie *v.* Bulow, Rich. Eq. Cas. 235; Colcock *v.* Butler, 1 Desauss. Eq. 307.

Virginia.— McAllister *v.* Harman, 101 Va. 17, 42 S. E. 920; Newberry *v.* French, 98 Va. 479, 36 S. E. 519; Gish *v.* Jamison, 96 Va. 312, 31 S. E. 521; Rison *v.* Newberry, 90 Va. 513, 18 S. E. 916; Hendricks *v.* Gillespie, 25 Gratt. 181; Bryan *v.* Loftus, 1 Rob. 12, 39 Am. Dec. 242.

United States.— Holgate *v.* Eaton, 116 U. S. 33, 6 S. Ct. 224, 29 L. ed. 538; Cooper *v.* Brown, 6 Fed. Cas. No. 3,191, 2 McLean 495; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call. (Va.) 308; McKay *v.* Carrington, 16 Fed. Cas. No. 8,841, 1 McLean 50.

Canada.— Nixon *v.* Logie, 4 Manitoba 366.

See 44 Cent. Dig. tit. "Specific Performance," § 327 *et seq.*

Otherwise where plaintiff was not in any way responsible for the delay see Maryland Constr. Co. *v.* Keuper, 90 Md. 529, 45 Atl. 197.

98. *Kentucky.*— Meaux *v.* Helm, Ky. Dec. 252, 2 Am. Dec. 716.

New Jersey.— Merritt *v.* Brown, 19 N. J. Eq. 286.

North Carolina.— Whitaker *v.* Bond, 63 N. C. 290.

Pennsylvania.— Andrews *v.* Bell, 56 Pa. St. 343.

Virginia.— Booten *v.* Scheffer, 21 Gratt. 474. See White *v.* Atkinson, 2 Wash. 94, 1 Am. Dec. 470.

See *supra*, IV, D, 5, b, note; VI, D, 2, b, note.

99. See *supra*, IV, D, 5, b.

1. See *supra*, VI, F, 4, b, (IV).

2. See Pomeroy Spec. Perf. § 408; Pomeroy Eq. Rem. §§ 21, etc.

Delay not fatal.— In the following cases the delay, with rise in value, was not fatal:

Arizona.—Walton *v.* McKinney, (1908) 94 Pac. 1122.

Georgia.— Brown *v.* Newsom, 24 Ga. 466.

Iowa.— Mathews *v.* Gilliss, 1 Iowa 242, one year.

Kentucky.— Harris *v.* Greenleaf, 117 Ky. 817, 79 S. W. 267, 25 Ky. L. Rep. 1940; East Jellico Coal Co. *v.* Carter, 97 S. W. 768, 30 Ky. L. Rep. 174, where delay is not chargeable to purchaser.

Michigan.—Wallace *v.* Pidge, 4 Mich. 570.

Missouri.— *In re* Ferguson, 124 Mo. 574, 27 S. W. 513.

Montana.— Strong dissenting opinion in Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115.

Nebraska.— Harrison *v.* Rice, 78 Nebr. 654, 111 N. W. 594, 78 Nebr. 659, 114 N. W. 151.

North Carolina.—Hairston *v.* Bescherer, 141 N. C. 205, 53 S. E. 845 (nine years' delay by vendee in possession); Falls *v.* Carpenter, 21 N. C. 237, 28 Am. Dec. 592.

Pennsylvania.— Sylvester *v.* Born, 132 Pa. St. 467, 19 Atl. 337, rise in value due to other purchases by plaintiff.

Virginia.— Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469, vendor's delay of two months, with depreciation in value.

3. *Illinois.*— Fitch *v.* Willard, 73 Ill. 92 (purchaser given option to reject the title if abstract not satisfactory; five years' delay); Hoyt *v.* Tuxbury, 70 Ill. 331 (purchaser given option to reject the title if abstract not satisfactory; three and a half years).

Kentucky.— Kentucky Iron, etc., Co. *v.* Adams, 106 S. W. 1198, 32 Ky. L. Rep. 823.

Louisiana.— Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007.

6. Delay After Repudiation by the Other Party. If one party gives the other notice that he does not hold himself bound to perform, and will not perform, the contract, and the other party makes no prompt assertion of his right to enforce the contract, equity will consider the latter as acquiescing in the notice, and as abandoning his equitable right. So long as he takes no action, he is in fact exercising his option to consider the contract abandoned. In such case a comparatively brief delay will be a bar.[4]

Maine.— Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635.

Missouri.— See Davis *v.* Petty, 147 Mo. 374, 48 S. W. 944.

New Jersey.— Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292; Ketcham *v.* Owen, 55 N. J. Eq. 344, 36 Atl. 1095; Meidling *v.* Trefz, 48 N. J. Eq. 638, 23 Atl. 824; Stoutenburgh *v.* Tompkins, 9 N. J. Eq. 332.

North Carolina.— Francis *v.* Love, 56 N. C. 321.

See also *ante*, VI, D, 2, d, e.

But that it is sufficient if the option is exercised within the period allowed by the contract see Kerr *v.* Moore, 6 Cal. App. 305, 92 Pac. 107.

4. Suit by vendee.— *Alabama.*— Gentry *v.* Rogers, 40 Ala. 442, nine months.

District of Columbia.— Barbour *v.* Hickey, 2 App. Cas. 207, 24 L. R. A. 763, two years.

Florida.— Hathcock *v.* Société Anonyme la Floridienne, 54 Fla. 631, 45 So. 481, three years.

Kansas.— Fowler *v.* Marshall, 29 Kan. 665, two years.

Maine.— Rogers *v.* Saunders, 16 Me. 92, 33 Am. Dec. 635.

Michigan.— Ritson *v.* Dodge, 33 Mich. 463; Smith *v.* Lawrence, 15 Mich. 499, three years' delay, and rise in value.

Minnesota.— McDermid *v.* McGregor, 21 Minn. 111, one year.

Montana.— Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115, three and a half years.

New Jersey.— Ketcham *v.* Owen, 55 N. J. Eq. 344, 36 Atl. 1095 (over three years); Bullock *v.* Adams, 20 N. J. Eq. 367 (nineteen months); Gariss *v.* Gariss, 16 N. J. Eq. 79 (two years).

New York.— Davison *v.* Jersey Co., 71 N. Y. 333 (four years); Peters *v.* Delaplaine, 49 N. Y. 362 (seventeen years); McWilliams *v.* Long, 32 Barb. 194, 19 How. Pr. 547 (five years).

Ohio.— Kirby *v.* Harrison, 2 Ohio St. 326, 59 Am. Dec. 677 (delay after vendor sues to rescind the contract); Higby *v.* Whittaker, 8 Ohio 198; Rummington *v.* Kelley, 7 Ohio, Pt. II, 97.

Pennsylvania.— Miller *v.* Henlan, 51 Pa. St. 265; Du Bois *v.* Baum, 46 Pa. St. 537, long delay after action of ejectment is brought.

South Carolina.— Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630 (two years); White *v.* Bennett, 7 Rich. Eq. 260 (twenty-seven months).

Vermont.— White *v.* Yaw, 7 Vt. 357, six years.

Wisconsin.— Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030; Combs *v.* Scott, 76 Wis. 662, 45 N. W. 532, six years.

United States.— McCabe *v.* Matthews, 155 U. S. 550, 15 S. Ct. 190, 39 L. ed. 253; Dudley *v.* Hayward, 11 Fed. 543 (five years); Wright *v.* Fullerton, 30 Fed. Cas. No. 18,079, 2 Biss. 336 (twenty years).

England.— Alloway *v.* Blaine, 26 Beav. 575, 53 Eng. Reprint 1020 (ten years); Walker *v.* Jeffreys, 1 Hare 341, 6 Jur. 336, 11 L. J. Ch. 209, 23 Eng. Ch. 341, 66 Eng. Reprint 1064 (two years).

Canada.— Crawford *v.* Birdsall, 8 Grant Ch. (U. C.) 415.

See 44 Cent. Dig. tit. "Specific Performance," § 327 *et seq.*

Delay by vendee after eviction from the premises by the vendor (Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921, nine years); or suffering vendor to recover judgment in ejectment and oust him from the premises, since commencement of the action against him was notice (Tibbs *v.* Morris, 44 Barb. (N. Y.) 138).

Suit by lessee see Walker *v.* Jeffreys, 1 Hare 341, 6 Jur. 336, 11 L. J. Ch. 209, 23 Eng. Ch. 341, 66 Eng. Reprint 1064; Heaphy *v.* Hill, 2 Sim. & St. 29, 1 Eng. Ch. 29, 57 Eng. Reprint 255.

Suit by vendor.— Richmond *v.* Gray, 3 Allen (Mass.) 25 (six months); Banks *v.* Burnam, 61 Mo. 76 (one year); Agens *v.* Koch, (N. J. Ch. 1908) 70 Atl. 348; Cadwalader's Appeal, 57 Pa. St. 158 (thirteen years); Watson *v.* Reid, 1 Russ. & M. 236, 5 Eng. Ch. 236, 39 Eng. Reprint 91 (one year); Heaphy *v.* Hill, 2 Sim. & St. 29, 1 Eng. Ch. 29, 57 Eng. Reprint 255 (two years); Guest *v.* Homfrey, 5 Ves. Jr. 818, 5 Rev. Rep. 176, 31 Eng. Reprint 875.

After judgment for vendee for breach of contract.— The rule is established in at least one state that a vendor generally comes too late for specific performance after the vendee has recovered a judgment for damages against him for breach of his contract to convey. Miller *v.* Johnson, 9 Dana (Ky.) 48; Bartlett *v.* Blanton, 4 J. J. Marsh. (Ky.) 426; Funk *v.* McKeoun, 4 J. J. Marsh. (Ky.) 162; Craig *v.* Martin, 3 J. J. Marsh. (Ky.) 50, 19 Am. Dec. 157; Moore *v.* Randolph, 6 Leigh (Va.) 175, 29 Am. Dec. 208. But such judgment if not "fairly" obtained is not a bar (Miller *v.* Johnson, *supra*); as where the vendor obtained title and tendered a deed before the verdict (Couchman *v.* Boyd, 2 Dana (Ky.) 288), where the vendee prevented the title from being conveyed (Hughes *v.* McKinsey, 5 T. B. Mon. (Ky.) 38), or where the heirs of the vendor were infants at the time of the judgment (Nesbit *v.* Moore, 9

7. Delay After Notice to Complete. Similarly, a notice given to the party in default, to complete his performance of the contract within a specified time, although it may be ineffectual for its purpose because prescribing an unreasonably brief time, yet imposes upon the party receiving it the duty of acting with a greater degree of promptness.[5]

8. Laches in Other Than Land Contracts. In most of the cases hitherto cited the contract has been for the purchase and sale of land. Instances of laches in other contracts are given below. In the case of the sale of corporate stock, since the subject-matter is apt to be very fluctuating in value, the parties are often held to a high degree of promptness.[6] Laches have also been held fatal in the case of agreements to organize a corporation;[7] to renew a lease;[8] to execute a mortgage;[9] to erect a bridge across granted premises;[10] to erect a railroad station on complainant's land;[11] to cancel a note;[12] to assign a patent right, being property of a speculative and fluctuating value;[13] for the sale of slaves;[14] to deliver a contract of insurance;[15] for the use of a ditch;[16] to renew notes;[17] to keep open a lane;[18] an antenuptial agreement to accumulate a fund to be paid to the wife in lieu of dower;[19] and in cases of awards.[20]

9. Delay Held Not Fatal — a. In General. Mere lapse of time is a matter of comparatively little moment in determining the question of laches. In several of the miscellaneous instances cited below the delay amounted to nearly half a century, but was sufficiently accounted for and excused.[21] "The question of

B. Mon. (Ky.) 508. See also Cook *v.* Hendricks, 4 T. B. Mon. (Ky.) 500).

The commencement of the suit against the vendor is not a bar. Brush *v.* Vandenbergh, 1 Edw. (N. Y.) 21.

5. Chabot *v.* Winter Park Co., 34 Fla. 258, 15 So. 756, 43 Am. St. Rep. 192 (thirteen years); Fuller *v.* Hovey, 2 Allen (Mass.) 324, 79 Am. Dec. 782 (three years); Russell *v.* Nester, 46 Mich. 290, 9 N. W. 420; Sharp *v.* Wright, 28 Beav. 150, 54 Eng. Reprint 323; Huxham *v.* Llewellyn, 28 L. T. Rep. N. S. 577, 21 Wkly. Rep. 776. See *supra*, VI, D, 4, d.

6. **Where the vendee sued** see Diamond State Iron Co. *v.* Todd, 6 Del. Ch. 163, 14 Atl. 27 (five years); Wonson *v.* Fenno, 129 Mass. 405; Ringler *v.* Jetter, 35 Misc. (N. Y.) 750, 72 N. Y. Suppl. 362; Schimpff *v.* Dime Deposit, etc., Bank, 208 Pa. St. 380, 57 Atl. 767; Rogers *v.* Van Nortwick, 87 Wis. 414, 58 N. W. 757; Davison *v.* Davis, 125 U. S. 90, 8 S. Ct. 825, 31 L. ed. 635; York *v.* Passaic Rolling-Mill Co., 30 Fed. 471; Levy *v.* Stogdon, [1899] 1 Ch. 5, 68 L. J. Ch. 19, 79 L. T. Rep. N. S. 364, reversionary interest.

Where the vendor sued see Demarest *v.* McKee, 2 Grant (Pa.) 248 (delay until stock becomes valueless); Umfrid *v.* Brooks, 14 Wash. 675, 45 Pac. 310.

7. Hernreich *v.* Lidberg, 105 Ill. App. 495, a year.

8. Myers *v.* Silljacks, 58 Md. 319, twelve years.

9. Nelson *v.* Hagerstown Bank, 27 Md. 51 (eleven years); Insurance Co. of North America *v.* Union Canal Co., 2 Pa. L. J. 65 (fifteen years).

10. Williams *v.* Hart, 116 Mass. 513, twenty years.

11. Thurmond *v.* Chesapeake, etc., R. Co., 140 Fed. 697, 72 C. C. A. 191, sixteen years.

12. Wendover *v.* Baker, 121 Mo. 273, 25 S. W. 918.

13. Harrigan *v.* Smith, (N. J. Ch. 1898) 40 Atl. 13 (five years); New York Paper Bag Mach. Co. *v.* Union Paper Bag Mach. Co., 32 Fed. 783.

14. Strickland *v.* Fowler, 21 N. C. 629, nine years.

15. Markey *v.* Mutual Ben. L. Ins. Co., 16 Fed. Cas. No. 9,091.

16. Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030.

17. Cohn *v.* Mitchell, 115 Ill. 124, 3 N. E. 420.

18. McCue *v.* Ralston, 9 Gratt. (Va.) 430, twenty years.

19. Sullings *v.* Sullings, 9 Allen (Mass.) 234, laches for fifteen years till after the death of the husband held fatal.

20. Chicago, etc., R. Co. *v.* Stewart, 19 Fed. 5; McNeil *v.* Magee, 16 Fed. Cas. No. 8,915, 5 Mason 244.

21. Plaintiff's delay was held not fatal in the following unclassified cases:

Georgia.— Brown *v.* Newsom, 24 Ga. 466, twenty years; performance never having been demanded of plaintiff.

Illinois.— Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824; Litsey *v.* Whittemore, 111 Ill. 267 (four months; no time for performance being fixed by the contract); McFarlane *v.* Williams, 107 Ill. 33 (three months after defendant's refusal).

Iowa.— Fisher *v.* Carroll County Fair, etc., Assoc., 103 Iowa 745, 72 N. W. 684 (four years; no change of position); Butler *v.* Archer, 76 Iowa 551, 41 N. W. 309 (one month; vendor); Young *v.* Daniels, 2 Iowa 126, 63 Am. Dec. 477.

Kentucky.—Spalding *v.* Alexander, 6 Bush 160 (vendor); Henry *v.* Graddy, 5 B. Mon. 450 (vendor; seven months); Woodson *v.* Scott, 1 Dana 470 (vendor); Logan *v.* McChord, 2 A. K. Marsh. 224.

laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." [22]

b. Unprejudicial Delay. The broad principle, as applied to other equitable remedies, is generally recognized, that a delay which neither evidences an abandonment of right, nor operates to the prejudice of the other party, is not a defense.[23] A number of specific performance cases have expressly announced and applied the same rule; and they are supported by the statements and reasoning of a much larger number, in which denial of relief is based upon the injury resulting from the delay.[24]

c. Plaintiff Not in Default Until Tender by Defendant. Where time is not essential,[25] and the tender of the deed and payment were to be concurrent acts, and neither party has tendered performance and demanded performance by the other, neither party is in default, and the contract remains in force until barred by the statute of limitations,[26] or until notice is given requiring performance

Michigan.— McArthur *v.* Cheboygan, 156 Mich. 152, 120 N. W. 575.

Minnesota.— Joslyn *v.* Schwend, 89 Minn. 71, 93 N. W. 705, vendor.

New Hampshire.—White *v.* Poole, 74 N. H. 71, 65 Atl. 255.

New Jersey.— Miller *v.* Miller, 25 N. J. Eq. 354, vendor; two and one-half months.

New York.— Willis *v.* Dawson, 34 Hun 492 (three weeks' delay excused by inability to get title examined); Robbins *v.* Clock, 59 Misc. 289, 112 N. Y. Suppl. 246; Northrup *v.* Gibbs, 1 N. Y. Suppl. 465 (vendor; seven and one-half months).

North Carolina.— Faw *v.* Whittington, 72 N. C. 321.

Pennsylvania.— Pennsylvania Min. Co. *v.* Martin, 210 Pa. St. 53, 59 Atl. 436 (two years); Remington *v.* Irwin, 14 Pa. St. 143 (six months).

South Carolina.— Prothro *v.* Smith, 6 Rich Eq. 324 (one month after defendant's repudiation); Osborne *v.* Bremar, 1 Desauss. Eq. 486 (vendor; three years).

Tennessee.— Craig *v.* Laiper, 2 Yerg. 193, 24 Am. Dec. 479, thirty years.

Texas.— Riley *v.* McNamara, 83 Tex. 11, 18 S. W. 141; Campbell *v.* McFadin, 71 Tex. 28, 9 S. W. 138 (forty-four years); Younger *v.* Welch, 22 Tex. 417; Clay County Land, etc., Co. *v.* Skidmore, 26 Tex. Civ. App. 472, 64 S. W. 815; Robinson *v.* Thompson, (Civ. App. 1899) 52 S. W. 117.

Washington.— Tacoma Water Supply Co. *v.* Dumermuth, 51 Wash. 609, 99 Pac. 741; Wooding *v.* Crain, 10 Wash. 35, 38 Pac. 756, vendor's delay of three months and twenty days.

Wisconsin.—Maltby *v.* Austin, 65 Wis. 527, 27 N. W. 162, vendor; three years.

United States.— Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383 (delay excused by relation of confidence between the parties); Coulson *v.* Walton, 9 Pet. 62, 83, 9 L. ed. 51 [*affirming* 29 Fed. Cas. No. 17,132, 1 McLean 120] (forty-eight years; delay excused by diligence, by "the condition of the parties, their remote residence from each other, their death, the state of the country and its tribunals"); Nowell *v.* McBride, 162 Fed. 432, 89 C. C. A. 318; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168.

See 44 Cent. Dig. tit. "Specific Performance," §§ 236, 327, *et seq.*

22. Townsend *v.* Vanderwerker, 160 U. S. 171, 186, 16 S. Ct. 258, 40 L. ed. 383.

23. See Pomeroy Eq. Rem. § 21 *et seq.*; and Chase *v.* Chase, 20 R. I. 202, 37 Atl. 804. The statement assumes that the statute of limitations has no bearing on the case. See *infra*, VI, G.

24. Woodson *v.* Scott, 1 Dana (Ky.) 470, 471 (vendor's delay); Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115 (dissenting opinion); Waters *v.* Travis, 9 Johns. (N. Y.) 450 (lapse of time can then be urged only on ground that it is evidence of abandonment); Roberts *v.* Braffett, 32 Utah 51, 92 Pac. 789 (dissenting opinion). And see McArthur *v.* Cheboygan, 156 Mich. 152, 120 N. W. 575. See also *supra*, VI, F, 4, b. "The chancellor . . . cannot but discriminate between that species of delay which has been the result of mere indolence or neglect unaccompanied, as here, by any injury to the party complaining of it, and that other which is wilful and designed, or at all indicative of a vacillation of purpose, as to a *bona fide* fulfilment of the contract." Woodson *v.* Scott, *supra*.

25. The rule does not apply where time is essential. Wells *v.* Smith, 7 Paige (N. Y.) 22, 31 Am. Dec. 274.

26. *Colorado.*— Byers *v.* Denver Circle R. Co., 13 Colo. 552, 22 Pac. 951.

Mississippi.— Walton *v.* Wilson, 30 Miss. 576.

New Jersey.— Melick *v.* Cross, 62 N. J. Eq. 545, 51 Atl. 16, vendor sues.

New York.— Van Campen *v.* Knight, 65 N. Y. 580 [*affirming* 63 Barb. 205]; Hubbell *v.* Von Schoening, 49 N. Y. 326 [*reversing* 58 Barb. 498]; Leaird *v.* Smith, 44 N. Y. 618; Bennet *v.* Bennet, 10 N. Y. App. Div. 550, 42 N. Y. Suppl. 435.

North Carolina.— White *v.* Butcher, 59 N. C. 231.

within a specified time, or until the situation of the parties is so greatly changed that specific performance would be inequitable.[27]

d. Delay Caused by Other Party — (i) *In General.* A delay is usually excused when it is caused by the other party.[28] In order to avail himself of plaintiff's laches, defendant must have been ready and willing to perform all the terms of the contract on his own part.[29] Defendant cannot set up his own laches.[30] But delay is not excused by defendant's failure to comply with plaintiff's unwarranted demands.[31] Where plaintiff vendor has made frequent efforts to enforce, and has been reasonably active in attempting to enforce performance, the delay is not fatal.[32]

(ii) *Delay of Vendee Caused by Vendor's Defective Title.* A reasonable objection to the vendor's title is a good excuse for the vendee's delay.[33]

Pennsylvania.— Remington *v.* Irwin, 14 Pa. St. 143.

South Dakota.— Spolek *v.* Hatch, 21 S. D. 386, 113 N. W. 75.

Texas.— Riley *v.* McNamara, 83 Tex. 11, 18 S. W. 141; Upton *v.* Maurice, (Civ. App. 1896) 34 S. W. 642, vendor sued.

Utah.— See Roberts *v.* Braffett, 33 Utah 51, 92 Pac. 789.

Washington.— Mudgett *v.* Clay, 5 Wash. 103, 31 Pac. 424.

What is sufficient tender.— Tender may be made to the vendee, and need not be made to his assignees. Hedenberg *v.* Jones, 73 Ill. 149. The deed tendered must be executed by vendor and wife. McWilliams *v.* Long, 32 Barb. (N. Y.) 194, 19 How. Pr. 547. A tender accompanied by an unwarranted demand is ineffectual. Denton *v.* White, 26 Wis. 679. As to tender see *supra*, VI, C.

27. Peters *v.* Delaplaine, 49 N. Y. 362.

28. *California.*— Karns *v.* Olney, 80 Cal. 90, 22 Pac. 57, 13 Am. St. Rep. 101 (failure to discover that contract made by vendor's agent was binding on vendor); Keer *v.* Moore, 6 Cal. App. 305, 92 Pac. 107 (vendor led vendee to believe that deed would be executed).

Iowa.— Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247, vendee frequently demanded a deed and vendor made excuses; eight years' delay not fatal.

Maryland.— Lawson *v.* Mullinix, 104 Md. 156, 64 Atl. 938.

Michigan.— Peters *v.* Canfield, 74 Mich. 498, 42 N. W. 125, vendor refused to render any statement of previous payments.

Ohio.— Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.

Texas.— Scarborough *v.* Arrant, 25 Tex. 129, defendant had promised to notify plaintiff as soon as former should be able to perform.

Vermont.— Burton *v.* Landon, 66 Vt. 361, 29 Atl. 374.

United States.— Gunton *v.* Carroll, 101 U. S. 426, 25 L. ed. 985.

29. Tate *v.* Pensacola Gulf, etc., Co., 37 Fla. 439, 20 So. 542, 53 Am. St. Rep. 251; House *v.* Beatty, 7 Ohio, Pt. II, 84. See Nowell *v.* McBride, 162 Fed. 432, 89 C. C. A. 318.

30. Dunn *v.* Vakish, 10 Okla. 388, 61 Pac. 926, vendor plaintiff.

31. Ryder *v.* Johnson, 153 Ala. 482, 45 So. 181 (vendee had rejected deed tendered), Taylor *v.* Merrill, 55 Ill. 52; Chicago, etc., R. Co. *v.* Wisconsin, etc., R. Co., 76 Iowa 615, 41 N. W. 375; Wormser *v.* Garvey, 4 Hun (N. Y.) 476.

32. Tiernan *v.* Roland, 15 Pa. St. 429; Coulson *v.* Walton, 9 Pet. (U. S.) 62, 9 L. ed. 51 [*affirming* 28 Fed. Cas. No. 17,132, 1 McLean 120].

But mere assertion of the claim from time to time, without taking steps to enforce it, does not excuse a great delay. Van Buren *v.* Stocking, 86 Mich. 246, 49 N. W. 50.

33. *Alabama.*— Johnston *v.* Jones, 85 Ala. 286, 4 So. 748.

Arizona.— Walton *v.* McKinney, (1908) 94 Pac. 1122.

Georgia.— Ellis *v.* Bryant, 120 Ga. 890, 48 S. E. 352.

Illinois.— Snyder *v.* Spaulding, 57 Ill. 480, sufficient excuse that facts rendered the title suspicious. *Compare*, however, Morse *v.* Seibold, 147 Ill. 318, 35 N. E. 369, vendee cannot wait four years until title is made good by prescription.

Iowa.— Fisher *v.* Carroll County Fair, etc., Assoc., 103 Iowa 745, 72 N. W. 684; Shreck *v.* Pierce, 3 Iowa 350.

Michigan.— Lambert *v.* Weber, 83 Mich. 395, 47 N. W. 251.

Minnesota.— Oliver Min. Co. *v.* Clark, 69 Minn. 75, 71 N. W. 908; Thompson *v.* Myrick, 20 Minn. 205.

New Jersey.— Kleim *v.* Lindley, (Ch. 1895) 30 Atl. 1063.

New York.— Greenblatt *v.* Hermann, 144 N. Y. 13, 38 N. E. 966.

Ohio.— Galloway *v.* Barr, 12 Ohio 354.

South Carolina.— Saverance *v.* Lockhart, 57 S. C. 131, 35 S. E. 505.

Texas.— Campbell *v.* McFadin, 71 Tex. 28, 9 S. W. 138 (forty-four years); Williams *v.* Talbot, 16 Tex. 1.

Washington.— Stevens *v.* Kittredge, 44 Wash. 347, 87 Pac. 484, failure of vendor to furnish abstract.

West Virginia.— Clark *v.* Gordon, 35 W. Va. 735, 14 S. E. 255; Watson *v.* Coast, 35 W. Va. 463, 14 S. E. 249.

United States.— Taylor *v.* Longworth, 14 Pet. 172, 10 L. ed. 405; Cleaver *v.* Taylor, 98 Fed. 900, 39 C. C. A. 338.

Failure of the vendor to make a good title does not excuse the vendee's delay, where the

But an objection to title is no excuse for delay where it is frivolous or urged in bad faith.[34]

e. Other Excuses. The plaintiff's mistake as to or ignorance of his rights may excuse his delay;[35] and his infancy, under most circumstances, is held to be an excuse.[36] Other excuses are mentioned in the note.[37]

f. When Vendee Has Fully Performed. If there is no evidence of abandonment of the vendee's claim, no mere lapse of time will bar his remedy when the consideration has been fully performed, as the vendor then becomes a trustee, and can gain no adverse rights without an open disavowal.[38]

g. When Vendee or Lessee Is in Possession. When the vendee or lessee takes or retains possession under the contract, his possession amounts to a continued assertion of his claim, and is inconsistent with any inference of abandonment. As a rule mere delay in such case does not bar his right to specific performance.[39]

vendee purchased such title as the vendor had. Brashier *v.* Gratz, 6 Wheat. (U. S.) 528, 5 L. ed. 322.

Increase in value.— In a suit to specifically enforce a contract to convey land, in which payments were delayed because the vendor did not furnish a perfect title, it is no defense that since the contract was entered into the property had greatly appreciated in value, where the payments were not delayed from motives of speculation. Walton *v.* McKinney, (Ariz. 1908) 94 Pac. 1122. *Compare supra,* VI, F, 4, b, (VI).

34. Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019 (vendee himself procured clouding of vendor's title); Hoyt *v.* Tuxbury, 70 Ill. 331; Rogers *v.* Williams, 8 Phila. (Pa.) 123.

35. McAllen *v.* Raphael, (Tex. Civ. App. 1906) 96 S. W. 760 (where all parties believed that a deed made in execution of the contract was valid); Max Meadows Land, etc., Co. *v.* Bridges, 95 Va. 184, 27 S. E. 839; Brown *v.* Sutton, 129 U. S. 238, 9 S. Ct. 273, 32 L. ed. 664. Where defendant's land, subject to a building line restriction during certain reconstruction thereon, was inclosed by a high board fence along the sidewalk, and plaintiffs brought suit promptly to enforce the restriction after discovering that defendant's erection was outside the building line, plaintiffs were not barred by laches. Codman *v.* Bradley, 201 Mass. 361, 87 N. E. 591.

But that plaintiff must show good reasons for his ignorance to excuse a delay of fourteen years see Haggerty *v.* Elyton Land Co., 89 Ala. 428, 7 So. 651.

That plaintiff's poverty is not an excuse see Moore *v.* Blake, 1 Ball & B. 62.

36. Putnam *v.* Tinkler, 83 Mich. 628, 47 N. W. 687 (mother's laches not imputable to infant); Dragoo *v.* Dragoo, 50 Mich. 573, 15 N. W. 910 (but twenty-five years' delay is to be considered in its bearing on the accuracy of evidence); Forsyth *v.* Johnson, 14 Grant Ch. (U. C.) 639 (where vendor caused the delay by his own arrangement with the infant's relatives). *Contra,* Henry *v.* Conn, 12 Ohio 193 (twenty-three years); Smith *v.* Christmas, 7 Yerg. (Tenn.) 565 (eight months; but see criticism in Wilkins *v.* Frierson, 2 Sneed (Tenn.) 701).

37. Defendant's absence from the state has been held an excuse. Lovejoy *v.* Stewart, 23 Minn. 94. And see Agens *v.* Koch, (N. J. Ch. 1908) 70 Atl. 348. But see Seculovich *v.* Morton, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106, where it was held that the vendee could have had a commissioner appointed to convey the land to him, and his long delay was therefore not excused.

That plaintiff was driven from state by war was an excuse in Melton *v.* Smith, 65 Mo. 315.

Fraud of defendant, and relation of trust and confidence.— Whether equitable relief shall be barred for laches must depend largely upon the circumstances of each case, and in a suit for specific performance of a contract for the purchase of property mere delay in bringing suit is not necessarily conclusive against the right of recovery, where there has been no change in the value of the property, and especially where the defense is based upon records which were fraudulently altered by defendants, or those acting in their interest, and they stood in a relation of trust and confidence toward complainant, or where the right to bring the suit was vested in a receiver who was personally adversely interested. Nowell *v.* McBride, 162 Fed. 432, 89 C. C. A. 318.

38. *Illinois.*— Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29.

Indiana.— Cutsinger *v.* Ballard, 115 Ind. 93, 17 N. E. 206.

New Hampshire.— Hunkins *v.* Hunkins, 65 N. H. 95, 18 Atl. 655, ten years.

Pennsylvania.— McLaughlin *v.* Shields, 12 Pa. St. 283, eighteen years.

Tennessee.— Koen *v.* White, Meigs 358; Childress *v.* Holland, 3 Hayw. 274.

Texas.— Reed *v.* West, 47 Tex. 240; Hemming *v.* Zimmerschitte, 4 Tex. 159.

See 44 Cent. Dig. tit. "Specific Performance," § 336.

Contra.— See Iglehart *v.* Vail, 73 Ill. 63, where the vendee allowed a subsequent purchaser without actual notice to make valuable improvements. The relation of vendor to vendee is viewed, not as an express trust, against which there can be no laches until the trust is repudiated, but a trust by implication of law. Johnson *v.* Hopkins, 19 Iowa 49. In Texas also a *dictum* favors this view. Hemming *v.* Zimmerschitte, 4 Tex. 159.

39. *Alabama.*— Jones *v.* Gainer, 157 Ala. 218, 47 So. 142; Peck *v.* Ashurst, 108 Ala.

Valuable improvements made on the land by the vendee in possession strengthen the presumption against abandonment of his claim.[40]

429, 19 So. 781; Louisville, etc., R. Co. *v.* Philyaw, 94 Ala. 463, 10 So. 83.

Arkansas.— Skipworth *v.* Martin, 50 Ark. 141, 6 S. W. 514.

California.— Day *v.* Cohn, 65 Cal. 508, 4 Pac. 511; Barsolou *v.* Newton, 63 Cal. 223.

Colorado.— Coffee *v.* Emigh, 15 Colo. 184, 25 Pac. 83, 10 L. R. A. 125.

Connecticut.— Pritchard *v.* Todd, 38 Conn. 413; Green *v.* Finin, 35 Conn. 178.

Florida.— Tate *v.* Pensacola, etc., Land, etc., Co., 37 Fla. 439, 20 So. 542, 53 Am. St. Rep. 251.

Illinois.— Sheldon *v.* Dunbar, 200 Ill. 490, 65 N. E. 1095; Hall *v.* Peoria, etc., R. Co., 143 Ill. 163, 32 N. E. 598 (twenty years); Bragg *v.* Olson, 128 Ill. 540, 21 N. E. 519; Whitsitt *v.* Pre-emption Presb. Church, 110 Ill. 125.

Indiana.— Stretch *v.* Schenck, 23 Ind. 77, ten years.

Iowa.— Laverty *v.* Hall, 19 Iowa 526; Armstrong *v.* Pierson, 5 Iowa 317.

Kentucky.— Buck *v.* Holloway, 2 J. J. Marsh. 163 (twenty years); Tyree *v.* Williams, 3 Bibb 365, 6 Am. Dec. 663.

Maryland.—Somerville *v.* Trueman, 4 Harr. & M. 43, 1 Am. Dec. 389, sixty or seventy years.

Massachusetts.— Low *v.* Low, 173 Mass. 580, 54 N. E. 257; Ryder *v.* Loomis, 161 Mass. 161, 36 N. E. 836; Western R. Corp. *v.* Babcock, 6 Metc. 346.

Michigan.— Stonehouse *v.* Stonehouse, 156 Mich. 43, 120 N. W. 23 (holding that complainant was not guilty of such laches as a matter of law as bars specific performance of his deceased father's agreement to convey in consideration of his services, where he took possession, subsequently obtained a deed, which he recorded, believing it to be a valid conveyance, and held possession under it for twenty years); Detroit United R. Co. *v.* Smith, 144 Mich. 235, 107 N. W. 922.

Minnesota.— Minneapolis, etc., R. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63; Gill *v.* Bradley, 21 Minn. 15.

New Hampshire.—Hunkins *v.* Hunkins, 65 N. H. 95, 18 Atl. 655; Pennock *v.* Ela, 41 N. H. 189.

New Jersey.— Pennsylvania R. Co. *v.* U. S. Pipe-Line Co., (Ch. 1896) 33 Atl. 809; Ashmore *v.* Evans, 11 N. J. Eq. 151; New Barbadoes Toll Bridge Co. *v.* Vreeland, 4 N. J. Eq. 157, twenty-three years.

New York.— Bruce *v.* Tilson, 25 N. Y. 194; Voorhees *v.* De Meyer, 2 Barb. 37; Cordes *v.* Kenney, 5 Silv. Sup. 4, 7 N. Y. Suppl. 849; Waters *v.* Travis, 9 Johns. 450 (fourteen years); Miller *v.* Bear, 3 Paige 466.

North Carolina.— Hairston *v.* Bescherer, 141 N. C. 205, 53 S. E. 845; Scarlett *v.* Hunter, 56 N. C. 84.

Pennsylvania.— McClure *v.* Fairfield, 153 Pa. St. 411, 26 Atl. 446 (two years); White *v.* Patterson, 139 Pa. St. 429, 21 Atl. 360 (thirty-three years).

South Carolina.— Smith *v.* Smith, McMull. Eq. 126.

Vermont.— Van Dyke *v.* Cole, 81 Vt. 379, 70 Atl. 593, 1103.

Virginia.— Williams *v.* Lewis, 5 Leigh 686 (forty-eight years); Zane *v.* Zane, 6 Munf. 406.

Washington.—Sayward *v.* Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389; Mudgett *v.* Clay, 5 Wash. 103, 31 Pac. 424.

West Virginia.— Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 44 S. E. 433, 97 Am. St. Rep. 1027; Norman *v.* Bennett, 32 W. Va. 614, 9 S. E. 914 (twenty-seven years); Abbott *v.* L'Hommedieu, 10 W. Va. 677.

Wisconsin.— Seaman *v.* Ascherman, 57 Wis. 547, 15 N. W. 788, suit by lessor against lessee.

United States.— Mason *v.* Wallace, 16 Fed. Cas. No. 9,255, 3 McLean 148; Mason *v.* Wallace, 16 Fed. Cas. No. 9,256, 4 McLean 77.

England.— Shepheard *v.* Walker, L. R. 20 Eq. 659, 44 L. J. Ch. 648, 33 L. T. Rep. N. S. 47, 23 Wkly. Rep. 903 (lessee, possession and payment of rent); Sharp *v.* Milligan, 22 Beav. 606, 53 Eng. Reprint 1242 (lessee; possession and payment of rent); Carton *v.* Bury, 10 Ir. Ch. 387 (lessee); Burke *v.* Smyth, 9 Ir. Eq. 135, 3 J. & L. 193; Clarke *v.* Moore, 7 Ir. Eq. 515, 1 J. & L. 723 (against lessee); Crofton *v.* Ormsby, 2 Sch. & Lef. 583, 9 Rev. Rep. 107. But see Powis *v.* Dynevor, 35 L. T. Rep. N. S. 940.

See 44 Cent. Dig. tit. "Specific Performance," § 337.

Contra.— In the following cases the vendee's possession did not excuse his laches: O'Donnell *v.* Jackson, 69 Cal. 622, 11 Pac. 251 (three years); Weber *v.* Marshall, 19 Cal. 447; Lewis *v.* Woods, 4 How. (Miss.) 86, 34 Am. Dec. 110 (two years); Brown *v.* Haines, 12 Ohio 1 (two or three years); Roberts *v.* Braffett, 33 Utah 51, 92 Pac. 789 (in which case the court evidently confuses the question of possession as an excuse for laches with the requisites of possession as an element in the part performance of patrol contracts).

The possession must be under the contract. — Mills *v.* Haywood, 6 Ch. D. 196. And see Clinchfield Coal Co. *v.* Clintwood Coal, etc., Co., 108 Va. 433, 62 S. E. 329.

In a suit by the vendor, his laches have been excused, where the vendee in possession had been cutting timber and the *status quo* could not be restored. Burton *v.* Adkins, 2 Del. Ch. 125.

No injustice from rule.— The delay in payment by the vendee in possession may of course be put an end to by notice from the vendor to complete payment in a specified time. See *supra*, VI, D, 4. The rule of the text thus works no injustice to the vendor.

40. *Iowa.*— Armstrong *v.* Pierson, 5 Iowa 317.

New Jersey.— Cranwell *v.* Clinton Realty

h. Waiver of Laches — (I) *In General.* The plaintiff's laches may be waived by defendant's acquiescence therein, as, by acts recognizing the contract as still subsisting.[41]

(II) *By Accepting Payment.* Thus the vendee's laches is waived by accepting payment or even by applying for payment; and where time is of the essence, his default as to any particular payment is waived by accepting such payment after it is due.[42]

i. Excuse For Laches in Other Than Land Contracts. The cases hitherto cited have been chiefly those relating to the purchase and sale of land. Other contracts are mentioned below, in the performance of which plaintiff's delay was excused, or did not render him guilty of laches.[43]

G. Statute of Limitations — 1. Analogy of Statute Followed. In states where the statute of limitations does not expressly apply, the court of equity frequently follows the analogy of the statute applicable to the corresponding legal action, and bars plaintiff who has delayed, without excuse, longer than the statutory period.[44]

Co., 67 N. J. Eq. 540, 58 Atl. 1030; Thompson *v.* Keeler, (Ch. 1899) 42 Atl. 1043.

Pennsylvania.— Todd *v.* Pfoutz, 3 Yeates 177.

United States.— Taylor *v.* Longworth, 14 Pet. 172, 10 L. ed. 405; Mason *v.* Wallace, 16 Fed. Cas. No. 9,255, 3 McLean 148; Mason *v.* Wallace, 16 Fed. Cas. No. 9,256, 4 McLean 77.

Canada.— O'Keefe *v.* Taylor, 2 Grant Ch. (U. C.) 95.

41. Waiver of purchaser's laches see Barsolou *v.* Newton, 63 Cal. 223; Mix *v.* Balduc, 78 Ill. 215 (vendee's five months' laches waived by recognition of his rights); Murphy *v.* Lockwood, 21 Ill. 611; Bennett *v.* Welch, 25 Ind. 140, 87 Am. Dec. 354 (fifteen years' delay waived by vendor's bringing suit on the contract); Eubank *v.* Hampton, 1 Dana (Ky.) 343; Welch *v.* Whelpley, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810; Thompson *v.* Keeler, (N. J. Ch. 1899) 42 Atl. 1043; Williston *v.* Williston, 41 Barb. (N. Y.) 635.

Waiver of vendor's laches see Emmons *v.* Kiger, 23 Ind. 483; Brush *v.* Vandenbergh, 1 Edw. (N. Y.) 21 (by demanding conveyance); Morgan *v.* Scott, 26 Pa. St. 51; Vail *v.* Nelson, 4 Rand. (Va.) 478; Pincke *v.* Curteis, 4 Bro. Ch. 329, 29 Eng. Reprint 918.

42. *Alabama.*— Brassell *v.* McLemore, 50 Ala. 476.

Connecticut.— Lounsbury *v.* Beebe, 46 Conn. 291.

Illinois.— Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540, vendor applies for payment.

Iowa.— Collins *v.* Vandever, 1 Iowa 573, delay of one year waived.

Kansas.— Wilson *v.* Emig, 44 Kan. 125, 24 Pac. 80; Kansas Lumber Co. *v.* Horrigan, 36 Kan. 387, 13 Pac. 564.

Massachusetts.— Potter *v.* Jacobs, 111 Mass. 32.

Michigan.— Ingersoll *v.* Horton, 7 Mich. 405; Wallace *v.* Pidge, 4 Mich. 570.

Nebraska.— Merriam *v.* Goodlett, 36 Nebr. 384, 54 N. W. 686; Paulman *v.* Cheney, 18 Nebr. 392, 25 N. W. 495, waiver of forfeiture.

Nevada.— Lake *v.* Lewis, 16 Nev. 94.

New Hampshire.— Ewins *v.* Gordon, 49 N. H. 444, waiver of forfeiture.

New Jersey.— Schloetterer *v.* Wagner, (Ch. 1891) 21 Atl. 863; Grigg *v.* Landis, 21 N. J. Eq. 494, waiver of forfeiture.

New York.— Richmond *v.* Foote, 3 Lans. 244; Voorhees *v.* De Meyer, 2 Barb. 37; Cordes *v.* Kenney, 5 Silv. Sup. 4, 7 N. Y. Suppl. 849.

United States.— Brown *v.* Guarantee Trust, etc., Co., 128 U. S. 403, 9 S. Ct. 127, 32 L. ed. 468.

See 44 Cent. Dig. tit. "Specific Performance," § 312.

But payment to a stranger, not ratified or adopted by the vendee, has no such effect. Durham *v.* Roberts, 33 Ga. Suppl. 123.

Subsequent payments.— The fact that vendor had accepted payments after they were due furnishes no excuse for not meeting the other payments promptly. Phelps *v.* Illinois Cent. R. Co., 63 Ill. 468.

43. To issue an insurance policy.— Belt *v.* Brooklyn L. Ins. Co., 12 Mo. App. 100, where the delay caused by defendant's representations.

To purchase a mortgage.— Law *v.* Smith, 68 N. J. Eq. 81, 59 Atl. 327, four years.

To deliver notes on satisfaction of judgment.— Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776.

To assign a patent.— Harrington *v.* Smith, 57 N. J. Eq. 635, 42 Atl. 579 [*reversing* (Ch. 1898) 40 Atl. 13].

To discontinue a suit.— Deen *v.* Milne, 113 N. Y. 303, 20 N. E. 861 (ten years' harmless delay); Burton *v.* Landon, 66 Vt. 361, 29 Atl. 374.

To sell personal property.— Livesley *v.* Johnston, 48 Oreg. 40, 84 Pac. 1044.

44. Castner *v.* Walrod, 83 Ill. 171, 25 Am. Rep. 369; Johnson *v.* Hopkins, 19 Iowa 49; Allen *v.* Beal, 3 A. K. Marsh. (Ky.) 554, 13 Am. Dec. 203; Taylor *v.* Campbell, 59 Tex. 315; McFaddin *v.* Williams, 58 Tex. 625; McKin *v.* Williams, 48 Tex. 89; Glasscock *v.* Nelson, 26 Tex. 150. But see Talmash *v.* Mugleston, 4 L. J. Ch. O. S. 200. See also

2. Statute Including Action For Specific Performance. In several states the statute of limitations by its terms applies to the action for specific performance.[45]

3. When Statute Does Not Apply. Where the vendee has fully performed, the vendor becomes a mere trustee of the land for the vendee, and the statute therefore does not run against the latter, until a repudiation of the contract by the vendor, brought home to the vendee's knowledge.[46] Also in several states the statute does not run against a vendee in possession.[47]

4. Laches, Although Statute Has Not Run. The period of limitations of equitable actions, fixed by the statute, is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case.[48] But mere delay short of the statutory period in some states is not a bar.[49]

VII. APPROXIMATE RELIEF.

A. Contract to Devise or Bequeath[50]**— 1. In General.** An agreement to make a certain disposition of property by will is one which strictly speaking is not capable of a specific execution,[51] yet it is within the jurisdiction of a court of equity to do what is equivalent to a specific performance of such an agreement.

Equity, 16 Cyc. 177; Limitations of Actions, 25 Cyc. 1056, 1059.

45. Lewis *v.* Prendergast, 39 Minn. 301, 39 N. W. 802; Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783 (period of limitation for actions in equity applies to an action for damages in lieu of specific performance); Peters *v.* Delaplaine, 49 N. Y. 362 (right of action accrues on vendor's refusal to perform, even though at that time he could not give a perfect title); Bruce *v.* Tilson, 25 N. Y. 194; McCotter *v.* Lawrence, 4 Hun (N. Y.) 107, 6 Thomps. & C. 392; Headen *v.* Womack, 88 N. C. 468; Boon *v.* Chamberlain, 82 Tex. 480, 18 S. W. 655; Chamberlain *v.* Boon, 74 Tex. 659, 12 S. W. 727; Meyer *v.* Andrews, 70 Tex. 327, 7 S. W. 814; Taylor *v.* Campbell, 59 Tex. 315; Sheldon *v.* Sternberger, (Tex. Civ. App. 1894) 25 S. W. 333; Sayles Civ. St. art. 3360; Tex. Rev. St. § 3209. See also Equity, 16 Cyc. 177; Limitations of Actions, 25 Cyc. 1057, 1059. That the statute applies to contracts for sale of land when the vendee is not in possession see McMillin *v.* McMillin, 7 T. B. Mon. (Ky.) 560; Smith *v.* Carney, 1 Litt. (Ky.) 295. That it applies to contracts for the sale of personal property see Waller *v.* Demint, 1 Dana (Ky.) 92, 25 Am. Dec. 134.

Action not barred.—A suit brought by a vendee to enforce specific performance of a contract to convey land against one of two joint vendors and the heirs of another, within two years after the refusal to make title, is not barred by the statute of limitations, when it is shown that the vendee was, until the refusal, ignorant of the vendor's inability to convey title. Taylor *v.* Rowland, 26 Tex. 293. Where a title bond provided that the title was to be made when the patent issued, and the patent had in fact issued before the bond was made, and both parties were ignorant of the fact, limitations do not begin to run until the vendee has a reasonable time to learn of the existence of the patent. Yeary *v.* Cummins, 28 Tex. 91.

46. Scadden Flat Gold-Min. Co. *v.* Scadden, 121 Cal. 33, 53 Pac. 440; Low *v.* Low, 173 Mass. 580, 54 N. E. 257; Ryder *v.* Loomis, 161 Mass. 161, 36 N. E. 836; Hemming *v.* Zimmerschitte, 4 Tex. 159.

47. *Arkansas.*— Coleman *v.* Hill, 44 Ark. 452.

California.— Gilbert *v.* Sleeper, 71 Cal. 290, 12 Pac. 172.

Georgia.— See Russell *v.* Napier, 80 Ga. 77, 4 S. E. 857.

Illinois.— Baker *v.* Allison, 186 Ill. 613, 58 N. E. 233.

Kentucky.— Sullivan *v.* Evans, 29 S. W. 619, 16 Ky. L. Rep. 712; Hampton *v.* Bailey, 5 S. W. 383, 9 Ky. L. Rep. 423, express exception from the statute, Gen. St. c. 71, art. 4, § 20.

South Carolina.— Smith *v.* Smith, McMull. Eq. 126.

Limitations will not commence while vendor is receiving payments on the contract. Burnell *v.* Bradbury, 67 Kan. 762, 74 Pac. 279.

Statute applies to vendee in possession who has not fully performed see McCotter *v.* Lawrence, 4 Hun (N. Y.) 107, 6 Thomps. & C. 392.

48. *Illinois.*— Walker *v.* Ray, 111 Ill. 315.

Kentucky.— Cocanougher *v.* Green, 93 Ky. 519, 20 S. W. 542, 14 Ky. L. Rep. 507.

Montana.— Wolf *v.* Great Falls Water Power, etc., Co., 15 Mont. 49, 38 Pac. 115.

New York.— Peters *v.* Delaplaine, 49 N. Y. 362; Darrow *v.* Bush, 45 N. Y. App. Div. 262, 61 N. Y. Suppl. 2.

Texas.— Herman *v.* Gieseke, (Civ. App. 1895) 33 S. W. 1006.

49. Harrison *v.* Rice, 78 Nebr. 654, 111 N. W. 524, 78 Nebr. 659, 114 N. W. 151; Riley *v.* McNamara, 83 Tex. 11, 18 S. W. 141; Reed *v.* West, 47 Tex. 240; Robinson *v.* Thompson, (Tex. Civ. App. 1899) 52 S. W. 117; Upton *v.* Maurice, (Tex. Civ. App. 1896) 34 S. W. 642.

50. See also Wills.

51. Colby *v.* Colby, 81 Hun (N. Y.) 221, 30 N. Y. Suppl. 677; Turnipseed *v.* Sirrine, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep.

Such a contract is enforced after the death of the promisor by fastening a trust on the property in the hands of heirs, devisees, and personal representatives and others holding the property with notice of the contract or as volunteers.[52]

580; Burdine *v.* Burdine, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741.

As to legal remedy for the breach of such contract see WILLS.

That the equitable relief hereinafter described does not depend on the question whether the contract will support an action at law see Phalen *v.* U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. N. S. 134 [*reversing* 100 N. Y. App. Div. 264, 91 N. Y. Suppl. 537]; Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647.

52. *Alabama.*—Allen *v.* Bromberg, 149 Ala. 317, 41 So. 771.

California.— Owens *v.* McNally, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; Barry *v.* Beamer, 8 Cal. App. 200, 96 Pac. 373; Stewart *v.* Smith, 6 Cal. App. 152, 91 Pac. 667; Schaadt *v.* New York Mut. L. Ins. Co., 2 Cal. App. 715, 84 Pac. 249, to bequeath part of proceeds of insurance policy.

Georgia.— Maddox *v.* Rowe, 23 Ga. 431, 68 Am. Dec. 535.

Illinois.— Klussman *v.* Wessling, 238 Ill. 568, 87 N. E. 544; Oswald *v.* Nehls, 233 Ill. 438, 84 N. E. 619; Barrett *v.* Geisinger, 179 Ill. 240, 53 N. E. 576; Whiton *v.* Whiton, 179 Ill. 32, 53 N. E. 722 [*affirming* 76 Ill. App. 553]; Jones *v.* Bean, 136 Ill. App. 545.

Iowa.— Cook *v.* Ely, (1908) 116 N. W. 129; Chehak *v.* Battles, 133 Iowa 107, 110 N. W. 330, 8 L. R. A. N. S. 1130.

Kansas.— Taylor *v.* Taylor, 79 Kan. 161, 99 Pac. 814; Anderson *v.* Anderson, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. N. S. 229; Newton *v.* Lyon, 62 Kan. 306, 62 Pac. 1000, 62 Kan. 651, 64 Pac. 592.

Maryland.— Frisby *v.* Parkhurst, 29 Md. 58, 96 Am. Dec. 503.

Minnesota.— Newton *v.* Newton, 46 Minn. 33, 48 N. W. 450, promissory note.

Mississippi.— Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658.

Missouri.— Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881; Sutton *v.* Hayden, 62 Mo. 101; Wright *v.* Tinsley, 30 Mo. 389.

Montana.— Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

Nebraska.— Peterson *v.* Bauer, 83 Nebr. 405, 119 N. W. 764; Pemberton *v.* Pemberton, 76 Nebr. 669, 107 N. W. 996; Best *v.* Gralapp, 69 Nebr. 811, 96 N. W. 641, 99 N. W. 837.

New Jersey.—Schutt *v.* Methodist Episcopal Church Missionary Soc., 41 N. J. Eq. 115, 3 Atl. 398; Johnson *v.* Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773.

New York.— Phalen *v.* U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. N. S. 734 [*reversing* 100 N. Y. App. Div. 264, 91 N. Y. Suppl. 537]; Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; Parsell *v.* Stryker, 41 N. Y. 480; Kine *v.* Farrell, 71 N. Y. App. Div. 219, 75 N. Y. Suppl. 542; Healy *v.* Healy, 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927 [*affirmed* in 167 N. Y. 572, 60 N. E. 1112]; Gates *v.* Gates, 34 N. Y. App. Div. 608, 54 N. Y. Suppl. 454; Colby *v.* Colby, 81 Hun 221, 30 N. Y. Suppl. 677, 24 N. Y. Civ. Proc. 148; Shakespeare *v.* Markham, 10 Hun 311 [*affirmed* in 72 N. Y. 400]; Rhoades *v.* Schwartz, 41 Misc. 648, 85 N. Y. Suppl. 229.

North Carolina.— Earnhardt *v.* Clement, 137 N. C. 91, 49 S. E. 49 (contract to bequeath); Price *v.* Price, 133 N. C. 494, 45 S. E. 855. But *compare* Morgan *v.* Tillet, 55 N. C. 39, where the agreement was by parol.

Ohio.— Emery *v.* Darling, 50 Ohio St. 160, 33 N. E. 715.

Rhode Island.— Spencer *v.* Spencer, 25 R. I. 239, 55 Atl. 637.

South Carolina.— Turnipseed *v.* Sirrine, 57 S. C. 559, 35 S. E. 757, 76 Am. St. Rep. 580; Fogle *v.* St. Michael's Church, 48 S. C. 86, 26 S. E. 99; Gary *v.* James, 4 Desauss. Eq. 185.

Tennessee.— Starnes *v.* Hatcher, 121 Tenn. 330, 117 S. W. 219; Green *v.* Broyles, 3 Humphr. 167, 39 Am. Dec. 156.

Texas.— Jordan *v.* Abney, 97 Tex. 296, 78 S. W. 486.

Virginia.—Plunkett *v.* Bryant, 101 Va. 814, 45 S. E. 742; Burdine *v.* Burdine, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741.

United States.—McKinnon *v.* McKinnon, 56 Fed. 409, 5 C. C. A. 530 [*reversing* 46 Fed. 713], Missouri.

England.— Ridley *v.* Ridley, 34 Beav. 478, 11 Jur. N. S. 475, 34 L. J. Ch. 462, 6 New Rep. 11, 12 L. T. Rep. N. S. 481, 13 Wkly. Rep. 763, 55 Eng. Reprint 720 (verbal contract to bequeath); Cassey *v.* Fitton, 2 Harg. Jur. Arg. 296 (1679).

Canada.— Fitzgerald *v.* Fitzgerald, 20 Grant Ch. (U. C.) 410.

See 44 Cent. Dig. tit. "Specific Performance," §§ 223, 224. And see WILLS.

Will made in violation of the contract should be probated.— Since the contract can be specifically enforced only by fastening a trust upon the property, and enforcing the trust against the persons claiming under the wrongful will, such will should first be probated. Allen *v.* Bromberg, 147 Ala. 317, 41 So. 771.

Form of the agreement.— If the agreement is that the promisee shall receive the property at the death of the promisor, or that it shall be left to him, or that it shall belong to him at the death of the promisor, a failure to specify the mode of carrying out the promise does not impair its binding force. There need be no express promise to make a will. Sutton *v.* Hayden, 62 Mo. 101; Best *v.* Gralapp, 69 Nebr. 811, 96 N. W. 641, 99 N. W. 837. See, generally, WILLS.

A covenant to make no distinction between the covenantor's children in the distribution of his estate by will has been enforced. Phalen *v.* U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. N. S. 434 [*reversing* 100 N. Y. App. Div. 264, 91 N. Y. Suppl. 537].

2. Informal Adoption Agreements. A common instance is an informal agreement to adopt a child and give it a child's rights of inheritance, or all the property the promisor dies possessed of, or a child's share of the estate, or to make it an equal heir with other children in consideration of the surrender of the child by its parent to the promisor, and of services to be rendered by the child.[53]

3. Subject to Usual Defenses. The usual principles as to consideration, certainty, fairness, compliance with statute of frauds, freedom from fraud, etc., apply to contracts to dispose of property by will.[54] A mere understanding between the parties, not amounting to a contract, does not suffice;[55] and an invalid will, not made in pursuance of any contract, will not be enforced as a contract.[56] A failure to object to the probate of a will made in violation of the contract does not defeat plaintiff's right to enforce the contract;[57] but plaintiff was held to have

A contract not to change, alter, or revoke a will, enforced against the devisees under a later will see Kine *v.* Farrell, 71 N. Y. App. Div. 219, 75 N. Y. Suppl. 542.

A contract not to make a will.— Such a contract may be enforced by the heirs against a devisee. Taylor *v.* Mitchell, 87 Pa. St. 518, 30 Am. Rep. 383.

Power of disposal.— That the contract reserves a power of disposal during life does not permit a disposal which is in effect testamentary and contrary to the agreement. Whiton *v.* Whiton, 179 Ill. 32, 53 N. E. 722 [*affirming* 76 Ill. App. 553].

53. *Iowa.*— Chehak *v.* Battles, 133 Iowa 107, 110 N. W. 330, 8 L. R. A. N. S. 1130, invalid instrument of adoption enforced as a contract.

Kansas.— Anderson *v.* Anderson, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. N. S. 229.

Missouri.—Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881; Sutton *v.* Hayden, 62 Mo. 101.

Montana.— Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653, a child's share; invalid instrument of adoption.

Nebraska.— Peterson *v.* Bauer, 83 Nebr. 405, 119 N. W. 764.

New Jersey.—Van Dyne *v.* Vreeland, 11 N. J. Eq. 370.

New York.— Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; Healy *v.* Healy, 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927 [*affirmed* in 167 N. Y. 572, 60 N. E. 1112]; Gates *v.* Gates, 34 N. Y. App. Div. 608, 54 N. Y. Suppl. 454.

Tennessee.— Starnes *v.* Hatcher, 121 Tenn. 330, 117 S. W. 219, holding also that where one contracted to adopt children and to leave them his property as his heirs, the fact that he died without adopting them, making that part of the contract impossible of performance, would not preclude them from obtaining specific performance of the other part; the two obligations being distinct in character.

See 44 Cent. Dig. tit. "Specific Performance," §§ 223, 224. And see Adoption of Children, 1 Cyc. 936.

Such an agreement not against public policy see Healy *v.* Healy, 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927 [*affirmed* in 167 N. Y. 572, 60 N. E. 1112].

Enforcement of such agreements when oral see *supra*, V, H, 3, c, 4, b.

Performance by plaintiff.— In a suit for specific performance of an agreement by testator to adopt a child and leave her one half of his estate by will, performance on the part of the child is shown by evidence that she became a member of testator's family, remained eighteen years, performed dutifully every detail of her relation during that time, and left with his consent. Peterson *v.* Bauer, 83 Nebr. 405, 119 N. W. 764.

54. Stewart *v.* Smith, 6 Cal. App. 152, 91 Pac. 667.

Certainty.—It has been held that the promisor's agreement to give a "child's part of his estate" is too uncertain as to the covenant to be specifically enforced (Woods *v.* Evans, 113 Ill. 186, 55 Am. Rep. 409); but this or closely similar expressions have often been held sufficiently definite (Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653; Healy *v.* Healy, 55 N. Y. App. Div. 315, 66 N. Y. Suppl. 927 [*affirmed* in 167 N. Y. 572, 60 N. E. 1112]; Gates *v.* Gates, 34 N. Y. App. Div. 608, 54 N. Y. Suppl. 455). Uncertainty has been found to exist in a promisor's agreement to give his entire estate (Ripson *v.* Hart, 64 N. Y. App. Div. 593, 72 N. Y. Suppl. 791), or all the balance of his property that he did not specifically devise or bequeath (Beaver *v.* Crump, 76 Miss. 34, 23 So. 432); but these holdings seem opposed both to reason and the weight of authority. See *supra*, VII, A, 1, 2.

Proof of oral agreement to will see *supra*, V, Q. 3.

That there must be proof of plaintiff's assent to the contract see Rose *v.* Oliver, 32 Oreg. 447, 52 Pac. 176.

As to fairness see *supra*, IV, D, 8, a, note. In Woods *v.* Evans, 113 Ill. 186, 55 Am. Rep. 409, specific performance of an adoption agreement to devise was refused chiefly for the extraordinary reason that it might have proved unfair to the promisor's children, if he had had any, and to his wife, if she had survived him.

55. Johnson *v.* Johnson, 16 Minn. 512.

56. Studer *v.* Seyer, 69 Ga. 125. And see Hazleton *v.* Reed, 46 Kan. 73, 26 Pac. 450, 26 Am. Rep. 86, where the instrument was held to be a will, and not a contract.

57. Phalen *v.* U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. N. S. 734 [*reversing* 100 N. Y. App. Div. 264, 91 N. Y.

ratified the will by prosecuting against the estate a claim for his services rendered under the contract.[58]

4. How Enforced in Lifetime of Promisor. The agreement may be indirectly enforced during the promisor's lifetime, by a decree canceling a conveyance made by him to another in violation of the agreement,[59] or a decree that the grantee in such conveyance hold the title subject to the purposes of the agreement; [60] by an injunction against conveying the property [61] or against making a will devising the property in violation of the agreement; [62] or by a decree that the promisor hold the property in trust for his own use during his life, with remainder in fee to the complainant or his heirs; [63] or that on performance or readiness to perform by plaintiff he will be entitled to the land on the death of the promisor.[64]

B. Partial Specific Performance; Compensation, Abatement of Price, and Indemnity[65]— 1. Where Vendor Sues — a. Slight Defect in Quantity. Where a vendor is unable, from any cause, not involving bad faith on his part, to convey each and every parcel of the land contracted to be sold, and it is apparent that the part which cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, in such case the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price, if that has not been paid.[66] The rule of the text applies to cases where land is sold in gross or

Suppl. 537]. And see Allen *v.* Bromberg, 147 Ala. 317, 41 So. 771.

58. Laird *v.* Laird, 115 Mich. 352, 73 N. W. 382.

59. Bird *v.* Pope, 73 Mich. 483, 41 N. W. 514; Davison *v.* Davison, 13 N. J. Eq. 246.

60. Whitney *v.* Hay, 15 App. Cas. (D. C.) 164 [*affirmed* in 181 U. S. 77, 21 S. Ct. 537, 45 L. ed. 758]; Teske *v.* Dittberner, 65 Nebr. 167, 91 N. W. 181, 101 Am. St. Rep. 614; Van Dyne *v.* Vreeland, 11 N. J. Eq. 370.

61. Whitney *v.* Hay, 15 App. Cas. (D. C.) 164 [*affirmed* in 181 U. S. 77, 21 S. Ct. 537, 45 L. ed. 758]; Carmichael *v.* Carmichael, 72 Mich. 76, 40 N. W. 173, 16 Am. St. Rep. 528, 1 L. R. A. 596; Pflugar *v.* Pultz, 43 N. J. Eq. 440, 11 Atl. 123.

62. Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. 750 [*reversed* on other grounds in 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440].

63. Gupton *v.* Gupton, 47 Mo. 37; Duvale *v.* Duvale, 54 N. J. Eq. 581, 35 Atl. 750 [*reversed* on other grounds in 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440], see form of decree.

64. Davison *v.* Davison, 13 N. J. Eq. 246.

Promise by parents; enforcement after death of father.— Where a contract was made between parents and a son that if he would live with them on the farm and support them he should have the land at their death, and he was placed in possession and continued therein until his father's death, eighteen years thereafter, the rents and profits were devoted to the support of the parents until the death of the father and after that to the support of the mother, and he paid the taxes and made lasting improvements, he was entitled to a decree declaring him to be the owner of the land subject to the rights of the mother to the rents and profits during life, and to the condition that he continue to perform the terms of the contract during her life. Taylor *v.* Taylor, 79 Kan. 161, 99 Pac. 814.

65. **Wilful misrepresentation** prevents such partial specific performance. See *supra*, IV, A, 1, d.

66. Foley *v.* Crow, 37 Md. 51. The doctrine is also well discussed in Van Blarcom *v.* Hopkins, 63 N. J. Eq. 466, 52 Atl. 147, by Pitney, V. C. And see the following cases:

Illinois.— De Wolf *v.* Pratt, 42 Ill. 198.

Kansas.— Kuhn *v.* Freeman, 15 Kan. 423. where a small portion of the land had been taken under eminent domain by a railroad.

Maryland.— Foley *v.* Crow, 37 Md. 51, where one lot out of four could not be conveyed.

New Jersey.— Van Blarcom *v.* Hopkins, 63 N. J. Eq. 466, 52 Atl. 147, ninety-three feet frontage instead of one hundred feet.

New York.— Beyer *v.* Marks, 2 Sweeny 715; Vedder *v.* Evertson, 3 Paige 281.

Ohio.— Bowler *v.* Brush Electric Light Co., 10 Ohio Dec. (Reprint) 582, 22 Cinc. L. Bul. 136, lot one hundred and sixty-five feet deep instead of one hundred and seventy-five.

Pennsylvania.— Stoddard *v.* Smith, 5 Binn. 355, five lots lacking out of forty-five sold.

Virginia.— Farris *v.* Hughes, 89 Va. 930, 17 S. E. 518.

West Virginia.—Morgan *v.* Brast, 34 W. Va. 332, 12 S. E. 710; Creigh *v.* Boggs, 19 W. Va. 240.

United States.—Hepburn *v.* Auld, 5 Cranch 262, 3 L. ed. 96.

England.— Poole *v.* Shergold, 2 Bro. Ch. 118, 29 Eng. Reprint 1163, 1 Cox Ch. 273, 29 Eng. Reprint 68, 1 Rev. Rep. 37; Corless *v.* Sparling, Ir. R. 9 Eq. 335 (deficiency of half the acreage, but waste land of nominal value); Stapylton *v.* Scott, 13 Ves. Jr. 425, 33 Eng. Reprint 353; McQueen *v.* Farquhar, 11 Ves. Jr. 467, 32 Eng. Reprint 1168 (six acres of large estate); Calcraft *v.* Roebuck, 1 Ves. Jr. 221, 1 Rev. Rep. 126, 30 Eng. Reprint 311 (two acres out of one hundred and eighty-six).

by metes and bounds, but the acreage or quantity is misstated, provided the deficiency is not a considerable one.[67]

b. Small Encumbrance, or Defect in Quality. The same rule applies where the title to the land is defective by reason of a small encumbrance for which compensation may be given,[68] or where there is a slight defect in the quality of the land or buildings.[69]

c. Substantial Defect in Quantity or Estate. But equity will not compel specific performance by an unwilling vendee where the defect in quantity, title, or estate is a substantial and material one, even though compensation is offered for the defect; since that would be to force a new contract upon defendant.[70]

d. Substantial Encumbrance. Nor will the vendee who has a right to an

67. *New Jersey.*—Van Blarcom *v.* Hopkins, 63 N. J. Eq. 466, 52 Atl. 147.

New York.— Beyer *v.* Marks, 2 Sweeny 715.

Ohio.— Bowler *v.* Brush Electric Light Co., 10 Ohio Dec. (Reprint) 582, 22 Cinc. L. Bul. 136.

Virginia.— Farris *v.* Hughes, 89 Va. 930, 17 S. E. 518.

West Virginia.— Morgan *v.* Brast, 34 W. Va. 332, 12 S. E. 710, sixty-six acres out of three hundred.

68. Guynet *v.* Mantel, 4 Duer (N. Y.) 86; Winne *v.* Reynolds, 6 Paige (N. Y.) 407 (nominal ground-rent, and reservation of non-existent minerals and water-rights); Ten Broeck *v.* Livingston, 1 Johns. Ch. (N. Y.) 357; Thompson *v.* Carpenter, 4 Pa. St. 132, 45 Am. Dec. 681; Howland *v.* Norris, 1 Cox Ch. 59, 29 Eng. Reprint 1062; Bowles *v.* Waller, Hayes 439 (quit rent); Smith *v.* Tolcher, 4 Russ. 302, 28 Rev. Rep. 103, 4 Eng. Ch. 302, 38 Eng. Reprint 819 (tithes); Esdaile *v.* Stephenson, 1 Sim. & St. 122, 24 Rev. Rep. 151, 1 Eng. Ch. 122, 57 Eng. Reprint 49 (undisclosed quit rent); Binks *v.* Rokeby, 2 Swanst. 222, 19 Rev. Rep. 68, 36 Eng. Reprint 600 (small portion of estate subject to tithes); Horniblow *v.* Shirley, 13 Ves. Jr. 81, 33 Eng. Reprint 225; Halsey *v.* Grant, 13 Ves. Jr. 73, 33 Eng. Reprint 222.

As to removing encumbrances by application of purchase-money see *infra*, VII, B, 4.

Abatement of price on account of encumbrances provided for by the contract as alternative to paying them off see McCullough *v.* Sutherland, 153 Fed. 418.

69. Towner *v.* Tickner, 112 Ill. 217 (premises slightly out of repair; a few fixtures lacking); Smyth *v.* Sturges, 108 N. Y. 495, 15 N. E. 544 (fixtures); King *v.* Bardeau, 6 Johns. Ch. (N. Y.) 38, 10 Am. Dec. 312 (position of building misdescribed); Grant *v.* Munt, Coop. 173, 14 Rev. Rep. 231, 10 Eng. Ch. 173, 35 Eng. Reprint 520 (dry rot in a house); Stewart *v.* Conyngham, 1 Ir. Ch. 534, 573 (small part of land not timber land); Scott *v.* Hanson, 1 Russ. & M. 128, 27 Rev. Rep. 141, 5 Eng. Ch. 128, 39 Eng. Reprint 49; Dyer *v.* Hargrave, 10 Ves. Jr. 505, 8 Rev. Rep. 36, 32 Eng. Reprint 941.

70. *Iowa.*— Donner *v.* Redenbaugh, 61 Iowa 269, 16 N. W. 127.

Kentucky.—Gaither *v.* O'Doherty, 12 S. W. 306, 11 Ky. L. Rep. 594; Snedaker *v.* Moore, 2 Duv. 542; McKean *v.* Read, Litt. Sel. Cas. 395, 12 Am. Dec. 318; McKinny *v.* Watts, 3 A. K. Marsh. 268.

Maryland.— Vickers *v.* Baltimore, 102 Md. 487, 63 Atl. 120; North Ave. Land Co. *v.* Baltimore, 102 Md. 475, 63 Atl. 115.

Missouri.— Hill *v.* Rich Hill Coal Min. Co., 119 Mo. 9, 24 S. W. 223.

New Jersey.— New York L. Ins. Co. *v.* Gilhooly, 61 N. J. Eq. 118, 47 Atl. 494.

North Carolina.— Bryan *v.* Read, 21 N. C. 78.

Tennessee.— Cunningham *v.* Sharp, 11 Humphr. 116; Buchanan *v.* Alwell, 8 Humphr. 516.

Virginia.— Jackson *v.* Ligon, 3 Leigh 161.

United States.— Kenner *v.* Bitely, 45 Fed. 133.

England.— Perkins *v.* Ede, 16 Beav. 193, 51 Eng. Reprint 751 (small but material defect); Peers *v.* Lambert, 7 Beav. 546, 29 Eng. Ch. 546, 49 Eng. Reprint 1178 (jetty, essential to use of wharf); Prendergast *v.* Eyre, 2 Hogan 79 (sale of two lots for entire sum); Roffey *v.* Shallcross, 4 Madd. 227, 20 Rev. Rep. 293, 56 Eng. Reprint 690 (vendor has only undivided lease); Knatchbull *v.* Grueber, 1 Madd. 153, 56 Eng. Reprint 58 [*affirmed* in 3 Meriv. 124, 17 Rev. Rep. 35, 36 Eng. Reprint 48] (small but material defect); Casamajor *v.* Strode, 2 Myl. & K. 706, 726, 7 Eng. Ch. 706, 39 Eng. Reprint 1114; Hick *v.* Phillips, Prec. Ch. 575, 24 Eng. Reprint 258 (one sixth of the land is copyhold instead of freehold); Dalby *v.* Pullen, 3 Sim. 29, 6 Eng. Ch. 29, 57 Eng. Reprint 911 [*affirmed* 8 L. J. Ch. O. S. 74, 1 Russ. & M. 296, 30 Rev. Rep. 123, 5 Eng. Ch. 296, 39 Eng. Reprint 114] (vendor has only undivided lease); Stapylton *v.* Scott, 13 Ves. Jr. 425, 33 Eng. Reprint 353; Drewe *v.* Corp, 9 Ves. Jr. 368, 32 Eng. Reprint 644 (leasehold for four thousand years instead of freehold).

Substantial defect in quality.—In Magennis *v.* Fallon, 2 Molloy 588, the vendor destroyed ornamental timber which was desirable to the enjoyment of the premises as a residence.

Waiver.— But the vendee's right to abandon the contract because of defects in title or the existence of encumbrances may be waived, as by going on with the negotiations after knowledge of the defect; and in such case the vendor may have specific performance with compensation. Melick *v.* Cross, 62 N. J. Eq. 545, 51 Atl. 16; Fordyce *v.* Ford, 4 Bro. Ch. 494, 29 Eng. Reprint 1007. And see Beck *v.*

unencumbered title be forced to take a title affected with a substantial encumbrance unless the latter is such that it may be discharged by an application of the purchase-money for the purpose.[71]

2. Where Vendee Sues — a. General Rule. Although the purchaser cannot have a partial interest forced upon him, yet if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, he is generally entitled to have the contract specifically performed as far as the vendor is able, and to have an abatement out of the purchase-money for any deficiency in title, quantity, or quality of the estate. This is not making a new contract for the parties, since the vendor is not compelled to convey anything which he did not agree to convey, and the vendee pays for what he gets according to the rate established by the agreement.[72] But if the contract was obtained by the purchaser's fraudulent mis-

Bridgman, 40 Ark. 382, where, on an exchange of lands, each party took possession, defendant knowing of the defect in plaintiff's title, and to refuse specific performance with compensation would work a fraud on plaintiff.

71. O'Kane *v.* Kiser, 25 Ind. 168; Hinckley *v.* Smith, 51 N. Y. 21 (mortgage in excess of purchase-price); Caballero *v.* Henty, L. R. 9 Ch. 447, 43 L. J. Ch. 635, 30 L. T. Rep. N. S. 314, 22 Wkly. Rep. 446; Barton *v.* Downes, Fl. & K. 505 (reservation of mines and minerals and the right to search for them); Fildes *v.* Hooker, 3 Madd. 193, 56 Eng. Reprint 481 (sale by lessee, whose lease was subject to covenants with provision for reëntry; indemnity against a possible loss of possession would not answer); Stewart *v.* Alliston, 1 Meriv. 26, 15 Rev. Rep. 81, 35 Eng. Reprint 587. See also *supra*, IV, F, 2, e; *infra*, VII, B, 4.

72. *Alabama.*— Bogan *v.* Daughdrill, 51 Ala. 312; Bell *v.* Thompson, 34 Ala. 633; Bass *v.* Gilliland, 5 Ala. 761.

Arkansas.— Bonner *v.* Little, 38 Ark. 397; Meek *v.* Walthall, 20 Ark. 648.

California.—Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394; Marshall *v.* Caldwell, 41 Cal. 611.

Colorado.— Cochrane *v.* Justice Min. Co., 16 Colo. 415, 26 Pac. 780.

Georgia.—Phinizy *v.* Guernsey, 111 Ga. 346, 36 S. E. 796, 78 Am. St. Rep. 207, 50 L. R. A. 680 (compensation for destruction of buildings); Seegar *v.* Smith, 78 Ga. 616, 3 S. E. 613.

Illinois.— Moore *v.* Gariglietti, 228 Ill. 143, 81 N. E. 826 (interest of cotenant); Kuhn *v.* Eppstein, 219 Ill. 154, 76 N. E. 145, 2 L. R. A. N. S. 884 (encumbrances); Lancaster *v.* Roberts, 144 Ill. 213, 33 N. E. 27; Hunt *v.* Smith, 139 Ill. 296, 28 N. E. 809; Lombard *v.* Chicago Sinai Cong., 64 Ill. 477 (compensation for destruction of building); McConnell *v.* Brillhart, 17 Ill. 354, 65 Am. Dec. 661.

Indiana.— Wingate *v.* Hamilton, 7 Ind. 73; Wilson *v.* Brumfield, 8 Blackf. 146.

Iowa.— Townsend *v.* Blanchard, 117 Iowa 36, 90 N. W. 519 (abatement for value of unplatted homestead); Presser *v.* Hildenbrand, 23 Iowa 483 (same).

Kansas.— Crockett *v.* Gray, 31 Kan. 346, 2 Pac. 809.

Kentucky.— Morgan *v.* Boone, 4 T. B. Mon. 291, 16 Am. Dec. 153; Rankin *v.* Maxwell, 2 A. K. Marsh. 488, 12 Am. Dec. 431; Kelly *v.* Bradford, 3 Bibb 317, 6 Am. Dec. 656; Jones *v.* Shackleford, 2 Bibb 410; McConnell *v.* Dunlap, Hard. 41, 3 Am. Dec. 723.

Massachusetts.— Pingree *v.* Coffin, 12 Gray 288, where heirs of part-owner are non-residents.

Michigan.— Wilkinson *v.* Kneeland, 125 Mich. 261, 84 N. W. 142; Covell *v.* Cole, 16 Mich. 223.

Minnesota.— Melin *v.* Woolley, 103 Minn. 498, 115 N. W. 654, 946, 22 L. R. A. N. S. 595.

Mississippi.— Wilson *v.* Cox, 50 Miss. 133; Mathews *v.* Patterson, 2 How. 729.

Missouri.—Lanyon *v.* Chesney, 186 Mo. 540, 85 S. W. 568; Krepp *v.* St. Louis, etc., R. Co., 99 Mo. App. 94, 72 S. W. 479.

New Jersey.— Jersey City *v.* Flynn, (Ch. 1908) 70 Atl. 497; Campbell *v.* Hough, 73 N. J. Eq. 601, 68 Atl. 759 (cotenant); White *v.* Weaver, 68 N. J. Eq. 644, 61 Atl. 25; Capstick *v.* Crane, 66 N. J. Eq. 341, 57 Atl. 1045; Melick *v.* Cross, 62 N. J. Eq. 545, 51 Atl. 16; Keator *v.* Brown, 57 N. J. Eq. 600, 42 Atl. 278 (share of tenant in common); Lounsbery *v.* Locander, 25 N. J. Eq. 554; Hulmes *v.* Thorpe, 5 N. J. Eq. 415.

New York.— Palmer *v.* Gould, 144 N. Y. 671, 39 N. E. 378; Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41; Gibert *v.* Peteler, 38 N. Y. 165, 97 Am. Dec. 785 [*affirming* 38 Barb. 488]; Hill *v.* Ressegieu, 17 Barb. 162 (compensation for dower in land of deceased vendor); Voorhees *v.* De Meyer, 2 Barb. 37 [*affirming* 3 Sandf. Ch. 614]; Jerome *v.* Scudder, 2 Rob. 169; Morrison *v.* Bauer, 4 N. Y. St. 701; Waters *v.* Travis, 9 Johns. 450; Morss *v.* Elmendorf, 11 Paige 277; Wiswall *v.* McGowan, Hoffm. 125 [*reversed* on other grounds in 2 Barb. 270 (*affirmed* in 10 N. Y. 465)]. See Sokolskn *v.* Buttenwieser, 96 N. Y. App. Div. 18, 88 N. Y. Suppl. 973 [*affirmed* in 183 N. Y. 557, 76 N. E. 1108].

North Carolina.— Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824; Henry *v.* Liles, 37 N. C. 407; Jacobs *v.* Locke, 37 N. C. 286; Leigh *v.* Crump, 36 N. C. 299.

Ohio.— Lucas *v.* Scott, 41 Ohio St. 636; Ketchum *v.* Stout, 20 Ohio 453.

Pennsylvania.— Napier *v.* Darlington, 70 Pa. St. 64; Erwin *v.* Myers, 46 Pa. St. 96 (cotenant); Rankin *v.* Hammond, 25 Pa. Co. Ct. 45.

representations, he cannot waive the part of the contract affected by the misrepresentation and have specific performance of the rest; fraud vitiates the contract *in toto*.[73] And partial performance with compensation will be refused where the result would be an injustice to the vendor or a third person; as, where an estate was sold for a lump sum under the belief of both parties that it contained the number of acres specified in the contract, but it turned out to contain only half

South Carolina.— Payne *v.* Melton, 69 S. C. 370, 48 S. E. 277; Harbers *v.* Gadsden, 6 Rich. Eq. 284, 62 Am. Dec. 390, misdescription as to quality.

Tennessee.— Moses *v.* Wallace, 7 Lea 413; Mullins *v.* Aikin, 2 Heisk. 535; Collins *v.* Smith, 1 Head 251.

Texas.— Roberts *v.* Lovejoy, 60 Tex. 253; Austin *v.* Ewell, 25 Tex. Suppl. 403.

Virginia.— White *v.* Dobson, 17 Gratt. 262; Clark *v.* Reins, 12 Gratt. 98; Chinn *v.* Heale, 1 Munf. 63.

West Virginia.— Garrett *v.* Goff, 61 W. Va. 221, 56 S. E. 351; Layne *v.* Johnson, 22 W. Va. 151 (vendee may deduct amount awarded vendor for part of land taken under eminent domain); Stockton *v.* Union Oil, etc., Co., 4 W. Va. 273.

Wisconsin.— Docter *v.* Hellberg, 65 Wis. 415, 27 N. W. 176; Wright *v.* Young, 6 Wis. 127, 70 Am. Dec. 453.

United States.— Townsend *v.* Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. ed. 383; Pratt *v.* Law, 9 Cranch 456, 3 L. ed. 791; McDuffee *v.* Hestonville, etc., Pass. R. Co., 158 Fed. 827 [*modifying* 154 Fed. 201, but *reversed* on other grounds in 162 Fed. 36, 89 C. C. A. 76], contract to sell patent.

England.— Powell *v.* Elliot, L. R. 10 Ch. 424, 33 L. T. Rep. N. S. 110, 23 Wkly. Rep. 777; Burrow *v.* Scammell, 19 Ch. D. 175, 51 L. J. Ch. 296, 45 L. T. Rep. N. S. 606, 30 Wkly. Rep. 310; Oceanic Steam Nav. Co. *v.* Sutherberry, 16 Ch. D. 236, 45 J. P. 238, 50 L. J. Ch. 308, 43 L. T. Rep. N. S. 743, 29 Wkly. Rep. 113; Horrocks *v.* Rigby, 9 Ch. D. 180, 47 L. J. Ch. 800, 38 L. T. Rep. N. S. 782, 26 Wkly. Rep. 714; McKenzie *v.* Hesketh, 7 Ch. D. 675, 47 L. J. Ch. 231, 38 L. T. Rep. N. S. 171, 26 Wkly. Rep. 189; Hooper *v.* Smart, L. R. 18 Eq. 683, 43 L. J. Ch. 704, 31 L. T. Rep. N. S. 86, 22 Wkly. Rep. 943; Whittemore *v.* Whittemore, L. R. 8 Eq. 603; Barnes *v.* Wood, L. R. 8 Eq. 424, 38 L. J. Ch. 683, 21 L. T. Rep. N. S. 227, 17 Wkly. Rep. 1080 (life-estate); Connor *v.* Potts, [1897] 1 Ir. 534; Nelthorpe *v.* Holgate, 1 Coll. 203, 8 Jur. 551, 28 Eng. Ch. 203, 63 Eng. Reprint 384; Hughes *v.* Jones, 3 De G. F. & J. 307, 8 Jur. N. S. 399, 31 L. J. Ch. 83, 5 L. T. Rep. N. S. 408, 10 Wkly. Rep. 139, 64 Eng. Ch. 242, 45 Eng. Reprint 897; Leslie *v.* Crommelen, Ir. R. 2 Eq. 134; Jones *v.* Evans, 12 Jur. 664, 17 L. J. Ch. 469; Ramsden *v.* Hirst, 4 Jur. N. S. 200, 27 L. J. Ch. 482, 6 Wkly. Rep. 349; Wilson *v.* Williams, 3 Jur. N. S. 810; Bolingbroke's Case, 1 Sch. & Lef. 19 note (a) [*cited* in Great Western R. Co. *v.* Birmingham, etc., R. Co., 2 Phil. 597, 605, 22 Eng. Ch. 597, 41 Eng. Reprint 1074]; Atty.-Gen. *v.* Day, 1 Ves. 218, 27 Eng. Reprint 992; Hill *v.* Buckley, 17 Ves. Jr. 394, 11 Rev. Rep. 109, 34 Eng. Reprint 153; Milligan *v.* Cooke, 16 Ves. Jr. 1, 33 Eng. Reprint 884; Dale *v.* Lister [*cited* in Milligan *v.* Cooke, *supra*]; Mortlock *v.* Buller, 10 Ves. Jr. 292, 7 Rev. Rep. 417, 32 Eng. Reprint 857.

Canada.— Stammers *v.* O'Donohoe, 28 Grant Ch. (U. C.) 207 (compensation for defect of quality); Wardell *v.* Trenouth, 24 Grant Ch. (U. C.) 465.

See 44 Cent. Dig. tit. "Specific Performance," § 420 *et seq.*

Where a tenant in common executed a contract for the sale of property in her own name and also, without authority, in the name of a cotenant, and the cotenant repudiated the act, the promise made by the signing tenant may be enforced as to her interest. Melin *v.* Woolley, 103 Minn. 498, 115 N. W. 654, 946, 22 L. R. A. N. S. 595.

When compensation may be claimed.—That compensation may be claimed at any stage in the suit, when the defect becomes apparent; or at the investigation of title before the master see Bristol *v.* Bristol, etc., Water Works, 25 R. I. 189, 55 Atl. 710.

That the remedy is at law where the contract has been fully executed by payment and delivery of deed see McCall *v.* Faithorne, 10 Grant Ch. (U. C.) 324. But see Wilkinson *v.* Kneeland, 125 Mich. 261, 84 N. W. 142.

Want of mutuality.— The principle of compensation for deficiency or abatement of price is an incident of specific performance, and, where specific performance is not compellable in part because of want of mutuality, the principle is without application. Knudtson *v.* Robinson, (N. D. 1908) 118 N. W. 1051.

Purchase of waterworks by city.—A city is not entitled to insist that a water-supply contract shall be specifically enforced by a conveyance of the waterworks to it, and at the same time to repudiate an agreement that, in the event of the completion of the waterworks before the claim of another to a part of the water-supply had been released or extinguished, the city should be entitled to retain out of the purchase-price a certain sum until a decision of the highest state court adverse to such claim, or the delivery of a release thereof, or an abandonment of a canal by the one claiming the right to the water, and demand an additional deduction. Jersey City *v.* Flynn, (N. J. Ch. 1908) 70 Atl. 497.

Existence of lease; no definite amount of damage to complainant shown see Kuhn *v.* Eppstein, 239 Ill. 555, 88 N. E. 174.

73. Clermont *v.* Tasburgh, 1 Jac. & W. 112, 20 Rev. Rep. 243, 37 Eng. Reprint 318. See also *supra*, IV, A, 1, d.

that number, in which case the vendee was not allowed a proportional abatement, but was given his election to pay the full price or to withdraw his suit.[74]

b. Measure of Abatement. The usual rule for estimating the amount to be deducted for a deficiency in quantity is to deduct that sum which bears the same proportion to the whole price as the amount of land lacking bears to the whole area of land agreed to be conveyed.[75]

c. Where Defect Is Very Great. The vendee has often been granted specific performance with compensation, although the defect in quantity was very great, amounting in several instances to one half.[76] In a few cases, however, where the portion to which a good title can be given is so small as compared with the whole amount embraced in the contract that compensation or damages appears to be the main object of the suit, specific performance has been refused and plaintiff left to his legal remedy.[77]

d. Where Vendee Knew of Defect, no Abatement. If the purchaser at the time of entering into the contract was aware of the defect in the vendor's interest or title, or deficiency in the subject-matter, he is not, on suing for specific performance, entitled to any compensation or abatement of price.[78]

74. Durham *v.* Legard, 34 Beav. 611, 11 Jur. N. S. 706, 34 L. J. Ch. 589, 13 Wkly. Rep. 959, 55 Eng. Reprint 771. Where the agreement was for an exchange of lands, and compensation to plaintiff would impose a pecuniary obligation upon defendant which the contract did not contemplate see Sternberger *v.* McGovern, 56 N. Y. 12; Sabriski *v.* Veloski, 11 N. Y. Suppl. 668, 25 Abb. N. Cas. 185. Where the conveyance of an undivided share in a colliery would be a great inconvenience to the coöwner see Price *v.* Griffith, 1 De G. M. & G. 80, 15 Jur. 1093, 21 L. J. Ch. 78, 50 Eng. Ch. 63, 42 Eng. Reprint 482. Where the remedy would be unjust to remainder-men see Thomas *v.* Deering, 1 Jur. 427, 1 Keen 729, 748, 6 L. J. Ch. 267, 15 Eng. Ch. 729, 48 Eng. Reprint 488.

75. Capstick *v.* Crane, 66 N. J. Eq. 341, 57 Atl. 1045; Moses *v.* Wallace, 7 Lea (Tenn.) 413; Mullins *v.* Aiken, 2 Heisk. (Tenn.) 535; Stockton *v.* Union Oil, etc., Co., 4 W. Va. 273; Hill *v.* Buckley, 17 Ves. Jr. 394, 11 Rev. Rep. 109, 34 Eng. Reprint 153. But see Davis *v.* Parker, 14 Allen (Mass.) 94 (can recover only market value of what cannot be conveyed); Docter *v.* Hellberg, 65 Wis. 415, 27 N. W. 176 (in calculating proportion, allowance must be made for value of buildings). And see Patrick *v.* Marshall, 2 Bibb (Ky.) 40, 4 Am. Dec. 670, holding that in a decree ordering the conveyance of a certain number of acres, part of a large tract of land, and, if a part only of said number shall be conveyed, compensation to be made in money, this compensation shall be made by estimating the deficit according to the average value per acre of the whole tract, in its natural and unimproved state, at the time of making the estimate.

As to method of computing compensation for loss of improvements on the property which have been destroyed by fire see Phinizy *v.* Guernsey, 111 Ga. 346, 36 S. E. 796, 78 Am. St. Rep. 207, 50 L. R. A. 680.

As to extent of abatement in case of a contract to assign a lease, where plaintiff is kept out of possession for a part of the term see Radford *v.* Wilson, 2 Bosw. (N. Y.) 237.

76. *Alabama.*— Bogan *v.* Daughdrill, 51 Ala. 312 (one fifth); Bass *v.* Gilliland, 5 Ala. 761 (one third).

California.— Marshall *v.* Caldwell, 41 Cal. 611, one half.

Michigan.— Wilkinson *v.* Kneeland, 125 Mich. 261, 84 N. W. 142, one half.

Pennsylvania.— Napier *v.* Darlington, 70 Pa. St. 64, two fifths.

England.— Burrow *v.* Scammell, 19 Ch. D. 175, 51 L. J. Ch. 296, 45 L. T. Rep. N. S. 606, 30 Wkly. Rep. 310 (one half); Oceanic Steam Nav. Co. *v.* Sutherberry, 16 Ch. D. 236, 45 J. P. 238, 50 L. J. Ch. 308, 43 L. T. Rep. N. S. 743, 29 Wkly. Rep. 113 (one third); Hooper *v.* Smart, L. R. 18 Eq. 683, 43 L. J. Ch. 704, 31 L. T. Rep. N. S. 86, 22 Wkly. Rep. 943 (one half); Jones *v.* Evans, 12 Jur. 664, 17 L. J. Ch. 469 (two seventhes).

That specific performance will be enforced, although the encumbrance for which deduction must be made is greater than the price agreed on so that vendor gets nothing see Horrocks *v.* Rigby, 9 Ch. D. 180, 47 L. J. Ch. 800, 38 L. T. Rep. N. S. 782, 26 Wkly. Rep. 714. But see Wheatley *v.* Slade, 4 Sim. 126, 6 Eng. Ch. 126, 58 Eng. Reprint 48.

77. Chicago, etc., R. Co. *v.* Durant, 44 Minn. 361, 46 N. W. 676; Corby *v.* Drew, 55 N. J. Eq. 387, 36 Atl. 827; Eickwort *v.* Powers, 17 N. Y. Suppl. 137, one half. And see Rugge *v.* Ellis, 1 Desauss. Eq. (S. C.) 160.

78. *Alabama.*— Weatherford *v.* James, 2 Ala. 170, where defendant contracted to convey on a contingency which had not happened.

California.— Olson *v.* Lovell, 91 Cal. 506, 27 Pac. 765; Jackson *v.* Torrence, 83 Cal. 521, 23 Pac. 695.

Florida.— Knox *v.* Spratt, 23 Fla. 64, 6 So. 924.

Illinois.— Short *v.* Kieffer, 43 Ill. App. 515 [*affirmed* in 142 Ill. 258, 31 N. E. 427].

Michigan.— Hall *v.* Loomis, 63 Mich. 709, 30 N. W. 374.

e. Inchoate Dower — (i) *Its Release Cannot Be Compelled.* A court of equity has no power to compel a wife to release her inchoate dower right or similar statutory right under a contract of her husband to sell the land, to which she was not a party;[79] nor will the court attempt to put a moral compulsion upon the wife by directing the husband to procure his wife to join him in the conveyance.[80]

Minnesota.—Chicago, etc., R. Co. *v.* Durant, 44 Minn. 361, 46 N. W. 676.

New Jersey.— Planer *v.* Equitable L. Assur. Soc., (Ch. 1897) 37 Atl. 668; Peeler *v.* Levy 26 N. J. Eq. 330.

New York.— Palmer *v.* Gould, 144 N. Y. 671, 39 N. E. 378; Felix *v.* Devlin, 90 N. Y. App. Div. 103, 86 N. Y. Suppl. 12; Levy *v.* Hill, 50 N. Y. App. Div. 294, 63 N. Y. Suppl. 1002; Warren *v.* Hall, 41 Hun 466; Bonnet *v.* Babbage, 19 N. Y. Suppl. 934.

North Carolina.— Farthing *v.* Rochelle, 131 N. C. 563, 43 S. E. 1; Fortune *v.* Watkins, 94 N. C. 304.

Ohio.— People's Sav. Bank *v.* Parisette, 68 Ohio St. 450, 67 N. E. 896, 96 Am. St. Rep. 672; Lucas *v.* Scott, 41 Ohio St. 636.

South Carolina.— Rugge *v.* Ellis, 1 Desauss. Eq. 160.

Utah.— Free *v.* Little, 31 Utah 449, 88 Pac. 407.

Virginia.— Clarke *v.* Reins, 12 Gratt. 98.

England.— Castle *v.* Wilkinson, L. R. 5 Ch. 534, 39 L. J. Ch. 843, 18 Wkly. Rep. 586; James *v.* Lichfield, L. R. 9 Eq. 51, 39 L. J. Ch. 248, 21 L. T. Rep. N. S. 521, 18 Wkly. Rep. 158; Beeston *v.* Stutely, 27 L. J. Ch. 156, 6 Wkly. Rep. 206. *Compare* for an exceptional case where enforcement of the rule would have been a great injustice to the vendee Barker *v.* Cox, 4 Ch. D. 464, 46 L. J. Ch. 62, 35 L. T. Rep. N. S. 662, 25 Wkly. Rep. 138.

Outstanding lease.— That the vendee has no right to compensation if he has constructive notice of an outstanding lease from the occupation of the tenant see James *v.* Lichfield, L. R. 9 Eq. 51, 21 L. T. Rep. N. S. 521, 18 Wkly. Rep. 158; Carroll *v.* Keayes, Ir. R. 8 Eq. 97, 22 Wkly. Rep. 243. *Contra,* Caballero *v.* Henty, L. R. 9 Ch. 447, 43 L. J. Ch. 635, 30 L. T. Rep. N. S. 314, 22 Wkly. Rep. 446.

Contract by husband alone for sale of homestead.— Under Mo. Rev. St. (1899) § 3616 (Annot. St. (1906) p. 2034), which makes any alienation of a homestead by the husband alone null and void, an executory contract by a husband to sell homestead property which exceeds in value the statutory limitation of three thousand dollars will not be specifically enforced by a court of equity as to the excess in value, which was not the contract made, nor will damages be awarded in lieu of performance as to such excess; both parties being chargeable with knowledge that the contract was void when it was signed. Mundy *v.* Shellaberger, 161 Fed. 503, 88 C. C. A. 445 [*affirming* 153 Fed. 219].

But occupancy of the estate by the vendor's mother is not necessarily notice of her life-interest. Nelthorpe *v.* Holgate, 1 Coll. 203, 8 Jur. 551, 28 Eng. Ch. 203, 63 Eng. Reprint 384.

Where the contract provided that it should be void in case the vendor could not furnish a good title, it was held that the terms of the contract precluded the court from decreeing partial specific performance with compensation. Schwab *v.* Baremore, 95 Minn. 295, 104 N. W. 10.

So where the vendor's agreement was conditioned on his obtaining a holder of a third interest to joint in the conveyance, and this, without fault on the vendor's part, could not be accomplished. Hoctor-Johnson Co. *v.* Billings, 65 Nebr. 214, 91 N. W. 183.

79. *Illinois.*—Casstevens *v.* Casstevens, 227 Ill. 547, 81 N. E. 709.

Iowa.— Venator *v.* Swenson, 100 Iowa 295, 69 N. W. 522.

Kentucky.— Henderson *v.* Perkins, 94 Ky. 207, 21 S. W. 1035, 14 Ky. L. Rep. 782; Plum *v.* Mitchell, 26 S. W. 391, 16 Ky. L. Rep. 162.

Minnesota.— Stromme *v.* Rieck, 107 Minn. 177, 119 N. W. 948; Cairncross *v.* McGrann, 37 Minn. 130, 33 N. W. 548.

New Jersey.— Krah *v.* Wassmer, (Ch. 1908) 71 Atl. 404; Camden, etc., R. Co. *v.* Adams, 62 N. J. Eq. 656, 51 Atl. 24; McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840, 61 N. J. Eq. 208, 48 Atl. 25.

New York.— Schoonmaker *v.* Bonnie, 119 N. Y. 565, 23 N. E. 1106 [*affirming* 6 N. Y. St. 122].

Utah.— Kelsey *v.* Crowther, 7 Utah 519, 27 Pac. 695.

Where husband and wife conveyed the land to a purchaser with notice of the contract, the dower right is extinguished, and such purchaser must convey the full title to plaintiff. Mansfield *v.* Hodgdon, 147 Mass. 304, 17 N. E. 544.

80. Weed *v.* Terry, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257 (see this case for review of the old English cases, *contra,* long since overruled); Peeler *v.* Levy, 26 N. J. Eq. 330; Reilly *v.* Smith, 25 N. J. Eq. 158; Hulmes *v.* Thorpe, 5 N. J. Eq. 415; Weller *v.* Weyand, 2 Grant (Pa.) 103; Clark *v.* Seirer, 7 Watts (Pa.) 107, 32 Am. Dec. 745. But see Simons *v.* Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35 (where the wife ratified the husband's contract by accepting its benefits); Rosetter *v.* Grant, 18 Ohio St. 126, 98 Am. Dec. 93 (where the husband, holding the legal title in trust for the wife, contracted, at her request to convey, and specific performance was decreed on the ground that her right was a mere equity and that it was unnecessary for her to join).

(II) *Husband Must Make Compensation.* The usual rule as to specific performance with abatement from the price is applied, in many of the states, to the case of a purchase from a married man, whose estate is subject to his wife's inchoate dower right. The purchaser may have specific performance, with a deduction from the price of such sum as represents the present value of the wife's contingent interest, estimated by the usual rules and tables.[81]

(III) *Indemnity.* By the practice in a number of states, instead of making an abatement of a lump sum from the purchase-price, estimated as the present value of the wife's inchoate dower interest, the court gives an indemnity to the vendee against such interest. This is generally done by permitting him to retain one third of the purchase-price until the wife dies or releases her dower, and securing its ultimate payment to the vendor or his heirs by mortgage or lien on the land conveyed.[82] By the rule in New Jersey the vendee will be indemnified against the wife's contingent dower if the wife's refusal to join was by collusion with, or the fraudulent procurement of, the husband;[83] otherwise the vendor is not

Statutory provisions for release of dower.— For procedure under the Maine statute (Rev. St. (1903) c. 77, § 17) by which the release of the wife's dower may be compelled see Handy *v.* Rice, 98 Me. 504, 57 Atl. 847.

Giving husband opportunity to procure release.— But it seems that a decree is not objectionable because it gives the husband the opportunity to procure the release of the wife's dower interest. Martin *v.* Merritt, 57 Ind. 34, 26 Am. Rep. 45; Wingate *v.* Hamilton, 7 Ind. 73; Pulliam *v.* Pulliam, 4 Dana (Ky.) 123; Drake *v.* Barton, 18 Minn. 462. And see Northrup *v.* Gibbs, 1 N. Y. Suppl. 465, vendor decreed to convey free from dower, where there was no evidence that he could not do so.

Decreeing delivery of deed executed by defendant and wife.—Where, in a suit to specifically enforce a contract to convey land, it appears that the vendor and his wife have executed and acknowledged a deed to complainant and his wife, the court can decree a delivery of such deed, if complainant will accept it, thus avoiding the necessity of complainant taking title subject to the wife's dower right. Krah *v.* Wassmer, (N. J. Ch. 1908) 71 Atl. 404.

81. *Alabama.*— Springle *v.* Shields, 17 Ala. 295.

Indiana.— Martin *v.* Merritt, 57 Ind. 34, 26 Am. Rep. 45; Hazelrig *v.* Hutson, 18 Ind. 481; Wingate *v.* Hamilton, 7 Ind. 73.

Iowa.— Noecker *v.* Wallingford, 133 Iowa 605, 111 N. W. 37; Thompson *v.* Colby, 127 Iowa 234, 103 N. W. 117; Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377; Townsend *v.* Blanchard, 117 Iowa 36, 90 N. W. 519; Miller *v.* Nelson, 64 Iowa 458, 20 N. W. 759; Zebley *v.* Sears, 38 Iowa 507; Presser *v.* Hildenbrand, 23 Iowa 483; Leach *v.* Forney, 21 Iowa 271, 89 Am. Dec. 574; Troutman *v.* Gowing, 16 Iowa 415.

Massachusetts.— Davis *v.* Parker, 14 Allen 94; Woodbury *v.* Luddy, 14 Allen 1, 92 Am. Dec. 731; Park *v.* Johnson, 4 Allen 259.

Michigan.—Walker *v.* Kelly, 91 Mich. 212, 51 N. W. 934.

Minnesota.—Sanborn *v.* Nockin, 20 Minn. 178.

New York.— Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41 (*semble*); Peters *v.* Delaplaine, 49 N. Y. 362 (*dictum*). In Sternberger *v.* McGovern, 56 N. Y. 12, the question was undecided, but a majority of the judges held that compensation would be unjust where the contract is one of exchange of land.

Ohio.— Moore *v.* Moulton, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466, 7 Ohio Dec. (Reprint) 405, 2 Cinc. L. Bul. 323.

South Carolina.—Wannamaker *v.* Brown, 77 S. C. 64, 57 S. E. 665; Payne *v.* Melton, 69 S. C. 370, 48 S. E. 277.

Wisconsin.—Wright *v.* Young, 6 Wis. 127, 70 Am. Dec. 453.

Canada.— Loughead *v.* Stubbs, 27 Grant Ch. (U. C.) 387; Skinner *v.* Ainsworth, 24 Grant Ch. (U. C.) 148; Van Norman *v.* Beaupre, 5 Grant Ch. (U. C.) 599; Kendrew *v.* Shewan, 4 Grant Ch. (U. C.) 578.

82. *Alabama.*— Springle *v.* Shields, 17 Ala. 295, against heirs of vendor, dower had been assigned to widow.

Iowa.— Thompson *v.* Colby, 127 Iowa 234, 103 N. W. 117; Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377; Leach *v.* Forney, 21 Iowa 271, 89 Am. Dec. 574. See Troutman *v.* Gowing, 16 Iowa 415.

New Jersey.— Young *v.* Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456, where wife's refusal is fraudulently procured.

Ohio.— Stanley *v.* Bedinger, 2 Ohio Cir. Ct. 344, 1 Ohio Cir. Dec. 522 ("compensation is for present loss, and indemnity is against future risk"); Moore *v.* Moulton, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466, 7 Ohio Dec. (Reprint) 405, 2 Cinc. L. Bul. 323.

South Carolina.—Wanamaker *v.* Brown, 77 S. C. 64, 57 S. E. 665, husband entitled to interest during life of wife.

England.—Wilson *v.* Williams, 3 Jur. N. S. 810.

Canada.— Skinner *v.* Ainsworth, 24 Grant Ch. (U. C.) 148.

Compare Roos *v.* Lockwood, 59 Hun (N. Y.) 181, 13 N. Y. Suppl. 128, criticizing the practice of giving indemnity, since "such an arrangement, moreover, renders the title exceedingly unmerchantable for an indefinite period."

83. Young *v.* Paul, 10 N. J. Eq. 401, 64 Am. Dec. 456.

entitled either to an indemnity or compensation during the lifetime of the husband.[84]

(iv) *Effect of Vendee's Knowledge.* Some cases lay down the rule that if the vendee entered into the contract with the knowledge that the vendor was a married man, no abatement from the purchase-price or indemnity will be allowed because of the wife's refusal to release her dower.[85]

(v) *Husband Need Not Make Compensation.* In a few states, however, the courts refuse to allow any abatement or compensation for the wife's inchoate dower; usually for the reason that to do so would be to put upon the wife an unfair coercion or inducement to relinquish the right secured to her by law.[86]

3. Compensation Difficult to Estimate. Partial performance with compensation or abatement of price has sometimes been refused because of the difficulty of estimating the proper amount of compensation.[87]

4. Discharge of Encumbrances. In a suit either by vendor or vendee, where the encumbrances can be discharged by mere payment thereof, and are not larger in amount than the purchase-money due, the court in its decree may direct the payment of a sufficient part of the purchase-money for the purpose to the holders of the encumbrances instead of to the vendor, even though such holders are not

84. McCormick *v.* Stephany, 61 N. J. Eq. 208, 48 Atl. 25; Borden *v.* Curtis, 48 N. J. Eq. 120, 21 Atl. 472 (but see criticism of the rule by Pitney, V. C.); Blake *v.* Flatley, 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128, 6 Am. St. Rep. 886; Peeler *v.* Levy, 26 N. J. Eq. 330; Reilly *v.* Smith, 25 N. J. Eq. 158; Hawralty *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613. The rule against indemnity does not apply where suit is brought against the vendor's heirs, since they are not in a position to exercise an undue influence upon the widow. McCormick *v.* Stephany, *supra*. As to method of adjusting equities of the parties where husband and wife, after the agreement, conveyed to a third person with notice see Saldutti *v.* Flynn, (N. J. Ch. 1906) 65 Atl. 246.

85. Bonnet *v.* Babbage, 19 N. Y. Suppl. 934; Farthing *v.* Rochelle, 131 N. C. 563, 43 S. E. 1; People's Sav. Bank *v.* Parisette, 68 Ohio St. 450, 67 N. E. 896, 96 Am. St. Rep. 672; Free *v.* Little, 31 Utah 449, 88 Pac. 407; Pomeroy Spec. Perf. § 461. And see Lucas *v.* Scott, 41 Ohio St. 636.

86. *District of Columbia.*— Barbour *v.* Hickey, 2 App. Cas. 207, 24 L. R. A. 763.

Illinois.— Cowan *v.* Kane, 211 Ill. 572, 71 N. E. 1097; Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Humphrey *v.* Clement, 44 Ill. 299, on ground of difficulty of estimation.

Missouri.— Aiple-Hemmelmann Real Estats Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480, exhaustively reviewing the cases.

New Jersey.— McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840; Borden *v.* Curtis, 48 N. J. Eq. 120, 21 Atl. 472; Blake *v.* Flaherty, 44 N. J. Eq. 228, 10 Atl. 158; Peeler *v.* Levy, 26 N. J. Eq. 330; Reilly *v.* Smith, 25 N. J. Eq. 158; Hawralty *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613.

New York.— Roos *v.* Lockwood, 59 Hun 181, 13 N. Y. Suppl. 128; Dixon *v.* Rice, 16 Hun 422; Bonnett *v.* Babbage, 19 N. Y. Suppl. 934.

Pennsylvania.— Burk *v.* Serrill, 80 Pa. St. 413, 21 Am. Rep. 105; Burk's Appeal, 75 Pa. St. 141, 15 Am. Rep. 587; Riesz's Appeal, 73 Pa. St. 485.

Virginia.— Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558, 37 Am. St. Rep. 894, 21 L. R. A. 133, *semble*.

The leading case is Riesz's Appeal, 73 Pa. St. 485, Sharswood, J. The chief ground adduced for refusing relief is that subjecting the husband to serious pecuniary loss because of his wife's refusal to join operates as a moral coercion upon her to yield her consent. It is also said that the wife's right is of such a contingent nature, that to estimate its value by the use of mortality tables, etc., works an injustice to one party or the other. See also Humphrey *v.* Clement, 44 Ill. 299. For cases which meet this last objection by providing indemnity instead of compensation see *ante*, VII, B, 2, e, (III). For a criticism on Riesz's Appeal, *supra*, and the cases which follow it see Pomeroy Spec. Perf. § 460.

87. *Illinois.*— Humphrey *v.* Clement, 44 Ill. 299, contingent dower.

New Jersey.— Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292, *dictum*.

New York.— Mills *v.* Van Voorhies, 20 N. Y. 412 [*reversing* 23 Barb. 125], defects in title as a whole.

Virginia.— Clark *v.* Reins, 12 Gratt. 98; Evans *v.* Kingsberry, 2 Rand. 120, 14 Am. Dec. 779, contingency of wife's surviving husband.

England.— Rudd *v.* Lascelles, [1900] 1 Ch. 815, 69 L. J. Ch. 396, 82 L. T. Rep. N. S. 256, 16 T. L. R. 278, 48 Wkly. Rep. 586 (restrictive covenant affecting the land); Westmacott *v.* Robins, 4 De G. F. & J. 390, 65 Eng. Ch. 390, 45 Eng. Reprint 1234; Brooke *v.* Rounthwaite, 5 Hare 298, 10 Jur. 656, 15 L. J. Ch. 332, 26 Eng. Ch. 298, 67 Eng. Reprint 926 (suit by vendor); Thomas *v.* Dering, 1 Jur. 427, 1 Keen 729, 6 L. J. Ch. 267, 15 Eng. Ch. 729, 48 Eng. Reprint 488 (where title is defective); Magennis *v.* Fallon, 2 Molloy 561, 584 (where the thing lacking has a peculiar value to purchaser not susceptible of compensation).

before the court;[88] or the court may authorize the vendee to remove the lien on failure of the vendor to remove it, and to reimburse himself out of his deferred payments of the purchase-price.[89]

5. Vendee May Have Partial Performance Without Compensation. The vendee in all cases, whether he was aware of the defect in the vendor's title or not, may, on payment of the full contract price, elect to take such title as the vendor is able to convey, and rely for his relief upon his legal action on the covenants in the vendor's deed.[90]

But it is enough to be able, by the aid of experts, to form a reasonable estimate. Ramaden *v.* Hirst, 4 Jur. N. S. 200, 27 L. J. Ch. 482, 6 Wkly. Rep. 349.

88. *California.*— Grant *v.* Beronio, 97 Cal. 496, 32 Pac. 556, suit of vendee. See details as to proper decree in opinion of Harrison, J.

Kansas.— Guild *v.* Atchison, etc., R. Co., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77.

North Carolina.— May *v.* Getty, 140 N. C. 310, 53 S. E. 75, vendor sues; decree that a sufficient part of the price be applied to acquiring outstanding legal title.

South Carolina.— Payne *v.* Melton, 69 S. C. 370, 48 S. E. 277, vendee sues.

Virginia.— Hudson *v.* Max Meadows Land, etc., Co., 97 Va. 341, 33 S. E. 586, vendee sues; encumbrancers can be made parties if necessary.

United States.— Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318 [*affirmed* in 149 Fed. 31], vendor sues; lien-holders are parties.

As to making encumbrancers parties see *infra*, X, F, 2, e.

Where it would be inequitable.— In Swanston *v.* Clark, 133 Cal. 300, 95 Pac. 1117, a lessee, having the right to purchase the premises during the term at a fixed price, elected to purchase, and tendered the price, but the lessor refused to convey. The lessee remained in possession of the premises, and sued for specific performance. It was held that since the lessee received the use of the premises after the tender, and was not liable for rent, it would be inequitable to compel the lessor to pay taxes and other encumbrances thereafter created, and not made or suffered by him or at his instance, or for his benefit.

89. Hunt *v.* Smith, 139 Ill. 296, 28 N. E. 809 (vendee sues; see form of decree); Strickland *v.* Barber, 76 Mich. 310, 43 N. W. 449 (vendor sues); Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41 (vendee sues); Jerome *v.* Scudder, 2 Rob. (N. Y.) 169 (see form of decree).

In a suit by the vendor, a decree which authorizes judgment against defendant only on deposit by plaintiff with the court of a deed free from encumbrance is objectionable. Preble *v.* Abrahams, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301, see form of decree.

That an encumbrance created after the contract is not a bar to the vendor's suit if he gives adequate security for the vendee's indemnity see Thompson *v.* Carpenter, 4 Pa. St. 132, 45 Am. Dec. 681.

That the vendee, plaintiff, may demand that the vendor procure a release or secure plaintiff for the payment of the mortgage see Reese *v.* Hoeckal, 58 Cal. 281.

Ordering suit by vendor to remove encumbrances.— A decree that defendant, the vendor, should prosecute suits to remove clouds on the title, and that plaintiff meanwhile should remain in possession without paying the purchase-money into court is erroneous. Easton *v.* Lockhart, 10 N. D. 181, 86 N. W. 697.

Suit pending on the encumbrance.— Where both vendor and vendee were contesting a suit on the mortgage, the vendor could not be required by decree in the specific performance suit to satisfy the mortgage within thirty days. Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630.

Independent suit by vendee to compel discharge of encumbrances.— Where the vendor is willing to have the encumbrances discharged from the purchase-money at the time of conveyance, a bill to compel their discharge from the vendor's funds before that time will not be entertained. Van Keuren *v.* Siedler, 73 N. J. Eq. 239, 66 Atl. 920.

90. *Arizona.*— Walton *v.* McKinney, (1908) 94 Pac. 1122.

Arkansas.— St. Louis, etc., R. Co. *v.* Beidler, 45 Ark. 17.

California.— Farnum *v.* Clarke, 148 Cal. 610, 84 Pac. 166, may take an inchoate equitable title.

Illinois.— Work *v.* Welsh, 160 Ill. 468, 43 N. E. 719; Watson *v.* Doyle, 130 Ill. 415, 22 N. E. 613; Bragg *v.* Olson, 128 Ill. 540, 21 N. E. 519; Hall *v.* Hall, 125 Ill. 95, 16 N. E. 896; Litsey *v.* Whittemore, 111 Ill. 267 (holding that the fact that a vendor of land is unable to give a warranty deed, so as to give a good title, and that his wife refuses to join in a deed for the land, is no defense to a bill by the vendee to enforce a specific performance; and when the decree requires the master in chancery to make a conveyance to the vendee, this will amount only to a quitclaim deed by the vendor alone, and the latter cannot complain of the decree on that account); Harding *v.* Parshall, 56 Ill. 219 (holding that where there is a contract of sale of land, and an agreement on the part of the vendor to convey with certain specified covenants for title, it is the right of the purchaser to have a specific performance, notwithstanding the vendor's title, in view of the character of covenants he agreed to make, may be found to be defective).

Indiana.— Cottrell *v.* Cottrell, 81 Ind. 87.

Iowa.— Donaldson *v.* Smith, 122 Iowa 388,

VIII. ALTERNATIVE AND ADDITIONAL RELIEF.

A. Damages in Place of Specific Performance — 1. Not When Plaintiff Knew That Specific Performance Was Impossible.

Where specific performance was impossible at the time of the commencement of the suit, and plaintiff knew or was informed at that time of the impossibility, the court, on denying the equitable relief, will not retain the case for the purpose of awarding damages, but will leave him to his legal remedy.[91]

98 N. W. 138; Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247; Wetherell *v.* Brobst, 23 Iowa 586.

Massachusetts.— See Davis *v.* Parker, 14 Allen 94.

Michigan.—Anderson *v.* Kennedy, 51 Mich. 467, 16 N. W. 816.

Minnesota.— Stromme *v.* Rieck, 107 Minn. 177, 119 N. W. 948.

Missouri.—Aiple-Himmelmann Real Estate Co. *v.* Spelbrink, 211 Mo. 671, 111 S. W. 480.

Montana.— Jones *v.* Gieske, 25 Mont. 132, 63 Pac. 1042.

Nebraska.— Lutjeharms *v.* Smith, 76 Nebr. 260, 107 N. W. 256; Vindquest *v.* Perky, 16 Nebr. 284, 20 N. W. 301; Gartrell *v.* Stafford, 12 Nebr. 545, 11 N. W. 732, 41 Am. Rep. 767.

New Hampshire.— Hallett *v.* Parker, 68 N. H. 598, 39 Atl. 433.

New Mexico.— Jasper *v.* Wilson, 14 N. M. 482, 94 Pac. 951, 23 L. R. A. N. S. 982, the rule that a vendee may waive the performance on the part of the vendor of portions of his contract and may elect to take a partial performance, if he himself is willing to fully perform, applies so as to allow a vendee to take title without warranty or abstract of title, where the vendor's agent exceeded his authority in stipulating therefor.

New York.— Kahn *v.* Chapin, 152 N. Y. 305, 46 N. E. 489 (defect cured by limitations during suit); Haffey *v.* Lynch, 143 N. Y. 241, 38 N. E. 298 [*reversing* 68 Hun 507, 23 N. Y. Suppl. 59] (defect cured during suit); Downer *v.* Church, 44 N. Y. 647 (title subject to a charge for support of third person); Jones *v.* Barnes, 105 N. Y. App. Div. 287, 94 N. Y. Suppl. 695 (title subject to inchoate dower); Westervelt *v.* Matheson, Hoffm. 37.

North Carolina.— Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682 (may enforce conveyance, although subject to inchoate dower of vendor's wife); Jacobs *v.* Locke, 37 N. C. 286.

Ohio.— Hyde *v.* Kelley, 10 Ohio 215; Stanley *v.* Bedinger, 2 Ohio Cir. Ct. 344, 1 Ohio Cir. Dec. 522.

Oregon.— West *v.* Washington R. Co., 49 Oreg. 436, 90 Pac. 666, subject to mortgage.

Pennsylvania.— Harrigan *v.* McAleese, (1888) 16 Atl. 31; Burk's Appeal, 75 Pa. St. 141, 15 Am. Rep. 587; Corson *v.* Mulvany, 49 Pa. St. 88, 88 Am. Dec. 485; Whiteside *v.* Winans, 29 Pa. Super. Ct. 244; Hughes *v.* Anthill, 23 Pa. Super. Ct. 290.

Rhode Island.— Millard *v.* Martin, 28 R. I. 494, 68 Atl. 420.

Virginia.— Steadman *v.* Handy, 102 Va. 382, 46 S. E. 380; Ross *v.* Hook, 4 Munf. 97.

Washington.—Newell *v.* Lamping, 45 Wash. 304, 88 Pac. 195.

West Virginia.— Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874; Cady *v.* Gale, 5 W. Va. 547.

Wisconsin.— Bull *v.* Bell, 4 Wis. 54.

United States.— U. S. *v.* Alexandria, 19 Fed. 609, 4 Hughes 545.

England.— Bennett *v.* Fowler, 2 Beav. 302, 17 Eng. Ch. 302, 48 Eng. Reprint 1197; Neal *v.* McKenzie, 1 Jur. 149, 1 Keen 474, 48 Eng. Reprint 389; Barrett *v.* Ring, 2 Smale & G. 43, 65 Eng. Reprint 294; Western *v.* Russell, 3 Ves. & B. 187, 35 Eng. Reprint 450.

See 44 Cent. Dig. tit. "Specific Performance," § 31.

Proof of vendor's title.— The vendee therefore does not need to offer proof of the vendor's title. The fact that the vendor assumed to sell the land raises the presumption that he has some title. Prince *v.* Bates, 19 Ala. 105; Gartrell *v.* Stafford, 12 Nebr. 545, 11 N. W. 732, 41 Am. Rep. 767.

Impossibility of performance by vendor.— Where vendor has no title see *supra*, III, A, 5. Where vendee demands a strict performance of the contract inability to convey a perfect title is a defense see Louisville, etc., R. Co. *v.* Bodenschatz-Bedford Stone Co., 141 Ind. 251, 39 N. E. 703; Hudson *v.* Max Meadows Land, etc., Co., 99 Va. 537, 39 S. E. 215, vendee demands an unencumbered title, and encumbrancers cannot be discharged from the purchase-price. But see Love *v.* Camp, 41 N. C. 209, 51 Am. Dec. 419, vendor, not having shown it impossible for him to obtain a full title, decreed to do so.

91. *Alabama.*— Eastman *v.* Reid, 101 Ala. 320, 13 So. 46. A contract leasing to complainant floor space in a building being erected, not being enforceable specifically, because of the impossibility of supervising the work, damages for the breach of the contract will not be awarded. Bromberg *v.* Eugenotto Constr. Co., 158 Ala. 323, 48 So. 60, 19 L. R. A. N. S. 1175.

Illinois.— Farson *v.* Fogg, 205 Ill. 326, 68 N. E. 755 [*reversing* 105 Ill. App. 572]; Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019; Sellers *v.* Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589 [*reversing* 64 Ill. App. 505]; Doan *v.* Mauzey, 3 Ill. 227. See Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210.

Iowa.— Eggert *v.* Pratt, 126 Iowa 727, 102 N. W. 786.

Maine.— Hill *v.* Fiske, 38 Me. 520.

2. When Defendant Disabled Himself Pending Suit. Where the vendor was able to perform at the beginning of the suit, but afterward puts it out of his power to perform by conveying to a *bona fide* grantee for value, the court will retain the suit and assess the vendee's damages.[92]

3. Where Plaintiff Did Not Know of Defendant's Disability. In this country the rule is generally accepted that, although the disability existed at the time of beginning the suit, the case may be retained for the assessment of damages, provided plaintiff brought his bill in good faith, without knowledge of the disability, supposing and having reason to suppose himself entitled to specific performance.[93] In some of the earlier cases, the rule as to retaining the case for damages was stated without any limitation arising from plaintiff's knowledge of the impossibility of specific relief.[94] In accordance with the general rule that damages may be given

Missouri.— McQueen *v.* Chouteau, 20 Mo. 222, 64 Am. Dec. 178.

New Jersey.— Van Keuren *v.* Siedler, 73 N. J. Eq. 239, 66 Atl. 920 (plaintiff had constructive notice of the encumbrance which made the title unmarketable); Logan *v.* Flattan, 73 N. J. Eq. 222, 67 Atl. 1007; Public Service Corp. *v.* Hackensack Meadows Co., 72 N. J. Eq. 285, 64 Atl. 976.

New York.—See Messenger *v.* Chambers, 53 Misc. 117, 103 N. Y. Suppl. 1100; Hatch *v.* Cobb, 4 Johns. Ch. 559; Wiswall *v.* McGowan, Hoffm. 125 [*reversed* on other grounds in 2 Barb. 270 (*affirmed* in 10 N. Y. 465)]. Where a complaint for specific performance did not state facts entitling complainant to equitable relief, which was the only relief demanded, defendant was entitled to have demurrer to the complaint for want of facts sustained, although from the facts stated a cause of action for money damages could be spelled out. Dingwall *v.* Chapman, 63 Misc. 193, 116 N. Y. Suppl. 520.

North Dakota.— Knudtson *v.* Robinson, (1908) 118 N. W. 1051, holding that where, at the time an action for specific performance was commenced, plaintiff knew that specific performance could not be had as to a part of the lands, and defendant had died pending the action, and his heirs at law and devisees and executors had been substituted and the estate had been finally settled, jurisdiction would not be retained for the purpose of assessing damages for a failure to convey but the action would be dismissed.

Pennsylvania.— Kerlin *v.* Knipp, 207 Pa. St. 649, 57 Atl. 34; Bartol *v.* Shaffer, 7 North. Co. Rep. 217.

Virginia.— Jones *v.* Tunis, 99 Va. 220, 37 S. E. 841.

Washington.— Peters *v.* Van Horn, 37 Wash. 550, 79 Pac. 1110; Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

United States.— Complainant in a suit to specifically enforce a void contract cannot recover on *quantum meruit* for services performed thereunder, his right of action therefor, if any, being at law, where the parties are entitled to trial by jury. McKinney *v.* Big Horn Basin Development Co., 167 Fed. 770, 93 C. C. A. 258.

See 44 Cent. Dig. tit. "Specific Performance," §§ 415, 416.

92. *Illinois.*— Oliver *v.* Croswell, 42 Ill. 41.

New York.— Pitt *v.* Davison, 12 Abb. Pr. 385; Wiswall *v.* McGowan, Hoffm. 125 [*reversed* on other grounds in 2 Barb. 270 (*affirmed* in 10 N. Y. 465)].

Ohio.— Chapman *v.* Mad River, etc., R. Co., 6 Ohio St. 119.

Oregon.— Livesley *v.* Johnston, 48 Oreg. 40, 84 Pac. 1044.

Wisconsin.— Fleming *v.* Ellison, 124 Wis. 36, 102 N. W. 398.

United States.— Altoona Electrical Engineering, etc., Co. *v.* Kittanning, etc., R. Co., 126 Fed. 559.

93. *Iowa.*— Renkin *v.* Hill, 49 Iowa 270, where plaintiff alleged that the subsequent purchaser had notice of the contract.

Kentucky.— Slaughter *v.* Tindle, 1 Litt. 358, where plaintiff merely had doubts as to the vendor's title.

Massachusetts.— Milkman *v.* Ordway, 106 Mass. 232, a leading case.

New York.— Woodcock *v.* Bennet, 1 Cow. 711, 13 Am. Dec. 568. *Contra,* Wiswall *v.* McGown, 2 Barb. 270 [*reversing* 1 Hoffm. 125, and *affirmed* in 10 N. Y. 465].

Pennsylvania.— Fitzpatrick *v.* Engard, 4 Pa. Dist. 383.

Washington.— Cunningham *v.* Duncan, 4 Wash. 506, 30 Pac. 647. And see Nelson *v.* Title Trust Co., 52 Wash. 258, 100 Pac. 730, holding that if one suing to compel defendant to convey lots as staked when he contracted to purchase, and for damages for misrepresentation, or, in the alternative, to rescind, proved any cause of action, an involuntary dismissal leaving him to sue at law for damages was improper.

See 44 Cent. Dig. tit. "Specific Performance," § 412 *et seq.*

Where the subsequent purchaser from the vendor took with notice, so that a decree for specific performance may be had against him, it is error to decree damages instead. Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273.

No request for such relief.— Although, on denying specific performance of a contract to convey, for want of equity, the court could have retained the bill to award plaintiff damages, it was not improper to fail to do so, where he did not request such course; the court being entitled to leave plaintiff wholly to his remedy at law. Banaghan *v.* Malaney, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378, 19 L. R. A. N. S. 871.

94. *Kentucky.*— Rankin *v.* Maxwell, 2 A. K. Marsh. 488, 12 Am. Dec. 431; Gerault *v.* An-

to a plaintiff who is ignorant that specific performance cannot be decreed, damages have been awarded where the court, in the exercise of its discretion, refuses specific performance because of the great hardship of that relief to defendant,[95] or because enforcement of the decree would be useless or impracticable.[96]

4. Effect of Codes on Equity Rules. The effect of the provisions of the codes of procedure, authorizing the uniting of causes of action, both legal and equitable, arising out of the same transaction, upon the equity rules as to damages in specific performance, has been little discussed,[97] save in two states, New York and Wisconsin. In New York the equity rule that where plaintiff was aware before the commencement of the action that defendant could not perform, the suit will not be retained for the purpose of awarding damages, is held to be abrogated by the code.[98]

derson, 2 Bibb 543; Reading *v.* Ford, 1 Bibb 338.

Ohio.— Gibbs *v.* Champion, 3 Ohio 335; Rees *v.* Smith, 1 Ohio 124, 13 Am. Dec. 599.

Virginia.— Henderson *v.* Lightfoot, 5 Call 241.

United States.— See Mobile County *v.* Kimball, 102 U. S. 691, 706, 26 L. ed. 238.

Canada.— Forsyth *v.* Johnson, 14 Grant Ch. (U. C.) 639.

See 44 Cent. Dig. tit. "Specific Performance," § 415 *et seq.*

Restitution of the purchase-price ordered see Cunningham *v.* Depew, Morr. (Iowa) 463; Cleveland *v.* Bergen Bldg., etc., Co. (N. J. Ch. 1903) 55 Atl. 117; Hall *v.* Wilkinson, 35 W. Va. 167, 12 S. E. 1118. Such restitution was ordered on failure of defendant to obtain the consent of his wife in Maris *v.* Masters, 31 Ind. App. 235, 67 N. E. 699; Huffman *v.* Bradshaw, 17 Pa. Super. Ct. 205.

Against what parties.— The heir of the vendor cannot be required to pay damages, unless it is shown that property of the deceased has come to him. Forman *v.* Stickney, 77 Ill. 575; Taylor *v.* Rowland, 26 Tex. 293. A decree for damages against the heirs should be against them jointly, not individually. Cogwell *v.* Lyon, 3 J. J. Marsh. (Ky.) 38. Where it is shown that defendant's disability to perform was the result of a conspiracy between him and another, the decree for damages should be against both. Powell *v.* Young, 45 Md. 494.

Decree in alternative.— That the decree should award damages only in the alternative, thus giving the vendor the opportunity to perform see Eastman *v.* Reid, 101 Ala. 320, 13 So. 46; Hook *v.* Ross, 1 Hen. & M. (Va.) 310. *Contra*, Levy *v.* Knepper, 117 N. Y. App. Div. 163, 102 N. Y. Suppl. 313.

95. Chicago Sanitary Dist. *v.* Martin, 227 Ill. 260, 81 N. E. 417 [*affirming* 129 Ill. App. 308].

96. Speer *v.* Erie R. Co., 68 N. J. Eq. 615, 60 Atl. 197 [*reversing* 64 N. J. Eq. 601, 54 Atl. 539]; Cincinnati Southern R. Co. *v.* Hooker, 26 Ohio Cir. Ct. 392, land immediately subject to the right of eminent domain.

Mutual mistake.— Where there was mutual mistake as to the existence of the subject-matter, the case is not one for damages. Morss *v.* Elmendorf, 11 Paige (N. Y.) 277.

97. See Messer *v.* Hibernia Sav., etc., Soc., 149 Cal. 122, 84 Pac. 835 (complaint may seek monetary relief as an alternative remedy); Mossman *v.* Schulter, 5 Ohio Dec. (Reprint) 404, 5 Am. L. Rec. 425 (action to enforce contract to deliver government bonds; although no jurisdiction because of adequate remedy at law, retained for damages); Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84; Mitchell *v.* Sheppard, 13 Tex. 484 (under blending of law and equity in Texas may pray for specific performance or in the alternative for damages); Boultbee *v.* Shore, Manitoba t. Wood 376.

98. The leading case is Sternberger *v.* McGovern, 56 N. Y. 12 [*reversing* 4 Daly 456], holding that where the complaint states facts giving a cause of action for specific performance, and also a cause of action for damages for breach of the contract, a failure to show a right to the equitable relief sought does not defeat plaintiff's right to the legal remedy. See also Haffey *v.* Lynch, 143 N. Y. 241, 38 N. E. 298; Barlow *v.* Scott, 24 N. Y. 40; Krasnow *v.* Topp, 128 N. Y. App. Div. 156, 112 N. Y. Suppl. 546; Elliott *v.* Asiel, 120 N. Y. App. Div. 829, 105 N. Y. Suppl. 655; Levy *v.* Knepper, 117 N. Y. App. Div. 163, 102 N. Y. Suppl. 313; Snow *v.* Monk, 81 N. Y. App. Div. 206, 80 N. Y. Suppl. 719; Mowbray *v.* Dieckman, 9 N. Y. App. Div. 120, 41 N. Y. Suppl. 82; O'Beirne *v.* Bullis, 2 N. Y. App. Div. 545, 38 N. Y. Suppl. 4 [*affirmed* in 158 N. Y. 466, 53 N. E. 211]; O'Beirne *v.* Bullis, 80 Hun 570, 30 N. Y. Suppl. 588 [*affirmed* in 151 N. Y. 372, 45 N. E. 873]; Styles *v.* Blume, 30 N. Y. Suppl. 409 [*reversed* on other grounds in 12 Misc. 421, 33 N. Y. Suppl. 620]; Hart *v.* Brown, 6 Misc. 238, 27 N. Y. Suppl. 74, where specific performance was refused for hardship. See Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783 [*affirming* 82 Hun 98, 31 N. Y. Suppl. 202] (if specific performance is barred by statute of limitations, action for damages is barred); Levy *v.* Knepper, 117 N. Y. App. Div. 163, 102 N. Y. Suppl. 313 (judgment should not be in alternative; court should decide whether or not specific performance can be granted); Messenger *v.* Chambers, 53 Misc. 117, 103 N. Y. Suppl. 1100 (where it appears on the face of the complaint that a court of equity has no jurisdiction, the cause will be transferred to the jury calendar); Chase *v.* Hogan, 3 Abb. Pr. N. S. 57 (where specific performance refused for plaintiff's default, no damages awarded). To justify a decree for damages in a suit for specific performance of a contract to convey, it must

The decisions in Wisconsin, while difficult to reconcile, show a disposition to adhere more closely to the equity rule.[99]

5. Measure of Damages. The measure of damages is sometimes the market value of the property contracted to be conveyed, deducting therefrom the amount of the purchase-price that remains unpaid,[1] and sometimes the amount paid on the purchase-price.[2]

6. Compensation For Expenditures, or Return of Price — a. When Not Granted. As a general rule, if plaintiff fails to make out a case for specific performance, especially if the failure is by reason of his own default, he is not entitled to have the case retained to award him compensation for services rendered, improvements made, return of the purchase-price paid, or damages, unless some special equity intervenes.[3]

b. When Granted. In other instances, where plaintiff vendee fails to make out a case for specific performance, but he has no full and adequate remedy at law, or there are special equities in his favor, the bill has been retained to award compensation for his expenditures made or services rendered on the faith of the contract.[4]

appear that specific performance cannot be had; and such fact was not apparent where defendant did not refuse at trial to convey as decreed, and was given twenty days after service of the decree on him in which to convey. Will *v.* Barnwell, 60 Misc. 458, 112 N. Y. Suppl. 462.

Necessity of a prayer in the complaint for damages see Bowen *v.* Webster, 3 N. Y. App. Div. 86, 38 N. Y. Suppl. 917; Stevenson *v.* Buxton, 37 Barb. (N. Y.) 13, 15 Abb. Pr. 352.

99. **Not retained for damages** see Park *v.* Minneapolis, etc., R. Co., 114 Wis. 347, 89 N. W. 532 (contract too indefinite for specific performance); Johns *v.* Northwestern Mut. Relief Assoc., 87 Wis. 111, 58 N. W. 76; Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255 (on finding that there was no contract, not retained for recovery of money advanced); Horn *v.* Ludington, 32 Wis. 73.

Retained see Combs *v.* Scott, 76 Wis. 662, 45 N. W. 532 (for the reason that the statute of limitations had run on the contract pending the suit); Hopkins *v.* Gilman, 22 Wis. 476; Leonard *v.* Rogan, 20 Wis. 540; Kelley *v.* Sheldon, 8 Wis. 258 (although equitable relief denied by reason of plaintiff's fraud, he may have amount paid refunded).

1. *California.*— Messer *v.* Hibernia Sav., etc., Soc., 149 Cal. 122, 84 Pac. 835, where there has been bad faith. See Civ. Code, § 3306.

Iowa.— Cornell *v.* Rodabaugh, 117 Iowa 287, 90 N. W. 599, 94 Am. St. Rep. 298.

New York.— Schorr *v.* Gewirz, 39 Misc. 186, 79 N. Y. Suppl. 134, where there has been bad faith; also vendee recovers interest on payment made and expenses of searching title.

Ohio.— Dustin *v.* Newcomer, 8 Ohio 49; Gibbs *v.* Champion, 3 Ohio 335.

Oregon.— Livesley *v.* Johnston, 48 Oreg. 40, 84 Pac. 1044.

Texas.— Phillips *v.* Herndon, 78 Tex. 378, 14 S. W. 857, 22 Am. St. Rep. 59.

But not where relief is refused because inequitable see Gough *v.* Bench, 9 Ont. Pr. 431.

Where the vendor resold at an advanced price, he was chargeable with the price received on the second sale, with interest. Sugg *v.* Stowe, 58 N. C. 126.

2. American Land Co. *v.* Grady, 33 Ark. 550; Powell *v.* Young, 45 Md. 494 (with interest); Eickwort *v.* Powers, 17 N. Y. Suppl. 137 (vendor having acted in good faith; vendee also recovers expenses of examining title); Cunningham *v.* Duncan, 4 Wash. 506, 30 Pac. 647; Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614 (with interest).

Measure of damages on other contracts than for the sale of land see Hagins *v.* Sewell, 124 Ky. 588, 99 S. W. 673, 30 Ky. L. Rep. 750 (to construct a wall); Wonson *v.* Fenno, 129 Mass. 405 (to sell stock); Dayton, etc., R. Co. *v.* Hatch, 1 Disn. (Ohio) 84 (to give land for stock).

3. *Alabama.*— Sims *v.* McEwen, 27 Ala. 184 (relief refused because uncertain whether plaintiff can perform his part); Goodwin *v.* Lyon, 4 Port. 297.

Florida.— Chabot *v.* Winter Park Co., 34 Fla. 258, 15 So. 756, 43 Am. St. Rep. 192, laches.

Iowa.— Findley *v.* Koch, 126 Iowa 131, 101 N. W. 766.

Maryland.— Brehm *v.* Sperry, 92 Md. 378, 48 Atl. 368, uncertainty.

North Carolina.— Murdock *v.* Anderson, 57 N. C. 77, uncertainty.

Ohio.—Scott *v.* Barber, 14 Ohio 547, laches.

United States.— Zeringue *v.* Texas, etc., R. Co., 34 Fed. 239; Fallon *v.* Missouri, etc., R. Co., 8 Fed. Cas. No. 4,629, 1 Dill. 121.

See 44 Cent. Dig. tit. "Specific Performance," § 412 *et seq.*

Compare, however, Clay *v.* Mayer, 183 Mo. 150, 81 S. W. 1066; Penrose *v.* Leeds, 46 N. J. Eq. 294, 19 Atl. 134.

4. *Alabama.*— Powell *v.* Higley, 90 Ala. 103, 7 So. 440; Allen *v.* Young, 88 Ala. 338, 6 So. 747. A bill for specific performance of an oral contract for sale of land, which avers the making of improvements by complainant on the faith of the contract, should not be dismissed on determination that per-

c. In Case of Parol Contracts. In an action for the specific performance of a parol contract for the sale of land, where plaintiff fails to make out the contract or the acts of part performance with the high degree of proof required, the case may be retained to decree restitution of the purchase-price or part thereof paid by him, and compensation for the improvements made in good faith upon the land.[5] Such restitution and compensation is also made in certain states where the doctrine of part performance is not recognized.[6]

d. Vendee's Lien. The vendee's right to compensation for payments made or services rendered under the contract, or for improvements upon the land, may be secured by giving him a lien thereon.[7]

formance cannot be decreed; but the case should be retained for the purpose of awarding compensation for the improvements, since complainant is entitled to have a lien declared for his reimbursement, and to accomplish that end he has no adequate remedy at law. Jones *v.* Gainer, 157 Ala. 218, 47 So. 142.

California.— Leuschner *v.* Duff, 7 Cal. App. 721, 95 Pac. 914.

Illinois.— A son entering on land of his father under an oral contract that, if he would occupy and improve the same, and would clear and improve another tract, both tracts should be his at his father's death, on failure to establish such part performance as to take the contract out of the statute of frauds, is entitled to compensation for the value of improvements of a permanent character, and to have a lien on the land therefor, but is not entitled to payment for services in clearing and breaking out new ground, but, if any claim accrued because of such services, it is a liability against his father's estate to be collected at law. Ranson *v.* Ranson, 233 Ill. 369, 84 N. E. 210.

Kentucky.— Newman *v.* Moore, 94 Ky. 147, 21 S. W. 759, 15 Ky. L. Rep. 1, 42 Am. St. Rep. 343; Tunstal *v.* Taylor, 1 A. K. Marsh. 43, services. Where, although specific performance was denied because the amount of the purchase-price as stated was altered, so that the amount tendered by plaintiff was less than that due, there was no evidence that the alteration was made by or through plaintiff, and he was not in possession of the land at any time, he was entitled to recover the amount paid with interest from the time of payment, and to a lien on the land therefor. Lowe *v.* Maynard, (1909) 115 S. W. 214.

New Jersey.— Copper *v.* Wells, 1 N. J. Eq. 10, to value lessee's improvements lessor having refused to name arbitrators.

Ohio.— Williams *v.* Champion, 6 Ohio 169.

Utah.— Duke *v.* Griffith, 13 Utah 361, 45 Pac. 276, improvements made in good faith.

West Virginia.—Moore *v.* Ligon, 30 W. Va. 146, 3 S. E. 572.

See 44 Cent. Dig. tit. "Specific Performance," § 413 *et seq.*

That a complainant who established his right to specific performance cannot in lieu thereof take a decree for the value of his improvements see People's Pure-Ice Co. *v.* Trumbull, 70 Fed. 166, 17 C. C. A. 43.

As to mode of estimating value of improvements see Fishback *v.* Ball, 34 W. Va. 644, 12 S. E. 856. And see, generally, IMPROVEMENTS, 22 Cyc. 26.

5. *Alabama.*— Goodwin *v.* Lyon, 4 Port. 297.

Indiana.— Johnston *v.* Glancy, 4 Blackf. 94, 28 Am. Dec. 45.

Michigan.— Fowler *v.* De Lance, 146 Mich. 630, 110 N. W. 41.

Minnesota.— See Evans *v.* Miller, 38 Minn. 245, 36 N. W. 640, alternative decree for conveyance or for value of improvements.

Missouri.— Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68; Hamilton *v.* Hamilton, 59 Mo. 232.

South Carolina.— McMillan *v.* McMillan, 77 S. C. 511, 58 S. E. 431.

Virginia.— Anthony *v.* Leftwich, 3 Rand. 238.

United States.— King *v.* Thompson, 13 Pet. 128, 10 L. ed. 91 [*reversing* 23 Fed. Cas. No. 13,963, 5 Cranch C. C. 93].

See 44 Cent. Dig. tit. "Specific Performance," § 412 *et seq.*

That expenditures must be for improvements on the property see Shafer's Appeal, 110 Pa. St. 382, 2 Atl. 365.

6. Asher *v.* Brock, 95 Ky. 270, 24 S. W. 1070, 15 Ky. L. Rep. 631; Speers *v.* Sewell, 4 Bush (Ky.) 239; Pendleton *v.* Dalton, 92 N. C. 185; Love *v.* Neilson, 54 N. C. 339; Ellis *v.* Ellis, 16 N. C. 398. See *supra*, V, B.

7. *Alabama.*— Powell *v.* Higley, 90 Ala. 103, 7 So. 440.

Kentucky.— Asher *v.* Brock, 95 Ky. 270, 24 S. W. 1070, 15 Ky. L. Rep. 631; Newman *v.* Moore, 94 Ky. 147, 21 S. W. 759, 15 Ky. L. Rep. 1, 42 Am. St. Rep. 343; Speers *v.* Sewell, 4 Bush 239.

Missouri.— Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68.

New Jersey.— Cleveland *v.* Bergen Bldg., etc., Co., (Ch. 1903) 55 Atl. 117.

New York.— Price *v.* Palmer, 23 Hun 504.

Ohio.— Williams *v.* Champion, 6 Ohio 169.

Virginia.— Matthias *v.* Warrington, 89 Va. 533, 16 S. E. 662.

West Virginia.— Moore *v.* Ligon, 30 W. Va. 146, 3 S. E. 572.

United States.— King *v.* Thompson, 13 Pet. 128, 10 L. ed. 91 [*reversing* 23 Fed. Cas. No. 13,963, 5 Cranch C. C. 93], no deficiency judgment allowed on enforcement of such lien.

England.— Rose *v.* Watson, 10 H. L. Cas. 672, 10 Jur. N. S. 297, 33 L. J. Ch. 385, 10 L. T. Rep. N. S. 106, 3 New Rep. 673, 12 Wkly. Rep. 585, 11 Eng. Reprint 1187.

B. Other Alternative Relief. Generally, where specific performance of a contract to convey land is denied, its rescission will be decreed,[8] and where the vendor is plaintiff, he may have a decree for the restoration of the possession of the land and an accounting of the rents and profits.[9] A court of equity should decree that which is equitable under the evidence, and should adjust the decree to the evidence, irrespective of failure to make specific objection to the sufficiency of the allegations and prayer to entitle plaintiff to the kind or form of relief asked; and hence the court should deny specific performance of a contract where plaintiff was not entitled to it, although defendant did not raise the question of plaintiff's right to such relief, but contended solely that there was no such contract.[10] In a suit against a corporation and its manager for specific performance of a contract by which the corporation, in consideration of the use of a patent, owned by complainant, agreed to pay royalties, and the manager agreed to convey certain property to complainant, equity will decree an accounting as to the royalties.[11] But one cannot sue in equity, and, upon failing to establish any basis for equitable relief, have the bill retained for the purpose of a recovery upon a purely legal demand, since such permission would deprive defendant of his constitutional right of trial by jury, and, complainant having sued to specifically perform an alleged contract whereby defendant was to hold corporate stock in trust for her and for an accounting, and having failed to prove any allegation authorizing equitable relief, it is error for the chancellor to retain jurisdiction to award a decree for money loaned, there being no showing why her remedy was not as complete and adequate at law as in equity.[12]

8. *Florida.*— Hendry *v.* Benlisa, 37 Fla. 609, 20 So. 800, 34 L. R. A. 283.

Kentucky.— Fisher *v.* Kay, 2 Bibb 434, exchange.

Minnesota.— Thwing *v.* Hall, etc., Lumber Co., 40 Minn. 184, 41 N. W. 815 (on rescission for mistake, plaintiff not entitled to damages for breach of contract); Buckley *v.* Patterson, 39 Minn. 250, 39 N. W. 490 (for mistake).

New York.— International Paper Co. *v.* Hudson River Water Power Co., 92 N. Y. App. Div. 56, 86 N. Y. Suppl. 736.

North Dakota.— Block *v.* Donovan, 13 N. D. 1, 99 N. W. 72, at suit of vendor.

Interest of infant defendants.— Where vendor asks for specific performance or rescission as the court may direct, the court should act for the best interests of the infant defendants. Greenbaum *v.* Austrian, 70 Ill. 591.

Reviving mortgage relinquished by plaintiff see Mitchell *v.* Graham, (Miss. 1891) 8 So. 646.

9. Gilpin *v.* Watts, 1 Colo. 479 (alternative decree); Gregorie *v.* Bulow, Rich. Eq. Cas. (S. C.) 235; Bryan *v.* Lofftus, 1 Rob. (Va.) 12, 39 Am. Dec. 242 (see for form of decree).

10. Newman *v.* French, 138 Iowa 482, 116 N. W. 468, 128 Am. St. Rep. 212, 18 L. R. A. N. S. 218. In this case defendant induced plaintiff, his daughter, to give up her home in the country, and go to live in town, in a house to be purchased by him, which was to belong to plaintiff in return for her personal services in making a home and caring for him. Soon afterward defendant left plaintiff, and conveyed the house to others. It was held that, although plaintiff was not entitled to specific performance, defendant should be restrained from conveying the premises free from plaintiff's claims, and from interfering with her possession and enjoyment thereof so long as she continued to perform or to be ready and able to perform the contract on her part, and the fee-simple title to the premises should be made to vest in her when her obligations under the contract shall have been fully performed, and she shall be otherwise entitled to a decree on her contract.

11. Collins *v.* Leary, (N. J. 1908) 71 Atl. 603.

Pleadings insufficient.— A contract for the purchase of stock in a corporation owning a hotel stipulated that the buyer should be employed as the manager of the hotel at a fixed salary, and that in case the hotel made a profit he should be entitled to have one fourth thereof credited on the balance due on the stock contracted for. He was removed from his position as manager and brought a suit to specifically enforce the contract by requiring his restoration to the position of manager and for the transfer and delivery to him of the corporate stock. There was no allegation that any profits had accrued or were due, nor was there any claim made for damages, and he made no tender of performance by alleging his willingness and ability to pay any balance that might be found due after applying profits to the liquidation of the debt. It was held that the court was without authority to enter a decree providing for the appointment of a referee to take an accounting of damages and of the earnings and profits of the hotel, and for the application of the same on the stock purchased, and the payment of the balance, if any, to the buyer. Deitz *v.* Stephenson, 51 Oreg. 596, 95 Pac. 803.

12. Brauer *v.* Laughlin, 235 Ill. 265, 85 N. E. 283 [*reversing* 138 Ill. App. 524].

C. Additional Relief — 1. In General. In accordance with the general maxim of equity that the court having obtained jurisdiction of the cause for one purpose will retain it for full relief,[13] there may be granted, in connection with specific performance, in an appropriate case, a final injunction,[14] an order for interpleader between conflicting claimants,[15] a decree for reformation of the contract, preliminary to its enforcement,[16] for cancellation of the articles of agreement,[17] or a judgment for possession.[18]

2. Damages in Addition to Specific Performance — a. In General. The court having acquired jurisdiction may, as incidental to the remedy, assess such damages as appear to have been sustained by plaintiff.[19] A familiar instance is presented in the specific performance of a contract to issue a policy of insurance; where a loss or death has already occurred, jurisdiction will be retained for the purpose of decreeing payment of the policy.[20]

b. Where Vendor Withholds Possession. Incidental to specific performance of a contract to convey land, if the vendor has wrongfully withheld possession,

13. See Equity, 16 Cyc. 106.

14. See Carnegie Natural Gas Co. *v.* South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548.

For interlocutory injunction see *infra*, XI, F, 1.

Enforcing contracts by means of injunction generally see Injunctions, 22 Cyc. 844.

15. Eppstein *v.* Kuhn, 225 Ill. 115, 80 N. E. 80 (between vendor and his lessee); Hanchett *v.* McQueen, 32 Mich. 22 (between vendee, defendant, and his assignee for creditors).

16. Waterman *v.* Dutton, 6 Wis. 265. See *supra*, IV, C, 5.

17. Gilchrist *v.* Buie, 21 N. C. 346.

For rescission on behalf of defendant see *infra*, IX, C.

18. Baker *v.* St. Louis, 7 Mo. App. 429 [*affirmed* in 75 Mo. 671].

19. West *v.* Washington R. Co., 49 Oreg. 436, 90 Pac. 666. As incidental to a contract by a vendee railroad to do certain work, the vendor may recover damages for nonperformance (Hooper *v.* Savannah, etc., R. Co., 69 Ala. 529); and the court may give damages for failure to perform a portion of the vendee's covenant which, in the court's discretion, it declines to specifically enforce (Post *v.* West Shore R. Co., 50 Hun (N. Y.) 301, 3 N. Y. Suppl. 172 [*affirmed* in 123 N. Y. 580, 26 N. E. 7]). On specific performance of a contract, for an entire consideration, to release all demand against complainant, and to cause certain notes to be executed, where the time for payment of the notes expired before the suit is brought, the court, having jurisdiction to enforce the release, may assess damages for failure to execute the notes. Lyle *v.* Addicks, 62 N. J. Eq. 123, 49 Atl. 1121. On a bill for a specific delivery of slaves, defendant could be compelled to account for the value of such of them as had died since the filing of the bill. Reese *v.* Holmes, 5 Rich. Eq. (S. C.) 531. By a contract for the conveyance of certain property complainant agreed to convey to defendant a house and lot for eight thousand one hundred dollars, less a mortgage of four thousand dollars. Defendant agreed to convey back a house and lot for seven thousand five hundred dollars, less a mortgage of two thousand five hundred dollars, leaving a balance of nine hundred dollars to be paid by complainant. At the time defendant made the contract he knew that his property was subject, not only to the mortgage of two thousand five hundred dollars, but also to an unrecorded mortgage of two thousand dollars. This mortgage he believed he could induce the holder to cancel, taking in its place a mortgage on the property to be conveyed to him. The holder, however, refused to change his security, and immediately put his mortgage on record. Thereupon complainant tried to make arrangements by which defendant could perform his agreement, and to that end offered to take back a second mortgage on other property to secure the payment of the two thousand dollars. It was held that, in the absence of any unfairness in the contract between the parties, complainant was entitled to a specific performance by defendant of the contract as made, free of encumbrances except as to the two thousand five hundred dollars, and, in case of defendant's failure to remove the encumbrance of two thousand dollars, the court might render, in addition to the decree for specific performance, a decree against him for that amount. Roche *v.* Osborne, (N. J. 1905) 69 Atl. 176.

Retaining jurisdiction for accounting see McDonald *v.* Davis, 43 Ga. 356.

That damages cannot be assessed against one not a party to the contract see Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121, 60 N. Y. Suppl. 739.

Part performance of oral contract.— But that, as incidental to a decree for specific performance of a verbal contract, on the ground of part performance, the court cannot give a personal judgment in damages for an independent cause of action growing out of the void contract, since relief is given not on the contract but on the equities arising from part performance see Harsha *v.* Reid, 45 N. Y. 415.

20. Gerrish *v.* German Ins. Co., 55 N. H. 355; Tayloe *v.* Merchants F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187; Hebert *v.* New York Mut. L. Ins. Co., 12 Fed. 807, 8 Sawy. 198, life insurance. See *supra*, II, B, 11, d.

the vendee is entitled to damages for the delay;[21] and for injury done to the freehold by the vendor's improper acts or neglect.[22]

3. Interest, and Rents and Profits — a. General Rule. Where there is delay in completion of the contract, compensation may be made to one or the other of the parties by means of the rents and profits, and interest on the price. The general rule is to adjust the rights of the parties so as to give to each as nearly as possible what he would have received if the contract had been performed according to its terms.[23]

b. Vendee in Default Pays Interest. In general the vendee in default is charged with interest on the purchase-money, the vendor not being in default.[24]

c. Vendee in Possession Pays Interest. A vendee in possession must pay interest on the unpaid purchase-money, although the vendor is unable to make title at the time appointed, and although by the terms of the contract the pur-

21. *Mississippi.*— Thurman *v.* Pointer, 67 Miss. 297, 7 So. 215, vendor failed to cancel lease.

New York.— Worrall *v.* Munn, 38 N. Y. 137 (exhaustive discussion of the subject); Benson *v.* Tilton, 24 How. Pr. 494 [*affirmed* in 41 N. Y. 619] (as to the measure of damages).

South Carolina.— Latimer *v.* Marchbanks, 57 S. C. 267, 35 S. E. 481.

Virginia.— See Grubb *v.* Starkey, 90 Va. 831, 20 S. E. 784, cause retained for damages where defendant completes the contract during suit.

England.— Cleaton *v.* Gower, Rep. t. Finch 164, 23 Eng. Reprint 90, damages to lessee for being kept out of enjoyment of lease.

22. Latimer *v.* Marchbanks, 57 S. C. 267, 35 S. E. 481; Nagle *v.* Newton, 22 Gratt. (Va.) 814 (in suit by vendor); Lynch *v.* Wright, 94 Fed. 703 (deterioration of vacant building); Fisken *v.* Wride, 11 Grant Ch. (U. C.) 245 (accountable for dilapidations by persons in possession). In Latimer *v.* Marchbanks, *supra*, recovery of damages by the vendee kept out of possession is held to be limited to the two causes mentioned in the text.

23. *Illinois.*— Tiernan *v.* Granger, 65 Ill. 351.

New Jersey.— Jersey City *v.* Flynn, (Ch. 1908) 70 Atl. 497.

New York.— Worrall *v.* Munn, 38 N. Y. 137.

North Dakota.— Pillsbury *v.* J. B. Streeter, Jr., Co., 15 N. D. 174, 107 N. W. 40.

United States.— Lynch *v.* Wright, 94 Fed. 703; Sohier *v.* Williams, 22 Fed. Cas. No. 13,160, 2 Curt. 195.

England.— De Visme *v.* De Visme, 1 Hall & T. 408, 47 Eng. Reprint 1470, 13 Jur. 1037, 19 L. J. Ch. 52, 1 Macn. & G. 336, 47 Eng. Ch. 269, 41 Eng. Reprint 1295.

As to rents and interest where a portion of the price is withheld as indemnity for vendor's widow's dower see Springle *v.* Shields, 17 Ala. 295.

Discretion of court.— Where a suit for specific performance of a contract to convey was delayed for a number of years by an ejectment suit against the vendor, which subsequently proved groundless, while the supreme court in its discretion might have relieved the vendor from liability for the rental value of the land from the time when she should have conveyed, upon her waiving interest on the purchase-money, its refusal to do so was not error as a matter of law. Haffey *v.* Lynch, 119 N. Y. App. Div. 885, 104 N. Y. Suppl. 1128 [*affirmed* in 193 N. Y. 67, 85 N. E. 817].

Application of rule of partial payments.— In a suit for specific performance, in allowing to the vendee the rental value of the land from the time the vendor should have conveyed, and to the vendor interest on the purchase-money, the rule of partial payments should be applied, and the vendor should not be charged with interest on the rental value from the termination of each year, but the rent should be applied to the interest annually accruing on the purchase-money, and should not itself bear interest, the rental being less than the annual interest; nor should the vendee be charged with interest on the taxes paid by the vendor, the rent being applicable to discharge them. Haffey *v.* Lynch, 119 N. Y. App. Div. 885, 104 N. Y. Suppl. 1128 [*affirmed* in 193 N. Y. 67, 85 N. E. 817].

24. Viele *v.* Troy, etc., R. Co., 21 Barb. (N. Y.) 381 [*affirmed* in 20 N. Y. 184] (vendee being in possession); Morrison *v.* Bauer, 4 N. Y. St. 701 (vendor being required to account for rents and profits); Andrews *v.* Tower, 3 Phila. (Pa.) 111 (vendor accounting for rents and profits); Roberts *v.* Lovejoy, 28 Tex. 641; Mason *v.* Wallace, 16 Fed. Cas. No. 9,256, 4 McLean 77 (vendee being in possession); Sohier *v.* Williams, 22 Fed. Cas. No. 13,160, 2 Curt. 195 (although vendee acted in good faith). That the vendor in possession is entitled to interest on the purchase-money only from the time a good title is shown see Lombard *v.* Chicago Sinai Cong., 64 Ill. 477.

Compound interest was required in Richards *v.* White, 44 Mich. 622, 7 N. W. 233; Morris *v.* Hoyt, 11 Mich. 9; Henderson *v.* Dickson, 9 Grant Ch. (U. C.) 379, stipulated for in contract.

That vendor's wilful default discharges the vendee from payment of interest notwithstanding the provision of the contract on the subject see Hayes *v.* Elmsley, 23 Can. Sup. Ct. 623.

chase-money is not payable until the deed is made. This is by way of compensation for the profits he is receiving during the vendor's inability to make title.[25]

d. Vendee Discharged From Paying Interest. The vendee is discharged from the duty of paying interest by a tender of the purchase-money when it became due and a continued readiness to pay it since, or by depositing it in a bank, with notice to the vendor, subject to his order, to be delivered to him on the execution and delivery of a deed.[26]

e. Rents and Profits. A vendor retaining, or wrongfully regaining, possession, after the time appointed for delivery of possession, is chargeable with the rents and profits, or with the fair rental value of the premises.[27] But where performance of a contract for sale of land was denied in a suit by the purchasers, they could not recover the amount of rentals of the property, as damages, as they would be entitled thereto only in case they enforced the contract.[28]

IX. RELIEF TO DEFENDANT.

A. Plaintiff Must Do Equity — 1. Equities Not Connected With the Contract. Plaintiff cannot be compelled, as a condition to obtaining specific performance, to discharge a claim against him growing out of an entirely distinct transaction, or not connected with the subject-matter of the suit.[29]

25. *Alabama.*— Schuessler *v.* Hatchett, 58 Ala. 181.

Illinois.— Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. 763 [*affirming* 117 Ill. App. 636].

North Dakota.— Pillsbury *v.* J. B. Streeter, Jr., Co., 15 N. D. 174, 107 N. W. 40.

Pennsylvania.— Minard *v.* Beans, 64 Pa. St. 411; Conover *v.* Wright, 9 Pa. Dist. 688.

Canada.— Stevenson *v.* Davis, 23 Can. Sup. Ct. 629 [*reversing* 19 Ont. App. 591 (*affirming* 21 Ont. 642)], unless vendor is in wilful default.

Rate.— Legal interest should be paid, if no other rate is stipulated for. Alston *v.* Connell, 145 N. C. 1, 58 S. E. 441.

A vendor in possession and refusing to perform is not, when specific performance is decreed, entitled to interest. Hart *v.* Brand, 1 A. K. Marsh. (Ky.) 159, 10 Am. Dec. 715; Hayes *v.* Elmsley, 23 Can. Sup. Ct. 623.

26. Bass *v.* Gilliland, 5 Ala. 761; Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41, 105 N. Y. 661, 12 N. E. 32; Worrall *v.* Munn, 38 N. Y. 137; Kershaw *v.* Kershaw, L. R. 9 Eq. 56, 21 L. T. Rep. N. S. 651, 18 Wkly. Rep. 477.

27. *Arkansas.*— Keatts *v.* Rector, 1 Ark. 391, see decree in this case.

California.— Swain *v.* Burnette, 76 Cal. 299, 18 Pac. 394; Heinlen *v.* Martin, 53 Cal. 321.

Massachusetts.— Eastman *v.* Simpson, 139 Mass. 348, 1 N. E. 346, rents and profits chargeable only from tender of price, where deed was to be made on payment at any time within five years.

Minnesota.— Smith *v.* Gibson, 15 Minn. 89.

Nebraska.— Craig *v.* Greenwood, 24 Nebr. 557, 39 N. W. 599, vendor must account for rents received after giving up possession.

New Jersey.— Naughton *v.* Elliott, 72 N. J. Eq. 564, 65 Atl. 858, chargeable with rent which, without his wilful neglect or default, he might have received.

New York.— Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41; Taylor *v.* Taylor, 43 N. Y. 578; Worrall *v.* Munn, 38 N. Y. 137.

North Carolina.— Sugg *v.* Stowe, 58 N. C. 126, where vendor regains possession.

North Dakota.— Cotton *v.* Butterfield, 14 N. D. 465, 105 N. W. 236, value of the use, or net profits, at vendee's election.

South Dakota.— Gira *v.* Harris, 14 S. D. 537, 86 N. W. 624.

Virginia.— Bolling *v.* Lersner, 26 Gratt. 36.

Wisconsin.— Benson *v.* Cutler, 66 Wis. 305, 28 N. W. 134, rent received, or which might have been received but for gross neglect.

England.— Phillips *v.* Silvester, L. R. 8 Ch. 173, 42 L. J. Ch. 225, 27 L. T. Rep. N. S. 840, 21 Wkly. Rep. 179.

See 44 Cent. Dig. tit. "Specific Performance," § 422.

Vendee in possession chargeable with rents on rescission.— Where specific performance is refused and the contract rescinded at the instance of either vendor or vendee, the vendee must account for the rents and profits received by him while in possession. Blondel *v.* Bolander, 80 Nebr. 531, 114 N. W. 574 (but vendee may deduct for his expenditures and services for vendor); Payne *v.* Graves, 5 Leigh (Va.) 561; Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856 (how rental is estimated); Moore *v.* Ligon, 30 W. Va. 146, 3 S. E. 572; Dudley *v.* Hayward, 11 Fed. 543. See also Cancellation of Instruments, 6 Cyc. 339 *et seq.*

28. Cummings *v.* Roeth, 10 Cal. App. 144, 101 Pac. 434.

29. *Alabama.*— Pulliam *v.* Owen, 25 Ala. 492, vendee's trespass on other lands of vendor.

California.— Meridian Oil Co. *v.* Dunham, 5 Cal. App. 367, 90 Pac. 469.

Georgia.— See Hardin *v.* Neal Loan, etc., Co., 125 Ga. 820, 54 S. E. 755.

Illinois.— Stewart *v.* Metcalf, 68 Ill. 109, default in performance of separate contract.

2. Where Literal Enforcement Would Be Harsh. Where because of mistake or by reason of the happening of an unforeseen contingency a literal enforcement of the contract would be productive of hardship, the court instead of refusing relief may grant it on condition that plaintiff assent to such modifications as justice requires.[30]

3. Reformation of Contract. Where, in an action for the specific performance of a contract, plaintiff refuses to submit to a decree for reformation as prayed for by defendant, and to perform the contract as reformed, the court may dismiss the action.[31]

B. Securing Plaintiff's Performance by Decree — 1. In General. The decree must provide for full performance by plaintiff,[32] and if there are acts to be done on plaintiff's part before he is entitled to performance by defendant, the decree should be so framed that defendant cannot be compelled to perform except upon the condition that plaintiff do such acts.[33]

2. Reimbursement of Defendant's Expenditures, Etc. The decree should provide for the reimbursement of the vendor for repairs and improvements which he was allowed by the terms of the contract to make at the vendee's expense, or which he made with the vendee's consent,[34] and for the refunding of advances

Michigan.— Putnam *v.* Tinkler, 83 Mich. 628, 47 N. W. 687, independent account between the parties.

Minnesota.—Thompson *v.* Winter, 42 Minn. 121, 43 N. W. 796, 6 L. R. A. 236, although defendant cannot enforce the independent claim by reason of plaintiff's insolvency.

New York.— Seaman *v.* Van Rensselaer, 10 Barb. 81.

Texas.— Cook *v.* Cook, 77 Tex. 85, 13 S. W. 847.

England.— Gibson *v.* Goldsmid, 5 De G. M. & G. 757, 3 Eq. Rep. 106, 1 Jur. N. S. 1, 24 L. J. Ch. 279, 3 Wkly. Rep. 79, 54 Eng. Ch. 595, 43 Eng. Reprint 1064 [*reversing* 18 Beav. 584, 52 Eng. Reprint 229].

Contra.— Secrest *v.* McKenna, 1 Strobh. Eq. (S. C.) 356; Evans *v.* Belmont Land Co., 92 Tenn. 348, 21 S. W. 670.

But payment of the disconnected claims may, by the contract, be made a condition precedent. Kight *v.* Luke, 69 Ala. 423.

Where the bill prayed for a settlement of all the equities that had arisen in defendant's favor on the entire transaction, and defendant accepted the issue thus tendered, and the cause proceeded to a hearing, the complainant should not be allowed to withdraw his offer. Mausert *v.* Feigenspan, 68 N. J. Eq. 671, 63 Atl. 610, 64 Atl. 801.

30. King *v.* Raab, 123 Iowa 632, 99 N. W. 306 (plaintiff required to reimburse defendant for street assessment unexpectedly laid upon the property); King *v.* Hamilton, 4 Pet. (U. S.) 311, 7 L. ed. 869 (where the tract sold was much larger than either party thought, and a decree was given only on condition that plaintiff pay *pro rata* for the surplus land); Mechanics Bank *v.* Lynn, 1 Pet. (U. S.) 376, 7 L. ed. 185 (agreement to accept in satisfaction of defendant's judgment against plaintiff provisions made for plaintiff's creditors in a deed of trust; defendant ignorant that time had elapsed in which creditor might have the benefit of the deed of trust; specific performance of the agreement only on condition that defendant be allowed to come in under the trust deed); Wright *v.* Vocalion Organ Co., 148 Fed. 209, 79 C. C. A. 183 [*reversing* 137 Fed. 313] (unforeseen contingency).

31. Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744.

32. Owens *v.* Hall, 13 Ohio St. 571; Freeburgh *v.* Lamoureux, 15 Wyo. 22, 85 Pac. 1054.

33. *Colorado.*— Gilpin *v.* Watts, 1 Colo. 479, vendor plaintiff; payment conditioned on conveyance.

Idaho.— Olympia Min. Co. *v.* Kerns, 13 Ida. 514, 91 Pac. 92.

Illinois.— Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540.

Kentucky.— Orear *v.* Tanner, 1 Bibb 237.

New York.— Birdsall *v.* Waldron, 2 Edw. 315, payment not compelled before title is given; vendor plaintiff.

Tennessee.— Doherty *v.* Stevenson, 3 Tenn. Ch. 25.

Virginia.— Watts *v.* Kinney, 3 Leigh 272, 23 Am. Dec. 266, deed should be offered by vendor plaintiff before decree is entered.

Clerk of court custodian of deed.— In a suit by the vendor, it is proper for the decree to make the clerk of the court custodian of the deed, to be delivered to the vendee on payment of the purchase-money. Corbus *v.* Teed, 69 Ill. 205.

Conditional decree held erroneous in not reserving to the court to determine the sufficiency of the performance by the vendor plaintiff see Jarman *v.* Davis, 4 T. B. Mon. (Ky.) 115.

34. Eastman *v.* Simpson, 139 Mass. 348, 1 N. E. 346; Bell *v.* Bradner, 31 N. J. Eq. 47; Mead *v.* Martens, 21 N. Y. App. Div. 134, 47 N. Y. Suppl. 299 [*affirmed* in 162 N. Y. 626, 57 N. E. 1117]. The vendor has been reimbursed for money expended in good faith, although contrary to the orders of the vendee. Benson *v.* Cutler, 53 Wis. 107, 10 N. W. 82. See also Westinghouse Air-Brake Co. *v.* Chicago Brake, etc., Co., 85 Fed. 786.

Removal of buildings.—The court may upon

made by the vendor under the contract;[35] but not for improvements on other lands which have enhanced the value of the land sold,[36] or for improvements made beyond the sum named in the contract, or after defendant, wrongfully withholding possession, received notice from plaintiff.[37]

3. Payment by Vendee — a. In General. In a suit by the vendee the decree must provide for full payment of what is due under the contract. It is error to leave the vendor to his legal remedy for the purchase-money. Usually a deed will be directed to be made only after payment, unless the contract otherwise provides.[38] The duty of payment as a condition of the decree remains, although

motion allow vendor to remove buildings which he had erected upon the land under a claim of right. Fitzgerald *v.* Clark, 6 Gray (Mass.) 393.

35. Campbell *v.* Lear, 2 Bibb (Ky.) 452; Rosenberger *v.* Jones, 118 Mo. 559, 24 S. W. 203; Dodge *v.* Miller, 81 Hun (N. Y.) 102, 30 N. Y. Suppl. 726. And see Canajoharie, etc., Church *v.* Leiber, 2 Paige (N. Y.) 43, advances made by defendant before plaintiff's incorporation. But a decree which, instead of being conditioned on refunding of the advances, declared them a paramount lien on the land, was held not improper, since payment had once been tendered and refused. Fluharty *v.* Beatty, 4 W. Va. 514.

Taxes accruing after the contract and paid by the vendor to protect the property ordered to be refunded as a condition of the decree see Creigh *v.* Boggs, 19 W. Va. 240. See also Smith *v.* Gibson, 15 Minn. 89; Seven Mile Beach Co. *v.* Dolley, 71 N. J. Eq. 770, 66 Atl. 191. Or the sum paid for taxes may be declared a lien on the land. Lillie *v.* Case, 54 Iowa 177, 6 N. W. 254.

36. Locander *v.* Lounsbery, 24 N. J. Eq. 417.

37. Alston *v.* Connell, 145 N. C. 1, 58 S. E. 441.

38. *Connecticut.*— Annan *v.* Merritt, 13 Conn. 478, conditional decree leaving it optional with plaintiff to pay proper.

Delaware.— Pleasanton *v.* Raughley, 3 Del. Ch. 124, decree directing payment into court within a time fixed, and conveyance when such order is complied with.

Illinois.— Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540; Allison *v.* Clark, 1 Ill. 348.

Iowa.— Roberts *v.* Campbell, 59 Iowa 675, 13 N. W. 846; Jones *v.* Alley, 4 Greene 181.

Kentucky.— Brewer *v.* Peed, 7 J. J. Marsh. 230; Sibert *v.* Kelly, 6 T. B. Mon. 669; Logan *v.* McChord, 2 A. K. Marsh. 224, can have an unconditional decree only where payment is proved.

Mississippi.— Cook *v.* Reynolds, 58 Miss. 243 (although purchase-money note is barred by statute of limitations); Stone *v.* Buckner, 12 Sm. & M. 73.

Missouri.— Delassus *v.* Poston, 19 Mo. 425.

New York.— Lawrence *v.* Ball, 14 N. Y. 477 (although presumption of payment from lapse of time); Wheeler *v.* Wheeler, 2 N. Y. Suppl. 496.

North Carolina.— Burnap *v.* Sidberry, 108 N. C. 307, 12 S. E. 1002.

Ohio.— Huntington *v* Rogers, 9 Ohio St. 511; Hutcheson *v.* McNutt, 1 Ohio 14; Taft *v.* Leavitt, Wright 389.

Oregon.— Maffett *v.* Thompson, 32 Oreg. 546, 52 Pac. 565, 53 Pac. 854, lessee must pay arrears of rent.

Texas.— Davison *v.* Poole, 65 Tex. 376; Daniel *v.* Hill, 23 Tex. 571; Kalklosh *v.* Haney, 4 Tex. Civ. App. 118, 23 S. W. 420.

Virginia.— McComas *v.* Easley, 21 Gratt. 23.

Washington.— Wintermute *v.* Carner, 8 Wash. 585, 36 Pac. 490, although a judgment for the price is outstanding.

West Virginia.— McCully *v.* McLean, 48 W. Va. 625, 37 S. E. 559.

Interest.— In a suit for specific performance of a contract to convey land, where the amounts tendered by complainant were not sufficient to pay the amounts then due on the contract when tendered, he should pay interest on the amount due up to the time of the decree below. Hickman *v.* Chaney, 155 Mich. 217, 118 N. W. 993.

But where the consideration was the indorsement of certain notes to the vendor by the vendee, defendant was bound to convey, although by his laches in taking steps to collect the notes of the makers he had discharged the indorser, the vendee. Hall *v.* Green, 14 Ohio 499.

Tender during trial is necessary, according to some Texas cases, to entitle the vendee to a decree. Polk *v.* Kyser, 21 Tex. Civ. App. 676, 53 S. W. 87; Hunter *v.* Clayton, (Civ. App. 1896) 36 S. W. 326. *Contra*, Kalklosh *v.* Haney, 4 Tex. Civ. App. 118, 23 S. W. 420, may have decree conditioned on payment within a time fixed therein.

Where the contract requires execution of deed before final payment, the decree must generally provide security, by mortgage or otherwise, for the deferred payments. Wamsley *v.* Lincicum, 68 Iowa 556, 27 N. W. 740 (vendee to furnish support to vendor, the annual amount to be determined by the court and made a lien on the land; see form of decree); Renwick *v.* Bancroft, 59 Iowa 116, 12 N. W. 801 (mortgage held sufficient); Van Scoten *v.* Albright, 5 N. J. Eq. 467; Mayo *v.* Purcell, 3 Munf. (Va.) 243 (vendor must make title before vendee executes mortgage). But see Boston, etc., R. Co. *v.* Rose, 194 Mass. 142, 80 N. E. 498, work to be done by vendee secured by inserting agreements in deed, and not by conditions subsequent.

Amount of payment.— A purchaser, having a contract to purchase real estate, agreed to convey a part of the premises to a third per-

the unpaid purchase-money notes, having been assigned by defendant, have indirectly come into the vendee's possession.[39]

b. Date For Payment. It is proper for the decree to fix a date before which payment shall be made.[40]

C. Relief to Defendant on Failure of Specific Performance — 1. Rescission. Rescission or cancellation of the contract is not given as a matter of course where specific performance is refused;[41] but on proper pleadings and proof is usually granted where the contract was obtained by such fraud[42] or mutual mistake[43] as would warrant the relief in a suit brought for rescission.

2. Return of Purchase-Money, Etc. In a suit by the vendor, if there is a decree for defendant because it appears that the vendor cannot furnish a good title or for other reasons, the vendee is entitled to a decree for return of the money paid under the contract, and sometimes for expenditures by him.[44]

X. Who May Sue and be Sued; Parties.[45]

A. On Assignment or Contract by Vendee or Lessee — 1. Assignee of Vendee or Lessee May Sue in His Own Name — a. General Rule. The person to whom the vendee or lessee has assigned the contract may sue in his own name to specifically enforce the vendor's or lessor's contract to convey, regardless of any privity of contract between the parties necessary to a suit at law.[46] But this

son, who agreed to pay therefor four thousand two hundred and twenty-five dollars. The third person paid twenty-five dollars to the purchaser, to be returned when a contract was entered into by the vendor with both parties to the other agreement. The purchaser obtained the legal title, and the third person sued for specific performance. It was held that a judgment awarding specific performance, and requiring the third person to pay four thousand two hundred dollars into court, was proper; the condition for the return of the twenty-five dollars having ceased to exist. Inglis *v.* Fohey, 136 Wis. 28, 116 N. W. 857.

39. Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540; Burnap *v.* Sidberry, 108 N. C. 307, 12 S. E. 1002; Taft *v.* Leavitt, Wright (Ohio) 389; Daniel *v.* Hill, 23 Tex. 571.

40. Giddings *v.* Seventy-Six Land, etc., Co., 109 Cal. 116, 41 Pac. 788 (ten days); Pleasanton *v.* Raughley, 3 Del. Ch. 124; Kalklosh *v.* Haney, 4 Tex. Civ. App. 118, 23 S. W. 420; Lawrence *v.* Halverson, 41 Wash. 534, 83 Pac. 889. See *infra*, XI, C, 8, b, note. But it seems that fixing a date for payment does not make time of payment essential, in the absence of an explicit declaration to that effect in the decree. Seventy-Six Land, etc., Co. *v.* San Francisco Super. Ct., 93 Cal. 139, 28 Pac. 813. Where no time was fixed, a delay of nine months was not unreasonable, since the vendor might have tendered a deed and demanded performance. Renwick *v.* Bancroft, 59 Iowa 116, 12 N. W. 801. Where postponement of the execution of the contract, before suit, was caused by the vendor's conduct, the vendee is entitled to the same credit, on the execution of the contract by the court, that he had by the stipulation of the contract. King *v.* Ruckman, 24 N. J. Eq. 556. But in general where the purchase-money is due, the court has no right to give further time for payments. Lombard *v.* Chicago Sinai Cong., 75 Ill. 271.

41. Humbard *v.* Humbard, 3 Head (Tenn.) 100; Simpson *v.* Belcher, 61 W. Va. 157, 56 S. E. 211. See *supra*, VIII, B.

42. Cleavenger *v.* Sturm, 59 W. Va. 658, 53 S. E. 593.

43. Thwing *v.* Hall, etc., Lumber Co., 40 Minn. 184, 41 N. W. 815.

44. *Iowa.*— Wold *v.* Newgaard, 123 Iowa 233, 98 N. W. 640.

New York.—Leinhardt *v.* Solomon, 57 Misc. 238, 109 N. Y. Suppl. 144.

Rhode Island.— Lowe *v.* Molter, (1909) 71 Atl. 592, recovery of deposit.

Texas.— Maurice *v.* Upton, (Civ. App. 1897) 41 S. W. 504.

Virginia.— McAllister *v.* Harman, 101 Va. 17, 42 S. E. 920, accounting.

With interest see Leinhardt *v.* Solomon, 57 Misc. (N. Y.) 238, 109 N. Y. Suppl. 144; Lowe *v.* Molter, (R. I. 1909) 71 Atl. 592.

Expenses in examining title.— That the vendee may recover his expenses, such as attorney's fees, in the examination of the title see Raynor *v.* Lyon, 46 Hun (N. Y.) 227; Leinhardt *v.* Solomon, 57 Misc. (N. Y.) 238, 109 N. Y. Suppl. 144; Lowe *v.* Molter, (R. I. 1909) 71 Atl. 592.

Taxes paid.— That the vendee is entitled to recover taxes paid by him see Lowe *v.* Molter, (R. I. 1909) 71 Atl. 592.

45. Right of agent to sue see *supra*, IV, A, 2, b.

46. *Arkansas.*— Weis *v.* Meyer, (1886) 1 S. W. 679.

California.— Owen *v.* Frink, 24 Cal. 171. And see Montgomery *v.* De Picot, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84.

Colorado.— Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410.

Georgia.— Perry *v.* Paschal, 103 Ga. 134, 29 S. E. 703.

does not apply of course where the contract is not assignable, as in the case of contracts to render personal services and the like.[47]

b. Who Are Assignees. The right to specific performance extends to the execution purchasers of the vendee's interest,[48] and to a mortgagee of that interest.[49]

c. Assignee of Option. The holder of an option may assign his right to exercise the option and to enforce the contract.[50]

d. Assignee Succeeds to Rights and Is Subject to Defenses. On assignment of the contract, the assignee succeeds to the rights of the assignor,[51] and is subject to any defense which might have been set up against his assignor.[52]

e. Must Complete Assignor's Performance. The assignee must complete the vendee's payments on the original contract as a condition of obtaining his decree, and perform other parts of the consideration which the vendee has not performed.

Illinois.— Fuller *v.* Bradley, 160 Ill. 51, 43 N. E. 732; Fleming *v.* Carter, 87 Ill. 565 (oral contract); Corbus *v.* Teed, 69 Ill. 205; Keys *v.* Test, 33 Ill. 316 (by remote assignee).

Iowa.— Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409.

Kentucky.— Hancock *v.* Hancock, 1 T. B. Mon. 121, 15 Am. Dec. 92; Respass *v.* McClanaban, 2 A. K. Marsh. 577.

Maryland.—If a landlord's covenant to convey the fee in the demised land enhances the value of the lessees' interest therein and forms part of the consideration for the acceptance of the lease, equity will decree specific performance not only as between the parties to the contract, but, in the absence of intervening equities, also in favor of assignees. Hollander *v.* Central Metal, etc., Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. N. S. 1135.

Massachusetts.— Currier *v.* Howard, 14 Gray 511 (assignee by verbal agreement of written contract); Ensign *v.* Kellogg, 4 Pick. 1.

Missouri.— Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19.

Nebraska.— Wagner *v.* Cheney, 16 Nebr. 202, 20 N. W. 222.

New Hampshire.— Ewins *v.* Gordon, 49 N. H. 444. But see as to verbal contract Abbott *v.* Baldwin, 61 N. H. 583.

New York.— Dodge *v.* Miller, 81 Hun 102, 30 N. Y. Suppl. 726, oral contract.

North Carolina.— Ward *v.* Ledbetter, 21 N. C. 496.

Pennsylvania.— Reed *v.* Hendricks, 2 Leg. Gaz. 204, 1 Leg. Gaz. Rep. 79.

Tennessee.— Wilburn *v.* Spofford, 4 Sneed 698, oral assignment of written contract.

See 44 Cent. Dig. tit. "Specific Performance," §§ 39½ *et seq.*, 343.

47. See ASSIGNMENTS, 4 Cyc. 1.

A contract calling for legal services by the vendee is not assignable by him before the services are performed. Martin *v.* Platt, 5 N. Y. St. 284.

That the vendee covenanted for himself, his heirs "and assigns" to perform certain conditions, does not make a non-assignable contract. Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19.

Condition requiring vendor's written consent to assignment.— For a case where a condition in the contract requiring the vendor's written consent to an assignment did not defeat a suit by an assignee who had fully performed see Wagner *v.* Cheney, 16 Nebr. 202, 20 N. W. 222.

That the assignor vendee cannot set up a provision against assignment in a suit against him by his assignee see Sproull *v.* Miles, 82 Ark. 455, 102 S. W. 204.

That a provision against assignment is waived by accepting payment from the assignee see Camp *v.* Wiggins, 72 Iowa 643, 34 N. W. 461.

48. Fitzhugh *v.* Smith, 62 Ill. 486; Morgan *v.* Bouse, 53 Mo. 219.

49. Ricker *v.* Moore, 77 Me. 292; Thompson *v.* Justice, 88 N. C. 269, mortgagee who has foreclosed.

50. *California.*— Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149.

Georgia.— Robinson *v.* Perry, 21 Ga. 183, 68 Am. Dec. 455, assignee of a lease may require specific performance of a covenant to renew.

Illinois.— Perkins *v.* Hadsell, 50 Ill. 216, option to buy on performance of certain conditions.

Oregon.— House *v.* Jackson, 24 Oreg. 89, 32 Pac. 1027, assignee of lease containing option to purchase.

Pennsylvania.— Napier *v.* Darlington, 70 Pa. St. 64; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526.

Canada.— Albert Brick, etc., Co. *v.* Nelson, 27 N. Brunsw. 276.

Contra.— Rice *v.* Gibbs, 40 Nebr. 264, 58 N. W. 724, 33 Nebr. 460, 50 N. W. 436.

51. American Land Co. *v.* Grady, 33 Ark. 550; Ewins *v.* Gordon, 49 N. H. 444, parol extension of time of payment made to the original vendee applies to the assignee.

52. *Illinois.*— Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019 (defense that objection to title was urged in bad faith); Rose *v.* Swann, 56 Ill. 37 (laches).

Kentucky.— Frazier *v.* Broadnax, 2 Litt. 249, that vendee has forfeited his right by refusal to perform his part.

Michigan.— Cox *v.* Raider, 138 Mich. 249, 101 N. W. 531 (estoppel); Berry *v.* Whitney, 40 Mich. 65 (fraud).

New York.— Aldrich *v.* Putney, 11 Paige 204, abandonment of contract by vendee.

Texas.— Kennedy *v.* Embry, 72 Tex. 387, 10 S. W. 88, contract rescinded for vendee's default.

He is bound to do all which the vendee would be required in equity and good conscience to perform before obtaining a conveyance.[53]

2. Vendor Cannot Sue Assignee. The vendor cannot have specific performance against his vendee's assignee, although he has paid part of the consideration; it is optional with the assignee whether or not to complete the contract.[54]

3. Vendees Who Have Contracted But Not Assigned. Purchasers who have not assigned their contract of sale, but who have agreed to sell to another on other and different terms, are still obligated to deliver good title to their vendee, and their interest in the subject-matter has not ceased, and an action for specific performance is properly brought in their names.[55]

4. Parties — a. Vendee and Assignee May Join. The vendee who has assigned may sue, joining the assignee as a party plaintiff.[56]

b. Joinder of Assignees. Where the vendee assigns to several persons, giving each a separate conveyance to separate parcels, they may join in an action against the vendor.[57] The assignee of a part or a partial interest in the land cannot sue alone, since the contract cannot be enforced by piecemeal.[58]

c. Joinder of Vendors. Where the assignor had contracts for the purchase of separate tracts from several owners and assigned the contracts to plaintiff, the latter cannot join such several owners in one suit to compel specific performance.[59]

d. Whether Assignee Is a Necessary Party. The assignee of a partial interest in the contract is not a necessary party to a suit by the vendee,[60] but where the

Compare, however, Womble *v.* Wilbur, 3 Cal. App. 535, 86 Pac. 916.

53. *Illinois.*— Carver *v.* Lasater, 36 Ill. 182.

Indiana.— Thompson *v.* Allen, 12 Ind. 539; Elliott *v.* Lewallen, 1 Ind. 534, Smith 284.

Kentucky.—Kennedy *v.* Davis, 7 T. B. Mon. 372; Tunstal *v.* Taylor, 1 A. K. Marsh. 43; Rennick *v.* Hendricks, 4 Bibb 303; Greenup *v.* Strong, 1 Bibb 590.

Maryland.— Tubman *v.* Anderson, 4 Harr. & M. 357.

Massachusetts.— Wass *v.* Mugridge, 128 Mass. 394; Love *v.* Sortwell, 124 Mass. 446.

Minnesota.— See McCarthy *v.* Couch, 37 Minn. 124, 33 N. W. 777.

New York.— Jones *v.* Lynds, 7 Paige 301.

United States.— Buchannon *v.* Upshaw, 1 How. 56, 11 L. ed. 46.

See 44 Cent. Dig. tit. "Specific Performance," §§ 40½, 44, 234, 343.

Relief by assignee against assignor.— That a remote assignee may have a decree ordering the original vendee to pay the balance of the purchase-money to the vendor see Underhill *v.* Williams, 7 Blackf. (Ind.) 125.

Amount to be paid.— A subvendee of a part of the land agreed to be conveyed cannot compel specific performance by the original vendor except upon payment of the whole amount due from the original vendee for the entire tract, as all the land would stand as security for the entire amount due the vendor. Hoover *v.* Baugh, 108 Va. 695, 62 S. E. 968, 128 Am. St. Rep. 985.

Notes for deferred payments; whether of vendee or assignee.—Under Civ. Code, § 1457, providing that the burden of an obligation may not be transferred without the consent of the party entitled to its benefit, where a contract for the sale of land calls for the delivery of the purchaser's notes for deferred payments, the purchaser's personal liability is a controlling element, and the tender of notes of an assignee of the purchaser does not satisfy the contract; but under a contract for a conveyance to the purchaser, his assigns, etc., upon an additional payment of ten thousand dollars, fifteen hundred dollars having been paid by the purchaser, or his assigns, the remaining thirty-three thousand five hundred dollars to be evidenced by "a promissory note" secured by a mortgage on the premises, the purchaser's assignee could enforce the contract by making the required payment and tendering her note secured by the required mortgage, although she was not financially responsible. Montgomery *v.* De Picot, 153 Cal. 509, 96 Pac. 305, 126 Am. St. Rep. 84.

54. Corbus *v.* Teed, 69 Ill. 205; Forbes *v.* Reynard, 46 Misc. (N. Y.) 154, 93 N. Y. Suppl. 1097. But for cases against the successors to the rights and franchises of railroad companies, where the original vendee or lessee company was held not a necessary party see Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824; Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1.

55. Bittrick *v.* Consolidated Imp. Co., 51 Wash. 469, 99 Pac. 303.

56. Simms *v.* Lide, 94 Ga. 553, 21 S. E. 220; Longworth *v.* Taylor, 15 Fed. Cas. No. 8,490, 1 McLean 395 [*affirmed* in 14 Pet. 172, 10 L. ed. 405], assignee a proper party.

57. Owen *v.* Frink, 24 Cal. 171.

58. McCotter *v.* Lawrence, 4 Hun (N. Y.) 107, 6 Thomps & C. 392; Lord *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 46.

59. Laughead *v.* Beale, 24 Pa. Co. Ct. 465.

60. Prince *v.* Bates, 19 Ala. 105 (vendee had sold part); Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103; Willard *v.* Tayloe, 8 Wall. (U. S.) 557, 19 L. ed. 501.

vendee has assigned his entire interest the assignee has been held a necessary party to his suit.[61] In a suit by the vendor against the vendee for specific performance assignees of the vendee are not necessary parties.[62]

e. Whether Vendee Is a Necessary Party. The vendee who has assigned all his interest absolutely is not a necessary party on a bill by the assignee, according to some cases;[63] although he is a proper party, for the purpose of settling in the suit the question of the validity of the assignment.[64] Other cases hold that the vendee who has assigned is a necessary party to the assignee's suit.[65]

f. Whether Vendor Is a Necessary Party. Where a suit by an assignee against the vendee assignor and other assignees seeks merely to settle rights in the vendee's equity, the vendor is not a necessary party.[66]

g. Intermediate Assignees. Intermediate assignees have been held necessary parties.[67]

B. On Conveyance by Vendor, Lessor, Etc.— 1. Relief Against Purchaser With Notice or Volunteer. Where the vendor or lessor, after the contract, conveys the land to a purchaser who takes with notice of the contract, actual or constructive, or who does not part with a valuable consideration for his purchase, such grantee takes and holds the land as a constructive trustee for the vendee or lessee, and may be compelled at his suit to perform the original contract by conveying or leasing the land to the vendee or lessee.[68] The same rule may

See also Gheen *v.* Oshorne, 11 Heisk. (Tenn.) 61, vendee sold pending the suit.

61. Craver *v.* Spencer, 40 Fla. 135, 23 So. 880; Brewer *v.* Dodge, 28 Mich. 359; Scholl *v.* Schoener, 1 Woodw. (Pa.) 200. But see Steinman *v.* Hagan, 108 Va. 563, 62 S. E. 348, 128 Am. St. Rep. 978, holding that only the purchaser is a necessary party defendant to a suit by the vendor for specific performance of the contract of sale; so that one to whom the purchaser had sold, although not made a party, was bound by the decree for sale of the property for payment of the purchase-money due the original vendor.

62. Rose *v.* Swann, 56 Ill. 37.

63. *Alabama.*— Davis *v.* Williams, 121 Ala. 542, 25 So. 704; Shakespeare *v.* Alba, 76 Ala. 351, under what circumstances a lessee who has assigned the lease is not a necessary party.

Kentucky.— Kennedy *v.* Davis, 7 T. B. Mon. 372, assignor passes his legal estate in the instrument assigned.

Maine.— Miller *v.* Whittier, 32 Me. 203.

Massachusetts.— Currier *v.* Howard, 14 Gray 511.

United States.— Cheney *v.* Bilby, 74 Fed. 52, 20 C. C. A. 291, where upon the record in the case the vendee was estopped to deny the assignment.

See 44 Cent. Dig. tit. "Specific Performance," §§ 342, 343.

64. Combs *v.* Tarlton, 2 B. Mon. (Ky.) 191 (for purpose of contribution); Voorhees *v.* De Myer, 3 Sandf. Ch. (N. Y.) 614 [*affirmed* in 2 Barb. 37].

65. *Illinois.*— Alexander *v.* Hoffman, 70 Ill. 114, execution purchaser of vendee's interest sues; vendee a necessary party, since it is his right to contest the validity of the judgment and execution.

Kentucky.— Bradley *v.* Morgan, 2 A. K. Marsh. 369; Sander *v.* Macey, 4 Bibb 457; McIntire *v.* Hughes, 4 Bibb 186.

Missouri.— Huter *v.* Gallagher, 4 Mo. 364.

New York.— Corning *v.* Roosevelt, 11 N. Y. Suppl. 758, 18 N. Y. Civ. Proc. 399, 25 Abb. N. Cas. 220 (sale of stock); Lord *v.* Underdunck, 1 Sandf. Ch. 46; Miller *v.* Bear, 3 Paige 466 (assignment made by heirs of vendee; since some of them were *non sui juris*, they must be joined).

Virginia.— Hoover *v.* Donally, 3 Hen. & M. 316.

See 44 Cent. Dig. tit. "Specific Performance," § 343.

66. Sproull *v.* Miles, 82 Ark. 455, 102 S. W. 204.

67. Hancock *v.* Beckham, 5 Litt. (Ky.) 135; Estill *v.* Clay, 2 A. K. Marsh. (Ky.) 497; McIntire *v.* Hughes, 4 Bibb (Ky.) 186; Parberry *v.* Goram, 3 Bibb (Ky.) 107; Woodward *v.* Clark, 15 Mich. 104; Allison *v.* Shilling, 27 Tex. 450, 86 Am. Dec. 622.

68. *Alabama.*— Ross *v.* Parks, 93 Ala. 153, 8 So. 368 (where plaintiff holds option); Brewer *v.* Brewer, 19 Ala. 481.

California.— Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149 (where plaintiff holds option); Peasley *v.* Hart, 65 Cal. 522, 4 Pac. 537.

Connecticut.— Annan *v.* Merritt, 13 Conn. 478, against grantee of married woman.

Florida.— Drake *v.* Brady, 57 Fla. 393, 48 So. 978; Tate *v.* Pensacola Gulf, etc., Co., 37 Fla. 439, 20 So. 542, 53 Am. St. Rep. 251, although title passed to defendant through a married woman.

Georgia.— Bryant *v.* Booze, 55 Ga. 438; Brown *v.* Crane, 47 Ga. 483; Jackson *v.* Gray, 9 Ga. 77.

Illinois.— Cumberledge *v.* Brooks, 235 Ill. 249, 85 N. E. 197; Forthman *v.* Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145; Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414; Chicago, etc., R. Co. *v.* Hay, 119 Ill. 507, 10 N. E. 34; Jefferson *v.* Jefferson, 96 Ill. 551; Dement *v.* Bonham, 26 Ill. 158.

apply to other contracts than those for the sale or lease of land.[69] Of course, in

Indiana.— Walker *v.* Cox, 25 Ind. 271; Hunter *v.* Bales, 24 Ind. 299.

Iowa.— Keegan *v.* Williams, 22 Iowa 378.

Kansas.— Wilson *v.* Emig, 44 Kan. 125, 24 Pac. 80; Gregg *v.* Hamilton, 12 Kan. 333.

Kentucky.— Lee *v.* Durret, 4 Bibb 20.

Maine.— White *v.* Mooers, 86 Me. 62, 29 Atl. 936; Cross *v.* Bean, 83 Me. 61, 21 Atl. 752; Ash *v.* Hare, 73 Me. 401 (contract to lease); Foss *v.* Haynes, 31 Me. 31.

Maryland.— Engler *v.* Garrett, 100 Md. 387, 59 Atl. 648 (against subsequent vendee or mortgagee); Smoot *v.* Rea, 19 Md. 398.

Massachusetts.— Harriman *v.* Tyndale, 184 Mass. 534, 69 N. E. 353; Mansfield *v.* Hodgdon, 147 Mass. 304, 17 N. E. 544; Connihan *v.* Thompson, 111 Mass. 270.

Michigan.— Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844; Farwell *v.* Johnston, 34 Mich. 342 (sufficient allegation of notice); Bird *v.* Hall, 30 Mich. 374.

Minnesota.— Oliver Min. Co. *v.* Clark, 69 Minn. 75, 71 N. W. 908.

Mississippi.— Carson *v.* Percy, 57 Miss. 97; Stone *v.* Buckner, 12 Sm. & M. 73; Ellis *v.* Ward, 7 Sm. & M. 651; Hines *v.* Baine, Sm. & M. Ch. 530.

Missouri.— Waddington *v.* Lane, 202 Mo. 387, 100 S. W. 1139; Randolph *v.* Wheeler, 182 Mo. 145, 81 S. W. 419; Hagman *v.* Shaffner, 88 Mo. 24; Thompson *v.* Henry, 85 Mo. 451; Farrar *v.* Patton, 20 Mo. 81.

Nebraska.— Hartman *v.* Streitz, 17 Nebr. 557, 23 N. W. 505.

New Jersey.— Cranwell *v.* Clinton Realty Co., 67 N. J. Eq. 540, 58 Atl. 1030; Pennsylvania R. Co. *v.* U. S. Pipe-Line Co., (Ch. 1896) 33 Atl. 809; Page *v.* Martin, 46 N. J. Eq. 585, 20 Atl. 46 (plaintiff holds option); Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921; Union Brick, etc., Mfg. Co. *v.* Lorillard, 44 N. J. Eq. 1, 13 Atl. 613; Haughwout *v.* Murphy, 21 N. J. Eq. 118; New Barbadoes Toll Bridge Co. *v.* Vreeland, 4 N. J. Eq. 157.

New York.— Laverty *v.* Moore, 33 N. Y. 658; Meaney *v.* Way, 108 N. Y. App. Div. 290, 95 N. Y. Suppl. 745; Veeder *v.* Horstmann, 85 N. Y. App. Div. 154, 83 N. Y. Suppl. 99; Post *v.* West Shore R. Co., 50 Hun 301, 3 N. Y. Suppl. 172 [*affirmed* in 123 N. Y. 580, 26 N. E. 7]; Merithew *v.* Andrews, 44 Barb. 200; Wadsworth *v.* Wendell, 5 Johns. Ch. 224 [*reversed* on other grounds in 20 Johns. 659].

North Dakota.— Hunter *v.* Coe, 12 N. D. 505, 97 N. W. 869.

Pennsylvania.— White *v.* Patterson, 139 Pa. St. 429, 21 Atl. 360; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526.

Tennessee.— Otis *v.* Payne, 86 Tenn. 663, 8 S. W. 848.

Texas.— Scarborough *v.* Arrant, 25 Tex. 129.

Vermont.— Van Dyke *v.* Cole, 81 Vt. 379, 70 Atl. 593, 1103.

Virginia.— Cummins *v.* Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881 (purchaser with notice of option); McKee *v.* Barley, 11 Gratt. 340.

West Virginia.— Camden *v.* Dewing, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. Rep. 797; Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874; Parrill *v.* McKinney, 6 W. Va. 67.

United States.— Marthinson *v.* King, 150 Fed. 48, 82 C. C. A. 360, purchaser with notice of option. And see Whitney *v.* Dewey, 158 Fed. 385, 86 C. C. A. 21.

England.— Potter *v.* Sanders, 6 Hare 1, 31 Eng. Ch. 1, 67 Eng. Reprint 1057; Waldron *v.* Jacob. Ir. R. 5 Eq. 131; Shaw *v.* Thackray, 17 Jur. 1045, 1 Smale & G. 537, 65 Eng. Reprint 235; Crofton *v.* Ormsby, 2 Sch. & Lef. 583, 9 Rev. Rep. 107; Daniels *v.* Davison, 17 Ves. Jr. 433, 34 Eng. Reprint 167, 16 Ves. 249, 33 Eng. Reprint 978.

See 44 Cent. Dig. tit. "Specific Performance," § 53.

Against volunteer grantee see Pearson *v.* Courson, 129 Ga. 656, 59 S. E. 907; Fulcher *v.* Daniel, 80 Ga. 74, 4 S. E. 259; Keys *v.* Test, 33 Ill. 316 (grantee had not actually paid); Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921; Falls *v.* Carpenter, 21 N. C. 237, 28 Am. Dec. 592 (second purchaser had not made payment); Martin *v.* Seamore, 1 Ch. Cas. 170, 22 Eng. Reprint 746.

Decree against subsequent grantee.—The decree should be for a conveyance from him to plaintiff, not for a cancellation of the vendor's deed to him. Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292.

Contract in respect to a chattel not in existence not enforced against a subsequent assignee with notice of the legal title see Maulden *v.* Armistead, 18 Ala. 500; Bower *v.* Bowser, 49 Oreg. 182, 88 Pac. 1104.

Compromise.— Where one suing to recover land agrees to convey a part to plaintiff in case the suit is successful, and afterward compromises the suit, the other party to the suit is not affected by the agreement, since the former never in fact had any title. Stonecifer *v.* Yellow Jacket Silver Min. Co., 3 Nev. 38.

That purchasers at foreclosure sale of a railroad are not necessarily bound to perform the contracts of the company see Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, 8 S. Ct. 74, 31 L. ed. 130.

But that a consolidation of two railroads cannot affect liability see Cumberland Valley R. Co. *v.* Gettysburg, etc., R. Co., 177 Pa. St. 519, 35 Atl. 952.

69. Contract for sale of vessel.— Andrews *v.* Brown, 3 Cush. (Mass.) 130; Clark *v.* Flint, 22 Pick. (Mass.) 231, 33 Am. Dec. 733.

Inventions and patents.— Where a person employed as a machinist to invent, perfect, and improve lubricating valves, force-feed oil pumps, etc., which his employer was engaged in manufacturing, and that whatever inventions or devices might result from such employment in the nature of machinery, tools, etc., to be used in connection with the employer's business, should at the employer's request be protected by patents and become the employer's property, secretly invented, during

order that the rule may apply, the contract must be of such a character that the court can specifically enforce it.[70]

2. Relief to Subsequent Purchaser. A subsequent purchaser from the vendor is entitled to be reimbursed for his own payments from the money decreed to be due from the plaintiff vendee to the vendor.[71]

3. Bona Fide Purchaser. The vendee can have no relief against a *bona fide* purchaser without notice and for a valuable consideration, who has received a conveyance of the legal title;[72] nor can he have relief against a purchaser with notice from a *bona fide* purchaser.[73]

4. Parties — a. Subsequent Purchaser. The subsequent purchaser from whom conveyance is sought is of course a proper and necessary party to the vendee's suit.[74]

b. Vendor Who Has Conveyed. The vendor who has conveyed has been held

his employment, a force-feed oil pump, a hot water valve, a mixing valve, and carburator at his home, and fraudulently induced certain of his employer's servants to leave their employment and assist him in such work, and afterward terminated the employment, formed a corporation to manufacture and sell such appliances, assigning to it, in consideration of stock issued to him, the applications for patents on such inventions, it was held that performance of his contract should be specifically enforced, both against him and against the corporation, by requiring a transfer of such inventions to his employer. Detroit Lubricator Co. *v.* Lavigne, 151 Mich. 650, 115 N. W. 988.

70. Ohio Pail Co. *v.* Cook, 222 Pa. St. 487, 71 Atl. 1051 (cannot compel specific performance of act of cutting and hauling timber); Davis, etc., Temperature Controlling Co. *v.* Tagliabue, 159 Fed. 712, 86 C. C. A. 466 (uncertainty). See *supra*, III.

71. Faraday Coal, etc., Co. *v.* Owens, 80 S. W. 1171, 26 Ky. L. Rep. 243; Brinton *v.* Scull, 55 N. J. Eq. 747, 35 Atl. 843; Borie *v.* Satterthwaite, 180 Pa. St. 542, 37 Atl. 102 [*affirming* 12 Mont. Co. Rep. 194]. See also as to relief to subsequent purchaser with notice Ellis *v.* Ward, 7 Sm. & M. (Miss.) 651; Hunter *v.* Coe, 12 N. D. 505, 97 N. W. 869, purchaser with constructive notice merely, entitled to reimbursement for improvements made in good faith, without protest from the plaintiff, who knew of his purchase.

On cancellation of a prior conveyance because of the vendor's insanity the grantee therein is entitled to repayment and improvements. Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715.

Subsequent grantee may enforce the contract on the ground of mutuality. Randolph *v.* Wheeler, 182 Mo. 145, 81 S. W. 419.

72. *Illinois.*— Boone *v.* Graham, 215 Ill. 511, 74 N. E. 559.

Maine.— Coleman *v.* Dunton, 99 Me. 121, 58 Atl. 430.

Massachusetts.— La Fleur *v.* Chace, 171 Mass. 59, 50 N. E. 456.

Michigan.— Youell *v.* Allen, 18 Mich. 107.

Missouri.— Digby *v.* Jones, 67 Mo. 104.

New Jersey.— Charlton *v.* Columbia Real Estate Co., 64 N. J. Eq. 631, 54 Atl. 444 [*reversed* on other grounds in 67 N. J. Eq. 629, 60 Atl. 192, 110 Am. St. Rep. 495, 69 L. R. A. 394].

New York.—Angel *v.* Williamsburgh Methodist Protestant Church, 47 N. Y. App. Div. 459, 62 N. Y. Suppl. 410; Wendell *v.* Wadsworth, 20 Johns. 659 [*reversing* 5 Johns. Ch. 224].

North Carolina.— Justice *v.* Carroll, 57 N. C. 429.

Rhode Island.— Flackhamer *v.* Himes, 23 R. I. 306, 53 Atl. 46.

South Carolina.— Doar *v.* Gibbes, Bailey Eq. 371.

United States.— Hamilton Woolen Co. *v.* Moore, 25 Fed. 4.

Canada.— Czuack *v.* Parker, 15 Manitoba 456.

See 44 Cent. Dig. tit. "Specific Performance," § 52.

Although a bona fide purchaser had not fully paid when he received notice, relief was refused in the court's discretion because the proof left plaintiff's contract in doubt. Zundelowitz *v.* Webster, 96 Iowa 587, 65 N. W. 835.

The vendor's prior grantee, even though his title was void, cannot be compelled to join in the conveyance to the vendee. Reynolds *v.* Condon, 110 N. Y. App. Div. 542, 97 N. Y. Suppl. 1.

73. La Fleur *v.* Chace, 171 Mass. 59, 50 N. E. 456.

74. *Alabama.*— Porter *v.* Worthington, 14 Ala. 584.

Kansas.—Atchison, etc., R. Co. *v.* Benton, 42 Kan. 698, 22 Pac. 698.

Kentucky.— Pringle *v.* Samuel, 1 Litt. 43, 13 Am. Dec. 214.

Michigan.— Daily *v.* Litchfield, 10 Mich. 29.

Mississippi.— Stone *v.* Buckner, 12 Sm. & M. 73.

New York.— Kantrowitz *v.* Rothweiler, 15 N. Y. St. 297.

See 44 Cent Dig. tit. "Specific Performance," § 344.

Purchasers pendente lite.— In the following cases such purchasers were held not necessary parties. Steele *v.* Taylor, 1 Minn. 274 (execution purchasers); Edwards *v.* Norton, 55 Tex. 405; Secombe *v.* Steele, 20 How. (U. S.) 94, 15 L. ed. 833 (execution purchasers). But such purchaser was held a necessary party in Casady *v.* Scallen, 15 Iowa 93. Where the purchaser *pendente lite* ex-

to be a necessary party.[75] Other cases hold him not a necessary party, when he has conveyed his whole interest.[78]

C. On Assignment of Purchase-Money Notes — 1. Assignee May Sue. The lien for the purchase-money, before conveyance, is assignable, and passes with the assignment of the purchase-money notes. The assignee of such a note may therefore maintain a bill, to enforce the lien and for specific performance, joining the holder of the legal title as plaintiff or defendant.[77]

2. Assignee May Be Joined in Vendee's Suit. An assignee of a purchase-money note is a necessary [78] or proper [79] party to the vendee's suit.[80]

D. On Death of Vendee — 1. Parties Plaintiff — a. Heirs May Compel Conveyance. On the death of the vendee before conveyance, his equitable estate passes to his heirs, or his devisees of the land, and they are entitled to compel conveyance from the vendor.[81]

b. Necessary or Proper Parties — (i) *Heirs.* The personal representative of the vendee cannot sue alone to enforce the contract; the heirs are necessary parties.[82]

pressly took subject to the vendee's rights, if any, he is not a necessary party. Harrigan *v.* Smith, (N. J. Ch. 1898) 40 Atl. 13.

75. Grizzle *v.* Gaddis, 75 Ga. 350; Daily *v.* Litchfield, 10 Mich. 29; Harrington *v.* Pinson, 30 Miss. 30; Lewis *v.* Madison, 1 Munf. (Va.) 303.

76. *Illinois.*— Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414; Grafton Dolomite Stone Co. *v.* St. Louis, etc., R. Co., 199 Ill. 458, 65 N. E. 424, heir or devisee of such vendor.

Kansas.— Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715.

Michigan.— Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844.

Rhode Island.— Burrill *v.* Garst, 19 R. I. 38, 31 Atl. 436.

Vermont.— Van Dyke *v.* Cole, 81 Vt. 379, 70 Atl. 593, 1103.

Wisconsin.— Noonan *v.* Orton, 4 Wis. 335.

Not necessary party.—Where a vendor, B, having only a contract for title from A, agrees to sell to C and subsequently causes the deed to be executed to another party, D, in C's suit against B and D, A is not a necessary party, since C does not seek to cancel the deed. Pearson *v.* Courson, 129 Ga. 656, 59 S. E. 907.

Intermediate grantee not a necessary party see Downing *v.* Risley, 15 N. J. Eq. 93.

Proper party.— That the vendor is a proper party, although no relief is claimed against him see Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287. *Contra,* Bristol *v.* Bristol, etc., Water Works, 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740. If the vendor conveys to B, and B to C, B is a proper party. Taylor *v.* Newton, 152 Ala. 459, 44 So. 583.

77. Kimbrough *v.* Curtis, 50 Miss. 117; Tanner *v.* Hicks, 4 Sm. & M. (Miss.) 294; Walker *v.* Kee, 16 S. C. 76; Hanna *v.* Wilson, 3 Gratt. (Va.) 243, 46 Am. Dec. 190. *Contra,* Brush *v.* Kinsley, 14 Ohio 20.

As to defenses against such suit see Heavner *v.* Morgan, 41 W. Va. 428, 23 S. E. 874.

Suit by assignee of vendor of stock.— The vendor should be joined as plaintiff or else the stock which was the subject of the contract should be transferred to plaintiff. Corning *v.* Roosevelt, 11 N. Y. Suppl. 758, 18 N. Y. Civ. Proc. 399, 25 Abb. N. Cas. 220.

78. Pollock *v.* Wilson, 3 Dana (Ky.) 25.

79. Gentry *v.* Gentry, 87 Va. 478, 12 S. E. 966.

80. **The assignee in bankruptcy** of the vendor who has not received full payment is a necessary party. Swepson *v.* Rouse, 65 N. C. 34, 6 Am. Rep. 735.

81. *Georgia.*— Hadden *v.* Thompson, 118 Ga. 207, 44 S. E. 1001, vendee having fully performed.

Michigan.— House *v.* Dexter, 9 Mich. 246, administrator is not competent to sue for specific performance.

Missouri.— Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881.

New Jersey.—Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921.

New York.— Williams *v.* Kierney, 6 N. Y. St. 560.

North Carolina.— Rutherford *v.* Green, 37 N. C. 121.

South Carolina.— Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630.

See 44 Cent. Dig. tit. "Specific Performance," §§ 46, 347.

The widow is also a proper party, since her claim for dower is not antagonistic to or inconsistent with the claim of the lien; both derive from the same source. Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921.

But an option contained in a lease is a chattel interest and goes to the executor and afterward to the legatee, not to the heir. McCormick *v.* Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

Holding that an option to purchase does not descend see Newton *v.* Newton, 11 R. I. 390, 23 Am. Rep. 476.

82. Putnam *v.* Tinkler, 83 Mich. 628, 47 N. W. 687 (infant heir not concluded by a suit by administrator); Hand *v.* Jacobus, 19 N. J. Eq. 79; Rhoades *v.* Schwartz, 41 Misc. (N. Y.) 648, 85 N. Y. Suppl. 229; Lord *v.* Underdunck, 1 Sandf. Ch. (N. Y.) 46 (suit by vendee's assignee).

All the heirs are proper parties, although it has been agreed among them that only a

(II) *DEVISEES.* The devisee of the vendee's interest in the land is a necessary party.[83]

(III) *PERSONAL REPRESENTATIVE.* The vendee's personal representative should ordinarily be a party, since it is his duty to make payment;[84] but when the contract had been fully performed on the vendee's part, he is not a necessary or proper party to a suit by the heir.[85]

2. PARTIES DEFENDANT. In a suit by the vendor, the heirs or devisees of the deceased vendee are proper defendants, since conveyance is to be made to them.[86]

E. On Death of Vendor — 1. PARTIES PLAINTIFF — a. Personal Representative May Compel Payment. On the death of the vendor, since the vendor's interest is regarded in equity as personalty, it passes to his personal representatives, and they may sue to enforce payment, and join the heirs or devisees for the purpose of compelling conveyance of the legal title from them to the vendee.[87]

b. Estate by Entirety. Since, where a deed is made to a named grantee "and his wife," without giving the wife's name, she takes as tenant by the entirety and becomes the absolute owner on the death of her husband, she can enforce a contract for the sale of the property made by her husband.[88]

c. Necessary Parties — (I) *HEIRS.* As a rule the heirs of a vendor must be joined in a suit by the personal representative, since the decree divests them of the legal title which vested in them on the death of their ancestor.[89] But in some

part of them should receive the conveyance and pay the price. Jackson *v.* Jackson, 127 Ga. 183, 56 S. E. 318.

But a devisee of the vendee's interest under the contract need not join the heirs as parties, unless the validity of the will is to be questioned. Spier *v.* Robinson, 9 How. Pr. (N. Y.) 325.

83. Buck *v.* Buck, 11 Paige (N. Y.) 170.

But a residuary devisee cannot sustain the bill until the estate is settled and it is determined whether he is entitled to anything. Lowry *v.* Lowry, 10 Phila. (Pa.) 105.

84. Miller *v.* Henderson, 10 N. J. Eq. 320. But see Boburg *v.* Prahl, 3 Wyo. 325, 23 Pac. 70, holding that, under Rev. St. § 3008, the administrator cannot sue.

85. McKay *v.* Broad, 70 Ala. 377; Healey *v.* Simpson, 113 Mo. 340, 20 S. W. 881; Buck *v.* Buck, 11 Paige (N. Y.) 170, although he is directed by the will to take all just and proper means to insure a conveyance of the land to the devisee.

But he is a necessary party where the bill seeks the alternative relief of repayment of money spent by the vendee in improvements. Young *v.* Young, 45 N. J. Eq. 27, 16 Atl. 921.

That the administrator cannot join with the heir where damages are sought for trespass committed on the land, since he and the heir would have no common right in or to the damages if recovered see McKay *v.* Broad, 70 Ala. 377.

86. Hays *v.* Hall, 4 Port. (Ala.) 374, 30 Am. Dec. 530; Jackson *v.* McCoy, 56 Miss. 781, the administrator not a necessary party, where the relief asked is a sale of the land for the purchase-money, and no personal decree is sought.

87. Hurst *v.* Hensley, 7 Blackf. (Ind.) 373; Coles *v.* Feeney, 52 N. J. Eq. 493, 29 Atl. 172; Miller *v.* Miller, 25 N. J. Eq. 354; Wheeler *v.* Crosby, 20 Hun (N. Y.) 140.

That an administrator who holds the title in his own right and not as representative of the vendor cannot compel the vendee to accept the title see Taylor *v.* Porter, 1 Dana (Ky.) 421, 25 Am. Dec. 155.

That the vendor's heirs may sue to enforce payment see Leslie *v.* Slusher, 15 Ind. 166.

What law governs.— In a suit brought in the District of Columbia by a Maryland executor to enforce specific performance of a contract made with his testator in that state concerning land there, it was held that the laws of that state must govern in ascertaining the rights of the parties, and that in Maryland an executor had authority to bring suit to enforce the specific performance of a contract for the sale of real estate, made by his testator during his lifetime, without joining the heirs as parties complainant, and had authority to execute a conveyance that would pass the legal title to such real estate. Griffith *v.* Stewart, 31 App. Cas. (D. C.) 29 (construing Md. Code, § 81, art. 93, and citing D. C. Code, § 327 [31 U. S. St. at L. 1241, c. 854]).

88. McArthur *v.* Weaver, 129 N. Y. App. Div. 743, 113 N. Y. Suppl. 1095.

89. Hays *v.* Hall, 4 Port. (Ala.) 374, 30 Am. Dec. 530; Mitchell *v.* Shell, 49 Miss. 118. But they need not be joined, where they have consented to the conveyance and have voluntarily vested the title in the administrator. Schroeppel *v.* Hopper, 40 Barb. (N. Y.) 425.

Infant heirs.— That infant heirs are bound by the decree if beneficial to them see Goddin *v.* Vaughn, 14 Gratt. (Va.) 102.

That the heir has a right to have the contract proved see Hamilton *v.* Walker, 12 Grant Ch. (U. C.) 172.

jurisdictions the personal representative may sue without joining the heirs as parties complainant.[90]

(II) *DEVISEES.* Devisees of the land are necessary parties.[91]

(III) *PERSONAL REPRESENTATIVES.* The personal representative of a deceased vendor is a necessary party, as a decree will require the purchase-money to be paid to him.[92]

2. PARTIES DEFENDANT — a. Heirs or Devisees Bound to Convey. It is incumbent upon those to whom the legal title to the land passed upon the vendor's death to convey to the vendee the right or title purchased by him, although they are not mentioned in the contract.[93]

b. Necessary Parties — (I) *HEIRS.* If the land has not been devised, all the heirs of the vendor are necessary parties defendant.[94]

(II) *DEVISEES.* The devisees of the land are necessary defendants.[95]

(III) *RULES MODIFIED BY STATUTE.* By statute in some states it is not necessary to make any other than the executor or administrator of the vendor party defendant.[96]

(IV) *PERSONAL REPRESENTATIVE.* The personal representatives of the deceased vendor are ordinarily necessary parties in the action by the vendees since they are entitled to receive payment;[97] but usually they are not necessary

90. See Griffith *v.* Stewart, 31 App. Cas. (D. C.) 29, referred to *supra*, X, E, 1, a, note 87.

91. Coles *v.* Feeney, 52 N. J. Eq. 493, 29 Atl. 172.

92. Hays *v.* Hall, 4 Port. (Ala.) 374, 30 Am. Dec. 530; Muldrow *v.* Muldrow, 2 Dana (Ky.) 386.

93. *Massachusetts.*— Miller *v.* Goodwin, 8 Gray 542, under statute affirming equity rules.

Nevada.— Brandon *v.* West, 28 Nev. 500, 83 Pac. 327, 29 Nev. 135, 85 Pac. 449, 88 Pac. 140.

New York.— Hill *v.* Ressegieu, 17 Barb. 162.

South Carolina.— Glaze *v.* Drayton, 1 Desauss. Eq. 109.

Texas.— Hibbert *v.* Aylott, 52 Tex. 530.

United States.— Bohanan *v.* Giles, 26 Fed. 204; Fields *v.* Squires, 9 Fed. Cas. No. 4,776, Deady 366; Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120 [*affirmed* in 9 Pet. 62, 9 L. ed. 51].

See 44 Cent. Dig. tit. "Specific Performance," §§ 55, 347.

Title acquired by heirs from other source. — But the heirs of the vendor cannot be compelled to convey a title which they acquired not from him but from some other source. Upshaw *v.* McBride, 10 B. Mon. (Ky.) 202; Partridge *v.* Dorsey, 3 Harr. & J. (Md.) 302.

94. *Alabama.*— Moore *v.* Murrah, 40 Ala. 573; Porter *v.* Worthington, 14 Ala. 584, statute requiring administrator to make title does not apply to proceedings in chancery.

Florida.— Rain *v.* Roper, 15 Fla. 121.

Illinois.— Duncan *v.* Wickliffe, 5 Ill. 452.

Indiana.— See Barnard *v.* Macy, 11 Ind. 536, not necessary to make such of them defendants as have already conveyed.

Kentucky.— Craig *v.* Foster, 3 J. J. Marsh. 285.

Missouri.— McQuitty *v.* Wilhite, 218 Mo. 586, 117 S. W. 730.

New Hampshire.— Kidder *v.* Barr, 35 N. H. 235; Newton *v.* Swazey, 8 N. H. 9.

New Jersey.— Collins *v.* Leary, (1908) 71 Atl. 603; Miller *v.* Henderson, 10 N. J. Eq. 320.

Tennessee.— Hale *v.* Darter, 5 Humphr. 79.

Virginia.— Boyd *v.* Magruder, 2 Rob. 761.

West Virginia.— Gallatin Land, etc., Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747.

United States.— Morgan *v.* Morgan, 2 Wheat. 290, 4 L. ed. 242.

See 44 Cent. Dig. tit. "Specific Performance," §§ 55, 347.

But the unsuccessful vendee cannot complain that all the heirs are not before the court, since it is a matter of no concern to whom the land is adjudged if he is not entitled to it. Bogard *v.* Turner, 63 S. W. 426, 23 Ky. L. Rep. 625.

95. Craig *v.* Johnson, 3 J. J. Marsh. (Ky.) 572; Newark Sav. Inst. *v.* Jones, 35 N. J. Eq. 406.

The heirs also are proper parties, where a question may arise whether the land passed by the devise. Hubbard *v.* Johnson, 77 Me. 139.

But residuary devisees, to whom the land was not devised, are not necessary parties. Lee *v.* Colston, 5 T. B. Mon. (Ky.) 238.

96. Iowa Code, §§ 2487, 2488.— See Van Aken *v.* Clark, 82 Iowa 256, 48 N. W. 73; Fulwider *v.* Peterkin, 2 Greene (Iowa) 522, discretionary with court whether heirs or devisees should join in the conveyance.

Tex. Act Feb. 2, 1844.— See Shannon *v.* Taylor, 16 Tex. 413; Ottenhouse *v.* Burleson, 11 Tex. 87.

Wis. Rev. St. (1898) §§ 3501, 3907.— See Fleming *v.* Ellison, 124 Wis. 36, 102 N. W. 398.

97. *Florida.*— Rain *v.* Roper, 15 Fla. 121.

Kentucky.— Sanders *v.* Macey, 4 Bibb 457, where compensation for deficiency is claimed.

parties where, because of full performance before suit by plaintiff, they have no interest in the case.[98]

F. General Rules as to Parties — 1. The English and Federal Court Rule. By the rule of English chancery practice, followed in the United States courts and in a few other jurisdictions in this country, the parties to the contract, or those who are substituted in their place on their death or on the conveyance of the land or on the assignment of the whole contract, are the only parties to the suit for specific performance. Such suit cannot be made the means of determining the rights in the subject-matter of other persons whose claims are not connected with the contract. The suit for specific performance therefore affords a marked exception to the general doctrine of equity relating to parties.[99]

2. The American Rule; All Persons Interested in the Subject-Matter — a. In General. Contrary to the rule of the English and federal courts, it is a generally accepted rule in this country that all persons interested in the subject-matter

New Hampshire.— Kidder *v.* Barr, 35 N. H. 235.

New Jersey.— Kempton *v.* Bartine, 59 N. J. Eq. 149 [*affirmed* in 44 Atl. 461, 60 N. J. Eq. 411, 45 Atl. 966]; Newark Sav. Inst. *v.* Jones, 35 N. J. Eq. 406.

North Carolina.— Castel *v.* Strange, 54 N. C. 324, where an account of profits is sought.

United States.— Bedilian *v.* Seaton, 3 Fed. Cas. No. 1,218, 3 Wall. Jr. 279.

See 44 Cent. Dig. tit. "Specific Performance," §§ 55, 347.

Contra.— That they are proper but not necessary parties see Judd *v.* Mosely, 30 Iowa 423.

98. McCabe *v.* Healy, 138 Cal. 81, 70 Pac. 1008 (the result of the action will affect only the residue of the estate after distribution); Stewart *v.* Smith, 6 Cal. App. 152, 91 Pac. 667; Watson *v.* Mahan, 20 Ind. 223. But the administrator is a proper party defendant, since the property in question might be needed to pay decedent's debt. Colfax *v.* Colfax, 32 N. J. Eq. 206. And where the contract was to devise the whole estate, the executor is a necessary party. Kempton *v.* Bartine, 59 N. J. Eq. 149, 44 Atl. 461 [*affirmed* in 60 N. J. Eq. 411, 45 Atl. 966].

Where the vendee becomes administrator of the vendor, he may maintain suit against the widow and heirs. Robinson *v.* McDonald, 11 Tex. 385, 62 Am. Dec. 480.

99. *Illinois.*— Springfield State Nat. Bank *v.* U. S. L. Ins. Co., 238 Ill. 148, 87 N. E. 396 [*affirming* 142 Ill. App. 624].

New Jersey.— Bacot *v.* Wetmore, 17 N. J. Eq. 250. Where one agreed with complainant's husband to convey property to complainant merely for convenience, but there was no agreement that she should hold it in trust for her husband's heirs, they were not necessary parties to a suit by her for specific performance of the agreement to convey. Collins *v.* Leary, (1908) 71 Atl. 603. But where defendant's husband agreed to convey to complainant property which complainant and her husband thereafter occupied, but defendant and her husband's heirs brought ejectment therefor after his death, in a suit for specific performance of the agreement to convey and to restrain the ejectment action, the heirs were proper parties for the purposes of the injunction. Collins *v.* Leary, *supra.*

New York.— Chapman *v.* West, 17 N. Y. 125 [*affirming* 10 How. Pr. 367].

United States.— Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501; Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Moulton *v.* Chafee, 22 Fed. 26.

England.— Tasker *v.* Small, 3 Myl. & C. 63, 14 Eng. Ch. 63, 40 Eng. Reprint 848.

The general rule is that only the parties to the contract are necessary parties to a suit for specific performance. The rule that all persons having an interest in the subject-matter must be made parties does not have full application to such a bill. Springfield State Nat. Bank *v.* U. S. L. Ins. Co., 238 Ill. 148, 87 N. E. 396 [*affirming* 142 Ill. App. 624]; Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 109 Ill. 71; Bennett *v.* Glaspell, 15 N. D. 239, 107 N. W. 45.

Contract to insure life.— On the expiration of life insurance policies, insured, and a bank to whom they had been assigned as collateral, obtained a continuance of the insurance, renewed by policies made payable to the bank, its successors, or assigns, issued in place of the originals which they surrendered. It was held that the only parties to the last contract were the insurer and the bank, and, conceding that insured and his wife had an equity therein, it did not necessarily follow that they should be made parties to a bill by the bank for specific performance thereof. Springfield State Nat. Bank *v.* U. S. Life Ins. Co., 238 Ill. 148, 87 N. E. 396 [*affirming* (1908) 142 Ill. App. 624].

But a person who, in the name of another, makes a contract for the purchase of real estate, and who alone is interested in the contract, is a necessary party. Cowan *v.* Kane, 211 Ill. 572, 71 N. E. 1097.

In a suit for the renewal of a lease, a person entitled to a portion of the interest sought to be renewed may be made a defendant. Butler *v.* Portarlington, 1 C. & L. 1, 1 Dr. & War. 20, 4 Ir. Eq. 1.

Mortgagee of lease.—Where after the date of an agreement for an under-lease the lessee mortgaged his lease by demise to parties who had notice of and took subject to the agreement, it was held that the mortgagees were

of the suit may properly be joined as parties, and are sometimes necessary parties. This is the fundamental doctrine of equity concerning parties.[1]

b. Persons Claiming Under Vendor Subsequent to Contract. All parties claiming an interest in the land obtained from the vendor subsequent to the contract, and with notice of the contract, have been held to be necessary defendants.[2]

c. Judgment and Attachment Creditors. Under the broader doctrine as to parties, it is proper for plaintiff to join as defendants the subsequent judgment [3] or attachment [4] creditors of the vendor.

d. Subsequent Mortgagees, Vendees, Etc. The purchaser may have relief in his bill against a subsequent mortgagee, with notice, of the vendor; and he is a proper party.[5] A subsequent contract vendee of the vendor has been held a necessary party.[6]

e. Prior Mortgagees, Vendees, Etc. It is variously held proper, not proper, or not necessary, to make prior mortgagees of the land parties defendant, in order to secure the application of the purchase-money to the payment of the mortgage debt.[7] A prior vendee of the vendor is a necessary party defendant where the

not proper parties to a suit for specific performance by the under-lessee. Long *v.* Bowring, 33 Beav. 585, 10 Jur. N. S. 668, 10 L. T. Rep. N. S. 683, 12 Wkly. Rep. 972, 55 Eng. Reprint 496.

1. See Pomeroy Eq. Jur. § 114; and the following cases:

Louisiana.— Whann *v.* Hiller, 110 La. 566, 54 So. 689, vendee defendant may bring in persons claiming rights to the land so as to determine whether such rights render the property unavailable for his purposes.

Michigan.— Baldwin *v.* Fletcher, 48 Mich. 604, 12 N. W. 873.

Minnesota.— Seager *v.* Burns, 4 Minn. 141.

Missouri.—Moore *v.* McCullough, 5 Mo. 141.

New York.— International Paper Co. *v.* Hudson River Water Power Co., 92 N. Y. App. Div. 56, 86 N. Y. Suppl. 736; McCotter *v.* Lawrence, 4 Hun 107, 6 Thomps. & C. 392; Woodward *v.* Aspinwall, 3 Sandf. 272, defendant's surety. Although a conveyance of land to the grantor's sister and her subsequent conveyance to his wife were not expressly in trust for the grantor's benefit, if by the terms of the deeds to them he had the title, and the power and right to sell the property, under the liberal rules of equity as to parties, they would be proper defendants in an action for specific performance of a contract by him to convey the land to another. East River, etc., Land Co. *v.* Kindred, 128 N. Y. App. Div. 146, 112 N. Y. Suppl. 540.

Virginia.— Hudson *v.* Max Meadows Land, etc., Co., 97 Va. 341, 33 S E. 586.

West Virginia.— Heavner *v.* Morgan, 30 W. Va. 335, 4 S. E. 406, 8 Am. St. Rep. 55, vendor plaintiff, to meet defense of doubtful title, may bring in persons claiming in hostility to his title.

United States.—Caldwell *v.* Taggart, 4 Pet. 190, 7 L. ed. 828, in a suit to compel execution of securities on land, prior mortgagees are necessary parties defendant.

See 44 Cent. Dig. tit. "Specific Performance," §§ 342, 345, 349.

But persons not claiming an interest in the portion of the property which is the subject of the suit are of course not necessary parties. Rudd *v.* Fosseen, 82 Minn. 41, 84 N. W. 496.

That an adverse claimant in possession, whose claim is not in any way connected with plaintiff's equity or the vendor's title, cannot be made a party, since he has a right to a jury trial see Ashley *v.* Little Rock, 56 Ark. 391, 19 S. W. 1058.

When the specific execution of a contract would be decreed between the immediate parties thereto, it will also be decreed between parties claiming under them in privity of estate, or representation, or title. Chambers *v.* Alabama Iron Co., 67 Ala. 353; Goodlett *v.* Hansell, 66 Ala. 151; Hays *v.* Hall, 4 Port. (Ala.) 374, 30 Am. Dec. 530; Hollander *v.* Central Metal, etc., Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. N. S. 1135.

Remainder-men.—A married woman contracting to convey real estate, conveyed to her for life with remainder to her children, cannot compel specific performance without making her children parties. Triplett *v.* Williams, 149 N. C. 394, 63 S. E. 79.

2. Morris *v.* Hoyt, 11 Mich. 9; International Paper Co. *v.* Hudson River Water Power Co., 92 N. Y. App. Div. 56, 86 N. Y. Suppl. 736.

Judgment creditors.— That *pendente lite* judgment creditors of the vendor are not necessary parties see Secombe *v.* Steele, 20 How. (U. S.) 94, 15 L. ed. 833.

Grantees of vendor see *supra*, X, B, 4.

3. Morgan *v.* Morgan, 3 Stew. (Ala.) 383, 21 Am. Dec. 638; Seager *v.* Burns, 4 Minn. 141.

4. Horton *v.* Hubbard, 83 Mich. 123, 47 N. W. 115; Brown *v.* Prescott, 63 N. H. 61.

5. Jowers *v.* Phelps, 33 Ark. 465; International Paper Co. *v.* Hudson River Water Power Co., 92 N. Y. App. Div. 56, 86 N. Y. Suppl. 736.

6. Fullerton *v.* McCurdy, 4 Lans. (N. Y.) 132. But see Ledbetter *v.* Higbee, 13 Tex. Civ. App. 267, 35 S. W. 801. That if he refuses to produce his contract the decree may divest him of all title see Carrington *v.* Lentz, 40 Fed. 18.

7. Chapman *v.* West, 17 N. Y. 125 [*affirm-*

determination of the validity of his contract is sought.[8] And a prior grantee of the vendor has a right to intervene in the suit, since a decree might cloud his title.[9]

f. In Contracts by Trustees, Etc.[10] In suits for specific performance of a contract made by a trustee the *cestui que trust* is often a proper but rarely a necessary party.[11] A previous trustee who did not join in the sale is not a necessary party.[12] On refusal of the trustee to sue, bondholders may have specific performance of a contract to execute a mortgage to secure their bonds.[13]

3. Parties to the Contract — a. Generally Necessary. Parties to the contract are generally necessary parties to the suit;[14] as a party who purchased in his own name, but in fact was agent for another, who brings the suit.[15]

b. Joint Contract. All the parties to a joint contract, whether vendors or vendees, must join or be joined in the suit.[16]

ing 10 How. Pr. 367] (not proper); Hudson *v.* Max Meadows Land, etc., Co., 97 Va. 341, 33 S. E. 586 (proper); McCullough *v.* Sutherland, 153 Fed. 418 (not necessary). See *supra*, VII, B, 4.

But that in a bill to compel the execution of securities on real estate, prior mortgagees are necessary parties, although a decree is asked which will operate only on the interest of the party promising the security see Caldwell *v.* Taggart, 4 Pet. (U. S.) 190, 7 L. ed. 828.

8. Van Keuren *v.* Siedler, 73 N. J. Eq. 239, 66 Atl. 920.

9. Carter *v.* Mills, 30 Mo. 432.

10. **Receiver.**—As to parties to the suit where the property has passed into the hands of a receiver see Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319. And see Receivers, 34 Cyc. 258, 426 *et seq.*

11. Gibbs *v.* Blackwell, 37 Ill. 191 (that the trustee, vendee, paid the purchase-price out of trust funds does not render the *cestui que trust* a necessary party); Bridgman *v.* McIntyre, 150 Mich. 78, 113 N. W. 776 (trustee purchaser as such); Newark Sav. Inst. *v.* Jones, 35 N. J. Eq. 406 (contract by testator; *cestuis que trustent* under the will not necessary parties, where no question can arise as to the trustees' authority to act under the contract); Bissell *v.* Heyward, 96 U. S. 580, 24 L. ed. 678 (trustee to preserve contingent remainders; remainder-men need not be joined). The absence of persons having an interest in the construction of a will from a suit by trustees under a will to compel a purchaser of the trust property to complete his purchase does not make it improper to require specific performance, there being no disputed question of fact, and the question of law involved not being so doubtful as to render the title unmarketable. Hardenbergh *v.* McCarthy, 130 N. Y. App. Div. 538, 114 N. Y. Suppl. 1073. Where testator devised his estate to his executors, in trust to provide an income for his widow and daughter during the widow's life, the trust to terminate at her death, and the estate to be divided among testator's children, the executors took title under the express trust, and were the proper parties to carry out a contract by testator to sell part of the land; and where, in an action against them for specific performance, it appeared that defendants were prepared to give full title as to the dower interest, the court properly refused to make the widow and heirs at law defendant. Hald *v.* Claffy, 131 N. Y. App. Div. 251, 115 N. Y. Suppl. 561.

Contract by trustees; cestuis que trustent held under the circumstances necessary parties see Internal Imp. Fund *v.* Gleason, 15 Fla. 384 (trustee apparently assumed an attitude hostile to beneficiaries); White *v.* Watkins, 23 Mo. 423 (contract of sale under deed of trust; the grantor, who was a *cestui que trust* of the residue after payment of the debt secured by the deed, was a necessary party).

12. Champlin *v.* Parish, 3 Edw. (N. Y.) 581.

13. O'Beirne *v.* Bullis, 2 N. Y. App. Div. 545, 38 N. Y. Suppl. 4 [*affirmed* in 158 N. Y. 466, 53 N. E. 211].

14. Petray *v.* Howell, 20 Ark. 615.

Where the party has conveyed or assigned see *supra*, X, A, B, C.

Contract by executors, administrators, etc. — Executors with a power of sale may be compelled to convey, where the contract is a valid execution of the power; and if the widow, or executor, joins in the contract and the sale is for the full value of the land, she will be compelled to convey her dower right. Bostwick *v.* Beach, 103 N. Y. 414, 9 N. E. 41. But that a contract made by one as administrator cannot be enforced against him as heir see Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

15. Pennsylvania, etc., R. Co. *v.* Ryerson, 36 N. J. Eq. 112.

16. *Alabama.*— Carlisle *v.* Carlisle, 77 Ala. 339, joint vendors; defendants.

Illinois.— See Davis *v.* Pfeiffer, 213 Ill. 249, 72 N. E. 718, vendees; plaintiffs.

New York.— Powell *v.* Finch, 5 Duer 666, vendees; defendants.

Oregon.— Knott *v.* Stephens, 3 Oreg. 269, representatives of a deceased copartner.

Tennessee.— Cook *v.* Hadly, Cooke 465, vendees; plaintiffs; those refusing to join as plaintiffs may be joined as defendants.

Texas.— Morrison *v.* Hazzard, 99 Tex. 583, 92 S. W. 33, vendors; defendants.

That all of the joint plaintiffs must be entitle to relief or no relief will be granted see

4. Holder of the Legal Title. One who holds the legal title to the land, although he has no beneficial interest, is a necessary defendant, if a conveyance of the legal title is sought.[17]

5. Agents. Mere agents of the parties to the contract are not necessary and usually not proper parties to the suit.[18] But an agent may have such a beneficial interest in the proceeds of the contract as to make him a proper party to bring the suit.[19] And a vendee cannot defeat specific performance of a contract for the sale of land on the ground that he made the contract as agent of another, when he failed to disclose his agency until after the execution of the contract.[20]

6. Who Has a Sufficient Interest to Sue — a. In General. One who has conveyed with warranty may maintain a bill to compel performance of an agreement to release the land from a mortgage;[21] and a subsequent mortgagee of land may sue to compel a release by a prior mortgagee.[22] A creditor at large before judgment cannot compel the specific execution of his debtor's contract.[23] A contingent remainder-man in fee, together with the tenant for life, may sufficiently represent the inheritance.[24]

b. Person For Whose Benefit Contract Is Made. The suit is properly brought by the person for whose benefit the promise was made to another, according to the doctrine prevailing in many of the states.[25] And beneficiaries of a contract should

Davis *v.* Williams, 130 Ala. 530, 30 So. 488, 54 L. R. A. 749.

17. *Arkansas.*—Arkadelphia Lumber Co. *v.* Mann, 78 Ark. 414, 94 S. W. 46, an agent, although authorized by his principal to execute a deed of conveyance, cannot be compelled to do so.

Florida.— A wife is a necessary party to a suit in equity by the husband for the specific performance by a third person of a contract of sale of real estate, the title to which is in the wife. Muldon *v.* Brawner, 57 Fla. 496, 49 So. 124.

Kentucky.— Rochester *v.* Anderson, Litt. Sel. Cas. 143; Slaughter *v.* Nash, 1 Litt. 322.

Minnesota.— Hopkins *v.* Baremore, 99 Minn. 413, 109 N. W. 831, undisclosed owners are proper defendants.

New York.— Mowbray *v.* Dieckman, 9 N. Y. App. Div. 120, 41 N. Y. Suppl. 82.

Wisconsin.— Morrow *v.* Lawrence University, 7 Wis. 574, trustee who holds legal title to corporation bonds; contract by the corporation.

United States.— Preston *v.* Walsh, 10 Fed. 315 [*reversed* on other grounds in 109 U. S. 297, 3 S. Ct. 169, 245, 27 L. ed. 940].

Contra.— For an instance where, under special circumstances, the holder of the legal title was not a necessary defendant see Capps *v.* Frederick, 44 Wash. 38, 86 Pac. 1128.

Custodian of deed.— One who holds the deed as an escrow and refuses to deliver it is a proper party defendant. Rea *v.* Ferguson, 126 Iowa 704, 102 N. W. 778; Davis *v.* Henry, 4 W. Va. 571.

Coöwner against whom no relief is sought not a necessary defendant see Stanton *v.* Singleton, (Cal. 1898) 54 Pac. 587.

Corporation.— Where the owners of all the stock in a corporation agreed to convey the same to defendant and to execute a deed to the corporation's property, the corporation as such was not a necessary party. McCullough *v.* Sutherland, 153 Fed. 418.

18. San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839; Roby *v.* Cossitt, 78 Ill. 638 (vendor's agents in making the sale not proper parties); Dahoney *v.* Hall, 20 Ind. 264 (not proper party); Baeck *v.* Meinken, 33 Misc. (N. Y.) 371, 68 N. Y. Suppl. 428; Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273 (not a proper party).

A city is a necessary defendant to a suit for specific performance of a contract for sale of its bonds made by city officers as mere agents for the city. Rollins Inv. Co. *v.* George, 48 Fed. 776.

That a contract under seal for the sale of land is not enforceable against the real purchaser who did not execute it see Van Allen *v.* Peabody, 112 N. Y. App. Div. 57, 97 N. Y. Suppl. 1119.

19. Hills *v.* McMunn, 232 Ill. 488, 83 N. E. 963.

20. Griffith *v.* Stewart, 31 App. Cas. (D. C.) 29.

21. Malins *v.* Brown, 4 N. Y. 403; Bennett *v.* Abrams, 41 Barb. (N. Y.) 619.

22. McLallen *v.* Jones, 20 N. Y. 162.

23. Griffith *v.* Frederick County Bank, 6 Gill & J. (Md.) 424.

24. Sohier *v.* Williams, 22 Fed. Cas. No. 13,159, 1 Curt. 479.

25. Crocker *v.* Higgins, 7 Conn. 342; Allen *v.* Davison, 16 Ind. 416 (contract with mother for benefit of child); Kempton *v.* Bartine, 59 N. J. Eq. 149, 44 Atl. 461 [*affirmed* in 60 N. J. Eq. 411, 45 Atl. 966] (beneficiaries should be classed as complainants, or cause be stated for making them defendants); Richards *v.* Green, 23 N. J. Eq. 536 (vendor agrees in writing to convey to vendee's wife). *Contra*, Ford *v.* Euker, 86 Va. 75, 9 S. E. 500. See also Contracts, 9 Cyc. 374 *et seq.*

For limitations on the rule (in New York) see Wait *v.* Wilson, 86 N. Y. App. Div. 485, 83 N. Y. Suppl. 834.

That there must be proof that the contract

be made parties to a suit to enforce performance of a provision of the contract affecting them.[26]

7. Joinder of Plaintiffs in General. Where the one transaction benefited several plaintiffs, there is no misjoinder of parties because they were not all interested to the same extent.[27] On a contract to convey in severalty, one vendee does not need to join the rest.[28] A vendor whose title depended on the exercise of a power in his favor need not join his predecessors whose title was subject to the exercise of the power.[29] Under the codes, a defect of parties plaintiff is waived when not taken by demurrer or answer.[30]

8. Judicial Sale. The officer making the sale under order of a court is the proper and only necessary party plaintiff in a suit to enforce the sale against the purchaser.[31]

XI. Pleading and Practice.

A. When Action May Be Brought. An action by the vendor before the time fixed for payment is premature;[32] and where conveyance is not to be made until payment, the vendee usually cannot maintain his bill until payment is due;[33] but where the vendor has repudiated the contract, the purchaser is entitled to sue at once, although the time fixed for complete performance has not arrived.[34]

was for plaintiffs' benefit see Wood *v.* Perry, 1 Barb. (N. Y.) 114.

For case where the beneficiary was not a necessary party see Gillies *v.* Commercial Bank, 9 Manitoba 165.

That the person to whom the promise is made, having no right in the subject-matter which a decree may affect, has no such interest in the controversy as to make him a necessary party see Crocker *v.* Higgins, 7 Conn. 342.

26. Where a contract for support in consideration of a conveyance required plaintiffs to pay to defendant's daughter, O, four hundred and fifty dollars on her becoming eighteen years of age, it was held that such daughter was a necessary party to a suit by which plaintiffs sought to enforce performance of a provision of the contract by which, on the payment of one thousand dollars, they would be relieved from all obligations thereunder, except as to the payment to O, in which action defendants claimed a right to rescind for breach of a condition subsequent. Mootz *v.* Petraschefski, 137 Wis. 315, 118 N. W. 865.

27. Stewart *v.* Smith, 6 Cal. App. 152, 91 Pac. 667.

Necessary plaintiffs.— One who paid the price and to whom it was agreed that a purchase-money mortgage should be given is a necessary party to a suit by the vendee's heirs. Alexander's Appeal, (Pa. 1887) 11 Atl. 83.

Defect not remedied by decree.—A decree directing conveyance to plaintiff and her coöwners does not remedy failure to join them, since they have a right to elect to accept specific performance or sue for damages. McCotter *v.* Lawrence, 4 Hun (N. Y.) 107, 6 Thomps. & C. 392.

28. Towle *v.* Carmelo Land, etc., Co., 99 Cal. 397, 33 Pac. 1126.

29. Dumesnil *v.* Dumesnil, 92 Ky. 526, 18 S. W. 229, 13 Ky. L. Rep. 770.

30. Dreutzer *v.* Lawrence, 58 Wis. 594, 17 N. W. 423. See Equity, 16 Cyc. 204; Pleading, 31 Cyc. 738.

31. Cureton *v.* Wright, 73 Ga. 8 (creditors claiming interest in proceeds cannot enforce); Bowne *v.* Ritter, 26 N. J. Eq. 456.

Or his successor in office.— Peake *v.* Young, 40 S. C. 41, 18 S. E. 237.

Suit by purchaser.— The former owner, claiming a right to redeem, should be joined as defendant in a suit against the sheriff. Crosby *v.* Davis, 9 Iowa 98.

32. Greenbaum *v.* Austrian, 70 Ill. 591; Jones *v.* Boyd, 80 N. C. 258.

33. Troy *v.* Clarke, 30 Cal. 419; May *v.* Sullivan, 37 Miss. 541. Where the owner of premises gave an option to purchase them for one hundred thousand dollars, payable thirty thousand dollars cash, balance on or before four years, four and one-half per cent net, and agreed to convey free from encumbrance, it was held that should the contract be interpreted to contemplate the payment of thirty thousand dollars and the execution of a deed upon payment of the balance of seventy thousand dollars, with four and one-half per cent interest per annum, the owner meanwhile to hold possession, an action for specific performance upon tender of the thirty thousand dollars only was premature. Marsh *v.* Lott, 8 Cal. App. 384, 97 Pac. 163.

34. Belanewsky *v.* Gallaher, 55 Misc. (N. Y.) 150, 105 N. Y. Suppl. 77; Payne *v.* Melton, 67 S. C. 233, 45 S. E. 154. But see Towers *v.* Christies, 6 Grant Ch. (U. C.) 159.

Contract relating to invention.—Where defendant had repudiated his agreement to give plaintiff an interest in an invention to be patented, and denied his rights thereunder, plaintiff could then bring suit for specific performance of the agreement, although the device had not been patented. McRae *v.* Smart, 120 Tenn. 413, 114 S. W. 729.

A bill to enforce a contract to lease a building when completed cannot be maintained while the building is in the course of construction.[35]

B. Jurisdiction and Venue — 1. Land Out of the Jurisdiction.[36] Since the decree for specific performance operates or may be made to operate directly upon the person of defendant, the relief may be had where the land is in another state or country, if defendant is personally served with process, and subjected to the jurisdiction of the court.[37]

2. Defendant Out of the Jurisdiction. A suit for specific performance by a vendee of land within the jurisdiction against a vendor out of the jurisdiction is, by the weight of authority, sufficiently a proceeding *in rem* to validate a decree founded on service of process by publication, and the passing of title by the decree or by an officer appointed by the court.[38] But where the decree is strictly *in personam*, requiring the performance of some personal act by defendant, it must be founded either upon personal service of process or upon a voluntary appearance.[39]

35. Friedman *v.* McAdory, 85 Ala. 61, 4 So. 835.

36. See Courts, 11 Cyc. 686.

37. *District of Columbia.*— Griffith *v.* Stewarts, 31 App. Cas. 29.

Iowa.— Rea *v.* Ferguson, 126 Iowa 704, 102 N. W. 778; Barringer *v.* Ryder, 119 Iowa 121, 93 N. W. 56.

Massachusetts.— Pingree *v.* Coffin, 12 Gray 288.

Missouri.— Olney *v.* Eaton, 66 Mo. 563.

New York.— Cleveland *v.* Burrill, 25 Barb. 532; Myres *v.* De Mier, 4 Daly 343 [*affirmed* in 52 N. Y. 647]; Sutphen *v.* Fowler, 9 Paige 280.

North Carolina.— Orr *v.* Irwin, 4 N. C. 351.

Ohio.— Penn *v.* Hayward, 14 Ohio St. 302, but where court has acquired jurisdiction of only part of necessary defendants, suit dismissed.

Pennsylvania.— Conover *v.* Wright, 9 Pa. Dist. 688.

Virginia.— Farley *v.* Shippen, Wythe 254.

United States.— Western Union Tel. Co. *v.* Pittsburg, etc., R. Co., 137 Fed. 435.

See 44 Cent. Dig. tit. "Specific Performance," § 321.

Enforcement of decree.— The court in such case, while it cannot pass title by its decree, may enforce the decree by attachment for contempt. Penn *v.* Hayward, 14 Ohio St. 302.

But the court cannot compel the construction of a railroad in another state. Kansas, etc., R. Constr. Co. *v.* Topeka, etc., R. Co., 135 Mass. 34, 46 Am. Rep. 439, since the court cannot superintend decree.

Exchange of lands.— The court may decree specific performance when plaintiff's land is out of the jurisdiction. Montgomery *v.* Ruppensburg, 31 Ont. 433.

38. Felch *v.* Hooper, 119 Mass. 52; Single *v.* Scott Paper Mfg. Co., 55 Fed. 553. *Contra*, for case holding the decree to be strictly *in personam*, so that service of process by publication upon an absent defendant will not confer jurisdiction see Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940.

Defendant personally served.— If defendant is personally served within the state, although he is a resident of another state, such decree is proper. Dooley *v.* Watson, 1 Gray (Mass.) 414.

Foreign corporation.— A personal decree may be rendered for specific performance against a foreign corporation upon which actual service has been had within the state under the provisions of the state statute. Shafer *v.* O'Brien, 31 W. Va. 601, 8 S. E. 298.

The case must be one which comes within the terms of the statute authorizing service by publication, or the decree will be void. Hollingsworth *v.* Barbour, 4 Pet. (U. S.) 466, 4 L. ed. 922.

In Maryland, under Code Pub. Gen. Laws (1904), art. 16, § 117, providing that, in suits to enforce contracts, the court may order notice to be given non-resident defendants, and section 127, prescribing how the notice shall be given, and section 91, authorizing appointment of a trustee to execute a deed decreed to be executed, while a non-resident cannot be compelled to execute a deed under a contract to convey, the court can appoint a trustee to convey his title, and to that end the proceedings are *in rem* and not *in personam*, and sustainable by publication service. Hollander *v.* Central Metal, etc., Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. N. S. 1135.

Description of land in order of publication. — An order for publication service in a suit to specifically perform a contract to convey sufficiently described the land where it described it as a lot of ground on the east side of a ten-foot alley in the rear of specified streets, as being subject to a specified annual ground-rent created by a lease between specified persons, of specified date, recorded at a specified place; and where it specified defendant's interest in the reversion, and stated that plaintiff notified defendants of its desire to redeem the rent, and sent them a deed which they refused to execute. Hollander *v.* Central Metal, etc., Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. N. S. 1135.

39. Huntington First Nat. Bank *v.* Henry, 156 Ind. 1, 58 N. E. 1057 (agreement to indorse a note); Worthington *v.* Lee, 61 Md. 530; Merrill *v.* Beckwith, 163 Mass. 503, 40 N. E. 855 (no specific performance against

3. Venue — a. Conflicting Interpretation of Statutes. Statutes rarely expressly mention the venue of actions for specific performance of land contracts. The nature of such an action being partly *in rem* and partly *in personam* has given rise to much conflict in the interpretation of the statutes of venue. It has been held to fall within a statute providing for the venue of "actions for the recovery of realty or for the determination of any right or interest therein;"[40] and not to fall within a statute of almost identical wording;[41] not to be a suit for the recovery of land;[42] that it is "a suit concerning real estate, or whereby the same may be affected;"[43] an action "to determine claims to real property;"[44] but not "for the determination of questions affecting the title of" land.[45] An action by the vendor to enforce his lien is held to be an action "for the sale of real property under a mortgage lien or other encumbrance."[46] The results of the interpretation of the various statutes are stated in the following paragraphs.

b. County of Defendant's Residence. By the rule in several states, the action should be brought in the county where the defendant or any one of the defendants resides,[47] or at least, may be brought in the county where defendant resides.[48]

c. County Where Land Is Situated. In other states the action must be brought in the county where the land is situated,[49] or is properly brought in the county where the land is situated.[50]

C. Bill, Complaint, or Petition[51] — 1. In General. The bill, complaint, or petition in an action for specific performance must state clearly and fully all the facts necessary to entitle plaintiff to the relief sought.[52] Where the allegations

a non-resident purchaser); Boswell *v.* Otis, 9 How. (U. S.) 336, 13 L. ed. 164 (decree for payment of money void).

40. Donaldson *v.* Smith, 122 Iowa 388, 98 N. W. 138, construing Code (1897), § 3491.

41. Close *v.* Wheaton, 65 Kan. 830, 70 Pac. 891, construing Code, § 47.

42. Miller *v.* Rusk, 17 Tex. 170; Hearst *v.* Kuykendall, 16 Tex. 327; Lucas *v.* Patton, (Tex. Civ. App. 1908) 107 S. W. 1143; Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

43. Ensworth *v.* Holly, 33 Mo. 370, construing Rev. Code (1855), p. 1221, § 3.

44. Hall *v.* Gilman, 77 N. Y. App. Div. 464, 79 N. Y. Suppl. 307, construing Code Civ. Proc. § 982.

45. Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

46. Henderson *v.* Perkins, 94 Ky. 207, 21 S. W. 1035, 14 Ky. L. Rep. 782 (construing Civ. Code, § 62); Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013, 13 Ky. L. Rep. 905 (and the court may render a personal judgment for deficiency).

47. *Georgia.*— Civ. Code (1895), §§ 4950, 5871. See Jackson *v.* Jackson, 127 Ga. 183, 56 S. E. 318; Johnson *v.* Griffin, 80 Ga. 551, 7 S. E. 94; Lowe *v.* Mann, 74 Ga. 387 (he must be a "substantial" defendant); Wactor *v.* Saulsbury, 73 Ga. 811.

Indiana.— Dehart *v.* Dehart, 15 Ind. 167; Coon *v.* Cook, 6 Ind. 268.

Kansas.— Close *v.* Wheaton, 65 Kan. 830, 70 Pac. 891. And see Timma *v.* Timma, 72 Kan. 73, 82 Pac. 481, action can be tried wherever jurisdiction of the person is acquired.

Maryland.— Dorsey *v.* Omo, 93 Md. 74, 48 Atl. 741, contract to assign a mortgage.

Texas.— Miller *v.* Rusk, 17 Tex. 170.

See 44 Cent. Dig. tit. "Specific Performance," §§ 322, 324.

48. Epperly *v.* Ferguson, 118 Iowa 47, 91 N. W. 816 (vendor sues); Owens *v.* Hall, 13 Ohio St. 571; Hearst *v.* Kuykendall, 16 Tex. 327.

A plea to the jurisdiction which does not negative the statutory exceptions to the rule that an action must be brought in such county is bad. Cavin *v.* Hill, 83 Tex. 73, 18 S. W. 323.

49. Parker *v.* McAllister, 14 Ind. 12; Henderson *v.* Perkins, 94 Ky. 207, 21 S. W. 1035, 14 Ky. L. Rep. 782; Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013, 13 Ky. L. Rep. 905; Ensworth *v.* Holly, 33 Mo. 370; Hall *v.* Gilman, 77 N. Y. App. Div. 464, 79 N. Y. Suppl. 307; Kearr *v.* Bartlett, 47 Hun (N. Y.) 245, contract to exchange land; immaterial that plaintiff's land is in another county. *Contra*, Davis *v.* Parker, 14 Allen (Mass.) 94; Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

But if partition and declaring of a lien be sought, the action is local. State *v.* Snohomish County Super. Ct., 13 Wash. 187, 43 Pac. 19.

50. Bradford *v.* Smith, 123 Iowa 41, 98 N. W. 377; Donaldson *v.* Smith, 122 Iowa 388, 98 N. W. 138; Epperly *v.* Ferguson, 118 Iowa 47, 91 N. W. 816 (vendor sues); Owens *v.* Hall, 13 Ohio St. 571; Burrall *v.* Eames, 5 Wis. 260 (in absence of statute).

An action against a non-resident of the state may be brought in the county where the land is situated. Gartrell *v.* Stafford, 12 Nebr. 545, 11 N. W. 732, 41 Am. Rep. 767.

51. See, generally, Equity, 16 Cyc. 216 *et seq.*

52. Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473; Herzog *v.* Atchison, etc., R. Co., 153

in a bill for the specific performance of a contract appear to be meager when contrasted with the facts as disclosed by the evidence, and presents a case where plaintiff has failed to make a full and candid disclosure in his bill, the court may refuse to grant the relief sought.[53] A prayer in the alternative for damages in case specific performance cannot be granted does not make the complaint demurrable as stating a cause of action for damages. Such a prayer is merely a precautionary application for relief.[54]

2. Inadequacy of Legal Remedy. The bill, complaint, or petition must state facts which show that plaintiff has not a plain, adequate, and complete remedy at law; and if the contract relates to personalty, special reasons must be stated bringing the contract within some exception to the rule that specific performance of such contracts will not be granted.[55] In contracts for the sale of land, however, an allegation that the remedy at law is inadequate is unnecessary, since that is apparent from the nature of the subject-matter.[56]

3. The Contract — a. In General. The bill or complaint must properly allege the execution or making of the contract;[57] and the essential terms of the

Cal. 496, 95 Pac. 898, 17 L. R. A. N. S. 428; Newman *v.* Johnson, 108 Md. 367, 70 Atl. 116; Clinchfield Coal Co. *v.* Clintwood Coal, etc., Co., 108 Va. 433, 62 S. E. 329; and other cases more specifically cited in the notes following. A bill to specifically enforce a contract signed by one defendant to convey land held by another defendant should show such situation. Krah *v.* Wassmer, (N. J. Ch. 1908) 71 Atl. 404.

Bill, complaint, or petition held sufficient see Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127.

Laches.— In a suit brought after 1905 to enforce specific performance of an agreement to convey mineral rights in land, executed in 1883, the burden was upon complainant to give sufficient reasons why the suit was not brought sooner, and to state specifically the impediments to an earlier prosecution thereof. Clinchfield Coal Co. *v.* Clintwood Coal, etc., Co., 108 Va. 433, 62 S. E. 329.

Plaintiff assignee.— In a suit to specifically perform a contract to convey to lessees and their assigns, it was sufficient to allege that plaintiff was an assignee of the leasehold interest, without setting forth circumstances tending to prove that fact. Hollander *v.* Central Metal, etc., Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. N. S. 1135.

Purchase of school lands.—A petition for specific performance of a contract to sell state school land, which alleges the execution of the contract and the refusal of defendant to make a deed, and which avers that plaintiff resided within a radius of five miles of the land, and was not disqualified from becoming a purchaser, and that he was in a position to comply with requirements as assignee, sufficiently shows that plaintiff could comply with the law in the purchase of school lands. Pope *v.* Taliaferro, (Tex. Civ. App. 1908) 115 S. W. 309.

Infringement of defendant's homestead right.— The bill is not demurrable on the ground that specific performance would infringe defendant's homestead right, either in the particular tract or in the right of selection from a larger tract, where it does not show that the land for which a conveyance is sought is part of defendant's homestead, although it does not appear that it is a part of a larger tract owned by defendant, as it will not be assumed that it was a part of defendant's homestead from such fact alone. Wilkins *v.* Hardaway, 159 Ala. 565, 48 So. 678.

53. Newman *v.* Johnson, 108 Md. 367, 70 Atl. 116.

54. Davenport *v.* Latimer, 53 S. C. 563, 31 S. E. 630; Konnerup *v.* Frandsen, 8 Wash. 551, 36 Pac. 493.

55. *California.*— Herzog *v.* Atchison, etc., R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. N. S. 428; Senter *v.* Davis, 38 Cal. 450.

Georgia.— Dudley *v.* Mallery, 4 Ga. 52.

Indiana.— Mather *v.* Simonton, 73 Ind. 595.

Vermont.— Angus *v.* Robinson, 62 Vt. 60, 19 Atl. 993.

United States.—Bernier *v.* Griscom-Spencer Co., 161 Fed. 438.

See *supra*, II, B, 2–9.

Sufficient allegation in bill to enforce a sale of stock see Manton *v.* Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811.

A general statement that there is no adequate remedy at law is not necessary where that is manifest from the facts alleged. International Paper Co. *v.* Hudson River Water Power Co., 92 N. Y. App. Div. 56, 86 N. Y. Suppl. 736.

56. Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007; Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; Belanewsky *v.* Gallaher, 55 Misc. (N. Y.) 150, 105 N. Y. Suppl. 77; Bishop *v.* Tartt, (Tex. Civ. App. 1908) 107 S. W. 359. See Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127. See also *supra*, II, A.

Value of land.— In an action for specific performance of a contract for the sale of land, it is not necessary to aver the value of the land. Brainard *v.* Jordan, (Tex. Civ. App. 1901) 60 S. W. 784.

57. Knox *v.* Childersburg Land Co., 86 Ala. 180, 5 So. 578.

Bill or complaint held sufficient see Nowell *v.* McBride, 162 Fed. 432, 89 C. C. A. 318, contract of corporation.

contract must be alleged with distinctness and certainty, and not left to inference. The bill or complaint must state facts which would be sufficient, upon a default, to enable the court to draft its decree from the averments.[58]

b. Consideration; Fairness, Justness, and Reasonableness. A general allegation that the contract was founded on a valuable consideration has been held sufficient against a general demurrer;[59] but there must be some showing of a consideration for the contract.[60] In California and Montana the statute requires

Execution of married woman's contract.— That a contract by a married woman must be shown to comply with the statutory requisites see Knox *v.* Childersburg Land Co., 86 Ala. 180, 5 So. 578.

Acceptance of defendant's offer need not be expressly alleged, where the complaint shows that plaintiff performed the conditions of the offer. Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Suppl. 303; Olmstead *v.* Abbott, 61 Vt. 281, 81 Atl. 315.

Delivery of the contract is not an essential averment, if it appears that the contract was made and accepted. Stanton *v.* Singleton, (Cal. 1898) 54 Pac. 587; Fogarty *v.* Smith, 100 S. W. 829, 30 Ky. L. Rep. 1237.

Contracts through agents.— It is not necessary to aver the manner of the execution of such contract, or anything more than the fact of execution. Harding *v.* Parshall, 56 Ill. 219; Hanchett *v.* McQueen, 32 Mich. 22; Begwelin *v.* Lee, 8 N. Y. St. 798. But see Roby *v.* Cossitt, 78 Ill. 638. As to averments respecting ratification of a contract executed by an agent see Harding *v.* Parshall, 56 Ill. 219.

Allegations respecting negotiations between the parties prior to the reduction of the contract to writing are immaterial and should be stricken out. Zeringue *v.* Texas, etc., R. Co., 34 Fed. 239.

58. *Alabama.*— Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473; Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758.

California.— Burnett *v.* Kullak, 76 Cal. 535, 18 Pac. 401 (where the contract set out is indefinite, but refers to another instrument to supply necessary terms, that instrument must be set out or pleaded); Durkee *v.* Cota, 74 Cal. 313, 16 Pac. 5 (where the contract set out is ambiguous, the pleading should put some definite construction upon it by averment); Joseph *v.* Holt, 37 Cal. 250 (the memorandum of the contract may be sufficient to satisfy the statute of frauds, but insufficient as a pleading).

Florida.— Maloy *v.* Boyett, 53 Fla. 956, 43 So. 243.

Indiana.— Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880 (must show what plaintiff is required by the contract to perform; that defendant waived objection to tender does not relieve plaintiff from stating what the contract is); Waymire *v.* Waymire, 141 Ind. 164, 40 N. E. 523 (terms as to payment).

Kentucky.— McKinley *v.* Butler, 4 Litt. 196.

New York.—Hall *v.* Gilman, 77 N. Y. App. Div. 458, 79 N. Y. Suppl. 303, contract sufficiently stated.

Rhode Island.— Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717, contract to assume and execute mortgages, bill not stating terms, duration, and interest.

Texas.— Ward *v.* Stuart, 62 Tex. 333; Jones *v.* Jones, 49 Tex. 683 (times and amount of payment); Gaudalupe County *v.* Johnston, 1 Tex. Civ. App. 713, 20 S. W. 833 (simply stating that a contract was made as shown by an exhibit insufficient).

Washington.— O'Connor *v.* Jackson, 23 Wash. 224, 62 Pac. 761, parol contract.

West Virginia.— Capehart *v.* Hale, 6 W. Va. 547, vendor plaintiff must allege that defendant agreed to pay.

See 44 Cent. Dig. tit. "Specific Performance," § 357.

The rule will be relaxed in a bill for specific performance (in effect a creditor's bill) brought by creditors of a deceased contracting party. Light St. Bridge Co. *v.* Bannon, 47 Md. 129.

Exhibit.— That the contract, made an exhibit to the bill, controls the allegations of the bill see Dreyer *v.* Goldy, 62 Ill. App. 347.

Allegation of contract sufficiently definite see Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127. A bill for specific performance sufficiently set out the contract by alleging: That when complainant became of age his father agreed that, if complainant would remain at home until his mother's death, and do the housework, etc., which complainant did, the father would pay him more than he could earn elsewhere; that the property involved was purchased by the father to secure complainant a permanent business location and in consideration of such services; that the father while living claimed no interest in the property, and at different times stated that it was purchased for complainant pursuant to the agreement, and he would execute a deed, and he did execute one which was recorded; and that ever since its execution complainant had been in possession believing that his title was valid, although the deed was subsequently adjudged not to have been delivered. Stonehouse *v.* Stonehouse, 156 Mich. 43, 120 N. W. 23.

Time of performance.— Failure to allege the time agreed on for performance does not make the bill demurrable, since it is presumed, in the absence of the allegation, that the contract was to be performed in a reasonable time. Phillips *v.* Jones, 79 Ark. 100, 95 S. W. 164. See Starkey *v.* Starkey, 136 Ind. 349, 36 N. E. 287.

59. Patillo *v.* Jones, 113 Ga. 330, 38 S. E. 745; Byars *v.* Thompson, 80 Tex. 468, 15 S. W. 1087.

60. Cox *v.* Cox, 59 Ala. 591; Tumlinson

that there shall be an adequate consideration and that the contract shall be, as to the party against whom it is to be enforced, just and reasonable.[61] In California it is held that the complaint must show the adequacy of the consideration and that the contract is, as to defendant, just and reasonable, and that it would not be inequitable to enforce it;[62] but in Montana the inadequacy of the consideration is with more reason treated as a matter of defense.[63]

c. Description of the Land. The bill or complaint must describe the land with sufficient certainty to enable the court to enter a decree upon the allegations of the bill or complaint; or at least with such certainty that the court may ascertain the boundaries of the land by ordering a survey.[64]

4. Contracts Within the Statute of Frauds. Ordinarily, when it is alleged

v. York, 20 Tex. 694, bond under seal, but reciting no consideration.

But an obligation acknowledging the consideration may be sued on without averment. Younger *v.* Welch, 22 Tex. 417.

61. See *supra*, IV, D, 1, a; IV, D, 2, a.

62. Kaiser *v.* Barron, 153 Cal. 788, 96 Pac. 806; Herzog *v.* Atchison, etc., R. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. N. S. 428; White *v.* Sage, 149 Cal. 613, 87 Pac. 193; Flood *v.* Templeton, 148 Cal. 374, 83 Pac. 148; Fleishman *v.* Woods, 135 Cal. 256, 67 Pac. 276; Stiles *v.* Cain, 134 Cal. 170, 66 Pac. 231; Prince *v.* Lamb, 128 Cal. 120, 60 Pac. 689; Windsor *v.* Miner, 124 Cal. 492, 57 Pac. 386; Stiles *v.* Hermosa Beach Land, etc., Co., 8 Cal. App. 352, 97 Pac. 91; Kerr *v.* Moore, 6 Cal. App. 305, 92 Pac. 107.

Complaint sufficient.—A complaint to enforce specific performance of a contract to convey land, specifically alleging that specified service rendered, and a specified sum agreed to be paid for the premises, was and is a just, fair, and adequate consideration and price for the land therein described, is not obnoxious to demurrer on the ground that it fails to present facts enabling the court to say that the consideration is adequate and the contract just and reasonable. Brown *v.* Sebastopol, 153 Cal. 704, 96 Pac. 363, 19 L. R. A. N. S. 178. And a complaint in a suit to enforce specific performance of a contract, which alleges the execution of the contract as set out, consisting of a lease and an option to the lessee to purchase during the term at a fixed price, and which avers that the lessee elected to purchase, that the contract was fair and reasonable, that the price agreed on was in fair proportion to the value of the property, and prays for the reformation of the contract relating to the rights of the parties in the event the lessee does not purchase under the option, shows a contract sufficiently certain on its face to support a suit for performance, especially after the contract has been reformed as prayed for. Swanston *v.* Clark, 153 Cal. 300, 95 Pac. 1117.

63. Finlen *v.* Heinze, 28 Mont. 548, 73 Pac. 123. But see Mayger *v.* Cruse, 5 Mont. 485, 6 Pac. 333.

64. *District of Columbia.*— McCormick *v.* Hammersley, 1 App. Cas. 313.

Florida.— Lente *v.* Clarke, 22 Fla. 515, 1 So. 149, but not necessary to allege that defendant has only one tract answering the description.

Georgia.— Askew *v.* Carr, 81 Ga. 685, 8 S. E. 74.

Illinois.— Hecke *v.* Meyer, 68 Ill. App. 65.

Indiana.— See Kirkman *v.* Kenyon, 17 Ind. 607, where plaintiff seeks a decree allowing him to make a selection.

Kentucky.— Gray *v.* Davis, 3 J. J. Marsh. 381.

Maryland.—Sanderson *v.* Stockdale, 11 Md. 563, agreement to give mortgage.

Massachusetts.— A bill for the specific performance of a contract to convey real property set out a memorandum of the sale, describing the property as "the three houses belonging to the Frances Dodge estate in Danvers," and another memorandum describing the property as "the three houses and land that rightfully belongs thereto, in Danvers, belonging to the Dodge estate." It was held that the bill must set out in substance that the three houses referred to in the memoranda were the only ones owned by defendant in the town, as otherwise it would be demurrable. Harrigan *v.* Dodge, 200 Mass. 357, 86 N. E. 780.

Minnesota.— Williams *v.* Langevin, 40 Minn. 180, 41 N. W. 936, if description uncertain, its falsity is ground for defense, not for demurrer.

North Carolina.— Mallory *v.* Mallory, 45 N. C. 80; Allen *v.* Chambers, 39 N. C. 125.

Oregon.— Bogard *v.* Barhan, 52 Oreg. 121, 96 Pac. 673.

See 44 Cent. Dig. tit. "Specific Performance," § 363.

Survey.— Where the bill averred that, pursuant to the contract, the survey was made, and the exact description and area of the tract agreed to be sold ascertained, it was held sufficient as against demurrer to show that any uncertainty in the description in the contract was removed. Wilkins *v.* Hardaway, 159 Ala. 565, 48 So. 678.

The value of the land need not be alleged. Brainard *v.* Jordan, (Tex. Civ. App. 1901) 60 S. W. 784.

Description of choses in action see Shockley *v.* Davis, 17 Ga. 177, 63 Am. Dec. 233.

Uncertainty cured.— That uncertainty of the description in the contract may be removed by a description in the bill and answer see Connell *v.* Mulligan, 13 Sm. & M. (Miss.) 388.

Correctness of description admitted in answer see Sprague *v.* Jessup, 48 Oreg. 211, 83 Pac. 145, 84 Pac. 802, 4 L. R. A. N. S. 410.

that parties entered into an agreement for the sale of land, it will be assumed, if nothing else appears, that the agreement is in writing. The bill or complaint need not aver that the contract is in writing.[65] If, however, the bill or complaint shows that the contract was by parol, and was one which by the statute of frauds is required to be in writing, it must clearly and distinctly allege such facts, constituting acts of part performance, as will take the contract out of the statute.[66]

5. Defendant's Ability to Perform — a. In General. The bill or complaint need not, according to the weight of authority, allege defendant's ability to perform, as his inability is a matter of defense; it is sufficient if it does not appear therefrom that performance is impossible.[67] Some of the cases, however, are to the contrary.[68]

b. Defendant's Title. The title of the defendant vendor need not be shown, when plaintiff is entitled to a conveyance of whatever interest defendant may have.[69]

65. *Alabama.*— Trammell *v.* Craddock, 93 Ala. 450, 9 So. 587.

California.— Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Nunez *v.* Morgan, 77 Cal. 427, 19 Pac. 753.

Georgia.— Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127.

Illinois.— Fowler *v.* Fowler, 204 Ill. 82, 68 N. E. 414.

Minnesota.— Benton *v.* Schulte, 31 Minn. 312, 17 N. W. 621.

Missouri.— Young Men's Christian Assoc. *v.* Dubach, 82 Mo. 475; Wildbahn *v.* Robidoux, 11 Mo. 659.

South Carolina.— Hubbell *v.* Courtney, 5 S. C. 87.

South Dakota.— Sundback *v.* Gilbert, 8 S. D. 359, 66 N. W. 941.

West Virginia.—Capehart *v.* Hale, 6 W. Va. 547.

Wisconsin.— Pettit *v.* Hamlyn, 43 Wis. 314.

See 44 Cent. Dig. tit. "Specific Performance," § 361.

Contra.— In Indiana, the contract is presumed to be in parol if there is no averment that it is in writing. Percifield *v.* Black, 132 Ind. 384, 31 N. E. 955. And see Titus *v.* Taylor, (N. J. Ch. 1907) 65 Atl. 1003.

66. *Arkansas.*— Underhill *v.* Allen, 18 Ark. 466.

California.— Fowler *v.* Sutherland, 68 Cal. 414, 9 Pac. 674.

Indiana.— Judy *v.* Gilbert, 77 Ind. 96, 40 Am. Rep. 289; Moore *v.* Higbee, 45 Ind. 487.

Michigan.— Bomier *v.* Caldwell, 8 Mich. 463.

Vermont.— Meach *v.* Stone, 1 D. Chipm. 182, 6 Am. Dec. 719.

See 44 Cent. Dig. tit. "Specific Performance," § 361.

If it appears from the bill that there was no sufficient memorandum within the statute of frauds, and acts of part performance are not alleged, the bill is demurrable. Miller *v.* Burt, 196 Mass. 395, 82 N. E. 39; Chambers *v.* Lecompte, 9 Mo. 575.

Possession.— Complainant, in a suit to specifically enforce a contract to convey land, having been in possession since a certain date, should show that fact in his bill. Krah *v.* Wassmer, (N. J. Ch. 1908) 71 Atl. 404.

67. Greenfield *v.* Carlton, 30 Ark. 547; Harrigan *v.* Dodge, 200 Mass. 357, 86 N. E. 780 (holding that in an action to compel the specific performance of a contract to transfer real estate, the bill is not demurrable for failure to allege that defendant was the owner of the property, as inability to perform the contract is a matter of defense); Borden *v.* Curtis, 46 N. J. Eq. 468, 19 Atl. 127; Jacobson *v.* Rechnitz, 46 Misc. (N. Y.) 135, 93 N. Y. Suppl. 173.

68. See Caylor *v.* Caylor, 22 Ind. App. 666, 52 N. E. 465, 72 Am. St. Rep. 331 (holding that one seeking to enforce a promise to deliver all of a decedent's property must allege that the estate is solvent or that it has been settled); Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007.

Insufficient allegation.—An allegation in an action for specific performance that defendant has made no effort to carry out the contract is not an equivalent of an allegation that defendant is able to do so, as the failure to make the effort may be based on knowledge of its futility. Lyons *v.* American Cigar Co., 121 La. 593, 46 So. 662.

69. *California.*— King *v.* Gildersleeve, 79 Cal. 504, 21 Pac. 961.

Colorado.— See Rice *v.* Bush, 16 Colo. 484, 27 Pac. 720.

Indiana.— Cottrell *v.* Cottrell, 81 Ind. 87.

Minnesota.— Seager *v.* Burns, 4 Minn. 141, defendants joined with vendor because they claim an interest in the property; sufficient to allege that mere fact.

Montana.— Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007.

New York.— Moore *v.* Burrows, 34 Barb. 173. But see Broder *v.* Gordon, 50 Misc. 282, 100 N. Y. Suppl. 463.

Washington.— See Hankle *v.* Denison, 34 Wash. 51, 74 Pac. 822, sufficient to allege that at time of the contract defendant was owner.

West Virginia.— Loar *v.* Wilfong, 63 W. Va. 306, 61 S. E. 333, holding that in a suit for specific performance of a written agreement to convey certain land on terms named and place the vendee in possession, an allegation that the vendor being or pretending to be seized and possessed in fee simple of the land, describing it, and being

But where the bill or complaint shows that the vendor has no title, the suit will be dismissed.[70]

6. Defendant's Default. The defendant's failure or refusal to perform must clearly appear from the bill or complaint.[71]

7. Performance by Plaintiff — a. Conditions Preeedent. The bill or complaint must show that plaintiff has performed the conditions precedent imposed upon him by the contract, or excuse non-performance.[72]

b. General Averment. A general averment of performance by plaintiff of conditions, or of all things necessary to entitle him to relief, is sufficient, under some statutes or decisions; [73] but insufficient, under others, on the ground that the

so seized on that day, to wit, etc., is a sufficient averment of title in the vendor.

See 44 Cent. Dig. tit. "Specific Performance," § 364.

The complaint need not allege that defendant is the owner of the land when the action is brought, where it does allege that he was owner when he made the offer. Ide *v.* Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17.

Defendant's ownership of personal property.— For sufficient averments see Livesley *v.* Johnston, 45 Oreg. 30, 76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783; Manton *v.* Ray, 18 R. I. 672, 29 Atl. 998, 49 Am. St. Rep. 811, 19 R. I. 423, 36 Atl. 1125.

70. Williams *v.* Mansell, 19 Fla. 546; Messenger *v.* Chambers, 53 Misc. (N. Y.) 117, 103 N. Y. Suppl. 1100. So, where the bill shows that the vendor cannot make a good title, and plaintiff does not ask for such title as the vendor may have, but only for a good title. Knox *v.* Spratt, 19 Fla. 817.

71. *Arizona.*— Mallory *v.* Globe Boston Copper Min. Co., (1908) 94 Pac. 1116.

California.— Lattin *v.* Hazard, 85 Cal. 58, 24 Pac. 611; Dodge *v.* Clark, 17 Cal. 586.

District of Columbia.—Woarms *v.* Hammond, 5 App. Cas. 338, averment of defendant's "neglect," after demand, to execute deed, sufficient.

Louisiana.—A petition, filed within seven months from the making of a contract, which alleges that defendant agreed to deliver a certain quantity of lumber within ten months, that defendant has delivered a part thereof, that defendant is about to sell all of its property in and permanently remove his business from the state, but which does not allege that defendant is in default on its contract or intends making default, or that the alleged contemplated sale and removal will result in such default, discloses no cause of action for either specific performance or the recovery of damages. E. Sondheimer Co. *v.* Richland Lumber Co., 121 La. 786, 46 So. 806. Where the petition alleges that plaintiff has elected to accept an option whereby under a contract with defendant for the delivery of five million feet of lumber an additional five million feet were to be delivered at prices to be fixed under certain conditions by a third person, and there is no allegation that the prices have been fixed, and plaintiff prays judgment condemning defendant to deliver the lumber, an exception of no cause of action should be sustained, and the demand is properly rejected. Southern Sawmill Co. *v.* Baldwin Lumber Co., 120 La. 975, 45 So. 961.

New York.— De Lacy *v.* Walcott, 2 Misc. 132, 21 N. Y. Suppl. 619.

Texas.— See Holman *v.* Criswell, 15 Tex. 394.

United States.—Where in a suit to enforce specific performance of a contract to purchase a pulp drier and to pay therefor in pulp at twelve dollars per ton, with leave to sell pulp to farmers, the bill alleged that all defendant's dried pulp was shipped on its own account direct to the L Milling Co., and that defendant had refused to deliver pulp to complainant, it impliedly negatived the claim that defendant sold pulp to farmers at thirteen dollars a ton, for which complainant was entitled to an accounting. Sugar Beets Product Co. *v.* Lyons Beet Sugar Refining Co., 161 Fed. 215.

But that a plaintiff claiming specific performance of a marriage settlement by his father need not set out his father's will made in violation of the settlement see Harrington *v.* McLean, 62 N. C. 258.

72. *California.*— Chadbourne *v.* Stockton Sav., etc., Soc., 88 Cal. 636, 26 Pac. 529.

Indiana.— Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880; Norris *v.* Norris, 3 Ind. App. 500, 28 N. E. 1014.

Kansas.—Armstrong *v.* Wyandotte Bridge Co., McCahon 167.

Kentucky.— Passmore *v.* Moore, 1 J. J. Marsh. 591.

Louisiana.— Horn *v.* Graffagnino, 121 La. 263, 46 So. 305.

Mississippi.— Harper *v.* Lacey, 62 Miss. 5, payment.

Nebraska.— Fisher *v.* Buchanan, 2 Nebr. (Unoff.) 158, 96 N. W. 339.

New Jersey.— New York, etc., R. Co. *v.* Lawton, 35 N. J. Eq. 386, performance should be shown by specific and positive averment, and not on information and belief.

New York.— Strong *v.* Harris, 84 Hun 314, 32 N. Y. Suppl. 349.

See 44 Cent. Dig. tit. "Specific Performance," § 365.

Conditions to be performed by defendant. — That complaint need not allege the performance of conditions which were to be performed by defendant or which depend on him for performance see Fanning *v.* Lehman, 123 N. Y. App. Div. 906, 107 N. Y. Suppl. 331; Downs *v.* Lehman, 123 N. Y. App. Div. 11, 107 N. Y. Suppl. 329.

73. Burke *v.* Mead, 159 Ind. 252, 64 N. E.

court must be allowed to judge of the extent of plaintiff's obligations.[74] If the complaint states facts showing the performance of the condition, a general averment of performance by plaintiff is unnecessary.[75]

c. Offer or Tender Before Suit. The averments as to offer or tender before suit vary with the rules obtaining in different states as to the necessity and form of such offer or tender.[76] It is frequently said, broadly, that the bill or complaint must show that plaintiff has performed or offered to perform all the stipulations of the contract on his part; or must show a sufficient excuse for his failure to do so, and aver his readiness and willingness to perform.[77]

8. Plaintiff's Readiness and Willingness. Plaintiff should show his readiness and willingness to perform his unperformed part of the contract.[78] The allega-

880 (under Rev. St. (1901) § 373); Daily *v.* Litchfield, 10 Mich. 29; Pomeroy *v.* Fullerton, 113 Mo. 440, 21 S. W. 19 (need not allege payment or tender); De Ford *v.* Hyde, 10 S. D. 386, 73 N. W. 265; Sundeback *v.* Gilbert, 8 S. D. 359, 66 N. W. 941 (under Comp. Laws, § 4927).

74. Short *v.* Kieffer, 142 Ill. 258, 31 N. E. 427 [*affirming* 43 Ill. App. 515]; Davis *v.* Harrison, 4 Litt. (Ky.) 261; Jones *v.* Jones, 49 Tex. 683.

75. Elsbury *v.* Shull, 32 Ind. App. 556, 70 N. E. 287.

76. See *supra*, VI, C.

77. *Alabama.*— Cox *v.* Boyd, 38 Ala. 42. Bill insufficient see Mitchell *v.* Wright, 155 Ala. 458, 46 So. 473.

Georgia.—A general allegation, in a petition for specific performance, of an unconditional and continued tender, made within the time specified in the contract, is good, as against a general demurrer, and, if defendant desires a more definite allegation with respect to the tender, he should call for it by special demurrer. Crovatt *v.* Baker, 130 Ga. 507, 61 S. E. 127.

Montana.— Mayger *v.* Cruse, 5 Mont. 485, 6 Pac. 333.

North Carolina.—Wilson *v.* Lineberger, 92 N. C. 547.

Pennsylvania.— Chess' Appeal, 4 Pa. St. 52, 45 Am. Dec. 668.

Washington.—O'Connor *v.* Jackson, 23 Wash. 224, 62 Pac. 761.

General averment.— That a general averment that plaintiff has offered and has always been ready and willing to comply with his contract is objectionable for want of particularity see Hart *v.* McClellan, 41 Ala. 251; Duff *v.* Fisher, 15 Cal. 375. But see St. Paul Div. No. 1 S. T. *v.* Brown, 9 Minn. 157.

When offer before suit not necessary see *supra*, VI, C; and Morris *v.* Hoyt, 11 Mich. 9.

That plaintiff must show a previous tender or offer to comply with his contract see Hart *v.* McClellan, 41 Ala. 251; Bell *v.* Thompson, 34 Ala. 633; McKleroy *v.* Tulane, 34 Ala. 78; Coleman *v.* Easterling, 93 Ga. 29, 18 S. E. 819; Dougherty *v.* Humpston, 2 Blackf. (Ind.) 273.

Excuse for failure to tender.— For sufficient averments of facts excusing tender see Meckel *v.* Johnson, 231 Ill. 540, 83 N. E. 209; De Wolf *v.* Pratt, 42 Ill. 198; Martin *v.* Merritt, 57 Ind. 34, 26 Am. Rep. 45; Deglow *v.* Meyer, 15 S. W. 875, 12 Ky. L. Rep. 954; Solomon Min. Co. *v.* Hadden, 148 Mich. 488, 111 N. W. 1040; Christiansen *v.* Aldrich, 30 Mont. 446, 76 Pac. 1007. A complaint for specific performance need not plead a tender where it shows that defendant had refused to carry out the terms of the contract, and that it would have been useless. Long *v.* Needham, 37 Mont. 408, 96 Pac. 731. Under supreme court rule 17, that in passing on a general demurrer "every reasonable intendment arising on the pleading shall be indulged in favor of its sufficiency," a petition for specific performance of a contract is not subject to a general demurrer because it shows that plaintiff did not tender performance within the contract time, where it also shows that defendant delayed furnishing an abstract, as agreed, and that plaintiff tendered performance within a reasonable time after the abstract was furnished. Robinson *v.* Collier, (Tex. Civ. App. 1909) 115 S. W. 915.

Demand.— That plaintiff must show a demand upon defendant or some sufficient excuse for failure to make a demand see Carter *v.* Thompson, 41 Ala. 375; Bell *v.* Thompson, 34 Ala. 633; Burns *v.* Fox, 113 Ind. 205, 14 N. E. 541; Blasingame *v.* Blasingame, 24 Ind. 86.

78. *California.*— Frixen *v.* Castro, 58 Cal. 442.

Illinois.— Dintleman *v.* Gilbert, 140 Ill. 597, 30 N. E. 766, must offer payment.

Indiana.— Moore *v.* Higbee, 45 Ind. 487; Garrick *v.* Garrick, (App. 1909) 87 N. E. 696, 88 N. E. 104.

Louisiana.— Joffrion *v.* Gumbel, 123 La. 391, 48 So. 1007; Horn *v.* Graffaquino, 121 La. 263, 46 So. 305.

Maine.— Hubbard *v.* Johnson, 77 Me. 139, amendment offering balance shown due by accounting.

Massachusetts.— Thaxter *v.* Sprague, 159 Mass. 397, 34 N. E. 541; Wass *v.* Mugridge, 128 Mass. 394.

Missouri.— Lumley *v.* Robinson, 26 Mo. 364.

New York.— Thomson *v.* Smith, 63 N. Y. 301, vendor.

North Carolina.— Oliver *v.* Dix, 21 N. C. 605.

Virginia.— Hoover *v.* Baugh, 108 Va. 695, 62 S. E. 968, 128 Am. St. Rep. 985. In a suit for specific performance of an agreement

tion of ability and willingness, however, is a formal one, and may be made in very general terms.[79]

9. Prayer For General Relief. Under the prayer for general relief in an equitable suit specially praying for other relief, specific performance may be had, if the statements in the body of the bill make out a case for specific performance.[80] Under the prayer for general relief in a specific performance suit various kinds of money relief have been held proper.[81]

10. Joinder of Causes of Action. Under the codes, a complaint which states

to convey land, an allegation that complainant and its predecessors in interest were at all times ready, able, and willing to carry out their part of the contract is not sufficient, where the admitted facts on the face of the bill contradict such allegations. Clinchfield Coal Co. *v.* Clintwood Coal, etc., Co., 108 Va. 433, 62 S. E. 329.

West Virginia.— Clay *v.* Deskins, 36 W. Va. 350, 15 S. E. 85.

United States.— Horton *v.* McKee, 68 Fed. 404.

See 44 Cent. Dig. tit. "Specific Performance," §§ 367, 368.

But a vendor's bill is not demurrable for failure to state a readiness to convey, when he pleads a previous tender. Lee *v.* Electric Typographic Co., 68 Fed. 519.

79. Jenkins *v.* Harrison, 66 Ala. 345; Kissack *v.* Bourke, 224 Ill. 352, 79 N. E. 619; Clexton *v.* Tunnard, 119 N. Y. App. Div. 709, 104 N. Y. Suppl. 665; McClaskey *v.* Albany, 64 Barb. (N. Y.) 310, sufficient offer.

The allegation of readiness has been held to be unnecessary, since it is implied by bringing the suit. Hatcher *v.* Hatcher, McMull. Eq. (S. C.) 311.

Waiver of objection.— The omission of the offer to perform is not fatal, where such omission is not objected to. Crosby *v.* Moses, 48 N. Y. Super. Ct. 146.

Amendment.— It may be supplied by amendment. Hubbard *v.* Johnson, 77 Me. 139 (where accounting shows balance due); Chess' Appeal, 4 Pa. St. 52, 45 Am. Dec. 668. See *infra*, XI, E, 3 note 26.

Payment of taxes.—An offer of payment and full performance includes taxes which plaintiff is required by the contract to pay. Morris *v.* Hoyt, 11 Mich. 9.

Where account necessary to ascertain balance due.— If plaintiff pleads a willingness to pay whatever sum is due, it is immaterial that he states incorrectly the balance due (Hull *v.* Peer, 27 Ill. 312; Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247; International Paper Co. *v.* Hudson River Water Power Co., 92 N. Y. App. Div. 56, 86 N. Y. Suppl. 736); or that he alleges that full payment had been made (Mix *v.* Beach, 46 Ill. 311); but it is held that plaintiff must show the balance due or that there is a dispute on that point (Wakeham *v.* Barker, 82 Cal. 46, 22 Pac. 1131); that he must show the balance due, or state good reasons why he could not ascertain the balance, and allege a tender of a specific sum (Coleman *v.* Easterling, 96 Ga. 29, 18 S. E. 819).

Plaintiff's title.— For sufficient averments as to title of vendor, plaintiff, see Daily *v.* Litchfield, 10 Mich. 29, that he held his lands in fee simple. For insufficient averments see Goodkind *v.* Bartlett, 153 Ill. 419, 38 N. E. 1045 (pleading taken most strongly against the pleader); Page *v.* Greeley, 75 Ill. 400 (to permit evidence of waiver of defects in title must allege waiver); Freeman *v.* Stokes, 12 Phila. (Pa.) 219 (married woman must show her right to convey); Low *v.* Heck, 3 W. Va. 680 (title to patents).

80. Williamson *v.* Warfield, etc., Co., 136 Ill. App. 168 [*affirmed* in 233 Ill. 487, 84 N. E. 706]; Shenandoah Valley R. Co. *v.* Dunlop, 86 Va. 346, 10 S. E. 239; Taylor *v.* Merchants' F. Ins. Co., 9 How. (U. S.) 390, 406, 13 L. ed. 187; Hepburn *v.* Dunlop, 1 Wheat. (U. S.) 179, 4 L. ed. 65, bill for rescission. Under Civ. Code Pr. § 90, providing if no defense be made plaintiff cannot have judgment for any relief not specifically demanded, but, if defense be made, he may have judgment for other relief under a prayer therefor, although the only specific prayer is for damages, yet there being a general one for all "proper and equitable relief," and a defense being made, there may, in addition to a judgment for damages, be a decree for specific performance; the facts pleaded and proved showing a right thereto. Illinois Cent. R. Co. *v.* Davidson, (Ky. 1909) 115 S. W. 770.

That a bill without general or special prayer is sufficient if it makes out a case for specific performance and the defect is not questioned see Smith *v.* Smith, 4 Rand. (Va.) 95.

Bill for rescission.— But that plaintiff cannot have specific performance on a bill for rescission under the general prayer see Rochester *v.* Anderson, Litt. Sel. Cas. (Ky.) 143.

In action for partition.— Under the code, in an action for partition, plaintiffs cannot have a decree for specific performance of a contract to divide the estate, such relief not being prayed for. Strong *v.* Harris, 84 Hun (N. Y.) 314, 32 N. Y. Suppl. 349.

In suit for damages.— That specific performance cannot be granted in a suit for damages see Towle *v.* Jones, 1 Rob. (N. Y.) 87, 19 Abb. Pr. 449. *Contra*, Kuntz *v.* Schnugg, 99 N. Y. App. Div. 191, 90 N. Y. Suppl. 933. And see Bateman *v.* Straus, 86 N. Y. App. Div. 540, 83 N. Y. Suppl. 785.

81. *Illinois.*— Cushman *v.* Bonfield, 139 Ill. 219, 28 N. E. 937 [*affirming* 36 Ill. App. 436]; Barlow *v.* McDowell, 118 Ill. App. 500.

Iowa.— Saunders *v.* King, 119 Iowa 291, 93 N. W. 272, judgment for costs.

Minnesota.— Sanborn *v.* Nockin, 20 Minn.

facts justifying either specific performance or damages, and praying for damages in case specific performance is impossible, states but one cause of action. The relief sought does not constitute any part of the cause of action.[82]

D. Other Pleadings — 1. Demurrer.[83] It has been held that a general demurrer does not raise the question whether the court, in its discretion, on consideration of all the equitable circumstances of the case, should enforce specific performance;[84] and that the question of the adequacy of the legal remedy, apparent on the face of the bill, is waived unless taken by demurrer.[85]

2. Answer or Plea[86] **— a. Defense of Adequate Remedy at Law.** By the rule in some states the defense that plaintiff's remedy at law is adequate must be pleaded, and if it is not, defendant cannot raise the objection at the trial.[87]

b. Defense of Statute of Frauds. By the generally established rule, if defendant admits the contract and does not set up the statute of frauds, he cannot have the benefit of the statute,[88] while under a denial of the contract, although the

178, damages for refusal of defendant's wife to join in the deed.

North Carolina.— Wilkie *v.* Womble, 90 N. C. 254 (parol contract; recovery of consideration paid); Capps *v.* Holt, 58 N. C. 153 (under general prayer and offer in answer to account, may have account and repayment).

Tennessee.— Allum *v.* Stockbridge, 8 Baxt. 356, recovery of consideration paid.

United States.— Watts *v.* Waddle, 6 Pet. 389, 8 L. ed. 437, rents and profits.

Canada.— Clark *v.* Ely, 11 Grant Ch. (U. C.) 98.

That a lien created by the contract may be enforced under the general prayer see Kirksey *v.* Means, 42 Ala. 426.

Contra.— Relief has been refused in some cases under the general prayer. Yost *v.* Devault, 9 Iowa 60 (damages); Rush *v.* Brown, 101 Mo. 586, 14 S. W. 735 (on account of the language of the Code; Rev. St. (1889) § 2039); Smith *v.* Smith, 36 N. C. 83 (compensation for improvements); Hall *v.* Layton, 10 Tex. 55 (damages). See Davis *v.* Cleaves, 5 Litt. (Ky.) 142.

Relief must be germane to prayer for specific performance.— That relief to be authorized under the prayer for general relief must be germane to the prayer for specific performance see White *v.* Sikes, 129 Ga. 508, 59 S. E. 228, 121 Am. St. Rep. 228.

Indemnity against inchoate dower.— It has been held that under the general prayer indemnity against the wife's inchoate dower may be had. Hession *v.* Linastruth, 96 Iowa 483, 65 N. W. 399. *Contra*, Bradley *v.* Johnson, 36 N. J. Eq. 66.

That partial performance with compensation or indemnity cannot be had unless specially prayed for see Campbell *v.* Hough, 72 N. J. Eq. 601, 68 Atl. 759; Milmoe *v.* Murphy, 65 N. J. Eq. 767, 56 Atl. 292.

If there is no prayer for general relief, and the bill does not justify specific performance, it must be dismissed, although the plaintiff may have been entitled to some other relief. Laird *v.* Boyle, 2 Wis. 431. And see McDole *v.* Kingsley, 163 Ill. 433, 45 N. E. 281.

82. San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549, 41 Pac. 495, 29 L. R. A. 839.

Multifariousness.— But where B bought the land from A and sold it to C, it was held that B could not in the same bill compel A to convey to B and C to accept conveyances from B. Reed *v.* Noe, 9 Yerg. (Tenn.) 283.

Bill framed in double aspect.— It is no objection to a bill that it prays for specific performance of a contract to convey land, and also to enforce a trust resulting from the payment for the land with plaintiff's money, if the title to relief will be the same in either alternative. Gerrish *v.* Towne, 3 Gray (Mass.) 82.

83. See, generally, Equity, 16 Cyc. 261 *et seq.*

84. Standard Fashion Co. *v.* Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 68 Am. St. Rep. 749, 43 L. R. A. 854 [*affirming* 30 N. Y. App. Div. 564, 52 N. Y. Suppl. 433] (function of demurrer commented upon); Cheney *v.* Cook, 7 Wis. 413.

85. Sunbury, etc., R. Co. *v.* Cooper, 33 Pa. St. 278.

86. See, generally, Equity, 16 Cyc. 297 *et seq.*

87. Le Vie *v.* Fenlon, 39 Misc. (N. Y.) 265, 79 N. Y. Suppl. 496; Goldberg *v.* Kirschstein, 36 Misc. (N. Y.) 249, 73 N. Y. Suppl. 358 (plaintiff cannot demur to such defense); Stuyvesant *v.* Weil, 26 Misc. (N. Y.) 445, 57 N. Y. Suppl. 592 [*reversed* on other grounds in 41 N. Y. App. Div. 551, 58 N. Y. Suppl. 697 (*reversed* in 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 870)].

But that no affirmative allegation of plaintiff's remedy at law was necessary where plaintiff's allegation of irreparable damage was denied see Butler *v.* Wright, 103 N. Y. App. Div. 463, 93 N. Y. Suppl. 113 [*reversed* on other grounds in 186 N. Y. 259, 78 N. E. 1002].

That plaintiff's remedy at law must be shown to be adequate see Gray *v.* Citizens' Gas Co., 206 Pa. St. 303, 55 Atl. 988.

88. Douglass *v.* Snow, 77 Me. 91; Mausert *v.* Feigenspan, 68 N. J. Eq. 671, 63 Atl. 610, 64 Atl. 801 (parol modification); Walker *v.* Hill, 21 N. J. Eq. 191; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; Ridgway *v.* Wharton, 3 De G. M. & G. 677, 6 H. L. Cas. 238, 2 Eq. Rep. 839, 2 Wkly. Rep. 137, 52 Eng. Ch. 528, 43 Eng. Reprint 266 [*affirmed* in 4 Jur. N. S. 173, 27 L. J. Ch. 46,

statute of frauds is not pleaded, he may have the benefit of the statute; plaintiff must then prove a contract in writing.[89]

c. Vendor's Title. By the rule in some jurisdictions, in order to entitle the vendee to an exhibition of the vendor's title, he must allege either an entire want of title, or point out the particular defects of which he complains.[90] But by the original chancery practice the objection need not be stated in the answer, or taken until the hearing before the master, on reference to settle the terms of the conveyance.[91]

d. Laches. According to the prevailing rule, plaintiff's laches not set up in defense will not prevent a specific performance.[92]

e. Other Matters of Defense.[93] Various other matters of defense which, it has been held, must be directly pleaded in the answer, are plaintiff's fraud;[94] appraiser's fraud, misconduct, or mistake;[95] homestead right in the land;[96] mutual abandonment;[97] and the vendor's wife's unwillingness to join in the deed.[98] But the facts which would render the remedy a hardship are not new matter.[99] Under a general

5 Wkly. Rep. 804, 10 Eng. Reprint 1287]. *Contra*, under the doctrine that an oral sale is void Asher *v.* Brock, 95 Ky. 270, 24 S. W. 1070, 15 Ky. L. Rep. 631.

If defendant in his answer admits the contract, he yet may avoid it by pleading the statute of frauds. Barnes *v.* Teague, 54 N. C. 277, 62 Am. Dec. 200; Thompson *v.* Tod, 23 Fed. Cas. No. 13,978, Pet. C. C. 380. *Contra*, Smith *v.* Brailsford, 1 Desauss. Eq. (S. C.) 350.

89. Bradley Real Estate Co. *v.* Robbins, 7 Indian Terr. 94, 103 S. W. 777; Wildbahn *v.* Robidoux, 11 Mo. 659; Walker *v.* Hill, 21 N. J. Eq. 191; Dunn *v.* Moore, 38 N. C. 364.

90. Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013, 13 Ky. L. Rep. 905; Logan *v.* Bull, 78 Ky. 607; Daily *v.* Litchfield, 10 Mich. 29, what denial insufficient. And see Skillman *v.* Hamilton, 1 Bush (Ky.) 248; Ochs *v.* Kramer, 107 S. W. 260, 32 Ky. L. Rep. 762, 108 S. W. 235, 32 Ky. L. Rep. 1205, answer shows title to be good. It has been held, however, that a contract to purchase land will not be specifically enforced where the defense of want of marketable title is shown by evidence not excepted to. Shea *v.* Evans, 109 Md. 229, 72 Atl. 600.

Defendant must offer to restore possession of the premises and rescind the contract. Lanyon *v.* Chesney, 186 Mo. 540, 85 S. W. 568.

91. Park *v.* Johnson, 7 Allen (Mass.) 378; Warren *v.* Richardson, Younge 1.

92. Peck *v.* Brighton Co., 69 Ill. 200; Thompson *v.* Colby, 127 Iowa 234, 103 N. W. 117; Vardeman *v.* Lawson, 17 Tex. 10; Hunter *v.* Marlboro, 12 Fed. Cas. No. 6,908, 2 Woodb. & M. 168. *Contra*, Hagerman *v.* Bates, 5 Colo. App. 391, 38 Pac. 1100; Poston *v.* Ingraham, 76 S. C. 167, 56 S. E. 780, laches may be considered at the hearing as a matter affecting the merits of the claim in the judicial conscience.

93. **Reply to new matter set up in answer** see Elston *v.* Jasper, 45 Tex. 409.

Evasive denial.—For illustration see Minor *v.* Willoughby, 3 Minn. 225, holding that denial of notice of the contract by a purchaser from the vendor must be full, positive, and precise.

Not evasive see Louisville, etc., R. Co. *v.* Philyaw, 94 Ala. 463, 10 So. 83; Mahana *v.* Blunt, 20 Iowa 142; Buttrick *v.* Holden, 13 Metc. (Mass.) 355, statement of matters of belief.

Denial not admitting the contract see Auter *v.* Miller, 18 Iowa 405.

Frivolous defense.— Examples see Oliver *v.* Croswell, 42 Ill. 41; Ochs *v.* Kramer, 107 S. W. 260, 32 Ky. L. Rep. 762, 108 S. W. 235, 32 Ky. L. Rep. 1205. Not frivolous see Young *v.* Phifer, 72 N. C. 529.

94. Fitzpatrick *v.* Beatty, 6 Ill. 454.

95. Guild *v.* Atchison, etc., R. Co., 57 Kan. 70, 45 Pac. 82, 57 Am. St. Rep. 312, 33 L. R. A. 77.

96. Stevenson *v.* Jackson, 40 Mich. 702; Brown *v.* Eaton, 21 Minn. 409.

97. Lipscomb *v.* Amend, (Tex. Civ. App. 1908) 108 S. W. 483, holding also that in an action by a vendee to compel specific performance of a contract for the sale of land, no abandonment being pleaded, the admission of evidence of abandonment could not be justified as tending to show original bad faith on the part of the vendee and as affecting the credibility of his testimony, where the case was clearly not one of the vendee's original bad faith.

Offer to repay expenditures.—Where, in a suit to enforce specific performance of a contract, consisting of a lease for a specified term, and of an option to the lessee to purchase during the term at a fixed price, the complainant alleges the making of valuable improvements by the lessee on the faith of the option to purchase, an answer attempting to allege a rescission by the lessor of the contract, prior to the election by the lessee to purchase, which does not offer to repay the lessee the moneys expended by him in improvements on the land, but only to repay the moneys "paid" the lessor by the lessee, and "to restore everything received" by the lessor under the agreement, is insufficient on demurrer. Swanston *v.* Clark, 153 Cal. 300, 95 Pac. 1117.

98. Campbell *v.* Beard, 57 W. Va. 501, 50 S. E. 747.

99. Miles *v.* Dover Furnace Iron Co., 125 N. Y. 294, 26 N. E. 261.

denial of the existence of the contract, evidence of the illegality of the purpose for which the sale was made is admissible;[1] and where the complaint alleges agency and a sale under the authority conferred, these allegations are put in issue, and a special plea of excess of authority is not required.[2] In an action for specific performance of a contract, where the answer is a general denial, it is error to quiet defendant's title against plaintiff's claim to the property involved.[3]

f. Setting Up Different Contract. On a bill for specific performance, defendant cannot admit that there was a contract, and then set out a materially different contract from the one alleged in the bill, making the one so set out binding upon complainant, although the parties are bound by the statements in the answer in so far as they are admissions, or admissions without substantial variation from the bill; and, where defendant admits a substituted contract, complainant can have specific performance thereof, if he chooses to perform it on his part.[4]

3. Cross Bill, Cross Complaint, or Counter-Claim[5] — a. In the Specific Performance Suit. In a suit for specific performance defendant may file a cross bill, cross complaint, or counter-claim, and such cross pleading may be retained for full relief, although plaintiff's bill or complaint is dismissed.[6] A cross bill is not necessary, however, in order to secure performance by a plaintiff who in his bill offers to perform,[7] or to secure to a defendant vendee the return of the earnest money or deposit where the title offered is bad.[8]

b. Specific Performance For Defendant in Action at Law. It is common practice in the code states to decree specific performance on the answer, counter-claim, or cross complaint of defendant in ejectment.[9] And in New Hampshire it was held

1. Sprague *v.* Rooney, 104 Mo. 349, 16 S. W. 505.

2. Staten *v.* Hammer, 121 Iowa 499, 96 N. W. 964.

3. Mancuso *v.* Rosso, 81 Nebr. 786, 116 N. W. 679.

4. Krah *v.* Wassner, (N. J. Ch. 1908) 71 Atl. 404.

5. See, generally, EQUITY, 16 Cyc. 324 *et seq.*

Relief to defendant see *supra*, IX.

6. Gish *v.* Ferrea, 10 Cal. App. 53, 101 Pac. 27 (holding that in an action for specific performance of a contract to transfer land brought against the original owner of the land and her grantee, the grantee may by cross bill ask to have his title to the land quieted, as both the action for specific performance and that to quiet title are equitable, and relate to the same subject-matter); Grand Tower, etc., R. Co. *v.* Walton, 150 Ill. 428, 37 N. E. 920 (legal relief); Ralls *v.* Ralls, 82 Ill. 243 (retained for partition, after dismissal of bill); Hess *v.* Evans, (N. J. Ch. 1888) 15 Atl. 310; Balleisen *v.* Schiff, 121 N. Y. App. Div. 285, 105 N. Y. Suppl. 692 (counter-claim for return of deposit and damages; withdrawal of plaintiff's demand for specific performance does not oust court of jurisdiction).

For reformation see Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744; and *supra*, IX, A, 3.

Plaintiff must be given an opportunity to answer the cross bill. Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

Intervention and relief to cross parties.— For illustrations see Franklin *v.* Burris, 35 Colo. 512, 84 Pac. 809; Burris *v.* Anderson, 27 Colo. 506, 62 Pac. 362; Kelly *v.* Johnson, 135 N. C. 647, 47 S. E. 674.

7. Dorsey *v.* Campbell, 1 Bland (Md.) 356.

8. Adams *v.* Valentime, 33 Fed. 1. Where, in a suit for performance of a land contract, vendee showed an unmarketable title, he was entitled to recover his deposit, taxes paid, and expense of searching the title, under Court and Pr. Act (1905), § 316, providing that respondent may in an equity suit avail himself of any matter which would be open to him on a cross bill, by setting up the matter in his answer. Lowe *v.* Molter, (R. I. 1909) 71 Atl. 592.

9. Kaiser *v.* Barron, 153 Cal. 788, 96 Pac. 806 (under Civ. Code, § 3391, providing that specific performance cannot be enforced against a party to a contract, if he has not received an adequate consideration, or if it is not as to him just and reasonable, etc., where a cross complaint in ejectment sought specific performance of a contract for the sale of land, but neither alleged in general terms the adequacy of the consideration or the fairness of the contract, nor pleaded facts which would justify an inference that such conditions existed, it was insufficient to sustain a decree for specific performance. See also *supra*, XI, C, 3, b); Stockton *v.* Herron, 3 Ida. 581, 32 Pac. 257 (must show a contract that would sustain a bill for specific performance); Emily *v.* Harding, 53 Ind. 102 (but the relief cannot be had on a general denial in the ejectment action); Dyke *v.* Spargur, 143 N. Y. 651, 38 N. E. 269 (defendant must ask for the relief and show performance on his own part); Beebe *v.* Dowd, 22 Barb. (N. Y.) 255 (defendant may plead and have benefit of a tender made after eject-

that where, in an action at law, it appeared upon the facts found that a decree for specific performance of parol agreements would be ordered, on a bill filed for that purpose by defendant, the same result might be reached by appropriate amendments and orders, and that plaintiff might be entitled to a judgment and defendant to a decree.[10] In Massachusetts where, under the statute, a husband was entitled to avail himself of a contract for separate maintenance of his wife as an equitable defense to her suit for support in the probate court, it was held that the trustee through whom such agreement was made was not entitled to maintain a bill in equity to restrain the wife's proceeding, and to specifically enforce such agreement, because of the fact that specific performance might be had by way of equitable defense in the suit in the probate court.[11] But in Missouri it was held that, as the defendant in an unlawful detainer suit could not set up an equitable defense, he might sue in equity to enjoin such suit and procure a specific performance of an option to renew his lease.[12]

E. Proof, Variance, and Amendment — 1. Proof — a. Oral Contracts. The stringent requirements as to proof of oral contracts within the statute of frauds have been already noted.[13] Similar requirements have been asserted as to the proof of other oral contracts;[14] but in the absence of any such reason as applies to contracts required by statute to be in writing, it is doubtful whether there is any generally recognized necessity of an extraordinary degree of proof to warrant specific performance of other oral contracts.

b. Action Upon Lost Instrument. Where the action is upon an alleged lost instrument, the contract must be clearly established, and the terms free from doubt. The same degree of proof appears to be necessary as for the establishment of a parol contract within the statute of frauds.[15]

ment suit was brought); Magee *v.* Blankenship, 95 N. C. 563 (specific performance or compensation for improvements).

10. Joyce *v.* O'Neal, 64 N. H. 91, 6 Atl. 33. In this case it was held that, in an action on the case for obstructing a way claimed as appurtenant to plaintiff's land over land of defendant, it appearing that defendant and plaintiff's grantors, before the obstruction complained of, verbally agreed that plaintiff's grantor would surrender a portion of the way, and defendant would surrender a certain easement in plaintiff's land, and that the agreement was so far executed as to entitle the parties to maintain a bill in equity for specific performance, defendant might file such a bill as an amendment to his plea, with a release of his easement in plaintiff's land, and thereupon a decree might be made that plaintiff execute a release of the portion of the way agreed to be surrendered, and that plaintiff might have judgment for his damages for obstruction of the portion of the way not surrendered.

11. Bailey *v.* Dillon, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427.

12. Blount *v.* Connolly, 110 Mo. App. 603, 85 S. W. 605.

13. See *supra*, V, Q.

14. *Idaho.*— Thompson *v.* Burns, 15 Ida. 572, 99 Pac. 111 (evidence held insufficient); Prairie Development Co. *v.* Leiberg, 15 Ida. 379, 98 Pac. 616 (by clear and satisfactory evidence).

Illinois.— Elwell *v.* Hicks, 238 Ill. 170, 87 N. E. 316 (evidence insufficient); Fleischman *v.* Moore, 79 Ill. 539 (agreement to assign patent).

Nebraska.— Pereau *v.* Frederick, 17 Nebr. 117, 22 N. W. 235, to execute a mortgage.

New York.— Pickett *v.* Michaels, 120 N. Y. App. Div. 357, 105 N. Y. Suppl. 411.

Oregon.— Portland Iron Works *v.* Willett, 49 Oreg. 245, 89 Pac. 421, 90 Pac. 1000, employee's contract to assign inventions.

Pennsylvania.— Hale, etc., Mfg. Co. *v.* Norcross, 199 Pa. St. 283, 49 Atl. 80, same; although four witnesses testified for plaintiff, and defendant alone for himself.

Virginia.— Rockecharlie *v.* Rockecharlie, (1898) 29 S. E. 825, to transfer certificate in benefit society.

Wisconsin.—Hibbert *v.* Mackinnon, 79 Wis. 673, 49 N. W. 21, to sell stock; casual verbal admissions insufficient.

United States.— Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749; Hildreth *v.* Duff, 148 Fed. 676, 78 C. C. A. 410 [*affirming* 143 Fed. 139] (to assign patent); Pressed Steel Car Co. *v.* Hansen, 128 Fed. 444 [*affirmed* in 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. N. S. 1172] (same).

Contract between aged mother and her children.— Specific performance of a contract between an aged devisee and her children, under which the most of the property left to the widow is to be surrendered, will not be enforced unless the evidence is clear. *In re* Panko, 83 Nebr. 145, 119 N. W. 224.

15. Dunn *v.* McGovern, 116 Iowa 663, 88 N. W. 938; Madeira *v.* Hopkins, 12 B. Mon. (Ky.) 595; McKee *v.* Higbee, 180 Mo. 263, 79 S. W. 407; Tedford *v.* Trimble, 87 Mo. 226; Van Horn *v.* Munnell, 145 Pa. St. 497, 22 Atl. 985.

2. Variance Between Pleading and Proof[16] — **a. General Rule.** The general rule of equity is that plaintiff must prove the contract as laid in the bill, not some other contract.[17] But an immaterial variance is not fatal.[18]

b. Stringent Rule in Certain States. In a few states, an absolute correspondence is required not only between every essential averment and the proof, but also between every redundant and superfluous averment with respect to a material fact, or descriptive of a matter or thing necessary to be alleged. In no other class of cases is correspondence between the allegations of the bill and the proof more rigidly exacted.[19]

c. Code Rule.[20] The codes of procedure contain the rule that no variance

But where the execution of a bond for title and payment of the price was admitted, proof of its contents was not necessary, since what are the usual contents of a bond for title is well understood. Vardeman *v.* Lawson, 17 Tex. 10.

16. See, generally, EQUITY, 16 Cyc. 403 *et seq.*

17. *Alabama.*— McDonald *v.* Walker, 95 Ala. 172, 10 So. 225; Price *v.* Bell, 91 Ala. 180, 8 So. 565; Derrick *v.* Monette, 73 Ala. 75; Riddle *v.* Cameron, 50 Ala. 263; Ellerbe *v.* Ellerbe, 42 Ala. 643; Williams *v.* Barnes, 28 Ala. 613; Sims *v.* McEwen, 27 Ala. 184; Aday *v.* Echols, 18 Ala. 353, 52 Am. Dec. 225; Goodwin *v.* Lyon, 4 Port. 297. And see *infra*, XI, A, 2, b.

Delaware.— Burton *v.* Vessels, 5 Del. Ch. 568; McFarland *v.* Reeve, 5 Del. Ch. 118.

Georgia.— Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294.

Illinois.— Tiernan *v.* Granger, 65 Ill. 351.

Maryland.— Carswell *v.* Walsh, 70 Md. 504, 17 Atl. 335.

Michigan.— Brown *v.* Brown, 47 Mich. 378, 11 N. W. 205; Munsell *v.* Loree, 21 Mich. 491; Wilson *v.* Wilson, 6 Mich. 9.

Missouri.— Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800.

New York.— Haight *v.* Child, 34 Barb. 186; Harris *v.* Knickerbacker, 5 Wend. 638; Forsyth *v.* Clark, 3 Wend. 637. *Contra*, under the code see *infra*, XI, E, 2, c.

Virginia.— Beal *v.* Roanoke, 90 Va. 77, 17 S. E. 738.

West Virginia.— Patrick *v.* Horton, 3 W. Va. 23.

See 44 Cent. Dig. tit. "Specific Performance," §§ 377, 379½, 380, 381.

Examples of substantial and fatal variance see Swift *v.* Swift, 36 Ala. 147 (alleging a mortgage, proving a conditional sale); Porter *v.* Allen, 54 Ga. 623 (alleging a gift, proving a sale. But see under the code Lobdell *v.* Lobdell, 36 N. Y. 327, 2 Transcr. App. 363, 4 Abb. Pr. N. S. 56, 33 How. Pr. 347 [*reversing* 32 How. Pr. 1], alleging a sale, proving a gift; variance not material); Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800 (alleging a sale, proving an agreement to assign a contract for sale); Beal *v.* Roanoke, 90 Va. 77, 17 S. E. 738 (alleging sale of fee, proving right to erect a building); Moore *v.* McCullough, 5 Mo. 141 (alleging payment, proving accord and satisfaction).

Material variance as to description of property see Price *v.* Bell, 91 Ala. 180, 8 So. 565; Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294; Munsell *v.* Loree, 21 Mich. 491.

Fraud in defendant cannot be shown as the ground of a decree, unless it be substantially averred in the bill. Crocker *v.* Higgins, 7 Conn. 342.

Right to redeem.—Where the purchaser sued on the contract for specific performance he could not recover on the theory that his right was that of an equitable owner to redeem. Free *v.* Little, 31 Utah 449, 88 Pac. 407.

No variance.—In the following cases it was held that the matters proved were covered by the allegations of the pleading and that there was therefore no variance. Andrews *v.* Andrews, 28 Ala. 432 (failure to prove alleged stipulation which the law implies); Gelwicks *v.* Todd, 24 Colo. 494, 52 Pac. 788 ("appurtenances" alleged includes water right proved); Buffum *v.* Buffum, 11 N. H. 451; New Barbadoes Toll Bridge Co. *v.* Vreeland, 4 N. J. Eq. 157; Phillips *v.* Herndon, 78 Tex. 378, 14 S. W. 857, 22 Am. St. Rep. 59.

18. Examples of immaterial variance see Lyman *v.* Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871; Mix *v.* Beach, 46 Ill. 311 (allegation that full payment has been made); Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247 (allegation of less sum than is found to be due); Taft *v.* Taft, 73 Mich. 502, 41 N. W. 481; Bigbee *v.* Bigbee, 50 Mich. 467, 15 N. W. 553; Bomier *v.* Caldwell, 8 Mich. 463 (time, place, and mode of payment not matters of substance); Cairncross *v.* McGrann, 37 Minn. 130, 33 N. W. 548 (oral); Ashmore *v.* Evans, 11 N. J. Eq. 151 (oral); Zane *v.* Zane, 6 Munf. (Va.) 406. See 44 Cent. Dig. tit. "Specific Performance," §§ 379½, 380.

Immaterial variance as to description of property see Homan *v.* Stewart, 103 Ala. 644, 16 So. 35; Bogan *v.* Daughdrill, 51 Ala. 312; Cairncross *v.* McGrann, 37 Minn. 130, 33 N. W. 548.

19. Jones *v.* Mahone, 157 Ala. 105, 47 So. 195; McDonald *v.* Walker, 95 Ala. 172, 10 So. 225; Allen *v.* Young, 88 Ala. 338, 6 So. 747; Johnston *v.* Jones, 85 Ala. 286, 4 So. 748 (as to date of contract); Webb *v.* Crawford, 77 Ala. 440; Ellerbe *v.* Ellerbe, 42 Ala. 643; Williams *v.* Barnes, 28 Ala. 613; Carswell *v.* Walsh, 70 Md. 504, 17 Atl. 335. But failure to prove an alleged stipulation in the contract which the law implies is no variance. Andrews *v.* Andrews, 28 Ala. 432.

20. See PLEADING, 31 Cyc. 700 *et seq.*

shall be deemed material unless it has actually misled the adverse party to his prejudice.[21]

d. Parol Contracts — (i) *In General.* The rule as to variance is applied with special strictness in the case of oral contracts.[22]

(ii) *Whether Defendant's Version of Contract May Be Enforced.* Where defendant, in a suit upon an oral contract, sets up a contract different from that alleged by plaintiff, and defendant's version is sustained by the proof, and plaintiff's acts of part performance apply equally well to either version, the question whether plaintiff may have specific performance of the contract as thus varied is one on which the courts, except in the code states, are by no means agreed.[23]

e. Plaintiff May Recover Part of His Claim. An apparent exception to the equity doctrine as to variance is found in the rule that plaintiff may be permitted to recover a portion of his claim.[24]

3. Amendments to Pleadings.[25] Courts of equity use a very liberal discretion in allowing amendments. In deciding whether leave to amend a bill shall be granted, they disregard mere matters of form, and simply consider whether the amendment is necessary or not to reach the real and substantial merits of the case.[26]

21. See Farley *v.* Eller, 29 Ind. 322 (under Gavin & H. St. §§ 94, 95); Lobdell *v.* Lobdell, 36 N. Y. 327, 2 Transcr. App. 363, 4 Abb. Pr. N. S. 56, 33 How. Pr. 347 [*reversing* 32 How. Pr. 1]; Stokes *v.* Brown, 20 Oreg. 530, 26 Pac. 561 (under Hill Annot. Code, § 96, defendant must show that he was misled); Columbia Water Power Co. *v.* Columbia, 5 S. C. 225.

22. *Alabama.*— Jones *v.* Mahone, 157 Ala. 105, 47 So. 195; Price *v.* Bell, 91 Ala. 180, 8 So. 565 (bill misdescribed the land); Allen *v.* Young, 88 Ala. 338, 6 So. 747; Ellerbe *v.* Ellerbe, 42 Ala. 643; Williams *v.* Barnes, 28 Ala. 613; Sims *v.* McEwen, 27 Ala. 184; Goodwin *v.* Lyon, 4 Port. 297.

Florida.— Maloy *v.* Boyett, 53 Fla. 956, 43 So. 243.

Georgia.— Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294.

Maryland.— Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480.

Michigan.— Brown *v.* Brown, 47 Mich. 378, 11 N. W. 205; Munsell *v.* Loree, 21 Mich. 491 (as to description); Bomier *v.* Caldwell, 8 Mich. 463 (as to improvements); Wilson *v.* Wilson, 6 Mich. 9 (wife alleged to be vendee, proof of subsequent agreement to convey to wife).

New Jersey.— Banks *v.* Weaver, (Ch. 1901) 48 Atl. 515, proof that contract was to convey to plaintiff and wife.

New York.— Haight *v.* Child, 34 Barb. 186; Harris *v.* Knickerbacker, 5 Wend. 638, as to payment of interest on price.

Virginia.—Anthony *v.* Leftwich, 3 Rand. 238.

West Virginia.— McCully *v.* McLean, 48 W. Va. 625, 37 S. E. 559.

See 44 Cent. Dig. tit. "Specific Performance," § 379½ *et seq.*

Rule not universally enforced see Crow *v.* Blythe, 3 Hayw. (Tenn.) 236; Mortimer *v.* Orchard, 2 Ves. Jr. 243, 30 Eng. Reprint 615.

And in the code states the rule has given way to the rule of variance established in the codes. Lobdell *v.* Lobdell, 36 N. Y. 327, 2 Transcr. App. 363, 4 Abb. Pr. N. S. 56, 33 How. Pr. 347 [*reversing* 32 How. Pr. 1]. See *supra*, XI, E, 2, c.

The admission of a parol contract essentially different from that alleged in the bill does not authorize a decree for performance. Haight *v.* Child, 34 Barb. (N. Y.) 186.

As to proof of oral contracts see *supra*, V, Q; XI, E, 1, a.

23. Specific performance refused see Sims *v.* McEwen, 27 Ala. 184; Levandowski *v.* Althouse, 136 Mich. 631, 99 N. W. 786 (although a written contract is proved); Haight *v.* Child, 34 Barb. (N. Y.) 186 (but rule changed by code); Byrne *v.* Romaine, 2 Edw. (N. Y.) 445. See *supra*, IV, C, 3.

On the other hand some cases hold that the court may, on proof of the contract set up by defendant, either dismiss the bill or give plaintiff his election between specific performance of the contract as proved and a rescission. McComas *v.* Easley, 21 Gratt. (Va.) 23; Norfolk, etc., R. Co. *v.* McGarry, 52 W. Va. 547, 44 S. E. 236; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637. And defendant may have specific performance of the version of the contract set up and proved by him. Thompson *v.* Hawley, 14 Oreg. 199, 12 Pac. 276; Garrett *v.* Goff, 61 W. Va. 221, 56 S. E. 351.

24. Homan *v.* Stewart, 103 Ala. 644, 16 So. 35; Bogan *v.* Daughdrill, 51 Ala. 312 (sale of four hundred acres alleged, decree as to eighty acres); Drury *v.* Conner, 6 Harr. & J. (Md.) 288; Brandon *v.* West, 28 Nev. 500, 83 Pac. 327, 29 Nev. 135, 85 Pac. 449, 88 Pac. 140; Latimer *v.* Marchbanks, 57 S. C. 267, 35 S. E. 481 (sale of thirty-three acres alleged, decree for twenty). See *supra*, VII, B, 5.

On the other hand, in a suit to enforce a parol gift, proof that a whole tract was given was held not to support an allegation of the gift of a part. Rives *v.* Lamar, 94 Ga. 186, 21 S. E. 294.

25. See Equity, 16 Cyc. 335; Pleading, 31 Cyc. 359.

26. Amendments allowed see Pearson *v.* Courson, 129 Ga. 656, 59 S. E. 907 (that deed for vendor to subsequent grantee had

F. Other Matters of Practice — 1. Preliminary or Interlocutory Injunction. The complainant is often entitled to a preliminary injunction maintaining the *status quo* until the determination of the suit, where it is probable that he will show himself entitled to the relief of specific performance.[27] But a temporary ancillary injunction will not be granted unless the allegations of the bill warrant a decree for specific performance; or where on the preliminary application the court is of opinion that no relief would be granted on the final hearing; or where the contract is disputed or uncertain.[28]

not been delivered); Sweat *v.* Hendley, 123 Ga. 332, 51 S. E. 331 (mere correction of a misdescription of the terms of a contract, or of the land covered by it, does not add a new cause of action); Mason *v.* Bair, 33 Ill. 194 (misdescription amended); Hubbard *v.* Johnson, 77 Me. 139 (offer to pay balance found due on accounting); Palmer *v.* Palmer, 114 Mich. 509, 72 N. W. 322 (allegation of willingness to perform added); Stevens *v.* Sibbett, 31 Nebr. 612, 48 N. W. 465; Pennock *v.* Ela, 41 N. H. 189 (asking account of payments made); Campbell *v.* Hough, 73 N. J. Eq. 601, 68 Atl. 759 (asking relief against one cotenant, the agreement being void as to the other cotenant); Fearey *v.* Hayes, 44 N. J. Eq. 425, 15 Atl. 592 (asking reformation); Reynolds *v.* Wynne, 127 N. Y. App. Div. 69, 111 N. Y. Suppl. 248 (amendment of complaint averring willingness to cancel the contract on a repayment of the deposit and on payment of the expenses of examining title); Chess' Appeal, 4 Pa. St. 52, 45 Am. Dec. 668 (performance or willingness and readiness to perform); Fitzpatrick *v.* Engard, 4 Pa. Dist. 383 (amendment of prayer so as to obtain damages in case specific performance was refused); Fetterling's Estate, 1 Woodw. (Pa.) 169 (date of contract); Wilkins *v.* Somerville, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. N. S. 1183 (amendment adding offer to perform).

Amendment refused as amounting to the institution of a new and wholly different suit see Brehm *v.* Porter, 165 Mo. 115, 65 S. W. 264.

As to parties.—A bill in equity, filed by the administrator of one deceased to compel specific performance of a contract to convey to said deceased certain land, cannot be amended on trial, so as to make the heirs of the deceased complainants parties instead of the administrator. House *v.* Dexter, 9 Mich. 246.

Amendment to the answer denying agreement, so as to plead the statute of frauds, was refused, on account of unfair conduct of defendants. Stern *v.* Doheny, 29 Misc. (N. Y.) 711, 62 N. Y. Suppl. 774.

Supplemental answer, to show that by act of third party, pending suit, specific performance has become impossible, proper see Wilbur *v.* Gold, etc., Tel. Co., 52 N. Y. Super. Ct. 189. In a suit for specific performance of a contract to convey land, when defendant has filed an answer denying the making of such agreement, either written or verbal, and relying upon that defense alone, and where depositions have been taken on both sides and the cause submitted by consent of the parties for final hearing and determination, defendant will not be permitted to file an amended or supplemental answer setting up an entirely new and different defense from that of his original answer, he having knowledge of all the facts at the time of filing his original answer. Loar *v.* Wilfong, 63 W. Va. 306, 61 S. E. 333.

27. *Massachusetts.*— Bauer *v.* International Waste Co., 201 Mass. 197, 87 N. E. 637.

Mississippi.— Bellamy *v.* Shelton, 26 Miss. 250, enjoining vendor's judgment for recovery of the land.

New Jersey.— Hurd *v.* Groch, (Ch. 1898) 51 Atl. 278; Huffman *v.* Hummer, 17 N. J. Eq. 263.

North Carolina.— Combes *v.* Adams, 150 N. C. 64, 63 S. E. 186.

Vermont.—Wilkins *v.* Somerville, 80 Vt. 48, 66 Atl. 893, 11 L. R. A. N. S. 1183, to prevent vendor withdrawing deed from escrow.

West Virginia.— Carnegie Natural Gas Co. *v.* South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548, to prevent operation of oil well.

Wisconsin.— Inglis *v.* Fohey, 136 Wis. 28, 116 N. W. 857 (holding that where plaintiff sued for the specific performance of a contract to convey real estate in his possession, the court properly preserved the *status quo* pending the litigation by granting an injunctional order restraining defendant from interfering with plaintiff's possession, and by requiring plaintiff to pay a monthly rental into court to abide the event of the action); Hadfield *v.* Bartlett, 66 Wis. 634, 29 N. W. 639 (against trespass interfering with plaintiff's possession).

United States.— Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woolw. 26, where defendant probably will, before the hearing, render itself incapable of executing the contract.

England.— Strelley *v.* Pearson, 15 Ch. D. 113, 49 L. J. Ch. 406, 43 L. T. Rep. N. S. 155, 28 Wkly. Rep. 752, holding that in an action for specific performance of an agreement to take a colliery lease, where the lessee had long retained possession and had worked the coal and then threatened to cease pumping, a motion for an injunction to restrain the lessee from ceasing pumping was a proper motion for the preservation of the property pending the action.

That a mandatory injunction may be granted when appropriate see Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 127 Am. St. Rep. 155, 16 L. R. A. N. S. 307.

28. *Alabama.*— Lewman *v.* Ogden, 143 Ala.

2. Receiver. A receiver has been appointed, pending suit, to take charge of the property and receive the proceeds under the same circumstances as in a mortgage foreclosure, namely, where the vendee is in possession and is insolvent, and the property is an inadequate security for the debt.[29]

3. Issues to the Jury[30] **— a. In General.** In the absence of a statute neither party is entitled to trial by jury as a matter of right. Special issues on matters of fact may be framed under the direction of the court. The decision of the jury is not binding on the court, but is merely advisory.[31]

b. Jury Trial in Certain States. In a few states by statute a jury trial of issues of fact is a matter of right.[32]

351, 42 So. 102, contract to deliver personal property; no injunction against removal, etc.

Florida.— Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 127 Am. St. Rep. 155, 16 L. R. A. N. S. 307.

Maryland.— Gelston *v.* Sigmund, 27 Md. 334; Geiger *v.* Green, 4 Gill 472; Allen *v.* Burke, 2 Md. Ch. 534.

New Jersey.— Campbell *v.* Hough, 73 N. J. Eq. 601, 68 Atl. 759 (contract "palpably unenforceable"); Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 456; Parkhurst *v.* Kinsman, 6 N. J. Eq. 600.

New York.— Fargo *v.* New York, etc., R. Co., 3 Misc. 205, 23 N. Y. Suppl. 360.

Rhode Island.— Hazard *v.* Hope Land Co., (1908) 69 Atl. 602, 849.

United States.— Lucas *v.* Milliken, 139 Fed. 816; Ross *v.* Union Pac. R. Co., 20 Fed. Cas. No. 12,080, Woolw. 26.

See 44 Cent. Dig. tit. "Specific Performance," § 353.

The injunction must appear to be appropriate and just (Taylor *v.* Florida East Coast R. Co., 54 Fla. 635, 45 So. 574, 127 Am. St. Rep. 155, 16 L. R. A. N. S. 307), and necessary for plaintiff's protection (Josey *v.* Perlstein, (Tex. Civ. App. 1908) 107 S. W. 558, *lis pendens* ample protection against conveyance by defendant).

Dissolution of injunction.— If plaintiff withdraws his prayer for specific performance and asks for damages, the injunction will be dissolved. Wescott *v.* Mulvane, 58 Fed. 305, 7 C. C. A. 242. That the injunction will be dissolved on the filing of an answer denying the averments of the complaint see Gariss *v.* Gariss, 13 N. J. Eq. 320; Rockwell *v.* Lawrence, 5 N. J. Eq. 20. But it will not be dissolved where the answer admits the material allegations upon which the equity of the bill rests, but sets up new matter in avoidance. Huffman *v.* Hummer, 17 N. J. Eq. 263. And see Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank Road Co., 11 Ga. 246, action for specific performance and to enjoin trespass; denial of contract but admission of trespass; injunction not dissolved.

That a motion for injunction after coming in of the answer must be founded upon the merits confessed in the answer see Whitaker *v.* Bond, 63 N. C. 290.

For practice in obtaining injunction, bond, etc. see Injunction, 22 Cyc. 724; and Pendelton *v.* Laub, 95 Iowa 722, 64 N. W. 653.

29. Gunby *v.* Thompson, 56 Ga. 316; Phillips *v.* Eiland, 52 Miss. 721; Reade *v.* Hamlin, 62 N. C. 128, vendee wasting the property.

At suit of vendee.— For appointment of receiver, in action to enforce assignment of lease of oil lands, where, under the code provision, the property "is in danger of being lost, removed, or materially injured" see Galloway *v.* Campbell, 142 Ind. 324, 41 N. E. 597.

Plaintiff's ability to perform.— That plaintiff, asking for a receiver, must show a present ability to fulfil his part of the contract see Baldwin *v.* Salter, 8 Paige (N. Y.) 473.

For refusal to appoint receiver when that would unreasonably burden the property with his compensation see Walters *v.* Walters, 132 Ill. 467, 23 N. E. 1120.

Action prematurely brought.— That the order for a receiver must be vacated where the action is prematurely brought see Jones *v.* Boyd, 80 N. C. 258.

30. See Equity, 16 Cyc. 413.

31. Hinkle *v.* Hinkle, 55 Ark. 583, 18 S. W. 1049; Waddington *v.* Lane, 202 Mo. 387, 100 S. W. 1139; Moore *v.* Moulton, 5 Ohio Dec. (Reprint) 534, 6 Am. L. Rec. 466. An issue whether defendants' purchase from plaintiff's vendor was in good faith was a proper one for a jury. Waddington *v.* Lane, *supra*. An issue is the proper mode of ascertaining damages for an alleged breach of covenant by plaintiff vendor. Ayres *v.* Robins, 30 Gratt. (Va.) 105. As to the effect of a verdict in curing a defective statement in the complaint see Despain *v.* Carter, 21 Mo. 331.

32. The question was held to be one for the jury in the following cases: Looney *v.* Watson, 97 Ga. 235, 22 S. E. 935 (whether improvements were such as amounted to a part performance); Willcoxon *v.* Eason, 19 Ga. 565 (whether consideration was grossly inadequate was a question for a special jury); Combes *v.* Adams, 150 N. C. 64, 63 S. E. 186 (as to conspiracy and fraud set up by defendants); Boles *v.* Caudle, 133 N. C. 528, 45 S. E. 835; Bird *v.* Bradburn, 127 N. C. 411, 37 S. E. 456 (whether the land was sold by the acre or *in solido*); Younger *v.* Welch, 22 Tex. 417 (as to terms of contract). See also Juries, 24 Cyc 110 note 57, 123.

Pennsylvania practice.—As to the province of judge and jury under the peculiar Pennsylvania practice, by which the equitable right is tried under the forms of a legal action of ejectment see Beeson *v.* Porter, 155 Pa. St. 579, 26 Atl. 699; Williams *v.* Bent-

4. Reference to Master or Referee.[33] Where it appears doubtful whether the vendor can make such a title as would authorize a decree for specific performance, the court should refer the title to a master to be examined and reported upon;[34] but such reference is not necessary when the court itself can see upon the pleadings and proof that the title is insufficient and cannot be cured.[35] There may also be a reference to state accounts and ascertain the amount due.[36] The court need not submit a question on which no evidence is offered.[37] Before the master's finding can become binding, it must be approved by the court. He cannot be required to act judicially, and to proceed to execute his own decree.[38] Defendant's assent to trial by referee is not a waiver of the objection that the legal remedy is adequate.[39]

G. Decree, Costs, and Appeal[40]**— 1. Decree Should Conform to Complaint.** The decree should conform to the complaint, especially as to the amount of the purchase-price to be paid.[41]

2. Decree Should Conform to Contract. The decree should conform to the contract. It cannot add to the contract a promise not made. The court will not make a contract for the parties.[42] But where exact enforcement of the contract

ley, 29 Pa. St. 272; Hanna *v.* Phillips, 1 Grant (Pa.) 253. As to the "conditional verdict" in such action see Webster *v.* Webster, 53 Pa. St. 161; Morrison *v.* Funk, 23 Pa. St. 421; Irvine *v.* Bull, 7 Watts (Pa.) 323.

Discretion as to relief.— That it is for the court to determine, on the facts found by the jury, whether in the exercise of a judicial discretion plaintiff is entitled to relief see Boles *v.* Caudle, 133 N. C. 528, 45 S. E. 835; Whitted *v.* Fuquay, 127 N. C. 68, 37 S. E. 141. And see Poston *v.* Ingraham, 76 S. C. 167, 56 S. E. 780.

Waiver of right to jury trial see Reynolds *v.* Wynne, 127 N. Y. App. Div. 69, 111 N. Y. Suppl. 248.

33. See Equity, 16 Cyc. 429.

34. Scott *v.* Thorpe, 1 Edw. (N. Y.) 512 (master should report how vendor can cause title to be made); Gentry *v.* Hamilton, 38 N. C. 376; Beverly *v.* Lawson, 3 Munf. (Va.) 317.

35. Tillotson *v.* Gesner, 33 N. J. Eq. 313; Domincik *v.* Michael, 4 Sandf. (N. Y.) 374, 424.

36. Hubbard *v.* Johnson, 77 Me. 139; Stevenson *v* Jackson, 40 Mich. 702.

But the existence of the contract must first be determined where that is in issue. Cayard *v* Texas Crude Oil, etc., Co., 118 N. Y. App. Div. 299, 103 N. Y. Suppl. 437.

Inchoate dower.—And the question of the amount to be deducted from the price because of inchoate dower cannot be referred, since it involves the exercise of judicial power. Cowan *v.* Kane, 211 Ill. 572, 71 N. E. 1097.

37. Roberts *v.* Cambridge, 170 Mass. 199, 49 N. E. 84.

38. Boston *v.* Nichols, 47 Ill. 353.

39. Butler *v.* Wright, 103 N. Y. App. Div. 463, 93 N. Y. Suppl. 113 [*reversed* on other grounds in 186 N. Y. 259, 78 N. E. 1002].

40. **Construction and effect of decrees.**— Where the lower court in a suit for specific performance passed a decree granting the relief prayed for by the bill, and, on a rehearing, passed another decree vacating the first decree and dismissing the bill, on the ground alone of defect of parties complainant, the two decrees, when considered together, will be deemed a finding for the complainant on the facts. Griffith *v.* Stewart, 31 App. Cas. (D. C.) 29.

41. Holman *v.* Vallejo, 19 Cal. 498 (and as to the description of the land); Russell *v.* Conners, 140 Ill. 660, 30 N. E. 606; Brown *v.* McCord, 105 Ill. 459 (compelling payment of taxes not claimed, erroneous); Smith *v.* Gallentin, 78 Ill. App. 21 (decree requiring payment of less sum than bill admits to be due, erroneous); Munro *v.* Allaire, 2 Cai. Cas. (N. Y.) 183, 2 Am. Dec. 330.

Immaterial variance.— Decree quieting title, on bill for specific performance, held only a formal discrepancy, and no cause for reversal. Thomas *v.* Brown, 10 Ohio St. 247.

42. *Illinois.*— Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824 (as to guarding railroad crossing); Boston *v.* Nichols, 47 Ill. 353 (error to render judgment for the amount of an instalment of the price not yet due).

Iowa.— Coy *v.* Minneapolis, etc., R. Co., 116 Iowa 558, 90 N. W. 344 (as to sale of right of way); Granfield *v.* Rawlings, 53 Iowa 654, 6 N. W. 31 (delivery of deed ordered in advance of payment of price, contract so requiring).

Kentucky.— Spronle *v.* Winant, 7 T. B. Mon. 195, 18 Am. Dec. 164 (deed should be made to vendee, not to vendee's husband); Webb *v.* Conn, 1 Litt. 82, 13 Am. Dec. 225 (cannot compel conveyance of other land); McConnell *v.* Dunlap, Hard. 41, 3 Am. Dec. 723 (same); Lloyd *v.* O'Rear, 59 S. W. 483, 22 Ky. L. Rep. 1000 (as to sale of right of way).

Maryland.— Ellicott *v.* White, 43 Md. 145, cannot compel acceptance of lease where fee was bargained for.

Massachusetts.—Dresel *v.* Jordan, 104 Mass. 407, as to grantee's assumption of a mortgage.

Michigan.— Abraham *v.* Stewart, 83 Mich. 7, 46 N. W. 1030, 21 Am. St. Rep. 585, sub-

is impracticable, plaintiff may sometimes have approximate relief in some other form which will secure to him the substantial advantages of his contract.[43]

ject to building restrictions mentioned in contract.

New Jersey.— Mausert *v.* Feigenspan, 68 N. J. Eq. 671, 63 Atl. 610, 64 Atl. 801 (lease); Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34, 57 Atl. 456 (maintenance of private railroad switch).

New York.— Abel *v.* Bischoff, 99 N. Y. App. Div. 248, 90 N. Y. Suppl. 990 [*modified* in 185 N. Y. 568, 77 N. E. 1181]; Caldwell *v.* Croft, 54 N. Y. Super. Ct. 523. The purchaser of lots is entitled, on a suit for specific performance, to a deed describing them by metes and bounds, and as in the contract of sale, as known as certain lots in a certain block on a map of the property belonging to vendor. Myrtle Realty Co. *v.* Kalter, 131 N. Y. App. Div. 281, 115 N. Y. Suppl. 694.

Ohio.— Courcier *v.* Graham, 2 Ohio 341.

Oregon.— West *v.* Washington R. Co., 49 Oreg. 436, 90 Pac. 666, decree for lessee should secure his contract privilege of exercising option to purchase during the term.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Lehigh Coal, etc., Co., 36 Pa. St. 204, decree must conform to contract as to mode of payment.

Texas.— Lone Star Salt Co. *v.* Texas Short Line R. Co., 99 Tex. 434, 90 S. W. 863, 3 L. R. A. N. S. 828.

Virginia.— Pence *v.* Life, 104 Va. 518, 52 S. E. 257.

Washington.— Constantine *v.* Caswell, 46 Wash. 651, 91 Pac. 7, where payment to be in chattels cannot decree payment in money.

United States.— Hepburn *v.* Dunlop, 1 Wheat. 179, 4 L. ed. 65.

Compare Paulman *v.* Cheney, 18 Nebr. 392, 25 N. W. 495, decree directing payment of price before it is due not set aside on behalf of vendor.

43. See *supra*, VII. Thus, where defendant agreed to discharge a mortgage, not yet due on the land, the decree should provide that on defendant failing to procure a discharge, the amount of the mortgage be made by execution and the money paid into court, to be invested for that purpose. Bennett *v.* Abrams, 41 Barb. (N. Y.) 619. Where defendant, a quarryman, was unable, because of insolvency, to supply the stone contracted for and necessary to completion of plaintiff's building, the decree permitted plaintiff to enter on defendant's premises and use his machinery for the purpose of procuring the stone. St. David's Parish *v.* Wood, 24 Oreg. 396, 34 Pac. 18, 41 Am. St. Rep. 860.

Additional and alternative relief see *supra*, VIII.

Relief to defendant and performance by plaintiff see *supra*, IX.

Other requisites of decree.— That it is erroneous to decree a conveyance without identifying the boundaries with reasonable certainty see Tribble *v.* Davis, 3 J. J. Marsh. (Ky.) 633. But that the decree may refer to the complaint for a description of the land see Foster *v.* Bowman, 55 Iowa 237, 7 N. W. 513. That the vendee is entitled to a deed with description in terms of the contract see Peden *v.* Owens, Rice Eq. (S. C.) 55. In decrees for specific performance of a contract for purchase, a time for payment of the purchase-money should be limited, or, in default, the bill dismissed. In such cases also the decree should direct a set-off between the unpaid money and the costs. McDonald *v.* Elder, 3 Grant Ch. (U. C.) 244.

The amount of recovery in a suit by the vendor is the amount due at the time of the decree, not at the commencement of the suit. Shaw *v.* Bayard, 4 Pa. St. 257.

Payment of instalments.— A purpose of a suit being to enforce payment of instalments under a contract, and all payments under it having become due before entry of the decree, and the prayer being broad enough, and the parties having been fully heard, the decree should be for payment of the instalments due at commencement of the suit, and for those which thereafter became due. Bauer *v.* International Waste Co., 201 Mass. 197, 87 N. E. 637.

Apportioning relief among plaintiffs.—That a defendant resisting specific performance cannot object to the decree because it adjudges to one of the parties too large an interest and too little to others see Harrison *v.* Town, 17 Mo. 237. Separate decrees for damages to vendee and his partial assignee were held erroneous in Eastman *v.* Reid, 101 Ala. 320, 13 So. 46. That on a joint purchase, where the purchasers have given their several notes for certain portions of the purchase-money, conveyance may be decreed to each in proportion to the amount paid or secured to be paid by him see Brothers *v.* Porter, 6 B. Mon. (Ky.) 106.

Decreeing payment to the attorney of either of two defendants, who had different interests and liabilities, and covenants standing between them, held erroneous see Greene *v.* Cook, 29 Ill. 186.

Deed to partnership.— Where the vendee is a firm, the deed should be decreed to be executed to the individual partners as tenants in common. Townshend *v.* Goodfellow, 40 Minn. 312, 41 N. W. 1056, 12 Am. St. Rep. 736, 3 L. R. A. 739.

Leaving performance optional.—Where specific performance is decreed, the contract is merged in the decree, and it must not be so entered as to leave it optional with plaintiff whether he will perform. A decree for specific performance must not be so entered as to be an option on behalf of either party. Thompson *v.* Burns, 15 Ida. 572, 99 Pac. 111. But it was held that in a suit to compel specific performance of a land contract by the purchaser, a decree giving defendant the option to settle according to the contract or to pay the full purchase-price, with interest, was proper. Prichard *v.* Mulhall, 140 Iowa 1, 118 N. W. 43.

3. Decree to Assignee. In a suit by an assignee of the vendee, the decree may direct the conveyance to be made directly to such assignee.[44] If the vendee is not a party, and the court finds against the assignment, it is error also to find against the validity of the contract.[45]

4. Infant Heirs. A decree against infant heirs of the vendor may direct a conveyance by them after they become of age.[46] Statutory provisions are found in most or all of the states, authorizing a deed to be executed on behalf of infant heirs by a commissioner, guardian, etc.[47]

5. Insane Persons. Since the change of the condition of a person entering into an agreement by becoming a lunatic will not alter the right of the parties, which will be the same as before, provided they can come at the remedy,[48] so when an agreement to convey real property or an interest therein has been entered into by one who subsequently becomes insane, equity may enforce a specific performance of the contract, either by the committee or guardian of the lunatic for him, or by the lunatic's representative after his decease;[49] as by the lunatic's heir where the lunatic had covenanted to surrender interests in real estate,[50] or to convey land absolutely.[51] So when the agreement to convey is by one himself sane, who dies before the execution of the contract leaving an insane heir at law, the committee of the latter may be directed to execute the contract for him.[52] The jurisdiction to enforce specific performance may be exercised when the insane party was one of several joint contractors, whose rights the failure to carry out the proposed contract may affect injuriously, as where the lunatic is one of several proposed lessees,[53] or is a member of a partnership by which certain deeds are to be executed.[54]

6. Form of Conveyance or Lease; Covenants. If the contract specified the form of the deed, the decree must of course conform to the contract. If the contract is silent as to the kind of deed required, a deed with covenants of warranty must be given according to some decisions.[55] Other cases hold a deed without warranty sufficient. If defendant has a title, it is reasoned, a quitclaim would be as effectual to transfer it; if he has no title, a deed with covenants would not

44. Gill *v.* Newell, 13 Minn. 462 (vendee repudiating the assignment); Crow *v.* Crow, 29 Pa. St. 216; Denton *v.* White, 26 Wis. 679. But see Payne *v.* Wallace, 6 T. B. Mon. (Ky.) 380.

45. MacCabe *v.* Jones, 1 N. Y. Suppl. 639.

46. Sutphen *v.* Fowler, 9 Paige (N. Y.) 280, and authorizing vendee meantime to take and hold possession.

47. Hogan *v.* McMurtry, 5 J. J. Marsh. (Ky.) 633 (by commissioner, reserving time of the coming of age to show cause against the decree); Hyatt *v.* Seeley, 11 N. Y. 52 (by guardian *ad litem*; deed must strictly comply with the order, and indicate the character in which the guardian signed); Matter of Ellison, 5 Johns. Ch. (N. Y.) 261 (as to covenants in the deed, and investment of the purchase-money); Van Schaick *v.* Stuyvesant, 2 Edw. (N. Y.) 204 (by guardian *ad litem*).

48. Owen *v.* Davies, 1 Ves. 82, 27 Eng. Reprint 905, per Lord Hardwicke.

49. Yauger *v.* Skinner, 14 N. J. Eq. 389; Swartwout *v.* Burr, 1 Barb. (N. Y.) 495; Hall *v.* Warren, 9 Ves. Jr. 605, 7 Rev. Rep. 306, 32 Eng. Reprint 738. The practice in such cases is regulated in England by Act 16 & 17 Vict. c. 70, § 122.

50. *In re* Cuming, L. R. 5 Ch. 72, 21 L. T. Rep. N. S. 739, 18 Wkly. Rep. 157.

51. Owen *v.* Davies, 1 Ves. 82, 27 Eng. Reprint 905.

52. Swartwout *v.* Burr, 1 Barb. (N. Y.) 495.

53. Pegge *v.* Skynner, 1 Cox Ch. 23, 29 Eng. Reprint 1045. An insane lessee was held liable to renew under a covenant contained in the original lease made before he became insane. *In re* Doolan, 2 C. & L. 232, 3 Dr. & War. 442.

54. Lawrie *v.* Lees, 14 Ch. D. 249, 49 L. J. Ch. 636, 42 L. T. Rep. N. S. 485, 28 Wkly. Rep. 779.

55. Linn *v.* Barkey, 7 Ind. 69; Henry *v.* Liles, 37 N. C. 407; Stanley *v.* Bedinger, 2 Ohio Cir. Ct. 522, 1 Ohio Cir. Dec. 522.

Accepting partial performance.—Where a vendee, in a suit for specific performance of a contract for conveyance with general warranty and abstract of title, accepted a decree divesting the title of the vendor and vesting it in plaintiff, it would be assumed that the vendee took such decree without objection, and waived performance of the contract in so far as it required a conveyance with warranty or an abstract of title. Jasper *v.* Wilson, 14 N. M. 482, 94 Pac. 951, 23 L. R. A. N. S. 982.

If the contract calls for a warranty deed, the vendee does not waive his right to such a deed by accepting a quitclaim deed under

transfer title.[56] A contract to execute a lease calls for a lease with the usual covenants.[57] The court may direct the lease to be dated at a time antecedent to alleged breaches, in order to give plaintiff his action on the covenants.[58]

7. Decree Vesting Title. The statutes in many states authorize the court to make a decree which shall execute itself, without any act of the parties, by divesting defendant of his title and vesting the same in plaintiff.[59]

8. Conveyance by Commissioner. By other statutes the method of passing title is to direct a commissioner or other officer of the court to execute a deed, such deed having the same effect as if executed by the holder of the title.[60]

9. Foreclosure of Vendor's Lien For Unpaid Price — a. By Sale. By the practice in many states, a final decree in the vendor's favor does not award execution generally for the debt and costs. The proper decree is to direct a sale of the premises, upon default being made in payment, awarding the vendee any surplus upon the sale.[61] But it has been held that where a certain sum is adjudged a

mistake. Point St. Iron Works *v.* Simmons, 11 R. I. 496.

56. Dodd *v.* Seymour, 21 Conn. 476; Davis *v.* Harrison, 4 Litt. (Ky.) 261; Lounsbery *v.* Locander, 25 N. J. Eq. 554; Hall *v.* Layton, 10 Tex. 55.

If the contract merely calls for a quitclaim, it is erroneous to decree a warranty deed. Darby *v.* Richardson, 3 J. J. Marsh. (Ky.) 544.

If the contract is to convey a possessory title merely, a deed which will convey such title is sufficient. Dargin *v.* Cranson, 12 Colo. App. 368, 55 Pac. 619.

The decree cannot require personal covenants binding parties interested, who have not appeared or been personally served, since specific performance is a remedy *in personam*. Worthington *v.* Lee, 61 Md. 530.

That heirs of the vendor can only be required to make a deed with special warranty see Boggess *v.* Robinson, 5 W. Va. 402. And see Hill *v.* Ressegieu, 17 Barb. (N. Y.) 162, holding also that covenants are not required of infant heirs.

Deed by vendor's grantee with notice.— If such grantee receives from the vendor a deed with covenants of warranty, he should be decreed to convey to the vendee plaintiff by a similar deed. Lovejoy *v.* Potter, 60 Mich. 95, 26 N. W. 844. If he received a quitclaim from the vendor, he need only quitclaim to plaintiff. Peterson *v.* Ramsey, 78 Nebr. 235, 110 N. W. 728.

57. Eaton *v.* Whitaker, 18 Conn. 222, 44 Am. Dec. 586.

58. Noonan *v.* Orton, 21 Wis. 283. See *supra*, VI, B, 2 note 90.

59. *Georgia.*— Banks *v.* Sloat, 69 Ga. 330.
Kentucky.— Kelly *v.* Bramblett, 81 S. W. 249, 26 Ky. L. Rep. 167.
Michigan.— Simmons *v.* Conklin, 129 Mich. 190, 88 N. W. 625.
New Jersey.— Gen. St. p. 383, § 63; Goldstein *v.* Curtis, 65 N. J. Eq. 382, 59 Atl. 639 (decree directing conveyance by married woman); Wharton *v.* Stoutenburgh, 39 N. J. Eq. 299 (where defendant is in contempt, decree establishing contract); Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq. 475 (such decree to be construed by same rules as conveyance would be).
New York.— Nanny *v.* Fancher, 15 N. Y. Suppl. 628.
North Carolina.— Skinner *v.* Terry, 134 N. C. 305, 46 S. E. 517, but such a decree is not a conveyance within the meaning of the recording acts requiring certain registration to make conveyance valid against creditors, etc.
Wisconsin.— Rev. St. (1898) § 3187; Brown *v.* Griswold, 109 Wis. 275, 85 N. W. 363; Burrall *v.* Eames, 5 Wis. 260.

60. Rush *v.* Truby, 11 Ind. 462; Sproule *v.* Winant, 7 T. B. Mon. (Ky.) 195, 18 Am. Dec. 164. That the vendor should first be given the opportunity to convey see Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747. And see Walker *v.* Walker, 55 S. W. 726, 21 Ky. L. Rep. 1521, defendant's deed approved by the court has all the efficacy of a commissioner's deed. As to the court's reserving power to determine when the commissioner should execute the deed in Kentucky see Sproule *v.* Winant, 7 T. B. Mon. (Ky.) 195, 18 Am. Dec. 164; Payne *v.* Wallace, 6 T. B. Mon. (Ky.) 380.

61. *Illinois.*—Andrews *v.* Sullivan, 7 Ill. 327, 43 Am. Dec. 53.
Kentucky.—Summers *v.* Wortham, 63 S. W. 436, 23 Ky. L. Rep. 571.
Michigan.— Loveridge *v.* Shurtz, 111 Mich. 618, 70 N. W. 132.
Minnesota.—Freeman *v.* Paulson, 107 Minn. 64, 119 N. W. 651.
Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71; Dollahite *v.* Orne, 2 Sm. & M. 590.
New York.— Strauss *v.* Bendheim, 22 Misc. 179, 66 N. Y. Suppl. 247; Clark *v.* Hall, 7 Paige 382, on motion by vendor in vendee's suit.
North Carolina.— Burnap *v.* Sidberry, 108 N. C. 307, 12 S. E. 1002, in vendee's suit. And see Jones *v.* Jones, 148 N. C. 358, 62 S. E. 417.
South Carolina.— Peake *v.* Young, 40 S. C. 41, 18 S. E. 237.
South Dakota.— Brace *v.* Doble, 3 S. D. 110, 52 N. W. 586.
Virginia.—Wade *v.* Greenwood, 2 Rob. 474, 40 Am. Dec. 759; Beverley *v.* Lawson, 3 Munf. 317. But see Rose *v.* Nicholas, Wythe 268.

lien on lands under parol contract between parties, the party in possession should be allowed a reasonable time to pay before sale of the lands.[62]

b. Strict Foreclosure. In other states a decree of strict foreclosure on behalf of the successful vendor is required or allowed: namely, that in default of payment within a specified time the vendee be foreclosed of all his right and equity in the premises.[63]

10. Costs[64] — a. Against Unsuccessful Party in General. If the plaintiff vendee is successful, costs are generally to be taxed against a defendant who denied plaintiff's right to a conveyance.[65]

b. Discretionary. The court, however, exercises a wide discretion in the matter of imposing costs.[66]

A sale without first complying with the conditions imposed by the decree will be set aside. Peck *v.* Zborowski, 13 S. D. 182, 82 N. W. 387.

An action to foreclose vendor's lien is one for specific performance, not a mortgage foreclosure. White *v.* Sage, 149 Cal. 613, 87 Pac. 193; De Hihns *v.* Free, 70 S. C. 344, 49 S. E. 841.

In a suit by the vendee sale of the land for payment of the unpaid price is erroneous; since if the land should sell for less than the amount due, the vendor would be deprived of the land for less than the stipulated price. Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540.

But that such sale may be had on vendor's motion see Clark *v.* Hall, 7 Paige (N. Y.) 382; Burnap *v.* Sidberry, 108 N. C. 307, 12 S. E. 1002.

Personal judgment for the balance of the purchase-money remaining unsatisfied after such sale may be had. Ochs *v.* Kramer, 107 S. W. 260, 32 Ky. L. Rep. 762, 108 S. W. 235, 32 Ky. L. Rep. 1205; Loveridge *v.* Shurtz, 111 Mich. 618, 70 N. W. 132. But see Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Suit against administrator and heirs of vendor.— The court, in a suit against the administratrix and heirs of a deceased vendor for specific performance of the contract of sale of realty, directed the administratrix on the payment of the purchase-money to execute a deed, and adjudged that payment should be made by a designated date, and that in default thereof the land should be sold for cash, retaining the case for the disposition of the price. The purchaser failed to comply with the judgment and three months later the administratrix executed a deed to the purchaser on his paying the price and interest. It was held that the judgment was proper and that the conveyance was valid, since the effect of the judgment was to declare that the heirs held the legal title, as trustees, to secure the purchase-money, as if the deceased had held at his death a mortgage on the land to secure the debt. Jones *v.* Jones, 148 N. C. 358, 62 S. E. 417.

62. Tillinghast *v.* Henderson, 59 S. C. 388, 38 S. E. 5.

63. Todd *v.* Simonton, 1 Colo. 54; Michigan Land, etc., Co. *v.* Doherty, 77 Mich. 359, 43 N. W. 988; London, etc., Mortg. Co. *v.* McMillan, 78 Minn. 53, 80 N. W. 841; Connecticut *v.* Sheridan, Clarke (N. Y.) 533 (see also as to recovery of costs). An action for such purposes is an action for specific performance. Adams *v.* Ash, 46 Hun (N. Y.) 105. In a suit by the vendee also, the decree may order that on default in payment within a specified time, all the vendee's rights shall be extinguished. Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540; Clark *v.* Hall, 7 Paige (N. Y.) 382.

64. See, generally, Costs, 11 Cyc. 1.

65. Downing *v.* Plate, 90 Ill. 268; Price *v.* Blackmore, 65 Ill. 386; White *v.* Hardin, 5 Dana (Ky.) 141; Fleming *v.* Harrison, 2 Bibb (Ky.) 171, 4 Am. Dec. 691, defendant refused to convey with general warranty. See Tracy *v.* Tracy, 14 W. Va. 243.

But that it was error to impose costs upon another defendant, who was shown to have made performance by his co-defendant possible, and to have done nothing to prevent the same, see Alexander *v.* McDaniel, 56 S. C. 252, 34 S. E. 405.

Attorney's fees.— Statutes allowing attorney's fees in actions for breach of contract (Brunswick Co. *v.* Dart, 93 Ga. 747, 20 S. E. 631), or in suits where the title or boundaries of land are in question (Wickliffe *v.* Roberts, 6 J. J. Marsh. (Ky.) 217), do not apply to suits for specific performance.

66. Carroll *v.* Tomlinson, 192 Ill. 398, 61 N. E. 484, 85 Am. St. Rep. 344; Cranwell *v.* Clinton Realty Co., 67 N. J. Eq. 540, 58 Atl. 1030 (Pub. Laws (1902), p. 538, § 84); Webb *v.* Chisholm, 24 S. C. 487.

Contract for lease or renewal.—As to costs in suits for specific performance of a contract for a lease or for renewal of a lease see Barrett *v.* Pearson, 2 Ball & B. 189 (where a tenant who by his conduct had made his title to a renewal doubtful, thereby rendering a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs); Vance *v.* Ranfurley, 1 Ir. Ch. 321 (where a lessor having, in his answer to a bill for renewal of the lease, alleged breach of covenant by the lessees as a defense to the bill, and having failed in proving it, was ordered to pay the costs occasioned by that defense); Burke *v.* Smyth, 9 Ir. Eq. 135, 3 J. & L. 193 (no costs allowed because of plaintiff's laches); Fitzgerald *v.* O'Connell, 6 Ir. Eq. 455, 1 J. & L. 134; Fitzgerald *v.* Carew, 1 Ir. Eq. 346 (holding that in a suit for renewal, if it appears that the tenant has been guilty of any laches, he must, in general, pay the land-

c. Refused to Either Party. In the exercise of its discretion, the court may refuse costs to either party, where both parties were in fault.[67]

d. Imposed on Successful Party. In the exercise of its discretion, the court may impose costs on the successful party because of his default.[68]

e. Where Plaintiff Made no Tender. If plaintiff, without sufficient excuse, failed to tender performance before suit, costs should be taxed against him.[69] But if tender was prevented by defendant's conduct, and specific performance is decreed, defendant must bear the costs.[70] So where the tender was faulty, but defendant refused to perform for another and invalid reason.[71] And costs were imposed on a defendant vendee, although the vendor was not able to make title at the beginning of the action, where defendant was not ready to make payment on condition of getting the estate bargained for, and contested the case.[72]

11. Operation and Enforcement of Decree. Various points of equity practice as to the operation, enforcement, and amendment of decrees are mentioned in the note.[73]

lord's costs; but if the tenant was guilty of no laches, and the landlord refused a renewal on insufficient grounds he will be decreed to pay the tenant's costs); White *v.* Beck, Ir. R. 6 Eq. 63, 20 Wkly. Rep. 275; Wortham *v.* Dacre, 2 Kay & J. 437, 4 Wkly. Rep. 451, 69 Eng. Reprint 853; Longinotto *v.* Morss, 26 L. T. Rep. N. S. 828; Doneraile *v.* Chartous, 1 Ridgw. P. C. 122.

67. Mausert *v.* Christian Feigenspan, 68 N. J. Eq. 671, 63 Atl. 610, 64 Atl. 801; Barger *v.* Grey, 64 N. J. Eq. 263, 53 Atl. 483; Pangburn *v.* Miles, 10 Abb. N. Cas. (N. Y.) 42, purchaser, although specific performance was decreed against him, was justified in refusing to accept the title offered. In a suit by the vendor, resisted by the vendee on the ground that the title is not marketable, where the vendee was not justified in demanding that the doubt as to the title be cured by suit, the cost of the suit may sometimes be imposed upon the vendor. Barger *v.* Grey, *supra.*

68. Hill *v.* Kirby, 7 Ind. 217; Winne *v.* Reynolds, 6 Paige (N. Y.) 407; Kuhn *v.* Skelley, 25 Pa. Super. Ct. 185; Barrett *v.* Pearson, 2 Ball & B. 189. See Cranwell *v.* Clinton Realty Co., 67 N. J. Eq. 540, 58 Atl. 1030.

Failure to offer performance in bill.— Costs imposed on successful plaintiff for failure to offer performance in his bill. Palmer *v.* Palmer, 114 Mich. 509, 72 N. W. 322.

Where defendant vendor contracted to convey property which he did not own and was unable to procure, so that specific performance was refused for impossibility, he was not entitled to costs. Stevenson *v.* Buxton, 37 Barb. (N. Y.) 13, 15 Abb. Pr. 352.

69. Lee *v.* Bickley, Litt. Sel. Cas. (Ky.) 290; Minneapolis, etc., R. Co. *v.* Chisholm, 55 Minn. 374, 57 N. W. 63; Swartwout *v.* Burr, 1 Barb. (N. Y.) 495; Hosmer *v.* Wyoming R., etc., Co., 129 Fed. 883, 65 C. C. A. 81.

70. Hart *v.* Brand, 1 A. K. Marsh. (Ky.) 159, 10 Am. Dec. 715.

71. Powell *v.* Dwyer, 149 Mich. 141, 112 N. W. 499, 11 L. R. A. N. S. 978; Abraham *v.* Stewart, 83 Mich. 7, 46 N. W. 1030, 21 Am. St. Rep. 585.

72. Hobson *v.* Buchanan, 96 N. C. 444, 2 S. E. 180.

73. See further Equity, 16 Cyc. 1.

Relation of title under the decree.— That the legal title of the vendee obtained under the decree does not relate back to the beginning of the suit so as to support an action of trespass, or an action for breach of warranty against the vendor's grantor see Goetchius *v.* Sanborn, 46 Mich. 330, 9 N. W. 437; Vancourt *v.* Moore, 26 Mo. 92.

Who bound by decree.— That the decree does not as a general rule run against parties who are not joined in the action see Work *v.* Welsh, 160 Ill. 468, 43 N. E. 719. But that *pendente lite* purchasers are bound whether made parties or not see Steele *v.* Taylor, 1 Minn. 274.

Decree of dismissal.— That such a decree in a specific performance suit is a bar to a new bill for the same object see Hepburn *v.* Dunlop, 1 Wheat. (U. S.) 179, 4 L. ed. 65.

Time for enforcement of decree.— If a decree in the vendee's favor designates no time for performance, he may demand its enforcement at any time, until the statute of limitations has run. Redington *v.* Chase, 34 Cal. 666. And the court has power to amend its decree by extending the time for payment of the purchase-money. Adams *v.* Ash, 46 Hun (N. Y.) 105. The court may recognize a conveyance not executed within the time limited by the decree, where great injustice will be done by a strict enforcement of the decree. Blair's Estate, 178 Pa. St. 582, 36 Atl. 179. But it is not a proper exercise of discretion to suspend the operation of the decree against the vendor because of the pendency of an ejectment action, there being no culpable conduct on the vendor's part. Rosenberg *v.* Haggerty, 189 N. Y. 481, 82 N. E. 503 [*reversing* 114 N. Y. App. Div. 920, 100 N. Y. Suppl. 1140].

Abandonment of decree by withdrawal of deposit see Cheney *v.* Wagner, 33 Nebr. 310, 50 N. W. 13.

Retention of suit after dismissal of bill.— If the bill is dismissed for non-performance of the decree by plaintiff, it is erroneous to retain the suit for the purpose of an account

12. Appeal. Certain general rules of appellate practice, as illustrated in specific performance cases, are mentioned below.[74]

H. Probate Jurisdiction — 1. In General. The legislation of many states provides for a special proceeding in the probate, orphans' or surrogate's court, by which the contracts of a deceased vendor may be enforced without resort to a suit in equity, in the course of settlement of his estate. This legislation varies greatly in its details.[75]

of rents and profits. Clark *v.* Hall, 7 Paige (N. Y.) 382.

Proceedings on death of parties.—Where the vendor, plaintiff, died after tender of deed in court, and the suit was revived by his administrator, the vendee was decreed to accept the deed, without making the heirs parties. Cook *v.* Hendricks, 4 T. B. Mon. (Ky.) 500. And see Faile *v.* Crawford, 34 N. Y. App. Div. 278, 54 N. Y. Suppl. 264. And where, after decree, the cause was stricken from the docket, and both parties died, a subsequent order that the commissioner appointed by the court convey to the heirs of the original parties was held void; the proper course of proceeding being by bill in the nature of a bill of revivor. Welch *v.* Louis, 31 Ill. 446.

Supplemental bill.—Where part of the land decreed to be conveyed has been taken for a highway, the vendee may recover the damages which the vendor received therefor. Low *v.* Low, 177 Mass. 306, 59 N. E. 57.

Loss of deed.—Where the deed, deposited with the clerk, pending appeal, is lost while in his custody, the defendant, on affirmance of the decree, must execute a new deed. Worrall *v.* Munn, 17 N. Y. 475.

Alteration of decree.—After decree for specific performance the court has no authority to enter a judgment for damages, and appoint a referee to ascertain the same, on the ground that specific performance has failed. Koehler *v.* Brady, 87 N. Y. App. Div. 326, 84 N. Y. Suppl. 457 [*affirmed* in 181 N. Y. 503, 73 N. E. 1125]. And see Eastman *v.* Simpson, 139 Mass. 348, 1 N. E. 346, where there was no disability on vendor's part. And after a conditional decree directing defendant to convey on payment of the purchase-money, a decree ordering the payment of the purchase-money cannot be made without a cross bill. Atchison *v.* Dorsey, 1 Bland (Md.) 535. That no decree should be altered on motion except to cure an error by which it does not correctly express the decision see Strauss *v.* Bendheim, 32 Misc. (N. Y.) 179, 66 N. Y. Suppl. 247.

Enforcement by execution.—A judgment directing the execution of a bond and mortgage is not a money judgment, on which an execution for the sale of the property can be issued. Roberge *v.* Winne, 75 Hun (N. Y.) 597, 27 N. Y. Suppl. 601.

74. Objection first made on appeal.—Where objection to the sufficiency of the complaint is made for the first time on appeal, that it will be held sufficient if by any reasonable inference or intendment the conclusion follows that it states a cause of action see Halvorsen *v.* Orinoco Min. Co., 89 Minn. 470, 95 N. W. 320; Drake *v.* Barton, 18 Minn. 462. That if no objection to vendor's title is made, title, was not asked at the trial, it cannot be raised on appeal see Brockenbrough *v.* Blythe, 3 Leigh (Va.) 619. That where relief against the vendor, notwithstanding defects in the title, was not asked at the trial, it cannot be granted on appeal see Mills *v.* Van Voorhis, 20 N. Y. 412, 10 Abb. Pr. 152.

Conflicting evidence.—Where the oral testimony as to the consideration is conflicting, the decree enforcing the contract will not be reversed; since the court must allow for the fact that the chancellor is the best judge of the credibility of oral evidence. Batcheller *v.* Batcheller, 144 Ill. 471, 33 N. E. 24. In specific performance the rule that a case will not be reversed where there is a substantial conflict of evidence must be taken and considered with the rule that, to obtain specific performance, the evidence must establish the contract clearly and satisfactorily. Prairie Development Co. *v.* Leiberg, 15 Ida. 379, 98 Pac. 616. A substantial conflict in the evidence so as to render the trial court's judgment conclusive on appeal does not necessarily arise because there is some evidence to support a contract in an action for specific performance, for in such actions the contract must be established by clear and satisfactory evidence, and the conflict must be substantial in the light of such rule. Prairie Development Co. *v.* Leiberg, *supra*.

Immaterial finding.—A reversal will not be granted because a finding of fact is without evidence to support it, unless it is a material fact and to some extent at least gives support to the judgment rendered. Wetmore *v.* Bruce, 118 N. Y. 319, 23 N. E. 303.

75. See Pomeroy Spec. Perf. §§ 497, 498. Legislation conferring jurisdiction on the probate court to require an administrator to convey land in pursuance of the contract of his intestate is valid. Adams *v.* Lewis, 1 Fed. Cas. No. 60, 5 Sawy. 229. The legislation sometimes confers power on the probate court to permit the vendor's administrator to convey on his *ex parte* petition. Carter *v.* Jackson, 56 N. H. 364. *Contra*, Buchanan *v.* Park, (Tex. Civ. App. 1896) 36 S. W. 807, Laws (1848). The legislation refers, not to contracts of the administrator, but to those of decedent. Ralston *v.* Ihmsen, 204 Pa. St. 588, 54 Atl. 365. For the history and description of the legislation in Pennsylvania see McFarson's Appeal, 11 Pa. St. 503; Chess' Appeal, 4 Pa. St. 52, 45 Am. Dec. 668. In Texas see Aspley *v.* Murphy, 52 Fed. 570, 3 C. C. A. 205 (Laws 1846); Houston *v.*

2. To What Contracts. The legislation generally refers only to contracts which are legally binding.[76]

3. Authority Must Be Strictly Pursued. The authority conferred on the probate court is special and limited, and must be strictly pursued.[77]

4. Effect on Equity Jurisdiction. The jurisdiction of equity courts to specifically enforce the contracts of deceased persons is not in most states taken away by this legislation.[78]

SPECIFIC POLICY. A policy of insurance covering several different articles, but limiting the insurer's liability to a fixed sum on each separate article.[1]

SPECIFIC QUESTION. A question specified; that is distinctly stated.[2]

SPECIFIC TAX. A tax which imposes a specific sum by the head or number, or some standard of weight or measurement, which requires no assessment beyond a listing and classification of the objects to be taxed.[3] (See, generally, TAXATION.)

Killough, 80 Tex. 296, 16 S. W. 56; Walker *v.* Myers, 36 Tex. 203.

76. Me. Rev. St. (1857) c. 71, § 17; Bates *v.* Sargent, 51 Me. 423 (if the vendee is in default his remedy is in equity); Dakin *v.* Dakin, 97 Mich. 284, 56 N. W. 562 (contract void under statute of frauds); Laird *v.* Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420 (parol contract); Peterson *v.* Bauer, 76 Nebr. 652, 107 N. W. 993, 111 N. W. 361, 124 Am. St. Rep. 812 (oral contract to adopt a child). In some states the jurisdiction is limited to contracts of a particular form: "Bond or obligation to make title" (Wilkerson *v.* Vinson, 20 Ala. 131; Lacy *v.* Simpson, Minor (Ala.) 33; Ky. Rev. St. c. 57, § 7; Grubbs *v.* Steele, 15 B. Mon. (Ky.) 570); "bond or written agreement," meaning an agreement which complies with the statute of frauds (Peters *v.* Phillips, 19 Tex. 70, 70 Am. Dec. 319). As to the requirement in Pennsylvania that the vendor must have died "possessed" of the land see McFarson's Appeal, 11 Pa. St. 503.

77. Jones *v.* Taylor, 7 Tex. 240, 56 Am. Dec. 48; Sander-Bowman Real-Estate Co. *v.* Yesler, 2 Wash. 429, 27 Pac. 269; Wash. Code (1881), c. 52, §§ 625, 627, 630. If the statute confers no authority on the probate court to bring in necessary third parties, this cannot be done, and relief must be sought in equity. *In re* Corwin, 61 Cal. 160; White *v.* Patterson, 139 Pa. St. 429, 21 Atl. 360. The court cannot entertain a suit to rescind its decree, brought by a stranger to the litigation. Rafferty's Estate, 9 Phila. (Pa.) 336. The plaintiff, by his petition, must bring himself within the language of the statute. Driver *v.* Hudspeth, 16 Ala. 348 (must show that deceased was owner of the land); Lacy *v.* Simpson, Minor (Ala.) 33 (same); Cory *v.* Hyde, 49 Cal. 469 (must state that contract was in writing). The petition must aver a readiness to perform. Anders' Estate, 12 Phila. (Pa.) 28.

Notice to heirs, etc.—Whether the Pennsylvania statute requires notice to the widow, heirs, and devisees of the deceased has been much discussed in that state. It appears to be settled that where the executor or administrator of the deceased vendor applies for specific performance of his contract, such notice is not necessary. Simmon's Estate, 140 Pa. St. 567, 21 Atl. 402; West Hickory Min. Assoc. *v.* Reed, 80 Pa. St. 38; Sutter *v.* Ling, 25 Pa. St. 466. But see Anshutz's Appeal, 34 Pa. St. 375 (notice should be given as a matter of security); McKee *v.* McKee, 14 Pa. St. 231; Anders' Estate, 12 Phila. (Pa.) 28 (devisees). But where the purchaser applies for specific performance of the decedent vendor's contract, the statute (Act Feb. 24, 1834, § 15) expressly requires that the heirs and devisees shall be made parties. Hoffner *v.* Wynkoop, 97 Pa. St. 130; Wilson's Estate, 7 Pa. Co. Ct. 459. The statute being silent as to the death intestate of the vendee, the chancery practice is followed, and his administrator and heirs should be made parties. Anshutz's Appeal, *supra*. In Kentucky all the heirs must be notified. Rev. St. c. 57, § 7; Grubbs *v.* Steele, 15 B. Mon. (Ky.) 570.

78. Kundinger *v.* Kundinger, 150 Mich. 630, 114 N. W. 408; Burns *v.* Smith, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653; Christ Church *v.* Beach, 7 Wash. 65, 33 Pac. 1053. *Contra*, Wiley's Appeal, 84 Pa. St. 270 (but chancery court has jurisdiction where settlement of partnership affairs is involved); McFarson's Appeal, 11 Pa. St. 503 (the orphans' court which has jurisdiction of the administrator's accounts, not that within whose jurisdiction the land lies); Weller *v.* Weyand, 2 Grant (Pa.) 103; Finley *v.* Aiken, 1 Grant (Pa.) 83; Utah Rev. St. (1898) §§ 3935–3940; Free *v.* Little, 31 Utah 449, 88 Pac. 407 (court of equity can act only when probate court cannot give the relief, and that fact must be established in the probate court).

1. American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 104, 49 Atl. 738.

2. Cummings *v.* Taylor, 21 Minn. 366, 369.

3. Union Trust Co. *v.* Wayne Probate Judge, 125 Mich. 487, 490, 84 N. W. 1101; Pingree *v.* Auditor-Gen., 120 Mich. 95, 104, 78 N. W. 1025, 44 L. R. A. 679, where it is said that a tax on property based on assessment is not a "specific tax."

SPECIFY. To point out, to particularize, to designate by words one thing from another.[4]

SPECIMEN. A part or small portion of anything; a sample.[5] (Specimen: As Part of Application For Patent, see PATENTS, 30 Cyc. 883 note 78. Of Handwriting Submitted For Comparison, see EVIDENCE, 17 Cyc. 155.)

SPECULATE. To take the risk of loss in view of possible gain.[6] (See SPECULATION; SPECULATIVE.)

SPECULATION. A term which when used with regard to a purchase of property is said to mean that the purchaser is getting the property for much less than it is worth.[7] (Speculation: Gambling Contract or Transaction, see GAMING, 20 Cyc. 921. See SPECULATE; SPECULATIVE.)

SPECULATIVE. Disposed toward speculation as distinguished from investment.[8] (Speculative: Policy, see LIFE INSURANCE, 25 Cyc. 732. Transaction, see GAMING, 20 Cyc. 941.)

SPECULATIVE DAMAGES. Damages which are allowed when the probability that a circumstance will exist as an element for compensation becomes conjectural.[9] (See DAMAGES, 13 Cyc. 36, 49.)

SPECULATIVE QUESTIONS OF LAW. See APPEAL AND ERROR, 2 Cyc. 533.

SPECULATIVE VALUE. A term which when used with reference to corporate stock is said to mean the value based on calculation of future prospects and contingencies.[10]

SPEECH. See CONSTITUTIONAL LAW, 8 Cyc. 892.

SPEED. The moving or causing to move forward with celerity, swiftness, quickness.[11] (Speed: Dangerous, see CARRIERS, 6 Cyc. 624. Expert Evidence as to, see EVIDENCE, 17 Cyc. 105. Liability of City For Injuries from Defects or Obstructions in Street Received While Violating Speed Law, see MUNICIPAL CORPORATIONS, 28 Cyc. 1417. Of Person Injured in Approaching Railroad Crossing — As Determining Contributory Negligence, see RAILROADS, 33 Cyc. 983; Duty to Stop, Look, and Listen, see RAILROADS, 33 Cyc. 1015; Duty Where View or Hearing Is Obstructed, see RAILROADS, 33 Cyc. 1022. Of Railroad Train — Generally, see RAILROADS, 33 Cyc. 971; As Causing Injury to Passenger, see CARRIERS, 6 Cyc. 624. Of Street Car, see STREET RAILROADS. Opinion Evidence, see EVIDENCE, 17 Cyc. 105. Regulation of — In the Use of Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 910; On Navigable River, see COMMERCE, 7 Cyc. 459 note 51.)

SPEEDILY. A term said not to be synonymous with "in a reasonable time."[12]

4. Stewart *v.* Jaques, 77 Ga. 365, 368, 3 S. E. 283, 4 Am. St. Rep. 86.

"Specified," as used in a statute requiring the party to swear that a mortgage is made to secure the debt specified in the condition, means, "particularized, specially named." Webster Dict. [*quoted* in Page *v.* Ordway, 40 N. H. 253, 256].

5. Webster Dict. [*quoted* in People *v.* Freeman, 1 Ida. 322, 323], where it is also said that a cabinet of minerals consists of specimens.

A marble statue is a specimen of sculpture within the meaning of the Tariff Act covering specimens or casts of sculpture. Sibbel *v.* U. S., 124 Fed. 105.

6. Century Dict. [*quoted* in Lawson *v.* Cobban, 38 Mont. 138, 99 Pac. 128, 130].

7. Maxwell *v.* Burns, (Tenn. Ch. App. 1900) 59 S. W. 1067, 1071.

8. Mutual L. Ins. Co. *v.* Lane, 151 Fed. 276, 284.

9. Anderson L. Dict. [*quoted* in Crichfield *v.* Julia, 147 Fed. 65, 70, 77 C. C. A. 297], where it is said that it is usually applied in cases of breach of contract when money is sought for loss of uncertain or remote profits not in the understanding of the parties, or it is uncertain whether the party has been damaged or the damages result from the act of the other party.

The term is used to designate damages in excess of compensatory damages, which are allowed as a punishment of the wrongdoer, and has been said to be synonymous with the terms "'exemplary,' 'vindictive,' and 'punitive'" damages. Murphy *v.* Hobbs, 7 Colo. 541, 547, 5 Pac. 119, 49 Am. Rep. 366.

10. Com. *v.* Edgerton Coal Co., 164 Pa. St. 284, 299, 30 Atl. 125, 129.

11. Bouvier L. Dict.

12. Hembling *v.* Grand Rapids, 99 Mich. 292, 294, 58 N. W. 310, where it was used in an instruction in an action against a city for injuries by reason of a defective sidewalk, declaring that the city was obliged to repair speedily, the term "speedily" requiring a lesser time than the jury might find was a reasonable time within which the city was bound to repair.

SPEEDWAY. A term which may refer to a boulevard.[13] (See BOULEVARD, 5 Cyc. 860.)

SPEEDY TRIAL. A trial regulated and conducted by fixed rules of law;[14] a trial as soon after indictment as the prosecution can with a reasonable diligence prepare for, regard being had to the terms of the court.[15] (See CRIMINAL LAW, 12 Cyc. 498.)

SPELLING. The formation of words by letters, orthography.[16] (Spelling: Defect or Mistake in, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 288, 291; PLEADING, 31 Cyc. 768. Of Name, see NAMES, 29 Cyc. 272.)

13. Horne *v.* Lowell, 171 Mass. 575, 581, 51 N. E. 536.

14. Sample *v.* State, 138 Ala. 259, 260, 36 So. 367, where it is said that any delay created by the operation of those rules does not work prejudice to any constitutional right of the defendant. See also to the same effect Nixon *v.* State, 2 Sm. & M. (Miss.) 497, 507, 41 Am. Dec. 601; State *v.* Caruthers, 1 Okla. Cr. 428, 447, 98 Pac. 474.

15. See 12 Cyc. 498 [*quoted* in State *v.* Keefe, 17 Wyo. 227, 244, 98 Pac. 122].

16. Black L. Dict.

SPENDTHRIFTS

By Charles Cyrus Marshall

CROSS-REFERENCES

For Matters relating to:
Spendthrift Trust, see Trusts.
Testamentary Capacity of Spendthrift, see Wills.

I. DEFINITION.

A spendthrift is a person who, by excessive drinking, gambling, idleness, or debauchery of any kind shall so spend, waste, or lessen his estate as to expose

himself or his family to want or suffering, or expose the town to charge or expense for the support of himself or family.[1]

II. POWER TO REGULATE.

A. In General. Statutes providing for the guardianship of spendthrifts are based upon the right of the government to protect the property of citizens for the benefit of themselves and their families, and of the community.[2]

B. Exercise of Power. The power conferred by a statute providing for the guardianship of a spendthrift's property is an extraordinary one, founded upon considerations of public policy, and should be exercised with great caution.[3]

III. WHO MAY BE ADJUDGED SPENDTHRIFTS.

A married woman who has the exclusive control of her property may be placed under guardianship as a spendthrift.[4]

IV. GUARDIANSHIP OF SPENDTHRIFTS.

A. Appointment of Guardian[5] — 1. Proceedings to Appoint — a. Venue. Under statutes conferring authority upon officers of the town to which a person belongs to institute proceedings for the appointment of a guardian for a spendthrift, the civil authorities of the town where the alleged spendthrift resides or has his domicile at the time of the appointment have jurisdiction,[6] although the legal settlement of such spendthrift is in another county[7] or state.[8]

1. Vt. Rev. St. c. 65, § 9 [*cited* in Black L. Dict.; Bouvier L. Dict.]. See also Young *v.* Young, 87 Me. 44, 32 Atl. 782; Morey's Appeal, 57 N. H. 54.

2. Bond *v.* Bond, 2 Pick. (Mass.) 382, holding that the exercise of statutory authority in appointing a guardian for a spendthrift is not a taking of the spendthrift's property in violation of his constitutional rights, but is a preservation of it for his own use.

The statute is primarily for the benefit of the spendthrift and his family, and secondarily for the benefit of the town. So far as the first object is to be obtained the proceeding is a police regulation to place a person who wantonly neglects himself and family under the control of those who will do what he himself ought to do. Cushing *v.* Hale, 8 Vt. 38. See also Norton *v.* Leonard, 12 Pick. (Mass.) 152, holding that the chief purpose of the statute is to restrain wasteful and vicious habits and to prevent the spendthrift from bringing misery and distress upon himself and family, the saving of expense to the town being subordinate to such purpose.

Denial of right of trial by jury.—A statute authorizing the judge of an inferior court to appoint a guardian does not deprive the spendthrift of the benefit of a trial by jury, where he has the right of appeal to a higher court, where a trial by jury may be ordered. Bond *v.* Bond, 2 Pick. (Mass.) 382.

3. Norton *v.* Leonard, 12 Pick. (Mass.) 152; Hamilton *v.* North Providence Prob. Ct., 9 R. I. 204.

Strict construction.—As such statutes are in derogation of common right, they will receive a strict construction and their provisions must be closely followed. Strong *v.* Birchard, 5 Conn. 357; Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206; Knapp *v.* Lockwood, 3 Day (Conn.) 131; Johnson *v.* Stanley, 1 Root (Conn.) 245; Ellis *v.* Cramton, 50 Vt. 608.

4. Tillinghast *v.* Holbrook, 7 R. I. 230, holding that the fact that the supreme court may appoint a trustee for a married woman's property is no objection to proceedings in a probate court looking to her guardianship as a spendthrift.

5. **Evidence of appointment.**— One original duplicate of the appointment of an overseer for a spendthrift is competent evidence of such appointment and supersedes the necessity of a sworn copy. Mix *v.* Peck, 13 Conn. 244. So the letter of guardianship is evidence that the guardian was duly appointed, where it appears that jurisdiction to make the appointment regularly attached. Raymond *v.* Wyman, 18 Me. 385.

6. Mix *v.* Peck, 13 Conn. 244; Stacey *v.* Benson, 18 Pick. (Mass.) 496; Cushing *v.* Hale, 8 Vt. 38.

A spendthrift in custody of an officer in a certain town and about to be committed to prison in another town at the time of the appointment of an overseer is within the jurisdiction of the selectment of the town in which he was in custody. Mix *v.* Peck, 13 Conn. 244.

7. Stacey *v.* Benson, 18 Pick. (Mass.) 496.

8. Cushing *v.* Hale, 8 Vt. 38.

Change of domicile.—Where an overseer in the first stage was duly appointed for a spendthrift and shortly thereafter the spendthrift was committed to an institution in another state, and while there the appointee was made overseer in the second stage, it was held that such removal did not change the ward's domicile, and hence the second appointment was not objectionable on the ground that the ward was not then an inhabitant of the town

b. Complaint or Petition — (I) *Who May Make.* Residents of the town in which an alleged spendthrift has his legal settlement cannot petition for the appointment of a guardian on the ground that such person may become a charge upon the town, where the statute does not give them such right.[9]

(II) *Sufficiency.* The petition must allege facts which show that the person complained of is subject to guardianship as a spendthrift within the statutory meaning of the term.[10]

c. Notice — (I) *To Whom Given.* If the spendthrift is of full age, notice to him is sufficient.[11]

(II) *Service.* Service by petitioner is improper where the statute requires that service be made by a disinterested person.[12]

d. Evidence. To authorize the appointment of a guardian for one as a spendthrift there must be proof of such wasteful or vicious habits on his part as will bring him within the statutory meaning of the term.[13]

e. Defenses. That a husband is able to support his wife will not prevent her being placed under guardianship as a spendthrift, but the court may consider such fact as bearing on the probability of her becoming unprovided for.[14]

f. Decree — (I) *Time For Which Guardianship May Be Decreed.* The appointment of a guardian for a spendthrift without limitation in point of time is void.[15]

where the appointment was made. Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337.

9. McKenna *v.* McKenna, (R. I. 1908) 69 Atl. 844. *Compare* Baker *v.* Searle, 2 R. I. 115, holding, under an earlier statute, that any inhabitant of the town might prefer such a petition, and the signature of the overseer of the poor was not required.

A complaint purporting to be made by a majority of the selectmen and civil authority of a town is *prima facie* evidence that it was so made, and one contending that it was not made by a majority has the burden of proof. Cushing *v.* Hale, 8 Vt. 38.

10. Johnson *v.* Stanley, 1 Root (Conn.) 245. See also Young *v.* Young, 87 Me. 44, 32 Atl. 782, holding that under a statute providing for the appointment of a guardian for those who have become incapable of managing their affairs by "excessive drinking, gambling, idleness or debauchery of any kind," and also for those "who so spend or waste their estate as to expose themselves or families to want or suffering, or their towns to expense," a petition alleging that a person "is an indolent and intemperate man, and who spends and wastes his estate so much that he exposes himself and family to want and suffering, and his said town to expense by reason of said indolence and intemperate habits, he is incompetent to manage his own estate or to protect his rights," contains all the allegations required by the statute to authorize the appointment of a guardian to a person falling within the description of the second class mentioned in the statute.

A petition for the appointment of a guardian for a married woman as a spendthrift need not allege that the husband is unable to support his wife. Tillinghast *v.* Holbrook, 7 R. I. 230.

11. Hamilton *v.* North Providence Prob. Ct., 9 R. I. 204, holding, however, that it may be advisable in some cases to notify the spendthrift's family.

Where the petition is by the party himself, service of notice upon him is not necessary. Pratt *v.* Pawtucket Prob. Ct., 22 R. I. 596, 48 Atl. 943.

Failure of defendant to appear after due notice has once been given will authorize the appointment of a guardian in his absence, the giving of further notice being within the discretion of the court. Young *v.* Young, 87 Me. 44, 32 Atl. 782.

12. Baker *v.* Searle, 2 R. I. 115.

Service on prisoner.—Where the statute requires service of the summons upon the alleged spendthrift by leaving a copy at his usual place of abode, service upon him at the jail where he was imprisoned on a criminal charge was sufficient, it appearing that he had no other place of residence at the time. Dunn's Appeal, 35 Conn. 82.

13. Morey's Appeal, 57 N. H. 54, holding that proof of foolish and weak-minded habits in money matters was insufficient.

It rests largely within the discretion of the court to determine what evidence tending to show the manner of life of the alleged spendthrift is too remote. Hopkins *v.* Howard, 20 R. I. 394, 39 Atl. 519, holding that evidence of spendthrift's financial condition ten years prior to the filing of the petition was properly excluded.

14. Tillinghast *v.* Holbrook, 7 R. I. 230.

15. Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206; Waters *v.* Waterman, 2 Root (Conn.) 214. See also Washband *v.* Washband, 24 Conn. 500, holding that, where an overseer in the second stage was appointed without limitation as to time, before the expiration of the definite term for which an overseer in the first stage had been appointed, such second appointment would continue only until the expiration of the first overseer's term.

The appointment must be for a reasonable time. Chalker *v.* Chalker, 1 Conn. 79, 6 Am. Dec. 206.

(II) *RECITALS.* The findings of fact in proceedings for the appointment of an overseer or guardian for a spendthrift need not follow the exact language of the statute as to the causes assigned for the appointment.[16]

g. Appeal — (I) *RIGHT OF APPEAL.* Petitioner cannot appeal from an order dismissing his petition.[17]

(II) *EFFECT OF APPEAL.* The taking of an appeal by a spendthrift from the action of town officers in appointing a guardian does not affect the operation of the appointment.[18]

2. FILING NOTICE OF APPOINTMENT, INVENTORIES, ETC. In order that the guardian of a spendthrift may become entitled to the custody of his ward's property, it is essential that he comply strictly with the statutory requirements as to giving notice of his appointment,[19] filing inventories of the property taken, etc.[20]

3. BOND OF GUARDIAN. The giving of a bond with sureties is not a condition precedent to the authority of a spendthrift's guardian to act.[21]

4. WRONGFUL APPOINTMENT. Officers who appoint an overseer or guardian for a person in an illegal or oppressive manner are liable in damages to the party injured.[22]

B. Control and Custody of Spendthrift's Person and Estate — **1. GUARDIAN'S AUTHORITY WITH RESPECT OF SPENDTHRIFT'S PERSON.** In general guardians of spendthrifts have no control of the persons of their wards.[23]

16. Mix *v.* Peck, 13 Conn. 244, where it was held that a finding that the alleged spendthrift was "spending his estate and likely to be reduced to want, and himself and family become chargeable to said town," was sufficient and proper without reciting in terms that he was "wasting or likely to waste his estate."

A decree based upon facts not assigned by the statute as grounds for the appointment is invalid. Johnson *v.* Stanley, 1 Root (Conn.) 245, holding that a decree reciting that the estate is likely to be reduced by lawsuits and mismanagement does not show sufficient grounds for the appointment of a guardian. And a decree which fails to recite that, by reason of the facts found, the spendthrift is likely to bring himself and family to want, or to render them chargeable upon the town, does not respond to the material allegations of the petition, and will not support the appointment. Pratt *v.* Pawtucket Prob. Ct., 22 R. I. 596, 48 Atl. 943; Hopkins *v.* Howard, 20 R. I. 394, 39 Atl. 519.

A decree appointing a guardian for a married woman as a spendthrift is not objectionable because guardianship of the property is coupled with guardianship of the person. Tillinghast *v.* Holbrook, 7 R. I. 230.

Recitals in probate records that a majority of the selectmen of a town made a representation and complaint to the judge of probate for the county; that a certain inhabitant of that town was a spendthrift and wasting his estate; and that thereupon notice issued to the alleged spendthrift to show cause why he should not be put under guardianship were sufficient to show that the judge of probate had jurisdiction. Raymond *v.* Wyman, 18 Me. 385.

Presumption as to recitals.— If the decree of the lower court recites all the elements required by statute as a basis for the appointment, it will be presumed by an appellate court that it was based upon a hearing and satisfactory proof of the material allegation of the petition. Young *v.* Young, 87 Me. 44, 32 Atl. 782.

17. McKenna *v.* McKenna, (R. I. 1908) 69 Atl. 844, holding that the petitioner was not a "person aggrieved" within the meaning of a statute giving the right of appeal to any person aggrieved by an order of the probate court, although he was a brother of the alleged spendthrift and had an annuity charged on her real estate.

18. Mix *v.* Peck, 13 Conn. 244.

19. Knapp *v.* Lockwood, 3 Day (Conn.) 131; Ellis *v.* Cramton, 50 Vt. 608.

20. Knapp *v.* Lockwood, 3 Day (Conn.) 131.

If he fails to do this, his ward may recover the property in an action of trover (Knapp *v.* Lockwood, 3 Day (Conn.) 131), and the guardian will be precluded from asserting the invalidity of a contract made between the spendthrift and one having no notice of his disability (Ellis *v.* Cramton, 50 Vt. 608).

Failure to sign and attest the inventory is, it seems, immaterial if it is otherwise perfect. Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337.

21. Russell *v.* Coffin, 8 Pick. (Mass.) 143.

Bond for sale.—A bond given to a judge of probate by several guardians and their sureties to obtain permission to sell the whole of the spendthrift's real estate is a probate bond upon which the liability is both joint and several. Wood *v.* Hayward, 13 Pick. (Mass.) 269.

22. Johnson *v.* Stanley, 1 Root (Conn.) 245, where it appeared that selectmen had appointed an overseer for one as a spendthrift upon grounds not authorized by the statute.

If a valid appointment is made maliciously and without probable cause, the law will imply damage. Parmalee *v.* Baldwin, 1 Conn. 313. But if such appointment is a nullity, the claimant cannot maintain an action unless he alleges and proves special injury. Parmalee *v.* Baldwin, 1 Conn. 313.

23. Boyden *v.* Boyden, 5 Mass. 427, hold-

2. Guardian's Authority With Respect of Spendthrift's Estate. The general rules applicable to the representation of persons under disability by their guardians in matters relating to the custody and care of their estates apply to the guardianship of spendthrifts.[24]

C. Release From Guardianship. Where a court is vested with discretionary power to grant relief to one under guardianship as a spendthrift, its authority to release him from guardianship is practically unlimited, and only a gross abuse of discretion will warrant a revision of its action on appeal.[25]

V. DISABILITIES OF SPENDTHRIFTS.

A. With Respect of Contracts — 1. In General. There is no incapacity of spendthrifts at common law;[26] nor do the statutes so far liken them to insane

ing that the spendthrift could not be restrained of his liberty or bound out to service by his guardian. *Compare* Lynch *v.* Dodge, 130 Mass. 458.

It is the duty of the guardian to see that the spendthrift does not suffer, and if the latter's estate has become exhausted he may obtain support for him at the expense of the town. Fiske *v.* Lincoln, 19 Pick. (Mass.) 473.

Where guardianship of the person is coupled with guardianship of the estate, such personal guardianship must be exercised in subordination to the rights of the spendthrift's wife. *In re* Chace, 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493.

24. See Guardian and Ward, 21 Cyc. 62.

Illustrations.— The guardian may maintain a suit for the benefit of the spendthrift, appoint an appraiser of land levied on under a judgment in his favor, and receive seizin in behalf of his ward. Bond *v.* Bond, 2 Pick. (Mass.) 382. He may obtain the dismissal of a suit pending against his ward prior to his appointment, when the ward's estate is decreed to be administered as an insolvent estate. Hawkins *v.* Learned, 54 N. H. 333. He may have a pension, to which his ward is entitled, transferred to himself. Cushing *v.* Hale, 8 Vt. 38. Where there are two guardians, one of them is competent to receive payment of a debt due to their ward. Raymond *v.* Wyman, 18 Me. 385. The guardian of an adult spendthrift may avoid any voidable contract made by his ward during minority. Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117. Where the spendthrift is a mortgagee of property and enters for condition broken, prior to being adjudged a spendthrift, the guardian may thereafter restore possession to the mortgagor and prevent foreclosure. Botham *v.* McIntier, 19 Pick. (Mass.) 346. The guardian must exercise reasonable prudence in making investments, and will be responsible for all losses arising in consequence of his failure to do so. Harding *v.* Larned, 4 Allen (Mass.) 426. The assent of the spendthrift will not exonerate him from responsibility for unauthorized acts or mismanagement. Hicks *v.* Chapman, 10 Allen (Mass.) 463; Harding *v.* Larned, 4 Allen (Mass.) 426. In making sales of the spendthrift's real estate under license of a judge of probate, the guardian will be held responsible for all losses arising in consequence of his disregard of the terms of the license, both in respect to the manner of making sale and the disposition of the proceeds. Harding *v.* Larned, 4 Allen (Mass.) 426. If the guardian of a spendthrift has assets and refuses to pay a debt of his ward, he is guilty of a breach of duty, the remedy for which is an action on the guardianship bond. Pendexter *v.* Cole, 66 N. H. 556, 22 Atl. 560.

No legal title to spendthrift's estate.— Simmons *v.* Almy, 100 Mass. 239; Hicks *v.* Chapman, 10 Allen (Mass.) 463, holding that an oral lease of the spendthrift's real estate by the guardian will not be construed as the latter's personal contract so as to vest the rents in him, where there is nothing in the terms of the contract to show that it was so intended.

Authority not coupled with interest.— Simmons *v.* Almy, 100 Mass. 239; Hicks *v.* Chapman, 10 Allen (Mass.) 463; Harding *v.* Larned, 4 Allen (Mass.) 426. *Contra,* Thompson *v.* Boardman, 1 Vt. 367, 18 Am. Dec. 684, holding, under the statute, that the power of the guardian was coupled with an interest and that he had the right to cut standing timber on the ward's land and that a note taken for such timber by the guardian, payable to himself, could not be discharged by the ward after he was released from guardianship.

The guardian may sell the homestead of the spendthrift for his maintenance and payment of his debts, under license of the court, although the homestead is exempt from levy on execution. Wilbur *v.* Hickey, 8 Gray (Mass.) 432.

25. Williston *v.* White, 11 Vt. 40.

The revocation of the guardian's appointment does not give validity to a contract, made while the appointment was in force, as against an intervening attachment. Mix *v.* Peck, 13 Conn. 244.

26. O'Donnell *v.* Smith, 142 Mass. 505, 8 N. E. 350; 1 Blackstone Comm. 305, 306.

Alimony.— In an action for divorce brought against a spendthrift, he may be ordered to pay alimony and suit money, since his liability therefor does not arise upon contract. Sturgis *v.* Sturgis, 51 Oreg. 10, 93 Pac. 696, holding that an order for payment of suit money and alimony directed to both the spendthrift and his guardian was erroneous as to the guardian, since the ward's debts are enforceable only against his estate.

persons as to create an incapacity apart from guardianship.[27] The disability of one who is adjudged a spendthrift is general; and no necessity of which the guardian is legally competent to judge will make a contract valid without his assent.[28]

2. Necessaries. A statute avoiding contracts of a spendthrift made after the filing of the complaint against him does not extend to implied contracts for necessaries.[29]

3. Time to Which Disability Relates. Where the statute provides that contracts entered into by the spendthrift after the filing of the complaint against him shall be void, an adjudication that defendant is a spendthrift relates back to the time of filing the complaint.[30] But the appointment cannot affect contracts entered into by the spendthrift for the purchase of goods prior to the commencement of the proceedings, but delivered after the appointment.[31]

B. Transfers and Conveyances of Property. Transfers and conveyances of property by one under guardianship as a spendthrift are void and will be set aside.[32] But a deed by one adjudged a spendthrift, and for whom a guardian has been named, is valid if the guardian has never qualified.[33]

VI. Actions By and Against Guardian or Spendthrift.

The general rules governing actions by or against persons under disability and their guardians apply to the guardian of a spendthrift and his ward.[34] A statute

27. O'Donnell *v.* Smith, 142 Mass. 505, 8 N. E. 350; Manson *v.* Felton, 13 Pick. (Mass.) 206.

Guardian's failure to qualify.—Where a decree was made appointing a guardian for a spendthrift, but the appointee never accepted or qualified, it was held that the decree, although unrevoked at the time of an assignment nine years later, would not affect the validity of such assignment, the incapacity of the spendthrift depending upon the fact of guardianship and not upon his habits. O'Donnell *v.* Smith, 142 Mass. 505, 8 N. E. 350.

28. Mix *v.* Peck, 13 Conn. 244, holding that a transfer of personal property by the spendthrift as security to one giving bail for his release under a criminal charge was invalid, not having been assented to by the guardian.

He cannot make a valid contract for the payment of money. Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117; Manson *v.* Felton, 13 Pick. (Mass.) 206.

29. McCrillis *v.* Bartlett, 8 N. H. 569, holding that expenses incurred in contesting the appointment may be regarded as necessary expenditures.

Articles of household furniture purchased by a spendthrift may be necessaries, and whether they are so is a question of fact. Leonard *v.* Stott, 108 Mass. 46.

30. Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117; McCrillis *v.* Bartlett, 8 N. H. 569, holding that the indorsement of a note by a spendthrift after filing the complaint was void where a guardian was afterward appointed on that complaint.

Ratification of contract pending appeal.—A spendthrift cannot ratify a contract executed by him while a minor, after the filing of a complaint in proceedings for the appointment of a guardian, and pending an appeal which results in the confirmation of the appointment. Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117.

A statute providing that "every gift, bargain, sale or transfer of any real or personal estate," made by the spendthrift after filing of the complaint and order of notice, shall be void, was held not to apply to promissory notes. Smith *v.* Spooner, 3 Pick. (Mass.) 239. *Compare* Manson *v.* Felton, 13 Pick. (Mass.) 206.

31. Myer *v.* Tighe, 151 Mass. 354, 24 N. E. 49.

32. Mix *v.* Peck, 13 Conn. 244; Ure *v.* Ure, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336 (holding that reimbursement of the purchaser for taxes paid by him is not a condition to setting aside the conveyance); McCrillis *v.* Bartlett, 8 N. H. 569.

Indorsement of note.—Where the payee of a note indorsed it, while under guardianship as a spendthrift, it was held that no title passed to the indorsee, although a copy of the complaint for the appointment was not filed as required by statute. Lynch *v.* Dodge, 130 Mass. 458. See also McCrillis *v.* Bartlett, 8 N. H. 569.

The subsequent assent of the guardian to an unauthorized transfer of personalty by a spendthrift will not give validity to such transfer as against an intervening attaching creditor. Mix *v.* Peck, 13 Conn. 244.

A spendthrift may appoint appraisers of land levied on under execution against him. Strong *v.* Birchard, 5 Conn. 357, holding that such appointment is not an act or contract within the meaning of the statute making acts and contracts of the spendthrift void.

33. O'Donnell *v.* Smith, 142 Mass. 505, 8 N. E. 350.

Deed to obtain release from guardianship.—A deed given by a spendthrift, under order of the court, to obtain his release from guardianship is not void for lack of, or illegality of consideration. Williston *v.* White, 11 Vt. 40.

34. See Guardian and Ward, 21 Cyc. 186.

barring claims against guardians, unless they are presented within a certain time after notice, does not bar the recovery of a personal judgment against an adult spendthrift.[35]

SPENDTHRIFT TRUST. The term commonly applied to a trust which is created with a view of providing a fund for the maintenance of another, and at the same time securing it against his improvidence or incapacity for his protection.[1] (See, generally, TRUSTS.)

SPENT BILL. Applied to a negotiable bill of lading, one which has not been produced, surrendered, or cancelled, although the goods represented thereby have been delivered to the consignee by the carrier.[2]

SPES EST VIGILANTIS SOMNIUM. A maxim meaning "Hope is the dream of the vigilant."[3]

SPES IMPUNITATIS CONTINUUM AFFECTUM TRIBUIT DELINQUENDI. A maxim meaning "The hope of impunity holds out a continual temptation to crime."[4]

SPINNING PLANT. A term which in its proper sense does not apply to silk machinery which does not elongate the fibre by drawing it out, as is done in the case of wool and cotton, but simply reels and twists it.[5]

SPINSTER. A woman who has never been married.[6]

SPIRIT or SPIRITS. An inflammable liquid produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the general appellation of "spirits";[7] distilled liquor;[8] liquor manufactured by distillation;[9] the name of

Illustrations.—The spendthrift cannot maintain civil suits in his own name. Mason *v.* Mason, 19 Pick. (Mass.) 506. No action is maintainable against the guardian personally for a debt of the spendthrift. Pendexter *v.* Cole, 66 N. H. 556, 22 Atl. 560; Sturgis *v.* Sturgis, 51 Oreg. 10, 93 Pac. 696. The remedy of a creditor of a spendthrift whose guardian refuses to pay his debt is by an action on the guardianship bond, and not against the guardian in person. Pendexter *v.* Cole, 66 N. H. 556, 22 Atl. 560. Creditors are not restricted to a suit on the guardian's bond, but may attach the ward's property by mesne process in all the usual modes, including trustee process. Simmons *v.* Almy, 100 Mass. 239; Hicks *v.* Chapman, 10 Allen (Mass.) 463. After revocation of the appointment and setting aside of sales made by the guardian under license of the court, the guardian may maintain an action against the administratrix of the spendthrift, to recover money which he has expended out of the proceeds of such sales in payment of the spendthrift's debts, and which he has been obliged to refund. Shearman *v.* Akins, 4 Pick. (Mass.) 283. The guardian of a spendthrift, whose estate has become exhausted, may notify the overseers of the poor that his ward is in need, and thereafter recover expenses incurred by him for the ward's support. Fiske *v.* Lincoln, 19 Pick. (Mass.) 473.

Service of a writ of entry on both the guardian and spendthrift and a general appearance of counsel for the defense will support a judgment for the demandant, although no formal summons was issued to the guardian. Whitcomb *v.* Jacobs, 9 Gray (Mass.) 255.

35. Wakefield Trust Co. *v.* Whaley, 17 R. I. 760, 24 Atl. 780.

The promise of a spendthrift under guardianship to pay a debt contracted before the appointment of his guardian will not take the debt out of the operation of the statute of limitations. Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117; Manson *v.* Felton, 13 Pick. (Mass.) 206. But such a promise by the guardian will have that effect and will hind the spendthrift. Manson *v.* Felton, 13 Pick. (Mass.) 206.

1. Bennett *v.* Bennett, 66 Ill. App. 28, 37.

A provision in a will which gave the rents and profits of the realty to the husband during his life, and the remainder in the property to his sisters, and exempted the interest of the husband in the property, or, rather, its rents and profits, from liability for the husband's debts, created such a trust. Guernsey *v.* Lazear, 51 W. Va. 328, 332, 41 S. E. 405.

2. See Colgate *v.* Pennsylvania Co., 102 N. Y. 120, 126, 6 N. E. 114; Mairs *v.* Baltimore, etc., R. Co., 73 N. Y. App. Div. 265, 270, 76 N. Y. Suppl. 838.

3. Black L. Dict. [*citing* 4 Inst. 203].

4. Bouvier L. Dict. [*citing* 3 Inst. 236].

5. American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 103, 49 Atl. 738.

6. *In re* Conway's Estate, 181 Pa. St. 156 158, 37 Atl. 204. See ADULTERY, 1 Cyc. 957 note 34.

The word "'spirit' is derived from the Latin word '*spiritus*,' one meaning of which is life." Caswell *v.* State, 2 Humphr. (Tenn.) 402, 403.

7. Atty.-Gen. *v.* Bailey, 1 Exch. 281, 292, 17 L. J. Exch. 9.

8. Caswell *v.* State, 2 Humphr. (Tenn.) 402, 403.

9. People *v.* Crilley, 20 Barb. (N. Y.) 246, 248.

an inflammable liquor produced by distillation;[10] an inflammable liquor, raised by distillation, and wine the fermented juice of the grape;[11] all inflammable liquors obtained by distillation;[12] a strong, pungent liquor usually obtained by distillation;[13] a strong, pungent, stimulating liquor, obtained by distillation.[14] (See SPIRITUOUS LIQUOR; and, generally, INTOXICATING LIQUORS, 23 Cyc. 43.)

SPIRIT GAS. A mixture of camphene and alcohol in different proportions than are employed of the same ingredients in making "burning fluid."[15]

SPIRITUALISM. A belief that the spirits of the dead can communicate with the living through the agency of persons called "mediums," who possess qualities or gifts not possessed by mankind in general.[16] (Spiritualism: Belief in as Affecting Testamentary Capacity, see WILLS.)

SPIRITUOUS. Active; lively; something that will produce active or lively results;[17] containing, partaking of spirit, having the refined, strong, ardent quality of alcohol in greater or less degree;[18] containing spirits;[19] having an active power or property.[20] (See SPIRITUOUS LIQUOR.)

SPIRITUOUS LIQUOR. Liquor composed fully or in part of alcohol produced by distillation;[21] liquor whose strength is obtained by distillation as distinguished from fermentation;[22] such liquors as contain alcohol, and thus have spirit, no matter by what name denominated, or in what liquid form or combination they may appear;[23] that which is in whole or in part composed of alcohol extracted by distillation;[24] liquors containing much alcohol; distilled; whether pure or compounded, as distinguished from fermented; ardent.[25] (See SPIRIT; SPIRITUOUS; and, generally, INTOXICATING LIQUORS, 23 Cyc. 43.)

10. State *v.* Moore, 5 Blackf. (Ind.) 118; Gnadinger *v.* Com., 4 Ky. L. Rep. 514.

11. Johnson Dict. [*quoted* in Caswell *v.* State, 2 Humphr. (Tenn.) 402, 403].

12. McCulloch Com. Dict. [*quoted* in Winning *v.* Gow, 32 U. C. Q. B. 528, 535].

13. Webster Dict. [*quoted* in Winning *v.* Gow, 32 U. C. Q. B. 528, 535].

14. Webster Dict. [*quoted* in Caswell *v.* State, 2 Humphr. (Tenn.) 402, 403].

It is the product of a double process, by the application of heat to a still containing the material. The product of the first distillation is known as "low wines, or singlings," which are subsequently subjected to a second process, in order to produce spirits. U. S. *v.* Tenbroek, 2 Wheat. (U. S.) 248, 258, 4 L. ed. 231.

Term has general meaning, as applied to fluids, mostly of a lighter character than ordinary water, obtained but not produced by distillation; but as applied to liquors, they signify the essence, the extract, the purest solution, the highest rectified spirit, the pure alcohol contained in them. State *v.* Giersch, 98 N. C. 720, 723, 4 S. E. 193, 37 Alb. L. J. (N. Y.) 200.

Absinthe is within the phrase "brandies and other spirits" in the French reciprocity agreement, providing for reduced duties on brandies and other spirits. U. S. *v.* Luyties, 124 Fed. 977.

This term includes: Brandy, rum, Geneva whisky and gin. McCulloch Com. Dict. [*quoted* in Winning *v.* Gow, 32 U. C. Q. B. 528, 535]. Cordials and liquors. U. S. *v.* Wile, 130 Fed. 331, 333, 64 C. C. A. 577]. Rum, brandy, gin, whisky. Caswell *v.* State, 2 Humphr. (Tenn.) 402, 403; Winning *v.* Gow, 32 U. C. Q. B. 528, 535.

This term does not include: Ale. People *v.* Crilley, 20 Barb. (N. Y.) 246, 248. Sweet spirits of nitre. Atty.-Gen. *v.* Bailey, 1 Exch. 281, 292. 17 L. J. Exch. 9.

"'British spirits'" is a term applied indiscriminately to the various sorts of spirits manufactured in Great Britain and Ireland, of these gin and whisky are by far the most important. Winning *v.* Gow, 32 U. C. Q. B. 528, 535.

15. Putnam *v.* Com. Ins. Co., 4 Fed. 753, 764, 18 Blatchf. 368.

"Camphene or spirit-gas," within the meaning of a fire policy prohibiting the lighting of the insured premises with such material, does not include "burning-fluid." Stettiner *v.* Granite Ins. Co., 5 Duer (N. Y.) 594, 596.

16. Middleditch *v.* Williams, 45 N. J. Eq. 726, 731, 17 Atl. 826, 4 L. R. A. 738.

17. U. S. *v.* Ellis, 51 Fed. 808, 813.

18. State *v.* Giersch, 98 N. C. 720, 724, 4 S. E. 193, 37 Alb. L. J. 200.

19. Webster Dict. [*quoted* in Lindberg *v.* Kearney, 4 Newfoundl. 484, 490].

20. Webster Dict. [*quoted* in U. S. *v.* Ellis, 51 Fed. 808, 812.

"Spirituous" and "spiritous" have the same meaning and "spirituous" might as well be written "spiritous." Webster Dict. [*quoted* in Com. *v.* Burke, 15 Gray (Mass.) 408, 409].

21. State *v.* Thompson, 20 W. Va. 674, 678.

22. *Re* Kwong Wo, 2 Brit. Col. 336, 340.

23. State *v.* Giersch, 98 N. C. 720, 724, 4 S. E. 193, 37 Alb. L. J. 200.

24. Marks *v.* State, (Ala. 1909) 48 So. 864, 867, where whisky, brandy and rum are citied as examples.

25. Century Dict. [*quoted* in Sarlls *v.* U. S., 152 U. S. 570, 574, 14 S. Ct. 720, 38 L. ed. 556].

Embraces all those liquors which are procured by distillation, but not those procured by fermentation. Caswell *v.* State, 2 Humphr. (Tenn.) 402, 403.

SPITE FENCE or **STRUCTURE.** See ADJOINING LANDOWNERS, 1 Cyc. 789.

SPITTING OF BLOOD. A term said to mean literally the spitting of blood without regard to the source from whence the blood comes.[26] (See LIFE INSURANCE, 25 Cyc. 810.)

SPITTOON. See CUSPIDOR, 12 Cyc. 1023.

SPLINE KEY. A small bar of steel used to fasten a pulley to a shaft.[27]

SPLIT SWITCH. A switch where there is one permanent rail, so that if the switch is open it allows you to run up another track.[28] (See STUB SWITCH.)

SPLITTER. A SPREADER,[29] *q. v.* Specifically, a person who splits recently slaughtered hogs in a packing plant with a cleaver.[30]

SPLITTING APPEALS. See APPEAL AND ERROR, 2 Cyc. 532.

SPLITTING CAUSE OF ACTION. Dividing a single cause of action, claim, or demand into two or more parts and bringing a suit for one of such parts only, intending to reserve the rest for a separate action.[31] (Splitting Cause of Action: In General, see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 589; JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 436. For Libel and Slander, see LIBEL AND SLANDER, 25 Cyc. 435. Ground For Abatement, see ABATEMENT AND REVIVAL, 1 Cyc. 35. In Admiralty, see ADMIRALTY, 1 Cyc. 850. Items of Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 477. Merger and Bar of Causes of Actions, and Defenses by Former Adjudication as Depending Upon Splitting of Causes of Actions in Former Actions, see JUDGMENTS, 23 Cyc. 1174. Separable Controversies For Purpose of Removal to United States Courts, see REMOVAL OF CAUSES, 34 Cyc. 1264.)

SPLITTING OFFENSES. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 225.

SPOILED LUMBER. Such as is rendered unfit for market, and not lumber which was not sawed according to the specifications of the contract.[32] (See, generally, LOGGING, 25 Cyc. 1546.)

SPOLIATION. A term which is said to mean taking an owner's lot entirely away in making an improvement to an adjoining public way.[33] Used in reference to an instrument in writing, the act of a stranger to the instrument in changing the instrument without the participation of the party interested therein;[34] the

Term includes: Beer and wine. State *v.* Giersch, 98 N. C. 720, 724, 4 S. E. 193, 37 Alb. L. J. 200.

Term does not include: Ale. Gnadinger *v.* Com., 4 Ky. L. Rep. 514, 515; Walker *v.* Prescott, 44 N. H. 511. Ale, porter, and strong beer. State *v.* Quinlan, 40 Minn. 55, 59, 41 N. W. 299. Crab cider. State *v.* Oliver, 26 W. Va. 422, 426, 53 Am. Rep. 79. Wine or other fermented liquor. State *v.* Oliver, *supra.*

"Spiritous liquors" *idem sonans* with "spirituous liquors" as used in an indictment see Brumley *v.* State, 11 Tex. App. 114, 116.

"Spiritual," as used in an indictment charging the defendant with the unlawful sale of "spiritual liquor," means "spirituous." State *v.* Clark, 3 Ind. 451, 452.

26. Singleton *v.* St. Louis Mut. Ins. Co., 66 Mo. 63, 76, 27 Am. Rep. 321, where it is said that as used in an application for a life insurance policy it evidently has a different meaning, and that parol evidence is admissible to explain the sense in which it was used.

Used in an application for a life insurance policy no doubt means the disorder so-called, whether proceeding from the lungs, the stomach, or any other part of the body. Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 475, 485. It includes the disorder by that name called whether the blood came from the stomach or the lungs, when it has assumed such proportion as to be a disease. Eminent Household C. W. *v.* Prater, (Okla. 1909) 103 Pac. 558, 563.

27. Anderson *v.* Berlin Mills Co., 88 Fed. 944, 945, 32 C. C. A. 143.

28. Chicago Terminal Transfer R. Co. *v.* Berkowitz, 137 Ill. App. 95, 101, where it is said that a train cannot be derailed by throwing a split switch.

29. Dean *v.* St. Louis Woodenware Works, 106 Mo. App. 167, 80 S. W. 292, 294.

30. Rendlich *v.* Hammond Packing Co., 106 Mo. App. 717, 719, 80 S. W. 683.

31. Black L. Dict.

32. Harris *v.* Rathbun, 2 Abb. Dec. (N. Y.) 326, 328, 2 Keyes 312.

33. Pfaffinger *v* Kremer, 115 Ky. 498, 74 S. W. 238, 240, 24 Ky. L. Rep. 2368.

Forcing an owner to make improvements, where the presumptive benefit does not exist, is to confiscate his property without compensation, and this is said to be "spoliation," and will not be enforced. Duker *v.* Barber Asphalt Paving Co., 74 S. W. 744, 745, 25 Ky. L. Rep. 135.

34. Medlin *v.* Platte County, 8 Mo. 235, 239, 40 Am. Dec. 135, where alteration is distinguished.

mutilation of an instrument by a stranger.[35] (Spoliation: French Spoliation Claims, see UNITED STATES. Of Evidence, see EVIDENCE, 16 Cyc. 1058. Of Instrument, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 137. Of Record, see RECORDS, 34 Cyc. 615. Of Will, see WILLS.)

SPOLIATOR OF EVIDENCE. One who fails to produce evidence in his possession or under his control.[36] (See SPOLIATION.)

SPOLIATUS ANTE OMNIA RESTITUENDUS.[37] See SPOLIATUS DEBET ANTE OMNIA RESTITUI.

SPOLIATUS DEBET ANTE OMNIA RESTITUI. A maxim meaning "A party despoiled [forcibly deprived of possession] ought first of all to be restored."[38]

SPONDET PERITIAM ARTIS. A maxim meaning "He promises the skill of his art; he engages to do the work in a skillful or workmanlike manner."[39]

SPONSALIA DICUNTUR FUTURARUM NUPTIARUM CONVENTIO ET REPROMISSIO. A maxim meaning "A betrothal is the agreement and promise of a future marriage."[40]

SPONSALIA, INTER MINORES CONTRACTA, ANTE SEPTEM ANNOS, NULLA SUNT. A maxim meaning "Betrothals contracted between parties under seven years of age are void."[41]

SPONTANEOUS COMBUSTION. The ignition of a body by the internal development of heat without the action of an external agent.[42]

SPONTE VIRUM MULIER FUGIENS ET ADULTERA FACTA, DOTE SUA CAREAT, NISI SPONTE RETRACTA. A maxim meaning "Let a woman who leaves her husband of her own accord, and commits adultery, lose her dower, unless her husband takes her back of his own accord."[43]

SPORT. To divert; to make merry; to exhibit or bring out in public, as to sport a new equipage; to practice the diversions of the field; to trifle;[44] to play; to frolic, to wanton; to represent by any kind of play;[45] synonymous with PLAY, *q. v.*; frolic; game; wanton.[46] (See SPORTING.)

SPORTING. A term which has been given seven definitions: (1) To indulge in diverting; (2) to indulge in merrymaking; (3) to indulge in representing by any kind of a play; (4) to indulge in bringing out in public, as to indulge in sporting a new hat or carriage; (5) to indulge in play or frolic; (6) to indulge in wantonness; (7) to indulge in trifling; (8) practicing diversions of the field.[47] One

35. Crockett *v.* Thomason, 5 Sneed (Tenn.) 342, 344, distinguishing alteration.

Change in the wording of a will made after execution by one who is not the testator nor is authorized by him; or the total destruction of a will by some one other than the testator or one authorized by him is a spoliation. *In re* Diener, (Nebr. 1907) 113 N. W. 149, 150 [*citing* Page Wills, § 300].

36. Lowe *v.* Donnelly, 36 Colo. 292, 297, 85 Pac. 318, where it is said that whatever inferences are drawn against him are allowed on the theory that he wilfully withheld such evidence.

37. Applied in Neilson *v.* McDonald, 6 Johns. Ch. (N. Y.) *201, 212; Dube *v.* Gueret, 2 Quebec Super. Ct. 314, 315.

38. Burrill L. Dict. [*citing* 2 Inst. 714; 4 Reeves Hist. 18].

Applied in Reg. *v.* Wollez, 8 Cox C. C. 337, 342.

39. Black L. Dict. [*citing* 2 Kent Comm. 588].

40. Peloubet Leg. Max. [*citing* Coke Litt. 34*a*].

41. Peloubet Leg. Max. [*citing* Jenkens' Cent. 95].

42. Sun Ins. Office *v.* Western Woolen-Mill Co., 72 Kan. 41, 58, 82 Pac. 513, dissenting opinion.

43. Morgan Leg. Max. [*citing* Coke Litt. 32*b*].

44. Webster Dict. [*quoted* in Wirth *v.* Calhoun, 64 Nebr. 316, 321, 89 N. W. 785].

45. Webster Dict. [*quoted* in Wirth *v.* Calhoun, 64 Nebr. 316, 321, 89 N. W. 785, 786; State *v.* O'Rourk, 35 Nebr. 614, 620, 53 N. W. 591, 17 L. R. A. 830].

46. Webster Dict. [*quoted* in State *v.* O'Rourk, 35 Nebr. 614, 620, 53 N. W. 591, 17 L. R. A. 830].

It is a very general term covering field sports and other means of recreation, and includes the game of billiards. State *v.* Miller, 68 Conn. 373, 379, 36 Atl. 795.

Playing at the game of baseball comes within the definition of "sporting" under the Nebraska statute concerning the observance of Sunday. Seay *v.* Shrader, 69 Nebr. 245, 248, 95 N. W. 690.

47. Wirth *v.* Calhoun, 64 Nebr. 316, 321, 89 N. W. 785, where the definition of "sport" instead of the term itself is used in defining "sporting," and where it is further said that the legislature did not employ the term in the first, second, fourth, fifth, or sixth sense

lexicographer defines the term as meaning indulging in sport; practicing diversions of the field.[48] (See SPORT.)

SPORTING-HOUSE. A house frequented by sportsmen, betting men, gamblers, and the like.[49] (See, generally, DISORDERLY HOUSES, 14 Cyc. 479.)

SPORTSMAN. One who sports; specifically, a man who practices field sports, especially hunting or fishing, usually for pleasure, and in a legitimate manner.[50]

SPOTTER. A person employed at so much compensation per day who makes it his business to procure illegal sales of intoxicating liquors for the purpose of prosecuting the sellers.[51] (See, generally, INTOXICATING LIQUORS, 23 Cyc. 184. See also SPY, *post*, p. 810.)

SPRAG. A billet of wood used as a prop in a mine [52] or as a check to a vehicle.[53]

SPRAIN. To weaken, as a joint, ligament, or muscle, by a sudden and excessive exertion, as by wrenching; to overstrain or stretch injuriously, but without luxation.[54]

SPRATS. The young of the herring.[55] (See SARDINE, 35 Cyc. 793.)

SPRAWL. A term used in quarrying, and is said to mean loose rock.[56]

SPREADER. A piece of iron or steel slightly thicker than and set about two inches behind the saw it is to be used with, so as to spread the seam in the wood, and thereby hinder the clamping of the saw.[57]

SPREADING. A word which, when used with the words contriving and propagating, is said to be equivalent to "circulating." [58]

SPRING. A fountain of water; [59] a place where water by natural forces issues from the ground; [60] the formation of water that naturally gushes out of the earth's surface; [61] water issuing by natural forces out of the earth at a particular place; [62] water issuing from the earth or found therein by digging or otherwise opening it; [63] a place where water comes naturally to the surface of the ground and flows away.[64] (See, generally, WATERS.)

of the definition in passing a law requiring the observance of Sunday.

48. Webster Dict. [*quoted* in Wirth *v.* Calhoun, 64 Nebr. 316, 321, 89 N. W. 785].

The general meaning of this term is said to be "'engaging or concerned in sport or diversion'; the specific meaning, 'interested in or practicing field sports.'" Century Dict. [*quoted* in Wirth *v.* Calhoun, 64 Nebr. 316, 321, 89 N. W. 785].

Does not mean the quiet, peaceable, and invigorating exercise of either walking or riding on the Sabbath day. Nagle *v.* Brown, 37 Ohio St. 7, 9.

Sporting paper.—A newspaper which contains no racing intelligence, and no betting odds, but is merely a record of amateur sports, such as cricket, football, cycling, running, etc., is not a "sporting paper." McFarlane *v.* Hulton, [1899] 1 Ch. 884, 890, 68 L. J. Ch. 408, 80 L. T. Rep. N. S. 486, 47 Wkly. Rep. 507.

49. Century Dict. [*quoted* in White *v.* Western Assur. Co., 52 Minn. 352, 355, 54 N. W. 195], where it is said that the term does not necessarily mean a house kept or used for unlawful sports or practices.

50. Century Dict. [*quoted* in White *v.* Western Assur. Co., 52 Minn. 352, 355, 54 N. W. 195].

51. State *v.* Hoxsie, 15 R. I. 1, 4, 22 Atl. 1059, 2 Am. St. Rep. 838, where it was held that such a person was not to be considered as an accomplice.

52. Webster New Int. Dict. See also McLean County Coal Co. *v.* Lamprecht, 51 Ill. App. 649, 651; South West Imp. Co. *v.* Smith, 85 Va. 306, 313, 7 S. E. 365, 17 Am. St. Rep. 59; Cutts *v.* Ward, L. R. 2 Q. B. 357, 364, 36 L. J. Q. B. 161, 15 L. T. Rep. N. S. 614, 15 Wkly. Rep. 445.

53. Webster New Int. Dict. See also South West Imp. Co. *v.* Smith, 85 Va. 306, 313, 7 S. E. 365, 17 Am. St. Rep. 59.

To sprag a wheel of a car is to "chock" it. South West Imp. Co. *v.* Smith, 85 Va. 306, 313, 7 S. E. 365, 17 Am. St. Rep. 59.

54. Webster Dict. [*quoted* in Ft. Worth, etc., R. Co. *v.* Rogers, 21 Tex. Civ. App. 605, 606, 53 S. W. 366].

55. *In re* Wieland, 98 Fed. 99, 100, where it is said to be a family distinct from that to which the sardines belong.

56. Alabama Consol. Coal, etc., Co. *v.* Hammond, 156 Ala. 253, 258, 47 So. 248.

57. Dean *v.* St. Louis Woodenware Works, 106 Mo. App. 167, 173, 80 S. W. 292, where it is also called a "splitter" or "divider."

58. People *v.* Goslin, 67 N. Y. App. Div. 16, 20, 73 N. Y. Suppl. 520.

59. Indiana *v.* Miller, 13 Fed. Cas. No. 7,022, 3 McLean 151.

60. Furner *v.* Seabury, 59 Hun (N. Y.) 272, 279, 13 N. Y. Suppl. 12; Magoon *v.* Harris, 46 Vt. 264, 271.

61. Furner *v.* Seabury, 59 Hun (N. Y.) 272, 279, 13 N. Y. Suppl. 12.

62. Furner *v.* Seabury, 135 N. Y. 50, 61, 31 N. E. 1004.

63. Monatiquot River Mills *v.* Braintree Water Supply Co., 149 Mass. 478, 484, 21 N. E. 761, 762, 4 L. R. A. 272.

64. Century Dict. [*quoted* in Grand Hotel Co. *v.* Wilson, 5 Ont. L. Rep. 141, 150].

SPRING-GUNS. See HOMICIDE, 21 Cyc. 787, 831.

SPRING-HOUSE. A house said to be embraced in the term "outhouse."[65]

SPRINGING USE. A use which arises from the seisin of the grantor, and where there is no estate going before it.[66] (See, generally, CURTESY, 12 Cyc. 1012; WILLS. See also SHIFTING USE, 35 Cyc. 2015.)

SPRING PLATE. A plate which holds up a spring.[67]

SPRING-TRAPS. See FISH AND GAME, 19 Cyc. 1012.

SPRINKLER LEAKAGE INSURANCE. A species of casualty insurance.[68]

SPURIOUS BILL. A bill which may be a legitimate impression from the genuine plate, but it must have the signatures of persons, not the officers of the bank whence it purports to have issued, or else the names of fictitious persons.[69] (See, generally, COUNTERFEITING, 11 Cyc. 300; FORGERY, 19 Cyc. 1367.)

SPUR-TRACK. A short track leading from a line of railway, and connected with it at one end only.[70] (Spur-Track: Condemnation of Land For, see EMINENT DOMAIN, 15 Cyc. 590. Duty of Railroad to Construct and Operate, see RAILROADS, 33 Cyc. 637.)

SPY. A person sent into an enemy's camp to inspect their works, ascertain their strength and their intentions, watch their movements and secretly communicate intelligence to the proper officer.[71] (Spy: In General, see DETECTIVES, 14 Cyc. 234; REWARDS, 34 Cyc. 1728. As Accomplice, see CRIMINAL LAW, 12 Cyc. 447. Authority of to Arrest Without Warrant, see ARREST, 3 Cyc. 878 note 51. Competency and Credibility of as Witness, see WITNESSES. Entrapment by, see BURGLARY, 6 Cyc. 181; CRIMINAL LAW, 12 Cyc. 160. Rights and Remedies of Informer in General, see CUSTOMS DUTIES, 12 Cyc. 1187; FINES, 19 Cyc. 561; FORFEITURES, 19 Cyc. 1364; INTERNAL REVENUE, 22 Cyc. 1694; INTOXICATING LIQUORS, 23 Cyc. 172, 282 note 7; PENALTIES, 30 Cyc. 1340. See also SPOTTER, *ante*, p. 809.)

SQUANDER. To scatter lavishly; to spend profusely; to throw away prodigally; to waste.[72]

SQUANDERER. A spendthrift; a prodigal; a waster.[73]

SQUARE. As an adjective, rendering equal justice; exact; fair; honest;[74] also a unit of measure.[75] As a noun, a term which is said to indicate a public

Used in a deed reserving to the grantor "the spring of water on said premises" means a small stream of water which had its rise in a spring on adjoining land, but flowed on to the premises conveyed, where it finally lost itself in the ground, where there was no other spring of water on the premises. Peck *v.* Clark, 142 Mass. 436, 439, 8 N. E. 335, 337.

65. Willoughby *v.* Shipman, 28 Mo. 50, 52.

66. Smith *v.* Brisson, 90 N. C. 284, 288, where it is distinguished from a "shifting use."

67. Hart, etc., Mfg. Co. *v.* Aucher Electric Co., 82 Fed. 911, 915, where it is said, however, that there is no technical interpretation of the term.

68. A policy of insurance covered loss by leakage or discharge from a sprinkler system installed for protection against fire. The policy provided that it would not cover injury resulting *inter alia* from freezing. The water in a pipe connected with the system froze, and the pipe burst, and damage was caused by consequent escape of the water therefrom. The judgment of the Ontario Court of Appeal in 14 Ont. L. R. 166, holding that the damage did not result from freezing, and that the insured could recover on his policy was affirmed. Canadian Casualty, etc., Ins. Co. *v.* Boulter, 39 Can. Sup. Ct. 558 [*affirming* 14 Ont. L. R. 166, 9 Ont. Wkly. Rep. 809, 816].

69. Kirby *v.* State, 1 Ohio St. 185, 187, where it is further said that a spurious bill may also be an illegitimate impression from the genuine plate, or an impression from a counterfeit plate, but it must have such signatures or names as indicated.

Counterfeit, forged, and spurious bills distinguished see Kirby *v.* State, 1 Ohio St. 185, 187.

70. Century Dict.

71. Black L. Dict. [*citing* Vattel 3, 179].

72. McDougal *v.* Calef, 34 N. H. 534, 543, where it is said: "Such is the definition given to the term by lexicographers and such its general acceptation."

73. McDougal *v.* Calef, 34 N. H. 534, 543.

74. Webster Dict. [*quoted* in Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 359, 21 So. 531].

75. Webster New Int. Dict.

"Square inch of water" is a volume or stream of water one inch square in cross-section area measured at right angles with the line of its flow, and flowing with the velocity due to the given head (Janesville Cotton Mills *v.* Ford, 82 Wis. 416, 423, 52 N. W. 764, 17 L. R. A. 564, where it is said to be a technical meaning among water engineers); a

use, either for purposes of a free passage or to be ornamented for grounds of pleasure, amusement, recreation, or health;[76] each subdivision of territory bounded on all sides by principal streets;[77] synonymous with BLOCK,[78] *q. v.* (See PARKS, 29 Cyc. 1684; and, generally, EASEMENTS, 14 Cyc. 1183; MUNICIPAL CORPORATIONS, 28 Cyc. 935.)

SQUATTER. An intruder;[79] one who has actual possession of the land of another and who makes no claim to own it, being merely an intruder;[80] one who settles on new land, particularly on public land, without a title;[81] one who settled on lands of others without any legal authority;[82] a person who settles or locates on land without obtaining a legal title.[83] (Squatter: Adverse Possession by, see ADVERSE POSSESSION, 1 Cyc. 1006, 1029 note 59. Person Entering Upon Land as, see LANDLORD AND TENANT, 24 Cyc. 1038 note 74.)

SQUEEZE. In mining parlance, a term said to mean the settling of the base of the columns or partitions left to support the roof into the softer material of the floor, thereby causing the floors in the spaces to heave, and masses of rock and coal to fall from the top and sides, rendering them more or less dangerous.[84]

SR. An abbreviation of "Senior."[85] (See NAMES, 29 Cyc. 267.)

STAB or **STABBING.** A wound made with a pointed instrument.[86] (See STABBING.)

STABBING. A wounding with a pointed instrument.[87] (Stabbing: In General, see HOMICIDE, 21 Cyc. 646. As Special Form of Assault, see ASSAULT AND BATTERY, 3 Cyc. 1027. Conviction of What Offense Under Indictment For, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 476 note 32.)

unit of measure of quantity of water, being the quantity which will flow through an orifice one inch square, or a circular orifice one inch in diameter, in a vertical surface under a constant head (Webster Int. Dict. [*quoted* in Jackson Milling Co. *v.* Chandos, 82 Wis. 437, 448, 52 N. W. 759]. See, generally, WEIGHTS AND MEASURES.

A "square league" is five thousand varas square, and its area is twenty-five million varas. U. S. *v.* De Rodriguez, 25 Fed. Cas. No. 14,950, 7 Sawy. 617, 618. See, generally, WEIGHTS AND MEASURES.

"Square yard" is a term which, when applied to a surface, means superficial measure, but when applied to a solid imports a solid measure or a yard every way. Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177, 182, 36 Am. Dec. 594, where it is said that when used in a contract for cutting and grading a street, it is synonymous with cubic yard — a square yard or a yard every way of the solid contents of the excavated ground. See, generally, WEIGHTS AND MEASURES.

76. Rowzee *v.* Pierce, 75 Miss. 846, 860, 23 So. 307, 309, 65 Am. St. Rep. 625, 40 L. R. A. 402; Hoboken M. E. Church *v.* Hoboken, 33 N. J. L. 13, 17, 97 Am. Dec. 696; Fessler *v.* Union, 67 N. J. Eq. 14, 23, 60 Atl. 272.

77. Broadway Baptist Church *v.* McAtee, 8 Bush (Ky.) 508, 514, 8 Am. Rep. 480. See also Caldwell *v.* Rupert, 10 Bush (Ky.) 179, 183.

78. State *v.* Natal, 42 La. Ann. 612, 613, 7 So. 781.

A term said to mean not merely an open space used as a means of communication like a street, but as having the wide meaning inclusive of a park — an open or inclosed space devoted to such use. Atty.-Gen. *v.* Toronto, 6 Ont. L. Rep. 159, 168.

As a measure of distances it may include streets. State *v.* Berard, 40 La. Ann. 172, 173, 3 So. 463.

79. Mahoney *v.* Hoffman, 58 Misc. (N. Y.) 217, 109 N. Y. Suppl. 13.

80. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 472, 27 S. E. 255.

81. O'Donnell *v.* McIntyre, 16 Abb. N. Cas. (N. Y.) 84, 87.

82. Bouvier L. Dict. [*quoted* in O'Donnell *v.* McIntyre, 16 Abb. N. Cas. (N. Y.) 84, 87].

83. McAdam Landl. & T. 283 [*quoted* in O'Donnell *v.* McIntyre, 16 Abb. N. Cas. (N. Y.) 84, 86].

Squatter riots.— Judicial notice will be taken in California that the term "squatter riots" has reference to riots occurring by reason of conflicting claims to land growing out of the uncertainty in the early land titles. Clarke *v.* Fitch, 41 Cal. 472, 477.

84. Reddon *v.* Union Pac. R. Co., 5 Utah 344, 349, 15 Pac. 262.

85. See NAMES, 29 Cyc. 267.

86. State *v.* Patza, 3 La. Ann. 512, 514.

As used in an indictment, will not be construed as a technical term, but in its ordinary acceptation, and to include a wound made with a knife. Ruby *v.* State, 7 Mo. 206, 208.

Imports a breaking and penetration of the skin as distinctly as would the word "cut," and more distinctly than would the word "wound," and is peculiarly, if not exclusively, appropriated to describe the injury inflicted by thrusting with a sharp pointed instrument. Jarnajin *v.* State, 10 Yerg. (Tenn.) 529, 531.

87. State *v.* Lowry, 33 La. Ann. 1224; State *v.* Cody, 18 Oreg. 506, 514, 23 Pac. 891, 24 Pac. 895.

To constitute "stabbing," the knife need not enter further than to penetrate the skin and draw blood. Ward *v.* State, 56 Ga. 408, 410.

STABIT PRÆSUMPTIO DONEC PROBETUR IN CONTRARIUM. A maxim meaning "A presumption shall stand, until proof be made to the contrary." [88]

STABITUR PRÆSUMPTIONI DONEC PROBITUR IN CONTRATIUM. [89] See STABIT PRÆSUMPTIO DONEC PROBETUR IN CONTRARIUM.

STABLE. A house, shed, or building for beasts to lodge and feed in.[90] (Stable: In General, see LIVERY-STABLE KEEPERS, 25 Cyc. 1504. As Appurtenance to Homestead, see HOMESTEADS, 21 Cyc. 496. As Nuisance, see NUISANCES, 29 Cyc. 1181. As Subject of Arson, see ARSON, 3 Cyc. 989. See also BARN, 5 Cyc. 674.)

STACK. A large pile of hay, grain, straw, or the like, usually of a nearly conical form, contracted at the top to a point or ridge and sometimes covered with thatch.[91] (See ARSON, 3 Cyc. 990.)

STAGE. A floor or platform; the floor on which theatrical performances are exhibited; a place of action or performance, as the stage of life; a place of rest on a journey; the distance between two places of rest on a road.[92]

STAGE-COACH. A coach or other carriage running regularly from one place to another for the conveyance of passengers; [93] a coach which is used by the owner to carry passengers from one point to another; [94] any carriage that travels by set stages; [95] a vehicle that starts from some one point at certain stated intervals; [98] a carriage which travels generally but does not go always, and may sometimes make many journeys in a day; [97] a coach that regularly carries passengers from town to town.[98] (See COACH, 7 Cyc. 265; and, generally, CARRIERS, 6 Cyc. 595.)

STAGE LINE. A regular line of vehicles for public use operated between distant points or between different cities.[99]

88. Burrill L. Dict. [*citing* Wingate Max. 712; Hobart Rep. 297; Broom Leg. Max. 429 (731)].

Applied in: Davenport *v.* Mason, 15 Mass. 85, 90; Johnston *v.* Darrah, 8 N. J. L. 282, 286; Fox *v.* Lambson, 8 N. J. L. 275, 277; New York *v.* Streeter, 91 N. Y. App. Div. 206, 213, 86 N. Y. Suppl. 665; Clute *v.* Emmerich, 21 Hun (N. Y.) 122, 128; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 519, 2 Am. Dec. 474; Coleman's Estate, 6 Pa. Dist. 777, 782; Stewart's Estate, 3 Pa. Dist. 747, 748, 15 Pa. Co. Ct. 380; Keil's Estate, 1 Pa. Dist. 457, 458; Chisholm *v.* McDonald, 3 Nova Scotia 367, 377; Lawson *v.* McGeoch, 20 Ont. App. 464, 467; Gibson *v.* Cubitt, 5 U. C. Q. B. O. S. 711, 715; McKinnon *v.* Burrows, 3 U. C. Q. B. O. S. 114, 119.

Another form of this maxim is *Stabitur præsumptioni donec probetur in contrarium*, meaning, "A presumption will be stood by, or upheld until proof be made to the contrary." This is the form in which it is quoted by Bracton, Coke, and Blackstone. Bracton fol. 6, Coke Litt. 373*b*; 3 Blackstone Comm. 371. Still another form is *Standum erit præsumptioni, donec*, &c. Bracton fol. 19*b*. See Fleta lib. 3, c. 9, § 18.

89. **Applied** in Henderson *v.* Lewis, 9 Serg. & R. (Pa.) 379, 384, 11 Am. Dec. 733.

90. Webster Dict. [*quoted* in Dugle *v.* State, 100 Ind. 259, 260].

Used interchangeably with "barn" see Saylor *v.* Com., 57 S. W. 614, 615, 22 Ky. L. Rep. 472 [*citing* Webster Int. Dict.], where it is said that in the United States a part of a barn is often made use of for the purpose of stabling domestic animals.

Does not include a fodder house and corncrib in a statute defining arson. State *v.* Jeter, 47 S. C. 2, 6, 24 S. E. 889.

91. Webster Dict.

Does not include grain in a mow in a barn see Benton *v.* Farmers' Mut. F. Ins. Co., 102 Mich. 281, 289, 60 N. W. 691, 26 L. R. A. 237.

"Shock of wheat" distinguished from "stack of wheat" see Denbow *v.* State, 18 Ohio 11, 12.

92. Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 185, 199.

Included in the term "dock" but not in the term "wet dock" see The Servia, [1898] P. 36, 44.

93. Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 185, 199.

94. Burton *v.* Monticello, etc., Turnpike Co., 109 S. W. 319, 33 Ky. L. Rep. 85.

95. Middlesex Turnpike Co. *v.* Wentworth, 9 Conn. 371, 373.

96. Reg. *v.* Ruscoe, 8 A. & E. 386, 388, 2 Jur. 888, 7 L. J. M. C. 94, 3 N. & P. 428, 1 W. W. & H. 435, 35 E. C. L. 644.

97. Reg. *v.* Ruscoe, 8 A. & E. 386, 390, 2 Jur. 888, 7 L. J. M. C. 94, 3 N. & P. 428, 1 W. W. & H. 435, 35 E. C. L. 644.

98. Johnson Dict. [*quoted* in Cincinnati, etc., Turnpike Co. *v.* Neil, 9 Ohio 11, 12].

It is sometimes called a "stage-carriage" where it is said to mean a carriage plying regularly from place to place. Comley *v.* Carpenter, 18 C. B. N. S. 378, 391, 11 Jur. N. S. 712, 12 L. T. Rep. N. S. 453, 13 Wkly. Rep. 812, 114 E. C. L. 378, and does not include a carriage employed wholly on a railroad. Brian *v.* Aylward, 18 T. L. R. 371, 372.

99. Com. *v.* Walton, 126 Ky. 523, 525, 104

STAGE-PLAY. Any tragedy, comedy, farce, opera, burletta, interlude, melodrama, or pantomime, or other entertainment of the stage or any part thereof.[1] (See, generally, THEATERS AND SHOWS.)

STAGGERING DRUNK. A term said to apply to a drunken man who staggers when he walks.[2] (See DRUNK, 14 Cyc. 1088; and, generally, DRUNKARDS, 14 Cyc. 1089.)

STAGNUM. In English, a pool.[3] (See POOL, 31 Cyc. 911.)

STAKE. In gaming transactions, a term usually given to the money or other things bet or wagered;[4] the money or thing put upon the chance.[5] In boundaries, an imaginary point.[6] (See, generally, GAMING, 20 Cyc. 873; PRIZE-FIGHTING, 32 Cyc. 397.)

STAKE-HOLDER. A mere depositary of both parties to a wager for the money deposited by them, respectively, with a naked authority to deliver it over on the proposed contingency;[7] one who has received the funds of another or others in special deposit for a given purpose, to be paid to one party, or divided between both, or among all the parties, on the happening or not happening of some anticipated event;[8] one holding a fund which two or more claim adversely to each other;[9] a person with whom money is deposited pending the decision of a bet or wager.[10] (Stake-Holder: Garnishment of, see GARNISHMENT, 20 Cyc. 1022 note 92. Injunction to Restrain Payment by, see INJUNCTIONS, 22 Cyc. 785 note 34. Liability For Interest, see INTEREST, 22 Cyc. 1504 note 73. Liability in Detinue, see DETINUE, 14 Cyc. 255 note 64. Necessity For Pleading That Complainant Is, in Bill of Interpleader, see INTERPLEADER, 23 Cyc. 21. Protection of by Bill of Interpleader, see INTERPLEADER, 23 Cyc. 8. Right of Appeal, see APPEAL AND ERROR, 2 Cyc. 628 note 48, 756 note 1. Rights and Liabilities in General, see GAMING, 20 Cyc. 947.)

STAL. Erroneously used for "steal" in an indictment.[11]

STALE CLAIM or DEMAND.[12] See EQUITY, 16 Cyc. 150; LACHES, 24 Cyc. 840.

STALL. A place of sale which is open.[13]

S. W. 323, 31 Ky. L. R. 916, where it is said not to include hacks, stages, and automobiles which merely operate from point to point in one city for the transportation of the public.

1. Day *v.* Simpson, 18 C. B. N. S. 680, 692, 11 Jur. N. S. 487, 34 L. J. M. C. 149, 12 L. T. Rep. N. S. 386, 13 Wkly. Rep. 748, 114 E. C. L. 680. See also Wigan *v.* Strange, L. R. 1 C. P. 175, 181, 183, 12 Jur. N. S. 9, 35 L. J. M. C. 31, 13 L. T. Rep. N. S. 371, 14 Wkly. Rep. 103.

2. Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102, 104.

3. Coke Litt. 5 [*quoted* in Johnson *v.* Rayner, 6 Gray (Mass.) 107, 110, where it is said to consist of water and land].

4. Jordan *v.* Kent, 44 How. Pr. (N. Y.) 206, 207.

5. Harris *v.* White, 81 N. Y. 532, 539; Porter *v.* Day, 71 Wis. 296, 301, 37 N. W. 259.

To "stake" money is to put it at hazard on the issue of competition, or upon a future contingency. Koster *v.* Seney, 99 Iowa 584, 587, 68 N. W. 824.

Money paid for lottery tickets is staked on a game of chance. Koster *v.* Seney, 99 Iowa 584, 587, 68 N. W. 824.

Used with reference to dealings in futures, it is the amount of the margin required to cover differences in value. Mohr *v.* Miesen, 47 Minn. 228, 231, 49 N. W. 862.

It is not synonymous with "wager" in reference to trotting horses for a "purse or stake" see Ballard *v.* Brown, 67 Vt. 586, 589, 32 Atl. 485.

"Stake race" see Stone *v.* Clay, 61 Fed. 889, 10 C. C. A. 147.

6. Mann *v.* Taylor, 49 N. C. 272, 273, 69 Am. Dec. 750; Massey *v.* Belisle, 24 N. C. 170, 178.

"Staked off" as used in an act defining mining claims and regulating title thereto see Becker *v.* Pugh, 9 Colo. 589, 592, 13 Pac. 906.

"Staked out" as used with reference to an act by which the selectmen of a town staked out for the town's use a highway see Boston *v.* Richardson, 13 Allen (Mass.) 146, 161. See also Boston *v.* Richardson, 105 Mass. 351, 369.

7. Turner *v.* Thompson, 107 Ky. 647, 651, 55 S. W. 210, 21 Ky. L. Rep. 1414; Ball *v.* Gilbert, 12 Metc. (Mass.) 397, 403; Fisher *v.* Hildreth, 117 Mass. 558, 562.

8. Oriental Bank *v.* Tremont Ins. Co., 4 Metc. (Mass.) 1, 10.

9. Century Dict. [*quoted* in Dauler *v.* Hartley, 178 Pa. St. 23, 27, 35 Atl. 857].

10. Rapalje & L. L. Dict. [*quoted* in Dauler *v.* Hartley, 178 Pa. St. 23, 27, 35 Atl. 857].

A stake-holder in equity is defined to be one who has in his hands money or other property claimed by several others. Bouvier L. Dict. [*quoted* in Wabash R. Co. *v.* Flannigan, 95 Mo. App. 477, 485, 75 S. W. 691].

11. See Wills *v.* State, 4 Blackf. (Ind.) 457. See also INDICTMENTS AND INFORMATIONS, 22 Cyc. 290; LARCENY, 25 Cyc. 72.

12. **"State" levy** see Terry *v.* Americus Bank, 77 Ga. 528, 529, 3 S. E. 154.

13. Richardson Dict. [*quoted* in Richards *v.* Washington F. & M. Ins. Co., 60 Mich.

STALLAGE. The liberty or right of pitching or erecting stalls in fairs or markets,[14] or the money paid for the same.[15] (See PICCAGE, 30 Cyc. 1605.)

STALLION. An uncastrated male horse;[16] a horse not castrated; a stock horse.[17] (See ANIMALS, 2 Cyc. 288; NUISANCES, 29 Cyc. 1182. See also GELDING, 20 Cyc. 1181; RIDGELING, 34 Cyc. 1762.)

STAMP. An impression made by public authority, in pursuance of law, upon paper or parchment, upon which certain legal proceedings, conveyances, or contracts are required to be written, and for which a tax or duty is exacted. In its more ordinary sense, a small label or strip of paper, bearing a particular device, printed and sold by the government, and required to be attached to mail matter and to some other articles subject to duty or excise.[18] (Stamp: In General, see INTERNAL REVENUE, 22 Cyc. 1619, 1648, 1650. Alteration of Instrument as Affecting, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 144 note 6. As Equivalent of Brand or Mark, see INSPECTION, 22 Cyc. 1367. Cancellation of, see COMMERCIAL PAPER, 7 Cyc. 681. Effect of Omission of From Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 681. Forgery in Use, see FORGERY, 19 Cyc. 1374 note 28. Necessity For — Affixing to Certificate of Qualification of Surety on Appeal-Bond, see APPEAL AND ERROR, 2 Cyc. 842; On Bill or Note, see COMMERCIAL PAPER, 7 Cyc. 680; On Award, see ARBITRATION AND AWARD, 3 Cyc. 669; On Bond, see BONDS, 5 Cyc. 738; On Contract, see CONTRACTS, 9 Cyc. 480 note 25; On Deed, see DEEDS, 13 Cyc. 559; On Lease, see LANDLORD AND TENANT, 24 Cyc. 904; On Mortgage, see MORTGAGES, 27 Cyc. 1107; On Subscription, see SUBSCRIPTION; On Tax Deed, see TAXES. Postage Stamps and Stamped Envelopes, see POST-OFFICE, 31 Cyc. 986. Stamping Bill or Note After Delivery, see COMMERCIAL PAPER, 7 Cyc. 682. Want of Stamp on Bond, see APPEAL AND ERROR, 2 Cyc. 848 note 67.)

STAMP TAX. See COMMERCE, 7 Cyc. 475; INTERNAL REVENUE, 22 Cyc. 1609, 1619.

STANCHIONS. Upright parts of wood or iron placed so as to support the beams of a vessel.[19]

STAND. As a noun, a place or post where one stands; a station; the act of standing or taking one's stand.[20] As a verb, to abide; to submit to; to remain as a thing is; to remain in force.[21]

420, 426, 27 N. W. 586, where "shop" is distinguished].

"State, booth, or other inclosure" see State *v.* Barge, 82 Minn. 256, 261, 84 N. W. 911, 1116, 53 L. R. A. 428.

14. Black L. Dict. [*citing* Stephen Comm. 664].

15. Black L. Dict. See also Lockwood *v.* Wood, 6 Q. B. 31, 43, 10 Jur. 158, 13 L. J. Q. B. 365, 51 E. C. L. 31 [*citing* Coke; Brooj Abridgm.].

It is a satisfaction to the owner of the soil for the liberty of placing a stall upon it. Blunt L. Dict.; Minsheu's Boyer *verbo* "Estallage;" Spelman Gloss. [all *quoted* in Northampton *v.* Ward, Str. 1238, 93 Eng. Reprint 1155 (*quoted* in Draper *v.* Sperring, 10 C. B. N. S. 113, 123, 30 L. J. M. C. 225, 4 L. T. Rep. N. S. 365, 9 Wkly. Rep. 656, 100 E. C. L. 113)].

16. State *v.* Royster, 65 N. C. 539.

17. Webster Dict. [*quoted* in Aylesworth *v.* Chicago, etc., R. Co., 30 Iowa 459, 460], where it is further said that the word would not include an uncastrated horse colt under the age and condition at which it was troublesome to mares or dangerous to be at large.

Distinguished from "gelding" see State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25.

18. Black L. Dict.

19. Keyser *v.* Duit, 150 Fed. 328, 80 C. C. A. 212.

20. Webster New Int. Dict.

21. Black L. Dict.

"Stand committed" held equivalent to statutory phrase "be committed" see Young *v.* Makepeace, 103 Mass. 50, 57.

"Stand for," used to secure credit for goods, construed to mean a guaranty or security for the value of the goods obtained. See Pake *v.* Wilson, 127 Ala. 240, 243, 28 So. 665.

"Stand" good for construed as a guaranty see McNabb *v.* Clipp, 5 Ind. App. 204, 31 N. E. 858, 859; Elkin *v.* Timlin, 151 Pa. St. 491, 497, 25 Atl. 139. As creating a chattel mortgage see Barnhill *v.* Howard, 104 Ala. 412, 417, 16 So. 1; Jackson *v.* Rutherford, 73 Ala. 155, 156.

"Stand the climate" construed in a contract for the sale of lamp oil. see Hart *v.* Hammett, 18 Vt. 127, 130.

"Submit, and stand to, and abide by" the award of arbitrators construed to mean the performance by the principal of the award after it is made see Washburne *v.* Lufkin, 4 Minn. 466.

"So long as the west wall shall stand" in a party-wall agreement, construed not to

STANDARD. A term said to imply, *ex vi termini*, a measure or test which has the general concurrence and recognition of the class of persons engaged in the particular business or trade under consideration.[22] (See, generally, EVIDENCE, 16 Cyc. 854.)

STAND CASKS. Vessels permanently affixed to the store, and constituting a part of the realty.[23] (See INTERNAL REVENUE, 22 Cyc. 1680.)

STANDING. As an adjective, upright or erect; at rest, not flowing; not transitory, lasting; not movable, fixed; established by law or custom.[24] As a noun, the act of one that stands or comes to a stand; condition in society; relative position; reputation; maintenance of position or condition; duration.[25]

STANDING ASIDE JURORS. See JURIES, 24 Cyc. 311.

STANDING BY. A term used in law as implying knowledge under such circumstances as rendered it the duty of the possessor to communicate it.[26] (See ESTOPPEL, 16 Cyc. 723.)

STANDING MUTE. See CRIMINAL LAW, 12 Cyc. 348.

STANDUM ERIT PRESUMPTIONI DONEC PROBITUR IN CONTRARUM. See STABIT PRÆSUMPTIO DONEC PROBETUR IN CONTRARIUM.

STANNARY COURTS. Courts in Devonshire and Cornwall for the administration of justice among the miners and tinners.[27]

mean as long as any portion of the wall itself shall remain, but so long as the wall shall remain fit for use as a party wall see Odd Fellows' Hall Assoc. *v.* Hegele, 24 Oreg. 16, 22, 32 Pac. 679.

22. Penn Steel Casting, etc., Co. *v.* Wilmington Malleable Iron Co., 1 Pennew. (Del.) 337, 341, 41 Atl. 236.

"**Standard development**" is a term used with reference to a stream of water, which is said to mean, the power which the stream affords by a natural unobstructed flow, to be used in a continuous 24-hour daily use. Hazard Powder Co. *v.* Somersville Mfg. Co., 78 Conn. 171, 175, 61 Atl. 519, 112 Am. St. Rep. 144. See also WEIGHTS AND MEASURES.

"**Standard grade**" see Des Moines University *v.* Polk County Homestead, etc., Co., 87 Iowa 36, 45, 53 N. W. 1080, referring to a college.

Standard time see TIME.

Used in the name of a certain tea, implies that there are various grades of it, and that this is the "Standard" or best article of the kind. Kenny *v.* Gillet, 70 Md. 574, 578, 17 Atl. 499.

23. U. S. *v.* Cask of Gin, 3 Fed. 20, 21.

24. Webster New Int. Dict.

"**Standing across**" a street, referring to a freight train see State *v.* Malone, 8 Ind. App. 8, 35 N. E. 198, 199.

"**Standing army**" is a term said to mean no more than the regular army. Franklin F. Ins. Co. *v.* Com., 10 Pa. St. 357, 360, where it is used in contradistinction to a force of volunteers. See, generally, ARMY AND NAVY, 3 Cyc. 812.

"**Standing crop**" is a crop not severed from the freehold. Holly *v.* State, 54 Ala. 238, 240.

Standing debt.—As used with reference to a debt or thing in action, it means standing without any proceedings toward enforcement. Digges *v.* Eliason, 7 Fed. Cas. No. 3,904, 4 Cranch C. C. 619.

"**Standing detached**" referring to a building described in a policy of fire insurance see Hill *v.* Hibernia Ins. Co., 10 Hun (N. Y.) 26, 29.

"**Standing corn**" has been applied to corn attached to the land and not cut. State *v.* Helmes, 27 N. C. 364, 365. And does not include grain cut and partially threshed see Ford *v.* Sutherlin, 2 Mont. 440, 442.

"**Standing in my name**," referring to a bequest of stock or bonds see Kunkel *v.* Macgill, 56 Md. 120, 123; Norris *v.* Thomson, 16 N. J. Eq. 218, 222.

Standing on any street for the sale of any article unless duly licensed see Com. *v.* Elliott, 121 Mass. 367.

Standing on platform of cars in violation of a regulation of railroad company see Bon *v.* Railway Pass. Assur. Co., 56 Iowa 664, 665, 10 N. W. 225, 41 Am. Rep. 127.

"**Standing on the footboard**" see Omaha *v.* Doty, 2 Nebr. (Unoff.) 726, 89 N. W. 992.

"**Standing**" **trees** are trees erect and supported by their roots. Webster Dict. [*quoted* in Ford *v.* Sutherlin, 2 Mont. 440, 442].

"**Standing timber**" see Balkcom *v.* Empire Lumber Co., 91 Ga. 651, 654, 17 S. E. 1020, 44 Am. St. Rep. 58; Nevels *v.* Kentucky Lumber Co., 108 Ky. 550, 552, 56 S. W. 969, 22 Ky. L. Rep. 247, 94 Am. St. Rep. 388, 49 L. R. A. 416; Strout *v.* Harper, 72 Me. 270, 273; Erskine *v.* Plummer, 7 Me. 447, 450, 22 Am. Dec. 216; Shepard *v.* Pettit, 30 Minn. 119, 14 N. W. 511; Drake *v.* Howell, 133 N. C. 162, 163, 45 S. E. 539.

"**Standing wood**" as a term applicable only to trees see Strout *v.* Harper, 72 Me. 270, 273.

25. Webster New Int. Dict.

"**Standing or walking** on the roadbed or bridge of any railway" does not include the mere crossing of the tracks. Duncan *v.* Preferred Mut. Acc. Assoc., 59 N. Y. Super. Ct. 145, 164, 13 N. Y. Suppl. 620, 621.

"**Loss of standing in society**" as an element of damage in battery see Barnes *v.* Martin, 15 Wis. 240, 246, 82 Am. Dec. 670.

Standing stallion see ANIMALS, 2 Cyc. 330.

26. Black L. Dict. [*citing* Gatling *v.* Rodman, 6 Ind. 289, 291; State *v.* Holloway, 8 Blackf. (Ind.) 45, 47].

27. Black L. Dict. [*citing* Brown L. Dict.].

STAPLE CROPS. Such productions of the soil as have an established and defined character in the commerce of the country.[28]

STARBOARD TACK. A term used to express the direction in which a vessel is moving when it is under way with the wind on her starboard bow.[29] (See, generally, COLLISION, 7 Cyc. 299.)

STAR CHAMBER. See COURT OF STAR CHAMBER, 11 Cyc. 631.

STARE DECISIS. A Latin phrase[30] meaning "to stand by decided cases; to uphold precedents; to maintain former adjudications."[31] (See COURTS, 11 Cyc. 745.)

STARE DECISIS, ET NON QUIETA MOVERE. A maxim meaning "To adhere to precedents, and not to unsettle things which are established."[32] (See STARE DECISIS.)

START. The commencement of an enterprise or undertaking.[33]

STATE. As a noun, a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by joint efforts of their combined strength.[34] As a verb, to express the particulars of in writing or in words; to place in mental view, or represent all the circumstances of modification; to make known specifically; to explain particularly;[35] to aver or allege, to represent fully in words, to narrate, to recite.[36] (See STATES, *post*, p. 820.)

STATE AGENT. See FOREIGN CORPORATIONS, 19 Cyc. 1305; STATES, *post*, p. 862.[37]

STATE ATTORNEY. See PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 687.

STATE AUDITOR. See STATES.

28. Keeran *v.* Griffith, 34 Cal. 580, 581, where it is said that among them may be reckoned wheat, rye, oats, buckwheat, beans, corn, barley, potatoes, etc.

29. Burrows *v.* Gower, 119 Fed. 616, 617.

30. Being the first two words of the maxim *Stare decisis, et non quieta movere, post.*

31. Black L. Dict. [*citing* 1 Kent Comm. 477]. See also Grattan L. Gloss.

"The point which has been often adjudged ought to rest in peace." Spicer *v.* Spicer, Cro. Jac. 527, 79 Eng. Reprint 451 [*cited* in 1 Kent Comm. 477].

The rule expresses the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations. The Madrid, 40 Fed. 677, 679.

The rule means, in general, that when a point has been once settled by judicial decision it forms a precedent for the guidance of the courts in similar cases. The Madrid, 40 Fed. 677, 679.

Where grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated, the maxim, *Fiat justitia ruat cœlum*, should apply, and not the rule of *stare decisis*. Ellison *v.* Georgia R. Co., 87 Ga. 691, 13 S. E. 809.

32. Bouvier L. Dict.

Applied in: Northwestern Forwarding Co. *v.* Mahaffey, 36 Kan. 152, 153, 12 Pac. 705; Sparks *v.* Brown, 46 Mo. App. 529, 534; White *v.* Wabash Western R. Co., 34 Mo. App. 57, 71; Calkins *v.* Long, 22 Barb. (N. Y.) 97, 106; People *v.* Cleary, 13 Misc. (N. Y.) 546, 553, 35 N. Y. Suppl. 588; People *v.* Brunswick Bd. of Excise, 13 Misc. (N. Y.) 537, 554, 35 N. Y. Suppl. 659; Moore *v.* Lyons, 25 Wend. (N. Y.) 119, 142; Driggs *v.* Rockwell, 11 Wend. (N. Y.) 504, 507; Hill *v.* Atlantic, etc., R. Co., 143 N. C. 539, 575, 55 S. E. 854, 9 L. R. A. N. S. 606; Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 181, 53 S. E. 90; Smith Table Co. *v.* Madsen, 30 Utah 297, 318, 84 Pac. 885; Hall *v.* Madison, 128 Wis. 132, 147, 107 N. W. 31; State *v.* Houser, 122 Wis. 534, 574, 100 N. W. 964; Maas *v.* Backman, 28 Nova Scotia 504, 512.

33. Graw *v.* Manning, 54 Iowa 719, 721, 7 N. W. 150.

"When started" referring to a gin see Lockhard *v.* Avery, 8 Ala. 502, 503.

34. Black L. Dict. [*citing* Cooley Const. Lim. 1].

35. Chappell *v.* State, 71 Ala. 322, 324.

36. Century Dict.; Webster Int. Dict. [both *quoted* in Butts *v.* Long, 94 Mo. App. 687, 692, 68 S. W. 754].

Not synonymous with "show" see Spalding *v.* Spalding, 3 How. Pr. (N. Y.) 297, 301.

"States facts" substantially equivalent to "contains" see Leach *v.* Adams, 21 Ind. App. 547, 52 N. E. 813, 814.

Stating a case to be within the purview of a statute is simply alleging that it is. Spalding *v.* Spalding, 3 How. Pr. (N. Y.) 297, 301, where it is distinguished from "showing" a case to be.

"Stating a fact" distinguished from "showing a fact" see Meadow Valley Min. Co. *v.* Dodds, 7 Nev. 143, 148, 8 Am. Rep. 709.

Stating the evidence includes the idea of placing it in logical relation to the propositions which it is to support or contradict, and means more than merely repeating it. Redding *v.* South Carolina R. Co., 5 S. C. 67, 69.

Stating the section of an act or ordinance is synonymous with "referring," and a reference to the section by number is sufficient. Utica *v.* Richardson, 6 Hill (N. Y.) 300, 302.

37. See also Stone *v.* Travelers' Ins. Co., 78 Mo. 655, 656.

STATE BOARDS AND COMMISSIONS. See States.

STATE BONDS. See Commercial Paper, 7 Cyc. 537; States.

STATE CENSUS. See Census, 6 Cyc. 726.

STATE CERTIFICATES OF CREDIT. See States.

STATE CHARITABLE INSTITUTION. A term which may include the state penitentiary.[38]

STATE CONSTABLE. See Sheriffs and Constables.

STATE CONSTITUTION. See States.

STATE CONTRACT. See States.

STATE CONTROLLER or COMPTROLLER. See States. See also Comptroller, 8 Cyc. 542; Controller, 9 Cyc. 811.

STATE CONVICT. See Convicts, 9 Cyc. 869.

STATE CORPORATION COMMISSION. See States.

STATE COURT. See Courts, 11 Cyc. 633.

STATED. Fixed, established, occurring at regular times;[39] settled, established, regular, occurring at regular times, not occasional;[40] told; recited.[41] (Stated: Account, see Accounts and Accounting, 1 Cyc. 364.)

STATED ACCOUNT. An agreement by both parties that all the articles are true;[42] one which has been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct;[43] one that has been expressly or impliedly acknowledged to be correct by all parties.[44] (See Accounts and Accounting, 1 Cyc. 364.)

STATE DEBT. See States.

STATE ELECTION. See Elections, 15 Cyc. 280.

STATE FUNDS. See States; Taxes.

STATE GOVERNMENT. See Constitutional Law, 8 Cyc. 771; States.

STATE GRANT. See Public Lands, 32 Cyc. 1086.

STATE INDEBTEDNESS. See Constitutional Law, 8 Cyc. 940; States.

STATE INSTITUTION. See States.

STATE JAIL or PENITENTIARY. See Prisons, 32 Cyc. 315; Reformatories, 34 Cyc. 1002.

STATE LAND BOARD. See States.

STATE LANDS. See Public Lands, 32 Cyc. 776, 1086.

STATE LAW. See Statutes. See also Evidence, 16 Cyc. 889.

STATE LEGISLATURE. See States, *post*, p. 820; Statutes.

STATE LIBRARY. A term which may include a public library partly supported by moneys received as fees and fines.[45]

STATEMENT. A formal, exact, detailed presentation;[46] the act of stating, reciting, or presenting, verbally or on paper.[47] (Statement: Accompanying Execution of Contract, see Evidence, 17 Cyc. 699. Account Stated, see Accounts

38. State *v.* Laramie County, 8 Wyo. 104, 141, 55 Pac. 451.

39. Mullen *v.* Erie County, 85 Pa. St. 288, 291, 27 Am. Rep. 650; Wood *v.* Moore, 1 Chest. Co. Rep. (Pa.) 265, 266.

40. Webster Dict. [*quoted* in People *v.* Tuthill, 31 N. Y. 550, 560; Zulich *v.* Bowman, 42 Pa. St. 83, 87].

41. Dewey *v.* Campau, 4 Mich. 565, 567.

Used in connection with other words.— "Stated attendance" see People *v.* Tuthill, 31 N. Y. 550, 560. "Stated meeting" see Zulich *v.* Bowman, 42 Pa. St. 83, 87. "Stated minister" see Ligonia *v.* Buxton, 2 Me. 102, 108, 11 Am. Dec. 46; Com. *v.* Spooner, 1 Pick. (Mass.) 235, 236. "Stated place of worship" see Mullen *v.* Erie County, 4 Wkly. Notes Cas. (Pa.) 502, 503. "Stated salary" see State *v.* Barnes, 24 Fla. 29, 32, 3 So. 433. "Stated supply," referring to clergyman see Myers *v.* Perry First Presb. Church, 11 Okla. 544, 554, 69 Pac. 874; Trustees *v.* Sturgion, 9 Pa. St. 321, 330. "Stated worship" see Mullen *v.* Erie County, 85 Pa. St. 288, 291, 27 Am. Rep. 650; Wood *v.* Moore, 1 Chest. Co. Rep. (Pa.) 265, 268.

42. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 113, 15 Am. Dec. 181.

43. McLellan *v.* Crofton, 6 Me. 307, 337.

44. Wharton L. Lex. [*quoted* in Dougall *v.* Leggo, 7 Manitoba 445, 447].

45. Little *v.* U. S., 104 Fed. 540, within the meaning of the Tariff Act of 1897, par. 503, putting certain book on its free list.

46. Standard Dict. [*quoted* in Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 176, 75 N. E. 368].

47. Webster Dict. [*quoted* in Montague *v.* Thomason, 91 Tenn. 168, 173, 18 S. W. 264].

AND ACCOUNTING, 1 Cyc. 364. As to What Witness Will Testify, Use of by State in Prosecution, see CRIMINAL LAW, 12 Cyc. 570. By Buyer of Goods to Mercantile Agency, see SALES. By Seller of Goods — Constituting Warranty, see SALES; Raising Implication of Warranty, see SALES; Reliance of Buyer on, see SALES. Declaratory as to Mineral Claim, see MINES AND MINERALS, 27 Cyc. 570. False, Made to Mercantile Agency, see FRAUD, 20 Cyc. 70. Forgery of, see FORGERY, 19 Cyc. 1386. For Renewal of Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1093. Of Account — By Referee, see REFERENCES, 34 Cyc. 830; Departure From Declaration, Complaint, or Petition in Reply or Replication in Action to Compel, see PLEADING, 31 Cyc. 268; Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1169. Of Accused — As Evidence in Bastardy Proceedings, see BASTARDS, 5 Cyc. 628. In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 418. Of Agreement or Contract, Motion to Make More Definite or Certain, see PLEADING, 31 Cyc. 644. Of Amount — Due and Nature of Claim in Notice of Sale Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1469; Of Promissory Note, Interest, see COMMERCIAL PAPER, 8 Cyc. 138. Of Articles Sold in Declaration, Complaint, or Petition in Action For Price or Value Thereof, see SALES. Of Assignee or Trustee in Administration of Insolvent Estate, see INSOLVENCY, 22 Cyc. 1304. Of Case — In Brief, see APPEAL AND ERROR, 2 Cyc. 1013; Of Facts For Purpose of Review, see APPEAL AND ERROR, 2 Cyc. 1014; CRIMINAL LAW, 12 Cyc. 877. Of Cause For Discharge of Employee, see MASTER AND SERVANT, 26 Cyc. 995. Of City Officers as to Fiscal Management, see MUNICIPAL CORPORATIONS, 28 Cyc. 1563. Of Claim — Against Assigned Estates, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 261; Against County, see COUNTIES, 11 Cyc. 589; Against Insolvent Estate of Decedent, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 857; Against Municipal Corporations, see MUNICIPAL CORPORATIONS, 28 Cyc. 1748; Against Property in Hands of Receiver, see RECEIVERS; By Persons Entitled to Town Site Lands, see PUBLIC LANDS, 32 Cyc. 848; For Mining Work, see MINES AND MINERALS, 27 Cyc. 775; In Affidavit of Attachment For Rent, see LANDLORD AND TENANT, 24 Cyc. 1235. Of Claim or Cause of Action — Generally, see PLEADING, 31 Cyc. 100; Amendment of, see PLEADING, 31 Cyc. 365; Demurrer to, see PLEADING, 31 Cyc. 288; In Civil Case in Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 558; On Trial of Cause Anew on Appeals From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 727; Operation and Effect of Verdict or Judgment as to Curing Defects in, see PLEADING, 31 Cyc. 763; Striking Out, see PLEADING, 31 Cyc. 615; Supplementary, see PLEADING, 31 Cyc. 502; Waiver of Objection to Statement or Want Thereof, see PLEADING, 31 Cyc. 728. Of Consideration in Promissory Note, Necessity For, see COMMERCIAL PAPER, 7 Cyc. 609. Of Counsel on Trial of Cause Anew in Appeal From Justices of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 742. Of Counter-Claim, Motion to Make More Definite and Certain, see PLEADING, 31 Cyc. 644. Of Date of Promissory Note, Necessity For, see COMMERCIAL PAPER, 7 Cyc. 542. Of Defense — Generally, see PLEADING, 31 Cyc. 129; Demurrer to, see PLEADING, 31 Cyc. 302. Of Facts — Expected to Be Proved, see CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 201; For Submission to Court, see SUBMISSION OF CONTROVERSY; On Motion or Application For New Trial, see NEW TRIAL, 29 Cyc. 942. Of Grounds — In Motion For Arrest of Judgment in Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 767; Of Appeal and Notice of Appeal From Justices of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 685, 698; Of Motion to Strike Out Evidence, see CRIMINAL LAW, 12 Cyc. 564. Of Grounds For New Trial — Generally, see APPEAL AND ERROR, 2 Cyc. 1000; NEW TRIAL, 29 Cyc. 942; As Part of

Distinguished from the term "declaration" see Dixon *v.* Sturgeon, 6 Serg. & R. (Pa.) 25, 28.

Term "statement in a 'public journal'" as disqualifying a juror includes a publication of the evidence or what purports to be the evidence. People *v.* Thiede, 11 Utah 241, 273, 39 Pac. 837; Hopt *v.* Utah, 120 U. S. 430, 435, 7 S. Ct. 614, 30 L. ed. 708.

Statement of account as between bank and depositor see Clark *v.* Mechanics' Nat. Bank, 11 Daly (N. Y.) 239, 241.

Record on Appeal, see APPEAL AND ERROR, 2 Cyc. 1050; In Criminal Prosecution in Application Therefor at the Trial, see CRIMINAL LAW, 12 Cyc. 935. Of Items of Account or Damages, Motion to Make More Definite and Certain, see PLEADING, 31 Cyc. 634. Of Juror, Admissible in Application For New Trial, see CRIMINAL LAW, 12 Cyc. 749. Of Justice of the Peace on Appeal or Error to Review Proceedings Had Before Him, see JUSTICES OF THE PEACE, 24 Cyc. 698. Of Lien — Generally, see MECHANICS' LIENS, 27 Cyc. 124; For Labor and Supplies Furnished to Railroad, see RAILROADS, 33 Cyc. 465. Of Loss Under Insurance Policy, see ACCIDENT INSURANCE, 1 Cyc. 274; FIRE INSURANCE, 19 Cyc. 848; LIFE INSURANCE, 25 Cyc. 884; MARINE INSURANCE, 26 Cyc. 708; MUTUAL BENEFIT INSURANCE, 29 Cyc. 148. Of Manner of Service of Process in Return, see PROCESS, 32 Cyc. 503. Of Nature and Ground — Of Cause of Action or Nature of Relief Demanded in Affidavit For Order For Service of Process or Publication, see PROCESS, 32 Cyc. 477; Of Proposed Amendment in Application For Leave to Amend, see PLEADING, 31 Cyc. 362. Of Parties, Consideration, Amount, Place, and Time of Negotiable Instrument, Essential of Negotiability, see COMMERCIAL PAPER, 7 Cyc. 542. Of Parties or Other Persons — Evidence, Admissions, and Declarations, see CRIMINAL LAW, 12 Cyc. 418, 459; EVIDENCE, 16 Cyc. 938. Part of Res Gestæ, see EVIDENCE, 16 Cyc. 1006. Of Prosecutrix, as Evidence, see BASTARDS, 5 Cyc. 660. Of Question of Proposition to Be Voted For on Election Ballots, see ELECTIONS, 15 Cyc. 349. Of Receiver, see RECEIVERS, 34 Cyc. 450. Of Separate Causes of Action or Defense, Motions to Make More Definite and Certain, see PLEADING, 31 Cyc. 648, 661. Of Subcontractor's and Materialman's Claim, Effect of Failure to Require, see MECHANICS' LIENS, 27 Cyc. 152. Of Witness Inconsistent With Testimony, see WITNESSES. On Appeal, Making and Filing of, see APPEAL AND ERROR, 2 Cyc. 1041. On Rehearing, see APPEAL AND ERROR, 2 Cyc. 1071. Patentability of Invention Founded on Statement of Others, see PATENTS, 30 Cyc. 877.)

STATEMENT OF FACT. The testimony by a witness of his recollection of things observed and perceived by him.[48] (See APPEAL AND ERROR, 2 Cyc. 1076, 3 Cyc. 53; CRIMINAL LAW, 12 Cyc. 865.)

STATE OF CULTIVATION. A phrase said to mean the converse to a state of nature.[49]

STATE OFFICER. See STATES.

STATE OF NATURE. A term used in contradistinction to "residing upon or cultivating."[50]

STATE PAPERS. See EVIDENCE, 17 Cyc. 297.

STATE PAUPER. See PAUPERS, 31 Cyc. 1127.

STATE POWER OVER INTERSTATE COMMERCE. See COMMERCE, 7 Cyc. 439.

STATE PRACTICE IN FEDERAL COURTS. See COURTS, 11 Cyc. 884.

STATE PRISON. See PRISONS, 32 Cyc. 315.

STATE PROPERTY. See CONSTITUTIONAL LAW, 8 Cyc. 1041; PUBLIC LANDS.

STATE PURPOSES. See TAXATION.

STATE RELIGION. A term said to refer to the religion of some individual, or set of individuals, taught and enforced by the state.[51] (See RELIGION, 34 Cyc. 1110.)

STATE REPORTS. See REPORTS, 34 Cyc. 1610.

STATE ROAD. See STREETS AND HIGHWAYS.

48. Lipscomb *v.* State, 75 Miss. 559, 590, 23 So. 210, 230.

49. Johnson *v.* Perley, 2 N. H. 56, 57, 9 Am. Dec. 35, where it is said that whenever lands have been wrought with a view to the production of a crop, they must be considered as becoming and continuing in "a state of cultivation" until abandoned for every purpose of agriculture and designedly permitted to revert to a condition similar to their original one.

50. Stovel *v.* Gregory, 21 Ont. App. 137, 142, as used in Ont. Rev. St. c. 111, § 5, subs. 4.

51. Cincinnati Bd. of Education *v.* Minor, 23 Ohio St. 211, 249, 13 Am. Rep. 233, where, however, it is said: "Properly speaking, there is no such thing as 'religion of state.'"

STATES

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CROSS-REFERENCES

For Matters Relating to:

Acceptance by State of Voluntary Surrender of Corporate Franchise, see CORPORATIONS, 10 Cyc. 1299.

Acquired Title to State Lands by Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1112.

Action:

In Name of State on Relation of County Officers, see COUNTIES, 11 Cyc. 609.

On the Bond of a Clerk of Court, Brought in Name of the State, see CLERKS OF COURTS, 7 Cyc. 240.

Adjustment of Accounts Between State and County, see COUNTIES, 11 Cyc. 515.

Aliens, see ALIENS, 2 Cyc. 100.

Appeal by State From Judgment to Which It Is a Party, see APPEAL AND ERROR, 2 Cyc. 642.

Authority of Governing Board of College or University to Bind State, see COLLEGES AND UNIVERSITIES, 7 Cyc. 295.

Bond Upon Appeal by State in a Suit For Its Own Interest, see APPEAL AND ERROR, 2 Cyc. 224.

Certiorari Against State, see CERTIORARI, 6 Cyc. 776.

Champerty by State Conveying Land Held Adversely, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 876.

Citizenship:

In State as Distinct From Citizenship in United States, see CITIZENS, 7 Cyc. 136.

In the United States Acquired by Admission of Territory as New State, see CITIZENS, 7 Cyc. 143.

Constitutionality of Retroactive Law Passed by a State Legislature Operating on Property Belonging to the State, see CONSTITUTIONAL LAW, 8 Cyc. 902.

Criminal:

Jurisdiction Over Land Purchased Within a State by the United States, see CRIMINAL LAW, 12 Cyc. 218.

Prosecution by State Upon Information Instead of Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 181.

Discharge in Bankruptcy as Not Releasing Bankrupt From Debt Due State, see BANKRUPTCY, 5 Cyc. 400.

For Matters Relating to — (*continued*)
District of Columbia, see DISTRICT OF COLUMBIA, 14 Cyc. 526.
Effect of Admission of Territory as State on Courts of the Territory and Transfer of Causes Thereupon, see COURTS, 11 Cyc. 959.
Election, see ELECTIONS, 15 Cyc. 268.
Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 543, 565, 611.
Estoppel Against State, see ESTOPPEL, 16 Cyc. 714.
Exclusive Right of State to Set Up Violation of Charter by Corporation or Want of Its Power to Act, see CORPORATIONS, 10 Cyc. 1164.
Exemption of State Officers From Garnishment, see GARNISHMENT, 20 Cyc. 990.
Fishery in Waters Between Two States, see FISH AND GAME, 19 Cyc. 1005.
Full Faith and Credit to Be Accorded to Judgment of Sister State, see JUDGMENTS, 23 Cyc. 1545.
Garnishment of State, see GARNISHMENT, 20 Cyc. 990.
Hunting and Fishing, and Statutory Supervision Thereof by States, see FISH AND GAME, 19 Cyc. 986.
Immunity of Members of Legislature From Arrest:
In Civil Actions, see ARREST, 3 Cyc. 919.
On Criminal Charges, see ARREST, 3 Cyc. 874.
Impairment of Obligation of Contract of State, see CONSTITUTIONAL LAW, 8 Cyc. 936.
Indians, see INDIANS, 22 Cyc. 109.
Injunction Against Action in Courts of Sister States, see INJUNCTIONS, 22 Cyc. 814.
International Law, see INTERNATIONAL LAW, 22 Cyc. 1706.
Interstate Treaties as to the Right of Fishing in Waters Lying Between Two States, see FISH AND GAME, 19 Cyc. 1005.
Intoxicating Liquors, see INTOXICATING LIQUORS, 23 Cyc. 64.
Invalidity of Contract Injurious to State, see CONTRACTS, 9 Cyc. 675.
Investment by Trustees in Confederate Bonds, see GUARDIAN AND WARD, 21 Cyc. 89.
Judicial Notice of State Boundaries and Location of Political Divisions of State, see EVIDENCE, 16 Cyc. 859.
Liability of State:
For Costs, see COSTS, 11 Cyc. 277, 286.
For Injury to Convict Laborer, see MASTER AND SERVANT, 26 Cyc. 1084.
Militia, see MILITIA, 27 Cyc. 489.
Necessity of Consent of State to Consolidation of Corporations, see CORPORATIONS, 10 Cyc. 288.
Officer:
Generally, see OFFICERS, 29 Cyc. 1356.
Of County, see COUNTIES, 11 Cyc. 417.
Of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 402.
Of Town, see TOWNS.
Power of:
Attorney-General to Bind State by Appearing For It in Action, see ATTORNEY-GENERAL, 4 Cyc. 1034.
Combination of States to Construct Railroad, see COMMERCE, 7 Cyc. 449.
Congress to Impose License Within a State, see LICENSES, 25 Cyc. 599.
State:
Over Interstate or Internal Commerce, see COMMERCE, 7 Cyc. 422.
To Appropriate Unpaid Dividend of Corporation, see CORPORATIONS, 10 Cyc. 547.
To Bind Non-Assenting Minority Stock-Holders by Alteration of Charter, see CONSTITUTIONAL LAW, 8 Cyc. 987.
To Build Bridges, see COMMERCE, 7 Cyc. 456.

For Matters Relating to — (*continued*)
Power of — (*continued*)
State — (*continued*)
To Change Charter of College or University, see COLLEGES AND UNIVERSITIES, 7 Cyc. 285.
To Impose License-Tax, see LICENSES, 25 Cyc. 599.
To Regulate:
Business of Foreign Corporation, see CONSTITUTIONAL LAW, 8 Cyc. 990.
Sale of Patented Articles, see COMMERCE, 7 Cyc. 436 note 11.
To Sue as Corporation, see CORPORATIONS, 10 Cyc. 1332.
To Tax the Indebtedness of a Foreign Railroad Corporation, see CONSTITUTIONAL LAW, 8 Cyc. 976 note 94.
Priority of Claim in Favor of State Against Insolvent, see INSOLVENCY, 22 Cyc. 1320.
Quo Warranto to Try Title to State Office, see QUO WARRANTO, 32 Cyc. 1418, 1420 *et seq.*
Recognition by State of Corporation as Evidence of Its Existence, see CORPORATIONS, 10 Cyc. 513.
Relation Between States, see INTERNATIONAL LAW, 22 Cyc. 1734.
Release or Discharge of Debt Due State by Discharge in Insolvency, see INSOLVENCY, 22 Cyc. 1344.
Restraint by State of Unlawful Combinations, see MONOPOLIES, 27 Cyc. 907, 910.
Right of State:
To Acquire Land by Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1021.
To a Preference on the Calendar in Actions in Which It Is Interested Over Other Causes, see APPEAL AND ERROR, 3 Cyc. 205.
To Have an Appeal Which It Has Taken Dismissed, see APPEAL AND ERROR, 3 Cyc. 184 note 48.
To Interest on County Taxes, see COUNTIES, 11 Cyc. 516.
State:
As Payee of Commercial Paper, see COMMERCIAL PAPER, 7 Cyc. 567.
As Proper Party to Suit to Enjoin Unlawful Expenditures of Public Money by Municipality, see INJUNCTIONS, 22 Cyc. 896.
State and Public Land, see PUBLIC LANDS, 32 Cyc. 759.
State Civil Rights Acts, see CIVIL RIGHTS, 7 Cyc. 165.
Submission to Arbitration by State, see ARBITRATION AND AWARD, 3 Cyc. 605 note 2.
Taxation, see TAXATION.
Territories, see TERRITORIES.
Treaty, see TREATIES.
United States, see UNITED STATES.
Waiver by State of Right to Forfeit Corporate Franchise, see CORPORATIONS, 10 Cyc. 1088.
War, see WAR.

I. DEFINITION.

A state in its broadest sense is a political community, organized under a distinct government, recognized and conformed to by the people as supreme; a commonwealth; a nation.[1] The word is used variously to describe a people or community

1. Standard Dict. [*quoted* in O'Connor *v.* State, (Tex. Civ. App. 1902) 71 S. W. 409, 419].
Other definitions are: "Nations or States are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength." Vattel L. Nat. § 1 [*quoted* in Thomas *v.* Taylor, 42 Miss. 651, 706, 2 Am. Rep. 625; Keith *v.* Clark, 97 U. S. 454, 459, 24 L. ed. 1071]. "Such a society has her affairs and her interests. She deliber-

of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; the country or territorial region inhabited by such a community; the government under which the people live; or the combined idea of people, territory, and government;[2] but the primary and leading sense in which the term is used in the federal constitution is as meaning the body politic inhabiting the territory;[3] that is to say, a political community of free

ates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights." Vattel L. Nat. § 1 [*quoted* in Republic of Mexico *v.* De Arangoiz, 5 Duer (N. Y.) 634, 637; Keith *v.* Clark, *supra*].

"A political society organized by the common consent of the inhabitants of a certain territory for purposes of mutual protection and defense, and exercising whatever powers are necessary to that end." People *v.* Martin, 38 Misc. (N. Y.) 67, 69, 76 N. Y. Suppl. 953 [*citing* Cooley Const. Lim. 1].

"A complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others." Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 455, 1 L. ed. 440.

The state is a body politic and not an association, society, or corporation within the meaning of a statute making property of any association, society, or corporation the subject of embezzlement. State *v.* Taylor, 7 S. D. 533, 534, 64 N. W. 548.

It is an artificial person having its affairs and its interests, its rules, its rights, and its obligations. It may acquire property distinct from that of its member; it may incur debts to be discharged out of public stock not out of the private fortunes of individuals; and it may be bound by contracts and for damages arising from the breach of those contracts. Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 455, 1 L. ed. 440.

As used in cases relating to the home port of a vessel the word "state" refers to the jurisdiction and not merely to a sovereignty, and cannot have greater significance than the word "jurisdiction," "county," or "territory." Rees *v.* Steam-boat Gen. Terry, 3 Dak. 155, 13 N. W. 533, 537.

Used in reference to the subject of taxation it is employed in contradistinction to the term "local," and hence an act which is expressly described as being intended to raise a revenue for the state cannot be construed as covering the subject of the support for a local object, such as lighting the streets in a city by its municipal officers. People *v.* Davenport, 91 N. Y. 574, 591.

As used in the sense of the whole state.— When a constitution speaks of the "state," the whole state in her political capacity and not merely a subdivision is intended. Cass *v.* Dillon, 2 Ohio St. 607. But counties, cities, and the like are political subdivisions of the state and are included in the term "state," which is the concrete whole. State *v.* Levy Ct., 1 Pennew. (Del.) 597, 43 Atl. 522.

As including foreign states and countries.— The word "state" as used in the inheritance tax law imposed by the law or revenue act upon property passing either by will or by the intestate law of any state or territory is not construed in a sense broad enough to include a foreign state or territory but is limited to the states of the United States. Eidman *v.* Martinez, 184 U. S. 578, 22 S. Ct. 515, 46 L. ed. 697. Similarly where a statute requires insurance companies as a condition of doing business within a state to make a certain deposit with a state treasurer or other officer of the state where the company is organized, the word "state" is confined to the communities of the United States and will not include a foreign country (Employers' Liability Ins. Co. *v.* Insurance Com'rs, 64 Mich. 614, 31 N. W. 542); and the same applies to a statute providing that the jurisdiction of a criminal action for stealing in another state or receiving stolen property knowing it to have been stolen and bringing the same into the state is in any county into or through which such stolen property has been brought, and such a statute does not apply to property stolen in Canada (People *v.* Black, 122 Cal. 73, 54 Pac. 385, under Cal. Pen. Code, § 789). But under a statute exempting from taxation shares of stock in a corporation situated in another state, where all its stock is taxed in such state, it is held that the word "state" applies to the foreign state as well as to one of the United States. Foster *v.* Stevens, 63 Vt. 175, 22 Atl. 78, 13 L. R. A. 166.

2. Wabash, etc., R. Co. *v.* People, 105 Ill. 236, 240; Silver Bow County *v.* Davis, 6 Mont. 306, 12 Pac. 688; Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 330; Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227, 25 Tex. 465, 595, holding, however, that in all these senses the primary conception is that of a people or community.

3. State *v.* Wilmington City, 3 Harr. (Del.) 294.

As used in U. S. Const. art. 2, § 1, providing for the appointment of presidential electors, and requiring that each state shall appoint a number of electors equal to the whole number of senators and representatives, "state" means the body politic and corporate. McPherson *v.* State Secretary, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

The word has a definite, fixed legal meaning in this country, and under our form of government it has acquired this meaning when the constitution was adopted, and this is held to be the one which must be attached to it when used in that instrument or in laws of congress. It means one of the commonwealths or political bodies of the American Union which under the constitution stand in certain specified relations to the national government and are invested as commonwealths with full power in their several spheres over all matters not expressly inhibited. It is a political

citizens occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed,[4] specifically one of the several members of the Union.[5] In the latter sense it is used throughout this article. When a state sprang into existence as such is a mixed question of law and fact.[6]

II. POLITICAL STATUS AND RELATIONS.

A. Sovereignty of States. Prior to the formation of the federal constitution the states were sovereign in the full, absolute sense of the term;[7] but under the constitution their sovereignty stops short of nationality and their political status at home and abroad is that of states of the United States;[8] and thus they are not sovereign within the meaning of that term in international law,[9] being prohibited by the federal constitution from dealing directly with foreign nations;[10] but the states are sovereign within their separate spheres as to all powers not delegated to the United States or prohibited to the states,[11] and subject to these restrictions each state is supreme and possesses the exclusive right of regulating

organization having a chief executive who can make a requisition for extradition, and whose duty under the law is to obey one when made by one having authority under the constitution and laws of the United States. *Ex p.* Morgan, 20 Fed. 298, 304.

There is a distinction between the government of a state and the state itself. In common speech and apprehension they are usually regarded as identical and as ordinarily the acts of the government are the acts of the state, and because within the limits of its delegation of power the government of the state is generally confounded with the state itself. The state itself, however, is an ideal person, intangible, invisible, immutable. The government is an agent and within the sphere of its agency a personal representative. This distinction is to be observed in determining the effect of the acts of a governor as binding the state. Grunert *v.* Spalding, (Wis. 1899) 78 N. W. 606 [*citing* and *following* Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185].

As distinguished from inhabitants.— Although it is sometimes said that the inhabitants make the state, nevertheless the state in its political organization is entirely different and distinct from the inhabitants who may happen to reside therein. State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

Indian tribes or nations as not constituting states see INDIANS, 22 Cyc. 117.

Territories of the United States as not constituting states see TERRITORIES.

District of Columbia as not constituting a state see DISTRICT OF COLUMBIA, 14 Cyc. 528.

The term "commonwealth" is synonymous with "state" to the extent that where the cognizors in a recognizance taken in a criminal proceeding acknowledged themselves to owe the commonwealth of West Virginia instead of the state of West Virginia, the recognizance is good. State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

4. Texas *v.* White, 7 Wall. (U. S.) 700, 721, 19 L. ed. 227, 25 Tex. 465, holding also that it is the union of such states under a common constitution which forms the greater political unit, which the constitution designates the United States, and makes of the people and states which compose it one people.

5. Hepburn *v.* Ellzey, 2 Cranch (U. S.) 445, 2 L. ed. 332; Cooley Const. Lim. 1. See also Texas *v.* White, 7 Wall. (U. S.) 100, 19 L. ed. 227.

6. McGowan *v.* Crooks, 5 Dana (Ky.) 65.

7. Thurlow *v.* Massachusetts, 5 How. (U. S.) 586, 12 L. ed. 293; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

8. New Hampshire *v.* Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. ed. 656.

9. New Hampshire *v.* Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. ed. 656. And see *In re* Hughes, 61 N. C. 57.

Meaning of "sovereign states" see INTERNATIONAL LAW, 22 Cyc. 1706.

10. U. S. Const. art. 1, § 10.

11. *California.*— People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Colorado.— People *v.* Tool, 35 Colo. 225, 86 Pac. 224, 229, 231, 117 Am. St. Rep. 198, 6 L. R. A. N. S. 575.

Missouri.— Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

New Jersey.— New Jersey Cent. R. Co. *v.* Jersey City, 70 N. J. L. 81, 56 Atl. 239 [*affirmed* in 72 N. J. L. 311, 61 Atl. 1118 (*affirmed* in 209 U. S. 473, 28 S. Ct. 592, 52 L. ed. 896)].

New York.— McDonald *v.* Mallory, 77 N. Y. 546, 33 Am. Rep. 664.

Pennsylvania.—Weaver *v.* Fegely, 29 Pa. St. 27, 70 Am. Dec. 151.

Washington.— Jones *v.* Reed, 3 Wash. 57, 27 Pac. 1067.

Wisconsin.— *In re* Wehlitz, 16 Wis. 443, 84 Am. Dec. 700.

United States.— New Hampshire *v.* Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. ed. 656; Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. 416, 14 L. ed. 997; Moore *v.* McGuire, 142 Fed. 787 [*reversed* on other grounds in 205 U. S. 214, 27 S. Ct. 483, 51 L. ed. 776]; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

See 44 Cent. Dig. tit. "States," § 1 *et seq.*

its own internal affairs,[12] and in all matters relating to the life, liberty, and property of citizens the state is sovereign so long as it does not conflict with the federal constitution.[13] Thus, except as restrained by the federal constitution, states may make or change their constitutions or laws at will;[14] or confer or withhold the right of state citizenship;[15] or exercise the taxing power;[16] or regulate the acquisition, tenure, transfer, and succession of real property within the state;[17] or, in general, may exercise any power possessed by them prior to the adoption of the constitution unless the exercise of such power is expressly or by necessary implication prohibited by the constitution, or interferes with the exercise of some power delegated to the United States;[18] and where by the constitution power is given to congress over a subject not exclusive in its terms or inconsistent with state action, the states may legislate on that subject until congress exercises the power conferred on it.[19]

B. Jurisdiction[20] — 1. In General. In general the jurisdiction of a state is coextensive with its sovereignty,[21] and subject to the restrictions imposed by the federal constitution, the sovereignty of each state extends throughout its entire territory and to all persons and property within its territorial limits.[22] Conversely,

The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. It gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union. Lowenstein *v.* Evans, 69 Fed. 908.

A state may change the common law by permitting the recovery of damages for injuries for which the common law gave no remedy and there is nothing in the federal constitution which prohibits this. Ivy *v.* Western Union Tel. Co., 165 Fed. 371, holding that the Arkansas act of March 7, 1903 (Acts (1903), p. 123, No. 68), Kirby Dig. § 7947, providing that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages," is based upon a reasonable and not an arbitrary classification and is not unconstitutional as depriving telegraph companies of the equal protection of the law.

12. Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248. See also People *v.* Tool, 35 Colo. 225, 86 Pac. 224, 229, 231, 117 Am. St. Rep. 198, 6 L. R. A. N. S. 822.

The power of the states to prescribe the qualifications of their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which such elections may be contested, is exclusive and free from external interference, except so far as plainly provided by the federal constitution. Taylor *v.* Beckham, 178 U. S. 548, 20 S. Ct. 890, 44 L. ed. 1187. And see, generally, Officers, 29 Cyc. 1375.

13. State *v.* Hanson, 16 N. D. 347, 113 N. W. 371.

14. Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; Blair *v.* Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581.

The state legislature has plenary power except as restrained by the constitution of the United States or of the state. Rison *v.* Farr, 24 Ark. 161, 87 Am. Dec. 52; Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352.

15. *In re* Wehlitz, 16 Wis. 443, 84 Am. Dec. 700. And see Citizens, 7 Cyc. 136 text and note 14.

Double citizenship in state and United States see Citizens, 7 Cyc. 136 *et seq.*

Power of state to confer and regulate the right of suffrage see Elections, 15 Cyc. 280.

16. People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581; Nathan *v.* Louisiana, 8 How. (U. S.) 73, 12 L. ed. 993. And see, generally, Taxation.

17. U. S. *v.* Fox, 94 U. S. 315, 24 L. ed. 192.

Operation of constitutional and statutory provisions as to descent and distribution see Descent and Distribution, 14 Cyc. 24.

18. Nougues *v.* Douglass, 7 Cal. 65 (holding that the state government possesses all the powers incident to political government and not delegated to the United States); Livingston *v.* Van Ingen, 9 Johns. (N. Y.) 507.

An initiative and referendum amendment of a state constitution depriving the governor of a veto power does not violate the provisions of the federal constitution. State *v.* Pacific States' Tel., etc., Co., (Oreg. 1909) 99 Pac. 427 [*approving* and *following* Kadderly *v.* Portland, 44 Oreg. 118, 74 Pac. 710, 75 Pac. 222].

19. Weaver *v.* Fegely, 29 Pa. St. 27, 70 Am. Dec. 151.

20. **Jurisdiction of state courts:** Of matters under laws of another state see Courts, 11 Cyc. 663. Of action for tort causing injury in another state see Courts, 11 Cyc. 665. Of action by, against, or between non-residents of the state see Courts, 11 Cyc. 667 *et seq.*

21. Sanders *v.* St. Louis, etc., Anchor Line, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390; State *v.* Metcalf, 65 Mo. App. 681.

22. New Jersey Cent. R. Co. *v.* Jersey City, 70 N. J. L. 81, 56 Atl. 239 [*affirmed* in 72 N. J. L. 311, 61 Atl. 1118 (*affirmed* in 209

no state can exercise jurisdiction by judicial process or otherwise over persons or property outside of its territorial limits,[23] unless such power has been acquired by compact with other states,[24] except in case of a vessel upon the high seas, where the state to which the vessel belongs has jurisdiction in respect to matters not committed exclusively to the federal government.[25]

2. Over Waters Forming Boundaries. The jurisdiction of a state bordering on the sea over the waters thereof is that of an independent nation, except so far as it would conflict with that of the United States, and extends for a marine league from the shore, and over the bays and arms of the sea within the limits defined by international law.[26] This principle has been applied to the laws relating to fisheries,[27] to the criminal laws,[28] and to statutes giving a right of action for death by wrongful act.[29] Ordinarily the jurisdiction of states separated by a river,[30] or other body of water,[31] extends to the interstate boundary, but in a number of instances, by compact, constitution, or statute, two states have concurrent jurisdiction over rivers, etc., forming the boundary between them.[32]

C. Relation of States to United States[33] **— 1. In General.** The relation of the states to the United States is peculiar and complex. Thus while it is held

U. S. 473, 28 S. Ct. 592, 52 L. ed. 896)]; Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 7 L. ed. 939; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

23. Meyler *v.* Wedding, 107 Ky. 310, 53 S. W. 809, 21 Ky. L. Rep. 1006, 92 Am. St. Rep. 347; People *v.* New Jersey Cent. R. Co., 42 N. Y. 283; Sheetz *v.* Sheetz, 6 Lanc. L. Rev. (Pa.) 97; Piatt *v.* Oliver, 19 Fed. Cas. No. 11,115, 2 McLean 267.

24. New Jersey Cent. R. Co. *v.* Jersey City, 70 N. J. L. 81, 56 Atl. 239 [*affirmed* in 72 N. J. L. 311, 61 Atl. 1118 (*affirmed* in 209 U. S. 473, 28 S. Ct. 592, 52 L. ed. 896)].

25. McDonald *v.* Mallory, 77 N. Y. 546, 33 Am. Rep. 664; Crapo *v.* Kelly, 16 Wall. (U. S.) 610, 21 L. ed. 430.

Effect of saving of common-law remedy by judiciary act upon the jurisdiction of admiralty and state courts see Admiralty, 1 Cyc. 811 *et seq.*

26. Chicago Transit Co. *v.* Campbell, 110 Ill. App. 366; Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264 [*affirming* 60 Fed. 428].

State control over navigable waters generally see Navigable Waters, 29 Cyc. 295.

27. Com. *v.* Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236 [*affirmed* in 139 U. S. 240, 11 S. Ct. 559, 35 L. ed. 159]; McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248.

For matters relating to hunting and fishing generally and statutory supervision thereof see Fish and Game, 19 Cyc. 986.

28. See Criminal Law, 12 Cyc. 214.

29. Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264 [*affirming* 60 Fed. 428].

30. See *infra*, II, F, 2.

31. See cases cited *infra*, this note.

The sovereignty of Wisconsin extends to the middle of Lake Michigan, and its laws, so far as they do not conflict with the laws of the United States relating to commerce and navigation, are operative to this extent upon the lake. Bigelow *v.* Nickerson, 70 Fed. 113, 17 C. C. A. 1, 30 L. R. A. 336.

Jurisdiction over Long Island sound belongs to New York so far as its waters are included within the boundaries of that state, and to New York and Connecticut where its waters are between those states, each state having jurisdiction to the middle of the sound on its own side thereof. Mahler *v.* Warwick, etc., Transp. Co., 35 N. Y. 352 [*reversing* 45 Barb. 226]; The Elizabeth, 8 Fed. Cas. No. 4,352, 1 Paine 10. See also Keyser *v.* Coe, 14 Fed. Cas. No. 7,750, 9 Blatchf. 32.

32. See the statutes of the several states. And see the following cases:

Indiana.— Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Sherlock *v.* Alling, 44 Ind. 184.

Iowa.— State *v.* Mullen, 35 Iowa 199.

Kentucky.— Church *v.* Chambers, 3 Dana 274.

Missouri.— Sanders *v.* St. Louis, etc., Anchor Line, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390; State *v.* Metcalf, 65 Mo. App. 681.

Pennsylvania.— Com. *v.* Shaw, 8 Pa. Dist. 509.

Wisconsin.— Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953; State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

United States.— Wedding *v.* Meyler, 192 U. S. 573, 24 S. Ct. 322, 48 L. ed. 570, 66 L. R. A. 833 [*reversing* 107 Ky. 310, 53 S. W. 809, 21 Ky. L. Rep. 1006, 92 Am. St. Rep. 347]; *In re* Mattson, 69 Fed. 535.

Jurisdiction of offenses on rivers forming state boundaries see Criminal Law, 12 Cyc. 213.

Where the river over which the two states have concurrent jurisdiction leaves its bed and ceases to be the boundary, the jurisdiction of each state extends only to the boundary line, that is, the middle of the old bed. Cooley *v.* Golden, 52 Mo. App. 229. And see *infra*, II, F, 3.

33. **For matters relating to cession or release of jurisdiction to United States,** under the provision in the federal constitution that congress shall have power to exercise exclusive legislation in all cases whatsoever over places purchased by the consent of the legis-

that a state can have no existence, politically, outside and independently of the constitution of the United States,[34] and that under the provision of the constitution that the United States shall guarantee to every state a republican form of government, it rests with congress to determine what government to establish in a state and whether such government is republican;[35] nevertheless the states are not in any true and complete sense inferior to or dependent upon the United States. As to the United States and the thirteen original states, the historical fact, substantially, is that the states did not owe their existence to the United States,[36] any more than the United States was the creature of the states, but that the same fact, the success of the Revolution, established at once the governments of the states and of the United States. Historically, the states afterward admitted into the Union were in fact the political creatures of congress. Whatever, however, may be the facts of history or the proper interpretation thereof, under the existing dual system of government, the powers of sovereignty are distributed between the governments of the states and that of the United States, and each government as to the powers committed to it is supreme and independent.[37] Within the limits of state sovereignty the United States cannot interfere with the states,[38] nor can the states interfere with the government of the United States in the exercise of its constitutional powers,[39] the supremacy of the United States within its proper sphere being expressly recognized in the constitutional provision that the constitution and laws and treaties of the United States shall be the supreme law of the land.[40] Although in a measure independent, the United States is not as to one of the states a foreign nation,[41] and the state courts are required to give to the stat-

lature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings see UNITED STATES.

34. Penn *v.* Tollison, 26 Ark. 545.

35. Penn *v.* Tollison, 26 Ark. 545; Calhoun *v.* Calhoun, 2 S. C. 283; Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227; Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581.

"A republican form of government," within the meaning of U. S. Const. art. 4, § 4, guaranteeing to the states a republican form of government, is a government by the people, through the representatives appointed by them to the various departments, executive, legislative, and judicial, as provided either by direct vote or through some intervening officer or body by them selected and appointed by direct vote, for the purpose. Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177. This provision of the constitution applies to the form of government for the state at large, and not to the systems of local government provided by the several states for the regulation of their municipalities or other subdivisions. Eckerson *v.* Des Moines, *supra*.

Enjoining enforcement of state law which violates federal constitution.—The action of a federal court, in the exercise of the powers conferred upon it, and the performance of the duties imposed upon it by the constitution of the United States, established as the supreme law of the land by the voluntary act of the people of all the states, in enjoining officers of a state from enforcing a state law which violates rights secured by such constitution, involves no question of state rights or of the right to hold self-government. Georgia Cent. R. Co. *v.* Alabama R. Commission, 161 Fed. 925 [*reversed* on other grounds in 170 Fed. 225].

36. Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

37. U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; Buffington *v.* Day, 11 Wall. (U. S.) 113, 20 L. ed. 122; Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227; Lane County *v.* Oregon, 7 Wall. (U. S.) 71, 19 L. ed. 101.

38. See UNITED STATES.

Under the confederate constitution it was held that the right of the confederate congress to exercise its various grants of power in imposing duties upon a citizen of a state, and its exaction of his services, must yield to the paramount right of the state to the services of such person in the administration of the state government, since to abridge this right would be destructive to the republican form of government as guaranteed by the constitution. Andrews *v.* Strong, 33 Ga. Suppl. 166.

39. Brennan *v.* Titusville, 153 U. S. 289, 14 S. Ct. 829, 38 L. ed. 719; Parkersburg, etc., Transp. Co. *v.* Parkersburg, 107 U. S. 691, 2 S. Ct. 732, 27 L. ed. 584; U. S. *v.* Bright, 24 Fed. Cas. No. 14,647, Brightly N. P. (Ohio) 19 note; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,274, 2 Sprague 292; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,273, 1 Sprague 602.

40. McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579. And see U. S. Const. art. 6.

41. Matter of League Island, 1 Brewst. (Pa.) 524; Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. ed. 264, holding that, in their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments, and that, although the jurisdiction and authority of the general gov-

utes of the United States the same recognition, force, and effect accorded the laws of the states;[42] and the intimate and necessary relation of the United States to the states is clearly shown by such constitutional provisions as those relating to the election of the president and members of congress, the organization, etc., of the militia, the guaranty of a republican form of government to the states, etc.[43]

2. Admission Into the Union — a. In General. The constitution provides that "new States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress,"[44] and under this provision a number of states have been admitted.[45] The admission of a territory as a state requires the action of both the people of the territory and of congress.[46]

b. Conditions of Admission. The constitution has left it to the discretion of congress to determine the circumstances under which a state shall be admitted and the steps to be taken by the people of the prospective state to obtain admission;[47] but while congress may refuse to admit a state, a state once admitted is not bound by any condition subsequent annexed by congress to her admission,[48] and it seems that congress has no power to impose upon a state any condition precedent which would impair her equality with other states;[49] but congress may impose conditions authorized by the federal constitution and which bind all the states alike.[50]

c. Effect of Admission[51] — (i) *In General.* Upon the admission of a territory into the Union as a state the state government succeeds to all the powers of sovereignty previously enjoyed by congress and which belong to the original states, and only such powers in respect to the people of the new state remain in the federal government as, under the constitution, it may exercise over the original states.[52]

ernment are essentially different from those of the states, they are not those of a different country.

42. Tandy *v.* Elmore-Cooper Live Stock Commission Co., 113 Mo. App. 409, 87 S. W. 614.

The right to prohibit the use of the flag for commercial purposes does not belong exclusively to congress but may be exercised by the states. Halter *v.* State, 74 Nebr. 757, 105 N. W. 298, 121 Am. St. Rep. 754, 7 L. R. A. N. S. 1079 [*affirmed* in 205 U. S. 34, 27 S. Ct. 419, 51 C. C. A. 696]. *Contra*, Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181. In any event a statute penalizing the use of the United States flag as a trade-mark is unconstitutional in so far as it applies to articles manufactured and in existence when it was lawful to manufacture them and have them in possession, being in violation of Const. art. 1, § 6, declaring that no person shall be deprived of life, liberty, or property without due process of law nor shall private property be taken for public use without just compensation. People *v.* Van de Carr, 178 N. Y. 425, 70 N. E. 965, 102 Am. St. Rep. 516, 66 L. R. A. 189. For matters relating to trade-marks and trade-names generally see Trade-Marks and Trade-Names.

A state may prohibit the use of the arms or the great seal of the state for advertising or commercial purposes. Com. *v.* R. I. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71.

43. See U. S. Const., *passim*.

44. U. S. Const. art. 4, § 3.

45. See Scott *v.* Detroit Young Men's Society's Lessee, 1 Dougl. (Mich.) 119; Brittle *v.* People, 2 Nebr. 198; Myers *v.* Manhattan Bank, 20 Ohio 283; Anderson *v.* Tyree, 12 Utah 129, 42 Pac. 201; Louisiana *v.* Mississippi, 202 U. S. 1, 26 S. Ct. 408, 50 L. ed. 913; Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103; Calkin *v.* Cocke, 14 How. (U. S.) 227, 14 L. ed. 398; Benner *v.* Porter, 9 How. (U. S.) 235, 13 L. ed. 119; Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565; Moore *v.* U. S., 85 Fed. 465, 29 C. C. A. 269; U. S. *v.* Stahl, 27 Fed. Cas. No. 16,373, Woolw. 192.

46. Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119; How *v.* Kane, 2 Pinn. (Wis.) 531, 2 Chandl. 222, 54 Am. Dec. 152.

The constitution formed preparatory to admission is not operative until adopted by the people. Territory *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749.

47. Brittle *v.* People, 2 Nebr. 198; Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684. See Cooley Princ. Const. L. (3d ed.) 189.

48. State *v.* New Orleans Nav. Co., 11 Mart. (La.) 309.

49. See Cooley Princ. Const. L. (3d ed.) 192–195.

50. Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441.

51. **Citizenship in the United States** acquired by admission of territory as new state see Citizens, 7 Cyc. 143.

52. Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845; Weber *v.* State Harbor Com'rs, 18 Wall. (U. S.) 57, 21 L. ed. 798; Permoli *v.* New Orleans Mu-

All treaties [53] and acts of congress affecting the rights, liberties, and privileges of the people in matters within the reserved powers of the states cease to have any effect, upon the admission of the new state, and such matters are regulated solely by the constitution and law of the state.[54] When, however, it is so provided by the state constitution, the laws of the territory remain in force,[55] and the officers of the territorial government may continue in the exercise of their duties,[56] until changed or superseded under authority of the state constitution. So also the constitutions sometimes provide for the preservation or continuance of actions, judgments, private rights, or claims, etc., after admission.[57] In general the new state succeeds to the rights [58] and liabilities [59] of the territory. The state government has no control over matters solely within federal cognizance, for example, over the records and proceedings of the late territorial courts.[60]

(II) *EQUALITY OF NEW STATES.* New states admitted into the Union are on an equal footing with the older states in respect to rank, the exercise of sovereign powers, and the restrictions placed upon all alike by the federal constitution; [61] and this doctrine does not rest upon any express provision of the constitution, but upon what is considered and held to be the general character and purpose of the Union of the states as established by the constitution, that is, a union of political equals; [62] but this equality does not require that the new states should

nicipality No. 1, 3 How. (U. S.) 589, 11 L. ed. 739; Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565; Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 9 Sawy. 441; U. S. *v.* Stahl, 27 Fed. Cas. No. 16,373, Woolw. 192.

The right of eminent domain, except as to the public lands of the United States, passes to the new state. Pollard *v.* Hagan, 3 How. (U. S.) 212, 11 L. ed. 565.

Corporations created by the territorial legislature become corporations of the state. Kansas Pac. R. Co. *v.* Atchison, etc., R. Co., 112 U. S. 414, 5 S. Ct. 208, 28 L. ed. 794. See also State *v.* Stormont, 24 Kan. 686.

53. St. Francis Roman Catholic Church *v.* Martin, 4 Rob. (La.) 62.

54. Permoli *v.* New Orleans Municipality No. 1, 3 How. (U. S.) 589, 11 L. ed. 739; Moore *v.* U. S., 85 Fed. 465, 29 C. C. A. 269.

The ordinance of 1787 for the government of the Northwest Territory ceased to have any effect in the states carved from such territory upon their admission, except so far as its provisions were adopted by them. La Plaisance Bay Harbor Co. *v.* Monroe, Walk. (Mich.) 155; State *v.* Edgerton Dist. Bd., 76 Wis. 177, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 S. Ct. 811, 31 L. ed. 629; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149; Huse *v.* Glover, 119 U. S. 543, 7 S. Ct. 313, 30 L. ed. 487; Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678, 2 S. Ct. 185, 27 L. ed. 442; Strader *v.* Graham, 10 How. (U. S.) 82, 13 L. ed. 337; Duluth Lumber Co. *v.* St. Louis Boom, etc., Co., 17 Fed. 419, 5 McCrary 382. See also Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337; Vaughan *v.* Williams, 28 Fed. Cas. No. 16,903, 3 McLean 530.

Enabling act modified by constitution.— Where the constitution adopted by the people and accepted by congress contains provisions repugnant to the terms of the enabling act, the provisions of the enabling act must be construed as modified thereby. Romine *v.* State, 7 Wash. 215, 34 Pac. 924.

55. Wright *v.* Young, 6 Oreg. 87; Jungk *v.* Holbrook, 15 Utah 198, 49 Pac. 305, 62 Am. St. Rep. 921; *In re* Murphy, 5 Wyo. 297, 40 Pac. 398; *In re* Moore, 81 Fed. 356; Gilchrist *v.* Helena, etc., R. Co., 58 Fed. 708. See also Stoughton *v.* State, 5 Wis. 291.

56. State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; State *v.* Meadows, 1 Kan. 90; Scott *v.* Detroit Young Men's Soc., 1 Dougl. (Mich.) 119; Benner *v.* Porter, 9 How. (U. S.) 235, 13 L. ed. 119.

57. Cusic *v.* Douglas, 3 Kan. 123, 87 Am. Dec. 458; Wastl *v.* Montana Union R. Co., 24 Mont. 159, 61 Pac. 9.

58. Crane *v.* Reeder, 21 Mich. 24, 4 Am. Rep. 430; State *v.* Merrill, 2 Pinn. (Wis.) 279, 1 Chandl. 258. See also Brown *v.* Grant, 116 U. S. 207, 6 S. Ct. 357, 29 L. ed. 598.

59. Jewell Nursery Co. *v.* State, 4 S. D. 213, 56 N. W. 113; State *v.* Richards, 15 Utah 477, 49 Pac. 532; Baxter *v.* State, 9 Wis. 38.

Effect of admission of territory as state on courts of the territory and transfer of causes thereupon see COURTS, 11 Cyc. 959.

60. Freeborn *v.* Smith, 2 Wall. (U. S.) 160, 17 L. ed. 922; Hunt *v.* Palao, 4 How. (U. S.) 589, 11 L. ed. 1115.

Prior to the admission of Oklahoma the records of the clerk of the United States court in the Indian Territory as *ex officio* recorder at Muskogee were the property of the United States, and as such it required the concurrent action of both the federal and the state governments to pass them under the jurisdiction of that state when admitted. Eberle *v.* King, 20 Okla. 49, 93 Pac. 748.

61. Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337; U. S. *v.* Stahl, 27 Fed. Cas. No. 16,373, Woolw. 192.

62. Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684.

be admitted to any right in the soil thereof considered as property;[63] nor does it preclude a difference between the states among themselves in respect to the restrictions which, in the exercise of their sovereign powers, they have voluntarily imposed upon themselves in their own constitutions;[64] and moreover, the true constitutional equality extends only to the right of each state, under the constitution, to have and enjoy the same measure of local or self-government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government.[65] The new state is not bound by any act of the United States before its admission, in derogation of its sovereignty as an equal member of the Union.[66]

3. Annexation. One state, Texas, has been added to the Union by annexation.[67] The former system of government so far as it conflicted with the federal authority was abrogated, and the constitution and laws of the United States were in force in Texas immediately upon her admission as a state;[68] and by such annexation and admission all the citizens of the former republic became, without any express declaration, citizens of the United States.[69]

4. Secession — a. In General. After having been for nearly three quarters of a century the subject of debate,[70] it was finally decided by the result of the Civil war that a state cannot secede from the Union. The failure of the attempt to secede of course established only that secession was impossible, leaving still open the question of constitutional right. The courts, however, soon after the war established the constitutional principle that no state has a legal right to secede without the consent of the other states. It was held that the ordinances of secession and all acts intended to give effect thereto or dependent thereon were null and void, and that the seceding states constituting the Confederacy remained during the war states of the Union notwithstanding their attempted secession.[71]

b. Status of Seceding States. It has been held by the supreme court of the United States that the southern confederacy was a treasonable and illegal confederation within the provision of the constitution prohibiting any treaty, alliance,

63. Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684.

64. Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

The admission of Washington subject to the exercise of a concurrent jurisdiction with Oregon over the Columbia river does not impair her sovereignty or place her upon an unequal footing with the other state. *In re* Mattson, 69 Fed. 535.

65. Case *v.* Toftus, 39 Fed. 730, 5 L. R. A. 684.

66. Hinman *v.* Warren, 6 Oreg. 408.

67. See cases cited *infra*, this note.

The articles of annexation were adopted by a convention of the people of Texas on July 4, 1845, and congress admitted Texas into the Union on Dec. 29, 1845. Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155. See also U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867; Brashear *v.* Mason, 6 How. (U. S.) 92, 12 L. ed. 357; Preston *v.* Walsh, 10 Fed. 315; Hancock *v.* Walsh, 11 Fed. Cas. No. 6,012, 3 Woods 351.

68. Lee *v.* King, 21 Tex. 577; Calkin *v.* Cocke, 14 How. (U. S.) 227, 14 L. ed. 398. But the United States constitution did not take effect in Texas prior to admission and laws passed by the republic were not subject thereto. Herman *v.* Phalen, 14 How. (U. S.) 79, 14 L. ed. 334; League *v.* De Young, 11 How. (U. S.) 185, 13 L. ed. 657.

69. Boyd *v.* Nebraska, 143 U. S. 135, 12 S. Ct. 375, 36 L. ed. 103. And see Citizens, 17 Cyc. 144 note 34.

70. See Reeves View Const. c. 32, maintaining that the states have a constitutional right to secede. This is said to have been a textbook used at the United States military academy prior to the Civil war.

71. *Alabama.*—Hall *v.* Hall, 43 Ala. 488, 94 Am. Dec. 703.

Arkansas.— Penn *v.* Tollison, 26 Ark. 545.

Georgia.— Chancely *v.* Bailey, 37 Ga. 532, 95 Am. Dec. 350.

Mississippi.— State *v.* McGinty, 41 Miss. 435, 93 Am. Dec. 264.

North Carolina.— *In re* Hughes, 61 N. C. 57.

Ohio.— Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340.

Tennessee.— Keith *v.* Clarke, 4 Lea 718.

West Virginia.— Hood *v.* Maxwell, 1 W. Va. 219.

United States.— Keith *v.* Clark, 97 U. S. 454, 24 L. ed. 1071; White *v.* Hart, 13 Wall. 646, 20 L. ed. 685; Texas *v.* White, 7 Wall. 700, 19 L. ed. 227; White *v.* Cannon, 6 Wall. 443, 18 L. ed. 923; Shortridge *v.* Macon, 22 Fed. Cas. No. 12,812, 1 Abb. 58, Chase 136; U. S. *v.* Cathcart, 24 Fed. Cas. No. 14,756, 1 Bond 556.

See 44 Cent. Dig. tit. "States," § 17 *et seq.*

The constitution, in all of its provisions, looks to an indestructible Union, composed of

or confederation by one state with another, and that the confederate government never had any legal existence even as a *de facto* government, and hence that its legislative and other public acts were without any validity whatever,[72] except in so far as they were adopted and put in force by a state.[73] In this connection a distinction is made between the acts of the confederate states and those of an individual state belonging to the confederacy,[74] in several early cases it being held that the government of the seceding states had no legal existence even as *de facto* governments, and that all their acts were wholly null and void;[75] but it is now well settled, however, by repeated decisions of the federal supreme court and of the state courts, that the existing state governments were practically unaffected by the acts of secession and the organization of the confederacy, and that the same general form of government and the same general law for the administration of justice and the protection of private rights which had previously existed in the states remained in existence during the period of secession, and that all public acts of the states not in conflict with the federal authority and laws were valid;[76] and furthermore it has also been recognized that for certain purposes, particularly as to consummated transactions between its own citizens, the confederate government constituted a *de facto* government which ceased to exist upon its overthrow in 1865;[77] and it has been held that during the war neither the law of the United

indestructible states. Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227.

72. Williams *v.* Bruffy, 96 U. S. 176, 24 L. ed. 716; Sprott *v.* U. S., 20 Wall. (U. S.) 459, 22 L. ed. 371; Hickman *v.* Jones, 9 Wall. (U. S.) 197, 19 L. ed. 551.

For other cases holding that the confederate government was not even a de facto government see Chisholm *v.* Coleman, 43 Ala. 204, 94 Am. Dec. 677; Cousin *v.* Abat, 21 La. Ann. 705; Smith *v.* Stewart, 21 La. Ann. 67, 99 Am. Dec. 709; McCracken *v.* Poole, 19 La. Ann. 359; Thomas *v.* Taylor, 42 Miss. 651, 2 Am. Rep. 625; Thornburg *v.* Harris 3 Coldw. (Tenn.) 157; Keppel *v.* Petersburg R. Co., 14 Fed. Cas. No. 7,722, Chase 167; Shortridge *v.* Macon, 22 Fed. Cas. No. 12,812, 1 Abb. 58, Chase 136.

The acts of the confederate states establishing a circulating medium were void. Norton *v.* Dawson, 19 La. Ann. 464, 92 Am. Dec. 548; Howard *v.* Kirwin, 19 La. Ann. 432; McCracken *v.* Poole, 19 La. Ann. 359. But the enforced payment of confederate money was *pro tanto* a payment of the confederate debt within the prohibition of the fourteenth amendment. Smith *v.* Nelson, 34 Tex. 516.

73. Williams *v.* Bruffy, 96 U. S. 176, 24 L. ed. 716.

74. Luter *v.* Hunter, 30 Tex. 688, 98 Am. Dec. 494; Williams *v.* Bruffy, 96 U. S. 176, 24 L. ed. 716. And see *infra*, II, C, 4, c, (I).

75. Hall *v.* Hall, 43 Ala. 488, 94 Am. Dec. 703; Ray *v.* Thompson, 43 Ala. 434, 94 Am. Dec. 696; Chisholm *v.* Coleman, 43 Ala. 204, 94 Am. Dec. 677. See also White *v.* McKee, 19 La. Ann. 111.

The provisional government of Kentucky in sympathy with the confederacy was not even a *de facto* government and the official acts of officers appointed by it were nullities. Simpson *v.* Loving, 3 Bush (Ky.) 458, 96 Am. Dec. 252.

76. *Alabama.*— McGuire *v.* Buckley, 58 Ala. 120; Shepherd *v.* Reese, 42 Ala. 329; Watson *v.* Stone, 40 Ala. 451, 91 Am. Dec. 484; Michael *v.* State, 40 Ala. 361.

Arkansas.— Howell *v.* Hogins, 37 Ark. 110.

Louisiana.— Cole *v.* Thompson, 35 La. Ann. 1026.

Mississippi.— Harlan *v.* State, 41 Miss. 566.

Tennessee.— Keith *v.* Clarke, 4 Lea 718.

Virginia.— Pulaski County *v.* Stuart, 28 Gratt. 872; Dinwiddie County *v.* Stuart, 28 Gratt. 526.

United States.— Baldy *v.* Hunter, 171 U. S. 388, 18 S. Ct. 890, 43 L. ed. 208; Johnson *v.* Atlantic, etc., Transit Co., 156 U. S. 618, 15 S. Ct. 520, 39 L. ed. 556; Ketchum *v.* Buckley, 99 U. S. 188, 25 L. ed. 473; Keith *v.* Clark, 97 U. S. 454, 24 L. ed. 1071; Williams *v.* Bruffy, 96 U. S. 176, 24 L. ed. 716; Texas *v.* White, 7 Wall. 700, 19 L. ed. 227; Evans *v.* Richmond, 8 Fed. Cas. No. 4,570, Chase 551; Van Epps *v.* Walsh, 28 Fed. Cas. No. 16,850, 1 Woods 598.

See 44 Cent. Dig. tit. "States," § 18 *et seq.*

The government of Mississippi during the period of secession while *de facto* as to its own citizens was not *de facto* as the term is used in international law. Buck *v.* Vasser, 47 Miss. 551; Mississippi Cent. R. Co. *v.* State, 46 Miss. 157; Thomas *v.* Taylor, 42 Miss. 651, 2 Am. Rep. 625; Cassell *v.* Backrack, 42 Miss. 56, 97 Am. Dec. 436, 2 Am. Rep. 590.

Right of seceding state to sue.— Notwithstanding secession, a seceding state might sue in the courts of New York (U. S. *v.* Vietor, 16 Abb. Pr. (N. Y.) 153), but not in the federal courts (Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227).

77. Atkinson *v.* Georgia Cent. Agricultural etc., Co., 58 Ga. 227; Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255; Cassell *v.* Backrack, 42 Miss. 56, 97 Am. Dec. 436, 2 Am. Rep. 590; Franklin *v.* Vannoy, 66 N. C. 145; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361; Mauran *v.* Alliance Ins. Co., 6

States nor any policy of the government thereof was in force in any part of the confederate states not in the possession or under the control of the United States.[78]

c. Validity of Acts Done Under Secession Governments — (1) *PUBLIC ACTS OF SECEDING STATES.* The acts of the several seceded states in their individual capacities through their legislative, judicial, and executive departments, not hostile to the federal government nor contrary to the constitution and laws of the United States, were valid. Thus acts of the legislature relating merely to matters of internal government and necessary for the preservation of peace and good order among citizens, such as laws relating to marriage and the domestic relations, the succession and transfer of property, the settlement of estates, the enforcement of contracts, the protection of property, the prosecution of crimes, and the like, were valid.[79] Similarly, the judgments, decrees, and other judicial acts and proceedings of the courts in matters of ordinary concern, and not in impairment of the federal power nor in violation of the constitution, were valid and binding on all persons within the jurisdiction of the court;[80] but such proceedings could not affect the rights of residents of the loyal states over whom the court had no jurisdiction;[81] and all legislative or judicial acts, contrary to the federal constitution or impairing or tending to impair the national authority, or in furtherance or support of the war against the United States,[82] such as acts imposing taxes for military pur-

Wall. (U. S.) 1, 18 L. ed. 836; Leather *v.* Salvor Wrecking, etc., Co., 15 Fed. Cas. No. 8,169, 2 Woods 680.

78. Bier *v.* Dozier, 24 Gratt. (Va.) 1.

79. *Alabama.*— Chappell *v.* Doe, 49 Ala. 153; Watson *v.* Stone, 40 Ala. 451, 91 Am. Dec. 484.

Arkansas.— Bragg *v.* Tuffts, 49 Ark. 554, 6 S. W. 158.

Mississippi.— Shattuck *v.* Daniel, 52 Miss. 834; Mister *v.* McLean, 43 Miss. 268; Buchanan *v.* Smith, 43 Miss. 90; Hill *v.* Boyland, 40 Miss. 618.

South Carolina.— Morgan *v.* Keenan, 1 S. C. 327.

Texas.— McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044 [*affirming* (Civ. App. 1894) 25 S. W. 705]; Wallace *v.* State, 33 Tex. 445.

United States.— Baldy *v.* Hunter, 171 U. S. 388, 18 S. Ct. 890, 43 L. ed. 208; Johnson *v.* Atlantic, etc., Transit Co., 156 U. S. 618, 15 S. Ct. 520, 39 L. ed. 556; U. S. *v.* Home Ins. Cos., 22 Wall. 99, 22 L. ed. 816 [*affirming* 8 Ct. Cl. 449]; Horn *v.* Lockhart, 17 Wall. 570, 21 L. ed. 657; Huntington *v.* Texas, 16 Wall. 402, 21 L. ed. 316; Texas *v.* White, 7 Wall. 700, 19 L. ed. 227; Cook *v.* Oliver, 6 Fed. Cas. No. 3,164, 1 Woods 437.

See 44 Cent. Dig. tit. "States," § 18 *et seq.*

A tax assessed by authority of a seceding state was valid and enforceable during the existence of the secession government, but if, after such assessment, the government was overthrown before the tax was collected, the assessment could not be enforced. O'Byrne *v.* Savannah, 41 Ga. 331, 5 Am. Rep. 532.

No act passed by Virginia after the separation of West Virginia had any force in West Virginia. Burkhart *v.* Jennings, 2 W. Va. 242.

80. Hill *v.* Armistead, 56 Ala. 118; McQueen *v.* McQueen, 55 Ala. 433; Hill *v.* Huckabee, 52 Ala. 155; Parks *v.* Coffey, 52 Ala. 32; Tarver *v.* Tankersley, 51 Ala. 309; Clark *v.* Bernstein, 49 Ala. 596; Green *v.* Scarborough, 49 Ala. 137; Freeman *v.* Bass, 34 Ga. 355, 89 Am. Dec. 255; Pepin *v.* Lachenmeyer, 45 N. Y. 27; Cook *v.* Oliver, 6 Fed. Cas. No. 3,164, 1 Woods 437; French *v.* Tumlin, 9 Fed. Cas. No. 5,104.

In a number of Alabama cases it was held that the judgments of the courts established in Alabama by the confederate government during the war were not void but had merely the force of the judgments of foreign courts. Sugg *v.* Winston, 49 Ala. 586; Bevans *v.* Henry, 49 Ala. 123; Bibb *v.* Avery, 45 Ala. 691; Griffin *v.* Ryland, 45 Ala. 688; Mosely *v.* Tuthill, 45 Ala. 621, 6 Am. Rep. 710; Noble *v.* Cullom, 44 Ala. 554; Martin *v.* Hewitt, 44 Ala. 418. These decisions are in conflict, however, with Horn *v.* Lockhart, 17 Wall. (U. S.) 570, 21 L. ed. 657, and later decisions of the Alabama court cited *supra*, this note. Hill *v.* Huckabee, 52 Ala. 155.

81. Blackwell *v.* Willard, 65 N. C. 555, 6 Am. Rep. 749; Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Stephens *v.* Brown, 24 W. Va. 234; Snider *v.* Snider, 3 W. Va. 200; Hawver *v.* Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532; Burkhart *v.* Jennings, 2 W. Va. 242; Botts *v.* Crenshaw, 3 Fed. Cas. No. 1,690, Chase 224; Livingston *v.* Jordan, 15 Fed. Cas. No. 8,415, Chase 454; Van Epps *v.* Walsh, 28 Fed. Cas. No. 16,850, 1 Woods 598.

82. *Alabama.*—Speed *v.* Cocke, 57 Ala. 209; Ray *v.* Thompson, 43 Ala. 434, 94 Am. Dec. 696.

Florida.—Garlington *v.* Priest, 13 Fla. 559.

Georgia.— Central R. Co. *v.* Collins, 40 Ga. 582.

Mississippi.— Mississippi Cent. R. Co. *v.* State, 46 Miss. 157.

Texas.— Luter *v.* Hunter, 30 Tex. 688, 98 Am. Dec. 494.

United States.— Taylor *v.* Thomas, 22 Wall. 479, 22 L. ed. 789; Horn *v.* Lockhart, 17 Wall. 570, 21 L. ed. 657 [*affirming* 15 Fed. Cas. No. 8,445, 1 Woods 628]; Texas *v.*

poses,[83] or providing for the issue of bonds, notes, etc., in support of the confederate government,[84] or authorizing the investment of fiduciary funds in confederate securities,[85] were void. In some instances the acts of the secession governments were ratified and made valid by the restored state governments,[86] while in others they were declared null and void.[87] It has been held that the restored state governments were not liable on the obligations of the secession governments;[88] nor did payment to the secession government of a debt due the former state government bind the restored government.[89]

(II) *Transactions and Acts of Individuals.* Transactions between or acts done by individuals in the seceded states in accordance with the laws thereof, which would have been lawful in ordinary circumstances, and which had no tendency to aid or promote the prosecution of the war against the United States, were valid;[90] but all such transactions or acts tending to give aid or support to the war were void.[91] It has been held, however, that individuals could not be held liable for acts done at the instance of the military authorities of the secession government.[92]

d. Reconstruction and Readmission. The acts of congress of 1867–1870, known as the Reconstruction Acts, which placed the southern states under military government, and provided for their restoration to the rights of states upon compliance with certain terms, have not been much considered by the courts.[93] These acts contemplated not the readmission of the reconstructed states into the Union as having ever been out of it, but merely their restoration to the full status of states by readmitting them to representation in congress.[94] While the consti-

White, 7 Wall. 700, 19 L. ed. 227; Evans *v.* Richmond, 8 Fed. Cas. No. 4,570, Chase 551; Hatch *v.* Burroughs, 11 Fed. Cas. No. 6,203, 1 Woods 439.

See 44 Cent. Dig. tit. "States," § 18 *et seq.*

83. Shattuck *v.* Daniel, 52 Miss. 834.

But an executor paying such tax on his testator's land during the war is entitled to credit therefor. Hudson *v.* Gray, 58 Miss. 882.

84. Bragg *v.* Tuffts, 49 Ark. 554, 6 S. W. 158; Tucker *v.* Horner, 28 Ark. 335.

85. Hall *v.* Hall, 43 Ala. 488, 94 Am. Dec. 703; Powell *v.* Boon, 43 Ala. 459; Bailey *v.* Fitz-Gerald, 56 Miss. 578 [*overruling* Trotter *v.* Trotter, 40 Miss. 704]; Horn *v.* Lockhart, 17 Wall. (U. S.) 570, 21 L. ed. 657; Van Epps *v.* Walsh, 28 Fed. Cas. No. 16,850, 1 Woods 598. *Contra*, Watson *v.* Stone, 40 Ala. 451, 91 Am. Dec. 484. See also Watson *v.* Stone, 52 Ala. 150.

86. Micou *v.* Tallassee Bridge Co., 47 Ala. 652; Powell *v.* Boon, 43 Ala. 459; Reynolds *v.* Taylor, 43 Ala. 420; Winter *v.* Dickerson, 42 Ala. 92; Jeffries *v.* State, 39 Ala. 655; Hughes *v.* Stinson, 21 La. Ann. 540.

87. Penn *v.* Tollison, 26 Ark. 545; Timms *v.* Grace, 26 Ark. 598; Thompson *v.* Mankin, 26 Ark. 586, 7 Am. Rep. 628; State *v.* Taylor, 2 Coldw. (Tenn.) 609.

88. Buck *v.* Vasser, 47 Miss. 551; Thomas *v.* Taylor, 42 Miss. 651, 2 Am. Rep. 625; Meredith *v.* Rogers, 24 Gratt. (Va.) 172; Com. *v.* Chalkley, 20 Gratt. (Va.) 404. See also McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044.

89. Mississippi Cent. R. Co. *v.* State, 46 Miss. 157.

90. Baldy *v.* Hunter, 171 U. S. 388, 18 S. Ct. 890, 43 L. ed. 208; Horn *v.* Lockhart, 17 Wall. (U. S.) 570, 21 L. ed. 657 [*affirming* 15 Fed. Cas. No. 8,445, 1 Woods 628]; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361. See also Porter *v.* Daniels, 11 W. Va. 250; Keppel *v.* Petersburg R. Co., 14 Fed. Cas. No. 7,722, Chase 167.

The same rule has been applied to contracts of counties.— Pulaski County *v.* Stuart, 28 Gratt. (Va.) 872; Dinwiddie County *v.* Stuart, 28 Gratt. (Va.) 526.

As to the adjustment after the war of contracts made on the basis of confederate currency see Mullins *v.* Christopher, 36 Ga. 584; Jarrett *v.* Nickell, 9 W. Va. 345; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361.

91. State *v.* Hays, 49 Mo. 604. See also Speed *v.* Cocke, 57 Ala. 209.

The payment in confederate currency of a debt to a loyal citizen did not discharge the debt. Shortridge *v.* Macon, 22 Fed. Cas. No. 12,812, 1 Abb. 58.

As to investments by trustees, etc., in confederate bonds see GUARDIAN AND WARD, 21 Cyc. 89.

92. Baker *v.* Wright, 1 Bush (Ky.) 500. But see Franklin *v.* Vannoy, 66 N. C. 145; Lively *v.* Ballard, 2 W. Va. 496.

93. See McGuire *v.* Buckley, 58 Ala. 120; Plowman *v.* Thornton, 52 Ala. 559; *Ex p.* Screws, 49 Ala. 57; Noble *v.* Cullom, 44 Ala. 554; Powell *v.* Boon, 43 Ala. 459; Macon, etc., R. Co. *v.* Little, 45 Ga. 370; State *v.* Williams, 49 Miss. 640; Lawson *v.* Jeffries, 47 Miss. 686, 12 Am. Rep. 342; Calhoun *v.* Calhoun, 2 S. C. 283; *In re* Kennedy, 2 S. C. 216; Luter *v.* Hunter, 30 Tex. 688, 98 Am. Dec. 494; Griffin *v.* Cunningham, 20 Gratt. (Va.) 31; *In re* Deckert, 7 Fed. Cas. No. 3,728, 2 Hughes 183; Hatch *v.* Burroughs, 11 Fed. Cas. No. 6,203, 1 Woods 439.

94. White *v.* Hart, 13 Wall. (U. S.) 646, 20 L. ed. 685.

tutional provision guaranteeing to the states a republican form of government has been supposed to afford authority for reconstruction,[95] the constitutionality of the acts providing for military government is at least doubtful, but has not been decided by the United States supreme court.[96] The question would probably have been decided in the McCardle case [97] had not congress deprived the supreme court of jurisdiction while the case was pending.

D. Relation of States to Each Other — 1. In General. Except to the limited extent to which the federal constitution has provided otherwise, the states are entirely independent, and sustain toward each other the relation of foreign states.[98] Special duties or restrictions are imposed by the constitution upon the states in interstate relations in connection with extradition,[99] the proof and effect of judgments,[1] the privileges and immunities of citizens,[2] and similar matters as to which the particular titles to which the matters relate must be consulted.[3] The principles of international comity apply as between the states, but comity between states so far as concerns rights, privileges, and immunities of each other's citizens not guaranteed by the federal constitution must yield to the laws and policy of the state in which it is invoked.[4] All the states of the Union, both old and new, stand upon a footing of equality of constitutional right and power.[5]

2. Compacts and Agreements Between States. States may enter into compacts or agreements with each other, and a number of such agreements relating to boundaries,[6] to the jurisdiction of offenses committed on boundary waters,[7] to the right of fishing in such waters,[8] or to other matters of public interest [9] have been upheld by the courts. Contracts between states are made by the acts of their respective legislatures; [10] and under the provision of the federal constitution that "no state shall, without the consent of congress, enter into any agreement or compact with another state or with a foreign power," [11] such contracts generally require the consent of congress. This provision, however, does not apply to every possible agreement or compact between two states, but only to such as might tend to increase the political power of the states affected, and thus encroach upon or interfere with the supremacy of the United States; agreements

95. See Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227.

96. See 2 Tucker Const. 597, 639.

97. *Ex p.* McCardle, 6 Wall. (U. S.) 318, 18 L. ed. 816, 7 Wall. 506, 19 L. ed. 264.

98. Phillips *v.* Payne, 92 U. S. 130, 23 L. ed. 649.

99. See Extradition, 19 Cyc. 85.

1. **Conclusive effect and enforcement of an action upon sister state judgments** see Judgments, 23 Cyc. 1545 *et seq.*

2. **Personal, civil, and political rights under the federal constitution** see Constitutional Law, 8 Cyc. 877.

For matters relating to citizens generally see Citizens, 7 Cyc. 132.

3. **For matters relating to conflict of laws** see Conflict of Laws, 8 Cyc. 567, and Cross-References Thereunder.

4. Donovan *v.* Pitcher, 53 Ala. 411, 25 Am. Rep. 634. And see Conflict of Laws, 8 Cyc. 567, and Cross-References Thereunder.

5. Escanaba, etc., Transp. Co. *v.* Chicago, 107 U. S. 678, 2 S. Ct. 185, 27 L. ed. 442.

Equality of new states see *supra*, II, C, 2, c, (II).

6. See *infra*, II, F, 2.

7. See *supra*, II, B, 2.

8. **Interstate treaties as to the right of fishery in waters lying between two states** see Fish and Game, 19 Cyc. 1005.

9. **Agreement as to separation:** Between Kentucky and Virginia see Beard *v.* Smith, 6 T. B. Mon. (Ky.) 430; Hawkins *v.* Barney, 5 Pet. (U. S.) 457, 8 L. ed. 190; Fisher *v.* Cockerell, 5 Pet. (U. S.) 248, 8 L. ed. 114; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547. Between Virginia and West Virginia see Virginia *v.* West Virginia, 11 Wall. (U. S.) 39, 20 L. ed. 67.

Agreement between Maine and Massachusetts in regard to Bowdoin College see Allen *v.* McKean, 1 Fed. Cas. No. 229, 1 Sumn. 276.

The Virginia compact which provides that all private rights and interests in land over which Virginia surrendered sovereignty derived from the laws of Virginia shall remain valid and secure under the laws of the proposed state of Kentucky was not violated by Acts (1906), p. 115, c. 22, relating to taxation of lands in the state, patents to land issued by Virginia being subject to the right and power of the sovereign to compel the payment of taxes on the land in the future, and to the correlative power to forfeit the title as a penalty for non-payment. Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138, 32 Ky. L. Rep. 129.

10. Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

11. U. S. Const. art. 1, § 10.

which can in no respect concern the United States may be made by the states without the consent of congress.[12] The consent of congress to an agreement between states may be given after as well as before the making of the agreement,[13] and need not be expressed in any particular form; it is sufficient that congress, by some positive act in relation to the agreement, has signified its consent thereto.[14] Thus an act of congress admitting into the Union a state formed by the division of an existing state is an implied consent to the agreement of the two states on the subject.[15] A compact made by two states with the consent of congress is binding upon the citizens of both states,[16] and is a contract within the constitutional prohibition of the impairment of the obligation of contracts.[17]

E. Relation of States to Foreign Countries. Since the states have no independent political existence in an international sense, they can sustain no public relation whatever to foreign countries;[18] and participation by the states in international affairs, such as making treaties or alliances, taxing imports and exports, engaging in war, etc., is expressly prohibited by the federal constitution.[19] The constitutional prohibitions do not, however, preclude a state from making aliens capable of inheriting or taking and holding property within the state, in the absence of treaty.[20]

F. Territorial Extent and Boundaries — 1. Compacts, Treaties, and Agreements as to Boundaries. In a number of instances questions relating to boundaries have been settled and the boundaries established by compacts or agreements between the states, made with the consent of congress, as between Florida and Georgia in 1859,[21] New Jersey and New York in 1833,[22] Kentucky and Tennessee in 1820,[23] Tennessee and Virginia in 1803,[24] and Virginia and Pennsylvania in 1780,[25] and on several occasions both prior to and since the adoption of the federal constitution particular states have ceded portions of their territory to the United States, the terms of cession being set forth in the acts or deeds of cession.[26] In like manner state boundaries forming also international boundaries

12. Union Branch R. Co. *v.* East Tennessee, etc., R. Co., 14 Ga. 327; Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882; Wharton *v.* Wise, 153 U. S. 155, 14 S. Ct. 783, 38 L. ed. 669; Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537. And see St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802.

Effect of legislation of two states authorizing consolidation of corporations resident in each other.— Legislation by each of two states authorizing a corporation resident in one state to unite with a corporation resident in the other state does not, in the absence of legislation by congress to the contrary, come within the prohibition of U. S. Const. art. 1, § 10, declaring that no state shall without the consent of congress enter into an agreement or compact with another state. Mackay *v.* New York, etc., R. Co., 82 Conn. 73, 72 Atl. 583.

13. Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537.

14. Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537; Virginia *v.* West Virginia, 11 Wall. (U. S.) 39, 20 L. ed. 67; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

15. Virginia *v.* West Virginia, 11 Wall. (U. S.) 39, 20 L. ed. 67; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

16. Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537; Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955 [*affirming* 9 Fed. Cas. No. 4,860, 1 McLean 185].

17. Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547. See also Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955.

18. Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 8 S. Ct. 689, 31 L. ed. 700; Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 614, 10 L. ed. 579, 618. And see *supra*, II, A.

19. U. S. Const. art. 1, § 10.

20. Blythe *v.* Hinckley, 180 U. S. 333, 21 S. Ct. 390, 45 L. ed. 557. And see Aliens, 2 Cyc. 100 text and note 58.

21. See Groover *v.* Coffee, 19 Fla. 61.

22. See New Jersey Cent. R. Co. *v.* Jersey City, 70 N. J. L. 81, 56 Atl. 239; State *v.* Babcock, 30 N. J. L. 29; Cook *v.* Weigley, 72 N. J. Eq. 221, 65 Atl. 196; Cook *v.* Weigley, 68 N. J. Eq. 480, 59 Atl. 1029 [*affirmed* in 69 N. J. Eq. 836, 65 Atl. 480]; Ferguson *v.* Ross, 126 N. Y. 459, 27 N. E. 954; People *v.* Richmond County, 73 N. Y. 393; People *v.* New Jersey Cent. R. Co., 42 N. Y. 283 [*reversing* 48 Barb. 478]; Devoe Mfg. Co., Petitioner, 108 U. S. 401, 2 S. Ct. 894, 27 L. ed. 764; The Mary McCabe, 22 Fed. 750.

23. See Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 9 L. ed. 680, 955.

24. See Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537; Robinson *v.* Campbell, 3 Wheat. (U. S.) 212, 4 L. ed. 372.

25. See Brien *v.* Elliott, 2 Penr. & W. (Pa.) 49; Irvine *v.* Sims, 3 Dall. (U. S.) 425, 1 L. ed. 665.

26. See cases cited, *infra*, this note.

have been established by treaty between the United States and the foreign power affected.[27] The settlement or adjustment of a disputed boundary line between two states requires not only the ratification by states but also the assent of congress before such adjusted line can be accepted as binding.[28]

2. Boundaries on Rivers. Where a river forms the boundary between two states, if the original property in the bed of the river is in neither state, and there is no convention on the subject, the boundary is the middle of the main channel of the river, and the jurisdiction of each state extends thereto,[29] which is held

Cession of 1802 by Georgia see Alabama *v.* Georgia, 23 How. (U. S.) 505, 16 L. ed. 556.

Cession of Bedloe's Island by New York see Osgood's Case, 6 City Hall Rec. 4.

Cession of 1789 by North Carolina see Egnew *v.* Cochrane, 2 Head (Tenn.) 320.

Cession of 1784 by Virginia of N. W. Territory see Kaskaskia *v.* McClure, 167 Ill. 23, 47 N. E. 72; Jackson *v.* Wilcox, 2 Ill. 344; McCool *v.* Smith, 1 Black (U. S.) 459, 17 L. ed. 218.

Cession of 1821 of Old Point Comfort see French *v.* Bankhead, 11 Gratt. (Va.) 136; Crook *v.* Old Point Comfort Hotel Co., 54 Fed. 604.

27. See the various treaties of the United States. And see Chicago Transit Co. *v.* Campbell, 110 Ill. App. 366; Montgomery *v.* Doe, 13 Sm. & M. (Miss.) 161; Edson *v.* Crangle, 62 Ohio St. 49, 56 N. E. 647; Moss *v.* Gibbs, 10 Heisk. (Tenn.) 283; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155; Spears *v.* State, 8 Tex. App. 467; U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867; U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285; Moore *v.* McGuire, 205 U. S. 214, 27 S. Ct. 483, 51 C. C. A. 776.

The line established by the American and Spanish commissioners in 1798 between American and Spanish territory is the present boundary between Louisiana and Mississippi. Jenkins *v.* Trager, 40 Fed. 726.

28. Newcastle Circle Boundary Case, 6 Pa. Dist. 184.

29. *Arkansas.*— De Loney *v.* State, 88 Ark. 311, 115 S. W. 138; Cessill *v.* State, 40 Ark. 501.

Georgia.— Simpson *v.* State, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75, 22 L. R. A. 248.

Illinois.— Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Keokuk, etc., Bridge Co. *v.* People, 176 Ill. 267, 52 N. E. 117; Keokuk, etc., Bridge Co. *v.* People, 145 Ill. 596, 34 N. E. 482; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; St. Louis Bridge Co. *v.* East St. Louis, 121 Ill. 238, 12 N. E. 723.

Iowa.— Chicago, etc., R. Co. *v.* Clinton, 88 Iowa 188, 55 N. W. 462.

Kentucky.— Fleming *v.* Kenney, 4 J. J. Marsh. 155.

Louisiana.— State *v.* Burton, 106 La. 732, 31 So. 291; State *v.* Burton, 105 La. 516, 29 So. 970; Myers *v.* Perry, 1 La. Ann. 372.

Mississippi.— Colbert *v.* State, 86 Miss. 769, 39 So. 65; Morgan *v.* Reading, 3 Sm. & M. 366.

Pennsylvania.— Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 100 Am. Dec. 597.

Tennessee.— Moss *v.* Gibbs, 10 Heisk. 283.

Texas.— Parsons *v.* Hunt, 98 Tex. 420, 84 S. W. 644; Tugwell *v.* Eagle Pass Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654; Spears *v.* State, 8 Tex. App. 467.

Wisconsin.— Franzini *v.* Layland, 120 Wis. 72, 97 N. W. 499; Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953.

United States.— Iowa *v.* Illinois, 147 U. S. 1, 13 S. Ct. 239, 37 L. ed. 55, 202 U. S. 59, 26 S. Ct. 571, 50 L. ed. 934; Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186; Howard *v.* Ingersoll, 13 How. 381, 14 L. ed. 189 [*reversing* 17 Ala. 780]; Handly *v.* Anthony, 5 Wheat. 374, 5 L. ed. 113; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324; St. Joseph, etc., R. Co. *v.* Devereux, 41 Fed. 14.

Wolf island in the Mississippi river is a part of Kentucky, and not of Missouri. Missouri *v.* Kentucky, 11 Wall. (U. S.) 395, 20 L. ed. 116.

All that portion of the bridge over the Mississippi river at St. Louis lying east of the middle of the main channel of the river lies within the state of Illinois and may be taxed by Illinois. St. Louis Bridge Co. *v.* People, 125 Ill. 226, 17 N. E. 468; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; St. Louis Bridge Co. *v.* East St. Louis, 121 Ill. 238, 12 N. E. 723. See also Keokuk, etc., Bridge Co. *v.* People, 145 Ill. 596, 34 N. E. 482.

Where there are two channels separated by an island the middle of the larger channel is the boundary. Cessill *v.* State, 40 Ark. 501. See also Kaskaskia *v.* McClure, 167 Ill. 23, 47 N. E. 72.

The channel of a river and bed of a river ordinarily mean the same thing, and are understood to describe that depression of the earth's surface in which the waters of a stream are confined and flow in its ordinary states, unaffected by freshets or droughts. State *v.* Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437.

Proof of a private survey not authorized by adjoining states is not competent evidence on an issue as to the location of a state boundary. De Loney *v.* State, 88 Ark. 311, 115 S. W. 138, holding also that a flagstaff man in a corps of surveyors employed by an Indian commission was held not competent to testify on an issue as to the location of a state boundary as to a line surveyed by the corps where the survey was not authorized by the states.

Missouri river as eastern boundary of Washington county, Nebraska.— In a suit to quiet

in some cases to mean to the middle of the main channel used in navigation, and not the middle of the river bed measured from bank to bank,[30] while other cases take an opposite view and hold the boundary to be the midway line of the two banks.[31] Where, however, one state is the original proprietor of the territory through which the river flows, and grants territory on one side of the river only, it retains the river within its own domain, and the state created out of the ceded territory extends to the river bank only.[32] Where the course of a river forming

title the contention that citizens cannot collaterally attack and have adjudicated state boundaries, and that as Sess. Laws (1887), p. 348, c. 25, defines the eastern boundary of Washington county, Nebraska, as the middle of the channel of the Missouri river, the courts cannot look beyond that act for proof of the location of the boundary, cannot be sustained, for, although the legislature is vested with comprehensive powers in this department of government it cannot, by mere enactment, without the coöperation of an adjoining state, extend the territory of this state at the expense of that state, or thereby invest its courts with extraterritorial jurisdiction. Rober *v.* Michelsen, 82 Nebr. 48, 116 N. W. 949.

30. *Illinois.*— Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Keokuk, etc., Bridge Co. *v.* People, 176 Ill. 267, 52 N. E. 117; Keokuk, etc., Bridge Co. *v.* People, 167 Ill. 15, 47 N. E. 313; Keokuk, etc., Bridge Co. *v.* People, 145 Ill. 596, 34 N. E. 482; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545.

Iowa.— Chicago, etc., R. Co. *v.* Clinton, 88 Iowa 188, 55 N. W. 462.

Missouri.— State *v.* Keane, 84 Mo. App. 127.

Wisconsin.— Franzini *v.* Layland, 120 Wis. 72, 97 N. W. 499.

United States.— Iowa *v.* Illinois, 147 U. S. 1, 13 S. Ct. 239, 37 L. ed. 55, 202 U. S. 59, 26 S. Ct. 571, 50 L. ed. 934.

See 44 Cent. Dig. tit. "States," § 8 *et seq.*

Columbia river as boundary between Oregon and Washington.— The middle of the north ship channel of the Columbia river, described as the boundary between Oregon and Washington in Act Feb. 14, 1859, c. 33 (11 U. S. St. at L. 383), admitting Oregon into the Union, remains the boundary, subject to the changes in it which come by accretion and is not moved to the other channel because the latter, in the course of years, becomes the more important and is properly called the main channel of the river. Washington *v.* Oregon, 211 U. S. 127, 29 S. Ct. 47, 53 L. ed. 118.

31. Cessill *v.* State, 40 Ark. 501; Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 8 N. W. 443; State *v.* Burton, 106 La. 732, 31 So. 291.

The western boundary of Tennessee declared and fixed by treaties and legislative enactments to be the middle of the Mississippi river means a line along the river bed equally distant from the visibly defined and substantially established banks confining the waters on either side, and does not mean the center of that part of the river which is deepest and constitutes the channel of commerce, and the concurrence of Tennessee and Arkansas by judicial decisions, legislation, and other official actions and long acquiescence, and the exercise of jurisdiction unchallenged as to their common boundary is effective between them and controlling, irrespective of the construction of treaties and legislation defining that boundary. State *v.* Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437.

32. Com. *v.* Jennings, 3 Gratt. (Va.) 624; Point Pleasant Bridge Co. *v.* Point Pleasant, 32 W. Va. 328, 9 S. E. 231; Barre *v.* Fleming, 29 W. Va. 314, 1 S. E. 731; State *v.* Plants, 25 W. Va. 119, 52 Am. Rep. 211; Howard *v.* Ingersoll, 13 How. (U. S.) 381, 14 L. ed. 189; Handly *v.* Anthony, 5 Wheat. (U. S.) 374, 5 L. ed. 113.

The territorial jurisdiction of Kentucky extends to the low-water mark on the northwestern side of the Ohio under the act of cession by Virginia to the United States of the Northwest Territory. Memphis, etc., Packet Co. *v.* Pikey, 142 Ind. 304, 40 N. E. 527; Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664; Meyler *v.* Wedding, 107 Ky. 310, 53 S. W. 809, 21 Ky. L. Rep. 1006, 92 Am. St. Rep. 347; Louisville Bridge Co. *v.* Louisville, 81 Ky. 189; McFall *v.* Com., 2 Metc. (Ky.) 394; McFarland *v.* McKnight, 6 B. Mon. (Ky.) 500; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823; Indiana *v.* Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. ed. 329; Handly *v.* Anthony, 5 Wheat. (U. S.) 374, 5 L. ed. 113.

The territorial limits of the state of Ohio on the side bounded by the Ohio river extend as far as to the ordinary low-water mark on the Ohio side of the river. Booth *v.* Shepherd, 8 Ohio St. 243; Ware *v.* Honk, 10 Ohio Dec. (Reprint) 724, 25 Wkly. L. Bul. 205; Newport, etc., Bridge Co. *v.* Hamilton County, 8 Ohio Dec. (Reprint) 564, 9 Cinc. L. Bul. 16.

The boundary between Alabama and Georgia is held to depend upon the words in the contract of cession between the United States and Georgia describing the boundary of the latter "west of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof," and under this grant it is held that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, the bed of the river being held to be that portion of its soil alternately covered and left bare by an increase or diminution in the supply of water, and the western bank of the cession of the Chattahoochee river must be traced on the water line of the acclivity on

a boundary is suddenly changed by avulsion or similar process, the boundary remains fixed by the original channel, although the stream may no longer flow therein;[33] but where the course of the river is gradually changed by accretion or degradation of its banks, the boundary is determined by the river as it runs, and gradual accessions of territory by accretion belong to the state owning the bank affected.[34]

3. Change of Boundaries. Congress has no power to take from one state any portion of its territory and give it to another state upon the admission of the latter into the Union,[35] nor can congress change the boundaries of a state as fixed by it when the state was admitted;[36] nor can a change in the boundaries of a

the western bank, and along that bank where it is defined, and in such place on the river where the western bank is not defined it must be continued up the river on the line of its bed, as that is made by the average and mean state of the water. Alabama *v.* Georgia, 23 How. (U. S.) 505, 16 L. ed. 556.

That the southern bank of the Red river and not the thread of the stream is the Texas-Arkansas boundary is held to be shown by the Spanish-American treaty (8 U. S. St. at L. 252 *et seq.*) making the Red river a boundary, and providing that the river should belong to the United States; by the Mexican-American treaty of 1828 (8 U. S. St. at L. 372); by Act Cong. June 16, 1836; by Ark. Const. (1836), and subsequent constitutions; by an act passed by the congress of Texas in 1836 (Laws of the Republic (1836), 133), recognizing the same boundary; and by the act of congress passed in 1845 (Act March 1, 1845, 5 U. S. St. at L. 797), admitting Texas and describing its territory as being that belonging to the republic of Texas. De Loney *v.* State, 88 Ark. 311, 115 S. W. 138.

In an issue as to the location of a house as to the state boundary formed by a river, evidence as to whether the house was north or south of the former river bank was held proper. De Loney *v.* State, 88 Ark. 311, 115 S. W. 138.

33. *Arkansas.*— De Loney *v.* State, 88 Ark. 311, 115 S. W. 138.

Kansas.— Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 117 Am. St. Rep. 534, 6 L. R. A. N. S. 162.

Missouri.— State *v.* Keane, 84 Mo. App. 127; Cooley *v.* Golden, 52 Mo. App. 229.

Nebraska.— Rober *v.* Michelsen, 82 Nebr. 48, 116 N. W. 949; Holbrook *v.* Moore, 4 Nebr. 437.

Tennessee.— Moss *v.* Gibbs, 10 Heisk. 283.

Texas.— Collins *v.* State, 3 Tex. App. 323, 30 Am. Rep. 142. See also Rodrigues *v.* Hernandez, 35 Tex. Civ. App. 78, 79 S. W. 343.

Vermont.— State *v.* Young, 46 Vt. 565.

United States.— Missouri *v.* Nebraska, 196 U. S. 23, 25 S. Ct. 155, 49 L. ed. 372, 197 U. S. 577, 25 S. Ct. 580, 49 L. ed. 881; Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186; Indiana *v.* Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. ed. 329; Missouri *v.* Kentucky, 11 Wall. 395, 20 L. ed. 116; Stockley *v.* Cissna, 119 Fed. 812, 56 C. C. A. 324.

See 44 Cent. Dig. tit. "States," § 8 *et seq.*

The change in the course of the Missouri river in 1877 near Omaha is a case of avulsion and not accretion, and does not affect the boundary between Nebraska and Iowa. Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186.

The new channel at Devil's Elbow, Tennessee.— The Mississippi river in 1876 cut for itself a new channel across Devil's Elbow, Tennessee. The change of channel was sudden and violent, occurring in less than two days, and the course of the river was shortened nearly twenty miles, nearly two thousand acres of cultivated land being occupied by the new bed and the old channel entirely abandoned, and the new channel called "Centennial Cut-Off," was of the usual width of the river. This was held to be an avulsion, and hence it did not change the boundary line between the state of Tennessee and Arkansas which remains where it was originally fixed, in the middle of the abandoned channel. Stockley *v.* Cissna, 119 Tenn. 135, 104 S. W. 792; State *v.* Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437.

34. *Arkansas.*— De Loney *v.* State, 88 Ark. 311, 115 S. W. 138.

Illinois.— Bellefontaine Imp. Co. *v.* Niedringhaus, 181 Ill. 426, 55 N. E. 184, 72 Am. St. Rep. 269; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545.

Kansas.— Fowler *v.* Wood, 73 Kan. 511, 85 Pac. 763, 117 Am. St. Rep. 534, 6 L. R. A. N. S. 162; McBride *v.* Steinweden, 72 Kan. 508, 83 Pac. 822.

Nebraska.— Rober *v.* Michelsen, 82 Nebr. 48, 116 N. W. 949.

Texas.— Denny *v.* Cotton, 3 Tex. Civ. App. 634, 22 S. W. 122.

United States.— Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186; Handley *v.* Anthony, 5 Wheat. 374, 5 L. ed. 113.

See 44 Cent. Dig. tit. "States," § 8 *et seq.*

The western boundary of Missouri, extended by Act Cong. June 7, 1836, c. 86 (5 U. S. St. at L. 34) to the Missouri river, remains the center of that stream, even if by erosion the result may be to take from Missouri territory which lies east of the original boundary defined as a meridian running due north from the mouth of the Kansas river. Missouri *v.* Kansas, 213 U. S. 78, 29 S. Ct. 417, 53 L. ed. 706.

35. Louisiana *v.* Mississippi, 202 U. S. 1, 26 S. Ct. 571, 50 L. ed. 913.

36. State *v.* Muncie Pulp Co., 119 Tenn. 47, 104 S. W. 437, holding that the western

state, even if made with the assent of congress, affect titles legally acquired under the preëxisting conditions.[37] On the other hand state boundary lines cannot be changed by prescription without the consent of congress, if thereby the political power and influence of the state enlarged would be increased; but where there would be no such effect boundary lines may be so established, although variant from the original lines.[38] Long acquiescence by one state in the possession of territory and the exercise of dominion and sovereignty over it by another state is conclusive of the latter state's title and rightful authority.[39]

4. Judicial Establishment of Boundaries; Jurisdiction and Procedure. The determination of the boundary of a state is ordinarily a political question with which the state courts will not intermeddle, and the action of the state legislature in the matter is conclusive on the courts;[40] and it is incompetent for any court in a suit between private persons to change the boundary line between two states for any purpose.[41] This principle, however, does not apply to a question of boundary arising between the United States and one of the states, or between two states. Such a question is not of a political nature and is susceptible of judicial determination.[42] The United States supreme court has original jurisdiction of suits in equity between two states,[43] or between the United States and a state,[44] to determine a state boundary. Such suits are brought by bill in equity and conducted according to the rules of pleading and practice of the court of chancery.[45] By reason, however, of the dignity of the parties and the importance of the interests involved, such controversies are not to be decided upon mere technicalities, but the chancery rules should be so molded and applied as to

boundary of Tennessee at the time of its admission as a state, in 1786 (1 U. S. St. at L. 491, c. 47), being the middle of the Mississippi river, the designation of the eastern boundary of Arkansas as the middle of the main channel at the time of its admission as a state, in 1836 (5 U. S. at L. 50, c. 100) could not have been intended to designate a different boundary line than that of Tennessee as it then existed, since under U. S. Const. art. 4, § 3, providing that new states may be admitted but no new state shall be formed or erected within the jurisdiction of any other state or any state formed by the junction of two or more states or parts of such states without their consent, congress was without power to change the boundaries of Tennessee as fixed by it when that state was admitted.

37. Piatt *v.* Oliver, 19 Fed. Cas. No. 11,115, 2 McLean 267.

An agreement between the adjoining states settling a disputed boundary does not operate retrospectively so as to disturb the boundaries between private landowners. Coffee *v.* Groover, 20 Fla. 64.

38. Searsburg *v.* Woodford, 76 Vt. 370, 57 Atl. 961.

39. Franzini *v.* Layland, 120 Wis. 72, 97 N. W. 499; Louisiana *v.* Mississippi, 202 U. S. 1, 26 S. Ct. 408, 50 L. ed. 913; Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537; Indiana *v.* Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. ed. 329; Rhode Island *v.* Massachusetts, 4 How. (U. S.) 591, 11 L. ed. 1116. See also State *v.* Young, 46 Vt. 565.

40. State *v.* Dunwell, 3 R. I. 127; Cameron *v.* State, 95 Tex. 545, 68 S. W. 508; Harrold *v.* Arrington, 64 Tex. 233.

41. Bluefield Waterworks, etc., Co. *v.* Sanders, 63 Fed. 333, 11 C. C. A. 232. See also *In re* New Castle Circle Boundary Case, 6 Pa. Dist. 184.

42. U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285.

43. Iowa *v.* Illinois, 202 U. S. 59, 26 S. Ct. 571, 50 L. ed. 934; Louisiana *v.* Mississippi, 202 U. S. 1, 26 S. Ct. 408, 50 L. ed. 913; Tennessee *v.* Virginia, 190 U. S. 64, 23 S. Ct. 827, 47 L. ed. 956; Indiana *v.* Kentucky, 163 U. S. 520, 16 S. Ct. 1162, 41 L. ed. 250; Virginia *v.* Tennessee, 148 U. S. 503, 13 S. Ct. 728, 37 L. ed. 537; Virginia *v.* West Virginia, 11 Wall. (U. S.) 39, 20 L. ed. 67; Alabama *v.* Georgia, 23 How. (U. S.) 505, 16 L. ed. 556; Florida *v.* Georgia, 17 How. (U. S.) 478, 15 L. ed. 181; Missouri *v.* Iowa, 7 How. (U. S.) 660, 12 L. ed. 861; Rhode Island *v.* Massachusetts, 15 Pet. (U. S.) 233, 10 L. ed. 721, 4 How. (U. S.) 591, 11 L. ed. 1116; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; New Jersey *v.* New York, 5 Pet. (U. S.) 284, 8 L. ed. 127; New York *v.* Connecticut, 4 Dall. (U. S.) 3, 1 L. ed. 715.

44. U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285. See also on this point U. S. *v.* Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. ed. 867.

The United States when interested may intervene in a boundary suit between two states. Fla. *v.* Ga., 17 How. (U. S.) 478, 15 L. ed. 181.

45. U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285; Missouri *v.* Iowa, 7 How. (U. S.) 660, 12 L. ed. 861; Rhode Island *v.* Massachusetts, 14 Pet. (U. S.) 210, 10 L. ed. 423; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

bring the cause to a hearing on its real merits,[46] and thus the court will not apply the same rules as to the time of answering,[47] or the effect of laches or the lapse of time,[48] as in suits between individuals. In general, however, the court acts in the same manner as in determining boundary disputes between private individuals; an issue at law may be directed, or a commission awarded, or, if the court is satisfied without either, it may itself determine the boundary.[49] In several cases the court has appointed commissioners to determine, run, or mark the boundary.[50] The costs of the suit will be equally divided between the two states where the matter involved is a governmental question in which each party has a real and vital yet not a litigious interest.[51]

5. DIVISION OF STATES. Although the constitutional provision that "no new state shall be formed or erected within the jurisdiction of any other state," [52] taken literally, would seem to forbid the division of a state, this provision has not been so interpreted, and in one instance, the case of Virginia, a state has been divided into two states.[53] Upon the division of the state, each of the resulting states became liable for the total indebtedness of the original state,[54] and provision was made for the apportionment and adjustment of such liability between them.[55]

III. GOVERNMENT AND OFFICERS.

A. Government in General. The state, in general, possesses all governmental powers not prohibited to it by the federal or state constitution,[56] this power being distributed between the executive, legislative, and judicial departments, the appropriate functions of each department being for the most part exercised exclusively by that department.[57] The state legislature is not, however, restricted to such powers as are expressed in the constitution of the state, but it may exercise any legislative authority that is not withheld by the language of the constitution.[58] The state can, however, properly exercise only such powers as are of a governmental nature, it being held that even in the absence of an express prohibition, the state has no power to embark in any trade which involves the purchase and sale of an article of commerce for profit;[59] although it seems that a state may properly conduct a business even though yielding a profit, where this is done merely as an exercise of the police power, as where a state conducts

46. Rhode Island *v.* Massachusetts, 14 Pet. (U. S.) 210, 10 L. ed. 423.

47. Rhode Island *v.* Massachusetts, 14 Pet. (U. S.) 23, 10 L. ed. 41.

48. Rhode Island *v.* Massachusetts, 14 Pet. (U. S.) 233, 10 L. ed. 721.

49. Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

50. See Missouri *v.* Iowa, 165 U. S. 118, 17 S. Ct. 290, 41 L. ed. 655; Indiana *v.* Kentucky, 159 U. S. 275, 16 S. Ct. 320, 40 L. ed. 149; Iowa *v.* Illinois, 147 U. S. 1, 13 S. Ct. 239, 37 L. ed. 55; Missouri *v.* Iowa, 7 How. (U. S.) 660, 12 L. ed. 861, 10 How. 1, 13 L. ed. 303, 160 U. S. 688, 16 S. Ct. 433, 40 L. ed. 583.

51. Missouri *v.* Iowa, 160 U. S. 688, 16 S. Ct. 433, 40 L. ed. 583; Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186, 145 U. S. 519, 12 S. Ct. 976, 36 L. ed. 798.

52. U. S. Const. art. 4, § 3.

53. See Higginbotham *v.* Com., 25 Gratt. (Va.) 627; Calwell *v.* Prindle, 19 W. Va. 604; Smith *v.* Henning, 10 W. Va. 596; Clay *v.* Robinson, 7 W. Va. 348; Shields *v.* McClung, 6 W. Va. 79; Virginia *v.* West Virginia, 11 Wall. (U. S.) 39, 20 L. ed. 67; Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391.

54. Higginbotham *v.* Com., 25 Gratt. (Va.) 627.

55. See Virginia *v.* West Virginia, 206 U. S. 290, 27 S. Ct. 732, 51 L. ed. 1068.

56. Clarke *v.* Rochester, 24 Barb. (N. Y.) 446 [*affirmed* in 28 N. Y. 605], holding that all powers not delegated to the general government were reserved to the state. And see *supra*, II, A; II, C, 1.

Under the federal constitution the state has no power to levy a tax to raise and support an army. Ferguson *v.* Landrum, 1 Bush (Ky.) 548.

The states have power to fix or change their seats of government see Livermore *v.* Waite, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; People *v.* Bigler, 5 Cal. 23; Fleckten *v.* Lamberton, 69 Minn. 187, 72 N. W. 65; Edwards *v.* Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815; Slack *v.* Jacob, 8 W. Va. 612.

57. People *v.* McKee, 68 N. C. 429.

58. People *v.* Young, 18 N. Y. App. Div. 162, 45 N. Y. Suppl. 772.

59. McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410.

the sale of intoxicating liquors in the state,[60] or engages in the manufacture of goods by convict labor.[61] But where a state engages in ordinary business, pursuing it like an individual, it throws off for the purpose its sovereignty and becomes subject to the rules governing the conduct of private individuals.[62] In the state there are two classes of political corporations, one of which is the state, and the other municipal corporations, and the state and municipal officers are but agencies and agents of the state to enable it as a corporation the better to discharge its duties and perform its functions;[63] but there cannot be at the same time and in the same state two valid state governments with two sets of officers.[64] Conditions involving this question have rarely arisen, but during the Civil war the courts had frequent occasion to pass upon the validity of the governments of the seceding states, and it was held that such governments were at least valid *de facto* governments, and their acts not in contravention of the federal authority were valid,[65] a *de facto* government being construed to be completely, although only temporarily, established in the place of the lawful government, occupying its capital and exercising its powers, and which is ultimately overthrown and the authority of the government *de jure* reëstablished.[66]

B. Legislature — 1. Legislative Districts and Apportionment — a. Manner and Time of Apportionment and Effect of Failure to Apportion. The state constitutions generally provide for the apportionment of the state into districts for the election of members of the legislature, and require the legislatures to provide for the enumeration of the inhabitants of the state at stated intervals as a basis for the apportionment;[67] and prescribe the time of apportionment, usually providing that it shall be made at the first or next session of the legislature after an enumeration of the inhabitants of the state;[68] and such a provision prescribing the time of making an apportionment impliedly prohibits

60. South Carolina *v.* U. S., 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261.

61. *In re* Western Implement Co., 166 Fed. 576 [*affirmed* in 171 Fed. 81].

62. State Bank *v.* Dibrell, 3 Sneed (Tenn.) 379.

63. Hamilton County *v.* Noyes, 5 Ohio Dec. (Reprint) 238, 3 Am. L. Rec. 745.

64. State *v.* McFarland, 25 La. Ann. 547. See also Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581.

65. Armistead *v.* State, 43 Ala. 340. And see *supra*, II, C, 4, d.

66. Thomas *v.* Taylor, 42 Miss. 651, 2 Am. Rep. 625. See also Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361.

67. See the constitution of the several states. And see the following cases:

Arkansas.— State *v.* Clendenin, 24 Ark. 78.

California.— Wheeler *v.* Herbert, 152 Cal. 224, 92 Pac. 353.

Idaho.— Heitman *v.* Gooding, 12 Ida. 581, 86 Pac. 785.

Illinois.— People *v.* Carlock, 198 Ill. 150, 65 N. E. 109; People *v.* Thompson, 155 Ill. 451, 40 N. E. 307.

Indiana.— Brooks *v.* State, 162 Ind. 568, 70 N. E. 980; Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

Kansas.— Farelly *v.* Cole, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464.

Kentucky.— Ragland *v.* Anderson, 125 Ky. 141, 100 S. W. 865, 30 Ky. L. Rep. 1199.

Maine.— Opinion of Justices, 18 Me. 458.

Massachusetts.— Opinion of Justices, 157 Mass. 595, 35 N. E. 111; Opinion of Justices, 142 Mass. 601, 7 N. E. 35.

Nebraska.— State *v.* Van Duyn, 24 Nebr. 586, 39 N. W. 612.

New Jersey.— State *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

New York.— Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841; Smith *v.* St. Lawrence County, 90 Hun 568, 36 N. Y. Suppl. 40; People *v.* New York, 89 Hun 460, 35 N. Y. Suppl. 817 [*affirmed* in 147 N. Y. 685, 42 N. E. 726, 30 L. R. A. 74].

Ohio.— State *v.* Campbell, 48 Ohio St. 435, 27 N. E. 884.

Wisconsin.— State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

Wyoming.— State *v.* Schnitger, 16 Wyo. 479, 95 Pac. 698.

See 44 Cent. Dig. tit. "States," § 28 *et seq.*

68. People *v.* Carlock, 198 Ill. 150, 65 N. E. 109.

An apportionment made at an extra session satisfies the requirement if such session is the next after the enumeration. People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836 [*affirming* 65 Hun 236, 20 N. Y. Suppl. 293].

Where a reapportionment bill passed at the next session after an enumeration is vetoed by the governor, a valid reapportionment may be made at the second session after such enumeration. *In re* Senate Resolution,

an apportionment at any other time; and when a valid apportionment has been made, no new apportionment can be made until the expiration of the prescribed period.[69] The legislature cannot be compelled to make such enumeration,[70] and, when it fails at the proper time to do so, this duty falls on each succeeding legislature until performed;[71] but during the interval between the return of an enumeration and the making of a new apportionment the former apportionment remains in force;[72] and so also when the time for a reapportionment arrives, the old apportionment remains in force until the new act takes effect,[73] or until a valid new apportionment is made, in case if for any reason a valid apportionment act is not passed at the appointed time.[74] Where representation is based upon the number of inhabitants exclusive of certain designated classes, the enumeration should specify the numbers of the excepted classes.[75]

b. Formation of Districts and Equality of Representation. The constitutions contain various provisions as to the formation of election districts, such as that they shall consist of compact or convenient and contiguous territory;[76] or that they shall be bounded by county, precinct, town, or ward lines;[77] or that counties, etc., shall not be divided, except for the formation of two or more districts;[78] and another provision is that the apportionment must be according to the popu-

etc., 12 Colo. 187, 21 Pac. 481; *In re* House Resolution, etc., 12 Colo. 186, 21 Pac. 480.

69. Wheeler *v.* Herbert, 152 Cal. 224, 92 Pac. 353; People *v.* Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L. R. A. 770; Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

Where the first apportionment act is unconstitutional, a second act may be passed at any time during the enumeration period. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

An apportionment act passed at the same session as the act providing for an enumeration is unconstitutional. People *v.* Monroe County, 65 Hun (N. Y.) 263, 20 N. Y. Suppl. 97.

70. *In re* State Census, 6 S. D. 540, 62 N. W. 129.

71. People *v.* Rice, 135 N. Y. 473, 41 N. E. 921, 16 L. R. A. 836.

72. Opinion of Justices, 157 Mass. 595, 35 N. E. 111.

73. Atty.-Gen. *v.* Springwells Tp., 143 Mich. 523, 107 N. W. 87.

74. Williams *v.* State Secretary, 145 Mich. 447, 108 N. W. 749; Giddings *v.* State Secretary, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; *In re* State Census, 6 S. D. 540, 62 N. W. 129.

75. People *v.* Rice, 65 Hun (N. Y.) 236, 20 N. Y. Suppl. 293 [*affirmed* in 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836].

Under the Massachusetts constitution ratable polls of aliens may be included in the enumeration determining town representation. Opinion of Justices, 7 Mass. 523.

76. *Illinois.*— People *v.* Carlock, 198 Ill. 150, 65 N. E. 109; People *v.* Thompson, 155 Ill. 451, 40 N. E. 307.

Indiana.— Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

Michigan.— Houghton County *v.* State Secretary, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432.

New York.— Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841; Smith *v.* St. Lawrence County, 148 N. Y. 187, 42 N. E. 592; *In re* Baird, 142 N. Y. 523, 37 N. E. 619; Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81; Matter of Timmerman, 51 Misc. 192, 100 N. Y. Suppl. 57.

Wisconsin.— State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

See 44 Cent. Dig. tit. "States," § 28 *et seq.*

77. People *v.* Thompson, 155 Ill. 451, 40 N. E. 307; Opinion of Justices, 18 Me. 458; Opinion of Justices, 142 Mass. 601, 7 N. E. 35; State *v.* Stevens, 112 Wis. 170, 88 N. W. 48; State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

78. Williams *v.* State Secretary, 145 Mich. 447, 108 N. W. 749; Houghton County *v.* State Secretary, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; People *v.* Westchester County, 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74; Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. See also People *v.* New York, 89 Hun (N. Y.) 460, 35 N. Y. Suppl. 817.

The New York constitutional prohibition against the division of towns does not apply to city wards. *In re* Baird, 142 N. Y. 523, 37 N. E. 619. But see Matter of Baird, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81.

The word "county" in N. Y. Const. (1895) art. 3, § 3, relating to senate districts, means a certain portion of territory and not a political organization. People *v.* New York, 89 Hun (N. Y.) 460, 35 N. Y. Suppl. 817 [*affirmed* in 147 N. Y. 685, 42 N. E. 726, 30 L. R. A. 74].

An act creating a new county of a portion of an existing county is not an apportionment act and does not affect legislative representation or change the boundaries of existing election districts. Sabin *v.* Curtis, 3 Ida. 662, 32 Pac. 1130. In such case the new county remains a portion of the district to which it previously belonged until attached

lation or that the districts shall contain an equal number of inhabitants;[79] and generally the apportionment act must provide for at least substantial equality of representation to the people of the several districts, based either upon the voting of the entire population or upon some other fair basis, and an act not providing for such equality is void.[80] Although exact equality in apportionment cannot be attained the legislature is required to approximate as nearly thereto as may be;[81] and an apportionment act which fails to provide representation for the voters of a portion of the territory to be apportioned is unconstitutional where there is no previous law in force providing representation for the omitted territory;[82] but the mere omission to provide complete representation will not invalidate the whole act where there is in force a former act under which the omitted portion may be allowed representation.[83] Where the provisions of an act apportioning the state into districts are dependent upon each other, the unconstitutionality of the apportionment of some of the districts will invalidate the entire act.[84]

c. Reapportionment and Change or Alteration of District. Except as restrained by the state constitution, the legislature has power to change the boundaries of election districts.[85] But the constitutions commonly prohibit the legislature, after having made a valid apportionment, from making a new apportionment during the apportionment period, the apportionment once made being required to remain unaltered until another enumeration,[86] and this prohibition

by a new apportionment to another district. Sabin *v.* Curtis, *supra*; State *v.* Van Camp, 36 Nebr. 91, 54 N. W. 113; People *v.* Westchester County, 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74.

Two counties may be joined as one district. People *v.* Hill, 7 Cal. 97; Ragland *v.* Anderson, 125 Ky. 141, 100 S. W. 865, 30 Ky. L. Rep. 1199.

79. *Idaho.*— Heitman *v.* Gooding, 12 Ida. 581, 86 Pac. 785.

Illinois.— People *v.* Carlock, 198 Ill. 150, 65 N. E. 109; People *v.* Thompson, 155 Ill. 451, 40 N. E. 307.

Indiana.— Brooks *v.* State, 162 Ind. 568, 70 N. E. 980; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

Kentucky.— Ragland *v.* Anderson, 125 Ky. 141, 100 S. W. 865, 30 Ky. L. Rep. 1199.

Michigan.—Williams *v.* State Secretary, 145 Mich. 447, 108 N. W. 749.

New York.— Smith *v.* St. Lawrence County, 148 N. Y. 187, 42 N. E. 592 [*reversing* 90 Hun 568, 36 N. Y. Suppl. 40]; *In re* Baird, 142 N. Y. 523, 37 N. E. 619 [*affirming* 75 Hun 545, 27 N. Y. Suppl. 535]; Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81; People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; People *v.* New York, 14 Misc. 105, 35 N. Y. Suppl. 259; *In re* Timmerman, 51 Misc. 192, 100 N. Y. Suppl. 57.

Ohio.— State *v.* Campbell, 48 Ohio St. 435, 27 N. E. 884.

Wisconsin.— State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

See 44 Cent. Dig. tit. "States," § 28 *et seq.*

80. *Idaho.*— Ballentine *v.* Willey, 3 Ida. 496, 31 Pac. 994, 95 Am. St. Rep. 17.

Indiana.— Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567.

Michigan.— Williams *v.* State Secretary, 145 Mich. 447, 108 N. W. 749; Giddings *v.* State Secretary, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; Houghton County *v.* State Secretary, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432.

New York.— Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81; People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836.

Wisconsin.— State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

See 44 Cent. Dig. tit. "States," § 28 *et seq.*

But after an apportionment act has been accepted and acted on for years without its validity being questioned, the court will not declare it void for inequality. Adams *v.* Bosworth, 126 Ky. 61, 102 S. W. 861, 31 Ky. L. Rep. 518, 10 L. R. A. N. S. 1184; Ragland *v.* Anderson, 125 Ky. 141, 100 S. W. 865, 30 Ky. L. Rep. 1199.

81. Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

82. Ballentine *v.* Willey, 3 Ida. 496, 31 Pac. 994, 95 Am. St. Rep. 17; Murphy *v.* Eney, 77 Md. 80, 25 Atl. 993.

83. State *v.* Van Duyn, 24 Nebr. 586, 39 N. W. 612.

84. Ballentine *v.* Willey, 3 Ida. 496, 31 Pac. 994, 95 Am. St. Rep. 17.

85. People *v.* Bradley, 36 Mich. 447.

86. *Kentucky.*— Mullen *v.* McDonald, 101 Ky. 87, 39 S. W. 698, 19 Ky. L. Rep. 224.

Maine.— Opinion of Justices, 33 Me. 587.

Massachusetts.— Opinion of Justices, 6 Cush. 575.

Michigan.— Atty.-Gen. *v.* Springwells Tp.

may be implied as well as express.[87] Such a prohibition does not prevent the change of boundaries of counties or towns;[88] but the legislature cannot by the incorporation or enlargement of towns affect the boundaries of the districts as apportioned.[89]

d. Judicial Review and Control. An apportionment act which contravenes the constitutional requirements is void,[90] and the courts have jurisdiction to pass upon the validity of apportionment acts and may set aside an unconstitutional act as an abuse of legislative discretion;[91] and in determining whether the legislature has abused its discretion will take into account all the circumstances of the case.[92] But the legislature is vested with considerable discretion in making apportionments, and its action is not subject to control or review by the courts unless such discretion is plainly and grossly abused,[93] and an apportionment will not be declared invalid except for serious defects therein.[94]

2. Election, Eligibility, and Qualification of Members. The election of members of the legislature is generally regulated by the constitutions of the states,[95] which usually prescribe the maximum and minimum number of members of the legislature, leaving the precise number, within the prescribed limits, to be fixed by the legislature,[96] and which also provide the term of office of members,[97] and their qualifications, as that they shall not at the same time hold certain other offices,[98] or that they shall have been for a designated period citizens or inhabitants

Bd., 142 Mich. 523, 107 N. W. 87; Bay County *v.* Bullock, 51 Mich. 544, 16 N. W. 896; People *v.* Bradley, 36 Mich. 447; People *v.* Holihan, 29 Mich. 116.

New Jersey.— Gardner *v.* Newark, 40 N. J. L. 297.

New York.— Kinne *v.* Syracuse, 2 Abb. Dec. 534, 3 Keyes 110 [*affirming* 30 Barb, 349].

See 44 Cent. Dig. tit. "States," § 32.

The legislature cannot repeal a valid apportionment law during the enumeration period at which it was passed. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

87. Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Slauson *v.* Racine, 13 Wis. 398.

88. Pulaski County *v.* Saline County Judge, 37 Ark. 339; Opinion of Justices, 6 Cush. (Mass.) 575; Bay County *v.* Bullock, 51 Mich. 544, 16 N. W. 896; People *v.* Holihan, 29 Mich. 116; People *v.* Westchester County, 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74.

89. Opinion of Justices, 33 Me. 587; Kinne *v.* Syracuse, 2 Abb. Dec. (N. Y.) 534, 3 Keyes 110.

90. Smith *v.* Baker, 73 N. J. L. 328, 63 Atl. 619, 74 N. J. L. 591, 64 Atl. 1067; Smith *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548. And see *supra*, III, B, 1, a.

91. *Indiana.*— Denney *v.* State, 114 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

Kentucky.— Ragland *v.* Anderson, 125 Ky. 141, 100 S. W. 865, 30 Ky. L. Rep. 1199.

Michigan.— Williams *v.* State Secretary, 145 Mich. 447, 108 N. W. 749.

New Jersey.— State *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.

New York.— Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841; Pendleton *v.* O'Brien, 186 N. Y. 1, 79 N. E. 7. See also Smith *v.* St. Lawrence County, 148 N. Y. 187, 42 N. E. 592.

Wisconsin.— State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

See 44 Cent. Dig. tit. "States," § 33.

92. People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836.

93. People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; Matter of Baird, 66 Hun (N. Y.) 335, 20 N. Y. Suppl. 470 [*reversed* on other grounds in 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81].

94. People *v.* Carlock, 198 Ill. 150, 65 N. E. 109; *In re* Whitney, 142 N. Y. 531, 37 N. E. 621; Baird *v.* Kings County, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

95. See the constitutions of the several states. And see People *v.* Pendegast, 96 Cal. 289, 31 Pac. 103; McPherson *v.* Bartlett, 65 Cal. 577, 4 Pac. 582; Morris *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548; State *v.* Kenney, 9 Mont. 223, 23 Pac. 733.

96. State *v.* Francis, 26 Kan. 724.

The Colorado constitution fixes the number of state senators at thirty-five. Mills *v.* Newell, 30 Colo. 377, 70 Pac. 405.

97. See the constitutions of the several states. And see *infra*, this, and the following notes.

Where the constitution fixes the term but does not prescribe when such term shall begin, the legislature may fix the commencement of the term by statute. Farrelly *v.* Cole, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464; State *v.* Robinson, 1 Kan. 17.

98. *Alabama.*— Scott *v.* Strobach, 49 Ala. 477.

Georgia.— McWilliams *v.* Neal, 130 Ga. 733, 61 S. E. 721; *In re* Grand Jury, R. M. Charlt. 149.

Maine.— Opinion of Justices, 68 Me. 582; State *v.* Coombs, 32 Me. 526.

Massachusetts.— Com. *v.* Hawkes, 123 Mass. 525.

of the districts for which they are elected;[99] and which usually provide that each house shall have power to judge of the qualifications and election of its members, each house under this provision being the sole judge and the courts having no jurisdiction of the matter;[1] and each branch of the legislature has power for cause to expel a member.[2] Before entering upon their office members are required to take the oath of office.[3]

3. Organization. In general the two houses of the legislature are organized and governed in accordance with the recognized principles of parliamentary law, subject to any special provisions of the state constitution,[4] each house being vested with the power of making rules for its own government.[5] As between two bodies claiming to be the lawfully constituted senate or house of representatives, the courts have jurisdiction to decide which is the constitutionally organized body.[6]

4. Sessions — a. Ordinary. The constitutions prescribe the terms of the legislature, generally providing for annual or biennial sessions, to begin at a designated time,[7] and not to continue longer than a stated number of days,[8] with a further provision for a prolongation of the session by the concurrent action of

Minnesota.— State *v.* Scott, 105 Minn. 513, 117 N. W. 845, 1044.

New York.— People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; People *v.* Green, 58 N. Y. 295.

See 44 Cent. Dig. tit. "States," § 34.

But the passage of a statute increasing the salary of members of the house does not disqualify members of the house of representatives from being eligible as candidates to succeed themselves. State *v.* Scott, 105 Minn. 513, 117 N. W. 1044.

The legislature cannot require additional qualifications in conflict with those prescribed by the constitution. People *v.* Chicago Election Com'rs, 221 Ill. 9, 77 N. E. 321.

Membership in a committee appointed by the legislature is not an office, within the meaning of the constitutional prohibition, but rather a special appointment to perform a particular act of service. Branham *v.* Lange, 16 Ind. 497.

99. People *v.* Markham, 96 Cal. 262, 31 Pac. 102; People *v.* Chicago Election Com'rs, 221 Ill. 9, 77 N. E. 321; Opinion of Justices, 122 Mass. 594.

1. *Colorado.*— Mills *v.* Newell, 30 Colo. 377, 70 Pac. 405; Hughes *v.* Felton, 11 Colo. 489, 19 Pac. 444.

Louisiana.— State *v.* Judges Civ. Dist. Ct., 40 La. Ann. 598, 4 So. 482.

Maryland.— Covington *v.* Buffett, 90 Md. 569, 45 Atl. 204, 47 L. R. A. 622.

Michigan.— Atty.-Gen. *v.* Seventh Senatorial Dist. Bd. of Canvassers, 155 Mich. 44, 118 N. W. 584; Wheeler *v.* Manistee County Bd. of Canvassers, 94 Mich. 448, 53 N. W. 914; Atty.-Gen. *v.* Menominee County, 89 Mich. 552, 51 N. W. 483; People *v.* Mahaney, 13 Mich. 481.

Minnesota.— State *v.* Peers, 33 Minn. 81, 21 N. W. 860.

Montana.— State *v.* Kenney, 9 Mont. 223, 23 Pac. 733.

New Hampshire.— Bingham *v.* Jewett, 66 N. H. 382, 29 Atl. 694.

New York.— Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124; People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 649.

Pennsylvania.— *In re* Nineteenth Ward Election, 1 Wkly. Notes Cas. 114.

Rhode Island.— Corbett *v.* Naylor, 25 R. I. 520, 57 Atl. 303.

Wyoming.— State *v.* Schnitger, 16 Wyo. 479, 95 Pac. 698.

Either house has power to compel witnesses to attend and testify before it or one of its committees in an election contest properly pending before it. *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519.

Admitting a member to his seat does not exhaust the power of the legislature to judge of the qualifications of its own members but the power continues during the entire term of office. State *v.* Gilmore, 20 Kan. 551, 27 Am. Rep. 189.

2. French *v.* State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556; Hiss *v.* Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768. See also State *v.* Gilmore, 20 Kan. 551, 27 Am. Rep. 189.

3. See Cohen *v.* Wright, 22 Cal. 293; Opinion of Justices, 70 Me. 570.

The provision of the United States constitution requiring members of the state legislatures to take the oath to support the federal constitution is mandatory. Thomas *v.* Taylor, 42 Miss. 651, 2 Am. Rep. 625.

4. See *Ex p.* Screws, 49 Ala. 57; *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; Opinion of Justices, 70 Me. 570; State *v.* Rogers, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354.

5. French *v.* State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556; *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; Wise *v.* Bigger, 79 Va. 269.

6. *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; State *v.* Rogers, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354.

7. Opinion of Judges, 15 Fla. 739; Gormley *v.* Taylor, 44 Ga. 76; Goodnight *v.* Moody, 3 Ida. 7, 26 Pac. 121.

8. Gormley *v.* Taylor, 44 Ga. 76.

both houses.[9] For certain purposes the two branches of the legislature sit in joint session,[10] and in the absence of a constitutional inhibition, one branch of the legislature may sit when the other is not in session.[11] The legislature usually sits at the seat of government, but provision is sometimes made for assembling elsewhere, where, on account of extraordinary conditions, it is not practicable to assemble at the seat of government.[12]

b. Extraordinary. Extraordinary sessions may be called by the governor under constitutional authority, and where the constitution authorizes the calling of such sessions by him, he is the sole judge as to whether or not an occasion for such session exists,[13] the power of the legislature to legislate when convened in extra session being subject to any limitation imposed thereon by the state constitution.[14]

c. Adjournments. Adjournments, except for brief periods, usually require the concurrent action of both houses, or, in case of a disagreement, the governor may order an adjournment;[15] but where the legislature has adjourned at the expiration of its term it cannot again be lawfully called together except by the governor to sit in extra session.[16]

d. Quorum. Generally a majority of the members of a legislative body will constitute a quorum, in the absence of a constitutional provision fixing the number.[17]

5. Officers, Committees, and Clerks Thereof. Each house has the power to choose its own officers and to remove them from office,[18] and to appoint committees which, in general, have those powers and only those which are conferred upon them by the legislature,[19] and which in the absence of special authority can act only while the legislature is in session.[20] But where the legislature is required

The word "days" in this connection means legislative working days, exclusive of Sunday and other days on which, by concurrent resolution, the two houses do not sit. *Ex p.* Cowert, 92 Ala. 94, 9 So. 225; Sayre *v.* Pollard, 77 Ala. 608; Moog *v.* Randolph, 77 Ala. 597. But it has been held that U. S. Rev. St. (1878) § 1852, as amended Dec. 23, 1880, limiting to "sixty days duration" the sessions of territorial legislatures, means sixty consecutive days from the beginning of the session. Maricopa County *v.* Osborn, 4 Ariz. 331, 40 Pac. 313 [*overruling* Cheyney *v.* Smith, 3 Ariz. 143, 23 Pac. 680].

9. Trammell *v.* Bradley, 37 Ark. 374; Speed *v.* Crawford, 3 Metc. (Ky.) 207.

10. Snow *v.* Hudson, 56 Kan. 378, 43 Pac. 260; Opinion of Justices, 6 Me. 514.

11. State *v.* Hillyer, 2 Kan. 17.

12. Taylor *v.* Beckham, 108 Ky. 278, 56 S. W. 177, 21 Ky. L. Rep. 1735, 94 Am. St. Rep. 357, 49 L. R. A. 258 [*affirmed* in 178 U. S. 548, 20 S. Ct. 890, 1009, 44 L. ed. 1187].

13. *In re* Veto Power, 9 Colo. 642, 21 Pac. 477; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; Farrelly *v.* Cole, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464.

14. People *v.* Blanding, 63 Cal. 333.

15. State *v.* Hillyer, 2 Kan. 17; *In re* Legislative Adjournment, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716. See also People *v.* Hatch, 33 Ill. 9.

16. French *v.* State Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556.

17. *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; State *v.* Ellington, 117 N. C. 158, 23 S. E. 250, 53 Am. St. Rep. 580, 30 L. R. A. 532.

Less than a quorum cannot regularly transact business, although they may take steps to perfect their organization and supply the deficiency in numbers. Opinion of Justices, 70 Me. 570; Opinion of Justices, 6 Me. 515. See also Opinion of Justices, 15 Fla. 735.

18. *In re* Speakership of House of Representatives, 15 Colo. 520, 25 Pac. 707, 11 L. R. A. 241; Cliff *v.* Parsons, 90 Iowa 665, 57 N. W. 599. See also State *v.* Gardner, 43 Ala. 234.

19. Purnell *v.* Worth, 117 N. C. 157, 23 S. E. 161, 30 L. R. A. 262; Baxter *v.* State, 9 Wis. 38.

Appointment of investigating committee as not precluding senate from acting.— The fact that the senate has appointed a committee to investigate charges against its members does not preclude it from investigating such charges itself. *Ex p.* McCarthy, 29 Cal. 395.

20. Marshall *v.* Harwood, 7 Md. 466; Commercial, etc., Bank *v.* Worth, 117 N. C. 146, 23 S. E. 160, 30 L. R. A. 261.

The legislature may authorize a committee to act in vacation. Branham *v.* Lange, 16 Ind. 497; *In re* Davis, 58 Kan. 368, 49 Pac. 160. But under the Arkansas constitution the senate alone cannot extend the powers of a committee beyond the session and fix the compensation thereof. Tipton *v.* Parker, 71 Ark. 193, 74 S. W. 298. See also *Ex p.* Caldwell, 61 W. Va. 49, 55 S. E. 910, 10 L. R. A. N. S. 172.

to act as a unit, a single branch cannot legally appoint a special investigating committee.[21] Each house may also employ clerks for its own committees.[22]

6. Journal of Proceedings. The constitutions provide for the keeping and publishing by the legislature of a journal of its proceedings,[23] and ordinarily these legislative journals constitute conclusive proof of their contents and import absolute verity, and cannot be impeached or disputed;[24] but erroneous recitals of facts in the journal may be corrected by the legislature by amendment at the same or a subsequent session.[25] It is not the duty of the secretary of state as the custodian of the legislative journals to expunge false entries therefrom, and he cannot be compelled to do so.[26]

7. Investigations and Inquiries; Compelling Attendance of Witnesses and Punishment For Contempt. The legislature, or either branch thereof, has power to institute investigations or inquiries in respect to matters properly coming before it, and in this connection may require witnesses to attend and testify before it or one of its committees,[27] and it has power to punish for contempt witnesses summoned by it who refuse to appear, or to testify, or to produce documents which they have been lawfully required to produce.[28]

8. Compensation of Members and Employees. The compensation of members

21. State *v.* Guilbert, 75 Ohio St. 1, 78 N. E. 931; *Ex p.* Caldwell, 61 W. Va. 49, 55 S. E. 910, 10 L. R. A. N. S. 172.

22. Tenney *v.* State, 27 Wis. 387.

23. State *v.* State Secretary, 43 La. Ann. 590, 9 So. 776; State *v.* Thompson, 41 Mo. 240.

24. Taylor *v.* Beckham, 108 Ky. 278, 56 S. W. 177, 21 Ky. L. Rep. 1735, 94 Am. St. Rep. 357, 49 L. R. A. 258; State *v.* State Secretary, 43 La. Ann. 590, 9 So. 776; Auditor-Gen. *v.* Menominee County, 89 Mich. 552, 51 N. W. 483; Wise *v.* Bigger, 79 Va. 269.

25. Turley *v.* Logan County, 17 Ill. 151.

Protest of member entered on the journal as not affecting adoption of resolution.—A constitutional privilege of a member to protest against any act, proceeding, or resolution which he may deem injurious to any person or to the public, as to have the nature of the dissent entered on the journal, although entered on the journal, cannot affect the previous adoption of the resolution, or be used as a statement of facts to contradict the journal. Auditor-Gen. *v.* Menominee County, 89 Mich. 552, 51 N. W. 483.

The official journal is the one filed with the secretary of state and it controls in case of any discrepancy between it and the printed journal. State *v.* Martin, (Ala. 1909) 48 So. 846.

26. State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772.

27. *California.*— *Ex p.* McCarthy, 29 Cal. 395; *Ex p.* Bunkers, 1 Cal. App. 61, 81 Pac. 748.

Kansas.— See Yoe *v.* Hoffman, 61 Kan. 265, 59 Pac. 351.

Massachusetts.— Burnham *v.* Morrissey, 14 Gray 226, 74 Am. Dec. 676.

New York.— Wickelhausen *v.* Willett, 10 Abb. Pr. 164 [*affirmed* in 12 Abb. Pr. 319, 21 How. Pr. 40 (*affirmed* in 4 Abb. Dec. 596, 1 Keyes 521)].

Wisconsin.— State *v.* Frear, 138 Wis. 173, 119 N. W. 894; *In re* Falvey, 7 Wis. 630.

See 44 Cent. Dig. tit. "States," § 46.

The workings of the primary election law for the selection by the public of candidates for United States senator, including the conduct of persons voted for or voting at such election as bearing on the policy of retaining or amending the law, is a proper subject for legislative inquiry, independent of whether the law is valid or not. State *v.* Frear, 138 Wis. 173, 119 N. W. 894.

The legislature may incur reasonable necessary expenses for this purpose payable out of the public funds. State *v.* Frear, 138 Wis. 173, 119 N. W. 894.

A legislative investigating committee is not a judicial tribunal within the meaning of a constitutional provision relating to judicial tribunals, where it is charged merely with the duty of gathering and reporting information for legislative guidance. State *v.* Frear, 138 Wis. 173, 119 N. W. 894.

28. *California.*— *Ex p.* Lawrence, 116 Cal. 298, 48 Pac. 124; *Ex p.* McCarthy, 29 Cal. 395.

Kansas.— *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519.

Massachusetts.— Burnham *v.* Morrissey, 14 Gray 226, 74 Am. Dec. 676.

Missouri.— Lowe *v.* Summers, 69 Mo. App. 637.

New York.— People *v.* Keeler, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 49; Wickelhausen *v.* Willett, 10 Abb. Pr. 164 [*affirmed* in 12 Abb. Pr. 319, 21 How. Pr. 40 (*affirmed* in 4 Abb. Dec. 596, 1 Keyes 521)]; People *v.* Webb, 5 N. Y. Suppl. 855.

South Carolina.— *Ex p.* Parker, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011.

Wisconsin.— *In re* Falvey, 7 Wis. 630.

See 44 Cent. Dig. tit. "States," § 46.

Power of committee.—A legislative committee appointed by the house of delegates without power to make such appointment has no power to imprison a witness for contempt (*Ex p.* Caldwell, 138 Fed. 487 [*reversed* on other grounds in 200 U. S. 293, 28 S. Ct. 264, 50 L. ed. 488]); nor has a committee sitting

of the legislature is fixed by law in the several states,[29] as is also the compensation of clerks of committees,[30] sergeants at arms,[31] or other employees.[32] An officer or employee cannot recover additional compensation for services in the regular line of his duty;[33] and the constitutions sometimes provide that no member shall, during his term, receive an increase of compensation under any law passed during his term;[34] and members are not ordinarily entitled to *per diem* compensation during recess due to adjournment during the session.[35] Unless provided otherwise, the president of the senate and the speaker of the house of representatives receive the same compensation as senators and representatives.[36] Statutes sometimes provide that members or employees of the legislature shall be entitled to a warrant for their compensation upon the presentation of a certificate of the presiding or other officer of their attendance or services.[37]

C. Officers, Agents, and Employees[38] — **1. Who Are State Officers.** State officers are those whose duties concern the state at large, or the general public, although exercised within defined limits,[39] and to whom are delegated

by legislative authority after the adjournment of the legislature (*In re* Davis, 58 Kan. 368, 49 Pac. 160).

Right to counsel.—A witness charged with contempt in such a case is not entitled to the aid of a counsel. *Ex p.* McCarthy, 29 Cal. 395; People *v.* Keeler, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 49.

29. *Idaho.*— Goodnight *v.* Moody, 3 Ida. 7, 26 Pac. 121.

Illinois.— People *v.* Beveridge, 38 Ill. 307.

Montana.— State *v.* Kenney, 10 Mont. 410, 25 Pac. 1022.

Pennsylvania.— Com. *v.* Butler, 99 Pa. St. 535; Philadelphia County *v.* Sharswood, 7 Watts & S. 16.

Wisconsin.— State *v.* Timme, 54 Wis. 318, 11 N. W. 785.

See 44 Cent. Dig. tit. "States," § 37.

Members are entitled to mileage when so provided. *Ex p.* Pickett, 24 Ala. 91; Opinion of Justices, 69 Me. 596; Cook *v.* Auditor-Gen., 129 Mich. 48, 87 N. W. 1037.

30. State *v.* Draper, 44 Mo. 278; State *v.* Wallichs, 14 Nebr. 439, 16 N. W. 481; People *v.* Olcott, 11 Hun (N. Y.) 610; Tenney *v.* State, 27 Wis. 387.

Where a committee of the legislature is not authorized to employ clerks, the state auditor may properly refuse to draw his warrant in payment for services rendered by a clerk employed by such committee. State *v.* Wallichs, 14 Nebr. 439, 16 N. W. 481.

A resolution of one branch of the legislature granting extra pay to clerks for night work violates a statutory prohibition of an increase of *per diem* compensation. State *v.* Holliday, 61 Mo. 229.

31. Massing *v.* State, 14 Wis. 502. See also State *v.* Williams, 34 Ohio St. 218.

32. Robinson *v.* Dunn, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297; Walker *v.* Coulter, 113 Ky. 814, 68 S. W. 1108, 24 Ky. L. Rep. 530; McDonald *v.* Norman, 95 Ky. 593, 26 S. W. 808, 16 Ky. L. Rep. 137; Cook *v.* Auditor-Gen., 129 Mich. 48, 87 N. W. 1037; State *v.* Draper, 43 Mo. 220.

33. State *v.* Cheetham, 21 Wash. 437, 58 Pac. 771; Massing *v.* State, 14 Wis. 502. See also People *v.* Olcott, 11 Hun (N. Y.) 610.

By the Pennsylvania constitution the legislature is prohibited from receiving any compensation other than the statutory salary. Russ *v.* Com., 210 Pa. St. 544, 60 Atl. 169, 105 Am. St. Rep. 825, 1 L. R. A. N. S. 409.

One branch of the legislature cannot by resolution allow extra compensation to an officer or employee when the legislature is itself prohibited by the constitution from doing so. State *v.* Williams, 34 Ohio St. 218; State *v.* Cheetham, 21 Wash. 437, 58 Pac. 771.

34. State *v.* Hallock, 16 Nev. 152. See also State *v.* Kenney, 10 Mont. 410, 25 Pac. 1022.

35. Moren *v.* Blue, 47 Ala. 709; *Ex p.* Pickett, 24 Ala. 91; State *v.* Thompson, 37 Mo. 176; Morgan *v.* Buffington, 21 Mo. 549.

Members of a legislative committee are not entitled to a *per diem* compensation for services rendered after adjournment where they had no power to act thereafter. Commercial, etc., Bank *v.* Worth, 117 N. C. 146, 23 S. E. 160, 30 L. R. A. 261; State *v.* Hastings, 16 Wis. 337.

But this does not apply to temporary adjournments over Sunday or a holiday, or to facilitate business and to enable committees to consider and mature bills, etc., the members being still in attendance. State *v.* Hastings, 16 Wis. 337.

36. People *v.* Whittemore, 2 Mich 306. See also State *v.* Hallock, 16 Nev. 152.

37. Lowell *v.* Bonney, 14 Colo. App. 230, 60 Pac. 830; Cook *v.* Auditor-Gen., 129 Mich. 48, 87 N. W. 1037; Morgan *v.* Buffington, 21 Mo. 549; State *v.* Hastings, 16 Wis. 337.

38. **"Office"** defined see Officers, 29 Cyc. 1364.

"Public officer" defined see Officers, 29 Cyc. 1364.

39. People *v.* Curley, 5 Colo. 412, 419 [*quoted* in *In re* Newport Police Commission, 22 R. I. 654, 656, 49 Atl. 36]. See Opinion of Justices, 167 Mass. 599, 46 N. E. 118.

The commissioners who manage Yosemite Valley and the Mariposa Big Tree Grove are officers of the state of California, and their

the exercise of a portion of the sovereign power of the state.[40] They are in a general sense those whose duties and powers are coextensive with the state,[41] or are not limited to any political subdivisions of the state,[42] and are thus distinguished from municipal officers strictly, whose functions relate exclusively to the particular municipality,[43] and from county,[44] city,[45] town,[46] and school-district officers.[47] Thus the term does not include constables,[48] or justices of the peace,[49] whose official functions are to be performed in the townships in which they are elected and who in common parlance are known as township officers or sheriffs,[50] coroners,[51] county justices,[52] or county treasurers,[53] whose functions are confined to their respective counties and are commonly called county officers. The agent of a municipal corporation is not an officer of the state.[54] A board of legal examiners created by statute as a medium through whom the privilege of practising

terms expire four years after their appointment. People *v.* Ashburner, 55 Cal. 517, 524.

A representative in the state legislature is a state officer, within a statute relative to balloting for state officers. Morril *v.* Haines, 2 N. H. 246, 247.

40. State *v.* Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174; Shelbey *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169. See also Parks *v.* People, 22 Colo. 86, 43 Pac. 542; McCornick *v.* Thatcher, 8 Utah 294, 30 Pac. 1091, 17 L. R. A. 243.

41. *Ex p.* Wiley, 54 Ala. 226 (holding that the term "state officers," in Const. (1868) art. 4, § 23, providing that all state officers may be impeached for any misdemeanor in office, etc., does not include an officer elected by the vote of a single county and confined in his duties to the territorial limits of such county); Opinion of Justices, 13 Fla. 693, 694 [*quoted* in dissenting opinion to State *v.* Burns, 38 Fla. 367, 21 So. 290]; State *v.* Spencer, 91 Mo. 206, 3 S. W. 410; State *v.* Dillon, 90 Mo. 229, 2 S. W. 417 [*followed* in Paddock-Hawley Iron Co. *v.* Mason, (Mo. 1887) 2 S. W. 841].

42. People *v.* Nixon, 158 N. Y. 221, 52 N. E. 1117.

43. People *v.* Curley, 5 Colo. 412, 419 [*quoted* in Britton *v.* Steber, 62 Mo. 370, 374; *In re* Newport Police Commission, 22 R. I. 654, 49 Atl. 36]; Kelley *v.* Cook, 21 R. I. 29, 41 Atl. 571; Dillon Mun. Corp. § 33.

Municipal officers see MUNICIPAL CORPORATIONS, 28 Cyc. 402.

44. Travis County *v.* Jourdan, 91 Tex. 217, 42 S. W. 543, holding that Rev. St. art. 946, providing that the supreme court may issue writs of mandamus against officers of the state government, does not apply to county officers.

County officers see COUNTIES, 11 Cyc. 417.

45. State *v.* St. Louis Bd. of Health, 90 Mo. 169, 2 S. W. 291, holding that members of a city board of health elected or appointed solely to execute the local laws of the city are not state officers.

The mayor of a city has been held not to be an officer under the state. Britton *v.* Steber, 62 Mo. 370, 374. But in another state the opposite view has been taken and the office of mayor of the city of Detroit has been held to be an office under the state, within Const. art. 5, § 15, providing that "no person holding office under the United States or this State shall execute the office of governor." Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

The warden of the city prison in New York is not a state officer, but a "person holding a position by appointment in any city or county . . . receiving a salary from such city or county," within Laws (1892), c. 577, prohibiting removal without a hearing of a veteran holding such an office. People *v.* Wright, 150 N. Y. 444, 44 N. E. 1036.

46. Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 498.

Township officers see TOWNS.

47. Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598. And see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 858 *et seq.*

48. State *v.* Dillon, 90 Mo. 229, 2 S. W. 417 [*distinguishing* State *v.* McKee, 69 Mo. 504].

49. State *v.* Dillon, 90 Mo. 229, 2 S. W. 417.

50. State *v.* Spencer, 91 Mo. 206, 3 S. W. 410; State *v.* Dillon, 90 Mo. 229, 2 S. W. 417. But see Andrews *v.* State, 78 Ala. 483 [*declining to follow* Kavanaugh *v.* State, 41 Ala. 399], holding that a special deputy, authorized by sheriff to execute a particular process, is an officer of the state, within an act punishing any person for knowingly resisting an officer of the state.

51. State *v.* Dillon, 90 Mo. 229, 2 S. W. 417.

52. State *v.* Dillon, 90 Mo. 229, 2 S. W. 417; Turner *v.* Cotton, 93 Tex. 559, 57 S. W. 35, holding that a county judge is not an officer of the state government, within Rev. St. art. 946, authorizing the supreme court to issue writs of mandamus against "officers of the state government."

A judge of probate is not a state officer, in the sense in which that term is used in the statutes of the state. Secord *v.* Foutch, 44 Mich. 89, 6 N. W. 110.

53. Donahue *v.* Will County, 100 Ill. 94, holding that a county treasurer, although commissioned by the governor and required to collect state revenues, is not a state officer, within Const. art. 5, § 15, making all state officers liable to impeachment for misdemeanors in office.

54. People *v.* Conover, 17 N. Y. 64.

law is to be conferred upon the citizen are state officers,[55] as are also levee commissioners,[56] and justices and officers of the supreme court of a state.[57] The term "state officer" has been held to be as a general rule applicable only to those superior executive officers who constitute the heads of the executive departments of the state,[58] or to such as belong to one of the three constituent branches of the state government;[59] and thus a day laborer employed to perform manual or mechanical labor is not a state officer, but a mere servant or employee.[60] The fact that there is no salary or emolument affixed to the office does not make it any the less a state office.[61]

2. Executive Officers and Boards — a. In General. The constitutions or statutes frequently provide for the establishment of executive officers, departments, boards, or commissions, their character, powers, duties, and functions being determined by law.[62] The enumeration by the constitution of certain officers as constituting the executive department of the state does not necessarily deprive the legislature of the power to create other executive offices, although it cannot abolish any of those created by the constitution;[63] and the legislature cannot deprive an officer of the duties imposed upon him by the constitution by the creation of another officer to perform the same duties;[64] and furthermore the creation of other executive offices is sometimes expressly prohibited by the constitutions;[65] but the establishment of executive boards of existing executive

55. State *v.* Hocker, 39 Fla. 477, 22 So. 721, 63 Am. St. Rep. 174.

56. Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

57. *In re* Janitor Supreme Ct., 35 Wis. 410, holding that the justices and officers of the supreme court are included in the words "state officers," in Rev. St. c. 10, § 13, relating to the duties of the superintendent of public property, and providing that he is not authorized to interfere with any rooms in the capitol that are appropriated by law for the use of the legislature or state officers, during the time the same shall be used and occupied.

58. State *v.* Smith, 6 Wash. 496, 33 Pac. 974, holding that an ex-treasurer of the board of regents of the agricultural college is not a state officer, within the meaning of Const. art. 4, § 4, giving the supreme court original jurisdiction in mandamus as to all state officers.

59. State *v.* Hewitt, 3 S. D. 187, 52 N. W. 875, 44 Am. St. Rep. 788, 16 L. R. A. 413, holding that the term does not include a member of the board of trustees of one of the educational institutions of the state.

But members of a state board of control of state institutions of learning are state officers. *In re* Members of Legislature, 49 Fla. 269, 39 So. 63.

Commissioners appointed merely for a special service or purpose whose functions cease when their particular duties are discharged are not state officers. Bunn *v.* People, 45 Ill. 397; Gleason *v.* Cleveland, 49 Ohio St. 431, 31 N. E. 802. But see State *v.* Cook, 17 Mont. 529, 43 Pac. 928.

60. Sipple *v.* State, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657, holding that Laws (1870), c. 321, § 1, conferring jurisdiction on the canal appraisers to hear and determine all claims against the state, etc., arising out of the negligence or conduct of any "officer of the State having charge [of the canals]," does not apply to a lock-tender, whose duty merely is to attend to the locks, to the opening and closing of the same, and the passing of boats through them.

61. *In re* Members of Legislature, 49 Fla. 269, 39 So. 63.

62. See the constitutions and statutes of the several states; and the following cases:

California.— *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; Condict *v.* San Francisco Police Ct., 59 Cal. 278.

Colorado.— *In re* Capitol Com'rs, 18 Colo. 220, 32 Pac. 278.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929; *In re* Members of Legislature, 49 Fla. 269, 39 So. 63.

Indiana.— French *v.* State, 141 Ind. 618, 41 N. E. 2, 21 L. R. A. 113; State *v.* Peelle, 121 Ind. 495, 22 N. E. 654.

Montana.— State *v.* Wright, 17 Mont. 565, 44 Pac. 89.

Nebraska.— Merrill *v.* State, 65 Nebr. 509, 91 N. W. 418; Pacific Express Co. *v.* Cornell, 59 Nebr. 364, 81 N. W. 377; Nebraska Tel. Co. *v.* Cornell, 58 Nebr. 823, 80 N. W. 43, 59 Nebr. 737, 82 N. W. 1.

Ohio.— State *v.* Shumate, 72 Ohio St. 487, 74 N. E. 588.

South Dakota.— Thomas *v.* State, 17 S. D. 579, 97 N. W. 1011; State *v.* Herried, 10 S. D. 109, 72 N. W. 93.

Tennessee.— State *v.* Kelly, 111 Tenn. 583, 82 S. W. 311.

Washington.— Howlett *v.* Cheetham, 17 Wash. 626, 50 Pac. 522; Parrish *v.* Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372.

Wisconsin.— State *v.* Sparling, 129 Wis. 164, 107 N. W. 1040.

See 44 Cent. Dig. tit. "States," § 47 *et seq.*

63. Parks *v.* Soldiers,' etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542; State *v.* Womack, 4 Wash. 19, 29 Pac. 939.

64. State *v.* Hastings, 10 Wis. 525.

65. See the constitutions of the several

officers by imposing upon them additional duties to be performed is not the creation of new executive offices.[66] In several states the constitutions provide for the appointment of an executive council to advise and assist the governor in the discharge of his duties.[67]

b. Governor. The governor is the chief executive officer of the state, and is clothed with the powers and charged with the duties appertaining to the office of such executive, his powers and duties being largely prescribed by constitution or statute.[68] As a rule these duties involve the exercise of official discretion, and his action is therefore not ordinarily subject to judicial review or control.[69] The constitutions provide that in case of the death,[70] resignation,[71] absence,[72] disability,[73] or impeachment [74] of the governor, his office or duties shall devolve upon some other officer, such as the lieutenant-governor,[75] president of the senate,[76] or secretary of state.[77] Where the governor voluntarily undertakes to perform duties not in the line of his official duty, such duties do not devolve upon his successor in office unless also accepted by him.[78]

c. Lieutenant-Governor. The lieutenant-governor is an executive officer provided for by the constitutions, and his principal duties are to act as president of the senate, and in case of the death, resignation, absence, disability, etc., of the

states. And see Lucas *v.* Futrall, 84 Ark. 540, 106 S. W. 667; State *v.* Porter, 69 Nebr. 203, 95 N. W. 769; Merrill *v.* State, 65 Nebr. 509, 91 N. W. 418; State *v.* Eskew, 64 Nebr. 600, 90 N. W. 629; State *v.* Cornell, 60 Nebr. 276, 83 N. W. 72; Pacific Express Co. *v.* Cornell, 59 Nebr. 364, 81 N. W. 377; Nebraska Tel. Co. *v.* Cornell, 58 Nebr. 823, 80 N. W. 43, 59 Nebr. 737, 82 N. W. 1; *In re* Appropriations, 25 Nebr. 662, 41 N. W. 643; *In re* Railroad Com'rs, 15 Nebr. 679, 50 N. W. 276.

66. Pacific Express Co. *v.* Cornell, 59 Nebr. 364, 81 N. W. 377; Nebraska Tel. Co. *v.* Cornell, 58 Nebr. 823, 80 N. W. 43, 59 Nebr. 737, 82 N. W. 1; State *v.* Buchanan, (Tenn. Ch. App. 1898) 52 S. W. 480; Arnold *v.* State, 71 Tex. 239, 9 S. W. 120.

67. Com. Co. *v.* Brown, 28 Kan. 83; Opinion of Justices, 70 Me. 570; *In re* Adams, 4 Pick. (Mass.) 25; Opinion of Justices, 3 Pick. (Mass.) 517; Opinion of Justices, 14 Mass. 470; Opinion of Justices, 45 N. H. 590.

68. See the constitutions of the several states. And see Henry *v.* State, 87 Miss. 1, 39 So. 856; Colbert *v.* State, 86 Miss. 769, 39 So. 65; State *v.* Clayton, 43 Tex. 410; Cardoza *v.* Epps, (Va. 1895) 23 S. E. 296; State *v.* Buchanan, 24 W. Va. 362; Shields *v.* Bennett, 8 W. Va. 74.

Special duties not necessarily belonging to the executive office are frequently imposed upon the governor by statute. See People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89; Druecker *v.* Salomon, 21 Wis. 621, 94 Am. Dec. 571.

Authentication of the great seal kept by the secretary of state is required in some cases for the official acts of the governor. Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699.

69. People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89; People *v.* Lewis, 7 Johns. (N. Y.) 73; Bates *v.* Taylor, 87 Tenn. 319, 11 S W. 266, 3 L. R. A. 316; State *v.* Buchanan, (Tenn. Ch. App 1898) 52 S. W. 480; Slack *v.* Jacob, 8 W. Va. 612.

70. State *v.* La Grave, 23 Nev. 216, 45 Pac. 243, 35 L. R. A. 233; State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

71. People *v.* Cornforth, 34 Colo. 107, 81 Pac. 871; Clifford *v.* Heller, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312.

72. State *v.* Graham, 26 La. Ann. 568, 21 Am. Rep. 551; State *v.* Walker, 78 Mo. 139; People *v.* Parker, 3 Nebr. 409, 19 Am. Rep. 634.

73. Atty.-Gen. *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613.

74. Opinion of Judges, 3 Nebr. 463.

75. *Colorado.*—People *v.* Cornforth, 34 Colo. 107, 81 Pac. 871.

Louisiana.— State *v.* Graham, 26 La. Ann. 568, 21 Am. Rep. 551.

Missouri.— State *v.* Walker, 78 Mo. 139.

Nebraska.— State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

Nevada.— State *v.* La Grave, 23 Nev. 216, 45 Pac. 243, 35 L. R. A. 233.

Washington.— State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

See 44 Cent. Dig. tit. "States," § 47 *et seq.* And see *infra*, III, C, 3, c.

76. Atty.-Gen. *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613; Clifford *v.* Heller, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312; Carr *v.* Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64.

Necessity for new oath.— The president of the senate, on becoming acting governor, need not take any qualifying oath other than that which he has taken as senator. Opinion of Justices, 70 Me. 570.

Effect of resignation of lieutenant-governor. — Under N. J. Const. art. 5, § 12, when the president of the senate who has succeeded to the powers and duties of governor resigns, the speaker of the house succeeds to the powers and duties of governor. Clifford *v.* Heller, 63 N. J. L. 195, 42 Atl. 155, 57 L. R. A. 312.

77. Opinion of Judges, 3 Nebr. 463; Chadwick *v.* Earhart, 11 Oreg. 389, 4 Pac. 1180.

78. Delaplaine *v.* Lewis, 19 Wis. 476.

governor, to succeed to the office or duties of the latter.[79] The succession to the powers and duties of the lieutenant-governor upon his succeeding to the office of governor is determined by law, these powers and duties usually devolving upon the president of the senate.[80]

d. Secretary of State. The constitutions provide for a secretary of state, the duties of the office being largely defined by statute.[81] Ordinarily the secretary of state is the keeper of the public records in his office,[82] and he is required to countersign and affix the state seal to commissions issued by the governor.[83] It is also his duty to prepare the copies of the laws and journals for the printer.[84] The secretary cannot certify to the genuineness of an officer's signature unless so authorized by statute.[85] The duties of the secretary of state must be performed personally except when otherwise provided;[86] but they may be performed by an assistant secretary when the law so provides.[87]

e. Treasurer. The treasurer has by law the custody and control of the moneys of the state,[88] and where his power is derived from the constitution, he cannot be deprived of such control by the legislature.[89] The duties and powers of the treasurer in connection with the state funds are, however, frequently prescribed by statute.[90] Upon the expiration of his term of office it is not necessary for the treasurer to withdraw public funds on deposit in a state depository and physically deliver their possession to his successor.[91]

3. Eligibility. The qualifications of state officers may be prescribed by law,[92] and where the constitution prescribes such qualifications the legislature

79. People *v.* Cornforth, 34 Colo. 107, 81 Pac. 871; State *v.* Duval County, 23 Fla. 483, 3 So. 193; State *v.* Sadler, 23 Nev. 356, 47 Pac. 450. See also Crosman *v.* Nightingill, 1 Nev. 323.

80. People *v.* Cornforth, 34 Colo. 107, 81 Pac. 871; State *v.* Stearns, 72 Minn. 200, 75 N. W. 210; State *v.* Sadler, 23 Nev. 356, 47 Pac. 450.

The president pro tem of the senate does not cease to be a senator when he becomes lieutenant-governor, by reason of a vacancy in such office. State *v.* Stearns, 72 Minn. 200, 75 N. W. 210.

81. See the constitutions and statutes of the several states. And see Collins *v.* State, 8 Ind. 344; Page *v.* Hardin, 8 B. Mon. (Ky.) 648; Brown *v.* Fleischner, 4 Oreg. 132.

82. State *v.* Wilson, 123 Ala. 259, 26 So. 482, 45 L. R. A. 772; State *v.* Bloor, 20 Mont. 574, 52 Pac. 611; Pinckney *v.* Henegan, 2 Strobh. (S. C.) 250, 49 Am. Dec. 592. See also Delaware Surety Co. *v.* Layton, (Del. 1901) 50 Atl. 378.

83. State *v.* Page, 20 Mont. 238, 50 Pac. 719; State *v.* Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45.

Refusal to countersign and seal void commission.— The secretary may rightfully refuse to countersign and seal a commission which the governor has no power in law to issue. People *v.* Forquer, 1 Ill. 104.

84. State *v.* Lewis, (Ida. 1898) 52 Pac. 163.

85. Wagner *v.* Fredcrick County Com'rs, 91 Fed. 969, 34 C. C. A. 147.

86. Beam *v.* Jennings, 96 N. C. 82, 2 S. E. 245.

87. Com. *v.* Ginn, 111 Ky. 110, 63 S. W. 467, 23 Ky. L. Rep. 521.

88. *In re* House Resolution, etc., 12 Colo. 395, 21 Pac. 486.

Application of funds to extinguishment of debt of predecessor.—The treasurer may apply moneys turned over to him by his predecessor in extinguishment of debts due the state by such predecessor. Baker *v.* Preston, Gilm. (Va.) 235.

As to the liability of the treasurer for interest on public funds in particular cases see State *v.* Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; Renfroe *v.* Colquitt, 74 Ga. 618; State *v.* Kimball, Wils. (Ind.) 174; State *v.* Harshaw, 84 Wis. 532, 54 N. W. 17; State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

89. *In re* House Resolution, etc., 12 Colo. 395, 21 Pac. 486.

90. See the statutes of the several states. And see, generally, State *v.* Newton, 33 Ark. 276; State *v.* Knott, 48 Fla. 188, 37 So. 307; State *v.* Croom, 48 Fla. 176, 37 So. 303; Whittemore *v.* People, 227 Ill. 453, 81 N. E. 427; State *v.* McCarty, Wils. (Ind.) 205; State *v.* Kimball, Wils. (Ind.) 174; State *v.* Bobleter, 83 Minn. 479, 86 N. W. 461; *In re* State Treasurer's Settlement, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746; State *v.* Hill, 47 Nebr. 456, 66 N. W. 541; State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873; State *v.* Bartley, 39 Nebr. 353, 58 N. W. 172, 23 L. R. A. 67; State *v.* Rhoades, 7 Nev. 434; State *v.* Sooy, 39 N. J. L. 135; *In re* Tax Assignment Orders, 19 R. I. 728, 36 Atl. 426; Houston Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317; State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

91. *In re* State Treasurer's Settlement, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746.

92. Searcy *v.* Grow, 15 Cal. 117; State *v.* Gylstrom, 77 Minn. 355, 79 N. W. 1038; State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

cannot add thereto.[93] A common negative provision is that persons holding certain offices shall be ineligible to hold certain other offices at the same time,[94] which provision is not, however, violated by a law simply annexing to such offices new powers and duties appropriate thereto.[95] On the other hand, making a person an *ex officio* officer by virtue of his holding another office does not merge the two offices into one.[96] In some states the constitution provides that members of the legislature shall be ineligible to state offices during the term for which they were elected to the legislature,[97] and in such case a member cannot render himself eligible by resigning his seat in the legislature.[98]

4. Appointment or Election.[99] The election or appointment of state officers, such as the governor [1] or other officers,[2] is provided for by constitution or statute.[3] Except in cases provided for by the constitution, the legislature may by law direct the manner in which officers shall be elected or appointed or vacancies filled,[4] and when the mode of filling an office is prescribed by law, the election or appointment of the officer in any other mode is void.[5] Some officers are elected or appointed by the legislature,[6] others are appointed by the gover-

93. Page *v.* Hardin, 8 B. Mon. (Ky.) 648; State *v.* Williams, 20 S. C. 12.

94. People *v.* Provines, 34 Cal. 520; People *v.* Sanderson, 30 Cal. 160; Searcy *v.* Grow, 15 Cal. 117; Atty.-Gen. *v.* Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211.

When a person holds both a federal and a state office made incompatible by the state constitution, he may perfect his title to the state office by resigning the federal office, even after the institution of quo warranto proceedings to oust him from the state office. De Turk *v.* Com., 129 Pa. St. 151, 18 Atl. 757, 15 Am. St. Rep. 705, 5 L. R. A. 853.

95. State *v.* Potterfield, 47 S. C. 75, 25 S. E. 39; Bridges *v.* Shallcross, 6 W. Va. 562. See also State *v.* Stearns, 72 Minn. 200, 75 N. W. 210.

96. State *v.* Laughton, 19 Nev. 202, 8 Pac. 344.

97. Shelby *v.* Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

Under a provision that no member of the legislature shall be "appointed" to any civil state office during his term, he may be elected to such an office. Carpenter *v.* People, 8 Colo. 116, 5 Pac. 828.

98. *In re* Members of Legislature, 49 Fla. 269, 39 So. 63; State *v.* Sutton, 63 Minn. 147, 65 N. W. 262, 56 Am. St. Rep. 459, 30 L. R. A. 630.

99. For matters relating to elections generally see Elections, 15 Cyc. 268.

1. *Arkansas.*— *Ex p.* Danley, 24 Ark. 1.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

North Carolina.— *In re* Hughes, 61 N. C. 57.

South Carolina.— *Ex p.* Smith, 8 S. C. 495; *Ex p.* Norris, 8 S. C. 408.

West Virginia.— Carr *v.* Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64.

See 44 Cent. Dig. tit. "States," § 47.

2. *Arkansas.*— Cox *v.* State, 72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17.

California.— *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; People *v.* Melony, 15 Cal. 58.

Indiana.— State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79; State *v.* Gorby, 122 Ind. 17, 23 N. E. 678; State *v.* Peelle, 121 Ind. 495, 22 N. E. 654; State *v.* Hyde, 121 Ind. 20, 22 N. E. 644; State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

Kansas.— State *v.* Robinson, 1 Kan. 17.

Maryland.— Thomas *v.* Owens, 4 Md. 189.

Massachusetts.— Opinion of Justices, 3 Gray 601.

New York.— People *v.* Foot, 19 Johns. 58.

See 44 Cent. Dig. tit. "States," § 51.

3. See the constitutions and statutes of the several states. And see the cases cited *supra*, notes 1 and 2.

4. State *v.* Kennon, 7 Ohio St. 546.

5. Lynch *v.* Kimball, 45 Miss. 151; State *v.* Bristol, 122 N. C. 245, 30 S. E. 1.

6. *Arkansas.*— Cox *v.* State, 72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17.

Indiana.— Price *v.* Baker, 41 Ind. 572, 13 Am. Rep. 346. See also State *v.* Peelle, 121 Ind. 495, 22 N. E. 654.

Kansas.— Snow *v.* Hudson, 56 Kan. 378, 43 Pac. 260, state printer.

Kentucky.—Sinking Fund Com'rs *v.* George, 47 S. W. 779, 20 Ky. L. Rep. 938.

Maryland.— Marshall *v.* Harwood, 5 Md. 423, state librarian.

North Carolina.— Cunningham *v.* Sprinkle, 124 N. C. 638, 33 S. E. 138.

Rhode Island.— *In re* Decision of Justices, (1908) 69 Atl. 555.

See 44 Cent. Dig. tit. "States," § 51.

The governor ratifies an appointment by the legislature by approving the act making the appointment, even though he might have prevented the appointment, as interfering with his prerogative, by vetoing the act. Thomas *v.* State, 17 S. D. 579, 97 N. W. 1011.

The constitution sometimes forbids the legislature to make appointments to office. See State *v.* Kennon, 7 Ohio St. 546; Bridges *v.* Shallcross, 6 W. Va. 562.

Effect of ineligibility of candidate receiving majority of votes.—Where in an election by the legislature the candidate who receives a majority of the votes is ineligible, the eli-

nor,[7] or by the governor by and with the advice and consent of the senate.[8] In the case of an officer appointed by the governor by and with the advice and consent of the senate, the issuance of his commission is a part of the act of appointment and completes it;[9] and generally a commission is not completed until it has been signed, countersigned, and sealed as the constitution prescribes; nor is a copy of an uncompleted commission, or the record thereof, evidence of any appointment to office;[10] but where the governor properly appoints an officer and issues a proper commission, the refusal of the secretary of state to countersign it and seal it with the great seal does not affect the validity of the appointment.[11] Mandamus lies to compel the governor to issue,[12] and the secretary of state to seal and countersign,[13] the commission of an officer entitled thereto. Where in an election by the legislature the candidate who receives a majority of the votes is ineligible, the eligible candidate receiving the largest number, although not a majority of the votes, is elected.[14] The mode of deciding contested elections is determined by law.[15]

5. Qualification. State officers are generally required to qualify before assuming the duties of their office, the formalities of qualification being prescribed by law.[16] The usual formalities are taking the oath of office[17] and giving bond,[18]

gible candidate receiving the next largest number, although not a majority, is elected. Price *v.* Baker, 41 Ind. 572, 13 Am. Rep. 346.

7. *Alabama.*— Lane *v.* Kolb, 92 Ala. 636, 9 So. 873.

Colorado.— *In re* Question Propounded by Governor, 12 Colo. 399, 21 Pac. 488.

Idaho.— *In re* Inman, 8 Ida. 398, 69 Pac. 120.

Indiana.— State *v.* Peelle, 121 Ind. 495, 22 N. E. 654.

Maryland.— Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

Minnesota.— State *v.* Gylstrom, 77 Minn. 355, 79 N. W. 1038.

Nebraska.— *In re* Public Lands, etc., 18 Nebr. 340, 25 N. W. 342; State *v.* Public Lands, etc., 7 Nebr. 42; State *v.* Bacon, 6 Nebr. 286.

Wyoming.— State *v.* Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45.

See 44 Cent. Dig. tit. "States," § 51.

8. State *v.* Tucker, 23 La. Ann. 139; Ivy *v.* Lusk, 11 La. Ann. 486; Nicholson *v.* Thompson, 5 Rob. (La.) 367; State *v.* Griffen, 69 Minn. 311, 72 N. W. 117; People *v.* McKee, 68 N. C. 429; State *v.* Chalfant, 6 Ohio Dec. (Reprint) 1033, 9 Am. L. Rec. 634. See also Monash *v.* Rhodes, 11 Colo. App. 404, 53 Pac. 236; State *v.* Williams, 20 S. C. 12.

The consent of the senate to an appointment may be revoked by it during the same session before any action on its vote has been taken. Dust *v.* Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574.

9. People *v.* Tyrrell, 87 Cal. 475, 25 Pac. 684.

The appointment is not completed until the commission is issued, and notwithstanding confirmation by the senate the governor may still defeat the appointment by not issuing the commission. Harrington *v.* Pardee, 1 Cal. App. 278, 82 Pac. 83.

10. State *v.* Crawford, 28 Fla. 441, 10 So. 118, 14 L. R. A. 253.

11. State *v.* Page, 20 Mont. 238, 50 Pac. 719.

12. Groome *v.* Gwinn, 43 Md. 572.

13. State *v.* Crawford, 28 Fla. 441, 10 So. 118, 14 L. R. A. 253; State *v.* Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45.

14. Price *v.* Baker, 41 Ind. 572, 13 Am. Rep. 346.

15. See State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657; Groome *v.* Gwinn, 43 Md. 572; *In re* Hughes, 61 N. C. 57. And see Elections, 15 Cyc. 393.

Quo warranto as a remedy in election contests see Quo Warranto, 32 Cyc. 1418, 1420 *et seq.*

Contested elections for the office of governor are determined by the legislature. Baxter *v.* Brooks, 29 Ark. 173; *In re* Senate Resolution No. 10, 33 Colo. 307, 79 Pac. 1009; Taylor *v.* Beckham, 108 Ky. 278, 56 S. W. 177, 21 Ky. L. Rep. 1735, 94 Am. St. Rep. 359, 49 L. R. A. 258 [*affirmed* in 178 U. S. 548, 20 S. Ct. 890, 44 L. ed. 1187].

Pending an appeal involving the right to a state office, the party in whose favor the lower court decided is regarded *pro tempore* the officer. Honey *v.* Davis, 38 Tex. 63.

The supreme court, in determining the validity of a pardon granted by one of two claimants to the office of governor, may look into the validity of the election to determine who was governor *de facto*. *Ex p.* Norris, 8 S. C. 408.

16. People *v.* Whitman, 10 Cal. 38.

Where an officer succeeds himself he must requalify and give a new bond. State *v.* Powell, 40 La. Ann. 241, 4 So. 447; Archer *v.* State, 74 Md. 410, 22 Atl. 6, 737. See also Jackson *v.* Martin, 136 N. C. 196, 48 S. E. 672.

17. Archer *v.* State, 74 Md. 443, 22 Atl. 8, 28 Am. St. Rep. 261; Harwood *v.* Marshall, 9 Md. 83; Thomas *v.* Owens, 4 Md. 189.

As to the test oath once required that the officer had not aided the rebellion and was opposed to the overthrow of the Union see McAlister *v.* Com., 6 Bush (Ky.) 581.

18. State *v.* Jarrett, 17 Md. 309; Harwood *v.* Marshall, 9 Md. 83; Marshall *v.* Harwood,

and no other formalities of qualification are necessary than those prescribed by law;[19] and where the constitution prescribes the formalities of qualification, the legislature cannot add thereto.[20] The failure of an officer to qualify does not ordinarily create a vacancy in the office, but the former incumbent holds over until a new officer is elected or appointed and qualifies;[21] but where the statute so provides, the failure to qualify within the time limited constitutes a refusal to accept the office, and a new election or appointment is required.[22] The mere qualification of a person as a state officer by taking the oath before his title to the office has been perfected by the observance of all the prescribed formalities of the election will not entitle him to assume the office.[23] An officer who fails to qualify is not entitled to the salary of the office.[24]

6. De Facto Officers.[25] The official acts of a *de facto* state officer have generally the same force and effect as if he had been an officer *de jure*.[26] Thus a regularly appointed or elected officer who has not taken the oath of office may act officially,[27] and his sureties are liable on his official bond for his defaults.[28]

7. Deputies and Assistants. Official duties involving such discretion and trust that they must be performed by an officer personally cannot be delegated to a deputy;[29] but ministerial duties may be delegated,[30] and officers are frequently authorized to appoint deputies to perform their regular duties;[31] and provision is also sometimes made for the appointment of assistant officers.[32] Deputies so appointed are state officers and not mere employees.[33] In the absence of a statutory provision to the contrary, the tenure of a deputy officer continues only during the term of the officer appointing him.[34]

8. Term of Office and Holding Over. The term of office, and time of commencement thereof, of state officers is generally prescribed by constitution or statute;[35] but where the constitution creates an office and leaves the term unde-

7 Md. 466; Steel *v.* Auditor-Gen., 111 Mich. 381, 69 N. W. 738; State *v.* Paxton, 65 Nebr. 110, 90 N. W. 983; State *v.* Kipp, 10 S. D. 495, 74 N. W. 440.

The fact that an officer's bond was not approved by the governor as required by law does not prevent it from being binding on the obligors. Auditor *v.* Woodruff, 2 Ark. 73, 33 Am. Dec. 368.

19. *Ex p.* Smith, 8 S. C. 495.

20. Thomas *v.* Owens, 4 Md. 189.

21. People *v.* Whitman, 10 Cal. 38.

An officer holding over may requalify where the statute so requires (State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602), but not unless so required (People *v.* Tyrrell, 87 Cal. 475, 25 Pac. 684).

22. Archer *v.* State, 74 Md. 443, 22 Atl. 8, 28 Am. St. Rep. 261. See also Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689; State *v.* Laughton, 19 Nev. 202, 8 Pac. 344.

23. Carr *v.* Wilson, 32 W. Va. 419, 9 S. E. 31, 32 L. R. A. 64.

24. Thomas *v.* Owens, 4 Md. 189.

25. **For matters relating to de facto officers** generally see Officers, 29 Cyc. 1389.

26. Atty.-Gen. *v.* Menominee County, 89 Mich. 552, 51 N. W. 483; State *v.* Williams, 5 Wis. 308, 68 Am. Dec. 65. See also Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841; Ellis *v.* North Carolina Inst., 68 N. C. 423.

27. Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344.

28. State *v.* Bates, 36 Vt. 387.

29. State *v.* Hastings, 10 Wis. 525.

30. People *v.* Bank of North America, 75 N. Y. 547.

The private secretary of the governor employed to assist him in the labors of his office as authorized by statute is not authorized to discharge the duties of the governor in his absence. Hager *v.* Sidebottom, 129 Ky. 687, 113 S. W. 870.

31. Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344; McNair *v.* Hunt, 5 Mo. 300; State *v.* Cornell, 60 Nebr. 276, 83 N. W. 72.

32. Page *v.* Hardin, 8 B. Mon. (Ky.) 648; Long *v.* Stone, 39 S. W. 836, 19 Ky. L. Rep. 246. See also State *v.* Herron, 24 La. Ann. 432.

33. State *v.* Cornell, 60 Nebr. 276, 83 N. W. 72.

But the appointment of deputies is not the creation of new offices within a constitutional prohibition of the creation of new executive offices. Merrill *v.* State, 65 Nebr. 509, 91 N. W. 418; State *v.* Eskew, 64 Nebr. 600, 90 N. W. 629; *In re* Appropriations for Deputies, 25 Nebr. 662, 41 N. W. 643.

34. Hord *v.* State, 167 Ind. 622, 79 N. E. 916.

35. See the constitutions and statutes of the several states. And see the following cases:

California.— People *v.* Ashburner, 55 Cal. 517; Ball *v.* Kenfield, 55 Cal. 320; People *v.* Whitman, 10 Cal. 38.

Colorado.— People *v.* Denman, 16 Colo. App. 337, 65 Pac. 455.

Indiana.— State *v.* Hyde, 121 Ind. 20, 22 N. E. 644.

Kansas.— State *v.* Robinson, 1 Kan. 17.

fined and unlimited, the officer holds during good behavior, subject to the power of the legislature to limit the term or authorize removal.[36] A state officer elected or appointed for a definite term will generally hold over after the expiration of his term until his successor is appointed or elected and qualifies,[37] and this without any express provision to that effect,[38] and although the constitution provides that the duration of office shall not exceed the prescribed term.[39] But an officer who vacated his office by resignation does not continue to hold over until the appointment or election of his successor.[40]

9. Vacancies. The mode of filling vacancies in state offices is prescribed by law. In a few instances, as in the case of the office of governor, the office is filled by the succession of another officer,[41] but generally vacancies are filled by appointment,[42] the governor being frequently given power to fill vacancies in certain cases,[43] as, for example, where no other mode is provided;[44] and in the case of elective officers the governor is sometimes authorized to fill a vacancy until the next election;[45] and similarly vacancies occurring while the legislature is not in session, in offices filled by the governor and senate, or by the legislature, are generally filled by appointments by the governor, the appointee holding the office until the expiration of the next session of the legislature, or for the unexpired term, or until his successor shall have been appointed and qualifies, as may be

Louisiana.— Nicholson *v.* Thompson, 5 Rob. 367; Bry *v.* Woodrooff, 13 La. 556.

Maine.— Justices Sup. Judicial Ct., 70 Me. 570.

Maryland.— Hill *v.* Slade, 91 Md. 640, 48 Atl. 64; Townsend *v.* Kurtz, 83 Md. 331, 34 Atl. 1123; Marshall *v.* Harwood, 5 Md. 423; Thomas *v.* Owens, 4 Md. 189.

Massachusetts.— Opinion of Justices, 3 Gray 601.

Missouri.— State *v.* Stonestreet, 99 Mo. 361, 12 S. W. 895.

Nebraska.— State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602.

North Carolina.— Bryan *v.* Patrick, 124 N. C. 651, 33 S. E. 151.

Washington.— State *v.* McBride, 29 Wash. 335, 70 Pac. 25.

Wyoming.— State *v.* Brooks, 14 Wyo. 393, 84 Pac. 488, 6 L. R. A. N. S. 750.

United States.— Ashburner *v.* California, 103 U. S. 575, 26 L. ed. 415.

See 44 Cent. Dig. tit. "States," § 56.

The term of an office created by the legislature may be fixed by the legislature. Dust *v.* Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574.

36. Field *v.* People, 3 Ill. 79. See also State *v.* Bacon, 14 S. D. 394, 85 N. W. 605.

37. *Arkansas.*— State *v.* Clendenin, 24 Ark. 78.

California.— People *v.* Tyrrell, 87 Cal. 475, 25 Pac. 684; People *v.* Stratton, 25 Cal. 382; People *v.* Whitman, 10 Cal. 38.

Connecticut.— State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.

Florida.— State *v.* Murphy, 32 Fla. 138, 13 So. 705.

Missouri.— State *v.* Lusk, 18 Mo. 333.

Montana.— State *v.* Page, 20 Mont. 238, 50 Pac. 719.

South Carolina.— *Ex p.* Smith, 8 S. C. 495; *Ex p.* Norris, 8 S. C. 408.

Virginia.— *Ex p.* Lawhorne, 18 Gratt. 85.

West Virginia.— Carr *v.* Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64.

See 44 Cent. Dig. tit. "States," § 56.

38. People *v.* Oulton, 28 Cal. 44; Thomas *v.* Owens, 4 Md. 189. But see State *v.* Bacon, 14 S. D. 284, 85 N. W. 225.

39. People *v.* Stratton, 28 Cal. 382; Carr *v.* Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64.

40. State *v.* Page, 20 Mont. 238, 50 Pac. 719.

41. State *v.* McBride, 29 Wash. 335, 70 Pac. 25. And see *supra*, III, C, 2, b, c.

42. Opinion of Justices, 14 Mass. 470. And see cases cited *infra*, the following notes.

Vacancies in the executive council may be filled by the legislature. Opinion of Justices, 14 Mass. 470.

43. *California.*— People *v.* Langdon, 8 Cal. 1; People *v.* Nye, 9 Cal. App. 148, 98 Pac. 241.

Maine.— Opinion of Justices, 38 Me. 597.

Michigan.—Atty.-Gen. *v.* Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574.

Missouri.— State *v.* Stonestreet, 99 Mo. 361, 12 S. W. 895.

New Hampshire.— Opinion of Justices, 45 N. H. 590.

North Carolina.— State's Prison *v.* Day, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295.

See 44 Cent. Dig. tit. "States," § 56.

44. *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; People *v.* Budd, 114 Cal. 168, 45 Pac. 1060, 34 L. R. A. 46; People *v.* Stratton, 28 Cal. 382; Ewart *v.* Jones, 116 N. C. 570, 21 S. E. 787; People *v.* McKee, 68 N. C. 429; State *v.* Bacon, 14 S. D. 284, 85 N. W. 225; State *v.* Finnerud, 7 S. D. 237, 64 N. W. 121; State *v.* Brooks, 14 Wyo. 393, 84 Pac. 488, 6 L. R. A. N. S. 750.

Where another mode is provided the governor has no power to fill a vacancy under such a provision. People *v.* Stratton, 28 Cal. 382.

45. State *v.* Day, 14 Fla. 9; State *v.* Gorby, 122 Ind. 17, 23 Ind. 678; State *v.* Peelle, 121 Ind. 495, 22 N. E. 654; State *v.* Hyde, 121 Ind. 20, 22 N. E. 644. See also Cox *v.* State,

provided by law.[46] What constitutes such a vacancy as may be filled by the governor will depend considerably upon the terms of the law authorizing the governor to act.[47] Plainly no such vacancy is created by the failure to elect,[48] or of the officer elected to qualify,[49] where the former incumbent holds over. The resignation of an officer creates a vacancy.[50] A statute providing for appointment to fill a vacancy upon resignation does not authorize a filling of one caused by death or some other cause.[51]

10. Resignation, Removal, or Suspension. The resignation[52] or removal or suspension[53] of state officers is to a considerable extent regulated by constitution or statute. Officers are in some cases removable by impeachment;[54] but ex-officers[55] and persons who are not state officers within the provisions relating to impeachment[56] are not subject to impeachment. Officers are sometimes removable by an address of the legislature,[57] and in some cases the governor is empowered to suspend an officer;[58] but the governor has, by virtue of his office, no general power of removal;[59] but this power is in some cases expressly conferred upon him,[60] and in the absence of a constitutional restriction the legis-

72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17.

46. *California.*— People *v.* Nye, 9 Cal. App. 148, 98 Pac. 241.

Colorado.— Monash *v.* Rhodes, 11 Colo. App. 404, 53 Pac. 236; Church *v.* Mullins, 10 Colo. App. 318, 50 Pac. 1054.

Florida.— State *v.* Murphy, 32 Fla. 138, 13 So. 705.

Georgia.— Gormley *v.* Taylor, 44 Ga. 76.

Illinois.— People *v.* Forquer, 1 Ill. 104.

Louisiana.— State *v.* Tucker, 23 La. Ann. 139. See also State *v.* Herron, 24 La. Ann. 432.

Maryland.— Hill *v.* Slade, 91 Md. 640, 48 Atl. 64; State *v.* Jarrett, 17 Md. 309.

Michigan.— Atty.-Gen. *v.* Oakman, 126 Mich. 717, 86 N. W. 151, 86 Am. St. Rep. 574.

Montana.— State *v.* Page, 20 Mont. 238, 50 Pac. 719.

New York.— People *v.* Fancher, 50 N. Y. 288.

Ohio.— State *v.* Nash, 66 Ohio St. 612, 64 N. E. 558.

South Carolina.— State *v.* Williams, 20 S. C. 12.

See 44 Cent. Dig. tit. "States," § 56.

The governor's power exists only when the original appointing power cannot act; he cannot fill a vacancy occurring when the legislature is in session. People *v.* Fitch, 1 Cal. 519; *In re* Railroad Com'r, (R. I. 1907) 67 Atl. 802.

47. *California.*— People *v.* Sanderson, 30 Cal. 160.

Colorado.— Church *v.* Mullins, 10 Colo. App. 318, 50 Pac. 1054.

Georgia.— Gormley *v.* Taylor, 44 Ga. 76.

Missouri.— State *v.* Stonestreet, 99 Mo. 361, 12 S. W. 895; State *v.* Ewing, 17 Mo. 515.

New Hampshire.— Opinion of Justices, 45 N. H. 590.

North Carolina.— Ewart *v.* Jones, 116 N. C. 570, 21 S. E. 787.

See 44 Cent. Dig. tit. "States," § 56.

48. State *v.* Boyd, 31 Nebr. 682, 48 N. W. 739, 51 N. W. 602; State *v.* Lusk, 18 Mo. 333. See also People *v.* Tyrrell, 87 Cal. 475, 25 Pac. 684; State *v.* Bristol, 122 N. C. 245, 30 S. E. 1.

49. People *v.* Whitman, 10 Cal. 38. But see State *v.* Laughton, 19 Nev. 202, 8 Pac. 344 [*disapproving* People *v.* Sanderson, 30 Cal. 160]. And see also Archer *v.* State, 74 Md. 443, 22 Atl. 8, 28 Am. St. Rep. 261.

50. State *v.* Page, 20 Mont. 238, 50 Pac. 719.

51. *In re* Railroad Com'rs, (R. I. 1907) 67 Atl. 802.

52. State *v.* Page, 20 Mont. 238, 50 Pac. 719.

53. People *v.* Foot, 19 Johns. (N. Y.) 58; Bryan *v.* Patrick, 124 N. C. 651, 33 S. E. 151.

54. *Kentucky.*— Page *v.* Hardin, 8 B. Mon. 648.

Nebraska.— State *v.* Hastings, 37 Nebr. 96, 55 N. W. 774; State *v.* Leese, 37 Nebr. 92, 55 N. W. 798, 40 Am. St. Rep. 474, 28 L. R. A. 579.

New Jersey.— Jersey City *v.* Pritchard, 36 N. J. L. 101.

South Dakota.— State *v.* Kipp, 10 S. D. 495, 74 N. W. 440.

Wyoming.— State *v.* Grant, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. N. S. 588.

See 44 Cent. Dig. tit. "States," § 57.

55. State *v.* Leese, 37 Nebr. 92, 55 N. W. 798, 40 Am. St. Rep. 474, 20 L. R. A. 579; State *v.* Hill, 37 Nebr. 80, 55 N. W. 794, 20 L. R. A. 573.

56. *Ex p.* Wiley, 54 Ala. 226. See also State *v.* Hewitt, 3 S. D. 187, 52 N. W. 875, 44 Am. St. Rep. 788, 16 L. R. A. 413.

57. See Nicholson *v.* Thompson, 5 Rob. (La.) 367.

58. State *v.* Herron, 24 La. Ann. 594; State *v.* Herron, 24 La. Ann. 432.

The legislature may authorize the governor to suspend an officer, although the constitution provides that he shall continue in office for a designated term. Brown *v.* Duffus, 66 Iowa 193, 23 N. W. 396.

59. Jersey City *v.* Pritchard, 36 N. J. L. 101; State *v.* Miller, 3 N. D. 433, 57 N. W. 193. See also Page *v.* Hardin, 8 B. Mon. (Ky.) 648.

60. *Colorado.*— Trimble *v.* People, 19 Colo.

lature may authorize the executive to remove incompetent or unfaithful officers.[61] Neither the governor alone nor the governor and senate has any power of removal as incidental to the power of appointment.[62] Where an officer is removable only for cause he cannot ordinarily be removed without notice and hearing;[63] but it is otherwise where the officer is removable at pleasure.[64] An officer who has been commissioned and inducted into office is in by color of title, and cannot be ousted by the governor, as by appointing another in his place, but the rival claimant must resort to quo warranto.[65]

11. Appointment, Employment, and Removal of Agents and Employees. State officers or boards have power to appoint or discharge agents or other employees whenever such power is expressly conferred by law or implied from the nature of the duties to be performed, but not otherwise;[66] and the state is not liable for the compensation of agents or employees employed by state officers without authority.[67] A state in employing an agent has the same power to revoke the appointment as an individual, and the repeal of the statute authorizing the agent's appointment operates as a revocation.[68]

12. Privileges of Officers. State officers while transacting official business are sometimes privileged from being sued in a civil action.[69] In some states public officers are prohibited by law from asking or receiving free passes on railways, but this prohibition does not apply to railroad commissioners traveling in the discharge of their official duties.[70]

187, 34 Pac. 981, 41 Am. St. Rep. 236. See also Benson *v.* People, 10 Colo. App. 175, 50 Pac. 212.

Kansas.— Yoe *v.* Hoffman, 61 Kan. 265, 59 Pac. 351.

Michigan.— Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699; People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644.

Nebraska.— State *v.* Bacon, 6 Nebr. 286.

New York.— *In re* Guden, 171 N. Y. 529, 64 N. E. 451; Matter of Bartlett, 9 How. Pr. 414.

South Dakota.— State *v.* Kipp, 10 S. D. 495, 74 N. W. 440.

Washington.— State *v.* Cheetham, 19 Wash. 330, 53 Pac. 349.

Wyoming.— State *v.* Grant, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. N. S. 588.

See 44 Cent. Dig. tit. "States," § 57.

61. Lynch *v.* Chase, 55 Kan. 367, 40 Pac. 666.

62. Field *v.* People, 3 Ill. 79; Nicholson *v.* Thompson, 5 Rob. (La.) 367.

63. *Colorado.*— People *v.* Denman, 16 Colo. App. 337, 65 Pac. 455.

Kansas.— Lease *v.* Freeborn, 52 Kan. 750, 35 Pac. 817.

Kentucky.— Sweeney *v.* Coulter, 109 Ky. 295, 58 S. W. 784, 22 Ky. L. Rep. 885; Page *v.* Hardin, 8 B. Mon. 648.

Michigan.— Atty.-Gen. *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 41 Am. St. Rep. 606, 23 L. R. A. 699; People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644; Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128.

Missouri.— State *v.* Knott, 207 Mo. 167, 105 S. W. 1040.

South Dakota.— State *v.* Hewitt, 3 S. D. 187, 52 N. W. 875, 44 Am. St. Rep. 788, 16 L. R. A. 413.

See 44 Cent. Dig. tit. "States," § 57.

Removal without notice or hearing.—Where the statute so provides an officer may be removed by the governor for cause on his filing written reason for such removal with the secretary of state, and in such case no notice or hearing is required. State *v.* Cheetham, 19 Wash. 330, 53 Pac. 349; State *v.* Burke, 8 Wash. 412, 36 Pac. 281; State *v.* Grant, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 116 Am. St. Rep. 982, 1 L. R. A. N. S. 588.

64. Townsend *v.* Kurtz, 83 Md. 331, 34 Atl. 1123.

65. State *v.* Draper, 48 Mo. 213.

66. *Illinois.*— State Bd. of Education *v.* Greenbaum, 39 Ill. 609.

Indiana.— Carr *v.* State, 111 Ind. 101, 12 N. E. 107.

Kentucky.— Hagar *v.* Shuck, 120 Ky. 574, 87 S. W. 300, 27 Ky. L. Rep. 957. See also Long *v.* Stone, 39 S. W. 836, 19 Ky. L. Rep. 246.

New Hampshire.— Opinion of Justices, 72 N. H. 601, 54 Atl. 950.

Pennsylvania.— Franklin *v.* Hammond, 45 Pa. St. 507.

See 44 Cent. Dig. tit. "States," § 58.

In New York, by statute, preference must be given to Union veterans in employment in public departments. People *v.* Morton, 148 N. Y. 156, 42 N. E. 538; Sweet *v.* Partridge, 66 N. Y. App. Div. 309, 72 N. Y. Suppl. 699; *In re* Sullivan, 55 Hun 285, 8 N. Y. Suppl. 401.

67. Estlin *v.* State, 28 La. Ann. 527. And see *infra*, V, A, 2.

68. State *v.* Walker, 88 Mo. 279 [*affirmed* in 125 U. S. 339, 8 S. Ct. 929, 31 L. ed. 769].

69. White Sewing Mach. Co. *v.* Hawes, 5 Ohio S. & C. Pl. Dec. 568, 7 Ohio N. P. 659.

70. Matter of Railroad Com'rs, 11 Misc. (N. Y.) 103, 32 N. Y. Suppl. 1115.

13. Compensation and Fees — a. In General. The compensation of state officers,[71] and employees,[72] including the amount, and the time and mode of payment, is ordinarily provided for and prescribed by law, and a public officer or agent is not entitled to compensation for his services unless so provided;[73] but where the law indicates that some compensation is to be paid, but does not fix the amount thereof, a reasonable compensation may be awarded.[74] The compensation of officers is usually in the form of salaries or fees or both,[75] by fees in this connection being meant compensation given by law to public officers for official services rendered to individuals,[76] and where there is no law authorizing it, a state officer cannot charge fees.[77] In many instances fees have been abolished, a fixed salary being substituted in their place.[78] Whether fees collected for services shall belong to the officer or to the state is determined by law.[79] The salary annexed to a public office is incident to the title to the office, and not to

71. *Alabama.*— Owen *v.* Beale, 145 Ala. 108, 39 So. 907; Riggs *v.* Brewer, 64 Ala. 282.
Arkansas.—Woodruff *v.* State, 3 Ark. 285.
Colorado.— Parks *v.* People, 22 Colo. 86, 43 Pac. 542; Carlile *v.* Hurd, 3 Colo. App. 11, 31 Pac. 952.
Florida.— State *v.* Bloxham, 26 Fla. 407, 7 So. 873; State *v.* Barnes, 25 Fla. 75, 5 So. 698.
Illinois.— Whittemore *v.* People, 227 Ill. 453, 81 N. E. 427.
Indiana.—Walker *v.* Dunham, 17 Ind. 483.
Kentucky.— Finley *v.* Stone, 106 Ky. 856, 48 S. W. 428, 21 Ky. L. Rep. 38.
Mississippi.— Adams *v.* Bolivar County, 75 Miss. 154, 21 So. 608; Swann *v.* Josselyn, 14 Sm. & M. 106.
Missouri.— State *v.* Walker, 97 Mo. 162, 10 S. W. 473.
Montana.— State *v.* Wright, 17 Mont. 565, 44 Pac. 89; State *v.* Cook, 17 Mont. 529, 43 Pac. 928.
New Jersey.— State *v.* Kelsey, 44 N. J. L. 1.
New York.— People *v.* Miller, 56 N. Y. 448.
Oregon.— Chadwick *v.* Earhart, 11 Oreg. 389, 4 Pac. 1180.
South Dakota.— Collins *v.* State, 3 S. D. 18, 51 N. W. 776.
Tennessee.—State *v.* Allen, (Ch. App. 1898) 46 S. W. 303.
Virginia.— Gaines *v.* Marye, 94 Va. 225, 26 S. E. 511.
Wisconsin.— State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.
Wyoming.— State *v.* Grant, 12 Wyo. 1, 73 Pac. 470.
See 44 Cent. Dig. tit. "States," § 61 *et seq.*

72. *Nebraska.*— State *v.* Garber, 7 Nebr. 14.
New York.— Drake *v.* State, 144 N. Y. 414, 39 N. E. 342; Clark *v.* State, 142 N. Y. 101, 36 N. E. 817; Poole *v.* State, 105 N. Y. 22, 11 N. E. 275; Kehn *v.* State, 93 N. Y. 291, 65 How. Pr. 488; Gilligan *v.* Waterford, 91 Hun 21, 36 N. Y. Suppl. 88; Larkin *v.* Brockport, 81 Hun 364, 30 N. Y. Suppl. 973, 87 Hun 573, 34 N. Y. Suppl. 551; Failing *v.* Syracuse, 4 Misc. 50, 24 N. Y. Suppl. 50.
North Carolina.— Battle *v.* Literary Board, 28 N. C. 203.
Texas.— Leon County *v.* Houston, 46 Tex. 575; Sawyer *v.* Milan County, 2 Tex. Unrep. Cas. 639.
Wisconsin.— Sloan *v.* State, 51 Wis. 623, 8 N. W. 393.
See 44 Cent. Dig. tit. "States," § 61 *et seq.*
Compensation for special service.—The compensation of an agent, attorney, or commissioner appointed or employed for a special service will be determined by the terms of his employment or contract, or of the statute providing therefor. Saffold *v.* Powell, 59 Ala. 377; Julian *v.* State, 140 Ind. 581, 39 N. E. 923; Wailes *v.* Smith, 76 Md. 469, 25 Atl. 922; State *v.* Chase, 3 Harr. & J. (Md.) 182; Davis *v.* Com., 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743; State *v.* Garber, 7 Nebr. 14; Burton *v.* Furman, 115 N. C. 166, 20 S. E. 443.

73. Standford *v.* Wheeler, 28 Ark. 144; State *v.* Guilbert, 63 Ohio St. 177, 57 N. E. 1083; State *v.* Allen, (Tenn. Ch. App. 1898) 46 S. W. 303; Young *v.* Millett, 19 Wash. 486, 53 Pac. 823.

74. Ripley *v.* Gifford, 11 Iowa 367; State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255.

75. See cases cited *supra*, note 71 *et seq.*

76. Henderson *v.* State, 96 Ind. 437.

77. Whittemore *v.* People, 227 Ill. 453, 81 N. E. 427; State *v.* Kelsey, 44 N. J. L. 1.

78. See McChesney *v.* Hager, 104 S. W. 714, 31 Ky. L. Rep. 1038; State *v.* Dunbar, 53 Oreg. 45, 98 Pac. 878.

79. *Arkansas.*— Woodruff *v.* State, 3 Ark. 285.
California.— People *v.* Van Ness, 79 Cal. 84, 21 Pac. 554, 12 Am. St. Rep. 134.
Idaho.— State *v.* Lewis, (1898) 52 Pac. 163.
Indiana.— Henderson *v.* State, 96 Ind. 437.
Kentucky.— Finley *v.* Stone, 106 Ky. 856, 48 S. W. 428, 21 Ky. L. Rep. 38.
Missouri.— State *v.* Walker, 97 Mo. 162, 10 S. W. 473.
Nebraska.— State *v.* Porter, 69 Nebr. 203, 95 N. W. 769; State *v.* Home Ins. Co., 59 Nebr. 524, 81 N. W. 443; Moore *v.* State, 53 Nebr. 831, 74 N. W. 319; State *v.* Liedtke, 12 Nebr. 171, 10 N. W. 703; State *v.* Weston, 4 Nebr. 234.
New Jersey.— State *v.* Duryee, 65 N. J. L. 449, 47 Atl. 1064.
Wisconsin.— State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.
See 44 Cent. Dig. tit. "States," § 61 *et seq.*

its occupation and exercise, and only a person having a right to the office can recover the salary thereof;[80] and where the title to the office is in dispute, the salary cannot be recovered until the question of title is settled by a competent tribunal.[81] Where an officer dies during a fiscal unit of time and a successor is appointed to fill out the time, the compensation for the period should be *pro rated*.[82]

b. Increase or Reduction. A common constitutional provision is that the compensation of public officers shall not be increased or diminished during their term of office;[83] but under a constitutional provision that the compensation of senators and representatives shall be a certain sum and that no increase shall be prescribed to take effect during the term for which the members of the existing legislature may have been elected, the legislature may increase the compensation of its members, to take effect at the next ensuing term.[84] In the absence of such restriction, the compensation and duties of officers may be increased or diminished at the will of the legislature.[85]

c. Double or Extra Compensation. Where the law so provides, an officer is entitled only to the compensation fixed by law;[86] but such a provision does not prevent his receiving compensation as the incumbent of another office which he may lawfully hold,[87] and an officer is entitled to extra compensation for extra services not incompatible with the duties of the office.[88] Where the constitution provides that an officer shall perform such duties as may be prescribed by law an officer who is required to perform additional duties to those already prescribed is not entitled to additional compensation therefor unless so provided by law;[89] and no additional compensation can be allowed by law where this would be an increase within the meaning of the constitutional prohibition.[90]

d. Payment, Allowance, and Recovery. Sometimes the salary of state officers is made by law a preferred claim against the state;[91] and a state officer may retain in his possession property in respect to which he has rendered services until his compensation is paid;[92] and an agent or attorney who has collected funds for the state may apply so much thereof as may be necessary in payment of his claim for compensation and expense,[93] unless the law provides otherwise;[94]

80. Baxter *v.* Brooks, 29 Ark. 173; People *v.* Oulton, 28 Cal. 44.

81. Baxter *v.* Brooks, 29 Ark. 173. But see State *v.* Draper, 48 Mo. 213.

82. State *v.* Dyer, 106 Iowa 640, 77 N. W. 329.

83. See the constitutions of the several states. And see Carlile *v.* Henderson, 17 Colo. 532, 31 Pac. 117; Bailey *v.* Kelly, 70 Kan. 869, 79 Pac. 735; Warner *v.* Board of State Auditors, 128 Mich. 500, 87 N. W. 638, 129 Mich. 648, 89 N. W. 591; State *v.* Kelsey, 44 N. J. L. 1; Thomas *v.* State, 17 S. D. 579, 97 N. W. 1011; Collins *v.* State, 3 S. D. 18, 51 N. W. 776; State *v.* Tingey, 24 Utah 225, 67 Pac. 33.

84. State *v.* Scott, 105 Minn. 513, 117 N. W. 845, 1044.

85. Walker *v.* Dunham, 17 Ind. 483.

86. *Arkansas.*— Woodruff *v.* State, 3 Ark. 285.

Idaho.— State *v.* Lewis, (1898) 52 Pac. 163.

Kentucky.— Finley *v.* Stone, 106 Ky. 207, 48 S. W. 428, 21 Ky. L. Rep. 38; Wortham *v.* Grayson County Ct., 13 Bush 53.

Missouri.— State *v.* Holladay, 67 Mo. 64.

Wisconsin.— State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

See 44 Cent. Dig. tit. "States," § 61.

The allowance to the governor of the use of the executive mansion is not other compensation within the prohibition. State *v.* Sheldon, 78 Nebr. 552, 111 N. W. 372.

87. *Missouri.*—State *v.* Walker, 97 Mo. 162, 10 S. W. 473.

Nebraska.— State *v.* Weston, 4 Nebr. 234.

Nevada.— State *v.* La Grave, (1897) 48 Pac. 193.

South Dakota.— State *v.* Reddle, 12 S. D. 433, 81 N. W. 980.

Wyoming.— State *v.* Grant, 12 Wyo. 1, 73 Pac. 470.

See 44 Cent. Dig. tit. "States," § 61.

88. Cornell *v.* Irvine, 56 Nebr. 657, 77 N. W. 114.

89. Young *v.* Millett, 19 Wash. 486, 53 Pac. 823.

90. Warner *v.* State Auditors, 128 Mich. 500, 87 N. W. 638, 129 Mich. 648, 89 N. W. 591.

91. People *v.* Goodykoontz, 22 Colo. 507, 45 Pac. 414; Parks *v.* People, 22 Colo. 86, 43 Pac. 542.

92. Ripley *v.* Gifford, 11 Iowa 367.

93. State *v.* Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469; Com. *v.* Evans, 2 Leg. Op. (Pa.) 3.

94. Swann *v.* Josselyn, 14 Sm. & M. (Miss.) 106.

but if, without retaining his compensation, the officer or agent pays the money into the state treasury, the state becomes his debtor, and he can recover his claim only by a legislative appropriation.[95] Where money payable to one officer has been improperly paid to another, the former cannot recover from the latter, but his claim is against the state, which may recover back the money improperly paid.[96]

e. Recovery by State of Excessive or Illegal Compensation or Fees Paid to Officer or Agent. The state may recover the amount of excessive or illegal compensation or fees paid to an officer or agent in an action brought against him,[97] even though paid under a mistake of law.[98]

14. Authority and Powers of Officers and Agents. The authority and powers of particular state officers and agents are determined by law, and the power conferred on a state officer by statute cannot be varied or enlarged by usage or by the construction placed on the statute by the state officer.[99] The powers of the general executive officers of the state are not usually conferred in detail, and such officers may exercise powers naturally falling within the scope of their general authority, although not expressly conferred.[1] A state is bound as a natural person by the acts of its authorized agents within the scope of their authority;[2] but a state officer or agent can act only within the powers conferred upon him, and the state is not bound by his unauthorized acts,[3] and individuals as well as courts must take notice of the nature and extent of the authority conferred by law on state officers and agents.[4]

15. Duties of Officers and Agents and Performance Thereof — a. In General. The position of a state officer is that of an agent or servant of the government rather than that of a party to a contract with the state.[5] Their duties are defined and prescribed by law, and in the performance of their duties they are bound by the provisions of the law;[6] but not by joint resolutions not having the force of

An order of court allowing attorneys employed by the state in a certain action a certain portion of the money collected by the suit is not binding on the state. State *v.* Corbin, 16 S. C. 533.

95. Whittemore *v.* People, 227 Ill. 453, 81 N. E. 427; Mabry *v.* Brown, 12 Heisk. (Tenn.) 597.

96. Trumbull *v.* Campbell, 8 Ill. 502.

97. Com. *v.* Norman, 50 S. W. 225, 20 Ky. L. Rep. 1893; Com. *v.* Field, 84 Va. 26, 3 S. E. 882. See also Trumbull *v.* Campbell, 8 Ill. 502; *In re* Benton, 66 Vt. 507, 29 Atl. 805.

98. Ellis *v.* Board of State Auditors, 107 Mich. 528, 65 N. W. 577. See also Com. *v.* Barker, 126 Ky. 200, 103 S. W. 303, 31 Ky. L. Rep. 648.

99. Hord *v.* State, 167 Ind. 622, 79 N. E. 916.

1. Jackson *v.* Brown, 5 Wend. (N. Y.) 590.

2. Luse *v.* Rankin, 57 Nebr. 632, 78 N. W. 258; State *v.* Jefferson Turnpike Co., 3 Humphr. (Tenn.) 305. And see *infra*, V, A, 2.

3. *California.*— San Francisco, etc., Land Co. *v.* Banbury, 106 Cal. 129, 39 Pac. 439.

Georgia.— Alexander *v.* State, 56 Ga. 478.

Iowa.— State *v.* Haskell, 20 Iowa 276.

Michigan.— Hammond *v.* Michigan State Bank, Walk. 214.

New Hampshire.— Chandler *v.* Eastman, 75 N. H. 88, 71 Atl. 221.

United States.— Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502.

See 44 Cent. Dig. tit. "States," § 68 *et seq.*

No executive officer can incur a state debt except by acts authorized by law. *In re* Incurring State Debts, 19 R. I. 610, 37 Atl. 14.

A payment of money to an officer not authorized to receive moneys due the state does not bind the state. Van Dyke *v.* State, 24 Ala. 81; State *v.* Home Ins. Co., 59 Nebr. 524, 81 N. W. 443; Moore *v.* State, 53 Nebr. 831, 74 N. W. 319.

The state auditor of Indiana is, under Burns Annot. St. (1908) § 9218, defining his duties, the accounting officer of the state, and he has no right to collect moneys except fees for official services for or on behalf of the state, without special authority conferred by statute. Daily *v.* State, 171 Ind. 646, 87 N. E. 4.

The authority of a public corporation created as agent of the state may be very extensive in the direction in which it is intended to be used, but it not only has less authority in other directions than ordinary citizens, but has none whatever, and the authority conferred upon it can be sustained only in so far as not divested or controlled by authority emanating from the same or a higher source. Chanvin *v.* Louisiana Oyster Commission, 121 La. 10, 46 So. 38.

4. State *v.* Hays, 52 Mo. 578; Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502.

5. People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520.

6. See Pinckney *v.* Henegan, 2 Strobh. (S. C.) 250, 49 Am. Dec. 592.

law.[7] In the absence of constitutional restrictions, the duties of a state officer may be increased or diminished at the will of the legislature;[8] but the legislature cannot take from an officer the powers and duties given him by the constitution.[9] A state officer will be presumed to have done his duty, and his acts will be presumed to be regular, until the contrary is shown;[10] but this rule does not apply to mere agents appointed by the legislature for a special service.[11] The official acts of state officers must be performed personally except when otherwise allowed by law.[12]

b. Accounting and Settlement. It is the duty of officers receiving and disbursing moneys of the state to keep accounts and make reports as provided by law,[13] the settlement of accounts between a state and its officers being governed in general by the rules affecting accounts between individuals,[14] subject to any statutory provisions on the subject.[15] Records of accounts of state officers have ordinarily no judicial character, but are mere books of entries of one party to an account, and open to correction;[16] but a settlement of accounts by the state through its authorized officers is binding on the state in the absence of fraud or mistake.[17] An account may be corrected in equity at the suit of the state for mistake.[18]

16. Liability of Officers[19] — a. In General. A state officer or agent who contracts for and in the name of the state is not personally liable on the contract;[20] and an officer who acts within his official duty is not liable to individuals for his acts.[21] While state officers are not ordinarily liable to individuals for mere non-

Where an office has no duties attached to it by the constitution, the officer has no claim of right to discharge any given service. Branham *v.* Lange, 16 Ind. 497.

Duty to keep office open.— Under Ida. Rev. St. (1887) § 452, the secretary of state is required to keep his office open for public business from ten A. M. until four P. M., except on holidays; but, although he is not required to keep his office open after four P. M., if he does so, and is transacting business of the public there, it is his duty to receive such business as is presented to him. Grant *v.* Lansdon, 15 Ida. 342, 97 Pac. 960.

7. Burritt *v.* State Contract Com'rs, 120 Ill. 322, 11 N. E. 180. But see Pinckney *v.* Henegan, 2 Strobh. (S. C.) 250, 49 Am. Dec. 592.

8. Walker *v.* Dunham, 17 Ind. 483; People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520. Where the constitution provides that an officer shall perform such duties as shall be prescribed by law, the legislature may increase the duties of the officer without allowing additional compensation. Young *v.* Millett, 19 Wash. 486, 53 Pac. 823.

9. *In re* House Resolution, etc., 12 Colo. 395, 21 Pac. 486.

10. Mills' Nat. Bank *v.* Herold, 74 Cal. 603, 16 Pac. 507, 5 Am. St. Rep. 476; State *v.* McCarty, Wils. (Ind.) 205; Philadelphia *v.* Com., 52 Pa. St. 451.

11. Pitman *v.* Brownlee, 2 A. K. Marsh. (Ky.) 210.

12. Beam *v.* Jennings, 96 N. C. 82, 2 S. E. 245. And see *supra*, III, C, 7.

13. Madden *v.* Hardy, 92 Tex. 613, 50 S. W. 926.

14. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 380; Wilson *v.* Burfoot, 2 Gratt. (Va.) 134.

15. People *v.* Melone, 73 Cal. 574, 15 Pac. 294; Smith *v.* Nicholson, 4 Yeates (Pa.) 6; Com. *v.* Evans, 2 Leg. Op. (Pa.) 3; State *v.* Buchanan, (Tenn. Ch. App. 1898) 52 S. W. 480.

16. Young *v.* Com., 28 Pa. St. 501.

17. Mason, etc., Co. *v.* Com., 36 S. W. 570, 18 Ky. L. Rep. 371; State *v.* Crutcher, 2 Swan (Tenn.) 504. See also State *v.* Allen, (Tenn. Ch. App. 1898) 46 S. W. 303.

In Pennsylvania, by statute, accounts with state officers are conclusive on such officers unless appealed from within the time allowed for appeal. Philadelphia *v.* Com., 52 Pa. St. 451; Hays *v.* Com., 27 Pa. St. 272; Hultz *v.* Com., 3 Grant 61; Respublica *v.* Bruce, 4 Yeates (Pa.) 361; Respublica *v.* Sergeant, 3 Yeates 543.

18. See Com. *v.* Webb, 42 S. W. 737, 19 Ky. L. Rep. 944.

19. **Liability of public officers** generally see OFFICERS, 29 Cyc. 1440 *et seq.*

20. *Connecticut.*— Osgood *v.* Grosvenor, 1 Root 89.

Kentucky.— Shuck *v.* Coulter, 90 S. W. 271, 28 Ky. L. Rep. 817.

Massachusetts.— Dawes *v.* Jackson, 9 Mass. 490.

North Carolina.— Stanly *v.* Hawkins, 3 N. C. 52.

Pennsylvania.— West *v.* Jones, 9 Watts 27.

Virginia.— Tutt *v.* Lewis, 3 Call 233.

United States.—New York, etc., Steamship Co. *v.* Harbison, 16 Fed. 688, 21 Blatchf. 332. See 44 Cent. Dig. tit. "States," § 78.

21. Litchfield *v.* Bond, 105 N. Y. App. Div. 229, 93 N. Y. Suppl. 1016 [*reversed* on other grounds in 186 N. Y. 66, 78 N. E. 719]. See also Daley *v.* Bd. of Public Works, 9 Ohio Dec. (Reprint) 18, 11 Cinc. L. Bul. 25; Roan *v.* Raymond, 15 Tex. 78.

Arrest by sergeant-at-arms.— It being a part of the duty of the sergeant-at-arms of

feasance in office, they are liable for misfeasance or positive wrong to third persons in the discharge of their official functions,[22] and an officer is liable for acts done without authority of law or under authority of a void law.[23] State officers are not personally liable for the wrongful acts of agents, servants, or other persons acting under them when they have themselves been guilty of no personal neglect, misfeasance, or wrong;[24] but an officer who has power to require a bond of a state employee and who fails to take such bond is responsible for the employee's default.[25] An officer cannot be held responsible for the derelictions of his predecessor with which he was not connected.[26]

b. To State. A state officer cannot be held liable to the state for the manner in which he has exercised his official discretion, although the state has thereby suffered loss;[27] and an incumbent of a state office, of which the duration and salary are definitely fixed by law, is not accountable to the state auditor for the manner in which he has discharged the duties of his office,[28] nor is a state officer responsible for the loss of state property unless due to his negligence;[29] and an officer who under an honest mistake as to the extent of his powers acts without authority of law is not liable to the state where no damage results thereto from his unauthorized act.[30] But a state officer may be held liable for money embezzled by himself or by a subordinate for whom he is responsible.[31]

c. On Official Bonds. It is well settled that a state treasurer,[32] or other state

the legislature to arrest and detain such persons as the legislature may direct, he cannot be held liable therefor by the person so arrested and detained. Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676; Canfield *v.* Gresham, 82 Tex. 10, 17 S. W. 390.

22. Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Bright *v.* Murphy, 105 La. 795, 30 So. 145; Litchfield *v.* Pond, 186 N. Y. 66, 78 N. E. 719. See also Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44.

By statute they may be made liable for nonfeasance. Switzler *v.* Rodman, 48 Mo 197.

23. Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832; Booth *v.* Lloyd, 33 Fed. 593. See also Michigan State Bank *v.* Hammond, 1 Dougl. (Mich.) 527. And see *infra*, IX, B, 2, b, (III).

24. Riggin *v.* Brown, 59 Fed. 1005; Mister *v.* Brown, 59 Fed. 909.

25. Board of Control *v.* Royes, 48 La. Ann. 1061, 20 So. 182.

26. Nance *v.* Stuart, 12 Colo. App. 125, 54 Pac. 867 [*affirmed* in 28 Colo. 194, 63 Pac. 323].

27. State *v.* Buchanan, (Tenn. Ch. App. 1898) 52 S. W. 480.

28. Cornell *v.* Irvine, 56 Nebr. 657, 77 N. W. 114.

29. State *v.* Chilton, 49 W. Va. 453, 39 S. E. 612.

30. State *v.* Allen, (Tenn. Ch. App. 1898) 46 S. W. 303.

Liability for sale on credit.— But where a state officer authorized to sell state property for cash sells without authority on credit he is accountable for the price as if sold for cash. State *v.* Chilton, 49 W. Va. 453, 39 S. E. 612.

31. Brown *v.* Sneed, 77 Tex. 471, 14 S. W. 248.

32. *Arkansas.*— State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880; State *v.* Newton, 33 Ark. 276; Woodruff *v.* State, 3 Ark. 285.

Colorado.— *In re* House Resolution, etc., 12 Colo. 395, 21 Pac. 486.

Indiana.— State *v.* Kimball, Wils. 174.

Kentucky.— Com. *v.* Tate, 89 Ky. 587, 13 S. W. 113, 12 Ky. L. Rep. 1.

Minnesota.— State *v.* Bobleter, 83 Minn. 479, 86 N. W. 461.

Nebraska.— State *v.* Hill, 47 Nebr. 456, 66 N. W. 541.

Nevada.— State *v.* Rhoades, 7 Nev. 434.

New Jersey.— State *v.* Sooy, 39 N. J. L. 539 [*affirmed* in 41 N. J. L. 394].

Pennsylvania.— Com. *v.* Baily, 129 Pa. St. 480, 10 Atl. 764.

Vermont.— State *v.* Bates, 36 Vt. 387.

Virginia.—Wilson *v.* Burfoot, 2 Gratt. 134.

Wisconsin.— State *v.* Harshaw, 84 Wis. 532, 54 N. W. 17; State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

See 44 Cent. Dig. tit. "States," § 80.

A mere irregularity of the treasurer in making a payment, where the money was paid to the proper person and applied to the proper use, is not a breach of his bond. State *v.* Baetz, 44 Wis. 624.

Entries in the treasurer's books of account are competent evidence against him and his sureties in an action on his bond. State *v.* Newton, 33 Ark. 276; Com. *v.* Tate, 89 Ky. 587, 13 S. W. 113, 12 Ky. L. Rep. 1; Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689; State *v.* Rhoades, 6 Nev. 352; Sooy *v.* State, 41 N. J. L. 394; Baker *v.* Preston, Gilm. (Va.) 235.

Allegations in petition justifying only nominal damages.—A petition which alleges that the state treasurer, having custody of a municipal warrant issued for a debt to the state, sold it without authority before it was reached for payment for its face and interest, turning the money into the treasury, does not show ground for recovery by the state for more

officer,[33] and his sureties are liable on his official bond for his defaults in office as contemplated by the bond. But no action can be maintained against the sureties on an officer's bond for defaults of the officer in connection with duties not belonging to his office and not contemplated by the bond; such default not constituting a breach of the bond,[34] although the officer may himself be held liable on his bond for such defaults.[35] The sureties on the bond given for one term are not liable for the officer's defaults during another term, the bond given for one term not covering official acts during another term.[36] The fact that the officer acted in good faith is in itself no defense to an action on his bond for a breach thereof;[37] but it is a good defense that the bond was invalid because not properly executed,[38] or on account of fraudulent representations to the sureties.[39] The release of sureties is sometimes provided for by statute;[40] but the mere fact that new duties have been imposed upon the principal by law,[41] or that the negligence of other officers made the principal's default possible,[42] will not relieve the sureties. Where a bond is made payable to an officer, suit thereon should ordinarily be brought in the name of the officer and not in the name of the state;[43] and where by law the bond is required to be given to the state, and there is no provision for its transfer to individuals aggrieved by the wrongful acts of the officer, the obligation of the bond cannot be extended so as to inure to their benefit.[44] The statute of limitations does not operate

than nominal damages against the treasurer, where there is no allegation that the warrant at the time of the sale was worth more than the amount paid for it, and the lack of such allegation is not supplied by an averment that some time after sale the warrant was paid in full by the municipality, with interest to the date of payment. State *v.* Kelly, 78 Kan. 42, 96 Pac. 40, holding also that where the state treasurer having custody of a municipal warrant sells it without authority before funds have been raised by the municipality for its redemption, and thereby becomes liable for its conversion, the measure of damages to the state does not necessarily include interest up to the time of payment.

33. *Florida.*— Bemis *v.* State, 3 Fla. 12.

Indiana.— State *v.* McCarty, Wils. 205.

Kentucky.— Sweeney *v.* Com., 118 Ky. 912, 82 S. W. 639, 26 Ky. L. Rep. 877.

Nebraska.— State *v.* Moore, 56 Nebr. 82, 76 N. W. 474.

Oregon.— State *v.* Davis, 42 Oreg. 34, 71 Pac. 681, 72 Pac. 317.

Pennsylvania.— Hultz *v.* Com., 3 Grant 61.

See 44 Cent. Dig. tit. "States," § 80.

34. *Georgia.*— Renfroe *v.* Colquitt, 74 Ga. 618.

Louisiana.— Saltenberry *v.* Loucks, 8 La. Ann. 95.

Mississippi.— Furlong *v.* State, 58 Miss. 717.

Nebraska.— State *v.* Moore, 56 Nebr. 82, 76 N. W. 474; State *v.* Holcomb, 46 Nebr. 612, 65 N. W. 873.

New York.— People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520.

Ohio.— State *v.* Medary, 17 Ohio 554.

Tennessee.— State *v.* Thomas, 88 Tenn. 491, 12 S. W. 1034.

Texas.— Brown *v.* Sneed, 77 Tex. 471, 14 S. W. 248.

See 44 Cent. Dig. tit. "States," § 80.

35. Brown *v.* Sneed, 77 Tex. 471, 14 S. W. 248. See also State *v.* Thomas, 88 Tenn. 491, 12 S. W. 1034.

36. State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880; Mulliken *v.* State, 7 Blackf. (Ind.) 77; State *v.* Powell, 40 La. Ann. 241, 4 So. 447; Public Accounts Com'rs *v.* Greenwood, 1 Desauss. Eq. (S. C.) 450.

Where the officer holds over until his successor qualifies, the original bond covers defalcations during the time between the expiration of his original term and the giving of a new bond. Archer *v.* State, 74 Md. 410, 22 Atl. 6, 737.

By statute in Kentucky where the sureties on successive bonds are the same, one action may be brought on the several bonds, the bonds being set out in separate paragraphs. Com. *v.* Tate, 89 Ky. 608, 13 S. W. 117, 12 Ky. L. Rep. 9.

37. Dodd *v.* State, 18 Ind. 56; Allen *v.* Com., 83 Va. 94, 1 S. E. 607.

But where the charge is fraud the question of good faith is of course important. See Jones *v.* Smith, 64 Ga. 711.

38. Mayo *v.* Renfroe, 66 Ga. 408.

Where the statute requires a joint and several bond from the officer, if a bond is executed and accepted which purports to bind each surety for a certain part only of the whole penalty, a surety cannot be held for more. State *v.* Polk, 14 Lea (Tenn.) 1.

39. State *v.* Sooy, 38 N. J. L. 324, 39 N. J. L. 135. See also State *v.* Bates, 36 Vt. 387.

40. State *v.* Laughton, 19 Nev. 202, 8 Pac. 344.

41. People *v.* Vilas, 36 N. Y. 459, 93 Am. Dec. 520; State *v.* Buchanan, (Tenn. Ch. App. 1898) 52 S. W. 480.

42. Com. *v.* Tate, 89 Ky. 587, 13 S. W. 113, 12 Ky. L. Rep. 1.

43. Galbraith *v.* State, 10 Lea (Tenn.) 568; State *v.* Bates, 36 Vt. 387.

44. Saltenberry *v.* Loucks, 8 La. Ann. 95.

against the state in an action on an officer's bond,[45] except where expressly so provided;[46] but the rule that limitations do not run against the state does not apply to suits on official bonds taken in the name of the state for the use of individuals.[47]

d. Criminal Liability. State officers are liable to criminal prosecution for offenses committed by them as officers;[48] but ordinarily an officer is not liable criminally for his official action except where he acts wilfully, maliciously, or corruptly.[49]

D. State Institutions, Corporations, and Public Works — 1. In General. The establishment, support, management, and control of state institutions, such as asylums, educational institutions, reformatories, prisons, and the like, are provided for and regulated by law.[50] These institutions are frequently, if not usually, corporations owned and controlled by the state;[51] and the state, in the absence of a constitutional prohibition, may be the sole stock-holder in a corporation of a public character such as a state bank.[52] But in several states the state is prohibited by the constitution from becoming joint owner or stock-holder in any company, association, or corporation.[53]

2. Public Improvements and Works. The construction, maintenance, or operation of public improvements or works is provided for by law, and is usually committed to boards, commissioners, or other officers;[54] and in the absence of any constitutional prohibition, the legislature may authorize the construction by state officers of works of internal improvement.[55] But in some of the states the constitution expressly prohibits the state from engaging in any work of internal improvement.[56]

IV. PROPERTY.

A. Acquisition and Tenure — 1. In General. A state has in general the same rights and powers in respect to property as an individual. It may acquire property, real or personal, by conveyance, will, or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit.[57] The power of the state in respect to its property rights is vested in the legislature, and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose.[58] The

45. Ware *v.* Greene, 37 Ala. 494; Brown *v.* Sneed, 77 Tex. 471, 14 S. W. 248.

46. Furlong *v.* State, 58 Miss. 717. See also State *v.* Davis, 42 Oreg. 34, 71 Pac. 68, 72 Pac. 317.

47. State *v.* Pratte, 8 Mo. 286, 40 Am. Dec. 140.

48. State *v.* Strong, 39 La. Ann. 1081, 3 So. 266; State *v.* Cardoza, 11 S. C. 195.

49. State *v.* Hastings, 37 Nebr. 96, 55 N. W. 774.

50. See Asylums, 4 Cyc. 362, and Cross-References Thereunder.

51. See Georgia Military Inst. *v.* Simpson, 31 Ga. 273; Opinion of Justices, 70 N. H. 638, 50 Atl. 328.

52. Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257, 9 L. ed. 709, 928.

53. See the constitutions of the several states. And see Holland *v.* State, 15 Fla. 455; Answers to Questions by Governor, 37 Mo. 129.

54. See State *v.* Hastings, 37 Nebr. 96, 55 N. W. 774; Robinson *v.* Chamberlain, 34 N. Y. 399, 90 Am. Dec. 713; People *v.* Comptroller, 20 Wend. (N. Y.) 595; Bridges *v.* Shallcross, 6 W. Va. 562; Shipman *v.* State, 42 Wis. 377.

55. Holland *v.* State, 15 Fla. 455; Clarke *v.* Rochester, 24 Barb. (N. Y.) 446 [*affirmed* in 28 N. Y. 605].

56. See the constitutions of the several states. And see Leavenworth County *v.* State, 7 Kan. 479, 12 Am. Rep. 425; Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551; Wilcox *v.* Paddock, 65 Mich. 23, 31 N. W. 609; Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549; Rippe *v.* Becker, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857. See also University R. Co. *v.* Holden, 63 N. C. 410.

57. Tomlin *v.* Cedar Rapids, etc., R., etc., Co., 141 Iowa 599, 120 N. W. 93; State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; Sinking Fund Com'rs *v.* Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; People *v.* Fisher, 190 N. Y. 468, 83 N. E. 482. See also Baltimore County Com'rs *v.* Maryland Hospital for Insane, 62 Md. 127; Boston Molasses Co. *v.* Com., 193 Mass. 387, 79 N. E. 827.

A state may acquire property in the form of a mortgage.— See Wilmington, etc., R. Co. *v.* Western R. Co., 66 N. C. 90.

As to title of state to land under navigable waters and to property found therein see the title Navigable Waters, 29 Cyc. 356.

58. State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; Sunbury, etc., R. Co. *v.* Cooper, 33 Pa. St. 278.

legislature may, however, ratify the unauthorized act of a state officer in dealing with its property.[59] The possession of state property by the authorized agents and officers of the state is the possession of the state.[60]

2. LAND SITUATED IN ANOTHER STATE. A state cannot hold land in another state if the latter state objects thereto;[61] but it may do so with the consent of such other state;[62] and where a state has acquired land in another state with the tacit consent of the latter, its title can be divested only by some proceeding by that state in the nature of office found; it cannot be impeached by a private individual in the absence of any action by the state.[63] When a state purchases land in another state from a private person it holds such land as a subject and not as a sovereign.[64] So also where a state grants land within its territory to a sister state, reserving the right and title of government, sovereignty, and jurisdiction, the grantee state assumes merely the position of a private proprietor, and holds its estate subject to all the incidents of ordinary ownership.[65]

B. Public Buildings. The legislature has power to provide for the acquisition of public buildings for the use of the state. Thus it may authorize the construction of a state house or other public building, subject to any limitation placed by the constitution on this power,[66] or it may buy or rent buildings for the use of the state.[67]

C. Results of Labor of State Employees. The results of the labor of a state employee, while working in the service of the state and with its materials, belong to the state, and the employee has no title thereto.[68]

D. Sales and Conveyances. The power to dispose of state property is vested in the legislature which may make provision therefor by statute,[69] and the statutory provisions must be complied with or the sale will be void.[70] The legislature may, however, ratify an unauthorized sale.[71] A deed executed by a state officer in behalf of the state, under authority of the legislature, is a sufficient conveyance of land belonging to the state;[72] and a conveyance executed by the duly authorized officers passes the state's title, although executed in the names of the officers and not in the name of the state;[73] but a conveyance of land to a state officer as such and his successors in office is not sufficient to vest title in the state, in the absence of evidence that the land was bought for the state, or that the officer was authorized to take title for the state in his own name.[74] A sale of state property by authorized officers is binding on the state, although the

Only the legislature can accept a bequest of property to the state in trust. State *v.* Blake, 69 Conn. 64, 36 Atl. 1019.

59. State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395.

60. Michigan State Bank *v.* Hastings, Walk. (Mich.) 9; People *v.* Bank of North America, 75 N. Y. 547.

An act providing for the purchase by the state of copies of the printed statutes of the state for distribution among the officers of the state does not necessarily vest title to such statutes in the officers receiving them. Marsh *v.* Stonebraker, 71 Nebr. 224, 98 N. W. 699, 65 L. R. A. 607.

61. Dodge *v.* Briggs, 27 Fed. 160.

62. Dodge *v.* Briggs, 27 Fed. 160.

63. Dodge *v.* Briggs, 27 Fed. 160.

64. Dodge *v.* Briggs, 27 Fed. 160.

65. Burbank *v.* Fay, 65 N. Y. 57.

66. See *infra*, V, E, 1.

67. Harris *v.* Dubuclet, 30 La. Ann. 662. See also Williams *v.* Mansur, 70 Ind. 41; Ormsby County *v.* State, 6 Nev. 283.

68. Com. *v.* Desilver, 3 Phila. (Pa.) 31, map made by draughtsman employed by state.

69. State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. St. Rep. 395. See also Bartlett *v.* Crawford, 36 Ark. 637; Sunbury, etc., R. Co. *v.* Cooper, 33 Pa. St. 278.

A state, through its legislature, may convey property to be held in trust for any public or private purpose. Sinking Fund Com'rs *v.* Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433.

A gift of public property unless by an officer or body clearly authorized to make it is void. Sixth Dist. Agricultural Assoc. *v.* Wright, 154 Cal. 119, 97 Pac. 144.

70. State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; State *v.* Missouri Bank, 45 Mo. 528; Gwyn *v.* Coffey, 117 N. C. 469, 23 S. E. 331.

71. State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395.

The ratification can be made only by the legislature.— State *v.* State Bank, 45 Mo. 528.

72. Dodge *v.* Briggs, 27 Fed. 160.

73. Sheets *v.* Selden, 2 Wall. (U. S.) 177, 17 L. ed. 822. See also Stinchfield *v.* Little, 1 Me. 231, 10 Am. Dec. 65.

74. State *v.* Evans, 33 S. C. 184, 11 S. E. 697.

officers refuse to execute the contract, and the law authorizing the sale is afterward repealed, and the officers can be compelled to complete the sale.[75] A state does not warrant the title to land which it grants,[76] but a grantee from the state is not estopped to deny what the state could assert.[77] A statute authorizing state officers to sell or dispose of state property vests no title to such property in the officers.[78]

E. Indebtedness to State — 1. Interest. In general debts due a state bear interest upon the same principles as debts due a private creditor.[79]

2. Priority of State as Creditor. In some states it is held that by the common law the state, as sovereign, is entitled to preference as creditor;[80] but in other states it is held that no such priority exists unless secured by constitution or statute;[81] and where such priority is recognized, it is defeated by a general assignment for the benefit of creditors.[82] The state through its legislature may waive its liens in favor of other creditors.[83] A surety of a deceased debtor to the state, who has paid the debt to the state, is entitled to be subrogated to the state's prior claim in the distribution of the debtor's assets.[84]

3. Settlement or Release. Except so far as restrained by her constitution, a state has power through her agents to make an amicable settlement or adjustment with her debtors,[85] and the legislature may release a debt due to the state,[86] unless such release is prohibited by the constitution.[87] Such a provision, however, is not intended to embrace a release of claims doubtful or hazardous which the state might hold against a corporation or individual.[88]

V. CONTRACTS.

A. Power to Contract — 1. In General. The state has, in general, the same power to contract as a corporation or an individual.[89] Thus a state may contract with an individual or with another state by an act of the legislature.[90]

75. Baldwin *v.* Com., 11 Bush (Ky.) 417.

76. State *v.* Crutchfield, 3 Head (Tenn.) 113.

As to covenants in deeds by state officers see American Dock, etc., Co. *v.* Public Schools, 35 N. J. Eq. 181.

77. Den *v.* Lunsford, 20 N. C. 542.

78. Bartlett *v.* Crawford, 36 Ark. 637.

79. Com. *v.* Cooke, 50 Pa. St. 201; Chevallier *v.* State, 10 Tex. 315.

80. Robinson *v.* Darien Bank, 18 Ga. 65; State *v.* Baltimore, 10 Md. 504; Davidson *v.* Clayland, 1 Harr. & J. (Md.) 546; Green's Estate, 4 Md. Ch. 349; Jones *v.* Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327; U. S. Fidelity, etc., Co. *v.* Rainey, 120 Tenn. 357, 113 S. W. 397, holding that the state is entitled to priority over other creditors of a defaulting public officer in the collection of its delinquent revenue on his bond.

Priority of state in distribution of decedent's estate see Executors and Administrators, 18 Cyc. 550.

Priority of state in payment of insolvent's debts see Insolvency, 22 Cyc. 1320.

81. Middlesex County *v.* New Brunswick State Bank, 29 N. J. Eq. 268 [*affirmed* in 30 N. J. Eq. 311].

The preference was abolished in Louisiana by statute. State *v.* Wright, 8 Mart. N. S. (La.) 316.

82. State *v.* State Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 63 Am. St. Rep. 47, 29 L. R. A. 226.

The same rule applies where a receiver is appointed for an insolvent corporation. State *v.* Williams, 101 Md. 529, 61 Atl. 297, 109 Am. St. Rep. 579, 1 L. R. A. 254.

83. Com. *v.* Chesapeake, etc., Canal Co., 32 Md. 501; Brady *v.* State, 26 Md. 290.

84. Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286.

85. Franklin *v.* Hammond, 45 Pa. St. 507.

A tender of state warrants in payment of a debt due the state is not good. Kentucky Chair Co. *v.* Com., 105 Ky. 455, 49 S. W. 197, 20 Ky. L. Rep. 1279.

86. Ernst *v.* Ernst, 1 Ill. 316; Ernst *v.* State Bank, 1 Ill. 86; State *v.* Hendrickson, 15 Md. 205; Green's Estate, 4 Md. Ch. 349.

A state and a corporation indebted to it may make a contract releasing such indebtedness on consideration of the payment of an annuity. Northern Cent. R. Co. *v.* Hering, 93 Md. 164, 48 Atl. 461.

87. Burr *v.* Carbondale, 76 Ill. 455; Adams *v.* Fragiacomo, 71 Miss. 417, 15 So. 798; State *v.* Mellette, 16 S. D. 297, 92 N. W. 395; Darby *v.* Wright, 6 Fed. Cas. No. 3,574, 3 Blatchf. 170.

88. Burr *v.* Carbondale, 76 Ill. 455.

89. State *v.* Cobb, 64 Ala. 127; Woodruff *v.* State, 3 Ark. 285.

90. Com. *v.* Collins, 12 Bush (Ky.) 386; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; State *v.* Junkin, 81 Nebr. 118, 115 N. W. 546; New Jersey *v.* Wilson, 7 Cranch (U. S.) 164, 3 L. ed. 303;

But the power of a state to contract may be limited by provisions of its constitution, and contracts in contravention of such limitations are void;[91] and the state's power to contract is subject to the further limitation that a state cannot by contract divest itself of the essential attributes of sovereignty, such as the police power, or the power of eminent domain, and the like.[92]

2. Contracts Made by Officers or Agents — a. In General. The contracts of a state are usually made by duly authorized officers or agents. The state is bound by contracts executed in its behalf by its authorized officers or agents;[93] and a contract made by state officers under statutory authority binds the state notwithstanding the subsequent repeal of the statute authorizing it.[94] But it is sometimes provided that officers must not be interested in any contract made by them in their official capacity, and a contract made by an interested officer does not bind the state.[95] The authority to bind the state by contract need not be express, but may be implied;[96] but it must be an actual as distinguished from an apparent authority,[97] and cannot be varied or enlarged by mere usage.[98] Where

Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162.

No contract can arise between a state and a corporation by implication from anything but the plain words of an act of legislature. Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

Where the contract is required to be made by act of legislature, a joint committee of the legislature has no power to contract on behalf of the state unless authorized by order of both branches of the legislature. Washburn *v.* Com., 137 Mass. 139. Nor can a resolution passed by only one branch confer authority upon a state officer to contract for the state. Field *v.* Auditor, 83 Va. 882, 3 S. E. 707.

91. *Colorado.*— Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827.

Michigan.— Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549; Ryerson *v.* Utley, 16 Mich. 269.

Minnesota.— Minnesota Sugar Co. *v.* Iverson, 91 Minn. 30, 97 N. W. 454.

Nebraska.—Oxnard Beet Sugar Co. *v.* State, 73 Nebr. 57, 102 N. W. 80, 105 N. W. 716.

New York.— Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400.

South Dakota.— Stanton *v.* State, 5 S. D. 515, 59 N. W. 738.

Texas.— Houston, etc., R. Co. *v.* State, (Civ. App. 1897) 41 S. W. 157.

See 44 Cent. Dig. tit. "States," § 91 *et seq.*

A public contract for an article below cost is not "inimical to the public welfare," within Miss. Const. § 198. B. T. Johnson Pub. Co. *v.* Mills, 79 Miss. 543, 31 So. 101.

The constitution of the state is a part of state contracts. Marshall *v.* Clark, 22 Tex. 23

92. See Lynn *v.* Polk, 8 Lea (Tenn.) 121. And see Constitutional Law, 8 Cyc. 934.

93. Moore *v.* Garneau, 39 Nebr. 511, 58 N. W. 179; Van Dusen *v.* State, 11 S. D. 318, 77 N. W. 201. See also State *v.* Galusha, 26 Minn. 238, 2 N. W. 939, 3 N. W. 350; Com. *v.* Johnson, 33 Gratt. (Va.) 294.

Contract to be performed after expiration of contracting officer's term.—A contract made in good faith in the ordinary course of business by an authorized officer may bind the state, although not to be performed until after the expiration of such officer's term of office. Brown *v.* State, 14 S. D. 219, 84 N. W. 801.

A contract made by the acting president of Texas was binding on the republic. Preston *v.* Walsh, 10 Fed. 315.

Ratification of unauthorized contracts see *infra*, V, F.

94. People *v.* Brooks, 16 Cal. 11; Baldwin *v.* Com., 11 Bush (Ky.) 417.

95. McGehee *v.* Lindsay, 6 Ala. 16; Anderson *v.* Lewis, 6 Ida. 51, 52 Pac. 163.

An attorney at law who is a member of the legislature cannot, under S. D. Const. art. 3, § 12, recover for services rendered by him as attorney under a contract made with him under authority of an act passed while he was a member. Palmer *v.* State, 11 S. D. 78, 75 N. W. 818. See also Lillard *v.* Freestone County, 23 Tex. Civ. App. 363, 57 S. W. 338.

The interest contemplated is a direct personal interest in the profit or loss on the contract. State *v.* Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298. See also Newport Wharf, etc., Co. *v.* Drew, 125 Cal. 585, 58 Pac. 187.

The state will be entitled to any profit fraudulently made by the officers on contracts made by them for the state. State *v.* McKay, 43 Mo. 594.

96. Lewis *v.* Colgan, 115 Cal. 529, 47 Pac. 357; State *v.* Buchanan, (Tenn. Ch. App. 1901) 62 S. W. 287.

97. *Arkansas.*—Woodward *v.* Campbell, 39 Ark. 580.

California.— Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262.

Florida.— Camp *v.* McLin, 44 Fla. 510, 32 So. 927.

South Carolina.— Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865.

West Virginia.—State *v.* Chilton, 49 W. Va. 453, 39 S. E. 612.

See 44 Cent. Dig. tit. "States," § 90 *et seq.*

98. Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865; State *v.* Chilton, 49 W. Va. 453, 39 S. E. 612.

an agent is appointed by law to contract for the state, the law under which he acts is as much a part of the contract made by him as if it were formally embodied in the contract; [99] and when the statute prescribes the terms upon which the state is to be bound by a contract executed by a public officer in its behalf, and declares that a failure to comply with such terms will result in no contract, such statute is mandatory, and constitutes a limitation upon the power of the officer to bind the state by such contract.[1] The governor of a state has no general authority to contract in its behalf and can bind the state only within the power specially conferred upon him by law.[2]

b. Unauthorized Contracts. Public officers have and can exercise only such powers as are conferred upon them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution,[3] unless such authorized contracts have been afterward ratified by the legislature;[4] and a state cannot by estoppel become bound by the unauthorized contracts of its officers; [5] nor is a state bound by an implied contract made by a state officer where such officer had no authority to make an express one.[6]

c. Notice of Extent of Officers' Powers. The powers of state officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the state, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred,[7]

99. State *v.* Allis, 18 Ark. 269. See also Marshall *v.* Clark, 22 Tex. 23.

All contracts are entered into with reference to the prevailing law, and the contractor takes the risk of loss incident to the administration of law. State *v.* Ward, 9 Heisk. (Tenn.) 100.

1. Camp *v.* McLin, 44 Fla. 510, 32 So. 927.

2. *Alabama.*— State *v.* Cobb, 64 Ala. 127.

Arkansas.— Compton *v.* State, 38 Ark. 601.

Mississippi.— State *v.* Mayes, 23 Miss. 516.

South Dakota.— Stanton *v.* State, 5 S. D. 515, 59 N. W. 738.

Washington.— Young *v.* State, 19 Wash. 634, 54 Pac. 36.

See 44 Cent. Dig. tit. "States," § 90 *et seq.*

3. *California.*— Mullan *v.* State, 114 Cal. 573, 46 Pac. 670, 34 L. R. A. 262; Lewis *v.* Colgan, (1896) 44 Pac. 1081.

Colorado.— Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827.

Indiana.— McCaslin *v.* State, 99 Ind. 428.

Louisiana.— State *v.* Clinton, 28 La. Ann. 52.

Missouri.— State *v.* State Bank, 45 Mo. 528.

Nebraska.— See State *v.* Kennard, 56 Nebr. 254, 76 N. W. 545.

Nevada.— State *v.* Horton, 21 Nev. 466, 34 Pac. 316.

New York.— Michigan *v.* Phœnix Bank, 33 N. Y. 9; Illinois *v.* Delafield, 8 Paige 527.

North Carolina.— State *v.* Bevers, 86 N. C. 588.

Ohio.— State *v.* Buttles, 3 Ohio St. 309.

South Carolina.— Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865

Tennessee.— State *v.* Ward, 9 Heisk. 100.

Washington.— Young *v.* State, 19 Wash. 634, 54 Pac. 36.

Wisconsin.— Randall *v.* State, 16 Wis. 340; State *v.* Hastings, 12 Wis. 596; Orton *v.* State, 12 Wis. 509; State *v.* Hastings, 12 Wis. 47; State *v.* Hastings, 10 Wis. 525.

United States.— Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502.

See 44 Cent. Dig. tit. "States," § 99 *et seq.*

State officers cannot contract to pay money beyond the amount authorized by law.— Jewell Nursery Co. *v.* State, 4 S. D. 213, 56 N. W. 113. See also State *v.* Young, 134 Iowa 505, 110 N. W. 292.

Authority to contract under seal.—Authority to enter into, reduce to writing, and sign a contract for the state, does not authorize execution under seal; and an action of covenant will not lie against a state on a contract made by an agent and sealed with his individual seal, where the agent was merely authorized to enter into, reduce to writing, and sign the contract. State *v.* Allis, 18 Ark. 269.

The state is not bound by the mistake of an officer in making a contract in its behalf where the officer acted in excess of his authority. State *v.* Young, 134 Iowa 505, 110 N. W. 292.

4. See *infra*, V, F.

5. *California.*— Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262.

Florida.— See Camp *v.* McLin, 44 Fla. 510, 32 So. 927.

Illinois.— Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33.

South Carolina.— Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865.

West Virginia.— State *v.* Chilton, 49 W. Va. 453, 39 S. E. 612, question arose between state and officer, no rights of other party involved.

6. Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865.

7. *Arkansas.*—Woodward *v.* Campbell, 39 Ark. 580.

the burden being upon the one seeking to enforce a contract purporting to be with the state to show that such contract was within the authority of the officer making it.[8]

B. Form and Requisites — 1. In General. Contracts made by state officers on behalf of the state should be made in the name of the state and not in the individual names of the officers;[9] but a contract purporting to be the act of the state, signed with the individual names of the officers with their official designation affixed, is sufficient, and is the contract of the state and not of the officers personally.[10] Unless the statute so requires, the contract need not be in writing in order to be binding;[11] but where the contract is required to be in writing, the state is not bound by a contract not reduced to writing, although all the terms thereof may be agreed upon.[12]

2. Official Approval. Sometimes contracts are required to be approved by designated officers,[13] in which case a contract is not binding on the state until so approved,[14] unless the requirement as to approval is merely directory.[15] The approval need not be in any particular form, unless so required,[16] and may be implied as well as express.[17]

C. Letting of Contracts — 1. In General. The manner of letting contracts for public work is frequently prescribed by statute,[18] and when so prescribed the officers charged with the duty of letting such contracts must proceed according to the prescribed mode. A contract not let in the manner required by law is not binding on the state.[19] The officers are usually invested, however, with a large amount of discretion in making the awards, and the exercise of this discretion, unless abused, cannot be controlled by the courts;[20] and they cannot be compelled by mandamus to let the contract to any person when, in the proper exercise of their discretion, they have awarded it to another;[21] but the awarding

California.— Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262.

Illinois.— Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33.

Indiana.— Hord *v.* State, 167 Ind. 622, 79 N. E. 916; Julian *v.* State, 140 Ind. 581, 39 N. E. 923.

Iowa.— State *v.* Young, 134 Iowa 505, 110 N. W. 292.

Michigan.— Hammond *v.* Michigan State Bank, Walk. 214.

Missouri.— State *v.* Hays, 52 Mo. 578; State *v.* State Bank, 45 Mo. 528.

South Carolina.— Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865.

Texas.— Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

Wisconsin.— Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426; State *v.* Hastings, 10 Wis. 525.

8. Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; Hord *v.* State, 167 Ind. 622, 79 N. E. 916; Van Dusen *v.* State, 11 S. D. 318, 77 N. W. 201.

9. Irish *v.* Webster, 5 Me. 171; Hunter *v.* Field, 20 Ohio 340.

10. State *v.* McCauley, 15 Cal. 429.

11. Austin *v.* Foster, 9 Pick. (Mass.) 341; Marston *v.* State Insane Hospital, 18 Pa. Super. Ct. 547; Ritchie *v.* State, 39 Wash. 95, 81 Pac. 79.

12. Capital Printing Co. *v.* Hoey, 124 N. C. 767, 33 S. E. 160.

Mandamus to compel execution of formal contract.—Where the officers accept a bid by a contractor and subsequently refuse improperly to sign a formal contract they may be compelled to do so by mandamus. State *v.* Toole, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644.

13. See Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33.

14. State *v.* Hogan, 22 Mont. 384, 56 Pac. 818; State *v.* Guilbert, 58 Ohio St. 637, 51 N. E. 117.

15. Com. *v.* Wood, 1 J. J. Marsh. (Ky.) 310.

16. Austin *v.* Foster, 9 Pick. (Mass.) 341.

17. Com. *v.* Wood, 1 J. J. Marsh. (Ky.) 310; Austin *v.* Foster, 9 Pick. (Mass.) 341.

18. See the statutes of the several states. And see cases cited *infra*, the following notes.

19. Bunch *v.* Tipton, 76 Ark. 167, 88 S. W. 888; Woodruff *v.* Berry, 40 Ark. 251; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; People *v.* State Secretary, 58 Ill. 90; Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

20. State *v.* Robinson, 1 Kan. 188; Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171; People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274; Carmichael *v.* McCourt, 27 Ohio Cir. Ct. 775; A. H. Pugh Printing Co. *v.* Yeatman, 22 Ohio Cir. Ct. 584, 12 Ohio Cir. Dec. 477. See also Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677.

21. Mills Pub. Co. *v.* Larrabee, 78 Iowa 97, 42 N. W. 593; Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171; People *v.* Contracting Bd., 27 N. Y. 378; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; Capital Printing Co. *v.* Hoey, 124 N. C. 767, 33 S. E. 160.

of a contract may be compelled in a proper case not involving the exercise of discretion.[22]

2. By Public Bid — a. Advertising; Acceptance and Rejection of Bids. The officers are frequently required to advertise for bids.[23] The officers may prescribe any reasonable formality to be observed by bidders,[24] and the advertisements must be sufficiently specific to enable contractors to make intelligent bids and proposals for the performance of the proposed contract,[25] and must be published as the law requires,[26] and a contract let upon less notice than that required by the statute is voidable by the state;[27] but a bidder who participates in the bidding without objecting to the manner of advertising for and receiving bids cannot, after the contract has been let to another, contest the validity of the proceedings previous to the actual letting.[28] The bids must conform at least substantially with the advertisement or proposal for bids,[29] and must also comply with the law governing the letting of the contract;[30] and after the bids have been filed and opened, the officers cannot permit corrections except for mistakes apparent on the face of the bids.[31] The fact that the bid was not deposited in the designated office within the time prescribed will not necessarily invalidate the bid where the requirement is merely directory.[32] The officers may reject bids which do not comply with the advertisement or proposal,[33] which on their face are palpably calculated and intended to cheat the state,[34] which result from a combination to prevent bidding,[35] or which are not accompanied by a proper bond.[36] Where the statute so provides, the officers may reject all bids and issue a new call for bids.[37]

b. Letting to Lowest Responsible Bidder; Setting Aside Award. A common requirement is that contracts with the state for public printing,[38] or other public

22. Beaver *v.* Institution for Blind, 19 Ohio St. 97. And see, generally, Mandamus, 26 Cyc. 291 *et seq.*

23. Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827; Free Press Assoc. *v.* Nichols, 45 Vt. 7.

24. State *v.* Fairchild, 22 Wis. 110.

25. Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374 (advertisement held insufficient); Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171 (not sufficient). The terms of the contract to be made should be prescribed before the bidding. People *v.* Contracting Bd., 33 Barb. (N. Y.) 510 [*affirmed* in 33 N. Y. 382].

26. State *v.* Toole, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644.

27. Woodruff *v.* Berry, 40 Ark. 251.

28. Detroit Free Press Co. *v.* State Auditors, 47 Micb. 135, 10 N. W. 171.

29. State *v.* Robinson, 1 Kan. 188; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470.

30. State *v.* Public Printing Com'rs, 52 Ohio St. 81, 39 N. E. 193; State *v.* Barnes, 35 Ohio St. 136.

31. Beaver *v.* Institution for Blind, 19 Ohio St. 97.

32. Free Press Assoc. *v.* Nichols, 45 Vt. 7.

33. State *v.* Fairchild, 22 Wis. 110.

34. People *v.* Contracting Bd., 33 Barb. (N. Y.) 510 [*reversing* 20 How. Pr. 206].

35. People *v.* Stephens, 71 N. Y. 527.

36. Philadelphia Metallic Co. *v.* Board of Public Grounds, 16 Pa. Co. Ct. 431.

Purpose and sufficiency of the bond.— It is sometimes provided that every bidder shall accompany his bid with a bond conditioned upon his undertaking and performing the contract if awarded to him. The object of this requirement is to secure good faith on the part of bidders, and the statutory provisions must be at least substantially complied with, but such compliance as will accomplish the object of the requirement is sufficient. Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171; People *v.* McDonough, 173 N. Y. 181, 65 N. E. 963 [*affirming* 76 N. Y. App. Div. 257, 78 N. Y. Suppl. 462]. See also Philadelphia Metallic Co. *v.* Board of Public Grounds, 16 Pa. Co. Ct. 431.

37. Goss *v.* State Capitol Commission, 11 Wash. 474, 39 Pac. 972. See also Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677. Such a provision does not authorize the board to act arbitrarily or reject bids without cause. State *v.* Cornell, 52 Nebr. 25, 71 N. W. 961.

38. *Arkansas.*—Woodruff *v.* Berry, 40 Ark. 251.

Georgia.— Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677.

Illinois.— Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; People *v.* State Secretary, 58 Ill. 90.

Michigan.— Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171.

Montana.— State *v.* Hogan, 22 Mont. 384, 56 Pac. 818; State *v.* Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298.

Nebraska.— State *v.* Cornell, 52 Nebr. 25, 71 N. W. 961.

New York.—People *v.* McDonough, 85 N. Y. App. Div. 162, 83 N. Y. Suppl. 125, 83 N. Y. St. 125 [*affirmed* in 176 N. Y. 606, 68 N. E. 1123]; People *v.* Palmer, 12 Misc. 392,

work,[39] or for supplies for the use of the state,[40] shall be let to the lowest responsible bidder, and a contract not so let does not bind the state.[41] The term "responsible" in this connection means something more than mere pecuniary ability; it includes also judgment, skill, ability, capacity, and integrity;[42] and hence the officers in awarding the contract must exercise official discretion in determining who is the lowest responsible bidder upon the consideration of all of these elements of responsibility,[43] and their decision, in the proper exercise of their discretion, in determining who was the lowest bidder, will not be reviewed;[44] but a letting to persons who have conspired to prevent bidding may be set aside.[45] The state, however, may waive its right to repudiate the contract because of the illegal combination, upon discovery of the fraud, and may affirm the contract and thus become bound thereby.[46]

D. Contractors' Bonds. Persons contracting to erect buildings or perform other public work for the state are frequently required to give bonds with sureties for the faithful performance of their contracts,[47] in which case the state is not bound unless such bond is given and approved.[48] In the absence of a provision in the statute or contract or bond extending the benefit of the bond to persons furnishing labor or material to the contractor, such persons cannot maintain an action on the bond;[49] but they may do so when expressly included in its benefits.[50]

33 N. Y. Suppl. 1088 [*affirmed* in 146 N. Y. 406, 42 N. E. 543]; Weed *v.* Beach, 56 How. Pr. 470.

North Carolina.— Capitol Printing Co. *v.* Hoey, 124 N. C. 767, 33 S. E. 160.

Ohio.— State *v.* Public Printing Com'rs, 52 Ohio St. 81, 39 N. E. 193.

See 44 Cent. Dig. tit. "States," § 95.

The law does not apply to such printing as is contingent, incidental, or casual, such as a contract for the purchase for the use of members of the legislature of a number of copies of a daily paper containing reports of its proceedings. Stone *v.* Dispatch Pub. Co., 55 S. W. 725, 21 Ky. L. Rep. 1473.

Advertising for proposals to furnish public supplies is not public printing within the law. State *v.* Toole, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644.

39. Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374 (state house); People *v.* Densmore, 1 Thomps. & C. (N. Y.) 280; People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118; Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452 (building); Goss *v.* State Capitol Commission, 11 Wash. 474, 39 Pac. 972.

40. Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827.

41. Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

42. State *v.* Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298. The bidder must be able to do what is expected or demanded; mere ability to procure the bond for performance is not enough. People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118.

43. Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677; State *v.* Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298; Hoole *v.* Kinkead, 16 Nev. 217; A. H. Pugh Printing Co. *v.* Yeatman, 22 Ohio Cir. Ct. 584, 12 Ohio Cir. Dec. 477.

Where the officers are unable to procure bids in a certain form, they may, as against the faulty bidders, examine all bids and, according to their best judgment, award the contract to the lowest. Weed *v.* Beach, 56 How. Pr. (N. Y.) 470.

44. State *v.* Smith, 21 Mont. 46, 52 Pac. 641; State *v.* Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298; Hoole *v.* Kinkead, 16 Nev. 217; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118; Murray *v.* Board of Public Grounds, 20 Pa. Co. Ct. 360.

45. Woodruff *v.* Berry, 40 Ark. 251; Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33; People *v.* Stephens, 71 N. Y. 527.

46. People *v.* Stephens, 71 N. Y. 527.

47. Com. *v.* Bacon, 111 S. W. 387, 33 Ky. L. Rep. 935; Burr *v.* Massachusetts School 197 Mass. 357, 83 N. E. 883; Philadelphia Metallic Co. *v.* Board of Public Grounds, 16 Pa. Co. Ct. 431; Lewis *v.* Stout, 22 Wis. 234.

Facts held not to estop surety from denying liability on bond see Com. *v.* Bacon, 111 S. W. 387, 33 Ky. L. Rep. 935.

48. Camp *v.* McLin, 44 Fla. 510, 32 So. 927.

Effect of failure to file bond.—Where such bond has been given, the fact that it is not properly filed as required by statute will not defeat an action thereon, requirements as to execution, approval, delivery, deposit, and recording being for the benefit of the state or obligee, who alone can take advantage of them. Evans *v.* Watson, 8 Kan. App. 144, 55 Pac. 17.

49. McCluskey *v.* Cromwell, 11 N. Y. 593; Montgomery *v.* Rief, 15 Utah 495, 50 Pac. 623. See also State *v.* Cheetham, 17 Wash. 131, 49 Pac. 227; Campbell, etc., Co. *v.* Carnagie's Estate, 98 Wis. 99, 73 N. W. 572.

50. Evans *v.* Watson, 8 Kan. App. 144, 55 Pac. 17; Rohman *v.* Gaiser, 53 Nebr. 474, 73 N. W. 923; Kaufmann *v.* Cooper, 46 Nebr.

E. Particular Contracts — 1. For Construction and Maintenance of Buildings and Other Public Works. The construction of public buildings and other public works by the state is authorized and regulated by statutes which prescribe the character of such buildings, etc., their cost and location, the persons who shall construct them and their powers, and other details of construction;[51] and so also the statutes generally provide for the care and maintenance of public buildings.[52] Statutes authorizing the construction of public works frequently fix the cost and make appropriation therefor and prescribe the mode of expenditure;[53] and where a statute authorizes the construction of a building at a cost not to exceed a certain amount, the officers in charge have no power to provide for the expenditure of more than that amount;[54] nor can money raised by the issue of bonds for the erection of a public building be used even temporarily for the general expenses of the state, such fund being analogous to a trust fund.[55] Where a commission appointed to erect a public building is invested with discretion in the discharge of its duties, such discretion cannot be delegated by them,[56] or controlled or reviewed by the courts;[57] but the commissioners may be held personally liable for wrongs and breaches of contract committed by them.[58]

2. For Employment of Servants or Agents. A state officer or board cannot bind the state by a contract employing an agent, assistant, or servant, unless the making of such contract was clearly within the authority conferred by law;[59] but in general state officers charged with the performance of certain duties have

644, 65 N. W. 796; Sample *v.* Hale, 34 Nebr. 220, 51 N. W. 837; Smith *v.* Bowman, 32 Utah 33, 88 Pac. 687, 9 L. R. A. N. S. 889. See also Kennedy *v.* Com., 182 Mass. 480, 65 N. E. 828; Nash *v.* Com., 182 Mass. 12, 64 N. E. 690.

51. See the statutes of the several states. And see the following cases:

Alabama.— Nichols *v.* Comptroller, 4 Stew. & P. 154.

California.— Newport Wharf, etc., Co. *v.* Drew, 125 Cal. 585, 58 Pac. 187.

Massachusetts.— Nash *v.* Com., 182 Mass. 12, 64 N. E. 690.

Minnesota.— Fleckten *v.* Lamberton, 69 Minn. 187, 72 N. W. 65.

Nebraska.— Van Dorn Iron Works Co. *v.* State, 76 Nebr. 713, 107 N. W. 856.

North Dakota.— State *v.* Budge, 14 N. D. 532, 105 N. W. 724.

Ohio.— State *v.* Johnson, 42 Ohio St. 134; Beaver *v.* Institution for Blind, 19 Ohio St. 97; Carmichael *v.* McCourt, 27 Ohio Cir. Ct. 775.

Pennsylvania.— Cope *v.* Hastings, 183 Pa. St. 300, 38 Atl. 717.

Rhode Island.—*In re* State House Construction Loan, 20 R. I. 704, 38 Atl. 927; *In re* New State House, (1897) 37 Atl. 2.

South Dakota.— Davenport *v.* Elrod, 20 S. D. 567, 107 N. W. 833.

Texas.— Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

Washington.— Ritchie *v.* State, 39 Wash. 95, 81 Pac. 79; State *v.* Cheetham, 17 Wash. 131, 49 Pac. 227; State *v.* McGraw, 13 Wash. 311, 43 Pac. 176; Goss *v.* State Capitol Commission, 11 Wash. 474, 39 Pac. 972.

Wisconsin.— Shipman *v.* State, 42 Wis. 377.

See 44 Cent. Dig. tit. "States," § 87 *et seq.*

Location of public building.—Where the constitution provides that all public institutions shall be located at the seat of government, a statute establishing one elsewhere is void. State *v.* Metschan, 32 Oreg. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692.

52. Furnish *v.* Satterwhite, 114 Ky. 905, 72 S. W. 309, 24 Ky. L. Rep. 1723; State *v.* Board of Public Works, 36 Ohio St. 409.

53. Koppikus *v.* State Capitol Com'rs, 16 Cal. 248; Ingram *v.* State Wagon-Road Commission, 4 Ida. 139, 36 Pac. 702; Henderson *v.* State Soldiers', etc., Monument Com'rs, 129 Ind. 92, 28 N. E. 127, 13 L. R. A. 169; Campbell *v.* State Soldiers', etc., Monument Com'rs, 115 Ind. 591, 18 N. E. 33; State-House Com'rs *v.* Whittaker, 81 Ind. 297; Williams *v.* Mansur, 70 Ind. 41; State *v.* Cook, 17 Mont. 529, 43 Pac. 928.

54. State *v.* Johnson, 42 Ohio St. 134; *In re* State House Construction Fund, 20 R. I. 704, 38 Atl. 927.

The state is not bound on contracts beyond the amount fixed by the statute.— Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452. But an architect who has prepared plans for a public building which have been accepted and approved by the officers in charge is entitled to recover for his services, although it is found that the plans call for the expenditure of a larger sum than is available. Marston *v.* State Hospital, 18 Pa. Super. Ct. 547.

55. *In re* Statehouse Bonds, 19 R. I. 393, 33 Atl. 870.

56. Warner *v.* Hastings, 183 Pa. St. 324, 38 Atl. 720.

57. Com. *v.* Mylin, 185 Pa. St. 19, 39 Atl. 835; Warner *v.* Hastings, 183 Pa. St. 324, 38 Atl. 720; Cope *v.* Hastings, 183 Pa. St. 300, 38 Atl. 717.

58. Warner *v.* Hastings, 183 Pa. St. 324, 38 Atl. 720.

59. Polk *v.* State, 138 Cal. 384, 71 Pac. 435, 648; Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262; Lewis *v.* Colgan,

implied authority to employ such assistants as may be necessary for the efficient discharge of their duties.[60]

3. For Employment of Counsel. In addition to the attorney-general, who is the chief law officer of the state,[61] special counsel may sometimes be employed under statutory authority to represent the state, and the state is liable for services of counsel or attorneys so appointed.[62] But the governor has no general authority to employ counsel for the state, and the state is not liable for the services of an attorney employed by the governor,[63] or other officers,[64] without special authority, or employed for an unauthorized purpose.[65]

4. For Public Printing. The subject of public printing and the making of contracts therefor is usually regulated by statute.[66] The statutes sometimes provide for the appointment or election of a public printer,[67] and sometimes for

(Cal. 1896) 44 Pac. 1081, (1897) 47 Pac. 357; State *v.* Strickland, 3 Head (Tenn.) 644; Young *v.* State, 19 Wash. 634, 54 Pac. 36.

Where no appropriation has been made to pay a person employed by state officers at a compensation fixed by them, he cannot maintain an action against the state to recover such compensation. Polk *v.* State, 138 Cal. 384, 71 Pac. 435, 648.

The state is liable for salary of clerks employed by a committee of the legislature by authority of law, but only to the amount allowed by law. Tenney *v.* State, 27 Wis. 387.

60. Lewis *v.* Colgan, 115 Cal. 529, 47 Pac. 357, (1896) 44 Pac. 1081. See also Polk *v.* State, 138 Cal. 384, 71 Pac. 435, 648.

State officers authorized to sell state bonds are not liable to the state for disbursements for commissions and expenses to brokers necessarily employed by them to effect such sale, although such disbursements were not expressly authorized. State *v.* Buchanan, (Tenn. Ch. App. 1901) 62 S. W. 287.

61. See Attorney-General, 4 Cyc. 1024.

62. Davis *v.* Com., 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743; State *v.* Mayes, 28 Miss. 706; State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255. See also Wailes *v.* Smith, 76 Md. 469, 25 Atl. 922 [writ of error *dismissed* in 157 U. S. 271, 15 S. Ct. 624, 39 L. ed. 698]; State *v.* Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469.

An attorney employed by the state has a lien on its funds in his hands for his compensation. State *v.* Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469.

63. *Arkansas.*— Compton *v.* State, 38 Ark. 601.

California.— People *v.* Talmadge, 6 Cal. 256.

Indiana.— Julian *v.* State, 122 Ind. 68, 23 N. E. 690, 140 Ind. 581, 39 N. E. 923.

Michigan.— Cahill *v.* State Auditors, 127 Mich. 487, 86 N. W. 450, 55 L. R. A. 493.

Virginia.— Field *v.* Auditor, 83 Va. 882, 3 S. E. 707.

Wisconsin.— Randall *v.* State, 16 Wis. 340. See 44 Cent. Dig. tit. "States," § 91.

64. *Idaho.*— See State *v.* Fitzpatrick, 5 Ida. 499, 51 Pac. 112.

Indiana.— Hord *v.* State, 167 Ind. 622, 79 N. E. 916.

Michigan.— Phelps *v.* Auditor-Gen., 136 Mich. 439, 99 N. W. 374.

Nebraska.— Bradford *v.* State, 7 Nebr. 109.

Nevada.— State *v.* Horton, 21 Nev. 466, 34 Pac. 316.

Ohio.— State *v.* Guilbert, 58 Ohio St. 637, 61 N. E. 117.

Tennessee.—See State *v.* Spurgeon, 99 Tenn. 659, 47 S. W. 235.

Wisconsin.— Tenney *v.* State, 27 Wis. 387; Orton *v.* State, 12 Wis. 509.

See 44 Cent. Dig. tit. "States," § 91.

65. Julian *v.* State, 140 Ind. 581, 39 N. E. 923.

66. See the statutes of the several states. And see the following cases:

Alabama.— Brown *v.* Seay, 86 Ala. 122, 5 So. 216.

Idaho.— Anderson *v.* Lewis, 6 Ida. 51, 52 Pac. 163.

Illinois.— People *v.* Tyndale, 47 Ill. 538.

Kansas.— State *v.* Robinson, 1 Kan. 188.

Kentucky.— Auditor *v.* Major, 79 Ky. 457; State Bd. of Health *v.* Stone, 37 S. W. 62, 18 Ky. L. Rep. 456.

Michigan.— Seventh-Day Adventist Pub. Assoc. *v.* State Auditors, 116 Mich. 672, 75 N. W. 95.

Missouri.— State *v.* Wilder, 199 Mo. 470, 97 S. W. 940; State *v.* Rodman, 42 Mo. 176.

Montana.— Fisk *v.* Cuthbert, 2 Mont. 593.

Nebraska.— State *v.* Cornell, 52 Nebr. 25, 71 N. W. 961.

New York.— Matter of American Bank-Note Co., 27 Misc. 572, 58 N. Y. Suppl. 275.

North Carolina.— Stewart *v.* State, 118 N. C. 124, 24 S. E. 114.

Ohio.— State *v.* Public Printing Com'rs, 52 Ohio St. 81, 39 N. E. 193.

Oklahoma.— Leader Printing Co. *v.* Lowry, 9 Okla. 89, 59 Pac. 242.

Pennsylvania.— Com. *v.* Jones, 2 Dauph. Co. Rep. 73.

South Dakota.— Carter *v.* State, 9 S. D. 420, 69 N. W. 593; Carter *v.* Thorson, 5 S. D. 474, 59 N. W. 469, 49 Am. St. Rep. 893, 24 L. R. A. 734; Carter *v.* Ringsrud, 3 S. D. 352, 53 N. W. 181.

Tennessee.— Jones *v.* Hobbs, 4 Baxt. 113.

Texas.— Marshall *v.* Clark, 22 Tex. 23; State *v.* Hutchings, 11 Tex. Civ. App. 316, 32 S. W. 315.

Washington.— Hicks *v.* King, 21 Wash. 567, 58 Pac. 1070.

Wisconsin.— State *v.* Harvey, 14 Wis. 151; Sholes *v.* State, 2 Pinn. 499, 2 Chandl. 182.

See 44 Cent. Dig. tit. "States," § 91.

67. Walker *v.* Dunham, 17 Ind. 483; Good-

the letting of contracts for public printing to the lowest responsible bidder.[68] State officers can bind the state for contracts for public printing only where authorized by law to make such contracts;[69] and where the manner of letting such contracts is prescribed, the officers in charge must proceed according to the prescribed mode, the contracts being governed by the statutes.[70] The rights of the contractor are fixed by the contract and by the law in force at the time of its execution.[71]

F. Ratification of Unauthorized Contract. The legislature may ratify an unauthorized contract made by a state officer,[72] unless in contravention of the constitution,[73] and a portion of a contract may be so ratified without ratifying it all.[74] The ratification can be only by the legislature,[75] and only by a law duly passed by both branches of the legislature;[76] and the act of ratification or adoption must be so explicit and definite as to show an intention to recognize and adopt the unauthorized contract.[77] It is not necessary, however, that the ratification should be in direct terms; it may be effected by legislation recognizing the contract as valid.[78] Thus bringing suit on the contract may amount to a ratification,[79] and an appropriation of money for the payment of a claim arising under the contract may be so made as to constitute a ratification,[80] and the state may also ratify a contract by taking advantage of it;[81] but the mere fact that the state has received the benefit of an unauthorized contract does not neces-

rich *v.* Moore, 2 Minn. 61; People *v.* Morgan, 45 N. Y. App. Div. 86, 60 N. Y. Suppl. 1109 [*affirmed* in 161 N. Y. 643, 57 N. E. 1120]; Jones *v.* Hobbs, 4 Baxt. (Tenn.) 113.

68. See *supra*, V, C, 2, b.

69. People *v.* Morgan, 45 N. Y. App. Div. 86, 60 N. Y. Suppl. 1109 [*affirmed* in 161 N. Y. 643, 57 N. E. 1120]; State *v.* Hastings, 16 Wis. 337.

Printing done outside of state.—A statute requiring the letting of a contract for printing and binding to a resident of the state does not require that the work shall be done in the state. State *v.* Hutchings, 11 Tex. Civ. App. 316, 32 S. W. 315.

70. *Illinois.*— People *v.* State Secretary, 58 Ill. 90.

Kentucky.— George G. Fetter Printing Co. *v.* Courier-Journal Job Printing Co., 47 S. W. 241, 20 Ky. L. Rep. 614.

Michigan.— Detroit Free Press Co. *v.* State Auditors, 47 Mich. 135, 10 N. W. 171.

New York.— People *v.* McDonough, 173 N. Y. 181, 65 N. E. 963.

Ohio.— State *v.* Public Printing Com'rs, 52 Ohio St. 81, 39 N. E. 193.

71. George G. Fetter Printing Co. *v.* Courier-Journal Job Printing Co., 47 S. W. 241, 20 Ky. L. Rep. 614.

72. *Michigan.*— Michigan State Bank *v.* Hastings, 1 Dougl. 224, 41 Am. Dec. 549.

Minnesota.— State *v.* Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395.

Missouri.— State *v.* McKay, 43 Mo. 594.

New York.—O'Hara *v.* State, 112 N. Y. 146, 19 N. E. 659, 8 Am. St. Rep. 726, 2 L. R. A. 603; People *v.* Denison, 80 N. Y. 656.

Ohio.— State *v.* Buttles, 3 Ohio St. 309.

Texas.— Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

Wisconsin.— Shipman *v.* State, 42 Wis. 377. See 44 Cent. Dig. tit. "States," § 100.

73. Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452. See also Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827.

74. State *v.* Buchanan, (Tenn. Ch. App. 1898) 52 S. W. 480. See also People *v.* State Secretary, 58 Ill. 90.

75. *Indiana.*— Hord *v.* State, 167 Ind. 622, 79 N. E. 916.

Louisiana.— State *v.* Clinton, 28 La. Ann. 52.

Minnesota.—State *v.* Torinus, 24 Minn. 332.

Missouri.—State *v.* State Bank, 45 Mo. 528.

New York.— Illinois *v.* Delafield, 8 Paige 529 [*affirmed* in 2 Hill 159, 26 Wend. 192].

Ohio.— State *v.* Buttles, 3 Ohio St. 309.

Tennessee.— State *v.* Ward, 9 Heisk. 100.

76. Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 462; Jewell Nursery Co. *v.* State, 8 S. D. 531, 67 N. W. 629.

77. State *v.* Ward, 9 Heisk. (Tenn.) 100.

78. People *v.* Brooks, 16 Cal. 11.

79. State *v.* Buttles, 3 Ohio St. 309.

When bringing action does not amount to ratification.— But a statute authorizing a suit against the state on an unauthorized contract merely to ascertain whether the state is liable thereon is not a ratification of the contract. Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

80. Goodrich *v.* Moore, 2 Minn. 62, 72 Am. Dec. 74; Jewell Nursery Co. *v.* State, 4 S. D. 213, 56 N. W. 113.

But the mere appropriation by the legislature of money for the payment of a claim arising under an unauthorized contract is not a ratification of such contract, but is merely an adjustment and settlement of the claim by the legislature, and gives no rights to the claimant except to accept the amount allowed. Julian *v.* State, 122 Ind. 68, 23 N. E. 690, 140 Ind. 581, 39 N. E. 923; Young *v.* State, 19 Wash. 634, 54 Pac. 36.

81. People *v.* State Secretary, 58 Ill. 90. See also Geo. H. Fuller Desk Co. *v.* State, 6 Ida. 315, 55 Pac. 857; State *v.* Perry, Wright

sarily constitute a ratification;[82] nor is the mere silence of the legislature for a short time respecting an unauthorized contract a ratification thereof;[83] nor the enactment of a statute authorizing certain contracts a ratification of similar contracts previously made without authority.[84] An officer or agent cannot ratify his own unauthorized contract.[85]

G. Construction and Operation. The contracts of a state with individuals are to be construed in the same manner and have the same binding effect upon the parties thereto as the contracts of private parties.[86] In construing such a contract, however, due regard must be had to the provisions and purposes of the statute authorizing it;[87] and where the contract is ambiguous, the statute may be resorted to for aid in its construction.[88]

H. Modification and Rescission. A state has no more right than an individual to modify or rescind a contract entered into by it, unless such right has been reserved,[89] particularly where the state is itself in default and the other party cannot be placed *in statu quo*.[90] But the state may modify its contract with the consent of the other party thereto,[91] and the state may repudiate a contract not let in accordance with the statute,[92] or which was fraudulently procured;[93] and while the state is liable on its contracts, it may defeat the enforcement thereof by reason of its immunity from suit except with its own consent, or by failing to make the necessary appropriation.[94] The state is not liable for the unauthorized action of a state officer in attempting to cancel a contract.[95] Where the making of a contract for public work is intrusted to a board, an individual member of the board has no power, without authority of the board, to modify a contract made by the board.[96]

I. Performance and Breach. A state, like an individual, is liable for its breach of contracts, although, in the absence of a statute authorizing suits against the state, the contractor cannot enforce performance or recover damages, and his only remedy is an appeal to the legislature for relief.[97] When authorized

(Ohio) 662; Jewell Nursery Co. *v.* State, 8 S. D. 531, 67 N. W. 629.

82. Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262; Mulinix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827; Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

83. Delafield *v.* State, 2 Hill (N. Y.) 159, 26 Wend. 192.

84. State *v.* Hays, 52 Mo. 578.

85. State *v.* Hays, 52 Mo. 578; Delafield *v.* State, 2 Hill (N. Y.) 159, 26 Wend. 192; Jewell Nursery Co. *v.* State, 4 S. D. 213, 56 N. W. 113; State *v.* Chilton, 49 W. Va. 453, 39 S. E. 512.

There must be some act or conduct on the part of the state, through its legislature, or other competent authority, and not merely on the part of its unauthorized officers or agents, upon which to base an estoppel giving binding effect to a contract. Camp *v.* McLin, 44 Fla. 510, 32 So. 927.

86. *California.*—Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158.

Florida.—State *v.* Tampa Water Works Co., 56 Fla. 858, 48 So. 639.

Indiana.— Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

Kentucky.— Com. *v.* Bacon, 111 S. W. 387, 33 Ky. L. Rep. 935.

Massachusetts.— Burr *v.* Massachusetts School for Feeble-Minded, 197 Mass. 357, 83 N. E. 883; Boston Molasses Co. *v.* Com., 193 Mass. 387, 79 N. E. 827.

Nebraska.— State *v.* Junkin, 81 Nebr. 118, 115 N. W. 546.

New York.— McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; People *v.* Stephens, 71 N. Y. 527.

Wisconsin.— Metzel *v.* State, 16 Wis. 347; Sholes *v.* State, 2 Pinn. 429, 2 Chandl. 182.

87. State *v.* Netter, 3 Ohio Cir. Ct. 369, 2 Ohio Cir. Dec. 207 [*reversing* 10 Ohio Dec. (Reprint) 309, 20 Cinc. L. Bul. 151].

88. Northern Cent. R. Co. *v.* State, 17 Md. 8.

89. See People *v.* State Secretary, 58 Ill. 90; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277; Baker *v.* State, 77 N. Y. App. Div. 528, 78 N. Y. Suppl. 922.

90. State *v.* McCauley, 15 Cal. 429.

91. Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1897) 41 S. W. 157 [*reversed* on other grounds in 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 672]. See also Ritchie *v.* State, 39 Wash. 95, 81 Pac. 79.

92. Woodruff *v.* Berry, 40 Ark. 251.

93. State *v.* McKay, 43 Mo. 594; People *v.* Stephens, 71 N. Y. 527.

94. Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

95. State *v.* Mayes, 23 Miss. 516.

96. Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426.

97. *Alabama.*— State *v.* Cobb, 64 Ala. 127.

California.— Frank *v.* State, 154 Cal. 730

by statute an action for damages may be brought against the state for breach of contract,[98] or a suit for specific performance may be maintained;[99] but there can be no recovery against the state on a contract not performed according to its terms.[1] A state breaking its contract is liable for prospective profits.[2] The passing of a law impairing the obligation of a contract made by the state may be taken by the other party to the contract as a breach, relieving him from performance;[3] but the mere refusal of a state to perform its contract does not impair its obligation, although it gives rise to a claim for damages.[4] All contracts made with the state are subject to the provisions of existing law, and the state is not liable for loss to contractors growing out of an alleged improper administration of that law by the executive officers;[5] nor is the state liable for loss to the contractor due to the misconduct of the officers of the state.[6]

VI. LIABILITIES.

A. In General. A state is liable on its contracts,[7] and for the expenses of the state government,[8] whenever the incurring of such liability is authorized by law; and in some cases the state is by constitution or statute made liable for certain expenses incurred by counties;[9] but the state is not so liable in the absence of statute.[10] The fact that the state is not subject to an action in behalf of a citizen does not establish that he has no claim against the state or that the state is not liable to him, but only that he has no remedy;[11] and a duty which cannot be enforced by action because owed by the state becomes a subject of action when transferred to private persons, as where a corporation purchases from the state certain public works subject to all the obligations of the state in respect thereto.[12]

B. Torts. A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable,[13] the only relief the aggrieved person has in such

99 Pac. 189; Union Trust Co. *v.* State, 154 Cal. 716, 99 Pac. 183; People *v.* Brooks, 16 Cal 11.

Mississippi.— Swann *v.* Buck, 40 Miss. 268.

Montana.— State *v.* Kenney, 9 Mont. 389, 24 Pac. 96.

New Jersey.— American Dock, etc., Co. *v.* Public Schools, 32 N. J. Eq. 428.

New York.— McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 477; Lord *v.* Thomas, 64 N. Y. 107.

North Carolina.— Stewart *v.* State, 118 N. C. 624, 24 S. E. 114.

See 44 Cent. Dig. tit. "States," § 105.

A state cannot be coerced into the performance of its contracts.— State *v.* Mortensen, 69 Nebr. 376, 95 N. W. 831; Marshall *v.* Clark, 22 Tex. 23.

The legislature may provide for the payment of a claim for damages caused by the state's interference with the contractor's performance of his contract, and such an appropriation does not constitute an increase in the contract price to be paid for the work. People *v.* Densmore, 1 Thomps. & C. (N. Y.) 280.

98. Com. *v.* Collins, 12 Bush (Ky.) 386; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277.

99. Com. *v.* Collins, 12 Bush (Ky.) 386.

An unauthorized contract will not be specifically enforced.— Bunch *v.* Tipton, 76 Ark. 167, 88 S. W. 888.

1. State *v.* Beard, 1 Ind. 460.

2. McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277; Baker *v.* State, 77 N. Y. App. Div. 528, 78 N. Y. Suppl. 922; Clements *v.* State, 77 N. C. 142.

3. State *v.* Public Works, 7 Ohio Dec. (Reprint) 446, 3 Cinc. L. Bul. 265.

4. Lord *v.* Thomas, 64 N. Y. 107.

5. State *v.* Ward, 9 Heisk. (Tenn.) 100.

6. Billings *v.* State, 27 Wash. 288, 67 Pac. 583.

7. Baldwin *v.* Com., 11 Bush (Ky.) 417. And see *supra*, V.

8. Garner *v.* Worth, 122 N. C. 250, 29 S. E. 364.

Liability of state for printing under statute fixing rates and specifications see Com. *v.* Bacon, 111 S. W. 387, 33 Ky. L. Rep. 935.

9. State *v.* Tyrrell, 22 Nev. 421, 41 Pac. 145; State *v.* Cappeller, 39 Ohio St. 207; Morgan *v.* State, 9 S. D. 230, 68 N. W. 538. See also Garner *v.* Worth, 122 N. C. 250, 29 S. E. 364.

10. State *v.* Cappeller, 39 Ohio St. 207; Uhl *v.* Shelby County, 6 Lea (Tenn.) 610.

11. Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; Coster *v.* Albany, 43 N. Y. 399.

12. Pennsylvania R. Co. *v.* Duquesne Borough, 46 Pa. St. 223.

13. *Alabama.*— Elmore *v.* Fields, 153 Ala. 345, 45 So. 66, 127 Am. St. Rep. 31; State *v.* Hill, 54 Ala. 67.

case being an appeal to the legislature;[14] and in the absence of a statute so providing, a state cannot be forced to compensate a private individual for damages to property from the construction or operation of public works, but the legislature may make an appropriation for this purpose;[15] but the state will be liable for such damages where there is a statute so providing.[16] A statute authorizing suits or claims against a state does not authorize a suit in tort for the negligence or misconduct of officers or agents of the state unless the state has by statute expressly agreed to be liable on such claims.[17]

VII. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES

A. Legislative Power in General. Except as limited by constitutional provisions, the legislature has absolute control over the finances of the state;[18]

California.— Melvin *v.* State, 121 Cal. 16, 53 Pac. 416; Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; Bourn *v.* Hart, 93 Cal. 321, 28 Pac. 951, 27 Am. St. Rep. 203, 15 L. R. A. 431.

Iowa.— Metz *v.* Soule, 40 Iowa 236.

Kentucky.— Albin Co. *v.* Com., 128 Ky. 295, 108 S. W. 299, 33 Ky. L. Rep. 367; Ketterer *v.* State Board of Control, 115 S. W. 200, 20 L. R. A. N. S. 274.

Massachusetts.— Murdock Parlor Grate Co. *v.* Com., 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399.

Minnesota.—Claussen *v.* Luverne, 103 Minn. 491, 115 N. W. 643, 15 L. R. A. 698.

Missouri.— Ray County *v.* Bentley, 49 Mo. 236.

New York.— Lewis *v.* State, 96 N. Y. 71, 48 Am. Rep. 607. But see Fitzgerald *v.* State, 122 N. Y. App. Div. 306, 106 N. Y. Suppl. 620.

North Carolina.— Moody *v.* State's Prison, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855; Clodfelter *v.* State, 86 N. C. 51, 41 Am. Rep. 440.

Ohio.— Daly *v.* Tucker, 9 Ohio Dec. (Reprint) 255, 11 Cinc. L. Bul. 320.

Pennsylvania.— Black *v.* Rempublicam, 1 Yeates 140.

Tennessee.— Clark *v.* State, 7 Coldw. 306.

Virginia.— Com. *v.* Colquhouns, 2 Hen. & M. 213.

Washington.— Billings *v.* State, 27 Wash. 288, 67 Pac. 583.

Wisconsin.— Houston *v.* State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39.

See 44 Cent. Dig. tit. "States," § 111.

Where the constitution forbids the legislature to make any gift of public money or other thing of value to any person, the legislature has no power to create any liability against the state for any past act of negligence on the part of its officers. Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158.

Independent contractor.— The state is not liable for the torts of an independent contractor. Coolidge *v.* State, 61 Misc. (N. Y.) 38, 114 N. Y. Suppl. 553.

14. Black *v.* Rempublicam, 1 Yeates (Pa.) 140.

15. *In re* Substitute for Senate Bill No. 83, 21 Colo. 69; 39 Pac. 1088. See also Metz *v.* Soule, 40 Iowa 236.

16. Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610.

In New York the state has by statute assumed liability for damages arising from the use and management of the canals or from the negligence or conduct of its officers having charge thereof, and the board of claims is given authority to hear and determine all claims against the state in this connection. Connor *v.* State, 152 N. Y. 49, 46 N. E. 1145; Slavin *v.* State, 152 N. Y. 45, 46 N. E. 321; Coleman *v.* State, 134 N. Y. 564, 31 N. E. 902; Ballou *v.* State, 111 N. Y. 496, 18 N. E. 627; Splittorf *v.* State, 108 N. Y. 205, 15 N. E. 322; Bowen *v.* State, 108 N. Y. 166, 15 N. E. 56; Rexford *v.* State, 105 N. Y. 229, 11 N. E. 514; Sipple *v.* State, 99 N. Y. 284, 1 N. E. 892, 3 N. E. 657; Spencer *v.* State, 110 N. Y. App. Div. 585, 97 N. Y. Suppl. 154 [*affirmed* in 187 N. Y. 484, 80 N. E. 375]. In an action against the state for damages for withholding water from plaintiff's mills, plaintiff may recover for loss of profits, together with the amount necessarily paid employees while the mill was necessarily idle, and interest from the date of filing his claim. Weeks *v.* State, 48 N. Y. App. Div. 357, 63 N. Y. Suppl. 203; Lakeside Paper Co. *v.* State, 45 N. Y. App. Div. 112, 60 N. Y. Suppl. 1081.

17. *Alabama.*— State *v.* Hill, 54 Ala. 67.

California.— Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158. See also Melvin *v.* State, 121 Cal. 16, 53 Pac. 416.

Massachusetts.— Murdock Parlor Grate Co. *v.* Com., 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399.

Tennessee.— Clark *v.* State, 7 Coldw. 306.

Washington.— Billings *v.* State, 27 Wash. 288, 67 Pac. 583.

Wisconsin.— Houston *v.* State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39.

Such a statute does not apply to an equitable action brought directly against the state to restrain it from perpetrating an alleged threatened injustice. Chicago, etc., R. Co. *v.* State, 53 Wis. 509, 10 N. W. 560.

18. Colbert *v.* State, 86 Miss. 769, 39 So. 65; State *v.* Cole, 81 Miss. 174, 32 So. 314; Wilson *v.* Jenkins, 72 N. C. 5.

The administration of the funds in the public treasury belongs to the executive department of the government, and the judicial de-

and its power as to the creation of indebtedness or the expenditure of state funds,[19] or making appropriations,[20] is plenary, and the exercise of this power cannot be controlled or reviewed by the courts. The legislature is, however, bound by all constitutional limitations,[21] although in determining whether the conditions or contingencies specified in the constitution as justifying the contraction of a debt or the making of an appropriation exist, the legislature has large discretion, and its action is not subject to judicial control unless such discretion has been plainly abused.[22]

B. Indebtedness and Expenditures — 1. Limitations Upon Power to Incur Indebtedness — a. Purpose of Indebtedness. In some states the constitution prohibits the legislature to contract any debt,[23] or to contract any debt in a particular manner, as by a loan,[24] except for certain purposes, such as to meet casual deficits in the revenue,[25] or to provide for defraying extraordinary expenses.[26]

b. Amount. In many of the states the amount of indebtedness which may be contracted or expenditure which may be authorized by the legislature, except for specified purposes, is expressly limited by the constitution; and where this is the case, a legislative appropriation or expenditure in excess of the constitutional limit is void and creates no indebtedness against the state.[27] Such a con-

partment has no jurisdiction to seize such funds and distribute them under its orders. Fairfield County Com'rs *v.* Winnsboro Nat. Bank, 7 S. C. 78.

19. Parks *v.* Soldiers, etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542; *In re* Contracting of State Debt by Loan, 21 Colo. 399, 41 Pac. 1110; Quick *v.* Whitewater Tp., 7 Ind. 570.

20. Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370; State *v.* Parkinson, 5 Nev. 15.

21. *California.*— Nougues *v.* Douglass, 7 Cal. 65; Woman's Relief Corps Home Assoc. *v.* Nye, 8 Cal. App. 527, 97 Pac. 208.

Colorado.— *In re* Appropriations by Gen. Assembly, 13 Colo. 316, 22 Pac. 464.

Illinois.— Burritt *v.* State Contracts Com'rs, 120 Ill. 322, 11 N. E. 180.

Kentucky.— James *v.* Cromwell, 129 Ky. 508, 112 S. W. 611, 33 Ky. L. Rep. 1024.

New York.— People *v.* Kings County, 52 N. Y. 556; Rodman *v.* Munson, 13 Barb. 63.

Ohio.— State *v.* Medbery, 7 Ohio St. 522.

South Carolina.— Whaley *v.* Gaillard, 21 S. C. 560; Walker *v.* State, 12 S. C. 200.

See 44 Cent. Dig. tit. "States," § 113 *et seq.*

22. People *v.* Pacheco, 27 Cal. 175; Franklin *v.* State Bd. of Examiners, 23 Cal. 173; Hovey *v.* Foster, 118 Ind. 502, 21 N. E. 39; Burch *v.* Earhart, 7 Oreg. 58.

23. Hovey *v.* Foster, 118 Ind. 502, 21 N. E. 39.

24. *In re* Casual Deficiency, 21 Colo. 403, 42 Pac. 669; *In re* Contracting State Debt by Loan, 21 Colo. 399, 41 Pac. 1110; *In re* Appropriations by Gen. Assembly, 13 Colo. 316, 22 Pac. 464.

25. *In re* Casual Deficiency, 21 Colo. 403, 42 Pac. 669; *In re* Contracting State Debt by Loan, 21 Colo. 399, 41 Pac. 1110; *In re* Appropriations by Gen. Assembly, 13 Colo. 316, 22 Pac. 464; Hovey *v.* Foster, 118 Ind. 502, 21 N. E. 39.

26. Walker *v.* State, 12 S. C. 200.

27. *California.*— Bickerdike *v.* State, 144 Cal. 681, 78 Pac. 270; Reis *v.* State, 133 Cal. 593, 65 Pac. 1102; Koppikus *v.* State Capitol Com'rs, 16 Cal. 248; State *v.* McCauley, 15 Cal. 429; Nougues *v.* Douglass, 7 Cal. 65; People *v.* Johnson, 6 Cal. 499.

Colorado.— Parks *v.* Soldiers, etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542; *In re* Canal Certificate, 19 Colo. 63, 24 Pac. 274; *In re* Loan of School Fund, 18 Colo. 195, 32 Pac. 273; Institute *v.* Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398; Henderson *v.* People, 17 Colo. 587, 31 Pac. 334; *In re* Appropriations by Gen. Assembly, 13 Colo. 316, 22 Pac. 464.

Kentucky.— Eastern Kentucky Lunatic Asylum *v.* Bradley, 101 Ky. 551, 41 S. W. 556, 19 Ky. L. Rep. 750.

Louisiana.— State *v.* Nicholls, 30 La. Ann. 980; State *v.* Clinton, 28 La. Ann. 393; State *v.* Funding Bd., 28 La. Ann. 249; State *v.* Graham, 25 La. Ann. 625; State *v.* Clinton, 25 La. Ann. 491; State *v.* Graham, 23 La. Ann. 402.

Montana.— State *v.* Kenney, 10 Mont. 488, 26 Pac. 383. See also State *v.* Cook, 17 Mont. 529, 43 Pac. 928.

Nevada.— State *v.* Parkinson, 5 Nev. 15.

New York.— People *v.* Kings County, 52 N. Y. 556.

North Dakota.— State *v.* McMillan, 12 N. D. 280, 96 N. W. 310.

Oklahoma.— *In re* Menefee, (1908) 97 Pac. 1014.

South Dakota.— *In re* State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852. See also Van Dusen *v.* State, 11 S. D. 318, 77 N. W. 201; State *v.* Mayhew, 10 S. D. 365, 73 N. W. 200.

United States.— Williams *v.* Louisiana, 103 U. S. 637, 26 L. ed. 595.

See 44 Cent. Dig. tit. "States," § 114.

There is no absolute criterion by which it can be known at the date of the act appropriating or authorizing the expenditure of money, whether such appropriation or expenditure will be in excess of the prescribed constitutional limits; but the general assembly must exercise its own judgment in the

stitutional limitation is mandatory and not merely directory,[28] and cannot be set aside by the judiciary;[29] nor can the state executive officers in any way legally approve or recognize legislative acts making appropriations in excess of the constitutional limits,[30] and it is the duty of the officers administering the state finances to treat as void every such excessive appropriation.[31] Debts contracted for certain purposes, such as to suppress insurrection, repel invasion, etc., are usually excepted from the constitutional limitation. The power of the legislature to contract debts for the excepted purposes is therefore unlimited.[32]

c. Provision For Payment. Acts creating indebtedness are sometimes required to make provision for the payment thereof.[33]

2. What Constitutes the Creation of a Debt. Whether an appropriation creates a debt within the meaning of a constitutional prohibition against contracting a debt depends on the character of the appropriation and the manner of its payment.[34] In general any act or transaction by which the state becomes bound to pay money creates a debt;[35] but making appropriations already provided for by the revenue laws is not creating a debt in the sense of the present discussion,[36] even though in anticipation of such revenue.[37] But an appropriation for which the revenue laws are inadequate,[38] and for which no provision is made by the appropriation act itself,[39] creates a debt. If, however, the appropriation law makes such provision, no debt is created.[40] The funding of an existing debt by the issue of bonds or other securities therefor merely in substitution and not in payment thereof is not creating a debt;[41] but the issue of bonds to be

first instance, and are clothed with ample powers for securing the most accurate and reliable information concerning the public revenue; but while the general assembly must exercise its own judgment in the first instance, yet if for any reason it exceeds the constitutional limits, such excessive acts are mere nullities. *In re* Appropriations by Gen. Assembly, 13 Colo. 316, 22 Pac. 464.

The term "year" as used in Colo. Const. art. 11, § 3, providing that the debt contracted in any one year to provide for deficiencies of revenue shall not exceed, etc., means fiscal year, which in Colorado commences December 1 and ends November 30. *In re* Contracting State Debt by Loan, 21 Colo. 399, 41 Pac. 1110. See also *In re* House Resolution No. 25, 15 Colo. 602, 26 Pac. 145.

28. Nougues *v.* Douglass, 7 Cal. 65.

29. Nougues *v.* Douglass, 7 Cal. 65; Parks *v.* Soldiers, etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542.

The courts have no power to validate an unconstitutional appropriation.— Parks *v.* Soldiers, etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542.

30. *In re* Appropriations by Gen. Assembly, 13 Colo. 316, 22 Pac. 464.

31. Henderson *v.* People, 17 Colo. 587, 31 Pac. 334.

32. Franklin *v.* State Bd. of Examiners, 23 Cal. 173; *In re* Contracting State Debt by Loan, 21 Colo. 399, 41 Pac. 1110.

33. *Louisiana.*— Burbridge *v.* State, 117 La. 841, 42 So. 337. See also State *v.* Graham, 25 La. Ann. 625.

North Dakota.— State *v.* McMillan, 12 N. D. 280, 96 N. W. 310.

Oregon.— Burch *v.* Earhart, 7 Oreg. 58.

South Carolina.— Morton *v.* Comptroller-Gen., 4 S. C. 430.

South Dakota.— Carter *v.* Thorson, 5 S. D. 474, 59 N. W. 469, 24 L. R. A. 734, 49 Am. St. Rep. 893.

See 44 Cent. Dig. tit. "States," § 115 *et seq.*

34. James *v.* State University, (Ky. 1908) 114 S. W. 767.

The issuance of a state warrant, where the money is already in the treasury or the tax levy has already been made, with provision for its collection, does not create an indebtedness within Const. art. 10, § 29, providing that no bond or evidence of indebtedness of the state shall be valid unless the same shall have indorsed thereon a certificate signed by the auditor and attorney-general, showing that the bond or evidence of indebtedness is issued pursuant to law, and is within the debt limit. Bryan *v.* Menefee, 21 Okla. 1, 95 Pac. 471.

35. Rodman *v.* Munson, 13 Barb. (N. Y.) 63, 188.

36. State *v.* Clinton, 28 La. Ann. 400; State *v.* Clinton, 28 La. Ann. 201; State *v.* Parkinson, 5 Nev. 15.

The appropriation of an unexpended balance in the treasury is not an act of borrowing. State *v.* Leaphart, 11 S. C. 458.

37. People *v.* Pacheco, 27 Cal. 175; State *v.* McCauley, 15 Cal. 429; Stein *v.* Morrison, 9 Ida. 426, 75 Pac. 246; State *v.* Parkinson, 5 Nev. 15; *In re* State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852.

38. State *v.* Graham, 23 La. Ann. 402; State *v.* Medbery, 7 Ohio St. 522.

39. State *v.* Clinton, 28 La. Ann. 201; State *v.* Graham, 25 La. Ann. 625.

40. People *v.* Pacheco, 27 Cal. 175. See also State *v.* Clinton, 25 La. Ann. 401.

The issue of stock certificates to be paid by funds arising from the sale of lands does not create an indebtedness. State *v.* Farwell, 3 Pinn. (Wis.) 393, 4 Chandl. 106.

41. Opinion of Justices, 81 Me. 602, 18

sold for the purpose of raising funds to discharge an existing debt creates a new debt.[42] A mere transfer from one fund to another of money already in the treasury does not create a debt,[43] nor does a statute appropriating a stated sum annually as a mere gratuity alterable both as to amount and manner of application at the pleasure of the legislature.[44] A state debt may be considered extinguished when there is money enough in the treasury, not subject to other claims, to pay it, even though it has not matured and has not been actually paid.[45]

3. Limitation on Use of Funds or Credit. The state constitutions frequently place certain restrictions upon the use of public credit or funds. Thus in some states the constitution prohibits the loaning of the credit of the state,[46] or the making of loans or gifts of public money or property or of state aid to private individuals or corporations;[47] or forbid appropriations for any sectarian or denom-

Atl. 291; Klein *v.* Kinkead, 16 Nev. 194; *In re* Menefee, (Okla. 1908), 97 Pac. 1014; Robertson *v.* Tillman, 39 S. C. 298, 17 S. E. 678. See also Walker *v.* State, 12 S. C. 200.

The issue of bonds creating an unconditional obligation as a substitute for conditional obligations of the state creates a debt. State *v.* Clinton, 28 La. Ann. 393; State *v.* Funding Bd., 28 La. Ann. 249.

42. State *v.* McGraw, 12 Wash. 541, 41 Pac. 893.

43. State *v.* Rogers, 21 Wash. 206, 57 Pac. 801.

44. Hager *v.* Kentucky Children's Home Soc., 119 Ky. 235, 83 S. W. 605, 26 Ky. L. Rep. 1133, 67 L. R. A. 815.

45. Auditor-Gen. *v.* State Treasurer, 45 Mich. 161, 7 N. W. 716.

46. McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518.

Ark. Const. (1868) art. 10, § 6, provided that "the credit of the State or counties shall never be loaned for any purpose without the consent of the people thereof, expressed through the ballot-box." McKittrick *v.* Arkansas Cent. R. Co., 152 U. S. 473, 14 S. Ct. 661, 38 L. ed. 518.

47. *California.*— Bickerdike *v.* State, 144 Cal. 681, 78 Pac. 270; Molineux *v.* State, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49; Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; Bourn *v.* Hart, 93 Cal. 321, 28 Pac. 951, 27 Am. St. Rep. 203, 15 L. R. A. 431; Stevenson *v.* Colgan, 91 Cal. 649, 27 Pac. 1089, 25 Am. St. Rep. 230, 14 L. R. A. 459; Yosemite Stage, etc., Co. *v.* Dunn, 83 Cal. 264, 23 Pac. 369; Robinson *v.* Dunn, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297; People *v.* Pacheco, 27 Cal. 175; Woman's Relief Corps Home Assoc. *v.* Nye, 8 Cal. App. 527, 97 Pac. 208, where, however, the act in question was held not to come within the constitutional prohibition. See also Rankin *v.* Colgan, 92 Cal. 605, 28 Pac. 673.

Illinois.— Boehm *v.* Hertz, 182 Ill. 154, 54 N. E. 973, 48 L. R. A. 575. See also Burke *v.* Snively, 208 Ill. 328, 70 N. E. 327.

Iowa.— Merchants' Union Barb. Wire Co. *v.* Brown, 64 Iowa 275, 20 N. W. 434. But see McSurely *v.* McGrew, 140 Iowa 163, 118 N. W. 415, holding that the legislature is not confined in its appropriation of public moneys, or of the sums to be raised by taxation, in favor of individuals, to cases in which a legal demand exists against the state, but the state can recognize claims founded in justice and equity.

Kentucky.— Hager *v.* Kentucky Children's Home Soc., 119 Ky. 235, 83 S. W. 605, 26 Ky. L. Rep. 1133, 67 L. R. A. 815; Norman *v.* Kentucky Bd. of Managers World's Columbian Exposition, 93 Ky. 537, 20 S. W. 901, 14 Ky. L. Rep. 529, 18 L. R. A. 556.

Louisiana.— Saucier *v.* New Orleans, 119 La. 179, 43 So. 999; Benedict *v.* New Orleans, 115 La. 645, 39 So. 792; Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882; State *v.* Burgess, 23 La. Ann. 225.

Maryland.— Bonsal *v.* Yellott, 100 Md. 481, 60 Atl. 593, 69 L. R. A. 914.

Missouri.— State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Elting *v.* Hickman, 172 Mo. 237, 72 S. W. 700; State *v.* St. Louis County Ct., 142 Mo. 575, 44 S. W. 734; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State *v.* Seibert, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624; State *v.* Walker, 85 Mo. 41; Webb *v.* Lafayette County, 67 Mo. 353; Opinion of Justices, 55 Mo. 497.

New York.— People *v.* Brooklyn Cooperage Co., 187 N. Y. 142, 79 N. E. 866; Fox *v.* Mohawk, etc., Humane Soc., 165 N. Y. 517, 59 N. E. 353, 80 Am. St. Rep. 767, 51 L. R. A. 681; Cayuga County *v.* State, 153 N. Y. 279, 47 N. E. 288; Shepherd's Fold of Protestant Church *v.* New York, 96 N. Y. 137 [*reversing* 10 Daly 319]; Exempt Firemen's Benev. Fund *v.* Roome, 93 N. Y. 313, 45 Am. Rep. 217 [*affirming* 29 Hun 391]; People *v.* Denniston, 23 N. Y. 247.

North Carolina.— Galloway *v.* Jenkins, 63 N. C. 147.

North Dakota.— State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

Ohio.— State *v.* Felton, 77 Ohio St. 554, 84 N. E. 85. See also State *v.* Buttles, 3 Ohio St. 309.

South Dakota.— Cutting *v.* Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691.

Washington.— Seattle, etc., Waterway Co. *v.* Seattle Dock Co., 35 Wash. 503, 77 Pac. 845 [*affirmed* in 195 U. S. 624, 25 S. Ct. 789, 49 L. ed. 350].

United States.— Cole *v.* La Grange, 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896; Darby *v.* Wright, 6 Fed. Cas. No. 3,574, 3 Blatchf. 170.

inational institution,[48] or for other than state institutions;[49] or prohibit the granting of any extra compensation or allowance to any public officer, agent, servant, or contractor after the rendering of the service or the making or performance of the contract;[50] and in several states it is provided that no debt shall be contracted or appropriation made in the aid of works of internal improvement.[51] Another provision is that the legislature shall not pay or authorize the payment of any claim arising under a contract not expressly authorized by preëxisting law;[52] but it is sufficient under this provision that the contract should have been authorized by law, although the law may afterward be held unconstitutional.[53] It is also sometimes provided that no indebtedness shall be incurred except in pursuance of an appropriation for the specific purpose first made.[54]

An appropriation for the benefit of sufferers from floods is void under such a prohibition. Patty *v.* Colgan, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744.

An appropriation for the relief of destitute farmers in certain counties of the state is within the prohibition. *In re* Relief Bills, 21 Colo. 62, 39 Pac. 1089. *Aliter* under the North Dakota constitution. State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283. But an act making an appropriation to procure for the farmers of the state barbed wire at cost is not within the prohibition. Merchants' Union Barb Wire Co. *v.* Brown, 64 Iowa 275, 20 N. W. 434.

A bounty for killing wild animals is not a gift within the prohibition. Ingraham *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; Weaver *v.* Scurry County, (Tex. Civ. App. 1894) 28 S. W. 836.

An act extending the time of a loan made by the state to a railroad company is not the giving or loaning of the state's credit within the prohibition. Opinion of Justices, 55 Mo. 497.

An appropriation in aid of fire companies is not within the prohibition. Exempt Firemen's Benev. Fund *v.* Rome, 93 N. Y. 313, 45 Am. Rep. 217; Cutting *v.* Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691.

48. Cook County *v.* Chicago Industrial School, 125 Ill. 540, 18 N. E. 183, 8 Am. St. Rep. 386, 1 L. R. A. 437; State *v.* Hallock, 16 Nev. 373; Dakota *v.* State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418. See also Pfeiffer *v.* Detroit Bd. of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536. And see, generally, SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 814, 824.

An appropriation to pay damages for injury caused by the state to a sectarian institution is not within the prohibition. *In re* Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088.

49. Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51, 27 Am. St. Rep. 95, 14 L. R. A. 474.

The "Soldiers' and Sailors Home" is an institution for "public good," within Const. art. 8, authorizing the same to be supported by the state. Goodykoontz *v.* People, 20 Colo. 374, 38 Pac. 473.

50. *California.*— Lewis *v.* Colgan, 115 Cal. 529, 47 Pac. 357; Stevenson *v.* Colgan, 91 Cal. 649, 27 Pac. 1089, 25 Am. St. Rep. 230, 14 L. R. A. 459; Robinson *v.* Dunn, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297.

Illinois.— People *v.* Beveridge, 38 Ill. 307.

Michigan.— Olds *v.* State Land Office Com'rs, 134 Mich. 442, 86 N. W. 956, 96 N. W. 508; Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549.

New York.— Swift *v.* State, 89 N. Y. 52 [*reversing* 26 Hun 508].

Wisconsin.— Carpenter *v.* State, 39 Wis. 271.

See 44 Cent. Dig. tit. "States," § 118.

In the absence of such a prohibition, extra compensation may be allowed by the legislature to a contractor in a proper case. Winters *v.* State, 5 Ida. 198, 47 Pac. 855.

51. *Illinois.*—Burke *v.* Snively, 208 Ill. 328, 70 N. E. 327.

Kansas.— State *v.* Kelly, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450.

Maryland.— Bonsal *v.* Yellott, 100 Md. 481, 60 Atl. 593, 60 L. R. A. 914.

Michigan.— Gibson *v.* State Land Office Com'rs, 121 Mich. 49, 79 N. W. 919; Atty.-Gen. *v.* Pingree, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407; Brady *v.* Hayward, 114 Mich. 326, 72 N. W. 233; Smith *v.* Carlow, 114 Mich. 67, 72 N. W. 22; Wilcox *v.* Paddock, 65 Mich. 23, 31 N. W. 609; People *v.* Springwells Tp. Bd., 25 Mich. 153; Ryerson *v.* Utley, 16 Mich. 269.

Wisconsin.— Bloomer *v.* Bloomer, 128 Wis. 297, 107 N. W. 974; State *v.* Froehlich, 115 Wis. 32, 91 N. W. 115, 95 Am. St. Rep. 894, 58 L. R. A. 757; Sloan *v.* State, 51 Wis. 623, 8 N. W. 393.

See 44 Cent. Dig. tit. "States," § 118.

52. *California.*— Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262; Lewis *v.* Colgan, (1896) 44 Pac. 1081; Miller *v.* Dunn, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67.

Colorado.— *In re* Senate Bill No. 196, 23 Colo. 508, 48 Pac. 540.

New York.—Rodman *v.* Munson, 13 Barb. 63.

Texas.— State *v.* Wilson, 71 Tex. 291, 9 S. W. 155; Nichols *v.* State, 11 Tex. Civ. App. 327, 32 S. W. 452.

Washington.— Seattle, etc., Waterway Co. *v.* Seattle Dock Co., 35 Wash. 503, 77 Pac. 845 [*affirmed* in 195 U. S. 624, 25 S. Ct. 789, 49 L. ed. 350].

See 44 Cent. Dig. tit. "States," § 118.

53. Miller *v.* Dunn, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67.

54. Van Dusen *v.* State, 11 S. D. 318, 77 N. W. 201.

C. Administration of Finances — 1. Collection and Custody of Funds. State funds are to be collected by the officers and in the manner provided by law,[55] and should generally be paid into the state treasury, where they are under the custody and control of the state treasurer,[56] who is sometimes authorized to deposit state funds in banks or other depositories.[57] Revenues of the state assessed and in process of collection are to be considered as constructively in the treasury, and may be appropriated and treated as though actually there.[58] The state treasurer may be held liable for interest on funds improperly loaned,[59] or deposited by him.[60]

2. Disbursements. The disbursement of state funds is regulated by law.[61] Generally the state treasurer has no power and cannot be required to pay out money from the state treasury except in pursuance of specific appropriations made by law,[62] and upon a warrant or order from the state auditor or other proper officer.[63] Where the constitution provides that no money shall be paid out of the treasury except on a warrant drawn therefor by the proper officer in pursuance of an appropriation made by law, mandamus will lie to compel the auditor or controller to draw a warrant for the payment of a valid claim for which the legislature has made an appropriation,[64] but not where no appropriation has been made,[65] nor where the appropriation made has been exhausted;[66] and where such warrant is required, a statute providing for the payment of money without a warrant is void,[67] and the inhibition applies to funds belonging to the state which have not yet reached the treasury as well as to money actually in the treasury.[68] The treasurer is not ordinarily required to pay out the identical money received by him for a special purpose, but only money of the same value and

55. See Louisville *v.* Com., 9 Dana (Ky.) 70; Young *v.* Hughes, 12 Sm. & M. (Miss.) 93; State *v.* Sooy, 38 N. J. L. 324; People *v.* Bank of North America, 75 N. Y. 547.

56. *Arkansas.*—Williams *v.* State, 65 Ark. 159, 46 S. W. 186.

Indiana.— Ristine *v.* State, 20 Ind. 328.

Kentucky.— Louisville *v.* Com., 9 Dana 70.

Missouri.— State *v.* Henderson, 160 Mo. 190, 60 S. W. 1093.

Nebraska.— *In re* State Treasurer's Settlement, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746.

Virginia.—Wilson *v.* Burfoot, 2 Gratt. 134.

Wisconsin.— State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 29 L. R. A. 223.

See 44 Cent. Dig. tit. "States," § 121 *et seq.*

Money and securities deposited with the state treasurer by corporations for the security of investors are not state funds and are not governed by the laws relating to such funds. State *v.* Stephens, 136 Mo. 537, 37 S. W. 506.

57. State *v.* McCarty, Wils. (Ind.) 205; State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223. And see Depositaries, 13 Cyc. 812.

58. *In re* State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852. See also State *v.* Kenney, 10 Mont. 488, 26 Pac. 383.

59. State *v.* McCarty, Wils. (Ind.) 205.

60. State *v.* Harshaw, 84 Wis. 532, 54 N. W. 17; State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

61. See the statutes of the several states. And see cases cited *infra*, this, and the following notes.

Issue of duplicate where original check is lost in the mails.—Where the statute requires payment to be made by the treasurer's check, the mailing of the check properly addressed is sufficient; and if the check is not received, the payee may receive a duplicate check on executing an indemnity bond and proving loss of check. Gibony *v.* Com., 91 S. W. 732, 28 Ky. L. Rep. 1230.

62. See *infra*, VII, C, 6, a.

63. *Arkansas.*— Featherston *v.* Adams, 10 Ark. 163.

Colorado.— Institute for Education of Mute *v.* Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398.

Indiana.— Ristine *v.* State, 20 Ind. 328.

Maine.— Weston *v.* Dane, 53 Me. 372.

Maryland.— Thomas *v.* Owens, 4 Md. 189.

Mississippi.—Wilson *v.* Griffith, 24 Miss. 468.

Oklahoma.— Trapp *v.* Wells Fargo Express Co., (1908) 97 Pac. 1003.

West Virginia.— See Shields *v.* Bennett, 8 W. Va. 74.

See 44 Cent. Dig. tit. "States," § 122.

64. State *v.* Kenney, 10 Mont. 485, 26 Pac. 197; State *v.* Grimes, 7 Wash. 191, 34 Pac. 833. See also Burch *v.* Earhart, 7 Oreg. 58.

65. See *infra*, VII, C, 6, a.

66. Clayton *v.* Berry, 27 Ark. 129; Marshall *v.* Dunn, 69 Cal. 223, 10 Pac. 399; Baggett *v.* Dunn, 69 Cal. 75, 10 Pac. 125; Boyd *v.* Dunbar, 44 Oreg. 380, 75 Pac. 695; Collins *v.* State, 3 S. D. 18, 51 N. W. 776.

67. Institute for Education of Mute *v.* Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398.

68. Institute for Education of Mute *v.* Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398.

essential qualities;[69] but warrants drawn on a particular fund are payable only out of that fund,[70] and warrants required by law to be discharged in a certain medium must be paid in that medium.[71] The treasurer may be held liable for loss to the state resulting from a payment irregularly made by him;[72] but a private citizen and taxpayer cannot sue to enjoin a state officer from misappropriating the public funds, where by law this duty is cast upon the attorney-general;[73] and where state funds have already been misapplied, the state, but not an individual taxpayer, may sue to recover them.[74]

3. Loan of Funds — a. In General. Officers charged with the collection, custody, and disbursement of funds belonging to the state cannot lawfully loan such funds in the absence of statutory authority therefor.[75] Such loans are, however, sometimes authorized by statute, in which case they will be governed as to their terms and conditions by the statutes authorizing them,[76] and must be made in accordance with the statute,[77] and an officer who loans money in an unauthorized manner may be charged with interest.[78] An unauthorized loan may be ratified by the legislature.[79]

b. On Mortgage Security. Mortgages taken by the state to secure its loans are subject to the general law of mortgages[80] as to the effect of default, etc., except so far as modified by particular statutes;[81] and foreclosure proceedings must conform at least substantially with all the statutory requirements as to parties, notice of sale, and similar matters, or they will be void;[82] but mere irregu-

69. State *v.* McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

70. People *v.* Beveridge, 38 Ill. 307.

71. People *v.* Beveridge, 38 Ill. 307.

72. State *v.* Baetz, 44 Wis. 624.

73. Jones *v.* Reed, 3 Wash. 57, 27 Pac. 1067.

74. Sears *v.* James, 47 Oreg. 50, 82 Pac. 14.

75. State *v.* Buttles, 3 Ohio St. 309.

76. See the statutes of the several states. And see the following cases:

Alabama.— *Ex p.* Selma, etc., R. Co., 46 Ala. 423.

Idaho.— State *v.* Fitzpatrick, 5 Ida. 499, 51 Pac. 112.

Indiana.— State *v.* Carr, 111 Ind. 335, 12 N. E. 318.

Mississippi.— McAfee *v.* Southern R. Co., 36 Miss. 669.

New York.— York *v.* Allen, 30 N. Y. 104; Jackson *v.* Voorhis, 9 Johns. 129; Denning *v.* Smith, 3 Johns. Ch. 332.

See 44 Cent. Dig. tit. "States," § 123.

The administration and loaning of the United States deposit fund received by the state of New York under the act of congress of 1836 are fully regulated by the statute of 1837. See Thompson *v.* Commissioners for Loaning Certain Moneys, etc., 79 N. Y. 54 [*reversing* 16 Hun 86]; Pell *v.* Ulmar, 18 N. Y. 139 [*reversing* 21 Barb. 500]; New York L. Ins. Co. *v.* White, 17 N. Y. 469; Olmsted *v.* Elder, 5 N. Y. 144 [*reversing* 2 Sandf. 325]; Powell *v.* Tuttle, 3 N. Y. 396; White *v.* Lester, 4 Abb. Dec. (N. Y.) 585, 1 Keyes 316, 34 How. Pr. 136; Goodhart *v.* Latting, 53 Hun (N. Y.) 26, 5 N. Y. Suppl. 615; Fellows *v.* Commissioners for Loaning U. S. Moneys, etc., 36 Barb. (N. Y.) 655; New York L. Ins., etc., Co. *v.* Staats, 21 Barb. (N. Y.) 570 [*affirmed* in 17 N. Y. 469]; U. S. Deposit Fund Com'rs *v.* Chase, 6 Barb. (N. Y.) 37; Goodhart *v.* Street, 12 Misc. (N. Y.) 360, 33 N. Y. Suppl. 687; Barley *v.* Roosa, 13 N. Y. Suppl. 209; Commissioners for Loaning Certain Moneys, etc. *v.* Van Demark, 36 How. Pr. (N. Y.) 145; Sherwood *v.* Reade, 7 Hill (N. Y.) 431 [*reversing* 8 Paige 633].

77. State *v.* McCarty, Wils. (Ind.) 205.

78. State *v.* McCarty, Wils. (Ind.) 205.

79. State *v.* Buttles, 3 Ohio St. 309.

80. See Mortgages, 27 Cyc. 916.

81. See Vannoy *v.* Blessing, 36 Ind. 349; Thompson *v.* Commissioners for Loaning Certain Moneys, etc., 79 N. Y. 54; York *v.* Allen, 30 N. Y. 104; Pell *v.* Ulmar, 18 N. Y. 139; Olmsted *v.* Elder, 5 N. Y. 144; White *v.* Lester, 4 Abb. Dec. (N. Y.) 585, 1 Keyes 316, 34 How. Pr. 136; Goodhart *v.* Latting, 53 Hun (N. Y.) 26, 5 N. Y. Suppl. 615; People *v.* Burdick, 52 Hun (N. Y.) 348, 5 N. Y. Suppl. 363; Wood *v.* Terry, 4 Lans. (N. Y.) 80; Fellows *v.* Commissioners for Loaning U. S. Moneys, etc., 36 Barb. (N. Y.) 655; New York L. Ins., etc., Co. *v.* Staats, 21 Barb. (N. Y.) 570 [*affirmed* in 17 N. Y. 469]; U. S. Deposit Fund Com'rs *v.* Chase, 6 Barb. (N. Y.) 37; Brown *v.* Wilbur, 8 Wend. (N. Y.) 657; Jackson *v.* Rhodes, 8 Cow. (N. Y.) 47; Sherrill *v.* Crosby, 14 Johns. (N. Y.) 358; Jackson *v.* Voorhis, 9 Johns. (N. Y.) 129; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 332.

Rescission of contract to purchase land mortgaged to state.—Where a person who had contracted for the purchase of land mortgaged his interest therein to the state, it was held that he could not, during the existence of the mortgage, rescind the contract without the assent of the state. Atty.-Gen. *v.* Purmort, 5 Paige (N. Y.) 620 [*affirmed* in 16 Wend. 460, 30 Am. Dec. 103].

82. Brown *v.* Ogg, 85 Ind. 234; Thompson *v.* Commissioners for Loaning Certain Moneys, etc., 79 N. Y. 54; York *v.* Allen, 30 N. Y.

larities not affecting the merits will not invalidate a sale otherwise regular and fair, at least as against *bona fide* purchasers without notice.[83] The failure to record a mortgage taken in pursuance of a statute works no prejudice to the state as all persons are chargeable with notice thereof.[84]

4. Special Funds. Statutes frequently create or set apart special funds for particular purposes, and such funds are generally governed by the statutes and must be expended and administered in accordance therewith;[85] and a fund created for a particular purpose must be applied thereto and cannot be diverted to any other purpose,[86] or transferred to any other fund,[87] except as to any surplus that may remain after the accomplishment of the purpose for which the fund was

104; Pell *v.* Ulmar, 18 N. Y. 139; Olmsted *v.* Elder, 5 N. Y. 144; Powell *v.* Tuttle, 3 N. Y. 396; Sherwood *v.* Reade, 7 Hill (N. Y.) 431; Rogers *v.* Murray, 3 Paige (N. Y.) 390; Denning *v.* Smith, 3 Johns. Ch. (N. Y.) 332; Cromwell *v.* McCalmont, 1 Serg. & R. (Pa.) 126.

83. Wood *v.* Lester, 4 Abb. Dec. (N. Y.) 585, 1 Keyes 316, 34 How. Pr. 136; Wood *v.* Terry, 4 Lans. (N. Y.) 80; King *v.* Stow, 6 Johns. Ch. (N. Y.) 323 [*overruled* in Powell *v.* Tuttle, 3 N. Y. 396]. See also Jackson *v.* Harris, 3 Cow. (N. Y.) 241.

84. Memphis, etc., R. Co. *v.* State, 37 Ark. 632. See also Brailsford *v.* House, 1 Nott & M. (S. C.) 31.

85. *Alabama.*— Purifoy *v.* Andrews, 101 Ala. 643, 16 So. 541.

Colorado.— *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274; *In re* Loan of School Fund, 18 Colo. 195, 32 Pac. 273.

Florida.— Wilson *v.* Mitchell, 43 Fla. 107, 30 So. 703; Hawkins *v.* Mitchell, 34 Fla. 405, 16 So. 311; Internal Imp. Fund Trustees *v.* Bailey, 10 Fla. 112, 81 Am. Dec. 194.

Idaho.— Steunenberg *v.* Storer, 6 Ida. 44, 52 Pac. 14; State *v.* Fitzpatrick, 5 Ida. 499, 51 Pac. 112.

Illinois.— People *v.* Swigert, 107 Ill. 494; People *v.* Auditor, 12 Ill. 307; Pike County *v.* People, 11 Ill. 202.

Indiana.— State *v.* Wabash, etc., Canal Trustees, 4 Ind. 495.

Kansas.— State *v.* Scott County, 58 Kan. 491, 49 Pac. 663.

Mississippi.— Young *v.* Hughes, 12 Sm. & M. 93.

Missouri.— State *v.* Thompson, 37 Mo. 87; State *v.* Bishop, 36 Mo. 58.

North Dakota.— State *v.* McMillan, 12 N. D. 280, 96 N. W. 310.

Texas.— Houston, etc., R. Co. *v.* State, (Civ. App. 1897) 41 S. W. 157.

Washington.— State *v.* Young, 18 Wash. 21, 50 Pac. 786; State *v.* McGraw, 13 Wash. 311, 43 Pac. 176.

Wyoming.— State *v.* Burdick, 4 Wyo. 290, 33 Pac. 131.

See 44 Cent. Dig. tit. "States," § 125.

Where by statute a special fund is created and dedicated to the payment of warrants issued against it under the provisions of the statute, there can be no state debt created to pay such warrants, but the holders thereof must look to the special fund exclusively. State *v.* Wright, 17 Mont. 565, 44 Pac. 89.

86. *Colorado.*— *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274; *In re* Internal Improvements, 18 Colo. 317, 32 Pac. 611.

Florida.— Internal Imp. Fund Trustees *v.* Bailey, 10 Fla. 112, 81 Am. Dec. 194.

Georgia.— Park *v.* Candler, 113 Ga. 647, 39 S. E. 89.

Illinois.— Burritt *v.* State Contract Com'rs, 120 Ill. 322, 11 N. E. 180; People *v.* Auditor, 12 Ill. 307.

Indiana.— State *v.* Porter, 89 Ind. 260.

Michigan.— See Flynn *v.* Turner, 99 Mich. 96, 57 N. W. 1092.

Mississippi.— Levee Com'rs *v.* Hemingway, 66 Miss. 289, 6 So. 235.

Nevada.— State *v.* Westerfield, 23 Nev. 468, 49 Pac. 119.

North Carolina.— Arendell *v.* Worth, 125 N. C. 111, 34 S. E. 232.

Ohio.— Daley *v.* Board of Public Works, 9 Ohio Dec. (Reprint) 118, 11 Cinc. L. Bul. 25.

Rhode Island.— *In re* State House Fund, 19 R. I. 393, 33 Atl. 870.

South Carolina.— State *v.* Cardozo, 8 S. C. 71, 28 Am. Rep. 275; Morton *v.* Comptroller-Gen., 4 S. C. 430.

See 44 Cent. Dig. tit. "States," § 125.

Money appropriated for a particular year should not, without authority, be applied to the expenditures of another year. State *v.* Seibert, 103 Mo. 401, 35 S. W. 761; Opinion of Judges, 5 Nebr. 566; State *v.* Hallock, 20 Nev. 73, 15 Pac. 472. See also Van Dusen *v.* State, 11 S. D. 318, 77 N. W. 201; State *v.* Mayhew, 10 S. D. 365, 73 N. W. 200. The Louisiana constitutional amendment of 1874 provides that the revenues of each year, except surplus revenues, shall be devoted to the expenses of that year. Klein *v.* Johnson, 33 La. Ann. 587; State *v.* State Auditor, 32 La. Ann. 89; Harris *v.* Dubuclet, 30 La. Ann. 662.

Where specific sums are appropriated for each of two ensuing years for a specific purpose, any unexpended balance of the fund appropriated for the first year may be expended during the second year. State *v.* Cook, 14 Mont. 332, 36 Pac. 177.

But so long as appropriations are still subject to legislative control, a fund appropriated for one purpose may be diverted by the legislature to another purpose. Richland County *v.* Lawrence County, 12 Ill. 1. See also State *v.* Omaha Nat. Bank, 59 Nebr. 483, 81 N. W. 319.

87. People *v.* Pacheco, 29 Cal. 210; People *v.* Auditor of Public Accounts, 30 Ill. 434; State *v.* Cook, 14 Mont. 332, 36 Pac. 177; Klein *v.* Kinkead, 16 Nev. 194.

raised,[88] or unless authorized by statute;[89] and the legislature cannot authorize the diversion of a special fund where such diversion would conflict with a provision of the constitution controlling such fund,[90] or would impair the obligation of a contract,[91] or constitute a breach of trust.[92] Individuals interested in a fund created for a particular purpose may enjoin the state officers having charge of the fund from diverting or applying it to any other purpose;[93] but the mere refusal of the disbursing officer to apply a particular fund to the purpose for which it was appropriated does not constitute a misappropriation of the fund.[94]

5. Apportionment of Funds. Ordinarily appropriations of the same rank share ratably if the fund out of which they are to be paid is inadequate to satisfy all.[95] But in some states the constitutions provide that in the event of a deficiency of funds to meet all of the appropriations made by the legislature, appropriations for certain purposes, such as for the support of the state, or its institutions, or to defray the necessary expenses of the executive, legislative, and judicial departments, or to pay the interest on the state debt, shall be entitled to preference over any other appropriations, without reference to the date of the appropriations.[96] After preferred appropriations are satisfied, other appropriations are to be paid according to priority of date;[97] and where several appropriations of the same grade are made by separate bills of the same date, and there are funds to pay only part, priority will be determined by the time of day at which the several acts take effect;[98] but where an appropriation to pay an indefinite number of claims of the same kind to arise in the future proves insufficient to pay all the claims filed, such claims should be paid in full in the order of filing until the appropriation is exhausted.[99] An appropriation out of a fund "not otherwise appropriated" must be postponed to appropriations previously made out of that fund.[1]

6. Appropriations — a. Necessity For. The state constitutions or statutes generally provide that no money shall be paid or drawn from the state treasury or warrant drawn therefor except in pursuance of specific appropriations made by law.[2] The object of such a provision is to prevent the expenditure of the

88. *Colorado.*— *In re* House Resolution No. 25, 15 Colo. 602, 26 Pac. 145.

Illinois.— People *v.* Swigert, 107 Ill. 494.

Louisiana.— Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882.

Michigan.—Auditor-Gen. *v.* State Treasurer, 45 Mich. 161, 7 N. W. 716.

Rhode Island.— *In re* State House Fund, 19 R. I. 393, 33 Atl. 870.

See 44 Cent. Dig. tit. "States," § 125.

Unexpended balances of a fund appropriated for a special purpose for a specified period lapse at the expiration of such period and should be carried to the general fund of the treasury. State *v.* Hallock, 20 Nev. 73, 15 Pac. 472.

89. People *v.* Swigert, 107 Ill. 494; Levee Com'rs *v.* Hemingway, 66 Miss. 289, 6 So. 235.

90. *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274.

91. Internal Imp. Fund Trustees *v.* Bailey, 10 Fla. 112, 81 Am. Dec. 194; State *v.* Cardozo, 8 S. C. 71, 28 Am. Rep. 275.

92. *In re* State House Funds, 19 R. I. 393, 33 Atl. 870.

93. Internal Imp. Fund Trustees *v.* Bailey, 10 Fla. 112, 81 Am. Dec. 194. But see People *v.* Pacheco, 29 Cal. 210.

94. Ryerson *v.* Utley, 16 Mich. 269.

95. Stuart *v.* Nance, 28 Colo. 194, 63 Pac. 323; State *v.* Burke, 37 La. Ann. 434; State *v.* Burke, 34 La. Ann. 548.

96. See the constitutions of the several states. And see Stuart *v.* Nance, 28 Colo. 194, 63 Pac. 323 [*affirming* 12 Colo. App. 125, 54 Pac. 867]; Parks *v.* Soldiers', etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542; Henderson *v.* People, 17 Colo. 587, 31 Pac. 334; *In re* Appropriations by General Assembly, 13 Colo. 316, 22 Pac. 464; State *v.* Burke, 37 La. Ann. 434; State *v.* Burke, 37 La. Ann. 196; State *v.* Burke, 34 La. Ann. 548; State *v.* Burke, 34 La. Ann. 404; State *v.* Burke, 32 La. Ann. 1213.

97. Parks *v.* Soldiers', etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542; Goodykoontz *v.* People, 20 Colo. 374, 38 Pac. 473.

98. Parks *v.* Soldiers', etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542.

99. Meade County Bank *v.* Reeves, 13 S. D. 193, 82 N. W. 751.

1. Klein *v.* State Treasurer, 43 La. Ann. 362, 8 So. 927.

2. See the constitutions and statutes of the several states. And see the following cases:

Alabama.— Reynolds *v.* Taylor, 43 Ala. 420.

Arkansas.— Moore *v.* Alexander, 85 Ark. 171, 107 S. W. 395; Clayton *v.* Berry, 27 Ark. 129; *Ex p.* Carroll, 10 Ark. 38.

California.— Stratton *v.* Green, 45 Cal. 149; Butler *v.* Bates, 7 Cal. 136.

people's funds without their own consent, expressed either by themselves in the state constitution or by their representatives in legislative acts;[3] and it secures to the legislature the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government.[4] Under such a provision the state treasurer cannot be compelled by mandamus to pay money out of the treasury,[5] nor the state auditor to draw his warrant for such payment,[6] where no appropriation has been made.

b. By Whom and How Made. Appropriations can be made only by the legislature,[7] the power of which, except as restricted by the constitution, is plenary over the matter of appropriations,[8] and whether or not an appropriation shall be made is a legislative question over which the courts have no supervision or control.[9] Since the enactment of a law requires the joint action

Colorado.— Crouter *v.* Bennet, 34 Colo. 120, 81 Pac. 761; Goodykoontz *v.* Acker, 19 Colo. 360, 35 Pac. 911; Collier, etc., Lith. Co. *v.* Henderson, 18 Colo. 259, 32 Pac. 417; Institute for Education of Mute, etc. *v.* Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398.

Florida.— Bemis *v.* State, 3 Fla. 12.

Georgia.— Park *v.* Candler, 113 Ga. 647, 39 S. E. 89.

Idaho.— Kingsbury *v.* Anderson, 5 Ida. 771, 51 Pac. 744.

Illinois.— People *v.* Miner, 46 Ill. 377.

Indiana.— Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370; Rice *v.* State, 95 Ind. 33; State *v.* Porter, 89 Ind. 260; State *v.* Ristine, 20 Ind. 345; Ristine *v.* State, 20 Ind. 328.

Kansas.— State *v.* Stover, 47 Kan. 119, 27 Pac. 850; Henderson *v.* Hovey, 46 Kan. 691, 27 Pac. 177, 13 L. R. A. 222; Martin *v.* Francis, 13 Kan. 220.

Kentucky.— Hager *v.* Shuck, 120 Ky. 574, 87 S. W. 300, 27 Ky. L. Rep. 957.

Louisiana.— State *v.* Frazee, 105 La. 250, 29 So. 478; State *v.* Graham, 25 La. Ann. 625.

Maine.— Weston *v.* Dane, 51 Me. 461.

Maryland.— McPherson *v.* Leonard, 29 Md. 377; Thomas *v.* Owens, 4 Md. 189.

Mississippi.—Colbert *v.* State, 86 Miss. 769, 39 So. 65; State *v.* Cole, 81 Miss. 174, 32 So. 314.

Missouri.— State *v.* Seibert, 99 Mo. 122, 12 S. W. 348; State *v.* Holladay, 66 Mo. 385; State *v.* Holladay, 64 Mo. 526; Opinion of Justices, 49 Mo. 216. See also *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218; State *v.* Henderson, 160 Mo. 190, 60 S. W. 1093.

Montana.— State *v.* Hickman, 11 Mont. 541, 29 Pac. 92; State *v.* Kenney, 9 Mont. 389, 24 Pac. 96.

Nebraska.—Providence Washington Ins. Co. *v.* Weston, 63 Nebr. 764, 89 N. W. 253; State *v.* Cornell, 54 Nebr. 647, 75 N. W. 25; State *v.* Moore, 50 Nebr. 88, 69 N. W. 373, 61 Am. St. Rep. 538; State *v.* Babcock, 18 Nebr. 221, 24 N. W. 683; State *v.* Wallichs, 16 Nebr. 679, 21 N. W. 397; State *v.* Wallichs, 15 Nebr. 609, 20 N. W. 110; State *v.* Wallichs, 15 Nebr. 457, 19 N. W. 641; State *v.* Wallichs, 12 Nebr. 407, 11 N. W. 860; State *v.* McBride, 6 Nebr. 506; State *v.* Weston, 6 Nebr. 16.

Nevada.— State *v.* Eggers, 29 Nev. 469, 91 Pac. 819, 16 L. R. A. N. S. 630.

Oregon.— Colbreath *v.* Dunbar, 46 Oreg. 580, 81 Pac. 366; Boyd *v.* Dunbar, 44 Oreg. 380, 75 Pac. 695; Brown *v.* Fleischner, 4 Oreg. 132.

South Carolina.— State *v.* Corbin, 16 S. C. 533.

South Dakota.— Carter *v.* Thorson, 5 S. D. 474, 59 N. W. 469, 49 Am. St. Rep. 893, 24 L. R. A. 734; Collins *v.* State, 3 S. D. 18, 51 N. W. 776.

Texas.— Pickle *v.* Finley, 91 Tex. 484, 44 S. W. 480.

Washington.— State *v.* McGraw, 13 Wash. 311, 43 Pac. 176; State *v.* Lindsley, 3 Wash. 125, 27 Pac. 1019. See also State *v.* Cheetham, 17 Wash. 483, 49 Pac. 1072.

Wisconsin.— State *v.* Harshaw, 76 Wis. 230, 45 N. W. 308.

See 44 Cent. Dig. tit. "States," § 128 *et seq.*

By the terms of the Montana constitution no specific appropriation is necessary to authorize the payment of interest on the public debt. State *v.* Hickman, 11 Mont. 541, 29 Pac. 92.

Failure of the legislature to appropriate is equivalent to a refusal to do so.— Moore *v.* Alexander, 85 Ark. 171, 107 S. W. 395.

3. Institute for Education of Mute, etc., 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398; Thomas *v.* Owens, 4 Md. 189.

4. Humbert *v.* Dunn, 84 Cal. 57, 24 Pac. 111.

5. State *v.* Stover, 47 Kan. 119, 27 Pac. 850; Martin *v.* Francis, 13 Kan. 220.

6. *California.*— Baggett *v.* Dunn, 69 Cal. 75, 10 Pac. 125; Stratton *v.* Gueen, 45 Cal. 149.

Colorado.— People *v.* Spruance, 8 Colo. 530, 9 Pac. 628.

Indiana.— May *v.* Rice, 91 Ind. 546; State *v.* Porter, 89 Ind. 267.

Montana.— State *v.* Kenney, 9 Mont. 389, 24 Pac. 96.

Nebraska.— State *v.* Wallichs, 15 Nebr. 457, 19 N. W. 641.

See 44 Cent. Dig. tit. "States," § 128.

7. Proll *v.* Dunn, 80 Cal. 220, 22 Pac. 143.

8. *In re* Continuing Appropriations, 18 Colo. 192, 32 Pac. 272; State *v.* Parkinson, 5 Nev. 15.

9. People *v.* Pacheco, 27 Cal. 175; Franklin *v.* State Bd. of Examiners, 23 Cal. 173; Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22

of both branches of the legislature, neither branch acting alone can make an appropriation by law. Thus a senate resolution is not a law within the constitutional requirement,[10] nor is a joint resolution not signed and approved by the governor nor otherwise adopted as a law;[11] but where a fund is provided by law for the contingent expenses of either branch, the disbursement of that fund for such purpose is subject to the control of such branch.[12] The state constitution is a law, and an appropriation made thereby is sufficient.[13]

c. What Constitutes a Valid Appropriation — (i) *In General.* A specific appropriation is an act by which a named sum of money is set apart in the treasury and devoted to the payment of particular claims or demands.[14] The appropriation must be specific as to the amount or fund appropriated [15] and as to the object for which the appropriation is made,[16] it being sufficient, however, if the amount is capable of being determined,[17] and it is not essential that the amount be certainly ascertained prior to the appropriation,[18] nor need the statute designate the fund out of which the money is to be drawn.[19] The appropriation need not be made in any particular form of words, nor need it necessarily be express. It is sufficient if the legislative intent to make an appropriation clearly appears, expressly or by implication, from the terms of the statute;[20] but such language

Am. St. Rep. 624, 11 L. R. A. 370; Burch *v.* Earhart, 7 Oreg. 58.

10. Reynolds *v.* Blue, 47 Ala. 711; Rice *v.* State, 95 Ind. 33.

11. *In re* Advisory Opinion, 43 Fla. 305, 31 So. 348; Burritt *v.* State Contracts Com'rs, 120 Ill. 322, 11 N. E. 180; May *v.* Rice, 91 Ind. 546.

A resolve of the legislature, authorizing the governor and council to fix the compensation of an agent of the state for prosecuting claims, is not an appropriation. Weston *v.* Dane, 51 Me. 461.

12. State *v.* Draper, 50 Mo. 24.

13. Thomas *v.* Owens, 4 Md. 189; State *v.* Hickman, 9 Mont. 370, 23 Pac. 740, 8 L. R. A. 403; Weston *v.* Herdman, 64 Nebr. 24, 89 N. W. 384; State *v.* Weston, 6 Nebr. 16; State *v.* Weston, 4 Nebr. 216; Morton *v.* Comptroller-Gen., 4 S. C. 430.

14. Stratton *v.* Green, 45 Cal. 149. See also Clayton *v.* Berry, 27 Ark. 129; Ristine *v.* State, 20 Ind. 328; State *v.* Moore, 50 Nebr. 88, 69 N. W. 373, 61 Am. St. Rep. 538; State *v.* Wallichs, 12 Nebr. 407, 11 N. W. 860; Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758; State *v.* Lindsley, 3 Wash. 125, 27 Pac. 1049.

Appropriation defined see APPROPRIATION, 3 Cyc. 565.

In Connecticut no special appropriations are required, and an act authorizing an expenditure is itself a sufficient appropriation of the money for the purpose designated. State *v.* Staub, 61 Conn. 553, 23 Atl. 924.

15. Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; Redding *v.* Bell, 4 Cal. 333.

16. Collier, etc., Lith. Co. *v.* Henderson, 18 Colo. 259, 32 Pac. 417; Rice *v.* State, 95 Ind. 33; State *v.* Seibert, 99 Mo. 122, 12 S. W. 348. See also Sullivan *v.* Gage, 145 Cal. 759, 79 Pac. 537.

17. State *v.* Searle, 79 Nebr. 111, 112 N. W. 380; State *v.* Hipple, 7 S. D. 234, 64 N. W. 120; Highgate *v.* State, 59 Vt. 39, 7 Atl. 898.

18. People *v.* Minier, 46 Ill. 384.

19. Proll *v.* Dunn, 80 Cal. 220, 22 Pac. 143 [*explaining* Stratton *v.* Green, 45 Cal. 149]; State *v.* Westerfield, 23 Nev. 468, 49 Pac. 119. See also Goodykoontz *v.* People, 20 Colo. 374, 38 Pac. 473.

20. *California.*— Humbert *v.* Dunn, 84 Cal. 57, 24 Pac. 111; Proll *v.* Dunn, 80 Cal. 220, 22 Pac. 143.

Colorado.— People *v.* Goodykoontz, 22 Colo. 507, 45 Pac. 414; *In re* Continuing Appropriations, 18 Colo. 192, 32 Pac. 272.

Indiana.— Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370; Campbell *v.* State Soldiers', etc., Monument Com'rs, 115 Ind. 591, 18 N. E. 33.

Louisiana.— State *v.* Steele, 37 La. Ann. 353.

Washington.— State *v.* Grimes, 7 Wash. 191, 34 Pac. 833.

See 44 Cent. Dig. tit. "States," § 129.

Appropriation may be by implication.— Thus a statutory direction to the proper officer or officers to pay money out of the treasury on a given claim or for a given object may by implication be held to be an appropriation of a sufficient amount of money to make the required payments. Hart *v.* State, (Ind. 1902) 64 N. E. 854; Campbell *v.* State Soldiers', etc., Monument Com'rs, 115 Ind. 591, 18 N. E. 33. But under a provision that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law," it has been held that there can be no implied appropriation. State *v.* Wallichs, 16 Nebr. 679, 21 N. W. 397; State *v.* Wallichs, 15 Nebr. 609, 20 N. W. 110.

For acts held to constitute a sufficient appropriation see Humbert *v.* Dunn, 84 Cal. 57, 24 Pac. 111; Proll *v.* Dunn, 80 Cal. 220, 22 Pac. 143; State *v.* Staub, 61 Conn. 553, 23 Atl. 924; Henderson *v.* State Soldiers', etc., Monument Com'rs, 129 Ind. 92, 28 N. E. 127, 13 L. R. A. 169; Campbell *v.* State Soldiers', etc., Monument Com'rs, 115 Ind. 591, 18 N. E. 33; State *v.* Steele, 37 La. Ann. 353; McPherson

must be used as will show the intention of the legislature to make an appropriation;[21] and such intention will not be inferred from doubtful or ambiguous language.[22]

(II) *For Salaries of Officers.* It is not necessary in order to authorize the drawing of a warrant for the salary of a public officer that there should be a special annual appropriation therefor where there is a general law fixing the amount of the salary and prescribing payment thereof at particular periods.[23] Where, however, the act fixing the salary of an officer contemplates a further act of appropriation by the legislature, there is no appropriation without such further legislation.[24]

d. Prospective Appropriations. An appropriation may be prospective, that is, of revenues to accrue in future;[25] but a mere promise by the state to pay money is not such an appropriation.[26] Under a provision that no appropriation shall be made whereby the expenditure of the state during any fiscal year shall exceed the tax, every appropriation act, where the money appropriated is not actually in the treasury, should specify the revenue of the particular fiscal year out of which the appropriation is to be paid;[27] but an act is not void which does not definitely specify such revenue, provided it can be ascertained with reasonable certainty from the language and purpose of the act.[28]

e. Continuing Appropriations. In the absence of a constitutional prohibition

v. Leonard, 29 Md. 377; People *v.* Auditor-Gen., 9 Mich. 141; State *v.* Brian, 84 Nebr. 30, 120 N. W. 916; State *v.* Babcock, 24 Nebr. 787, 40 N. W. 316; Highgate *v.* State, 59 Vt. 39, 7 Atl. 898; State *v.* Grimes, 7 Wash. 191, 34 Pac. 833.

For acts held not to constitute a sufficient appropriation see People *v.* Spruance, 8 Colo. 530, 9 Pac. 628 [*disapproved* in *In re* Continuing Appropriations, 18 Colo. 192, 32 Pac. 272]; State *v.* Ristine, 20 Ind. 345; Ristine *v.* State, 20 Ind. 328; State *v.* Wallichs, 15 Nebr. 609, 20 N. W. 110; State *v.* Wallichs, 15 Nebr. 457, 19 N. W. 641; State *v.* Wallichs, 12 Nebr. 407, 11 N. W. 860; State *v.* Weston, 6 Nebr. 16; Croasman *v.* Kincaid, 31 Oreg. 445, 49 Pac. 764; State *v.* Lindsley, 3 Wash. 125, 27 Pac. 1010.

21. Kingsbury *v.* Anderson, 5 Ida. 771, 51 Pac. 744.

22. Goodykoontz *v.* Acker, 19 Colo. 360, 35 Pac. 911; *In re* Continuing Appropriations, 18 Colo. 192, 32 Pac. 272. See also State *v.* Frazee, 105 La. 250, 29 So. 478.

23. *Alabama.*— Riggs *v.* Brewer, 64 Ala. 282; Reynolds *v.* Taylor, 43 Ala. 420; Nichols *v.* Comptroller, 4 Stew. & P. 154.

Colorado.— People *v.* Goodykoontz, 22 Colo. 507, 45 Pac. 414.

Indiana.— Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

Maryland.— Thomas *v.* Owens, 4 Md. 189.

Montana.— State *v.* Kenney, 10 Mont. 485, 26 Pac. 197; State *v.* Hickman, 9 Mont. 370, 23 Pac. 740, 8 L. R. A. 403.

Nebraska.— Weston *v.* Herdman, 64 Nebr. 24, 89 N. W. 384; State *v.* Weston, 4 Nebr. 216.

Tennessee.— State *v.* King, 108 Tenn. 271, 67 S. W. 812.

Washington.— State *v.* Grimes, 7 Wash. 191, 34 Pac. 833.

Wyoming.— State *v.* Burdick, 4 Wyo. 272, 33 Pac. 125, 24 L. R. A. 266.

See 44 Cent. Dig. tit. "States," § 129.

But see Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758.

24. Goodykoontz *v.* Acker, 19 Colo. 360, 35 Pac. 911; State *v.* Weston, 6 Nebr. 16; Pickle *v.* Finley, 91 Tex. 484, 44 S. W. 480.

As to appropriations for salaries see Irelan *v.* Colgan, 96 Cal. 413, 31 Pac. 294; State *v.* Hallock, 19 Nev. 371, 12 Pac. 488; Perez *v.* Territory, 6 N. M. 618, 30 Pac. 923.

25. *California.*— People *v.* Pacheco, 27 Cal. 175; People *v.* Brooks, 16 Cal. 11; State *v.* McCauley, 15 Cal. 429.

Idaho.— Stein *v.* Morrison, 9 Ida. 426, 75 Pac. 246.

Indiana.— Ristine *v.* State, 20 Ind. 328.

Nevada.— State *v.* Parkinson, 5 Nev. 15.

South Dakota.— *In re* State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852.

A designation of the amount and the fund out of which it shall be paid is sufficient; it is not necessary that there should be at the time funds in the treasury to meet it. People *v.* Brooks, 16 Cal. 11. See also People *v.* Miner, 46 Ill. 384.

Under the Colorado constitution the public revenues may be anticipated and drawn upon for some purposes when the taxes have been actually levied according to law, but the levy itself cannot be thus anticipated and drawn upon. Goodykoontz *v.* People, 20 Colo. 374, 38 Pac. 473.

26. Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370. See also Institute for Education of Mute, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398.

27. Goodykoontz *v.* People, 20 Colo. 374, 38 Pac. 473; Henderson *v.* People, 17 Colo. 587, 31 Pac. 334.

28. Goodykoontz *v.* People, 20 Colo. 374, 38 Pac. 473.

the legislature may make continuing appropriations, that is, those the payment of which is to be continued beyond the term or session of the legislature by which they are made.[29] But in several states the constitutions provide that no appropriations shall continue in force longer than for a designated period.[30] Even under such a provision, however, unless expressly so provided, it is not necessary that the money appropriated should be actually drawn from the treasury during the time limited, although the expense must be incurred or the claim arise during such period.[31]

f. Purposes For Which Appropriations May Be Made. In making appropriations of public funds the legislature is bound by any restrictions placed by the state constitution upon the purposes for which appropriations may be made;[32] and, in general, appropriations should be made only for some public purpose.[33] In this connection, an appropriation for the payment of the debt of the state,[34] for the encouragement of patriotism,[35] in recognition of military,[36] or civil service,[37] for the benefit of destitute children of the state,[38] in the aid of expositions and fairs,[39]

29. People *v.* Pacheco, 27 Cal. 175; *In re* Continuing Appropriations, 18 Colo. 192, 32 Pac. 272; Fleckten *v.* Lamberton, 69 Minn. 187, 72 N. W. 65.

30. *Missouri.*— State *v.* Holladay, 66 Mo. 385; State *v.* Holladay, 64 Mo. 526.

Montana.— State *v.* Kenney, 11 Mont. 553, 29 Pac. 89.

Nebraska.— Opinion of Judges, 5 Nebr. 566.

Ohio.— State *v.* Medbery, 7 Ohio St. 522.

Tennessee.— See Lynn *v.* Polk, 8 Lea 121.

See 44 Cent. Dig. tit. "States," § 129.

Illinois—Nebraska.—Under Ill. Const. (1870) art. 4, § 18, all appropriations, when otherwise unlimited, continue in force and are available for the purposes for which they were made until the expiration of the first fiscal quarter after the adjournment of the next regular session of the legislature, at which time all appropriations lapse and cease to be of any validity. People *v.* Swigert, 107 Ill. 494; People *v.* Lippincott, 72 Ill. 578; People *v.* Lippincott, 64 Ill. 256. See also as to similar provision in Nebraska State *v.* Moore, 50 Nebr. 88, 69 N. W. 373, 61 Am. St. Rep. 538; State *v.* Moore, 36 Nebr. 579, 54 N. W. 866; State *v.* Babcock, 22 Nebr. 33, 33 N. W. 709; Opinion of Judges, 5 Nebr. 566.

31. Benedict *v.* New Orleans, 115 La. 645, 39 So. 792; Maryland Agriculture College *v.* Atkinson, 102 Md. 557, 62 Atl. 1035; State *v.* Brian, 84 Nebr. 30, 120 N. W. 916; Opinion of Judges, 5 Nebr. 566.

Under Mo. Const. art. 10, § 19, no money can be drawn from the treasury unless such payment be made, or warrant be issued therefor within two years after the appropriation act. State *v.* Seibert, 99 Mo. 122, 12 S. W. 348.

32. See *supra*, VII, B, 3.

33. *California.*— Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51, 27 Am. St. Rep. 95, 14 L. R. A. 474.

Massachusetts.— Opinion of Justices, 175 Mass. 599, 57 N. E. 675, 49 L. R. A. 564.

Michigan.— Michigan Corn Imp. Assoc. *v.* Auditor-Gen., 150 Mich. 69, 113 N. W. 582 (holding that Act No. 261, p. 332, Pub. Acts (1907), appropriating money for the use of a voluntary unincorporated society, whose object is to stimulate effort to improve the quality of the corn crop and increase the yield, is unconstitutional); Michigan Sugar Co. *v.* Dix, 124 Mich. 674, 83 N. W. 625.

Minnesota.— Minnesota Sugar Co. *v.* Iverson, 91 Minn. 30, 97 N. W. 454; Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568.

Nebraska.— Oxnard Beet Sugar Co. *v.* State, 73 Nebr. 57, 102 N. W. 80, 105 N. W. 716.

New York.— See Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358, 14 L. R. A. 481.

Wisconsin.— State *v.* Houser, 125 Wis. 256, 104 N. W. 77, 110 Am. St. Rep. 824; State *v.* Froehlich, 118 Wis. 129, 94 N. W. 50, 99 Am. St. Rep. 985, 61 L. R. A. 345.

In Kentucky the state university and the state normal schools are among the educational institutions, for which, under the proviso of Const. § 184, the legislature may make appropriations without submitting the question to the voters. James *v.* State University, (1908) 114 S. W. 767.

34. People *v.* Densmore, 1 Thomps. & C. (N. Y.) 280.

Appropriation to satisfy a moral obligation. — The legislature is not restricted, in its appropriation of public moneys, to cases where a legal demand exists against the county or state, and where a moral obligation exists, the legislature may give it legal effect. Civic Federation *v.* Salt Lake County, 22 Utah 6, 61 Pac. 222.

35. Russ *v.* Com., 210 Pa. St. 544, 60 Atl. 169, 105 Am. St. Rep. 875, 1 L. R. A. N. S. 409.

36. Opinion of Justices, 190 Mass. 611, 77 N. E. 820.

37. Opinion of Justices, 175 Mass. 599, 57 N. E. 675, 49 L. R. A. 564.

38. Hager *v.* Kentucky Children's Home Soc., 119 Ky. 235, 83 S. W. 605, 26 Ky. L. Rep. 1133, 67 L. R. A. 815.

39. Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51, 27 Am. St. Rep. 95, 14 L. R. A. 474; Kentucky Live Stock Breeders' Assoc. *v.* Hager, 120 Ky. 125, 85 S. W. 738, 27 Ky. L. Rep. 518; Norman *v.* Kentucky Bd. of Managers of World's Columbian Exposition, 93

or of fire companies,[40] or for the relief of sufferers from some great public disaster,[41] is an appropriation for a public purpose. A constitutional prohibition of the levying of a tax for a stated purpose ordinarily amounts to a prohibition to make an appropriation for such purpose.[42]

g. Operation and Effect. Appropriation acts specify the purposes for which the appropriations made shall be used, and appropriations made for one purpose cannot be used for any other purpose.[43]

D. Warrants, Scrip, and Certificates of Indebtedness[44] — **1. Power and Duty to Issue.** State warrants, scrip, or certificates of indebtedness may be issued when,[45] and only when,[46] authorized by law. The power and duty of state auditors and similar officers to draw or issue such instruments are largely determined by constitutional and statutory provisions.[47] A common provision is that no warrant shall be drawn on the treasury except in pursuance of a specific appropriation made by law.[48] Where an appropriation has been made for the payment of a claim, the auditor may draw his warrant therefor;[49] and unless, as is sometimes the case, a statute provides otherwise,[50] the fact that there is no money in the treasury to make payment does not impair the duty of the auditor to issue a warrant for a proper claim, although it will delay the obligation of the treasurer to pay it.[51] It has been held that the auditor has the right to question the validity of an appropriation act under which he is called upon to issue a warrant,[52] and that he may lawfully refuse to issue the warrant where such act is unconstitutional;[53] and under some of the statutes the issuance of warrants is not authorized or required unless the claims have been audited and allowed by the proper officers;[54]

Ky. 537, 20 S. W. 901, 14 Ky. L. Rep. 529, 18 L. R. A. 556; Minneapolis *v.* Janney, 86 Minn. 111, 90 N. W. 312.

40. Exempt Firemen's Fund Trustees *v.* Roome, 93 N. Y. 313, 45 Am. Rep. 217; Cutting *v.* Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691.

41. State *v.* Davidson, 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, 58 L. R. A. 739.

42. Agricultural, etc., College *v.* Hager, 121 Ky. 1, 87 S. W. 1125, 27 Ky. L. Rep. 1178.

43. Henderson *v.* Hovey, 46 Kan. 691, 27 Pac. 177, 13 L. R. A. 222; State *v.* Wallichs, 12 Nebr. 407, 11 N. W. 860; Bragg *v.* State, 20 Nev. 443, 23 Pac. 427; State *v.* Hallock, 19 Nev. 371, 12 Pac. 488; Swift *v.* Doron, 6 Nev. 125. And see *supra*, VII, C, 4.

44. Necessity for warrant see *supra*, VII, C, 2.

Mandamus as to state treasurer, auditor, or controller to compel issuance of warrant see Mandamus, 26 Cyc. 234 *et seq.*

45. *In re* Certificates of Indebtedness, 18 Colo. 566, 33 Pac. 556.

It is the duty of the auditor to draw warrants for claims against the state in a proper case. State *v.* Dubuclet, 24 La. Ann. 16.

46. *Alabama.*— Chisholm *v.* McGehee, 41 Ala. 192.

Arkansas.—Wilamouicz *v.* Adams, 13 Ark. 12.

Louisiana.— State *v.* Graham, 24 La. Ann. 429.

Nebraska.— See State *v.* Omaha Nat. Bank, 59 Nebr. 483, 81 N. W. 319.

North Carolina.— Bayne *v.* Jenkins, 66 N. C. 356.

See 44 Cent. Dig. tit. "States," § 134.

An issue of scrip in violation of the state constitution is void. Lee *v.* Robinson, 196 U. S. 64, 25 S. Ct. 180, 49 L. ed. 388 [*affirming* 122 Fed. 1012].

47. See the constitutions and statutes of the several states. And see cases cited *infra*, the following notes.

48. See *supra*, VII, C, 6, a.

A statute which directs the issue of warrants for claims but makes no provision for the payment thereof is inoperative and void. Pillow *v.* Gaines, 3 Lea (Tenn.) 466.

Where a claim contains items not provided for by the appropriation, the auditor may refuse to draw his warrant unless the items not provided for are stricken out. Boyer *v.* Morgan, 5 Ohio St. 583.

49. Lange *v.* Stover, 19 Ind. 175.

50. See Smith *v.* Jones, 50 Ala. 465.

51. *California.*—People *v.* Brooks, 16 Cal. 11.

Iowa.— State *v.* Sherman, 46 Iowa 415.

Kansas.— Evans *v.* McCarthy, 42 Kan. 426, 22 Pac. 631.

Louisiana.— State *v.* Clinton, 28 La. Ann. 350.

Montana.— State *v.* Kenney, 10 Mont. 488, 26 Pac. 383.

Nebraska.— State *v.* Searle, 79 Nebr. 111, 112 N. W. 380.

Washington.— Allen *v.* Grimes, 9 Wash. 424, 37 Pac. 662.

See 44 Cent. Dig. tit. "States," § 134.

52. Norman *v.* Kentucky Bd. of Managers of World's Columbian Exposition, 93 Ky. 537, 20 S. W. 901, 14 Ky. L. Rep. 529, 18 L. R. A. 556. But see State *v.* Moore, 40 Nebr. 854, 59 N. W. 755, 25 L. R. A. 774.

53. State *v.* Hallock, 16 Nev. 373.

54. Cahill *v.* Colgan, (Cal. 1892) 31 Pac. 614; Winters *v.* Ramsey, 4 Ida. 303, 39 Pac. 193; Opinion of Justices, 13 Allen (Mass.) 593. And see *infra*, VIII, A, 1.

but when a claim has been duly allowed and ordered to be paid, the officer is bound to draw his warrant therefor,[55] and he has authority to do so.[56] The auditor cannot issue warrants for claims not matured;[57] nor, where the statute forbids, in favor of defaulting state officers[58] or of persons indebted to the state;[59] and the auditor, in his discretion, may refuse to issue a warrant for a claim, although certified to by another officer, where the law does not make such certificates conclusive on the auditor.[60] Such certificates are, however, *prima facie* correct.[61]

2. Requisites and Validity. Where a warrant is required it must be in proper form;[62] and the omission of a material recital is fatal,[63] and a warrant issued by an unauthorized officer is invalid;[64] but mere clerical errors or omissions in a warrant do not invalidate it where it substantially complies with the law.[65] Where vouchers[66] or requisitions[67] are required as a basis for issuing warrants, these must be presented to the auditor and must be in proper form.

3. Revocation. A warrant on the state treasurer authorizing the payment of money in pursuance of an appropriation is not a contract, but is only a license, and is revocable so long as it has not been paid;[68] and a resolution of both houses of the legislature instructing the treasurer not to pay the warrant operates as a revocation.[69]

4. Negotiability and Transfer. A warrant drawn by the proper officer on the state treasurer is assignable so as to authorize the assignee to demand payment and bring suit thereon.[70] It is not, however, a negotiable instrument in the sense of the law merchant so as to shut out as against a *bona fide* purchaser inquiries as to its validity or preclude defenses or set-offs which could be asserted as against the original payee;[71] and the assignee acquires no greater rights than the party to whom the warrant was originally issued;[72] but he succeeds to all the rights of his assignor.[73]

5. Interest. State warrants bear interest when the statute so provides.[74]

6. Payment. It is the duty of the state treasurer to pay all warrants drawn on him in legal form by the proper officer, if there are funds in the treasury appropriated by law for the purpose specified in the warrant.[75] He may, however,

55. Prime *v.* McCarthy, 92 Iowa 569, 61 N. W. 220; *In re* State House Commission, (R. I. 1895) 33 Atl. 453.

The approval of a claim by the California board of examiners, and an appropriation by the legislature to pay it, are conclusive as against the controller as to the validity of the claim. Cabill *v.* Colgan, (1892) 31 Pac. 614.

56. *In re* Certificates of Indebtedness, 18 Colo. 566, 33 Pac. 556.

57. Tandy *v.* Norman, 27 S. W. 861, 16 Ky. L. Rep. 290.

58. State *v.* Brewer, 62 Ala. 215.

59. State *v.* Dickinson, 12 Sm. & M. (Miss.) 579.

60. State *v.* Clark, 61 Mo. 263.

The certificate of the speaker of the house of representatives as to the pay of a member is not conclusive on the auditor. People *v.* Hatch, 33 Ill. 9; State *v.* Thompson, 37 Mo. 176; Morgan *v.* Buffington, 21 Mo. 549.

61. Lindsey *v.* State Auditor, 3 Bush (Ky.) 231. See also Danley *v.* Whiteley, 14 Ark. 687.

62. See Weston *v.* Dane, 51 Me. 461.

63. Thomas *v.* Owens, 4 Md. 189. See also Allen *v.* Grimes, 9 Wash. 424, 37 Pac. 662.

64. Reeves *v.* State, 7 Coldw. (Tenn.) 96.

65. Mills Nat. Bank *v.* Herold, 74 Cal. 603, 16 Pac. 507, 5 Am. St. Rep. 476.

66. State *v.* Cornell, 51 Nebr. 553, 71 N. W. 300; State *v.* Moore, 37 Nebr. 507, 55 N. W. 1078, 56 N. W. 154. See also State *v.* Atkinson, 25 Wash. 283, 65 Pac. 531; State *v.* McGraw, 13 Wash. 311, 43 Pac. 176.

67. Opinion of the Judges, 5 Nebr. 566.

68. Fletcher *v.* Renfroe, 56 Ga. 674.

69. Fletcher *v.* Renfroe, 56 Ga. 674.

70. Mills, etc., Nat. Bank *v.* Herold, 74 Cal. 603, 16 Pac. 507, 5 Am. St. Rep. 476.

71. Klein *v.* State Treasurer, 43 La. Ann. 359, 8 So. 926; State *v.* Dubuclet, 25 La. Ann. 161; State *v.* Dubuclet, 23 La. Ann. 267; Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

72. Klein *v.* State Treasurer, 43 La. Ann. 359, 8 So. 926.

73. State *v.* Barret, 25 Mont. 112, 63 Pac. 1030.

74. State *v.* Barret, 25 Mont. 112, 63 Pac. 1030.

75. *California.*— Mills, etc., Nat. Bank *v.* Herold, 74 Cal. 603, 16 Pac. 507, 5 Am. St. Rep. 476.

Louisiana.— Hommerich *v.* Hunter, 14 La. Ann. 225.

Maryland.— Thomas *v.* Owens, 4 Md. 189.

Missouri.— State *v.* Bishop, 36 Mo. 49.

Montana.— See State *v.* Wright, 17 Mont. 565, 44 Pac. 89.

See 44 Cent. Dig. tit. "States," § 138.

Where the holder of a warrant sells it at a discount because of a want of funds to meet it, he cannot hold the state liable for

lawfully question the legality of the warrant;[76] and if the warrant is drawn for too great an amount, a new warrant must be issued; the proper amount cannot be paid on the original warrant.[77] Payment must be made out of the fund,[78] and in the medium,[79] if any, provided or prescribed by law. Where the legislature has made an appropriation within its power to make to pay a claim, the disbursing officer must apply the money for the purpose of the appropriation, without inquiry into the reasons therefor.[80]

E. Bills of Credit or Other Securities Intended to Circulate as Money.[81] The federal constitution provides that "no state shall emit Bills of Credit."[82] Any bill, warrant, certificate of indebtedness, or similar instrument, issued by the state, on the faith of the state, and designed to circulate as money, is a bill of credit within the meaning of the prohibition;[83] but bills not issued on the general credit of the state but made payable out of a special fund pledged therefor are not bills of credit,[84] nor are state obligations not intended to circulate as money, such as auditor's warrants[85] or coupons for interest on state bonds.[86] The prohibition does not extend to bills issued by corporations incorporated by the state, although intended to circulate as money; such bills are not emitted by the state,[87] and it is immaterial that the state is the sole stock-holder of the corporation.[88] The constitutional provision does not prohibit a state from paying bills of credit[89] or making a loan thereof.[90]

F. Bonds — 1. Power to Issue. Subject to any restriction that may be contained in the state constitution, the legislature has power to authorize the issue of state bonds, and such bonds issued under authority of a constitutional

the loss, nor can the governor bind the state to pay it. State *v.* Wilson, 71 Tex. 291, 9 S. W. 155.

76. Carlile *v.* Hurd, 3 Colo. App. 11, 31 Pac. 952; Commercial, etc., Bank *v.* Worth, 117 N. C. 146, 23 S. E. 160, 30 L. R. A. 261; Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758; State *v.* Lindsley, 3 Wash. 125, 27 Pac. 1019.

Warrant to one for claim of another.— The treasurer may properly refuse to pay a warrant drawn in favor of one person for a claim of another. State *v.* State Treasurer, 41 Mo. 590.

77. People *v.* State Treasurer, 40 Mich. 320.

78. People *v.* Beveridge, 38 Ill. 307; State *v.* Bartley, 41 Nebr. 277, 59 N. W. 907. See also Park *v.* Candler, 113 Ga. 647, 39 S. E. 89.

The holders of warrants payable out of a fund which is inadequate to pay all in full cannot object to a just and equitable mode of distributing the fund among them. Klein *v.* State Treasurer, 43 La. Ann. 359, 8 So. 926.

79. People *v.* Beveridge, 38 Ill. 307.

80. People *v.* Schuyler, 79 N. Y. 189.

81. **The state as payee of a negotiable instrument** see Commercial Paper, 7 Cyc. 567.

Power of public officer to transfer negotiable instrument belonging to a state see Commercial Paper, 7 Cyc. 786.

82. U. S. Const. art. I, § 10.

Bill of credit defined see Bill of Credit, 5 Cyc. 706.

83. *Arkansas.*— Bragg *v.* Tuffts, 49 Ark. 554, 6 S. W. 158.

Georgia.— Georgia Cent. Bank *v.* Little, 11 Ga. 346.

Louisiana.— City Nat. Bank *v.* Mahan, 21 La. Ann. 751.

Mississippi.— Pagaud *v.* State, 5 Sm. & M. 491.

Missouri.— Loper *v.* State, 1 Mo. 632.

South Carolina.— Auditor *v.* Treasurer, 4 S. C. 311; State *v.* Comptroller-Gen., 4 S. C. 185.

Texas.— See Houston, etc., R. Co. *v.* State, (Civ. App. 1897) 41 S. W. 157.

United States.— Briscoe *v.* Kentucky Commonwealth Bank, 11 Pet. 257, 9 L. ed. 709, 928; Byrne *v.* Missouri, 8 Pet. 40, 8 L. ed. 859; Craig *v.* Missouri, 4 Pet. 410, 7 L. ed. 903; Robinson *v.* Lee, 122 Fed. 1012 [*affirmed* in 196 U. S. 64, 25 S. Ct. 180, 49 L. ed. 388]; Wesley *v.* Eells, 90 Fed. 151.

See 44 Cent. Dig. tit. "States," § 141.

Treasury notes issued by the confederate government were within the prohibition. Hale *v.* Huston, 44 Ala. 134, 4 Am. Rep. 124; Thornburg *v.* Harris, 3 Coldw. (Tenn.) 157.

84. Gowen *v.* Shute, 4 Baxt. (Tenn.) 57. See also State *v.* Cardozo, 5 S. C. 297.

85. Pagaud *v.* State, 5 Sm. & M. (Miss.) 491; Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 672 [*reversing* (Tex. Civ. App. 1897) 41 S. W. 157].

86. Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185.

87. McFarland *v.* State Bank, 4 Ark. 44, 37 Am. Dec. 761; Smith *v.* New Orleans, 23 La. Ann. 5; Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257, 9 L. ed. 709, 928.

88. Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257, 9 L. ed. 709, 928. See also Western, etc., R. Co. *v.* Taylor, 6 Heisk. (Tenn.) 408.

89. Walker *v.* State, 12 S. C. 200.

90. Loper *v.* State, 1 Mo. 632; Mansker *v.* State, 1 Mo. 452.

statute are valid obligations of the state.[91] In the exercise of this power state bonds have been issued in aid of banks,[92] or railroads,[93] or public works and improvements.[94] But, as has been indicated, the power of the legislature is subject to constitutional limitations, and bonds issued under authority of an unconstitutional act are void;[95] and such limitation need not be express; where the constitution prescribes the subjects and occasions for and on which the legislature may issue bonds, the legislature may issue bonds only as prescribed,[96] and bonds not issued in accordance with the provisions of the statute authorizing them are void.[97] The legislature may authorize the issuance of bonds on which the state is to become liable only in a certain event, and the liability of the state will depend upon the happening of the prescribed condition.[98]

2. Form, Execution, and Validity. Where by constitution or statute state bonds are required to be executed in any particular form, bonds not so executed are void.[99] Where the state engages to give its bonds it must have them made by the proper officers at its own expense,[1] and in some states bonds are required to be registered.[2] Where a state authorizes an issue of bonds and all the preliminary conditions have been satisfied, the duty of the governor to issue the bonds is ministerial.[3] State bonds issued illegally may sometimes be made valid by subsequent legislation;[4] but a state officer cannot ratify an unauthorized, irregular, or fraudulent issue of state securities.[5]

3. Sale by Agent. A sale of state bonds or other securities by an agent is binding on the state only when made within the scope of the agent's authority,[6] a purchaser of state bonds from an agent selling under statutory authority being presumed to know the extent of the agent's authority, purchasing at his peril where such authority is not pursued.[7] Thus an agent authorized to sell for cash cannot bind the state by a sale on credit,[8] nor when authorized to sell at par can

91. Cheney *v.* Jones, 14 Fla. 587; Klein *v.* Kinkead, 16 Nev. 194; Walker *v.* State, 12 S. C. 200; *In re* State Bonds, 7 S. D. 42, 63 N. W. 223.

92. Hope *v.* Board of Liquidation, 43 La. Ann. 738, 9 So. 754.

93. State *v.* Nicholls, 30 La. Ann. 1217; Chamberlain *v.* St. Paul, etc., R. Co., 92 U. S. 299, 23 L. ed. 715; Williams *v.* Little Rock, etc., R. Co., 18 Fed. 344, 5 McCrary 597; Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6. See also Swasey *v.* North Carolina R. Co., 23 Fed. Cas. No. 13,679, 1 Hughes 17, 71 N. C. 571.

Sometimes state aid has been extended by the indorsement by the state of railroad bonds see State *v.* Cobb, 64 Ala. 127; Cunningham *v.* Macon, etc., R. Co., 156 U. S. 400, 15 S. Ct. 361, 39 L. ed. 471; Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

94. Opinion of Justices, 13 Fla. 699; State *v.* Farwell, 3 Pinn. (Wis.) 393.

95. *Florida.*— Holland *v.* State, 15 Fla. 455; Cheney *v.* Jones, 14 Fla. 587.

Kansas.— State *v.* School Fund Com'rs, 4 Kan. 261.

Louisiana.— State *v.* Hart, 46 La. Ann. 54, 14 So. 430.

North Carolina.— Baltzer *v.* State, 104 N. C. 265, 10 S. E. 153.

North Dakota.— State *v.* McMillan, 12 N. D. 280, 96 N. W. 310.

See 44 Cent. Dig. tit. "States," § 143.

96. Holland *v.* State, 15 Fla. 455; Cheney *v.* Jones, 14 Fla. 587.

97. Woodruff *v.* State, 66 Miss. 298, 6 So. 235.

98. Reis *v.* State, 133 Cal. 593, 65 Pac. 1102; Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580, 834.

99. State *v.* McMillan, 12 N. D. 280, 96 N. W. 310.

"Evidence of indebtedness," as used in Okla. Const. art. 10, § 29, providing that no bond or evidence of indebtedness of the state shall be valid unless the same shall have indorsed thereon a certificate signed by the auditor and the attorney-general, showing that the bond or evidence of indebtedness is issued pursuant to law and is within the debt limit, means such indebtedness as is usually evidenced by a bond. Bryan *v.* Menefee, 21 Okla. 1, 95 Pac. 471.

1. Caire *v.* State Bank, 4 Mart. N. S. (La.) 295.

2. Gurnee *v.* Speer, 68 Ga. 711; Walker *v.* State, 12 S. C. 200.

3. Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6.

4. Cheney *v.* Jones, 14 Fla. 587; Butler *v.* Dubois, 29 Ill. 105; Carver *v.* Board of Liquidation, 35 La. Ann. 261; Leak *v.* Bear, 80 N. C. 271.

5. Herwig *v.* Richardson, 44 La. Ann. 703, 11 So. 135; Pugh *v.* Moore, 44 La. Ann. 209, 10 So. 710.

6. State *v.* State Bank, 45 Mo. 528; Illinois *v.* Delafield, 8 Paige (N. Y.) 527 [*affirmed* in 2 Hill 159, 26 Wend. 192].

7. State *v.* State Bank, 45 Mo. 528.

8. Illinois *v.* Delafield, 8 Paige (N. Y.) 527 [*affirmed* in 2 Hill 159, 26 Wend. 192].

he sell below par.[9] An agent appointed to sell state bonds on commission is not entitled to commissions where he has not effected a sale on the terms stipulated.[10]

4. Liability of State to Bondholders[11] — a. In General. A purchaser of state bonds issued under statutory authority is charged with knowledge of the provisions of the authorizing statute as well as of the terms of the bonds, and takes the bonds subject thereto;[12] and the state is not liable on bonds issued in non-conformity with the authorizing law,[13] or issued fraudulently,[14] although bonds fraudulently issued have in some circumstances been held valid in the hands of *bona fide* purchasers.[15]

b. For Interest. A state is liable for interest on its bonds where it has agreed to pay interest.[16] It is not, however, liable for interest on instalments of interest on default in payment thereof, in the absence of an agreement therefor;[17] nor, in the absence of statute or a valid contract, is it liable for interest on the principal after maturity.[18] But it is liable for such interest when so provided.[19]

5. Sinking Fund and Redemption. Provision is sometimes made by constitution or statute for the creation of sinking funds for the payment of principal or interest of state obligations,[20] which funds cannot, under constitutional provisions, be used otherwise than for the redemption of the obligations for the payment of which the funds were created.[21]

9. Illinois *v.* Delafield, 8 Paige (N. Y.) 527 [*affirmed* in 2 Hill 159, 26 Wend. 192]. See also State *v.* Buchanan, (Tenn. Ch. App. 1898) 52 S. W. 480.

10. Coffin *v.* Coke, 3 Hun (N. Y.) 396, 6 Thomps. & C. 71.

11. Walker *v.* State, 12 S. C. 200.

Under a constitutional provision that the state supreme court shall have jurisdiction to hear claims against the state, but that its decision shall be merely recommendatory, an owner of state bonds and coupons past due thereon may invoke the recommendatory jurisdiction of the court. Horne *v.* State, 82 N. C. 382.

A coupon bond of a state is a negotiable instrument, and the state issuing the same incurs the same responsibilities as an individual (Ehrlich *v.* Jennings, 78 S. C. 269, 58 S. E. 922, 125 Am. St. Rep. 795), and S. C. Const. art. 10, § 11, forbidding the general assembly from creating any further debt or obligation without first submitting the question to the electors, does not bar a *bona fide* holder of a coupon bond of the state from the right to exchange the same for a certificate of stock under the express provisions of Laws (1892), pp. 24, 25, §§ 1, 2, although such bond has theretofore been redeemed by exchange of a certificate of stock, but again restored to circulation by theft (Ehrlich *v.* Jennings, *supra*).

12. Sutro *v.* Dunn, 74 Cal. 593, 16 Pac. 505. See also Cecil *v.* Board of Liquidation, 30 La. Ann. 34.

13. Cecil *v.* Board of Liquidation, 30 La. Ann 34; Woodruff *v.* State, 66 Miss. 298, 6 So. 235.

Even in the hands of innocent holders such bonds are void. State *v.* Little Rock, etc., R. Co., 31 Ark. 701.

After a lapse of thirty years bonds apparently regular will be presumed to have been issued under and in conformity with lawful authority. Carver *v.* Board of Liquidation, 35 La. Ann. 261; Hamlin *v.* Board of Liquidation, 30 La. Ann. 443.

14. State *v.* Hart, 46 La. Ann. 40, 14 So. 507; Herwig *v.* Richardson, 44 La. Ann. 703, 11 So. 135; Pugh *v.* Moore, 44 La. Ann. 209, 10 So. 710. See also State *v.* Wells, 15 Cal. 336.

15. Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118, 26 L. ed. 327. See also Tucker *v.* New Hampshire Sav. Bank, 58 N. H. 83, 42 Am. Rep. 580.

16. State *v.* Washington Bank, 18 Ark. 554; State Bank *v.* Dunn, 66 Cal. 38, 4 Pac. 916; Gray *v.* State, 72 Ind. 567; Colbert *v.* State, 86 Miss. 769, 39 So. 65.

What law governs.— The payment of interest on state bonds is governed by the law of the state by which the bonds were issued, although merely for the convenience of bondholders, the interest coupons are payable at a bank in another state. U. S. *v.* North Carolina, 136 U. S. 211, 10 S. Ct. 920, 34 L. ed. 336.

17. State *v.* Washington Bank, 18 Ark. 554; Molineux *v.* State, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49; Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370; Livingston *v.* State, 18 Nev. 352, 4 Pac. 708.

18. U. S. *v.* North Carolina, 136 U. S. 211, 10 S. Ct. 920, 34 L. ed. 336.

19. Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

20. See the constitutions and statutes of the several states. And see Cheney *v.* Jones, 14 Fla. 587; People *v.* Dubois, 19 Ill. 223; Graham *v.* Horton, 6 Kan. 343; Swann *v.* Wilson, 24 Miss. 471; State *v.* Dickenson, 12 Sm. & M. (Miss.) 579; Opinion of Justices, 49 Mo. 216; State *v.* Thompson, 39 Mo. 429.

21. Park *v.* Candler, 114 Ga. 466, 40 S. E. 523; Graham *v.* Horton, 6 Kan. 343; McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447; Gratz *v.* Pennsylvania R. Co., 41 Pa. St. 447.

6. Funding, Reissue, and Exchange. In the absence of a constitutional prohibition, the legislature may provide for the funding of state obligations;[22] and provision for the funding, retirement, reissue, or exchange of state bonds is sometimes made by statutes which prescribe the terms and conditions of their operation.[23] But any legislative attempt to settle or compromise the bonded indebtedness of the state in violation of the state constitution is void.[24]

7. Payment. The time, place, and manner of paying state bonds or the interest thereon must be determined by the statutes under which the bonds are issued and by the terms of the instruments themselves.[25] Where the treasurer is prohibited from paying out funds in the treasury without a warrant, he cannot pay out such funds in exchange for coupons of state bonds without a warrant;[26] and if the treasurer pays an instalment of interest to the wrong person on a forged order, the state is liable to the real bondholder.[27] On the other hand one who collects from the state interest on coupons clipped from a bond which he knows to be void must make restitution to the state.[28]

VIII. Claims Against States.

A. Presentment and Allowance — 1. In General. The constitutions or statutes of many, if not most, of the states provide for the presentation to designated officers or boards of claims against the state for allowance or rejection, and prescribe the duties and powers of such officers or boards, the mode of presenting and passing upon such claims, and the course to be pursued upon their allowance or rejection. These provisions vary considerably in the several states. In general claims must be presented within the time and in the manner prescribed before they can be paid, if allowed, or before other steps can be taken for their

22. *In re* Contracting of State Debt by Loan, 21 Colo. 399, 41 Pac. 1110.

23. See the statutes of the several states. And see the following cases:

Alabama.— State *v.* Cobb, 64 Ala. 127.

Illinois.— People *v.* Dubois, 19 Ill. 222.

Louisiana.—Wright *v.* State Board of Liquidatiou, 49 La. Ann. 1213, 22 So. 361; Hope *v.* Board of Liquidation, 43 La. Ann. 738, 9 So. 754; Hope *v.* Board of Liquidation, 41 La. Ann. 535, 6 So. 819; Charles *v.* Board of Liquidation, 41 La. Ann. 240, 6 So. 125; Jardet *v.* Board of Liquidation, 40 La. Ann. 379, 3 So. 893; Adams *v.* Board of Liquidation, 39 La. Ann. 689, 2 So. 508; Sage *v.* Board of Liquidation, 37 La. Ann. 412; State *v.* Funding Board, 35 La. Ann. 195; State *v.* Funding Board, 34 La. Ann. 197; State *v.* Burke, 33 La. Ann. 969; Sterry *v.* Board of Liquidation, 31 La. Ann. 46; State *v.* Board of Liquidation, 31 La. Ann. 273; Louisiana Nat. Bank *v.* Board of Liquidation, 30 La. Ann. 1356; State *v.* Nicholls, 30 La. Ann. 980; State *v.* Board of Liquidators, 30 La. Ann. 816; Lesassier *v.* Board of Liquidation, 30 La. Ann. 611; Hamlin *v.* Board of Liquidation, 30 La. Ann. 443; State *v.* Board of Liquidators, 29 La. Ann. 690; State *v.* Board of Liquidators, 29 La. Ann. 264; State *v.* Funding Board, 28 La. Ann. 249; State *v.* Board of Liquidators, 27 La. Ann. 660.

Maine.— Opinion of Justices, 81 Me. 602, 18 Atl. 291.

Mississippi.— Colbert *v.* State, 86 Miss. 769, 39 So. 65.

South Carolina.— Lord *v.* Bates, 48 S. C. 95, 26 S. E. 213; Evans *v.* Tillman, 38 S. C. 238, 17 S. E. 49; Whaley *v.* Gaillard, 21 S. C. 560; Walker *v.* State, 12 S. C. 200.

Tennessee.— State *v.* Buchanan, (Ch. App 1898) 52 S. W. 480.

Virginia.— Com. *v.* McCullough, 90 Va. 597 19 S. E. 114; Robinson *v.* Rogers, 24 Gratt. 319.

United States.— McGahey *v.* Virginia, 135 U. S. 662, 685, 10 S. Ct. 972, 34 L. ed. 304; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271; Board of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 626; Wabash, etc., Canal Co. *v.* Beers, 2 Black 448, 17 L. ed. 327; Farmers' Nat. Bank *v.* Jones, 105 Fed. 459; Faure *v.* Sinking Fund Com'rs, 25 Fed. 641.

See 44 Cent. Dig. tit. "States," § 156.

24. Lynn *v.* Polk, 8 Lea (Tenn.) 121.

25. See Tipton *v.* Smythe, 78 Ark. 392, 94 S. W. 678, 115 Am. St. Rep. 44, 7 L. R. A. N. S. 714; State *v.* Washington Bank, 18 Ark. 554; Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580, 834; Gray *v.* State, 72 Ind. 567; Colbert *v.* State, 86 Miss. 769, 39 So. 65; Swann *v.* Wilson, 24 Miss. 471; Opinion of Justices, 49 Mo. 216; State *v.* Bishop, 41 Mo. 16; Dyer *v.* State Auditor, 37 Mo. 157.

Where bonds deposited with the state treasurer are fraudulently canceled by him without payment, the bonds, as between the state and the owner, remain unpaid, and the state is liable thereon. Bassett *v.* State, 26 Ohio St. 543.

26. State *v.* Rust, 3 Tenn. Ch. 718.

27. People *v.* Smith, 43 Ill. 219, 92 Am. Dec. 109.

28. State *v.* Hart, 46 La. Ann. 54, 14 So. 430.

enforcement, if rejected.[29] But the requirement that claims shall be so presented in no way affects the obligation of the state to pay all valid claims, but relates only to the proceeding to obtain payment, which, like all statutes relating to remedies, may be changed from time to time. Hence it is no objection to the statute that it operates on claims which arose before its passage.[30]

2. What Claims May Be Presented or Allowed. In some instances the constitutions or statutes specify the claims which may be presented to and passed upon by the officers or boards, but usually all claims generally, with specified exceptions, are included.[31] In authorizing the hearing and allowance of claims,

29. *Arkansas.*— Clayton *v.* Berry, 27 Ark. 129; Danley *v.* Whiteley, 14 Ark. 687; State *v.* Thompson, 10 Ark. 61.

California.— Sawyer *v.* Colgan, (1893) 33 Pac. 911; People *v.* Brooks, 16 Cal. 11.

Colorado.— Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893.

Michigan.— Phelps *v.* Auditor-Gen., 136 Mich. 439, 99 N. W. 374.

Missouri.— State *v.* Halliday, 60 Mo. 596; State *v.* Draper, 48 Mo. 56.

Montana.— State *v.* Collins, 21 Mont. 448, 53 Pac. 1114; State *v.* Hickman, 11 Mont. 541, 29 Pac. 92.

Nebraska.— Lincoln Safe Deposit, etc., Co. *v.* Weston, 72 Nebr. 536, 101 N. W. 16; State *v.* Cornell, 56 Nebr. 143, 76 N. W. 459; State *v.* Moore, 37 Nebr. 507, 55 N. W. 1078, 56 N. W. 154; State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711; State *v.* Stout, 7 Nebr. 89.

Nevada.— State *v.* Hallock, 20 Nev. 326, 22 Pac. 123; State *v.* Doron, 5 Nev. 399; State *v.* Parkinson, 5 Nev. 15.

New York.— Evers *v.* Glynn, 126 N. Y. App. Div. 519, 110 N. Y. Suppl. 405.

Oregon.— Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758; Brown *v.* Fleischner, 4 Oreg. 132.

Wisconsin.— State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; Martin *v.* State, 51 Wis. 407, 8 N. W. 248.

See 44 Cent. Dig. tit. "States," § 164.

30. Sawyer *v.* Colgan, (Cal. 1893) 33 Pac. 911.

31. See the constitutions and statutes of the several states. And see the following cases:

Arkansas.— State *v.* Thompson, 10 Ark. 61.

California.— Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580, 834; State Library *v.* Kenfield, 55 Cal. 488; People *v.* Brooks, 16 Cal. 11.

Michigan.— Flint, etc., R. Co. *v.* State Auditors, 102 Mich. 500, 60 N. W. 971.

Missouri.— State *v.* Halliday, 60 Mo. 596.

Montana.— State *v.* Cook, 17 Mont. 529, 43 Pac. 928.

Nebraska.— Lancaster County *v.* State, 74 Nebr. 211, 104 N. W. 187, 107 N. W. 388; State *v.* Moore, 37 Nebr. 507, 55 N. W. 1078, 56 N. W. 154; State *v.* Stout, 7 Nebr. 89.

Nevada.— State *v.* La Grave, 23 Nev. 387, 48 Pac. 370; State *v.* Hallock, 20 Nev. 326, 22 Pac. 123; Torreyson *v.* State Examiners, 7 Nev. 19; State *v.* Parkinson, 5 Nev. 15.

New York.— Locke *v.* State, 140 N. Y. 480, 35 N. E. 1076; O'Hara *v.* State, 112 N. Y. 146, 19 N. E. 659, 8 Am. St. Rep. 726, 2 L. R. A. 603.

Oregon.— Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758.

Utah.—Thoreson *v.* State Bd. of Examiners, 21 Utah 187, 60 Pac. 982; Thoreson *v.* State Bd. of Examiners, 19 Utah 18, 57 Pac. 175.

See 44 Cent. Dig. tit. "States," § 161 *et seq.*

A gratuity to recompense a citizen for false imprisonment for a crime is not a claim against the state within Const. art. 8, § 21, authorizing the board of auditors to adjust all claims against the state, etc. Allen *v.* State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117. But see Roberts *v.* State, 160 N. Y. 217, 54 N. E. 678.

Effect of giving receipt without payment.— Where by statute the obtaining of a receipt from any person for any debt due by or from the state without actual payment is forbidden, one who gives a receipt to a state agent for a debt due him by the state without actual payment has no claim against the state. Fitler *v.* Com., 31 Pa. St. 406.

A claim upon a fund not raised by taxation but donated to the state for certain purposes and held in trust therefor is not a claim against the state, within the meaning of the constitutional provision requiring claims against the state to be passed upon by a board of examiners. State *v.* Collins, 21 Mont. 448, 53 Pac. 1114.

A statutory claim for bounties for killing coyotes is a claim that must be presented before the controller may draw his warrant therefor. Ingram *v.* Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187.

A claim for the contingent expenses of the legislature duly authorized by that body constitutes a valid claim against the state. McDonald *v.* Norman, 95 Ky. 593, 26 S. W. 808 (for copying and engrossing bills, clerk hire); Stone *v.* Dispatch Pub. Co., 55 S. W. 725, 21 Ky. L. Rep. 1473. See also State *v.* Parkinson, 5 Nev. 15.

The court of claims in adjudging compensation for land appropriated by the state cannot place the value of the land below that given by any witness. Burchard *v.* State, 128 N. Y. App. Div. 750, 113 N. Y. Suppl. 233. Claimant is entitled, as part of his damages, to be reimbursed for the expense of obtaining a clerk's search showing his title, which is a prerequisite to payment by the state of the claim, since otherwise he would not receive the full damages suffered to which he is entitled under the constitution. Burchard *v.* State, *supra*. The cost of the search is not

the legislature is of course bound by any limitations imposed by the state constitution;[32] but in the absence of such limitation, it may authorize the hearing and determination not only of claims constituting legal demands, but also of claims founded merely in right and justice, although they might not have been enforceable in the courts against individuals.[33] The statute may require the presentation of claims which arose before its passage,[34] but claims which are already certain and specific need not be audited.[35] A statute authorizing the presentation of a particular claim for the determination of its validity is not a concession of the state's liability thereon.[36] In any event, claims against the state cannot arise by implication, and he who demands money from the treasury must show that his claim is warranted by law.[37]

3. Audit and Allowance in General — a. In General. The auditing officers or boards in passing upon claims presented to them act to some extent in a judicial capacity and are invested with a certain measure of judicial discretion,[38] and thus the fact that the legislature has made an appropriation for the payment of specific claims is not conclusive on the auditing officers and they may nevertheless determine the legality and constitutionality of the appropriation.[39] But the decisions of the auditors in favor of claims are not judgments against the state,[40] and the state is not concluded thereby, but may sue to recover money erroneously paid under the award;[41] nor will their rejection of a claim bar an action by the claimant against the state to enforce the claim,[42] and in some states the statute specifically provides that a claimant whose claim has been rejected may bring a suit thereon against the state;[43] and it has been held that the allowance of a

a disbursement in the action within Code Civ. Proc. § 274, providing that no disbursements will be allowed in actions before the court of claims. Burchard *v.* State, *supra.*

32. Allen *v.* State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117.

33. O'Hara *v.* State, 112 N. Y. 146, 19 N. E. 659, 8 Am. St. Rep. 726, 2 L. R. A. 603; Cole *v.* State, 102 N. Y. 48, 6 N. E. 277.

A claim for a mere gratuity from the state does not constitute such a claim as requires to be audited. Allen *v.* State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117; State *v.* Moore, 40 Nebr. 854, 59 N. W. 755, 25 L. R. A. 774.

34. Sawyer *v.* Colgan, (Cal. 1893) 33 Pac. 911.

35. *Connecticut.*— State *v.* Staub, 61 Conn. 553, 23 Atl. 924.

Michigan.— See Flint, etc., R. Co. *v.* State Auditors, 102 Mich. 500, 60 N. W. 971.

Missouri.— State *v.* Halliday, 60 Mo. 596.

Nevada.— State *v.* La Grave, 23 Nev. 387, 48 Pac. 370.

Wisconsin.— State *v.* Hastings, 15 Wis. 75. See 44 Cent. Dig. tit. "States," § 161 *et seq.*

Compare Brizzolari *v.* Crawford, 38 Ark. 218.

An order by a state officer assigning his quarter's salary is not such a claim as has to be audited, when such salary has been audited. State *v.* Hastings, 15 Wis. 75.

36. Roberts *v.* State, 160 N. Y. 217, 54 N. E. 678.

37. Hager *v.* Sidebottom, 130 Ky. 687, 113 S. W. 870.

38. *California.*— Sullivan *v.* Gage, 145 Cal. 759, 79 Pac. 537; Sawyer *v.* Colgan, (1893) 33 Pac. 911. But see Lewis *v.* Colgan, 115 Cal. 529, 47 Pac. 357, (1896) 44 Pac. 1081.

Colorado.— Schwanbeck *v.* People, 15 Colo. 64, 24 Pac. 575.

Nebraska.— State *v.* Hastings, 37 Nebr. 96, 55 N. W. 774, 38 Nebr. 584, 58 N. W. 32.

North Carolina.— Boner *v.* Adams, 65 N. C. 639.

Oregon.— State *v.* Brown, 10 Oreg. 215.

Wisconsin.— State *v.* Hastings, 10 Wis. 525. See 44 Cent. Dig. tit. "States," § 169 *et seq.*

Under Ky. St. (1903) § 3974, which provides that every bill shall be presented to the commissioners of public printing, who shall examine the same, and, if any error is found shall correct it, and that, if the account is found to be correct, etc., they shall indorse it, and thereupon the auditor shall draw a warrant in favor of the contractor, no judicial power is conferred on the commissioners, and they act simply in a ministerial capacity, their conclusion not being final, and, if they approve a claim containing errors, by mistake, or through their being misled by the claimant, the latter is liable to an action by the commonwealth for the money improperly received on the claim in excess of the amount rightfully due thereon. Com. *v.* Bacon, 111 S. W. 387, 33 Ky. L. Rep. 935.

39. *In re* Appropriations by Gen. Assembly, 13 Colo. 316, 22 Pac. 464; Parks *v.* Hays, 11 Colo. App. 415, 53 Pac. 893.

The making of a specific appropriation by the legislature for the payment of a claim is not an auditing of such claim. State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711.

40. Clayton *v.* Berry, 27 Ark. 129.

41. State *v.* Brown, 10 Oreg. 215.

42. Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158.

43. Denning *v.* State, 123 Cal. 316, 55 Pac.

claim by the auditing officer or board is not conclusive as to the validity of the claim, and the fiscal officers of the state may lawfully refuse to draw or pay warrants for claims so allowed if such claims are in fact not valid.[44] But the approval of the claim by the auditing officers and the appropriation by the legislature of money for its payment are conclusive of its validity, and the controller may be required by mandamus to draw his warrant therefor on the treasurer.[45]

b. Auditing Boards and Officers. The constitutions or statutes designate the officers or establish the boards by whom claims against the state are to be considered and passed upon. These are usually the state auditor,[46] secretary of state,[47] a board or court of claims,[48] a board of examiners,[49] or a board of auditors;[50] and special committees or commissions are also sometimes appointed by statute to audit and settle particular claims.[51] Where the constitution confers upon a

1000; Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; Houston *v.* State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39.

44. Lewis *v.* Colgan, (Cal. 1896) 44 Pac. 1081; State *v.* Horton, 21 Nev. 466, 34 Pac. 316; State *v.* Hastings, 12 Wis. 596; State *v.* Hastings, 10 Wis. 525.

45. Cahill *v.* Colgan, (Cal. 1892) 31 Pac. 614.

46. *Arkansas.*— Danley *v.* Whiteley, 14 Ark. 687.

Missouri.— State *v.* Hinkson, 7 Mo. 353.

Nebraska.— State *v.* Cornell, 56 Nebr. 143, 76 N. W. 459; Barry *v.* State, 40 Nebr. 171, 58 N. W. 717; State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711.

South Dakota.— Sawyer *v.* Mayhew, 10 S. D. 18, 71 N. W. 141.

Wyoming.— State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146.

See 44 Cent. Dig. tit. "States," § 163.

Where the constitution creates the office of state auditor but attaches to it no duties, the auditor may discharge only such duties as may be enjoined upon him by law. Branham *v.* Lange, 16 Ind. 497.

47. Irwin-Hodson Co. *v.* Kincaid, 31 Oreg. 478, 49 Pac. 765; Croasman *v.* Kincaid, 31 Oreg. 445, 49 Pac. 764; Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758; Brown *v.* Fleischner, 4 Oreg. 132.

Legislative resolution not violating a constitutional provision making the secretary of state the state auditor.— A legislative resolution appropriating money to defray the expenses of an investigation was not violative of Const. art. 6, § 2, making the secretary of state the state auditor because it required the expense accounts to be audited by the secretary of state on the certificate of the chairman of the committee of the facts to which the legislative fee bill is to be applied in the given case; no auditing authority being thus conferred on the chairman of the committee. State *v.* Frear, 138 Wis. 173, 119 N. W. 894.

48. Ostrander *v.* State, 192 N. Y. 415, 85 N. E. 668; Locke *v.* State, 140 N. Y. 480, 35 N. E. 1076; Yaw *v.* State, 127 N. Y. 190, 27 N. E. 829; Nussbaum *v.* State, 119 N. Y. App. Div. 755, 104 N. Y. Suppl. 527; Remington *v.* State, 116 N. Y. App. Div. 522, 101 N. Y. Suppl. 952; Williams *v.* State, 94 N. Y. App. Div. 489, 88 N. Y. Suppl. 19; American Bank Note Co. *v.* State, 64 N. Y. App. Div. 223, 71 N. Y. Suppl. 1049.

The jurisdiction of the New York court of claims to order the bringing in of other parties, under Code Civ. Proc. §§ 264, 281, on presentation of claims against the state, is limited to proceedings in which the state consents to be sued. Elmore, etc., Contracting Co. *v.* State, 62 Misc. (N. Y.) 58, 115 N. Y. Suppl. 1071, holding that where a claim is presented against the state for damages in the construction of a road in the county of O, a motion to bring in the county as a party defendant will be denied, under N. Y. Code Civ. Proc. § 281.

49. Sawyer *v.* Colgan, (Cal. 1893) 33 Pac. 911; Kroutinger *v.* Board of Examiners, 8 Ida. 463, 69 Pac. 279; State *v.* Collins, 21 Mont. 448, 53 Pac. 1114; State *v.* Hickman, 11 Mont. 541, 29 Pac. 92; State *v.* LaGrave, 23 Nev. 387, 48 Pac. 370; State *v.* Hallock, 20 Nev. 326, 22 Pac. 123.

In Idaho the state board of examiners is given power, under Const. art. 4, § 18, to examine all claims against the state, except salaries or compensation of officers fixed by law, and such power cannot be exercised by a district court in entering judgment against the state, and thereby control the action of the state board. Thomas *v.* State, (1909) 100 Pac. 761.

50. Auditor-Gen. *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847; People *v.* Auditor-Gen., 38 Mich. 746; People *v.* State Auditors, 32 Mich. 191; Monroe Bank *v.* State, 26 Hun (N. Y.) 581 [*affirmed* in 93 N. Y. 635]; People *v.* Phœnix Bank, 4 Bosw. (N. Y.) 363, 7 Bosw. 20 [*modified* in 33 N. Y. 9].

51. *Indiana.*— Branham *v.* Lange, 16 Ind. 497; State *v.* McGinley, 4 Ind. 7; State *v.* Beard, 1 Ind. 460.

Iowa.— Prime *v.* McCarthy, 92 Iowa 569, 61 N. W. 220.

Kentucky.— Hewitt *v.* Craig, 86 Ky. 23, 5 S. W. 280, 9 Ky. L. Rep. 232.

Mississippi.— Jack *v.* State, 6 Sm. & M. 494.

New York.— Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400.

South Carolina.— *Ex p.* Childs, 12 S. C. 111.

Wisconsin.— Martin *v.* State, 51 Wis. 407, 8 N. W. 248; State *v.* Doyle, 38 Wis. 92.

See 44 Cent. Dig. tit. "States," § 163.

certain officer or board the power to audit claims, the legislature cannot deprive such officer or board of such power and confer it upon another;[52] and so also where the legislature has by statute made it the duty of a certain officer to audit claims that duty cannot be devolved upon another by joint resolution.[53] In the absence of a constitutional prohibition, the legislature may take upon itself the adjustment and settlement of claims;[54] but in several states the constitutions provide that the legislature shall not itself audit or allow any private claims against the state.[55] It has been held that the office of auditor is one of personal trust and that its duties cannot be delegated to a deputy;[56] and where a board is required to approve a claim as a board, approval by a single member, even with the authority of the other members, is not sufficient, for such power cannot be delegated.[57] But a mere change in the *personnel* of a board after the approval of the claim and before the institution of proceedings to enforce payment does not make necessary a new approval by the board as changed.[58] The powers and duties of the auditing officers or boards are largely defined by statute. They are generally invested with adequate powers for the proper investigation of claims, such as power to require proof of claims, examine witnesses, and compel their attendance, and the like.[59]

4. Judicial Control and Review. When and in so far as the duties of the auditing officers are merely ministerial, their action may be reviewed and controlled by the courts,[60] which, however, will not compel the auditing officers to audit claims which they are not required by law to audit,[61] or which have been properly disallowed,[62] and in so far as the auditors' duties are judicial in their nature,[63] they cannot be compelled by the courts to allow a claim unless their refusal to do so has been a plain abuse of discretion.[64] In some states an appeal is allowed

As to the court of claims established by the South Carolina act of 1878 for the settlement of the unfunded debt of the state see Walker *v.* State, 12 S. C. 200; *Ex p.* Childs, 12 S. C. 111.

52. State *v.* Hallock, 20 Nev. 326, 22 Pac. 123; State *v.* Hastings, 10 Wis. 525.

53. Barry *v.* State, 40 Nebr. 171, 58 N. W. 717.

54. Julian *v.* State, 140 Ind. 581, 39 N. E. 923; State *v.* Draper, 44 Mo. 245.

55. Olds *v.* State Land Office Com'r, 134 Mich. 442, 86 N. W. 956, 96 N. W. 508; State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711; Cayuga County *v.* State, 153 N. Y. 279, 47 N. E. 288; O'Hara *v.* State, 112 N. Y. 146, 19 N. E. 659, 8 Am. St. Rep. 726, 2 L. R. A. 603; Cole *v.* State, 102 N. Y. 48, 6 N. E. 277.

Under the Idaho constitution no claim against the state can be passed upon by the legislature without first having been considered and acted upon by the state board of examiners. Kroutinger *v.* Board of Examiners, 8 Ida. 463, 69 Pac. 279.

56. State *v.* Hastings, 10 Wis. 525.

57. Schwanbeck *v.* People, 15 Colo. 64, 27 Pac. 575.

58. Cahill *v.* Colgan, (Cal. 1892) 31 Pac. 614.

59. See San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; Lakeside Paper Co. *v.* State, 15 N. Y. App. Div. 169, 44 N. Y. Suppl. 281; Sawyer *v.* Mayhew, 10 S. D. 18, 71 N. W. 141; Clement *v.* Graham, 78 Vt. 290, 63 Atl. 146; State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146.

Under Cal. Pol. Code, § 662, the reasons for the disapproval of a claim must be stated, but the statement need not be made in formal legal language. San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174.

60. Shattuck *v.* Kincaid, 31 Oreg. 379, 49 Pac. 758; State *v.* Brown, 10 Oreg. 215; Thoreson *v.* State Bd. of Examiners, 19 Utah 18, 57 Pac. 175; Sloan *v.* State, 51 Wis. 623, 8 N. W. 393; State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146.

Mandamus to compel state auditing officers to perform their duties see MANDAMUS, 26 Cyc. 235 *et seq.*

Where the proceeds of a certain tax or a certain part of the state revenue are by law annually set apart for a designated purpose, the state auditor may be compelled by mandamus to ascertain the amount applicable to such purpose and to draw his warrant therefor. People *v.* Auditor, 12 Ill. 307; State *v.* Halliday, 60 Mo. 596.

61. State *v.* Weigel, 48 Mo. 29.

62. Springer *v.* Green, 46 Cal. 73.

63. See *supra*, VIII, A, 3, b.

64. *California.*— San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; Springer *v.* Green, 46 Cal. 73.

Idaho.— Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438.

South Dakota.— Sawyer *v.* Mayhew, 10 S. D. 18, 71 N. W. 141.

Wisconsin.— State *v.* Doyle, 38 Wis. 92.

Wyoming.— State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146.

The Michigan board of state auditors is an executive department of the state, whose action in the exercise of their executive discretion is not subject to direct control or review by the courts. People *v.* Auditor-Gen., 38

to the courts from the action of the auditing officers in disallowing a claim,[65] and the statutes sometimes authorize a rehearing or new trial before the auditing board,[66] and the claimant may sue the state on such claim where the state has consented to be sued;[67] but it is held that there is no appeal when not allowed by law,[68] and a finding of the auditing officers as to the amount of a claim will not ordinarily be disturbed where it appears that they acted in good faith and the amount is not clearly erroneous.[69]

B. Statute of Limitations. A claim against a state may be barred by lapse of time, as by the failure to file the claim within the prescribed period;[70] but the legislature may authorize the payment of a claim notwithstanding the lapse of time,[71] not, however, where the limitation is created by the constitution.[72] The presentation of a claim to the state board of claims is equivalent to the commencement of an action between individuals, and suspends the operation of the statute of limitations.[73] Where the statute of limitations is the only defense to a just claim, such defense should be established with reasonable certainty.[74]

Mich. 746; People *v.* State Auditors, 32 Mich. 191.

65. *Kentucky.*— Sparks *v.* Com., 6 Ky. L. Rep. 289.

Nebraska.— State *v.* Cornell, 56 Nebr. 143, 76 N. W. 459; Garneau *v.* Moore, 39 Nebr. 791, 58 N. W. 438; State *v.* Stout, 7 Nebr. 89.

New York.— Slavin *v.* State, 152 N. Y. 45, 46 N. E. 321; Spencer *v.* State, 135 N. Y. 619, 32 N. E. 128; Coleman *v.* State, 134 N. Y. 564, 31 N. E. 902; Bower *v.* State, 134 N. Y. 429, 31 N. E. 894; Sayre *v.* State, 128 N. Y. 622, 27 N. E. 1079; Sayre *v.* State, 123 N. Y. 291, 25 N. E. 163; Chaphe *v.* State, 117 N. Y. 511, 23 N. E. 185; Perkins *v.* State, 113 N. Y. 660, 21 N. E. 397.

Pennsylvania.— Fitler *v.* Com., 31 Pa. St. 406.

Virginia.— Com. *v.* Farmers' Bank, 2 Rob. 737; Com. *v.* Beaumarchais, 3 Call 122.

West Virginia.— Robinson *v.* LaFollette, 46 W. Va. 565, 33 S. E. 288.

Wyoming.— State *v.* Burdick, 3 Wyo. 588, 28 Pac. 146.

See 44 Cent. Dig. tit. "States," § 171 *et seq.*

In Idaho the remedy of a claimant whose demand against the state has been disallowed by the state board of examiners is, under Const. art. 5, § 10, providing that the supreme court shall have original jurisdiction to hear claims against the state, but that its decision shall be merely recommendatory, and that the same shall be reported to the next session of the legislature for its action. Bragaw *v.* Gooding, 14 Ida. 288, 94 Pac. 438.

Recognition by statute of a claim is not necessary to give the court of claims jurisdiction under N. Y. Code Civ. Proc. § 264, giving the court of claims jurisdiction to hear and determine a private claim against the state which shall have accrued within two years before it is filed. Quayle *v.* State, 192 N. Y. 47, 84 N. E. 583.

When a claim against the state is allowed in part by the auditor, and the claimant accepts a warrant drawn for the part allowed, he thereby waives his right of appeal. Weston *v.* Falk, 66 Nebr. 198, 92 N. W. 204, 93 N. W. 131. And where a right of appeal is given to a claimant whose claim has been disallowed by the auditing officers, mandamus will not lie to compel the officer to issue a warrant for such claim, the remedy at law being adequate. State *v.* Babcock, 22 Nebr. 38, 33 N. W. 711.

66. Chaphe *v.* State, 117 N. Y. 511, 23 N. E. 185.

67. State *v.* Hallock, 20 Nev. 326, 22 Pac. 123.

68. Spencer *v.* State, 135 N. Y. 619, 32 N. E. 128; State *v.* Kings County, 125 N. Y. 312, 26 N. E. 272.

69. People *v.* Miller, 101 N. Y. App. Div. 291, 91 N. Y. Suppl. 639.

70. San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; Small *v.* State, 10 Ida. 1, 76 Pac. 765; State *v.* Draper, 48 Mo. 56; Benedict *v.* State, 120 N. Y. 228, 24 N. E. 314; McDougall *v.* State, 109 N. Y. 73, 16 N. E. 78; Buffalo *v.* State, 116 N. Y. App. Div. 539, 101 N. Y. Suppl. 595; Bissell *v.* State, 70 N. Y. App. Div. 238, 73 N. Y. Suppl. 1105 [*affirmed* in 177 N. Y. 540, 69 N. E. 1120].

Under Nebr. Const. art. 9, § 9, a creditor of the state is not required to file his claim for adjustment within two years after its accrual, where the law makes no provision for its payment, and his failure to do so will not bar an action against the state. Lancaster County *v.* State, 74 Nebr. 211, 104 N. W. 187, 107 N. W. 388 [*following* State *v.* Moore, 40 Nebr. 854, 59 N. W. 755, 25 L. R. A. 774].

71. O'Hara *v.* State, 112 N. Y. 146, 19 N. E. 659, 8 Am. St. Rep. 726, 2 L. R. A. 603. See also Lancaster County *v.* State, 74 Nebr. 211, 104 N. W. 187, 107 N. W. 388.

72. Gates *v.* State, 128 N. Y. 221, 28 N. E. 373; McDougall *v.* State, 109 N. Y. 73, 16 N. E. 78. See Cayuga County *v.* State, 153 N. Y. 279, 47 N. E. 288; Parmenter *v.* State, 135 N. Y. 154, 31 N. E. 1035.

73. Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400. See also Corkins *v.* State, 99 N. Y. 491, 2 N. E. 454, 3 N. E. 660.

74. Yaw *v.* State, 127 N. Y. 190, 27 N. E. 829; Corkings *v.* State, 99 N. Y. 491, 2 N. E. 454, 3 N. E. 660.

C. Interest.[75] A state is not liable for interest in the absence of a statute or express contract providing for the payment thereof;[76] but the state is liable for interest wherever a statute so provides,[77] or if it has expressly contracted to pay it.[78] The time from which interest is chargeable against the state is determined by the general law of interest, and as a rule interest does not begin to run until a liquidated claim becomes due from the state,[79] and the running of interest will be stopped only by payment or its equivalent.[80]

D. Compromise and Adjustment. The state, through its legislature, has the same power as an individual debtor to adjust its liabilities with the consent of its creditors, although it cannot by its own act alone impair the obligation of its contracts;[81] and the legislatures sometimes provide for the compromise and adjustment of claims against the state,[82] or for the submission of such claims to arbitration;[83] and in such cases the general rules applicable between individuals apply.[84]

E. Payment.[85] The payment of claims against the state is sometimes specially regulated or provided for by law, and the payment of claims is of course subject to such restrictions as the law may impose;[86] and thus where a statute so provides, payment cannot be made to claimants indebted to the state, without deducting the amount of their indebtedness.[87] Claims not properly chargeable to the state do not become legal demands simply because audited and approved by the auditing officers, and the payment of such claims cannot be enforced,[88] and money wrongfully paid on an award by the auditing officers may be recovered

75. **Liability of state for interest on bonds** see *supra*, VII, F, 4, b.

76. *Arkansas.*— State *v.* Thompson, 10 Ark. 61.

California.— Molineux *v.* State, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49; Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580.

Florida.— Hawkins *v.* Mitchell, 34 Fla. 405, 16 So. 311.

Georgia.—Western, etc., R. Co. *v.* State, (1891) 14 L. R. A. 438.

Indiana.— Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

Michigan.— Flint, etc., R. Co. *v.* State Auditors, 102 Mich. 500, 60 N. W. 971.

Mississippi.— Green *v.* State, 53 Miss. 148; Whitney *v.* State, 52 Miss. 732; State *v.* Mayes, 28 Miss. 706.

North Carolina.—Atty.-Gen. *v.* Cape Fear Nav. Co., 37 N. C. 444. See also Bledsoe *v.* State, 64 N. C. 392.

Tennessee.— See State *v.* Crutchfield, 3 Head 113.

Texas.— Auditorial Bd. *v.* Arles, 15 Tex. 72.

United States.— U. S. *v.* North Carolina, 136 U. S. 211, 10 S. Ct. 920, 34 L. ed. 336.

See 44 Cent. Dig. tit. "States," § 162.

Interest, however, has been allowed in several cases.— See Com. *v.* Lyon, 72 S. W. 323, 24 Ky. L. Rep. 1747; Swann *v.* Turner, 23 Miss. 565; Bledsoe *v.* State, 64 N. C. 392; Milne *v.* Rempublicam, 3 Yeates (Pa.) 102; Respublica *v.* Mitchell, 2 Dall. (Pa.) 101, 1 L. ed. 307.

77. Flint, etc., R. Co. *v.* State Auditors, 102 Mich. 500, 60 N. W. 971; State *v.* Hickman, 11 Mont. 541, 29 Pac. 92. See also Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400; Parmenter *v.* State, 135 N. Y. 154, 31 N. E. 1035; Sayre *v.* State, 128 N. Y. 622, 27 N. E. 1079; Martin *v.* Auditor, 4 Rand. (Va.) 264.

But a general statute providing that all debts shall bear interest does not apply to the indebtedness of the state. Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580, 834; Flint, etc., R. Co. *v.* State Auditors, 102 Mich. 500, 60 N. W. 971.

78. See U. S. *v.* North Carolina, 136 U. S. 211, 10 S. Ct. 920, 34 L. ed. 336.

79. *Mississippi.*— Whitney *v.* State, 52 Miss. 732; State *v.* Mayes, 28 Miss. 706; Swann *v.* Turner, 23 Miss. 565.

New York.— McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417.

North Carolina.— Bledsoe *v.* State, 64 N. C. 392.

Pennsylvania.— Milne *v.* Rempublicam, 3 Yeates 102.

Wisconsin.— State *v.* Warner, 55 Wis. 271, 9 N. W. 795, 13 N. W. 255; Martin *v.* State, 51 Wis. 407, 8 N. W. 248.

See 44 Cent. Dig. tit. "States," § 162.

80. Com. *v.* Newton, 1 Hen. & M. (Va.) 90.

81. State *v.* Cobb, 64 Ala. 127.

82. Gorman *v.* Sinking Fund Com'rs, 25 Fed. 647. See also Baxter *v.* State, 9 Wis. 38.

83. State *v.* McGinley, 4 Ind. 7; Hewitt *v.* Craig, 86 Ky. 23, 5 S. W. 280, 9 Ky. L. Rep. 232; State *v.* Ward, 9 Heisk. (Tenn.) 100.

84. State *v.* Ward, 9 Heisk. (Tenn.) 100; Gorman *v.* Sinking Fund Com'rs, 25 Fed. 647.

85. **Mandamus to compel state officers to pay claims against the state** see MANDAMUS, 26 Cyc. 234 *et seq.*

86. See Stone *v.* Houses of Reform, 44 S. W. 984, 19 Ky. L. Rep. 1977; State *v.* Williams, 34 Ohio St. 218.

87. Long *v.* McDowell, 107 Ky. 14, 52 S. W. 812, 21 Ky. L. Rep. 605; Johnson *v.* Auditor, 78 Ky. 282; Stone *v.* Mayo, 55 S. W. 700, 21 Ky. L. Rep. 1559.

88. State *v.* La Grave, 22 Nev. 417, 41 Pac. 115.

back by the state.[89] Where a fund appropriated for the payment of an indefinite number of claims of the same kind to arise in the future proves insufficient to pay all the claims filed, such claims should be paid in full in the order of filing until the appropriation is exhausted.[90] A claimant's right to the payment of a just claim against the state is not defeated by the wrongful acts of the state officers in failing to discharge their duties in connection with such payment.[91]

IX. ACTIONS.

A. By State — 1. Capacity of State to Sue — a. In General. A state, as plaintiff, may sue in its own courts,[92] and this right, although sometimes expressly conferred by statute,[93] exists independently of statute as an incident of sovereignty;[94] and a state may sue in its own courts both in its sovereign capacity and by virtue of its corporate rights.[95] A state may also sue in the courts of another state,[96] or in the federal courts.[97]

b. To Recover Realty. Since the state, on account of its supposed legal ubiquity, cannot be disseized or dispossessed, it has been held that it cannot maintain a direct action of ejectment or trespass to try title,[98] and an action to recover land is therefore brought in the form of an information by the attorney-general on behalf of the state;[99] but the state may maintain ejectment where by statute disseizin is not essential to maintain that action.[1]

2. General Rules Governing Suits by States. As a general rule subject to certain exceptions in matters touching the sovereignty of the state,[2] when a state, as plaintiff, voluntarily comes into court and invokes its aid, she is bound by all the rules established for the administration of justice between individuals and the suit is governed by the same rules as private suits;[3] and an equitable action

89. *Kentucky.*— Com. *v.* Carter, 55 S. W. 701, 21 Ky. L. Rep. 1509.
Michigan.— Ellis *v.* Board of State Auditors, 107 Mich. 528, 65 N. W. 577.
New York.— State *v.* Phœnix Bank, 33 N. Y. 9.
North Carolina.— Worth *v.* Stewart, 122 N. C. 258, 29 S. E. 579.
Oregon.— State *v.* Brown, 10 Oreg. 215.
See 44 Cent. Dig. tit. "States," § 177.

90. Meade County Bank *v.* Reeves, 13 S. D. 193, 82 N. W. 751.

91. State *v.* Cornell, 60 Nebr. 694, 84 N. W. 87.

92. *Colorado.*— People *v.* Tool, 35 Colo. 225, 86 Pac. 224, 229, 231, 117 Am. St. Rep. 198, 6 L. R. A. N. S. 822; Brown *v.* State, 5 Colo. 496.
Minnesota.— State *v.* Grant, 10 Minn. 39.
Missouri.— State *v.* Moody, 202 Mo. 120, 100 S. W. 619.
Ohio.— Friend, etc., Paper Co. *v.* Public Works, 7 Ohio Dec. (Reprint) 56, 1 Cinc. L. Bul. 92.
Oregon.— State *v.* Metschan, 32 Oreg. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692.
Texas.— State *v.* Thompson, 64 Tex. 690.
West Virginia.— State *v.* Burkeholder, 30 W. Va. 593, 5 S. E. 439.
See 44 Cent. Dig. tit. "States," § 178.
Illustrations of actions which the state may prosecute.— The state may maintain a suit to foreclose a mortgage (Ravenscroft *v.* State, 1 Mo. 536), to set aside a fraudulent conveyance (State *v.* Burkeholder, 30 W. Va. 593, 5 S. E. 439), or to restrain public corporations from doing acts in violation of the constitution and laws of the state (State *v.* Saline County Ct., 51 Mo. 350, 11 Am. Rep. 454).

93. See Gaston *v.* State, 88 Ala. 459, 7 So. 340; State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029.

94. State *v.* Metschan, 32 Oreg. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692; State *v.* Delesdenier, 7 Tex. 76. See also Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590.

95. State *v.* Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

96. Esley *v.* People, 23 Kan. 510; Hines *v.* North Carolina, 10 Sm. & M. (Miss.) 529; Delafield *v.* Illinois, 2 Hill (N. Y.) 159, 26 Wend. 192; Indiana *v.* John, 5 Ohio 217; Spencer *v.* Brockway, 1 Ohio 259, 13 Am. Dec. 615.

97. Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227; State *v.* Atkins, 10 Fed. Cas. No. 5,350, 1 Abb. 22, 35 Ga. 315.
A state may file an original bill in the United States supreme court against a citizen of another state. Georgia *v.* Tennessee Copper Co., 206 U. S. 230, 27 S. Ct. 618, 51 L. ed. 1038; Florida *v.* Anderson, 91 U. S. 667, 23 L. ed. 290. See also Georgia *v.* Brailsford, 2 Dall. 402, 1 L. ed. 433.

98. State *v.* Arledge, 1 Bailey (S. C.) 551; State *v.* Stark, 3 Brev. (S. C.) 101.

99. State *v.* Pinckney, 22 S. C. 484; State *v.* Pacific Guano Co., 22 S. C. 50; State *v.* Arledge, 1 Bailey (S. C.) 551. See also State *v.* Paxson, 119 Ga. 730, 46 S. E. 872.

1. Brown *v.* State, 5 Colo. 496. See also McCaslin *v.* State, 38 Ind. App. 184, 75 N. E. 844.

2. See *infra*, IX, A, 7, b; IX, F.

3. *Indiana.*— State *v.* Washington County, 101 Ind. 69.

by the state opens the door to any defense or cross complaint germane to the matter in controversy that defendant may see fit to interpose;[4] but all claims and demands arising out of independent transactions are in effect suits against the state, and cannot, without its consent, be asserted;[5] and the general rule requiring plaintiff in an action for the cancellation of a contract to repay to the other party any sum received thereunder does not apply where the state is plaintiff, where its officers have no power to draw money for the purpose.[6]

3. Interest in Subject-Matter of Suit. A state, like any other party, cannot maintain a suit unless it appears that it has such an interest in the subject-matter thereof as to authorize the bringing of the suit by it.[7] In this connection, however, a distinction should be noted between actions by the people or by the state in a sovereign capacity, and suits founded on some pecuniary interest or proprietary right. In its sovereign capacity the state, by its proper law officers and by appropriate proceedings, may establish and enforce the execution of trusts by public corporations, prevent the misappropriation or misapplication of public funds or property, and the abuse of power by public officers, and in general protect the interests of the people at large in matters in which they cannot act for themselves;[8] and a suit by the state in its sovereign capacity, as the guardian of the rights of the people, may be maintained without any special injury to the state;[9] and where a state claims property as sovereign, its bare assertion of title and averment thereof in general terms is sufficient;[10] but suits by the state as an ordinary proprietor for the recovery or protection of money or property are governed by the ordinary rules applicable to suits between individuals, and cannot be maintained without proper averment and proof of title or ownership.[11]

4. Venue. Unless specially provided for by statute, the venue of suits brought by the state is governed by the general law relating to the venue of other suits.[12]

5. Parties. Ordinarily any suit in which the state is the real party in interest should be brought in the name of the state or of the people, and not in the name of a state officer or agent.[13] Sometimes suits should be brought in the name of

Maryland.— Brady *v.* State, 26 Md. 290.

Nebraska.— State *v.* Kennedy, 60 Nebr. 300, 83 N. W. 87.

New York.— People *v.* Canal Bd., 55 N. Y. 390.

Ohio.— State *v.* Buttles, 3 Ohio St. 309.

Oregon.— State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473; State *v.* Pennoyer, 26 Oreg. 205, 37 Pac. 906, 41 Pac. 1104, 25 L. R. A. 862.

South Carolina.—State *v.* Pinckney, 22 S. C. 484; State *v.* Pacific Guano Co., 22 S. C. 50.

Tennessee.— Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

Texas.— State *v.* Zanco, 18 Tex. Civ. App. 127, 44 S. W. 527.

West Virginia.— State *v.* Bowen, 38 W. Va. 91, 18 S. E. 375.

United States.— Port Royal, etc., R. Co. *v.* South Carolina, 60 Fed. 552.

4. State *v.* Kilburn, 81 Conn. 9, 69 Atl. 1028; State *v.* Holgate, 107 Minn. 71, 119 N. W. 792.

5. State *v.* Holgate, 107 Minn. 71, 119 N. W. 792.

6. State *v.* Washington Dredging, etc., Co., Co., 43 Wash. 508, 86 Pac. 936.

7. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178. See also New York *v.* Connecticut, 4 Dall. (U. S.) 1, 1 L. ed. 715.

8. People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; State *v.* Metschan, 32 Oreg. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692.

9. State *v.* Metschan, 32 Oreg. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692; Kansas *v.* Colorado, 185 U. S. 125, 22 S. Ct. 552, 46 L. ed. 838. See also People *v.* Tweed, 13 Abb. Pr. N. S. (N. Y.) 25; People *v.* Fields, 50 How. Pr. (N. Y.) 481.

10. State *v.* Paxson, 119 Ga. 730, 46 S. E. 872; State *v.* Evans, 33 S. C. 184, 11 S. E. 697; State *v.* Pinckney, 22 S. C. 484; State *v.* Pacific Guano Co., 22 S. C. 50. See also State *v.* Gramelspacher, 126 Ind. 398, 26 N. E. 81.

11. People *v.* New York, etc., R. Co., 84 N. Y. 565; People *v.* Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; People *v.* Booth, 32 N. Y. 397; State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473; State *v.* Evans, 33 S. C. 184, 11 S. E. 697; State *v.* Pinckney, 22 S. C. 484; State *v.* Pacific Guano Co., 22 S. C. 50; New York *v.* Connecticut, 4 Dall. (U. S.) 1, 1 L. ed. 715.

12. State *v.* Wichita Land, etc., Co., 73 Tex. 450, 11 S. W. 488; State *v.* Stone Cattle, etc., Co., 66 Tex. 363, 17 S. W. 735.

13. *Arkansas.*— State *v.* Wood, 51 Ark. 205, 10 S. W. 624.

Colorado.— Barton *v.* Continental Oil Co., 5 Colo. App. 341, 38 Pac. 432.

Connecticut.— State *v.* New London, 22 Conn. 163; Spencer *v.* Huntington, 6 Conn. 312.

Kentucky.— McAlister *v.* Com., 6 Bush 581; Com. *v.* Wood, 1 J. J. Marsh. 310.

the state upon the relation of the proper officer,[14] but no relator need be named where the suit immediately concerns the state.[15] The state may prescribe by statute the cases in which its officers or agents may sue in their own or their official names.[16] Sometimes the governor,[17] attorney-general,[18] or state treasurer[19] may sue in his official capacity on behalf of the state; and where suit on a contract is required to be brought by a party thereto, it has been held that a suit on a contract by a state officer for the state in his own name must be brought by the officer and not by the state;[20] but as a general rule it seems that, in the absence of express authority, state officers may sue in their own names only where they are clothed with a corporate or quasi-corporate character.[21] In matters of public concern, private individuals may sometimes use the name of the state in an action to obtain relief;[22] but private persons have no right to carry on litigation in the name of the state in regard to matters in which the state is not interested and which may be settled in ordinary suits.[23] The fact that a suit brought in the name of the state is brought or conducted by the attorney-general or other law officer is ordinarily sufficient to show that the suit is authorized by the state.[24] The state may be made a party plaintiff with individuals in a suit in which the state is interested.[25]

6. Pleading.[26] The pleadings in an action by the state are in general governed by the ordinary rules of pleading.[27] Thus the declaration or complaint must set forth such facts as constitute a cause of action or it will be demurrable;[28] and in an action in regard to property it must appear that the state has an interest therein;[29] but the corporate character of the state need not be alleged.[30] Sur-

Missouri.— State *v.* Saline County Ct., 51 Mo. 350, 11 Am. Rep. 454.

Ohio.— Hunter *v.* Field, 20 Ohio 340; Hamilton County *v.* Noyes, 5 Ohio Dec. (Reprint) 238, 3 Am. L. Rec. 745.

South Dakota.— State *v.* Welbes, 11 S. D. 86, 75 N. W. 820.

Texas.— Lewright *v.* Love, 95 Tex. 157, 65 S. W. 1089.

Vermont.— State *v.* Bradish, 34 Vt. 419.

See 44 Cent. Dig. tit. "States," § 195.

14. State *v.* Gramelspacher, 126 Ind. 398, 26 N. E. 81; Neal *v.* State, 49 Ind. 51; McCaslin *v.* State, 44 Ind. 151; Pepper *v.* State, 22 Ind. 399, 85 Am. Dec. 430; Shook *v.* State, 6 Ind. 113; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561. See also State *v.* Kelly, 111 Tenn. 583, 82 S. W. 311.

15. Fry *v.* State, 27 Ind. 348; Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1; People *v.* Metropolitan Bank, 7 How. Pr. (N. Y.) 144.

16. Hamilton County *v.* Noyes, 5 Ohio Dec. (Reprint) 238, 3 Am. L. Rec. 745. See also Drummond *v.* Clinton, etc., R. Co., 7 Rob. (La.) 234.

17. Alexander *v.* State, 56 Ga. 478; State *v.* Houston, 21 Okla. 782, 97 Pac. 982; Governor *v.* Allen, 8 Humphr. (Tenn.) 176; Polk *v.* Plummer, 2 Humphr. (Tenn.) 500, 37 Am. Dec. 566.

In Mississippi any inherent power of the governor at common law to sue in the name of the state is superseded by article 5 of the constitution defining executive powers. Henry *v.* State, 8 Miss. 628, 39 So. 856.

18. Atty.-Gen. *v.* Williams, 140 Mass. 329, 2 N. E. 80, 3 N. E. 214, 54 Am. Rep. 468. And see Attorney-General, 4 Cyc. 1029.

The power of the attorney-general to bring suits in behalf of the state may be limited by statute.— State *v.* Thompson, 64 Tex. 690.

19. State *v.* Pederson, 135 Wis. 31, 114 N. W. 828.

20. Maine *v.* Gould, 11 Metc. (Mass.) 220; Galbraith *v.* Gaines, 10 Lea (Tenn.) 568.

21. Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

Where officer goes out of office pending suit.—Where a suit is brought by a state officer in his official capacity in behalf of the state, the state and not the officer is the real party in interest, and hence where such officer goes out of office pending the suit, the incoming officer is entitled to be made a party in his stead, and prosecute the suit to judgment. Lacy *v.* Webb, 130 N. C. 545, 41 S. E. 549.

22. State *v.* Morris Canal, etc., Co., 14 N. J. L. 411.

A suit may be brought in the name of the state for the use of a township.— State *v.* Earhart, 27 Ind. 119.

23. People *v.* Pacheco, 29 Cal. 210; State *v.* Shively, 10 Oreg. 267; State *v.* Union Inv. Co., 7 S. D. 51, 63 N. W. 232.

24. Com. *v.* Dehner, 12 Wkly. Notes Cas. (Pa.) 273; State *v.* Hirsch, 16 Lea (Tenn.) 40; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865.

25. Central R. Co. *v.* Collins, 40 Ga. 582.

26. See Pleading, 31 Cyc. 1.

27. See Pleading, 31 Cyc. 1.

28. State *v.* Pennoyer, 26 Oreg. 205, 37 Pac. 906, 41 Pac. 1104, 25 L. R. A. 862; Alabama *v.* Burr, 115 U. S. 413, 6 S. Ct. 81, 29 L. ed. 435.

29. People *v.* Booth, 32 N. Y. 397.

30. Wisconsin *v.* Torinus, 22 Minn. 272.

plusage may be rejected.[31] A demurrer on the ground that the state is without legal capacity to sue will not lie unless such want of capacity appears affirmatively from the complaint.[32] A plea in abatement on the ground that an action in the name of the state is not brought by the state's attorney, as required by statute, should negative all the exceptions in the statute requiring such suits to be so brought.[33]

7. Defenses and Offsets — a. In General. As a rule defendant in a suit brought by the state may set up any defense directly touching the merits of the state's claim which he could have urged against a private individual.[34]

b. Statute of Limitations. The statute of limitations does not apply to actions brought by the state,[35] except when expressly so provided.[36] This rule applies to actions in which the state, although not a party to the record, is the real party in interest;[37] but not to cases in which the state is merely the nominal party and sues in the interest of some private person.[38]

c. Laches. The doctrine of laches does not apply to suits brought by the state in its governmental capacity.[39]

d. Recoupment, Set-Off, and Counter-Claim; Cross Action. As a part of his defense defendant may maintain against the state a cross bill or cross complaint, provided it relates only to the subject-matter of plaintiff's suit and does not pray for original and independent relief;[40] but he cannot maintain such cross action for independent affirmative relief;[41] nor can he, without clear statutory authority therefor, claim the benefit of a set-off or counter-claim against the state constituting an independent cause of action, for this would contravene the rule that a state cannot be sued without its consent,[42] although there is some authority

31. State *v.* Johnson, 52 Ind. 197; Shook *v.* State, 6 Ind. 113.

32. Wisconsin *v.* Torinus, 22 Minn. 272. See also Van Dyke *v.* State, 24 Ala. 81; State *v.* Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

33. McCauley *v.* State, 21 Md. 556.

34. Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570; People *v.* Auditor-Gen., 38 Mich. 746; Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712; State *v.* Ward, 9 Heisk. (Tenn.) 111; Rice *v.* Dickson Car Wheel Co., (Tex. Civ. App. 1901) 65 S. W. 645. See also Bouldin *v.* State, 21 Ark. 84.

35. *Arkansas.*— State *v.* Burk, 63 Ark. 56, 37 S. W. 406.

Indiana.— Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401; State *v.* Halter, 149 Ind. 292, 47 N. E. 665.

Louisiana.— State *v.* New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205.

Mississippi.— Josselyn *v.* Stone, 28 Miss. 753; State *v.* Joiner, 23 Miss. 500; Parmilee *v.* McNutt, 1 Sm. & M. 179.

Ohio.—Wasteney *v.* Schott, 58 Ohio St. 410, 51 N. E. 34.

Tennessee.— See State *v.* Columbia, (Ch. App. 1899) 52 S. W. 511; State *v.* Crutchfield, 3 Head 113.

West Virginia.— State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

And see Limitations of Actions, 25 Cyc. 1007 text and note 7.

36. People *v.* Clarke, 9 N. Y. 349; State *v.* Pinckney, 22 S. C. 484; State *v.* Sponaugle, 45 W. Va. 415, 32 S. C. 283, 43 L. R. A. 727. See also Hepburn's Case, 3 Bland (Md.) 95; Caldwell *v.* Prindle, 19 W. Va. 604. And see Limitations of Actions, 25 Cyc. 1006 text and note 6.

37. Wasteney *v.* Schott, 58 Ohio St. 410, 51 N. E. 34.

38. State *v.* Halter, 149 Ind. 292, 47 N. E. 665, held to be action for benefit of public.

39. *Indiana.*— Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401.

Mississippi.— Josselyn *v.* Stone, 28 Miss. 753.

Pennsylvania.— Haehnlen *v.* Com., 13 Pa. St. 617, 53 Am. Dec. 502.

Tennessee.— State *v.* Columbia, (Ch. App. 1899) 52 S. W. 511.

West Virginia.— State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

40. State *v.* Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379; McCandlish *v.* Com., 76 Va. 1002; Port Royal, etc., R. Co. *v.* State, 60 Fed. 552.

41. Holmes *v.* State, 100 Ala. 291, 14 So. 51; American Dock, etc., Co. *v.* Public Schools, 32 N. J. Eq. 428; State *v.* State Bank, 62 Tenn. 395.

42. *Alabama.*— Alabama Girls' Industrial School *v.* Reynolds, 143 Ala. 579, 42 So. 114; Holmes *v.* State, 100 Ala. 291, 14 So. 51; White *v.* Governor, 18 Ala. 767.

California.— People *v.* Miles, 56 Cal. 401.

Louisiana.— State *v.* Gaines, 46 La. Ann. 431, 15 So. 174; State *v.* Bradley, 37 La. Ann. 623; State *v.* Leckie, 14 La. Ann. 636.

Maryland.— State *v.* Baltimore, etc., R. Co., 34 Md. 344. See also State *v.* Northern Cent. R. Co., 18 Md. 193.

Michigan.—Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570; Aplin *v.* Grand Traverse County, 73 Mich. 182, 41 N. W. 223, 16 Am. St. Rep. 576; Auditor-Gen. *v.* Van

to the contrary.[43] A defendant pleading set-off allowed by statute must bring himself clearly within the terms of the statute.[44]

B. Against States — 1. Liability and Consent of State to Be Sued — a. In General. A state, being sovereign, cannot be sued in its own courts,[45] or in the

Tassel, 73 Mich. 28, 40 N. W. 847. See also Auditor-Gen. *v.* Shiawassee County, 74 Mich. 536, 42 N. W. 143.

Mississippi.— Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

New York.— People *v.* Dennison, 84 N. Y. 272 [*affirming* 8 Abb. N. Cas. 128, 59 How. Pr. 157]; People *v.* Corner, 59 Hun 299, 12 N. Y. Suppl. 936 [*affirmed* in 128 N. Y. 640, 29 N. E. 147].

North Carolina.— Battle *v.* Thompson, 65 N. C. 406.

Pennsylvania.—Com. *v.* Philadelphia County, 157 Pa. St. 531, 27 Atl. 546; Com. *v.* Matlock, 4 Dall. 303, 1 L. ed. 483.

South Carolina.— State *v.* Corbin, 16 S. C. 533; State *v.* Baldwin, 14 S. C. 135; Treasurers *v.* Cleary, 3 Rich. 372.

Tennessee.— Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

Texas.— Chevallier *v.* State, 10 Tex. 315; Borden *v.* Houston, 2 Tex. 594.

See 44 Cent. Dig. tit. "States," § 189.

A citizen cannot compel the state by mandamus to apply funds in its hands to the payment of his taxes, since this is in effect a set-off against the claim of the state which is not permissible. People *v.* Roberts, 30 N. Y. App. Div. 78, 51 N. Y. Suppl. 747 [*affirmed* in 157 N. Y. 676, 51 N. E. 1093].

43. Powers *v.* Central Bank, 18 Ga. 658; Com. *v.* Barker, 126 Ky. 200, 103 S. W. 303, 31 Ky. L. Rep. 648; Com. *v.* Owensboro, etc., R. Co., 81 Ky. 572; Com. *v.* Todd, 9 Bush (Ky.) 708; Sinking Fund Com'rs *v.* Northern Bank, 1 Metc. (Ky.) 174; State *v.* Franklin Bank, 10 Ohio 91; State *v.* Gaillard, 1 Bay (S. C.) 500.

These cases are examined and explained or disapproved in Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

44. Briscoe *v.* State, 19 Ark. 559; Frier *v.* State, 11 Fla. 300.

45. *Arkansas.*— Auditor *v.* Davies, 2 Ark. 494.

California.— Melvin *v.* State, 121 Cal. 16, 53 Pac. 416; People *v.* Miles, 56 Cal. 401; Sharp *v.* Contra Costa County, 34 Cal. 284; People *v.* Talmage, 6 Cal. 256; Hunsaker *v.* Borden, 5 Cal. 288, 63 Am. Dec. 130.

Colorado.— *In re* Constitutionality of Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088.

Florida.— Bloxham *v.* Florida Cent., etc., R. Co., 35 Fla. 625, 17 So. 902; McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504.

Georgia.— Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677; Western, etc., R. Co. *v.* State, (1891) 14 L. R. A. 438; Printup *v.* Cherokee R. Co., 45 Ga. 365.

Idaho.— Thomas *v.* State, 16 Ida. 81, 100 Pac. 761; Hollister *v.* State, 9 Ida. 8, 71 Pac. 541.

Illinois.— People *v.* Chicago Sanitary Dist., 210 Ill. 171, 71 N. E. 334; People *v.* Dulaney, 96 Ill. 503.

Indiana.— Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370; Pattison *v.* Shaw, 6 Ind. 377.

Iowa.— Mills Pub. Co. *v.* Larrabee, 78 Iowa 97, 42 N. W. 593.

Kansas.— State *v.* Appleton, 73 Kan. 160, 84 Pac. 753; Asbell *v.* State, 60 Kan. 51, 55 Pac. 338.

Kentucky.— Tate *v* Salmon, 79 Ky. 540; Divine *v.* Harvie, 7 T. B. Mon. 439, 18 Am. Dec. 194.

Louisiana.— State *v.* Gaines, 46 La. Ann. 431, 15 So. 174; State *v.* Lazarus, 40 La. Ann. 856, 5 So. 289; State *v.* Jumell, 38 La. Ann. 337; State *v.* Burke, 33 La. Ann. 498.

Maine.— Weston *v.* Dane, 53 Me. 372.

Maryland.— State *v.* Baltimore, etc., R. Co., 34 Md. 344.

Massachusetts.— McArthur Bros. Co. *v.* Com., 197 Mass. 137, 83 N. E. 334; Hodgdon *v.* Haverhill, 193 Mass. 406, 79 N. E. 830; Milford *v.* Com., 144 Mass. 64, 10 N. E. 516; Wesson *v.* Com., 144 Mass. 60, 10 N. E. 762; Troy, etc., R. Co. *v.* Com., 127 Mass. 43.

Michigan.— Auditor-Gen. *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847; Ottawa County *v.* Auditor-Gen., 69 Mich. 1, 36 N. W. 702; Sanilac County *v.* Auditor-Gen., 68 Mich. 659, 36 N. W. 794; Burrill *v.* Auditor-Gen., 46 Mich. 256, 9 N. W. 273; Ambler *v.* Auditor-Gen., 38 Mich. 746; Michigan State Bank *v.* Hammond, 1 Dougl. 527; Michigan State Bank *v.* Hastings, 1 Dougl. 224, 41 Am. Dec. 549; Michigan State Bank *v.* Hastings, Walk. 9.

Mississippi.— Hall *v.* State, 79 Miss. 38, 29 So. 994.

Montana.— Fisk *v.* Cuthbert, 2 Mont. 593; Langford *v.* King, 1 Mont. 33.

Nebraska.— State *v.* Mortensen, 69 Nebr. 376, 95 N. W. 831.

New Jersey.— Lodor *v.* Baker, 39 N. J. L. 49; American Dock, etc., Co. *v.* Public Schools, 32 N. J. Eq. 428.

New York.— Sanders *v.* Saxton, 182 N. Y. 477, 108 Am. St. Rep. 826, 1 L. R. A. N. S. 727; *In re* Hoople, 179 N. Y. 308, 72 N. E. 229; Locke *v.* State, 140 N. Y. 480, 35 N. E. 1076; Rexford *v.* State, 105 N. Y. 229, 11 N. E. 514; People *v.* Dennison, 84 N. Y. 272 [*affirming* 8 Abb. N. Cas. 128]; Nussbaum *v.* State, 119 N. Y. App. Div. 755, 104 N. Y. Suppl. 527; Seitz *v.* Messerschmitt, 117 N. Y. App. Div. 401, 102 N. Y. Suppl. 732 [*affirmed* in 188 N. Y. 587, 81 N. E. 1175]; Kiersted *v.* People, 1 Abb. Pr. 385.

North Carolina.— Battle *v.* Thompson, 65 N. C. 406.

Ohio.— Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273; Friend, etc., Paper Co. *v.* Public Works, 7 Ohio Dec. (Reprint) 56, 1 Cinc. L. Bul. 92. See also State *v.* Franklin Bank, 10 Ohio 91.

courts of another state,[46] or in the federal courts by an individual,[47] without its own consent; and the constitutions of several states expressly provide that the state shall never be made defendant in any court of law or equity.[48] But the immunity of a state from suit is a privilege which it may waive,[49] and the state may be sued whenever it has consented thereto;[50] and the voluntary appearance of the state in a suit may constitute a waiver for that particular suit,[51] although the mere consent of an officer of the state by appearing and answering in the name of the state, without authority of law, does not bind the state;[52] and a constitutional provision that the state shall never be made a defendant in any court cannot be waived by any officer or agency of the state.[53]

b. Constitutional and Statutory Provisions. The consent of the states to be sued in the supreme court of the United States by the United States or by another state has been given by their adoption of the federal constitution.[54] Some of the

Oregon.— Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832.

Pennsylvania.—Williamsport, etc., R. Co. *v.* Com., 33 Pa. St. 288. See also Pennsylvania R. Co. *v.* Duquesne Borough, 46 Pa. St. 223.

South Carolina.— Columbia Water-Power Co. *v.* Columbia Electric St. R., etc., Co., 43 S. C. 154, 20 S. E. 1002; Lowry *v.* Thompson, 25 S. C. 416, 1 S. E. 141; Whaley *v.* Gaillard, 21 S. C. 560; State *v.* Corbin, 16 S. C. 533; State *v.* Baldwin, 14 S. C. 135; *Ex p.* Dunn, 8 S. C. 207; Treasurers *v.* Cleary, 3 Rich. 372.

Tennessee.— General Oil Co. *v.* Crain, 117 Tenn. 82, 95 S. W. 824, 121 Am. St. Rep. 967; State *v.* Odom, 93 Tenn. 446, 25 S. W. 105; State *v.* Tennessee Bank, 3 Baxt. 395.

Texas.— Marshall *v.* Clark, 22 Tex. 23; Auditorial Bd. *v.* Arles, 15 Tex. 72; Hosner *v.* De Young, 1 Tex. 764.

Virginia.— Cornwall *v.* Com., 82 Va. 644, 3 Am. St. Rep. 121; Dunnington *v.* Ford, 80 Va. 177; Public Works *v.* Gannt, 76 Va. 455.

United States.— Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140; Beers *v.* Arkansas, 20 How. 527, 15 L. ed. 991; Adams *v.* Bradley, 1 Fed. Cas. No. 48, 5 Sawy. 217.

See 44 Cent. Dig. tit. "States," § 179.

In a suit to foreclose a mortgage on land, the title to which the state had acquired by escheat, a sovereign state can be sued in its own courts only with its consent. Seitz *v.* Messerschmitt, 188 N. Y. 587, 81 N. E. 1175.

46. Garr *v.* Bright, 1 Barb. Ch. (N. Y.) 157; Moore *v.* Tate, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712; Tappan *v.* Western, etc., R. Co., 3 Lea (Tenn.) 106. See also Nathan *v.* Virginia, 1 Dall. (Pa.) 77 note, 1 L. ed. 44 note.

But if the state appears and submits to the jurisdiction of the court of a sister state, she must submit to all proper matters of adjudication involved in the suit. Tappan *v.* Western, etc., R. Co., 3 Lea (Tenn.) 106.

47. See *infra*, IX, B, 4, b.

48. See the constitutions of the several states. And see Alabama Girls' Industrial School *v.* Reynolds, 143 Ala. 579, 42 So. 114; Holmes *v.* State, 100 Ala. 291, 14 So. 51; People *v.* Chicago Sanitary Dist., 210 Ill. 171, 71 N. E. 334; *In re* Mt. Vernon, 147 Ill. 359, 35 N. E. 533, 23 L. R. A. 807; People *v.* Dulaney, 96 Ill. 503; Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. 514; Miller *v.* State Bd. of Agriculture, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811; Tompkins *v.* Kanawha Board, 19 W. Va. 257.

49. Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666; Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 26 S. Ct. 252, 50 L. ed. 477; Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780.

By legislative submission to arbitration the state waives its exemption from suit so as to give to the other party all the benefits of the award or to protect him from the consequences of an illegal award. State *v.* Ward, 9 Heisk. (Tenn.) 100.

50. *Arkansas.*— State *v.* Curran, 12 Ark. 321.

Louisiana.— See State *v.* Montegut, 7 Mart. 447.

Mississippi.— Farish *v.* State, 4 How. 170.

New York.— Rexford *v.* State, 105 N. Y. 229, 11 N. E. 514; Meigs *v.* Roberts, 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215 [*reversed* on other grounds in 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322].

South Carolina.— Carolina Nat. Bank *v.* State, 60 S. C. 465, 38 S. E. 629, 85 Am. St. Rep. 865.

Virginia.— Parsons *v.* Com., 80 Va. 163; Higginbotham *v.* Com., 25 Gratt. 627; Atty.-Gen. *v.* Turpin, 3 Hen. & M. 548.

United States.—Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780; Curran *v.* Arkansas, 15 How. 304, 14 L. ed. 705; Saranac Land, etc., Co. *v.* Roberts, 68 Fed. 521.

51. Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 26 S. Ct. 252, 50 L. ed. 477; Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780.

52. Seitz *v.* Messerschmitt, 117 N. Y. App. Div. 401, 102 N. Y. Suppl. 732 [*affirmed* in 188 N. Y. 587, 81 N. E. 1175]; *Ex p.* Dunn, 8 S. C. 207; Adams *v.* Bradley, 1 Fed. Cas. No. 48, 5 Sawy. 217. See Smith *v.* Doe, 111 N. Y. Suppl. 525.

53. Alabama Industrial School *v.* Addler, 144 Ala. 555, 42 So. 116, 113 Am. St. Rep. 58.

This prohibition is absolute and binding on all the courts of the state, and cannot be waived by the attorney-general. People *v.* Chicago Sanitary Dist., 210 Ill. 171, 71 N. E. 334.

54. South Dakota *v.* North Carolina, 192

states have also consented to be sued in their own courts. This consent may be expressed either in the state constitution,[55] or in an act,[56] or joint resolution,[57] of the legislature, and the legislature may authorize suits against the state independently of any constitutional authority,[58] unless prohibited by the constitution.[59] In some states the constitution authorizes or requires the legislature to direct by law in what courts and in what manner suits shall be brought against the state.[60] Such provisions are not self-executing, and no suit can be maintained against the state until the legislature has made provision therefor;[61] but where a statute gives a court jurisdiction to hear and determine claims against the state, a special act is not necessary to give the consent of the state to be sued.[62] The consent of the state to be sued must be given in express terms, or at least in terms so clear and unambiguous as necessarily to imply consent;[63] and it has been held that statutes authorizing suits against a state, being in derogation of its sovereignty, should be construed strictly,[64] although not so strictly as to exclude a case clearly coming within their terms,[65] for the construction should be such as to carry out the legislative intent.[66]

c. Operation and Effect of Consent. The consent of the state to be sued is entirely voluntary on its part, and it may therefore prescribe the cases in which and the terms and conditions upon which it may be sued, and how the suit

U. S. 286, 24 S. Ct. 269, 48 L. ed. 448; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257. And see COURTS, 11 Cyc. 633, 912.

55. See Hollister *v.* State, 9 Ida. 8, 71 Pac. 541.

56. Haley *v.* Sheridan, 190 N. Y. 331, 83 N. E. 296; Lenox *v.* State, 61 Misc. (N. Y.) 28, 114 N. Y. Suppl. 744. See also State *v.* Crutchfield, 3 Head (Tenn.) 113. And see cases cited *infra*, note 57 *et seq.*

57. Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666; Com. *v.* Lyon, 72 S. W. 323, 24 Ky. L. Rep. 1747.

A resolution of the senate, passed in accordance with a statute, will authorize a suit against the state. Lancaster County *v.* State, 74 Nebr. 211, 104 N. W. 187, 107 N. W. 388.

58. Hollister *v.* State, 9 Ida. 8, 71 Pac. 541; Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666; Com. *v.* Lyon, 72 S. W. 323, 24 Ky. L. Rep. 1747.

59. See *supra*, IX, B, 1, a.

60. *Arkansas.*— Turner *v.* State, 27 Ark. 337.

Florida.— Bloxham *v.* Florida Cent., etc., R. Co., 35 Fla. 625, 17 So. 902.

Kentucky.— See Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666; Tate *v.* Salmon, 79 Ky. 540.

Nebraska.— State *v.* Mortensen, 69 Nebr. 376, 95 N. W. 831.

Tennessee.— North British, etc., Ins. Co. *v.* Craig, 106 Tenn. 621, 62 S. W. 155.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 53 Wis. 509, 10 N. W. 560.

United States.— Galbes *v.* Girard, 46 Fed. 500.

See 44 Cent. Dig. tit. "States," § 180.

61. *Alabama.*— *Ex p.* Greene, 29 Ala. 52.

Arkansas.— State *v.* Curran, 12 Ark. 321.

Tennessee.— General Oil Co. *v.* Crain, 117 Tenn. 82, 95 S. W. 824, 121 Am. St. Rep. 967.

Washington.— Northwestern, etc., Bank *v.* State, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33.

Wisconsin.— Houston *v.* State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39; Chicago, etc., R. Co. *v.* State, 53 Wis. 509, 10 N. W. 560; Dickson *v.* State, 1 Wis. 122.

Wash. Const. art. 2, § 26, provides that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state." By such provision it was intended that the state might be permitted to be sued in like manner as an individual, and it was left to the legislature to determine in what court such suit should be brought, and to prescribe the method of procedure. Northwestern, etc., Bank *v.* State, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33.

Notwithstanding such a provision, it is not essential that the state's consent should be given by a law passed in pursuance thereof. A joint resolution of the legislature approved by the governor is just as effective. Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666; Com. *v.* Lyon, 72 S. W. 323, 24 Ky. L. Rep. 1747.

62. Quayle *v.* State, 124 N. Y. App. Div. 81, 108 N. Y. Suppl. 361 [*affirmed* in 192 N. Y. 47, 84 N. E. 583].

63. Asbell *v.* State, 60 Kan. 51, 55 Pac. 338; Murdock Parlor Grate Co. *v.* Com., 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399; People *v.* Dennison, 84 N. Y. 272.

Consent may be given by clear implication. — See Saranac Land, etc., Co. *v.* Roberts, 68 Fed. 521.

64. Western, etc., R. Co. *v.* State, (Ga. 1891) 14 L. R. A. 438; State *v.* Appleton, 73 Kan. 160, 84 Pac. 753; Asbell *v.* State, 60 Kan. 51, 55 Pac. 338; Hall *v.* State, 79 Miss. 38, 29 So. 994; Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382. But see State *v.* Curran, 12 Ark. 321.

65. Fitler *v.* Com., 31 Pa. St. 406.

66. Northwestern, etc., Bank *v.* State, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33.

Particular statutes construed see Hall *v.* State, 79 Miss. 38, 29 So. 994; Green *v.* State, 53 Miss. 148; North British, etc., Ins. Co. *v.*

shall be conducted;[67] and the state can be sued only in the cases,[68] manner,[69] place,[70] and courts [71] prescribed by it, and one who seeks to avail himself of such consent must pursue the remedy as it is provided by law, and must fully comply with the prescribed terms and conditions,[72] and it is the duty of the courts to see that the prescribed methods of procedure are followed.[73] Where a state consents to be sued in its own courts it can be bound only to the extent of its submission to the jurisdiction,[74] which sometimes extends only to an adjudication of plaintiff's claim, without any provision for its enforcement by judicial process, in which case no effective judgment can be rendered against the state, and the only remedy is through an appropriation by the legislature in satisfaction of the court's award.[75] When, however, a state submits itself without reservation to the jurisdiction of the court, that jurisdiction may be used to give full effect to whatever the state, by its act of submission, has allowed to be done;[76] and in any

Craig, 106 Tenn. 621, 62 S. W. 155; Baker *v.* Briggs, 99 Va. 360, 38 S. E. 277; Higginbotham *v.* Com., 25 Gratt. (Va.) 627; Northwestern, etc., Bank *v.* State, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33.

67. *Georgia.*— Thweatt *v.* State, 66 Ga. 673.

Louisiana.—Wright *v.* State Bd. of Liquidation, 49 La. Ann. 1213, 22 So. 361. See also Durbridge *v.* State, 117 La. 841, 42 So. 337.

New York.— Gates *v.* State, 128 N. Y. 221, 28 N. E. 373; State *v.* Kings County, 125 N. Y. 312, 26 N. E. 272.

Pennsylvania.— Fitler *v.* Com., 31 Pa. St. 406.

Texas.— Treasurer *v.* Wygall, 46 Tex. 447.

United States.— Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140; Beers *v.* Arkansas, 20 How. 527, 15 L. ed. 991.

68. Milford *v.* Com., 144 Mass. 64, 10 N. E. 516; Wesson *v.* Com., 144 Mass. 60, 10 N. E. 762; State *v.* Mortensen, 69 Nebr. 376, 95 N. W. 831; State *v.* Stout, 7 Nebr. 89; Locke *v.* State, 140 N. Y. 480, 35 N. E. 1076.

Sometimes special acts authorize suits against the state on particular claims.— See Bickerdike *v.* State, 144 Cal. 681, 78 Pac. 270; Green *v.* State, (Cal. 1887) 12 Pac. 683; Com. *v.* Jackson, 5 Bush (Ky.) 680; M. C. Lilly Co. *v.* Com., 93 S. W. 1039, 29 Ky. L. Rep. 589; Carter *v.* State, 49 La. Ann. 1487, 22 So. 400; Williams *v.* State, 94 N. Y. App. Div. 489, 88 N. Y. Suppl. 19; Seely *v.* State, 12 Ohio 496 [*affirming* 11 Ohio 501]; Hampson *v.* State, 8 Ohio 315.

Under some of the statutes only claims presented to and disallowed by designated state officers may be sued on.— See San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; Hall *v.* State, 79 Miss. 38, 29 So. 994; Green *v.* State, 53 Miss. 148; State *v.* Lancaster County Bank, 8 Nebr. 218; State *v.* Stout, 7 Nebr. 89; Lyman County *v.* State, 11 S. D. 391, 78 N. W. 17; Lyman County *v.* State, 9 S. D. 413, 69 N. W. 601; Chicago, etc., R. Co. *v.* State, 53 Wis. 509, 10 N. W. 560.

69. *Massachusetts.*— McArthur Bros. Co. *v.* Com., 197 Mass. 137, 83 N. E. 334; Flagg *v.* Bradford, 181 Mass. 315, 63 N. E. 898.

Mississippi.— Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

Nebraska.— State *v.* White, 7 Nebr. 113; Bradford *v.* State, 7 Nebr. 109; Owen *v.* State, 7 Nebr. 108; State *v.* Stout, 7 Nebr. 89.

New York.— Plumtree *v.* Dratt, 41 Barb. 333.

Pennsylvania.— Williamsport, etc., R. Co. *v.* Com., 33 Pa. St. 288.

South Carolina.— Whaley *v.* Gaillard, 21 S. C. 560.

South Dakota.— Michel Brewing Co. *v.* State, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911.

Texas.— Hosner *v.* De Young, 1 Tex. 764.

A sovereign state can be sued only on its own terms.— Treasurer *v.* Wygall, 46 Tex. 447.

Suits against the state are governed by the code except so far as the statute allowing them expressly provides the contrary. Baxter *v.* State, 10 Wis. 454.

70. Auditor *v.* Davies, 2 Ark. 494; Flagg *v.* Bradford, 181 Mass. 315, 63 N. E. 898.

71. *Ex p.* Greene, 29 Ala. 52; Flagg *v.* Bradford, 181 Mass. 315, 63 N. E. 898; Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140.

72. *Arkansas.*— Auditor *v.* Davies, 2 Ark. 494.

Georgia.— Western, etc., R. Co. *v.* State, (1891) 14 L. R. A. 438; Mason *v.* Cooper, 19 Ga. 543.

New York.— Gates *v.* State, 128 N. Y. 221, 28 N. E. 373.

South Carolina.— Whaley *v.* Gaillard, 21 S. C. 560.

Virginia.— Com. *v.* Dunlop, 89 Va. 431, 16 S. E. 273; Cornwall *v.* Com., 82 Va. 644, 3 Am. St. Rep. 121; Dunnington *v.* Ford, 80 Va. 177.

Wisconsin.— See Chicago, etc., R. Co. *v.* State, 53 Wis. 509, 10 N. W. 560.

See 44 Cent. Dig. tit. "States," § 184 *et seq.*

73. Dunnington *v.* Ford, 80 Va. 177.

74. Carter *v.* State, 42 La. Ann. 927, 8 So. 836, 21 Am. St. Rep. 404; State *v.* Lazarus, 40 La. Ann. 856, 5 So. 289.

75. Hollister *v.* State, 9 Ida. 8, 71 Pac. 541; Carter *v.* State, 42 La. Ann. 927, 8 So. 836, 21 Am. St. Rep. 404; Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Baltzer *v.* North Carolina, 161 U. S. 240, 16 S. Ct. 500, 40 L. ed. 684; South, etc., Alabama R. Co. *v.* Alabama, 101 U. S. 832, 25 L. ed. 973; Memphis, etc., R. Co. *v.* Tennessee, 101 U. S. 337, 25 L. ed. 960. And see *infra*, IX, B, 6.

76. State *v.* Lazarus, 40 La. Ann. 856, 5

case it is the duty of the court to look carefully into the terms of the submission, and render judgment accordingly.[77] By consenting to be sued a state simply waives its immunity from suit. It does not thereby concede its liability to plaintiff, or create any cause of action in his favor, or extend its liability to any cause not previously recognized. It merely gives a remedy to enforce a preëxisting liability and submits itself to the jurisdiction of the court, subject to its right to interpose any lawful defense.[78]

d. Withdrawal or Modification of Consent. The consent of a state to be sued, being voluntary, may be withdrawn or modified by the state whenever it sees fit,[79] even though pending suits may be thereby defeated;[80] and upon the repeal of the statute authorizing the suit, the court in which the suit is pending can proceed no further therein.[81]

2. What Constitutes a Suit Against a State — a. In General. The question as to whether a particular suit is a suit against a state is not always to be determined by reference to the nominal parties to the record, and, although the contrary was once held,[82] the fact that the state is not named as a party defendant is not conclusive that the suit is not a suit against the state, and a suit in form against a state officer may be in fact a suit against the state, although the state is not a party to the record.[83] On the other hand, in an action against a state officer for trespass, a mere averment that his act was committed on behalf of the state does not make the suit one against the state.[84]

b. Suits Against State Officers — (i) *Where the State Is the Real Party in Interest.* Suits against officers of a state as representing the state in action and liability, and in which the state, although not a party to the record, is the real party against which relief is sought and in which a judgment for plain-

So. 289; Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. ed. 448.

77. State *v.* Lazarus, 40 La. Ann. 856, 5 So. 289.

78. *California.*— Denning *v.* State, 123 Cal. 316, 55 Pac. 1000; Davis *v.* State, 121 Cal. 210, 53 Pac. 555; Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158; Coulterville, etc., Turnpike Co. *v.* State, 104 Cal. 321, 37 Pac. 1035; Hoagland *v.* State, (1889) 22 Pac. 142; Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610.

Massachusetts.— Murdock Parlor Grate Co. *v.* Com., 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399.

North Carolina.— Moody *v.* State's Prison, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855.

Tennessee.— Clark *v.* State, 7 Coldw. 306.

Washington.— Billings *v.* State, 27 Wash. 288, 67 Pac. 583.

79. South, etc., R. Co. *v.* State, 53 Ala. 637; *In re* Hoople, 179 N. Y. 308, 72 N. E. 229; State *v.* Tennessee Bank, 3 Baxt. (Tenn.) 395; Beers *v.* Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991.

A statute embodying such consent is not a contract, and hence the repeal or modification thereof does not impair the obligation of a contract. State *v.* State Dispensary Commission, 79 S. C. 316, 60 S. E. 928; State *v.* Tennessee Bank, 3 Baxt. (Tenn.) 395; Beers *v.* Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991. See also South, etc., Alabama R. Co. *v.* Alabama, 101 U. S. 832, 25 L. ed. 973; Memphis, etc., R. Co. *v.* Tennessee, 101 U. S. 337, 25 L. ed. 960; Baltzer *v.* North Carolina, 161 U. S. 240, 16 S. Ct. 500, 40 L. ed. 684, in which it was held that the statutes repealed did not afford such a remedy that their repeal impaired the obligation of a contract.

80. *Ex p.* State, 52 Ala. 231, 23 Am. Rep. 567; South, etc., Alabama R. Co. *v.* Alabama, 101 U. S. 832, 25 L. ed. 973; Beers *v.* Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991.

81. *Ex p.* State, 52 Ala. 231, 23 Am. Rep. 567; South, etc., Alabama R. Co. *v.* Alabama, 101 U. S. 832, 25 L. ed. 973; Beers *v.* Arkansas, 20 How. (U. S.) 527, 15 L. ed. 991.

82. Michigan State Bank *v.* Hammond, 1 Dougl. (Mich.) 527; Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 224, 41 Am. Dec. 549; Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Swasey *v.* North Carolina R. Co., 23 Fed. Cas. No. 13,679, 1 Hughes 17, 71 N. C. 571 [*affirmed* in 23 Wall. (U. S.) 405, 23 L. ed. 136].

83. Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832; Butler *v.* Ellerbe, 44 S. C. 256, 22 S. E. 425; Lowry *v.* Thompson, 25 S. C. 416, 1 S. E. 141; Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. 514; Miller *v.* Agriculture State Bd., 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363 [*affirming* 43 Fed. 339]; *Ex p.* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216; Hagood *v.* Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. ed. 805; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185; Chicago, etc., R. Co. *v.* Dey, 35 Fed. 866, 1 L. R. A. 744.

84. Elmore *v.* Fields, 153 Ala. 345, 45 So. 66.

tiff, although nominally against defendant as an individual, could operate to control the action of the state or subject it to liability, are suits against the state.[85] A broad line of demarcation separates such suits, in which it is sought to compel the performance, by affirmative official action on the part of defendants, of an obligation which belongs to the state in its political capacity, from suits against defendants personally on account of wrongs done or threatened to the personal or property rights of plaintiffs without authority or under color of authority unconstitutional and void.[86] It seems that the rule which forbids a suit against state officers because in effect a suit against the state applies only where the interest of the state is through some contract or property right, and it is not enough that the state should have a mere interest in the vindication of its laws, or in their enforcement as affecting the public at large or the rights of individuals or corporations; it must be an interest of value in a material sense to the state as a distinct entity.[87] Thus a suit against the governor of a state, not by name but solely in his official character, is a suit against the state,[88] so also is a suit against state officers for the purpose of enforcing through them the performance of the contracts of the state,[89] or to compel them to do acts which would impose contractual liabilities upon the state; [90] and likewise a suit to enjoin the attorney-

85. *Arkansas.*— Auditor *v.* Davies, 2 Ark. 494.

Florida.— Bloxham *v.* Florida Cent., etc., R. Co., 35 Fla. 625, 17 So. 902.

Georgia.— Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677; Printup *v.* Cherokee R. Co., 45 Ga. 365; Fowler *v.* Rome Dispensary, 5 Ga. App. 36, 62 S. E. 660. See also Georgia Military Inst. *v.* Simpson, 31 Ga. 273.

Iowa.— Wilson *v.* Louisiana Purchase Exposition Commission, 133 Lowa 586, 110 N. W. 1045; Mills Pub. Co. *v.* Larrahee, 78 Iowa 97, 42 N. E. 593.

Kentucky.— Tate *v.* Salmon, 79 Ky. 540.

Louisiana.— State *v.* Lanier, 47 La. Ann. 110, 16 So. 647; State *v.* Burke, 33 La. Ann. 498.

Massachusetts.— Flagg *v.* Bradford, 181 Mass. 315, 63 N. E. 898.

Michigan.—Ottawa County *v.* Auditor-Gen., 69 Mich. 1, 36 N. W. 702; McElroy *v.* Swart, 57 Mich. 500, 24 N. W. 766; Michigan State Bank *v.* Hastings, Walk. 9.

Montana.— State *v.* Toole, 26 Mont. 22, 66 Pac. 496.

Oregon.— Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832.

South Carolina.— Lowry *v.* Thompson, 25 S. C. 416, 1 S. E. 141.

Texas.— Stephens *v.* Texas, etc., R. Co., 100 Tex. 177, 97 S. W. 309; Treasurer *v.* Wygall, 46 Tex. 447; League *v.* De Young, 2 Tex. 497; Hosner *v.* De Young, 1 Tex. 764; Producers' Oil Co. *v.* Stephens, (Civ. App. 1906) 99 S. W. 157.

Virginia.— Board of Public Works *v.* Gannt, 76 Va. 455.

Wisconsin.— State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692.

United States.— Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 440; Louisiana *v.* Steele, 134 U. S. 230, 10 S. Ct. 511, 33 L. ed. 891; North Carolina *v.* Temple, 134 U. S. 22, 10 S. Ct. 509, 33 L. ed. 849; *Ex p.* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216; Cunningham *v.* Macon, 109 U. S. 446, 3 S. Ct. 292, 27 L. ed. 992; Western Union Tel. Co. *v.* Andrews, 154 Fed. 95; Lowenstein *v.* Evans, 69 Fed. 908; Brown University *v.* Rhode Island Agricultural, etc., College, 56 Fed. 55.

See 44 Cent. Dig. tit. "States," § 192.

A suit against the auditor-general of a state to compel him to pay over state moneys is in effect a suit against the state. Ottawa County *v.* Auditor-Gen., 69 Mich. 1, 36 N. W. 702; People *v.* Auditor-Gen., 38 Mich. 746.

86. Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363; Hagood *v.* Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. ed. 805; Yale College *v.* Sanger, 62 Fed. 177.

87. McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504; *Ex p.* Fitzpatrick, 171 Ind. 557, 86 N. E. 964; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Chicago, etc., R. Co. *v.* Dey, 35 Fed. 866, 1 L. R. A. 744.

88. Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717; Georgia *v.* Madrazo, 1 Pet. (U. S.) 110, 7 L. ed. 73. See also Peeples *v.* Byrd, 98 Ga. 688, 25 S. E. 677.

89. *Illinois.*— People *v.* Dulaney, 96 Ill. 503.

Louisiana.— State *v.* Lanier, 47 La. Ann. 110, 16 So. 647.

Nebraska.— State *v.* Mortensen, 69 Nebr. 376, 95 N. W. 831.

Virginia.—Board of Public Works *v.* Gannt, 76 Va. 455.

West Virginia.— Miller *v.* State Bd. of Agriculture, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811.

United States.— Hagood *v.* Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. ed. 805; Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. ed. 448; Yale College *v.* Sanger, 62 Fed. 177; McCauley *v.* Kellogg, 15 Fed. Cas. No. 8,688, 2 Woods 13. See also De Laittre *v.* Board of Com'rs, 149 Fed. 800.

90. Farmers' Nat. Bank *v.* Jones, 105 Fed. 459.

general or other officer from bringing suits, or instituting prosecutions under a state statute, is a suit against the state.[91]

(II) *For Unauthorized or Illegal Acts.* A suit against an individual who, claiming to act as a state officer, has committed or threatens to commit acts of wrong and injury to the rights and property of plaintiff, either without authority from the state or under color of an unconstitutional statute, brought to recover property wrongfully taken by defendant in behalf of the state,[92] or for damages,[93] or for an injunction,[94] is not a suit against a state, for defendant, in assuming to act without lawful authority, lays aside his official character and becomes liable as an individual to persons injured by his unlawful acts; he is not sued as or because he is an officer of the state, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer; to make out his defense he must show that his authority was sufficient in law to protect him.[95] In such a suit, where it is claimed that the statute under color of which defendant acts or

91. McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504; Stephens *v.* Texas, etc., R. Co., 100 Tex. 177, 97 S. W. 309; Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; *Ex p.* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. ed. 216; Morenci Copper Co. *v.* Freer, 127 Fed. 199; Union-Trust Co. *v.* Stearns, 119 Fed. 790; Arbuckle *v.* Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864. But see Cobb *v.* Clough, 83 Fed. 604.

92. Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. ed. 185. See also Prewitt *v.* Illinois L. Ins. Co., 93 S. W. 633, 29 Ky. L. Rep. 447.

An action against the state treasurer to recover taxes illegally collected is not a suit against the state. German Alliance Ins. Co. *v.* Van Cleave, 191 Ill. 410, 61 N. E. 94; Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548.

93. Scott *v.* Donald, 165 U. S. 58, 17 S. Ct. 265, 41 L. ed. 632; Chaffin *v.* Taylor, 114 U. S. 309, 5 S. Ct. 924, 962, 29 L. ed. 198, 207; White *v.* Greenhow, 114 U. S. 307, 5 S. Ct. 923, 962, 29 L. ed. 199. See also Pleasants *v.* Greenhow, 114 U. S. 323, 5 S. Ct. 931, 962, 29 L. ed. 204; Carter *v.* Greenhow, 114 U. S. 317, 5 S. Ct. 928, 962, 29 L. ed. 202. *Compare* Lowenstein *v.* Evans, 69 Fed. 908.

94. *Illinois.*— Burke *v.* Snively, 208 Ill. 328, 70 N. E. 327.

Indiana.— Welch *v.* Fisk, 139 Ind. 637, 38 N. E. 403.

Kentucky.—Herr *v.* Central Kentucky Lunatic Asylum, 97 Ky. 458, 30 S. W. 971, 17 Ky. L. Rep. 320, 53 Am. St. Rep. 414, 28 L. R. A. 394.

Missouri.— Merchants' Exch. *v.* Knott, 212 Mo. 616, 111 S. W. 565.

Oregon.— Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832.

South Carolina.— Ware Shoals Mfg. Co. *v.* Jones, 78 S. C. 211, 58 S. E. 811; Butler *v.* Ellerbe, 44 S. C. 256, 22 S. E. 425.

Tennessee.— Lynn *v.* Polk, 8 Lea 121.

Virginia.— Blanton *v.* Southern Fertilizing Co., 77 Va. 335.

Wisconsin.— Bonnett *v.* Vallier, 136 Wis. 193, 116 N. W. 885, 17 L. R. A. N. S. 486.

United States.— Scully *v.* Bird, 209 U. S. 481, 28 S. Ct. 597, 52 L. ed. 899; Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648 [*affirming* 67 Fed. 854]; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363 [*affirming* 43 Fed. 339]; Louisiana Bd. of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623; Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258; Mills *v.* Green, 67 Fed. 818; Tuchman *v.* Welch, 42 Fed. 548; Chaffraix *v.* Board of Liquidation, 11 Fed. 638; Preston *v.* Walsh, 10 Fed. 315; Hancock *v.* Walsh, 11 Fed. Cas. No. 6,012, 3 Woods 351, 8 Reporter 71.

See 44 Cent. Dig. tit. "States," § 192. And see COURTS, 11 Cyc. 864 text and note 84.

Right to enjoin state officers generally see INJUNCTIONS, 22 Cyc. 881.

A suit to restrain state officers from collecting an illegal tax or enforcing an unconstitutional tax law is not a suit against the state. German Alliance Ins. Co. *v.* Van Cleve, 191 Ill. 410, 61 N. E. 94; Budd *v.* Houston, 36 La. Ann. 959; Briscoe *v.* McMillan, 117 Tenn. 115, 100 S. W. 111; Galveston, etc., R. Co. *v.* Davidson, (Tex. Civ. App. 1906) 93 S. W. 436; Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408; Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 26 S. Ct. 252, 50 L. ed. 477; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. ed. 200, 207; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Union Pac. R. Co. *v.* Alexander, 113 Fed. 347; Western Union Tel. Co. *v.* Henderson, 68 Fed. 588; Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525 [*affirming* 58 Fed. 620]; Secor *v.* Singleton, 35 Fed. 376.

A suit to enjoin state officers from acting under a law impairing the obligation of the state's contracts is not an action against the state. Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363; Louisiana Bd. of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623; Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Cobb *v.* Clough, 83 Fed. 604; Chaffraix *v.* Board of Liquidation, 11 Fed. 638; Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502, 8 Reporter 39.

95. Cunningham *v.* Macon, etc., R. Co., 109 U. S. 446, 3 S. Ct. 292, 609, 27 L. ed. 992.

threatens to act, is unconstitutional, the court will inquire into the validity of the statute, and if it is found that the statute is constitutional, and hence that defendant's acts are under lawful authority, the suit will be dismissed for want of equity or cause of action;[96] but if the statute is found to be unconstitutional, the relief prayed for will be granted.[97] A contempt proceeding against a state officer for violation of a mandate of a federal court under color of state law is not a suit against the state, where there was no valid state law authorizing defendant's act.[98]

(III) *To Compel the Performance of Official Duty.* A suit against a state officer to compel him by mandamus or similar process to perform duties of his office of a purely ministerial nature, involving the exercise of no discretion or political or governmental power, is not a suit against the state, and may be maintained without its consent.[99] But where the duties involve the exercise of official discretion or of political or governmental power, such a suit is a suit against the state and cannot be so maintained.[1] Moreover it seems that a state officer will never be compelled to perform acts forbidden by the law of his state, even though such law be unconstitutional.[2]

c. Suits Affecting Property in Which State Has Interest. The mere fact that the state has or claims an interest in the property which is the subject of a suit does not necessarily make the suit a suit against the state.[3] Thus an action against state officers to recover possession of real property which they hold on behalf of the state, and in which they claim no personal interest, is not a suit against the state;[4] but a judgment for plaintiff in such action will not conclude the state, where it has not become a party to the suit;[5] and a suit which affects the state's own title or right of possession, and in which no effective decree can

96. See Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548; Western Union Tel. Co. *v.* Henderson, 68 Fed. 588.

Action against officer for authorized acts.— An action will not lie against an officer of the state on account of his acts done in his official capacity under valid authority from the state, as such action is a suit against the state, and cannot be brought without its consent. Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832.

97. See Lynn *v.* Polk, 8 Lea (Tenn.) 121; Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. ed. 185; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

98. *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689.

99. Greenwood Cemetery Land Co. *v.* Routt, 17 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 284, 15 L. R. A. 369; State Bd. Land Com'rs *v.* Carpenter, 16 Colo. App. 436, 66 Pac. 165; State *v.* Nicholls, 42 La. Ann. 209, 7 So. 738; State *v.* Jumel, 30 La. Ann. 861; State *v.* Dubuclet, 26 La. Ann. 127; State *v.* Toole, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644; Granville County Bd. of Education *v.* State Bd. of Education, 106 N. C. 81, 10 S. E. 1002; Ehrlich *v.* Jennings, 78 S. C. 269, 58 S. E. 922, 125 Am. St. Rep. 795.

A suit against a state officer to compel him to do what the state law requires him to do is not a suit against a state. Rolston *v.* Missouri Fund Com'rs, 120 U. S. 390, 7 S. Ct. 599, 30 L. ed. 721.

1. Cope *v.* Hastings, 183 Pa. St. 300, 38 Atl. 717; Louisiana *v.* Steele, 134 U. S. 230, 10 S. Ct. 511, 33 L. ed. 891; North Carolina *v.* Temple 134 U. S. 22, 10 St. Ct. 509, 33 L. ed. 849.

2. See Louisiana *v.* Steele, 134 U. S. 230, 10 St. Ct. 511, 33 L. ed. 891; Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. ed. 448.

Mandamus will not lie to compel an officer to do an act prohibited by law.— State *v.* Lanier, 47 La. Ann. 110, 16 So. 647.

3. Public Works *v.* Gannt, 76 Va. 455; Wheeler *v.* Chicago, 68 Fed. 526; U. S. *v.* Bright, 24 Fed. Cas. No. 14,647. See Gordon *v.* Weaver, (Tenn. Ch. App. 1899) 53 S. W. 740. And see also COURTS, 11 Cyc. 865 text and note 84.

State as necessary party.— In an action to recover realty the fact that defendant claims under a grant or lease from the state does not make the state a necessary party to the suit. Watts *v.* Wheeler, 10 Tex. Civ. App. 117, 30 S. W. 297. The fact that defendant in an action for injuries to plaintiff's land defends under authority of a lease from the state does not make the state an indispensable party so as to oust the court of jurisdiction on refusal of the state to become a party. Columbia Water-Power Co. *v.* Columbia Electric St. R., etc., Co., 43 S. C. 154, 20 S. E. 1002.

4. Whatley *v.* Patten, 10 Tex. Civ. App. 77, 31 S. W. 60; Tindal *v.* Wesley, 167 U. S. 204, 17 S. Ct. 770, 42 L. ed. 137 [*affirming* 65 Fed. 731, 13 C. C. A. 160]; Saranac Land, etc., Co. *v.* Roberts, 68 Fed. 521.

5. Tindal *v.* Wesley, 167 U. S. 204, 17 S. Ct. 770, 42 L. ed. 137.

be entered without binding the state, is a suit against the state, and cannot be maintained without its consent.[6]

d. Suits Against Departments of Government of Public Corporations. A suit against a department of the state government or a board or corporation created by the state for governmental purposes is a suit against the state, and cannot be maintained without its consent;[7] but such suit may be maintained when authorized by statute, as where the statute creating the corporation provides that it may sue and be sued.[8] A suit against a corporation created by the state for certain public purposes not of a governmental character is not a suit against the state,[9] although the state may own the stock or property of such corporation;[10] and by engaging in business operations through a corporation the state divests itself so far of its sovereign character, and by implication consents to suits against the corporation.[11] A suit against state officers composing a board or commission endowed by statute with administrative powers may be maintained in some cases.[12] Thus a suit against a state railroad commission or board of transportation for relief against the enforcement of illegal rates or regulations prescribed by them or by a statute is not a suit against the state,[13] which has no pecuniary interest in the result of such a suit, the only parties so interested being the shippers

6. Sanders *v.* Saxton, 182 N. Y. 477, 75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. N. S. 727; Lowry *v.* Thompson, 25 S. C. 416, 1 S. E. 141; Christian *v.* Atlantic, etc., R. Co., 133 U. S. 233, 10 S. Ct. 260, 33 L. ed. 589; Cunningham *v.* Macon, etc., R. Co., 109 U. S. 446, 3 S. Ct. 292, 609, 27 L. ed. 992. See also McElroy *v.* Swart, 57 Mich. 500, 24 N. W. 766; Public Works *v.* Gannt, 76 Va. 455.

7. *Alabama.*— Alabama Industrial School *v.* Addler, 144 Ala. 555, 42 So. 116; Alabama Girls' Industrial School *v.* Reynolds, 143 Ala. 579, 42 So. 114.

Minnesota.—Lane *v.* Minnesota State Agricultural Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708.

North Carolina.— Moody *v.* State's Prison, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855; Lord, etc., Chemical Co. *v.* Board of Agriculture, 111 N. C. 135, 15 S. E. 1032.

Ohio.— Friend, etc., Paper Co. *v.* Public Works, 7 Ohio Dec. (Reprint) 56, 1 Cinc. L. Bul. 92.

Oklahoma.— Oklahoma Agricultural, etc., College *v.* Willis, 6 Okla. 593, 52 Pac. 921, 40 L. R. A. 677.

South Carolina.—Hopkins *v.* Clemson Agricultural College, 77 S. C. 12, 57 S. E. 551.

As to suits against counties see COUNTIES, 11 Cyc. 607.

A suit against a city is not a suit against the state. Terre Haute *v.* Farmers' Loan, etc., Co., 99 Fed. 838, 40 C. C. A. 117.

8. Chicago *v.* Chicago, 207 Ill. 37, 69 N. E. 580; Hopkinsville Bank *v.* Western Kentucky Asylum for Insane, 108 Ky. 357, 56 S. W. 525, 21 Ky. L. Rep. 1820; Herr *v.* Central Kentucky Lunatic Asylum, 97 Ky. 458, 30 S. W. 971, 17 Ky. L. Rep. 320, 53 Am. St. Rep. 414, 28 L. R. A. 394; Granville County Bd. of Education *v.* State Bd. of Education, 106 N. C. 81, 10 S. E. 1002; Kelly *v.* Board of Public Works, 25 Gratt. (Va.) 755.

A statute making a state agency liable to be sued does not extend its liability to causes not previously recognized, it merely gives a remedy to enforce a preëxisting liability. Moody *v.* State's Prison, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855; Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

9. Moore *v.* Wabash, etc., Canal, 7 Ind. 462; Gross *v.* World's Columbia Exposition, 105 Ky. 840, 49 S. W. 458, 20 Ky. L. Rep. 1418, 43 L. R. A. 703; Stern *v.* State Bd. of Dental Examiners, 50 Wash. 100, 96 Pac. 693; Tompkins *v.* Kanawha Bd., 19 W. Va. 257.

10. Tompkins *v.* Kanawha Bd., 19 W. Va. 257. See also Moore *v.* Wabash, etc., Canal, 7 Ind. 462.

A suit against a bank chartered and owned by the state is not a suit against the state. Kentucky Bank *v.* Wister, 2 Pet. (U. S.) 318, 7 L. ed. 437; U. S. Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

A suit may be maintained against a railroad controlled and operated by a state. Western, etc., R. Co. *v.* Carlton, 28 Ga. 180; Amstein *v.* Gardner, 134 Mass. 4. See also East Tennessee, etc., R. Co. *v.* Nashville, etc., R. Co., (Tenn. Ch. App. 1897) 51 S. W. 202.

11. Western, etc., R. Co. *v.* Carlton, 28 Ga. 180; Amstein *v.* Gardner, 134 Mass. 4; U. S. Bank *v.* Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. ed. 244.

12. See Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 29 S. Ct. 67, 53 C. C. A. 150; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363; Board of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623.

13. McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504; Mississippi R. Commission *v.* Illinois Cent. R. Co., 203 U. S. 335, 27 S. Ct. 90, 51 L. ed. 209 [*affirming* 138 Fed. 327, 70 C. C. A. 617]; Prout *v.* Starr, 188 U. S. 537, 23 S. Ct. 398, 47 L. ed. 584 [*affirming* Starr *v.* Chicago, etc., R. Co., 110 Fed. 3]; Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; Clyde *v.* Richmond, etc., R. Co., 57 Fed. 436; Chicago, etc., R. Co. *v.* Becker, 35 Fed. 883;

and the carriers.[14] Such boards or commissioners may be enjoined from instituting suits in the name of the state to recover the statutory penalties for violations of the prescribed rates.[15]

3. Process. In a suit against a state, or to which a state is a party, process should be served upon the governor and attorney-general of the state,[16] and, in the absence of special statutory provisions, it seems that service upon either one of these officers alone is sufficient.[17] Where the state is not a party to the record, process should be served upon the officer defending in behalf of the state.[18]

4. Jurisdiction and Venue — a. In General. Where the statute authorizes suits against the state in a particular court or county, the suit must be brought in the court,[19] or county,[20] designated.

b. Federal Jurisdiction. The federal constitution provides that the judicial power of the United States shall extend "to Controversies between two or more States; (and) between a State and Citizens of another State," and that "in all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." [21] Under this provision a suit may be brought in the supreme court by the United States against a state,[22] or by one state against another;[23] and in an early case it was held that the federal judicial power extended also to a suit by a private citizen of one state against another state.[24] This decision gave great dissatisfaction and led to the adoption in 1798 of the eleventh amendment, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State." [25] By the force of this amendment no action can now be maintained in any federal court by a citizen of one state against another state without its consent, even though a federal question be involved;[26] and although

Chicago, etc., R. Co. *v.* Dey, 35 Fed. 866, 1 L. R. A. 744.

14. Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014.

15. Prout *v.* Starr, 188 U. S. 537, 23 S. Ct. 398, 47 L. ed. 584 [*affirming* Starr *v.* Chicago, etc., R. Co., 110 Fed. 3]; Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014. See also Louisiana *v.* Lagarde, 60 Fed. 186. *Contra*, the earlier case of McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 5 So. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504.

16. State *v.* Steele, 57 Tex. 200; Wheeler *v.* State, 8 Tex. 228; Huger *v.* South Carolina, 3 Dall. (U. S.) 339, 1 L. ed. 627; Grayson *v.* Virginia, 3 Dall. (U. S.) 320, 1 L. ed. 619; Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

17. Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25; State *v.* Cook, 57 Tex. 205; Port Royal, etc., R. Co. *v.* South Carolina, 60 Fed. 552.

18. Poydras de la Lande *v.* Louisiana, 17 How. (U. S.) 1, 15 L. ed. 93.

19. *Ex p.* Greene, 29 Ala. 52; Thomas *v.* State, (Ida. 1909) 100 Pac. 761; Flagg *v.* Bradford, 181 Mass. 315, 63 N. E. 898; Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140.

The legislature may direct in what courts suits which are sought to be brought against the state shall be brought. Dickson *v.* State, 1 Wis. 122.

20. Auditor *v.* Davies, 2 Ark. 494; Flagg *v.* Bradford, 181 Mass. 315, 63 N. E. 898. The legislature may provide for a change of venue of a suit against the state even after the suit is brought. Treasurer *v.* Wygall, 46 Tex. 447.

21. U. S. Const. art. 3, § 2.

22. U. S. *v.* Michigan, 190 U. S. 379, 23 S. Ct. 742, 47 L. ed. 1103; U. S. *v.* Texas, 143 U. S. 621, 12 S. Ct. 488, 36 L. ed. 285. See also U. S. *v.* North Carolina, 136 U. S. 211, 10 S. Ct. 920, 34 L. ed. 336.

23. South Dakota *v.* North Carolina, 192 U. S. 286, 24 S. Ct. 269, 48 L. ed. 448; Kansas *v.* Colorado, 185 U. S. 125, 22 S. Ct. 552, 46 L. ed. 838; Missouri *v.* Illinois, 180 U. S. 208, 21 S. Ct. 331, 45 L. ed. 497; Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233; New Jersey *v.* New York, 5 Pet. (U. S.) 284, 8 L. ed. 127.

24. Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

25. See New Hampshire *v.* Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. ed. 656; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

Effect of amendment on pending actions.— This amendment deprived the supreme court of jurisdiction over actions of this class pending at the time of its adoption. Hollingsworth *v.* Virginia, 3 Dall. (U. S.) 378, 1 L. ed. 644.

26. McGahey *v.* Virginia, 135 U. S. 662, 10 S. Ct. 972, 34 L. ed. 304; Cunningham *v.* Macon, etc., R. Co., 109 U. S. 446, 3 S. Ct. 292, 27 L. ed. 992; Morenci Copper Co. *v.* Freer, 127 Fed. 199.

the eleventh amendment does not in terms so declare, this same immunity from suits extends to suits against a state by one of its own citizens.[27]

5. Parties — a. In General. Whenever the state is interested in the subject-matter of a suit in equity, it should be made a party defendant, if, by virtue of the state's consent, this can be done;[28] and if, as in a suit against a state officer, the state is so interested as to be an indispensable party within the rules of equity pleading, and cannot be made a party because it has not consented to be sued, the suit must be dismissed.[29] But the fact that the state cannot be sued because it has not consented is a sufficient excuse for not making it a party where its interest is not such as to make it an indispensable party.[30] A state may be made a party defendant to a suit in equity for the purpose of enabling it to appear and protect its rights if it desires to do so, even though it could not, without its consent, be bound by the decree.[31] The objection that the state is not made a party when an indispensable party, being jurisdictional, may be interposed at any time,[32] and may be raised by the court of its own motion.[33] In a suit to which the state is not nominally a party, the jurisdiction of the court is not ousted by a mere suggestion that the state is the real party defendant, so as to prevent the court from examining into and determining the truth of the suggestion.[34]

b. Intervention by State. The state may intervene in an action against one of its officers or agents, in which it is interested;[35] and where the state so intervenes it thereby waives its immunity from suit and submits to the jurisdiction of the court;[36] but the state cannot intervene unless it has a property interest in the subject-matter of the suit; its general interest in the enforcement of its laws is not sufficient.[37]

The eleventh amendment does not prohibit a suit against a county in a federal court.— Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766.

The state's immunity from suit by a citizen of another state cannot be evaded by bringing the suit in the name of a state as nominal plaintiff where such state has no real interest in the controversy. New Hampshire *v.* Louisiana, 108 U. S. 76, 2 S. Ct. 176, 27 L. ed. 656.

27. *Ex p.* Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932; Smith *v.* Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. ed. 1140; Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; North Carolina *v.* Temple, 134 U. S. 22, 10 S. Ct. 509, 33 L. ed. 849; Hans *v.* Louisiana, 134 U. S. 1, 10 S. Ct. 504, 33 L. ed. 842 [*affirming* 24 Fed. 55].

This does not apply to a writ of error from the supreme court to a state court by a citizen of the state who is proceeded against criminally in its courts. Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

28. Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

29. Martin *v.* Worth, 91 N. C. 45; Columbia Water-Power Co. *v.* Columbia Electric St. R., etc., Co., 43 S. C. 154, 20 S. E. 1002; Christian *v.* Atlantic, etc., R. Co., 133 U. S. 233, 10 S. Ct. 260, 33 L. ed. 589; Hagood *v.* Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. ed. 805; Cunningham *v.* Macon, etc., R. Co., 109 U. S. 446, 3 S. Ct. 292, 27 L. ed. 992. See also American Dock, etc., Co. *v.* Public Schools, 35 N. J. Eq. 181.

30. Stewart *v.* Chesapeake, etc., Canal Co., 1 Fed. 361, 4 Hughes 41; Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606. See also Welch *v.* Fisk, 139 Ind. 637, 38 N. E. 403; Watts *v.* Wheeler, 10 Tex. Civ. App. 117, 30 S. W. 297.

The state need not be made a party to a suit to foreclose a mortgage on land on which it holds a prior mortgage, for its rights, being paramount, cannot be affected by the suit. Pattison *v.* Shaw, 6 Ind. 377.

If a state officer appears in a suit against him and defends the suit, he cannot afterward object that the suit is against the state. Stoner *v.* Rice, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387.

31. Garr *v.* Bright, 1 Barb. Ch. (N. Y.) 157.

32. Columbia Water Power Co. *v.* Columbia Electric St. R., etc., Co., 43 S. C. 154, 20 S. E. 1002; Lowry *v.* Thompson, 25 S. C. 416, 1 S. E. 141. But see Butler *v.* Ellerbe, 44 S. C. 256, 22 S. E. 425.

33. Lowry *v.* Thompson, 25 S. C. 416, 1 S. E. 141.

34. Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832.

35. State *v.* Graham, 23 La. Ann. 402.

36. Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780.

But the state is not bound by an unauthorized intervention by its attorney-general. New Orleans, etc., R. Co. *v.* New Orleans, 34 La. Ann. 429. Nor where it intervenes merely for a special purpose without submitting fully to the jurisdiction. See Georgia *v.* Jesup, 106 U. S. 458, 1 S. Ct. 363, 27 L. ed. 216. See also South Carolina *v.* Wesley, 155 U. S. 542, 15 S. Ct. 230, 39 L. ed. 254.

37. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412.

6. DEFENSES — a. Limitations and Laches. A right of action against a state may be barred by the statute of limitations;[38] but the limitation does not begin to run until the passage of the statute giving the right to sue the state.[39] Moreover the state is not affected by the laches of its officers, and may interpose a defense, although it is not tendered within the time fixed by statute.[40]

b. Set-Off. A state being sued may set off a claim against plaintiff.[41]

7. JUDGMENT AND EXECUTION. Upon the failure of a state to appear in a suit against it in the supreme court of the United States, judgment by default may be entered against it.[42] But it seems that no such judgment could be entered in a state court;[43] and, as in ordinary cases, a judgment rendered against a state on a petition which fails to state a cause of action is a nullity, and is not aided by the assent of the attorney-general thereto.[44] Even where a state has consented to be sued, a judgment against it has moral force only; such consent does not authorize the enforcement of the judgment by judicial process;[45] and it seems that the legislature has no power to pass an act authorizing the courts to enforce a judgment against the state.[46] On the decision of the court in favor of plaintiff on a claim against the state, the proper course is for the clerk to transmit the proceedings and judgment to the governor to be communicated by him to the legislature,[47] and provision for the payment of the judgment must be made by the legislature.[48] In a suit in which the state is the real party in interest a judgment in its favor should be so rendered, and not in favor of the officers who were the nominal parties and who appeared in the state's behalf.[49]

C. Appearance and Representation by Attorney. A state can become a party to legal proceedings only through agents or representatives appointed by law,[50] and the appearance in its behalf of one having no authority so to appear is no appearance for the state.[51] Ordinarily the court will not pass upon the interests of the state unless it is duly represented;[52] but in the United States supreme court if a state duly served with process fails to appear, the cause may be heard and decided *ex parte*.[53] The question as to who may appear for the state is largely

38. San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174; Small *v.* State, 10 Ida. 1, 76 Pac. 765; People *v.* Miller, 181 N. Y. 439, 74 N. E. 477.

39. *California.*— San Luis Obispo County *v.* Gage, 139 Cal. 398, 73 Pac. 174.

Georgia.— Western, etc., R. Co. *v.* State, (1891) 14 L. R. A. 438.

Kentucky.— Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666.

Mississippi.— Whitney *v.* State, 52 Miss. 732.

New York.— Cayuga County *v.* State, 153 N. Y. 279, 47 N. E. 288; Parmenter *v.* State, 135 N. Y. 154, 31 N. E. 1035.

40. Hager *v.* Sidebottom, 130 Ky. 687, 113 S. W. 870.

41. Com. *v.* Phœnix Bank, 11 Metc. (Mass.) 129.

42. Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

43. See *infra*, IX, C.

44. State *v.* Lancaster County Bank, 8 Nebr. 218.

45. *California.*— Sharp *v.* Contra Costa County, 34 Cal. 284.

Louisiana.— Carter *v.* State, 47 La. Ann. 927, 8 So. 836, 21 Am. St. Rep. 404.

Mississippi.— Green *v.* State, 53 Miss. 148.

North Carolina.— Garner *v.* Worth, 122 N. C. 250, 29 S. E. 364.

South Carolina.— *Ex p.* Dunn, 8 S. C. 207; Dabney *v.* State Bank, 3 S. C. 124.

United States.— Memphis, etc., R. Co. *v.* Tennessee, 101 U. S. 337, 25 L. ed. 960.

See 44 Cent. Dig. tit. "State," § 201.

It is so provided by the Idaho constitution. — Hollister *v.* State, 9 Ida. 8, 71 Pac. 541.

46. See Carter *v.* State, 42 La. Ann. 927, 8 So. 836, 21 Am. St. Rep. 404.

47. Clements *v.* State, 77 N. C. 142. See also Geo. H. Fuller Desk Co. *v.* State, 6 Ida. 315, 55 Pac. 857.

48. Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666; Higginbotham *v.* Com., 25 Gratt. (Va.) 627, where a special fund provided for the payment of particular claims is exhausted, a judgment for such a claim obtained in a suit against the state authorized by statute must be paid out of the general funds in the treasury not otherwise appropriated.

49. Producers' Oil Co. *v.* Stephens, 44 Tex. Civ. App. 327, 99 S. W. 157.

50. People *v.* Navarre, 22 Mich. 1.

51. New Orleans, etc., R. Co. *v.* New Orleans, 34 La. Ann. 429; Fletcher's Succession, 12 La. Ann. 498; D'Aquin's Succession, 9 La. Ann. 400; People *v.* Navarre, 22 Mich. 1; State *v.* Enloe, (Tenn. 1909) 117 S. W. 233; Adams *v.* Bradley, 1 Fed. Cas. No. 48, 5 Sawy. 217; *Ex p.* Jenkins, 13 Fed. Cas. No. 7,259, 2 Wall. Jr. 521.

52. D'Aquin's Succession, 9 La. Ann. 400.

53. New Jersey *v.* New York, 5 Pet. (U. S.)

regulated by statute. Ordinarily the attorney-general is the proper person to appear in all suits in which the state is interested,[54] and he may appear in a suit brought in the name of the state on the relation of a private individual in which the state is only a nominal party.[55]

D. Appeal and Error.[56] The right of appeal is largely regulated by statute, but in general the state, when a party to a suit,[57] has the same right of appeal as any other party.[58] The appeal may be taken by the attorney-general,[59] or in some instances by the governor [60] or other officers.[61] But an officer who is neither a necessary nor a proper party to a suit in the name of the state cannot take an appeal therein.[62] Where the state is the only party defendant an appeal from a judgment for plaintiff should be in its name.[63]

E. Costs. Costs are not recoverable against the state in a suit in its own courts to which it is a party, whether as plaintiff [64] or defendant,[65] and whether

284, 8 L. ed. 127; Huger *v.* South Carolina, 3 Dall. (U. S.) 339, 1 L. ed. 627; Grayson *v.* Virginia, 3 Dall. (U. S.) 320, 1 L. ed. 619; Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 1 L. ed. 440.

54. People *v.* Pacheco, 29 Cal. 210; Fletcher's Succession, 12 La. Ann. 498; D'Aquin's Succession, 9 La. Ann. 400; Frey *v.* Michie, 68 Mich. 323, 36 N. W. 184; Babcock *v.* Hanselman, 56 Mich. 27, 22 N. W. 99. And see ATTORNEY-GENERAL, 4 Cyc. 1032.

In Georgia it is the duty of the governor to defend suits against any person where the state is interested, and he may appear for the state through his legal adviser. Mayo *v.* Renfroe, 66 Ga. 408.

Filing a demurrer by the attorney-general is an appearance by the state. New Jersey *v.* New York, 6 Pet. (U. S.) 323, 8 L. ed. 414. Filing of demurrer as amounting to appearance in actions generally see APPEARANCE, 3 Cyc. 506.

55. Parker *v.* State, 132 Ind. 419, 31 N. E. 1114.

56. Right of state to appeal without giving bond see APPEAL AND ERROR, 2 Cyc. 824.

57. South Carolina *v.* Wesley, 155 U. S. 542, 15 S. Ct. 230, 39 L. ed. 254.

In a suit to which it is not a party a state has no right to a writ of error. Fry *v.* Britton, 2 Heisk. (Tenn.) 606.

58. See State *v.* Montegut, 7 Mart. (La.) 447; Land Com'rs *v.* Weede, Dall. (Tex.) 361.

Right of review in civil actions generally see APPEAL AND ERROR, 2 Cyc. 626.

59. Fletcher's Succession, 12 La. Ann. 498; People *v.* Navarre, 22 Mich. 1. And see ATTORNEY-GENERAL, 4 Cyc. 1032.

60. State *v.* Graham, 25 La. Ann. 629; State *v.* Dubuclet, 25 La. Ann. 161; State *v.* Dubuclet, 22 La. Ann. 602.

61. Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773; Adams *v.* Kuhn, 72 Miss. 276, 16 So. 598; State *v.* Duff, 83 Wis. 291, 53 N. W. 446.

62. Lawson *v.* Hart, 40 W. Va. 52, 20 S. E. 819.

An unauthorized officer cannot take an appeal in behalf of the state. Fletcher's Succession, 12 La. Ann. 498; State *v.* Duff, 83 Wis. 291, 53 N. W. 446.

63. Boston, etc., R. Co. *v.* Com., 157 Mass. 68, 31 N. E. 696.

64. *Alabama.*— Collier *v.* Powell, 23 Ala. 579.

Illinois.— People *v.* Pierce, 6 Ill. 553; People *v.* Wabash, etc., R. Co., 11 Ill. App. 512; People *v.* Coultas, 9 Ill. App. 39.

Kentucky.— Com. *v.* Todd, 9 Bush 708.

Louisiana.—State *v.* Waggner, 42 La. Ann. 54, 8 So. 209; State *v.* Lazarus, 40 La. Ann. 856, 5 So. 289; Townsend's Succession, 40 La. Ann. 66, 3 So. 488; State *v.* Taylor, 33 La. Ann. 1270.

Maine.— State *v.* Webster, 8 Me. 105.

Maryland.— State *v.* Williams, 101 Md. 529, 61 Atl. 297, 109 Am. St. Rep. 579, 1 L. R. A. N. S. 254; State *v.* Greenwell, 4 Gill & J. 407.

New Hampshire.— State *v.* Kinne, 41 N. H. 238.

North Carolina.— State *v.* ——, 2 N. C. 221.

Pennsylvania.— Com. *v.* Yeakel, 1 Woodw. 143.

Vermont.— State *v.* Bradford Sav. Bank, etc., Co., 71 Vt. 234, 44 Atl. 349.

Wisconsin.— Porter *v.* State, 46 Wis. 375, 1 N. W. 78.

See 44 Cent. Dig. tit. "States," § 203.

So by statute in New York. People *v.* Hodnett, 81 Hun 137, 30 N. Y. Suppl. 735 [*affirmed* in 146 N. Y. 378, 41 N. E. 90].

As to the liability of the state for costs in criminal cases see COSTS, 11 Cyc. 277, 286, 287. And see People *v.* Kirkpatrick, 57 Cal. 353; State *v.* Taylor, 34 La. Ann. 978; State *v.* Barton, 3 Humphr. (Tenn.) 13; State *v.* Harrington, 2 Tyler (Vt.) 44.

Where the state has paid costs for which she was not liable she may recover the amount from the party liable. State *v.* New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205.

In an action brought in the name of the state for the use of an individual, it is no valid objection to the judgment that costs have been adjudged against the state, the real plaintiff and not the state being liable therefor. State *v.* Turner, 8 Gill & J. (Md.) 125; State *v.* Greenwell, 4 Gill & J. (Md.) 407.

65. Stone *v.* Falconer, 54 S. W. 712, 21 Ky. L. Rep. 1216; Romine *v.* State, 7 Wash. 215, 34 Pac. 924; Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504.

successful [66] or defeated,[67] in the suit, in the absence of a statute providing therefor. But under statutes so providing costs may be awarded against the state,[68] but only in a case coming clearly within the terms of the statute.[69] A state is not bound to give security for costs in any case.[70]

STATE'S ATTORNEY. See PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 687.

STATE SECURITIES. See STATES, *ante*, p. 897.

STATE'S EVIDENCE. See CRIMINAL LAW, 12 Cyc. 376, 449.

STATE STATUTE (In General, see STATUTES. As Rules of Decision in Federal Court, see COURTS, 11 Cyc. 895. Judicial Notice of, see EVIDENCE, 16 Cyc. 889. Of Sister State, Presumptions as to, see EVIDENCE, 16 Cyc. 1084. Use of by Jury During Deliberation, see CRIMINAL LAW, 12 Cyc. 676).

STATE TAX. See TAXATION.

STATE TREASURER. See STATES, *ante*, p. 856.

STATE TREASURY. See COUNTIES, 11 Cyc. 515; STATES, *ante*, p. 856.

STATE UNIVERSITY. See COLLEGES AND UNIVERSITIES, 7 Cyc. 283.

STATE WARRANT. See STATES, *ante*, p. 895.

STATE WATERS. See NAVIGABLE WATERS, 29 Cyc. 356; WATERS.

STATE WITNESS. See WITNESSES.

STATING AN ACCOUNT. Exhibiting, or listing in their order, the items which make up an account.[1] (See ACCOUNTS AND ACCOUNTING, 1 Cyc. 370; BANKRUPTCY, 5 Cyc. 340; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1169; GUARDIAN AND WARD, 21 Cyc. 154; INSANE PERSONS, 22 Cyc. 1149; INSOLVENCY, 22 Cyc. 1304; JUSTICES OF THE PEACE, 24 Cyc. 420; MORTGAGES, 27 Cyc. 1836; PARTNERSHIP, 30 Cyc. 701; PRINCIPAL AND AGENT, 31 Cyc. 1474; RECEIVERS, 34 Cyc. 450.)

STATING PART OF A BILL. That part of a bill in chancery in which plaintiff

66. State *v.* Waggner, 42 La. Ann. 54, 8 So. 209; State *v.* Lazarus, 40 La. Ann. 856, 5 So. 289.

67. *Alabama.*— Collier *v.* Powell, 23 Ala. 579.

Kentucky.— Com. *v.* Todd, 9 Bush 708; Stone *v.* Falconer, 54 S. W. 712, 21 Ky. L. Rep. 1216.

Maine.— State *v.* Webster, 8 Me. 105.

New Hampshire.— State *v.* Kinne, 41 N. H. 238.

Pennsylvania.— Com. *v.* Yeakel, 1 Woodw. 143.

Vermont.— State *v.* Bradford Sav. Bank, etc., Co., 71 Vt. 234, 44 Atl. 349.

Washington.— Romine *v.* State, 7 Wash. 215, 34 Pac. 924.

Wisconsin.— Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504; Porter *v.* State, 46 Wis. 375, 1 N. W. 78.

See 44 Cent. Dig. tit. "States," § 203.

68. *California.*— Sullivan *v.* Gage, 145 Cal. 759, 79 Pac. 537.

Indiana.— Henderson *v.* State, 96 Ind. 437.

Michigan.— Flint, etc., R. Co. *v.* State Auditors, 102 Mich. 500, 60 N. W. 971.

Minnesota.— State *v.* Buckman, 95 Minn. 272, 104 N. W. 240, 289.

New York.— People *v.* Clarke, 9 N. Y. 349.

North Carolina.— State *v.* Simmons, 120 N. C. 19, 26 S. E. 649; Blount *v.* Simmons, 119 N. C. 50, 25 S. E. 789. See also Garner *v.* Worth, 122 N. C. 250, 29 S. E. 364.

See 44 Cent. Dig. tit. "States," § 203.

Under N. Y. Code Civ. Proc. § 1579, providing that the court in a partition suit may in its discretion render judgment against any party for the costs and expenses of the action, the exercise of such discretion in awarding costs against the state as a party in such an action cannot be reviewed on appeal. Haley *v.* Sheridan, 190 N. Y. 331, 83 N. E. 296 [*affirming* 114 N. Y. App. Div. 903, 100 N. Y. Suppl. 1119].

Interest on costs.— A judgment against the state for costs under Howell Annot. St. Mich. § 8984, bears interest. Flint, etc., R. Co. *v.* State Auditors, 102 Mich. 500, 60 N. W. 971.

69. Davis *v.* Norman, 101 Ky. 599, 42 S. W. 108, 19 Ky. L. Rep. 812; State *v.* New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205; Mahan *v.* Sundry Defendants, 22 La. Ann. 583; People *v.* Auditor-Gen., 38 Mich. 94. But see State *v.* Buchanan, (Tenn. Ch. App. 1901) 62 S. W. 287, and Romine *v.* State, 7 Wash. 215, 34 Pac. 924, in which costs were allowed against the state, it not appearing from the report whether there was statutory authority or not.

70. People *v.* Pierce, 6 Ill. 553; People *v.* Coultas, 9 Ill. App. 39; Board of Health *v.* Maginnis Cotton Mills, 46 La. Ann. 806, 15 So. 164; State *v.* Taylor's Succession, 33 La. Ann. 1270; Atty-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1.

Strict construction of statute.— The rule exempting the state from liability for costs should be strictly construed, and it must clearly appear that a party claiming the exemption in fact represents the state. Board of Health *v.* Maginnis Cotton Mills, 46 La. Ann. 806, 15 So. 164.

1. Black L. Dict.

states the facts of his case as distinguished from the charging part and the prayer.[2] (See EQUITY, 16 Cyc. 220.)

STATION.[3] As a noun, employment, occupation, or business;[4] a place or position;[5] in railroad law, every regular stopping place of a railway train, where it receives or leaves passengers;[6] a place on a railroad at which a halt is made for the purpose of taking on or letting down passengers or goods;[7] a halting place intermediate between the termini of a railway, where passengers are taken up and let down;[8] synonymous with DEPOT,[9] *q. v.*, or with "passenger depot."[10] In military law, a place or a department where a military duty is to be performed.[11] As a verb, to place; to set; to appoint or assign to the occupation of a post, place, or office.[12] (Station: Duty of Carrier to Provide and Maintain, see CARRIERS, 6 Cyc. 608. Of Railroad — Generally, see RAILROADS, 33 Cyc. 140; Appropriation of Property For, see EMINENT DOMAIN, 15 Cyc. 588; Grounds, Duty to Fence, see RAILROADS, 33 Cyc. 1190; Injuries to Persons at, see RAILROADS, 33 Cyc. 762; Mandamus to Compel Railroad to Furnish and Maintain, see MANDAMUS, 26 Cyc. 369; Relocation, Removal, or Abandonment, see RAILROADS, 33 Cyc. 142; Removal of Trespassers From, see RAILROADS, 33 Cyc. 819; Use of by Hackmen and Cab Drivers, see RAILROADS, 33 Cyc. 639. Of Street Railroad, see STREET RAILROADS.)

STATION AGENT. An agent of a company operating or owning a railroad;[13] the agent locally in charge of a railroad station or depot.[14] (Station Agent: Duty of Railroad to Keep at Station, see RAILROADS, 33 Cyc. 639 note 39. Fellow-Servant of Train Employee, see MASTER AND SERVANT, 26 Cyc. 1357. Service of Process on, see PROCESS, 32 Cyc. 553.)

STATIONER. One who sells paper, quills, inkstands, pencils, and other furniture for writing.[15] (See STATIONERY.)

STATIONERY. Writing materials in general;[16] the articles usually sold by

2. Black L. Dict.

3. A term said to be technical in church regulations, in the science of ecclesiology, in the civil law, in surveying, in railroad language and in military science. U. S. *v.* Phisterer, 94 U. S. 219, 222, 24 L. ed. 116 [*citing* Richardson Dict.; Worcester Dict.].

4. Webster Dict. [*quoted* in Canal, etc., Com'rs *v.* Willamette Transp., etc., Co., 6 Oreg. 219, 228].

5. U. S. *v.* Phisterer, 94 U. S. 219, 222, 24 L. ed. 116.

6. Ricker *v.* Portland, etc., R. Co., 90 Me. 395, 401, 38 Atl. 338.

The stopping place of a street car see Maxey *v.* Metropolitan St. R. Co., 95 Mo. App. 303, 307, 68 S. W. 1063.

7. Falk *v.* New York, etc., R. Co., 56 N. J. L. 380, 383, 29 Atl. 157, where it is said that this term holds good for all stations, terminal or otherwise.

8. Imperial Dict. [*quoted* in Goyeau *v.* Great Western R. Co., 25 Grant Ch. (U. C.) 62, 64].

9. Goyeau *v.* Great Western R. Co., 25 Grant Ch. (U. C.) 62, 64. See also Caldwell's Case, 19 Wall. (U. S.) 264, 268, 22 L. ed. 114.

10. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 74, 32 N. E. 817, 18 L. R. A. 502.

In railroad parlance "station," or "station limits," includes "yards." Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, 441, 49 N. W. 239.

"Stations or station houses" has been held to denote the buildings at the point where a station had already been established and not the place itself. *In re* Railroad Com'rs, 79 Vt. 266, 271, 65 Atl. 82.

"Station at the end of the lines" as construed in the charter of a street railway company see Wilson *v.* Duluth St. R. Co., 64 Minn. 363, 364, 67 N. W. 82.

11. Caldwell's Case, 19 Wall. (U. S.) 264, 268, 22 L. ed. 114.

As meaning "permanent station," the place of performance of his military duties, and not a place to which he was temporarily ordered for a special duty see Andrews *v.* U. S., 15 Ct. Cl. 264, 269.

"Military station" as synonymous with "military post" see U. S. *v.* Phisterer, 94 U. S. 219, 222, 24 L. ed. 116.

12. Ft. Worth, etc., R. Co. *v.* Shetter, (Tex. Civ. App. 1900) 58 S. W. 179, 181.

13. Welsh *v.* Chicago, etc., R. Co., 53 Iowa 632, 633, 6 N. W. 13.

14. Detroit *v.* Wabash, etc., R. Co., 63 Mich. 712, 714, 30 N. W. 321, where it is said not generally to apply to the station at the end of the road, but at some intermediate place.

15. Webster Dict. [*quoted* in Knox County *v.* Arms, 22 Ill. 175, 179].

Originally the term is said to have meant a "bookseller" from his occupying a stand or station for selling books. Webster Dict. [*quoted* in Knox County *v.* Arms, 22 Ill. 175, 179]; Worcester Dict. [*quoted* in State *v.* Dupré, 42 La. Ann. 561, 563, 7 So. 727].

16. Standard Dict. [*quoted* in Crook *v.* Calhoun County Com'rs Ct., 144 Ala. 505, 506, 39 So. 383; Gregory *v.* Keller, 137 Ill. App. 441, 443], where it is said to include paper, envelopes, blank books, pens, ink, etc.

stationers;[17] the goods sold by a stationer.[18] (Stationery: As Part of Incidental Expenses, see COUNTIES, 11 Cyc. 434. Contract For County Printing, see COUNTIES, 11 Cyc. 470.)

STATION GROUNDS. See DEPOT GROUNDS, 13 Cyc. 1042.

STATISTICS. That part of political science which is concerned in collecting and arranging facts illustrative of the conditions and resources of a state.[19] (Statistics: Generally, see CENSUS, 6 Cyc. 725. Judicial Notice of Facts Established by, see EVIDENCE, 16 Cyc. 870. Vital, see HEALTH, 21 Cyc. 387 note 30.)

STAT PRO RATIONE VOLUNTAS POPULI. A maxim meaning "The will of the people stands in place of a reason."[20]

STATUARY. One who professes or practises the art of carving images or making statues.[21] As defined by the federal customs laws, a term which includes the professional productions of a statuary or of a sculptor only.[22] (Statuary: Duties on, see CUSTOMS DUTIES, 12 Cyc. 1131. Infringement of Copyright, see COPYRIGHT, 9 Cyc. 906.)

STATUS. The legal, social relation and condition of parties.[23] (Status: Of a Person in a State, Regulation of by Congress, see COMMERCE, 7 Cyc. 419 note 64. Of Citizenship in the United States, see ALIENS, 2 Cyc. 86 note 10.

17. Webster Dict. [*quoted* in Crook *v.* Calhoun County Com'rs Ct., 144 Ala. 505, 506, 39 So. 383; Knox County *v.* Arms, 22 Ill. 175, 179; Gregory *v.* Keller, 137 Ill. App. 441, 443; Oklahoma County *v.* Blakeney, 5 Okla. 70, 77, 48 Pac. 101], where it is said to include paper, ink, pens, blank books, etc.

18. Worcester Dict. [*quoted* in State *v.* Dupré, 42 La. Ann. 561, 562, 7 So. 727], where it is said to include books, paper, pens, sealing wax, ink, etc.

This term has been held to include: Blanks. Knox County *v.* Arms, 22 Ill. 175, 179; Harris County *v.* Clarke, 14 Tex. Civ. App. 56, 59, 37 S. W. 22. Blank writs, subpœnas, witness-certificates, etc., procured by a circuit clerk for the use of his office, and actually used in his office. Pike County Com'rs Ct. *v.* Goldthwaite, 35 Ala. 704, 706. Postage. Downing *v.* Hinds County, 84 Miss. 29, 32, 36 So. 73.

Held not to include: Blanks used by a clerk of a district court. Arapahoe County Com'rs *v.* Koons, 1 Colo. 160, 161. Election tickets. Oklahoma County *v.* Blakeney, 5 Okla. 70, 77, 48 Pac. 101. Postage used by the judge in his official capacity. Crook *v.* Calhoun County Com'rs Ct., 144 Ala. 505, 509, 39 So. 383. Stamps. Gregory *v.* Keller, 137 Ill. App. 441, 443. But see Cole *v.* White County, 32 Ark. 45, 54.

It embraces all writing materials and implements together with the numerous appliances with the desk, and of mercantile and commercial offices. 9 Americanized Encyclopedia Britannica, p. 5555 [*quoted* in Crook *v.* Calhoun County Com'rs Ct., 144 Ala. 505, 507, 39 So. 383; Oklahoma County *v.* Blakeney, 5 Okla. 70, 77, 48 Pac. 101].

In modern use this term has been said probably to cover only blank books, account books, etc. State *v.* Dupré, 42 La. Ann. 561, 562, 7 So. 727.

The term "fancy stationery" covers a miscellaneous assembly of leather and other goods, such as pocket-books, bags, card-cases and many kindred articles, which cannot be classified. 9 Americanized Encyclopedia Britannica, p. 5555 [*quoted* in Crook *v.* Calhoun County Com'rs Ct., 144 Ala. 505, 507, 39 So. 383; Oklahoma County *v.* Blakeney, 5 Okla. 70, 77, 48 Pac. 101].

19. Black L. Dict. [*citing* Wharton L. Dict.].

20. Black L. Dict.

Applied in: Sweeney *v.* Stevens, 46 N. J. L. 344, 346; Livingston *v.* Trinity Church, 45 N. J. L. 230, 239; Aller *v.* Aller, 40 N. J. L. 446, 451; Dietz's Case, 41 N. J. Eq. 284, 296, 7 Atl. 443; Rusling *v.* Rusling, 35 N. J. Eq. 120, 128; Collins *v.* Osborn, 34 N. J. Eq. 511, 521; National Docks R. Co. *v.* New Jersey Cent. R. Co., 32 N. J. Eq. 755, 764; Farmers' L. & T. Co. *v.* Hunt, 16 Barb. (N. Y.) 514, 525; Sears *v.* Shafer, 1 Barb. (N. Y.) 408, 411; Campbell *v.* McDonald, 10 Watts (Pa.) 179, 184.

21. Viti *v.* Tutton, 14 Fed. 241, 243, 15 Phila. (Pa.) 507.

22. Benziger *v.* U. S., 192 U. S. 38, 51, 24 S. Ct. 189, 48 L. ed. 331; Merritt *v.* Tiffany, 132 U. S. 167, 169, 10 S. Ct. 52, 33 L. ed. 299.

The definition embraces such works of art as are the result of the artist's own creation, or are copies of them, made under his direction and supervision, or copies of works of other artists, made under the like direction and supervision, as distinguished from the productions of manufacturer or mechanic. Merritt *v.* Tiffany, 132 U. S. 167, 169, 10 S. Ct. 52, 33 L. ed. 299. See also U. S. *v.* Tiffany, 160 Fed. 408, 411, 87 C. C. A. 360.

The term includes a marble figure made in the establishment of a professional sculptor under his written instructions, supplemented by his verbal instructions. Sibbel *v.* U. S., 124 Fed. 105, 106.

Statues cast from bronze, and touched up and made expressive by the hands of sculptors, are held not within the definition. Tiffany *v.* U. S., 65 Fed. 494, 495.

23. Barney *v.* Tourtellotte, 138 Mass. 106, 108; Burlen *v.* Shannon, 3 Gray (Mass.) 387, 389, where the term is applied to the mar-

Of College or University, see COLLEGES AND UNIVERSITIES, 7 Cyc. 284. Of Convict — At Common Law, see CONVICTS, 9 Cyc. 870; By Statute, see CONVICTS, 9 Cyc. 872. Of Director of Corporation — At Law, see CORPORATIONS, 10 Cyc. 823; In Equity, see CORPORATIONS, 10 Cyc. 824; Named in the Certificate of Incorporation, see CORPORATIONS, 10 Cyc. 740. Of Legal and Equitable Owner of Corporate Stock, see CORPORATIONS, 10 Cyc. 696. Of Pledgee of Share of Corporate Stock Where Debt Has Been Paid, see CORPORATIONS, 10 Cyc. 642. Of Shareholder of Corporation, see CORPORATIONS, 10 Cyc. 373.)

STATUS QUO. The existing state of things at any given date.[24] (Status Quo: Restoration to — On Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 306; On Cancellation of Share of Corporate Stock, see CORPORATIONS, 10 Cyc. 455; On Rescission of Contract, see CONTRACTS, 9 Cyc. 437.)

STATUTA ITA INTERPRETANDA UT INNOXIIS NE OBSINT. A maxim meaning "Statutes are to be so interpreted that they may not hurt the innocent." [25]

STATUTA PRO PUBLICO COMMODO LATE INTERPRETANTUR. A maxim meaning "Statutes made for the public good ought to be liberally construed." [26]

STATUTA SUO CLUDUNTUR TERRITORIO, NEC ULTRA TERRITORIUM DISPONUNT. A maxim meaning "Statutes are confined to their own territory, and have no extraterritorial effect." [27]

STATUTE-FAIR. A fair at which laborers of both sexes stood and offered themselves for hire.[28]

STATUTE IN PARI MATERIA. A phrase applicable to private statutes or general laws made at different times, and in reference to the same subjects.[29] (See STATUTES.)

STATUTE LAW. The express written will of the legislature, rendered authentic by certain prescribed forms and solemnities.[30] (See STATUTES.)

STATUTE MERCHANT. A proceeding where a man is bound before a mayor or bailiff of a corporate town, who has power to take such bonds or recognizances to pay a certain sum of money at a fixed date; if there be default in payment, then the person in whose favor it is made comes before the officer taking the statute, and prays him to certify it under his seal, upon which there issues a writ to execute the statute.[31]

STATUTE MILE. In Great Britain and the United States, a mile equal to three hundred and twenty rods or poles, one thousand seven hundred and sixty yards, or five thousand two hundred and eighty feet.[32]

STATUTE OF DISTRIBUTION. See DESCENT AND DISTRIBUTION, 14 Cyc. 24.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF, 20 Cyc. 147.

riage relation. And see Dunham *v.* Dunham, 57 Ill. App. 475, 497, where the term is used in the sense of "condition."

"The very meaning of the word 'status,' both derivative and as defined in legal proceedings, forbids that it should be applied to a mere relation. 'Status' implies relations undoubtedly, but it is not a mere relation." De la Montanya *v.* De la Montanya, 112 Cal. 101, 115, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82.

"A 'status' once established is presumed by the law to remain, until the contrary appears." Kidder *v.* Stevens, 60 Cal. 414, 419.

24. Black L. Dict.

25. Morgan Leg. Max. [*citing* Halkerstone Max. 171].

26 Peloubet Leg. Max. [*citing* Jenkins Cent. 21].

27. Black L. Dict.

Applied in: *In re* New York Foundling Hospital, 9 Ariz. 105, 116, 79 Pac. 231, 7 L. R. A. N. S. 306; Woodworth *v.* Spring, 4 Allen (Mass.) 321, 424.

28. Black L. Dict. See also Simpson *v.* Wells, L. R. 7 Q. B. 214, 41 L. J. M. C. 105, 26 L. T. Rep. N. S. 163.

29. Black Int. Laws [*quoted* in State *v.* Frederickson, 101 Me. 37, 42, 63 Atl. 535, 115 Am. St. Rep. 295, 6 L. R. A. N. S. 186].

30. Kent Comm. [*quoted* in Thorne *v.* Cramer, 15 Barb. (N. Y.) 112, 114]. See also People *v.* Collins, 3 Mich. 343, 347.

31. Yates *v.* People, 6 Johns. (N. Y.) 337, 404. See also 13 Cyc. 779 text and note 34.

32. Webster New Int. Dict. See also Rockland, etc., Steamship Co. *v.* Fessenden, 79 Me. 140, 146, 8 Atl. 550.

"The land mile is more common to those whose business is upon the land — to landmen — while the sea mile is the only one recognized by those who navigate the sea — by seamen. The first named was legalized in the reign of Queen Elizabeth, known as 'statute mile' — or 'English mile' — or 'English statute mile;' and the 'log' was invented at about the same time which inaugurated the measuring of sea or marine miles,

STATUTE OF JEOFAILS. See PLEADING, 31 Cyc. 361 note 27.

STATUTE OF LIMITATIONS. See LIMITATIONS OF ACTIONS, 25 Cyc. 963.

STATUTE OF USES. The statute of 27 Henry VIII, abolishing conveyances to uses by annexing the estate of the feoffee to the estate of him who had the use.[33] (Statute of Uses: In General, see TRUSTS. As Affecting Charities, see CHARITIES, 6 Cyc. 929.)

STATUTE OF WILLS. See WILLS.

STATUTE PENALTY. A penalty fixed by statute as a punishment for the violation of some provision of law.[34] (See PENALTIES, 30 Cyc. 1331, and Cross-References Thereunder.)

known as 'English geographical miles.' Each is adapted to its own sphere." Rockland, etc., Steamship Co. *v.* Fessenden, 79 Me. 140, 146, 8 Atl. 550.

33. Thompson *v.* Bennet, Smith (N. H.) 327, 330.

34. Bouvier L. Dict. [*quoted* in Woodward *v.* Alston, 12 Heisk. (Tenn.) 581, 585].

STATUTES

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CROSS-REFERENCES

For Matters Relating to:
Constitutionality of Statute in General, see CONSTITUTIONAL LAW, 8 Cyc. 863 *et seq.*
Constitutional Law, see CONSTITUTIONAL LAW, 8 Cyc. 695.
Due Process of Law, see CONSTITUTIONAL LAW, 8 Cyc. 1080.
Ex Post Facto Law, see CONSTITUTIONAL LAW, 8 Cyc. 1027.
Judicial Notice, see EVIDENCE, 16 Cyc. 889.
Municipal Ordinances, see MUNICIPAL CORPORATIONS, 28 Cyc. 347.
Other Acts and Proceedings of:
State, see STATES, *ante,* p. 820.
Territory, see TERRITORIES.
United States, see UNITED STATES.
Police Power Generally, see CONSTITUTIONAL LAW, 8 Cyc. 863; MUNICIPAL CORPORATIONS, 28 Cyc. 692.
Retrospective Statute, see CONSTITUTIONAL LAW, 8 Cyc. 1017.

For Matters Relating to — (*continued*)
Statute Denying, Impairing, or Infringing:
Equal Protection of the Laws, see CONSTITUTIONAL LAW, 8 Cyc. 711.
Obligation of Contract, see CONSTITUTIONAL LAW, 8 Cyc. 706.
Personal, Civil, or Political Rights, see CONSTITUTIONAL LAW, 8 Cyc. 877.
Vested Rights, see CONSTITUTIONAL LAW, 8 Cyc. 894.
Statute Granting Privilege or Immunity, see CONSTITUTIONAL LAW, 8 Cyc. 1036.
Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 147.
Statute of Limitation, see LIMITATIONS OF ACTIONS, 25 Cyc. 963.
Statutes Relating to Crimes, see CRIMINAL LAW, 12 Cyc. 70; and the Particular Crimes Titles in This Work.
Statutes Relating to Particular Subject, see the Particular Titles in This Work.

I. DEFINITION AND NATURE.

A. Definition — 1. STATUTES. It is usual to describe a statute as a written law, *lex scripta*, to distinguish it from the unwritten, or the common law, *lex non scripta*.[1] This description is to an extent unsatisfactory, since the common law is not necessarily unwritten, and in certain of the states has been declared by specific constitutional provision to include statutes.[2] And then too there are written laws, such as constitutions,[3] treatises, and municipal ordinances, which are not within the ordinary meaning of statutes. A statute may be defined as the written will of the legislature, rendered authentic by certain prescribed forms and solemnities, prescribing rules of action or civil conducts,[4] in respect to either persons or things, or both. The meaning of the term varies according to the connection in which it is used. For certain purposes an enactment to which a state gives the force of law, is a statute, although not originating in the legislature.[5] Under certain circumstances a municipal ordinance may be deemed to be a stat-

1. See COMMON LAW, 8 Cyc. 367.
Statutes, state and national, are equally the expressions in writing of the sovereign or legislative will, known in ancient and elementary law books, as *leges scripta*, or written laws, as distinguished from the *leges non scripta*, the unwritten or common law. The latter owe their binding force to the principles of justice as declared by the courts and to long usage and consent of the nation or people. The former, to the positive command or declaration of the supreme power. Dwarris St. (Potter ed.) 35.
2. See COMMON LAW, 8 Cyc. 373.
3. **The organic law** is the constitution of the United States and of the state, and is altogether written. Other written laws are denominated "statutes." Oreg. Annot. Codes & Sts. § 734.
4. The first part of this definition is that used by Chancellor Kent. 1 Kent Comm. 447 [*quoted* in People *v.* Collins, 3 Mich. 343, 418]. See also *In re* Government Seat, 1 Wash. Terr. 115, 122.
Other definitions are: Those rules of conduct which are introduced by the law-making power in an express and positive form, and which control the particular cases and circumstances to which they relate or describe. Dwarris St. (Potter ed.) 38.
"The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state." Bouvier L. Dict. [*quoted* by McLeary, J., in Lane *v.* Missoula County, 6 Mont. 473, 481, 13 Pac. 136].
"An act of the legislature as an organized body." State *v.* Partlow, 91 N. C. 550, 552, 49 Am. Rep. 652.
"An act of ordinary legislation, by the appropriate organ of the government; the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them." Eakin *v.* Raub, 12 Serg. & R. (Pa.) 330, 348.
"Any enactment, from whatever source originating, to which a State gives the force of law." New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741, 748, 31 L. ed. 607. See also Stevens *v.* Griffith, 111 U. S. 48, 4 S. Ct. 283, 28 L. ed. 348.
A permanent statute is one which is understood to continue in force until its repeal. Palcher *v.* U. S., 11 Fed. 47, 3 McCrary 510.
A city charter, as an instrument of government and in its political provisions, is a statute within the meaning of a statute providing that all contracts may be oral, except when required by statute to be in writing. Frick *v.* Los Angeles, 115 Cal. 512, 47 Pac. 250.
5. Williams *v.* Bruffy, 96 U. S. 176, 183, 24 L. ed. 716.
An enactment of the confederacy, although void as such, may be treated as the statute of the state by whose sanction it was enforced as a law of that state. Stevens *v.* Griffith, 111 U. S. 48, 51, 4 S. Ct. 283, 28 L. ed. 348.

ute,[6] although usually not included within the meaning of such term.[7] Under the civil law "statutes" is a term applied to all sorts of laws and regulations; to every provision of law which permits, ordains, or prohibits anything.[8]

2. Statutes of England. "Statutes of England," as used in a statute providing that none of such statutes shall be considered as laws of the state, mean acts of parliament,[9] enacted by the king, by the assent of the lords, spiritual and temporal, and of the commons and parliament assembled.[10]

3. Statute Law. "Statute law" is frequently used interchangeably with statute;[11] but the term is broader in its meaning, and includes not only statutes as already defined, but also the judicial interpretation and application of such statutes.[12]

B. Nature of Statutes. A statute is the written expression of the legislative will. It is the positive declaration of what the law shall be by that branch of the government possessing legislative functions, as distinguished from the executive and judicial functions of coördinate branches.[13] It either makes positive what is already recognized as law, modifies that law, or declares to be unlawful that which hitherto had been lawful.[14] When duly enacted it becomes controlling in respect to the matter to which it properly relates, and unless transcribing certain fixed constitutional limitations, its effect is absolute until again changed by like legislative authority.[15]

6. Murray *v.* Charleston, 96 U. S. 432, 440, 24 L. ed. 760; New York Home Ins. Co. *v.* Augusta City Council, 93 U. S. 116, 23 L. ed. 825.

An ordinance impairing the obligation of a contract is within the meaning of the constitutional prohibition against the enactment of laws impairing such obligations. New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 31, 8 S. Ct. 741, 31 L. ed. 607.

7. Rutherford *v.* Swink, 96 Tenn. 564, 35 S. W. 554, where a municipal ordinance was held not to be a statute in the sense in which that word is used in a statute providing that the repeal of a statute does not affect any penalty incurred nor any proceeding commenced under the statute repealed.

8. Story Confl. Laws (8th ed.), § 12. See Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 589, 16 Am. Dec. 212.

Under the civil law statutes may be real or personal. A real statute is one which regulates property within the state where it is in force. A personal statute is one which follows and governs the party subject to it wherever he goes. Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212; Columbia Bank *v.* Walker, 14 Lea (Tenn.) 299.

9. Levy *v.* McCartee, 6 Pet. (U. S.) 102, 111, 8 L. ed. 334.

It is frequently provided by state statute or constitutional provisions that the statutes of England in aid of the common law, passed prior to the fourth year of the reign of James I, with certain exceptions, and which are not local in their nature, are in full force and effect, except so far as inconsistent with the statutes of the state or of the United States. Plumleigh *v.* Cook, 16 Ill. 669; Stevenson *v.* Cloud, 5 Blackf. (Ind.) 92. See also Common Law, 8 Cyc. 373.

10. 1 Blackstone Comm. 85; Prince's Case, 8 Coke 136, 20*a*, 77 Eng. Reprint 496.

There must be an agreement of these three legislative authorities before their enactments assume the form of statutes. Wilberforce St. L. 10. The difference between an act of parliament and a resolution of one branch of the legislature was shown in the case of Stockdale *v.* Hansard, 9 A. & E. 1, 3 Jur. 905, 8 L. J. Q. B. 294, 2 P. & D. 1, 36 E. C. L. 27.

11. People *v.* Collins, 3 Mich. 343; Rohrbacher *v.* Jackson, 51 Miss. 735; Thorne *v.* Cramer, 15 Barb. (N. Y.) 112.

12. **Statute law** may properly be defined as the will of the nation expressed by the legislature, expounded by the courts of justice. The legislature, as the representative of the nation, expresses the national will by means of statutes. These statutes are expounded by the courts so as to form the body of the statute law. Wilberforce St. L. 8.

Judicial construction of a statute becomes, so far as contract rights are concerned, a part of the statute, and has the same effect on such rights as an amendment of the statute by legislative enactment. Douglass *v.* Pike County, 101 U. S. 677, 687, 25 L. ed. 968.

13. **Encroachment on legislature** see Constitutional Law, 8 Cyc. 848.

The distinction between a legislative and judicial act is that the former predetermines what the law shall be for the regulation of future cases, while the latter determines what the law is in respect to some existing thing done or happened. Wulzen *v.* San Francisco, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17. See also 23 Cyc. 1614 note 20, 25 Cyc. 181 note 73.

To declare what the law is or has been is judicial power; to declare what the law shall be is legislative. Ogden *v.* Blackledge, 2 Cranch (U. S.) 272, 2 L. ed. 276.

14. Bishop Written Laws, § 5.

15. Slack *v.* Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1.

II. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

A. In General — 1. Source of Statute Law — a. In General. A statute ordinarily owes its existence to the act of that branch of government whose functions are legislative, as distinguished from the executive and judicial functions of the coördinate branches. The power to enact statutes is variously conferred by fundamental authority upon legislative bodies, or upon the sovereign himself in accordance with the form of government established in the particular jurisdiction.[16]

b. Federal Statutes. In the United States the constitution has vested the power of making laws in congress consisting of the senate and the house of representatives.[17] Other federal authorities may be clothed with the power of making rules and regulations with the force of statutes, or performing other duties more or less legislative in their character, but when so enacted they are not deemed statutory and are not within the scope of this article.[18]

c. State Statutes — (I) *In General.* In the several states legislative bodies are created by constitutional provision, bearing a similarity to that of congress, and having such legislative authority as may be conferred upon them by the constitution.[19]

(II) *Initiative and Referendum.* Unless the state constitution so provides, no legislative act is dependent for its validity on the assent of the people whom it affects.[20] In a number of the states, however, constitutional provisions have been adopted whereby the people have reserved the power to propose laws, and to enact or reject the same at the polls, independent of the legislative assembly.[21] This is what is known as legislation by the initiative. The federal constitution guarantees to every state a republican form of government,[22] and it has been insisted that direct legislation by the people does not conform to that provision. Cases decided in those states which have adopted the initiative sustain the validity of the system.[23] The referendum, when authorized by constitutional provision, may be applied to any law enacted by the legislature, under the restrictions imposed by the constitution. When ordered by the legislature or petitioned for by a certain percentage of the voters of the state, the measure to which it related does not become a law until approved by a majority of the votes cast thereon. Statutes thus enacted are valid,[24] and are not subject to the same criticism as legislation by the initiative.

16. See Constitutional Law, 8 Cyc. 806.

17. See United States.

18. See Constitutional Law, 8 Cyc. 830–843.

19. These bodies are variously constituted; they meet at stated intervals, usually biennially or annually, and their acts constitute the statute law of the states. See States, *ante*, p. 820.

20. Carrithers *v.* Shelbyville, 126 Ky. 769, 104 S. W. 744, 17 L. R. A. N. S. 421, 31 Ky. L. Rep. 1166.

21. The following states have adopted by constitutional amendment the initiative system of legislation, in one form or another: Illinois, Montana, Nevada, Oregon, South Dakota, and Utah. Constitutional amendments to this effect have been proposed and will be submitted to the people in Maine, Missouri, North Dakota, and Washington.

22. 23 U. S. Const. art. 4, § 4.

23. *In re* Pfahler, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. N. S. 1092 (opinion of Angelloti, J.); Kadderly *v.* Portland, 44 Oreg. 118, 74 Pac. 710, 75 Pac. 222.

The initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government or substituted another in its place. The government is still divided into legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people. Kadderly *v.* Portland, 44 Oreg. 118, 74 Pac. 710, 75 Pac. 222.

24. See Constitutional Law, 8 Cyc. 840.

Where neither the form nor the manner of submitting the act are prescribed by the constitution, the court will declare the act invalid only when the question submitted is so framed as to be palpably evasive and misleading. State *v.* Duluth, etc., R. Co., 102 Minn. 26, 112 N. W. 897 [*followed* in State *v.* Minnesota, etc., R. Co., 102 Minn. 506, 112 N. W. 899].

d. Territorial Statutes. The territories of the United States are subject to the legislative authority of congress, and statutes in force therein are enacted either by congress itself, or by representative bodies upon which congress has conferred legislative authority.[25]

e. Transfer of Territory. Where territory is transferred from one jurisdiction to another, the statutes in force at that time remain so until changed by subsequent statutory enactment by the legislative body of the latter jurisdiction,[26] except so far as they may be in direct conflict with the constitution and laws thereof.[27] It is a well recognized principle of international law that the statutes of a ceded country remain in force until changed by the conquering or acquiring power.[28]

2. Existence and Status of Legislative Body[29] — a. In General. If legislative bodies are not created and established according to the constitution they may not rightfully exercise their powers.[30] Where the validity of the acts of a legislature has been acquiesced in by the people for a long time, and rights have vested pursuant thereto, the legality of such legislature will be presumed.[31]

25. Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867; Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423; People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444; Cope *v.* Cope, 137 U. S. 682, 11 S. Ct. 222, 34 L. ed. 832; Mormon Church *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478.

The validity of a territorial statute depends upon the grant of power from congress, and must conform therewith as well as with the constitution of the United States.

Arizona.— Territory *v.* Blomberg, 2 Ariz. 204, 11 Pac. 671.

Idaho.—Stevenson *v.* Moody, 2 Ida. (Hash.) 260, 12 Pac. 902; Taylor *v.* Stevenson, 2 Ida. (Hash.) 180, 9 Pac. 642; Betts *v.* Butler, 1 Ida. 185.

Montana.— Territory *v.* Guyott, 9 Mont. 46, 22 Pac. 134; Territory *v.* Lee, 2 Mont. 124.

Oklahoma.— Allen *v.* Reed, 10 Okla. 105, 60 Pac. 782, 63 Pac. 867; Brown *v.* Parker, 2 Okla. 258, 39 Pac. 567; Farris *v.* Henderson, 1 Okla. 384, 33 Pac. 380.

Utah.— People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444.

United States.— *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89.

26. The laws of Spain were not abrogated by the transfer of the territory of Orleans to the United States. Wagner *v.* Kenner, 2 Rob. (La.) 120. These laws remained in force in Louisiana until repealed in 1828. Hubgh *v.* New Orleans, etc., R. Co., 6 La. Ann. 495, 54 Am. Dec. 565. See also De la Rama *v.* De la Rama, 201 U. S. 303, 26 S. Ct. 485, 50 L. ed. 765; Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128.

27. By the substitution of the new supremacy, although the former political relations of the inhabitants were dissolved, their rights vested under the government of their former allegiance or those arising from contract or usage remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the constitution and laws of the United States. Leitendorfer *v.* Webb, 20 How. (U. S.) 176, 15 L. ed. 891. It would be a narrow construction of the constitution to require the people of the annexed territory to abandon all traditions, laws, and systems of administration, or to substitute for a system, which represents the growth of generations, a jurisdiction with which they had no previous acquaintance or sympathy. Holden *v.* Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780. See also Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088; De Lima *v.* Bidwell, 182 U. S. 1, 41, 21 S. Ct. 743, 45 L. ed. 1041.

28. *California.*— Macoleta *v.* Packard, 14 Cal. 178; Fowler *v.* Smith, 2 Cal. 39, 568.

Mississippi.— Chew *v.* Calvert, Walk. 54.

Missouri.— Mitchell *v.* Tuckers, 10 Mo. 260; McNair *v.* Hunt, 5 Mo. 300.

United States.—Chicago, etc., R. Co. *v.* McGlinn, 114 U. S. 542, 5 S. Ct. 1005, 29 L. ed. 270; Langdeau *v.* Hanes, 21 Wall. 521, 22 L. ed. 606; U. S. *v.* Power, 11 How. 570, 13 L. ed. 817; Mitchel *v.* U. S., 9 Pet. 711, 9 L. ed. 283; U. S. *v.* Percheman, 7 Pet. 51, 8 L. ed. 604; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 242.

England.— Campbell *v.* Hall, Cowp. 204, 98 Eng. Reprint 1045, Lofft. 655, 98 Eng. Reprint 848; Blankard *v.* Galdy, 2 Salk. 411, 91 Eng Reprint 356.

See also International Law, 22 Cyc. 1729.

29. As to right of courts to inquire into see *infra*, II, G, 1, b, (II).

30. *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; State *v.* Judge, Super. Dist. Ct., 29 La. Ann. 223.

The Kansas house of representatives can consist of one hundred and twenty-five members only. An act which would not have been passed if more than that number had not voted either for or against it is unconstitutional. State *v.* Francis, 26 Kan. 724.

The acts of a territorial legislature passed after the territory was admitted as a state, but prior to the election of a state legislature, are valid. State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; State *v.* Meadows, 1 Kan. 90; State *v.* Barnes, 3 N. D. 319, 55 N. W. 883.

31. Anderson *v.* Fisk, 36 Cal. 625, holding that under such circumstances only imperative rules of law will induce courts to hold that such legislature was without authority to legislate.

b. Competing Legislative Bodies. Where two competing bodies claim to be the legal legislature, that body which consists of the greater number of members duly certified by the proper officers as having been elected is the legal legislature and should be recognized.[32]

c. Effect of Unconstitutional Apportionment. A legislature whose members were elected under an unconstitutional apportionment is a *de facto* legislature, and its acts are valid.[33]

3. Powers and Duties of Legislative Body — a. In General. A legislative body, existing by virtue of a constitutional provision, will find its powers prescribed and its duties fixed by the terms of the constitution.[34] A state legislature has such powers as are not expressly, or by fair implication, prohibited by the state or federal constitutions,[35] while congress may only legislate in respect to those matters which are within the terms of the federal constitution.[36] The authority conferred is legislative, and the acts passed must fall within the scope thereof.[37] The fact that a power is broad and, to an extent, dangerous, is immaterial,[38] so long as it is legislative in its character. So far as matters of legislation are concerned one legislature cannot bind a succeeding legislature, except as to valid contracts entered into by it,[39] and as to rights which have actually vested under its acts.[40]

b. Special or Extra Sessions. Extra or special sessions of a legislative body are usually provided for in the constitution, to convene upon the call of the executive. The call is usually required to state the subjects to be legislated upon, in which case only such acts are valid as fall properly within the terms thereof.[41]

32. *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; State *v.* Rogers, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173.

33. Hughes *v.* Felton, 11 Colo. 489, 19 Pac. 444 (holding that a statute enacted by a legislature regularly organized is not invalid because the members were elected under an apportionment act which contained no provision for the representation of one county); Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841.

The courts may intervene to prevent the election of members under a void apportionment. And if members are thereupon elected thereunder the body so constituted would not have a legal existence, and statutes enacted by it would be invalid. State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

34. See Constitutional Law, 8 Cyc. 775.

35. *Connecticut.*— Lowrey *v.* Gridley, 30 Conn. 450.

Florida.— Sams *v.* King, 18 Fla. 557.

Louisiana.— State *v.* Gutierrez, 15 La. Ann. 190; Bozant *v.* Campbell, 9 Rob. 411.

North Dakota.— State *v.* Anderson, (1908) 118 N. W. 22.

Tennessee.— Wright *v.* Cunningham, 115 Tenn. 445, 91 S. W. 293.

See 44 Cent. Dig. tit. "Statutes," § 3; and Constitutional Law, 8 Cyc. 774.

In Oregon the legislative assembly, when not interdicted by amendments to the Organic Act of the state, is a law-making power with coördinate authority with the people, when the latter exercise the initiative power which they have reserved. Hall *v.* Dunn, 52 Oreg. 475, 97 Pac. 811.

36. See Constitutional Law, 8 Cyc. 771.

37. Cincinnati, etc., R. Co. *v.* Clinton County, 1 Ohio St. 77.

Authority of the courts may not be infringed by legislative act. Matter of Clinton St., 2 Brewst. (Pa.) 599. But the legislature may change rules of evidence and prescribe what shall be the effect of documentary evidence of a certain kind, when introduced in actions thereafter commenced. St. Louis *v.* Œters, 36 Mo. 456. See Sams *v.* King, 18 Fla. 557. And see Constitutional Law, 8 Cyc. 924.

38. State *v.* Franklin County, 35 Ohio St. 458, holding that the legislature may pass a mandatory act requiring county commissioners to cause a designated road to be improved and to levy a tax to defray the expense thereof. See also Schall *v.* Norristown, 6 Leg. Gaz. (Pa.) 157.

39. Gilleland *v.* Schuyler, 9 Kan. 569; Manigault *v.* Ward, 123 Fed. 707.

Acts of parliament derogating to the power of subsequent parliaments bind not. 1 Blackstone Comm. 90. See also Cooley Const. Lim. *126 note 3.

40. Gilleland *v.* Schuyler, 9 Kan. 569.

41. *Colorado.*— Parsons *v.* People, 32 Colo. 221, 76 Pac. 666; *In re* Governor's Proclamation, 19 Colo. 333, 35 Pac. 530.

Illinois.— Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

Missouri.— Wells *v.* Missouri Pac. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; St. Louis *v.* Withaus, 90 Mo. 646, 3 S. W. 395.

Montana.— State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

Nebraska.— Chicago, etc., R. Co. *v.* Wolfe, 61 Nebr. 502, 86 N. W. 441.

Nevada.— Jones *v.* Theall, 3 Nev. 233.

Tennessee.— Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364; Davidson *v.* Moorman, 2 Heisk. 575; Mitchell *v.* Franklin, etc., Turnpike Co., 3 Humphr. 456.

Texas.— Manor Casino *v.* State, (Civ. App. 1896) 34 S. W. 769; Brown *v.* State, 32 Tex.

The call or proclamation should be reasonably construed so as to bring the act within its meaning if possible.[42] Where a general object is described, the legislature is free to determine in what manner such object shall be carried into effect.[43] In determining whether a given act is germane to the objects stated, the entire proclamation should be considered.[44] Under a provision requiring the subject for legislation to be presented to the legislature, such presentation must be in writing.[45] Where there is no constitutional restriction upon the authority of a legislative body in special session, it may enact any law at such session that it might at a regular session.[46] An additional proclamation, designating other subjects for consideration, may be issued;[47] and a proclamation by an executive may be revoked by him or by his successor, and having been revoked, the legislature is without authority to act.[48] Whether or not an extra session should be called is a question solely for the executive.[49]

c. Duration of Session. Where the length of the regular session of a legislature is prescribed by the constitution, such legislature cannot validly act after the expiration of the time prescribed.[50]

d. Special Powers of One Branch. Either one house or the other of a legisla-

Cr. 119, 22 S. W. 596; Baldwin *v.* State, 21 Tex. App. 591, 3 S. W. 109.

Washington.— State *v.* Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

West Virginia.—State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

United States.— Devereaux *v.* Brownsville, 29 Fed. 742.

See 44 Cent. Dig. tit. "Statutes," § 4.

Vetoed bills may be returned by a secretary of state to a legislature convened in extra session, but unless the governor calls attention to such bills and requires action thereon the legislature may not act on them. Jones *v.* Theall, 3 Nev. 233.

A rejected bill may be enacted at a special session, although Tenn. Const. art. 2, § 19, provides that "after a bill has been rejected no bill containing the same substance shall be passed into a law during the same session." Williams *v.* Nashville, 89 Tenn. 487, 15 S. W. 364.

A constitutional amendment may not be proposed at an extra session when the subject thereof is not embraced within the subject included in the proclamation, the proposing of such an amendment is a legislative act. People *v.* Curry, 130 Cal. 82, 62 Pac. 516.

Where an extra session of a territorial legislature is unauthorized, an act passed during that session is without any validity whatever. Treadway *v.* Schnauber, 1 Dak. 236, 46 N. W. 464.

42. State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

43. *Colorado.*— Parsons *v.* People, 32 Colo. 221, 76 Pac. 666 (holding that where the general object is the raising of revenue, the governor cannot restrict the legislature as to the particular mode of raising such revenue, or as to the subject of taxation); People *v.* Arapahoe County Dist. Ct., 23 Colo. 150, 46 Pac. 681; *In re* Governor's Proclamation, 19 Colo. 333, 35 Pac. 530 (holding that the legislature may not go beyond the business specially named, but within such limits may act freely in whole or in part, or not at all).

Tennessee.— Mitchell *v.* Franklin, etc., Turnpike Co., 3 Humphr. 456.

Texas.— Stockard *v.* Reid, (Civ. App. 1909) 121 S. W. 1144; Baldwin *v.* State, 21 Tex. App. 591, 3 S. W. 109.

Washington.— State *v.* Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

United States.— Baker *v.* Kaiser, 126 Fed. 317, 61 C. C. A. 303.

See 44 Cent. Dig. tit. "Statutes," § 4.

A proclamation authorizing apportionment of judicial districts, by implication authorizes all such legislation on that subject as may be deemed necessary by the legislature. Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 596.

44. Carroll *v.* Wright, 131 Ga. 728, 63 S. E. 260; Chicago, etc., R. Co. *v.* Wolfe, 61 Nebr. 502, 86 N. W. 441. *Compare* State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

45. Manor Casino *v.* State, (Tex. Civ. App. 1896) 34 S. W. 769.

46. Morford *v.* Unger, 8 Iowa 82.

47. Pittsburg's Petition, 217 Pa. St. 227, 66 Atl. 348 [*affirmed* in 207 U. S. 161, 28 S. Ct. 40, 52 L. ed. 151].

48. Tennant's Case, 3 Nebr. 409.

49. Farrelly *v.* Cole, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464; Pittsburg's Petition, 217 Pa. St. 227, 66 Atl. 348 [*affirmed* in 207 U. S. 161, 28 S. Ct. 40, 52 L. ed. 151].

50. White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. *Compare* Speed *v.* Crawford, 3 Metc. (Ky.) 207, 214.

In computing the length of a session, actual working legislative days, exclusive of Sundays and days on which the legislature did not sit, are to be counted. *Ex p.* Cowert, 92 Ala. 94, 9 So. 225; Moog *v.* Randolph, 77 Ala. 597; Sayre *v.* Pollard, 77 Ala. 608; Cheyney *v.* Smith, 3 Ariz. 143, 23 Pac. 680 (in which the court held that the act of congress provided that the sessions of the legislative assemblies of the several territories shall be limited to sixty days' duration, means a session of sixty legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment, not sixty

tive body is sometimes clothed with powers not conferred upon the other.[51] Under the constitution of the United States,[52] and of many of the states, all bills for the raising of revenue must originate in the house of representatives, or the lower house as it is called.[53] Bills of revenue are those which draw money from the people to the state, without giving direct equivalent in return therefor.[54] They do not include bills permitting the taxation of real property mortgages as land [55] in the county where recorded;[56] bills seeking a local object for the accomplishment of which it is necessary to raise money by tax upon the locality affected;[57] bills permitting municipalities to impose license taxes for municipal purposes;[58] bills providing for the collection of fees by certain officers, out of which their salaries are to be paid,[59] or bills licensing the sale of intoxicating liquors.[60] The precise meaning of the clause "to raise revenue" is to levy a tax as a means of collecting revenue,[61] and should not be extended to include bills the incidental result of which may be to create revenue.[62] An appropriation bill is not a bill for raising revenue, although it may necessitate a levy of taxes.[63]

4. Requirements as to Petition or Notice — a. In General. It is often required by constitutional provision that a special or local law shall not be passed until

consecutive days). *Contra*, White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

51. See the constitutions of the several states.

52. U. S. Const. art. 1, § 7.

As to bills of revenue the senate may propose or concur with amendments as on other bills U. S. Const. art. 1, § 7.

53. See the constitutions of the several states.

Historical statement as to causes giving rise to this constitutional restriction see *In re* Opinion of Justices, 126 Mass. 557.

54. *Arkansas.*— Fletcher *v.* Oliver, 25 Ark. 289.

District of Columbia.— Twin City Nat. Bank *v.* Nebeker, 3 App. Cas. 190 [*affirmed* in 167 U. S. 196, 17 S. Ct. 766, 42 L. ed. 134].

Massachusetts.— *In re* Opinion of Justices, 126 Mass. 557.

Montana.— State *v.* Bernheim, 19 Mont. 512, 49 Pac. 441.

New Hampshire.—*In re* Opinion of Justices, 70 N. H. 642, 50 Atl. 329.

Oregon.— Northern Counties Inv. Trust *v.* Sears, 30 Oreg. 388, 41 Pac. 931, 35 L. R. A. 188.

Texas.— Raymond *v.* Kibbe, 43 Tex. Civ. App. 209, 95 S. W. 727.

See 44 Cent. Dig. tit. "Statutes," § 5.

Bills of revenue impose taxes on the people, either directly or indirectly, or lay imposts or excise for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in commen with the rest of the people, of the benefit of good government. U. S. *v.* James, 26 Fed. Cas. No. 15,464, 13 Blatchf. 207. A bill for raising revenue is one which provides for the levy and collection of taxes for the purpose of paying the officers, and of defraying the expenses of the government. Geer *v.* Ouray County, 97 Fed. 435, 38 C. C A. 250. See also Story Comm. Const. § 880.

A succession tax on amount going to foreign heirs, legatees, or donees is a bill for raising revenue. Sala's Succession, 50 La. Ann. 1009, 24 So. 674; Givanovich's Succession, 50 La. Ann. 625, 24 So. 679.

55. Mumford *v.* Sewall, 11 Oreg. 67, 4 Pac. 585, 50 Am. Rep. 462.

56. Dundee Mortg. Trust Inv. Co. *v.* Parrish, 24 Fed. 197.

57. Fletcher *v.* Oliver, 25 Ark. 289; Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455, 1 So. 873; Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462; Millard *v.* Roberts, 202 U. S. 429, 26 S. Ct. 674, 50 L. ed. 1090; Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250 (holding that an act authorizing counties to refund their judgment and bonded debts is not one for raising revenue).

58. Rankin *v.* Henderson, 7 S. W. 174, 9 Ky. L. Rep. 861; Geib *v.* State, 31 Tex. Cr. 514, 21 S. W. 190.

59. Com. *v.* Bailey, 81 Ky. 395; Northern Counties Inv. Trust *v.* Sears, 30 Oreg. 388, 41 Pac. 931, 35 L. R. A. 188; U. S. *v.* Hill, 123 U. S. 681, 8 S. Ct. 308, 31 L. ed. 275.

60. Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; State *v.* Wright, 14 Oreg. 365, 12 Pac. 708; U. S. *v.* Bromley, 12 How. (U. S.) 88, 13 L. ed. 905.

61. Dundee Mortg. Trust Inv. Co. *v.* Parrish, 24 Fed. 197.

A bill for reducing taxation, if it provides for collecting revenue, is a bill for raising revenue. Perry County *v.* Selma, etc., R. Co., 58 Ala. 546.

62. *Georgia.*— Harper *v.* Eberton, 23 Ga. 566.

Kentucky.— Com. *v.* Bailey, 81 Ky. 395.

Montana.— Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462; State *v.* Bernheim, 19 Mont. 512, 49 Pac. 441.

Texas.— Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865.

United States.— Millard *v.* Roberts, 202 U. S. 429, 26 S. Ct. 674, 50 L. ed. 1090; Twin City Nat. Bank *v.* Nebeker, 167 U. S. 196, 17 S. Ct. 766, 42 L. ed. 134 [*affirming* 3 App. Cas. (D. C.) 190]; U. S. *v.* Mayo, 26 Fed. Cas. No. 15,755, 1 Gall. 396.

See 44 Cent. Dig. tit. "Statutes," § 5.

63. *In re* Opinion of Justices, 126 Mass.

notice of the intention to apply therefor shall have been published as prescribed.[64] In the absence of a clause prohibiting the enactment of such legislation without notice the provision is directory and not mandatory.[65] Where it is provided that no such act shall be passed unless such a notice be given, the requirement is absolute.[66] Requirements as to the things necessary to be stated in a petition are held to be directory only.[67]

b. Necessity of Notice. In general, the question whether an act is a local or special one,[68] so as to require notice of intention to apply therefor, is a legislative and not a judicial one.[69] It has been held that notice of intention is not required in case of an act to transfer money from a state to a local fund;[70] of an act relating to a district court in a certain county, where the jurisdiction thereof is not limited to such county,[71] or to a jury commissioner in such a court;[72] of an act relating to cities having more than a certain population according to the last federal census;[73] or of an act providing for the erection of a court house at the joint expense of the state and a county.[74] An act repealing local acts relating to schools in a city is within the requirement,[75] and so is an act excepting certain cities from the provisions of an act permitting cities and towns to issue bonds for specified purposes.[76]

c. Sufficiency of Notice. It is usually sufficient to include in the notice the substance of the proposed law.[77] Proof of publication should be made by affidavit

557; Curryer *v.* Merrill, 25 Minn. 1, 33 Am. Rep. 450.

64. As to special or local laws see *infra*, III, A.

65. McClinch *v.* Sturgis, 72 Me. 288; Day *v.* Stetson, 8 Me. 365.

66. Larkin *v.* Simmons, 155 Ala. 273, 46 So. 451; State *v.* Sayre, 142 Ala. 641, 39 So. 240; Cummins *v.* Gaston, (Tex. Civ. App. 1908) 109 S. W. 476.

But the passage of such an act has been held conclusive of the fact that one notice was given, such fact being jurisdictional. Cutcher *v.* Crawford, 105 Ga. 180, 31 S. E. 139; Bray *v.* Williams, 137 N. C. 387, 49 S. E. 887; Moller *v.* Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116. But see Atty.-Gen. *v.* Tuckerton, 67 N. J. L. 120, 50 Atl. 602.

67. Stevens *v.* Benson, 50 Oreg. 269, 91 Pac. 577 [*followed* in Logan *v.* Benson, 50 Oreg. 563, 91 Pac. 581].

68. As to local or special laws see *infra*, III, A.

69. Caton *v.* Western Clay Drainage Dist., 87 Ark. 8, 112 S. W. 145.

70. Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882.

71. State *v.* Murray, 47 La. Ann. 1424, 17 So. 832; State *v.* Dalon, 35 La. Ann. 1141; State *v.* Orrick, 106 Mo. 111, 17 S. W. 176, 329; State *v.* Hughes, 104 Mo. 459, 16 S. W. 489; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746; Cordova *v.* State, 6 Tex. App. 207, holding that an act providing for a prescribed number of terms in a district court in a certain county was not within the provisions of the constitution as to notice of intention. *Compare* Dudley *v.* Fitzpatrick, 143 Ala. 162, 39 So. 384 (holding that an act providing for the removal of causes from a city court to other courts in the same county is a local bill within this requirement); State *v.* Sayre, 142 Ala. 641, 39 So. 240.

Where a criminal court is limited in its jurisdiction to a certain county an act relating thereto is local, and notice is required. Ashbrook *v.* Schaub, 160 Mo. 107, 60 S. W. 1085.

Where the constitution has expressly conferred power upon the legislature to enact laws on a particular subject, even though local in character, the power is not restricted by a constitutional provision requiring publication of notice of intention to apply for the passage of a local or special law. Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455, 1 So. 873. See also State *v.* Capdevielle, 104 La. 561, 29 So. 215; State *v.* Brownson, 94 Tex. 436, 61 S. W. 114; Boesch *v.* Byrom, 37 Tex. Civ. App. 35, 83 S. W. 18.

72. State *v.* Beeder, 44 La. Ann. 1007, 11 So. 816.

73. Griffin *v.* Drennen, 145 Ala. 128, 40 So. 1016; State *v.* Capdevielle, 104 La. 561, 29 So. 215.

74. Benedict *v.* New Orleans, 115 La. 645, 39 So. 792.

75. Chalfant *v.* Edwards, 173 Pa. St. 246, 33 Atl. 1048.

Under the Texas constitution authorizing the legislature to provide for the formation of school-districts within counties, without the local notice required in other cases of special legislation, the legislature has power to create independent school-districts without giving notice. Snyder *v.* Baird Independent School Dist., (Civ. App. 1908) 109 S. W. 472.

76. Blakey *v.* Montgomery, 144 Ala. 481, 39 So. 745. *Compare* Forman *v.* Hair, 150 Ala. 589, 43 So. 827, holding that notice is unnecessary after the county affected by the act has voted on the question of issuing bonds.

77. Ham *v.* State, 156 Ala. 645, 47 So. 126; *Ex p.* O'Neal, 154 Ala. 237, 45 So. 712; *Ex p.* Kelly, 153 Ala. 668, 45 So. 290; State *v.* Abernathy, 146 Ala. 689, 40 So. 353; State *v.* Tunstall, 145 Ala. 477, 40 So. 135; Uniontown *v.* State, 145 Ala. 471, 39 So. 814; *Ex p.* Black, 144 Ala. 1, 40 So. 133; State *v.* Wilburn, (Ala. 1905) 39 So. 816; State *v.* Williams, 143 Ala. 501, 39 So. 276; Dudley *v.*

or otherwise, as prescribed by law, and be duly spread upon the legislative journals [78] of both houses.[79]

d. Notice Required by Statute. Where notice is required by a statute only, it will not be binding upon subsequent legislatures,[80] and may be entirely disregarded by them.[81]

5. Mode of Enactment. A statute is valid, so far as its enactment is concerned, if all the mandatory requirements prescribed by the constitution regulating legislative proceedings have been complied with, even though provisions which are directory have not been observed.[82] Where the constitution provides that legislation on specified subjects shall be enacted by bill, the legislature cannot by joint resolution legislate in respect to such subjects.[83]

B. Introduction of Bills and Proceedings Before Passage — 1. Time For Introduction. Where the time for the introduction of new bills is limited to a certain number of days after the session of the legislature has commenced,[84]

Fitzpatrick, 143 Ala. 162, 39 So. 384 (holding notice to be sufficient, although it fails to refer to procedure contained in act providing for removal of causes from one local court to another in the same county); Law *v.* State, 142 Ala. 62, 38 So. 798; Stubbs *v.* Galveston, 3 Tex. App. Civ. Cas. § 143.

Notice held insufficient see Larkin *v.* Simmons, 155 Ala. 273, 46 So. 451; Hudgins *v.* State, 145 Ala. 499, 39 So. 717; State *v.* Speake, 144 Ala. 509, 39 So. 224; Norwell *v.* State, 143 Ala. 561, 39 So. 357 (holding that a notice stating that an application would be made for the repeal of the act creating the Walker county law and equity court was insufficient where such act also contained provisions in addition to such repeal); Green *v.* State, 143 Ala. 2, 39 So. 362 (holding that insufficiency of notice in respect to one amendment will not affect sufficiency of such notice as to other amendments); Brame *v.* State, (Ala. 1905) 38 So. 1031; Elba *v.* Rhodes, 142 Ala. 689, 38 So. 807; Tillman *v.* Porter, 142 Ala. 372, 38 So. 647; Alford *v.* Hicks, 142 Ala. 355, 38 So. 752 (holding that where the act specified in the notice would be unconstitutional, the legislature cannot enact a constitutional law on the same subject); Hooton *v.* Mellon, 142 Ala. 245, 37 So. 937; Wallace *v.* Jefferson County Bd. of Revenue, 140 Ala. 491, 37 So. 321 (holding that it is not enough to state in the notice the title or subject of the act, which gives but a faint conception of its substance); Lancaster *v.* Gafford, 139 Ala. 372, 37 So. 108.

Signature unnecessary.— The published notice of intention to apply for the enactment of a local law need not be signed. *Ex p.* Kelly, 153 Ala. 668, 45 So. 290; Dudley *v.* Fitzpatrick, 143 Ala. 162, 39 So. 384.

78. Dudley *v.* Fitzpatrick, 143 Ala. 162, 39 So. 384, holding that the omission of the jurat of the affidavit of publication from the printed copy of the journal is immaterial.

Proof by affidavit that notice was published "regularly in four weekly issues" of a designated weekly newspaper is sufficient. *Ex p.* Black, 144 Ala. 1, 40 So. 133.

Proof of publication.— An affidavit of the publisher of a newspaper, which stated that the notice of the intention to apply for the passage of a local act, contained a copy of the bill proposed, and which was otherwise sufficient, sufficiently proved the giving of the notice of intention. Jacobs *v.* State, 144 Ala. 98, 40 So. 572. Pasting of notice as published, with typewritten copy of notice, on legislative journal constituted sufficient spreading of notice and proof of journal. Childers *v.* Shepherd, 142 Ala. 385, 39 So. 235.

As the Florida constitution does not specifically require that the journals show that notice has been given, the courts are precluded from inquiring into the question. Rushton *v.* State, (Fla. 1909) 50 So. 486.

79. Sellers *v.* State, (Ala. 1909) 50 So. 340.

80. *In re* Opinion of Ct., 63 N. H. 625.

Under such a statute, the absence of formal notice does not invalidate the act, provided the parties affected thereby have notice in fact. People *v.* Calder, 153 Mich. 724, 117 N. W. 314, 126 Am. St. Rep. 550.

81. Smith *v.* Helmer, 7 Barb. (N. Y.) 416.

Where a statute directs as to how a notice shall be given, a failure to comply therewith does not prevent the legislature from acting. Day *v.* Stetson, 8 Me. 365.

82. State *v.* Mason, 155 Mo. 486, 55 S. W. 636. See also State *v.* Swan, 7 Wyo. 166, 51 Pac. 209, 75 Am. St. Rep. 889, 40 L. R. A. 195.

83. Henderson *v.* Collier, etc., Lith. Co., 2 Colo. App. 251, 30 Pac. 40; May *v.* Rice, 91 Ind. 546 (holding that money cannot be appropriated by joint resolution); Boyers *v.* Crane, 1 W. Va. 176.

Joint resolution is a proper means for ordering the secretary of state to publish certain statutes previous to the general publication of all the statutes. State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

The repeal of a law by a joint resolution of two houses of the general assembly, without such resolution having undergone the three several readings prescribed by the constitution, and having received the approval of the council of revision, is invalid. People *v.* Campbell, 8 Ill. 466.

84. Cal. Const. art. 4, § 2; Colo. Const. art. 5, § 19; Ga. Const. § 7, ¶ 15; Mich. Const. art. 4, § 28; N. D. Const. art. 2, § 60.

The object of the constitution in providing

the limitation cannot be evaded by ingrafting on the original bill foreign and disconnected amendments.[85] A substitute that is germane to the subject of the original bill is not a new bill within the meaning of this limitation;[86] and any amendment not departing from the general purposes of the bill,[87] and which is germane to the subject-matter, may be admitted at any time.[88]

2. Proceedings Before Passage — a. Reference to Committees. Legislative rules usually provide for the reference of bills upon introduction to the proper committee, and occasionally it is provided by constitution that such a reference be had and a report made thereon. Such a provision is sufficiently complied with where a bill is referred to and reported by a committee of one house and is passed by the other without reference.[89]

b. Printing Bills. A constitutional requirement that a bill be printed before it shall be considered or become a law does not necessitate printing the bill before it is read.[90]

c. Reading of Bills[91] — (I) *Reasons For Requirement.* The requirement that each bill have three separate readings, prescribed either by constitution or legislative rule, is one of the many restrictions imposed upon the passage of bills to prevent hasty and inconsiderate legislation, surprise, and fraud,[92] by

that no new bill shall be introduced after the first fifty days of the session is to prevent hasty and improvident legislation, and to compel, so far as any previous law can accomplish that result, the careful examination of proposed laws, or at least the affording of opportunity for that purpose. Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203.

85. People *v.* Loomis, 135 Mich. 556, 98 N. W. 262; Atty.-Gen. *v.* Detroit, etc., Plank-Road Co., 97 Mich. 589, 56 N. W. 943; Caldwell *v.* Ward, 83 Mich. 13, 46 N. W. 1024; Sackrider *v.* Saginaw County, 79 Mich. 59, 44 N. W. 165.

86. Hale *v.* McGettigan, 114 Cal. 112, 45 Pac. 1049 (holding that a substitute bill may be introduced in place of several bills amending the whole or parts of an existing act); Atty.-Gen. *v.* Stryker, 141 Mich. 437, 104 N. W. 737; Toll *v.* Jerome, 101 Mich. 468, 59 N. W. 816; Caldwell *v.* Ward, 83 Mich. 13, 46 N. W. 1024; Atty.-Gen. *v.* Amos, 60 Mich. 372, 27 N. W. 571.

Substitute for amendment of city charter. —A bill amending certain sections of a city charter may be substituted for a bill amending other sections thereof, although the subject-matter of the sections amended by the two bills materially differed, since the title of the original bill was sufficient to indicate that an amendment of the charter was in contemplation. Detroit *v.* Schmid, 128 Mich. 379, 87 N. W. 383, 92 Am. St. Rep. 468.

87. Pack *v.* Barton, 47 Mich. 520, 11 N. W. 367.

88. Renackowsky *v.* Detroit Water Com'rs, 122 Mich. 613, 81 N. W. 581; Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

Even though amendments are extensive, they will not render the act of the legislature invalid, if they indicated no purpose to isolate the constitution, or to exceed the proper limits of legislative discretion. Powell *v.* Jackson, 51 Mich. 129, 16 N. W. 369.

89. Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865.

A bill is acted on by a committee when it is reported to the house without recommendation. Walker *v.* Montgomery, 139 Ala. 468, 36 So. 23.

A report by a different committee than the one to which the bill was referred is not a sufficient compliance with the constitutional provision. State *v.* Smith, (Ala. 1909) 50 So. 364.

Where reference is made to a joint conference committee consisting of members of both houses, the committee may report an amended bill germane to the subject-matter embraced in the original bill, notwithstanding a constitutional requirement that bills must originate in either house. Nelson *v.* Haywood County, 91 Tenn. 596, 20 S. W. 1.

90. Massachusetts Mut. L. Ins. Co. *v.* Colorado L. & T. Co., 20 Colo. 1, 36 Pac. 793.

Printing amendments.— Where it is provided that all substantial amendments shall be printed for the use of the members before a final vote is taken on the bill, such provision must be complied with, or the act is void (*In re* House Bill No. 250, 26 Colo. 234, 57 Pac. 49), although it is inapplicable to amendments recommended by a conference committee of the two houses (Pueblo County *v.* Strait, 36 Colo. 137, 85 Pac. 178), and will not prevent the correction of manifest errors in titles at any time before the final passage of the bills (State *v.* Cronin, 72 Nebr. 636, 642, 101 N. W. 325, 327).

The provision that no bill shall be passed unless it shall have been printed and on the desks of the members in its final form at least three legislative days before its final passage is complied with by placing the bill, as printed in the house in which it originated, with all amendments, on the desks of the members of both houses. People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314 [*affirming* 110 N. Y. App. Div. 821, 97 N. Y. Suppl. 535].

91. **Reading of amendments** see *infra*, II, B, 2, d, (III).

92. State *v.* Buckley, 54 Ala. 599; Weill *v.*

providing opportunities for deliberate consideration of them in detail, and for amendment.[93]

(II) *What Constitutes Reading.* A substantial compliance with a constitutional requirement as to the reading of bills is sufficient.[94] To read by title is by universal parliamentary usage considered a reading of a bill,[95] unless it be required by the constitution that a bill be read at length.[96] The requirement that bills be read on different days in each house will not prevent the reading of a bill in one house on the day that it was passed by the other.[97] Unless expressly so stated the journal is not required to show that a bill was read at the times and in the manner prescribed by the constitution.[98]

(III) *Enactment by Reference.* Notwithstanding such a constitutional requirement, it is permissible to pass an act adopting a revised code,[99] incorporat-

Kenfield, 54 Cal. 111; Ramsey County *v.* Heenan, 2 Minn. 330; Phenix Ins. Co. *v.* Perkins, 19 S. D. 59, 101 N. W. 1110.

93. State *v.* Platt, 2 S. C. 150, 16 Am. Rep. 647.

Before the invention of printing, and when the art of reading was unknown to three fourths of the deputies of the nation, to supply this deficiency it was directed that every bill should be read three times in the house. Bentham Pol. Tac. 11, 353.

94. State *v.* Crawford, 35 Ark. 237 (in which case it appeared that a bill originating in the house was read twice in the senate and then recalled by the house, repassed and transmitted a second time to the senate where it was read a third time and passed, and it was held that it had had three separate readings in the senate); *In re* Reading of Bills, 9 Colo. 641, 21 Pac. 477.

95. Webster *v.* Little Rock, 44 Ark. 536; People *v.* McElroy, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609.

The necessity for reading is superseded by printing, and the rule which requires a bill to be read is now satisfied by reading the title and a few of the first words. Cushing L. & Pr. Leg. Assemblies, § 2141.

96. Weill *v.* Kenfield, 54 Cal. 111 (in which case a constitutional provision that a bill "be read on three several days" in each house was held to require a reading at length on each day); State *v.* Dillon, 42 Fla. 95, 28 So. 781; Brown *v.* Collister, 5 Ida. 589, 51 Pac. 417.

Even where it is provided by the constitution that each bill shall be read three times in each house, unless dispensed with by a two-thirds vote, a reading by title has been held sufficient without such vote. Chicot County *v.* Davies, 40 Ark. 200.

97. Smith *v.* Garth, 33 Ark. 17; Worthen *v.* Badgett, 32 Ark. 496.

Where duplicate bills are introduced in both houses the substitution and final passage of the house bill for the senate bill on its order of third reading does not render the substitute bill obnoxious to the constitutional requisite that bills shall be passed on three different days in the senate. Archibald *v.* Clark, 112 Tenn. 532, 82 S. W. 310.

The requirement as to reading separately upon different days is usually held to be mandatory.

Alabama.— State *v.* Buckley, 54 Ala. 509.

Idaho.— Brown *v.* Collister, 5 Ida. 589, 51 Pac. 417; Cohn *v.* Kingsley, 5 Ida. 416, 49 Pac. 985, 38 L. R. A. 74.

Illinois.— Ryan *v.* Lynch, 68 Ill. 160.

Minnesota.— Ramsey County *v.* Heenan, 2 Minn. 330.

Nebraska.— State *v.* Burlington, etc., R. Co., 60 Nebr. 741, 84 N. W. 254.

North Carolina.— Bray *v.* Williams, 137 N. C. 387, 49 S. E. 887; Smathers *v.* Madison County, 125 N. C. 480, 34 S. E. 554; Charlotte *v.* Shepard, 122 N. C. 602, 29 S. E. 842; Union Bank *v.* Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

Oklahoma.— See Sweitzer *v.* Territory, 5 Okla. 297, 47 Pac. 1094, holding that a provision that the reading of a bill on three separate days prior to its passage may be suspended by a two-thirds vote, and by not less than a majority of the members elected, is merely a rule directing the conduct of the legislature.

Utah.— Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

See 44 Cent. Dig. tit. "Statutes," § 12.

Compare Miller *v.* State, 3 Ohio St. 475, holding that such provision is merely directory.

98. *Colorado.*— Massachusetts Mut. L. Ins. Co. *v.* Colorado L. & T. Co., 20 Colo. 1, 36 Pac. 793, holding that a contention that the journal did not show that the bill had been read on three different days is without merit, where it did show that it was read a first and third time.

Kansas.— Weyand *v.* Stover, 35 Kan. 545, 11 Pac. 355.

Minnesota.— *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

North Carolina.— New Hanover County *v.* De Rosset, 129 N. C. 275, 40 S. E. 43.

Oregon.— Mumford *v.* Sewall, 11 Oreg. 67, 4 Pac. 585, 50 Am. Rep. 462.

United States.— Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730 [*affirmed* in 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018].

See 44 Cent. Dig. tit. "Statutes," § 17.

A statement that the bill "was read the third time," entered on the journal, is sufficient to show that it was read three times. Weyand *v.* Stover, 35 Kan. 545, 11 Pac. 355.

99. Georgia Cent. R. Co. *v.* State, 104 Ga. 831, 31 S. E. 532, 42 L. R. A. 518.

ing a corporation by reference to its constitution and by-laws, without embodying them in the act,[1] or declaring valid and binding certain rules of the common law,[2] without reading the matter referred to and adopted.

(IV) *SUSPENSION OF RULES.* It is occasionally provided by the constitution that the rule as to reading bills may be suspended by a vote of the house in case of urgency; the house itself being the judge of what constitutes urgency.[3]

d. Amendment of Bills — (I) *IN GENERAL.* In the absence of a special constitutional requirement it is not essential that the journal of the house should show the adoption of amendments,[4] although it is the usual practice to note such fact. If the journals show that certain amendments were stricken out and the bill as approved contained such amendments it is invalid.[5]

(II) *CONSTITUTIONAL REQUIREMENTS.* A constitutional requirement that a bill shall not be so altered or amended, in the course of its enactment, as to change its original purpose, is not to be so construed as to prevent the introduction of matter extending the scope and operation of the bill, providing such matter is germane to the object sought to be accomplished.[6]

1. Bibb County L. Assoc. *v.* Richards, 21 Ga. 592.

2. Dew *v.* Cunningham, 28 Ala. 466, 65 Am. Dec. 362. *Compare* Phenix Ins. Co. *v.* Perkins, 19 S. D. 59, 101 N. W. 1110.

3. Weyand *v.* Stover, 35 Kan. 545, 11 Pac. 355; Hull *v.* Miller, 4 Nebr. 503.

The suspension may be effected by a resolution naming the bill (People *v.* Glenn County, 100 Cal. 419, 35 Pac. 302, 38 Am. St. Rep. 305) adopted by the vote required by the constitution (Frellsen *v.* Mahan, 21 La. Ann. 79).

The body of the bill need not state the emergency which necessitates the suspension of the rules. Couk *v.* Skeen, 109 Va. 6, 63 S. E. 11.

4. West *v.* State, 50 Fla. 154, 39 So. 412; Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

In Alabama the constitution requires amendments to bills to be entered at length on the journal of the house where adopted, and provides that amendments in one house shall be concurred in by the other on a vote being taken and the ayes and nays entered in the journal. It was held that concurrence was sufficiently recorded by entering the names of those voting therefor on the journal, although the amendment was not set out thereon. State *v.* Porter, 145 Ala. 541, 40 So. 144.

5. State *v.* Wendler, 94 Wis. 369, 68 N. W. 759.

A material change in the title of an act after its passage will invalidate it, where constitutionally the title of an act is an essential part of it. State *v.* Burlington, etc., R. Co., 60 Nebr. 741, 84 N. W. 254; Chicago, etc., R. Co. *v.* Smyth, 103 Fed. 376.

A new bill of the same character and having the same general object may be regarded as an amendment and be passed by concurrence. Brake *v.* Callison, 122 Fed. 722 [*affirmed* in 129 Fed. 196].

The legislature may pass an amendment to a bill which is in the hands of the governor awaiting his consideration. McKenzie *v.* Baker, 88 Tex. 669, 32 S. W. 1038.

6. Southern R. Co. *v.* Mitchell, 139 Ala. 629, 37 So. 85; Henderson *v.* State, 94 Ala. 95, 10 So. 332; Hall *v.* Steele, 82 Ala. 562, 2 So. 650; Stein *v.* Leeper, 78 Ala. 517 (holding that the original purpose of a bill to prohibit the sale of liquor in specified localities is not changed by the addition of other localities); Harrison *v.* Gordy, 57 Ala. 49; Vincenheller *v.* Reagan, 69 Ark. 460, 64 S. W. 278; Loftin *v.* Watson, 32 Ark. 414; *In re* House Bill No. 250, 26 Colo. 234, 57 Pac. 49; Airy *v.* People, 21 Colo. 144, 40 Pac. 362; Massachusetts Mut. L. Ins. Co. *v.* Colorado L. & T. Co., 20 Colo. 1, 36 Pac. 793; *In re* New Counties, 9 Colo. 624, 21 Pac. 472; State *v.* Mason, 155 Mo. 486, 55 S. W. 636.

Although the provision be mandatory, it should not receive so rigid or narrow a construction as to embarrass or hamper the two houses in amending and perfecting their bills, and drive them to accomplish by a number of bills that which might be accomplished by amending a bill without adding foreign or incongruous matters, or perverting its original purpose. Cooley Const. Lim. 142.

Any alteration of the form of a bill, as by increasing or decreasing the number of sections (*In re* Amendments of Legislative Bills, 19 Colo. 356, 35 Pac. 917; Nelson *v.* Haywood County, 91 Tenn. 596, 20 S. W. 1), or changing its title to conform to its substance (State *v.* Doherty, 3 Ida. 384, 29 Pac. 855; State *v.* Field, 119 Mo. 593, 24 S. W. 752) does not affect its validity within the purview of the constitutional inhibition.

The striking out of the word "written" by amendment is not a material change and does not affect the validity of the act. State *v.* Semmes, (Ala. 1909) 50 So. 120.

A material change in the title of a bill after it has passed both houses of the legislature, and before its presentation to the governor for his approval or rejection, renders the act unconstitutional and void. Weis *v.* Ashley, 59 Nebr. 494, 81 N. W. 318, 80 Am. St. Rep. 704. Under the constitution of Nebraska the title is an essential part of the bill. Chicago, etc., R. Co. *v.* Smyth, 103 Fed. 376.

(III) *READING OF AMENDMENTS.* The constitutional requirement that bills be read in course of their passage [7] does not apply to amendments so as to compel bills to be read the required number of times in their amended forms.[8]

C. Passage of Bills — 1. IN GENERAL. Certain prerequisites to the final passage of bills are prescribed by constitutional provisions specially applicable to those embracing or relative to certain subjects or affecting local or special interests,[9] and a compliance therewith is essential to their validity.[10] The fact that persons not members were permitted to sit upon the floor of both houses and consult and advise with members of the legislature will not invalidate the legislation enacted.[11]

2. TIME OF PASSAGE.[12] A requirement as to the time when certain bills shall be passed is prescribed in some constitutions.[13]

3. VOTING UPON BILLS [14] **— a. Mode of Voting.** State constitutions usually provide that on the final passage of a bill the vote shall be by yeas and nays. This provision is imperative and must be strictly followed.[15] The limitation as to yeas

Whether or not an amendment to a bill is a substantial one, effecting a change in its general purposes, is a judicial rather than a legislative question. *In re* House Bill No. 250, 26 Colo. 234, 57 Pac. 49.

7. See *supra*, II, B, 2, c.

8. *California.*— People *v.* Thompson, (1885) 7 Pac. 142.

Florida.— State *v.* Dillon, 42 Fla. 95, 28 So. 781; State *v.* Hocker, 36 Fla. 358, 18 So. 767.

Illinois.— People *v.* Wallace, 70 Ill. 680.

Louisiana.—Allopathic State Bd. *v.* Fowler, 50 La. Ann. 1358, 24 So. 809.

Nebraska.— Cleland *v.* Anderson, 66 Nebr. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. N. S. 136; Richards *v.* State, 65 Nebr. 808, 91 N. W. 878; State *v.* Liedtke, 9 Nebr. 490, 4 N. W. 75.

North Carolina.— Brown *v.* Stewart, 134 N. C. 357, 46 S. E. 741.

Ohio.— Miller *v.* State, 3 Ohio St. 475.

South Carolina.— State *v.* Brown, 33 S. C. 151, 11 S. E. 641.

Tennessee.— Nelson *v.* Haywood County, 91 Tenn. 596, 20 S. W. 1.

United States.— Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35; Cantini *v.* Tillman, 54 Fed. 969.

See 44 Cent. Dig. tit. "Statutes," § 16.

9. As to local or special laws see *infra*, III.

10. Wittowsky *v.* Jackson County, 150 N. C. 90, 63 S. E. 275.

For instance a constitutional requirement that a bill relating to a city be sent to the mayor thereof for his acceptance prevents its enactment into a law without such acceptance. McGrath *v.* Gront, 171 N. Y. 7, 63 N. E. 547; Chrystal *v.* New York, 63 N. Y. App. Div. 93, 71 N. Y. Suppl. 352.

Minor defects in procedure not pertaining to essentials, and not within some constitutional prohibition, as where through clerical error words were omitted from the title which should have been included (Larrison *v.* Peoria, etc., R. Co., 77 Ill. 11; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526), or through oversight a motion to strike out an enacting clause was not rescinded (Wenner *v.* Thornton, 98 Ill. 156) will not affect the validity of the act after its approval by the governor.

Where a member, in calling up a bill, refers to it by its right number, the law cannot be defeated merely because he stated the title incorrectly. Ellis *v.* Parsell, 100 Mich. 170, 58 N. W. 839.

11. State *v.* Iron Cliffs Co., 54 Mich. 350, 20 N. W. 493.

12. As to time of passage as affecting time of taking effect see *infra*, VII, C, 6.

13. Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882.

Bills for raising revenue.— An act which affords a general system for the maintenance, improvement, and protection of the public roads of a certain county is not within a constitutional prohibition against the passage of bills for raising revenue within the last five days of a legislative session. Kennamer *v.* State, 150 Ala. 74, 43 So. 482.

Under certain circumstances this provision has been held to be directory. McClinch *v.* Sturgis, 72 Me. 288.

14. As to entry of vote in journals see *infra*, II, C, 5, c.

15. *Arkansas.*— State *v.* Bowman, (1909) 118 S. W. 711.

Illinois.— Burrit *v.* State Contracts Com'rs, 120 Ill. 322, 11 N. E. 180; Ryan *v.* Lynch, 68 Ill. 160; Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Minnesota.— Lincoln *v.* Haugan, 45 Minn. 451, 48 N. W. 196; Ramsey County *v.* Heenan, 2 Minn. 330.

New York.— People *v.* Chenango, 8 N. Y. 317.

North Carolina.— Debnam *v.* Chitty, 131 N. C. 657, 43 S. E. 3; Hooker *v.* Greenville, 130 N. C. 472, 42 S. E. 141; Rodman-Heath Cotton Mills *v.* Waxhaw, 130 N. C. 293, 41 S. E. 488; New Hanover County *v.* De Rosset, 129 N. C. 275, 40 S. E. 43; Stanley County *v.* Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439.

United States.— Portland Gold Min. Co. *v.* Duke, 164 Fed. 180, 90 C. C. A. 166; Stanley County *v.* Coler, 96 Fed. 284, 37 C. C. A. 484, 113 Fed. 705, 51 C. C. A. 379 [*affirmed* in 190 U. S. 437, 23 S. Ct. 811, 47 L. ed. 1126].

See 44 Cent. Dig. tit. "Statutes," § 20.

It is not sufficient to merely enter the number voting in the affirmative or the

and nays is sometimes restricted to bills of a specified character, in which case the question involved is whether or not a bill comes within the class.[16]

b. Number of Votes Required[17] — (i) *In General.* Unless restricted by constitutional provision,[18] when a quorum of a legislative body is present, the votes of a majority of the quorum will be sufficient to pass a bill.[19] It is frequently provided that bills of a specified character be passed by a greater vote than a majority, usually three fourths or two thirds.[20]

number voting in the negative. Smithee *v.* Garth, 33 Ark. 17.

If there is no constitutional requirement as to the entry of a vote by yea and nay it is sufficient if it appear upon the record that the bill was passed by a majority vote. This practice, however, may be governed by the rules of the house. Lincoln *v.* Haugan, 45 Minn. 451, 48 N. W. 196.

Concurrence after final passage by one house, in amendments made by the other, does not require voting by yea and nay. State *v.* Corbett, 61 Ark. 226, 32 S. W. 686; Browning *v.* Powers, (Mo. 1897) 38 S. W. 943; New Hanover County *v.* Armour Packing Co., 135 N. C. 62, 47 S. E. 411; Callison *v.* Brake, 129 Fed. 196, 63 C. C. A. 354. Nor does the requirement apply to a motion to reconsider action taken on the passage of a bill. Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; People *v.* Chenango County, 8 N. Y. 317.

16. Lutterloh *v.* Fayetteville, 149 N. C. 65, 62 S. E. 758; Stanley County *v.* Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439.

In Tennessee a "bill of a general character" requires the calling of the ayes and nays on its final passage. A bill creating a private banking corporation is not such a bill. Ferguson *v.* Miners, etc., Bank, 3 Sneed 609. Nor is a bill changing two counties from one judicial circuit to another. State *v.* Algood, 87 Tenn. 163, 10 S. W. 310.

In Wisconsin, where a bill "imposes, continues or renews a tax, or creates a debt or charge, or makes, continues, or renews an appropriation" or "releases, discharges, or commutes a claim or demand of the state," the question must be taken by yeas and nays. Const. art. 8, § 8. A law creating a judicial district is not within this provision. *In re* Ryan, 80 Wis. 414, 50 N. W. 187; McDonald *v.* State, 80 Wis. 407, 50 N. W. 185.

17. **As to number of votes required in act creating corporation** see CORPORATIONS, 10 Cyc. 189.

18. **In many of the states** it is specially provided by constitution that a majority of all the members elected to either house shall be necessary for the passage of any bill. Such provision is mandatory, and a law is not valid unless the required number of votes be cast therefor. Kelley *v.* Secretary of State, 149 Mich. 343, 112 N. W. 978 (holding that the vote of the presiding officer, in case of a division, does not render the bill or joint resolution a law, under a constitutional provision restricting his right to vote to cases of division in committee of the whole); Ramsey County *v.* Heenan, 2 Minn. 330; State *v.* Davis, 66 Nebr. 333, 92 N. W. 740; Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

A concurrent resolution comes within the meaning of a constitutional provision that a bill or joint resolution, to become a law, must receive the concurrence of a majority of all the members elected to each house. Kelley *v.* Secretary of State, 149 Mich. 343, 112 N. W. 978.

The emergency clause to a legislative act, to be effective under the constitution of Colorado, must be adopted by a vote of two thirds of all the members elected to each house. If not so adopted, it should be struck out before enrolment, even though the bill be otherwise constitutionally passed. *In re* Emergency Clause, 18 Colo. 291, 32 Pac. 647.

A reference in an act to another act, whereby the act referred to is applied to a specified condition, is not necessarily an attempt to reënact such act in violation of a provision requiring the votes of a majority of the members in favor of a bill. Temmick *v.* Owings, 70 Md. 246, 16 Atl. 719.

19. U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. ed. 321. And see, generally, PARLIAMENTARY LAW, 29 Cyc. 1689.

20. Allen *v.* State Auditor, 122 Mich. 324, 81 N. W. 113, 80 Am. St. Rep. 573, 47 L. R. A. 117; State *v.* Voris, 10 Ohio S. & C. Pl. Dec. 451, 8 Ohio N. P. 16.

Where such a provision is made it means a vote of two thirds of all of the members of each house. State *v.* Gould, 31 Minn. 189, 17 N. W. 276. *Contra*, State *v.* Skeggs, 154 Ala. 249, 46 So. 268; Walker *v.* State, 12 S. C. 200; Morton *v.* Comptroller-Gen., 4 S. C. 430.

The question which arises under such a provision usually pertains to the character of the bill. Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 499, 38 Am. Rep. 793 (holding that an act providing for the transfer of prisoners to the care of a certain corporation, without charge, was not a donation or gratuity within the meaning of the provision requiring bills of such a character to be passed by a two-thirds vote); Mills County *v.* Brown County, 87 Tex. 475, 29 S. W. 650 (holding that a two-thirds vote is not necessary to pass an act prescribing the manner of enforcing the liability of a new county for its proportionate part of the debt of a county out of which it was created, under a provision of the constitution requiring a two-thirds vote to pass an act creating a new county, etc.).

Final enactment intended.— A constitutional requirement of a two-thirds vote on legislation at a special session on subjects

(II) *Acts Imposing a Tax.* A constitutional regulation as to the number of votes required to pass a law imposing a tax means a state tax, and not a local tax.[21]

(III) *Acts Appropriating Public Moneys* — (A) *In General.* A requirement that the legislature shall not authorize the expenditure or disposition of state money, property, or credit without the concurrence of two thirds of the members of each house [22] does not apply to the release of a claim against the state;[23] nor does it apply to a law regulating the manner in which moneys shall be paid out of the state treasury.[24] Where there is an exception in favor of laws appropriating money for the state's necessary expenses, the legislature has the implied power of determining what is a necessary expense.[25]

(B) *For Local or Private Purposes.* The constitutional requirement of a two-thirds vote of the members of the legislative body in favor of a bill appropriating public money or property for a private or local purpose does not apply to a bill providing for the payment of services rendered in a public capacity.[26] Nor is a

other than those designated in the proclamation contemplates such a vote on the final enactment of a law, and not during the process of enactment. State *v.* Skeggs, 154 Ala. 249, 46 So. 268.

21. Jones *v.* Chamberlain, 109 N. Y. 100, 16 N. E. 72; *In re* McPherson, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502; Whittaker *v.* Janesville, 33 Wis. 76; Watertown *v.* Cady, 20 Wis. 501.

Such a regulation is applicable to a law imposing a tax upon a collateral inheritance (Matter of Stickney, 110 N. Y. App. Div. 294, 97 N. Y. Suppl. 336 [*affirmed* in 185 N. Y. 107, 77 N. E. 993]. See *In re* Weeks, 185 N. Y. 541, 77 N. E. 1197 [*affirming* 109 N. Y. App. Div. 859, 96 N. Y. Suppl. 876], but not to one imposing a commutation tax on militiamen in lieu of services (People *v.* Chenango County, 8 N. Y. 317), nor to one compelling a municipality to compensate the owners of property for damages caused by a riot or mob (Darlington *v.* New York, 31 N. Y. 164, 28 How. Pr. 352, 88 Am. Dec. 248).

The fact that a law will doubtless lead to the necessity of taxation does not make it a law imposing a tax. Darlington *v.* New York, 31 N. Y. 164, 28 How. Pr. 352, 88 Am. Dec. 248; New York *v.* Gorman, 26 N. Y. App. Div. 191, 49 N. Y. Suppl. 1026.

22. **The provision only applies** to an appropriation of money or property. An act authorizing a corporation to use and occupy lands under water for the purpose of a bridge is not an appropriation of property. New York, etc., Bridge Co. *v.* Skelly, 90 Hun (N. Y.) 312, 35 N. Y. Suppl. 920 [*affirmed* in 148 N. Y. 540, 42 N. E. 1088]. An act regulating the distribution of money collected on account of the liquor traffic between the state and municipalities is not an appropriation of money. People *v.* Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344. A law disposing of money collected by a tax before it is paid into the state treasury is not within this constitutional requirement. Alcorn *v.* Hamer, 38 Miss. 652; People *v.* Ronner, 185 N. Y. 285, 77 N. E. 1061; Seneca County *v.* Allen, 99 N. Y. 532, 2 N. E. 459; Darlington *v.* New York, 31 N. Y. 164, 28 How. Pr. 352, 88 Am. Dec. 248.

An act appointing a commission to adjust and settle by arbitration a liability on contracts between the state and a private person is not an act attempting to make an "appropriation of any money, or the creation of any debt," which under Ky. Const. art. 2, § 40, can only be passed by a majority vote of all the members of each house. Hewitt *v.* Craig, 86 Ky. 23, 5 S. W. 280, 9 Ky. L. Rep. 232.

23. State *v.* Mills, 52 Ala. 484.

Claims against state.— It is sometimes provided that certain claims against the state shall not be paid by appropriation except by a two-thirds vote. Fordyce *v.* Godman, 20 Ohio St. 1.

Support of state institution.— An act, the sole object of which is to provide for the support of a state institution, does not come within such a provision. State *v.* Oglevee, 36 Ohio St. 211.

Institution under state control.— Where it is provided that no appropriation shall be made to an educational institution not "under the absolute control of the State," unless by a vote of two thirds of all the members elected to each house, an act appropriating money to a medical college managed by a board of trustees who are not public officers, authorized to prescribe courses of study and to appoint instructors, is invalid without such vote, since the institution is not under the absolute control of the state. State *v.* Sowell, 143 Ala. 494, 39 So. 246.

24. People *v.* Beveridge, 38 Ill. 307.

25. State *v.* Sloan, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 106.

Extraordinary expenses may be "necessary" and may be authorized by a majority vote. State *v.* Moore, 76 Ark. 197, 88 S. W. 881, 70 L. R. A. 671.

26. People *v.* Black Rock Harbor Canal Bd., 1 Thomps. & C. (N. Y.) 309 [*affirmed* in 55 N. Y. 390, and *following* People *v.* Densmore, 1 Thomps. & C. (N. Y.) 280]; Morris *v.* People, 3 Den. (N. Y.) 381.

An appropriation to pay the debt of the state is not an appropriation for a private

bill for the release of lands which have escheated to the state within the meaning of the constitution a bill which requires a two-thirds vote.[27]

4. Transmission From One House to Other and Concurrence in Amendments — a. Transmission of Bill. Parliamentary practice requires the passage of a bill in its final form by both houses of a legislative body, and transmission from one house to the other of a bill and all its amendments should appear on the record. The bill as acted upon by both houses should be the same, but the omission of a word from the title by clerical error in its passage from one house to the other will not affect the validity of the act, if such error was of such a character as not to deceive or mislead any one.[28]

b. Concurrence in Amendment After Transmission. A bill is not duly enacted unless it is voted on affirmatively by both houses in its final form.[29] It follows

purpose. People *v.* Densmore, 1 Thomps. & C. (N. Y.) 280.

The purpose is local when the money is to be expended in a particular locality, even though the public be remotely benefited thereby. People *v.* Allen, 42 N. Y. 378 [*reversing* 1 Lans. 248], holding that an appropriation for the improvement of the navigation of a designated river is for a local purpose, requiring a two-thirds vote.

The appropriation must be of the money or property of the state. A bill authorizing the expenditure of money by a municipality is not within the restriction. People *v.* Havemeyer, 3 Hun (N. Y.) 97. So an act providing for the compensation of a sheriff of a county, with appropriate machinery to provide the means, does not appropriate public moneys, either state or local, for a local purpose, and does not therefore require a two-thirds vote. New York *v.* Gorman, 26 N. Y. App. Div. 191, 49 N. Y. Suppl. 1026. And a relief act making it the duty of a state auditor to determine the amount of tax due from a private corporation is not in any sense an appropriation of money from the public treasury requiring a two-thirds vote for its enactment. Tallassee Mfg. Co. *v.* Glenn, 50 Ala. 489. To bring a bill appropriating property rights within the requirement, it must appear that the rights disposed of are the property of the state. Sweet *v.* Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289, holding that a bill authorizing a city to take water not required by the state for canal purposes is not a bill appropriating public property for a local purpose, since the water not required for the canal did not belong to the state. The appropriation is not within the restriction if it be for a public purpose, as in the case of an appropriation of state lands for the construction of a state road. McRae *v.* State Land Office Com'rs, 89 Mich. 463, 50 N. W. 1091. If the state in carrying out a policy of justice appropriates, through its legislature, money to repair an injury inflicted either upon an individual or a locality, it is but a part of its legitimate functions and duties as a sovereign, and the purpose is public. Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358, 14 L. R. A. 481 (in which case it was held that an act appropriating money for dredging the channel of a river and of a mill-race owned by a private person, so as to remedy an injury caused by the taking of the water from such river and mill-race for canal purposes, was not a private or local bill); Morris *v.* People, 3 Den. (N. Y.) 381.

Municipal indebtedness.— An act authorizing municipal corporations to bond in aid of railroads does not appropriate public money and property within the meaning of the provision of the constitution requiring a two-thirds vote for its passage. *In re* Kingston Tax-payers, 40 How. Pr. (N. Y.) 444.

Jurisdiction of claim against state.— The requirement of a two-thirds vote does not apply to an act which confers on a named court jurisdiction to pass upon the claim of a purchaser of public land, whose title has failed by reason of an error of a state officer. Wheeler *v.* State, 190 N. Y. 406, 83 N. E. 54, 123 Am. St. Rep. 555.

27. Englishbe *v.* Helmuth, 3 N. Y. 294.

28. Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526.

The fact that a mistake was made in the number of a bill in transmitting it from one house to the other will not vitiate it, it appearing that the bill was the same. Williams *v.* State, 6 Lea (Tenn.) 549.

Retention of title.— There is no rule of parliamentary law requiring that an act shall retain the same title through all its stages in both houses. Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; Binz *v.* Weber, 81 Ill. 288; Larrison *v.* Peoria, etc., R. Co., 77 Ill. 11; Plummer *v.* People, 74 Ill. 362; State *v.* Field, 119 Mo. 593, 24 S. W. 752; Cantini *v.* Tillman, 54 Fed. 969; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730 [*affirmed* in 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018].

29. Rogers *v.* State, 72 Ark. 565, 82 S. W. 169; People *v.* Knopf, 198 Ill. 340, 64 N. E. 842, 1127.

Immaterial clerical errors in the title made in one house will not invalidate the act, if not concurred in by the other. Plummer *v.* People, 74 Ill. 361.

Where a section of the Revised Statutes has two numbers and the reference to it in a bill passed by one house is to one number and the section is given the other number in the other house, a concurrence in the amendment is not essential. Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119.

that after amendments have been made in the house to which it was transmitted, they must be concurred in by the house in which it originated.[30] Where the house making the amendment votes by a constitutional majority to recede therefrom, the bill is duly passed,[31] although the better parliamentary practice would be to again place the bill upon its final passage.[32]

5. Journals — a. In General. It is required either by constitutional provision or by statute that legislative assemblies shall keep journals in which the records of the proceedings shall be entered. The forms of the journals and the methods of making entries therein differ in the respective states.[33]

30. *Louisiana.*— State *v.* Laiche, 105 La. 84, 29 So. 700.

Michigan.— People *v.* Burch, 84 Mich. 408, 47 N. W. 765.

Nebraska.— Moore *v.* Neese, 80 Nebr. 600, 114 N. W. 767.

New Hampshire.— *In re* Opinion of Justices, 35 N. H. 579.

Wyoming.— State *v.* Swan, 7 Wyo. 166, 51 Pac. 209, 75 Am. St. Rep. 889, 40 L. R. A. 195.

See 44 Cent. Dig. tit. "Statutes," § 26.

A failure to concur in any amendment so made will invalidate the entire act. Prescott *v.* Illinois, etc., Canal, 19 Ill. 324.

The vote of concurrence must be that required on the final passage of the bill. Stephens *v.* Labette County, 79 Kan. 153, 98 Pac. 790; Norman *v.* Kentucky Bd. of Managers, etc., 93 Ky. 537, 20 S. W. 901, 14 Ky. L. Rep. 529, 18 L. R. A. 556. Concurrence by a majority is sufficient for the adoption of the amendments, the nature of which is not shown by the journals, under the provisions of Ala. Const. § 22, art. 4, permitting amendments to be concurred in by a majority vote, although the bill amended related to boundaries of counties, and which, under Ala. Const. § 2, art. 2, could not be passed except by a two-thirds vote. Jefferson County *v.* Crow, 141 Ala. 126, 37 So. 469; Jackson *v.* State, 131 Ala. 21, 31 So. 380.

An immaterial amendment need not in any way affect the substance where a reference to "Thompson & Steger's Code" was struck out and the "Revised Code of Tennessee" inserted in its place, both being the same book, it was held that there was not any substance and amendments requiring concurrence. Gaines *v.* Horrigan, 4 Lea (Tenn.) 608.

An omission of an emergency clause not concurred in by the house in which the bill originated is fatal. People *v.* Knopf, 198 Ill. 340, 64 N. E. 842, 1127.

Where a bill as approved contained important clauses which the journal shows were stricken out by amendment in one house, it is invalid. State *v.* Wendler, 94 Wis. 369, 68 N. W. 759.

31. Robertson *v.* People, 20 Colo. 279, 38 Pac. 326; People *v.* De Wolf, 62 Ill. 253 (holding that where the vote upon the motion to recede was less than a constitutional majority, the bill never became a law); *In re* Howard County, 15 Kan. 194 (in which case the court based its opinion upon the fact that the receding from amendments by a sufficient vote of the members of the house in which such amendments were added had always been considered a sufficient compliance with the constitutional provision requiring a vote to be taken and entered upon the final passage of a bill); People *v.* Chenango, 8 N. Y. 317 (holding that the constitutional requirement as to yeas and nays is complied with when a bill has been passed by such a vote in both houses and subsequent amendments have been passed in the same manner, which upon being disagreed to by one of the houses, was receded from by a vote without calling the yeas and nays).

If, after receding from the amendment, the bill is enrolled and signed by the governor, with the amendment still remaining in the bill, it is not valid. Smithee *v.* Campbell, 41 Ark. 471.

Where a conference committee makes a report recommending the recession by one house from certain specific amendments, the report must be adopted by the house in which the amendments were made and also by the house to which the bill had been transmitted with the amendments included. Jefferson County *v.* Crow, 141 Ala. 126, 37 So. 469.

The adoption by one house of a report of a conference committee recommending that the other house recede from certain specific amendments is not evidence of a concurrence in other proposed amendments not embraced within the committee's report. Jefferson County *v.* Crow, 141 Ala. 126, 37 So. 469, in which case the court stated that any implication, from the adoption by one house of the report of a conference committee, that it was intended thereby to concur in amendments proposed by the other house, must be a necessary implication and not an inconclusive one.

32. *In re* Howard County, 15 Kan. 194.

33. **A constitutional requirement that each house** of a legislature keep a journal of its proceedings means that the journal should show all the proceedings in each house and all of the steps taken in the passage of every bill. Montgomery Beer Bottling Works *v.* Gaston, 126 Ala. 425, 28 So. 497, 85 Am. St. Rep. 42, 51 L. R. A. 396; Cohn *v.* Kingsley, 5 Ida. 416, 49 Pac. 985, 38 L. R. A. 74.

The term "entered upon the journal," as applied to a provision relative to a proposed constitutional amendment, means that the amendment shall be spread at length on the journal, and the yeas and nays set out therein in full or at length. Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 493, 11 Pac. 3 (where the court said: "The words 'entered in'

b. Compliance With Constitutional Requirements. In the passage of a bill by either house the journal thereof must show affirmatively that all the constitutional requirements were complied with by it;[34] but such compliance will be presumed, notwithstanding the failure of the journal to show such compliance, where it otherwise appears that the legislature has expressed its will in accordance with the constitution.[35] If it appears from the journal that a bill had not been actually

are to have their natural and ordinary meaning. The word 'entered' must be construed in connection with the preposition 'in' and their journals. Whatever meaning we may attribute to the word 'enter' or 'entry' taken by itself, in arriving at its meaning here we cannot dissociate it from the words used with it. We must arrive at the meaning of the word 'entered' when connected with the words joined with it, that is, the context"); Koehler *v.* Hill, 60 Iowa 543, 556, 14 N. W. 738, 15 N. W. 609 (where the court said: "It may be suggested that to enter or entering on the journal does not necessarily mean spreading the same at length thereon. This will be conceded, but that it may so mean must also, we think, be conceded. See Webster's Dictionary. Various instances where the words 'to enter' or 'entered' occur in statutes and Constitution may, no doubt, be cited, where they do not mean spread at length. But this is not of much significance — for the object to be attained must be considered in determining the meaning of the word entered, as used in the Constitution. The evident intent of the Constitution is that the proposed amendment should be entered at length on the journal, or, at least, so entered as to leave no reasonable doubt as to its provisions"). And see Thomason *v.* Ruggles, 69 Cal. 465, 11 Pac. 20.

Entries in the journal are sometimes made after the adjournment of the legislature under provisions made therefor either by the rules or by statute; but after the journal has been delivered to the secretary of state for filing in his office, the clerk cannot direct entries to be made, since his official connection with the journal has terminated. Montgomery Beer Bottling Works *v.* Gaston, 126 Ala. 425, 28 So. 497, 85 Am. St. Rep. 42, 51 L. R. A. 396.

Although journals have been held to be controlling as regards what the legislature does in respect to the passage of a bill they are not necessarily so as to the contents of a statute. Milwaukee County *v.* Isenring, 109 Wis. 9, 85 N. W. 131, 53 L. R. A. 635.

34. *Arkansas.*— Pelt *v.* Payne, 60 Ark. 637, 30 S. W. 426; Burr *v.* Ross, 19 Ark. 250.

Idaho.— Cohn *v.* Kingsley, 5 Ida. 416, 49 Pac. 985, 38 L. R. A. 74.

Illinois.— People *v.* Starne, 35 Ill. 121, 85 Am. Dec. 348; Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Indiana.— McCulloch *v.* State, 11 Ind. 424.

Missouri.— State *v.* Mead, 71 Mo. 266.

Nebraska.— State *v.* Burlington, etc., R. Co., 60 Nebr. 741, 84 N. W. 254; Webster *v.* Hastings, 59 Nebr. 563, 81 N. W. 510.

North Carolina.— Stanley Co. *v.* Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439.

Wisconsin.— State *v.* Wendler, 94 Wis. 369, 68 N. W. 759.

Wyoming.— State *v.* Swan, 7 Wyo. 166, 51 Pac. 209, 75 Am. St. Rep. 889, 40 L. R. A. 195.

United States.— Coler *v.* Stanly County, 89 Fed. 257 [*affirmed* in 113 Fed. 725, 96 Fed. 285, 37 C. C. A. 484 (*affirmed* in 190 U. S. 437, 28 S. Ct. 811, 47 L. ed. 1126)].

See 44 Cent. Dig. tit. "Statutes," § 27.

If the constitution expressly requires an entry of a record upon the journal, a failure so to do would necessarily invalidate the act.

Alabama.— Walker *v.* Griffith, 60 Ala. 361.

Arkansas.— Worthen *v.* Badgett, 32 Ark. 496. But see Pelt *v.* Payne, 60 Ark. 637, 30 S. W. 426.

Minnesota.— State *v.* Hastings, 24 Minn. 78. But see Lincoln *v.* Haugan, 45 Minn. 451, 48 N. W. 196.

Ohio.— Miller *v.* State, 3 Ohio St. 475.

Tennessee.— Williams *v.* State, 6 Lea 549.

See 44 Cent. Dig. tit. "Statutes," § 27.

Compare Stanly Co. *v.* Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439, holding that the provision was directory only.

If the constitution does not require legislative journals to affirmatively show that a particular thing necessary to the validity of the legislative action was done, mere silence will not invalidate the act. Hollingsworth *v.* Thompson, 45 La. Ann. 222, 12 So. 1, 40 Am. St. Rep. 220.

Title of bill.— In the absence of special constitutional or statutory requirement a journal need not specify the title of a bill. Chicago, etc., R. Co. *v.* Smyth, 103 Fed. 376; Cotting *v.* Kansas City Stock-Yards Co., 82 Fed. 839. And see State *v.* Swiggart, 118 Tenn. 556, 102 S. W. 75, holding that all that is necessary is that the title or caption be so described as to identify it. An abbreviated title is sufficient. Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

A mere clerical omission in the journal will not be fatal if there is sufficient of record to show a substantial compliance with the constitutional requirements. State *v.* Skeggs, 154 Ala. 249, 46 So. 268; Price *v.* Moundsville, 43 W. Va. 523, 27 S. E. 218, 64 Am. St. Rep. 878, holding that the court will supply all clerical mistakes in such records to prevent the failure of a solemn legislative enactment by mere clerical error.

35. *Alabama.*— *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

Dakota.— Territory *v.* O'Connor, 5 Dak. 397, 37 N. W. 765.

Georgia.— Fullington *v.* Williams, 98 Ga. 807, 27 S. E. 183.

Indiana.— McCulloch *v.* State, 11 Ind. 424.

passed it cannot become a law.[36] The journal cannot be impeached on the ground of mistake or fraud. If there are errors the house itself is the only tribunal authorized to correct it.[37]

c. Entry of Vote. Entry on the journal of the names of the members voting either yea or nay is usually required.[38]

6. Rules of Legislature. The power to make rules is usually conferred, either in express terms or by implication, and when so conferred is absolute, if exercised within prescribed limitations.[39]

D. Approval or Veto by Executive Authority — 1. In General. Under the system of government adopted in this country the chief executive, either the president or a governor, is a part of the law-making power,[40] and it is usually provided by constitution that a bill shall not become a law until presented to the executive for his approval or veto.[41]

Kansas.— *In re* Taylor, 60 Kan. 87, 55 Pac. 340; Homrighausen *v.* Knoche, 58 Kan. 646, 50 Pac. 879; State *v.* Francis, 26 Kan. 724.

Louisiana.— Hollingsworth *v.* Thompson, 45 La. Ann. 222, 12 So. 1, 40 Am. St. Rep. 220.

Missouri.— State *v.* Mead, 71 Mo. 266.

Oregon.— McKinnon *v.* Cotner, 30 Oreg. 588, 49 Pac. 956.

Tennessee.— Williams *v.* State, 6 Lea 549.

See 44 Cent. Dig. tit. "Statutes," § 27.

Contra.— Cohn *v.* Kingsley, 5 Ida. 416, 49 Pac. 985, 38 L. R. A. 74, holding that the failure of a house journal to show that a step required by the constitution in the passage of a law was taken is conclusive evidence that it was not taken.

Where entries in a journal are ambiguous and conflicting so that it is impossible to ascertain therefrom whether the bill was duly enacted, it will be assumed that the proper constitutional action was taken thereon. Homrighausen *v.* Knoche, 58 Kan. 646, 50 Pac. 879; State *v.* Francis, 26 Kan. 724.

36. Burr *v.* Ross, 19 Ark. 250; Webster *v.* Hastings, 56 Nebr. 669, 77 N. W. 127.

37. McCulloch *v.* State, 11 Ind. 424; State *v.* Wendler, 94 Wis. 369, 68 N. W. 759.

38. Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571; Lincoln *v.* Haugan, 45 Minn. 451, 48 N. W. 196; Debnam *v.* Chitty, 131 N. C. 657, 43 S. E. 3; Hooker *v.* Greenville, 130 N. C. 472, 42 S. E. 141; Rodman-Heath Cotton Mills *v.* Waxhaw, 130 N. C. 293, 41 S. E. 488; New Hanover County *v.* De Rosset, 129 N. C. 275, 40 S. E. 43; Stanly County *v.* Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439; Portland Gold Min. Co. *v.* Duke, 164 Fed. 180, 90 C. C. A. 166; Coler *v.* Stanly County, 89 Fed. 257 [*affirmed* in 113 Fed. 705, 51 C. C. A. 379, 96 Fed. 285, 37 C. C. A. 484 (*affirmed* in 190 U. S. 437, 28 S. Ct. 811, 47 L. ed. 1126)].

39. U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. ed. 321.

An act will not be declared invalid for non-compliance with such rules. St. Louis, etc., R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; Sweitzer *v.* Territory, 5 Okla. 297, 47 Pac. 1094; State *v.* Brown, 33 S. C. 151, 11 S. E. 641; *In re* Ryan, 80 Wis. 414, 50 N. W. 187; McDonald *v.* State, 80 Wis. 407, 50 N. W. 185. Nor is a failure to observe statutory requirements fatal to the validity of an act. Cook *v.* State, 26 Ind. App. 278, 59 N. E. 489; State *v.* Wirt County Ct., 37 W. Va. 808, 17 S. E. 379; Manigault *v.* Ward, 123 Fed. 707.

40. State *v.* Deal, 24 Fla. 293, 4 So. 899, 12 Am. St. Rep. 204; State *v.* Junkin, 79 Nebr. 532, 113 N. W. 256; People *v.* Bowen, 21 N. Y. 517; Com. *v.* Barnett, 199 Pa. St. 161, 48 Atl. 976, 55 L. R. A. 882.

The last legislative act which breathes the breath of life into a statute and makes it a part of the laws of the state is the approval of the governor. Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069.

The veto power of the president is not executive in its nature, but essentially legislative. It makes him in effect a branch of congress, although only to a limited and qualified extent. Black Const. L. § 67. And see Hare Lect. Const. L. p. 212; Cooley Gen. Princ. Const. L. (2d ed.) p. 49.

The sovereign of England, who is charged with the duty of approving or disapproving acts of parliament, is considered a constituent part of the supreme legislative power. 1 Blackstone Comm. 361.

41. Weis *v.* Ashley, 59 Nebr. 494, 81 N. W. 318, 80 Am. St. Rep. 704; State *v.* Crounse, 36 Nebr. 835, 55 N. W. 246, 20 L. R. A. 265; *In re* Richardson, 20 Fed. Cas. No. 11,777, 2 Story 571.

It is thus apparent that a constitutional requirement that a bill be presented to the governor for his approval is mandatory. A failure in this respect will nullify the law. State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5; Burritt *v.* State Contract Com'rs, 120 Ill. 322, 11 N. E. 180; Cheyron *v.* Atty.-Gen., 12 La. 315; *In re* Richardson, 20 Fed. Cas. No. 11,777, 2 Story 571.

Although the constitution prescribes that a bill shall be passed by a greater vote than that required to pass a bill over the governor's veto, the bill when so passed must be submitted to the executive for his action. State *v.* Crounse, 36 Nebr. 835, 55 N. W. 246, 20 L. R. A. 265.

Concurrent resolution.— If it is constitutionally provided that a concurrent resolution be presented to the governor, no such

2. Presentation to Executive — a. Time of Presentation. A bill must be presented to the executive after its final passage by both houses of the legislature. If through mistake the executive acts upon a bill presented to him without having been legally passed by either house of the legislature, the law is a nullity.[42]

b. Manner of Presentation. In the absence of any constitutional provision as to the time or place of presentation, any presentation which is appropriate to the purpose of affording the executive opportunity for the considerate exercise of the discretion vested in him is sufficient.[43]

c. Recall After Presentation. In the absence of a constitutional restriction the legislature may, by concurrent action of both houses, recall a bill which has been presented to the governor.[44]

resolution will be valid unless so presented, notwithstanding the fact that it bears directly upon the question of whether or not the governor is entitled to hold his office. *In re* Contest Proceedings, 31 Nebr. 262, 47 N. W. 923, 10 L. R. A. 803.

Where the initiative and referendum prevails, presentation to, and approval by, the governor is unnecessary. State *v.* Kline, 50 Oreg. 426, 93 Pac. 237.

In colonial legislation, statutes enacted by the assembly of New York and approved by the governor and counsel were valid and operative immediately; they continued in force unless they were disapproved by the king, and upon that happening they became annulled. Such disapproval did not abrogate or impair the rights acquired under the statutes after its passage and before its disapproval by the sovereign. Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

42. State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5.

Previous to adjournment of legislature.— Where presentation is required one day previous to adjournment, to compel executive action, either by approval or return of the bill, the presentation must be made twenty-four hours or more before the hour of adjournment. Hyde *v.* White, 24 Tex. 137.

After adjournment of legislature.— In the absence of expressed constitutional provision a bill may be presented to the governor after the adjournment of the legislature.

Arkansas.— Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297. See also Smithee *v.* Campbell, 41 Ark. 471.

Georgia.— Solomon *v.* Cartersville, 41 Ga. 157.

Louisiana.— State *v.* Fagan, 22 La. Ann. 545.

Maryland.— Lankford *v.* Somerset County, 73 Md. 195, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491.

Michigan.— Detroit *v.* Chapin, 108 Mich. 136, 66 N. W. 587, 37 L. R. A. 391.

New York.— People *v.* Bowen, 21 N. Y. 517.

United States.— Seven Hickory *v.* Ellery, 103 U. S. 423, 26 L. ed. 435.

See 44 Cent. Dig. tit. "Statutes," § 32.

Recess of congress.— The president may approve a bill during a recess of congress. La Arba Silver Min. Co. *v.* U. S., 175 U. S. 423, 20 S. Ct. 168, 44 L. ed. 223.

Time fixed by constitution.— The time for presentation is sometimes fixed by the constitution. Where such a provision requires a bill to be presented on the same day that it was certified by the presiding officer of each house of the legislature, such provision has been held to be directory merely, and a failure to comply therewith will not invalidate the law. State *v.* Mead, 71 Mo. 266.

The omission from an enrolled bill of provisions which have been duly incorporated therein affects the validity of the act and the approval of such a bill is ineffectual. Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297. See also Smithee *v.* Campbell, 41 Ark. 471.

43. Wrede *v.* Richardson, 77 Ohio St. 182, 82 N. E. 1072, 122 Am. St. Rep. 498.

Personal presentation.— The bill should be presented to the governor personally. It is not sufficient to present it to the secretary of state. *In re* Opinion of Justices, 99 Mass. 636.

A presentation at the office of the governor in the presence of the person in charge thereof will suffice, although the governor is absent. *In re* Opinion of Justices, 45 N. H. 607, holding that where it is the custom for the legislature to make communications to the governor at the executive chamber, it is a sufficient presentation of a bill to the governor if it is deposited upon his table there by an officer of the legislature, who calls the attention of the persons in charge of the room to the fact, although the governor is not present.

The presentation must be such as to afford the governor opportunity to deliberately consider the provisions of the bill. A presentation which in any manner deprives him of this right is ineffectual. Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; McKenzie *v.* Moore, 92 Ky. 216, 17 S. W. 483, 13 Ky. L. Rep. 509, 14 L. R. A. 251.

Presumption as to presentation.— Presentation at the office of the governor will be presumed, although at the time it is made the governor had been impeached and deposed from his office. Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832.

44. *In re* Recalling Bills, 9 Colo. 630, 21 Pac. 474; State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5; McKenzie *v.* Moore, 92 Ky. 216, 17 S. W. 483, 13 Ky. L. Rep. 509, 14 L. R. A. 251; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377.

Consent of both houses.—A bill duly passed and presented to the governor becomes the

d. Time For Executive Action — (I) *In General.* Where a certain number of days is prescribed within which the governor must either approve, veto, or return a bill, such days are to be computed by excluding the day on which the bill was received and including the last day.[45]

(II) *Effect of Adjournment of Legislature.* Constitutional provisions differ as to the effect of an adjournment upon the time afforded the governor for the consideration of bills which have been presented to him. In some states it is provided that a bill which has been presented to the governor and not returned within a certain time shall become a law without his signature, unless such return was prevented by the adjournment of the legislature. Under such a provision the adjournment before the expiration of time allowed does not prevent the governor's action.[46] Where it is provided that a bill shall become a law if

act of both houses and cannot be recalled by one house without the consent of the other. People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec 377.

Time of recall.— Ordinarily if the bill be approved by the governor and deposited by him in the office of the secretary of state there is no possibility of recall. People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377. It has been held, however, that a governor may upon being convinced of a mistake in the passage of a bill erase his signature and return the bill upon the request of the legislature. State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5.

45. *California.*— Iron Mountain Co. *v.* Haight, 39 Cal. 540; Price *v.* Whitman, 8 Cal. 412.

Colorado.— *In re* Computation of Time, 9 Colo. 632, 21 Pac. 475.

Illinois.— People *v.* Hatch, 33 Ill. 9.

Mississippi.— Carter *v.* Henry, 87 Miss. 411, 39 So. 690.

Missouri.— Beaudean *v.* Girardeau, 71 Mo. 392.

New Hampshire.— *In re* Opinion of Justices, 45 N. H. 607.

South Carolina.— Corwin *v.* Comptroller-Gen., 6 S. C. 390.

See 44 Cent. Dig. tit. "Statutes," § 31.

Exclusion of Sunday.— It is sometimes provided that Sundays shall be excluded in computing number of days.

California.— Fowler *v.* Peirce, 2 Cal. 165.

Illinois.— People *v.* Hatch, 33 Ill. 9.

Minnesota.— Stinson *v.* Smith, 8 Minn. 366.

Mississippi.— Carter *v.* Henry, 87 Miss. 411, 39 So. 690.

South Carolina.— Corwin *v.* Comptroller-Gen., 6 S. C. 390.

United States.— Seven Hickory *v.* Ellery, 103 U. S. 423, 26 L. ed. 435; John V. Farwell Co. *v.* Matheis, 48 Fed. 363.

See 44 Cent. Dig. tit. "Statutes," § 31.

If the last day falls on Sunday the time expires on the following day. *In re* Computation of Time, 9 Colo. 632, 21 Pac. 475.

Length of day.— In computing the number of days a day means a full day of twenty-four hours. Carter *v.* Henry, 87 Miss. 411, 39 So. 690.

After admission of state.— A law is not invalid because approved on the day after a state was admitted into the Union. State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503.

Where a bill is required to be returned within a specified time, the days are to be counted as those during which the house in which the bill originated was in session. State *v.* South Norwalk, 77 Conn. 257, 58 Atl. 759.

46. *Arkansas.*— Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297.

Georgia.— Solomon *v.* Cartersville, 41 Ga. 157.

Illinois.— People *v.* Hatch, 33 Ill. 9.

Indiana.— Stalcup *v.* Dixon, 136 Ind. 9, 35 N. E. 987.

Louisiana.— State *v.* Fagan, 22 La. Ann. 545.

Maryland.— Lankford *v.* Somerset County, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491, holding that the time within which a bill must be returned is allowed the governor for his consideration of it, and his right to this time is not to be taken away by the adjournment of both houses of the legislature.

Michigan.— Detroit *v.* Chapin, 108 Mich. 136, 66 N. W. 587, 37 L. R. A. 391.

Minnesota.— Burns *v.* Sewell, 48 Minn. 425, 51 N. W. 224.

Mississippi.— State *v.* Coahoma County, 64 Miss. 358, 1 So. 501 [*overruling* Hardee *v.* Gibbs, 50 Miss. 802]. See also State *v.* Holder, 76 Miss. 158, 23 So. 643.

New York.— People *v.* Bowen, 21 N. Y. 517.

United States.— Seven Hickory *v.* Ellery, 103 U. S. 423, 26 L. ed. 435.

See 44 Cent. Dig. tit. "Statutes," § 32.

Contra.— Fowler *v.* Peirce, 2 Cal. 165 (in which case the court based its conclusion that the governor's power to veto terminated upon the adjournment of the legislature upon the ground that the governor in the exercise of this power acts as a component part of the law-making power and the power of veto ceases from the time of the adjournment of the legislative body); School Dist. No. 1 *v.* Ormsby County, 1 Nev. 334.

A bill passed by congress and duly presented to the president during its session may be signed by him during a recess which congress has taken for a fixed period. La Abra Silver Min. Co. *v.* U. S., 175 U. S. 423, 20 S. Ct. 168, 44 L. ed. 223 [*affirming* 32 Ct. Cl. 462].

it is signed by the governor or returned with his objections within three days, unless such return is prevented by adjournment, a bill presented to the governor within the last three days of the session, neither signed nor returned with objections before adjournment, does not become a law unless it is subsequently approved by the governor.[47]

3. Manner of Approval — a. In General. The approval of the governor is usually shown by his signature to the bill. The place of signature is properly at the end, although, in the absence of an express direction, a signature at the end of a section may be sufficient.[48]

b. Reconsideration of Action. The rule seems to be that the governor's approval is not complete until the bill leaves his possession and control. Prior to that time he may reconsider his action and erase his signature.[49] After the

Computation of time.— Where it is provided that the governor may act on bills passed a prescribed period before adjournment, within a certain time thereafter, the days to be counted before the adjournment are the business days of the legislature, and Sundays are to be excluded. John V. Farwell Co. *v.* Matheis, 48 Fed. 363.

An adjournment from day to day is not such an adjournment as prevents a return of the bill by the governor within the time prescribed. Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; Miller *v.* Hurford, 11 Nebr. 377, 9 N. W. 477; *In re* Opinion of Justices, 45 N. H. 607. See also U. S. *v.* Weil, 29 Ct. Cl. 523, holding that a bill signed by the president after the usual adjournment of congress for the winter holidays or within ten days from the time when it was presented to him is duly approved. The adjournment required is that by which the session of the legislature is terminated. *In re* Opinion of Justices, 45 N. H. 607; Corwin *v.* Comptroller-Gen., 6 S. C. 390. An adjournment from February 17 to February 27 is not such an adjournment as prevents the return of a bill sent to the governor February 10 within the ten days required by the constitution. Hequembourg *v.* Dunkirk, 49 Hun (N. Y.) 550, 2 N. Y. Suppl. 447.

47. Darling *v.* Boesch, 67 Iowa 702, 25 N. W. 887.

If it is provided that where a return of a bill is prevented by the adjournment of the legislature the governor shall file his objections with the secretary of state within a certain prescribed time, the bill will become a law without the governor's approval if he fails to file such objections within the required time. Stalcup *v.* Dickson, 136 Ind. 9, 35 N. E. 987.

Where a constitution provides that "if any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return," it was held that the adjournment contemplated is such that it deprives the executive of the ability to communicate with the house in which a bill shall have originated, during the period within which the executive is required to return the bill. An adjournment directed by the governor acting under the power given to him by the constitution to adjourn the legislature in case of a disagreement between the houses as to the time of adjournment, is sufficient to prevent the return of the bill. People *v.* Hatch, 33 Ill. 9.

48. National Land, etc., Co. *v.* Mead, 60 Vt. 257, 14 Atl. 689.

The affixing of the date of signature is desirable for the purpose of indicating the time of taking effect, or whether it was approved within the required time after adjournment, but a failure to affix the date is not fatal. State *v.* Hitchcock, 1 Kan. 178, 81 Am. Dec. 503, holding that in the absence of a date a law will be treated as having been signed during the time when the governor was authorized to act.

Once having signed a bill, and having notified the legislature of that fact, the bill is a law, although the executive sets forth his objections thereto in a message. State *v.* Whisner, 35 Kan. 271, 10 Pac. 852.

49. State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5; People *v.* McCullough, 210 Ill. 488, 71 N. E. 602; Allegany County *v.* Warfield, 100 Md. 516, 60 Atl. 599.

The signature of the governor to an act of the legislature is conclusive evidence of the executive approval against everyone but himself. He alone should be permitted to dispute it, and only then, while he holds control of the act, and before he shall have deposited the same in the archives of the state. Weeks *v.* Smith, 81 Me. 538, 81 Atl. 325.

Signature by mistake.— An act was signed by the governor by mistake, and a message was delivered to the house of representatives by his private secretary announcing his approval. This was done, not by the special direction of the governor, but according to usual routine of business, because the secretary had found it on the governor's table with his signature attached. Upon the governor's request the message of approval was sent back, and the governor's signature was erased. The bill had never been out of his possession. It was held that the act never became a law. People *v.* Hatch, 19 Ill. 283. But see Powell *v.* Hayes, 83 Ark. 448, 104 S. W. 177, in which case, the governor being ill and absent, the president of the senate became acting governor. The acting governor signed a bill just before his successor

bill leaves his possession, he cannot regain control, erase his signature, and return the bill vetoed,[50] unless the bill was illegally passed and was wrongfully transmitted to him.[51]

4. Exercise of Veto Power — a. Authority to Veto. The authority of an executive to set aside an enactment of the legislative department is not an inherent power, and can be exercised only when sanctioned by a constitutional provision.[52]

b. Disapproval and Return of Bill — (I) *In General.* When the governor returns a bill to the legislature without his approval, he is generally required to state his reasons for not approving the same.[53]

(II) *Portion of Bill.* The question as to the right of the governor to veto a portion of a bill relates exclusively to the veto of items in appropriation acts.[54]

was elected president of the senate, thereby becoming acting governor. The bill never left the governor's office, and the successor erased the signature of the former acting governor and sent the bill with a veto message to the secretary of state as required by law. The court held that the bill became a law when signed and that the erasure of the signature and subsequent veto were unauthorized. In Gardner *v.* Barney, 6 Wall. (U. S.) 499, 18 L. ed. 890, and Seven Hickory *v.* Ellery, 103 U. S. 423, 26 L. ed. 435, statements are found to the effect that a bill becomes a law when signed; and that everything done thereafter is with a view to preserving the evidence of its passage and approval. But in neither of these cases did it appear that the executive retained possession and control of the bill.

50. People *v.* McCullough, 210 Ill. 488, 71 N. E. 602.

After the governor approves and signs a bill, and deposits the same with the secretary of state, it has passed beyond his control. Its status has then become fixed and unalterable so far as he is concerned. State *v.* Whisner, 35 Kan. 271, 10 Pac. 852.

51. State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5.

52. State *v.* Kline, 50 Oreg. 426, 93 Pac. 237.

All legislative acts required to be transmitted to the executive for his consideration (see *supra*, II, D, 1) may be vetoed by the executive, if within his constitutional authority (People *v.* Buffalo, 20 N. Y. Suppl. 51), notwithstanding a constitutional provision commanding the legislature to pass the bill (*In re* Veto Power, 9 Colo. 642, 21 Pac. 477).

The provision of the initiative and referendum amendment to the constitution that the veto power of the governor shall not extend to measures referred to the people is limited to measures which the legislature may refer, and does not apply to acts on which the referendum may be invoked by petition; the amendment authorizing such petition within ninety days after adjournment of the legislature, and the constitution requiring the governor to exercise his veto power, if at all, not later than five days after the adjournment. Kadderly *v.* Portland, 44 Oreg. 118, 74 Pac. 710, 75 Pac. 222.

53. State *v.* Crounse, 36 Nebr. 835, 55 N. W. 246, 20 L. R. A. 265.

It is immaterial that at the time the bill was returned, the governor was out of the state, he having stated his objections before his departure, and delivered them to his secretary for return to the house in which the bill originated. *In re* Opinion of Justices, 135 Mass. 594. Nor is it material that the objection stated by the executive is based upon a defect in the bill which does not in fact exist. Birdsall *v.* Carrick, 3 Nev. 154.

A return to be effectual must be such as places the bill beyond the executive control and in the possession, actual or potential, of the proper house (Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432), or of the secretary of state, in case the legislature has adjourned (State *v.* Junkin, 79 Nebr. 532, 113 N. W. 256). A bill may be returned to a house which is in session, although no action may be taken thereon because of a lack of a quorum. Corwin *v.* Comptroller-Gen., 6 S. C. 390. A return by laying the bill upon the table of the presiding officer (*In re* Opinion of Justices, 45 N. H. 607), or by delivery to some officer or other suitable person connected with the house, where the house has adjourned for the day on the last day allowed for retention by the governor (Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432. *Contra*, State *v.* Wheeler, (Ind. 1909) 89 N. E. 1) would be sufficient.

54. Porter *v.* Hughes, 4 Ariz. 1, 32 Pac. 165.

Where the governor is given the authority to veto a part of an appropriation bill he cannot exercise the power in relation to the provision contained therein which does not relate to the appropriation of money. Porter *v.* Hughes, 4 Ariz. 1, 32 Pac. 165 (in which case it was held, under the organic act of the territory of Arizona, providing that the governor might disapprove a bill and return it to the house in which it originated, together with his objections, that he could not veto a single item of an appropriation bill and permit the remainder of the bill to stand approved); State *v.* Holder, 76 Miss. 158, 23 So. 643.

If authority be given to veto any item in an appropriation bill the veto of such item only affects that part, and the remainder is approved. Com. *v.* Barnett, 199 Pa. St. 161, 48 Atl. 976, 55 L. R. A. 882 (in which case under a constitutional provision granting to the governor "power to disapprove of any item or items of any bill mak-

(III) *Failure to Approve or Return.* A failure to approve or return a bill within a prescribed time usually results in the bill becoming a law without executive action,[55] regardless of any contrary provisions in the bill itself.[56]

c. Passage Over Veto. After the return of a bill or resolution vetoed by the governor, it is usually provided that the same may become a law notwithstanding such veto, if it receives the votes of two thirds of the members of each house.[57]

E. Authentication, Enrolment, Filing, and Publication — 1. Signatures of Legislative Officers — a. Necessity. The effect of the failure of the proper officers to certify over their signatures as to the final passage of a bill as required by constitutional provision is not clearly determined by the authorities.[58] In some states, where the evident purpose of the signatures is to indicate to the governor that the bill has been constitutionally passed, it has been held that the failure to affix the signatures will not invalidate the act;[59] while in other

ing appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation disapproved shall be void" (Pa. Const. art. 4, § 16), it was held that an appropriation of a lump sum for school purposes, in a general appropriation bill, may be vetoed in part); Pickle *v.* McCall, 86 Tex. 212, 24 S. W. 265.

55. Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; McNeil *v.* Com., 12 Bush (Ky.) 727.

Legislative declaration.— Where a legislature, on ascertaining by a committee that an act had been neither approved nor vetoed by the governor, nor by him transmitted to the secretary of state, declared the act to have become a law, and ordered that it be transmitted to the secretary of state, it is the duty of the court to treat the act as a law. Danielly *v.* Cabaniss, 52 Ga. 211.

56. Atlantic Coast Line Co. *v.* Mallard, 53 Fla. 515, 43 So. 755; Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462.

57. Smith *v.* Jennings, 67 S. C. 324, 45 S. E. 821; Brown *v.* Nash, 1 Wyo. 85.

"Two-thirds" vote.— Where the constitutional provision is to the effect that a bill may be passed over a veto by a vote of "two thirds of that house," it has been construed to mean two thirds of the members present at the time of the reconsideration of the bill or resolution. Smith *v.* Jennings, 67 S. C. 324, 45 S. E. 821. Two thirds of that house means two thirds of a quorum, that is, two thirds of a majority of all the members elected to the house. State *v.* McBride, 4 Mo. 303, 29 Am. Dec. 636. See also Bond Debt Cases, 12 S. C. 200, 285; Bliss *v.* Comptroller-Gen., 4 S. C. 462. Two thirds of the members present voting in favor of the bill after a veto is sufficient. The fact that the bill received two thirds of the votes recorded is not sufficient. Brown *v.* Nash, 1 Wyo. 85.

The fact that the vote required to pass a bill in the first instance is greater than that required to pass a bill over the governor's veto does not dispense with the necessity of a repassage of a bill upon its return disapproved. State *v.* Crounse, 36 Nebr. 835, 55 N. W. 246, 20 L. R. A. 265, in which case it was held that the governor being a part of the law-making power of the state, each bill before it becomes a law, even if constitutionally passed by two-thirds majority of each house, must be approved by him, passed over his veto, or remain in his hands more than five days, Sundays excepted.

58. **In the absence of a constitutional or statutory requirement,** the failure of the proper presiding officer to attach his signature will not affect the validity of the act, even though the rules of the house may require it. Simon *v.* State, 86 Ark. 527, 111 S. W. 991; Speer *v.* Allegheny, etc., Plank Road Co., 22 Pa. St. 376.

Unless expressly provided for, a bill passed over the governor's veto need not be again signed by the presiding officers of both houses. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. *Contra*, State *v.* Howell, 26 Nev. 93, 64 Pac. 466.

Concurrent resolutions are usually required to be signed by the presiding officers of both houses as in the case of bills. *In re* Election of Executive Officers, 31 Nebr. 262, 47 N. W. 923, holding that a concurrent resolution determining a contest election of executive officers must be signed by the *de facto* presiding officer of the senate, although he is one of the officers whose election is contested.

59. *Colorado.*— *In re* Roberts, 5 Colo. 525, holding that a provision requiring the fact of signature by the presiding officer in the presence of the house be entered upon the journal is directory so far as the entry is concerned.

Kansas.—Aikman *v.* Edwards, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149 (holding that a failure of the presiding officers of the respective houses of the legislature to sign a bill within two days after its passage did not impair its validity, when approved by the governor); Leavenworth County *v.* Higginbotham, 17 Kan. 62.

Missouri.— Douglas *v.* State Bank, 1 Mo. 24.

Nebraska.— Taylor *v.* Wilson, 17 Nebr. 88, 22 N. W. 119; Cottrell *v.* State, 9 Nebr. 125, 1 N. W. 1008, in which case it appeared that the bill was enrolled and properly signed by all the required officers of both houses, except the president of the senate; and it was held that there was sufficient evidence

states, where the signatures are required for purposes of authentication and identification, such a failure is regarded as fatal, upon the ground that the constitutional provision as to signatures is mandatory.[60]

b. Who May Sign. A temporary speaker,[61] and an assistant secretary,[62] have been held to be authorized to sign and certify to the passage of bills, under provisions requiring signature by a presiding officer or a secretary of state.

c. Manner of Signing. A constitutional provision that the presiding officer shall sign bills in the presence of the house and that the fact of signing shall be duly entered in the journals is sufficiently complied with when it appears that the bills were so signed, although it appears that the entries in the journal were not technically correct.[63]

2. Authentication and Filing. A statutory requirement that a bill be authenticated either by a proper entry upon the journal,[64] or by certificates executed by the presiding officers of both houses,[65] is binding upon the legislature, and a failure to comply therewith will affect the validity of the act.[66] The filing of the

before the governor to authorize the assumption that the bill had been constitutionally passed. In State *v.* Mickey, 73 Nebr. 281, 102 N. W. 679, the court refused to extend the principle laid down in the above cases to a bill which was not authenticated by the presiding officer of either house.

Tennessee.— Nelson *v.* Haywood County, 91 Tenn. 596, 20 S. W. 1.

See 44 Cent. Dig. tit. "Statutes," § 39; and Constitutional Law, 8 Cyc. 761.

60. *Illinois.*— Lynch *v.* Hutchinson, 219 Ill. 193, 76 N. E. 370; Burritt *v.* State Contract Com'rs, 120 Ill. 322, 11 N. E. 180.

Missouri.— State *v.* Mead, 71 Mo. 266, holding that a constitutional provision that "no bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session" is mandatory.

Nevada.— State *v.* Howell, 26 Nev. 93, 64 Pac. 466; State *v.* Glenn, 18 Nev. 34, 1 Pac. 186.

Ohio.— State *v.* Kiesewetter, 45 Ohio St. 254, 12 N. E. 807.

Texas.— Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233.

See 44 Cent. Dig. tit. "Statutes," § 39; and Constitutional Law, 8 Cyc. 761.

The identical bill passed by the legislature must be signed. The signing of another bill does not make it a law. King Lumber Co. *v.* Crow, 155 Ala. 504, 46 So. 646.

The presumption is that the legislature is bound by the constitutional requirement. Perry County *v.* Selma, etc., R. Co., 58 Ala. 546; Varney *v.* Justice, 86 Ky. 596, 6 S. W. 457, 9 Ky. L. Rep. 743; Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233; Holley *v.* State, 14 Tex. App. 505; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

Where there is an entire disregard of the constitutional requirement of authentication by the presiding officers of both houses, and a failure to file in the office of the secretary of state and a subsequent publication by him the bill will not become a law. State *v.* Kiesewetter, 45 Ohio St. 254, 12 N. E. 807.

61. Robertson *v.* State, 130 Ala. 164, 30 So. 494.

A de facto presiding officer has been deemed to have the right to sign a bill. Simon *v.* State, 86 Ark. 527, 111 S. W. 991.

62. State *v.* Glenn, 18 Nev. 34, 1 Pac. 186, holding that the requirement that bills shall be signed by the secretary of the senate is sufficiently complied with by a signature of the assistant secretary.

63. State *v.* Mead, 71 Mo. 266 (in which case it was held that a failure to enter in the journal the fact of the signature of the presiding officer did not invalidate the bill, although the constitution provided that the fact of the signature should be noted on the journal); Younger *v.* Hehn, 12 Wyo. 289, 75 Pac. 443, 109 Am. St. Rep. 986; State *v.* Cahill, 12 Wyo. 225, 75 Pac. 433 (in which case it was held that the fact that the entry made the speaker announce that he was "about" to sign, instead of that he was signing or had signed, did not render it insufficient).

Entry in journal.— A constitutional provision requiring the fact of signing in open session, or in the presence of the house, to be entered in the journal is directory merely. *In re* Roberts, 5 Colo. 525; Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 101 S. W. 770. See also Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

64. Wabash R. Co. *v.* Hughes, 38 Ill. 174.

65. Matter of Weeks, 109 N. Y. App. Div. 859, 96 N. Y. Suppl. 876 [*affirmed* in 185 N. Y. 541, 77 N. E. 1197].

66. **The certificate** required under the New York statute, Legislative Law (Laws (1892), c. 682), § 40, stating the date of passage, and the number of members present and voting for the bill, is defective which merely states that a majority of the members voted therefor without mentioning whether the required number were present. Matter of Weeks, 109 N. Y. App. Div. 859, 96 N. Y. Suppl. 876 [*affirmed* in 185 N. Y. 541, 77 N. E. 1197]. Such a certificate, signed by the speaker of the assembly, cannot be amended by him after the expiration of his term of office as speaker. Matter of Stickney, 110 N. Y. App. Div. 294, 97 N. Y. Suppl. 336 [*affirmed* in 185 N. Y. 107, 77 N. E. 993].

law in the office of the secretary of state, after its due passage and approval by the governor, is an essential step, made so either by statute [67] or by constitution.[68]

3. Publication — a. In General. Legislative acts must be published or promulgated, as required either by express constitutional provision or by statute.[69]

b. Method of Publication. Publication is not confined to mere printing; [70] but in its ordinary and usual acceptation includes publication in newspapers,

If the fact of the final passage of a bill appears from the journal, the failure of the clerk of the house to certify to its passage before the termination of his official functions does not affect its validity. Houston, etc, R. Co. *v.* Odum, 53 Tex. 343.

In the absence of proper authentication the governor may refuse to consider a bill. Hamilton *v.* State, 61 Md. 14, in which case the court held that the governor was justified in refusing to consider a bill not having attached thereto the great seal of the state as required in the constitution. And if there has been a disregard of a constitutional requirement as to authentication the bill does not become a law. State *v.* Kiesewetter, 45 Ohio St. 254, 12 N. E. 807 (holding that a bill, the passage of which had not been entered on the journal, which had not been signed by either presiding officer, or enrolled or filed in the office of the secretary of state, did not become a law, because of the absence of an authentic record of its due passage); Burke *v.* Cincinnati, 10 Ohio S. & C. Pl. Dec. 542, 8 Ohio N. P. 109.

67. State *v.* Whisner, 35 Kan. 271, 10 Pac. 852.

68. Burke *v.* Cincinnati, 10 Ohio S. & C. Pl. Dec. 542, 8 Ohio N. P. 109.

An exception exists where the bill contains an emergency clause. State *v.* Wheeler, (Ind. 1909) 89 N. E. 1.

69. Peterman *v.* Huling, 31 Pa. St. 432.

The reason for such requirement is obvious. The public subjected to or affected by such acts are entitled to some official and reliable means of securing information as to the contents thereof. Calkin *v.* State, 1 Greene (Iowa) 68; Clark *v.* Janesville, 10 Wis. 136.

In Louisiana all laws, before they become obligatory, must be made known and promulgated by the governor. State *v.* Judge Super. Dist. Ct., 29 La. Ann. 223; Cheyron *v.* Atty.-Gen., 12 La. 315. The signature of the governor, without further act on his part, does not constitute a promulgation. It is made the duty of the governor to see that the act is printed and distributed. St. Avid *v.* Weimprender, 5 Mart. 14. A bill becoming a law without the governor's approval must be promulgated as well as one with his signature, and all bills must be promulgated through the office of the secretary of state. Whited *v.* Lewis, 25 La. Ann. 568.

A constitutional requirement that any bill affecting the taxation or revenue of a specified levee district shall be published does not apply to the innumerable details which bills may have in respect to the taxation or revenue of the district, other than those which increase or diminish the revenue thereof. Bobo *v.* Yazoo-Mississippi Delta Levee Com'rs, 92 Miss. 792, 46 So. 819.

70. Sholes *v.* State, 2 Pinn. (Wis.) 499.

Publication should be made in the mode and by the officers prescribed by law. State *v.* Judge Super. Dist. Ct., 29 La. Ann. 223. An unofficial publication will not usually suffice. Calkin *v.* State, 1 Greene (Iowa) 68 (holding that a publication of an act in some of the newspapers of the state, thus making public notice of its passage and provisions, but without authority of the general assembly, or in the manner authorized by it, is ineffectual); Clark *v.* Janesville, 10 Wis. 136; State *v.* Lean, 9 Wis. 279. Notwithstanding a general statutory provision as to the publication of all statutes, the legislature may prescribe how a particular statute shall be published. Mills *v.* Jefferson, 20 Wis. 50. Provisions as to form of binding, division into volumes, character of materials, and the like are directory. State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405. A failure to comply with a provision that an act be published in all the newspapers of the state, as an omission from a single newspaper, will not nullify the act, since such provision is directory. Chandler *v.* Spear, 22 Vt. 388. If a general law is published in a volume of private laws, and is not published with the other general laws, as required by law, owing to improper classification, it will nevertheless be operative. *In re* Boyle, 9 Wis. 264. When an act is published as authorized by law, the fact that it was not so published as to make it known to a certain person is immaterial. Barber *v.* St. Louis, etc., R. Co., 43 Iowa 223, 22 Am. Rep. 243. Where the secretary of state may in his discretion cause certain general laws to be published in a volume with the special and local laws, such a publication will be sufficient unless there is an abuse of discretion. McCool *v.* State, 7 Ind. 378.

Publication of codes.— The constitutional provision relating to the revision and publication of the laws, civil and criminal, contemplates the publication of the codes. Marshall *v.* Clark, 22 Tex. 23.

When bound volumes of the laws have been issued and distributed among the people pursuant to law, they have the right to look to these volumes as containing all the laws by which they are to be governed, until the next session of the legislature. State *v.* Lean, 9 Wis. 279.

An act incorporating a railroad company is not a general act requiring publication, but sections thereof authorizing towns to issue bonds in aid of such company and providing for the punishment of persons obstruct-

as well as in books and pamphlets; [71] although a publication in some other form may be deemed sufficient.[72]

c. Time of Publication. A provision in a statute that it be published for a specified time is directory.[73]

d. Effect of Failure to Publish. Where it is made the duty of an officer to cause an act to be published, his neglect thereof cannot defeat the taking effect of the act.[74]

e. Errors in Publication. Mere verbal omissions or defects in the published act will not defeat its operation.[75] In those states where the enrolled act is not conclusive and evidence is admissible to show, by the journals, whether such act was in fact passed,[76] if there is a material variance between the bill as passed and the act as enrolled the act is a nullity.[77]

f. Variance Between Published Act and Enrolled Bill. If there is a variance between the bill as enrolled and the act as published the enrolment will control.[78]

ing its trains should be published. Burhop *v.* Milwaukee, 21 Wis. 257.

71. Chicago *v.* McCoy, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413.

72. Peterman *v.* Huling, 31 Pa. St. 432, 436, where the court says: "There are, however, other modes of publication than that by the pamphlet laws. The doings of the legislature are necessarily public, and the journals of each house are required to be published weekly. Every enactment is therefore published in the sense in which publication is intended in the word prescribed."

73. State *v.* Click, 2 Ala. 26; State *v.* Lean, 9 Wis. 279.

A requirement that an act be published immediately is complied with by a publication within a time reasonable in view of the character of the law and the circumstances. State *v.* Lean, 9 Wis. 279, but holding further that the requirement is not complied with by a publication several months after the time for the publication of the law in the bound volume has expired.

74. State *v.* Click, 2 Ala. 26; Peterman *v.* Huling, 31 Pa. St. 432.

The validity of a statute regularly passed is not affected by an omission to publish it. Hancock County *v.* Hawkins County, 15 Lea (Tenn.) 266.

75. Smith *v.* Hoyt, 14 Wis. 252. See also Michigan State Prison *v.* Auditor-Gen., 149 Mich. 386, 112 N. W. 1017.

The addition of a clause to a bill made by the engrossing clerk, which declares that the bill is to take immediate effect, when in fact it was so ordered by only one house of the legislature, does not destroy the validity of the enactment. Stow *v.* Grand Rapids, 79 Mich. 595, 44 N. W. 1047.

If the enrolled bill shows the governor's approval, a failure to publish it will not affect the validity of the bill. Dishon *v.* Smith, 10 Iowa 212. But the omission of a material part of the published act, as, for instance, the enacting clause, will nullify the act. *In re* Swartz, 41 Kan. 157, 27 Pac. 839.

Increase in amount appropriated by an engrossed bill over the amount specified in the bill as passed may be disregarded. State *v.* Moore, 37 Nebr. 13, 55 N. W. 299.

76. See *infra*, VIII, B, 1, b, (I), (A).

77. *Alabama.*— Yancy *v.* Waddell, 139 Ala. 524, 36 So. 733 (holding that an act establishing a stock law district which described the district materially different from that described in the bill as passed was void); Stein *v.* Leeper, 78 Ala. 517; Donnelly *v.* State, 78 Ala. 453; Abernathy *v.* State, 78 Ala. 411; Sayre *v.* Pollard, 77 Ala. 608; Moog *v.* Randolph, 77 Ala. 597; Jones *v.* Hutchinson, 43 Ala. 721.

Florida.— State *v.* Deal, 24 Fla. 293, 4 So. 899, 12 Am. St. Rep. 204.

Maryland.— Legg *v.* Annapolis, 42 Md. 203; Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69.

Michigan.— Rode *v.* Phelps, 80 Mich. 598, 45 N. W. 493.

Mississippi.— Brady *v.* West, 50 Miss. 68.

Nebraska.— State *v.* McLelland, 18 Nebr. 236, 25 N. W. 77, 53 Am. Rep. 814.

Ohio.— State *v.* Jones, 22 Ohio Cir. Ct. 682, 11 Ohio Cir. Dec. 496.

South Carolina.— State *v.* Hagood, 13 S. C. 46.

See 44 Cent. Dig. tit. "Statutes," § 42.

The omission of amendments concurred in by both houses nullifies the act. Moody *v.* State, 48 Ala. 115, 17 Am. Rep. 28.

78. *Alabama.*— Wilson *v.* Duncan, 114 Ala. 659, 21 So. 1017; State *v.* Marshall, 14 Ala. 411.

California.— McLaughlin *v.* Menotti, 105 Cal. 572, 38 Pac. 973, 39 Pac. 207.

Georgia.— Goldsmith *v.* Augusta, etc., R. Co., 62 Ga. 468.

Idaho.— Ollis *v.* Kirpatrick, 3 Ida. 247, 28 Pac. 435.

Iowa.— Dishon *v.* Smith, 10 Iowa 212.

Mississippi.— Nugent *v.* Jackson, 72 Miss. 1040, 18 So. 493 (holding that where words contained in a code as revised by commissioners, adopted by the legislature and filed in the office of the secretary of state, are omitted from the code as published, the code as adopted and filed will control); *Ex p.* Wren, 63 Miss. 512, 56 Am. Rep. 825.

Missouri.— Ruckert *v.* Grand Ave. R. Co., 163 Mo. 260, 63 S. W. 814.

Nebraska.— Bruce *v.* State, 48 Nebr. 570, 67 N. W. 454.

New York.— People *v.* Marlborough High-

Discrepancies in the printed act which are not material,[79] or which tend to give sensible meaning to verbiage contained in the enrolled bill,[80] do not affect the validity of the act.

4. Variance Between Enrolled Bill and Journal. A variance between the enrolled bill and the journal may be fatal.[81] In some jurisdictions, however, it is held to be the duty of the court to sustain the validity of the enrolled act, where the act is plain and unambiguous, and the journals are silent and ambiguous.[82]

F. Form and Requisites — 1. In General. A law must be complete in all its terms when it leaves the legislature.[83]

2. Appropriation Acts. Special provision is sometimes made by constitution that appropriation acts shall contain no provisions not relating to appropriations contained therein.[84]

3. Enacting Clause. The enacting clause is usually a constitutional requirement. Its form varies in the several states, but the general rule is that when required its omission is fatal.[85] A failure to use the words prescribed by the

way Com'rs, 54 N. Y. 276, 13 Am. Rep. 581; De Bow *v.* People, 1 Den. 9.

Tennessee.— Weaver *v.* Davidson County, 104 Tenn. 315, 59 S. W. 1105.

Texas.— Williams *v.* Sapieha, (Civ. App. 1900) 59 S. W. 947.

United States.— Pease *v.* Peck, 18 How. 595, 15 L. ed. 518; Reed *v.* Clark, 20 Fed. Cas. No. 11,643, 3 McLean 480.

See 44 Cent. Dig. tit. "Statutes," § 42.

The adoption of a code by constitutional declaration does not include the adoption of all inaccuracies and mistakes printed therein. Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106.

There are exceptions to this rule, as in the case of a penal statute, where there has been long acquiescence and observance of the provisions of the printed act. Pacific *v.* Seifert, 79 Mo. 210; Pease *v.* Peck, 18 How. (U. S.) 595, 597, 15 L. ed. 518, in which it was said: "The propriety of recurring to ancient, altered, and erased manuscripts, for the purpose of changing their construction, after a lapse of thirty years, and after their construction has been long settled by the courts, and has entered as an element into the contracts and business of the citizens, may well be doubted."

79. Stow *v.* Grand Rapids, 79 Mich. 595, 44 N. W. 1047.

80. Goldsmith *v.* Augusta, etc., R. Co., 62 Ga. 468, where the act as published contained the expression "one-half of one per centum," in the place of "one half of per centum," as in the engrossed bill, and it was held that they both meant the same.

81. Rode *v.* Phelps, 80 Mich. 598, 45 N. W. 493, holding that the fact that such variance was caused by gross carelessness, or intentionally to defeat the purposes of the act, will not affect the application of this rule. *Compare* Stow *v.* Grand Rapids, 79 Mich. 595, 44 N. W. 1047.

If the variance does not materially affect the meaning of the act, it will not defeat its validity. Stein *v.* Leeper, 78 Ala. 517; Jones *v.* Hutchinson, 43 Ala. 721; Sharp *v.* Merrill, 41 Minn. 492, 43 N. W. 385. A clerical mistake in the title of an act, made in engrossing, after its passage, but before the governor's approval, will not invalidate it, if, on inspection as a whole, such error cannot mislead. People *v.* Onondaga Tp., 16 Mich. 254. And where in the engrossed bill the title was corrected so as to refer to the act amended by the proper number and year, the validity of the act is not thereby affected. Stow *v.* Grand Rapids, 79 Mich. 595, 44 N. W. 1047. Mere clerical mistakes or carelessness in keeping the journals will not vitiate a law, if its constitutional passage can be deduced from them. Ramsey County *v.* Heenan, 2 Minn. 330; Lumberton Imp. Co. *v.* Robeson County, 146 N. C. 353, 59 S. E. 1014.

82. Ayers *v.* Trego County, 37 Kan. 240, 15 Pac. 229; Weyand *v.* Stover, 35 Kan. 545, 11 Pac. 355; *In re* Hinkle, 31 Kan. 712, 3 Pac. 531; State *v.* Francis, 26 Kan. 724.

A discrepancy between the enrolled act and the journals, as to the origin and passage of the bill, and the enrolled bill itself, will not defeat the act. State *v.* Robertson, 41 Kan. 200, 21 Pac. 382.

83. Southern Pac. Co. *v.* U. S., 171 Fed. 360, 96 C. C. A. 252.

As to sufficiency of titles and expressions of subject-matter see *infra*, IV.

In many instances provisions, such as that general laws be divided into articles and sections, have been declared to be directory. Dorchester County *v.* Meekins, 50 Md. 28; Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

If the validity of an act depends upon the existence of certain conditions, such conditions are not necessarily to be specified. Owen *v.* Sioux City, 91 Iowa 190, 59 N. W. 3.

84. See Ill. Const. art. 4, § 16; N. Y. Const. art. 3, § 22.

Such a provision must be strictly complied with. Mathews *v.* People, 202 Ill. 389, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73; McCord *v.* Massey, 155 Ill. 123, 39 N. E. 592.

In the absence of constitutional provision, no formal words are required in an appropriation bill. State *v.* Bordelon, 6 La. Ann. 68.

85. *Illinois.*— Burritt *v.* State Contract Com'rs, 120 Ill. 322, 11 N. E. 180.

constitution, in those states where the clause is made mandatory, will vitiate the act.[88]

4. Language Employed — a. In General. Unless expressly required by constitutional provision, the legislature is not restricted in the form of the expression of its will.[87]

b. Imperfections and Defects. The imperfection of a law will not render it void, unless it is so imperfect as to render it impossible of execution.[88] So the failure of an act to provide all the details required for its enforcement does not necessarily render it void.[89]

Indiana.— May *v.* Rice, 91 Ind. 546.

Michigan.— People *v.* Dettenthaler, 118 Mich. 595, 77 N. W. 450, 44 L. R. A. 164.

Minnesota — Sjoburg *v.* Security Sav., etc., Assoc., 73 Minn. 203, 75 N. W. 1116, 72 Am. St. Rep. 616.

Nevada.— State *v.* Rogers, 10 Nev. 250, 21 Am. Rep. 738.

North Carolina.— State *v.* Patterson, 98 N. C. 660, 4 S. E. 350.

Oregon.— State *v.* Wright, 14 Oreg. 365, 12 Pac. 708.

South Carolina.— Smith *v.* Jennings, 67 S. C. 324, 45 S. E. 821.

Washington.— *In re* Government Seat, 1 Wash. Terr. 115.

United States.— Montgomery Amusement Co. *v.* Montgomery Traction Co., 139 Fed. 353 [*affirmed* in 140 Fed. 988, 72 C. C. A. 682].

See 44 Cent. Dig. tit. "Statutes," § 44.

Enacting clause directory because not of the essence of the law see McPherson *v.* Leonard, 29 Md. 377; Swann *v.* Buck, 40 Miss. 268; St. Louis *v.* Foster, 52 Mo. 513; Cape Girardeau *v.* Riley, 52 Mo. 424, 14 Am. Rep. 427; Watson *v.* Corey, 6 Utah 150, 21 Pac. 1089.

Elimination without authority.— A bill is not void for lack of the enacting clause, when it appears that it was regularly passed, but on the enrolled bill on file iu the office of the secretary of state appears a heavy penstroke through the words "Be it enacted," probably the act of some irresponsible party, done without the authority of the legislature. State *v.* Wright, 14 Oreg. 365, 12 Pac. 708.

If a concurrent resolution is considered as a bill or law then the enacting clause must be inserted. Collier, etc., Lith. Co. *v.* Henderson, 18 Colo. 259, 32 Pac. 417; Burritt *v.* State Contract Com'rs, 120 Ill. 322, 11 N. E. 180. It is not required in case of a resolution, as contradistinguished from a bill. State *v.* Delesdenier, 7 Tex. 76; Weekes *v.* Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544.

86. May *v.* Rice, 91 Ind. 546 (where the constitution required the style of the enacting clause to be, "Be it enacted by the General Assembly," and the act omitted the words "by the General Assembly," and it was held that the act was a nullity); State *v.* Rogers, 10 Nev. 250, 21 Am. Rep. 738 (where the act was declared invalid because it omitted the word "in Senate and"). *Compare* Montgomery Amusement Co. *v.* Montgomery Traction Co., 139 Fed. 353 [*affirmed* in 140 Fed. 988, 72 C. C. A. 682] (where it was held that the added words "of the state of" in an enacting clause which read "Be it enacted by the Legislature of the state of Alabama" did not affect the validity of the act); State *v.* Burrow, 119 Tenn. 376, 104 S. W. 526 (holding that the omission of the words "the state of" does not render an act invalid).

"Be it resolved," in a joint resolution, is a sufficient compliance with a mandatory provision requiring all laws to be enacted by the words "Be it enacted," etc. Smith *v.* Jennings, 67 S. C. 324, 45 S. E. 821.

87. State *v.* Bordelon, 6 La. Ann. 68; Bathurst *v.* Course, 3 La. Ann. 260.

A statute forbidding and punishing an offense by a generally understood name may be explained and enforced by the courts. Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

Wrong reference to sections of acts amended or repealed will be disregarded where there is no difficulty in ascertaining the intent of the legislature. Richards *v.* State, 65 Nebr. 808, 91 N. W. 878.

88. Hughes' Case, 1 Bland (Md.) 46; Drake *v.* Drake, 15 N. C. 110; Cochran *v.* Loring, 17 Ohio 409; Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837.

The omission of words which may be readily supplied by a consideration of the remainder of the act will not defeat the purpose of the act. Waters *v.* Laurel, 93 Md. 221, 48 Atl. 499.

Mere difficulty in ascertaining its meaning will not render it nugatory. State *v.* West Side St. R. Co., 146 Mo. 155, 47 S. W. 959.

The enactment must be made by appropriate language and not be left to stand upon mere inference and surmise. Warren County *v.* Nall, 78 Miss. 726, 29 So. 755; State *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265; *In re* Public Safety, 34 Wkly. Notes Cas. (Pa.) 476.

89. Bloomer *v.* Bloomer, 128 Wis. 297, 107 N. W. 974. See also Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837.

Enforcement of lien.— A statute which leaves the enforcement of a specific lien to the general law in reference to liens is not invalid. Illinois Cent. R. Co. *v.* Wells, 104 Tenn. 706, 59 S. W. 1041.

Imperfections in details may be supplied by the court. Cochran *v.* Loring, 17 Ohio 409; Bloomer *v.* Bloomer, 128 Wis. 297, 107 N. W. 974.

Conflicting and inconsistent provisions do not necessarily nullify the act (Hand *v.*

c. Certainty and Definiteness. If an act is so uncertain and indefinite as not to indicate the matter or thing to which it relates, it is invalid.[90] If the act is capable of reasonable construction,[91] or if it has been for a considerable time uniformly construed and applied without question or doubt as to its meaning by those affected by it, it will not be declared void for uncertainty.[92] Crimes specified will be deemed to include offenses coming within the terms used, and need not be defined.[93]

5. Incorporation of or Reference to Prior Act — a. In General. The pro-

Stapleton, 135 Ala. 156, 33 So. 689. See also *infra*, VII, A, 4, c), except where the conflict is so irreconcilable as to render the act incapable of interpretation and enforcement (*In re* Hendricks, 60 Kan. 796, 57 Pac. 965).

90. *Arkansas.*— Bittle *v.* Stuart, 34 Ark. 224, where an act changing the boundaries of counties which failed to sufficiently describe the territory annexed to one of them was declared invalid.

Colorado.— *In re* House Resolution, 12 Colo. 359, 21 Pac. 485.

Indiana.— Cook *v.* State, 26 Ind. App. 278, 59 N. E. 489, holding that an act making it an offense to use narrow tired wagons for carrying a load of a certain weight is void for uncertainty, since it furnishes no method of determining what constitutes a narrow tire. But see State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566, holding that an act providing for a classification of cities according to the number of children of school age is not void for uncertainty, where it appears that there are official reports which may be resorted to for the needed information.

Kansas.— *In re* Hendricks, 60 Kan. 796, 57 Pac. 965.

Kentucky.— Matthews *v.* Murphy, 63 S. W. 785, 23 Ky. L. Rep. 750.

Louisiana.— State *v.* Gaster, 45 La. Ann. 636, 12 So. 739, holding that a statute that denounces and punishes as a crime "any misdemeanor in the execution of his office" is void for uncertainty because it does not define the act which constitutes the misdemeanor.

Michigan.— People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287.

Minnesota.— State *v.* Rumberg, 86 Minn. 399, 90 N. W. 1055.

Missouri.— State *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265; State *v.* West Side St. R. Co., 146 Mo. 155, 47 S. W. 959.

New York.— People *v.* Briggs, 193 N. Y. 457, 86 N. E. 522.

North Carolina.—State *v.* Partlow, 91 N. C. 550, 49 Am. Rep. 652.

Ohio.— State *v.* Brinkman, 7 Ohio Cir. Ct. 165, 3 Ohio Cir. Dec. 710.

Pennsylvania.—Com. *v.* Junker, 7 Pa. Dist. 125.

Texas.— Ward *v.* Ward, 37 Tex. 389; Missouri, etc., R. Co. *v.* State, (Civ. App. 1906) 97 S. W. 720 [*reversed* on other grounds in 100 Tex. 420, 100 S. W. 766].

See 44 Cent. Dig. tit. "Statutes," § 47.

It is not essential to validity that the act define what is intended to be included. State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068; Missouri, etc., R. Co. *v.* State, (Tex. Civ. App. 1906) 97 S. W. 720 [*reversed* on other grounds in 100 Tex. 420, 100 S. W. 766].

The question whether a certain act is within the statute will be for a jury to determine. Louisville, etc., R. Co. *v.* Com., 103 Ky. 605, 45 S. W. 880, 46 S. W. 697, 20 Ky. L. Rep. 366; Missouri, etc., R. Co. *v.* State, (Tex. Civ. App. 1906) 97 S. W. 720.

91. *Indiana.*— Gustavel *v.* State, 153 Ind. 613, 54 N. E. 123.

Iowa.— State *v.* Dvoracek, 140 Iowa 266, 118 N. W. 399.

Michigan.— Hammond *v.* Muskegon School Bd., 109 Mich. 676, 67 N. W. 973.

Rhode Island.— Leonhard *v.* John Hope, etc., Mfg. Co., 21 R. I. 449, 44 Atl. 305.

Wisconsin.— Wentworth *v.* Racine County, 99 Wis. 26, 74 N. W. 551.

See 44 Cent. Dig. tit. "Statutes," § 47.

92. Petterson *v.* Galveston Port Pilot Com'rs, 24 Tex. Civ. App. 33, 57 S. W. 1002.

93. State *v.* Mulhisen, 69 Ind. 145; People *v.* Coon, 67 Hun (N. Y.) 523, 22 N. Y. Suppl. 865 (in which it was held that an act relating to commitments to women's reformatories was not invalid because it did not enumerate in terms the acts which shall constitute a female "a common prostitute"); Lloyd *v.* Dollisin, 13 Ohio Cir. Dec. 571; State *v.* Stuth, 11 Wash. 423, 39 Pac. 665 (holding that the word "distinct," as used in an act making it a crime to disturb a religious meeting, has a well-known legal significance and needs no definition). *Compare* Johnston *v.* State, 100 Ala. 32, 14 So. 629 (holding that an act is void for indefiniteness which provides for the punishment of the theft of a dog as in other cases of larceny, without specifying whether it shall be grand or petit larceny); State *v.* Taylor, 7 S D. 533, 64 N. W. 548; State *v.* Wentler, 76 Wis. 89, 44 N. W. 841, 45 N. W. 816.

Attempt to bring about prohibited results. — A criminal statute is not void for uncertainty because it denounces acts which "tend" or are "reasonably calculated" to bring about the prohibited results. Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417 [*affirming* (Civ. App. 1907) 106 S. W. 918].

A criminal act is not void for uncertainty which prescribes as a punishment for the doing of a certain act, the same punishment that is prescribed for doing another named act, when the same criminal code defines the latter act and prescribes its punishment. Davis *v.* State, 51 Nebr. 301, 70 N. W. 984.

visions of one statute may be made applicable to another by reference to the former in the latter, in the absence of constitutional restriction.[94]

b. Constitutional Provisions. It is provided by constitution in many states that no act shall be passed which shall enact that any existing law shall be deemed a part of, or applicable to, it except by inserting it therein.[95] Where the reference adds nothing to the force or effect of the act, it will not be construed so as to nullify the act.[96]

94. *California.*— Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

Colorado.— Schwenke *v.* Union Depot, etc., Co., 7 Colo. 512.

Florida.— Jones *v.* Dexter, 8 Fla. 276.

Illinois.— Turney *v.* Wilton, 36 Ill. 385.

Texas.— Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738.

Wisconsin.— Garland *v.* Hickey, 75 Wis. 178, 43 N. W. 832; Land, etc., Co. *v.* Brown, 73 Wis. 294, 40 N. W. 482, 3 L. R. A. 472; Sika *v.* Chicago, etc., R. Co., 21 Wis. 370; Wood *v.* Hustis, 17 Wis. 416.

United States.— Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. 51, 18 L. ed. 137.

England.— Warrington Waterworks Co. *v.* Longshaw, 9 Q. B. D. 145, 46 J. P. 773, 51 L. J. Q. B. 498, 46 L. T. Rep. N. S. 815, 31 Wkly. Rep. 11; Atty.-Gen. *v.* Gaslight, etc., Co., 7 Ch. D. 217, 47 L. J. Ch. 534, 37 L. T. Rep. N. S. 746, 26 Wkly. Rep. 125.

See 44 Cent. Dig. tit. "Statutes," § 48.

In such cases this method is as effectual as though the whole statute was reënacted *verbatim.* Turney *v.* Wilton, 36 Ill. 385; Garland *v.* Hickey, 75 Wis. 178, 43 N. W. 832.

95. Christie *v.* Bayonne, 48 N. J. L. 407, 5 Atl. 805 (holding that a statute granting to a fireman the same exemptions "as now are or hereafter may be allowed to members of the national guard" was in violation of such a constitutional provision); Weinckie *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 689 [*affirmed* in 133 N. Y. 656, 31 N. E. 625]; Ninth Ave. R. Co. *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 347; Patten *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 306 [*affirmed* in 67 N. Y. 484]; Titusville Iron-Works *v.* Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917, 1 L. R. A. 361; Reynolds Lumber Co. *v.* Reynolds, 4 Pa. Dist. 573; McKeever *v.* Victor Oil Co., 9 Pa. Co. Ct. 284; Donohugh *v.* Roberts, 15 Phila. (Pa.) 144; Doud *v.* Citizens' Ins. Co., 6 Pa. Co. Ct. 329 (holding that the act of May 25, 1887, attempting by simple reference to extend the provisions of the act of 1806 to actions *ex contractu* and *ex delicto*, to which they do not apply, is repugnant to Const. art. 3, § 6, prohibiting the extension of the provisions of a law by reference to its title only).

A reference in one act to another act for the purpose of providing for the enforcement of a right or duty (People *v.* Banks, 67 N. Y. 568; People *v.* Hayt, 7 Hun (N. Y.) 39 [*reversed* on other grounds in 66 N. Y. 606]; People *v.* Learned, 5 Hun (N. Y.) 626; People *v.* Rontey, 4 N. Y. Suppl. 235 [*affirmed* in 117 N. Y. 624, 22 N. E. 1128]), or the necessary means or procedure for carrying into effect the provisions of the former (Christie *v.* Bayonne, 48 N. J. L. 407, 5 Atl. 805; De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43; Campbell *v.* State Bd. of Pharmacy, 45 N. J. L. 241; *In re* Trenton St. R. Co., (N. J. Ch. 1900) 47 Atl. 819; Curtin *v.* Barton, 139 N. Y. 505, 34 N. E. 1093; People *v.* Lorillard, 135 N. Y. 285, 31 N. E. 1011; People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; Matter of New York, 95 N. Y. App. Div. 552, 89 N. Y. Suppl. 6; People *v.* McKay, 72 N. Y. App. Div. 527, 76 N. Y. Suppl. 600; Matter of Buffalo Traction Co., 25 N. Y. App. Div. 447, 49 N. Y. Suppl. 1052 [*affirmed* in 155 N. Y. 700, 50 N. E. 1115]; People *v.* Bruning, 89 Hun (N. Y.) 124, 34 N. Y. Suppl. 1048; People *v.* Wilber, 15 N. Y. Suppl. 435; Bergman *v.* Wolff, 11 N. Y. Suppl. 591; Kauffman *v.* Jacobs, 4 Pa. Co. Ct. 462), or as an example by way of illustration (Krause *v.* Pennsylvania R. Co., 4 Pa. Co. Ct. 60, 20 Wkly. Notes Cas. 111), or with the object of conferring certain powers specified in the act referred to upon officers named (Kennedy *v.* Belmar, 61 N. J. L. 20, 38 Atl. 756; *In re* Haynes, 54 N. J. L. 6, 22 Atl. 923; Mortland *v.* Christian, 52 N. J. L. 521, 20 Atl. 673. *Compare* Donohugh *v.* Roberts, 15 Phila. (Pa.) 144) is not within the inhibition. To constitute a violation the new act must, in express terms, provide that an existing act shall be made or deemed a part of it. People *v.* Van de Carr, 150 N. Y. 439, 44 N. E. 1040 [*affirming* 7 N. Y. App. Div. 608, 39 N. Y. Suppl. 581]; People *v.* Lorillard, 135 N. Y. 285, 31 N. E. 1011; Weinckie *v.* New York Cent., etc., R. Co., 15 N. Y. Suppl. 689; Wells *v.* Buffalo, 14 Hun (N. Y.) 438 [*affirmed* in 80 N. Y. 253]; Hathaway *v.* Tuttle, 12 N. Y. Wkly. Dig. 240. So if the substance of a special act is sought to be qualified by reference to another act, or if it is sought to limit or modify the terms of such act by such a reference, then this constitutional restriction applies. Matter of Buffalo Traction Co., 25 N. Y. App. Div. 447, 49 N. Y. Suppl. 1052 [*affirmed* in 155 N. Y. 700, 50 N. E. 1115].

96. *In re* Haynes, 54 N. J. L. 6, 22 Atl. 923; People *v.* Partridge, 13 Abb. N. Cas. (N. Y.) 410; Krause *v.* Pennsylvania R. Co., 4 Pa. Co. Ct. 60, 20 Wkly. Notes Cas. 111.

Reference may be made in a special city law to the charter of the city to provide the method of imposing a tax and the manner of its assessment and collection. Choate *v.* Buffalo, 39 N. Y. App. Div. 379, 57 N. Y. Suppl. 383 [*affirmed* in 167 N. Y. 597, 60 N. E. 1108]; Hurlburt *v.* Banks, 1 Abb. N.

c. Reënactment by Reference. Independent of such a constitutional restriction it is probable that a reënactment of a former law by mere reference to it, without the required formalities, and without publication, would be ineffectual.[97]

d. Effect of Codification. The incorporation of an act into a code and its subsequent reënactment cures defects which may have existed in the original act by reason of failure to comply with formal requisites.[98]

G. Validity[99] **— 1. Determination of by Courts**[1] **— a. Grounds For Jurisdiction.**[2] In cases where the question is presented and is necessarily involved,[3] it is the power and duty of the courts to declare invalid acts of the legislature which are in undoubted conflict with constitutional provisions.[4] However, a violation of constitutional restraints and prohibitions is the only permissible ground for calling upon the courts to determine the validity of a statute,[5] and the unwisdom, impracticableness, unreasonableness, or injustice of the enactment furnishes no ground for interposition.[6]

b. Scope of Inquiry — (i) *Steps Prior to Enrolment.* In regard to the question as to how far the courts must treat an enrolled bill, properly authenticated, approved, and deposited with the secretary of state, as conclusive of the regularity and validity of its passage, the rule obtaining in a majority of the jurisdictions where the question has been decided is that such a bill is conclusively presumed to have been regularly enacted, and that the courts have no power to go behind

Cas. (N. Y.) 157, 52 How. Pr. 196 [*affirmed* in 67 N. Y. 568]. And a provision making a code of ordinances, promulgated by a duly authorized municipal body, binding upon the city does not come within the purview of this constitutional provision. People *v.* Davis, 78 N. Y. App. Div. 570, 79 N. Y. Suppl. 747.

97. Street *v.* Hooten, 131 Ala. 492, 32 So. 580.

A provision in a constitution that statutes in force at the time of its adoption, and not repugnant thereto, shall remain in force until repealed, does not operate as a reënactment, but as a continuation of such statute. State *v.* Ellis, 22 Wash. 129, 60 Pac. 136.

98. Daniel *v.* State, 114 Ga. 533, 40 S. E. 805.

99. **Constitutionality of statutes** see Constitutional Law, 8 Cyc. 775.

1. **Authority of courts to determine applicability of general law** see Constitutional Law, 8 Cyc. 851.

2. **Jurisdiction of appellate court** see Appeal and Error, 2 Cyc. 545, 664.

3. Sayles *v.* Walla Walla County, 30 Wash. 194, 70 Pac. 256; Morrison *v.* Eau Claire, 115 Wis. 538, 92 N. W. 280, 95 Am. St. Rep. 955.

The question will not be determined on a motion, unless unavoidably necessary to the decision. McGrath *v.* Grout, 37 Misc. (N. Y.) 64, 74 N. Y. Suppl. 779 [*affirmed* in 69 N. Y. App. Div. 314, 74 N. Y. Suppl. 782]. See, generally, Motions, 28 Cyc. 1.

4. Hayes *v.* Walker, 54 Fla. 163, 44 So. 747; Macon, etc., R. Co. *v.* Davis, 13 Ga. 68; St. Mary's Bank *v.* State, 12 Ga. 475; Sackrider *v.* Saginaw County, 79 Mich. 59, 44 N. W. 165; People *v.* Mahaney, 13 Mich. 481; Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394. See also Constitutional Law, 8 Cyc. 728.

Lapse of time immaterial.— The court is not prevented from declaring unconstitutional statutes of a certain class by reason of the fact that they have long been in existence and considered constitutional. Sadler *v.* Langham, 34 Ala. 311.

5. Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Brown *v.* Tharpe, 74 S. C. 207, 54 S. E. 363. And see Constitutional Law, 8 Cyc. 776.

A conflict with the laws of other jurisdictions does not give the court any right to pass upon its validity. Himmel *v.* Eichengreen, 107 Md. 610, 69 Atl. 511.

6. *Arkansas.*— Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785.

California.— Spier *v.* Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196.

Georgia.— Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Indiana.— Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 62 Am. St. Rep. 477, 37 L. R. A. 294.

Kentucky.— Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138, 32 Ky. L. Rep. 129, 33 Ky. L. Rep. 49.

Nebraska.— Granger *v.* State, 52 Nebr. 352, 72 N. W. 474.

New York.— People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; Pearce *v.* Stephens, 18 N. Y. App. Div. 101, 45 N. Y. Suppl. 422 [*affirmed* in 153 N. Y. 673, 48 N. E. 1106], holding that an objection that a statute is partisan cannot be sustained where no specific constitutional objection is pointed out.

Rhode Island.— Baxter *v.* Tripp, 12 R. I. 310.

South Carolina.—Brown *v.* Tharpe, 74 S. C. 207, 54 S. E. 363.

See 44 Cent. Dig. tit. "Statutes," § 53; and Constitutional Law, 8 Cyc. 851.

it and look at the legislative journals or other records, for the purpose of determining whether constitutional requirements as to form and procedure were observed;[7] while the rule prevailing in a minority of jurisdictions, in some of which there are constitutional provisions authorizing such inquiry, is that, although the enrolled bill is *prima facie* evidence of its passage, the presumption of regularity is rebuttable, and the court may go behind it and look at other records,[8] with the

The judiciary has no general authority to correct injustice in legislative action in matters of taxation. Pence *v.* Frankfort, 101 Ky. 534, 41 S. W. 1011, 19 Ky. L. Rep. 721. See, generally, TAXATION.

7. *California.*— People *v.* Harlan, 133 Cal. 16, 65 Pac. 9; Yolo County *v.* Colgan, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41; People *v.* Burt, 43 Cal. 560; Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 93 [*overruling* Fowler *v.* Peirce, 2 Cal. 165].

Indiana.— Lewis *v.* State, 148 Ind. 346, 47 N. E. 675; Western Union Tel. Co. *v.* Taggart, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671; State *v.* Boice, 140 Ind. 506, 39 N. E. 64, 40 N. E. 113; Madison County *v.* Burford, 93 Ind. 383; Evans *v.* Browne, 30 Ind. 514, 95 Am. Dec. 710 [*followed* in Bender *v.* State, 53 Ind. 254]. See also State *v.* Grant County, 107 Ind. 343, 8 N. E. 222; Edger *v.* Randolph County, 70 Ind. 331. An exception is made in cases where the bill is passed over the governor's veto, as no certification is required in such cases. State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65. But even in this class of cases, when the enactment is certified by the legal custodian of the law, properly authenticated and complete in form, it is held that judicial investigation is at an end. Hovey *v.* State, 119 Ind. 395, 21 N. E. 21.

Kentucky.— Com. *v.* Hardin County Ct., 99 Ky. 188, 35 S. W. 275, 18 Ky. L. Rep. 113; Com. *v.* Shelton, 99 Ky. 120, 35 S. W. 128, 18 Ky. L. Rep. 30; Lafferty *v.* Huffman, 99 Ky. 80, 35 S. W. 123, 18 Ky. L. Rep. 17, 32 L. R. A. 203; Waller *v.* Murray, 53 S. W. 25, 21 Ky. L. Rep. 783. But see Norman *v.* Kentucky Bd. of Managers World's Columbian Exposition, 93 Ky. 537, 20 S. W. 901, 14 Ky. L. Rep. 529, 18 L. R. A. 556.

Mississippi.— *Ex p.* Wren, 63 Miss. 512, 56 Am. Rep. 825 [*overruling* Brady *v.* West, 50 Miss. 68]; Swann *v.* Buck, 40 Miss. 268; Green *v.* Weller, 32 Miss. 650.

Montana.— State *v.* Long, 21 Mont. 26, 52 Pac. 645.

Nevada.— State *v.* Beck, 25 Nev. 68, 56 Pac. 1008; State *v.* Nye, 23 Nev. 99, 42 Pac. 866; State *v.* Glenn, 18 Nev. 34, 1 Pac. 186; State *v.* Swift, 10 Nev. 176, 21 Am. Rep. 721.

New Jersey.— Pangborn *v.* Young, 32 N. J. L. 29. However, under a subsequent constitutional amendment requiring the preservation of evidence of the notice of intention to apply for the passage of a local act, the court may look at such evidence. Ewing Tp. *v.* Trenton, 57 N. J. L. 318, 31 Atl. 223 [*following* Passaic County *v.* Stevenson, 46 N. J. L. 173].

New York.— People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377. And see People *v.* Chenango County, 8 N. Y. 317; Warner *v.* Beers, 23 Wend. 103. *Compare* Purdy *v.* People, 4 Hill 384.

North Carolina.— Carr *v.* Coke, 116 N. C. 223, 22 S. E. 16, 47 Am. St. Rep. 801, 28 L. R. A. 737 (applying the rule in a case where it appeared on the face of the journals, that the bill was enrolled before it had been read before each house the number of times required by the constitution); Brodnax *v.* Groom, 64 N. C. 244.

North Dakota.— Power *v.* Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691.

Pennsylvania.— Perkins *v.* Philadelphia, 156 Pa. St. 539, 27 Atl. 356; Kilgore *v.* Magee, 85 Pa. St. 401; Massey *v.* Philadelphia, 1 Wkly. Notes Cas. 140.

South Dakota.— State *v.* Bacon, 14 S. D. 394, 85 N. W. 605; Narregang *v.* Brown County, 14 S. D. 357, 85 N. W. 602.

Texas.— Houston, etc., R. Co. *v.* Stuart, (Civ. App. 1898) 48 S. W. 799; McLane *v.* Paschal, 8 Tex. Civ. App. 398, 28 S. W. 711; *Ex p.* Tipton, 28 Tex. App. 438, 13 S. W. 610, 8 L. R. A. 326; Usener *v.* State, 8 Tex. App. 177. And see Blessing *v.* Galveston, 42 Tex. 641.

Utah.— Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

Washington.— State *v.* Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340.

United States.— Lyons *v.* Woods, 153 U. S. 649, 14 S. Ct. 959, 38 L. ed. 854 [*affirming* 5 N. M. 327, 21 Pac. 346, and *following* Field *v.* Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294]. *Contra*, Chicago, etc., R. Co. *v.* Smyth, 103 Fed. 376, following the rule obtaining in Nebraska in determining the validity of a legislative enactment of that state.

See 44 Cent. Dig. tit. "Statutes," § 55.

In Louisiana, after a law has been duly promulgated, the court will accept it without inquiry as to the observance or non-observance of constitutional rules relating to its passage. Louisiana State Lottery Co. *v.* Richoux, 23 La. Ann. 743, 8 Am. Rep. 602 [*followed* in Whited *v.* Lewis, 25 La. Ann. 568].

The courts will not go behind the ratification of an act to ascertain whether notice was given in accordance with the constitution of the state. Cox *v.* Pitt County, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. N. S. 253.

What evidence is admissible to show existence of statute see *infra*, VIII, B, 1.

8. *Alabama.*— Wallace *v.* Jefferson County Bd. of Revenue, 140 Ala. 491, 37 So. 321; Jones *v.* Hutchinson, 43 Ala. 721.

limitation, in some jurisdictions, that judicial inquiry must stop with an examination of the legislative journals.[9]

(II) *Other Matters.* In passing upon the validity of an enactment, it is not the province of the court to inquire, through the medium of the journals or otherwise, into the motives of the legislature, or any member or members thereof, in enacting the law;[10] the organization of the legislature or the election and qualification of the members thereof;[11] the observance of the joint rules of

Colorado.—Andrews *v.* People, 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76.

Idaho.— State *v.* Boise, 5 Ida. 519, 51 Pac. 110.

Illinois.— Turley *v.* Logan County, 17 Ill. 151; Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Kansas.— *In re* Taylor, 60 Kan. 87, 55 Pac. 340.

Michigan.— Rode *v.* Phelps, 80 Mich. 598, 45 N. W. 493; Sackrider *v.* Saginaw County, 79 Mich. 59, 44 N. W. 165; Hart *v.* McElroy, 72 Mich. 446, 40 N. W. 750; Callaghan *v.* Chipman, 59 Mich. 610, 26 N. W. 806; People *v.* Onondaga Tp., 16 Mich. 254; Green *v.* Graves, 1 Dougl. 351.

Minnesota.— Ramsey County *v.* Heenan, 2 Minn. 330.

Nebraska.— State *v.* Frank, 61 Nebr. 679, 85 N. W. 956, 60 Nebr. 327, 83 N. W. 74; State *v.* Burlington, etc., R. Co., 60 Nebr. 741, 84 N. W. 254; Webster *v.* Hastings, 56 Nebr. 669, 77 N. W. 127; State *v.* Moore, 37 Nebr. 13, 55 N. W. 299; State *v.* McLelland, 18 Nebr. 236, 25 N. W. 77, 53 Am. Rep. 814.

New Hampshire.— *In re* Opinion of Justices, 35 N. H. 579.

South Carolina.— State *v.* Hagood, 13 S. C. 46.

Wyoming.— Brown *v.* Nash, 1 Wyo. 85.

See 44 Cent. Dig. tit. "Statutes," § 55.

Effect of omissions in journals see *infra*, VIII, B.

The message of the governor to the general assembly, at which the statute in question was passed, may be considered by the court in determining the question whether the governor, in calling a special session, intended that the assembly should pass acts for the taxation of property merely, or pass a general revenue law. Parsons *v.* People, 32 Colo. 221, 76 Pac. 666.

9. Lee *v.* Tucker, 130 Ga. 43, 60 S. E. 164; Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203; *In re* Granger, 56 Nebr. 260, 76 N. W. 588; State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; Miller *v.* State, 3 Ohio St. 475; State *v.* Jones, 11 Ohio Cir. Dec. 496.

Absence of protest on journal.— Under the provisions of the Missouri constitution, it has been held that where there is no protest "noted on the journal" of either house, pointing out in what respect the constitution has been violated during the passage of the bill, it will be presumed that the legislature was not remiss in its duty to make such protest if any grounds therefor existed. State *v.* Mason, 155 Mo. 486, 55 S. W. 636 [*affirmed* in 179 U. S. 328, 21 S. Ct. 125, 45 L. ed. 214]; State *v.* Mead, 71 Mo. 266. Before this provision was inserted in the constitution, the rule was that the courts could not go behind the enrolled bill. Pacific R. Co. *v.* Governor, 23 Mo. 353.

10. *Arkansas.*— Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785.

California.— People *v.* Glenn County, 100 Cal. 419, 35 Pac. 302, 38 Am. St. Rep. 305. And see Robinson *v.* Bidwell, 22 Cal. 379.

Delaware.— State *v.* Burris, 4 Pennew. 3, 49 Atl. 930.

Idaho.— Blaine County *v.* Heard, 5 Ida. 6, 45 Pac. 890 [*following* Wright *v.* Kelley, 4 Ida. 624, 43 Pac. 565].

Indiana.— State *v.* Terre Haute, etc., R. Co., 166 Ind. 580, 77 N. E. 1077 (holding that the courts will not hear and determine a charge of fraud and corruption to annul legislative action); Judah *v.* Vincennes University, 16 Ind. 56.

Minnesota.— Jewell *v.* Weed, 18 Minn. 272.

New Jersey.— Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61.

New York.— People *v.* Shepard, 36 N. Y. 285.

United States.— Davis *v.* Cleveland, etc., R. Co., 146 Fed. 403.

See 44 Cent. Dig. tit. "Statutes," § 55; and Constitutional Law, 8 Cyc. 857.

The controlling cause for the enactment of a statute cannot affect its validity. Kirst *v.* Street Imp. Dist. No. 120, 86 Ark. 1, 109 S. W. 526.

11. *Colorado.*— Hughes *v.* Felton, 11 Colo. 489, 19 Pac. 444.

Georgia.— Gormley *v.* Taylor, 44 Ga. 76.

Michigan.— People *v.* Mahaney, 13 Mich. 481. See also Auditor-Gen. *v.* Menominee County, 89 Mich. 552, 51 N. W. 483.

New Mexico.— Chavez *v.* Luna, 5 N. M. 183, 21 Pac. 344.

New York.— Sherrill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841, holding that members of a legislature elected under an unconstitutional apportionment, on being received, become not only *de facto*, but *de jure*, members of the body to which they were elected.

United States.— Lyons *v.* Woods, 153 U. S. 649, 14 S. Ct. 959, 38 L. ed. 854 [*affirming* 5 N. M. 327, 21 Pac. 346].

See 44 Cent. Dig. tit. "Statutes," § 55; and States.

The omission of the members of a legislature to take the official oath prescribed by the constitution does not affect the validity of their acts. Hill *v.* Boyland, 40 Miss. 618. See, generally, States.

the assembly;[12] the question whether the general assembly conformed to the direction of another law in passing it;[13] the proper fulfilment of requirements of which the legislature is necessarily the judge, such as the sufficiency of the advertisement or notice of a special act;[14] nor will it consider objections affecting merely the construction of the act.[15]

c. Question of Law or Fact. Whether a seeming act of a legislature is or is not a law is a judicial question to be determined by the court, and not a question of fact to be tried by a jury,[16] even though a determination of the question may involve a finding of fact.[17]

d. Rules Applicable — (I) *IN GENERAL.* The validity of a statute is to be determined by the application of its language to the subject to which it relates.[18] Although its general effect and consequence are to be considered,[19] the fact that it is or may be unjustly administered is not.[20]

(II) *PRESUMPTION*[21] *IN FAVOR OF VALIDITY.* The same presumption which attaches in favor of the constitutionality of a statute as regards its subject-matter[22] is indulged with reference to its form and enactment. It is only in a case free from doubt that a statute will be declared invalid, and where the act is susceptible of two interpretations, the court will adopt the one which will sustain it.[23]

12. St. Louis, etc., R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452 [*affirmed* in 156 U. S. 649, 15 S. Ct. 484, 39 L. ed. 567]; Hunt *v.* Wright, 70 Miss. 298, 11 So. 608; *In re* Ryan, 80 Wis. 414, 50 N. W. 187; McDonald *v.* State, 80 Wis. 407, 50 N. W. 185.

Matters of parliamentary law will not be reviewed by the courts (Welborn *v.* Akin, 44 Ga. 420), where no substantive requirement of the constitution has been violated (State *v.* Moore, 37 Nebr. 13, 55 N. W. 299).

13. State *v.* Septon, 3 R. I. 119.

14. Waterman *v.* Hawkins, 75 Ark. 120, 86 S. W. 844; Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184; Chamlee *v.* Davis, 115 Ga. 266, 41 S. E. 691 (holding that the court must presume that the requisite publication was made unless the contrary clearly appears from the journals of the legislature); Peed *v.* McCrary, 94 Ga. 487, 21 S. E. 232 [*following* Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402]; Perkins *v.* Philadelphia, 156 Pa. St. 539, 27 Atl. 356. *Contra*, Ewing Tp. *v.* Trenton, 57 N. J. L. 318, 31 Atl. 223 [*following* Passaic County *v.* Stevenson, 46 N. J. L. 173]. See, generally, STATES.

15. *In re* McPhee, 154 Cal. 385, 97 Pac. 878.

16. *Arkansas.*— Scott *v.* Clark County, 34 Ark. 283.

Colorado.— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221.

Minnesota.— Ramsey County *v.* Heenan, 2 Minn. 330.

Pennsylvania.—Ayars' Appeal, 122 Pa. St. 266, 16 Atl. 356, 2 L. R. A. 577.

Texas.— Blessing *v.* Galveston, 42 Tex. 641.

United States.— Lyons *v.* Woods, 153 U. S. 649, 14 S. Ct. 959, 38 L. ed. 854; Post *v.* Kendall County, 105 U. S. 667, 26 L. ed. 1204; South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. ed. 154.

See 44 Cent Dig. tit. "Statutes," § 54.

17. Rio Grande Sampling Co. *v.* Catlin, 40 Colo 450, 94 Pac. 323.

18. Atty.-Gen. *v.* Williams, 178 Mass. 330, 59 N. E. 812.

19. Scranton City *v.* Ansley, 34 Pa. Super. Ct. 133.

The effect in a particular case is not controlling, but the thing to be considered is the general purpose of the statute and its sufficiency to effect that purpose. Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 52 L. R. A. 548.

The knowledge or ignorance of the parties who may be affected by its operation is not material. Oakland *v.* Carpentier, 21 Cal. 642.

20. McGovern *v.* Hope, 63 N. J. L. 76, 42 Atl. 830; People *v.* City Prison, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718.

Extreme cases.— The validity of a law is not to be tested by the fact that its application to extreme cases, involving the assumption of gross misconduct of public officers, would result in great injustice. Rode *v.* Siebe, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342.

In no event is the validity of the statute to be determined by what has been done under it in any particular instance, but by what may be done under it. Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673, 76 Am. St. Rep. 659, 53 L. R. A. 548; Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258. And see Gilman *v.* Tucker, 128 N. Y. 190, 28 N. E. 1040, 26 Am. St. Rep. 464, 13 L. R. A. 304.

21. **Presumption to aid construction** see *infra*, VII, A, 5.

22. See CONSTITUTIONAL LAW, 8 Cyc. 801.

23. *Alabama.*— Jackson *v.* Birmingham Foundry, etc., Co., 154 Ala. 464, 45 So. 660; Quartlebaum *v.* State, 79 Ala. 1; Sadler *v.* Langham, 34 Ala. 311.

Arkansas.— State *v.* Moore, 76 Ark. 197, 88 S. W. 881, 70 L. R. A. 671; Waterman *v.* Hawkins, 75 Ark. 120, 86 S. W. 844; Webster *v.* Little Rock, 44 Ark. 536.

e. Effect of Decision. A decision in favor of the validity of a statute conclusively settles the question.[24]

2. Recognition of Invalid Act. The legislature by repeatedly recognizing a law invalid for failure to comply with certain constitutional requirements as to form and procedure may effectually ratify it and make it valid.[25]

California.—Woodward *v.* Fruitvale Sanitary Dist., 99 Cal. 554, 34 Pac. 239; People *v.* San Francisco, etc., R. Co., 35 Cal. 606.

Connecticut.— Ferguson *v.* Stamford, 60 Conn. 432, 22 Atl. 782.

Florida.— Hayes *v.* Walker, 54 Fla. 163, 44 So. 747; *Ex p.* Knight, 52 Fla. 144, 41 So. 786; Potter *v.* Lainhart, 44 Fla. 647, 33 So. 251.

Georgia.— Cutts *v.* Hardee, 38 Ga. 350; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Winter *v.* Jones, 10 Ga. 190, 54 Am. Dec. 379; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Illinois.— People *v.* Onahan, 170 Ill. 449, 48 N. E. 1003; Bedard *v.* Hall, 44 Ill. 91; Illinois Cent. R. Co. *v.* Wren, 43 Ill. 77 [*followed* in Hensoldt *v.* Petersburg, 63 Ill. 157].

Indiana.—McCulloch *v.* State, 11 Ind. 424; State *v.* Dunning, 9 Ind. 20.

Iowa.— Iowa Homestead Co. *v.* Webster County, 21 Iowa 221.

Kansas.— Leavenworth County *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Kentucky.— Morrell Refrigerator Car Co. *v.* Com., 128 Ky. 447, 108 S. W. 926, 32 Ky. L. Rep. 1383.

Louisiana.— New Orleans *v.* Salamander Ins. Co., 25 La. Ann. 650.

Missouri.— State *v.* Wray, 109 Mo. 594, 19 S. W. 86; St. Louis, etc., R. Co. *v.* Evans, etc., Fire Brick Co., 85 Mo. 307; Ewing *v.* Hoblitzell, 85 Mo. 64.

Nebraska.— Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993]; People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314 [*affirming* 110 N. Y. App. Div. 821, 97 N. Y. Suppl. 535]; New York, etc., Bridge Co. *v.* Smith, 148 N. Y. 540, 42 N. E. 1088 [*affirming* 90 Hun 312, 35 N. Y. Suppl. 920]; People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; People *v.* Chenango, 8 N. Y. 317; McGrath *v.* Grout, 37 Misc. 64, 74 N. Y. Suppl. 779 [*affirmed* in 69 N. Y. App. Div. 314, 74 N. Y. Suppl. 782].

North Carolina.— Slocomb *v.* Fayetteville, 125 N. C. 362, 34 S. E. 436.

Pennsylvania.— Matter of League Island, 1 Brewst. 524; McManaman *v.* Hanover Coal Co., 6 Kulp 181.

Tennessee.— Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460 (holding that the rule is applicable to the interpretation of titles); State *v.* Swiggart, 118 Tenn. 556, 102 S. W. 75; Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796.

Texas.— State *v.* Galveston, etc., R. Co., 100 Tex. 153, 97 S. W. 71 [*reversing* (Civ. App. 1906) 93 S. W. 464].

Virginia.— Harvey *v.* Hoffman, 108 Va. 626, 62 S. E. 371.

Washington.— State *v.* Ide, 35 Wash. 576, 77 Pac. 961, 102 Am. St. Rep. 914, 67 L. R. A. 280.

West Virginia.— Underwood Typewriter Co. *v.* Piggott, 60 W. Va. 532, 55 S. E. 664.

Wisconsin.— Lawton *v.* Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616; Palms *v.* Shawano County, 61 Wis. 211, 21 N. W. 77; Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

United States.— Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144 [*reversing* 18 App. Cas. (D. C.) 191]; Whitman College *v.* Berryman, 156 Fed. 112; *Ex p.* Davis, 21 Fed. 396; Shelley *v.* St. Charles County, 17 Fed. 909, 5 McCrary 474; Darling *v.* Berry, 13 Fed. 659, 4 McCrary 470; St. Louis Nat. Bank *v.* Papin, 21 Fed. Cas. No. 12,239, 4 Dill. 29.

See 44 Cent. Dig. tit. "Statutes," § 56.

Long acquiescence in the constitutionality of the act may be considered in its support in a doubtful case. Somerset County *v.* Pocomoke Bridge Co., 109 Md. 1, 71 Atl. 462.

The rule does not apply where the validity of an act is assailed as a special act when a general law is applicable. Anderson *v.* Cloud County, 77 Kan. 721, 95 Pac. 583. Nor will a statute, which includes by general language subjects within and those without the constitutional jurisdiction of the state, be limited by judicial construction to the former class and then sustained. Cella Commission Co. *v.* Bohlinger, 147 Fed. 419, 78 C. C. A. 467, 8 L. R. A. N. S. 537.

24. State *v.* Bosworth, 13 Vt. 402.

Where a statute as a whole is held to have been regularly enacted, the validity of the adoption of each and every section thereof is a necessary consequence. Com. *v.* Hardin County Ct., 35 S. W. 275, 18 Ky. L. Rep. 113.

A decision that the statute is unconstitutional renders it null and void from the date of its enactment. See Constitutional Law, 8 Cyc. 804.

25. Leavenworth County *v.* Higginbotham, 17 Kan. 62; Atty.-Gen. *v.* Joy, 55 Mich. 94, 20 N. W. 806; Wrought Iron Range Co. *v.* Carver, 118 N. C. 328, 24 S. E. 352.

Effect of subsequent legislation on statutes held unconstitutional see Constitutional Law, 8 Cyc. 805.

Such an act is not validated by the approval of the governor (Wells *v.* Missouri Pac. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; Manor Casino *v.* State, (Tex. Civ. App. 1896) 34 S. W. 769), by an amendment of the constitution (State *v.* Tuffy, 20 Nev. 427, 22 Pac. 1054, 19 Am. St. Rep. 374;

3. Effect of Partial Invalidity [26] — **a. Rule Stated.** It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.[27] The rule is,

Bradley *v.* Baxter, 15 Barb. (N. Y.) 122), or by becoming incorporated in a general revision (Dane *v.* McArthur, 57 Ala. 448; Cook *v.* Stewart, 85 Mo. 575).

26. Partial invalidity of: Act having defective title see *infra*, IV, C, 9. Municipal ordinances see Municipal Corporations, 28 Cyc. 372. Repealing acts see *infra*, VI, A, 4. Retrospective law see *infra*, VII, D, 7.

27. *Alabama.*— Ham *v.* State, 156 Ala. 645, 47 So. 126; Thornton *v.* Bramlett, 155 Ala. 417, 46 So. 577; Harper *v.* State, 109 Ala. 28, 19 So. 857; Mobile, etc., R. Co. *v.* State, 29 Ala. 573.

Arkansas.— State *v.* Marsh, 37 Ark. 356.

California.— Rood *v.* McCargar, 49 Cal. 117; Christy *v.* Sacramento County, 39 Cal. 3; Mills *v.* Sargent, 36 Cal. 379; Maclay *v.* Love, 25 Cal. 367, 85 Am. Dec. 133; Robinson *v.* Bidwell, 22 Cal. 379; Lathrop *v.* Mills, 19 Cal. 513; People *v.* Hill, 7 Cal. 97.

Connecticut.— State *v.* Dow, 78 Conn. 53, 60 Atl. 1063; Miller *v.* Colonial Forestry Co., 73 Conn. 500, 48 Atl. 98.

District of Columbia.— Hyde *v.* Southern R. Co., 31 App. Cas. 466; District of Columbia *v.* Green, 29 App. Cas. 296.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929; Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819; State *v.* Baker, 20 Fla. 616.

Georgia.— Lippitt *v.* Albany, 131 Ga. 629, 63 S. E. 33.

Idaho.— *In re* Abel, 10 Ida. 288, 77 Pac. 621.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82; Noel *v.* People, 187 Ill. 587, 58 N. E. 616, 79 Am. St. Rep. 238, 52 L. R. A. 287; Donnersberger *v.* Prendergast, 128 Ill. 229, 21 N. E. 1; Nelson *v.* People, 33 Ill. 390.

Indiana.— Dixon *v.* Poe, 159 Ind. 492, 65 N. E. 518, 95 Am. St. Rep. 309, 60 L. R. A. 308; Henderson *v.* State, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469; McCulloch *v.* State, 11 Ind. 424; Clark *v.* Ellis, 2 Blackf. 8; Southern R. Co. *v.* Hunt, (App. 1908) 83 N. E. 721.

Iowa.— McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214; Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Kentucky.— Gayle *v.* Owen County Ct., 83 Ky. 61.

Louisiana.—Watson *v.* McGrath, 111 La. 1097, 36 So. 204; State *v.* Goff, 106 La. 270, 30 So. 844; St. Landry's Parish *v.* Stout, 32 La. Ann. 1278.

Maryland.— Somerset County *v.* Pocomoke Bridge Co., 109 Md. 1, 71 Atl. 462; Kafka *v.* Wilkinson, 99 Md. 238, 57 Atl. 617; Steenken *v.* State, 88 Md. 708, 42 Atl. 212; Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69; Hagerstown *v.* Dechert, 32 Md. 369.

Massachusetts.— Com. *v.* Hana, 195 Mass. 262, 81 N. E. 149, 122 Am. St. Rep. 251, 11 L. R. A. N. S. 799; Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590; Edwards *v.* Bruorton, 184 Mass. 529, 69 N. E. 328; White *v.* Gove, 183 Mass. 333, 67 N. E. 359; Com. *v.* Petranich, 183 Mass. 217, 66 N. E. 807; Com. *v.* Hitchings, 5 Gray 482; Com. *v.* Clapp, 5 Gray 97; Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381; Com. *v.* Farmers', etc., Bank, 21 Pick. 542, 32 Am. Dec. 290.

Michigan.— Union Trust Co. *v.* Wayne Probate Judge, 125 Mich. 487, 84 N. W. 1101; Mathias *v.* Cramer, 73 Mich. 5, 40 N. W. 926; Atty.-Gen. *v.* Amos, 60 Mich. 372, 27 N. W. 571; People *v.* Detroit, 29 Mich. 108.

Mississippi.— Campbell *v.* Union Bank, 6 How. 625.

Missouri.— State *v.* Nast, 209 Mo. 708, 108 S. W. 563; State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317; State *v.* Field, 119 Mo. 593; 24 S. W. 752; State *v.* Williams, 77 Mo. 310; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Montana.— State *v.* Courtney, 27 Mont. 378, 71 Pac. 308.

Nebraska.— State *v.* Malone, 74 Nebr. 645, 105 N. W. 893; Union Pac. R. Co. *v.* Sprague, 69 Nebr. 48, 95 N. W. 46; Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812; Merrill *v.* State, 65 Nebr. 509, 91 N. W. 418; Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740; State *v.* Moore, 48 Nebr. 870, 67 N. W. 876; Muldoon *v.* Levi, 25 Nebr. 457, 41 N. W. 280. And see Ballou *v.* Black, 17 Nebr. 389, 23 N. W. 3.

Nevada.— *Ex p.* Hewlett, 22 Nev. 333, 40 Pac. 96; State *v.* Swift, 11 Nev. 128.

New Jersey.— State *v.* Davis, 72 N. J. L. 345, 61 Atl. 2; Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373.

New York.— Lawton *v.* Steele, 119 N. Y. 226, 23 N. E. 878, 16 Am. Rep. 813, 7 L. R. A. 134; People *v.* Van de Carr, 91 N. Y. App. Div. 20, 86 N. Y. Suppl. 644 [*affirmed* in 178 N. Y. 425, 70 N. E. 965, 102 Am. St. Rep. 516, 66 L. R. A. 189]; Harris *v.* Niagara County, 33 Hun 279.

North Carolina.— Gamble *v.* McCrady, 75 N. C. 509; Berry *v.* Haines, 4 N. C. 311.

Ohio.— Gibbons *v.* Cincinnati Catholic Inst., 34 Ohio St. 289; Exchange Bank *v.* Hines, 3 Ohio St. 1.

Pennsylvania.— Lea *v.* Bumm, 83 Pa. St. 237; Allegheny County Home's Case, 77 Pa. St. 77; Com. *v.* Shaleen, 30 Pa. Super. Ct. 1 [*affirmed* in 215 Pa. St. 595, 64 Atl. 797]; Com. *v.* Reynolds, 8 Pa. Co. Ct. 568, 5 Kulp 547; Lehigh Valley Coal Co. *v.* U. S. Pipe Line Co., 7 Kulp 77.

Rhode Island.— State *v.* Amery, 12 R. I.

however, subject to several important limitations, and the whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject-matter, meaning, and purpose that it cannot be presumed that the legislature would have passed the one without the other;[28]

64; State *v.* Snow, 3 R. I. 64; State *v.* Copeland, 3 R. I. 33.

South Carolina.— State *v.* Platt, 2 S. C. 150, 16 Am. Rep. 647.

South Dakota.— Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121; State *v.* Morgan, 2 S. D. 32, 48 N. W. 314.

Tennessee.— Franklin County *v.* Nashville, etc., R. Co., 12 Lea 521.

Texas.— Texas, etc., R. Co. *v.* Mahaffey, 98 Tex. 392, 84 S. W. 646 [*reversing* (Civ. App. 1904) 81 S. W. 1047].

Utah.— State *v.* Beddo, 22 Utah 432, 63 Pac. 96; Lyman *v.* Martin, 2 Utah 136.

Vermont.— State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

Virginia.— Bertram *v.* Com., 108 Va. 902, 62 S. E. 969; Trimble *v.* Com., 96 Va. 818, 32 S. E. 786.

Wisconsin.— Quiggle *v.* Herman, 131 Wis. 379, 111 N. W. 479.

United States.— Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679; Pollock *v.* Farmers' Loan, etc., Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. ed. 1014; McPherson *v.* Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869 [*affirming* 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475]; Field *v.* Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294; Little Rock, etc., R. Co. *v.* Worthen, 120 U. S. 97, 7 S. Ct. 469, 30 L. ed. 588; Presser *v.* Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. ed. 615; Florida Cent. R. Co. *v.* Schutte, 103 U. S. 118, 26 L. ed. 327; Allen *v.* Louisiana City, 103 U. S. 80, 26 L. ed. 318; Hamilton Bank *v.* Dudley, 2 Pet. 492, 7 L. ed. 496; Dundee Mortg., etc., Inv. Co. *v.* School Dist. No. 1, 21 Fed. 151; Albany *v.* Stanley, 12 Fed. 82; The General Tompkins, 9 Fed. 620; Duer *v.* Small, 7 Fed. Cas. No. 4,116, 4 Blatchf. 263, 17 How. Pr. (N. Y.) 201; *Ex p.* Touchman, 24 Fed. Cas. No. 14,108, 1 Hughes 601.

See 44 Cent. Dig. tit. "Statutes," § 58.

The test is not to be found in the fact that the constitutional and unconstitutional provisions are in separate sections, for the division into sections is purely artificial, and the rule may apply where the parts in question are in the same section, provided the separation can be accomplished without rewriting the act.

District of Columbia.— Hyde *v.* Southern R. Co., 31 App. Cas. 466.

Maryland.— Steenken *v.* State, 88 Md. 708, 42 Atl. 212.

Massachusetts.— Com. *v.* Hitchings, 5 Gray 482.

Minnesota.— State *v.* Duluth Water, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

New York.— People *v.* Kenney, 96 N. Y. 294.

Vermont.— State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

See 44 Cent. Dig. tit. "Statutes," § 58.

28. *Alabama.*— Yerby *v.* Cochrane, 101 Ala. 541, 14 So. 355; Doe *v.* Minge, 56 Ala. 121.

Arkansas.— *Ex p.* Jones, 49 Ark. 110, 4 S. W. 639.

California.— *Ex p.* Fraser, 54 Cal. 94; Reed *v.* Omnibus R. Co., 33 Cal. 212; Robinson *v.* Bidwell, 22 Cal. 379.

Colorado.— Wadsworth *v.* Union Pac. R. Co., 18 Colo. 600, 33 Pac. 515, 36 Am. St. Rep. 309, 23 L. R. A. 812.

District of Columbia.— Hyde *v.* Southern R. Co., 31 App. Cas. 466.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82; Cornell *v.* People, 107 Ill. 372; Hinze *v.* People, 92 Ill. 406; People *v.* Cooper, 83 Ill. 585.

Indiana.— Henderson *v.* State, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469.

Kansas.— Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790.

Louisiana.— State *v.* Clinton, 28 La. Ann. 201.

Maine.— State *v.* Montgomery, 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386.

Maryland.— Somerset County *v.* Pocomoke Bridge Co., 109 Md. 1, 71 Atl. 462; Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Massachusetts.— Com. *v.* Petranich, 183 Mass. 217, 66 N. E. 807; Warren *v.* Charlestown, 2 Gray 84.

Michigan.— McDonald *v.* Springwells, 152 Mich. 28, 115 N. W. 1066; Campau *v.* Detroit, 14 Mich. 276.

Missouri.— State *v.* Nast, 209 Mo. 708, 108 S. W. 563.

Nebraska.— Crawford Co. *v.* Hathaway, 60 Nebr. 754, 84 N. W. 271, 61 Nebr. 317, 85 N. W. 303.

New Jersey.— Hann *v.* Bedell, 67 N. J. L. 148, 50 Atl. 364; Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373.

New York.— New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 558, 85 N. E. 1113].

Ohio.— State *v.* Perry County, 5 Ohio St. 497; Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1.

Oklahoma.— *In re* Seventh Judicial Dist. Counties, (1908) 98 Pac. 557.

Pennsylvania.— Com. *v.* Shaleen, 30 Pa. Super. Ct. 1 [*affirmed* in 215 Pa. St. 595, 64 Atl. 797].

South Carolina.— Dean *v.* Spartanburg County, 59 S. C. 110, 37 S. E. 226.

and where the invalid section is of such import that the other sections without it would cause results not contemplated or desired by the legislature,[29] where the obnoxious part is the consideration and inducement of the whole act,[30] or where the constitutional parts are ineffective and unenforceable in themselves, in accordance with the legislative intent.[31]

b. Application of Rule — (I) *ACTS RELATING TO POLITICAL DIVISIONS AND OFFICERS* — (A) *Courts and Judicial Officers.*[32] The constitutional parts of acts creating courts and judicial districts, and defining the jurisdiction of the courts thus created and the authority of the officers thereof, have been generally held[33]

South Dakota.— Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121.

Tennessee.—Weaver *v.* Davidson County, 104 Tenn. 315, 59 S. W. 1105; Burkholtz *v.* State, 16 Lea 71.

Texas.— Texas, etc., R. Co. *v.* Mahaffey, 98 Tex. 392, 84 S. W. 646 [*reversing* (Civ. App. 1904) 81 S. W. 1047]; Western Union Tel. Co. *v.* State, 62 Tex. 630; *Ex p.* Towles, 48 Tex. 413.

Vermont.— State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

Virginia.— Robertson *v.* Preston, 97 Va. 296, 33 S. E. 618; Black *v.* Trower, 79 Va. 123.

West Virginia.— Eckhart *v.* State, 5 W. Va. 515.

Wisconsin.— Bonnett *v.* Vallier, 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061, 17 L. R. A. N. S. 486; Slauson *v.* Racine, 13 Wis. 398.

United States.— Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185.

See 44 Cent. Dig. tit. "Statutes," § 58.

The presumption is that the legislature intended the enactment to be effective in its entirety, hence unconstitutional provisions may be eliminated only when they are so independent that their removal will leave the constitutional features and the purposes of the act unaffected thereby. Riccio *v.* Hoboken, 69 N. J. L. 649, 55 Atl. 1109, 63 L. R. A. 485 [*reversing* 69 N. J. L. 104, 54 Atl. 801].

Main provision unconstitutional.— Where all the provisions of an act are secondary to an unconstitutional provision, the whole is invalid. Brooks *v.* Hydorn, 76 Mich. 273, 42 N. W. 1122; Darby *v.* Wilmington, 76 N. C. 133.

29. Robert *v.* San Francisco Police Ct., 148 Cal. 131, 82 Pac. 838; State *v.* Patterson, 50 Fla. 127, 39 So. 398; Mathews *v.* People, 202 Ill. 389, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679; Spraigue *v.* Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. ed. 115.

If the general scope and purpose are constitutional, and constitutional means are provided for executing such general purpose, the entire statute will not be declared void because one or more of the details are not in accordance with the constitution, provided the invalid part may be eliminated without affecting the general purpose. State *v.* Kelsey, 44 N. J. L. 1; Lowery *v.* Kernersville, 140 N. C. 33, 52 S. E. 267.

30. State *v.* Nast, 209 Mo. 708, 108 S. W. 563; State *v.* Drexel, 74 Nebr. 776, 105 N. W. 174; State *v.* Galusha, 74 Nebr. 188, 104 N. W. 197; Union Pac. R. Co. *v.* Sprague, 69 Nebr. 48, 95 N. W. 46; Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812; Redell *v.* Moores, 63 Nebr. 219, 88 N. W. 243, 93 Am. St. Rep. 431, 55 L. R. A. 740; Quiggle *v.* Herman, 131 Wis. 379, 111 N. W. 479; Huber *v.* Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 115 Am. St. Rep. 1023, 3 L. R. A. N. S. 653; State *v.* Dousman, 28 Wis. 541.

31. Hayes *v.* Walker, 54 Fla. 163, 44 So. 747; State *v.* Patterson, 50 Fla. 127, 39 So. 398; Cain *v.* Smith, 117 Ga. 902, 44 S. E. 5; Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121.

Where the beneficent purposes of the statute may all be carried into effect, notwithstanding the elimination of the objectionable section, the entire act will not necessarily fall because of the unconstitutionality of one section thereof. Robison *v.* Wayne County Cir. Judges, 151 Mich. 315, 115 N. W. 682.

32. See, generally, COURTS, 11 Cyc. 633; JUDGES, 23 Cyc. 499.

33. **The contrary has been held** in some cases where the scope and purpose of the act was confined to the invalid section, and the constitutional and unconstitutional provisions were vitally connected. Robert *v.* San Francisco Police Ct., 148 Cal. 131, 82 Pac. 838; People *v.* Olsen, 204 Ill. 494, 68 N. E. 376; People *v.* Knopf, 198 Ill. 340, 64 N. E. 842, 1127; Atty.-Gen. *v.* Loomis, 141 Mich. 547, 105 N. W. 4; *In re* Seventh Judicial Dist. Counties, (Okla. 1908) 98 Pac. 557.

Law reporting.—The provisions of an act creating a new system of law reporting in which the judges shall prepare the syllabi have been held to be so interdependent that the unconstitutionality of the requirement as to the syllabi renders the whole act void. Griffin *v.* State, 119 Ind. 520, 22 N. E. 7. See, generally, REPORTS, 34 Cyc. 1610.

Special legislation.—An act providing that the governor may declare special holidays on which the courts shall be open for the transaction of all judicial business, except the trial of an action based on a contract for the direct payment of money, is void in its entirety, as the exception is void on account of being special legislation, and it is an integral part of the act. Diepenbrock *v.*

not to be affected by minor invalid sections which confer more authority or jurisdiction than is authorized by the constitution,[34] or by invalid sections, relating to the qualification, appointment, election,[35] or compensation of judicial officers.[36]

(B) *State Boards and Officers.* Where the essential feature of an act is the appointment of a bureau by the governor, which feature is invalid as interfering with the right of local self-government, the act is void *in toto*.[37]

(C) *Counties and Municipalities.*[38] The invalidity of some sections does not in general affect the validity of the remainder of a statute incorporating a town,[39]

Sacramento County Super. Ct., 153 Cal. 597, 95 Pac. 1121. See, generally, HOLIDAYS, 21 Cyc. 440.

34. *Colorado.*— People *v.* Jobs, 7 Colo. 475, 589, 4 Pac. 798, 1124.

Georgia.— Lorentz *v.* Alexander, 87 Ga. 444, 13 S. E. 632.

Indiana.— Elkhart County *v.* Albright, 168 Ind. 564, 81 N. E. 578 [*followed* in Mumaw *v.* Turner, 169 Ind. 701, 81 N. E. 721].

Kentucky.— See Louisville, etc., R. Co. *v.* Herndon, 126 Ky. 589, 104 S. W. 732, 31 Ky. L. Rep. 1059.

New Jersey.— Jones *v.* Rushmore, 67 N. J. L. 157, 50 Atl. 587 [*following* Stier *v.* Koster, 66 N. J. L. 155, 48 Atl. 790].

Texas.— Kleiber *v.* McManus, 66 Tex. 48, 17 S. W. 249; Meyers *v.* State, (Civ. App. 1907) 105 S. W. 48.

Wisconsin.— Baker *v.* State, 80 Wis. 416, 50 N. W. 518.

See 44 Cent. Dig. tit. "Statutes," § 60.

An act conferring jurisdiction beyond the proper territorial limits has been held valid in so far as it gave jurisdiction within the proper limits. Reid *v.* Morton, 119 Ill. 118, 6 N. E. 414. The contrary has been held on the ground that the designation of territory was entire. People *v.* Upson, 79 Hun (N. Y.) 87, 29 N. Y. Suppl. 615 [*affirmed* in 147 N. Y. 716, 42 N. E. 725]. See, generally, COURTS, 11 Cyc. 633.

Provisions taking away jurisdiction conferred by the constitution do not affect the validity of the rest of the statute. St. Louis Southwestern R. Co. *v.* Hall, 98 Tex. 480, 85 S. W. 786; Lytle *v.* Halff, 75 Tex. 128, 12 S. W. 610. See, generally, COURTS, 11 Cyc. 633.

Conferring of authority upon wrong officers. —Milwaukee Industrial School *v.* Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702. See, generally, COURTS, 11 Cyc. 633.

Act relating to navigable lakes.—McGee *v.* Hennepin County, 84 Minn. 472, 88 N. W. 6. See, generally, WATERS.

35. Wilson *v.* State, 136 Ala. 114, 33 So. 831; Brown *v.* Moss, 126 Ky. 833, 105 S. W. 139, 31 Ky. L. Rep. 1288; Ensworth *v.* Curd, 68 Mo. 282; Curtin *v.* Barton, 139 N. Y. 505, 34 N. E. 1093; Brennan *v.* New York, 122 N. Y. App. Div. 477, 107 N. Y. Suppl. 150. See, generally, JUDGES, 23 Cyc. 499.

An invalid provision reducing the number of judges in one judicial district does not render invalid the entire act, when it is complete in itself as to the other districts. *In re* Groff, 21 Nebr. 647, 33 N. W. 426, 59 Am. Rep. 859.

Tenure of office.— An act incorporating cities of a certain class is not rendered invalid as a whole by the alleged unconstitutionality of a provision extending the term of office of the police judge, whose term is limited by the constitution. State *v.* Malone, 74 Nebr. 645, 105 N. W. 893.

36. Harlin *v.* Schafer, 169 Ind. 1, 81 N. E. 721 [*followed* in Mumaw *v.* Turner, 169 Ind. 701, 81 N. E. 721]; Swartz *v.* Lake County, 158 Ind. 141, 63 N. E. 31; Bennett *v.* State, 16 S. D. 417, 93 N. W. 643. See, generally, JUDGES, 23 Cyc. 499.

37. Davidson *v.* Hine, 151 Mich. 294, 115 N. W. 246, 123 Am. St. Rep. 267, 15 L. R. A. N. S. 575. See, generally, STATES.

The rule is otherwise in regard to acts relating to state officials, where only minor provisions are unconstitutional. State *v.* People's Slaughter House, etc., Co., 46 La. Ann. 1031, 15 So. 408; State *v.* Kelsey, 44 N. J. L. 1, holding that an act requiring the secretary of state to furnish copies of the laws to certain newspapers is not rendered invalid *in toto* by an unconstitutional provision reducing the compensation to be paid to the secretary for furnishing such copies below what it was when he took the office. And see Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788. See, generally, STATES.

38. See, generally, COUNTIES, 11 Cyc. 325; MUNICIPAL CORPORATIONS, 28 Cyc. 55.

39. Bass *v.* Lawrence, 124 Ga. 75, 52 S. E. 296; State *v.* Swift, 11 Nev. 128 (holding that an invalid provision relating to licenses does not render the whole incorporation act invalid); Fort *v.* Cummings, 90 Hun (N. Y.) 481, 36 N. Y. Suppl. 36; Rodman-Heath Cotton Mills *v.* Waxhaw, 130 N. C. 293, 41 S. E. 488 (holding that invalid provisions relating to the power of taxation may be eliminated without affecting the other portions of the act). See also MUNICIPAL CORPORATIONS, 28 Cyc. 143.

An act amending a charter is subject to the same rule. Oak Cliff *v.* State, (Tex. Civ. App. 1903) 77 S. W. 24 [*affirmed* in 97 Tex. 383, 79 S. W. 1]. *Contra*, in regard to an amendment, relating to the representation of a city on the board of county supervisors, and so framed that its provisions cannot be separated. Atty.-Gen. *v.* Gramlich, 129 Mich. 630, 89 N. W. 446.

Contra as to reincorporation acts.—Where the reincorporation feature of an act is unconstitutional, the provisions for dissolution fall with it. State *v.* Stark, 18 Fla. 255. Likewise a statute contemplating the dissolution of incorporated towns and cities, for

classifying cities and towns,[40] or providing for the government of municipalities, and the appointment, election, and compensation of officers thereof.[41] The same rule applies to acts organizing counties,[42] to acts providing for the removal of

the purpose of annexing their territory to another city, is void if a provision therein for determining such action by the vote of the taxpayers is unconstitutional. Valverde *v.* Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208. As it is highly improbable that the general assembly would have enacted the provisions of an act for the redistricting of a city without the further provisions for the appointment of a board of control, the unconstitutionality of the latter provision renders the whole act invalid. State *v.* Pugh, 43 Ohio St. 98, 1 N. E. 439.

Election in remaining portion of county.—An error in a consolidation act which defeats the first election held under it in that portion of the original county excluded from the consolidation is not of itself sufficient to warrant a decision that the whole act is unconstitutional. People *v.* Hill, 7 Cal. 97.

Where part of a village charter restricting the right to vote at elections of officers of said village is unconstitutional, but was not the consideration for the enactment of the other portions of the charter, and the latter constitute an effective and sufficient village charter, they are valid as such. State *v.* Tuttle, 53 Wis. 45, 9 N. W. 791.

40. State *v.* Baker, 55 Ohio St. 1, 44 N. E. 516, holding that if in the formation of a class of municipal corporations an invalid exception is made, the exception alone will be treated as invalid, and the class sustained, where that will most likely give effect to the prevailing purpose of the legislature. See, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 55.

Transfer of cities from one class to another.—Although so much of Ky. St. § 3264, relative to transfer of cities of the third class to another class as provides for transfer by the circuit courts is void, the part providing for the future government of the transferred city and the rights of existing officers is valid. Gilbert *v.* Paducah, 115 Ky. 160, 72 S. W. 816, 24 Ky. L. Rep. 1998.

41. *Georgia.*—Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120. And see Gainesville *v.* Simmons, 96 Ga. 477, 23 S. E. 508, holding that the fact that an act establishing schools in a city was unconstitutional, in that it authorized the exaction of matriculation fees from pupils residing in the city, did not render it invalid *in toto*.

Illinois.— People *v.* Hazelwood, 116 Ill. 319, 6 N. E. 480, holding that a disconnected section relating to the date of an election does not invalidate the remainder of the act.

Indiana.— State *v.* Blend, 121 Ind. 514, 23 N. E. 511, 16 Am. St. Rep. 411 [*distinguishing* Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93]. *Contra*, as to a statute wherein provisions relating to the police and fire departments are so connected and dependent that they cannot be separated. State *v.* Fox, 158 Ind. 126, 63 N. E. 19.

Michigan.— People *v.* Mahaney, 13 Mich. 481.

Montana.— Dunn *v.* Great Falls, 13 Mont. 58, 31 Pac. 1017, holding that an act authorizing bonded indebtedness beyond the amount allowed by the constitution is void only as to the excess.

New Jersey.— Fagan *v.* Payen, (1904) 59 Atl. 568 [*reversing* 70 N. J. L. 341, 57 Atl. 469]; New Brunswick *v.* Fitzgerald, 48 N. J. L. 457, 8 Atl. 729. And see McCullough *v.* Franklin Tp., 59 N. J. L. 106, 34 Atl. 1088, where the rule was applied to an act conferring certain powers on the governing board of townships.

New York.— People *v.* Kenney, 96 N. Y. 294; People *v.* Coler, 71 N. Y. App. Div. 584, 76 N. Y. Suppl. 205 [*affirmed* in 173 N. Y. 103, 65 N. E. 956], holding that an act providing for the removal of a police commissioner by the mayor or the governor, although unconstitutional in conferring power of removal on the governor, is not invalid *in toto*, since the remainder of the act may be given effect consistent with the legislative intent.

Ohio.— Cincinnati *v.* Cincinnati St. R. Co., 1 Ohio S. & C. Pl. Dec. 591, 31 Cinc. L. Bul. 308.

See 44 Cent. Dig. tit. "Statutes," § 61; and, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 55.

Acts passed on same day.—An act providing that legislative bodies of incorporated cities and towns shall have power to license every kind of business transacted within their jurisdiction is not invalidated by another act which went into effect on the same day, conferring power on municipalities to license every kind of business, including the sale of intoxicating liquors, authorized by law and transacted in such city, for even if such subdivision of the latter act is void as being special legislation, such act cannot be regarded as part of the first act by reason of having been passed on the same day and relating to the same subject-matter. *Ex p.* Pfirrmann, 134 Cal. 143, 66 Pac. 205.

Where the unconstitutional provisions are so numerous that the court cannot say that the legislature would have passed the act with those provisions left out the whole act will be declared void. Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 122 Am. St. Rep. 1002.

42. Carleton *v.* People, 10 Mich. 250. See also COUNTIES, 11 Cyc. 345.

Contra, as to acts organizing districts within counties.—Where a provision in a special law creating an independent school-district was void as making a preëxisting bonded indebtedness of a city included in the new district a charge upon taxpayers of the new district who were not originally liable for its payment because not residents of the city, the whole act was rendered invalid thereby, in the absence of any means of de-

county-seats,[43] or to acts relating to the offices, terms of office, and officers of a county.[44]

(II) *Acts Relating to Particular Subjects* — (A) *Public Works and Improvements.* Acts relating to public works and improvements, the acquisition of land therefor, and the assessment of damages and benefits, are valid even though they contain unconstitutional provisions, where, after eliminating such provisions, sufficient of the act remains to carry out its general purpose.[45]

(B) *Taxation and Appropriations.*[46] The rule which requires the rejection of

termining that the legislature would have formed the new district at all without making the disposition that was made of the indebtedness. Cummins *v.* Gaston, (Tex. Civ. App. 1908) 109 S. W. 476. An act which provides for making each county a single poor district, and which is intended to operate as a whole, cannot be held to be in part constitutional and in part unconstitutional. Jenks Tp. Poor Dist. *v.* Sheffield Tp. Poor Dist., 135 Pa. St. 400, 19 Atl. 1004.

43. Lee *v.* Tucker, 130 Ga. 43, 60 S. E. 164; Lindsey *v.* Allen, 112 Tenn. 637, 82 S. W. 171; Bouldin *v.* Lockhart, 3 Baxt. (Tenn.) 262; Harrell *v.* Lynch, 65 Tex. 146.

44. *Indiana.*— Henderson *v.* State, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469.

Nebraska.— Allen *v.* Kennard, 81 Nebr. 289, 116 N. W. 63.

Nevada.— Turner *v.* Fish, 19 Nev. 295, 9 Pac. 884.

New Jersey.— State *v.* Corrigan, 72 N. J. L. 64, 60 Atl. 515; Ross *v.* Essex County, 69 N. J. L. 143, 53 Atl. 1042.

South Carolina.— State *v.* Burns, 73 S. C. 194, 52 S. E. 960.

Tennessee.— State *v.* Trewhitt, 113 Tenn. 561, 82 S. W. 480.

See 44 Cent. Dig. tit. "Statutes," § 61; and, generally, Counties, 11 Cyc. 325.

Invalid provisions extending the term of office of an incumbent during his term do not invalidate other provisions relating to the beginning and duration of the term. Hunt *v.* Buhrer, 133 Mich. 107, 94 N. W. 589; State *v.* Harvey, 8 Ohio Cir. Ct. 599, 4 Ohio Cir. Dec. 227.

45. *Colorado.*— *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274.

Indiana.—Martindale *v.* Rochester, 171 Ind. 250, 86 N. E. 321; Allen County *v.* Silvers, 22 Ind. 491.

Maine.— Cole *v.* Cumberland County, 78 Me. 532, 7 Atl. 397.

Massachusetts.—Lentell *v.* Boston, etc., St. R. Co., 187 Mass. 445, 73 N. E. 542; Edwards *v.* Bruorton, 184 Mass. 529, 69 N. E. 328.

Michigan.— Mathias *v.* Cramer, 73 Mich. 5, 40 N. W. 926.

New York.— Comstock *v.* Syracuse, 129 N. Y. 643, 27 N. E. 1081, 29 N. E. 289; Sweet *v.* Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289 [*reversing* 60 Hun 28, 14 N. Y. Suppl. 421]; *In re* Roberts, 81 N. Y. 62; New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 558, 85 N. E. 1113].

Ohio.— Little Miami R. Co. *v.* Greene County, 31 Ohio St. 338, holding that an act providing for the removal of obstructions in public roads, and declaring that the statute of limitations shall not be deemed to have run in favor of any person for obstructing such road, is not wholly unconstitutional even if the latter provision operates retroactively to destroy a vested right to a defense founded on the bar of limitations.

Pennsylvania.— Dewhurst *v.* Allegheny, 95 Pa. St. 437.

Texas.— Adams *v.* San Angelo Waterworks Co., (Civ. App. 1894) 26 S. W. 1104.

Washington.— Seattle, etc., Waterway Co. *v.* Seattle Dock Co., 35 Wash. 503, 77 Pac. 845 [*affirmed* in 195 U. S. 624, 25 S. Ct. 789, 49 L. ed. 350]; State *v.* Henry, 28 Wash. 38, 68 Pac. 368.

See 44 Cent. Dig. tit. "Statutes," § 62.

Invalid provisions relating to the assessment of damages do not necessarily render the rest of the statute invalid. Smith *v.* Claussen Park Drainage, etc., Dist., 229 Ill. 155, 82 N. E. 278; People *v.* Munroe, 227 Ill. 604, 81 N. E. 704; Harrison *v.* Milwaukee County, 51 Wis. 645, 8 N. W. 731; U. S. *v.* Freeman, 113 Fed. 370. Nor do unconstitutional provisions for the taking of lands without compensation. Wheelwright *v.* Boston, 188 Mass. 521, 74 N. E. 937; Kennedy *v.* Milwaukee, etc., R. Co., 22 Wis. 581.

Extension of territory of town.— The invalidity of a provision that a certain town shall not be required to keep in repair county bridges located within described territory which is sought to be annexed to the town does not affect the validity of so much of the act as provides for an extension of the territory of the town so as to include the territory described. Ham *v.* State, 156 Ala. 645, 47 So. 126.

The few instances in which such acts have been declared invalid *in toto* by reason of the unconstitutionality of a portion thereof are cases where the constitutional and unconstitutional parts were so intimately connected that it could not be presumed that the legislature would have passed the one without the other. Newton County *v.* State, 161 Ind. 616, 69 N. E. 442; Albright *v.* Sussex County Lake, etc., Commission, 71 N. J. L. 309, 59 Atl. 146 [*affirming* 71 N. J. L. 303, 57 Atl. 398, 108 Am. St. Rep. 749, 69 L. R. A. 768]; Harper *v.* New Hanover County Com'rs, 133 N. C. 106, 45 S. E. 526; Pittsburgh's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761.

A possibility that the contemplated undertaking can be carried out under the remaining portions of the act is not sufficient. Skagit County *v.* Stiles, 10 Wash. 388, 39 Pac. 116.

46. See, generally, Taxation.

an unconstitutional part of a statute and the retention of the constitutional part is applicable to taxation [47] and appropriation laws.[48]

(c) *Primary Elections and Apportionment.*[49] As the very nature of an apportionment act compels its treatment as a whole, the unconstitutionality of one provision renders the whole statute invalid; [50] but the whole of a primary election law is not rendered invalid by unconstitutional provisions requiring candidates to pay a fee for the filing of nomination papers,[51] improperly limiting delegates to national conventions,[52] or provisions relating to the qualification and nomination of candidates for the legislature,[53] or congress.[54]

(d) *Intoxicating Liquors.*[55] Acts regulating or prohibiting the sale of intoxicating liquors, as well as those providing for the holding of local option elections, have quite generally been upheld after striking out invalid sections,[56] such as those

47. *California.*— People *v.* Whyler, 41 Cal. 351. And see People *v.* Todd, 23 Cal. 181.

Iowa.—Dubuque *v.* Chicago, etc., R. Co., 47 Iowa 196.

Kentucky.— Southern R. Co. *v.* Coulter, 113 Ky. 657, 68 S. W. 873, 24 Ky. L. Rep. 203.

Louisiana.— Morrison *v.* Larkin, 26 La. Ann. 699.

Minnesota.— State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

Missouri.— Haag *v.* Ward, 186 Mo. 325, 85 S. W. 391; Birch *v.* Plattsburg, 180 Mo. 413, 79 S. W. 475; Westport *v.* McGee, 128 Mo. 152, 30 S. W. 523.

Montana.— Northwestern Mut. L. Ins. Co. *v.* Lewis County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572.

Nebraska.— State *v.* Fleming, 70 Nebr. 523, 529, 97 N. W. 1063.

New Jersey.— New Jersey Cent. R. Co. *v.* Baird, 75 N. J. L. 771, 69 Atl. 239 [*modifying* 75 N. J. L. 120, 67 Atl. 672, 686].

New York.— People *v.* Lawrence, 36 Barb. 177 [*affirmed* in 41 N. Y. 137], holding that the imposition of a tax and the designation of collectors thereof are entirely distinct subject-matters, and that an illegality in regard to the latter will not necessarily impeach the provisions relating to the tax.

Ohio.— Pump *v.* Lucas County, 69 Ohio St. 448, 69 N. E. 666.

Pennsylvania.— Fox's Appeal, 112 Pa. St. 337, 4 Atl. 149.

South Dakota.— *In re* Taxes, 4 S. D. 6, 54 N. W. 818.

Tennessee.— State *v.* Scott, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461.

Texas.— Price *v.* Garvin, (Civ. App. 1902) 69 S. W. 985.

Washington.—State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707; Nathan *v.* Spokane County, 35 Wash. 26, 76 Pac. 521, 102 Am. St. Rep. 888, 65 L. R. A. 336.

United States.— Little Rock, etc., R. Co. *v.* Worthen, 120 U. S. 97, 7 S. Ct. 469, 30 L. ed. 588; Peacock *v.* Pratt, 121 Fed. 772, 58 C. C. A. 48.

See 44 Cent. Dig tit. "Statutes," § 65.

An unconstitutional provision for the payment of bounties to sugar producers does not invalidate provisions relating to duties on imports. Field *v.* Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294. See, generally, Customs Duties, 12 Cyc. 1104.

Where a single comprehensive scheme of taxation is provided for in the act, and the different parts are interdependent, the whole statute must fall upon one provision thereof being shown to be unconstitutional. Quinlon *v.* Rogers, 12 Mich. 168; Williams *v.* Park, 72 N. H. 305, 56 Atl. 463, 64 L. R. A. 33; Angell *v.* Cass County, 11 N. D. 265, 92 N. W. 72; State *v.* O'Connor, 5 N. D. 629, 67 N. W. 824; Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108. And see Campbell *v.* Bryant, 104 Va. 509, 52 S. E. 638, holding that a municipal charter, which contains an unconstitutional provision exempting the inhabitants of the town from the payment of certain taxes to the county to be wholly void, because such exemption was one of the chief inducements to get the taxpayers of the proposed town to vote for the charter. See, generally, Taxation.

48. State *v.* Clinton, 28 La. Ann. 201; Merrill *v.* State, 65 Nebr. 509, 91 N. W. 418.

49. See, generally, Elections, 15 Cyc. 268.

50. Sherill *v.* O'Brien, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841 [*reversing* 114 N. Y. App. Div. 890, 101 N. Y. Suppl. 858]; People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836 [*reversing* 65 Hun 236, 20 N. Y. Suppl. 293]. *Compare* State *v.* Schnitger, 16 Wyo. 479, 95 Pac. 698, holding that the provisions of an act establishing senatorial and representative districts and giving the right of new counties to representation are severable, and the invalidity of the apportionment of senators and representatives does not affect the validity of the other provisions.

51. State *v.* Drexel, 74 Nebr. 776, 105 N. W. 174.

52. Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121.

53. State *v.* Blaisdell, (N. D. 1908) 118 N. W. 141. See, generally, States.

54. State *v.* Nichols, 50 Wash. 508, 97 Pac. 728. See, generally, United States.

55. See, generally, Intoxicating Liquors, 23 Cyc. 43.

56. *Alabama.*—Fourment *v.* State, 155 Ala. 109, 46 So. 266; Mitchell *v.* State, 141 Ala. 90, 37 So. 407 (holding that the prohibitive features of an act are not affected by the in-

containing provisions which amount to unconstitutional exemptions, exceptions, or discriminations.[57]

(E) *Commerce.* The weight of authority is to the effect that where a state statute is primarily intended to regulate domestic commerce, it will be sustained so far as it relates to such commerce, although it contains clauses invalid as attempting to regulate interstate commerce.[58]

(F) *Licenses.*[59] An act requiring persons engaged in certain occupations and professions to be licensed and regulating the granting of such licenses is not invalid *in toto* by reason of invalid provisions prescribing the conditions essential to obtain a license,[60] nor by reason of an invalid provision exempting a deposit made by the licensee from attachment.[61]

(G) *Remedies and Procedure* — (1) CIVIL.[62] Where the same statute provides for different civil remedies, or where the same statutes contain distinct provisions as to the right of action and the procedure to be followed in the enforcement of the same, the unconstitutionality of one section does not invalidate the remainder,[63]

validity, if any, of the dispensary features); Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; McCreary *v.* State, 73 Ala. 480.

Arkansas.— Ferguson *v.* Josey, 70 Ark. 94, 66 S. W. 345.

Georgia.— Hancock *v.* State, 114 Ga. 439, 40 S. E. 317.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82.

Indiana.— State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

Michigan.— People *v.* Richmond, 59 Mich. 570, 26 N. W. 770.

New Jersey.—Meehan *v.* Jersey City Excise Com'rs, 75 N. J. L. 557, 70 Atl. 363 [*affirming* 73 N. J. L. 382, 64 Atl. 689].

New York.— See People *v.* Windholz, 92 N. Y. App. Div. 569, 86 N. Y. Suppl. 1015, relating to adulterated vinegar. *Compare* Wynehamer *v.* People, 13 N. Y. 378 [*affirming* 20 Barb. 567, 11 How. Pr. 530, 2 Park. Cr. 377].

Rhode Island.— State *v.* Paul, 5 R. I. 185.

Texas.— *Ex p.* Dupree, 101 Tex. 150, 105 S. W. 493 [*followed* in *Ex p.* Byrd, 101 Tex. 157, 105 S. W. 496]; Hoover *v.* Thomas, 35 Tex. Civ. App. 535, 80 S. W. 859; Sweeney *v.* Webb, 33 Tex. Civ. App. 324, 76 S. W. 766.

See 44 Cent. Dig. tit. "Statutes," § 66.

Contra.— State *v.* Bengsch, 170 Mo. 81, 70 S. W. 710.

57. *Alabama.*— Powell *v.* State, 69 Ala. 10.

Arkansas.— State *v.* Deschamp, 53 Ark. 490, 14 S. W. 653; State *v.* Marsh, 37 Ark. 356.

Massachusetts.— Com. *v.* Petranich, 183 Mass. 217, 66 N. E. 807.

Vermont.— State *v.* Scampini, 77 Vt. 92, 59 Atl. 201.

United States.— Busch *v.* Webb, 122 Fed. 655.

See 44 Cent. Dig. tit. "Statutes," § 66.

58. Standard Oil Co. *v.* State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. N. S. 1015; Allen *v.* Texas, etc., R. Co., 100 Tex. 525, 101 S. W. 792 [*reversing* (Civ. App. 1906) 98 S. W. 450]; State *v.* Peet, 80 Vt. 449, 68 Atl. 661, 14 L. R. A. N. S. 677. And see Austin *v.* State, 101 Tenn. 563, 48 S. W. 305, 70 Am. St. Rep. 703, 50 L. R. A. 478 [*affirmed* in 179 U. S. 343, 21 S. Ct. 132, 45 L. ed. 224]. See, generally, COMMERCE, 7 Cyc. 422.

The Employers' Liability Act (U. S. St. at L. 232, c. 3073 [U. S. Comp. St. Suppl. (1907) p. 891]) is wholly invalid on account of its regulation of intrastate commerce (Atchison, etc., R. Co. *v.* Mills, (Tex. Civ. App. 1908) 108 S. W. 480; Howard *v.* Illinois Cent. R. Co., 207 U. S. 463, 28 S. Ct. 141, 52 L. ed. 297 [*affirming* 148 Fed. 986, 997]. *Contra,* Spain *v.* St. Louis, etc., R. Co., 151 Fed. 522). The same invalidity has been held to attach to a state statute which included a regulation of interstate commerce. State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A. N. S. 326.

59. See, generally, LICENSES, 25 Cyc. 593.

60. Com. *v.* Shaleen, 30 Pa. Super. Ct. 1 [*affirmed* in 215 Pa. St. 595, 64 Atl. 797]; State *v.* Walker, 48 Wash. 8, 92 Pac. 775. *Contra,* Com. *v.* Hana, 195 Mass. 262, 81 N. E. 149, 122 Am. St. Rep. 251, 11 L. R. A. N. S. 799, holding a license act, which discriminates between the agricultural products of the United States and other countries wholly invalid.

Provision dispensing with examination.— Where the main purpose of an act is to admit no one to practice medicine who has not passed such an examination as is prescribed by it, the law is not otherwise void, because a provision giving the board of medical examiners power to admit without examination persons who have passed an equally strict examination of another state board is unconstitutional. *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249. See, generally, PHYSICIANS AND SURGEONS, 30 Cyc. 1539.

An invalid provision, which excepts a large proportion of the class intended to be licensed, renders the whole law invalid. State *v.* Harmon, 23 Ohio Cir. Ct. 292.

61. State *v.* Feingold, 77 Conn. 326, 59 Atl. 211. See, generally, GARNISHMENT, 20 Cyc. 969.

62. See, generally, ACTIONS, 1 Cyc. 634.

63. *Alabama.*— South, etc., R. Co. *v.* Morris, 65 Ala. 193.

California.— People *v.* San Luis Obispo Bank, 154 Cal. 194, 97 Pac. 306.

unless the rest of the statute is wholly dependent upon that part of the statute which is unconstitutional.[64]

(2) CRIMINAL.[65] The invalidity of a section of a criminal statute which is not involved in the prosecution in question will not be considered.[66] The sections of a criminal statute defining different offenses, as well as the sections relating to the elements of the offense, the prosecution, and the punishment therefor, are generally so distinct and separable that the unconstitutionality of one will not be held to affect the validity of the rest of the statute.[67]

Nebraska.— State *v.* Moore, 48 Nebr. 870, 67 N. W. 876.

New York.— McLaughlin *v.* Kipp, 82 N. Y. App. Div. 413, 81 N. Y. Suppl. 896.

South Dakota.— Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121.

Tennessee.—Tillman *v.* Cocke, 9 Baxt. 429.

Utah.— Utah Sav., etc., Co. *v.* Diamond Coal, etc., Co., 26 Utah 299, 73 Pac. 524.

Washington.— Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868.

Wisconsin.— Pleasants *v.* Rohrer, 17 Wis. 577; Wakely *v.* Mohr, 15 Wis. 609.

United States.— See Glenn *v.* Humphreys, 10 Fed. Cas. No. 5,480, 4 Wash. 424.

See 44 Cent. Dig. tit. "Statutes," § 64.

A provision for the removal of causes to another court, and a change of the place of trial, is not affected by the unconstitutionality of another portion of the same statute for the extension of the jurisdiction of the courts mentioned in it. Darragh *v.* McKim, 2 Hun (N. Y.) 337. Similarly where, in such an act, a provision that the trial of causes so transferred shall be postponed beyond the next succeeding term of court is unconstitutional, the portion relating to the transfer is still valid. Waterman *v.* Hawkins, 75 Ark. 120, 86 S. W. 844. See, generally, VENUE.

64. *California.*— Lathrop *v.* Mills, 19 Cal. 513.

Maryland.— Maryland Jockey Club *v.* State, 106 Md. 413, 67 Atl. 239.

Minnesota.— Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777.

Pennsylvania.— Titusville Iron Works *v.* Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917, 1 L. R. A. 361.

South Carolina.— Utsey *v.* Hiott, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910.

Washington.— Oregon R., etc., Co. *v.* Smalley, 1 Wash. 206, 23 Pac. 1008, 22 Am. St. Rep. 143 [*overruling* Dacres *v.* Oregon R., etc., Co., 1 Wash. 525, 20 Pac. 601].

See 44 Cent. Dig. tit. "Statutes," § 64.

Where a provision relating to appeals is unconstitutional, other provisions, such as those that are claimed to obviate the necessity of obtaining an order allowing the appeal, must fall also. Jones *v.* Jones, 104 N. Y. 234, 10 N. E. 269.

65. See, generally, CRIMINAL LAW, 12 Cyc. 70.

66. Johnson *v.* District of Columbia, 30 App. Cas. (D. C.) 520; District of Columbia *v.* Green, 29 App. Cas. (D. C.) 296. And see Wyatt *v.* McCreery, 126 N. Y. App. Div. 650, 111 N. Y. Suppl. 86 [*followed* in Wyatt *v.* Wanamaker, 126 N. Y. App. Div. 656, 111 N. Y. Suppl. 90 (*affirming* 58 Misc. 429, 110 N. Y. Suppl. 900)], holding that the fact that the part of a statute making a person violating its provisions guilty of a misdemeanor may be unconstitutional is not material in passing on the constitutionality of another portion of the statute providing for a civil remedy.

67. *Arkansas.*— Morrison *v.* State, 40 Ark. 448.

California.— *In re* Hallawell, 8 Cal. App. 563, 97 Pac. 320 [*affirmed* in 155 Cal. 112, 99 Pac. 490].

Florida.— Wooten *v.* State, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

Indiana.— Levy *v.* State, 161 Ind. 251, 68 N. E. 172; State *v.* Newton, 59 Ind. 173.

Louisiana.— St. Landry Parish *v.* Stout, 32 La. Ann. 1278.

Massachusetts.— Com. *v.* Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590; Sullivan *v.* Adams, 3 Gray 476.

Michigan.— People *v.* Moorman, 86 Mich. 433, 49 N. W. 263.

Missouri.— See Finck *v.* Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452.

Nevada.— *Ex p.* Hewlett, 22 Nev. 333, 40 Pac. 96.

North Carolina.— State *v.* McGinnis, 138 N. C. 724, 51 S. E. 50 [*followed* in State *v.* Gatewood, 138 N. C. 749, 51 S. E. 53].

Rhode Island.— State *v.* Snow, 3 R. I. 64.

Vermont.— State *v.* Abraham, 78 Vt. 53, 61 Atl. 766.

Virginia.— Bertram *v.* Com., 108 Va. 902, 62 S. E. 969.

Washington.— *In re* O'Neill, 41 Wash. 174, 83 Pac. 104, 3 L. R. A. N. S. 558; State *v.* Scott, 32 Wash. 279, 73 Pac. 365.

See 44 Cent. Dig. tit. "Statutes," § 63.

The rule in favor of upholding the constitutional parts of a statute applies to statutes providing for the recovery of a penalty (St. Louis, etc., R. Co. *v.* State, 55 Ark. 200, 17 S. W. 806 [*followed* in St. Louis, etc., R. Co. *v.* State, 56 Ark. 166, 19 S. W. 572]; Harrod *v.* Latham Mercantile, etc., Co., 77 Kan. 466, 95 Pac. 11; Hardy *v.* Kingman County, 65 Kan. 111, 68 Pac. 1078; State *v.* Laredo Ice Co., 96 Tex. 461, 73 S. W. 951; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1907) 103 S. W. 449), with an exception where the various sections of the act were passed in furtherance of a single schems (Texas, etc., R. Co. *v.* Mahaffey, 98 Tex. 392, 84 S. W. 646 [*reversing* (Civ. App. 1904) 81

(III) *Acts Relating to Corporations.* An act regulating or conferring powers upon a corporation is valid, even though it contains invalid provisions, where, after striking out the invalid sections, sufficient of the act remains to be effective.[68]

III. General, Special, and Local Laws.

A. Terminology — 1. General or Public Laws. A general or public act is a universal rule affecting the entire community or class of the community covered by it.[69] It is not necessary, however, in order to constitute a statute a public act,

S. W. 1047]. See, generally, Penalties, 30 Cyc. 1331.

Proceedings of grand jury.—An act providing that every grand jury shall consist of twelve persons is not rendered invalid by the insertion therein of an unconstitutional provision that the assent of eight shall be sufficient for the finding of an indictment. English *v.* State, 31 Fla. 356, 12 So. 689 [*following* Donald *v.* State, 31 Fla. 255, 12 So. 695]. See, generally, Grand Juries, 20 Cyc. 1291.

Proceedings after imprisonment.—The constitutional parts of statutes have been held not to be impaired by unconstitutional provisions for the transfer of prisoners from a reformatory to a penitentiary (People *v.* Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; *In re* Linden, 112 Wis. 523, 88 N. W. 645), or for the deduction of time for good conduct (Fite *v.* State, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. N. S. 520); but an unconstitutional section vesting in a board of prison commissioners the power to grant conditional pardons invalidates all other sections dependent on the power to grant such conditional pardon (*In re* Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658). See, generally, Prisons, 32 Cyc. 312.

In several cases the whole statute has been declared invalid on account of the unconstitutional section being the leading feature of the whole act and the remaining sections being inseparably connected with and dependent upon it (People *v.* McNulty, (Cal. 1891) 28 Pac. 816; State *v.* Ramsey County, 48 Minn. 236, 51 N. W. 112, 31 Am. St. Rep. 650; State *v.* Hamey, (Mo. 1901) 65 S. W. 946; State *v.* Cudahy Packing Co., 33 Mont. 179, 82 Pac. 833, 114 Am. St. Rep. 804; *In re* Van Horne, (N. J. Ch. 1908) 70 Atl. 986), or on account of the invalid provision being the compensation and inducement of the prohibitory section (Saratoga Springs *v.* Van Norder, 75 N. Y. App. Div. 204, 77 N. Y. Suppl. 1020).

68. Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69; Lawrence *v.* Rutland R. Co., 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. N. S. 350; Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328. *Contra,* Matter of New York, etc., Bridge Co., 54 Hun (N. Y.) 400, 7 N. Y. Suppl. 445 [*affirming* 5 N. Y. Suppl. 77], holding that an extension of time given to corporations to construct a certain bridge must fall with the invalid condition upon which it was granted. See, generally, Corporations, 10 Cyc. 1.

An exemption from liabilities imposed by another act may be separated from the valid portions of the act, so as to save the latter. McGowan *v.* McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149.

The validity of an act as respects domestic corporations has been held not to be impaired by its invalidity as to foreign corporations. Murphy *v.* Wheatley, 100 Md. 358, 59 Atl. 704. But see Cella Commission Co. *v.* Bohlinger, 147 Fed. 419, 78 C. C. A. 467, 8 L. R. A. N. S. 537.

69. 1 Blackstone Comm. 85, 86 [*quoted* in *Ex p.* Burke, 59 Cal. 6, 11, 43 Am. Rep. 231; Sasser *v.* Martin, 101 Ga. 447, 453, 29 S. E. 278; Unity *v.* Burrage, 103 U. S. 447, 454, 26 L. ed. 405]; 1 Kent Comm. 459, 460; Potter Dwarris 52, 53; Smith Const. Constr. p. 917, § 802 [*quoted* in People *v.* Wright, 70 Ill. 388, 399].

Other definitions are: "One which affects the public, either generally or in some classes." Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336, 349.

"One which relates to persons or things as a class." *In re* Church, 92 N. Y. 1, 4; *In re* New York El. R. Co., 70 N. Y. 327, 350; Wheeler *v.* Philadelphia, 77 Pa. St. 338, 348; Sutherland St. Constr. § 121 [*quoted* in Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 690, 41 Pac. 635].

"One affecting the public generally, either in its proper rights or applicable to its liberties." Hankins *v.* Lawrence, 8 Blackf. (Ind.) 266, 267.

"[One] which relates to matters of public policy." Palcher *v.* U. S., 11 Fed. 47, 49, 3 McCrary 510.

"[One which] operates equally and uniformly upon all persons, places or things brought within the relation and circumstances for which it provided." Farrell *v.* Columbia, 50 Oreg. 169, 173, 91 Pac. 546, 93 Pac. 254.

"One which affects the public at large." Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489. See also Holt *v.* Birmingham, 111 Ala. 369, 19 So. 735; People *v.* Chautauqua County, 43 N. Y. 10, 17; Bretz *v.* New York, 3 Abb. Pr. N. S. (N. Y.) 478, 479; State *v.* Chambers, 93 N. C. 600.

"One which is obligatory on all the citizens, and of which they must take notice at their peril." Burnham *v.* Webster, 5 Mass. 266, 268. See also Crawford *v.* Linn County, 11 Oreg. 482, 5 Pac. 738.

In England every statute that concerns the king and every statute that relates to all subjects of the realm is a public statute.

that it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute.[70]

2. Special or Private Laws. A special or private act is a statute operating only on particular persons and private concerns.[71]

3. Local Laws. A local act is an act applicable only to a particular part of the legislative jurisdiction.[72]

Jenkins *v.* Union Turnpike Road, 1 Cai. Cas. (N. Y.) 86, 93 [*citing* Oxford University Case, 10 Coke 53*b*, 57*a*, 77 Eng. Reprint 1006; Holland's Case, 4 Coke 75*a*, 77*a*, 76 Eng. Reprint 1047].

In this country the limits of the class of public acts have been in general enlarged and all acts of a general character, although affecting only a particular locality, if they apply to all persons, are treated as public acts. Winooski *v.* Gokey, 49 Vt. 282, 285.

An act amending a public act is itself a public act. State *v.* Welch, 21 Minn. 22.

70. *Alabama.*— Holt *v.* Birmingham, 111 Ala. 369, 19 So. 735.

Arkansas.— Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785.

California.— Title, etc., Restoration Co. *v.* Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. N. S. 682; Brooks *v.* Hyde, 37 Cal. 366.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294.

Georgia.— Sasser *v.* Martin, 101 Ga. 447, 29 S. E. 278.

Illinois.— People *v.* Wright, 70 Ill. 388.

Indiana.— Groesch *v.* State, 42 Ind. 547; Levy *v.* State, 6 Ind. 281.

Iowa.— Haskel *v.* Burlington, 30 Iowa 232; McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338.

Maine.— Pierce *v.* Kimball, 9 Me. 54, 23 Am. Dec. 537.

Maryland.— Herbert *v.* Baltimore County, 97 Md. 639, 55 Atl. 376.

Minnesota.— State *v.* Cooley, 56 Minn. 540, 58 N. W. 150.

New Jersey.— State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780.

New York.— Kerrigan *v.* Force, 9 Hun 185 [*affirmed* in 68 N. Y. 381]; Burnham *v.* Acton, 7 Rob. 395, 4 Abb. Pr. N. S. 1, 35 How. Pr. 48.

North Carolina.— State *v.* Chambers, 93 N. C. 600.

Ohio.— McGill *v.* State, 34 Ohio St. 228.

Oregon.— Farrell *v.* Columbia, 50 Oreg. 169, 91 Pac. 546, 93 Pac. 254.

Texas.— Cordova *v.* State, 6 Tex. App. 207.

Vermont.—Winooski *v.* Gokey, 49 Vt. 282.

See 44 Cent. Dig. tit. "Statutes," § 70.

Compare Davis *v.* Clark, 106 Pa. St. 377.

71. 1 Blackstone Comm. 85 [*quoted* in *Ex p.* Burke, 59 Cal. 6, 11, 43 Am. Rep. 231; McGregor *v.* Baylies, 19 Iowa 43, 46; Maxwell *v.* Tillamook County, 20 Oreg. 495, 499, 26 Pac. 803; Groves *v.* Grant County Ct., 42 W. Va. 587, 601, 26 S. E. 460; Unity *v.* Burrage, 103 U. S. 447, 454, 26 L. ed. 405; Bickford *v.* Chatham, 16 Can. Sup. Ct. 235 [*affirming* 14 Ont. App. 32 (*affirming* 10 Ont. 257)]; Ontario, etc., R. Co. *v.* Canadian Pac. R. Co., 14 Ont. 432; Bouvier L. Dict. [*quoted* in People *v.* Palmer, 14 Misc. (N. Y.) 41, 45, 35 N. Y. Suppl. 222; Smith *v.* State, 54 Tex. Cr. 298, 303, 113 S. W. 289].

Other definitions are: "One which relates to private matters, which do not concern the public at large." Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336, 349; Burrill L. Dict. [*quoted* in Allen *v.* Hirsch, 8 Oreg. 412, 423].

"One which relates to particular persons or things of a class." *In re* Church, 92 N. Y. 1, 4; *In re* New York El. R. Co., 70 N. Y. 327, 350; Wheeler *v.* Philadelphia, 77 Pa. St. 338, 348.

"[One] made for individual cases, and for less than a class." Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 690, 41 Pac. 635.

"[One] which applies to an individual or individuals or to some individuals of a class." Wallis *v.* Williams, 101 Tex. 395, 397, 108 S. W. 153. See also Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343.

"One which relates to certain individuals or particular classes of men." Palcher *v.* U. S., 11 Fed. 47, 49, 3 McCrary 510.

"One relating to a selected class, as well as to a particular object." Bruch *v.* Colombet, 104 Cal. 347, 38 Pac. 45; Smith *v.* McDermott, 93 Cal. 421, 425, 29 Pac. 34; Earle *v.* San Francisco Bd. of Education, 55 Cal. 489.

"One which relates and applies to particular members of a class, either particularized by the express terms of the act, or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable." State *v.* Cooley, 56 Minn. 540, 549, 58 N. W. 150. See also Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, 58 Atl. 571.

"One which concerns only certain designated persons, and affects only their private rights." Oreg. Annot. Codes & St. (1901) § 735; Utah Rev. St. (1898) § 3377.

The test of a special law is an appropriateness of its provisions and the objects that it excludes. It is not therefore what a law includes that makes it special but what it excludes. Budd *v.* Hancock, 66 N. J. L. 133, 48 Atl. 1023.

A false or deficient classification of its objects renders a law special. State *v.* Walker, 83 Minn. 295, 86 N. W. 104; State *v.* Somers Point, 52 N. J. L. 32, 18 Atl. 694, 6 L. R. A. 57; State *v.* Yard, 42 N. J. L. 357; Johnson *v.* Milwaukee, 88 Wis. 383, 60 N. W. 270.

72. *Alabama.*— State *v.* Sayre, 142 Ala. 641, 646, 39 So. 240.

Maryland.— Herbert *v.* Baltimore County, 97 Md. 639, 646, 55 Atl. 376.

4. General, Public, Special, Private, and Local Laws Distinguished. The distinction between general and special laws [73] and private and public laws depends

Nevada.— State *v.* Irwin, 5 Nev. 111, 120.

New Jersey.— State *v.* Somers Point, 52 N. J. L. 32, 34, 18 Atl. 694, 6 L. R. A. 57.

New York.— People *v.* Newburgh, etc., Plank Road Co., 86 N. Y. 1, 7; Kerrigan *v.* Force, 68 N. Y. 381, 383; People *v.* Chautauqua County, 43 N. Y. 10, 16; People *v.* O'Brien, 38 N. Y. 193, 195.

North Carolina.— State *v.* Chambers, 93 N. C. 600, 602.

Oklahoma.— Territory *v.* Oklahoma County School Dist. No. 83, 10 Okla. 556, 561, 64 Pac. 241.

Oregon.— Ladd *v.* Holmes, 40 Oreg. 167, 172, 66 Pac. 714, 91 Am. St. Rep. 457; Ellis *v.* Frazier, 38 Oreg. 462, 468, 63 Pac. 642, 53 L. R. A. 454; Maxwell *v.* Tillamook County, 20 Oreg. 495, 499, 26 Pac. 803; Allen *v.* Hirsch, 8 Oreg. 412, 414.

Pennsylvania.— Davis *v.* Clark, 106 Pa. St. 377, 382.

Texas.— Clark *v.* Finley, 93 Tex. 171, 178, 54 S. W. 343; Bohl *v.* State, 3 Tex. App. 683, 685.

Wisconsin.— Clark *v.* Janesville, 10 Wis. 136, 180.

See 44 Cent. Dig. tit. "Statutes," § 79.

"An act is local when the subject relates to a portion only of the people or their property, and may not, either in its subject, operation, or immediate necessary results, affect the people of the State or their property in general." Sedgwick St. & Const. Constr. (2d ed.) p. 529 note [*quoted* in Earle *v.* San Francisco Bd. of Education, 55 Cal. 489, 491; State *v.* Pond, 93 Mo. 606, 640, 6 S. W. 469].

The term "local" as applied to statutes is of modern origin, and is used to designate an act which operates only within a single city, county or other particular division or place, and not throughout the entire legislative jurisdiction. In this sense, the term "local" is the antithesis of "general." State *v.* Sayre, 142 Ala. 641, 39 So. 240. See also McGregor *v.* Baylies, 19 Iowa 43.

73. *Maryland.*— Herbert *v.* Baltimore County, 97 Md. 639, 646, 55 Atl. 376.

Missouri.— Hamman *v.* Central Coal, etc., Co., 156 Mo. 232, 241, 56 S. W. 1091; Ewing *v.* Hoblitzelle, 85 Mo. 64, 78; State *v.* Herrmann, 75 Mo. 340, 346.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 398, 32 Pac. 437.

New Jersey.— Schmalz *v.* Wooley, 56 N. J. Eq. 649, 39 Atl. 539.

Oklahoma.— Gay *v.* Thomas, 5 Okla. 1, 27, 46 Pac. 578.

Texas.— Clark *v.* Finley, 93 Tex. 171, 180, 54 S. W. 343.

See 44 Cent. Dig. tit. "Statutes," § 70.

Illustrations of general laws.— Statutes on the following subjects were held general and not special: Agricultural experiment station (Wasson *v.* Wayne County, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795); appeal by municipal corporations without giving bond (Potwin *v.* Johnson, 108 Ill. 70); boundaries dependent on local action (Thomas *v.* State, 92 Ga. 1, 18 S. E. 44); building certain locks (Dehon *v.* Lafourche Basin Levee Bd., 110 La. 767, 34 So. 770); change of venue from police courts in certain cases (Bumb *v.* Evansville, 168 Ind. 272, 80 N. E. 625); collecting coyote bounty (Bickerdike *v.* State, 144 Cal. 681, 78 Pac. 270); defining a political party (State *v.* Michel, 121 La. 374, 46 So. 430); deposits in waters near New York city (Ferguson *v.* Ross, 59 Hun (N. Y.) 207, 13 N. Y. Suppl. 398 [*affirmed* in 126 N. Y. 459, 27 N. E. 954]); fire-escapes on buildings of certain class (Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851); fishing in certain waters (State *v.* Hockett, 29 Ind. 302); fishing in county (*Ex p.* Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700); fishing in lakes of certain size (Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114); fishing in streams flowing into Lake Erie (State *v.* Owen, 4 Ohio S. & C. Pl. Dec. 163, 3 Ohio N. P. 181); giving powers to all unincorporated cities and towns (Streeter *v.* People, 69 Ill. 595); giving state control and title of property of the state agricultural society (Berman *v.* Minnesota State Agricultural Soc., 93 Minn. 125, 100 N. W. 732); intoxicating liquors (State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675; Murph *v.* Landrum, 76 S. C. 21, 56 S. E. 850; Severance *v.* Murphy, 67 S. C. 409, 46 S. E. 35); jurors in counties of forty thousand or more (State *v.* Berkeley, 64 S. C. 194, 41 S. E. 961); metropolitan police (State *v.* Hunter, 38 Kan. 578, 17 Pac. 177); protection of fish (Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380); protection of stock-raisers with omission of certain counties (Lastro *v.* State, 3 Tex. App. 363); redemption of land sold for taxes, although all the land affected is in one locality (Lombard *v.* Antioch College, 60 Wis. 459, 19 N. W. 367); rights in certain river as public highway (Matter of Wilder, 90 N. Y. App. Div. 262, 85 N. Y. Suppl. 741); running at large of domestic animals with separate regulations in different districts (Addington *v.* Canfield, 11 Okla. 204, 66 Pac. 355); settling accounts between the state and certain parties (State *v.* Crawford, 35 Ark. 237); state hospitals (People *v.* King, 127 Cal. 570, 60 Pac. 35); stock raising with certain counties excepted (Beyman *v.* Black, 47 Tex. 558); support of the poor (State *v.* Bargus, 53 Ohio St. 94, 41 N. E. 245, 53 Am. St. Rep. 628); taxation of mortgages (Dundee Mortg., etc., Inv. Co. *v.* Parrish, 24 Fed. 197); and vaccination of school children (French *v.* Davidson, 143 Cal. 658, 77 Pac. 663).

Illustrations of special laws.— Statutes on the following subjects were held special: Authorizing any city to supply gas under any authority conferred, where the only authority given had been conferred on one

on all the attendant circumstances,[74] having regard to the effect rather than the form of the statute.[75] A public [76] or general law is one operating uniformly [77]

township and declared unconstitutional (Van Giesen *v.* Bloomfield, 47 N. J. L. 442, 2 Atl. 249); city ordinance fixing different license-fee on certain street than elsewhere (Harrodsburg *v.* Renfro, 58 S. W. 795, 22 Ky. L. Rep. 806, 51 L. R. A. 897); commissioners in certain county (Pope *v.* Phifer, 3 Heisk. (Tenn.) 682); elections in certain city (Alexandria *v.* Dearmon, 2 Sneed (Tenn.) 104); juries in certain counties (Burt *v.* State, 86 Miss. 280, 38 So. 233; State *v.* Queen, 62 S. C. 247, 40 S. E. 553); officers' fees in certain counties (Dean *v.* Spartanburg County, 59 S. C. 110, 37 S. E. 226); prohibiting sale of liquors in certain county (Edwards *v.* State, 123 Ga. 542, 51 S. E. 630); sluiceways for fish on certain rivers (Sibley *v.* State, 107 Tenn. 515, 64 S. W. 703); taking certain public burying-ground (York School Dist.'s Appeal, 169 Pa. St. 70, 32 Atl. 92); validating certain bonds (Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743); and water rates in San Francisco (Spring Valley Water Works *v.* Bryant, 52 Cal. 132).

A public act may be local. Pierce *v.* Kimball, 9 Me. 54, 56, 23 Am. Dec. 537; Kerrigan *v.* Force, 68 N. Y. 381, 383. See also State *v.* Nichols, 28 Wash. 628, 69 Pac. 372. So a statute may be general and yet operative only in a particular locality. Mt. Vernon *v.* Evans, etc., Fire Brick Co., 204 Ill. 32, 34, 68 N. E. 208.

Public statutes may be divided into general and local. Lastro *v.* State, 3 Tex. App. 363, 365.

The terms "general" and "public" law are frequently used synonymously, but they are not the equivalent of each other. Every general law is necessarily a public law but every public law is not a general law. A general law is a law which operates throughout the state, alike upon all the people or all of a class. Any law affecting the public within the limits of the county or community would be a public law, though not a general law. Holt *v.* Birmingham, 111 Ala. 369, 372, 19 So. 735. See also Sasser *v.* Martin, 101 Ga. 447, 29 S. E. 278; Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177. However, general laws were construed to mean all public acts in Hingle *v.* State, 24 Ind. 28, 34; State *v.* Duffy, 7 Nev. 342, 350, 8 Am. Rep. 713.

A time limit placed on the operation of a statute does not prevent it from being general. People *v.* Wright, 70 Ill. 388; Cincinnati St. R. Co. *v.* Horstman, 72 Ohio St. 93, 73 N. E. 1075.

That a law is prospective only does not render it special. Redlands *v.* Brook, 151 Cal. 474, 91 Pac. 150.

74. *In re* Church, 92 N. Y. 1, 4; Wheeler *v.* Philadelphia, 77 Pa. St. 338, 348; Winooski *v.* Gokey, 49 Vt. 282.

"Local law" and "special law" are synonymous terms and apply to laws only applicable to a particular locality. Smith *v.* Grayson County, 18 Tex. Civ. App. 153, 155, 44 S. W. 921; Dundee Mortg., etc., Co. *v.* Multnomah County School Dist. No. 1, 19 Fed. 359, 371.

"Private" is generally synonymous with "local"— Kerrigan *v.* Force, 68 N. Y. 381, 383; Allen *v.* Hirsch, 8 Oreg. 412, 422.

75. *Alabama.*— State *v.* Sayre, 142 Ala. 641, 645, 39 So. 240; Holt *v.* Birmingham, 111 Ala. 369, 373, 19 So. 735.

California.— People *v.* Central Pac. R. Co., 43 Cal. 398, 433.

Kansas.— State *v.* Hunter, 38 Kan. 578, 590, 17 Pac. 177; Topeka *v.* Gillett, 32 Kan. 431, 437, 4 Pac. 800.

New Jersey.— State *v.* Somers Point, 52 N. J. L. 32, 34, 18 Atl. 694, 6 L. R. A. 57 [*cited* with approval in State *v.* Elizabeth, 56 N. J. L. 71, 28 Atl. 51, 23 L. R. A. 525].

New York.— St. John *v.* Andrews Inst. for Girls, 191 N. Y. 254, 270, 83 N. E. 981.

Ohio.— State *v.* Shearer, 46 Ohio St. 275, 276, 20 N. E. 335; McGill *v.* State, 34 Ohio St. 228, 239.

Oregon.— Ladd *v.* Holmes, 40 Oreg. 167, 172, 66 Pac. 714, 91 Am. St. Rep. 457.

South Carolina.— Newberry Bank *v.* Greenville, etc., R. Co., 9 Rich. 495, 496.

West Virginia.— Groves *v.* Grant County Ct., 42 W. Va. 587, 594, 26 S. E. 460.

See 44 Cent. Dig. tit. "Statutes," § 70.

The repeal of a general law except as to one county does not make it special. Gilmore *v.* State, 126 Ala. 20, 28 So. 595. So an act will not be declared special legislation solely because at the time of its enactment there was only one county in the state to which its provisions were applicable. Hunzinger *v.* State, 39 Nebr. 653, 58 N. W. 194; McClay *v.* Lincoln, 32 Nebr. 412, 49 N. W. 282. And a law framed in general terms is not made special by the fact that it excepts another general law from its operation. State *v.* Haring, 55 N. J. L. 327, 26 Atl. 915.

76. *Indiana.*— Levy *v.* State, 6 Ind. 281. See McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089, act taxing for a private purpose held a public act.

Maine.— Pierce *v.* Kimball, 9 Me. 54, 23 Am. Dec. 537.

New York.— Kerrigan *v.* Force, 9 Hun 185 [*affirmed* in 68 N. Y. 381]; Burnham *v.* Acton, 7 Rob. 395, 4 Abb. Pr. N. S. 1, 35 How. Pr. 48; McLain *v.* New York, 3 Daly 32, public, although mostly of local application.

Texas.— Cordova *v.* State, 6 Tex. App. 207.

Wisconsin.— Hooker *v.* Green, 50 Wis. 271, 6 N. W. 816, dam across certain river.

See 44 Cent. Dig. tit. "Statutes," § 70.

77. *California.*—Western Granite, etc., Co. *v.* Knickerbocker, 103 Cal. 111, 37 Pac. 192, heights of fences and walls.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294.

Georgia.— McGinnis *v.* Ragsdale, 116 Ga.

as distinguished from a special [78] or local act,[79] which does not so operate, but relates to a particular locality or a part of a class.

B. Legislative Power to Enact Special or Local Laws — 1. In General. The rule is well settled by numerous authorities that the legislative branch of a government has full power to enact special laws unless expressly forbidden by constitutional provisions.[80] And the legislature, in the absence of constitutional prohibition,[81] may pass local laws on a subject already covered by general law.[82]

245, 42 S. E. 492; Sasser *v.* Martin, 101 Ga. 447, 29 S. E. 278.

Illinois.— Dawson Soap Co. *v.* Chicago, 234 Ill. 314, 84 N. E. 920; Jones *v.* Chicago, etc., R. Co., 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; People *v.* Wright, 70 Ill. 388.

Nebraska.— State *v.* Frank, 61 Nebr. 679, 85 N. W. 956, although affecting a single county.

New Jersey.— State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780 (holding that a statute is not special or local merely because it prohibits the doing of a thing in a particular locality, but is general if it applies to all citizens, and deals with a matter of general concern); Van Riper *v.* Parsons, 40 N. J. L. 1, 40 N. J. L. 123, 29 Am. Rep. 210.

New York.— *In re* New York El. R. Co., 70 N. Y. 327.

See 44 Cent. Dig. tit. "Statutes," § 70.

78. Manowsky *v.* Stephen, 233 Ill. 409, 84 N. E. 365; People *v.* Hazelwood, 116 Ill. 319, 6 N. E. 480 (holding that an act which provides for a class of objects already provided for by a previous act, and which does not extend to all of the objects provided for by such previous act, is a local and special law); Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, 58 Atl. 571 (holding that a law is special in a constitutional sense, when by force of an inherent limitation it arbitrarily separates some persons, places, or things from those upon which, but for such separation, it would operate); Dundee Mortg., etc., Co. *v.* School-Dist., 21 Fed. 151.

Private acts operate like conveyances, and are binding only on the parties. Campbell's Case, 2 Bland (Md.) 209, 20 Am. Dec. 360.

That notice of intention to apply for enactment of a general law was published as required for special laws, and that precedent steps taken by those seeking its enactment showed that they considered it a special law, does not render it special. State *v.* Stratton, 136 Mo. 423, 38 S. W. 83.

79. Green *v.* State, 143 Ala. 2, 39 So. 362; Gaskin *v.* Meek, 42 N. Y. 186, 8 Abb. Pr. N. S. 312; Milwaukee County *v.* Isenring, 109 Wis. 9, 85 N. W. 31, 53 L. R. A. 635.

Failure to repeal general laws.—A law framed in general terms cannot be rendered special by the fact that it does not repeal other general laws. Harrington Tp. Road Commission *v.* Harrington Tp. Collector, 54 N. J. L. 274, 23 Atl. 666.

80. *Alabama.*— Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128. See also Sisk *v.* Cargile, 138 Ala. 164, 35 So. 114.

Georgia.— Lee County Dispensary Com'rs *v.* Hooper, 128 Ga. 99, 56 S. E. 997; Roberts *v.* State, 114 Ga. 541, 40 S. E. 750; Hancock *v.* State, 114 Ga. 439, 40 S. E. 317; Hawkinsville, etc., R. Co. *v.* Waycross Air-Line R. Co., 114 Ga. 239, 39 S. E. 844; Smith *v.* State, 112 Ga. 291, 37 S. E. 441; South Carolina, etc., R. Co. *v.* Augusta Cotton, etc., Co., 105 Ga. 486, 30 S. E. 891; Augusta Nat. Bank *v.* Augusta Cotton, etc., Co., 104 Ga. 403, 30 S. E. 888; Massey *v.* Bowles, 99 Ga. 216, 25 S. E. 270.

Illinois.— Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480; People *v.* Harper, 91 Ill. 357.

Iowa.— See State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186.

Kansas.— Rambo *v.* Larrabee, 67 Kan. 634, 73 Pac. 915.

Michigan.— Messenger *v.* Teagan, 106 Mich. 654, 64 N. W. 499.

Ohio.— State *v.* Covington, 29 Ohio St. 102, holding that Const. art. 2, § 26, providing that "all laws of a general nature shall have a uniform operation throughout the state," does not inhibit the passage of appropriate local laws.

Texas.— Orr *v.* Rhine, 45 Tex. 345.

See 44 Cent. Dig. tit. "Statutes," § 67.

A private act of the legislature is in the nature of an assurance at common law, and must depend upon the consent of persons *in esse* whose property is to be affected by it. Lee *v.* Shankle, 51 N. C. 313.

Excepting places which already have local regulation may be valid. Dickinson *v.* Hudson County, 71 N. J. L. 589, 596, 60 Atl. 220, 222 [*affirming* 71 N. J. L. 159, 58 Atl. 182]; *In re* Cheltenham Tp. Road, 140 Pa. St. 136, 21 Atl. 238; Evans *v.* Phillipi, 117 Pa. St. 226, 11 Atl. 630, 2 Am. St. Rep. 655; Bitting *v.* Com., 7 Pa. Cas. 545, 12 Atl. 29.

The fact that the legislative representatives of a county sanctioned a local act applicable to it does not affect its unconstitutionality. Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one and they may extend to all citizens or be confined to particular classes, as minors, married women, or traders or the like. The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of the state, or to a single class of its citizens only. Cooley Const. Lim. 488.

81. See *infra*, II, B, 2.

82. Dudley *v.* Birmingham, R., etc., Co., 139 Ala. 453, 36 So. 700; Montezuma *v.*

Again the legislature may pass general laws where local laws relating to the same subject exist.[83]

2. Constitutional Prohibitions on Special or Local Legislation — a. In General. State constitutions frequently prohibit the enactment of special laws where a general law is applicable.[84] Such constitutional provisions are not retroactive so as to annul special laws already in force [85] and will not affect general laws already in force.[86]

Minor, 70 Ga. 191 (holding that a general law abating certain nuisances does not deprive the legislature from conferring a similar power on towns as to nuisances within their limits); Miller *v.* Wicomico County, 107 Md. 438, 69 Atl. 118; Herbert *v.* Baltimore County, 97 Md. 639, 55 Atl. 376; Hamilton *v.* Carroll, 82 Md. 326, 33 Atl. 648; Revell *v.* Annapolis, 81 Md. 1, 31 Atl. 695; O'Brian *v.* Baltimore County, 51 Md. 15; Pumphrey *v.* Baltimore, 47 Md. 145, 28 Am. Rep. 446; State *v.* Wilcox, 45 Mo. 458.

83. *Georgia.*— Mattox *v.* Knox, 96 Ga. 403, 23 S. E. 307, holding that the fact that at the passage of a general law a local law relating to the same subject existed did not render the former law local.

Minnesota.— State *v.* Sullivan, 62 Minn. 283, 64 N. W. 813.

Missouri.— State *v.* Fiala, 47 Mo. 310.

Pennsylvania.— *In re* Ruan St., 24 Wkly. Notes Cas. 460.

Tennessee.— Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114.

See 44 Cent. Dig. tit. "Statutes," § 68.

"Unless particularly named, or necessarily from its terms therein embraced, a general law does not repeal a local or particular law." Montezuma *v.* Minor, 70 Ga. 191, 193.

84. *Arkansas.*— See Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184, holding prohibition merely cautionary.

California.— *Ex p.* Burke, 59 Cal. 6, 43 Am. Rep. 231.

Georgia.— Glover *v.* State, 126 Ga. 594, 55 S. E. 592; Georgia Empire Mut. Ins. Co. *v.* Wright, 118 Ga. 796, 45 S. E. 606; Harris *v.* State, 114 Ga. 436, 40 S. E. 315; Griffin *v.* Enves, 114 Ga. 65, 39 S. E. 913; Embry *v.* State, 109 Ga. 61, 35 S. E. 116; O'Brien *v.* State, 109 Ga. 51, 35 S. E. 112; Benning *v.* Smith, 108 Ga. 259, 33 S. E. 823; Papworth *v.* Fitzgerald, 105 Ga. 491, 30 S. E. 837; Aycock *v.* Rutledge, 104 Ga. 533, 30 S. E. 815; Papworth *v.* State, 103 Ga. 36, 31 S. E. 402.

Kansas.— Gray *v.* Crockett, 30 Kan. 138, 1 Pac. 50.

Maryland.—Baltimore *v.* Alleghany County, 99 Md. 1, 57 Atl. 632.

New Jersey.— Wanser *v.* Hoos, 60 N. J. L. 482, 38 Atl. 449, 64 Am. St. Rep. 600; Van Riper *v.* Parsons, 40 N. J. L. 1.

North Carolina.— Hanstein *v.* Johnson, 112 N. C. 253, 17 S. E. 155.

Wisconsin.— See State *v.* Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954, holding that a direction in state constitution that certain general laws shall be enacted does not render such method exclusive.

See 44 Cent. Dig. tit. "Statutes," § 69.

Classification.— It is competent for the legislature to classify objects of legislation, and, if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. Brooks *v.* Hyde, 37 Cal. 366; Rambo *v.* Larrabee, 67 Kan. 634, 73 Pac. 915; Baker *v.* Gillan, 68 Nebr. 368, 94 N. W. 615; State *v.* Farmers', etc., Irr. Co., 59 Nebr. 1, 80 N. W. 52; Wheeler *v.* Philadelphia, 77 Pa. St. 338.

The fourteenth amendment of the federal constitution does not prohibit legislation limited as to objects or territory, but merely requires that all persons subject to it shall be treated alike under all circumstances. Messenger *v.* Heagan, 106 Mich. 654, 64 N. W. 499; Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 209, 8 S. Ct. 1161, 32 L. ed. 107, where the court says that the argument is made "that legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. . . . Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws."

85. *California.*— San Francisco Bd. of Education *v.* Hyatt, 152 Cal. 515, 93 Pac. 117; *Ex p.* Burke, 59 Cal. 6, 43 Am. Rep. 231.

Colorado.— Huer *v.* Central, 14 Colo. 71, 23 Pac. 323.

Illinois.— Covington *v.* East St. Louis, 78 Ill. 548. But see Mitchell *v.* People, 70 Ill. 138.

Kansas.— State *v.* Thompson, 2 Kan. 432.

Kentucky.— Smith *v.* Simmons, 129 Ky. 93, 110 S. W. 336, 33 Ky. L. Rep. 503; Louisville, etc., R. Co. *v.* Berg, 32 S. W. 616, 17 Ky. L. Rep. 1105.

Maryland.— New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537; Brown *v.* State, 23 Md. 503.

New York.— People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75; People *v.* Carson, 10 Misc. 237, 30 N. Y. Suppl. 817 [*affirmed* in 35 N. Y. Suppl. 1114].

South Dakota.— Guild *v.* Deadwood First Nat. Bank, 4 S. D. 566, 57 N. W. 499.

See 44 Cent. Dig. tit. "Statutes," § 69.

Compare Saunders *v.* Morris, 48 N. J. L. 99, 2 Atl. 666.

Contra.— Chidsey *v.* Scranton, 70 Miss. 449, 12 So. 545.

Saving clauses were construed in People *v.* Richards, 1 Cal. App. 566, 82 Pac. 691; Adam *v.* Wright, 84 Ga. 720, 11 S. E. 893; Chance *v.* Marion County, 64 Ill. 66; Jefferson County *v.* Jones, 63 Ill. 531.

86. Meeker *v.* Chicago Cast Steel Co., 84

b. Special Law Where General Is Applicable. The constitutional provisions of the constitutions of the several states of the Union generally prohibit special legislation in cases for which provision can be made by a general law.[87] It is the general doctrine that the legislature is the sole judge whether a provision by a general law is possible under a provision in the constitution to the effect that no special law shall be enacted, in all cases where a general law can be made applicable;[88]

Ill. 276; Jefferson County *v.* Jones, 63 Ill. 531.

87. *Arizona.*— Leatherwood *v.* Hill, 10 Ariz. 16, 85 Pac. 405.

Arkansas.— St. Louis Southwestern R. Co. *v.* Grayson, 72 Ark. 119, 78 S. W. 777; Powell *v.* Durden, 61 Ark. 21, 31 S. W. 740.

California.— Deyoe *v.* Mendocino County Super. Ct., 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; Escondido High School Dist. *v.* Escondido Seminary, 130 Cal. 128, 62 Pac. 401; Bloss *v.* Lewis, 109 Cal. 493, 41 Pac. 1081; People *v.* Henshaw, 76 Cal. 436, 18 Pac. 413.

Indiana.— State *v.* Borce, 140 Ind. 506, 39 N. E. 64, 40 N. E. 113; Vickery *v.* Chase, 50 Ind. 461.

Iowa.— Cooper *v.* Mills County, 69 Iowa 350, 28 N. W. 633; Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455.

Kansas.— Rambo *v.* Larrabee, (1903) 72 Pac. 225.

Kentucky.— Kentucky Live Stock Breeders' Assoc. *v.* Hager, 120 Ky. 125, 85 S. W. 738, 27 Ky. L. Rep. 518; Hager *v.* Kentucky Children's Home Soc., 119 Ky. 235, 83 S. W. 605, 26 Ky. L. Rep. 1133, 67 L. R. A. 815.

Missouri.— Henderson *v.* Koenig, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659; Ashbrook *v.* Schaub, 160 Mo. 107, 60 S. W. 1085; State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415; State *v.* Aubuchon, 8 Mo. App. 325.

Nebraska.— *In re* House Roll No. 284, 31 Nebr. 505, 48 N. W. 275.

Nevada.— *Ex p.* Boyce, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47; *Ex p.* Spinney, 10 Nev. 323; Evans *v.* Joh, 8 Nev. 322.

New York.— People *v.* Bowen, 21 N. Y. 517 [*reversing* 30 Barb. 24].

Ohio.— State *v.* Spellmire, 67 Ohio St. 77, 65 N. E. 619.

Pennsylvania.— See Strine *v.* Northumberland County, 2 Walk. 198.

Texas.— Gulf, etc., R. Co. *v.* Ellis, (1892) 18 S. W. 723; Buttron *v.* El Paso Northeastern R. Co., (Civ. App. 1906) 93 S. W. 676.

Utah.— Openshaw *v.* Halfin, 24 Utah 426, 68 Pac. 138, 91 Am. St. Rep. 796.

United States.— Greenwich Ins. Co. *v.* Carroll, 125 Fed. 121 [*reversed* on other grounds in 199 U. S. 401, 26 S. Ct. 66, 50 L. ed. 246]; Manigault *v.* Ward, 123 Fed. 707; Union Sewer-Pipe Co. *v.* Connelly, 99 Fed. 354 [*affirmed* in 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679]; Murdock *v.* Woodson, 17 Fed. Cas. No. 9,942, 2 Dill. 188 [*affirmed* in 22 Wall. 351, 22 L. ed. 716].

See 44 Cent. Dig. tit. "Statutes," § 77½.

A law declaratory of existing law does not violate the constitutional provision set out in the text. Napa State Hospital *v.* Yuba County, 138 Cal. 378, 71 Pac. 450; Cook *v.* Equitable Bldg., etc., Assoc., 104 Ga. 814, 30 S. E. 911.

The existence of a general law covering the subject at the time of the passage of the special law, whose existence is being questioned, does not affect the question. The fact that a preceding legislature may have considered that a general law on the subject could be made applicable is not binding upon a succeeding legislature. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; Oak Cliff *v.* State, (Tex. Civ. App. 1903) 77 S. W. 24 [*affirmed* in 97 Tex. 383, 79 S. W. 1]. See also Dallas *v.* Western Electric Co., 83 Tex. 243, 18 S. W. 552; Smith *v.* Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921. However, it has been held that if a general law exists which is applicable then the validity of a local law is a judicial question. The legislature has decided that a general law may be applicable. Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; Crabb *v.* State, 88 Ga. 584, 15 S. E. 455; State *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041; Henderson *v.* Koenig, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659; State *v.* Dousman, 28 Wis. 541.

88. *Alabama.*— Jones *v.* Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95.

Arkansas.— Hendricks *v.* Block, 80 Ark. 333, 97 S. W. 63; Waterman *v.* Hawkins, 75 Ark. 120, 86 S. W. 844; St. Louis, etc., R. Co. *v.* Grayson, 72 Ark. 119, 78 S. W. 777; State *v.* Sloan, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 106; Powell *v.* Durden, 61 Ark. 21, 31 S. W. 740; Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590; Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6.

California.— People *v.* Mullender, 132 Cal. 217, 64 Pac. 299; People *v.* Sutter County Levee Dist. No. 6, (1900) 63 Pac. 342, 131 Cal. 30, 63 Pac. 676.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82; People *v.* Chicago Bd. Election Com'rs, 221 Ill. 9, 77 N. E. 321; Mt. Vernon *v.* Evans, etc., Fire Brick Co., 204 Ill. 32, 68 N. E. 208.

Indiana.— Marion School City *v.* Forrest, 168 Ind. 94, 78 N. E. 187; Smith *v.* Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849; Schneck *v.* Jeffersonville, 152 Ind. 204, 52 N. E. 212; Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908; State *v.* Tucker, 46 Ind. 355; Marks *v.* Purdue University, 37 Ind. 155; Gentile *v.* State, 29 Ind. 409 [*overruling* Thomas *v.* Clay County, 5 Ind. 4].

Iowa.— Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445.

nevertheless in very plain cases the courts have declared statutes void as violating this provision.[89]

c. Uniformity in Operation of General Laws — (I) *IN GENERAL.* Constitutional provisions of the various constitutions usually provide that all general laws shall have a uniform operation,[90] which provisions are satisfied by statutes applying uniformly within a class of persons based on a reasonable distinction,[91] or

Missouri.— State *v.* Boone County Ct., 50 Mo. 317, 11 Am. Rep. 415.

Nebraska.— Weston *v.* Ryan, 70 Nebr. 211, 97 N. W. 347.

Nevada.— *In re* Sticknoth, 7 Nev. 223; Hess *v.* Pegg, 7 Nev. 23.

New York.— People *v.* Bowen, 21 N. Y. 517 [*reversing* 30 Barb. 24].

North Dakota.— Edmonds *v.* Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725.

Oklahoma.— Johnson *v.* Mocabee, 1 Okla. 204, 32 Pac. 336.

Texas.— Smith *v.* Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921.

United States.—Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 19 S. Ct. 513, 43 L. ed. 796; Kearny County *v.* Vandriss, 115 Fed. 866, 53 C. C. A. 192; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585; Rathbone *v.* Kiowa County, 83 Fed. 125, 27 C. C. A. 477.

See 44 Cent. Dig. tit. "Statutes," § 77½.

89. Little Rock *v.* Parish, 36 Ark. 166.

Question made judicial.— Kan. Const. art. 2, § 17, as amended in 1905 (Laws (1905), p. 907, c. 543), takes from the legislature the right to determine finally when a general law can be made applicable, and devolves upon the courts the duty to determine it as a judicial question without regard to any legislative assertion on the subject. Anderson *v.* Cloud County, 77 Kan. 721, 95 Pac. 583. See, however, State *v.* Nation, 78 Kan. 394, 96 Pac. 659.

In South Carolina the question is judicial. State *v.* Brock, 66 S. C. 357, 44 S. E. 931; State *v.* Hammond, 66 S. C. 219, 300, 44 S. E. 797, 933; Carolina Grocery Co. *v.* Burnet, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687.

90. *California.*— *Ex p.* Sohncke, 148 Cal. 262, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L. R. A. N. S. 813; Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581; Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600; Heilman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; Bruch *v.* Colombet, 104 Cal. 347, 38 Pac. 45; Quale *v.* Moon, 48 Cal. 478.

Georgia.— Lorentz *v.* Alexander, 87 Ga. 444, 13 S. E. 632; Burks *v.* Morgan, 84 Ga. 627, 10 S. E. 1096.

Iowa.— Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746, 118 Iowa 234, 91 N. W. 1081; State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186.

Kansas.— Rambo *v.* Larrabee, 67 Kan. 634, 73 Pac. 915.

Ohio.— Hixson *v.* Burson, 54 Ohio St. 470, 43 N. E. 1000; State *v.* Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218; State *v.* Bargus, 53 Ohio St. 94, 41 N. E. 245, 53 Am. St. Rep. 628; State *v.* Shearer, 46 Ohio St. 275, 20 N. E. 335 [*overruling* State *v.* Powers, 38 Ohio St. 54]; Kelley *v.* State, 6 Ohio St. 269.

Pennsylvania.— Com. *v.* Middleton, 210 Pa. St. 582, 60 Atl. 297.

Wyoming.— *In re* Boulter, 5 Wyo. 329, 40 Pac. 520.

United States.— San Francisco Bd. of Education *v.* Alliance Assur. Co., 159 Fed. 994.

See 44 Cent. Dig. tit. "Statutes," § 71.

"**The uniform operation** required by this provision does not mean universal operation. A general law may be constitutional and yet operate in fact only upon a very limited number of persons or things, or within a limited territory. But, so far as it is operative, its burdens and its benefits must bear alike upon all persons and things upon which it does operate." Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 341, 51 N. W. 386.

A time limit of fifty years placed on the operation of a law as to street railways does not render it special but leaves it a temporary general statute. Cincinnati St. R. Co. *v.* Horstman, 72 Ohio St. 93, 73 N. E. 1075.

91. *Arkansas.*— Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264; Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297; Little Rock, etc., R. Co. *v.* Haniford, 49 Ark. 291, 5 S. W. 294.

California.— People *v.* Finley, 153 Cal. 59, 94 Pac. 248; *In re* Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137; French *v.* Davidson, 143 Cal. 658, 77 Pac. 663; Napa State Hospital *v.* Yuba County, 138 Cal. 378, 71 Pac. 450; Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167; Vernon School Dist. *v.* Los Angeles Bd. of Education, 125 Cal. 593, 58 Pac. 175; People *v.* Lodi High School Dist., 124 Cal. 694, 57 Pac. 660; People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Colorado.— *In re* Eight-Hour Bill, 21 Colo. 29, 39 Pac. 328; Robertson *v.* People, 20 Colo. 279, 38 Pac. 326.

Florida.—Jacksonville, etc., R. Co. *v.* Prior, 34 Fla. 271, 15 So. 760.

Georgia.— Southern R. Co. *v.* State, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203; Smith *v.* Oatts, 92 Ga. 692, 18 S. E. 1007.

Illinois.— Douglas *v.* People, 225 Ill. 536, 80 N. E. 341, 116 Am. St. Rep. 162, 8 L. R. A. N. S. 1116.

Indiana.— Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937.

Iowa.— Coggeshall *v.* Des Moines, 138 Iowa 730, 117 N. W. 309, 128 Am. St. Rep. 221; Mier *v.* Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621; Morris *v.* Stout, 110 Iowa 659, 78 N. W. 843, 50 L. R. A. 97; Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355; State *v.*

objects of a reasonable class,[92] and operating the same on all parts of the state under the same circumstances.[93]

Gouss, 85 Iowa 21, 51 N. W. 1147; Missouri, etc., R., etc., Co. *v.* Harrison County, 74 Iowa 283, 37 N. W. 372; McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338.

Kansas.— McBride *v.* Reitz, 19 Kan. 123; State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130.

Nebraska.— Allen *v.* Kennard, 81 Nebr. 289, 116 N. W. 63; State *v.* Berka, 20 Nebr. 375, 30 N. W. 267.

New Jersey.— State *v.* Bergen Neck R. Co., 53 N. J. L. 108, 20 Atl. 762.

North Dakota.— Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

Ohio.— State *v.* Felton, 77 Ohio St. 554, 84 N. E. 85; Cramer *v.* Southern Ohio L. & T. Co., 72 Ohio St. 395, 74 N. E. 200, 69 L. R. A. 415; Hixson *v.* Burson, 54 Ohio St. 470, 43 N. E. 1000; State *v.* Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317; State *v.* Portsmouth, etc., Turnpike R. Co., 37 Ohio St. 481; Geiger *v.* State, 25 Ohio Cir. Ct. 742.

Texas.— Texas Southern R. Co. *v.* Harle, 101 Tex. 170, 105 S. W. 1107; Austin Rapid Transit R. Co. *v.* Groethe, (Civ. App. 1895) 31 S. W. 197.

Wisconsin.— Milwaukee County *v.* Isenring, 109 Wis. 9, 85 N. W. 131, 53 L. R. A. 635.

United States.— Chicago, etc., R. Co. *v.* Cutts, 94 U. S. 155, 24 L. ed. 94; Shaver *v.* Pennsylvania Co., 71 Fed. 931.

See 44 Cent. Dig. tit. "Statutes," § 72.

A reasonable distinction must be the basis of the classification. San Francisco Bd. of Education *v.* Alliance Assur. Co., 159 Fed. 994.

92. *California.*—Deyoe *v.* Mendocino County Super. Ct., 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; *Ex p.* Clancy, 90 Cal. 553, 27 Pac. 411.

Georgia.— Vance *v.* State, 128 Ga. 661, 57 S. E. 889.

Iowa.— Primghar State Bank *v.* Rerick, 96 Iowa 238, 64 N. W. 801.

Missouri.— Ensworth *v.* Albin, 46 Mo. 450.

New Jersey.— New Jersey Cent. R. Co. *v.* Baird, 75 N. J. L. 771, 69 Atl. 239 [*modifying* 75 N. J. L. 120, 67 Atl. 672, 686].

Ohio.— Wallace *v.* Leiter, 76 Ohio St. 185, 81 N. E. 187; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672; State *v.* Powers, 38 Ohio St. 54; State *v.* Franklin County, 35 Ohio St. 458; Cincinnati *v.* Steinkamp, 9 Ohio Cir. Ct. 178, 6 Ohio Cir. Dec. 85.

See 44 Cent. Dig. tit. "Statutes," § 76.

Artesian wells having a natural flow are properly distinguished from wells not having a natural flow, and legislation referring only to such walls has a uniform operation that is valid. *Ex p.* Elam, 6 Cal. App. 233, 91 Pac. 811.

93. *California.*—Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600; Brooks *v.* Hyde, 37 Cal. 366; Addison *v.* Saulnier, 19 Cal. 82.

Georgia.— Binns *v.* Ficklen, 130 Ga. 377, 60 S. E. 1051; McGinnis *v.* Ragsdale, 116 Ga. 245, 42 S. E. 492; Benning *v.* Smith, 108 Ga. 259, 33 S. E. 823; Mathis *v.* Jones, 84 Ga. 804, 11 S. E. 1018.

Illinois.— Chicago Terminal Transfer R. Co. *v.* Greer, 223 Ill. 104, 79 N. E. 46, 114 Am. St. Rep. 313.

Indiana.— Groesch *v.* State, 42 Ind. 547.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; State *v.* Standley, 76 Iowa 215, 40 N. W. 815; Haskel *v.* Burlington, 30 Iowa 232.

Kansas.— State *v.* Butler County, 77 Kan. 527, 94 Pac. 1004; Belleville *v.* Wells, 74 Kan. 823, 88 Pac. 47; Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781; Rambo *v.* Larrabee, 67 Kan. 634, 73 Pac. 915; Eichholtz *v.* Martin, 53 Kan. 486, 36 Pac. 1064; Koester *v.* Atchison County, 44 Kan. 141, 24 Pac. 65; Norton County *v.* Shoemaker, 27 Kan. 77; Leavenworth County *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425.

Minnesota.— Stees *v.* Bergmeier, 91 Minn. 513, 98 N. W. 648.

Missouri.— State *v.* Speed, 183 Mo. 186, 81 S. W. 1260; State *v.* Hill, 147 Mo. 63, 47 S. W. 798.

Nebraska.— Allen *v.* Kennard, 81 Nebr. 289, 116 N. W. 63; State *v.* Berka, 20 Nebr. 375, 30 N. W. 267.

New Hampshire.— State *v.* Griffin, 69 N. H. 1, 39 Atl. 260, 76 Am. St. Rep. 139, 41 L. R. A. 177.

New Jersey.— Loucks *v.* Bradshaw, 56 N. J. L. 1, 27 Atl. 939; Doughty *v.* Conover, 42 N. J. L. 193.

North Dakota.— Picton *v.* Cass County, 13 N. D. 242, 100 N. W. 711.

Ohio.— Wallace *v.* Leiter, 76 Ohio St. 185, 81 N. E. 187; Gentsch *v.* State, 71 Ohio St. 151, 72 N. E. 900; Schumacher *v.* McCallip, 69 Ohio St. 500, 69 N. E. 986; Hibbard *v.* State, 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654; State *v.* Bloch, 65 Ohio St. 370, 62 N. E. 441; State *v.* Brown, 60 Ohio St. 462, 54 N. E. 525; State *v.* Buckley, 60 Ohio St. 273, 54 N. E. 272; State *v.* Kendle, 52 Ohio St. 346, 39 N. E. 947; Kimbleawecz *v.* State, 51 Ohio St. 228, 36 N. E. 1072.

Utah.— State *v.* Standford, 24 Utah 148, 66 Pac. 1061.

West Virginia.— State *v.* Braxton County Ct., 60 W. Va. 339, 55 S. E. 382.

United States.— Rathbone *v.* Kiowa County, 73 Fed. 395.

See 44 Cent. Dig. tit. "Statutes," § 71.

All general laws extend over all territory over which the state has exclusive or concurrent jurisdiction. Sherlock *v.* Alling, 44 Ind. 184.

Identity in the time when a statute goes into operation in various parts of the state is not essential to its uniformity except where it is coupled with identity of facts or circumstances. People *v.* Henshaw, 76 Cal. 436, 18 Pac. 413. To the same effect see Freman *v.* Marshall, 137 Cal. 159, 69 Pac. 986.

(II) *Amendment, Suspension, or Partial Repeal.* Where all general laws must be uniform in their operation,[94] an attempted exception to a general law by amendment,[95] suspension, [96] or partial repeal [97] is invalid.

d. Grant of Special Privileges. The grant of special privileges is usually unconstitutional.[98]

94. See *supra*, III, B, 2, c, (I).

95. Beauvoir Club *v.* State, 148 Ala. 643, 42 So. 1040, 121 Am. St. Rep. 62 (allowing certain club to sell liquor); Omnibus R. Co. *v.* Baldwin, 57 Cal. 160 (exempting certain corporations from operation of general law); Darling *v.* Rodgers, 7 Kan. 592 (fencing statute); Friend *v.* Levy, 76 Ohio St. 26, 80 N. E. 1036. But see People *v.* Judge Twelfth Dist., 17 Cal. 547; Sprague *v.* Fremont, etc., R. Co., 6 Dak. 86, 50 N. W. 617; Barnesville *v.* Means, 128 Ga. 197, 57 S. E. 422; Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

If a local law is void when passed as in conflict with a general law, it is not made valid by the subsequent amendment of the general law so as not to conflict with it. Jones *v.* McCaskill, 112 Ga. 453, 37 S. E. 724. And see *infra*, V, C, 2.

Municipal corporations were not included within a constitution requiring uniform operation of general laws in Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016. But see *In re* Denver, 18 Colo. 288, 32 Pac. 615.

96. State *v.* Mobile, etc., R. Co., 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277; Yazoo, etc., R. Co. *v.* Southern R. Co., 83 Miss. 746, 36 So. 74 (as to certain corporation); Woodard *v.* Brien, 14 Lea (Tenn.) 520; Morgan *v.* Reed, 2 Head (Tenn.) 276. See Wright *v.* Cunningham, 115 Tenn. 445, 91 S. W. 293.

97. Henderson *v.* Koenig, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659; Friend *v.* Levy, 76 Ohio St. 26, 80 N. E. 1036 (exceptions in repealing statute); Bearce *v.* Fairview Tp., 9 Pa. Co. Ct. 342 (removing bar of statute of limitation from actions for bounties); *In re* Collector's Bond, 4 Lanc. L. Rev. (Pa.) 166 (collection of taxes).

98. *Arizona.*— Leatherwood *v.* Hill, 10 Ariz. 243, 89 Pac. 521; McRae *v.* Cochise County, 5 Ariz. 26, 44 Pac. 299 (offering reward for first finding artesian wells in county).

California.— *Ex p.* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249.

Illinois.— People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; Frye *v.* Partridge, 82 Ill. 267 (ferries at particular point); Streeter *v.* People, 69 Ill. 595; Munn *v.* People, 69 Ill. 80.

Indiana.— Consumers' Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505.

Louisiana.— Benedict *v.* New Orleans, 115 La. 645, 39 So. 792.

Maryland.— Montague *v.* State, 54 Md. 481.

Minnesota.— Dike *v.* State, 38 Minn. 366, 38 N. W. 95.

Nebraska.— Farmers' Canal Co. *v.* Frank, 72 Nebr. 136, 100 N. W. 286; Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 68 N. W. 375; State *v.* Robinson, 35 Nebr. 401, 53 N. W. 213, 17 L. R. A. 383.

New Jersey.— Meehan *v.* Jersey City, 73 N. J. L. 382, 64 Atl. 689 [*affirmed* in 75 N. J. L. 557, 70 Atl. 363]; Alexander *v.* Elizabeth, 56 N. J. L. 71, 28 Atl. 51, 23 L. R. A. 525 (allowing race-courses in existence before a certain time to be licensed on better terms than other race-courses); Atlantic City Water-Works Co. *v.* Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. 581 (exclusive privilege to supply water).

New York.— *In re* Brooklyn, etc., R. Co., 185 N. Y. 171, 77 N. E. 994 [*affirming* 106 N. Y. App. Div. 240, 94 N. Y. Suppl. 113]; Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789; Farnham *v.* Benedict, 107 N. Y. 159, 13 N. E. 784; People *v.* Loew, 102 N. Y. 471, 7 N. E. 297; *In re* Brooklyn, etc., R. Co., 75 N. Y. 335; Auchincloss *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 63, 74 N. Y. Suppl. 534 [*reversing* 29 Misc. 151, 60 N. Y. Suppl. 792]; *In re* Union Ferry Co., 32 Hun 82 (to set apart certain pier for certain ferry): Exempt Firemen's Benev. Fund *v.* Roome, 29 Hun 391 [*affirmed* in 93 N. Y. 313, 45 Am. Rep. 217].

Oklahoma.— Guthrie Daily Leader *v.* Cameron, 3 Okla. 677, 41 Pac. 635, that all territorial printing be done by a certain company.

Pennsylvania.— Com. *v.* Martin, 35 Pa. Super. Ct. 241.

South Dakota.— Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

Tennessee.— Memphis *v.* Fisher, 9 Baxt. 239, allowing cities of certain population to begin suits without giving bond for costs.

United States.— San Francisco Bd. of Education *v.* Alliance Assur. Co., 159 Fed. 994; Thomas *v.* Wabash, etc., R. Co., 40 Fed. 126, 7 L. R. A. 145 (prohibiting railroad companies from carrying by water unless they own the boat landings); Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

See 44 Cent. Dig. tit. "Statutes," § 84.

The words "privilege and immunity," as used in Const. (1870) art. 4, § 22, providing that the general assembly shall not pass any special law granting any special or exclusive privilege, immunity, or franchise whatever, include all the rights which the state government was created to establish and every right which can be conferred or granted by any law of the state, and by that provision of the constitution a guaranty is given that all valid enactments of the legislature shall operate uniformly on persons and property, and all citizens are assured the equal protection of the laws of the state. Jones *v.*

e. Local Option — (i) *In General.* The fact that the adoption of an act in any locality depends on the vote of that locality does not make it a special act.[99]

(ii) *Liquor Laws.* Liquor laws providing for local option in their application are not invalid as special legislation.[1]

3. Particular Subjects of Legislation — a. Personal Rights. Special acts regulating personal rights may be valid,[2] unless within an express prohibition.[3]

Chicago, etc., R. Co., 231 Ill. 302, 83 N. E. 215.

Municipal corporations were not included in the prohibition against special privileges in State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348; State Bd. of Health *v.* Diamond Paper Mills Co., 64 N. J. Eq. 793, 53 Atl. 1125 [*affirming* 63 N. J. Eq. 111, 51 Atl. 1019]; Com. *v.* Emmers, 33 Pa. Super. Ct. 151; Lauderdale County *v.* Fargason, 7 Lea (Tenn.) 153; Sherman County *v.* Simonds, 109 U. S. 735, 3 S. Ct. 502, 27 L. ed. 1093. See, generally, Municipal Corporations, 28 Cyc. 139.

Surety companies were favored by legislation which was upheld when allowed to act in a fiduciary capacity without giving bond (Coleman *v.* Parrott, 13 S. W. 525, 11 Ky. L. Rep. 947; Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418; Roane Iron Co. *v.* Wisconsin Trust Co., 99 Wis. 273, 74 N. W. 818, 67 Am. St. Rep. 856), or to become a sole surety where two individuals are required (Gans *v.* Carter, 77 Md. 1, 25 Atl. 663; Herzberg *v.* Warfield, 76 Md. 446, 25 Atl. 664), to the exclusion of other kinds of corporations (Holmes *v.* Tennessee Coal, etc., Co., 49 La. Ann. 1465, 22 So. 403; Standard Cotton Seed Oil Co. *v.* Matheson, 48 La. Ann. 1321, 20 So. 713), or allowing a fiduciary to be credited in his account with sums paid surety companies for going on his bond (*In re* Clark, 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587). See, generally, Principal and Surety, 32 Cyc. 303.

99. *Georgia.*— Thomas *v.* State, 92 Ga. 1, 18 S. E. 44; Haney *v.* Bartow County, 91 Ga. 770, 18 S. E. 28.

Illinois.— People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793. See, however, People *v.* Cooper, 83 Ill. 585.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; Dalhy *v.* Wolf, 14 Iowa 228.

Missouri.— State *v.* Handler, 178 Mo. 38, 76 S. W. 984; *Ex p.* Handler, 176 Mo. 383, 75 S. W. 920.

Montana.— State *v.* Rotwitt, 15 Mont. 29, 37 Pac. 845.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New Jersey.— State *v.* Hudson County, 52 N. J. L. 398, 20 Atl. 255 [*affirming* 51 N. J. L. 454, 18 Atl. 117]; *In re* Cleveland, 52 N. J. L. 188, 19 Atl. 17, 20 Atl. 317, 7 L. R. A. 431; Warner *v.* Hoagland, 51 N. J. L. 62, 16 Atl. 166.

Oklahoma.— Johnson *v.* Mocabee, 1 Okla. 204, 32 Pac. 336.

Pennsylvania.— Reeves *v.* Philadelphia Traction Co., 152 Pa. St. 153, 25 Atl. 516; Com. *v.* Reynolds, 137 Pa. St. 389, 20 Atl. 1011; Jenks Tp. Poor Dist. *v.* Sheffield Tp. Poor Dist., 135 Pa. St. 400, 19 Atl. 1004; Reading City *v.* Savage, 120 Pa. St. 198, 13 Atl. 919, 124 Pa. St. 328, 16 Atl. 788 [*distinguishing* Scranton School-Dist.'s Appeal, 113 Pa. St. 176, 6 Atl. 156]. But see Com. *v.* Denworth, 145 Pa. St. 172, 22 Atl. 820; Frost *v.* Cherry, 122 Pa. St. 417, 15 Atl. 782 [*affirming* 4 Pa. Co. Ct. 579]; Com. *v.* Halstead, (St. (1886)) 7 Atl. 221.

Wisconsin.— State *v.* Lean, 9 Wis. 279.

See 44 Cent. Dig. tit. "Statutes," § 80.

When the time for adoption of an act is limited the act is void. Topeka *v.* Gillett, 32 Kan. 431, 4 Pac. 800; State *v.* Holmes, 68 N. J. L. 192, 53 Atl. 76; Ross *v.* Passaic, 64 N. J. L. 488, 45 Atl. 817; Christie *v.* Bayonne, 64 N. J. L. 191, 44 Atl. 887; De Hart *v.* Atlantic City, 63 N. J. L. 223, 43 Atl. 742. See, however, Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612 [*reversed* in 71 N. J. L. 303, 57 Atl. 398, 108 Am. St. Rep. 749, 69 L. R. A. 768].

1. *Dakota.*— Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; Minnehaha County *v.* Champion, (1888) 37 N. W. 766.

Delaware.— State *v.* Fountain, 6 Pennew. 520, 69 Atl. 926.

Georgia.— Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.

Missouri.— State *v.* Handler, 178 Mo. 38, 76 S. W. 984; *Ex p.* Handler, 176 Mo. 383, 75 S. W. 920.

Montana.— *In re* O'Brien, 29 Mont. 530, 75 Pac. 196.

New Jersey.— Berry *v.* Cramer, 58 N. J. L. 278, 33 Atl. 201.

Ohio.— Madden *v.* Smeltz, 2 Ohio Cir. Ct. 168, 1 Ohio Cir. Dec. 424.

Oregon.— Fouts *v.* Hood River, 46 Oreg. 492, 81 Pac. 370, 1 L. R. A. 483.

Texas.— *Ex p.* Byrd, 101 Tex. 157, 105 S. W. 496; *Ex p.* Dupree, 101 Tex. 150, 105 S. W. 493.

See 44 Cent. Dig. tit. "Statutes," § 80; and Constitutional Law, 23 Cyc. 78.

An option to all the villages of the state to elect to take advantage of a bill leaves it a general and not a local act. Arthur *v.* Glens Falls, 66 Hun (N. Y.) 136, 21 N. Y. Suppl. 81.

That the law applied only to cities did not make it invalid. Lloyd *v.* Dollisin, 23 Ohio Cir. Ct. 571.

2. Eskridge *v.* Carter, 29 S. W. 748, 16 Ky. L. Rep. 760 (empowering a *feme covert* to trade as a *feme sole*); Coehran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570.

3. Jones *v.* Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95 (granting a divorce); Mayo *v.*

b. Property Rights — (i) *In General.* Laws regulating property rights and transfers are not obnoxious as special laws if they are of general application.[4] And special statutes designed to settle estates [5] or other special statutes concerning property rights are often upheld.[6]

(ii) *Regulation of Business — Sunday Laws.* In some states special laws regulating business are unconstitutional,[7] but reasonable regulations of

Renfroe, 66 Ga. 408 (fixing a liability of a state official in a certain matter). See Georgia R. Co. *v.* Ivey, 73 Ga. 499 (statute abolishing fellow-servant rule as to railroads is not special); Hughes *v.* Murdock, 45 La. Ann. 935, 13 So. 182 (prohibition against adoption of children by special act does not prohibit legitimation).

4. *California.*— Lofstad *v.* Murasky, 152 Cal. 64, 91 Pac. 1008 (process for establishing title where public records are destroyed); *Ex p.* Elam, 6 Cal. App. 233, 91 Pac. 811 (regulating flow from artesian wells for certain purposes).

Illinois.— Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851, 85 Am. St. Rep. 357, 58 L. R. A. 277, fire-escapes.

Kentucky.— Marshall *v.* Marshall, 4 Bush 248.

Nebraska.— Dougherty *v.* Kubat, 67 Nebr. 269, 93 N. W. 317, inheritance by nonresident aliens.

North Dakota.—Powers El. Co. *v.* Pottner, 16 N. D. 359, 113 N. W. 703, mechanics' liens on lands occupied under the federal land laws.

Tennessee.— Parks *v.* Parks, 12 Heisk. 633, giving cotton brokers a seller's lien.

Texas.— Lastro *v.* State, 3 Tex. App. 363, inspection of cattle.

See 44 Cent. Dig. tit. "Statutes," § 91.

Registration of land titles is not unconstitutional as special legislation. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297. See also Records, 34 Cyc. 598.

5. Watson *v.* Oates, 58 Ala. 647 (authorizing widow to sell lands of her deceased husband); Davidson *v.* Koehler, 76 Ind. 398 (sale of realty of an estate in the absence of constitutional prohibition against local laws); Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636 (authorizing an administrator to sell real estate); Clarke *v.* Van Surley, 15 Wend. (N. Y.) 436 [*affirmed* in 20 Wend. 365, 32 Am. Dec. 570] (authorizing sale of estate of certain infant remainder-men to provide for their education).

Disentanglement of estates.—"It may sometimes happen that by the ingenuity of some and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances, (a confusion unknown to the simple conveyances of the common law,) so that it is out of the power of either the courts of law or equity to relieve the owner; or it may sometimes happen that by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power, (as letting leases, making a jointure for a wife, or the like,) which power cannot be given him by the ordinary judges, either in common law or equity; or it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities, who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of the like kind, the transcendent power of parliament is called in to cut the gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate, to give its tenant reasonable powers, or to assure it to a purchaser against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred." 2 Blackstone Comm. 344 [*cited* in Clarke *v.* Van Surlay, 15 Wend. (N. Y.) 436, 440 (*affirmed* in 20 Wend. 365, 32 Am. Dec. 570)].

The property of infants may be ordered transferred by special statute. Ebling *v.* Dreyer, 149 N. Y. 460, 44 N. E. 155. See also Clarke *v.* Van Surlay, 15 Wend. (N. Y.) 436 [*affirmed* in 20 Wend. 365, 32 Am. Dec. 570]. But the power does not extend to the sale of lands in which adults, competent to act for themselves, have an interest. Brevoort *v.* Grace, 53 N. Y. 245; Cochran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570 [*affirming* 15 Wend. 436]. See also Infants, 22 Cyc. 579.

6. *Arkansas.*— State *v.* Crawford, 35 Ark. 237, to settle accounts between certain parties and the state.

Connecticut.—Starr Burying Ground Assoc. *v.* North Lane Cemetery Assoc., 77 Conn. 83, 53 Atl. 467, authorizing taking of particular property by eminent domain for a particular public use.

Georgia.— Georgia Cent. R. Co. *v.* Wright, 125 Ga. 617, 54 S. E. 64, taking of certain public burying-grounds.

Indiana.— Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217, compensation to owners of animals killed or injured by railroad companies.

Michigan.— Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155, statute authorizing a plank-road to mortgage took effect as an amendment of the charter.

Ohio.— State *v.* Hoffman, 35 Ohio St. 435, curing injustice in assessment.

Pennsylvania.— York School Dist.'s Appeal, 169 Pa. St. 70, 32 Atl. 92, taking and occupancy of certain public burying-grounds.

See 44 Cent. Dig. tit. "Statutes," § 91.

7. *Colorado.*— *In re* Eight-Hour Bill, 21 Colo. 29, 39 Pac. 328, eight-hour law as to

occupations under reasonable classifications,[8] and even prohibitions of certain kinds of business on Sunday,[9] are valid.

mining, manufacturing, and smelting industries alone.

Illinois.— Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558, horseshoeing regulated only in cities of over ten thousand inhabitants.

New Jersey.— Alexander *v.* Elizabeth, 56 N. J. L. 71, 28 Atl. 51, 23 L. R. A. 525; Tiger *v.* Morris County Ct. C. Pl., 42 N. J. L. 631.

Pennsylvania.— Com. *v.* Clark, 14 Pa. Super. Ct. 435 (prohibiting discharge of employees for membership in labor unions); Com. *v.* Farley, 6 Pa. Co. Ct. 433 (registering mineral bottles).

Tennessee.— Sibley *v.* State, 107 Tenn. 515, 64 S. W. 703.

8. *California.*— *In re* Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, prohibiting employment of children under fourteen in certain occupations.

Georgia.— Glover *v.* State, 126 Ga. 594, 55 S. E. 592; Allen *v.* Nussbaum, 87 Ga. 470, 13 S. E. 635.

Idaho.— *In re* Jacobs, 13 Ida. 720, 92 Pac. 1003.

Illinois.— Douglas *v.* People, 225 Ill. 536, 80 N. E. 341, 116 Am. St. Rep. 162, 8 L. R. A. N. S. 1116, examination of plumbers in cities of five thousand or more inhabitants.

Indiana.— Levy *v.* State, 161 Ind. 251, 68 N. E. 172; Gentile *v.* State, 29 Ind. 409; State *v.* Hockett, 29 Ind. 302.

Iowa.— Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355 (board to license physicians); State *v.* Gouss, 85 Iowa 21, 51 N. W. 1147 (licensing itinerant vendors of medicines).

Kansas.— State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130, payment of employees by employers of ten or more.

Kentucky.— Com. *v.* Reinecke Coal Min. Co., 117 Ky. 885, 79 S. W. 287, 25 Ky. L. Rep. 2027 (weekly payment of miners — blacklisting); Com. *v.* Hillside Coal Co., 109 Ky. 47, 58 S. W. 441, 22 Ky. L. Rep. 559 (payment of miner's wages by employers of ten or more).

Louisiana.— Allopathic State Bd. of Medical Examiners *v.* Fowler, 50 La. Ann. 1358, 24 So. 809 (regulating practice of medicine); State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465, 6 So. 220.

Minnesota.— Hyvonen *v.* Hector Iron Co., 103 Minn. 331, 115 N. W. 167, 123 Am. St. Rep. 332, classifying engineers.

Mississippi.— *Ex p.* Fritz, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700.

Missouri.— State *v.* Thompson, 160 Mo. 333, 60 S. W. 1077, 83 Am. St. Rep. 468, 54 L. R. A. 950 (confining pool-selling on horseraces to places mentioned in license upheld as an act in the interest of public morals); State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068 (screens for motormen on street cars); State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39 (option purchases made criminal).

Nebraska.— Baker *v.* Gillan, 68 Nebr. 368, 94 N. W. 615, that real estate brokers must have contracts in writing with owners.

New Jersey.— State *v.* Price, 71 N. J. L. 249, 58 Atl. 1015 (controlling oyster beds in certain county); State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780 (cultivation of oysters in two counties); Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86 [*reversing* 56 N. J. Eq. 649, 39 Atl. 539] (protecting trade union labels).

New York.— Perkins *v.* Heert, 158 N. Y. 306, 53 N. E. 18, 70 Am. St. Rep. 483, 43 L. R. A. 858 [*affirming* 5 N. Y. App. Div. 335, 39 N. Y. Suppl. 223].

Ohio.— State *v.* Owen, 4 Ohio S. & C. Pl. Dec. 163, 3 Ohio N. P. 181, fishing in streams flowing into Lake Erie.

Oregon.— White *v.* Mears, 44 Oreg. 215, 74 Pac. 931, sailors' boarding-houses on certain rivers.

Pennsylvania.— Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237, 50 Am. St. Rep. 801, 29 L. R. A. 808 (regulation of foremen in coal mines not applicable to farmers operating for their own use); Com. *v.* Shafer, 32 Pa. Super. Ct. 497 (plumbers registered only where sewers exist); Com. *v.* Mintz, 19 Pa. Super. Ct. 283 (junk shops and second-hand dealers); Com. *v.* Hanley, 15 Pa. Super. Ct. 271 (undertakers in cities); Com. *v.* Beatty, 15 Pa. Super. Ct. 5 (prohibiting women from working more than sixty hours a week in shops or factories); Com. *v.* Clark, 10 Pa. Super. Ct. 507 [*affirmed* in 195 Pa. St. 634, 16 Atl. 286, 86 Am. St. Rep. 694, 57 L. R. A. 348] (classifying retail and wholesale merchants separately for license tax).

Tennessee.— Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114, fish in lakes of certain size.

Texas.— Beyman *v.* Black, 47 Tex. 558 (to encourage stockmen, excepting certain counties for a time); Green *v.* State, 49 Tex. Cr. 380, 92 S. W. 847 (druggists in towns of one thousand inhabitants or more).

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380, protection of fish by special act is valid as on a subject not prohibited by constitution.

See 44 Cent. Dig. tit. "Statutes," § 90.

9. *California.*— *Ex p.* Koser, 60 Cal. 177.

Idaho.— *In re* Jacobs, 13 Ida. 720, 92 Pac. 1003; State *v.* Dolan, 13 Ida. 693, 92 Pac. 995, 14 L. R. A. N. S. 1259.

New York.— People *v.* Kings County, 13 Misc. 587, 35 N. Y. Suppl. 19.

Texas.— Bohl *v.* State, 3 Tex. App. 683.

Utah.— State *v.* Sopher, 25 Utah 318, 71 Pac. 482, 95 Am. St. Rep. 845, 60 L. R. A. 468.

See 44 Cent. Dig. tit. "Statutes," § 90; and, generally, SUNDAY.

Sunday laws prohibiting barbers from keeping open on Sunday were held invalid as covering a subject on which a general law could be applicable in *Ex p.* Jentzsch, 112 Cal. 468,

(III) *LIQUOR LAWS.* Liquor laws must usually be general in nature.[10] Otherwise such laws are void.[11]

(IV) *INTEREST* — (A) *In General.* State constitutions requiring interest laws of general operation are not violated by differences based on the business done[12] or the nature of the debt, but an attempt to allow a particular corporation to charge or pay a particular rate of interest is invalid.[13]

44 Pac. 803, 32 L. R. A. 664; Eden *v.* People, 161 Ill. 296, 43 N. E. 1108, 52 Am. St. Rep. 365, 32 L. R. A. 659; Armstrong *v.* State, 170 Ind. 188, 84 N. E. 3, 15 L. R. A. N. S. 646; People *v.* Granneman, 132 Mo. 326, 33 S. W. 784; Ragio *v.* State, 86 Tenn. 272, 6 S. W. 401. They were upheld in McClelland *v.* Denver, 36 Colo. 486, 86 Pac. 126; State *v.* Petit, 74 Minn. 376, 77 N. W. 225 [*affirmed* in 177 U. S. 164, 20 S. Ct. 666, 44 L. ed. 716]; People *v.* Havnor, 149 N. Y. 195, 43 N. E. 541, 52 Am. St. Rep. 707, 31 L. R. A. 689 [*affirming* 1 N. Y. App. Div. 459, 37 N. Y. Suppl. 314]; People *v.* Kings County, 13 Misc. (N. Y.) 587, 35 N. Y. Suppl. 19; *Ex p.* Northrup, 41 Oreg. 489, 69 Pac. 445; Breyer *v.* State, 102 Tenn. 103, 50 S. W. 769; State *v.* Bergfeldt, 41 Wash. 234, 83 Pac. 177; State *v.* Nichols, 28 Wash. 628, 69 Pac. 372 [*overruling* Tacoma *v.* Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68]. See, generally, SUNDAY.

A law prohibiting the business of baking on Sunday was held to be a special law in *Ex p.* Westerfield, 55 Cal. 550. 36 Am. Rep. 47. See also State *v.* Sopher, 25 Utah 318, 71 Pac. 482, 95 Am. St. Rep. 845, 60 L. R. A. 468.

10. *Alabama.*— State *v.* Skeggs, 154 Ala. 249, 46 So. 268, although operative in different counties at different times.

California.— *Ex p.* Jackson, 143 Cal. 564, 77 Pac. 457.

Florida.— Randall *v.* Tillis, 43 Fla. 43, 29 So. 540, sales in violation of local option laws.

Georgia.— Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181, allowing sale of liquor only by public dispensaries in certain county.

Michigan.— White *v.* Bracelin, 144 Mich. 332, 107 N. W. 1055, keeping saloon within one hundred yards of school.

Minnesota.— State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675.

New Jersey.— Sexton *v.* Asbury Park Excise Com'rs, 76 N. J. L. 102, 69 Atl. 470 (prohibiting the issue of a new license to sell liquor within a mile from a camp meeting); Meehan *v.* Jersey City Excise Com'rs, 75 N. J. L. 557, 70 Atl. 363 (classifying liquor dealers).

Pennsylvania.— Com. *v.* Sellers, 130 Pa. St. 32, 18 Atl. 541, 542, not authorize the sale of liquor in any district having special prohibition laws.

South Carolina.— Murph *v.* Landrum, 76 S. C. 21, 56 S. E. 850, dispensary act excepting two counties which never had them.

Texas.— *Ex p.* Massey, 49 Tex. Cr. 60, 92 S. W. 1083, 122 Am. St. Rep. 784, storing liquors in local option districts.

Wisconsin.— Rock County *v.* Edgerton, 90 Wis. 288, 63 N. W. 291.

See, generally, INTOXICATING LIQUORS, 23 Cyc. 75.

11. *Georgia.*— Benning *v.* State, 123 Ga. 546, 51 S. E. 632 (prohibiting sale of liquor in certain county); Edwards *v.* State, 123 Ga. 542, 51 S. E. 630; Bagley *v.* State, 103 Ga. 388, 29 S. E. 123, 32 S. E. 414 (prohibiting sale of liquor in certain town); Caldwell *v.* State, 101 Ga. 557, 29 S. E. 263 (prohibiting sale of liquor in certain county).

Kentucky.— Harrodsburg *v.* Renfro, 58 S. W. 795, 22 Ky. L. Rep. 806, different license-fee on certain street than on other streets.

Minnesota.— State *v.* Schraps, 97 Minn. 62, 106 N. W. 106.

Missouri.— State *v.* Turner, 210 Mo. 77, 107 S. W. 1064, prohibiting dram-shops within five miles of any state educational institution having one thousand five hundred or more students, where only one such institution existed.

New Jersey.— Bingham *v.* Camden, 40 N. J. L. 156, board of excise commissioners in certain city.

See, generally, INTOXICATING LIQUORS, 23 Cyc. 75.

12. *Ex p.* Lichtenstein, 67 Cal. 359, 7 Pac. 728, 56 Am. Rep. 713 (pawnbrokers); Caruthers *v.* Andrews, 2 Coldw. (Tenn.) 378 (loans of money). See *Ex p.* Sohncke, 148 Cal. 262, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L. R. A. N. S. 813, holding a law for the regulation of interest on certain chattel loans to be void. See, generally, INTEREST, 22 Cyc. 1481.

Unpaid taxes may be made to earn special rates of interest. McChesney *v.* People, 99 Ill. 216; People *v.* Peacock, 98 Ill. 172; People *v.* Smith, 94 Ill. 226; New Orleans *v.* Firemen's Ins. Co., 41 La. Ann. 1142, 7 So. 82; Seaboard Nat. Bank *v.* Woesten, 176 Mo. 49, 75 S. W. 464; Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861. See, generally, TAXATION.

13. *California.*— See *Ex p.* Sohncke, 148 Cal. 262, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L. R. A. N. S. 813.

Georgia.— Atlanta Sav. Bank *v.* Spencer, 107 Ga. 629, 33 S. E. 878, bank charter authorizing it to make loans otherwise usurious.

Montana.— Hotchkiss *v.* Marion, 12 Mont. 218, 29 Pac. 821, interest on county warrants excepting a certain county.

Pennsylvania.— Handy *v.* Philadelphia, etc., R. Co., 1 Phila. 31.

Tennessee.— McKinney *v.* Memphis Overton Hotel Co., 12 Heisk. 104.

Texas.— Bayha *v.* Carter, 7 Tex. Civ. App. 1, 26 S. W. 137, city improvement certificates.

See 44 Cent. Dig. tit. "Statutes," § 93; and INTEREST, 22 Cyc. 1481.

(B) *Building and Loan Associations.* Interest payments by members to building and loan associations may be properly made the subject of particular regulation.[14]

c. Private Corporations — (I) *CREATION AND REGULATION.* In some states corporations can be organized,[15] or corporate power granted [16] only under general statutes; but even in such states the legislature may regulate corporations [17] under

14. *Georgia.*— Union Sav. Bank, etc., Co. *v.* Dottenheim, 107 Ga. 606, 34 S. E. 217.

Illinois.— Winget *v.* Quincy Bldg., etc., Assoc., 128 Ill. 67, 21 N. E. 12; Freeman *v.* Ottawa Bldg., etc., Assoc., 114 Ill. 182, 28 N. E. 611; Holmes *v.* Smythe, 100 Ill. 413.

Indiana.— International Bldg., etc., Assoc. No. 2 *v.* Wall, 153 Ind. 554, 55 N. E. 431 (premiums, fines, and interest on fines); McLaughlin *v.* Citizens' Bldg., etc., Assoc., 62 Ind. 264; Stein *v.* Indianapolis Bldg., etc., Assoc., 18 Ind. 237, 81 Am. Dec. 353.

Michigan.— People's Bldg., etc., Assoc. *v.* Billing, 104 Mich. 186, 62 N. W. 373.

Nebraska.— Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 68 N. W. 375.

North Dakota.— Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318.

Ohio.— Cramer *v.* Southern Ohio L. & T. Co., 72 Ohio St. 395, 74 N. E. 200, 69 L. R. A. 415.

See 44 Cent. Dig. tit. "Statutes," § 93; and BUILDING AND LOAN SOCIETIES, 6 Cyc. 150.

Compare Safety Bldg., etc., Co. *v.* Ecklar, 106 Ky. 115, 50 S. W. 50, 20 Ky. L. Rep. 1770; Simpson *v.* Kentucky Citizens' Bldg., etc., Assoc., 101 Ky. 496, 41 S. W. 570, 42 S. W. 834, 19 Ky. L. Rep. 1176; Gordon *v.* Winchester Bldg., etc., Assoc., 12 Bush (Ky.) 110, 23 Am. Rep. 713; Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Mills *v.* Salisbury Bldg., etc., Assoc., 75 N. C. 292.

Advances made by a building and loan association to its members differ so materially from other loan transactions that it was perfectly competent for the legislature to place them in a certain class for the purpose of regulating questions of usury and interest. The law is certainly not local for it is not confined to any locality, but it extends in its operation throughout the state. It is not special because it embraces all citizens of the state and gives to every person who may conform to its requirements the same rights and privileges. Union Sav. Bank, etc., Co. *v.* Dottenheim, 107 Ga. 606, 34 S. E. 217. "For many years, many states, and England as well, have pursued a policy of encouraging the operation of such associations as facilitate the building of homes for the people, and the public policy thereby involved would justify the legislature in its wisdom in classifying loans for such purpose, and made in such ways, as a group by themselves and subject to different restrictions and privileges than those applying to loans generally." Livingston Loan, etc., Assoc. *v.* Drummond, 49 Nebr. 200, 205, 68 N. W. 375, per Irvine, C.

15. *California.*— San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

Delaware.— State *v.* Hancock, 2 Pennew. 252, 45 Atl. 851.

Indiana.— Ohio, etc., R. Co. *v.* Ridge, 5 Blackf. 78.

Maryland.— Reed *v.* Baltimore Trust, etc., Co., 72 Md. 531, 20 Atl. 194.

New Jersey.—Atlantic City Water Works Co. *v.* Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. 581.

North Carolina.— Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

Ohio.— State *v.* Cincinnati, 20 Ohio St. 18; State *v.* Roosa, 11 Ohio St. 16.

South Carolina.—A concurrent resolution organizing a corporation is valid. McMeekin *v.* Central Carolina Power Co., 80 S. C. 512, 61 S. E. 1020, 128 Am. St. Rep. 885; Riley *v.* Charleston Union Station Co., 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579.

Tennessee.— *Ex p.* Chadwell, 3 Baxt. 98.

Washington.— Terry *v.* King County, 43 Wash. 61, 86 Pac. 210.

United States.— Griffin *v.* Clinton Line Extension R. Co., 11 Fed. Cas. No. 5,816.

See 44 Cent. Dig. tit. "Statutes," § 86; and CORPORATIONS, 10 Cyc. 172 *et seq.*

16. *California.*— San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

Illinois.— Chicago First M. E. Church *v.* Dixon, 178 Ill. 260, 52 N. E. 887; Streeter *v.* People, 69 Ill. 595.

Indiana.— Smith *v.* Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849.

Kansas.— Roberts *v.* Missouri, etc., R. Co., 43 Kan. 102, 22 Pac. 1006.

Ohio.— Sims *v.* Brooklyn St. R. Co., 37 Ohio St. 556; Pennsylvania, etc., Canal Co. *v.* Portage County, 27 Ohio St. 14.

Tennessee.— Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019.

Wisconsin.— Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851; Black River Imp. Co. *v.* Holway, 87 Wis. 584, 59 N. W. 126; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425, 560.

United States.— Vought *v.* Columbus, etc., R. Co., 176 U. S. 481, 20 S. Ct. 398, 44 L. ed. 554 [*affirming* 58 Ohio St. 123, 50 N. E. 442].

See 44 Cent. Dig. tit. "Statutes," § 86; and CORPORATIONS, 10 Cyc. 172 *et seq.*

17. *California.*— Murphy *v.* Pacific Bank, 119 Cal. 334, 51 Pac. 317.

Georgia.—Ætna Ins. Co. *v.* Brigham, 120 Ga. 925, 48 S. E. 348.

Indiana.— Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937.

Iowa.— Porter *v.* Thomson, 22 Iowa 391; Jones *v.* Galena, etc., R. Co., 16 Iowa 6.

Kentucky.— Kentucky Live Stock Breeders' Assoc. *v.* Hager, 120 Ky. 125, 85 S. W. 738, 27 Ky. L. Rep. 518.

Michigan.—Woodmere Cemetery *v.* Roulo, 104 Mich. 595, 62 N. W. 1010; Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 47 N. W. 489.

reasonable and proper classifications without subjecting such regulations to objection as being unconstitutional.[18]

(II) *AMENDMENTS OF CHARTERS.* A reasonable amendment of a corporation charter is not void as a special act creating a new corporation;[19] but an amendment altering the essentials of a corporation [20] or an amendment extending

Missouri.— Trice *v.* Hannibal, etc., R. Co., 49 Mo. 438.

Montana.— King *v.* Pony Gold Min. Co., 24 Mont. 470, 62 Pac. 783.

New York.— Bohmer *v.* Haffen, 161 N. Y. 390, 55 N. E. 1047 [*affirming* 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030]; Atty.-Gen. *v.* North America L. Ins. Co., 82 N. Y. 172; *In re* New York El. R. Co., 70 N. Y. 327.

Ohio.— Cincinnati St. R. Co. *v.* Horstman, 72 Ohio St. 93, 73 N. E. 1075.

Texas.—Austin Rapid Transit R. Co. *v.* Groethe, (Civ. App. 1895) 31 S. W. 197.

United States.— Terre Haute, etc., R. Co. *v.* Cox, 102 Fed. 825, 42 C. C. A. 654.

See 44 Cent. Dig. tit. "Statutes," § 86; and CORPORATIONS, 10 Cyc. 172 *et seq.*

18. *Alabama.*— Beyer *v.* National Bldg., etc., Assoc., 131 Ala. 369, 31 So. 113.

California.— Krause *v.* Durbrow, 127 Cal. 681, 60 Pac. 438; Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076.

Idaho.— Idaho Mut. Co-operative Ins. Co. *v.* Myer, 10 Ida. 294, 77 Pac. 628.

Illinois.— Park *v.* Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932; Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340.

Indiana.— Pittsburgh, etc., R. Co. *v.* Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. N. S. 461.

Iowa.— Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548.

Kentucky.— Williams *v.* Nall, 108 Ky. 21, 55 S. W. 706, 21 Ky. L. Rep. 1526.

Michigan.— Atty.-Gen. *v.* McArthur, 38 Mich. 204.

Missouri.— State *v.* Darrah, 152 Mo. 522, 54 S. W. 226; State *v.* Aetna Ins. Co., 150 Mo. 113, 51 S. W. 413.

Montana.— King *v.* Pony Gold Min. Co., 24 Mont. 470, 62 Pac. 783.

Nebraska.— State *v.* Missouri Pac. R. Co., 81 Nebr. 174, 115 N. W. 757; State *v.* Missouri Pac. R. Co., 81 Nebr. 15, 115 N. W. 614; Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802; State *v.* Farmers', etc., Irr. Co., 59 Nebr. 1, 80 N. W. 52; Chadron Loan, etc., Assoc. *v.* Hayes, 1 Nebr. (Unoff.) 718, 95 N. W. 812.

New Jersey.— Jersey City *v.* North Jersey St. R. Co., 74 N. J. L. 774, 67 Atl. 113; Perrine *v.* Jersey Cent. Traction Co., 70 N. J. L. 168, 56 Atl. 374; Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 139, 16 Atl. 436.

New York.—*In re* New York El. R. Co., 70 N. Y. 327.

Ohio.— Cincinnati St. R. Co. *v.* Horstman, 72 Ohio St. 93, 73 N. E. 1075; State *v.* Portsmouth, etc., Turnpike R. Co., 37 Ohio St. 481.

Pennsylvania.— Kennedy *v.* Agricultural Ins. Co., 165 Pa. St. 179, 30 Atl. 724.

Tennessee.— Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921.

Wisconsin.— Roane Iron Co. *v.* Wisconsin Trust Co., 99 Wis. 273, 74 N. W. 818, 67 Am. St. Rep. 856; State *v.* Cheek, 77 Wis. 284, 46 N. W. 163.

United States.— Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

See 44 Cent. Dig. tit. "Statutes," § 86; and CORPORATIONS, 10 Cyc. 172 *et seq.*

19. *Louisiana.*— Williams *v.* Western Star Lodge No. 24 F. & A. M., 38 La. Ann. 620.

Maryland.— Webster *v.* Cambridge Female Seminary, 78 Md. 193, 28 Atl. 25 (giving authority to corporation for exclusive education of girls to lease grounds not needed); Hodges *v.* Baltimore Union Pass. R. Co., 58 Md. 603; New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537.

Michigan.— Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155.

Minnesota.— Brady *v.* Moulton, 61 Minn. 185, 63 N. W. 489; Green *v.* Knife Falls Boom Corp., 35 Minn. 155, 27 N. W. 924; St. Paul F. & M. Ins. Co. *v.* Allis, 24 Minn. 75; State *v.* Clark, 23 Minn. 422; Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241.

Missouri.— St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581; State *v.* Cape Girardeau, etc., R. Co., 48 Mo. 468.

New Jersey.— State *v.* Bergen Neck R. Co. 53 N. J. L. 108, 20 Atl. 762. extending time of completion of certain railroads.

New York.— Utica Bank *v.* Magher, 18 Johns. 341.

United States.— Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401 [*affirming* 13 Fed. Cas. No. 7,465, 3 Woods 443]; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895 (changing name and giving power to purchase railroad and franchises of another corporation); Southern Pac. R. Co. *v.* Orton, 32 Fed. 457, 6 Sawy. 157; Adams *v.* Douglas County, 1 Fed. Cas. No. 52, 1 Kan. 627.

See 44 Cent. Dig. tit. "Statutes," § 87; and CORPORATIONS, 10 Cyc. 172 *et seq.*

Amendment public where valid original charter is public.— The act authorizing the bank of Utica to establish an office of discount at Canandaigua, being merely an extension of the powers of the bank under its act of incorporation, which was a public act, is also a public act of which every person must take notice. Utica Bank *v.* Magher, 18 Johns. (N. Y.) 341.

20. Marion Trust Co. *v.* Bennett, 169 Ind. 346, 82 N. E. 782, 124 Am. St. Rep. 228, change in amount of capital stock.

the powers of a corporation [21] in time [22] is void as special legislation and in contravention of the constitutional provisions against such legislation.

d. Municipal Corporations — (i) *In General.* At common law the legislature has plenary authority over municipalities or other governmental subdivisions by general or special legislation,[23] but constitutional provisions frequently prohibit such special or local legislation.[24]

Rule stated.— "Every corporation has certain essentials which must appear in its articles. In this state these essentials are the corporate name, the corporate objects, the amount of the capital stock and the number of shares, the time of the corporate existence, the number of trustees and their names, and the principal place of business. It seems to us that a change in any of these essentials is, to that extent, the creation of a new corporation." So a preëxisting corporation cannot so amend its articles to accomplish objects prohibited by a statute declaring that no corporation should thereafter be created for a particular purpose. State *v.* Nichols, 38 Wash. 309, 312, 80 Pac. 462.

The change in the name of a preëxisting corporation so as to make use of the word "trust," the use of which word was prohibited to any company organized after the passage of the statute of 1903, chapter 176, is to that extent the creation of a new corporation and is forbidden by that statute. State *v.* Nichols, 38 Wash. 309, 80 Pac. 462. However, a change in name was held to be valid in Hazelett *v.* Butler University, 84 Ind. 230. See also CORPORATIONS, 10 Cyc. 155.

21. *Indiana.*—Marion Trust Co. *v.* Bennett, 169 Ind. 346, 82 N. E. 782, 124 Am. St. Rep. 228.

Kansas.— State *v.* Stormont, 24 Kan. 686, allowing medical society to create a board to examine applicants.

New Jersey.— Pennsylvania R. Co. *v.* Burlington, 58 N. J. Eq. 547, 43 Atl. 700, right to lay additional tracks in city.

Ohio.— State *v.* Cincinnati, 20 Ohio St. 18; Merrill *v.* Toledo, 6 Ohio Cir. Ct. 430, 3 Ohio Cir. Dec. 524.

Pennsylvania.— See Reeves *v.* Philadelphia Traction Co., 152 Pa. St. 153, 25 Atl. 516.

Washington.— See North River Boom Co. *v.* Smith, 15 Wash. 138, 45 Pac. 750.

Wisconsin.— Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295.

See 44 Cent. Dig. tit. "Statutes," § 87; and CORPORATIONS, 10 Cyc. 172 *et seq.*

22. *Georgia.*— Logan *v.* Western, etc., R. Co., 87 Ga. 533, 13 S. E. 516.

Indiana.— *In re* Bank of Commerce, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489.

Iowa.— Cedar Rapids Water Co. *v.* Cedar Rapids, 117 Iowa 250, 90 N. W. 746, 118 Iowa 234, 91 N. W. 1081.

Kansas.— State *v.* Lawrence Bridge Co., 22 Kan. 438.

New Jersey.— Grey *v.* Newark Plank Road Co., 65 N. J. L. 51, 46 Atl. 606, construing Pamphl. Laws, p. 230.

See 44 Cent. Dig. tit. "Statutes," § 87; and CORPORATIONS, 10 Cyc. 172 *et seq.*

Compare Foster *v.* Wood County, 9 Ohio St. 540.

Contra.— Cotton *v.* Mississippi, etc., Boom Co., 22 Minn. 372.

An act which extends the period of existence of a corporation is a grant of corporate power. Jersey City *v.* North Jersey St. R. Co., 73 N. J. L. 175, 63 Atl. 906; Grey *v.* Newark Plank Road Co., 65 N. J. L. 51, 46 Atl. 606 [*affirmed* in 65 N. J. L. 603, 48 Atl. 557].

A general statute permitting corporations organized under special charters which take advantage of the statute to extend their corporate existence was upheld as a general statute in Jersey City *v.* North Jersey St. R. Co., 73 N. J. L. 175, 63 Atl. 906. And was declared invalid in State *v.* Lawrence Bridge Co., 22 Kan. 438. The only difference between the two cases suggested by the court in the New Jersey case is that in Kansas there were many vicious corporations existing by special law, while this was not the situation in New Jersey.

23. Benning *v.* Smith, 108 Ga. 259, 33 S. E. 823, holding that in the absence of a general prohibition the creation of a municipal corporation by special act is valid. See also MUNICIPAL CORPORATIONS, 28 Cyc. 282.

The incorporation or creation of a public board with corporate powers is not forbidden by a constitution prohibiting special charters.

Arkansas.— Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Indiana.— Marion School City *v.* Forrest, 168 Ind. 94, 78 N. E. 187.

Iowa.— Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355.

Kentucky.— Kirch *v.* Louisville, 125 Ky. 391, 101 S. W. 373, 30 Ky. L. Rep. 1356.

Louisiana.— Duffy *v.* New Orleans, 49 La. Ann. 114, 21 So. 179.

United States.— Rees *v.* Olmsted, 135 Fed. 296, 68 C. C. A. 50.

See 44 Cent. Dig. tit. "Statutes," § 103; and, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 282 *et seq.*

24. *Arkansas.*— Little Rock *v.* Parish, 36 Ark. 166.

California.— Bloss *v.* Lewis, 109 Cal. 493, 41 Pac. 1081; Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

Indiana.— Thomas *v.* Clay County, 5 Ind. 4.

Kansas.— State *v.* Nelson, 78 Kan. 408, 96 Pac. 662; State *v.* Nation, 78 Kan. 394, 96 Pac. 659; Deng *v.* Scott County, 77 Kan.

(II) *Amendment or Repeal of Charter.* As a rule the amendment of municipal charters should be by general law,[25] although reasonable amendments may everywhere be made,[26] and their repeal may be effected by special act.[27]

(III) *Counties* — (A) *In General.* Statutes affecting counties should as a rule be of a general character.[28]

863, 95 Pac. 592; Gardner *v.* State, 77 Kan. 742, 95 Pac. 588; *In re* Council Grove, 20 Kan. 619.

Kentucky.— Droege *v.* McInerney, 120 Ky. 796, 87 S. W. 1085, 27 Ky. L. Rep. 1137.

Missouri.— State *v.* Anslinger, 171 Mo. 600, 71 S. W. 1041.

Nebraska.— Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565; Clegg *v.* Richardson County School Dist. No. 56, 8 Nebr. 178.

Ohio.—State *v.* Cincinnati, 23 Ohio St. 445.

See, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 282.

Municipal corporations are included within the prohibition against the passing of any special act conferring corporate powers. "There is certainly nothing in the words of the provision to suggest any such distinction or limitation. Nor do we see any reason why the local corporate bodies discharging public functions should not be governed by general and uniform laws as well as those for private enterprises. In fact, the weight of the argument seems to be the other way, for it can very well be seen that the aggregation of individual capital and energy into an associated organization may require different powers for each enterprise so established, while the powers to be exercised by cities, towns, townships, and school districts in the same State may or should be uniform in character all over the State. If any such rule is defensible at all, of which it is not our province to judge, its application to the latter class of corporations seems the more appropriate of the two." Richardson County School Dist. No. 56 *v.* St. Joseph F. & M. Ins. Co., 103 U. S. 707, 709, 26 L. ed. 601, per Miller, J.

25. *Illinois.*— Knopf *v.* People, 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17; Guild *v.* Chicago, 82 Ill. 472.

Iowa.— Von Phul *v.* Hammer, 29 Iowa 222; *Ex p.* Pritz, 9 Iowa 30.

Kansas.— Atchison *v.* Bartholow, 4 Kan. 124.

Minnesota.— State *v.* Copeland, 66 Minn. 315, 69 N. W. 27, 61 Am. St. Rep. 410, 34 L. R. A. 777.

Mississippi.— Monette *v.* State, 91 Miss. 662, 44 So. 989, 124 Am. St. Rep. 715.

New Jersey.— Sutterly *v.* Camden County Ct. C. Pl., 41 N. J. L. 495; Pell *v.* Newark, 40 N. J. L. 71 [*affirmed* in 40 N. J. L. 550, 29 Am. Rep. 266].

See 44 Cent. Dig. tit. "Statutes," § 99; and, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 238.

When the original act incorporating a city is declared to be a public act, a supplement to the charter of such city will become a public act without any clause declaring it to be such. Vreeland *v.* Bergen, 34 N. J. L. 438.

26. Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781; Brown *v.* Milliken, 42 Kan. 769, 23 Pac. 167; State *v.* Piper, 17 Nebr. 614, 24 N. W. 204; State *v.* Covington, 29 Ohio St. 102; State *v.* Brown, 6 Ohio Dec. (Reprint) 740, 7 Am. L. Rec. 652, 4 Cinc. L. Bul. 174; State *v.* Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394. See, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 235, and cases there cited.

27. Worthley *v.* Steen, 43 N. J. L. 542; Luehrman *v.* Shelby Taxing Dist., 2 Lea (Tenn.) 425; Central Wharf, etc., Co. *v.* Corpus Christi, 23 Tex. Civ. App. 390, 57 S. W. 982; South Morgantown *v.* Morgantown, 49 W. Va. 729, 40 S. E. 15. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 235.

The disincorporation of a city may be effected by general law. Mintzer *v.* Schilling, 117 Cal. 361, 49 Pac. 209; *In re* Denver, 18 Colo. 288, 32 Pac. 615; *Ex p.* Wells, 21 Fla. 280; Von Storch *v.* Scranton, 3 Pa. Co. Ct. 567. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 235.

The question whether a provision, in an act to disincorporate a town, limiting the time to present claims against the town, is special legislation, cannot be raised by one having no claim against the town. State *v.* Beck, 25 Nev. 68, 56 Pac. 1008.

28. *Alabama.*— Mitchell *v.* State, 129 Ala. 23, 30 So. 348.

Arizona.— Harwood *v.* Perrin, 7 Ariz. 114, 60 Pac. 891.

California.— Wheeler *v.* Herbert, 152 Cal. 224, 92 Pac. 353; Freman *v.* Marshall, 137 Cal. 159, 69 Pac. 986; Solano County *v.* McCudden, 120 Cal. 648, 53 Pac. 213; Tulare County *v.* May, 118 Cal. 303, 50 Pac. 427.

Illinois.— People *v.* Knopf, 183 Ill. 410, 56 N. E. 155.

Indiana.— Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908.

Minnesota.— State *v.* Walker, 83 Minn. 295, 86 N. W. 104; Duluth Banking Co. *v.* Koon, 81 Minn. 486, 84 N. W. 335.

Missouri.— State *v.* Arnold, 136 Mo 446, 38 S. W. 79.

Montana.— State *v.* Thomas, 25 Mont. 226, 64 Pac. 503.

Nebraska.— State *v.* Frank, 60 Nebr. 327, 83 N. W. 74.

Nevada.— Thompson *v.* Turner, 24 Nev. 292, 53 Pac. 178; Schweiss *v.* Storey County First Judicial Dist. Ct., 23 Nev. 226, 45 Pac. 289, 34 L. R. A. 602.

New Jersey.— Govern *v.* Bumstead, 48 N. J. L. 612, 9 Atl. 577 [*affirming* 47 N. J. L. 368, 1 Atl. 835].

North Dakota.— State *v.* Stark County, 14 N. D. 368, 103 N. W. 913.

Pennsylvania.— Com. *v.* Anderson, 178 Pa. St. 171, 35 Atl. 632.

Tennessee.— Peterson *v.* State, 104 Tenn.

(B) *Location of County-Seat.* Where special laws are prohibited, statutes as to the location and removal of county-seats must be general.[29]

(IV) *Classification of Municipalities.* Statutes concerning municipal government are valid as general laws whenever based on classifications reasonably germane to the subjects embraced therein,[30] and if so the legislative classification is conclusive on the courts,[31] although only one of a class may exist when the act

127, 56 S. W. 834; Pope *v.* Phifer, 3 Heisk. 682.

Texas.— Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343.

Utah.— State *v.* Stanford, 24 Utah 148, 66 Pac. 1061.

Washington.— Lewis County *v.* Gordon, 20 Wash. 80, 54 Pac. 779.

Wisconsin.— State *v.* Kersten, 118 Wis. 287, 95 N. W. 120.

Wyoming.— Reals *v.* Smith, 8 Wyo. 159, 56 Pac. 690.

See 44 Cent. Dig. tit. "Statutes," § 103; and, generally, COUNTIES, 11 Cyc. 325.

Compare Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147, holding that Const. art. 9, § 1, declaring that the legislature shall provide by general law for organizing new counties, changing county lines, etc., although mandatory, prescribes no penalty for failure to perform such duty, and hence such section does not render invalid a special act providing for the change of boundaries of a specified county.

Creation of new county.— Mont. Const. art. 5, § 26, prohibiting special legislation regulating county affairs, does not forbid the creation of a new county by special act, or the regulation by such act of matters necessarily incidental thereto. Holliday *v.* Sweet Grass County, 19 Mont. 364, 48 Pac. 553.

29. *Alabama.*— Haney *v.* State, (1906) 42 So. 683; *Ex p.* Owens, 148 Ala. 402, 42 So. 676, 121 Am. St. Rep. 67, 8 L. R. A. N. S. 888.

Dakota.—Adams *v.* Smith, 6 Dak. 94, 50 N. W. 720.

Indiana.— Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037; Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908; Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727.

Louisiana.— Mobley *v.* Bossier Parish Police Jury, 41 La. Ann. 821, 6 So. 779.

Minnesota.— Nichols *v.* Walter, 37 Minn. 264, 33 N. W. 800.

New Mexico.— Codlin *v.* Kohlhousen, 9 N. M. 565, 58 Pac. 499.

New York.— Stanton *v.* Essex County, 191 N. Y. 428, 84 N. E. 380 [*affirming* 112 N. Y. App. Div. 877, 98 N. Y. Suppl. 1059 (*affirming* 48 Misc. 415, 96 N. Y. Suppl. 840)].

North Dakota.— Edmonds *v.* Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725.

Ohio.— Noble *v.* Baker, 5 Ohio St. 524.

Texas.— Presidio County *v.* Jeff Davis County, (Civ. App. 1903) 77 S. W. 278.

See 44 Cent. Dig. tit. "Statutes," § 104; and, generally, COUNTIES, 11 Cyc. 366.

The relocation of a county-seat is not "a regulation of county business," within Const. art. 4, § 22, which prohibits special laws "regulating county and township business." Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908; Mode *v.* Beasley, 143 Ind. 306, 42 N. E. 727.

30. *California.*— Darcy *v.* San Jose, 104 Cal. 642, 38 Pac. 500.

Florida.— Lake *v.* State, 18 Fla. 501.

Illinois.— Dawson Soap Co. *v.* Chicago, 234 Ill. 314, 84 N. E. 920; Northwestern University *v.* Wilmette, 230 Ill. 80, 82 N. E. 615; Cleveland, etc., R. Co. *v.* Randle, 183 Ill. 364, 55 N. E. 728.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177.

Kentucky.— Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357.

New Jersey.— Riccio *v.* Hoboken, 69 N. J. L. 649, 55 Atl. 1109, 63 L. R. A. 485; McArdle *v.* Jersey City, 69 N. J. L. 590, 49 Atl. 1013, 88 Am. St. Rep. 496; Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612; Foley *v.* Hoboken, 61 N. J. L. 478, 38 Atl. 833; McLaughlin *v.* Newark, 57 N. J. L. 298, 30 Atl. 543; Van Giesen *v.* Bloomfield, 47 N. J. L. 442, 2 Atl. 249.

New Mexico.— Codlin *v.* Kohlhousen, 9 N. M. 565, 58 Pac. 499.

New York.— People *v.* Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344 [*affirming* 4 N. Y. App. Div. 185, 38 N. Y. Suppl. 909].

Ohio.— Gentsch *v.* State, 71 Ohio St. 151, 72 N. E. 900; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

Pennsylvania.— Pittsburg's Petition, 32 Pa. Super. Ct. 210 [*affirmed* in 217 Pa. St. 227, 66 Atl. 348 (*affirmed* in 207 U. S. 161, 28 S. Ct. 40, 52 L. ed. 151)].

Wisconsin.— Bloomer *v.* Bloomer, 128 Wis. 297, 107 N. W. 974.

Wyoming.— McGarvey *v.* Swan, 17 Wyo. 120, 96 Pac. 697.

See 44 Cent. Dig. tit. "Statutes," § 101.

"It is not the form a statute is made to assume, but its operation and effect, which is to determine its constitutionality." State *v.* Pugh, 43 Ohio St. 98, 113, 1 N. E. 439.

The test "is not results, but possibilities." Com. *v.* Reynolds, 137 Pa. St. 389, 20 Atl. 1011. "If it relates to subjects of municipal concern only, it is constitutional, because operating upon all the members of the class it is a general law. If it relates to subjects of a general, as distinguished from a municipal, character, it is local, and therefore invalid, although it may embrace all the members of the class." Scranton *v.* Whyte, 148 Pa. St. 419, 426, 23 Atl. 1043.

31. Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; Allen *v.* Kennard, 81 Nebr. 289, 116 N. W. 63; Hermann *v.* Guttenberg, 63 N. J. L. 616, 44 Atl. 758; Foley *v.* Hoboken, 61 N. J. L. 478, 38 Atl. 833. See

goes into effect.[32] Classification is properly based on population when reasonably

State *v.* Kolsen, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566, holding that the court cannot inquire whether the legislature intended bringing only one city under the act.

Rule stated.— "Whether in either case, the legislation presents a subject for judicial control depends upon whether the classification be substantial or illusive — substantial, in this sense, meaning that the limitation is incidentally consequent upon the character of the legislation; illusive, that the selection is extraneous from it. Such illusiveness results equally when a classification is created with a view of escaping the constitutional restriction and when one is adopted with a like result. Legislation for municipalities may deal with the municipal apparatus as such, or it may affect the citizen in other respects. Where the governmental apparatus alone is the subject of legislation, population ordinarily so fully connotes all the essential considerations that the general subject is, in the absence of palpable evasion, a question for legislative judgment. But where the legislation affects the citizen or taxpayer in other respects, classification by mere population is substantial or illusive according to the criterion already indicated, hence may present a question for judicial control." Foley *v.* Hoboken, 61 N. J. L. 478, 480, 38 Atl. 833.

32. *Colorado.*— McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516.

Florida.— Givens *v.* Hillsborough County, 46 Fla. 502, 35 So. 88, 110 Am. St. Rep. 104; *Ex p.* Wells, 21 Fla. 280.

Illinois.— People *v.* Onahan, 170 Ill. 449, 48 N. E. 1003.

Indiana.— Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177.

Kansas.— Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781.

Kentucky.— Kirch *v.* Louisville, 125 Ky. 391, 101 S. W. 373, 30 Ky. L. Rep. 1356; Hager *v.* Gast, 119 Ky. 502, 84 S. W. 556, 27 Ky. L. Rep. 129; Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357; Louisville School Bd. *v.* Superintendent of Public Instruction, 102 Ky. 394, 43 S. W. 718, 19 Ky. L. Rep. 1350.

Minnesota.— State *v.* St. Louis County Dist. Ct., 61 Minn. 542, 64 N. W. 190.

Missouri.— State *v.* Speed, 183 Mo. 186, 81 S. W. 1260; *Ex p.* Loving, 178 Mo. 194, 77 S. W. 508; State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116; State *v.* Mason, 155 Mo. 486, 55 S. W. 636; Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855; Glover *v.* Meinrath, 133 Mo. 292, 34 S. W. 72; McMahon *v.* Pacific Express Co., 132 Mo. 641, 34 S. W. 478; Dunne *v.* Kansas City Cable R. Co., 131 Mo. 1, 32 S. W. 641; B. F. Coombs, etc., Commission Co. *v.* Block, 139 Mo. 668, 32 S. W. 1139.

Nebraska.— State *v.* Malone, 74 Nebr. 645, 105 N. W. 893; State *v.* Stuht, 52 Nebr. 209, 71 N. W. 941.

New Jersey.— Van Reipen *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740; Rutgers *v.* New Brunswick, 42 N. J. L. 51.

Ohio.— Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463; State *v.* Hudson, 44 Ohio St. 137, 5 N. E. 225; State *v.* Toledo, 23 Ohio Cir. Ct. 327.

Oregon.— Ladd *v.* Holmes, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

Pennsylvania.— Kilgore *v.* Magee, 85 Pa. St 401; Wheeler *v.* Philadelphia, 27 Pa. St. 338.

Wisconsin.—Bingham *v.* Milwaukee County, 127 Wis. 344, 106 N. W. 1071; State *v.* Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954; Verges *v.* Milwaukee County, 116 Wis. 191, 93 N. W. 44; Adams *v.* Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441.

Wyoming.— McGarvey *v.* Swan, 17 Wyo. 120, 96 Pac. 697.

United States.— Fellows *v.* Walker, 39 Fed. 651.

See 44 Cent. Dig. tit. "Statutes," § 102.

Arbitrary and illusory classification.—Statutes were void in the following cases on the ground that the classification applying to only one of a class was arbitrary and illusory.

California.— Desmond *v.* Dunn, 55 Cal. 242.

Illinois.— Knopf *v.* People, 185 Ill. 20, 57 N. E. 22, 76 Am. St. Rep. 17; Devine *v.* Cook County, 84 Ill. 590.

Indiana.— Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743.

Iowa.— State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186.

Kansas.— State *v.* Downs, 60 Kan. 788, 57 Pac. 962.

Missouri.— Henderson *v.* Koenig, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659; State *v.* Jackson County Ct., 89 Mo. 237, 1 S. W. 307.

New Jersey.— Lodi Tp. *v.* State, 51 N. J. L. 402, 18 Atl. 749, 6 L. R. A. 56; Pavonia Horse R. Co. *v.* Jersey City, 45 N. J. L. 297; Zeigler *v.* Gaddis, 44 N. J. L. 363.

Ohio.— Platt *v.* Craig, 66 Ohio St. 75, 63 N. E. 594; Hibbard *v.* State, 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654; Mott *v.* Hubbard, 59 Ohio St. 199, 53 N. E. 47; Cincinnati *v.* Steinkamp, 54 Ohio St. 284, 43 N. E. 490; Pittsburgh, etc., R. Co. *v.* Martin, 53 Ohio St. 386, 41 N. E. 690; State *v.* Schwab, 49 Ohio St. 229, 34 N. E. 736.

Pennsylvania.— Blankenburg *v.* Black, 200 Pa. St. 629, 50 Atl. 198; Perkins *v.* Philadelphia, 156 Pa. St. 539, 554, 27 Atl. 356; Com. *v.* Patton, 88 Pa. St. 258; *In re* Knox St., 7 Pa. Dist. 500; *In re* Prison Com'rs, 9 Kulp 196.

Wisconsin.—Wagner *v.* Milwaukee County, 112 Wis. 601, 88 N. W. 577; Burnham *v.* Milwaukee, 98 Wis. 128, 73 N. W. 1018.

United States.— Central Trust Co. *v.* Citizens' St. R. Co., 82 Fed. 1.

See 44 Cent. Dig. tit. "Statutes," § 102.

adapted to the subject of the statute.[33] Otherwise the classification by population is special legislation [34] Other circumstances than population may be made the

33. *Arizona.*— Harwood *v.* Wentworth, 4 Ariz. 378, 42 Pac. 1025.

California.— Sanchez *v.* Fordyce, 141 Cal. 427, 75 Pac. 56; Davidson *v.* Von Detten, 139 Cal. 467, 73 Pac. 189; Thom *v.* Los Angeles County, 136 Cal. 375, 69 Pac. 18; Fragley *v.* Phelan, 126 Cal. 383, 58 Pac. 923; Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580; Kumler *v.* San Bernardino County, 103 Cal. 393, 37 Pac. 383; People *v.* McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294; Pueblo County *v.* Smith, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465.

Georgia.— Bone *v.* State, 86 Ga. 108, 12 S. E. 205.

Illinois.— Northwestern University *v.* Wilmette, 230 Ill. 80, 82 N. E. 615; Douglas *v.* People, 225 Ill. 536, 80 N. E. 341, 116 Am. St. Rep. 162, 8 L. R. A. N. S. 1116; L'Hote *v.* Milford, 212 Ill. 418, 72 N. E. 399, 103 Am. St. Rep. 234; Burton Stock Car Co. *v.* Traeger, 187 Ill. 9, 58 N. E. 418; People *v.* Cook County, 176 Ill. 576, 52 N. E. 334; People *v.* Onahan, 170 Ill. 449, 48 N. E. 1003.

Indiana.— Evansville, etc., R. Co. *v.* Terre Haute, 161 Ind. 26, 67 N. E. 686; State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; State *v.* Reitz, 62 Ind. 159.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; Owen *v.* Sioux City, 91 Iowa 190, 59 N. W. 3.

Kansas.— Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781; State *v.* Butts, 31 Kan. 537, 2 Pac. 618.

Kentucky.— Brown *v.* Holland, 97 Ky. 249, 30 S. W. 629, 17 Ky. L. Rep. 149; Com. *v.* Chicago, etc., R. Co., 99 S. W. 596, 30 Ky. L. Rep. 673; Walston *v.* Louisville, 66 S. W. 385, 23 Ky. L. Rep. 1852.

Louisiana.— McKeon *v.* Sumner Bldg., etc., Co., 51 La. Ann. 1961, 26 So. 430; State *v.* O'Hara, 36 La. Ann. 93.

Minnesota.— State *v.* Henderson, 97 Minn. 369, 106 N. W. 348; Le Tourneau *v.* Hugo, 90 Minn. 420, 97 N. W. 115; Beck *v.* St. Paul, 87 Minn. 381, 92 N. W. 328; State *v.* Ames, 87 Minn. 23, 91 N. W. 18; State *v.* Ramsey County Dist. Ct., 84 Minn. 377, 87 N. W. 942; State *v.* Sullivan, 72 Minn. 126, 75 N. W. 8.

Missouri.— State *v.* Keating, 202 Mo. 197, 100 S. W. 648; *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218; Kansas City *v.* Stegmiller, 151 Mo. 189, 52 S. W. 723; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State *v.* Pond, 93 Mo. 606, 621, 6 S. W. 469; State *v.* Binswanger, 122 Mo. App. 78, 98 S. W. 103.

Nebraska.— State *v.* Graham, 16 Nebr. 74, 19 N. W. 470; Holmberg *v.* Hauck, 16 Nebr. 337, 20 N. W. 279.

New Jersey.— McCarthy *v.* Queen, 76 N. J. L. 144, 69 Atl. 30; Schwarz *v.* Dover, 72 N. J. L. 311, 62 Atl. 1135 [*affirming* 70 N. J. L. 502, 57 Atl. 394]; Dickinson *v.* Hudson County, 71 N. J. L. 159, 58 Atl. 182; Schwarz *v.* Dover, 70 N. J. L. 502, 57 Atl. 394; Riccio *v.* Hoboken, 69 N. J. L. 649, 55 Atl. 1109, 63 L. R. A. 485 [*reversing* 69 N. J. L. 104, 54 Atl. 801].

New York.— Koster *v.* Coyne, 184 N. Y. 494, 77 N. E. 983 [*affirming* 110 N. Y. App. Div. 742, 97 N. Y. Suppl. 433]; *In re* Church, 92 N. Y. 1 [*affirming* 28 Hun 476].

Ohio.— State *v.* Baker, 55 Ohio St. 1, 44 N. E. 516; State *v.* Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; State *v.* Hudson, 44 Ohio St. 137, 5 N. E. 225; State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228; Welker *v.* Potter, 18 Ohio St. 85.

Oregon.— Ladd *v.* Holmes, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

Pennsylvania.— Com. *v.* Blackley, 198 Pa. St. 372, 47 Atl. 1104, 52 L. R. A. 367, 9 Pa. Dist. 381; *In re* Lackawanna Tp., 160 Pa. St. 494, 28 Atl. 927; Straub *v.* Pittsburgh, 138 Pa. St. 356, 22 Atl. 93; *In re* Ruan St., 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193; Com. *v.* Patton, 88 Pa. St. 258.

Washington.— State *v.* Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893.

Wisconsin.— Smith *v.* Burlington, 129 Wis. 336, 109 N. W. 79; Bingham *v.* Milwaukee County, 127 Wis. 344, 106 N. W. 1071; State *v.* Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954; Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603; Land, etc., Co. *v.* Brown, 73 Wis. 294, 40 N. W. 482, 3 L. R. A. 472.

Wyoming.— McGarvey *v.* Swan, 17 Wyo. 120, 96 Pac. 697.

United States.— Harwood *v.* Wentworth, 162 U. S. 547, 16 S. Ct. 890, 40 L. ed. 1069; Waite *v.* Santa Cruz, 89 Fed. 619.

See 44 Cent. Dig. tit. "Statutes," § 102.

Last census determines population.— When population is made the basis of classification for regulating the affairs of counties, the last official census determines the population to which the regulation is to be applied, and such census takes effect from its promulgation by the secretary of state in accordance with the statute. Martin *v.* Ivins, 59 N. J. L. 364, 36 Atl. 93.

34. *Alabama.*— State *v.* Weakley, 153 Ala. 648, 45 So. 175.

California.— Pratt *v.* Browne, 135 Cal. 649, 67 Pac. 1082; Rauer *v.* Williams, 118 Cal. 401, 50 Pac. 691; Marsh *v.* Hanly, 111 Cal. 368, 43 Pac. 975; Denman *v.* Broderick, 111 Cal. 96, 43 Pac. 516; Turner *v.* Siskiyou County, 109 Cal. 332, 42 Pac. 434; Darcy *v.* San Jose, 104 Cal. 642, 38 Pac. 500; Welsh *v.* Bramlet, 98 Cal. 219, 33 Pac. 66; Dougherty *v.* Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161; Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604.

Florida.— McConihe *v.* State, 17 Fla. 238.

Illinois.— L'Hote *v.* Milford, 212 Ill. 418, 72 N. E. 399, 103 Am. St. Rep. 234.

basis of classification when reasonably germane and pertinent to the subject-matter.[35] The classification should be prospective, calculated to embrace any

Minnesota.— Thomas *v.* St. Cloud, 90 Minn. 477, 97 N. W. 125; State *v.* Ritt, 76 Minn. 531, 79 N. W. 535.

Missouri.— Owen *v.* Baer, 154 Mo. 434, 55 S. W. 644.

New Jersey.— State *v.* Riordan, 75 N. J. L. 16, 69 Atl. 494; Lowthorp *v.* Trenton, 62 N. J. L. 795, 44 Atl. 755 [*affirming* 61 N. J. L. 484, 40 Atl. 442]; Foley *v.* Hoboken, 61 N. J. L. 478, 38 Atl. 833; Dufford *v.* Staats, 54 N. J. L. 286, 23 Atl. 667; State *v.* Simon, 53 N. J. L. 550, 22 Atl. 120; Burlington *v.* Pennsylvania R. Co., 56 N. J. Eq. 259, 38 Atl. 849.

North Dakota.—Angell *v.* Cass County, 11 N. D. 265, 91 N. W. 72.

Ohio.— State *v.* Cowles, 64 Ohio St. 162, 59 N. E. 895; State *v.* Pugh, 43 Ohio St. 98, 1 N. E. 439; State *v.* Mitchell, 31 Ohio St. 592; Price *v.* Toledo, 25 Ohio Cir. Ct. 617; Cincinnati *v.* Ehrman, 9 Ohio S. & C. Pl. Dec. 1, 6 Ohio N. P. 169; Emery *v.* Coles, 7 Ohio S. & C. Pl. Dec. 414, 5 Ohio N. P. 199.

Pennsylvania.— Chalfant *v.* Edwards, 173 Pa. St. 246, 33 Atl. 1048 [*reversing* 26 Pittsb. Leg. J. N. S. 121]; Ayars' Appeal, 122 Pa. St. 266, 16 Atl. 356, 2 L. R. A. 577; Scranton *v.* Silkman, 113 Pa. St. 191, 6 Atl. 146; Morrison *v.* Bachert, 112 Pa. St. 322, 5 Atl 739; McCarthy *v.* Com., 110 Pa. St. 243, 2 Atl. 423; Davis *v.* Clark, 106 Pa. St. 377.

See 44 Cent. Dig. tit. "Statutes," § 102.

Classification by population was held not germane or suitable to the subject-matter in the following cases:

California.— Rauer *v.* Williams, 118 Cal. 401, 50 Pac. 691; Summerland *v.* Bicknell, 111 Cal. 567, 44 Pac. 232.

Illinois.— Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558.

Minnesota.— State *v.* Justus, 90 Minn. 474, 97 N. W. 124; Murray *v.* Ramsey County, 81 Minn. 359, 84 N. W. 103, 83 Am. St. Rep. 379, 51 L. R. A. 828.

New Jersey.— Lane *v.* Otis, 68 N. J. L. 64, 52 Atl. 305; Wanser *v.* Hoos, 60 N. J. L. 482, 38 Atl. 449, 64 Am. St. Rep. 600.

Pennsylvania.— Philadelphia *v.* Westminster Cemetery Co., 162 Pa. St. 105, 29 Atl. 349 [*affirming* 3 Pa. Dist. 151, 34 Wkly. Notes Cas. 17]; Com. *v.* Heckert, 7 Pa. Dist. 186.

See 44 Cent. Dig. tit. "Statutes," § 102.

35. *Arkansas.*— Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785, annexation of towns located within a mile.

Dakota.— Farris *v.* Vannier, 6 Dak. 186, 42 N. W. 31, 3 L. R. A. 713.

Illinois.— Dawson Soap Co. *v.* Chicago, 234 Ill. 314, 84 N. E. 920; Erford *v.* Peoria, 229 Ill. 546, 82 N. E. 374; People *v.* Hazelwood, 116 Ill. 319, 6 N. E. 480.

Minnesota.— Kaiser *v.* Campbell, 90 Minn. 375, 96 N. W. 916, issue of bonds in villages dependent on amount of indebtedness.

Missouri.— State *ex rel.* McCaffery *v.* Mason, 155 Mo. 486, 55 S. W. 636, distinguishing "cities not within counties" and requiring them to pay election expenses.

Nebraska.—Allan *v.* Kennard, 80 Nebr. 289, 116 N. W. 63, difference between ordinary counties and those having within their boundaries a city of the metropolitan class.

Nevada.— State *v.* Donovan, 20 Nev. 75, 15 Pac. 783, gaming license not to be issued in any county where more than one thousand five hundred votes were cast at the last general election.

New Jersey.—Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612; State *v.* Elizabeth, 66 N. J. L. 687, 688, 52 Atl. 1130 [*affirming* 65 N. J. L. 479, 47 Atl. 454]; Johnson *v.* Asbury Park, 58 N. J. L. 604, 33 Atl. 850; Glen Ridge *v.* Stout, 58 N. J. L. 598, 33 Atl. 858; State Bd. of Health *v.* Diamond Paper Mills Co., 64 N. J. Eq. 793, 53 Atl. 1125 [*affirming* 63 N. J. Eq. 111, 51 Atl. 1019].

New York.— Treanor *v.* Eichhorn, 74 Hun 58, 26 N. Y. Suppl. 314, highways in counties adjoining cities of one million inhabitants.

Ohio.— State *v.* Buckley, 60 Ohio St. 273, 54 N. E. 272; Bronson *v.* Oberlin, 41 Ohio St. 476, 52 Am. Rep. 90, local option liquor law as to university towns.

Pennsylvania.— Yoho *v.* Allegheny County, 218 Pa. St. 401, 67 Atl. 648; Stegmaier *v.* Jones, 203 Pa. St. 47, 52 Atl. 56; Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199.

Wisconsin.— State *v.* Policemen's Pension Fund, 121 Wis. 44, 98 N. W. 954, cities classified as to a pension fund for policemen on the basis of maintaining a paid fire department.

United States.— Globe El. Co. *v.* Andrew, 144 Fed. 871.

See 44 Cent. Dig. tit. "Statutes," § 102.

Classing cities according to the size of counties in which they exist is void. People *v.* Knopf, 183 Ill. 410, 56 N. E. 155; Crookall *v.* Matthews, 61 N. J. L. 349, 39 Atl. 659; Phillips *v.* Schumacher, 10 Hun (N. Y.) 405; Scowden's Appeal, 96 Pa. St. 422.

Cities having a special charter may be made a separate class. Ulbrecht *v.* Keokuk, 124 Iowa 1, 97 N. W. 1082; Harvey *v.* Clarinda, 111 Iowa 528, 82 N. W. 994; Iowa R. Land Co. *v.* Soper, 39 Iowa 112; State *v.* King, 37 Iowa 462; Haskel *v.* Burlington, 30 Iowa 232; Christianson *v.* Tracy, 104 Minn. 533, 116 N. W. 925; Hunter *v.* Tracy, 104 Minn. 378, 116 N. W. 922; Beck *v.* St. Paul, 87 Minn. 381, 92 N. W. 328; Schintgen *v.* La Crosse, 117 Wis. 158, 94 N. W. 84; Appleton Water Works Co. *v.* Appleton, 116 Wis. 363, 93 N. W. 262; Adams *v.* Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441; Johnson *v.* Milwaukee, 88 Wis. 383, 60 N. W. 270; McGarvey *v.* Swan, 17 Wyo. 120, 96 Pac. 697. See, however, State *v.* Johnson, 77 Minn. 453, 80 N. W. 620. *Contra*, People *v.* Normal, 170 Ill. 468, 48 N. E. 901; Grey *v.* Union, 67 N. J. L. 363, 51 Atl. 482; Fitzgerald *v.*

change in population or circumstances,[36] and should be complete, covering all kinds of the subjects dealt with.[37] In some states the classification of municipalities is fixed by the constitution itself.[38]

e. Public Matters — (i) *PUBLIC FUNDS OR PROPERTY.* Prohibitions against special laws forbid special acts regarding the public funds or special acts regarding public property. Such acts are valid when general,[39] and void

New Brunswick, 47 N. J. L. 479, 1 Atl. 496, 54 Am. St. Rep. 182.

36. *Arizona.*— Bravin *v.* Tombstone, 4 Ariz. 83, 33 Pac. 589.

Indiana.— Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743.

Iowa.— State *v.* Des Moines, 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186; Owen *v.* Sioux City, 91 Iowa 190, 59 N. W. 3.

Minnesota.— State *v.* Ritt, 76 Minn. 531, 79 N. W. 535; McCormick *v.* West Duluth, 47 Minn. 272, 50 N. W. 128.

Missouri.— *Ex p.* Loving, 178 Mo. 194, 77 S. W. 508; Elting *v.* Hickman, 172 Mo. 237, 72 S. W. 700; *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218; State *v.* Mason, 155 Mo. 486, 55 S. W. 636; Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855; Glover *v.* Meinrath, 133 Mo. 292, 34 S. W. 72.

Nebraska.— State *v.* Scott, 70 Nebr. 681, 97 N. W. 1021, 70 Nebr. 685, 100 N. W. 812; State *v.* Stuht, 52 Nebr. 209, 71 N. W. 941.

New Jersey.— Decker *v.* Daudt, 74 N. J. L. 790, 67 Atl. 375; Bunsted *v.* Henry, 74 N. J. L. 162, 64 Atl. 475; *In re* Fagan, 70 N. J. L. 341, 57 Atl. 469; Bennett *v.* Trenton, 55 N. J. L. 72, 25 Atl. 113.

Ohio.— State *v.* Schwab, 49 Ohio St. 229, 34 N. E. 736; State *v.* Ellet, 47 Ohio St. 90, 23 N. E. 931, 21 Am. St. Rep. 772; State *v.* Anderson, 44 Ohio St. 247, 6 N. E. 571; Seifert *v.* Weidner, 12 Ohio Cir. Ct. 1, 5 Ohio Cir. Dec. 506; Merrill *v.* Toledo, 6 Ohio Cir. Ct. 430, 3 Ohio Cir. Dec. 524.

Oregon.— Ladd *v.* Holmes, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

Pennsylvania.— Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837; Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199; Pittsburgh's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761; Com. *v.* Patton, 88 Pa. St. 258; Kilgore *v.* Magee, 85 Pa. St. 401; Wheeler *v.* City, 27 Pa. St. 338.

Washington.— State *v.* Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893.

Wisconsin.— Bloomer *v.* Bloomer, 128 Wis. 297, 107 N. W. 974; Bingham *v.* Milwaukee County, 127 Wis. 344, 106 N. W. 1071.

United States.— Central Trust Co. *v.* Citizens' St. R. Co., 82 Fed. 1.

See 44 Cent. Dig. tit. "Statutes," § 102.

A statute will be construed as prospective in operation if possible. State *v.* Mason, 155 Mo. 486, 55 S. W. 636; Young *v.* Kansas City, 152 Mo. 661, 54 S. W. 535.

Under peculiar circumstances a statute may be valid and general, although not prospective. Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, 58 Atl. 571 (where sewer district created was peculiarly situated and not likely to be duplicated at any time); State Bd. of Health *v.* Diamond Paper Mills Co., 64 N. J. Eq. 793, 53 Atl. 1125; McGarvey *v.* Swan, 17 Wyo. 120, 96 Pac. 697 (where class of cities having special charters and under the constitution no other city can be specially incorporated); Globe El. Co. *v.* Andrew, 144 Fed. 871 (grain and warehouse commission for Superior is valid as that city is in a peculiar condition).

Laws for a temporary purpose may be based on existing circumstances only. Alexander *v.* Duluth, 77 Minn. 445, 80 N. W. 623.

37. *California.*— Darcy *v.* San Jose, 104 Cal. 642, 38 Pac. 500.

Minnesota.— State *v.* Ritt, 76 Minn. 531, 79 N. W. 535.

New Jersey.— Decker *v.* Dandt, 74 N. J. L. 790, 67 Atl. 375; Bunsted *v.* Henry, 74 N. J. L. 162, 64 Atl. 475; New Brunswick *v.* Fitzgerald, 48 N. J. L. 457, 8 Atl. 729; Lowthorp *v.* Trenton, 62 N. J. L. 795, 44 Atl. 755.

North Dakota.— Angell *v.* Cass County, 11 N. D. 265, 91 N. W. 72.

South Dakota.— Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147.

See 44 Cent. Dig. tit. "Statutes," § 102.

To whatever class a law may apply, it must apply equally to each member thereof. Johnson *v.* Milwaukee, 88 Wis. 383, 60 N. W. 270. See Knight *v.* Martin, 128 Cal. 245, 60 Pac. 849; Robert J. Boyd Paving, etc., Co. *v.* Ward, 85 Fed. 27, 28 C. C. A. 667 [*affirming* 79 Fed. 390].

38. *California.*— *Ex p.* Giambonini, 117 Cal. 573, 49 Pac. 732; Dwyer *v.* Parker, 115 Cal. 544, 47 Pac. 372.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294.

Minnesota.— State *v.* Ames, 87 Minn. 23, 91 N. W. 18; Alexander *v.* Duluth, 77 Minn. 445, 80 N. W. 623.

Missouri.— St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686.

Pennsylvania.— Com. *v.* Reynolds, 137 Pa. St. 389, 20 Atl. 1011.

United States.— Ward *v.* Robert J. Boyd Paving, etc., Co., 79 Fed. 390.

39. *Arkansas.*— State *v.* Crawford, 35 Ark. 237.

California.— Redlands *v.* Brook, 151 Cal. 474, 91 Pac. 150; Bickerdike *v.* State, 144 Cal. 681, 78 Pac. 270; Napa State Hospital *v.* Yuba County, 138 Cal. 378, 71 Pac. 450; Los Angeles *v.* Teed, 112 Cal. 319, 44 Pac. 580; California University *v.* Bernard, 57 Cal. 612.

Indiana.— Lafayette, etc., R. Co. *v.* Geiger, 34 Ind. 185.

Minnesota.— State *v.* Brown, 97 Minn. 402, 106 N. W. 477; Berman *v.* Minnesota State

if special,[40] although such statutes are often valid under the constitution, although special.[41]

(II) *Public Health.* As a rule the public health must be protected by general laws.[42]

(III) *Highways or Other Public Works.* The constitutional requirements as to general acts usually govern legislation regulating highways,[43]

Agricultural Soc., 93 Minn. 125, 100 N. W. 732; State *v.* Rogers, 93 Minn. 55, 100 N. W. 659; Kaiser *v.* Campbell, 90 Minn. 375, 96 N. W. 916.

Missouri.— Lynch *v.* Murphy, 119 Mo. 163, 24 S. W. 774.

New York.— People *v.* Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344 [*affirming* 4 N. Y. App. Div. 185, 38 N. Y. Suppl. 909].

Ohio.— Cincinnati *v.* Cincinnati Hospital, 66 Ohio St. 440, 64 N. E. 420; Wasson *v.* Wayne County, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795; State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

Oklahoma.— Guthrie *v.* Territory, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841.

Pennsylvania.— Loftus *v.* Farmers', etc., Nat. Bank, 133 Pa. St. 97, 19 Atl. 347, 7 L. R. A. 313; East Stroudsburg State Normal School *v.* Yetter, 33 Pa. Super. Ct. 557.

United States.— Waite *v.* Santa Cruz, 184 U. S. 302, 22 S. Ct. 327, 46 L. ed. 552 [*reversing* 98 Fed. 387, 39 C. C. A. 106 (*affirming* 89 Fed. 619)].

See 44 Cent. Dig. tit. "Statutes," § 105.

40. *Alabama.*— Montgomery *v.* Reese, 149 Ala. 188, 43 So. 116.

California.— San Luis Obispo County *v.* Graves, 84 Cal. 71, 23 Pac. 1032.

Indiana.— Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743.

Minnesota.— Hetland *v.* Norman County, 89 Minn. 492, 95 N. W. 305.

Missouri.—State *v.* Walker, 85 Mo. 41.

Montana.— Hotchkiss *v.* Marion, 12 Mont. 218, 29 Pac. 821.

Nevada.— Williams *v.* Bidleman, 7 Nev. 68.

New Jersey.— Halsey *v.* Mowrey, 71 N. J. L. 481, 59 Atl. 449; Hudson County *v.* Buck, 51 N. J. L. 155, 16 Atl. 698; Anderson *v.* Trenton, 42 N. J. L. 486.

Ohio.— Simpkinson *v.* Cincinnati Bd. of Public Works, 9 Ohio Dec. (Reprint) 453, 13 Cinc. L. Bul. 614.

Wisconsin.— McRae *v.* Hogan, 39 Wis. 529; State *v.* Dousman, 28 Wis. 541.

United States.— Pepin Tp. *v.* Sage, 129 Fed. 657, 64 C. C. A. 169.

See 44 Cent. Dig. tit. "Statutes," § 105.

41. *Idaho.*— Wiggin *v.* Lewiston, 8 Ida. 527, 69 Pac. 286.

Indiana.— Young *v.* Tipton County, 137 Ind. 323, 36 N. E. 1118.

Kansas.— Belleville *v.* Wells, 74 Kan. 823, 88 Pac. 47.

Louisiana.— Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882; New Orleans Tax Payers' Assoc. *v.* New Orleans, 33 La. Ann. 567.

Minnesota.—State *v.* Cooley, 56 Minn. 540, 58 N. W. 150.

New York.— People *v.* Erie County, Sheld. 517.

Ohio.— Wood County *v.* Pargillis, 10 Ohio Cir. Ct. 376, 6 Ohio Cir. Dec. 717.

South Carolina.— Buist *v.* Charleston, 77 S. C. 260, 57 S. E. 862.

Wisconsin.— Milwaukee County *v.* Pabst, 45 Wis. 311.

See 44 Cent. Dig. tit. "Statutes," § 105.

42. French *v.* Davidson, 143 Cal. 658, 77 Pac. 663 (vaccination of school children); People *v.* King, 127 Cal. 570, 60 Pac. 35 (state hospitals); State Bd. of Health *v.* Diamond Paper Mills Co., 64 N. J. Eq. 793, 53 Atl. 1125 [*affirming* 63 N. J. Eq. 111, 51 Atl. 1019]; Stull *v.* Reber, 215 Pa. St. 156, 64 Atl. 419. See, generally, Health, 21 Cyc. 382.

43. *Arizona.*— Sanford *v.* Tucson, 8 Ariz. 247, 71 Pac. 903.

California.— Madera County *v.* Raymond Granite Co., 139 Cal. 128, 72 Pac. 915; Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Georgia.— Phinizy *v.* Eve, 108 Ga. 360, 33 S. E. 1007; Mattox *v.* Knox, 96 Ga. 403, 23 S. E. 307.

Indiana.— Spaulding *v.* Mott, 167 Ind. 58, 76 N. E. 620; Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743; Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1; Hymes *v.* Aydelott, 26 Ind. 431.

Kansas.— Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781.

Maryland.— State *v.* Baltimore County, 29 Md. 516.

Missouri.— Owen *v.* Baer, 154 Mo. 434, 55 S. W. 644.

New Jersey.— Johnson *v.* Ocean City, 74 N. J. L. 187, 64 Atl. 987; *In re* Fagan, 70 N. J. L. 341, 57 Atl. 469; Slocum *v.* Neptune Tp., 68 N. J. L. 595, 53 Atl. 301; Randolph *v.* Union County, 63 N. J. L. 155, 41 Atl. 960; Harrington Tp. Road Commission *v.* Haring, 55 N. J. L. 327, 26 Atl. 915; Harrington Tp. Road Commission *v.* Harrington Tp., 54 N. J. L. 274, 23 Atl. 666.

New York.— Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081 [*affirming* 25 N. Y. App. Div. 329, 49 N. Y. Suppl. 713]; *In re* Henneberger, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132 [*affirming* 25 N. Y. App. Div. 164, 49 N. Y. Suppl. 230]; *In re* Church, 92 N. Y. 1 [*affirming* 28 Hun 476]; People *v.* Newburgh, etc., Plank Road Co., 86 N. Y. 1; People *v.* Banks, 67 N. Y. 568; Matter of Wilder, 90 N. Y. App. Div. 262, 85 N. Y. Suppl. 741; Matter of Newburg Business Men's Assoc., 54 Misc. 13, 103 N. Y. Suppl. 843.

regulating bridges,[44] regulating public buildings,[45] regulating parks,[46] or regulating other public works.[47]

(iv) *Police.* Police acts must in many jurisdictions be general in nature.[48]

Ohio.— Hamilton County *v.* State, 50 Ohio St. 653, 35 N. E. 887; Costello *v.* Wyoming, 49 Ohio St. 202, 30 N. E. 613; State *v.* Hamilton County, 20 Ohio Cir. Ct. 659, 11 Ohio Cir. Dec. 317.

Oregon.— St. Benedict's Abbey *v.* Marion County, 50 Oreg. 411, 93 Pac. 231; Ellis *v.* Frazier, 38 Oreg. 462, 63 Pac. 642; Oregon City *v.* Moore, 30 Oreg. 215, 46 Pac. 1017, 47 Pac. 851; Maxwell *v.* Tillamook County, 20 Oreg. 495, 26 Pac. 803.

Pennsylvania.— Lehigh Valley Coal Co.'s Appeal, 164 Pa. St. 44, 30 Atl. 210; Norristown *v.* Norristown Pass. R. Co., 148 Pa. St. 87, 23 Atl. 1062; *In re* Cheltenham Tp. Road, 140 Pa. St. 136, 21 Atl. 238; *In re* Ruan St., 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193; Phillips *v.* Com., 44 Pa. St. 197.

South Dakota.— Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

West Virginia.— West Virginia Transp. Co. *v.* Volcanic Oil, etc., Co., 5 W. Va. 382.

Wisconsin.— Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603; Anderton *v.* Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830; Jensen *v.* Polk County, 47 Wis. 298, 2 N. W. 320.

See 44 Cent. Dig. tit. "Statutes," § 108; and, generally, Streets and Highways.

A navigable stream is not a highway in the sense that that word is used in the provision of S. C. Const. art. 3, § 34, forbidding the enactment of local or special laws "to lay out, open, alter or work roads or highways." Manigault *v.* Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. ed. 274 [*affirming* 123 Fed. 707]. See also *In re* Burns, 155 N. Y. 23, 49 N. E. 246 [*reversing* 16 N. Y. App. Div. 507, 44 N. Y. Suppl. 930]; Matter of Wilder, 90 N. Y. App. Div. 262, 85 N. Y. Suppl. 741. See, generally, Streets and Highways.

44. *Kansas.*— Anderson *v.* Cloud County, 77 Kan. 721, 95 Pac. 583; State *v.* Shawnee County, 57 Kan. 267, 45 Pac. 616; Shawnee County *v.* State, 49 Kan. 486, 31 Pac. 149.

New Jersey.— State *v.* Hunterdon County, 52 N. J. L. 512, 19 Atl. 972.

New York.—People *v.* Chautauqua County, 43 N. Y. 10.

Ohio.— Platt *v.* Craig, 66 Ohio St. 75, 63 N. E. 594; State *v.* Jones, 11 Ohio Cir. Dec. 496.

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania.— Stegmaier *v.* Jones, 203 Pa. St. 47, 52 Atl. 56; Seabolt *v.* Northumberland County, 187 Pa. St. 318, 41 Atl. 22; Boston Bridge Co.'s Case, 13 Pa. Co. Ct. 190.

Wisconsin.— Bingham *v.* Milwaukee County, 127 Wis. 344, 106 N. W. 1071; State *v.* Sauk County, 62 Wis. 376, 22 N. W. 572.

See 44 Cent. Dig. tit. "Statutes," § 108; and, generally, Bridges, 5 Cyc. 1049.

45. *Indiana.*— Macy *v.* Miami County, 170 Ind. 707, 83 N. E. 718; Kraus *v.* Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769 [*affirming* (App. 1907) 80 N. E. 550]; Newton County *v.* State, 161 Ind. 616, 69 N. E. 442.

New Jersey.— Dickinson *v.* Hudson County, 71 N. J. L. 589, 596, 60 Atl. 220, 222 [*affirming* 71 N. J. L. 159, 58 Atl. 182].

Ohio.— State *v.* Brown, 60 Ohio St. 462, 54 N. E. 525.

Washington.— Terry *v.* King County, 43 Wash. 61, 86 Pac. 210.

Wisconsin.— State *v.* Milwaukee County, 25 Wis. 339.

See 44 Cent. Dig. tit. "Statutes," § 108.

The building of a county court-house is "county business," within the meaning of Const. art. 4, § 22, forbidding the passage of local or special laws regulating county business. Kraus *v.* Lehman, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769 [*affirming* (App. 1907) 80 N. E. 550]; Newton County *v.* State, 161 Ind. 616, 69 N. E. 442.

46. Kucera *v.* West Chicago Park Com'rs, 221 Ill. 488, 77 N. E. 912; West Chicago Park Com'rs *v.* Chicago, 216 Ill. 54, 74 N. E. 771; Ewing *v.* West Chicago Park Com'rs, 215 Ill. 357, 74 N. E. 400; Pettibone *v.* West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387; West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215.

47. *California.*— Thomason *v.* Ashworth, 73 Cal. 73, 14 Pac. 615.

Illinois.— L'Hote *v.* Milford, 212 Ill. 418, 72 N. E. 399, 103 Am. St. Rep. 234.

Iowa.— Owen *v.* Sioux City, 91 Iowa 190, 59 N. W. 3.

Kansas.— Clarke *v.* Lawrence, 75 Kan. 26, 88 Pac. 735.

Kentucky.— Miller *v.* Louisville, 99 S. W. 284, 30 Ky. L. Rep. 664.

Louisiana.— Dehon *v.* Lafourche Basin Levee Bd., 110 La. 767, 34 So. 770; Duffy *v.* New Orleans, 49 La. Ann. 114, 21 So. 179.

Minnesota.—Alexander *v.* Duluth, 57 Minn. 47, 58 N. W. 866.

Missouri.— Rutherford *v.* Heddens, 82 Mo. 388.

New Jersey.— Frelinghuysen *v.* Morristown, 76 N. J. L. 271, 70 Atl. 77; Oliver *v.* Burlington, 75 N. J. L. 227, 67 Atl. 43; Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 574, 60 Atl. 214, 108 Am. St. Rep. 754 [*reversing* 71 N. J. L. 183, 58 Atl. 571]; State *v.* Plainfield, 54 N. J. L. 529, 24 Atl. 494; Jelliff *v.* Newark, 49 N. J. L. 239, 12 Atl. 770 [*affirming* 48 N. J. L. 101, 2 Atl. 627].

Ohio.— Wasson *v.* Wayne County, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795.

Pennsylvania.—Com. *v.* Heller, 219 Pa. St. 65, 67 Atl. 925.

Wisconsin.— Appleton Waterworks Co. *v.* Appleton, 116 Wis. 363, 93 N. W. 262; Bryant *v.* Robbins, 70 Wis. 258, 35 N. W. 545.

See 44 Cent. Dig. tit. "Statutes," § 108.

48. State *v.* Nealon, 73 N. J. L. 100, 62

(v) *Poor.* Statutes providing for the poor should in some jurisdictions be general.[49]

(vi) *Schools.* The regulation of schools should commonly be by general law.[50]

(vii) *Taxes.* Constitutional prohibitions against the passage and enactment of special laws apply to taxation statutes which may be valid as general,[51] or

Atl. 182; Clark *v.* Cape May, 50 N. J. L. 558, 14 Atl. 581; State *v.* Jones, 66 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 592. See State *v.* Hunter, 38 Kan. 578, 17 Pac. 177, holding that a metropolitan police act is not special legislation as police is a public concern. See, generally, Municipal Corporations, 28 Cyc. 486.

49. Kennedy *v.* Meara, 127 Ga. 68, 56 S. E. 243; State *v.* Bargus, 53 Ohio St. 94, 41 N. E. 245, 53 Am. St. Rep. 628; Rose *v.* Beaver County, 204 Pa. St. 372, 54 Atl. 263; Pulaski Tp. Poor Dist. *v.* Lawrence County, 34 Pa. Super. Ct. 602; Rose *v.* Beaver County, 20 Pa. Super. Ct. 110 [*affirmed* in 204 Pa. St. 372, 54 Atl. 263]; State *v.* Groth, 132 Wis. 283, 112 N. W. 431. See, generally, Paupers, 30 Cyc. 1058.

50. *California.*— Los Angeles County *v.* Kirk, 148 Cal. 385, 83 Pac. 250; Bruch *v.* Colombet, 104 Cal. 347, 38 Pac. 45.

Colorado.— *In re* Senate Bill No. 9, 26 Colo. 136, 56 Pac. 173; *In re* Senate Bill No. 23, 23 Colo. 499, 48 Pac. 647.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Georgia.— Houseworth *v.* Stevens, 127 Ga. 256, 56 S. E. 288; Sellers *v.* Cox, 127 Ga. 246, 56 S. E. 284; Neal *v.* McWhorter, 122 Ga. 431, 50 S. E. 381; Barber *v.* Alexander, 120 Ga. 30, 47 S. E. 580.

Illinois.— Speight *v.* People, 87 Ill. 595.

Indiana.— Campbell *v.* Indianapolis, 155 Ind. 186, 57 N. E. 920; Shepardson *v.* Gillette, 133 Ind. 125, 31 N. E. 788; Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 698.

Iowa.— State *v.* Squires, 26 Iowa 340.

Kansas.— Eichholtz *v.* Martin, 53 Kan. 486, 36 Pac. 1064.

Minnesota.— State *v.* Minor, 79 Minn. 201, 81 N. W. 912; Sauk Centre Bd. of Education *v.* Moore, 17 Minn. 412.

Missouri.— State *v.* Miller, 100 Mo. 439, 13 S. W. 677.

Montana.— State *v.* Long, 21 Mont. 26, 52 Pac. 645.

New Jersey.— Wendel *v.* Hoboken Bd. of Education, 75 N. J. L. 70, 66 Atl. 1075 [*reversed* on other grounds in 76 N. J. L. 499, 70 Atl. 152]; Rutgers College *v.* Morgan, 70 N. J. L. 460, 57 Atl. 250 [*reversed* on other grounds in 71 N. J. L. 663, 60 Atl. 205]; Riccio *v.* Hoboken, 69 N. J. L. 649, 55 Atl. 1109, 63 L. R. A. 485 [*reversing* 69 N. J. L. 104, 54 Atl. 801].

North Dakota.— Plummer *v.* Borsheim, 8 N. D. 565, 80 N. W. 690.

Ohio.— State *v.* Spellmire, 67 Ohio St. 77, 65 N. E. 619; State *v.* Powers, 38 Ohio St. 54.

Oklahoma.—Territory *v.* Oklahoma County School Dist. No. 83, 10 Okla. 556, 64 Pac. 241.

Pennsylvania.— Com. *v.* Middleton, 210 Pa. St. 582, 60 Atl. 297; Com. *v.* Guthrie, 203 Pa. St. 209, 52 Atl. 254; Com. *v.* Hitchens, 200 Pa. St. 508, 50 Atl. 91; Erie School Dist. *v.* Smith, 195 Pa. St. 515, 46 Atl. 127; Com. *v.* Gilligan, 195 Pa. St. 504, 46 Atl. 124; *In re* Sugar Notch Borough, 192 Pa. St. 349, 43 Atl. 985.

Vermont.— Brattleboro Town School Dist. *v.* Brattleboro School Dist. No. 2, 72 Vt. 451, 48 Atl. 697.

Wisconsin.— State *v.* Lindemann, 132 Wis. 47, 111 N. W. 214; State *v.* Vanhuse, 120 Wis. 15, 97 N. W. 503.

United States.— Briggs *v.* Johnson, 4 Fed. Cas. No. 1,872, 4 Dill. 148.

See 44 Cent. Dig. tit. "Statutes," § 107; and, generally, Schools and School-Districts, 35 Cyc. 801.

Compare State *v.* Wolf, 145 N. C. 440, 59 S. E. 40; State *v.* McCaw, 77 S. C. 351, 58 S. E. 145.

School laws are not special or local because under them a higher grade of education is given to the children in one district than to those in another. Landis *v.* Ashworth, 57 N. J. L. 509, 31 Atl. 1017; Holmes, etc., Furniture Co. *v.* Hedges, 13 Wash. 696, 43 Pac. 944.

51. *Arizona.*— Territory *v.* Gaines, (1908) 93 Pac. 281; Bennett *v.* Nichols, 9 Ariz. 138, 80 Pac. 392.

California.— Lower Kings River Reclamation Dist. No. 531 *v.* McCullah, 124 Cal. 175, 56 Pac. 887; Rode *v.* Siehe, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342; People *v.* Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905; Kings County *v.* Johnson, 104 Cal. 198, 37 Pac. 870; Stockton *v.* Western F. & M. Ins. Co., 73 Cal. 621, 15 Pac. 314.

Colorado.— *In re* Magnes, 32 Colo. 527, 77 Pac. 853.

Florida.— Bloxham *v.* Florida Cent., etc., R. Co., 35 Fla. 625, 17 So. 902.

Georgia.— Georgia Cent. R. Co. *v.* Wright, 125 Ga. 617, 54 S. E. 64; Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52; Georgia State Bldg., etc., Assoc. *v.* Savannah, 109 Ga. 63, 35 S. E. 67; Georgia Midland, etc., R. Co. *v.* State, 89 Ga. 597, 15 S. E. 301; Columbus Southern R. Co. *v.* Wright, 89 Ga. 574, 15 S. E. 293.

Illinois.—People *v.* Knopf, 183 Ill. 410, 56 N. E. 155; Cleveland, etc., R. Co. *v.* Randle, 183 Ill. 364, 55 N. E. 728; People *v.* Wallace, 70 Ill. 680.

Indiana.— Kersey *v.* Terre Haute, 161 Ind. 471, 68 N. E. 1027; State *v.* Smith, 158 Ind. 542, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A.

void as special,[52] or valid, although special,[53] depending upon the operation and effect of the particular provision alleged to have been violated.

116; Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908.

Iowa.— Primghar State Bank *v.* Rerick, 96 Iowa 238, 64 N. W. 801; Beecher *v.* Webster County, 50 Iowa 538; U. S. Express Co. *v.* Ellyson, 28 Iowa 370.

Kansas.— Francis *v.* Atchison, etc., R. Co., 19 Kan. 303.

Kentucky.— Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 32 Ky. L. Rep. 129; Com. *v.* E. H. Taylor, Jr., Co., 101 Ky. 325, 41 S. W. 11, 19 Ky. L. Rep. 552.

Louisiana.— State *v.* O'Hara, 36 La. Ann. 93.

Missouri.— Haag *v.* Ward, 186 Mo. 325, 85 S. W. 391; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State *v.* St. Louis, etc., R. Co., 9 Mo. App. 532.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

New Jersey.— United New Jersey R., etc., Co. *v.* Baird, 75 N. J. L. 788, 69 Atl. 472; United New Jersey R., etc., Co. *v.* Parker, 75 N. J. L. 771, 69 Atl. 239 [*modifying* (Sup. 1907) 67 Atl. 686, 75 N. J. L. 120, 67 Atl. 672]; New Jersey Cent. R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 1, 65 Atl. 244; State Chancellor *v.* Elizabeth, 65 N. J. L. 483, 47 Atl. 455 [*affirming* 66 N. J. L. 687, 688, 52 Atl. 1130]; Reid *v.* Wiley, 46 N. J. L. 473.

New Mexico.— Santa Fe County *v.* New Mexico, etc., R. Co., 3 N. M. 116, 2 Pac. 376.

New York.— People *v.* Murray, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344 [*affirming* 4 N. Y. App. Div. 185, 38 N. Y. Suppl. 909].

North Dakota.— State *v.* Hanson, 16 N. D. 347, 113 N. W. 371; Picton *v.* Cass County, 13 N. D. 242, 100 N. W. 711.

Ohio.— Yost *v.* Maumee Brewing Co., 20 Ohio Cir. Ct. 26, 10 Ohio Cir. Dec. 693; Gaylord *v.* Hubbard, 12 Ohio Cir. Ct. 112, 5 Ohio Cir. Dec. 529; Grove *v.* Leidy, 9 Ohio Cir. Ct. 272, 6 Ohio Cir. Dec. 116.

Oklahoma.— Gay *v.* Thomas, 5 Okla. 1, 46 Pac. 578 [*following* Daily Leader *v.* Cameron, 3 Okla. 677, 41 Pac. 635].

Oregon.— Crawford *v.* Linn County, 11 Oreg. 482, 5 Pac. 738.

Pennsylvania.— Philadelphia Co.'s Petition, 210 Pa. St. 490, 60 Atl. 93; Kniseley *v.* Cotterel, 196 Pa. St. 614, 46 Atl. 861, 50 L. R. A. 86; Com. *v.* Macferron, 152 Pa. St. 244, 25 Atl. 556, 19 L. R. A. 568; Evans *v.* Phillipi, 117 Pa. St. 226, 11 Atl. 630, 2 Am. St. Rep. 655; Bitting *v.* Com., 7 Pa. Cas. 545, 12 Atl. 29.

Texas.—Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537.

West Virginia.— State *v.* Braxton County Ct., 60 W. Va. 339, 55 S. E. 382; McEldowney *v.* Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609.

Wisconsin.— Verges *v.* Milwaukee County, 116 Wis. 191, 93 N. W. 44; State *v.* Sauk County, 70 Wis. 485, 36 N. W. 396; Lombard *v.* Antioch College, 60 Wis. 459, 19 N. W. 367.

Wyoming.— Standard Cattle Co. *v.* Baird, 8 Wyo. 144, 56 Pac. 598.

United States.—Western Union Tel. Co. *v.* Henderson, 68 Fed. 588; Dundee Mortg. Trust Inv. Co. *v.* Parrish, 24 Fed. 197.

See 44 Cent. Dig. tit. "Statutes," § 106; and, generally, TAXATION.

Assessment and collection includes what.— The provisions of Wis. Const. art. 4, § 31, forbidding the enactment of special laws "for the assessment or collection of taxes," extend to all the proceedings requisite to raise money by taxation, and not merely to "assessment" and "collection" as part of such proceedings. Chicago, etc., R. Co. *v.* Forest County, 95 Wis. 80, 70 N. W. 77.

52. *California.*— People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303; Spring Valley Water Works *v.* Bryant, 52 Cal. 132.

Georgia.— Stewart *v.* Collier, 91 Ga. 117, 17 S. E. 279; Atlanta, etc., R. Co. *v.* Wright, 87 Ga. 487, 13 S. E. 578.

Illinois.—West Chicago Park Com'rs *v.* Chicago, 216 Ill. 54, 74 N. E. 771; Pettibone *v.* West Chicago Park Com'rs, 215 Ill. 304, 74 N. E. 387; Ewing *v.* West Chicago Park Com'rs, 215 Ill. 357, 74 N. E. 400.

Indiana.— Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037.

Maryland.— Baltimore *v.* Starr Methodist Protestant Church, 106 Md. 281, 67 Atl. 261.

Missouri.— State *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265.

Nevada.— State *v.* Consolidated Virginia Min. Co., 16 Nev. 432; State *v.* California Min. Co., 15 Nev. 234.

New Jersey.— United New Jersey R., etc., Co. *v.* Parker, 75 N. J. L. 771, 69 Atl. 239 [*modifying* (Sup. 1907) 67 Atl. 686, 75 N. J. L. 120, 67 Atl. 672]; Hartshorne *v.* Avon-by-the-Sea, 75 N. J. L. 407, 67 Atl. 935.

New York.— See People *v.* Raymond, 126 N. Y. App. Div. 720, 111 N. Y. Suppl. 177 [*reversed* in 194 N. Y. 189, 87 N. E. 90].

Ohio.— State *v.* Lewis, 74 Ohio St. 403, 78 N. E. 523; Gaylord *v.* Hubbard, 56 Ohio St. 25, 46 N. E. 66; Hamilton County *v.* Rosche, 50 Ohio St. 103, 33 N. E. 408.

Oregon.— Manning *v.* Klippel, 9 Oreg. 367.

Pennsylvania.— Van Loon *v.* Engle, 171 Pa. St. 157, 33 Atl. 77; Pittsburgh's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761.

Wisconsin.— Chicago, etc., R. Co. *v.* Forest County, 95 Wis. 80, 70 N. W. 77; State *v.* Bell, 91 Wis. 271, 64 N. W. 845; State *v.* Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; Nevil *v.* Clifford, 63 Wis. 435, 24 N. W. 65; Kimball *v.* Rosendale, 42 Wis. 407, 24 Am. Rep. 421.

United States.— Dundee Mortg., etc., Co. *v.* School-Dist. No. 1, 21 Fed. 151.

See 44 Cent. Dig. tit. "Statutes," § 106; and, generally, TAXATION.

53. *Alabama.*— Sisk *v.* Cargile, 138 Ala. 164, 35 So. 114.

f. The Administration of Justice — (i) *Courts.* Under constitutions forbidding special legislation, laws should be general covering the creation,[54] jurisdiction,[55] organization,[56] and sessions of the courts,[57] and practice and evidence therein.[58]

Illinois.— Chicago Gen. R. Co. *v.* Chicago, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959.

Indiana.— McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089.

Kansas.— Midland El. Co. *v.* Stewart, 50 Kan. 378, 32 Pac. 33.

Kentucky.— O'Mahoney *v.* Bullock, 97 Ky. 774, 31 S. W. 878, 17 Ky. L. Rep. 523.

Nevada.— State *v.* Fogus, 19 Nev. 247, 9 Pac. 123; Gibson *v.* Mason, 5 Nev. 283.

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Wisconsin.—Warner *v.* Knox, 50 Wis. 429, 7 N. W. 372.

See 44 Cent. Dig. tit. "Statutes," § 106; and, generally, Taxation.

54. *Alabama.*— State *v.* Sayre, 142 Ala. 641, 39 So. 240; Wallace *v.* Jefferson County, 140 Ala. 491, 37 So. 321.

Arkansas.—Waterman *v.* Hawkins, 75 Ark. 120, 86 S. W. 844.

Colorado.— Pueblo County *v.* Smith, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465; McInerney *v.* Denver, 17 Colo. 302, 29 Pac. 516; People *v.* Richmond, 16 Colo. 274, 26 Pac. 929; Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155.

Georgia.— Lamar *v.* Prosser, 121 Ga. 153, 48 S. E. 977; Welborne *v.* Donaldson, 115 Ga. 563, 41 S. E. 999.

Indiana.—Woods *v.* McCay, 144 Ind. 316, 43 N. E. 269, 33 L. R. A. 97.

Iowa.— Page *v.* Millerton, 114 Iowa 378, 86 N. W. 440; McGregor *v.* Baylies, 19 Iowa 43; Baker *v.* The Milwaukee, 14 Iowa 214.

Kansas.— Chesney *v.* McClintock, 61 Kan. 94, 58 Pac. 993.

Nebraska.— State *v.* Magney, 52 Nebr. 508, 72 N. W. 1006.

New Jersey.— De Hart *v.* Atlantic City, 62 N. J. L. 586, 41 Atl. 687; Calvo *v.* Westcott, 55 N. J. L. 78, 25 Atl. 269.

Tennessee.— State Bank *v.* Cooper, 2 Yerg. 599, 24 Am. Dec. 517.

Utah.— Mill *v.* Brown, 31 Utah 473, 88 Pac. 609.

See 44 Cent. Dig. tit. "Statutes," § 110; and, generally, Courts, 11 Cyc. 704.

55. *Colorado.*— Rogers *v.* People, 9 Colo. 450, 12 Pac. 843, 59 Am. Rep. 146; *Ex p.* Stout, 5 Colo. 509; *Ex p.* White, 5 Colo. 521.

Georgia.— Starnes *v.* Mutual Loan, etc., Co., 102 Ga. 597, 29 S. E. 452.

Illinois.— Mitchell *v.* People, 70 Ill. 138.

Indiana.— Hingle *v.* State, 24 Ind. 28.

Iowa.— State *v.* Emmons, 72 Iowa 265, 33 N. W. 672.

Louisiana.— Blanchard *v.* Abraham, 115 La. 989, 40 So. 379.

Missouri.— State *v.* Hill, 147 Mo. 63, 47 S. W. 798.

Nebraska.— Moores *v.* State, 63 Nebr. 345, 88 N. W. 514.

Ohio.— Oberer *v.* State, 28 Ohio Cir. Ct. 620; Mahoney *v.* Kinney, 7 Ohio S. & C. Pl. Dec. 405, 5 Ohio N. P. 336.

Pennsylvania.—Wilkes-Barre *v.* Meyers, 113 Pa. St. 395, 6 Atl. 110.

Texas.— Nalle *v.* Austin, 23 Tex. Civ. App. 595, 56 S. W. 954.

See 44 Cent. Dig. tit. "Statutes," § 110; and, generally, Courts, 11 Cyc. 659.

56. *Alabama.*— Gilmore *v.* State, 126 Ala. 20, 28 So. 595; Childress *v.* State, 122 Ala. 21, 26 So. 162.

Colorado.— Pitkin County *v.* Aspen First Nat. Bank, 24 Colo. 124, 48 Pac. 1043 [*affirming* 6 Colo. App. 423, 40 Pac. 894].

Louisiana.— State *v.* Judge New Orleans Third City Ct., 39 La. Ann. 889, 2 So. 786; State *v.* Dalon, 35 La. Ann. 1141.

Mississippi.— Burt *v.* State, 86 Miss. 280, 38 So. 233.

Missouri.— State *v.* Dabbs, 182 Mo. 359, 81 S. W. 1148; B. F. Coombs, etc., Commission Co. *v.* Block, 130 Mo. 668, 32 S. W. 1139.

Montana.—State *v.* Clancy, 30 Mont. 529, 77 Pac. 312.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

New York.— People *v.* Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247 [*affirming* 31 N. Y. App. Div. 139, 52 N. Y. Suppl. 968].

South Carolina.— State *v.* Garrett, 64 S. C. 249, 42 S. E. 108; State *v.* Berkeley, 64 S. C. 194, 41 S. E. 961; State *v.* Queen, 62 S. C. 247, 40 S. E. 553.

See 44 Cent. Dig. tit. "Statutes," § 110; and, generally, Courts, 11 Cyc. 704.

57. *Illinois.*— Mt. Vernon *v.* Evens, etc., Fire Brick Co., 204 Ill. 32, 68 N. E. 208.

Kentucky.— Johnson *v.* Fulton, 121 Ky. 594, 89 S. W. 672, 28 Ky. L. Rep. 569.

Michigan.— Toll *v.* Jerome, 101 Mich. 468, 59 N. W. 816.

Missouri.— State *v.* Stratton, 136 Mo. 423, 38 S. W. 83; State *v.* Field, 119 Mo. 593, 24 S. W. 752.

Pennsylvania.— Gill *v.* Scowden, 14 Phila. 626.

See 44 Cent. Dig. tit. "Statutes," § 110; and, generally, Courts, 11 Cyc. 726.

58. *Alabama.*— Dudley *v.* Birmingham R., etc., Co., 139 Ala. 453, 36 So. 700.

California.— Tulare *v.* Hevren, 126 Cal. 226, 58 Pac. 530; Wigmore *v.* Buell, 122 Cal. 144, 54 Pac. 600; San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797; Turner *v.* Siskiyou County, 109 Cal. 332, 42 Pac. 434.

Colorado.— Cardillo *v.* People, 26 Colo. 355, 58 Pac. 678; Johnson *v.* People, 6 Colo. App. 163, 40 Pac. 576.

Florida.— State *v.* Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221; State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72.

(II) *JUSTICES OF THE PEACE AND NOTARIES.* Laws relating to the appointment,[59] compensation,[60] or jurisdiction[61] of justices of the peace or of notaries[62] should be general under many state constitutions.

(III) *CIVIL REMEDIES.* The constitutional provisions of the various state constitutions usually provide that the practice in the courts shall be regulated only by general laws of uniform application.[63] Under such provisions general regulations are universally upheld, although applicable only to certain subjects,[64]

Idaho.— Bear Lake County *v.* Budge, 9 Ida. 703, 75 Pac. 614, 108 Am. St. Rep. 179.

Illinois.— Downey *v.* People, 205 Ill. 230, 68 N. E. 807; People *v.* Raymond, 186 Ill. 407, 57 N. E. 1066.

Indiana.— Jackson County *v.* State, 147 Ind. 476, 46 N. E. 908.

Kentucky.— Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995; Com. *v.* Haly, 106 Ky. 716, 51 S. W. 430, 21 Ky. L. Rep. 666.

Missouri.— Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227; State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317.

Nebraska.— Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

New York.— People *v.* Washington County, 155 N. Y. 295, 49 N. E. 779; People *v.* Howland, 155 N. Y 270, 49 N. E. 775, 41 L. R. A. 838 [*affirming* 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347]; Czarnowsky *v.* Rochester, 55 N. Y. App. Div. 388, 66 N. Y. Suppl. 931 [*affirmed* in 165 N. Y. 649, 59 N. E. 1121].

Ohio.— *In re* Brown, 9 Ohio S. & C. Pl. Dec. 810, 6 Ohio N. P. 178.

Oregon.— State *v.* Frazier, 36 Oreg. 178, 59 Pac. 5.

Pennsylvania.— Record Pub. Co. *v.* Geyer, 29 Pittsb. Leg. J. 70.

South Dakota.— State *v.* Sexton, 11 S. D. 105, 75 N. W. 895; McClain *v.* Williams, 11 S. D. 60, 75 N. W. 391.

Texas.— Houston, etc., R. Co. *v.* Stuart, (Civ. App. 1898) 48 S. W. 799.

United States.— San Francisco Bd. of Education *v.* Alliance Assur. Co., 159 Fed. 994.

See 44 Cent. Dig. tit. "Statutes," § 110.

The proceedings and practice of the several district courts of the state are uniform, even though the prosecution in one case may be by information in one county, and in another case in another county by indictment, since wherever the proceeding is by indictment, if it obtain in every county, the proceedings relating to indictments are uniform, and the same is likewise true if by information. Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 178.

59. Bishop *v.* Oakland, 58 Cal. 572; Tissier *v.* Rhein, 130 Ill. 110, 22 N. E. 848; Spaulding *v.* Brady, 128 Mo. 653, 31 S. W. 103; State *v.* Walton, 69 Mo. 556; Clemmensen *v.* Peterson, 35 Oreg. 47, 56 Pac. 1015. See, generally, JUSTICES OF THE PEACE, 24 Cyc. 407.

60. Maricopa County *v.* Burnett, 8 Ariz. 242, 71 Pac. 908; Johnson *v.* Gunn, 148 Cal. 745, 84 Pac. 665; Reid *v.* Groezinger, 115 Cal. 551, 47 Pac. 374; State *v.* Messerly, 198 Mo. 351, 95 S. W. 913. See, generally, JUSTICES OF THE PEACE, 24 Cyc. 418.

61. People *v.* Meech, 101 Ill. 200; Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217; Watkins *v.* Schleeter, 9 Ohio S. & C. Pl. Dec. 590, 7 Ohio N. P. 42; Love *v.* Liddle, 26 Utah 62, 72 Pac. 185, 62 L. R. A. 482. See, generally, JUSTICES OF THE PEACE, 24 Cyc. 440.

62. State *v.* Herrmann, 75 Mo. 340. See, generally, NOTARIES, 29 Cyc. 1067.

63. Harker *v.* Brink, 24 N. J. L. 333, holding that a statute which regulates the form of remedies and judicial proceedings must apply to all persons parties to the proceedings.

64. Clay *v.* Central R., etc., Co., 84 Ga. 345, 10 S. E. 967, right to recover for homicide. See Com. *v.* Lyon, 72 S. W. 323, 24 Ky. L. Rep. 1747, where an act authorizing certain claimants to sue the commonwealth in a named court was upheld.

Illustrations.— Statutes regulating the following matters have been unheld: Appeals (Holmes *v.* Mattoon, 111 Ill. 27, 53 Am. Rep. 602; Garcia *v.* Free, 31 Utah 389, 88 Pac. 30); attorney's fees (Jacksonville, etc., R. Co. *v.* Prior, 34 Fla. 271, 15 So. 760; Wabash, etc., R. Co. *v.* Lavieux, 14 Ill.. App. 469; Insurance Co. of North America *v.* Bachler, 44 Nebr. 549, 62 N. W. 911; McMullin *v.* Doughty, 68 N. J. Eq. 776, 55 Atl. 284, 64 Atl. 1134; Gulf, etc., R. Co. *v.* Ellis, (Tex. 1892) 18 S. W. 723, 17 L. R. A. 286); classification of cities by population (Dallas *v.* Western Electric Co., 83 Tex. 243, 18 S. W. 552; Texas Sav., etc., Inv. Assoc. *v.* Pierre, 10 Tex. Civ. App. 453, 31 S. W. 426); collection of taxes (Wallapai Min., etc., Co. *v.* Territory, 9 Ariz. 373, 84 Pac. 85; Hughes *v.* Lazard, 5 Ariz. 4, 43 Pac. 422; McDonald *v.* Conniff, 99 Cal. 386, 34 Pac. 71; Denver *v.* Campbell, 33 Colo. 162, 80 Pac. 142; Eyerman *v.* Blaksley, 78 Mo. 145); contributory negligence in actions for personal injuries (Citizens' St. R. Co. *v.* Jolly, 161 Ind. 80, 67 N. E. 935; Indianapolis St. R. Co. *v.* Taylor, 158 Ind. 274, 63 N. E. 456; Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722; Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 232, 61 N. E. 197); costs (Cincinnati, etc., Traction Co. *v.* Felix, 25 Ohio Cir. Ct. 393); divorce (Deyoe *v.* Mendocino County Super. Ct., 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73); expediting trials (Louisville, etc., R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787; Jensen *v.* Fricke, 133 Ill. 171, 24 N. E. 515); garnishment (Ruperich *v.* Baehr, 142 Cal. 190, 75 Pac. 782); horse-racing (State *v.* Roby, 142 Ind. 168, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213); insurance (Chicago L. Ins. Co. *v.* Auditor Public Accounts, 101 Ill. 82;

while statutes special in their nature, or dependent on unnatural classifications, are invalid.[65]

(iv) *CRIMES.* Acts are not invalid as special legislation which provide reasonably what constitute the essential elements of a crime,[66] which reasonably

Jenkins *v.* Covenant Mut. L. Ins. Co., 171 Mo. 375, 71 S. W. 688; Union Cent. L. Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; Mutual L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286; Manhattan L. Ins. Co. *v.* Fields, (Tex. Civ. App. 1894) 26 S. W. 280); juries (People *v.* Richards, 1 Cal. App. 566, 82 Pac. 691; Jacksonville, etc., R. Co. *v.* Adams, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272; U. S. *v.* De Amador, 6 N. M. 173, 27 Pac. 488; Geiger *v.* State, 25 Ohio Cir. Ct. 742; Gardenshire *v.* State, (Tex. Cr. App. 1908) 111 S. W. 1031; Logan *v.* State, 54 Tex. Cr. 74, 111 S. W. 1028); liens (*In re* Clark, 195 Pa. St. 520, 46 Atl. 127, 48 L. R. A. 587); limitations of actions (Brooks *v.* Hyde, 37 Cal. 366; Rider *v.* Mt. Vernon, 87 Hun (N. Y.) 27, 33 N. Y. Suppl. 745); negligence (Hartje *v.* Moxley, 235 Ill. 164, 85 N. E. 216; Froelich *v.* Toledo, etc., R. Co., 24 Ohio Cir. Ct. 359; Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280); pleadings (Johnson *v.* Chicago, etc., El. Co., 105 Ill. 462); proceedings to test taking by eminent domain (Boggs *v.* Ganeard, 148 Cal. 711, 84 Pac. 195); railroads (Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937; Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793); security (Smith *v.* McDermott, 93 Cal. 421, 29 Pac. 34; Cramer *v.* Tittle, 72 Cal. 12, 12 Pac. 869, (1886) 11 Pac. 852; State *v.* O'Neil Lumber Co., 170 Mo. 7, 70 S. W. 121; Hurd *v.* Hannibal, etc., R. Co., 6 N. Y. Civ. Proc. 386; Dillingham *v.* Putnam, (Tex. 1890) 14 S. W. 303); service of process (Title, etc., Restoration Co. *v.* Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. N. S. 682; Anglo-Californian Bank *v.* Field, 146 Cal. 644, 80 Pac. 1080; Davidson *v.* Houston, 35 La. Ann. 492); venue (People *v.* Twelfth Dist. Judge, 17 Cal. 547; Bumb *v.* Evansville, 168 Ind. 272, 80 N. E. 625; State *v.* McKinney, 5 Nev. 194; Czarnowsky *v.* Rochester, 55 N. Y. App. Div. 388, 66 N. Y. Suppl. 931 [*affirmed* in 165 N. Y. 649, 59 N. E. 1121]).

The exclusion of pending actions from the effect of a regulation does not make it invalid as special. Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 232, 61 N. E. 197; New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557; Chunn *v.* Chunn, Meigs (Tenn.) 131.

65. Tate *v.* Bell, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221, revival of certain judgments.

Illustrations.— Statutes on the following subjects were held to be invalid: Appeals (Jones *v.* Chicago, etc., R. Co., 231 Ill. 302, 83 N. E. 215, 121 Am. St. Rep. 313; Dawson *v.* Eustice, 148 Ill. 346, 36 N. E. 87; Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217); attorneys' fees (Builders' Supply Depot *v.* O'Connor, 150 Cal. 265, 88 Pac. 982, 17 L. R. A. N. S. 909; Manowsky *v.* Stephan, 233 Ill. 409, 84 N. E. 365; Brubaker *v.* Bennett, 19 Utah 401, 57 Pac. 170); collection of judgments (Betz *v.* Philadelphia, 4 Pa. Co. Ct. 481, 21 Wkly. Notes Cas. 155; Philadelphia *v.* Pepper, 2 Pa. Co. Ct. 287); collection of sheriff's fees (Strine *v.* Foltz, 113 Pa. St. 349, 6 Atl. 206); collection of taxes (People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303); damages for city takings (Pittsburgh's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761; Wilbert's Appeal, 137 Pa. St. 494, 21 Atl. 74; *In re* Ruan St., 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193); difference in administration of estates based on population of county (Strong *v.* Dignan, 207 Ill. 385, 69 N. E. 909, 99 Am. St. Rep. 225); juries (Pitkin County *v.* Aspen First Nat. Bank, 6 Colo. App. 423, 40 Pac. 894; People *v.* Petrea, 92 N. Y. 128, 65 How. Pr. 59 [*affirming* 30 Hun 98, 64 How. Pr. 139]; Silberman *v.* Hay, 59 Ohio St. 582, 53 N. E. 258, 44 L. R. A. 264); liens (Safe-Deposit, etc., Co. *v.* Fricke, 152 Pa. St. 231, 25 Atl. 530; Scranton *v.* Whyte, 148 Pa. St. 419, 23 Atl. 1043; Philadelphia *v.* Pepper, 115 Pa. St. 291, 8 Atl. 241); mechanics' liens (Vulcanite Paving Co. *v.* Philadelphia Rapid Transit Co., 220 Pa. St. 603, 69 Atl. 1117, 17 L. R. A. N. S. 884); Vulcanite Portland Cement Co. *v.* Allison, 220 Pa. St. 382, 69 Atl. 855); new trials (Cullen *v.* Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047); publication (Martin *v.* Reissner, 54 Ind. 217; Reissner *v.* Hurle, 50 Ind. 424).

66. *California.*— People *v.* Finley, 153 Cal. 59, 94 Pac. 248 (assaults by convicts); *Ex p.* Koser, 60 Cal. 177 (Sunday law).

Colorado.— Robertson *v.* People, 20 Colo. 279, 38 Pac. 326, receiving deposits in a bank knowing of its insolvency.

Florida.— Randall *v.* Tillis, 43 Fla. 43, 29 So. 540, sales in violation of local option law.

Georgia.— Vance *v.* State, 128 Ga. 661, 57 S. E. 889; Southern R. Co. *v.* State, 125 Ga. 287, 54 S. E. 160, 114 Am. St. Rep. 203 (railroads failing to furnish pure drinking water); Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181 (allowing sale of liquor only by public dispensaries in certain county).

Iowa.— Morris *v.* Stout, 110 Iowa 659, 78 N. W. 843, 5 L. R. A. 97, desertion by husband who marries to avoid prosecution for seduction.

Kentucky.— Com. *v.* Reinecke Coal Min. Co., 117 Ky. 885, 79 S. W. 287, 25 Ky. L. Rep. 2027, weekly payment of miners.

Michigan.— White *v.* Bracelin, 144 Mich. 332, 107 N. W. 1055, keeping saloon within one hundred rods of school.

Missouri.— State *v.* Hamey, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846 (carnal knowledge of infant female); State *v.* Gritzner, 134 Mo. 512, 36 S. W. 39 (option purchases).

Nebraska.— Halter *v.* State, 74 Nebr. 757, 105 N. W. 298, 121 Am. St. Rep. 754, 7 L. R. A. N. S. 1079, prohibiting use of the United States flag for advertising.

New York.— People *v.* Kings County, 13

provide for the trial of the offense,[67] and which reasonably prescribe the punishment therefor.[68]

g. Public Officers. The creation of office, the election to office,[69] and the

Misc. 587, 35 N. Y. Suppl. 19, barbering on Sunday, excepting in certain places.

Oregon.— State *v.* Baker, 50 Oreg. 381, 92 Pac. 1076, 13 L. R. A. N. S. 1040 (permitting female infant to remain in public restaurant except where liquor is kept); *Ex p.* Northrup, 41 Oreg. 489, 69 Pac. 445 (forbidding barbers from working on Sunday).

See 44 Cent. Dig. tit. "Statutes," § 96.

Particular criminal acts invalid.— The following statutes regulating particular criminal acts were invalid as special legislation: Baking on Sunday (*Ex p.* Westerfield, 55 Cal. 550, 36 Am. Rep. 47); fishing in two counties (State *v.* Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561); gambling at a certain place (Nye *v.* State, 1 Ohio Cir. Ct. 355, 1 Ohio Cir. Dec. 198); having burglar's tools within four miles of city of first class (*Ex p.* Falk, 42 Ohio St. 638); prohibiting sale of liquor in certain county (Caldwell *v.* State, 101 Ga. 557, 29 S. E. 263); prohibiting sale of liquor in certain town (Bagley *v.* State, 103 Ga. 388, 29 S. E. 123, 32 S. E. 414); removing trees from certain creek (State *v.* Hammond, 66 S. C. 300, 44 S. E. 933); usury laws applying differently to corporations organized under a certain statute (*Ex p.* Sohncke, 148 Cal. 262, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L. R. A. N. S. 813).

67. *Alabama.*— Green *v.* State, 143 Ala. 2, 39 So. 362.

California.— Napa State Hospital *v.* Yuba County, 138 Cal. 378, 71 Pac. 450 (expenses for caring for insane criminals); Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167 (fees for jurors in criminal cases).

Illinois.— Reynolds *v.* Foster, 89 Ill. 257, summary convictions for refusing to work on the roads.

Indiana.— Woods *v.* McCay, 144 Ind. 316, 43 N. E. 269, 33 L. R. A. 97, creating superior court of certain county with criminal jurisdiction.

Missouri.— State *v.* Jackson, 80 Mo. 175, 50 Am. Rep. 499, allowing jury to determine proportion of negro blood from the appearance of the person.

Texas.— Ham *v.* State, 4 Tex. App. 645, venue either in county of T or in county where the offense was committed or where the land affected was situated.

Wyoming.— *In re* Boulter, 5 Wyo. 329, 40 Pac. 520, prosecution of felonies by information.

See 44 Cent. Dig. tit. "Statutes," § 96.

The following provisions were invalid as special legislation: Criminal procedure in certain city (State *v.* Kring, 74 Mo. 612); right to challenge jurors differing in different counties (State *v.* Hayes, 88 Mo. 344); separate trials of infants under sixteen (*In re* Courts for Trial of Infants, 14 Pa. Co. Ct. 254).

Where an offense is already indictable under general law, a special act is invalid which undertakes to give jurisdiction over it to other authorities. Papworth *v.* Fitzgerald, 105 Ga. 491, 30 S. E. 837; Aycock *v.* Rutledge, 104 Ga. 533, 30 S. E. 815.

68. *Ex p.* Williams, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248 (sentence to certain house of correction); Bingham *v.* Gibbs, 46 N. J. L. 513 (commitment to jail where no workhouse).

Statutes were void in State *v.* Jackson County Ct., 89 Mo. 237, 1 S. W. 307 (reform school in county of fifty thousand, applicable to but one county); Com. *v.* Carey, 2 Pa. Co. Ct. 293 (discharge of prisoners excepting in counties containing a city coextensive with it); Gildea *v.* Lackawanna County, 5 Pa. Co. Ct. 472.

69. *Alabama.*— State *v.* Thompson, 142 Ala. 98, 38 So. 679; Lovejoy *v.* Beeson, 121 Ala. 605, 25 So. 599.

California.— Spier *v.* Baker, 129 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; Britton *v.* San Francisco Election Com'rs, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115; Walser *v.* Austin, 104 Cal. 128, 37 Pac. 869.

Georgia.— Dallis *v.* Griffin, 117 Ga. 408, 43 S. E. 758; Pulaski County *v.* Thompson, 83 Ga. 270, 9 S. E. 1065.

Idaho.— Sabin *v.* Curtis, 3 Ida. 662, 32 Pac. 1130.

Illinois.— People *v.* Edgar County, 223 Ill. 187, 79 N. E. 123; People *v.* Chicago Election Com'rs, 221 Ill. 9, 77 N. E. 321; People *v.* Adams County, 185 Ill. 288, 56 N. E. 1044.

Kentucky.— New Castle *v.* Scott, 125 Ky. 545, 101 S. W. 944, 30 Ky. L. Rep. 894.

Louisiana.— State *v.* Michel, 121 La. 374, 46 So. 430.

Maryland.— Lankford *v.* Somerset County, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491.

Missouri.— Young *v.* Kansas City, 152 Mo. 661, 54 S. W. 535.

Nebraska.— Allen *v.* Kennard, 81 Nebr. 289, 116 N. W. 63; State *v.* Scott, 70 Nebr. 685, 100 N. W. 812, 70 Nebr. 681, 97 N. W. 1021.

New Jersey.— Bumsted *v.* Henry, 74 N. J. L. 790, 67 Atl. 375 [*affirming* 74 N. J. L. 162, 64 Atl. 475]; Hopper *v.* Stack, 69 N. J. L. 562, 56 Atl. 1; Butler *v.* Montclair, 67 N. J. L. 426, 51 Atl. 494.

New Mexico.— Territory *v.* Gutierrez, 12 N. M. 254, 78 Pac. 139.

New York.— People *v.* Westchester County, 139 N. Y. 524, 34 N. E. 1106; People *v.* Oneida County, 68 N. Y. App. Div. 650, 74 N. Y. Suppl. 1142 [*affirming* 36 Misc. 597, 73 N. Y. Suppl. 1098]; Fort *v.* Cummings, 90 Hun 481, 36 N. Y. Suppl. 36.

Ohio.— State *v.* Buckley, 60 Ohio St. 273, 54 N. E. 272.

term of office,[70] as well as the number,[71] powers,[72] removal,[73] and compensation[74] of public officers must usually be by general law.

C. Curative Acts. Statutes validating or curing defective acts are upheld,[75]

Pennsylvania.— Com. *v.* Samuels, 14 Pa. Co. Ct. 423; Knisely *v.* Cotterel, 3 Dauph. Co. Rep. 120; Com. *v.* Green, 7 Kulp 151.

Tennessee.— Alexandria *v.* Dearmon, 2 Sneed 104.

Texas.— Wallis *v.* Williams, 101 Tex. 395, 108 S. W. 153; Johnson *v.* Martin, 75 Tex. 33, 12 S. W. 321.

Wisconsin.— State *v.* Riordan, 24 Wis. 484.

See 44 Cent. Dig. tit. "Statutes," § 112 *et seq.*; and, generally, OFFICERS, 29 Cyc. 1368.

70. Tetrault *v.* Orange, 55 N. J. L. 99, 25 Atl. 268; People *v.* Hoffman, 60 How. Pr. (N. Y.) 324. See, generally, OFFICERS, 29 Cyc. 1395.

71. Davidson *v.* Von Detten, 139 Cal. 467, 73 Pac. 189.

72. Hibernia Sav., etc., Soc. *v.* Clarke, 110 Cal. 27, 42 Pac. 425; Dorchester County *v.* Meekins, 50 Md. 28; People *v.* Oneida County, 68 N. Y. App. Div. 650, 74 N. Y. Suppl. 1142 [*affirming* 36 Misc. 597, 73 N. Y. Suppl. 1098]; Phillips *v.* Schumacher, 10 Hun (N. Y.) 405; Pope *v.* Phifer, 3 Heisk. (Tenn.) 682. See, generally, OFFICERS, 29 Cyc. 1431.

73. State *v.* O'Connor, 54 N. J. L. 36, 22 Atl. 1091; Fitzgerald *v.* New Brunswick, 47 N. J. L. 479, 1 Atl. 496, 54 Am. Rep. 182; Pell *v.* Newark, 40 N. J. L. 550, 29 Am. Rep. 266; Territory *v.* Gutierrez, 12 N. M. 254, 78 Pac. 139. See, generally, OFFICERS, 29 Cyc. 1406.

74. *California.*— Thom *v.* Los Angeles County, 136 Cal. 375, 69 Pac. 18; Vail *v.* San Diego County, 126 Cal. 35, 58 Pac. 392; Tulare County *v.* May, 118 Cal. 303, 50 Pac. 427; Dwyer *v.* Parker, 115 Cal. 544, 47 Pac. 372; Dougherty *v.* Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161; Miller *v.* Kister, 68 Cal. 142, 8 Pac. 813.

Indiana.— Lyons *v.* Perry County, 165 Ind. 197, 73 N. E. 916; Perry County *v.* Lindemann, 165 Ind. 186, 73 N. E. 912; Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937; Henderson *v.* State, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469.

Minnesota.— State *v.* Sullivan, 72 Minn. 126, 75 N. W. 8 [*citing* State *v.* Copeland, 66 Minn. 315, 69 N. W. 27, 61 Am. St. Rep. 410, 34 L. R. A. 777].

Missouri.— State *v.* Fleming, 147 Mo. 1, 44 S. W. 758; Kenefick *v.* St. Louis, 127 Mo. 1, 29 S. W. 838.

Montana.— *In re* Dewar, 10 Mont. 426, 25 Pac. 1026.

Nevada.— Comstock Mill, etc., Co. *v.* Allen, 21 Nev. 325, 31 Pac. 434; State *v.* Boyd, 19 Nev. 43, 3 Pac. 735.

New Jersey.— Budd *v.* Hancock, 66 N. J. L. 133, 48 Atl. 1023; Oram *v.* New Brunswick, 64 N. J. L. 19, 44 Atl. 883; Tetrault *v.* Orange, 55 N. J. L. 99, 25 Atl. 268. See also Hallock *v.* Hollingshead, 49 N. J. L. 64, 6 Atl. 433.

New York.— Gaskin *v.* Meek, 42 N. Y. 186, 8 Abb. Pr. N. S. 312 [*affirming* 55 Barb. 259]; People *v.* Washington County, 18 Misc. 714, 43 N. Y. Suppl. 797 [*affirmed* in 17 N. Y. App. Div. 165, 45 N. Y. Suppl. 347 (*affirmed* in 155 N. Y. 270, 295, 49 N. E. 775, 779, 41 L. R. A. 838)].

Ohio.— Pearson *v.* Stephens, 13 Ohio Cir. Ct. 49, 7 Ohio Cir. Dec. 122.

Oregon.— Landis *v.* Lincoln County, 31 Oreg. 424, 50 Pac. 530; Manning *v.* Klippel, 9 Oreg. 367.

Pennsylvania.—Weaver *v.* Schuylkill County, 17 Pa. Super. Ct. 327; Weaver *v.* Schuylkill County, 23 Pa. Co. Ct. 507; Morrison *v.* Bachert, 1 Pa. Co. Ct. 153.

South Carolina.— State *v.* Burns, 73 S. C. 194, 52 S. E. 960; Nance *v.* Anderson County, 60 S. C. 501, 39 S. E. 5; Dean *v.* Spartanburg County, 59 S. C. 110, 37 S. E. 226.

Wisconsin.— Milwaukee County *v.* Isenring, 109 Wis. 9, 85 N. W. 131, 53 L R. A. 635.

See 44 Cent. Dig. tit. "Statutes," § 114. And see, generally, OFFICERS, 29 Cyc. 1422 *et seq.*

Classifying salaries according to population was held valid in the following cases:

California.— Summerland *v.* Bicknell, 111 Cal. 567, 44 Pac. 232; Farnum *v.* Warner, 104 Cal. 677, 38 Pac. 421; Cody *v.* Murphey, 89 Cal. 522, 26 Pac. 1081.

Indiana.— Harmon *v.* Madison County, 153 Ind. 68, 54 N. E. 105; Legler *v.* Paine, 147 Ind. 181, 45 N. E. 604; State *v.* Reitz, 62 Ind. 159, 30 Am. Rep. 203.

Kentucky.—Winston *v.* Stone, 102 Ky. 423, 43 S. W. 397, 19 Ky. L. Rep. 1483; Stone *v.* Wilson, 39 S. W. 49, 19 Ky. L. Rep. 126.

Minnesota.— Bowe *v.* St. Paul, 70 Minn. 341, 73 N. W. 184.

South Dakota.— Minnehaha County *v.* Thorne, 6 S. D. 449, 61 N. W. 688.

Texas.— Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343.

See 44 Cent. Dig. tit. "Statutes," § 114; and, generally, OFFICERS, 29 Cyc. 1422.

Compare Henderson *v.* Koenig, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659.

75. Windsor *v.* Des Moines, 111 Iowa 175, 81 N. W. 476, 80 Am. St. Rep. 280 (holding that an act, passed after the commencement of an action disputing the validity of certain proceedings, which afterward were cured by the passage of such act, is a defense to the action); State *v.* Hoffman, 35 Ohio St. 435. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 1023.

Illustrations.—Statutes have been found not obnoxious as special on the following subjects: Legalizing a certain city ordinance (Leavenworth *v.* Leavenworth City, etc., Water Co., 69 Kan. 82, 76 Pac. 451; Flynn

as a general rule, but not where they seek to legalize something which the legislature could not have done in the first place.[76]

IV. SUBJECTS AND TITLES OF ACTS.

A. Constitutional Provisions — 1. IN GENERAL. The constitutions of most of the states forbid the passage of laws pertaining to more than one subject-matter or whose subject is not expressed in the title to the act.[77]

2. PURPOSE OF PROVISIONS. These provisions are intended to prevent the evils of "omnibus bills" and surreptitious legislation.[78]

3. CONSTRUCTION OF PROVISIONS. The provisions of the various constitutions relating to the subject-matter and titles of acts should be construed liberally to

v. Little Falls Electric, etc., Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106); legalizing elections (Lovejoy *v.* Beeson, 121 Ala. 605, 25 So. 599; Fox *v.* Kendall, 97 Ill. 72; Witter *v.* Polk County, 112 Iowa 380, 83 N. W. 1041); legalizing grants of franchises (Matter of Buffalo Traction Co., 25 N. Y. App. Div. 447, 49 N. Y. Suppl. 1052 [*affirmed* in 155 N. Y. 700, 50 N. E. 1115]); legalizing judicial acts (Davidson *v.* Koehler, 76 Ind. 398; Marshall *v.* Marshall, 4 Bush (Ky.) 248); legalizing a just municipal debt (State *v.* Brown, 97 Minn. 402, 106 N. W. 477; State *v.* Neely, 39 S. C. 587, 9 S. E. 664, 3 L. R. A. 672; State *v.* Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777; Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462); legalizing particular acts of public officers (Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1; Kelly *v.* State, 92 Ind. 236; Fair *v.* Buss, 117 Iowa 164, 90 N. W. 527; Windsor *v.* Des Moines, 101 Iowa 343, 70 N. W. 214; Inlow *v.* Graham County, 6 Kan. App. 391, 51 Pac. 65; Wrought-Iron Bridge Co. *v.* Attica, 119 N. Y. 204, 23 N. E. 542 [*affirming* 49 Hun 513, 2 N. Y. Suppl. 359]; Davidge *v.* Binghamton, 62 N. Y. App. Div. 525, 71 N. Y. Suppl. 282; *In re* Providence School Fund, 2 Walk. (Pa.) 37); legalizing taxes (Chicago, etc., R. Co. *v.* Avoca Independent Dist., 99 Iowa 556, 68 N. W. 881; Mason *v.* Spencer, 35 Kan. 512, 11 Pac. 402); validating a defective corporate organization either private (State *v.* Webb, 110 Ala. 214, 20 So. 462; Central Agriculture, etc., Assoc. *v.* Alabama Gold L. Ins. Co., 70 Ala. 120; Syracuse City Bank *v.* Davis, 16 Barb. (N. Y.) 188); or municipal (State *v.* Squires, 26 Iowa 340; State *v.* Thief River Falls, 76 Minn. 15, 78 N. W. 867; State *v.* Spaude, 37 Minn. 322, 34 N. W. 164; State *v.* Larkin, 41 Tex. Civ. App. 253, 90 S. W. 912); validating informal deeds or wills by general statute (Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352; Wright *v.* Taylor, 30 Fed. Cas. No. 18,096, 2 Dill. 23).

76. Stange *v.* Dubuque, 62 Iowa 303, 17 N. W. 518; Williams *v.* Boynton, 147 N. Y. 426, 42 N. E. 184 [*affirming* 71 Hun 309, 25 N. Y. Suppl. 60]; Kimball *v.* Rosendale, 42 Wis. 407, 24 Am. Rep. 421. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 1023.

Bona fide purchasers protected.— Curative legislation does not operate against persons acquiring title to property in good faith, and for value, before its enactment. Finders *v.* Bodle, 58 Nebr. 57, 78 N. W. 480.

77. See the constitutions of the several states.

78. *Arkansas.*— Fletcher *v.* Oliver, 25 Ark. 289.

Colorado.— Catron *v.* Archuleta County, 18 Colo. 553, 33 Pac. 513.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Georgia.— Savannah *v.* State, 4 Ga. 26.

Iowa.— State *v.* Davis County Judge, 2 Iowa 280.

Michigan.— People *v.* Mahaney, 13 Mich. 481.

Missouri.— Kansas *v.* Payne, 71 Mo. 159.

Montana.— Russell *v.* Chicago, etc., R. Co., 37 Mont. 1, 94 Pac. 488, 501.

Nebraska.— State *v.* Power, 63 Nebr. 496, 88 N. W. 769; State *v.* Stuht, 52 Nebr. 209, 71 N. W. 941; Kansas City, etc., R. Co. *v.* Frey, 30 Nebr. 790, 47 N. W. 87.

Nevada.— State *v.* Silver, 9 Nev. 227.

New York.— Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 241.

Pennsylvania.— Yeager *v.* Weaver, 64 Pa. St. 425.

Texas.— Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737.

Virginia.— Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822.

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

United States.— Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090.

"The purpose of these provisions was — first, to prevent hodge-podge or 'log-rolling' legislation; second, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Cooley Const. Lim. [*cited* with approval in State *v.* Hoadley, 20 Nev. 317, 318, 22 Pac. 99].

"As inherited from the colonies and adopted in the early constitutions, the veto power was confined to approval or disapproval of the

uphold proper legislation, all parts of which are reasonably germane on the one hand,[79] and to prevent trickery on the other hand.[80] The restriction requiring the subject of an act to be expressed in its title should be reasonably construed,[81] con-

entire bill as presented. . . . But by joining a number of different subjects in one bill, the governor was put under compulsion to accept some enactments that he could not approve, or to defeat the whole, including others that he thought desirable or even necessary. Such bills, popularly called 'omnibus' bills, became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits." Com. *v.* Barnett, 199 Pa. St. 161, 171, 48 Atl. 976, 55 L. R. A. 882.

An omnibus bill is a legislative bill of a multifarious character. Parkinson *v.* State, 14 Md. 184, 193, 74 Am. Dec. 522.

79. *Delaware.*—State *v.* Fountain, 6 Pennew. 520, 69 Atl. 926.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929; Florida, etc., R. Co. *v.* Hazel, 43 Fla. 263, 31 So. 272.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82.

Iowa.— State *v.* Davis County Judge, 2 Iowa 280.

Kansas.— *In re* Schley, 71 Kan. 266, 80 Pac. 631; Blaker *v.* Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854; *In re* Sanders, 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603.

Kentucky.— Smith *v.* Com., 8 Bush 108; Johnson *v.* Higgins, 3 Metc. 566; Phillips *v.* Covington, etc., Bridge Co., 2 Metc. 219.

Louisiana.— Lanzetti's Succession, 9 La. Ann. 329; New Orleans Municipality No. 3 *v.* Michoud, 6 La. Ann. 605.

Maryland.— Jeffers *v.* Annapolis, 107 Md. 268, 68 Atl. 553.

Michigan.— Ryerson *v.* Utley, 16 Mich. 269.

Missouri.— Bergman *v.* St. Louis, etc., R. Co., 88 Mo. 678, 1 S. W. 384; State *v.* Miller, 45 Mo. 495.

Nebraska.— State *v.* Power, 63 Nebr. 496, 88 N. W. 769.

South Dakota.— Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121.

Texas.— Joliff *v.* State, 53 Tex. Cr. 61, 109 S. W. 176.

Utah.— Edler *v.* Edwards, 34 Utah 13, 95 Pac. 367.

Washington.— State *v.* Graham, 34 Wash. 81, 74 Pac. 1058.

United States.— Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431; Mexican Nat. R. Co. *v.* Jackson, 118 Fed. 549, 55 C. C. A. 315; South St. Paul *v.* Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585.

See 44 Cent. Dig. tit. "Statutes," § 117.

Canons of construction have been adopted which may be summarized as follows: That every law is presumed to be valid; that this provision of the constitution is to be liberally construed, and all doubts resolved in favor of the law; that the title should also be liberally construed, giving to its general words paramount weight; that it is not essential that the best or even accurate words in the title be employed, but the remedy to be secured and mischief avoided furnish the best test of its sufficiency to prevent such title from being made a cloak or artifice to distract attention from the substance of the act, provided the title be fairly suggestive, and not foreign to the purpose of the statute. State *v.* State Institutions Bd. of Control, 85 Minn. 165, 88 N. W. 533.

Whether an act is objectionable as embracing more than one subject is to be determined from the body of the act, and not from its title. Monaghan *v.* Lewis, 5 Pennew. (Del.) 218, 59 Atl. 948.

80. State *v.* Burns, 38 Fla. 367, 21 So. 290; Ek *v.* St. Paul Permanent Loan Co., 84 Minn. 245, 87 N. W. 844; State *v.* King County, 49 Wash. 619, 96 Pac. 156.

The mere fact that legislative grants have at various times been included in acts with titles too restrictive is not sufficient to force the courts to disregard a plain mandate of the constitution directed against surreptitious legislation. Wade *v.* Atlantic Lumber Co., 51 Fla. 628, 41 So. 72; Blake *v.* People, 109 Ill. 504; State *v.* Montgomery County, 26 Ind. 522; State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

Unusual meaning imposed on terms.— The legislature cannot in the title of an act use language which in the ordinary acceptation of the terms thereof would imply one idea and in the body of the act declare that such language means the reverse. Turner *v.* Coffin, 9 Ida. 338, 74 Pac. 962.

81. *Kentucky.*— Howland Coal, etc., Works *v.* Brown, 13 Bush 681.

Louisiana.— New Orleans Municipality No. 3 *v.* Michoud, 6 La. Ann. 605.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Michigan.— Inkster *v.* Carver, 16 Mich. 484.

New Jersey.—Griffith *v.* Trenton, 76 N. J. L. 23, 69 Atl. 29; Richards *v.* Hammer, 42 N. J. L. 435.

New York.— People *v.* Banks, 67 N. Y. 568; Harris *v.* Niagara County, 23 Hun 279.

Oregon.— State *v.* Shaw, 22 Oreg. 287, 29 Pac. 1028.

See 44 Cent. Dig. tit. "Statutes," § 136.

"We must give the constitutional provision a reasonable construction and effect.—The constitution requires no law to embrace more than one object, which shall be expressed in its title. Now the object may be very comprehensive and still be without objection, and the one before us is of that character. But

sidering substance rather than form,[82] to require the expression in the title of the general object but not the details or incidents,[83] or means of effecting the object sought [84]

it is by no means essential that every end and means necessary or convenient for the accomplishment of the general object should be either referred to or necessarily indicated by the title. All that can reasonably be required is, that the title shall not be made to cover legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection." Blair *v.* Chicago, 201 U. S. 400, 452, 26 S. Ct. 427, 50 L. ed. 801, per Day, J.

Common meaning given.— In determining whether the title of an act expresses its object within the meaning of the clause of the constitution on that subject, there should be attributed to the words used such meaning as they had then acquired in common and legislative usage. State *v.* Twining, 73 N. J. L. 683, 64 Atl. 1073, 1135 [*affirming* 73 N. J. L. 3, 62 Atl. 402]. And where the meaning attached to the terms in an act by a definition therein contained differs from that attached to them in common understanding, the title must express such special meaning so clearly as to put persons reading the same on inquiry. Com. *v.* Kebort, 212 Pa. St. 289, 61 Atl. 895.

Long use of a general title to a particular class of legislative enactments is such construction by the legislature of the constitutional provision that no law shall embrace more than one subject as to be entitled to consideration by the court in determining the sufficiency of such title. Atwell *v.* Parker, 93 Minn. 462, 101 N. W. 946.

82. *Colorado.*— Burcher *v.* People, 41 Colo. 495, 93 Pac. 14, 124 Am. St. Rep. 143.

Missouri.— State *v.* Hermann, 11 Mo. App. 43, "abolish" in act used in sense of "vacate" in title.

Montana.— Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462.

Nebraska.— Union Pac. R. Co. *v.* Sprague, 69 Nebr. 48, 95 N. W. 46.

South Dakota.— Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121.

See 44 Cent. Dig. tit. "Statutes," § 136.

The purpose of the constitution to give notice to all parties of the provisions of a statute should be kept in mind in construing a statute.

Florida.— Campbell *v.* Skinner Mfg. Co., 53 Fla. 632, 43 So. 874; State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Illinois.— People *v.* Protestant Deaconesses' Inst., 71 Ill. 229.

Minnesota.— Winters *v.* Duluth, 82 Minn. 127, 84 N. W. 788.

Pennsylvania.— *In re* Phœnixville Road, 109 Pa. St. 44; State Line, etc., R. Co.'s Appeal, 77 Pa. St. 429; Allegheny County Home's Case, 77 Pa. St. 77; Com. *v.* Hudusko, 10 Pa. Dist. 230.

Tennessee.— Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460.

Washington.— State *v.* King County, 49 Wash. 619, 96 Pac. 156.

See 44 Cent. Dig. tit. "Statutes," § 136.

83. *Arkansas.*— State *v.* Sloan, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 106.

California.— People *v.* Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86.

Colorado.—El Paso County *v.* Teller County, 32 Colo. 310, 76 Pac. 368.

Florida.— Jacksonville *v.* Basnett, 20 Fla. 525.

Georgia.— Brown *v.* State, 73 Ga. 38; Green *v.* Savannah, R. M. Charlt. 368.

Idaho.— Turner *v.* Coffin, 9 Ida. 338, 74 Pac. 962.

Indiana.— Egoff *v.* Madison County, 170 Ind. 238, 84 N. E. 151; State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Bright *v.* McCullough, 27 Ind. 223.

Kentucky.— Wiemer *v.* Louisville Sinking Fund Com'rs, 99 S. W. 242, 30 Ky. L. Rep. 523.

Louisiana.— State *v.* Bolden, 107 La. 116, 31 So. 393, 90 Am. St. Rep. 280; Edwards *v.* Police Jury, 39 La. Ann. 855, 2 So. 804; American Printing House *v.* Dupuy, 37 La. Ann. 188; State *v.* Daniel, 28 La. Ann. 38.

Maryland.— Baltimore *v.* Flack, 104 Md. 107, 64 Atl. 702; Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Michigan.— Van Husan *v.* Heames, 96 Mich. 504, 56 N. W. 22; Gillett *v.* McLaughlin, 69 Mich. 547, 37 N. W. 551; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Minnesota.— State *v.* Cassidy, 22 Minn. 312, 21 Am. Rep. 765.

Missouri.— *In re* Burris, 66 Mo. 442.

Nebraska.— Cathers *v.* Hennings, 76 Nebr. 295, 107 N. W. 586; State *v.* Tibbet, 52 Nebr. 228, 71 N. W. 990, 66 Am. St. Rep. 492.

New Jersey.—Bumsted *v.* Govern, 47 N. J. L. 368, 1 Atl. 835; Rader *v.* Union Tp. Committee, 39 N. J. L. 509.

New York.— *In re* Upton, 89 N. Y. 67; People *v.* Briggs, 50 N. Y. 553; Brewster *v.* Syracuse, 19 N. Y. 116; Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 241; Central Crosstown R. Co. *v.* Twenty-third St. R. Co., 54 How. Pr. 168.

Pennsylvania.— Read *v.* Clearfield County, 12 Pa. Super. Ct. 419; City Sewage Utilization Co. *v.* Davis, 8 Phila. 625.

Tennessee.— State *v.* Wilcon, 12 Lea 246.

Texas.— Robinson *v.* State, 15 Tex. 311.

Utah.— Edler *v.* Edwards, 34 Utah 13, 95 Pac. 367.

West Virginia.— State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

Wisconsin.— Diana Shooting Club *v.* Lamoreux, 114 Wis. 44, 89 N. W. 880.

United States.— Woodson *v.* Murdock, 22 Wall. 351, 22 L. ed. 716 [*affirming* 17 Fed. Cas. No. 9,942, 2 Dill. 188]; Pickens Tp. *v.* Post, 99 Fed. 659, 41 C. C. A. 1.

See 44 Cent. Dig. tit. "Statutes," § 136.

That an act is retrospective should show in the title. Katz *v.* Herrick, 12 Ida. 1, 86 Pac. 873.

84. *Maryland.*— Jeffers *v.* Annapolis, 107

and to include the subject [85] and not the purpose of the act and the reasons which brought about the enactment of it by the legislature.[86]

4. Operation and Effect of Provisions — a. In General. Acts containing more than one subject are void under the constitutional restrictions.[87] These restrictions apply to statutes of all kinds unless express exception is made,[88] and are mandatory rather than directory.[89]

Md. 268, 68 Atl. 553; Baltimore *v.* Flack, 104 Md. 107, 64 Atl. 702.

Michigan.— People *v.* State Ins. Co., 19 Mich. 392.

New York.— People *v.* Lawrence, 41 N. Y. 123 [*affirming* 36 Barb. 177].

Wisconsin.— Diana Shooting Club *v.* Lamoreux, 114 Wis. 44, 89 N. W. 880.

United States.— Blair *v.* Chicago, 201 U. S. 400, 402, 26 S. Ct. 427, 50 L. ed. 801.

See 44 Cent. Dig. tit. "Statutes," § 136.

85. *Florida.*— State *v.* Bryan, 50 Fla. 293, 39 So. 929; Florida East Coast R. Co. *v.* Hazel, 43 Fla. 263, 31 So. 272, 99 Am. St. Rep. 114.

Illinois.— Rouse *v.* Thompson, 228 Ill. 522, 81 N. E. 1109.

Minnesota.— Watkins *v.* Bigelow, 93 Minn. 210, 100 N. W. 1104; *In re* Hegne-Hendrum Ditch No. 1, (1900) 82 N. W. 1094.

Nebraska.— Alperson *v.* Whalen, 74 Nebr. 680, 105 N. W. 474; State *v.* Burlington, etc., R. Co., 60 Nebr. 741, 84 N. W. 254; State *v.* Tibbets, 52 Nebr. 228, 71 N. W. 990, 66 Am. St. Rep. 492.

Wisconsin.— Diana Shooting Club *v.* Lamoreux, 114 Wis. 44, 89 N. W. 880.

See 44 Cent. Dig. tit. "Statutes," § 136.

86. State *v.* Cantwell, 179 Mo. 245, 78 S. W. 569; People *v.* Lawrence, 36 Barb. (N. Y.) 177 [*affirmed* in 41 N. Y. 137]; Cantwell *v.* Missouri, 199 U. S. 602, 26 S. Ct. 749, 50 L. ed. 329 [*affirming* 179 Mo. 245, 78 S. W. 569].

87. *Alabama.*— Ballentyne *v.* Wickersham, 75 Ala. 533.

Florida.— Schiller *v.* State, 49 Fla. 25, 38 So. 706.

Idaho.— Pioneer Irr. Dist. *v.* Bradley, 8 Ida. 310, 68 Pac. 295, 101 Am. St. Rep. 201.

Louisiana.— Shreveport *v.* Tidwell, 112 La. 172, 36 So. 312.

Nebraska.— Norfolk Beet Sugar Co. *v.* State, 73 Nebr. 69, 102 N. W. 83; Oxnard Beet Sugar Co. *v.* State, 73 Nebr. 57, 102 N. W. 80, 105 N. W. 716.

See 44 Cent. Dig. tit. "Statutes," § 135.

88. Morton *v.* Comptroller-Gen., 4 S. C. 430; Judson *v.* Plattsburg, 14 Fed. Cas. No. 7,570, 3 Dill. 181.

As to applicability to local or private bills only see *infra*, IV, A, 4, e.

Laws adopted at the polls must be tested by the same standards as those enacted by the legislature. State *v.* Richardson, 48 Oreg. 309, 85 Pac. 225, 8 L. R. A. N. S. 362.

Retroactive effect.— The constitutional provisions do not apply retroactively to statutes previously passed.

Alabama.— Lindsay *v.* U. S. Savings, etc., Assoc., 120 Ala. 156, 24 So. 171, 42 L. R. A. 783.

Louisiana.— State *v.* Green, 33 La. Ann. 1408.

Michigan.— Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730; Thomas *v.* Collins, 58 Mich. 64, 24 N. W. 553; Rogers *v.* Windoes, 48 Mich. 628, 12 N. W. 882; Stewart *v.* Riopelle, 48 Mich. 177, 12 N. W. 36.

Missouri.— Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228.

Nebraska.— State *v.* Robinson, 35 Nebr. 401, 53 N. W. 213, 17 L. R. A. 383.

Oklahoma.— Choctaw, etc., R. Co. *v.* Alexander, 7 Okla. 579, 52 Pac. 944.

See 44 Cent. Dig. tit. "Statutes," § 119.

89. *Alabama.*— Weaver *v.* Lapsley, 43 Ala. 224.

Colorado.— Central, etc., Road Co. *v.* People, 5 Colo. 39.

Delaware.— Equitable Guarantee, etc., Co. *v.* Donahoe, 3 Pennew. 191, 49 Atl. 372.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929; State *v.* Burns, 38 Fla. 367, 21 So. 290.

Georgia.— Prothro *v.* Orr, 12 Ga. 36.

Illinois.— Burritt *v.* State Contracts Com'rs, 120 Ill. 322, 11 N. E. 180.

Indiana.— Indiana Cent. R. Co. *v.* Potts, 7 Ind. 681.

Kansas.— Philpin *v.* McCarty, 24 Kan. 393.

Kentucky.— Phillips *v.* Covington, etc., Bridge Co., 2 Metc. 219.

Minnesota.— Ramsey County *v.* Heenan, 2 Minn. 330.

Missouri.— State *v.* Miller, 45 Mo. 495.

Nebraska.— Oxnard Beet Sugar Co. *v.* State, 73 Nebr. 57, 102 N. W. 80, 105 N. W. 716.

Nevada.— State *v.* Ah Sam, 15 Nev. 27, 37 Am. Rep. 454.

New Jersey.— American Surety Co. *v.* Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579.

New York.— Huber *v.* People, 49 N. Y. 132.

North Dakota.— Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841.

Tennessee.— Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460; State *v.* McCann, 4 Lea 1; Cannon *v.* Mathes, 8 Heisk. 504.

Texas.— State *v.* McCracken, 42 Tex. 383; San Antonio *v.* Gould, 34 Tex. 49; Cannon *v.* Hemphill, 7 Tex. 184.

Utah.— Edler *v.* Edwards, 34 Utah 13, 95 Pac. 367.

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

United States.— Montgomery Traction Co. *v.* Montgomery Amusement Co., 140 Fed. 988, 72 C. C. A. 682 [*affirming* 139 Fed. 353].

See 44 Cent. Dig. tit. "Statutes," § 118.

Contra.— *In re* Boston Min., etc., Co., 51 Cal. 624; Pierpont *v.* Crouch, 10 Cal. 315;

b. City Ordinances. City ordinances are not embraced within the constitutional provision that a law shall have but one object, to be expressed in its title.[90]

c. Codifications and Revisions. Proper codifications and revisions of the statutes do not offend against the constitutional provisions.[91]

d. Constitutional Amendments. The constitutional prohibition does not cover proceedings for an amendment to the constitution.[92]

e. Private or Local Bills. The constitutional restrictions apply in some states only to local or private bills.[93]

Washington *v.* Page, 4 Cal. 388; Weil *v.* State, 46 Ohio St. 450, 21 N. E. 643; Oshe *v.* State, 37 Ohio St. 494; State *v.* Covington, 29 Ohio St. 102; Pim *v.* Nicholson, 6 Ohio St. 176. But see *Ex p.* Liddell, 93 Cal. 633, 29 Pac. 251.

90. *California.*— *Ex p.* Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

Kansas.— Topeka *v.* Raynor, 61 Kan. 10, 58 Pac. 557.

Michigan.— People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.

Missouri.— Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

South Carolina.— State *v.* Gibbes, 60 S. C. 500, 39 S. E. 1.

See 44 Cent. Dig. tit. "Statutes," § 119; and MUNICIPAL CORPORATIONS, 28 Cyc. 378.

91. *Alabama.*— *Ex p.* Thomas, 113 Ala. 1, 21 So. 369.

Florida.— Martin *v.* Johnson, 33 Fla. 287, 14 So. 725.

Georgia.— Georgia R. Co. *v.* State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518.

Idaho.— Pioneer Irr. Dist. *v.* Bradley, 8 Ida. 310, 68 Pac. 295, 101 Am. St. Rep. 201.

Illinois.— Larned *v.* Tiernan, 110 Ill. 173.

Iowa.— Cook *v.* Marshall County, 119 Iowa 384, 93 N. W. 372, 104 Am. St. Rep. 283.

Michigan.— Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271.

Minnesota.— Johnson *v.* Harrison, 47 Minn 575, 50 N. W. 923, 28 Am. St. Rep. 382.

North Dakota.— Tribune Printing, etc., Co *v.* Barnes, 7 N. D. 591, 75 N. W. 904.

Ohio.— Oshe *v.* State, 37 Ohio St. 494.

South Carolina.— Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53; State *v.* McDaniel, 19 S. C. 114. And see State *v.* Murray, 72 S. C. 508, 52 S. E. 189, holding that a subdivision in a code is not part of the title of the act.

Washington.— Marston *v.* Humes, 3 Wash. 267, 28 Pac. 520. And see State *v.* Graham, 34 Wash. 81, 74 Pac. 1058, holding that the compiler's headlines are no part of the title.

See 44 Cent. Dig. tit. "Statutes," § 119.

A law valid when passed is not rendered void by incorporation in a revision of the laws. Hennig *v.* Staed, 138 Mo. 430, 40 S. W. 95. See also Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730. But a void act may thus become valid. McFarland *v.* Donaldson, 115 Ga. 567, 41 S. E. 1000.

92. Julius *v.* Callahan, 63 Minn. 154, 65 N. W. 267.

93. People *v.* Wallace, 70 Ill. 680; People *v.* City Prison, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718 [*affirming* 81 Hun 434, 30 N. Y. Suppl. 1095]; Ferguson *v.* Ross, 126 N. Y. 459, 27 N. E. 954 [*affirming* 59 Hun 207, 13 N. Y. Suppl. 398]; People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirming* 6 N. Y. St. 1 (*affirming* 14 Daly 154, 1 N. Y. St. 633), and *affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666]; Johnston *v.* Spicer, 107 N. Y. 185, 13 N. E. 753; Rogers *v.* Stephens, 86 N. Y. 623 [*affirming* 21 Hun 44]; People *v.* Livingston, 79 N. Y. 279; Huber *v.* People, 49 N. Y. 132 [*reversing* 61 Barb. 456]; People *v.* Chautauqua County, 43 N. Y. 10; People *v.* O'Brien, 38 N. Y. 193; Williams *v.* People, 24 N. Y. 405; Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. 355]; Rochester *v.* Bloss, 77 N. Y. App. Div. 28, 79 N. Y. Suppl. 236 [*affirmed* in 173 N. Y. 646, 66 N. E. 1105]; Fort *v.* Cummings, 90 Hun (N. Y.) 481, 36 N. Y. Suppl. 36; Reilly *v.* Gray, 77 Hun (N. Y.) 402, 28 N. Y. Suppl. 811; Arthur *v.* Glens Falls, 66 Hun (N. Y.) 136, 21 N. Y. Suppl. 81; Kerrigan *v.* Force, 9 Hun (N. Y.) 185 [*affirmed* in 68 N. Y. 381]; De Camp *v.* Eveland, 19 Barb. (N. Y.) 81; Burnham *v.* Acton, 7 Rob. (N. Y.) 395, 4 Abb. Pr. N. S. 1, 35 How. Pr. 48; Phillips *v.* New York, 1 Hilt. (N. Y.) 483; Kelly *v.* Pratt, 41 Misc. (N. Y.) 31, 83 N. Y. Suppl. 636; People *v.* Stephens, 2 Abb. Pr. N. S. (N. Y.) 348 [*reversed* in 41 N. Y. 619]; Fall Brook Coal Co. *v.* Lynch, 47 How. Pr. (N. Y.) 520; Fisher *v.* World Mut. L. Ins. Co., 47 How. Pr. (N. Y.) 451; *In re* Wakker, 1 Edm. Sel. Cas. (N. Y.) 575; Julien *v.* Model Bldg. Loan, etc., Assoc., 116 Wis. 79, 92 N. W. 561; Thompson *v.* Milwaukee, 69 Wis. 492, 34 N. W. 402; Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971; Unity *v.* Burrage, 103 U. S. 447, 26 L. ed. 405; Syracuse Third Nat. Bank *v.* Seneca Falls, 15 Fed. 783. See Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730 [*reversed* in 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018].

Calling a private act public does not relieve it from the constitutional prohibition. Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589; Economic Power, etc., Co. *v.* Buffalo, 59 Misc. (N. Y.) 571, 111 N. Y. Suppl. 443 [*affirmed* in 128 N. Y. App. Div. 883, 112 N. Y. Suppl. 1127].

When a local or private bill contains provisions which apply to the whole state the act is valid, although the title does not refer to such provisions; but when a statute which applies to the state at large contains provisions of a local or private nature, not disclosed in the title, the latter provisions are void as being in violation of the constitution.

f. Submission to Popular Vote. An act may include a provision not indicated in its title for submission to popular vote,[94] and such provision does not make it duplex in character.[95]

B. Duplicity in Subject — 1. "Subject" or "Object." State constitutions sometimes forbid an act to embrace more than one "subject," which means the matter to which the statute relates,[96] or more than one "object," which is its general purpose.[97]

2. Amending Act. An amending act is not void for duplicity in amending two statutes,[98] or one statute in two particulars.[99]

3. One Subject and Its Branches or Subdivisions. A statute covering one subject with various branches is not void for multifariousness.[1]

People *v.* Morgan, 65 Barb. (N. Y.) 473, 1 Thomps. & C. 101 [*reversed* on other grounds in 55 N. Y. 587].

94. Caldwell *v.* Barrett, 73 Ga. 604; Virden *v.* Allan, 107 Ill. 505; Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147; Unity *v.* Burrage, 103 U. S. 447, 26 L. ed. 405.

95. Burnside *v.* Lincoln County Ct., 86 Ky. 423, 6 S. W. 276, 9 Ky. L. Rep. 635; People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirming* 6 N. Y. St. 1 (*affirming* 14 Daly 154, 1 N. Y. St. 633), and *affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666]; Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147.

96. Matter of Mayer, 50 N. Y. 504; Dorsey's Appeal, 72 Pa. St. 192.

Distinction stated. In People *v.* Lawrence, 36 Barb. (N. Y.) 177, 192 [*affirmed* in 41 N. Y. 137), the court says: "The constitution demands that the title of an act shall express the subject, not the object, of the act. It is the matter to which the statute relates, and with which it deals, and not what it proposes to do, which is to be found in the title. It is no constitutional objection to a statute, that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers." In Texas a constitution forbidding an act from containing more than one object was amended to read "no bill . . . shall contain more than one subject." In Stone *v.* Brown, 54 Tex. 330, 341, Bonner, J., observes that "the word 'subject' may have been thus substituted as less restrictive than 'object.'" See also Fahey *v.* State, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182. "If any distinction is to be made, it seems to me that the word 'object,' in the connection in which it is used, is obviously of broader significance than the word 'subject.' . . . For all practical purposes, the words are synonymous, as indicated by Mr. Cooley [Const. Lim.]," per Turner, J., in Harland *v.* Territory, 3 Wash. Terr. 131, 145, 13 Pac. 453. And see Adams *v.* San Angelo Water Works Co., 86 Tex. 485, 25 S. W. 605.

97. State *v.* Ferguson, 104 La. 249, 28 So. 917, 81 Am. St. Rep. 123; Mich. Const. (1850) art. 4, § 20; N. J. Const. (1844) art. 4, § 7; W. Va. Const. (1872) art. 6, § 30; Shields *v.* Bennett, 8 W. Va. 74.

98. State *v.* People's Slaughterhouse, etc., Co., 46 La. Ann. 1031, 15 So. 408.

99. State *v.* Brown, 41 La. Ann. 771, 6 So. 638; Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832, holding that the title of an act "to amend sections fifty, fifty-one, seventy-one, and one hundred and five, of an act entitled An act," etc., is not objectionable as containing more than one subject.

1. *Alabama.*—Montgomery *v.* Birdsong, 126 Ala. 632, 28 So. 522 (all crimes); *Ex p.* Upshaw, 45 Ala. 234; Gunter *v.* Dale County, 44 Ala. 639.

California.— Los Angeles County *v.* Spencer, 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 217, protection of state horticultural interests.

Colorado.— Harding *v.* People, 10 Colo. 387, 15 Pac. 727, act to protect the public health and to regulate the practice of medicine.

Delaware.— State *v.* Fountain, 6 Pennew. 520, 69 Atl. 926.

Florida.— Schiller *v.* State, 49 Fla. 25, 38 So. 706; Gibson *v.* State, 16 Fla. 291.

Georgia.— Seay *v.* Rome Bank, 66 Ga. 609, act as to state depositories may prescribe for giving of bonds.

Idaho.— Pioneer Irr. Dist. *v.* Bradley, 8 Ida. 310, 68 Pac. 295, 101 Am. St. Rep. 201.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, may have many "provisions" on one "subject."

Indiana.— Maule Coal Co. *v.* Partenheimer, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710, protecting coal miners.

Kansas.— Bowman *v.* Cockrill, 6 Kan. 311, government of state.

Maryland.— Stevens *v.* State, 89 Md. 669, 43 Atl. 929 (preservation of birds and game); Baltimore *v.* Keeley Inst., 81 Md. 106, 31 Atl. 437, 27 L. R. A. 646 (treatment and cure of drunkards).

Michigan.— People *v.* Brooks, 101 Mich. 98, 59 N. W. 444; Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585.

Minnesota.— Crookston *v.* Polk County, 79 Minn. 283, 82 N. W. 586, 79 Am. St. Rep. 453.

Missouri.— Ewing *v.* Hoblitzelle, 85 Mo. 64; State *v.* Brassfield, 81 Mo. 151, 162, 51 Am. Rep. 235, all crimes.

New York.— Potter *v.* Collis, 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471 [*affirmed* in 156 N. Y. 16, 50 N. E. 413], railroad extension and regulation.

4. Penalty or Remedy. The addition of a penalty [2] or remedy [3] does not render a statute void for duplicity.

5. Particular Subjects of Legislation — a. Corporations. The constitutional restrictions apply to statutes creating [4] or regulating [5] corporations.

Oregon.— State *v.* Portland Gen. Electric Co., 52 Oreg. 502, 95 Pac. 722, 98 Pac. 160.

Pennsylvania.— Com. *v.* Pittsburg Charity Hospital, 198 Pa. St. 270, 47 Atl. 980 (protecting public health by regulating location of hospitals, pest-houses, and cemeteries); *In re* Sugar Notch Borough, 192 Pa. St. 349, 43 Atl. 985 (creating a city); City Sewage Utilization Co. *v.* Davis, 8 Phila. 625.

Tennessee.— State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941, restraining competition in imported and domestic articles.

Texas.— Houston, etc., R. Co. *v.* State, 24 Tex. 117, 56 S. W. 228; Missouri, etc., R. Co. *v.* Hannig, (1897) 41 S. W. 196 (fellow-servant's act); Joliff *v.* State, 53 Tex. Cr. 61, 109 S. W. 176 (where all objects are germane to the main subject).

Virginia.— Morgan *v.* Com., 98 Va. 812, 35 S. E. 448, fishing — with penalties.

Wyoming.— Farm Inv. Co. *v.* Carpenter, 9 Wyo. 110, 61 Pac. 258, under act for supervision and use of waters, authorizing state board of control to adjudicate water-rights.

United States.— Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; South St. Paul *v.* Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585.

See 44 Cent. Dig. tit. "Statutes," § 121.

Single main purpose.—"An act, no matter how comprehensive, would be valid provided a single main purpose was held in view, and nothing embraced in the act except what was naturally connected with and incidental to that purpose." Van Horn *v.* State, 46 Nebr. 62, 74, 64 N. W. 365.

The entire statutory law upon one general subject may be incorporated in a single act. Pioneer Irr. Dist. *v.* Bradley, 8 Ida. 310, 68 Pac. 295, 101 Am. St. Rep. 201.

2. Alberson *v.* Hamilton, 82 Ga. 30, 8 S. E. 869; Blaker *v.* Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854.

A penal clause in a general statute, embracing a given subject, which simply provides for the punishment of the violation of the provisions of such act, is not the intermixing in such act of things which have no proper relation to each other. State *v.* Twining, 73 N. J. L. 3, 62 Atl. 402 [*affirmed* in 73 N. J. L. 683, 64 Atl. 1073]. So the title of an act is neither misleading, nor does the act embrace more than one subject, because the penalty, or other means provided for the accomplishment of the purpose of the act, is not disclosed in the title. Thompson *v.* Akin, 81 Ill. App. 62.

3. State *v.* Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221; Gustavel *v.* State, 153 Ind. 613, 54 N. E. 123.

4. *Georgia.*— Ruden *v.* State, 73 Ga. 567; King *v.* Banks, 61 Ga. 20; *Ex p.* Conner, 51 Ga. 571, reviving three corporations.

Kentucky.— Sherman *v.* Com., 82 Ky. 102, 5 Ky. L. Rep. 874, "incorporation and regulation of life insurance."

Louisiana.—Bridgeford *v.* Hall, 18 La. Ann. 211.

Michigan.— Jenking *v.* Secretary of State, 70 Mich. 305, 44 N. W. 787.

United States.— Falconer *v.* Campbell, 8 Fed. Cas. No. 4,620, 2 McLean 195.

See 44 Cent. Dig. tit. "Statutes," § 124; and, generally, Corporations, 10 Cyc. 182.

5. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 124 Ala. 132, 26 So. 902, act incorporating a railroad company — including sections authorizing grant of additional power to the company.

California.— Francais *v.* Somps, 92 Cal. 503, 28 Pac. 592.

Colorado.— Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142.

Illinois.— People *v.* Ottawa Hydraulic Co., 115 Ill. 281, 3 N. E. 413 (conferring certain powers on two corporations); Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589 (holding that a law authorizing the construction of a railroad, with a branch or extension, the purchasing of land, and the making of coal beds thereon, and the purchasing or leasing of a ferry franchise, embraces only one subject).

Indiana.— Chicago, etc., R. Co. *v.* State, 153 Ind. 134, 51 N. E. 924 (penalty for not filing articles covers filing consolidations); Central Union Tel. Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64 (duties of telegraph and telephone companies); Crawfordsville, etc., Turnpike Co. *v.* Fletcher, 104 Ind. 97, 2 N. E. 243 (prohibiting toll on roads and providing for forfeiting charters of turnpike companies).

Iowa.— Guaranty Sav., etc., Assoc. *v.* Ascherman, 108 Iowa 150, 78 N. W. 823, building and loan association act including contracts between the association and its members.

Kansas.— Blaker *v.* Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854, organization of banks with penalties.

Kentucky.— Phillips *v.* Covington, etc., Bridge Co., 2 Metc. 219.

Maryland.— O'Phinney *v.* Sheppard, etc., Hospital, 88 Md. 633, 42 Atl. 58.

Michigan.— Jackson, etc., Traction Co. *v.* Railroad Com'rs, 128 Mich. 164, 87 N. W. 133 (construction and maintenance of strset railway tracks); Fort St. Union Depot Co. *v.* Railroad Com'rs, 118 Mich. 340, 76 N. W. 631; Skinner *v.* Wilhelm, 63 Mich. 568, 30 N. W. 311 (merchants and manufacturers, mutual insurance companies); Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, 11 N. W. 271 (revision of railroad legislation).

Minnesota.— Shakopee First Nat. Bank *v.* How, 65 Minn. 187, 67 N. W. 994; Winona,

b. Courts and Public Officers. The constitutional restrictions apply to statutes as to courts and judges [6] and public officers.[7]

etc., R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100, consolidation of railroads and building a certain bridge.

Missouri.— State *v.* State Bank, 45 Mo. 528.

New Jersey.—Hickman *v.* State, 62 N. J. L. 499, 41 Atl. 942 (act regulating insurance companies does not include individual insurers); Schenck *v.* State, 60 N. J. L. 381, 37 Atl. 724; Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97 (formation and regulation of railroad corporations).

New York.— Coxe *v.* State, 144 N. Y. 396 39 N. E. 400 (creating corporation and granting it marsh lands); People *v.* Morgan, 65 Barb. 473, 1 Thomps. & C. 101 [*reversed* on other grounds in 55 N. Y. 587] (to facilitate construction of an old railroad and to authorize towns to subscribe to its capital stock).

Pennsylvania.— Philadelphia *v.* Ridge Ave. Pass. R. Co., 6 Pa. Co. Ct. 283 (consolidating company and relieving it from certain duties); West Philadelphia Pass. R. Co. *v.* Union Pass. R. Co., 9 Phila. 495 (to declare quarterly dividends and lay additional tracks).

Tennessee.— Ryan *v.* Louisville, etc., Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303, railroad terminal companies.

Texas.— Houston, etc., R. Co. *v.* State, 95 Tex. 507, 68 S. W. 777, reserving land for railroad in act to adjust and define its rights.

Virginia.— Bosang *v.* Iron Belt Bldg., etc., Assoc., 96 Va. 119, 30 S. E. 440, providing new charter for a certain building and loan association and validating acts done under the old charter.

Wisconsin.— Phillips *v.* Albany, 28 Wis. 340, amending charter of railroad and authorizing certain towns to aid in its construction.

United States.— Woodson *v.* Murdock, 22 Wall. 351, 22 L. ed. 716 [*affirming* 17 Fed. Cas. No. 9,942, 2 Dill. 188] (settling claim of state against certain railroad and providing for foreclosure if not settled); Baltimore, etc., R. Co. *v.* Jefferson County, 29 Fed. 305 (extension of railroad and subscription to its stock).

See 44 Cent. Dig. tit. "Statutes," § 124; and, generally, CORPORATIONS, 10 Cyc. 182.

6. *Alabama.*— Chambers *v.* Morris, 156 Ala. 626, 47 So. 235; Blue *v.* Everett, 145 Ala. 104, 40 So. 203; Ballentyne *v.* Wickersham, 75 Ala. 533.

Florida.— State *v.* Hocker, 36 Fla. 358, 18 So. 767.

Georgia.— Welborne *v.* State, 114 Ga. 793, 40 S. E. 857; Starnes *v.* Mutual Loan, etc., Co., 102 Ga. 597, 29 S. E. 452.

Illinois.— Fleischman *v.* Walker, 91 Ill. 318.

Iowa.— State *v.* Emmons, 72 Iowa 265, 33 N. W. 672.

Kansas.— *In re* Greer, 58 Kan. 268, 48 Pac. 950.

Kentucky.— Allen *v.* Hall, 14 Bush 85; Hind *v.* Rice, 10 Bush 528.

Michigan.— Robison *v.* Wayne Cir. Judges, 151 Mich. 315, 115 N. W. 682; Messenger *v.* Teagan, 106 Mich. 654, 64 N. W. 499; Toll *v.* Jerome, 101 Mich. 468, 59 N. W. 816; Brooks *v.* Hydorn, 76 Mich. 273, 42 N. W. 1122.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Missouri.—State *v.* Chambers, 70 Mo. 625; State *v.* Finn, 8 Mo. App. 341.

Nevada.— State *v.* Atherton, 19 Nev. 332, 10 Pac. 901.

New York.— Curtin *v.* Barton, 139 N. Y. 505, 34 N. E. 1093; *In re* Walker, 3 Barb. 162; Phillips *v.* New York, 1 Hilt. 483; Matter of Bernstein, 3 Redf. Surr. 20.

Tennessee.— State *v.* Fickle, 3 Lea 79.

Utah.— Marioneaux *v.* Cutler, 32 Utah 475, 91 Pac. 355.

Wyoming.— *In re* Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850.

See 44 Cent. Dig. tit. "Statutes," § 133.

7. *Alabama.*— State *v.* Buckley, 54 Ala. 599; State *v.* Price, 50 Ala. 568.

Colorado.— Airy *v.* People, 21 Colo. 144, 40 Pac. 362.

Georgia.— Christie *v.* Miller, 128 Ga. 412, 57 S. E. 697; Spier *v.* Morgan, 80 Ga. 581, 5 S. E. 768.

Indiana.— State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; Walker *v.* Dunham, 17 Ind. 483.

Kansas.—Norton County *v.* Snow, 45 Kan. 332, 25 Pac. 903.

Louisiana.— State *v.* Read, 49 La. Ann. 1535, 22 So. 761; State *v.* Pittsburgh, etc., Coal Co., 41 La. Ann. 465, 6 So. 220.

Minnesota.—Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

Nebraska.—State *v.* Cornell, 60 Nebr. 276, 83 N. W. 72.

Nevada.— State *v.* Humboldt County, 21 Nev. 235, 29 Pac. 974; Esser *v.* Spaulding, 17 Nev. 289, 30 Pac. 896.

New York.— People *v.* Howe, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664 [*reversing* 88 N. Y. App. Div. 158, 84 N. Y. Suppl. 597]; Conner *v.* New York, 5 N. Y. 285; Phillips *v.* Schumacher, 10 Hun 405.

Oregon.— Northern Counties Inv. Trust *v.* Sears, 30 Oreg. 388, 41 Pac. 931, 35 L. R. A. 188.

Pennsylvania.— Com. *v.* Lloyd, 178 Pa. St. 308, 35 Atl. 816; Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199; Evans *v.* Willistown Tp., 168 Pa. St. 578, 32 Atl. 87; Perkins *v.* Philadelphia, 156 Pa. St. 539, 27 Atl. 356.

Texas.— Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343; Linden *v.* Finley, 92 Tex. 451, 49 S. W. 578; Stone *v.* Brown, 54 Tex. 330.

Utah.— Edler *v.* Edwards, 34 Utah 13, 95 Pac. 367.

Virginia.— Com. *v.* Drewry, 15 Gratt. 1.

See 44 Cent. Dig. tit. "Statutes," § 134.

c. Crimes. Statutes relating to crimes are void if duplex under the constitutional restrictions.[8]

d. Governmental Matters. The constitutional restrictions against duplicity apply to statutes regulating state government,[9] municipal corporations,[10] counties,[11]

8. *Alabama.*— De Kalb County *v.* Smith, 47 Ala. 407 (murder, lynching, and assault and battery); Miles *v.* State, 40 Ala. 39 (punishments for larceny, arson, and burglary).

Colorado.— Hecht *v.* Wright, 31 Colo. 117, 72 Pac. 48.

Indiana.— State *v.* Newton, 59 Ind. 173, misdemeanors of various kinds.

Kentucky.—Diamond *v.* Com., 124 Ky. 418, 99 S. W. 232, 30 Ky. L. Rep. 655, crime and punishment.

Louisiana.— State *v.* Davis, 121 La. 623, 46 So. 673; State *v.* Peterman, 121 La. 620, 46 So. 672; State *v.* Abrams, 121 La. 550, 46 So. 623; State *v.* Logan, 104 La. 254, 28 So. 912 (defining extortion and specifying modes of its accomplishment); State *v.* Ackerman, 51 La. Ann. 1213, 26 So. 80 (purchasing goods with intent to defraud); State *v.* Rushing, 49 La. Ann. 1530, 22 So. 798 (creating and specifying an offense); State *v.* Heywood, 38 La. Ann. 689 (malicious threats).

Michigan.— People *v.* McGlaughlin, 108 Mich. 516, 66 N. W. 385, requiring marriage licenses and penalty for violation.

Missouri.— State *v.* Hamlett, 212 Mo. 80, 110 S. W. 1082 (various misdemeanors and punishment); State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363 (conspiracies to control prices).

Nebraska.— Granger *v.* State, 52 Nebr. 352, 72 N. W. 474, cattle stealing.

South Dakota.— State *v.* Ayers, 8 S. D. 517, 67 N. W. 611, informations instead of indictments.

Tennessee.— State *v.* Brown, 103 Tenn. 449, 53 S. W. 727 (age of consent in rape); Garvin *v.* State, 13 Lea 162.

Texas.— McMeans *v.* Finley, 88 Tex. 515, 32 S. W. 524 ("pugilism" and "fights between men and animals"); Bills *v.* State, 42 Tex. 305; State *v.* Shadle, 41 Tex. 404 (unlawful interference with private property or private rights); State *v.* Deitz, 30 Tex. 511.

Washington.— State *v.* Poole, 42 Wash. 192, 84 Pac. 727, prostitutes and men living with prostitutes.

Wyoming.— *In re* Boulter, 5 Wyo. 329, 40 Pac. 520, grand jury system.

See 44 Cent. Dig. tit. "Statutes," § 123.

Statutes relating to crimes may be valid, although including both a civil and a criminal liability. State *v.* Roby, 142 Ind. 168, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213; Thomasson *v.* State, 15 Ind. 449; *Ex p.* Howe, 26 Oreg. 181, 37 Pac. 536.

9. Hecht *v.* Wright, 31 Colo. 117, 72 Pac. 48; Merrill *v.* State, 65 Nebr. 509, 91 N. W. 418.

10. *Alabama.*— State *v.* Crook, 126 Ala. 600, 28 So. 745; Alabama, etc., R. Co. *v.* Reed, 124 Ala. 253, 27 So. 19, 82 Am. St. Rep. 166; Hawkins *v.* Roberts, 122 Ala. 130, 27 So. 327; Judson *v.* Bessemer, 87 Ala. 240, 6 So. 267, 4 L. R. A. 742.

Colorado.— Frost *v.* Pfeiffer, 26 Colo. 338, 58 Pac. 147.

Florida.— State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225; State *v.* Green, 36 Fla. 154, 18 So. 334.

Georgia.— Brown *v.* State, 79 Ga. 324, 4 S. E. 861; King *v.* Banks, 61 Ga. 20.

Illinois.— People *v.* Brislin, 80 Ill. 423.

Iowa.— Davis *v.* Woolnough, 9 Iowa 104.

Kansas.— Eudora *v.* Darling, 54 Kan. 654, 39 Pac. 184; Atchison *v.* State, 26 Kan. 44.

Louisiana.— Conery *v.* New Orleans Water Works Co., 41 La. Ann. 910, 7 So. 8.

Michigan.— Hargrave *v.* Weber, 66 Mich. 59, 32 N. W. 921.

Minnesota.— State *v.* La Vaque, 47 Minn. 106, 49 N. W. 525.

Missouri.— Ewing *v.* Hoblitzelle, 85 Mo. 64.

Nebraska.— State *v.* Corner, 22 Nebr. 265, 34 N. W. 499, 3 Am. St. Rep. 267; State *v.* Palmer, 10 Nebr. 203, 4 N. W. 965.

New Jersey.— Kennedy *v.* Belmar, 61 N. J. L. 20, 38 Atl. 756; Doyle *v.* Newark, 34 N. J. L. 236.

New York.— People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; *In re* Metropolitan Gaslight Co., 85 N. Y. 526; People *v.* Squires, 14 Daly 154, 1 N. Y. St. 633 [*affirmed* in 6 N. Y. St. 1 (*affirmed* in 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666])].

Oregon.— State *v.* Wright, 14 Oreg. 365, 12 Pac. 708.

Pennsylvania.— Com. *v.* Taylor Borough School Directors, 6 Lack. Leg. N. 116; Com. *v.* Hough, 8 Pa. Dist. 685, 22 Pa. Co. Ct. 440.

Texas.— Nalle *v.* Austin, 23 Tex. Civ. App. 595, 56 S. W. 954; Childress County Land, etc., Co. *v.* Baker, 23 Tex. Civ. App. 451, 56 S. W. 756.

Washington.— Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

United States.— South St. Paul *v.* Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585; Morgan *v.* Des Moines, 54 Fed. 456; Judson *v.* Plattsburg, 14 Fed. Cas. No. 7,570, 3 Dill. 181.

See 44 Cent. Dig. tit. "Statutes," § 126.

Provisions amending the charter of a city may be embraced in the same statute with provisions ratifying and confirming corporate acts of the city authorities previously done. Annapolis *v.* State, 30 Md. 112; State *v.* Union, 33 N. J. L. 350.

11. *Alabama.*—Walker *v.* Griffith, 60 Ala. 361.

California.— Wheeler *v.* Herbert, 152 Cal. 224, 92 Pac. 353.

Georgia.— Allen *v.* Tison, 50 Ga. 374.

towns,[12] and districts.[13] They also apply to statutes regulating municipal indebtedness and funds,[14] appropriations,[15] schools,[16] taxes,[17] and public improvements[18]—

Indiana.— Haggard *v.* Hawkins, 14 Ind. 299.

Iowa.— Duncombe *v.* Prindle, 12 Iowa 1.

Kansas.— State *v.* Sanders, 42 Kan. 228, 21 Pac. 1073; John *v.* Reaser, 31 Kan. 406, 2 Pac. 771.

Michigan.—Atty.-Gen. *v.* Weimer, 59 Mich. 580, 26 N. W. 773.

Minnesota.— State *v.* McFadden, 23 Minn. 40; Ramsey County *v.* Heenan, 2 Minn. 330.

Nebraska.— State *v.* Page, 12 Nebr. 386, 11 N. W. 495.

Nevada.— Humboldt County *v.* Churchill County, 6 Nev. 30.

Oregon.— Allison *v.* Hatton, 46 Oreg. 370, 80 Pac. 101.

South Dakota.— Stuart *v.* Kirley, 12 S. D. 245, 81 N. W. 147.

West Virginia.—Cutlip *v.* Calhoun County, 3 W. Va. 588.

United States.— Carter County *v.* Sinton, 120 U. S. 517, 7 S. Ct. 650, 30 L. ed. 701.

See 44 Cent. Dig. tit. "Statutes," § 125.

12. Atty.-Gen. *v.* Weimer, 59 Mich. 580, 26 N. W. 773; Ramsey County *v.* Heenan, 2 Minn. 330; Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

13. Ader *v.* Newport, 6 S. W. 577, 9 Ky. L. Rep. 748; Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455, 1 So. 873; Moore *v.* Bossier Parish Police Jury, 32 La. Ann. 1013.

14. *Georgia.*— Black *v.* Cohen, 52 Ga. 621.

Kentucky.— Owensboro, etc., R. Co. *v.* Logan County, 11 S. W. 76, 11 Ky. L. Rep. 99.

Nebraska.— Hopkins *v.* Scott, 38 Nebr. 661, 57 N. W. 391; Dawson County *v.* McNamar, 10 Nebr. 276, 4 N. W. 991.

Nevada.— State *v.* Storey County, 17 Nev. 96, 28 Pac. 122.

Washington.— Baker *v.* Seattle, 2 Wash. 576, 27 Pac. 462.

United States.— Otoe County *v.* Baldwin, 111 U. S. 1, 4 S. Ct. 265, 28 L. ed. 331; Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250; West Plains Tp. *v.* Sage, 69 Fed. 943, 16 C. C. A. 553.

See 44 Cent. Dig. tit. "Statutes," § 127.

15. In some states the constitutions provide that appropriation bills shall contain no provision on any other subject.

Alabama.— Woolf *v.* Taylor, 98 Ala. 254, 13 So. 688.

Arkansas.— State *v.* Moore, 76 Ark. 197, 88 S. W. 881, 70 L. R. A. 671; Vincenheller *v.* Reagan, 69 Ark. 460, 64 S. W. 278; State *v.* Sloan, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 106.

California.— Murray *v.* Colgan, 94 Cal. 435, 29 Pac. 871; People *v.* Dunn, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118.

Colorado.— *In re* House Bill 168, 21 Colo. 46, 39 Pac. 1096; Collier, etc., Lith. Co. *v.* Henderson, 18 Colo. 259, 32 Pac. 417.

Florida.— *In re* Opinion of Justices, 14 Fla. 283.

Illinois.— Chicago *v.* Wolf, 221 Ill. 130, 77 N. E. 414; Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79; People *v.* Beveridge, 38 Ill. 307.

Oregon.— Burch *v.* Earhart, 7 Oreg. 58.

Pennsylvania.— Com. *v.* Gregg, 161 Pa. St. 582, 29 Atl. 297.

See 44 Cent. Dig. tit. "Statutes," § 128.

The unity of a subject of an appropriation is not broken by appropriating several sums for several specific objects which are necessary or convenient or tend to the accomplishment of one general design, notwithstanding other purposes than the main design may be thereby subserved. State *v.* Sloan, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 106.

16. *Georgia.*— Brand *v.* Lawrenceville, 104 Ga. 486, 30 S. E. 954; Smith *v.* Bohler, 72 Ga. 546.

Missouri.— State *v.* Miller, 100 Mo. 439, 13 S. W. 677.

New York.— People *v.* Bennett, 54 Barb. 480.

Pennsylvania.— Payne *v.* Coudersport School Dist., 168 Pa. St. 386, 31 Atl. 1072.

Tennessee.— State *v.* True, 116 Tenn. 294, 95 S. W. 1028.

Texas.— Austin *v.* Austin Gas-Light, etc., Co., 69 Tex. 180, 7 S. W. 200.

United States.— Independent School Dist. *v.* Hall, 113 U. S. 135, 5 S. Ct. 371, 28 L. ed. 954.

See 44 Cent. Dig. tit. "Statutes," § 129.

17. *California.*— San Francisco *v.* Spring Valley Water Works, 54 Cal. 571.

Florida.— Schiller *v.* State, 49 Fla. 25, 38 So. 706.

Kentucky.— Murphy *v.* Louisville, 114 Ky. 762, 71 S. W. 934, 24 Ky. L. Rep. 1574.

Michigan.— Reed *v.* Auditor-Gen., 146 Mich. 208, 109 N. W. 275; Auditor-Gen. *v.* Stiles, 83 Mich. 460, 47 N. W. 241.

New Jersey.— *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

Tennessee.— Cannon *v.* Mathes, 8 Heisk. 504.

Texas.— Raymond *v.* Kibbe, 43 Tex. Civ. App. 209, 95 S. W. 727; *Ex p.* Mabry, 5 Tex. App. 93.

Washington.— Merritt *v.* Corey, 22 Wash. 444, 61 Pac. 171.

See 44 Cent. Dig. tit. "Statutes," § 127.

18. *Illinois.*— Boehm *v.* Hertz, 182 Ill. 154, 54 N. E. 973, 48 L. R. A. 575; People *v.* Nelson, 133 Ill. 565, 27 N. E. 217; Blake *v.* People, 109 Ill. 504.

Indiana.— Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388, 6 L. R. A. 315.

Iowa.— Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445.

Kansas.— Jockheck *v.* Shawnee County, 53 Kan. 780, 37 Pac. 621; State *v.* Cherokee County, 36 Kan. 337, 13 Pac. 558.

Louisiana.— Dehon *v.* Lafourche Basin Levee Bd., 110 La. 767, 34 So. 777; Weise *v.*

such as roads, streets and highways,[19] and also to statutes regulating betterment assessments.[20]

e. Intoxicating Liquors. Laws dealing with the use and sale of intoxicating liquor in various ways are generally upheld.[21]

f. Private Rights and Liabilities. Statutes dealing with private rights and liabilities, occupations, and employments are covered by the principles laid down above.[22]

Thibaut, 34 La. Ann. 556; Pointe Coupee Police Jury *v.* Colomb, 20 La. Ann. 196.

Maryland.— Baltimore Catholic Cathedral Church *v.* Manning, 72 Md. 116, 19 Atl. 599; Baltimore *v.* Reitz, 50 Md. 574.

Michigan.— Detroit *v.* Wabash, etc., R. Co., 63 Mich. 712, 30 N. W. 321.

Minnesota.— Fleckten *v.* Lamberton, 69 Minn. 187, 72 N. W. 65.

New Jersey.— Easton, etc., R. Co. *v.* Central R. Co., 52 N. J. L. 267, 19 Atl. 722.

New York.— Van Brunt *v.* Flatbush, 128 N. Y. 50, 27 N. E. 973 [*reversing* 59 Hun 192, 13 N. Y. Suppl. 545]; Wrought-Iron Bridge Co. *v.* Attica, 119 N. Y. 204, 23 N. E. 542 [*affirming* 49 Hun 513, 2 N. Y. Suppl. 359]; People *v.* Oneida County, 68 N. Y. App. Div. 650, 74 N. Y. Suppl. 1142 [*affirming* 36 Misc. 597, 73 N. Y. Suppl. 1098].

North Dakota.— Martin *v.* Tyler, 4 N. D. 278, 60 ... W. 392, 25 L. R. A. 838.

Pennsylvania.— Clearfield County *v.* Cameron Tp. Poor Dist., 135 Pa. St. 86, 19 Atl. 952.

Tennessee.— State *v.* Maloney, (1901) 65 S. W. 871.

Texas.— Looney *v.* Bagley, (1887) 7 S. W. 360; Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865.

United States.— Borden *v.* Trespalacios Rise, etc., Co., 204 U. S. 667, 27 S. Ct. 785, 51 L. ed. 671 [*affirming* 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640]; Seattle Dock Co. *v.* Seattle, etc., Waterway Co., 195 U. S. 624, 25 S. Ct. 789, 49 L. ed. 350 [*affirming* 35 Wash. 503, 77 Pac. 845].

See 44 Cent. Dig. tit. "Statutes," § 130.

19. *California.*— Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Iowa.— State *v.* Davis County Judge, 2 Iowa 280.

Kansas.— Allen *v.* Hopkins, 62 Kan. 175, 61 Pac. 750; Brook *v.* Blue Mound, 61 Kan. 184, 59 Pac. 273; Wichita *v.* Burleigh, 36 Kan. 34, 12 Pac. 332.

Michigan.— Grand Rapids *v.* Burlingame, 93 Mich. 469, 53 N. W. 620; People *v.* Denahy, 20 Mich. 349.

New York.— *In re* Prospect Park, etc., R. Co., 67 N. Y. 371; Robert *v.* Kings County, 3 N. Y. App. Div. 366, 38 N. Y. Suppl. 521 [*affirmed* in 158 N. Y. 673, 52 N. E. 1126]; Wilson *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 65.

Pennsylvania.—Myers *v.* Com., 110 Pa. St. 217, 1 Atl. 264; Shoemaker *v.* Harrisburg, 4 Pa. Co. Ct. 86.

Tennessee.— Dixon *v.* State, 117 Tenn. 79, 94 S. W. 936.

See 44 Cent. Dig. tit. "Statutes," § 131.

20. *California.*— Dowling *v.* Conniff, 103 Cal. 75, 36 Pac. 1034; Perine *v.* Erzgraber, 102 Cal. 234, 36 Pac. 585.

Illinois.— Blake *v.* People, 109 Ill. 504.

Minnesota.— *In re* Piedmont Ave. East, 59 Minn. 522, 61 N. W. 678.

New Jersey.— Bergen County Sav. Bank *v.* Union Tp., 44 N. J. L. 599.

New York.— *In re* Van Antwerp, 56 N. Y. 261 [*affirming* 1 Thomps. & C. 423].

Wisconsin.—State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622.

See 44 Cent. Dig. tit. "Statutes," § 132.

21. *Alabama.*— Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. Rep. 68; Gandy *v.* State, 86 Ala. 20, 5 So. 420; Block *v.* State, 66 Ala. 493.

Florida.— Brass *v.* State, 45 Fla. 1, 34 So. 307.

Georgia.— Kemp *v.* State, 120 Ga. 157, 47 S. E. 548; Alberson *v.* Hamilton, 82 Ga. 30, 8 S. E. 869; Caldwell *v.* Barrett, 73 Ga. 604; Howell *v.* State, 71 Ga. 224, 51 Am. Rep. 259.

Indiana.—Thomasson *v.* State, 15 Ind. 449.

Iowa.— Centerville *v.* Miller, 51 Iowa 712, 2 N. W. 527.

Kansas.— State *v.* Brown, 38 Kan. 390, 16 Pac. 259; Hardten *v.* State, 32 Kan. 637, 5 Pac. 212. But see State *v.* Barrett, 27 Kan. 213.

Kentucky.— Brann *v.* Hart, 97 Ky. 735, 31 S. W. 736, 17 Ky. L. Rep. 462; Burnside *v.* Lincoln County Ct., 86 Ky. 423, 6 S. W. 276, 9 Ky. L. Rep. 635; Beattyville *v.* Daniel, 25 S. W. 746, 15 Ky. L. Rep. 793.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Michigan.—Fleek *v.* Bloomingdale Tp. Bd., 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69; Flower *v.* Witkovsky, 69 Mich. 371, 37 N. W. 364.

Missouri.— Lynch *v.* Murphy, 119 Mo. 163, 24 S. W. 774.

Nevada.— *Ex p.* Livingstone, 20 Nev. 282, 21 Pac. 322.

Texas.— Peavy *v.* Goss, 90 Tex. 89, 37 S. W. 317; Davey *v.* Galveston County, 45 Tex. 291.

See 44 Cent. Dig. tit. "Statutes," § 123; and, generally, INTOXICATING LIQUORS, 23 Cyc. 43.

22. *Alabama.*— Builders', etc., Supply Co. *v.* Lucas, 119 Ala. 202, 24 So. 416 (general assignments and defrauding creditors); Rice *v.* Westcott, 108 Ala. 353, 18 So. 844 (registration and lien of judgment and satisfaction); Key *v.* Jones, 52 Ala. 238 (compensation of fiduciaries and county commissioners); Weaver *v.* Lapsley, 43 Ala. 224.

Colorado.— Mitchell *v.* Colorado Milling, etc., Co., 12 Colo. App. 277, 55 Pac. 736

C. Aptness of Title — 1. In General. The title may be comprehensive,[23] and need not be a synopsis of the entire act,[24] but may cover any matters having

[*affirmed* in 26 Colo. 284, 58 Pac. 28] ("act concerning damages sustained by agents, servants and employees" is void so far as it affects actions by others than employees); Mollie Gibson Consol. Min., etc., Co. *v.* Sharp, 5 Colo. App. 321, 38 Pac. 850.

Georgia.— McCommons *v.* English, 100 Ga. 653, 28 S. E. 386; Clay *v.* Central R., etc., Co., 84 Ga. 345, 10 S. E. 967 (recovery for death); Halleman *v.* Halleman, 65 Ga. 476 (alimony to family of husband— custody of children, etc.).

Illinois.— Allardt *v.* People, 197 Ill. 501, 64 N. E. 533 (passes on railroads); Kennedy *v.* Le Moyne, 188 Ill. 255, 58 N. E. 903 (authorizing church to raise fund for support of bishop and to receive conveyances of property); Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79 (regulating manufacture of clothing and inspection thereof); Cohn *v.* People, 149 Ill. 486, 37 N. E. 60, 41 Am. St. Rep. 304, 23 L. R. A. 821 (protecting trade-marks and advertising forms).

Indiana.— Levy *v.* State, 161 Ind. 251, 68 N. E. 172 (transient merchants); State *v.* Bowers, 14 Ind. 195 (licenses of various kinds).

Kansas.— State *v.* Tibbits, 73 Kan. 493, 85 Pac. 526, injunctions in various cases.

Kentucky.— Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406, actions for injuries by railroad companies and others.

Louisiana.— State *v.* Atkins, 104 La. 37, 28 So. 919 (to encourage freedom of trade and to forbid issue of trade tickets); Allopathic State Bd. *v.* Fowler, 50 La. Ann. 1358, 24 So. 809 (practice of medicine).

Michigan.— Atty.-Gen. *v.* Sanilac County, 71 Mich. 16, 38 N. W. 639, recording mortgages and reporting them.

Minnesota.— Benz *v.* St. Paul, 77 Minn. 375, 79 N. W. 1024, 82 N. W. 1118 (fixing boundary lines); Barton *v.* Drake, 21 Minn. 299; Tuttle *v.* Strout, 7 Minn. 465, 82 Am. Dec. 108 (homestead exemption and exemption of personal property).

Missouri.— *Ex p.* Loving, 178 Mo. 194, 77 S. W. 508 (neglected and delinquent children); State *v.* Miller, 45 Mo. 495 (false receipts and fraudulent transfers).

Nebraska.— Nebraska Loan, etc., Assoc. *v.* Perkins, 61 Nebr. 254, 85 N. W. 67 (to encourage building of homesteads); Muldoon *v.* Levi, 25 Nebr. 457, 41 N. W. 280 (time for docketing appeals); Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401 (right of exceptions and right of appeal in certain cases); Trumble *v.* Trumble, 37 Nebr. 340, 55 N. W. 869 (descent of estates of intestates and the abolition of dower and curtesy).

New York.— Perkins *v.* Heert, 158 N. Y. 306, 53 N. E. 18, 70 Am. St. Rep. 483, 43 L. R. A. 858 [*affirming* 5 N. Y. App. Div. 335, 39 N. Y. Suppl. 223], union labels.

Oklahoma.— Choctaw, etc., R. Co. *v.* Alexander, 7 Okla. 591, 54 Pac. 421, liability of railroad included in act to regulate prairie fires.

Pennsylvania.— Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953, actions for personal injuries — including limitation period.

South Carolina.— McTeer *v.* Southern Express Co., (1907) 58 S. E. 930, adjustment by common carriers of freight rates and claims for damage to freight.

Tennessee.— State *v.* Hoskins, 106 Tenn. 430, 61 S. W. 781 (liens of landlords and furnishers); State *v.* Bradt, 103 Tenn. 584, 53 S. W. 942 (trade-marks); State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656 (to protect hotel, inn, and boarding-house keepers); Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618 (injuries to stock on railroads); Cole Mfg. Co. *v.* Falls, 90 Tenn. 466, 16 S. W. 1045 (mechanics' liens); State *v.* Lasater, 9 Baxt. 584 (as to innkeepers and giving them a right of action against a riotous person).

Texas.— Campbell *v.* Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878 (to define who are fellow servants and who are not); Dillingham *v.* Putnam, (1890) 14 S. W. 303 (receivers); Taggart *v.* Hillman, 42 Tex. Civ. App. 71, 93 S. W. 245 (bonds by bonding company instead of two sureties); German Ins. Co. *v.* Luckett, 12 Tex. Civ. App. 139, 34 S. W. 173 (limitation of actions and notice of claim).

Washington.— McMaster *v.* Advance Thresher Co., 10 Wash. 147, 38 Pac. 760, commencement of civil actions and bringing same to trial.

Wyoming.— Koppala *v.* State, 15 Wyo. 398, 89 Pac. 576, 93 Pac. 662, prohibiting various acts imperiling the safety of miners.

United States.— Mexican Nat. R. Co. *v.* Jackson, 118 Fed. 549, 55 C. C. A. 315, liability for personal injuries.

See 44 Cent. Dig. tit. "Statutes," § 122.

23. *Illinois.*— People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244.

Kansas.— *In re* Howard County, 15 Kan. 194.

Michigan.— People *v.* State Ins. Co., 19 Mich. 392.

Nebraska.— State *v.* Heldenbrand, 62 Nebr. 136, 87 N. W. 25, 89 Am. St. Rep. 743.

United States.— Blair *v.* Chicago, 201 U. S. 400, 452, 26 S. Ct. 427, 50 L. ed. 801.

See 44 Cent. Dig. tit. "Statutes," § 136.

"A title is not bad merely because of comprehensiveness, but it is bad if it is so indefinite as to express no subject, or if it does not express the particular subject of the Act. The title must not only express a subject, but must express that which is dealt with in the body of the Act." Missouri, etc., R. Co. *v.* State, 102 Tex. 153, 156, 113 S. W. 916.

24. *Florida.*— Campbell *v.* Skinner Mfg. Co., 53 Fla. 632, 43 So. 874; State *v.* Bryan,

congruity and proper connection with it.[25] The title need not express limitations in the body of the act,[26] but where the title is restrictive the act must be also.[27]

2. Amending Acts. A supplemental[28] or amending act should indicate clearly in its title the act amended,[29] and may be valid when referring by chapter and

50 Fla. 293, 39 So. 929; Jacksonville *v.* Basnett, 20 Fla. 525.

Georgia.— Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306.

Indiana.— Reed *v.* State, 12 Ind. 641.

Kentucky.— Collins *v.* Henderson, 11 Bush 74.

Louisiana.— Edwards *v.* Police Jury, 39 La. Ann. 855, 2 So. 804; State *v.* Daniel, 28 La. Ann. 38.

Maryland.— Jeffers *v.* Annapolis, 107 Md. 268, 68 Atl. 553; Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Michigan.— People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Nebraska.— People *v.* McCallum, 1 Nebr. 182.

New Jersey.— Bumsted *v.* Govern, 47 N. J. L. 368, 1 Atl. 835; Rader *v.* Union Tp., 39 N. J. L. 509.

New York.— People *v.* Howe, 177 N. Y. 499, 69 N. E. 1114, 6 L. R. A. 664; Kerrigan *v.* Force, 68 N. Y. 381; People *v.* Briggs, 50 N. Y. 553.

Pennsylvania.— Com. *v.* Green, 58 Pa. St. 226; Schall *v.* Norristown, 6 Leg. Gaz. 157; Wheeler *v.* Philadelphia, 32 Leg. Int. 75.

Tennessee.— State *v.* Wilson, 12 La. 246.

West Virginia.— State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

United States.— Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431; Skinner *v.* Garnett Gold-Min. Co., 96 Fed. 735.

See 44 Cent. Dig. tit. "Statutes," § 136.

"It is not necessary that the title to an act be a synopsis or abstract of the entire act in all its details; it is sufficient if the title indicate clearly, though in general terms, the scope of the act." *In re* Sanders, 53 Kan. 191, 198, 36 Pac. 348, 23 L. R. A. 603.

25. *Alabama.*— Ham *v.* State, 156 Ala. 645. 47 So. 126; Lewis *v.* State, 123 Ala. 84, 26 So. 516.

California.— De Witt *v.* San Francisco, 2 Cal. 289.

Florida.— *Ex p.* Knight, 52 Fla. 144, 41 So. 786; State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Georgia.— Banks *v.* State, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. N. S. 1007.

Idaho.— Pioneer Irr. Dist. *v.* Bradley, 8 Ida. 310, 68 Pac. 295, 101 Am. St. Rep. 201.

Indiana.— Reed *v.* State, 12 Ind. 641.

Maryland.— Jeffers *v.* Annapolis, 107 Md. 268, 68 Atl. 553.

Michigan.— Fornia *v.* Wayne County Cir. Judge, 140 Mich. 631, 104 N. W. 147; Van Husan *v.* Heames, 96 Mich. 504, 56 N. W. 22.

Minnesota.— State *v.* Cassidy, 22 Minn. 312, 21 Am. Rep. 765.

Nevada.— State *v.* Silver, 9 Nev. 227.

New Jersey.— Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86.

New York.— *In re* Mayer, 50 N. Y. 504; Utica Water Works Co. *v.* Utica, 31 Hun 426; People *v.* Havemeyer, 3 Hun 97.

Pennsylvania.— Schall *v.* Norristown, 6 Leg. Gaz. 157.

Texas.— Robinson *v.* State, 15 Tex. 311.

Washington.— *Ex p.* Donnellan, 49 Wash. 460, 95 Pac. 1085.

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

United States.— Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848].

See 44 Cent. Dig. tit. "Statutes," § 136.

That which is appropriate or relevant to the subject of a bill as expressed by its title, or is a necessary incident to the object of a bill as thus expressed, is germane, and one test is whether the legislation in the body of the bill is on matters properly connected with its subject as expressed by its title, or proper to the more full accomplishment of the object so indicated. People *v.* Erbaugh, 42 Colo. 480, 94 Pac. 349.

That the title contains more than one subject is immaterial if the act itself contains but one. Judson *v.* Bessemer, 87 Ala. 240, 6 So. 267, 4 L. R. A. 742.

26. Neuendorff *v.* Duryea, 69 N. Y. 557, 25 Am. Rep. 235 [*affirming* 6 Daly 276].

27. *Ex p.* Knight, 52 Fla. 144, 41 So. 786; West *v.* State, 50 Fla. 154, 39 So. 412; Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460.

The title to an act may be so restrictive as to confine the body of the act to such phase of the subject as is indicated by the title. State *v.* Bryan, 50 Fla. 293, 39 So. 929.

28. Rahway Sav. Inst. *v.* Rahway, 53 N. J. L. 48, 20 Atl. 756; *In re* Rodgers, 192 Pa. St. 97, 43 Atl. 475; Millers *v.* Brown, 22 Pa. Co. Ct. 109; Snider *v.* International, etc., R. Co., 52 Tex. 306; Loomis *v.* Runge, 66 Fed. 856, 14 C. C. A. 148; Titusville Second Nat. Bank *v.* Caldwell, 13 Fed. 429. See Schmalz *v.* Wooley, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 86 [*reversing* 56 N. J. Eq. 649, 39 Atl. 539], holding that "a further supplement to an act entitled 'An act to protect trade marks'" is a valid title, although there was no prior act.

The mere fact that a new law whether as an amendatory or as an independent act affects some provisions of existing laws does not render the title insufficient because it does not set forth that result where the result may be reasonably apprehended within the terms of the title. Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18.

29. *Colorado.*— Dallas *v.* Redman, 10 Colo. 297, 15 Pac. 397.

Georgia.— Robinson *v.* Lane, 19 Ga. 337.

section number only to existing law.[30] An amending act should set out its pur-

Idaho.— Cassia County School Dist. No. 27 *v.* Twin Falls, 13 Ida. 471, 90 Pac. 735.

Illinois.— Timm *v.* Harrison, 109 Ill. 593.

Indiana.— Brandon *v.* State, 16 Ind. 197.

Iowa.— McGuire *v.* Chicago, etc., R. Co., 131 Iowa 340, 108 N. W. 902.

Louisiana.—Fullilove *v.* Bossier Parish, 51 La. Ann. 359, 25 So. 302.

Maryland.— State *v.* Fox, 51 Md. 412.

New Jersey.— Moore *v.* Burdett, 62 N. J. L. 163, 40 Atl. 631.

New York.— People *v.* Hills, 35 N. Y. 449 [*reversing* 46 Barb. 340]; Dyker Meadow Land, etc., Co. *v.* Cook, 3 N. Y. App. Div. 164, 38 N. Y. Suppl. 222 [*affirmed* in 159 N. Y. 6, 53 N. E. 690].

Tennessee.— Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460; State *v.* Algood, 87 Tenn. 163, 10 S. W. 310.

Utah.— Edler *v.* Edwards, 34 Utah 13, 95 Pac. 367.

See 44 Cent. Dig. tit. "Statutes," § 138.

Amendment to amending act.—Where the title of a statute is one to "amend" a former act, giving the title and date of approval of the latter, and the title of such amended act sufficiently expresses its "subject," the title of the amending act is sufficient to cover an express amendment made by one of its sections of an intermediate act expressly amending a section or sections of the original act. Sanders *v.* Pensacola Provisional Municipality, 24 Fla. 226, 4 So. 801.

The title of an act amending a former act may be looked to as well as that of the original act to ascertain if the amending act has any matter different from what is expressed in the title. Jones *v.* Columbus, 25 Ga. 610.

A slight error in the title of the amending act is immaterial.

Georgia.— Alberson *v.* Hamilton, 82 Ga. 30, 8 S. E. 869.

Indiana.— Citizens' St. R. Co. *v.* Haugh, 142 Ind. 254, 41 N. E. 533.

Iowa.— See State *v.* Shreves, 81 Iowa 615, 47 N. W. 899.

Montana.— State *v.* Mitchell, 17 Mont. 67, 42 Pac. 100, unless calculated to mislead.

New Jersey.— American Surety Co. *v.* Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579.

Oregon.— State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357.

United States.— Northern Pac. Express Co. *v.* Metschan, 90 Fed. 80, 32 C. C. A. 530.

See 44 Cent. Dig. tit. "Statutes," § 138.

New matter indicated in the title of the amendatory act may be introduced. Andrews *v.* Ada County, 7 Ida. 453, 63 Pac. 592. And see Saunders *v.* Pensacola Provisional Municipality, 24 Fla. 226, 4 So. 801.

30. *Alabama.*— Montgomery *v.* State, 107 Ala. 372, 18 So. 157.

California.— Beach *v.* Von Detten, 139 Cal. 462, 73 Pac. 187; People *v.* Parvin, (1887) 14 Pac. 783. See, however, Lewis *v.* Dunne, 134 Cal. 291, 66 Pac. 478, 86 Am. St. Rep. 257, 55 L. R. A. 833; Leonard *v.* January, 56 Cal. 1.

Georgia.— Wheeler *v.* State, 23 Ga. 9.

Kentucky.— *Ex p.* Paducah, 125 Ky. 510, 101 S. W. 898, 31 Ky. L. Rep. 170. See, however, Pennington *v.* Woolfolk, 79 Ky. 13.

Louisiana.— State *v.* Brown, 41 La. Ann. 771, 6 So. 638; State *v.* Garrett, 29 La. Ann. 637.

Maryland.— Garrison *v.* Hill, 81 Md. 551, 32 Atl. 191; Talbot County *v.* Queen Anne County, 50 Md. 245.

Michigan.— People *v.* Judge Grand Rapids Super. Ct., 39 Mich. 195.

Missouri.— State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23.

Nebraska.— Kleckner *v.* Turk, 45 Nebr. 176, 63 N. W. 469; Trumble *v.* Trumble, 37 Nebr. 340, 55 N. W. 869; Dogge *v.* State, 17 Nebr. 140, 22 N. W. 348; Miller *v.* Hurford, 11 Nebr. 377, 9 N. W. 477.

Oregon.— *Ex p.* Howe, 26 Oreg. 181, 37 Pac. 536; State *v.* Phenline, 16 Oreg. 107, 17 Pac. 572.

Texas.— Womack *v.* Garner, (1895) 31 S. W. 358 [*affirming* 10 Tex. Civ. App. 367, 30 S. W. 589]; Ratigan *v.* State, 33 Tex. Cr. 301, 26 S. W. 407. See, however, Gunter *v.* Texas Land, etc., Co., 82 Tex. 496, 17 S. W. 840.

Utah.— Edler *v.* Edwards, 34 Utah 13, 95 Pac. 367.

West Virginia.— State *v.* Mines, 38 W. Va. 125, 18 S. E. 470; Heath *v.* Johnson, 36 W. Va. 782, 15 S. E. 980.

United States.— Ross *v.* Aguirre, 191 U. S. 60, 24 S. Ct. 22, 48 L. ed. 94; Beatrice *v.* Masslich, 108 Fed. 743, 47 C. C. A. 657; McCalla *v.* Bane, 45 Fed. 828.

See 44 Cent. Dig. tit. "Statutes," § 138.

Contra.— *Florida.*— Webster *v.* Powell, 36 Fla. 703, 18 So. 441.

Indiana.— O'Mara *v.* Wabash R. Co., 150 Ind. 648, 50 N. E. 821. See, however, Reed *v.* State, 12 Ind. 641.

Kansas.— Shepherd *v.* Shepherd, 4 Kan. App. 546, 45 Pac. 658.

Minnesota.— Kedzie *v.* Ewington, 54 Minn. 116, 55 N. W. 864. See, however, Hall *v.* Leland, 64 Minn. 71, 66 N. W. 202.

New York.— New York *v.* Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494; Tingue *v.* Port Chester, 101 N. Y. 294, 4 N. E. 625; People *v.* Briggs, 50 N. Y. 553; People *v.* Hills, 35 N. Y. 449.

Washington.— State *v.* Kings County Super. Ct., 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831; Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143; State *v.* Halbert, 14 Wash. 306, 44 Pac. 538; Rumsey *v.* Territory, 3 Wash. Terr. 332, 21 Pac. 152; Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453. See, however, Marston *v.* Humes, 3 Wash. 267, 28 Pac. 520.

If the title of an original act is sufficient to embrace a provision contained in an amendatory act, it is immaterial that the

pose generally [31] and must be germane to the original act of which it is an amendment.[32]

3. Repealing Acts. A repealing act with a title simply referring to the original is sufficient.[33] An act may under a general statement of its subject in its title

title of the amendatory act is insufficient. State *v.* Ranson, 73 Mo. 78.

New sections, even though germane, may not be added under a title to amend specified sections. State *v.* Southern R. Co., 115 Ala. 250, 22 So. 589; Shepherd *v.* Shepherd, 4 Kan. App. 546, 45 Pac. 658; Kafka *v.* Wilkinson, 99 Md. 238, 57 Atl. 617. *Contra,* Lewis *v.* State, 148 Ind. 346, 47 N. E. 675.

Only the sections referred to in the title to the amending act may be affected by it. State *v.* Bankers', etc., Mut. Ben. Assoc., 23 Kan. 499; Wisner *v.* Monroe, 25 La. Ann. 598; *Ex p.* Hewlett, 22 Nev. 333, 40 Pac. 96. However, in Michigan the whole act seems to be open to amendment under an amending statute referring in its title to certain sections. Detroit *v.* Schmid, 128 Mich. 379, 87 N. W. 383, 92 Am. St. Rep. 468.

Reference to the title may be sufficient and need not include the date of passage or chapter of the act amended. Willis *v.* Mahon, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281; State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

31. Saucier *v.* New Orleans, 119 La. 179, 43 So. 999; People *v.* McCallum, 1 Nebr. 182; Bennett *v.* Sullivan County, 29 Pa. Super. Ct. 120; The Borrowdale, 39 Fed. 376. See, however, Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110, holding that if the title of an act is sufficient to embrace matters covered by an act amendatory thereof, it is immaterial that the title of the latter act does not express the purpose of the act.

Nature of the amendment.— The title of the amending act need not indicate the nature of the amendment. Leake *v.* Colgan. 125 Cal. 413, 58 Pac. 69; Fort St. Union Depot Co. *v.* Railroad Com'r, 118 Mich. 340, 76 N. W. 631; State *v.* Algood, 87 Tenn. 163, 10 S. W. 310.

32. Wall *v.* Garrison, 11 Colo. 515, 19 Pac. 469; Chippewa County *v.* Auditor-Gen., 65 Mich. 408, 32 N. W. 651; Trumble *v.* Trumble, 37 Nebr. 340, 55 N. W. 869; Miller *v.* Hurford, 11 Nebr. 377, 9 N. W. 477; State *v.* Pierce County, 10 Nebr. 476, 6 N. W. 763; State *v.* Washoe County, 22 Nev. 399, 41 Pac. 145.

An amendatory statute is not broader than its title, where the title gives notice to whosoever reads that legislation is impending which, by amending the act referred to in the title of the amending act, may touch upon the subject-matter of any of the provisions of the act amended. People *v.* Whitlock, 92 N. Y. 191.

An amendment applying local option to the original act is valid. Marion County *v.* Winkley, 29 Kan. 36; Wright *v.* Cunningham, 115 Tenn. 445, 91 S. W. 293.

Enlarging restrictive title.—"While a general title covering an entire subject cannot be enlarged by an amendatory act so as to include other matter, because thereby two subjects would be introduced in the body of the act, we can see no reason why a restrictive title cannot be enlarged by that of an amendatory act, so as to allow legislation germane to the body of the original act. The title of the original act could have been made broad enough to cover matter of the amendment, and whatever could have been done originally can be done by amendment. If the rule were otherwise, it would be impossible to amend an act with a restrictive title, however germane the proposed amendment might be to the body of the original act. While this direct question has not before been presented to this court, yet we think the principle is distinctly recognized in our cases." Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 307, 104 S. W. 460.

33. Dunbar *v.* Frazer, 78 Ala. 538; Moore *v.* Burdett, 62 N. J. L. 163, 40 Atl. 631, reference to date of original is unnecessary. See State *v.* Brown, 29 Mont. 179, 74 Pac. 366, holding that a title, to repeal Bill No. 129 as amended by Bill No. 13, is insufficient where the real intention was to amend Bill No. 13.

Affirmative legislation under guise of repeal.—Where a bill, when read by its title, declares that nothing is to be done except to repeal a certain act, a section which attempts affirmative legislation is void, its subject not being expressed in the title. Stiefel *v.* Maryland Inst. for Instruction of Blind, 61 Md. 144; Chicago, etc., R. Co. *v.* Smyth, 103 Fed. 376. See, however, Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971, to the effect that the repeal of a statute on a certain subject is properly connected with the subject-matter of a new statute on the same subject.

An intention to repeal all laws inconsistent with the proposed measure is necessarily implied, and need not be expressed in the title of a legislative bill. Union Pac. R. Co. *v.* Sprague, 69 Nebr. 48, 95 N. W. 46.

Reënactment.—An act entitled, a repealing act, which in fact repeals and reënacts the statute referred to is void. State *v.* Benzinger, 83 Md. 481, 35 Atl. 173.

Repeals by implication are not affected by constitutional provisions requiring the subject of an act to be expressed in its title. Trackman *v.* People, 22 Colo. 83, 43 Pac. 662; Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24; Mix *v.* Illinois Cent. R. Co., 116 Ill. 502, 6 N. E. 42; Geisen *v.* Heiderich, 104 Ill. 537; Gabbert *v.* Jeffersonville R. Co., 11 Ind. 365, 71 Am. Dec. 358; Coleman *v.* Cravens, 41 Wash. 1, 82 Pac. 1005. *Compare In re* Bd. of Public Lands, etc., 37 Nebr. 425, 55 N. W. 1092; Brown's Estate, 152 Pa. St. 401, 25 Atl. 630; Purefoy *v.* Brown, 2 Pa. Dist. 821; Bennett *v.*

repeal all acts inconsistent with it,[34] but may not include a repeal of acts on a different subject.[35]

4. Penalties. Penalties for violations of a statute do not as a general rule need to be mentioned in the title.[36]

5. Title Referring to Extrinsic Document. A title referring to some extrinsic document for its subject is insufficient.[37]

6. "Etc.," or Similar Expressions in Title. The expression, etc., in a title may be considered in construing it,[38] but "for other purposes"[39] or "and so forth"[40] should not be considered in construing the title to an act.

7. Title Broader Than Act. The act may be valid, although its title is broader than the act itself.[41] On the other hand the title of an act may be void where it

Keystone Mut. Ben. Assoc., 16 Pa. Co. Ct. 596.

A restriction in a repealing act not mentioned in the title will make the restriction void and leave the repeal to apply as if the restriction did not exist. *In re* Winn, (Kan. App. 1898) 54 Pac. 516.

That part of a repealing act not expressed in its title is void. State *v.* Pierce, 51 Kan. 241, 32 Pac. 924; *In re* Winn, (Kan. App. 1898) 54 Pac. 516.

34. State *v.* Tucker, 46 Ind. 355; State *v.* Steele, 39 Oreg. 419, 65 Pac. 515; Northern Pac. Express Co. *v.* Metschan, 90 Fed. 80, 32 C. C. A. 530.

35. Northern Pac. Express Co. *v.* Metschan, 90 Fed. 80, 32 C. C. A. 530.

36. *Indiana.*— Republic Iron, etc., Co. *v.* State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136.

Louisiana.— State *v.* Abrams, 121 La. 550, 46 So. 623.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Michigan.— People *v.* McGlaughlin, 108 Mich. 516, 66 N. W. 385; Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474.

Minnesota.— State *v.* Boehm, 92 Minn. 374, 100 N. W. 95.

Montana.— *In re* Terrett, 34 Mont. 325, 86 Pac. 266; State *v.* Bernheim, 19 Mont. 512, 49 Pac. 441.

Nebraska.— State *v.* Power, 63 Nebr. 496, 88 N. W. 769.

Oregon.— State *v.* Koshland, 25 Oreg. 178, 35 Pac. 32.

Pennsylvania.— Com. *v.* Immel, 33 Pa. Super. Ct. 388.

Washington.—State *v.* Merchant, 48 Wash. 69, 92 Pac. 890; State *v.* Ames, 47 Wash. 328, 92 Pac. 137.

See 44 Cent. Dig. tit. "Statutes," § 136.

37. Pennington *v.* Woolfolk, 79 Ky. 13; Tingue *v.* Port Chester, 101 N. Y. 294, 4 N. E. 625; Gunter *v.* Texas Land, etc., Co., 82 Tex. 496, 17 S. W. 840.

38. Garvin *v.* State, 13 Lea (Tenn.) 162. *Contra,* State *v.* Hackett, 5 La. Ann. 91.

39. *California.*— Spier *v.* Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196.

Colorado.— Pitkin County *v.* Aspen Min., etc., Co., 3 Colo. App. 223, 32 Pac. 717.

Georgia.— Macon *v.* Hughes, 110 Ga. 795, 36 S. E. 247; Burns *v.* State, 104 Ga. 544, 30 S. E. 815. See, however, Black *v.* Cohen, 52 Ga. 621.

Indiana.— State *v.* Arnold, 140 Ind. 628, 631, 38 N. E. 820.

Kansas.— Shepherd *v.* Helmers, 23 Kan. 504.

Louisiana.— State *v.* Garrett, 29 La. Ann. 637.

Michigan.—Ryerson *v.* Utley, 16 Mich. 269.

Missouri.— St. Louis *v.* Tiefel, 42 Mo. 578.

Nebraska.— Lincoln Bldg., etc., Assoc. *v.* Graham, 7 Nebr. 173.

New York.— Fishkill *v.* Fishkill, etc., Plank Road Co., 22 Barb. 634.

Pennsylvania.— Com. *v.* Green, 58 Pa. St. 226.

See 44 Cent. Dig. tit. "Statutes," § 137.

40. Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822.

41. *Alabama.*— Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

California.— Abeel *v.* Clark, 84 Cal. 226, 24 Pac. 383.

Idaho.— West *v.* Latah County, 14 Ida. 353, 94 Pac. 445.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82.

Kansas.— Ash *v.* Thorp, 65 Kan. 60, 68 Pac. 1067.

Maryland.— Strauss *v.* Heiss, 48 Md. 292.

Michigan.— Boyer *v.* Grand Rapids F. Ins. Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338.

Missouri.— State *v.* Bronson, 115 Mo. 271, 21 S. W. 1125; State *v.* Burgdoerfer, 107 Mo. 1, 28, 17 S. W. 646, 14 L. R. A. 846.

Nebraska.— State *v.* Heldenbrand, 62 Nebr. 136, 87 N. W. 25, 89 Am. St. Rep. 743.

North Dakota.— Eaton *v.* Guarantee Co., 11 N. D. 79, 88 N. W. 1029; Power *v.* Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691.

Oregon.— State *v.* Frazier, 36 Oreg. 178, 59 Pac. 5.

South Dakota.— State *v.* Becker, 3 S. D. 29, 51 N. W. 1018.

Tennessee.— Knoxville *v.* Gass, 119 Tenn. 438, 104 S. W. 1084; Nichols, etc., Co. *v.* Loyd, 111 Tenn. 145, 76 S. W. 911; Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

West Virginia.— McEldowney *v.* Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609.

See 44 Cent. Dig. tit. "Statutes," § 136.

A statute that is invalid because its enactment is not for the entire class mentioned in its title may be cured by an amendment that extends the operation of the act to the

is so general as to give no information whatever or be so misleading,[42] as to clearly contravene the requirements of the constitution with regard to titles of acts.

8. Errors, Redundancy, or Surplusage in Title. Apparent errors[43] or redundant[44] or superfluous[45] words in a title may be disregarded.

9. Partial Invalidity.[46] An act may be void in part only where the portion not referred to in the title is separable from the rest of the act;[47] but the statute

whole of the titular class. Smith *v.* Howell, 60 N. J. L. 384, 38 Atl. 180.

42. *Alabama.*— Moses *v.* Mobile, 52 Ala. 198.

Louisiana.— State *v.* Walker, 105 La. 492, 29 So. 973.

New Jersey.— State *v.* Steelman, 66 N. J. L. 518, 49 Atl. 978; Beverly *v.* Waln, 57 N. J. L. 143, 30 Atl. 545; Coutieri *v.* New Brunswick, 44 N. J. L. 58.

New York.— People *v.* Allen, 42 N. Y. 404.

Pennsylvania.— Union Passenger R. Co.'s Appeal, 81 Pa. St. 91.

Wisconsin.— Anderton *v.* Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830; Durke *v.* Janesville, 26 Wis. 697.

See 44 Cent. Dig. tit. "Statutes," § 136.

43. *California.*— *In re* Campbell, 143 Cal. 623, 77 Pac. 674.

Kansas.— Allen *v.* Hopkins, 62 Kan. 175, 61 Pac. 750; Brook *v.* Blue Mound, 61 Kan. 184, 59 Pac. 273.

Minnesota.— State *v.* Lake City, 25 Minn. 404.

New Jersey.— Curry *v.* Elvins, 32 N. J. L. 362; Schmalz *v.* Wooley, 56 N. J. Eq. 649, 39 Atl. 539.

Pennsylvania.— *In re* Delaware County License Bonds, 10 Pa. Co. Ct. 594; *In re* Clearfield County License Bonds, 10 Pa. Co. Ct. 593.

United States.— Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35; Montgomery Traction Co. *v.* Montgomery Amusement Co., 140 Fed. 988, 72 C. C. A. 682 [*affirming* 139 Fed. 353].

See 44 Cent. Dig. tit. "Statutes," § 193.

When the error might have misled some person it may not be corrected, although on inspection of the act itself the error may be apparent. The court cannot correct an error from inspection of the act alone. Turnquist *v.* Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852; Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841.

44. *In re* Haynes, 54 N. J. L. 6, 22 Atl. 923.

45. Thomas *v.* State, 124 Ala. 48, 27 So. 315; State *v.* Green, 36 Fla. 154, 18 So. 334; Nichols, etc., Co. *v.* Loyd, 111 Tenn. 145, 76 S. W. 911; Beatrice *v.* Mosshich, 108 Fed. 743, 47 C. C. A. 657; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730.

46. Partial invalidity generally see *supra*, II, G, 3.

47. *Alabama.*— Thomas *v.* State, 124 Ala. 48, 27 So. 315; Harper *v.* State, 109 Ala. 28, 19 So. 857; Bradley *v.* State, 99 Ala. 177, 13 So. 415; *Ex p.* Cowert, 92 Ala. 94, 9 So. 225; *Ex p.* Moore, 62 Ala. 471; Walker *v.* State, 49 Ala. 329.

Colorado.— Catron *v.* Archuleta County, 18 Colo. 553, 33 Pac. 513; People *v.* Hall, 8 Colo. 485, 9 Pac. 34; Mitchell *v.* Colorado Milling, etc., Co., 12 Colo. App. 277, 55 Pac. 736.

Florida.— State *v.* Palmes, 23 Fla. 620, 3 So. 171.

Georgia.— Whittendale *v.* Dixon, 70 Ga. 721; Savannah *v.* State, 4 Ga. 26.

Illinois.— Donnersberger *v.* Prendergast, 128 Ill. 229, 21 N. E. 1.

Indiana.— Wabash R. Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. N. S. 1091.

Iowa.— Henkle *v.* Keota, 68 Iowa 334, 27 N. W. 250.

Kentucky.— Stickrod *v.* Com., 86 Ky. 285, 5 S. W. 580, 9 Ky. L. Rep. 563; Fuqua *v.* Mullen, 13 Bush 467; Jones *v.* Thompson, 12 Bush 394.

Louisiana.— State *v.* Kohnke, 109 La. 838, 33 So. 793; State *v.* Read, 49 La. Ann. 1535; 22 So. 761; State *v.* Crowley, 33 La. Ann. 782; State *v.* Exnicios, 33 La. Ann. 253; Williams *v.* Payson, 14 La. Ann. 7.

Maryland.— Stiefel *v.* Maryland Inst. for Instruction of Blind, 61 Md. 144.

Michigan.— Manistee, etc., R. Co. *v.* Railroad Com'r, 118 Mich. 349, 76 N. W. 633.

Minnesota.— Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865.

Nebraska.— Union Pac. R. Co. *v.* Sprague, 69 Nebr. 48, 95 N. W. 46; Messenger *v.* State, 25 Nebr. 674, 41 N. W. 638; State *v.* Hurds, 19 Nebr. 316, 27 N. W. 139; State *v.* Lancaster County, 17 Nebr. 85, 22 N. W. 228.

Nevada.— State *v.* Beck, 25 Nev. 68, 56 Pac. 1008.

New Jersey.— Hickman *v.* State, 62 N. J. L. 499, 41 Atl. 942; Evernham *v.* Hulit, 45 N. J. L. 53; Rader *v.* Union Tp., 39 N. J. L. 509.

New York.— Bohmer *v.* Haffen, 161 N. Y. 390, 55 N. E. 1047 [*affirming* 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030] (*affirming* 22 Misc. 565, 50 N. Y. Suppl. 857)]; New York, etc., Bridge Co. *v.* Smith, 148 N. Y. 540, 42 N. E. 1088 [*affirming* 90 Hun 312, 35 N. Y. Suppl. 920]; *In re* Metropolitan Gaslight Co., 85 N. Y. 526; Richards *v.* Richards, 76 N. Y. 186 [*affirming* 14 Hun 25 (*affirming* 2 Abb. N. Cas. 93)]; *In re* Sackett St., 74 N. Y. 95; People *v.* Briggs, 50 N. Y. 553; Parfitt *v.* Ferguson, 3 N. Y. App. Div. 176, 38 N. Y. Suppl. 466 [*affirmed* in 159 N. Y. 111, 53 N. E. 707]; Phillips *v.* New York, 1 Hilt. 483.

Oregon.— State *v.* Linn County, 25 Oreg. 503, 36 Pac. 297.

Pennsylvania.— McGee's Appeal, 114 Pa. St. 470, 8 Atl. 237; Dewhurst *v.* Allegheny, 95 Pa. St. 437; Schall *v.* Norristown, 6 Leg. Gaz. 157.

is void entirely where it is all inseparable and interdependent,[48] or where the act or the title includes two or more distinct objects and it is impossible to tell which part of the statute should be rejected.[49]

10. Particular Subjects of Legislation — a. Civil Remedies. Acts covering civil practice and procedure and remedies generally are usually valid.[50] Similarly

Texas.— Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343; Campbell *v.* Cook, (Civ. App. 1894) 24 S. W. 977.

Virginia.— Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822.

Washington.—State *v.* Merchant, 48 Wash. 69, 92 Pac. 890; State *v.* Ames, 47 Wash. 328, 92 Pac. 137; Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868; Van Houten *v.* Routhe, 1 Wash. 306, 25 Pac. 728.

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

See 44 Cent. Dig. tit. "Statutes," § 195.

The introduction of a single foreign or irrelevant subject not indicated in the title would not render void a law otherwise constitutional, but such irrelevant matter would be rejected; but if an act be composed of a number of dissimilar subjects, so that no one can be recognized as the principal one, the whole law would be void. Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

48. *Alabama.*—Yerby *v.* Cochrane, 101 Ala. 541, 14 So. 355.

Maryland.— State *v.* Benzinger, 83 Md. 481, 35 Atl. 173.

Nebraska.— Trumble *v.* Trumble, 37 Nebr. 340, 55 N. W. 869; State *v.* Lancaster County, 6 Nebr. 474.

New York.— People *v.* Briggs, 50 N. Y. 553.

Tennessee.— State *v.* Hayes, 116 Tenn. 40, 93 S. W. 98.

See 44 Cent. Dig. tit. "Statutes," § 195.

49. *Alabama.*— Builders', etc., Supply Co. *v.* Lucas, 119 Ala. 202, 24 So. 416.

California.— People *v.* Parks, 58 Cal. 624, 638.

Louisiana.— State *v.* Ferguson, 104 La. 249, 28 So. 917, 81 Am. St. Rep. 123; State *v.* Harrison, 11 La. Ann. 722.

Michigan.— Skinner *v.* Wilhelm, 63 Mich. 568, 30 N. W. 311.

Nebraska.— State *v.* Lancaster County, 17 Nebr. 85, 22 N. W. 228.

New York.— Webb *v.* New York, 64 How. Pr. 10.

See 44 Cent. Dig. tit. "Statutes," § 195.

An act is void as a whole where its title expresses only one subject, whereas there is a plurality of subjects in the body of the act. State *v.* McCann, 4 Lea (Tenn.) 1.

50. *Alabama.*— Comer *v.* Age Herald Pub. Co., 151 Ala. 613, 44 So. 673, 13 L. R. A. N. S. 525, practice in slander regulated under title regulating actions for slander.

Colorado.— Mollie Gibson Consol. Min., etc., Co. *v.* Sharp, 23 Colo. 259, 47 Pac. 266, title "concerning damages" act giving right of action for death by negligence.

Georgia.— Georgia Cent. R. Co. *v.* State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518.

Illinois.— Lang *v.* Friesenecker, 213 Ill. 598, 73 N. E. 329. But see Woodruff *v.* Kellyville Coal Co., 182 Ill. 480, 55 N. E. 550.

Indiana.— Pennsylvania Co. *v.* Ebaugh, 152 Ind. 531, 53 N. E. 763.

Michigan.— Ovid Firat Nat. Bank *v.* Steel, 136 Mich. 588, 99 N. W. 786; Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52.

Minnesota.—Bausher *v.* St. Paul, 72 Minn. 539, 75 N. W. 745; Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532.

Montana.— Snook *v.* Clark, 20 Mont. 230, 50 Pac. 718.

New Jersey.— *In re* Port Reading R. Co., 75 N. J. L. 430, 68 Atl. 219. But see George Jonas Glass Co. *v.* Ross, 69 N. J. L. 157, 53 Atl. 675.

North Dakota.— Eaton *v.* State Guarantee Co., 11 N. D. 79, 88 N. W. 1029.

Texas.— *Ex p.* Allison, 99 Tex. 455, 90 S. W. 870, 122 Am. St. Rep. 653, 2 L. R. A. N. S. 1111.

Washington.— Jolliffe *v.* Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868.

See 44 Cent. Dig. tit. "Statutes," § 155.

Illustrations.—Acts on the following subjects have been held valid: Abatement of actions (Frazier *v.* Georgia R., etc., Co., 101 Ga. 77, 28 S. E. 662); appeals (Zahnle *v.* Grosscup, 132 Ill. App. 383; Baker *v.* Prewett, 3 Wash. Terr. 474, 19 Pac. 149); attachment of wages (Farley *v.* Dowe, 45 Ala. 324; Singer Mfg. Co. *v.* Fleming, 39 Nebr. 679, 58 N. W. 226, 42 Am. St. Rep. 613, 23 L. R. A. 210); attorney's lien for fees (O'Connor *v.* St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495); costs (Turnquist *v.* Cass County Drain Com'rs, 11 N. D. 514, 92 N. W. 852; Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841); damages (Florida East Coast R. Co. *v.* Hazel, 43 Fla. 263, 31 So. 272, 99 Am. St. Rep. 114; Beebe *v.* Tolerton, etc., Co., 117 Iowa 593, 91 N. W. 905); exceptions (Van Houton *v.* People, 22 Colo. 53, 43 Pac. 137); forcible entry proceedings (Sturgeon *v.* Hitchens, 22 Ind. 107; Wallace *v.* Smith, 8 La. Ann. 376); foreclosure (Gaines *v.* Williams, 146 Ill. 450, 34 N. E. 934; Lynott *v.* Dickerman, 65 Minn. 471, 67 N. W. 1143; Gillitt *v.* McCarthy, 34 Minn. 318, 25 N. W. 637; Atkinson *v.* Duffy, 16 Minn. 45); judicial sales (Kerrigan *v.* Force, 68 N. Y. 381; Merrill *v.* Thorpe, 22 Pa. Co. Ct. 181); limitation of actions (Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198; Gibson *v.* Belcher, 1 Bush (Ky.) 145); probate procedure (Johnson *v.* Harrison, 47 Minn. 575, 50 N. W. 923, 28 Am. St. Rep. 382; Murphey *v.* Menard, 11 Tex. 673); and survival of actions (Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953; Houston

acts amending [51] statutes covering civil practice, procedure and remedies are usually valid.

b. Crimes. Statutes concerning criminal offenses have been usually upheld, whether general or special,[52] even when a civil liability for a criminal act is

Printing Co. *v.* Dement, 18 Tex. Civ. App. 30, 44 S. W. 558).

51. *Indiana.*—Citizens' St. R. Co. *v.* Haugh, 142 Ind. 254, 41 N. E. 533.

Kansas.— Bennett *v.* Wolverton, 24 Kan. 284.

Minnesota.—Hoffman *v.* Parsons, 27 Minn. 236, 6 N. W. 797.

Nebraska.— Gatling *v.* Lane, 17 Nebr. 77, 80, 22 N. W. 227, 453.

Pennsylvania.—Loewi *v.* Haedrich, 8 Wkly. Notes Cas. 70.

Texas.— Womack *v.* Gardner, 10 Tex. Civ. App. 367, 30 S. W. 589.

See 44 Cent. Dig. tit. "Statutes," § 157.

52. *Indiana.*— Jett *v.* Richmond, 78 Ind. 316.

Louisiana.— State *v.* Breeden, 47 La. Ann. 374, 17 So. 125; State *v.* Dubois, 39 La. Ann. 676, 2 So. 558; State *v.* Taylor, 34 La. Ann. 978; State *v.* Lacombe, 12 La. Ann. 195.

Missouri.— State *v.* Brassfield, 81 Mo. 151, 51 Am. Rep. 235.

Nebraska.— Boggs *v.* Washington County, 10 Nebr. 297, 4 N. W. 984, holding that the title of an act "to establish a criminal code" is broad enough to embrace provisions relative to the payment of costs.

Washington.— *In re* Donnellan, 49 Wash. 460, 95 Pac. 1085.

See 44 Cent. Dig. tit. "Statutes," § 158.

Illustrations.—Acts on the following subjects have been upheld as having proper titles: Animal theft (Diamond *v.* Com., 124 Ky. 418, 99 S. W. 232, 30 Ky. L. Rep. 655; Ream *v.* State, 52 Nebr. 727, 73 N. W. 227; Tabor *v.* State, 34 Tex. Cr. 631, 31 S. W. 662, 53 Am. St. Rep. 726. *Contra,* State *v.* Cunningham, 35 Mont. 547, 90 Pac. 755; State *v.* Crosby, 51 S. C. 247, 28 S. E. 529); arson (State *v.* Hall, 24 Wash. 255, 64 Pac. 153); book-making or pool-selling (Benners *v.* State, 124 Ala. 97, 26 So. 942; State *v.* Delmar Jockey Club, (Mo. 1905) 92 S. W. 185; State *v.* Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846; Hernan *v.* Texas, 198 U. S. 579, 25 S. Ct. 800, 49 L. ed. 1171); convicts (Brown *v.* State, 115 Ala. 74, 22 So. 458; White *v.* Burgin, 113 Ala. 170, 21 So. 832; Woodruff *v.* Baldwin, 23 Kan. 491); disorderly persons (People *v.* Kelly, 99 Mich. 82, 57 N. W. 1090); drunkenness (Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487); embezzlement (Teston *v.* State, 50 Fla. 138, 39 So. 787); extortion (State *v.* Rushing, 49 La. Ann. 1530, 22 So. 798; *In re* Algoe, 74 Nebr. 353, 104 N. W. 751. *Contra,* Com. *v.* Hudusko, 10 Pa. Dist. 230); felonies (Peachee *v.* State, 63 Ind. 399. *Contra,* State *v.* Dalcourt, 112 La. 420, 36 So. 479; State *v.* Clark, 43 Wash. 664, 86 Pac. 1067); forgery (Johnson *v.* State, 9 Tex. App. 249; Francis *v.* State, 7 Tex. App. 501; Ham *v.* State, 4 Tex. App. 645); frauds (Banks *v.* State, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. N. S. 1007; State *v.* Morgan, 112 Mo. 202, 20 S. W. 456; Herold *v.* State, 21 Nebr. 50, 31 N. W. 258; Com. *v.* Martin, 35 Pa. Super. Ct. 241); fraudulent sales (Com. *v.* Barney, 115 Ky. 475, 74 S. W. 181, 24 Ky. L. Rep. 2352); gambling (State *v.* Stripling, 113 Ala. 120, 21 So. 409, 36 L. R. A. 81; Bobel *v.* People, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64; Garvin *v.* State, 13 Lea (Tenn.) 162; Singleton *v.* State, 53 Tex. Cr. 625, 111 S. W. 736; Lescallett *v.* Com., 89 Va. 878, 17 S. E. 546. *Contra,* State *v.* Hayes, 116 Tenn. 40, 93 S. W. 98); grand juries (*In re* Rafferty, 1 Wash. 382, 25 Pac. 465); horse-races (State *v.* Roby, 142 Ind. 168, 41 N. E. 145, 51 Am. St. Rep. 174, 33 L. R. A. 213; *Ex p.* Hernan, 45 Tex. Cr. 343, 77 S. W. 225); incest (State *v.* De Hart, 109 La. 570, 33 So. 605); larceny (People *v.* Lovren, 119 Cal. 88, 51 Pac. 22, 638; Graves *v.* People, 32 Colo. 127, 75 Pac. 412; Strobhar *v.* State, 55 Fla. 167, 47 So. 4; *Ex p.* Bush, 48 Fla. 69, 37 So. 177; State *v.* Dunn, 66 Kan. 483, 71 Pac. 811; State *v.* O'Day, 74 S. C. 448, 54 S. E. 607); minors (State *v.* Hahn, 70 Kan. 877, 79 Pac. 670); misdemeanors (Davenport *v.* State, 112 Ala. 49, 20 So. 971; Weil *v.* State, 46 Ohio St. 450, 21 N. E. 643 [*affirming* 3 Ohio Cir. Ct. 657, 2 Ohio Cir. Dec. 382]. *Contra,* State *v.* Walker, 105 La. 492, 29 So. 973; Boggs *v.* Washington County, 10 Nebr. 297, 4 N. W. 984); mob violence and threats (Weber *v.* Com., 72 S. W. 30, 24 Ky. L. Rep. 1726); murder (Com. *v.* Darmska, 35 Pa. Super. Ct. 580; Augustine *v.* State, 41 Tex. Cr. 59, 52 S. W. 77, 96 Am. St. Rep. 765); offenses against railroads (*In re* Tutt, 55 Kan. 705, 41 Pac. 957); penalties (Giles *v.* State, 52 Ala. 29; State *v.* Baker, 112 La. 801, 36 So. 703; State *v.* Pioneer Press Co., 100 Minn. 173, 110 N. W. 867, 117 Am. St. Rep. 684; State *v.* Crusius, 57 N. J. L. 279, 31 Atl. 235. *Contra, Ex p.* Gayles, 108 Ala. 514, 19 So. 12); pool and billiard tables (Hart *v.* State, 113 Ga. 939, 39 S. E. 321; State *v.* Maloney, 115 La. 498, 39 So. 539; Com. *v.* Ayers, 17 Pa. Super. Ct. 352); prize-fighting (People *v.* Taylor, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287); prosecutions (People *v.* Oates, 142 Cal. 12, 75 Pac. 337; Byrne *v.* State, 47 Ind. 120); prostitution (Holton *v.* State, 28 Fla. 303, 9 So. 716; State *v.* Brown, 103 Tenn. 449, 53 S. W. 727; Zenner *v.* Graham, 34 Wash. 81, 74 Pac. 1058; *In re* Moore, 81 Fed. 356); selling encumbered personalty (State *v.* Heldenbrand, 62 Nebr. 136, 87 N. W. 25, 89 Am. St. Rep. 743. *Contra,* Dempsey *v.* State, 94 Ga. 766, 22 S. E. 57); Sunday law (*Ex p.* Jacobs, 13 Ida. 720, 92 Pac. 1003; State *v.* Dolan, 13 Ida. 693, 92 Pac. 995, 14 L. R. A. N. S. 1259; State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224; *In re* Donnellan, 49 Wash. 460, 95 Pac. 1085); trials (Dean *v.* State,

included.[53] Amendments to criminal statutes are valid if germane [54] and invalid when including matter not provided in the original title.[55]

c. Governmental Matters — (I) *STATE GOVERNMENT.* Titles are generally upheld as germane to acts concerning the state government,[56] institutions,[57] property,[58] appropriations,[59] militia,[60] vital statistics,[61] and the public health [62] and safety.[63]

100 Ala. 102, 14 So. 762; State *v.* Wright, 45 La. Ann. 57, 12 So. 129; State *v.* Carter, 33 La. Ann. 1214; State *v.* White, 33 La. Ann. 1218); vagrants (Hays *v.* Cumberland County, 186 Pa. St. 109, 40 Atl. 282); and venue (State *v.* Hunter, 79 S. C. 91, 60 S. E. 226; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746).

Making abetters joint principals is germane to be subject to certain offenses and within the scope of the title. State *v.* Brown, 103 Tenn. 449, 53 S. W. 727.

53. *Colorado.*— Clare *v.* People, 9 Colo. 122, 10 Pac. 799.

Illinois.— Larned *v.* Tiernan, 110 Ill. 173.

Michigan.— Burrows *v.* Delta Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468.

Oregon.— O'Keefe *v.* Weber, 14 Oreg. 55, 12 Pac. 74.

Washington.— Maling *v.* Crummey, 5 Wash. 222, 31 Pac. 600. But see State *v.* Tieman, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854.

See 44 Cent. Dig. tit. "Statutes," § 159.

54. *Colorado.*— Heller *v.* People, 2 Colo. App. 459, 31 Pac. 773.

Florida.— Lester *v.* State, 37 Fla. 382, 20 So. 232.

Georgia.— Wheeler *v.* State, 23 Ga. 9.

Maryland.— State *v.* Norris, 70 Md. 91, 16 Atl. 445.

Michigan.—People *v.* Howard, 73 Mich. 10, 40 N. W. 789; Ellis *v.* Hutchinson, 70 Mich. 154, 38 N. W. 14.

Missouri.— State *v.* Laughlin, 75 Mo. 358.

Nebraska.— Perry *v.* Gross, 25 Nebr. 826, 41 N. W. 799.

South Carolina.— State *v.* Crosby, 51 S. C. 247, 28 S. E. 529.

Texas.— Fehr *v.* State, 36 Tex. Cr. 93, 35 S. W. 381, 650.

See 44 Cent. Dig. tit. "Statutes," § 160.

55. *Alabama.*— Harper *v.* State, 109 Ala. 28, 19 So. 857.

Missouri.— State *v.* Persinger, 76 Mo. 346.

Montana.— State *v.* Mitchell, 17 Mont. 67, 42 Pac. 100.

Oregon.— Hearn *v.* Louttit, 42 Oreg. 572, 72 Pac. 132.

Washington.— State *v.* Halbert, 14 Wash. 306, 44 Pac. 538.

See 44 Cent. Dig. tit. "Statutes," § 160.

56. Slack *v.* Jacob, 8 W. Va. 612 (removal of seat of government); State *v.* Schnitger, 16 Wyo. 479, 95 Pac. 698 (apportionment acts).

57. Kentucky Live Stock Breeders' Assoc. *v.* Hager, 120 Ky. 125, 85 S. W. 738, 27 Ky. L. Rep. 518 (state fair under control of breeders' association provided under title mentioning state fair); Berman *v.* Cosgrove, 95 Minn. 353, 104 N. W. 534; State *v.* State Inst. Bd. of Control, 85 Minn. 165, 88 N. W. 533.

58. *Indiana.*— Hovey *v.* Foster, 118 Ind. 502, 21 N. E. 39; Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

Louisiana.—State *v.* State Auditor, 32 La. Ann. 89.

Michigan.— Chippewa County *v.* Auditor-Gen., 65 Mich. 408, 32 N. W. 651.

Minnesota.— State *v.* Shevlin-Carpenter Co., 102 Minn. 470, 113 N. W. 634, 114 N. W. 738 [*affirming* 99 Minn. 158, 108 N. W. 935].

Pennsylvania.—Leger *v.* Rice, 8 Phila. 167.

South Dakota.— Davenport *v.* Elrod, 20 S. D. 567, 107 N. W. 833.

Texas.— Snyder *v.* Compton, 87 Tex. 374, 28 S. W. 1061; State *v.* Parker, 61 Tex. 265.

United States.— Illinois *v.* Illinois Cent. R. Co., 33 Fed. 730 [*affirmed* in 146 U. S. 387, 13 S. Ct. 110, 36 L. ed. 1018].

See 44 Cent. Dig. tit. "Statutes," § 165.

59. *Maryland.*— Maryland Agricultural College *v.* Keating, 58 Md. 580.

Minnesota.—Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568.

Nebraska.— State *v.* Moore, 37 Nebr. 13, 55 N. W. 299.

Oregon.— Burch *v.* Earhart, 7 Oreg. 58.

Pennsylvania.— Philadelphia *v.* Pepper, 2 Pa. Co. Ct. 287.

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

See 44 Cent. Dig. tit. "Statutes," § 167.

60. Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570; Hall *v.* Judge Grand Rapids Super. Ct., 88 Mich. 438, 50 N. W. 289.

61. Com. *v.* McConnell, 76 S. W. 41, 25 Ky. L. Rep. 552; Com. *v.* Light, 35 Pa. Super. Ct. 366.

62. *California.*—Abeel *v.* Clark, 84 Cal. 226, 24 Pac. 383, vaccination.

Indiana.— Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, adulterated foods.

Louisiana.—Campagnie Francaise de Navigation a Vapeur *v.* State Bd. of Health, 51 La. Ann. 645, 25 So. 591, 72 Am. St. Rep. 458, 56 L. R. A. 795.

Michigan.— Pratt Food Co. *v.* Bird, 148 Mich. 631, 112 N. W. 701.

Pennsylvania.— Com. *v.* Arow, 32 Pa. Super. Ct. 1; Com. *v.* Kebort, 26 Pa. Super. Ct. 584; Com. *v.* Curry, 4 Pa. Super. Ct. 356, 40 Wkly. Notes Cas. 369 [*reversing* 6 Pa. Dist. 143, 18 Pa. Co. Ct. 513].

63. Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851 (fire-escapes); Burrows *v.* Delta Transp. Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468 (fire screens on vessels).

(II) *Contracts, Public Works, and Assessments.* Titles are only valid when germane in case of statutes relating to public contracts,[64] and buildings,[65] public improvements [66] and assessments therefor,[67] bridges,[68] drains and sewers,[69]

64. Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Colo. 71, 46 Pac. 123, 33 L. R. A. 827; State *v.* Dorsey, 167 Ind. 199, 78 N. E. 843; Parfitt *v.* Ferguson, 159 N. Y. 111, 53 N. E. 707 [*affirming* 3 N. Y. App. Div. 176, 38 N. Y. Suppl. 406].

65. Washburn *v.* Shawnee County, 37 Kan. 217, 15 Pac. 237; McArthur *v.* Nelson, 81 Ky. 67; People *v.* Rochester, 50 N. Y. 525.

66. *California.*— Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Colorado.— Pitkin County *v.* Aspen Min., etc., Co., 3 Colo. App. 223, 32 Pac. 717.

Illinois.— Gage *v.* Chicago, 203 Ill. 26, 67 N. E. 477; Jones *v.* Lake View, 151 Ill. 663, 38 N. E. 688.

Kansas.— Clarke *v.* Lawrence, 75 Kan. 26, 88 Pac. 735.

Louisiana.— Dehon *v.* Lafourche Basin Levee Bd., 110 La. 767, 34 So. 770.

Maryland.— Mealey *v.* Hagerstown, 92 Md. 741, 48 Atl. 746.

Michigan.— Grand Rapids *v.* Judge Grand Rapids Super. Ct., 102 Mich. 321, 60 N. W. 698; Butler *v.* Detroit, 43 Mich. 552, 5 N. W. 1078.

Minnesota.— Merchants' Nat. Bank *v.* East Grand Forks, 94 Minn. 246, 102 N. W. 703.

Mississippi.— Bobo *v.* Yazoo-Mississippi Delta Levee Com'rs, 92 Miss. 792, 46 So. 819.

Missouri.— State *v.* Borden, 164 Mo. 221, 64 S. W. 172.

Nebraska.— State *v.* Douglass County, 47 Nebr. 428, 66 N. W. 434.

New Jersey.— State Bd. of Health *v.* Diamond Paper Mills Co., 64 N. J. Eq. 793, 53 Atl. 1125 [*affirming* 63 N. J. L. 111, 51 Atl. 1019].

New York.— Sweet *v.* Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289 [*affirming* 60 Hun 28, 14 N. Y. Suppl. 421]; *In re* Upson, 89 N. Y. 67; *In re* Department Public Parks, 86 N. Y. 437; *In re* Mayer, 50 N. Y. 504.

North Dakota.— Tribune Printing, etc., Co. *v.* Barnes, 7 N. D. 591, 75 N. W. 904.

Oregon.— Spaulding Logging Co. *v.* Independence Imp. Co., 42 Oreg. 394, 71 Pac. 132.

Pennsylvania.— *In re* Church St., 54 Pa. St. 353.

South Dakota.— Miles *v.* Benton Tp., 11 S. D. 450, 78 N. W. 1004.

Texas.— Adams *v.* San Angelo Water Works Co., 86 Tex. 485, 25 S. W. 605.

Washington.—Aylmore *v.* Seattle, 48 Wash. 42, 92 Pac. 932; Seattle, etc., Waterway Co. *v.* Seattle Dock Co., 35 Wash. 503, 77 Pac. 845; Seymour *v.* Tacoma, 6 Wash. 138, 32 Pac. 1077; Yesler *v.* Seattle, 1 Wash. 308, 25 Pac. 1014.

United States.— Seattle Dock Co. *v.* Seattle, etc., Waterway Co., 195 U. S. 624, 25 S. Ct. 789, 49 L. ed. 350 [*affirming* 35 Wash. 503, 77 Pac. 845]; Pelham *v.* The B. F. Woolsey, 16 Fed. 418.

See 44 Cent. Dig. tit. "Statutes," § 177.

67. *Alabama.*— Montgomery *v.* Birdsong, 126 Ala. 632, 28 So. 522.

Illinois.— West Chicago Park Com'rs *v.* Sweet, 167 Ill. 326, 47 N. E. 728.

New York.— People *v.* Wilson, 121 N. Y. 684, 24 N. E. 1098 [*affirming* 3 N. Y. Suppl. 326]; Hurlburt *v.* Banks, 1 Abb. N. Cas. 157, 52 How. Pr. 196 [*affirmed* in 67 N. Y. 568, 1 Abb. N. Cas. 172].

Pennsylvania.— Pittsburg *v.* Daly, 5 Pa. Super. Ct. 528, 41 Wkly. Notes Cas. 236.

Washington.— Lewis County *v.* Gordon, 20 Wash. 80, 54 Pac. 779.

Wisconsin.— Evans *v.* Sharp, 29 Wis. 564; Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578.

See 44 Cent. Dig. tit. "Statutes," § 181.

68. *Alabama.*— State *v.* Street, 117 Ala 203, 23 So. 807.

Arkansas.—Fletcher *v.* Oliver, 25 Ark. 289.

Idaho.— Andrews *v.* Ada County, 7 Ida. 453, 63 Pac. 592.

Kansas.—Barber County *v.* Smith, 48 Kan. 331, 29 Pac. 565.

Minnesota.— State *v.* Renville County, 83 Minn. 65, 85 N. W. 830.

New York.— Wrought-Iron Bridge Co. *v.* Attica, 119 N. Y. 204, 23 N. E. 542 [*affirming* 49 Hun 513, 2 N. Y. Suppl. 359].

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania.— Stegmaier *v.* Jones, 203 Pa. St. 47, 52 Atl. 56; Seabolt *v.* Northumberland County, 187 Pa. St. 318, 41 Atl. 22.

See 44 Cent. Dig. tit. "Statutes," § 178.

69. *California.*— People *v.* Parks, 58 Cal. 624.

Illinois.— People *v.* Nelson, 133 Ill. 565, 27 N. E. 217.

Indiana.— Ross *v.* Davis, 97 Ind. 79.

Iowa.— Sisson *v.* Buena Vista County, 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440.

Louisiana.— Irwin's Succession, 33 La. Ann. 63.

Michigan.— Rice *v.* Ionia Probate Judge, 141 Mich. 692, 105 N. W. 17; Hall *v.* Slaybaugh, 69 Mich. 484, 37 N. W. 545.

Minnesota.— State *v.* Crosby, 92 Minn. 176, 99 N. W. 636.

Nebraska.— Omaha, etc., R. Co. *v.* Sarpy County, 82 Nebr. 140, 117 N. W. 116.

New Jersey.— Frelinghuysen *v.* Morristown, 76 N. J. L. 271, 70 Atl. 77; Newark *v.* Orange, 55 N. J. L. 514, 26 Atl. 799; Milburn Tp. *v.* South Orange, 55 N. J. L. 254, 26 Atl. 75.

New York.— Van Brunt *v.* Flatbush, 128 N. Y. 50, 27 N. E. 973 [*reversing* 59 Hun 192, 13 N. Y. Suppl. 545].

North Dakota.— Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841.

Pennsylvania.— Mauch Chunk *v.* McGee, 81 Pa. St. 433.

Washington.— Skagit County *v.* McLean, 20 Wash. 92, 54 Pac. 781.

See 44 Cent. Dig. tit. "Statutes," § 180.

and streets and highways.[70] And the same rule applies to statutes relating to irrigation,[71] and to turnpikes and toll-roads.[72]

(III) *Courts and Judges — Justices of the Peace.* Acts are generally upheld as having apt titles concerning courts and judges [73] and justices of the peace.[74]

70. *Alabama.*—Williams *v.* Butler County, 123 Ala. 432, 26 So. 346; State *v.* Street, 117 Ala. 203, 23 So. 807.

California.— San Francisco *v.* Kiernan, 98 Cal. 614, 33 Pac. 720; Davies *v.* Los Angeles, 86 Cal. 37, 24 Pac. 771.

Florida.— Duval County *v.* Jacksonville, 36 Fla. 196, 18 So. 339, 29 L. R. A. 416.

Illinois.— Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 233, 1 L. R. A. N. S. 393; People *v.* Kirk, 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277.

Indiana.— State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; South East, etc., R. Co. *v.* Evansville, etc., Electric R. Co., 169 Ind. 339, 82 N. E. 765, 13 L. R. A. 916; Bowlin *v.* Cochran, 161 Ind. 486, 69 N. E. 153.

Kentucky.— Graham *v.* Conger, 85 Ky. 582, 4 S. W. 327, 9 Ky. L. Rep. 133.

Maryland.—Fout *v.* Frederick County, 105 Md. 545, 66 Atl. 487.

Michigan.— Shearer *v.* Bay County, 128 Mich. 552, 87 N. W. 789; Frary *v.* Allen Tp., 91 Mich. 666, 52 N. W. 78; Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52.

Missouri.— Shively *v.* Lankford, 174 Mo. 535, 74 S. W. 835.

Nebraska.— Bryant *v.* Dakota County, 53 Nebr. 755, 74 N. W. 313.

New Jersey.— Beverly *v.* Waln, 57 N. J. L. 143, 30 Atl. 545; Rader *v.* Union Tp., 39 N. J. L. 509.

New York.— People *v.* Fitch, 147 N. Y. 355, 41 N. E. 695; *In re* New York, etc., Bridge, 72 N. Y. 527; *In re* New York, 57 N. Y. App. Div. 166, 68 N. Y. Suppl. 196 [*affirmed* in 167 N. Y. 624, 60 N. E. 1108].

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania.— Dorrance *v.* Dorranceton Borough, 181 Pa. St. 164, 37 Atl. 200; *In re* Airy St., 113 Pa. St. 281, 6 Atl. 122; *In re* Middletown Road, 15 Pa. Super. Ct. 167.

Tennessee.— Memphis *v.* Hastings, 113 Tenn. 142, 86 S. W. 609, 69 L. R. A. 750.

Texas.—Smith *v.* Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921.

Wisconsin.— Anderton *v.* Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830; Harrison *v.* Milwaukee County, 51 Wis. 645, 8 N. W. 731.

See 44 Cent. Dig. tit. "Statutes," § 178.

71. *California.*— People *v.* Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86.

Colorado.— Anderson *v.* Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. 313; Farmers' Independent Ditch Co. *v.* Agricultural Ditch Co., 22 Colo. 513, 45 Pac. 444, 55 Am. St. Rep. 149; Golden Canal Co. *v.* Bright, 8 Colo. 144, 6 Pac. 142.

Idaho.— Nampa, etc., Irr. Dist. *v.* Brose, 11 Ida. 474, 83 Pac. 499; Boise Irr., etc., Co. *v.* Stewart, 10 Ida. 38, 77 Pac. 25, 321.

Nebraska.— Paxton, etc., Irr. Canal, etc., Co. *v.* Farmers', etc., Irr., etc., Co., 45 Nebr. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853.

Texas.— Borden *v.* Trespalacios Rice, etc., Co., 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640 [*affirming* (Civ. App. 1904) 82 S. W. 461].

Washington.— Weed *v.* Goodwin, 36 Wash. 31, 78 Pac. 36.

See 44 Cent. Dig. tit. "Statutes," § 183.

72. Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213; Lauer *v.* State, 22 Ind. 461; Johnson *v.* Wabash, etc., Plank Road Co., 16 Ind. 389; People *v.* Fishkill, etc., Plank Road Co., 27 Barb. (N. Y.) 445; Mt. Joy *v.* Lancaster, etc., Turnpike Co., 182 Pa. St. 581, 38 Atl. 411; *In re* Carbondale, etc., Road, 10 Pa. Cas. 204, 13 Atl. 913; *In re* Frankford, etc., Plank Road, etc., 8 Pa. Dist. 166.

73. State *v.* Cornell, 50 Nebr. 526, 70 N. W 56; State *v.* Franklin, 80 S. C. 332, 60 S. E. 953; Nystrom *v.* Clark, 27 Utah 186, 75 Pac. 378; State *v.* Rusk, 15 Wash. 403, 46 Pac. 387.

Illustrations.— In the following cases acts have been held valid on the following subjects: Appeals (Perkins *v.* DuVal, 31 Ark. 236); establishing courts (State *v.* Abernathy, (Ala. 1906) 40 So. 353; State *v.* Sayre, 118 Ala. 1, 24 So. 89; People *v.* Henshaw, 76 Cal. 436, 18 Pac. 413; Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; Elkhart County *v.* Albright, 168 Ind. 564, 81 N. E. 578; Swartz *v.* Lake County, 158 Ind. 141, 63 N. E. 31; Wheeler *v.* Calvert, 25 Ind. 365; Brown *v.* Moss, 126 Ky. 833, 105 S. W. 139, 31 Ky. L. Rep. 1288; People *v.* Morgan, 58 N. Y. 679 [*affirming* 5 Daly 161]; Jimeson *v.* Lehley, 51 Misc. (N. Y.) 352, 101 N. Y. Suppl. 215; Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460; State *v.* McConnell, 3 Lea (Tenn.) 332; Howth *v.* Greer, 40 Tex. Civ. App. 552, 90 S. W. 211; Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 596; Bogue *v.* Seattle, 19 Wash. 396, 53 Pac. 548; *In re* Fourth Judicial Dist., 4 Wyo. 133, 32 Pac. 850); jurisdiction (Norvell *v.* State, 143 Ala. 561, 39 So. 357; Lee *v.* State, 143 Ala. 93, 39 So. 366; Jackson *v.* State, 136 Ala. 96, 33 So. 888; Johnson *v.* Johnson, 84 Ark. 307, 105 S. W. 869; Payne *v.* Mahon, 44 N. J. L. 213; Wenzler *v.* People, 58 N. Y. 516; People *v.* McCann, 16 N. Y. 58, 69 Am. Dec. 642; Whitlock *v.* Hawkins, 105 Va. 242, 53 S. E. 401; Morriss *v.* Virginia Ins. Co., 85 Va. 588, 8 S. E. 383); and terms of court (Louisville, etc., R. Co. *v.* Herndon, 126 Ky. 589, 104 S. W. 732, 31 Ky. L. Rep. 1059; Johnson *v.* Fulton, 121 Ky. 594, 89 S. W. 672, 28 Ky. L. Rep. 569; State *v.* Burr, 16 N. D. 581, 113 N. W. 705).

74. *Indiana.*— Baltimore, etc., R. Co. *v.*

(IV) *ELECTIONS AND REGISTRATION OF VOTERS.* Statutes on elections [75] or registration of voters [76] are valid when having titles indicating the subject.

(V) *MUNICIPAL CORPORATIONS* — (A) *In General.* Acts concerning municipal government are valid where reasonably germane to their titles,[77]

Whiting, 161 Ind. 228, 68 N. E. 266; Bergman *v.* Ashdill, 48 Ind. 489; Robinson *v.* Skipworth, 23 Ind. 311.

Kansas.— Martin *v.* Borgman, 21 Kan. 672.

Louisiana.— McGregor *v.* Allen, 33 La. Ann. 870.

Michigan.— Sunderlin *v.* Ionia County, 119 Mich. 535, 78 N. W. 651; Soukup *v.* Van Dyke, 109 Mich. 679, 67 N. W. 911.

New Jersey.— Colwell *v.* Chamberlin, 43 N. J. L. 387.

New York.— People *v.* Lane, 53 N. Y. App. Div. 531, 65 N. Y. Suppl. 1004; *In re* Walker, 3 Barb. 162, 1 Code Rep. 9.

Pennsylvania.—Wilson *v.* Downing, 40 Wkly. Notes Cas. 342.

See 44 Cent. Dig. tit. "Statutes," § 185.

75. *Alabama.*— State *v.* Crook, 126 Ala. 600, 28 So. 745.

California.— Spier *v.* Baker, 129 Cal. 370, 52 Pac. 659, 41 L. R. A. 196.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294; People *v.* Goddard, 8 Colo. 432, 7 Pac. 301.

Georgia.— McCook *v.* State, 91 Ga. 740, 17 S. E. 1019.

Illinois.— Rouse *v.* Thompson, 228 Ill. 522, 81 N. E. 1109.

Kentucky.— Rogers *v.* Jacob, 88 Ky. 502, 11 S. W. 513, 11 Ky. L. Rep. 45.

Louisiana.— State *v.* Michel, 121 La. 374, 46 So. 430.

Maryland.— Lankford *v.* Somerset County, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491.

Michigan.— Dykstra *v.* Holden, 151 Mich. 289, 115 N. W. 74; McPherson *v.* Secretary of State, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

Missouri.— State *v.* Herring, 208 Mo. 708, 106 S. W. 984; State *v.* Keating, 202 Mo. 197, 100 S. W. 648; State *v.* Mead, 71 Mo. 266.

Nebraska.— Dodson *v.* Bowlby, 78 Nebr. 190, 110 N. W. 698.

Pennsylvania.— Com. *v.* Weir, 15 Pa. Co. Ct. 425.

South Dakota.— Morrow *v.* Wipf, 22 S. D. 146, 115 N. W. 1121.

Texas.— Cofield *v.* Britton, (Civ. App. 1908) 109 S. W. 493.

Utah.— Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

United States.—Dows *v.* Elmwood, 34 Fed. 114.

See 44 Cent. Dig. tit. "Statutes," § 188.

76. State *v.* Bush, 45 Kan. 138, 25 Pac. 614; Eureka *v.* Davis, 21 Kan. 578; Osthoff *v.* Flotte, 48 La. Ann. 1094, 20 So. 282. But see State *v.* Drexel, 74 Nebr. 776, 105 N. W. 174, holding that registration of voters and electors is not properly treated under "elections."

77. *Alabama.*— Griffin *v.* Drennen, 145 Ala. 128, 40 So. 1016; Little *v.* State, 137 Ala. 659, 35 So. 134.

California.— *In re* Melone, 141 Cal. 331, 74 Pac. 991; People *v.* Mullender, 132 Cal. 217, 64 Pac. 299; Longan *v.* Solano County, 65 Cal. 122, 3 Pac. 463.

Colorado.— Patterson *v.* Watson, 35 Colo. 502, 83 Pac. 958; El Paso County *v.* Teller County, 32 Colo. 310, 76 Pac. 368.

Georgia.— Barnesville *v.* Means, 128 Ga. 197, 57 S. E. 422; Stapleton *v.* Perry, 117 Ga. 561, 43 S. E. 996; Carson *v.* Forsyth, 94 Ga. 617, 20 S. E. 116.

Illinois.— Chicago *v.* Cicero, 210 Ill. 290, 71 N. E. 356.

Indiana.— Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138.

Iowa.— Beaner *v.* Lucas, 138 Iowa 215, 112 N. W. 772.

Kansas.— Topeka *v.* Wood, 62 Kan. 809, 64 Pac. 630; State *v.* Sanders, 42 Kan. 228, 21 Pac. 1073; Weyand *v.* Stover, 35 Kan. 545, 11 Pac. 355; Mitchell *v.* Topeka, (App. 1898) 54 Pac. 292.

Louisiana.— Browne *v.* Providence, 114 La. 631, 38 So. 478; Edwards *v.* Avoyelles Police Jury, 39 La. Ann. 855, 2 So. 804; New Orleans *v.* Waggaman, 31 La. Ann. 299.

Maryland.— Price *v.* Cecil County Liquor License Com'rs, 98 Md. 346, 57 Atl. 215; Dorchester County *v.* Meekins, 50 Md. 28; Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

Michigan.— McDonald *v.* Springwells Tp., 152 Mich. 28, 115 N. W. 1066; Blades *v.* Detroit, 122 Mich. 366, 81 N. W. 271; Lansing *v.* State Auditors, 111 Mich. 327, 69 N. W. 723.

Minnesota.— Watkins *v.* Bigelow, 93 Minn. 210, 100 N. W. 1104; Winters *v.* Duluth, 82 Minn. 127, 84 N. W. 788; Flynn *v.* Little Falls Electric, etc., Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; State *v.* Starkey, 49 Minn. 503, 52 N. W. 24.

Missouri.— State *v.* Mason, 155 Mo. 486, 55 S. W. 636.

Nebraska.— Webster *v.* Hastings, 59 Nebr. 563, 81 N. W. 510; Lincoln Land Co. *v.* Grant, 57 Nebr. 70, 77 N. W. 349; State *v.* Tibbets, 52 Nebr. 228, 71 N. W. 990, 66 Am. St. Rep. 492; Weigel *v.* Hastings, 29 Nebr. 379, 45 N. W. 694.

New Jersey.— Morris, etc., R. Co. *v.* Newark, 76 N. J. L. 555, 70 Atl. 194; Bloomfield *v.* Middlesex County, 74 N. J. L. 261, 65 Atl. 890; Drew *v.* West Orange Tp., 64 N. J. L. 481, 45 Atl. 787; Kennedy *v.* Belmar Borough, 61 N. J. L. 20, 38 Atl. 756; Johnson *v.* Asbury Park, 60 N. J. L. 427, 39 Atl. 693; Anderson *v.* Camden, 58 N. J. L. 515, 33 Atl. 846.

New York.— People *v.* Coler, 173 N. Y. 103, 65 N. E. 956 [*affirming* 71 N. Y. App. Div. 584, 76 N. Y. Suppl. 205]; *In re* New York, 167 N. Y. 624, 60 N. E. 1108 [*affirming* 57 N. Y. App. Div. 166, 68 N. Y. Suppl.

as in case of statutes on municipal indebtedness,[78] statutes incorporating a city,[79] statutes amending incorporating acts,[80] statutes altering city

196]; People *v.* Sutphin, 166 N. Y. 163, 59 N. E. 770 [*modifying* 53 N. Y. App. Div. 613, 66 N. Y. Suppl. 49]; Clinton Water Com'rs *v.* Dwight, 101 N. Y. 9, 3 N. E. 782; Billings *v.* New York, 68 N. Y. 413.

Ohio.— State *v.* Covington, 29 Ohio St. 102.

Oregon.— Ladd *v.* Holmes, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457; Simpson *v.* Bailey, 3 Oreg. 515.

Pennsylvania.— Yoho *v.* Allegheny County, 218 Pa. St. 401, 67 Atl. 648; House of Refuge *v.* Luzerne County, 215 Pa. St. 429, 64 Atl. 601; Bridgewater Borough *v.* Big Beaver Bridge Co., 210 Pa. St. 105, 59 Atl. 697; Rose *v.* Beaver County, 204 Pa. St. 372, 54 Atl. 263; Com. *v.* Moir, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. Rep. 801, 53 L. R. A. 837; *In re* Sugar Notch Borough, 192 Pa. St. 349, 43 Atl. 985.

South Carolina.— State *v.* Burley, 80 S. C. 127, 61 S. E. 255, 16 L. R. A. N. S. 266; Barsdale *v.* Laurens, 58 S. C. 413, 36 S. E. 661; State *v.* Chester, 18 S. C. 464.

Tennessee.— Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002; State *v.* Hamby, 114 Tenn. 361, 84 S. W. 622; Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, 87 S. W. 1016.

Texas.— Werner *v.* Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159; Nalle *v.* Austin, (Civ. App. 1907) 103 S. W. 825.

Virginia.— Alexandria County *v.* Alexandria, 95 Va. 469, 28 S. E. 882; Ingles *v.* Straus, 91 Va. 209, 21 S. E. 490.

Washington.— Anderson *v.* Whatcom County, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137.

Wisconsin.— Verges *v.* Milwaukee County, 116 Wis. 191, 93 N. W. 44.

United States.— Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090; The George W. Elder, 159 Fed. 1005.

See 44 Cent. Dig. tit. "Statutes," § 171.

78. *Alabama.*— Blakey *v.* Montgomery, 144 Ala. 481, 39 So. 745; Hare *v.* Kennerly, 83 Ala. 608, 3 So. 683.

Arkansas.— Worthen *v.* Badgett, 32 Ark. 496.

California.—Los Angeles *v.* Hance, 122 Cal. 77, 54 Pac. 387.

Florida.— Potter *v.* Lainhart, 44 Fla. 647, 33 So. 251.

Georgia.— Black *v.* Cohen, 52 Ga. 621.

Illinois.— McChesney *v.* Chicago, 159 Ill. 223, 42 N. E. 894; Quincy, etc., R. Co. *v.* Morris, 84 Ill. 410.

Indiana.— Jameson *v.* Bartholomew County, 64 Ind. 524; Miami County *v.* Bearss, 25 Ind. 110.

Kansas.— Rathbone *v.* Hopper, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674.

Kentucky.— Kentucky Union R. Co. *v.* Bourbon County, 85 Ky. 98, 2 S. W. 687, 8 Ky. L. Rep. 881.

Maryland.— Baltimore *v.* Flack, 104 Md. 107, 64 Atl. 702; Smith *v.* Annapolis, 97 Md. 736, 57 Atl. 976.

Minnesota.— State *v.* Gunn, 92 Minn. 436, 100 N. W. 97.

Missouri.— State *v.* Allen, 178 Mo. 555, 77 S. W. 868.

New York.— Elmira *v.* Seymour, 111 N. Y. App. Div. 199, 97 N. Y. Suppl. 623; Dunton *v.* Hume, 15 N. Y. App. Div. 122, 44 N. Y. Suppl. 305.

Oregon.— State *v.* Frazier, 36 Oreg. 178, 59 Pac. 5.

South Carolina.— Buist *v.* Charleston, 77 S. C. 260, 57 S. E. 862.

Tennessee.— Knoxville *v.* Gass, 119 Tenn. 438, 104 S. W. 1084, 14 L. R. A. N. S. 519.

Texas.— Mills County *v.* Brown County, 87 Tex. 475, 29 S. W. 650; Thornburgh *v.* Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

Wisconsin.— Wagner County *v.* Milwaukee County, 112 Wis. 601, 88 N. W. 577.

United States.— Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601; Travelers' Ins. Co. *v.* Oswego Tp., 59 Fed. 58, 7 C. C. A. 669.

See 44 Cent. Dig. tit. "Statutes," § 172.

79. *Alabama.*— Lockhart *v.* Troy, 48 Ala. 579.

Florida.— State *v.* Green, 36 Fla. 154, 18 So. 334; State *v.* Duval County, 23 Fla. 483, 3 So. 193.

Illinois.— Potwin *v.* Johnson, 108 Ill. 70; Guild *v.* Chicago, 82 Ill. 472.

Iowa.— Whiting *v.* Mt. Pleasant, 11 Iowa 482.

Michigan.— People *v.* Gobles, 67 Mich. 475, 35 N. W. 91.

Nebraska.— Haverly *v.* State, 63 Nebr. 83, 88 N. W. 171.

New York.— People *v.* Wilber, 15 N. Y. Suppl. 435.

Oregon.— Nottage *v.* Portland, 35 Oreg. 539, 58 Pac. 883, 76 Am. St. Rep. 513.

Pennsylvania.— Franklin *v.* Hancock, 18 Pa. Super. Ct. 398.

See 44 Cent. Dig. tit. "Statutes," § 169.

80. *Alabama.*— Ensley *v.* Cohn, 149 Ala. 316, 42 So. 827; Black *v.* State, 144 Ala. 92, 40 So. 611; Woolf *v.* Taylor, 98 Ala. 254, 13 So. 688; *Ex p.* Cowert, 92 Ala. 94, 9 So. 225.

California.— *In re* Pfahler, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. N. S. 1092; Beach *v.* Von Detten, 139 Cal. 462, 73 Pac. 187.

Colorado.— People *v.* Fleming, 7 Colo. 230, 3 Pac. 70.

Florida.— St. Petersburg *v.* English, 54 Fla. 585, 45 So. 483; Jacksonville *v.* Basnett, 20 Fla. 525.

Georgia.— Poulan *v.* Atlantic Coast Line R. Co., 123 Ga. 605, 51 S. E. 657; Fitts *v.* Atlanta, 121 Ga. 567, 49 S. E. 793, 104 Am. St. Rep. 167, 67 L. R. A. 803; Macon *v.* Hughes, 110 Ga. 795, 36 S. E. 247; Butner *v.* Boifeuillet, 100 Ga. 743, 28 S. E. 464; Atlantic *v.* Gate City St. R. Co., 80 Ga. 276, 4 S. E. 269; Hill *v.* Decatur, 22 Ga. 203.

Idaho.— Butler *v.* Lewiston, 11 Ida. 393, 83 Pac. 234.

Illinois.— Prescott *v.* Chicago, 60 Ill. 121.

limits,[81] dissolving [82] or reincorporating a city,[83] or revising municipal statutes.[84] Incorporating acts may include necessary and proper municipal powers.[85]

(B) *Towns, Counties, or Districts.* Acts are generally held to be valid whose titles are reasonably germane referring to creating and organizing [86] or alter-

Iowa.—Williamson *v.* Keokuk, 44 Iowa 88; Morford *v.* Unger, 8 Iowa 82.

Kansas.— Leavenworth *v.* Leavenworth City, etc., Water Co., 69 Kan. 82, 76 Pac. 451.

Kentucky.— Augusta *v.* Maysville, etc., R. Co., 97 Ky. 145, 30 S. W. 1, 16 Ky. L. Rep. 890; Covington *v.* Voskotter, 80 Ky. 219.

Louisiana.— New Orleans *v.* Cazelar, 27 La. Ann. 156.

Michigan.— Detroit *v.* Donovan, 112 Mich. 317, 70 N. W. 894; People *v.* Pond, 67 Mich. 98, 34 N. W. 647; Atty-Gen. *v.* Amos, 60 Mich. 372, 27 N. W. 571.

Minnesota.— State *v.* Anderson, 63 Minn. 208, 65 N. W. 265; Kelly *v.* Minneapolis City, 57 Minn. 294, 59 N. W. 304, 47 Am. St. Rep. 605, 26 L. R. A. 92; State *v.* Madson, 43 Minn. 438, 45 N. W. 856; State *v.* Gallagher, 42 Minn. 449, 44 N. W. 529; Winona *v.* Winona County School-Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46; St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278.

Missouri.— State *v.* Jackson County Ct., 102 Mo. 531, 15 S. W. 79.

New Jersey.— Walling *v.* Deckertown, 64 N. J. L. 203, 44 Atl. 864; Walter *v.* Union, 33 N. J. L. 350.

New York.— Rochester *v.* Bloss, 173 N. Y. 646, 66 N. E. 1105 [*affirming* 77 N. Y. App. Div. 28, 79 N. Y. Suppl. 236]; Tingue *v.* Port Chester, 101 N. Y. 294, 4 N. E. 625; Gloversville *v.* Howell, 70 N. Y. 287 [*affirming* 7 Hun 345]; People *v.* Kent, 83 N. Y. App. Div. 554, 82 N. Y. Suppl. 172.

Oregon.— David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

Pennsylvania.— *In re* Pottstown, 117 Pa. St. 538, 12 Atl. 573.

Tennessee.— Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002; Luehrman *v.* Shelby County Taxing Dist., 2 Lea 425; Quarles *v.* Sparta, 2 Tenn. Ch. App. 714.

Texas.— State *v.* Larkin, 41 Tex. Civ. App. 253, 90 S. W. 912.

See 44 Cent. Dig. tit. "Statutes," § 170.

81. *California.*— Vernon School Dist. *v.* Los Angeles Bd. of Education, 125 Cal. 593, 58 Pac. 175.

Florida.— Hayes *v.* Walker, 54 Fla. 163, 44 So. 747; Ormond *v.* Shaw, 50 Fla. 445, 39 So. 108.

Georgia.— Smith *v.* Macon, 129 Ga. 227, 58 S. E. 713; Toney *v.* Macon, 119 Ga. 83, 46 S. E. 80.

Illinois.— McGurn *v.* Chicago Bd. of Education, 133 Ill. 122, 24 N. E. 529.

Louisiana.— New Orleans *v.* Bright, 28 La. Ann. 873; Teaulet's Succession, 28 La. Ann. 42; State *v.* Daniel, 28 La. Ann. 38.

Michigan.— Fairview *v.* Detroit, 150 Mich. 1, 113 N. W. 368; Atty.-Gen. *v.* Springwells Tp. Bd., 143 Mich. 523, 107 N. W. 87; People *v.* Bradley, 36 Mich. 447.

Minnesota.— Christianson *v.* Tracy, 104 Minn. 533, 116 N. W. 925; Hunter *v.* Tracy, 104 Minn. 378, 116 N. W. 922.

Texas.— Oak Cliff *v.* State, 97 Tex. 383, 79 S. W. 1 [*affirming* (Civ. App. 1903) 77 S. W. 24].

See 44 Cent. Dig. tit. "Statutes," § 169.

82. *Ex p.* Wells, 21 Fla. 280.

83. Holden *v.* Osceola County, 77 Mich. 202, 43 N. W. 969; Morris *v.* State, 62 Tex. 728.

84. Frost *v.* Wilson, 70 Mo. 664; Hannibal *v.* Marion County, 69 Mo. 571; Matter of McAdam, 7 N. Y. Suppl. 454 [*affirming* 5 N. Y. Suppl. 387]; People *v.* Coleman, 4 N. Y. Suppl. 417.

85. *Alabama.*— Judson *v.* Bessemer, 87 Ala. 240, 6 So. 267, 4 L. R. A. 742. But see Albertville *v.* Rains, 107 Ala. 691, 18 So. 255.

Georgia.— Bass *v.* Lawrence, 124 Ga. 75, 52 S. E. 296.

Illinois.— Guild *v.* Chicago, 82 Ill. 472.

Louisiana.—Browne *v.* Providence, 114 La. 631, 38 So. 478.

Minnesota.— Crookston *v.* Polk County, 79 Minn. 283, 82 N. W. 586, 79 Am. St. Rep. 453.

Nebraska.— Cathers *v.* Hennings, 76 Nebr. 295, 107 N. W. 586; State *v.* Aitken, 62 Nebr. 428, 87 N. W. 153; State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348.

Nevada.— State *v.* Ruhe, 24 Nev. 251, 52 Pac. 274.

New Jersey.— Coward *v.* North Plainfield, 63 N. J. L. 61, 42 Atl. 805.

New York.— Harris *v.* People, 59 N. Y. 599.

Pennsylvania.— Allentown *v.* Wagner, 214 Pa. St. 210, 63 Atl. 697; Franklin *v.* Hancock, 204 Pa. St. 110, 53 Atl. 644; *In re* Lackawanna Tp., 160 Pa. St. 494, 28 Atl. 927.

Washington.— State *v.* New Whatcom, 3 Wash. 7, 27 Pac. 1020; King County *v.* Davies, 1 Wash. 290, 24 Pac. 540.

See 44 Cent. Dig. tit "Statutes," § 171.

86. *Alabama.*— *Ex p.* Moore, 62 Ala. 471.

Illinois.— People *v.* Hazelwood, 116 Ill. 319, 6 N. E. 480.

Indiana.— Clinton Tp. *v.* Draper, 14 Ind. 295.

Kansas.— State *v.* Lewelling, 51 Kan. 562, 33 Pac. 425.

Michigan.— Paye *v.* Grosse Pointe Tp., 134 Mich. 524, 96 N. W. 1077.

New Jersey.— Cooper *v.* Springer, 65 N. J. L. 161, 46 Atl. 589.

New York.— More *v.* Deyoe, 22 Hun 208.

Oregon.— Clemmensen *v.* Peterson, 35 Oreg. 47, 56 Pac. 1015.

United States.— Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431.

See 44 Cent. Dig. tit. "Statutes," § 168.

ing [87] towns, creating and organizing [88] or altering [89] counties, or constituting a district.[90]

(VI) *PRISONS, REFORMATORIES, ETC.* Acts with general titles are usually valid, covering prisons,[91] reformatories,[92] and asylums.[93]

(VII) *PUBLIC OFFICERS.* Titles of acts are generally held to be valid covering public officers, their powers and duties,[94] and their compensation and

87. People *v.* Martin, 178 Ill. 611, 53 N. E. 309; Nefing *v.* Pontiac, 56 Ill. 172; Hammond *v.* Lesseps, 31 La. Ann. 337; Stambaugh Tp. *v.* Iron County Treasurer, 153 Mich. 104, 116 N. W. 569.

88. *California.*— Kings County *v.* Johnson, 104 Cal. 198, 37 Pac. 870.

Colorado.— Denver School Dist. No. 1 *v.* Arapahoe County School Dist. No. 7, 33 Colo. 43, 78 Pac. 690.

Florida.— Lake County *v.* State, 24 Fla. 263, 4 So. 795.

Indiana.— Brandon *v.* State, 16 Ind. 197.

Kansas.— State *v.* Hordey, 41 Kan. 630, 21 Pac. 601; Philpin *v.* McCarty, 24 Kan. 393.

Maryland.— Hamilton *v.* Carroll, 82 Md. 326, 33 Atl. 648.

Minnesota.— State *v.* Red Lake County, 67 Minn. 352, 69 N. W. 1083.

New York.— People *v.* Backus, 11 N. Y. App. Div. 147, 42 N. Y. Suppl. 899 [*affirmed* in 153 N. Y. 686, 48 N. E. 1106].

Oregon.— Allison *v.* Hatton, 46 Oreg. 370, 80 Pac. 101.

See 44 Cent. Dig. tit "Statutes," § 168.

89. *Alabama.*— *Ex p.* Upshaw, 45 Ala. 234.

California.— Wheeler *v.* Herbert, 152 Cal. 224, 92 Pac. 353.

Kentucky.—Walters *v.* Richardson, 93 Ky. 374, 20 S. W. 279, 14 Ky. L. Rep. 410.

Minnesota.— State *v.* Honerud, 66 Minn. 32, 68 N. W. 323.

Nevada.— Humboldt County *v.* Churchill County, 6 Nev. 30.

Pennsylvania.— Blood *v.* Marcelliott, 53 Pa. St. 391.

Texas.— Marsalis *v.* Craeger, 2 Tex. Civ. App. 368, 21 S. W. 545; Fielder *v.* State, 40 Tex. Cr. 184, 49 S. W. 376.

See 44 Cent. Dig. tit. "Statutes," § 168.

90. Dillard *v.* Webb, 55 Ala. 468. But see Montgomery *v.* State, 88 Ala. 141, 7 So. 51.

91. Bond *v.* State, 78 Md. 523, 18 Atl. 407; People *v.* Huntley, 112 Mich. 569, 71 N. W. 178.

92. *California.*— *Ex p.* Liddell, 93 Cal. 633, 29 Pac. 251.

Indiana.— Jarrard *v.* State, 116 Ind. 98, 17 N. E. 912; McCaslin *v.* State, 44 Ind. 151.

Kansas.— *In re* Sanders, 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603.

Minnesota.— State *v.* Cassidy, 22 Minn. 312, 21 Am. Rep. 765.

Texas.—Washington *v.* State, 28 Tex. App. 411, 13 S. W. 606.

See 44 Cent. Dig. tit. "Statutes," § 166.

93. Klein *v.* Kinkead, 16 Nev. 194; *In re* Kol, 10 N. D. 493, 88 N. W. 273.

An inquest in lunacy is properly included in "an act relating to charities and charitable and reformatory institutions." *In re* Schley, 71 Kan. 266, 80 Pac. 631.

94. *Alabama.*— State *v.* Bracken, 154 Ala. 151, 45 So. 841; State *v.* McCary, 128 Ala. 139, 30 So. 641; State *v.* Rogers, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520; Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 46 Am. St. Rep. 98, 21 L. R. A. 529; Board of Revenue *v.* Barber, 53 Ala. 589.

California.— People *v.* Cobb, 133 Cal. 74, 65 Pac. 325.

Colorado.— People *v.* Wright, 30 Colo. 439, 71 Pac. 365.

Georgia.— Collins *v.* Russell, 107 Ga. 423, 33 S. E. 444; Stewart *v.* Collier, 91 Ga. 117, 17 S. E. 279.

Illinois.— Chicago *v.* Wolf, 221 Ill. 130, 77 N. E. 414; People *v.* Wright, 70 Ill. 388.

Indiana.— Peelle *v.* State, 161 Ind. 378, 68 N. E. 682; State *v.* Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418; Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26.

Kansas.— Rogers *v.* Morrill, 55 Kan. 737, 42 Pac. 355; State *v.* Stunkle, 41 Kan. 456, 21 Pac. 675.

Kentucky.— Hoke *v.* Com., 79 Ky. 567.

Louisiana.— State *v.* Leovy, 21 La. Ann. 538.

Maryland.— Calvert County *v.* Heelen, 72 Md. 603, 20 Atl. 130.

Michigan.— Tarsney *v.* Detroit Bd. of Education, 147 Mich. 418, 110 N. W. 1093; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Minnesota.— Gaare *v.* Clay County, 90 Minn. 530, 97 N. W. 422; Ek *v.* St. Paul Permanent Loan Co., 84 Minn. 245, 87 N. W. 844.

New Jersey.— Vreeland *v.* Pierson, 70 N. J. L. 508, 57 Atl. 151; Boorum *v.* Connelly, 66 N. J. L. 197, 48 Atl. 955, 88 Am. St. Rep. 469; *In re* Passaic Sewer Assessment, 54 N. J. L. 156, 23 Atl. 517.

New York.— *In re* Knaust, 101 N. Y. 188, 4 N. E. 338; People *v.* Brinkerhoff, 68 N. Y. 259; People *v.* Coler, 71 N. Y. App. Div. 584, 76 N. Y. Suppl. 205 [*affirmed* in 173 N. Y. 103, 65 N. E. 956]; Sweet *v.* Syracuse, 60 Hun 28, 14 N. Y. Suppl. 421 [*reversing* 11 N. Y. Suppl. 114].

Pennsylvania.—Com. *v.* Lloyd, 2 Pa. Super. Ct. 6; Com. *v.* Dillon, 17 Pa. Co. Ct. 227.

South Carolina.— Bond Debt Cases, 12 S. C. 200; Morton *v.* Comptroller-Gen., 4 S. C. 430.

Texas.— International, etc., R. Co. *v.* Smith County, 54 Tex. 1.

See 44 Cent. Dig. tit. "Statutes," § 189.

What is germane.— In a statute creating a public office, whatever is regarded by the

fees.[95] And this rule has been held to be equally applicable to the amendment[96] or repeal[97] of such acts.

(VIII) *SCHOOLS AND SCHOOL-DISTRICTS.* As a rule titles referring to schools and school-districts generally are upheld as germane.[98]

legislature as requisite to describe or establish the nature of the office, the character, limit, and effect of the powers communicated, the extent of the duties intended to be imposed on its incumbent, and the official and personal rights intended to be claimed and exercised by him, as well as all provisions intended to afford means of carrying out the objects contemplated by the establishment of such office, may be regarded as part of the subject-matter and entering into the proper subject of the statute. Morton *v.* Comptroller-Gen., 4 S. C. 430.

95. *California.*— Jackson *v.* Baehr, 138 Cal. 266, 71 Pac. 167; Ream *v.* Siskiyou County, 36 Cal. 620.

Colorado.— Merwin *v.* Boulder County, 29 Colo. 169, 67 Pac. 285.

Indiana.— Hargis *v.* Perry County, 165 Ind. 194, 73 N. E. 915, 165 Ind. 186, 73 N. E. 912; Garrigus *v.* Howard County, 157 Ind. 103, 60 N. E. 948; Henderson *v.* State, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469; Bitters *v.* Fulton County, 81 Ind. 125.

Kansas.— Hardy *v.* Kingman County, 65 Kan. 111, 68 Pac. 1078; Lowe *v.* Bourbon County, 6 Kan. App. 603, 51 Pac. 579; Higgins *v.* Mitchell County, 6 Kan. App. 314, 51 Pac. 72.

Kentucky.— Com. *v.* Bailey, 81 Ky. 395.

Michigan.— Chipman *v.* Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024.

Montana.— Jobb *v.* Meagher County, 20 Mont. 424, 51 Pac. 1034.

Nebraska.— State *v.* Ream, 16 Nebr. 681, 21 N. W. 398.

New York.— Conner *v.* New York, 5 N. Y. 285 [*affirming* 2 Sandf. 355]; New York *v.* Gorman, 26 N. Y. App. Div. 191, 49 N. Y. Suppl. 1026.

Pennsylvania.— Berks County *v.* Linderman, 30 Pa. Super. Ct. 119.

Washington.— State *v.* Pierce County, 48 Wash. 461, 93 Pac. 920.

See 44 Cent. Dig. tit. "Statutes," § 190.

96. *Colorado.*— Colorado Farm, etc., Co. *v.* Beerbolm, 43 Colo. 464, 96 Pac. 443. See also Stocknan *v.* Brooks, 17 Colo. 248, 29 Pac. 746.

Illinois.— Morrison *v.* People, 196 Ill. 454, 63 N. E. 989.

Iowa.— Henkle *v.* Keota, 68 Iowa 334, 27 N. W. 250.

Kansas.— John *v.* Reaser, 31 Kan. 406, 2 Pac. 771.

Kentucky.— Wilson *v.* Louisville, 2 Duv. 499.

Minnesota.— State *v.* Browne, 56 Minn. 269, 57 N. W. 659.

Missouri.— State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717.

Montana.— Dowty *v.* Pittwood, 23 Mont. 113, 57 Pac. 727.

Nebraska.— State *v.* Eskew, 64 Nebr. 600, 90 N. W. 629.

Texas.— Johnson *v.* Martin, 75 Tex. 33, 12 S. W. 321; State *v.* Larkin, 41 Tex. Civ. App. 253, 90 S. W. 912.

Utah.— Edler *v.* Edwards, 34 Utah 13, 95 Pac. 367.

See 44 Cent. Dig. tit. "Statutes," § 191.

97. *Georgia.*— Sayer *v.* Douglas County, 119 Ga. 550, 46 S. E. 654; Sayer *v.* Brown, 119 Ga. 539, 46 S. E. 649.

Louisiana.— Hope *v.* New Orleans, 106 La. 345, 30 So. 842.

Maryland.— Herbert *v.* Baltimore County, 97 Md. 639, 55 Atl. 376; Cecil County *v.* Banks, 80 Md. 321, 30 Atl. 919; Drennen *v.* Banks, 80 Md. 310, 30 Atl. 655.

Oregon.— State *v.* Steele, 39 Oreg. 419, 65 Pac. 515.

Texas.— State *v.* Larkin, 41 Tex. Civ. App. 253, 90 S. W. 912.

Washington.— State *v.* Newland, 37 Wash. 428, 79 Pac. 983.

See 44 Cent. Dig. tit. "Statutes," § 191.

98. *Alabama.*— Courtner *v.* Etheredge, 149 Ala. 78, 43 So. 368; Dickinson *v.* Cunningham, 140 Ala. 527, 37 So. 345; State *v.* Griffin, 132 Ala. 47, 31 So. 112.

California.— French *v.* Davidson, 143 Cal. 658, 77 Pac. 663.

Georgia.— Georgia R., etc., Co. *v.* Hutchinson, 125 Ga. 762, 54 S. E. 725; Smith *v.* Bohler, 72 Ga. 546.

Indiana.— Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18; State *v.* Bailey, 157 Ind. 324, 61 N. E. 730; Gory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738.

Iowa.— State *v.* Grefe, 139 Iowa 18, 117 N. W. 13; Boggs *v.* Cass School Tp., 128 Iowa 15, 102 N. W. 796; State *v.* Squires, 26 Iowa 340.

Kansas.— Atchison County School Dist. No. 3 *v.* Atzenweiler, 67 Kan. 609, 73 Pac. 927; Reynolds *v.* Topeka Bd. of Education, 66 Kan. 672, 72 Pac. 274; Ash *v.* Thorp, 65 Kan. 60, 68 Pac. 1067; Topeka Bd. of Education *v.* State, 64 Kan. 6, 67 Pac. 559.

Michigan.— Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 92 N. W. 289.

Minnesota.— Putnam *v.* St. Paul, 75 Minn. 514, 78 N. W. 90; State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115; State *v.* Phillips, 73 Minn. 77, 75 N. W. 1029.

Missouri.— State *v.* Bronson, 115 Mo. 271, 21 S. W. 1125; State *v.* Macklin, 41 Mo. App. 335.

Montana.— Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462.

Nebraska.— Affholder *v.* State, 51 Nebr. 91, 70 N. W. 544; State *v.* Bowers, 10 Nebr. 12, 4 N. W. 379.

New York.— Gordon *v.* Cornes, 47 N. Y. 608.

Pennsylvania.— Com. *v.* Gilligan, 195 Pa. St. 504, 46 Atl. 124 [*affirming* 10 Kulp 117]; Com. *v.* Reynolds, 8 Pa. Co. Ct. 568, 5 Kulp 547.

(IX) *TAXES.* Statutes are generally valid with titles reasonably apt concerning taxes,[99] or concerning license taxes.[1] Similarly statutes amending[2] or

Texas.— Felder *v.* State, 50 Tex. Cr. 388, 97 S. W. 701.

Washington.— State *v.* Packenham, 40 Wash. 403, 82 Pac. 597; Callvert *v.* Winsor, 26 Wash. 368, 67 Pac. 91.

Wisconsin.— State *v.* Vanhuse, 120 Wis. 15, 97 N. W. 503.

See 44 Cent. Dig. tit. "Statutes," § 175.

99. *Alabama.*— Montgomery *v.* Moore, 140 Ala. 638, 37 So. 291, title as to bond issue, act for raising funds. Ellis *v.* Miller, 136 Ala. 185, 3 So. 890.

California.— *In re* Campbell, 143 Cal. 623, 77 Pac. 674; *Ex p.* Pfirrmann, 134 Cal. 143, 66 Pac. 205; Clarke *v.* Police, etc., Ins. Bd., 123 Cal. 24, 55 Pac. 576; Pennie *v.* Reis, 80 Cal. 266, 22 Pac. 176.

Colorado.— American Smelting, etc., Co. *v.* People, 34 Colo. 240, 82 Pac. 531; *In re* Magnes, 32 Colo. 527, 77 Pac. 853; Parsons *v.* People, 32 Colo. 221, 76 Pac. 666.

Delaware.— Monagban *v.* Lewis, 5 Pennew. 218, 59 Atl. 948.

Georgia.— Georgia, R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251; McGhee *v.* State, 92 Ga. 21, 17 S. E. 276; Columbus Southern R. Co. *v.* Wright, 89 Ga. 574, 15 S. E. 293.

Illinois.— Danville *v.* Danville Water Co., 180 Ill. 235, 54 N. E. 224; Manchester *v.* People, 178 Ill. 285, 52 N. E. 964; Burke *v.* Monroe County, 77 Ill. 610.

Indiana.— Warren *v.* Britton, 84 Ind. 14; State *v.* Montgomery County, 26 Ind. 522; Coffman *v.* Keightley, 24 Ind. 509.

Iowa.— Newton *v.* Jasper County, 135 Iowa 27, 112 N. W. 167; Beresheim *v.* Arnd, 117 Iowa 83, 90 N. W. 506.

Kansas.— Lincoln Mortg., etc., Co. *v.* Davis, 76 Kan. 639, 92 Pac. 707; Douglass *v.* Leavenworth County, 75 Kan. 6, 88 Pac. 557; State *v.* Ewing, 22 Kan. 708.

Kentucky.— Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138, 32 Ky. L. Rep. 129; McGlone *v.* Womack, 129 Ky. 274, 111 S. W. 688, 33 Ky. L. Rep. 811, 864, 17 L. R. A. N. S. 855; Brown-Foreman Co. *v.* Com., 125 Ky. 402, 101 S. W. 321, 30 Ky. L. Rep. 793.

Louisiana.— Levy's Succession, 115 La. 377, 39 So. 37, 8 L. R. A. N. S. 1180; Stewart's Succession, 41 La. Ann. 127, 6 So. 587; City Nat. Bank *v.* Mahan, 21 La. Ann. 751.

Michigan.— National Loan, etc., Co. *v.* Detroit, 136 Mich. 451, 99 N. W. 380; St. Mary's Power Co. *v.* Chandler-Dunbar Water Power Co., 133 Mich. 470, 95 N. W. 554; State Tax Com'rs *v.* Grand Rapids, 124 Mich. 491, 83 N. W. 209.

Minnesota.—State *v.* Bigelow, 52 Minn. 307, 54 N. W. 95.

Missouri.— Elting *v.* Hickman, 172 Mo. 237, 72 S. W. 700; State *v.* Bengsch, 170 Mo. 81, 70 S. W. 710; State *v.* Shepherd, 74 Mo. 310.

Montana.— Western Ranches *v.* Custer County, 28 Mont. 278, 72 Pac. 659.

Nebraska.— Nebraska Cent. Bldg., etc., Assoc. *v.* Lancaster County, 78 Nebr. 472, 111 N. W. 147, 78 Nebr. 478, 112 N. W. 314; Woodrough *v.* Douglas County, 71 Nebr. 354, 98 N. W. 1092.

New Jersey.— Devine *v.* Franks, (Ch. 1900) 47 Atl. 228; Van Riper *v.* North Plainfield Tp., 43 N. J. L. 349; Richards *v.* Hammer, 42 N. J. L. 435.

New York.— Matter of Lockitt, 58 Misc. 5, 110 N. Y. Suppl. 32; Prentice *v.* Weston, 47 Hun 121 [*affirmed* in 111 N. Y. 460, 18 N. E. 720]; Outwater *v.* New York, 18 How. Pr. 572.

North Dakota.— Paine *v.* Dickey County, 8 N. D. 581, 80 N. W. 770.

Pennsylvania.— Philadelphia Co.'s Petition, 210 Pa. St. 490, 60 Atl. 93; New Brighton *v.* Biddell, 201 Pa. St. 96, 50 Atl. 989 [*affirming* 14 Pa. Super. Ct. 207]; Bruce *v.* Pittsburg, 166 Pa. St. 152, 30 Atl. 831.

South Dakota.— Walling *v.* Lummis, 16 S. D. 349, 92 N. W. 1063.

Tennessee.—State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242; Arbuckle *v.* McCutcheon, 111 Tenn. 514, 77 S. W. 772; Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

Texas.— State *v.* Missouri, etc., R. Co., (1907) 100 S. W. 146.

Virginia.— Morgan *v.* Com., 98 Va. 812, 35 S. E. 448.

Washington.— *In re* White, 42 Wash. 360, 84 Pac. 831; State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

West Virginia.— McEldowney *v.* Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609.

United States.— Read *v.* Plattsmouth, 107 U. S. 568, 2 S. Ct. 208, 27 L. ed. 414; Baker *v.* Kaiser, 126 Fed. 317, 61 C. C. A. 303; Gibson County *v.* Pullman Southern Car Co., 42 Fed. 572.

See 44 Cent. Dig. tit. "Statutes," § 173.

1. *Iowa.*— Cook *v.* Marshall County, 119 Iowa 384, 93 N. W. 372, 104 Am. St. Rep. 283.

Kentucky.— Rumbley *v.* Hall, 107 Ky. 349, 54 S. W. 4, 21 Ky. L. Rep. 1071; Nunn *v.* Citizens' Bank, 107 Ky. 262, 53 S. W. 665, 21 Ky. L. Rep. 961.

Louisiana.— Alexandria *v.* White, 46 La. Ann. 449, 15 So. 15.

Maryland.— Steenken *v.* State, 88 Md. 708, 42 Atl. 212; McGrath *v.* State, 46 Md. 631; Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226.

New Jersey.— Johnson *v.* Asbury Park, 58 N. J. L. 604, 33 Atl. 850.

Pennsylvania.— Com. *v.* Lorman, 21 Pa. Co. Ct. 481.

See 44 Cent. Dig. tit. "Statutes," § 173.

2. *California.*— Butte County *v.* Merrill, 141 Cal. 396, 74 Pac. 1036; Murphy *v.* Bondshu, 2 Cal. App. 249, 83 Pac. 278.

Illinois.— *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810.

Kentucky.— Rosenham *v.* Com., 2 S. W. 230, 7 Ky. L. Rep. 590.

Louisiana.— Murphy *v.* St. Mary Parish Police Jury, 118 La. 401, 42 So. 979.

repealing [3] the tax laws are usually upheld as constitutional within the application of the same rule.

d. Personal Rights — (i) *In General.* Acts regulating persons and personal rights to be valid must have proper titles.[4]

(ii) *Occupations.* Occupations must be regulated by statutes of apt titles.[5]

Michigan.— Reed *v.* Auditor-Gen., 146 Mich. 208, 109 N. W. 275; Jackson *v.* Jackson County Treasurer, 117 Mich. 305, 75 N. W. 617.

Minnesota.— Crookston *v.* Polk County, 79 Minn. 283, 82 N. W. 586, 79 Am. St. Rep. 453; State *v.* Olson, 58 Minn. 1, 59 N. W. 634.

Missouri.— Ward *v.* Gentry County, 135 Mo. 309, 36 S. W. 648.

Montana.— Hotchkiss *v.* Marion, 12 Mont. 218, 29 Pac. 821.

New Jersey.— American Surety Co. *v.* Great White Spirit Co., 58 N. J. Eq. 526, 43 Atl. 579; Tax-Payers' Protective Assoc. *v.* Kirkpatrick, 41 N. J. Eq. 347, 7 Atl. 625; Kirkpatrick *v.* New Brunswick, 40 N. J. Eq. 46.

New York.— Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401.

North Dakota.— State Finance Co. *v.* Mather, 15 N. D. 386, 109 N. W. 350.

Pennsylvania.— Com. *v.* Sharon Coal Co., 164 Pa. St. 284, 30 Atl. 127, 128; Com. *v.* Wilkes Barre, etc., R. Co., 162 Pa. St. 614, 29 Atl. 696, 14 Pa. Co. Ct. 205.

South Carolina.— State *v.* County Treasurer, 4 S. C. 520.

Tennessee.— Cannon *v.* Mathes, 8 Heisk. 504.

Virginia.— Kelly *v.* Gwatkin, 108 Va. 6, 60 S. E. 749; Whitlock *v.* Hawkins, 105 Va. 242, 53 S. E. 401.

See 44 Cent. Dig. tit. "Statutes," § 174.

3. Com. *v.* Godshaw, 92 Ky. 435, 17 S. W. 737, 13 Ky. L. Rep. 572; New Orleans *v.* Dunbar, 28 La. Ann. 722; Miller *v.* Wicomico County, 107 Md. 438, 69 Atl. 118; Washington County *v.* Franklin R. Co., 34 Md. 159.

4. *Illinois.*— Olsen *v.* People, 219 Ill. 40, 76 N. E. 89, title referring to divorce — act forbidding remarriage.

Indiana.— Egoff *v.* Madison County, 170 Ind. 238, 84 N. E. 151 (board of children's guardians with necessary detail); Barnett *v.* Harshbarger, 105 Ind. 410, 5 N. E. 718 (title, "An act concerning husband and wife —" act removing disabilities of married women).

Michigan.— People *v.* McGlaughlin, 108 Mich. 516, 66 N. W. 385; People *v.* Congdon, 77 Mich. 351, 43 N. W. 986, title as to changing names of adopted minors — act prescribing rights and duties of adopting parent.

Minnesota.— Atwell *v.* Parker, 93 Minn. 462, 101 N. W. 946.

Nebraska.— Messenger *v.* State, 25 Nebr. 674, 41 N. W. 638, title including only "citizens" is void as extended in the act to "all persons" who are not citizens.

Pennsylvania.— Kelley *v.* Mayberry Tp., 154 Pa. St. 440, 26 Atl. 595 (actions by husband and wife); U. S. *v.* Randolph, 1 Pittsb. 24 (title referring to seamen — act making it an offense to forge any evidence of citizenship).

Washington.— McKnight *v.* McDonald, 34 Wash. 98, 74 Pac. 1060, title property rights of husband and wife — act as to community property.

See 44 Cent. Dig. tit. "Statutes," § 140.

An act entitled, An act to enforce the 13th article of the constitution, and prohibiting the ingress of negroes and mulattoes into the state, is not repugnant to the constitution, as containing matter not expressed in the title. Hatwood *v.* State, 18 Ind. 492.

5. *Colorado.*— Burcher *v.* People, 41 Colo. 495, 93 Pac. 14, 124 Am. St. Rep. 143.

Florida.— State *v.* Palmes, 23 Fla. 620, 3 So. 171.

Illinois.— Allardt *v.* People, 197 Ill. 501, 64 N. E. 533.

Indiana.— Henderson *v.* London, etc., Ins. Co., 135 Ind. 23, 34 N. E. 565, 41 Am. St. Rep. 410, 20 L. R. A. 827, title "fireman's pension fund"— act affecting insurance companies.

Iowa.— State *v.* Bristow, 131 Iowa 664, 109 N. W. 199.

Louisiana.— Beary *v.* Narrau, 113 La. 1034, 37 So. 961; Williams *v.* Payson, 14 La. Ann. 7, title "act relating to pilots"— act granting salvage on anchors and cables.

New Jersey.—Sneath *v.* Mager, 64 N. J. L. 94, 44 Atl. 983; Grover *v.* Ocean Grove Camp-Meeting Assoc., 45 N. J. L. 399.

Pennsylvania.— Com. *v.* Schulte, 26 Pa. Super. Ct. 95; Com. *v.* Hartzell, 5 Pa. Dist. 148, 17 Pa. Co. Ct. 91; Com. *v.* Moore, 4 Pa. Dist. 649, 16 Pa. Co. Ct. 481; Com. *v.* Lehr, 16 Pa. Co. Ct. 532.

Tennessee.— Ragio *v.* State, 86 Tenn. 272, 6 S. W. 401, title as to barbering on Sunday act covering bath-rooms.

United States.— Northern Pac. Express Co. *v.* Metschan, 90 Fed. 80, 32 C. C. A. 530.

See 44 Cent. Dig. tit. "Statutes," § 145.

Acts on the following subjects were valid: Amusements (State *v.* Blackstone, 115 Mo. 424, 22 S. W. 370); attorneys (People *v.* Erbaugh, 42 Colo. 480, 94 Pac. 349); banks (State *v.* Arnold, 140 Ind. 628, 38 N. E. 820; State *v.* Leland, 91 Minn. 321, 98 N. W. 92); barbers (State *v.* Briggs, 45 Oreg. 366, 77 Pac. 750, 78 Pac. 361; State *v.* Bergfeldt, 41 Wash. 234, 83 Pac. 177; State *v.* Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893); carriers (Samuelson *v.* State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805); cigarettes (Alperson *v.* Whalen, 74 Nebr. 680, 105 N. W. 474); commercial agencies (State *v.* Morgan, 2 S. D. 32, 48 N. W. 314); contracts redeemable in the order of their issue (State *v.* Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S. W. 1075); cotton bales (Park *v.*

e. Property Rights — (I) *Rights, Transfers, and Encumbrances.* Statutes are valid containing proper provisions reasonably germane to general titles relating to descent,[6] encumbrances,[7] protecting property,[8] title to property,[9] transfers,[10] and the rights of husband or wife and family.[11]

Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234); dentistry (Gothard *v.* People, 32 Colo. 11, 74 Pac. 890; Morris *v.* State, 117 Ga. 1, 43 S. E. 368; State *v.* Doerring, 194 Mo. 398, 92 S. W. 489); elevator companies (State *v.* Minneapolis, etc., El. Co., 17 N. D. 31, 114 N. W. 485; State *v.* Minneapolis, etc., El. Co., 17 N. D. 23, 114 N. W. 482); food (State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355; People *v.* Rotter, 131 Mich. 250, 91 N. W. 167; People *v.* Worden Grocer Co., 118 Mich. 604, 77 N. W. 315; Butler *v.* Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 638; State *v.* McKinney, 29 Mont. 375, 74 Pac. 1095; Shivers *v.* Newton, 45 N. J. L. 469; Hathaway *v.* McDonald, 27 Wash. 659, 68 Pac. 376); insurance (Rayford *v.* Faulk, 154 Ala. 285, 45 So. 714; *In re* Pinkney, 47 Kan. 89, 27 Pac. 179; Boyer *v.* Grand Rapids Fire Ins. Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338; State *v.* Hickman, 63 N. J. L. 666, 44 Atl. 1099 [*affirming* 62 N. J. L. 499, 41 Atl. 942]); hotels (State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994; State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656); lodging-houses (Com. *v.* Muir, 180 Pa. St. 47, 36 Atl. 413); master and servant (Republic Iron, etc., Co. *v.* State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136; State *v.* Haun, 7 Kan. App. 509, 54 Pac. 130; State *v.* Justus, 85 Minn. 279, 88 N. W. 759, 89 Am. St. Rep. 550, 56 L. R. A. 757; Hamilton *v.* Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; Boyle *v.* Vanderhoof, 45 Minn. 31, 47 N. W. 396; De Both *v.* Rich Hill Coal, etc., Co., 141 Mo. 497, 42 S. W. 1081; State *v.* Anaconda Copper-Min. Co., 23 Mont. 498, 59 Pac. 854; Wenham *v.* State, 65 Nebr. 394, 91 N. W. 421, 58 L. R. A. 825; State *v.* Power, 63 Nebr. 496, 88 N. W. 769; Com. *v.* Jones, 4 Pa. Super. Ct. 362, 40 Wkly. Notes Cas. 424; Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246); medicine (People *v.* Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165 [*reversing* 96 Ill. App. 456]; People *v.* Blue Mountain Joe, 129 Ill. 370, 21 N. E. 923; State *v.* Edmunds, 127 Iowa 333, 101 N. W. 431; State *v.* Wilcox, 64 Kan. 789, 68 Pac. 634; State *v.* Lee, 106 La. 400, 31 So. 14; People *v.* Phippin, 70 Mich. 6, 37 N. W. 888; Little *v.* State, 60 Nebr. 749, 84 N. W. 248, 51 L. R. A. 717; Com. *v.* Clymer, 217 Pa. St. 302, 66 Atl. 560 [*affirming* 30 Pa. Super. Ct. 61]; *In re* Campbell, 197 Pa. St. 581, 47 Atl. 860); mining (Com. *v.* Reinecke Coal Min. Co., 117 Ky. 885, 79 S. W. 287, 25 Ky. L. Rep. 2027; State *v.* Murlin, 137 Mo. 297, 38 S. W. 923); opium (State *v.* Ah Sam, 15 Nev. 27, 27 Am. Rep. 454; Luck *v.* Sears, 29 Oreg. 421, 44 Pac. 693; *Ex p.* Yung Jon, 28 Fed. 308); oysters (McGrath *v.* State, 46 Md. 631; State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780); pharmacy (State *v.* Kumpfert, 115 La. 950, 40 So. 365; State *v.* Hall, 109 La. 290, 33 So. 318; State *v.* Donaldson, 41 Minn. 74, 42 N. W. 781; State *v.* Hamlett, 212 Mo. 80, 110 S. W. 1082); railways (Chicago, etc., R. Co. *v.* Anderson, 72 Nebr. 856, 101 N. W. 1019; Doeppenschmidt *v.* International, etc., R. Co., 100 Tex. 532, 101 S. W. 1080; International, etc., R. Co. *v.* Texas R. Comm., 99 Tex. 332, 89 S. W. 961 [*affirming* (Civ. App. 1905) 86 S. W. 16]; *In re* O'Neill, 41 Wash. 174, 83 Pac. 104, 3 L. R. A. N. S. 558); trade-marks (Com. *v.* Meads, 29 Pa. Super. Ct. 321; Com. *v.* Morton, 23 Pa. Co. Ct. 386); and warehousemen (Sykes *v.* People, 127 Ill. 117, 19 N. E. 705, 2 L. R. A. 461; State *v.* Koshland, 25 Oreg. 178, 35 Pac. 32).

6. Hudnall *v.* Ham, 172 Ill. 76, 49 N. E. 985; Barron *v.* Smith, 108 Md. 317, 70 Atl. 225.

7. *Illinois.*— Blumenthal *v.* Huerter, (1885) 3 N. E. 425.

Kansas.— Hutchinson First Nat. Bank *v.* Pearce, 76 Kan. 408, 92 Pac. 53; Otto Gas-Engine Works *v.* Hare, 64 Kan. 78, 67 Pac. 444.

Nebraska.— Van Duzer *v.* Mellinger, 66 Nebr. 508, 92 N. W. 738; Bonorden *v.* Kriz, 13 Nebr. 121, 12 N. W. 831.

Oregon.—Lawrey *v.* Sterling, 41 Oreg. 518, 69 Pac. 460.

Wisconsin.— Julien *v.* Model Bldg., etc., Assoc., 116 Wis. 79, 92 N. W. 561, 61 L. R. A. 668.

See 44 Cent. Dig. tit. "Statutes," § 150.

8. Com. *v.* Clark, 3 Pa. Super. Ct. 141.

9. *Alabama.*— Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

Minnesota.— *In re* Hegne-Hendrum Ditch No. 1, 80 Minn. 58, 82 N. W. 1094.

New Jersey.—Morris, etc., R. Co. *v.* Jersey City, 63 N. J. Eq. 45, 51 Atl. 387.

New York.— Leffmann *v.* Long Island R. Co., 120 N. Y. App. Div. 528, 105 N. Y. Suppl. 487 [*reversing* 47 Misc. 169, 93 N. Y. Suppl. 647].

North Dakota.— Power *v.* Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691.

Washington.— Goudy *v.* Meath, 38 Wash. 126, 80 Pac. 295.

See 44 Cent. Dig. tit. "Statutes," § 150.

Compare Howard *v.* Schneider, 10 Kan. App. 137, 62 Pac. 435; Ellinger *v.* Com., 102 Va. 100, 45 S. E. 807.

10. Henry *v.* Henry, 13 Ind. 250; Calloway *v.* Cooley, 50 Kan. 743, 32 Pac. 372; Johnston *v.* Wood, 19 Wash. 441, 53 Pac. 707; Swinburne *v.* Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932. But see Walker *v.* State, 49 Ala. 329 (title "to restrict sale," act prohibiting destruction of mortgaged personalty); Carr *v.* Thomas, 18 Fla. 736.

11. *California.*— Jones *v.* Falvella, 126 Cal. 24, 58 Pac. 311.

(II) *Animals, Fish, and Game.* Titles reasonably germane are upheld when applying to acts relating to animals [12] or protecting fish, game, and birds [13] by proper amendments.[14]

(III) *Contracts.* Contract rights may be regulated by acts with titles of a general nature if germane.[15]

Florida.— Saxon *v.* Rawls, 51 Fla. 555, 41 So. 594.

Indiana.— Scott *v.* Scott, 13 Ind. 225.

Louisiana.—Bienvenu's Succession, 106 La. 595, 31 So. 193; Aaron's Succession, 11 La. Ann. 671; Lanzetti's Succession, 9 La. Ann. 329.

Missouri.— Ferguson *v.* Gentry, 206 Mo. 189, 104 S. W. 104.

Nebraska.— Holmes *v.* Mason, 80 Nebr. 448, 114 N. W. 606.

New Jersey.— Deegan *v.* Morrow, 31 N. J. L. 136.

Pennsylvania.— Mink *v.* Mink, 16 Pa. Co. Ct. 189.

United States.— Richards *v.* Bellingham Bay Land Co., 54 Fed. 209, 4 C. C. A. 296.

See 44 Cent. Dig. tit. "Statutes," § 150.

12. Street *v.* Hooten, 131 Ala. 492, 32 So. 580; *In re* Pratt, 19 Colo. 138, 34 Pac. 680 (title "branding, herding and care of stock" — act including punishment for stealing cattle); Cole *v.* Hall, 103 Ill. 30 (holding that the imposition of a license-fee on the owners or keepers of dogs is within the title of an act entitled, "An act to indemnify the owners of sheep in cases of damage committed by dogs"); Com. *v.* Depuy, 148 Pa. St. 201, 23 Atl. 896 (title taxation of dogs and protection of sheep — act providing that dogs are personal property and subject of larceny); March *v.* Smith, 11 York Leg. Rec. 42. *Compare* Clark *v.* Wallace County, 54 Kan. 634, 39 Pac. 225 (title "to protect fruit trees," etc.— act providing for bounties for gophers); Ives *v.* Norris, 13 Nebr. 252, 13 N. W. 276 (title "herding and driving" — act giving damages for castration of cattle).

Statutes prohibiting stock running at large were upheld in the following cases: State *v.* Patterson, 146 Ala. 128, 42 So. 19; Barnhill *v.* Teague, 96 Ala. 207, 11 So. 444; Erlinger *v.* Boneau, 51 Ill. 94; Wright *v.* Cunningham, 115 Tenn. 445, 91 S. W. 293; Peterson *v.* State, 104 Tenn. 127, 56 S. W. 834.

13. *Alabama.*— State *v.* Harrub, 95 Ala. 176, 10 So. 752, 36 Am. St. Rep. 195, 15 L. R. A. 761, title to regulate planting and taking of oysters — act prohibiting shipping out of state.

Illinois.— Meul *v.* People, 198 Ill. 258, 64 N. E. 1106.

Louisiana.— *In re* Schwartz, 119 La. 290, 44 So. 26, 121 Am. St. Rep. 516; Buras Levee Dist. *v.* Mialegvich, 52 La. Ann. 1292, 27 So. 790; State *v.* Karstendiek, 49 La. Ann. 1621, 22 So. 845, 39 L. R. A. 526.

Michigan.— Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982 (title "to regulate" the taking of fish covers a provision "prohibiting" the taking of fish during portions of the year); *In re* Yell, 107 Mich. 228, 65 N. W. 97; People *v.* Miller, 88 Mich. 383, 50 N. W. 296 (punishment for violation); People *v.* O'Neil, 71 Mich. 325, 39 N. W. 1.

Minnesota.— State *v.* Tower Lumber Co., 100 Minn. 38, 110 N. W. 254; State *v.* Chapel, 63 Minn. 535, 65 N. W. 940.

Missouri.— State *v.* Weber, 205 Mo. 36, 102 S. W. 955, 10 L. R. A. N. S. 1155 "game animals" in title includes deer either tame or wild.

Montana.— *In re* Terrett, 34 Mont. 325, 86 Pac. 266.

Nebraska.— McMahon *v.* State, 70 Nebr. 722, 97 N. W. 1035.

New Jersey.— State *v.* Harned, 73 N. J. L. 681, 64 Atl. 1134 [*affirming* 72 N. J. L. 353, 61 Atl. 5]; State *v.* Davis, 73 N. J. L. 680, 64 Atl. 1134 [*affirming* 72 N. J. L. 345, 61 Atl. 2]; Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612. But see State *v.* Steelman, 66 N. J. L. 518, 49 Atl. 978.

Oregon.— State *v.* Shaw, 22 Oreg. 287, 29 Pac. 1028.

Pennsylvania.— Com. *v.* Immel, 33 Pa. Super. Ct. 388; Com. *v.* Kenney, 32 Pa. Super. Ct. 544; Com. *v.* Barnett, 9 Pa. Dist. 517.

See 44 Cent. Dig. tit. "Statutes," § 162.

Compare Harris *v.* State, 110 Ga. 887, 36 S. E. 232.

14. *California.*— People *v.* Dobbins, 73 Cal. 257, 14 Pac. 860.

Illinois.— Magner *v.* People, 97 Ill. 320.

Indiana.— Lewis *v.* State, 148 Ind. 346, 47 N. E. 675.

Maryland.— State *v.* Applegarth, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812.

Michigan.— People *v.* Kirsch, 67 Mich. 539, 35 N. W. 157.

Montana.— *In re* Terrett, 34 Mont. 325, 86 Pac. 266, amendment providing new set of officers to administer law.

Pennsylvania.— Com. *v.* Rothermel, 27 Pa. Super. Ct. 648.

Texas.— Raymond *v.* Kibbe, 43 Tex. Civ. App. 209, 95 S. W. 727.

Virginia.— Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 116.

See 44 Cent. Dig. tit. "Statutes," § 163.

15. *Illinois.*— Flynn *v.* Coakley, 164 Ill. 470, 45 N. E. 1076.

Indiana.— Mewherter *v.* Price, 11 Ind. 199.

Michigan.— Inkster *v.* Carver, 16 Mich. 484.

New York.— Hurd *v.* Hannibal, etc., R. Co., 6 N. Y. Civ. Proc. 386; *In re* Tappan, 54 Barb. 225, 36 How. Pr. 390.

Tennessee.— Gilley *v.* Harrell, 118 Tenn. 115, 101 S. W. 424.

(IV) *CORPORATIONS* — (A) *Incorporation.* General statutes for the formation of corporations are usually germane to their titles.[16] And special acts of incorporation with proper provisions to facilitate the work of the corporation are commonly valid.[17]

Texas.— Taggart *v.* Hillman, 42 Tex. Civ. App. 71, 93 S. W. 245.

See 44 Cent. Dig. tit. "Statutes," § 152.

16. *Colorado.*— Jones *v.* Aspen Hardware Co., 21 Colo. 263, 40 Pac. 457, 52 Am. St. Rep. 220, 29 L. R. A. 143, title to fix fees for incorporation — act denying corporate power until fee paid.

Indiana.— Shipley *v.* Terre Haute, 74 Ind. 297, title for incorporation of railroad companies — act making stock-holders liable for debts. But see Grubbs *v.* State, 24 Ind. 295, title incorporation of insurance companies — act regulating agencies of foreign insurance companies.

Kansas.— Wichita *v.* Missouri, etc., Tel. Co., 70 Kan. 441, 78 Pac. 886, "formation" in title includes all rights to engage in business.

Michigan.— Atty.-Gen. *v.* Arnott, 145 Mich. 416, 108 N. W. 646 (imposing tax on capital stock); American Matinee Assoc. *v.* State Secretary, 140 Mich. 579, 104 N. W. 141; Fort St. Union Depot Co. *v.* Railroad Com'rs, 118 Mich. 340, 76 N. W. 631; McMorran *v.* Maccabees Great Hive, 117 Mich. 398, 75 N. W. 943; Ripley *v.* Evans, 87 Mich. 217, 49 N. W. 504 (title for organizing companies — act fixing stock-holders' liability); Fort St. Union Depot Co. *v.* Morton, 83 Mich. 265, 47 N. W. 228 (power given depot companies to take land by eminent domain not expressed in 'the title); Wardle *v.* Townsend, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511 (title for incorporation of insurance companies defining their powers and duties embraces winding up on insolvency); Tolford *v.* Church, 66 Mich. 431, 33 N. W. 913.

Minnesota.— Finnegan *v.* Noerenberg, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. Rep. 552, 18 L. R. A. 778 (limiting capital stock); Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

Nebraska.— State *v.* Moore, 48 Nebr. 870, 67 N. W. 876.

New Jersey.— Newark *v.* Mt. Pleasant Cemetery Co., 58 N. J. L. 168, 33 Atl. 396, exempting from taxation property of cemeteries organized under general laws.

Pennsylvania.— Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284; Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 3 Pa. Dist. 58, 14 Pa. Co. Ct. 88.

Washington.— State *v.* Nichols, 38 Wash. 309, 80 Pac. 462, trust company statute forbidding any corporation organized under any other name from using the word "trust" in its name.

United States.— Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592; Tabor *v.* Commereial Nat. Bank, 62 Fed. 383, 10 C. C. A. 429 (title formation of corporations — act as to filing reports).

See 44 Cent. Dig. tit. "Statutes," § 141.

Compare Bryan *v.* Kentucky Annual Conference Bd. of Education, 90 Ky. 322, 13 S. W. 276, 12 Ky. L. Rep. 12.

17. *Alabama.*— Montgomery Mut. Bldg., etc., Assoc. *v.* Robinson, 69 Ala. 413.

Georgia.— Bonner *v.* Milledgeville R. Co., 123 Ga. 115, 50 S. E. 973; Goldsmith *v.* Georgia R. Co., 62 Ga. 485; Davis *v.* Fulton Bank, 31 Ga. 69.

Illinois.—People *v.* Lowenthal, 93 Ill. 191; O'Leary *v.* Cook County, 28 Ill. 534; Schuyler County *v.* Farwell, 25 Ill. 181; Firemen's Benev. Assoc. *v.* Lounsberry, 21 Ill. 511, 74 Am. Dec. 115. But see Snell *v.* Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; People *v.* Protestant Deaconesses Inst., 71 Ill. 229.

Kentucky.— Geiger *v.* McLin, 78 Ky. 232; McReynolds *v.* Smallhouse, 8 Bush 447. But see Bryan *v.* Annual Conference Kentucky Bd. of Education, 90 Ky. 322, 13 S. W. 276, 12 Ky. L. Rep. 12.

Louisiana.— Morgan's Louisiana, etc., R., etc., Co. *v.* Barton, 51 La. Ann. 1338, 26 So. 271; Mississippi, etc., R. Co. *v.* Wooten, 36 La. Ann. 441; New Orleans *v.* New Orleans, etc., R. Co., 27 La. Ann. 414; Crescent City Gaslight Co. *v.* New Orleans Gaslight Co., 27 La. Ann. 138.

Minnesota.— O'Brien *v.* St. Croix Boom Corp., 75 Minn. 343, 77 N. W. 991.

New Jersey.— Vail *v.* Easton, etc., R. Co., 44 N. J. L. 237; Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

New York.— Bohmer *v.* Haffen, 161 N. Y. 390, 55 N. E. 1047 [*affirming* 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030]; Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789; New York Fire Underwriters *v.* Whipple, 2 N. Y. App. Div. 361, 37 N. Y. Suppl. 712; Freeman *v.* Panama R. Co., 7 Hun 122; Bohmer *v.* Haffen, 22 Misc. 565, 50 N. Y. Suppl. 857 [*affirmed* in 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030 (*affirmed* in 161 N. Y. 390, 55 N. E. 1047)]; *In re* Malone Water-Works Co., 15 N. Y. Suppl. 649; Central Crosstown R. Co. *v.* Twenty-Third St. R. Co., 54 How. Pr. 168. *Compare* Economic Power, etc., Co. *v.* Buffalo, 195 N. Y. 286, 88 N. E. 389 [*reversing* 128 N. Y. App. Div. 883, 112 N. Y. Suppl. 1127 (*affirming* 59 Misc. 571, 111 N. Y. Suppl. 443)].

Oregon.— State *v.* Portland Gen. Electric Co., 52 Oreg. 502, 95 Pac. 722, 98 Pac. 160.

Pennsylvania.— Com. *v.* Keystone Ben. Assoc., 171 Pa. St. 465, 32 Atl. 1027; Millvale Borough *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993; Carothers *v.* Philadelphia Co., 118 Pa. St. 468, 12 Atl. 314.

Texas.— *Ex p.* House, 36 Tex. 83.

Wisconsin.—Diana Shooting Club *v.* Lamoreaux, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898.

See 44 Cent. Dig. tit. "Statutes," § 142.

(B) *Regulation.* Regulations of corporations may be valid when covered by general words in the title.[18]

Compare Wade *v.* Atlantic Lumber Co., 51 Fla. 628, 41 So. 72.

Authorizing municipalities to subscribe to the capital stock may be included in a special charter without being mentioned in the title.

Georgia.— Hope *v.* Gainesville, 72 Ga. 246.

Illinois.— Hutchinson *v.* Self, 153 Ill. 542, 39 N. E. 27; Virden *v.* Allan, 107 Ill. 505; Abington *v.* Cabeen, 106 Ill. 200. But see People *v.* Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280.

South Carolina.—Floyd *v.* Perrin, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242; Connor *v.* Green Pond, etc., R. Co., 23 S. C. 427. And see Riley *v.* Charleston Union Station Co., 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579.

Virginia.—Powell *v.* Brunswick County, 88 Va. 707, 14 S. E. 543.

West Virginia.— State *v.* Wirt County Ct., 37 W. Va. 808, 17 S. E. 379.

See 44 Cent. Dig. tit. "Statutes," § 142.

Contra.— People *v.* Allen, 42 N. Y. 404; Peck *v.* San Antonio, 51 Tex. 490; Giddings *v.* San Antonio, 47 Tex. 548, 26 Am. Rep. 321 [*overruling* San Antonio *v.* Lane, 32 Tex. 405].

18. *Alabama.*— State *v.* Hartford F. Ins. Co., 99 Ala. 221, 13 So. 362; Tallassee Mfg. Co. *v.* Glenn, 50 Ala. 489.

California.— Anglo-Californian Bank *v.* Field, 146 Cal. 644, 80 Pac. 1080; People *v.* San Francisco Super. Ct., 100 Cal. 105, 34 Pac. 492.

Colorado.— Heilman *v.* Ludington, 26 Colo. 326, 57 Pac. 1075 [*affirming* 9 Colo. App. 548, 49 Pac. 377]; Burton *v.* Snyder, 22 Colo. 173, 43 Pac. 1004.

Idaho.— Katz *v.* Herrick, 12 Ida. 1, 86 Pac. 873.

Illinois.— People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244, title "in relation to gas companies"— act authorizing merger.

Indiana.— Western Union Tel. Co. *v.* Braxtan, 165 Ind. 165, 74 N. E. 985; State *v.* Commercial Ins. Co., 158 Ind. 680, 64 N. E. 466; Pittsburgh, etc., R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301; Hunt *v.* Lake Shore, etc., R. Co., 112 Ind. 69, 13 N. E. 263; State *v.* Cox, 88 Ind. 254; Madison, etc., R. Co. *v.* Whiteneck, 8 Ind. 217.

Iowa.— Christie *v.* Life Indemnity, etc., Co., 82 Iowa 360, 48 N. W. 94; McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338.

Kansas.— Harrod *v.* Latham Mercantile, etc., Co., 77 Kan. 466, 95 Pac. 11; La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448; Manley *v.* Mayer, 68 Kan. 377, 75 Pac. 550; Leavenworth *v.* Leavenworth City, etc., Water Co., 62 Kan. 643, 64 Pac. 66; Missouri Pac. R. Co. *v.* Harrelson, 44 Kan. 253, 24 Pac. 465; Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793; Marion County *v.* Harvey County, 26 Kan. 181.

Kentucky.—Conley *v.* Com., 98 Ky. 125, 32 S. W. 285, 17 Ky. L. Rep. 678; Louisville, etc., Turnpike Road Co. *v.* Ballard, 2 Metc. 165.

Maryland.— Himmel *v.* Eichengreen, 107 Md. 610, 69 Atl. 511; Luman *v.* Hitchens, Bros. Co., 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393.

Michigan.— Ecorse Tp. *v.* Jackson, etc., R. Co., 153 Mich. 393, 117 N. W. 89; Fort St. Union Depot Co. *v.* Railroad Com'r, 118 Mich. 340, 76 N. W. 631; McMorran *v.* Great Hive L. M., 117 Mich. 398, 75 N. W. 943; Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007; Fort St. Union Depot Co. *v.* Morton, 83 Mich. 265, 47 N. W. 228; Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474; Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167; People *v.* State Ins. Co., 19 Mich. 392.

Minnesota.— McCollister *v.* Bishop, 78 Minn. 228, 80 N. W. 1118; Anderson *v.* Seymour, 70 Minn. 358, 73 N. W. 171.

Missouri.— State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068; Witzmann *v.* Southern R. Co., 131 Mo. 612, 33 S. W. 181.

Nebraska.— Western Union Tel Co. *v.* Lowrey, 32 Nebr. 732, 49 N. W. 707.

New Jersey.— State *v.* Twining, 73 N. J. L. 683, 64 Atl. 1073, 1135 [*affirming* 73 N. J. L. 3, 62 Atl. 402]; Brinkerhoff *v.* Newark, etc., Traction Co., 66 N. J. L. 478, 49 Atl. 812; Morris, etc., Dredging Co. *v.* Jersey City, 64 N. J. L. 587, 46 Atl. 609; Hickman *v.* State, 62 N. J. L. 499, 41 Atl. 942; Long Dock Co. *v.* Haight, 36 N. J. L. 54.

New York.— Parker *v.* Elmira, etc., R. Co., 165 N. Y. 274, 59 N. E. 81 [*affirming* 27 N. Y. App. Div. 383, 49 N. Y. Suppl. 1127]; Bailey *v.* New York Arcade R. Co., 113 N. Y. 615, 20 N. E. 594; Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789 [*affirming* 48 Hun 562, 1 N. Y. Suppl. 174]; *In re* Prospect Park, etc., R. Co., 67 N. Y. 371; People *v.* Lawrence, 41 N. Y. 123; Hardenbergh *v.* Van Keuren, 16 Hun 17 [*reversing* 4 Abb. N. Cas. 43]; Smith *v.* Buffalo, 51 Misc. 244, 100 N. Y. Suppl. 922.

Oregon.— Singer Mfg. Co. *v.* Graham, 8 Oreg. 17, 34 Am. Rep. 572.

Pennsylvania.— Com. *v.* Morningstar, 144 Pa. St. 103, 22 Atl. 867; Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50, 2 Atl. 48.

South Carolina.— Aycock-Little Co. *v.* Southern R. Co., 76 S. C. 331, 57 S. E. 27; *Ex p.* Bacot, 36 S. C. 125, 15 S. E. 204, 16 L. R. A. 586.

Tennessee.— Nichols, etc., Co. *v.* Loyd, 111 Tenn. 145, 76 S. W. 911.

Texas.— Missouri, etc., R. Co. *v.* State, 102 Tex. 153, 113 S. W. 916 [*reversing* (Civ. App. 1908) 109 S. W. 867]; Missouri, etc., R. Co. *v.* State, 100 Tex. 420, 100 S. W. 766 [*reversing* (Civ. App. 1906) 97 S. W. 720]; English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169.

(c) *Amendment of Charter.* An act amending a charter of a corporation may, under a title simply referring to the original act, make changes in the powers or liabilities of the corporation germane to the original charter,[19] and so of an amendment to a general law.[20]

(d) *Repeal.* An act repealing a statute relating to corporations is valid when germane to the original act.[21]

(e) *Building and Loan Associations.* Building and loan associations must be governed by laws with apt titles.[22]

(f) *Railroads.* Acts regulating railroad rates [23] or liabilities [24] or other affairs [25] are commonly valid.

(v) *Interest.* Acts referring in their titles to the rate of interest may be valid when including provisions germane to this general subject.[26]

Virginia.— Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 591.

Washington.—State *v.* Merchant, 48 Wash. 69, 92 Pac. 890; State *v.* Fraternal K. & L., 35 Wash. 338, 77 Pac. 500.

West Virginia.— Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648.

United States.— Crowther *v.* Fidelity Ins., etc., Co., 85 Fed. 41, 29 C. C. A. 1; Thomas *v.* Wabash, etc., R. Co., 40 Fed. 126, 7 L. R. A. 145; Oregon, etc., Trust Inv. Co. *v.* Rathburn, 18 Fed. Cas. No. 10,555, 5 Sawy. 32.

See 44 Cent. Dig. tit. "Statutes," § 144.

19. *Colorado.*— Edwards *v.* Denver, etc., R. Co., 13 Colo. 59, 21 Pac. 1011.

Florida.— State *v.* Knowles, 16 Fla. 577.

Georgia.— Robinson *v.* Darien Bank, 18 Ga. 65.

Indiana.—Mull *v.* Indianapolis, etc., Traction Co., 169 Ind. 214, 81 N. E. 657.

Kentucky.— O'Bannon *v.* Louisville, etc., R. Co., 8 Bush 348; Bierley *v.* Quick Run, etc., Turnpike Road Co., 29 S. W. 874, 17 Ky. L. Rep. 36; Cassell *v.* Lexington, etc., Turnpike Road Co., 9 S. W. 502, 701, 10 Ky. L. Rep. 486.

Maryland.— Brown *v.* Maryland Tel., etc., Co., 101 Md. 574, 61 Atl. 338; Gans *v.* Carter, 77 Md. 1, 25 Atl. 663.

Michigan.— Canal St. Gravel-Road Co. *v.* Paas, 95 Mich. 372, 54 N. W. 907.

Missouri.— Cox *v.* Hannibal, etc., R. Co., 174 Mo. 588, 74 S. W. 854.

New Jersey.—Hill *v.* Morrison, 46 N. J. L. 488; Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171.

Pennsylvania.— Millvale Borough *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993; City Sewage Utilization Co. *v.* Davis, 8 Phila. 625.

Tennessee.— Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138, 12 S. W. 537.

Texas.— Houston, etc., R. Co. *v.* Odum, 53 Tex. 343; Texas, etc., R. Co. *v.* Mayes, (App. 1890) 15 S. W. 43.

Wisconsin.— Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971.

United States.— Jonesboro City *v.* Cairo, etc., R. Co., 110 U. S. 192, 4 S. Ct. 67, 28 L. ed. 116.

See 44 Cent. Dig. tit. "Statutes," § 143.

Additional matters caused the act to be void in the following cases: New York, etc., R. Co. *v.* Montclair Tp., 47 N. J. Eq. 591, 21 Atl. 493; Rogers *v.* Union R. Co., 10 Misc. (N. Y.) 57, 30 N. Y. Suppl. 855; Philadelphia *v.* Spring Garden Farmers' Market Co., 161 Pa. St. 522, 29 Atl. 286; Philadelphia *v.* Ridge Ave. Pass. R. Co., 6 Pa. Co. Ct. 283; Union Pass. R. Co.'s Appeal, 81 Pa. St. 91; Union Pass. R. Co.'s Appeal, 4 Leg. Gaz. (Pa.) 381; Crowther *v.* Fidelity Ins., etc., Co., 85 Fed. 41, 29 C. C. A. 1; Case *v.* Loftus, 43 Fed. 839.

The nature of the amendment was suggested in the title to the amending act which was valid in the following cases: Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; Luzerne Water Co. *v.* Toby Creek Water Co., 148 Pa. St. 568, 24 Atl. 117; Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. ed. 543; Mahomet *v.* Quackenbush, 117 U. S. 508, 6 S. Ct. 858, 29 L. ed. 982.

20. Bell *v.* Maish, 137 Ind. 226, 36 N. E. 358, 1118; Wardle *v.* Cummings, 86 Mich. 395, 49 N. W. 212, 538.

21. Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971. See Northeastern R. Co. *v.* Morris, 59 Ga. 364.

22. *Alabama.*— Lindsay *v.* U. S. Sav., etc., Assoc., 120 Ala. 156, 24 So. 171, 42 L. R. A. 783; Montgomery *v.* National Bldg., etc., Assoc., 108 Ala. 336, 18 So. 816.

California.— Provident Mut. Bldg.-Loan Assoc. *v.* Davis, 143 Cal. 253, 76 Pac. 1034.

Indiana.— Clarke *v.* Darr, 156 Ind. 692, 60 N. E. 688.

Iowa.— Iowa Sav., etc., Assoc. *v.* Selby, 111 Iowa 402, 82 N. W. 968.

Nebraska.— Nebraska Loan, etc., Assoc. *v.* Perkins, 61 Nebr. 254, 85 N. W. 67; Chadron Loan, etc., Assoc. *v.* O'Linn, 1 Nebr. (Unoff.) 1, 95 N. W. 368.

See 44 Cent. Dig. tit. "Statutes," § 144.

23. Giesecke *v.* San Joaquin County, 109 Cal. 489, 42 Pac. 446. But see Evans *v.* Memphis, etc., R. Co., 56 Ala. 246, 28 Am. Rep. 771, holding that an act regulating railroad freight rates cannot include passenger transportation.

24. Muscogee R. Co. *v.* Neal, 26 Ga. 120; Missouri Pac. R. Co. *v.* Merrill, 40 Kan. 404, 19 Pac. 793; Dacres *v.* Oregon R., etc., Co., 1 Wash. 525, 20 Pac. 601.

25. Woodson *v.* Murdock, 22 Wall. (U. S.) 351, 22 L. ed. 716.

26. Maynard *v.* Marshall, 91 Ga. 840, 18

(VI) *INTOXICATING LIQUORS.* Titles in general terms governing the sale or other disposal of intoxicating liquors are usually held to be valid,[27] although the

S. E. 403; Second German American Bldg. Assoc. *v.* Newman, 50 Md. 62.

27. *Alabama.*— McAllister *v.* State, 156 Ala. 122, 47 So. 161; State *v.* Skeggs, 154 Ala. 249, 46 So. 268; Fourment *v.* State, 155 Ala. 109, 46 So. 266; Beauvoir Club *v.* State, 148 Ala. 643, 42 So. 1040, 121 Am. St. Rep. 62; Chaney *v.* State, 146 Ala. 136, 41 So. 172; Mitchell *v.* State, 133 Ala. 65, 32 So. 132.

Colorado.— Smith *v.* People, 32 Colo. 251, 75 Pac. 914; Cardillo *v.* People, 26 Colo. 355, 58 Pac. 678; Liggett *v.* People, 26 Colo. 364, 58 Pac. 144.

Delaware.— State *v.* Fountain, 6 Pennew. 520, 69 Atl. 926.

Florida.— Caesar *v.* State, 50 Fla. 1, 39 So. 470; Schiller *v.* State, 49 Fla. 25, 38 So. 706.

Georgia.— Glover *v.* State, 126 Ga. 594, 55 S. E. 592; James *v.* State, 124 Ga. 72, 52 S. E. 295; Chamlee *v.* Davis, 115 Ga. 266, 41 S. E. 691; Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; Burns *v.* State, 104 Ga. 544, 30 S. E. 815; Newman *v.* State, 101 Ga. 534, 28 S. E. 1005.

Idaho.— Gerding *v.* Idaho County, 13 Ida. 444, 90 Pac. 357; State *v.* Doherty, 3 Ida. 384, 29 Pac. 855.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82.

Indiana.— Donovan *v.* State, 170 Ind. 123, 83 N. E. 744; Cain *v.* Allen, 168 Ind. 8, 79 N. E. 201, 79 N. E. 896; Regodanz *v.* Haines, 168 Ind. 140, 79 N. E. 1085; State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Kane *v.* State, 78 Ind. 103; O'Kane *v.* State, 69 Ind. 183; Williams *v.* State, 48 Ind. 306.

Iowa.— State *v.* Forkner, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206; State *v.* Aulman, 76 Iowa 624, 41 N. W. 379.

Kansas.— *In re* Ellis, 76 Kan. 368, 91 Pac. 81; State *v.* Everhardy, 75 Kan. 851, 90 Pac. 276; State *v.* Thomas, 74 Kan. 360, 86 Pac. 499; State *v.* Brooks, 74 Kan. 175, 85 Pac. 1013; State *v.* Kleinfield, 72 Kan. 674, 83 Pac. 831; Wilson *v.* Herink, 64 Kan. 607, 68 Pac. 72.

Kentucky.— Hyser *v.* Com., 116 Ky. 410, 76 S. W. 174, 25 Ky. L. Rep. 608; Burnside *v.* Lincoln County Ct., 86 Ky. 423, 6 S. W. 276, 9 Ky. L. Rep. 635; Gayle *v.* Owen County Ct., 83 Ky. 61, 6 Ky. L. Rep. 789; Raubold *v.* Com., 54 S. W. 17, 21 Ky. L. Rep. 1125; White *v.* Com., 50 S. W. 678, 20 Ky. L. Rep. 1942; Neighbors *v.* Com., 9 S. W. 718, 10 Ky. L. Rep. 594.

Maryland.— Clark *v.* Tower, 104 Md. 175, 65 Atl. 3.

Michigan.— People *v.* Japinga, 115 Mich. 222, 73 N. W. 111.

Minnesota.— State *v.* Braun, 96 Minn. 521, 105 N. W. 975.

Missouri.— State *v.* Bixman, 162 Mo. 1, 62 S. W. 828; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; Lynch *v.* Murphy, 119 Mo. 163, 24 S. W. 774.

Montana.— State *v.* Courtney, 27 Mont. 378, 71 Pac. 308.

Nebraska.— *In re* White, 33 Nebr. 812, 51 N. W. 287.

New Jersey.—State *v.* Johnson, 73 N. J. L. 199, 63 Atl. 12.

New York.— Matter of De Vaucene, 31 How. Pr. 289.

North Dakota.— State *v.* Haas, 2 N. D. 202, 50 N. W. 254.

Oregon.— State *v.* Phenline, 16 Oreg. 107, 17 Pac. 572.

Pennsylvania.— Com. *v.* Sellers, 130 Pa. St. 32, 18 Atl. 541, 542; Stroudsburg *v.* Shick, 24 Pa. Super. Ct. 442; Doberneck's License, 5 Pa. Co. Ct. 454.

South Carolina.— State *v.* Potterfield, 47 S. C. 75, 25 S. E. 39; State *v.* Chester, 39 S. C. 307, 17 S. E. 752.

South Dakota.— Garrigan *v.* Kennedy, 19 S. D. 11, 101 N. W. 1081, 1135, 117 Am. St. Rep. 927; State *v.* Barber, 19 S. D. 1, 101 N. W. 1078.

Texas.— Webber *v.* State, (Cr. App. 1908) 109 S. W. 182; Joliff *v.* State, 53 Tex. Cr. 61, 109 S. W. 176; *Ex p.* Brown, 38 Tex. Cr. 295, 42 S. W. 554, 70 Am. St. Rep. 743; Floeck *v.* State, 34 Tex. Cr. 314, 30 S. W. 794; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737.

Washington.— State *v.* Moran, 46 Wash. 596, 90 Pac. 1044; State *v.* Spokane Falls, 2 Wash. 40, 25 Pac. 903.

United States.— Cantini *v.* Tillman, 54 Fed. 969.

See 44 Cent. Dig. tit. "Statutes," § 148.

An act entitled to prohibit the "sale" of liquors is not unconstitutional, because the body of the act prohibits the "giving," as well as the sale, of liquors. Williams *v.* State, 48 Ind. 306; Com. *v.* Edinger, 7 Ky. L. Rep. 441; Cearfoss *v.* State, 42 Md. 403.

Local option provisions were valid under general language in the title in the following cases:

Georgia.— Oglesby *v.* State, 121 Ga. 602, 49 S. E. 706; McGruder *v.* State, 83 Ga. 616, 10 S. E. 281.

Maryland.— Whitman *v.* State, 80 Md. 410, 31 Atl. 325. And see Slymer *v.* State, 62 Md. 237.

Michigan.— *In re* Hauck, 70 Mich. 396, 38 N. W. 269.

New Jersey.— State *v.* Gloucester County, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86.

Oregon.— See State *v.* Richardson, 48 Oreg. 309, 85 Pac. 225, 8 L. R. A. N. S. 362.

See 44 Cent. Dig. tit. "Statutes," § 148.

Statutes were void in the following cases:

Alabama.— Borck *v.* State, (1905) 39 So. 580; Watson *v.* State, 140 Ala. 134, 37 So. 225; State *v.* Davis, 130 Ala. 148, 30 So. 344, 89 Am. St. Rep. 23; Yahn *v.* Merritt,

body of the act includes provisions relating to penalties[28] and civil remedies for violations of the statute.[29]

(VII) *MANUFACTURE AND SALE OF GOODS.* The manufacture and sale of commodities is often regulated by statutes with titles valid, although general in nature.[30]

(VIII) *MECHANICS' LIENS.* Acts referring in their titles to mechanics' liens are generally valid.[31]

117 Ala. 485, 23 So. 71; Morgan *v.* State, 81 Ala. 72, 1 So. 472.

Georgia.— Sasser *v.* State, 99 Ga. 54, 25 S. E. 619; Elliott *v.* State, 91 Ga. 694, 17 S. E. 1004; Knight *v.* State, 88 Ga. 590, 15 S. E. 457; Crabb *v.* State, 88 Ga. 584, 15 S. E. 455; McDuffie *v.* State, 87 Ga. 687, 13 S. E. 596.

Idaho.— Gerding *v.* Idaho County, 13 Ida. 444, 90 Pac. 357.

Illinois.— Neinong *v.* Pontiac, 56 Ill. 172.

Michigan.—*In re* Hauck, 70 Mich. 396, 38 N. W. 269 (title to "regulate"— act authorizing prohibition); People *v.* Gadway, 61 Mich. 285, 28 N. W. 101, 1 Am. St. Rep. 578.

Missouri.—State *v.* Fulks, 207 Mo. 26, 105 S. W. 733, 15 L. R. A. N. S. 430, section prohibiting gift of liquor.

New Jersey.— Mack *v.* State, 60 N. J. L. 28, 36 Atl. 1088 (sale from ambulatory conveyance); Ryno *v.* State, 58 N. J. L. 238, 33 Atl. 219.

Pennsylvania.— Com. *v.* Frantz, 135 Pa. St. 389, 19 Atl. 1025; Hatfield *v.* Com., 120 Pa. St. 395, 14 Atl. 151; Com. *v.* Doll, 6 Pa. Co. Ct. 49.

South Carolina.— Croxton *v.* Truesdel, 75 S. C. 418, 56 S. E. 45.

Tennessee.— Hyman *v.* State, 87 Tenn. 109, 9 S. W. 372, 1 L. R. A. 497.

See 44 Cent. Dig. tit. "Statutes," § 148.

28. *Alabama.*— Fourment *v.* State, 155 Ala. 109, 46 So. 266.

Delaware.— State *v.* Fountain, 6 Pennew. 520, 69 Atl. 926.

Georgia.— Caldwell *v.* Barrett, 73 Ga. 604.

Indiana.— Farrell *v.* State, 45 Ind. 371; O'Connor *v.* State, 45 Ind. 347; Hingle *v.* State, 24 Ind. 28; Reams *v.* State, 23 Ind. 111.

Iowa.— Martin *v.* Blattner, 68 Iowa 286, 25 N. W. 131, 27 N. W. 244; State *v.* Schroeder, 51 Iowa 197, 1 N. W. 431.

See 44 Cent. Dig. tit. "Statutes," § 149.

Penalties were valid, although not noted in the title in the following cases:

California.— *Ex p.* Kobler, 74 Cal. 38, 15 Pac. 436.

Indiana.— Fletcher *v.* State, 54 Ind. 462.

Kansas.— State *v.* Campbell, 50 Kan. 433, 32 Pac. 35.

Kentucky.— McTigue *v.* Com., 99 Ky. 66, 35 S. W. 121, 17 Ky. L. Rep. 1418; Helvenstine *v.* Yantis, 88 Ky. 695, 11 S. W. 811, 11 Ky. L. Rep. 208; Gayle *v.* Owen County Ct., 83 Ky. 61, 6 Ky. L. Rep. 789.

Pennsylvania.— Com. *v.* Watson, 2 Pa. Dist. 526.

See 44 Cent. Dig. tit. "Statutes," § 149.

Penalties for drunkenness cannot be inserted under a title relating to the sale of liquor. State *v.* Young, 47 Ind. 150; People *v.* Beadle, 60 Mich. 22, 26 N. W. 800.

29. *Kansas.*— Durein *v.* Pontious, 34 Kan. 353, 8 Pac. 428; Werner *v.* Edmiston, 24 Kan. 147.

Michigan.— People *v.* Laning, 73 Mich. 284, 41 N. W. 424; Flower *v.* Witkovsky, 69 Mich. 371, 37 N. W. 364.

Nebraska.— Poffenbarger *v.* Smith, 27 Nebr. 788, 43 N. W. 1150.

South Dakota.— Palmer *v.* Schurz, 22 S. D. 283, 117 N. W. 150.

Texas.— Peavy *v.* Goss, (Civ. App. 1896) 37 S. W. 990.

See 44 Cent. Dig. tit. "Statutes," § 149.

30. *Illinois.*— Hronek *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837 (explosives); Fuller *v.* People, 92 Ill. 182 (obscene literature). But see Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 46 Am. St. Rep. 315, 29 L. R. A. 79, title manufacture of clothing — act appropriating money for inspectors.

Kentucky.— Vanmeter *v.* Spurrier, 94 Ky. 22, 21 S. W. 337, 14 Ky. L. Rep. 684, fertilizers.

Missouri.— State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317, forbidding coloring of substitute for butter.

Montana.— State *v.* Bernheim, 19 Mont. 512, 49 Pac. 441.

Pennsylvania.— Com. *v.* Caulfield, 27 Pa. Super. Ct. 279, oleomargarine.

Tennessee.— State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Truss *v.* State, 13 Lea 311, sale of cotton at night.

United States.— Preston *v.* Finley, 72 Fed. 850, Sunday newspapers.

See 44 Cent. Dig. tit. "Statutes," § 147.

Compare Northwestern Mfg. Co. *v.* Wayne Cir. Judge, 58 Mich. 381, 25 N. W. 372, 55 Am. Rep. 693 (holding that Acts (1885), No. 186, entitled "An act to prevent deception in the manufacture and sale of dairy products, and to preserve the public health," goes beyond its title in making the manufacture of imitations of butter a crime and is unconstitutional); *In re* Paul, 94 N. Y. 497.

31. *California.*— Carpenter *v.* Furrey, 128 Cal. 665, 61 Pac. 369.

Colorado.— Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265, 74 Pac. 786.

Kentucky.— Humboldt Bldg. Assoc. Co. *v.* Ducker, 82 S. W. 969, 26 Ky. L. Rep. 931.

Minnesota.— State *v.* Brachvogel, 38 Minn. 265, 36 N. W. 641, title giving labor a first lien and material furnished a second lien,—

(ix) *Recording Acts.* Statutes with general titles as to the recording of instruments are generally valid.[32]

V. Amendment, Revision,[33] and Codification.[34]

A. Amendment Defined. An amendment as applied to statutes means an alteration in the draft of a bill proposed or in a law already passed.[35]

B. Power to Amend — 1. In General. It is as competent for the people to withhold from the legislature the power of amending an act, as to withhold the

the act making it criminal for a contractor to receive payment and neglect to pay laborers and materialmen.

Nebraska.— Kansas City, etc., R. Co. *v.* Frey, 30 Nebr. 790, 47 N. W. 87; Ballou *v.* Black, 17 Nebr. 389, 23 N. W. 3.

North Dakota.— Powers El. Co. *v.* Pottner, 16 N. D. 359, 113 N. W. 703.

Pennsylvania.— Hood *v.* Norton, 202 Pa. St. 114, 51 Atl. 748; Hoffa *v.* Person, 1 Pa. Super. Ct. 357.

Tennessee.— McElwee *v.* McElwee, 97 Tenn. 649, 37 S. W. 560.

See 44 Cent. Dig. tit. "Statutes," § 154.

Acts were void in the following cases:

Alabama.— Carpenter *v.* Joiner, 151 Ala. 454, 44 So. 424; Randolph *v.* Builders', etc., Supply Co., 106 Ala. 501, 17 So. 721.

Iowa.— Rex Lumber Co. *v.* Reed, 107 Iowa 111, 77 N. W. 572.

New York.— Tommasi *v.* Archibald, 114 N. Y. App. Div. 838, 100 N. Y. Suppl. 367.

Pennsylvania.— Dorsey's Appeal, 72 Pa. St. 192 (title confined to leaseholds — act covering freeholds); McKeever *v.* Victor Oil Co., 9 Pa. Co. Ct. 284.

Virginia.— Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858, under title "to secure payment of wages and salaries of certain employees of railway companies," provision is void giving a lien to materialmen.

Washington.— Armour *v.* Western Constr. Co., 36 Wash. 529, 78 Pac. 1106, title "lien for labor and material" — act giving lien for "provisions."

United States.— Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372.

See 44 Cent. Dig. tit. "Statutes," § 154.

32. *California.*— Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

Colorado.— People *v.* Crissman, 41 Colo. 450, 92 Pac. 949, Torrens Land Law under title, "Act Concerning Land Titles."

Kansas.— Otto Gas Engine Works *v.* Hare, 64 Kan. 78, 67 Pac. 444.

Kentucky.— McPherson *v.* Gordon, 96 S. W. 791, 29 Ky. L. Rep. 826, 1073, title concerning conveyances — act requiring reference to next prior deed.

Texas.— Magee *v.* Merriman, 85 Tex. 105, 19 S. W. 1002, title as to supplying lost records — act relating both to supplying and re-recording them.

Utah.— *In re* Monk, 16 Utah 100, 50 Pac. 810.

See 44 Cent. Dig. tit. "Statutes," § 151.

33. **Revision defined** see Revision, 34 Cyc. 1723.

34. **Codification defined** see Codification, 7 Cyc. 270.

35. State *v.* Wright, 14 Oreg. 365, 369, 12 Pac. 708.

Other definitions are: "An alteration or change of something proposed in a bill or established as law." Bouvier L. Dict.

"A change in some of the existing provisions of an act." Sheridan *v.* Salem, 14 Oreg. 328, 337, 12 Pac. 925.

"A modification or alteration proposed to be made in a bill on its passage, or an enacted law; also such modification or change when made." Black L. Dict.

"That which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original." McCleary *v.* Babcock, 169 Ind. 228, 233, 82 N. E. 453; State *v.* Wyandot County, 16 Ohio Cir. Ct. 218, 221, 9 Ohio Cir. Dec. 90.

Derivation.—The word "amend" came into our language from the French "amender," the root or parent word being *menda*, a fault, and means in its most comprehensive sense "to better." Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, 500.

The word "amend" is synonymous with "correct, reform, rectify." It means a correction of errors, an improvement, a reformation. It necessarily implies something upon which the correction, alteration, and improvement can operate. Something to be reformed, corrected, or improved. To amend a statute is to alter it, to annul or remove that which will improve it. McCleary *v.* Babcock, 169 Ind. 228, 233, 82 N. E. 453; *In re* Pennsylvania Tel. Co., 2 Chest. Co. Rep. (Pa.) 129, 131.

Distinguished from supplement.— It signifies something additional, something added to supply what is wanting. McCleary *v.* Babcock, 169 Ind. 228, 233, 82 N. E. 453; Webster Int. Dict.

A law is revised or amended, not when it is repealed, but when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose. Falconer *v.* Robinson, 46 Ala. 340, 348.

It is the effect, not the name given to an act, that determines its character. If a subsequent statute does in fact modify and change the proceedings to be had under a

power of amending the constitution itself;[36] but one legislature cannot bind another as to the mode in which it shall exercise its constitutional power of amendment;[37] nor, on the other hand, can a legislature delegate to revisers, codifiers, or commissioners the power to amend.[38] It is competent for the legislature, at the same session, to alter, modify, or repeal a law by a subsequent act at the same session;[39] and a succeeding legislature can amend acts passed by its predecessors without express authority.[40] And a constitutional provision that "no bill shall be so amended in its passage through either house as to change its original purpose" does not affect the power of a subsequent legislature to make changes in a statute.[41]

2. Manner of Exercising Power. In the absence of a constitutional prohibition, a section of an act may be amended in one or more of four ways: By striking out certain words; by striking out certain words and inserting others; by inserting certain words; and by adding other provisions.[42] In amending a law, the legislature may substitute any provision it pleases for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted;[43] and a section may be amended by adding

former act, the later act is an amendment of the earlier act. State *v.* Chadbourne, 74 Me. 506, 508.

36. Van Steenwyck *v.* Sackett, 17 Wis. 645.

37. Brightman *v.* Kirner, 22 Wis. 54.

38. *Arkansas.*— Vinsant *v.* Knox, 27 Ark. 266.

Florida.— Mathis *v.* State, 31 Fla. 291, 12 So. 681.

Georgia.— McDaniel *v.* Campbell, 78 Ga. 188.

Missouri.— Bowen *v.* Missouri Pac. R. Co., 118 Mo. 541, 24 S. W. 436.

New Hampshire.— *In re* School-Law Manual, 63 N. H. 574, 4 Atl. 878.

Oregon.— State *v.* Gaunt, 13 Oreg. 115, 9 Pac. 55.

See 44 Cent. Dig. tit. "Statutes," § 213.

39. Mobile, etc., R. Co. *v.* State, 29 Ala. 573; Atty.-Gen. *v.* Brown, 1 Wis. 513.

40. Alexander *v.* McDowell County, 70 N. C. 208, holding that where an act authorizing a county to issue bonds to pay its subscription to a railroad omits to provide by whom the bonds should be signed and issued, a succeeding legislature has the power to amend the act in such particular, and so render valid the action of those who issued the bonds without express authority. And see cases cited *infra*, the following notes.

41. State *v.* Pike County, 144 Mo. 275, 45 S. W. 1096.

42. Fletcher *v.* Prather, 102 Cal. 413, 36 Pac. 658, holding that this mode of amendment does not repeal or disturb the existence of the parts of the original section not stricken out.

The objection to this mode of amendment is that it tends to confusion and uncertainty owing to the difficulty of correctly reading the original section with the amendments, a difficulty largely increased with each subsequent amendment. Fletcher *v.* Prather, 102 Cal. 413, 36 Pac. 658.

43. Underwood *v.* McDuffee, 15 Mich. 361, 93 Am. Dec. 194.

Amendment of general law by special act.— If there is no constitutional prohibition against such a practice, it is held that there can be no objection to the amendment of a general law by a special act. Murray *v.* State, 112 Ga. 7, 37 S. E. 111; Richardson *v.* Kansas City Bd. of Education, 72 Kan. 629, 84 Pac. 538.

A bill which subsequently becomes a law may be amended by a bill introduced before but passed after, the first bill becomes a law. Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446.

Intention of legislature.— While, in amending statutes, it is proper to embrace in the first part of the amending act, as declaratory of the intention of the general assembly, what is to be the character of the amendment, still this part of the statute, which is merely declaratory of the legislative intention, is not to be looked to as the final determination of the general assembly. When a statute or a section of the code to be amended is recited in the statute in its amended shape, and it is in express terms declared therein that, when amended, the old law shall read in a certain way, this declaration by the general assembly, being the last expression of its intention as to what shall be the law of the state, absolutely controls where any conflict arises as to matter contained in this declaration of what the law shall be and what is set forth in the first part of the amending statute as declaratory of the legislative intention. If the declaratory part, which recites that certain amendments are to be made, is entirely omitted from the recital as to how the statute shall read when amended it is to be presumed that it was the intention of the general assembly to omit from the new law that part of the amending statute which was not carried into the new law as recited in the statute, and that the failure to strike from the declaratory part of the law so much of it as was not to be embraced in the new law was by mistake or inadvertence. Gilbert *v.* Georgia R., etc., Co., 104 Ga. 412, 30 S. E. 673.

Striking out words.— An act may be amended by an enactment that certain words shall

thereto a new section, provided the section added relates to and is germane to the subject-matter of the act proposed to be amended.[44]

C. Acts Subject to Amendment — 1. In General. In general any statute which is not a mere nullity,[45] or which has not been entirely abrogated,[46] or repealed by implication,[47] may properly be amended.

2. Amendment of Amended, Repealed, or Void Statute. In many cases it is held that an amendment to be valid must not relate to a statute which has been repealed or declared unconstitutional,[48] and that where an entire act is void there is nothing to amend;[49] and thus it is held that an amendatory statute which attempts to amend a section which has already been amended and repealed by implication is void.[50] But in the absence of constitutional prohibition the better rule has been held to be that an amendatory statute will be upheld, although it purports to amend a statute already amended or which for any reason has been declared invalid;[51]

be stricken from the act amended. Mobley *v.* Dent, 10 S. C. 471.

Where two separate bills are passed by the legislature on the same general subject, with differently worded titles, they may be amended by one bill with a proper title. Pioneer Irr. Dist. *v.* Bradley, 8 Ida. 310, 68 Pac. 295, 101 Am. St. Rep. 201.

44. Settlers' Irr. Dist. *v.* Settlers' Canal Co., 14 Ida. 504, 94 Pac. 829.

45. State *v.* Bailey, 56 Kan. 81, 42 Pac. 373.

Compiled statutes, published under authority of law, and supposed to contain all the laws in force at the date of publication, may be amended by a proper reference thereto; and, if the amendatory act clearly points out the portion of the statute amended, the objection that the amendment is of the compiled statutes will be unavailing (*In re* White, 33 Nebr. 812, 51 N. W. 287); and an act passed, enrolled, approved, and deposited with the secretary of state is an act in force, competent of amendment, although by error, inadvertency, or misconception it may not have been compiled and published in the same manner as all other laws of the state (State *v.* Partridge, 29 Nebr. 158, 45 N. W. 290; Fenton *v.* Yule, 27 Nebr. 758, 43 N. W. 1140).

An act, the execution of which is postponed, either by a limiting clause, or a delay of its promulgation, may be affected by an intermediate declaration of the legislative will modifying or repealing it. New Orleans *v.* Ripley, 2 La. 344; Gosselin *v.* Gosselin, 7 Mart. N. S. (La.) 469.

46. Jacksonville, etc., R. Co. *v.* Adams, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272.

47. Mitchell *v.* State, 19 Ind. 381.

48. *California.*— Fletcher *v.* Prather, 102 Cal. 413, 36 Pac. 658; Schamblin *v.* Means, 6 Cal. App. 261, 91 Pac. 1020.

Georgia.— Lampkin *v.* Pike, 115 Ga. 827, 42 S. E. 213, 90 Am. St. Rep. 153.

Indiana.— Helt *v.* Helt, 152 Ind. 142, 52 N. E. 699; Smith *v.* McClain, 146 Ind. 77, 88, 89, 45 N. E. 41; Boring *v.* State, 141 Ind. 640, 41 N. E. 270; Carr *v.* Fowler, 74 Ind. 590 [*following* Cowley *v.* Rushville, 60 Ind. 327, and *followed* in Copeland *v.* Sheridan, 152 Ind. 107, 51 N. E. 474].

Montana.— *In re* Terrett, 34 Mont. 325, 86 Pac. 266.

Nebraska.— Plattsmouth *v.* Murphy, 74 Nebr. 749, 105 N. W. 293; State *v.* Wahoo, 62 Nebr. 40, 86 N. W. 923.

See 44 Cent. Dig. tit. "Statutes," §§ 202, 203.

49. Lynch *v.* Murphy, 119 Mo. 163, 24 S. W. 774. See also Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453, holding that the book published as the "Code of Washington" is a private compilation of the laws of Washington territory, without any legislative authorization; and an act of the legislature purporting to amend one of the sections thereof is void.

It is otherwise when there is only one section, or a part of one section, sought to be amended. In the latter case the amendment may be made to any part of the section, or by substituting an entire new section in lieu thereof, provided the act, when amended, does not embrace a purpose outside of its title, and inconsistent with the provisions remaining unrepealed. Lynch *v.* Murphy, 119 Mo. 163, 24 S. W. 774; Keystone State Tel., etc., Co. *v.* Ridley Park, 28 Pa. Super. Ct. 635.

50. Louisville, etc., R. Co. *v.* East St. Louis, 134 Ill. 656, 25 N. E. 962; Peele *v.* Ohio, etc., Oil Co., 158 Ind. 374, 63 N. E. 763; Stony Creek Tp. *v.* Kabel, 144 Ind. 501, 43 N. E. 559; Lawson *v.* De Bolt, 78 Ind. 563; Brocaw *v.* Gibson County, 73 Ind. 543; State *v.* Harrison, 67 Ind. 71; Marion County *v.* Smith, 52 Ind. 420; Blakemore *v.* Dolan, 50 Ind. 194; Longlois *v.* Longlois, 48 Ind. 60; Board *v.* Markle, 46 Ind. 96; Draper *v.* Falley, 33 Ind. 465; State *v.* Benton, 33 Nebr. 823, 51 N. W. 140.

Act held not to amend a statute which had already been superseded by an amendment see Brocaw *v.* Gibson County, 73 Ind. 543.

51. *Florida.*— Basnett *v.* Jacksonville, 19 Fla. 664.

Maine.— Blake *v.* Brackett, 47 Me. 28.

Massachusetts.— Com. *v.* Kenneson, 143 Mass. 418, 9 N. E. 761.

Michigan.— People *v.* Pritchard, 21 Mich. 236.

Ohio.— State *v.* Brewster, 39 Ohio St. 653.

Texas.— Greer *v.* State, 22 Tex. 588.

United States.— Columbia Wire Co. *v.* Boyce, 104 Fed. 172, 44 C. C. A. 588.

See 44 Cent. Dig. tit. "Statutes," §§ 202, 203.

and that a statute amended and not repealed may be amended;[52] and a statute amending a statute which has already been superseded by an amendatory statute is valid, where it was the intention of the legislature to amend the amendatory statute, and not the amended statute,[53] and a statute purporting to amend a repealed or void statute is valid where the provisions of the new statute are independent and complete in themselves.[54] Where a statute has been amended, a later statute, declaring the original act, with no express reference to the amendment, to be applicable, makes it applicable as amended and not in its original form.[55] An act is not void because its title purports it to be an act supplementary to an act which expired by its own limitation, where such act was subsequently revived.[56]

D. Effect of Invalidity or Inapplicability of Amendatory Act. Where a statute which undertakes to amend and reënact an existing statute is invalid, the existing statute remains in force;[57] and similarly if the amendatory act is not germane to the subject-matter of the original act it is of no effect as an amend-

In Alabama it is held to be clearly settled that the legislature may amend an original act which has been amended and repealed and disregard intervening amendatory and repealing acts. Harper *v.* State, 109 Ala. 28, 19 So. 857; *Ex p.* Pierce, 87 Ala. 110, 6 So. 392; State *v.* Warford, 84 Ala. 15, 3 So. 911; Dunbar *v.* Frazer, 78 Ala. 538.

If a statute is wholly or in part unconstitutional, but has a title expressing a constitutional object, it may by amendment be rendered constitutional, without having recourse to an enactment independent throughout its provisions. Allison *v.* Corker, 67 N. J. L. 596, 52 Atl. 362 [*modifying* 66 N. J. L. 182, 48 Atl. 1118]. So an act dealing with a single subject-matter, but with two phases of the same, which is held valid as to one phase but inoperative as to the other, may be amended by an act relieving the defects applicable to the one portion, so as, in the single act, to complete the scheme of the original act. Edalgo *v.* Southern R. Co., 129 Ga. 258, 58 S. E. 846.

52. Fletcher *v.* Prather, 102 Cal. 413, 36 Pac. 658; State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348; White *v.* Kings County Inebriates' Home, 141 N. Y. 123, 35 N. E. 1092 [*affirming* 74 Hun 39, 26 N. Y. Suppl. 294]. See also Hall *v.* Craig, 125 Ind. 523, 25 N. E. 538.

53. People *v.* Upson, 79 Hun (N. Y.) 87, 29 N. Y. Suppl. 615.

54. *Illinois.*— People *v.* Onahan, 170 Ill. 449, 48 N. E. 1003.

Kansas.— Reynolds *v.* Topeka Bd. of Education, 66 Kan. 672, 72 Pac. 274, where the former statute had been repealed by implication.

Michigan.— Atty.-Gen. *v.* Stryker, 141 Mich. 437, 104 N. W. 737.

New Jersey.— Doyle *v.* Newark, 34 N. J. L. 236.

New York.— People *v.* Jefferson County Canvassers, 143 N. Y. 84, 37 N. E. 649 [*affirming* 77 Hun 372, 28 N. Y. Suppl. 871].

United States.— Beatrice *v.* Masslich, 108 Fed. 743, 47 C. C. A. 657.

See 44 Cent. Dig. tit. "Statutes," §§ 202, 203.

Compare Stone *v.* State, 137 Ala. 1, 34 So. 629.

A statute amending a repealed statute "so as to read as follows" has been held operative without regard to the former statute. People *v.* Jefferson County Canvassers, 77 Hun (N. Y.) 372, 28 N. Y. Suppl. 871 [*affirmed* in 143 N. Y. 84, 37 N. E. 649]; Van Clief *v.* Van Vechten, 55 Hun (N. Y.) 467, 8 N. Y. Suppl. 760 [*reversed* on other grounds in 130 N. Y. 571, 29 N. E. 1017]; Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189. Similarly a statute which amends a statute "so as to read as follows," and which covers substantially all the subject of the amended statute, is in effect a substitute for such statute, and not a repeal thereof, and a statute which in like manner again amends this amended statute is not void as an amendment of a repealed statute, but stands like an independent enactment in place of the two prior statutes. Com. *v.* Kenneson, 143 Mass. 418, 9 N. E. 761.

55. Westchester Bd. of Excise *v.* Curley, 9 Abb. N. Cas. (N. Y.) 100.

56. Baltimore, etc., R. Co. *v.* Van Ness, 2 Fed. Cas. No. 830, 4 Cranch C. C. 595.

57. *Georgia.*— Barker *v.* State, 118 Ga. 35, 44 S. E. 874.

Illinois.— People *v.* Butler St. Foundry, etc., Co., 201 Ill. 236, 66 N. E. 349.

Indiana.— Wilkison *v.* Marion County Children's Guardians, 158 Ind. 1, 62 N. E. 481.

Missouri.— Lexington *v.* Lafayette County Bank, 165 Mo. 671, 65 S. W. 943.

New York.— People *v.* Mensching, 187 N. Y. 8, 79 N. E. 884 [*affirming* 115 N. Y. App. Div. 893, 101 N. Y. Suppl. 1138]; *In re* Cullinan, 181 N. Y. 527, 73 N. E. 1122 [*affirming* 97 N. Y. App. Div. 122, 89 N. Y. Suppl. 683].

Texas.— Miller *v.* State, 44 Tex. Cr. 99, 69 S. W. 522; Ford *v.* State, 23 Tex. App. 520, 5 S. W. 145.

Virginia.— Whitlock *v.* Hawkins, 105 Va. 242, 53 S. E. 401.

Washington.— See *In re* Donnellan, 49 Wash. 460, 95 Pac. 1085.

ment;[58] and no act can be rendered unconstitutional by a section which makes no change whatever in the law as it was before, and which might have been omitted without any effect.[59] Where it appears from an amendatory act that it is intended to amend some section of the previous act by changing it so as to read as set out in the amendatory act, and it does not appear from anything in the latter act for what provision the proposed reading is to be substituted, the latter act is void for uncertainty.[60]

E. Construction of Amendments. If possible an amendment like an original statute will be so construed as to uphold its constitutionality rather than to render it unconstitutional,[61] and amendatory statutes like other writings are not to be overthrown on account of grammatical construction,[62] or errors,[63] or

United States.— *Ex p.* Davis, 21 Fed. 396.

See 44 Cent. Dig. tit. "Statutes," § 211.

58. *Alabama.*— State *v.* Southern R. Co., 115 Ala. 250, 22 So. 589; *Ex p.* Cowert, 92 Ala. 94, 9 So. 225.

Colorado.—People *v.* Fleming, 7 Colo. 230, 3 Pac. 70; Pitkin County *v.* Aspen Min., etc., Co., 3 Colo. App. 223, 32 Pac. 717.

Kansas.— State *v.* Bankers' etc., Mut. Ben. Assoc., 23 Kan. 499.

Kentucky.— Chiles *v.* Monroe, 4 Metc. 72.

Louisiana.— State *v.* American Sugar Refining Co., 106 La. 553, 31 So. 181 (holding that an amendment of a special section of an act implies merely a change of the provisions upon the same subject to which the section relates); State *v.* Ferguson, 104 La. 249, 28 So. 817, 81 Am. St. Rep. 123.

Nebraska.— Knight *v.* Lancaster County, 74 Nebr. 82, 103 N. W. 1064; Preston *v.* Stover, 70 Nebr. 632, 97 N. W. 812; Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; State *v.* Bowen, 54 Nebr. 211, 74 N. W. 615; State *v.* Cornell, 54 Nebr. 72, 74 N. W. 432; State *v.* Tibbets, 52 Nebr. 228, 71 N. W. 990, 66 Am. St. Rep. 492; Trumble *v.* Trumble, 37 Nebr. 340, 55 N. W. 869; Miller *v.* Hurford, 11 Nebr. 377, 9 N. W. 477. See also Allen *v.* Kennard, 81 Nebr. 289, 116 N. W. 63.

Nevada.—*Ex p.* Hewlett, 22 Nev. 333, 40 Pac. 96.

See 44 Cent. Dig. tit. "Statutes," §§ 202, 211.

But see Hobart *v.* Butte County, 17 Cal. 23.

Averments held to be germane and valid see Gale *v.* Beerbohm, 43 Colo. 521, 96 Pac. 449; Colorado Farm, etc., Co. *v.* Beerbohm, 43 Colo. 464, 96 Pac. 443; Moline *v.* State, 72 Nebr. 361, 100 N. W. 810; State *v.* Frank, 61 Nebr. 679, 85 N. W. 956, 60 Nebr. 327, 83 N. W. 74; New York *v.* Chelsea Jute Mills, 43 Misc. (N. Y.) 266, 88 N. Y. Suppl. 1085.

59. Knisely *v.* Cotterel, 196 Pa. St. 614, 46 Atl. 861, 50 L. R. A. 86.

60. Murphy *v.* Eney, 77 Md. 80, 25 Atl. 993.

61. *Arkansas.*— State *v.* Corbett, 61 Ark. 226, 32 S. W. 686.

California.—*In re* Campbell, 143 Cal. 623, 77 Pac. 674; Deyo *v.* Mendocino County Super. Ct., 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; *Ex p.* Liddell, 93 Cal. 633, 29 Pac. 251.

Florida.— State *v.* Duval County, 23 Fla. 483, 3 So. 193.

Kentucky.— Joyce *v.* Woods, 78 Ky. 386.

Michigan.— Pioneer Fuel Co. *v.* Molloy, 131 Mich. 465, 91 N. W. 750.

Montana.— *In re* Terrett, 34 Mont. 325, 86 Pac. 266.

New York.— Matter of Wallace, 36 Misc. 1, 72 N. Y. Suppl. 445.

Texas.— Kimberly *v.* Morris, 10 Tex. Civ. App. 592, 31 S. W. 809.

United States.— Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

62. State *v.* Bailey, 157 Ind. 324, 61 N. E. 730.

63. *Alabama.*— Harper *v.* State, 109 Ala. 28, 19 So. 857.

Florida.— Saunders *v.* Pensacola Provisional Municipality, 24 Fla. 226, 4 So. 801.

Georgia.— Dowda *v.* State, 74 Ga. 12.

Illinois.— People *v.* Haire, 231 Ill. 153, 83 N. E. 133; Patton *v.* People, 229 Ill. 512, 82 N. E. 386 (holding that an amendatory act is not invalid for incorrectly referring to the date of approval of the amended act as June 26, 1885, where the enacting clause gives the correct date, June 27, 1885, and clearly shows the act amended); District No. 5 School Directors *v.* District No. 10 School Directors, 73 Ill. 249 (holding that an otherwise valid statute is not rendered inoperative by an erroneous reference to a previous law intended to be amended).

Indiana.— Citizens' St. R. Co. *v.* Haugh, 142 Ind. 254, 41 N. E. 533; Ray *v.* Jeffersonville, 90 Ind. 567; Clare *v.* State, 68 Ind. 17.

Kentucky.— Com. *v.* Casteel, 4 Ky. L. Rep. 623.

Minnesota.—Winona *v.* Whipple, 24 Minn. 61.

North Carolina.— State *v.* Woolard, 119 N. C. 779, 25 S. E. 719.

Texas.— State *v.* McCracken, 42 Tex. 383.

Washington.— State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707.

Wisconsin.— Penberthy *v.* Lee, 51 Wis. 261, 8 N. W. 116; Madison, etc., Plank Road Co. *v.* Reynolds, 3 Wis. 287.

Wyoming.— Hollibaugh *v.* Hehn, 13 Wyo. 269, 79 Pac. 1044.

United States.— Northern Pac. Express Co. *v.* Metscham, 90 Fed. 80, 32 C. C. A. 530.

omissions [64] therein, if the intention of the legislative assembly can be collected from the entire language used.

F. Title of Amendatory Act — 1. In General. The title of an amendatory act must indicate the subject of the amendment by reference to the act or title of the act to be amended or the substance thereof.[65] However, if the title contains any reference to the law to be amended, or designation of it by which it can with reasonable certainty be determined what law is intended, it is sufficient,[66] reference by number being held in some cases sufficient;[67] and when an act is sup-

64. Murphy *v.* Salem, 49 Oreg. 54, 87 Pac. 532.

65. *California.*— Lewis *v.* Dunne, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257; People *v.* Curry, 130 Cal. 82, 62 Pac. 516.

Indiana.— O'Mara *v.* Wabash R. Co., 150 Ind. 648, 50 N. E. 821.

Kansas.— State *v.* Looker, 54 Kan. 227, 38 Pac. 288.

Michigan.— Grosvenor *v.* Duffy, 121 Mich. 220, 80 N. W. 19; Fish *v.* Stockdale, 111 Mich. 46, 69 N. W 92.

Nebraska.— Douglas County *v.* Hayes, 52 Nebr. 191, 71 N. W. 1023; West Point Water-Power, etc., Co. *v.* State, 49 Nebr. 223, 68 N. W. 507.

New York.— Bonagur *v.* Orlandi, 51 Misc. 582, 101 N. Y. Suppl. 115.

Pennsylvania.—Moore *v.* Moore, 23 Pa. Super. Ct. 73; Winkler *v.* Com., 7 Pa. Dist. 696; Hamburger Co. *v.* Friedman, 6 Pa. Dist. 693, 20 Pa. Co. Ct. 1.

Tennessee.— Galloway *v.* Memphis, 116 Tenn. 736, 94 S. W. 75; State Nat. Bank *v.* Memphis, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. N. S. 663; Memphis St. R. Co. *v.* State, 110 Tenn. 598, 75 S. W. 730; State *v.* Brown, 103 Tenn. 449, 53 S. W. 727; Debardelaben *v.* State, 99 Tenn. 649, 42 S. W. 684; Shelton *v.* State, 96 Tenn. 521, 32 S. W. 967; State *v.* Runnels, 92 Tenn. 320, 21 S. W. 665; Ransome *v.* State, 91 Tenn. 716, 20 S. W. 310; Burnett *v.* Turner, 87 Tenn. 124, 10 S. W. 194; McGhee *v.* State, 2 Lea 622; Hardaway *v.* Lilly, (Ch. App. 1898) 48 S. W. 712.

Washington.— State *v.* King County Super. Ct., 28 Wash. 317, 68 Pac. 957.

See 44 Cent. Dig. tit. "Statutes," § 204 *et seq.*

In Montana there is nothing in the organic law or statutes requiring an amendatory act to refer to the amended or repealed act by its title. Carruthers *v.* Madison County, 6 Mont. 482, 13 Pac. 140; Lane *v.* Missoula County, 6 Mont. 473, 13 Pac. 136.

66. *Alabama.*— Stone *v.* State, 137 Ala. 1, 34 So. 629.

California.— Leake *v.* Colgan, 125 Cal. 413, 58 Pac. 69.

Colorado.— Heller *v.* People, 2 Colo. App. 459, 31 Pac. 773.

Georgia.— Murray *v.* State, 112 Ga. 7, 37 S. E. 111; Bagwell *v.* Lawrenceville, 94 Ga. 654, 21 S. E. 903.

Idaho.— Settlers' Irr. Dist. *v.* Settlers' Canal Co., 14 Ida. 504, 94 Pac. 829; State *v.* Jones, 9 Ida. 693, 75 Pac. 819.

Indiana.— Bell *v.* Maish, 137 Ind. 226, 36 N. E. 358, 1118; Brandon *v.* State, 16 Ind. 197.

Iowa.— Morford *v.* Unger, 8 Iowa 82.

Kansas.—State *v.* Butler County, 77 Kan. 527, 94 Pac. 1004.

Louisiana.— State *v.* Bazile, 50 La. Ann. 21, 23 So. 8; State *v.* Read, 49 La. Ann. 1535, 22 So. 761.

Michigan.— People *v.* Howard, 73 Mich. 10, 40 N. W. 789.

Missouri.— O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8; State *v.* Heege, 135 Mo. 112, 36 S. W. 614; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State *v.* Ranson, 73 Mo. 78; St. Louis *v.* Tiefel, 42 Mo. 578.

Montana.— *In re* Ryan, 20 Mont. 64, 50 Pac. 129.

Nebraska.— State *v.* Berka, 20 Nebr. 375, 30 N. W. 267; Dogge *v.* State, 17 Nebr. 140, 22 N. W. 348.

Oregon.— Murphy *v.* Salem, 49 Oreg. 54, 87 Pac. 532; State *v.* Banfield, 43 Oreg. 287, 72 Pac. 1093; *Ex p.* Howe, 26 Oreg. 181, 37 Pac. 536.

Pennsylvania.— Com. *v.* Dickert, 195 Pa. St. 234, 45 Atl. 1058; Com. *v.* Black Co., 34 Pa. Super. Ct. 431.

Tennessee.— Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460; State *v.* Algood, 87 Tenn. 163, 10 S. W. 310; State *v.* Gaines, 1 Lea 734.

Utah.— Mill *v.* Brown, 31 Utah 473, 88 Pac. 609.

Virginia.— Brown *v.* Epps, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676.

Washington.— Shortall *v.* Puget Sound Bridge, etc., Co., 45 Wash. 290, 88 Pac. 212, 122 Am. St. Rep. 899; Marston *v.* Humes, 3 Wash. 267, 28 Pac. 520 [*overruling* Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453].

West Virginia.— Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278; State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

Wisconsin.— Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971.

Wyoming.— Laramie County *v.* Stone, 7 Wyo. 280, 51 Pac. 605.

United States.— Knights Templars', etc., Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139; Beatrice *v.* Masslich, 108 Fed. 743, 47 C. C. A. 657; Steele County *v.* Erskine, 98 Fed. 215, 39 C. C. A. 173.

See 44 Cent. Dig. tit. "Statutes," § 204 *et seq.*

67. *Louisiana.*— State *v.* Bazile, 50 La. Ann. 21, 23 So. 8; State *v.* Read, 49 La. Ann. 1535, 22 So. 761.

plemental to a former act or amendatory thereto, if the subject of the original act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the general rule is that the subject of the supplement is covered by a title which contains specific reference to the original.[68] Where an amendatory act clearly expresses its object, it is not necessary for it to change or amend the title of the act amended;[69] and where the title clearly shows that the act amends a particular statute, it is immaterial that the body of the act does not so declare;[70] or that the title after referring correctly to the statute amended names a section thereof which does not exist, since the reference may be disregarded as surplusage and a sufficient title will remain,[71] it being held that the title of the amendatory act need not specifically enumerate the sections of the act amended;[72] and it is immaterial that an amendatory act does not refer to the

Michigan.— People *v.* Howard, 73 Mich. 10, 40 N. W. 789.

Missouri.— State *v.* Heege, 135 Mo. 112, 36 S. W. 614; State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23.

Oregon.— *Ex p.* Howe, 26 Oreg. 181, 37 Pac. 536.

Washington.— Karasek *v.* Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; Marston *v.* Humes, 3 Wash. 267, 28 Pac. 520.

United States.— Knights Templars', etc., Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139; *In re* Moore, 81 Fed. 356. But see The Borrowdale, 39 Fed. 376.

See 44 Cent. Dig. tit. "Statutes," § 204 *et seq.*

But see Boring *v.* State, 141 Ind. 640, 41 N. E. 270.

68. *Arkansas.*— St. Louis, etc., R. Co. *v.* Paul, 64 Ark. 83, 40 S. W. 705, 62 Am. St. Rep. 154, 37 L. R. A. 504.

Georgia.— Dallis *v.* Griffin, 117 Ga. 408, 43 S. E. 758; Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; Newman *v.* State, 101 Ga. 534, 28 S. E. 1005.

Illinois.— Park *v.* Modern Woodmen of America, 181 Ill. 214, 54 N. E. 932.

Indiana.— McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453; Parks *v.* State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

Kentucky.— Hoskins *v.* Crabtree, 103 Ky. 117, 44 S. W. 434, 19 Ky. L. Rep. 1757, 82 Am. St. Rep. 576.

Montana.— State *v.* Courtney, 27 Mont. 378, 71 Pac. 308.

Nebraska.— Van Duzer *v.* Mellinger, 66 Nebr. 508, 92 N. W. 738; Richards *v.* State, 65 Nebr. 808, 91 N. W. 878; Howard *v.* Clay County, 54 Nebr. 443, 74 N. W. 953; State *v.* Cornell, 54 Nebr. 72, 74 N. W. 432; Henry *v.* Ward, 49 Nebr. 392, 68 N. W. 518.

New Jersey.— Seaside Realty, etc., Co. *v.* Atlantic City, 74 N. J. L. 178, 64 Atl. 1081.

New York.— Bohmer *v.* Haffen, 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030 [*affirmed* in 22 Misc. 565, 50 N. Y. Suppl. 857].

North Dakota.— Erickson *v.* Cass County, 11 N. D. 494, 92 N. W. 841.

Pennsylvania.— Mt. Joy *v.* Lancaster, etc., Turnpike Co., 182 Pa. St. 581, 38 Atl. 411; Com. *v.* Morgan, 178 Pa. St. 198, 35 Atl. 589; Philadelphia *v.* Ridge Ave. R. Co., 142 Pa. St. 484, 21 Atl. 982, 24 Am. St. Rep. 512; Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369; *In re* Pottstown Borough, 117 Pa. St. 538, 12 Atl. 573; Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417; State Line, etc., Co.'s Appeal, 77 Pa. St. 429; Stroudsburg *v.* Shick, 24 Pa. Super. Ct. 442; Com. *v.* Hodusko, 24 Pa. Co. Ct. 388; Forty Fort Borough *v.* Forty Fort Water Co., 9 Kulp 241.

South Dakota.— Theo. Hamm Brewing Co. *v.* Foss, 16 S. D. 162, 91 N. W. 584.

Tennessee.— Goodbar *v.* Memphis, 113 Tenn. 20, 81 S. W. 1061.

Virginia.— Com. *v.* Brown, 91 Va. 752, 21 S. E. 357, 28 L. R. A. 110.

West Virginia.— Roby *v.* Sheppard, 42 W. Va. 286, 26 S. E. 278.

United States.— Steele County *v.* Erskine, 98 Fed. 215, 39 C. C. A. 173 [*affirming* 87 Fed. 630].

See 44 Cent. Dig. tit. "Statutes," § 204 *et seq.*

Amendments held not germane see Preston *v.* Stover, 70 Nebr. 632, 97 N. W. 812; Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; State *v.* Tibbets, 52 Nebr. 228, 71 N. W. 990, 66 Am. St. Rep. 492.

69. Cunningham *v.* Griffin, 107 Ga. 690, 33 S. E. 664.

70. State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357.

The use of the word "repealing" in the title instead of "amending" does not violate a constitutional provision requiring a recital in their caption of the title or substance of the bill to be amended, when the other words of the title clearly point out the sections, chapter, title, code, and subject to be affected by the provisions of the bill (State *v.* Page, 20 Mont. 238, 50 Pac. 719); and on the other hand an act declaring in its title that it is an amendment is valid, although it is in reality not an amendment but a repeal of the statute referred to (Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002).

71. Otis *v.* People, 196 Ill. 542, 63 N. E. 1053; State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357.

72. State *v.* Long, 21 Mont. 26, 52 Pac. 645. See also Knights Templars', etc., Life

chapter or year when the original act was passed, where there was no other act of the same title.[73] The failure of the legislature in amending the same section of the original act a second time to specifically refer to it as having been amended by the first amendatory act does not affect the validity or constitutionality of the second amendment.[74] An intention to repeal all laws inconsistent with the proposed amendment is necessarily implied and need not be expressed in the title of the amendment.[75]

2. Constitutional Prohibition Against Amending Merely by Reference to Title — a. Rule Stated. Under constitutional provision in many states no act may be revised or amended merely by reference to its title, but the act as revised or amended must be set forth and published at length.[76]

Indem. Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139.

73. Willis *v.* Mabon, 48 Minn. 140, 50 N. W. 1110, 21 Am. St. Rep. 626, 16 L. R. A. 281; Winona *v.* Winona County School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 12 Am. St. Rep. 687, 3 L. R. A. 46.

An independent act, complete in itself, not purporting to amend any other act, is not an amending act, within the provision of the constitutions as to the title of such acts, although incidentally it affects some older laws. *Ex p.* Sahlberg, 31 Utah 489, 88 Pac. 616; Mill *v.* Brown, 31 Utah 473, 88 Pac. 609.

Misrecital of the date of the act to which it is supplementary does not make the act void. Baltimore, etc., R. Co. *v.* Van Ness, 2 Fed. Cas. No. 830, 4 Cranch C. C. 595.

74. *California.*— Fletcher *v.* Prather, 102 Cal. 413, 36 Pac. 658.

Idaho.— West *v.* Latah County, 14 Ida. 353, 94 Pac. 445.

Illinois.— Melrose Park *v.* Dunnebecke, 210 Ill. 422, 71 N. E. 431.

Michigan.— Atty.-Gen. *v.* Stryker, 141 Mich. 437, 104 N. W. 737.

New York.— People *v.* Coleman, 4 N. Y. Suppl. 417.

Tennessee.— Goodbar *v.* Memphis, 113 Tenn. 20, 81 S. W. 1061.

Texas.— *Ex p.* Segars, 32 Tex. Cr. 553, 25 S. W. 26.

United States.— Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

See 44 Cent. Dig. tit. "Statutes," § 203 *et seq.*

75. Union Pac. R. Co. *v.* Sprague, 69 Nebr. 48, 95 N. W. 46, holding that the title of a bill for an amendatory act is not materially changed by omitting a clause providing for a repeal in general terms of all repugnant statutes, and substituting therefor a clause providing specifically for the repeal of the amended law.

76. *Alabama.*— Rose *v.* Lampley, 146 Ala. 445, 41 So. 521; Bates *v.* States, 118 Ala. 102, 24 So. 448; Rice *v.* Westcott, 108 Ala. 353, 18 So. 844; Miller *v.* Berry, 101 Ala. 531, 14 So. 655; Barnhill *v.* Teague, 96 Ala. 207, 11 So. 444; Bay Shell Road Co. *v.* O'Donnell, 87 Ala. 376, 6 So. 119; Judson *v.* Bessemer, 87 Ala. 240, 6 So. 267, 4 L. R. A. 742; Stewart *v.* Hale County, 82 Ala. 209, 2 So. 270; Tuskaloosa Bridge Co. *v.* Olmstead, 41 Ala. 9.

Arkansas.— Beard *v.* Wilson, 52 Ark. 290, 12 S. W. 567; Watkins *v.* Eureka Springs, 49 Ark. 131, 4 S. W. 384.

California.— Clarke *v.* Police, etc., Ins. Bd., 123 Cal. 24, 55 Pac. 576; Central Pac. R. Co. *v.* Shackleford, 63 Cal. 261.

Colorado.— Pitkin County *v.* Aspen Min., etc., Co., 3 Colo. App. 223, 32 Pac. 717.

Georgia.— Murray *v.* State, 112 Ga. 7, 37 S. E. 111.

Illinois.— Erford *v.* Peoria, 229 Ill. 546, 82 N. E. 374; Badenoch *v.* Chicago, 222 Ill. 71, 78 N. E. 31; People *v.* Chicago Election Com'rs, 221 Ill. 9, 77 N. E. 321.

Indiana.— Hendershot *v.* State, 162 Ind. 69, 69 N. E. 679; Mankin *v.* Pennsylvania Co., 160 Ind. 447, 67 N. E. 229; Boring *v.* State, 141 Ind. 640, 41 N. E. 270; Feihleman *v.* State, 98 Ind. 516; Dodd *v.* State, 18 Ind. 56; Armstrong *v.* Berreman, 13 Ind. 422; Wilkins *v.* Miller, 9 Ind. 100; Rogers *v.* State, 6 Ind. 31; Langdon *v.* Applegate, 5 Ind. 327.

Kansas.— State *v.* Davis, 74 Kan. 895, 86 Pac. 141; State *v.* Carter, 74 Kan. 156, 86 Pac. 138; *In re* Ashby, 60 Kan. 101, 55 Pac. 336; Sedgwick *v.* Bailey, 13 Kan. 600.

Kentucky.— New Castle *v.* Scott, 125 Ky. 545, 101 S. W. 944, 30 Ky. L. Rep. 894; Murpby *v.* Louisville, 114 Ky. 762, 71 S. W. 934, 24 Ky. L. Rep. 1574.

Louisiana.— Kohn *v.* Carrollton, 10 La. Ann. 719; Walker *v.* Caldwell, 4 La. Ann. 297.

Michigan.— Atty.-Gen. *v.* Loomis, 141 Mich. 547, 105 N. W. 4; People *v.* Shuler, 136 Mich. 161, 98 N. W. 986; Mok *v.* Detroit Bldg., etc., Assoc. No. 4, 30 Mich. 511; People *v.* Pritchard, 21 Mich. 236.

Missouri.— French *v.* Woodward, 58 Mo. 66.

Nebraska.— Haverly *v.* State, 63 Nebr. 83, 88 N. W. 171; State *v.* Byrum, 60 Nebr. 384, 83 N. W. 207 (holding that a purely amendatory act must set out the section as amended, and, in addition, contain a provision for the repeal of the old section sought to be amended); Reid *v.* Panska, 56 Nebr. 195, 78 N. W. 534; Reynolds *v.* State, 53 Nebr. 761, 74 N. W. 330; State *v.* Stewart, 52 Nebr. 243, 71 N. W. 998; State *v.* Tibbets, 52 Nebr. 228, 71 N. W. 990, 66 Am. St. Rep. 492; German-American F. Ins. Co. *v.* Minden, 51 Nebr. 870, 71 N. W. 995;

b. Construction and Application. The prohibition against revision or amendment by reference to title and other similar constitutional restrictions have never, in construction, been given a rigid effect, but have been held applicable only to such statutes as come within their terms, when construed according to the spirit of such restrictions, and in the light of the evils to be suppressed;[77] and the

Grand Island, etc., R. Co. *v.* Swinbank, 51 Nebr. 521, 71 N. W. 48; State *v.* Douglas County, 47 Nebr. 428, 66 N. W. 434; Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365; State *v.* Cobb, 44 Nebr. 434, 62 N. W. 867; South Omaha *v.* Taxpayers' League, 42 Nebr. 671, 60 N. W. 957; Trumble *v.* Trumble, 37 Nebr. 340, 55 N. W. 869; *In re* House Roll No. 284, 31 Nebr. 505, 48 N. W. 275; State *v.* Corner, 22 Nebr. 265, 34 N. W. 499, 3 Am. St. Rep. 267; Sovereign *v.* White, 7 Nebr. 409; Smails *v.* White, 4 Nebr. 353.

Nevada.— State *v.* Gibson, 30 Nev. 353, 96 Pac. 1057.

New Jersey.— Haring *v.* State, 53 N. J. L. 664, 23 Atl. 581 [*affirming* 51 N. J. L. 386, 17 Atl. 1079]; State *v.* Trenton, 53 N. J. L. 566, 22 Atl. 731; Christie *v.* Bayonne, 48 N. J. L. 407, 5 Atl. 805; Campbell *v.* State Bd. of Pharmacy, 45 N. J. L. 241.

Oregon.— State *v.* Wright, 14 Oreg. 365, 12 Pac. 708; Portland *v.* Stock, 2 Oreg. 69.

Pennsylvania.— Pittsburg's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761; Barrett's Appeal, 116 Pa. St. 486, 10 Atl. 36; Bennett *v.* Sullivan County, 29 Pa. Super. Ct. 120; Com. *v.* Hudusko, 10 Pa. Dist. 230; *In re* Oil City, etc., Bridge, 9 Pa. Dist. 110; *In re* Greenfield Ave., 8 Pa. Dist. 80, 21 Pa. Co. Ct. 619; Oakley *v.* Oakley, 1 Pa. Dist. 781, 11 Pa. Co. Ct. 572; Com. *v.* J——, 21 Pa. Co. Ct. 625; Com. *v.* Mercer, 9 Pa. Co. Ct. 461.

Tennessee.—State *v.* Smith, 119 Tenn. 521, 105 S. W. 68; Southern R. Co. *v.* Maxwell, 113 Tenn. 464, 82 S. W. 1137.

Texas.—Weekes *v.* Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544; Houston, etc., R. Co. *v.* State, (Civ. App. 1896) 39 S. W. 390 [*affirmed* in 95 Tex. 507, 68 S. W. 777].

Utah.— State *v.* Cutler, 34 Utah 99, 95 Pac. 1071; State *v.* McNally, 23 Utah 277, 64 Pac. 765; State *v.* Morrey, 23 Utah 273, 64 Pac. 764.

Virginia.— Beale *v.* Pankey, 107 Va. 215, 57 S. E. 661.

United States.— Beatrice *v.* Masslich, 108 Fed. 743, 47 C. C. A. 657; *In re* Buelow, 98 Fed. 86; Geer *v.* Ouray County, 97 Fed. 435, 38 C. C. A. 250; Olsen *v.* Haritwen, 57 Fed. 845, 6 C. C. A. 608 [*reversing* on other grounds 52 Fed. 652].

See 44 Cent. Dig. tit. "Statutes," § 204 *et seq.*

The constitution of Louisiana seems to have been the first to contain such a provision. Portland *v.* Stock, 2 Oreg. 69.

The object of the provision was to show the law-maker the true meaning of the proposed enactment without the necessity of resorting to the old law (Haring *v.* State, 51 N. J. L. 386, 17 Atl. 1079; Van Riper *v.* Parsons, 40 N. J. L. 123, 29 Am. Rep. 210), the mischief designed to be remedied being the enactment of amendatory statutes in terms so blind that both legislators and the public were deceived as to their import (People *v.* Mahaney, 13 Mich. 481 [*quoted* in Bush *v.* Indianapolis, 120 Ind. 476, 22 N. E. 422]; Chicago, etc., R. Co. *v.* Sporer, 72 Nebr. 372, 100 N. W. 813); and to prevent laws relating to one subject from being made applicable to laws passed upon another subject (Edwards *v.* Denver, etc., R. Co., 13 Colo. 59, 21 Pac. 1011; People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893).

This provision has been held to be directory merely and not mandatory so as to make a failure to comply fatal to the constitutionality of the amendment. East Georgia, etc., R. Co. *v.* King, 91 Ga. 519, 17 S. E. 939. The great weight of authority is, however, to the contrary. See cases cited *supra*, this note.

Amendments held not invalid under this constitutional provision see People *v.* Parvin, 74 Cal. 549, 16 Pac. 490; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403, 15 Pac. 714; Gilbert *v.* Georgia R., etc., Co., 105 Ga. 486, 30 S. E. 888; Foster *v.* State, 99 Ga. 56, 25 S. E. 613; Linquist *v.* State, 153 Ind. 542, 55 N. E. 426; Com. *v.* Reinecke Coal Min. Co., 117 Ky. 885, 79 S. W. 287, 25 Ky. L. Rep. 2027; McPherson *v.* Gordon, 96 S. W. 791, 29 Ky. L. Rep. 826, 1073; State *v.* Vicknair, 52 La. Ann. 1921, 28 So. 273; Arnoult *v.* New Orleans, 11 La. Ann. 54; Nations *v.* Lovejoy, 80 Miss. 401, 31 So. 811; State *v.* Hendrix, 98 Mo. 374, 11 S. W. 728; Morrison *v.* St. Louis, etc., R. Co., 96 Mo. 602, 9 S. W. 626, 10 S. W. 148; State *v.* Thruston, 92 Mo. 325, 4 S. W. 930, 1 Am St. Rep. 720; State *v.* Chambers, 70 Mo. 625; Spratt *v.* Helena Power Transmission Co., 37 Mont. 60, 94 Pac. 631; Dowty *v.* Pittwood, 23 Mont. 113, 57 Pac. 727; Eaton *v.* Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605; Horkey *v.* Kendall, 53 Nebr. 522, 73 N. W. 953, 68 Am. St. Rep. 623; State *v.* Stewart, 52 Nebr. 243, 71 N. W. 998; Merritt *v.* Whitlock, 200 Pa. St. 50, 49 Atl. 786; Gallagher *v.* MacLean, 193 Pa. St. 583, 45 Atl. 76; Purvis *v.* Ross, 158 Pa. St. 20, 27 Atl. 882; Neuls *v.* Scranton, 20 Pa. Super. Ct. 286; Merritt *v.* Whitlock, 6 Lack. Leg. N. (Pa.) 76; State *v.* Brown, 103 Tenn. 449, 53 S. W. 727; Taggart *v.* Hillman, 42 Tex. Civ. App. 71, 93 S. W. 245; Nobles *v.* State, 38 Tex. Cr. 330, 42 S. W. 978; State *v.* Bergfeldt, 41 Wash. 234, 83 Pac. 177.

77. *Alabama.*— *Ex p.* Pollard, 40 Ala. 77.

Illinois.— Timm *v.* Harrison, 109 Ill. 593.

Kansas.— State *v.* Cross, 38 Kan. 696, 17 Pac. 190.

Maryland.— Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

proper construction has been held to be not that the original act revised or amended should be set forth but only the act as revised or amended.[78] The clause

Michigan.— People *v.* Mahaney, 13 Mich. 481, a leading decision by Judge Cooley.

New Jersey.— Everham *v.* Hulit, 45 N. J. L. 53.

Oregon.— Fleischner *v.* Chadwick, 5 Oreg. 152.

Tennessee.— State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; Home Ins. Co. *v.* Taxing Dist., 4 Lea 644.

Texas.— Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738.

Virginia.— Anderson *v.* Com., 18 Gratt. 295.

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

See 44 Cent. Dig. tit. "Statutes," § 205 *et seq.*

When a statute after granting privileges and powers to a municipality refers to an existing local statute to indicate the procedure or the administrative details necessary to the accomplishment of its purpose, it is not within the inhibition. Fornia *v.* Wayne Cir. Judge, 140 Mich. 631, 104 N. W. 147; Curtin *v.* Barton, 139 N. Y. 505, 34 N. E. 1093; People *v.* Lorillard, 135 N. Y. 285, 31 N. E. 1011; *In re* Union Ferry Co., 98 N. Y. 139; People *v.* Banks, 67 N. Y. 568; Choate *v.* Buffalo, 39 N. Y. App. Div. 379, 57 N. Y. Suppl. 383 [*affirmed* in 167 N. Y. 597, 60 N. E. 1108]; Matter of Buffalo Traction Co., 25 N. Y. App. Div. 447, 49 N. Y. Suppl. 1052 [*affirmed* in 155 N. Y. 700, 50 N. E. 1115]; People *v.* Bruning, 89 Hun (N. Y.) 124, 34 N. Y. Suppl. 1048 [*quoting* People *v.* Lorillard, 135 N. Y. 285, 31 N. E. 1011]; St. Louis, etc., R. Co. *v.* Southwestern Tel., etc., Co., 121 Fed. 276, 58 C. C. A. 198.

A mere change in the name of an officer without any change in the duties or law governing the office itself is not within the mischief aimed at or its prohibition. Lloyd *v.* Smith, 176 Pa. St. 213, 35 Atl. 199.

The provision does not extend to the passage of original laws making operative articles of the constitution which were not self-operating, but is restricted to the revisal and amendment of laws already passed. Lucky *v.* Bienville Parish Police Jury, 46 La. Ann. 679, 15 So. 89.

When a statute provides a rule of construction for prior statutes, and is not in terms amendatory thereof, but is covered by the title of the original act, it is not within the provision. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453.

A code adopted by a single act of the legislature, although it may contain inconsistent provisions, and one section may be modified by another, is not within the letter or spirit of the provision. *Ex p.* Thomas, 113 Ala. 1, 21 So. 369; Porter *v.* Waterman, 77 Ark. 383, 91 S. W. 754.

78. *Alabama.*— Thornton *v.* Bramlett, 155 Ala. 417, 46 So. 577; State *v.* Patterson, 146 Ala. 128, 42 So. 19; Bray *v.* State, 140 Ala. 172, 37 So. 250; Lewis *v.* State, 123 Ala. 84, 26 So. 516; Wilkinson *v.* Ketler, 59 Ala. 306.

California.— Sanchez *v.* Fordyce, 141 Cal. 427, 76 Pac. 56.

Georgia.— Gilbert *v.* Georgia R., etc., Co., 104 Ga. 412, 30 S. E. 673.

Idaho.— State *v.* Jones, 9 Ida. 693, 75 Pac. 819.

Illinois.— Manchester *v.* People, 178 Ill. 285, 52 N. E. 964; Chambers *v.* People, 113 Ill. 509; Timm *v.* Harrison, 109 Ill. 593; People *v.* Wright, 70 Ill. 388.

Kentucky.— Purnell *v.* Mann, 105 Ky. 87, 48 S. W. 407, 20 Ky. L. Rep. 1146, 49 S. W. 346, 20 Ky. L. Rep. 1396, 50 S. W. 264, 21 Ky. L. Rep. 1129.

Louisiana.— Murphy *v.* St. Mary Parish Police Jury, 118 La. 401, 42 So. 979. See Arnoult *v.* New Orleans, 11 La. 54.

Missouri.— Wayland *v.* Herring, 208 Mo. 708, 106 S. W. 984; Cox *v.* Hannibal, etc., R. Co., 174 Mo. 588, 74 S. W. 854.

New Jersey.— State *v.* American Forcite Powder Mfg. Co., 50 N. J. L. 75, 11 Atl. 127; Colwell *v.* Chamberlain, 43 N. J. L. 387; Montclair Tp. *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 18 Atl. 242.

New York.— People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirming* 6 N. Y. St. 1 (*affirming* 14 Daly 154, 1 N. Y. St. 633), and *affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666)]; Wells *v.* Buffalo, 14 Hun 438 [*affirmed* in 80 N. Y. 253].

Oregon.— David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174; Portland *v.* Stock, 2 Oreg. 69.

Pennsylvania.— *In re* East Grant St., 121 Pa. St. 596, 16 Atl. 366; Wilson *v.* Downing, 4 Pa. Super. Ct. 487; Com. *v.* Flecker, 8 Kulp 225.

Tennessee.— Moses *v.* Groner, (Ch. App. 1896) 37 S. W. 1031.

Texas.— Womack *v.* Garner, (1895) 31 S. W. 358 [*affirming* 10 Tex. Civ. App. 367, 30 S. W. 589]; Dickinson *v.* State, 38 Tex. Cr. 472, 41 S. W. 759, 43 S. W. 520, holding also that it is not necessary to retain the numbering of the section or sections amended.

Washington.— State *v.* Lawson, 40 Wash. 455, 82 Pac. 750.

United States.— The Borrowdale, 39 Fed. 376 (holding that the act amended need not be published at full length in the amendatory act, unless the amendments thereto amount to a revision of the same by producing some change in every section thereof); Titusville Second Nat. Bank *v.* Caldwell, 13 Fed. 429.

See 44 Cent. Dig. tit. "Statutes," § 209 *et seq.*

In Indiana the opposite construction formerly prevailed, and it was there held that the meaning of the provision is that the act revised or amended shall be inserted in full in the act amending or revising it. Armstrong *v.* Berreman, 13 Ind. 422; Kennon *v.*

was not intended to abolish the doctrine of amendment or repeal by implication,[79] or

Shull, 9 Ind. 154; Littler *v.* Smiley, 9 Ind. 118; Wilkins *v.* Muller, 9 Ind. 100; Rogers *v.* State, 6 Ind. 31. But in the case of Newcastle Southern Turnpike Co. *v.* State, 28 Ind. 382, these decisions were overruled (see Bush *v.* Indianapolis, 120 Ind. 476, 22 N. E. 422), and it is now held to be well settled that it is not necessary to set out the section to be amended and that the consitutional requirement is fulfilled by setting out the section as amended (Bush *v.* Indianapolis, *supra*; Niblack *v.* Goodman, 67 Ind. 174). But a section of a statute cannot be amended without setting forth the whole section as amended, no matter how many clauses the section may be divided into (Martinsville *v.* Frieze, 83 Ind. 507; Draper *v.* Falley, 33 Ind. 465), although if the amended act is set forth it will not invalidate the amendment, the amended act being treated as surplusage (Draper *v.* Falley, *supra*).

A code, body, or system of law adopted or enacted by a single act of a legislature, although it may contain inconsistent or repugnant provisions or one section or part may be modified, and to the extent of the modifications controlled by another, is not within the spirit or letter of the mandate (*Ex p.* Thomas, 113 Ala. 1, 21 So. 369; Ellis *v.* Parsell, 100 Mich. 170, 58 N. W. 839, holding that Laws (1893), Act 118, "to revise and consolidate" the laws relative to penal institutions, and the government and discipline thereof, and "to repeal all acts inconsistent therewith," although the acts revised and consolidated are not reënacted and published at length does not violate Const. art. 4, § 25, providing that the act revised and the sections altered or amended shall be reënacted and published at length; the terms "revise" and "consolidate" implying the intention to include entire control over the subject, and the provisions of the act covering the entire management of such penal institutions); and the adoption of a code by an act which declares the various chapters constituting the code to be in force is not reviving or amending laws by reference to their titles only, within the prohibition of the constitution (Hunt *v.* Wright, 70 Miss. 298, 11 So. 608), and to specify how and in what mode the law shall be designated and cited is not an enactment of new law (U. S. *v.* Moore, 26 Fed. Cas. No. 15,804, holding that the enactment of the Revised Statutes by act of congress was not the enactment of a body of laws as original legislation, but was simply the enactment of a more convenient expression of the law as it existed on Dec. 1, 1873; it does not enact or reënact anything as law which was not the law on that date).

Reference to sections of a code by number, in order to incorporate in the new act the provisions of said code sections, has the same effect as if the code sections had been copied into the new act. But such reference has no effect whatever on other code sections, not referred to by number, but being in the same article from which those specifically named are taken, and part of the same scheme of legislation, when said other sections have no bearing whatever on the new legislation. Quearles *v.* Sparta, 2 Tenn. Ch. App. 714. See also Washington *v.* State, 28 Tex. App. 411, 13 S. W. 606.

The whole act need not be set out where one section is amended, even though other sections may be, by implication, modified or extended. Nations *v.* State, 64 Ark. 467, 43 S. W. 396; Noble *v.* Bragaw, 12 Ida. 265, 85 Pac. 903.

79. *Alabama.*— State Medical College *v.* Muldon, 46 Ala. 603.

Arkansas.—Little Rock *v.* Quindley, 61 Ark. 622, 33 S. W. 1053.

California.— Hellman *v.* Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057.

Florida.— St. Petersburg *v.* English, 54 Fla. 585, 45 So. 483; State *v.* Hocker, 36 Fla. 358, 18 So. 767; Smith *v.* State, 29 Fla. 408, 10 So. 894; Lake *v.* State, 18 Fla. 501.

Georgia.— Edalgo *v.* Southern R. Co., 129 Ga. 258, 58 S. E. 846.

Idaho.— Noble *v.* Bragaw, 12 Ida. 265, 85 Pac. 903.

Kansas.— Parker-Washington Co. *v.* Kansas City, 73 Kan. 722, 85 Pac. 781; State *v.* Guiney, 55 Kan. 532, 40 Pac. 926; State *v.* Cross, 38 Kan. 696, 17 Pac. 190; Norton County *v.* Shoemaker, 27 Kan. 77.

Michigan.—McCall *v.* Calhoun Cir. Judge, 146 Mich. 319, 109 N. W. 601; People *v.* Mahaney, 13 Mich. 481, a leading and often cited case decided by Judge Cooley.

Minnesota.— State *v.* Klein, 22 Minn. 328.

Missouri.— State *v.* Miller, 100 Mo. 439, 13 S. W. 677.

New Jersey.— Haring *v.* State, 51 N. J. L. 386, 17 Atl. 1079; Evernham *v.* Hulit, 45 N. J. L. 53.

Ohio.— Lehman *v.* McBride, 15 Ohio St. 573 (holding that the clause of Const. art. 2, § 16, which provides that "the section or sections so amended, shall be repealed," is directory only to the general assembly, and was not intended to abrogate the long-established rule as to repeals by implication); State *v.* Wyandot County, 16 Ohio Cir. Ct. 218, 9 Ohio Cir. Dec. 90; State *v.* Gano, 3 Ohio Dec. (Reprint) 177, 4 Wkly. L. Gaz. 337.

Oregon.— Warren *v.* Crosby, 24 Oreg. 558, 34 Pac. 661; Fleischner *v.* Chadwick, 5 Oreg. 152.

Pennsylvania.— Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284; Com. *v.* Halstead, 1 Pa. Co. Ct. 335; Com. *v.* Connell, 5 Lack. Leg. N. 332.

Tennessee.—Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019; Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618; Home Ins. Co. *v.* Taxing Dist., 4 Lea 644.

Texas.— Snyder *v.* Compton, 87 Tex. 374, 28 S. W. 1061.

to forbid the enactment of supplemental laws;[80] and thus a statute which, while it may relate to other statutes or matters contained therein, does not in fact amend them is not within the constitutional prohibition,[81] and simply because a statute, which adds to or is properly described as a supplement to another act, by construction is incidentally amendatory thereof, it does not violate the clause of the constitution,[82] particularly where each act is complete as to its purpose;[83] nor is it invalidated by a reference to the act as to which it is supplementary.[84] Furthermore, an act which on its face is a complete and perfect act of legislation and does not purport to amend prior legislation is not interdicted by such a provision, although it amends by implication other legislation on the same subject.[85]

West Virginia.— State *v.* Cain, 8 W. Va. 720.

Wisconsin.—Gilbert *v.* Pier, 103 Wis. 331, 79 N. W. 215; Hooker *v.* Green, 50 Wis. 271, 6 N. W. 816.

United States.— Dakota County School Dist. No. 11 *v.* Chapman, 152 Fed. 887, 82 C. C. A. 35.

See 44 Cent. Dig. tit. "Statutes," § 210.

80. State *v.* Guiney, 55 Kan. 532, 40 Pac. 926; Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371.

81. *Alabama.*— Burton *v.* State, 107 Ala. 108, 18 So. 284; Falconer *v.* Robinson, 46 Ala. 340.

Illinois.— People *v.* Lippincott, 81 Ill. 193; Northwestern Life Assoc. *v.* Stout, 32 Ill. App. 31.

Indiana.— Hazelett *v.* Butler University, 84 Ind. 230.

Kansas.— Wichita *v.* Missouri, etc., Tel. Co., 70 Kan. 441, 78 Pac. 886.

Louisiana.— State *v.* Henderson, 32 La. Ann. 779; Moore *v.* New Orleans, 32 La. Ann. 726; Kathman *v.* New Orleans, 11 La. Ann. 145.

Maryland.—Barron *v.* Smith, 108 Md. 317, 70 Atl. 225.

Michigan.— Atty.-Gen. *v.* Loomis, 141 Mich. 547, 105 N. W. 4; Rice *v.* Hosking, 105 Mich. 303, 63 N. W. 311, 55 Am. St. Rep. 448.

Nebraska.—Pacific Express Co. *v.* Cornell, 59 Nebr. 364, 81 N. W. 377; *In re* State Treasurer's Settlement, 51 Nebr. 116, 70 N. W. 532, 36 L. R. A. 746. See also State *v.* Frank, 60 Nebr. 327, 83 N. W. 74.

Pennsylvania.— Hood *v.* Norton, 202 Pa. St. 114, 51 Atl. 748; Com. *v.* Muir, 180 Pa. St. 47, 36 Atl. 413; Pittsburgh's Petition, 138 Pa. St. 401, 21 Atl. 757, 759, 761; Getz *v.* Brubaker, 25 Pa. Super. Ct. 303; Purvis *v.* Ross, 12 Pa. Co. Ct. 193; Shoemaker *v.* Harrisburg, 4 Pa. Co. Ct. 86; Shoemaker *v.* Harrisburg, 4 Lanc. L. Rev. 333.

South Dakota.— Wilson *v.* Huron Bd. of Education, 12 S. D. 535, 81 N. W. 952.

Tennessee.—State *v.* Henley, 98 Tenn. 665, 41 S. W. 352.

Texas.— Quinlan *v.* Houston, etc., R. Co., 89 Tex. 356, 34 S. W. 738; Snider *v.* International, etc., R. Co., 52 Tex. 306.

Virginia.— Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907; Christian *v.* Taylor, 96 Va. 503, 31 S. E. 904.

See 44 Cent. Dig. tit. "Statutes," § 209 *et seq.*

Changing names not an amendment.— The act of the first legislative assembly of the state of Idaho, amending the Revised Statutes of Idaho territory, and the Fifteenth Session Laws, changing the word "territory," to "state," and "comptroller" to "auditor," is not in conflict with the constitution, which prohibits the amendment of statutes by reference to their titles, or otherwise than by setting them out in full as amended. Gilbert *v.* Moody, 3 Ida. 3, 25 Pac. 1092.

82. *Alabama.*— Lockhart *v.* Troy, 48 Ala. 579.

Colorado.— Long *v.* Sullivan, 21 Colo. 109, 40 Pac. 359.

Indiana.— McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453; Harlin *v.* Schafer, 169 Ind. 1, 81 N. E. 721.

Kansas.— Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371.

Michigan.— Rice *v.* Ionia Probate Judge, 141 Mich. 692, 105 N. W. 17.

New Jersey.—Hopper *v.* Stack, 69 N. J. L. 562, 56 Atl. 1; Bradley *v.* Loving, 54 N. J. L. 227, 23 Atl. 685.

Oregon.— David *v.* Portland Water Committee, 14 Oreg. 98, 12 Pac. 174.

Pennsylvania.—Com. *v.* Halstead, 2 C. Pl. 247; Com. *v.* Connell, 5 Lack. Leg. N. 332.

Texas.— Oak Cliff *v.* State, 97 Tex. 383, 79 S. W. 1 [*affirming* (Civ. App. 1903) 77 S. W. 24]; Werner *v.* Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159.

United States.— Loomis *v.* Runge, 66 Fed. 856, 14 C. C. A. 148; Chester County Nat. Bank *v.* Chester County, 14 Fed. 239.

See 44 Cent. Dig. tit. "Statutes," § 209 *et seq.*

The supplemental matter must be germane to the subject, as expressed in the title of the original act; that is, the new supplemental matter must be of a character which, if contained in the original act, would be clearly embraced within its title. McCleary *v.* Babcock, 139 Ind. 228, 82 N. E. 453.

83. State *v.* Hancock, 54 N. J. L. 393, 24 Atl. 726; Oak Cliff *v.* State, 97 Tex. 383, 79 S. W. 1.

84. Hopper *v.* Stack, 69 N. J. L. 562, 56 Atl. 1; State *v.* Hancock, 54 N. J. L. 393, 24 Atl. 726.

85. *Alabama.*— Courtner *v.* Etheredge, 149

c. Sufficiency of Reference. The provision refers merely to the body of the act or section and does not require that an amendment to an existing act have a

Ala. 78, 43 So. 368; Beason *v.* Shaw, 148 Ala. 544, 42 So. 611; Sisk *v.* Cargile, 138 Ala. 164, 35 So. 114; Montgomery *v.* Birdsong, 126 Ala. 632, 28 So. 522; Thomas *v.* State, 124 Ala. 48, 27 So. 315; Cobb *v.* Vary, 120 Ala. 263, 24 So. 442; Phœnix Assur. Co. *v.* Montgomery Fire Dept., 117 Ala. 631, 23 So. 843, 42 L. R. A. 468; Birmingham Union R. Co. *v.* Elyton Land Co., 114 Ala. 70, 21 So. 314; State *v.* Rogers, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520; Gandy *v.* State, 86 Ala. 20, 5 So. 420.

Arkansas.— State *v.* Hunter, 69 Ark. 548, 64 S. W. 885; Baird *v.* State, 52 Ark. 326, 12 S. W. 566.

Colorado.— Edwards *v.* Denver, etc., R. Co., 13 Colo. 59, 21 Pac. 1011.

Illinois.— People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82; Erford *v.* Peoria, 229 Ill. 546, 82 N. E. 374; People *v.* Knopf, 183 Ill. 410, 56 N. E. 155; People *v.* Loeffler, 175 Ill. 585, 51 N. E. 785; Union School Dist. *v.* New Union School Dist., 135 Ill. 464, 28 N. E. 49; Timm *v.* Harrison, 109 Ill. 593; People *v.* Wright, 70 Ill. 388.

Indiana.— Harrison Tp. Advisory Bd. *v.* State, 170 Ind. 439, 85 N. E. 18; Lyons *v.* Perry County, 165 Ind. 197, 73 N. E. 916; Perry County *v.* Lindeman, 165 Ind. 186, 73 N. E. 912; Pittsburgh, etc., R. Co *v.* Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Indianapolis Brewing Co. *v.* Claypool, 149 Ind. 193, 48 N. E. 228; State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; Dodd *v.* State, 18 Ind. 56.

Kansas.— State *v.* Cross, 38 Kan. 696, 17 Pac. 190; Norton County *v.* Shoemaker, 27 Kan. 77; Emporia *v.* Norton, 16 Kan. 236.

Louisiana.— Dehon *v.* Lafourche Basin Levee Bd., 110 La. 767, 34 So. 770; State *v.* De Hart, 109 La. 570, 33 So. 605; State *v.* Henderson, 32 La. Ann. 779; Lafon *v.* Dufrocq, 9 La. Ann. 350; Wallace *v.* Smith, 8 La. Ann. 376.

Michigan.— Dykstra *v.* Holden, 151 Mich. 289, 115 N. W. 74; People *v.* Wands, 23 Mich. 385.

Missouri.— State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; State *v.* Bennett, (1889) 11 S. W. 264.

Montana.— Spratt *v.* Helena Power Transmission Co., 37 Mont. 60, 94 Pac. 631; Palatine Ins. Co. *v.* Northern Pac. R. Co., 34 Mont. 268, 85 Pac. 1032; King *v.* Pony Gold Min. Co., 24 Mont. 470, 62 Pac. 783.

Nebraska.— Zimmerman *v.* Trude, 80 Nebr. 503, 114 N. W. 641; Weston *v.* Ryan, 70 Nebr. 211, 218, 97 N. W. 347; De France *v.* Harmer, 66 Nebr. 14, 92 N. W. 159; Wenham *v.* State, 65 Nebr. 394, 91 N. W. 421, 58 L. R. A. 825; Nebraska Loan, etc., Assoc. *v.* Perkins, 61 Nebr. 254, 85 N. W. 67; Nebraska Tel. Co. *v.* Cornell, 59 Nebr. 737, 82 N. W. 1; Affholder *v.* State, 51 Nebr. 91, 70 N. W. 544; State *v.* Cornell, 50 Nebr. 526, 70 N. W. 56; State *v.* Moore, 48 Nebr. 870, 67 N. W. 876; Smith *v.* State, 34 Nebr. 689, 52 N. W. 572; Stricklett *v.* State, 31 Nebr. 674, 48 N. W. 820; State *v.* Arnold, 31 Nebr. 75, 47 N. W. 694; State *v.* Ream, 16 Nebr. 681, 21 N. W. 398 [*following* State *v.* Whittemore, 12 Nebr. 252, 11 N. W. 310]; Jones *v.* Davis, 6 Nebr. 33; Smails *v.* White, 4 Nebr. 353.

Nevada.— State *v.* Trolson, 21 Nev. 419, 32 Pac. 930.

New Jersey.— McEwan *v.* Pennsylvania, etc., R. Co., 72 N. J. L. 419, 60 Atl. 1130; State *v.* Trenton, 53 N. J. L 566, 22 Atl. 731; Evernham *v.* Hulit, 45 N. J. L. 53.

Oregon.— Northern Counties Inv. Trust *v.* Sears, 30 Oreg. 388, 41 Pac. 931, 35 L. R. A. 188; Hoffman *v.* Branch, 24 Oreg. 588, 38 Pac. 4; Warren *v.* Crosby, 24 Oreg. 558, 34 Pac. 661.

Pennsylvania.— New Brighton *v.* Biddell, 201 Pa. St. 96, 50 Atl. 989; *In re* Greenfield Ave., 191 Pa. St. 290, 43 Atl. 225; Com. *v.* Hill, 127 Pa. St. 540, 19 Atl. 141; New Brighton *v.* Biddell, 14 Pa. Super. Ct. 207; Com. *v.* Bowman, 35 Pa. Super. Ct. 410; Matter of Emsworth, 5 Pa. Super. Ct. 29; Gallagher *v.* Maclean, 6 Pa. Dist. 315; Forty Ft. *v.* Forty Ft. Water Co., 9 Kulp 241.

Tennessee.— State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

Texas.— Clark *v.* Finley, 93 Tex. 171, 54 S. W. 343; Johnson *v.* Martin, 75 Tex. 33, 12 S. W. 321; Morris *v.* State, 62 Tex. 728; Oak Cliff *v.* State, (Civ. App. 1903) 77 S. W. 24 [*affirmed* in 97 Tex. 383, 79 S. W. 1].

Utah.— State *v.* Beddo, 22 Utah 432, 63 Pac. 96.

Virginia.— Anderson *v.* Com., 18 Gratt. 295.

Washington.— State *v.* Pierce County Super. Ct., 44 Wash. 476, 87 Pac. 521; *In re* Dietrick, 32 Wash. 471, 73 Pac. 506; Copland *v.* Pirie, 26 Wash. 481, 67 Pac. 227, 90 Am. St. Rep. 769.

Wyoming.— *In re* Boulter, 5 Wyo. 329, 40 Pac. 520.

See 44 Cent. Dig. tit. "Statutes," § 206 *et seq.*

But where the act is not complete in itself, but in its effect is simply and clearly amendatory of a former statute, it falls directly within the constitutional inhibition and is void. Havis *v.* Jefferson, (Ark. 1890) 14 S. W. 1101; Aurora Bd. of Education *v.* Moses, 51 Nebr. 288, 70 N. W. 946; Stricklett *v.* State, 31 Nebr. 674, 48 N. W. 820; Sovereign *v.* State, 7 Nebr. 409 [*following* Smails *v.* White, 4 Nebr. 353]; Titusville Iron-Works *v.* Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917, 1 L. R. A. 361.

When a portion of an act is unconstitutional, and such portion can be rejected, and the remaining portion is properly indicated by the title, and forms a complete enactment in itself, capable of being executed

new title;[88] and requires only description not transcription; and while the description must be distinct, there is no requirement that it shall be lengthy or extended, any reasonable description of the act amendable being a sufficient compliance,[87] as by giving the title of the act, and the date of its approval,[88] together with a recital of how the act would read when amended;[89] and it is held sufficient to entitle an amendatory act, an act to amend certain specified sections of an authorized version of the statutes or a code, without any other description of the subject of the amending act;[90] but on the other hand an amendatory act has been held not to sufficiently express a subject of a section in the Revised Statutes by merely referring to its number;[91] and the constitutionality of the amending act will not be aided by the reference to a publication unless it is recognized by law.[92] An amendatory act which refers to the title of the act amended or to the section of the Revised Statutes the subject of amendment, but which sets forth in full the act or section as amended, does not violate the constitutional requirement;[93] and where the amendment is plain and can be carried out it may be held valid

according to the manifest intention of the legislature, independent of the part stricken out, such portion must be sustained. State *v.* Beddo, 22 Utah 432, 63 Pac. 96.

86. Northern Pac. Express Co. *v.* Metschan, 90 Fed. 80, 32 C. C. A. 530.

87. *California.*— Beach *v.* Von Detten, 139 Cal. 462, 73 Pac. 187.

Georgia.— Cunningham *v.* State, 128 Ga. 55, 57 S. E. 90; Welborne *v.* State, 114 Ga. 793, 40 S. E. 857; Puckett *v.* Young, 112 Ga. 578, 37 S. E. 880; Murray *v.* State, 112 Ga. 7, 37 S. E. 111; Collins *v.* Russell, 107 Ga. 423, 33 S. E. 444; Gilbert *v.* Georgia R., etc., Co., 105 Ga. 486, 30 S. E. 888; Ryle *v* Wilkinson County, 104 Ga. 473, 30 S. E. 934; Newman *v.* State, 101 Ga. 534, 28 S. E. 1005; Peed *v.* McCrary, 94 Ga. 487, 21 S. E. 232; Georgia Southern, etc., R. Co. *v.* George, 92 Ga. 760, 19 S. E. 813; Fite *v.* Black, 85 Ga. 413, 11 S. E. 782.

Indiana.— Citizens' St. R. Co. *v.* Haugh, 142 Ind. 254, 41 N. E. 533; Bush *v.* Indianapolis, 120 Ind. 476, 22 N. E. 422.

Nebraska.— State *v.* Kearney, 49 Nebr. 325, 68 N. W. 533; State *v.* Babcock, 23 Nebr. 128, 36 N. W. 348.

New York.— Matter of Kavanaugh, 53 Hun 1, 5 N. Y. Suppl. 676 [*affirmed* in 125 N. Y. 418, 26 N. E. 470].

Pennsylvania.— *In re* Dickinson Tp. Road, 23 Pa. Super. Ct. 34.

Washington.— State *v.* Scott, 32 Wash. 279, 73 Pac. 365 [*following* Marston *v.* Humes, 3 Wash. 267, 28 Pac. 520].

88. Cunningham *v.* State, 128 Ga. 55, 57 S. E. 90; Adam *v.* Wright, 84 Ga. 720, 11 S. E. 893.

89. Georgia Southern, etc., R. Co. *v.* George, 92 Ga. 760, 19 S. E. 813; Weatherbogg *v.* Jasper County, 158 Ind. 14, 62 N. E. 477.

90. *California.*— People *v.* Oates, 142 Cal. 12, 75 Pac. 337; *In re* McCue, 7 Cal. App. 765, 96 Pac. 110.

Missouri.— State *v.* Marion County Ct., 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State *v.* Ranson, 73 Mo. 78.

Nebraska.— State *v.* Berka, 20 Nebr. 375, 30 N. W. 267.

New York.— People *v.* Clute, 12 Abb. Pr. N. S. 399 [*affirmed* in 63 Barb. 356 (*reversed* on other grounds in 50 N. Y. 451)].

Oregon.— State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357, holding also that where the amendatory act correctly names a section number of the code, the fact that it adds that it is part of a chapter or title which does not exist is immaterial, the subject of legislation appearing plainly from the body or amendment.

Tennessee.— Wallace *v.* Goodlett, 104 Tenn. 670, 58 S. W. 343; State *v.* Brown, 103 Tenn. 449, 53 S. W. 727; State *v.* Runnels, 92 Tenn. 320, 21 S. W. 665; Hardaway *v.* Lilly, (Ch. App. 1898) 48 S. W. 712.

Texas.— Gunter *v.* Texas Land, etc., Co., 82 Tex. 496, 17 S. W. 840 (where, however, the title was held insufficient in that it did not sufficiently indicate the body of laws or revision of statutes to which it related); State *v.* McCracken, 42 Tex. 385; Hasselmeyer's Case, 1 Tex. App. 690; Nichols *v.* State, 32 Tex. Cr. 291, 23 S. W. 680.

Virginia.— Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110.

West Virginia.— Heath *v.* Johnson, 36 W. Va. 782, 15 S. E. 980.

United States.— McCalla *v.* Bane, 45 Fed. 828 [*following* State *v.* Phenline, 16 Oreg. 107, 17 Pac. 572]; The Borrowdale, 39 Fed. 376.

See 44 Cent. Dig. tit. "Statutes," § 209 *et seq.*

In Washington while it was a territory such reference was held insufficient. Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453. See also State *v.* Halbert, 14 Wash. 306, 44 Pac. 538. The rule has been held to be otherwise, however, under the state government. Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143; Marston *v.* Humes, 3 Wash. 267, 28 Pac. 520.

91. Webster *v.* Powell, 36 Fla. 703, 18 So. 441; Boring *v.* State, 141 Ind. 640, 41 N. E. 270. See also Wall *v.* Garrison, 11 Colo. 515, 19 Pac. 469.

92. Memphis St. R. Co. *v.* State, 110 Tenn. 598, 75 S. W. 730.

93. State *v.* Read, 49 La. Ann. 1535, 22 So. 761.

even though the section numbers of the original act and of the amendment are in confusion.[94]

G. Codification, Compilation, and Revision. In many states the statutes have been collected and systematically arranged into a body of laws variously called a Code, Revised Statutes, Consolidated Laws, or some similar name,[95] which are held to be not mere compilations of laws previously existing, but bodies of laws so enacted that laws previously existing and omitted therefrom cease to exist, and such additions as appear therein are the law from the approval of the act adopting the code.[96] But revisers of statutes are presumed not to change the law if the language which they use fairly admits of a construction which makes it consistent with the former statutes;[97] and it is a well-settled rule that in the

94. People *v.* Judge Grand Rapids Super. Ct., 39 Mich. 195 [*quoted* in Fenton *v.* Yule, 27 Nebr. 758, 43 N. W. 1140]; State *v.* Partridge, 29 Nebr. 158, 45 N. W. 290.

95. See cases cited *infra*, this, and the following notes.

Where a previous law is inserted in a code by an oversight of the codifiers, and is not observed by the legislature when it is adopted, in determining the legislative intent, the dates of the enactment will be looked to, and the one last "in time will be held as the law." Mobile Sav. Bank *v.* Patty, 16 Fed. 751.

Adding provisions omitted.— The legislature may provide that certain provisions of the law omitted in the revision of the statutes should be added thereto. Martin *v.* Johnson, 33 Fla. 287, 14 So. 725.

Acts of the same general assembly adopting the general statutes if inconsistent therewith or embraced therein are in force under a statutory provision, that so far as acts of the same general assembly may be inconsistent with any provision of those statutes they should be considered the law of the land. Sellers *v.* Com., 13 Bush (Ky.) 331.

An act amending a section of the Revised Statutes by striking out the same, and substituting other provisions, becomes a part of the Revised Statutes. U. S. *v.* Sapinkow, 90 Fed. 654.

The code need not be embodied in the act adopting it, but a reference in such act to the code adopted is sufficient. Mathis *v.* State, 31 Fla. 291, 12 So. 681 (holding that by Acts (1891, c. 4055, the Revised Statutes mentioned therein as accompanying it were constitutionally enacted as statute law, of a general and public nature, under the title of the "Revised Statutes of the State of Florida," although they were not bodily incorporated in said act); Georgia Cent. R. Co. *v.* State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518. And see *supra*, text and notes 90, 91.

The only manner of revising a sectionized code is by amending and repealing sections and adding new ones. Lewis *v.* Dunne, 134 Cal. 291, 66 Pac. 478, 86 Am. St. Rep. 257, 55 L. R. A. 833. Under a constitutional provision that no law shall be revised by reference to its title, but in such case the act revised shall be reënacted and published at length as revised, an act to revise a code of procedure will be unconstitutional, unless the whole code as revised is reënacted and published at length. Lewis *v.* Dunne, 134 Cal. 291, 66 Pac. 478, 86 Am. St. Rep. 257, 55 L. R. A. 833; State *v.* De Hart, 109 La. 570, 33 So. 605.

96. State *v.* Towery, 143 Ala. 48, 39 So. 309. See also *Ex p.* Donnellan, 49 Wash. 460, 95 Pac. 1085, holding that a code introduced as an original bill, and passed as such by the legislature, and approved by the governor, is a valid law and not a compilation of existing laws, even though the person who prepared it was not authorized to do so.

97. *Alabama.*— Camp *v.* State, 27 Ala. 53.

Connecticut.— Duffield *v.* Pike, 71 Conn. 521, 42 Atl. 641.

Georgia.— Georgia Cent. R. Co. *v.* State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518.

Indiana.— Belton *v.* Smith, 45 Ind. 291; Patterson *v.* Crawford, 12 Ind. 241; Abernathy *v.* Reeves, 7 Ind. 306.

Kentucky.— Louisville *v.* Louisville Public Warehouse Co., 107 Ky. 184, 53 S. W. 291, 21 Ky. L. Rep. 867.

Texas.— Fischer *v.* Simon, 95 Tex. 234, 66 S. W. 447, 882; Swain *v.* Mitchell, 27 Tex. Civ. App. 62, 66 S. W. 61.

Wisconsin.—Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130.

See 44 Cent. Dig. tit. "Statutes," § 216.

The court cannot permit inquiry into the correctness of the proceedings of the revising committee, in an ordinary civil suit, appointed by the general assembly for a revision of the statutes. Eld *v.* Gorham, 20 Conn. 8; Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86, holding that revisers having been authorized "to revise and digest" existing statutes, the supreme court, construing the code, in doubtful cases will presume that this was done, and that it was not intended to alter or change them.

Marginal notes no indication of construction.— By a resolution directing that a compilation of the general laws shall be published, with marginal notes indicating briefly the contents of each section, the general assembly does not sanction the construction to be placed on the different sections by the marginal notes to be thereafter prepared. Com. Mut. F. Ins. Co. *v.* Place, 21 R. I. 248, 43 Atl. 68. Furthermore, the failure of the revision committee to note, at the lower margin of Rev. St. § 3480, the amendment of Rev. St. (1879) § 1253, as they were re-

revision of statutes neither an alteration in phraseology nor the omission or addition of words in the latter statute shall be held necessarily to alter the construction of the former act, excepting where the intent of the legislature to make such change is clear.[98] But where no effect can be given to the new language in any other manner, the law will be construed to be changed;[99] and the rule that a revision of the statutes making no substantial change in the preëxisting law shall be taken as only embodying, in changed form, the statutes previously existing, is not conclusive where the revision was adopted by the legislature, and has the force of law, especially where the revision contained new provisions, and enlarged and systematized old ones.[1] Although an act from which a section of the code was taken is subject to the constitutional objection that it contains matter different from that embraced in the title, this defect in the act does not render the section of the code invalid;[2] but if an act is void when first passed, the mere fact that it was copied into the Revised Statutes does not *prima facie* establish its validity, unless it be shown that it was reënacted by the legislature at some regular session,[3] although the mere appearance of a section in the Revised Statutes is sufficient authority for treating it as the law on the subject, until it is shown to be incorrect by the files in the secretary of state's office;[4] and the authority which attaches to a printed volume of the revision of the statutes duly certified is not lessened by the fact that a certain provision found therein does not appear in the printed volume of the annual session acts.[5]

VI. REPEAL, SUSPENSION, AND REVIVAL.

A. Repeal — 1. DEFINITION. The primary meaning of the word "repeal," as used in speaking of the repeal of a statute, is, as its etymology imports, the recalling or revoking of the statute.[6]

quired to do by Rev. St. § 6609, does not affect the validity of the section as amended, since these notations were only intended to facilitate the examination of the statutes. State *v.* Wray, 109 Mo. 594, 19 S. W. 86.

98. *Iowa.*— Eastwood *v.* Crane, 125 Iowa 707, 101 N. W. 481; Minneapolis, etc., R. Co. *v.* Cedar Rapids, etc., R. Co., 114 Iowa 502, 87 N. W. 410.

Kentucky.—Allen *v.* Ramsey, 1 Metc. 635; Overfield *v.* Sutton, 1 Metc. 621.

Louisiana.— State *v.* Gaster, 45 La. Ann. 636, 12 So. 739.

Maine.— Hughes *v.* Farrar, 45 Me. 72.

Massachusetts.— Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6.

New Hampshire.— Burnham *v.* Stevens, 33 N. H. 247; Mooers *v.* Bunker, 29 N. H. 420.

New York.— Douglas *v.* Douglas, 5 Hun 140; Croswell *v.* Crane, 7 Barb. 191; Dominick *v.* Michael, 4 Sandf. 374; People *v.* Deming, 1 Hilt. 271, 13 How. Pr. 441; Theriat *v.* Hart, 2 Hill 380; *In re* Brown, 21 Wend. 316.

North Carolina.— Hughes *v.* Smith, 64 N. C. 493.

Ohio.— Conger *v.* Barker, 11 Ohio St. 1.

Texas.— Ennis *v.* Crump, 6 Tex. 34.

Vermont.— Clark *v.* Powell, 62 Vt. 442, 20 Atl. 597.

Virginia.— Parramore *v.* Taylor, 11 Gratt. 220.

United States.— People's Sav. Bank, etc., Co. *v.* Batchelder Egg Case Co., 51 Fed. 130 2 C. C. A. 126.

See 44 Cent. Dig. tit. "Statutes," § 216.

The alteration of a single article in a code after adoption does not alter the legal effect of the other articles. Table Mountain Tunnel Co. *v.* Stranahan, 31 Cal. 387.

99. Burnham *v.* Stevens, 33 N. H. 247; The Brothers, 4 Fed. Cas. No. 1,968, 10 Ben. 400; Dodge *v.* Arthur, 7 Fed. Cas. No. 3,950; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,520, 10 Ben. 170.

1. State *v.* Burgess, 101 Tex. 524, 109 S. W. 922.

2. Kennedy *v.* Meara, 127 Ga. 68, 56 S. E. 243; Barker *v.* State, 118 Ga. 35, 44 S. E. 874; McFarland *v.* Donaldson, 115 Ga. 567, 41 S. E. 1000 [*following* Georgia Cent. R. Co. *v.* State, 104 Ga. 831, 31 S. C. 531, 42 L. R. A. 518].

When an act is incorporated in the code in accordance with a constitutional provision it becomes statutory law, without reference to its title as originally enacted, and the objection that the subject of the act does not correspond with its title cannot be raised. Park *v.* Laurens Cotton Mills, 75 S. C. 560, 56 S. E. 234.

3. Bowen *v.* Missouri Pac. R. Co., 118 Mo. 541, 24 S. W. 436.

4. Langston *v.* Canterbury, 173 Mo. 122, 73 S. W. 151.

5. Selders *v.* Kansas City, etc., R. Co., 19 Mo. App. 334.

6. Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 485, 11 Pac. 3; Jessee *v.* De Shong, (Tex. Civ. App. 1907) 105 S. W. 1011, 1014.

Other definition.—"An abrogation of one statute by another." Butte, etc., Consol. Min.

2. Power to Repeal — a. In General. A legislature has plenary power to enact laws or repeal them, unless prohibited expressly or by implication by the state or federal constitution. The power to repeal a law is as complete and full as the power to enact it.[7] The act of one legislature is not binding upon future legislatures.[8] This power of repeal extends to a previous act of the same session,[9] even before it becomes a law.[10] Nor can one legislature bind a future legislature to a particular mode of repeal.[11]

b. Void Act. The right of the legislature to repeal an unconstitutional act is self-evident,[12] and the fact that an act is unconstitutional does not render unconstitutional an act passed to repeal it and to substitute another in its stead.[13]

3. Modes of Repeal — a. In General. In the absence of any constitutional restraint, a state legislature may exercise the power of repeal in any form in which it can give a clear expression of its will.[14]

b. Express Repeal — (i) *In General* — (a) *Intention Governs.* A clause in a statute purporting to repeal other statutes is subject to the same rules of interpretation as other enactments, and the intent must prevail over literal interpretation.[15]

Co. *v.* Montana Ore Purchasing Co., 24 Mont. 125, 133, 60 Pac. 1039.

Suspension distinguished.— There is a material difference between the repeal and the suspension of a statute. Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681; Brown *v.* Barry, 3 Dall. (U. S.) 365, 1 L. ed. 638. A repeal removes the law entirely; but, when suspended, it still exists, and has operation in every respect, except wherein it has been suspended. Mernaugh *v.* Orlando, 41 Fla. 433, 27 So. 34. A repeal puts an end to the law. A suspension holds it in abeyance. Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995.

7. Musgrove *v.* Vicksburg, etc., R. Co., 50 Miss. 677.

Assignment of reasons unnecessary.—A legislature has power to repeal a statute, although no reason be assigned therefor; or if a reason be assigned which fails, or proves wholly insufficient, the repeal still remains effective. Jones *v.* Franklin County, 25 Ohio Cir. Ct. 510.

Vote of people.—A law cannot be repealed by a vote of the people. Geebrick *v.* State, 5 Iowa 491.

8. *Arkansas.*— Files *v.* Fuller, 44 Ark. 273.

Florida.— Gonzales *v.* Sullivan, 16 Fla. 791; Internal Imp. Fund *v.* St. Johns R. Co., 16 Fla. 531.

Georgia.— Shaw *v.* Macon, 21 Ga. 280; Hamrick *v.* Rouse, 17 Ga. 56.

Illinois.— Bragg *v.* People, 78 Ill. 328.

Indiana.— State *v.* Oskins, 28 Ind. 364; Armstrong *v.* Dearborn County Com'rs, 4 Blackf. 208; Elwell *v.* Tucker, 1 Blackf. 285.

Kansas.—Gilleland *v.* Schuyler, 9 Kan. 569.

Louisiana.—Renthorp *v.* Bourg, 4 Mart. 97.

New York.—People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94.

Texas.— Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

United States.— Bloomer *v.* Stolley, 3 Fed. Cas. No. 1,559, 5 McLean 158.

See 44 Cent. Dig. tit. "Statutes," § 218.

A legislature cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes. Mongeon *v.* People, 55 N. Y. 613.

The presumption is against making a statute irrepealable. Saginaw County *v.* Hubinger, 137 Mich. 72, 100 N. W. 261.

An act, the execution of which is suspended, may, in the meanwhile, be repealed by a posterior act. New Orleans *v.* Ripley, 2 La. 344; Gosselin *v.* Gosselin, 7 Mart. N. S. (La.) 469.

An exception to this rule exists where the act of the legislature is the discharge of a ministerial duty, rather than the exercise of legislative power. Leib *v.* Com., 9 Watts (Pa.) 200.

9. Mobile, etc., R. Co. *v.* State, 29 Ala. 573 (holding that the regulations of parliamentary law as to the entertainment of propositions to repeal acts during the sessions of their adoption are rules of legislative conduct, but do not absolutely exclude all propositions for the alteration of previously adopted acts of the same session); Atty.-Gen. *v.* Brown, 1 Wis. 513.

10. Southwark Bank *v.* Com., 26 Pa. St. 446.

11. Nevada County *v.* Hicks, 48 Ark. 515, 3 S. W. 524; Mix *v.* Illinois Cent. R. Co., 116 Ill. 502, 6 N. E. 42; Brightman *v.* Kirner, 22 Wis. 54; Kellogg *v.* Oshkosh, 14 Wis. 623.

12. State *v.* Field, 119 Mo. 593, 24 S. W. 752.

13. State *v.* Field, 119 Mo. 593, 24 S. W. 752.

14. State *v.* Judge Eighth Judicial Dist., 14 La. Ann. 486.

Ordinarily when the legislature intend to repeal a statute, they may be expected to do it in express terms (Pursell *v.* New York L. Ins., etc., Co., 42 N. Y. Super. Ct. 383; People *v.* Baker, 10 Abb. N. Cas. (N. Y.) 210; Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609), or by the use of words which are equivalent to an express repeal (Ludlow *v.* Johnston, *supra*). But in a proper case a repeal may be as well effected by implication. See *infra*, VI, A, 3, c.

15. Home Bldg., etc., Assoc. *v.* Nolan, 21

(B) *Reference to Subject of Repeal in Title of Repealing Act.* If the subject of a statute is to repeal another statute, then that subject must be fairly expressed in the title.[16] If, however, the repealing act is upon the same subject as the act repealed, the repeal is properly connected with the subject-matter, and the repealing act is valid notwithstanding the title is silent on the subject.[17]

(C) *Identification of Act Repealed* — (1) IN GENERAL. Where a statute repeals a former statute, to give effect to the repealing statute, the repealing statute must be so pointed out as to leave no doubt as to what statute was intended.[18]

(2) BY REFERENCE TO TITLE. A constitutional provision that no law shall be repealed by mere reference to the title is not violated by an act referring to the date of the repealed act as well as to its title, there being no other act of the same date, with the same title,[19] or by an act which, in its body, contains the full title of the act to be repealed, and repeals the same.[20]

(3) EFFECT OF MISTAKE IN IDENTIFICATION. Effect may be given to a statute

Mont. 205, 53 Pac. 738; Smith *v.* People, 47 N. Y. 330; State *v.* Moorhouse, 5 N. D. 406, 67 N. W. 140.

Even words of absolute repeal may be qualified by the intention manifested in other parts of the same act.

Alabama.— Holt *v.* Mobile School Com'rs, 29 Ala. 451, holding that where the language employed demonstrates that it was used for an object more limited, the court will give it the more limited significance.

Iowa.— State *v.* Payton, 139 Iowa 125, 117 N. W. 43.

Montana.— Home Bldg., etc. Assoc. *v.* Nolan, 21 Mont. 205, 53 Pac. 738.

New York.— Smith *v.* People, 47 N. Y. 330.

North Dakota.— State *v.* Moorhouse, 5 N. D. 406, 67 N. W. 140.

Utah.— Pratt *v.* Swan, 16 Utah 483, 52 Pac. 1092.

Washington.— Howlett *v.* Cheetham, 17 Wash. 626, 50 Pac. 522.

16. State *v.* Sholl, 58 Kan. 507, 49 Pac. 668; Howlett *v.* Cheetham, 17 Wash. 626, 50 Pac. 522. See also *supra*, IV, C, 3.

Expression of subject in title.— Under a constitutional provision that no bill shall embrace more than one subject, and that it shall be expressed in the title, it is not necessary in all cases that the repeal of a given statute should be expressed in terms in the title. Howlett *v.* Cheetham, 17 Wash. 626, 50 Pac. 522. See, generally, *supra*, IV, C, 3.

When the title does not refer to the repeal of any particular statute, but only to laws contrary to and in conflict with the provisions of the act, while the repealing clause undertakes to repeal a particular act, only so much of the act as is broader than the title is unconstitutional, and the rest is not affected. New Iberia *v.* New Iberia, etc., Drainage Dist., 106 La. 651, 31 So. 305.

17. Howlett *v.* Cheetham, 17 Wash. 626, 50 Pac. 522.

Where a repealing act relates to a different subject from that in a statute sought to be repealed, the subject of repeal must be expressed in the title of such act. Howlett *v.* Cheetham, 17 Wash. 626, 50 Pac. 522. See also *supra*, IV, C, 3.

18. Holt *v.* Mobile School Com'rs, 29 Ala. 451 (holding that the repealing act should describe the act to be repealed, either by its caption or by such reference to its contents as to show the intention to repeal it); Com. *v.* Central Pass. R. Co., 52 Pa. St. 506.

An identification of any kind is sufficient. Leard *v.* Leard, 30 Ind. 171. Nevertheless the usual mode of repealing a statute is to distinguish it by its name or title. See Chegaray *v.* Jenkins, 3 Sandf. (N. Y.) 409 [*affirmed* in 5 N. Y. 376].

Where the body of a repealing act does not identify the act intended to be repealed, the title of such repealing act may be resorted to. San Diego County Sav. Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102. Especially is this true in states where the constitution provides that no act shall embrace more than one subject, and that shall be expressed in the title. San Diego County Sav. Bank *v.* Burns, *supra*. See also *supra*, IV, C, 3.

19. Fullington *v.* Williams, 98 Ga. 807, 27 S. E. 183. See also *supra*, IV, C, 3.

Reference to title.— A constitutional provision that no law shall be revised or amended by reference to its title only does not prevent a repeal of statutes in such manner.

Arkansas.— Scales *v.* State, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768.

Idaho.— Nohle *v.* Bragaw, 12 Ida. 265, 85 Pac. 903.

Louisiana.— Commercial Bank *v.* Markham, 3 La. Ann. 698.

Maryland.— Dorchester County *v.* Meekins, 50 Md. 28.

Michigan.— Ripley *v.* Evans, 87 Mich. 217, 49 N. W. 504.

Missouri.— State *v.* Murlin, 137 Mo. 297, 38 S. W. 923.

New Jersey.— State *v.* Parsons, 40 N. J. L. 123, 29 Am. Rep. 210.

Oregon.— Bird *v.* Wasco County, 3 Oreg. 282.

Texas.— Hearn *v.* State, 25 Tex. 336; Chambers *v.* State, 25 Tex. 307; Fielder *v.* State, (Cr. App. 1899) 49 S. W. 376.

West Virginia.— Shields *v.* Bennett, 8 W. Va. 74.

See 44 Cent. Dig. tit. "Statutes," §§ 222, 223.

20. Adam *v.* Wright, 84 Ga. 720, 11 S. E. 893. See also *supra*, IV, C, 3.

repealing a former statute, although the former be incorrectly described, providing the intention is clear.[21]

(II) *Repeal of All Laws Within Purview.* A later statute repeals an earlier one, if it covers the same subject and in general terms repeals all other laws within its purview.[22]

c. Implied Repeal[23] — (I) *In General.* A legislature may express its will in any form — affirmative or negative — that it pleases, so long as it does not transgress constitutional prohibitions. It is under no obligation to use words of express repeal.[24] But the repeal of statutes by implication is not favored by the courts.[25] The presumption is always against the intention to repeal where express

21. State *v.* Pierce, 51 Kan. 241, 32 Pac. 924; Reg. *v.* Wilcock, 7 Q. B. 317, 9 Jur. 729, 14 L. J. M. C. 104, 1 New Sess. Cas. 651, 53 E. C. L. 317. In State *v.* Knoll, 69 Kan. 767, 77 Pac. 580, it is held that where one act is mentioned in the title of a repealing act, and another in the body thereof, the latter being the one desired to be repealed, such act is not expressly repealed, even though correctly named in the body, but, where the repealing act was evidently intended to cover the whole subject, it affects a repeal of the act in question by implication.

An inaccuracy in the enumeration of laws repealed does not effect a repeal of the laws thus mentioned. People *v.* Lord, 9 N. Y. App. Div. 458, 41 N. Y. Suppl. 343; McKee Land, etc., Co. *v.* Swikehard, 23 Misc. (N. Y.) 21, 51 N. Y. Suppl. 399 [*affirmed* in 63 N. Y. App. Div. 553, 71 N. Y. Suppl. 1141]. See also State *v.* Knoll, 69 Kan. 767, 77 Pac. 580.

The mistake must appear beyond doubt from the face of the act, or when read in connection with other acts *in pari materia.* Jones *v.* Franklin County, 25 Ohio Cir. Ct. 510. *A fortiori* where the repealing statute expressly recites the substance of the one repealed. Jones *v.* Franklin County, *supra.*

22. Wilcox *v.* Cheviott, 92 Me. 239, 42 Atl. 403; Ogden *v.* Witherspoon, 18 Fed. Cas. No. 10,461, 3 N. C. 227.

The term "purview" means the enacting part of the statute in contradistinction to the preamble. Payne *v.* Conner, 3 Bibb (Ky.) 180, 181; The San Pedro, 2 Wheat. (U. S.) 132, 139, 4 L. ed. 202. Hence the repeal is not confined merely to such parts of the former act as are inconsistent with the provisions of the repealing act. The San Pedro, 2 Wheat. (U. S.) 132, 4 L. ed. 202. But a statute repealing all former acts within its purview does not repeal the provisions of former laws as to cases not provided for by the repealing statute. State *v.* Reynolds, 108 Ind. 353, 9 N. E. 287; Payne *v.* Conner, 3 Bibb (Ky.) 180; State *v.* Fuller, 14 La. Ann. 667. And where some of the provisions of the prior act are within the purview of the repealing act, and others are not, if to hold the former repealed and the latter not leads to an absurdity, none of the provisions upon the subject will be held repealed. Com. *v.* Watts, 84 Ky. 537, 2 S. W. 123, 8 Ky. L. Rep. 571.

23. By constitutional provisions see Constitutional Law, 8 Cyc. 747 *et seq.*

24. Lindsay *v.* Lindsay, 47 Ind. 283; Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953; Sifred *v.* Com., 104 Pa. St. 179.

Principle applicable to all classes of legislation.— Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019.

25. *Alabama.*—Wyman *v.* Campbell, 6 Port. 219, 31 Am. Dec. 677.

California.— People *v.* San Francisco, etc., R. Co., 28 Cal. 254.

Colorado.— Schwenke *v.* Union Depot, etc., Co., 7 Colo. 512, 4 Pac. 905, 7 Colo. 521, 5 Pac. 816.

District of Columbia.— Moss *v.* U. S., 29 App. Cas. 188; McCarthy *v.* McCarthy, 20 App. Cas. 195; U. S. *v.* Sampson, 19 App. Cas. 419.

Georgia.— Erwin *v.* Moore, 15 Ga. 361.

Illinois.— Schafer *v.* Gerbers, 234 Ill. 468, 84 N. E. 1064; Ridgway *v.* Gallatin County, 181 Ill. 521, 55 N. E. 146; Harding *v.* Rockford, etc., R. Co., 65 Ill. 90; Hume *v.* Gossett, 43 Ill. 297; Chicago, etc., Coal Co. *v.* People, 114 Ill. App. 75 [*affirmed* in 214 Ill. 421, 73 N. E. 770]; Boyer *v.* Onion, 108 Ill. App. 612; Halpin *v.* Prosperity Loan, etc., Assoc., 108 Ill. App. 316; McGillen *v.* Wolff, 83 Ill. App. 227.

Indiana.— Blain *v.* Bailey, 25 Ind. 165; Litchenstein *v.* State, 5 Ind. 162.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; Fairfield *v.* Shallenberger, 135 Iowa 615, 113 N. W. 459; Burke *v.* Jeffries, 20 Iowa 145; State *v.* Berry, 12 Iowa 58; Casey *v.* Harned, 5 Iowa 1.

Kentucky.— Lee *v.* Forman, 3 Metc. 114; Louisville, etc., R. Co. *v.* Jarvis, 87 S. W. 759, 27 Ky. L. Rep. 986.

Louisiana.— State *v.* Brown, 48 La. Ann. 1569, 21 So. 143.

Massachusetts.— Snell *v.* Bridgewater Cotton Gin Mfg. Co., 24 Pick. 296; Goddard *v.* Boston, 20 Pick. 407.

Michigan.— Hoffman *v.* H. M. Loud, etc., Lumber Co., 138 Mich. 5, 104 N. W. 424, 138 Mich. 5, 100 N. W. 1010; Connors *v.* Carp River Iron Co., 54 Mich. 168, 19 N. W. 938.

Mississippi.—Swann *v.* Buck, 40 Miss. 268.

Missouri.— Raymore Special Road Dist. *v.* Huber, 212 Mo. 551, 111 S. W. 472; State *v.* Bishop, 41 Mo. 16.

Nebraska.— Holton *v.* Sampson, 81 Nebr. 30, 115 N. W. 545; State *v.* Omaha El. Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874; Wheeler *v.* State, (1905) 102 N. W. 773; Schafer *v.* Schafer, 71 Nebr. 708, 99 N. W.

terms are not used.[26] To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable,[27] or the intent to effect a repeal must be otherwise clearly expressed.[28] It follows that where the intention not to repeal is apparent or manifest from an act there is no room for repeal by implication, or the application of rules regarding implied repeal.[29]

482; Dawson County *v.* Clark, 58 Nebr. 756, 79 N. W. 822; Hopkins *v.* Scott, 38 Nebr. 661, 57 N. W. 391.

New Jersey.— Hotel Registry Realty Corp. *v.* Stafford, 70 N. J. L. 528, 57 Atl. 145; Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649; Naylor *v.* Field, 29 N. J. L. 287.

New York.—People *v.* Metz, 189 N. Y. 550, 82 N. E. 1131 [*affirming* 119 N. Y. App. Div. 271, 104 N. Y. Suppl. 649]; People *v.* Quigg, 59 N. Y. 83; People *v.* Palmer, 52 N. Y. 83; Williams *v.* Potter, 2 Barb. 316; New York, etc., R. Co. *v.* Delaware County, 67 How. Pr. 5.

North Carolina.— State *v.* Perkins, 141 N. C. 797, 53 S. E. 735; Robinson *v.* Goldsboro, 122 N. C. 211, 30 S. E. 324.

Ohio.— Buckingham *v.* Steubenville, etc., R. Co., 10 Ohio St. 25.

Pennsylvania.— Com. *v.* Navle, 2 Walk. 311; Shinn *v.* Com., 3 Grant 205; Kister's Petition, 9 Pa. Dist. 64, 7 Del. Co. 502.

Tennessee.— Zickler *v.* Union Bank, etc., Co., 104 Tenn. 277, 57 S. W. 341; Furman *v.* Nichol, 3 Coldw. 432; Hockaday *v.* Wilson, 1 Head 113.

Texas.— Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100; Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

Utah.— State University *v.* Richards, 20 Utah 457, 59 Pac. 96, 77 Am. St. Rep. 928.

Virginia.— Somers *v.* Com., 97 Va. 759, 33 S. E. 381.

Washington.— Griggs Land Co. *v.* Smith, 46 Wash. 135, 89 Pac. 477.

Wisconsin.— Hay *v.* Baraboo, 127 Wis. 1, 105 N. W. 654, 115 Am. St. Rep. 977, 3 L. R. A. N. S. 84.

United States.— McCool *v.* Smith, 1 Black 459, 17 L. ed. 218; Allen *v.* U. S., 40 Ct. Cl. 170 [*affirmed* in 204 U. S. 581, 27 S. Ct. 324, 51 L. ed. 634].

England.—Dobbs *v.* Grand Junction Waterworks Co., 9 Q. B. D. 151, 51 L. J. Q. B. 504, 46 J. P. 756, 46 L. T. Rep. N. S. 820, 31 Wkly. Rep. 15.

See 44 Cent. Dig. tit. "Statutes," § 228; and CONSTITUTIONAL LAW, 8 Cyc. 748.

When not allowed.—A repeal by implication is not favored and ought never to be allowed when it will lead to absurd consequences, if such result can be avoided (Harding *v.* Rockford, etc., R. Co., 65 Ill. 90); or when such a construction will violate a constitutional provision (State *v.* Moore, 37 Oreg. 536, 62 Pac. 26).

This principle does not apply to a statute defining for the first time a new class of offenses. Allen *v.* U. S., 40 Ct. Cl. 170 [*affirmed* in 204 U. S. 581, 27 S. Ct. 324, 51 L. ed. 634].

26. Arzonico *v.* West New York Bd. of Education, 75 N. J. L. 21, 69 Atl. 450; Tappan *v.* Dayton, 51 N. J. Eq. 260, 28 Atl. 1; Furman *v.* Nichol, 3 Coldw. (Tenn.) 432; Somers *v.* Com., 97 Va. 759, 33 S. E. 381; Fulkerson *v.* Bristol, 95 Va. 1, 27 S. E. 815; Hogan *v.* Guigon, 29 Gratt. (Va.) 705; The India, Brown & L. 221, 33 L. J. Adm. 193, 12 L. T. Rep. N. S. 316.

27. See *infra*, VI, A, 3, c, (III), (A).

28. *California.*— *In re* Mitchell, 120 Cal. 384, 52 Pac. 799; Soher *v.* Calaveras County, 39 Cal. 134; *In re* Ackerman, 6 Cal. App. 5, 91 Pac. 429.

Colorado.— Schwenke *v.* Union Depot, etc., Co., 7 Colo. 512, 4 Pac. 905, 7 Colo. 521, 5 Pac. 816.

Florida.— Curry *v.* Lehman, 55 Fla. 847, 47 So. 18.

Indiana.—Lindsay *v.* Lindsay, 47 Ind. 283; Indianapolis Waterworks Co. *v.* Burkhart, 41 Ind. 364.

Louisiana.— State *v.* White, 49 La. Ann. 127, 21 So. 141.

Nebraska.— Schafer *v.* Schafer, 71 Nebr. 708, 99 N. W. 482.

Nevada.— Thorpe *v.* Schooling, 7 Nev. 15.

New Jersey.— State *v.* Brooks, 63 N. J. L. 359, 43 Atl. 701.

New York.— Mongeon *v.* People, 55 N. Y. 613 [*affirming* 2 Thomps. & C. 128]; New York, etc., R. Co. *v.* Delaware County, 67 How. Pr. 5; Bowen *v.* Lease, 5 Hill 221.

North Carolina.— State *v.* Perkins, 141 N. C. 797, 53 S. E. 735.

Oklahoma.— Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423.

Pennsylvania.— Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953; York Gazette Co. *v.* York County, 25 Pa. Super. Ct. 517.

Texas.— Aiken *v.* State, (Cr. App. 1901) 64 S. W. 57.

Virginia.— Com. *v.* Clopton, 9 Leigh 109.

United States.— U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

See 44 Cent. Dig. tit. "Statutes," § 228.

Statute passed in ignorance of former law. — Where the legislature passes a law, the manifest object of which is to extend a benefit, or create a right, under a misapprehension or in ignorance of the existence or effect of a former law, which extended a greater benefit, or created a greater right, than that provided by the new law, the first law is not repealed or affected by the last, so as to limit or abridge the right or benefit and to restrict it within the limits of the last law, unless there are restrictive words showing an intention that no greater right or benefit shall be enjoyed than is provided in the last law. Tyson *v.* Postlethwaite, 13 Ill. 727.

29. People *v.* Harris, 123 N. Y. 70, 25 N. E. 317 [*affirming* 54 Hun 638, 7 N. Y. Suppl. 773]; People *v.* Kelly, 7 Rob. (N. Y.)

(II) *Effect of Constitutional Requirements as to Repeal.* A statute may be repealed by implication as well as by direct reference, notwithstanding a constitutional provision that all acts which repeal, revive, or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended;[30] that no law shall be repealed, revised, or amended by reference to its title only;[31] that no act shall be amended by providing that designated words shall be struck out;[32] or that no act shall embrace more than one subject.[33] Such provisions have no application to repeals by implication.[34]

(III) *Modes of Implied Repeal* — (A) *By Inconsistency or Repugnancy.* Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause.[35] But it is not sufficient to establish such

592 [*affirmed* in 50 Barb. 562]; Com. *v.* Dillon, 17 Pa. Co. Ct. 227.

Only a necessary and irresistible implication will be held to operate a repeal of a statute.

Georgia.— Alabama Branch Bank *v.* Kirkpatrick, 5 Ga. 34.

Maine.— Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579.

Missouri.—State *v.* Wells, 210 Mo. 601, 109 S. W. 758.

Texas.— Jessee *v.* De Chong, (Civ. App. 1907) 105 S. W. 1011.

United States.—Wood *v.* U. S., 16 Pet. 342, 10 L. ed. 987; U. S. *v.* Ten Thousand Cigars, 28 Fed. Cas. No. 16,451, Woolw. 123.

See 44 Cent. Dig. tit. "Statutes," § 228.

30. Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019; Turner *v.* State, 111 Tenn. 593, 69 S. W. 774; State *v.* King, 104 Tenn. 156, 57 S. W. 150; State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618; Ballentine *v.* Pulaski, 15 Lea (Tenn.) 633; Maney *v.* State, 6 Lea (Tenn.) 218; Home Ins. Co. *v.* Taxing Dist., 4 Lea (Tenn.) 644. See also *supra*, IV, C, 3.

31. *Florida.*— St. Petersburg *v.* English, 54 Fla. 585, 45 So. 483.

Georgia.— Swift *v.* Van Dyke, 98 Ga. 725, 26 S. E. 59.

Illinois.— Geisen *v.* Heiderich, 104 Ill. 537.

Indiana.— Branham *v.* Lange, 16 Ind. 497; Davis *v.* State Bank, 7 Ind. 316.

Michigan.— People *v.* Mahaney, 13 Mich. 481.

Ohio.— Lehman *v.* McBride, 15 Ohio St. 573; Chillicothe *v.* Logan Natural Gas, etc., Co., 11 Ohio S. & C. Pl. Dec. 24, 8 Ohio N. P. 88.

Virginia.—Anderson *v.* Com., 18 Gratt. 295.

United States.— Mayer *v.* Cahalin, 16 Fed. Cas. No. 9,340, 5 Sawy. 355.

See 44 Cent. Dig. tit. "Statutes," § 233.

32. State *v.* Geiger, 65 Mo. 306.

33. Geisen *v.* Heiderich, 104 Ill. 537. See also *supra*, IV, B.

34. See cases cited *supra*, note 25 *et seq.*

35. *Alabama.*— State *v.* Sawyer, 139 Ala. 138, 36 So. 545; David *v.* Levy, 119 Ala. 241, 24 So. 589; Harrison *v.* Jones, 80 Ala. 412; Cook *v.* Meyer, 73 Ala. 580; Henback *v.* State, 53 Ala. 523, 25 Am. Rep. 650; Kinney *v.* Mallory, 3 Ala. 626.

Arkansas.— Hogane *v.* Hogane, 57 Ark. 508, 22 S. W. 167; Hamilton *v.* Buxton, 6 Ark. 24.

California.— People *v.* Auburn, etc., Turnpike Co., 122 Cal. 335, 55 Pac. 10; Crossman *v.* Kenniston, 97 Cal. 379, 32 Pac. 448; *In re* Yick Wo, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12; Goodwin *v.* Buckley, 54 Cal. 295; People *v.* Burt, 43 Cal. 560; *Ex p.* Smith, 40 Cal. 419; Perry *v.* Ames, 26 Cal. 372.

Georgia.— Union Branch R. Co. *v.* East Tennessee, etc., R. Co., 14 Ga. 327; Brooks *v.* Ashburn, 9 Ga. 297; Harrison *v.* Walker, 1 Ga. 32.

Idaho.— People *v.* Lytle, 1 Ida. 143.

Illinois.—Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798; Pavey *v.* Utter, 132 Ill. 489, 24 N. E. 77; Law *v.* People, 80 Ill. 268; Culver *v.* Third Nat. Bank, 64 Ill. 528; Lyon *v.* Kain, 36 Ill. 362; Korah *v.* Ottawa, 32 Ill. 121, 83 Am. Dec. 255; Mullen *v.* People, 31 Ill. 444; Sullivan *v.* People, 15 Ill. 233; Illinois, etc., Canal *v.* Chicago, 14 Ill. 334; Moore *v.* Moss, 14 Ill. 106; Chicago, etc., Coal Co. *v.* People, 114 Ill. App. 75 [*affirmed* in 214 Ill. 421, 73 N. E. 770]; Washington Heights *v.* Moffatt, 57 Ill. App. 269; Highway Com'rs *v.* Deboe, 43 Ill. App. 25; West Chicago Park Com'rs *v.* Brenock, 18 Ill. App. 559.

Indiana.— Heagy *v.* State, 85 Ind. 260; Warren *v.* Britton, 84 Ind. 14; Wright *v.* Tipton County, 82 Ind. 335; State *v.* Smith, 59 Ind. 179; McKinsey *v.* Bowman, 58 Ind. 88; Evansville *v.* Bayard, 39 Ind. 450; State *v.* Craig, 23 Ind. 185; Wall *v.* State, 23 Ind. 150; De Pauw *v.* New Albany, 22 Ind. 204; State *v.* Pierce, 14 Ind. 302; Vermillion County *v.* Potts, 10 Ind. 286; Webb *v.* Baird, 6 Ind. 13; State *v.* Miskimmons, 2 Ind. 440; McQuilkin *v.* Stoddard, 8 Blackf. 581; Ham *v.* State, 7 Blackf. 314.

Iowa.—Edgar *v.* Greer, 8 Iowa 394, 74 Am. Dec. 316.

Kansas.— Elliott *v.* Lochnane, 1 Kan. 126.

Kentucky.— Com. *v.* Godshaw, 92 Ky. 435, 17 S. W. 737, 13 Ky. L. Rep. 572; Means *v.* Frame, 5 Dana 535.

Maine.— Smith *v.* Sullivan, 71 Me. 150.

Maryland.—State *v.* Northern Cent. R. Co., 90 Md. 447, 45 Atl. 465; State *v.* Yewell, 63

repeal that the subsequent law covers some, or even all, of the cases provided for by the prior statute, since it may be merely affirmative, or cumulative, or auxiliary.[36] Between the two acts[37] there must be plain, unavoidable, and irreconcilable

Md. 120; Prince George's County *v.* Laurel Com'rs, 51 Md. 457.

Massachusetts.— Johnson *v.* Quincy, 198 Mass. 411, 84 N. E. 606; New London, etc., R. Co. *v.* Boston, etc., R. Co., 102 Mass. 386.

Minnesota.— Merriman *v.* Great Northern Express Co., 63 Minn. 543, 65 N. W. 1080.

Mississippi.— Gibbons *v.* Brittenum, 56 Miss. 232; Peyton *v.* Cabaniss, 44 Miss. 808; Southern R. Co. *v.* Jackson, 38 Miss. 334.

Missouri.— Pool *v.* Brown, 98 Mo. 675, 11 S. W. 743; Pacific R. Co. *v.* Cass County, 53 Mo. 17; State *v.* Draper, 47 Mo. 29.

Montana.— Territory *v.* Gilbert, 1 Mont. 371.

Nebraska.—Allen *v.* Kennard, 81 Nebr. 289, 116 N. W. 63; State *v.* Magney, 52 Nebr. 508, 72 N. W. 1006; State *v.* Moore, 48 Nebr. 870, 67 N. W. 876; Omaha Real Estate, etc., Co. *v.* Reiter, 47 Nebr. 592, 66 N. W. 658; State *v.* Howe, 28 Nebr. 618, 44 N. W. 874.

New Jersey.— Mulligan *v.* Cavanagh, 46 N. J. L. 45; Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 360.

New Mexico.— Baca *v.* Bernalillo County, 10 N. M. 438, 62 Pac. 979.

New York.— People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; Tilley *v.* Phillips, 1 N. Y. 610, 3 How. Pr. 364, 1 Code Rep. N. S. 111; People *v.* Coler, 65 N. Y. App. Div. 217, 72 N. Y. Suppl. 564; People *v.* Fuller, 41 N. Y. App. Div. 404, 58 N. Y. Suppl. 835; Smith *v.* People, 9 Hun 446 [*reversed* on other grounds in 69 N. Y. 175]; Excelsior Petroleum Co. *v.* Embury, 67 Barb. 261 [*affirmed* in 63 N. Y. 422]; People *v.* Kerr, 37 Barb. 357 [*affirmed* in 27 N. Y. 188]; Dexter, etc., Plank Road Co. *v.* Allen, 16 Barb. 15; Farley *v.* De Waters, 2 Daly 192; Matter of Stewart, 40 Misc. 32, 81 N. Y. Suppl. 209 [*affirmed* in 86 N. Y. App. Div. 627, 83 N. Y. Suppl. 1117 (*affirmed* in 177 N. Y. 558, 69 N. E. 1131)]; Doll *v.* Devery, 27 Misc. 149, 57 N. Y. Suppl. 767. See also Cure *v.* Crawford, 5 How. Pr. 293, 1 Code Rep. N. S. 18, 2 Edm. Sel. Cas. 233.

North Carolina.— McCall *v.* Webb, 135 N. C. 356, 47 S. E. 802.

Ohio.— Cambridge *v.* Smallwood, 27 Ohio Cir. Ct. 302.

Oregon.— Hurst *v.* Hawn, 5 Oreg. 275; Grant County *v.* Sels, 5 Oreg. 243.

Pennsylvania.— Spees *v.* Boggs, 204 Pa. St. 504, 54 Atl. 346; Gwinner *v.* Lehigh, etc., R. Co., 55 Pa. St. 126; Com. *v.* Allegheny County, 40 Pa. St. 348; *In re* Johnston, 33 Pa. St. 511; Shinn *v.* Com., 3 Grant 205; *In re* Clairton Borough, 34 Pa. Super. Ct. 74; Com. *v.* Cromley, 1 Ashm. 179; Rambo *v.* Chester County, 1 Chest. Co. Rep. 414; Chester *v.* Roan, 8 Del. Co. 66; Easton *v.* Fire Ins. Co., 5 Lanc. L. Rev. 86; Woodmansie *v.* Boyer, 2 Lanc. L. Rev. 365.

South Carolina.— Laurens *v.* Crawford, 55 S. C. 594, 33 S. E. 728; Byrne *v.* Stewart, 3 Desauss. Eq. 135.

Tennessee.— Wells *v.* State, 3 Lea 70; Furman *v.* Nichol, 3 Coldw. 432.

Vermont.— Hogaboom *v.* Highgate, 55 Vt. 412.

Virginia.— Haynes *v.* Com., 31 Gratt. 96.

Washington.— Baum *v.* Sweeny, 5 Wash. 712, 32 Pac. 778.

United States.— Henrietta Min., etc., Co. *v.* Gardner, 173 U. S. 123, 19 S. Ct. 327, 43 L. ed. 637 [*reversing* 5 Ariz. 211, 81 Pac. 1126]; Hefel *v.* Whitely Land Co., 54 Fed. 179; U. S. *v.* Sixty-Five Terra Cotta Vases, 18 Fed. 508, 21 Blatchf. 511; The Chase, 14 Fed. 854; Johnson *v.* Byrd, 13 Fed. Cas. No. 7,376, Hempst. 434; Milne *v.* Huber, 17 Fed. Cas. No. 9,617, 3 McLean 212; Ogden *v.* Witherspoon, 18 Fed. Cas. No. 10,461, 3 N. C. 227; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267; Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327; U. S. *v.* Barr, 24 Fed. Cas. No. 14,527, 4 Sawy. 254; U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178; U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400; West *v.* Pine, 29 Fed. Cas. No. 17,423, 4 Wash. 691; Woods *v.* Jackson Iron Mfg. Co., 30 Fed. Cas. No. 17,993, Holmes 379.

England.— Summers *v.* Holborn Dist. Bd. of Works, [1893] 1 Q. B. 612, 57 J. P. 326, 62 L. J. M. C. 81, 68 L. T. Rep. N. S. 226, 5 Reports 284, 41 Wkly. Rep. 445; Ely *v.* Bliss, 5 Beav. 574, 6 Jur. 496, 11 L. J. Ch. 351, 49 Eng. Reprint 700; The India, Brown & L. 221, 33 L. J. Adm. 193, 12 L. T. Rep. N. S. 316; Daw *v.* Metropolitan Bd. of Works, 12 C. B. N. S. 161, 8 Jur. N. S. 1040, 31 L. J. C. P. 223, 6 L. T. Rep. N. S. 353, 104 E. C. L. 161; O'Flaherty *v.* McDowell, 6 H. L. Cas. 142, 4 Jur. N. S. 33, 10 Eng. Reprint 1248. See also Hayden *v.* Carroll, 3 Ridg. P. C. 592.

Canada.— *Ex p.* Byrne, 15 N. Brunsw. 125; Kingan *v.* Hall, 23 U. C. Q. B. 503.

See 44 Cent. Dig. tit. "Statutes," § 229.

Exception to rule.— The general rule, *leges posteriores priores contrarias abrogant,* must not govern in construing a new law simply giving application and direction to the prior law. State *v.* Vernon County Ct., 53 Mo. 128.

36. *California.*— Bank of British North America *v.* Cahn, 79 Cal. 463, 21 Pac. 863.

Georgia.— Alabama Branch Bank *v.* Kirkpatrick, 5 Ga. 34.

Missouri.— State *v.* Wells, 210 Mo. 601, 109 S. W. 758.

Texas.— Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

United States.—Wood *v.* U. S., 16 Pet. 342, 10 L. ed. 987; Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

See 44 Cent. Dig. tit. "Statutes," § 229.

37. *Alabama.*—Cook *v.* Meyer, 73 Ala. 580; Riggs *v.* Brewer, 64 Ala. 282; Parker *v.* Hub-

repugnancy, and even then the old law is repealed by implication only *pro tanto*,

bard, 64 Ala. 203; Iverson *v.* State, 52 Ala. 170; Pearce *v.* Mobile Bank, 33 Ala. 693.

Arkansas.— Benton *v.* Willis, 76 Ark. 443, 88 S. W. 1000.

California.— Nickey *v.* Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459; Chico Bridge Co. *v.* Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780.

Connecticut.— Kallahan *v.* Osborne, 37 Conn. 488.

District of Columbia.— Moss *v.* U. S., 29 App. Cas. 188; Morris *v.* Hitchcock, 21 App. Cas. 565 [*affirmed* in 194 U. S. 384, 24 S. Ct. 712, 48 L. ed. 1030]; McCarthy *v.* McCarthy, 20 App. Cas. 195; U. S. *v.* Sampson, 19 App. Cas. 419.

Florida.— Florida East Coast R. Co. *v.* Hazel, 43 Fla. 263, 31 So. 272, 99 Am. St. Rep. 114; State *v.* Palmes, 23 Fla. 620, 3 So. 171.

Georgia.— Edalgo *v.* Southern R. Co., 129 Ga. 258, 58 S. E. 846; Alabama Branch Bank *v.* Kirkpatrick, 5 Ga. 34.

Illinois.— Harding *v.* Rockford, etc., R. Co., 65 Ill. 90; Hume *v.* Gossett, 43 Ill. 297; McDonough County *v.* Campbell, 42 Ill. 490; Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447; McGillen *v.* Wolff, 83 Ill. App. 227.

Indiana.— Coghill *v.* State, 37 Ind. 111; Collins Coal Co. *v.* Hadley, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353.

Iowa.— State *v.* Smith, 7 Iowa 244; Casey *v.* Harned, 5 Iowa 1.

Kansas.— Newman *v.* Lake, 70 Kan. 848, 79 Pac. 675; Hornaday *v.* State, 63 Kan. 499, 65 Pac. 656.

Louisiana.— Lafiton *v.* Doiron, 12 La. Ann. 164; Johnson *v.* Pilster, 4 Rob. 71; Gayle *v.* Williams, 7 La. 162; Jarreau *v.* Choppin, 6 La. 130; Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Lacroix *v.* Coquet, 5 Mart. N. S. 527; Herman *v.* Sprigg, 3 Mart. N. S. 190; Nathan *v.* Lee, 2 Mart. N. S. 32; Dubreuil *v.* Rouzan, 1 Mart. N. S. 158; Tilghman *v.* Dias, 12 Mart. 691; Bernard *v.* Vignaud, 10 Mart. 482.

Maryland.— Cumberland *v.* Magruder, 34 Md. 381; Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306.

Minnesota.— State *v.* Archibald, 43 Minn. 328, 45 N. W. 606; Moss *v.* St. Paul, 21 Minn. 421.

Mississippi.— Richards *v.* Patterson, 30 Miss. 583; White *v.* Johnson, 23 Miss. 68; Commercial Bank *v.* Chambers, 8 Sm. & M. 9; Planters' Bank *v.* State, 6 Sm. & M. 628.

Missouri.— State *v.* Wells, 210 Mo. 601, 109 S. W. 758; State *v.* Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; Manker *v.* Faulhaber, 94 Mo. 430, 6 S. W. 372; State *v.* Missouri Pac. R. Co., 92 Mo. 137, 6 S. W. 862; Pacific R. Co. *v.* Cass County, 53 Mo. 17; McVey *v.* McVey, 51 Mo. 406; State *v.* Bishop, 41 Mo. 16.

Nebraska.— Beha *v.* State, 67 Nebr. 27, 93 N. W. 155; Hopkins *v.* Scott, 38 Nebr. 661, 57 N. W. 391; Lawson *v.* Gibson, 18 Nebr. 137, 24 N. W. 447.

Nevada.— *In re* Walley, 11 Nev. 260.

New Jersey.— State *v.* Brooks, 63 N. J. L. 359, 43 Atl. 701; State *v.* Blake, 35 N. J. L. 208.

New York.— People *v.* Van Nort, 64 Barb. 205; Williams *v.* Potter, 2 Barb. 316; New York, etc., R. Co. *v.* Delaware County, 67 How. Pr. 5.

North Carolina.— State *v.* Perkins, 141 N. C. 797, 53 S. E. 735; Brunswick County *v.* Woodside, 31 N. C. 496.

Ohio.— Pierce *v.* West Loveland Bd. of Education, 8 Ohio S. & C. Pl. Dec. 648, 1 Ohio N. P. 286.

Oregon.— *In re* Booth, 40 Oreg. 154, 61 Pac. 1135, 66 Pac. 710.

Pennsylvania.— Safe Deposit, etc., Co. *v.* Fricke, 152 Pa. St. 231, 25 Atl. 530; Wright *v.* Vickers, 81 Pa. St. 122; Shinn *v.* Com., 3 Grant 205; *In re* Egypt St., 2 Grant 455; Street *v.* Com., 6 Watts & S. 209; Morris *v.* Delaware, etc., Canal, 4 Watts & S. 461; Kister's Petition, 9 Pa. Dist. 64, 7 Del. Co. 502; Metzger's Case, 6 Pa. Co. Ct. 272; Pittsburgh First Nat. Bank *v.* Kountz, 6 Pa. Co. Ct. 249; Com. *v.* Gregory, 2 Pars. Eq. Cas. 241; Conroy *v.* Goodman, 1 Leg. Rec. Rep. 352; Com. *v.* Shopp, 1 Woodw. 123.

Tennessee.— Memphis, etc., R. Co. *v.* Union R. Co., 116 Tenn. 500, 95 S. W. 1019; McCampbell *v.* State, 116 Tenn. 98, 93 S. W. 100; Blaufield *v.* State, 103 Tenn. 593, 53 S. W. 1090; Memphis *v.* American Express Co., 102 Tenn. 336, 52 S. W. 172; Hunter *v.* Memphis, 93 Tenn. 571, 26 S. W. 828; Buchanan *v.* Robinson, 3 Baxt. 147; Furman *v.* Nichol, 3 Coldw. 432.

Texas.— Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011; Williams *v.* State, 52 Tex. Cr. 371, 107 S. W. 1121; *Ex p.* Kimbrell, 47 Tex. Cr. 333, 83 S. W. 382; *Ex p.* Keith, 47 Tex. Cr. 283, 83 S. W. 683; Walker *v.* State, 7 Tex. App. 245, 32 Am. Rep. 595.

Virginia.— Hogan *v.* Guigon, 29 Gratt. 705.

Washington.— Mathews *v.* Wagner, 49 Wash. 54, 94 Pac. 759.

West Virginia.— Forgueron *v.* Donnally, 7 W. Va. 114; Conley *v.* Calhoun County, 2 W. Va. 416.

Wisconsin.— Atty.-Gen. *v.* Brown, 1 Wis. 513.

United States.— Wood *v.* U. S., 16 Pet. 342, 10 L. ed. 987; Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567]; St. Louis Third Nat. Bank *v.* Harrison, 8 Fed. 721, 3 McCrary 162; The Argo, 1 Fed. Cas. No. 516, 1 Gall. 150; Butler *v.* Russell, 4 Fed. Cas. No. 2,243, 3 Cliff. 251; Cooke *v.* Ford, 6 Fed. Cas. No. 3,173, 2 Flipp. 22; Morlot *v.* Lawrence, 17 Fed. Cas. No. 9,815, 1 Blatchf. 608; West *v.* Pine, 29 Fed. Cas. No. 17,423, 4 Wash. 691; Cromwell *v.* U. S., 42 Ct. Cl. 432.

England.— West Ham *v.* Fourth City Mut. Bldg. Soc., [1892] 1 Q. B. 654, 56 J. P. 438, 61 L. J. M. C. 128, 66 L. T. Rep. N. S. 350, 40 Wkly. Rep. 446; Kutner *v.* Phillips,

to the extent of the repugnancy.[38] If both acts can, by any reasonable construction, be construed together, both will be sustained.[39] Two statutes are not

[1891] 2 Q. B. 267, 60 L. J. Q. B. 505, 64 L. T. Rep. N. S. 628, 39 Wkly. Rep. 526; *Ex p.* Warrington, 3 De G. M. & G. 159, 17 Jur. 430, 22 L. J. Bankr. 33, 1 Wkly. Rep. 261, 52 Eng. Ch. 125, 43 Eng. Reprint 64; Dakins *v.* Seaman, 6 Jur. 783, 11 L. J. Exch. 274, 9 M. & W. 777.

See 44 Cent. Dig. tit. "Statutes," § 229.

The reason of the rule is that when the mind of the legislature has considered the object and details of the subject of the statute, and not in express language contradicted the original act, the latter act shall not be considered as intended to affect the previous provisions of the former, unless it is absolutely necessary to give the latter act such a construction as that its words shall have any meaning at all. Pursell *v.* New York L. Ins., etc., Co., 42 N. Y. Super. Ct. 383; People *v.* Baker, 10 Abb. N. Cas. (N. Y.) 210.

An exception is not repugnant to the general rule, or, if it be, it is so only to the extent of the exception. *Ex p.* Smith, 40 Cal. 419.

Where an omission in the prior act is supplied by the subsequent one, there is no inconsistency between them. State *v.* Thompson, 70 Me. 196.

38. *Alabama.*— Cook *v.* Meyer, 73 Ala. 580; George *v.* Skeates, 19 Ala. 738.

California.— Chapman *v.* Buchanan, 39 Cal. 674.

Illinois.— McGillen *v.* Wolff, 83 Ill. App. 227.

Indiana.— Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 403; Carver *v.* Smith, 90 Ind. 522, 46 Am. Rep. 210; Bate *v.* Sheets, 64 Ind. 209.

Kansas.— Hornaday *v.* State, 63 Kan. 499, 65 Pac. 656.

Michigan.— *In re* Lambrecht, 137 Mich. 450, 100 N. W. 606; Connors *v.* Carp River Iron Co., 54 Mich. 168, 19 N. W. 938.

Minnesota.— Stevens *v.* Minneapolis, 29 Minn. 219, 12 N. W. 533.

Mississippi.— Pons *v.* State, 49 Miss. 1; White *v.* Johnson, 23 Miss. 68.

Missouri.— State *v.* Wells, 210 Mo. 601, 109 S. W. 758.

New Jersey.— Mersereau *v.* Mersereau Co., 51 N. J. Eq. 382, 26 Atl. 682; New Jersey Public Schools Trustees *v.* Trenton, 30 N. J. Eq. 667.

New York.— People *v.* Van Nort, 64 Barb. 205.

Tennessee.— Furman *v.* Nichol, 3 Coldw. 432.

Texas.— Garrison *v.* Richards, (Civ. App. 1908) 107 S. W. 861; Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

United States.— Wood *v.* U. S., 16 Pet. 342, 10 L. ed. 987; Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517; Seward County *v.* Aetna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585.

See 33 Cent. Dig. tit. "Statutes," § 229.

39. *Alabama.*— Cook *v.* Meyer, 73 Ala. 580; Kinney *v.* Mallory, 3 Ala. 626.

Georgia.— Conner *v.* Southern Express Co., 37 Ga. 397.

Indiana.— Blain *v.* Bailey, 25 Ind. 165.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; Fairfield *v.* Shallenberger, 135 Iowa 615, 113 N. W. 459.

Kansas.— Elliott *v.* Lochnane, 1 Kan. 126.

Louisiana.— Nixon *v.* Piffet, 16 La. Ann. 379.

Maryland.— Cumberland *v.* Magruder, 34 Md. 381.

Massachusetts.— Haynes *v.* Jenks, 2 Pick. 172.

Minnesota.— State *v.* Archibald, 43 Minn. 328, 45 N. W. 606.

Missouri.— Manker *v.* Faulhaber, 94 Mo. 430, 6 S. W. 372; State *v.* Bishop, 41 Mo. 16.

Montana.— Thomas *v.* Smith, 1 Mont. 21.

Nebraska.— Central City *v.* Marquis, 75 Nebr. 233, 106 N. W. 221; State *v.* Babcock, 21 Nebr. 599, 33 N. W. 247.

New Jersey.— State *v.* Brooks, 63 N. J. L. 359, 43 Atl. 701; Britton *v.* Blake, 35 N. J. L. 208; Tappan *v.* Dayton, 51 N. J. Eq. 260, 28 Atl. 1.

New York.— People *v.* Palmer, 52 N. Y. 83; Williams *v.* Potter, 2 Barb. 316.

North Carolina.— Brunswick County *v.* Woodside, 31 N. C. 496.

Ohio.— State *v.* Ehrman, 6 Ohio S. & C. Pl. Dec. 11, 3 Ohio N. P. 292.

Pennsylvania.— Shinn *v.* Com., 3 Grant 205.

Tennessee.— Furman *v.* Nichol, 3 Coldw. 432.

Virginia.— Somers *v.* Com., 97 Va. 759, 33 S. E. 381.

Wisconsin.— Atty.-Gen. *v.* Brown, 1 Wis. 513.

United States.— Beals *v.* Hale, 4 How. 37, 11 L. ed. 865; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585; West *v.* Pine, 29 Fed. Cas. No. 17,423, 4 Wash. 691.

England.— Hayden *v.* Carroll, 3 Ridg. P. C. 592.

Canada.— Kingan *v.* Hall, 23 U. C. Q. B. 503.

See 44 Cent. Dig. tit. "Statutes," § 229.

That two acts are repugnant on principle merely forms no reason why both may not stand. *Ex p.* Smith, 40 Cal. 419.

A statute which does not take away any right, or impose any substantial new duty, but regulates with additional requirements a duty imposed by a previous act is not to be deemed inconsistent with the previous act. Staats *v.* Hudson River R. Co., 4 Abb. Dec. (N. Y.) 287, 3 Keyes 196, 33 How. Pr. 139.

Acts held not in conflict — both sustainable see Rouse *v.* Jayne, 14 Ala. 727; Beach *v.* Meriden, 46 Conn. 502; Vance *v.* State, 128 Ga. 661, 57 S. E. 889; Murray *v.* State, 112 Ga. 7, 37 S. E. 111; Shaw *v.* Macon, 21 Ga. 280; People *v.* Raymond, 186 Ill. 407, 57

repugnant to each other unless they relate to the same subject.[40] Furthermore it is necessary to the implication of a repeal that the objects of the two statutes be the same. If they are not, both statutes will stand, although they may refer to the same subject.[41]

(B) *By Act Covering Whole Subject-Matter.* When two statutes cover, in whole or in part, the same subject-matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both.[42] Where, however, a later act covers the whole subject of earlier acts

N. E. 1066; Kern *v.* People, 44 Ill. App. 181; Indianapolis *v.* Morris, 25 Ind. App 409, 58 N. E. 510; Douglass *v.* Craig, 2 La. Ann. 919; Garitee *v.* Baltimore, 53 Md. 422; Highland Park *v.* McAlpine, 117 Mich. 666, 76 N. W. 159; Beatrice Paper Co. *v.* Beloit Iron Works, 46 Nebr. 900, 65 N. W. 1059; People *v.* DeWitt, 167 N. Y. 575, 60 N. E. 1118 [*affirming* 59 N. Y. App. Div. 493, 69 N. Y. Suppl. 366]; Keyes *v.* New York, 165 N. Y. 654, 69 N. E. 1124 [*affirming* 40 N. Y. App. Div. 409, 57 N. Y. Suppl. 1047]; People *v.* Metz, 119 N. Y. App. Div. 271, 104 N. Y. Suppl. 649 [*affirmed* in 189 N. Y. 550, 82 N. E. 1131]; Hendrix's Account, 146 Pa. St. 285, 23 Atl. 435; Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460; Cate *v.* State, 3 Sneed (Tenn.) 120; McCormick *v.* Allegheny City, 15 Fed. Cas. No. 8,717.

40. *Colorado.*—Adams *v.* People, 25 Colo. 532, 55 Pac. 806.

Illinois.— Lewis *v.* Cook County, 72 Ill. App. 151.

Kentucky.— George *v.* Lillard, 106 Ky. 820, 51 S. W. 793, 1011, 21 Ky. L. Rep. 483.

Louisiana.— State *v.* Desgorges, 48 La. Ann. 73, 18 So. 912.

New Mexico.— Baca *v.* Bernalillo County, 10 N. M. 438, 62 Pac. 979.

Tennessee.— Blaufield *v.* State, 103 Tenn. 593, 53 S. W. 1090.

Texas.— Joliff *v.* State, 53 Tex. Cr. 61, 109 S. W. 176; Aiken *v.* State, (Cr. App. 1901) 64 S. W. 57.

Washington.— Seattle *v.* Foster, 47 Wash. 172, 91 Pac. 642.

See 44 Cent. Dig. tit. "Statutes," § 229.

41. *Colorado.*—Adams *v.* People, 25 Colo. 532, 55 Pac. 806.

District of Columbia.— District of Columbit *v.* Washington Sisters of Visitation, 15 App. Cas. 300.

Kentucky.— Perrit *v.* Crouch, 5 Bush 199.

Louisiana.— Albert *v.* Brewer, 9 La. Ann. 64.

New Mexico.— Baca *v.* Bernalillo County, 10 N. M. 438, 62 Pac. 979.

Oklahoma.— McMillan *v.* Payne County, 14 Okla. 659, 79 Pac. 898.

United States.— U. S. *v.* Claflin, 97 U. S. 546, 24 L. ed. 1082, 1085.

See 44 Cent. Dig. tit. "Statutes," § 229.

Where there is a difference in the whole purview of two statutes apparently relating to the same matter, the former statute remains in force. Haywood *v.* Savannah, 12 Ga. 404.

42. *California.*— Merrill *v.* Gorham, 6 Cal. 41.

Colorado.— Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101.

Georgia.— Conner *v.* Southern Express Co., 37 Ga. 397; Erwin *v.* Moore, 15 Ga. 361.

Illinois.— Fowler *v.* Pirkins, 77 Ill. 271; People *v.* Barr, 44 Ill. 198; Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

Indiana.— Ely *v.* Morgan County, 112 Ind. 361, 14 N. E. 236; Montgomery County *v.* Fullen, 111 Ind. 410, 12 N. E. 298; Robinson *v.* Rippey, 111 Ind. 112, 12 N. E. 141.

Iowa.— Diver *v.* Keokuk Sav. Bank, 126 Iowa 691, 102 N. W. 542; Ament *v.* Humphrey, 3 Greene 255; Hummer *v.* Hummer, 3 Greene 42.

Kentucky.— Brown *v.* Miller, 4 J. J. Marsh. 474.

Louisiana.— State *v.* Callac, 45 La. Ann. 27, 12 So. 119; De Armas' Case, 10 Mart. 158.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Massachusetts.—Com. *v.* Flannelly, 15 Gray 195; Pearce *v.* Atwood, 13 Mass. 324.

Nebraska.— Holton *v.* Sampson, 81 Nebr. 30, 115 N. W. 545; Lingonner *v.* Ambler, 44 Nebr. 316, 62 N. W. 486.

Nevada.— State *v.* Rogers, 10 Nev. 319.

New York.— *In re* Evergreens, 47 N. Y. 216; Perry *v.* Tynen, 22 Barb. 137; Allen *v.* Reynolds, 36 N. Y. Super. Ct. 297; McCartee *v.* Orphan Asylum Soc., 9 Cow. 437, 18 Am. Dec. 516.

Oklahoma.— Garton *v.* Hudson-Kimberly Pub. Co., 8 Okla. 631, 58 Pac. 946.

Tennessee.— Smith *v.* Hickman, Cooke 330.

Texas.— *Ex p.* Stubblefield, 1 Tex. App. 757.

Utah.— State University *v.* Richards, 20 Utah 457, 59 Pac. 96, 77 Am. St. Rep. 928.

Wisconsin.— Atty.-Gen. *v.* Brown, 1 Wis. 513.

United States.— Frost *v.* Wenie, 157 U. S. 46, 15 S. Ct. 532, 39 L. ed. 614; Wood County *v.* Lackawanna Iron, etc., Co., 93 U. S. 619, 23 L. ed. 989; U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356; U. S. *v.* Woolsey, 28 Fed. Cas. No. 16,763.

See 44 Cent. Dig. tit. "Statutes," § 230.

Where a new remedy or mode of procedure is authorized, without an express repeal of a former one relating to the same matter, and the new remedy is not inconsistent with the former one, the later act will be regarded as creating a concurrent remedy, and not as abrogating the former mode of procedure. Reynolds *v.* Hanrahan, 100 Mass. 313; Arzonico *v.* West New York Bd. of Education, 75 N. J. L. 21, 69 Atl. 450. But see Montel

and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act.[43] But in order to effect

v. Consolidation Coal Co., 39 Md. 164, holding that when two statutes provide separate remedies, differing only in form, for the same grievance, it is to be presumed that the legislature intended, by the later act, to prescribe the only rules which should govern in such cases.

43. *Alabama.*— Prowell *v.* State, 142 Ala. 80, 39 So. 164; Edson *v.* State, 134 Ala. 50, 32 So. 308.

Arkansas.— Western Union Tel. Co. *v.* State, 82 Ark. 302, 101 S. W. 745; Lawyer *v.* Carpenter, 80 Ark. 411, 97 S. W. 662; Inman *v.* State, 65 Ark. 508, 47 S. W. 558; Hogane *v.* Hogane, 57 Ark. 508, 22 S. W. 167; Wood *v.* State, 47 Ark. 488, 1 S. W. 709.

California.— Dillon *v.* Bicknell, 116 Cal. 111, 47 Pac. 937; Maxwell *v.* Los Angeles County, (1893) 32 Pac. 443; Journal Pub. Co. *v.* Whitney, 97 Cal. 283, 32 Pac. 237; Mendocino County *v.* Mendocino Bank, 86 Cal. 255, 24 Pac. 1002; People *v.* Henshaw, 76 Cal. 436, 18 Pac. 413; *Ex p.* Benjamin, 65 Cal. 310, 4 Pac. 23; State *v.* Conkling, 19 Cal. 501; Sacramento *v.* Bird, 15 Cal. 294.

Colorado.— Lace *v.* People, 43 Colo. 199, 95 Pac. 302; People *v.* Ames, 27 Colo. 126, 60 Pac. 346.

District of Columbia.— U. S. *v.* Macfarland, 18 App. Cas. 120.

Florida.— State *v.* Palmes, 23 Fla. 620, 3 So. 171.

Idaho.— People *v.* Lytle, 1 Ida. 143.

Illinois.— Chicago, etc., Coal Co. *v.* People, 114 Ill. App. 75 [*affirmed* in 214 Ill. 421, 73 N. E. 770].

Indiana.— Findling *v.* Foster, 170 Ind. 325, 81 N. E. 480, 84 N. E. 529; Crowell *v.* Jaqua, 114 Ind. 246, 15 N. E. 242; Wright *v.* Hancock County, 98 Ind. 88; Allen *v.* Salem, 10 Ind. App. 650, 38 N. E. 425; Koons *v.* Cluggish, 8 Ind. App. 232, 34 N. E. 651.

Iowa.— Diver *v.* Keokuk Sav. Bank, 126 Iowa 691, 102 N. W. 542.

Kansas.— State *v.* Studt, 31 Kan. 245, 1 Pac. 635.

Kentucky.— Gorham *v.* Luckett, 6 B. Mon. 146.

Louisiana.— State *v.* Henderson, 120 La. 535, 45 So. 430; Hart *v.* New Orleans, 24 La. Ann. 290.

Maine.— Smith *v.* Sullivan, 71 Me. 150.

Maryland.— Montel *v.* Consolidation Coal Co., 39 Md. 164.

Michigan.— Atty.-Gen. *v.* Railroad Com'r, 117 Mich. 477, 76 N. W. 69; Ellis *v.* Parsell, 100 Mich. 170, 58 N. W. 839; Shannon *v.* People, 5 Mich. 71.

Minnesota.— Clark *v.* Baxter, 98 Minn. 256, 108 N. W. 838; Nicol *v.* St. Paul, 80 Minn. 415, 83 N. W. 375.

Mississippi.— Swann *v.* Buck, 40 Miss. 268.

Missouri.— Meriwether *v.* Love, 167 Mo. 514, 67 S. W. 250; Manker *v.* Faulhaber, 94 Mo. 430, 6 S. W. 372.

Nebraska.— State *v.* Omaha Elevator Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874.

Nevada.— Thorpe *v.* Schooling, 7 Nev. 15.

New Jersey.— Hotel Registry Realty Corp. *v.* Stafford, 70 N. J. L. 528, 57 Atl. 145; Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649; Camden *v.* Varney, 63 N. J. L. 325, 43 Atl. 889; Anderson *v.* Camden, 58 N. J. L. 515, 33 Atl. 846; De Ginther *v.* New Jersey Home for Education, etc., of Feeble-Minded Children, 58 N. J. L. 354, 33 Atl. 968; Hayes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176; State Bd. of Health *v.* Vineland, 72 N. J. Eq. 289, 65 Atl. 174; Mersereau *v.* Mersereau Co., 51 N. J. Eq. 382, 26 Atl. 682; Bracken *v.* Smith, 39 N. J. Eq. 169; Industrial School Dist. *v.* Whitehead, 13 N. J. Eq. 290.

New York.— Buffalo *v.* Lewis, 192 N. Y. 193, 84 N. E. 809 [*affirming* 123 N. Y. App. Div. 163, 108 N. Y. Suppl. 450]; McDermott *v.* Nassau Electric R. Co., 85 Hun 422, 32 N. Y. Suppl. 884 [*affirmed* in 147 N. Y. 700, 42 N. E. 724]; Excelsior Petroleum Co. *v.* Embury, 67 Barb. 261 [*affirmed* in 63 N. Y. 422]; Dexter, etc., Plank Road Co. *v.* Allen, 16 Barb. 15.

Pennsylvania.— Ft. Pitt Bldg., etc., Assoc. *v.* Model Plan Bldg., etc., Assoc., 159 Pa. St. 308, 28 Atl. 215; Knoblouch's License, 28 Pa. Super. Ct. 323; Phillips *v.* Barnhart, 27 Pa. Super. Ct. 26; *In re* Wetherill Steel Casting Co., 5 Pa. Co. Ct. 337.

Texas.— State *v.* Travis County, 85 Tex. 435, 21 S. W. 1029 [*reversing* (Civ. App. 1892), 21 S. W. 119]; Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100; Harold *v.* State, 16 Tex. App. 157; Etter *v.* Missouri Pac. R. Co., 2 Tex. App. Civ. Cas. § 58; Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930.

Virginia.— Somers *v.* Com., 97 Va. 759, 33 S. E. 381; Hogan *v.* Guigon, 29 Gratt. 705.

Washington.— *Ex p.* Donnellan, 49 Wash. 460, 95 Pac. 1085; Baer *v.* Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; State *v.* Carbon Hill Coal Co., 4 Wash. 422, 30 Pac. 728.

United States.— Murphy *v.* Utter, 186 U. S. 95, 22 S. Ct. 776, 46 L. ed. 1070; The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320; Fisk *v.* Henarie, 142 U. S. 459, 12 S. Ct. 207, 35 L. ed. 1080; Tracy *v.* Tuffly, 134 U. S. 206, 10 S. Ct. 527, 33 L. ed. 879; Cook County Nat. Bank *v.* U. S., 107 U. S. 445, 2 S. Ct. 561, 27 L. ed. 537; King *v.* Cornell, 106 U. S. 395, 1 S. Ct. 312, 27 L. ed. 60; U. S. *v.* Claflin, 97 U. S. 546, 553 note, 20 L. ed. 1082, 1085; U. S. *v.* Tynen, 11 Wall. 88, 20 L. ed. 153; Daviess *v.* Fairbairn, 3 How. 636, 11 L. ed. 760; Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517; Butler *v.* Russell, 4 Fed. Cas.

such repeal by implication it must appear that the subsequent statute covered the whole subject-matter of the former one, and was intended as a substitute for it.[44] If the later statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands.[45]

(c) *By Revision or Codification* — (1) IN GENERAL — (a) REVISION — aa. *In General.* It is a familiar and well-settled rule that a subsequent statute, revising the subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former[46] to the extent to which its provisions are revised and sup-

No. 2,243, 3 Cliff. 251; U. S. *v.* Barr, 24 Fed. Cas. No. 14,527, 4 Sawy. 254; U. S. *v.* One Case of Hair Pencils, 27 Fed. Cas. No. 15,924, 1 Paine 400.

Canada.— Daly *v.* Amherst Park Land Co., 13 Quebec Super. Ct. 516.

See 44 Cent. Dig. tit. "Statutes," § 230.

Qualification of rule.—The rule that a later act covering the whole subject of a former act and embracing new provisions operates by implication to repeal the prior act is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws in conflict therewith, it excludes any implication of a more extended repeal. Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

A new act which extends and enlarges a right before existing impliedly repeals the act by which the right was created or given. Garrison *v.* Richards, (Tex. Civ. App. 1908) 107 S. W. 861.

44. *Indiana.*— Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364; Bell *v.* Hiner, 16 Ind. App. 184, 44 N. E. 576; Allen *v.* Salem, 10 Ind. App. 650, 38 N. E. 425; Beaver *v.* Wilkinson, 9 Ind. App. 693, 37 N. E. 188; Specter *v.* Kimball, etc., Stone Co., 7 Ind. App. 157, 34 N. E. 452; Taylor *v.* Dahn, 6 Ind. App. 672, 34 N. E. 121, 51 Am. St. Rep. 312.

Kansas.— Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869.

Nebraska.— State *v.* Omaha Elevator Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874.

Pennsylvania.— Allegheny City *v.* McClurkan, 14 Pa. St. 81.

Washington.— State *v.* Caldwell, 9 Wash. 336, 37 Pac. 669.

See 44 Cent. Dig. tit. "Statutes," § 230.

45. State *v.* Omaha El. Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874.

46. *Arkansas.*—Western Union Tel. Co. *v.* State, 82 Ark. 302, 101 S. W. 745; Lawyer *v.* Carpenter, 80 Ark. 411, 97 S. W. 662; Pulaski County *v.* Downer, 10 Ark. 588.

California.— Mack *v.* Jastro, 126 Cal. 130, 58 Pac. 372; Dillon *v.* Bicknell, 116 Cal. 111, 47 Pac. 937; *In re* Yick Wo, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12; State *v.* Conkling, 19 Cal. 501.

Delaware.— Husbands *v.* Talley, 3 Pennew. 88, 47 Atl. 1009.

Florida.— Jernigan *v.* Holden, 34 Fla. 530, 16 So. 413.

Illinois.— State Bd. of Health *v.* Ross, 191 Ill. 87, 60 N. E. 811 [*affirming* 91 Ill. App. 281]; Schwartz *v.* Ritter, 186 Ill. 209, 57 N. E. 887; Canal Com'rs *v.* East Peoria, 179 Ill. 214, 53 N. E. 633 [*affirming* 75 Ill. App. 450]; Devine *v.* Cook County, 84 Ill. 590; Culver *v.* Chicago Third Nat. Bank, 64 Ill. 528; Illinois, etc., Canal *v.* Chicago, 14 Ill. 334.

Indiana.— Findling *v.* Foster, 170 Ind. 325, 81 N. E. 480, 84 N. E. 529.

Louisiana — State *v.* Judge Cr. Dist. Ct., 37 La. Ann. 578.

Maine.— Towle *v.* Marratt, 3 Me. 22, 14 Am. Dec. 206.

Maryland.— Montel *v.* Consolidation Coal Co., 39 Md. 164; Frederick *v.* Groshon, 30 Md. 436, 96 Am. Dec. 591.

Massachusetts.— Com. *v.* Cooley, 10 Pick. 37; Bartlet *v.* King, 12 Mass. 537, 7 Am. Dec. 99; Goodenow *v.* Buttrick, 7 Mass. 140.

Mississippi.— Clay County *v.* Chickasaw County, 64 Miss. 534, 1 So. 753.

Nevada.— State *v.* Rogers, 10 Nev. 319; Thorpe *v.* Schooling, 7 Nev. 15.

New Hampshire.— Wakefield *v.* Phelps, 37 N. H. 295; Leighton *v.* Walker, 9 N. H. 59.

New York.— Pratt Inst. *v.* New York, 183 N. Y. 151, 75 N. E. 1119; People *v.* Peck, 157 N. Y. 51, 51 N. E. 412 [*affirming* 32 N. Y. App. Div. 624, 52 N. Y. Suppl. 259]; *In re* New York Inst. for Instruction of Deaf, etc., 121 N. Y. 234, 24 N. E. 378; *In re* New York Bd. Street Opening, 86 Hun 267, 33 N. Y. Suppl. 299; People *v.* Peck, 22 Misc. 477, 50 N. Y. Suppl. 820 [*affirmed* in 32 N. Y. App. Div. 624, 52 N. Y. Suppl. 259 (*affirmed* in 157 N. Y. 51, 51 N. E. 412)].

Ohio.— Lorain Plank Road Co. *v.* Cotton, 12 Ohio St. 263.

Oregon.— Reed *v.* Dunbar, 41 Oreg. 509, 69 Pac. 451; *Ex p.* Ferdon, 35 Oreg. 171, 57 Pac. 376; Little *v.* Cogswell, 20 Oreg. 345, 25 Pac. 727; Stingle *v.* Nevel, 9 Oreg. 62.

Pennsylvania.— Ft. Pitt Bldg., etc., Assoc. *v.* Model Plan Bldg., etc., Assoc., 159 Pa. St. 308, 28 Atl. 215; *In re* Johnston, 33 Pa. St. 511; Reeves' Appeal, 33 Pa. Super. Ct. 196; Com. *v.* Cromley, 1 Ashm. 179.

South Dakota.— Sands *v.* Cruickshank, 12 S. D. 1, 80 N. W. 173.

Tennessee.— Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002.

Texas.— Stirman *v.* State, 21 Tex. 734;

plied.[47] The rule is applicable even when the provisions of a prior law are contained in a special act.[48] Where there is such revision, there need be no express words of repeal.[49] Neither is it required that the later statute shall be so repugnant to the former that both cannot stand and be construed together.[50] But it must appear that the subsequent statute revised the whole subject-matter of the former one and was evidently intended as a substitute for it.[51]

bb. *Effect on Omitted Acts.* Where a statute is revised, some parts of the original act being omitted, the parts which are omitted cannot be revived by construction, but are to be considered as annulled,[52] provided it clearly appears to

Rogers *v.* Watrous, 8 Tex. 62, 58 Am. Dec. 100; Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011; Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930.

Vermont.— Barton Nat. Bank *v.* Atkins, 72 Vt. 33, 47 Atl. 176; Giddings *v.* Cox, 31 Vt. 607; Farr *v.* Brackett, 30 Vt. 344.

West Virginia.— State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; State *v.* Mines, 38 W. Va. 125, 18 S. E. 470; Conley *v.* Calhoun County, 2 W. Va. 416.

Wisconsin.— State *v.* Campbell, 44 Wis. 529; Burlander *v.* Milwaukee, etc., R. Co., 26 Wis. 76; Lewis *v.* Stout, 22 Wis. 234.

United States.— District of Columbia *v.* Hutton, 143 U. S. 18, 12 S. Ct. 369, 36 L. ed. 60; Murdock *v.* Memphis, 20 Wall. 590, 22 L. ed. 429; Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517; Kent *v.* U. S., 73 Fed. 680, 19 C. C. A. 642; Butler *v.* Russell, 4 Fed. Cas. No. 2,243, 3 Cliff. 251; U. S. *v.* Checseman, 25 Fed. Cas. No. 14,790, 3 Sawy. 424.

England.— Rex *v.* Cator, 4 Burr. 2026, 98 Eng. Reprint 56; Rex *v.* Davis, Leach C. C. 306.

See 44 Cent. Dig. tit. "Statutes," § 242.

This rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions mentioned in the latter act as the only ones on that subject which shall be obligatory. Mack *v.* Jastro, 126 Cal. 130, 58 Pac. 372; State *v.* Conkling, 19 Cal. 501; People *v.* Thornton, 186 Ill. 162, 57 N. E. 841; Roche *v.* Jersey City, 40 N. J. L. 257; Bracken *v.* Smith, 39 N. J. Eq. 169.

In the case of a statute revising the common law, the implication is at least equally strong. Com. *v.* Cooley, 10 Pick. (Mass.) 37.

The purpose of a statute revising the whole subject-matter of a former one is the provision of a new and comprehensive system of law as to the subject-matter, and is not an erection on former laws of a mere superstructure, but the erection of a new structure, using only such of the old materials as are suitable, so that the work consists of inclusion only by means of express and implied enactments and reënactments and express and implied adoption of existing laws. State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394.

Revision of statutes implies a reëxamination of them.— The word is applied to a restatement of the law in an improved and corrected form. A revision is intended to take the place of the law as previously formulated. Jernigan *v.* Holden, 34 Fla. 530, 16 So. 413.

47. Stirman *v.* State, 21 Tex. 734; Cain *v.* State, 20 Tex. 355; Dickinson *v.* State, 38 Tex. Cr. 472, 41 S. W. 759, 43 S. W. 520.

48. People *v.* Thornton, 186 Ill. 162, 57 N. E. 841; People *v.* Centralia Bd. of Education, 166 Ill. 388, 46 N. E. 1099; Andrews *v.* People, 75 Ill. 605.

The rule seems not to be applied to aid in the construction of acts passed at the same session. Cain *v.* State, 20 Tex. 355.

49. Jernigan *v.* Holden, 34 Fla. 530, 16 So. 413. See also cases cited *supra*, note 46.

50. Mack *v.* Jastro, 126 Cal. 130, 58 Pac. 372; Jernigan *v.* Holden, 34 Fla. 530, 16 So. 413.

51. Indianapolis Water Works Co. *v.* Burkhart, 41 Ind. 364. See also cases cited *supra*, note 46.

52. *Indiana.*— State *v.* Miller, 140 Ind. 168, 39 N. E. 148, 664.

Kentucky.— Buchannon *v.* Com., 95 Ky. 334, 25 S. W. 265, 15 Ky. L. Rep. 738; Broaddus *v.* Broaddus, 10 Bush 299.

Maine.— Pingree *v.* Snell, 42 Me. 53; Buck *v.* Spofford, 31 Me. 34.

Maryland.— Frederick *v.* Groshon, 30 Md. 436, 96 Am. Dec. 591.

Massachusetts.— Blackburn *v.* Walpole, 9 Pick. 97; Ellis *v.* Paige, 1 Pick. 43.

Mississippi.— Clay County *v.* Chickasaw County, 64 Miss. 534, 1 So. 753.

New Mexico.— Tafoya *v.* Garcia, 1 N. M. 480.

New York.— *In re* Southworth, 5 Hun 55.

Pennsylvania.— Reeves' Appeal, 33 Pa. Super. Ct. 196.

Texas.— Flores *v.* State, 41 Tex. Cr. 166, 53 S. W. 346; Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930.

Wisconsin.— Bentley *v.* Adams, 92 Wis. 386, 66 N. W. 505.

United States.— U. S. *v.* Bedgood, 49 Fed. 54.

See 44 Cent. Dig. tit. "Statutes," § 242.

Presumption from omission.—When a statute is revised and a provision contained in it is omitted in the new statute, the inference

have been the intention of the legislature to cover the whole subject by the revision.[53]

cc. *Time When Repeal Effected.* A repeal is not effected until the revised law goes into effect.[54]

(b) CODIFICATION. Where the laws and jurisprudence of a state are reduced to the form of a code, without any clause of repeal, the rule of interpretation must be, as in cases of successive statutes, not to favor a repeal by implication, unless in case of manifest repugnance,[55] or where the legislature intended to cover the whole subject in the code.[56]

(2) EFFECT OF EXPRESS REPEALING CLAUSE.[57] The doctrine that a statute is impliedly repealed by a subsequent statute, revising the whole matter of the first,[58] does not apply where the revisory statute declares what effect it is intended to have upon the former, as where it provides that it shall operate to repeal all inconsistent or repugnant acts;[59] all acts of a public and general nature;[60] all acts in every case provided for in the code;[61] or all acts whose subjects are revised, consolidated, or reënacted in the revision or code.[62] In such cases only such

is that a change in the law was intended to be made. If the omission was by accident, it belongs to the legislature to supply it. Buck *v.* Spofford, 31 Me. 34.

If the revising act does not legislate upon a subject the omission therefrom of a prior act relating to that subject does not operate to repeal that act. Com. *v.* Grinstead, 108 Ky. 59, 55 S. W. 720, 21 Ky. L. Rep. 1444, 57 S. W. 471, 22 Ky. L. Rep. 377; Conley *v.* Com., 98 Ky. 125, 32 S. W. 285, 17 Ky. L. Rep. 678; Com. *v.* Carter, 55 S. W. 701, 21 Ky. L. Rep. 1509; Jennison *v.* Warmack, 5 La. 493; Wetzell *v.* Paducah, 117 Fed. 647.

53. Butler *v.* Russell, 4 Fed. Cas. No. 2,243, 3 Cliff. 251.

An unintentional omission in printing a revision does not affect a repeal of the omitted section. Flower *v.* Griffith, 6 Mart. N. S. (La.) 89.

54. State *v.* Edwards, 136 Mo. 360, 38 S. W. 73.

55. Rosasco *v.* Tuolumne County, 143 Cal. 430, 77 Pac. 148; Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251; Murray *v.* State, 112 Ga. 7, 37 S. E. 111; Lyon *v.* Fisk, 1 La. Ann. 444.

56. Chrisman *v.* Carney, 33 Ark. 316.

57. **Express repeal as raising presumption against implied repeal** see *infra*, VI, A, 3, c, (v).

58. See *supra*, VI, A, 3, c, (III), (C), (1), (a), aa.

59. St. John *v.* Pierce, 22 Barb. (N. Y.) 362 [*affirmed* in 4 Abb. Dec. 140, 26 How. Pr. 599]; Palmer *v.* Adams, 22 How. Pr. (N. Y.) 375; *In re* Hawes, 22 R. I. 312, 47 Atl. 705.

The general repealing clause of a revision refers only to general statutes, and not to statutes regarding particular matters within their general scope. State *v.* Public Land Com'rs, 106 Wis. 584, 82 N. W. 549; Janesville *v.* Markoe, 18 Wis. 350; Walworth County *v.* Whitewater, 17 Wis. 193; *Re* Colenutt, 13 Ont. Pr. 253.

In Louisiana, where the provisions of the code of practice are inconsistent with those of the civil code, the latter must be considered as repealed, and the former recognized as the law of the case, for the statute adopting the code of practice provides that, whenever its provisions are contrary to those of the civil code, the latter shall be considered as repealed. Desban *v.* Pickett, 16 La. Ann. 350; Flower *v.* Griffith, 6 Mart. N. S. 89.

60. *Alabama.*—Taylor *v.* State, 62 Ala. 164.

Iowa.— West *v.* Bishop, 110 Iowa 410, 81 N. W. 696.

Mississippi.— Postal Tel. Cable Co. *v.* Shannon, 91 Miss. 476, 44 So. 809.

North Carolina.— State *v.* Chambers, 93 N. C. 600.

Tennessee.— Padgett *v.* Ducktown Sulphur, etc., Co., 97 Tenn. 690, 37 S. W. 698.

Texas.— Heil *v.* Martin, (Civ. App. 1902) 70 S. W. 430.

Virginia.— Carter *v.* Edwards, 88 Va. 205, 13 S. E. 352.

See 44 Cent. Dig. tit. "Statutes," §§ 242, 243.

61. Carpenter *v.* Jones, 121 Cal. 362, 53 Pac. 842; Gray *v.* Dixon, 74 Cal. 508, 16 Pac. 305; Com. *v.* Watts, 84 Ky. 537, 2 S. W. 123, 8 Ky. L. Rep. 571; Wigginton *v.* Moss, 2 Metc. (Ky.) 38; Grigsby *v.* Barr, 14 Bush (Ky.) 330; State *v.* Cunningham, 72 N. C. 469; U. S. *v.* Bedgood, 49 Fed. 54.

A statute creating both a right and a remedy to enforce it is not repealed by a code in which is found no remedy to enforce the right thus created. Newman *v.* Ecton, 100 Ky. 653, 21 S. W. 526, 14 Ky. L. Rep. 793.

Applicability of such a provision.—A provision repealing all laws in every case provided for in the code itself applies, not in every particular instance or cause, but to every category or class of cases, or subject-matter upon which the code contains express provisions, and abrogates all previous laws on these subjects. Waters *v.* Petrovic, 19 La. 584.

The subject-matter is to be determined with reference to the substantive thing done by the act, not merely the purpose or mode of exercising the power conferred. Vicksburg *v.* Sun Mut. Ins. Co., 72 Miss. 67, 16 So. 257.

62. State *v.* Jenkins, 73 Miss. 523, 19 So.

effect can be given to the revisory act as it directs. The enumerated acts are repealed; all others remain in force.[63]

(3) Effect of Saving Clause. To guard against oversights and omissions necessarily incident to all statute revisions and codifications, a provision is frequently inserted to the effect that laws of a general nature not repugnant to the revision shall remain in force.[64] Furthermore it is customary to save from repeal special and local acts,[65] acts passed at the same legislative session,[66] and acts no part of which is embraced in the revision or codification.[67]

(d) *By Amendatory Act* — (1) In General. A law purporting to amend another law may or may not operate as a repeal of the original law. If an amendment does not change the original law, but simply adds something to it, the amendatory law will not operate as a repeal of the old law.[68] But where an amendment is made that changes the old law in its substantial provisions, it must, by a necessary

206; McCarty *v.* State, 37 Miss. 411; Kern *v.* Supreme Council A. L. H., 167 Mo. 471, 67 S. W. 252; State *v.* Wardell, 153 Mo. 319, 54 S. W. 574; Bird *v.* Sellers, 122 Mo. 23, 26 S. W. 668 [*overruling* Bird *v.* Sellers, 113 Mo. 580, 21 S. W. 91]; Butler *v.* Sullivan County, 108 Mo. 630, 18 S. W. 1142; Dane County *v.* Reindahl, 104 Wis. 302, 80 N. W. 438.

No matter how many different subjects are included in a prior act, if any one of them is embodied or reënacted in the general statutes, the entire act is repealed. Burgess *v.* Memphis, etc., R. Co., 18 Kan. 53.

63. *Alabama.*— Birmingham Bldg., etc., Assoc. *v.* May, etc., Hardware Co., 99 Ala. 276, 13 So. 612.

Alaska.— State Gold Min. Co. *v.* Ebner, 2 Alaska 611.

Georgia.— Johnson *v.* Southern Mut. Bldg., etc., Assoc., 97 Ga. 622, 25 S. E. 358.

Minnesota.— Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614.

Missouri.— State *v.* Merry, 3 Mo. 278.

New York.— St. John *v.* Pierce, 22 Barb. 362 [*affirmed* in 4 Abb. Dec. 140, 26 How. Pr. 599]; Ruge *v.* Gallagher, 22 Misc. 572, 49 N. Y. Suppl. 729.

Rhode Island.— State *v.* Pollard, 6 R. I. 290.

South Carolina.— Hurst *v.* Samuels, 29 S. C. 476, 7 S. E. 822.

Washington.— Cosh-Murray Co. *v.* Tuttich, 10 Wash. 449, 38 Pac. 1134.

Wisconsin.— Lewis *v.* Stout, 22 Wis. 234. But see State *v.* Campbell, 44 Wis. 529, in which case it is held that revision works the entire repeal of prior legislation on the subject, although the revising act contains an express repealing clause of inconsistent provisions only.

United States.— Holden *v.* Minnesota, 137 U. S. 483, 11 S. Ct. 143, 34 L. ed. 734; Patterson *v.* Tatum, 18 Fed. Cas. No. 10,830, 3 Sawy. 164.

See 44 Cent. Dig. tit. "Statutes," § 242.

Contra.— Ellis *v.* Parsell, 100 Mich. 170, 58 N. W. 839.

The converse proposition, however, seems not to be true. Thus it has been held that the mere enumeration in a statute of certain previous provisions which shall not be affected by it does not warrant the inference that all existing provisions on similar subjects not so enumerated are repealed. Burnham *v.* Onderdonk, 41 N. Y. 425. But see Lewis *v.* Casenave, 6 La. 437.

64. Com. *v.* Mason, 82 Ky. 256.

65. Thomas *v.* State, 124 Ala. 48, 27 So. 315; State *v.* Sargent, 45 Conn. 358; State *v.* Cantwell, 142 N. C. 604, 55 S. E. 820, 8 L. R. A. N. S. 498; State *v.* Womble, 112 N. C. 862, 17 S. E. 491, 19 L. R. A. 827; Humphries *v.* Baxter, 28 N. C. 437; Grandy *v.* Morris, 28 N. C. 433; McRae *v.* Wessell, 28 N. C. 153; Powell *v.* Richmond, 94 Va. 79, 26 S. E. 389.

In Iowa statutes which are public and special, and the subjects of which are not revised in the code, are not repealed by the code unless their provisions are repugnant to its enactments. Gray *v.* Mount, 45 Iowa 591; State *v.* Harris, 10 Iowa 441.

Miss. Annot. Code (1892), § 8, provides that to effect the repeal of a local law, by the enactment of the code, it must be expressly so provided therein. Vicksburg *v.* Sun Mut. Ins. Co., 72 Miss. 67, 16 So. 257.

66. O'Rear *v.* Jackson, 124 Ala. 298, 26 So. 944; Benners *v.* State, 124 Ala. 97, 26 So. 942; South *v.* State, 86 Ala. 617, 6 So. 52; State *v.* Wills, 49 Fla. 380, 38 So. 289; People *v.* Potter, 88 N. Y. App. Div. 239, 85 N. Y. Suppl. 460 [*affirming* 40 Misc. 485, 82 N. Y. Suppl. 649], holding that Statutory Construction Law (Laws (1892), p. 1492, c. 667), § 33, providing that an amendatory law passed at the same session at which any chapter of the revision of the general laws was enacted shall not be deemed repealed unless specifically designated in the repealing schedule, does not apply to repeals before the taking effect of the act.

67. Chadwick *v.* Tatem, 9 Mont. 354, 23 Pac. 729; Creswell *v.* State, 37 Tex. Cr. 335, 39 S. W. 372, 935; Phipps *v.* State, 36 Tex. Cr. 216, 36 S. W. 753.

68. *Arizona.*— Territory *v.* Ruval, 9 Ariz. 415, 84 Pac. 1096.

Indiana.— Longlois *v.* Longlois, 48 Ind. 60.

Louisiana.— Guillotte *v.* New Orleans, 12 La. Ann. 432.

New Jersey.— Newark *v.* Mt. Pleasant Cemetery Co., 58 N. J. L. 168, 33 Atl. 396.

Texas.— Green *v.* State, (App. 1889) 12 S. W. 872.

See 44 Cent. Dig. tit. "Statutes," § 239.

implication, repeal the old law so far as they are in conflict.[69] And where a new law, whether it be in the form of an amendment or otherwise, covers the whole subject-matter of the former, and is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication.[70]

(2) By Amendment "So as to Read as Follows." Generally speaking, where a statute is amended "so as to read as follows," the amendatory act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment;[71] but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein.[72] On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption;[73] that so much of the act as is omitted is repealed;[74] and that any substantial change in other portions

69. Longlois *v.* Longlois, 48 Ind. 60; Breitung *v.* Lindauer, 37 Mich. 217; Jacobus *v.* Meskill, 56 N. J. L. 255, 28 Atl. 383; Tifft *v.* Buffalo, 8 N. Y. St. 325 [*reversed* on other grounds in 7 N. Y. Suppl. 633 (*affirmed* in 130 N. Y. 695, 30 N. E. 68)].

70. *Indiana.*— Blakemore *v.* Dolan, 50 Ind. 194; Longlois *v.* Longlois, 48 Ind. 60.

Kansas.— Lowe *v.* Bourbon County, 6 Kan. App. 603, 51 Pac. 579.

Michigan.— Breitung *v.* Lindauer, 37 Mich. 217; People *v.* Saginaw County, 32 Mich. 260.

New Jersey.— Vanderveer *v.* Herbert, 76 N. J. L. 173, 68 Atl. 909.

Ohio.— State *v.* Wyandot County, 16 Ohio Cir. Ct. 218, 9 Ohio Cir. Dec. 90.

Wisconsin.— Schneider *v.* Staples, 66 Wis. 167, 28 N. W. 145.

United States.— Minnesota, etc., Imp. Co. *v.* Billings, 111 Fed. 972, 50 C. C. A. 70.

See 44 Cent. Dig. tit. "Statutes," § 239.

71. People *v.* Wilmerding, 136 N. Y. 363, 32 N. E. 1099; People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; Goodno *v.* Oshkosh, 31 Wis. 127; Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

72. Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567]. See also cases cited *infra*, this section. But see State *v.* Andrews, 20 Tex. 230, holding that an amending act which provides that a section of the previous act "shall hereafter read as follows" entirely repeals such section.

73. *Arizona.*— Territory *v.* Ruval, 9 Ariz. 415, 84 Pac. 1096.

California.—Central Pac. R. Co. *v.* Shackelford, 63 Cal. 261.

Minnesota.—State *v.* Herzog, 25 Minn. 490; Kerlinger *v.* Barnes, 14 Minn. 526.

New York.— *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; Moore *v.* Mausert, 49 N. Y. 332 [*affirming* 5 Lans. 173]; Ely *v.* Holton, 15 N. Y. 595; Mortimer *v.* Chambers, 63 Hun 335, 17 N. Y. Suppl. 874.

North Dakota.— Fargo *v.* Ross, 11 N. D. 369, 92 N. W. 449.

Oregon.— Stingle *v.* Nevel, 9 Oreg. 62.

Vermont.— Kelsey *v.* Kendall, 48 Vt. 24.

Virginia.— Richmond *v.* Henrico County, 83 Va. 204, 2 S. E. 26.

Washington.—Mudgett *v.* Liebes, 14 Wash. 482, 45 Pac. 19.

West Virginia.— State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

Wisconsin.— Goodno *v.* Oshkosh, 31 Wis. 127.

United States.— Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

See 44 Cent. Dig. tit. "Statutes," § 239.

This rule is not so absolute as not to yield to a contrary intention when it is to be found in the nature of the case, in the language employed, or in the course of contemporaneous legislation on the same subject. Metropolis Bank *v.* Faber, 150 N. Y. 200, 44 N. E. 779 [*affirming* 1 N. Y. App. Div. 341, 37 N. Y. Suppl. 423]; *In re* Rochester Water Com'rs, 66 N. Y. 413. Thus if it appears that the legislature did not intend merely to repeat or copy the language of the original law, but, although using the same words, intended them to have a different meaning and effect, the rule is not applicable. Kerlinger *v.* Barnes, 14 Minn. 526.

74. *Florida.*— State *v.* Duval County, 23 Fla. 483, 3 So. 193.

Minnesota.— Shadewald *v.* Phillips, 72 Minn. 520, 75 N. W. 717.

New York.— *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; People *v.* Brooklyn Bd. Assessors, 84 N. Y. 610; People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; Moore *v.* Mausert, 49 N. Y. 332 [*affirming* 5 Lans. 173]; Ely *v.* Holton, 15 N. Y. 595; People *v.* Madill, 91 Hun 152, 36 N. Y. Suppl. 534; Wirt *v.* Allegany County, 90 Hun 205, 35 N. Y. Suppl. 887; McDermott *v.* Nassau Electric R. Co., 85 Hun 422, 32 N. Y. Suppl. 884 [*affirmed* in 147 N. Y. 700, 42 N. E. 724]; Matter of Connellan, 25 Misc. 592, 56 N. Y. Suppl. 157.

North Dakota.— Fargo *v.* Ross, 11 N. D. 369, 92 N. W. 449.

Pennsylvania.— *In re* Thirty-Eighth Ward Election, 35 Pa. Super. Ct. 256; Fowler *v.* Columbia County, 18 Pa. Co. Ct. 653. See also Lehigh Valley Coal Co. *v.* U. S. Pipe Line Co., 7 Kulp 77.

of the original act, as also any matter which is entirely new, is operative as new legislation.[75]

(E) *By Reënactment* — (1) IN GENERAL. The repeal and simultaneous reënactment of substantially the same statutory provisions is to be construed, not as an implied repeal of the original statute, but as a continuation thereof.[76] Nor does a later law, which is merely a reënactment of a former, repeal an intermediate act which qualifies or limits the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first.[77]

South Carolina.— Williams *v.* Kershaw County, 56 S. C. 400, 34 S. E. 694.

Virginia.— Somers *v.* Com., 97 Va. 759, 33 S. E. 381.

Wisconsin.— Chapin *v.* Crusen, 31 Wis. 209; Goodno *v.* Oshkosh, 31 Wis. 127; State *v.* Ingersoll, 17 Wis. 631.

United States.— Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

See 44 Cent. Dig. tit. "Statutes," § 239.

The mere omission to embody in an amendment to a remedial statute some of the provisions of the original law, not conflicting, but which may exist independent of and in entire harmony with it, will not, as to existing rights, and in the absence of circumstances indicating an intention to repeal the omitted provision, be deemed to have the effect of repealing it. Kerlinger *v.* Barnes, 14 Minn. 526.

75. *California.*— Central Pac. R. Co. *v.* Shackelford, 63 Cal. 261.

Minnesota.— Kerlinger *v.* Barnes, 14 Minn. 526.

New York.— Moore *v.* Mausert, 49 N. Y. 332 [*affirming* 5 Lans. 173]; Ely *v.* Holton, 15 N. Y. 595.

North Dakota.— Fargo *v.* Ross, 11 N. D. 369, 92 N. W. 449.

Vermont.— Kelsey *v.* Kendall, 48 Vt. 24.

Virginia.— Richmond *v.* Henrico County, 83 Va. 204, 2 S. E. 26.

United States.— Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

See 44 Cent. Dig. tit. "Statutes," § 239.

76. *Connecticut.*— State *v.* Baldwin, 45 Conn. 134.

Florida.—Florida Cent., etc., R. Co. *v.* Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149; Forbes *v.* Escambia County Bd. of Health, 27 Fla. 189, 9 So. 446, 26 Am. St. Rep. 63.

Idaho.— Barton *v.* Moscow Independent School Dist. No. 5, 3 Ida. 270, 29 Pac. 43.

Indiana.— State *v.* Kates, 149 Ind. 46, 48 N. E. 365; Cordell *v.* State, 22 Ind. 1; Martindale *v.* Martindale, 10 Ind. 566; Alexander *v* State, 9 Ind. 337; Cheezem *v.* State, 2 Ind. 149.

Iowa.— Robinson *v.* Ferguson, 119 Iowa 325, 93 N. W. 350; State *v.* Prouty, 115 Iowa 657, 84 N. W. 670; Hancock *v.* Perry Dist. Tp., 78 Iowa 550, 43 N. W. 527.

Kentucky.— Galloway *v.* Bradburn, 119 Ky. 49 82 S. W. 1013, 26 Ky. L. Rep. 977.

Mississippi.— Abbay *v.* Yazoo-Mississippi Delta Levee Com'rs, 83 Miss. 102, 35 So. 426.

Nebraska.— State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348.

New York.— Powers *v.* Shepard, 48 N. Y. 540 [*affirming* 49 Barb. 418, 35 How. Pr. 53].

North Carolina.— Abbott *v.* Beddingfield, 125 N. C. 256, 34 S. E. 412; Robinson *v.* Goldsboro, 122 N. C. 211, 30 S. E. 324.

Pennsylvania.—South Chester *v.* Broomall, 1 Del. Co. 58.

Texas.— McMullen *v.* Guest, 6 Tex. 275; Price *v.* Wakeham, 48 Tex. Civ. App. 339, 107 S. W. 132; Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

Vermont.— State *v.* Kibling, 63 Vt. 636, 22 Atl. 613.

Washington.— Northern Pac. R. Co. *v.* Ellison, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263.

West Virginia.— Burns *v.* Hays, 44 W. Va. 503, 30 S. E. 101.

Wisconsin.— Glentz *v.* State, 38 Wis. 549; State *v.* Gumber, 37 Wis. 298; Laude *v.* Chicago, etc., R. Co., 33 Wis. 640; Hurley *v.* Texas, 20 Wis. 634; Fullerton *v.* Spring, 3 Wis. 667.

United States.— Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. 450, 17 L. ed. 805; Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

See 44 Cent. Dig. tit. "Statutes," §§ 224, 241.

The provisions of the two statutes must be practically identical in order to work a continuation. Gull River Lumber Co. *v.* Lee, 7 N. D. 135, 73 N. W. 430.

It makes no difference whether the statute be a civil or a penal one. State *v.* Wish, 15 Nebr. 448, 19 N. W. 686; State *v.* Williams, 117 N. C. 753, 23 S. E. 250; State *v.* Gumber, 37 Wis. 298. *Contra*, State *v.* King, 12 La. Ann. 593, holding that the repeal of a penal statute, pending a prosecution under it, without a saving clause, puts an end to the prosecution.

In practical operation and effect, the new statute is to be considered as a continuance of the old, rather than as an abrogation of the old and the reënactment of a new one. Robinson *v.* Ferguson, 119 Iowa 325, 93 N. W. 350; State *v.* Prouty, 115 Iowa 657, 84 N. W. 670; Stenberg *v.* State, 50 Nebr. 127, 69 N. W. 849; State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348; State *v.* Williams, 117 N. C. 753, 23 S. E. 250.

77. *Georgia.*— Horn *v.* State, (1901) 40 S. E. 297.

(2) By Amendatory Act. Reënactment of a statute, in compliance with a constitutional provision requiring amendments to be made by setting out the whole section as amended, does not effect a repeal of the former statute.[78]

(3) By Revisory Act. Independently of express provision to that effect, a revision of a statute by reënactment of a previous statute operates as a continuance of the former, instead of as a repeal and new enactment.[79]

(F) *By Non-User and Other Causes Rendering Statute Obsolete.* A statute cannot be repealed by non-user,[80] unless such non-user be accompanied by the enactment of irreconcilable statutes, or by the establishment of an opposite

Michigan.— Goodrich *v.* Hackley-Phelps-Bonnell Co., 141 Mich. 343, 104 N. W. 669.

Minnesota.— Powell *v.* King, 78 Minn. 83, 80 N. W. 850; Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614. See also Hawes *v.* Fliegler, 87 Minn. 319, 92 N. W. 223.

Nevada.— State *v.* Beard, 21 Nev. 218, 29 Pac. 531.

South Dakota.— Co-operative Sav., etc., Assoc. *v.* Fawick, 11 S. D. 589, 79 N. W. 847.

Texas.— Taggart *v.* Hillman, 42 Tex. Civ. App. 71, 93 S. W. 245.

Wisconsin.— Bentley *v.* Adams, 92 Wis. 386, 66 N. W. 505.

England.— Morisse *v.* Royal British Bank, 1 C. B. N. S. 67, 3 Jur. N. S. 137, 26 L. J. C. P. 62, 5 Wkly. Rep. 138, 87 E. C. L. 67.

The reënactment of a general rule or principle of the Spanish law does not repeal the exception with which it was accompanied. Verret *v.* Theriot, 15 La. 106; McCarty *v.* Steam Cotton Press Co., 5 La. 16; Valsain *v.* Cloutier, 3 La. 170, 22 Am. Dec. 179; Le Blanc *v.* Landry, 7 Mart. N. S. (La.) 665; Duncan *v.* Hampton, 6 Mart. N. S. (La.) 31.

78. *California.*— Swamp Land Dist. No. 307 *v.* Glide, 112 Cal. 85, 44 Pac. 451.

Indiana.— Sage *v.* State, 127 Ind. 15, 26 N. E. 667.

Michigan.— Gordon *v.* People, 44 Mich. 485, 7 N. W. 69.

New Jersey.— McLaughlin *v.* Newark, 57 N. J. L. 298, 30 Atl. 543.

New York.— *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713.

North Dakota.— Fargo *v.* Ross, 11 N. D. 369, 92 N. W. 449.

Texas.— Taggart *v.* Hillman, 42 Tex. Civ. App. 71, 93 S. W. 245; Robinson *v.* State, (Civ. App. 1894) 28 S. W. 566.

Vermont.— Kelsey *v.* Kendall, 48 Vt. 24.

West Virginia.— State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

United States.— Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567]; The Louis Olsen, 57 Fed. 845, 6 C. C. A. 608.

See 44 Cent. Dig. tit. "Statutes," § 241.

79. *Iowa.*— State *v.* Prouty, 115 Iowa 657, 84 N. W. 670.

Massachusetts.— Wright *v.* Oakley, 5 Metc. 400.

New Hampshire.— State *v.* Wimpfheimer, 69 N. H. 166, 38 Atl. 786.

New Jersey.— Henry *v.* Simanton, 64 N. J. Eq. 572, 54 Atl. 153; Randolph *v.* Larned, 27 N. J. Eq. 557; Middleton *v.* New Jersey, etc., R. Co., 26 N. J. Eq. 269.

Texas.— Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

Utah.— Pratt *v.* Swan, 16 Utah 483, 52 Pac. 1092.

Wisconsin.— Sheftels *v.* Tabert, 46 Wis. 439, 1 N. W. 161.

In some states this rule has been expressly declared by statute.

New York.— Ingersoll *v.* Nassau Electric R. Co., 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236; Boyce *v.* Perry, 26 Misc. 355, 57 N. Y. Suppl. 214; Close *v.* Potter, 2 Misc. 1, 21 N. Y. Suppl. 1086.

Vermont.— Richardson *v.* Fletcher, 74 Vt. 417, 52 Atl. 1064.

Wisconsin.— Julien *v.* Model Bldg., etc., Assoc., 116 Wis. 79, 92 N. W. 561.

United States.—First Nat. Bank *v.* Weidenbeck, 97 Fed. 896, 38 C. C. A. 131 [*reversing* 87 Fed. 271], construing Montana statute.

Canada.— Reg. *v.* Durnion, 14 Ont. 672.

80. *District of Columbia.*— Costello *v.* Palmer, 20 App. Cas. 210.

Iowa.—Pearson *v.* International Distillery, 72 Iowa 348, 34 N. W. 1.

Maryland.— Snowden *v.* Snowden, 1 Bland 550.

Oregon.— State *v.* Nease, 46 Oreg. 433, 80 Pac. 897.

Pennsylvania.— Homer *v.* Com., 106 Pa. St. 221, 51 Am. Rep. 521; Kitchen *v.* Smith, 101 Pa. St. 452; Com. *v.* Hoover, 1 Browne Appendix 25.

Washington.— State *v.* Meek, 26 Wash. 405, 67 Pac. 76.

England.— Hebbert *v.* Purchas, L. R. 3 P. C. 605, 40 L. J. Exch. 33, 7 Moore P. C. N. S. 468, 19 Wkly. Rep. 898, 17 Eng. Reprint 468; The India, Brown & L. 221, 33 L. J. Adm. 193, 12 L. T. Rep. N. S. 316; Leigh *v.* Kent, 3 T. R. 362, 100 Eng. Reprint 621; White *v.* Boot, 2 T. R. 274, 100 Eng. Reprint 149.

See 44 Cent. Dig. tit. "Statutes," § 253.

Contra.— O'Hanlon *v.* Myers, 10 Rich. (S. C.) 128.

Long practice is important in explaining ambiguities, and determining the true construction of statutes. Hebbert *v.* Purchas, L. R. 3 P. C. 605, 40 L. J. Exch. 33, 7 Moore P. C. N. S. 468, 19 Wkly. Rep. 898, 17 Eng. Reprint 468; Leigh *v.* Kent, 3 T. R. 362, 100 Eng. Reprint 621.

Popular disregard of a statute does not repeal it. Georgia, R., etc., Co. *v.* Walker, 87 Ga. 204, 13 S. E. 511.

legislative policy,[81] or unless circumstances have so changed that the object of the statute has vanished or its reason ceased.[82] So a statute may become of no force, although not repealed, by a change of circumstances rendering its enforcement a fraud.[83] But the repeal of an act cannot be implied from the mere fact that some of the evils provided against in it are removed by a subsequent act.[84]

(G) *By Acts Passed at Same Session.* Where two acts relating to the same subject-matter are passed at the same legislative session, there is a strong presumption against implied repeal,[85] and they are to be construed together, if possible, so as to give effect to each;[86] but, if the two are irreconcilable, the one which is the later expression of the legislative will must prevail.[87] A statute cannot be superseded by one of earlier date;[88] or, where publication is necessary to put an act in force, by one which precedes it in the authorized publication of the laws.[89] But it is frequently provided that a revision or code must be construed as though

81. Pearson *v.* International Distillery, 72 Iowa 348, 34 N. W. 1; Hill *v.* Smith, Morr. (Iowa) 70. See also Adams *v.* Norris, 23 How. (U. S.) 353, 16 L. ed. 539 [*affirming* 1 Fed. Cas. No. 51, McAllister 253].

82. James *v.* Com., 12 Serg. & R. (Pa.) 220; Watson *v.* Blaylock, 2 Mill (S. C.) 351.

83. Williamson *v.* Bacot, 1 Bay (S. C.) 62, holding that the act of 1778, making paper money a legal tender, became of no force, although not repealed, after the money had gone out of circulation.

84. Alexandria *v.* Dearmon, 2 Sneed (Tenn.) 104.

85. State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; State *v.* Rotwitt, 17 Mont. 41, 41 Pac. 1004; Altoona *v.* Calvert, 21 Pa. Co. Ct. 362.

86. *Georgia.*— Hope *v.* Gainesville, 72 Ga. 246.

Indiana.— State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; Indiana Cent. Canal Co. *v.* State, 53 Ind. 575.

Iowa.— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177.

Louisiana.— New Orleans *v.* Mechanics', etc., Bank, 15 La. Ann. 107; State *v.* Southern Steamship Co., 13 La. Ann. 497.

Maryland.— Fouke *v.* Fleming, 13 Md. 392.

Missouri.— State *v.* Bishop, 41 Mo. 16; Lang *v.* Calloway, 68 Mo. App. 393; Curtwright *v.* Crow, 44 Mo. App. 563.

Montana.— State *v.* Rotwitt, 17 Mont. 41, 41 Pac. 1004.

Oklahoma.— Garton *v.* Hudson-Kimberly Pub. Co., 8 Okla. 631, 58 Pac. 946.

Texas.— McGrady *v.* Terrell, 98 Tex. 427, 84 S. W. 641; Monroe *v.* Arledge, 23 Tex. 478; Cain *v.* State, 20 Tex. 355; Joliff *v.* State, 53 Tex. Cr. 61, 109 S. W. 176.

Vermont.— Brattleboro Town School Dist. *v.* Brattleboro School Dist. No. 2, 72 Vt. 451, 48 Atl. 697.

Washington.— Follansbee *v.* Wilbur, 14 Wash. 242, 44 Pac. 262.

See 44 Cent. Dig. tit. "Statutes," § 231.

87. *California.*— Thompson *v.* Alameda County, 111 Cal. 553, 44 Pac. 230.

Indiana.— State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; State *v.* Schoonover, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767; Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205; Spencer *v.* State, 5 Ind. 41.

Kentucky.— Peyton *v.* Moseley, 3 T. B. Mon. 77.

Louisiana.— State *v.* Southern Steamship Co., 13 La. Ann. 497.

Maryland.— State *v.* Davis, 70 Md. 237, 16 Atl. 529.

Michigan.— Detroit United R. Co. *v.* Barnes Paper Co., 149 Mich. 675, 113 N. W. 285.

Montana.— Congdon *v.* Butte Consol. R. Co., 17 Mont. 481, 43 Pac. 629.

Ohio.— State *v.* Halliday, 63 Ohio St. 165, 57 N. E. 1097.

Tennessee.— Bailey *v.* Drane, 96 Tenn. 16, 33 S. W. 573.

Texas.— McGrady *v.* Terrell, 98 Tex. 427, 84 S. W. 641; Cain *v.* State, 20 Tex. 355; Joliff *v.* State, 53 Tex. Cr. 61, 109 S. W. 176.

Utah.— State University *v.* Richards, 20 Utah 457, 59 Pac. 96, 77 Am. St. Rep. 928.

Virginia.— Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822.

See 44 Cent. Dig. tit. "Statutes," § 231.

The reason and necessity for the rule recognizing repeals by irreconcilable repugnancy are the same whether the two acts are passed at the same session of the legislature, or at different sessions, far apart. Spencer *v.* State, 5 Ind. 41; Bailey *v.* Drane, 96 Tenn. 16, 33 S. W. 573.

The parliamentary rule that an act shall not be repealed at the session at which it is passed has no reference to repeal by implication. Spencer *v.* State, 5 Ind. 41.

88. Mariposa County *v.* Madera County, 142 Cal. 50, 75 Pac. 572; Thomas *v.* Collins, 58 Mich. 64, 24 N. W. 553.

89. Thomas *v.* Collins, 58 Mich. 64, 24 N. W. 553; Bondholders *v.* Railroad Com'rs, 3 Fed. Cas. No. 1,625; *In re* Northwestern R. Co., 18 Fed. Cas. No. 10,340; Pick *v.* Chicago, etc., R. Co., 19 Fed. Cas. No. 11,138, 6 Biss. 177 [*affirmed* in 94 U. S. 164, 24 L. ed. 97].

In England, where two acts come into operation on the same day, and are repugnant, the one which last received the royal assent virtually repeals the other, although the former by reason of the classing of the different acts may be numbered as of a chapter later down in order than the latter. Rex *v.* Middlesex, 2 B. & Ad. 818, 1 Dowl. P. C. 117, 1 L. J. M. C. 5, 22 E. C. L. 344.

passed on the first day of the session, and if the provisions of any other act passed at the same session are inconsistent with such revision or code, the former shall prevail.[90] Where a statute is passed to take effect from its passage, and on the next day another statute upon the same subject is passed, to take effect at a future day, the latter does not operate to repeal the former.[91]

(IV) *PARTICULAR CLASSES OF ACTS* — (A) *Special by General Act* — (1) GENERAL RULES. While the rule undoubtedly is that a general affirmative act, without express words of repeal, will not repeal a previous special or local act on the same subject,[92] even though the provisions of the two be inconsist-

90. Mariposa County *v.* Madera County, 142 Cal. 50, 75 Pac. 572; Smith *v.* McDermott, 93 Cal. 421, 29 Pac. 34; Cerf *v.* Reichert, 73 Cal. 360, 15 Pac. 10; Winn's Succession, 25 La. Ann. 216; U. S. *v.* Mason, 34 Fed. 129, 13 Sawy. 218; *In re* Oregon Bulletin Printing, etc., Co., 18 Fed. Cas. No. 10,561, 3 Sawy. 614, 14 Nat. Bankr. Reg. 405, 14 Alb. L. J. (N. Y.) 130.

91. Weatherford *v.* Weatherford, 8 Port. (Ala.) 171.

92. *Alabama.*— Mobile, etc., R. Co. *v.* State, 29 Ala. 573.

Arkansas.— *Ex p.* Morrison, 69 Ark. 517, 64 S. W. 270; McFarland *v.* State Bank, 4 Ark. 410.

California.— Banks *v.* Yolo County, 104 Cal. 258, 37 Pac. 900.

Colorado.— Rice *v.* Goodwin, 2 Colo. App. 267, 30 Pac. 330.

Florida.— Luke *v.* State, 5 Fla. 185.

Georgia.— Haywood *v.* Savannah, 12 Ga. 404.

Illinois.— Cook County *v.* Gilbert, 146 Ill. 268, 33 N. E. 761 [*affirming* 44 Ill. App. 69]; Covington *v.* East St. Louis, 78 Ill. 548; People *v.* Mount, 87 Ill. App. 194 [*affirmed* in 186 Ill. 560, 58 N. E. 360]; Lewis *v.* Cook County, 72 Ill. App. 151.

Iowa.— Cole *v.* Jackson County, 11 Iowa 552.

Kentucky.— Louisville *v.* Louisville Water Co., 105 Ky. 754, 49 S. W. 766, 20 Ky. L. Rep. 1529.

Louisiana.— State *v.* Ogden, 50 La. Ann. 982, 24 So. 593; State *v.* Judge Second City Ct., 40 La. Ann. 844, 5 So. 525; Beridon *v.* Barbin, 13 La. Ann. 458; State *v.* Kitty, 12 La. Ann. 805.

Maryland.— Garrett *v.* Janes, 65 Md. 260, 3 Atl. 597.

Michigan.— State University *v.* Auditor-Gen., 109 Mich. 134, 66 N. W. 956.

Minnesota.— State *v.* Peter, 101 Minn. 462, 112 N. W. 866.

Missouri.— State *v.* Slover, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102; State *v.* Severance, 55 Mo. 378; State *v.* Bishop, 41 Mo. 16; Brown *v.* Crawford County, 8 Mo. 640; State *v.* Fitzporter, 17 Mo. App. 271.

Nebraska.— Canham *v.* Bruegman, 77 Nebr. 436, 109 N. W. 733; State *v.* Hay, 45 Nebr. 321, 63 N. W. 821; Jackson *v.* Washington County, 34 Nebr. 680, 52 N. W. 169.

Nevada.— State *v.* Beard, 21 Nev. 218, 29 Pac. 531.

New Jersey.— State *v.* Dwyer, 42 N. J. L. 327.

New Mexico.— Wilburn *v.* Territory, 10 N. M. 402, 62 Pac. 968.

New York.— Casterton *v.* Vienna, 163 N. Y. 368, 57 N. E. 622 [*affirming* 17 N. Y. App. Div. 94, 44 N. Y. Suppl. 868]; Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400; People *v.* Jefferson County Canvassers, 143 N. Y. 84, 37 N. E. 649 [*affirming* 77 Hun 372, 28 N. Y. Suppl. 871]; Van Denburgh *v.* Greenbush, 66 N. Y. 1; People *v.* Quigg, 59 N. Y. 83; *In re* Central Park Com'rs, 50 N. Y. 493; Welstead *v.* Jennings, 104 N. Y. App. Div. 179, 93 N. Y. Suppl. 339 [*affirmed* in 185 N. Y. 588, 78 N. E. 1114]; People *v.* Wells, 94 N. Y. App. Div. 271, 87 N. Y. Suppl. 1107; People *v.* O'Grady, 46 N. Y. App. Div. 213, 61 N. Y. Suppl. 577; People *v.* Dohling, 6 N. Y. App. Div. 86, 39 N. Y. Suppl. 765; McKenna *v.* Edmundstone, 10 Daly 410 [*affirmed* in 91 N. Y. 231, 64 How. Pr. 461]; Matter of Newburg Business Men's Assoc., 54 Misc. 13, 103 N. Y. Suppl. 843; Matter of McKay, 33 Misc. 520, 68 N. Y. Suppl. 925; People *v.* Sheridan, 1 N. Y. Suppl. 61; McLaughlin *v.* Page, 8 N. Y. St. 367; Bartels *v.* Cunningham, 8 Abb. N. Cas. 226; New York, etc., R. Co. *v.* Delaware County, 67 How. Pr. 5.

North Dakota.— Reeves *v.* Bruening, 16 N. D. 398, 114 N. W. 313.

Ohio.— State *v.* Newton, 26 Ohio St. 200; Fosdick *v.* Perrysburg, 14 Ohio St. 472.

Oklahoma.— Atchison, etc., R. Co. *v.* Haynes, 8 Okla. 576, 58 Pac. 738.

Pennsylvania.— Fraim *v.* Lancaster County, 171 Pa. St. 436, 33 Atl. 339; Homer *v.* Com., 106 Pa. St. 221, 51 Am. Rep. 521; Wright *v.* Vickers, 81 Pa. St. 122 [*affirming* 10 Phila. 381]; *In re* Pittsburg 11th Ward Bounty Accounts, 70 Pa. St. 92; Brown *v.* Philadelphia County, 21 Pa. St. 37; *In re* Sheraden Borough, 34 Pa. Super. Ct. 639; Corn *v.* Vetterlein, 21 Pa. Super. Ct. 587; *In re* Hansberry St., 7 Pa. Dist. 505; Com. *v.* Rogers, 1 Del. Co. 517.

South Carolina.— *Ex p.* Dunn, 8 S. C. 207.

Tennessee.—McCampbell *v.* State, 116 Tenn. 98, 93 S. W. 100.

Texas.— Laredo *v.* Martin, 52 Tex. 548; Ellis *v.* Batts, 26 Tex. 703; Monroe *v.* Arledge, 23 Tex. 478; Paul *v.* State, 48 Tex. Civ. App. 25, 106 S. W. 448; *Ex p.* Neal, 47 Tex. Cr. 441, 83 S. W. 831; *Ex p.* Kimbrell, 47 Tex. Cr. 333, 83 S. W. 382.

West Virginia.—Conley *v.* Calhoun County, 2 W. Va. 416.

Wisconsin.— State *v.* Public Land Com'rs, 106 Wis. 584, 82 N. W. 549.

ent,[93] and although the terms of the general law are broad enough to include the cases embraced in the special act,[94] yet it is not a rule of positive law, but of construc-

United States.— St. Louis Third Nat. Bank *v.* Harrison, 8 Fed. 721, 3 McCrary 162; Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368.

England.— Seward *v.* The Vera Cruz, 10 App. Cas. 59, 5 Aspin. 386, 54 L. J. P. D. & Adm. 9, 52 L. T. Rep. N. S. 474, 33 Wkly. Rep. 477; *In re* Smith, 35 Ch. D. 589, 51 J. P. 692, 56 L. J. Ch. 726, 56 L. T. Rep. N. S. 850, 35 Wkly. Rep. 514; Taylor *v.* Oldham, 4 Ch. D. 395, 46 L. J. Ch. 105, 35 L. T. Rep. N. S. 696, 25 Wkly. Rep. 178; Reg. *v.* Champneys, L. R. 6 C. P. 384, 40 L. J. C. P. 95, 24 L. T. Rep. N. S. 181, 19 Wkly. Rep. 386; Thorpe *v.* Adams, L. R. 6 C. P. 125, 40 L. J. M. C. 52, 23 L. T. Rep. N. S. 810, 19 Wkly. Rep. 352; Thames Conservators *v.* Hall, L. R. 3 C. P. 415, 37 L. J. C. P. 163, 18 L. T. Rep. N. S. 361, 16 Wkly. Rep. 971; Purnell *v.* Wolverhampton New Waterworks Co., 10 C. B. N. S. 576, 4 L. T. Rep. N. S. 513, 100 E. C. L. 576; Fitzgerald *v.* Champneys, 2 Johns. & H. 31, 7 Jur. N. S. 1006, 30 L. J. Ch. 777, 9 Wkly. Rep. 850, 70 Eng. Reprint 958; Gard *v.* Sewer Com'rs, 49 L. T. Rep. N. S. 325.

Canada.— Vancouver *v.* Bailey, 25 Can. Sup. Ct. 62; Robinson *v.* Graham, 16 Manitoba 69. See also Reg. *v.* Wilkinson, 5 Ont. Pr. 20.

See 44 Cent. Dig. tit. "Statutes," § 235.

The reason of the rule is clear: In passing the special act, the legislature have their attention directed to the special case which the act was meant to meet, and consider and provide for all the circumstances of that special case; and, having so done, they are not to be considered, by a general enactment passed subsequently and making no mention of any such intention, to have intended to derogate from that which, by their own special act, they have thus carefully supervised and regulated. Lewis *v.* Cook County, 72 Ill. App. 151; Merchants' Ins. Co. *v.* Hill, 12 Mo. App. 148; *Ex p.* Neal, 47 Tex. Cr. 441, 83 S. W. 831; Fitzgerald *v.* Champneys, 2 Johns. & H. 31, 7 Jur. N. S. 1006, 30 L. J. Ch. 777, 9 Wkly. Rep. 850, 70 Eng. Reprint 958.

The special act and general laws must stand together, the one as the law of the particular case, and the other as the general law of the land. Hayes *v.* Morgan's Louisiana, etc., R., etc., Co., 117 La. 593, 42 So. 150; Brattleboro Town School Dist. *v.* Brattleboro School Dist. No. 2, 72 Vt. 451, 48 Atl. 697; Christie-St. Commission Co. *v.* U. S., 136 Fed. 326, 69 C. C. A. 464 [*affirming* 129 Fed. 506]; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585. Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act (Woodworth *v.* Kalamazoo, 135 Mich. 233, 97 N. W. 714; Atchison, etc., R. Co. *v.* Haynes, 8 Okla. 576, 58 Pac. 738; State *v.* Sturgess, 9 Oreg. 537; Altoona *v.* Calvert, 21 Pa. Co. Ct. 362; Paul *v.* State, 48 Tex. Civ. App. 25, 106 S. W. 448); especially when such general and special acts are substantially contemporaneous (Crane *v.* Reeder, 22 Mich. 322; Nelden *v.* Clark, 20 Utah 382, 59 Pac. 524, 77 Am. St. Rep. 917).

When passed at same session.—A general law does not operate as a repeal of a special law on the same subject, although passed at the same session. McFarland *v.* State Bank, 4 Ark. 410; Covington *v.* East St. Louis, 78 Ill. 548; Ottawa *v.* La Salle County, 12 Ill. 339. See also *supra*, VI, A, 3, c, (III), (G).

93. *Illinois.*— Rushville *v.* Rushville, 32 Ill. App. 320.

Louisiana.— Cumberland Tel., etc., Co. *v.* Morgan's Louisiana, etc., R., etc., Co., 112 La. 287, 36 So. 352.

Missouri.— State *v.* Fiala, 47 Mo. 310; Gazollo *v.* McCann, 63 Mo. App. 414.

Ohio.— Muskingum County *v.* State Bd. of Public Works, 39 Ohio St. 628.

Oregon.— State *v.* Sturgess, 9 Oreg. 537.

Pennsylvania.— Com. *v.* Brown, 210 Pa. St. 29, 59 Atl. 479; Fraim *v.* Lancaster County, 171 Pa. St. 436, 33 Atl. 339; Safe Deposit, etc., Co. *v.* Fricke, 152 Pa. St. 231, 25 Atl. 530; Rounds *v.* Waymart Borough, 81 Pa. St. 395; Com. *v.* Navle, 2 Walk. 311; O'Hara *v.* Johnson, 2 Walk. 115; Mohr *v.* Scherer, 30 Pa. Super. Ct. 509; Nissley *v.* Lancaster County, 27 Pa. Super. Ct. 405 [*affirmed* in 215 Pa. St. 562, 64 Atl. 794]; Com. *v.* Lloyd, 2 Pa. Super. Ct. 6 [*affirmed* in 178 Pa. St. 308, 35 Atl. 816].

See 44 Cent. Dig. tit. "Statutes," § 235.

The element of repugnancy between the provisions in a general statute and one that is special or local ordinarily will furnish little or no aid in arriving at the intention of the legislature in the matter of repeal. Conflicts in terms and provisions in general and local statutes often exist, and yet both statutes stand, each having a field of operation. State *v.* Houghton, 142 Ala. 90, 38 So. 761. In such a case the later general act does not repeal the former local act unless a repeal is necessary to give the words of the general act any meaning at all. State *v.* Houghton, *supra*.

94. People *v.* Pacific Imp. Co., 130 Cal. 442, 62 Pac. 739; McKay *v.* New York, 46 N. Y. App. Div. 579, 62 N. Y. Suppl. 58; People *v.* Keller, 35 N. Y. App. Div. 493, 54 N. Y. Suppl. 1011 [*affirmed* in 158 N. Y. 187, 52 N. E. 1107]; McKenna *v.* Edmundstone, 10 Daly (N. Y.) 410 [*affirmed* in 91 N. Y. 231, 64 How. Pr. 461]; Matter of McKay, 33 Misc. (N. Y.) 520, 68 N. Y. Suppl. 925; People *v.* Scannell, 25 Misc. (N. Y.) 619, 56 N. Y. Suppl. 117 [*affirmed* in 40 N. Y. App. Div. 633, 58 N. Y. Suppl. 1146 (*affirmed* in

tion only.[95] In accordance with this rule, the presumption is that a general act does not repeal a local or special statute,[96] although it contains a general repealer of acts inconsistent with it.[97] But, equally in accordance with the purpose and limitations of the rule, such presumption must give way to a plain manifestation of a different legislative intent.[98] The question is always one of intention and the purpose to abrogate the particular enactment by a later general one is sufficiently manifested when the two acts are so irreconcilably inconsistent or repugnant that both cannot stand together.[99] Such intention may also be made to appear by

160 N. Y. 103, 54 N. E. 570)]; Bartels *v.* Cunningham, 8 Abb. N. Cas. (N. Y.) 226.

95. New Brunswick *v.* Williamson, 44 N. J. L. 165; Fraim *v.* Lancaster County, 171 Pa. St. 436, 33 Atl. 339.

96. St. Louis Southwestern R. Co. *v.* Grayson, 72 Ark. 119, 78 S. W. 777; Hayes *v.* Morgan's Louisiana, etc., R., etc., Co., 117 La. 593, 42 So. 150; Fraim *v.* Lancaster County, 171 Pa. St. 436, 33 Atl. 339.

97. *Arkansas.*— St. Louis, etc., R. Co. *v.* Grayson, 72 Ark. 119, 78 S. W. 777.

Louisiana.— Hayes *v.* Morgan's Louisiana, etc., R., etc., Co., 117 La. 593, 42 So. 150; State *v.* Judge Second City Ct., 40 La. Ann. 844, 5 So. 525.

Missouri.— State *v.* Fiala, 47 Mo. 310.

New Jersey.— Brown *v.* Mullica Tp., 48 N. J. L. 447, 4 Atl. 427; Sheridan *v.* Stevenson, 44 N. J. L. 371; Morris, etc., R. Co. *v.* Railroad Taxation Com'rs, 38 N. J. L. 472.

New York.— Casterton *v.* Vienna, 163 N. Y. 368, 57 N. E. 622 [*affirming* 17 N. Y. App. Div. 94, 44 N. Y. Suppl. 868]; Whipple *v.* Christian, 80 N. Y. 523 [*affirming* 15 Hun 321].

See 44 Cent. Dig. tit. "Statutes," § 235.

No additional repealing force as to local or special provisions is given to a general affirmative act by a clause declaring in terms the repeal of inconsistent enactments. People *v.* Craig, 60 Misc. (N. Y.) 300, 111 N. Y. Suppl. 909 [*affirmed* in 128 N. Y. App. Div. 908, 112 N. Y. Suppl. 1142]; Reading *v.* Shepp, 2 Pa. Dist. 137; State *v.* Carson, 6 Wash. 250, 33 Pac. 428.

A general statute which repeals general laws inconsistent therewith does not repeal a local law inconsistent therewith. O'Hara *v.* Johnson, 2 Walk. (Pa.) 115; Com. *v.* Scheckler, 1 Pa. Co. Ct. 505.

A declaration in a general law that all acts or parts of acts, whether local or special, or otherwise inconsistent with its provisions, are repealed, will repeal inconsistent provisions in prior special acts. New Brunswick *v.* Williamson, 44 N. J. L. 165.

If a general law applies in express terms to a special corporation, a general repealer would necessarily repeal inconsistent provisions in the special charter. Morris, etc., R. Co. *v.* Railroad Taxation Com'rs, 38 N. J. L. 472.

98. *Georgia.*— Davis *v.* Dougherty County, 116 Ga. 491, 42 S. E. 764.

Kansas.— Howard *v.* Hulbert, 63 Kan. 793, 66 Pac. 1041, 88 Am. St. Rep. 267.

Louisiana.— Hayes *v.* Morgan's Louisiana, etc., R., etc., Co., 117 La. 593, 42 So. 150.

Minnesota.— State *v.* Peter, 101 Minn. 462, 112 N. W. 866.

Missouri.— State *v.* Fiala, 47 Mo. 310; Gazollo *v.* McCann, 63 Mo. App. 414.

Nebraska.— State *v.* Nolan, 71 Nebr. 136, 98 N. W. 657.

New Jersey.— Brown *v.* Mullica Tp., 48 N. J. L. 447, 4 Atl. 427.

New York.— Van Denburgh *v.* Greenbush, 66 N. Y. 1; *In re* Central Park Com'rs, 50 N. Y. 493; Troy Press Co. *v.* Mann, 115 N. Y. App. Div. 25, 100 N. Y. Suppl. 516 [*affirmed* in 187 N. Y. 279, 79 N. E. 1006]; Welstead *v.* Jennings, 104 N. Y. App. Div. 179, 93 N. Y. Suppl. 339 [*affirmed* in 185 N. Y. 588, 78 N. E. 1114]; People *v.* Wells, 94 N. Y. App. Div. 271, 87 N. Y. Suppl. 1107; Matter of McKay, 33 Misc. 520, 68 N. Y. Suppl. 925; Bartels *v.* Cunningham, 8 Abb. N. Cas. 226; New York, etc., R. Co. *v.* Delaware County, 67 How. Pr. 5.

North Dakota.— Reeves *v.* Bruening, 16 N. D. 398, 114 N. W. 313.

Ohio.— Muskingum County *v.* State Bd. of Public Works, 39 Ohio St. 628; Fosdick *v.* Perrysburg, 14 Ohio St. 472.

Pennsylvania.— Com. *v.* Brown, 210 Pa. St. 29, 59 Atl. 479; Fraim *v.* Lancaster County, 171 Pa. St. 436, 33 Atl. 339; Mohr *v.* Scherer, 30 Pa. Super. Ct. 509; Nissley *v.* Lancaster County, 27 Pa. Super. Ct. 405 [*affirmed* in 215 Pa. St. 562, 64 Atl. 794]; Com. *v.* Vetterlein, 21 Pa. Super. Ct. 587.

Texas.— Paul *v.* State, 48 Tex. Civ. App. 25, 106 S. W. 448; *Ex. p.* Neal, 47 Tex. Cr. 441, 83 S. W. 831; *Ex p.* Kimbrell, 47 Tex. Cr. 333, 83 S. W. 382.

Utah.— State University *v.* Richards, 20 Utah, 457, 59 Pac. 96, 77 Am. St. Rep. 928.

England.— *In re* Williams, 36 Ch. D. 573, 57 L. J. Ch. 264, 57 L. T. Rep. N. S. 756, 36 Wkly. Rep. 34; Thames Conservators *v.* Hall, L. R. 3 C. P. 415, 37 L. J. C. P. 163, 18 L. T. Rep. N. S. 361, 16 Wkly. Rep. 971.

Canada.— Garant *v.* Carrier, 15 Quebec Super. Ct. 601.

See 44 Cent. Dig. tit. "Statutes," § 235.

99. *Connecticut.*— Hartford *v.* Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483.

Florida.— State *v.* Southern Land, etc., Co., 45 Fla. 374, 33 So. 999.

Idaho.— People *v.* Lytle, 1 Ida. 143.

Illinois.— Ridgway *v.* Gallatin County, 181 Ill. 521, 55 N. E. 146; People *v.* Nelson, 156 Ill. 364, 40 N. E. 957; People *v.* Mount, 87 Ill. App. 194 [*affirmed* in 186 Ill. 560, 58 N. E. 360].

the words of the general act, by the subject-matter with which the general act is concerned, by other legislation on the same matter, by the surrounding circumstances, by the purpose to be accomplished, or by anything else to which reference may properly be had for the purpose of discovering the legislative intent.[1] Thus where the clear general intent of the legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed.[2] So also where an act is passed to carry into effect a general mandatory provision of the constitution, all acts inconsistent therewith, although local, are repealed.[3]

(2) PARTICULAR LOCAL ACTS — (a) IN GENERAL. When the provisions of a general law, applicable to the entire state, are repugnant to the provisions of a previously enacted special law, applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either in whole or in part, unless such modification or repeal is provided for by express words, or arises by necessary implication.[4]

Indiana.— Walter *v.* State, 105 Ind. 589, 5 N. E. 735.

Louisiana.— Osthoff *v.* Flotte, 48 La. Ann. 1094, 20 So. 282; State *v.* Callac, 45 La. Ann. 27, 12 So. 119; State *v.* Kitty, 12 La. Ann. 805; De Armas' Case, 10 Mart. 158.

Maryland.— Garrett *v.* Janes, 65 Md. 260, 3 Atl. 597.

Massachusetts.— Gage *v.* Currier, 4 Pick. 399.

Minnesota.— State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115.

Missouri.— State *v.* Severance, 55 Mo. 378; Pacific R. Co. *v.* Cass County, 53 Mo. 17; State *v.* Macon County Ct., 41 Mo. 453.

New Jersey.— New Brunswick *v.* Williamson, 44 N. J. L. 165.

New York.— Matter of Reddish, 45 N. Y. App. Div. 37, 60 N. Y. Suppl. 1111.

Ohio.— Robbins *v.* State, 8 Ohio St. 131.

Pennsylvania.— Com. *v.* Straughas, 24 Pa. Co. Ct. 145; Com. *v.* McCandless, 4 Pa. Co. Ct. 119; Com. *v.* Rogers, 1 Del. Co. 517.

West Virginia.— Chesapeake, etc., R. Co. *v.* Hoard, 16 W. Va. 270; Conley *v.* Calhoun County, 2 W. Va. 416.

England.— Reg. *v.* Champneys, L. R. 6 C. P. 384, 40 L. J. C. P. 95, 24 L. T. Rep. N. S. 181, 19 Wkly. Rep. 386; Thorpe *v.* Adams, L. R. 6 C. P. 125, 40 L. J. M. C. 52, 23 L. T. Rep. N. S. 810, 19 Wkly. Rep. 352; Great Cent. Gas Consumers Co. *v.* Clarke, 13 C. B. N. S. 838, 32 L. J. C. P. 41, 11 Wkly. Rep. 123, 106 E. C. L. 838; Bramston *v.* Colchester, 6 E. & B. 246, 2 Jur. N. S. 809, 25 L. J. M. C. 73, 4 Wkly. Rep. 401, 88 E. C. L. 246.

See 44 Cent. Dig. tit. "Statutes," § 235.

The inference of an intent to repeal, arising from subsequent inconsistent legislation, is greatly diminished when the inconsistency arises between a subsequent general and a prior special statute. State *v.* Peter, 101 Minn. 462, 112 N. W. 866.

1. Hartford *v.* Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483.

2. *Connecticut.*— Hartford *v.* Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483.

Florida.— State *v.* Southern Land, etc., Co., 45 Fla. 374, 33 So. 999.

Illinois.— People *v.* Nelson, 156 Ill. 364, 40 N. E. 957; Struthers *v.* People, 116 Ill. App. 481.

Kentucky.— Com. *v.* Owensboro, etc., R. Co., 95 Ky. 60, 23 S. W. 868, 15 Ky. L. Rep. 449.

Maryland.— Alexander *v.* Baltimore, 53 Md. 100.

New Jersey.— Bogardus *v.* Gordon, 53 N. J. Eq. 40, 30 Atl. 812.

New York.— Barker *v.* Floyd, 61 N. Y. App. Div. 92, 69 N. Y. Suppl. 1109 [*affirming* 32 Misc. 474, 66 N. Y. Suppl. 216]; New York, etc., R. Co. *v.* Delaware County, 67 How. Pr. 5.

Pennsylvania.— Com. *v.* Brown, 210 Pa. St. 29, 59 Atl. 479; Com. *v.* Summerville, 204 Pa. St. 300, 54 Atl. 27; Mohr *v.* Scherer, 30 Pa. Super. Ct. 509; Nissley *v.* Lancaster County, 27 Pa. Super. Ct. 405; Jadwin *v.* Hurley, 10 Pa. Super. Ct. 104; Com. *v.* Lloyd, 2 Pa. Super. Ct. 6 [*affirmed* in 178 Pa. St. 308, 35 Atl. 816]; Com. *v.* McDonnell, 3 Pa. Dist. 767, 7 Kulp 357; Nash *v.* Com., 2 C. Pl. 239.

South Carolina.— Rose *v.* Charleston, 3 S. C. 369.

Tennessee.— State *v.* Butcher, 93 Tenn. 679, 28 S. W. 296.

Washington.— State *v.* Purdy, 14 Wash. 343, 44 Pac. 857.

Wisconsin.— Allaby *v.* Mauston Electric Service Co., 135 Wis. 345, 116 N. W. 4, 16 L. R. A. N. S. 420.

United States.— Rogers *v.* Nashville, etc., R. Co., 91 Fed. 299, 33 C. C. A. 517, Lurton, J., delivering the opinion of the court.

See 44 Cent. Dig. tit. "Statutes," § 235.

Where an earlier statute is special, only in the sense that it applies to a single case, of which there may be many in the state, and the later one is general in its operation, and applies to all such cases, then the earlier one is repealed by the later, because the whole includes the several parts. Hartford *v.* Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483.

3. Com. *v.* Brown, 210 Pa. St. 29, 59 Atl. 479.

4. *Minnesota.*— State *v.* Archibald, 43 Minn. 328, 45 N. W. 606.

(b) Acts Relating to Municipal Corporations. The principle *generalia specialibus non derogant* is especially applicable to cases where general statutes are argued to overrule the provisions of special charters granted to municipal corporations, or special acts passed for their benefit.[5] Of course where the repugnancy between their provisions is so irreconcilable that no reasonable field of operation for either can be found without trenching on the ground covered by the other,[6] or where the manifest intention of the later enactment is to revise the whole matter covered by disconnected general and special enactments, to furnish a substitute for all, and to introduce a new and exclusive rule upon the subject,[7] the later general provision is to be regarded as repealing the inconsistent earlier one.

New Jersey.— Gorum *v.* Mills, 34 N. J. L. 177.

New York.— Van Denburgh *v.* Greenbush, 66 N. Y. 1; *In re* Central Park Com'rs, 50 N. Y. 493; People *v.* Wells, 94 N. Y. App. Div. 271, 87 N. Y. Suppl. 1107; People *v.* Baker, 10 Abb. N. Cas. 210; Bartels *v.* Cunningham, 8 Abb. N. Cas. 226; Davis *v.* Haffner, 2 Abb. Pr. 187.

Pennsylvania.— Com. *v.* Brown, 210 Pa. St. 29, 59 Atl. 479; Mohr *v.* Scherer, 30 Pa. Super. Ct. 509; Nissley *v.* Lancaster County, 27 Pa. Super. Ct. 405; Com. *v.* Lloyd, 2 Pa. Super. Ct. 6 [*affirmed* in 178 Pa. St. 308, 35 Atl. 816]; *In re* Hansberry St., 7 Pa. Dist. 505.

Texas.— *Ex p.* Neal, 47 Tex. Cr. 441, 83 S. W. 831.

See 44 Cent. Dig. tit. "Statutes," § 237.

5. *Alabama.*— Montgomery *v.* Shoemaker, 51 Ala. 114.

Louisiana.— Welch *v.* Gossens, 51 La. Ann. 852, 25 So. 472; Garrett *v.* Mayor, 47 La. Ann. 618, 17 So. 238.

Maine.— State *v.* Donovan, 89 Me. 448, 36 Atl. 982.

Massachusetts.— Copeland *v.* Springfield, 166 Mass. 498, 44 N. E. 605; Brown *v.* Lowell, 8 Metc. 172.

New York.— McKay *v.* New York, 46 N. Y. App. Div. 579, 62 N. Y. Suppl. 58; Reynolds *v.* Niagara Falls, 81 Hun 353, 30 N. Y. Suppl. 954; Higgins *v.* Bell, 53 Hun 632, 6 N. Y. Suppl. 105 [*affirmed* in 128 N. Y. 598, 28 N. E. 251]; People *v.* Westchester County, 40 Hun 353 (holding that special legislation in behalf of a town is not necessarily repealed by a general law which states that it applies to "every town in the state"); Deposit *v.* Devereux, 8 Hun 317; McKenna *v.* Edmundstone, 10 Daly 410 [*affirmed* in 91 N. Y. 231, 64 How. Pr 461]; People *v.* Carson, 10 Misc. 237, 30 N. Y. Suppl. 817 [*affirmed* in 35 N. Y. Suppl. 1114].

Pennsylvania.— Com. *v.* Summerville, 204 Pa. St. 300, 54 Atl. 27; McCleary *v.* Allegheny County, 163 Pa. St. 578, 30 Atl. 120; Reading *v.* Shepp, 2 Pa. Dist. 137.

See 44 Cent. Dig. tit. "Statutes," § 237.

A local statute enacted for a particular municipality is intended to be exceptional, and for the benefit of such municipality. State *v.* Donovan, 89 Me. 448, 36 Atl. 982.

Where a local and special statute covers the entire ground, and constitutes a complete system of provisions and regulations, which the general statute, if allowed to operate, would alter, it is not to be deemed repealed, except the intent to repeal is clearly manifested. People *v.* Keller, 157 N. Y. 90, 51 N. E. 431; People *v.* Monroe County Ct., 105 N. Y. App. Div. 1, 93 N. Y. Suppl. 452. Thus the provisions of the Greater New York Charter, relating to the civil service of the new city, operated to establish a special system, and to take the city out of the operation of the general civil service law (Laws (1883), c. 354), and were not repealed or affected by Laws (1898), c. 186, amending the general law. People *v.* Keller, *supra.*

6. Garrett *v.* Aby, 47 La. Ann. 618, 17 So. 238; Reading *v.* Shepp, 2 Pa. Dist. 137.

A change in the penalty provided by general laws for selling liquor contrary to such laws is in no manner inconsistent with a special charter provision authorizing the city council to license, regulate, and control the traffic within the city limits by ordinance, and to enforce it by appropriate penalties. State *v.* Lindquist, 77 Minn. 540, 80 N. W. 701.

7. Alexander *v.* Baltimore, 53 Md. 100; Acquackanonk Water Co. *v.* Passaic, 65 N. J. L. 476, 47 Atl. 464; State *v.* Jersey City, 54 N. J. L. 49, 22 Atl. 1052; Van Vorst *v.* Jersey City, 27 N. J. L. 493; Bruce *v.* Pittsburg, 166 Pa. St. 152, 30 Atl. 831; Quinn *v.* Cumberland County, 162 Pa. St. 55, 29 Atl. 289; Com. *v.* Macferron, 152 Pa. St. 244, 25 Atl. 556, 19 L. R. A. 568; Mohr *v.* Scherer, 30 Pa. Super. Ct. 509; Nissley *v.* Lancaster County, 27 Pa. Super. Ct. 405.

Classification acts.— While a previous local statute is not repealed by a subsequent general statute inconsistent with it unless words of repeal are employed, yet such rule is not applicable to classification acts: (1) Because the legislative intent to repeal local laws is fully expressed in those acts. (2) Because those acts are of a character to exclude the operation of the rule, being intended to revise the laws relating to municipal affairs so as to reduce all former types and forms of municipal government to three, one for each class. (3) Because the very nature of class legislation renders the rule inapplicable. Com. *v.* Macferron, 152 Pa. St. 244, 25 Atl. 556, 19 L. R. A. 568.

Whenever the legislature passes an act and applies its provisions to the entire territory of a county, inconsistent provisions in the charter of an incorporated town within the county are repealed by implication. Glover *v.* State, 126 Ga. 594, 55 S. E. 592.

(3) Acts Relating to Particular Subjects — (a) In General. A subsequent statute which is general does not repeal or abrogate a former statute intended to operate upon particular subjects,[8] or for the benefit and relief of individuals.[9]

(b) Elections. An act, special in its nature, and applying only to a particular class of elections, is not repealed by a general election law, unless an intent so to do is plainly manifested.[10]

(c) Private Corporations. Where a special charter to a private corporation is followed by general legislation on the same subject, which does not in terms, or by necessary construction, repeal the particular grant, the two are to be deemed to stand together, one as the general law of the land, the other as the law of the particular case.[11] Where, however, the language of the general law evinces a purpose on the part of the legislature to have a uniform law upon the subject, provisions in a special charter inconsistent therewith are repealed.[12]

(d) Procedure. A special act providing a special or summary mode of procedure in a particular case is not affected by a subsequent general act relating to procedure, unless there is found in the subsequent act a direct indication of an intent to repeal such special act.[13]

(e) Public Officers. A special or local act relating to the election and term of office of certain officers of a particular county is not repealed by a general act relating to such county officers in general,[14] unless it was intended by the sub-

8. Trausch *v.* Cook County, 147 Ill. 534, 35 N. E. 477 [*affirming* 46 Ill. App. 333]; Ottawa *v.* La Salle County, 12 Ill. 339.

9. Beridon *v.* Barbin, 13 La. Ann. 458; State *v.* Cleland, 68 Me. 258.

10. State *v.* Houghton, 142 Ala. 90, 38 So. 761; People *v.* Weber, 222 Ill. 180, 78 N. E. 56; People *v.* Marquiss, 192 Ill. 377, 61 N. E. 352; Ridgway *v.* Gallatin County, 181 Ill. 521, 55 N. E. 146; Essex County *v.* Essex County Park Com'rs, 62 N. J. L. 376, 41 Atl. 957; Matter of Taylor, 3 N. Y. App. Div. 244, 38 N. Y. Suppl. 348 [*affirmed* in 150 N. Y. 242, 44 N. E. 790].

Thus the provisions of the charter of a municipal corporation with regard to the election of its officers are not impliedly repealed by the provisions of a subsequently enacted general election law, which makes no mention thereof. Welch *v.* Gossens, 51 La. Ann. 852, 25 So. 472; People *v.* Carson, 10 Misc. (N. Y.) 237, 30 N. Y. Suppl. 817 [*affirmed* in 35 N. Y. Suppl. 1114]. Where, however, the general law was evidently intended to inaugurate a distinct and general system of elections throughout the whole state, it will be construed to repeal all former laws which conflict with its provisions. State *v.* May, 49 Ala. 376.

11. *Alabama.*— Pearce *v.* Mobile Bank, 33 Ala. 693.

Connecticut.— New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

Illinois.— Hyde Park *v.* Oakwoods Cemetery Assoc., 119 Ill. 141, 7 N. E. 627.

Louisiana.— Hayes *v.* Morgan's Louisiana, etc., Steamship Co., 117 La. 593, 42 So. 150.

Missouri.— State *v.* Greene County, 54 Mo. 540; Smith *v.* Clark County, 54 Mo. 58. See also Merchants' Ins. Co. *v.* Hill, 12 Mo. App. 148.

New Jersey.— Morris, etc., R. Co. *v.* Railroad Taxation Com'rs, 38 N. J. L. 472; West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333.

New York.— Parker *v.* Elmira, etc., R. Co., 165 N. Y. 274, 59 N. E. 81.

Washington.— Cascades R. Co. *v.* Sohns, 1 Wash. Terr. 557.

See 44 Cent. Dig. tit. "Statutes," § 236.

Where the legislature has vested special powers in a particular body for special purposes, a general act subsequently passed will not override those special powers. London, etc., R. Co. *v.* Limehouse Dist. Bd. of Works, 3 Kay & J. 123, 26 L. J. Ch. 164, 5 Wkly. Rep. 64, 69 Eng. Reprint 1048.

When the legislature has granted special privileges to two independent corporations, the court will not so construe any general expressions in the last grant as to effect a repeal or destruction of the first. New Haven *v.* New Haven Water Co., 44 Conn. 105.

12. Springfield Water Com'rs *v.* Conkling, 113 Ill. 340; Louisville, etc., R. Co. *v.* Williams, (Ky. 1897) 41 S. W. 287; *In re* Opinion of Justices, 66 N. H. 629, 33 Atl. 1076.

13. Rice *v.* Goodwin, 2 Colo. App. 267, 30 Pac. 330; Key *v.* Harris, 116 Tenn. 161, 92 S. W. 235; State *v.* Parker, 12 Wash. 685, 42 Pac. 113; *In re* East London R. Co., 24 Q. B. D. 507, 63 L. T. Rep. N. S. 147, 38 Wkly. Rep. 312. See Nusser *v.* Com., 25 Pa. St. 126, holding that where an act limited to a single county prescribes the mode of punishing an offense, and afterward an act is passed, for the whole state, prescribing a mode of punishment for the same offense, the latter act repeals the former.

14. State *v.* Fiala, 47 Mo. 310.

A local salary act is not impliedly repealed by a subsequent general salary act, when no such intention is manifest, and there is no direct repugnancy between them. Adams *v.* People, 25 Colo. 532, 55 Pac. 806; Bell *v.*

sequent general law to establish a system of laws which should be uniform in their application in all the counties of the state.[15]

(f) Streets and Highways. Special local regulations relating to streets and highways are not ordinarily repealed by a general law on the subject.[16]

(g) Taxation. A special or local act on the subject of taxation is not repealed by a general tax law unless the intent to repeal the same is clearly apparent.[17] But a constitutional provision that property shall be assessed for taxes under general laws and by uniform rules abrogates all special or local laws which provide for any different assessment.[18]

(B) *General by Special Act.* A special act will not repeal a general law unless there is a manifest repugnancy between their provisions or one was obviously intended as *pro tanto* a substitute for the other.[19] But when a special law, local

Allegheny County, 149 Pa. St. 381, 24 Atl. 209; Rymer *v.* Luzerne County, 142 Pa. St. 108, 21 Atl. 794, 12 L. R. A. 192; Morrison *v.* Fayette County, 127 Pa. St. 110, 17 Atl. 755; Bucks County *v.* Gill, 5 Pa. Dist. 266, 17 Pa. Co. Ct. 584; Batesman *v.* County, 5 Lanc. L. Rev. (Pa.) 165; Blanton *v.* Barnwell County, 16 S. C. 623.

Where there is irreconcilable hostility between the principles of the two acts, the local act will be repealed by the later general one. McCleary *v.* Allegheny County, 163 Pa. St. 578, 30 Atl. 120 [*distinguishing* Bell *v.* Allegheny County, 149 Pa. St. 381, 24 Atl. 209]; Com. *v.* Grier, 152 Pa. St. 176, 25 Atl. 624; Schultzman *v.* McCarthy, 5 Pa. Dist. 10, 16 Pa. Co. Ct. 600.

15. State *v.* Pearcy, 44 Mo. 159.

16. Harlem Bridge, etc., R. Co. *v.* Southern Boulevard R. Co., 41 Hun (N. Y.) 553; People *v.* Westchester County, 40 Hun (N. Y.) 353; Elsbree *v.* Keller, 35 Pa. Super. Ct. 497; *In re* Egypt St., 11 Montg. Co. Rep. (Pa.) 94.

17. Burke *v.* Jeffries, 20 Iowa 145; Casterton *v.* Vienna, 17 N. Y. App. Div. 94, 44 N. Y. Suppl. 868 [*affirmed* in 163 N. Y. 368, 57 N. E. 622]; Warner Iron Co. *v.* Pace, 89 Tenn. 707, 15 S. W. 1077.

Illustrations.— The Kentucky act of April 18, 1892, vesting in the fiscal court of each county power to levy taxes for county purposes, did not repeal by implication a special act of the legislature giving commissioners for a separate district of a county the power to levy a tax to pay a debt incurred for the benefit of such district, there being no irreconcilable conflict. Mauget *v.* Plummer, 107 Ky. 41, 52 S. W. 844, 21 Ky. L. Rep. 641. The Tennessee 1895 general revenue law, which deals generally with the subject of privilege taxation, does not operate to repeal Laws (1893), c. 174, which relates to the special subject of collateral inheritance taxation, and is in itself a complete enactment concerning that subject, since the enactment of a general law will not operate to repeal a special law, which treats in a particular manner a subject treated in the later law only in a general way. Zickler *v.* Union Bank, etc., Co., 104 Tenn. 277, 57 S. W. 341.

Such intent is sufficiently shown where a general tax law is enacted for the purpose of establishing generally a uniform procedure throughout the state. Matter of McIntyre, 124 N. Y. App. Div. 66, 108 N. Y. Suppl. 242; Troy Press Co. *v.* Mann, 115 N. Y. App. Div. 25, 100 N. Y. Suppl. 516; Harrisburg *v.* Harrisburg Gas Co., 31 Pa. Super. Ct. 530 [*affirmed* in 219 Pa. St. 76, 67 Atl. 904].

The special exemption of particular property from municipal taxation is not repealed by a subsequent general statute taxing all property, there being no express repeal (Morris, etc., R. Co. *v.* Minton, 23 N. J. L. 529; Wheeler *v.* Lane, 15 Vt. 26), unless the general law is intended to be a revision of and substitute for all former exemption statutes, general and special (*In re* Huntington, 168 N. Y. 399, 61 N. E. 643; Pratt Inst. *v.* New York, 99 N. Y. App. Div. 525, 91 N. Y. Suppl. 136 [*affirmed* in 183 N. Y. 151, 75 N. E. 1119]; Pittsburgh *v.* Mercantile Library Hall Co., 3 Pa. Co. Ct. 519. See also Yazoo, etc., R. Co. *v.* Adams, 77 Miss. 194, 24 So. 200, 317, 28 So. 956 [*affirmed* in 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395]).

18. Little *v.* Oliver, 59 N. J. L. 89, 34 Atl. 943.

The only special laws on the subject of taxation which are not swept away by such a constitutional provision are such enactments as relate to the details of the method whereby taxes are to be assessed and collected. Little *v.* Oliver, 59 N. J. L. 89, 34 Atl. 943; Public Schools *v.* Trenton, 30 N. J. Eq. 667.

19. *Alabama.*— State *v.* Stiles, 121 Ala. 363, 25 So. 1015.

Connecticut.— Skelly *v.* Montville St. R. Co., 67 Conn. 261, 34 Atl. 1040.

Iowa.— Casey *v.* Harned, 5 Iowa 1.

Kentucky.— Com. *v.* Pointer, 5 Bush 301.

Michigan.—People *v.* Wenzel, 105 Mich. 70, 62 N. W. 1038.

New Jersey.—State *v.* Douglass, 33 N. J. L. 363.

Pennsylvania.— Allegheny County *v.* Com., 1 Mona. 119.

Washington.—Corbett *v.* Washington Terr., 1 Wash. Terr. 431.

United States.— Barber County *v.* Savings Soc., 101 Fed. 767, 41 C. C. A. 667; Pratt County *v.* Savings Soc., 90 Fed. 233, 32 C. C. A. 596; Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585; Babcock *v.* U. S., 34 Fed. 873.

or restricted in its operation, is positively repugnant to a former general law relating to the same subject-matter, and is not merely affirmative, cumulative, or auxiliary, the special law repeals the general, by implication, to the extent of the repugnancy within the limits to which such special law applies.[20]

(c) *Special Act by Special Act.* It has been said to be a rule of law that one special or private act cannot repeal another, except by express enactment.[21]

(d) *Act Adopted by Reference.* A statute which refers to and adopts the provisions of a prior statute is not repealed by the subsequent repeal of the prior statute, and the provisions of the incorporated statute continue in force so far as it forms a part of the second statute.[22]

England.— The Clan Gordon, 7 P. D. 190, 1 Aspin. 513, 46 L. T. Rep. N. S. 490, 30 Wkly. Rep. 691.

Canada.— Ste. Cunegonde *v.* Gougeon, 25 Can. Sup. Ct. 78.

See 44 Cent. Dig. tit. "Statutes," § 238.

In Georgia it is held that Pol. Code (1895), § 679, providing a method of removing obstructions from private ways by petition to the ordinary of the county within which the private way is located, is a general law having uniform operation throughout the state, and is not subject to repeal or modification by a special or local law. Griffin *v.* Sanborn, 127 Ga. 17, 56 S. E. 71.

In New York, Pen. Code, § 728, provides that no provision of the penal code can be repealed by implication. American Soc. for Prevention of Cruelty to Animals *v.* Gloversville, 78 Hun 40, 29 N. Y. Suppl. 257.

20. *Indiana.*— Daniels *v.* State, 150 Ind. 348, 50 N. E. 74 (holding that a general statute gives way to a special statute only so far as the special statute is complete within itself); Walsh *v.* State, 142 Ind. 357, 41 N. E. 65, 33 L. R. A. 392.

Michigan.— Miller *v.* Grandy, 13 Mich. 540.

Minnesota.—Tierney *v.* Dodge, 9 Minn. 166.

Missouri.— State *v.* Green, 87 Mo. 583.

New Jersey.— McGavisk *v.* State, 34 N. J. L. 509; North Hudson County R. Co. *v.* Kelly, 34 N. J. L. 75.

New York.— Ulster County *v.* State, 177 N. Y. 189, 69 N. E. 370 [*affirming* 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128].

Ohio.— Thomas *v.* Evans, 73 Ohio St. 140, 76 N. E. 862.

Vermont.— Isham *v.* Bennington Iron Co., 19 Vt. 230.

England.— London County Council *v.* London School Bd., [1892] 2 Q. B. 606, 56 J. P. 791, 62 L. J. M. C. 30, 5 Reports 1, 40 Wkly. Rep. 604; City, etc., R. Co. *v.* London County Council, [1891] 2 Q. B. 513, 56 J. P. 6, 60 L. J. M. C. 149, 65 L. T. Rep. N. S. 362, 40 Wkly. Rep. 166; Yarmouth *v.* Simmons, 10 Ch. D. 518, 47 L. J. Ch. 792, 38 L. T. Rep. N. S. 881, 26 Wkly. Rep. 802; Hill *v.* Hall, 1 Ex. D. 411, 45 L. J. M. C. 153, 35 L. T. Rep. N. S. 860; *Ex p.* Kelly, Ir. R. 9 C. L. 114.

Canada.— Smith *v.* Sparrow, 21 U. C. Q. B. 323.

See 44 Cent. Dig. tit. "Statutes," § 238.

In other words the later statute creates an exception to the more general provision.

Michigan.— Crane *v.* Reeder, 22 Mich. 322.

Ohio.— Thomas *v.* Evans, 73 Ohio St. 140, 76 N. E. 862.

Virginia.— Branham *v.* Long, 78 Va. 352.

United States.— Townsend *v.* Little, 109 U. S. 504, 3 S. Ct. 357, 27 L. ed. 1012.

England.—Pilkington *v.* Cooke, 16 M. & W. 615.

A general statute which suppresses is inconsistent with a special statute which authorizes regulation, and is therefore repealed by it. State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; State *v.* Lewis, 5 Mo. App. 465. But a general statute which regulates is not repealed by a special statute which authorizes regulation by a subordinate agency. State *v.* Lewis, 5 Mo. App. 465.

21. Birkenhead Docks *v.* Laird, 4 De G. M. & G. 732, 18 Jur. 883, 23 L. J. Ch. 457, 2 Wkly. Rep. 7, 53 Eng. Ch. 574, 43 Eng. Reprint 694.

But it has been held that where all the essential provisions of a special act are supplied by a later special act, the former will be deemed to have been repealed by implication, although there be no repealing clause. *In re* Martz' Election, 110 Pa. St. 502, 1 Atl. 419; Ledlie *v.* Monongahela Nav. Co., 6 Pa. St. 392.

22. *California.*—Ventura County *v.* Clay, 112 Cal. 65, 44 Pac. 488; Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

Kentucky.— Nunes *v.* Wellisch, 12 Bush 363.

Maine.—Collins *v.* Blake, 79 Me. 218, 9 Atl. 358.

Massachusetts.— Com. *v.* Kendall, 144 Mass. 357, 11 N. E. 425.

Nebraska.— Shull *v.* Barton, 58 Nebr. 741, 79 N. W. 732.

New York.—Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577, 50 N. Y. Suppl. 479.

Wisconsin.— Sika *v.* Chicago, etc., R. Co., 21 Wis. 370.

England.— Clarke *v.* Bradlaugh, 8 Q. B. D. 63, 51 L. J. Q. B. 7, 46 L. T. Rep. N. S. 52, 30 Wkly. Rep. 55; Reg. *v.* Brecon County, 15 Q. B. 813, 15 Jur. 351, 19 L. J. M. C. 203, 69 E. C. L. 813; Reg. *v.* Smith, L. R. 8 Q. B. 146, 42 L. J. M. C. 46, 28 L. T. Rep. N. S. 129, 21 Wkly. Rep. 382; Reg. *v.* Merionethshire, 6 Q. B. 343, 8 Jur. 778, 13 L. J. M. C. 158, 1 New Sess. Cas. 316, 51 E. C. L. 343; Reg. *v.* Stock, 8 A. & E. 405, 3 N. & P. 420, 35 E. C. L. 653.

See 44 Cent. Dig. tit. "Statutes," § 232.

(E) *Amended Act.* Where a section of a statute is amended, and afterward such section, "as amended," is repealed, the original section, and not the amendment merely, is repealed.[23] But where a so-called amendatory act is in reality affirmative and original in its character, it will not be affected by the repeal of the original act.[24]

(F) *Penal and Criminal Laws* — (1) IN GENERAL. While it is the duty of the court, in construing two sections upon the same subject defining criminal offenses, to so construe them as to bring them in harmony, and make them both effective and operative, to the end that a remedy may be afforded for the evil sought to be suppressed,[25] yet, when they are irreconcilably in conflict, the earlier is repealed.[26] In order that two penal statutes may be repugnant, they must relate to the same subject; in other words, where each statute is directed against a distinct offense, there can be no repugnancy, and no repeal.[27] Furthermore it is necessary to the implication of a repeal that the objects of the two statutes be the same.[28]

(2) BY CHANGE IN GRADE OF OFFENSE. Where a statute expressly alters the grade of an offense, as by making it a misdemeanor instead of a felony, or *vice versa*, it operates to repeal by implication the former law on the subject.[29]

Thus if a special law refers to a general law, and the general law is afterward repealed, such repeal does not operate as a repeal of the special law. Schwenke *v.* Union Depot, etc., R. Co., 7 Colo. 512, 4 Pac. 905, 7 Colo. 521, 5 Pac. 816; Nunes *v.* Wellisch, 12 Bush (Ky.) 363; Furbish *v.* Kennebec County Com'rs, 93 Me. 117, 44 Atl. 364; People *v.* Webster, 8 Misc. (N. Y.) 133, 28 N. Y. Suppl. 646.

The rule applies only where some particular general law, or a section thereof, is referred to in the special act, and not to cases where the special act makes no such particular reference, but merely to the "existing general law," or to the "general law now in force." Newman *v.* North Yakima, 7 Wash. 220, 34 Pac. 921. And it has been held that repealing a statute to which a subsequent prohibitory statute refers for a penalty renders the latter inoperative. Smith *v.* State, 7 Tex. App. 286.

23. State *v.* Burk, 88 Iowa 661, 56 N. W. 180.

A proviso falls with the law to which it is applicable. Church *v.* Stadler, 16 Ind. 463.

Where an amendment merely enlarges and extends the provisions of the original act, such act retaining its identity, the repeal thereof carries with it the amendment. Ellison *v.* Jackson Water Co., 12 Cal. 542; Blake *v.* Brackett, 47 Me. 28; Welstead *v.* Jennings, 104 N. Y. App. Div. 179, 93 N. Y. Suppl. 339 [*affirmed* in 185 N. Y. 588, 78 N. E. 1114]; *In re* Ward, 10 Misc. (N. Y.) 424, 31 N. Y. Suppl. 49.

24. Barton *v.* Moscow Independent School Dist. No. 5, 3 Ida. 270, 29 Pac. 43; State *v.* Young, 30 S. C. 399, 9 S. E. 355.

25. State *v.* Taylor, 186 Mo. 608, 85 S. W. 564.

26. State *v.* Taylor, 186 Mo. 608, 85 S. W. 564.

27. *Alabama.*— Sanders *v.* State, 58 Ala. 371.

California.— People *v.* Chu Quong, 15 Cal. 332.

Louisiana.— State *v.* Desforges, 48 La. Ann. 73, 18 So. 912.

Massachusetts.— Com. *v.* Bennett, 108 Mass. 30, 11 Am. Rep. 304; Com. *v.* Norton, 13 Allen 550.

Michigan.— People *v.* Kinney, 110 Mich. 97, 67 N. W. 1089.

North Carolina.— State *v.* Edwards, 113 N. C. 653, 18 S. E. 387; State *v.* Biggers, 108 N. C. 760, 12 S. E. 1024.

Pennsylvania.— Cumberland County *v.* Boyd, 113 Pa. St. 52, 4 Atl. 346; Kirkendale *v.* Luzerne County, 33 Leg. Int. 313.

England.— Wyatt *v.* Gems, [1893] 2 Q. B. 225, 57 J. P. 665, 62 L. J. M. C. 158, 69 L. T. Rep. N. S. 456, 5 Reports 507, 42 Wkly. Rep. 28.

See 44 Cent. Dig. tit. "Statutes," § 240; and *supra*, VI, A, 3, c, (III), (A).

28. Blaufeld *v.* State, 103 Tenn. 593, 53 S. W. 1090; U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085; Stockwell *v.* U. S., 13 Wall. (U. S.) 531, 20 L. ed. 491.

If they are not, both statutes will stand, although they may refer to the same subject. U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085.

Where one statute provides a criminal prosecution for an offense, and the other a civil remedy for the same offense, both statutes may subsist together. Harvey *v.* State, 5 Ind. App. 422, 31 N. E. 835.

29. *California.*— People *v.* Tisdale, 57 Cal. 104.

Florida.— Sherman *v.* State, 17 Fla. 888.

Indiana.— Hayes *v.* State, 55 Ind. 99.

Missouri.— State *v.* Taylor, 186 Mo. 608, 85 S. W. 564; State *v.* McKee, 126 Mo. App. 524, 104 S. W. 486.

New York.— People *v.* Cleary, 13 Misc. 546, 35 N. Y. Suppl. 588.

Pennsylvania.— Corn *v.* McGowan, 2 Pars. Eq. Cas. 341.

See 44 Cent. Dig. tit. "Statutes," § 240.

An amendment of a statute defining a crime by enlarging its scope does not affect the balance of the section. State *v.* Wilson, 9 Wash. 218, 37 Pac. 424.

(3) By Change of Penalty. It has been held that a subsequent statute which adds accumulative penalties or institutes new methods of proceeding, without altering the class or character of the offense, does not, without negative words, repeal a former statute.[30] On the other hand it is a well-settled rule that where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offense the latter statute operates by way of substitution and not cumulatively, and repeals the former,[31] and this whether the penalty is increased,[32] or diminished ;[33] the intention to inflict two punishments for the same offense not being imputable to the legislature.[34] Where the change is not in the nature of the penalty or its degree, but only in the locality where it may be inflicted, no repeal is effected.[35]

(4) By Statute Covering Whole Subject-Matter. An act intended to be a complete system of statutory laws relating to crimes and punishments supersedes or repeals all existing laws on that subject.[36]

(v) *Express Repeal as Raising Presumption Against Implied Repeal*[37]— (a) *In General.* The specification of certain sections in an act as

30. Mitchell *v.* Duncan, 7 Fla. 13; Com. *v.* McGowan, 2 Pars. Eq. Cas. (Pa.) 341. See also Bush *v.* Republic, 1 Tex. 455; Sims *v.* Pay, 16 Cox C. C. 609, 53 J. P. 420, 58 L. J. M. C. 39, 60 L. T. Rep. N. S. 602.

31. *Georgia.*— Gorman *v.* Hammond, 28 Ga. 85.

Indiana.— Huber *v.* State, 25 Ind. 175.

Louisiana.— State *v.* Callahan, 109 La. 946, 33 So. 931.

Massachusetts.— Britton *v.* Com., 1 Cush. 302; Com. *v.* Kimball, 21 Pick. 373; Nichols *v.* Squire, 5 Pick. 168.

New York.— Mongeon *v.* People, 55 N. Y. 613 [*affirming* 2 Thomps. & C. 128].

Pennsylvania.— Hoffman *v.* Com., 123 Pa. St. 75, 16 Atl. 609.

Texas.— State *v.* Smith, 44 Tex. 443.

United States.— Norris *v.* Crocker, 13 How. 429, 14 L. ed. 210.

England.— Michell *v.* Brown, 1 E. & E. 267, 5 Jur. N. S. 707, 28 L. J. M. C. 53, 7 Wkly. Rep. 80, 102 E. C. L. 267; Robinson *v.* Emerson, 4 H. & C. 352, 12 Jur. N. S. 378, 14 L. T. Rep. N. S. 391, 14 Wkly. Rep. 658; *In re* Baker, 2 H. & N. 219.

Canada.— Reg. *v.* Rose, 27 Ont. 195.

See 44 Cent. Dig. tit. "Statutes," § 240.

An act merely repealing a prior act so far as it respects the punishment prescribed for offenses named therein is not a repeal of the act. Wheeler *v.* State, 23 Ga. 9.

An amendatory act, prescribing a different mode of distributing the penalty imposed, does not affect the offense or effect the repeal of the penalty, but only modifies the form of the judgment. State *v.* Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

If the earlier statute contains special provisions relating to a particular crime, it will be considered as an exception to the provisions of a later general statute on the same subject, at least where an intent to repeal the former statute does not appear. Magruder *v.* State, 40 Ala. 347; Keiser *v.* State, 78 Ind. 430.

32. *Alabama.*— Caldwell *v.* State, 55 Ala. 133.

Illinois.— Mullen *v.* People, 31 Ill. 444.

Indiana.— State *v.* Pierce, 14 Ind. 302; State *v.* Horsey, 14 Ind. 185.

New Hampshire.— Leighton *v.* Walker, 9 N. H. 59.

New Jersey.— Buckallew *v.* Ackerman, 8 N. J. L. 48.

Ohio.— Carter *v.* Hawley, Wright 74.

Pennsylvania.— Com. *v.* Huntzinger, 18 Pittsb. Leg. J. N. S. 364.

England.— Rex *v.* Cator, 4 Burr. 2026, 98 Eng. Reprint 56.

See 44 Cent. Dig. tit. "Statutes," § 240.

33. State *v.* Whitworth, 8 Port. (Ala.) 434; Smith *v.* State, 1 Stew. (Ala.) 506; U. S. *v.* One Bay Horse, etc., 128 Fed. 207; Rex *v.* Davis, Leach C. C. 306.

34. Gorman *v.* Hammond, 28 Ga. 85.

35. Carter *v.* Burt, 12 Allen (Mass.) 424.

36. Johns *v.* State, 78 Ind. 332, 41 Am. Rep. 577; Buchannon *v.* Com., 95 Ky. 334, 25 S. W. 265, 15 Ky. L. Rep. 738; People *v.* Cleary, 13 Misc. (N. Y.) 546, 35 N. Y. Suppl. 588.

If a later statute again describes an offense created by a former statute, and affixes a different punishment varying the procedure, etc., the later operates by way of substitution, not cumulatively, and the former is repealed. Michell *v.* Brown, 1 E. & E. 267, 5 Jur. N. S. 707, 28 L. J. M. C. 53, 7 Wkly. Rep. 80, 102 E. C. L. 267; *In re* Baker, 2 H. & N. 219. See also Parry *v.* Croydon Commercial Gas Co, 11 C. B. N. S. 579, 103 E. C. L. 579 [*affirmed* in 15 C. B. N. S. 568, 10 Jur. N. S. 172, 9 L. T. Rep. N. S. 694, 12 Wkly. Rep. 212, 109 E. C. L. 568]. And where a new statute covers the whole subject-matter of an old one, adds offenses, and prescribes different penalties for those enumerated in the old law, the former is repealed by implication. U. S. *v.* Tynen, 11 Wall. (U. S.) 88, 20 L. ed. 153; Norris *v.* Crocker, 13 How. (U. S.) 429, 14 L. ed. 210. So a statute covering the whole subject-matter of a former one, adding offenses, and varying the procedure, impliedly repeals it. U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085.

37. Express repealing clause in revisory act see *supra*, VI, A, 3, c, (III), (C), (2).

repealed is equivalent to a declaration that remaining sections shall continue in force,[38] unless they are absolutely inconsistent with the repealing act,[39] or a general intent to effect a further repeal is otherwise manifested.[40]

(B) *General Repeal of Inconsistent Acts and Provisions.* Where a statute repeals all laws and parts of laws in conflict with it, a previous act on the same subject, the material provisions of which are repugnant to those of the new act, is repealed,[41] unless the subsequent act shows an intention to keep the previous one in force.[42] Although in a measure such a repealing clause has the form of an express repeal,[43] yet in legal effect it adds nothing to the repealing effect of the act of which it is a part.[44] It operates merely as an express limitation upon the extent to which it was intended that the former act should cease to be operative,[45] namely,

38. *Alabama.*— Rose *v.* Lampley, 146 Ala. 445, 41 So. 521.

California.— Crosby *v.* Patch, 18 Cal. 438.

Florida.— State *v.* Palmes, 23 Fla. 620, 3 So. 171.

Michigan.— People *v.* Henwood, 123 Mich. 317, 82 N. W. 70.

Missouri.— State *v.* Patterson, 207 Mo. 129, 105 S. W. 1048; State *v.* Morrow, 26 Mo. 131.

New York.— Pursell *v.* New York L. Ins., etc., Co., 42 N. Y. Super. Ct. 383; Ruge *v.* Gallagher, 22 Misc. 572, 49 N. Y. Suppl. 729; People *v.* Barker, 2 Whcel. Cr. 19.

Ohio.— Stahl *v.* State, 11 Ohio Cir. Ct. 23, 5 Ohio Cir. Dec. 29.

Pennsylvania.— Com. *v.* Navle, 2 Walk. 311; Com. *v.* Dillon, 17 Pa. Co. Ct. 227.

South Dakota.— Co-operative Sav., etc., Assoc. *v.* Fawick, 11 S. D. 589, 79 N. W. 847.

United States.— Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed 567].

See 44 Cent. Dig. tit. "Statutes," § 234.

An express repeal of general laws manifests an intent not to repeal special or local laws. O'Hara *v.* Johnson, 2 Walk. (Pa.) 115; Com. *v.* Scheckler, 1 Pa. Co. Ct. 505.

39. Crosby *v.* Patch, 18 Cal. 438.

40. Com. *v.* Owensboro, etc., R. Co., 95 Ky. 60, 23 S. W. 868, 15 Ky. L. Rep. 449; Com. *v.* McCandless, 4 Pa. Co. Ct. 119.

Inadvertent omission.— Repealing all but one of a number of statutes of one purport has been held an implied repeal of the one, which was evidently omitted from being overlooked. New York *v.* Broadway, etc., R. Co., 12 Hun (N. Y.) 571.

41. *California.*—Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Santa Clara County *v.* Southern Pac. R. Co., 66 Cal. 642, 6 Pac. 744; People *v.* Grippen, 20 Cal. 677.

Illinois.— Melrose Park *v.* Dunnebecke, 210 Ill. 422, 71 N. E. 431.

Indiana.— Flinn *v.* Parsons, 60 Ind. 573.

Louisiana.— State *v.* King, 12 La. Ann. 593.

Maryland.— State *v.* Davis, 70 Md. 237, 16 Atl. 529.

Minnesota.— McRoberts *v.* Washburn, 10 Minn. 23.

Pennsylvania.— Newbold *v.* Pennock, 154 Pa. St. 591, 26 Atl. 606; Com. *v.* Dauphin County, 3 Pa. Dist. 584, 15 Pa. Co. Ct. 233; Wood *v.* Armstrong County, 12 Pa. Co. Ct. 289; Com. *v.* Armstrong, 9 Phila. 479.

Washington.— State *v.* Allen, 14 Wash. 103, 44 Pac. 121.

See 44 Cent. Dig. tit. "Statutes," § 225.

Where the repealing clause of a statute expressly repeals certain designated statutes, and in general terms repeals all laws in conflict with it, it will have the effect of repealing every previous act, identical with any one of those expressly repealed. State *v.* Barrow, 30 La. Ann. 657. But a repeal of all laws inconsistent with a statute does not affect laws inconsistent only with such parts of that statute as are unconstitutional and void. Sullivan *v.* Adams, 3 Gray (Mass.) 476; Devoy *v.* New York, 35 Barb. (N. Y.) 264, 22 How. Pr. 226; Harbeck *v.* New York, 10 Bosw. (N. Y.) 366 [*affirmed* in 36 N. Y. 449, 2 Transcr. App. 377]; Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

42. People *v.* Grippen, 20 Cal. 677.

43. Com. *v.* Churchill, 2 Metc. (Mass.) 118; State *v.* Kelly, 34 N. J. L. 75.

44. *California.*— *In re* Clary, 149 Cal. 732, 87 Pac. 580.

District of Columbia.— District of Columbia *v.* Sisters of Visitation, 15 App. Cas. 300.

Illinois.— Struthers *v.* People, 116 Ill. App. 481.

Nebraska.— State *v.* Drexel, 74 Nebr. 776, 105 N. W. 174.

New York.— Casterton *v.* Vienna, 163 N. Y. 368, 57 N. E. 622 [*affirming* 17 N. Y. App. Div. 94, 44 N. Y. Suppl. 868].

Pennsylvania.— Reading *v.* Shepp, 2 Pa. Dist. 137.

Tennessee.— Memphis *v.* American Express Co., 102 Tenn. 336, 52 S. W. 172; State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

Washington.— Pierce *v.* Commercial Inv. Co., 30 Wash. 272, 70 Pac. 496.

United States.— Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

45. Birmingham Bldg., etc., Assoc. *v.* May, etc., Hardware Co., 99 Ala. 276, 13 So. 612; Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614; Hogan *v.* Guigon, 29 Gratt. (Va.) 705; U. S. *v.* Henderson, 11 Wall. (U. S.) 652, 20 L. ed. 235.

only so far as it is inconsistent with the new act,[46] unless it sufficiently appears that the repealing act was intended to supersede all prior legislation upon the same subject.[47]

4. Effect of Invalidity of Repealing Act. An act, unconstitutional in itself, may contain a valid clause repealing another act.[48] The rule is well settled, however, that an unconstitutional enactment will not repeal a former valid law by mere implication.[49] And the rule is the same where the subsequent unconstitutional act declares the repeal of all acts or parts of acts inconsistent therewith,[50] and it is apparent that the repealing statute is to be substituted for the one

46. *Alabama.*— Maxwell *v.* State, 89 Ala. 150, 7 So. 824.

California.— Bank of British North America *v.* Cahn, 79 Cal. 463, 21 Pac. 863; People *v.* Durick, 20 Cal. 94.

Georgia.— Elrod *v.* Gilliland, 27 Ga. 467.

Illinois.— Hutchinson *v.* Self, 143 Ill. 542, 39 N. E. 27.

Louisiana.— De Gravelle *v.* Iberia, etc., Drain. Dist., 104 La. 703, 29 So. 302.

Montana.— Barden *v.* Wells, 14 Mont. 462, 36 Pac. 1076.

Nebraska.— State *v.* Drexel, 74 Nebr. 776, 105 N. W. 174.

South Carolina.— McNamee *v.* Huckabee, 20 S. C. 190.

Texas.— Gaddes *v.* Terrell, 101 Tex. 574, 110 S. W. 429.

Utah.— People *v.* McAllister, 10 Utah 357, 37 Pac. 578.

Washington.— Pierce *v.* Commercial Inv. Co., 30 Wash. 272, 70 Pac. 496.

Wisconsin.— Lewis *v.* Stout, 22 Wis. 234, holding that the general rule of construction, that a statute which revises the subject-matter of a former statute works a repeal of such former statute without express words to that effect, does not so apply to an act expressly providing that all acts and parts of acts "inconsistent" with such act are repealed, as to extend to previous enactments not "inconsistent" therewith.

United States.— U. S. *v.* Henderson, 11 Wall. 652, 20 L. ed. 235.

See 44 Cent. Dig. tit. "Statutes," § 225.

47. See *supra*, VI, A, 3, c, (III), (B).

The actual intent of the legislature will be determined, if possible, notwithstanding such a clause. People *v.* Craig, 60 Misc. (N. Y.) 300, 111 N. Y. Suppl. 909 [*affirmed* in 128 N. Y. App. Div. 908, 112 N. Y. Suppl. 1142].

48. Orange County *v.* Harris, 97 Cal. 600, 32 Pac. 594; State *v.* Blend, 121 Ind. 514, 23 N. E. 511, 16 Am. St. Rep. 411; Meshmeier *v.* State, 11 Ind. 482; Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 70; Campau *v.* Detroit, 14 Mich. 276.

The question is one of legislative intent, and it is only requisite that words should be used which show an intent to repeal irrespective of the unconstitutional portions. Orange County *v.* Harris, 97 Cal. 600, 32 Pac. 594; State *v.* Blend, 121 Ind. 514, 23 N. E. 511, 16 Am. St. Rep. 411; Childs *v.* Shower, 18 Iowa 261; Campau *v.* Detroit, 14 Mich. 276. In other words the repeal must be accomplished without making use of the void provisions for that purpose. Campau *v.* Detroit, *supra*.

If the repealing clause is positive and unconditional, and under circumstances indicating a design to repeal the old law at all events, it will be operative, although contained in a statute which is unconstitutional. Childs *v.* Shower, 18 Iowa 261.

49. *Alabama.*— *Ex p.* Gayles, 108 Ala. 514, 19 So. 12.

Arkansas.— *Ex p.* Merritt, 80 Ark. 203, 96 S. W. 983.

California.— *Ex p.* Sohncke, 148 Cal. 262, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L. R. A. N. S. 813; Santa Cruz Rock Pavement Co. *v.* Lyons, 133 Cal. 114, 65 Pac. 329; Orange County *v.* Harris, 97 Cal. 600, 32 Pac. 594.

Illinois.— People *v.* Butler St. Foundry, etc., Co., 201 Ill. 236, 66 N. E. 349.

Kansas.— Stephens *v.* Ballou, 27 Kan. 594.

Louisiana.—State *v.* Dalcourt, 112 La. 420, 36 So. 479.

Missouri.— Westport *v.* McGee, 128 Mo. 152, 30 S. W. 523.

New York.— Baldwin *v.* New York, 42 Barb. 549 [*affirmed* in 1 Abb. Dec. 75, 2 Keyes 387].

United States.— Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 20 S. Ct. 518, 44 L. ed. 657; Dupont *v.* Pittsburgh, 69 Fed. 13; *Ex p.* Davis, 21 Fed. 396.

See 44 Cent. Dig. tit. "Statutes," § 244.

50. *Alabama.*— Tims *v.* State, 26 Ala. 165.

Arkansas.— St. Louis, etc., R. Co. *v.* State, 86 Ark. 343, 111 S. W. 260; Union Sawmill Co. *v.* Felsenthal, 85 Ark. 346, 108 S. W. 217.

California.— *Ex p.* Clary, 149 Cal. 732, 87 Pac. 580; Orange County *v.* Harris, 97 Cal. 600, 32 Pac. 594.

Colorado.— People *v.* Fleming, 7 Colo. 230, 3 Pac. 70; Pitkin County *v.* Aspen First Nat. Bank, 6 Colo. App. 423, 40 Pac. 894 [*affirmed* in 24 Colo. 124, 48 Pac. 1043].

Indiana.— State *v.* Blend, 121 Ind. 514, 23 N. E. 511, 16 Am. St. Rep. 411 [*modifying* Meshmeier *v.* State, 11 Ind. 482].

Iowa.— Childs *v.* Shower, 18 Iowa 261.

Michigan.— Detroit *v.* Western Union Tel. Co., 130 Mich. 474, 90 N. W. 283; Campau *v.* Detroit, 14 Mich. 276.

Missouri.—State *v.* Thomas, 138 Mo. 95, 39 S. W. 481; Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281.

Washington.— *In re* Rafferty, 1 Wash. 382, 25 Pac. 465.

Wisconsin.— State *v.* Judge La Crosse

repealed;[51] there being nothing that can conflict with a void statute.[52] So where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid,[53] unless it shall appear that the legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed.[54]

B. Suspension. The suspension of a statute means a temporary stop for a time.[55] The power of suspending laws cannot be exercised except by the legislature.[56]

C. Revival — 1. In General. There are two distinct modes of reviving statutes that have been repealed — the one by legislative enactment,[57] the other by operation of law, as when a repealing act is itself repealed.[58] The legislature may make the revival of an act depend upon a future event, and direct that event to be made known by proclamation.[59]

2. Implied Revival — a. By Repeal of Repealing Act[60] — (i) *At Common Law* — (A) *In General.* It is a common-law rule of statutory construction that when a repealing statute is itself repealed the first statute is revived, without any formal words for that purpose,[61] in the absence of a contrary intention expressly

County Ct., 11 Wis. 50; Shepardson *v.* Milwaukee, etc., R. Co., 6 Wis. 605.

See 44 Cent. Dig. tit. "Statutes," § 244.

51. St. Louis, etc., R. Co. *v.* State, 86 Ark. 343, 111 S. W. 260; State *v.* Blend, 121 Ind. 514, 23 N. E. 511, 16 Am. St. Rep. 411; Childs *v.* Shower, 18 Iowa 261; Campau *v.* Detroit, 14 Mich. 276.

52. *Alabama.*— Tims *v.* State, 26 Ala. 165.

Colorado.— People *v.* Fleming, 7 Colo. 230, 3 Pac. 70.

Michigan.— Campau *v.* Detroit, 14 Mich. 276.

Missouri.— Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281.

Wisconsin.— State *v.* Judge La Crosse County Ct., 11 Wis. 50.

See 44 Cent. Dig. tit. "Statutes," § 244.

53. *Alabama.*— Randolph *v.* Builders', etc., Supply Co., 106 Ala. 501, 17 So. 721.

Illinois.— Cook County *v.* Healy, 222 Ill. 310, 78 N. E. 623.

Indiana.— Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

Maryland.— State *v.* Benzinger, 83 Md. 481, 35 Atl. 173; Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89.

Michigan.— People *v.* De Blaay, 137 Mich. 402, 100 N. W. 598.

Minnesota.— O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458.

Nevada.— State *v.* Hallock, 14 Nev. 202, 33 Am. Rep. 559; State *v.* McClear, 11 Nev. 39.

New Jersey.— Virtue *v.* Essex County, 67 N. J. L. 139, 50 Atl. 360.

Ohio.— State *v.* Buckley, 60 Ohio St. 273, 54 N. E. 272; State *v.* Heffner, 59 Ohio St. 368, 52 N. E. 785; Collins *v.* Bingham, 22 Ohio Cir. Ct. 533, 12 Ohio Cir. Dec. 825.

Oklahoma.— Porter *v.* Kingfisher County, 6 Okla. 550, 51 Pac. 741.

South Carolina.— Barringer *v.* Florence, 41 S. C. 501, 19 S. E. 745.

Texas.— Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537.

See 44 Cent. Dig. tit. "Statutes," § 244.

Subsequent act must be totally void.— In cases of express repeal it seems to be settled that the old section remains in force only where the subsequent act is totally void, including the repealing clause. Equitable Guarantee, etc., Co. *v.* Donahoe, 3 Pennew. (Del.) 191, 49 Atl. 372.

When the evident purpose of the repeal is to displace the old law and substitute the new in its stead, the repealing clause, being dependent on that purpose of substitution, necessarily falls when falls the main purpose of the act. State *v.* Thomas, 138 Mo. 95, 39 S. W. 481.

54. Equitable Guarantee, etc., Co. *v.* Donahoe, 3 Pennew. (Del.) 191, 49 Atl. 372; People *v.* De Blaay, 137 Mich. 402, 100 N. W. 598; Collins *v.* Bingham, 22 Ohio Cir. Ct. 533, 12 Ohio Cir. Dec. 825.

55. Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict. [*quoted* in Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 397, 100 S. W. 138, 10 L. R. A. N. S. 681].

Repeal and suspension distinguished see *supra*, VI, A, 1.

56. See Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681.

Instances of suspension see Denman *v.* McGuire, 101 N. Y. 161, 4 N. E. 278; State *v.* Spillers, 30 Tex. 517; Harrison *v.* Allen, Wythe (Va.) 291; State *v.* Burdick, 4 Wyo. 290, 33 Pac. 131.

57. People *v.* Miner, 46 Ill. 367; Kirkpatrick *v.* Com., 95 Ky. 326, 25 S. W. 113, 15 Ky. L. Rep. 671; People *v.* Bell, 38 N. Y. 386.

58. See *infra*, VI, C, 2, a.

59. The Aurora, 7 Cranch (U. S.) 382, 3 L. ed. 378.

60. Repeal of statute as revival of common law see Common Law, 8 Cyc. 377 notes 38, 39.

61. *Dakota.*— People *v.* Wintermute, 1 Dak. 63, 46 N. W. 694.

Georgia.— Harrison *v.* Walker, 1 Ga. 32.

Indiana.— Lindsay *v.* Lindsay, 47 Ind. 283; Doe *v.* Naylor, 2 Blackf. 32; Haugh *v.* Smelser, 31 Ind. App. 571, 66 N. E. 55, 506.

declared,[62] or necessarily to be implied from the enactment of provisions conflicting with those of the law which would otherwise be revived;[63] and it matters not whether the repeal in either case be by express language or by implication.[64] Where a repealing act is repealed before it becomes operative, the original act continues in force by virtue of its original enactment and not because of its revival.[65]

(B) *Special or Local Acts.* Where special legislation is prohibited, and a special or local law is repealed by another special or local law, and the latter is then repealed, the former is not revived if there is a general law governing the subject.[66]

(II) *UNDER STATUTES.* By 13 & 14 Vict. c. 21, § 15, it was provided that where an act repealing, in whole or in part, a former act, is itself repealed, the last repeal shall not revive the act before repealed, unless it is expressly so provided. Similar enactments are in force in many of the United States.[67]

Massachusetts.— Com. *v.* Churchill, 2 Metc. 118; Com. *v.* Mott, 21 Pick. 492.

New Jersey.— James *v.* Dubois, 16 N. J. L. 285.

New York.— People *v.* New Rochelle, 26 Hun 488; Merchants' Bank *v.* Spalding, 12 Barb. 302 [*affirmed* in 9 N. Y. 53]; Rome *v.* Knox, 14 How. Pr. 268. *Compare* Sarsfield *v.* Van Vaughner, 15 Abb. Pr. 65, 38 Barb. 444 [*reversing* 14 Abb. Pr. 297].

North Carolina.— Brinkley *v.* Swicegood, 65 N. C. 626.

Pennsylvania.— York County Poor Directors *v.* Wrightsville, etc., R. Co., 7 Watts & S. 236; *In re* Doran, 2 Pars. Eq. Cas. 467.

West Virginia.— State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

United States.— U. S. *v.* Philbrick, 120 U. S. 52, 7 S. Ct. 413, 30 L. ed. 559; James *v.* Buzzard, 13 Fed. Cas. No. 7,206*b*, 1 Hempst. 259.

England.— 1 Blackstone Comm. 90; 4 Inst. 326.

Canada.— Lamb *v.* Cleveland, 19 Can. Sup. Ct. 78.

See 44 Cent. Dig. tit. "Statutes," § 246.

The rule itself rests upon the theory that each expression of the legislative mind represents the legislative intent at the time of that expression, and that the repealing statute indicates a change of the legislative purpose as expressed in the prior law; and therefore when the repealing statute is in turn repealed, without any reference to the preëxisting law, the presumption is that the legislature intended by the repeal to restore the order of things existing under the repealed statute. Butner *v.* Boifeuillet, 100 Ga. 743, 28 S. E. 464; People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; Van Denburgh *v.* Greenbush, 66 N. Y. 1.

When the remedy upon a contract has been suspended by a statute, the repeal of the statute restores the remedy in all cases, except when rights have become vested by virtue of the statute while it was in force. Johnson *v.* Meeker, 1 Wis. 436. See also York County Poor Directors *v.* Wrightsville, etc., R. Co., 7 Watts & S. (Pa.) 236.

If a statute creating an offense be repealed after the commission of that offense by an individual, but before he is tried for such offense, a repeal of the repealing statute revives the liability of the offender. Com. *v.* Mott, 21 Pick. (Mass.) 492. See also CRIMINAL LAW, 12 Cyc. 139 note 59.

62. U. S. *v.* Philbrick, 120 U. S. 52, 7 S. Ct. 413, 30 L. ed. 559. See also Patapsco Guano Co. *v.* North Carolina Bd. of Agriculture, 52 Fed. 690 [*affirmed* in 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191].

63. Middlesex Turnpike Co. *v.* Freeman, 14 Conn. 85.

64. Hastings *v.* Aiken, 1 Gray (Mass.) 163; Van Denburgh *v.* Greenbush, 66 N. Y. 1; Matter of Sweeley, 12 Misc. (N. Y.) 174, 33 N. Y. Suppl. 369 [*affirmed* in 146 N. Y. 401, 42 N. E. 543]; State *v.* King, 104 Tenn. 156, 57 S. W. 150.

65. Adam *v.* Wright, 84 Ga. 720, 11 S. E. 893; Coe *v.* Aroostook County, 64 Me. 31.

66. *In re* Knox St., 12 Pa. Super. Ct. 534 [*affirming* 7 Pa. Dist. 500]; *In re* Hazle Tp., 6 Kulp (Pa.) 491; Com. *v.* Kelly, 5 Kulp (Pa.) 533. See also Durr *v.* Com., 3 Pa. Co. Ct. 525.

67. See the statutes of the several states; and the following cases:

California.— Yolo County *v.* Colgan, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41.

Colorado.— Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995.

Illinois.— Sullivan *v.* People, 15 Ill. 233.

Iowa.—Edworthy *v.* Iowa Sav., etc., Assoc., 114 Iowa 220, 86 N. W. 315.

Kentucky.— Rice *v.* Com., 61 S. W. 473, 22 Ky. L. Rep. 1793.

Louisiana.— Witkouski *v.* Witkouski, 16 La. Ann. 232; Tallamon *v.* Cardenas, 14 La. Ann. 509.

Missouri.— State *v.* De Bar, 58 Mo. 395; State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471; State *v.* Stewart, 47 Mo. 382; State *v.* Huffschmidt, 47 Mo. 73.

New York.— People *v.* Steuben County, 41 Misc. 590, 85 N. Y. Suppl. 244 [*affirmed* in 93 N. Y. App. Div. 604, 87 N. Y. Suppl. 1144].

South Carolina.— Addison *v.* Sujette, 50 S. C. 192, 27 S. E. 631.

West Virginia.— State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

Wisconsin.— Smith *v.* Hoyt, 14 Wis. 252.

United States.— U. S. *v.* Philbrick, 120 U. S. 52, 7 S. Ct. 413, 30 L. ed. 559.

See 44 Cent. Dig. tit. "Statutes," § 246.

This provision applies not only to laws expressly repealed, but also to repeals by implication.[68] It applies, however, only to statutes repealing statutes, and not to statutes repealing the common law.[69] Again this rule applies only to cases of absolute repeal, and not to cases where the original act has been merely suspended,[70] amended,[71] or modified.[72]

b. By Repeal of Amendment or Revision. The rule above stated [73] can have no application in a case where the statute repeals absolutely a prior existing law, and substitutes for it another and more comprehensive scheme of legislation, which undertakes to deal with the whole subject to which the prior statute relates.[74] This canon of construction is not absolute, but will yield to a contrary intention apparent from the language employed or from statutes *in pari materia*.[75]

c. By Expiration of Temporary Act. When a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect be expressed.[76]

Act Cong. Feb. 25, 1871 (16 U. S. St. at L. 431), providing that "whenever an act shall be repealed, which repealed a former act, such former act shall not thereby be revived," has no reference to the legislation of a territory; said provision being part of an act prescribing the forms of acts and resolutions of congress and rules of their construction. People *v.* Wintermute, 1 Dak. 63, 46 N. W. 694.

68. Milne *v.* Huber, 17 Fed. Cas. No. 9,617, 3 McLean 212.

69. State *v.* Otis, 58 Minn. 275, 59 N. W. 1015; State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

Acts passed at same session.— Such a statute does not affect a repealing act passed at the same legislative session. Ottman *v.* Hoffman, 7 Misc. (N. Y.) 714, 28 N. Y. Suppl. 28 [*affirming* 6 Misc. 56, 26 N. Y. Suppl. 881].

70. Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995; Cassell *v.* Lexington, etc., Turnpike Road Co., 9 S. W. 502, 701, 10 Ky. L. Rep. 486; State *v.* Sawell, 107 Wis. 300, 83 N. W. 296; Brown *v.* Barry, 3 Dall. (U. S.) 365, 1 L. ed. 638.

71. Hannibal *v.* Guyott, 18 Mo. 515.

72. Dykstra *v.* Holden, 151 Mich. 289, 115 N. W. 74.

Thus, where an act merely creates exceptions to an act previously existing and continuing in force, the repeal of the former act leaves the excepted cases to be again governed by the previous general act. Dykstra *v.* Holden, 151 Mich. 289, 115 N. W. 74; State *v.* Wirt County Ct., 63 W. Va. 230, 59 S. E. 884, 981; State *v.* Mines, 38 W. Va. 125, 18 S. E. 470; McConiha *v.* Guthrie, 21 W. Va. 134; Smith *v.* Hoyt, 14 Wis. 252; Pepin Tp. *v.* Sage, 129 Fed. 657, 64 C. C. A. 169; Mount *v.* Taylor, L. R. 3 C. P. 645, 37 L. J. C. P. 325, 18 L. T. Rep. N. S. 476, 16 Wkly. Rep. 866.

73. See *supra*, VI, C, 2, a.

74. Butner *v.* Boifeuillet, 100 Ga. 743, 28 S. E. 464.

Accordingly, it has been held that the repeal of a statute which was a revision of and a substitute for a former act to the same effect, which was therefore repealed, cannot be deemed to revive the previous act, for this would be plainly contrary to the intention of the legislature. Butner *v.* Boifeuillet, 100 Ga. 743, 28 S. E. 464; Cochrane *v.* King County, 12 Wash. 518, 41 Pac. 922; Butler *v.* Russell, 4 Fed. Cas. No. 2,243, 3 Cliff. 251. So also where one act amends another so as to read as prescribed in the former, the repeal of the amendatory act does not revive the original law. Moody *v.* Seaman, 46 Mich. 74, 8 N. W. 711; People *v.* Wilmerding, 136 N. Y. 363, 32 N. E. 1099; People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; Goodno *v.* Oshkosh, 31 Wis. 127.

After a statute has been in several different years reënacted with changes, a subsequent repeal of the earlier amendatory acts neither restores nor repeals the original statute. People *v.* Brooklyn Assessors, 8 Abb. Pr. N. S. (N. Y.) 150.

75. Metropolis Bank *v.* Faber, 150 N. Y. 200, 44 N. E. 779 [*affirming* 1 N. Y. App. Div. 341, 37 N. Y. Suppl. 423]. See also Waugh *v.* Riley, 68 Ind. 482; Emigh *v.* State Ins. Co., 3 Wash. 122, 27 Pac. 1063.

Legislative intent to revive a law, which has by legislative action been annihilated, is not alone sufficient to accomplish such revival; there must be some legislative expression using language equivalent to a reënactment. State *v.* Conkling, 19 Cal. 501; People *v.* Wilmerding, 136 N. Y. 363, 32 N. E. 1099 [*reversing* 62 Hun 391, 17 N. Y. Suppl. 102]; Metropolis Bank *v.* Faber, 1 N. Y. App. Div. 341, 37 N. Y. Suppl. 423 [*affirmed* in 150 N. Y. 200, 44 N. E. 779]. See also Leatherwood *v.* Hill, 10 Ariz. 16, 85 Pac. 405.

76. Bouton *v.* Boyce, 2 Luz. Leg. Reg. (Pa.) 241; U. S. *v.* Twenty-five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356; Warren *v.* Windle, 3 East 205, 102 Eng. Reprint 576. *Contra*, Collins *v.* Smith, 6 Whart. (Pa.) 294, 36 Am. Dec. 228.

An offense against a temporary statute cannot be punished after the expiration of the act, unless a particular provision be made

3. Necessity of Republishing Revived Act. In the absence of a constitutional provision to the contrary, revival of a repealed statute by reference to its title only is valid.[77] The state constitutions, however, usually provide that no act shall be revived by reference to its title only, but the act revived shall be republished at length.[78]

4. Effect of Revival. Where an act is revived by a subsequent act, it is revived precisely in that form and with that effect which it had at the time when it expired.[79]

5. Effect of Repeal of Statute of Revival. Where a statute, reviving a statute which has been repealed, is itself repealed, the statute which was revived stands as it did before the revival.[80]

VII. CONSTRUCTION AND OPERATION.

A. Rules of Construction — 1 In General — a. Introductory Statement. By the construction of a statute is meant the process of ascertaining its true meaning and application.[81] For this purpose resort may be had not only to the language and arrangement of the statute,[82] but also to the intention of the legislature,[83] the object to be secured,[84] and to such extrinsic matters as the circumstances attending its passage,[85] the sense in which it was understood by contemporaries,[86] and its relation to other laws.[87]

b. Judicial Authority and Duty. The proper construction of a statute is a

for that purpose. The Irresistible, 7 Wheat. (U. S.) 551, 5 L. ed. 520.

Where there is no such express repeal, but a repeal by implication only, then it would seem that, if the legislature allow the second act to expire, it was their intention to revive the first. See U. S. *v.* Twenty-five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356.

77. *In re* Barry, 12 R. I. 51.

78. Stewart *v.* State, 100 Ala. 1, 13 So. 943; State *v.* Brugh, 5 Ind. App. 592, 32 N. E. 869; Renter *v.* Bauer, 3 Kan. 503. See also State *v.* Thomas, 74 Kan. 360, 86 Pac. 499; Durr *v.* Com., 3 Pa. Co. Ct. 525.

Such a constitutional provision has been held to apply only to express statutory revivals and not to revivals by operation of law. Wallace *v.* Bradshaw, 54 N. J. L. 175, 23 Atl. 759 [*reversing* 53 N. J. L. 315, 21 Atl. 941]. *Compare* Renter *v.* Bauer, 3 Kan. 503.

79. The Aurora, 7 Cranch (U. S.) 382, 3 L. ed. 378.

The revived act takes effect as an original act to the extent of its provisions. Alabama Branch Bank *v.* Kirkpatrick, 5 Ga. 34. It repeals all previous acts which are repugnant to it, and such only. Alabama Branch Bank *v.* Kirkpatrick, 5 Ga. 34.

80. Calvert *v.* Makepeace, Smith (Ind.) 86.

81. Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262; Russell *v.* Farquhar, 55 Tex. 355; Von Diest *v.* San Antonio Traction Co., 33 Tex. Civ. App. 577, 77 S. W. 632; Black L. Dict. 260. See 8 Cyc. 1141.

Legal or doctrinal interpretation.— It is said to be either "legal," which rests on the same authority as the law itself, or "doctrinal," which rests upon its intrinsic reasonableness. Legal interpretation may be either "authentic," when it is expressly provided by the legislator, or "usual," when it is derived from unwritten practice. Doctrinal interpretation may turn on the meaning of words and sentences, when it is called "grammatical," or on the intention of the legislator, when it is described as "logical." When logical interpretation stretches the words of a statute to cover its obvious meaning, it is called "extensive"; when, on the other hand, it avoids giving full meaning to the words, in order not to go beyond the intention of the legislator, it is called "restrictive." Black L. Dict. [*quoting* Holland Jur. § 344]. See also 14 Cyc. 824.

Although a statute contains the elements of a contract between the government and an individual, it must be construed according to the rules for the construction of statutes, and not according to the rules for contracts. Union Pac. R. Co. *v.* U. S., 10 Ct. Cl. 548 [*affirmed* in 91 U. S. 72, 23 L. ed. 224].

82. See *infra*, VII, A, 3.

83. See *infra*, VII, A, 2.

84. Cleveland, etc., R. Co. *v.* Baker, 106 Ill. App. 500.

85. Truelove *v.* Washington, 169 Ind. 291, 82 N. E. 530. See *infra*, VII, A, 6.

86. See *infra*, VII, A, 6.

87. Grannis *v.* San Francisco Super. Ct., 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

An unscientific and bungling statute cannot be construed and interpreted by the same strict scientific rules as a consistent and scientific one. Reynolds *v.* Bingham, 126 N. Y. App. Div. 289, 110 N. Y. Suppl. 520 [*affirmed* in 193 N. Y. 601, 86 N. E. 1131]. See *infra*, VII, A, 7.

question for the court,[88] and should not be submitted to the jury.[89] The courts, however, must confine themselves to the construction of the law as it is,[90] and not attempt to construe statutes before they take effect,[91] to supply defective legislation,[92] or otherwise amend or change the law under the guise of construction.[93] The wisdom or want of wisdom displayed in the act [94] is not a question for the courts, nor are the motives of the legislature in including or omitting certain provisions.[95] It is the duty of the court to endeavor to carry out the intention and policy of the legislature,[96] and therefore it will not declare a statute unconstitutional in whole or in part where it is reasonably susceptible of a construction giving it effect in all its parts.[97] The rules for the interpretation of statutes are the same in courts of equity as in courts of law.[98]

c. **Foreign Laws.**[99] The construction of foreign statutes, as in the case of other written instruments,[1] is a question for the court,[2] and not one for the

88. *California.*— Sierra County *v.* Nevada County, 155 Cal. 1, 99 Pac. 371.

Illinois.— Christiansen *v.* William Graver Tank Works, 223 Ill. 142, 79 N. E. 97 [*affirming* 126 Ill. App. 86], statute of foreign state.

Michigan.— Albert *v.* Gibson, 141 Mich. 698, 105 N. W. 19.

Montana.— O'Donnell *v.* Glenn, 9 Mont. 452, 23 Pac. 1018, 8 L. R. A. 629.

North Carolina.— State *v.* Patterson, 134 N. C. 612, 47 S. E. 808.

Wisconsin.— Berliner *v.* Waterloo, 14 Wis. 378.

United States.— St. Louis, etc., R. Co. *v.* Delk, 158 Fed. 931, 934, 86 C. C. A. 95, 162 Fed. 145, 89 C. C. A. 169, where it is said of the court that "being bound to administer the law, it is obliged to determine what the law really means and explain it to the jury."

England.—Bell *v.* Holtby, L. R. 15 Eq. 178, 42 L. J. Ch. 266, 28 L. T. Rep. N. S. 9, 21 Wkly. Rep. 321.

See 44 Cent. Dig. tit. "Statutes," § 255.

Legislative declaration that an act is an amendment of another is not conclusive, as this is a judicial question. Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 122 Am. St. Rep. 1002.

But a legislative declaration in a preamble to a city charter that the city contains a certain number of inhabitants is conclusive. *Ex p.* Fedderwitz, (Cal. 1900) 62 Pac. 935.

89. People *v.* Peden, 109 Ill. App. 560; Belt *v.* Marriott, 9 Gill (Md.) 331.

90. *Arizona.*— Flowing Wells Co. *v.* Culin, (1908) 95 Pac. 111.

Florida.— Curry *v.* Lehman, 55 Fla. 847, 47 So. 18.

Louisiana.— Walker *v.* Vicksburg, etc., R. Co., 110 La. 718, 721, 34 So. 749, where the court says: "The scope of judicial interpretation does not admit the right of reading other words into the law. It would be objectionable, and a species of legislative judicial action always to be avoided."

Michigan.— Ellis *v.* Boer, 150 Mich. 452, 114 N. W. 239.

Texas.— Philadelphia Fire Assoc. *v.* Love, 101 Tex. 376, 108 S. W. 158, 810; Austin *v.* Cahill, 99 Tex. 172, 187, 88 S. W. 542, 89 S. W. 552, holding that "the judiciary above all, on account of the peculiar position it occupies in the construction and interpretation of law, should scrupulously keep within its sphere, following the ancient landmarks so far as adapted to modern conditions, and avoiding always the reproach of undertaking to legislate, directly or indirectly."

West Virginia.— Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336.

United States.— St. Louis, etc., R. Co. *v.* Delk, 158 Fed. 931, 86 C. C. A. 95, 162 Fed. 145, 89 C. C. A. 169.

See 44 Cent. Dig. tit. "Statutes," § 255.

91. State *v.* Pierce County Super. Ct., 25 Wash. 271, 65 Pac. 183.

92. Kilpatrick *v.* Byrne, 25 Miss. 571; Love *v.* Love, 2 Yerg. (Tenn.) 288.

93. Clark *v.* Kansas City, etc., R. Co., 219 Mo. 524, 118 S. W. 40; *Ex p.* Pittman, (Nev. 1909) 99 Pac. 700; Com. *v.* Gouger, 21 Pa. Super. Ct. 217.

"By 'doubts and difficulties' arising in the construction of statutes is not meant those which are engendered by the predilection of the court or its own notions about what the law ought to be, but such doubts and difficulties as are inherent in the problem to be solved. St. Louis, etc., R. Co. *v.* Delk, 158 Fed. 931, 86 C. C. A. 95, 162 Fed. 145, 89 C. C. A. 169.

94. Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 405; Gorham *v.* Steinau, 10 Ohio S. & C. Pl. Dec. 131, 7 Ohio N. P. 478; Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L. R. A. 93.

95. Ohio Nat. Bank *v.* Berlin, 26 App. Cas. (D. C.) 218; Ellis *v.* Boer, 150 Mich. 452, 114 N. W. 239; State *v.* Rat Portage Lumber Co., (Minn. 1908) 115 N. W. 162.

96. Best *v.* Gholson, 89 Ill. 465.

97. State *v.* Lancashire F. Ins. Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348.

98. State *v.* Comptoir Nat. D'Escompte de Paris, 51 La. Ann. 1272, 26 So. 91; Goss Co. *v.* Greenleaf, 98 Me. 436, 57 Atl. 581.

99. **For construction of statutes adopted from other states or countries** see *infra*, VII, A, 7, d.

For executive construction of foreign statutes see *infra*, VII, A, 6, e, (III), (B).

Courts do not take judicial notice of statutes of foreign states or counties. See 16 Cyc. 895.

1. Gibson *v.* Manufacturers' F., etc., Ins. Co., 144 Mass. 81, 10 N. E. 729.

2. Cecil Bank *v.* Barry, 20 Md. 287, 83

jury.[3] Where a foreign statute has been construed by the courts of the state or country where enacted, such construction will be followed by the courts of other states,[4] or countries,[5] and by the federal courts.[6] The rule, however, rests merely upon the principle of comity, and not upon the full faith and credit clause of the federal constitution;[7] nor will it be applied where the decisions of the state of enactment are in conflict with those of the United States supreme court.[8] Furthermore the opinions of text-writers and the evidence of persons skilled in the foreign law may be resorted to in construing the foreign statute.[9] Where a foreign statute has not been construed in the state of enactment, the courts of the state where the cause is on trial will construe it as they would a like statute of their own state.[10]

Am. Dec. 553; Kline *v.* Baker, 99 Mass. 253; Charlotte *v.* Chouteau, 25 Mo. 465; Moore *v.* Gwynn, 27 N. C. 187.

3. Sidwell *v.* Evans, 1 Penr. & W. (Pa.) 383, 21 Am. Dec. 387 [*overruling* Mulliken *v.* Aughinbaugh, 1 Penr. & W. 117]. *Contra*, when resort is had to the testimony of experts as to the proper construction of the foreign statute. Holman *v.* King, 7 Metc. (Mass.) 384.

4. *Alabama.*— Bloodgood *v.* Grasey, 31 Ala. 575.

California.— Osborne *v.* Home L. Ins. Co., 123 Cal. 610, 56 Pac. 616.

Georgia.— Clark *v.* Turner, 73 Ga. 1; Georgia, etc., R. Co. *v.* Sasser, 4 Ga. App. 276, 61 S. E. 505.

Illinois.— Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Fowler *v.* Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Wanamaker *v.* Poorbaugh, 91 Ill. App. 560.

Iowa.— Franklin *v.* Twogood, 25 Iowa 520, 96 Am. Dec. 73.

Kansas.— Crooker *v.* Pearson, 41 Kan. 410, 21 Pac. 270; Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, 18 Pac. 57.

Mississippi.— McIntyre *v.* Ingraham, 35 Miss. 25.

Missouri.— McMerty *v.* Morrison, 62 Mo. 140.

New Jersey.— Watson *v.* Lane, 52 N. J. L. 550, 20 Atl. 894, 10 L. R. A. 784; Lane *v.* Watson, 51 N. J. L. 186, 17 Atl. 117; Hale *v.* Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Herrick *v.* King, 19 N. J. Eq. 80.

New York.— Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491; Jessup *v.* Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; St. Louis Sav. Assoc. *v.* O'Brien, 51 Hun 45, 3 N. Y. Suppl. 764; Hoyt *v.* Thompson, 3 Sandf. 416 [*reversed* on other grounds in 5 N. Y. 320]; Howe *v.* Welch, 17 Abb. N. Cas. 397, 3 How. Pr. N. S. 465 [*affirmed* in 14 Daly 80, 3 N. Y. St. 576]; Viele *v.* Wells, 9 Abb. N. Cas. 277.

North Carolina.—Watson *v.* Orr, 14 N. C. 161.

Ohio.— Kulp *v.* Fleming, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611.

Oklahoma.— Blumle *v.* Kramer, 14 Okla. 366, 79 Pac. 215, 1134.

Pennsylvania.— Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208; Merrimac Min. Co. *v.* Levy, 54 Pa. St. 227, 93 Am. Dec. 697; Kean *v.* Rice, 12 Serg. & R. 203.

South Carolina.—Carlton *v.* Felder, 6 Rich. Eq. 58; Johnston *v.* Southwestern R. Bank, 3 Strobh. Eq. 263.

Texas.— State *v.* De Leon, 64 Tex. 553; Powell *v.* De Blanc, 23 Tex. 66.

Vermont.— Blaine *v.* Curtis, 59 Vt. 120, 7 Atl. 708, 59 Am. Rep. 702.

Washington.— Whitman *v.* Mast, etc., Co., 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874.

West Virginia.— Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184.

United States.— Cathcart *v.* Robinson, 5 Pet. 264, 8 L. ed. 120; Bate Refrigerating Co. *v.* Gillett, 20 Fed. 192; Humphreyville Copper Co. *v.* Sterling, 12 Fed. Cas. No. 6,872, Brunn. Col. Cas. 3; Prentice *v.* Zane, 19 Fed. Cas. No. 11,383.

Even a dictum will be some evidence of the proper construction. Hackett *v.* Potter, 135 Mass. 349.

Where the statutes, but not the decisions, are in evidence, the decisions may be consulted, but are only persuasive and not binding. Nelson *v.* Goree, 34 Ala. 565.

See 44 Cent. Dig. tit. "Statutes, § 256.

5. Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199.

6. Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 11 Fed. 381, 3 McCrary 609. But see Pease *v.* Peck, 18 How. (U. S.) 595, 15 L. ed. 518, holding that where there is a settled construction of a statute of a state by its highest court, it is the practice of the federal courts to adopt it without criticism or further inquiry; but that when the United States supreme court has first construed a state statute, it will not feel bound to surrender its convictions on account of a contrary subsequent decision of the state court.

7. New York L. Ins. Co. *v.* English, (Tex. Civ. App. 1904) 79 S. W. 616; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 11 Fed. 381, 3 McCrary 609.

8. Davis *v.* Robertson, 11 La. Ann. 752.

But a law of a foreign state will not be declared unconstitutional, although apparently repugnant to the federal constitution, where it has not been so adjudged in the state of enactment if the question involved is in any way capable of being decided without passing on the validity of such law. Shelden *v.* Miller, 9 La. Ann. 187.

9. Charlotte *v.* Chouteau, 25 Mo. 465.

10. Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111; Smith *v.* Bartram, 11 Ohio St. 690.

The meaning of foreign statutes will not be extended by construction where this has not

d. Statutory Rules and Provisions [11] — (i) *In General.* It is competent for the legislature to enact rules for the construction of statutes, present [12] or future,[13] and when it has done so, each succeeding legislature, unless a contrary intention is plainly manifested,[14] is supposed to employ words and frame enactments with reference to such rules. Such statutory rules of construction may be only declaratory of the common law,[15] or they may operate to change the common-law rules of construction. It is the duty of the courts to give such construing acts their practical application so far as possible,[16] but they will not be construed so as to revive laws that have been repealed.[17] Such acts of legislative construction are not binding upon the courts as to transactions occurring before their passage,[18] but as to matters occurring thereafter such legislation guides all departments of the government,[19] even though plainly contradictory to the act construed.[20] A common legislative provision is that all statutes shall be liberally construed,[21] and this has been generally held to apply to all except penal statutes,[22] and in some cases to include even penal statutes.[23]

(ii) *Interpretation Clauses and Definitions in Statutes Construed.* The legislature may define certain words used in the statute,[24] or declare in the body of the act the construction to be placed thereon,[25] and the

been done by the courts of the jurisdiction where enacted. Thorn *v.* Beamon, 1 La. Ann. 270.

11. For legislative construction see *infra*, VII, A, 6, e, (iv).

12. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453.

13. People *v.* Zito, 237 Ill. 434, 86 N. E. 1041 [*affirming* 140 Ill. App. 611]; People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 51 N. E. 312 [*reversing* 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1132]; Prentiss *v.* Danaher, 20 Wis. 311.

14. People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 51 N. E. 312 [*reversing* 28 N. Y. App. Div. 37, 50 N. Y. Suppl. 1132]; Davidson *v.* Witthaus, 106 N. Y. App. Div. 182, 94 N. Y. Suppl. 428; Palmer *v.* Hickory Grove Cemetery, 84 N. Y. App. Div. 600, 82 N. Y. Suppl. 973; Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93 [*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed 567].

Statutory rule is not applicable when "inconsistent with the general object of the subsequent statute, or the context of the language construed, or other provision of the repealing law indicating a different intent." Davidson *v.* Witthaus, 106 N. Y. App. Div. 182, 185, 94 N. Y. Suppl. 428. See also to the same general effect State *v.* Shepherd, 218 Mo. 656, 117 S. W. 1169, 131 Am. St. Rep. 568.

15. Bailey *v.* Com., 11 Bush (Ky.) 688.

16. Bassett *v.* U. S., 2 Ct. Cl. 448. Cal. Pol. Code, § 4484, providing that, if conflicting provisions are found in different sections of the same chapter or article the provisions of the sections last in numerical order must prevail, has no application where the sections are passed at different times. People *v.* Dobbins, 73 Cal. 257, 14 Pac. 860.

17. People *v.* Potter, 40 Misc. (N. Y.) 485, 82 N. Y. Suppl. 649 [*affirmed* in 88 N. Y. App. Div. 239, 85 N. Y. Suppl. 460].

18. Bassett *v.* U. S., 2 Ct. Cl. 448.

19. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453.

20. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453.

21. People *v.* Harrison, 191 Ill. 257, 61 N. E. 99 [*affirming* 92 Ill. App. 643]; Hyatt *v.* Anderson, 74 S. W. 1094, 25 Ky. L. Rep. 132, 76 S. W. 337, 25 Ky. L. Rep. 711.

22. O'Connor *v.* State, (Tex. Civ. App. 1902) 71 S. W. 409 [*reversed* on other grounds in 96 Tex. 484, 73 S. W. 1041].

23. Richmond *v.* Moore, 107 Ill. 429, 47 Am. Rep. 445; Hankins *v.* People, 106 Ill. 628; Peterson *v.* Currier, 62 Ill. App. 163.

24. Reg. *v.* Boiler Explosion Act Com'rs, [1891] 1 Q. B. 703, 60 L. J. Q. B. 544, 64 L. T. Rep. N. S. 674, 39 Wkly. Rep. 440; Lindsay *v.* Cundy, 1 Q. B. D. 348, 45 L. J. Q. B. 381, 34 L. T. Rep. N. S. 314, 24 Wkly. Rep. 730; Midland R. Co. *v.* Ambergate, etc., R. Co., 10 Hare 359, 1 Wkly. Rep. 162, 44 Eng. Ch. 348, 68 Eng. Reprint 965.

A definition of certain words in one part of an act applies to those words through the statute (*In re* Kohler, 79 Cal. 313, 21 Pac. 758), unless a contrary intent clearly appear (Lindsay *v.* Cundy, 1 Q. B. D. 348, 358, 45 L. J. Q. B. 381, 34 L. T. Rep. N. S. 314, 24 Wkly. Rep. 730, in which Blackburn, J., says that the interpretation clause "is a modern innovation and frequently does a great deal of harm, because it gives a non-natural sense to words which are afterward used in a natural sense, without noticing the distinction").

But a constitutional provision that the word "corporation," as used "in the constitution," shall embrace joint stock companies and associations, does not control the definition of the word "corporation" when used in the statutes of the state. Com. *v.* Adams Express Co., 123 Ky. 720, 97 S. W. 386, 29 Ky. L. Rep. 1280.

25. Snyder *v.* Compton 87 Tex. 374, 28 S. W. 1061; *In re* West Riding of Toronto, 31 U. C. Q. B. 409 [*affirming* 5 Ont. Pr. 394]; Appelbe *v.* Baker, 27 U. C. Q. B. 486.

courts are bound by such construction, and all other parts of the act must yield,[26] although otherwise the language would have been construed to mean a different thing.[27] But the interpretation clause should be used only for the purpose of interpreting words that are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain.[28]

2. Intention of Legislature — a. In General. The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature.[29] This intention, however, must be the intention as expressed in the stat-

26. Farmers' Bank *v.* Hale, 59 N. Y. 53.

27. Smith *v.* State, 28 Ind. 321; Com. *v.* Curry, 4 Pa. Super. Ct. 356, 40 Wkly. Notes Cas. 369 [*reversing* 6 Pa. Dist. 143, 18 Pa. Co. Ct. 513].

28. Robinson *v.* Barton-Eccles, 8 App. Cas. 798, 52 L. J. Ch. 5, 47 L. T. Rep. N. S. 286, 32 Wkly. Rep. 249; Reg. *v.* Pearce, 5 Q. B. D. 386, 44 J. P. 216, 49 L. J. M. C. 81, 28 Wkly. Rep. 568.

29. *Alabama.*— Sunflower Lumber Co. *v.* Turner Supply Co., 158 Ala. 191, 48 So. 510.

Arkansas.— Brown *v.* Nelms, 86 Ark. 368, 112 S. W. 373; St. Louis, etc., R. Co. *v.* Batesville, etc., Tel. Co., 86 Ark. 300, 110 S. W. 1047.

California.— Blanc *v.* Bowman, 22 Cal. 23; People *v.* Dana, 22 Cal. 11; Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Colorado.— Wilson *v.* People, 44 Colo. 608, 99 Pac. 335; Gibson *v.* People, 44 Colo. 600, 99 Pac. 333; Dekelt *v.* People, 44 Colo. 525, 99 Pac. 330.

Georgia.— Ezekiel *v.* Dixon, 3 Ga. 146.

Idaho.— Empire Copper Co. *v.* Henderson, 15 Ida. 635, 99 Pac. 127.

Illinois.— People *v.* Willison, 237 Ill. 584, 86 N. E. 1094; Struthers *v.* People, 116 Ill. App. 481; Andel *v.* People, 106 Ill. App. 558.

Indiana.— State *v.* Barrett, (1909) 87 N. E. 7; State *v.* Weller, 171 Ind. 53, 85 N. E. 761; Evansville *v.* Summers, 108 Ind. 189, 9 N. E. 81; Maxwell *v.* Collins, 8 Ind. 38; Jones *v.* Leeds, 41 Ind. App. 164, 83 N. E. 526.

Iowa.—Howard *v.* Emmet County, 140 Iowa 527, 118 N. W. 882; Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262.

Kansas.— Jones *v.* State, 1 Kan. 273.

Kentucky.— Grinstead *v.* Kirby, 110 S. W. 247, 33 Ky. L. Rep. 287.

Louisiana.— Louisiana State Bd. of Health *v.* State Auditor, 52 La. Ann. 1256, 27 So. 792.

Maine.— A. L., etc., Goss Co. *v.* Greenleaf, 98 Me. 436, 440, 57 Atl. 581, where the court says: "It is to be assumed that the legislature in framing statutes and settling their phraseology does so with reference to established canons of statutory interpretation."

Massachusetts.— *In re* Kilby Bank, 23 Pick. 93; Opinion of Justices, 22 Pick. 571.

Michigan.— Detroit, etc., R. Co. *v.* Alpena Cir. Judge, 152 Mich. 201, 115 N. W. 724 (holding that, having ascertained that a certain legislative intent extended to all the provisions of a statute, the court will so construe it as to make such intent effective as to the whole statute, if it can do so without doing violence to the express terms thereof); Atty.-Gen. *v.* State Bank, Harr. 315.

Missouri.— Eaton *v.* Gmelich, 208 Mo. 152, 106 S. W. 618; Armstrong *v.* Modern Brotherhood of America, 132 Mo. App. 171, 112 S. W. 24; Grimes *v.* Reynolds, 94 Mo. App. 576, 68 S. W. 588 [*affirmed* in 184 Mo. 679, 68 S. W. 588, 83 S. W. 1132].

Montana.— State *v.* Livingston Concrete Bldg., etc., Co., 34 Mont. 570, 87 Pac. 980.

Nebraska.— State *v.* Hansen, (1908) 117 N. W. 412, 80 Nebr. 724, 115 N. W. 294; Little *v.* State, 60 Nebr. 749, 84 N. W. 248, 51 L. R. A. 717.

Nevada.— Thorpe *v.* Schooling, 7 Nev. 15.

New Mexico.— Douglass *v.* Lewis, 3 N. M. 345, 9 Pac. 377.

New York.— Farmers' Bank *v.* Hale, 59 N. Y. 53; People *v.* Glynn, 128 N. Y. App. Div. 257, 112 N. Y. Suppl. 695.

North Carolina.— State *v.* Barco, 150 N. C. 792, 63 S. E. 673; McLeod *v.* Carthage, 148 N. C. 77, 61 S. E. 605; Blair *v.* Coakley, 136 N. C. 405, 48 S. E. 804.

North Dakota.— State *v.* Burr, 16 N. D. 581, 113 N. W. 705.

Ohio.— Manuel *v.* Manuel, 13 Ohio St. 458.

Oklahoma.— Sampson *v.* Clark, 2 Okla. 82, 35 Pac. 882.

Rhode Island.— Ruhland *v.* Waterman, 29 R. I. 365, 71 Atl. 1, 450.

South Dakota.—Fremont, etc., R. Co. *v.* Pennington County, 22 S. D. 202, 116 N. W. 75; State *v.* Whealey, 5 S. D. 427, 59 N. W. 211.

Texas.— Edwards *v.* Morton, 92 Tex. 152, 153, 46 S. W. 792, where the court says: "The intention of the Legislature in enacting a law is the law itself."

Vermont.— Simonds *v.* Powers, 28 Vt. 354.

Washington.— State *v.* State R. Commission, 52 Wash. 33, 100 Pac. 184.

West Virginia.—State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394.

Wisconsin.— State *v.* State R. Commission, 137 Wis. 80, 117 N. W. 846.

United States.— Shulthis *v.* MacDougal, 162 Fed. 331 [*affirmed* in 170 Fed. 529]; Cardinel *v.* Smith, 5 Fed. Cas. No. 2,395, Deady 197; Ogden *v.* Strong, 18 Fed. Cas. No. 10,460, 2 Paine 584; Union Pac. R. Co.'s Case *v.* U. S., 10 Ct. Cl. 548.

England.— Freme *v.* Clement, 18 Ch. D. 499, 50 L. J. Ch. 801, 44 L. T. Rep. N. S. 399, 30 Wkly. Rep. 1.

See 44 Cent. Dig. tit. "Statutes," § 259.

Intent will prevail over technical rules of interpretation (Stevens *v.* Nave-McCord Mercantile Co., 150 Fed. 71, 80 C. C. A. 25); and also over ingenious distinctions of language

ute,[30] and where the meaning of the language used is plain,[31] it must be given effect by the courts,[32] or they would be assuming legislative authority.[33] But where the language of the statute is of doubtful meaning,[34] or where an adherence to the strict letter would lead to injustice,[35] to absurdity,[36] or to contradictory pro-

and close analysis of sentences (State *v.* Scheffield, 123 La. 271, 48 So. 932).

30. *California.*— Tynan *v.* Walker, 35 Cal. 634, 95 Am. Dec. 152.

Indiana.— Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222.

Iowa.— Lahart *v.* Thompson, 140 Iowa 298, 118 N. W. 398.

Kentucky.— Barron *v.* Kaufman, 131 Ky. 642, 115 S. W. 787; Com. *v.* International Harvester Co., 131 Ky. 551, 115 S. W. 703.

Louisiana.— Gooden *v.* Lincoln Parish Police Jury, 122 La. 755, 48 So. 196, holding that where an act is free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Maryland.— Cearfoss *v.* State, 42 Md. 403.

Michigan.— Detroit *v.* Detroit United R. Co., 156 Mich. 106, 120 N. W. 600 (holding that neither the rule that remedial statutes should be construed liberally, nor the rule that statutes should not be construed so as to enlarge the meaning which the words employed will bear, will justify a disregard of the language of a statute); Ellis *v.* Boer, 150 Mich. 452, 114 N. W. 239.

New Jersey.— State *v.* Woodruff, 68 N. J. L. 89, 52 Atl. 294.

New York.— Coxson *v.* Doland, 2 Daly 66.

North Carolina.— State *v.* Barco, 150 N. C. 792, 63 S. E. 673; Propst *v.* Southern R. Co., 139 N. C. 397, 51 S. E. 920.

Ohio.— Slingluff *v.* Weaver, 66 Ohio St. 621, 64 N. E. 574.

Pennsylvania.— Union Imp. Co. *v.* Com., 69 Pa. St. 140; Bradbury *v.* Wagenhorst, 54 Pa. St. 180.

South Dakota.— *Ex p.* Brown, 21 S. D. 515, 114 N. W. 303.

Utah.— State *v.* Montello Salt Co., 34 Utah 458, 98 Pac. 549.

United States.— U. S. *v.* Goldenberg, 168 U. S. 95, 18 S. Ct. 3, 42 L. ed. 394; Atlantic Coast Line R. Co. *v.* U. S., 168 Fed. 175, 94 C. C. A. 35 [*affirming* 153 Fed. 918]; U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. N. S. 167; U. S. *v.* Starn, 17 Fed. 435; U. S. *v.* Marks, 26 Fed. Cas. No. 15,721, 2 Abb. 531. *Compare* Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 47 L. ed. 363 [*reversing* 117 Fed. 462, 465, 54 C. C. A. 508].

England.— Logan *v.* Courtown, 13 Beav. 22, 20 L. J. Ch. 347, 51 Eng. Reprint 9; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Fordyce *v.* Bridges, 1 H. L. Cas. 1, 11 Jur. 157, 9 Eng. Reprint 649; Birmingham *v.* Birmingham Canal Navigations, 3 Loc. Gov. 1287, 21 T. L. R. 548.

See 44 Cent. Dig. tit. "Statutes," § 259.

31. *District of Columbia.*— Ohio Nat. Bank *v.* Berlin, 26 App. Cas. 218.

Georgia.— Ezekiel *v.* Dixon, 3 Ga. 146.

Kansas.— *In re* Linn County Seat, 15 Kan. 500.

Michigan.— Barstow *v.* Smith, Walk. 394.

Nebraska.— Goble *v.* Simeral, 67 Nebr. 276, 93 N. W. 235.

Ohio.— Woodbury *v.* Berry, 18 Ohio St. 456.

Oklahoma.— Choctaw, etc., R. Co. *v.* Alexander, 7 Okla. 591, 54 Pac. 421, 7 Okla. 579, 52 Pac. 944.

Pennsylvania.— Cowanshannock Poor Dist. *v.* Armstrong County, 31 Pa. Super. Ct. 396, holding that where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the question whether the same reasons that impelled the legislature to enact the law would justify a still broader provision is not the subject of judicial inquiry.

Utah.— Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

Wisconsin.— Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L. R. A. 93.

United States.— Lake County *v.* Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 L. ed. 1060; Thornley *v.* U. S., 113 U. S. 310, 5 S. Ct. 491, 28 L. ed. 999; U. S. *v.* Tyler, 105 U. S. 244, 26 L. ed. 985; U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. N. S. 167; Union Cent. L. Ins. Co. *v.* Champlin, 116 Fed. 858, 54 C. C. A. 208; Webber *v.* St. Paul City R. Co., 97 Fed. 140, 38 C. C. A. 79; Farmers' L. & T. Co. *v.* Oregon, etc., R. Co., 24 Fed. 407; Prindle *v.* U. S., 41 Ct. Cl. 8; Rodgers *v.* U. S., 36 Ct. Cl. 266 [*affirmed* in 185 U. S. 83, 22 S. Ct. 582, 46 L. ed. 816].

England.— Reg. *v.* Poor Law Com'rs, 6 A. & E. 56, 7 L. J. M. C. 33, 3 N. & P. 77, 33 E. C. L. 54.

See 44 Cent. Dig. tit. "Statutes," § 259.

32. Horton *v.* Mobile School Com'rs, 43 Ala. 598; Martin *v.* Martin, etc., Co., 27 App. Cas. (D. C.) 59; Idaho Mut. Co-Operative Ins. Co. *v.* Myer, 10 Ida. 294, 77 Pac. 628; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621.

33. Ogden *v.* Strong, 18 Fed. Cas. No. 10,460, 2 Paine 584.

34. Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222; Atty.-Gen. *v.* State Bank, Harr. (Mich.) 315; State Mut. Ins. Co. *v.* Clevenger, 17 Okla. 49, 87 Pac. 583; State Mut. Ins. Co. *v.* Roark, 17 Okla. 48, 87 Pac. 584; *In re* Mathews, 109 Fed. 603 [*modified* in 119 Fed. 1, 55 C. C. A. 579]; Ogden *v.* Strong, 18 Fed. Cas. No. 10,460, 2 Paine 584; Lowe *v.* U. S., 38 Ct. Cl. 170 [*affirmed* in 194 U. S. 193, 24 S. Ct. 617, 48 L. ed. 931].

35. State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594; U. S. *v.* Hunter, 26 Fed. Cas. No. 15,428, Pet. C. C. 10; *Ex p.* Corbett, 14 Ch. D. 122, 49 L. J. Bankr. 74, 42 L. T. Rep. N. S. 164, 28 Wkly. Rep. 569.

36. *District of Columbia.*— Fields *v.* U. S., 27 App. Cas. 433.

visions,[37] the duty devolves upon the court of ascertaining the true meaning.[38] If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction,[39] consistent with the general principles of law.[40]

b. Equitable Construction. By the equitable construction of statutes is meant a construction which extends a statute to a like case not within the words of the statute, but within its purpose,[41] or which prevents the operation of a statute upon a case within the words, but not within the purpose of the statute.[42] This principle of construction was formerly applied,[43] especially to early acts of parliament,[44] which were brief and general in their terms; but the doctrine of equitable construction has now been abandoned.[45]

c. Spirit or Letter of Law. Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit or reason of the law will prevail over its letter.[46] Especially is this rule applicable where the literal mean-

Kentucky.— Bailey *v.* Com., 11 Bush 688.
Missouri.— E. R. Darlington Lumber Co. *v.* Missouri Pac. R. Co., 216 Mo. 658, 116 S. W. 530.
Virginia.— Albemarle County Immigration Soc. *v.* Com., 103 Va. 46, 48 S. E. 509.
Wisconsin.— Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 91 Am. St. Rep. 910, 58 L. R. A. 93.
England.— Rothes *v.* Kirkcaldy, etc., Waterworks Com'rs, 7 App. Cas. 702.
See 44 Cent. Dig. tit. "Statutes," § 259.

37. Brooklyn School Bd. *v.* New York Bd. of Education, 157 N. Y. 566, 53 N. E. 583 [*affirming* 34 N. Y. App. Div. 49, 53 N. Y. Suppl. 1000, 54 N. Y. Suppl. 185]; *Ex p.* Walton, 17 Ch. D. 746, 50 L. J. Ch. 657, 45 L. T. Rep. N. S. 1, 30 Wkly. Rep. 395.

38. Jones *v.* U. S. Fidelity, etc., Co., (Ky. 1909) 117 S. W. 406.

39. Troy Laundry, etc., Co. *v.* Denver, 11 Colo. App. 368, 53 Pac. 256.

40. Manuel *v.* Manuel, 13 Ohio St. 458; Big Black Creek Imp. Co. *v.* Com., 94 Pa. St. 450; Fuellhart *v.* Blood, 21 Pa. Co. Ct. 601; Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

41. Strawbridge *v.* Mann, 17 Ga. 454; Booth *v.* Williams, 2 Ga. 252; 1 Coke Inst. 24b.

42. Wiley *v.* Kelsey, 3 Ga. 274; Eyston *v.* Studd, Plowd. 459, 75 Eng. Reprint 688.

43. Hoguet *v.* Wallace, 28 N. J. L. 523.

44. Eyston *v.* Studd, Plowd. 459, 75 Eng. Reprint 688; Hill *v.* Grange, Plowd. 164, 75 Eng. Reprint 253.

45. *Maryland.*— Collins *v.* Carman, 5 Md. 503.
Missouri.— Perry *v.* Strawbridge, 209 Mo. 621, 108 S. W. 641, 123 Am. St. Rep. 510, 16 L. R. A. N. S. 244; State *v.* Woodside, 112 Mo. App. 451, 87 S. W. 8.
New York.— Tompkins *v.* Penn Yan First Nat. Bank, 18 N. Y. Suppl. 234; Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467.
Wisconsin.— Encking *v.* Simmons, 28 Wis. 272; Harrington *v.* Smith, 28 Wis. 43; Woodbury *v.* Shackleford, 19 Wis. 55.
England.— Brandling *v.* Barrington, 6 B. & C. 467, 5 L. J. K. B. O. S. 181, 13 E. C. L. 215.
See 44 Cent. Dig. tit. "Statutes," § 260.

46. *Alabama.*— Davis *v.* Thomas, 154 Ala. 279, 45 So. 897; Thompson *v.* State, 20 Ala. 54; Kennedy *v.* Kennedy, 2 Ala. 571.
Arkansas.— St. Louis, etc., R. Co. *v.* State, 86 Ark. 518, 112 S. W. 150; Wilson *v.* Biscoe, 11 Ark. 44.
District of Columbia.— *In re* Cahn, 27 App. Cas. 173.
Florida.— Curry *v.* Lehman, 55 Fla. 847, 47 So. 18; Knight, etc., Co. *v.* Tampa Sand Lime Brick Co., 55 Fla. 728, 46 So. 285.
Georgia.— Erwin *v.* Moore, 15 Ga. 361; Roberts *v.* State, 4 Ga. App. 207, 60 S. E. 1082.
Idaho.— Chandler *v.* Lee, 1 Ida. 349.
Illinois.— Wabash, etc., R. Co. *v.* Binkert, 106 Ill. 298; Perry County *v.* Jefferson County, 94 Ill. 214; Boyer *v.* Onion, 108 Ill. App. 612; Gilbert *v.* Morgan, 98 Ill. App. 281.
Indiana.— Bailey *v.* State, 163 Ind. 165, 71 N. E. 655; Miller *v.* State, 106 Ind. 415, 7 N. E. 209; Storms *v.* Stevens, 104 Ind. 46, 3 N. E. 401.
Iowa.— Sexton *v.* Sexton, 129 Iowa 487, 105 N. W. 314, 2 L. R. A. N. S. 708; Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262.
Kentucky.— Maysville, etc., R. Co. *v.* Herrick, 13 Bush 122; Bailey *v.* Com., 11 Bush 688.
Louisiana.— Ardry *v.* Ardry, 16 La. 264; Buhol *v.* Boudousquie, 8 Mart. N. S. 425; Cox *v.* Williams, 5 Mart. N. S. 139.
Maine.— Gray *v.* Cumberland County, 83 Me. 429, 22 Atl. 376.
Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.
Massachusetts.— Staniels *v.* Raymond, 4 Cush. 314; Com. *v.* Cambridge, 20 Pick. 267; Mendon *v.* Worcester County, 10 Pick. 235; Somerset *v.* Dighton, 12 Mass. 383.
Michigan.— Stanbaugh Tp. *v.* Iron County Treasurer, 153 Mich. 104, 116 N. W. 569.
Minnesota.— Winters *v.* Duluth, 82 Minn. 127, 84 N. W. 788; Barker *v.* Kelderhouse, 8 Minn. 207; Grimes *v.* Bryne, 2 Minn. 89.
Mississippi.— New Orleans, etc., R. Co. *v.*

ing is absurd,[47] or, if given effect, would work injustice,[48] or where the provision was inserted through inadvertence.[49] Words may accordingly be rejected and others substituted,[50] even though the effect is to make portions of the statute entirely inoperative.[51] So the meaning of general terms may be restrained by the spirit or reason of the statute,[52] and general language may be construed to admit implied exceptions.[53]

Hemphill, 35 Miss. 17; Ingraham *v.* Speed, 30 Miss. 410.

Missouri.— Perry *v.* Strawbridge, 209 Mo. 621, 108 S. W. 641, 123 Am. St. Rep. 510, 16 L. R. A. N. S. 244; State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963; State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005; Kane *v.* Kansas City, etc., R. Co., 112 Mo. 34, 20 S. W. 532; State *v.* King, 44 Mo. 283; Riddick *v.* Territory, 1 Mo. 147.

Nebraska.— State *v.* Drexel, 75 Nebr. 614, 106 N. W. 791; Kelley *v.* Gage County, 67 Nebr. 6, 93 N. W. 194, 99 N. W. 524; Parker *v.* Nothomb, 65 Nebr. 308, 91 N. W. 395, 93 N. W. 851, 60 L. R. A. 699.

New Hampshire.— State *v.* People's Nat. Bank, 75 N. H. 27, 70 Atl. 542; Carter *v.* Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. N. S. 733; Sargent *v.* Concord Union School-Dist., 63 N. H. 528, 2 Atl. 641.

New Jersey.— Mendles *v.* Danish, 74 N. J. L. 333, 65 Atl. 888; Jersey Co. Associates *v.* Davison, 29 N. J. L. 415; Brown *v.* Wright, 13 N. J. L. 240.

New York.— People *v.* Lacombe, 99 N. Y. 43, 49, 1 N. E. 599 (where it is said: "It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute"); Smith *v.* People, 47 N. Y. 303; Crocker *v.* Crane, 21 Wend. 211, 34 Am. Dec. 228; People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

North Dakota.— State *v.* Hanson, 16 N. D. 347, 113 N. W. 371.

Oklahoma.— Territory *v.* Clark, 2 Okla. 82, 35 Pac. 882, holding that to this end words may be modified, altered, or supplied.

Pennsylvania.— Eshelman's Appeal, 1 Leg. Chron. 245.

South Carolina.— Ham *v.* McClaws, 1 Bay 93.

Tennessee.— State *v.* Clarksville, etc., Turnpike Co., 2 Sneed 88.

Texas.— Edwards *v.* Morton, 92 Tex. 152, 46 S. W. 792; Von Diest *v.* San Antonio Traction Co., 33 Tex. Civ. App. 577, 77 S. W. 632.

Vermont.— *In re* Howard, 80 Vt. 489, 68 Atl. 513; Ryegate *v.* Wardsboro, 30 Vt. 746.

West Virginia.—State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746; Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

Wisconsin.— State *v.* Railroad Comm., 137 Wis. 80, 117 N. W. 846; Wisconsin Industrial School *v.* Clark County, 103 Wis. 651, 79 N. W. 422; Gilkey *v.* Cook, 60 Wis. 133, 18 N. W. 639.

United States.— Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226; Wilkinson *v.* Leland, 2 Pet. 627, 7 L. ed. 542; Interstate Drainage, etc., Co. *v.* Freeborn County, 158 Fed. 270, 85 C. C. A. 532; Rigney *v.* Plaster, 88 Fed. 686; U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487.

England.— Caledonian R. Co. *v.* North British R. Co., 6 App. Cas. 114, 29 Wkly. Rep. 685.

Canada.— Fitzgerald *v.* Wilson, 8 Ont. 559.

See 44 Cent. Dig. tit. "Statutes," § 261.

A thing within the intention of a statute is within the statute, although it would be excluded by a literal construction. Matter of Rapid Transit R. Com'rs, 128 N. Y. App. Div. 103, 112 N. Y. Suppl. 619 [*modified* in 197 N. Y. 81, 90 N. E. 456].

47. State *v.* People's Nat. Bank, 75 N. H. 27, 70 Atl. 542; U. S. *v.* Hogg, 112 Fed. 909, 50 C. C. A. 608 [*affirming* 111 Fed. 292]; *Ex p.* Walton, 17 Ch. D. 746, 50 L. J. Ch. 657, 45 L. T. Rep. N. S. 1, 30 Wkly. Rep. 395.

48. Carter *v.* Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. N. S. 733; State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

49. Pond *v.* Maddox, 38 Cal. 572.

50. Brace *v.* Solner, 1 Alaska 361; Iuka *v.* Schlosser, 97 Ill. App. 222; Peoria First Nat. Bank *v.* Farmers', etc., Nat. Bank, 171 Ind. 323, 86 N. E. 417, (App. 1907) 82 N. E. 1013; James *v.* U. S. Fidelity, etc., Co., (Ky. 1909) 117 S. W. 406.

51. Pond *v.* Maddox, 38 Cal. 572; Farmers' Bank *v.* Hale, 59 N. Y. 53.

52. *District of Columbia.*— Moss *v.* U. S., 29 App. Cas. 188.

Maine.— Carrigan *v.* Stillwell, 99 Me. 434, 59 Atl. 683, 68 L. R. A. 386.

Missouri.— Perry *v.* Strowbridge, 209 Mo. 621, 108 S. W. 641, 123 Am. St. Rep. 510; Kane *v.* Kansas City, etc., R. Co., 112 Mo. 34, 20 S. W. 532; Walton *v.* Harris, 73 Mo. 489; Hobein *v.* Murphy, 20 Mo. 447, 64 Am. Dec. 194.

New York.— Murray *v.* New York Cent. R. Co., 3 Abb. Dec. 339, 4 Keyes 274.

United States.— Price *v.* Forrest, 173 U. S. 410, 19 S. Ct. 434, 43 L. ed. 749; Tsoi Sim *v.* U. S., 116 Fed. 920, 54 C. C. A. 154.

See 44 Cent. Dig. tit. "Statutes," § 261.

53. *Connecticut.*— Kelley *v.* Killourey, 81 Conn. 320, 70 Atl. 1031, 129 Am. St. Rep. 220; Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

District of Columbia.— Garrison *v.* District of Columbia, 30 App. Cas. 515.

d. Policy and Purpose of Act. Every statute must be construed with reference to the object intended to be accomplished by it.[54] In order to ascertain this object it is proper to consider the occasion and necessity [55] of its enactment, the defects or evils in the former law,[56] and the remedy provided by the new one; [57]

Massachusetts.— Plumley *v.* Birge, 124 Mass. 57, 26 Am. Rep. 645.

New Hampshire.— Quimby *v.* Woodbury, 63 N. H. 370.

Rhode Island.— Peck *v.* Williams, 24 R. I. 583, 54 Atl. 381, 61 L. R. A. 351.

Vermont.— State *v.* Audette, 81 Vt. 400, 70 Atl. 833, 130 Am. St. Rep. 1061, 18 L. R. A. N. S. 527.

See 44 Cent. Dig. tit. "Statutes," § 261.

54. *Alaska.*— Brace *v.* Solner, 1 Alaska 361.

California.— People *v.* Dana, 22 Cal. 11; Genilla *v.* Hanley, 6 Cal. App. 614, 92 Pac. 752.

District of Columbia.—District of Columbia *v.* Dewalt, 31 App. Cas. 326; U. S. *v.* Day, 27 App. Cas. 458.

Illinois.— Cleveland, etc., R. Co. *v.* Baker, 106 Ill. App. 500; People *v.* Ballhorn, 100 Ill. App. 571.

Iowa.— Coggeshall *v.* Des Moines, 138 Iowa 730, 117 N. W. 309, 128 Am. St. Rep. 221.

Kentucky.— Com. *v.* International Harvester Co., 131 Ky. 551, 115 S. W. 703; Wildharber *v.* Lurkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221; Com. *v.* Trent, 117 Ky. 34, 77 S. W. 390, 25 Ky. L. Rep. 1180.

Louisiana.— La. Civ. Code, art. 18.

Maryland.— Cochran *v.* Preston, 108 Md. 220, 70 Atl. 113, 129 Am. St. Rep. 432, 23 L. R. A. N. S. 1163.

Michigan.— *In re* Ticknor, 13 Mich. 44.

Montana.— Lewis *v.* Northern Pac. R. Co., 36 Mont. 207, 92 Pac. 469.

New York.— Hathorn *v.* Natural Carbonic Gas Co., 194 N. Y. 326, 87 N. E. 504, 128 Am. St. Rep. 555, 23 L. R. A. N. S. 436 [*affirming* 128 N. Y. App. Div. 33, 112 N. Y. Suppl. 374 (*affirming* and *modifying* 60 Misc. 341, 113 N. Y. Suppl. 458)]; Brooklyn School Bd. *v.* New York City Bd. of Education, 157 N. Y. 566, 52 N. E. 583 [*affirming* 34 N. Y. App. Div. 49, 54 N. Y. Suppl. 185]; Honduras *v.* Soto, 112 N. Y. 310, 19 N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642.

North Carolina.— Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116.

Ohio.— *Ex p.* Christmas, 1 Ohio Dec. (Reprint) 594, 10 West. L. J. 541.

Pennsylvania.— Turbett Tp. *v.* Port Royal Borough, 33 Pa. Super. Ct. 520.

South Carolina.— Kaufman *v.* Carter, 67 S. C. 312, 45 S. E. 211.

Virginia.— Norfolk, etc., Traction Co. *v.* Ellington, 108 Va. 245, 61 S. E. 779, 17 L. R. A. N. S. 117.

Washington.— State *v.* Pollman, 51 Wash. 110, 98 Pac. 88; Cherry Point Fish Co. *v.* Nelson, 25 Wash. 558, 66 Pac. 55.

West Virginia.— Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

Wisconsin.— State *v.* Railroad Commission, 137 Wis. 80, 117 N. W. 846; Davis *v.* State, 134 Wis. 632, 115 N. W. 150.

Wyoming.— Ross *v.* State, 16 Wyo. 285, 93 Pac. 299, 94 Pac. 217.

United States.— U. S. *v.* Musgrave, 160 Fed. 700; St. Louis, etc., R. Co. *v.* Delk, 158 Fed. 931, 86 C. C. A. 95, 162 Fed. 145, 89 C. C. A. 169; Cook *v.* Hamilton County, 6 Fed. Cas. No. 3,157, 6 McLean 112; Jasper *v.* U. S., 38 Ct. Cl. 202.

England.— Rex *v.* Hall, 1 B. & C. 123, 25 Rev. Rep. 332, 8 E. C. L. 53, 107 Eng. Reprint 47 [*approved* in The Lion, L. R. 2 P. C. 525, 38 L. J. Adm. 51, 21 L. T. Rep. N. S. 41, 6 Moore P. C. N. S. 163, 17 Wkly. Rep. 993, 16 Eng. Reprint 688].

See 44 Cent. Dig. tit. "Statutes," § 262.

55. *Colorado.*— Dekels *v.* People, 44 Colo. 525, 99 Pac. 330.

District of Columbia.— District of Columbia *v.* Dewalt, 31 App. Cas. 326.

Illinois.—People *v.* Sholem, 238 Ill. 203, 87 N. E. 390.

Louisiana.— State *v.* Judge Ninth Judicial Dist., 12 La. Ann. 777.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Michigan.— Sibley *v.* Smith, 2 Mich. 486.

Missouri.— State *v.* Diveling, 66 Mo. 375.

New York.— People *v.* Lacombe, 99 N. Y. 43, 1 N. E. 599; People *v.* Essex County, 70 N. Y. 228; Tonnele *v.* Hall, 4 N. Y. 140.

Oregon.— Keith *v.* Quinney, 1 Oreg. 364.

See 44 Cent. Dig. tit. "Statutes," § 262.

56. *District of Columbia.*— U. S. *v.* Crawford, 6 Mackey 319.

Illinois.— Marquette Third Vein Coal Co. *v.* Allison, 132 Ill. App. 221.

Indiana.— Evansville *v.* Summers, 108 Ind. 189, 9 N. E. 81.

Iowa.— Woods *v.* Mains, 1 Greene 275.

Louisiana.— State *v.* Maloney, 115 La. 498, 39 So. 539.

Maine.— Winslow *v.* Kimball, 25 Me. 493.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522; New England Car Spring Co. *v.* Baltimore, etc., R. Co., 11 Md. 81, 69 Am. Dec. 181.

Texas.— Croomes *v.* State, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882.

Washington.— State *v.* Stewart, 52 Wash. 61, 100 Pac. 153.

Wisconsin.— Minneapolis Threshing Mach. Co. *v.* Haug, 136 Wis. 350, 117 N. W. 811; Malloy *v.* Chicago, etc., R. Co., 109 Wis. 29, 85 N. W. 130.

United States.— U. S. *v.* Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. N. S. 185.

See 44 Cent. Dig. tit. "Statutes," § 262.

57. State *v.* Peet, 80 Vt. 449, 68 Atl. 661, 130 Am. St. Rep. 998, 14 L. R. A. N. S. 677, holding that the purpose of a statute, in whatever language it may be framed, must

and the statute should be given that construction which is best calculated to advance its object,[58] by suppressing the mischief and securing the benefits intended.[59] For the purpose of determining the meaning, although not the validity,[60] of a statute, recourse may be had to considerations of public policy,[61] and to the established policy of the legislature as disclosed by a general course of legislation.[62] Ordinarily where the law-making power distinctly states its design, no place is left for construction;[63] but a legislative declaration that a law was intended to promote a certain purpose is not binding on the courts, and they have the power to inquire its real as distinguished from its ostensible purpose;[64] and where the purpose of a statute does not appear on its face, it is open to inquiry.[65] If the purpose and well ascertained object of a statute are inconsistent with the precise words,[66] the latter must yield to the controlling influence of the legislative will resulting from the whole act.

e. Effect and Consequences. It is the rule for which there is an abundance of authority that the mere fact that a certain construction of a statute will cause inconvenience[67] or failure of justice[68] will not affect the judicial determination of a case involving such a construction. But where the proper construction of a statute is otherwise doubtful,[69] arguments from the inconvenience,[70] absurdity,[71]

be determined by its natural and reasonable effect.

58. *Alaska.*— *In re* Wynn-Johnson, 1 Alaska 630.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294.

Iowa.—Coggeshall *v.* Des Moines, 138 Iowa 730, 117 N. W. 309, 128 Am. St. Rep. 221.

Kentucky.— Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221, holding that a statute will be construed liberally so as to effectuate the purpose of the legislature.

Ohio.— Allen *v.* Parish, 3 Ohio 187.

Rhode Island.— Greenough *v.* Providence Police Com'rs, 29 R. I. 410, 71 Atl. 806.

West Virginia.— Charleston *v.* Charleston Brewing Co., 61 W. Va. 34, 56 S. E. 198.

United States.— U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266].

See 44 Cent. Dig. tit. "Statutes," § 262.

59. Maynard *v.* Johnson, 2 Nev. 25; Wheeler *v.* McCormick, 29 Fed. Cas. No. 17,498, 8 Blatchf. 267.

Original bill, as deposited by the legislative department among the archives of the state, may be resorted to, where amendments are shown on its face. Mason *v.* Cranbury Tp., 68 N. J. L. 149, 52 Atl. 568.

60. State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707, holding that the courts have nothing to do with the policy of a statute except in so far as it may explain the legislative intention.

61. Opinion of Justices, 7 Mass. 523; Jersey City Gas-light Co. *v.* Consumers' Gas Co., 40 N. J. Eq. 427, 2 Atl. 922; Baxter *v.* Tripp, 12 R. I. 310.

62. Jewell *v.* Ithaca, 36 Misc. (N. Y.) 499, 73 N. Y. Suppl. 953 [*affirmed* in 72 N. Y. App. Div. 220, 76 N. Y. Suppl. 126]; Austin *v.* Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552.

But the "policy of the government" with reference to any particular legislation is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes. Hadden *v.* Barney, 5 Wall. (U. S.) 107, 18 L. ed. 518, act imposing duties on imports.

63. U. S. *v.* Starn, 17 Fed. 435.

64. *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State *v.* Redmon, 134 Wis. 89, 114 N. W. 137, 126 Am. St. Rep. 1003, 14 L. R. A. N. S. 229; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. ed. 205.

65. Cochran *v.* Preston, 108 Md. 220, 70 Atl. 113, 129 Am. St. Rep. 432.

66. Commercial Bank *v.* Foster, 5 La. Ann. 516; State *v.* Clark, 29 N. J. L. 96; U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266]; Baring *v.* Erdman, 2 Fed. Cas. No. 981.

67. *Arizona.*— Buggeln *v.* Cameron, (1907) 90 Pac. 324.

Florida.— Curry *v.* Lehman, 55 Fla. 847, 47 So. 18.

Kansas.— Dudley *v.* Reynolds, 1 Kan. 285, holding that it is only when all other means of ascertaining the legislative intention fail that a court may look to the effect of a law, and then their interpretation becomes a sort of judicial legislation.

Minnesota.— State *v.* Lesure Lumber Co., (1908) 115 N. W. 167; State *v.* Rat Portage Lumber Co., (1908) 115 N. W. 162.

Ohio.— Gorham *v.* Steinau, 10 Ohio S. & C. Pl. Dec. 131, 7 Ohio N. P. 478.

See 44 Cent. Dig. tit. "Statutes," § 263.

68. Pitman *v.* Flint, 10 Pick. (Mass.) 504.

69. Kane *v.* Kansas City, etc., R. Co., 112 Mo. 34, 20 S. W. 532; State *v.* Rombauer, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502; Schepp *v.* Reading, 2 Woodw. (Pa.) 460.

70. St. Louis, etc., R. Co. *v.* Batesville, etc., Tel. Co., 86 Ark. 300, 110 S. W. 1047; Putnam *v.* Longley, 11 Pick. (Mass.) 487; Steppacher *v.* McClure, 75 Mo. App. 135; Dixon *v.* Caledonian, etc., R. Co., 5 App. Cas. 820, 43 L. T. Rep. N. S. 513, 29 Wkly. Rep. 250.

71. *Arkansas.*— St. Louis, etc., R. Co. *v.*

injustice,[72] or prejudice to the public interests,[73] resulting from a proposed construction, may be considered. Furthermore, in accordance with the maxim, *Ut res magis valeat quam pereat*, statutes should, if reasonably possible, be so construed as to render them valid;[74] and to give them force and effect.[75] So also uncertain or ambiguous words will be construed so as, if possible, to produce a reasonable result.[76] A statute will not be construed to authorize an extraterritorial act,[77] or otherwise to have any extraterritorial effect,[78] if subject to any other rational construction.

f. Implications and Inferences. The rule is that whatever is necessarily,[79] or

Batesville, etc., Tel. Co., 86 Ark. 300, 110 S. W. 1047.

Florida.—Curry *v.* Lehman, 55 Fla. 847, 47 So. 18.

Illinois.— People *v.* Admire, 39 Ill. 251.

Indiana.— Jeffersonville *v.* Weems, 5 Ind. 547; Coal Creek Tp. Advisory Bd. *v.* Levandowski, (App. 1908) 84 N. E. 346.

Nebraska.— Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812.

New Jersey.— State *v.* Clark, 29 N. J. L. 96.

Vermont.— *In re* Howard, 80 Vt. 489, 68 Atl. 513; Henry *v.* Tilson, 17 Vt. 479.

England.— Reg. *v.* Tonbridge Parish, 13 Q. B. D. 342, 48 J. P. 740, 53 L. J. Q. B. 489, 51 L. T. Rep. N. S. 199, 33 Wkly. Rep. 24.

See 44 Cent. Dig. tit. "Statutes," § 263.

72. *Connecticut.*— Kelley *v.* Killourey, 81 Conn. 320, 70 Atl. 1031, 129 Am. St. Rep. 220.

Illinois.— Iuka *v.* Schlosser, 97 Ill. App. 222.

Kentucky.— Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452.

Maine.—State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901.

Mississippi.— Pattison *v.* Clingan, (1908) 47 So. 503.

New Jersey.— Jersey City *v.* North Jersey St. R. Co., 72 N. J. L. 383, 61 Atl. 95, holding that statutes are not to be so construed as to interfere with vested rights, if their terms admit of any other reasonable construction.

North Carolina.— Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116.

Ohio.— Ohio Mut. Ins. Co. *v.* Marietta Woolen Factory, 1 Ohio Dec. (Reprint) 577, 10 West. L. J. 466.

Vermont.— State *v.* Audette, 81 Vt. 400, 70 Atl. 833, 130 Am. St. Rep. 1061, 18 L. R. A. N. S. 527.

West Virginia.— State *v.* Baltimore, etc., R. Co., 61 W. Va. 367, 56 S. E. 518.

United States.— Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969; Chinese Laborers on Shipboard Case, 13 Fed. 291, 7 Sawy. 542.

England.— Gowan *v.* Wright, 18 Q. B. D. 201, 56 L. J. Q. B. 131, 35 Wkly. Rep. 297; Atty.-Gen. *v.* Horner, 14 Q. B. D. 257, 54 L. J. Q. B. 227, 33 Wkly. Rep. 93; *Ex p.* Corbett, 14 Ch. D. 122, 49 L. J. Bankr. 74, 42 L. T. Rep. N. S. 164, 28 Wkly. Rep. 569.

See 44 Cent. Dig. tit. "Statutes," § 263.

73. Albemarle County Immigration Soc. *v.* Com., 103 Va. 46, 48 S. E. 509.

74. *Illinois.*— Hogan *v.* Akin, 181 Ill. 448, 55 N. E. 137 [*reversing* 81 Ill. App. 62]; Sauter *v.* Anderson, 112 Ill. App. 580.

Kentucky.— Com. *v.* International Harvester Co., 131 Ky. 551, 115 S. W. 703; Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452.

New Jersey.— East Orange *v.* Hussey, 70 N. J. L. 244, 57 Atl. 1086.

New York.— People *v.* Lane, 53 N. Y. App. Div. 531, 65 N. Y. Suppl. 1004, striking the word "exclusive" from a statute in order to sustain its constitutionality.

North Carolina.— Mardre *v.* Felton, 61 N. C. 279, holding that a construction of a statute which attributes to the legislature the exercise of a doubtful power will not, in the absence of direct words, be adopted.

Virginia.— Martin *v.* South Salem Land Co., 97 Va. 349, 33 S. E. 600.

See 44 Cent. Dig. tit. "Statutes," §§ 56, 263.

For construction to avoid unconstitutionality see CONSTITUTIONAL LAW, 8 Cyc. 806. See *supra*, II, G, 1, d, (II).

75. *Louisiana.*— State *v.* Banks, 106 La. 480, 31 So. 53.

Nevada.—Hettel *v.* Esmeralda County First Judicial Dist. Ct., 30 Nev. 382, 96 Pac. 1062.

New York.—Jewell *v.* Ithaca, 36 Misc. 499, 73 N. Y. Suppl. 953 [*affirmed* in 72 N. Y. App. Div. 220, 76 N. Y. Suppl. 126].

North Dakota.— State *v.* Duis, 17 N. D. 319, 116 N. W. 751.

England.— Curtis *v.* Stovin, 22 Q. B. D. 513, 58 L. J. Q. B. 174, 60 L. T. Rep. N. S. 772, 37 Wkly. Rep. 315.

See 44 Cent. Dig. tit. "Statutes," § 263.

76. State *v.* Louisiana, etc., R. Co., 215 Mo. 479, 114 S. W. 956; Hough *v.* Porter, 51 Oreg. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.

77. *In re* Wood, 137 Cal. 129, 69 Pac. 900; New York Mut. L. Ins. Co. *v.* Prewitt, 127 Ky. 399, 105 S. W. 463, 31 Ky. L. Rep. 1319, 32 Ky. L. Rep. 298, 537; Farnum *v.* Blackstone Canal Corp., 8 Fed. Cas. No. 4,675, 1 Sumn. 46.

78. Lanham *v.* Lanham, 136 Wis. 360, 117 N. W. 787, 128 Am. St. Rep. 1085, 17 L. R. A. N. S. 804.

79. Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869; State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; Great Northern R. Co. *v.* U. S., 155 Fed. 945, 84 C. C. A. 93

plainly,[80] implied in a statute is as much a part of it as that which is expressed.[81] But a statute should not be extended beyond the fair and reasonable meaning of its terms [82] because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning.[83] The grant of a specific power or the imposition of a definite duty confers by implication authority to do whatever is necessary to execute the power or perform the duty.[84] Where a statute deals with a genus, and the thing which afterward comes into existence is a species thereof, the language of the statute will generally be extended to the new species,[85] although it was not known and could not have been contemplated by the legislature when the act was passed; but where the statute shows plainly that the word is not used as describing the whole genus put forward as the one applicable to the case, but only some particular species thereof, the rule has no application.[86]

g. Matters Omitted.[87] Where a statute is incomplete or defective,[88] whether as a result of inadvertence,[89] or because the case in question was not foreseen or contemplated,[90] it is beyond the province of the courts to supply the omissions,[91] even though as a result the statute is a nullity.[92] But where the ordinary interpretation of a statute leads to consequences so dangerous and absurd that they could never have been intended, the court may adopt a construction from analogous provisions, and thus supply an omission.[93] Where a statute prescribes the

[*affirmed* in 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567].

A necessary implication is not one which shuts out every other possible or imaginary conclusion, and from which there is no escape, but an implication which, under all the circumstances, is compelled by a reasonable view of the statute, and the contrary of which would be improbable and absurd. Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869.

80. Riddick *v.* Walsh, 15 Mo. 519 (holding that a new statute making substantially the same provision for the widow as a former one must be construed to repeal the former provision); Gorham *v.* Steinau, 10 Ohio S. & C. Pl. Dec. 131, 7 Ohio N. P. 478.

81. **The question of implication is essentially a question of legislative intent.**—Bailey *v.* State, 163 Ind. 165, 71 N. E. 655; Bressler's Petition, 6 Pa. Dist. 656.

Where the provision of a statute is general, everything that is necessary to make it effectual is supplied by implication. Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277; State *v.* Cain, 78 S. C. 348, 58 S. E. 937; Hogan *v.* Piggott, 60 W. Va. 541, 56 S. E. 189.

82. Crawford *v.* State, Minor (Ala.) 143; Morgan Park *v.* Knopf, 210 Ill. 453, 71 N. E. 340; Morris Canal, etc., Co. *v.* State, 24 N. J. L. 62.

83. Tompkins *v.* Penn Yan First Nat. Bank, 18 N. Y. Suppl. 234.

An inference will not be made that will defeat the object of the law.— Cook *v.* Hamilton County, 6 Fed. Cas. No. 3,157, 6 McLean 112.

Inference that legislature had no intention of overturning established principles of law.— Lowe *v.* Yolo County Consol. Water Co., 8 Cal. App. 167, 96 Pac. 379; Boonville *v.* Ormrod, 26 Mo. 193.

The application of particular provisions is not to be extended beyond the general scope of the statute, unless such extension is manifestly designed. *In re* Tickner, 13 Mich. 44.

An implication arising from a portion of a statute must yield to the general intent. Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746.

A penalty will not be raised by implication. — Jones *v.* Estis, 2 Johns. (N. Y.) 379.

84. Brown *v.* Clark, 102 Tex. 323, 116 S. W. 360 [*reversing* (Civ. App. 1908) 108 S. W. 421].

85. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453.

86. Birmingham *v.* Birmingham Canal Navigations, 3 Loc. Gov. 1287, 21 T. L. R. 548.

87. **For words omitted see** *infra,* VII, A, 3, p.

88. Swift *v.* Luce, 27 Me. 285.

An exception not made by the legislature cannot be read into the statute.— Kunkalman *v.* Gibson, 171 Ind. 503, 84 N. E. 985, 86 N. E. 850; Siren *v.* State, 78 Nebr. 778, 111 N. W. 798; U. S. *v.* Musgrave, 160 Fed. 700.

89. Ripley *v.* Gifford, 11 Iowa 367.

90. Hull *v.* Hull, 2 Strobh. Eq. (S. C.) 174. See *supra,* VII, A, 2, f.

91. Com. *v.* Gouger, 21 Pa. Super. Ct. 217, 229, where the court says: "But where an enactment is plain and sensible, and, according to any meaning, broad or narrow, popular or technical, which may be ascribed to the words, does not apply to the case in hand, it is not permissible for the courts to add or omit words, in order to make it so apply, even though it may be clear to them that the case is as fully within the mischief to be remedied as the cases provided for. This would be, not to construe, but to amend the law, which is within the exclusive province of the legislature."

92. Hughes' Case, 1 Bland (Md.) 46; State *v.* Reneau, 75 Nebr. 1, 104 N. W. 1151, 106 N. W. 451; Benton *v.* Wickwire, 54 N. Y. 226.

93. Foley *v.* Bourg, 10 La. Ann. 129.

manner in which a certain thing may be done, the court must act according to the prescribed mode, so far as applicable, and in all other respects must be governed by its own established course of proceeding, in so far as it can be modified and adapted to the positive enactments of the legislature.[94]

3. Meaning of Language — a. In General. In the interpretation of statutes words in common use [95] are to be construed in their natural, plain, and ordinary signification.[96] It is a very well-settled rule that so long as the language used is

94. Hughes' Case, 1 Bland (Md.) 46.

95. For technical words see *infra*, VII, A, 3, f.

96. *Alabama.*—Wetumpka *v.* Winter, 29 Ala. 651.

California.— Gross *v.* Fowler, 21 Cal. 392; Quigley *v.* Gorham, 5 Cal. 418, 63 Am. Dec. 139; *In re* McCoy, 10 Cal. App. 116, 101 Pac. 419.

Connecticut.— Southington *v.* Southington Water Co., 80 Conn. 646, 658, 69 Atl. 1023, where the court said: "If some other meaning was intended, some other appropriate expression would have been employed."

District of Columbia.— *In re* Mark Cross Co., 26 App. Cas. 101; Duehay *v.* District of Columbia, 25 App. Cas. 434.

Florida.— Southern Bell Tel., etc., Co. *v.* D'Alemberte, 39 Fla. 25, 21 So. 570.

Illinois.— Chudnovski *v.* Eckels, 232 Ill. 312, 83 N. E. 846; People *v.* Illinois, etc., Canal Com'rs, 4 Ill. 153.

Indiana.—Indianapolis Northern Tract. Co. *v.* Brennan, (1909) 87 N. E. 215; Kunkalman *v.* Gibson, 171 Ind. 503, 84 N. E. 985, 86 N. E. 850; Boyer *v.* State, 169 Ind. 691, 83 N. E. 350.

Louisiana.— Maysville *v.* Maysville St. R. etc., Co., 128 Ky. 673, 108 S. W. 960, 32 Ky. L. Rep. 1366; Civ. Code, § 14.

Maine.— State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901 (holding that words "should be construed according to their ordinary and popular meaning in connection with the subject matter to which they relate"); Davis *v.* Randall, 97 Me. 36, 53 Atl. 835; Jones *v.* Jones, 18 Me. 308, 38 Am. Dec. 723.

Maryland.—Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522; Allen *v.* Mut. F. Ins. Co., 2 Md. 111.

Michigan.— Bacon *v.* State Tax Com'rs, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524, 60 L. R. A. 321.

Mississippi.— Green *v.* Weller, 32 Miss. 650.

Missouri.— McFarland *v.* Missouri, etc., R. Co., 94 Mo. App. 336, 68 S. W. 105.

Nebraska.— State *v.* Byrum, 60 Nebr. 384, 83 N. W. 207; Hagenbuck *v.* Reed, 3 Nebr. 17.

New Hampshire.— *In re* Justices' Opinion, 74 N. H. 606, 68 Atl. 873; Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

New Jersey.— Lake *v.* Ocean City, 62 N. J. L. 160, 41 Atl. 427; McLorinan *v.* Bridgewater Tp., 49 N. J. L. 614, 10 Atl. 187; Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114.

New York.— New York *v.* Manhattan R. Co., 192 N. Y. 90, 84 N. E. 745 [*affirming* 119 N. Y. App. Div. 240, 100 N. Y. Suppl. 609]; Benton *v.* Wickwire, 54 N. Y. 226; *In re* Fox, 52 N. Y. 530, 11 Am. Rep. 751 [*affirmed* in 94 U. S. 315, 24 L. ed. 192]; People *v.* Bashford, 128 N. Y. App. Div. 351, 112 N. Y. Suppl. 502 [*affirmed* in 128 N. Y. App. Div. 357, 112 N. Y. Suppl. 1143]; People *v.* Glynn, 128 N. Y. App. Div. 257, 112 N. Y. Suppl. 695; Lee *v.* Dill, 39 Barb. 516, 16 Abb. Pr. 92 [*affirmed* in 41 N. Y. 619]; Cruger *v.* Cruger, 5 Barb. 225; Matter of Tipple, 13 N. Y. Suppl. 263, 2 Connoly Surr. 508.

Ohio.— Manuel *v.* Manuel, 13 Ohio St. 458; Stokes *v.* Logan County, 2 Ohio Dec. (Reprint) 122, 1 West. L. Month. 448.

Pennsylvania.— Pittsburgh *v.* Kalchthaler, 114 Pa. St. 547, 7 Atl. 921; Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20; Gruh *v.* Lancaster Mfg. Co., 1 Wkly. Notes Cas. 264.

Texas.— Engelking *v.* Van Wamel, 26 Tex. 469.

Utah.— Law *v.* Smith, 34 Utah 394, 98 Pac. 300.

Virginia.— Willis *v.* Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L. R. A. N. S. 1009.

West Virginia.— Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336; Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

Wisconsin.— Sharpe *v.* Hasey, 134 Wis. 618, 114 N. W. 1118.

United States.— Lake County *v.* Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 L. ed. 1060; U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27; Brun *v.* Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. N. S. 154; Wadsworth *v.* Boysen, 148 Fed. 771, 78 C. C. A. 437; Corning *v.* Meade County, 102 Fed. 57, 42 C. C. A. 154; Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46; The Samuel E. Spring, 27 Fed. 764; Schriefer *v.* Wood, 21 Fed. Cas. No. 12,481, 5 Blatchf. 215.

England.—Pietermaritzburg *v.* Natal Land, etc., Co., 13 App. Cas. 478, 57 L. J. P. C. 82, 58 L. T. Rep. N. S. 895; Unwin *v.* Hansen, [1891] 2 Q. B. 115, 55 J. P. 662, 60 L. J. Q. B. 531, 65 L. T. Rep. N. S. 511, 39 Wkly. Rep. 587 (per Lord Esher, M. R.); Hornsey Local Bd. *v.* Monarch Invest. Bldg. Soc., 24 Q. B. D. 1, 54 J. P. 391, 59 L. J. Q. B. 105, 61 L. T. Rep. N. S. 867, 38 Wkly. Rep. 85; Nuth *v.* Tamplin, 8 Q. B. D. 247, Coltm. 260, 46 J. P. 692, 51 L. J. Q. B. 177, 30 Wkly. Rep. 346; Collins *v.* Welch, 5 C. P. D. 27, 49 L. J. C. P. 260, 41 L. T. Rep. N. S. 785, 28 Wkly. Rep. 208 (in which Grove, J., speaks of this rule as "the golden rule of construction"); Philpott *v.* St. George's Hospital, 6

unambiguous,[97] a departure from its natural meaning is not justified [98] by any consideration of its consequences,[99] or of public policy;[1] and it is the plain duty of the court to give it force and effect.[2] But in obedience to the cardinal rule of

H. L. Cas. 338, 3 Jur. N. S. 1269, 5 Wkly. Rep. 845, 10 Eng. Reprint 1326; Birmingham *v.* Birmingham Canal Navigations, 3 Loc. Gov. 1287, 21 T. L. R. 548; Smith *v.* Bell, 10 M. & W. 378, 2 R. & Can. Cas. 877.

See 44 Cent. Dig. tit. "Statutes," § 266.

Unless other provisions of the statutes clearly show that the language was used in a different sense.— Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

"It is generally safe to reject an interpretation that does not materially suggest itself to the mind of a casual reader, but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey." Shulthis *v.* MacDougal, 162 Fed. 331, 340 [*affirmed* in 170 Fed. 529 (*quoting* Ardmore Coal Co. *v.* Bevil, 61 Fed. 757, 10 C. C. A. 41)].

97. *District of Columbia.*— McCarthy *v.* McCarthy, 20 App. Cas. 195.

Idaho.— Empire Copper Co. *v.* Henderson, 15 Ida. 635, 99 Pac. 127.

Kentucky.— James *v.* U. S. Fidelity, etc., Co., (1909) 117 S. W. 406; Com. *v.* Glove, (1909) 116 S. W. 769.

Louisiana.— Walker *v.* Vicksburg, etc., R. Co., 110 La. 718, 34 So. 749; Civ. Code, § 13.

Maryland.— Cearfoss *v.* State, 42 Md. 403.

Michigan.— Bidwell *v.* Whitaker, 1 Mich. 469.

Mississippi.— Yerger *v.* State, 91 Miss. 802, 45 So. 849; Koch *v.* Bridges, 45 Miss. 247.

Missouri.— St. Louis, etc., R. Co. *v.* Clark, 53 Mo. 214.

Nebraska.— State *v.* Insurance Co. of North America, 71 Nebr. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

Nevada.— *Ex p.* Rickey, (1909) 100 Pac. 134.

New Jersey.— Rahway Water Com'rs *v.* Brewster, 42 N. J. L. 125; Douglass *v.* Essex County, 38 N. J. L. 214.

New York.— People *v.* Long Island R. Co., 194 N. Y. 130, 87 N. E. 79 [*affirming* 126 App. Div. 477, 110 N. Y. Suppl. 512]; Newell Universal Mill Co. *v.* Muxlow, 115 N. Y. 170, 21 N. E. 1048; Johnson *v.* Hudson River R. Co., 49 N. Y. 455.

North Carolina.— State *v.* Barco, 150 N. C. 792, 63 S. E. 673.

Ohio.— Slingluff *v.* Weaver, 66 Ohio St. 621, 64 N. E. 574.

Pennsylvania.— Com. *v.* Gouger, 21 Pa. Super. Ct. 217.

South Dakota.—*Ex p.* Brown, 21 S. D. 515, 114 N. W. 303.

Tennessee.— Atlantic Coast Line R. Co. *v.* Richardson, 121 Tenn. 448, 117 S. W. 496.

Texas.— Philadelphia Fire Assoc. *v.* Love, 101 Tex. 876, 108 S. W. 158, 810; Chambers *v.* Hill, 26 Tex. 472; Blanks *v.* Missouri, etc., R. Co., (Civ. App. 1909) 116 S. W. 377.

Utah.— State *v.* Waugham, (1909) 100 Pac. 934.

Wisconsin.— State *v.* Hinkel, 136 Wis. 66, 116 N. W. 639; Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

United States.— U. S. *v.* Musgrave, 160 Fed. 700; U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. N. S. 167; U. S. *v.* Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. N. S. 185; U. S. *v.* York, 131 Fed. 323; Swarts *v.* Siegel, 117 Fed. 13, 54 C. C. A. 399; Virginia Coupon Cases, 25 Fed. 641; U. S. *v.* Ragsdale, 27 Fed. Cas. No. 16,113, Hempst. 479. *Compare* Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508].

England.— Richards *v.* McBride, 8 Q. B. D. 119, 46 J. P. 247, 51 L. J. M. C. 15, 45 L. T. Rep. N. S. 677, 30 Wkly. Rep. 121.

See 44 Cent. Dig. tit. "Statutes," § 266.

98. U. S. *v.* Goldenberg, 168 U. S. 95, 18 S. Ct. 3, 42 L. ed. 394; Franklin Sugar Refining Co. *v.* U. S., 153 Fed. 653.

99. *Illinois.*— Diederich *v.* Rose, 228 Ill. 610, 81 N. E. 1140; Frye *v.* Chicago, etc., R. Co., 73 Ill. 399; Schæffer *v.* Burnett, 120 Ill. App. 79 [*affirmed* in 221 Ill. 315, 77 N. E. 546].

Louisiana.— State *v.* Mix, 8 Rob. 549.

Maine.—Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559.

Maryland.— Collins *v.* Carman, 5 Md. 503.

Missouri.— State *v.* Wilder, 206 Mo. 541, 105 S. W. 272.

Ohio.— Morris Coal Co. *v.* Donley, 73 Ohio St. 298, 76 N. E. 945.

Vermont.— State *v.* Franklin County Sav. Bank, etc., Co., 74 Vt. 246, 52 Atl. 1069.

United States.— Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 15 S. Ct. 508, 39 L. ed. 601; Denn *v.* Reid, 10 Pet. 524, 9 L. ed. 519.

See 44 Cent. Dig. tit. "Statutes," § 266.

Not even to preserve the statute from unconstitutionality.—Austin *v.* Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552.

1. Hyatt *v.* Taylor, 42 N. Y. 258.

2. *Colorado.*— Litch *v.* People, 19 Colo. App. 421, 75 Pac. 1079.

Indiana.— Green *v.* Cheek, 5 Ind. 105; Peoria First Nat. Bank *v.* Farmers, etc., Nat. Bank, (App. 1907) 82 N. E. 1013.

Louisiana.— Denton *v.* Reading, 22 La. Ann. 607.

Massachusetts.—Doane *v.* Phillips, 12 Pick. 223; Pearce *v.* Atwood, 13 Mass. 324.

Missouri.— State *v.* Gammon, 73 Mo. 421.

Oregon.— Dutro *v.* Ladd, 50 Oreg. 120, 91 Pac. 459.

United States.— U. S. *v.* Warner, 28 Fed. Cas. No. 16,643, 4 McLean 463.

See 44 Cent. Dig. tit. "Statutes," § 266.

The language used need not be the most accurate.— Kentucky Seminary *v.* Payne, 3

ascertaining the intention of the legislature,[3] if more than one significance may reasonably be attached to the language used,[4] or a literal construction will make the act absurd,[5] or will lead to injustice,[6] the court may properly resort to construction.[7]

b. Different Languages and Translations. Before the admission of Louisiana into the Union in 1812, the laws of the territory were passed and promulgated both in English and in French, and each text was entitled to equal respect.[8] But by

T. B. Mon. (Ky.) 161; State *v.* Livingston Concrete Bldg., etc., Mfg. Co., 34 Mont. 570, 87 Pac. 980; McLorinan *v.* Bridgewater Tp., 49 N. J. L. 614, 10 Atl. 187; State *v.* Whealey, 5 S. D. 427, 59 N. W. 211.

There is no room for interpretation of a statute where the language leaves no doubt as to its meaning.— Hunt *v.* Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; King *v.* Armstrong, 9 Cal. App. 368, 99 Pac. 527.

The use of a word in one sense in one clause of a constitution of a state is no evidence that it is used in the same sense in every other clause, and where it is used in but one sense throughout the constitution it does not follow that the legislature used it in the sense in statutes subsequently enacted. Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621.

But when it appears that the framers have used a word in a particular sense generally in the act, it will be presumed that it was intended to be used in the same sense throughout the act, unless the intention to give it a different signification plainly appears in the particular part of the act alleged to be an exception to the general meaning indicated. Green *v.* Weller, 32 Miss. 650.

Custom or usage cannot override the language of the statute.— U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406 (holding that a custom or usage, if ever admissible to affect the construction of an act of congress, by altering the ordinary meaning of ordinary words or phrases, must be shown to have been so prevalent in all sections where the law was to become operative, and so universal in such sections, as to leave no room for doubt that it was known to the law-makers, and that the statute was enacted with reference thereto); Love *v.* Hinckley, 15 Fed. Cas. No. 8,548, Abb. Adm. 436.

3. *Alabama.*— Favers *v.* Glass, 22 Ala. 621, 58 Am. Dec. 272, holding that a word which has two significations should ordinarily receive that meaning which is generally attached to it in the community; but when this construction would contravene the manifest intention of the legislature, this rule will be disregarded and effect given to the intention.

Illinois.— Chicago *v.* Green, 238 Ill. 258, 87 N. E. 417, holding that the meaning of a statute is to be discovered by construing words, not necessarily in their primary sense, but in the sense in which they were intended to be used.

New Jersey.— Lane *v.* Schomp, 20 N. J. Eq. 82.

South Carolina.— Mills *v.* Southern R. Co., 82 S. C. 242, 64 S. E. 238.

United States.— Apperson *v.* Memphis, 1 Fed. Cas. No. 497, 2 Flipp. 363; U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178.

Canada.— Watson *v.* Maze, 15 Quebec Super. Ct. 268, 272, in which the court said: "The dictionary is not a final and infallible authority in the interpretation of statutes. The judge must seek to discover the intention of the Legislature."

See 44 Cent. Dig. tit. "Statutes," § 266.

A statute couched in crude and unscientific terms will not be construed by the same strict rules as a consistent and scientific one. Pelham *v.* Shinn, 194 N. Y. 548, 87 N. E. 1128 [*affirming* 129 N. Y. App. Div. 20, 113 N. Y. Suppl. 98]; Reynolds *v.* Bingham, 193 N. Y. 601, 86 N. E. 1131 [*affirming* 126 N. Y. App. Div. 289, 110 N. Y. Suppl. 520].

4. Jeffersonville *v.* Weems, 5 Ind. 547; Houston *v.* Potter, 41 Tex. Civ. App. 381, 91 S. W. 389; Caledonian R. Co. *v.* North British R. Co., 6 App. Cas. 114, 29 Wkly. Rep. 685; Cope *v.* Doherty, 2 De G. & J. 614, 4 Jur. N. S. 699, 27 L. J. Ch. 600, 6 Wkly. Rep. 695, 59 Eng. Ch. 482, 44 Eng. Reprint 1127.

5. State *v.* Clark, 29 N. J. L. 96; Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

6. *In re* Brockelbank, 23 Q. B. D. 461, 58 L. J. Q. B. 375, 61 L. T. Rep. N. S. 543, 6 Morr. Bankr. Cas. 138, 37 Wkly. Rep. 537; *In re* Hall, 21 Q. B. D. 137, 57 L. J. Q. B. 494, 59 L. T. Rep. N. S. 37, 36 Wkly. Rep. 892 (holding, however, that a very strong case of injunction arising from giving the language of an act of parliament its natural meaning must be made out before the court will construe a section in a way contrary to the natural meaning of the language used); Plumstead Dist. Bd. of Works *v.* Spackman, 13 Q. B. D. 878, 53 L. J. M. C. 142, 51 L. T. Rep. N. S. 760.

7. George *v.* Board of Education, 33 Ga. 344; Opinion of Justices, 7 Mass. 523.

Construction not supported by the words cannot be adopted. Frye *v.* Chicago, etc., R. Co., 73 Ill. 399.

Where the courts have construed and applied terms used in a statute, the meaning attached by the courts will prevail over the popular conception of the terms. Nephi Plaster, etc., Co. *v.* Juab County, 33 Utah 114, 93 Pac. 53, 14 L. R. A. N. S. 1043.

8. State *v.* Mix, 8 Rob. (La.) 549; Hudson *v.* Grieve, 1 Mart. (La.) 143, 144, in which the court said: "They must be taken

the first constitution, adopted in 1812, it was provided that laws should be enacted in English, and the English text of statutes adopted since that time has been the law.[9] Since 1812 the French text of laws passed before that date has been entitled to great respect,[10] but if it cannot be reconciled with the English the latter must prevail.[11] In Quebec the English and French versions of the statutes are of equal authority,[12] and are interpreted as one and the same enactment.[13] Where a statute has first been enacted in a foreign language and afterward translated into English,[14] its history will be considered in giving it a construction.

c. Rules of Grammar. The ordinary rules of grammar will be applied for the purpose of ascertaining the meaning of a statute,[15] but, after all, they are only rules of construction, and will yield to the clearly disclosed legislative intent.[16]

d. Punctuation. While punctuation, including quotation marks, brackets, etc., is subordinate to the text and can never control the plain meaning of a statute,[17]

as two laws on the same subject, and construed together."

The two texts were considered as parts of a whole, and not as distinct acts. State *v.* Moore, 8 Rob. (La.) 518; State *v.* Dupuy, 2 Mart. (La.) 177.

Where the French expressions were more comprehensive than those in English, or *vice versa*, the more enlarged sense was taken, as thus full effect was given to both texts. Chretien *v.* Theard, 2 Mart. N. S. (La.) 582; Hudson *v.* Grieve, 1 Mart. (La.) 143.

Compliance with either law in matters of procedure was sufficient.— Fink *v.* Lallande, 16 La. 547; Borel *v.* Borel, 3 La. 30; Touro *v.* Cushing, 1 Mart. N. S. (La.) 425; Gray *v.* Trafton, 12 Mart. (La.) 702.

In a criminal statute that text was chosen which was more favorable to the accused. State *v.* Dupuy, 2 Mart. (La.) 177.

9. State *v.* Ellis, 12 La. Ann. 390; Williams *v.* Robinson, 5 La. Ann. 110; State *v.* Mix, 8 Rob. (La.) 549; Emerson *v.* Fox, 3 La. 178.

But the French translation may be consulted where the English text is ambiguous. Breedlove *v.* Turner, 9 Mart. (La.) 353.

This rule was not affected by the provision contained in the constitutions of 1845 and 1852 that the laws should be "promulgated" in both the English and French languages. State *v.* Fontenot, 112 La. 628, 36 So. 630; Lafourche Parish *v.* Terrebonne Parish, 34 La. Ann. 1230; State *v.* Ellis, 12 La. Ann. 390.

10. Durnford *v.* Clark, 3 La. 199.

The French text of the code of practice is entitled to more weight than the French text of other laws, as it is the original from which the English text is a translation. Emerson *v.* Fox, 3 La. 178.

11. Viterbo *v.* Friedlander, 120 U. S. 707, 7 S. Ct. 962, 30 L. ed. 776.

12. Davis *v.* Montreal, 27 Can. Sup. Ct. 539.

13. **Where, owing to a difference between the two versions,** there is uncertainty as to the intention of the legislature, the one or the other of the two versions will prevail according to the following rules: (1) If the variance occurs in a statute consolidating previous statutes, or in a statute founded upon the preëxisting law, that version will prevail which is the more consistent with the former law. (2) If the variance occurs in a statute changing the law, the ordinary rules of legal interpretation will be applied to determine the intention of the legislature. Thus in a penal statute that version will prevail which is more favorable to the accused. Roy *v.* Davidson, 15 Quebec Super. Ct. 83; Thivierge *v.* Cinqmars, 13 Quebec Super. Ct. 398.

14. Douglass *v.* Lewis, 3 N. M. 345, 9 Pac. 377.

15. *District of Columbia.*— Ohio Nat. Bank *v.* Berlin, 26 App. Cas. 218.

Indiana.— Peoria First Nat. Bank *v.* Farmers, etc., Nat. Bank, 171 Ind. 323, 86 N. E. 417, (App. 1907) 82 N. E. 1013, holding that considerations of grammatical and rhetorical usage are not always controlling in construing a statute, where an intent in conflict therewith is disclosed, but are not unimportant and may influence a doubtful case, and where there is nothing out of accord therewith, either in the particular language or the general intent, they are of controlling force.

Missouri.— State *v.* Louisiana, etc., R. Co., 215 Mo. 479, 114 S. W. 956.

Montana.— Jay *v.* Cascade County School Dist. No. 1, 24 Mont. 219, 61 Pac. 250.

New York.— Coxson *v.* Doland, 2 Daly 66.

England.—Richards *v.* McBride, 8 Q. B. D. 119, 46 J. P. 247, 51 L. J. M. C. 15, 45 L. T. Rep. N. S. 677, 30 Wkly. Rep. 121.

See 44 Cent. Dig. tit. "Statutes," § 268.

16. State *v.* Scaffer, 95 Minn. 311, 104 N. W. 139; Fremont, etc., R. Co. *v.* Pennington County, 20 S. D. 270, 105 N. W. 929.

17. Waters-Pierce Oil Co. *v.* State, 48 Tex. Civ. App. 162, 106 S. W. 918; Union Refrigerator Transit Co. *v.* Lynch, 18 Utah 378, 55 Pac. 639, 48 L. R. A. 790; Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264 [*reversing* 116 Fed. 867].

Quotation marks are marks of punctuation. — State *v.* Banfield, 43 Oreg. 287, 72 Pac. 1093.

Brackets.— *In re* Schilling, 53 Fed. 81, 83, 3 C. C. A. 440, where the court says: "The curved lines or brackets are, it is true, punctuation, but they are made with forethought, and for the purpose of clearness and definite-

it is nevertheless proper, in case of doubt, that punctuation, etc., should operate as an aid in the construction and interpretation of the statute.[18]

e. Existence of Ambiguity.[19] An ambiguity exists in a statute where it is susceptible of two or more different meanings or applications without doing violence to its terms.[20]

f. Technical Terms. Terms of art, or technical words and phrases [21] used in a statute, and such others as may have acquired a peculiar and appropriate meaning in the law,[22] must be interpreted in accordance with their received meaning and acceptation with the learned in the art, trade, or profession to which they belong, unless it clearly appears from the context, or otherwise, that it was the intention of the legislature to use them in a different sense.[23]

g. Associated Words. In accordance with the maxim, *noscitur a sociis*,[24] the meaning of a word used in a statute must be construed in connection with the words with which it is associated.[25] Where several words are connected by a copulative conjunction, they are presumed to be of the same class,[26] unless a contrary intention appears.[27]

h. General and Specific Words [28] — (i) *In General.* General words in a statute should receive a general construction;[29] but they must be understood

ness. They designate much more distinctly than by the use of commas the character of the clause which is included."

18. Seiler *v.* State, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448; Taylor *v.* Caribou, 102 Me. 401, 67 Atl. 2; Blood *v.* Beal, 100 Me. 30, 60 Atl. 427; U. S. *v.* Three Railroad Cars, 28 Fed. Cas. No. 16,513, 1 Abb. 196.

19. See AMBIGUITY, 2 Cyc. 278.

20. State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394, holding that mere informality in phraseology or clumsiness of expression does not constitute an ambiguity if the language imports one intent with reasonable certainty.

21. *Louisiana.*— La. Civ. Code, art. 15.

Massachusetts.— *Ex p.* Hall, 1 Pick. 261, military terms.

Missouri.— State *v.* Missouri Pac. R. Co., 219 Mo. 156, 117 S. W. 1173; State *v.* Murlin, 137 Mo. 297, 38 S. W. 923; Rev. St. (1899) § 4160.

Tennessee.— State *v.* Smith, 5 Humphr. 393.

Wisconsin.—Sharpe *v.* Hasey, 134 Wis. 618, 114 N. W. 1118.

England.— The Dunelm, 9 P. D. 164, 5 Aspin. 304, 53 L. J. P. D. & Adm. 81, 51 L. T. Rep. N. S. 214, 32 Wkly. Rep. 970.

See 44 Cent. Dig. tit. "Statutes," § 270.

"Passenger train," and "regular passenger train," have no technical meaning in law and are to be construed in their ordinary sense. State *v.* Missouri Pac. R. Co., 219 Mo. 156, 117 S. W. 1173.

22. Merchants' Bank *v.* Cook, 4 Pick. (Mass.) 405 (holding that in construing a statute relating to courts and legal proceedings, the legislature will be considered as speaking technically, unless from the statute itself it appears that they made use of the terms in a more popular sense); Green *v.* Weller, 32 Miss. 650; Loewy *r.* Gordon, 129 N. Y. App. Div. 459, 114 N. Y. Suppl. 211; Ruckmoboye *r.* Lulloobhoy Mottichund, 5 Moore Indian App. 234, 18 Eng. Reprint 884, 8 Moore P. C. 4, 14 Eng. Reprint 2.

Common-law terms.—*Alabama.*— *Ex p.* Vincent, 26 Ala. 145, 62 Am. Dec. 714.

Arkansas.— Fort *v.* Brinkley, 87 Ark. 400, 112 S. W. 1084.

Indiana.— Western Union Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. 604.

North Carolina.— Vann *r.* Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461.

Tennessee.— Apple *r.* Apple, 1 Head 348.

United States.—U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209.

See 44 Cent. Dig. tit. "Statutes," § 270.

Words that have acquired a well-understood meaning, through judicial interpretation.— The Abbotsford *v.* Johnson, 98 U. S. 440, 25 L. ed. 168; U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73.

23. Sargent *v.* Concord Union School-Dist., 63 N. H. 528, 2 Atl. 641; Robinson *r.* Varnell, 16 Tex. 382, holding that where, if the words of a statute should be construed according to their technical signification, it would be inoperative, but, if construed according to their common signification, it would have a reasonable operation, the latter mode of construction should be adopted.

24. See 29 Cyc. 1065.

25. Carson *v.* Shelton, 128 Ky. 248, 107 S. W. 793, 32 Ky. L. Rep. 1083, 15 L. R. A. N. S. 509; Reg. *v.* France, 7 Quebec Q. B. 83.

26. Carson *v.* Shelton, 128 Ky. 248, 107 S. W. 793, 32 Ky. L. Rep. 1083, 15 L. R. A. N. S. 509.

27. State *v.* Ransell, 41 Conn. 433.

28. **For conflict between general and specific provisions** of a statute see *infra*, VII, A, 4, c.

For conflict between general and special statutes see *infra*, VII, A, 7, d, (IV).

29. *Georgia.*— Torrance *v.* McDougald, 12 Ga. 526.

Maine.— Jones *v.* Jones, 18 Me. 308, 36 Am. Dec. 723.

as used in reference to the subject-matter in the mind of the legislature, and strictly limited to it,[30] and should also be so limited in their application as not to lead to injustice,[31] oppression, or an absurd consequence.[32] So words of general import in a statute are limited by words of restricted import immediately following and relating to the same subject.[33] It is generally true that a statute which treats of things or persons of an inferior degree cannot by general words be extended to those of a superior degree; [34] but when all those of an inferior degree are embraced by the express words used, and there are still general words, they must be applied to things of a higher degree than those enumerated.[35]

(II) *Doctrine of Ejusdem Generis.* By the rule of construction known as "*ejusdem generis*," where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.[36]

Montana.— Lewis *v.* Northern Pac. R. Co., 36 Mont. 207, 92 Pac. 469.

North Carolina.— Efland *v.* Southern R. Co., 146 N. C. 135, 59 S. E. 355, holding that the word "company" may be construed to include all corporations, companies, firms, or individuals in statutes passed in promotion of the public good, such as the enforcement of the collection of revenue, regulation of the exercise of quasi-public franchises, and in other similar matters.

Ohio.— McKent *v.* Kent, 2 Ohio Dec. (Reprint) 370, 2 West. L. Month. 540.

Utah.— Skeen *v.* Craig, 31 Utah 20, 86 Pac. 487.

England.— Rex *v.* Russell, [1901] A. C. 446, 20 Cox C. C. 51, 70 L. J. K. B. 998, 85 L. T. Rep. N. S. 253, 17 T. L. R. 685 (holding that, under offenses against Pen. Act (1861), § 57, which enacts "Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony," the words "or elsewhere" cannot be so construed as to mean "elsewhere within the king's domain"); Minet *v.* Leman, 20 Beav. 269, 3 Eq. Rep. 501, 1 Jur. N. S. 410, 24 L. J. Ch. 545, 3 Wkly. Rep. 359, 52 Eng. Reprint 606; Beckford *v.* Wade, 17 Ves. Jr. 87, 11 Rev. Rep. 20, 34 Eng. Reprint 34 (full discussion).

Canada.— Canada Atlantic R. Co. *v.* Henderson, 29 Can. Sup. Ct. 632 [*affirming* 25 Ont. App. 437]; Reg. *v.* Strauss, 5 Brit. Col. 486.

See 44 Cent. Dig. tit. "Statutes," § 272.

30. State *v.* Fry, 186 Mo. 198, 85 S. W. 328.

31. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

Act of God.—An act which in general terms imposes a liability in a certain event is to be read subject to the implied qualification that the liability will not arise where the event happens through the act of God. River Wear Com'rs *v.* Adamson, 1 Q. B. D. 546, 35 L. T. Rep. N. S. 118, 24 Wkly. Rep. 872.

32. State *v.* Smiley, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903; Chinese Merchant's Case, 13 Fed. 605, 7 Sawy. 546; The Duke of Buccleuch, 15 P. D. 86, 6 Aspin. 471, 62 L. T. Rep. N. S. 94.

33. Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116.

34. Ellis *v.* Murray, 28 Miss. 129; State *v.* Longfellow, 93 Mo. App. 364, 67 S. W. 665 [*followed* in State *v.* Longfellow, 95 Mo. App. 660, 69 S. W. 596]; Ailesbury *v.* Pattison, Dougl. (3d ed.) 28, 99 Eng. Reprint 22; Williams *v.* Cronwall, 32 Ont. 255.

35. Ellis *v.* Murray, 28 Miss. 129.

36. *Indiana.*—Wiggins *v.* State, (1909) 87 N. E. 718; State *v.* Jackson, 168 Ind. 384, 81 N. E. 62.

Iowa.— Rohlf *v.* Kasemeier, 140 Iowa 182, 118 N. W. 276, 23 L. R. A. N. S. 1284.

New York.— State Bd. of Pharmacy *v.* Gasau, 195 N. Y. 197, 88 N. E. 55 [*reversing* 122 N. Y. App. Div. 803, 107 N. Y. Suppl. 409 (*affirming* 52 Misc. 490, 102 N. Y. Suppl. 539)]; Lantry *v.* Mede, 194 N. Y. 544, 87 N. E. 1121 [*affirming* 127 N. Y. App. Div. 557, 111 N. Y. Suppl. 833 (*reversing* 58 Misc. 221, 108 N. Y. Suppl. 1099)].

Pennsylvania.— Brandon *v.* Davis, 2 Leg. Rec. 142.

South Carolina.— State *v.* Williams, 2 Strobh. 474.

Virginia.— American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466.

United States.—U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178; Merchants' Nat. Bank *v.* U. S., 42 Ct. Cl. 6.

See 44 Cent. Dig. tit. "Statutes," § 272.

This rule is especially applicable to statutes defining crimes and regulating their punishment.— State *v.* Erwin, 91 N. C. 545; Lane *v.* State, 39 Ohio St. 312 (holding that under Rev. St. § 7215, which provides that an indictment shall not be deemed invalid for any of certain enumerated defects, "nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits," the defects mentioned refer only to matters of form, and the words quoted apply only to such matters as are *ejusdem generis* with those comprehended in the preceding part of the section); *Ex p.* Muckenfuss, 52 Tex. Cr. 467, 107 S. W. 1131; State *v.* Goodrich, 84 Wis. 359, 54 N. W. 577; Reg. *v.* Reid, 30 Ont. 732.

Authority to do "all other acts as natural persons," in the charter of a corporation fol-

The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus.[37] The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes.[38] The words "other" or "any other" following an enumeration of particular classes are therefore to be read as "other such like," [39] and to include only others of like kind or character.[40] The doctrine

lowing an enumeration of special powers, must be restrained to such other acts as are authorized by its charter or the statutes of the state applicable to the corporation. Erwin *v.* St. Joseph Bd. of Public Schools, 12 Fed. 680, 682, 2 McCrary 608; Gause *v.* Clarksville, 10 Fed. Cas. No. 5,276.

37. Philips *v.* Christian County, 87 Ill. App. 481; Pein *v.* Miznerr, 41 Ind. App. 255, 83 N. E. 784; American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466; Baltimore Merchants' Nat. Bank *v.* U. S., 42 Ct. Cl. 6.

38. Stroud Jud. Dict. [*quoted* in *Ex p.* Williams, (Cal. App. 1906) 87 Pac. 565, 567]; State *v.* Campbell, 76 Iowa 122, 125, 40 N. W. 100; People *v.* Edelstein, 91 N. Y. App. Div. 447, 448, 86 N. Y. Suppl. 861; The City of Salem, 31 Fed. 616, 618, 12 Sawy. 469, 2 L. R. A. 380.

39. *California.*— *Ex p.* Williams, (App. 1906) 87 Pac. 565, 566.

Iowa.— State *v.* Campbell, 76 Iowa 122, 125, 40 N. W. 100.

Massachusetts.— Com. *v.* Dejardin, 126 Mass. 46, 47, 30 Am. Rep. 652.

Minnesota.— Rhone *v.* Loomis, 74 Minn. 200, 204, 77 N. W. 31.

New Hampshire.— Jones *v.* Gibson, 1 N. H. 266, 272.

See 44 Cent. Dig. tit. "Statutes," § 272.

40. The cases in which this rule has been applied are classified below: "Other articles." Carre *v.* New Orleans, 41 La. Ann. 996, 999, 6 So. 893; Jones *v.* Raines, 35 La. Ann. 996, 998; Greenville Ice, etc., Co. *v.* Greenville, 69 Miss. 86, 90, 10 So. 574; Matter of Ludlow, 1 N. Y. Leg. Obs. 322, 323; Warren *v.* Geer, 117 Pa. St. 207, 212, 11 Atl. 415; Rosenbach *v.* Dreyfuss, 2 Fed. 217, 220; *In re* Thiell, 23 Fed. Cas. No. 13,882, 4 Biss. 241, 243; *In re* Williams, 29 Fed. Cas. No. 17,701, 1 Pa. L. J. 212, 214. "Other buildings." McDade *v.* People, 29 Mich. 50; State *v.* Schuchmann, 133 Mo. 111, 116, 33 S. W. 35, 34 S. W. 842; People *v.* Richards, 108 N. Y. 137, 150, 15 N. E. 371, 2 Am. St. Rep. 373; Rutherfoord *v.* Cincinnati, etc., R. Co., 35 Ohio St. 559, 563; Pennsylvania Steel Co. *v.* J. E. Potts Salt, etc., Co., 63 Fed. 11, 15, 11 C. C. A. 11. *Contra,* Gillock *v.* People, 171 Ill. 307, 49 N. E. 712; State *v.* Rogers, 54 Kan. 683, 685, 39 Pac. 219. "Other cases." Bauer *v.* Bauer, 2 N. D. 108, 110, 49 N. W. 418; Wilson *v.* Sandford, 10 How. (U. S.) 99, 101, 13 L. ed. 344. "Other causes." Langstaff *v.* Rock, 13 Mo. 579, 582; State *v.* Hay, 45 Nebr. 321, 331, 63 N. W. 821; *In re* Hawley, 100 N. Y. 206, 211, 3 N. E. 68; *In re* Tilden, 98 N. Y. 434, 442; Matter of Soule, 72 Hun (N. Y.) 594, 597, 25 N. Y. Suppl. 270; Matter of Monteith, 27 Misc. (N. Y.) 163, 164, 58 N. Y. Suppl. 379; State *v.* McGarry, 21 Wis. 496, 498; Edson *v.* Hayden, 20 Wis. 682, 684; Newport News, etc., Co. *v.* U. S., 61 Fed. 488, 490, 9 C. C. A. 579. "Other occupations." St. Louis *v.* Laughlin, 49 Mo. 559, 564; St. Joseph *v.* Porter, 29 Mo. App. 605, 608; Sproul *v.* Murray, 156 Pa. St. 293, 296, 27 Atl. 302; Pardee's Appeal, 100 Pa. St. 408, 412; Winsor *v.* Farmers', etc., Nat. Bank, 81 Pa. St. 304, 307; Merriman *v.* Mullett, 2 Pa. Co. Ct. 360, 362. "Other party." State *v.* Farmer, 54 Mo. 439, 447; Clapp *v.* Hull, 18 R. I. 652, 653, 29 Atl. 687; Kenyon *v.* Peirce, 17 R. I. 794, 798, 24 Atl. 825; Barnes *v.* Dow, 59 Vt. 530, 545, 10 Atl. 258. "Other persons." Guptil *v.* McFee, 9 Kan. 30, 33; Moore *v.* Settle, 82 Ky. 187, 188, 56 Am. Rep. 889; Brooks *v.* Cook, 44 Mich. 617, 619, 7 N. W. 216, 38 Am. Rep. 282; Winters *v.* Duluth, 82 Minn. 127, 133, 84 N. W. 788; Grimes *v.* Byrne, 2 Minn. 89, 103, 105; State *v.* Krueger, 134 Mo. 262, 270, 35 S. W. 604; St. Louis *v.* Laughlin, 49 Mo. 559, 563; State *v.* Longfellow, 93 Mo. App. 364, 372, 67 S. W. 665 [*followed* in State *v.* Longfellow, 95 Mo. App. 660, 667, 69 S. W. 596]; Grant County School Dist. No. 94 *v.* Gautier, 13 Okla. 194, 204, 73 Pac. 954; Bucher *v.* Com., 103 Pa. St. 528, 530; Whitfield *v.* Terrell Compress Co., 26 Tex. Civ. App. 235, 237, 62 S. W. 116; Honerine Min., etc., Co. *v.* Tallerday Steel Pipe, etc., Co., 31 Utah 326, 332, 88 Pac. 9; Lynchburg *v.* Norfolk, etc., R. Co., 80 Va. 237, 246, 249, 56 Am. Rep. 592; Jensen *v.* State, 60 Wis. 577, 582, 19 N. W. 374; Wicker *v.* Comstock, 52 Wis. 315, 316, 9 N. W. 25; Bevitt *v.* Crandall, 19 Wis. 581, 583; U. S. *v.* 1,150½ Pounds of Celluloid, 82 Fed. 627, 636, 27 C. C. A. 231; The City of Salem, 31 Fed. 616, 618, 12 Sawy. 469, 2 L. R. A. 380; Sandiman *v.* Breach, 7 B. & C. 96, 99, 9 D. & R. 796, 5 L. J. K. B. O. S. 298, 31 Rev. Rep. 169, 14 E. C. L. 52. *Compare* Welch *v.* Seymour, 28 Conn. 387, 391, 392 [*cited* in Citizens' Loan Assoc. *v.* Nugent, 40 N. J. L. 215, 218, 29 Am. Rep. 230]. "Other place." Rhone *v.* Loomis, 74 Minn. 200, 204, 77 N. W. 31; Jones *v.* Gibson, 1 N. H. 266, 272; *In re* Kelly, 71 Fed. 545, 550; U. S. *v.* Bevans, 3 Wheat. (U. S.) 336, 389, 4 L. ed. 404. "Other property." People *v.* Cummings, 114 Cal. 437, 441, 46 Pac. 284; Martin *v.* New York, etc., R. Co., 62 Conn 331, 341, 25 Atl. 239; Standard Oil Co. *v.* Swanson, 121 Ga. 412, 415, 49 S. E. 262; Columbus Southern R. Co. *v.* Wright, 89 Ga. 574, 589, 15 S. E. 293 [*cited* in Greene County *v.* Wright, 126 Ga. 504, 511, 54 S. E. 951]; Wall *v.* Platt, 169 Mass. 398, 406, 48 N. E. 270; Brailey *v.* Southborough, 6 Cush. (Mass.)

of *ejusdem generis*, however, is only a rule of construction, to be applied as an aid in ascertaining the legislative intent,[41] and does not control where it clearly appears from the statute as a whole that no such limitation was intended.[42] Nor does

141, 142; Roberts *v.* Detroit, 102 Mich. 64, 66, 60 N. W. 450, 27 L. R. A. 572; Berg *v.* Baldwin, 31 Minn. 541, 542, 18 N. W. 821; Livermore *v.* Camden County, 29 N. J. L. 245, 247; Renick *v.* Boyd, 1 Chest. Co. Rep. (Pa.) 267, 269 [*affirmed* in 99 Pa. St. 555, 557, 44 Am. Rep. 124]; State *v.* Black, 75 Wis. 490, 492, 44 N. W. 635; Alabama *v.* Montague, 117 U. S. 602, 609, 611, 6 S. Ct. 911, 29 L. ed. 1000. "Other thing." Moore *v.* Chicago, 69 Ill. App. 571, 573; Marquis *v.* Chicago, 27 Ill. App. 251, 253; Com. *v.* Dejardin, 126 Mass. 46, 47, 30 Am. Rep. 652. Miscellaneous phrases see Eastern Arkansas Hedge-Fence Co. *v.* Tanner, 67 Ark. 156, 159, 53 S. W. 886; Denman *v.* Webster, (Cal. 1902) 70 Pac. 1063, 1064; People *v.* Chretien, 137 Cal. 450, 452, 70 Pac. 305; People *v.* Parks, 58 Cal. 624, 638; People *v.* Curley, 5 Colo. 412, 415; Maxwell *v.* People, 158 Ill. 248, 254, 41 N. E. 995; Union County *v.* Ussery, 147 Ill. 204, 208, 35 N. E. 618; Wood *v.* Williams, 142 Ill. 269, 275, 31 N. E. 681, 34 Am. St. Rep. 79; Shirk *v.* People, 121 Ill. 61, 65, 11 N. E. 888; Davis *v.* Abstract Constr. Co., 121 Ill. App. 121, 129; Rasure *v.* Hart, 18 Kan. 340, 344, 26 Am. Rep. 772; Campbell *v.* Farmers' Bank, 10 Bush (Ky.) 152, 155; Com. *v.* Kammerer, 13 S. W. 108, 11 Ky. L. Rep. 777; State *v.* Brown, 41 La. Ann. 345, 346, 6 So. 541; Commercial Bank *v.* New Orleans, 17 La. Ann. 190, 195; Sprigg *v.* Garrett Park, 89 Md. 406, 410, 43 Atl. 813; Ripley *v.* Evans, 87 Mich. 217, 228, 49 N. W. 504; State *v.* Barge, 82 Minn. 256, 261, 84 N. W. 911, 53 L. R. A. 428; Winters *v.* Duluth, 82 Minn. 127, 129, 84 N. W. 788; Benson *v.* Chicago, etc., R. Co., 75 Minn. 163, 165, 77 N. W. 798, 74 Am. St. Rep. 444; Doyle *v.* Duluth, 74 Minn. 157, 161, 76 N. W. 1029; U. S. *v.* Gideon, 1 Minn. 292, 296 [*cited* in Patton *v.* State, 93 Ga. 111, 113, 19 S. E. 734, 24 L. R. A. 732]; Turnipseed *v.* Hudson, 50 Miss. 429, 446, 19 Am. Rep. 15; Ellis *v.* Murray, 28 Miss. 129, 142; Ruckert *v.* Grand Ave. R. Co., 163 Mo. 260, 276, 63 S. W. 814; State *v.* Dinnisse, 109 Mo. 434, 438, 19 S. W. 92; Gartside *v.* Orphans' Ben. Ins. Co., 62 Mo. 322, 324; Joplin *v.* Leckie, 78 Mo. App. 8, 12; Edgecomb *v.* His Creditors, 19 Nev. 149, 153, 7 Pac. 533; Erwin *v.* Jersey City, 60 N. J. L. 141, 147, 37 Atl. 732, 64 Am. St. Rep. 584; State *v.* Bayonne Bd. of Education, 54 N. J. L. 313, 314, 23 Atl. 670; People *v.* Richards, 108 N. Y. 137, 148, 150, 15 N. E. 371, 2 Am. St. Rep. 373; Hermance *v.* Ulster County, 71 N. Y. 481, 485; Wood *v.* North Western Ins. Co., 46 N. Y. 421, 426; People *v.* Edelstein, 91 N. Y. App. Div. 447, 448, 86 N. Y. Suppl. 861; Kratzenstein *v.* Lehman, 19 Misc. (N. Y.) 600, 601, 44 N. Y. Suppl. 369; People *v.* Bell, 3 N. Y. Suppl. 812, 813; Woodworth *v.* State, 26 Ohio St. 196, 197; *In re* Barre Water Co., 62 Vt. 27, 30, 20 Atl. 109, 9 L. R. A. 195; Townsend Gas, etc., Co. *v.* Hill, 24 Wash. 469, 473, 64 Pac. 778; People *v.* Dolan, 5 Wyo. 245, 253, 39 Pac. 752; Western Dredging, etc., Co. *v.* Heldmaier, 111 Fed. 123, 125, 49 C. C. A. 264; Crowther *v.* Fidelity Ins., etc., Co., 85 Fed. 41, 42, 29 C. C. A. 1; Crystal Springs Distillery Co. *v.* Cox, 49 Fed. 555, 559, 1 C. C. A. 365; Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372, 377; Gause *v.* Clarksville, 10 Fed. Cas. No. 5,276, 5 Dill. 165, 169, 7 Reporter 519, 19 Alb. L. J. (N. Y.) 253; U. S. *v.* The Mollie, 26 Fed. Cas. No. 15,795, 2 Woods (U. S.) 318, 322; U. S. *v.* Smith, 27 Fed. Cas. No. 16,321, 1 Bond 68, 79; Webb *v.* Bird, 10 C. B. N. S. 268, 286, 30 L. J. C. P. 384, 4 L. T. Rep. N. S. 445, 9 Wkly. Rep. 899, 100 E. C. L. 268; Reg. *v.* Reed, 28 Eng. L. & Eq. 133, 136; Farquharson *v.* Imperial Oil Co., 29 Ont. 206, 210.

41. *Alabama.*— Martin *v.* State, 156 Ala. 89, 47 So. 104.

Illinois.— Mertens *v.* Southern Coal, etc., Co., 235 Ill. 540, 85 N. E. 743 [*affirming* 140 Ill. App. 190].

Indiana.— U. S. Cement Co. *v.* Cooper, (1909) 88 N. E. 69 [*reversing* (App. 1907) 82 N. E. 981]; Pein *v.* Miznerr, 41 Ind. App. 255, 83 N. E. 784.

Minnesota.— Winters *v.* Duluth, 82 Minn. 127, 84 N. W. 788.

Utah.— Nephi Plaster, etc., Co. *v.* Juab County, 33 Utah 114, 93 Pac. 53, 14 L. R. A. N. S. 1043.

United States.— Prindle *v.* U. S., 41 Ct. Cl. 8.

England.— Rex *v.* Russell, [1901] A. C. 446, 20 Cox C. C. 51, 70 L. J. K. B. 998, 85 L. T. Rep. N. S. 253, 17 T. L. R. 685.

See 44 Cent. Dig. tit. "Statutes," § 272.

42. *Alabama.*— Martin *v.* State, 156 Ala. 89, 47 So. 104, holding that the rule is not to be applied to a statute relating to the jurisdiction of the offense of assaults in which no "stick or other weapon" is used, since a "stick" is not technically a "weapon," although the statute manifestly intended it as such; and therefore the phrase "or other weapon" will not be restricted either to a weapon in a technical sense or to what may be commonly termed a weapon, but, as employed, includes any substance or matter foreign to the person used in committing an assault and battery.

California.— *In re* La Société Francaise d'Epargnes et de Prevoyance Mutuelle, 123 Cal. 525, 56 Pac. 458.

Colorado.— Wilson *v.* People, 44 Colo. 608, 99 Pac. 335; Gibson *v.* People, 44 Colo. 600, 99 Pac. 333; Martin *v.* Bond, 14 Colo. 466, 24 Pac. 326.

Connecticut.— Grissell *v.* Housatonic R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138; State *v.* Ransell, 41 Conn. 433.

Kentucky.— Wallace *v.* Young, 5 T. B. Mon. 155.

Massachusetts.— Peirce *v.* Richardson, 9 Metc. 69.

the doctrine apply where the specific words of a statute signify subjects greatly different from one another;[43] nor where the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless.[44]

i. Express Mention and Implied Exclusion.[45] In accordance with the maxim, "*expressio unius est exclusio alterius*," [46] where a statute enumerates the things upon which it is to operate,[47] or forbids certain things,[48] it is to be construed as excluding from its effect all those not expressly mentioned. And where it directs the performance of certain things in a particular manner, it forbids by implication every other manner of performance.[49] So where it prescribes certain conditions, compliance with which are necessary to the existence of a right, no other conditions need be fulfilled.[50] But the maxim should be applied only as a means of discovering the legislative intent,[51] and should never be permitted to defeat the plainly indicated purpose of the legislature.[52] Nor will it generally exclude the application of the statute to things of the same class as those expressly mentioned which have come into existence since the passage of the statute.[53]

Minnesota.— Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481.

Missouri.— Henderson *v.* Wabash, etc., R. Co., 81 Mo. 605; State *v.* Broderick, 7 Mo. App. 19 [*affirmed* in 70 Mo. 622].

New York.— Ossmann *v.* Crowley, 101 N. Y. App. Div. 597, 92 N. Y. Suppl. 29 [*overruling* Lasche *v.* Dearing, 23 Misc. 722, 53 N. Y. Suppl. 58]; Gallagher *v.* Dolan, 27 Misc. 122, 57 N. Y. Suppl. 334 [*overruling* Lasche *v.* Dearing, 23 Misc. 722, 53 N. Y. Suppl. 58].

Ohio.— State *v.* Kelly, 32 Ohio St. 421; Woodworth *v.* State, 26 Ohio St. 196.

South Carolina.— State *v.* Holman, 3 McCord 306.

Texas.— Randolph *v.* State, 9 Tex. 521; Crow *v.* State, 6 Tex. 334 [*followed* in McElroy *v.* Carmichael, 6 Tex. 454].

Washington.— State *v.* Bridges, 19 Wash. 431, 53 Pac. 545.

United States.— U. S. *v.* Louisville, etc., R. Co., 18 Fed. 480; *In re* Sixty-Five Terra Cotta Vases, 10 Fed. 880; Boving *v.* Lawrence, 3 Fed. Cas. No. 1,712, 1 Blatchf. 616.

Canada.— Kennedy *v.* Toronto, 12 Ont. 211.

See 44 Cent. Dig. tit. "Statutes," § 272.

43. McReynolds *v.* People, 230 Ill. 623, 82 N. E. 945; Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481.

44. U. S. Cement Co. *v.* Cooper, (Ind. 1909) 88 N. E. 69 [*reversing* (App. 1907) 82 N. E. 981]; Weiss *v.* Swift, 36 Pa. Super. Ct. 376.

45. For express repeal as raising presumption against further implied repeal see *supra*, VI, A, 3, c, (v).

46. See 19 Cyc. 23.

47. *Alabama.*— Page *v.* Bartlett, 101 Ala. 193, 13 So. 768.

California.— Perkins *v.* Thornburgh, 10 Cal. 189; Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Illinois.— St. Louis Coal Co. *v.* Miller, 236 Ill. 149, 86 N. E. 205.

Indian Territory.— McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043, 58 L. R. A. 878.

Nebraska.— State *v.* Insurance Co. of North America, 71 Nebr. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

South Dakota.— *Ex p.* Brown, 21 S. D. 515, 114 N. W. 303.

West Virginia.— State *v.* Wirt County Ct., 63 W. Va. 230, 59 S. E. 884, 981; Neale *v.* Wood County Ct., 43 W. Va. 90, 27 S. E. 370; Brannon *v.* Kanawha County Ct., 33 W. Va. 789, 11 S. E. 34, 8 L. R. A. 304.

United States.— Johnson *v.* Southern Pac. Co., 117 Fed. 462, 54 C. C. A. 508 [*reversed* on other grounds in 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363]; Oxford Iron Co. *v.* Slafter, 18 Fed. Cas. No. 10,637, 13 Blatchf. 455.

Canada.— Dain *v.* Gossage, 6 Ont. Pr. 103.

See 44 Cent. Dig. tit. "Statutes," § 273.

48. Com. *v.* Kammerer, 13 S. W. 108, 11 Ky. L. Rep. 777.

49. *Iowa.*— Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262.

Ohio.— Harlan *v.* Roberts, 2 Ohio Dec. (Reprint) 473, 3 West. L. Month. 203.

Oregon.— Scott *v.* Ford, 52 Oreg. 288, 97 Pac. 99.

Tennessee.— Rich *v.* Rayle, 2 Humphr. 404.

Texas.— Bryan *v.* Sundberg, 5 Tex. 418.

See 44 Cent. Dig. tit. "Statutes," § 273.

For construction as mandatory or directory see *infra*, VII, A, 8.

50. Hughes *v.* Wallace, (Ky. 1909) 118 S. W. 324.

51. Portland *v.* New England Tel., etc., Co., 103 Me. 240, 68 Atl. 1040; Lexington *v.* Commercial Bank, 130 Mo. App. 687, 692, 108 S. W. 1095 (where the court says: "It has been said, if there is some special reason for mentioning one and none for mentioning the other, the absence of any mention of the latter will not operate as an exclusion, and that the maxim does not apply to a statute in which mention is made by way of example or made in affirmance of existing law or to remove doubts, or when the context shows a different intention"); McFarland *v.* Missouri, etc., R. Co., 94 Mo. App. 336, 68 S. W. 105.

52. Swick *v.* Coleman, 218 Ill. 33, 75 N. E. 807; Kinney *v.* Henring, (Ind. App. 1909) 87 N. E. 1053, 88 N. E. 865; Rex *v.* Russell, [1901] A. C. 446, 20 Cox C. C. 51, 70 L. J. K. B. 998, 85 L. T. Rep. N. S. 253, 17 T. L. R. 685.

53. Portland *v.* New England Tel., etc., Co.,

j. Relative and Qualifying Terms and Their Relation to Antecedents. By what is known as the doctrine of the "last antecedent," relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding,[54] and are not to be construed as extending to [55] or including [56] others more remote, unless such extension is clearly required by a consideration of the entire act.[57]

k. Conjunctive and Disjunctive Words. Whenever necessary to effectuate the obvious intention of the legislature,[58] conjunctive words may be construed as disjunctive,[59] and *vice versa*.[60]

l. Singular and Plural Words. When necessary to give effect to the legislative intent,[61] words in the plural number will be construed to include the singular,[62] and words importing the singular only will be applied to the plural of persons and things.[63]

103 Me. 240, 68 Atl. 1040; Northern Counties Inv. Trust *v.* Sears, 30 Oreg. 388, 41 Pac. 931, 35 L. R. A. 188.

54. *Louisiana.*— Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

Massachusetts.— Quinn *v.* Lowell Electric Light Corp., 140 Mass. 106, 3 N. E. 200; Cushing *v.* Worrick, 9 Gray 382.

Minnesota.— State *v.* Scaffer, 95 Minn. 311, 104 N. W. 139.

New Hampshire.— Fowler *v.* Tuttle, 24 N. H. 9.

New York.— Wood *v.* Baldwin, 10 N. Y. Suppl. 195.

Pennsylvania.—Com. *v.* Burrell, 7 Pa. St. 34. See 44 Cent. Dig. tit. "Statutes," § 274.

55. Fowler *v.* Tuttle, 24 N. H. 9; Fremont, etc., R. Co. *v.* Pennington County, 20 S. D. 270, 105 N. W. 929.

56. Cushing *v.* Worrick, 9 Gray (Mass.) 382.

57. Seiler *v.* State, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448 (holding that punctuation may be considered); State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

58. Where a contrary intention does not clearly appear, the words will be given their natural meaning. Rountree *v.* State, 10 Tex. App. 110; Werner *v.* State, 93 Wis. 266, 67 N. W. 417; Mersey Docks, etc., Bd. *v.* Henderson, 13 App. Cas. 595, 58 L. J. Q. B. 152, 59 L. T. Rep. N. S. 697, 37 Wkly. Rep. 449.

59. State *v.* Myers, 146 Ind. 36, 44 N. E. 801; Douglass *v.* State, 18 Ind. App. 289, 48 N. E. 9; State *v.* Myers, 10 Iowa 448; Barker *v.* Esty, 19 Vt. 131; Boag *v.* Lewis, 1 U. C. Q. B. 357.

60. *Colorado.*— Thomas *v.* Grand Junction, 13 Colo. App. 80, 56 Pac. 665.

Illinois.— Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 58 N. E. 318, holding that the word "or" may be construed to mean "and" or "with."

Iowa.— State *v.* Brandt, 41 Iowa 593, 615, where the court says: "That courts have interpreted the word 'and' as a disjunctive, and the word 'or' as a conjunctive when the sense absolutely required, and this in extreme cases in criminal statutes, against the accused, is laid down as elemental."

Kentucky.— James *v.* U. S. Fidelity, etc., Co., (1909) 117 S. W. 406.

New Jersey.— Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394.

New York.— Folmsbee *v.* Amsterdam, 142 N. Y. 118, 36 N. E. 821; People *v.* Rice, 138 N. Y. 151, 33 N. E. 846; People *v.* Butler, 125 N. Y. App. Div. 384, 109 N. Y. Suppl. 900; Coxson *v.* Doland, 2 Daly 66, 67, in which the court says: "'Or' is a conjunction, marking distribution, an alternative, or opposition, and the conjunction 'nor' performs the same office in negative propositions."

North Carolina.— Sparrow *v.* Davidson College, 77 N. C. 35; State *v.* Mitchell, 27 N. C. 350.

Oklahoma.— State *v.* Hooker, (1908) 98 Pac. 964.

Pennsylvania.— Rolland *v.* Com., 82 Pa. St. 306, 22 Am. Rep. 758; Foster *v.* Com., 8 Watts & S. 77.

England.— Metropolitan Bd. of Works *v.* Steed, 8 Q. B. D. 445, 51 L. J. M. C. 21, 45 L. T. Rep. N. S. 612, 30 Wkly. Rep. 891.

See 44 Cent. Dig. tit. "Statutes," § 275.

Contra.— U. S. *v.* Ten Cases Shawls, 28 Fed. Cas. No. 16,448, 2 Paine 162.

And see State *v.* Tiffany, 44 Wash. 602, 604, 87 Pac. 932, in which the court says: "But the plain language of a statute can only be disregarded, and this exceptional rule of construction can only be resorted to, where the act itself furnishes cogent proof of the legislative error. . . . The word 'or' cannot be construed to mean 'and' where the words, wilfully or wantonly, or wilfully, maliciously or wantonly, are used in defining a crime."

The rule applies even to penal statutes and against the accused. See cases cited *supra*, this note.

61. Garrigus *v.* Parke County, 39 Ind. 66; Jocelyn *v.* Barrett, 18 Ind. 128.

62. Hogan *v.* State, 36 Wis. 226, 247 (holding that in a statute providing that an act, in order to constitute murder in the second degree, must be imminently dangerous to "others," the word does not imply that the act must be dangerous to several persons, but "to other or others . . . than the person committing it"); Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722.

63. People *v.* Aurora, 84 Ill. 157; Ellis *v.* Whitlock, 10 Mo. 781; Atty.-Gen. *v.* Temple, 29 Nova Scotia 279.

m. Particular Words and Phrases.[64] Through the process of judicial interpretation and construction, certain significations and meanings have been attached to particular words and phrases[65] employed and used in statutes, such as absorption,[66] action,[67] agent,[68] aggrieved party,[69] along,[70] any person,[71] appeal,[72] as soon as possible,[73] at,[74] cigarette,[75] citizens,[76] city,[77] civil,[78] connection,[79] convey, conveyed, and conveyance,[80] court,[81] define,[82] elapse,[83] false,[84] falsely,[85] father,[86] give,[87] grain,[88] grant,[89] hereby declared,[90] herein contained,[91] in operation,[92] intervene,[93] issued,[94] knowing,[95] legal voter,[96] may,[97] may be given,[98] month,[99] mother,[1] must,[2] new county,[3] now,[4] on,[5] otherwise dispose of,[6] owner,[7] paragraph,[8] passage of act,[9] personal property,[10] plaintiffs and defendants,[11] pleading and practice,[12] preceding,[13]

64. For construction of particular words as mandatory or directory see *infra*, VII, A, 8, b.

For words and phrases relating to descent see DESCENT AND DISTRIBUTION, 14 Cyc. 16, 25, 34.

For construction of words relating to time of taking effect see *infra*, VII, C.

65. See notes *infra*, 66–39.

66. Coopersville Co-Operative Creamery Co. *v.* Lemon, 163 Fed. 145, 89 C. C. A. 595.

67. Calderwood *v.* Calderwood, 38 Vt. 171.

68. Lamb *v.* State, 49 Tex. Cr. 442, 93 S. W. 734.

69. State *v.* Central Vermont R. Co., 81 Vt. 459, 71 Atl. 193, 21 L. R. A. N. S. 949.

70. Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468.

71. Proctor *v.* Hannibal, etc., R. Co., 64 Mo. 112.

72. Nash *v.* Glen Elder, 74 Kan. 756, 88 Pac. 62.

73. Reg. *v.* The Beatrice, 5 Can. Exch. 9.

74. Waynesville *v.* Satterthwait, 136 N. C. 226, 48 S. E. 661.

75. Goodrich *v.* State, 133 Wis. 242, 113 N. W. 388.

76. Bacon *v.* State Tax Com'rs, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524, 60 L. R. A. 321.

77. Burke *v.* Monroe County, 77 Ill. 610.

78. Waters *v.* Petrovic, 19 La. 584; Jennison *v.* Warmack, 5 La. 493.

79. Allison *v.* Smith, 16 Mich. 405.

80. Booker *v.* Castillo, 154 Cal. 672, 98 Pac. 1067, holding that they do not apply to a mortgage.

81. Fye *v.* Chapin, 121 Mich. 675, 80 N. W. 797.

82. Walters *v.* Richardson, 93 Ky. 374, 20 S. W. 279, 14 Ky. L. Rep. 410.

83. Logsdon *v.* Logsdon, 109 Ill. App. 194.

84. U. S. *v.* Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. N. S. 185.

85. U. S. *v.* Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. N. S. 185.

86. Landry *v.* American Creosote Works, 119 La. 231, 43 So. 1016, 11 L. R. A. N. S. 387.

87. Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

88. Holland *v.* State, 34 Ga. 455.

89. Peck *v.* Walton, 26 Vt. 82; Rice *v.* Minnesota, etc., R. Co., 1 Black (U. S.) 358, 17 L. ed. 147.

90. Lane *v.* Kolb, 92 Ala. 636, 9 So. 873.

91. McGill *v.* Peterborough County, 12 U. C. Q. B. 44.

92. Allen *v.* Savannah, 9 Ga. 286.

93. Logsdon *v.* Logsdon, 109 Ill. App. 194.

94. Corning *v.* Meade County, 102 Fed. 57, 42 C. C. A. 154.

95. State *v.* McBarron, 66 N. J. L. 680, 51 Atl. 146.

96. Sanford *v.* Prentice, 28 Wis. 358.

97. See *infra*, VII, A, 8.

98. Simpson *v.* North Adams, 174 Mass. 450, 54 N. E. 878.

99. Parsons *v.* Chamberlin, 4 Wend. (N. Y.) 512; Stackhouse *v.* Halsey, 3 Johns. Ch. (N. Y.) 74.

1. Landry *v.* American Creosote Works, 119 La. 231, 43 So. 1016, 11 L. R. A. N. S. 387.

2. See *infra*, VII, A, 8.

3. Jones *v.* Rountree, 96 Ga. 230, 23 S. E. 311.

4. Noble *v.* Gadban, 5 H. L. Cas. 504, 10 Eng. Reprint 997. See Larpent *v.* Bibby, 5 H. L. Cas. 481, 24 L. J. Q. B. 301, 10 Eng. Reprint 988.

5. Robertson *v.* Robertson, 8 P. D. 94, 48 L. T. Rep. N. S. 591, 31 Wkly. Rep. 652.

6. Kennedy *v.* Toronto, 12 Ont. 211.

7. Osgoode Tp. *v.* York, 24 Can. Sup. Ct. 282.

8. Alfrey *v.* Colbert, 168 Fed. 231, 93 C. C. A. 517, construed to mean "section."

9. These words ordinarily mean the time when the act takes effect (Schneider *v.* Hussey, 2 Ida. (Hasb.) 8, 1 Pac. 343 [*following* Rogers *v.* Vass, 6 Iowa 405]; Thompson *v.* Allison, etc., Independent School Dists., 102 Iowa 94, 70 N. W. 1093), but where the constitution provides that no act shall take effect until ninety days after its passage, it means the date of the passage of the act by the two houses, and not the date of its approval by the governor (State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243).

10. Conger *v.* Kennedy, 26 Can. Sup. Ct. 397.

11. Schuyler County *v.* Mercer County, 9 Ill. 20.

12. State *v.* Moore, 121 Ind. 116, 22 N. E. 742.

13. Cotting *v.* Kansas City Stock-Yards Co., 79 Fed. 679.

Preceding census.— Nelson *v.* Edwards, 55 Tex. 389.

Preceding section.— By statute in many states it is provided that the word "preceding," when used by way of reference to any section of a statute, or title of a code, shall

proceeding,[14] property,[15] prosecuted,[16] qualified elector,[17] railroad,[18] reasonable cause to believe,[19] recovery,[20] regularly,[21] saloon,[22] section,[23] sell,[24] shall,[25] soil,[26] suit,[27] undue,[28] unsold,[29] wantonly,[30] widening,[31] wittingly,[32] and year.[33] The word "person," when used in a statute, will be construed to include not only natural persons,[34] but also corporations,[35] unless the context clearly indicates that it was used in the more limited sense.[36] But the word "person" does not ordinarily include within its meaning the government of the United States, or of a state, or foreign country,[37] although it has been construed to do so,[38] especially

mean the section next preceding that in which the reference is made, unless some other section is expressly designated, or unless the context requires a different construction. Wilkinson *v.* State, 10 Ind. 372, 373. See Ala. Civ. Code (1896), § 5; Conn. Gen. St. (1902) § 1; Ga. Pen. Code (1895), § 2; Horner Rev. St. Ind. (1901) § 240, subd. 6; Ky. St. (1903) § 462; Me. Rev. St. (1883) p. 59, c. 1, § 6, subd. 15; Mass. Rev. Laws (1902), p. 89, c. 9, § 5, subd. 18; Mich. Comp. Laws (1897), § 50, subd. 13; Minn. Gen. St. (1894) § 255, subd. 12; Mo. Rev. St. (1899) § 4156; N. Y. Laws (1892), c. 677, § 10; N. C. Code (1883), § 3765, subd. 7; Tex. Pen. Code (1895), art. 29; Tex. Rev. St. (1895) art. 3270; Vt. St. (1894) 15; Va. Code (1887), § 5; W. Va. Code (1899), p. 133, c. 13, § 17; Wis. Rev. St. (1898) § 4971; Wyo. Rev. St. (1899) § 2724. But may be used to refer to portions of the paragraph in which the word occurs as well as to the one next before. *In re* Salomon, 55 Fed. 285. The word "preceding," as used in the Texas jury law of 1876, § 26, making it cause for challenge that a petit juror had served for one week in the district court within six months preceding, has reference to a term prior to and other than the one then being held. Myers *v.* State, 7 Tex. App. 640, 652; Tuttle *v.* State, 6 Tex. App. 556, 559; Garcia *v.* State, 5 Tex. App. 337, 340 [*citing* Welsh *v.* State, 3 Tex. App. 413].

14. Daily *v.* Burke, 28 Ala. 328; Calderwood *v.* Calderwood, 38 Vt. 171.

15. De Witt *v.* San Francisco, 2 Cal. 289; Figg *v.* Snook, 9 Ind. 202.

16. Adams *v.* Woods, 2 Cranch (U. S.) 336, 2 L. ed. 297.

17. Sanford *v.* Prentice, 28 Wis. 358.

18. State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901.

19. Smith *v.* Bean, 130 Mass. 298.

20. Jones *v.* Walker, 10 Fed. Cas. No. 7,507, 2 Paine 688.

21. Macon, etc., R. Co. *v.* Little, 45 Ga. 370.

22. *Ex p.* Livingston, 20 Nev. 282, 21 Pac. 322.

23. Spring *v.* Olney, 78 Ill. 101; Ellis *v.* Whitlock, 10 Mo. 781; Dain *v.* Gossage, 6 Ont. Pr. 103.

24. Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

25. Boyer *v.* Onion, 108 Ill. App. 612. See *infra*, VII, A, 8.

26. Pretty *v.* Solly, 26 Beav. 606, 53 Eng. Reprint 1032.

27. Dunn *v.* Pownal, 65 Vt. 116, 26 Atl. 484; Calderwood *v.* Calderwood, 38 Vt. 171.

28. Bulwinkle *v.* Grube, 5 Rich. (S. C.) 286.

29. Gormley *v.* Uthe, 116 Ill. 643, 7 N. E. 73.

30. Werner *v.* State, 93 Wis. 266, 67 N. W. 417.

31. Watson *v.* Maze, 15 Quebec Super. Ct. 268; Joseph *v.* Montreal, 10 Quebec Super. Ct. 531.

32. Osborne *v.* Warren, 44 Conn. 357.

33. Garfield Tp. *v.* Hubbell, 9 Kan. App. 785, 59 Pac. 600.

34. **Is not limited to adults.**— O'Shanassy *v.* Joachim, 1 App. Cas. 82, 45 L. J. P. C. 43, 34 L. T. Rep. N. S. 265, 24 Wkly. Rep. 792.

35. *Alabama.*— Planters', etc., Bank *v.* Andrews, 8 Port. 404.

California.—Douglass *v.* Pacific Mail Steamship Co., 4 Cal. 304.

Massachusetts.— Aldrich *v.* Blatchford, 175 Mass. 369, 56 N. E. 700.

New York.— *In re* Fox, 52 N. Y. 530, 11 Am. Rep. 751 [*affirmed* in 94 U. S. 315, 24 L. ed. 192]; Sommese *v.* Florence Distilling Co., 56 Misc. 670, 107 N. Y. Suppl. 630; People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

Wisconsin.— Norwich Pharmacal Co. *v.* Abaly, 133 Wis. 530, 113 N. W. 963.

See 44 Cent. Dig. tit. "Statutes," § 277.

Contra.— Betts *v.* Menard, 1 Ill. 395; Fox's Appeal, 112 Pa. St. 337, 4 Atl. 149; Philadelphia Sav. Fund Soc. *v.* Yard, 9 Pa. St. 359; Carlisle School Directors *v.* Carlisle Bank, 8 Watts (Pa.) 289, 291 (in which the court says: "The term 'person' being generally understood as denoting a natural person, is to be taken in that sense, unless from the context, or other parts of the act, it appear that artificial persons, such as corporations, were also intended to be embraced"); Pharmaceutical Soc. *v.* London, etc., Assoc., 5 App. Cas. 862, 45 J. P. 20, 49 L. J. Q. B. 736, 43 L. T. Rep. N. S. 389, 28 Wkly. Rep. 957.

Statutes.— Chippewa Valley, etc., R. Co. *v.* Chicago, etc., R. Co., 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601; Union Steamship Co. *v.* Melbourne Harbour Trust, 9 App. Cas. 365, 53 L. J. P. C. 59, 50 L. T. Rep. N. S. 337; Enniskillen Union *v.* Hilliard, L. R. 14 Ir. 214; Newcastle *v.* Atty.-Gen., 12 Cl. & F. 402, 8 Eng. Reprint 1464; St. Helens Tramway Co. *v.* Wood, 56 J. P. 71; Royal Canadian Bank *v.* Grand Trunk R. Co., 23 U. C. C. P. 225.

36. See *supra*, note 35.

37. Blair *v.* Worley, 2 Ill. 178; Banton *v.* Griswold, 95 Me. 445, 50 Atl. 89; *In re* Fox, 52 N. Y. 530, 11 Am. Rep. 751 [*affirmed* in 94 U. S. 315, 24 L. ed. 192].

38. Honduras *v.* Soto, 112 N. Y. 310, 19

in the case of criminal statutes denouncing actions to the injury of "any person." [39]

n. **Mistakes in Writing, Grammar, Spelling, or Punctuation.**[40] Mere verbal inaccuracies,[41] or clerical errors in statutes in the use of words,[42] or numbers,[43] or in grammar,[44] spelling, or punctuation,[45] will be corrected by the court, whenever

N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642; Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378, holding that a state may be the payee of a promissory note.

39. State *v.* Herold, 9 Kan. 194 (holding that the United States is a "person" within the meaning of a statute punishing certain trespasses on the lands of "any other person"); Martin *v.* State, 24 Tex. 61 (holding that a statute punishing the doing of certain acts, "with intent that any person may be defrauded," includes acts performed with intent to defraud the state).

40. For errors in titles see *supra*, IV, C, 8. **For weight punctuation entitled to** see *supra*, VII, A, 3, d.

41. *California.*— *In re* Bulger, 45 Cal. 553.

Georgia.— Lee *v.* Tucker, 130 Ga. 43, 60 S. E. 164.

Kentucky.— Com. *v.* Grinstead, 108 Ky. 59, 55 S. W. 720, 21 Ky. L. Rep. 1444, 57 S. W. 471, 22 Ky. L. Rep. 377.

New Mexico.— Territory *v.* Ashenfelter, 4 N. M. 93, 12 Pac. 879.

New York.—McKee Land, etc., Co. *v.* Swikehard, 23 Misc. 21, 51 N. Y. Suppl. 399 [*affirmed* in 63 N. Y. App. Div. 553, 71 N. Y. Suppl. 1141 (*affirmed* in 173 N. Y. 630, 66 N. E. 1112)].

Utah.— White *v.* Rio Grande Western R. Co., 25 Utah 346, 71 Pac. 593.

England.— Quin *v.* O'Keeffe, 10 Ir. C. L. 393.

See 44 Cent. Dig. tit. "Statutes," § 278.

42. *Arkansas.*— Haney *v.* State, 34 Ark. 263.

Idaho.— Holmberg *v.* Jones, 7 Ida. 752, 761, 65 Pac. 563 (in which the court says: "While courts do, in order to carry out the will of the legislature, expressed in an imperfect way, interpolate punctuation or words evidently intended to be used, yet, when such interpolation comprises the real substance of the act — in this instance, words creating a county — the court is not authorized to make such interpolation"); State *v.* Mulkey, 6 Ida. 617, 59 Pac. 17.

Kentucky.— Bird *v.* Kenton County, 95 Ky. 195, 24 S. W. 118, 15 Ky. L. Rep. 578.

Minnesota.— Moody *v.* Stephenson, 1 Minn. 401.

Missouri.— Ellis *v.* Whitlock, 10 Mo. 781; Frazier *v.* Gibson, 7 Mo. 271.

New York.— Matter of New York, 95 N. Y. App. Div. 552, 89 N. Y. Suppl. 66; McKee Land, etc., Co. *v.* Swikehard, 23 Misc. 21, 51 N. Y. Suppl. 399 [*affirmed* in 63 N. Y. App. Div. 553, 71 N. Y. Suppl. 1141 (*affirmed* in 173 N. Y. 630, 66 N. E. 1112)].

North Carolina.— Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950.

Pennsylvania.— Lancaster County *v.* Lancaster City, 170 Pa. St. 108, 32 Atl. 567, 160 Pa. St. 411, 28 Atl. 854; Lancaster County *v.* Frey, 128 Pa. St. 593, 18 Atl. 478.

South Carolina.— Waring *v.* Cheraw, etc., R. Co., 16 S. C. 416.

Texas.—Hearn *v.* State, 25 Tex. 336; Chambers *v.* State, 25 Tex. 307; Freeman *v.* Collier Racket Co., (Civ. App. 1906) 105 S. W. 1129.

Wisconsin.— State *v.* Stillman, 81 Wis. 124, 51 N. W. 260; Palms *v.* Shawano County, 61 Wis. 211, 21 N. W. 77; Nazro *v.* Merchants' Mut. Ins. Co., 14 Wis. 295.

United States.— Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,517, 3 Sumn. 279, Fish. Pat. Rep. 14, holding that, in the construction of a statute renewing a patent, the court will correct mere formal errors, but not errors that go to the very essence of the patent.

See 44 Cent. Dig. tit. "Statutes," §§ 278, 279.

43. *Maine.*— Lowell *v.* Washington County R. Co., 90 Me. 80, 37 Atl. 869.

New York.— People *v.* Lord, 9 N. Y. App. Div. 458, 41 N. Y. Suppl. 343.

Pennsylvania.— Parrish *v.* Wilkes-Barre, 9 Kulp 201.

Utah.— People *v.* Hill, 3 Utah 334, 3 Pac. 75.

West Virginia.— State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

See 44 Cent. Dig. tit. "Statutes," §§ 278, 279.

44. Lane *v.* Schomp, 20 N. J. Eq. 82.

45. *California.*—Randolph *v.* Bayne, 44 Cal. 366.

District of Columbia.— Lorenz *v.* U. S., 24 App. Cas. 337.

Kansas.— State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037.

Kentucky.— Mechanics', etc., Sav. Bank *v.* Com., 128 Ky. 190, 108 S. W. 263, 32 Ky. L. Rep. 1022.

Maryland.— Manger *v.* State Medical Examiners, 90 Md. 659, 45 Atl. 891.

Massachusetts.— Browne *v.* Turner, 174 Mass. 150, 54 N. E. 510; Martin *v.* Gleason, 139 Mass. 183, 29 N. E. 664; Cushing *v.* Worrick, 9 Gray 382.

Montana.— State *v.* Pilgrim, 17 Mont. 311, 42 Pac. 856.

Ohio.— Hamilton *v.* The R. B. Hamilton, 16 Ohio St. 428.

Pennsylvania.— Com. *v.* Taylor, 159 Pa. St. 451, 28 Atl. 348 (quotation marks); Com. *v.* Shopp, 1 Woodw. 123, 130 (in which the court says: "The marks of punctuation are added subsequently by a clerk or compositor, and this duty is performed very frequently in an exceedingly capricious and novel way").

Utah.— Union Refrigerator Transit Co. *v.* Lynch, 18 Utah 378, 55 Pac. 639, 48 L. R. A. 790.

Vermont.— McPhail *v.* Gerry, 55 Vt. 174, holding that the punctuation of the original

necessary to carry out the intention of the legislature as gathered from the entire act.[46]

o. Surplusage and Unnecessary Matter. While, as a general rule, every word in a statute is to be given force and effect,[47] yet, whenever a statute contains words to which no meaning at all can be attached,[48] or at least no meaning in harmony with the legislative intent as collected from the entire act,[49] such words will be treated as surplusage, and will be wholly disregarded in the construction of the act.

p. Words Omitted.[50] Where it appears from the context that certain words have been inadvertently omitted from a statute,[51] the court may supply such words as are necessary to complete the sense and to express the legislative intent.[52] But in the application of this rule the court should exercise great care to keep within its province of construction and not to trespass upon that of legislation.[53]

act, as passed by the legislature, should prevail over that of the printed copy.

United States.— Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264; U. S. *v.* Voorhees, 9 Fed. 143; Black *v.* Scott, 3 Fed. Cas. No. 1,464, 2 Brock. 325. But see U. S. *v.* York, 131 Fed. 323, holding that where a statute defining a criminal offense is grammatically accurate, and its meaning is not obscure, its scope cannot be extended by repunctuation.

See 44 Cent. Dig. tit. "Statutes," §§ 278, 279.

Declarations of members of the conference committees upon the floor of congress as to a mistake in the punctuation of a statute will not authorize the court to change the punctuation actually made, where the attention of congress has been called to the mistake and no action taken. *In re* Schilling, 53 Fed. 81, 3 C. C. A. 440; Barrow *v.* Wadkin, 24 Beav. 327, 3 Jur. N. S. 679, 27 L. J. Ch. 129, 5 Wkly. Rep. 695, 53 Eng. Reprint 384.

46. Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950.

No change will be made unless to effect a meaning clearly shown by other parts of the act.— State *v.* Bracken, 154 Ala. 151, 155, 45 So. 841 (in which the court says: "The court is not at liberty to change the wording of the statute, so as to effectuate a supposed intent which cannot be gathered from the act itself, or from the journals of the legislature"); Lane *v.* Schomp, 20 N. J. Eq. 82.

In case of variance between the enrolled bill and the printed act the enrolled bill will prevail. Stoneman *v.* Whaley, 9 Iowa 390; State *v.* Beneke, 9 Iowa 203; Clare *v.* State, 5 Iowa 509; Johnson *v.* Barham, 99 Va. 305, 38 S. E. 136; Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950.

47. Leversee *v.* Reynolds, 13 Iowa 310, holding that words in a statute will never be construed as unmeaning and surplusage, if a construction can be legitimately found which will give force and preserve all the words of the statute. See *infra*, VII, A, 4, b.

48. Settlers' Irr. Dist. *v.* Settlers' Canal Co., 14 Ida. 504, 94 Pac. 829; State *v.* Acuff, 6 Mo. 54; State *v.* Beasley, 5 Mo. 91; Paxton, etc., Canal, etc., Co. *v.* Farmers', etc., Irr., etc., Co., 45 Nebr. 884, 64 N. W. 343, 50 Am. St. Rep. 585, 29 L. R. A. 853; Stone *v.* Yeovil, 2 C. P. D. 99, 46 L. J. C. P. 137, 36 L. T. Rep. N. S. 279, 25 Wkly. Rep. 240.

49. Com. *v.* Grinstead, 108 Ky. 59, 55 S. W. 720, 21 Ky. L. Rep. 1444, 57 S. W. 471, 22 Ky. L. Rep. 377; Trinity County *v.* Polk County, 58 Tex. 321; Chapman *v.* State, 16 Tex. App. 76; U. S. *v.* York, 131 Fed. 323; U. S. *v.* Stern, 27 Fed. Cas. No. 16,389, 5 Blatchf. 512.

50. For matters omitted in general see *supra*, VII, A, 2, g.

51. Abernathy *v.* Mitchell, 113 Ga. 127, 38 S. E. 303; Brinsfield *v.* Carter, 2 Ga. 143; Landrum *v.* Flannigan, 60 Kan. 436, 56 Pac. 753.

The enrolled bill may be consulted to determine whether words have been omitted from the printed act. Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950.

52. Com. *v.* Herald Pub. Co., 128 Ky. 424, 108 S. W. 892, 32 Ky. L. Rep. 1293; Com. *v.* Grinstead, 108 Ky. 59, 55 S. W. 720, 21 Ky. L. Rep. 1444, 57 S. W. 471, 22 Ky. L. Rep. 377; Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950; State *v.* State R. Commission, 137 Wis. 80, 117 N. W. 846; Nichols *v.* Halliday, 27 Wis. 406.

53. *Kentucky.*— Barron *v.* Kaufman, 131 Ky. 642, 115 S. W. 787, holding that the interpolation of words is allowable only where necessary to prevent the act from being absurd, or to carry into effect its obvious purpose.

Montana.— Hilburn *v.* St. Paul, etc., R. Co., 23 Mont. 229, 58 Pac. 551, 811, holding that the court is not justified in reading such a change into a statute as will have the effect of abrogating a specific provision made there.

New Jersey.— Orvil Tp. *v.* Woodcliff, 61 N. J. L. 107, 38 Atl. 685; Lane *v.* Schomp, 20 N. J. Eq. 82.

South Dakota.— *Ex p.* Brown, 21 S. D. 515, 114 N. W. 303, holding that the statutory enumeration of persons of the same class by specific terms has the effect of restricting the statute to that class of individuals, and no consideration of the mischief to be remedied by the act is sufficient to justify the interpolation of other words to bring within the operation of the statute another class

4. Statutes as a Whole and Intrinsic Aids to Construction — a. In General. In construing a statute, the legislative intent is to be determined from a general view of the whole act,[54] with reference to the subject-matter to which it applies[55] and the particular topic under which the language in question is found.[56]

b. Giving Effect to Entire Statute. It is a cardinal rule in the construction of statutes that effect is to be given, if possible,[57] to every word, clause, and sentence.[58]

of persons whose business is distinctively different.

Virginia.— Johnson *v.* Barham, 99 Va. 305, 310, 38 S. E. 136, in which the court said: "It is safer in a case which admits of doubt, where the court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which may reasonably be supposed to have influenced the Legislature in the particular case should fail of consummation than that courts should too readily yield to a supposed necessity, and exercise a power so delicate, and so easily abused, as that of adding to or taking from the words of the statute."

See 44 Cent. Dig. tit. "Statutes," § 281.

54. *Alabama.*— State *v.* Bracken, 154 Ala. 151, 45 So. 841.

Arkansas.— Chicago, etc., R. Co. *v.* State, 84 Ark. 409, 106 S. W. 199.

California.— Cullerton *v.* Mead, 22 Cal. 95; People *v.* San Francisco, 21 Cal. 668; *Ex p.* Ellis, 11 Cal. 222.

Colorado.— Dekelt *v.* People, 44 Colo. 525, 99 Pac. 330.

District of Columbia.— Garfield *v.* U. S., 30 App. Cas. 177, 188, 190, 31 App. Cas. 231, 232, 233, 234; Groff *v.* Miller, 20 App. Cas. 353.

Illinois.— Gilbert *v.* Morgan, 98 Ill. App. 281; Iuka *v.* Schlosser, 97 Ill. App. 222.

Indiana.— Boyer *v.* State, 169 Ind. 691, 83 N. E. 350; Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222; Wasson *v.* Indianapolis First Nat. Bank, 107 Ind. 206, 8 N. E. 97; Evans *v.* Wadkins, Wils. 114; Hasely *v.* Ensley, 40 Ind. App. 598, 82 N. E. 809.

Iowa.— Rohlf *v.* Kasemeier, 140 Iowa 182, 118 N. W. 276, 23 L. R. A. N. S. 1284; Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262.

Louisiana.— Reynolds *v.* Baldwin, 1 La. Ann. 162.

Maryland.—Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Michigan.—Atty.-Gen. *v.* Michigan Bank, Harr. 315.

Minnesota.—State *v.* Polk County, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

Missouri.— Stump *v.* Hornback, 94 Mo. 26, 6 S. W. 356.

Nebraska.— Lincoln *v.* Janesch, 63 Nebr. 707, 89 N. W. 280.

New York.— People *v.* Long Island R. Co., 194 N. Y. 130, 87 N. E. 79 [*affirming* 126 N. Y. App. Div. 477, 110 N. Y. Suppl. 512]; People *v.* McClave, 99 N. Y. 83, 1 N. E. 235.

Ohio.— Manuel *v.* Manuel, 13 Ohio St. 458.

Oregon.— Riggs *v.* Polk County, 51 Oreg. 509, 95 Pac. 5.

Pennsylvania.— Stewart *v.* Hanson, 2 Leg. Op. 146; Bouton *v.* Boyce, 2 Luz. Reg. 241.

Rhode Island.— Lederer Realty Corp. *v.* Hopkins, (1908) 71 Atl. 456.

South Dakota.— State *v.* Carlisle, 22 S. D. 529, 118 N. W. 1033; State *v.* Mudie, 22 S. D. 41, 115 N. W. 107; Fremont, etc., R. Co. *v.* Pennington County, 20 S. D. 270, 105 N. W. 929.

Vermont.— State *v.* Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065.

Virginia.—Willis *v.* Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L. R. A. N. S. 1009; Matthews *v.* Com., 18 Gratt. 989.

Washington.— Cherry Point Fish Co. *v.* Nelson, 25 Wash. 558, 66 Pac. 55.

West Virginia.— Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

Wisconsin.— State *v.* State R. Commission, 137 Wis. 80, 117 N. W. 846.

United States.— Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46; Mutual L. Ins. Co. *v.* Champlin, 21 Fed. 85; Ogden *v.* Strong, 18 Fed. Cas. No. 10,460, 2 Paine 584; Strode *v.* Stafford Justices, 23 Fed. Cas. No. 13,537, 1 Brock. 162.

England.— Colquhoun *v.* Brooks, 14 App. Cas. 493, 54 J. P. 277, 59 L. J. Q. B. 53, 61 L. T. Rep. N. S. 518, 38 Wkly. Rep. 289; Barlow *v.* Ross, 24 Q. B. D. 381, 59 L. J. Q. B. 183, 62 L. T. Rep. N. S. 552, 38 Wkly. Rep. 372; Beckford *v.* Wade, 17 Ves. Jr. 92, 11 Rev. Rep. 20, 34 Eng. Reprint 34.

See 44 Cent. Dig. tit. "Statutes," § 282.

The numbering of sections in statutes is a purely artificial and unessential arrangement resorted to for convenience only, and does not prevent the construction of the act as a whole. *In re* Bull, 153 Cal. 715, 96 Pac. 366.

Greater New York charter is only one statute, although it is divided into chapters and sections. People *v.* Kane, 43 N. Y. App. Div. 472, 61 N. Y. Suppl. 195, 632, 14 N. Y. Cr. 316 [*affirmed* in 161 N. Y. 380, 55 N. E. 946].

55. *In re* Kilby Bank, 23 Pick. (Mass.) 93; Catlin *v.* Hull, 21 Vt. 152; Lion Mut. Mar. Ins. Assoc. *v.* Tucker, 2 Q. B. D. 176, 53 L. J. Q. B. 185, 49 L. T. Rep. N. S. 764, 32 Wkly. Rep. 546.

56. Griffith *v.* Carter, 8 Kan. 565.

57. **The rule must be taken with the qualifications** that the interpretation must in itself be reasonable and in harmony with the legislative intent. San Francisco *v.* Hazen, 5 Cal. 169; U. S. *v.* Bassett, 24 Fed. Cas. No. 14,539, 2 Story 389.

58. *Alabama.*— Hawkins *v.* Louisville, etc., R. Co., 145 Ala. 385, 40 So. 293; Brooks *v.* Mobile School Com'rs, 31 Ala. 227.

Alaska.— Brace *v.* Solner, 1 Alaska 361; Chambers *v.* Solner, 1 Alaska 271.

Arkansas.— Ingle *v.* Batesville Grocery Co., 89 Ark. 378, 117 S. W. 241; Chicago, etc., R. Co. *v.* State, 84 Ark. 409, 106 S. W. 199; Scott *v.* State, 22 Ark. 369; Wilson *v.* Biscoe, 11 Ark. 44.

It is the duty of the court, so far as practicable, to reconcile the different provisions, so as to make them consistent and harmonious,[59] and to give a sensible and intelligent effect to each.

California.— Gates *v.* Salmon, 35 Cal. 576, 95 Am. Dec. 139; People *v.* San Francisco, 21 Cal. 668; Escondido *v.* Wohlford, (App. 1908) 97 Pac. 199; Escondido *v.* Escondido Lumber, etc., Co., 8 Cal. App. 435, 97 Pac. 197.

Colorado.— Denver *v.* Campbell, 33 Colo. 162, 80 Pac. 142; Electro-Magnetic Min., etc., Co. *v.* Van Auken, 9 Colo. 204, 11 Pac. 80.

District of Columbia.— Duehay *v.* District of Columbia, 25 App. Cas. 434.

Florida.— Goode *v.* State, 50 Fla. 45, 39 So. 461.

Illinois.— People *v.* Sholem, 238 Ill. 203, 87 N. E. 390; Jones *v.* Grieser, 238 Ill. 183, 87 N. E. 295; McReynolds *v.* People, 230 Ill. 623, 82 N. E. 945; Crozer *v.* People, 206 Ill. 464, 69 N. E, 489; Thompson *v.* Bulson, 78 Ill. 277; Peterson *v.* People, 129 Ill. App. 55; Boyer *v.* Onion, 108 Ill. App. 612; Andel *v.* People, 106 Ill. 558.

Indiana.— State *v.* Weller, 171 Ind. 53, 85 N. E. 761; Green *v.* Cheek, 5 Ind. 105; Hutchen *v.* Niblo, 4 Blackf. 148.

Iowa.— Coggeshall *v.* Des Moines, (1908) 117 N. W. 309; State *v.* Corning Sav. Bank, 139 Iowa 338, 115 N. W. 937.

Kansas.— Noecker *v.* Noecker, 66 Kan. 347, 71 Pac. 815.

Kentucky.— Nichols *v.* Wells, Ky. Dec. 255.

Louisiana.— State *v.* Fontenot, 112 La. 628, 36 So. 630; Reynolds *v.* Baldwin, 1 La. Ann. 162; New Orleans City Bank *v.* Huie, 1 Rob. 236; Clark *v.* Morse, 16 La. 575; Devlin *v.* His Creditors, 2 La. 361; Martinez *v.* Layton, 4 Mart. N. S. 368; U. S. *v.* Hawkins, 4 Mart. N. S. 317; Nathan *v.* Lee, 2 Mart. N. S. 32; Ward *v.* Brandt, 9 Mart. 625.

Maryland.— Smith *v.* Dorchester County School Com'rs, 81 Md. 513, 32 Atl. 193; Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Massachusetts.—*In re* Kilby Bank, 23 Pick. 93; Opinion of Justices, 22 Pick. 571.

Michigan.— Robinson *v.* Harmon, 157 Mich. 266, 117 N. W. 661; Atty.-Gen. *v.* Detroit Bd. of Education, 154 Mich. 584, 118 N. W. 606; People *v.* Burns, 5 Mich. 114; Atty.-Gen. *v.* Detroit, etc., Plank Road Co., 2 Mich. 138.

Minnesota.— McNamara *v.* Minnesota Cent. R. Co., 12 Minn. 388.

Missouri.— Strottman *v.* St. Louis, etc., R. Co., 211 Mo. 227, 109 S. W. 769; State *v.* Harter, 188 Mo. 516, 87 S. W. 941.

Montana.— State *v.* Cave, 20 Mont. 468, 52 Pac. 200.

Nebraska.— Ford *v.* State, 79 Nebr. 309, 112 N. W. 606; State *v.* Fink, 74 Nebr. 641, 104 N. W. 1059; Western Travelers' Acc. Assoc. *v.* Taylor, 62 Nebr. 783, 87 N. W. 950; Hagenbuck *v.* Reed, 3 Nebr. 17; McCann *v.* McLennan, 2 Nebr. 286.

New Jersey.— James *v.* Dubois, 16 N. J. L. 285.

New York.— Baxter *v.* York Realty Co., 128 N. Y. App. Div. 79, 112 N. Y. Suppl. 455 [*affirmed* in 198 N. Y. 521]; Ft. Edward *v.* Hudson Valley R. Co., 127 N. Y. App. Div. 438, 111 N. Y. Suppl. 753; Freeman *v.* Freeman, 126 N. Y. App. Div. 601, 110 N. Y. Suppl. 686 [*reversing* 57 Misc. 400, 109 N. Y. Suppl. 705]; Wehrenberg *v.* New York, etc., R. Co., 124 N. Y. App. Div. 205, 108 N. Y. Suppl. 704; Clark *v.* Lockard, 13 N. Y. Civ. Proc. 278; Whithers *v.* Toulmin, 13 N. Y. Civ. Proc. 1.

North Carolina.— Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116; Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950.

North Dakota.— State *v.* Burr, 16 N. D. 581, 113 N. W. 705.

Ohio.— McKent *v.* Kent, 2 Ohio Dec. (Reprint) 370, 2 West. L. Month. 541; Stokes *v.* Logan County Road Com'rs, 2 Ohio Dec. (Reprint) 122, 1 West. L. Month. 448.

Oklahoma.— Trapp *v.* Wells Fargo Express Co., (1908) 97 Pac. 1003.

Oregon.— Dutro *v.* Ladd, 50 Oreg. 120, 91 Pac. 459.

Tennessee.— Lacy *v.* Moore, 6 Coldw. 348.

Utah.— Hoffman *v.* Lewis, 31 Utah 179, 87 Pac. 167.

Vermont.— State *v.* Rutland R. Co., 81 Vt. 508, 71 Atl. 197.

Virginia.— Smith *v.* Bryan, 100 Va. 199, 40 S. E. 652.

West Virginia.—State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

United States.— U. S. *v.* Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. N. S. 185; Mutual L. Ins. Co. *v.* Champlin, 21 Fed. 85 (holding that the natural import of the language of one part of a statute should not be narrowed by construction, although it overlap in part the provisions of another part of the same statutes, where both will still have a distinct and exclusive purpose to subserve); McKay *v.* Hill, 16 Fed. Cas. No. 8,845, 1 Hask. 276.

See 44 Cent. Dig. tit. "Statutes," § 283.

59. *Mississippi.*— Ellison *v.* Mobile, etc., R. Co., 36 Miss. 572.

Missouri.— Stump *v.* Hornback, 94 Mo. 26, 6 S. W. 356.

New Jersey.— Morris, etc., R. Co. *v.* Railroad Taxation Com'r, 37 N. J. L. 228.

North Carolina.— Tabor *v.* Ward, 83 N. C. 291.

North Dakota.— State *v.* Burr, 16 N. D. 581, 113 N. W. 705.

Ohio.— Manuel *v.* Manuel, 13 Ohio St. 458.

Oklahoma.— Trapp *v.* Wells Fargo Express Co., (1908) 97 Pac. 1003.

Texas.— Hill *v.* State, 54 Tex. Cr. 646, 114 S. W. 117.

Utah.— Lawson *v.* Tripp, 34 Utah 28, 95 Pac. 520.

c. Conflicting Provisions.[60] In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent,[61] and all particular rules for the construction of such provisions must be regarded as subservient to this end. In accordance with the well-settled principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute,[62] or in different statutes,[63] the last enacted in point of time prevails; [64] and on the same principle, if both were enacted at the same time, the last in order of arrangement controls.[65] As a corollary to this latter rule, a proviso in an act repugnant to the purview thereof is not void, but stands as the last expression of the legislative will.[66] Where the conflict is between words and figures, the words will be given effect.[67] Where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part,[68] the particular provisions will be given effect [69] as clearer and

Virginia.—Hoover *v.* Saunders, 104 Va. 783, 52 S. E. 657.

United States.— Ogden *v.* Strong, 18 Fed. Cas. No. 10,460, 2 Paine 584.

See 44 Cent. Dig. tit. "Statutes," § 283.

60. For conflict between French and English texts of the same law see *supra*, VII, A, 3, b.

61. *Florida.*— Hall *v.* State, 39 Fla. 637, 23 So. 119; Sams *v.* King, 18 Fla. 557.

Illinois.— Boyer *v.* Onion, 108 Ill. App. 612.

Iowa.— Noble *v.* State, 1 Greene 325.

New York.—Wilson *v.* Allen, 4 How. Pr. 54, 2 Code Rep. 26, 7 N. Y. Leg. Obs. 286.

Ohio.— State *v.* Mulhern, 74 Ohio St. 363, 78 N. E. 507.

See 44 Cent. Dig. tit. "Statutes," § 284.

62. State *v.* Courtney, 27 Mont. 378, 71 Pac. 308.

63. Nelden *v.* Clark, 20 Utah 382, 59 Pac. 524, 77 Am. St. Rep. 917.

64. The section that has been last amended prevails over one in conflict therewith, even though preceding it in order of arrangement. People *v.* Dobbins, 73 Cal. 257, 14 Pac. 860.

A provision inserted by way of amendment to the act in the course of its passage will prevail over another provision of the act in conflict therewith. State *v.* Burr, 16 N. D. 581, 113 N. W. 705.

65. *Illinois.*— Peterson *v.* People, 129 Ill. App. 55.

Indiana.— Quick *v.* White Water Tp., 7 Ind. 570.

Maine.— Howard *v.* Bangor, etc., R. Co., 86 Me. 387, 29 Atl. 1101.

Nebraska.— Omaha Real Estate, etc., Co. *v.* Reiter, 47 Nebr. 592, 66 N. W. 658; Ryan *v.* State, 5 Nebr. 276.

Nevada.— *Ex p.* Hewlett, 22 Nev. 333, 40 Pac. 96.

Pennsylvania.— Packer *v.* Sunbury, etc., R. Co., 19 Pa. St. 211.

Tennessee.— Hightower *v.* Wells, 6 Yerg. 249.

United States.— U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266]; Hall *v.* Equator Min., etc., Co., 11 Fed. Cas. No. 5,931.

Canada.— Reg. *v.* Rose, 27 Ont. 195.

See 44 Cent. Dig. tit. "Statutes," § 284.

This rule is to be applied only after exhausting every other effort at construction.— State *v.* Williams, 8 Ind. 191, 192 (in which the court says: "It is only when the subsequent clause of a statute has the combined advantage of equal clearness as well as position that it will control the former"); Gibbons *v.* Brittenum, 56 Miss. 232; People *v.* McClave, 99 N. Y. 83, 1 N. E. 235; State *v.* Mulhern, 74 Ohio St. 363, 78 N. E. 507.

The antecedent words or clauses will control where they clearly embody the legislative intent. Sams *v.* King, 18 Fla. 557; State *v.* Bates, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612.

66. *Maine.*— Portland Sav. Inst. *v.* Makin, 23 Me. 360.

Nebraska.— Van Horn *v.* State, 46 Nebr. 62, 64 N. W. 365.

New Jersey.— Townsend *v.* Brown, 24 N. J. L. 80.

New York.— Fayetteville Farmers' Bank *v.* Hale, 59 N. Y. 53.

Vermont.—Vermont *v.* Clark, 19 Vt. 129, holding that in order to avoid repugnancy to other statutes the terms of a proviso may be limited by the scope of the enacting clause.

See 44 Cent. Dig. tit. "Statutes," § 284.

Contra.— Penick *v.* High Shoals Mfg. Co., 113 Ga. 592, 38 S. E. 973; Jackson *v.* Moye, 33 Ga. 296.

67. Weaver *v.* Davidson County, 104 Tenn. 315, 59 S. W. 1105.

68. Whether the particular provisions precede (Rogers *v.* Beiller, 3 Mart. (La.) 665; Rodgers *v.* U. S., 185 U. S. 83, 22 S. Ct. 582, 46 L. ed. 816 [*affirming* 36 Ct. Cl. 266]) or follow (Covington *v.* McNickle, 18 B. Mon. (Ky.) 262) the rule applies.

69. *California.*— King *v.* Armstrong, 9 Cal. App. 368, 99 Pac. 527; Miller *v.* Engle, 3 Cal. App. 325, 85 Pac. 159.

District of Columbia.— U. S. *v.* Crawford, 6 Mackey 319.

Georgia.— Torrance *v.* McDougald, 12 Ga. 526.

Illinois.—McKean *v.* Gauthier, 132 Ill. App. 376.

Kansas.— Long *v.* Culp, 14 Kan. 412.

Louisiana.— State *v.* Fontenot, 112 La. 628, 36 So. 630; Egerton *v.* New Orleans Third Municipality, 1 La. Ann. 435.

Maryland.— Stockett *v.* Bird, 18 Md. 484.

Nebraska.— State *v.* Nolan, 71 Nebr. 136, 98 N. W. 657; Kountze *v.* Omaha, 63 Nebr. 52, 88 N. W. 117; State *v.* Kearney, 49 Nebr.

more definite expressions of the legislative will. But a particular expression in one part of a statute not so large and extensive in its import as other expressions in the same statute will yield to the larger and more extensive expressions, where the latter embody the real intent of the legislature.[70]

d. Context and Related Clauses.[71] The words, phrases, and sentences of a statute are to be understood as used, not in any abstract sense,[72] but with due regard to the context,[73] and in that sense which best harmonizes with all other parts of the statute.[74] In expounding one part of a statute therefore resort should be had to every other part,[75] including even parts that are unconstitu-

325, 68 N. W. 533; McCann *v.* McLennan, 2 Nebr. 286.

New Jersey.— Bartlett *v.* Trenton, 38 N. J. L. 64.

New York.— Coxson *v.* Doland, 2 Daly 66, holding that general words occurring at the end of a sentence are presumed to refer to and qualify the whole; but if they occur in the middle of a sentence, and obviously apply to a particular portion of it, they are not to be extended to what follows them.

Pennsylvania.—Kolb *v.* Reformed Episcopal Church of Reconciliation, 18 Pa. Super. Ct. 477.

South Dakota.— Sanford *v.* King, 19 S. D. 334, 103 N. W. 28, holding that where a statute includes both a particular and also a general enactment which in its most comprehensive sense would include what is embraced in the particular one, the particular enactment must be given effect, and the general enactment must be taken to embrace only such cases within its general language as are not within the provisions of the particular enactment.

Texas.— Austin *v.* Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; Shock *v.* Colorado County, (Civ. App. 1908) 115 S. W. 61; Callaghan *v.* McGown, (Civ. App. 1905) 90 S. W. 319.

Wisconsin.— State *v.* Hobe, 106 Wis. 411, 82 N. W. 336; State *v.* Goetze, 22 Wis. 363; Felt *v.* Felt, 19 Wis. 193.

United States.—U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266]; *In re* Rouse, 91 Fed. 96, 33 C. C. A. 356.

England.— *In re* Watson, [1893] 1 Q. B. 21, 67 L. T. Rep. N. S. 519, 4 Reports 90, 41 Wkly. Rep. 34; Taylor *v.* Oldham, 4 Ch. D. 395, 46 L. J. Ch. 105, 35 L. T. Rep. N. S. 696, 25 Wkly. Rep. 178; Pretty *v.* Solly, 26 Beav. 606, 53 Eng. Reprint 1032; De Winton *v.* Brecon, 26 Beav. 533, 5 Jur. N. S. 882, 28 L. J. Ch. 598, 600, 53 Eng. Reprint 1004.

See 44 Cent. Dig. tit. "Statutes," §§ 272, 284.

Words expressive of a particular intent incompatible with others expressive of a general intent may sometimes be construed as an exception to the latter so that all may have effect. State *v.* Moore, 108 Md. 636, 71 Atl. 461; Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116.

70. *Arkansas.*— State *v.* Jennings, 27 Ark. 419.

Georgia.— Torrance *v.* McDougald, 12 Ga. 526.

Illinois.— Burke *v.* Monroe County, 77 Ill. 610; Mason *v.* Finch, 3 Ill. 223.

Louisiana.— Reynolds *v.* Baldwin, 1 La. Ann. 162.

England.— Doe *v.* Brandling, 7 B. & C. 643, 6 L. J. K. B. O. S. 162, 1 M. & R. 600, 14 E. C. L. 290.

See 44 Cent. Dig. tit. "Statutes," § 284.

71. See the maxims, *ex antecedentibus et consequentibus fit optima interpretatio*, 17 Cyc. 825, and *noscitur a sociis*, 29 Cyc. 1065.

72. McIntyre *v.* Ingraham, 35 Miss. 25.

73. *California.*— Civ. Code, § 13.

Illinois.— Standard Radiator Co. *v.* Fox, 85 Ill. App. 389.

Indiana.— Seiler *v.* State, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448.

Kansas.— Griffith *v.* Carter, 8 Kan. 565.

Louisiana.— State *v.* Judge Ninth Judicial Dist., 12 La. Ann. 777; Dumas *v.* Boulin, McGloin 274; Civ. Code, art. 16.

Maine.— State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901.

Michigan.— *In re* Corby, 154 Mich. 353, 117 N. W. 906; Wass *v.* Barbers' Bd. of Examiners, 123 Mich. 544, 82 N. W. 234.

Mississippi.— McIntyre *v.* Ingraham, 35 Miss. 25; Green *v.* Weller, 32 Miss. 650.

Missouri.— State *v.* Missouri Pac. R. Co., 219 Mo. 156, 117 S. W. 1173; Ruggles *v.* Washington County, 3 Mo. 496.

New Jersey.— State *v.* Paterson, 35 N. J. L. 196.

Pennsylvania.— Com. *v.* Montrose Borough, 52 Pa. St. 391; Com. *v.* Gouger, 21 Pa. Super. Ct. 217.

Utah.— White *v.* Rio Grande Western R. Co., 25 Utah 346, 71 Pac. 593; Miles *v.* Wells, 22 Utah 55, 61 Pac. 534.

West Virginia.—Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320.

United States.— U. S. *v.* Baltimore, etc., R. Co., 159 Fed. 33, 86 C. C. A. 223; The Lizzie Henderson, 20 Fed. 524.

See 44 Cent. Dig. tit. "Statutes," § 285.

74. State *v.* Paterson, 35 N. J. L. 196; Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116; U. S. *v.* Baltimore, etc., R. Co., 159 Fed. 33, 86 C. C. A. 223.

75. *Illinois.*— Belleville, etc., R. Co. *v.* Gregory, 15 Ill. 20, 58 Am. Dec. 589.

Kentucky.— Manion *v.* Lambert, 10 Bush 295.

Maryland.— Magruder *v.* Carroll, 4 Md. 335.

Massachusetts.— Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381.

Missouri.— State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593.

North Carolina.—Peters Grocery Co. *v.* Collins Bag Co., 142 N. C. 174, 55 S. E. 90, hold-

tional [76] or that have been repealed.[77] And where one part of the statute is susceptible of two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions, and opposed to the other, that construction must be adopted which will render all clauses harmonious.[78] Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout;[79] and where its meaning in one instance is clear, this meaning will be attached to it elsewhere,[80] unless it clearly appears from the whole statute that it was the intention of the legislature to use it in different senses.[81]

e. Preamble [82] and Recitals.[83] In cases of doubt as to the proper construction of the body of a statute, resort must be had to the preamble or recitals,[84] for the purpose of ascertaining the legislative intent. But where the enacting part of the statute is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals.[85] The operation of the enacting clause of a

ing that each section must be restricted in its application by the language of any other section when the purpose to do so is apparent.

Washington.— Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302, holding that those parts susceptible of but one meaning will control those susceptible of two, if the act can thereby be rendered harmonious.

England.— Palmer's Case, East P. C. 893, Leach C. C. 391; Reg *v.* Mallow Union, 12 Ir. C. L. 35.

See 44 Cent. Dig. tit. "Statutes," § 282.

76. Philadelphia *v.* Barber, 160 Pa. St. 123, 28 Atl. 644; Ruhland *v.* Waterman, 29 R. I. 365, 71 Atl. 1, 450.

77. New York Sav. Bank *v.* Field, 3 Wall. (U. S.) 495, 18 L. ed. 207.

78. Torrance *v.* McDougald, 12 Ga. 526; Alexander *v.* Worthington, 5 Md. 471.

79. Pitte *v.* Shipley, 46 Cal. 154; Indianapolis Northern Traction Co. *v.* Brennan, (Ind. 1909) 87 N. E. 215, holding that the meaning of a word in the title of an act should be tested by the rule applicable to the body of the statute); People *v.* Behan, 7 Abb. Pr. (N. Y.) 82; Spencer *v.* Metropolitan Bd. of Works, 22 Ch. D. 142, 52 L. J. Ch. 249, 47 L. T. Rep. N. S. 459, 31 Wkly. Rep. 347.

An amending statute is to be regarded as part of the original statute in this connection. Browne *v.* Turner, 174 Mass. 150, 54 N. E. 510.

80. Gunning *v.* People, 86 Ill. App. 174; James *v.* Dubois, 16 N. J. L. 285; Rhodes *v.* Weldy, 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584; Raymond *v.* Cleveland, 42 Ohio St. 522; Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468.

81. Henry *v.* Perry Tp., 48 Ohio St. 671, 30 N. E. 1122, holding that where giving the expression the same meaning would produce an unreasonable result and defeat the manifest object of the statute, the court should disregard the presumption.

As where it relates to different subject-matters.— State *v.* Knowles, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695.

82. See 31 Cyc. 1156.

83. See 34 Cyc. 532.

84. *Kentucky.*— Nichols *v.* Wells, Ky. Dec. 255.

Maryland.— Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

New York.— Furman *v.* New York, 5 Sandf. 16 [*affirmed* in 10 N. Y. 567]; Jackson *v.* Gilchrist, 15 Johns. 89.

Rhode Island.— Tripp *v.* Goff, 15 R. I. 299, 3 Atl. 591.

Tennessee.— Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 104 S. W. 460.

Wisconsin.— Nazro *v.* Merchants' Mut. Ins. Co., 14 Wis. 295.

United States.— Price *v.* Forrest, 173 U. S. 410, 19 S. Ct. 434, 43 L. ed. 749; Hahn *v.* Salmon, 20 Fed. 801.

England.— West Ham *v.* Iles, 8 App. Cas. 386, 47 J. P. 708, 52 L. J. Q. B. 650, 49 L. T. Rep. N. S. 205, 31 Wkly. Rep. 928; Salkeld *v.* Johnson, 2 C. B. N. S. 749, 2 Exch. 256, 18 L. J. Exch. 89, 53 E. C. L. 749; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Hughes *v.* Chester, etc., R. Co., 1 Dr. & Sm. 524, 9 Wkly. Rep. 760, 62 Eng. Reprint 478; Atty.-Gen. *v.* Powis, 2 Eq. Rep. 566, Kay 186, 2 Wkly. Rep. 140, 69 Eng. Reprint 79; Copeman *v.* Gallant, 1 P. Wms. 317, 24 Eng. Reprint 404.

See 44 Cent. Dig. tit. "Statutes," § 287.

The preamble has been termed "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress." Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 61 L. J. Q. B. 265, 65 L. T. Rep. N. S. 621; Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034; Stowell *v.* Zouch, Plowd. 353, 75 Eng. Reprint 536, 560.

85. *Georgia.*— Eastman *v.* McAlpin, 1 Ga. 157.

Louisiana.— Montesquieu *v.* Heil, 4 La. 51, 23 Am. Dec. 471.

Massachusetts.— Holbrook *v.* Holbrook, 1 Pick. 248.

Missouri.— Lackland *v.* Walker, 151 Mo. 210, 52 S. W. 414.

Pennsylvania.— Philadelphia *v.* Thirteenth St., etc., Pass. R. Co., 8 Phila. 648.

South Carolina.— Bynum *v.* Clark, 3 McCord 298, 15 Am. Dec. 633.

Texas.— Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100.

United States.— U. S. *v.* Webster, 28 Fed Cas. No. 16,658, 2 Ware 46; Jordan *v.* U. S.,

statute may be extended by the preamble of the statute,[86] but it cannot be restrained,[87] by it.

f. Title, Headings, and Marginal Notes. While expressions are often found,[88] especially in the earlier English cases,[89] to the effect that the title is no part of a statute, yet, the rule is now well established, both in England,[90] in the United States,[91]

19 Ct. Cl. 108 [*affirmed* in 113 U. S. 418, 5 S. Ct. 585, 28 L. ed. 1013].

England.— Taylor *v.* Oldham, 4 Ch. D. 395, 46 L. J. Ch. 105, 35 L. T. Rep. N. S. 696, 25 Wkly. Rep. 178; Mason *v.* Armitage, 13 Ves. Jr. 25, 9 Rev. Rep. 131, 33 Eng. Reprint 204.

See 44 Cent. Dig. tit. "Statutes," § 287.

The preamble or recitals may be framed with a view to concealing the real object of the statute.— Priewe *v.* Wisconsin State Land, etc., Co., 103 Wis. 537, 79 N. W. 780, 74 Am. St. Rep. 904.

86. James *v.* Dubois, 16 N. J. L. 285; Kearns *v.* Cordwainers' Co., 6 C. B. N. S. 388, 5 Jur. N. S. 1216, 28 L. J. C. P. 285, 95 E. C. L. 388.

87. Laidler *v.* Young, 2 Harr. & J. (Md.) 69; James *v.* Dubois, 16 N. J. L. 285; Barr's Estate, 21 Pa. Co. Ct. 222; Sutton *v.* Sutton, 22 Ch. D. 511, 52 L. J. Ch. 333, 48 L. T. Rep. N. S. 95, 31 Wkly. Rep. 369; Doe *v.* Brandling, 7 B. & C. 643, 6 L. J. K. B. O. S. 162, 1 M. & R. 600, 14 E. C. L. 290; Kearns *v.* Cordwainers' Co., 6 C. B. N. S. 388, 5 Jur. N. S. 1216, 28 L. J. C. P. 285, 95 E. C. L. 388.

But the preamble may serve to give a definite and qualified meaning to indefinite and general terms used in the enacting clause. Emanuel *v.* Constable, 5 L. J. Ch. O. S. 191, 3 Russ. 436, 3 Eng. Ch. 436, 38 Eng. Reprint 639 [*overruling* Lees *v.* Summersgill, 17 Ves. Jr. 508, 34 Eng. Reprint 197].

The legislature may have had in view a particular mischief, which is recited in the preamble, and to prevent which was the immediate and principal object of the statute, but may then, in the body of the act, provide a remedy for general mischiefs of the same nature. Holbrook *v.* Holbrook, 1 Pick. (Mass.) 248; Proprietors' School Fund's Appeal, 2 Walk. (Pa.) 37; Sutherland *v.* De Leon, 1 Tex. 250, 46 Am. Dec. 100; Mace *v.* Cammel, Lofft 783, 98 Eng. Reprint 917; Colehan *v.* Cooke, Willes 393.

88. State *v.* Welsh, 10 N. C. 404.

89. Salkeld *v.* Johnson, 2 C. B. N. S. 749, 2 Exch. 256, 18 L. J. Exch. 89, 52 E. C. L. 749; Mills *v.* Wilkins, 6 Mod. 62, 87 Eng. Reprint 822; Rex *v.* Williams, W. Bl. 93, 96 Eng. Reprint 51.

English statutes were enacted without titles prior to 2 Henry VII (Coomber *v.* Berks, 9 Q. B. D. 17, 46 J. P. 629, 51 L. J. Q. B. 297, 30 Wkly. Rep. 785; Chance *v.* Adams, 1 Ld. Raym. 77, 91 Eng. Reprint 948); and titles were first added by the clerk (Ogden *v.* Strong, 18 Fed. Cas. No. 10,460, 2 Paine 584).

90. Kenrick *v.* Lawrence, 25 Q. B. D. 99, 38 Wkly. Rep. 779; Coomber *v.* Berks, 9 Q. B. D. 17, 46 J. P. 629, 51 L. J. M. C. 297, 30 Wkly. Rep. 785; Blake *v.* Midland R. Co., 18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233, 83 E. C. L. 93; Bentley *v.* Rotherham, etc., Local Bd., 4 Ch. D. 588, 46 L. J. Ch. 284; Reg. *v.* Mallow Union, 12 Ir. C. L. 35; Shaw *v.* Ruddin, 9 Ir. C. L. 214.

91. *California.*— Cohen *v.* Barrett, 5 Cal. 195.

Georgia.—Wimberly *v.* Georgia Southern, etc., R. Co., 5 Ga. App. 263, 63 S. E. 29.

Illinois.—Perry County *v.* Jefferson County, 94 Ill. 214.

Indiana.— Garrigus *v.* Parke County, 39 Ind. 66.

Iowa.— Cook *v.* Federal Life Assoc., 74 Iowa 746, 35 N. W. 500.

Louisiana.— State *v.* Bolden, 107 La. 116, 31 So. 393, 90 Am. St. Rep. 280.

Maryland.— Bradford *v.* Jones, 1 Md. 351; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Missouri.— Connecticut Mut. L. Ins. Co. *v.* Albert, 39 Mo. 181.

New York.— Rosin *v.* Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245, 86 N. Y. Suppl. 49.

North Carolina.— Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 59 Am. Rep. 250.

Ohio.— Burgett *v.* Burgett, 1 Ohio 469, 13 Am. Dec. 634.

Pennsylvania.— Moore *v.* Chartiers Valley Water Co., 216 Pa. St. 457, 65 Atl. 936; Topper *v.* Kruse, 3 Lanc. Bar 113; Bouton *v.* Boyce, 2 Luz. Leg. Reg. 241.

South Carolina.— State *v.* Stephenson, 2 Bailey 334.

Virginia.— Chesapeake, etc., R. Co. *v.* Pew, 109 Va. 288, 64 S. E. 35.

Wisconsin.— Nazro *v.* Merchants' Mut. Ins. Co., 14 Wis. 295.

United States.— Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226; U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224; U. S. *v.* Nakashima, 160 Fed. 842, 87 C. C. A. 646; St. Louis, etc., R. Co. *v.* Delk, 158 Fed. 931, 86 C. C. A. 95, 162 Fed. 145, 89 C. C. A. 169; U. S. Shoe Mach. Co. *v.* Duplessis Shoe Mach. Co., 155 Fed. 842, 84 C. C. A. 76 [*affirming* 148 Fed. 31]; Rodgers *v.* U. S., 152 Fed. 346, 81 C. C. A. 454; U. S. *v.* Fisher, 2 Cranch 358, 385, 2 L. ed. 304, in which Marshall, C. J., says: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case, the title claims a degree of notice, and will have its due share of consideration." Hahn *v.* Salmon, 20 Fed. 801; Wilson *v.* Spaulding, 19 Fed. 304; Copeland *v.* Memphis, etc., R. Co., 6 Fed. Cas. No. 3,209, 3 Woods 651; Ogden *v.* Strong, 18 Fed. Cas. No. 10,460, 2 Paine 584; Robinson *v.* U. S., 42 Ct. Cl. 52.

See 44 Cent. Dig. tit. "Statutes," § 288.

Title of joint resolutions.— Lovett *v.* Ferguson, 10 S. D. 44, 71 N. W. 765.

and in the English colonies,[92] that, where the meaning of the body of the act is doubtful, reference may be had to the title to remove the ambiguity or to supply an omission.[93] Ordinarily, where the body of a statute is free from ambiguity, the meaning expressed therein must be given effect, without resort to the title;[94] and in no event should the language of the title be permitted to control expressions in the enacting clause in conflict therewith.[95] In the absence of constitutional limitations the body of the statute may be couched in far more general language than the title,[96] and may even deal with subjects not embraced in the title,[97] and yet all the provisions of the enacting clause must be given effect. But under the provisions of a number of the state constitutions,[98] requiring that every statute shall have but one subject, which shall be expressed in its title, the operation and scope of the enacting clause is limited by the title.[99] For the purpose of explaining and clearing up ambiguities in the enacting clauses of statutes, reference may also be had to the headings of portions of statutes,[1] such as titles, articles, chapters, and sections, and for this purpose it has been held that a code or revision is to be regarded as one statute.[2] But, as in the case of titles,[3] neither

92. O'Connor *v.* Nova Scotia Tel. Co., 22 Can. Sup. Ct. 276, 292, in which Sedgwick, J., after referring to the "supposed" English rule, forbidding consideration of the title, continues: "I doubt whether as a matter of law there is at present any rule at all upon the subject. In none of the cases referred to in the text books has the existence or authority of the rule been the point to be determined. The assertion of the rule has been *dicta* and nothing more. There is this difference too between English and colonial statutes. In England the title of an act is a creation of modern growth; at one time acts were passed without it and there is even now no binding rule as to its character. Colonial legislatures have, on the other hand, always been under a constitutional obligation, by virtue of express instructions from the crown, to take care that no clause shall be inserted in any act foreign to what the title of it imports." Greene *v.* Provincial Ins. Co., 4 Ont. App. 521; Reg. *v.* Washington, 46 U. C. Q. B. 221.

93. But see Rider *v.* U. S., 149 Fed. 164, 79 C. C. A. 112 (holding that the title of a legislative act cannot be so read into the body of it as to supply the absence of a substantive provision essential to the conferring of power and authority); O'Connor *v.* Nova Scotia Tel. Co., 22 Can. Sup. Ct. 276.

94. Eastman *v.* McAlpin, 1 Ga. 157; Forman *v.* New Orleans Sewerage, etc., Bd., 119 La. 49, 43 So. 908; Com. *v.* Slifer, 53 Pa. St. 71; Cornell *v.* Coyne, 192 U. S. 418, 24 S. Ct. 383, 48 L. ed. 504; Patterson *v.* The Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 L. ed. 1002; U. S. *v.* McCrory, 119 Fed. 861, 56 C. C. A. 373.

95. *Alabama.*— Bartlett *v.* Morris, 9 Port. 266.

California.— Harris *v.* San Francisco, 52 Cal. 553; *In re* Boston Min., etc., Co., 51 Cal. 624; People *v.* Abbott, 16 Cal. 358.

Illinois.— South Park Com'rs *v.* Chicago First Nat. Bank, 177 Ill. 234, 52 N. E. 365.

Louisiana.— State *v.* Cazeau, 8 La. Ann. 109.

North Carolina.— Blue *v.* McDuffie, 44 N. C. 131.

Oklahoma.— Territory *v.* Hopkins, 9 Okla. 133, 59 Pac. 976.

United States.— The New York, 108 Fed. 102, 47 C. C. A. 232 [*affirmed* in 189 U. S. 363, 23 S. Ct. 504, 47 L. ed. 854].

England.— Wilmot *v.* Rose, 2 C. L. R. 677, 3 E. & B. 563, 18 Jur. 518, 23 L. J. Q. B. 281, 2 Wkly. Rep. 378, 77 E. C. L. 563.

See 44 Cent. Dig. tit. "Statutes," § 288.

96. Hadden *v.* Barney, 5 Wall. (U. S.) 107, 18 L. ed. 518, the title may actually be misleading.

97. Hough *v.* Porter, 51 Oreg. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; U. S. *v.* McArdle, 26 Fed. Cas. No. 15,653, 2 Sawy. 367; U. S. *v.* Randolph, 27 Fed. Cas. No. 16,120, 1 Pittsb. (Pa.) 24.

98. See *supra*, IV, A.

99. *Georgia.*— Macon, etc., R. Co. *v.* Little, 45 Ga. 370.

Louisiana.— State *v.* Banks, 106 La. 480, 31 So. 53.

Minnesota.— Megins *v.* Duluth, 97 Minn. 23, 106 N. W. 89.

New Jersey.— Jones *v.* Morristown, 66 N. J. L. 488, 49 Atl. 440; Allen *v.* Bernards Tp. Taxation Com'rs, 57 N. J. L. 303, 31 Atl. 219.

United States.— Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 12 S. Ct. 689, 36 L. ed. 537 [*affirming* 47 Fed. 225].

See 44 Cent. Dig. tit. "Statutes," § 288.

1. Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969; Hammersmith, etc., R. Co. *v.* Brand, L. R. 4 H. L. 171, 38 L. J. Q. B. 265, 21 L. T. Rep. N. S. 238, 18 Wkly. Rep. 12; Bryan *v.* Child, 5 Exch. 368; Eastern Counties, etc., R. Co. *v.* Marriage, 9 H. L. Cas. 32, 7 Jur. N. S. 53, 31 L. J. Exch. 73, 3 L. T. Rep. N. S. 60, 8 Wkly. Rep. 748, 11 Eng. Reprint 639; Donly *v.* Homwood, 4 Ont. App. 555; Lawrie *v.* Rathbun, 38 U. C. Q. B. 255.

The headings of chapters and sections are entitled to greater weight than the title of the entire act. Barnes *v.* Jones, 51 Cal. 303; People *v.* Molyneux, 40 N. Y. 113 [*affirming* 53 Barb. 9].

2. Conery *v.* Waggaman, McGloin (La.) 43.

3. See *supra*, note 95.

headings [4] nor arrangement into sections [5] will be allowed to control the clear import of the enacting clauses. Reference may likewise be made to notes written on the face or margin of the original statute, in the course of its enactment,[6] but not to the marginal notes on printed copies,[7] as these are no part of the statute, but are inserted only for convenience in examining it.

5. Presumptions to Aid Construction.[8] Numerous presumptions have been indulged in by the courts as aids in the construction of statutes.[9] Thus, it has been presumed that the legislature, in passing a statute, acted with a full knowledge of the constitutional scope of its powers;[10] of prior legislation on the same subject,[11] and its construction by the courts,[12] and executive officers;[13] and with full information in regard to the subject-matter of the statute;[14] that it acted from honorable motives;[15] that it did not intend to overthrow long-established principles of law,[16] or to give its enactments an extraterritorial operation.[17] Presumptions have also been indulged, in the interpretation of statutes, that the legislature understood the meaning of words used by them;[18] that words are used in their common and ordinary meaning,[19] with reference to the subject-matter of the

4. Chesapeake, etc., R. Co. *v.* Pew, 109 Va. 288, 64 S. E. 35; State *v.* Bridges, 19 Wash. 431, 53 Pac. 545; Union Steamship Co. *v.* Melbourne Harbour Trust Com'rs, 9 App. Cas. 365, 53 L. J. P. C. 59, 50 L. T. Rep. N. S. 337; Reg. *v.* Currie, 31 U. C. Q. B. 582.

5. *In re* Bull, 153 Cal. 715, 96 Pac. 366, holding that the numbering of sections is a purely artificial and unessential arrangement, resorted to for convenience only, and does not prevent the construction of the act as a whole.

6. Mason *v.* Cranbnry Tp., 68 N. J. L. 149, 52 Atl. 568.

7. Cook *v.* Federal Life Assoc., 74 Iowa 746, 35 N. W. 500; Sutton *v.* Sutton, 22 Ch. D. 511, 52 L. J. Ch. 333, 48 L. T. Rep. N. S. 95, 31 Wkly. Rep. 369; Atty.-Gen. *v.* Great Eastern R. Co., 11 Ch. D. 449, 48 L. J. Ch. 429, 40 L. T. Rep. N. S. 265, 27 Wkly. Rep. 759; Claydon *v.* Green, L. R. 3 C. P. 511, 37 L. J. C. P. 226, 18 L. T. Rep. N. S. 607, 16 Wkly. Rep. 1126. But see Mackey *v.* Miller, 126 Fed. 161, 62 C. C. A. 139, holding that marginal notes in the Revised Statutes of the United States may be referred to on questions of construction, as indicating the intention of congress not to alter by revision the substantial provisions of previous acts.

8. **For construction in favor of validity** see *supra*, II, G, 1, d, (II).

For presumptions as to enactment see *infra*, VII, A, 1, b.

For presumptions as to statutes adopted from other states see *infra*, VII, A, 7, e.

9. See *infra*, notes 10–30.

10. French *v.* Teschemaker, 24 Cal. 518; Reynolds *v.* Enterprise Transp. Co., 198 Mass. 590, 85 N. E. 110; Austin *v.* Cahill, 99 Tex. 172, 88 S. W. 542, 89 S. W. 552; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

11. *Arkansas.*— Benton *v.* Willis, 76 Ark. 443, 88 S. W. 1000.

Florida.— Wilson *v.* State, 50 Fla. 164, 39 So. 471.

Missouri.— Reed *v.* Goldneck, 112 Mo. App. 310, 86 S. W. 1104.

Montana.—McLean *v.* Moran, 38 Mont. 298, 99 Pac. 836.

New York.— Matter of Simmons, 130 N. Y. App. Div. 350, 114 N. Y. Suppl. 571 [*affirming* 58 Misc. 607, 109 N. Y. Suppl. 1054].

Utah.— Lavagnino *v.* Uhlig, 26 Utah 1, 71 Pac. 1046, 99 Am. St. Rep. 808.

Vermont.— State *v.* Rutland R. Co., 81 Vt. 508, 71 Atl. 197.

West Virginia.—State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394.

See 44 Cent. Dig. tit. "Statutes," § 289.

12. Walker *v.* Bobbitt, 114 Tenn. 700, 88 S. W. 327; Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

13. State *v.* Central Vermont R. Co., 81 Vt. 508, 71 Atl. 197.

14. State *v.* Higgins, 121 Iowa 19, 95 N. W. 244; State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; Beaden *v.* King, 9 Hare 499, 22 L. J. Ch. 111, 41 Eng. Ch. 499, 68 Eng. Reprint 608.

15. Milner *v.* Pensacola, 17 Fed. Cas. No. 9,619, 2 Woods 632.

16. *California.*— Lowe *v.* Yolo County Consol. Water Co., 8 Cal. App. 167, 96 Pac. 379.

Louisiana.— Wagner *v.* Kenner, 2 Rob. 120.

Maine.— Haggett *v.* Hurley, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362.

Michigan.— Bandfield *v.* Bandfield, 117 Mich. 80, 75 N. W. 287, 72 Am. St. Rep. 550, 40 L. R. A. 757.

Ohio.— Manuel *v.* Manuel, 13 Ohio St. 458.

Oklahoma.— State *v.* Hooker, (1908) 98 Pac. 964, holding that the presumption is that the legislature did not intend to change existing law beyond what is expressly declared.

Pennsylvania.— Big Black Creek Imp. Co. *v.* Com., 94 Pa. St. 450; Fuelhart *v.* Blood, 21 Pa. Co. Ct. 601.

Vermont.—State *v.* Central Vermont R. Co., 81 Vt. 459, 71 Atl. 193, 21 L. R. A. N. S. 949.

West Virginia.— Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

See 44 Cent. Dig. tit. "Statutes," § 289.

17. State *v.* Lancashire F. Ins. Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348.

18. Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116.

19. Hasely *v.* Ensley, 40 Ind. App. 598, 82 N. E. 809; Skinner *v.* Tibbitts, 13 N. Y. Civ.

act;[20] that some effect is to be given to each;[21] that no exceptions are to be made to general language;[22] and that whenever a power is given or duty imposed, everything necessary for the execution of the power or performance of the duty is conferred by implication.[23] Presumptions are also indulged against any retrospective operation,[24] and against any unjust[25] or absurd consequences;[26] against any purpose or object hostile to religion;[27] and against any intention of the legislature to abandon its rights[28] or to infringe those of the coördinate departments of government.[29] In the absence of proof to the contrary, the laws of other states will be presumed to be in accord with those of the state of the forum.[30]

6. Extrinsic Aids to Construction — a. In General. The statute itself furnishes the best means for its own exposition, and if the sense in which words were intended to be used can be clearly ascertained from all its parts and provisions, a resort to extrinsic facts is not permitted to ascertain the meaning.[31] But where, after a consideration of the language of the entire statute, there remains a doubt as to its meaning, reference may be had to extrinsic matters,[32] such as maps[33] and other documents,[34] referred to in the act, or used as the basis of the act,[35] the circumstances existing at the time of its enactment,[36] general facts of common knowledge,[37] other legislation on the same subject,[38] and the results that would follow different constructions.[39]

Proc. 370; Continental Hose Co. *v.* Fargo, 17 N. D. 5, 114 N. W. 834.

20. U. S. *v.* Jarvis, 26 Fed. Cas. No. 15,468, 2 Ware 278.

21. Browne *v.* Turner, 174 Mass. 150, 54 N. E. 510; State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394.

22. U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. N. S. 167; Cella Commission Co. *v.* Bohlinger, 147 Fed. 419, 78 C. C. A. 467, 8 L. R. A. N. S. 537.

23. Callaghan *v.* McGown, (Tex. Civ. App. 1905) 90 S. W. 319.

24. Rich *v.* U. S., 33 Ct. Cl. 191. See *infra*, VII, D, 1.

25. *In re* Mitchell, 120 Cal. 384, 52 Pac. 799; State *v.* Clinton, 28 La. Ann. 201.

26. Dekelt *v.* People, 44 Colo. 525, 99 Pac. 330; *In re* King, 105 Iowa 320, 75 N. W. 187.

27. Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226.

28. Republic Bank *v.* Hamilton County, 21 Ill. 53.

29. Lyman *v.* Gramercy Club, 28 N. Y. App. Div. 30, 50 N. Y. Suppl. 1004.

30. Hewitt *v.* Morgan, 88 Iowa 468, 55 N. W. 478; Clark *v.* Eltinge, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858.

31. *Alabama.*— Bartlett *v.* Morris, 9 Port. 266.

Iowa.— Tennant *v.* Kuhlemeier, 142 Iowa 241, 120 N. W. 689, holding that the code commission being only the draftsman of the code, its intent, even if admissible upon its construction, will not control over the statute as finally adopted by the legislature.

Maryland.— Alexander *v.* Worthington, 5 Md. 471.

Minnesota.— State *v.* St. Paul, 81 Minn. 391, 84 N. W. 127.

Mississippi.— Green *v.* Weller, 32 Miss. 650.

Montana.— State *v.* Cudahy Packing Co., 33 Mont. 179, 82 Pac. 833, 114 Am. St. Rep. 804.

Ohio.— Slingluff *v.* Weaver, 66 Ohio St. 621, 64 N. E. 574.

Pennsylvania.— Commonwealth Bank *v.* Com., 19 Pa. St. 144.

Wisconsin.— Appleton Waterworks Co. *v.* Appleton, 116 Wis. 363, 93 N. W. 262.

United States.— Thomas *v.* Vandegrift, 162 Fed. 645, 89 C. C. A. 437.

See 44 Cent. Dig. tit. "Statutes," § 290.

An amendment to a statute passed many years after the original act cannot be used to show the intention of the framers of the original act. Com. *v.* Hana, 195 Mass. 262, 81 N. E. 149, 122 Am. St. Rep. 251, 11 L. R. A. N. S. 799.

32. Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950; Hamilton *v.* Rathbone, 175 U. S. 414, 20 S. Ct. 155, 44 L. ed. 219.

33. People *v.* Dana, 22 Cal. 11.

34. Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 292, 3 Abb. N. Cas. 372 [*affirmed* in 71 N. Y. 430]; Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950.

35. U. S. *v.* Webster, 28 Fed. Cas. No. 16,658, 2 Ware 46.

36. People *v.* Schoonmaker, 63 Barb. (N. Y.) 44; Merchants' Nat. Bank *v.* U. S., 42 Ct. Cl. 6. See *infra*, VII, A, 6, b.

37. State *v.* Maloney, 115 La. 498, 39 So. 539; Browne *v.* Turner, 174 Mass. 150, 54 N. E. 510; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554.

38. *Colorado.*— Hart *v.* Hart, 31 Colo. 333, 73 Pac. 35.

Florida.— Curry *v.* Lehman, 55 Fla. 847, 47 So. 18.

Kansas.— Gilbert *v.* Craddock, 67 Kan. 346, 72 Pac. 869.

Kentucky.— Com. *v.* International Harvester Co., 131 Ky. 551, 115 S. W. 703.

Minnesota.— State *v.* Twin City Tel. Co., 104 Minn. 270, 116 N. W. 835.

United States.— Merchants' Nat. Bank *v.* U. S., 42 Ct. Cl. 6.

See 44 Cent. Dig. tit. "Statutes," § 290; and *infra*, VII, A, 7, d, 2.

39. Riley *v.* Pennsylvania Co., 32 Pa. Super. Ct. 579.

b. Contemporaneous Circumstances. For the purpose of removing ambiguities in the language of a statute, it must be read with reference to all the facts and circumstances connected with its enactment,[40] such as the history of the times,[41] the state of the existing law,[42] and the evils to be remedied by the new act.[43]

c. Motives and Opinions of Legislature. The intention of the legislature to which effect must be given is that expressed in the statute, and the courts will not inquire into the motives which influenced the legislature,[44] or individual

40. *Alabama.*— Prowell *v.* State, 142 Ala. 80, 39 So. 164.

Illinois.— Chicago *v.* Green, 238 Ill. 258, 87 N. E. 417.

Maryland.— Maryland Agricultural College *v.* Atkinson, 102 Md. 557, 62 Atl. 1035.

Missouri.— Lexington *v.* Commercial Bank, 130 Mo. App. 687, 108 S. W. 1095.

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

New York.— Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 778 [*affirming* 121 App. Div. 582, 106 N. Y. Suppl. 378].

Pennsylvania.— Claysville Borough School Dist. *v.* Worrell, 37 Pa. Super. Ct. 10.

West Virginia.—State *v.* Harden, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394; Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

United States.— Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 S. Ct. 666, 40 L. ed. 940; Clark *v.* U. S., 37 Ct. Cl. 60; Pacific Coast Steamship Co. *v.* U. S., 33 Ct. Cl. 36.

England.— McWilliams *v.* Adams, 1 Macq. 120.

See 44 Cent. Dig. tit. "Statutes," § 291.

41. *Indiana.*— Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222.

Kansas.— State *v.* Kelly, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450.

Louisiana.— State *v.* Nicholls, 30 La. Ann. 980.

New York.— See Story *v.* New York El. R. Co., 3 Abb. N. Cas. 478 [*reversed* on other grounds in 90 N. Y. 122, 43 Am. Rep. 146, 11 Abb. N. Cas. 236].

United States.— U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224; Preston *v.* Browder, 1 Wheat. 115, 4 L. ed. 50; U. S. *v.* Oregon, etc., R. Co., 57 Fed. 426; Baring *v.* Erdman, 2 Fed. Cas. No. 981; Dunlap *v.* U. S., 33 Ct. Cl. 135.

England.— Reg. *v.* Most, 7 Q. B. D. 244, 14 Cox C. C. 583, 45 J. P. 696, 50 L. J. M. C. 113, 44 L. T. Rep. N. S. 823, 29 Wkly. Rep. 760; Crawford *v.* Montrose, 1 Macq. 401.

Canada.— Toronto R. Co. *v.* Reg., 4 Can. Exch. 262.

See 44 Cent. Dig. tit. "Statutes," § 291.

42. *California.*— People *v.* Lebus, (1908) 96 Pac. 1118; *In re* Moffitt, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. N. S. 207.

Missouri.— Grimes *v.* Reynolds, 184 Mo. 679, 83 S. W. 1132 [*affirming* 94 Mo. App. 576, 68 S. W. 588].

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

New Jersey.— Keyport, etc., Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 13.

Texas.— Scott *v.* State, (Cr. App. 1908) 110 S. W. 69; Cohen *v.* State, 53 Tex. Cr. 422, 110 S. W. 66; Williams *v.* State, 52 Tex. Cr. 371, 107 S. W. 1121; *Ex p.* Keith, 47 Tex. Cr. 283, 83 S. W. 683.

England.— Phillips *v.* Rees, 24 Q. B. D. 17, 54 J. P. 293, 59 L. J. Q. B. 1, 61 L. T. Rep. N. S. 713, 38 Wkly. Rep. 53; Yewens *v.* Noakes, 6 Q. B. D. 530, 45 J. P. 8, 50 L. J. Q. B. 132, 44 L. T. Rep. N. S. 128, 28 Wkly. Rep. 562.

See 44 Cent. Dig. tit. "Statutes," § 291.

43. *Indiana.*— Clinton County *v.* Given, 169 Ind. 468, 80 N. E. 965, 82 N. E. 918; Bailey *v.* State, 163 Ind. 165, 71 N. E. 655; Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222.

Louisiana.— State *v.* Maloney, 115 La. 498, 39 So. 539; Richard *v.* Lazard, 108 La. 540, 32 So. 559.

Minnesota.—Taylor *v.* Taylor, 10 Minn. 107.

New York.— Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 178 [*affirming* 121 N. Y. App. Div. 582, 106 N. Y. Suppl. 378]; Fairchild *v.* Gwynne, 16 Abb. Pr. 23.

Vermont.— Barker *v.* Esty, 19 Vt. 131, 139, holding, however, that a statute must be construed "without reference to any traditional history of the occasion of its enactment, unless that result from some known state of embarrassment under the former law."

West Virginia.— Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746.

United States.— Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226; Mosle *v.* Bidwell, 130 Fed. 334, 65 C. C. A. 533; U. S. *v.* Wilson, 58 Fed. 768.

See 44 Cent. Dig. tit. "Statutes," § 291.

44. *Illinois.*— Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174 [*reversing* 118 Ill. App. 138], holding that the court cannot consider the actions and purposes of a lobby interested in the passage of the act.

Kansas.— Wichita *v.* Burleigh, 36 Kan. 34, 12 Pac. 332.

Kentucky.— Lebanon *v.* Creel, 109 Ky. 363, 59 S. W. 16, 22 Ky. L. Rep. 865.

Michigan.— Ellis *v.* Boer, 150 Mich. 452, 114 N. W. 239.

New York.— Waterloo Woolen Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358, 14 L. R. A. 481 [*reversing* 58 Hun 50, 11 N. Y. Suppl. 829]; People *v.* Draper, 15 N. Y. 532.

United States.— Southern R. Co. *v.* Machinists' Local Union No. 14, 111 Fed. 49; Ropes *v.* Clinch, 20 Fed. Cas. No. 12,041, 8 Blatchf. 304, holding that if an act of congress is plainly in conflict with an existing

members,[45] in voting for its passage; nor indeed as to the intention of the draftsman, or of the legislature, so far as it has not been expressed in the act.[46]

d. History and Passage of Act. Where the language of a statute is ambiguous, its meaning may frequently be ascertained by resort to the history of its passage through the legislature.[47] While the authentication of an enrolled bill by the signatures of the presiding officers of the two legislative houses is conclusive evidence of its enactment,[48] yet for the purpose of interpreting the legislative will resort may be had to the history of the statute as found in the journals of the two legislative bodies,[49] and also to the original bill with the amendments noted thereon.[50] As a general rule the debates in the legislature are not appropriate sources of information from which to discover the meaning of a statute.[51] Both

treaty with a foreign nation, a court cannot inquire whether, in passing such act, congress had or had not an intention to pass a law inconsistent with the provisions of the treaty.

See 44 Cent. Dig. tit. "Statutes," § 292.

All acts will be presumed to have been passed in good faith.— State *v.* Eau Claire, 40 Wis. 533; Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

45. *Arkansas.*— State *v.* Lancashire F. Ins. Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348.

Illinois.— Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174 [*reversing* 118 Ill. App. 138].

Indiana.— Parker *v.* State, 132 Ind. 419, 31 N. E. 1114.

Iowa.— Tennant *v.* Kuhlemeier, 142 Iowa 241, 120 N. W. 689.

United States.— U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224; U. S. *v.* Wilson, 58 Fed. 768; Dunlap *v.* U. S., 33 Ct. Cl. 135.

See 44 Cent. Dig. tit. "Statutes," § 292.

46. Tennant *v.* Kuhlemeier, 142 Iowa 241, 120 N. W. 689; *In re* Murphy, 23 N. J. L. 180; Keyport, etc., Steamboat Co. *v.* Farmers' Transp. Co., 18 N. J. Eq. 13; Combined Saw, etc., Co. *v.* Flournoy, 88 Va. 1029, 14 S. E. 976; Richmond *v.* Henrico County, 83 Va. 204, 2 S. E. 26.

47. *Massachusetts.*— Browne *v.* Turner, 174 Mass. 150, 54 N. E. 510.

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

New Mexico.— Douglass *v.* Lewis, 3 N. M. 345, 9 Pac. 377.

New York.— People *v.* Schoonmaker, 63 Barb. 44.

North Dakota.— State *v.* Burr, 16 N. D. 581, 113 N. W. 705.

Tennessee.— Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002.

Vermont.— State *v.* Rutland R. Co., 81 Vt. 508, 71 Atl. 197.

Wisconsin.— Mead *v.* Bagnall, 15 Wis. 156, holding that the date of the approval of a law, and not the date of publication, is to be looked at, in determining the intent of the legislature, so far as that intent depends on the priority of its action.

United States.—U. S. *v.* Musgrave, 160 Fed. 700.

But see Tennant *v.* Kuhlemeier, 142 Iowa 241, 120 N. W. 689.

See 44 Cent. Dig. tit. "Statutes," § 293.

48. Evans *v.* Browne, 30 Ind. 514, 95 Am. Dec. 710; Passaic County *v.* Stevenson, 46 N. J. L. 173; Pangborn *v.* Young, 32 N. J. L. 29. See *supra*, II, E, 2.

49. *Alabama.*— State *v.* Bracken, 154 Ala. 151, 45 So. 841.

Arkansas.— Hill *v.* Mitchell, 5 Ark. 608.

Illinois.— Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174 [*reversing* 118 Ill. App. 138].

Indiana.— Edger *v.* Randolph County, 70 Ind. 331; Walter A. Wood Mowing, etc., Co. *v.* Caldwell, 54 Ind. 270, 23 Am. Rep. 641.

Kansas.— State *v.* Kelly, 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450.

Missouri.— *Ex p.* Helton, 117 Mo. App. 609, 93 S. W. 913.

North Dakota.— State *v.* Burr, 16 N. D. 581, 113 N. W. 705.

Pennsylvania.— Southwark Bank *v.* Com., 26 Pa. St. 446; Commonwealth Bank *v.* Com., 19 Pa. St. 144.

Washington.— Scouten *v.* Whatcom, 33 Wash. 273, 74 Pac. 389.

United States.— Blake *v.* New York Nat. City Bank, 23 Wall. 307, 23 L. ed. 119.

See 44 Cent. Dig. tit. "Statutes," § 293.

Journals cannot be resorted to where the act itself is unambiguous.— Duncan *v.* Combs, 131 Ky. 330, 115 S. W. 222.

50. Mason *v.* Cranbury Tp., 68 N. J. L. 149, 52 Atl. 568; Scouten *v.* Whatcom, 33 Wash. 273, 74 Pac. 389.

51. *California.*— Leese *v.* Clark, 20 Cal. 387.

District of Columbia.—District of Columbia *v.* Washington Market Co., 3 MacArthur 559 [*affirmed* in 108 U. S. 243, 2 S. Ct. 543, 27 L. ed. 714].

Minnesota.— Taylor *v.* Taylor, 10 Minn. 107.

Pennsylvania.—Lenhart *v.* Cambria County, 29 Pa. Super. Ct. 350 [*affirmed* in 216 Pa. St. 25, 64 Atl. 876].

United States.— U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007; U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224; Carter *v.* Hobbs, 92 Fed. 594; U. S. *v.* Oregon, etc., R. Co., 57 Fed. 426; Pacific Coast Steamship Co. *v.* U. S., 33 Ct. Cl. 36.

England.— Southeastern R. Co. *v.* Railway Com'rs, 6 Q. B. D. 586, 45 J. P. 388, 50 L. J. Q. B. 201, 44 L. T. Rep. N. S. 203 [*overruling* Reg. *v.* Oxford, 4 Q. B. D. 525, 47 L. J. Q. B. 609, 41 L. T. Rep. N. S. 122].

Canada.— Gosselin *v.* Rex, 33 Can. Sup. Ct. 255; Toronto R. Co. *v.* Reg., 4 Can. Exch. 262.

the debates,[52] however, and the reports of committees[53] may be consulted for the purpose of ascertaining the general object of the legislation proposed[54] and the evils sought to be remedied.[55]

e. Contemporaneous Construction[56] — (i) *In General.* Primarily it is the function and duty of the courts to interpret the meaning of a statute, and where they can ascertain the legislative intent by the use of intrinsic aids alone[57] resort to its contemporaneous construction by other persons is both unnecessary and improper. But where the language of the statute itself is ambiguous or uncertain, the opinions entertained by contemporaries as to its meaning are frequently the best guides to the legislative intent.[58]

(ii) *Practical Construction or Usage.*[59] On the principle of contemporaneous exposition, common usage and practice under the statute,[60] or a

See 44 Cent. Dig. tit. "Statutes," § 293.

Amendments offered to a bill during its passage, but which were not finally incorporated in the statute as passed, cannot be considered in interpreting the statute. Lane *v.* Kolb, 92 Ala. 636, 9 So. 873.

Executive report on which statute is supposed to be founded may not be considered.— Ewart *v.* Williams, 3 Drew. 21, 3 Eq. Rep. 476, 1 Jur. N. S. 409, 24 L. J. Ch. 414, 3 Wkly. Rep. 348, 61 Eng. Reprint 800; Martin *v.* Hemming, 10 Exch. 478, 18 Jur. 1002, 24 L. J. Exch. 3, 3 Wkly. Rep. 29; Arding *v.* Bonner, 2 Jur. N. S. 763.

52. State *v.* Nicholls, 30 La. Ann. 980; Maynard *v.* Johnson, 2 Nev. 25; Jennison *v.* Kirk, 98 U. S. 453, 25 L. ed. 240; Shallus *v.* U. S., 162 Fed. 653, 89 C. C. A. 445 [*reversing* 155 Fed. 213]; Wadsworth *v.* Boysen, 148 Fed. 771, 78 C. C. A. 437; Ho Ah Kow *v.* Nunan, 12 Fed. Cas. No. 6,546, 5 Sawy. 552, 8 Reporter 195, 20 Alb. L. J. (N. Y.) 250.

Especially the remarks of the member in charge of the bill.— U. S. *v.* Wilson, 58 Fed. 768; *Ex p.* Farley, 40 Fed. 66.

53. Harrington *v.* Smith, 28 Wis. 43; Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226; U. S. *v.* Chicago, etc., R. Co., 157 Fed. 616 [*reversed* on other grounds in 168 Fed. 236, 93 C. C. A. 450, 21 L. R. A. N. S. 690]; Mosle *v.* Bidwell, 130 Fed. 334, 65 C. C. A. 533 [*reversing* 119 Fed. 480].

54. See *supra*, notes 49–52.

55. Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226.

56. For the maxim "*Contemporanea expositio est optima et fortissima in lege*" see 8 Cyc. 1145.

57. Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174 [*reversing* 118 Ill. App. 138]; Bates, etc., Co. *v.* Payne, 194 U. S. 106, 24 S. Ct. 595, 48 L. ed. 894; Smith *v.* Payne, 194 U. S. 104, 24 S. Ct. 595, 48 L. ed. 893; Houghton *v.* Payne, 194 U. S. 88, 24 S. Ct. 590, 48 L. ed. 888; U. S. *v.* Graham, 110 U. S. 219, 221, 3 S. Ct. 582, 28 L. ed. 126, in which the court says: "If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise and with its meaning evident there is no room for construction, and consequently no need of anything to give it aid."

58. *Kentucky.*— Nichols *v.* Wells, Ky. Dec. 255.

New Hampshire.— Green *v.* Bancroft, 75 N. H. 204, 72 Atl. 373.

Pennsylvania.— Com. *v.* Paine, 207 Pa. St. 45, 56 Atl. 317; Reeves' Appeal, 33 Pa. Super. Ct. 196; Com. *v.* Grant, 2 Woodw. 379.

Virginia.— Smith *v.* Bryan, 100 Va. 199, 40 S. E. 652.

Wisconsin.— State *v.* Frear, 138 Wis. 536, 120 N. W. 216.

United States.— Cohens *v.* Virginia, 6 Wheat. 264, 5 L. ed. 257; Matz *v.* Chicago, etc., R. Co., 85 Fed. 180 (holding that uniform and contemporaneous action and opinion of the bench and bar of a state should have weight with the federal courts in construing a statute of the state); U. S. *v.* Ballard, 24 Fed. Cas. No. 14,506.

See 44 Cent. Dig. tit. "Statutes," § 294.

59. For the maxim "*Optimus legum interpres consuetudo*" see 29 Cyc. 1502.

60. *Colorado.*— Brown *v.* State, 5 Colo. 496.

Connecticut.— Dyer *v.* Smith, 12 Conn. 384.

Indian Territory.— McCurtain *v.* Grady, 1 Indian Terr. 107, 38 S. W. 65.

Kentucky.— Collins *v.* Henderson, 11 Bush 74; Neal *v.* Taylor, 9 Bush 380.

Louisiana.— Kernion *v.* Hills, 1 La. Ann. 419; Cox *v.* Williams, 5 Mart. N. S. 139; Caulker *v.* Banks, 3 Mart. N. S. 532.

Maryland.— Frazier *v.* Warfield, 13 Md. 279; Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. 449.

Massachusetts.— Packard *v.* Richardson, 17 Mass. 122, 9 Am. Dec. 123; Rogers *v.* Goodwin, 2 Mass. 475.

New York.— Meriam *v.* Harsen, 2 Barb. Ch. 232.

Ohio.— Brown *v.* Farran, 3 Ohio 140.

Pennsylvania.— *In re* Leh's Contested Election, 6 Pa. Dist. 152; Close *v.* Berks County, 2 Woodw. 453.

South Carolina.— Barksdale *v.* Morrison, Harp. 101.

Vermont.—State *v.* Central Vermont R. Co., 81 Vt. 508, 71 Atl. 197.

Wisconsin.— State *v.* Frear, 138 Wis. 536, 120 N. W. 216.

United States.—Mitchel *v.* U. S., 9 Pet. 711, 9 L. ed. 283; U. S. *v.* Arredondo, 6 Pet. 691, 8 L. ed. 547; McKeen *v.* Delancy, 5 Cranch 22, 3 L. ed. 25; Polk *v.* Hill, 19 Fed. Cas. No. 11,249, Brunn. Col. Cas. 126, 2 Overt. (Tenn.) 118.

course of conduct indicating a particular understanding of it,[61] will frequently be of great value in determining its real meaning, especially where such usage has been acquiesced in by all parties concerned, and has extended over a long period of time.[62] But no matter how long the usage has been established, or how general the acquiescence in the customary construction, it will not be permitted to vary or to defeat the real intention of the legislature as expressed in the statute and interpreted by the court.[63]

(III) *EXECUTIVE CONSTRUCTION* — (A) *In General.* The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration,[64] especially if such construction has been made by the highest

See 44 Cent. Dig. tit. "Statutes," §§ 294, 295.

Construction of corporation charter.—Louisville *v.* Louisville Water Co., 105 Ky. 754, 49 S. W. 766, 20 Ky. L. Rep. 1529; Clark's Run, etc., Turnpike Road Co. *v.* Com., 96 Ky. 525, 29 S. W. 360, 16 Ky. L. Rep. 681.

The construction placed upon a statute regulating a certain industry by practical persons engaged in the industry will be considered. Himrod Coal Co. *v.* Stevens, 104 Ill. App. 639 [*affirmed* in 203 Ill. 115, 67 N. E. 389].

61. State *v.* Davis, 62 W. Va. 500, 69 S. E. 584, 14 L. R. A. N. S. 1142.

62. *Maryland.*— Munroe *v.* Woodruff, 17 Md. 159 (holding that since, by the custom of merchants and current of authorities, a uniform usage has authorized the employment of clerks in offices of notaries in large commercial cities, a protest of a bill or note made by a clerk so employed is valid, although the statute provides for protests by notaries only); Frazier *v.* Warfield, 13 Md. 279.

Minnesota.— State *v.* Northern Pac. R. Co., 95 Minn. 43, 103 N. W. 731.

New York.— Troup *v.* Haight, Hopk. 239, 268, twenty-seven years.

North Carolina.—Atty.-Gen. *v.* Cape Fear Bank, 40 N. C. 71.

Ohio.— Chesnut *v.* Shane, 16 Ohio 599, 47 Am. Dec. 387.

West Virginia.— State *v.* Davis, 62 W. Va. 500, 60 S. E. 584, 14 L. R. A. N. S. 1142, in which the rule is referred to as "the strong and wholesome rule of contemporaneous construction."

United States.— McKeen *v.* Delancy, 5 Cranch 22, 3 L. ed. 25.

England.— Clyde Nav. Trustees *v.* Laird, 8 App. Cas. 658, 673.

See 44 Cent. Dig. tit. "Statutes," §§ 294, 295.

63. *Illinois.*— J. Burton Co. *v.* Chicago, 236 Ill. 383, 86 N. E. 93 [*reversing* 140 Ill. App. 344].

Indiana.— McCrary *v.* McFarland, 93 Ind. 466; Blizzard *v.* Walker, 32 Ind. 437.

Iowa.— O'Ferrall *v.* Simplot, 4 Greene 162, holding that the form of a certificate of acknowledgment cannot, on the strength of its being in common use, be regarded as a construction of the statute concerning such acknowledgments.

Louisiana.— Devlin *v.* His Creditors, 2 La. 361, holding that the opinions of merchants as to what the law is, based on their knowledge of their own customs, cannot inform the court, or influence its judgment in construing a recent statute.

Maine.— Lord *v.* Burbank, 18 Me. 178.

Massachusetts.— Mansfield *v.* Stoneham, 15 Gray 149.

New Hampshire.— Bailey *v.* Rolfe, 16 N. H. 247.

North Carolina.— State *v.* Southern R. Co., 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246, holding that in construing a penal statute prohibiting discrimination between passengers, the construction placed on it by common carriers and favored recipients of such discrimination will not be considered.

Texas.— Central R. Co. *v.* Hearne, 32 Tex. 546; Smyth *v.* Walton, 5 Tex. Civ. App. 673, 24 S. W. 1084.

Virginia.— Delaplane *v.* Crenshaw, 15 Gratt. 457.

United States.— Swift, etc., Co. *v.* U. S., 105 U. S. 691, 26 L. ed. 1108; Basey *v.* Gallagher, 20 Wall. 670, 22 L. ed. 452; Love *v.* Hinckley, 15 Fed. Cas. No. 8,548, Abb. Adm. 436.

England.— Clyde Nav. Trustees *v.* Laird, 8 App. Cas. 658, 673 (in which Lord Watson says: "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken"); Dunbar *v.* Roxburghe, 3 Cl. & F. 335, 6 Eng. Reprint 1462.

See 44 Cent. Dig. tit. "Statutes," §§ 294, 295.

Local usage will not control the construction of a general law.—Chicago *v.* Becker, 233 Ill. 189, 84 N. E. 242.

64. *District of Columbia.*— U. S. *v.* Day, 27 App. Cas. 458.

Florida.— State *v.* Bryan, 50 Fla. 293, 39 So. 929.

Georgia.— Howell *v.* State, 71 Ga. 224, 51 Am. Rep. 259.

Illinois.— Mathews *v.* Shores, 24 Ill. 27. See also Harrison *v.* People, 97 Ill. App. 421 [*reversed* on other grounds in 195 Ill. 466, 63 N. E. 191].

Michigan.— People *v.* Michigan Cent. R.

officers in the executive department of the government,[65] or has been observed and acted upon for many years,[66] and such construction should not be disregarded or overturned unless it is clearly erroneous.[67] The consideration to be accorded executive construction is also especially weighty in the case of statutes prescribing penalties,[68] or levying impositions,[69] where the executive construction has been in favor of the persons affected; or in cases where the executive construction has been impliedly indorsed by the legislature.[70] To the extent that a reversal of the executive construction would result in depriving persons affected of vested rights in property [71] or contract,[72] the executive construction will be regarded as

Co., 145 Mich. 140, 108 N. W. 772; Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256.

Missouri.— Ewing *v.* Vernon County, 216 Mo. 681, 116 S. W. 518; State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532.

Nebraska.— *In re* Hastings Brewing Co., (1908) 119 N. W. 27; Douglas County *v.* Vinsonhaler, 82 Nebr. 810, 118 N. W. 1058.

New Hampshire.—Wyatt *v.* Equalization State Bd., 74 N. H. 552, 70 Atl. 387.

New York.— New York *v.* New York City R. Co., 193 N. Y. 543, 86 N. E. 565 (holding that when the meaning is doubtful, a practical construction by those for whom the law was enacted, or by public officers whose duty it was to enforce it, is entitled to great influence, but the ambiguity must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject); Greenwald *v.* Weir, 130 N. Y. App. Div. 696, 115 N. Y. Suppl. 311, 131 N. Y. App. Div. 568, 116 N. Y. Suppl. 172 [*reversing* 59 Misc. 431, 111 N. Y. Suppl. 235]; Matter of Street Opening, etc., 12 Misc. 526, 33 N. Y. Suppl. 594 [*affirmed* in 91 Hun 477, 36 N. Y. Suppl. 311 (*affirmed* in 149 N. Y. 575, 43 N. E. 988)].

Pennsylvania.— Com. *v.* Mann, 168 Pa. St. 290, 31 Atl. 1003.

Texas.— Edwards *v.* James, 7 Tex. 372; State *v.* Gunter, 36 Tex. Civ. App. 381, 81 S. W. 1028.

Virginia.— Smith *v.* Bryan, 100 Va. 199, 40 S. E. 652.

West Virginia.— Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690.

Wisconsin.— State *v.* Frear, 138 Wis. 536, 120 N. W. 216; Scanlan *v.* Childs, 33 Wis. 663.

United States.— U. S. *v.* Cerecedo Hermanos y. Compañia, 209 U. S. 337, 28 S. Ct. 532, 52 L. ed. 821; Union Ins. Co. *v.* Hoge, 21 How. 35, 16 L. ed. 61; Gear *v.* Grosvenor, 10 Fed. Cas. No. 5,291, 6 Fish. Pat. Cas. 314, Holmes 215.

See 44 Cent. Dig. tit. "Statutes," §§ 294, 295, 296.

In the application of statutes relating to public lands, the decisions of the land department are conclusive as to all matters of fact. O'Connor *v.* Gertgens, 85 Minn. 481, 89 N. W. 866.

65. U. S. *v.* Bliss, 12 App. Cas. (D. C.) 485 (holding that such a construction should not be disregarded except for cogent reasons); State *v.* Brady, (Tex. Civ. App. 1908) 114 S. W. 895; Harrington *v.* Smith, 28 Wis. 43; U. S. *v.* Burkett, 150 Fed. 208; Hahn's Case, 14 Ct. Cl. 305 [*affirmed* in 107 U. S. 402, 2 S. Ct. 494, 27 L. ed. 527]. *Compare* Swift Courtney, etc., Co.'s Case, 14 Ct. Cl. 481 [*reversed* in 105 U. S. 691, 26 L. ed. 1108].

66. *Arizona.*— Copper Queen Consol. Min. Co. *v.* Territorial Bd. of Equalization, 9 Ariz. 383, 84 Pac. 511.

District of Columbia.—Allen *v.* U. S., 26 App. Cas. 8 [*affirmed* in 203 U. S. 476, 27 S. Ct. 141, 51 L. ed. 281].

Indiana.— Franklin County *v.* Bunting, 111 Ind. 143, 12 N. E. 151.

Kentucky.— Com. *v.* Gregory, 121 Ky. 256, 89 S. W. 168, 28 Ky. L. Rep. 217.

Louisiana.— State *v.* Comptoir Nat. D'Escompte de Paris, 51 La. Ann. 1272, 26 So. 91.

Nebraska.— State *v.* Sheldon, 79 Nebr. 455, 113 N. W. 208.

New Jersey.— State *v.* Kelsey, 44 N. J. L. 1, fifty years.

New York.— Goff *v.* Vedder, 12 N. Y. Civ. Proc. 358.

Washington.— Regan *v.* Snohomish County School Dist. No. 25, 44 Wash. 523, 87 Pac. 828.

United States.— U. S. *v.* Finnell, 185 U. S. 236, 244, 22 S. Ct. 633, 46 L. ed. 890 (in which the court says: "Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. . . . But if there simply be doubt as to the soundness of that construction . . . the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons"); U. S. *v.* Johnston, 124 U. S. 236, 8 S. Ct. 446, 31 L. ed. 389.

See 44 Cent. Dig. tit. "Statutes," §§ 294, 295, 296.

67. Sells *v.* U. S., 36 Ct. Cl. 94.

68. U. S. *v.* One Thousand Four Hundred and Twelve Gallons of Distilled Spirits, 27 Fed. Cas. No. 15,960, 10 Blatchf. 428.

69. State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872; State *v.* Comptoir Nat. D'Escompte de Paris, 51 La. Ann. 1272, 26 So. 91; Atty.-Gen. *v.* Newbern, 21 N. C. 216.

70. As by the reënactment of the statute in substantially the same terms after its construction by the executive. Bloxham *v.* Consumers' Electric Light, etc., R. Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Louisville *v.* Louisville School Bd., 119 Ky. 574, 84 S. W. 729, 27 Ky. L. Rep. 209; State *v.* Sheldon, 79 Nebr. 455, 113 N. W. 208.

71. *In re* Warfield, 22 Cal. 51, 83 Am. Dec. 49.

72. Com. *v.* Owensboro, etc., R. Co., 95

conclusive. But the application of the foregoing rules in regard to executive construction should be restricted to cases in which the meaning of the statute is really doubtful,[73] and in no case,[74] except to the extent that a different construction will disturb vested rights,[75] are the courts bound to follow an executive construction which they deem erroneous.

(B) *Foreign Statute.*[76] In the absence of any judicial decision determining the construction of a foreign statute, the practical interpretation given it by those whose duty it has been to apply and administer it affords the best means of ascertaining its true construction;[77] and such construction will be followed unless it be clear that it is erroneous.[78]

(IV) *LEGISLATIVE CONSTRUCTION.*[79] A construction of a statute by the legislature, as indicated by the language of subsequent enactments, is entitled to great weight,[80] especially where such construction has been contemporaneous

Ky. 60, 23 S. W. 868, 15 Ky. L. Rep. 449, holding an executive construction of a statute exempting certain railroads from taxation conclusive as to those acting upon and expending money upon the faith of the construction.

73. *District of Columbia.*— U. S. *v.* MacFarland, 28 App. Cas. 552.

Illinois.—Whittemore *v.* People, 227 Ill. 453, 81 N. E. 427, overturning a construction by the auditor and state treasury, acquiesced in for nearly forty years, and impliedly ratified by other executive officers and by the legislature.

Indiana.— Hord *v.* State, 167 Ind. 622, 79 N. E. 916.

Kentucky.— Com. *v.* Owensboro, etc., R. Co., 95 Ky. 60, 23 S. W. 868, 15 Ky. L. Rep. 449, overturning a construction made by the legislature, the governor, the railroad commissioners, and the auditor.

Massachusetts.— Com. *v.* Dennie, Thach. Cr. Cas. 165.

Michigan.— Ewing *v.* Ainger, 97 Mich. 381, 56 N. W. 767.

Mississippi.— State *v.* Henry, 87 Miss. 125, 40 So. 152, 5 L. R. A. N. S. 340.

New York.— People *v.* Consolidated Tel., etc., Subway Co., 187 N. Y. 58, 79 N. E. 892 [*affirming* 110 N. Y. App. Div. 171, 96 N. Y. Suppl. 609]; Commercial Bank *v.* Varnum, 3 Lans. 86 [*reversed* on other grounds in 49 N. Y. 269]; Moriarty *v.* New York, 59 Misc. 204, 110 N. Y. Suppl. 842.

South Carolina.— De Saussure *v.* Zeigler, 6 S. C. 12.

Texas.— Philadelphia Fire Assoc. *v.* Love, 101 Tex. 376, 108 S. W. 158, 810.

Wisconsin.— State *v.* Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455; Travelers' Ins. Co. *v.* Fricke, 94 Wis. 258, 68 N. W. 958.

United States.— Studebaker *v.* Perry, 184 U. S. 258, 22 S. Ct. 463, 46 L. ed. 528 [*affirming*, 102 Fed. 947, 43 C. C. A. 69]; Deming *v.* McClaughry, 113 Fed. 639, 51 C. C. A. 349 [*affirmed* in 186 U. S. 49, 22 S. Ct. 786, 46 L. ed. 1049].

See 44 Cent. Dig. tit. "Statutes," §§ 294, 295, 296.

74. *District of Columbia.*— Smith *v.* Payne, 22 App. Cas. 463 [*affirmed* in 194 U. S. 104, 24 S. Ct. 595, 48 L. ed. 893]; Payne *v.* Houghton, 22 App. Cas. 234 [*affirmed* in 194 U. S. 88, 24 S. Ct. 590, 48 L. ed. 888].

Illinois.— Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174 [*reversing* 118 Ill. App. 138], withdrawing a pension granted upon the faith of an executive construction.

Indiana.— Hord *v.* State, 167 Ind. 622, 79 N. E. 916.

New York.— *In re* Manhattan Sav. Inst., 82 N. Y. 142; People *v.* Buffalo, 84 N. Y. Suppl. 434.

United States.— U. S. *v.* Tanner, 147 U. S. 661, 13 S. Ct. 436, 37 L. ed. 321; Union Pac. R. Co. *v.* U. S., 10 Ct. Cl. 548 [*affirmed* in 91 U. S. 72, 23 L. ed. 224].

See 44 Cent. Dig. tit. "Statutes," §§ 294, 295, 296.

75. See *supra*, notes 71, 72.

76. For construction of foreign statute in general see *supra*, VII, A, 1, c.

77. U. S. *v.* Sherebeck, 27 Fed. Cas. No. 16,275, Hoffm. Dec. 11.

78. U. S. *v.* Sherebeck, 27 Fed. Cas. No. 16,275, Hoffm. Dec. 11.

79. For statutory rules and provisions see *supra*, VII, A, 1, d.

For encroachment on judiciary see CONSTITUTIONAL LAW, 8 Cyc. 810 *et seq.*

80. *Arkansas.*— State *v.* Lancashire F. Ins. Co., 66 Ark. 466, 51 S. W. 633, 45 L. R. A. 348, holding that where before the passage of an act the legislature was aware of the construction placed on it by the attorney-general, and rejected an amendment expressly giving it a different meaning than that placed on it by him, such action does not conclusively show that the legislature intended to adopt his construction.

Colorado.— Denver *v.* Adams County, 33 Colo. 1, 77 Pac. 858.

Missouri.—Crohn *v.* Kansas City Home Tel. Co., 131 Mo. App. 313, 109 S. W. 1068.

New York.— People *v.* Craig, 129 N. Y. App. Div. 851, 114 N. Y. Suppl. 833 [*affirming* 60 Misc. 529, 112 N. Y. Suppl. 781, and *reversed* on other grounds in 195 N. Y. 190, 88 N. E. 38].

Texas.— Houston *v.* Robertson, 2 Tex. 1.

United States.— U. S. *v.* Freeman, 3 How. 556, 11 L. ed. 724.

England.— Dunbar *v.* Roxburghe, 3 Cl. & F. 335, 6 Eng. Reprint 1462.

See 44 Cent. Dig. tit. "Statutes," § 298.

with the passage of the original act, and has been long continued.[81] So a declaratory statute explaining and construing a prior act of the legislature is binding as to future transactions,[82] although, if deemed erroneous by the courts, such construction will not be given a retroactive effect.[83] A legislative construction in one act of the meaning of certain words is entitled to consideration in construing the same words in another act,[84] but is not conclusive, as the words may have been used in different senses.[85] After all it must be remembered that the courts are the final arbiters as to the proper construction of statutes; [86] and in discharging this important function, they are at liberty to disregard a legislative construction, which, in their judgment, is not a correct exposition of the original act.[87] So also a recital in a statute that a former statute has been repealed or superseded by former acts is not binding on the courts.[88]

(v) *Judicial Construction.* A construction placed upon a statute by inferior courts and long acquiesced in will generally be upheld,[89] especially where

A construction by the legislature is entitled to greater weight than one by the executive. — U. S. *v.* Gilmore, 8 Wall. (U. S.) 330, 19 L. ed. 396.

Acquiescence by the legislature in a construction by the executive or the judiciary departments is evidence that such construction is in accordance with the legislative intent. McChesney *v.* Hager, 104 S. W. 714, 31 Ky. L. Rep. 1038.

81. Auditor of Public Accounts *v.* Cain, 61 S. W. 1016, 22 Ky. L. Rep. 1888; State *v.* Herring, 208 Mo. 708, 106 S. W. 984.

82. Georgia Penitentiary Co. *v.* Nelms, 65 Ga. 67; Stebbins *v.* Pueblo County, 4 Fed. 282, 2 McCrary 196.

83. McCleary *v.* Babcock, 169 Ind. 228, 82 N. E. 453; Smith *v.* Syracuse, 17 N. Y. App. Div. 63, 44 N. Y. Suppl. 852 [*reversed* on other grounds in 161 N. Y. 484, 55 N. E. 1077]; Erhard *v.* Clearfield Creek Coal Co., 5 Pa. Dist. 611, holding that a declaratory act, at least so far as it affects and concerns vested rights, is practically a reënactment, and not merely a construction, of the former act.

84. Philadelphia, etc., R. Co. *v.* Catawissa R. Co., 53 Pa. St. 20.

85. Feagin *v.* Comptroller, 42 Ala. 516.

86. Slutts *v.* Dana, 138 Iowa 244, 115 N. W. 1115; Aikin *v.* Western R. Corp., 20 N. Y. 370, 373, in which the court says: "I entirely concur in the position taken by the appellants' counsel, that the Legislature cannot exercise any judicial power; that it has no authority to construe laws and charters; the power to do this being confided not to the Legislature, but to the judicial branch of the government. But the Legislature may make new grants of power to existing corporations. . . . The act in question, therefore, although nugatory as a judicial exposition of the charter, may, nevertheless, operate, as in my view it was intended to operate, as a grant to the city of Albany of any power which might remain in the Legislature over the ferries mentioned in it."

87. *California.*— San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, holding that an act which purports on its face to be, and is in fact a special act, cannot be converted into a general act, by a declaration of the legislature in another act that it shall be considered a general act.

Colorado.— Gibson *v.* People, 44 Colo. 600, 99 Pac. 333.

Delaware.— Philadelphia, etc., R. Co. *v.* Neary, 5 Del. Ch. 600, 8 Atl. 363.

Illinois.— Morgan Park *v.* Knopf, 210 Ill. 453, 71 N. E. 340; Turney *v.* Wilton, 36 Ill. 385.

Iowa.— Slutts *v.* Dana, 138 Iowa 244, 115 N. W. 1115.

Maine.— Ingalls *v.* Cole, 47 Me. 530, holding that statutes are to be construed according to their plain import, without regard to mere inferences which may be drawn from the language of an act passed by a subsequent legislature.

Minnesota.— Bingham *v.* Winona County, 8 Minn. 441, holding that "the opinion of a subsequent legislature upon the meaning of a statute, is entitled to no more weight than that of the same men in a private capacity."

Missouri.— Tilford *v.* Ramsey, 43 Mo. 410.

New York.— Matter of Harbeck, 43 N. Y. App. Div. 188, 59 N. Y. Suppl. 362 [*reversed* on other grounds in 161 N. Y. 211, 55 N. E. 850].

Rhode Island.— Smith *v.* Westerly, 19 R. I. 437, 35 Atl. 526.

United States.— Fidelity Trust Co. *v.* Gill Car Co., 25 Fed. 737, holding that the legislature should not be held to have interpreted a former statute in a given way because, on the suggestion of a judicial opinion of the supreme court, it has amended a defect in the law, notwithstanding the reasoning of the opinion may support that interpretation; particularly if the amendment be as reasonable under some other construction of the statute.

England.— Reg. *v.* Haughton, 1 E. & B. 501, 17 Jur. 455, 22 L. J. M. C. 89, 1 Wkly. Rep. 164, 72 E. C. L. 501.

Canada.—North-West Electric Co. *v.* Walsh, 29 Can. Sup. Ct. 33; *In re* Rockwood Electoral Div. Agricultural Soc., 12 Manitoba 655.

See 44 Cent. Dig. tit. "Statutes," § 298.

88. U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085.

89. Auditor of Public Accounts *v.* Cain, 61 S. W. 1016, 22 Ky. L. Rep. 1888; Plummer *v.* Plummer, 37 Miss. 185.

the adoption of a different rule would cause great mischief.[90] And when a statute has been construed by the highest court having jurisdiction to pass on it, such construction is as much a part of the statute as if plainly written into it originally.[91]

f. Evidence to Aid Construction. The enrolled bill stands as the final expression of the legislative will,[92] and its terms may not be varied or contradicted by a reference to the legislative journals,[93] nor is the evidence of a member of the legislature [94] or of any other person [95] admissible as to the legislative intent. But evidence may be introduced to identify documents mentioned in the statute,[96] or to identify the subjects upon which it is to operate.[97] Where technical words, or terms of art, are used in a statute, the evidence of persons engaged in the profession, trade, or occupation to which they pertain [98] may be admitted for the purpose of interpreting their meaning. And upon a prosecution of persons for violation of a statute, evidence may be introduced of the customary method of complying with its requirements.[99] Where the construction of a statute of another state or country is involved, the decisions of the highest court of such foreign state or country may properly be admitted into evidence to resolve the doubt.[1]

7. Construction With Reference to Other Laws — a. In General. Every statute is to be construed with reference to the general system of laws of which it forms a part, and must therefore be interpreted in the light of the customary or unwritten law,[2] of other statutes on the same subject,[3] and of the decisions of the courts.[4]

90. Van Loon *v.* Lyon, 4 Daly (N. Y.) 149 [*reversed* on other grounds in 61 N. Y. 22].

91. Emery *v.* Reed, 65 Cal. 351, 4 Pac. 200 (holding that with respect to laws passed under a former state constitution, the construction put upon them by the highest court in existence under such constitution will be accepted, without regard to the views of the present supreme court in respect to the correctness or incorrectness of such construction); McChesney *v.* Hager, 104 S. W. 714, 31 Ky. L. Rep. 1038; Eau Claire Nat. Bank *v.* Benson, 106 Wis. 624, 82 N. W. 604; Douglass *v.* Pike County, 101 U. S. 677, 25 L. ed. 968 (holding that where municipal bonds have been sold, the rights of the parties are to be determined according to the statute as it had been judicially construed when the bonds were placed on the market, because a change in the decision would be equivalent to a change in the law itself, and giving such change a retroactive effect would impair the obligation of the contract of sale).

92. The language of the enrolled act prevails over that of the printed act.— Stoneman *v.* Whaley, 9 Iowa 390; State *v.* Beneke, 9 Iowa 203; Claré *v.* State, 5 Iowa 509; De Sentmanat *v.* Soulé, 33 La. Ann. 609; Weaver *v.* Davidson County, 104 Tenn. 315, 59 S. W. 1105.

93. Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394; State *v.* Under-Ground Cable Co., (N. J. Ch. 1889) 18 Atl. 581.

The journals may be examined to identify a bill referred to in a subsequent act.—Southwark Bank *v.* Com., 26 Pa. St. 446.

94. Stewart *v.* Atlanta Beef Co., 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119; State *v.* Burk, 88 Iowa 661, 56 N. W. 180; Combined Saw, etc., Co. *v.* Flournoy, 88 Va. 1029, 14 S. E. 976; Badeau *v.* U S., 21 Ct. Cl. 48.

95. Pagaud *v.* State, 5 Sm. & M. (Miss.) 491, 497 (in which the court says: "Testimony to explain the motives which operated upon the law-makers, or to point out the objects they had in view, is wholly inadmissible. It would take from the statute law every semblance of certainty, and make its character depend upon the varying and conflicting statements of witnesses"); Commonwealth Bank *v.* Com., 19 Pa. St. 144; Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457 (holding that evidence is inadmissible as to the knowledge of members of the legislature).

96. Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 292, 3 Abb. N. Cas. 372 [*affirmed* in 71 N. Y. 430].

97. Smith *v.* Helmer, 7 Barb. (N. Y.) 416.

98. People *v.* Borda, 105 Cal. 636, 38 Pac. 1110; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

99. Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667, 54 L. J. Q. B. 205, 52 L. T. Rep. N. S. 589, 33 Wkly. Rep. 673.

1. Blumle *v.* Kramer, 14 Okla. 366, 373, 79 Pac. 215, 1134.

2. See cases cited *infra*, this note.

But even long established custom cannot control a subsequent plain statutory enactment.— Green *v.* Reg., 1 App. Cas. 513, 35 L. T. Rep. N. S. 495; Rex *v.* Hogg, Cald. 266, 1 T. R. 721, 1 Rev. Rep. 375, 99 Eng. Reprint 1341; Northan Bridge Co. *v.* Reg., 55 L. T. Rep. N. S. 759. See *infra*, VII, A, 7, b, c.

3. See *infra*, VII, A, 7, d.

4. *In re* Moffitt, 153 Cal. 359, 95 Pac. 653, 1025 [*reaffirmed* in *In re* Sims, 153 Cal. 365, 95 Pac. 655, and People *v.* Lebus, (Cal. 1908) 96 Pac. 1118]; *Ex p.* Kent County Council, [1891] 1 Q. B. 725, 55 J. P. 647, 60 L. J. Q. B. 435, 65 L. T. Rep. N. S. 213, 39 Wkly. Rep. 465.

b. Construction With Reference to Common Law.[5] Statutes are to be construed with reference to the principles of the common law in force at the time of their passage;[6] and words used in a statute which have a definite and settled meaning at common law are presumed to be employed in the same sense.[7] Where a statute is purely in affirmance of a rule of the common law, it is to be interpreted in accordance with the construction that has hitherto been placed upon the common law.[8] It naturally follows also that statutes are not to be understood as effecting any change in the law beyond that which is expressed,[9] or is necessarily implied from the language used.[10] The court must assume, however, that the legislature knew the existing law, and that its purpose in enacting the statute was to make some change in the former law.[11]

c. Construction With Reference to Civil Law. In those states or countries whose jurisprudence is based on the civil, rather than on the common, law, stat-

5. For construction of statutes adopting common law see COMMON LAW, 8 Cyc. 373.

6. *Colorado.*— Bradley *v.* People, 8 Colo. 599, 9 Pac. 783, holding that, where a statute provides that any person committing certain acts shall be guilty of larceny, it does not dispense with the common-law rule requiring the existence of a criminal intent as a necessary element of guilt.

Indiana.— Truelove *v.* Truelove, (1909) 86 N. E. 1018, 43 Ind. App. 734, 86 N. E. 1000, (1909) 88 N. E. 516.

Missouri.— Perry *v.* Strawbridge, 209 Mo. 621, 108 S. W. 641, 123 Am. St. Rep. 510, 16 L. R. A. N. S. 244.

New York.— Howe *v.* Peckham, 10 Barb. 656, 6 How. Pr. 229, 4 Code Rep. N. S. 381.

Pennsylvania.— Corry Bank *v.* Childs, 31 Leg. Int. 309.

Vermont.— State *v.* Central Vermont R. Co., 81 Vt. 459, 71 Atl. 193, 21 L. R. A. N. S. 949.

England.— Swanton *v.* Goold, 9 Ir. C. L. 234; Miles *v.* Williams, 1 P. Wms. 252, 24 Eng. Reprint 375.

See 44 Cent. Dig. tit. "Statutes," § 301.

Ecclesiastical law.— So statutes that relate to matters formerly governed by the ecclesiastical law of England are to be construed with reference to such law. Hawkins *v.* Hawkins, 193 N. Y. 409, 86 N. E. 468, 127 Am. St. Rep. 979, 19 L. R. A. N. S. 468 [*reversing* 121 N. Y. App. Div. 896, 105 N. Y. Suppl. 889].

7. Truelove *v.* Truelove, (Ind. 1909) 86 N. E. 1018, 43 Ind. App. 734, 86 N. E. 1000, (1909) 88 N. E. 516; Adams *v.* Turrentine, 30 N. C. 147; Welty *v.* U. S., 14 Okla. 7, 76 Pac. 121. *Compare* U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 67, 7 C. C. A. 15, 24 L. R. A. 73 [*reversed* on other grounds in 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007], holding that "where congress creates an offense, and uses common-law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common-law offense, for the definition of the offense if it is not clearly defined in the act adopting or creating it."

For common-law words and phrases as technical terms see *supra*, VII, A, 3, f.

8. Baker *v.* Baker, 13 Cal. 87; Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

9. Davis *v.* Abstract Constr. Co., 121 Ill. App. 121; Brown *v.* Rouse, 116 Ill. App. 513; Rosin *v.* Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245, 86 N. Y. Suppl. 49; Tompkins *v.* Penn Yan First Nat. Bank, 18 N. Y. Suppl. 234; Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268; River Wear Com'rs *v.* Adamson, 2 App. Cas. 743, 47 L. J. Q. B. 193, 37 L. T. Rep. N. S. 543, 26 Wkly. Rep. 217; Reg. *v.* Wimbledon Local Bd., 8 Q. B. D. 459, 51 L. J. Q. B. 219, 46 L. T. Rep. N. S. 47, 30 Wkly. Rep. 400; Rendall *v.* Blair, 45 Ch. D. 139, 59 L. J. Ch. 641, 63 L. T. Rep. N. S. 265, 38 Wkly. Rep. 689; Arthur *v.* Bokenham, 11 Mod. 148, 88 Eng. Reprint 957.

10. *District of Columbia.*— McCarthy *v.* McCarthy, 20 App. Cas. 195.

Illinois.— Chicago, etc., R. Co. *v.* People, 214 Ill. 421, 73 N. E. 770 [*affirming* 114 Ill. App. 75].

New York.— Graves *v.* Cameron, 9 Daly 152, 58 How. Pr. 75, holding that, where the law of another state is involved in the decision of a case, the courts will presume that the common law is in force in such state, unless a statute changing it be pleaded and proved.

Pennsylvania.— Keim *v.* Reading, 32 Pa. Super. Ct. 613.

Rhode Island.— Langlois *v.* Dunn Worsted Mills, 25 R. I. 645, 57 Atl. 910.

Wisconsin.— Byington *v.* Merrill, 112 Wis. 211, 88 N. W. 26.

United States.— Johnson *v.* Southern Pac. Co., 117 Fed. 462, 54 C. C. A. 508 [*reversed* on other grounds in 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363].

England.— Reg. *v.* Harrald, L. R. 7 Q. B. 361, 41 L. J. Q. B. 173, 26 L. T. Rep. N. S. 616, 20 Wkly. Rep. 328; Ash *v.* Abdy, 3 Swanst. 664, 36 Eng. Reprint 1014.

See 44 Cent. Dig. tit. "Statutes," § 301.

Remedial statutes are presumed to provide remedies in addition to those which existed at common law, unless a clear intent is expressed to make the statutory remedy exclusive. Rosin *v.* Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245, 86 N. Y. Suppl. 49. See *infra*, VII, B, 2.

11. Reed *v.* Goldneck, 112 Mo. App. 310, 86 S. W. 1104.

utes will be construed with reference to the civil law [12] in accordance with the principles stated above.

d. Construction With Reference to Other Statutes — (I) *In General.* All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it.[13] They are therefore to be construed as a part of a general and uniform system of jurisprudence,[14] and their meaning and effect is to be determined in connection, not only with the common law [15] and the constitution,[16] but also in connection with other statutes on the same subject,[17] and, under certain circumstances, with statutes on cognate [18] and even different subjects.[19] This rule of construction, however, so far as prior statutes are concerned, is to be restricted to cases where the statute in question is really doubtful; if the statute is clear on its face, prior statutes may not be consulted to create an ambiguity.[20] In the construction of private statutes the rule is more restricted, and resort may not be had to any other private act not relating to the same parties and the same subject-matter.[21] Where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand and to give force and effect to each.[22] So the meaning of

12. Nixon *v.* Piffet, 16 La. Ann. 379; Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212.

13. *Indiana.*— Ensley *v.* State, (1909) 88 N. E. 62.

Missouri.— Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700.

New Jersey.— Little *v.* Bowers, 48 N. J. L. 370, 5 Atl. 178.

North Carolina.— State *v.* Southern R. Co., 145 N. C. 495, 59 S. E. 570, 13 L. R. A. N. S. 966.

United States.— *In re* McKenzie, 142 Fed. 383, 73 C. C. A. 483, holding that a statute which merely declares existing laws is not nugatory because it does not modify them, its true purpose being to prevent such modification.

See 44 Cent. Dig. tit. "Statutes," § 302.

14. *Georgia.*— McDougald *v.* Dougherty, 14 Ga. 674.

Indiana.— Robertson *v.* State, 109 Ind. 79, 10 N. E. 582, 643; State *v.* Boswell, 104 Ind. 541, 545, 4 N. E. 675 (in which the court says: "If construction proceeded upon any other principle, the law of a State would consist of disjointed and inharmonious parts, and conflict and confusion be the result. The light needed for the just interpretation of a statute is not supplied by the statute itself, but comes from other statutes and from the principles declared by the courts of the land. It would be as illogical as mischievous to act upon a single statute found in a great body of law irrespective of other statutes and other laws, and against such a course the faces of the courts have been long and firmly set"); Humphries *v.* Davis, 100 Ind. 274, 50 Am. Rep. 788; Minnich *v.* Packard, 42 Ind. App. 371, 85 N. E. 787.

Kentucky.— Com. *v.* International Harvester Co., 131 Ky. 551, 115 S. W. 703.

Massachusetts.— Brooks *v.* Fitchburg, etc., R. Co., 200 Mass. 8, 86 N. E. 289, 128 Am. St. Rep. 432, 21 L. R. A. N. S. 976.

Nebraska.— Chappell *v.* Lancaster County, 84 Nebr. 301, 120 N. W. 1116; Rohrer *v.* Hastings Brewing Co., 83 Nebr. 111, 119 N. W. 27.

Pennsylvania.— Stevenson *v.* Deal, 2 Pars. Eq. Cas. 212.

West Virginia.— State *v.* Snyder, 64 W. Va. 659, 63 S. E. 385; Reeves *v.* Ross, 62 W. Va. 7, 57 S. E. 284.

See 44 Cent. Dig. tit. "Statutes," § 302.

15. See *supra*, VII, A, 7, b.

16. State *v.* McMillan, 55 Fla. 246, 254, 45 So. 882; St. George *v.* Hardie, 147 N. C. 88, 60 S. E. 920; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484. See CONSTITUTIONAL LAW, 8 Cyc. 699 *et seq.*

17. McAfee *v.* Southern R. Co., 36 Miss. 669. See *infra*, VII, A, 7, d, (II).

Two statutes may supplement and aid each other.— Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950.

18. E. R. Darlington Lumber Co. *v.* Missouri Pac. R. Co., 216 Mo. 658, 116 S. W. 530; State *v.* Summers, 142 Mo. 586, 44 S. W. 797; Smith *v.* People, 47 N. Y. 330; Bowe *v.* Richmond, 109 Va. 254, 64 S. E. 51.

19. **Where the provisions of two statutes are distinct, one is not affected by any question of the unconstitutionality of the other.** Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141.

20. Holden *v.* U. S., 24 App. Cas. (D. C.) 318; Mills *v.* Larrance, 120 Ill. App. 83 [*affirmed* in 217 Ill. 446, 75 N. E. 555]; Hamilton *v.* Rathbone, 175 U. S. 414, 20 S. Ct. 155, 44 L. ed. 219; *In re* Guggenheim Smelting Co., 126 Fed. 728, 61 C. C. A. 646 [*reversing* 121 Fed. 153]; Merchants' Nat. Bank *v.* U. S., 42 Ct. Cl. 6.

21. Thomas *v.* Mahan, 4 Me. 513, 516, in which the court says: "There is a manifest distinction between a public statute, which is of universal concernment and obligation, and prescribes a rule of action to all, and a grant by the legislature, or a private act, granting certain chartered privileges to individuals; or to be executed by persons appointed for the purpose, and under bond for their fidelity."

22. *Alabama.*— State *v.* Martin, 160 Ala. 181, 48 So. 846.

Florida.— Curry *v.* Lehman, 55 Fla. 847,

doubtful words in one statute may be determined by reference to another in which the same words have been used in a more obvious sense;[23] although it does not necessarily follow that the words have the same meaning in the two statutes, as they may have been used in entirely different senses.[24] If it is not possible to reconcile inconsistent statutes, the dates of their enactment will be examined in determining the legislative intent, and effect given to the later one.[25]

(II) *STATUTES RELATING TO SAME SUBJECT-MATTER.*[26] Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things.[27] In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject,[28] or having the same general purpose,[29] should be read in connection with it,[30]

855, 47 So. 18, in which the court says: "The rule of construction in such cases is that if courts can by any fair, strict or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is their duty to do so."

Indiana.— Ensley *v.* State, (1909) 88 N. E. 62; State *v.* Smith, 59 Ind. 179.

Kentucky.— Maysville Turnpike Road Co. *v.* How, 14 B. Mon. 426.

Massachusetts.— Brooks *v.* Fitchburg, etc., R. Co., 200 Mass. 8, 86 N. E. 289.

Missouri.— Kane *v.* Kansas City, etc., R. Co., 112 Mo. 34, 20 S. W. 532.

Montana.— State *v.* Fransham, 19 Mont. 273, 48 Pac. 1.

New Mexico.— Codlin *v.* Kohlhousen, 9 N. M. 565, 58 Pac. 499, holding that whenever an act of the legislature can be so construed and applied as to avoid a conflict with the laws of congress and give it the force of law, such construction should be adopted by the court.

Rhode Island.— Masterson *v.* Whipple, 27 R. I. 192, 61 Atl. 446.

Texas.—Williams *v.* Keith, (Civ. App. 1908) 111 S. W. 1056, 112 S. W. 948; Williams *v.* State, 52 Tex. Cr. 371, 107 S. W. 1121.

See 44 Cent. Dig. tit. "Statutes," § 302.

23. Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177; Kelly *v.* Thuey, 143 Mo. 422, 45 S. W. 300.

24. Rupp *v.* Swineford, 40 Wis. 28; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621; Spencer *v.* Metropolitan Bd. of Works, 22 Ch. D. 142, 52 L. J. Ch. 249, 47 L. T. Rep. N. S. 459, 31 Wkly. Rep. 347.

25. State *v.* Hennepin County Dist. Ct., 107 Minn. 437, 120 N. W. 894; Jones *v.* Broadway Roller Rink Co., 136 Wis. 595, 118 N. W. 170, 19 L. R. A. N. S. 907; Mobile Sav. Bank *v.* Patty, 16 Fed. 751.

26. For implied repeal by statutes relating to same subject-matter see *supra*, VII, A, 3, c, (III).

For statutes imposing taxes see TAXATION.

27. United Soc. *v.* Eagle Bank, 7 Conn. 456, 469, in which the court gives the following definition: "Statutes are *in pari materia*, which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the term *similis*. It is used in opposition to it, as in the expression '*magis pares sunt quam similes*'; intimating not likeness merely, but identity. It is a phrase applicable to the public statutes or general laws, made at different times, and in reference to the same subject."

This definition is quoted and approved in State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469. 33 L. R. A. 313; Waterford, etc., Turnpike *v.* People, 9 Barb. (N. Y.) 161; State *v.* Wirt County Ct., 63 W. Va. 230, 59 S. E. 884, 981.

"**Private acts of the legislature,** conferring distinct rights on different individuals, which never can be considered as being one statute, or the parts of a general system, are not to be interpreted, by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons." United Soc. *v.* Eagle Bank, 7 Conn. 456, 470.

Statutes relating to different subjects cannot be in pari materia.—State *v.* Wirt County Ct., 63 W. Va. 230, 59 S. E. 884, 981; U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. N. S. 167. But see Munger *v.* Lenroot, 32 Wis. 541, holding two statutes *in pari materia*, although they relate to different counties, being otherwise precisely similar.

28. U. S. *v.* Trans-Missouri Freight Assoc., 58 Fed. 58, 7 C. C. A. 15, 24 L. R. A. 73.

29. Van Wagenen *v.* Paterson Sav. Bank, 10 N. J. Eq. 13; Jerome *v.* Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484.

30. *Arkansas.*—Woods *v.* Carl, 75 Ark. 328, 87 S. W. 621 [*affirmed* in 203 U. S. 358, 27 S. Ct. 99, 51 L. ed. 219].

California.— Grannis *v.* San Francisco Super. Ct., 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23.

Florida.— Curry *v.* Lehman, 55 Fla. 847, 47 So. 18; State *v.* McMillan, 55 Fla. 246, 254, 45 So. 882 (holding that it is not necessary that the statutes should contain references to each other); Mitchell *v.* Duncan, 7 Fla. 13; Bryan *v.* Dennis, 4 Fla. 445.

Georgia.— Harrison *v.* Walker, 1 Ga. 32.

Idaho.— Barton *v.* Moscow Independent School Dist. No. 5, 3 Ida. 270, 29 Pac. 43.

Illinois.—Wabash, etc., R. Co. *v.* Binkert, 106 Ill. 298; Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

as together constituting one law.[31] The endeavor should be made, by tracing the history of legislation on the subject,[32] to ascertain the uniform and con-

Indiana.— State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Lafontaine *v.* Avaline, 8 Ind. 6 (statutes relating to Indians); Hutchens *v.* Covert, 39 Ind. App. 382, 78 N. E. 1061; Cahill *v.* State, 36 Ind. App. 507, 76 N. E. 182; State *v.* Kimball, Wils. 174.

Kentucky.— American Tobacco Co. *v.* Com., (1909) 115 S. W. 755, 756; Com. *v.* International Harvester Co., 131 Ky. 551, 115 S. W. 703; Danville Bd. of Council *v.* Boyle County Fiscal Ct., 51 S. W. 157, 21 Ky. L. Rep. 196 [*withdrawing* opinion in 49 S. W. 458, 20 Ky. L. Rep. 1495].

Louisiana.— Desban *v.* Pickett, 16 La. Ann. 350; Hebert's Succession, 5 La. Ann. 121; Phelps *v.* Rightor, 9 Rob. 531; Rouanet *v.* Hunt, 17 La. 407; Gayle *v.* Williams, 7 La. 162; Civ. Code, art. 17.

Maine.— Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069; State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901.

Maryland.— Billingsley *v.* State, 14 Md. 369; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1.

Massachusetts.— Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446; Com. *v.* Cambridge, 20 Pick. 267; Mendon *v.* Worcester County, 10 Pick. 235; Holbrook *v.* Holbrook, 1 Pick. 248; Holland *v.* Makepeace, 8 Mass. 418; Thayer *v.* Dudley, 3 Mass. 296; Church *v.* Crocker, 3 Mass. 17.

Mississippi.— Scott *v.* Searles, 1 Sm. & M. 590.

Missouri.— Grimes *v.* Reynolds, 184 Mo. 679, 83 S. W. 1132 [*affirming* 94 Mo. App. 576, 68 S. W. 588]; Powell *v.* Sherwood, 162 Mo. 605, 63 S. W. 485; Springfield *v.* Starke, 93 Mo. App. 70.

Nebraska.— Rohrer *v.* Hastings Brewing Co., 83 Nebr. 111, 119 N. W. 27; State *v.* Omaha El. Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874; Barker *v.* Wheeler, 71 Nebr. 740, 99 N. W. 548; Dawson County *v.* Clark, 58 Nebr. 756, 79 N. W. 822.

New Hampshire.— Hayes *v.* Hanson, 12 N. H. 284.

New York.— Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 778 [*affirming* 121 N. Y. App. Div. 582, 106 N. Y. Suppl. 378]; People *v.* Lacombe, 99 N. Y. 43, 1 N. E. 599; Ebling Brewing Co. *v.* Nimphius, 58 Misc. 545, 109 N. Y. Suppl. 808.

Ohio.—Wabash R. Co. *v.* Fox, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. Rep. 739; Manuel *v.* Manuel, 13 Ohio St. 458.

Oklahoma.— De Graffenreid *v.* Iowa Land, etc., Co., 20 Okla. 687, 95 Pac. 624.

Oregon.— McLaughlin *v.* Hoover, 1 Oreg. 31.

Vermont.— State *v.* Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194, 130 Am. St. Rep. 1065; Isham *v.* Bennington Iron Co., 19 Vt. 230.

Virginia.— Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468.

West Virginia.—Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336.

United States.— Converse *v.* U. S., 21 How. 463, 16 L. ed. 192 (appropriation laws); U. S. *v.* Freeman, 3 How. 556, 11 L. ed. 724; The Harriet, 11 Fed. Cas. No. 6,099, 1 Story 251 [*affirming* 11 Fed. Cas. No. 6,100, 1 Ware 348]; Le Roy *v.* Chabolla, 15 Fed. Cas. No. 8,267, 2 Abb. 448, 1 Sawy. 456.

England.— Blantyre *v.* Clyde Nav. Trustees, 6 App. Cas. 273; Doe *v.* Yarborough, 1 Bing. 24, 7 Moore P. C. 258, 25 Rev. Rep. 575, 8 E. C. L. 384; *In re* Perrin, 1 C. & L. 567, 2 Dr. & War. 147, 4 Ir. Eq. 362; Palmer's Case, East P. C. 893, Leach C. C. 391; Catterall *v.* Sweetman, 9 Jur. 951, 1 Rob. Eccl. 304, 580 (holding that colonial statutes should be construed as *in pari materia* with English statutes on the same subject); Anonymous, Lofft 398, 98 Eng. Reprint 714; Rex *v.* Excise Com'rs, 2 T. R. 381, 100 Eng. Reprint 205.

See 44 Cent. Dig. tit. "Statutes," § 303.

31. *Kentucky.*— Com. *v.* Herald Pub. Co., 128 Ky. 424, 108 S. W. 892, 32 Ky. L. Rep. 1293.

Louisiana.— De Armas' Case, 10 Mart. 158.

Michigan.— *In re* Kreiner, 156 Mich. 296, 120 N. W. 785; McCall *v.* Calhoun Cir. Judge, 146 Mich. 319, 109 N. W. 601.

Nebraska.— Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812.

North Dakota.— Wishek *v.* Becker, 10 N. D. 63, 84 N. W. 590.

Vermont.— Highgate *v.* State, 59 Vt. 39, 7 Atl. 898.

United States.— Seward County *v.* Ætna L. Ins. Co., 90 Fed. 222, 32 C. C. A. 585.

England.— Ailesbury *v.* Pattison, Dougl. (3d ed.) 28, 99 Eng. Reprint 22; Waterlow *v.* Dobson, 8 E. & B. 585, 27 L. J. Q. B. 55, 92 E. C. L. 585; McWilliam *v.* Adams, 1 Macq. 120.

Canada.— Reg. *v.* The Shelby, 5 Can. Exch. 1.

See 44 Cent. Dig. tit. "Statutes," § 303.

32. *Illinois.*— Struthers *v.* People, 116 Ill. App. 481.

Indiana.— Indianapolis Northern Traction Co. *v.* Ramer, 37 Ind. App. 264, 76 N. E. 808, statutes on the subject of street and interurban railways.

Nebraska.— Chicago, etc., R. Co. *v.* Zernecke, 59 Nebr. 689, 82 N. W. 26, 55 L. R. A. 610.

New York.— Fort *v.* Burch, 6 Barb. 60.

North Carolina.— Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116.

Texas.— Williams *v.* State, 52 Tex. Cr. 371, 107 S. W. 1121; *Ex p.* Keith, 47 Tex. Cr. 283, 83 S. W. 683.

Vermont.— Henry *v.* Tilson, 17 Vt. 479.

Virginia.— Norfolk, etc., Traction Co. *v.* Ellington, 108 Va. 245, 61 S. E. 779, 17 L. R. A. N. S. 117.

Wisconsin.— Milwaukee County *v.* Sheboygan, 94 Wis. 58, 68 N. W. 387.

See 44 Cent. Dig. tit. "Statutes," § 303.

sistent purpose of the legislature,[33] or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time.[34] With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature,[35] but also acts passed at prior and subsequent [36] sessions, and even those which have been repealed.[37] So far as reasonably possible the several statutes, although seemingly in conflict with each other,[38] should be harmonized,[39] and force and effect given to

33. *Alaska.*— Brace *v.* Solner, 1 Alaska 361.
Indiana.— State *v.* Kiley, 36 Ind. App. 513, 76 N. E. 184.
Nebraska.— State *v.* Omaha El. Co., 75 Nebr. 637, 648, 106 N. W. 979, 110 N. W. 874, in which the court says: "We think it clear that the whole series of statutes directed against combinations and monopolies should be considered as part of a connected system, and that no one act should be singled out for construction and be considered apart from the general trend of legislation upon the subject. Statutes *in pari materia* are to be construed together, and repeals by implication are not favored. The courts will regard all statutes upon the same general subject matter as part of one system, and later statutes should be construed as supplementary or complementary to those preceding them. They are to fill up the gaps left by former attempts to mend the evil."
Pennsylvania.— Whitmire *v.* Muncy Creek Tp., 17 Pa. Super. Ct. 399.
West Virginia.— Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746, holding that an undeviating course of legislation in a certain direction for a long time in an effort to perfect the law relating to a given subject strongly emphasizes the express language embodying the final declaration of legislative will.
See 44 Cent. Dig. tit. "Statutes," § 303.
The rule is peculiarly applicable to revenue and taxation acts.— Hannibal, etc., R. Co. *v.* Shacklett, 30 Mo. 550; State *v.* Ebbs, 89 Mo. App. 95; U. S. *v.* Collier, 25 Fed. Cas. No. 14,833, 3 Blatchf. 325.

34. Steck *v.* Prentice, 43 Colo. 17, 95 Pac. 552; Com. *v.* Burry, 5 Pa. Co. Ct. 481, modifications in Sunday laws.

35. See *infra*, VII, A, 7, d, (III).

36. Jackson County *v.* Branaman, 169 Ind. 80, 82 N. E. 65; Indianapolis Northern Traction Co. *v.* Ramer, 37 Ind. App. 264, 76 N. E. 808, 810 (holding that "the rule of construction by the aid of statutes *in pari materia* does not restrict the court to the consideration of other legislation enacted on the same day or at the same session. The use of the rule, like all other methods of construction, is to ascertain the intention of the Legislature by reference to other enactments relating to the same matter or subject — to the same person or thing, or to the same class of persons or things. Familiar illustrations are found in the interpretation and construction of progressive statutes relating to the rights of married women, or to the regulation of the liquor traffic"); State *v.* Patterson, 207 Mo. 129, 105 S. W. 1048; Campbell *v.* Youngson, 80 Nebr. 322, 114 N. W. 415; Cocheu *v.* Williamsburgh Methodist Protestant Church, 32 N. Y. App. Div. 239, 52 N. Y. Suppl. 1019.

37. *Colorado.*— Steck *v.* Prentice, 43 Colo. 17, 95 Pac. 552.
Massachusetts.— Church *v.* Crocker, 3 Mass. 17.
Utah.— Ogden City *v.* Boreman, 20 Utah 98, 57 Pac. 843.
West Virginia.— Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746; Daniel *v.* Simms, 49 W. Va. 554, 39 S. E. 690; Forqueran *v.* Donnally, 7 W. Va. 114.
United States.— People's U. S. Bank *v.* Goodwin, 162 Fed. 937; Southern R. Co. *v.* McNeill, 155 Fed. 756.
England.— *Ex p.* Copeland, 2 De G. M. & G. 914, 17 Jur. 121, 22 L. J. Bankr. 17, 1 Wkly. Rep. 9, 51 Eng. Ch. 714, 42 Eng. Reprint 1129.
Canada.— *Ex p.* Lugrin, 16 N. Brunsw. 125.
See 44 Cent. Dig. tit. "Statutes," § 303.
But see Lockwood *v.* District of Columbia, 24 App. Cas. (D. C.) 569, holding that where a personal tax law imposes a tax on a certain occupation without defining it, it is doubtful whether the court in construing it can look to old and repealed tax laws which define such occupation to ascertain the legislative meaning.

38. La Grange County *v.* Cutler, 6 Ind. 354.
To the extent that two different statutes cannot be harmonized the later prevails.— State *v.* Kiley, 36 Ind. App. 513, 76 N. E. 184.

39. *Indiana.*— Cahill *v.* State, 36 Ind. App. 507, 76 N. E. 182.
Kansas.— Kansas Pac. R. Co. *v.* Wyandotte County, 16 Kan. 587, holding that where there is no way of reconciling conflicting clauses of a statute, and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject.
Kentucky.— Wilson *v.* Bradley, 105 Ky. 52, 48 S. W. 166, 1088, 20 Ky. L. Rep. 1118, holding that it will be presumed that a state statute was intended to have the same meaning as a federal statute which it was enacted to effectuate.
Nebraska.— State *v.* Dunn, 76 Nebr. 155, 107 N. W. 236, holding that where the conflict relates to an immaterial matter, the discrepancies will be disregarded.
New York.— *In re* New York, etc., R. Co., 193 N. Y. 72, 85 N. E. 1014.
Pennsylvania.— People's Trust, etc., Co. *v.* Ehrhart, 34 Pa. Super. Ct. 16, holding that later statutes, which abrogate settled practice or repeal former statutes, are to be expounded as near to the use and reason of the

each,[40] as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms;[41] nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments.[42] Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense,[43] unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby.[44] It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it cannot be invoked where the language of a statute is clear and unambiguous.[45]

prior law as can be without violation of their intent.

Utah.—Twiggs *v.* State Bd. of Land Com'rs, 27 Utah 241, 75 Pac. 729.

England.— Reg. *v.* Tonbridge Parish, 13 Q. B. D. 342, 48 J. P. 740, 53 L. J. Q. B. 489, 51 L. T. Rep. N. S. 199, 33 Wkly. Rep. 24; Reg. *v.* Oastler, 45 J. P. 93, 50 L. J. M. C. 6, 43 L. T.Rep. N. S. 404.

See 44 Cent. Dig. tit. "Statutes," § 303.

40. *Illinois.*— People *v.* Mount, 87 Ill. App. 194 [*affirmed* in 186 Ill. 560, 58 N. E. 360].

Indiana.— State *v.* Kiley, 36 Ind. App. 513, 76 N. E. 184.

Nebraska.— State *v.* Royse, 71 Nebr. 1, 98 N. W. 459, 3 Nebr. (Unoff.) 269, 97 N. W. 473; Chicago, etc., R. Co. *v.* Zernecke, 59 Nebr. 689, 82 N. W. 26, 55 L. R. A. 610.

New York.— McCartee *v.* Orphan Asylum Soc., 9 Cow. 437, 18 Am. Dec. 516, holding that where a statute, creating a corporation, authorizes it to take real estate by purchase, the word "purchase" will, in order to avoid a conflict with the statute of wills which prohibits devises to corporations, be construed according to its popular and not its technical meaning, and not to include devises.

Oklahoma.— Carpenter *v.* Russell, 13 Okla. 277, 73 Pac. 930.

Virginia.— Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468.

United States.— U. S. *v.* Hewes, 26 Fed. Cas. No. 15,359, Crabbe 307; Repetti *v.* U. S., 40 Ct. Cl. 240, holding that the extension of an earlier statute by a later one, in the absence of words of limitation, must be as prospective and as permanent as the statute which is extended.

See 44 Cent. Dig. tit. "Statutes," § 303.

Later statutes are presumed to be supplementary to those preceding them on the same subject. State *v.* Omaha El. Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874; Rosin *v.* Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245, 86 N. Y. Suppl. 49; Rich *v.* Keyser, 54 Pa. St. 86.

41. State *v.* Givens, 48 Fla. 165, 37 So. 308; McKinsey *v.* Bowman, 58 Ind. 88; State *v.* Omaha El. Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874; Lybbe *v.* Hart, 29 Ch. D. 8, 54 L. J. Ch. 860, 52 L. T. Rep. N. S. 634 (holding that when a statute is not expressly repealed, the burden is on those who assert that there is an implied repeal to show that the two statutes cannot stand consistently together); Middleton *v.* Crofts, 2 Atk. 265, 26 Eng. Reprint 788, 2 Barn. 351, 94 Eng. Reprint 547, Cas. t. Hardw. 57, 95 Eng. Reprint 36, Str. 1056, 93 Eng. Reprint 1030, W. Kel. 148, 25 Eng. Reprint 539 (appendix).

For doctrine of implied repeal see *supra*, VI, A, 3, c.

42. State *v.* Givens, 48 Fla. 165, 174, 37 So. 308, in which the court says: "The legal presumption is that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. An interpretation leading to such a result should not be adopted unless it be inevitable. But the canon of construction in such cases is that if the courts can by any fair, strict or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject it is their duty to do so."

43. *Iowa.*— Eckerson *v.* Des Moines, 137 Iowa 452, 115 N. W. 177.

Kansas.— *In re* Linn County, 15 Kan. 500.

New Jersey.— State *v.* Garthwaite, 23 N. J. L. 143.

Wisconsin.— Oneida County *v.* Keppler, 125 Wis. 18, 102 N. W. 1135; Oneida County *v.* Tibbits, 125 Wis. 9, 102 N. W. 897.

United States.— U. S. *v.* Twenty-Four Coils of Cordage, 28 Fed. Cas. No. 16,566, Baldw. 502 [*affirming* 28 Fed. Cas. No. 16,573, Gilp. 299].

See 44 Cent. Dig. tit. "Statutes," § 303.

44. *In re* Linn County, 15 Kan. 500.

45. Schaeffer *v.* Burnett, 120 Ill. App. 79 [*affirmed* in 221 Ill. 315, 77 N. E. 546]; Goodrich *v.* Russell, 42 N. Y. 177 (holding that the rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous ones); Rich *v.* Keyser, 54 Pa. St. 86 (holding that where the words of a subsequent statute differ from those of a prior statute on the same subject, it is an intimation that they are to have a different construction); Com. *v.* Burry, 5 Pa. Co. Ct. 481 (holding that the act of April 22, 1794, authorizing the dressing of victuals on Sunday, but omitting words found in prior acts expressly authorizing their sale, must be considered as not including the right to sell);

(III) *STATUTES ADOPTED AT SAME SESSION.*[46] The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature;[47] it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy,[48] and they are to be construed together as if parts of the same act.[49] They should be so construed, if possible, as to harmonize,[50] and force and effect should be given to the provisions of each;[51] if, however, they are necessarily inconsistent, a statute which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature;[52] and of two inconsistent statutes enacted at the same session, that will prevail which takes effect at the later date.[53]

(IV) *GENERAL AND SPECIAL STATUTES.*[54] Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy;[55] but to the extent of any necessary repugnancy between them,[56] the special will prevail over the general statute.[57] Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one;[58] and where the general act is later, the special will be construed as

U. S. *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. N. S. 167.

46. For implied repeal by statute enacted at same session see VI, A, 3, c, (III), (G).

47. *Indiana.*— Swinney *v.* Ft. Wayne, etc., R. Co., 59 Ind. 205; State *v.* Rackley, 2 Blackf. 249.

Maine.— Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069.

Missouri.— Curtwright *v.* Crow, 44 Mo. App. 563.

New York.— Smith *v.* People, 47 N. Y. 330.

Texas.— Austin *v.* Gulf, etc., R. Co., 45 Tex. 234.

United States.— Black *v.* Scott, 3 Fed. Cas. No. 1,464, 2 Brock. 325.

See 44 Cent. Dig. tit. "Statutes," § 304.

48. Grant *v.* Cooke, 7 D. C. 165; Curry *v.* Lehman, 55 Fla. 847, 47 So. 18.

49. Blackwell *v.* Albuquerque First Nat. Bank, 10 N. M. 555, 63 Pac. 43.

Especially if the two acts are passed or approved the same day.— Territory *v.* Wingfield, 2 Ariz. 305, 15 Pac. 139; People *v.* Jackson, 30 Cal. 427; Chandler *v.* Lee, 1 Ida. 349; Manuel *v.* Manuel, 13 Ohio St. 458.

50. Willson *v.* Hahn, 131 Ky. 439, 115 S. W. 231; Sprague *v.* Baldwin, 18 Pa. Co. Ct. 568; McGrady *v.* Terrell, 98 Tex. 427, 84 S. W. 641; Garrison *v.* Richards, (Tex. Civ. App. 1908) 107 S. W. 861; Twiggs *v.* State Bd. of Land Com'rs, 27 Utah 241, 75 Pac. 729.

51. *California.*— Leake *v.* Colgan, 125 Cal. 413, 58 Pac. 69.

District of Columbia.— Moss *v.* U. S., 29 App. Cas. 188.

Indiana.— Lincoln School Tp. *v.* American Furniture Co., 31 Ind. App. 405, 68 N. E. 301.

Montana.— State *v.* Fransham, 19 Mont. 273, 48 Pac. 1.

Oklahoma.— Trapp *v.* Wells Fargo Express Co., (1908) 97 Pac. 1003.

Pennsylvania.— Brooke *v.* Kaufman, 6 Pa. Dist. 513.

See 44 Cent. Dig. tit. "Statutes," § 304.

52. Dobbins *v.* Yuba County, 5 Cal. 414; St. Martin *v.* New Orleans, 14 La. Ann. 113; Metropolitan Bd. of Health *v.* Schmades, 3 Daly (N. Y.) 282, 10 Abb. Pr. N. S. 205; Mead *v.* Bagnall, 15 Wis. 156.

For construction of general and special statutes with reference to each other see *infra*, VII, A, 7, d, (IV).

53. State *v.* Marion County, 170 Ind. 595, 83 N. E. 513 (holding that where two acts are passed at the same session, each without any repealing or emergency clause, the one approved last will prevail, even though both take effect at the same time); Harrington *v.* Harrington, 53 Vt. 649. But see Heilig *v.* Puyallup, 7 Wash. 29, 34 Pac. 164, holding that where the first to take effect was accompanied by an emergency clause, it prevailed over one without such clause taking effect at a later date.

54. For general and specific words in same statute see *supra*, VII, A, 3, h.

55. Martin *v.* San Francisco Election Com'rs, 126 Cal. 404, 58 Pac. 932; Reusch *v.* Lincoln, 78 Nebr. 828, 112 N. W. 377; State *v.* Stanley, 82 Vt. 37, 71 Atl. 817, holding that where one statute confers a limited jurisdiction over offenses generally and another a larger jurisdiction as to certain specified ones, the two will stand together, one as the law of the general subject and the other as the law of the particular offense.

56. Talcott *v.* State Harbor Com'rs, 53 Cal. 199.

57. *Arkansas.*— Lawyer *v.* Carpenter, 80 Ark. 411, 97 S. W. 662.

Missouri.—Ackerman *v.* Green, 201 Mo. 231, 100 S. W. 30.

New York.— Gabel *v.* Williams, 39 Misc. 489, 80 N. Y. Suppl. 489.

Oregon.— Zachary *v.* Chambers, 1 Oreg. 321.

Wisconsin.—Jones *v.* Broadway Roller Rink Co., 136 Wis. 595, 118 N. W. 170.

See 44 Cent. Dig. tit. "Statutes," § 305.

58. *Florida.*— State *v.* McMillan, 55 Fla. 246, 254, 45 So. 882.

remaining an exception to its terms,[59] unless it is repealed in express words or by necessary implication.[60]

(v) *Reënactment of or Reference to Former Statute* [61] — (A) *In General.* The legislature may extend or continue [62] an existing statute, or may reënact it, in whole [63] or in part.[64] So a statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute.[65] Where, however, the adopted statute is referred to merely by words describing its general character, only those parts of it which are of a general nature,[66] or particularly relate to the subject of the adopting statute,[67] will be construed as incorporated into the latter in the absence of a clear intention to adopt the whole act. As a rule the adoption of a statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed,[68] and therefore is not affected by any subsequent modification [69] or

Montana.— Carland *v.* Custer County, 5 Mont. 579, 6 Pac. 24.

Ohio.— Cincinnati *v.* Holmes, 56 Ohio St. 104, 46 N. E. 514.

West Virginia.— Hawkins *v.* Bare, 63 W. Va. 431, 60 S. E. 391.

England.— Metropolitan Dist. R. Co. *v.* Sharpe, 5 App. Cas. 425, 44 J. P. 716, 50 L. J. Q. B. 16, 43 L. T. Rep. N. S. 130, 28 Wkly. Rep. 617.

See 44 Cent. Dig. tit. "Statutes," § 305.

59. Dawson County *v.* Clark, 58 Nebr. 756, 79 N. W. 822; State *v.* Dwyer, 42 N. J. L. 327; Carpenter *v.* Russell, 13 Okla. 277, 73 Pac. 930; Rodgers *v.* U. S., 185 U. S. 83, 22 S. Ct. 582, 46 L. ed. 816 [*affirming* 36 Ct. Cl. 266]; Rosencrans *v.* U. S., 165 U. S. 257, 17 S. Ct. 302, 41 L. ed. 708.

60. Kennedy *v.* San Francisco Bd. of Education, 82 Cal. 483, 22 Pac. 1042; *Ex p.* Ah You, 82 Cal. 339, 22 Pac. 929; People *v.* Henshaw, 76 Cal. 436, 18 Pac. 413; State *v.* Omaha El. Co., 75 Nebr. 637, 106 N. W. 979, 110 N. W. 874.

61. For revisions and codes see *infra*, VII, A, 10, b.

62. No particular form of words is necessary to continue a statute. Barnes *v.* White, 1 C. B. 192, 9 Jur. 182, 14 L. J. M. C. 65, 50 E. C. L. 192; Rex *v.* Longmead, Leach C. C. 800.

A temporary act when made perpetual by a subsequent act is in effect perpetual *ab initio*. Rex *v.* Swiney, Alc. & N. 139.

63. Pease *v.* Peck, 18 How. (U. S.) 595, 15 L. ed. 518 [*affirming* 19 Fed. Cas. No. 10,894, 5 McLean 486], holding that the statute of limitations, adopted from the state of Vermont, in 1820, by the governor and judges of the territory of Michigan, under the provisions of the ordinance of 1787, had the force of law, after it was reported by the commissioners appointed in 1825 to revise the laws of the territory, not by virtue of its original adoption, but in virtue of its being so reported and adopted by the legislative council of the territory; and therefore the court will not look to the law of Vermont to correct an error in the act as printed under territorial authority.

64. Coffin *v.* Rich, 45 Me. 507, 71 Am. Dec. 559, holding that a statute repealing a former act and reënacting portions of it should be construed in the light of the prior statute, which, however, should be given no force except so far as specially saved by the repealing act.

65. *Alabama.*— *Ex p.* Greene, 29 Ala. 52.

Indiana.— State *v.* Marion County, 170 Ind. 595, 85 N. E. 513.

Kentucky.— Nunes *v.* Wellisch, 12 Bush 363.

United States.— Daviess *v.* Fairbairn, 3 How. 636, 11 L. ed. 760.

England.— Atty.-Gen. *v.* Great Eastern R. Co., L. R. 7 Ch. 475, 41 L. J. Ch. 505, 26 L. T. Rep. N. S. 749, 20 Wkly. Rep. 599; Great Western R. Co. *v.* Cefn. Cribbwr Brick Co., [1894] 2 Ch. 157, 63 L. J. Ch. 500, 70 L. T. Rep. N. S. 279, 8 Reports 178, 42 Wkly. Rep. 493; *In re* Wood, 31 Ch. D. 607, 55 L. J. Ch. 488, 54 L. T. Rep. N. S. 145, 34 Wkly. Rep. 375; *In re* Barker, 17 Ch. D. 241, 50 L. J. Ch. 334, 44 L. T. Rep. N. S. 33, 29 Wkly. Rep. 873; Sirhowy Tramroad Co. *v.* Jones, 3 A. & E. 640 note, 5 N. & M. 88, 30 E. C. L. 296; Simpson *v.* South Staffordshire Waterworks Co., 4 De G. J. & S. 679, 11 Jur. N. S. 453, 34 L. J. Ch. 380, 12 L. T. Rep. N. S. 360, 6 New Rep. 184, 13 Wkly. Rep. 729, 69 Eng. Ch. 519, 46 Eng. Reprint 1082; Weld *v.* London, etc., R. Co., 9 Jur. N. S. 510, 8 L. T. Rep. N. S. 13, 1 New Rep. 415, 11 Wkly. Rep. 448.

See 44 Cent. Dig. tit. "Statutes," § 306.

66. Rex *v.* Surrey, 2 T. R. 504, 100 Eng. Reprint 271.

67. Jones *v.* Dexter, 8 Fla. 276; State *v.* Marion County, 170 Ind. 595, 85 N. E. 513.

68. Crohn *v.* Kansas City Home Tel. Co., 131 Mo. App. 313, 109 S. W. 1068; Griswold *v.* Atlantic Dock Co., 21 Barb. (N. Y.) 225; Brisco *v.* Rich, 20 Utah 349, 58 Pac. 837.

69. Culver *v.* People, 161 Ill. 89, 43 N. E. 812; Pinkard *v.* Smith, Litt. Sel. Cas. (Ky.) 331; Tomlinson *v.* Dillard, 3 Call (Va.) 105 [*reaffirmed* in Dillard *v.* Tomlinson, 1 Munf. (Va.) 183]; Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190. But see Jones *v.* Dexter, 8 Fla. 276, holding that where an act simply adopted in general terms as applicable to the distribution of personal property "the provisions of the law regulating descents" it included subsequent modifications of the law

repeal[70] of the statute adopted. The mere enactment of a statute on a particular subject does not of itself prove that the law on that subject was different before,[71] as such enactment may have been made in affirmance of the existing law and to remove doubts.[72]

(B) *Adoption of Provisions Previously Construed.* Where a statute that has been construed by the courts has been reënacted in the same,[73] or substantially the same,[74] terms, the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction.[75] So where words or phrases employed in a new

of descent from the time of their enactment. And see also Dudley Gas Co. *v.* Warmington, 45 J. P. 649, 50 L. J. M. C. 69, 44 L. T. Rep. N. S. 475, 29 Wkly. Rep. 680, holding that the adopting statute operated to include a subsequent statute modifying the one adopted, where the subsequent statute provided that the one adopted should be construed together with it as one act.

70. Nunes *v.* Wellisch, 12 Bush (Ky.) 363; Crohn *v.* Kansas City Home Tel. Co., 131 Mo. App. 313, 109 S. W. 1068; Flanders *v.* Merrimack, 48 Wis. 567, 4 N. W. 741; *Ex p.* Higginbotham, 9 Dowl. P. C. 200.

71. Nunnally *v.* White, 3 Metc. (Ky.) 584.

72. Montville *v.* Haughton, 7 Conn. 543; Laird *v.* McGuire, 40 Nova Scotia 129, holding that where a statute is reënacted in different words, and thereby becomes susceptible of more than one interpretation, it will not be construed as altering the previous statute unless such alteration is clearly expressed.

73. *Alabama.*— Tennessee Coal, etc., Co. *v.* Roussell, 155 Ala. 435, 46 So. 866, 130 Am. St. Rep. 56; Wood Dickerson Supply Co. *v.* Cocciola, 153 Ala. 555, 45 So. 192; White *v.* State, 134 Ala. 197, 32 So. 320; Barnewall *v.* Murrell, 108 Ala. 366, 18 So. 831; Huddleston *v.* Askey, 56 Ala. 218; Woolsey *v.* Cade, 54 Ala. 378, 25 Am. Rep. 671; *Ex p.* Matthews, 52 Ala. 51; O'Byrnes *v.* State, 51 Ala. 25; Mobile Bank *v.* Meagher, 33 Ala. 622.

Arkansas.— McKenzie *v.* State, 11 Ark. 594.

Colorado.— Harvey *v.* Travelers' Ins. Co., 18 Colo. 354, 32 Pac. 935.

Indiana.—Marshall *v.* Matson, 171 Ind. 238, 86 N. E. 339; State *v.* Derry, 171 Ind. 18, 85 N. E. 765, 131 Am. St. Rep. 237; Pavey *v.* Braddock, 170 Ind. 178, 84 N. E. 5; McIntyre *v.* State, 170 Ind. 163, 83 N. E. 1005; Sopher *v.* State, 169 Ind. 177, 81 N. E. 913, 14 L. R. A. N. S. 172; Cronin *v.* Zimmerman, 169 Ind. 75, 81 N. E. 1083; Hilliker *v.* Citizens' St. R. Co., 152 Ind. 86, 52 N. E. 607; Anderson *v.* Bell, 140 Ind. 375, 39 N. E. 735, 29 L. R. A. 541; State *v.* Swope, 7 Ind. 91.

Louisiana.— Crescent Bed Co. *v.* New Orleans, 111 La. 124, 35 So. 484; State *v.* Brewer, 22 La. Ann. 273; La Selle *v.* Whitfield, 12 La. Ann. 81.

Maine.— Tuxbury's Appeal, 67 Me. 267; Cota *v.* Ross, 66 Me. 161; Myrick *v.* Hasey, 27 Me. 9, 45 Am. Dec. 583.

Maryland.— Buchanan *v.* Turner, 26 Md. 1; McKee *v.* McKee, 17 Md. 352.

Mississippi.— Hoy *v.* Hoy, 92 Miss. 732, 48 So. 903.

Missouri.— Camp *v.* Wabash R. Co., 94 Mo. App. 272, 68 S. W. 96.

Nebraska.— State *v.* Cornell, 54 Nebr. 647, 75 N. W. 25.

Nevada.— Gould *v.* Wise, 18 Nev. 253, 3 Pac. 30.

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

New Jersey.— Frost *v.* Barnert, 56 N. J. Eq. 290, 38 Atl. 956.

New York.— People *v.* Green, 56 N. Y. 466; Erhard *v.* Kings County, 36 N. Y. Suppl. 656.

Oklahoma.— De Graffenreid *v.* Iowa Land, etc., Co., 20 Okla. 687, 95 Pac. 624.

Pennsylvania.— Delaware Mut. Safety Ins. Co. *v.* Loughlin, 2 Pa. Co. Ct. 600; Guarantee Trust Co. *v.* Loughlin, 2 Pa. Co. Ct. 591, 17 Phila. 123; Brock *v.* Brock, 1 Pa. Co. Ct. 232, 18 Wkly. Notes Cas. 123.

Rhode Island.— *In re* O'Connor, 21 R. I. 465, 44 Atl. 591, 79 Am. St. Rep. 814.

Texas.— Cooper *v.* Yoakum, 91 Tex. 391, 43 S. W. 871; Supreme Council A. H. L. *v.* Anderson, 36 Tex. Civ. App. 615, 83 S. W. 207.

Virginia.— Mangus *v.* McClelland, 93 Va. 786, 22 S. E. 364.

West Virginia.—Pennington *v.* Gillaspie, 63 W. Va. 541, 61 S. E. 416.

United States.—U. S. *v.* Cerecedo Hermanos Y Compania, 209 U. S. 337, 28 S. Ct. 532, 52 L. ed. 821; The Devonshire, 13 Fed. 39, 8 Sawy. 209.

England.— *Ex p.* Campbell, L. R. 5 Ch. 703, 23 L. T. Rep. N. S. 289, 18 Wkly. Rep. 1056. See 44 Cent. Dig. tit. "Statutes," § 306.

74. *Colorado.*— Hart *v.* Hart, 31 Colo. 333, 73 Pac. 35, holding that Mills Annot. St. § 1567, conferring jurisdiction on district courts to grant alimony *pendente lite* and saying nothing of counsel fees and suit money, having been construed by the supreme court not to prevent the allowance of counsel fees and suit money independent thereof, a subsequent act (Laws (1893), c. 80), providing for alimony and counsel fees *pendente lite*, but silent as to suit money, must be construed as not depriving the courts of the right to allow suit money as theretofore.

Illinois.— Atton *v.* South Chicago City R. Co., 236 Ill. 507, 86 N. E. 277.

Indiana.— Monroe County *v.* Conner, 155 Ind. 484, 58 N. E. 828.

New York.— Taylor *v.* Matteawan, 122 N. Y. App. Div. 406, 106 N. Y. Suppl. 841.

Rhode Island.— Bates *v.* Hacking, 29 R. I. 1, 68 Atl. 622, 14 L. R. A. N. S. 937.

West Virginia.— Pennington *v.* Gillaspie, 63 W. Va. 541, 61 S. E. 416.

75. Steele *v.* McKinlay, 5 App. Cas. 754, 43 L. T. Rep. N. S. 358, 29 Wkly. Rep. 17.

statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed, in the absence of a clearly expressed intent to the contrary,[76] to be used in the same sense in the new statute as in the previous statute.[77] These rules are also extended to statutes[78] and parts of statutes[79] that have been reënacted after having received a practical construction by the legislative or executive departments of the government.

e. Construction of Statutes Adopted From Other States or Countries.[80] Where the legislature enacts a provision taken from a statute of another state[81]

76. Rutland *v.* Mendon, 1 Pick. (Mass.) 154 (holding that if the clause varies it shows a different intention in the legislature); *Ex p.* Blaiberg, 23 Ch. D. 254, 52 L. J. Ch. 461, 49 L. T. Rep. N. S. 16, 31 Wkly. Rep. 906 (holding that where the language of the old statute had been altered in the new, the court should ascertain the meaning of the new act without reference to the decisions under the old).

77. *Kentucky.*— Shehan *v.* Louisville, etc., R. Co., 125 Ky. 478, 101 S. W. 380, 31 Ky. L. Rep. 113.

Nebraska.— Kendall *v.* Garneau, 55 Nebr. 403, 75 N. W. 852.

New York.— Matter of Baird, 126 N. Y. App. Div. 439, 110 N. Y. Suppl. 708.

Texas.— Cooper *v.* Yoakum, 91 Tex. 391, 43 S. W. 871; Scott *v.* State, (Cr. App. 1908) 110 S. W. 69; Cohen *v.* State, 53 Tex. Cr. 422, 110 S. W. 66.

Vermont.— Whitcomb *v.* Rood, 20 Vt. 49.

England.— *Ex p.* Campbell, L. R. 5 Ch. 703, 23 L. T. Rep. N. S. 289, 18 Wkly. Rep. 1056; Barlow *v.* Teal, 15 Q. B. D. 403, 54 L. J. Q. B. 400, 53 L. T. Rep. N. S. 52; Greaves *v.* Tofield, 14 Ch. D. 563, 50 L. J. Ch. 118, 43 L. T. Rep. N. S. 100, 28 Wkly. Rep. 840; Clark *v.* Wallond, 47 J. P. 551, 52 L. J. Q. B. 321, 48 L. T. Rep. N. S. 762, 31 Wkly. Rep. 551; Ruckmaboye *v.* Luloobhoy Mottichund, 5 Moore Indian App. 234, 18 Eng. Reprint 884, 8 Moore P. C. 4, 14 Eng. Reprint 2, holding that the rule should be applied, although the sense attached to the words varies from their strict literal meaning.

See 44 Cent. Dig. tit. "Statutes," § 306.

78. U. S. *v.* Cerecedo Hermanos Y Compania, 209 U. S. 337, 28 S. Ct. 532, 52 L. ed. 821; Copper Queen Consol. Min. Co. *v.* Arizona Territorial Bd. of Equalization, 206 U. S. 474, 27 S. Ct. 695, 51 L. ed. 1143 [*affirming* 9 Ariz. 383, 84 Pac. 511].

79. State *v.* Moore, 50 Nebr. 88, 69 N. W. 373, 61 Am. St. Rep. 538.

80. For construction of foreign statutes in general see *supra*, VII, A, 1, c.

For construction of constitutional provisions adopted from other states see CONSTITUTIONAL LAW, 8 Cyc. 739.

81. *Alabama.*— Kennedy *v.* Kennedy, 2 Ala. 571.

Arizona.— Murphey *v.* Brown, (1909) 100 Pac. 801; Costello *v.* Muheim, 9 Ariz. 422, 84 Pac. 906; Copper Queen Consol. Min. Co. *v.* Territorial Bd. of Equalization, 9 Ariz. 383, 84 Pac. 511; Anderson *v.* Territory, (1904) 76 Pac. 636; Santa Cruz County *v.* Barnes, (1904) 76 Pac. 621; Goldman *v.* Sotelo, 8 Ariz. 85, 68 Pac. 558.

Arkansas.— McNutt *v.* McNutt, 78 Ark. 346, 95 S. W. 778.

Colorado.— U. S. Fidelity, etc., Co. *v.* People, 44 Colo. 557, 98 Pac. 828; *In re* Shapter, 35 Colo. 578, 85 Pac. 688, 117 Am. St. Rep. 216, 6 L. R. A. N. S. 575; Gilman *v.* Matthews, 20 Colo. App. 170, 77 Pac. 366; McGovney *v.* Gwillim, 16 Colo. App. 284, 65 Pac. 346.

Delaware.— Wilmington City R. Co. *v.* People's R. Co., (1900) 47 Atl. 245.

District of Columbia.— McManus *v.* Lynch, 28 App. Cas. 381; Strasburger *v.* Dodge, 12 App. Cas. 37.

Florida.— Atlantic Coast Line R. Co. *v.* Beazley, 54 Fla. 311, 45 So. 761; Florida Cent., etc., R. Co. *v.* Mooney, 40 Fla. 17, 24 So. 148; Duval *v.* Hunt, 34 Fla. 85, 15 So. 876.

Idaho.— Stein *v.* Morrison, 9 Ida. 426, 75 Pac. 246; Griffiths *v.* Montandon, 4 Ida. 377, 39 Pac. 548.

Illinois.— Rhoads *v.* Chicago, etc., R. Co., 227 Ill. 328, 81 N. E. 371, 11 L. R. A. N. S. 623 [*affirming* 130 Ill. App. 145]; Gage *v.* Smith, 79 Ill. 219; Freese *v.* Tripp, 70 Ill. 496; Fisher *v.* Deering, 60 Ill. 114; Tyler *v.* Tyler, 19 Ill. 151; Campbell *v.* Quinlin, 4 Ill. 288; Requa *v.* Graham, 86 Ill. App. 566 [*affirmed* in 187 Ill. 67, 58 N. E. 357, 52 L. R. A. 641].

Indiana.— Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248.

Indian Territory.— J. B. Bostic Co. *v.* Eggleston, 7 Indian Terr. 134, 104 S. W. 566.

Iowa.— Jamison *v.* Burton, 43 Iowa 282; Pangborn *v.* Westlake, 36 Iowa 546.

Kansas.— Missouri Pac. R. Co. *v.* Haley, 25 Kan. 35; Stebbins *v.* Guthrie, 4 Kan. 353; Bemis *v.* Becker, 1 Kan. 226.

Massachusetts.— Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; Pratt *v.* American Bell Tel. Co., 141 Mass. 225, 5 N. E. 307, 55 Am. Rep. 465; Com. *v.* Hartnett, 3 Gray 450.

Michigan.— Besser *v.* Alpena Cir. Judge, 155 Mich. 631, 119 N. W. 902; Preston Nat. Bank *v.* Wayne Cir. Judge, 142 Mich. 272, 105 N. W. 757; State *v.* Holmes, 115 Mich. 456, 73 N. W. 548; Daniels *v.* Clegg, 28 Mich. 32; Greiner *v.* Klein, 28 Mich. 12; Harrison *v.* Sager, 27 Mich. 476; Drennan *v.* People, 10 Mich. 169.

Minnesota.— Nicollet Nat. Bank *v.* City

or country,[82] in which the language of the act has received a settled con-

Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

Mississippi.— Ingraham *v.* Regan, 23 Miss. 213.

Missouri.—State *v.* Miles, (1908) 109 S. W. 614; State *v.* Miles, (1908) 109 S. W. 613; State *v.* Miles, 210 Mo. 127, 109 S. W. 595; Knight *v.* Rawlings, 205 Mo. 412, 104 S. W. 38, 13 L. R. A. N. S. 212; Burnside *v.* Wand, 170 Mo. 531, 71 S. W. 337, 62 L. R. A. 427; State *v.* Macon County Ct., 41 Mo. 453; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625; St. Louis Nat. Bank *v.* Hoffman, 74 Mo. App. 203.

Montana.— *In re* Wisner, 36 Mont. 298, 92 Pac. 958; Anaconda Div. No. 1 A. O. H. *v.* Sparrow, 29 Mont. 132, 74 Pac. 197, 101 Am. St. Rep. 563, 64 L. R. A. 128; Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41, 63 Pac. 825, 24 Mont. 125, 60 Pac. 1039; Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582; Largey *v.* Chapman, 18 Mont. 563, 46 Pac. 808; Lindley *v.* Davis, 6 Mont. 453, 13 Pac. 118.

Nebraska.— Gentry *v.* Bearss, 82 Nebr. 787, 118 N. W. 1077; Goble *v.* Simeral, 67 Nebr. 276, 93 N. W. 235; Kendall *v.* Garneau, 55 Nebr. 403, 75 N. W. 852; Forrester *v.* Kearney Nat. Bank, 49 Nebr. 655, 68 N. W. 1059; Coffield *v.* State, 44 Nebr. 417, 62 N. W. 875.

New Mexico.— Raymond *v.* Newcomb, 10 N. M. 151, 61 Pac. 205.

New York.—Waterford, etc., Turnpike *v.* People, 9 Barb. 161.

North Dakota.— State *v.* Blaisdell, (1909) 119 N. W. 360; Cass County *v.* Security Imp. Co., 7 N. D. 528, 75 N. W. 775.

Oklahoma.— Hixon *v.* Hubbell, 4 Okla. 224, 44 Pac. 222; State *v.* Caruthers, 1 Okla. Cr. 428, 98 Pac. 474.

Oregon.— Everding *v.* McGinn, 23 Oreg. 15, 35 Pac. 178; McIntyre *v.* Kamm, 12 Oreg. 253, 7 Pac. 27.

South Dakota.— Carlson *v.* Stuart, 22 S. D. 560, 119 N. W. 41; Murphy *v.* Nelson, 19 S. D. 197, 102 N. W. 691; Yankton Sav. Bank *v.* Gutterson, 15 S. D. 486, 90 N. W. 144; Adams *v.* Grand Island, etc., R. Co., 10 S. D. 239, 72 N. W. 577.

Texas.— Tyler *v.* St. Louis Southwestern R. Co., 99 Tex. 491, 91 S. W. 1, (1906) 93 S. W. 997 [*reversing* (Civ. App. (1905) 87 S. W. 238].

Utah.— Dixon *v.* Ricketts, 26 Utah 215, 72 Pac. 947; People *v.* Ritchie, 12 Utah 180, 42 Pac. 209.

Virginia.— Chesapeake, etc., R. Co. *v.* Pew, 109 Va. 288, 64 S. E. 35.

Washington.— *In re* Third Ave., 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862.

Wisconsin.— Manitowoc Clay Product Co. *v.* Manitowoc, etc., R. Co., 135 Wis. 94, 115 N. W. 390; State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697; State *v.* Wheeler, 97 Wis. 96, 72 N. W. 225; Milwaukee County *v.* Sheboygan, 94 Wis. 58, 68 N. W. 387; Pomeroy *v.* Pomeroy, 93 Wis. 262, 67 N. W. 430; Kilkelly *v.* State, 43 Wis. 604; Westcott *v.* Miller, 42 Wis. 454; Poertner *v.* Russel, 33 Wis. 193; Draper *v.* Emerson, 22 Wis. 147.

United States.— Henrietta Min., etc., Co. *v.* Gardner, 173 U. S. 123, 19 S. Ct. 327, 43 L. ed. 637 [*reversing* 5 Ariz. 211, 81 Pac. 1126]; Willis *v.* Eastern Trust, etc., Co., 169 U. S. 295, 18 S. Ct. 347, 42 L. ed. 752; Whitney *v.* Fox, 166 U. S. 637, 17 S. Ct. 713, 41 L. ed. 1145; Brown *v.* Walker, 161 U. S. 591, 16 S. Ct. 644, 40 L. ed. 819; Hardenbergh *v.* Ray, 151 U. S. 112, 14 S. Ct. 305, 38 L. ed. 93 [*affirming* 33 Fed. 812, 13 Sawy. 158]; Harrill *v.* Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. N. S. 1153 [*reversing* 7 Indian Terr. 152, 104 S. W. 573]; Welsh *v.* Barber Asphalt Paving Co., 167 Fed. 465, 93 C. C. A. 191; Larussi *v.* Missouri Pac. R. Co., 155 Fed. 654 [*affirmed* in 161 Fed. 66]; Boise City Artesian Hot, etc., Water Co. *v.* Boise City, 123 Fed. 232, 59 C. C. A. 236; Blaylock *v.* Muskogee, 117 Fed. 125, 54 C. C. A. 639; Peterman *v.* Northern Pac. R. Co., 105 Fed. 335; Swofford Bros. Dry-Goods Co. *v.* Mills, 86 Fed. 556; Coulter *v.* Stafford, 48 Fed. 266.

See 44 Cent. Dig. tit. "Statutes," § 307.

State statutes adopted by congress.— For District of Columbia see Strasburger *v.* Dodge, 12 App. Cas. (D. C.) 37; Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. ed. 873; Inland, etc., Coasting Co. *v.* Hall, 124 U. S. 121, 8 S. Ct. 397, 31 L. ed. 369; Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 7 S. Ct. 1334, 30 L. ed. 1022. For territories see Fish *v.* Hemple, 2 Alaska 175; Snellen *v.* Kansas City Southern R. Co., 82 Ark. 334, 102 S. W. 193; Western Inv. Co. *v.* Davis, 7 Indian Terr. 152, 104 S. W. 573; Le Bosquet *v.* Myers, 7 Indian Terr. 75, 103 S. W. 770; Boyt *v.* Mitchell, 4 Indian Terr. 47, 64 S. W. 610; Blaylock *v.* Muskogee, 4 Indian Terr. 43, 64 S. W. 609; McFadden *v.* Blocker, 3 Indian Terr. 224, 54 S. W. 873; Zufall *v.* U. S., 1 Indian Terr. 638, 43 S. W. 760; National Live Stock Commission Co. *v.* Taliaferro, 20 Okla. 177, 93 Pac. 983; Chisolm *v.* Weisse, 2 Okla. 611, 39 Pac. 467; Red River Nat. Bank *v.* De Berry, 47 Tex. Civ. App. 96, 105 S. W. 998; Robinson *v.* Belt, 187 U. S. 41, 23 S. Ct. 16, 47 L. ed. 65 [*affirming* 100 Fed. 718, 40 C. C. A. 664]; Appolos *v.* Brady, 49 Fed. 401, 1 C. C. A. 299; Sanger *v.* Flow, 48 Fed. 152, 1 C. C. A. 56.

Unimportant differences between the two statutes do not affect the application of the rule. Rigg *v.* Wilton, 13 Ill. 15, 54 Am. Dec. 419; State *v.* Miles, (Mo. 1908) 109 S. W. 614; State *v.* Miles, (Mo. 1908) 109 S. W. 613; State *v.* Miles, 210 Mo. 127, 109 S. W. 595; Willis *v.* Eastern Trust, etc., Co., 169 U. S. 295, 18 S. Ct. 347, 42 L. ed. 752.

Nor changes in punctuation made in printing the statute in the adopting state. Griffiths *v.* Montandon, 4 Ida. 377, 39 Pac. 548.

82. **Rule applied to English statutes adopted in the United States.**— Bailey *v.* Bailey, 35 Ala. 687; Armstrong *v.* Armstrong, 29 Ala. 538; Kennedy *v.* Kennedy, 2 Ala. 571; State *v.* Rowley, 12 Conn. 101; Jarvis *v.*

struction,[83] it is presumed to have intended that such provision should be understood and applied in accordance with that construction. This rule of construction, however, while recognized by all the courts,[84] is subject to a number of limitations.[85] The construction placed upon the statute by courts of the state from which it was adopted is regarded as persuasive, and indeed as entitled to very great weight,[86] with the courts of the adopting state, but not as conclusive;[87] and it will not be applied where it would be inconsistent with the constitution of the adopting state,[88] or contrary to the spirit and policy of its laws,[89] or is regarded as unsound in principle and against the weight of authority.[90]

Hitch, 161 Ind. 217, 67 N. E. 1057; Bowman *v.* Conn, 8 Ind. 58; Lavender *v.* Rosenheim, 110 Md. 150, 72 Atl. 669; Marqueze *v.* Caldwell, 48 Miss. 23; Ingraham *v.* Regan, 23 Miss. 213, 226 (holding that "a distinction exists, in the very nature of the case, between a statute of the British empire, which had been admitted to operate in one of her dependent colonies, and a law, although transcribed from the English statute-book, enacted by a sovereign state"); Sears *v.* Tindall, 15 N. J. L. 399; Adams *v.* Field, 21 Vt. 256; Norfolk, etc., R. Co. *v.* Old Dominion Baggage Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 145 U. S. 263, 12 S. Ct. 844, 36 L. ed. 699 [*affirming* 43 Fed. 37]; McDonald *v.* Hovey, 110 U. S. 619, 4 S. Ct. 142, 28 L. ed. 269; McCool *v.* Smith, 1 Black (U. S.) 459, 17 L. ed. 218; Pennock *v.* Dialogue, 2 Pet. (U. S.) 1, 7 L. ed. 327; Kirkpatrick *v.* Gibson, 14 Fed. Cas. No. 7,848, 2 Brock. 388.

English statute adopted in Canada.— Paradis *v.* Reg., 1 Can. Exch. 191; Reg. *v.* Authier, 6 Quebec Q. B. 146.

Other English colonies.— Trimble *v.* Hill, 5 App. Cas. 342, 49 L. J. P. C. 49, 42 L. T. Rep. N. S. 103, 28 Wkly. Rep. 479; Catterall *v.* Sweetman, 9 Jur. 951, 1 Rob. Eccl. 304, 580.

83. Such construction must be that of the highest court of the state to entitle it to consideration. Smith *v.* Baker, 5 Okla. 326, 49 Pac. 61.

Mere usage or practice under the statute is not presumed to be adopted. Gray *v.* Askew, 3 Ohio 466.

A construction placed by the commissioners who prepared for New York the civil code that was not adopted in New York, but was adopted in South Dakota, should be followed by the courts in the latter state. Bailey Loan Co. *v.* Seward, 9 S. D. 326, 69 N. W. 58.

84. Construction by federal courts.— The rule will also be applied by the federal courts in construing a state statute adopted from another state. Chicago, etc., R. Co. *v.* Stahley, 62 Fed. 363, 11 C. C. A. 88. But the construction of a state statute by the state supreme court is the rule of interpretation within the state for the federal courts, although the statute was adopted from another state, where it has been differently construed. Chicago, etc., R. Co. *v.* Stahley, *supra*.

85. See *infra*, notes 88–96.

86. See *supra*, notes 81–83.

87. *Colorado.*— Davis Iron Works Co. *v.* White, 31 Colo. 82, 71 Pac. 384; Colorado Milling, etc., Co. *v.* Mitchell, 26 Colo. 284, 58 Pac. 28.

Iowa.— Jamison *v.* Burton, 43 Iowa 282, 286, giving as the reason of the limitation that "otherwise we could not avail ourselves of the legislative wisdom of other states, without introducing along with it incongruous and inharmonious judicial construction."

Massachusetts.— Com. *v.* Hartnett, 3 Gray 450.

Missouri.— Pratt *v.* Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656, adopting a later construction of the English courts upon an English statute in preference to that obtaining at the time of the adoption of the statute in Missouri.

Nebraska.— Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788, holding that the construction given the statute in the state from which it was adopted is entitled to no greater consideration than previous decisions of the supreme court of the adopting state.

Texas.— Snoddy *v.* Cage, 5 Tex. 106.

See 44 Cent. Dig. tit. "Statutes," § 307.

See *infra*, notes 88–96.

88. Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611; *In re* Swearinger, 23 Fed. Cas. No. 13,683, 5 Sawy. 52, 17 Nat. Bankr. Reg. 138.

89. *Illinois.*— Cole *v.* People, 84 Ill. 216.

Iowa.— Jamison *v.* Burton, 43 Iowa 282.

Michigan.— Bliss *v.* Caille Bros. Co., 149 Mich. 601, 113 N. W. 317, holding that the interpretation of a statute by the courts of a sister state prior to its adoption in Michigan is binding on the courts of Michigan, only in so far as it determines that the statute must be aided by the common law, but the particular rule of common law in force in Michigan is for its own courts.

Montana.— Oleson *v.* Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639.

Tennessee.— Smith *v.* Dayton Coal, etc., Co., 115 Tenn. 543, 92 S. W. 62, 4 L. R. A. N. S. 1180.

See 44 Cent. Dig. tit. "Statutes," § 307.

90. Anaconda Div. No. 1 A. O. H. *v.* Sparrow, 29 Mont. 132, 135, 74 Pac. 197, 101 Am. St. Rep. 563, 64 L. R. A. 128 (holding that "this court will not blindly follow the construction given a particular statute by the court of a state from which we borrowed it, when the decision does not appeal to us as founded on right reasoning"); Rhea *v.* State, 63 Nebr. 461, 88 N. W. 789; Morgan *v.* State, 51 Nebr. 672, 71 N. W. 788 (holding that the construction of the statute by the courts of the state from which it was adopted will not be followed where such construction is un-

So the presumption does not arise where the statute differs materially from that of the state from which it was adopted; [91] nor where the judicial construction of the statute in the state where first enacted was not known at the time of its adoption in the other state; [92] nor where other jurisdictions having the identical or substantially the same provision had given the language a different construction prior to the adoption in question.[93] Indeed in a few cases the courts have gone so far as to declare that a statute adopted from another jurisdiction stands upon the same footing and is subject to the same rules of construction as other legislative enactments.[94] It is the construction of the statute which prevailed in the original state at the time of its adoption by the other state that is presumed to follow the statute; [95] and subsequent decisions of the original state have no more weight in the adopting state than that to which they are entitled by reason of their intrinsic merit.[96] That a statute is almost a literal copy of an earlier statute of a sister state is persuasive evidence of a practical reënactment of the statute of the sister state,[97] unless it also appears that earlier statutes substantially similar have also been enacted in other states.[98]

8. Construction as Mandatory or Directory [99] — **a. In General.** A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void,[1] while a directory provision is one the observance of which is not necessary to the validity of the proceeding.[2] Whether a particular statute is mandatory or directory does not depend upon its form,[3] but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other.[4] In the application of subsidiary rules

satisfactory in reasoning, unsound in principle, and against the overwhelming weight of authority); State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 633.

91. Howells Min. Co. *v.* Gray, 148 Ala. 535, 42 So. 448; Kirman *v.* Powning, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; Copper Queen Consol. Min. Co. *v.* Arizona Territorial Bd. of Equalization, 206 U. S. 474, 27 S. Ct. 695, 51 L. ed. 1143 [*affirming* 9 Ariz. 383, 84 Pac. 511].

92. Smith *v.* Baker, 5 Okla. 326, 49 Pac. 61; Stutsman County *v.* Wallace, 142 U. S. 293, 12 S. Ct. 227, 35 L. ed. 1018.

93. The court of the jurisdiction in question will in such case adopt that construction which it regards as most reasonable.— State *v.* Campbell, 73 Kan. 688, 85 Pac. 784; Smith *v.* Baker, 5 Okla. 326, 49 Pac. 61; Coulam *v.* Doull, 4 Utah 267, 9 Pac. 568; Spokane Mfg., etc., Co. *v.* McChesney, 1 Wash. 609, 21 Pac. 198; Coad *v.* Cowhick, 9 Wyo. 316, 63 Pac. 584, 87 Am. St. Rep. 953; Coulam *v.* Doull, 133 U. S. 216, 10 S. Ct. 253, 33 L. ed. 596.

94. Ingraham *v.* Regan, 23 Miss. 213; Snoddy *v.* Cage, 5 Tex. 106.

95. *Arizona.*— Elias *v.* Territory, 9 Ariz. 1, 15, 76 Pac. 605, holding that "the construction that may have been placed upon it by decisions of the supreme court of that jurisdiction after its adoption by us would have no greater weight with us than the construction placed upon similar statutes by the supreme courts of other jurisdictions."

Colorado.— Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

Nebraska.— Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

Oklahoma.— Barnes *v.* Lynch, 9 Okla. 11, 156, 59 Pac. 995.

Wyoming.—Wyoming Coal Min. Co. *v.* State, 15 Wyo. 97, 87 Pac. 337, 984, 123 Am. St. Rep. 1014.

See 44 Cent. Dig. tit. "Statutes," § 307.

96. Hardenbergh *v.* Ray, 151 U. S. 112, 123, 14 S. Ct. 305, 38 L. ed. 93 [*affirming* 33 Fed. 812, 13 Sawy. 158], in which the court says: "The construction which the Supreme Court of the State of Missouri has thus given to its statute since its first adoption thereof by Oregon does not have the same controlling effect it would have if the decisions had been rendered before such adoption, still, they are strongly persuasive of the proper interpretation of the act."

97. Mann *v.* Carter, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. N. S. 150.

98. Smith *v.* Baker, 5 Okla. 326, 49 Pac. 61; Texas, etc., R. Co. *v.* Humble, 181 U. S. 57, 21 S. Ct. 526, 45 L. ed. 747 [*affirming* 97 Fed. 837, 38 C. C. A. 502].

99. For construction of statutes relating to transfer of prosecutions see Criminal Law, 12 Cyc. 222.

For construction of statutes relating to indorsement of process see Process, 32 Cyc. 442.

For statutes relating to notice to pay taxes see Taxation.

1. Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 11 Pac. 3, 18.

2. Stem *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 15.

3. Eccles Lumber Co. *v.* Martin, 31 Utah 241, 87 Pac. 713. See *infra*, note 4.

4. *Mississippi.*— Koch *v.* Bridges, 45 Miss. 247, holding that to say that a statute is "directory" approaches so near legislative

for the determination of the legislative intent in this respect there is no small confusion in the decisions,[5] but the following rules have been recognized as established. A provision of course is mandatory which is declared by the statute itself to be so.[6] When a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance,[7] or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business,[8] the provision may generally be regarded as directory.[9] When a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding,[10] or when some antecedent and prerequisite conditions must exist prior to the exercise of power,[11] or must be performed before certain

discretion that this rule of construction ought to be applied by the courts with reluctance, and only in extraordinary cases, where great public mischiefs would otherwise occur.

Nevada.— Corbett *v.* Bradley, 7 Nev. 106.

North Dakota.— State *v.* Barry, 14 N. D. 316, 103 N. W. 637.

Ohio.— State *v.* Preble County, 6 Ohio S. & C. Pl. Dec. 228, 4 Ohio N. P. 180; State *v.* Defiance County, 1 Ohio S. & C. Pl. Dec. 584, 32 Cinc. L. Bul. 88.

Pennsylvania.— Carbaugh *v.* Sanders, 13 Pa. Super. Ct. 361.

England.— *Re* Newport Bridge, 2 E. & E. 377, 6 Jur. N. S. 97, 29 L. J. M. C. 52, 1 L. T. Rep. N. S. 131, 8 Wkly. Rep. 62, 105 E. C. L. 377.

Canada.— McFarlane *v.* Miller, 26 Ont. 516.

See 44 Cent. Dig. tit. "Statutes," § 308.

5. Koch *v.* Bridges, 45 Miss. 247.

6. Pottsville *v.* Marburger, 1 Leg. Chron. (Pa.) 60.

7. *California.*— People *v.* Weller, 11 Cal. 49, 70 Am. Dec. 754.

Connecticut.— Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010; Gallup *v.* Smith, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353; Colt *v.* Eves, 12 Conn. 243.

Florida.— Reid *v.* Southern Development Co., 52 Fla. 595, 42 So. 206.

Mississippi.— Koch *v.* Bridges, 45 Miss. 247.

Texas.—Ferris Press Brick Co. *v.* Hawkins, (Civ. App. 1909) 116 S. W. 80.

England.— Rex *v.* Loxsdale, 1 Burr. 447, 97 Eng. Reprint 394.

Canada.— Berton *v.* Central Bank, 10 N. Brunsw. 493; *Re* Lincoln, 2 Ont. App. 324; Ontario Inv. Assoc. *v.* Sippi, 20 Ont. 440; Couse *v.* Hannan, 14 U. C. C. P. 26; City Bank *v.* Chency, 15 U. C. Q. B. 400; Gildersleeve *v.* Corby, 15 U. C. Q. B. 150; Dumont *v.* Carbonneau, 13 Quebec Super. Ct. 416.

See 44 Cent. Dig. tit. "Statutes," § 308.

8. *California.*— McCrea *v.* Haraszthy, 51 Cal. 146.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294; May *v.* People, 8 Colo. 210, 6 Pac. 816.

Connecticut.— Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010.

Florida.— Reid *v.* Southern Development Co., 52 Fla. 595, 42 So. 206.

Indiana.— State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

Kansas.— Jones *v.* State, 1 Kan. 273.

Missouri.— State *v.* Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490.

Montana.— Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586.

New York.— People *v.* McDonough, 173 N. Y. 181, 65 N. E. 963 [*affirming* 76 N. Y. App. Div. 257, 78 N. Y. Suppl. 462].

South Carolina.—Atty.-Gen. *v.* Baker, 9 Rich. Eq. 521.

Texas.— Ferris Press Brick Co. *v.* Hawkins, (Civ. App. 1909) 116 S. W. 80.

Vermont.— Holland *v.* Osgood, 8 Vt. 276.

United States.— U. S. *v.* De Visser, 10 Fed. 642.

England.— Reg. *v.* Cheshire, 3 D. & L. 337, 10 Jur. 311, 15 L. J. M. C. 3, 2 New Sess. Cas. 161; Reg. *v.* Milner, 3 D. & L. 128, 10 Jur. 334, 14 L. J. M. C. 157; Mountcashell *v.* O'Neill, 5 H. L. Cas. 937, 2 Jur. N. S. 1030, 4 Wkly. Rep. 818, 10 Eng. Reprint 1172; Cole *v.* Greene, 13 L. J. C. P. 30, 6 M. & G. 872, 7 Scott N. R. 682, 46 E. C. L. 872.

Canada.— McMicken *v.* Fonseca, 6 Manitoba 370; Davidson *v.* Garrett, 30 Ont. 653; Lewis *v.* Brady, 17 Ont. 377; Reg. *v.* Heffernan, 13 Ont. 616; *In re* Goderich Tp., 6 Ont. Pr. 213; Church *v.* Fenton, 28 U. C. C. P. 384; Judd *v.* Read, 6 U. C. C. P. 362; Reg. *v.* Rose, 12 U. C. Q. B. 637.

See 44 Cent. Dig. tit. "Statutes," § 308.

Substantial compliance with such provisions is sometimes required (Evers *v.* Hudson, 36 Mont. 135, 92 Pac. 462; Eccles Lumber Co. *v.* Martin, 31 Utah 241, 87 Pac. 713), although not strict, technical compliance (Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586).

9. Hurford *v.* Omaha, 4 Nebr. 336, 351.

10. Hope *v.* Flentge, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806; *In re* Norwegian St., 81 Pa. St. 349, holding that in all cases where the authority of the courts to proceed is conferred by statute, and where the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory, and must be strictly complied with, or the proceeding will be utterly void.

11. Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010; Eccles Lumber Co. *v.* Martin, 31 Utah 241, 87 Pac. 713.

other powers can be exercised,[12] then the statute must be regarded as mandatory.[13] When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative [14] or exclusive [15] terms, either expressed or implied,[16] then such negative or exclusive terms clearly indicate a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the manner prescribed.[17] Statutes which confer upon a public body or officer power to act for the sake of justice,[18] or which clothe a public body or officer with power to perform acts which concern the public interests [19] or the rights of individuals,[20] although the language is permissive merely,[21] will be construed as imposing duties rather than conferring privileges,[22] and will therefore be regarded as mandatory; but if they are purely enabling in character, simply making that legal and possible which otherwise there would be no authority to do,[23] they will not be construed to impose a duty to perform the acts authorized.

12. State *v.* Farney, 36 Nebr. 537, 54 N. W. 862; Corliss *v.* Corliss, 8 Vt. 373 (holding that where a statute authorizing a division of real estate requires notice to be given, the requirement of such preliminary notice is intended to secure to those affected an opportunity to be heard, and cannot be treated as merely directory); Rex *v.* Croke, Cowp. 26, 98 Eng. Reprint 948; Toronto *v.* Caston, 30 Can. Sup. Ct. 390 [*affirming* 26 Ont. App. 459 (*affirming* 30 Ont. 16)]; Trenton *v.* Dyer, 24 Can. Sup. Ct. 474 [*affirming* 21 Ont. App. 379]; Donovan *v.* Hogan, 15 Ont. App. 432; Love *v.* Webster, 26 Ont. 453; McKay *v.* Ferguson, 26 Grant Ch. (U. C.) 236; Hall *v.* Hall, 2 Grant Err. & App. (U. C.) 569 [*affirming* 22 U. C. Q. B. 578].

13. Hurford *v.* Omaha, 4 Nebr. 336, 351.

14. Spencer's Appeal, 78 Conn. 301, 61 Atl. 1010; Cotton *v.* Brien, 6 Rob. (La.) 115 (although no penalty is provided for non-compliance); Bladen *v.* Philadelphia, 60 Pa. St. 464; Pearse *v.* Morrice, 2 A. & E. 84, 4 L. J. K. B. 21, 4 N. & M. 48, 29 E. C. L. 59; Rex *v.* Leicester, 7 B. & C. 6, 9 D. & R. 772, 5 L. J. M. C. O. S. 95, 31 Rev. Rep. 138, 14 E. C. L. 13.

15. *In re* Farrell, 36 Mont. 254, 92 Pac. 785.

16. Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262; Hughes' Case, 1 Bland (Md.) 46; People *v.* Niagara County, 49 Hun (N. Y.) 32, 1 N. Y. Suppl. 460; Cook *v.* Kelley, 12 Abb. Pr. (N. Y.) 35 [*affirmed* in 14 Abb. Pr. 466].

The imposition of a penalty upon an act amounts to a prohibition. Skelton *v.* Bliss, 7 Ind. 77; Bacon *v.* Lee, 4 Iowa 490; Com. *v.* Snyder, 2 Luz. Leg. Obs. (Pa.) 354.

17. Hurford *v.* Omaha, 4 Nebr. 336, 350.

18. State *v.* Barry, 14 N. D. 316, 103 N. W. 637.

19. *Alabama.*—Tarver *v.* Tallapoosa County, 17 Ala. 527.

New Jersey.— Hugg *v.* Camden, 39 N. J. L. 620.

New York.— People *v.* Moore, 78 N. Y. App. Div. 28, 79 N. Y. Suppl. 7.

Ohio.— State *v.* Franklin County, 35 Ohio St. 458.

Wisconsin.— State *v.* Lean, 9 Wis. 279.

England.— Young *v.* Leamington, 8 App. Cas. 517, 52 L. J. Q. B. 713, 49 L. T. Rep. N. S. 1, 30 Wkly. Rep. 500; Hunt *v.* Wimbledon Local Bd., 4 C. P. D. 48, 48 L. J. C. P. 207, 40 L. T. Rep. N. S. 115, 27 Wkly. Rep. 123; Frend *v.* Dennett, 4 C. B. N. S. 576, 4 Jur. N. S. 897, 27 L. J. C. P. 314, 93 E. C. L. 576.

See 44 Cent. Dig. tit. "Statutes," § 308.

20. Phelps *v.* Lodge, 60 Kan. 122, 55 Pac. 840; Shawnee County *v.* Carter, 2 Kan. 115; Koch *v.* Bridges, 45 Miss. 247; People *v.* Buffalo, 140 N. Y. 300, 35 N. E. 485, 37 Am. St. Rep. 563 [*affirming* 2 Misc. 7, 21 N. Y. Suppl. 601]; People *v.* New York, 3 Misc. (N. Y.) 131, 23 N. Y. Suppl. 1060; Swenehart *v.* Strathman, 12 S. D. 313, 81 N. W. 505.

21. *Illinois.*— Binder *v.* Langhorst, 234 Ill. 583, 85 N. E. 400.

New York.— Phelps *v.* Hawley, 52 N. Y. 23; People *v.* Otsego County, 51 N. Y. 401; McConnell *v.* Allen, 120 N. Y. App. Div. 548, 105 N. Y. Suppl. 16 [*reversed* on other grounds in 193 N. Y. 318, 85 N. E. 1082]; People *v.* Herkimer County, 56 Barb. 452; People *v.* New York, 11 Abb. Pr. 114.

North Dakota.— State *v.* Barry, 14 N. D. 316, 103 N. W. 637.

Oregon.— Springfield Milling Co. *v.* Lane County, 5 Oreg. 265.

Pennsylvania.— Carbaugh *v.* Sanders, 13 Pa. Super. Ct. 361.

United States.— Ralston *v.* Crittenden, 13 Fed. 508, 3 McCrary 344.

See 44 Cent. Dig. tit. "Statutes," § 308.

22. Milford *v.* Orono, 50 Me. 529; Veazie *v.* China, 50 Me. 518; State *v.* Farney, 36 Nebr. 537, 54 N. W. 862.

23. *Connecticut.*— Colley *v.* Webster, 59 Conn. 361, 20 Atl. 334.

Louisiana.— State *v.* Fitzpatrick, 47 La. Ann. 1329, 17 So. 828.

New York.—Armstrong *v.* Murphy, 65 N. Y. App. Div. 123, 72 N. Y. Suppl. 473; People *v.* Gilroy, 82 Hun 500, 31 N. Y. Suppl. 776 [*affirmed* in 145 N. Y. 596, 40 N. E. 164]; Appleby *v.* New York, 41 Hun 481.

Ohio.— State *v.* Columbia Tp. School Dist. No. 6 Bd. of Education, 11 Ohio S. & C. Pl. Dec. 422, 8 Ohio N. P. 186.

England.— Canadian Pac. R. Co. *v.* Parke, [1899] A. C. 535, 68 L. J. P. C. 89, 81 L. T. Rep. N. S. 127, 15 T. L. R. 427, 48 Wkly. Rep. 118; Julius *v.* Oxford, 5 App. Cas. 214, 44 J. P. 600, 49 L. J. Q. B. 577, 42 L. T. Rep. N. S. 546, 28 Wkly. Rep. 726; Bell *v.* Crane, L. R. 8 Q. B. 481, 42 L. J. M. C. 122, 29 L. T. Rep. N. S. 217, 21 Wkly. Rep. 911; York,

A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory merely,[24] unless the nature of the act to be performed,[25] or the phraseology of the statute,[26] or of other statutes relating to the same subject-matter, is such that the designation of time must be considered a limitation upon the power of the officer; but under statutes conferring privileges upon private individuals for a certain period of time, such privileges cannot be exercised after the lapse of the time allowed.[27]

b. Construction of Particular Language. As a general rule the word "may," when used in a statute, is permissive only[28] and operates to confer discretion,[29] while the words "shall"[30] and "must"[31] are imperative, operating to impose a duty which may be enforced. These words, however, are constantly used in statutes without regard to their literal meaning;[32] and in each case are to be given that effect which is necessary to carry out the intention of the legislature as determined by the ordinary rules of construction.[33] Thus the word "may" should be construed to be mandatory[34] whenever the public[35] or individ-

etc., R. Co. *v.* Reg., 1 C. L. R. 119, 1 E. & B. 858, 17 Jur. 690, 22 L. J. Q. B. 225, 7 R. & Can. Cas. 459, 1 Wkly. Rep. 358, 72 E. C. L. 858; Edinburgh, etc., R. Co. *v.* Philip, 3 Jur. N. S. 249, 2 Macq. 514, 5 Wkly. Rep. 377.

Canada.— Matton *v.* Reg., 5 Can. Exch. 401; Hands *v.* Upper Canada Law Soc., 16 Ont. 625 [*reversed* in 17 Ont. 300 (*reversed* in 17 Ont. App. 41)].

See 44 Cent. Dig. tit. "Statutes," § 308.

24. *California.*— People *v.* Lake County, 33 Cal. 487.

Colorado.— People *v.* Earl, 42 Colo. 238, 94 Pac. 294.

Illinois.—Webster *v.* French, 12 Ill. 302.

Indiana.— Stayton *v.* Hulings, 7 Ind. 144; Duncan *v.* Cox, 41 Ind. App. 61, 81 N. E. 735, 82 N. E. 125.

Kentucky.— Blimm *v.* Com., 7 Bush 320.

Mississippi.— Friar *v.* State, 3 How. 422.

Missouri.— St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355.

Montana.— Custer County *v.* Yellowstone County, 6 Mont. 39, 9 Pac. 586.

Nebraska.— State *v.* Moore, 36 Nebr. 579, 54 N. W. 866.

New York.— Metcalf *v.* New York, 1 N. Y. Suppl. 873; People *v.* Allen, 6 Wend. 486.

Wisconsin.— State *v.* Lean, 9 Wis. 279.

Canada.— Danaher *v.* Peters, 17 Can. Sup. St. 44; *Re* Farlinger, 16 Ont. 722.

See 44 Cent. Dig. tit. "Statutes," § 308.

25. *Missouri.*— St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355.

New York.— People *v.* Allen, 6 Wend. 486.

Wisconsin.— State *v.* Lean, 9 Wis. 279.

England.— Barker *v.* Palmer, 8 Q. B. D. 9, 51 L. J. Q. B. 110, 45 L. T. Rep. N. S. 480, 30 Wkly. Rep. 59, holding that requirements that notices in judicial proceedings shall be served on or before a certain time are mandatory.

Canada.— Sweeny *v.* Smith's Falls, 22 Ont. App. 429, registration of by-law.

See 44 Cent. Dig. tit. "Statutes," § 308.

26. St. Louis County Ct. *v.* Sparks, 10 Mo. 117, 45 Am. Dec. 355; People *v.* Allen, 6 Wend. (N. Y.) 486; State *v.* Lean, 9 Wis. 279.

27. Corbett *v.* Bradley, 7 Nev. 106.

28. *Indiana.*— Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344.

Iowa.— Queeny *v.* Higgins, 136 Iowa 573, 114 N. W. 51.

Massachusetts.— Com. *v.* Haynes, 107 Mass. 194.

Missouri.— State *v.* Justices Holt County Ct., 39 Mo. 521.

New York.— Skinner *v.* Tibbitts, 13 N. Y. Civ. Proc. 370.

United States.— Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47.

England.— Wentworth *v.* Mathieu, [1900] A. C. 212, 69 L. J. P. C. 611, 82 L. T. Rep. N. S. 161, 16 T. L. R. 223; Davies *v.* Evans, 9 Q. B. D. 238, 46 J. P. 471, 51 L. J. M. C. 132, 46 L. T. Rep. N. S. 419, 30 Wkly. Rep. 548.

Canada.— Bernardin *v.* North Dufferin, 19 Can. Sup. Ct. 581; *Re* Dwyer, 21 Ont. 175.

See 44 Cent. Dig. tit. "Statutes," § 309; and 26 Cyc. 1590 *et seq.*

29. Chicago, etc., Coal Co. *v.* People, 114 Ill. App. 75 [*affirmed* in 214 Ill. 421, 73 N. E. 770]; Com. *v.* Morrisey, 157 Mass. 471, 32 N. E. 664; State *v.* Henry, 87 Miss. 125, 40 So. 152, 5 L. R. A. N. S. 340; Cutler *v.* Howard, 9 Wis. 309.

30. Davies *v.* Evans, 9 Q. B. D. 238, 46 J. P. 471, 51 L. J. M. C. 132, 46 L. T. Rep. N. S. 419, 30 Wkly. Rep. 548; *Re* Lincoln, 2 Ont. App. 324. See SHALL, 35 Cyc. 1451.

31. People *v.* Thomas, 32 Misc. (N. Y.) 170, 66 N. Y. Suppl. 191. See MUST, 28 Cyc. 1780.

32. Fields *v.* U. S., 27 App. Cas. (D. C.) 433 [certiorari *denied* in 205 U. S. 292, 27 S. Ct. 543, 51 L. ed. 807].

33. Boyer *v.* Onion, 108 Ill. App. 612; Skinner *v.* Tibbitts, 13 N. Y. Civ. Proc. 370; State *v.* Columbia Tp. School Dist. No. 6 Bd. of Education, 11 Ohio S. & C. Pl. Dec. 422, 8 Ohio N. P. 186; Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47.

34. See MAY, 26 Cyc. 1590 *et seq.*

35. *Alabama.*— *Ex p.* Banks, 28 Ala. 28; Gould *v.* Hayes, 19 Ala. 438; *Ex p.* Simonton, 9 Port. 390, 33 Am. Dec. 320.

Illinois.— Binder *v.* Langhorst, 234 Ill. 583, 85 N. E. 400; Cairo *v.* Campbell, 116 Ill. 305, 5 N. E. 114, 8 N. E. 688; Fowler *v.* Pirkins, 77 Ill. 271; Kane *v.* Footh, 70 Ill. 587; Schuyler County *v.* Mercer County, 9 Ill. 20.

uals [36] have a claim *de jure* that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or the public good; [37] but never for the purpose of creating a right.[38] So the word "shall" is to be construed as merely permissive [39] where no public benefit or private right requires it to be given an imperative meaning. Even "must" has been construed as merely directory,[40] where, from a construction of the entire statute and the object to be accomplished by it, such appears to have been the intention of the legislature. The words "it shall be lawful" are, according to their ordinary and natural meaning, permissive and enabling words only,[41] but will be construed as imposing a duty to exercise the power authorized whenever such construction is required for the enforcement of the rights of the public or of individuals.[42] The expression "shall and may" is ordinarily to be construed as mandatory,[43] but may be treated as merely directory where this clearly appears to be the legislative intent.[44] So likewise such expressions as "authorized and empowered," [45] and "shall have power" [46] are to be construed as mandatory or permissive in accordance with the legislative intent manifested in the particular act.

9. Provisos, Exceptions, and Saving Clauses [47] — a. Provisos.[48] A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or

Indiana.— Gray *v.* State, 72 Ind. 567; Gill *v.* State, 72 Ind. 266; State *v.* Buckles, 39 Ind. 272; Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344; Nave *v.* Nave, 7 Ind. 122.

Kansas.— Phelps *v.* Lodge, 60 Kan. 122, 55 Pac. 840.

Maine.— Low *v.* Dunham, 61 Me. 566.

Missouri.— State *v.* Laughlin, 73 Mo. 443; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87.

New Hampshire.— Blake *v.* Portsmouth, etc., R. Co., 39 N. H. 435.

New York.— Phelps *v.* Hawley, 3 Lans. 160 [*affirmed* in 52 N. Y. 23]; People *v.* Brooklyn, 22 Barb. 404; People *v.* Brooks, 1 Den. 457, 43 Am. Dec. 704; Newburgh, etc., Turnpike Road Co. *v.* Miller, 5 Johns. Ch. 101, 9 Am. Dec. 274.

South Dakota.— Swenehart *v.* Strathman, 12 S. D. 313, 81 N. W. 505.

Wisconsin.— Cutler *v.* Howard, 9 Wis. 309.

United States.— Galena *v.* U. S., 5 Wall. 705, 18 L. ed. 560; Rock Island County *v.* U. S., 4 Wall. 435, 18 L. ed. 419.

England.— Rex *v.* Flockwold Inclosure Com'rs, 2 Chit. 251, 18 E. C. L. 618.

Canada.—*Ex p.* Gilbert, 14 N. Brunsw. 231; Cameron *v.* Wait, 3 Ont. App. 175.

See 44 Cent. Dig. tit. "Statutes," § 309.

36. *Illinois.*— Binder *v.* Langhorst, 234 Ill. 583, 85 N. E. 400; Traders' Mut. L. Ins. Co. *v.* Humphrey, 109 Ill. App. 246 [*affirmed* in 207 Ill. 540, 69 N. E. 875].

Kansas.— Phelps *v.* Lodge, 60 Kan. 122, 55 Pac. 840; Stevens *v.* Miller, 3 Kan. App. 192, 43 Pac. 439.

Nebraska.—State *v.* Buffalo County, 6 Nebr. 454.

New York.— Goff *v.* Vedder, 12 N. Y. Civ. Proc. 358.

South Dakota.— Swenehart *v.* Strathman, 12 S. D. 313, 81 N. W. 505.

See 44 Cent. Dig. tit. "Statutes," § 309.

37. Mitchell *v.* Duncan, 7 Fla. 13; People *v.* Buffalo County, 4 Nebr. 150; Rex *v.* Barlow, 2 Salk. 609, 91 Eng. Reprint 516; Rex *v.* Derby, Skin. 370, 90 Eng. Reprint 164.

38. *Ex p.* Banks, 28 Ala. 28; State *v.* Justices Holt County Ct., 39 Mo. 521; Gilmore *v.* Utica, 121 N. Y. 561, 24 N. E. 1009; People *v.* Gilroy, 82 Hun (N. Y.) 500, 31 N. Y. Suppl. 776.

39. Wheeler *v.* Chicago, 24 Ill. 105, 76 Am. Dec. 736; Boyer *v.* Onion, 108 Ill. App. 612; Blimm *v.* Com., 7 Bush (Ky.) 320; Metcalf *v.* New York, 1 N. Y. Suppl. 873; State *v.* Columbia Tp. School Dist. No. 6 Bd. of Education, 11 Ohio S. & C. Pl. Dec. 422, 8 Ohio N. P. 186. See Shall, 35 Cyc. 1451.

40. *In re* Rutledge, 162 N. Y. 31, 56 N. E. 511, 47 L. R. A. 721; Matter of O'Hara, 40 Misc. (N. Y.) 355, 82 N. Y. Suppl. 293. See Must, 28 Cyc. 1780.

41. Seiple *v.* Elizabeth, 27 N. J. L. 407; Julius *v.* Oxford, 5 App. Cas. 214, 44 J. P. 600, 49 L. J. Q. B. 577, 42 L. T. Rep. N. S. 546, 28 Wkly. Rep. 726; *Re* Bridgman, 1 Dr. & Sm. 164, 6 Jur. N. S. 1065, 29 L. J. Ch. 844, 2 L. T. Rep. N. S. 560, 8 Wkly. Rep. 598, 62 Eng. Reprint 340; Hereford R. Co. *v.* Reg., 24 Can. Sup. Ct. 1.

42. Tarver *v.* Tallapoosa Com'rs Ct., 17 Ala. 527; Hugg *v.* Camden, 39 N. J. L. 620; New York *v.* Furze, 3 Hill (N. Y.) 612; Mason *v.* Fearson, 9 How. (U. S.) 248, 13 L. ed. 125.

43. State *v.* Camden, 39 N. J. L. 620; Atty.-Gen. *v.* Lock, 3 Atk. 164, 26 Eng. Reprint 897; Steward *v.* Greaves, 2 Dowl. P. C. N. S. 485, 6 Jur. 1116, 12 L. J. Exch. 109, 10 M. & W. 711; Chapman *v.* Milvain, 5 Exch. 61, 14 Jur. 251, 19 L. J. Exch. 228, 1 L. M. & P. 209.

44. See *supra*, note 43. And see Stamper *v.* Millar, 3 Atk. 212, 26 Eng. Reprint 923, holding that "shall or may" grants discretionary power.

45. People *v.* Herkimer County, 56 Barb. (N. Y.) 452, held mandatory.

46. Cummins *v.* Cummins, 1 Marv. (Del.) 423, 31 Atl. 816, held permissive.

47. For allegation in indictment or information as to provisos and exceptions see Indictments and Informations, 22 Cyc. 344.

48. See Proviso, 32 Cyc. 743.

modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it,[49] or of excluding some possible ground of misinterpretation of it,[50] as by extending it to cases not intended by the legislature to be brought within its purview. The proviso is generally introduced by the word "provided," but its existence and effect are to be determined rather by its matter and substance than by its form.[51] It should be construed together with the enacting clause,[52] with a view to giving effect to each [53] and to carrying out the intention of the legislature as manifested in the entire act.[54] The enacting clause is of course the principal part of the statute, and, as its terms may be presumed to have embodied the main object of the act, the proviso should be strictly construed.[55] The appropriate office of the proviso is to restrain or modify the enacting clause,[56] and not to enlarge it; [57] but where from the language employed

49. *Alabama.*— *Ex p.* Lusk, 82 Ala. 519, 2 So. 140; Carroll *v.* State, 58 Ala. 396; Pearce *v.* Mobile Bank, 33 Ala. 693.

Alaska.— Brace *v.* Solner, 1 Alaska 361.

Illinois.— *In re* Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; Walsh *v.* Van Horn, 22 Ill. App. 170.

Indiana.— State *v.* Barrett, (1909) 87 N. E. 7.

Minnesota.— State *v.* Twin City Tel. Co., 104 Minn. 270, 116 N. W. 835.

New York.— Rowell *v.* Janvrin, 151 N. Y. 60, 45 N. E. 398; Waffle *v.* Goble, 53 Barb. 517; People *v.* Kelly, 5 Abb. N. Cas. 383.

Pennsylvania.— Com. *v.* Hough, 8 Pa. Dist. 685, 22 Pa. Co. Ct. 440.

United States.— U. S. *v.* Dickson, 15 Pet. 141, 10 L. ed. 689; Voorhees *v.* Jackson, 10 Pet. 449, 471, 9 L. ed. 490 [*affirming* 2 Fed. Cas. No. 939, 1 McLean 221]; Wayman *v.* Southard, 10 Wheat. 1, 30, 6 L. ed. 253; Deitch *v.* Staub, 115 Fed. 309, 53 C. C. A. 137.

See 44 Cent. Dig. tit. "Statutes," § 310.

50. Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Baggaley *v.* Pittsburg, etc., Iron Co., 90 Fed. 636, 33 C. C. A. 202.

51. Carroll *v.* State, 58 Ala. 396; Brace *v.* Solner, 1 Alaska 361, 370 (holding that "the word 'provided' in its first proviso has only the meaning of the conjunction 'and' or 'but,' while the second has the full significance of a proviso"); Rowell *v.* Janvrin, 151 N. Y. 60, 45 N. E. 398; Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 9 S. Ct. 47, 32 L. ed. 377.

52. Pearce *v.* Mobile Bank, 33 Ala. 693; Coal Creek Tp. Advisory Bd. *v.* Levandowski, (Ind. App. 1908) 84 N. E. 346; U. S. *v.* Bernays, 158 Fed. 792, 86 C. C. A. 52, holding that a proviso should be construed with reference to the subject-matter of the sentence of which it forms a part.

53. *Ex p.* Lusk, 82 Ala. 519, 2 So. 140; Wartensleben *v.* Haithcock, 80 Ala. 565, 1 So. 38; Markee *v.* People, 103 Ill. App. 347 (holding that a construction given to a statute without a proviso will not apply to it after a proviso has been added); State *v.* Weller, 171 Ind. 53, 85 N. E. 761; Austin *v.* U. S., 155 U. S. 417, 15 S. Ct. 167, 39 L. ed. 206; Quackenbush *v.* U. S., 33 Ct. Cl. 355 [*affirmed* in 177 U. S. 20, 20 S. Ct. 530, 44 L. ed. 654]. The proviso will be disregarded where, by reason of omissions or of accidental mistakes in the use of words, it can be given no sensible effect. Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

54. Baggaley *v.* Pittsburg, etc., Iron Co., 90 Fed. 636, 33 C. C. A. 202.

55. *Alabama.*— *Ex p.* Lusk, 82 Ala. 519, 2 So. 140.

Kansas.— *In re* Schenck, 78 Kan. 207, 96 Pac. 43.

Kentucky.— Ditto *v.* Geoghegan, 1 Metc. 169.

Minnesota.— State *v.* Twin City Tel. Co., 104 Minn. 270, 116 N. W. 835.

New Jersey.— Clark Thread Co. *v.* Kearny Tp., 55 N. J. L. 50, 25 Atl. 327.

Texas.— Roberts *v.* Yarboro, 41 Tex. 449.

See 44 Cent. Dig. tit. "Statutes," § 310.

Only those cases that are fairly within the terms of the proviso are taken out of the operation of the statute by it. Towson *v.* Denson, 74 Ark. 302, 86 S. W. 661; Clark's Appeal, 58 Conn. 207, 20 Atl. 456; Futch *v.* Adams, 47 Fla. 257, 36 So. 575.

56. *Illinois.*— Gaither *v.* Wilson, 164 Ill. 544, 46 N. E. 58; Chicago *v.* Phœnix Ins. Co., 126 Ill. 276, 18 N. E. 668; Stephen *v.* Illinois Cent. R. Co., 128 Ill. App. 99; Walsh *v.* Van Horn, 22 Ill. App. 170, 173 (holding that "it being the office of a proviso to limit the body of the act or antecedent clause, and in no sense its proper function to extend them, it should not be held to have this latter effect unless it appears from an inspection of the whole act, with reasonable certainty, that such was the legislative intention").

Minnesota.— State *v.* Twin City Tel. Co., 104 Minn. 270, 116 N. W. 835.

New York.— Matter of Webb, 24 How. Pr. 247.

North Carolina.— Isler *v.* Dewey, 75 N. C. 466.

Ohio.— State *v.* Craig, 10 Ohio S. & C. Pl. Dec. 577, 8 Ohio N. P. 148.

Pennsylvania.— Kensington *v.* Keith, 2 Pa. St. 218.

United States.— Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 9 S. Ct. 47, 32 L. ed. 377; Deitch *v.* Staub, 115 Fed. 309, 53 C. C. A. 137; Quackenbush *v.* U. S., 33 Ct. Cl. 355 [*affirmed* in 177 U. S. 20, 20 S. Ct. 530, 44 L. ed. 654].

England.— Mullins *v.* Surrey, 5 Q. B. D. 170, 49 L. J. Q. B. 257, 42 L. T. Rep. N. S. 128, 28 Wkly. Rep. 426.

See 44 Cent. Dig. tit. "Statutes," § 310.

57. *In re* Day, 181 Ill. 73, 54 N. E. 646, 50

it is apparent that the legislature intended a more comprehensive meaning, it must be construed to enlarge the scope of the act,[58] or to assume the function of an independent enactment.[59] So the operation of a proviso is usually and properly confined to the clause or provision immediately preceding;[60] yet, where necessary to effectuate the legislative intent, it will be construed as applying also to other preceding[61] or subsequent sections[62] or to the entire act.[63] Where the proviso is entirely contradictory and repugnant to the enacting clause it has been declared void,[64] and the statute has been construed as if it contained no such clause; but in the case of only a partial inconsistency which cannot be harmonized, the proviso, as the later expression of the legislative will, prevails to the extent of the inconsistency.[65]

b. Exceptions and Saving Clauses. An exception differs from a proviso in that the exception exempts something absolutely from the operation of the statute

L. R. A. 519; People *v.* Kelly, 5 Abb. N. Cas. (N. Y.) 383; Com. *v.* Hough, 8 Pa. Dist. 685, 22 Pa. Co. Ct. 440, holding that it should not be construed to confer a power.

58. Stephen *v.* Illinois Cent. R. Co., 128 Ill. App. 99; Prindle *v.* U. S., 41 Ct. Cl. 8.

59. *Alabama.*— Wartensleben *v.* Haithcock, 80 Ala. 565, 1 So. 38.

District of Columbia.— Hall's Safe Co. *v.* Herring-Hall-Marvin Safe Co., 31 App. Cas. 498, holding that while it is the function of a proviso to make an exception from the enacting clause, to restrain generality and prevent misinterpretation, yet in view of the constant and different use of a proviso in congressional legislation, this restriction of its office no longer maintains in its strictness.

Illinois.— Hackett *v.* Chicago City R. Co., 235 Ill. 116, 85 N. E. 320 [*reversing* 136 Ill. App. 594].

Maryland.— Cumberland *v.* Magruder, 34 Md. 381.

North Carolina.— Propst *v.* Southern R. Co., 139 N. C. 397, 51 S. E. 920; Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. C. 298, 3 S. E. 363; Mason *v.* McCormick, 75 N. C. 263, 80 N. C. 244.

Oregon.— State *v.* Wright, 14 Oreg. 365, 12 Pac. 708.

United States.— National Bank of Commerce *v.* Cleveland, 156 Fed. 251; Prindle *v.* U. S., 41 Ct. Cl. 8.

See 44 Cent. Dig. tit. "Statutes," § 310.

60. *Alabama.*— Wartensleben *v.* Haithcock, 80 Ala. 565, 1 So. 38; Rawls *v.* Doe, 23 Ala. 240, 48 Am. Dec. 289.

Illinois.— Hackett *v.* Chicago City R. Co., 235 Ill. 116, 85 N. E. 320 [*reversing* 136 Ill. App. 594]; Gaither *v.* Wilson, 164 Ill. 544, 46 N. E. 58; De Graff *v.* Went, 164 Ill. 485, 45 N. E. 1075 (holding that as the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, upon sound principles of construction, it should be confined to what precedes, unless it is clear that it was intended to be applied to subsequent matter); Spring *v.* Olney, 78 Ill. 101.

Indiana.— Coal Creek Tp. Advisory Bd. *v.* Levandowski, (App. 1908) 84 N. E. 346.

Maryland.— Wolf *v.* Bauereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680.

Michigan.— Sullivan *v.* Bailey, 125 Mich. 104, 83 N. W. 996.

Oklahoma.— Leader Printing Co. *v.* Nicholas, 6 Okla. 302, 50 Pac. 1001.

Pennsylvania.— Lehigh County *v.* Meyer, 102 Pa. St. 479.

United States.— U. S. *v.* Bernays, 158 Fed. 792, 86 C. C. A. 52, holding that a proviso should be construed with reference to the subject-matter of the sentence of which it forms a part, unless it clearly appears to be designed by the legislature for a broader or more independent operation.

See 44 Cent. Dig. tit. "Statutes," § 310.

61. Wartensleben *v.* Haithcock, 80 Ala. 565, 1 So. 38; State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Austin *v.* U. S., 155 U. S. 417, 15 S. Ct. 167, 39 L. ed. 206.

62. Mechanics', etc., Bank's Appeal, 31 Conn. 63; State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Waters *v.* Campbell, 29 Fed. Cas. No. 17,264, 4 Sawy. 121, 15 Alb. L. J. (N. Y.) 16.

63. State *v.* Webber, 96 Minn. 348, 105 N. W. 68; Propst *v.* Southern R. Co., 139 N. C. 397, 51 S. E. 920; U. S. *v.* Babbit, 1 Black (U. S.) 55, 17 L. ed. 94; U. S. *v.* Scruggs, etc., Dry Goods Co., 156 Fed. 940, 84 C. C. A. 440 [*reversing* 147 Fed. 888]; U. S. *v.* Downing, 146 Fed. 56, 76 C. C. A. 376 [*reversing* 135 Fed. 250, and 139 Fed. 58] (holding that the general rule that a proviso to a particular section does not apply to other sections, but is to be construed with reference to the immediately preceding parts of the clause to which it is attached, is not controlling, especially in such composite structures as tariff and appropriation acts, and that the true rule seems to be that while the position of a proviso in a statute has a great and sometimes controlling influence upon the question of its application, yet the inference from its position cannot overrule its plain general intent); Carter *v.* U. S., 143 Fed. 256, 74 C. C. A. 394 [*affirming* 137 Fed. 978].

64. Collner's Estate, 22 Pa. Co. Ct. 198; Colegrove's Estate, 21 Pa. Co. Ct. 577; Portuondo's Estate, 20 Pa. Co. Ct. 209; *Ex p.* Mayor's Ct., 4 Pa. L. J. Rep. 315.

65. State *v.* Barrett, (Ind. 1909) 87 N. E. 7; Campbell *v.* Jackman, 140 Iowa 475, 118 N. W. 755; Clark Thread Co. *v.* Kearny Tp., 55 N. J. L. 50, 25 Atl. 327; Townsend *v.* Brown, 24 N. J. L. 80.

For conflict between proviso and body of act see *supra*, VII, A, 4, c.

by express words in the enacting clause,[66] while a proviso follows the enacting clause and operates to defeat its operation conditionally.[67] A saving clause contains an exception of special things out of the general things mentioned in the statute,[68] and its most common use is in repealing statutes for the purpose of saving from their operation rights accrued,[69] duties imposed, penalties incurred,[70] and proceedings commenced.[71] Both exceptions [72] and saving clauses,[73] where directly repugnant to the purview of the act, are void.

10. Amendments, Revisions, Codes, and Repealing Acts [74] — a. Amendatory and Amended Acts. Amendments are to be construed together with the original act to which they relate as constituting one law; [75] and also together with other statutes on the same subject,[76] as part of a coherent system of legislation.[77] The

66. Campbell *v.* Jackman, 140 Iowa 475, 118 N. W. 755; Rowell *v.* Janvrin, 151 N. Y. 60, 45 N. E. 398; Acker *v.* Richards, 63 N. Y. App. Div. 305, 71 N. Y. Suppl. 929; Waffle *v.* Goble, 53 Barb. (N. Y.) 517.

67. See *infra*, notes 68–71.

68. Clark Thread Co. *v.* Kearny Tp., 55 N. J. L. 50, 25 Atl. 327.

A saving clause must be strictly construed. — Devonshire *v.* O'Connor, 24 Q. B. D. 468, 54 J. P. 740, 59 L. J. Q. B. 206, 62 L. T. Rep. N. S. 917, 38 Wkly. Rep. 420; Lord Advocate *v.* Hamilton, 1 Macq. 46.

69. State *v.* Brady, (Tex. 1909) 118 S. W. 128 [*reversing* (Civ. App. 1908) 114 S. W. 895] (holding that such a saving clause should be strictly construed so as not to include anything not fairly within its terms); Dickinson *v.* Handsley, 53 J. P. 676, 60 L. T. Rep. N. S. 567. See *infra*, VII, A, 10, c.

70. *In re* Schneck, 78 Kan. 207, 96 Pac. 43, holding that where, on the repeal and amendment of a section prescribing a penalty for a crime, no saving clause is embodied in the amendment, the general saving clause in Gen. St. (1901) § 7342, applies.

71. State *v.* St. Louis, 174 Mo. 125, 73 S. W. 623, 61 L. R. A. 593; Reg. *v.* West Riding of Yorkshire, 1 Q. B. D. 220, 45 L. J. M. C. 97, 35 L. T. Rep. N. S. 358; Barnes *v.* Eddleston, 1 Ex. D. 102, 45 L. J. M. C. 162, 33 L. T. Rep. N. S. 822.

72. Clelland *v.* Ker, 6 Ir. Eq. 35 [*affirmed* in Drury 227].

73. Clark Thread Co. *v.* Kearny Tp., 55 N. J. L. 50, 25 Atl. 327.

74. For repeal by amendatory acts see *supra*, VII, A, 3, c, (III), (D).

75. *District of Columbia.*— Chase *v.* U. S., 7 App. Cas. 149 (holding that a statute amending previous statutes must be construed, in the absence of restrictions express or implied, as having the same general and extensive application as the statutes to which it is an amendment); U. S. *v.* Crawford, 6 Mackey 319 (holding that an act being limited to certain localities, one amendatory thereof can have no wider scope unless it is expressly so provided).

Florida.— Harrell *v.* Harrell, 8 Fla. 46, holding that no portion of either should be declared inoperative, if it can be sustained without wresting words from their appropriate meaning.

Illinois.— Holbrook *v.* Nichol, 36 Ill. 161.

Louisiana.— Gas Light, etc., Co. *v.* Nuttall, 19 La. 447.

Massachusetts.— Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446.

Michigan.— People *v.* Michigan Cent. R. Co., 145 Mich. 140, 108 N. W. 772.

Mississippi.— George *v.* Woods, (1909) 49 So. 147.

Nebraska.— Campbell *v.* Youngson, 80 Nebr. 322, 114 N. W. 415; Richards *v.* State, 65 Nebr. 808, 91 N. W. 878 (holding that when the words "original code" were used in the title to a bill providing for the amendment and repeal of a section of the general law relating to crimes, they must be construed as referring to the code then in force and not to a former code that had been superseded); State *v.* Partridge, 29 Nebr. 158, 45 N. W. 290 (holding that each amendment applies to the statute as it exists at the time the amendment takes effect); State *v.* Babcock, 23 Nebr. 128, 36 N. W. 348.

New Jersey.— Van Riper *v.* Essex Public Road Bd., 38 N. J. L. 23; Schmalz *v.* Wooley, 56 N. J. Eq. 649, 39 Atl. 539.

New York.— *In re* Locust Ave., 185 N. Y. 115, 77 N. E. 1012 [*modifying* 110 N. Y. App. Div. 774, 97 N. Y. Suppl. 508].

Ohio.— McKibben *v.* Lester, 9 Ohio St. 627.

Rhode Island.— State *v.* Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

United States.— U. S. *v.* Woolsey, 28 Fed. Cas. No. 16,763, holding that a general reference in one statute to another antecedent act embraces also its amendments because these must be construed together with the original.

See 44 Cent. Dig. tit. "Statutes," § 311.

Judicial decisions construing the original act are entitled to weight in construing the amended act. McGann *v.* People, 194 Ill. 526, 62 N. E. 941 [*reversing* 97 Ill. App. 587]; State *v.* Dorsey, 167 Ind. 199, 78 N. E. 843; McEvoy *v.* Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006.

Of two constructions equally warranted by the language of the amendment, that is to be preferred which best harmonizes it with the act amended. Atty.-Gen. *v.* Lewis, 151 Mich. 81, 114 N. W. 927; Yuengling *v.* Schile, 12 Fed. 97, 20 Blatchf. 452; Griffin's Case, 11 Fed. Cas. No. 5,815, Chase 364.

76. Fitzgerald *v.* Lewis, 164 Mass. 495, 41 N. E. 687; Grimes *v.* Reynolds, 184 Mo. 679, 68 S. W. 588, 83 S. W. 1132 [*affirming* 94 Mo. App. 576, 68 S. W. 588]; Vreeland *v.* Pierson, 70 N. J. L. 508, 57 Atl. 151; Farrell *v.* State, 54 N. J. L. 421, 24 Atl. 725; Christian *v.* Taylor, 96 Va. 503, 31 S. E. 904.

77. State *v.* Hinton, 49 La. Ann. 1354, 22

old law should be considered, the evils arising under it, and the remedy provided by the amendment, and that construction of the amended act should be adopted which will best repress the evils and advance the remedy.[78] Words used in the original act will be presumed to be used in the same sense in the amendment.[79] An amended act is ordinarily to be construed as if the original statute had been repealed, and a new and independent act in the amended form had been adopted in its stead; [80] or, as frequently stated by the courts, so far as regards any action after the adoption of the amendment, as if the statute had been originally enacted in its amended form.[81] The original provisions appearing in the amended act are to be regarded as having been the law since they were first enacted, and as still speaking from that time; [82] while the new provisions are to be construed as enacted at the time the amendment took effect.[83] It will be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore the courts will endeavor to give some effect to the amendment.[84] A change of phraseology from that of the original act will raise the presumption that a change of meaning was also intended; [85] this presumption

So. 617; U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890 [*affirming* 71 Fed. 382]; U. S. *v.* Jessup, 15 Fed. 790.

78. People *v.* Greer, 43 Ill. 213; Maus *v.* Logansport, etc., R. Co., 27 Ill. 77; Campbell *v.* Youngson, 80 Nebr. 322, 114 N. W. 415.

79. Robbins *v.* Omnibus R. Co., 32 Cal. 472.

80. *Colorado.*— Dimpfel *v.* Beam, 41 Colo. 25, 91 Pac. 1107.

Iowa.— McGuire *v.* Chicago, etc., R. Co., 131 Iowa 340, 108 N. W. 902.

Michigan.— People *v.* Michigan Cent. R. Co., 145 Mich. 140, 108 N. W. 772.

Missouri.— Kamerick *v.* Castleman, 21 Mo. App. 587.

Nebraska.— Campbell *v.* Youngson, 80 Nebr. 322, 114 N. W. 415.

New Mexico.— Cortesy *v.* Territory, 7 N. M. 89, 32 Pac. 504.

Ohio.— McKibben *v.* Lester, 9 Ohio St. 627.

England.— Michell *v.* Brown, 1 E. & E. 267, 5 Jur. N. S. 707, 28 L. J. M. C. 53, 7 Wkly. Rep. 80, 102 E. C. L. 267.

See 44 Cent. Dig. tit. "Statutes," § 311.

81. *Illinois.*— Holbrook *v.* Nichol, 36 Ill. 161.

Indiana.— State *v.* Adams Express Co., 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. N. S. 93; Cain *v.* Allen, 168 Ind. 8, 79 N. E. 201, 896; State *v.* Bock, 167 Ind. 559, 79 N. E. 493; Russell *v.* State, 161 Ind. 481, 68 N. E. 1019.

Missouri.— Epperson *v.* New York L. Ins. Co., 90 Mo. App. 432.

New Jersey.— Farrell *v.* State, 54 N. J. L. 421, 24 Atl. 725.

United States.— Ludington *v.* U. S., 15 Ct. Cl. 453.

See 44 Cent. Dig. tit. "Statutes," § 311.

82. Barrows *v.* People's Gaslight, etc., Co., 75 Fed. 794.

83. Callahan *v.* Jennings, 16 Colo. 471, 27 Pac. 1055; Richardson *v.* Fitzgerald, 132 Iowa 253, 109 N. W. 866.

But a declaratory act, in the form of an amendment, placing a legislative construction upon the original act, will be construed retrospectively as taking effect at the same time as the original act. Mosle *v.* Bidwell, 130 Fed. 334, 65 C. C. A. 533 [*reversing* 119 Fed. 480].

84. *California.*— People *v.* King, 28 Cal. 265, holding that an amendment referring in terms to section 293 of the Practice Act will be construed as referring to section 296 of that act where that is the only section to which it can properly apply.

Illinois.— Toledo, etc., R. Co. *v.* Anderson, 48 Ill. App. 130, holding that where one section of a statute requires certain things under pain of incurring penalties provided in another section, a change in the penalties of the section referred to also operates to effect a change in those of the section in which the reference is made.

Indiana.— Mankin *v.* Pennsylvania Co., 160 Ind. 447, 67 N. E. 229, holding that when an act or section to be amended is identified in the manner required by the constitution, and it is not certain what act or section was amended, the court will resort to means other than the title to determine what act or section was meant, but if not so identified the court will not resort to such other means, although the act intended would be thereby ascertained beyond question.

Iowa.— Rural Independent School Dist. No. 10 *v.* New Independent School Dist., 120 Iowa 119, 94 N. W. 284, holding, however, that the action of the legislature in amending a statute so as to make it directly applicable to a particular case is not a conclusive admission that it did not originally cover such a case.

New Jersey.— United New Jersey R., etc., Co. *v.* Parker, 75 N. J. L. 771, 69 Atl. 239 [*modifying* 75 N. J. L. 120, 67 Atl. 672], holding that the effect of each of several amendments to the same statute is to be considered separately.

New York.— People *v.* Snedecor, 102 N. Y. Suppl. 352; People *v.* Weinstock, 117 N. Y. App. Div. 168, 102 N. Y. Suppl. 349 [*reversed* on other grounds in 193 N. Y. 481, 86 N. E. 547].

Oregon.— State *v.* Wright, 14 Oreg. 365, 12 Pac. 708.

See 44 Cent. Dig. tit. "Statutes," § 311.

85. Barker *v.* Potter, 55 Nebr. 25, 75 N. W. 57; Homnyack *v.* Prudential Ins. Co. of America, 194 N. Y. 456, 87 N. E. 769; U. S. *v.* Bashaw, 50 Fed. 749, 754, 1 C. C. A. 653 [*re-*

is fairly strong in the case of an isolated, independent amendment,[86] but is of little force in the case of amendments adopted in a general revision or codification of the laws,[87] as in such case the change of phraseology may be due to a rearrangement of the statutes or to a desire to improve the style.[88]

b. Revisions and Codes.[89] A general revision or code is intended to contain all the statute law of a public nature in force in the jurisdiction at the time of its adoption.[90] It is compiled by collecting separate statutes, and by altering them as deemed advisable, and is intended as a substitute for all the public statutes in force before its adoption.[91] When the meaning of the language of the revision is plain and unambiguous, no recourse may be had to the original statutes to see if errors were committed in the revision;[92] but wherever necessary to construe doubtful language in the revision, the original acts may be consulted to determine the meaning intended.[93] In such cases also reference may be had to the report

versed on other grounds in 152 U. S. 436, 14 S. Ct. 638, 38 L. ed. 505] (holding that "the very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act"); Hurlbatt *v.* Barnett, [1893] 1 Q. B. 77, 62 L. J. Q. B. 1, 67 L. T. Rep. N. S. 818, 4 Reports 103, 41 Wkly. Rep. 33.

The omission of provisions in a former statute that are merely declaratory of the common law does not effect any change in the law. Moss Point Lumber Co. *v.* Harrison County, 89 Miss. 448, 42 So. 290, 873.

86. Jessee *v.* De Shong, (Tex. Civ. App. 1907) 105 S. W. 1011, holding that the omission of material words contained in the former indicate an intent to change the law.

87. Cortesy *v.* Territory, 7 N. M. 89, 32 Pac. 504.

88. See *infra*, VII, A, 10, b.

89. **For repeal by revisions and codes** see *supra*, VI, A, 3, c, (III), (C).

For continuance or alteration of existing law see *supra*, V, G.

90. Barker *v.* Bell, 46 Ala. 216.

The second edition of the Revised Statutes of the United States is neither a new revision nor a new enactment, as it is only a compilation containing the original law, with certain specific alteration made by subsequent legislation incorporated therein. Wright *v.* U. S., 15 Ct. Cl. 80.

91. St. Louis Church *v.* Blanc, 8 Rob. (La.) 51; Hartford F. Ins. Co. *v.* Walker, 94 Tex. 473, 61 S. W. 711 [*reversing* (Civ. App. 1901) 60 S. W. 820]; Marston *v.* Yaites, (Tex. Civ. App. 1901) 66 S. W. 867.

United States Revised Statutes.— "The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. Hamilton *v.* Rathbone, 175 U. S. 414, 421, 20 S. Ct. 155, 44 L. ed. 219.

Mere incorporation of acts into a revision and giving the sections new numbers does not change their force and effect. Strottman *v.* St. Louis, etc., R. Co., 211 Mo. 227, 109 S. W. 769.

An act passed subsequent to the adoption of the code, but copied therein by the codifier, does not become a part of the laws as codified and adopted and must be construed as a separate enactment. Rayford *v.* Faulk, 154 Ala. 285, 45 So. 714.

92. Broaddus *v.* Broaddus, 10 Bush (Ky.) 299 (holding that omissions or changes made from a former revision are to be considered as done advisedly); Bent *v.* Hubbardston, 138 Mass. 99; McNeely *v.* State, 50 Tex. Cr. 279, 96 S. W. 1083 (holding that Pen. Code (1895), art. 794, making it an offense to break or pull down the fence of another without his consent, enacted in 1873, and containing a caption with reference to fences used for agricultural purposes, having been brought forward in the code without said caption or any clause with reference to fences surrounding lands used for agricultural purposes, relates to all fences, and is not circumscribed to fences around land used for agricultural purposes); Hamilton *v.* Rathbone, 175 U. S. 414, 20 S. Ct. 155, 44 L. ed. 219 (holding that "if the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it"); U. S. *v.* Bowen, 100 U. S. 508, 25 L. ed. 631 (holding that the United States Revised Statutes must be accepted as the law on the subjects which they embrace as it existed Dec. 1, 1873); U. S. *v.* North American Commercial Co., 74 Fed. 145; U. S. *v.* Sixty-Five Terra Cotta Vases, 18 Fed. 508, 21 Blatchf. 511. But see Nicholson *v.* Mobile, etc., R. Co., 49 Ala. 205, holding that where the codifier was forbidden to change "the substance or meaning of any statute to be included therein," the original statute may be consulted and will control the language of the revision to the extent of any difference in meaning.

93. *Georgia.*— Comer *v.* State, 103 Ga. 69, 29 S. E. 501.

Maine.— Taylor *v.* Caribou, 102 Me. 401, 67 Atl. 2.

Minnesota.— Becklin *v.* Becklin, 99 Minn. 307, 109 N. W. 243; State *v.* Stroschein, 99 Minn. 248, 109 N. W. 235.

New Jersey.— O'Hara *v.* National Biscuit Co., 69 N. J. L. 198, 54 Atl. 241; *In re* Murphy, 23 N. J. L. 180.

Ohio.— Heck *v.* State, 44 Ohio St. 536, 9 N. E. 305.

Texas.— Runnels *v.* State, 45 Tex. Cr. 446,

of the commissioners who prepared the revision,[94] and to previous decisions of the courts on the statutes [95] and common law [96] embodied in the revision. The code as a whole should be construed with reference to the system of jurisprudence to which it belongs; [97] and all its different parts,[98] particularly those parts which relate to the same subject,[99] must be construed together,[1] with a view to harmonizing them,[2] if possible, and giving effect to each.[3] A code also should be so construed as to promote the object of the legislature in compiling and adopting it.[4] In case of conflict the rules contained in the code itself for determining which provision is to prevail should be followed.[5] Definitions inserted in a code should be construed with reference to its positive enactments,[6] and in case of inconsistency therewith, they will be controlled by them.[7] The different sections should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will; [8] but where every means of reconciling inconsistencies

77 S. W. 458 (holding that the court may look to the original act for aid in construing the language of the revision, but may not bring forward any portion of the original which has been omitted from the revision); Braun *v.* State, 40 Tex. Cr. 236, 49 S. W. 620.

United States.— Viterbo *v.* Friedlander, 120 U. S. 707, 7 S. Ct. 962, 30 L. ed. 776; Thomas *v.* U. S., 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. N. S. 720; Schmidt *v.* U. S., 133 Fed. 257, 66 C. C. A. 389; U. S. *v.* Dauphin, 20 Fed. 625; Merchants' Nat. Bank *v.* U. S., 42 Ct. Cl. 6, holding that in the construction of the Revised Statutes courts cannot refer to the antecedent legislation embodied therein to create a doubt, but they can to solve one.

See 44 Cent. Dig. tit. "Statutes," § 312.

94. McCrory *v.* Skinner, 2 Ohio Dec. (Reprint) 268, 2 West. L. Month. 203.

95. *In re* Budgett, [1894] 2 Ch. 557, 63 L. J. Ch. 847, 71 L. T. Rep. N. S. 72, 1 Manson 230, 8 Reports 424, 42 Wkly. Rep. 551.

96. Calhoun *v.* Little, 106 Ga. 336, 32 S. E. 86, 71 Am. St. Rep. 254, 43 L. R. A. 630 (holding that where a section of the code has been codified from a decision of the supreme court, it will be construed in the light of such decision, unless its language imperatively demands a different construction); Robinson *v.* Canadian Pac. R. Co., [1892] A. C. 481, 61 L. J. P. C. 79, 67 L. T. Rep. N. S. 505; Bank of England *v.* Vagliano, [1891] A. C. 107, 55 J. P. 676, 60 L. J. Q. B. 145, 64 L. T. Rep. N. S. 353, 39 Wkly. Rep. 657.

97. Grannis *v.* San Francisco Super. Ct., 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23 (holding that the provisions of the code must be construed with a view to effect its objects, and when the language used is not entirely clear the court may, in aid of interpretation, consider the spirit, intention, and purpose of a law, and may look into contemporaneous and prior legislation on the same subject, and the external and historical facts and conditions which led to the enactment of the provisions under review); Dillehay *v.* Hickey, 71 S. W. 1, 24 Ky. L. Rep. 1220, 69 S. W. 1095, 24 Ky. L. Rep. 760 (holding that the common-law rule that statutes in derogation thereof are to be strictly construed does not apply to the revision of the Kentucky statutes, which is to be liberally construed, with a view to promote its object); The Louis Olsen, 57 Fed. 845, 848, 6 C. C. A. 608 [*reversing* 52 Fed. 652] (holding that Cal. Civ. Code, § 5, declaring that the provisions of the code, "so far as they are substantially the same as existing statutes or the common law, must be construed as a continuation thereof, and not as new enactments," referred to the existing common law, not the law formerly prevailing, which had been abrogated by statute).

98. O'Neal *v.* Robinson, 45 Ala. 526; *Ex p.* Ray, 45 Ala. 15; Childers *v.* Johnson, 6 La. Ann. 634; Ferguson *v.* Monroe County, 71 Miss. 524, 14 So. 81; Ashley *v.* Harrington, 1 D. Chipm. (Vt.) 348.

Rule applied to English consolidated statutes.— Boston *v.* Lelievre, L. R. 3 P. C. 157, 39 L. J. P. C. 17, 22 L. T. Rep. N. S. 735, 18 Wkly. Rep. 408.

99. Hatchett *v.* Billingslea, 65 Ala. 16; Mobile, etc., R. Co. *v.* Malone, 46 Ala. 391; Gallegos *v.* Pino, 1 N. M. 410.

1. Cincinnati *v.* Guckenberger, 60 Ohio St. 353, 54 N. E. 376.

2. Groff *v.* Miller, 20 App. Cas. (D. C.) 353; Childers *v.* Johnson, 6 La. Ann. 634; Gibbons *v.* Brittenum, 56 Miss. 232.

3. Gee *v.* Thompson, 11 La. Ann. 657, 659 (holding that "it is the duty of the court, where it is possible, to give effect to every Article of the Code, and it is incumbent on those who hold an Article void for repugnancy to some other to make the repugnancy appear by the clearest logic, and then also to show that the law, so alleged to be abrogated, is older in date than the repealing statute"); State *v.* Silver Bow County Second Judicial Dist. Ct., 38 Mont. 119, 99 Pac. 139; Congdon *v.* Butte Consol. R. Co., 17 Mont. 481, 43 Pac. 629; Propst *v.* Southern R. Co., 139 N. C. 397, 51 S. E. 920.

4. State *v.* Clallam County Super. Ct., 52 Wash. 13, 100 Pac. 155, holding that the code should be construed so as to simplify practice.

5. State *v.* Campbell, 3 Cal. App. 602, 86 Pac. 840; Peet *v.* Nalle, 30 La. Ann. 949; Haritwen *v.* The Louis Olsen, 52 Fed. 652 [*following* People *v.* Freese, 76 Cal. 633, 18 Pac. 812].

6. Depas *v.* Riez, 2 La. Ann. 30.

7. Ellis *v.* Prevost, 13 La. 230.

8. Groff *v.* Miller, 20 App. Cas. (D. C.) 353; Congdon *v.* Butte Consol. R. Co., 17

has been employed in vain, the section last adopted will prevail.[9] A mere change of phraseology in the incorporation of a statute in a general revision will not be regarded as altering the law,[10] unless it is clear that such was the intent,[11] such changes being frequently made on account of a difference in arrangement and a desire to improve the style.[12] In the adoption of the code, the legislature is presumed to have known the judicial construction which had been placed on the former statutes; and therefore the reënactment in the code of provisions substantially the same as those contained in the former statutes is a legislative adoption of their known judicial construction.[13] So where the legislature has revised a statute after a constitution has been adopted, such a revision is to be regarded as a legislative construction that the statute so revised conforms to the constitution.[14] A code is usually divided, for the sake of clearness and convenience of reference, into chapters,[15] titles,[16] articles, or sections, and the arrangement is entitled to some consideration in determining the construction of each division; but not to a controlling effect,[17] as the arrangement is not necessarily an accurate

Mont. 481, 43 Pac. 629; Ashley *v.* Harrington, 1 D. Chipm. (Vt.) 348.

9. *Ex p.* Ray, 45 Ala. 15; Gee *v.* Thompson, 11 La. Ann. 657; Gibbons *v.* Brittenum, 56 Miss. 232.

10. *Alabama.*— Jackson County *v.* Derrick, 117 Ala. 348, 23 So. 193.

Connecticut.— Montville St. R. Co. *v.* New London Northern R. Co., 68 Conn. 418, 36 Atl. 811.

Georgia.— McDaniel *v.* Camphell, 78 Ga. 188, holding that the Georgia constitution of 1868 in adopting the code of that year, and also the acts passed since 1861, did not ratify any change made in codifying such acts, and therefore, where an act in respect to the abandonment of children made it a part of the offense that they should be left in a "dependent and destitute" condition, a change of the word "and" to "or" in codifying such act was not ratified by the constitution.

Maine.— Taylor *v.* Caribou, 102 Me. 401, 406, 67 Atl. 2 (holding also that the rule applies with equal force to punctuation); Hughes *v.* Farrar, 45 Me. 72.

Minnesota.— Becklin *v.* Becklin, 99 Minn. 307, 109 N. W. 243.

Texas.— Braun *v.* State, 40 Tex. Cr. 236, 49 S. W. 620.

West Virginia.—Brown *v.* Randolph County Ct., 45 W. Va. 827, 32 S. E. 165.

United States.— Schmidt *v.* U. S., 133 Fed. 257, 66 C. C. A. 389.

See 44 Cent. Dig. tit. "Statutes," § 312.

11. Where the obvious intent of the change was to give the statute a different meaning, it must be given effect. Collins *v.* Millen, 57 Ohio St. 289, 48 N. E. 1097; Stokes *v.* Logan County, 2 Ohio Dec. (Reprint) 122, 1 West. L. Month. 448; State *v.* Ritchie, 32 Utah 381, 91 Pac. 24; Vance *v.* W. A. Vandercook Co., 170 U. S. 438, 18 S. Ct. 674, 42 L. ed. 1100 [*modifying* 80 Fed. 786], holding that the fact that a law omits provisions of a former law relating to the same subject which have been declared unconstitutional negatives an intention to make them a part of the new law. Mitchell *v.* Simpson, 23 Q. B. D. 373, 53 J. P. 694, 58 L. J. Q. B. 425, 61 L. T. Rep. N. S. 248, 37 Wkly. Rep. 798 (holding that in construing a consolidation statute, the court would not place upon certain words a construction which they did not otherwise properly bear, although by reason of alterations in the law between the dates of the original and the consolidation statutes it was difficult in any other way to give effect at the time to those words.

12. St. George *v.* Rockland, 89 Me. 43, 35 Atl. 1033.

13. *Alabama.*— Anthony *v.* State, 29 Ala. 27; Duramus *v.* Harrison, 26 Ala. 326.

California.— State Commission in Lunacy *v.* Welch, 154 Cal. 775, 99 Pac. 181.

Indiana.— Evans *v.* State, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 2 L. R. A. N. S. 619.

Kentucky.— Overfield *v.* Sutton, 1 Metc. 621.

Massachusetts.—Shelton *v.* Sears, 187 Mass. 455, 73 N. E. 666.

Missouri.— Strottman *v.* St. Louis, etc., R. Co., 211 Mo. 227, 109 S. W. 769.

Texas.— Gulf, etc., R. Co. *v.* Ft. Worth, etc., R. Co., 68 Tex. 98, 2 S. W. 199, 3 S. W. 564.

Virginia.— Swift *v.* Wood, 103 Va. 494, 49 S. E. 643.

Wisconsin.— Smith *v.* Smith, 19 Wis. 522.

England.— Mitchell *v.* Simpson, 25 Q. B. D. 183, 55 J. P. 36, 59 L. J. Q. B. 355, 63 L. T. Rep. N. S. 405, 38 Wkly. Rep. 565.

See 44 Cent. Dig. tit. "Statutes," § 312.

14. St. Louis, etc., R. Co. *v.* Evans, etc., Fire Brick Co., 85 Mo. 307.

15. Cleaves *v.* Jordan, 35 Me. 429, holding that each chapter of the Revised Statutes is a statute or act on the subject to which it relates.

16. Broaddus *v.* Broaddus, 10 Bush (Ky.) 299; Louisville Public Warehouse Co. *v.* Miller, 81 S. W. 275, 26 Ky. L. Rep. 351, each holding that any title of the Kentucky statutes must be considered as containing all the law on the subject embraced under such title.

17. Hooker *v.* Creager, 84 Md. 195, 35 Atl. 967, 1103, 36 Atl. 359, 35 L. R. A. 202, holding that where two acts passed at different times are combined and incorporated into one section of the code, the fact that the act first in point of time is placed second in order cannot alter the construction which said acts as originally passed obviously bear.

or proper one, and sections grouped together may bear no relation to each other,[18] or widely separated sections may deal with the same subject and require construction with reference to each other.[19]

c. Repealing Acts.[20] Acts of the legislature, or parts of legislative acts, purporting to repeal prior statutes, are subject to the same rules of construction and interpretation as are applicable to other statutes,[21] and the courts should endeavor to give them just the effect that was intended by the legislature enacting them.[22] Where a statute is repealed, it must be considered as if it had never existed,[23]

The mere fact that acts are incorporated into a revision of the statutes, and the sections given new numbers by the revisers, does not change the force or effect of the acts. Strottman *v.* St. Louis, etc., R. Co., 211 Mo. 227, 109 S. W. 769; Paddock *v.* Missouri Pac. R. Co., 155 Mo. 524, 536, 56 S. W. 453.

18. Weatherly *v.* Capital City Water Co., 115 Ala. 156, 22 So. 140; Battle *v.* Shivers, 39 Ga. 405; John *v.* Sebattis, 69 Me. 473; *In re* Murphy, 23 N. J. L. 180.

19. Hatchett *v.* Billingslea, 65 Ala. 16.

20. For effect of reënactment by repealing act see *supra*, VI, A, 3, c, (III), (E).

For general repealing clauses see *supra*, VI, A, 3, b, (II); VI, A, 3, c, (V), (B).

For express repeal as raising presumption against further implied repeal see *supra*, VI, A, 3, c, (V).

21. Kunkalman *v.* Gibson, 171 Ind. 503, 84 N. E. 985, 86 N. E. 850 (holding that where there is a plain provision for the repeal of all existing laws on a certain subject with certain specified exceptions, the supreme court may not declare a further exception in order to give the statute an equitable operation); State *v.* Stinson, 17 Me. 154 (holding that where the last section of a statute declares that all acts and parts of acts relating to the subject-matter thereof shall be repealed "from and after the time" when such statute shall take effect, this will not be construed a repeal of such statute itself, but to mean all other acts); Mongeon *v.* People, 55 N. Y. 613; Smith *v.* People, 47 N. Y. 330; State *v.* Moorhouse, 5 N. D. 406, 67 N. W. 140.

22. Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030 (holding that a repealing clause is subject to construction, the same as any other provision of a statute, and even an express declaration of a repeal will not be given that effect when it is apparent that the legislature did not so intend); Thorpe *v.* Schooling, 7 Nev. 15; Matthews *v.* Murchison, 17 Fed. 760.

23. *California.*— Horton *v.* Los Angeles, 119 Cal. 602, 51 Pac. 956 (holding that proceedings which had been commenced under an act inviting proposals for the sale of a telephone franchise could not be continued after the repeal of the act); Lamb *v.* Schottler, 54 Cal. 319.

Florida.— Jacksonville Nat. Bank *v.* Williams, 38 Fla. 305, 20 So. 931.

Georgia.— Western Union Tel. Co. *v.* Lumpkin, 99 Ga. 647, 26 S. E. 74, holding that repeal of a statute before the expiration of defendant's right to except to a judgment in an action founded thereon abates the action.

Illinois.— Illinois, etc., Canal *v.* Chicago, 14 Ill. 334.

Indiana.— McQuilkin *v.* Doe, 8 Blackf. 581.

Kentucky.— Roberts *v.* Hackney, 109 Ky. 265, 58 S. W. 810, 59 S. W. 328, 22 Ky. L. Rep. 975, holding that an officer sued for false imprisonment cannot justify under a statute which had been abrogated by the constitution at the time the acts complained of were committed, although it had not then been adjudged that the statute had been abrogated.

Louisiana.— State *v.* King, 12 La. Ann. 593.

Missouri.— Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747, holding that the fact that a statute changing the mode of service of process may not have been distributed and brought to the knowledge of attorneys bringing a suit will not avail to sustain a service made under the repealed statute.

Nevada.— Kennedy *v.* Adams, 24 Nev. 217, 51 Pac. 840.

North Carolina.— Wikel *v.* Jackson County, 120 N. C. 451, 27 S. E. 117, holding that the repeal of Acts (1895), c. 12, requiring county commissioners to build a bridge and levy a tax therefor pending an appeal from a judgment against the commissioners in mandamus to compel them to perform such acts, abated the proceeding.

Pennsylvania.— Com. *v.* Brown, 20 Pa. Co. Ct. 139.

Tennessee.— Heaton *v.* Dennis, 103 Tenn. 155, 52 S. W. 175, holding that where the ground of defense interposed to a suit has been repealed before advantage is sought to be taken of it, it cannot be invoked.

England.— Surtees *v.* Ellison, 9 B. & C. 750, 7 L. J. K. B. O. S. 335, 4 M. & R. 586, 17 E. C. L. 334; Kay *v.* Goodwin, 6 Bing. 576, 583, 19 E. C. L. 261 (in which Tindal, C. J., says: "I take the effect of repealing a statute to be, to obliterate it as completely from the records of the parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law"); Simpson *v.* Ready, 1 D. & L. 449, 12 L. J. Exch. 441, 11 M. & W. 344; Morgan *v.* Thorne, 9 Dowl. P. C. 226, 5 Jur. 294, 10 L. J. Exch. 125, 7 M. & W. 400; Charington *v.* Meatheringham, 5 Dowl. P. C. 464, 1 Jur. 104, 6 L. J. Exch. 86, 2 M. & W. 228; Steavenson *v.* Oliver, 5 Jur. 1064, 10 L. J. Exch. 338, 8 M. & W. 234; Warne *v.* Beresford, 6 L. J. Exch. 192, 2 M. & W. 848; Reg.

except as to vested rights which have accrued under it,[24] and as to those parts which are saved by the repealing statute.[25] In codes, or revisions of statutes, however,[26] and also frequently in special statutes,[27] it is customary to insert express provision to the effect that rights accrued,[28] duties imposed, penalties,[29] forfeitures,[30] or other liabilities incurred,[31] and proceedings commenced,[32] under

v. McKenzie, R. & R. 429; Miller's Case, W. Bl. 451, 96 Eng. Reprint 259.

Canada.— Armstrong *v.* Campbell, 4 U. C. C. P. 15; Jones *v.* Ketchum, 11 U. C. Q. B. 52 (holding that an action for a penalty begun under a valid act cannot be continued after its repeal); Hardy *v.* Hall, 2 U. C. Q. B. 276; L'Association Pharmaceutique de Quebec *v.* Livernois, 9 Quebec Q. B. 243 (holding that a penalty for the sale of prohibited medicines cannot be imposed, where the law prohibiting such sales has been repealed, although after the commencement of the action to recover such penalty).

See 44 Cent. Dig. tit. "Statutes," § 313.

May revoke existing privileges.— U. S. *v.* Carlisle, 5 App. Cas. (D. C.) 138, holding that an act repealing a former statute granting a bounty to licensed sugar producers operated not only to forbid licenses to be granted producers thereafter, but also to revoke existing licenses.

24. Allen *v.* Stovall, 94 Tex. 618, 63 S. W. 863, 64 S. W. 777 [*reversing* (Civ. App. 1901) 62 S. W. 87].

25. McCotter *v.* Hooker, Code Rep. N. S. (N. Y.) 213, 217, 2 Edm. Sel. Cas. 260 [*affirmed* in 8 N. Y. 497]. See *infra*, notes 26–32.

26. Com. *v.* Desmond, 123 Mass. 407, holding that under St. (1869) c. 410, establishing certain rules for the construction of repealing statutes, the general rules so established are to be deemed a part of every repealing statute since passed, as much so as if expressly inserted therein, unless the statute clearly manifests a different intention. See *infra*, notes 28–32.

27. Connor *v.* McPherson, 18 Grant Ch. (U. C.) 607; Charlesworth *v.* Ward, 31 U. C. Q. B. 94.

28. *Indiana.*— Indianapolis *v.* Ritzinger, 24 Ind. App. 65, 56 N. E. 141.

Kansas.— Denning *v.* Yount, 9 Kan. App. 708, 59 Pac. 1092 [*affirmed* in 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103].

New York.— McCrea *v.* Champlain, 35 N. Y. App. Div. 89, 55 N. Y. Suppl. 125, holding that a proceeding begun under a statute prescribing a method for condemning lands for a village water float is not an "accrued right" under the terms of the general saving clause.

North Carolina.—Wilmington *v.* Cronly, 122 N. C. 383, 388, 30 S. E. 9, holding that an action to recover arrearages of taxes is an action for the recovery of rights accrued under the terms of a saving clause.

Tennessee.—Wallace *v.* Goodlett, 104 Tenn. 670, 58 S. W. 343.

Wisconsin.— H. W. Wright Lumber Co. *v.* Hixon, 105 Wis. 153, 80 N. W. 1110, 1135.

Canada.— Morris Tp. *v.* Huron County, 27 Ont. 341; *In re* Chaffey, 30 U. C. Q. B. 64; Winter *v.* Keown, 22 U. C. Q. B. 341, holding that a statute repealing an act requiring a by-law, before it can have any effect, to be confirmed by the county council within a year from its passing, did not include within a saving clause by-laws that had been passed, but not confined by the court's council).

See 44 Cent. Dig. tit. "Statutes," § 313.

When right accrues.— Cushman *v.* Hale, 68 Vt. 444, 35 Atl. 382, holding that under a statute providing that a certain percentage of the fines mentioned should go to the prosecuting officer, his right to them had not accrued pending an appeal from the decision imposing the fines, and was therefore defeated by a repeal of the statute.

The privilege of renewing a license for mining permitted under the repealed act is not an "accrued right." Reynolds *v.* Atty.-Gen., [1896] A. C. 240, 65 L. J. P. C. 16, 74 L. T. Rep. N. S. 108.

29. Dyer *v.* Ellington, 126 N. C. 941, 36 S. E. 177, holding that an act specifically relieving certain officials from any and all penalties for failure to comply with a certain statute operated to destroy a cause of action then pending for a penalty, no vested right to the penalty having accrued, notwithstanding the general saving clause in the code.

30. Seawell *v.* Hendricks, 4 Okla. 435, 46 Pac. 557.

31. Starr *v.* State, 149 Ind. 592, 49 N. E. 591; State *v.* Houck, 16 Ind. App. 698, 45 N. E. 347; State *v.* Hardman, 16 Ind. App. 357, 45 N. E. 345 (each holding that Rev. St. (1894) § 248, providing that the repeal of any statute shall not release any "penalty, forfeiture or liability" incurred thereunder, unless the repealing act shall so expressly provide, includes fines and imprisonment for violation of penal statutes); International, etc., R. Co. *v.* Culpepper, (Tex. Civ. App. 1897) 38 S. W. 818.

32. *Mississippi.*— Kendrick *v.* Kyle, 78 Miss. 278, 28 So. 951, holding that where a contract, unenforceable when made, is afterward made valid by statute, a repeal of the validating statute will not prevent its enforcement in a suit begun before it was passed, but not concluded at the time of its repeal.

Missouri.— Monett *v.* Hall, 128 Mo. App. 79, 106 S. W. 579, holding that the repeal of an ordinance imposing a penalty for its violation, pending a prosecution for the penalty, does not abate the action where the repealing ordinance provides that actions pending shall remain unaffected thereby.

New York.— Champlain *v.* McCrea, 165 N. Y. 264, 59 N. E. 83 [*reversing* 33 N. Y. App. Div. 259, 53 N. Y. Suppl. 1096]; Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co.,

or by virtue of the statute repealed, shall not be affected by the repeal thereof. In some jurisdictions it has been held that general saving clauses do not apply to repealing statutes having a specific saving clause,[33] while in others they have been construed to supplement the saving clauses in special statutes.[34] Such general saving clauses are not invalid as applied to repealing laws passed subsequent to them, on the ground that they attempt to bind future legislatures,[35] as such legislatures, in passing statutes, are presumed to act with knowledge of previously existing laws.

11. Construction as Including or Binding Government.[36] The state, or the public, is not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be,[37] unless expressly named

163 N. Y. 228, 57 N. E. 498; People *v.* New York Cent., etc., R. Co., 156 N. Y. 570, 51 N. E. 312; People *v.* Campbell, 152 N. Y. 51, 46 N. E. 176.

Pennsylvania.—Com. *v.* Robb, 14 Pa. Super. Ct. 597.

Canada.— Reg. *v.* Sailing Ship Troop, 29 Can. Sup. Ct. 662, 675 (holding, however, that "independent and general provisions as to proof contained in the later Act would seem to be *prima facie* applicable to all cases where such proof has to be made"); Walker *v.* Walton, 1 Ont. App. 579 [*reversing* 24 Grant Ch. (U. C.) 209]; Reg. *v.* Kerr, 26 U. C. C. P. 214 (holding that the laying of an information and arrest of the prisoners before the passage of a repealing act is sufficient to bring a prosecution within a saving clause as regards proceedings commenced and pending, although indictment was not found until after the passage of the repealing act); McDonald *v.* McDonell, 24 U. C. Q. B. 424 (holding that where a statute allowing three years for redemption before the sheriff can convey under a sale for taxes is repealed by a subsequent statute, except in so far as it might affect "any rates or taxes of the present year," "or any rates or taxes not otherwise provided for by this act," the sheriff could not convey to a purchaser who had bought at a sale under the former law, but less than three years before its repeal, although such a result was clearly not intended). And to the same effect see *Re* United Presb. Cong., 6 Ont. Pr. 129 (holding that a repealing act "saving any rights, proceedings, or things legally had, acquired or done under the said Acts, or any of them," preserved to rights, proceedings, and things completely had, acquired, or done, the efficiency which they had under the act repealed, but did not continue the repealed act for the purpose of perfecting rights, proceedings, or things not completely had, acquired, or done); McDougall *v.* McMillan, 25 U. C. C. P. 75; Cotter *v.* Sutherland, 18 U. C. C. P. 357; Bryant *v.* Hill, 23 U. C. Q. B. 96.

See 44 Cent. Dig. tit. "Statutes," § 313.

"Pending actions."—An action to foreclose a mortgage on land, and to recover a judgment for a deficiency, in which a decree has been rendered ordering a sale, and holding defendants personally liable for any deficiency, is a "pending action" for the recovery of a personal judgment, within the meaning of Comp. St. (1899) c. 88, § 2, providing that the repeal of a statute shall not affect a "pending action." Hanscom *v.* Meyer, 61 Nebr. 798, 86 N. W. 381. The words "suit" and "civil cause" as used in Vt. St. §§ 28, 29, relating to the effect of the repeal of a statute on actions then pending, do not include proceedings before a board of railroad commissioners, whose functions are merely administrative or ministerial, and whose decision is final. Burlington *v.* Burlington Traction Co., 70 Vt. 491, 41 Atl. 514.

Defenses.— Fowler *v.* Vail, 4 Ont. App. 267 (holding that the right to enter certain pleas as defenses to an action under the act repealed was within the term "existing right" as used in the saving clause); Barned's Banking Co. *v.* Reynolds, 40 U. C. Q. B. 435 (holding that a defense pleaded in a pending action before the passage of the repealing act was within the general saving clause).

33. State *v.* Showers, 34 Kan. 269, 8 Pac. 474.

34. Indianapolis *v.* Morris, 25 Ind. App. 409, 58 N. E. 510.

35. Thacher *v.* Steuben County, 21 Misc. (N. Y.) 271, 47 N. Y. Suppl. 124 [*reversed* in mem. in 31 N. Y. App. Div. 634, on authority of Wirt *v.* Allegany County, 90 Hun 205, 210, 35 N. Y. Suppl. 887].

36. For estoppel by legislative acts see Estoppel, 16 Cyc. 685, 714.

37. *Alabama.*— State *v.* Brewer, 64 Ala. 287, holding that general statutes will not be so interpreted as to impose liabilities on the state or to divest or diminish its rights or prerogatives, unless such intention is clearly expressed or necessarily implied.

California.— San Francisco Union Trust Co. *v.* State, 154 Cal. 716, 99 Pac. 183, holding that general words in a statute as to a state are not to be construed as imposing liability on the state.

Maine.—A. L. & E. F. Goss Co. *v.* Greenleaf, 98 Me. 436, 57 Atl. 581.

New Hampshire.— State *v.* Kinne, 41 N. H. 238.

Ohio.— State *v.* Ohio Public Works, 36 Ohio St. 409.

United States.— Dollar Sav. Bank *v.* U. S., 19 Wall. 227, 22 L. ed. 80; U. S. *v.* Greene, 26 Fed. Cas. No. 15,258, 4 Mason 427; U. S. *v.* Hewes, 26 Fed. Cas. No. 15,359, Crabbe 307; U. S. *v.* Hoar, 26 Fed. Cas. No. 15,373, 2 Mason 311; U. S. *v.* Weise, 28 Fed. Cas. No. 16,659, 2 Wall. Jr. 72.

therein,[38] or included by necessary implication.[39] This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested;[40] but has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong.[41]

12. Effect of Statutes as Evidence.[42] Recitals in public statutes of matters of fact are admissible in evidence upon an issue as to such facts;[43] and, while such recitals in private statutes are not admissible in suits involving the rights of third parties,[44] they are admissible as between the state and the parties at whose instance the acts were passed,[45] and are particularly strong as evidence against such parties. Such recitals, however, whether in public[46] or private[47] statutes, are not conclusive even between the parties affected, or binding on the courts.[48]

B. Particular Classes of Statutes[49] **— 1. Liberal or Strict Construction as Affected by Nature of Act in General.** A "strict construction" of a statute

England.— *Ex p.* Exeter, 10 C. B. 102, 19 L. J. C. P. 200, 70 E. C. L. 102; Magdalen College Case, 11 Coke 66*b*, 77 Eng. Reprint 1235; Atty.-Gen. *v.* Edmunds, 22 L. T. Rep. N. S. 667.

Canada.— Sydney, etc., Coal, etc., Co. *v.* Sword, 21 Can. Sup. Ct. 152; Reg. *v.* Pouliot, 2 Can. Exch. 49 (holding that clause 46 of section 7 of the Interpretation Act, Can. Rev. St. c. 1, whereby it is provided that no provision or enactment in any act shall affect in any manner or way whatsoever the rights of her majesty, her heirs or successors, unless it is expressly stated therein that her majesty shall be bound thereby, is not limited or qualified by an exception such as that mentioned in Magdalen College Case, 11 Coke 66*b*, 77 Eng. Reprint 1235, "that the King is impliedly bound by statutes passed for the general good . . . or to prevent fraud, injury or wrong"); McGee *v.* Baines, 3 Can. L. J. 151; Atty.-Gen. *v.* Ryan, 5 Manitoba 81; Reg. *v.* Benson, 2 Ont. Pr. 350; Reg. *v.* Davidson, 21 U. C. Q. B. 41.

See 44 Cent. Dig. tit. "Statutes," § 314.

38. U. S. *v.* Knight, 14 Pet. (U. S.) 301, 10 L. ed. 465. See *supra*, note 37.

39. State *v.* Milburn, 9 Gill (Md.) 105, holding that it is not imperative that the state should be named, but it should plainly appear from the language used that the state itself was in contemplation of the legislature in passing the statute. See *supra*, note 37.

40. U. S. *v.* Hoar, 26 Fed. Cas. No. 15,373, 2 Mason 311, holding that the United States is not bound by a state statute of limitations.

41. U. S. *v.* Knight, 14 Pet. (U. S.) 301, 10 L. ed. 465 (applying to the United States statute regulating the mode of proceeding in suits); De Bode *v.* Reg., 13 Q. B. 364, 14 Jur. 970, 66 E. C. L. 364; Rex *v.* Wright, 1 A. & E. 434, 3 L. J. Exch. 370, 3 N. & M. 892, 28 E. C. L. 214; Magdalen College Case, 11 Coke 66*b*, 77 Eng. Reprint 1235.

42. See Evidence, 17 Cyc. 298, 347.

For admissibility and sufficiency of act of incorporation to prove corporate existence see Corporations, 10 Cyc. 235.

43. People *v.* Pacheco, 27 Cal. 175; Dougherty *v.* Bethune, 7 Ga. 90; Winona *v.* Huff, 11 Minn. 119; Atty.-Gen. *v.* Powis, 2 Eq. Rep. 566, Kay 186, 2 Wkly. Rep. 140, 69 Eng. Reprint 79; Rex *v.* Sutton, 4 M. & S. 532.

44. Duncombe *v.* Prindle, 12 Iowa 1; Elmondorff *v.* Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

45. State *v.* Beard, 1 Ind. 460, Smith 276; May *v.* Frazee, 4 Litt. (Ky.) 391, 14 Am. Dec. 159; Sohier *v.* Trinity Church, 109 Mass. 1, holding that a recital in an act of a legislature that the continuance of a cemetery in the church building of a religious society is injurious to the public health cannot be contradicted by any statement of the officers of the society, previously made, asserting a contrary opinion.

46. Dougherty *v.* Bethune, 7 Ga. 90.

47. State *v.* Beard, 1 Ind. 460, Smith 276.

48. White *v.* State, 121 Ga. 592, 49 S. E. 715; Frederick Female Seminary *v.* State, 9 Gill (Md.) 379. But see Hare *v.* Kennerly, 83 Ala. 608, 3 So. 683, holding that a recital in the title of an act to adjust and settle the debt of the city of Mobile that the report of the commissioners of Mobile had been made and laid before the general assembly is conclusive of that fact and that the act was made on the basis of that report.

49. For construction of: Bankrupt laws see Bankruptcy, 5 Cyc. 227. Chinese exclusion acts see Aliens, 2 Cyc. 124. Copyright acts see Copyright, 9 Cyc. 889. Divorce laws see Divorce, 14 Cyc. 556. Exemptions from taxation see Taxation. Homestead exemption laws see Homesteads, 21 Cyc. 448. Judiciary act see Courts, 11 Cyc. 949. Mechanics' lien laws see Mechanics' Liens, 27 Cyc. 1. Statutes of limitations see Limitations of Actions, 25 Cyc. 963. Usury laws see Usury.

For construction of statutes: Abolishing imprisonment for debt see Arrest, 3 Cyc. 899. Conferring right of eminent domain see Eminent Domain, 15 Cyc. 567. Creating maritime liens see Maritime Liens, 26 Cyc. 743. Relating to actions for separate maintenance see Husband and Wife, 21 Cyc. 1603. Relating to adoption of children see Adoption of Children, 1 Cyc. 914. Relating to depositions see Depositions, 13 Cyc. 822. Re-

is a close adherence to the literal or textual interpretation, and a case is excluded from its operation unless the language of the statute includes it;[50] while a statute "liberally construed" may be extended to include cases clearly within the mischief intended to be remedied, unless such construction does violence to the language used.[51] Laws enacted in the interest of the public welfare[52] or convenience;[53] for the construction of works of great public utility;[54] for the protection of human life,[55] or in regard to the rights of citizenship;[56] for the prevention of fraud;[57] or providing remedies against either public or private wrongs[58] should be liberally construed with a view to promote the object in the mind of the legislature.[59] On the other hand statutes in derogation of common rights,[60] or conferring special privileges on individuals[61] or corporations,[62] should be construed strictly against those specially favored;[63] while all statutes of a penal nature,[64] whether civil or criminal, must be construed strictly in favor of those whom they affect.[65] The requirements of a statute which are mandatory must be strictly construed, while those which are directory should receive a liberal construction for the accomplishment of the purpose of the act.[66]

2. Remedial Statutes.[67] Statutes enacted for the suppression of fraud,[68] the

lating to married women's property see Husband and Wife, 21 Cyc. 1119.

50. Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36.

51. Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36; Kellar *v.* James, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. N. S. 1003, holding that the evils intended to be suppressed, and the purposes and objects to be promoted, are all mentioned in the statutes involved, and the rule of liberal construction requires no more than that they shall be so interpreted and applied as to suppress the named evils, and effectuate the specified purposes and objects; it does not authorize the court to add other supposed evils, purposes, and objects.

52. *Alabama.*— *Ex p.* Plowman, 53 Ala. 440.

Florida.— Bryan *v.* Dennis, 4 Fla. 445.

Nebraska.— State *v.* Several Parcels of Land, 83 Nebr. 13, 119 N. W. 21, holding that laws for the assessment and collection of general taxes, unlike laws with reference to special assessments, should be liberally construed.

New Jersey.— Camden, etc., R., etc., Co. *v.* Briggs, 22 N. J. L. 623.

Canada.—Butland *v.* Gillespie, 16 Ont. 486.

See 44 Cent. Dig. tit. "Statutes," § 316.

Where acts of public officers are done in exact pursuance of the literal command of the law, that interpretation of the law will be preferred which protects their good faith in the discharge of their duties. Agaisse *v.* Guedron, 2 Mart. N. S. (La.) 73.

The words "general" and "public," as applied to statutes, are construed as having the same signification. Clark *v.* Janesville, 10 Wis. 136.

53. Marshall *v.* Vultee, 1 E. D. Smith (N. Y.) 294.

54. Baring *v.* Erdman, 2 Fed. Cas. No. 981.

55. Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264 [*reversing* 116 Fed. 867].

56. People *v.* Earl, 42 Colo. 238, 94 Pac. 294 (holding that statutes in regard to the franchise and elections should be construed liberally in favor of the voters); *In re* Polsson, 159 Fed. 283.

57. Cumming *v.* Fryer, Dudley (Ga.) 182 (holding that statutes against frauds should be construed liberally so as to avoid the transaction affected); Sharp *v.* New York, 18 How. Pr. (N. Y.) 97.

58. See *infra*, VII, B, 2.

59. Where the provisions of an act are adopted by a general reference, the act will receive a more liberal construction than if originally passed with reference to the particular subject. Jones *v.* Dexter, 8 Fla. 276.

60. See *infra*, VII, B, 5.

61. Warner *v.* Fowler, 8 Md. 25; State *v.* Biggs, 133 N. C. 729, 46 S. E. 401, 98 Am. St. Rep. 731, 64 L. R. A. 139.

62. Garrigus *v.* Parke County, 39 Ind. 66; Camden, etc., R., etc., Co. *v.* Briggs, 22 N. J. L. 623.

63. See *infra*, VII, B, 4, 5.

64. U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344, holding that a strict construction should be given to statutes which work forfeitures or the confiscation of property.

Where there is a penal clause and a remedial clause in the same statute, the courts may place a literal construction on the penal clause, and a liberal construction on the remedial clause. Com. *v.* Shalcen, 215 Pa. St. 595, 64 Atl. 797; Stull *v.* Reber, 215 Pa. St. 156, 64 Atl. 419; Short *v.* Hubbard, 2 Bing. 349, 3 L. J. C. P. O. S. 35, 10 Moore C. P. 107, 9 E. C. L. 610. See *infra*, VII, B, 7.

65. See *infra*, VII, B, 7.

66. People *v.* Earl, 42 Colo. 238, 94 Pac. 294.

67. For distinction between remedial and penal statutes see *infra*, VII, B, 7, a.

For retroactive operation of remedial statutes see *infra*, VII, D, 1, d.

For statutes giving right of action: For death caused by negligence or wrongful act see Death, 13 Cyc. 311. In nature of bill of interpleader see Interpleader, 23 Cyc. 35.

68. Carey *v.* Giles, 9 Ga. 253; Doe *v.* Avaline, 8 Ind. 6, holding that statutes im-

correction of errors,[69] the supplying [70] or curing [71] of defects, the protection of life and property,[72] the remedy of public evils,[73] the redress of existing grievances,[74] introducing some new regulation or proceeding conducive to the public good,[75] or the granting of remedies for the recovery or protection of rights,[76] are known as remedial statutes. In construing such statutes, regard should be had to the former law, the defects or evils to be cured or abolished, and the remedy provided; [77] and they should be interpreted liberally [78] so as to promote the object of the legis-

posing disabilities upon Indians, for their own benefit and protection, are remedial.

69. White County *v.* Key, 30 Ark. 603.

70. *California.*—People *v.* Hays, 4 Cal. 127.

Massachusetts.— Gray *v.* Bennett, 3 Metc. 522.

Nebraska.—Western Travelers' Acc. Assoc. *v.* Taylor, 62 Nebr. 783, 87 N. W. 950; Buckmaster *v.* McElroy, 20 Nebr. 557, 31 N. W. 76, 57 Am. St. Rep. 843.

Texas.— Lewellyn *v.* Ellis, (Civ. App. 1909) 115 S. W. 84; O'Connor *v.* State, (Civ. App. 1902) 71 S. W. 409.

Vermont.— Montpelier *v.* Senter, 72 Vt. 112, 47 Atl. 392.

See 44 Cent. Dig. tit. "Statutes," § 317.

71. Peet *v.* East Grand Forks, 101 Minn. 523, 112 N. W. 1005 (holding, however, that the legislature cannot validate what it could not previously have authorized); Howes *v.* Dolan, 9 Pa. Super. Ct. 586, 44 Wkly. Notes Cas. 62; Tate *v.* Rose, (Utah 1909) 99 Pac. 1003.

72. Boston, etc., Mill Corp. *v.* Gardner, 2 Pick. (Mass.) 33; Gillespie *v.* Windberg, 4 Daly (N. Y.) 318; Nashville *v.* Nichol, 3 Baxt. (Tenn.) 338.

73. Lovejoy *v.* Isbell, 70 Conn. 557, 40 Atl. 531.

74. Baylies *v.* Curry, 30 Ill. App. 105; Van Hook *v.* Whitlock, 2 Edw. (N. Y.) 304 [*affirmed* in 7 Paige 373 (*affirmed* in 26 Wend. 43)].

75. Baylies *v.* Curry, 30 Ill. App. 105; Van Hook *v.* Whitlock, 2 Edw. (N. Y.) 304 [*affirmed* in 7 Paige 373 (*affirmed* in 26 Wend. 43)].

76. *Colorado.*— Colorado Milling, etc., Co. *v.* Mitchell, 26 Colo. 284, 58 Pac. 28 [*affirming* 12 Colo. App. 277, 55 Pac. 736], holding that an employer's liability act is remedial.

Georgia.— Carey *v.* Giles, 9 Ga. 253.

Illinois.— Harrison *v.* Monmouth Nat. Bank, 207 Ill. 630, 69 N. E. 871 [*affirming* 108 Ill. App. 493], holding that a statute relating to negotiable instruments, and authorizing the holder to sue all parties liable thereon in one action, and to recover a judgment against them according to their rights between themselves, is remedial in character, and must be liberally construed.

Michigan.—Robinson *v.* Harmon, 157 Mich. 272, 117 N. W. 664.

Nebraska.— Becker *v.* Brown, 65 Nebr. 264, 91 N. W. 178 (holding that the statute creating an agister's lien is remedial in its nature and should be liberally construed); State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118 (holding that an act to regulate railroads and prevent unjust discrimination is a remedial statute).

New Jersey.— Kennealy *v.* Leary, 67 N. J. L. 435, 51 Atl. 475.

West Virginia.— Cain *v.* Brown, 54 W. Va. 656, 46 S. E. 579, holding that a statute allowing infants one year after becoming of age to redeem land sold for non-payment of taxes should be liberally construed.

United States.— U. S. *v.* Rhodes, 27 Fed. Cas. No. 16,151, 1 Abb. 28, 29, holding that "an Act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication" is not a penal statute, but a remedial one, and is to be liberally construed.

See 44 Cent. Dig. tit. "Statutes," § 317.

Statutes relating to bills of exceptions have been declared remedial in nature. Williams *v.* Miles, 62 Nebr. 566, 87 N. W. 315; Morehead *v.* Adams, 18 Nebr. 569, 26 N. W. 242.

77. Howes *v.* Dolan, 9 Pa. Super. Ct. 586, 44 Wkly. Notes Cas. 62.

78. *Arkansas.*—White County *v.* Key, 30 Ark. 603.

California.— Cullerton *v.* Mead, 22 Cal. 95; White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

Connecticut.—Wolcott *v.* Pond, 19 Conn. 597.

Georgia.— Carey *v.* Giles, 9 Ga. 253.

Illinois.— Jackson *v.* Warren, 32 Ill. 331.

Indiana.— Doe *v.* Avaline, 8 Ind. 6; Ryan *v.* Vanlandingham, 7 Ind. 416, holding that in the construction of remedial statutes, the time within which an act is required to be done, if not made essential by the express terms of the statute, will not be treated as such.

Massachusetts.— Boston, etc., Mill Corp. *v.* Gardner, 2 Pick. 33.

Nebraska.— State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 35 N. W. 118.

New Jersey.—Kennealy *v.* Leary, 67 N. J. L. 435, 51 Atl. 475 (holding that a statute permitting the recovery of money lost on a wager or in gaming is a remedial statute); Camden, etc., Transp. Co. *v.* Briggs, 22 N. J. L. 623.

New York.— Hudler *v.* Golden, 36 N. Y. 446; Smith *v.* Moffat, 1 Barb. 65 [*affirmed* in 4 N. Y. 126]; Gillespie *v.* Winberg, 4 Daly 318.

North Carolina.—Asheville Land Co. *v.* Lange, 150 N. C. 26, 63 S. E. 164; Morris *v.* Staton, 44 N. C. 464.

Oregon.— State *v.* Dunn, 53 Oreg. 304, 99 Pac. 278, 100 Pac. 258.

Rhode Island.— State *v.* Lynch, 28 R. I. 463, 68 Atl. 315.

Tennessee.— Nashville *v.* Nichol, 3 Baxt. 338.

Texas.— State *v.* O'Connor, 96 Tex. 484,

lature [79] by suppressing the mischiefs and advancing the remedy.[80] The rule of liberal or beneficial construction, however, should never be applied so as to extend the application of statutes to cases not within the contemplation of the legislature,[81] as any attempt on the part of the courts to do this would constitute judicial legislation. Where necessary to effectuate the legislative intent, remedial statutes will be construed to include cases within the reason, although outside the letter,[82] of the statute, and to exclude cases within the letter, but outside the reason.[83] Where a statute imposes a new duty upon any person without providing any remedy or penalty for its infraction, any person for whose benefit, advantage, or protection the statute was enacted, who, without fault on his part, suffers a loss by reason of the failure to perform such duty, may maintain an action against the delinquent to recover damages.[84] If the statute imposes a new duty and creates a new right, and at the same time provides a specific remedy to punish the neglect of the one and to secure the other, that remedy is exclusive, and no other action lies for an infraction of the statute.[85] Where the statute simply

73 S. W. 1041 [*reversing* (Civ. App. 1902) 71 S. W. 409].

West Virginia.— Cain *v.* Brown, 54 W. Va. 656, 46 S. E. 579.

See 44 Cent. Dig. tit. "Statutes," § 317.

But see Peet *v.* East Grand Forks, 101 Minn. 523, 112 N. W. 1005, holding that curative statutes should be strictly construed.

79. Sprowl *v.* Lawrence, 33 Ala. 674; Rawson *v.* State, 19 Conn. 292; State *v.* Central Vermont R. Co., 81 Vt. 459, 71 Atl. 193, 21 L. R. A. N. S. 949.

80. Jones *v.* Com., 25 Fed. 666; Dapueto *v.* Wyllie, L. R. 5 P. C. 482, 43 L. J. Adm. 20, 30 L. T. Rep. N. S. 887, 22 Wkly. Rep. 777; Atcheson *v.* Everitt, Cowp. 391, 98 Eng. Reprint 1142; Johnes *v.* Johnes, 3 Dow. 1, 3 Eng. Reprint 969.

Self-executing statute.—A statutory provision is said to be self-executing "when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Reeves *v.* Anderson, 13 Wash. 17, 23, 42 Pac. 625.

81. Farrel Foundry *v.* Dart, 26 Conn. 376; Franklin *v.* Franklin, 1 Md. Ch. 342; Virginia Coupon Cases, 25 Fed. 666.

82. Traudt *v.* Hagerman, 27 Ind. App. 150, 60 N. E. 1011; Palestine Tp. Rural Independent School Dist. No. 10 *v.* Kelley New Independent School Dist., 120 Iowa 119, 94 N. W. 284; St. Peter *v.* Middleborough, 2 Y. & J. 196.

83. Traudt *v.* Hagerman, 27 Ind. App. 150, 60 N. E. 1011; Gorris *v.* Scott, L. R. 9 Exch. 125, 43 L. J. Exch. 92, 30 L. T. Rep. N. S. 431, 22 Wkly. Rep. 575, holding that when a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. See *supra*, VII, A, 2, c.

84. *Alabama.*—Wolf *v.* Smith, 149 Ala. 457, 42 So. 824, 9 L. R. A. N. S. 338.

Colorado.— Platte, etc., Canal, etc., Co. *v.* Dowell, 17 Colo. 376, 30 Pac. 68; Platte, etc., Ditch Co. *v.* Anderson, 8 Colo. 131, 6 Pac. 515.

Illinois.— Terre Haute, etc., R. Co. *v.* Williams, 69 Ill. App. 392 [*affirmed* in 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44]; Ohio, etc., R. Co. *v.* McGehee, 47 Ill. App. 348.

Maine.— Ricker Classical Inst. *v.* Mapleton, 101 Me. 553, 64 Atl. 948; Rackliff *v.* Greenbush, 93 Me. 99, 44 Atl. 375; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95.

Minnesota.— Baxter *v.* Coughlin, 70 Minn. 1, 72 N. W. 797; Osborne *v.* McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698.

Missouri.— Pike *v.* Eddy, 53 Mo. App. 505.

New Hampshire.— Brember *v.* Jones, 67 N. H. 374, 30 Atl. 411, 26 L. R. A. 408; Brooks *v.* Hart, 14 N. H. 307.

New York.— Pauley *v.* Steam Gauge, etc., Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194 [*approving* Willy *v.* Mulledy, 78 N. Y. 310, 34 Am. Rep. 536]; Wademan *v.* Albany, etc., R. Co., 51 N. Y. 568; Pitcher *v.* Lennon, 12 N. Y. App. Div. 356, 42 N. Y. Suppl. 156; Jones *v.* Seligman, 16 Hun 230 [*affirmed* in 81 N. Y. 190]; Wilson *v.* Susquehanna Turnpike Road Co., 21 Barb. 68; Kerr *v.* West Shore R. Co., 2 N. Y. Suppl. 686.

Ohio.— New York, etc., R. Co. *v.* Lambright, 5 Ohio Cir. Ct. 433, 3 Ohio Cir. Dec. 213.

Rhode Island.— O'Donnell *v.* Providence, etc., R. Co., 6 R. I. 211.

Vermont.— Brattleboro *v.* Wait, 44 Vt. 459.

Virginia.— Noble *v.* Richmond, 31 Gratt. 271, 31 Am. Rep. 726.

Wisconsin.— State *v.* Chicago, etc., R. Co., 79 Wis. 259, 48 N. W. 243, 12 L. R. A. 180

United States.— Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. ed. 434.

England.— Davis *v.* Taff Vale R. Co., [1895] A. C. 542, 64 L. J. Q. B. 488, 72 L. T. Rep. N. S. 632, 11 Reports 189, 44 Wkly. Rep. 172 [*reversing* [1894] 1 Q. B. 43, 63 L. J. Q. B. 347, 9 Reports 82, 42 Wkly. Rep. 215]; Ross *v.* Rugge-Price, 1 Ex. D. 269, 45 L. J. Exch. 777, 34 L. T. Rep. N. S. 535, 24 Wkly. Rep. 786; Gorris *v.* Scott, L. R. 9 Exch. 125, 43 L. J. Exch. 92, 30 L. T. Rep. N. S. 431, 22 Wkly. Rep. 575.

See 44 Cent. Dig. tit. "Statutes," § 317.

85. *Massachusetts.*— Pollock *v.* Eastern R. Co., 124 Mass. 158.

provides a new remedy for an old right,[86] or, recognizing an old right, imposes another duty in respect to it,[87] and provides a method of enforcing such duty, the remedy provided in the statute is cumulative and existing rights of action are unaffected unless expressly taken away.[88] Where the statute prescribes no

New York.— Gorman *v.* McArdle, 67 Hun 484, 22 N. Y. Suppl. 479; Almy *v.* Harris, 5 Johns. 175.

North Carolina.— State *v.* Southern R. Co., 145 N. C. 495, 59 S. E. 570, 13 L. R. A. N. S. 966.

Tennessee.— Louisville, etc., R. Co. *v.* Collier, 104 Tenn. 189, 54 S. W. 980.

United States.— Yates *v.* Jones Nat. Bank, 206 U. S. 158, 27 S. Ct. 638, 51 L. ed. 1002; Farmers, etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196.

England.— Saunders *v.* Halborn Dist. Bd. of Works, [1895] 1 Q. B. 64, 59 J. P. 453, 64 L. J. Q. B. 101, 71 L. T. Rep. N. S. 519, 15 Reports 25, 43 Wkly. Rep. 26; Lamplugh *v.* Norton, 22 Q. B. D. 452, 53 J. P. 389, 58 L. J. Q. B. 279, 37 Wkly. Rep. 422; Bailey *v.* Bailey, 13 Q. B. D. 855, 53 L. J. Q. B. 583; Vallance *v.* Falle, 13 Q. B. D. 109, 5 Aspin. 280, 48 J. P. 519, 53 L. J. Q. B. 459, 51 L. T. Rep. N. S. 158, 32 Wkly. Rep. 770; Marshall *v.* Nicholls, 18 Q. B. 882, 16 Jur. 1155, 21 L. J. Q. B. 343, 83 E. C. L. 882; Watkins *v.* Great Northern R. Co., 16 Q. B. 961, 15 Jur. 127, 20 L. J. Q. B. 391, 71 E. C. L. 961; Stevens *v.* Jeacocke, 11 Q. B. 731, 12 Jur. 477, 17 L. J. Q. B. 163, 63 E. C. L. 731; Cooper *v.* Whittingham, 15 Ch. D. 501, 49 L. J. Ch. 752, 43 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720 (holding that in a proceeding under such a statute only the statutory penalty can be recovered, and no other relief can be asked for); West *v.* Downman, 14 Ch. D. 111, 42 L. T. Rep. N. S. 340, 29 Wkly. Rep. 6; Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441, 46 L. J. Exch. 775, 36 L. T. Rep. N. S. 761, 25 Wkly. Rep. 794; St. Pancras Parish *v.* Batterbury, 2 C. B. N. S. 477, 3 Jur. N. S. 1106, 26 L. J. C. P. 243, 89 E. C. L. 477; Blackburn *v.* Parkinson, 1 E. & E. 71, 5 Jur. N. S. 572, 28 L. J. M. C. 7, 7 Wkly. Rep. 11, 102 E. C. L. 71; O'Flaherty *v.* McDowell, 6 H. L. Cas. 142, 4 Jur. N. S. 33, 10 Eng. Reprint 1248; Handley *v.* Moffat, Ir. R. 7 C. L. 104, 21 Wkly. Rep. 231; *In re* International Patent Pulp, etc., Co., 46 L. J. Ch. 625, 37 L. T. Rep. N. S. 351, 25 Wkly. Rep. 822; Preston *v.* Great Yarmouth, 41 L. J. Ch. 310, 26 L. T. Rep. N. S. 235, 20 Wkly. Rep. 358 [*affirmed* in L. R. 7 Ch. 655, 41 L. J. Ch. 760, 27 L. T. Rep. N. S. 87, 20 Wkly. Rep. 875]; Danby *v.* Watson, 46 L. J. M. C. 179, 36 L. T. Rep. N. S. 412, 25 Wkly. Rep. 464.

Canada.— Sims *v.* Kelly, 20 Ont. 291.

See 44 Cent. Dig. tit. "Statutes," § 317.

This rule is subject to the qualification that the remedy supplied by the statute must cover the whole right given by it. Stubbs *v.* Martin, [1895] 2 Ir. 70.

Rule applied to special remedies provided for new offenses.— Reg. *v.* Hall, [1891] 1 Q. B. 747, 17 Cox C. C. 278, 60 L. J. M. C. 124, 64 L. T. Rep. N. S. 394; Reg. *v.* Lovibond, 24 L. T. Rep. N. S. 357, 19 Wkly. Rep. 753.

Criminal proceedings bar to civil remedy.— Where a statute provided that a person who misapplied certain moneys should, on summary conviction, be liable to a penalty and to be ordered to repay all moneys improperly applied and in default of such repayment or of the payment of the penalty should be imprisoned, an order made under this statute was a bar to an action brought to recover the same moneys. Vernon *v.* Watson, [1891] 2 Q. B. 288, 60 L. J. Q. B. 472, 64 L. T. Rep. N. S. 728, 39 Wkly. Rep. 520.

Remedy provided must be sought within the time specified.— Colley *v.* London, etc., R. Co., 5 Ex. D. 277, 44 J. P. 427, 49 L. J. Exch. 575, 42 L. T. Rep. N. S. 807, 29 Wkly. Rep. 16.

86. Colorado Milling, etc., Co. *v.* Mitchell, 26 Colo. 284, 58 Pac. 28 [*affirming* 12 Colo. App. 277, 55 Pac. 736]; State *v.* Fransham, 19 Mont. 273, 48 Pac. 1 (holding that where two statutes, enacted at the same session of the legislature, provide remedies for the same cause of action, both should be given effect if possible); Rich *v.* Keyser, 54 Pa. St. 86; Brockwell *v.* Bullock, 22 Q. B. D. 567, 53 J. P. 405, 58 L. J. Q. B. 289, 37 Wkly. Rep. 455; Sharp *v.* Warren, 6 Price 131 (holding that the new remedy for an old right is only cumulative, although given in terms that apparently prescribe such remedy).

87. Rosin *v.* Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245, 86 N. Y. Suppl. 49.

88. Lang *v.* Scott, 1 Blackf. (Ind.) 405, 12 Am. Dec. 257; Kinyon *v.* Chicago, etc., R. Co., 118 Iowa 349, 92 N. W. 40, 96 Am. St. Rep. 382; Kaminitsky *v.* Northeastern R. Co., 25 S. C. 53; Rochdale Canal Co. *v.* King, 14 Q. B. 122, 14 Jur. 16, 18 L. J. Q. B. 293, 68 E. C. L. 122; Lichfield *v.* Simpson, 8 Q. B. 65, 9 Jur. 989, 15 L. J. Q. B. 78, 55 E. C. L. 65; Collinson *v.* Newcastle, etc., R. Co., 1 C. & K. 546, 47 E. C. L. 546; Couch *v.* Steel, 2 C. L. R. 940, 3 E. & B. 402, 18 Jur. 515, 23 L. J. Q. B. 121, 2 Wkly. Rep. 170, 77 E. C. L. 402 [*questioned* in Atkinson *v.* Newcastle, etc., Waterworks Co., 2 Ex. D. 441, 46 L. J. Exch. 775, 36 L. T. Rep. N. S. 761, 25 Wkly. Rep. 794]; Great Northern R. Co. *v.* Kennedy, 7 D. & L. 197, 4 Exch. 417, 13 Jur. 1008, 19 L. J. Exch. 11, 6 R. & Can. Cas. 5; Inglis *v.* Great Northern R. Co., 16 Jur. 895, 1 Macq. 112; *Ex p.* Clayton, 1 Russ. & M. 369, 5 Eng. Ch. 369, 39 Eng. Reprint 143.

A new remedy in the nature of a lien is cumulative.— Great Western R. Co. *v.* Sharman, 61 L. J. Q. B. 600, 40 Wkly. Rep. 643.

The abolition of the superior of two remedies for the non-observance of a right remits the injured party to the use of the inferior remedy. Christie *v.* Barker, 53 L. J. Q. B. 537.

procedure for the enforcement of the rights or duties created by it, it will be construed to authorize the usual procedure in the court having jurisdiction.[89] But where a particular procedure is prescribed, this must be followed.[90]

3. Statutes in Derogation of Sovereignty.[91] Statutes in derogation of sovereignty, such as statutes containing exemptions from taxation,[92] or other public burdens, conferring sovereign powers upon corporations,[93] or allowing suits against the state, or its representative,[94] should be construed strictly in favor of the state, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies,[95] unless the intention of the legislature to effect this object is clearly expressed in the statute.

4. Legislative Grants.[96] As a general rule, legislative grants of property,[97] rights,[98] or privileges[99] must be construed strictly in favor of the public; and whatever is not granted in clear and explicit terms is withheld.[1] The rule is especially applicable to gratuitous grants made at the instance of the parties benefited,[2] and to grants of corporate franchises and privileges.[3] It must always be remembered, however, that a legislative grant is a form of statute, and, like

89. Green *v.* Penzance, 6 App. Cas. 657, 51 L. J. Q. B. 25, 45 L. T. Rep. N. S. 353, 30 Wkly. Rep. 218.

90. Pietermaritzburg *v.* Natal Land, etc., Co., 13 App. Cas. 478, 57 L. J. P. C. 82, 58 L. T. Rep. N. S. 895; Hanley, etc., Coal Co. *v.* North Staffordshire R. Co., 64 L. T. Rep. N. S. 656.

91. **For construction of statutes as including or binding government** see *supra*, VII, A, 11.

92. Kentucky Cent. R. Co. *v.* Bourbon County, 82 Ky. 497; Academy of Fine Arts *v.* Philadelphia County, 22 Pa. St. 496.

93. Henderson *v.* Young, 119 Ky. 224, 83 S. W. 583, 26 Ky. L. Rep. 1152.

94. Rose *v.* Governor, 24 Tex. 496.

95. Jersey City Water Com'rs *v.* Hudson, 13 N. J. Eq. 420; U. S. *v.* Herron, 20 Wall. (U. S.) 251, 22 L. ed. 275, holding that a discharge in bankruptcy does not operate as a release from a debt due the United States.

96. **For constitutionality of grants of special privileges** see Constitutional Law, 8 Cyc. 1036.

97. People *v.* Kerber, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93; Jackson *v.* Lamphire, 3 Pet. (U. S.) 280, 7 L. ed. 679.

98. Galloway *v.* London, L. R. 1 H. L. 34, 12 Jur. N. S. 747, 35 L. J. Ch. 477, 14 L. T. Rep. N. S. 865; Wake *v.* Redfearn, 44 J. P. 681, 43 L. T. Rep. N. S. 123.

99. *Michigan.*— La Plaisance Bay Harbor Co. *v.* Monroe, Walk. 155.

Pennsylvania.— Scranton Electric Light, etc., Co. *v.* Scranton Illuminating, etc., Co., 3 Pa. Co. Ct. 628.

South Carolina.— State *v.* Pacific Guano Co., 22 S. C. 50.

United States.— Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 12 S. Ct. 689, 36 D. ed. 537 [*affirming* 47 Fed. 225]; Stein *v.* Bienville Water Supply Co., 141 U. S. 67, 11 S. Ct. 892, 35 L. ed. 622; Hannibal, etc., R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 8 S. Ct. 874, 31 L. ed. 731; Moran *v.* Miami County, 2 Black 722, 17 L. ed. 342; Rice *v.* Minnesota, etc., R. Co., 1 Black 358, 17 L. ed. 147; U. S. *v.* Arredondo, 13 Pet. 133, 10 L. ed. 93; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938.

England.— Herron *v.* Rathmines, etc., Imp. Com'rs, [1892] A. C. 498, 67 L. T. Rep. N. S. 658; Reg. *v.* All Saints, 1 App. Cas. 611, 35 L. T. Rep. N. S. 381, 25 Wkly. Rep. 128; Stourbridge Canal Corp. *v.* Wheeley, 2 B. & Ad. 792, 22 E. C. L. 333; Liverpool *v.* Chorley Water-works Co., 2 De G. M. & G. 852, 51 Eng. Ch. 666, 42 Eng. Reprint 1105; Dawson *v.* Paver, 5 Hare 415, 11 Jur. 766, 16 L. J. Ch. 274, 26 Eng. Ch. 415, 67 Eng. Reprint 974; King's Lynn *v.* Pemberton, 1 Swanst. 244, 18 Rev. Rep. 62, 36 Eng. Reprint 375.

See 44 Cent. Dig. tit. "Statutes," § 319.

1. Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 12 S. Ct. 689, 36 L. ed. 537 [*affirming* 47 Fed. 225]; Reg. *v.* Barclay, 8 Q. B. D. 306, 46 J. P. 167, 51 L. J. M. C. 27, 46 L. T. Rep. N. S. 102, 30 Wkly. Rep. 472.

The reason assigned for the rule is that the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to secure what could not be obtained in clear and express terms. Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550, 12 S. Ct. 689, 36 L. ed. 537; Central Transp. Co. *v.* Pullman's Palace-Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. ed. 55; Slidell *v.* Grandjean, 111 U. S. 412, 4 S. Ct. 475, 28 L. ed. 321; Pryce *v.* Monmouthshire Canal, etc., Co., 4 App. Cas. 197, 49 L. J. Exch. 130, 40 L. T. Rep. N. S. 630, 27 Wkly. Rep. 666.

2. Wilson *v.* Massachusetts Inst. of Technology, 188 Mass. 565, 75 N. E. 128.

3. Holyoke Water Power Co. *v.* Lyman, 15 Wall. (U. S.) 500, 21 L. ed. 133; Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. (U. S.) 51, 75, 18 L. ed. 137 (holding that if, on a fair reading of the charter of a corporation, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the

all other statutes,[4] must be construed in accordance with the cardinal rule of ascertaining and enforcing the intention of the legislature.[5] Where this intention is obviously to deal liberally with the grantee, the terms of the statute should receive a fair and liberal interpretation; and this is especially true where it appears that the grant flows, not from the solicitation of the grantee, but from the government's own motion,[6] or where the state receives a valuable consideration therefor.[7] Where the legislature makes a grant of power to a municipal or public service corporation,[8] to any department or officer of the government,[9] or to any other public body,[10] such grant includes all powers that are necessary or incidental to the exercise of those expressly granted;[11] but such statutes are not to be construed to authorize anything that constitutes a nuisance,[12] unless it appears from express words or by necessary implication that the act is permitted notwithstanding its tending to the creation of a nuisance.[13]

5. Statutes in Derogation of Common Law or Common Right. As the common law forms the basis of the Anglo-Saxon system of jurisprudence, and furnishes the

state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it); Beaty *v.* Knowler, 4 Pet. (U. S.) 152, 7 L. ed. 813; Hughes *v.* Northern Pac. R. Co., 18 Fed. 106, 9 Sawy. 313; Tatum *v.* Tamaroa, 14 Fed. 103, 9 Biss. 475 (holding that where a statute incorporating a town declares that such town shall have all the rights, privileges, and powers conferred upon a town previously incorporated, the latter incorporation act does not include the power conferred on the prior incorporated town by an act amending its act of incorporation, although the amendatory act has passed prior to the later incorporation act); Atty.-Gen. *v.* Great Eastern R. Co., 5 App. Cas. 473, 44 J. P. 648, 49 L. J. Ch. 545, 42 L. T. Rep. N. S. 810, 28 Wkly. Rep. 769; Ashbury R., etc., Co. *v.* Riche, L. R. 7 H. L. 653, 44 L. J. Exch. 185, 33 L. T. Rep. N. S. 451, 24 Wkly. Rep. 794.

4. Fore *v.* Williams, 35 Miss. 533, holding that in the case of conflict between two clauses of a grant the first in position prevails.

5. Logue *v.* Fenning, 29 App. Cas. (D. C.) 519 (holding that statutes embodying a further extension of charity or bounty to soldiers should be liberally construed in pursuance of the benevolent policy shown in all legislation in respect to pensions founded on military service); Caverow *v.* Newark Mut. Ben. L. Ins. Co., 52 Pa. St. 287; Missouri, etc., R. Co. *v.* Kansas Pac. R. Co., 97 U. S. 491, 24 L. ed. 1095; Moran *v.* Miami County, 2 Black (U. S.) 722, 17 L. ed. 342; St. Paul, etc., R. Co. *v.* Greenhalgb, 26 Fed. 563; Friedman *v.* Goodwin, 9 Fed. Cas. No. 5,119, McAllister 142 (sustaining a grant to persons not named but described as a class); London, etc., R. Co. *v.* Limehouse Dist. Bd. of Works, 3 Kay & J. 123, 26 L. J. Ch. 164, 5 Wkly. Rep. 64, 69 Eng. Reprint 1048.

6. Hyman *v.* Read, 13 Cal. 444; Atty.-Gen. *v.* Eardley, Dan. 271, 8 Price 39, 22 Rev. Rep. 697.

7. Hyman *v.* Read, 13 Cal. 444.

8. London, etc., R. Co. *v.* Limehouse Dist. Bd. of Works, 3 Kay & J. 123, 26 L. J. Ch. 164, 5 Wkly. Rep. 64, 69 Eng. Reprint 1048.

9. State *v.* Wirt County Ct., 63 W. Va. 230, 59 S. E. 884, 981.

10. *In re* Dudley, 8 Q. B. D. 86, 46 J. P. 340, 51 L. J. Q. B. 124, 45 L. T. Rep. N. S. 734.

11. Wandsworth Dist. Bd. of Works *v.* United Tel. Co., 13 Q. B. D. 904, 48 J. P. 676, 53 L. J. Q. B. 457, 51 L. T. Rep. N. S. 148, 32 Wkly. Rep. 776 (holding, however, that the statute should not be construed to confer upon the local body any larger powers than were reasonably necessary to enable it to carry out the objects of the statute); Harrison *v.* Southwark, etc., Water Co., [1891] 2 Ch. 409, 60 L. J. Ch. 630, 64 L. T. Rep. N. S. 864.

12. Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617; Rapier *v.* London Tramways Co., [1893] 2 Ch. 588, 63 L. J. Ch. 36, 69 L. T. Rep. N. S. 361, 2 Reports 448; Vernon *v.* St. James, 16 Ch. D. 449, 50 L. J. Ch. 81, 44 L. T. Rep. N. S. 229, 29 Wkly. Rep. 222; Reg. *v.* Bradford Nav. Co., 6 B. & S. 631, 11 Jur. N. S. 769, 34 L. J. Q. B. 191, 13 Wkly. Rep. 892, 118 E. C. L. 631; Meux's Brewery Co. *v.* London Electric Lighting Co., 70 L. T. Rep. N. S. 762, 8 Reports 823, 42 Wkly. Rep. 644 [*varied* in 12 Reports 441, 43 Wkly. Rep. 238 (*distinguishing* National Tel. Co. *v.* Baker, [1893] 2 Ch. 186, 57 J. P. 373, 62 L. J. Ch. 699, 68 L. T. Rep. N. S. 283, 3 Reports 318)].

13. London, etc., R. Co. *v.* Truman, 11 App. Cas. 45, 50 J. P. 388, 55 L. J. Ch. 354, 54 L. T. Rep. N. S. 250, 34 Wkly. Rep. 657 [*distinguishing* Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617]; Dixon *v.* Metropolitan Bd. of Works, 7 Q. B. D. 418, 46 J. P. 4, 50 L. J. Q. B. 772, 45 L. T. Rep. N. S. 312, 30 Wkly.

rule of decision except so far as it has been changed by statute, the common law in regard to a particular matter is presumed to be in force until it affirmatively appears that it has been abrogated or modified by statute.[14] Therefore, except in those jurisdictions where the rule has been changed by express enactment,[15] all statutes in derogation of the common law are to be construed strictly.[16] Where the statute not only effects a change in the common law, but is also in derogation of common rights,[17] it must be construed with especial strictness. Examples of such statutes are those which operate in restraint of personal liberty[18] or civil rights,[19] or the use and enjoyment of public highways;[20] which grant or enlarge

Rep. 83; National Tel. Co. *v.* Baker, [1893] 2 Ch. 186, 57 J. P. 373, 62 L. J. Ch. 699, 68 L. T. Rep. N. S. 283, 3 Reports 318; Lea Conservancy Bd. *v.* Hertford, Cab. & E. 299, 48 J. P. 628.

14. See *infra*, this section; and COMMON LAW, 8 Cyc. 376.

15. Ky. St. § 460; Sutton *v.* Sutton, 87 Ky. 216, 8 S. W. 337, 10 Ky. L. Rep. 136, 12 Am. St. Rep. 476; Galveston, etc., R. Co. *v.* Walker, 48 Tex. Civ. App. 52, 106 S. W. 705; Berry *v.* Powell, 47 Tex. Civ. App. 599, 105 S. W. 345 (holding that under Rev. St. (1895) final title, § 3, providing that the common-law rule that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes, but that they shall be liberally construed, Rev. St. (1895) art. 1700, permitting bastards to inherit, should be interpreted to include all those in justice entitled to receive its benefits); *In re* Garr, 31 Utah 57, 86 Pac. 757 (holding that under the express provisions of Rev. St. (1898) § 2489, statutes in derogation of the common law are to be liberally construed, with a view to effect the objects thereof and to promote justice).

16. *Alabama.*— Lock *v.* Miller, 3 Stew. & P. 13.

California.— People *v.* Buster, 11 Cal. 215.

Illinois.— McNemar *v.* Cohn, 115 Ill. App. 31.

Indiana.— Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710 [*reversing* (App. 1907) 80 N. E. 636].

Missouri.— Perry *v.* Strawbridge, 209 Mo. 621, 108 S. W. 641, 123 Am. St. Rep. 510, 16 L. R. A. N. S. 244.

New York.— Millered *v.* Lake Ontario, etc., R. Co., 9 How. Pr. 238.

Rhode Island.— State *v.* Shapiro, 29 R. I. 133, 69 Atl. 340.

Tennessee.— State *v.* Cooper, 120 Tenn. 549, 113 S. W. 1048.

West Virginia.—Kellar *v.* James, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. N. S. 1003.

Canada.— *Re* Ingersoll, 16 Ont. 194.

See 44 Cent. Dig. tit. "Statutes," § 320.

But see The Warkworth, 9 P. D. 20, 5 Aspin. 194, 53 L. J. P. D. & Adm. 4, 49 L. T. Rep. N. S. 715, 32 Wkly. Rep. 479 [*affirmed* in 9 P. D. 145, 5 Aspin. 326, 53 L. J. P. D. & Adm. 65, 51 L. T. Rep. N. S. 558, 33 Wkly. Rep. 112], holding that the fact that statutes interfere with common-law rights is no reason why they should be construed differently from any other acts of parliament.

The commercial law is a part of the common law and within the operation of this rule. Crowell *v.* Van Bibber, 18 La. Ann. 637. See COMMERCIAL LAW, 8 Cyc. 376.

17. *Indiana.*— Webb *v.* Baird, 6 Ind. 13.

Missouri.— Perry *v.* Strawbridge, 209 Mo. 621, 108 S. W. 641, 123 Am. St. Rep. 510, 16 L. R. A. N. S. 244.

New York.— People *v.* Coler, 190 N. Y. 268, 83 N. E. 18 [*reversing* 121 N. Y. App. Div. 898, 105 N. Y. Suppl. 1137 (*affirming* 54 Misc. 21, 103 N. Y. Suppl. 590)]; Sprague *v.* Birdsall, 2 Cow. 419.

England.— Scottish Drainage, etc., Co. *v.* Campbell, 14 App. Cas. 139; Western Counties R. Co. *v.* Windsor, etc., R. Co., 7 App. Cas. 178, 51 L. J. P. C. 43, 46 L. T. Rep. N. S. 351; Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617; Rendall *v.* Blair, 45 Ch. D. 139, 59 L. J. Ch. 641, 63 L. T. Rep. N. S. 265, 38 Wkly. Rep. 689; Finch *v.* Birmingham Canal Navigations, 5 B. & C. 821, 8 D. & R. 680, 5 L. J. K. B. O. S. 17, 11 E. C. L. 696; Scales *v.* Pickering, 4 Bing. 448, 6 L. J. C. P. O. S. 53, 1 M. & P. 195, 13 E. C. L. 582; Stockton, etc., R. Co. *v.* Barrett, 11 Cl. & F. 590, 8 Eng. Reprint 1225, 7 M. & G. 870, 49 E. C. L. 870, 8 Scott N. R. 641; Rex *v.* Croke, Cowp. 26, 98 Eng. Reprint 948; Hughes *v.* Chester, etc., R. Co., 8 Jur. N. S. 221, 31 L. J. Ch. 97, 7 L. T. Rep. N. S. 197, 10 Wkly. Rep. 219.

Canada.— London, etc., Loan, etc., Co. *v.* Connell, 11 Manitoba 115.

See 44 Cent. Dig. tit. "Statutes," § 320.

18. *Georgia.*— Elam *v.* Rawson, 21 Ga. 139.

Indiana.— Ramsey *v.* Foy, 10 Ind. 493.

Maine.— Pierce's Case, 16 Me. 255.

Massachusetts.— Com. *v.* Beck, 187 Mass. 15, 72 N. E. 357.

New York.— Southern Inland Nav., etc., Co. *v.* Sherwin, 1 N. Y. Civ. Proc. 44.

Pennsylvania.— Snedden *v.* Gunn, 25 Pittsb. Leg. J. N. S. 364.

United States.— *Ex p.* Morgan, 20 Fed. 298.

England.— Crowley's Case, Buck. 264, 2 Swanst. 1, 36 Eng. Reprint 514.

See 44 Cent. Dig. tit. "Statutes," § 320.

19. State *v.* Van Camp, 36 Nebr. 9, 54 N. W. 113, holding that a construction will not be adopted which would disfranchise a considerable number of voters, or deprive a county of representation in the legislature, unless such construction is rendered necessary by express and unequivocal language of the statute or constitution.

20. Young *v.* Madison County, 137 Iowa 515, 115 N. W. 23; Hyland *v.* Ossining, 57 Misc. (N. Y.) 212, 107 N. Y. Suppl. 225 [*af-*

special privileges;[21] which grant power to deprive persons of the ownership of property without their consent;[22] which impose restrictions upon the control,[23] management,[24] use,[25] or alienation[26] of private property; which disturb vested rights in property or contracts;[27] or which restrain the freedom of contract, the exercise of any trade or occupation,[28] or the conduct of business.[29] The rule to be applied in the construction of all such statutes is that they must not be deemed to extinguish or restrain private rights, unless it appears by express words or plain implication that it was the intention of the legislature to do so.[30]

6. Statutes Imposing Liabilities. A statute creating a new liability,[31] or increasing an existing liability,[32] or even a remedial statute giving a remedy against a party who would not otherwise be liable,[33] will be strictly construed.

7. Penal Statutes[34] — a. Nature and Subject-Matter. Strictly and properly speaking, penal statutes are those imposing punishment for an offense committed against the state, which, under the English and American constitutions, the executive of the state has the power to pardon.[35] In common use, however,

firmed in 127 N. Y. App. Div. 291, 111 N. Y. Suppl. 309].

21. Loewy *v.* Gordon, 129 N. Y. App. Div. 459, 114 N. Y. Suppl. 211.

22. Trumpler *v.* Bemerly, 39 Cal. 490; Young *v.* McKenzie, 3 Ga. 31; Campbell *v.* Youngson, 80 Nebr. 322, 114 N. W. 415. See Eminent Domain, 15 Cyc. 567.

23. Omaha Sav. Bank *v.* Rosewater, 1 Nebr. (Unoff.) 723, 96 N. W. 68.

24. Gray *v.* Stewart, 70 Kan. 429, 78 Pac. 852, 109 Am. St. Rep. 461.

25. Richardson *v.* Ainsa, (Ariz. 1908) 95 Pac. 103; Wynehamer *v.* People, 13 N. Y. 378; Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116; Reg. *v.* Mallow Union, 12 Ir. C. L. 35.

26. Richardson *v.* Emswiler, 14 La. Ann. 658.

27. Peet *v.* East Grand Forks, 101 Minn. 523, 112 N. W. 1005.

28. Lockwood *v.* District of Columbia, 24 App. Cas. (D. C.) 569; Com. *v.* Beck, 187 Mass. 15, 72 N. E. 357; People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People *v.* Sommer, 55 Misc. (N. Y.) 55, 106 N. Y. Suppl. 190.

29. Turner *v.* London, etc., R. Co., L. R. 17 Eq. 561, 43 L. J. Ch. 430.

30. Campbell *v.* Youngson, 80 Nebr. 322, 114 N. W. 415 (holding that the doctrine of strict construction of statutes in derogation of common right is not to be unreasonably extended so as to hamper the execution of public enterprise); State *v.* Van Camp, 36 Nebr. 9, 54 N. W. 113; Western Counties R. Co. *v.* Windsor, etc., R. Co., 7 App. Cas. 178, 51 L. J. P. C. 43, 46 L. T. Rep. N. S. 351; Metropolitan Asylum Dist. *v.* Hill, 6 App. Cas. 193, 45 J. P. 664, 50 L. J. Q. B. 353, 44 L. T. Rep. N. S. 653, 29 Wkly. Rep. 617; Reg. *v.* Mallow Union, 12 Ir. C. L. 35; Hibernian Mine Co. *v.* Tuke, 8 Ir. C. L. 321; Hughes *v.* Chester, etc., R. Co., 8 Jur. N. S. 221, 31 L. J. Ch. 97, 7 L. T. Rep. N. S. 197, 10 Wkly. Rep. 219.

31. *Colorado.*— Ahern *v.* High Line Irr. Dist., 39 Colo. 409, 89 Pac. 963.

Iowa.— Alexander *v.* Crosby, (1909) 119 N. W. 717.

Minnesota.— Hunt *v.* Burns, 90 Minn. 172, 95 N. W. 1110.

New York.— Smith *v.* Boston, etc., R. Co., 99 N. Y. App. Div. 94, 91 N. Y. Suppl. 412 [*affirmed* in 181 N. Y. 132, 73 N. E. 679].

United States.— Russell *v.* Transylvania University, 1 Wheat. 432, 4 L. ed. 129, holding that an act of the legislature confiscating the property of an individual can be intended to operate only upon the interest of that individual, and not to defeat the rights of those who held or might claim the land, to the prejudice of the individual himself.

See 44 Cent. Dig. tit. "Statutes," § 321.

32. Smith *v.* Boston, etc., R. Co., 99 N. Y. App. Div. 94, 91 N. Y. Suppl. 412 [*affirmed* in 181 N. Y. 132, 73 N. E. 679].

33. The Ohio *v.* Stunt, 10 Ohio St. 582.

34. For construction of criminal statutes see Criminal Law, 12 Cyc. 141.

For penalties for violation of customs laws see Customs Duties, 12 Cyc. 1106.

For penalties relating to internal revenue see Internal Revenue, 22 Cyc. 1642, 1679.

For penalties for interference with relation of landlord and tenant see Landlord and Tenant, 24 Cyc. 1476.

For statutes imposing penalties for failure to enter partial payments on mortgage debt see Mortgages, 27 Cyc. 1425.

35. *California.*— Levy *v.* San Francisco Super. Ct., 105 Cal. 600, 607, 38 Pac. 965, 29 L. R. A. 811.

Connecticut.— Plumb *v.* Griffin, 74 Conn. 132, 134, 50 Atl. 1.

Florida.— State *v.* Atlantic Coast Line R. Co., 56 Fla. 617, 651, 47 So. 969.

Indiana.— American Credit-Indemnity Co. *v.* Ellis, 156 Ind. 212, 221, 59 N. E. 679; Indianapolis *v.* Fairchild, 1 Ind. 315, 318.

Michigan.— People *v.* Bay City, 36 Mich. 186, 189.

Montana.— Manhattan Trust Co. *v.* Davis, 23 Mont. 273, 280, 58 Pac. 718.

New York.— Hutchinson *v.* Young, 80 N. Y. App. Div. 246, 249, 80 N. Y. Suppl. 259; People *v.* Wells, 52 N. Y. App. Div. 583, 589, 65 N. Y. Suppl. 319.

Rhode Island.— Kilton *v.* Providence Tool Co., 22 R. I. 605, 615, 48 Atl. 1039; Ayls-

this sense has been enlarged to include under the term "penal statutes" all statutes which command or prohibit certain acts, and establish penalties for their violation,[36] and even those which, without expressly prohibiting certain acts, impose a penalty upon their commission.[37] Under this broader definition, penal statutes include not only those in which the penalty is recovered by a public prosecution and inures to the state, but also those permitting a recovery of the penalty by a private individual in an action of debt or *qui tam*.[38] The true test in determining

worth *v.* Curtis, 19 R. I. 517, 522, 34 Atl. 1109, 61 Am. St. Rep. 785, 33 L. R. A. 110.

Vermont.—Drew *v.* Russell, 47 Vt. 250, 253, holding that in a strict sense a penalty "is the punishment and retribution for crime."

United States.— Huntington *v.* Attrill, 146 U. S. 657, 667, 13 S. Ct. 224, 36 L. ed. 1123.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

The term "penal law" is more generally applied to statutes that impose fines for their breach than to those that inflict imprisonment. Drew *v.* Russell, 47 Vt. 250, 253.

36. *Alabama.*—Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 366, 13 So. 564.

Connecticut.— Mitchell *v.* Hotchkiss, 48 Conn. 9, 19, 40 Am. Rep. 146; Stoddard *v.* Couch, 23 Conn. 238, 240.

Illinois.— Woolverton *v.* Taylor, 132 Ill. 197, 206, 23 N. E. 1007, 22 Am. St. Rep. 521.

Indiana.— State *v.* Hardman, 16 Ind. App. 357, 45 N. E. 345, 346.

Michigan.— Wayne County *v.* Detroit, 17 Mich. 390, 399.

New York.— People *v.* Bennett, 6 Abb. Pr. 343, 348.

Rhode Island.— Kilton *v.* Providence Tool Co., 22 R. I. 605, 613, 48 Atl. 1039.

South Carolina.— Butler *v.* Butler, 62 S. C. 165, 177, 40 S. E. 138.

West Virginia.— Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 39, 28 S. E. 754, 67 Am. St. Rep. 757, 41 L. R. A. 669.

Wisconsin.— Platteville *v.* Bell, 43 Wis. 488, 492.

United States.— U. S. *v.* Chapel, 25 Fed. Cas. No. 14,781.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

Two classes of penal statutes exist — one where the statute enjoins or forbids an act, without declaring the omission or commission of the act indictable, and the other where the omission or commission is made specially indictable. U. S. *v.* Chapel, 25 Fed. Cas. No. 14,781.

37. Chester *v.* Chester First Nat. Bank, 9 Pa. Super. Ct. 517, 521, 7 Del. Co. 359, 44 Wkly. Notes Cas. 180; *In re* Cork, etc., R. Co., L. R. 4 Ch. 748, 758, 39 L. J. Ch. 277, 21 L. T. Rep. N. S. 735, 18 Wkly. Rep. 26; D'Allex *v.* Jones, 2 Jur. N. S. 979, 26 L. J. Exch. 79.

38. Baylies *v.* Curry, 30 Ill. App. 105, 109 [*affirmed* in 128 Ill. 287, 21 N. E. 595]; Mansfield *v.* Ward, 16 Me. 433, 436; Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722, 726; L'Association Pharmaceutique de Quebec *v.* Livernois, 31 Can. Sup. Ct. 43, 45 [*reversing* 9 Quebec Q. B. 243].

Penal statutes include: A criminal law (Indianapolis *v.* Fairchild, 1 Ind. 315, 318); a law for the breach of which a penalty is imposed (Atchison, etc., R. Co. *v.* State, 22 Kan. 1, 15); a law of the state for the preservation of the public order, and enforced by the state authorities (People *v.* Bay City, 36 Mich. 186, 189); a law which imposes a fine for its breach (Drew *v.* Russell, 47 Vt. 250, 253); an act by which a forfeiture is imposed for transgressing its provisions (Diversey *v.* Smith, 103 Ill. 378, 390, 42 Am. Rep. 14); a statute which imposes punishment for offenses against the state (People *v.* Wells, 52 N. Y. App. Div. 583, 589, 65 N. Y. Suppl. 319; Blum *v.* Widdicomb, 90 Fed. 220, 221); one imposing punishment for an offense committed against the state, which, by the English and American constitutions, the executive of the state has the power to pardon (American Credit-Indemnity Co. *v.* Ellis, 156 Ind. 212, 221, 59 N. E. 679; State *v.* Warner, 197 Mo. 650, 659, 94 S. W. 962; Manhattan Trust Co. *v.* Davis, 23 Mont. 273, 280, 58 Pac. 718; Hutchison *v.* Young, 80 N. Y. App. Div. 246, 249, 80 N. Y. Suppl. 259; Huntington *v.* Attrill, 146 U. S. 657, 667, 13 S. Ct. 224, 36 L. ed. 1123); one by which a punishment is imposed for transgression of the law (Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 39, 28 S. E. 754, 67 Am. St. Rep. 757, 41 L. R. A. 669); one by which some punishment is imposed for violation of the law (Gardner *v.* New York, etc., R. Co., 17 R. I. 790, 791, 24 Atl. 831); one which imposes a forfeiture or penalty for transgressing its provisions or for doing a thing prohibited (Bell *v.* Farwell, 176 Ill. 489, 496, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804); one which imposes a penalty (Spencer *v.* Swannell, 6 Dowl. P. C. 326, 329); one which imposes a penalty upon the commission of the prohibited offense, which is recovered by an action of debt, in the name of the informer, for his own use, or *qui tam* (Baylies *v.* Curry, 30 Ill. App. 105, 109 [*affirmed* in 128 Ill. 287, 21 N. E. 595]); one which provides a penalty or mulct for some offense of a public nature (Sackett *v.* Sackett, 8 Pick. (Mass.) 309, 319); a law which expressly defines or limits a punishment of any offense (Abbott L. Dict. [*quoted* in Huntingdon *v.* Attrill, 17 Ont. 245, 252]); a law which prohibits an act, and imposes a penalty for the commission of it (Rapalje & L. L. Dict. [*quoted* in Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 366, 13 So. 564; State *v.* Hardman, 16 Ind. App. 357, 45 N. E. 345]; Wharton L. Lex. [*quoted* in Huntingdon *v.* Attrill, 17 Ont. 245, 252]); an act of parliament whereby a forfeiture is inflicted for transgressing the provisions

whether a statute is penal is whether the penalty is imposed for the punishment of a wrong to the public,[39] or for the redress of an injury to the individual.[40] If the statute permits a recovery of the penalty by an individual for the purpose of enforcing obedience to the mandate of the law by punishing its violation, it is penal in character;[41] but if the recovery of the penalty by an individual is per-

therein enacted (3 Blackstone Comm. 161 [*quoted* in People *v.* Bennett, 6 Abb. Pr. (N. Y.) 343, 348]); a statute that inflicts a penalty for the violation of some of its provisions (Bouvier L. Dict. [*quoted* in Mitchell *v.* Hotchkiss, 48 Conn. 9, 19, 40 Am. Rep. 146]); one which commands or prohibits a thing under a certain penalty (Bouvier L. Dict. [*quoted* in Ashley *v.* Frame, 4 Kan. App. 265, 45 Pac. 927, 928]); one which imposes a forfeiture or penalty for transgressing or for doing a thing prohibited (Potter Dwar. St. 74 [*quoted* in Woolverton *v.* Taylor, 132 Ill. 197, 206, 23 N. E. 1007, 22 Am. St. Rep. 521]); one which imposes a penalty or punishment for an offense committed (Rapalje & L. L. Dict. [*quoted* in Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 498, 4 L. R. A. 554]); a statute providing that any person summoned as trustee, who shall, upon his examination, knowingly and wilfully answer falsely, shall be guilty of perjury, and shall also be liable to pay to plaintiff in the action the full amount of such judgment, or such part as may remain due, with interest and double cost (Mansfield *v.* Ward, 16 Me. 433, 436); an act imposing a penalty upon any officer who has served a writ for indorsing thereon or receiving more than his lawful fees (Stoddard *v.* Couch, 23 Conn. 238, 240); a statute giving creditors a remedy against corporate officers for official defaults (Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557, 561, 18 N. W. 356); a statute imposing an imprisonment for a fraud (Peek *v.* Shields, 31 U. C. C. P. 112, 127); one imposing a penalty for doing that which the statute prohibits, or for omitting to do that which a statute requires, or one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited (People *v.* Crucible Steel Co., 151 Mich. 618, 115 N. W. 705); one authorizing a sale of land for taxes (Yancey *v.* Hopkins, 1 Munf. (Va.) 419); a statute authorizing the jury to punish the prosecutor with costs (Clemens *v.* Com., 7 Watts (Pa.) 485); a statute for the regulation of trade, imposing fines, and creating forfeitures (Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269, 276; Com. *v.* Shopp, 1 Woodw. (Pa.) 123, 129); a revenue law which imposes a pecuniary penalty, fine, and imprisonment for a failure to pay the tax (State *v.* Wheeler, 23 Nev. 143, 152, 44 Pac. 430).

Do not include.—A statute compelling a man to maintain a bastard child (Com. *v.* Withers, 4 T. B. Mon. (Ky.) 510, 511); one which gives a remedy for an injury against him by whom it is committed to the person injured, and to him alone, and limits the recovery to the mere amount of the loss sustained (Boice *v.* Gibbons, 8 N. J. L. 324, 330); one providing that, if a corporation contract debts before the capital is paid in, stock-holders at such time shall become severally and individually liable therefor (Norris *v.* Wrenschall, 34 Md. 492, 500); a statute which merely gives a private action against a wrong-doer (Plumb *v.* Griffin, 74 Conn. 132, 134, 50 Atl. 1); a statute imposing a license-tax upon a business for the purpose of revenue (State *v.* Carter, 129 N. C. 560, 561, 40 S. E. 11).

Penalty need not be for specific amount.—Diversey *v.* Smith, 103 Ill. 378, 42 Am. Rep. 14; Schulte *v.* Menke, 111 Ill. App. 212; Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157; Cable *v.* McCune, 26 Mo. 371, 72 Am. Dec. 214; Kritzer *v.* Woodson, 19 Mo. 327; Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854; Derrickson *v.* Smith, 27 N. J. L. 166; Lawler *v.* Burt, 7 Ohio St. 340.

For qui tam actions for penalties see PENALTIES, 30 Cyc. 1346; QUI TAM ACTIONS, 32 Cyc. 1399, and Cross-References.

39. Nebraska Nat. Bank *v.* Walsh, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301; Bond *v.* Wabash, etc., R. Co., 67 Iowa 712, 25 N. W. 892 (holding that a statute imposing a penalty against a railroad or other common carrier for extortion or unjust discrimination in carrying persons or property is in the nature of a criminal statute, and must be strictly construed); Cox *v.* Paul, 175 N. Y. 328, 67 N. E. 586.

40. Atchison, etc., R. Co. *v.* State, 22 Kan. 1; Com. *v.* Withers, 4 T. B. Mon. (Ky.) 510; Huntington *v.* Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. ed. 1123. *Compare* Cullinan *v.* Burkhard, 93 N. Y. App. Div. 31, 86 N. Y. Suppl. 1003 [*reversing* 41 Misc. 321, 84 N. Y. Suppl. 825].

A penal statute involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by civil or criminal procedure. Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36.

41. Casey *v.* St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419; Schultzman *v.* McCarthy, 16 Pa. Co. Ct. 600 (holding that a statute providing for the recovery by the person injured of a penalty from an officer exacting a greater or other fee than that specified by law for any service performed by him in discharge of the duties of his office is a penal statute); Redpath *v.* Allan, L. R. 4 P. C. 511, 42 L. J. Adm. 8, 27 L. T. Rep. N. S. 725, 9 Moore P. C. N. S. 340, 21 Wkly. Rep. 276, 17 Eng. Reprint 542; D'Allex *v.* Jones, 2 Jur. N. S. 979, 26 L. J. Exch. 79.

A penal statute is generally passed to compel the performance of some duty, public or private. Cox *v.* Paul, 175 N. Y. 328, 67 N. E. 586.

mitted as a remedy for the injury or loss suffered by him, the statute is remedial.[42] It is the substance and effect of the statute, rather than its form, that is to be considered in determining whether it is penal.[43] Thus, laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good are not, in a strict sense, penal acts, although they may inflict a penalty for their violation.[44] And a statute may be penal in one part and remedial in another, in which case, when it is sought to enforce the penalty, it is to be considered a penal statute, and when it is sought to enforce the remedy, it is to be considered as remedial in its nature.[45]

b. How Construed. It is a fundamental rule in the construction of statutes that penal statutes must be construed strictly.[46] By this rule, however, it is not

42. *Maryland.*— Norris *v.* Wrenschall, 34 Md. 492.

Michigan.— Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557, 18 N. W. 356.

New Jersey.— Boice *v.* Gibbons, 8 N. J. L. 324, 330 [*quoted* in Kennealy *v.* Leary, 67 N. J. L. 435, 51 Atl. 475], holding that "a statute which gives a remedy for an injury, against him by whom it is committed, to the person injured and to him alone, and limits the recovery to the mere amount of the loss sustained, belongs clearly to the class of remedial statutes."

United States.— Brady *v.* Daly, 175 U. S. 148, 20 S. Ct. 62, 44 L. ed. 109.

England.— Woodgate *v.* Knatchbull, 2 T. R. 148, 1 Rev. Rep. 449, 100 Eng. Reprint 80.

Canada.— Trice *v.* Robinson, 16 Ont. 433.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

A statute giving the right to recover back money lost at gaming, and if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, is remedial as to the loser, and penal as regards a suit by a third person. Cole *v.* Groves, 134 Mass. 471; Read *v.* Stewart, 129 Mass. 407; Grace *v.* McElroy, 1 Allen (Mass.) 563; Brandon *v.* Pate, 2 H. Bl. 308; Bones *v.* Booth, W. Bl. 1226, 96 Eng. Reprint 721. See GAMING, 20 Cyc. 917.

A statute giving a right of action for damages for death by wrongful act to the personal representative of the deceased for the benefit of the estate is remedial, not penal. Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 18 S. Ct. 105, 42 L. ed. 537; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Dennick *v.* New Jersey Cent. R. Co., 103 U. S. 11, 26 L. ed. 439. See DEATH, 13 Cyc. 291.

Statutes allowing double or treble damages for wrongs suffered are remedial where an action would lie at common law and the statute only increases the damages (Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36; Read *v.* Chelmsford, 16 Pick. (Mass.) 128; Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662; Sackett *v.* Sackett, 8 Pick. (Mass.) 309; Ellis *v.* Whitlock, 10 Mo. 781; Casey *v.* St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419; Lake *v.* Smith, 1 B. & P. N. R. 174; Wilkinson *v.* Colley, 5 Burr. 2694, 98 Eng. Reprint 414; Woodgate *v.* Knatchbull, 2 T. R. 148, 1 Rev. Rep. 449, 100 Eng. Reprint 80; Wynne *v.* Middleton, 1 Wils. C. P. 125, 95 Eng. Reprint 530); but penal if the statute creates a new cause of action (Clark *v.* American Express Co., 130 Iowa 254, 106 N. W. 642; Abbott *v.* Wood, 22 Me. 541), or the language used shows clearly that such was the intention of the legislature (Reed *v.* Davis, 8 Pick. (Mass.) 514; Janvrin *v.* Scammon, 29 N. H. 280).

Damages to plaintiff must be proved in suit under a remedial statute, but not in suit under a penal statute. Mansfield *v.* Ward, 16 Me. 433.

For definition and construction of remedial statutes see *supra*, VII, B, 2.

43. Diversey *v.* Smith, 103 Ill. 378, 42 Am. Rep. 14; Globe Pub. Co. *v.* State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854.

44. Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559 (statute to prevent frauds on the revenue); Ten Cases of Opium, 23 Fed. Cas. No. 13,828, Deady 62; U. S. *v.* Rhodes, 27 Fed. Cas. No. 16,151, 1 Abb. 28 (act to protect persons in their civil rights). See *supra*, VII, B, 2.

45. *Illinois.*— Bell *v.* Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804.

Indiana.— Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36.

Maryland.— Ordway *v.* Baltimore Cent. Nat. Bank, 47 Md. 217, 28 Am. Rep. 455.

Rhode Island.— Gardner *v.* New York, etc., R. Co., 17 R. I. 790, 24 Atl. 831.

Vermont.— Adams *v.* Fitchburg R. Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323. See also *supra*, VII, B, 2.

46. *Alabama.*— Bettis *v.* Taylor, 8 Port. 564.

Arizona.— Flowing Wells Co. *v.* Culin, (1908) 95 Pac. 111.

Arkansas.—Jonesboro, etc., R. Co. *v.* Brookfield, 87 Ark. 409, 112 S. W. 977.

Connecticut.— Morin *v.* Newbury, 79 Conn. 338, 65 Atl. 156.

District of Columbia.— U. S. *v.* Evans, 30 App. Cas. 58; U. S. *v.* Baltimore, etc., R. Co., 26 App. Cas. 581.

Georgia.— Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265.

Idaho.— Latah County Independent School Dist. No. 5 *v.* Collins, 15 Ida. 535, 98 Pac. 857.

Illinois.— Schulte *v.* Menke, 111 Ill. App.

meant that they should be subjected to any strained or unnatural construction

212; Palmer *v.* People, 109 Ill. App. 269; Long *v.* People, 109 Ill. App. 197; Walker *v.* Dailey, 101 Ill. App. 575; Pierce *v.* Dillingham, 96 Ill. App. 300.

Indiana.— Fahnestock *v.* State, 102 Ind. 156, 1 N. E. 372; Steel *v.* State, 26 Ind. 82; Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36; Sourwine *v.* McRoy Clay Works, 42 Ind. App. 358, 85 N. E. 782.

Iowa.— Clark *v.* American Express Co., 130 Iowa 254, 106 N. W. 642.

Kansas.— State *v.* Chapman, 33 Kan. 134, 5 Pac. 768.

Kentucky.— Com. *v.* Standard Oil Co., 129 Ky. 744, 112 S. W. 902; Com. *v.* Louisville, etc., R. Co., 112 Ky. 783, 66 S. W. 753, 23 Ky. L. Rep. 1986.

Maine.— Butler *v.* Ricker, 6 Me. 268.

Minnesota.— Ferch *v.* Victoria El. Co., 79 Minn. 416, 82 N. W. 678.

Mississippi.— Adams *v.* Saunders, (1908) 46 So. 960.

Missouri.— State *v.* Butler, 178 Mo. 272, 77 S. W. 560; State *v.* Canton, 43 Mo. 48; Riddick *v.* Territory, 1 Mo. 147; Casey *v.* St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419.

Nevada.— *Ex p.* Rickey, (1909) 100 Pac. 134.

New Jersey.— Lair *v.* Killmer, 25 N. J. L. 522; Camden, etc., R., etc., Co. *v.* Briggs, 22 N. J. L. 623; Broadwell *v.* Conger, 2 N. J. L. 210.

New York.— People *v.* Weinstock, 193 N. Y. 481, 86 N. E. 547 [*reversing* 117 N. Y. App. Div. 168, 102 N. Y. Suppl. 349]; People *v.* Briggs, 193 N. Y. 457, 86 N. E. 522; People *v.* Friedman, 132 N. Y. App. Div. 61, 116 N. Y. Suppl. 538; People *v.* Hemleb, 127 N. Y. App. Div. 356, 111 N. Y. Suppl. 690; People *v.* Sturgis, 121 N. Y. App. Div. 407, 106 N. Y. Suppl. 61; Hoboken Beef Co. *v.* Hand, 104 N. Y. App. Div. 390, 93 N. Y. Suppl. 834; Sprague *v.* Birdsall, 2 Cow. 419; Jones *v.* Estis, 2 Johns. 379.

North Carolina.— Nance *v.* Southern R. Co., 149 N. C. 366, 63 S. E. 116, holding that where the penal clause of a statute is less comprehensive than the body of the act, the courts will neither extend the penalties provided for to a class of persons not within the clause, even though there is a manifest oversight of the legislature, nor will they strike words from the clause in order to reach a class of persons excluded therefrom.

Ohio.— Hall *v.* State, 20 Ohio 7; State *v.* Oak Harbor Gas Co., 18 Ohio Cir. Ct. 751, 4 Ohio Cir. Dec. 158; State *v.* Fennessy, 10 Ohio Dec. (Reprint) 608, 22 Cinc. L. Bull. 198.

Pennsylvania.— Warner *v.* Com., 1 Pa. St. 154, 44 Am. Dec. 114; Dawson *v.* Shaw, 28 Pa. Super. Ct. 563; Com. *v.* Taggert, 3 Brewst. 340; Com. *v.* Liller, 10 Lanc. Bar 188.

South Carolina.— State *v.* Solomons, 3 Mill 96.

Texas.— Texas, etc., R. Co. *v.* Blocker, 48 Tex. Civ. App. 100, 106 S. W. 718.

Virginia.— Jennings *v.* Com., 109 Va. 821, 63 S. E. 1080, 21 L. R. A. N. S. 265; Kloss *v.* Com., 103 Va. 864, 49 S. E. 655.

West Virginia.— Diddle *v.* Continental Casualty Co., 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. N. S. 779.

Wisconsin.— State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

United States.— Aicardi *v.* Alabama, 19 Wall. 635, 22 L. ed. 215; Martin *v.* U. S., 168 Fed. 198, 93 C. C. A. 484 [*reversing* 7 Indian Terr. 451, 104 S. W. 678]; U. S. *v.* Louisville, etc., R. Co., 165 Fed. 936; U. S. *v.* Twenty Boxes of Corn Whisky, 133 Fed. 910, 67 C. C. A. 214 [*affirming* 123 Fed. 135]; U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487; Andrews *v.* U. S., 1 Fed. Cas. No. 381, 2 Story 202; Ferrett *v.* Atwill, 8 Fed. Cas. No. 4,747, 1 Blatchf. 151, 4 N. Y. Leg. Obs. 215, 294; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267 (holding that congress may declare a forfeiture for non-payment of taxes that will take effect *ipso jure*; but a statute will not be so construed unless such intention clearly appears); U. S. *v.* Clark, 25 Fed. Cas. No. 14,804, 1 Gall. 497; U. S. *v.* Clayton, 25 Fed. Cas. No. 14,814, 2 Dill. 219.

England.— Dickenson *v.* Fletcher, L. R. 9 C. P. 1, 43 L. J. M. C. 25, 29 L. T. Rep. N. S. 540; Harrison *v.* Southcote, 1 Atk. 537, 26 Eng. Reprint 333; Lloyd *v.* Rosbee, 2 Campb. 453, 11 Rev. Rep. 764; Stephenson *v.* Higginson, 3 H. L. Cas. 638, 10 Eng. Reprint 252; Rex *v.* Harvey, 1 Wils. C. P. 164, 95 Eng. Reprint 551.

Canada.—Farquharson *v.* Imperial Oil Co., 30 Can. Sup. Ct. 188 [*reversing* 29 Ont. 206]; Reg. *v.* Booth, 3 Ont. 144 [*affirming* 9 Ont. Pr. 452].

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

The reason of the principle is to establish a certain rule by conformity to which mankind may be safe and the discretion of the judge limited. Daggett *v.* State, 4 Conn. 60, 10 Am. Dec. 100; Cearfoss *v.* State, 42 Md. 403; State *v.* Woodruff, 68 N. J. L. 89, 52 Atl. 294; U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118.

Penal statutes can have no operation outside the state enacting them, nor be enforced in any other jurisdiction. Kennealy *v.* Leary, 67 N. J. L. 435, 51 Atl. 475.

Statutes punishing misdemeanors will usually be construed with less strictness than those punishing a higher grade of offenses. McGowan *v.* State, 9 Yerg. (Tenn.) 184 (holding that a statute passed at a time when all kinds of gaming were punished as misdemeanors authorizing the courts to construe all acts against gaming remedially is not applicable to a subsequent statute making certain kinds of gaming felonies); Randolph *v.* State, 9 Tex. 521.

Accumulative penalties.—As a general rule penal statutes will be so construed as to permit the recovery of but one penalty for all acts prior to the bringing of the action

in order to work exemption from their penalties.[47] Such statutes are to be interpreted by the aid of all the ordinary rules for the construction of statutes, and with the cardinal object of ascertaining the intention of the legislature.[48] But,

(Fisher *v.* New York Cent., etc., R. Co., 46 N. Y. 644; Sturgis *v.* Spofford, 45 N. Y. 446; Washburn *v.* McInroy, 7 Johns. (N. Y.) 134; Parks *v.* Nashville, etc., R. Co., 13 Lea (Tenn.) 1, 49 Am. Rep. 655; Gulledge *v.* Missouri Pac. R. Co., 3 Tex. App. Civ. Cas. § 168), unless the language of the statute clearly expresses a contrary intent (Johnson *v.* Hudson River R. Co., 2 Sweeny (N. Y.) 298; Deyo *v.* Rood, 3 Hill (N. Y.) 527; Pittsburgh, etc., R. Co. *v.* Moore, 33 Ohio St. 384, 31 Am. Rep. 543; Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722). See PENALTIES, 30 Cyc. 1339.

47. *District of Columbia.*— District of Columbia *v.* Dewalt, 31 App. Cas. 326.

Indiana.— State *v.* Goodwin, 169 Ind. 265, 82 N. E. 459, holding that while the rule of strict construction applies generally to criminal statutes, the excessively strict construction that formerly prevailed has been so modified as to look to the legislative intent when plainly manifested; courts, on the one hand, refusing to hold those not clearly brought within the scope of the statute, and, on the other hand, refusing, by radical refinement or unreasonable, incongruous construction, to discharge those plainly within its scope.

Maine.— State *v.* J. P. Bass Pub. Co., 104 Me. 288, 71 Atl. 894, 20 L. R. A. N. S. 495.

New Hampshire.— Pike *v.* Jenkins, 12 N. H. 255, holding that courts are not to narrow the construction of penal statutes, but are to give effect, as near as may be, to the plain meaning of words; and, where they are doubtful, are to adopt the sense that best harmonizes with the context, and the apparent policy and objects of the legislature.

Ohio.— Conrad *v.* State, 75 Ohio St. 52, 78 N. E. 957, 6 L. R. A. N. S. 1154.

Pennsylvania.— Bartolett *v.* Achey, 38 Pa. St. 273.

South Carolina.— Mills *v.* Southern R. Co., 82 S. C. 242, 64 S. E. 238.

United States.— U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

48. *Alabama.*—Walton *v.* State, 62 Ala. 197; Huffman *v.* State, 29 Ala. 40 (holding that it is the duty of the court, while disclaiming the right to extend a criminal statute to cases out of its letter, to apply it to every case clearly within the mischief or cause of making it, where its words are broad enough to embrace such case); Foster *v.* Blount, 18 Ala. 687 (holding that the rule that where in penal statutes general words follow an enumeration of words of a particular and specific meaning such general words are to be held as applying only to persons or things of the same kind as those designated by the particular words is but a rule of construction, to enable the court to ascertain the intention of the legislature, and, when that intention is apparent, can no more be allowed to govern in the exposition of penal than any other statutes).

Connecticut.— Rawson *v.* State, 19 Conn. 292.

District of Columbia.— Tyner *v.* U. S., 23 App. Cas. 324; U. S. *v.* Guiteau, 1 Mackey 498, 47 Am. Rep. 247, holding that penal statutes are to be so construed as to effectuate the intention of complete protection against the crime, if their ordinary and reasonable meaning permit such construction.

Illinois.— Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; Zeller *v.* White, 106 Ill. App. 183 [*affirmed* in 208 Ill. 518, 70 N. E. 669, 100 Am. St. Rep. 243].

Indiana.— Groff *v.* State, 171 Ind. 547, 85 N. E. 769; Boyer *v.* State, 169 Ind. 691, 83 N. E. 350; State *v.* Kiley, 36 Ind. App. 513, 76 N. E. 184.

Louisiana.— State *v.* Callahan, 47 La. Ann. 444, 17 So. 50.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Massachusetts.— Com. *v.* Loring, 8 Pick. 370.

Mississippi.— Bobo *v.* Mississippi Delta Levee Com'rs, 92 Miss. 792, 46 So. 819.

Missouri.— State *v.* Green, 24 Mo. App. 227.

New Jersey.— State *v.* Hand, 71 N. J. L. 137, 58 Atl. 641 (holding that a construction of a statute which would place it in the power of the transgressor to defeat by an evasion the object of the law will not be favored); Stricker *v.* Pennsylvania R. Co., 60 N. J. L. 230, 37 Atl. 776.

New York.— Sickles *v.* Sharp, 13 Johns. 497.

Pennsylvania.— Philadelphia *v.* Davis, 6 Watts & S. 269.

Texas.—International, etc., R. Co. *v.* Voss, (Civ. App. 1908) 109 S. W. 984; Braun *v.* State, 40 Tex. Cr. 236, 49 S. W. 620, holding that, in construing a revised penal code, the court may look to the provisions of a revised civil code, adopted by the same legislature, relating to the same subject.

Vermont.— Hardwick *v.* Vermont Tel., etc., Co., 70 Vt. 180, 40 Atl. 169.

United States.— Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508]; Bolles *v.* Outing Co., 175 U. S. 262, 20 S. Ct. 94, 44 L. ed. 156 [*affirming* 77 Fed. 966, 23 C. C. A. 594] (holding that if the language of a penal statute is plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of defendant than it would if the statute were remedial); U. S. *v.* Hartwell, 6 Wall. 385, 18 L. ed. 830; U. S. *v.* Briggs, 9 How. 351, 13 L. ed. 170 (holding that where

if the acts alleged do not come clearly within the prohibition of the statute, its scope will not be extended to include other offenses than those which are clearly described and provided for;[49] and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of defendant.[50] So they will be construed to refer solely to the commission of acts

the words of the enacting clause of a statute, even a penal statute, are more general than the title, the enacting clause governs); The Emily, 9 Wheat. 381, 6 L. ed. 116; U. S. *v.* Wiltberger, 5 Wheat. 76, 5 L. ed. 37; U. S. *v.* Williams, 159 Fed. 310 (holding that while penal statutes must be strictly construed, yet, if the act comes within the spirit and within the reasonable interpretation of the letter of the statute, it is sufficient, although there may be a literal interpretation that might be put on the statute which would not include the case); U. S. *v.* Lonabaugh, 158 Fed. 314; McInerney *v.* U. S., 143 Fed. 729, 74 C. C. A. 655; Peonage Cases, 123 Fed. 671 (holding that statutes imposing penalties for the invasion of the rights of the citizen in order to protect him in his liberty and happiness are not subjects of disfavor in the law, and are not construed with the same strictness or on the same footing as those which regulate or restrain the exercise of a natural right or forbid the doing of things not intrinsically wrong); Bryant *v.* U. S., 105 Fed. 941, 45 C. C. A. 145; Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722; *In re* Coy, 31 Fed. 794; The Harriet, 11 Fed. Cas. No. 6,099, 1 Story 251 [*affirming* 11 Fed. Cas. No. 6,100, 1 Ware 348]; U. S. *v.* Athens Armory, 24 Fed. Cas. No. 14,473, 2 Abb. 129, 35 Ga. 344 (holding that even in determining the construction of a statute authorizing a confiscation of property for an offense by its owner, words are not to be confined to a strict technical sense, when so doing will clearly defeat the evident intent of the statute); U. S. *v.* Winn, 28 Fed. Cas. No. 16,740, 3 Sumn. 209 (holding that in the construction of penal statutes, the proper course is to search out and follow the true intent of the legislature, and to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature).

Canada.—Walsh *v.* Trebilcock, 23 Can. Sup. Ct. 695 [*overruling* Reg. *v.* Dillon, 10 Ont. Pr. 352].

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

49. *Alabama.*— Gunter *v.* Leckey, 30 Ala. 591.

Connecticut.— Rawson *v.* State, 19 Conn. 292.

Illinois.— Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 75 N. E. 368.

Indiana.— Western Union Tel. Co. *v.* Axtell, 69 Ind. 199 (holding that a court cannot create a penalty by construction, but must avoid it by construction unless it is brought within the letter and the necessary meaning of the act creating it); Indianapolis, etc., R. Co. *v.* Kinney, 8 Ind. 402.

Iowa.—Young *v.* Madison County, 137 Iowa 515, 115 N. W. 23; Hanks *v.* Brown, 79 Iowa 560, 44 N. W. 811; Bond *v.* Wabash, etc., R. Co., 67 Iowa 712, 25 N. W. 892.

Louisiana.— State *v.* Whetstone, 13 La. Ann. 376.

Maine.— State *v.* Peabody, 103 Me. 327, 69 Atl. 273; State *v.* Wallace, 102 Me. 229, 66 Atl. 476.

Mississippi.— Hatton *v.* State, 92 Miss. 651, 46 So. 708.

Missouri.— State *v.* Jaeger, 63 Mo. 403 (holding that where one class of persons is designated as subject to the penalties of the statute, persons not belonging to such class should be deemed exonerated); Pollard *v.* Missouri, etc., Tel. Co., 114 Mo. App. 533, 90 S. W. 121.

Nebraska.— McCormick Harvesting Mach. Co. *v.* Mills, 64 Nebr. 166, 89 N. W. 621.

New York.— William Fox Amusement Co. *v.* McClellan, 62 Misc. 100, 114 N. Y. Suppl. 594; New York Health Dept. *v.* Owen, 42 Misc. 221, 85 N. Y. Suppl. 397 [*affirmed* in 94 N. Y. App. Div. 425, 88 N. Y. Suppl. 184].

North Carolina.— Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 59 Am. Rep. 250.

Ohio.— Hall *v.* State, 20 Ohio 7, holding that penal statutes of a local character, referring to persons, places, or things, unless otherwise expressed, are to be confined to such persons, places, or things as existed at the time of their passage.

Oklahoma.— Geneseo First Nat. Bank *v.* National Live Stock Bank, 13 Okla. 719, 76 Pac. 130.

United States.— The Ben R., 134 Fed. 784, 67 C. C. A. 290; *In re* McDonough, 49 Fed. 360 (holding that a penal statute cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose for which it was enacted); U. S. *v.* Starn, 17 Fed. 435; French *v.* Foley, 11 Fed. 801; The Enterprise, 8 Fed. Cas. No. 4,499, 1 Paine 32; U. S. *v.* Twenty-Four Coils of Cordage, 28 Fed. Cas. No. 16,566, Baldw. 502 [*affirming* 28 Fed. Cas. No. 16,573, Gilp. 299]. *Compare* Johnson *v.* Southern Pac. Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. ed. 363 [*reversing* 117 Fed. 462, 54 C. C. A. 508].

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

Criminal statutes cannot be extended to cases not included within the clear and obvious import of their language. Young *v.* State, 58 Ala. 358; State *v.* Lovell, 23 Iowa 304; State *v.* Peters, 37 La. Ann. 730; Remmington *v.* State, 1 Oreg. 281; Horner *v.* State, 1 Oreg. 267; U. S. *v.* Clayton, 25 Fed. Cas. No. 14,814, 2 Dill. 219.

50. *Alaska.*— U. S. *v.* Doo-noch-keen, 2 Alaska 624.

Connecticut.— Daggett *v.* State, 4 Conn. 60, 10 Am. Dec. 100.

Georgia.— Austin *v.* State, 71 Ga. 595; Gibson *v.* State, 38 Ga. 571, holding that

within the state.[51] In order to enforce a penalty against a person, he must be brought clearly within both the spirit [52] and the letter of the statute;[53] and a private individual who seeks to recover a penalty imposed by statute must bring himself clearly within the terms of the statute,[54] and must pursue the method pointed out by the statute in all possible strictness.[55] In some states the common-

penal statutes are to receive a strict construction in favor of life.

Indiana.— Laporte Carriage Co. *v.* Sullender, 165 Ind. 290, 75 N. E. 277; Lagler *v.* Buie, 42 Ind. App. 592, 85 N. E. 36.

Iowa.— Rohlf *v.* Kasemeier, 140 Iowa 182, 118 N. W. 276, 23 L. R. A. N. S. 1284.

Nebraska.— State *v.* Dailey, 76 Nebr. 770, 107 N. W. 1094.

New York.— People *v.* Craig, 195 N. Y. 190, 88 N. E. 38 [*reversing* 129 N. Y. App. Div. 851, 114 N. Y. Suppl. 833 (*affirming* 60 Misc. 529, 112 N. Y. Suppl. 781)]; New York Fire Dept. *v.* Braender, 14 Daly 53, 3 N. Y. St. 580.

Pennsylvania.— Dawson *v.* Shaw, 28 Pa. Super. Ct. 563; Philadelphia *v.* Costello, 17 Pa. Super. Ct. 339; Com. *v.* Hickey, 2 Pars. Eq. Cas. 317.

United States.— Chase *v.* Curtis, 113 U. S. 452, 5 S. Ct. 554, 28 L. ed. 1038; The Enterprise, 8 Fed. Cas. No. 4,499, 1 Paine 32; U. S. *v.* Reese, 27 Fed. Cas. No. 16,137, 5 Dill. 405.

England.— Graff *v.* Evans, 8 Q. B. D. 373, 46 J. P. 262, 51 L. J. M. C. 25, 46 L. T. Rep. N. S. 347, 30 Wkly. Rep. 381.

Canada.— McCaskill *v.* Paxton, Hodg. El. Rep. (U. C.) 304.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

Must contain a definite and certain provision for punishment in every case where the duties enjoined by it were ignored. Black L. Dict.; Bouvier L. Dict. [both *quoted* in Nebraska Nat. Bank *v.* Walsh, 68 Ark. 433, 436, 59 S. W. 952, 82 Am. St. Rep. 301].

A proviso in a penal statute which is favorable to defendant is to be liberally interpreted in his behalf. Dawson *v.* Shaw, 28 Pa. Super. Ct. 563; Philadelphia *v.* Costello, 17 Pa. Super. Ct. 339.

51. *In re* Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L. R. A. N. S. 892.

52. Rex *v.* Mackintosh, 2 U. C. Q. B. O. S. 531.

53. *Connecticut.*— Leonard *v.* Bosworth, 4 Conn. 421, holding that to subject a party to a penalty for violation of a statute, it is not sufficient that the offense is within the mischief if it be not within the literal construction of the statute.

Louisiana.— State *v.* King, 12 La. Ann. 593, holding that in construing penal statutes, courts cannot take into view the motives of the law-giver further than they are expressed in the statute.

Maryland.— Cearfoss *v.* State, 42 Md. 403.

Oregon.— State *v.* Fisher, 53 Oreg. 38, 98 Pac. 713.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

United States.— U. S. *v.* Sheldon, 2 Wheat. 119, 4 L. ed. 199 (holding that a law prohibiting the transportation of provisions to an enemy in any wagon or otherwise is not infringed by driving fat oxen on foot); Field *v.* U. S., 137 Fed. 6, 69 C. C. A. 568 (holding that the courts may not lawfully extend a penal statute by interpretation to a class of persons who were excluded from its effect by its terms, for the reason that their acts may be as mischievous as those of the class whose deeds it denounces); U. S. *v.* Ragsdale, 27 Fed. Cas. No. 16,113, Hempst. 479 (holding that in the construction of penal statutes, it is a general rule that an offender who is protected by its letter cannot be deprived of its benefit on the ground that his case is not within the spirit and intention of the law); U. S. *v.* Ten Cases Shawls, 28 Fed. Cas. No. 16,448, 2 Paine 162 [*affirming* 28 Fed. Cas. No. 16,447]. But see Bryant *v.* U. S., 105 Fed. 941, 943, 45 C. C. A. 145 [*quoted* and *approved* in Bobo *v.* Yazoo-Mississippi Delta Levee Com'rs, 92 Miss. 792, 812, 46 So. 819], holding that "while it is true that penal statutes should be strictly construed, it is undoubtedly the duty of the courts to look to the mischief intended to be prevented, and to take into consideration the character of the remedy proposed to be applied, in doing which the mere letter must yield to the manifest spirit, and give to the provisions that measure of restriction or expansion which a sound, reasonable reading of the whole requires of each particular."

England.— Rex *v.* Cook, Leach C. C. 123; *In re* International Patent Pulp, etc., Co., 46 L. J. Ch. 625, 37 L. T. Rep. N. S. 351, 25 Wkly. Rep. 822.

Canada.— Macdonell *v.* Macdonald, 8 U. C. C. P. 479; McDonell *v.* Smith, 17 U. C. Q. B. 310.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

54. *Arkansas.*— St. Louis, etc., R. Co. *v.* McClerkin, 88 Ark. 277, 114 S. W. 240.

Missouri.— State *v.* St. Louis, etc., R. Co., 105 Mo. App. 207, 79 S. W. 714.

North Carolina.— Cox *v.* Atlantic Coast Line R. Co., 148 N. C. 459, 62 S. E. 556.

Texas.— Murray *v.* Gulf, etc., R. Co., 63 Tex. 407, 51 Am. Rep. 650.

Wisconsin.— Minneapolis Threshing Mach. Co. *v.* Haug, 136 Wis. 350, 117 N. W. 811.

England.— Bradlaugh *v.* Clarke, 8 App. Cas. 354, 52 L. J. Q. B. 505, 48 L. T. Rep. N. S. 681, 31 Wkly. Rep. 677, holding that where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party aggrieved, and the offense is not against an individual, it belongs to the crown, and the crown alone can maintain a suit for it.

See 44 Cent. Dig. tit. "Statutes," §§ 322, 323.

55. Bennett *v.* Ward, 3 Cai. (N. Y.) 259

law rule requiring penal statutes to be strictly construed has been abolished by statute,[56] and in such jurisdictions they must be construed in accordance with the same principles as other statutes with a view to carrying out the intention of the legislature.[57]

8. Statutes Relating to Remedies and Procedure[58] — a. In General. As a general rule, statutes relating to remedies and procedure are to be construed liberally with a view to the effective administration of justice;[59] and this is especially true of statutes designed to render the methods of procedure more simple and convenient.[60] So statutes extending the right of appeal are remedial and should be liberally construed.[61] But the burden is on plaintiff to show the jurisdiction of the court,[62] and to prove every fact necessary to entitle him to the remedy provided.[63] And statutes which take away, change, or diminish fundamental rights,[64] statutory remedies for rights unknown to the common law,[65] and statutes which provide new and extraordinary remedies[66] must be construed

(holding that where it does not clearly appear from the statute whether the penalty is to be recovered in a summary way or by the ordinary mode of proceeding, the latter method must be adopted); De la Garza *v.* Booth, 28 Tex. 478, 91 Am. Dec. 328; Crane *v.* Lawrence, 25 Q. B. D. 152, 54 J. P. 471, 59 L. J. M. C. 110, 63 L. T. Rep. N. S. 197, 38 Wkly. Rep. 620; Smith *v.* Wood, 24 Q. B. D. 23, 54 J. P. 324, 59 L. J. Q. B. 5, 61 L. T. Rep. N. S. 870, 38 Wkly. Rep. 138.

56. People *v.* Soto, 49 Cal. 67.

Under such a provision in Oklahoma (Wilson Rev. & Annot St. (1903) § 5144) all laws must be liberally construed in furtherance of justice (Morris *v.* Territory, 1 Okla. Cr. 617, 99 Pac. 760, 101 Pac. 111); but if there is a well-founded doubt as to an act being a public offense, especially one not *malum in se*, it should not be declared such (McCord *v.* State, (Cr. App. 1909) 101 Pac. 280).

57. *In re* Mitchell, 1 Cal. App. 396, 82 Pac. 347 (holding that the rule laid down by Pen. Code, § 4, that all the provisions of such code are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice, applies to penal statutes not a part of the code); Com. *v.* Trent, 117 Ky. 34, 77 S. W. 390, 25 Ky. L. Rep. 1180; Com. *v.* Davis, 12 Bush (Ky.) 240; State *v.* Dunn, 53 Oreg. 304, 99 Pac. 278, 100 Pac. 258; State *v.* Elliot, 34 Tex. 148, 151 (holding that "the reason for this rule having passed away, or rather having never existed here, the lawmaking power wisely determined to reverse the rule, to the end that the innocent might be protected and the criminal punished").

58. For statutes providing for attachment see Attachment, 4 Cyc. 400.

59. *Idaho.*— Shields *v.* Johnson, 10 Ida. 454, 79 Pac. 394, holding that statutes authorizing the issuance of injunctions, especially temporary injunctions to hold property *in statu quo* pending the litigation, should be liberally construed.

Illinois.— Coats *v.* Barrett, 49 Ill. App. 275, holding that the statutory provision that "no judgment shall be reversed in the Supreme Court for mere error in form" applies also to the appellate courts created after the enactment of such statute.

Indiana.— State *v.* Blair, 32 Ind. 313.

Maryland.— Mitchell *v.* Mitchell, 1 Gill 66.

Missouri.— Kansas City *v.* Summerwell, 58 Mo. App. 246.

New Hampshire.— Fairbanks *v.* Antrim, 2 N. H. 105.

New Jersey.— Hoguet *v.* Wallace, 28 N. J. L. 523.

Wisconsin.— Hall *v.* Allen, 31 Wis. 691, holding that Taylor St. p. 1214, § 15, empowering the circuit court to take proof of the execution and validity of a lost will, is remedial, and must be liberally construed.

Canada.— McMicken *v.* Fonseca, 6 Manitoba 370.

See 44 Cent. Dig. tit. "Statutes," § 324.

60. State *v.* Judge Second Dist. Ct., 5 La. Ann. 518 (holding that a general rule of practice, prescribed by the code of practice, applies to cases which may arise under a statute subsequently enacted, unless the statute repeals the rule prescribed); Heman *v.* McNamara, 77 Mo. App. 1.

61. *California.*— Mitchell *v.* California, etc., Steamship Co., 154 Cal. 731, 99 Pac. 202.

Illinois.— People *v.* Sholen, 238 Ill. 203, 87 N. E. 390, holding that a statute which, literally construed, gives an appeal to only one party should be construed, if possible, so as to give the same right to the other party.

Louisiana.— Arceneaux *v.* De Benoit, 21 La. Ann. 673.

Minnesota.— Converse *v.* Burrows, 2 Minn. 229.

New York.— Pearson *v.* Lovejoy, 53 Barb. 407, 33 How. Pr. 193.

See 44 Cent. Dig. tit. "Statutes," § 324.

62. Cain *v.* State, 36 Ind. App. 51, 74 N. E. 1102; *In re* Norwegian St., 81 Pa. St. 349.

63. Banks *v.* Darden, 18 Ga. 318.

64. Crowder *v.* Fletcher, 80 Ala. 219.

Short statutes of limitations are construed strictly. St. Louis, etc., R. Co. *v.* Batesville, etc., Tel. Co., 86 Ark. 300, 110 S. W. 1047. And see Limitations of Actions, 25 Cyc. 988.

65. Crowder *v.* Fletcher, 80 Ala. 219; Ham *v.* The Hamburg, 2 Iowa 460.

66. Palmer *v.* Adams, 22 How. Pr. (N. Y.)

strictly, both as to the cases embraced within their terms and as to the methods to be pursued.[67]

b. Summary Proceedings.[68] All statutes authorizing summary proceedings must be strictly construed,[69] and strict conformity to the statute, in the exercise of the jurisdiction it confers, is essential to the regularity and validity of the proceeding.[70]

9. Revenue Laws.[71] As a general rule, revenue laws, such as laws imposing taxes and licenses,[72] are neither remedial laws, nor laws founded upon any permanent public policy;[73] but, on the contrary, operate to impose burdens upon the public, or to restrict them in the enjoyment of their property and the pursuit of their occupations,[74] and are therefore construed strictly.[75] The provisions of such statutes are not to be extended beyond the clear import of the language used;[76] in order to sustain the tax, it must come clearly within the letter of the statute,[77] and the powers granted to officers charged with its execution must be strictly pursued.[78] So, statutes creating forfeitures, or authorizing sales of prop-

375; Fisher *v.* Kreebel, 1 Leg. Chron. (Pa.) 113; Com. *v.* School Directors, 4 L. T. N. S. (Pa.) 6; Woodward *v.* Alston, 12 Heisk. (Tenn.) 581; Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. 718, 50 C. C. A. 435 [*affirmed* in 190 U. S. 70, 24 S. Ct. 28, 48 L. ed. 101]. See *infra*, VII, B, 8, b.

67. Crowder *v.* Fletcher, 80 Ala. 219; *In re* Norwegian St., 81 Pa. St. 349.

68. **Summary proceedings are** such proceedings as are not according to the courts of the common law (Govan *v.* Jackson, 32 Ark. 553, 557; Phillips *v.* Phillips, 8 N. J. L. 122, 124); or those without the ordinary forms prescribed by law for regular judicial procedure (Western, etc., R. Co. *v.* Atlanta, 113 Ga. 537, 544, 38 S. E. 996, 54 L. R. A. 294).

69. Welman *v.* Harris, 2 Ga. Dec. Pt. II 63; Hale *v.* Burton, Dudley (Ga.) 105.

This rule does not apply to the construction of statutes bearing upon the merits of the case merely because the question arises in summary proceedings. Woodward *v.* Alston, 12 Heisk. (Tenn.) 581.

70. *Ex p.* Buckley, 53 Ala. 42.

71. See Customs Duties, 12 Cyc. 1104; Internal Revenue, 22 Cyc. 1592; and Taxation.

72. State *v.* Wheeler, 23 Nev. 143, 44 Pac. 430 (holding that a statute requiring a license for certain acts and imposing a penalty for the performance of such acts without a license should be construed strictly); Cache County *v.* Jensen, 21 Utah 207, 61 Pac. 303; Brown *v.* Com., 98 Va. 366, 36 S. E. 485.

73. Rice *v.* U. S., 53 Fed. 910, 4 C. C. A. 104.

74. Wilby *v.* State, (Miss. 1908) 47 So. 465; Rice *v.* U. S., 53 Fed. 910, 4 C. C. A. 104.

75. *Iowa.*— National Loan, etc., Co. *v.* Linn County, 138 Iowa 11, 115 N. W. 480.

Pennsylvania.— Com. *v.* Frank, 2 Chest. Co. Rep. 243; Eastburn's Appeal, 2 Chest. Co. Rep. 241.

Wisconsin.— Dean *v.* Charlton, 27 Wis. 522.

United States.— American Net, etc., Co. *v.* Worthington, 141 U. S. 468, 12 S. Ct. 55, 35 L. ed. 821; Hartranft *v.* Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. ed. 1012; U. S. *v.* Isham, 17 Wall. 496, 21 L. ed. 728; Lynch *v.* San Francisco Union Trust Co., 164 Fed. 161, 90 C. C. A. 147; Rice *v.* U. S., 53 Fed. 910, 4 C. C. A. 104; *In re* Gribbon, 53 Fed. 78; Powers *v.* Barney, 19 Fed. Cas. No. 11,361, 5 Blatchf. 202.

England.— Cox *v.* Rabbits, 3 App. Cas. 473, 47 L. J. Q. B. 385, 38 L. T. Rep. N. S. 430, 26 Wkly. Rep. 483; Aiton *v.* Stephen, 1 App. Cas. 456; Partington *v.* Atty.-Gen., L. R. 4 H. L. 100, 38 L. J. Exch. 205, 21 L. T. Rep. N. S. 370; Kingston-upon-Hull Dock Co. *v.* La Marche, 8 B. & C. 42, 6 L. J. K. B. O. S. 216, 2 M. & R. 107, 15 E. C. L. 30; Mersey Docks, etc., Bd. *v.* Lucas, 46 J. P. 388, 51 L. J. Q. B. 114.

See 44 Cent. Dig. tit. "Statutes," § 326.

76. Maysville *v.* Maysville St. R., etc., Co., 128 Ky. 673, 108 S. W. 960, 32 Ky. L. Rep. 1366; McNally *v.* Field, 119 Fed. 445; U. S. *v.* Wigglesworth, 28 Fed. Cas. No. 16,690, 2 Story 369.

77. Oriental Bank *v.* Wright, 5 App. Cas. 842, 50 L. J. P. C. 1, 43 L. T. Rep. N. S. 177; Pryce *v.* Monmouthshire Canal, etc., Co., 4 App. Cas. 197, 49 L. J. Exch. 130, 40 L. T. Rep. N. S. 630, 27 Wkly. Rep. 666; Partington *v.* Atty.-Gen., L. R. 4 H. L. 100, 122, 38 L. J. Exch. 205, 21 L. T. Rep. N. S. 370 (holding that "if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute"); *In re* Thorley, [1891] 2 Ch. 613, 60 L. J. Ch. 537, 64 L. T. Rep. N. S. 515, 39 Wkly. Rep. 565; Reg. *v.* Mallow Union, 12 Ir. C. L. 35; Shaw *v.* Ruddin, 9 Ir. C. L. 214; South Staffordshire Waterworks Co. *v.* Barrow, 61 J. P. 661; Ingram *v.* Drinkwater, 44 L. J. P. C. 83, 32 L. T. Rep. N. S. 746.

78. Com. *v.* Glover, (Ky. 1909) 116 S. W.

erty [79] for non-payment of taxes, must be construed strictly in favor of the citizen, and provisions allowing redemption from such sales should be construed liberally in his favor.[80] The doctrine of the strict construction of revenue statutes, however, should be applied with due regard to the intention of the legislature as expressed in the statute, and with a view to promoting the object of the statute; [81] and especially those provisions of the statute which are intended to prevent fraud should receive a liberal construction.[82] In pursuance of the beneficent public policy which favors equality in the distribution of the burdens of government, all exemptions of persons or property from taxation are to be construed strictly against the exemption; [83] the intention to create exemptions must affirmatively appear and cannot be raised by implication.[84]

10. Special or Local Laws.[85] Special or local statutes are usually passed at the instance of parties interested, and for the benefit of particular persons or localities, rather than for the general welfare, and are therefore to be construed strictly, both as to the extent of the territory in which they are operative [86] and also as to the powers granted by them.[87]

11. Private Acts.[88] The same general rules are to be applied to the construction of both public and private statutes.[89] Those private statutes, however,

769; Augusta Commercial Bank *v.* Sandford, 103 Fed. 98; Minturn *v.* Smith, 17 Fed. Cas. No. 9,647, 3 Sawy. 142.

79. Augusta Commercial Bank *v.* Sandford, 103 Fed. 98.

80. Mosser *v.* Moore, 56 W. Va. 478, 49 S. E. 537; Parker *v.* Overman, 18 How. (U. S.) 137, 15 L. ed. 318; McClung *v.* Ross, 5 Wheat. (U. S.) 116, 5 L. ed. 46; Williams *v.* Peyton, 4 Wheat. (U. S.) 77, 4 L. ed. 518. See *supra*, VII, B, 6; and Taxation.

81. Cornwall *v.* Todd, 38 Conn. 443; Eliot *v.* Prime, 98 Me. 48, 56 Atl. 207; *In re* De Lancey, L. R. 4 Exch. 345, 38 L. J. Exch. 193 [*affirmed* in L. R. 5 Exch. 102, 39 L. J. Exch. 76, 22 L. T. Rep. N. S. 239, 18 Wkly. Rep. 468] (holding that the doctrine of the court of equity that money directed to be laid out in land is land does not extend to the interpretation of statutes imposing duties on personal estate); South Staffordshire Waterworks Co. *v.* Barrow, 61 J. P. 661 (holding that the cases which have decided that taxing acts are to be construed strictly probably meant little more than this — that, inasmuch as there was not any *a priori* liability in any subject to pay any particular tax, or any antecedent relationship between the taxpayer and the taxing authority, no reason founded on any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequences).

Previous decisions must be followed, especially in a fiscal matter, where consistency and certainty are of universal importance. Inland Revenue Com'rs *v.* Harrison, L. R. 7 H. L. 1, 43 L. J. Exch. 138, 30 L. T. Rep. N. S. 274, 22 Wkly. Rep. 559.

82. Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559; Ten. Cases of Opium, 23 Fed. Cas. No. 13,828, Deady 62. See *supra*, VII, B, 2.

83. People *v.* Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198; Northwestern University *v.* People, 80 Ill. 333, 22 Am. Rep. 187; Com. *v.* Nunan, 126 Ky. 698, 104 S. W. 731, 31 Ky. L. Rep. 1090.

84. *In re* Walker, 200 Ill. 566, 66 N. E. 144; Cooper Hospital *v.* Camden, 70 N. J. L. 478, 57 Atl. 260, holding that to create an exemption from taxation it must clearly appear that the state surrendered its right to impose the burden.

85. For distinction between special or local statutes and general or public statutes see *supra*, III, A, 4.

86. State *v.* Parker, 57 N. J. L. 360, 31 Atl. 214, holding that the act of May 11, 1886 (Suppl. Revision, p. 122), providing for the protection of oyster planting and cultivating in the county of Ocean, does not apply to territory subsequently annexed to that county.

87. Aurora, etc., R. Co. *v.* Lawrenceburgh, 56 Ind. 80; Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867 (holding that where a general law is enacted giving an option to county boards to put the same in effect in their respective counties, but giving them no power to repeal their action, having given effect to the law in a county, the county board cannot abolish such effect); Campbell *v.* Lang, 1 Eq. Rep. 98, 1 Macq. 451. But see Reg. *v.* London, etc., R. Co., 46 L. J. M. C. 102, 35 L. T. Rep. N. S. 626, 25 Wkly. Rep. 59 [*affirmed* in 4 App. Cas. 467, 48 L. J. M. C. 57, 41 L. T. Rep. N. S. 160, 28 Wkly. Rep. 52], holding that a partial exemption from the payment of rates for borough improvement purposes, conceded by a local act, is not taken away by the mere passing of public general acts for similar purposes.

88. For distinction between private statutes and general or public statutes see *supra*, III, A, 4.

89. Bartlett *v.* Morris, 9 Port. (Ala.) 266; Edinburgh, etc., R. Co. *v.* Wauchope, 8 Cl. & F. 710, 3 R. & Can. Cas. 233, 8 Eng. Reprint 279; Dover Gas-Light Co. *v.* Dover, 7 De G. M. & G. 545, 1 Jur. N. S. 812, 56 Eng.

which are passed for the accommodation of particular persons or corporations,[90] rather than for the general good, are to be construed strictly, and so as not to affect the rights or privileges of others,[91] unless such effect is required by express words or by necessary implication.[92]

C. Time of Taking Effect[93] — **1. Constitutional and General Statutory Provisions.** The practice now almost universally prevails of fixing by general constitutional[94] or statutory[95] provisions some definite time subsequent to its passage, when, in the absence of a special provision fixing a different time,[96] every statute, or at least every statute of a general nature,[97] shall take effect.[98] Com-

Ch. 423, 44 Eng. Reprint 212 (holding that an act empowering a company to contract, for purposes of public advantage, ought not to receive a narrow construction); Eton College *v.* Winchester, Lofft 401, 98 Eng. Reprint 715.

90. Waiver of statutory rights.—A statute or charter having the force of a statute may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. Goldsmid *v.* Great Eastern R. Co., 25 Ch. D. 511, 53 L. J. Ch. 371, 49 L. T. Rep. N. S. 717, 32 Wkly. Rep. 341.

91. Rothes *v.* Kirkcaldy, etc., Waterworks Com'rs, 7 App. Cas. 707.

92. Hood *v.* Dighton Bridge, 3 Mass. 263.

93. For vote as to time of taking effect see *supra*, II, C.

For time of taking effect of constitutions see Constitutional Law, 8 Cyc. 743.

For judicial notice of time of taking effect see Evidence, 16 Cyc. 889.

For time of taking effect of treaties see Treaties.

94. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40 (holding that under Const. art. 1, § 25, which declares that no law shall be passed the taking effect of which shall be made to depend on any authority except as provided in the constitution, the pure food law (Acts (1899), p. 189) providing that within ninety days after its passage the board of health shall prepare regulations fixing minimum standards of foods and drugs, defining specific adulterations, etc., is not violative of the constitution as the statute becomes law without action on the part of the board of health, which is only charged with its enforcement); Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

95. Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 13 So. 564; Andrews *v.* St. Louis Tunnel Co., 16 Mo. App. 299; Eliot *v.* Cranston, 10 R. I. 88; Day *v.* McGinnis, 1 Heisk. (Tenn.) 310, holding that under the code, section 162, providing that no general law shall go into operation or have any binding effect until the expiration of forty days after the adjournment without day, unless otherwise provided in the act itself, an adjournment to a day certain to hold a special session does not put acts passed in operation until forty days from the end of the latter session.

Constitutional and statutory provisions in regard to the procedure required for the enactment of a law have no application to the time when it shall take effect (Harrison *v.* Colgan, 148 Cal. 69, 82 Pac. 674), and a declaration of "an imperative public necessity that the constitutional rules requiring bills to be read on several days be suspended and this act placed on its final passage and it is so enacted" related to the method of passing the bill and not to the time of its taking effect (Wickes-Nease *v.* Watts, 30 Tex. Civ. App. 515, 70 S. W. 1001).

A resolution of the general assembly, authorizing a poor tort debtor to take the poor debtor's oath with the same effect as if he had been committed to jail for a contract debt, is not a statute within Gen. St. c. 22, § 19, prescribing the time when a statute shall take effect. Berry *v.* Viall, 12 R. I. 18.

For the common-law rule as to time of statutes taking effect see *infra*, VII, C, 5–10.

96. For express provisions see *infra*, VII, C, 2.

97. "General law," as used in Wis. Const. art. 6, § 21, declaring when acts take effect, etc., includes an act regulating the disposal of a part of the public funds of the state, previously regulated by general laws. State *v.* Hoeflinger, 31 Wis. 257. So the act of March 4, 1834, of the Maine legislature, annexing a part of one town to another, is a public act, and is to be construed accordingly as to the time of its taking effect (New Portland *v.* New Vineyard, 16 Me. 69); but an act repealing the charter of a town is not "a law of a general nature" within the meaning of Tenn. Const. art. 2, § 20, which cannot take effect for forty days after its passage (Johnson *v.* State, 3 Lea (Tenn.) 469, 31 Am. Rep. 648).

Private statutes.— The provision in Me. Rev. St. c. 1, § 1, that every statute shall take effect in thirty days from the recess of the legislature passing the same, unless otherwise prescribed, extends to private statutes. Cooper *v.* Curtis, 30 Me. 488. Under the Delaware statute (1843), the record of a private act of assembly dated from the time of lodging a copy in the recorder's office to be recorded; a private act was therefore not void, although not actually recorded within the year, if deposited in due time. Jefferson *v.* Stewart, 4 Harr. (Del.) 82.

98. The reason for the adoption of these provisions was the hardships and injustice entailed by the operation of the former rules by which statutes took effect either from the first day of the session or from their passage. Price *v.* Hopkins, 13 Mich. 318; Halbert *v.* San Saba Springs Land, etc., Assoc., 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193. See *infra*, VII, C, 4, 6.

mon provisions of this kind are that the statute shall take effect at a certain fixed day,[99] or a certain length of time after its passage [1] or approval,[2] or after the end of the legislative session,[3] or upon its publication,[4] or the proclamation of the governor announcing it in force.[5] Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose,[6] and all acts purporting to have been done under it prior to that time are void.[7]

2. Express Provisions of Statute [8] — a. In General. In the absence of constitutional restrictions,[9] the legislature is free to fix in each act the time it shall take effect;[10] and may therefore provide that it shall take effect from its pas-

99. People *v.* Rose, 166 Ill. 422, 47 N. E. 64; Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

1. State *v.* Little Rock, etc., R. Co., 31 Ark. 701; Files *v.* Robinson, 30 Ark. 487; Whitehead *v.* Wells, 29 Ark. 99; *Ex p.* Sohncke, 148 Cal. 262, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L. R. A. 813; Harrison *v.* Colgan, 148 Cal. 69, 82 Pac. 674; Swann *v.* Buck, 40 Miss. 268; Johnson *v.* State, 3 Lea (Tenn.) 469, 31 Am. Rep. 648.

2. Ross *v.* New England Mortg. Security Co., 101 Ala. 362, 13 So. 564. See *infra*, VII, C, 6.

3. *Alabama.*— Glenn *v.* State, 158 Ala. 44, 48 So. 505.

Maine.— Cooper *v.* Curtis, 30 Me. 488.

Tennessee.— Day *v.* McGinnis, 1 Heisk. 310.

Texas.— Halbert *v.* San Saba Springs Land, etc., Assoc., 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193; Wickes-Nease *v.* Watts, 30 Tex. Civ. App. 515, 70 S. W. 1001.

Washington.— State *v.* Rogers, 24 Wash. 417, 64 Pac. 515, construing Const. art. 2, § 31, providing that no law except appropriation bills shall take effect till ninety days after adjournment of the session unless in case of emergency the legislature shall otherwise direct. See *infra*, VII, C, 5.

4. State *v.* Stevenson, 2 Ark. 260; New Portland *v.* New Vineyard, 16 Me. 69. See *infra*, VII, C, 7.

5. State *v.* Stevenson, 2 Ark. 260; State *v.* State Bd. of Pharmacy, 155 Ind. 414, 58 N. E. 531; Hall *v.* Dunn, 52 Oreg. 475, 97 Pac. 811. And see Matter of Chardavoyne, 5 Dem. Surr. (N. Y.) 466, giving a history of the changes of rule in England, and a summary of the rules in the different states of the Union.

6. Whitney *v.* Haggard, 60 Cal. 513; Speegle *v.* Joy, 60 Cal. 278; Peachey *v.* Calaveras County, 59 Cal. 548 (all three holding that the act of March 30, 1878, which was to become operative in March, 1880, never went into effect, since Const. art. 22, § 1, which became operative Jan. 1, 1880, provided that all laws in force at the adoption of the constitution and not inconsistent therewith should remain in force, as it was only the acts in force on that day that were kept in existence); Rice *v.* Ruddiman, 10 Mich. 125; State *v.* Northern Pac. R. Co., 36 Mont. 582, 93 Pac. 945, 15 L. R. A. N. S. 134.

7. *California.*— Harrison *v.* Colgan, 148 Cal. 69, 82 Pac. 674; Santa Cruz Water Co. *v.* Kron, 74 Cal. 222, 15 Pac. 772; Miller *v.* Kister, 68 Cal. 142, 8 Pac. 813; People *v.* Johnston, 6 Cal. 673.

Illinois.— People *v.* Rose, 166 Ill. 422, 47 N. E. 64; Iroquois County *v.* Keady, 34 Ill. 293.

Louisiana.— State *v.* Bruno, 48 La. Ann. 1481, 21 So. 30.

Michigan.— Price *v.* Hopkin, 13 Mich. 318.

Texas.— Johnson *v.* State, 35 Tex. Cr. 273, 33 S. W. 232.

The old law remains in force until the new takes effect. Reddington *v.* Waldron, 22 Cal. 185; Cowen *v.* Withrow, 116 N. C. 771, 21 S. E. 676.

8. For date fixed in act see *infra*, VII, C, 8.

9. A constitutional requirement that laws shall be promulgated in the English language does not deprive the legislature of power to make a particular law take effect before its promulgation. Thomas *v.* Scott, 23 La. Ann. 689. The legislature may fix a later time than that required by the constitution for a particular act to take effect. Price *v.* Hopkin, 13 Mich. 318.

Where the provisions in a particular statute conflict with the constitutional rule, the latter prevails. Hill *v.* State, 5 Lea (Tenn.) 725.

10. *In re* Hendricks, 5 N. D. 114, 64 N. W. 110, holding that Laws (1893), c. 74, relating to the revision of the statutes and the publication of the same, and providing, in section 7, that on delivery of the finished copies of the volume to the secretary of state, the governor shall proclaim the acceptance of the volume, and thirty days after the proclamation the statutes shall take effect, and thereafter be in force and be received as evidence of the laws of the state, fixed a date when the laws should go into effect, as well as when they should be received as evidence.

The time a particular statute shall take effect may be fixed by another statute passed at the same session, either as a separate enactment (Honeycutt *v.* St. Louis, etc., R. Co., 40 Mo. App. 674) or by way of amendment to the principal act (Elliott *v.* Lochnane, 1 Kan. 126). And where a statute was silent as to the time when it should take effect, but a supplemental act passed at the same session provided that the supplement should take effect from the time of its passage, it was held to relate back so as to embrace the time of the operation of the original act. West Feliciana R. Co. *v.* Johnson, 6 Miss. 273.

sage[11] or approval,[12] or at a fixed date,[13] which may be either earlier or later than the date fixed by a general statute,[14] or upon publication,[15] or upon compliance with other requirements fixed by the act.[16] To the extent that the time fixed in the particular statute differs from that fixed by a prior general law, the particular statute, as the latest expression of the legislative will, prevails over the general law.[17] In order, however, for a provision in a particular statute to have the effect of putting a statute in operation at a different time than that fixed by the general rule, such provision must conform to constitutional requirements,[18] and the language must be clear and explicit; it is not sufficient that certain parts of the act might bear such a construction.[19]

b. Emergency Clause. In those jurisdictions in which, under the general rule, statutes do not take effect until some time subsequent to their passage and approval, it is commonly provided that when an emergency exists the legislature may declare a statute in force from its passage.[20] Under such provisions the

11. New Orleans *v.* Holmes, 13 La. Ann. 502; *In re* Merchants Bank, 2 La. Ann. 68; Buhol *v.* Boudousquie, 8 Mart. N. S. (La.) 425; Matter of Kenna, 91 Hun (N. Y.) 178, 36 N. Y. Suppl. 280; State *v.* Mancke, 18 S. C. 81.

12. *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218; State *v.* Reynolds, 24 Utah 29, 66 Pac. 614, holding that where Const. art. 6, § 25, provides that all acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjournment of the session at which it is passed, "unless the Legislature by a vote of two-thirds of all the members elected to each house, shall otherwise direct," the subordinate clause introduced by the conjunction "unless" was intended to modify both of the clauses preceding it; and, where it was provided that a statute should take effect upon approval, it became operative immediately upon approval, without previous publication.

Where the statute provides that it shall take effect immediately it is operative from its final passage (Fairchild *v.* Gwynne, 14 Abb. Pr. (N. Y.) 121 [*reversed* on other grounds in 16 Abb. Pr. 23]), which has been construed to mean its approval by the governor (Matter of Kemeys, 56 Hun (N. Y.) 117, 9 N. Y. Suppl. 182), and applies to a case which was being tried on the day of its passage (Douglass *v.* Seiferd, 18 Misc. (N. Y.) 188, 41 N. Y. Suppl. 289).

13. Charless *v.* Lamberson, 1 Iowa 435, 63 Am. Dec. 457 (holding that where, by express provisions, the code took effect July 1, 1851, "heretofore" and "hereafter" in it refer to that time, and not to the time of its enactment); Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358 (holding that the act of the general assembly of 1827, relative to the construction of limitations over in wills after a "dying without issue," etc., which was ratified on Jan. 7, 1828, and directs that it shall not apply to wills made "before the 15th day of January next," must be construed to speak from the first day of the session, which was in November, 1827; and therefore it went into effect on Jan. 15, 1828).

14. See *supra*, note 13.

15. Hunt *v.* Murray, 17 Iowa 313; State *v.* Topeka, 68 Kan. 177, 74 Pac. 647, holding that where a general act provides that it shall take effect and be in force from and after its publication in the official city paper, it will become operative from and after its publication in the official state paper, under Gen. St. (1901) § 6750, providing that all acts of the legislature taking effect on publication shall be published in the official state paper.

16. Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937.

Where an act is declared to be in effect from the time it is filed with the clerks of the circuit courts in their respective counties, this is an implied direction to the secretary of state to distribute the act to the clerks, and as he will be presumed to have done his duty, the act will be in force in a particular county after the lapse of a reasonable time for the transmission to such county. State *v.* Dunning, 9 Ind. 20; Doe *v.* Collins, 1 Ind. 24.

17. State *v.* Welch, 21 Minn. 22 (holding a provision that an act of the legislature shall take effect and be in force from and after its passage is effectual, and *pro tanto*, a repeal of Gen. St. (1866) c. 4, § 2, directing that no general law shall take effect until published); Baker *v.* Compton, 52 Tex. 252.

18. Mark *v.* State, 15 Ind. 98.

19. *In re* Alexander, 53 Fla. 647, 44 So. 175 (holding that the phrase "from and after the passage of this act," occurring in the beginning of an act, will not put the act into immediate effect in the absence of the usual effective clauses generally observed in the state); Wheeler *v.* Chubbuck, 16 Ill. 361; State *v.* State Bd. of Pharmacy, 155 Ind. 414, 58 N. E. 531 (holding that a provision in one section of a statute declaring that on or after a certain date it shall be unlawful for any one to conduct a pharmacy unless it is in charge of a registered pharmacist under the provisions of the act does not delay the statute taking effect until the date named).

20. State *v.* State R. Commission, 52 Wash. 17, 100 Pac. 179.

Where under a particular provision of the constitution the legislature is authorized to

legislature is the sole judge as to whether an emergency exists,[21] and its declaration is not open to question by the courts.[22] Where, however, such special provisions, permitting the legislature to except certain statutes from the general rule, are found in the constitution, the legislative declaration that an emergency exists must conform to the constitutional requirements,[23] and must be clear, distinct, and unequivocal.[24] A statute containing a valid emergency clause takes

pass acts of a particular nature to take effect at once, such acts may be made to take effect upon their passage without an emergency clause, notwithstanding a general requirement of an emergency clause in acts intended to take effect before a certain time. People *v.* Rose, 166 Ill. 422, 47 N. E. 64.

Where the constitution provides that an emergency measure shall not include certain classes of statutes, these do not take effect at once, even though emergency clauses are attached. Oklahoma City *v.* Shields, (Okla. 1908) 100 Pac. 559. See *infra*, notes 21–25.

21. *Illinois.*—Wheeler *v.* Chubbuck, 16 Ill. 361.

Indiana.— Carpenter *v.* Montgomery, 7 Blackf. 415.

Oklahoma.— *In re* Menefee, (1908) 97 Pac. 1014.

Oregon.— Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115.

South Dakota.— State *v.* Bacon, 14 S. D. 394, 85 N. W. 605.

See 44 Cent. Dig. tit. "Statutes," § 332.

22. Day Land, etc., Co. *v.* State, 68 Tex. 526, 4 S. W. 865.

23. *In re* General Appropriation Bill, 16 Colo. 539, 29 Pac. 379 (holding that a bill lacking an emergency clause and signed by the executive and presiding officers of the two houses does not take effect until the time prescribed by the general rule, although the journals of the houses showed it contained such clause when the final votes were taken); Cain *v.* Goda, 84 Ind. 209, 211 (holding that "the emergency must be declared in the preamble or body of the act itself, and can not be incorporated, with effect, in any other statute"); Mark *v.* State, 15 Ind. 98; Missouri, etc., R. Co. *v.* McGlamory, 92 Tex. 150, 41 S. W. 466 (holding that under Const. art. 3, § 39, providing that no emergency clause shall take effect unless it receive a vote of two thirds of all the members elected to each house, a bill with an emergency clause that receives seventy-eight ayes and eight noes in a house of one hundred and twenty-eight members cannot take effect until the time fixed for bills without such a clause).

An act providing that it shall take effect on and after its passage and approval does not express an emergency under Nebr. Const. art. 3, § 24. State *v.* Adams Express Co., 80 Nebr. 840, 115 N. W. 625; State *v.* Wells, 80 Nebr. 838, 115 N. W. 625; State *v.* Pacific Express Co., 80 Nebr. 823, 115 N. W. 619, 18 L. R. A. N. S. 664. So the phrase "from and after the passage of this act," occurring at the beginning of a statute, does not constitute a sufficient emergency clause. *In re* Alexander, 53 Fla. 647, 44 So. 175.

Referendum.— Under a constitutional provision for the submission of acts to the people before their taking effect "except as to laws necessary for the immediate preservation of the public peace, health or safety," a clause intended to put them in effect before the time prescribed by the general law must not only declare an emergency, but must also set forth such an emergency as described in the above quoted provision of the constitution. Sears *v.* Multnomah County, 49 Oreg. 42, 88 Pac. 522; Kadderly *v.* Portland, 44 Oreg. 118, 147, 74 Pac. 710, 75 Pac. 222. But see State *v.* Bacon, 14 S. D. 394, 85 N. W. 605, holding that under a similar exception of "such laws as are passed for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions," a declaration that "the enactment of the foregoing provision is necessary for the immediate preservation and support of the existing public institutions of this state, and an emergency is hereby declared to exist," was a sufficient declaration of an emergency to make the statute effective from its passage and approval.

24. Wheeler *v.* Chubbuck, 16 Ill. 361; Mark *v.* State, 15 Ind. 98. Under Tex. Const. art. 3, § 39, providing that "no law . . . shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency, expressed [therein], the Legislature shall . . . otherwise direct," and section 32 prescribing the manner in which laws are to be considered and passed, and authorizing such rules to be suspended in case of "imperative public necessity," a clause in an act reciting the existence of "an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and this act placed on its final passage, and it is so enacted," related to the method of passing the bill and not to the time it should take effect. Wickes-Nease *v.* Watts, 30 Tex. Civ. App. 515, 70 S. W. 1001. See also Belcher *v.* State, 39 Tex. Cr. 121, 44 S. W. 1106, 519. But see Jameson *v.* State, 32 Tex. Cr. 385, 24 S. W. 508, holding that the act of March 15, 1893, section 3, reciting that certain conditions create an imperative necessity justifying suspension of the rule requiring bills to be read on three several days in both houses, suspended said rule, and enacted that the bill become a law from and after its passage, is a sufficient emergency clause to put the act in effect from its passage; and Orrick *v.* Ft. Worth, (Tex. Civ. App. 1908) 114 S. W. 677, to the same general effect. And see Swann *v.* Buck, 40 Miss. 268, holding that a law may take effect immediately, al-

effect immediately it passes through all the formalities required by the constitution for the complete enactment of laws.[25]

3. Local Option Laws.[26] Where by the terms of a statute a question affecting only a particular subdivision of the state is authorized or directed to be submitted to the votes of such subdivision,[27] or the application of a general law to particular localities is suspended until adopted in such localities by popular vote[28] or the decision of some local government body,[29] the language of the act must be followed strictly,[30] and the suspended provisions will not be in force in such locality until all the steps required by the statute have been taken.[31] As a general rule, however, when a canvassing board to which is committed the duty of determining the result of such election decides that the provisions of the statute have been adopted, such decision is final and conclusive,[32] and the courts are without authority to inquire whether all who participated in the election were legally qualified voters.[33] Such a statute takes effect as an entirety at one and the same time in accordance with the general rule,[34] and it is only the application of certain provisions to particular localities that is suspended.[35]

4. Beginning of Legislative Session. The rule of the English common law was that, in the absence of a special provision in a statute as to the time of its taking effect, it related back and became effective from the first day of the session at which it was adopted;[36] and this rule continued in force in a few of the older

though there is no express provision in it that shall do so, if the intention of the legislature to give it immediate effect is clearly manifested in some other manner than by the general phraseology of the act or resolution itself.

25. Tarlton *v.* Peggs, 18 Ind. 24; Texas Co. *v.* Stephens, 100 Tex. 628, 103 S. W. 481; Galveston, etc., R. Co. *v.* Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389, holding that an act providing for submission of a cause on special issues, which was passed with the emergency clause, controls in cases submitted to the jury on the day it became a law, after the hour at which it was received at the department of state with the governor's approval and signature.

In case of veto by the governor of an act containing an emergency clause, it takes effect from the time it is passed over his veto. Sinking Fund Com'rs *v.* George, 104 Ky. 260, 47 S. W. 779, 20 Ky. L. Rep. 938, 84 Am. St. Rep. 454; Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115.

26. **For nature and validity of local option** laws see *supra*, III, B, 2, e, and Intoxicating Liquors, 23 Cyc. 89. For constitutionality see Constitutional Law, 8 Cyc. 840.

27. Foy *v.* Gardiner Water Dist., 98 Me. 82, 56 Atl. 201.

Election as to removal of county-seat.— Iroquois County *v.* Keady, 34 Ill. 293; Noble *v.* Baker, 5 Ohio St. 524; State *v.* Perry County, 5 Ohio St. 497.

For proceedings for establishment or removal of county-seat see Counties, 11 Cyc. 366.

28. Harvey *v.* Cook County, 221 Ill. 76, 77 N. E. 424.

29. Joiner *v.* Winston, 68 Ala. 129.

30. Joiner *v.* Winston, 68 Ala. 129 (holding that where a statute was not to take effect in certain counties until the court had ascertained and declared that a majority of the landowners therein were desirous of availing themselves of its provisions, an order entered on the minutes of the court that the statute "is declared of force" in certain parts of the county, and "that new elections be held" in certain other parts, does not show an adoption of the law); Harvey *v.* Cook County, 221 Ill. 76, 77 N. E. 424.

31. Messenger *v.* Messenger, 223 Ill. 282, 79 N. E. 27 (holding that the act of 1903 (Laws (1903), pp. 121, 122), amending Torrens Land Title Law, §§ 7, 18 (Hurd Rev. St. (1905) c. 30, § 61) so as to render abstracts of title admissible in evidence in support of the title, but declaring the amendment inapplicable in any county until adopted at an election therein, did not render an abstract admissible in a proceeding commenced in a certain county in the interim between the declaration of the adoption of the amendment by the election authorities and the holding by the supreme court that such amendment had not been adopted in the county); Welch *v.* Hannibal, etc., R. Co., 26 Mo. App. 358.

32. Simpson *v.* Mecklenburg, 84 N. C. 158.

33. Cain *v.* Davie County, 86 N. C. 8.

For right to inquire into validity of election in general see Elections, 15 Cyc. 379.

34. Iroquois County *v.* Keady, 34 Ill. 293; Clarke *v.* Rochester, 28 N. Y. 605 [*affirming* 24 Barb. 446]; State *v.* Perry County, 5 Ohio St. 497; Thoms *v.* Greenwood, 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320; Hall *v.* Dunn, 52 Oreg. 475, 97 Pac. 811.

35. Noble *v.* Baker, 5 Ohio St. 524.

36. Latless *v.* Holmes, 4 T. R. 660, 100 Eng. Reprint 1230; Panter *v.* Atty.-Gen., 6 Bro. P. C. 486, 2 Eng. Reprint 1217. This was changed by the statute of 33 Geo. III, c. 13 (1793), by reason of its "gross and manifest injustice," and it was enacted that statutes should take effect from the time

American states after the Revolution,[37] until abolished by constitutional or statutory provisions.[38]

5. End of Legislative Session or Time Computed Therefrom. By the constitutions and statutes of a number of the states,[39] in the absence of special provision fixing a different time, statutes go into effect upon the adjournment of the session of the legislature at which they are passed,[40] or a certain number of days,[41] or months,[42] after such adjournment.

6. Passage or Approval of Act or Time Computed Therefrom — a. In General. Where no time is expressly fixed by a general constitutional or statutory provision, or by a provision in the act itself, a statute takes effect from its passage;[43] and even where some other time is fixed by a general act, the legislature may, by express provision in the statute, in accordance with the constitution, direct that

they receive the royal assent. Matter of Chardavoyne, 5 Dem. Surr. (N. Y.) 466, 471.

37. In force in North Carolina until 1799.— Sumner *v.* Barksdale, 1 N. C. 241; Smith *v.* Smith, 1 N. C. 30. And see Hamlet *v.* Taylor, 50 N. C. 36, holding that where by an express provision the statute was to take effect from its passage, it related back and took effect from the first day of the session.

38. In certain cases statutes are still presumed to speak from the beginning of the session, although they do not take effect until later. Cerf *v.* Reichert, 73 Cal. 360, 15 Pac. 10; Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358.

39. See *supra*, VII, C, 1.

40. Hess *v.* Trigg, 8 Okla. 286, 57 Pac. 159, holding that under this provision they take effect at the first moment of the day after the adjournment of the legislature.

41. Smith *v.* State, 29 Fla. 408, 10 So. 894; Piper *v.* Spencer, 58 S. W. 815, 22 Ky. L. Rep. 780; Gorham *v.* Springfield, 21 Me. 58; *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218; Beale *v.* Johnson, 45 Tex. Civ. App. 119, 99 S. W. 1045; Johnson *v.* State, 35 Tex. Cr. 273, 33 S. W. 232; Jenkins *v.* State, 28 Tex. App. 86, 12 S. W. 411.

How time computed.— The phrase, "until ninety days after the adjournment," has been construed to make the statutes effective on the first moment of the ninetieth day computed by excluding the day of adjournment (*In re* Boyce, 25 Wash. 612, 66 Pac. 54); but they do not become effective until the first moment of the ninety-first day computed in the same way, under cases making a distinction between the phrase in question and "until the ninetieth day" (Halbert *v.* San Saba Springs Land, etc., Assoc., 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193; Voight *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1900) 59 S. W. 578 [*reversed* on other grounds in 94 Tex. 357, 60 S. W. 658]). In *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218, construing a constitutional provision in exactly similar terms as the above it is said, evidently through inadvertence, that a statute passed May 22 takes effect August 22. In Chapman *v.* State, 2 Head (Tenn.) 36, the same rule as that applied in *In re* Boyce, *supra*, is applied to a provision that statutes shall take effect forty days from the adjournment of the legislature. And see Matter of Chardavoyne, 5 Dem. Surr. (N. Y.) 466.

For computation of time generally see TIME.

Where an act provides that it shall go into effect immediately upon its approval by the governor and it becomes a law without his approval, it does not take effect under Const. art. 3, § 18, until sixty days from the final adjournment of the legislature. Thompson *v.* State, 56 Fla. 107, 47 So. 816.

42. State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348.

How time computed.— Unless otherwise expressly provided, the word "month" will be construed to mean calendar month, and the number of months will be computed not by counting the number of days, but by looking at the calendar; a month therefore terminates with the day numerically corresponding to the day of its commencement, less one, in the following month, the statute taking effect on the first moment of the next day. McGinn *v.* State, 46 Nebr. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450.

For computation of time generally see TIME.

43. *Alabama.*— State *v.* Click, 2 Ala. 26; Rathbone *v.* Bradford, 1 Ala. 312.

Georgia.— Smets *v.* Weathersbee, R. M. Charlt. 537.

Illinois.— Goodsell *v.* Boynton, 2 Ill. 555.

Iowa.— Temple *v.* Hays, Morr. 9.

Louisiana.— West *v.* His Creditors, 1 La. Ann. 365.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Ohio.— State *v.* Perry County, 5 Ohio St. 497.

South Carolina.— McNamee *v.* Huckabee, 20 S. C. 190; *Ex p.* De Hay, 3 S. C. 564.

Tennessee.— Chapman *v.* State, 2 Head 36.

United States.— Lapeyre *v.* U. S., 17 Wall. 191, 21 L. ed. 606; Matthews *v.* Zane, 7 Wheat. 164, 5 L. ed. 425; The Ann, 1 Fed. Cas. No. 397, 1 Gall. 62; Warren Mfg. Co. *v.* Etna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501.

See 44 Cent. Dig. tit. "Statutes," § 336.

No presumption as to the order in which statutes were passed arises from their numbering, since this is not a legislative act, but a ministerial one performed in the office of the secretary of state. Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069.

it shall take effect from its passage.[44] The rule that a statute shall take effect from its passage has usually been construed to make it effective from the time it has passed through all the forms required by the constitution to give it force and validity.[45] Thus, where the approval of the governor is required, it takes effect from the time of receiving such approval;[46] and, where the statute is passed by the constitutional majority over the governor's veto, from the time of such passage.[47] But in some jurisdictions the same language has been construed to refer to the time of the signature of the bill by the presiding officers of the two houses of the legislature,[48] or even to the time of the passage through the second house of the legislature,[49] and in these jurisdictions, upon its approval by the governor, it relates back, and takes effect from the time of such signature or passage.[50] In North Carolina the same language has been construed to make the statute effective from the first day of the session.[51] In the jurisdictions where statutes take effect from their passage, it has been generally held that a statute takes effect on the day of the final enactment, without allowing any time for its publication or for its provisions to become known,[52] even though provision is made by general law for the publication of statutes;[53] but in some cases the day of approval has been excluded and the statute given effect at the first moment of the following day.[54] In a few states, by general constitutional or statutory provisions, statutes take effect a certain length of time after their passage.[55] Where,

44. See *supra*, VII, C, 2.

45. Wartman *v.* Philadelphia, 33 Pa. St. 202, 208 (holding that the passage of a statute is dated from the time it ceases to be a mere proposition or bill and becomes a law); Chance *v.* U. S., 38 Ct. Cl. 75.

United States statutes.— Under Const. art. 1, § 7, providing that every bill after passing the house of representatives and the senate, shall, before it becomes a law, be presented to the president, and if he approves it he shall sign it, a bill takes effect as law from the time of such approval by the president. *In re* Richardson, 20 Fed. Cas. No. 11,777, 2 Story 571.

46. *Alabama.*—Montgomery Traction Co. *v.* Knabe, 158 Ala. 458, 48 So. 501; Taylor *v.* State, 31 Ala. 383.

Colorado.— Denver, etc., R. Co. *v.* Brennaman, 45 Colo. 264, 100 Pac. 414.

Florida.— Parker *v.* Evening News Pub. Co., 54 Fla. 482, 44 So. 718.

Georgia.— Wright *v.* Overstreet, 122 Ga. 633, 50 S. E. 487 (holding that statutes take effect in the order of their approval, regardless of the order in which they are passed by the legislature); Freeman *v.* Gaither, 76 Ga. 741.

Nebraska.— Walker *v.* State, 46 Nebr. 25, 64 N. W. 357.

New York.— Matter of Chardavoyne, 5 Dem. Surr. 466.

South Carolina.— State *v.* Mancke, 18 S. C. 81.

Tennessee.— Hill *v.* State, 5 Lea 725 (holding that, when the constitution provides that a statute shall take effect from its approval by the governor, a statute that by its terms is to take effect from its passage is not in force until approved by the governor); Logan *v.* State, 3 Heisk. 442.

United States.— U. S. *v.* Standard Oil Co., 148 Fed. 719 (holding that where an act of congress went into effect upon its approval by the president June 29, 1906, a joint resolution of congress approved by the president June 30, 1906, directing that the act approved the day before "shall take effect and be in force sixty days after its approval by the President of the United States" was without effect); U. S. *v.* Stoddard, etc., Co., 89 Fed. 699.

See 44 Cent. Dig. tit. "Statutes," § 336.

Retaining a bill in his hands without signature a certain number of days after its passage through the houses of the legislature is, under many constitutional provisions, equivalent to approval. Wartman *v.* Philadelphia, 33 Pa. St. 202, 208.

A provision in a statute that it "shall take effect immediately" relates to its approval by the governor and not to the time of its passage through the legislature. Matter of Kemeys, 56 Hun (N. Y.) 117, 9 N. Y. Suppl. 182.

47. Wartman *v.* Philadelphia, 33 Pa. St. 202, 208.

48. State *v.* O'Brien, 47 Ohio St. 464, 25 N. E. 121; State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243.

49. Dyer *v.* State, Meigs (Tenn.) 237, decided under the constitution not requiring governor's approval for validity of law, but the rule is otherwise under the present constitution requiring governor's approval or passage over his veto. See Logan *v.* State, 3 Heisk. (Tenn.) 442.

50. See *supra*, notes 48, 49.

51. Hamlet *v.* Taylor, 50 N. C. 36.

52. Mobile Branch Bank *v.* Murphy, 8 Ala. 119; Freeman *v.* Gaither, 76 Ga. 741; Heard *v.* Heard, 8 Ga. 380; The Mary and Susan, 1 Wheat. (U. S.) 46, 4 L. ed. 32; Arnold *v.* U. S., 9 Cranch (U. S.) 104, 3 L. ed. 671.

For hour of day see *infra*, VII, C, 6, b.

53. Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522; State *v.* South Carolina Bank, 12 Rich. (S. C.) 609.

54. Matter of Foley, 8 Misc. (N. Y.) 57, 28 N. Y. Suppl. 608.

55. State *v.* Little Rock, etc., R. Co., 31

in a particular statute, use is made of the phrase "passage of this act," [56] or other equivalent language,[57] it is generally construed to refer to the time the statute takes effect under the general rule; [58] but it has been construed to mean the time of its approval by the governor,[59] or its passage through the legislature.[60] In some jurisdictions the phrase "from and after the passing of this act" is construed to refer to the first moment of the day following that on which the statute takes effect; [61] while in other jurisdictions the same language is construed to include the day the act is passed, and to make it take effect on that day.[62]

b. Hour of the Day. As a general rule the law does not take notice of fractions of a day, and therefore a statute which takes effect from its passage, or approval,

Ark. 701; Files *v.* Robinson, 30 Ark. 487; Whitehead *v.* Wells, 29 Ark. 99; Lienau *v.* Moran, 5 Minn. 482; Swann *v.* Buck, 40 Miss. 268.

56. *Iowa.*— Charless *v.* Lamberson, 1 Iowa 435, 63 Am. Dec. 457.

Massachusetts.— Johnson *v.* Fay, 16 Gray 144.

Michigan.— Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982.

Missouri.— Andrews *v.* St. Louis Tunnel R. Co., 16 Mo. App. 299.

Nebraska.— State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348, 352.

New York.— *In re* Howe, 112 N. Y. 100, 19 N. E. 513, 2 L. R. A. 825 [*affirming* 48 Hun 235]; Matter of Chardavoyne, 5 Dem. Surr. 466.

Pennsylvania.— Wartman *v.* Philadelphia, 33 Pa. St. 202, 208.

Texas.— Shook *v.* Laufer, (Civ. App. 1907) 100 S. W. 1042.

See 44 Cent. Dig. tit. "Statutes," § 336.

57. *Colorado.*— Harding *v.* People, 10 Colo. 387, 15 Pac. 727.

Idaho.— Schneider *v.* Hussey, 2 Ida. (Hasb.) 8, 1 Pac. 343.

Illinois.—Patrick *v.* Perryman, 52 Ill. App. 514.

Iowa.— Rogers *v.* Vass, 6 Iowa 405.

Missouri.— *Ex p.* Lucas, 160 Mo. 218, 61 S. W. 218, holding that the phrase "within ninety days after the approval of the act" must be construed to mean ninety days after the act can and does constitutionally take effect.

Nebraska.— State *v.* Bemis, 45 Nebr. 724, 64 N. W. 348.

See 44 Cent. Dig. tit. "Statutes," § 336.

58. See *supra*, notes 56, 57.

59. *In re* Tebbetts, 23 Fed. Cas. No. 13,817; Walker *v.* Mississippi Valley, etc., R. Co., 29 Fed. Cas. No. 17,079.

60. Eliot *v.* Cranston, 10 R. I. 88 (holding that the phrase "after the passage of the act," as used in Gen. St. c. 860, § 1, providing that arrest or imprisonment for any action accruing "after the passage of this act for the recovery of debt or of state or town taxes is hereby abolished," which act was passed on March 31, and to take effect on July 1, must be construed to refer to March 31, and not to July 1; and hence, arrest is prohibited in every case where the cause of action accrued after March 31, and from that time no arrest could be made, and no writ could command it); Baker *v.* Compton, 52 Tex. 252.

61. Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470; Parkinson *v.* Brandenburg, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326; Lorent *v.* South Carolina Ins. Co., 1 Nott & M. (S. C.) 505; King *v.* Moore, Jeff. (Va.) 9; O'Connor *v.* Fond du Lac, 109 Wis. 253, 261, 85 N. W. 327, 53 L. R. A. 831, in which the court says: "The word 'from,' and that in connection with the word 'after,' is sometimes used inclusively and sometimes exclusively. They have no certain literal or legal meaning that can be accepted as a guide under all circumstances. They are open to construction in many cases, so that courts sometimes hold that they are used exclusively, and at other times inclusively, as seems best calculated to effect the legislative intent; though it has come to be quite generally accepted as the rule that the meaning of the words in connection, 'from and after,' excludes the day from which the reckoning is to be made, and in order to avoid the application of it as a rule of construction there must be something in the act, or the result of a literal application of the words to the subject treated by it, to indicate a contrary intent."

Where the act provides that it shall take effect "one year from and after its passage," in computing the period of one year, the day of the passage of the act shall be excluded. Duncan *v.* Cobb, 32 Minn. 460, 21 N. W. 714.

"From and after the year nineteen hundred" has been construed as excluding the year 1900. Sindall *v.* Baltimore, 93 Md. 526, 49 Atl. 645.

"From and after" a certain day should be construed to exclude the day named; if the intention has been to include it, the phrase "on and after" would have been used. Handley *v.* Cunningham, 12 Bush (Ky.) 401.

62. People *v.* Clark, 1 Cal. 406; Leavenworth Coal Co. *v.* Barber, 47 Kan. 29, 27 Pac. 114 (holding that where a statute is to take effect "from and after its publication," the day of its publication is to be included); Mallory *v.* Hiles, 4 Metc. (Ky.) 53; Arrowsmith *v.* Hemering, 39 Ohio St. 573; Mathews *v.* Zane, 7 Wheat. (U. S.) 164, 5 L. ed. 425; Arnold *v.* U. S., 9 Cranch (U. S.) 104, 3 L. ed. 671; U. S. *v.* Stoddard, 91 Fed. 1005, 34 C. C. A. 175 [*affirming* 89 Fed. 699]; U. S. *v.* Williams, 28 Fed. Cas. No. 16,723, 1 Paine 261.

For construction of "from and after" generally see TIME.

relates back and becomes effective from the first moment of the day on which it is passed,[63] or approved;[64] but this doctrine of relation is only a legal fiction, and wherever its application would cause injustice, the act will be given effect only from the moment of its approval.[65]

7. Publication of Act.[66] Under the general constitutional and statutory provisions of some states, all statutes,[67] or at least those of a general or public nature,[68] take effect from their publication,[69] or at the expiration of a fixed time

63. *Alabama.*— Turnipseed *v.* Jones, 101 Ala. 593, 14 So. 377; Wood *v.* Fort, 42 Ala. 641.

Kentucky.— Mallory *v.* Hiles, 4 Metc. 53.

New York.— Croveno *v.* Atlantic Ave R. Co., 150 N. Y. 225, 44 N. E. 968; *In re* Foley, 8 Misc. 57, 28 N. Y. Suppl. 608.

Ohio.—Arrowsmith *v.* Hemering, 39 Ohio St. 573; Orth *v.* McCook, 2 Ohio Dec. (Reprint) 624, 4 West. L. Month. 215.

Washington.— *In re* Boyce, 25 Wash. 612, 66 Pac. 54.

United States.— U. S. *v.* Williams, 28 Fed. Cas. No. 16,723, 1 Paine 261; *In re* Welman, 29 Fed. Cas. No. 17,407, 20 Vt. 653.

Canada.— Cole *v.* Porteous, 19 Ont. App. 111, holding an act of parliament to which the royal assent was given at three o'clock in the afternoon applicable to a chattel mortgage executed and registered before twelve o'clock on the same day.

See 44 Cent. Dig. tit. "Statutes," § 337.

This rule is especially applicable to remedial statutes.— People *v.* Welde, 28 Misc. (N. Y.) 582, 59 N. Y. Suppl. 1030.

64. Tomlinson *v.* Bullock, 4 Q. B. D. 230, 48 L. J. M. C. 95, 40 L. T. Rep. N. S. 459, 27 Wkly. Rep. 552.

65. *California.*— Davis *v.* Whidden, 117 Cal. 618, 49 Pac. 766 (holding that when two irreconcilable legislative acts are approved upon the same day, resort may be had to the office of the secretary of state, and also to the published statutes, for information as to the order of their approval, and the one that is found to have been approved last is the prevailing law); People *v.* Clark, 1 Cal. 406.

Kansas.— Leavenworth Coal Co. *v.* Barber, 47 Kan. 29, 27 Pac. 114.

Massachusetts.— Kennedy *v.* Palmer, 6 Gray 316, holding that where an action is commenced before a justice of the peace on the day of the passage of a statute vesting exclusive jurisdiction of such actions in another court, the justice is not deprived of jurisdiction in the case unless it is made affirmatively to appear that the act was passed at an earlier hour of the day than the commencement of the action.

New York.— *In re* Dreyfous, 18 N. Y. Suppl. 767, 28 Abb. N. Cas. 27.

Ohio.— Arrowsmith *v.* Hemering, 39 Ohio St. 573.

Pennsylvania.— Southwark Bank *v.* Com., 26 Pa. St. 446.

United States.— Louisville *v.* Portsmouth Sav. Bank, 104 U. S. 469, 26 L. ed. 775; Gardner *v.* Barney, 6 Wall. 499, 18 L. ed. 890; Arnold *v.* U. S., 9 Cranch 104, 3 L. ed. 671; U. S. *v.* Stoddard, 91 Fed. 1005, 34 C. C. A. 175 [*affirming* 89 Fed. 699] (holding that the Dingley Tariff Act of 1897 took effect from the moment of its approval by the president, six minutes after four P. M., Washington time, July 24, 1897, and goods imported and entered for consumption on that day, but prior to such approval, were dutiable under the former law); American Wood-Paper Co. *v.* Glen's Falls Paper Co., 1 Fed. Cas. No. 321, 8 Blatchf. 513; *In re* Ankrim, 1 Fed. Cas. No. 395, 3 McLean 285; The Ann, 1 Fed. Cas. No. 397, 1 Gall. 62; *In re* Richardson, 20 Fed. Cas. No. 11,777, 2 Story 571; Salmon *v.* Burgess, 21 Fed. Cas. No. 12,262, 1 Hughes 356 [*affirmed* in 97 U. S. 381, 24 L. ed. 1104]; *In re* Wynne, 30 Fed. Cas. No. 18,117, Chase 227, 4 Nat. Bankr. Reg. 23; 3 Op. Atty.-Gen. 82.

See 44 Cent. Dig. tit. "Statutes," § 337.

Statutes approved the same day are presumed to have been approved contemporaneously, where nothing appears to the contrary. Stuart *v.* Chapman, 104 Me. 17, 70 Atl. 1069.

66. For promulgation and publication in general see *supra*, II, E, 3.

67. See *infra*, notes 68–75.

68. What are general or public acts under such provisions.— Stephenson *v.* Wait, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489 (holding that an act prescribing the boundaries of a county formed out of an existing county is a public act); Scott *v.* Clark, 1 Iowa 70 (holding that an act "to re-locate the seat of government" is a special law); State *v.* School Fund Com'rs, 4 Kan. 261 (holding that a joint resolution authorizing the issue of bonds for public purposes is a public law); Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 49 N. W. 971 (holding that an act to incorporate the "Yellow River Improvement Company" is a general law); Luling *v.* Racine, 15 Fed. Cas. No. 8,603, 1 Biss. 314 (holding that a law authorizing a city to issue bonds for stock in a railroad company is a general law).

69. How time computed.— Leavenworth Coal Co. *v.* Barber, 47 Kan. 29, 27 Pac. 114 (holding that where a statute provides that it shall take effect "from and after its publication," in computing the time when it takes effect the day of its publication is to be included, and the precise time of its publication or taking effect may be shown, where an act is done on the same day of its publication, which is affected by it in any way); State *v.* Barrow, 30 La. Ann. 657 (holding that under the Louisiana statute laws are considered to be promulgated the day after their publication in the State Gazette, or in thirty days thereafter, according to locality).

after their publication.[70] In accordance with the phraseology of these provisions in the different states, such publication may be in the newspapers or journals,[71] in pamphlets,[72] in bound volumes,[73] or by distribution of printed copies to certain designated officials;[74] and the statute is without force or effect until the requirements of the law have been substantially complied with.[75]

8. DATE FIXED IN ACT.[76] Where by general law, or by the express terms of the statute itself, it is to take effect upon a fixed future day, it will take effect from the first moment of the day named;[77] but where it is to take effect "from and after" a day named, that day is generally construed to be excluded from the operation of the act.[78]

9. CONDITIONS AND OCCURRENCE OF CONTINGENCY.[79] Upon the passage of a valid statute, which by its terms is to go into effect upon the happening of a certain contingency, or compliance with certain conditions, its language must be strictly followed;[80] and it will take effect only from the happening of the contingency,[81] or the performance of the conditions.[82]

A provision that statutes shall take effect "from and after" their publication has been construed to make them effective on the day after their publication (O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831), and has also been construed to make them effective from the first moment of the day of their legal and proper publication (Kearny County *v.* Vandriss, 115 Fed. 866, 53 C. C. A. 192).

Evidence of date of publication.—Where the certificate of the secretary of state, annexed to a volume of private laws, bears a certain date, he being authorized to make such certificate only after the publication of the laws has been completed, in the absence of proof to the contrary, the court will presume an act contained in such volume to have been in effect from the date of the certificate. *In re* Boyle, 9 Wis. 264.

70. See *supra*, note 69.

71. Hudson *v.* Green Hill Seminary Corp., 113 Ill. 618; Scott *v.* Clark, 1 Iowa 70; Mills *v.* Jefferson, 20 Wis. 50.

72. Bravard *v.* Cincinnati, etc., R. Co., 115 Ind. 1, 17 N. E. 183.

73. State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405.

74. Jones *v.* Cavins, 4 Ind. 305; Jewett *v.* Davis, 5 Mart. N. S. (La.) 432.

75. *Illinois.*— Hudson *v.* Green Hill Seminary Corp., 113 Ill. 618, holding that where publication in newspapers is authorized, a failure to publish in the designated papers as required will not prevent the act from becoming a law upon the publication and distribution of the body of laws passed at the legislative session.

Indiana.— Cain *v.* Goda, 84 Ind. 209; State *v.* Bailey, 16 Ind. 46, 79 Am. Dec. 405; Jones *v.* Cavins, 4 Ind. 305; Tredway *v.* Gapin, 1 Blackf. 299.

Iowa.—State *v.* Donehey, 8 Iowa 396, holding that where the act as published corresponds with the original act on file in the office of the secretary of state, it is to be deemed in force, although the act as published in the session laws may not correspond with it.

Kansas.— State *v.* School Fund Com'rs, 4 Kan. 261.

Louisiana.— Jewett *v.* Davis, 5 Mart. N. S. 432.

See 44 Cent. Dig. tit. "Statutes," § 338.

76. **For express provisions of statute** see *supra*, VII, C, 2.

77. McLaughlin *v.* Page, 8 N. Y. St. 367.

That the day fixed is Sunday does not prevent the statute from taking effect on that day. Bloomingdale *v.* Seligman, 3 N. Y. Suppl. 243, 22 Abb. N. Cas. 98.

Where the date fixed is earlier than the passage of the act, it takes effect from its passage. McLaughlin *v.* Newark, 57 N. J. L. 298, 30 Atl. 543; Chicago, etc., R. Co. *v.* U. S., 14 Ct. Cl. 125 [*reversed* on other grounds in 104 U. S. 687, 26 L. ed. 893].

For retroactive operation see *infra*, VII, D.

Publication before the day named is not necessary (Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522); except where, by express statutory provision, publication is made a prerequisite to its taking effect (Noel *v.* Ewing, 9 Ind. 37).

78. Handley *v.* Cunningham, 12 Bush (Ky.) 401; Koltenbrock *v.* Cracraft, 36 Ohio St. 584; Fosdick *v.* Perrysburg, 14 Ohio St. 472 (holding that a statute by its terms to take effect "from and after the fifteenth day of May next thereafter" passed by the concurrent vote of the two houses of the legislature April 28, 1852, but which did not receive the signatures of the presiding officers of the two houses necessary to its final enactment until May 3, 1852, took effect on the day after May 15, 1852, and its operation was not postponed until May, 1853); Brown *v.* State, 137 Wis. 543, 119 N. W. 338.

Contra, holding that it takes effect on the day named.—Whittaker *v.* New York Mut. L. Ins. Co., 133 Mo. App. 664, 114 S. W. 53; Turner *v.* Odum, 3 Coldw. (Tenn.) 455.

79. **For validity of contingent or conditional legislation** see CONSTITUTIONAL LAW, 8 Cyc. 840.

80. State *v.* Liedtke, 9 Nebr. 490, 4 N. W. 75.

81. State *v.* Liedtke, 9 Nebr. 490, 4 N. W. 75

82. Savage *v.* Walshe, 26 Ala. 619 (holding that where a statute affects a community,

10. Parts of Acts Taking Effect at Different Times. Where not prohibited by the constitution,[83] the legislature may direct that different parts of the same statute shall go into effect at different times.[84] Under constitutional provisions requiring all parts of a statute to take effect at the same time, it is sufficient that the statute becomes effective as an entirety at one time, notwithstanding that, as to some persons or matters affected by it, it becomes operative at different times.[85]

D. Retroactive Operation[86] — 1. In General — a. Nature of Retroactive Operation. Literally defined, a retrospective law is a law that looks backward or on things that are past; and a retroactive law is one that acts on things that are past.[87] In common use, as applied to statutes, the two words are synonymous.[88] In this literal sense all laws having an effect on past transactions or matters, or by which the slightest modification is made of the remedy for the recovery of rights accrued or the redress of wrongs done, are included equally with those which divest rights, impair the obligation of contracts, or make an act, innocent at the time it was done, subsequently punishable as an offense.[89] A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations

and requires as a condition to its validity that something be done before it goes into operation, the act has no force until the thing required to be done is performed; but where a statute affects only one or more designated persons, either natural or artificial, those interested in its object may waive provisions intended for their benefit); Hobart *v.* Butte County, 17 Cal. 23; Little *v.* Frost, 3 Mass. 106.

83. McCabe *v.* Jefferds, 122 Cal. 302, 54 Pac. 897; Miller *v.* Kister, 68 Cal. 142, 8 Pac. 813; State *v.* Deets, 54 Kan. 504, 38 Pac. 798; Finnegan *v.* Sale, 54 Kan. 420, 38 Pac. 477; Miami County *v.* Hiner, 54 Kan. 334, 38 Pac. 286; Montgomery County *v.* Glass, 4 Kan. App. 286, 45 Pac. 935.

84. Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487; Plummer *v.* Jones, 84 Me. 58, 24 Atl. 585; Fortune *v.* Buncombe County, 140 N. C. 322, 52 S. E. 950.

Repealing clause in revising statute.— Where the provisions of a revising statute are to take effect at a future period, and the statute contains a clause repealing the former statute upon the same subject, the repealing clause will not take effect until the other provisions come into operation. Leyner *v.* State, 8 Ind. 490; Spaulding *v.* Alford, 1 Pick. (Mass.) 33; McArthur *v.* Franklin, 16 Ohio St. 193.

85. State *v.* Newbold, 56 Kan. 71, 42 Pac. 345; Miami County *v.* Hiner, 54 Kan. 334, 38 Pac. 286; Cherokee County *v.* Chew, 44 Kan. 162, 24 Pac. 62; Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982; State *v.* Stuht, 52 Nebr. 209, 71 N. W. 941; Hopkins *v.* Scott, 38 Nebr. 661, 57 N. W. 391.

86. Retroactive effect of: Act of congress prohibiting special or local laws in territories see *supra*, III, A, 3. Constitution see Constitutional Law, 8 Cyc. 745. Statutes making records constructive notice to purchasers see Vendor and Purchaser.. Statutes relating to particular subjects see Acknowledgments, 1 Cyc. 609; Actions, 1 Cyc. 705; Aliens, 2 Cyc. 118; Bankruptcy, 5 Cyc. 240, 242; Bastards, 5 Cyc. 635; Chattel Mortgages, 6 Cyc. 1090; Curtesy, 12 Cyc. 1003, 1004; Customs Duties, 12 Cyc. 1116; Descent and Distribution, 14 Cyc. 25; Divorce, 14 Cyc. 594; Dower, 14 Cyc. 884; Escheat, 16 Cyc. 556; Executors and Administrators, 18 Cyc. 140; Exemptions, 18 Cyc. 1378, 1395; Frauds, Statute of, 20 Cyc. 281; Fraudulent Conveyances, 20 Cyc. 344; Homesteads, 21 Cyc. 462; Husband and Wife, 21 Cyc. 1215; Improvements, 22 Cyc. 15; Insolvency, 22 Cyc. 1263; Interest, 22 Cyc. 1481, 1521; Internal Revenue, 22 Cyc. 1607; Intoxicating Liquors, 23 Cyc. 77; Joint Tenancy, 23 Cyc. 487; Judgments, 23 Cyc. 1106; Juries, 24 Cyc. 30; Landlord and Tenant, 24 Cyc. 1250; Licenses, 25 Cyc. 623; Limitations of Actions, 25 Cyc. 991; Logging, 25 Cyc. 1582; Master and Servant, 26 Cyc. 1361; Mechanics' Liens, 27 Cyc. 221; Monopolies, 27 Cyc. 910; Municipal Corporations, 28 Cyc. 377, 675, 678, 1015, 1195; Railroads, 33 Cyc. 653; Streets and Highways; Witnesses.

Validity of retrospective or *ex post facto* laws see Constitutional Law, 8 Cyc. 1017.

87. Simpson *v.* City Sav. Bank, 56 N. H. 466, 471, 22 Am. Rep. 491; Rich *v.* Flanders, 39 N. H. 304, 320; De Cordova *v.* Galveston, 4 Tex. 470, 475.

88. Rairden *v.* Holden, 15 Ohio St. 207, 210.

89. Willard *v.* Harvey, 24 N. H. 344, 353; Bell *v.* Perkins, Peck (Tenn.) 261, 266, 14 Am. Dec. 745; Townsend *v.* Townsend, Peck (Tenn.) 1, 15, 14 Am. Dec. 722 (holding that a retrospective law "taken in its common and unrestrained sense, extends to all prior times, persons, and transactions, whether civil or criminal"); De Cordova *v.* Galveston, 4 Tex. 470, 475.

already past.[90] Retrospective laws, in their general sense, include *ex post facto*

90. Other definitions are: "Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." Society for Propagation of Gospel *v.* Wheeler, 22 Fed. Cas. No. 13,156, 2 Gall. 105, 139 [*quoted* in *Ex p.* Buckley, 53 Ala. 42, 55] (per Story, J.); Higgins *v.* Bear River, etc., Min. Co., 27 Cal. 153, 159; Ducey *v.* Patterson, 37 Colo. 216, 227, 86 Pac. 109, 9 L. R. A. N. S. 1066; Perry *v.* Denver, 27 Colo. 93, 95, 59 Pac. 747; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162, 167; Gladney *v.* Sydnor, 172 Mo. 318, 326, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880; Leete *v.* St. Louis State Bank, 115 Mo. 184, 198, 21 S. W. 788; Simpson *v.* City Sav. Bank, 56 N. H. 466, 471, 22 Am. Rep. 491; Rich *v.* Flanders, 39 N. H. 304, 362; Dow *v.* Norris, 4 N. H. 16, 18, 17 Am. Dec. 400; Dodin *v.* Dodin, 17 Misc. (N. Y.) 35, 39, 40 N. Y. Suppl. 748 [*affirmed* in 16 N. Y. App. Div. 42, 44 N. Y. Suppl. 800 (*affirmed* in 162 N. Y. 635, 57 N. E. 1108)]; Hamilton County *v.* Rosche, 50 Ohio St. 103, 111, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584; Rairden *v.* Holden, 15 Ohio St. 207, 210; Paschal *v.* Perez, 7 Tex. 348, 365; De Cordova *v.* Galveston, 4 Tex. 470, 478; Sturges *v.* Carter, 114 U. S. 511, 519, 5 S. Ct. 1014, 29 L. ed. 240; Deland *v.* Platte County, 54 Fed. 823, 832].

"Any law, prescribing new rules for the decision of existing causes, so as to change the ground of the action or the nature of the defence." Woart *v.* Winnick, 3 N. H. 473, 481, 14 Am. Dec. 384 [*quoted* in *Ex p.* Bethurum, 66 Mo. 545, 550; Rich *v.* Flanders, 39 N. H. 304, 361].

"One made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them characteristics, or ascribes to them effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence. It gives a right where none before existed, or takes away one which before existed." Keith *v.* Guedry, (Tex. Civ. App. 1908) 114 S. W. 392, 396.

"For the punishment of an offence, within the meaning of our bill of rights . . . a law made to punish an act previously done, or to increase the punishment of such act, or in some way to change the rules of law in relation to its punishment, to the prejudice of him who committed it. In other words . . . a law establishing a new rule for the punishment of an act already done. . . . And a retrospective law for the decision of civil causes, is a law prescribing the rules by which existing causes are to be decided, upon facts existing previous to the making of the law." Woart *v.* Winnick, 3 N. H. 473, 476, 14 Am. Dec. 384 [*quoted* in Rich *v.* Flanders, 39 N. H. 304, 361; Dow *v.* Norris, 4 N. H. 16, 18, 17 Am. Dec. 400].

"[One] usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the act." Bouvier L. Dict. [*quoted* in Deland *v.* Platte County, 54 Fed. 823, 832].

"A statute which creates a new obligation, or imposes a new duty, in respect to transactions already past." Gaston *v.* Merriam, 33 Minn. 271, 279, 22 N. W. 614.

"One which changes, or injuriously affects, a present right, by going behind it, and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued." Poole *v.* Fleeger, 11 Pet. (U. S.) 185, 198, 9 L. ed. 680.

"An act taking away rights vested, and giving rights which had been extinguished by the general laws of the state." Bradford *v.* Brooks, 2 Aik. (Vt.) 284, 294, 16 Am. Dec. 715; Ward *v.* Barnard, 1 Aik. (Vt.) 121.

"[One that gives] a right where none before existed, and by relation back, gives the party the benefit of it." Sutherland *v.* De Leon, 1 Tex. 250, 305, 46 Am. Dec. 100.

"[One] which looks back upon interests already settled, or events which have already happened." Merrill *v.* Sherburne, 1 N. H. 199, 213, 8 Am. Dec. 52.

"One intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence." Chicago, etc., R. Co. *v.* State, 47 Nebr. 549, 564, 66 N. W. 624, 53 Am. St. Rep. 557, 41 L. R. A. 481.

"[One] reaching back to and giving to a previous transaction some different legal effect from that which it had under the law when it took place." Leete *v.* St. Louis State Bank, 115 Mo. 184, 198, 21 S. W. 788.

"One that relates back to, and gives to a previous transaction some different legal effect from that which it had under the law when it transpired." State *v.* Whittlesey, 17 Wash. 447, 454, 50 Pac. 119.

Retrospective laws include: A statute which "impairs the force of contracts, or confiscates private property, or disturbs any vested rights." Boston *v.* Cummins, 16 Ga. 102, 106, 60 Am. Dec. 717. "A statute which abrogates an existing right of action or defense, or creates a new obligation on transactions or considerations already past." Evans *v.* Denver, 26 Colo. 193, 196, 57 Pac. 696. "A statute which repeals an act limiting the time within which crimes shall be proscribed." State *v.* Moore, 42 N. J. L. 208, 231. Every law "that takes away or impairs rights vested, agreeable to existing laws." Calder *v.* Bull, 3 Dall. (U. S.) 386, 390, 1 L. ed. 648 [*quoted* in De Cordova *v.* Galveston, 4 Tex. 470, 478]. One giving "a right to recover back taxes paid by mistake where such right did not exist before." Hamilton County *v.* Rosche, 50 Ohio St. 103, 111, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584. A law affecting "an existing cause of

laws,[91] and laws impairing the obligation of contracts;[92] but the term "retrospective" is frequently used as applicable only to civil laws by way of distinguishing them from *ex post facto* laws.[93] Retrospective statutes are usually construed to embrace only those which relate to substantial rights,[94] as those which destroy or impair an existing right,[95] or give a right where none before existed;[96] and

action, or an existing right of defence, by taking away or abrogating a perfect existing right, although no suit or legal proceeding then exists." Clark *v.* Clark, 10 N. H. 380, 386, 34 Am. Dec. 165 [*quoted* in De Cordova *v.* Galveston, 4 Tex. 470, 477].

Curative acts.— The term "retrospective statute" includes curative acts. Conde *v.* Schenectady, 164 N. Y. 258, 264, 58 N. E. 130. See *infra*, VII, D, 3.

Do not include.— A statute requiring a county that has sold bonds, afterward decided to have been issued under an unconstitutional act, to fulfil the equitable and moral obligation to the holders of such bonds by paying the amount of the principal and interest accrued thereon. New York L. Ins. Co. *v.* Cuyahoga County, 106 Fed. 123, 45 C. C. A. 233 [*reversing* 99 Fed. 846]. A statute providing a new method of assessing and collecting taxes is not retroactive merely because operative upon taxes due before passage of act, or because part of the property subject to the taxes had been removed from the state. State *v.* Manhattan Silver Min. Co., 4 Nev. 318, 333. An act providing for the assessment of property subject to taxation, which permits an assessment after the property has been removed, since it merely enforces an existing duty. Virginia *v.* Chollar Potosi Gold, etc., Min. Co., 2 Nev. 86. A statute conferring on adopted children the right to inherit, which they did not theretofore possess, as it does not affect any existing right or obligation. Dodin *v.* Dodin, 17 Misc. (N. Y.) 35, 40 N. Y. Suppl. 748 [*affirmed* in 16 N. Y. App. Div. 42, 44 N. Y. Suppl. 800 (*affirmed* in 162 N. Y. 635, 57 N. E. 1108)]. A statute applying to future transactions merely because they relate to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing. Johnston *v.* U. S., 17 Ct. Cl. 157. A construction of the Sherman anti-trust law of July 2, 1890, as applying to contracts made prior to its enactment and forbidding their further performance does not give it a retroactive effect. U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007. A statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." Reg. *v.* St. Mary, 12 Q. B. 120, 127, 64 E. C. L. 120. And see *In re* Scott, 126 Fed. 981, 984, holding that a statute is not retrospective merely "because its operation in a given case may be dependent upon an occurrence anterior to its passage."

91. Bell *v.* Perkins, Peck (Tenn.) 261, 267, 14 Am. Dec. 745; Calder *v.* Bull, 3 Dall. (U. S.) 386, 390 1 L. ed. 648.

92. Townsend *v.* Townsend, Peck (Tenn.) 1, 15, 14 Am. Dec. 722.

93. French *v.* Deane, 19 Colo. 504, 512, 36 Pac. 609, 24 L. R. A. 387; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162, 164 (holding that "the term retrospective was intended to apply to laws which could not properly be said to be included in the description of *ex post facto*, or laws impairing the obligation of contracts"); Westerman *v.* Supreme Lodge K. P., 196 Mo. 670, 740, 94 S. W. 470, 5 L. R. A. N. S. 1114; Gladney *v.* Sydnor, 172 Mo. 318, 326, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880; *Ex p.* Bethrum, 66 Mo. 545, 550; Merrill *v.* Sherburne, 1 N. H. 199, 213, 8 Am. Dec. 52; Townsend *v.* Townsend, Peck (Tenn.) 1, 15, 14 Am. Dec. 722.

94. Cross County School Dist. No. 11 *v.* Cross County School Dist. No. 20, 63 Ark. 543, 39 S. W. 850; Willard *v.* Harvey, 24 N. H. 344, 351; Jones *v.* Jones, 2 Overt. (Tenn.) 2, 5, 5 Am. Dec. 645; Bronson *v.* Kinzie, 1 How. (U. S.) 311, 315, 11 L. ed. 143.

95. Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162, 165 (holding that "a law may be retrospective in its operation, if it affect an existing cause of action, or an existing right of defense, by taking away or abrogating a perfect existing right, although no suit or legal proceeding then exists. Of course it is not intended to deny the right of the legislature to vary the mode of enforcing the remedy; or to provide for the more effectual security of existing rights. . . . The statute of limitations may be changed by an extension of the time, or by an entire repeal, and affect existing causes of action, which by the existing law would soon be barred. In such case the right of action is perfect, and no right of defense has accrued from the time already elapsed. But if a right has become vested and perfect, a law, which afterward annuls or takes it away, is retrospective"); Paschal *v.* Perez., 7 Tex. 348, 349, 365; Westerman *v.* Supreme Lodge K. P., 196 Mo. 670, 739, 94 S. W. 470, 5 L. R. A. N. S. 1114 (holding that a civil law is not retrospective unless it disturbs existing rights).

96. McFadden *v.* Blocker, 2 Indian Terr. 260, 272, 48 S. W. 1043, 58 L. R. A. 878; Hamilton County *v.* Rosche, 50 Ohio St. 103, 111, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584 (holding that "however every statute that is designed to act retrospectively is not retroactive within the terms of section 28, of art. II, of the constitution of 1851, which forbids the general assembly of this state to pass 'retroactive' laws. Whether a statute falls within the prohibition of this provision of the constitution de-

statutes which affect remedies only are not within the scope of the inhibition against retrospective laws,[97] unless the remedy is entirely taken away, or is encumbered with conditions which render it impracticable.[98]

b. Express Provisions.[99] A statute is prospective only which expressly declares that it is not retroactive,[1] which, by its terms, is to apply to actions or to things done "hereafter," [2] or "thereafter," [3] or is to take effect at a fixed future date,[4] or which contains, in the enacting clause, the phrase "from and after the passing of this act," [5] or which expressly excepts rights acquired prior to the passage of the act,[6] or "actions now pending," [7] or "any suit or proceeding had or commenced" before the passage of the act.[8] So the words "heretofore," [9] and "theretofore," [10] or other similar words,[11] expressly give the statute a restrospective operation.

pends upon the character of the relief that it provides. If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of this state"); Sutherland *v.* De Leon, 1 Tex. 250, 305, 46 Am. Dec. 100 (holding that "retrospection, within the meaning of the constitution, would be to give a right where none before existed, and by relation back, to give the party the benefit of it; if, however, the right already existed, it would be in the power of the legislature to devise and provide a remedy").

97. Aultman, etc., Mach. Co. *v.* Fish, 120 Ill. App. 314, 316; Paschal *v.* Perez, 7 Tex. 348, 365.

98. Simpson *v.* City Sav. Bank, 56 N. H. 466, 471, 22 Am. Rep. 491; Woart *v.* Winnick, 3 N. H. 473, 477, 14 Am. Dec. 384 [*quoted* in Rich *v.* Flanders, 39 N. H. 304, 362] (holding that "as, on the one hand, it is not within the constitutional competency of the legislature to annul by statute any legal ground, on which a pending action is founded, or to create any new bar, by which such an action may be defeated; so, on the other hand, it is believed, that no new ground for the support of an existing action can be created by statute, nor any legal bar to such an action be thus taken away. A statute, attempting any of these things, seems to us to be a retrospective law for the decision of civil causes, within the prohibition of this article in the bill of rights"); De Cordova *v.* Galveston, 4 Tex. 470, 473.

99. Statutory provisions relating to right to foreclose lien of mortgages on railroads see RAILROADS, 33 Cyc. 562 *et seq.*

1. Ukiah Bank *v.* Gibson, (Cal. 1895) 39 Pac. 1069; Central Pac. R. Co. *v.* Shackleford, 63 Cal. 261; Wilson *v.* Pickering, 28 Mont. 435, 72 Pac. 821; Dodge *v.* Nevada Nat. Bank, 109 Fed. 726, 48 C. C. A. 626.

2. *Maine.*— Thomas *v.* Mayo, 56 Me. 40.

Minnesota.— Foster *v.* Berkey, 8 Minn. 351.

Pennsylvania.— Ihmsen *v.* Monongahela Nav. Co., 32 Pa. St. 153.

Virginia.— Peters *v.* Auditor, 33 Gratt. 368.

Washington.—Realty Co. *v.* Appolonio, 5 Wash. 437, 32 Pac. 219.

United States.—Northwestern Mut. L. Ins. Co. *v.* Seaman, 80 Fed. 357.

See 44 Cent. Dig. tit. "Statutes," § 343.

3. Glassford *v.* Harshaw, 4 N. J. L. J. 118.

4. Price *v.* Hopkin, 13 Mich. 318; Dewart *v.* Purdy, 29 Pa. St. 113. And see Burn *v.* Carvahlo, 1 A. & E. 883, 28 E. C. L. 407, 4 N. & M. 889, 30 E. C. L. 622, holding that even where it is expressly enacted that a statute shall take effect on a day named, yet, if the royal assent is not obtained until a subsequent day, the provisions of a particular section in its terms prospective do not take effect until such subsequent day.

5. Turner *v.* Turner, 4 Call (Va.) 234.

6. Johnson *v.* Fay, 16 Gray (Mass.) 144, holding that the exception, in a statute confirming titles to realty, of rights acquired prior to the passage of the act, does not include rights acquired after its approval by the governor, but before it took effect.

7. Mazange *v.* Slocum, 23 Ala. 668; Berry *v.* Clary, 77 Me. 482, 1 Atl. 360, holding that a statute providing that "nothing herein contained shall apply to any action now pending" applies to actions arising before as well as after its enactment, and excepts only actions pending at the date of its passage.

The terms "actions" and "causes of action" as used in such statutes do not include statutes for the punishment of crime. Calkins *v.* State, 14 Ohio St. 222.

So the term "action" does not include a proceeding in insolvency. Belfast *v.* Fogler, 71 Me. 403.

8. Gwin *v.* Brown, 21 App. Cas. (D. C.) 295.

Saving clauses see *infra*, VII, D, 6, h.

9. Dalhy *v.* Wolf, 14 Iowa 228; People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187.

10. Fielden *v.* Lahens, 9 Bosw. (N. Y.) 436 [*modified* in 2 Abb. Dec. 111, 3 Transcr. App. 218, 6 Abb. Pr. N. S. 341]; U. S. Saving, etc., Co. *v.* Miller, (Tenn. Ch. App. 1897) 47 S. W. 17, holding that the proviso in Acts (1895), c. 81, reciting that the act shall not affect any contract theretofore made, does not apply to a loan, although the negotiations therefor had been pending for some time, and the papers had been drawn and the draft signed, where the papers were not executed, the draft delivered, or the proceedings approved until after the act went into effect.

11. Essex Public Road Bd. *v.* Skinkle, 49 N. J. L. 65, 6 Atl. 435.

c. Retrospective Construction in General.[12] It is a rule of statutory construction that all statutes are to be construed as having only a prospective operation,[13]

12. Validity and constitutionality of retrospective statutes see CONSTITUTIONAL LAW, 8 Cyc. 1017.

13. *Alabama.*— New England Mortg. Security Co. *v.* Board of Revenue, 81 Ala. 110, 1 So. 30; *Ex p.* Buckley, 53 Ala. 42; Barnes *v.* Mobile, 19 Ala. 707; Williams *v.* Young, 3 Ala. 145.

California.— Von Schmidt *v.* Huntington, 1 Cal. 55.

Colorado.— Colorado Springs *v.* Neville, 42 Colo. 219, 93 Pac. 1096; Ducey *v.* Patterson, 37 Colo. 216, 86 Pac. 109, 9 L. R. A. N. S. 1066; Edelstein *v.* Carlile, 33 Colo. 54, 78 Pac. 680; Denver, etc., R. Co. *v.* Woodward, 4 Colo. 162.

Connecticut.— Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 14 Am. St. Rep. 94, 4 L. R. A. 45; Goodsell's Appeal, 55 Conn. 171, 10 Atl. 557; Plumb *v.* Sawyer, 21 Conn. 351; Brewster *v.* McCall, 15 Conn. 274.

Delaware.— Smith *v.* Clemson, 6 Houst. 171.

District of Columbia.— De Ferranti *v.* Lyndmark, 30 App. Cas. 417; Brown *v.* Grand Fountain U. O. T. R., 28 App. Cas. 200 (holding that statutes will be given a prospective operation only, unless the language used clearly indicates that they were intended to be retrospective in their operation, especially where to give them a retrospective effect will impair the obligation of a contract); Ohio Nat. Bank *v.* Berlin, 26 App. Cas. 218.

Florida.— McCarthy *v.* Havis, 23 Fla. 508, 2 So. 819.

Georgia.— Forsyth *v.* Marbury, R. M. Charlt. 324.

Illinois.— People *v.* Gage, 233 Ill. 447, 500, 84 N. E. 616, 618; Bauer Grocer Co. *v.* Zelle, 172 Ill. 407, 50 N. E. 238; People *v.* Peacock, 98 Ill. 172; *In re* Tuller, 79 Ill. 99, 22 Am. Rep. 164; Lake View *v.* Letz, 44 Ill. 81; Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Guard *v.* Rowan, 3 Ill. 499; Garrett *v.* Doe, 2 Ill. 335, 30 Am. Dec. 653 (holding that courts will not give to a law a retrospective operation, even where they might do so without a violation of the paramount law of the constitution, unless the intention of the legislature be clearly expressed in favor of the retrospective operation); Brennan *v.* Electrical Installation Co., 120 Ill. App. 461; Halpin *v.* Prosperity Loan, etc., Assoc., 108 Ill. App. 316 (holding that a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute taken by themselves, in connection with the subject-matter and the occasion of the enactment); Porter *v.* Glenn, 87 Ill. App. 106; La Salle *v.* Blanchard, 1 Ill. App. 635. But see Aultman, etc., Mfg. Co. *v.* Fish, 120 Ill. App. 314, holding that the rule that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the act is so clear that it will admit of no other construction, applies only to statutes which affect some vested right or to statutes which affect some interest existing under a prior law.

Indiana.— Rogers *v.* Rogers, 137 Ind. 151, 36 N. E. 895 (holding that no presumption arises that one section of an act was intended to be retrospective by reason of an intention shown in another section that it should not be retrospective); Lang *v.* Clapp, 103 Ind. 17, 2 N. E. 197; Wilhite *v.* Hamrick, 92 Ind. 594; Hopkins *v.* Jones, 22 Ind. 310; Aurora, etc., Turnpike Co. *v.* Holthouse, 7 Ind. 59; Pritchard *v.* Spencer, 2 Ind. 486.

Iowa.— Knoulton *v.* Redenbaugh, 40 Iowa 114; Bartruff *v.* Remey, 15 Iowa 257.

Kansas.— Douglas County *v.* Woodward, 73 Kan. 238, 84 Pac. 1028.

Kentucky.— Head *v.* Ward, 1 J. J. Marsh. 280.

Louisiana.— Cassard *v.* Tracy, 52 La. Ann. 835, 27 So. 368, 49 L. R. A. 272; Vicksburg, etc., R. Co. *v.* Scott, 52 La. Ann. 512, 27 So. 137; Saunders *v.* Carroll, 12 La. Ann. 793; Mechanics', etc., Bank *v.* Richardson, 12 Rob. 596; Deyraud's Succession, 9 Rob. 357; Oyon's Sucession, 6 Rob. 504, 41 Am. Dec. 274; State *v.* Bermudez, 12 La. 352; Guidry *v.* Rees, 7 La. 278; Donaldson *v.* Winter, 1 La. 137; Dean *v.* Carnahan, 7 Mart. N. S. 258; Miller *v.* Reynolds, 5 Mart. N. S. 665; Durnford *v.* Ayme, 3 Mart. N. S. 270; Fournier *v.* Landreau, 3 Mart. N. S. 173; White *v.* Brown, 3 Mart. N. S. 17; Turpin *v.* His Creditors, 9 Mart. 562.

Maine.— *In re* Pope, 103 Me. 382, 69 Atl. 616; Carr *v.* Judkins, 102 Me. 506, 67 Atl. 569; Torrey *v.* Corliss, 33 Me. 333; Hastings *v.* Lane, 15 Me. 134.

Maryland.— Baltimore City Appeal Tax Ct. *v.* Western Maryland R. Co., 50 Md. 274 (holding that, before a statute can be given a retrospective operation, the court must see that the words are so strong and imperative in their retrospective expression that no other meaning can be attached to them, or that the plain intention of the legislature could not otherwise be gratified); Dallam *v.* Oliver, 3 Gill 445.

Massachusetts.— Haverhill *v.* Marlborough, 187 Mass. 150, 72 N. E. 943; Somerset *v.* Dighton, 12 Mass. 383.

Michigan.—Bedier *v.* Fuller, 116 Mich. 126, 74 N. W. 506 (holding that Laws (1897), No. 195, providing that, in cases where an action on the case for fraud or deceit would lie, assumpsit may be brought to recover damages for the injury, does not affect cases pending on appeal when it was enacted); Fuller *v.* Grand Rapids, 40 Mich. 395; Smith *v.* Humphrey, 20 Mich. 398.

Minnesota.— Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821 (holding that statutes will be considered to have a prospective op-

unless the purpose and intention of the legislature to give them a retrospective

eration only unless an intent to the contrary is expressed by or implied from the language used, especially where to construe the act as retroactive would render it unconstitutional); Brown *v.* Hughes, 89 Minn. 150, 94 N. W. 438; Gaston *v.* Merriam, 33 Minn. 271, 279, 22 N. W. 614 (holding that it is a rule of statutory construction, as elementary as it is universal, that a law will not be regarded as retrospective unless such construction is essential to give it effect, or its terms are so explicit as to preclude any other interpretation).

Mississippi.— Powers *v.* Wright, 62 Miss. 35 (holding that, although a statute is remedial in some respects, yet if in its general scope it is a penal statute, it will not be given a retrospective operation); Brown *v.* Wilcox, 14 Sm. & M. 127; Hooker *v.* Hooker, 10 Sm. & M. 599.

Missouri.— State *v.* Dirckx, 211 Mo. 568, 111 S. W. 1; State *v.* Ferguson, 62 Mo. 77; State *v.* Hays, 52 Mo. 578; State *v.* Thompson, 41 Mo. 25; Schulenberg *v.* Campbell, 14 Mo. 491.

Montana.— Bullard *v.* Smith, 28 Mont. 387, 72 Pac. 761.

Nebraska.— Kearney County *v.* Taylor, 54 Nebr. 542, 74 N. W. 965, holding that a statute legalizing payments to public officers does not affect a judgment against such an officer for the repayment of such money, if the judgment was rendered before the act was passed.

New Jersey.— Allen *v.* Bernards Tp. Taxation Com'rs, 57 N. J. L. 303, 31 Atl. 219 (holding that this rule of construction applies to the title as well as to the enacting clauses of a statute); Warshung *v.* Hunt, 47 N. J. L. 256; Citizens' Gaslight Co. *v.* Alden, 44 N. J. L. 648; State *v.* Newark, 40 N. J. L. 92; State *v.* Scudder, 32 N. J. L. 203.

New York.— Rhodes *v.* Sperry, etc., Co., 193 N. Y. 223, 85 N. E. 1097, 127 Am. St. Rep. 945 [*affirming* 120 N. Y. App. Div. 467, 104 N. Y. Suppl. 1102]; People *v.* Columbia County, 43 N. Y. 130; Danks *v.* Quackenbush, 1 N. Y. 129, 3 Den. 594, How. App. Cas. 325 [*affirming* 1 Den. 128]; Weisberg *v.* Weisberg, 112 N. Y. App. Div. 231, 98 N. Y. Suppl. 260 (holding that Laws (1893), p. 1387, c. 601, as amended by Laws (1896), p. 215, c. 272, prohibiting marriage between uncles and nieces, was not retroactive, so as to invalidate a prior marriage between such relatives); People *v.* Reliance Mar. Ins. Co., 70 Hun 554, 24 N. Y. Suppl. 190; People *v.* Strack, 1 Hun 96, 3 Thomps: & C. 165; Bay *v.* Gage, 36 Barb. 447; Berley *v.* Rampacher, 5 Duer 183; Dodin *v.* Dodin, 17 Misc. 35, 40 N. Y. Suppl. 748 [*affirmed* in 16 N. Y. App. Div. 42. 44 N. Y. Suppl. 800 (*affirmed* in 162 N. Y. 635, 57 N. E. 1108)]; Matter of Foley, 8 Misc. 57, 28 N. Y. Suppl. 608; Dash *v.* Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291; Jarvis *v.* Jarvis, 3 Edw. 462.

North Carolina.— Wilkinson *v.* Wright, 1 N. C. 422.

North Dakota.— Adams, etc., Co. *v.* Kenoyer, 17 N. D. 302, 116 N. W. 98, 16 L. R. A. N. S. 681.

Ohio.— Kelley *v.* Kelso, 5 Ohio St. 198; State *v.* Staley, 5 Ohio Cir. Ct. 602, 3 Ohio Cir. Dec. 294.

Oregon.— Denny *v.* Bean, 51 Oreg. 180, 93 Pac. 693, 94 Pac. 503.

Pennsylvania.— Horn, etc., Mfg. Co. *v.* Steelman, 215 Pa. St. 187, 64 Atl. 409; Taylor *v.* Mitchell, 57 Pa. St. 209; *In re* Juniata Tp. Div., 31 Pa. St. 301; Dewart *v.* Purdy, 29 Pa. St. 113; Mullock *v.* Souder, 5 Watts & S. 198; Oliphant *v.* Smith, 6 Watts 449; Smith *v.* Illinois Cent. R. Co., 36 Pa. Super. Ct. 584; *In re* Old Forge School Dist., 27 Pa. Super. Ct. 586; Martin *v.* Greenwood, 27 Pa. Super. Ct. 245; Schonawolff *v.* Schuylkill County, 5 Pa. Co. Ct. 329; Headley *v.* Ettling, 1 Phila. 39; Brown *v.* Peterson, 2 Woodw. 112.

South Carolina.— Atlanta Mut. Aid., etc., Co. *v.* Logan, 55 S. C. 295, 33 S. E. 372; Warren *v.* Jones, 9 S. C. 288; *Ex p.* Graham, 13 Rich. 277.

South Dakota.— American Inv. Co. *v.* Thayer, 7 S. D. 72, 63 N. W. 233; American Inv. Co. *v.* Beadle County, 5 S. D. 410, 59 N. W. 212.

Texas.— Gulf, etc., R. Co. *v.* Wells-Fargo Express Co., (1908) 110 S. W. 41 [*affirming* (Civ. App. 1908) 108 S. W. 174]; Texas, etc., R. Co. *v.* Wells-Fargo Express Co., 101 Tex. 564, 110 S. W. 38 [*affirming* (Civ. App. 1908) 108 S. W. 172]; Aaron *v.* State, 34 Tex. Cr. 103, 29 S. W. 267, holding that where a local option election is held in conformity to the law in force at the time, the passage of a subsequent law changing the manner of such election does not defeat local option adopted at such prior election.

Utah.— Farrel *v.* Pingree, 5 Utah 443, 16 Pac. 843.

Vermont.— Richardson *v.* Cook, 37 Vt. 599, 88 Am. Dec. 622; Wires *v.* Farr, 25 Vt. 41; Briggs *v.* Hubbard, 19 Vt. 86; Lowry *v.* Keyes, 14 Vt. 66.

Virginia.— Burton *v.* Seifert, 108 Va. 338, 61 S. E. 933; Swift *v.* Newport News, 105 Va. 108, 52 S. E. 821, 3 L. R. A. N. S. 404.

Washington.— Heilig *v.* Puyallup, 7 Wash. 29, 34 Pac. 164.

West Virginia.— Barker *v.* Hinton, 62 W. Va. 639, 59 S. E. 614; Rogers *v.* Lynch, 44 W. Va. 94, 29 S. E. 507, holding that no statute, however positive, is to be construed as retroactive or as designed to interfere with existing contracts or rights of action, especially vested rights, unless the intention that it shall so operate is expressly declared.

Wisconsin.— Austin *v.* Burgess, 36 Wis. 186; Seamans *v.* Carter, 15 Wis. 548, 82 Am. Dec. 696; State *v.* Atwood, 11 Wis. 422.

United States.— U. S. *v.* American Sugar Refining Co., 202 U. S. 563, 26 S. Ct. 717, 50 L. ed. 1149 [*reversing* 136 Fed. 508]; Sohn *v.* Waterson, 17 Wall. 596, 21 L. ed. 737; Reynolds *v.* McArthur, 2 Pet. 417, 434, 7 L. ed. 470 [*quoted* in Ladiga *v.* Roland, 2 How. 581, 11 L. ed. 387] (holding that "it

effect is expressly declared [14] or is necessarily implied from the language used.[15]

is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable"); McDougald *v.* New York L. Ins. Co., 146 Fed. 674, 77 C. C. A. 100; U. S. *v.* Jackson, 143 Fed. 783, 75 C. C. A. 41 [*reversing* 140 Fed. 266]; U. S. *v.* Atchison, etc., R. Co., 142 Fed. 176; Hathaway *v.* New York Mut. L. Ins. Co., 99 Fed. 534; The Queen, 93 Fed. 834 (holding that Cal. Act, March 27, 1897, amending Code Civ. Proc. § 690, by exempting absolutely from execution wages of seamen, in an amount not exceeding one hundred dollars, cannot be construed to apply to executions based upon judgments rendered in suits on contract prior to the passage of the act. Such a statute, if applied to judgments based on contracts made before its enactment, would conflict with the provision of the constitution which denies to a state the power to pass any law impairing the obligation of contracts); Wrightman *v.* Boone County, 88 Fed. 435, 31 C. C. A. 570; Ellis *v.* Connecticut Mut. L. Ins. Co., 8 Fed. 81, 19 Blatchf. 383; *In re* Billing, 3 Fed. Cas. No. 1,408, 3 Ben. 212, 2 Nat. Bankr. Reg. 512; *In re* Richardson, 20 Fed. Cas. No. 11,777, 2 Story 571; Warren Mfg. Co. *v.* Etna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501; Johnston *v.* U. S., 17 Ct. Cl. 157 (holding that a statute does not operate retrospectively when it is made to operate on future transactions merely because such transactions have relation to, and are founded on, antecedent events).

England.— *In re* Norman, [1893] 2 Q. B. 369, 63 L. J. Q. B. 34, 69 L. T. Rep. N. S. 675, 4 Reports 584; *Ex p.* Todd, 19 Q. B. D. 186, 56 L. J. Q. B. 431, 57 L. T. Rep. N. S. 835, 4 Morr. Bankr. Cas. 209, 35 Wkly. Rep. 676; Laurie *v.* Renad, [1892] 3 Ch. 402, 61 L. J. Ch. 580, 67 L. T. Rep. N. S. 275, 40 Wkly. Rep. 679; Allhusen *v.* Brooking, 26 Ch. D. 559, 53 L. J. Ch. 520, 51 L. T. Rep. N. S. 57, 32 Wkly. Rep. 657; Hickson *v.* Darlow, 23 Ch. D. 690, 52 L. J. Ch. 453, 31 Wkly. Rep. 361 [*affirmed* in 23 Ch. D. 693, 48 L. T. Rep. N. S. 449, 31 Wkly. Rep. 417]; Westbury-on-Severn Union *v.* Barrow-in-Furness Parish, 3 Ex. D. 88, 47 L. J. M. C. 79, 38 L. T. Rep. N. S. 315, 26 Wkly. Rep. 372; Hitchcock *v.* May, 6 A. & E. 943, 6 L. J. K. B. 215, 2 N. & P. 72, W. W. & D. 491, 33 E. C. L. 490; Waugh *v.* Middleton, 8 Exch. 352, 22 L. J. Exch. 109; Pettamberdass *v.* Thackoorseydass, 15 Jur. 257, 5 Moore Indian App. 109, 18 Eng. Reprint 836, 7 Moore P. C. 239, 13 Eng. Reprint 873; Tenterden Poor Law Union *v.* St. Mary, 47 L. J. M. C. 81, 38 L. T. Rep. N. S. 485.

Canada.— Association Pharmaceutique de Québec *v.* Livernois, 31 Can. Sup. Ct. 43; Grinnell *v.* Reg., 16 Can. Sup. Ct. 119; Massey *v.* McClelland, 17 Can. L. T. Occ. Notes 293; Doe *v.* Milne, 18 N. Brunsw. 375; Smith *v.* Burke, 16 N. Brunsw. 130; Clarkson *v.* Sterling, 15 Ont. App. 234; Coats *v.* Kelly, 15 Ont. App. 81; Conn *v.* Smith, 28 Ont. 629; Sawyer *v.* Pringle, 20 Ont. 111; Clarkson *v.* Ontario Bank, 13 Ont. 666; Nagle *v.* Latour, 27 U. C. C. P. 137; Campbell *v.* Elma, 13 U. C. C. P. 296; Cusick *v.* McRae, 11 U. C. Q. B. 509; White *v.* Clark, 11 U. C. Q. B. 137, 10 U. C. Q. B. 490.

See 44 Cent. Dig. tit. "Statutes," § 344.

14. Ukiah Bank *v.* Gibson, (Cal. 1895) 39 Pac. 1069; Evans *v.* Williams, 2 Dr. & Sm. 324, 11 Jur. N. S. 256, 34 L. J. Ch. 661, 11 L. T. Rep. N. S. 762, 13 Wkly. Rep. 423, 62 Eng. Reprint 644. See *supra*, VII, D, 1, b.

15. *Alabama.*— Leahart *v.* Deedmeyer, 158 Ala. 295, 48 So. 371.

Arizona.— Cummings *v.* Rosenberg, (1909) 100 Pac. 810.

California.— *In re* Richmond, 9 Cal. App. 402, 99 Pac. 554.

Illinois.— O'Donnell *v.* Healy, 134 Ill. App. 187.

Louisiana.— McGeehan *v.* Burke, 37 La. Ann. 156.

Minnesota.— Parkinson *v.* Brandenburg, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326; Giles *v.* Giles, 22 Minn. 348; Kerlinger *v.* Barnes, 14 Minn. 526.

Missouri.— State *v.* Thompson, 41 Mo. 25.

New Jersey.— Frelinghuysen *v.* Morristown, (1909) 72 Atl. 2 [*affirming* 76 N. J. L. 271, 70 Atl. 77].

New York.— New York, etc., R. Co. *v.* Van Horn, 57 N. Y. 473.

Oklahoma.— Anderson *v.* Ritterbusch, (1908) 98 Pac. 1002.

Tennessee.— Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796.

Wisconsin.— Finney *v.* Ackerman, 21 Wis. 268.

United States.— Blanchard *v.* Sprague, 3 Fed. Cas. No. 1,518, 2 Story 164, 3 Sumn. 535, 1 Robb. Pat. Cas. 734, 742; Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175.

England.— Quilter *v.* Wapleson, 9 Q. B. D. 672, 52 L. J. Q. B. 44, 31 Wkly. Rep. 75; Thompson *v.* Lack, 3 C. B. 540, 16 L. J. C. P. 75, 54 E. C. L. 540; Moon *v.* Durden, 2 Exch. 22, 12 Jur. 138.

See 44 Cent. Dig. tit. "Statutes," § 344.

This is also a rule of the civil law.— Taylor's Succession, 10 La. Ann. 509; Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 504, 5 Am. Dec. 291; *In re* Hickory Tree Road, 43 Pa. St. 139; Larkin *v.* Saffarans, 15 Fed. 147.

The reason of the rule is that a statute should not be given a construction that will render it unconstitutional or unjust. Quackenbush *v.* Danks, 1 Den. (N. Y.) 128 [*affirmed* in 1 N. Y. 129, How. App. Cas. 325, 3 Den. 594]; Merwin *v.* Ballard, 66 N. C. 398; Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930, 1063; Kelley *v.* Great Northern R. Co., 152 Fed. 211.

The repeal of a section providing that "this act shall have no retroactive effect" does not of itself make the original statute

In every case of doubt, the doubt must be solved against the retrospective effect.[16] This general rule has been applied to a great variety of statutes, including the uniform "Negotiable Instruments Law," [17] usury laws,[18] statutes levying taxes,[19] relating to defenses to actions on insurance policies,[20] relating to damages for wrongs,[21] providing for rendition of deficiency judgments upon sale of mortgaged premises,[22] limiting the time for the commencement of actions,[23] declaring certain contracts void,[24] regulating parties who may sue for death by wrongful act,[25] or the manner of distribution of the amount recovered,[26] modifying the fellow-servant rule,[27] relating to plans for bridges over railroad tracks,[28] relating to mechanics' liens,[29] defining the boundary of a city,[30] imposing a liability upon counties to reimburse towns for money expended in constructing bridges,[31] and providing that railroad companies held liable for fires communicated by their locomotives shall have the benefit of the insurance on the property destroyed.[32] After all, however, the presumption against the retrospective operation of statutes is only a rule of construction,[33] and if the legislative intent to give a statute a retroactive operation is obvious and plain, such intention must be given effect.[34]

retroactive. St. Joachim de la Point Claire *v.* Point Claire Turnpike Road Co., 24 Can. Sup. Ct. 486.

16. *Illinois.*— People *v.* Lower, 236 Ill. 608, 86 N. E. 577; Cleary *v.* Hoobler, 207 Ill. 97, 69 N. E. 967.

Maine.— Dyer *v.* Belfast, 88 Me. 140, 33 Atl. 790.

Maryland.— Grinder *v.* Nelson, 9 Gill 299, 52 Am. Dec. 694.

Missouri.— Leete *v.* St. Louis State Bank, 115 Mo. 184, 195, 21 S. W. 788, holding that "in construing statutes in regard to whether their action is to be prospective or retrospective, all the adjudicated cases and all the text-writers with unbroken uniformity unite in declaring 'that they are to operate prospectively and not otherwise unless the intent that they are to operate in such an unusual way, to-wit, retrospectively, is manifested on the face of the statute in a manner altogether free from ambiguity.'"

New Jersey.— Williams *v.* Brokaw, (Ch. 1908) 70 Atl. 665; Berdan *v.* Van Riper, 16 N. J. L. 7, holding that where a statute is susceptible of construction as both prospective and retrospective, the former construction will be adopted, but especially if the retrospective operation will work injustice to any one.

See 44 Cent. Dig. tit. "Statutes," § 344.

17. Jefferson County Nat. Bank *v.* Dewey, 181 N. Y. 98, 73 N. E. 569 [*reversing* 90 N. Y. App. Div. 443, 86 N. Y. Suppl. 350].

18. Isherwood *v.* Dixon, 5 Grant Ch. (U. C.) 314; Montreal Bank *v.* Scott, 17 U. C. C. P. 358; Commercial Bank *v.* Harris, 26 U. C. Q. B. 594.

19. Eaton *v.* Union County Nat. Bank, 141 Ind. 159, 40 N. E. 693; Com. *v.* Preston Coal, etc., Co., 2 Dauph. Co. Rep. (Pa.) 263; Dodge *v.* Nevada Nat. Bank, 109 Fed. 726, 48 C. C. A. 626.

20. Huff *v.* Sovereign Camp W. W., 85 Mo. App. 96.

21. Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628 (holding that a statute will not be given a retrospective operation to reduce the amount of damages recoverable under the law at the time the cause of action arose); Ihmsen *v.* Monongahela Nav. Co., 32 Pa. St. 153.

22. Thompson *v.* West, 59 Nebr. 677, 82 N. W. 13, 49 L. R. A. 337.

23. Friedmann *v.* McGowan, 1 Pennew. (Del.) 436, 42 Atl. 723. See LIMITATIONS OF ACTIONS, 25 Cyc. 991.

24. Cotter *v.* Montana Grand Lodge A. O. U. W., 23 Mont. 82, 57 Pac. 650.

25. Nohrden *v.* Northeastern R. Co., 54 S. C. 492, 32 S. E. 524.

26. Berg *v.* Berg, 105 Ky. 80, 48 S. W 432, 20 Ky. L. Rep. 1083.

27. Wright *v.* Southern R. Co., 80 Fed. 260.

28. State *v.* New York, etc., R. Co., 71 Conn. 43, 40 Atl. 925.

29. Jones *v.* Young, 78 Ill. App. 78.

30. Oakland *v.* Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277.

31. Thacher *v.* Steuben County, 21 Misc. (N. Y.) 271, 47 N. Y. Suppl. 124 [*reversed* in memoranda on authority of Wirt *v.* Allegany County, 90 Hun 205].

32. Wild *v.* Boston, etc., R. Co., 171 Mass. 245, 50 N. E. 533.

33. Lamb *v.* Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558.

34. *Illinois.*— Logan County *v.* People, 116 Ill. 466, 6 N. E. 475.

New Jersey.— Baldwin *v.* Newark, 38 N. J. L. 158, holding that if a retrospective intention clearly appears on the face of a statute, the court will give it that effect, unless to do so will violate some constitutional provision.

New York.— *In re* Protestant Episcopal Public School, 46 N. Y. 178 [*reversing* 58 Barb. 161, 40 How. Pr. 139].

Ohio.— Hamilton County *v.* Rosche, 50 Ohio St. 103, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584.

Oregon.— Denny *v.* Bean, 51 Oreg. 180, 93 Pac. 693, 94 Pac. 503.

Tennessee.— Kurtzman *v.* Blackwell, 21 Tex. Civ. App. 222, 51 S. W. 659.

Where a statute is expressly or by clear implication made retroactive to a certain extent or for a certain purpose, the courts will not by construction give to it a retroactive operation to any greater extent or for any other purpose.[35]

d. Remedial Statutes.[36] In accordance with the general rule that remedial statutes should be given a liberal construction, they will be freely construed to have a retrospective operation whenever such seems to have been the intention of the legislature,[37] unless such a construction would impair the validity of contracts, disturb vested rights,[38] or create new obligations.[39] This principle has been applied to statutes for the prevention of fraud,[40] legitimating the issue of void marriages,[41] conferring capacity upon certain classes to take by devise,[42] declaring that settlements made by public officers shall not be conclusive,[43] relating to recovery for

Vermont.— Sturgis *v.* Hull, 48 Vt. 302 (holding that when the language of a statute is such that it will admit of either construction, if it appears that a retrospective construction is necessary to accompany and carry into effect the intent and purpose of the legislature, and no substantial rights are thereby impaired or destroyed, and no wrong done, or when a statute is purely remedial, and does not take away vested rights, such a construction will be put upon it; otherwise it will be considered as prospective); Hine *v.* Pomeroy, 39 Vt. 211, 223 [*quoted* in Sturgis *v.* Hull, 48 Vt. 302] (holding that "ordinarily statutes are held to operate prospectively and not retrospectively, unless it appears that they were designed to have the latter operation. When it is sought to have such operation given to a statute, to the impairment of an existing right, or the infliction of a wrong, established and familiar principles would require the courts effectually to interpose and prevent such results. When, without such consequences, the intention is apparent that the law should have such operation, such intention would prevail").

Washington.—Swinburne *v.* Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932.

United States.— Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041; Lamb *v.* Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558 (holding that the rule cannot be invoked to change or defeat the intention when it is made obvious or certain by the terms of the statute); Pauley Jail Bldg., etc., Co. *v.* Crawford County, 84 Fed. 942, 28 C. C. A. 579 (holding that in a statute relating to judgments "rendered or to be rendered," the use of the word "rendered" demonstrates the legislative intention to make it operative upon judgments already entered when the statute was enacted); Baeder *v.* Jennings, 40 Fed. 199.

England.— Reg. *v.* Vine, L. R. 10 Q. B. 195, 13 Cox C. C. 43, 44 L. J. M. C. 60, 31 L. T. Rep. N. S. 842, 23 Wkly. Rep. 649; Atty.-Gen. *v.* Theobald, 24 Q. B. D. 557, 62 L. T. Rep. N. S. 768, 38 Wkly. Rep. 527.

Canada.— Reg. *v.* Canada Sugar Refining Co., 27 Can. Sup. Ct. 395; Vance *v.* Cummings, 13 Grant Ch. (U. C.) 25; Loucks *v.* Fisher, 2 U. C. Q. B. 470.

See 44 Cent. Dig. tit. "Statutes," § 344.

35. Gumpper *v.* Waterbury Traction Co., 68 Conn. 424, 36 Atl. 806; Reid *v.* Reid, 31 Ch. D. 402, 55 L. J. Ch. 294, 54 L. T. Rep. N. S. 100, 34 Wkly. Rep. 333.

36. Nature and construction of remedial statutes in general see *supra*, VII, B, 2.

Statutes relating to remedies and procedure see *infra*, VII, D, 2.

37. *Iowa.*— Haskel *v.* Burlington, 30 Iowa 232.

Maryland.— State *v.* Norwood, 12 Md. 195.

Minnesota.— State *v.* Baldwin, 62 Minn. 518, 65 N. W. 80.

Tennessee.— Fisher *v.* Dabbs, 6 Yerg. 119.

Texas.— Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

Wisconsin.— Bevier *v.* Dillingham, 18 Wis. 529.

United States.— Larkin *v.* Saffarans, 15 Fed. 147; *In re* Billing, 3 Fed. Cas. No. 1,408, 3 Ben. 212, 2 Nat. Bankr. Reg. 512.

England.— The Ironsides, 31 L. J. Adm. 129, Lush. 458, 6 L. T. Rep. N. S. 59; Reg. *v.* Birwistle, 58 L. J. M. C. 158.

Canada.— Easton *v.* Longchamp, 3 U. C. Q. B. 475.

See 44 Cent. Dig. tit. "Statutes," § 345.

38. Fisher *v.* Hervey, 6 Colo. 16.

39. Hamilton County *v.* Rosche, 50 Ohio St. 103, 112, 33 N. E. 408, 40 Am. St. Rep. 653, 19 L. R. A. 584, in which the court says: "This statute, it is contended, is remedial, and remedial statutes may be retroactive. It is remedial no doubt, in that enlarged sense of that term, where it is employed to designate laws made to supply defects in, or pare away hardships of, the common law, but not remedial in the sense of providing a more appropriate remedy than the law before afforded, to enforce an existing right or obligation. The statute under consideration provided no new method of procedure; it simply imposed upon Hamilton county an obligation towards these plaintiffs in error that did not attach to the transaction when it occurred. In attempting to accomplish this result the legislature transcended its constitutional powers."

40. Suydam *v.* New Brunswick Bank, 3 N. J. Eq. 114.

41. Brower *v.* Bowers, 1 Abb. Dec. (N. Y.) 214.

42. Hall *v.* Hall, 13 Hun (N. Y.) 306.

43. Heagy *v.* State, 85 Ind. 260.

death by wrongful act,[44] and providing a remedy for errors and irregularities in public proceedings;[45] but has been denied application to a statute extending the time of redemption from mortgage foreclosure sales,[46] extending the provisions of a pension law to the widow and minor children of those already included,[47] and to one for the relief of persons who have paid certain claims to the state or to the proper officer, where the state was fully paid, and the claim assigned, before the passage of the act.[48]

e. Statutes Impairing Vested Rights[49] — (i) *In General.* The rule that statutes are not to be construed retrospectively unless such construction was plainly intended by the legislature[50] applies with peculiar force to those statutes the retroactive operation of which would impair or destroy vested rights.[51] A statute therefore is not to be construed to impair the validity of contracts entered into before its passage.[52] This rule has been applied to statutes abolishing slavery,[53] for the release of sureties on a note or other instrument in writing,[54] requiring an indorsement for the transfer of a note,[55] or otherwise affecting the rights of parties to negotiable instruments,[56] requiring conditional sales to be

44. Bartley *v.* Boston, etc., R. Co., 198 Mass. 163, 83 N. E. 1093.

45. Miller *v.* Graham, 17 Ohio St. 1.

46. Wilder *v.* Campbell, 4 Ida. 695, 43 Pac. 677.

47. Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174 [*reversing* 118 Ill. App. 138].

48. Johnson *v.* Johnson, 26 Ind. 441. And see People *v.* Ulster County, 63 Barb. (N. Y.) 83, 88, holding that "even remedial statutes are not excepted from the general rule, except in those cases where no other construction can be given without leaving the enactment of no effect; or where such a retrospective construction is a necessary implication from the language employed."

49. Constitutional guarantee against divesting of rights by statute see CONSTITUTIONAL LAW, 8 Cyc. 1020.

Impairment of obligation of contract by statute see CONSTITUTIONAL LAW, 8 Cyc. 929.

Retrospective effect of statute governing descent and distribution see DESCENT AND DISTRIBUTION. 14 Cyc. 25.

50. See *supra*, VII, D, 1, c.

51. *Connecticut.*— Plumb *v.* Sawyer, 21 Conn. 351.

Indiana.— Bowen *v.* Striker, 100 Ind. 45; Aurora, etc., Turnpike Co. *v.* Holthouse, 7 Ind. 59, 61, holding that "statutes are to be considered prospective, unless the intention to give a retrospective operation is clearly expressed, and not even then, if, by such a construction, the act would divest vested rights."

Minnesota.— Davidson *v.* Gaston, 16 Minn. 230.

New York.— Calkins *v.* Calkins, 3 Barb. 305; Dash *v.* Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291. *Compare* Shepard *v.* People, 25 N. Y. 406 [*reversing* 23 How. Pr. 337].

United States.— Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43 [*reversed* on another ground in 121 U. S. 552, 7 S. Ct. 1129, 30 L. ed. 1010].

England.— Marsh *v.* Higgins, 9 C. B. 551, 19 L. J. C. P. 297, 1 L. M. & P. 253, 67 E. C. L. 551.

Canada.— *In re* Roden, 25 Ont. App. 12; Martindale *v.* Clarkson, 6 Ont. App. 1; Howell Lith. Co. *v.* Brethour, 30 Ont. 204; Scott *v.* Wye, 11 Ont. Pr. 93 (married women's property act); McDonald *v.* McDonald, 14 Grant Ch. (U. C.) 133; Jones *v.* Cowden, 36 U. C. Q. B. 495 [*affirming* 34 U. C. Q. B. 345].

See 44 Cent. Dig. tit. "Statutes," § 346.

But see Hardy *v.* Dunlap, 7 Tex. Civ. App. 339, 26 S. W. 852, holding that where one has not been in adverse possession of land a sufficient time to acquire title under the existing law, a statute changing the law of adverse possession is applicable to him.

A mere expectancy of inheriting does not constitute a vested right and may be affected by a statute passed after it arises. Burget *v.* Merritt, 155 Ind. 143, 57 N. E. 714.

Failure to exercise vested rights before the enactment of a subsequent statute which seeks to divest them in no way affects or lessens such rights. Gladney *v.* Sydnor, 172 Mo. 318, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880.

This rule will yield to the intention of the legislature where the intention clearly appears. *Re* Tate, 5 Can. L. J. N. S. 260.

52. *Indiana.*— Free *v.* Haworth, 19 Ind. 404.

Kentucky.— Duckham *v.* Smith, 5 T. B. Mon. 372; Feemster *v.* Ringo, 5 T. B. Mon. 336.

Minnesota.— Olson *v.* Nelson, 3 Minn. 53.

Mississippi.— Murrell *v.* Jones, 40 Miss. 565.

Nevada.— Milliken *v.* Sloat, 1 Nev. 573.

New York.—Van Rensselaer *v.* Livingston, 12 Wend. 490.

Canada.— Waterous Engine Works Co. *v.* Wilson, 11 Manitoba 287.

See 44 Cent. Dig. tit. "Statutes," § 346.

53. Roundtree *v.* Baker, 52 Ill. 241, 4 Am. Rep. 597; Bradford *v.* Jenkins, 41 Miss. 328.

54. Field *v.* Brokaw, 148 Ill. 654, 37 N. E. 80.

55. Creighton *v.* Gordon, Morr. (Iowa) 41.

56. North Bridgewater Bank *v.* Copeland, 7 Allen (Mass.) 139.

witnessed in writing, acknowledged, and recorded,[57] authorizing insolvency proceedings against non-residents,[58] providing that payments made within three months before an assignment for the benefit of creditors shall be void,[59] or that in certain cases a trust for the benefit of creditors shall be discharged at the end of twenty-five years,[60] permitting a purchaser in possession, in the vendor's action for the purchase-money, to set up by way of counter-claim a breach of covenant of title,[61] declaring that orders issued by a corporation shall not be negotiable,[62] requiring the registration of marriage contracts,[63] providing for the payment by a town of a certain part of the cost of construction of a highway,[64] forbidding the payment or receipt of royalties for coal mined,[65] creating or modifying homestead exemptions,[66] giving priority of payment to the United States out of the assets of their debtors,[67] prohibiting the transfer of any contract with the United States,[68] and to an ordinance prohibiting the planting of diseased trees;[69] but its application has been refused to the legal tender acts of 1862 and 1863, providing that the United States treasury notes should be a legal tender in payment of all debts public or private, within the United States, except duties on imports and interest on the public debt.[70] Where a particular contract is lawful when made, but such contract or its further performance is rendered illegal or void by a subsequent statute, acts done or rights acquired in pursuance of the contract and before the passage of the statute are not affected by it;[71] but the contract is discharged from the time the statute takes effect, without liability of either party on account of such discharge.[72] A statute subsequent to a judgment vesting rights in a party can have no retrospective operation to divest such rights.[73] Where rights have vested under a will admitted to probate before the passage of the act,[74] under homestead exemption laws,[75] under the existing law as to the property rights of husband and wife,[76] or as to the respective rights of life-tenants [77] and remainder-

57. Knoulton *v.* Redenbaugh, 40 Iowa 114.
58. Stetson *v.* Hall, 86 Me. 110, 29 Atl. 952.
59. Leavitt *v.* Lovering, 64 N. H. 607, 15 Atl. 414, 1 L. R. A. 58.
60. McCahill *v.* Hamilton, 20 Hun (N. Y.) 388.
61. Great Western Stock Co. *v.* Saas, 1 Cinc. Super. Ct. (Ohio) 21.
62. Craig *v.* Richmond Dist., 1 Phila. (Pa.) 33
63. Baldwin *v.* Baldwin, 2 Humphr. (Tenn.) 473.
64. Rader *v.* Kriebel, 32 Pa. Super. Ct. 548.
65. Southwestern Coal, etc., Co. *v.* McBride, 185 U. S. 499, 22 S. Ct. 763, 46 L. ed. 1010 [*affirming* 104 Fed. 1007, 43 C. C. A. 683].
66. Banks *v.* Speers, 97 Ala 560, 11 So. 841 (holding that where, under existing laws, a homestead has been lost by removal therefrom, it cannot be revested by a subsequent statute); Gladney *v.* Sydnor, 172 Mo. 318, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880; Spitley *v.* Frost, 15 Fed. 299, 5 McCrary 43 [*reversed* on another ground in 121 U. S. 552, 7 S. Ct. 1129, 30 L. ed. 1010].
67. U. S. *v.* Bryan, 9 Cranch (U. S.) 374, 3 L. ed. 764.
68. Robertson *v.* U. S., 2 Ct. Cl. 322; Chollar *v.* U. S., 2 Ct. Cl. 319.
69. Gray *v.* Long, (Cal. 1894) 37 Pac. 380. And see National Commercial Bank *v.* McDonnell, 92 Ala 387, 9 So. 149, holding that one who becomes a stock-holder in a corporation, after the passage of a law lessening the liability of stock-holders to creditors, is equally liable with the old stock-holders, under the former law, to creditors whose claims existed previous to the change of law.
70. Knox *v.* Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287; Hepburn *v.* Griswold, 8 Wall. (U. S.) 603, 19 L. ed. 513. *Contra*, Higgins *v.* Bear River, etc., Water, etc., Co., 27 Cal. 153.
71. Story *v.* Kimbrough, 33 Ga. 21; Bennett *v.* Woolfolk, 15 Ga. 213; Bradford *v.* Jenkins, 41 Miss. 328; Lowey *v.* Granite State Provident Assoc., 8 Misc. (N. Y.) 319, 28 N. Y. Suppl. 560.
72. Lowey *v.* Granite State Provident Assoc., 8 Misc. (N. Y.) 319, 28 N. Y. Suppl. 560; Rogers *v.* Hough, 4 Vt. 172; Odlin *v.* Pennsylvania Ins. Co., 18 Fed. Cas. No. 10,433, 2 Wash. 312.
73. Coughanour *v.* Bloodgood, 27 Pa. St. 285; Charles Baumbach Co. *v.* Singer, 86 Wis. 329, 56 N. W. 873.
74. Jones *v.* Jones, 37 Ala. 646; Albertson *v.* Landon, 42 Conn. 209.
75. Gladney *v.* Sydnor, 172 Mo. 318, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A. 880.
76. Ingoldsby *v.* Juan, 12 Cal. 564; Rose *v.* Rose, 104 Ky. 48, 46 S. W. 524, 20 Ky. L. Rep. 417, 84 Am. St. Rep. 430, 41 L. R. A. 353; Given *v.* Marr, 27 Me 212; *In re* Chavez, 149 Fed. 73, 80 C. C. A. 451.
Retrospective operation of statutes as to: Dower see DOWER, 14 Cyc. 884. Curtesy see CURTESY, 12 Cyc. 1004.
77. Kent *v.* Bentley, 10 Ohio Cir. Ct. 132, 6 Ohio Cir. Dec. 457.

men; [78] or where a right of action for damages has accrued before the passage of the act,[79] such rights will not be impaired or affected by the act. Also statutes regulating the procedure of elections,[80] or in regard to the salaries of officers,[81] are not to be construed retrospectively to impair rights vested before their passage.

(II) *Rights Accruing After Passage and Before Approval by Executive.* Since a statute does not become law until it has passed through all the forms required by the constitution, it cannot impair a contract made after the passage of the act by the two houses of the legislature, but before its approval by the governor.[82]

f. Statutes Imposing Liabilities.[83] A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage.[84] This rule has been applied to statutes creating liens,[85] imposing liabilities upon common carriers [86] and upon subscribers to corporate stock,[87] changing the law in regard to interest and usury,[88] authorizing the levy of taxes,[89] imposing penalties for non-payment of taxes,[90] authorizing recovery for expenses of assisting paupers,[91] authorizing a tenant for years to recover betterments as against the owner of the expectant estate,[92] relating to the liability of parties to negotiable instruments,[93] and to one providing that the death of one jointly liable on a contract shall not discharge his estate.[94]

g. Statutes Relating to Offenses and Prosecutions.[95] Statutes of a criminal or penal nature will not be construed to have a retrospective operation unless the intention of the legislature to give them such operation is expressed in clear and unequivocal language.[96] Applications of this rule have been made to prevent

78. Folsom *v.* Clark, 72 Me. 44.

79. Gould *v.* Eagle Creek School Dist. Sub-Dist. No. 3, 7 Minn. 203; Litchfield *v.* Bond, 186 N. Y. 66, 78 N. E. 719 [*reversing* 105 N. Y. App. Div. 229, 93 N. Y. Suppl. 1016]; Quinlan *v.* Welch, 141 N. Y. 158, 36 N. E. 12; Okeson *v.* Patterson, 29 Pa. St. 22; Humboldt Lumber Manufacturers' Assoc. *v.* Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

80. Todd *v.* Kalamazoo, etc., Counties Election Com'rs, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330.

81. U. S. *v.* Wanamaker, 21 D. C. 119; Goodman *v.* Huntingdon County, 17 Pa. Co. Ct. 393.

82. Wartman *v.* Philadelphia, 33 Pa. St. 202.

83. **Retrospective construction of statutes relating to:** Husband's liability for wife's antenuptial debts see HUSBAND AND WIFE, 21 Cyc. 1215. Liability of stock-holder for corporate debts see CORPORATIONS, 10 Cyc. 667. Seizure and forfeiture of intoxicating liquors see INTOXICATING LIQUORS, 23 Cyc. 292.

84. Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15. And see Craft *v.* Lofinck, 34 Kan. 365, 8 Pac. 359 (holding that to authorize the legislature by a retrospective act to impose a legal liability upon a township, where no such liability existed before, there must be a preëxisting moral obligation resting upon the people to discharge such liability); White *v.* Noland, 3 Mart. N. S. (La.) 636; Reg. *v.* Martin, 20 Can. Sup. Ct. 240 [*reversing* 2 Can. Exch. 328]; Penny *v.* Reg., 4 Can. Exch. 428; Bergman *v.* The Aurora, 3 Can. Exch. 228; Reg. *v.* Martin, 20 Can. Sup. Ct. 240.

85. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. 676.

86. Bucher *v.* Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216; Gallowsbaw *v.* Lonsdale Co., 25 R. I. 383, 55 Atl. 932.

87. Ogle *v.* Somerset, etc., Turnpike Road Co., 13 Serg. & R. (Pa.) 256.

88. Maynard *v.* Marshall, 91 Ga. 840, 18 S. E. 403.

89. Ohio Valley Tel. Co. *v.* Louisville, 123 Ky. 193, 94 S. W. 17, 29 Ky. L. Rep. 631, 682. But see Wood County *v.* State, 41 Ohio St. 423, holding that a law authorizing a levy to make good a deficiency is not a retroactive law.

90. People *v.* Peacock, 98 Ill. 172.

91. Rutland *v.* Chittenden, 74 Vt. 219, 52 Atl. 426.

92. Pratt *v.* Churchill, 42 Me. 471.

93. Cook *v.* Googins, 126 Mass. 410; Friend *v.* Wilkinson, 9 Gratt. (Va.) 31.

94. Richardson *v.* Draper, 23 Hun (N. Y.) 188 [*affirmed* in 87 N. Y. 337].

95. See CRIMINAL LAW, 12 Cyc. 70.

Retrospective construction of: Amendatory acts see *infra*, VII, D, 5, a. Repealing acts see *infra*, VII, D, 6.

Validity of ex post facto statutes see CONSTITUTIONAL LAW, 8 Cyc. 1027.

96. *Indiana.*— Eacock *v.* State, 169 Ind. 488, 82 N. E. 1039.

Missouri.— State *v.* Emerich, 87 Mo. 110.

New Jersey.— State *v.* Moore, 42 N. J. L. 208.

New York.— Shepherd *v.* People, 24 N. Y. 406, 24 How. Pr. 388.

North Carolina.— State *v.* Coley, 114 N. C. 879, 19 S. E. 705; State *v.* Massey, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308.

a retroactive construction of statutes creating offenses,[97] increasing the punishment,[98] imposing disabilities,[99] permitting conviction on less evidence than was required at the time of the commission of the offense,[1] abolishing degrees of an offense,[2] and to statutes conferring jurisdiction to punish offenses which at the time of the commission no court possessed jurisdiction to try.[3] So the statute applicable to the crime of murder is that in force at the time the act was committed,[4] and not a statute passed subsequently but before the death of the victim.[5] Furthermore a statute will not be construed to operate retrospectively so as to take away a penalty or condone a crime unless such intention is clearly expressed.[6] But by the use of appropriate language, a statute ameliorating the punishment for a crime may be applied to offenses committed before its passage;[7] even such a statute, however, will not be applicable to cases tried after its passage, but before it takes effect.[8]

2. Statutes Relating to Remedies and Procedure — a. In General.[9] The presumption against the retrospective construction of statutes is founded on the principle that they should not be given such a construction as will make them unconstitutional or unjust, and therefore as a general rule does not apply to statutes that relate merely to remedies and modes of procedure.[10] The legislature has full control over the mode, times, and manner of prosecuting suits;[11] and whenever, upon consideration of an entire statute relating to these matters, it appears to have been the legislative intent to make it retroactive, it will be given this effect.[12] A retroactive effect has accordingly been given statutes providing a new mode of enforcing claims against the state[13] or county,[14] authorizing the

97. U. S. *v.* Starr, 27 Fed. Cas. No. 16,379, Hempst. 469; Reg. *v.* Griffiths, [1891] 2 Q. B. 145, 56 J. P. 87, 60 L. J. M. C. 93, 39 Wkly. Rep. 719.

98. Wade *v.* State, 40 Ala. 74; Stephen *v.* State, 40 Ala. 67; Moore *v.* State, 40 Ala. 49; Miles *v.* State, 40 Ala. 39.

99. *In re* Pulborough Parish, [1894] 1 Q. B. 725, 58 J. P. 572, 63 L. J. Q. B. 497, 70 L. T. Rep. N. S. 639, 1 Manson 172, 9 Reports 395, 42 Wkly. Rep. 388.

1. Com. *v.* Grover, 16 Gray (Mass.) 602.

2. Reynolds *v.* State, 33 Fla. 301, 14 So. 723.

3. U. S. *v.* Starr, 27 Fed. Cas. No. 16,379, Hempst. 469.

4. Debney *v.* State, 45 Nebr. 856, 64 N. W. 446, 34 L. R. A. 851.

5. People *v.* Gill, 6 Cal. 637.

6. State *v.* Startup, 39 N. J. L. 423.

7. Blount *v.* State, 34 Tex. Cr. 640, 31 S. W. 652; Ledbetter *v.* State, (Tex. Cr. App. 1895) 29 S. W. 479; Royer *v.* Loranger, 8 Quebec Q. B. 119. And see Reg. *v.* Hagan, 8 C. & P. 167, 34 E. C. L. 670, holding that a statute by which a party charged with felony may, notwithstanding acquittal, be found guilty of assault, applied to offenses committed before it came into operation.

8. Jenkins *v.* State, 28 Tex. App. 86, 12 S. W. 411.

9. Retrospective construction of: Amendatory acts see *infra*, VII, D, 5, a. Remedial statute see *supra*, VII, D, 1, d. Revisions see *infra*, VII, D, 5, b. Statute relating to actions on bonds of contractors for public work of United States see United States. Statutes relating to recovery of civil damages for sale of liquor see Intoxicating Liquors, 23 Cyc. 310. Statutes relating to remedies and procedure in regard to particular subjects see Equity, 16 Cyc. 29; Limitations of Actions, 25 Cyc. 991; Lis Pendens, 25 Cyc. 1452, 1484.

10. Clark *v.* Kansas City, etc., R. Co., 219 Mo. 524, 118 S. W. 40; Dieterich *v.* Fargo, 194 N. Y. 359, 87 N. E. 518, 22 L. R. A. N. S. 696 [*reversing* 119 N. Y. App. Div. 315, 104 N. Y. Suppl. 334]; Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930, 1063.

11. De Cordova *v.* Galveston, 4 Tex. 470.

12. *California.*—Swamp Land Dist. No. 307 *v.* Glide, 112 Cal. 85, 44 Pac. 451; Bensley *v.* Ellis, 39 Cal. 309.

Colorado.— Fisher *v.* Hervey, 6 Colo. 16.

Illinois.— Aultman, etc., Machinery Co. *v.* Fish, 120 Ill. App. 314.

Indiana.— Indianapolis *v.* Imberry, 17 Ind. 175; Collier *v.* State, 10 Ind. 58.

Minnesota.— Wade *v.* Drexel, 60 Minn. 164, 62 N. W. 261.

Oregon.— Denny *v.* Bean, 51 Oreg. 180, 93 Pac. 693, 94 Pac. 503.

Vermont— Pollard *v.* Wilder, 17 Vt. 48.

United States.— Sampeyreac *v.* U. S., 7 Pet. 222, 8 L. ed. 665.

England.— Curtis *v.* Stovin, 22 Q. B. D. 513, 58 L. J. Q. B. 174, 60 L. T. Rep. N. S. 772, 37 Wkly. Rep. 315; Wright *v.* Hale, 6 H. & N. 227, 6 Jur. N. S. 1212, 30 L. J. Exch. 40, 3 L. T. Rep. N. S. 444, 9 Wkly. Rep. 157.

Canada.— *In re* Sharp, 5 Brit. Col. 117, construing the Homestead Act Amendment of 1896.

See 44 Cent. Dig. tit. "Statutes," § 350.

13. Chapman *v.* State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158.

14. Gilman *v.* Contra Costa County, 6 Cal. 676.

issue of executions [15] and attachments [16] in cases where they were not permitted before, authorizing a particular procedure for the settlement of estates,[17] authorizing the foreclosure of mortgages in certain cases,[18] relating to the enforcement of liens,[19] regulating the parties to an action for death by wrongful act,[20] relating to the remedy on bonds given by an insolvent petitioner,[21] relating to the limitations of actions,[22] relating to the extension of chattel mortgages,[23] allowing recoupment of usurious interest,[24] making compliance with certain conditions a necessary prerequisite to the validity of certain defenses,[25] and even to statutes relating to procedure in criminal cases.[26] But any generalization founded on the distinction between right and remedy is attended with some danger because of the difficulty of drawing the distinction accurately;[27] and where the remedy is taken away altogether,[28] or is encumbered with conditions that would render it useless or impracticable to pursue it,[29] where, under the guise of making a change in the remedy, a new right or obligation is created,[30] or where the intention of the legislature to give the statutes only a prospective operation is clearly expressed in the act,[31]

15. Myers *v.* Moran, 113 N. Y. App. Div. 427, 99 N. Y. Suppl. 269.

16. Kuehn *v.* Paroni, 20 Nev. 203, 19 Pac. 273; Rouge *v.* Rouge, 14 Misc. (N. Y.) 421, 35 N. Y. Suppl. 836 [*affirmed* in 15 Misc. 36, 36 N. Y. Suppl. 436]; Swartz *v.* Lawrence, 12 Phila. 181.

17. Fitzhugh *v.* Fitzhugh, 6 B. Mon. (Ky.) 4.

18. Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 9.

19. Orman *v.* Crystal River R. Co., 5 Colo. App. 493, 39 Pac. 434.

20. Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371.

21. State *v.* Burke, 2 Gill (Md.) 79.

22. Stine *v.* Bennett, 13 Minn. 153; Crooks *v.* Crooks, 4 Grant Ch. (U. C.) 615; Notman *v.* Crooks, 10 U. C. Q. B. 105. But see *In re* Roden, 25 Ont. App. 12, holding that there is a strong presumption that statutes of limitation are not retrospective.

23. Aultman, etc., Mach. Co. *v.* Fish, 120 Ill. App. 314.

24. Bowen *v.* Phillips, 55 Ind. 226. This case is to be distinguished from Kepler *v.* Conkling, 89 Ind. 392, in which such recoupment was not allowed because the statute in question expressly provided that "nothing herein contained shall be construed as affecting existing contracts."

25. Erskine *v.* Glidden, (Me. 1886) 3 Atl. 651.

26. State *v.* Main, 16 Wis. 398.

27. Kent *v.* Gray, 53 N. H. 576, 579 [*quoted* in Simpson *v.* City Sav. Bank, 56 N. H. 466, 471, 22 Am. Rep. 491], holding that "undoubtedly, a remedy may be changed, in some sense, and to some extent, without affecting a right,—that is, there may be a change in the remedy that is not injurious, oppressive, and unjust; but it is equally clear that a remedy may be so changed as to affect a right injuriously, oppressively, and unjustly, within the meaning of the prohibition." And see People *v.* Hays, 4 Cal. 127 [*overruled* in Allen *v.* Allen, 95 Cal. 184, 205, 30 Pac. 213, 16 L. R. A. 646; Moore *v.* Martin, 38 Cal. 428].

28. Knight *v.* Lee, [1893] 1 Q. B. 41, 62 L. J. Q. B. 28, 67 L. T. Rep. N. S. 688, 5 Reports 54, 41 Wkly. Rep. 125.

29. Ball *v.* Anderson, 196 Pa. St. 86, 46 Atl. 366, 79 Am. St. Rep. 693 (holding that where a statute allows the individual creditor of an insolvent corporation to sue an individual stock-holder on his liability, an amendment of the statute to conform to the general equitable principles of collection and distribution is not a change of remedy only, but of substantive rights, and therefore does not affect pending actions); De Cordova *v.* Galveston, 4 Tex. 470; Relyea *v.* Tomahawk Paper, etc., Co., 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878 (holding that a change in the law as to the time for the enforcement of existing rights, or imposing a new condition of such enforcement, which does not allow a reasonable time within which to commence an action for such enforcement or to comply with the new condition, will not be construed retrospectively to operate upon causes of action arising before its passage); *In re* Roden, 25 Ont. App. 12.

Retroactive effect of statute as to limitations of actions see 25 Cyc. 991.

30. Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84; Plummer *v.* Northern Pac. R. Co., 152 Fed. 206; Dixon *v.* Winnipeg Electric St. R. Co., 11 Manitoba 528, holding that a statute lengthening the period of a statute of limitations does not operate to revive rights of action barred before its passage.

31. *Alabama.*— Crawford *v.* State, Minor 143.

California.— People *v.* Hays, 4 Cal. 127.

District of Columbia.— Ohio Nat. Bank *v.* Berlin, 26 App. Cas. 218.

Florida.— McCarthy *v.* Havis, 23 Fla. 508, 2 So. 819; Kennedy *v.* Mitchell, 4 Fla. 457.

Indiana.— Kepler *v.* Conkling, 89 Ind. 392; Hopkins *v.* Jones, 22 Ind. 310.

Kentucky.— Craig *v.* Craig, 6 J. J. Marsh. 171.

Louisiana.— Louisiana Citizens' Bank *v.* Deynoodt, 25 La. Ann. 628.

Maine.— Stinson *v.* Rouse, 52 Me. 261.

Michigan.— Fuller *v.* Grand Rapids, 40 Mich. 395.

it will not be construed to affect remedies and procedure as to causes of action arising before its passage.

b. Application to Pending Actions and Proceedings [32] — (i) *In General.* An act relating to remedies or procedure will not be construed to apply to proceedings pending at the time it takes effect where it is expressly provided either in the statute itself [33] or by general law [34] that it shall not apply to such proceedings. Furthermore a statute will not be applied by the courts to actions or proceedings pending at the time of its passage whenever such application would work injustice,[35] as by cutting off rights to which parties were entitled under the prior law,[36] subjecting a party to new liabilities,[37] abrogating liens acquired before its passage,[38] limiting the amount of damages recoverable,[39] conferring jurisdiction not possessed by the court when the action was instituted,[40] rendering void proceedings valid when taken,[41] abating an action properly commenced,[42] requiring

New York.— Cooper *v.* North, 1 How. Pr. 59.

Oregon.— Denny *v.* Bean, (1908) 93 Pac. 693 [*modified* as to another matter in (1908) 94 Pac. 503], holding that, where a remedy has been once barred by statute, a subsequent enactment establishing a longer period of time in which the remedy may be enjoyed will not be given a retroactive construction to revive the lost remedy, unless that intention is affirmatively expressed in the act.

Virginia.— Lovell *v.* Arnold, 2 Leigh 16.

United States.— Sears *v.* Mahoney, 66 Fed. 860.

See 44 Cent. Dig. tit. "Statutes," § 350.

32. Retrospective construction of: Bankrupt laws see BANKRUPTCY, 5 Cyc. 241. Curative statutes see *infra*, VII, D, 3. Repealing acts see VII, D, 6. Revisions and codes see VII, D, 5, b.

33. *Arkansas.*— Nevada County *v.* Hicks, 48 Ark. 515, 3 S. W. 524, holding that the act of Feb. 27, 1879, providing that "hereafter" counties should prosecute their suits in the name of the state, does not apply to suits pending at the time of the passage of the act.

Connecticut.— State *v.* Smith, 38 Conn. 397.

Indiana.— Stieler *v.* State, 166 Ind. 548, 77 N. E. 1083.

Maine.— Erskine *v.* Glidden, (1886) 3 Atl. 651.

Maryland.— Baltimore City Appeal Tax Ct. *v.* State University, 50 Md. 457; Baltimore City Appeal Tax Ct. *v.* Baltimore Academy of Visitation, 50 Md. 437; Baltimore City Appeal Tax Ct. *v.* Patterson, 50 Md. 354.

Missouri.— Manwaring *v.* Missouri Lumber, etc., Co., 200 Mo. 718, 98 S. W. 762; Haarstick *v.* Gabriel, 200 Mo. 237, 98 S. W. 760.

North Carolina.— Douglas *v.* Caldwell, 64 N. C. 372; Walton *v.* McKesson, 64 N. C. 154.

Ohio.— Jones *v.* Howells, 8 Ohio Dec. (Reprint) 127, 5 Cinc. L. Bul. 851.

South Carolina.— Duren *v.* Kee, 41 S. C. 171, 19 S. E. 492.

See 44 Cent. Dig. tit. "Statutes," § 351.

But even the express application of a statute to suits pending at the time of its passage will not operate to cure errors made before its passage. Weitz *v* Walter A. Wood Reaping, etc., Mach. Co., 49 Nebr. 434, 68 N. W. 613; Altschuler *v.* Snyder, 49 Nebr. 22, 67 N. W. 869.

34. Henderson *v.* Hayne, 2 Metc. (Ky.) 342; Hine *v.* Pomeroy, 39 Vt. 211.

35. *Alabama.*— Snediker *v.* Boyleston, 83 Ala. 408, 4 So. 33; Broadnax *v.* Sullivan, 29 Ala. 320.

Louisiana.— Edwards *v.* Marin, 28 La. Ann. 567.

New York.— Trist *v.* De Cabezas, 2 Rob. 708, 710, 18 Abb. Pr. 143, holding that "in all statutes which affect or change a remedy, it is but fair to presume that it was intended to exempt pending cases and proceedings from their operation, unless the contrary appears; especially where the change might prejudice or injure the rights of parties."

North Carolina.— Merwin *v.* Ballard, 66 N. C. 398.

Pennsylvania.— Com. *v.* Credit Mobilier, 1 Leg. Op. 57.

Canada.— Caradoc Tp. *v.* Metcalfe Tp., 21 Ont. 309.

See 44 Cent. Dig. tit. "Statutes," § 351.

36. Wallace *v.* Oregon Short Line R. Co., 16 Ida. 103, 100 Pac. 904; Hawley *v.* Simons, (Ill. 1887) 14 N. E. 7; Rogers *v.* Greenbush, 58 Me. 395; Provident Life, etc., Co. *v.* Brunner, 4 Nebr. (Unoff.) 48, 93 N. W. 144.

37. Manwaring *v.* Missouri Lumber, etc., Co., 200 Mo. 718, 98 S. W. 762; Haarstick *v.* Gabriel, 200 Mo. 237, 98 S. W. 760; State *v.* Berry, 25 Mo. 355; Ogle *v.* Somerset, etc., Turnpike Road Co., 13 Serg. & R. (Pa.) 256.

38. Ryan *v.* Maxey, 14 Mont. 81, 35 Pac. 515.

39. Osborne *v.* Detroit, 32 Fed. 36. But see Dent *v.* Holbrook, 54 Cal. 145, holding that where, between the commencement of the action and the recovery of judgment, a statute has been passed permitting the recovery of damages to a greater amount than was allowed by the former law, the amount will be governed by the later law.

40. Wheatland *v.* Lovering, 10 Gray (Mass.) 16, holding that the jurisdiction of a court cannot be suppressed by a statute passed before the commencement of the action but not taking effect until after such commencement.

41. Barnes *v.* Bell, 10 Rich. (S. C.) 376.

42. Gould *v.* Hayes, 19 Ala. 438; Reid *v.*

steps not necessary under the former law,[43] dispensing with steps necessary under the law when proceedings were taken,[44] or upholding a proceeding not authorized under the law in existence when instituted.[45] But a statute in regard to remedies and procedure will be construed to apply to pending proceedings [46] whenever the language used clearly indicates that such construction was intended by the legislature; [47] and whenever the act is purely remedial in character,[48] so that its application to pending proceedings will not work hardship or injustice, but, on the other hand, will the better protect and secure the rights of parties.[49] Such enactments also as do not affect the nature of the remedy, but relate solely to incidents of procedure,[50] such as pleading,[51] evidence,[52] and appeal and error,[53] unless the contrary is expressed, are applicable to all proceedings taken in pending actions from the time they take effect.

(II) *SPECIAL PROCEEDINGS.*[54] Where a statute is passed transferring jurisdiction of special proceedings from one body to another it will operate, in the absence of a saving clause, to divest the former body of jurisdiction over proceedings pending at the time it takes effect.[55] In so far, however, as the new statute merely provides for changes in the mode of procedure, it will not invalidate steps taken before it goes into effect,[56] but will apply to all proceedings taken thereafter.[57]

New York, 139 N. Y. 534, 34 N. E. 1102 [*affirming* 68 Hun 110, 22 N. Y. Suppl. 623].

43. Auditor-Gen. *v.* Chandler, 108 Mich. 569, 66 N. W. 482.

44. Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. 33.

45. Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Smith *v.* Lyon, 44 Conn. 175.

46. Williams *v.* Ely, 14 Wis. 236, holding that an act made applicable to pending proceedings does not extend to cases in which final judgment had been rendered before its passage.

47. *Minnesota.*— Fish *v.* Chicago, etc., R. Co., 82 Minn. 9, 84 N. W. 458, 83 Am. St. Rep. 398.

Ohio.— Gibson *v.* Miller, 28 Ohio Cir. Ct. 28, 421.

Texas.— Phœnix Ins. Co. *v.* Shearman, (Civ. App. 1898) 43 S. W. 1063.

Virginia.— Danville *v.* Pace, 25 Gratt. 1, 18 Am. Rep. 663, holding that "no corporation shall hereafter interpose the defence of usury in any action" is sufficient indication of intention to apply the statute to pending actions.

Wisconsin.— Williams *v.* Ely, 14 Wis. 236.

Canada.— Bell *v.* Ley, 1 U. C. Q. B. 9; Bank of British North America *v.* Clarke, 1 U. C. Q. B. 1.

See 44 Cent. Dig. tit. "Statutes," § 351.

48. Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701, statute allowing compensation for betterments.

49. *Connecticut.*— Buel's Appeal, 60 Conn. 63, 22 Atl. 488, conferring power upon probate court to order sale of decedent's real estate.

Georgia.— Johnson *v.* Bradstreet Co., 87 Ga. 79, 13 S. E. 250, preventing abatement of suit on death of party.

Illinois.— Rockford Ins. Co. *v.* Nelson, 65 Ill. 415, authorizing action of assumpsit on sealed obligation.

Michigan.— Judd *v.* Judd, 125 Mich. 228, 84 N. W. 134, granting power to enforce by fine and imprisonment refusal to comply with order of the court for the payment of alimony.

Mississippi.— Excelsior Mfg. Co. *v.* Keyser, 62 Miss. 155, granting a lien on compliance with certain conditions.

New York.— Litch *v.* Brotherson, 16 Abb. Pr. 384, 25 How. Pr. 407, act to expedite litigation and prevent delay of justice.

Canada.— Foulds *v.* Foulds, 12 Manitoba 389.

See 44 Cent. Dig. tit. "Statutes," § 351.

50. *Iowa.*— Davidson *v.* Wheeler, Morr. 238.

Maine.— Gray *v.* Carleton, 35 Me. 481.

New York.— People *v.* Syracuse, 128 N. Y. App. Div. 702, 113 N. Y. Suppl. 707.

Oregon.— Denny *v.* Bean, 51 Oreg. 180, 93 Pac. 693, 94 Pac. 503; Marks *v.* Crow, 14 Oreg. 382, 13 Pac. 55.

Pennsylvania.— Kille *v.* Reading Iron-Works, 134 Pa. St. 225, 19 Atl. 547; *In re* Hickory Tree Road, 43 Pa. St. 139.

England.— Singer *v.* Hasson, 50 L. T. Rep. N. S. 326.

51. Blair *v.* Cary, 9 Wis. 543.

52. Hubbard *v.* New York, etc., R. Co., 70 Conn. 563, 40 Atl. 533 (holding, however, that where the application of the statute was dependent upon the adoption of rules by the judges of the supreme court, it was not operative before the adoption of the rules); Fish *v.* Chicago, etc., R. Co., 82 Minn. 9, 84 N. W. 458, 83 Am. St. Rep. 398.

53. *In re* Public Works Com'r, 111 N. Y. App. Div. 285, 97 N. Y. Suppl. 503 [*affirmed* in 185 N. Y. 391, 78 N. E. 146].

54. For amendment of statute pending proceedings to lay out a highway see STREETS AND HIGHWAYS.

55. Grand Trunk R. Co. *v.* Cumberland County, 88 Me. 225, 33 Atl. 988.

56. Mayne *v.* Huntington County, 123 Ind. 139, 24 N. E. 80.

57. Union County *v.* Greene, 40 Ohio St. 318; Texas Midland R. Co. *v.* Southwestern

c. Jurisdiction and Venue — (I) *JURISDICTION IN GENERAL.* Where a court derives its jurisdiction from the constitution, the repeal of a statute purporting to confer jurisdiction upon it is without effect;[58] but where the jurisdiction of a court depends wholly upon a statute, the repeal of the statute operates to divest the court of its jurisdiction even of pending suits.[59] Where such intention is clearly expressed in the act, a statute depriving a court of jurisdiction may operate retrospectively to suspend proceedings then pending,[60] and a statute conferring jurisdiction may operate to give jurisdiction over causes of action arising before the passage of the act.[61] But in the absence of such clearly expressed intention a statute will not be construed to deprive a court of jurisdiction then possessed by it,[62] or to confer jurisdiction over causes of action arising before its passage.[63]

(II) *VENUE.* A statute in relation to the venue may be given a retrospective operation so as to apply to actions accrued or pending [64] at the time it takes effect; but unless such intention is clearly expressed, it will not be given a retroactive effect.[65]

d. Parties, Pleading, and Evidence — (I) *PARTIES.* A statute determining who may be proper parties to actions, especially when of a remedial nature,[66] will be applied to actions accrued [67] or pending [68] at the time of its passage.

(II) *PLEADING.* Statutes relating to pleading may,[69] or may not,[70] be given a retroactive effect, in accordance with the expressed intention of the legislature. In the absence of any such expression of intention, they will not be construed to invalidate pleadings filed before their taking effect,[71] but will be applied to all pleadings thereafter filed, even though the cause of action had accrued [72] or was pending [73] before the statute took effect.

(III) *EVIDENCE.*[74] Rules of evidence are at all times subject to modification by the legislature,[75] and statutes making such changes are applicable from their passage,[76] not only to causes of action arising thereafter, but also to actions

Tel., etc., Co., 24 Tex. Civ. App. 198, 58 S. W. 152.

58. Knight *v.* Knight, 12 La. Ann. 59.

59. Remington *v.* Smith, 1 Colo. 53; Langdon *v.* Applegate, 5 Ind. 327; Hunt *v.* Jennings, 5 Blackf. (Ind.) 195, 33 Am. Dec. 465; Todd *v.* Landry, 5 Mart. (La.) 459, 12 Am. Dec. 479; Gates *v.* Osborne, 9 Wall. (U. S.) 567, 19 L. ed. 748.

60. Remington *v.* Smith, 1 Colo. 53; State *v.* Lackey, 2 Ind. 285; Fairchild *v.* U. S., 91 Fed. 297; Corbett *v.* U. S., 1 Ct. Cl. 139.

61. Thompson *v.* Harbison, 7 Blackf. (Ind.) 495; State *v.* Welch, 65 Vt. 50, 25 Atl. 900; Larkin *v.* Saffarans, 15 Fed. 147.

62. Lilly *v.* Purcell, 78 N. C. 82.

A statute conferring upon one court jurisdiction then exercised by another will not operate to divest jurisdiction already acquired by the latter (Gould *v.* Hayes, 19 Ala. 438, 450; Champlin *v.* Bakewell, 21 La. Ann. 353; Com. *v.* Hudson, 11 Gray (Mass.) 64; State *v.* St. Louis County Ct., 38 Mo. 402), unless the act clearly indicates that the jurisdiction conferred by it is exclusive (State *v.* Lackey, 2 Ind. 285).

63. Indianapolis, etc., R. Co. *v.* Kercheval, 16 Ind. 84; Maguire *v.* Nowland, 2 Blackf. (Ind.) 76; Buck *v.* Dowley, 16 Gray (Mass.) 555.

64. Houston, etc., R. Co. *v.* Graves, 50 Tex. 181; Ball *v.* Presidio County, (Tex. Civ. App. 1894) 27 S. W. 702.

65. *In re* Sanborn, 96 Mich. 606, 56 N. W. 25; Baines *v.* Jemison, 86 Tex. 118, 23 S. W. 639 [*followed* in Baines *v.* Jemison, (Tex. Civ. App. 1893) 27 S. W. 182].

66. Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371.

67. Throop *v.* Cheeseman, 16 Johns. (N. Y.) 264.

68. Holyoke *v.* Haskins, 9 Pick. (Mass.) 259.

69. Grinder *v.* Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694.

70. Larsh *v.* Estep, 8 Ind. 287; Pickering *v.* Pickering, 19 N. H. 389.

71. Wood *v.* Ostram, 29 Ind. 177; Smith *v.* Keen, 26 Me. 411.

72. Southern Indiana R. Co. *v.* Peyton, 157 Ind. 690, 61 N. E. 722; Bartley *v.* Boston, etc., R. Co., 198 Mass. 163, 83 N. E. 1093.

73. Willis *v.* Fincher, 68 Ga. 444; Barret *v.* Browning, 8 Mo. 689; Grinnell *v.* Marine Guano, etc., Co., 13 R. I. 135; Nelson *v.* North, 1 Overt. (Tenn.) 33.

74. Effect of changes in law relating to taking depositions see DEPOSITIONS, 13 Cyc. 835, and relating to their admission in evidence see DEPOSITIONS, 13 Cyc. 981.

75. Baxter *v.* Hamilton, 20 Mont. 327, 335, 51 Pac. 265 (holding that "it is fundamental that a person has no vested right to have a controversy determined by existing rules of evidence. Like other rules affecting the remedy, they are subject to modification and change by the legislature"); Tabor *v.* Ward, 83 N. C. 291.

76. Clark *v.* Troy, 20 Cal. 219; Hubbard

accrued [77] or pending [78] at the time. Where, however, it was clearly the intention of the legislature not to make the act retrospective,[79] or, as in the case of evidence in criminal prosecutions,[80] a retrospective construction would render the statute unconstitutional,[81] it will be given only a prospective operation.

e. Trial.[82] Statutes relating to the time [83] or mode [84] of trial, and to qualifications [85] and challenges [86] of jurors, are to be construed as applicable to all proceedings, whether in civil or criminal [87] cases, from the time they take effect. But such statutes do not apply to trials,[88] or proceedings therein,[89] occurring before they went into effect; and, by express direction of the legislature, may be made applicable only to actions subsequently instituted.[90]

f. Judgments and Enforcement Thereof. A statute should not be construed to impair the force or validity of a judgment previously obtained,[91] to give validity to a judgment theretofore rendered without authority,[92] or to authorize a judgment in a pending proceeding to which a party was not entitled at the time the

v. New York, etc., R. Co., 70 Conn. 563, 40 Atl. 533; Heagy *v.* State, 85 Ind. 260; Jessee *v.* De Shong, (Tex. Civ. App. 1907) 105 S. W. 1011.

77. Stocker *v.* Foster, 178 Mass. 591, 60 N. E. 407; Cincinnati, etc., R. Co. *v.* Hedges, 15 Ohio Cir. Ct. 254, 8 Ohio Cir. Dec. 265; Lewis *v.* San Antonio, 7 Tex. 288; Sanders *v.* Malsbury, 1 Ont. 178; Atty.-Gen. *v.* Halliday, 26 U. C. Q. B. 397.

78. *Iowa.*— Inghram *v.* Dooley, Morr. 28; Ballard *v.* Ridgley, Morr. 27.

Massachusetts.— Woodvine *v.* Dean, 194 Mass. 40, 79 N. E. 882.

Montana.— Baxter *v.* Hamilton, 20 Mont. 327, 51 Pac. 265.

North Dakota.— Grand Forks First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615.

Texas.— Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011.

Canada.— Grantham *v.* Powell, 10 U. C. Q. B. 306.

See 44 Cent. Dig. tit. "Statutes," § 354.

Retrospective operation requiring reversal of case.— A bond to the state was executed at a time when such bonds were required by the revenue laws of the state to be on stamped paper. A suit was brought on this bond, and the court refused to admit it in evidence for want of the stamp. An appeal was taken, and pending the appeal the stamp law was repealed, and validity given to all contracts previously made on unstamped paper. The statute was construed to have a retroactive effect and the judgment was reversed. State *v.* Norwood, 12 Md. 195.

Where the statute is expressly confined to "cases now pending," it will not apply to actions instituted after it takes effect. Hardee *v.* Langford, 6 Fla. 13.

79. Cincinnati, etc., R. Co. *v.* Hedges, 63 Ohio St. 339, 58 N. E. 804.

80. Com. *v.* Homer, 153 Mass. 343, 26 N. E. 872; Kittrell *v.* State, 89 Miss. 666, 42 So. 609, holding that a statute changing the rules of evidence will not be applied to a trial occurring before it took effect.

Where the change is favorable to defendant, the new law will govern the admission of evidence on a trial occurring after the act takes effect, even though the alleged offense was committed and the indictment found before. Laughlin *v.* Com., 13 Bush (Ky.) 261. See CONSTITUTIONAL LAW, 8 Cyc. 1027.

81. Evidence as to execution of wills.— A statute changing the rules of evidence relating to the execution of wills will not be given a retroactive operation, because such a construction would result in depriving the heirs of vested rights, and a will must be proved as required by the law in force at the time of its execution. Giddings *v.* Turgeon, 58 Vt. 106, 4 Atl. 711.

82. Retrospective construction of statutes relating to: Qualifications of jurors see JURIES, 24 Cyc. 196. Repeal of exemptions from jury service see JURIES, 24 Cyc. 207.

83. Hoa *v.* Lefranc, 18 La. Ann. 393.

84. State *v.* Main, 16 Wis. 398.

85. Mercer *v.* State, 17 Ga. 146; Stokes *v.* People, 53 N. Y. 164, 13 Am. Rep. 492.

86. Lore *v.* State, 4 Ala. 173, holding that the alteration of the law relative to challenges of jurors, enlarging the privilege of the prisoner, applies to the trial of one offending before the alteration.

87. See *supra*, notes 83–86.

88. Secor *v.* State, 118 Wis. 621, 95 N. W. 942.

89. Weitz *v.* Walter A. Wood Reaping, etc., Mach. Co., 49 Nebr. 434, 68 N. W. 613 (holding that an act authorizing a county judge to allow a bill of exceptions in certain cases does not cure a previous error on his part in allowing such a bill without authority); People *v.* Chalmers, 5 Utah 201, 14 Pac. 131 (holding that an act of congress requiring jurors to take an additional oath did not apply to jurors selected, accepted, and sworn according to the existing law the day before the new statute went into effect).

90. Joliet Iron, etc., Co. *v.* Chicago, etc., R. Co., 50 Iowa 455; Trebon *v.* Zuraff, 50 Iowa 180; Simondson *v.* Simondson, 50 Iowa 110; Wormley *v.* Hamburg, 46 Iowa 144; Wadsworth *v.* Wadsworth, 40 Iowa 448; Bristow *v.* Guess, 12 Iowa 404; Gassert *v.* Bogk, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240.

91. People *v.* San Francisco, 21 Cal. 668; Duperier *v.* Iberia Parish Police Jury, 31 La. Ann. 709.

92. Price *v.* Simmons, 13 Ala. 749.

action was commenced.[93] So where a statute relating to judgments refers to those "hereafter rendered," [94] or uses other similar words in the future tense,[95] it will be applied only to judgments obtained after it takes effect. But all statutes relating to the enforcement of judgments,[96] such as those relating to the issue [97] and levy of executions [98] and the sale of property,[99] in the absence of express provisions to the contrary, are applicable to all judgments, whether obtained before or after their passage.[1]

g. Costs. As a general rule the rights and liabilities of parties in regard to costs depend upon the law in force at the time of the termination of the proceedings.[2] Where, however, final judgment is not given immediately upon the return of the verdict, all items of costs incurred prior to the verdict should be taxed in accordance with the law as it existed at the time of its return.[3] Where, however, it is the manifest intention of the legislature, as expressed in the act itself,[4] or in a general law,[5] that its provisions in regard to costs shall not apply to pending proceedings, the costs will be fixed in accordance with the law in force at the time such proceedings were instituted.

h. Appeal and Error.[6] Unless the language of a statute indicates a contrary intention, the right of a party to an appeal will be governed by the law in force at the time the appeal is taken.[7] Where a new statute takes away certain grounds

93. Fielden *v.* Labens, 9 Bosw. (N. Y.) 436 [*modified* in 2 Abb. Dec. 111, 3 Transcr. App. 218, 6 Abb. Pr. N. S. 341].

94. Tremont, etc., Mills *v.* Lowell, 165 Mass. 265, 42 N. E. 1134.

95. *District of Columbia.*— Ohio Nat. Bank *v.* Berlin, 26 App. Cas. 218, "shall be rendered."

Mississippi.—Caruth *v.* Anderson, 24 Miss. 60, 62, "in all cases in which any court of probate shall make and enter a judgment."

New Jersey.— State *v.* Connell, 43 N. J. L. 106, "when any judgment is obtained."

Oregon.— Denny *v.* Bean, 51 Oreg. 180, 93 Pac. 693, 94 Pac. 503, "whenever a judgment is given."

United States.— Ashley *v.* Maddox, 30 Fed. Cas. No. 18,227, Hempst. 217, "in all cases where any plaintiff shall obtain judgment."

See 44 Cent. Dig. tit. "Statutes," § 356.

96. Allen *v.* Cunningham, 3 Leigh (Va.) 395.

97. **May operate to extend time for issue of executions** on judgments previously obtained. Henschall *v.* Schmidtz, 50 Mo. 454; Bolton *v.* Landsdown, 21 Mo. 399; Finch *v.* Carpenter, 5 Abb. Pr. (N. Y.) 225. But will not operate retrospectively to deprive defendant of a right to stay of execution to which he was entitled under the law in force when the judgment was obtained. Du Boise *v.* Bloom, 38 Iowa 512.

98. Pratt *v.* Jones, 25 Vt. 303.

May operate to abolish exemptions from attachments on judgments previously obtained. Finns *v.* Banker, 5 Kulp (Pa.) 33.

99. Spencer *v.* Carter, 4 Hen. & M. (Va.) 402.

1. See cases cited *supra*, notes 96–99.

2. *Connecticut.*— Lew *v.* Bray, 81 Conn. 213, 70 Atl. 628.

Illinois.— Turley *v.* Logan County, 17 Ill. 151.

Indiana.— Free *v.* Haworth, 19 Ind. 404.

Maine.— Ellis *v.* Whittier, 37 Me. 548.

New Jersey.— Bonney *v.* Reed, 31 N. J. L. 133.

New York.— Munson *v.* Curtis, 43 Hun 214; Fargo *v.* Helmer, 43 Hun 17; Balcom *v.* Terwilliger, 42 Hun 170; Fargo *v.* Hamlin, 5 N. Y. St. 297; Ackley *v.* Tarbox, 19 Abb. Pr. 119; Crary *v.* Norwood, 5 Abb. Pr. 219; Steward *v.* Lamoreaux, 5 Abb. Pr. 14; Jones *v.* Underwood, 18 How. Pr. 532; Jackett *v.* Judd, 18 How. Pr. 385; Fisher *v.* Hunter, 15 How. Pr. 156; McCann *v.* Bradley, 15 How. Pr. 79; Torry *v.* Hadley, 14 How. Pr. 357; Goodenow *v.* Livingston, 1 How. Pr. 232; Van Valkenburgh *v.* Van Alen, 1 How. Pr. 86; Onondaga *v.* Briggs, 3 Den. 173; Matter of Sexton, 1 Dem. Surr. 3.

Pennsylvania.— Grace *v.* Altemus, 15 Serg. & R. 133.

South Carolina.— Irwin *v.* Brooks, 19 S. C. 96; Clark *v.* Linsser, 1 Bailey 187.

Utah.—Hepworth *v.* Gardner, 4 Utah 439, 11 Pac. 566.

Canada.— Todd *v.* Union Bank, 6 Manitoba 457; Ferguson *v.* English, etc., Inv. Co., 8 Ont. Pr. 404; Brown *v.* York, 9 U. C. Q. B. 453.

3. Scudder *v.* Gori, 28 How. Pr. (N. Y.) 155; Moore *v.* Westervelt, 14 How. Pr. (N. Y.) 279; Cooper *v.* North, 1 How. Pr. (N. Y.) 59; Kapp *v.* Loyns, 13 S. C. 288.

4. State *v.* Berry, 25 Mo. 355; Fitch *v.* Elko County, 8 Nev. 271.

5. Norwood *v.* Wooley, 9 Ohio Cir. Ct. 195, 4 Ohio Cir. Dec. 274.

6. See APPEAL AND ERROR, 2 Cyc. 553.

Appeals from justices of the peace see JUSTICES OF THE PEACE, 24 Cyc. 638.

Certiorari to review proceedings of justices of the peace see JUSTICES OF THE PEACE, 24 Cyc. 762.

7. *Michigan.*— Sanborn *v.* Beach, 96 Mich. 606, 56 N. W. 25.

New York.— New York *v.* Draper, 111 N. Y. App. Div. 285, 97 N. Y. Suppl. 503 [*affirmed* in 185 N. Y. 391, 78 N. E. 146].

of appeal, it will apply to pending cases,[8] and even to cases in which judgment has been pronounced;[9] but will not affect an appeal granted before it takes effect.[10] A statute authorizing appeals not allowed under the former law will not be construed to authorize an appeal from an order made before its passage,[11] or to apply to a case where an appeal has been barred by lapse of time[12] or has been dismissed[13] before the act took effect. But a statute in relation to the right of appeal will not be applied to pending actions where the language of the statute indicates that it is intended to apply only to actions thereafter brought,[14] or where such application would deprive a party of rights acquired before the passage of the act.[15] A writ of error is considered a new action, and the jurisdiction of a court to issue it,[16] or the right of a party to it,[17] must be determined by the law in force at the time it is issued or refused. Unless a different intention is shown,[18] statutes changing the time formerly allowed for taking an appeal will usually be applied from the time they take effect,[19] with a saving of a reasonable time, however, in any case where a strict application of the new act would at once deprive a party of a right of appeal existing under the former law.[20] In the case of actions pending at the time the new law goes into effect, the procedure necessary to obtain an appeal or writ of error will be governed by the former law[21] or by the new act,[22] in accordance with the intention of the legislature;[23] but in cases where judgments had been rendered and exceptions filed before the statute took effect, the old law will govern.[24] Where the decision of a case on appeal depends upon

Ohio.—Gibson *v.* Miller, 28 Ohio Cir. Ct. 28.

Oregon.— Bennett *v.* Taffe, (1891) 27 Pac. 223; Judkins *v.* Taffe, 21 Oreg. 89, 27 Pac. 221.

United States.— U. S. *v.* Hooe, 3 Cranch 73, 2 L. ed. 370.

Canada.— *Re* Scott, 6 Manitoba 193; Reg. *v.* Lynch, 12 Ont. 372; Spence *v.* Grand Trunk R. Co., 17 Ont. Pr. 172; Rose *v.* Hickey, 7 Ont. Pr. 390.

See 44 Cent. Dig. tit. "Statutes," § 358.

8. Lucas *v.* Dennington, 86 Ill. 88; Holcomb *v.* People, 79 Ill. 409.

9. Hale *v.* Grogan, 106 Ky. 311, 50 S. W. 257, 20 Ky. L. Rep. 1856, (1899) 49 S. W. 464.

10. Gilkerson *v.* Scott, 76 Ill. 509; Mundell *v.* Perry, 2 Gill & J. (Md.) 193. But see St. Helena Police Jury *v.* Fluker, 17 La. 465, and Perkins *v.* Nettles, 17 La. 253, both holding that remedial statutes intended to prevent the dismissal of appeals on technical grounds will be applied to appeals obtained, but not disposed of, before their passage.

11. Pumphry *v.* Brown, 3 W. Va. 9.

12. Dyer *v.* Belfast, 88 Me. 140, 33 Atl. 790.

13. Koksilah Quarry Co. *v.* Reg., 5 Brit. Col. 600.

14. Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120; Simondson *v.* Simondson, 50 Iowa 110; Davenport *v.* Davenport, etc., R. Co., 37 Iowa 624; Simberskey *v.* Smith, 27 Iowa 177; Cowen *v.* Evans, 22 Can. Sup. Ct. 331; Williams *v.* Irvine, 22 Can. Sup. Ct. 108; Couture *v.* Bouchard, 21 Can. Sup. Ct. 281; Hurtubise *v.* Desmarteau, 19 Can. Sup. Ct. 562.

15. Wilder *v.* Lumpkin, 4 Ga. 208.

Criminal cases.— A statute authorizing writs of error to review judgments which shall have been rendered in favor of those indicted for criminal offenses does not include judgments rendered before its passage. People *v.* Carnal, 6 N. Y. 463.

16. Lequatte *v.* Drury, 6 Ill. App. 389; McAlpin *v.* Clark, 2 Ohio S. & C. Pl. Dec. 160, 1 Ohio N. P. 195.

17. Young *v.* Shallenberger, 53 Ohio St. 291, 41 N. E. 518; Pope *v.* Reilly, 29 U. C. Q. B. 495.

18. Watkins *v.* Haight, 18 Johns. (N. Y.) 138, holding that a statute limiting the time of bringing writs of error should be construed to apply to judgments subsequently rendered.

19. Odum *v.* Garner, 86 Tex. 374, 25 S. W. 18; Garce *v.* Buffington, (Tex. Civ. App. 1894) 25 S. W. 317. And see Beebe *v.* Birkett, 108 Mich. 234, 65 N. W. 970, holding that an act increasing the time allowed for settling a case applies to actions then pending.

20. Odum *v.* Garner, 86 Tex. 374, 25 S. W. 18, holding that where the statute reduces the time allowed, the court will give that proportion of the total time allowed under the new statute which the unexpired time bore to the total time under the old law.

21. Thompson *v.* Blanchard, 4 How. Pr. (N. Y.) 260; Clarke *v.* Crandall, 4 How. Pr. (N. Y.) 127, 2 Code Rep. 70; Doty *v.* Brown, 3 How. Pr. (N. Y.) 375.

22. Hufford *v.* Grand Rapids, etc., R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; Farmers' L. & T. Co. *v.* Carroll, 4 How. Pr. (N. Y.) 211; Young *v.* Shallenberger, 53 Ohio St. 291, 41 N. E. 518.

23. Altschuler *v.* Snyder, 49 Nebr. 22, 67 N. W. 869, holding that a statute authorizing a bill of exceptions in certain cases and especially making it applicable to pending actions does not cure an error in a judgment rendered prior to its passage on consideration of such a bill of exceptions.

24. Battelle *v.* Bridgman, Morr. (Iowa)

whether a statute passed after the judgment in the court below shall be applied, such a statute will usually be applied to the decision of questions of procedure,[25] but will not operate to deprive defendant of a ground of reversal in a criminal case,[26] or to deprive parties of substantial rights to which they were entitled under the old law.[27]

i. Competency of Witnesses. Statutes governing the competency of witnesses will be applied to all trials held after they take effect, including those in pending actions,[28] unless they contain an express[29] or implied[30] exception of actions pending at the time; but will not be applied to cases pending on appeal in which the trial was had before their passage.[31]

3. Curative Statutes[32] — a. In General. Curative statutes are by their very nature intended to act upon past transactions, and are therefore wholly retrospective.[33] Examples of such statutes are those validating defective acknowledgments,[34] the assessment and collection of taxes,[35] the levy of executions,[36] bonds issued by municipal[37] and private[38] corporations, elections held without authority of positive law,[39] contracts,[40] deeds,[41] mortgages,[42] judgments,[43] and sales,[44] and ratifying and confirming other acts void when done.[45] The effect of curative statutes is usually to make the acts to which they relate valid *ab initio*,[46] but in some cases they have been construed to make such acts valid only from their passage,[47] and in no event will their retrospective operation be construed to deprive third parties of vested rights.[48] Where, from a consideration of the

363; Kentucky Cent. R. Co. *v.* Wells, 2 Ky. L. Rep. 60.

25. Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930, 1063.

Change of law pending rehearing.— If no judgment has been rendered on a decision, the supreme court will reverse the same on a rehearing, where a law has been enacted in opposition to such decision while the rehearing was pending. Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

26. Simpson *v.* State, 56 Miss. 297; Myers *v.* Com., 90 Va. 785, 20 S. E. 152.

27. Dutcher *v.* Culver, 24 Minn. 584.

28. Besson *v.* Cox, 35 N. J. Eq. 87; Southwick *v.* Southwick, 49 N. Y. 510; Tabor *v.* Ward, 83 N. C. 291.

Depositions of witnesses taken before the passage of an act making such evidence incompetent cannot be used in a trial after the passage of the act. Yarborough *v.* Moss, 9 Ala. 382; Hubbell *v.* U. S., 4 Ct. Cl. 37.

A statute making competent witnesses who were not competent before applies to occurrences before as well as after its passage. Wilson *v.* Wilson, 86 Ind. 472.

29. Graham *v.* Chandler, 38 Vt. 559.

30. The Farmer *v.* McCraw, 31 Ala. 659; Hammond *v.* Myrick, 14 Ga. 77.

31. Woodrow *v.* Mansfield, 106 Mass. 112.

32. **Curative acts as special legislation** see *supra*, III, C.

Curative acts as to municipal bonds see Municipal Corporations, 28 Cyc. 1606.

Curative acts as to tax deeds see Taxation.

Definition and constitutionality of curative acts see Acknowledgments, 1 Cyc. 609; Constitutional Law, 8 Cyc. 765, 1023.

33. Farmers' Sav., etc., Assoc. *v.* Berger, (Ark. 1902) 69 S. W. 57; McSurely *v.* McGrew, 140 Iowa 163, 118 N. W. 415.

34. Foster *v.* Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Tate *v.* Stooltzfoos, 16 Serg. & R. (Pa.) 35, 16 Am. Dec. 546. See Acknowledgments, 1 Cyc. 609.

35. Whitlock *v.* Hawkins, 105 Va. 242, 53 S. E. 401.

36. Norris *v.* Sullivan, 47 Conn. 474, holding that a statute providing that, when any officer "shall have levied" an execution, and by mistake or inadvertence the same shall not have been completed until after the lawful return-day, the levy shall be valid, is applicable to levies already made as well as to later ones.

37. Lockhart *v.* Troy, 48 Ala. 579.

38. Seymour *v.* Spring Forest Cemetery Assoc., 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859.

39. Huff *v.* Cook, 44 Iowa 639.

40. **Act validating usurious contracts void when made.** Iowa Sav., etc., Assoc. *v.* Heidt, 107 Iowa 297, 77 N. W. 1050, 70 Am. St. Rep. 197, 43 L. R. A. 689.

41. Burget *v.* Merritt, 155 Ind. 143, 57 N. E. 714; Campbell *v.* Fox, 17 U. C. C. P. 542; Loucks *v.* Fisher, 2 U. C. Q. B. 470.

42. McFaddin *v.* Evans-Snider-Buel Co., 185 U. S. 505, 22 S. Ct. 758, 46 L. ed. 1012 [*overruling* McFadden *v.* Blocker, 2 Indian Terr. 260, 48 S. W. 1043, 58 L. R. A. 878].

43. Underwood *v.* Lilly, 10 Serg. & R. (Pa.) 97.

44. Kurtzman *v.* Blackwell, 21 Tex. Civ. App. 222, 51 S. W. 659.

45. Locke *v.* Dane, 9 Mass. 360; Brand *v.* Multnomah County, 38 Oreg. 79, 60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 52 L. R. A. 389; Bleakney *v.* Farmers', etc., Bank, 17 Serg. & R. (Pa.) 64, 17 Am. Dec. 635.

46. King *v.* Course, 25 Ind. 202.

47. People *v.* McCain, 51 Cal. 360; People *v.* Kinsman, 51 Cal. 92; People *v.* O'Neil, 51 Cal. 91; Reis *v.* Graff, 51 Cal. 86.

48. Marsh *v.* Chesnut, 14 Ill. 223; Kurtzman *v.* Blackwell, 21 Tex. Civ. App. 222,

history and language of a curative statute, it appears to have been the intention of the legislature to restrict it to certain acts, its operation will not be extended by construction.[49] And in no case will a curative statute be construed to validate acts which the legislature could not have previously authorized.[50]

b. Pending Actions and Proceedings. Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court [51] and upon appeal [52] at the time of their passage. By express provision, however, either in the statute itself [53] or by general law,[54] pending suits may be exempted from the operation of a curative statute, but such exemption will be strictly construed.[55]

4. Declaratory Acts — a. Definition. A declaratory act is one that does not purport to change the former law, but only to determine the proper construction to be placed upon the common law [56] or a former statute.[57]

b. Construction. As a general rule an act declaring the proper construction of a former statute is given a retroactive operation so as to determine the meaning of the earlier statute from its enactment.[58] This rule, however, is universally recognized to be subject to the limitation that a declaratory act will not be given a retroactive operation to impair rights vested [59] or to affect cases terminated [60]

51 S. W. 659; Pringle *v.* Allan, 18 U. C. Q. B. 575.

49. Swartz *v.* Andrews, 137 Iowa 261, 114 N. W. 888, 126 Am. St. Rep. 285.

50. Wright *v.* Johnson, 108 Va. 855, 62 S. E. 948.

51. Green *v.* Abraham, 43 Ark. 420; Bonney *v.* Reed, 31 N. J. L. 133; Bleakney *v.* Greencastle Farmers', etc., Bank, 17 Serg. & R. (Pa.) 64, 17 Am. Dec. 635. But see Linn *v.* Scott, 3 Tex. 67, refusing to apply to pending proceedings a joint resolution of the legislature validating the acts of certain officials where the effect of such application would be to give a good title to land to one party to the suit, whereas, without such application, the other party would be entitled to it.

52. Applied whether the decision of the lower court was in favor of such operation (Pelt *v.* Payne, 60 Ark. 637, 30 S. W. 426), or against it (Sidway *v.* Lawson, 58 Ark. 117, 23 S. W. 648). But see People *v.* Moore, 1 Ida. 662, holding that where a judgment was rendered declaring a tax levy void, and pending an appeal a statute was passed validating the levy, the act could not operate retrospectively upon the case and it must be affirmed.

53. New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557.

54. Fuller *v.* Montpelier, 73 Vt. 44, 50 Atl. 544.

55. New York, etc., Land Co. *v.* Weidner, 169 Pa. St. 359, 32 Atl. 557, holding that the act of May 12, 1891 (Pamphl. Laws 53), curing defective acknowledgments of conveyances by married women, with the proviso "that the act shall not apply to suits now pending," applies to a second action of ejectment, brought under a rule, by the unsuccessful party to a former ejectment, which was undetermined at the passage of the act.

56. See Declaratory Statutes, 13 Cyc. 430.

57. Peyton *v.* Smith, 4 McCord (S. C.) 476, 17 Am. Dec. 758.

Does not include: An act merely reënacting a former statute in force (Spokane Falls, etc., R. Co. *v.* Stevens County, 48 Wash. 699, 93 Pac. 927; Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 93 Pac. 924), or repealed (Carpenter *v.* Rodgers, 1 Mont. 90), nor a statute effecting an entire change in the former law (State *v.* Stock, 38 Kan. 154, 16 Pac. 106; Johnson *v.* Dexter, 37 Vt. 641).

58. *Colorado.*— Cowell *v.* Colorado Springs Co., 3 Colo. 82.

District of Columbia.— Washington, etc., R. Co. *v.* Martin, 7 D. C. 120.

North Carolina.— Arnett *v.* Wanett, 28 N. C. 41.

Ohio.— State *v.* Ohio Soldiers', etc., Orphans' Home, 37 Ohio St. 275, holding that a statute declaratory of a former one has the same effect on such former act, in the absence of any intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage by the legislature.

South Carolina.— Peyton *v.* Smith, 4 McCord 476, 17 Am. Dec. 758; Hall *v.* Goodwyn, 4 McCord 442; Adams *v.* Chaplin, 1 Hill Eq. 265.

United States.— *In re* Clinton Bridge, 5 Fed. Cas. No. 2,900, Woolw. 150 [*affirmed* in 10 Wall. 454, 19 L. ed. 969].

England.— Jones *v.* Bennett, 6 Aspin. 596, 63 L. T. Rep. N. S. 705.

Canada.— *In re* Gillespie, 19 Ont. App. 713; McEvoy *v.* Clune, 21 Grant Ch. (U. C.) 515; Doe *v.* Grover, 4 U. C. Q. B. 23.

See 44 Cent. Dig. tit. "Statutes," § 362.

59. Washington, etc., Co. *v.* Martin, 7 D. C. 120; Salters *v.* Tobias, 3 Paige (N. Y.) 338; Ogden *v.* Blackledge, 2 Cranch (U. S.) 272, 2 L. ed. 276; Virginia Coupon Cases, 25 Fed. 641, 647, 654, 666.

60. Luke *v.* Calhoun County, 56 Ala. 415; Lambertson *v.* Hogan, 2 Pa. St. 22.

before its passage. In other cases the construction of such acts has been still further limited by denying their application to cases pending at the time of their passage,[61] or even to all acts or occurrences prior to their passage.[62]

5. Amendatory Acts, Revisions, and Codes — a. Amendatory Acts. Unless required in express terms [63] or by clear implication,[64] an amendatory act will not be given a retrospective construction.[65] Proceedings instituted,[66] orders made,[67] and judgments rendered [68] before the passage of the amendment will therefore not be affected by it, but will continue to be governed by the original statute.[69] Where a statute, or a portion thereof, is amended by declaring that, as amended, it shall read as follows, and then setting forth the amended section in full, the provisions of the original statute that are repeated are to be considered as having been the law from the time they were first enacted,[70] and the new provisions are to be understood as enacted at the time the amended act takes effect.[71]

b. Revisions and Codes. In some cases general revisions of the statutes have expressly provided that those portions which are the same as existing statutes shall be construed as continuations thereof,[72] and even in the absence of such a

61. Stephenson *v.* Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; People *v.* New York, 16 N. Y. 424.

62. Dequindre *v.* Williams, 31 Ind. 444; Home Mut. Ins. Co. *v.* Stockdale, 12 Fed. Cas. No. 6,662.

63. Parsons *v.* Wayne County Cir. Judge, 37 Mich. 287.

64. Tivey *v.* People, 8 Mich. 128; Peters *v.* Vawter, 10 Mont. 201, 25 Pac. 438; Leak *v.* Gay, 107 N. C. 468, 482, 12 S. E. 312, 315.

65. *Iowa.*— Richardson *v.* Fitzgerald, 132 Iowa 253, 109 N. W. 866.

Maine.— Carr *v.* Judkins, 102 Me. 506, 67 Atl. 569.

New York.— *In re* Miller, 110 N. Y. 216, 18 N. E. 139; Mortimer *v.* Chambers, 17 N. Y. Suppl. 552, 27 Abb. N. Cas. 289 [*affirmed* in 63 Hun 335, 17 N. Y. Suppl. 874].

Virginia.— Richmond *v.* Henrico County, 83 Va. 204, 2 S. E. 26.

England.— *In re* Chapman, [1896] 1 Ch. 323, 65 L. J. Ch. 170, 73 L. T. Rep. N. S. 658, 44 Wkly. Rep. 311; Jackson *v.* Woolley, 8 E. & B. 778, 4 Jur. N. S. 656, 27 L. J. Q. B. 448, 6 Wkly. Rep. 686, 92 E. C. L. 778; Williams *v.* Smith, 4 H. & N. 559, 5 Jur. N. S. 1107, 28 L. J. Exch. 286, 7 Wkly. Rep. 503.

Especially where a retrospective construction would render the act unconstitutional (Millay *v.* White, 86 Ky. 170, 5 S. W. 429, 9 Ky. L. Rep. 462), or impair vested rights (*Ex p.* Camden County, T. U. P. Charlt. (Ga.) 191).

A provision in an amendatory statute that such statute shall not affect pending suits or proceedings qualifies only the addition which is made to the preëxisting statute and not the whole of the statute amended. Homnyack *v.* Prudential Ins. Co., 194 N. Y. 456, 87 N. E. 769 [*affirming* 123 N. Y. App. Div. 907, 107 N. Y. Suppl. 1130].

66. Whatley *v.* State, 46 Fla. 145, 35 So. 80; State *v.* McDonald, 101 Minn. 349, 112 N. W. 278.

67. Knoff *v.* Ellsworth, 8 N. Y. St. 568.

68. Geneva *v.* People, 98 Ill. App. 315; State *v.* Fletcher, 1 R. I. 193.

69. State *v.* McDonald, 101 Minn. 349, 112 N. W. 278; *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713 (holding that the same rule applies where the amendatory act reënacts provisions substantially equivalent to those of the former law, but in different language); Thacher *v.* Steuben County, 21 Misc. (N. Y.) 271, 47 N. Y. Suppl. 124 [*reversed* on other grounds in 31 N. Y. App. Div. 634, 53 N. Y. Suppl. 1116, on authority of Wirt *v.* Allegany County, 90 Hun 210, 35 N. Y. Suppl. 887] (holding that the original statute applies to all past cases, proceedings, and contracts that have been made and rights that have accrued thereunder, and the amended act only applies to future transactions. *Contra*, State *v.* Massey, 103 N. C. 356, 9 S. E. 632, 4 L. R. A. 308 [Merrimont, J., and Smith, C. J., dissenting], holding that where an act providing for the punishment of any person who shall "unlawfully and wilfully" commit certain acts is amended by substituting the words "wantonly and wilfully," an offense committed prior to the passage of the amendatory act could not be prosecuted to conviction subsequent to its passage under an indictment drawn under the old law.

70. People *v.* State Bd. of Equalization, 20 Colo. 220, 37 Pac. 964; *Ex p.* Todd, 19 Q. B. D. 186, 56 L. J. Q. B. 431, 57 L. T. Rep. N. S. 835, 4 Morr. Bankr. Cas. 209, 35 Wkly. Rep. 676. And see Blantyre *v.* Clyde Nav. Trustees, 6 App. Cas. 273, holding that an act repealing existing statutes and giving certain powers, "in terms of the said recited acts," had the effect of incorporating the provisions of the repealed statutes and of consolidating them.

71. Eddy *v.* Morgan, 216 Ill. 437, 75 N. E. 174; Ely *v.* Holton, 15 N. Y. 595; Thacher *v.* Steuben County, 21 Misc. (N. Y.) 271, 47 N. Y. Suppl. 124 [*reversed* on other grounds in 31 N. Y. App. Div. 634, 53 N. Y. Suppl. 1116, on authority of Wirt *v.* Allegany County, 90 Hun 210, 35 N. Y. Suppl. 887]; Kelsey *v.* Kendall, 48 Vt. 24; Fuller *v.* U. S., 48 Fed. 654.

72. State *v.* McDonald, 101 Minn. 349, 112

provision the adoption of a general revision of the statutes does not affect acts committed [73] or proceedings instituted [74] before the revision takes effect.[75] In accordance, however, with the general rule that requires a retrospective construction of statutes relating to remedies and procedure,[76] proceedings subsequent to the taking effect of a revision or code must be conducted in accordance therewith.[77]

6. Repealing Acts — a. In General.[78] The general rule against the retrospective construction of statutes does not apply to repealing acts, and in the absence of a saving clause,[79] or other clear expression of intention, the repeal of a statute has the effect of blotting it out as completely as if it had never existed [80] and of putting an end to all proceedings under it.[81] By way of exception to this general rule, however, the repeal of a statute will not operate to impair rights vested under it,[82] or to revive rights lost [83] or taken away [84] under the repealed statute, or to affect acts performed [85] or suits commenced, prosecuted, and concluded [86] under the former law. As a general rule the repeal of a statute does not render valid a contract that was void by reason of the statute when made; [87]

N. W. 278; Hale *v.* Wetmore, 4 Ohio St. 600.

73. State *v.* McCort, 23 La. Ann. 326.

74. Smith *v.* Haines, 58 N. H. 157.

75. Wright *v.* Oakley, 5 Metc. (Mass.) 400, 406 [*quoted* in Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450, 458, 17 L. ed. 805] (holding that "in construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution, to avoid giving an effect to these acts, which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment, in which the repealing act stood in force, without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the reënactment of new ones"); Gamble *v.* Beattie, 4 How. Pr. (N. Y.) 41.

76. See *supra*, VII, D, 2.

77. Lefferts *v.* Hollister, 10 How. Pr. (N. Y.) 383; People *v.* Phelps, 5 Wend. (N. Y.) 9.

78. Effect of reënactment by repealing act see *supra*, VI, A, 3, c, (III), (E).

For construction of repealing acts relating to: Exemption laws see EXEMPTIONS, 18 Cyc. 379. Mechanics' lien laws see MECHANICS' LIENS, 27 Cyc. 23. Right to receive compensation awarded in condemnation proceedings see EMINENT DOMAIN, 15 Cyc. 831.

79. See *infra*, VII, D, 6, h.

80. Burton *v.* Emerson, 4 Greene (Iowa) 393; Hensley *v.* Dodge, 7 Mo. 479; McNair *v.* Dodge, 7 Mo. 404; James *v.* Dubois, 16 N. J. L. 285; Reynolds *v.* Atty.-Gen., [1896] A. C. 240, 65 L. J. P. C. 16, 74 L. T. Rep. N. S. 108; Matter of Mexican, etc., Co., 4 De G. & J. 544, 28 L. J. Ch. 769, 5 Jur. N. S. 1191, 7 Wkly. Rep. 681, 61 Eng. Ch. 430, 45 Eng. Reprint 211; Key *v.* Goodwin, 4 M. & P. 341 [*quoted* in Cook *v.* Gray, 2 Houst. (Del.) 455, 475, 81 Am. Dec. 185; Van Inwagen *v.* Chicago, 61 Ill. 31, 34; Gordon *v.* State, 4 Kan. 489, 500; Musgrove *v.* Vicksburg, etc., R. Co., 50 Miss. 677, 681; Washburn *v.* Franklin, 35 Barb. (N. Y.) 599, 600, 13 Abb. Pr. 140, 24 How. Pr. 515; People *v.* Van Pelt, 4 How. Pr. (N. Y.) 36, 39; Newsom *v.* Greenwood, 4 Oreg. 119, 122; Miller *v.* Chicago etc., R. Co., 133 Wis. 183, 113 N. W. 384; Dillon *v.* Linder, 36 Wis. 344, 349; Pruseux *v.* Welch, 20 Fed. Cas. No. 11,456; White *v.* Clark, 11 U. C. Q. B. 137, 141], in which Tindal, C. J., says that the effect of repealing a statute is "to obliterate the statute repealed, as completely from the records of parliament, as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law."

81. Kane *v.* New York, etc., R. Co., 49 Conn. 139 (holding that a reënactment at a later date of the repealed statute does not operate to revive the proceedings); Gilleland *v.* Schuyler, 9 Kan. 569; Gordon *v.* State, 4 Kan. 489. See *infra*, VII, D, 6, g.

82. Burton *v.* Emerson, 4 Greene (Iowa) 393. See *infra*, VII, D, 6, b.

83. Boylan *v.* Kelly, 36 N. J. Eq. 331.

84. Stine *v.* Bennett, 13 Minn. 153.

85. James *v.* Dubois, 16 N. J. L. 285; Pratt *v.* Stevens, 26 Hun (N. Y.) 229 [*reversed* as to other matters in 94 N. Y. 387]; Trail *v.* McAllister, L. R. 25 Ir. 524, holding that the repeal of a statute does not render lawful acts that were unlawful under the statute when committed.

86. See *supra*, note 85.

87. *Alabama.*— Pacific Guano Co. *v.* Dawkins, 57 Ala. 115; Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671.

Louisiana.— Quarles *v.* Evans, 7 La. Ann. 543.

Maine.— Robinson *v.* Barrows, 48 Me. 186; Banchor *v.* Mansel, 47 Me. 58, contract relating to sale of spirituous liquors.

in some cases, however, distinctions have been made as to statutes that do not render the contracts themselves void, but only take away all remedy for their enforcement;[88] and as to statutes rendering contracts void, not because they are *malum in se*, but merely on the ground of some public policy,[89] and the enforcement of the contracts has been permitted after a repeal of the prohibitory statute. In some jurisdictions the repeal of a statute against usury has been construed to permit the enforcement of contracts declared void by the statute,[90] while in others the repeal does not operate to permit such enforcement.[91] Repeals of revenue laws,[92] such as statutes imposing taxes,[93] are to be construed as prospective only, and do not operate to remit taxes due under such statutes before their repeal.[94] The repeal of a statute prescribing the method and procedure for holding and deciding elections does not affect elections held before such repeal,[95] but may operate to revoke authority conferred under the former statute as a result of the election.[96]

b. Rights Accrued. The repeal of a statute does not operate to impair or otherwise affect rights that have been vested or accrued[97] under the statute

Massachusetts.— Springfield Bank *v.* Merrick, 14 Mass. 322.

Mississippi.— Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435.

New York.— Bailey *v.* Mogg, 4 Den. 60. *Compare* Washburn *v.* Franklin, 11 Abb. Pr. 93 [*reversed* in 35 Barb. 599, 13 Abb. Pr. 140, 24 How. Pr. 515].

North Carolina.— Puckett *v.* Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43.

Ohio.— Nichols *v.* Poulson, 6 Ohio 305.

South Carolina.— Gilliland *v.* Phillips, 1 S. C. 152.

Texas.— Hunt *v.* Robinson, 1 Tex. 748.

Vermont.— Warren *v.* Saxby, 12 Vt. 146.

United States.— Hannay *v.* Eve, 3 Cranch 242, 2 L. ed. 427; Milne *v.* Huber, 17 Fed. Cas. No. 9,617, 3 McLean 212.

See 44 Cent. Dig. tit. "Statutes," § 365.

88. Farr *v.* Brigham, 15 Vt. 557; Bird *v.* Fake, 1 Pinn. (Wis.) 290.

89. Washburn *v.* Franklin, 35 Barb. (N. Y.) 599, 13 Abb. Pr. 140, 24 How. Pr. 515 [*reversing* 11 Abb. Pr. 93]; Central Bank *v.* Empire Stone Dressing Co., 26 Barb. (N. Y.) 23.

90. Jenness *v.* Cutler, 12 Kan. 500; Curtis *v.* Leavitt, 15 N. Y. 9, 224 (in which Selden, J., says: "Usury being a mere statutory defence not founded upon any common law right, either legal or equitable, it was clearly within the power of the legislature to take it away"); Ewell *v.* Daggs, 108 U. S. 143, 151, 2 S. Ct. 408, 27 L. ed. 682 [*affirming* 6 Fed. Cas. No. 3,537, 3 Woods 344] (holding "that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract").

91. Seegar *v.* Seegar, 19 Ill. 121; De Merville *v.* Le Blanc, 12 La. Ann. 221; Daquin *v.* Coiron, 3 La. 404 (holding that usurious contracts are governed by the law in force when made and that rights acquired under them cannot be affected by the repeal of such laws); Magwood *v.* Duggan, 1 Hill (S. C.) 182. See USURY.

92. Blakemore *v.* Cooper, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. N. S. 1074.

93. Pacific, etc., Tel. Co. *v.* Com., 66 Pa. St. 70 [*affirming* 3 Brewst. 517].

94. Oakland *v.* Whipple, 44 Cal. 303.

95. Gordon *v.* State, 4 Kan. 489 (holding, however, that when an election for the removal of a county-seat results in no choice, and a second election is held, but in the meantime the law under which the first election was held is repealed by another law, the second election must conform to the new law, and cannot be considered as a mere continuation of proceedings commenced when the old law was in force); Christian County Ct. *v.* Smith, 12 S. W. 134, 13 S. W. 276, 11 Ky. L. Rep. 834; Davis *v.* Maxwell, 22 La. Ann. 66.

96. Veats *v.* Danbury, 37 Conn. 412, holding that a legislative enactment, repealing an act authorizing towns to pay bounties to volunteers, and prohibiting towns from making further appropriations for such purpose, renders inoperative the vote of a town to pay such bounties, taken before the passage of the repealing statute.

97. *Alabama.*— Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

California.— Nevada Bank *v.* Steinmitz, 64 Cal. 301, 30 Pac. 970 (holding that the validity of railroad aid bonds issued after the repeal of the railroad aid enabling act of 1870, but under a contract entered into and partly performed prior to the repeal, was not affected thereby); Taylor *v.* Woodward, 10 Cal. 90.

Florida.— Mitchell *v.* Doggett, 1 Fla. 356.

Indiana.— Clinton County *v.* McDowell, 30 Ind. 87.

Louisiana.— Dixon *v.* Dixon, 4 La. 188, 23 Am. Dec. 478.

Maine.— State *v.* Boies, 41 Me. 344.

Michigan.— Peters *v.* Goulden, 27 Mich. 171.

while in force; [98] and this rule is applicable alike to rights acquired under contracts [99] and to rights of action to recover damages for torts.[1] Where, however, the statute is regarded, not as creating a right, but only as providing a remedy where none existed at common law, its repeal has the effect of taking away the remedy for acts or omissions occurring while the statute was still in force.[2] In those jurisdictions where a lien is regarded as a substantial right, the repeal of a statute is construed not to affect existing liens acquired under it; [3] but where the lien is regarded as only a remedy, it falls with the repeal of the statute.[4] The repeal of a statute authorizing the refunding of taxes takes away existing rights to have such taxes refunded unless the claims have been reduced to judgment before the repeal.[5]

c. Executory or Inchoate Rights. Where a right given by a statute is not by nature a vested right, and at the time of the repeal of the statute has not been reduced to judgment,[6] or otherwise executed,[7] it will fall with the statute,[8] unless expressly excepted.[9]

d. Liabilities Incurred. A repealing statute in the usual form will not be construed to impose liability for a prior act as to which no liability attached under the terms of the statute in force at the time it occurred; [10] but where an act repeals a former statute under which certain contracts were void, it may expressly validate such contracts so as to permit a recovery upon them.[11] So as a general rule the repeal of a statute imposing a liability by a subsequent act containing no saving clause [12] operates to release all liabilities incurred under the

New Hampshire.— Opinion of Justices, 45 N. H. 593.

New York.— Butler *v.* Palmer, 1 Hill 324.

Ohio.— State *v.* Washington Tp., 24 Ohio St. 603.

Texas.— McLeary *v.* Dawson, 87 Tex. 524, 29 S. W. 1044.

Utah.— Tufts *v.* Tufts, 8 Utah 142, 30 Pac. 309, 16 L. R. A. 482, holding that a repeal of a statute prescribing the grounds of divorce will not impair any right to a divorce which had accrued under the statute.

United States.— Pacific Mail Steamship Co. *v.* Joliffe, 2 Wall. 450, 17 L. ed. 805, holding that "when a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

England.— *Ex p.* Raison, 60 L. J. Q. B. 206, 63 L. T. Rep. N. S. 709, 8 Morr. Bankr. Cas. 11, 39 Wkly. Rep. 271.

See 44 Cent. Dig. tit. "Statutes," § 366.

Remedy.— Where a statutory remedy, for a right created by that statute, is repealed, but the repealing statute provides a substantially similar remedy, the right may be prosecuted under the repealing statute. Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603. And where no new remedy has been substituted for the enforcement of a right accrued under a statute afterward repealed, the old remedy remains. Wilson *v.* Herbert, 41 N. J. L. 454, 32 Am. Rep. 243.

98. The same rule applies where the statute is repealed by a constitutional provision. — Edmondson *v.* Kentucky Cent. R. Co., 28 S. W. 789, 16 Ky. L. Rep. 459; Wilson *v.* Herbert, 41 N. J. L. 454, 32 Am. Rep. 243.

99. Suffield First Ecclesiastical Soc. *v* Loomis, 42 Conn. 570; Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351; White *v.* Rourke, 11 Nebr. 519, 9 N. W. 689.

1. Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; Edmondson *v.* Kentucky Cent. R. Co., 28 S. W. 789, 16 Ky. L. Rep. 459 [*following* Wright *v.* Woods, 96 Ky. 56, 27 S. W. 979, 16 Ky. L. Rep. 337]; Gorman *v.* McArdle, 67 Hun (N. Y.) 484, 22 N. Y. Suppl. 479.

2. Bennet *v.* Hargus, 1 Nebr. 419; Cope *v.* Hampton County, 42 S. C. 17, 19 S. E. 1018.

3. Sinking Fund Com'rs *v.* Kentucky Northern Bank, 1 Metc. (Ky.) 174; Capital State Bank *v.* Lewis, 64 Miss. 727, 2 So. 243; Sahin *v.* Connor, 21 Fed. Cas. No. 12,197.

4. Woodbury *v.* Grimes, 1 Colo. 100; Bailey *v.* Mason, 4 Minn. 546. See MECHANICS' LIENS, 27 Cyc. 23.

5. Henderson *v.* State, 58 Ind. 244.

6. Van Inwagen *v.* Chicago, 61 Ill. 31; Bailey *v.* Mason, 4 Minn. 546.

7. Butler *v.* Palmer, 1 Hill (N. Y.) 324, holding that the repeal of a statute allowing a certain time for the redemption of property sold under a mortgage cuts off such right in the case of a sale before the repeal, where it had not been exercised at that time.

8. Wirt *v.* Allegany County, 90 Hun (N. Y.) 205, 35 N. Y. Suppl. 887.

9. See *infra*, VII, D, 6, h.

10. Missouri, etc., R. Co. *v.* Scofield, (Tex. Civ. App. 1906) 98 S. W. 435.

11. Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713.

12. **Construction of saving clause** see *infra*, VII, D, 6, h.

repealed statute where no proceedings have been commenced to enforce such liability,[13] and even where proceedings have been commenced,[14] unless vested rights have been acquired under them prior to the repeal.[15]

e. Rights and Liabilities as to Penalties.[16] The repeal of a statute under which penalties recoverable in a civil action have been incurred will operate to take away all rights to the recovery of such penalties[17] either by the public or by individuals,[18] unless such rights are preserved by a saving clause,[19] or such suits have been prosecuted to judgment before the repealing act takes effect.[20]

f. Offenses Committed.[21] In the absence of a saving clause[22] the repeal of a statute relating to offenses affects offenses already committed but not punished, and operates to put an end to or prevent any proceedings for the punishment of such offenses.[23] So the repeal of a statute of limitations, after an offense has

13. Commercial Union Assur. Co. *v.* Wolf, 8 Cal. App. 413, 97 Pac. 79; Gaspar *v.* State, 11 Ind. 548 (holding that a recognizance taken in a prosecution under a statute, repealed before the prosecution was begun, is void); U. S. *v.* The Helen, 6 Cranch (U. S.) 203, 3 L. ed. 199 (holding that a vessel which has violated a law of the United States cannot be seized for such violation after the law has expired, unless some special provision be made therefor by statute).

14. Cavanaugh *v.* Patterson, 41 Colo. 158, 91 Pac. 1117; Wirt *v.* Allegany County, 90 Hun (N. Y.) 205, 35 N. Y. Suppl. 887.

15. Crawford *v.* Hedrick, 9 Ind App. 356, 36 N. E. 771; Com. *v.* Specht, 9 Lanc. Bar (Pa.) 139, holding that the repeal of the act of 1856, relative to liquors, by the act of 1875, does not prevent a recovery on the bond given by the applicant for license before the repeal.

16. See TAXATION.

Application to pending proceedings see *infra*, VII, D, 6, g, (II).

Definition and general construction of penal statutes see *supra*, VII, B, 7.

17. *Alabama.*—Broughton *v.* Mobile Branch Bank, 17 Ala. 828.

Colorado.— Gregory *v.* Denver German Bank, 3 Colo. 332, 25 Am. Rep. 760.

Indiana.— Hill *v.* Shannon, 68 Ind. 470; Thompson *v.* Bassett, 5 Ind. 535.

Kentucky.— Mason, etc., Co. *v.* Com., 36 S. W. 570, 18 Ky. L. Rep. 371.

Maine.— Gaul *v.* Brown, 53 Me. 496.

Michigan.— Engle *v.* Shurts, 1 Mich. 150.

Wisconsin.— Miller *v.* Chicago, etc., R. Co., 133 Wis. 183, 113 N. W. 384.

England.—Ward *v.* Stevenson, 1 New Sess. Cas. 162.

See 44 Cent. Dig. tit. "Statutes," § 369.

Proceedings for the enforcement of the penalty after the repeal of the statute are illegal and void. Church *v.* Parmelee, 2 Root (Conn.) 248; Lambert *v.* Parmelee, 2 Root (Conn.) 181.

Where the statute is modified before recovery of the penalty by an amendment reducing the amount, only the amount left in force can be recovered. Com. *v.* Jackson, 2 B. Mon. (Ky.) 402. *Compare* Nash *v.* White's Bank, 105 N. Y. 243, 11 N. E. 546 [*reversing* 37 Hun 57].

The legislature may by express provision take away a right to a penalty accrued under a prior statute. Parmelee *v.* Lawrence, 44 Ill. 405.

A statute imposing an inheritance tax on property inherited by aliens is not a penal statute and its repeal does not affect the collection of such tax from the estate of a person dying while the statute was in force. Arnaud *v.* His Executor, 3 La. 336.

18. Welch *v.* Wadsworth, 30 Conn. 149, 79 Am. Dec. 239 (holding that the parties to usurious contracts hold any rights they may have to penalties given by the law subject to modification or repeal by the legislature, which may destroy such rights and validate the contracts); Butler *v.* Palmer, 1 Hill (N. Y.) 324; Miller *v.* Chicago, etc., R. Co., 133 Wis. 183, 113 N. W. 384. And see cases cited *supra*, note 17.

19. See *infra*, VII, D, 6, h.

20. See *supra*, VII, D, 1, e.

21. **Application to pending proceedings** see *infra*, VII, D, 6, g, (III).

Retroactive operation in general see *supra*, VII, D, 1, g.

22. See *infra*, VII, D, 6, h.

23. *California.*— People *v.* Tisdale, 57 Cal. 104.

Indiana.— State *v.* Mason, 108 Ind. 48, 8 N. E. 716; Howard *v.* State, 5 Ind. 183.

Mississippi.— Hodnett *v.* State, 66 Miss. 26, 5 So. 518; Wheeler *v.* State, 64 Miss. 462, 1 So. 632.

New York.—Hartung *v.* People, 22 N. Y. 95.

South Carolina.— State *v.* Cole, 2 McCord 1.

Tennessee.—Wharton *v.* State, 5 Coldw. 1, 94 Am. Dec. 214.

Texas.— Cottenham *v.* State, 1 Tex. App. 463.

Virginia.— Com. *v.* Leftwich, 5 Rand. 657; Scutt *v.* Com., 2 Va. Cas. 54, holding that the enactment, at the same time with the repeal, of a new statute which does not differ from the repealed act in respect to the penalty, does not vary the rule.

Washington.— State *v.* Oliver, 12 Wash. 547, 41 Pac. 895.

Wisconsin.— State *v.* Campbell, 44 Wis. 529; State *v.* Ingersoll, 17 Wis. 631.

See 44 Cent. Dig. tit. "Statutes," § 370.

The reason is that "it is not only unwise and impolitic, but it is unjust to punish a man for the commission of an act which the law no longer considers as an offence." State *v.* Cole, 2 McCord (S. C.) 1, 2.

once been barred by it, does not revive the liability to prosecution.[24] Where, however, an act merely increases the punishment imposed for an offense under a former statute, without in terms repealing it, an offense committed before the passage of the new act may be punished afterward in accordance with the law in force when committed.[25]

g. Actions and Other Proceedings Pending[26] — (i) *In General.* As a general rule the repeal of a statute without any reservation[27] takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal.[28] The rule is especially applicable to the repeal of statutes creating a cause of action,[29] providing a remedy not known to the common law[30] or conferring jurisdiction where it did not exist before;[31] and is carried to such extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff.[32] A suit the continuance of which is dependent upon the statute repealed stops where the repeal finds it;[33] and a process abolished by the repeal cannot be served,

24. Thompson *v.* State, 54 Miss. 740. See LIMITATIONS OF ACTIONS, 25 Cyc. 996.

25. State *v.* Taylor, 2 McCord (S. C.) 483; State *v.* Cole, 2 McCord (S. C.) 1.

26. See APPEAL AND ERROR, 2 Cyc. 553, 3 Cyc. 407.

Application of statutes to pending actions in general see *supra*, VII, D, 2, b; VII, D, 3, b.

Effect of reënactment by repealing act see *supra*, VII, D, 5, b.

Jurisdiction of offenses see CRIMINAL LAW, 12 Cyc. 200.

Proceedings to consolidate corporations see CORPORATIONS, 10 Cyc. 290.

Proceedings to lay out a highway see STREETS AND HIGHWAYS.

Termination of action by repeal of statute affecting right to costs see COSTS, 11 Cyc. 26.

27. See *infra*, VII, D, 6, h.

28. *Alabama.*— *Ex p.* State, 52 Ala. 231, 23 Am. Rep. 567.

Colorado.— Smith *v.* Arapahoe County Dist. Ct., 4 Colo. 235.

Illinois.— People *v.* Franklin Park, 196 Ill. 276, 63 N. E. 664; Illinois, etc., Canal *v.* Chicago, 14 Ill. 334.

Indiana.— Taylor *v.* Strayer, 167 Ind. 23, 78 N. E. 236; St. Joseph County *v.* Ruckman, 57 Ind. 96; Hunt *v.* Jennings, 5 Blackf. 195, 33 Am. Dec. 465.

Kansas.— Gilleland *v.* Schuyler, 9 Kan. 569; Gordon *v.* State, 4 Kan. 489.

Louisiana.—Doss *v.* Mermentau Levee Dist. Com'rs, 117 La. 450, 41 So. 720 (holding that where a suit is brought to restrain the performance of certain actions authorized by statute, the suit abates upon repeal of the statute); Cooper *v.* Hodge, 17 La. 476.

Maine.— Macnawhoc Plantation *v.* Thompson, 36 Me. 365.

Massachusetts.— New London, etc., R. Co. *v.* Boston, etc., R. Co., 102 Mass. 386.

Mississippi.— Musgrove *v.* Vicksburg, etc., R. Co., 50 Miss. 677.

New York.— Lazarus *v.* Metropolitan El. R. Co., 83 Hun 553, 32 N. Y. Suppl. 48, 24 N. Y. Civ. Proc. 260 [*affirmed* in 145 N. Y. 581, 40 N. E. 240]; Schoepflin *v.* Calkins, 5 Misc. 159, 25 N. Y. Suppl. 696.

North Carolina.—Wilson *v.* Jenkins, 72 N. C. 5.

Oregon.— State *v.* Ju Nun, 53 Oreg. 1, 97 Pac. 96, 98 Pac. 513.

Pennsylvania.— *In re* North Canal St. Road, 10 Watts 351, 36 Am. Dec. 185; Abbott *v.* Com., 8 Watts 517, 34 Am. Dec. 492; Stoever *v.* Immell, 1 Watts 258; *In re* Hatfield Tp. Road, 4 Yeates 392; Philadelphia *v.* Kingsley, 5 Pa. Co. Ct. 75.

Texas.— Jessee *v.* De Shong, (Civ. App. 1907) 105 S. W. 1011; Gulf, etc., R. Co. *v.* Lott, 2 Tex. App. Civ. Cas § 63.

Wisconsin.— Miller *v.* Chicago, etc., R. Co., 133 Wis. 183, 113 N. W. 384; Beebee *v.* O'Brien, 10 Wis. 481.

United States.— Gates *v.* Osborne, 9 Wall. 567, 19 L. ed. 748.

England.— Miller's Case, 1 W. Bl. 451, 96 Eng. Reprint 259, 3 Wils. C. P. 420, 95 Eng. Reprint 1134.

See 44 Cent. Dig. tit. "Statutes," § 371.

29. Detroit *v.* Chapin, 108 Mich. 136, 66 N. W. 587, 37 L. R. A. 391; French *v.* State, 53 Miss. 651; Keener *v.* Fouch, 4 Pa. Dist 338, 16 Pa. Co. Ct. 207.

30. *Indiana.*— Stephenson *v.* Doe, 8 Blackf. 508, 46 Am. Dec. 489.

Michigan.— Heimbach *v.* Weinberg, 18 Mich. 48.

Texas.— Stewart *v.* Lattner, (Civ. App. 1909) 116 S. W. 860.

Washington.—Wooding *v.* Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223.

United States.— Kimbro *v.* Colgate, 14 Fed. Cas. No. 7,778, 5 Blatchf. 229.

See 44 Cent. Dig. tit. "Statutes," § 371.

31. Porco *v.* State Bd. of Barber Examiners, (Cal. 1903) 73 Pac. 168; Somerville *v.* Mayes, 54 Miss. 31; Rice *v.* Wright, 46 Miss. 679; *In re* Washington Borough, 26 Pa. Super. Ct. 296; Trapier *v.* Waldo, 16 S. C. 276.

32. Vance *v.* Rankin, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173 [*reversing* 95 Ill. App. 562] (holding that a repeal will operate to defeat an action in which plaintiff's judgment in the trial court has been affirmed by the court of appeals, from which decision an appeal to the supreme court is pending at the time of the repeal of the statute); Bradley *v.* Martin, 100 Ill. App. 668; Sumner *v.* Cummings, 23 Vt. 427.

33. Sharrock *v.* Kreiger, 6 Indian Terr.

even though in the hands of an officer for service at the time of the repeal.[34] So the repeal of a statute authorizing a particular defense operates to deprive defendant in a pending suit of such defense,[35] even though it has already been pleaded.[36] Acts done, however,[37] and suits concluded by final judgment[38] before the repeal are not affected by the repeal of statutes relating to them; nor does a suit pending to enforce a vested right abate upon a repeal of the statute under which the right accrued.[39] Where the repealing act relates merely to matters of procedure and substitutes new forms or methods in place of the old, the action does not abate, nor is the validity of proceedings already taken affected;[40] further proceedings in such a case are had, so far as possible, under the new law,[41] and where it does not apply are conducted in accordance with the old.[42] So where a statute repeals a former act, but reënacts substantially the same provisions, the new statute is generally construed as a continuance of the old one, and does not operate to abate an action pending at the time of its enactment.[43] Where a statute has been made expressly applicable to pending proceedings, a right given by it is not taken away by a revision before trial which omits the provision.[44] The repeal of a repealing act does not in itself operate to revive proceedings pending at the time of the repeal of the original act;[45] but where the proceedings under the original act have not been formally abated since its repeal, the action may be continued under a subsequent act which expressly so provides.[46]

(II) *Actions For Penalties.* As there can be no vested right to a penalty before final judgment,[47] the repeal of a statute imposing a penalty operates to defeat all actions pending for its recovery,[48] whether maintained in the name of the state[49] or in that of a private individual;[50] and so strictly is this rule enforced

466, 98 S. W. 161 (holding that where a part of a judgment or decree rests on the authority of a statute repealed pending the action, the judgment or decree is void as to such part); South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. ed. 937.

34. Frey *v.* Hebenstreit, 1 Rob. (La.) 561.

35. Nicholls *v.* Gee, 30 Ark. 135 (usury); Dougherty *v.* Downey, 1 Mo. 674 (plea to jurisdiction).

36. Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309 (usury); Barnes *v.* Roy, 27 R. I. 534, 65 Atl. 277.

37. Bates *v.* Koch, 6 Pa. St. 474, recognizances taken.

38. Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410.

39. Crawford *v.* Hedrick, 9 Ind. App. 356, 36 N. E. 771; Dow *v.* Electric Co., 68 N. H. 59, 31 Atl. 22; State *v.* Williams, 10 Tex. Civ. App. 346, 30 S. W. 477; Eastman *v.* Clackamas County, 32 Fed. 24, 12 Sawy. 613.

40. Mitchell *v.* Eyster, 7 Ohio 257; Newsom *v.* Greenwood, 4 Oreg. 119; Danforth *v.* Smith, 23 Vt. 247. *Compare* Georgia Cent. R. Co. *v.* Alabama R. Commission, 161 Fed. 925 [*reversed* in 170 Fed. 225, 95 C. C. A. 117].

41. Pittsburgh, etc., R. Co. *v.* Oglesby, 165 Ind. 542, 76 N. E. 165; Sharrock *v.* Kreiger, 6 Indian Terr. 466, 98 S. W. 161; Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603; *In re* Uwchlan Tp. Road, 30 Pa. St. 156; *In re* Fenelon, 7 Pa. St. 173.

42. *In re* Hickory Tree Road, 43 Pa. St. 139; Beebee *v.* O'Brien, 10 Wis. 481.

43. Moore *v.* Kenockee Tp., 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; State *v.* Vernon County Ct., 53 Mo. 128; Smith *v.* People, 47 N. Y. 330.

44. Birdsall *v.* Wheeler, 58 Conn. 429, 20 Atl. 607.

45. Com. *v.* Leech, 24 Pa. St. 55.

46. Davis *v.* Meade, 13 Serg. & R. (Pa.) 281.

47. Com. *v.* Welch, 2 Dana (Ky.) 330.

48. See cases cited *infra*, note 49 *et seq.*

Effect of saving clause see *infra*, VII, D, 6, h.

49. State *v.* Tombeckbee Bank, 1 Stew. (Ala.) 347; Pensacola, etc., R. Co. *v.* State, 45 Fla. 86, 33 So. 985, 110 Am. St. Rep. 67; U. S. *v.* Six Fermenting Tubs, 27 Fed. Cas. No. 16,296, 1 Abb. 268.

Suspension of act imposing penalty.— Where an act imposing a penalty is suspended, it cannot be enforced during the period of suspension, for penalties previously incurred. State *v.* State Bank, 12 Rich. (S. C.) 609.

50. *Alabama.*— Pope *v.* Lewis, 4 Ala. 487.

Georgia.— Woodburn *v.* Western Union Tel. Co., 95 Ga. 808, 23 S. E. 116; St. Mary's Bank *v.* State, 12 Ga. 475.

Illinois.— Eaton *v.* Graham, 11 Ill. 619; Coles *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161.

Maine.— Cummings *v.* Chandler, 26 Me. 453.

Nebraska.— Kleckner *v.* Turk, 45 Nebr. 176, 63 N. W. 469.

New York.— Nash *v.* White's Bank, 105 N. Y. 243, 11 N. E. 946 [*reversing* 37 Hun 57] (holding that where a statute imposing a penalty for charging a higher rate of interest than seven per cent is amended and reënacted in the same language except that

that it defeats a pending action even where the repealing act is passed after verdict,[51] or pending an appeal from a judgment of the trial court in favor of a recovery of the penalty.[52]

(iii) *Criminal Prosecutions and Punishments.*[53] In the absence of a saving clause,[54] the repeal of a criminal statute operates from the moment it takes effect to defeat all pending prosecutions under the repealed statute.[55] This rule applies alike to cases pending before trial or verdict,[56] to those in which defendant has been convicted but not sentenced,[57] and to cases pending on appeal after conviction and sentence.[58] Under some circumstances it has been held that a repeal of the statute after the prisoner has been sentenced to death, but before

"six per centum" is substituted in the place of "seven per centum," actions pending for the recovery of penalties under the former act are defeated); Smith *v.* Banker, 3 How. Pr. 142; Cole *v.* Rose, 1 N. Y. City Ct. 45.

South Carolina.—Allen *v.* Farrow, 2 Bailey 584.

Vermont.— Sumner *v.* Cummings, 23 Vt. 427.

Wisconsin.— Rood *v.* Chicago, etc., R. Co., 43 Wis. 146.

United States.— Union Iron Co. *v.* Pierce, 24 Fed. Cas. No. 14,367, 4 Biss. 327.

See 44 Cent. Dig. tit. "Statutes," § 372.

Contra as to suit by private individual.— Taylor *v.* Rushing, 2 Stew. (Ala.) 160.

51. Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390.

52. *California.*— San Luis Obispo First Nat. Bank *v.* Henderson, 101 Cal. 307, 35 Pac. 899.

Colorado.— Union Pac. R. Co. *v.* Proctor, 12 Colo. 194, 20 Pac. 615; Denver, etc., R. Co. *v.* Crawford, 11 Colo. 598, 19 Pac. 673, both holding that the implied repeal of that portion of a statute imposing a penalty by an amendment to the statute omitting the provision as to the penalty operates to defeat the action for the penalty then pending on appeal.

Florida.— Pensacola, etc., R. Co. *v.* State, 45 Fla. 86, 33 So. 985, 110 Am. St. Rep. 67.

Georgia.—Western Union Tel. Co. *v.* Smith, 96 Ga. 569, 23 S. E. 899, repeal of statute after motion for new trial overruled and before filing of bill of exceptions.

Louisiana.— Mouras *v.* The A. C. Brewer, 17 La. Ann. 82.

See 44 Cent. Dig. tit. "Statutes," § 372.

53. See Criminal Law, 12 Cyc. 144, 770, 956.

54. See *infra*, VII, D, 6, h, (II).

55. *Alabama.*— Carlisle *v.* State, 42 Ala. 523; State *v.* Allaire, 14 Ala. 435.

Indiana.— State *v.* Loyd, 2 Ind. 659.

Kentucky.— Com. *v.* Welch, 2 Dana 330.

Louisiana.— State *v.* O'Conner, 13 La. Ann. 486.

Maine.— Heald *v.* State, 36 Me. 62, applying the rule to a case where the plea of *nolo contendere* had been entered prior to the repeal.

Maryland.—Annapolis *v.* State, 30 Md. 112; Keller *v.* State, 12 Md. 322, 71 Am. Dec. 596.

New York.— People *v.* Meakim, 21 N. Y. Suppl. 1103 [*affirmed* in 25 N. Y. Suppl. 1120 (*affirmed* in 144 N. Y. 646, 39 N. E. 494)]; People *v.* Van Pelt, 4 How. Pr. 36.

North Carolina.— State *v.* Cress, 49 N. C. 421.

Pennsylvania.— Genkinger *v.* Com., 32 Pa. St. 99.

Rhode Island.— State *v.* Fletcher, 1 R. I. 193, holding that a judgment cannot be rendered on an indictment under an act which is amended before conviction obtained by an act varying the form of judgment and repealing so much of the amended act as is inconsistent therewith, where there is no saving clause as to pending indictments.

Texas.— Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302; Mulkey *v.* State, 16 Tex. App. 53.

United States.— U. S. *v.* Tynen, 11 Wall. 88, 20 L. ed. 153.

England.— Reg. *v.* Denton, 18 Q. B. 761, Dears. C. C. 3, 17 Jur. 453, 21 L. J. M. C. 207, 83 E. C. L. 761; Rex *v.* McKenzie, R. & R. 429.

See 44 Cent. Dig. tit. "Statutes," § 373.

Where a statute passed after the filing of an indictment for murder made offenses similar to that charged manslaughter only, a trial for manslaughter was properly held under the indictment. Packer *v.* People, 8 Colo. 361, 8 Pac. 564; Garvey's Case, 7 Colo. 384, 3 Pac. 903, 49 Am. Rep. 358.

56. See cases cited *supra*, note 55.

57. Com. *v.* Kimball, 21 Pick. (Mass.) 373; Com. *v.* Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; Hartung *v.* People, 22 N. Y. 95 (holding that where an act repeals an existing statute and provides that persons already convicted, but not sentenced, shall be punished under the new law, the convicted person cannot be convicted under the old law, as it is repealed, or under the new law, as it is *ex post facto*); State *v.* Williams, 97 N. C. 455, 2 S. E. 55.

58. Higginbotham *v.* State, 19 Fla. 557; State *v.* King, 12 La. Ann. 593; Kenyon *v.* State, 31 Tex. Cr. 13, 23 S. W. 191; Montgomery *v.* State, 2 Tex. App. 618; Hubbard *v.* State, 2 Tex. App. 506; Sheppard *v.* State, 1 Tex. App. 522; State *v.* Allen, 14 Wash. 103, 44 Pac. 121.

The correctness of the court's charge to the jury must be governed by the law in force at the time, although repealed before the hearing on appeal. Jones *v.* State, 20 Tex. App. 665.

The statutory right to bail of one convicted of a criminal offense pending an ap-

execution, will entitle him to be discharged;[59] but under other circumstances it has been held not to prevent the execution of the sentence.[60]

h. Saving Clauses — (I) *In General.* It is common practice to insert saving clauses in repealing acts;[61] and in most jurisdictions there are general constitutional or statutory saving clauses applicable to all repealing acts.[62] These general statutory saving clauses are themselves subject to either express or implied repeal by subsequent acts,[63] and cannot operate to save provisions of existing statutes contrary to the express terms of the repealing act.[64] General saving clauses are not to be regarded as attempts on the part of the legislatures enacting them to curtail the authority of succeeding legislatures by limiting in advance the effect to be given their enactments, but rather as the substitution of a new rule of construction to be observed by the courts with respect to statutes thereafter enacted;[65] and hence they are properly applicable, not only to all repealing statutes enacted at the same time therewith, but also to all such acts passed thereafter,[66] unless such application is negatived by the express terms or clear implication of a particular repealing act,[67] or the general saving clause has itself been abrogated by a subsequent statute.[68]

(II) *Pending Actions.* A common provision is that the repeal of a statute shall not affect actions or suits commenced[69] or proceedings pending[70] under it

peal is lost by a repeal of the statute pending the prosecution of a case to which it applied. *In re* Shoemaker, 2 Okla. 606, 39 Pac. 284.

59. Aaron *v.* State, 40 Ala. 307, holding that if from any cause a convict sentenced to death has not been executed, and after sentence the act under which it was pronounced has been repealed, without an effectual saving clause, the prisoner must be discharged, although a repeal between the sentence and the day set for execution would have had no effect.

60. State *v.* Addington, 2 Bailey (S. C.) 516, 23 Am. Dec. 150, holding that, where a prisoner had been convicted and sentenced, a repeal of the statute after his release on a conditional pardon did not affect the execution of the original sentence upon his breach of the condition of his pardon.

61. Jennings *v.* Hammond, 1 Sm. & M. (Miss.) 174; Beilin *v.* Wein, 51 Misc. (N. Y.) 595, 101 N. Y. Suppl. 38.

62. See *infra*, note 64 *et seq.*

63. Jones *v.* State, 1 Iowa 395.

64. Pannell *v.* Louisville Tobacco Warehouse Co., 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141, 23 Ky. L. Rep. 2423 (holding that where a statute repealing a former statute expressly provides that no penalty provided by the repealed statute "shall hereafter be recoverable in any court of this Commonwealth," the courts have no power thereafter to render judgment for such a penalty, notwithstanding St. § 465, which provides that no new law "shall be construed" to repeal a former law as to any penalty incurred thereunder); Cortelyou *v.* Anderson, 73 N. J. L. 427, 63 Atl. 1095.

65. U. S. *v.* Chicago, etc., R. Co., 151 Fed. 84 [*affirmed* in 162 Fed. 835]; U. S. *v.* Standard Oil Co., 148 Fed. 719.

66. Gilleland *v.* Schuyler, 9 Kan. 569; Com. *v.* Sherman, 85 Ky. 686, 4 S. W. 790, 9 Ky. L. Rep. 218; People *v.* Jackson, 36 Misc. (N. Y.) 282, 73 N. Y. Suppl. 461; Thatcher *v.* Steuben County, 21 Misc. (N. Y.) 271, 47 N. Y. Suppl. 124 [*reversed* in memoranda in 31 N. Y. App. Div. 634, 53 N. Y. Suppl. 1116, on authority of Wirt *v.* Allegany County, 90 Hun 205, 35 N. Y. Suppl. 887]; Great Northern R. Co. *v.* U. S., 208 U. S. 452, 28 S. Ct. 313, 52 L. ed. 567 [*affirming* 155 Fed. 945, 84 C. C. A. 93]. *Contra*, Mongeon *v.* People, 55 N. Y. 613; Westchester County *v.* Dressner, 23 N. Y. App. Div. 215, 48 N. Y. Suppl. 953; People *v.* Cleary, 13 Misc. (N. Y.) 546, 35 N. Y. Suppl. 588.

67. State *v.* Showers, 34 Kan. 269, 8 Pac. 474 (holding that where a repealing statute contains a special saving clause, the general statutory saving clause does not apply); Pannell *v.* Louisville Tobacco Warehouse Co., 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141, 23 Ky. L. Rep. 2423.

68. See cases cited *supra*, notes 63, 64.

69. O'Neill *v.* Hoboken, 73 N. J. L. 189, 63 Atl. 986; Cortelyou *v.* Ten Eyck, 22 N. J. L. 45.

70. *Arkansas.*— Files *v.* Fuller, 44 Ark. 273; Cannon *v.* Davies, 33 Ark. 56.

Connecticut.— Downs *v.* Huntington, 35 Conn. 588.

Indiana.— Clemans *v.* Hatch, 168 Ind. 291, 78 N. E. 1065.

Iowa.— Wade *v.* Carpenter, 4 Iowa 361.

Kansas.— Consolidated Barb Wire Co. *v.* Stevenson, 71 Kan. 64, 79 Pac. 1085; State *v.* Boyle, 10 Kan. 113.

Maine.— Treat *v.* Strickland, 23 Me. 234.

Missouri.— Rogers *v.* Pacific R. Co., 35 Mo. 153.

New York.— Beilin *v.* Wein, 51 Misc. 595, 101 N. Y. Suppl. 38.

Ohio.— Norton *v.* Montville Tp., 8 Ohio Cir. Ct. 335, 4 Ohio Cir. Dec. 422, holding that, under a general saving clause, the repeal of an act to prohibit townships from appropriating lands within two hundred yards of a dwelling-house for a cemetery, or any

at the time the repeal takes effect. Under such provisions a court deprived of jurisdiction by the repealing act may nevertheless proceed with pending suits; [71] the form of action also will remain unchanged,[72] and the case will be decided in accordance with the old law; [73] but the further procedure, so far as possible, must be in conformity with that prescribed by the new law.[74] The existence of a saving clause will not have the effect to save pending proceedings where it is not so expressed as to preserve the right of action on which the proceedings are based.[75] The word "pending," as applied to proceedings in saving clauses, is used in the general sense of "commenced and not terminated," and not in the technical sense in which the expression "*lis pendens*" is usually understood; [76] but it has been held to apply only to actions in which there are different parties, having conflicting interests, and therefore not to include *ex parte* proceedings.[77] The phrase "proceeding taken" has been construed liberally to include the filing of a petition for mandamus; [78] and again, has been construed strictly,[79] and has been declared not to be equivalent to "suit commenced." [80]

addition thereto, did not affect a pending action to enjoin a township from violating the act repealed.

Vermont.— Pratt *v.* Jones, 25 Vt. 303.

United States.— U. S. *v.* Claflin, 25 Fed. Cas. No. 14,799, 14 Blatchf. 55 [*affirmed* in 97 U. S. 546, 24 L. ed. 1082, 1085].

See 44 Cent. Dig. tit. "Statutes," § 374.

Application to implied repeal.— Hine *v.* Pomeroy, 39 Vt. 211, holding that a general saving of pending actions was not designed to be limited to cases of formal repeal in literal terms, but was designed to be efficacious to save suits depending on statutory provisions, where after the bringing of the suits the provisions on which they depended had ceased to be operative by reason of other enactments.

A repealing act saving orders or judgments already made applies not merely to those made before the passage of the act through the legislature, but to all those made before the repealing act takes effect. Brookman *v.* State Ins. Co., 15 Wash. 29, 45 Pac. 655, 46 Pac. 243.

71. Chittenden *v.* Judson, 57 Conn. 333, 17 Atl. 929; Milan Overseers of Poor *v.* Dutchess County, 14 Wend. (N. Y.) 71; Pennybacker *v.* Switzer, 75 Va. 671.

72. Fowle *v.* Kirkland, 18 Pick. (Mass.) 299.

73. Peters *v.* Harman, 27 Ohio Cir. Ct. 88; Kemmish *v.* Ball, 30 Fed. 759.

74. Wheelock *v.* Myers, 64 Kan. 47, 67 Pac. 632 (holding that such a clause does not save the right to try a pending cause under a rule of evidence established by a repealed statute); Bookwalter *v.* Conrad, 15 Mont. 464, 39 Pac. 573, 851 (holding that Comp. St. div. 5, § 209, providing that no action pending at the time any statutory provision shall be repealed shall be affected by such repeal, but shall proceed the same as if the provision were not repealed, refers only to provisions which affect the action, and not the place of trial).

75. Dillon *v.* Linder, 36 Wis. 344, holding that a provision that "no action at law or criminal prosecution now pending, or which shall hereafter be commenced, founded upon any statute of this state, shall be defeated by a repeal of such statute; but any such action or prosecution shall proceed to issue, trial and final judgment in the same manner, and to the same purpose and effect, as though the statute upon which the same is or shall be founded was continued in full force, virtue and effect to the time of such trial, issue and final judgment," was applicable only to statutes giving new forms of remedy for old rights, or providing new modes of prosecution for offenses existing by law outside of the statute, and did not operate to save rights of action unknown to the common law and wholly dependent upon the statute repealed.

76. Rice *v.* McCaulley, 7 Houst. (Del.) 226, 31 Atl. 240 (holding that an action is "pending" within a statute exempting pending actions from its provisions, where a writ of summons in assumpsit has been issued, although the sheriff has made return "*non est inventus*"); State *v.* Reno County, 38 Kan. 317, 16 Pac. 337 (holding that the wrongful refusal of commissioners to act upon a petition for an election does not defeat the right to proceed with the election after the repeal of the statute authorizing the petition. where the repealing act contains a saving in favor of pending elections).

77. *In re* County Com'rs, 30 Me. 221. See, generally, PENDING, 30 Cyc. 1364, and Cross-References Thereunder.

78. Murphy *v.* Utter, 186 U. S. 95, 22 S. Ct. 776, 46 L. ed. 1070.

79. Gordon *v.* State, 4 Kan. 489, holding that the word "proceeding" is confined to judicial matters and does not include the holding of an election for permanently locating a county-seat.

80. Tulley *v.* Tranor, 53 Cal. 274, holding that a saving of "rights acquired or proceedings taken" applies only to proceedings under the statute amended, whereby some right had been acquired and which could not be disregarded without affecting the right itself, and that the expression "proceedings taken" is not the equivalent of "suit commenced." See, generally, PROCEEDINGS, 32 Cyc. 406, and Cross-References Thereunder.

Meaning of "litigation" see *infra*, VII, D, 6, h, (v), p. 1234 note 10.

(III) *Rights, Remedies, and Defenses Accrued.* Frequently the saving clauses are couched in more general terms,[81] and include not only pending proceedings, but also all rights, remedies, and defenses vested or accrued before the repeal takes effect.[82] Such provisions have been construed to save rights accrued under contracts,[83] under recording acts,[84] under statutes for the settlement of decedents' estates,[85] and claims against municipal corporations accrued before the repeal;[86] to save remedies accrued before the repeal for personal injuries,[87] for the collection of delinquent taxes,[88] for the default of public officers,[89] for cutting timber on public land,[90] and the right to pursue a summary remedy[91] or other form of action[92] authorized by the law in force when it arose; and to save defenses, such as that the lien sought to be enforced was divested by the former law before its repeal,[93] or that under the former law the action should be dismissed.[94] Under saving clauses of this nature, rights and remedies accrued under the act repealed are not to be arrested or interrupted by the repeal but are to be preserved and matured under the former law in the same manner as if it continued in force for all purposes,[95] except that the procedure, in its non-essential details, should be conducted, so far as possible, in conformity with the law then in force.[96] In the sense in which the word "accrued" is generally used in such saving clauses, the right claimed under the old law must have fully matured, and it is not sufficient that a party should have had a mere contingent or inchoate right at the time of the repeal;[97] but where demanded by the express language of the saving clause, it will be given a more liberal construction.[98]

(IV) *Liabilities.* Existing statutory liabilities, as well as rights, may be preserved by saving clauses in repealing acts.[99] Thus liabilities under contracts,[1]

81. See *In re* Everson Borough, 31 Pa. Super. Ct. 170, holding that the act of April 11, 1862 (Pamphl. Laws 471), relating to the formation of new school-districts, has not been repealed or suspended by the act of June 24, 1895 (Pamphl. Laws 259), which provides that it shall not be construed to repeal existing acts applicable to the same subject.

82. Hart *v.* Ross, 64 Ala. 96. See *infra*, note 83 *et seq.*

83. *In re* House Bill No. 238, 12 Colo. 337, 21 Pac. 484.

84. Hart *v.* Ross, 64 Ala. 96; Fort *v.* Burch, 6 Barb. (N. Y.) 60.

85. O'Flynn *v.* Powers, 136 N. Y. 412, 32 N. E. 1085; Cochran *v.* Taylor, 13 Ohio St. 382; Jones *v.* Marable, 6 Humphr. (Tenn.) 116.

86. Beatty *v.* People, 6 Colo. 538; Wirt *v.* Allegany County, 90 Hun (N. Y.) 205, 35 N. Y. Suppl. 887; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816; Lincoln County *v.* Oneida County, 80 Wis. 267, 50 N. W. 344.

87. Harris *v.* Townshend, 56 Vt. 716; Wells *v.* Remington, 118 Wis. 573, 95 N. W. 1094.

88. Louisville Water Co. *v.* Com., 34 S. W. 1064, 18 Ky. L. Rep. 2.

89. Oneida *v.* Thompson, 92 Hun (N. Y.) 16, 37 N. Y. Suppl. 889.

90. Plantation No. 9 *v.* Bean, 36 Me. 359.

91. State *v.* McBride, 76 Ala. 51.

92. Henderson *v.* Hayne, 2 Metc. (Ky.) 342.

93. Grace *v.* Donovan, 12 Minn. 580.

94. Cincinnati, etc., R. Co. *v.* Belt, 35 Ohio St. 479.

95. Lakeman *v.* Moore, 32 N. H. 410.

96. Farmer *v.* People, 77 Ill. 322; Lazarus *v.* Metropolitan El. R. Co., 83 Hun (N. Y.) 553, 32 N. Y. Suppl. 48, 24 N. Y. Civ. Proc. 260 [*affirmed* in 145 N. Y. 581, 40 N. E. 240].

97. Longley *v.* Little, 26 Me. 162 (holding that where a statute made stock-holders individually liable for corporate debts to the extent of their stock, on failure to obtain satisfaction from the corporate property, a cause of action against individual stock-holders did not accrue until a failure to obtain the amount of a judgment against the corporation from the corporate property by due course of proceedings for that purpose); Farr *v.* Brigham, 15 Vt. 557; Abbott *v.* Minister For Lands, [1895] A. C. 425, 64 L. J. P. C. 167, 72 L. T. Rep. N. S. 402, 11 Reports 466. *Compare In re* Van Dyke, 44 Hun 394 [*reversing* 7 N. Y. St. 710, 5 Dem. Surr. 331, 25 Wkly. Dig. 177].

98. Treat *v.* Strickland, 23 Me. 234, holding that a provision saving "all actions and causes of action, which shall have accrued in virtue of, or founded on any of said repealed acts, in the same manner, as if such acts had never been repealed" operates to preserve not only actions which technically and properly speaking had accrued or been founded on the statute, but those also which were preserved or secured to a party by the repealed act.

99. Cavanaugh *v.* Patterson, 41 Colo. 158, 91 Pac. 1117. See cases cited *infra*, note 1 *et seq.*

1. State *v.* Helms, 136 Ind. 122, 35 N. E. 893.

for personal injuries,[2] for public improvements,[3] for accrued taxes,[4] and other statutory liabilities[5] have been construed to be preserved after the repeal of the statute imposing them. Such saving clauses, however, must be carefully examined, and must not be construed to preserve liabilities clearly beyond those whose preservation was intended by the legislature.[6]

(v) *Penalties and Forfeitures.* Under similar saving clauses such penalties[7] and forfeitures[8] recoverable in a civil action as have accrued before the repealing act takes effect, are preserved and may be enforced after the repeal.[9] Following the general rule that penal statutes are to be construed strictly in favor of defendant, it has been held that such saving clauses attempting to preserve penalties under repealed statutes should be construed strictly against the survival of such penalties.[10]

(vi) *Criminal Prosecutions*[11] — (a) *In General.* A common provision in statutes relating to criminal offenses is that the new statute or amendment[12] shall not affect pending prosecutions[13] or any offenses committed[14] or penalties incurred[15] under the repealed statutes while still in force. Under such a clause

2. Hochstettler *v.* Mosier Coal, etc., Co., 8 Ind. App. 442, 35 N. E. 927.

3. Bruce *v.* Cook, 136 Ind. 214, 35 N. E. 992.

4. Com. *v.* Commonwealth Bank, 22 Pick. (Mass.) 176.

5. Crawford *v.* Hedrick, 9 Ind. App. 356, 36 N. E. 771; New York *v.* Herdje, 68 N. Y. App. Div. 370, 74 N. Y. Suppl. 104.

6. Wirt *v.* Allegany County, 90 Hun (N. Y.) 205, 35 N. Y. Suppl. 887.

7. *Colorado.*— Cavanaugh *v.* Patterson, 41 Colo. 158, 91 Pac. 1117.

Connecticut.— State *v.* New London, 22 Conn. 163.

Illinois.— Chicago, etc., R. Co. *v.* People, 136 Ill. App. 2.

Indiana.—Western Union Tel. Co. *v.* Brown, 108 Ind. 538, 8 N. E. 171; Daggy *v.* Ball, 7 Ind. App. 64, 34 N. E. 246.

Kansas.— Jenness *v.* Cutler, 12 Kan. 500.

New York.— People *v.* Bremer, 69 N. Y. App. Div. 14, 74 N. Y. Suppl. 570.

North Dakota.— McCann *v.* Mortgage, etc., Co., 3 N. D. 172, 54 N. W. 1026; State Nat. Bank *v.* Lemke, 3 N. D. 154, 54 N. W. 919.

Wisconsin.— Miller *v.* Chicago, etc., R. Co., 133 Wis. 183, 113 N. W. 384.

United States.— Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722.

See 44 Cent. Dig. tit. "Statutes," § 374.

8. Myers *v.* Van Alstyne, 10 Wend. (N. Y.) 97; White *v.* Freeman, 79 Va. 597 (holding that Code (1873), c. 15, § 13, providing that, if by a new law, repealing a former, any penalty or forfeiture be mitigated by any provision of the new law, such provision may, with the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect, applies to forfeitures in civil causes); Stockwell *v.* U. S., 13 Wall. (U. S.) 531, 20 L. ed. 491.

9. St. Louis, etc., R. Co. *v.* Hadley, 161 Fed. 419, holding that the repeal of a statute fixing railroad rates by a new statute, which enacts substituted rates, and provides that penalties incurred for violation of the repealed law may still be enforced, does not abate pending suits to enjoin the enforcement of the old statute, and supplemental bills may be filed therein to enjoin the enforcement of the new rates.

10. Rood *v.* Chicago, etc., R. Co., 43 Wis. 146, holding that in a saving clause to the effect that "nothing herein contained shall in any manner affect any litigation now pending," the word "litigation" means "the contest of the parties to a suit; it begins when the first step is taken toward defense, and ends when the cause is submitted for decision;" and therefore does not include a case which has been submitted for decision, but in which judgment has not been rendered.

11. See Criminal Law, 12 Cyc. 145, 956.

12. People *v.* Gill, 7 Cal. 356.

13. *Arkansas.*— McCuen *v.* State, 19 Ark. 634.

Florida.— Brown *v.* State, 31 Fla. 207, 12 So. 640.

Georgia.— Jackson *v.* State, 12 Ga. 1.

Iowa.— State *v.* Shaffer, 21 Iowa 486.

Kentucky.— Com. *v.* Sherman, 85 Ky. 686, 4 S. W. 790, 9 Ky. L. Rep. 218; Dunn *v.* Com., 29 S. W. 143, 16 Ky. L. Rep. 527.

Minnesota.— State *v.* Smith, 62 Minn. 540, 64 N. W. 1022.

Ohio.— Bergin *v.* State, 31 Ohio St. 111.

Tennessee.— Richardson *v.* State, 3 Coldw. 122.

Texas.— Myers *v.* State, 8 Tex. App. 321.

United States.— U. S. *v.* Baum, 74 Fed. 43, holding that the power to punish, in a pending case, for crime committed in a territory, if the act prescribing the punishment was impliedly repealed by the admission of the territory as a state, was saved by U. S. Rev. St. (1878) § 13 [U. S. Comp. St. (1901) p. 6], providing that such a repeal in criminal cases should not affect causes of prosecution already accrued.

See 44 Cent. Dig. tit. "Statutes," § 375.

14. People *v.* Strauss, 97 Ill. App. 47; State *v.* Mathews, 14 Mo. 133; State *v.* Crusius, 57 N. J. L. 279, 31 Atl. 235; People *v.* Sloan, 2 Utah 326.

15. State *v.* Boyle, 10 Kan. 113; Com. *v.* Bennett, 108 Mass. 30, 11 Am. Rep. 304; U. S. *v.* Barr, 24 Fed. Cas. No. 14,527, 4 Sawy. 254.

all offenses and proceedings committed or taken before the repealing statute goes into effect, even though it has passed through the legislature and has been approved by the governor, are controlled by the old law.[16] A criminal prosecution is pending within the meaning of a saving clause from the time of the arrest and commitment of defendant.[17] Where the general saving clause provides that if the repealing act mitigates the penalty imposed by the act repealed, such mitigated penalty may be imposed, it will accordingly be given effect.[18] Such saving clauses apply only to acts forbidden by statute at the time of their commission,[19] and, like other statutes in regard to criminal offenses, are construed strictly in favor of defendant.[20]

(B) *Matters Relating to Procedure.* Such saving clauses frequently provide that the legal proceedings thereafter in the prosecution of offenses excepted from the general operation of the repealing act shall conform so far as practicable to the laws in force at the time such proceedings are had;[21] and, even in the absence of such special provision, the new law will govern in all matters relating to procedure,[22] unless procedure is expressly included in the language of the saving clause,[23] or the change affects in some way the substantial rights of the defense.[24]

7. Prospective Construction and Validity of Retrospective Laws — a. Prospective Construction. Where a statute is expressed in general terms and in words of the present tense it will as a general rule be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation, by which it will apply to such as come into existence thereafter.[25] Where, however, the statute is couched exclusively in words of the past or perfect tenses,[26] or clearly appears, from its language, to deal only with subject-matter

16. Com. *v.* Bennett, 108 Mass. 30, 11 Am. Rep. 304.

17. Hartnett *v.* State, 42 Ohio St. 568. And see People *v.* Quinn, 18 Cal. 122, and People *v.* Madill, 91 Hun (N. Y.) 152, 36 N. Y. Suppl. 1130, both holding that the saving clause includes offenses committed before the repeal, even though indictment is not found until afterward.

18. Com. *v.* Sherman, 85 Ky. 686, 4 S. W. 790, 9 Ky. L. Rep. 218; Keene *v.* State, 3 Pinn. (Wis.) 99, 3 Chandl. 109, holding that under such a clause, where the statute in force when an indictment for manslaughter was found against the prisoner made no different degrees of the crime, but that in force at the time of the trial created four different degrees of the crime, and provided a different punishment, the trial and judgment were properly had under the latter statute.

19. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,570, 12 Blatchf. 345.

20. Aaron *v.* State, 40 Ala. 307 (holding that in an act repealing a criminal statute, a saving clause which excepts from the effect of the repeal any prosecution pending at the time of its passage does not apply to a case when the prosecution has closed, and judgment and sentence been pronounced); Pensacola, etc., R. Co. *v.* State, 45 Fla. 86, 33 So. 985, 110 Am. St. Rep. 67 (holding that a constitutional provision that the repeal or amendment of a criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment does not apply to a civil suit for the recovery by the state of a penalty imposed by statute for an act that is not denounced or punishable as a crime); Jones *v.* State, 1 Iowa 395 (holding that where murder was committed when one statute was in force, and this statute was repealed by a second statute, with a saving of crimes already committed against it, and subsequently a third statute was passed repealing the second, with a saving of all offenses committed "under any act hereby repealed," this did not operate to authorize the punishment of offenses under the first act after the passage of the third, since the latter repealed the clause in the second by which offenses against the first were saved).

21. People *v.* Strauss, 97 Ill. App. 47.

22. Mathis *v.* State, 31 Fla. 291, 12 So. 681 (holding that the right to peremptorily challenge jurors relates to procedure, and is governed by the law in force at the time of trial); McCalment *v.* State, 77 Ind. 250.

23. Miller *v.* State, 165 Ind. 566, 76 N. E. 245; Hartnett *v.* State, 42 Ohio St. 568, holding that under a provision that "when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed," the right to challenge jurors is governed by the old law, notwithstanding its repeal before trial. And see Thurman *v.* State, 169 Ind. 240, 82 N. E. 64, holding that a statute relating to the admissibility of confessions, being in force when the offense was committed, must govern at the trial.

24. Mathis *v.* State, 31 Fla. 291, 12 So. 681.

25. Davis *v.* Mobile Branch Bank, 12 Ala. 463; People *v.* Zito, 237 Ill. 434, 86 N. E. 1041 [*affirming* 140 Ill. App. 611].

26. Lucas *v.* State, 86 Ind. 180 (holding

in existence at its passage,[27] it will be interpreted accordingly, and will not be applied to acts done or statutes passed thereafter.[28]

b. Prospective Validity of Invalid Retrospective Statute. Where statutes intended from their language to be given both a prospective and a retrospective operation are void as to their retrospective effect, they are not necessarily void *in toto*, and will usually be upheld and applied in their prospective sense.[29]

VIII. PLEADING AND EVIDENCE.[30]

A. Pleading — 1. Pleading Public Statutes — a. In General. Courts will take judicial notice of all general or public domestic statutes,[31] and they need not be specially pleaded.[32]

b. Definition of Public Statute. What is a public act within the meaning of this rule is determined by the ordinary tests applied to distinguish public from private acts;[33] and it has been specially declared unnecessary to plead acts imposing liability upon railroad companies for injuries caused by negligence of fellow-servants,[34] or declaring certain employees vice-principals and not fellow-servants,[35] prescribing the duties of bank directors,[36] declaring a particular body of water to be free and open for the common and public use of all citizens of the state,[37] legalizing an election and authorizing the issue of bonds in pursuance

that the act of March 13, 1875, entitled "An act to legalize the acts of boards of trustees," etc., "where the inspectors of elections have failed," etc., is, on its face, retrospective and curative only, and can have no prospective force); Simpson *v.* Farmers', etc., Bank, 7 T. B. Mon. (Ky.) 549; State *v.* Salomans, Riley (S. C.) 99, 3 Hill 96 (holding that the act of 1794, relating to prosecutions of deputy surveyors "who shall have wilfully and knowingly violated the instructions of the surveyor general," etc., is only retrospective in its operation); Richardson *v.* Perkins, 4 Munf. (Va.) 512.

27. Bond *v.* Brewer, 96 Ga. 443, 23 S. E. 421, holding that the act of Sept. 27, 1881 (Code, § 1955*a*), making "the existing statutes and laws of this State in relation to the registration and record of mortgages on personal property" applicable to conditional sales of personalty, refers to such statutes and laws only as existed at the time of its passage.

28. See cases cited *supra*, notes 26, 27.

Application of general saving clauses to subsequent repealing statutes see *supra*, VII, D, 6, h, (I).

29. McNichol *v.* U. S. Mercantile Reporting Agency, 74 Mo. 457 (holding that where an act was passed declaratory of a former act, although retrospectively void, it was valid as to future cases); Cornell *v.* Beaver County, 3 Pa. Dist. 783 (holding that the act of May 23, 1893, changing the fees of justices of the peace, etc., and by its words applicable to all officers, although unconstitutional in so far as it affects those in office at the time of the passage of the act, will yet be upheld as regards future incumbents); Kehler *v.* Miller, 4 Leg. Gaz. (Pa.) 125, Leg. Chron. 35 (holding that the act of April 12, 1859, section 6, providing that premiums, fines, and interest may be collected by building, etc., associations, as debts of like amount are now collected, is not invalid except so far as it has a retroactive effect).

30. For pleading: Municipal ordinances see MUNICIPAL CORPORATIONS, 28 Cyc. 393. Statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 155. Statute of limitations see LIMITATIONS OF ACTIONS, 25 Cyc. 977.

Judicial notice generally see EVIDENCE, 16 Cyc. 821.

Judicial notice of laws of other states see EVIDENCE, 16 Cyc. 884, 893.

Pleading in action for: Causing death see DEATH, 13 Cyc. 340. Libel or slander see LIBEL AND SLANDER, 25 Cyc. 434. Neglect of statutory duty in actions for injuries to servants see MASTER AND SERVANT, 26 Cyc. 1392. Penalty see PENALTIES, 30 Cyc. 1352. Under statutes allowing double or treble damages see DAMAGES, 13 Cyc. 173.

Presumptions as to laws of other states see EVIDENCE, 16 Cyc. 1084.

Sufficiency of indictments or informations for statutory offenses see INDICTMENTS AND INFORMATIONS, 22 Cyc. 335.

31. Shaw *v.* Tobias, 3 N. Y. 188; Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606; Darling *v.* Hitchcock, 25 U. C. Q. B. 463; Girdlestone *v.* O'Reilly, 21 U. C. Q. B. 409.

32. Special acts of congress may be introduced under a plea of not guilty under a statute declaring certain short forms of pleading to be sufficient in all actions at law. U. S. *v.* Denver, etc., R. Co., 11 N. M. 145, 66 Pac. 550 [*reversed* on other grounds in 191 U. S. 84, 24 S. Ct. 33, 48 L. ed. 106].

33. See *supra*, III, A, 4.

34. Hancock *v.* Norfolk, etc., R. Co., 124 N. C. 222, 32 S. E. 679, holding the statute a public act, even though published among the private acts.

35. Schradin *v.* New York Cent., etc., R. Co., 103 N. Y. Suppl. 73.

36. O'Brien *v.* Kursheedt, 79 Hun (N. Y.) 615, 29 N. Y. Suppl. 973.

37. Sanborn *v.* People's Ice Co., 82 Minn. 43, 84 N. W. 641, 83 Am. St. Rep. 401, 51 L. R. A. 829.

thereof,[38] empowering a local board of education to levy a tax to pay bonds issued for school purposes,[39] regulating the sale of spirituous liquors in certain counties,[40] conferring jurisdiction on certain courts for the punishment of particular misdemeanors in all cases, although the courts named could not take jurisdiction of other misdemeanors,[41] curative acts validating titles to land,[42] insolvency laws,[43] and the charters of municipal corporations;[44] and under a statute providing that every act of incorporation shall be so far a public act that the same may be declared on and given in evidence without specially pleading it, acts amendatory of an act of incorporation need not be pleaded.[45]

c. Form and Sufficiency of Pleading. Where a public statute is applicable to a case, it is sufficient that the pleading of the party who seeks to rely upon the statute shall set forth the facts which bring the case within it;[46] and it is not necessary to recite the title of the act[47] or otherwise designate[48] or even refer to it.[49] Where it is claimed that an act or ordinance is void because, in its sub-

38. Unity *v.* Burrage, 103 U. S. 447, 26 L. ed. 405.

39. Hawesville Bd. of Education *v.* Louisville, etc., R. Co., 110 Ky. 932, 62 S. W. 1125, 23 Ky. L. Rep. 376.

40. McCuen *v.* State, 19 Ark. 630.

41. Hingle *v.* State, 24 Ind. 28.

42. People *v.* Harrison, 107 Cal. 541, 40 Pac. 956.

43. Mason *v.* Montgomery, Wright (Ohio) 723.

44. Covington *v.* Hoadley, 83 Ky. 444; Edwards *v.* Law, 63 N. Y. App. Div. 451, 71 N. Y. Suppl. 1097; Utica *v.* Richardson, 6 Hill (N. Y.) 300; Durch *v.* Chippewa County, 60 Wis. 227, 19 N. W. 79; Janesville *v.* Milwaukee, etc., R. Co., 7 Wis. 484.

45. Gorham Mfg. Co. *v.* New York, etc., R. Co., 27 R. I. 35, 60 Atl. 638.

46. *Alabama.*— Rasberry *v.* Pulliam, 78 Ala. 191, holding that under a statute providing that no person shall obtain a judgment on an account, any item of which is for liquor in less quantities than a quart without producing a license to retail liquor, the facts necessary to bring the case within the statute must be specially pleaded in an action on a note which does not disclose that part of its consideration is for such liquors.

Michigan.— Clark *v.* North Muskegon, 88 Mich. 308, 50 N. W. 254, holding that in an action under a Michigan statute against a municipal corporation for failure to keep a highway in repair, the declaration must aver: (1) That the highway on which the accident occurred was open to public travel; and (2) that it had been in use as a public highway for ten years; but it need not refer expressly to the statute.

Missouri.— Hance *v.* Wabash Western R. Co., 56 Mo. App. 476.

Rhode Island.— Kettelle *v.* Warwick, etc., Water Co., 24 R. I. 485, 53 Atl. 631, holding that a declaration in an action for the recovery of a tax which alleges that the tax was validated and legalized by Pub. Laws (1901), cc. 904, 944, is sufficient, without averring the particulars in which the tax was thereby validated; the laws specifying the particulars.

Tennessee.—Denton *v.* Moore, 2 Overt. 168, holding, however, that if defendant wishes to rely upon a right given by statute, where none existed before, he must bring himself within it by his plea.

See 44 Cent. Dig. tit. "Statutes," § 378.

Whether or not a purported public statute is a law is a question of law, and cannot be made an issue of fact by the pleadings. Portland Gold Min. Co. *v.* Duke, 164 Fed. 180, 90 C. C. A. 166.

47. **A misrecital of the title is mere surplusage.**— Eckert *v.* Head, 1 Mo. 593.

48. Smith *v.* Merwin, 15 Wend. (N. Y.) 184, holding that in a count in debt for a statutory penalty, which names the part, chapter, title, article, and section of the statutes under which recovery is sought, it is not necessary to name the subject-matter of the statute.

49. *Colorado.*— McConathy *v.* Deck, 34 Colo. 232, 82 Pac. 702; Denver, etc., R. Co. *v.* De Graff, 2 Colo. App. 42, 29 Pac. 664.

Iowa.— Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286, holding that an averment by a railroad company that it had the "legal right to take, hold, use and occupy a right of way" over the land in controversy, being based upon a public statute, is sufficient, without citing or setting out such statute in the pleadings.

Maine.— Peru *v.* Barrett, 100 Me. 213, 60 Atl. 968, 109 Am. St. Rep. 494, 70 L. R. A. 567.

Missouri.— Bair *v.* Heibel, 103 Mo. App. 621, 77 S. W. 1017.

New York.— O'Brien *v.* Kursheedt, 79 Hun 615, 29 N. Y. Suppl. 973; McHarg *v.* Eastman, 7 Rob. 137, 35 How. Pr. 205 (holding that a reference by a pleader, in citing a general and public statute, to the wrong section of the statute is wholly immaterial, as the reference is surplusage); Smith *v.* Merwin, 15 Wend. 184 (holding that in a count in case to recover damages under a statute, it is not necessary to refer to the statute).

See 44 Cent. Dig. tit. "Statutes," § 378.

Distinction between "pleading" and "counting on" statute.— "Pleading the statute is stating the facts which bring the case within it, and counting on it, in the strict language of pleading, is making express reference to it by apt terms to show the source of right relied on.' Howser *v.* Melcher, 40 Mich.

stance, it is violative of the fundamental law, it is sufficient to allege generally that it is invalid;[50] but where the objection to the validity of the law is that it was not regularly and constitutionally passed and adopted, the defect in the proceedings must be specifically pleaded.[51] Where a form of pleading is set forth in a statute it is not necessary to include in a pleading averments formerly necessary, but omitted from the statutory form,[52] and statutory forms must always be adopted with reference to the evidence of the particular case.[53]

d. Exceptions and Provisos. Where the enacting clause of a statute contains an exception to the general provisions of the act, a party pleading the provisions of the statute must negative the exception;[54] but where the exception is contained in a proviso,[55] in a separate substantive clause,[56] or in an amendment,[57] the party pleading the statute need not negative the exception, and it is for the other party to set it up in avoidance of the general provisions of the statute.

2. Pleading Private Acts — a. In General. Courts do not take judicial notice of private statutes, and a party relying upon a private statute must both plead and prove it.[58] As distinguished from public acts, which relate to the community at large,[59] private acts are those which relate only to certain individuals,[60] and are especially to be distinguished from special acts, which may be private, or may be merely public acts of local application.[61] Acts granting charters to particular

185. As a general rule, if the allegations of the complaint bring the case within the provisions of the statute, it is not necessary either to plead the statute or to count on it (Leone *v.* Kelly, 77 Conn. 569, 60 Atl. 136; Hayes *v.* West Bay City, 91 Mich. 418, 51 N. W. 1067; Fuller *v.* Jackson, 82 Mich. 480, 46 N. W. 721; Grand Rapids, etc., R. Co. *v.* Southwick, 30 Mich. 444); but where the action is for a penalty, it has been held necessary, under the common-law system of pleading, both to plead the statute and to count on it (Howser *v.* Melcher, 40 Mich. 185).

50. New York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065.

51. New York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065; People *v.* Chenango County, 8 N. Y. 317 [*quoted* in Darlington *v.* New York, 2 Rob. 274 (*affirmed* in 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352)] (holding that where the objection to the validity of a law springs out of the failure of the legislature to comply with the provisions of the constitution, which is not apparent upon the act itself, it should be distinctly set forth in the pleadings); Darlington *v.* New York, 2 Rob. (N. Y.) 274 [*affirmed* in 31 N. Y. 164, 88 Am. Dec. 248, 28 How. Pr. 352]; State *v.* Swiggart, 118 Tenn. 556, 102 S. W. 75 (holding, however, that the journals of the general assembly, showing the various steps taken in the enactment of a statute, are not required to be specially pleaded or proven, when the statute is attacked for want of formalities in its enactment required by the constitution). But in pleading a statute which is of such a nature that a three-fifths vote is required to pass it, it is not necessary to allege that such a vote was had; an averment that the statute was passed is sufficient, on demurrer. Wolfe *v.* Richmond County, 11 Abb. Pr. (N. Y.) 270, 19 How. Pr. 370. While it is not necessary to plead that a statute is unconstitutional, or has been impliedly repealed by a subsequent statute, yet the particular clause of the constitution which is claimed to be contravened, or the particulars in which the later statute repeals the earlier, must be otherwise pointed out specifically. Cook *v.* State, 26 Ind. App. 278, 59 N. E. 489; Farmers' Mut. Ins. Co. *v.* Cole, 4 Nebr. (Unoff.) 130, 93 N. W. 730.

An averment in a complaint that an act was passed by the legislature through improper motives does not constitute an issuable fact, as the courts cannot inquire into the motives of the legislature. Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081 [*affirming* 25 N. Y. App. Div. 329, 49 N. Y. Suppl. 713].

52. Reg. *v.* Cronin, 36 U. C. Q. B. 342.

53. Tucker *v.* Paren, 7 U. C. C. P. 269; Upper Canada Bank *v.* Gwynne, 4 U. C. Q. B. 145.

54. Muller *v.* U. S., 4 Ct. Cl. 61; Spieres *v.* Parker, 1 T. R. 141, 1 Rev. Rep. 165, 99 Eng. Reprint 1019.

It is not necessary to negative the exception by express words, but it is sufficient if the facts pleaded clearly negative the exception. Maxwell *v.* Evans, 90 Ind. 596, 46 Am. Rep. 234.

55. Muller *v.* U. S., 4 Ct. Cl. 61.

56. Vandegrift *v.* Meihle, 66 N. J. L. 92, 49 Atl. 16.

57. Bond *v.* Central Bank, 2 Ga. 92.

58. Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237. See cases cited *infra*, note 60 *et seq.*

59. See *supra*, III, A, 4; III, B, 1; VIII, A, 1.

60. New York Fire Underwriters *v.* Metropolitan Lloyds, 11 Misc. (N. Y.) 646, 33 N. Y. Suppl. 547, 24 N. Y. Civ. Proc. 307 [*affirmed* in 87 Hun 619, 33 N. Y. Suppl. 1131]; Ryan *v.* State, 32 Tex. 280, holding that private acts or such as confer immunities or privileges on individuals must be specially pleaded.

61. Toledo, etc., R. Co. *v.* Nordyke, 27 Ind.

private corporations, such as railroad [62] and turnpike companies,[63] have been declared private acts; but statutes granting charters to municipal corporations are regarded as public acts,[64] and in some cases statutes granting charters to banks [65] and certain other corporations [66] have been declared public. It has been held necessary to plead ordinances of municipal corporations,[67] acts granting divorce,[68] and an act authorizing the governor to appoint arbitrators to adjust a controversy between two persons.[69]

b. Form and Sufficiency. Under the old common-law practice it was necessary, in pleading a private statute, to set it out in full; [70] but under modern practice it is sufficient that the statute be so described or referred to that it can be clearly identified,[71] and a common statutory provision is that it shall be sufficient to refer to it by stating its title and the day on which it became a law.[72] Under such a provision, where the statute is not referred to in any way by the party who seeks to rely upon it, the pleading is clearly defective; [73] but an omission of the date, where no date is affixed to the private law, is not a fatal defect; [74] and where the party has complied with the statute, an express reference to particular provisions does not exclude judicial cognizance from other parts of the statute.[75] In an action against a corporation it is not necessary to refer to the title or date of its charter, as it is conclusively presumed to know these things.[76]

95; Covington *v.* Voskotter, 80 Ky. 219 (holding that the act of 1874, limiting the time of bringing suits against the city of Covington, is not a private statute); Ryan *v.* State, 32 Tex. 280.

62. Durham *v.* Richmond, etc., R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1, holding that such a statute is not rendered a public one by its embracing one or more public statutory provisions, nor by being published among the public statutes.

63. Crawfordsville, etc., Turnpike Co. *v.* Fletcher, 104 Ind. 97, 2 N. E. 243.

64. Central Covington *v.* Weighans, 44 S. W. 985, 19 Ky. L. Rep. 1979. But see Kosters *v.* Auburn Nat. Bank, 62 Misc. (N. Y.) 419, 116 N. Y. Suppl. 647, holding that an act to revise the charter of the city of Auburn should be pleaded in the manner required for private statutes.

65. Bond *v.* Central Bank, 2 Ga. 92 (holding that the charter of the central bank of Georgia and acts amendatory thereof need not be pleaded); Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662.

66. New York Fire Underwriters *v.* Metropolitan Lloyds, 11 Misc. (N. Y.) 646, 33 N. Y. Suppl. 547 [*affirmed* in 87 Hun 619, 33 N. Y. Suppl. 1131], holding that Laws (1867), c. 846, incorporating the New York board of fire underwriters, is a public act so far as it authorizes the board to provide a fire patrol, to be under the control of the fire department while on duty at a fire, with "suitable apparatus to save and preserve property or life at and after a fire," and gives the patrol full power "to enter any building on fire or which may be exposed to or in danger of taking fire from other burning buildings."

67. York *v.* Miller, 11 York Leg. Rec. (Pa.) 138; Garlich *v.* Northern Pac. R. Co., 131 Fed. 837, 67 C. C. A. 237.

68. Cochran *v.* Couper, 1 Harr. (Del.) 200.

69. Whetcroft *v.* Dorsey, 3 Harr. & M. (Md.) 357.

70. Territory *v.* Reyburn, McCahon (Kan.) 134.

71. Utica Bank *v.* Smedes, 3 Cow. (N. Y.) 662; Kirk *v.* Kirkland, 6 Brit. Col. 442, holding that where there are two statutes, the short titles of which are identical, a defendant pleading one of them should make it plainly appear on which he relies, but he need not plead the particular section. And see Devonport *v.* Plymouth Tramways Co., 49 J. P. 405, 52 L. T. Rep. N. S. 161, holding that where an act of parliament contains a provision for the special benefit or protection of an individual, he may enforce his rights thereunder by an action without either joining the attorney-general as a party or showing that he has sustained any particular damage.

72. See cases cited *infra*, notes 73–76. A statutory provision that "neither the evidence relied on by a party, nor presumptions of law, nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading" does not require, but permits the pleading of private statutes (Central Covington *v.* Weighaus, 44 S. W. 985, 19 Ky. L. Rep. 1979), and the permission was probably given for fear that the prohibition as to evidence might be regarded as applying to private statutes (Ky. Bullitt Code, § 119).

73. Zable *v.* Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 Ky. L. Rep. 385, 13 L. R. A. 668; Pittsburgh, etc., R. Co. *v.* Moore, 33 Ohio St. 384, 31 Am. Rep. 543.

74. Territory *v.* Reyburn, McCahon (Kan.) 134.

75. Hewitt *v.* Grand Chute, 7 Wis. 282.

76. Louisville, etc., R. Co. *v.* Robbins, 111 S. W. 283, 33 Ky. L. Rep. 778, holding that the statutory provision was intended to require a party who was relying upon a private act to give the other party notice of it when the other party is not presumably familiar

3. Pleading Foreign Statutes [77] **— a. In General.** Statutes of other states are regarded as matters of fact,[78] and when relied on to support a cause of action [79] or defense [80] must be pleaded [81] and proved.[82] By this rule, however, it is only

with or connected in any way with the private act. And see Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252, holding that private statutes and by-laws may be proved, although not set out in pleading, where it is not necessary to state them as part of the cause of action.

77. In actions to recover interest under laws of another state see Interest, 22 Cyc. 1576.

78. Thomas *v.* Bruce, 50 S. W. 63, 20 Ky. L. Rep. 1818; Myers *v.* Chicago, etc., R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579.

79. See cases cited *infra*, note 81.

80. *Connecticut.*— Hempstead *v.* Reed, 6 Conn. 480.

Illinois.— Palmer *v.* Marshall, 60 Ill. 289; Leathe *v.* Thomas, 109 Ill. App. 434 [*affirmed* in 218 Ill. 246, 75 N. E. 810].

Minnesota.—Thomson-Houston Electric Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536.

New York.— Graves *v.* Cameron, 9 Daly 152, 58 How. Pr. 75.

Ohio.— Worthington *v.* Smyth, 4 Ohio Dec. (Reprint) 574, 2 Clev. L. Rep. 395.

Oklahoma.— Betz *v.* Wilson, 17 Okla. 383, 87 Pac. 844, usury laws.

See 44 Cent. Dig. tit. "Statutes," § 380.

81. *California.*— Peck *v.* Noee, 154 Cal. 351, 97 Pac. 865.

Delaware.— Thomas *v.* Grand Trunk R. Co., 1 Pennew. 593, 42 Atl. 987.

Georgia.— Savannah, etc., R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. 308; Cummings *v.* Montague, 116 Ga. 457, 42 S. E. 732.

Illinois.— Chumasero *v.* Gilbert, 24 Ill. 293; Farmers' Trust Co. *v.* Schenuit, 83 Ill. App. 267; Stockham *v.* Simmons, 67 Ill. App. 83.

Indiana.— Swank *v.* Hufnagle, 111 Ind. 453, 12 N. E. 303; Milligan *v.* State, 86 Ind. 553; Davis *v.* Rogers, 14 Ind. 424.

Iowa.—*In re* Capper, 85 Iowa 82, 52 N. W. 6; Taylor *v.* Runyan, 9 Iowa 522; Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357.

Kansas.— Loyal Mystic Legion of America *v.* Brewer, 75 Kan. 729, 90 Pac. 247.

Kentucky.— Roots *v.* Merriwether, 8 Bush 397; Thomas *v.* Bruce, 50 S. W. 63, 20 Ky. L. Rep. 1818; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499.

Massachusetts.— Palfrey *v.* Portland, etc., R. Co., 4 Allen 55; Legg *v.* Legg, 8 Mass. 99.

Michigan.— Great Western R. Co. *v.* Miller, 19 Mich. 305.

Minnesota.— Myers *v.* Chicago, etc., R. Co., 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579; Hoyt *v.* McNeil, 13 Minn. 390.

Missouri.— Mathieson *v.* St. Louis, etc., R. Co., 219 Mo. 542, 118 S. W. 9; Lee *v.* Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614.

Montana.—McKnight *v.* Oregon Short Line R. Co., 33 Mont. 40, 82 Pac. 661.

Nebraska.— Smith *v.* Mason, 44 Nebr. 610, 63 N. W. 41; Sells *v.* Haggard, 21 Nebr. 357, 32 N. W. 66.

New Jersey.— Perkins *v.* Trinity Realty Co., 71 N. J. Eq. 304, 71 Atl. 1135 [*affirming* 69 N. J. Eq. 723, 61 Atl. 167].

New York.— Monroe *v.* Douglass, 5 N. Y. 447; Rothschild *v.* Rio Grande Western R. Co., 59 Hun 454, 13 N. Y. Suppl. 361; Vandeventer *v.* New York, etc., R. Co., 27 Barb. 244, 6 Abb. Pr. 239.

North Dakota.— National German American Bank *v.* Lang, 2 N. D. 66, 49 N. W. 414, holding that in an action on a note payable in another state, where defendant desires to take advantage of the laws of the other state as to the rate of interest after maturity, it is incumbent on him to show by his pleadings what such laws are, and wherein they differ from those of this state; and, if he fails to do so, it is error to admit testimony at the trial as to what the foreign law is.

Ohio.— Williams *v.* Finley, 40 Ohio St. 342.

Oklahoma.— Mansur-Tebbetts Implement Co. *v.* Willet, 10 Okla. 383, 61 Pac. 1066.

Oregon.— Young *v.* Young, 53 Oreg. 365, 100 Pac. 656.

Pennsylvania.— Callaway *v.* Prettyman, 218 Pa. St. 293, 67 Atl. 418, holding that where a resident of New Jersey sues to recover on a parol contract for commissions for the sale of real estate in New Jersey, the printed statutes of New Jersey requiring such contracts to be in writing are inadmissible under plea of *non assumpsit*, but only by way of special matter after due notice, under Court Rule No. 30, § 8.

Texas.— Armendiaz *v.* De La Serna, 40 Tex. 291; Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354.

Vermont.— Herring *v.* Selding, 2 Aik. 12.

Virginia.— Dowell *v.* Cox, 108 Va. 460, 62 S. E. 272.

Washington.— Ongaro *v.* Twohy, 49 Wash. 93, 94 Pac. 916; Lowry *v.* Moore, 16 Wash. 476, 48 Pac. 238, 58 Am. St. Rep. 49.

Foreign statutes are not admissible in evidence unless they have been specially pleaded. — Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357; Audley *v.* Townsend, 49 Misc. (N. Y.) 23, 96 N. Y. Suppl. 439; Andrews, etc., Iron Co. *v.* I. D. Smead Heating, etc., Co., 11 Ohio Cir. Ct. 286, 5 Ohio Cir. Dec. 460; Dunham *v.* Holloway, 3 Okla. 244, 41 Pac. 140. But see Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271, holding that under Code, § 3249, in a proceeding by motion upon notice it is not necessary to plead a foreign statute unless defendant moves for an order requiring plaintiff to file a statement of the particulars of his claim.

See 44 Cent. Dig. tit. "Statutes," § 380.

82. See *infra*, VIII, B.

meant that foreign statutes, like other facts, must be pleaded when they are essential to the cause of action or defense; and when they are not so essential, but only constitute evidence relating to the facts in issue, they may be offered in evidence, like other facts, without being specially pleaded.[83] The federal courts take judicial notice of the public statutes of all the states, and an action on a statute of one state can therefore be sustained in a federal court in another state without pleading such statute.[84]

b. Form and Sufficiency — (I) *In General.* In pleading the statute of a foreign state, it is not necessary that it should be set forth *in hæc verba,*[85] but the substance of those portions that are relied on should be stated with sufficient distinctness to enable the court to judge of the meaning and effect of the law.[86] A general averment that a contract was made [87] or an injury suffered [88] in another state is not sufficient to authorize the introduction of the statutes of that state into evidence; nor is it sufficient, in the absence of a statute especially authorizing

83. *Illinois.*— Christiansen *v.* William Graver Tank Works, 223 Ill. 142, 79 N. E. 97 [*affirming* 126 Ill. App. 86].

Iowa.— Green *v.* Equitable Mut. Life, etc., Assoc., 105 Iowa 628, 75 N. W. 635.

Minnesota.— Thomson-Houston Electric Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536.

Missouri.— Hatch *v.* Hanson, 46 Mo. App. 323; Banchor *v.* Gregory, 9 Mo. App. 102.

Washington.— Cunningham *v.* Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

See 44 Cent. Dig. tit. "Statutes," § 380.

84. Noonan *v.* Delaware, etc., R. Co., 68 Fed. 1.

85. St. Louis, etc., R. Co. *v.* Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617.

86. *Connecticut.*— Hempstead *v.* Reed, 6 Conn. 480.

Illinois.— Consolidated Tank Line Co. *v.* Collier, 148 Ill. 259, 35 N. E. 756, 39 Am. St. Rep. 181 (holding that an allegation that a certain instrument, executed in another state, was made in all respects in conformity with the laws of that state, and acknowledged and delivered in accordance with said laws, is a sufficient averment as to such laws); Palmer *v.* Marshall, 60 Ill. 289; Stockham *v.* Simmons, 67 Ill. App. 83.

Kansas.— Showalter *v.* Rickert, 64 Kan. 82, 67 Pac. 454.

Kentucky.— Roots *v.* Merriwether, 8 Bush 397.

Massachusetts.— Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35, holding that when a party pleads a part of a statute upon which he relies, with a profert of the exemplification of the whole statute, the court can take notice of only those parts specially pleaded.

Minnesota.— Hoyt *v.* McNeil, 13 Minn. 390.

New York.— Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L. R. A. 541 (holding that an allegation in a complaint that letters of administration on the estate of a deceased person were granted by the surrogate of —— county, and that "said surrogate had jurisdiction and was duly authorized and empowered by the laws of the state of New Jersey to issue said letters as aforesaid," is sufficient to authorize proof of the laws of said state, and of the jurisdiction of the surrogate in issuing letters); Bernardston Cong. Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396, 51 N. Y. Suppl. 704 (holding that in an action in New York by an unincorporated religious society located in Massachusetts to recover a legacy, where the complaint alleged that "by the laws of said Commonwealth the plaintiff is now, and always has been, competent to take and hold said legacy, and to sue for and recover the same," and that "at the time of the death of said [testator] it was and still is the law of said Commonwealth, that incorporated and unincorporated religious societies may appoint trustees . . . to hold and manage bequests for their benefit," and that such trustees had been appointed, these allegations were sufficient to authorize proof of the laws of Massachusetts); O'Reilly, etc., Co. *v.* Greene, 18 Misc. 423, 41 N. Y. Suppl. 1056 (holding that the law of another state under which a corporation is authorized to sue on its debts after expiration of its charter is sufficiently pleaded by an averment "that under and pursuant" to such law, suits may be brought).

Wisconsin.— New York Cent. Trust Co. *v.* Burton, 74 Wis. 329, 43 N. W. 141, holding that under Rev. St. § 2676, providing that a statute of another state may be pleaded by referring to its title and the date of its passage, it is not error to plead its substance instead.

See 44 Cent. Dig. tit. "Statutes," § 380.

When general rule does not apply.— Where a complaint in an application for injunction alleges that the acts sought to be enjoined are not authorized by any provisions of the statutes of a foreign state, the general rule requiring foreign statutes to be pleaded does not apply, and the allegation is sufficient to authorize proof of all the statutes of that state that are applicable. Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. (N. Y.) 583, 54 N. Y. Suppl. 116.

87. Bean *v.* Briggs, 4 Iowa 464.

88. Ongaro *v.* Twohy, 49 Wash. 93, 94 Pac. 916.

a particular method of pleading a foreign statute,[89] to make a general averment of the existence of a foreign statute relating to the subject,[90] nor the mere statement of a conclusion of law derived from the application of the statute to the facts;[91] nor a reference to the statute by its title, or the date of its enactment,[92] or both,[93] or by its chapter number.[94] Where a party relies upon proceedings had in accordance with a statute of another state, but unknown to the common law, the statute authorizing the proceedings should be set forth;[95] and a statement that the proceedings were "pursuant to"[96] or "according to"[97] the statute is insufficient. Where a party seeks to avail himself of a particular construction placed upon a statute of another state by the courts thereof, he should not only plead the statute itself, but should also set forth the construction contended for;[98] but it is not necessary to set out the facts on which the decision was rendered, or to refer to the case by title or other citation.[99]

(II) *Manner of Raising Objection to.* Where one party desires to have the allegations of another in regard to a foreign statute made more specific, the proper procedure is by motion to make the pleading more definite and specific.[1]

89. Becht *v.* Harris, 4 Minn. 504 (holding that a statute providing that "in actions by or against corporations, under the laws of this territory," the act of incorporation may be pleaded by title, is confined in its effect to domestic corporations, and does not extend to those created under the laws of another state or territory); New York Cent. Trust Co. *v.* Burton, 74 Wis. 329, 43 N. W. 141 (construing Rev. St. § 2676, providing that both private domestic statutes and all foreign statutes may be pleaded by referring to the title and day of passage). And see *supra*, VIII, A, 2, b.

90. Cubbedge *v.* Napier, 62 Ala. 518, opinion of Brickell, C. J.

91. *Alabama.*— Lomb *v.* Pioneer Sav., etc., Co., 96 Ala. 430, 11 So. 154 (holding that averments in a bill to foreclose a mortgage that the note and mortgage are "in accordance with" the laws of another state, "with respect to which the same were made," and that the forfeiture was made "in accordance with" the regulations and by-laws of the corporation making the loan, and an averment stating the effect of such laws, are insufficient pleadings of a foreign statute); Forsyth *v.* Preer, 62 Ala. 443.

Connecticut.— Hempstead *v.* Reed, 6 Conn. 480.

Delaware.—Thomas *v.* Grand Trunk R. Co., 1 Pennew. 593, 42 Atl. 987.

Iowa.— Green *v.* Equitable Mut. Life, etc., Assoc., 105 Iowa 628, 75 N. W. 635; Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357.

Kentucky.—Valz *v.* Birmingham First Nat. Bank, 96 Ky. 543, 29 S. W. 329, 16 Ky. L. Rep. 624, 49 Am. St. Rep. 306 (holding that where a defendant pleads, as a defense to an action upon a cause of action arising in a foreign state, the statute of limitations of such foreign state, he must allege the terms and provisions of such statute, so as to show that the cause of action is barred in such foreign state, or the action will be held to be governed by the *lex fori*); Temple *v.* Brittan, 12 S. W. 306, 11 Ky. L. Rep. 467; Tempieton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499.

Montana.— Owensboro Bank of Commerce *v.* Fugua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588.

Ohio.— Ott *v.* Ott, 3 Ohio S. & C. Pl. Dec. 684, 3 Ohio N. P. 161; Christie *v.* Drennon, 1 Ohio S. & C. Pl. Dec. 374.

Pennsylvania.— Stockton *v.* Lehigh Coal, etc., Co., 14 Phila. 77.

See 44 Cent. Dig. tit. "Statutes," § 380.

92. Engleman *v.* Cable, 4 Indian Terr. 336, 69 S. W. 894.

93. Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357.

94. McDonald *v.* Des Moines Bankers' Life Assoc., 154 Mo. 618, 55 S. W. 999.

95. Holmes *v.* Broughton, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536.

96. Walker *v.* Maxwell, 1 Mass. 104; Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. L. 52.

97. Pearce *v.* Rhawn, 13 Ill. App. 637.

98. Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431 (holding that, in construing a Kentucky statute, this court followed the Kentucky decision upon it, because it approved of the reasoning, although as the decision was neither pleaded nor given in evidence the court was not bound by it); Ingraham *v.* Hart, 11 Ohio 255 (holding that where a plea sets up a defense under a statute of a sister state, to avoid the application of the statute, the replication must disclose the modifications which it has received in that state, by construction or otherwise, not depending merely on a just interpretation of the statute); Ott *v.* Ott, 3 Ohio S. & C. Pl. Dec. 684, 3 Ohio N. P. 161.

99. Angell *v.* Van Schaick, 132 N. Y. 187, 30 N. E. 395 [*reversing* 56 Hun 247, 9 N. Y. Suppl. 568].

1. Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L. R. A. 541; Williams *v.* Finlay, 40 Ohio St. 342; Christie *v.* Drennon, 1 Ohio S. & C. Pl. Dec. 374.

B. Evidence [2] — **1. Evidence as to Public Statutes — a. Presumptions as to Enactment.** An enrolled act,[3] or an act signed by the governor, deposited with the secretary of state, and published as a law,[4] is presumed, in the absence of a contrary showing, to have been passed with all the formalities required by the constitution for its validity,[5] and in the form, both as to title and body, in which it was signed by the governor.[6] Unless expressly required by the constitution,[7] it is not necessary that the legislative journal shall affirmatively show

2. Construction in favor of validity see *supra*, II, G, 1, d, (II).
Effect of statutes as evidence see *supra*, VII, A, 12.
Judicial notice in general see EVIDENCE, 16 Cyc. 821.
Presumptions as to continuance of laws shown to exist see EVIDENCE, 16 Cyc. 1086.
Presumptions to aid construction see *supra*, VII, A, 5.
Want of signature by governor see *supra*, I, D, 4.

3. *Arkansas.*— Chicot County *v.* Davies, 40 Ark. 200, holding that where an amendment to a legislative bill is not required by law to be entered, and the journal shows that there was an amendment, but fails to show that it was rescinded, and the enrolled bill contains no amendment, it will be presumed that the amendment was rescinded.

Dakota.— Territory *v.* O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355.

Iowa.— Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548.

Kansas.— Stephens *v.* Labette County, 79 Kan. 153, 98 Pac. 790; State *v.* Andrews, 64 Kan. 474, 67 Pac. 870, both holding that an enrolled statute imports absolute verity, and is conclusive evidence of its passage, unless the journals of the legislature show affirmatively and beyond all doubt that the act was not regularly passed.

Michigan.— People *v.* McElroy, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609, holding that while the court may look behind the enrolment, and into the legislative journals, to ascertain whether an act was passed in accordance with constitutional requirements, it cannot act on anything not found in the journals, nor presume that any such requirement has been omitted, unless the fact affirmatively appears in the journals.

Minnesota.—Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632, holding that the presumption that a properly authenticated bill was passed in accordance with the constitution is not overcome by the failure of the legislative journals to show any fact which is not specifically required by the constitution to be entered therein.

Missouri.— Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675.

Nebraska.— Colburn *v.* McDonald, 72 Nebr. 431, 100 N. W. 961, holding that in order to overthrow an enrolled bill, signed and approved, found in the office of the secretary of state, it must be made to affirmatively appear by the journals of the legislature that it did not pass.

Texas.— Blessing *v.* Galveston, 42 Tex. 641.

Wyoming.— State *v.* Cahill, 12 Wyo. 225, 75 Pac. 433.

See 44 Cent. Dig. tit. "Statutes," § 382.

4. *Arkansas.*— Pelt *v.* Payne, 60 Ark. 637, 30 S. W. 426.

Colorado — Peckham *v.* People, 32 Colo. 140, 75 Pac. 422, holding that on appeal facts relied on to show unconstitutionality not being in the bill of exceptions, the appellate court will not inspect the legislative journals for the purpose of ascertaining whether the constitution has been complied with.

Minnesota.— Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289.

Nebraska.— Stetter *v.* State, 77 Nebr. 777, 110 N. W. 761.

New York.— McGrath *v.* Grout, 37 Misc. 64, 74 N. Y. Suppl. 779 [*affirmed* in 69 N. Y. App. Div. 314, 74 N. Y. Suppl. 782 (*affirmed* in 171 N. Y. 7, 63 N. E. 547)].

Tennessee.— State *v.* Algood, 87 Tenn. 163, 10 S. W. 310.

Utah.— Lyman *v.* Martin, 2 Utah 136.

Wisconsin.— Bound *v.* Wisconsin Cent. R. Co., 45 Wis. 543.

See 44 Cent. Dig. tit. "Statutes," § 382.

5. People *v.* Loewenthal, 93 Ill. 191; Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59 (holding that in determining whether a statute was duly passed, the bound volumes of the legislative journals containing matter not in the journal as published from day to day will be presumed to have been properly amended in such respect by authority of the legislature); People *v.* Burch, 84 Mich. 408, 47 N. W. 765 (holding that where a house of the legislature at the beginning of the session has passed a resolution dispensing with the daily reading of the journal and authorizing the secretary to make all necessary corrections, it will be presumed that a bill was passed as stated in the secretary's corrections).

6. Erford *v.* Peoria, 229 Ill. 546, 82 N. E. 374; Binz *v.* Weber, 81 Ill. 288; State *v.* Brown, 33 S. C. 151, 11 S. E. 641, holding that where, from a certified copy of the original draught of an act of the legislature, it appears that the draught is upon a paper bearing the heading "A Joint Resolution," which words are marked out, and the words "A Bill" written instead, it will be presumed, in the absence of marginal notes, that the substitution was made by the draughtsman, and that the paper was introduced as a bill, not as a joint resolution.

7. Rio Grande Sampling Co. *v.* Catlin, 40 Colo. 450, 94 Pac. 323, holding that under a

that all the requirements of the constitution as to reading, printing, etc., have been complied with.[8] Other formalities that are presumed to have been complied with are notice of application for the passage of a special act,[9] suspension of the rules,[10] taking vote by yeas and nays,[11] passage by a constitutional majority,[12] printing,[13] and publication as required by law.[14] Where the date of the approval of a statute is in question, the date shown by the published statute duly authenticated, is presumed to be correct;[15] and where the time of a statute taking effect depends upon the date of its publication, the date of the certificate of the secretary of state appended to the published volume of the laws will be presumed to be that of its first publication,[16] and to be correct.[17] These presumptions, which are ordinarily only *prima facie*,[18] have been declared conclusive where the statute has long been accepted and recognized as law,[19] especially when it has been so recognized by judicial decisions,[20] and also where the legislature has directed that a copy of the laws deposited in the office of the secretary of state and certified by him shall be an authentic record of said laws.[21]

b. Admissibility [22] — (i) *In General* — (a) *Legislative Journals.* In England, where there is no written constitution and the parliament is supreme, an enrolled statute is conclusive evidence of its passage and validity, and no evidence is admissible to impeach it.[23] In the United States the equivalent of the English

constitutional provision that "no bill shall become a law except by a vote of a majority of all the members elected to each house, nor unless, on its final passage, the vote be taken by ayes and noes, and the names of those voting be entered on the journal," a failure of the journal to show the names of those voting "aye" and of those voting "no" raises the presumption that the bill was not duly passed in accordance with the constitution.

8. *Alabama.*—Walker *v.* Griffith, 60 Ala. 361.
Arkansas.— Glidewell *v.* Martin, 51 Ark. 559, 11 S. W. 882.
California.— People *v.* Dunn, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118.
Colorado.— Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.
Florida.— State *v.* Hocker, 36 Fla. 358, 18 So. 767.
Georgia.— Butler *v.* State, 89 Ga. 821, 15 S. E. 763.
Illinois.— Schuyler County *v.* People, 25 Ill. 181.
Kansas.— Weyand *v.* Stover, 35 Kan. 545, 11 Pac. 355.
North Carolina.— Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818.
Oregon.— State *v.* Rogers, 22 Oreg. 348, 30 Pac. 74.
Tennessee.— State *v.* McConnell, 3 Lea 332.
See 44 Cent. Dig. tit. "Statutes," § 382.

9. Norvell *v.* State, 149 Ala. 561, 39 So. 357; Jennings *v.* Russell, 92 Ala. 603, 9 So. 421; Hall *v.* Steele, 82 Ala. 562, 2 So. 650; McKemie *v.* Gorman, 68 Ala. 442; Walker *v.* Griffith, 60 Ala. 361; Harrison *v.* Gordy, 57 Ala. 49; Smith *v.* Helmer, 7 Barb. (N. Y.) 416. And see State *v.* Murray, 47 La. Ann. 1424, 17 So. 832, holding that the recital in a special act that notice of intention to apply for its passage was published as required by the constitution is conclusive evidence of such publication, in the absence of fraud.

10. Chicot County *v.* Davies, 40 Ark. 200; State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

11. State *v.* Rogers, 22 Oreg. 348, 30 Pac. 74.

12. People *v.* Chenango County, 8 N. Y. 317; Stone *v.* Stumper, 1 Tex. App. Civ. Cas. § 324.

13. People *v.* Dunn, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118; Stone *v.* Dispatch Pub. Co., 55 S. W. 725, 21 Ky. L. Rep. 1473; State *v.* Field, 119 Mo. 593, 24 S. W. 752.

14. Stine *v.* Bennett, 13 Minn. 153; Lowell *v.* North, 4 Minn. 32. But a certificate of the secretary of state that an act has been published in one newspaper will not justify an inference that it has been published in two newspapers, as required to make it become a law. Welch *v.* Battern, 47 Iowa 147.

15. Gibson *v.* Anderson, 131 Fed. 39, 65 C. C. A. 277.

16. Berliner *v.* Waterloo, 14 Wis. 378.

17. Atty.-Gen. *v.* Foote, 11 Wis. 14, 78 Am. Dec. 689.

18. See cases cited *supra*, notes 16, 17.

19. Louisville, etc., R. Co. *v.* Elizabethtown Dist. Public School, 64 S. W. 974, 23 Ky. L. Rep. 1169; Daniel *v.* Robinson, 4 Call (Va.) 570.

20. Mitchell *v.* Campbell, 19 Oreg. 198, 24 Pac. 455.

21. Eld *v.* Gorham, 20 Conn. 8.

22. **Judicial authority** in general see *supra*, II, G, 1, a.
Scope of inquiry as to validity of enactment see *supra*, II, G, 1, b.
Documentary evidence see EVIDENCE, 17 Cyc. 296.
Best and secondary evidence see EVIDENCE, 17 Cyc. 465.

23. Rex *v.* Arundel, Hob. 109, 80 Eng. Reprint 258; Rex *v.* Jefferies, Str. 446, 93 Eng. Reprint 626.
How enrolled.— In England a public statute is enrolled by being copied on the roll of

enrolment is the signing of the act by the presiding officers of both houses of the legislature and its deposit with the secretary of state;[24] and there is a strong conflict of opinion as to whether an act authenticated in this manner is conclusive evidence as to the correctness of its contents and as to its passage in the mode prescribed by law.[25] In a number of the states the enrolled act is regarded as conclusive, and no evidence is admissible to impeach either its contents[26] or the validity of its passage.[27] The principal reasons assigned for regarding the

parliament, and a private statute by its deposit with the clerk of parliament. Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325.

24. Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325.

25. See *infra*, notes 26–37.

26. Fouke *v.* Fleming, 13 Md. 392 (holding that the enrolled act is better evidence of the subject-matter of a statute than the journals of both houses); Mason *v.* Cranbury Tp., 68 N. J. L. 149, 52 Atl. 568; *Ex p.* Tipton, 28 Tex. App. 438, 13 S. W. 610, 8 L. R. A. 326.

27. *Arizona.*— Harwood *v.* Wentworth, 4 Ariz. 378, 42 Pac. 1025 [*affirmed* in 162 U. S. 547, 16 S. Ct. 890, 40 L. ed. 1069].

California.— In California the early rule announced in Fowler *v.* Pierce, 2 Cal. 165, was in favor of the admission of the journals, but this case was overruled by Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 93, followed by People *v.* Burt, 43 Cal. 560, and the conclusiveness of the enrolled act was firmly established. Under a new constitution, however, requiring certain things in regard to the passage of bills to be entered on the journals, the question has been reopened. In People *v.* Dunn, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118; Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 11 Pac. 3, and Weill *v.* Kenfield, 54 Cal. 111, the journals were admitted, and this rule was also applied in Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385 [*affirmed* in 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118], and in Railroad Tax Cases, 13 Fed. 722, 8 Sawy. 238 [*modified* on another point in 116 U. S. 138, 6 S. Ct. 317, 29 L. ed. 589], both construing the California constitution; but the admission has been denied in Sacramento Paving Co. *v.* Martyn, (App. 1905) 82 Pac. 1071, and in Sacramento Paving Co. *v.* Anderson, 1 Cal. App. 672, 82 Pac. 1069.

Connecticut.— State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5 (holding that under Revision (1902), §§ 99, 106, requiring the secretary of state to safely keep a record of the acts of the general assembly, the secretary's record is evidence, and ordinarily conclusive evidence, of the existence or non-existence of an act of the general assembly); Eld *v.* Gorham, 20 Conn. 8.

Indiana.— Hovey *v.* State, 119 Ind. 395, 21 N. E. 21 (holding that where an act, complete in form, and properly signed by the speaker of the house and president of the senate, is certified by the secretary of state under his seal, together with his certificate that the bill was passed over the governor's veto, it will be conclusively presumed that it became a law in some constitutional manner, without the governor's approval); Stout *v.* Grant County, 107 Ind. 343, 8 N. E. 222; Madison County *v.* Burford, 93 Ind. 383; Bender *v.* State, 53 Ind. 254 (holding that the courts cannot look beyond the enrolled act of the legislature to ascertain whether there has been a compliance with the requirement of the constitution that "no bill shall be presented to the governor within two days next previous to the final adjournment of the General Assembly"); Evans *v.* Browne, 30 Ind. 514, 95 Am. Dec. 710 [*overruling* McCulloch *v.* State, 11 Ind. 424; Coleman *v.* Dobbins, 8 Ind. 156; Skinner *v.* Deming, 2 Ind. 558, 54 Am. Dec. 463].

Kentucky.— Duncan *v.* Combs, 131 Ky. 330, 115 S. W. 222; Com. *v.* Hardin County Ct., 99 Ky. 188, 35 S. W. 275, 18 Ky. L. Rep. 113; Com. *v.* Shelton, 99 Ky. 120, 35 S. W. 128, 18 Ky. L. Rep. 30; Lafferty *v.* Huffman, 99 Ky. 80, 35 S. W. 123, 18 Ky. L. Rep. 17, 32 L. R. A. 203.

Louisiana.—In Louisiana the journals have been admitted upon a question as to whether an amendment by the senate to a house bill was concurred in by the house (Hollingsworth *v.* Thompson, 45 La. Ann. 222, 12 So. 1, 40 Am. St. Rep. 220); but their admission has been refused upon a question as to whether an act has been passed with the proper formalities (Whited *v.* Lewis, 25 La. Ann. 568; Louisiana State Lottery Co. *v.* Richoux, 23 La. Ann. 743, 8 Am. Rep. 602), or through improper influence (State *v.* Fagan, 22 La. Ann. 545).

Mississippi.— Hunt *v.* Wright, 70 Miss. 298, 11 So. 608; *Ex p.* Wren, 63 Miss. 512, 56 Am. Rep. 825 [*overruling* Brady *v.* West, 50 Miss. 68]; Green *v.* Weller, 32 Miss. 650.

Nevada.— State *v.* Nye, 23 Nev. 99, 42 Pac. 866; State *v.* Glenn, 18 Nev. 34, 1 Pac. 186; State *v.* Rogers, 10 Nev. 250, 21 Am. Rep. 738; State *v.* Swift, 10 Nev. 176, 21 Am. Rep 721.

New Jersey.— Bloomfield *v.* Middlesex County, 74 N. J. L. 261, 65 Atl. 890; Mason *v.* Cranbury Tp., Middlesex County, 68 N. J. L. 149, 52 Atl. 568; Pangborn *v.* Young, 32 N. J. L. 29; Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394.

New York.— In New York the cases are in great confusion and it cannot be said that any rule is clearly established. The following cases favor the conclusiveness of the enrolled act: People *v.* Marlborough Highway Com'rs, 54 N. Y. 276, 13 Am. Rep. 581; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377. The following favor the admission of the journals: *In re* Stickney, 185 N. Y. 107, 77 N. E. 993 [*affirming* 110 N. Y. App. Div. 294, 97 N. Y. Suppl. 336]; New York, etc., Bridge Co. *v.* Smith, 148 N. Y. 540, 42 N. E. 1088; Rumsey

enrolled act as conclusive are that the legislature is a separate branch of the government, coördinate with the judiciary, and therefore its certificate, made by the presiding officers of the two houses, is the best evidence of compliance with constitutional requirements;[28] and that the admission of the journals or other evidence would result in great uncertainty and confusion as to the validity of statutes.[29] In other states the enrolled act deposited with the secretary of state is regarded as *prima facie*,[30] but not conclusive, evidence of its passage in due form, and the courts will admit other evidence to overturn the presumption, and to prove that the act was not passed in accordance with the constitutional requirements.[31]

v. New York, etc., R. Co., 130 N. Y. 88, 28 N. E. 763 [*affirming* 15 N. Y. Suppl. 509]; People *v.* Chenango, 8 N. Y. 317; Matter of Weeks, 109 N. Y. App. Div. 859, 96 N. Y. Suppl. 876 [*affirmed* in 185 N. Y. 541, 77 N. E. 1197]; Purdy *v.* People, 4 Hill 384 [*reversing* 2 Hill 31]; De Bow *v.* People, 1 Den. 9.

Pennsylvania.— Com. *v.* Martin, 107 Pa. St. 185.

South Carolina.— State *v.* Chester, 39 S. C. 307, 17 S. E. 752 [*overruling* State *v.* Hagood, 13 S. C. 46; State *v.* Platt, 2 S. C. 150, 16 Am. Rep. 647].

Texas.— Williams *v.* Taylor, 83 Tex. 667, 19 S. W. 156 [*overruling* in effect Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233]; El Paso, etc., R. Co. *v.* Foth, 45 Tex. Civ. App. 275, 100 S. W. 171 [*affirmed* on this point and *reversed* on another point in 101 Tex. 133, 100 S. W. 171, 105 S. W. 322]; McLane *v.* Paschal, 8 Tex. Civ. App. 398, 28 S. W. 711; Usener *v.* State, 8 Tex. App. 177.

Utah.— People *v.* Clayton, 5 Utah 598, 18 Pac. 628.

Washington.— State *v.* Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340.

United States.— The United States supreme court has decided that an enrolled act of congress is conclusive evidence of its contents and passage (Field *v.* Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. ed. 294); but later, at the same term of court, has admitted the journals upon a question as to whether a quorum was present upon passage of the bill (U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. ed. 321); and has also permitted the introduction of the journals of congress to determine the date upon which a statute took effect (Gardner *v.* Barney, 6 Wall. 499, 18 L. ed. 890); while it has declined to admit the journals upon a question as to the acts of a territorial legislature (Harwood *v.* Wentworth, 162 U. S. 547, 16 S. Ct. 890, 40 L. ed. 1069 [*affirming* 4 Ariz. 378, 42 Pac. 1025]). The inferior federal courts, in the construction of various state constitutions, have admitted the journals. Henderson County *v.* Travelers' Ins. Co., 128 Fed. 817, 63 C. C. A. 467 (North Carolina); Simpson *v.* Union Stock Yards Co., 110 Fed. 799; Ames *v.* Union Pac. R. Co., 64 Fed. 165 [*affirmed* in 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819] (both construing Nebraska constitution. In Ames *v.* Union Pac. R. Co., 64 Fed. 165, 168, the court says: "The courts of the United States will regard an act of any state legislature, thus authenticated, as having been enacted in full compliance with all the prescribed forms, unless there be some special provision in the constitution of that state, or some decision of its supreme court, which requires a looking beyond these evidences of authenticity"); Comstock *v.* Tracey, 46 Fed. 162 (Minnesota); Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385 [*affirmed* in 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118]; Railroad Tax Cases, 13 Fed. 722, 8 Sawy. 238 [*modified* on another point in 116 U. S. 138, 6 S. Ct. 317, 29 L. ed. 589] (both construing California constitution).

See 44 Cent. Dig. tit. "Statutes," §§ 383, 384.

Where the enrolled act shows that it was vetoed by the governor, evidence is not admissible to show that it was approved by him. Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325.

28. See cases cited *supra*, note 27.

29. Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 93; Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325; Pangborn *v.* Young, 32 N. J. L. 29.

30. Massachusetts Mut. L. Ins. Co. *v.* Colorado Loan, etc., Co., 20 Colo. 1, 6, 36 Pac. 793, 794; Turley *v.* Logan County, 17 Ill. 151; State *v.* Frank, 60 Nebr. 327, 83 N. W. 74; Ritchie *v.* Richards, 14 Utah 345, 47 Pac. 670.

31. *Alabama.*— *Ex p.* Kelly, 153 Ala. 668, 45 So. 290; Robertson *v.* State, 130 Ala. 164, 30 So. 494; Moody *v.* State, 48 Ala. 115, 17 Am. Rep. 28; Jones *v.* Hutchinson, 43 Ala. 721.

Arkansas.— Webster *v.* Little Rock, 44 Ark. 536; Chicot County *v.* Davies, 40 Ark. 200; Worthen *v.* Badgett, 32 Ark. 496; Burr *v.* Ross, 19 Ark. 250.

Colorado.— Robertson *v.* People, 20 Colo. 279, 38 Pac. 326; Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; *In re* Roberts, 5 Colo. 525.

Florida.— West *v.* State, 50 Fla. 154, 39 So. 412.

Illinois.— Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; People *v.* De Wolf, 62 Ill. 253; People *v.* Starne, 35 Ill. 121, 85 Am. Dec. 348; Prescott *v.* Illinois, etc., Canal, 19 Ill. 324; Spangler *v.* Jacoby, 14 Ill. 297, 58 Am. Dec. 571.

Iowa.— Koehler *v.* Hill, 60 Iowa 543, 551, 14 N. W. 738, 15 N. W. 609, holding that upon a question as to the passage of a joint resolution proposing an amendment to the constitution, the journals are more reliable evidence than the enrolled resolution. Of the earlier cases of Duncombe *v.* Prindle, 12 Iowa 1, and Clare *v.* State, 5 Iowa 509, generally regarded as favoring the conclusiveness of the enrolled act, the court says: "All that was

In all the jurisdictions in which the impeachment of the enrolled act is permitted, resort is had for that purpose to the journals of the two houses of the legislature containing the record of its passage.[32] The theory on which the journals are admitted for this purpose is that, under the constitutional provisions, not only the enrolled act, but also the journals of the houses, are made official records,[33] and that it is the duty of the courts, as final arbiters of the constitutionality of

determined . . . was that, where there is a conflict between the printed act and the enrolled act filed in the office of the Secretary of State, the latter is the ultimate proof of the expression of the legislative will. Whether the journals were competent evidence, or their effect, was not considered in either case."

Kansas.— Stephens *v.* Labette County, 79 Kan. 153, 98 Pac. 790; State *v.* Andrews, 64 Kan. 474, 67 Pac. 870; *In re* Taylor, 60 Kan. 87, 55 Pac. 340; Homrighausen *v.* Knoche, 58 Kan. 646, 50 Pac. 879; State *v.* Francis, 26 Kan. 724; Division *v.* Howard County, 15 Kan. 194.

Maryland.—Legg *v.* Annapolis, 42 Md. 203; Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69.

Michigan.—Callaghan *v.* Chipman, 59 Mich. 610, 26 N. W. 806; Atty.-Gen. *v.* Joy, 55 Mich. 94, 20 N. W. 806; People *v.* Mahaney, 13 Mich. 481 (holding that, to enable the courts to determine whether all the constitutional requirements to the validity of a statute have been complied with, they should take notice of the journals of the legislature, but they cannot by that means inquire into the legality of the elections of the several members, even though such facts are spread on the journals, for that would be invading the exclusive province of each house to judge the qualifications, elections, and returns of its members); Southward *v.* Palmyra, etc., R. Co., 2 Mich. 287.

Minnesota.— State *v.* Gould, 31 Minn. 189, 17 N. W. 276; State *v.* Hastings, 24 Minn. 78; Ramsey County *v.* Heenan, 2 Minn. 330.

Missouri.— State *v.* Wray, 109 Mo. 594, 597, 19 S. W. 86 (in which the court says: "This presumption is conclusive except as to matters upon which the constitution makes the validity of the enactment rest. In respect to such matters the constitution is mandatory, and the rolls themselves may be contradicted by journal entries, and the law itself overthrown, if these entries show clearly, and beyond all doubt, a want of conformity to the mandates of the constitution"); State *v.* Mead, 71 Mo. 266 [*overruling* Pacific R. Co. *v.* Governor, 23 Mo. 353, 66 Am. Dec. 673]; Bradley *v.* West, 60 Mo. 33; Cox *v.* Mignery, 126 Mo. App. 669, 105 S. W. 675 (applying rule to municipal ordinances).

Montana.— Palatine Ins. Co. *v.* Northern Pac. R. Co., 34 Mont. 268, 85 Pac. 1032.

Nebraska.— Colburn *v.* McDonald, 72 Nebr. 431, 100 N. W. 961; State *v.* Frank, 60 Nebr. 327, 83 N. W. 74 (holding, however, that the silence of the legislative journals is not conclusive evidence of the non-existence of a fact, which ought to be recorded therein, regarding the enactment of a law); State *v.* McLelland, 18 Nebr. 236, 25 N. W. 77, 53 Am. Rep. 814.

New Hampshire.— Opinion of Justices, 52 N. H. 622; Opinion of Justices, 35 N. H. 579.

North Carolina.— Brown *v.* Stewart, 134 N. C. 357, 46 S. E. 741; New Hanover County *v.* De Rosset, 129 N. C. 275, 40 S. E. 43.

Ohio.— State *v.* Price, 8 Ohio Cir. Ct. 25, 4 Ohio Cir. Dec. 296.

Oregon.— Currie *v.* Southern Pac. Co., 21 Oreg. 566, 28 Pac. 884.

Tennessee.— Nelson *v.* Haywood County, 91 Tenn. 596, 20 S. W. 1 (holding, however, that the mere failure of the journal of the two houses to show the passage of a bill reported by a committee of conference for adjustment of the differences between the two houses, at the time it purported to have been passed, did not indicate that it was not in fact passed at that time, as the omission might only have been accidental); Brewer *v.* Huntingdon, 86 Tenn. 732, 9 S. W. 166.

Wisconsin.— Meracle *v.* Down, 64 Wis. 323, 25 N. W. 412, holding that Rev. St. (1878) § 4135, providing that printed copies of the statutes shall be sufficient evidence thereof, does not preclude a showing by the legislative journals that a statute never was enacted by both houses.

Wyoming.— State *v.* Cahill, 12 Wyo. 225, 75 Pac. 433.

See 44 Cent. Dig. tit. "Statutes," §§ 383, 384.

32. See cases cited, *supra* note 31.

What constitutes journal.—A supplement to a house journal issued in pursuance of a resolution of the house is a part of the journal itself, but other parts of the journal may be used to show that the copy of a bill contained in the supplement is not correct. Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

33. *Alabama.*— Moody *v.* State, 48 Ala. 115, 17 Am. Rep. 28.

California.— Fowler *v.* Pierce, 2 Cal. 165.

Florida.— Wade *v.* Atlantic Lumber Co., 51 Fla. 628, 41 So. 72, holding that where the journals of the legislature speak as to the title of an act, and the enrolled bill contains a variance therefrom, the journals must control.

Kansas.— State *v.* Andrews, 64 Kan. 474, 67 Pac. 870.

Michigan.— People *v.* Mahaney, 13 Mich. 481.

Minnesota.— State *v.* Hastings, 24 Minn. 78.

South Carolina.— State *v.* Hagood, 13 S. C. 46.

See 44 Cent. Dig. tit. "Statutes," §§ 383, 384.

legislation, to determine, from these records, whether the statute in question was adopted in the manner required by the constitution for its validity. In some jurisdictions in which the enrolled act is conclusive evidence as to contents and validity, the journals are nevertheless admissible as to the time of its taking effect.[34] In some states the enrolled act is conclusive evidence as to subject-matter;[35] but the journals are admissible for the purpose of determining whether it was passed in accordance with the requirements of the constitution,[36] or as to whether it was passed at all.[37]

(B) *Other Evidence Than Legislative Journals* — (1) IN GENERAL. Regardless of this attitude as to the admission of the journals, the courts are almost unanimously agreed that no other evidence may be introduced to impeach the enrolled act.[38] It has been held, however, that the journals may be supplemented by other evidence to show that the constitutional requirements have been complied with;[39] but evidence supplementary to that of the journals as to the passage of a municipal ordinance has been excluded.[40]

(2) RECORDS AND OTHER WRITTEN MATTER. The engrossed bill has been refused admission in evidence to contradict the enrolled bill,[41] but has been admitted as evidence of the passage in due form of the bill as enrolled.[42] Other forms of evidence that have been declared inadmissible are *ex parte* affidavits,[43] and the original bill,[44] and amendments attached thereto.[45] On the other hand evidence has been admitted to show that an act properly authenticated was unconstitutional because not mentioned in the executive call of the special session at which it was passed;[46] the record required by the constitution to be kept by the secretary of state has been admitted to show that a bill was presented to the governor at a time other than that indicated by the indorsements on the bill by the clerks of the two houses;[47] recitals in a governor's proclamation have been declared *prima facie* evidence of the facts stated therein so far as they were within his official cognizance and relevant as to the validity of a veto;[48] and a memorandum in the minute-book of the journal clerk of the house, together with the parol evidence of the clerk as to the message to which it referred, has been admitted to show that a veto message was received the day before that indicated by the journal.[49]

(3) PAROL EVIDENCE. Parol evidence in particular has been repeatedly declared inadmissible either to impeach the enrolled act[50] or to impeach the

34. Missouri, etc., R. Co. *v.* McGlamory, 92 Tex. 150, 41 S. W. 466; Ewing *v.* Duncan, 81 Tex. 230, 16 S. W. 1000; Gardner *v.* Barney, 6 Wall. (U. S.) 499, 18 L. ed. 890, holding that, where the enrolled act does not show the time of its passage, resort may be had to the record in the office of the secretary of state of the time of its filing, to the journals of the two houses of congress, and to a message of the president, to show the date of its passage.

35. Annapolis *v.* Harwood, 32 Md. 471, 3 Am. Rep. 161; Fouke *v.* Fleming, 13 Md. 392; Lusher *v.* Scites, 4 W. Va. 11.

36. Berry *v.* Baltimore, etc., R. Co., 41 Md. 446, 20 Am. Rep. 69; Osburn *v.* Staley, 5 W. Va. 85, 13 Am. Rep. 640.

37. Cordell *v.* State, 22 Ind. 1.

38. State *v.* Brodie, 148 Ala. 381, 41 So. 180; Robertson *v.* State, 130 Ala. 164, 30 So. 494; Hughes *v.* Felton, 11 Colo. 489, 19 Pac. 444; Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; Ames *v.* Union Pac. R. Co., 64 Fed. 165.

39. State *v.* Frank, 60 Nebr. 327, 83 N. W. 74; New Hanover County *v.* De Rosset, 129 N. C. 275, 40 S. E. 43, and Black *v.* Buncombe County, 129 N. C. 121, 39 S. E. 818, both holding that entries on the original bill and on the calendars, not inconsistent with the journals, may be consulted.

40. Covington *v.* Ludlow, 1 Metc. (Ky.) 295.

41. *In re* Howard County, 15 Kan. 194.

42. Hollingsworth *v.* Thompson, 45 La. Ann. 222, 12 So. 1, 40 Am. St. Rep. 220.

43. Legg *v.* Annapolis, 42 Md. 203.

44. Sherman *v.* Story, 30 Cal. 253, 89 Am. Dec. 93; State *v.* Swift, 10 Nev. 176, 21 Am. Rep. 721; State *v.* Jones, 11 Ohio Cir. Dec. 496.

45. State *v.* Swift, 10 Nev. 176, 21 Am. Rep. 721.

46. Manor Casino *v.* State, (Tex. Civ. App. 1896) 34 S. W. 769.

47. Lankford *v.* Somerset County, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491.

48. Powell *v.* Hays, 83 Ark. 448, 104 S. W. 177.

49. U. S. *v.* Allen, 36 Fed. 174.

50. Jackson *v.* State, 131 Ala. 21, 31 So. 380; Sackrider *v.* Saginaw County, 79 Mich. 59, 44 N. W. 165; State *v.* Swift, 10 Nev. 176, 21 Am. Rep. 721; Wrede *v.* Richardson, 77 Ohio St. 182, 82 N. E. 1072, 122 Am. St.

journals;[51] nor is it admissible as to the intention of the legislature in passing the bill;[52] nor as to whether certain members of the house passing the bill had been improperly seated;[53] nor as to whether a veto of the governor was indorsed on a bill before or after it was filed with the secretary of state.[54]

(II) *Where Act Not Enrolled or Authenticated.* If an act has never been authenticated by the signatures of the presiding officers of the two houses,[55] or deposited with the secretary of state,[56] as a general rule, neither the journals,[57] nor an engrossed bill with the certificate of the clerical officers of the two houses attached,[58] nor any other evidence,[59] will be admitted to prove its passage. However, in a few cases involving either special circumstances, or mandatory and explicit constitutional provisions,[60] authentication by the presiding officers of the two legislative houses [61] and enrolment in the office of the secretary of state has been regarded only as the best source of evidence, and in its absence other evidence has been admitted of the passage of the act.[62]

c. Weight and Sufficiency [63] — (I) *Enrolled Act and Journals.* Even in those states in which the journals are admitted, there is a strong presumption in favor of the subject-matter [64] and validity [65] of the enrolled act; and it is generally

Rep. 498, holding parol evidence not admissible to show that the governor was disabled by illness to receive or consider a bill at the time it was presented to him and for ten days thereafter. And see cases cited *supra*, note 38.

51. *Florida.*— Wade *v.* Atlantic Lumber Co., 51 Fla. 638, 41 So. 72; State *v.* Green, 36 Fla. 154, 18 So. 334.

Indiana.— McCulloch *v.* State, 11 Ind. 424.

Iowa.— Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609.

Kansas.— *In re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519.

Louisiana.— State *v.* Secretary of State, 43 La. Ann. 590, 616, 9 So. 776, holding that "the true distinction to be taken, in our opinion, is that no extrinsic proof is admissible to contradict the facts which are established by the journals; but fraud, error, mistake, or the improper exercise of judgment, on the part of a State agent or representative, existing intrinsically, may be shown."

North Carolina.— New Hanover County *v.* Armour Packing Co., 135 N. C. 62, 47 S. E. 411; Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023; New Hanover County *v.* De Rossett, 129 N. C. 275, 40 S. E. 43.

Ohio.— State *v.* Moffitt, 5 Ohio 358.

Virginia.— Wise *v.* Bigger, 79 Va. 269.

Wyoming.— White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

United States.— U. S. *v.* Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. ed. 321 [*reversing* 45 Fed. 170]; Ames *v.* Union Pac. R. Co., 64 Fed. 165.

52. Garland County *v.* Hot Spring County, 68 Ark. 83, 56 S. W. 636; State *v.* Hoff, (Tex. Civ. App. 1895) 29 S. W. 672 [*affirmed* in 88 Tex. 297, 31 S. W. 290]; Northern Trust Co. *v.* Snyder, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

53. State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829, holding that each house is the sole judge of the election of its members.

54. People *v.* McCullough, 210 Ill. 488, 71 N. E. 602.

55. State *v.* Kiesewetter, 45 Ohio St. 254, 12 N. E. 807.

56. Graves *v.* Alsap, 1 Ariz. 274, 25 Pac. 836.

57. Graves *v.* Alsap, 1 Ariz. 274, 25 Pac. 836.

58. State *v.* Mickey, 73 Nebr. 281, 102 N. W. 679.

59. State *v.* Kiesewetter, 45 Ohio St. 254, 12 N. E. 807, holding that a printed bill deposited in the state library is not admissible.

60. The certificate of the secretary of state is admissible to show what proceedings were had in each house of the legislature, under the Illinois constitution making the secretary of state the depositary of the statutes and of all the documents relating thereto, and providing that copies certified by him shall be received in evidence in the same manner and with the like effect as the originals. Ryan *v.* Lynch, 68 Ill. 160.

61. An act not signed by the presiding officer of the senate was sustained in Leavenworth County *v.* Higginbotham, 17 Kan. 62, and Cottrell *v.* State, 9 Nebr. 125, 1 N. W. 1008. In Speer *v.* Allegheny, etc., Plank-Road Co., 22 Pa. St. 376, an act not signed by the presiding officer of either house was sustained. And in Houston, etc., R. Co. *v.* Odum, 53 Tex. 343, an act not authenticated by the clerks of the two houses as provided by law was sustained.

62. State *v.* New London Sav. Bank, 79 Conn. 141, 64 Atl. 5; State *v.* South Norwalk, 77 Conn. 257, 57 Atl. 759.

63. Construction as including or binding government see *supra*, VII, A, 11.

64. State *v.* Brown, 20 Fla. 407; *In re* Howard-County, 15 Kan. 194, holding that the subject-matter of the statute as shown by the enrolled act and the journals cannot be impeached by extrinsic evidence to the effect that a mistake was made in enrolling.

65. *Arkansas.*— Scott *v.* Clark County, 34 Ark. 283; English *v.* Oliver, 28 Ark. 317.

Florida.— State *v.* Hocker, 36 Fla. 358, 18 So. 767.

declared that this will be sustained unless it affirmatively appears from the journals that the act was not passed as required by the constitution.[66] But where the constitution expressly requires certain matters relating to the passage of statutes to be affirmatively shown by the journals, a statute is invalid in the absence of such affirmative showing.[67] Under such provisions journals have been held sufficient even though they sometimes designated a bill by the wrong number;[68] or contained an obvious error in grammar;[69] or, after stating the number of "ayes," contained a blank after the word "nays;"[70] or, in giving the names of the members voting for a bill, omitted the christian names, but, wherever there were two members of the same surname, gave the county which they represented;[71] but a mere statement in the journal, after giving the number of those voting aye, that "those voting in the affirmative are . . ." is an insufficient compliance with a requirement that the names of those voting for a bill shall be entered on the journal.[72]

(II) *PRINTED AND ENROLLED COPIES OF STATUTES.* Copies of the statutes printed by authority are admissible as *prima facie* evidence of the true contents and valid enactment of such statutes.[73] Private compilations of statutes authorized

Illinois.— Larrison *v.* Peoria, etc., R. Co., 77 Ill. 11.

Kansas.— Belleville *v.* Wells, 74 Kan. 823, 88 Pac. 47; Chicago, etc., R. Co. *v.* Manhattan, 45 Kan. 419, 25 Pac. 879; Weyand *v.* Stover, 35 Kan. 545, 11 Pac. 355.

Minnesota.— State *v.* Hastings, 24 Minn 78.

Nebraska.— State *v.* Robinson, 20 Nebr. 96, 29 N. W. 246; State *v.* McLelland, 18 Nebr. 236, 25 N. W. 77, 53 Am. Rep. 814.

Nevada.— State *v.* Swift, 10 Nev. 176, 21 Am. Rep. 721.

See 44 Cent. Dig. tit. "Statutes," § 386.

66. *Alabama.*—Robertson *v.* State, 130 Ala. 164, 30 So. 494.

Florida.— West *v.* State, 50 Fla. 154, 39 So. 412.

Kansas.— Missouri, etc., R. Co. *v.* Simons, 75 Kan. 130, 88 Pac. 551; State *v.* Andrews, 64 Kan. 474, 480, 67 Pac. 870 [*quoting* State *v.* Francis, 26 Kan. 724, 731], holding that "an enrolled statute imports absolute verity and is conclusive evidence of the passage of the act and of its validity, unless the journals of the legislature show affirmatively, 'clearly, conclusively and beyond all doubt that the act was not passed regularly and legally.'"

Minnesota.— *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

Nebraska.— State *v.* Frank, 60 Nebr. 327, 83 N. W. 74.

Wyoming.— State *v.* Cahill, 12 Wyo. 225, 75 Pac. 433.

United States.— Henderson County *v.* Travelers' Ins. Co., 128 Fed. 817, 63 C. C. A. 467; Ames *v.* Union Pac. R. Co., 64 Fed. 165 [*affirmed* in 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819].

See 44 Cent. Dig. tit. "Statutes," §§ 383, 384, 385, 386.

Negative evidence or mere evidence of the journals has been declared insufficient in the following cases: Massachusetts Mut. L. Ins. Co. *v.* Colorado L. & T. Co., 20 Colo. 1, 6, 36 Pac. 793, 794; *In re* Vanderberg, 28 Kan. 243; Stratton *v.* State, 79 Nebr. 118, 112 N. W. 361; Colburn *v.* McDonald, 72 Nebr. 431, 100 N. W. 961; Ball *v.* Presidio County, (Tex. Civ. App. 1894) 27 S. W. 702.

67. State *v.* Brodie, 148 Ala. 381, 41 So. 180, relating to notice of intention to apply for passage of local or special act.

Where a certificate of the secretary of state purports to show all the proceedings in full as to the passage of the bill in both branches of the legislature, there can be no inference that any other proceedings were had. Ryan *v.* Lynch, 68 Ill. 160.

68. Miesen *v.* Canfield, 64 Minn. 513, 67 N. W. 632.

69. Bound *v.* Wisconsin Cent. R. Co., 45 Wis. 543.

70. Onslow County *v.* Tollman, 145 Fed. 753, 76 C. C. A. 317 [*affirming* 140 Fed. 89].

71. Onslow County *v.* Tollman, 145 Fed. 753, 76 C. C. A. 317 [*affirming* 140 Fed. 89].

72. New Hanover County *v.* De Rosset, 129 N. C. 275, 40 S. E. 43.

73. *Alabama.*—White *v.* St. Guirons, Minor 331, 12 Am. Dec. 56, holding that the act of congress as published in the pamphlet acts of the session may be read on the trial without proof that the pamphlet is authentic.

Arkansas.— Henry *v.* State, 71 Ark. 574, 76 S. W. 1071.

New York.— People *v.* Marlborough, 54 N. Y. 276, 13 Am. Rep. 581.

North Carolina.— Copeland *v.* Collins, 122 N. C. 619, 30 S. E. 315.

United States.— Beatrice *v.* Edminson, 117 Fed. 427, 54 C. C. A. 601, holding that under U. S. Rev. St. (1878) § 721 [U. S. Comp. St. (1901) p. 581] (providing that the laws of the several states, where not in conflict with those of the United States, shall be regarded as rules of decision in trials at common law, etc., and U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677], providing that the acts of a state legislature shall be authenticated by having the seal of the state attached, the printed copies of the statute laws of Nebraska, purporting to be published under its authority, are *prima facie* evidence of the passage and existence of the laws therein contained, in the courts of the United States); Wright *v.* U. S., 15 Ct. Cl. 80.

See 44 Cent. Dig. tit. "Statutes," § 386.

by the legislature, without expense to the state, and made competent evidence by a subsequent act, are likewise *prima facie* evidence of the correctness and validity of their contents;[74] but it has been held that unofficial compilations of statutes not authorized or indorsed by the legislature are not admissible in evidence.[75] The best evidence, however, of the existence [70] and subject-matter [77] of a statute consists of the manuscript enrolled act on file with the secretary of state; and to this resort may be made for the correction of errors in the printed copies.[78] So printed copies of the journals are *prima facie* but not conclusive evidence of the truth of their contents.[79] Where the printed statute has long been accepted and acted upon as correct, it has been held, in exceptional cases, that it will continue to be recognized and enforced as the best evidence of the statute in spite of discrepancies between it and the enrolled copy.[80]

(III) *OTHER RECORDS AND WRITINGS.* It has been held sufficient evidence of the veto of an act by the governor that the original act filed with the secretary of state bore an indorsement that it was not approved, and that both the act and the records of the secretary's office show that it was filed within the time allowed after the adjournment of the legislature; [81] and a statement in a code by the commissioners appointed to revise it that a certain section was not in the enrolled act has been declared sufficient evidence of that fact.[82]

2. EVIDENCE AS TO PRIVATE STATUTES. Where a party to an action relies on a private statute, he must not only plead it specially,[83] but must also produce satisfactory evidence of its contents and validity; [84] nor is the necessity for such proof dispensed with by an act providing that the printed statute books shall be evidence of the acts therein.[85] A constitutional provision authorizing the legis-

Printed pamphlets containing the acts of the confederate congress and identified by a member of the congress as genuine are admissible. Bartow County *v.* Newell, 64 Ga. 699.

Evidence of time of publication.—Where the certificate of the secretary of state is attached to a volume as required by law, in the absence of any suggestion to the contrary, the date of the certificate should be taken as the time of the publication. Clark *v.* Janesville, 10 Wis. 136; *In re* Boyle, 9 Wis. 264.

74. Clagett *v.* Duluth Tp., 143 Fed. 824, 74 C. C. A. 620.

75. Hill *v.* Grant, (Tex. Civ. App. 1898) 44 S. W. 1016.

76. Greer *v.* State, 54 Miss. 378, holding that the existence of a valid statute may be proved by showing that it is properly authenticated and enrolled in the office of the secretary of state, although it has never been printed.

77. Clare *v.* State, 5 Iowa 509.

78. *California.*— McLaughlin *v.* Menotti, 105 Cal. 572, 38 Pac. 973, 39 Pac. 207.

Georgia.— Epstin *v.* Levenson, 79 Ga. 718, 4 S. E. 328; Bass *v.* Doughty, 5 Ga. App. 458, 63 S. E. 516.

Iowa.— Duncombe *v.* Prindle, 12 Iowa 1; Clare *v.* State, 5 Iowa 509.

Michigan.— Hulburt *v.* Merriam, 3 Mich. 144.

Mississippi.— Hunt *v.* Wright, 70 Miss. 298, 11 So. 608; Greer *v.* State, 54 Miss. 378.

Nebraska.— State *v.* Byrum, 60 Nebr. 384, 83 N. W. 207; Bruce *v.* State, 48 Nebr. 570, 67 N. W. 454.

New York.— People *v.* Marlborough, 54 N. Y. 276, 13 Am. Rep. 581, holding that the printed statute is presumptively correct and the original act is conclusive.

Texas.— Central R. Co. *v.* Hearne, 32 Tex. 546.

United States.— Simpson *v.* Union Stock Yards Co., 110 Fed. 799; Reed *v.* Clark, 20 Fed. Cas. No. 11,643, 3 McLean 480; Wright's Case, 15 Ct. Cl. 80.

See 44 Cent. Dig. tit. "Statutes," § 386.

79. Chicot County *v.* Davies, 40 Ark. 200; Bradley *v.* West, 60 Mo. 33 (holding that a printed copy is not admissible in evidence in the supreme court where it was not introduced in the trial below); Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385.

80. Pacific *v.* Seifert, 79 Mo. 210 (holding that after a lapse of twenty years from its enactment, a printed copy hitherto accepted will not be corrected by the manuscript copy permitting the imposition of a larger fine for violation of a municipal ordinance, where the provision of the manuscript copy was unknown to defendant until the trial); Pease *v.* Peck, 18 How. (U. S.) 595, 15 L. ed. 518 (holding that a printed copy of a statute accepted by the people and courts for thirty years will not be corrected by reference to the manuscript for the purpose of aiding the running of the statute of limitations).

81. People *v.* McCullough, 210 Ill. 488, 71 N. E. 602.

82. Postal Tel. Cable Co. *v.* Shannon, 91 Miss. 476, 44 So. 809.

83. See *supra*, VIII, A, 2.

84. Cochran *v.* Couper, 1 Harr. (Del.) 200; Vinyard *v.* Passalaigue, 2 Strobh. (S. C.) 536.

85. Walker *v.* Armstrong, 2 Kan. 198;

lative journals to be introduced in evidence as to one matter for the purpose of impeaching the enrolled or printed statute does not authorize their admission as to other matters.[86] A private statute may be declared void upon proof that its passage was procured by fraud, but this will be done only upon clear and convincing evidence as to the fraudulent acts and representations.[87]

3. Admissions and Agreements. Upon an issue as to whether a statute has been passed in accordance with constitutional requirements, no admissions of parties or stipulations of counsel will be considered by the court, either for the purpose of sustaining the act [88] or of defeating it.[89]

4. Evidence as to Foreign Statutes [90] — a. In General. In accordance with the general rule as to foreign laws, the statutes of another state or country must be proved as facts by evidence addressed, not to the jury, but to the court.

b. Other States — (I) *Presumptions.* In the absence of evidence to the contrary, the common law will be presumed to be in force in another state,[91] and its public policy will be presumed to be the same as that of the state of the forum; [92] but the existence of statutes in another state similar to those of the state of the forum will not be presumed.[93]

(II) *Necessity For.* The courts of one state will not take judicial notice of the statutes of another state,[94] and the party relying upon such statutes to support his cause of action or defense must not only plead them,[95] but must also produce satisfactory evidence of their subject-matter and validity.[96]

Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023.

86. Bray *v.* Williams, 137 N. C. 387, 49 S. E. 887 (refusing to admit testimony to show that proper notice was not given of application for passage of a private act); Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023 (holding that a misnomer of a town in a private act, as found in a copied journal, deposited with the secretary of state, cannot affect the validity of the act).

87. Williamson *v.* Williamson, 3 Sm. & M. (Miss.) 715, 41 Am. Dec. 636.

88. Graves *v.* Alsap, 1 Ariz. 274, 25 Pac. 836; Jones *v.* Madison County, 72 Miss. 777, 18 So. 87.

89. *Colorado.*—Anderson *v.* Grand Valley Irr. Dist., 35 Colo. 525, 85 Pac. 313.

Florida.— Wade *v.* Atlantic Lumber Co., 51 Fla. 638, 41 So. 72.

Illinois.— Happel *v.* Brethauer, 70 Ill. 166, 22 Am. Rep. 70.

Michigan.— Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203.

North Carolina.— New Hanover County *v.* De Rosset, 129 N. C. 275, 40 S. E. 43; Gatlin *v.* Tarboro, 78 N. C. 119.

See 44 Cent. Dig. tit. "Statutes," § 388.

90. Ferguson *v.* Clifford, 37 N. H. 86; Pickard *v.* Bailey, 26 N. H. 152.

91. Title Guarantee, etc., Co. *v.* Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422.

92. Loud *v.* Hamilton, (Tenn. Ch. App. 1898) 51 S. W. 140, 45 L. R. A. 400.

93. Buffalo Bank of Commerce *v.* Windmuller, 106 Ky. 395, 50 S. W. 548, 20 Ky. L. Rep. 1951, holding that there is no presumption of the existence in New York of a statute similar to one in Kentucky forbidding the preferring of creditors.

94. Dyer *v.* Smith, 12 Conn. 384; Bean *v.* Briggs, 4 Iowa 464.

95. See *supra*, VIII, A, 3.

96. *Alabama.*— Sidney *v.* White, 12 Ala. 728.

Arkansas.— McNeil *v.* Arnold, 17 Ark. 154.

Georgia.— Thomas *v.* Clarkson, 125 Ga. 72, 54 S. E. 77, 6 L. R. A. N. S. 658 (holding that upon a plea of usury as a defense to a contract governed by the law of another state, defendant must prove that the statute was in force at the time of the execution of the contract); Brooks *v.* Boyd, 1 Ga. App. 65, 57 S. E. 1093.

Kansas.— Loyal Mystic Legion of America *v.* Brewer, 75 Kan. 729, 90 Pac. 247.

Maryland.— Gardner *v.* Lewis, 7 Gill 377.

Michigan.— Ellis *v.* Maxson, 19 Mich. 186, 2 Am. Rep. 81.

Mississippi.— Hemphill *v.* Alabama Bank, 6 Sm. & M. 44.

Missouri.— Lee *v.* Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

Nebraska.— Sells *v.* Haggard, 21 Nebr. 357, 32 N. W. 66, where the statute of another state is pleaded and offered and allowed in evidence, but not introduced, it will be unavailing to the party offering the same.

New York.— Pomeroy *v.* Ainsworth, 22 Barb. 118; Persse, etc., Paper Works *v.* Willett, 1 Rob. 131 (an act of another state, incorporating a company, is a law within Code Proc. § 426, relating to the proof of the laws of other states); Electric Fireproofing Co. *v.* Smith, 113 N. Y. App. Div. 615, 99 N. Y. Suppl. 37; Thomas *v.* Robinson, 3 Wend. 267.

Pennsylvania.— American Alkali Co. *v.* Huhn, 209 Pa. St. 238, 58 Atl. 283; Lyon *v* Goldsmith, 1 Lehigh Val. L. Rep. 177.

Texas.— Bryant *v.* Kelton, 1 Tex. 434.

Vermont.— Ward *v.* Morrison, 25 Vt. 593.

Virginia.— Union Cent. L. Ins. Co. *v.* Pol-

(III) *ADMISSIBILITY.* In pursuance of the provision of the federal constitution that congress may, by general laws, prescribe the manner in which the statutes of a state shall be proved,[97] congress has declared that "the acts of the legislature of any State or Territory . . . shall be authenticated by having the seals of such State, Territory, or Country affixed thereto,"[98] and such statute may accordingly be proved in this way.[99] The method of proving foreign statutes by authenticated copies, however, is not exclusive,[1] and they may be proved by the introduction of printed copies published by authority of the state.[2] Editions

lard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

See 44 Cent. Dig. tit. "Statutes," § 390.

Sufficiency of evidence.—Mandru *v.* Ashby, 108 Md. 693, 71 Atl. 312 (holding that the mere reading of the law of another state to the court in argument cannot supply the failure to prove the law in the manner prescribed by Code Gen. Pub. Laws (1904), art. 35, § 53); Moore *v.* Coler, 106 N. Y. App. Div. 331, 94 N. Y. Suppl. 630 (holding that proof that a section of the statutes of another state declares that "every action, other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years," does not amount to proof that four years is the limitation imposed upon an action on a county bond); Atchison, etc., R. Co. *v.* Mills, (Tex. Civ. App. 1908) 108 S. W. 480 (holding that, in an action for personal injury to an employee caused in another state, a statement in the record by defendant's counsel that it was conceded that the fellow servant law was in force in such other state, and that the act would be considered as having been introduced, is insufficient to show what the law is in such state respecting fellow servants).

97. U. S. Const. art. 4, § 1.

98. U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677; Title Guarantee, etc., Co. *v.* Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422.

99. *Indiana.*— Hall *v.* Harris, 16 Ind. 180.

Louisiana.— Lapice *v.* Smith, 13 La. 91, 33 Am. Dec. 555.

Nebraska.— Topliff *v.* Richardson, 76 Nebr. 114, 107 N. W. 114.

New Hampshire.— State *v.* Carr, 5 N. H. 367, holding that a copy of a legislative act to which the seal of the state is affixed is admissible in evidence without other proof, as the seal of the state is of itself the highest test of authenticity.

North Carolina.— State *v.* Jackson, 13 N. C. 563.

Pennsylvania.— Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

Virginia.— Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 154, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271, holding that "the usual and better, if not the only manner, of proving the laws of a foreign State, when they are statutory, is by introducing in evidence a properly authenticated copy of the statute, or so much of it as is necessary to show what the foreign law is upon the particular point or points in controversy.

United States.— Thompson *v.* Musser, 1 Dall. 457, 1 L. ed. 222.

See 44 Cent. Dig. tit. "Statutes," § 390.

1. See cases cited *infra*, notes 2, 4, 5, 7.

2. *Alabama.*— Clanton *v.* Barnes, 50 Ala. 260; Walker *v.* Forbes, 31 Ala. 9; Inge *v.* Murphy, 10 Ala. 885.

Arkansas.— Clarke *v.* Mississippi Bank, 10 Ark. 516, 52 Am. Dec. 248.

District of Columbia.— Main *v.* Aukam, 12 App. Cas. 375, holding that no other authentication of the public statute law of a state is required in another jurisdiction than the impress of the authority by which it is published, contained in the book itself.

Illinois.— Eagan *v.* Connelly, 107 Ill. 458.

Indiana.— Rothrock *v.* Perkinson, 61 Ind. 39; Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283; Crake *v.* Crake, 18 Ind. 156; Vaughn *v.* Griffeth, 16 Ind. 353; Line *v.* Mack, 14 Ind. 330.

Kentucky.— Biesenthall *v.* Williams, 1 Duv. 329, 85 Am. Dec. 629; Thomas *v.* Davis, 7 B. Mon. 227; Taylor *v.* Illinois Bank, 7 T. B. Mon. 576.

Maine.— Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Massachusetts.— Ashley *v.* Root, 4 Allen 504; Merrifield *v.* Robbins, 8 Gray 150; Raynham *v.* Canton, 3 Pick. 293.

Michigan.— Wilt *v.* Cutler, 38 Mich. 189; People *v.* Calder, 30 Mich. 85.

Missouri.— Bradley *v.* West, 60 Mo. 33.

New Hampshire.— Emery *v.* Berry, 28 N. H. 473, 61 Am. Dec. 622; Lord *v.* Staples, 23 N. H. 448.

New Jersey.— Van Buskirk *v.* Mulock, 18 N. J. L. 184 [*overruling* Hale *v.* Ross, 3 N. J. L. 807]; Title Guarantee, etc., Co. *v.* Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422, holding that under the statute of March 2, 1847, printed statute books and pamphlet session laws of other states printed by authority are admissible. Before the passage of the statute of 1847, the method provided by congress had been decided to be exclusive.

New York.— In New York, prior to 1848, statutes of other states could be proved only by a copy exemplified by the officer having custody of them (Toulandon *v.* Lachenmeyer, 1 Sweeney 45, 6 Abb. Pr. N. S. 215, 37 How. Pr. 145, and Packard *v.* Hill, 2 Wend. 411); but by statute passed in that year (now Civ. Code, § 942), they were authorized to be proved by copies printed by authority or commonly admitted as evidence of the existing law in the courts of that state (Toulandon *v.* Lachenmeyer, *supra*). In construing this provision, a copy of foreign statutes published by the state printer and showing on its title page that it was published under a

of the statutes of another state printed by private individuals but not under the authority of, nor indorsed by, the legislature, are not admissible under an act authorizing the introduction of copies printed by authority;[3] but are admissible under an act providing that "printed volumes purporting to contain the laws of a sister state or territory shall be admitted as *prima facie* evidence of the statutes of such state or territory."[4] In some jurisdictions the testimony of attorneys, and others skilled in the law of the state in question, is admissible as to the existence and meaning of the statutes;[5] but in other jurisdictions parol evidence is inadmissible to prove the statute law of another state.[6] So the reports of judicial deci-

"resolve" of the legislature of a certain date, has been admitted (Bernardston Cong. Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396, 51 N. Y. Suppl. 704); but the testimony of an attorney of such other state that he was acquainted with the laws thereof and that the book in question was the Revised Statutes of that state has been held insufficient (Lambert *v.* Hoffman, 20 Misc. 331, 45 N. Y. Suppl. 806). And see Pacific Pneumatic Gas Co. *v.* Wheelock, 80 N. Y. 278 [*affirming* 44 N. Y. Super. Ct. 566].

North Carolina.— Copeland *v.* Collins, 122 N. C. 619, 30 S. E. 315; State *v.* Cheek, 35 N. C. 114. *Contra*, State *v.* Twitly, 9 N. C. 441, 11 Am. Dec. 779, holding the method provided by congress exclusive.

Pennsylvania.— Mullen *v.* Morris, 2 Pa. St. 85; Kean *v.* Rice, 12 Serg. & R. 203; Biddis *v.* James, 6 Binn. 321, 6 Am. Dec. 456.

South Carolina.— Free *v.* Southern R. Co., 78 S. C. 57, 58 S. E. 952; Allen *v.* Watson, 2 Hill 319.

Tennessee.—Hobbs *v.* Memphis, etc., R. Co., 9 Heisk. 873; Foster *v.* Taylor, 2 Overt. 191.

Texas.— Martin *v.* Payne, 11 Tex. 292; Beard *v.* State, 47 Tex. Cr. 183, 83 S. W. 824, holding that a compilation of laws declared by statute presumptive evidence of all acts of the territory in force at the time of approval is evidence that a particular section was in force from the date given at the end of the section.

Vermont.— State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754; State *v.* Stade, 1 D. Chipm. 303.

Virginia.— Taylor *v.* Alexandria Bank, 5 Leigh 471.

See 44 Cent. Dig. tit. "Statutes," § 390.

Other evidence is admissible to prove such copies inaccurate.— Bradley *v.* West, 60 Mo. 33.

The distinct authority for printing and publishing the laws need not appear where they purport to be published under the authority of the government. Wilt *v.* Cutler, 38 Mich. 189.

3. *Connecticut.*— Canfield *v.* Squire, 2 Root 300, 1 Am. Dec. 71.

Indiana.— Magee *v.* Sanderson, 10 Ind. 261.

Iowa.— Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473, holding that a copy printed by a private individual was not admissible, even though it contained a printed certificate of the secretary of state to the effect that so much of the matter contained in the book as purports to be a copy of the Revised Statutes is correctly transcribed.

New York.— Packard *v.* Hill, 2 Wend. 411.

Texas.—Martin *v.* Payne, 11 Tex. 292; Northwestern Nat. L. Ins. Co. *v.* Blasingame, 38 Tex. Civ. App. 402, 85 S. W. 819, holding that a pamphlet purporting to be the insurance laws of another state, and to have been printed by the "State Printers," does not purport to have been printed by authority of that state, so as to be admissible as evidence of the laws of that state, under the Texas statutes.

See 44 Cent. Dig. tit. "Statutes," § 390. And cases cited *supra*, note 2.

4. Glenn *v.* Hunt, 120 Mo. 330, 25 S. W. 181; Cummings *v.* Brown, 31 Mo. 309; White *v.* Reitz, 129 Mo. App. 307, 108 S. W. 601 (Shannon's Annotated Code of Tennessee); Frick Co. *v.* Marshall, 86 Mo. App. 463 (Brightly's Purdon's Digest of the Laws of Pennsylvania); Williams *v.* Williams, 53 Mo. App. 617.

5. Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga 676, 13 S. E. 109; Raynham *v.* Canton, 3 Pick. (Mass.) 293; Title Guarantee, etc., Co. *v.* Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422 (holding that "in order to know what the law of a foreign state is on a given subject we need something more than the production of the statute, for that only gives the words in which the law is written. The question to be determined is not what the language of the law is, but what the law is altogether, as shown by exposition, interpretation and adjudication; and this, I take it, can best be ascertained by the testimony of a professional witness, whose special knowledge enables him to speak to that fact"); Wood *v.* Stephen, 1 Serg. & R. (Pa.) 175 (holding, however, that where a negro claimed his freedom under the last will of his master, formerly of Maryland, dated April 2, 1768, evidence that an act of assembly of Maryland, passed in 1752, declared manumissions by last will void, and was in force in 1768, and repealed as late as 1796, although it was to continue only three years, is not sufficient, unless the record of the laws making the continuance be produced).

6. Comparet *v.* Jernegan, 5 Blackf. (Ind.) 375; Zimmerman *v.* Helser, 32 Md. 274; Toulandon *v.* Lachenmeyer, 1 Sweeny (N. Y.) 45, 6 Abb. Pr. N. S. 215, 37 How. Pr. 145. And see People *v.* Lambert, 5 Mich. 349, 72

sions are admissible for the same purpose in some jurisdictions,[7] but not in others.[8]

c. Other Countries. The rules in regard to the evidence admissible to prove the statutes of a foreign country are very much the same as those in regard to the evidence admissible to prove those of another state.[9] They must be proved as facts,[10] and their existence and validity established by satisfactory evidence.[11] While a copy duly authenticated by the proper official is the best evidence as to the enactment and text of a foreign statute,[12] yet, by the general rule prevailing in the United States, printed copies of foreign statutes are admissible where shown to the reasonable satisfaction of the court to be authentic.[13] In some jurisdictions parol evidence is inadmissible;[14] but in others the testimony of persons learned

Am. Dec. 49, rejecting the evidence of a policeman and constable of New Jersey as to the laws of that state.

7. Barger *v.* Farnham, 130 Mich. 487, 90 N. W. 281.

8. Free *v.* Southern R. Co., 78 S. C. 57, 58 S. E. 952; Seiders *v.* Merchants' Life Assoc., 93 Tex. 194, 54 S. W. 753 [*reversing* (Civ. App. 1899) 51 S. W. 547].

9. See *supra*, VIII, B, 4, b; and cases cited *infra*, notes 10–18.

10. Innerarity *v.* Mims, 1 Ala. 660; De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555; Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158; Pierce *v.* Indseth, 106 U. S. 546, 1 S. Ct. 418, 27 L. ed. 254; Ennis *v.* Smith, 14 How. (U. S.) 400, 426, 14 L. ed. 472; Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15; Dickerson *v.* Matheson, 50 Fed. 73 [*affirmed* in 57 Fed. 524, 6 C. C. A. 466] (holding that mere citations to English statutes and authorities cannot be accepted as showing the English law); Robinson *v.* Clifford, 20 Fed. Cas. No. 11,948, 2 Wash. 1.

11. Gonzales *v.* Sanchez, 4 Mart. N. S. (La.) 657; Woodbridge *v.* Austin, 2 Tyler (Vt.) 364, 4 Am. Dec. 740.

12. *Alabama.*— Innerarity *v.* Mims, 1 Ala. 660.

Maryland.—Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688.

New York.— Lincoln *v.* Battelle, 6 Wend. 475.

Pennsylvania.— Phillips *v.* Gregg, 10 Watts 158, 36 Am. Dec. 158.

South Carolina.— Allen *v.* Watson, 2 Hill 319.

See 44 Cent. Dig. tit. "Statutes," § 391.

13. *Maine.*— Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Massachusetts.—Anglo-American Land, etc., Co. *v.* Dyer, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437.

Michigan.— Dawson *v.* Peterson, 110 Mich. 431, 68 N. W. 246, holding that a printed volume, purporting to be the Revised Statutes of Ontario, printed by the Toronto law printers, and identified and used as evidence in the courts of Ontario, was properly admitted.

New York.— Hecla Powder Co. *v.* Sigua Iron Co., 157 N. Y. 437, 52 N. E. 650 [*affirming* 91 Hun 429, 36 N. Y. Suppl. 838], holding that a copy of an official book in general use containing the customs ordinances of the Spanish government, printed in Spanish, was competent, although not proved to have been published by authority of the government. But see Chanoine *v.* Fowler, 3 Wend. 173; Packard *v.* Hill, 2 Wend. 411, both refusing to admit printed copies under very similar circumstances.

Pennsylvania.— Jones *v.* Maffet, 5 Serg. & R. 523.

United States.— Nashua Sav. Bank *v.* Anglo-American Land, etc., Co., 189 U. S. 221, 23 S. Ct. 517, 47 L. ed. 782, holding that copies of acts of parliament are sufficiently authenticated to be admissible in evidence in a federal court sitting in New Hampshire, when produced by an attorney and solicitor of the supreme court of judicature in England of thirty years' experience, in connection with his testimony that he was intimately acquainted with such acts, and that the copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472; Talbot *v.* Seeman, 1 Cranch 1, 2 L. ed. 15; The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142; U. S. *v.* Certain Casks of Glassware, 25 Fed. Cas. No. 14,764; Dauphin *v.* U. S., 6 Ct. Cl. 221.

See 44 Cent. Dig. tit. "Statutes," § 391.

A statute once proved will be presumed to remain in force until a change is proved. The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142.

14. Innerarity *v.* Mims, 1 Ala. 660; Kermott *v.* Ayer, 11 Mich. 181 (holding that a foreign statute cannot be proved by parol evidence without some showing why secondary evidence becomes necessary); Geoghegan *v.* Atlas Steamship Co., 16 Daly (N. Y.) 229, 10 N. Y. Suppl. 121 (holding that a commission to take the testimony of foreign lawyers to prove the existence and construction of a statute of their country is properly denied where the moving papers fail to show any ambiguity or uncertainty in the meaning of the statute, or that it has received any judicial interpretation, or that it cannot be proved under Code Civ. Proc. § 942, providing for the proving of foreign statutes by officially printed copies); People *v.* Rosenzweig, 47 Misc. (N. Y.) 584, 96 N. Y. Suppl. 103; Robinson *v.* Clifford, 20 Fed. Cas. No. 11,948, 2 Wash. 1; U. S. *v.* Ortega, 27 Fed. Cas. No. 15,970, 4 Wash. 531, Hoffm. Land Cas. 135.

in the law of such foreign country is not only admitted,[15] but in conjunction with the text of the statute itself is regarded as the best evidence of its meaning;[16] and in some cases the evidence of persons who are neither lawyers nor public officers has been admitted in regard to such portions of the statute law as they have been in a position to become acquainted with.[17] So text books have also been held admissible in connection with statutes for the purpose of determining their proper construction.[18]

STATUTES OF ENGLAND. The acts of parliament.[1]

STATUTE STAPLE. A security for a debt acknowledged to be due, so called from its being entered into before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns.[2]

STATUTORY AWARD. See ARBITRATION AND AWARD, 3 Cyc. 568.

STATUTORY BOND. A bond that conforms to a statute.[3] (Statutory Bond: Construction as, see BONDS, 5 Cyc. 751. Right to Enforce at Common Law, see BONDS, 5 Cyc. 813. Validity of, see BONDS, 5 Cyc. 747. See, generally, BONDS, 5 Cyc. 721, and Cross-References Thereunder.)

STATUTORY CONTRACT. A contract which the statute says shall be implied from certain facts.[4] (See CONTRACTS, 9 Cyc. 243.)

STATUTORY DEDICATION. See DEDICATION, 13 Cyc. 440.

STATUTORY FORECLOSURE. The execution of a power of sale given in the mortgage.[5] (See MORTGAGES, 27 Cyc. 1449.)

STATUTORY INSOLVENCY. An inability to pay debts when due or demandable.[6] (See INSOLVENCY, 22 Cyc. 1256.)

A letter is inadmissible to prove the law of a foreign country.— Pratt *v.* Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035 [*affirmed* in 166 N. Y. 593, 59 N. E. 1120].

15. *Illinois.*— Canale *v.* People, 177 Ill. 219, 52 N. E. 310.

Indiana.— Line *v.* Mack, 14 Ind. 330; Comparet *v.* Jernegan, 5 Blackf. 375.

New Hampshire.— Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207.

Rhode Island.— Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283, holding that a witness offered as an expert in the foreign law may state a written law without producing it, and that he may produce a copy of the foreign statute and refer to it for the purpose of refreshing his recollection as to the law.

United States.— The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142.

England.— De Bode's Case, 8 Q. B. 208, 55 E. C. L. 208; Nelson *v.* Bridport, 8 Beav. 527, 10 Jur. 871, 50 Eng. Reprint 207.

See 44 Cent. Dig. tit. "Statutes," § 391.

16. Slater *v.* Mexican Nat. R. Co., 194 U. S. 120, 24 S. Ct. 581, 48 L. ed. 900 [*affirming* 115 Fed. 593, 53 C. C. A. 239], holding that the testimony of an expert as to the accepted or proper construction of a foreign statute is admissible upon any matter open to reasonable doubt, and is not precluded by the admission of an agreed translation of the statutes. The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142.

In Vermont the necessity of producing a copy of the statutes itself is not dispensed with by the admission of parol evidence. Spaulding *v.* Vincent, 24 Vt. 501.

17. American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; Phillips *v.* Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158, holding that the fact that a marriage ceremony performed in the Spanish dominion more than fifty years before was valid according to the colonial laws of Spain could be proved by witnesses who were not learned in the law, but who were in a position to be conversant with the facts; as citizens in general are interested in, and acquainted with, the laws of marriage.

18. The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142; Rex *v.* Picton, 30 How. St. Tr. 225.

1. Levy *v.* McCartee, 6 Pet. (U. S.) 102, 111, 8 L. ed. 334, where such was said to be the meaning of the term as used in the New York statute providing "that none of the statutes of England, &c., shall be considered as laws of this state."

2. Black L. Dict. [*citing* 2 Blackstone Comm. 160; 1 Stephens Comm. 287].

In other respects it resembled the statute-merchant but like that has now fallen into disuse. 2 Blackstone Comm. 160; 1 Stephen Comm. 287. See *ante*, p. 927.

3. Mt. Vernon *v.* Brett, 193 N. Y. 276, 287, 86 N. E. 6.

"Common law bond" distinguished see Hedderick *v.* Pontet, 6 Mont. 345, 349, 12 Pac. 765; Mt. Vernon *v.* Brett, 193 N. Y. 276, 287, 86 N. E. 6.

4. Foley *v.* Leisy Brewing Co., 116 Iowa 176, 179, 89 N. W. 230.

5. Mowry *v.* Sanborn, 11 Hun (N. Y.) 545, 548.

6. Finch Mfg. Co. *v.* Stirling Co., 187 Pa. St. 596, 601, 41 Atl. 294.

STATUTORY LIABILITY. A liability that depends for its existence upon the enactment of a statute, and not upon the contract of the parties.[7] (Statutory Liability: Of Stock-Holder, see CORPORATIONS, 10 Cyc. 660.)

STATUTORY LIEN. See LIENS, 25 Cyc. 662, and Cross-References Thereunder.

STATUTORY RECEIVER. See RECEIVERS, 34 Cyc. 17.

STATUTORY TRUST. See TRUSTS.

STATUTUM AFFIRMATIVUM NON DEROGAT COMMUNI LEGI. A maxim meaning "An affirmative statute does not derogate from the common law." [8]

STATUTUM EX GRATIA REGIS DICITUR, QUANDO REX DIGNATUR CEDERE DE JURE SUO REGIO, PRO COMMODO ET QUIETE POPULI SUI. A maxim meaning "A statute is said to be by the grace of the king, when the king deigns to yield some portion of his royal rights for the good and quiet of his people." [9]

STATUTUM GENERALITER EST INTELLIGENDUM QUANDO VERBA STATUTI SUNT SPECIALIA, RATIO AUTEM GENERALIS. A maxim meaning "When the words of a statute are special, but the reason of it general, it is to be understood generally." [10] (See STATUTES.)

STATUTUM SPECIALE STATUTO SPECIALI NON DEROGAT. A maxim meaning "One special statute does not take from another special statute." [11] (See STATUTES.)

STAY. As a noun, the act of stopping or arresting a judicial proceeding by order of the court or judge.[12] As a verb, to forbear to act; to stop.[13] (Stay: Arrest of Judgment, see CRIMINAL LAW, 12 Cyc. 756; JUDGMENTS, 23 Cyc. 824. Of Execution — In General, see EXECUTIONS, 17 Cyc. 1135; Affecting Right to Sue on Judgment in Another State, see JUDGMENTS, 23 Cyc. 1559 note 32; Against Maker of Negotiable Instrument, Effect as Release of Indorser, see COMMERCIAL PAPER, 7 Cyc. 910 note 32; Against Principal as Affecting Discharge of Sureties, see PRINCIPAL AND SURETY, 32 Cyc. 212; As Affecting Commencement of Judgment Lien, see JUDGMENTS, 23 Cyc. 1366; As Affecting Right to Appeal, see APPEAL AND ERROR, 2 Cyc. 657; As Postponement of Judgment Lien, see JUDGMENTS, 23 Cyc. 1389; As Suspension of Lien of Judgment, see JUDGMENTS, 23 Cyc. 1402; Authority of Attorney to Grant, see ATTORNEY AND CLIENT, 4 Cyc. 942; Authority of Court to Allow, see APPEAL AND ERROR, 2 Cyc. 891; Constitutionality of Statute Allowing, see CONSTITUTIONAL LAW, 8 Cyc. 1016; Effect Upon Priorities Between Executions, see EXECUTIONS, 17 Cyc. 1057; In Action By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1078; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 626; In Replevin Proceedings, see REPLEVIN, 34 Cyc. 1553; Of Permanent Injunction, see INJUNCTIONS, 22 Cyc. 970; Of Sentence of One Convicted of Crime, see CRIMINAL LAW, 12 Cyc. 790; Of Warrant or Writ of Possession, see LANDLORD AND TENANT, 24 Cyc. 1435. Of Proceedings — In General, see ACTIONS, 1 Cyc. 751; Against Bankrupt, see BANKRUPTCY, 5 Cyc. 254; Agreement to Stay as Consideration, see CONTRACTS, 9 Cyc. 346; Effect as to Suspending Interest, see INTEREST, 22 Cyc. 1560; Effect as to Suspending Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1282; Effect of Adverse Claims to Public Mineral Lands as, see MINES AND MINERALS, 27 Cyc. 607; Effect of Commission to Take Depositions as, see DEPOSITIONS, 13 Cyc. 893; Effect of Removal of Cause as, see REMOVAL OF CAUSES, 34 Cyc. 1305; For Collection of Costs, see COSTS, 11 Cyc. 255; For Garnishment, see GAR-

7. Bigby *v.* Douglas, 123 Ga. 635, 638, 51 S. E. 606; Pare *v.* Mahone, 32 Ga. 253, 255.

8. Burrill L. Dict. [*citing* Jenkins Cent. 24].

9. Black L. Dict. [*citing* 2 Inst. 378].

10. Bouvier L. Dict. [*citing* Beawfage's Case, 10 Coke 99*b*, 101*b*, 77 Eng. Reprint 1076].

11. Morgan Leg. Max. [*citing* Jenkins Cent. 199].

12. Burrill L. Dict. [*quoted* in Rossiter *v.* Ætna L. Ins. Co., 96 Wis. 466, 468, 71 N. W. 898, where the term is distinguished from "injunction"].

"Stay of proceedings at law" see Lewton *v.* Hower, 18 Fla. 872, 876.

13. Webster Dict. [*quoted* in *In re* Schwarz, 14 Fed. 787, 788, where such is said to be the general meaning of the term, although in a certain technical sense the term may be said to apply to proceedings already commenced].

"Order to stay proceedings" distinguished

NISHMENT, 20 Cyc. 1116; For Possession of Mortgaged Property, see MORTGAGES, 27 Cyc. 1242; For Recovery of Demised Premises by Landlord, see LANDLORD AND TENANT, 24 Cyc. 1404, 1435; Necessity For Revival of Judgment, see JUDGMENTS, 23 Cyc. 1438; Notice and Service of Orders of Court For, see ORDERS, 29 Cyc. 1517 note 33; On Appeal, see APPEAL AND ERROR, 2 Cyc. 885; On Appeal From Justices of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 697; On Appeal in Admiralty, see ADMIRALTY, 1 Cyc. 902; On Appeal in Habeas Corpus Proceedings, see HABEAS CORPUS, 21 Cyc. 342; On Appeal in Replevin, see REPLEVIN, 34 Cyc. 1554; On Appeal, Necessity of Allowance by Court, see APPEAL AND ERROR, 2 Cyc. 891; On Application or Motion For New Trial, see NEW TRIAL, 29 Cyc. 714; On Bail-Bond in Civil Action, see BAIL, 5 Cyc. 51; On Certiorari, see JUSTICES OF THE PEACE, 24 Cyc. 775; On Giving Security For Restitution, see APPEAL AND ERROR, 2 Cyc. 916; On Guardianship Bond, see GUARDIAN AND WARD, 21 Cyc. 260; On Mandamus, see MANDAMUS, 26 Cyc. 482; Pending Accounting in Action to Compel Accounting by Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1135; Pending Appeal or Writ of Error, see APPEAL AND ERROR, 2 Cyc. 885; CRIMINAL LAW, 12 Cyc. 830; Pending Application For Respite in Insolvency Proceedings, see INSOLVENCY, 22 Cyc. 1330; Pending Other Action, see ABATEMENT AND REVIVAL, 1 Cyc. 21; Pending Review, see REVIEW, 34 Cyc. 1715; Provisions For in Judgment or Decree of Foreclosure, on Payment of Instalment Due, see MORTGAGES, 27 Cyc. 1658; Rendition of Judgment During, see JUDGMENTS, 23 Cyc. 785; To Recover Rent, see LANDLORD AND TENANT, 24 Cyc. 1200; Under Decree Pending Bill of Review, see EQUITY, 16 Cyc. 525 note 48; Until Payment of Costs, see COSTS, 11 Cyc. 255. Of Sale — On Foreclosure, see MORTGAGES, 27 Cyc. 1682; To Enforce Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 446. Of Writ of Possession in Ejectment, see EJECTMENT, 15 Cyc. 189. Restraining Enforcement of Judgment Pending Appeal or New Trial, see JUDGMENTS, 23 Cyc. 1427. Supersedeas, see SUPERSEDEAS. Violation of Stay Order, see CONTEMPT, 9 Cyc. 11; SHERIFFS AND CONSTABLES, 35 Cyc. 1683.)

STAYING PROCEEDINGS. See STAY, and Cross-References Thereunder.

STAY LAWS. See STAY, and Cross-References Thereunder.

STAYOR. In Tennessee, a surety for the payment of a judgment.[14] (See PRINCIPAL AND SURETY, 32 Cyc. 1.)

STEAD. A term which originally meant place or spot.[15]

STEADY AND PERMANENT. Words which usually signify stability and duration.[16] (See PERMANENT, 30 Cyc. 1460.)

STEADYING BOARD. An appliance in a packing plant to hold the hog in position while the splitter cleaves it in two.[17]

STEAL or **STEALING.** As a noun, a criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it;[18] a term which when used in connection with property which is a subject of larceny, is said to mean the felonious taking;[19] the felonious taking and carrying away of the personal goods of another;[20] the wrongful or fraudulent

from "order to extend time" for doing a particular act see Wallace *v.* Wallace, 13 Wis. 224, 226.

14. Stockard *v.* Granberry, 3 Lea (Tenn.) 668, 678.

15. McKeough *v.* McKeough, 69 Vt. 34, 37, 37 Atl. 275, where discussing the meaning of the term "homestead" it is said: "This meaning is now obsolete, except as preserved in compound words."

16. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 116, 32 N. E. 802, 805, 51 Am. St. Rep. 289.

"Steady and permanent employment" is a term which when reasonably construed is said to mean employment as long as a person is able, ready, and willing to perform such services as the other party may have for him to perform. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 116, 32 N. E. 802, 805, 51 Am. St. Rep. 289. See EMPLOYMENT, 15 Cyc. 1041.

17. Rendlich *v.* Hammond Packing Co., 106 Mo. App. 717, 719, 80 S. W. 683.

18. Com. *v.* Kelley, 184 Mass. 320, 323, 68 N. E. 346.

19. People *v.* Tomlinson, 102 Cal. 19, 24, 36 Pac. 506.

20. State *v.* Boyce, 65 Ark. 82, 83, 44 S. W. 1043; State *v.* Chambers, 2 Greene (Iowa) 308, 311; State *v.* Parry, 48 La. Ann. 1483, 1484, 21 So. 30.

taking and carrying away of personal property by trespass with a felonious intent to deprive the owner thereof, and convert the same to the taker's own use;[21] synonymous with "larceny"[22] or with "theft."[23] As a verb, to take a man's property from his custody with a felonious intent;[24] to commit larceny;[25] to take and carry away feloniously;[26] to take and carry away feloniously; to take without right or leave, and with intent to keep wrongfully.[27] (Steal or Stealing: In General, see BURGLARY, 6 Cyc. 169; EMBEZZLEMENT, 15 Cyc. 48; FALSE PERSONATION, 19 Cyc. 379; FALSE PRETENSES, 19 Cyc. 384; KIDNAPPING, 24 Cyc. 796; LARCENY, 25 Cyc. 1; RECEIVING STOLEN GOODS, 34 Cyc. 513; ROBBERY, 34 Cyc. 1795. Charge of, as Actionable *Per Se*, see LIBEL AND SLANDER, 25 Cyc. 302.)

21. Webster Int. Dict. [*quoted* in Hughes *v.* Terr., 8 Okla. 28, 31, 56 Pac. 708].

22. Satterfield *v.* Com., 105 Va. 867, 870, 52 S. E. 979.

As not the equivalent of "larceny" see Barnhart *v.* State, 154 Ind. 177, 182, 56 N. E. 212.

23. Sands *v.* State, 30 Tex. App. 578, 580, 18 S. W. 86; Young *v.* State, 12 Tex. App. 614, 615.

24. State *v.* Fitzpatrick, 9 Houst. (Del.) 385, 387, 32 Atl. 1072.

25. Abbott L. Dict. [*quoted* in State *v.* Lee Yan Yan, 10 Oreg. 365, 366]; Anderson L. Dict. [*quoted* in Hughes *v.* Terr., 8 Okla. 28, 31, 56 Pac. 708].

26. Webster Dict. [*quoted* in People *v.* Lopez, 90 Cal. 569, 572, 27 Pac. 427; Satterfield *v.* Com., 105 Va. 867, 870, 52 S. E. 979].

27. Webster Dict. [*quoted* in Baldwin *v.* State, 46 Fla. 115, 127, 35 So. 220; State *v.* Dewitt, 152 Mo. 76, 85, 53 S. W. 429; People *v.* Lammerts, 164 N. Y. 137, 144, 58 N. E. 22; Hughes *v.* Terr., 8 Okla. 28, 31, 56 Pac. 708; State *v.* Minnick, (Oreg. 1909) 102 Pac. 605, 607; State *v.* Smith, 31 Wash. 245, 248, 71 Pac. 767].

Synonymous with the term "'carry away'" see Mooney *v.* State, 8 Ala. 328, 331.

To take an article from another, and to steal it, are said to be not necessarily synonymous terms. Stone *v.* Stevens, 12 Conn. 219, 229, 30 Am. Dec. 611.

This term is a legal result of facts — a mere conclusion of law. Williams *v.* State, 12 Tex. App. 395, 401.

"Stealing" is a term which is said to mean fraudulently and without color of right taking anything with intent to deprive the owner temporarily or absolutely of such thing. Reg. *v.* Lyon, 2 Can. Cr. Cas. 242, 250, 29 Ont. 497; Rex *v.* George, 35 Nova Scotia 42, 44.

STEAM

By James W. Osborne*

CROSS-REFERENCES

For Matters Relating to:

Constitutional Law, see Constitutional Law, 8 Cyc. 695.

Damages in General, see Damages, 13 Cyc. 1.

Insurance, see Boiler Insurance, 5 Cyc. 719; Insurance, 22 Cyc. 1380; Liability Insurance, Cyc. Ann.

Landlord and Tenant, see Landlord and Tenant, 24 Cyc. 845.

Master and Servant, see Master and Servant, 26 Cyc. 941.

Municipal Corporation in General, see Municipal Corporations, 28 Cyc. 55.

Municipal Police Power in General, see Municipal Corporations, 28 Cyc. 692.

Steam Railroad, see Railroads, 33 Cyc. 1; Street Railroads.

Steam Vessel, see Collision, 7 Cyc. 299; Shipping.

I. DEFINITION.

Steam is the elastic aeriform fluid into which water is converted when heated to the boiling point. It is an element of power.[1]

1. Reynolds *v.* Washington Real Estate Co., 23 R. I. 197, 203, 49 Atl. 707.

It is not synonymous with "power."—Reynolds *v.* Washington Real Estate Co., 23 R. I. 197, 49 Atl. 707.

Steam as motive power is inclusive of electricity generated by it. Prospect Park, etc., R. Co. *v.* Coney Island, etc., R. Co., 66 Hun (N. Y.) 366, 21 N. Y. Suppl. 1046 [*reversed* on other grounds in 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610].

The terms "steam boilers" and "steam machinery" as used in Minn. Gen. Laws (1899), c. 91, p. 92, providing for licensing of persons operating steam boilers or steam machinery of any kind, are not inclusive of steam heating plants, used for heating buildings occupied in part for business and in

* Author of "Signatures," *ante*, p. 442.

II. STATUTORY PROVISIONS.

In some jurisdictions there are statutes regulating the use of steam engines;[2] and it has been made a statutory offense for the owner or user of a boiler, or the person acting in his behalf, not to notify certain public authorities of an explosion within a specified time after it has taken place.[3]

III. STEAM-HEATING CORPORATIONS.

A turnpike is a public highway, within the meaning of a statute giving steam-heating corporations power to lay their pipes in public highways.[4] A steam-heating corporation occupying a street permanently and for a semi-public purpose can recover for injuries to its pipes by a private corporation subsequently occupying the street temporarily and for a purely private purpose, even though the injuries are not due to negligence.[5] A steam-heating corporation in placing heating apparatus in a store at the owner's request is not an insurer against danger therefrom; it is bound only to use that degree of care which ordinary prudence and foresight would under the circumstances suggest and prompt.[6]

IV. LIABILITY FOR INJURIES INCIDENT TO PRODUCTION AND USE OF STEAM.

A. Negligence[7] **— 1. Producers and Users — a. In General.** Persons using or producing steam are liable for injuries caused by their negligence in its use[8] to

part for residences. State *v.* Justus, 94 Minn. 207, 208, 102 N. W. 452.

2. See the statutes of the several states.

Mass. St. (1845) c. 197, regulating the use of steam engines, applies to works subsequently erected as well as to those existing at the time of its passage. Call *v.* Allen, 1 Allen (Mass.) 137.

3. Boiler Explosion Act (1882), 45 & 46 Vict. c. 22, § 5.

This statute does not apply to boilers used exclusively for domestic purposes.— Boiler Explosion Act (1882), 45 & 46 Vict. c. 22, § 4; Boiler Explosion Act (1890), 53 & 54 Vict. c. 35, § 2; Smith *v.* Müller, [1894] 1 Q. B. 192, 58 J. P. 167, 70 L. T. Rep. N. S. 170, 10 Reports 622, holding that a boiler used to heat the clerks' offices in a merchant's place of business and also used by a caretaker and his family who lived on the premises was used exclusively for domestic purposes within the meaning of the act.

The board of trade has jurisdiction to hold an inquiry into an explosion of a boiler in a mine. Reg. *v.* Boiler Explosion Com'rs, [1891] 1 Q. B. 703, 60 L. J. Q. B. 544, 64 L. T. Rep. N. S. 674, 39 Wkly. Rep. 440 [*affirming* 55 J. P. 616], holding that 45 & 46 Vict. c. 22, § 4, was repealed by 53 & 54 Vict. c. 35, § 2.

The term "boiler" is defined by the English Boiler Explosion Act (45 & 46 Vict., c. 22, § 2) as any closed vessel used for generating steam, or for heating water, or for heating other liquids into which steam is admitted for steaming, boiling, or similar purposes. Reg. *v.* Boiler Explosion Com'rs, [1891] 1 Q. B. 703, 60 L. J. Q. B. 544, 64 L. T. Rep. N. S. 674, 39 Wkly. Rep. 440 [*affirming* 55 J. P. 616], holding that an explosion of a pipe connected with a boiler, at a point some thirteen hundred feet from the boiler, is an explosion of a boiler within the meaning of the act.

4. Berks, etc., Turnpike Road *v.* Lebanon Steam Co., 5 Pa. Co. Ct. 354.

5. New York Steam Co. *v.* Foundation Co., 195 N. Y. 43, 87 N. E. 765 [*reversing* 123 N. Y. App. Div. 254, 108 N. Y. Suppl. 84, and *distinguishing* Western Union Tel. Co. *v.* Electric Light, etc., Co., 178 N. Y. 325, 70 N. E. 866 (*reversing* 8 N. Y. App. Div. 655)]. In Western Union Tel. Co. *v.* Electric Light, etc., Co., *supra*, the action was brought by one public service corporation against another and also against the city which had granted a franchise to each to build a subway in one of its streets.

6. Reis *v.* New York Steamer Co., 128 N. Y. 103, 28 N. E. 24.

7. Negligence generally see 29 Cyc. 400.

8. Young *v.* Bransford, 12 Lea (Tenn.) 232.

Liability of partners.— In an action for damages for an injury resulting from the explosion of a steam boiler the following facts appeared: The owner of a boiler had used it for years in running a sawmill; he entered into partnership with two others to erect and operate a grist-mill with the boiler; by the terms of the partnership the boiler was to be used on certain days of the week to operate the grist-mill for the benefit of the partnership; the owner reserved to himself the right to use the boiler on the other days of the week to run the sawmill for his exclusive benefit; the boiler exploded on one of the latter days when it was being used by the owner to operate the sawmill. The jury found as a fact that, under the partnership agreement, each of the two other partners had an undivided fourth interest in the boiler. There was no evidence that it was in a defective condition when the parties en-

adjoining property-owners,[9] to licensees,[10] to strangers,[11] to employees,[12] and to employees of others working on their premises.[13] They are not, however, liable for injuries unless negligence is shown.[14]

b. Extent and Limits of Liability. Persons using or producing steam must in connection with such use or production be careful to use safe machinery.[15] They are liable for injuries caused by accidents due to defects where they have notice of the defects and continue to use the machinery in defective condition.[16]

tered into the partnership. It was held that the original owner and not the two partners would be liable for an injury caused by the explosion. Young *v.* Bransford, 12 Lea (Tenn.) 232.

9. Anderson *v.* Hays Mfg. Co., 207 Pa. St. 106, 56 Atl. 345, 63 L. R. A. 540.

10. Davis *v.* Chicago, etc., R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667. But see Armstrong *v.* Medbury, 67 Mich. 250, 34 N. W. 566, 11 Am. St. Rep. 585, an action to recover damages for injuries to a horse where the following facts appeared: Plaintiff drove on defendant's premises; defendant was a mill owner; in leaving defendant's premises plaintiff's horse became frightened and plaintiff lost control of it; the horse left the road provided for egress from the premises, and was injured by stepping in ground that had become soft and spongy by reason of the escape of steam from a broken pipe; this soft ground was twenty-five feet from the road used for egress from the premises. The court held that even if defendant were negligent in allowing the steam to escape, plaintiff in leaving the road of egress from the premises became a mere licensee, and that he could not recover for injuries from a defect outside of the roadway unless it was substantially adjacent to the roadway, and that a defect twenty-five feet away from the roadway was not adjacent to it.

11. Illinois Cent. R. Co. *v.* Phillips, 55 Ill. 194; Illinois Cent. R. Co. *v.* Phillips, 49 Ill. 234 (where it was held that a railroad company would be liable to a person in a union station who did not intend to become a passenger on its line for damages caused by an explosion if the explosion happened through the negligence of the company); McMahon *v.* Davidson, 12 Minn. 357; Andrews *v.* Powell, 1 Ohio Dec. (Reprint) 126, 2 West. L. J. 369; Spencer *v.* Campbell, 9 Watts & S. (Pa.) 32 (holding that where plaintiff loaned his horse to a person who took it to defendant's mill where it was killed by a boiler explosion, the mill-owner would be liable to plaintiff for the value of the horse if the boiler explosion was caused by his negligence).

12. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338; Fay *v.* Davidson, 13 Minn. 523; Posey *v.* Scoville, 10 Fed. 140.

13. Keiley *v.* The Alliance, 44 Fed. 97.

14. John Morris Co. *v.* Burgess, 44 Ill. App. 27; Veith *v.* Hope Salt, etc., Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

Adjoining property-owners may not recover for injuries caused by explosions unless negligence is shown. Marshall *v.* Welwood, 38 N. J. L. 339, 20 Am. Dec. 394; Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623 [*reversing* 61 Barb. 86]; Losee *v.* Saratoga Paper Co., 42 How. Pr. (N. Y.) 385.

Injuries from fire caused by explosion of boiler gives no cause of action without proof of negligence. Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475 [*reversing* 55 N. Y. Super. Ct. 384, 14 N. Y. St. 713].

Injury to horse caused by explosion of boiler gives no cause of action without proof of negligence. Spencer *v.* Campbell, 9 Watts & S. (Pa.) 32.

Landlord and tenant.— In an action against a tenant to recover damages resulting from the explosion of a steam boiler belonging to the landlord and leased with the premises, where the lease provided that if the premises became untenable by casualty the tenant could at his option terminate the lease or repair the premises and that if he should fail to do so the lease should cease, it was held that the landlord could not recover when the explosion did not occur through the negligence of the tenant. John Morris Co. *v.* Southworth, 154 Ill. 118, 39 N. E. 1099 [*reversing* 50 Ill. App. 429].

In Canada this is not true; there the liability of persons using steam for injuries caused by it is absolute without respect to the question of negligence. Roe *v.* Lucknow, 13 Can. L. T. Occ. Notes 148, holding in an action for damages for injuries to a stallion frightened by a steam whistle on defendant's premises, that defendant was liable without proof of negligence. See *infra*, IV, B.

15. Illinois Cent. R. Co. *v.* Phillips, 49 Ill. 234; Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293; Andrews *v.* Powell, 1 Ohio Dec. (Reprint) 126, 2 West. L. J. 369; Grimsley *v.* Hankins, 46 Fed. 400.

Railroad companies are held to the highest diligence to have safe machinery. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338.

Reputable manufacturers— The fact that defendants in an action for the recovery of damages for an explosion of a steam boiler purchased the boiler from reputable manufacturers is a fact to be considered as tending to a justification, in an action for damages for injuries caused by an explosion of a boiler. Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.

16. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338 (where in an action for injuries caused by the explosion of a locomotive boiler it is held that if a locomotive engine in use by a company is unsafe, actual knowledge of the fact by persons having charge of the machinery of the road is not necessary. In order

On the other hand they are not liable for defects which ordinary care and skill will not enable them to detect.[17] They are not required to make extraordinary tests to discover defects in machinery, and will not be liable if an accident happens through their failure to do so.[18] Persons using steam should not subject their machinery to too great pressure,[19] nor should they have it unattended.[20] They should select prudent and skilful servants to operate and manage the machinery.[21] It is their duty to exercise a supervision of their premises.[22] It

to charge the company with liability, it is sufficient if they have had such reports of its bad condition as ought to have given them knowledge of the truth); Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293 (holding that in an action for personal injuries resulting from the explosion of a boiler of the condition of which defendant had notice two or three weeks before the accident, that defendant could not avoid liability on the ground that it had not sufficient time to make necessary repairs). But see John Morris Co. *v.* Burgess, 44 Ill. App. 27, holding, in an action for damages for personal injuries caused by an explosion of a boiler, that an instruction which made defendant liable if its servant failed to keep the machinery in reasonable repair was erroneous.

17. Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494; Illinois Cent. R. Co. *v.* Phillips, 49 Ill. 234; Losee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Racine *v.* New York Cent., etc., R. Co., 70 Hun (N. Y.) 453, 24 N. Y. Suppl. 388 (holding that defendant was not liable in an action to recover damages resulting to an employee from the explosion of a boiler of one of the defendant's locomotives where it appeared that the injury was caused by an explosion of the crown sheet of the boiler, which about a week before the accident was found by the engineer to be white, and that at his suggestion a careful examination was made of it, but that no weakness in the boiler could be discovered, that afterward the boiler was subjected to the test of one hundred and forty-five pounds pressure, its maximum capacity, and resisted that pressure; that subsequently, under a pressure of only one hundred and ten pounds, while the engine was running at a moderate rate of speed, it exploded); Richmond, etc., R. Co. *v.* Elliott, 149 U. S. 266, 13 S. Ct. 837, 37 L. ed. 728.

18. Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494 (holding that in an action to recover for death caused by an explosion of an engine boiler that a railroad was not required to make the steam test, as it appeared that such test was dangerous); Richmond, etc., R. Co. *v.* Elliott, 149 U. S. 266, 13 S. Ct. 837, 37 L. ed. 728 (holding that in an action for damages for injuries caused by an explosion that a railroad company purchasing machinery from a reputable manufacturer was not required to tear it to pieces to discover defects). See also Merryman *v.* Hall, 131 Mich. 406, 91 N. W. 647, where in an action for injuries owing to the explosion of a boiler a lack of reasonable inspection was relied on by plaintiff as negligence, and defendant sought to show that it was not practicable to remove the flues from the boiler for the purpose of ascertaining the condition of the "braces," it was held that it was error to exclude the evidence, that the question was whether an ordinarily prudent and careful man would have removed the flues.

19. Beunk *v.* Valley City Desk Co., 128 Mich. 562, 87 N. W. 793 (holding that in an action for injuries from the bursting of a boiler negligently operated under greater pressure than it was adapted to, evidence that the boiler, although only safe under pressure of sixty pounds, was run with the safety valve set to blow off at ninety pounds, and that it carried a pressure of over eighty pounds at the time of the accident, such pressure being directed by defendant, made a *prima facie* case); Carroll *v.* Staten Island R. Co., 65 Barb. (N. Y.) 32 (holding in an action for the recovery of damages for injuries caused by an explosion of a boiler, that operating a steam boiler by the certificate of the government inspectors under an act of congress is evidence of negligence).

20. Merryman *v.* Hall, 124 Mich. 263, 82 N. W. 881 (holding that, where the evidence in an action for injuries to a government inspector on a dredge, caused by the explosion of a boiler, showed that there was a high pressure of steam in the boiler, and that during an intermission in the work the fireman left the boiler for thirty or forty minutes without doing anything to check the fires, and that the boiler exploded, it was error to direct a verdict for defendant as the question of negligence should have been submitted to the jury); Davis *v.* Chicago, etc., R. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667 (holding, in an action for damages resulting from an explosion, that leaving a boiler unattended for more than half an hour, in the condition shown by the evidence, was culpable negligence on the part of the servants of the company, and that the jury should have been allowed to determine whether such negligence was the cause of the explosion, and whether leaving such boiler unattended in the vicinity of a place where they knew people would be passing was a want of ordinary care toward them).

21. Illinois Cent. R. Co. *v.* Phillips, 49 Ill. 234; Andrews *v.* Powell, 1 Ohio Dec. (Reprint) 126, 2 West. L. J. 369; Grimsley *v.* Hankins, 46 Fed. 400.

22. Keiley *v.* The Allianca, 44 Fed. 97, holding that a steamship company is liable to an employee of a contractor engaged in cleaning the inside of the ship's boiler for injuries resulting from the escape of steam and hot water in the boiler caused by a med-

is also their duty to observe statutory provisions in operation regulating the use and production of steam.[23]

c. Where Duty Delegated to Others. Persons using steam may have their machinery repaired by others, and when they have used due care in selecting proper mechanics to make the repairs, and have had the machinery inspected by competent inspectors, and it has been reported to be safe, they will not be liable for injuries resulting from an accident caused by a defect in the repairs.[24] They should, however, have repairs tested;[25] but this duty may be delegated to competent inspectors, and when it is so delegated persons using the steam will not be responsible for the negligence of the inspectors if they have no knowledge of their negligence.[26]

2. Manufacturers of Machinery. Manufacturers of steam boilers, if negligent in the construction of a boiler, are liable to a purchaser for injuries caused by its explosion.[27] They are not, however, liable to third persons for injuries caused by an explosion.[28]

3. Inspectors and Insurers.[29] Insurers of steam boilers who coöperate actively with the owners in the management of boilers, having them inspected from time to time, are responsible for injuries to the adjacent property of third persons, sustained by explosions of boilers caused by the omission of proper tests and inspection.[30] Corporations authorized by statute to insure and to inspect steam boilers and stationary steam engines, and to issue certificates, stating the maximum working pressure, which are to be accepted instead of state inspection, are liable for damages resulting from a negligent inspection and false certificate.[31]

4. Contributory Negligence. As in other cases of negligence,[32] the contributory negligence of plaintiff will defeat a recovery in an action for damages for injuries caused by the negligent use of steam.[33] The burden of proof, it has been

dling stranger, since the ship-owner was bound to exercise a supervision of the premises to insure the safety of such employee.

23. Fay *v.* Davidson, 13 Minn. 523; McMahon *v.* Davidson, 12 Minn. 357, holding, in an action for damages for injuries caused by an explosion, that to permit the water in a boiler to fall below three inches above the flue is, unless the same happened through inevitable accident, an act of negligence for which the owner is liable.

These decisions are based upon an act of congress of Aug. 30, 1852, 10 U. S. St. at L. 69, c. 106, § 12.

24. Anderson *v.* Hays Mfg. Co., 207 Pa. St. 106, 56 Atl. 345, 63 L. R. A. 540.

25. Anderson *v.* Hays Mfg. Co., 207 Pa. St. 106, 56 Atl. 345, 63 L. R. A. 540; Posey *v.* Scoville, 10 Fed. 140.

Failure to test must be proximate cause of injury.—Where a railroad company did not apply a test to a boiler at the time repairs were made, ten months before the explosion, and it was proved that the defect in the boiler which caused the explosion had existed but six months, at longest, before the explosion, it was held that the failure to test the repairs was not negligence. Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494.

26. Anderson *v.* Hays Mfg. Co., 207 Pa. St. 106, 56 Atl. 345, 63 L. R. A. 540.

27. Erie City Iron Works *v.* Barber, 102 Pa. St. 156. But see Beers *v.* Woodruff, etc., Iron Works, 30 Conn. 308, where in an action to recover for injuries caused by a boiler explosion it appeared that defendant manufactured, without special warranty, a boiler for plaintiff, who being well acquainted with machinery prescribed the quality of iron to be used, and directed the size and shape of the boiler; that the boiler was placed in plaintiff's factory, and was there run successfully for nine months; that it then exploded while the person who attended it was at dinner. No satisfactory evidence as to the cause of the explosion was shown. Upon these facts the court held that a verdict for plaintiff was against the evidence, set it aside, and granted defendant a new trial.

28. Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638.

29. Liability insurance generally see Liability Insurance, Cyc. Ann.

30. Van Winkle *v.* American Steam-Boiler Co., 52 N. J. L. 240, 19 Atl. 472.

31. Bradley *v.* Hartford Steam-Boiler Inspection, etc., Co., 19 Fed. 246.

32. See Negligence, 29 Cyc. 400.

33. Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217 (holding, in an action for damages for the death of an engineer, killed by the explosion of an engine boiler, that there could be no recovery if the explosion happened through the negligent manner in which the engine was managed by the engineer, or if the engineer had good reason to believe that the boiler was unsafe, or if, by the exercise of ordinary skill, he could have learned that the engine was unsafe, and continued to use it); Illinois Cent. R. Co. *v.* Houck, 72 Ill. 285; National Woodenware, etc., Co. *v.* Smith, 108 Ill. App. 477.

Question for jury.—In an action for damages for injuries resulting from the explosion

held in at least one jurisdiction, is on plaintiff to establish freedom from contributory negligence.[34]

5. Actions — a. Form. The proper form of an action for injuries caused by the explosion of a steam boiler is action on the case and not trespass.[35]

b. Pleading. In an action to recover damages for injuries caused by the explosion of a steam boiler plaintiff must recover according to the allegations and the proof, and not according to either alone.[36] In an action for damages sustained by reason of the explosion of a steamboat, alleged to have been caused by the negligence of the master and owners, an averment of strict compliance on the part of the proprietors with the requirements of the act of congress of 1852, relating to steamboats, was held to be insufficient as a defense, without the further allegation of care and a denial of negligence.[37]

c. Evidence[38] — (i) *Presumptions and Burden of Proof.* In actions for damages for injuries caused by the use of steam the burden is upon plaintiff to show negligence.[39] And it is a general rule that where defendant owes plaintiff no duty other than the exercise of ordinary care to prevent injury, the fact of an explosion raises no presumption of negligence.[40] But where defendant owes

of a boiler it was held that the trial court's refusal to submit the question of contributory negligence to the jury, and its ruling that contributory negligence was not sufficiently shown were erroneous, where the following facts appeared: Plaintiff, who was passing through a street where a new boiler was to be tested, stopped; although he was told to leave, and that it was not safe for him to stop, he did not leave; he was injured by the explosion of the boiler which was caused by the reckless application of a test. Ochsenbein *v.* Shapley, 85 N. Y. 214.

34. Illinois Cent. R. Co. *v.* Houck, 72 Ill. 285.

In Canada, however, where defendant relies upon the contributory negligence of plaintiff to defeat the cause of action, the burden is upon him not only to show the contributory negligence but to show that it was the proximate cause of the injury. Roe *v.* Lucknow, 13 Can. L. T. Occ. Notes 148.

Burden of showing contributory negligence generally see Negligence, 29 Cyc. 601.

35. Spencer *v.* Campbell, 9 Watts & S. (Pa.) 32.

Case generally see Case, Action on, 6 Cyc. 681.

36. Long *v.* Doxey, 50 Ind. 385, holding that the trial court did not err in refusing to give the following instruction: "If you believe from the evidence that the explosion of said boiler resulted from the unskilfulness or negligence of the engineer running said engine, you will find for the defendant, as there is no allegation in the complaint of the want of skill or management, in said factory, of the engineer or any other employe in or about said factory, and hence with that question you have nothing to do."

37. Curran *v.* Cheeseman, 1 Cinc. Super. Ct. (Ohio) 52.

38. Evidence generally see 16 Cyc. 821.

39. *Illinois.*— Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338.

Michigan.— Voigt *v.* Michigan Peninsular Car Co., 112 Mich. 504, 70 N. W. 1103.

New York.— Reiss *v.* New York Steam Co., 128 N. Y. 103, 28 N. E. 24; Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475 [*reversing* 55 N. Y. Super. Ct. 384, 14 N. Y. St. 713].

Tennessee.—Young *v.* Bransford, 12 Lea 232.

West Virginia.— Vieth *v.* Hope Salt, etc., Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410.

United States.— Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136.

See 44 Cent. Dig. tit. "Steam," § 10.

Insurers and inspectors.— In an action against a corporation authorized by statute to insure and inspect steam-boilers, and to issue certificates of inspection, stating the maximum working pressure allowed, which certificates should be accepted in place of a state inspection, the trial court, in charging the jury, held that where a steam boiler, so insured and inspected, exploded, killing a child of the plaintiffs, the burden of proof was upon plaintiffs to show that the certificate accorded to the boiler a greater capacity of resistance than it would safely bear, thus authorizing its use under a dangerous degree of pressure; and that this was the result of negligent inspection. Bradley *v.* Hartford Steam-Boiler Inspection, etc., Co., 19 Fed. 246.

40. Reiss *v.* New York Steam Co., 128 N. Y. 103, 28 N. E. 24 (holding that where defendant, at plaintiff's request, put steam pipes into his building, and connected the pipes with its steam supply pipes, and after the pipes had been tested by defendant and accepted by plaintiffs, the bonnet on the service valve blew off, and the escaping steam damaged plaintiff's goods, the mere fact of the accident was no proof of negligence on the part of defendant); Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475 [*reversing* 55 N. Y. Super. Ct. 384, 14 N. Y. St. 713]; Huff *v.* Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; Vieth *v.* Hope Salt, etc., Co., 51 W. Va.

plaintiff a greater duty than ordinary care, it is held that proof of an explosion is *prima facie* proof of negligence, and casts upon defendant the burden of showing that the explosion was not caused by his negligence.[41] In the United States courts it is held that a steamboat boiler explosion is *prima facie* evidence of negligence and casts upon the owner the burden of disproving negligence.[42] In fact congress has passed an act providing that proof of the explosion of a steamboat boiler shall be *prima facie* evidence of negligence.[43]

96, 41 S. E. 187, 57 L. R. A. 410 (holding that proof of the explosion of steam boilers raised no presumptions of negligence).

Landlord and tenant.— The explosion of a steam boiler, leased as part of the premises, and used by the tenant, is not of itself *prima facie* evidence of the tenant's negligence. Morris Co. *v.* Southworth, 154 Ill. 118, 39 N. E. 1099.

Master and servant.— This rule applies to actions between employees and their employers. Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494; Voigt *v.* Michigan Peninsular Car Co., 112 Mich. 504, 70 N. W. 1103; Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136. See Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217, and Illinois Cent. R. Co. *v.* Houck, 72 Ill. 285, holding that no presumption of negligence arises from the proof of a boiler explosion, in an action between the engine driver and the master.

Inference of negligence.— In an action for damages caused by the explosion of a steam boiler, negligence in the operation of the boiler, or defect in its construction, may be inferred by the jury from the mere fact of the explosion; but a charge to the effect that proof of the mere fact of an explosion raises a presumption of negligence and casts upon defendant the burden of disproving negligence is erroneous. Young *v.* Bransford, 12 Lea (Tenn.) 232.

A contrary rule has, however, been followed in some cases. See Illinois Cent. R. Co. *v.* Phillips, 55 Ill. 194, 49 Ill. 234 (where it was held, in an action for damages by a person in a union depot, injured by an explosion of a locomotive of a railroad, on whose line he did not intend to become a passenger, that the fact of the explosion was presumptive evidence of negligence in the construction or management of the engine, on which the company might be held liable for the injury; that the presumption was not conclusive and might be rebutted by affirmative proof of due care, but that in the absence of such proof the law presumed that the casualty was attributable to some cause against which the company should have provided); John Morris Co. *v.* Burgess, 44 Ill. App. 27 (holding that the fact of the explosion of a boiler causing injury to a person lawfully present, who sustains no relation of employment or duty to the person controlling the boiler, is *prima facie* evidence of negligence in those having the management of the boiler); Corbett *v.* Lymansville Co., (R. I. 1908) 69 Atl. 69 (holding that plaintiff in an action to recover damages for injuries caused by an explosion makes out a *prima facie* case that the explosion was caused by an extraordinary pressure from the steam supplied by showing that the machine adapted to retain steam under pressure, and apparently in good condition and capable of withstanding an ordinary pressure, suddenly exploded with violence).

41. Caldwell *v.* New Jersey Steamboat Co., 56 Barb. (N. Y.) 425 [*affirmed* in 47 N. Y. 282] (holding that the fact of the explosion of the boiler of a steamboat is of itself presumptive evidence of negligence on the part of the owner, and casts on him the burden of showing that the accident was due to causes which human skill and foresight in the construction and management could not foresee or avert); Goll *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 74, 5 N. Y. Suppl. 185 [*affirmed* in 125 N. Y. 714, 26 N. E. 756] (holding that where plaintiff, passing under defendant's elevated road, was injured by a fragment of a cylinder which burst on one of defendant's engines, negligence might be inferred from the nature of the accident, and the question should be allowed to go to the jury). See also Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475; Huff *v.* Austin, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613, in both of which cases the courts, although holding in those cases that no presumption of negligence arose from the mere proof of an explosion, pointed out the distinction between actions for negligence where a contractual relation existed between the parties, and those in which defendant owed to plaintiff no other duty than to use such ordinary care, and said that in the latter class a presumption of negligence would arise on such proof. And *compare* Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494, where it was held that, in an action by an employee for damages received by the explosion of a boiler, the fact of the explosion was not presumptive evidence of negligence, although the presumption was said to be otherwise in an action by a passenger on a railroad.

42. Grimsley *v.* Hankins, 46 Fed. 400; Posey *v.* Scoville, 10 Fed. 140.

When conclusive.— The presumption of negligence, arising from the fact of the explosion of the boiler of a steamboat, becomes conclusive when no hidden defect is shown to have existed, and the boiler is found to have been in an unsafe condition resulting from burning, which must have been done by the carelessness of the engineer. Dunlap *v.* The Reliance, 2 Fed. 249, 4 Woods 420.

Contractual relations between the parties are not necessary in order that the presumption may be raised, it originates from the nature of the act. Rose *v.* Stephens, etc., Transp. Co., 11 Fed. 438, 20 Blatchf. 411.

43. 5 U. S. St. at L. 306, § 13.

(II) *ADMISSIBILITY.*[44] In actions for injuries sustained on account of the use of steam, the ordinary rules of evidence as to admissibility are applicable, and as a general rule any evidence tending to establish or defeat the cause of action is admissible, subject, however, to the restrictions imposed by the law governing the admissibility of evidence.[45]

(III) *WEIGHT AND SUFFICIENCY.* The facts in each action and the general

Not repealed by Act Cong. 1852 (10 U. S. St. at L. 72, § 30), providing that whenever damage should be sustained from explosion of a vessel, the master and owner and the vessel should be liable to every person so injured, if it happens through any neglect to comply with the provisions of law, or through known defects of the steam apparatus. Curran *v.* Cheeseman, 1 Cinc. Super. Ct. (Ohio) 52.

Master and servant.— Connolly *v.* Davidson, 15 Minn. 519, 2 Am. Rep. 154 (holding, in an action where plaintiff was a deck hand on a steamboat, and was injured by the explosion of a boiler of another steamboat while the two boats, operated by defendants, jointly interested in their earnings, were going up the Mississippi side by side, that the statute was applicable); McMahon *v.* Davidson, 12 Minn. 357 (holding that, in an action for damages caused by the explosion of a boiler on a steamboat, on which plaintiff was a deck hand, the statute was applicable.

Passengers.— This statute was held to apply to actions by a passenger, not on the vessel, the boiler of which exploded, but on a vessel going up the river beside it. Fay *v.* Davidson, 13 Minn. 523.

Sufficiency of evidence to overcome presumption.—Where two steamboats were each "doing their best" to reach a certain landing first, and efforts had been made at least twice by the rear boat to pass the one in front, and the engineer of the front boat was restless and constantly watching the rear boat, the boiler on the forward boat exploded, injuring the libellant, and, where the only denials that the boats were racing were made by the pilot and engineer of the damaged boat, and the fact that the boats were racing was testified to by a number of passengers and the pilot of the rear boat, and was not denied by the master of the forward boat, and the assistant engineer and the fireman of the forward boat testified that the boiler was permitted to carry forty pounds of steam, and that when the explosion occurred they were carrying only twenty-three pounds, and the principal engineer could not recollect how much steam they carried, and the master of the boat was silent on that subject and as to the speed of the boat, it was held that the presumption of negligence raised by the statute was not rebutted by the evidence, since the court would not treat the evidence of those who were engaged in racing the boat as sufficient for that purpose. The New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019.

Statutory actions for wrongful death.— This statute is held to apply to actions under a state statute requiring compensation for causing death by wrongful act, neglect, or default. Bradley *v.* Northern Transp. Co., 15 Ohio St. 553.

44. **Admissibility** generally see EVIDENCE, 16 Cyc. 821.

45. See cases cited *infra*, this note.

Admissions made by an engineer in the line of his duty, as to the number of pounds of pressure that he was working under at the time of an explosion, are competent in an action to recover damages for injuries caused by the explosion. Beunk *v.* Valley City Desk Co., 128 Mich. 562, 87 N. W. 793.

The construction of a boiler should be understood by the jury in an action to recover damages for injuries caused by its explosion, and the exclusion of evidence to explain it was thought error. Merryman *v.* Hall, 131 Mich. 406, 91 N. W. 647.

The condition, shortly after an accident, of the instrumentality which caused it is admissible in an action for damages for injuries caused by a boiler explosion, as bearing upon its condition at the time of the accident, or just prior thereto, when it appears that there has been no intervening change. Chicago Great Western R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517.

Expert evidence to the effect that an explosion of a steam boiler was caused by excessive pressure was thought competent in an action for damages for injuries caused by the explosion, where the witness explained the reasons on which his conclusion was based. Beunk *v.* Valley City Desk Co., 128 Mich. 562, 87 N. W. 793.

Experimental tests made after the accident, upon a boiler similar in construction to the one in question, was held to be admissible in evidence for the purpose of showing that defendant was not negligent in the inspection of the boiler which exploded. Bradley *v.* Hartford Steam-Boiler Inspection, etc., Co., 19 Fed. 246.

The impracticability of removing the flues of a boiler for the purpose of ascertaining the condition of the "braces" may be shown in an action for injuries owing to the explosion of a boiler, where the lack of reasonable inspection is relied upon by plaintiff as negligence, since the question is whether ordinarily careful and prudent men would have removed the flues, and the exclusion of evidence of the fact is error. Merryman *v.* Hall, 131 Mich. 406, 91 N. W. 647.

Other explosions.— In an action for injuries sustained through a boiler explosion, where the gravamen of the charge was that defendant had negligently failed to exercise reasonable care in maintaining the boiler in

rules of evidence [46] must be considered to determine the weight to be given to particular facts [47] and their sufficiency to support a cause of action,[48] or their

a reasonably safe condition, evidence of recurring explosions, occurring in the course of its prior use, when the conditions were substantially the same, was held to be admissible as bearing upon its tendency to become impaired by the particular use to which it had been subjected, defendant's knowledge of that tendency, and the precautions which, in the exercise of reasonable or ordinary care, should have been taken thereunder in inspecting and testing it to determine whether it was in reasonably safe condition for use; but such evidence was held not to be admissible for any other purpose. Chicago Great Western R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517.

An ordinance which made it unlawful to operate a tank subject to steam pressure, without having first obtained the inspection and approval thereof, by the inspector of boilers, within one year previous to such use, was held to be competent evidence in an action for death resulting from the bursting of a steam boiler, where the declaration counted upon the ordinance, and the evidence showed that the tank in question had been subject to steam pressure, not only at the time of the accident, but occasionally prior thereto. National Woodenware, etc., Co. *v.* Smith, 108 Ill. App. 477.

Practice of another company in testing boilers.— Chicago Great Western R. Co. *v.* McDonough, 161 Fed. 657, 88 C. C. A. 517, holding that evidence of the practice of another railroad company in testing boilers was admissible in an action for damages for injuries caused by a boiler explosion.

That an engineer was skilful may be proved by defendant, in an action to recover damages for the injuries caused by an explosion of a steam boiler on a steamboat, even if the engineer was not licensed, and a statute made it a crime to permit engineers to operate boilers on steamboats unless they were licensed. Fay *v.* Davidson, 13 Minn. 523.

That an engine had always been considered unsafe by employees using it was thought competent in an action to recover damages caused by the explosion of the engine to show that the person having charge of the machinery knew, or might have known by reasonable diligence, that the engine was not safe. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338.

The verdict of a coroner's jury to the effect that injuries of plaintiff's intestate, in an action to recover for wrongful death caused by a steam boiler explosion, were caused by his own carelessness is competent to show contributory negligence when that defense is pleaded. National Wooden-Ware, etc., Co. *v.* Smith, 108 Ill. App. 477.

Hearsay evidence is incompetent in an action to recover for personal injuries caused by an explosion of an engine boiler, so it is proper for the court to refuse to permit a witness to state the reason he has heard given by an engineer for having quit the engine, the boiler of which exploded. Long *v.* Doxey, 50 Ind. 385.

The number of engineers that had been employed upon an engine within the month preceding an explosion of the boiler of the engine was not thought relevant to show the condition of the boiler, in an action to recover damages caused by the explosion, and the exclusion of evidence thereof was held to be proper. Long *v.* Doxey, 50 Ind. 385.

That steam had been escaping at other places along the pipe, by other persons, at different times, is neither competent nor relevant evidence in an action to recover damages for an injury that occurred by reason of a break in a steam pipe on defendant's premises, which defendant claimed was unknown to her, or any of her employees, at the time the injury occurred. Armstrong *v.* Medbury, 67 Mich. 250, 34 N. W. 566, 11 Am. St. Rep. 585.

That more steam than the rules of the company allowed had been carried by the engineer on a previous trip is not competent evidence in an action to recover for the death of a brakeman caused by an explosion of a steam boiler. Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338.

46. See EVIDENCE, 16 Cyc. 821; NEGLIGENCE, 29 Cyc. 400.

47. Report of a boiler insurance company that its inspectors had made a proper inspection of a particular boiler is not conclusive evidence of that fact; the weight to be given must be determined by the jury. Anderson *v.* Hays Mfg. Co., 207 Pa. St. 106, 56 Atl. 345, 63 L. R. A. 540.

Inference to be drawn from an explosion.— In an action to recover damages for injuries resulting from negligence, the court said: "The fact of an explosion admits of but two inferences, negligence in overstraining a boiler free from defects, or the existence of defects which would deny the proper use of the boiler if it were free from defects." Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 175, 44 N. E. 997, 46 N. E. 471, 3 L. R. A. 293.

Weight given testimony of officers of steamboat whose boilers exploded see The New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019.

48. Bursting of joint in steam pipe.— In an action for recovery of damages for death resulting from the bursting of a joint in a steam pipe where, although the cause of the explosion was entirely speculative, it was plaintiff's theory that it was caused by a defect in the joint itself, and he introduced evidence to show that the joint had been leaking for a long time prior to the accident, and that afterward a crack was discovered therein of such a character that it must have existed for some time, and where there was no evidence to show that the joint was improperly constructed, or that the leakage in itself was a signal of danger, or that an inspection would have revealed the defect, it

sufficiency to establish contributory negligence.[49] Where the evidence of negligence is conflicting, the reviewing court will not disturb a finding of the jury.[50]

d. Trial;[51] Instructions. General instructions in actions for damages for injuries caused by negligence in the use of steam are inappropriate where a special verdict is required.[52] It is only necessary for plaintiff to prove so many acts alleged by him as constitute a cause of action, and so an instruction which places upon him a greater burden is erroneous.[53]

B. Nuisances.[54] While producing and using steam is not a nusiance *per se*,[55] to operate a steamboat the boiler of which has not been inspected as required by statute [56] is a nuisance;[57] and so is the operation of a steam engine on one's premises so as to cause vibration and shaking of the adjoining building to such an extent as to endanger and injure it.[58] In Canada persons using steam on their premises are liable to damages for maintaining a nuisance, if they permit it to injure the adjoining property.[59]

was held that the evidence was not sufficient to establish a cause of action. Voigt *v.* Michigan Peninsular Car Co., 112 Mich. 504, 70 N. W. 1103.

Fire caused by explosion.— In an action for damages for the burning of plaintiff's vessel, it was held the following facts did not establish a cause of action: The vessel was lying at a wharf adjacent to defendant's oil refinery; there was an explosion of a boiler in the refinery, followed by a fire; the burning oil flowed down a pipe, used for pumping oil into the refinery from vessels, into a lighter filled with oil; this exploded, communicating the fire to plaintiff's vessel about twenty feet away. Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475 [*reversing* 44 N. Y. Super. Ct. 384, 14 N. Y. St. 713].

Sufficiency of evidence to charge manufacturers see Beers *v.* Woodruff, etc., Iron Works, 30 Conn. 308.

Scalding.—In an action to recover for being scalded by steam being turned on, while plaintiff was inside a boiler, the evidence was reviewed and held to have justified the trial court in withdrawing the case from the jury, and directing a verdict for defendant. White *v.* Sydney, etc., Coal, etc Co., 25 Nova Scotia 384.

Sufficiency to rebut presumption of negligence see The New World *v.* King, 16 How. (U. S.) 469, 14 L. ed. 1019.

49. Illinois Cent. R. Co. *v.* Houck, 72 Ill. 285, where the evidence is reviewed and thought to establish contributory negligence on the part of plaintiff's intestate.

50. Toledo, etc., R. Co. *v.* Moore, 77 Ill. 217; Chicago, etc., R. Co. *v.* Shannon, 43 Ill. 338; Lipp *v.* Otis, 28 N. Y. App. Div. 228, 51 N. Y. Suppl. 13 [*reversed* on other grounds in 161 N. Y. 559, 76 N. E. 79], holding, in an action for damages from death caused by the escape of steam and boiling water, when it appeared that plaintiff's intestate was employed on a building in which defendants were putting in elevators, that an exhaust pipe connected with the operation of the elevators had been carried above the roof, but at the time of the accident had not been capped, that on the morning of the accident defendants' representative turned on the steam, and boiling water and steam were thrown out of the exhaust pipe, and scalded plaintiff's intestate, and where there was evidence that the exhaust drip valves were all open when the steam was turned on, and, on the other hand, evidence that condensed steam had collected in the exhaust pipe during the previous night, that the drip valves had not been opened for any appreciable length of time, and that the accident was due to negligence in turning on steam without attending to them, that it was for the jury to determine whether the drip valves had been open during the night.

51. Trial generally, see TRIAL.

52. Louisville, etc., R. Co. *v.* Lynch, 147 Ind. 165, 44 N. E. 997, 46 N. E. 471, 34 L. R. A. 293, holding, in an action for damages for injuries caused by an explosion of a steam boiler, where the jury were to return a special, and not a general verdict, that it was not error to refuse to give an instruction to the effect that the fact that a boiler exploded when in use was not evidence of negligence, either as to the inspection or repairing of the engine, or of the management of it.

53. Long *v.* Doxey, 50 Ind. 385, holding that where a complaint for an injury causing death alleged that the injury resulted from the explosion of a boiler, and charged that the boiler was composed of bad iron, was defectively made, and was old, decayed, and worn to unfitness for use, it is error to instruct the jury that they must find that the explosion resulted from all these causes or they must find for defendant.

54. Nuisances see, generally, 29 Cyc. 1143.

55. Marshall *v.* Welwood, 38 N. J. L. 339, 20 Am. Rep. 394; Lozee *v.* Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.

56. U. S. Rev. St. (1878) §§ 4417, 4418, 4427, 4499 [U. S. Comp. St. (1901) pp. 3024, 3060].

57. Van Norden *v.* Robinson, 45 Hun (N. Y.) 567, holding defendant liable for damages caused by a boiler explosion without proof of negligence.

58. McKeon *v.* See, 4 Rob. (N. Y.) 449.

59. Chandler Electric Co. *v.* Fuller, 21 Can Sup. Ct. 337; Fuller *v.* Pearson, 23 Nova Scotia 263.

STEAMBOAT. A vessel propelled by steam.[1] (See STEAM-VESSEL, and Cross-References Thereunder, *post*, p. 1271. Owner of Saloon on River Steamboat Subject to License Only at Home Port, see INTOXICATING LIQUORS, 22 Cyc. 115 note 39.)

STEAMBOAT CHANNEL. The channel upon which commerce on the river by steamboats or other vessels is usually conducted; where boats ordinarily run in carrying the commerce of the river.[2] (See CHANNEL, 6 Cyc. 891; and, generally, NAVIGABLE WATERS, 29 Cyc. 285.)

STEAMBOAT or STEAMSHIP COMPANIES. (Subject to: Mandamus, see MANDAMUS, 26 Cyc. 375. Taxation by State, to What Extent, see COMMERCE, 7 Cyc. 483. See STEAM-VESSEL, and Cross-References Thereunder, *post*, p. 1271; and, generally, CARRIERS, 6 Cyc. 352; CORPORATIONS, 10 Cyc. 1.)

STEAMER. A vessel propelled by steam.[3] (See STEAM-VESSEL, and Cross-References Thereunder, *post*, p. 1271.)

STEAM FARM ENGINE. In a strictly technical sense, a machine consisting in a horizontal boiler with a drop-fire box and a horizontal engine attached to the top of the boiler, mounted on wheels for convenience of transportation, and having the smoke-stack so that it can be lowered when the machine is moved; but, in a broader sense, capable of including any steam engine adapted to farm purposes.[4] (See ENGINE, 15 Cyc. 1048; FARM, 19 Cyc. 456; STEAM, *ante*, p. 1260.)

STEAM LUMP. A certain grade of coal.[5]

STEAM RAILROAD. A term used to describe an ordinary commercial railroad, because the latter, which carries both passengers and freight, is usually propelled by steam.[6] (Steam Railroad: Definition and Nature of "Railroad" or "Commercial Railroad," see RAILROADS, 33 Cyc. 33. See, generally, RAILROADS, 33 Cyc. 1; STEAM, *ante*, p. 1260.)

STEAM SAWMILL. A term which, used to describe insured property, has

1. Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492, 506, so holding within the meaning of 1 N. Y. Rev. St. 684, Sess. Laws (1826), p. 353, §§ 3, 4, providing for lights to be shown by steamboats and adding: "Whether the power be applied in one part of the vessel or another, and whether the vessel uses the auxiliary power of sails, or relies solely upon steam."

Included probably under "boat"; certainly under "vessel" see Tisdell *v.* Combe, 7 A. & E. 788, 796, 2 Jur. 32, 7 L. J. M. C. 48, 3 N. & P. 29, 1 W. W. & H. 5, 34 E. C. L. 412.

Does not include a boat not propelled by its own steam. A canal-boat cannot become a steamboat through being moved by a steam tug. Buckley *v.* Brown, 4 Fed. Cas. No. 2,092, 3 Wall. Jr. 199. See STEAM-VESSEL, *post* note 9.

"Steamboat debts"—Claims against steamboats.—A guarantee against "all claims and demands that may arise or be brought against said steamboat," as explained by evidence of its purpose, may be construed to include "all existing debts contracted for repairs, supplies and running expenses for and on account of the steamboat" for which the debtor is liable, and evidence that "steamboat debts" has, among men dealing with steamboats, a technical meaning which includes only such debts as constitute a lien on the boat, is properly refused, the phrase being neither in the language of the contract nor in itself a technical phrase within the meaning of the rule of evidence applicable to such cases. Moran *v.* Prather, 23 Wall. (U. S.) 492, 502, 23 L. ed. 121.

2. Iowa *v.* Illinois, 147 U. S. 1, 2, 13 S. Ct. 239, 37 L. ed. 55, with reference to the Mississippi river.

3. Campbell *v.* Jimenes, 7 Misc. (N. Y.) 77, 79, 27 N. Y. Suppl. 351, where the word is said to be so defined by the lexicographers in all dictionaries, and it is added: "No matter whether it is a passenger, freight or war vessel."

4. Wilson *v.* Union Mut. F. Ins. Co., 77 Vt. 28, 58 Atl. 799, 800, 801 [*explaining* Wilson *v.* Union Mut. F. Ins. Co., 75 Vt. 320, 325, 55 Atl. 662], holding that the broader definition applies to the term as used in a fire insurance policy to be void on the use of a "steam farm engine" within a certain distance of insured premises.

5. See Dreiske *v.* Jones, etc., Co., 133 Ill. App. 572, 574.

Steam lump includes all the coal except that which passes through a half-inch screen at the time. That part which passes through such screen is called slack, dust, or screenings Coal that is steam lump when put on board cars at the mine remains steam lump after transportation, although in transportation and in loading and unloading, more or less lump coal is necessarily broken up, and converted into slack or dust. "Mine run coal" includes the slack and dust and is the next grade below steam lump. "Lump," "three-quarter lump," "domestic lump" and "Milwaukee lump" are all grades better than "steam lump." Dreiske *v.* Jones, etc., Co., 133 Ill. App. 572, 574.

6. Wilder *v.* Aurora, etc., Electric Traction Co., 216 Ill. 493, 526, 75 N. E. 194.

been held to embrace both mill and apparatus — not only the building but the whole machinery necessary to make it a steam sawmill in all its parts.[7] (See Logging, 25 Cyc. 1547; and, generally, Mills, 27 Cyc. 509; Steam, *ante*, p. 1260.)

Steamship. A ship provided with steam power.[8] (See Steam-Vessel, and Cross-References Thereunder, *post*, this page.)

Steam-Vessel. A vessel propelled by steam; a steamboat or steamship; a steamer.[9] (Steam-Vessel: Negligent Management of, as Cause — Of Carrier's Liability For Injury to Passenger, see Carriers, 6 Cyc. 594; Of Manslaughter, see Homicide, 21 Cyc. 768. Subject to Prohibition Against — Discrimination on Account of Race, see Civil Rights, 7 Cyc. 169; Gaming, see Gaming, 20 Cyc. 891 note 14. Subject to Regulations to Prevent Collision — As to Lights, see Collision, 6 Cyc. 330, 331, 334; As to Signals For Steam Vessels Under Sail by Day, see Collision, 7 Cyc. 339; As to Sound Signals For Passing Steamer, see Collision, 7 Cyc. 367; Ordinary Rules of Navigation, see Collision, 7 Cyc. 325 text and notes, 67, 68; Steering and Sailing Rules, see Collision, 7 Cyc. 349, 352, 353, 358. Subject to Regulations to Promote Commerce — In General, see Commerce, 7 Cyc. 465; Imposing License-Tax, see Commerce, 7 Cyc. 466; Imposing Tonnage Tax, see Commerce, 7 Cyc. 475; Tax on Steamship Company, see Commerce, 7 Cyc. 483; Ticket Regulations, see Commerce, 7 Cyc. 469. For Matters Affecting Steam-Vessels, see, generally, Admiralty, 1 Cyc. 797; Collision, 7 Cyc. 299; Maritime Liens, 26 Cyc. 743; Marine Insurance, 26 Cyc. 538; Navigable Waters, 26 Cyc. 285; Pilots, 30 Cyc. 1607; Piracy, 30 Cyc. 1626; Salvage, 35 Cyc. 716; Shipping, *ante*, p. 1; Steam, *ante*, p. 1260; Towage; Wharves. See also Ship, 35 Cyc. 2015; Steamboat, *ante*, p. 1270; Steamer, *ante*, p. 1270; Steamship, *ante*, this page; Vessel.)

Stearic Acid. A monobasic fatty acid, obtained in the form of white, crystalline scales, soluble in alcohol and ether.[10]

Stearine. One of the products resulting from the manufacture of tallow; a hard substance, or residuum, left after extracting or pressing the oil from the tallow;[11] formed by a combination of glycerine with stearic acid.[12]

Steatite. A variety of talc — soapstone.[13]

Sted, Stede, or **Stethe.** Properly a bank of a river, and many times a place.[14]

7. See Bigler *v.* New York Cent. Ins. Co., 20 Barb. (N. Y.) 635, 636.

8. See Swan *v.* U. S., 19 Ct. Cl. 51, 62, where it is said: "There is a specific sense in which the term 'ship,' applied to sailing vessels, means a craft having three masts, with cross-yards on each mast, fitted to carry square sails on each, in addition to a number of fore and aft sails. When such a craft is provided with steam power as well as sails, she is called a steamship." To the same effect see Fraser *v.* Telegraph Constr. Co., L. R. 7 Q. B. 566, 569, 41 L. J. Q. B. 249.

9. Webster Int. Dict. *sub verb.* "Steam."

Does not include a mass of seventeen canal-boats and two tugs, fastened together, even if that is to be deemed a single vessel either as a "steam vessel under steam" within the sailing rules laid down by the United States statutes, nor a "steam vessel" within the meaning of U S. Rev. St. (1878) § 4233 [U. S. Comp. St. (1901) p. 2893], providing that a steam vessel shall keep out of the way of a sailing vessel even if that be intended to apply to any steam vessel having a tow. Millbank *v.* The A. P. Cranmer, 1 Fed. 255, 256. See Steamboat, *ante*, note 1.

10. Webster Int. Dict. [*quoted* in Propfe *v.* Coddington, 108 Fed. 86, 87, 47 C. C. A. 218].

Characteristics.— "It burns like wax, and is used for making candles" (Century Dict. *sub. verb.* "Stearic" [*quoted* in Propfe *v.* Coddington, 108 Fed. 86, 87, 47 C. C. A. 218]); "melts to an oily liquid at 69° C." (Webster Int. Dict. [*quoted* in Propfe *v.* Coddington, *supra*]).

One of the three "free fat acids" see Tilghman *v.* Proctor, 102 U. S. 707, 709, 26 L. ed. 279 [*quoted* in Tilghman *v.* Proctor, 125 U. S. 136, 138, 139, 8 S. Ct. 894, 31 L. ed. 664].

11. Fairbanks *v.* Spaulding, 19 Fed. 416.

Subject to customs duties.— Classed as a "manufacture of tallow" under U. S. Rev. St. (1878) § 2516, and not as "tallow" under U. S. Rev. St. (1878) § 2504 schedule M. Fairbanks *v.* Spaulding, 19 Fed. 416, where also it was held that neither by judicial notice nor with the aid of such evidence as the case afforded could it be held "grease for soap stock only," under U. S. Rev. St. § 2505.

12. Tilghman *v.* Proctor, 102 U. S. 707, 708, 26 L. ed. 279 [*quoted* in Tilghman *v.* Proctor, 125 U. S. 136, 138, 8 S. Ct. 894, 31 L. ed. 664].

13. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516, 519, 5 Fish. Pat. Cas. 433.

14. 1 Coke Litt. 4*b* [*quoted* in Woodman

STEEL. Iron carbonized with a certain proportion of carbon;[15] formerly, a compound of iron and carbon in which the carbon was present in an amount varying from one-half of one per cent to two per cent, with the property of being tempered by heating and cooling; but now subject to two contending definitions, one which excludes all compounds of iron and carbon which do not have the tempering quality, another, which includes all malleable products produced by fusion, whether or not the percentage of iron is sufficient to give the tempering quality.[16] (Steel: Scheduled as Subject to Tariff — Steel, see CUSTOMS DUTIES, 12 Cyc. 120 text and note 99; Scrap Steel, see CUSTOMS DUTIES, 12 Cyc. 1120 text and note 2; Sheet Steel, see CUSTOMS DUTIES, 12 Cyc. 1120 note 99; Steel Slabs, see CUSTOMS DUTIES, 12 Cyc. 1120 text and note 1.)

STEEL PLATES. A term which covers all things, whether called "plates" or not, which are made of steel and within the definition of "plates."[17]

STEEL STRIPS. A term which has the same meaning in trade and commerce,

v. Lane, 7 N. H. 241, 245 (*quoted* in Barney *v.* Leeds, 51 N. H. 253, 265), reading "sted" for "stede;" defining its derivative "stead," in "homestead" as "place"].

15. U. S. *v.* Ullman, 28 Fed. Cas. No. 16,593, 4 Ben. 547, 556.

16. See Wallace *v.* Noyes, 13 Fed. 172, 177, 21 Blatchf. 83.

"Practically applied by American steel manufacturers to the low carbon article" see Wallace *v.* Noyes, 13 Fed. 172, 177, 21 Blatchf. 83.

"Produced in three ways: First, directly from certain pure iron ores; second, by the decarburization of malleable iron; or, third, by the decarburization of pig iron" see Greenwich Iron & Steel, § 677 [*cited* in Gary *v.* Cockley, 65 Fed. 497, 502, 13 C. C. A. 17].

Under U. S. Tariff Acts.— Under 26 U. S. St. at L. 577, c. 1244 (McKinley Act), par. 150, steel is defined as "all metal produced from iron or its ores, which is cast and malleable, of whatever description or form, without regard to the percentage of carbon contained therein, whether produced by cementation, or converted, cast, or made from iron or its ores, by the crucible, Bessemer, Clapp-Griffiths, pneumatic, Thomas-Gilchrist, basic, Siemens-Martin, or open hearth process, or by the equivalent of either, or by a combination of two or more of the processes, or their equivalents, or by any fusion or other process which produces from iron or its ores a metal either granular or fibrous in structure, which is cast and malleable, excepting what is known as 'malleable-iron castings'" (Gary *v.* Cockley, 65 Fed. 497, 501, 13 C. C. A. 17). Under U. S. Tariff Act March 3, 1883, schedule C, par. 183, setting a rate on steel not specially enumerated, steel was defined as "all metal produced from iron or its ores, of whatever description or form, without regard to the percentage of carbon contained therein, or the particular process of manufacture, either granular or fibrous in structure, which is cast, and which is malleable." Farris *v.* Magone, 46 Fed. 845, 848.

Soft or homogeneous steel is produced by fusion, as distinguished from that produced by cementation, and is manufactured by the crucible process and by the Bessemer and Siemens-Martin processes. All steel is homogeneous in fact, but the term has been applied to this kind on account of its especial uniformity of structure. It is low in carbon and does not harden and temper in water, and in that respect is materially unlike the steel that was formerly manufactured, and has been refused the name by many metallurgists. Wallace *v.* Noyes, 13 Fed. 172, 175, 21 Blatchf. 83.

"Form or shape of steel" as used in the U. S. Tariff Act July 24, 1897 (30 U. S. St. at L. 161, c. 11, schedule C, par. 135 [U. S. Comp. St. (1901) p. 1638]) does not include everything made of steel; it must be construed by the rule of *ejusdem generis*, with regard to the kinds of things previously enumerated in the paragraph. U. S. *v.* Buehne Steel Wool Co., 154 Fed. 93, 93 [*reversed* on grounds not adverse to the proposition in 159 Fed. 107, 86 C. C. A. 297, and *followed* in U. S. *v.* Sellers, 160 Fed. 518, 519].

"Sheet steel.— In commerce, a product of steel rolled hot in sheet mills especially adapted for the purpose, between rolls running so slowly that the sheets cannot be run over twelve feet in length, the sheets not less than eight inches wide. Boker *v.* U. S., 124 Fed. 59, 60, 59 C. C. A. 425; U. S. *v.* Wetherell, 65 Fed. 987, 988, 13 C. C. A. 264.

"Sheet steel in strips" (dutiable under U. S. Tariff Act Aug. 27, 1894, § 1, schedule C, par. 124), distinguished from "steel strips" or "cold rolled-steel" (dutiable under par. 122 of the same schedule as included in "steel in all forms and shapes not specially provided for") see Boker *v.* U. S., 124 Fed. 59, 60, 61, 59 C. C. A. 425. But under U. S. Tariff Act October 1, 1890, par. 38, setting duty on "flat steel wire" or "sheet steel in strips" "whether drawn through dies or rolls," the distinction did not exist. U. S. *v.* Wetherell, 65 Fed. 987, 991, 13 C. C. A. 264 [*explained* in Boker *v.* U. S., *supra*].

17. U. S. *v.* Sellers, 160 Fed. 518, so holding within the meaning of the Tariff Act July 24, 1897, c. 11, § 1, par. 135, and (as to "polished steel plates") par. 141.

"These plates are 'sheets of metal of uniform thickness and even surface' (Century Dictionary); and they are also 'pieces of metal extended or flattened to an even surface, with a uniform thickness' (Webster's Dictionary)." U. S. *v.* Sellers, 160 Fed. 518, 519.

and as used in the Tariff Act, as in common speech, and includes all things made of steel and within the definition of "strip."[18] (Steel Strips: Dutiable, see CUSTOMS DUTIES, 12 Cyc. 1120 note 99.)

STEEL TUBES. A term which has been held to include bottle-shaped vessels of steel, about four feet long and eight inches in diameter with one end permanently closed and the other tapered to a neck.[19]

STEEL WOOL. A product manufactured from steel wire by a patented process, whereby, by means of a toothed knife, the steel is shaved into filaments of varying degrees of fineness, constituting in that form a finished commercial article, used chiefly for polishing hardwood floors and furniture.[20]

STEELY IRON. A term applied to a grade of mild or soft steel, which approaches so closely in physical and chemical characteristics the metal known as malleable wrought iron as to be difficult to distinguish the one from the other; or a grade of wrought iron so nearly approaching steel as to be almost undistinguishable.[21]

STEER. A young male of the ox kind, or common ox;[22] especially a castrated taurine male from two to four years old.[23] In popular parlance, equivalent to "ox," a castrated taurine male that has been brought under the yoke.[24] In the plural, sometimes employed to refer to working cattle, cattle that have worked.[25] (See BULL, 6 Cyc. 167; CALF, 6 Cyc. 265; CATTLE, 6 Cyc. 702; COW, 11 Cyc. 1185; and, generally, ANIMALS, 2 Cyc. 288.)

STEERER. In slang vocabulary, a person of plausible manners and address who gains the confidence of the person intended to be fleeced.[26] (See CONFIDENCE GAME, 8 Cyc. 564.)

18. Magone *v.* Vom Cleff, 70 Fed. 980, 981, 17 C. C. A. 549, defining the term as used in U. S. Tariff Act March 3, 1883, § 177.

Distinguished from "sheet steel in strips" see Boker *v.* U. S., 124 Fed. 59, 61, 59 C. C. A. 425.

As "cold-rolled steel" see Boker *v.* U. S., 124 Fed. 59, 61, 59 C. C. A. 425.

19. Downing *v.* U. S., 99 Fed. 423 [*affirmed* without opinion in 105 Fed. 1005, 44 C. C. A. 686, and *followed* against the personal opinion of the court, in U. S. *v.* Liquid Carbonic Co., 160 Fed. 455, 456, 87 C. C. A. 671, where the fuller report of the case appears in the opinion], so holding within the Tariff Act of 1894, par. 30.

20. Buehne Steel Wool Co. *v.* U. S., 159 Fed. 107, 109, 86 C. C. A. 297 [*reversing* 154 Fed. 93], classing the product, when actually manufactured from steel wire, as "articles manufactured from steel wire," under U. S. Tariff Act July 24, 1897, c. 11, § 1, schedule C, par. 137, and not under par. 135, as "steel in all forms and shapes not specially provided for."

21. Gary *v.* Cockley, 65 Fed. 497, 503, 13 C. C. A. 17.

Steely irons, according to testimony received, are products of iron or very mild steel containing from about seven tenths of one per cent to two tenths of one per cent of carbon, and in this respect occupying a middle ground between hard steel and wrought iron. Farris *v.* Magone, 46 Fed. 845, 847, statement of facts.

It is an unscientific term which, according to the opinion of an expert, should not be used except in the absence of data, when there is doubt as to whether the substance is properly steel or wrought iron. Gary *v.* Cockley, 65 Fed. 497, 501, 502, 503, 13 C. C. A. 17.

22. Webster Dict. [*quoted* in Martinez *v.* Territory, 5 Ariz. 55, 44 Pac. 1089].

23. Webster Dict. [*quoted* in Martinez *v.* Territory, 5 Ariz. 55, 44 Pac. 1089; Milligan *v.* Jefferson County, 2 Mont. 543, 546].

24. Watson *v.* State, 55 Ala. 150.

Does not include "cow" (Territory *v.* Martinez, 5 Ariz. 55, 44 Pac. 1089); or "bull" (State *v.* Royster, 65 N. C. 539).

"Calf" whether included see, on the one hand, Milligan *v.* Jefferson County, 2 Mont. 543, 546 (holding that "steer" does not include "calf" and that the specification in Mont. St. c. 85, §§ 4, 15, of "calves" as taxable, is not confined by the specification, in § 16, of "Heifers and steers between one and two years old" to calves not less than one year old); on the other hand, Mundell *v.* Hammond, 40 Vt. 641, 644 (holding that the word as used in a provision for exemption from attachment and execution includes calves some months less than a year old, they being "calf steers" or "steer calves," and expressing the opinion that an animal may be too old to be a steer, but cannot be too young).

Not a variance from "'animal of the cow kind'" (Watson *v.* State, 55 Ala. 150); "neat cattle" (State *v.* Lange, 22 Tex. 591; Arrington *v.* State, 13 Tex. App. 551, 553. See also State *v.* Lawn, 80 Mo. 241, 242, where the language of the indictment was "certain cattle, to wit one steer"); "cattle" (Robertson *v.* State, 1 Tex. App. 311, 314); "cattle, or other beast" (State *v.* Abbott, 20 Vt. 537, 538).

25. Wessels *v.* Territory, McCahon (Kan.) 100, 102.

26. Century Dict. [*quoted* in People *v.* Simmons, 125 N. Y. App. Div. 234, 237, 109 N. Y. Suppl. 190].

STENCIL. A thin plate or sheet of any substance in which a figure, letter, or pattern is formed by cutting completely through the plate.[27]

STENOGRAPHER. One who is skilled in stenography;[28] an officer of the court, charged with the duty of correctly reporting all the proceedings on the trial;[29] a sworn officer of the court, whose duty it is to take full stenographic notes of all pleadings, including the testimony, rulings, and charge of the court, and every trial had thereat.[30] (Stenographer: Court, as Ministerial Officer, see COURTS, 11 Cyc. 720. Court, as Witness — To Former Evidence of Witness, see EVIDENCE, 16 Cyc. 1110 text and note 9; To Former Evidence of Witness Now Beyond Jurisdiction, in Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 96 note 14; When in Court and Compellable to Testify From Notes, Failure to File Transcript of Evidence There Contained, Not Ground For Continuance, see CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 170 note 32. Court, Certificate by — That All the Evidence Is Preserved on the Record, see APPEAL AND ERROR, 3 Cyc. 82 note 73; That Transcript Bill or Case Is Complete, Not Within Province of Stenographer, see APPEAL AND ERROR, 2 Cyc. 107 note 84. Court, Employment — By County, see COUNTIES, 11 Cyc. 473–474 text and note 14; In Bankruptcy, see BANKRUPTCY, 5 Cyc. 274, 385 note 30; In Bankruptcy, Compensation, see BANKRUPTCY, 5 Cyc. 274 text and note 12; In Criminal Trial Appointment and Services, see CRIMINAL LAW, 12 Cyc. 521. Court, Failure of to Transcribe Evidence No Excuse For Failure of Party to File Transcript, see APPEAL AND ERROR, 3 Cyc. 129 note 94. Court, Fees as Costs — In General, see COSTS, 11 Cyc. 125; In Admiralty, see ADMIRALTY, 1 Cyc. 911 note 20; In Coroner's Proceeding, see CORONERS, 9 Cyc. 993 note 19; Liability of Attorney For Costs in General, see ATTORNEY AND CLIENT, 4 Cyc. 922; On Appeal, in General, see COSTS, 11 Cyc. 232; On Appeal in Criminal Case, Defendant Appellant in Some Jurisdictions Exempt From Paying, see CRIMINAL LAW, 12 Cyc. 826; On Appeal of Indigent Prisoner, Minutes Chargeable to County, see COSTS, 11 Cyc. 285 note 84; On Motion For New Trial, Expense of Transcript of Evidence, see COSTS, 11 Cyc. 252–253 text and note 70. Court, Notes as Evidence — Not Public Records Within Meaning of Rule For Admission in Evidence, see EVIDENCE, 17 Cyc. 349; Of Proceedings at Former Trial, see EVIDENCE, 16 Cyc. 1108; Transcript of Testimony Inadmissible, Though Certified, in Absence of Statute Providing For Certification of Judicial Proceedings, see EVIDENCE, 17 Cyc. 329. Court, Report as Part of Record — Report as Extended From Short-Hand Note Not Part of Record in Absence of Law Allowing It to Be Filed as Such, see APPEAL AND ERROR, 2 Cyc. 1023 note 5; Report by Unsworn Stenographer Not Vitiating Bill of Exceptions in Which It Is Incorporated, see APPEAL AND ERROR, 3 Cyc. 28 note 25; Reporter's Note as Substitute For Bill of Exceptions, see APPEAL AND ERROR, 2 Cyc. 1091; Report in Full Containing All Questions and Answers Not a Condensed Brief of the Evidence, see APPEAL AND ERROR, 3 Cyc. 91 note 21; Report Not Part of Record Unless Incorporated in the Case or Bill of Exceptions Signed and Settled by Judge, see APPEAL AND ERROR, 3 Cyc. 57; Report of Evidence Not a Part of Bill of Exceptions Unless Incorporated Therein, see APPEAL AND ERROR, 3 Cyc. 27; Report Prevailing in Conflict With Allegation in Bill of Exceptions, see APPEAL AND ERROR, 3 Cyc. 154 note 11; Transcript of Minutes Embracing Evidence as Extended and Directed to Be Annexed to Judgment-Roll Not Part of Record, see APPEAL AND ERROR, 2 Cyc. 1075 note 3. Court, Showing on Record as to Choice and Swearing of, see APPEAL AND ERROR, 2 Cyc. 1040 note 64. Court, Validity of Act Imposing Expenses of Criminal Court Stenographer on City, see CONSTITUTIONAL LAW, 8 Cyc. 784 note 69. Distinguished From Clerk, see CLERK,

27. A. B. Dick Co. *v.* Fuerth, 57 Fed. 834, 836.

28. Webster Dict. [*quoted* in *In re* Appropriations, 25 Nebr. 662, 670, 41 N. W. 643].

A statute requiring the evidence to be taken in writing does not demand a stenographer. Benton Harbor Terminal Co. *v.* King, 131 Mich. 377, 380, 91 N. W. 641.

29. Tallmadge *v.* Hooper, 37 Oreg. 503, 510, 61 Pac. 349, 1127.

30. Rynerson *v.* Allison, 30 S. C. 534, 538, 9 S. E. 656, adding: "But it will be observed

7 Cyc. 191 note 56. For Attorney-General, see ATTORNEY-GENERAL, 4 Cyc. 1027. For Court Commissioner, see COURT COMMISSIONERS, 11 Cyc. 626 note 26. For Grand Jury — Effect of Presence Before Grand Jury, see GRAND JURIES, 20 Cyc. 1341; INDICTMENTS AND INFORMATIONS, 22 Cyc. 422 note 98; Extra Compensation to Grand Juror Acting as Stenographer, see GRAND JURIES, 20 Cyc. 1357 note 75. Whether Subject to Privilege as to Contents of Libelous Letter Dictated, see LIBEL AND SLANDER, 25 Cyc. 400. See STENOGRAPHIC TRANSCRIPT, *post*, this page; STENOGRAPHY, *post*, this page.)

STENOGRAPHIC TRANSCRIPT. A term which, as used in a certain statute,[31] applies to stenographic notes transcribed, as distinguished from the mere original notes.[32] (See STENOGRAPHER, and Cross-References Thereunder, *ante*, p. 1274.)

STENOGRAPHY. The art of writing shorthand by using abbreviations or characters for whole words;[33] the generic term for shorthand writing.[34] (See STENOGRAPHER, and Cross-References Thereunder, *ante*, p. 1274.)

STEPBROTHER. Strictly, a brother related by marriage only, without common blood.[35] (See STEPSON, and Cross-References Thereunder, *post*, p. 1276.)

STEPCHILDREN. See STEPSON, *post*, p. 1276.

STEPDAUGHTER. See STEPSON, *post*, p. 1276.

STEPFATHER. The husband of one's mother who is not one's father;[36] as generally understood, the husband of one's mother by a subsequent marriage.[37] (Stepfather: Incest by, With Stepdaughter, see INCEST, 22 Cyc. 46 text and note 28; PARENT AND CHILD, 29 Cyc. 1668 note 20. Naturalization of, as Conferring Citizenship on Alien Minor Stepchild, see ALIENS, 2 Cyc. 118. Profanity of, Affecting Mother's Guardianship, see GUARDIAN AND WARD, 21 Cyc. 55 note 96. Relation of to Stepdaughter, Within Statutes Against Incest, Ended by Termination of Marriage Relation with Mother, see PARENT AND CHILD, 29 Cyc. 1668 note 20. Right of — Of Action For Seduction of Stepchild, see SEDUCTION, 35 Cyc. 1303; Of Chastisement of Stepchild, see ASSAULT AND BATTERY, 3 Cyc. 1052 note 83; PARENT AND CHILD, 29 Cyc. 1667 note 20. Support by, of Stepchildren Not a Duty, see HUSBAND AND WIFE, 21 Cyc. 1152. See STEPSON, and Cross-References Thereunder, *ante*, p. 1276.)

STEP IN THE PROCEEDINGS. Such as to preclude application for a stay within the meaning of the English Arbitration Act,[38] something in the nature of an application to the court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind.[39]

that this must be done 'under the directions of the presiding judge of the court.'"

31. 29 Tex. Acts, pp. 219, 221, c. 112, §§ 3, 4, 5, where it appears by the context that the mere notes as taken at the trial are not contemplated.

32. See Mundine *v.* State, 50 Tex. Cr. 93, 96, 97 S. W. 490.

33. Webster Dict. [*quoted* in *In re* Appropriations, etc., 25 Nebr. 662, 670, 41 N. W. 643].

As derived from the Greek the term means, "To write in narrow compass." Cummings *v.* Armstrong, 34 W. Va. 1, 7, 11 S. E. 742.

34. Cummings *v.* Armstrong, 34 W. Va. 1, 7, 11 S. E. 742, where it is said that the term is so used in Pennsylvania law, and that its use in this sense is sanctioned by custom and the authority of Webster and other lexicographers.

35. Weiss' Estate, 1 Montg Co. Rep. (Pa.) 209, 210.

Held to include half-brother see Weiss' Estate, 1 Montg. Co. Rep. (Pa.) 209, 210, construing will.

36. Wharton L. Dict. [*quoted* in Thornburg *v.* American Strawboard Co., 141 Ind. 443, 446, 40 N. E. 1062, 50 Am. St. Rep. 334 (*quoted* in Citizens' St. R. Co. *v.* Cooper, 22 Ind. App. 459, 53 N. E. 1092, 1094, 72 Am. St. Rep. 319)].

One marrying mother of illegitimate included see Lipham *v.* State, 125 Ga. 52, 53 S. E. 817, 818, 114 Am. St. Rep. 181 [*disapproving* a *dictum* to the contrary in Thornburg *v.* American Strawboard Co., 141 Ind. 443, 445, 40 N. E. 1062, 50 Am. St. Rep. 334 (*quoted obiter* with approval in Citizens' St. R. Co. *v.* Cooper, 22 Ind. App. 459, 53 N. E. 1092, 1094, 72 Am. St. Rep. 319)].

37. Thornburg *v.* American Strawboard Co., 141 Ind. 443, 445, 40 N. E. 1062, 50 Am. St. Rep. 334 [*quoted* in Citizens' St. R. Co. *v.* Cooper, 22 Ind. App. 459, 53 N. E. 1092, 1094, 72 Am. St. Rep. 319].

38. Arbitration Act, 1899 (52 & 53 Vict. c. 49, § 4).

39. Ives *v.* Willans, [1894] 2 Ch. 478, 484, 63 L. J. Ch. 521, 70 L. T. Rep. N. S. 674, 7 Reports 243, 42 Wkly. Rep. 483 [*quoted* in

STEPSISTER. A sister related by marriage only, without common blood.[40] (See STEPSON, and Cross-References Thereunder, *post*, this page.)

STEPSON or STEPDAUGHTER. The child of a wife or husband by a former marriage.[41] (Stepson or Stepdaughter: In General, see PARENT AND CHILD, 29 Cyc. 1667. Descent and Distribution of Estate of, see DESCENT AND DISTRIBUTION, 14 Cyc. 43. Not Included in Word "Children," see CHILDREN, 7 Cyc. 125 text and note 39. Not Part of Stepfather's "Family," see HUSBAND AND WIFE, 21 Cyc. 1152 text and note 76. See also STEPBROTHER, *ante*, p. 1275; STEPFATHER, and Cross-References Thereunder, *ante*, p. 1275; STEPSISTER, *ante*, this page.)

STEREOPTICON. A highly developed form of magic lantern.[42] (Stereopticon: Exhibition on Sunday, see SUNDAY.)

STERILITY. BARRENNESS,[43] *q. v.* See also MARRIAGE, 26 Cyc. 902 note 56. (Sterility: As Impotence — Existing at Marriage as Ground For Divorce, see DIVORCE, 14 Cyc. 596, 664 note 96; Existing at Marriage, Concealment of as Fraud, see MARRIAGE, 26 Cyc. 902 note 56. Supervening After Marriage, see MARRIAGE, 26 Cyc. 902 note 57. See also IMPOTENCY, 21 Cyc. 1742.)

STERLING MONEY. A term to be construed with reference to place.[44] (Sterling Money: Note Payable in, see COMMERCIAL PAPER, 7 Cyc. 592 note 52. Pound Sterling, see MONEY, 27 Cyc. 817; POUND, 31 Cyc. 1030 text and note 29.)

STET. A word which, written on the margin, is the printer's usual mode of indicating that words stricken out are to be regarded as still in the paper.[45]

STETHE. See STED, *ante*, p. 1271.

STEVEDORE. One of a class of laborers at the ports, whose business it is to load and unload vessels;[46] one whose occupation it is to load and unload vessels in port.[47] (Stevedore: Compensation For Services — In General, see SEAMEN,

Zalinoff *v.* Hammond, [1898] 2 Ch. 92, 94, 67 L. J. Ch. 370, 78 L. T. Rep. N. S. 456].

Includes attendance on summons for directions without objection or request for stay (County Theatres, etc., *v.* Knowles, [1902] 1 K. B. 480, 482, 71 L. J. K. B. 351, 86 L. T. Rep. N. S. 132 [*followed* in Richardson *v.* Le Maitre, [1903] 2 Ch. 222, 72 L. J. Ch. 799, 88 L. T. Rep. N. S. 626; Steven *v.* Buncle, [1902] W. N. 44]); taking out a summons and obtaining an order for further time for delivering defense (Ford's Hotel Co. *v.* Bartlett, [1896] A. C. 1, 4, 67 L. J. Q. B. 166, 73 L. T. Rep. N. S. 665, 44 Wkly. Rep. 241); taking out a summons to a counter-claim but as to whether this constitutes a step if the counter-claim be afterward amended the court was evenly decided (Chappell *v.* North, [1891] 2 Q. B. 252, 256, 257, 60 L. J. Q. B. 554, 65 L. T. Rep. N. S. 23, 40 Wkly. Rep. 16); obtaining an order for interrogatories (Chappell *v.* North, *supra*).

Does not include the mere filing of affidavits in defense to the motion for a receiver (Zalinoff *v.* Hammond, [1898] 2 Ch. 92, 94, 67 L. J. Ch. 370, 78 L. T. Rep. N. S. 456); notice by defendant requiring a statement of claim (Ives *v.* Willans, [1894] 2 Ch. 478, 483, 63 L. J. Ch. 521, 70 L. T. Rep. N. S. 674, 7 Reports 243, 42 Wkly. Rep. 483); asking for time by letter (Brighton Mar. Palace, etc. *v.* Woodhouse, [1893] 2 Ch. 486, 488, 62 L. J. Ch. 697, 68 L. T. Rep. N. S. 669, 3 Reports 565, 41 Wkly. Rep. 488); merely obtaining from party a series of consents to extension of time (Chappell *v.* North, [1891] 2 Q. B. 252, 256, 60 L. J. Q. B. 554, 65 L. T. Rep. N. S. 23, 40 Wkly. Rep. 16).

40. Weiss' Estate, 1 Montg. Co. Rep. (Pa.) 209, 210.

Held to include half-sister see Weiss' Estate, 1 Montg. Co. Rep. (Pa.) 209, 210, construing will.

41. Lipham *v.* State, 125 Ga. 52, 53 S. E. 817, 114 Am. St. Rep. 181, where the word is said to be so defined with unanimity by dictionaries and text-books.

42. Webster New Int. Dict.

43. Standard Dict.

44. See Taylor *v.* Booth, 1 C. & P. 286, 12 E. C. L. 172, where it is said: "If a man draws a bill in 'Ireland' upon 'England,' and states that it is for sterling money, it must be taken to mean sterling in that part of the united kingdom where it is payable."

An award payable in "sterling money of Great Britain" is not open to objection, although made in New Jersey. In so holding it was said: "As to the objection . . . there might be something in it, if this were a judgment. . . . The judgments of this court must, to be sure, be entered in the current money of the state." Warder *v.* Whitall, 1 N. J. L. 84.

45. See Beach *v.* O'Riley, 14 W. Va. 55, 62.

46. The Senator, 21 Fed. 191.

47. Webster Dict. [*quoted* in Rankin *v.* Merchants', etc., Transp. Co., 73 Ga. 229, 232, 54 Am. Rep. 874, adding: "In other words, a contractor or jobber for special business, ready to be employed by anybody on his line"].

Independent contractor.— Stevedore so held see MASTER AND SERVANT, 26 Cyc. 1549 text and note 30. *Contra*, see The Elton, 83 Fed. 519, 521, 31 C. C. A. 496.

35 Cyc. 1205; For Salvage, see SALVAGE, 35 Cyc. 716; Subject of Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 833. Employment in General, see SEAMEN, 35 Cyc. 1183. Injuries to, see SHIPPING, *ante*, p. 172. Lien For Services, see MARITIME LIENS, 26 Cyc. 751; SEAMEN, 35 Cyc. 1230. Negligence of, see SHIPPING, *ante*, p. 165.)

STEWARD. A man employed in the place or stead of another, the word generally denoting a principal officer within his jurisdiction;[48] a fiscal agent of certain bodies, as the steward of a congregation in the Methodist Church, and the like.[49] In maritime parlance, one on a vessel who has the charge of distributing food and drink, or of waiting on the officers and passengers;[50] a waiter on board a ship or other vessel.[51] (Steward: Limit of Power to Bind Vessel or Owners by Contract as Agent, see MARITIME LIENS, 26 Cyc. 777 note 42.)

STICK. A small shoot, branch, separated as by cutting from a tree or shrub; any long and comparatively slender piece of wood, whether in natural form or shaped with tools; a rod; a wand; a staff.[52]

STICKER. A recognized device used to insert the name of a candidate upon a ballot.[53]

STIFFENING NOTE. A permit issued by the collector or controller of a port to the master of a ship, to receive heavy goods for lading before the whole of the inward cargo is discharged, in order to stiffen or ballast the ship.[54]

STIFLING COMPETITION. In General, see MONOPOLIES, 27 Cyc. 888. Agreement in Restraint of Trade, see CONTRACTS, 9 Cyc. 523. Chilling the Bidding, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1044.

STIFLING PROSECUTION. Agreeing, in consideration of receiving a pecuniary or other advantage, to abstain from prosecuting a person for an offense not giving rise to a civil remedy.[55] (Stifling Prosecution: In General, see COMPOUNDING FELONY, 8 Cyc. 490. Compounding Offense as Subject of Illegal Contract, see CONTRACTS, 9 Cyc. 505. Proof of Literal Promise to Stifle Not Necessary to Conviction, see COMPOUNDING FELONY, 8 Cyc. 497 text and note 39.)

STILL. As a noun, a vessel, boiler, or copper, used in the distillation of liquids; specifically, one used for the distillation of alcoholic liquors; a retort; a name sometimes applied to the whole apparatus used in vaporization and condensation.[56] (See DISTILLATION, 14 Cyc. 521; DISTILLED SPIRITS, 14 Cyc. 521; DISTILLER, 14 Cyc. 522; DISTILLERY, 14 Cyc. 522.)

48. Black L. Dict.

"A steward de facto is no other, than he who has the reputation of being steward, and yet is not a good steward in point of law." Parker *v.* Kett, 1 Ld. Raym. 658, 660, 91 Eng. Reprint 1338.

49. Webster Dict.

"Steward" of a church organization, does not import such ownership or control of real property as would render such steward liable for death arising from negligence in failure to keep fences in proper repair. Foppiano *v.* Baker, 3 Mo. App. 560.

50. Webster Dict.

Status—"A steward . . . is generally regarded as one of the crew. . . . There is nothing in his title which *ex vi termini* gives him more implied authority to bind the vessel or its owners for supplies than any other member of the crew, and they have none." Durando *v.* New York, etc., Steam-Boat Co., 4 N. Y. Suppl. 386, 387, 23 Abb. N. Cas. 56. *Compare* MARITIME LIENS, 26 Cyc. 777 note 42.

51. Webster Dict. [*quoted* in Durando *v.* New York, etc., Steam-Boat Co., 4 N. Y. Suppl. 386, 387, 23 Abb. N. Cas. 56].

52. Webster Dict. [*quoted* in Wilder *v.* Great Western Cereal Co., 130 Iowa 263, 267, 104 N. W. 434].

Sticks for umbrellas, parasols or sunshades, and walking canes see U. S. *v.* Borgfeldt, 124 Fed. 304.

Sawed sticks.—"Sticks" like "timber," used in a letter revoking an order, was held to be used in the sense of "sawed sticks of timber," as distinguished from "logs." Cincinnati, etc., R. Co. *v.* Dickey, 30 Ohio St. 16, 19.

"Wood is ordinarily meant, and one would not infer, save under peculiar circumstances, that by the word 'stick' a piece of iron was intended." Wilder *v.* Great Western Cereal Co., 130 Iowa 263, 267, 104 N. W. 434.

53. See De Walt *v.* Bartley, 146 Pa. St. 529, 544, 24 Atl. 185, 28 Am. St. Rep. 814, 15 L. R. A. 771.

54. See Pierson *v.* Ogden, 19 Fed. Cas. No. 11,160.

55. Black L. Dict.

56. Webster Int. Dict.

Distinguished from "distillery" see U. S. *v.* Blaisdell, 24 Fed. Cas. No. 14,608, 3 Ben. 132, 138.

STILLBORN CHILD. In General, see ABORTION, 1 Cyc. 170; CONCEALMENT OF BIRTH OR DEATH, 8 Cyc. 544. As Subject of Bastardy Proceedings, see BASTARDS, 5 Cyc. 649 note 41. Never in Existence For Purposes of Inheritance or Distribution, see DESCENT AND DISTRIBUTION, 14 Cyc. 39 text and note 95.

STILL WINE. A fermented product of the juice of grapes or other fruit, which improves with age, drunk for purposes of exhilaration, and capable of producing intoxication.[57]

STIPEND. As a noun, the requital of some supposed service, paid yearly or at even portions of a year.[58] As a verb, to pay by settled stipend or wages; put upon or provide with a stipend.[59] (See SALARY, and Cross-References Thereunder, 34 Cyc. 1826; WAGES.)

STIPULATE. To make an agreement, to bargain, to contract, to settle terms.[60] (See STIPULATIONS, *post*, p. 1279.)

STIPULATED DAMAGES. See DAMAGES, 13 Cyc. 89.

STIPULATION BOND. In admiralty, an instrument, securing a stipulation for the return of property in action, being a security given to the court, and a pledge or substitute for the property.[61] (See ADMIRALTY, 1 Cyc. 871–876.)

Still house as statutory subject of burglary see State *v.* Sufferin, 6 Wash. 107, 108, 32 Pac. 1021.

57. See U. S. *v.* Komada, 162 Fed. 465, 468, 89 C. C. A. 385, where *sake* is held dutiable on the basis of still wine, as a "similar" article, within the meaning of Dingley Tariff Act, 30 U. S. St. at L. 205, c. 11, § 7 [U. S. Comp. St. (1901) p. 1693].

Distinguished from, but similar to "sake" see U. S. *v.* Komada, 162 Fed. 465, 468, 89 C. C. A. 385.

58. Mangam *v.* Brooklyn, 98 N. Y. 585, 598, 50 Am. Rep. 705, defining "stipends" and "salaries" alike.

Subject of contract between the parties see Mangam *v.* Brooklyn, 98 N. Y. 585, 598, 50 Am. Rep. 705.

Does not include a balance due on a contract to build a bridge. Morse *v.* Robertson, 9 Hawaii 195, 197.

59. Century Dict. [*quoted* in Morse *v.* Robertson, 9 Hawaii 195, 197, misquoting "provide" as "provided"].

60. Campbellsville Lumber Co. *v.* Hubbert, 112 Fed. 718, 724, 50 C. C. A. 435 [*affirmed* in 191 U. S. 70, 24 S. Ct. 28, 48 L. ed. 101].

"Stipulated" held to mean "fixed" see De Braam *v.* Ford, [1900] 1 Ch. 142, 148, 69 L. J. Ch. 82, 81 L. T. Rep. N. S. 568, 7 Manson 28, 16 T. L. R. 69.

61. See The New York, 104 Fed. 561, 564, 44 C. C. A. 38, where the term is so applied, and where the court said: "Such a bond is not mere personal security given to the plaintiff but a security given to the court."

STIPULATIONS

Edited as to English and Canadian authorities by Hon. Mr. Justice ANGLIN, of the Supreme Court of Canada

CROSS-REFERENCES

For Matters Relating to:

Abatement and Revival, see ABATEMENT AND REVIVAL, 1 Cyc. 137.

Amendment and Supplying Deficiencies in Transcript on Appeal, see APPEAL AND ERROR, 3 Cyc, 147.

Authority of Attorney to Make Stipulations, see ATTORNEY AND CLIENT, 4 Cyc. 937.

Disability of Parties Making or Adding by Stipulation to Record of Court Upon Appeal, see APPEAL AND ERROR, 2 Cyc. 1075.

Estoppel of Stipulator to Take Position Inconsistent With Stipulation, see ESTOPPEL, 16 Cyc. 798.

For Matters Relating to — (*continued*)
Stipulation:
As Constituting General Appearance, see APPEARANCES, 3 Cyc. 510.
As Evidence of Statement Contained Therein, see EVIDENCE, 16 Cyc. 973.
As to Issues and Proof in Ejectment, see EJECTMENT, 15 Cyc. 123.
As to Powers of Assignee For the Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 185.
By Plaintiff Waiving Right to Hold Defendant in Bail, see ARREST, 3 Cyc. 915.
Extending Time For Filing Transcript on Appeal, see APPEAL AND ERROR, 3 Cyc. 121.
For Agricultural Lien, see AGRICULTURE, 2 Cyc. 61.
For Costs, see COSTS, 11 Cyc. 99.
For Entry of Judgment After Verdict, as Not Waiving Right to Appeal, see APPEAL AND ERROR, 2 Cyc. 657.
For Increased Rate of Interest as Penalty For Non-Payment as Non-Enforceable in Equity, see EQUITY, 16 Cyc. 176.
In Admiralty, see ADMIRALTY, 1 Cyc. 871.
In Assignment For Benefit of Creditors Imposing Conditions Upon Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 190.
That Chose in Action Assigned Shall Carry With It Security Incidental to the Chose, see ASSIGNMENTS, 4 Cyc. 72.
To Defeat or Confer Jurisdiction on Appellate Court Where Case Is or Is Not One Within Appellate Jurisdiction, see APPEAL AND ERROR, 2 Cyc. 574.
Subrogation, see SUBROGATION.
Trial, see TRIAL.

I. DEFINITION AND NATURE.

A stipulation is an agreement between counsel respecting business before a court.[1] When made in open court, with reference to the subject-matter of a pending cause, stipulations are contracts not only between the parties, but between them and the court;[2] but stipulations made independently of the court, and relating purely to the conduct of the action or proceeding, are not governed by all the rules of law applicable to ordinary contracts.[3] Stipulations are regarded as proceedings in the cause, and as such are under the supervision of the court,[4]

1. Anderson L. Dict. [*cited* in *In re* More, 143 Cal. 493, 496, 77 Pac. 407.

Another definition is: "An agreement of the attorney entered into for the purpose of binding his clients, so far as he may do so." *In re* More, 143 Cal. 493, 496, 77 Pac. 407.

Stipulation distinguished from contract see Lewis *v.* The Orpheus, 15 Fed. Cas. No. 8,330, 3 Ware 143, 146.

Solicitor's undertaking see *Ex p.* Hales, [1907] 2 K. B. 539, 76 L. J. K. B. 931, 97 L. T. Rep. N. S. 212, 23 T. L. R. 573.

2. Meagher *v.* Gagliardo, 35 Cal. 602 (holding that the court will enforce a stipulation made in its presence, not only for the benefit of a party but to protect its own honor and dignity); Banks *v.* American Tract Soc., 4 Sandf. Ch. (N. Y.) 438.

Necessity for assent.— It is essential to a binding stipulation that its terms be assented to by the parties. Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580 (holding that where one defendant refuses to sign a stipulation entered into by the other parties to the action, a statement by his counsel that he is willing to obey any order of the court in the cause does not constitute an assent by such defendant to be bound by the stipulation); Bower *v.* Blessing, 8 Serg. & R. (Pa.) 243 (holding that a paper filed by one party to an action, agreeing to be bound by certain terms, if the verdict is in his favor, is not binding on the party who filed it, unless accepted by the other party).

Acknowledgment of service of a paper in a suit is in no sense a stipulation that its recitals are true, but is merely for the purpose of supplying evidence of service. *In re* More, 143 Cal. 493, 77 Pac. 407.

3. Reynolds *v.* Lawrence, 15 Cal. 359; Galbreath *v.* Rogers, 30 Mo. App. 401; Becker *v.* Lamont, 13 How. Pr. (N. Y.) 23; Paschall *v.* Penry, 82 Tex. 673, 18 S. W. 154; Cullers *v.* Platt, 81 Tex. 258, 16 S. W. 1003; Porter *v.* Holt, 73 Tex. 447, 11 S. W. 494; McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552; Hancock *v.* Winans, 20 Tex. 320.

4. Reynolds *v.* Lawrence, 15 Cal. 359

and may be binding upon parties who are incapable of binding themselves by contract out of court.[5] In England and Canada the word "stipulation" has not this technical meaning, but signifies merely a term or provision of a contract.[5a]

II. FORM, REQUISITES, AND VALIDITY.

A. Necessity of Writing — 1. Stipulations Out of Court. It is often required by statute or rule of court that stipulations between parties or their attorneys shall be in writing, and where this is required no oral stipulation, made out of court, will be deemed of any validity, except in so far as it is not disputed.[6]

(holding that such stipulations are to be treated as a rule of practice in the particular case, but even as a rule of practice they are not absolutely binding on the court, since a party has no unqualified right to stipulate for the abrogation of rules of court prescribed for the convenient despatch of business); Galbreath *v.* Rogers, 30 Mo. App. 401; Becker *v.* Lamont, 13 How. Pr. 23; Hancock *v.* Winans, 20 Tex. 320 (holding that an agreement to take up causes out of their regular order would not be enforced).

5. Galbreath *v.* Rogers, 30 Mo. App. 401. See Rhodes *v.* Swithenbank, 22 Q. B. D. 577, 58 L. J. Q. B. 287, 60 L. T. Rep. N. S. 856, 37 Wkly. Rep. 457; Wilson *v.* Birchall, 16 Ch. D. 41, 44 L. T. Rep. N. S. 113, 29 Wkly. Rep. 27; Mattei *v.* Vautro, 105 L. T. J. 202; Poley Solicitors 134.

5a. Capital, etc., Bank *v.* Rhodes, [1903] 1 Ch. 631, 658, 72 L. J. Ch. 336, 88 L. T. Rep. N. S. 255, 17 T. L. R. 260, 51 Wkly. Rep. 470; Hill *v.* Fox, 4 H. & N. 359, 364.

6. *Alabama.*— Ransom *v.* Peters, 2 Ala. 647.

California.— Borkheim *v.* North British, Ac., Ins. Co., 38 Cal. 623; Reese *v.* Mahoney, 21 Cal. 305; Patterson *v.* Ely, 19 Cal. 28; Peralta *v.* Mariea, 3 Cal. 185, stipulation to continue cause.

Colorado.— Morse *v.* Budlong, 5 Colo. App. 147, 38 Pac. 59, agreement to notify opposing counsel when case is called for trial.

Florida.— Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Georgia.— Lee *v.* Atlanta St. R. Co., 91 Ga. 215, 18 S. E. 136 (stipulation extending time for filing brief of evidence for new trial); Arnold *v.* Hall, 70 Ga. 445; Huff *v.* State, 29 Ga. 424.

Indiana.— American White Bronze Co. *v.* Clark, 123 Ind. 230, 23 N. E. 855; Goben *v.* Goldsberry, 72 Ind. 44 (extension of time for filing bill of exceptions); Louisville, etc., R. Co. *v.* Boland, 70 Ind. 595; Barnes *v.* Smith, 34 Ind. 516 (stipulation permitting default judgment).

Iowa.— Searles *v.* Lux, 86 Iowa 61, 52 N. W. 327 (agreement to submit several causes on appeal upon one record); Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64; Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52; State *v.* Stewart, 74 Iowa 336, 37 N. W. 400; Sapp *v.* Aiken, 68 Iowa 699, 28 N. W. 24 (agreement not to ask for continuance).

Kansas.— Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315.

Kentucky.— McCormick Harvesting Mach. Co. *v.* Harned, 6 Ky. L. Rep. 668, holding that a rule requiring written pleadings cannot be abrogated by oral stipulations after the commencement of the action.

Maine.— Smith *v.* Wadleigh, 17 Me. 353.

Massachusetts.— Nye *v.* Old Colony R. Co, 124 Mass. 241, extension of time to file bill of exceptions.

Michigan.— Brooks *v.* Mead, Walk. 389; Suydam *v.* Dequindre, Walk. 23.

Montana.— Beach *v.* Spokane Ranch, etc., Co., 21 Mont. 184, 53 Pac. 493; Rankin *v.* Campbell, 1 Mont. 300.

Nebraska.— Kent *v.* Green, 43 Nebr. 673, 62 N. W. 71; Haylen *v.* Missouri Pac. R. Co., 28 Nebr. 660, 44 N. W. 873 (agreement to waive service of summons in error); Rich *v.* Lincoln State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382.

Nevada.— Stretch *v.* Montezuma Min. Co., 29 Nev. 163, 86 Pac. 445.

New York.— Bradford *v.* Downs, 25 N. Y. App. Div. 581, 49 N. Y. Suppl. 521 (holding that a distinct parol agreement will not be enforced against the protest of one of the parties); Broome *v.* Wellington, 1 Sandf. 664; Connell *v.* Stalker, 21 Misc. 609, 48 N. Y. Suppl. 77; Matter of Keeler, 7 N. Y. Suppl. 199, 2 Connoly Surr. 45; Leese *v.* Schermerhorn, 3 How. Pr. 63; Parker *v.* Root, 7 Johns. 320; Dubois *v.* Roosa, 3 Johns. 145; Griswold *v.* Lawrence, 1 Johns. 507; Shadwick *v.* Phillips, 3 Cai. 129 (agreement between parties not to bring case on for trial); Bain *v.* Thomas, 2 Cai. 95; Combs *v.* Wyckoff, 1 Cai. 147; Rogers *v.* Rogers, 4 Paige 516, 27 Am. Dec. 84.

North Carolina.— Smith *v.* Smith, 119 N. C. 311, 25 S. E. 877; Roberts *v.* Partridge, 118 N. C. 355, 24 S. E. 15; Graham *v.* Edwards, 114 N. C. 228, 19 S. E. 150; Walton *v.* Pearson, 82 N. C. 464; Adams *v.* Reeves, 74 N. C. 106; Wade *v.* Newbern, 72 N. C. 498, extension of time to file undertaking on appeal.

Pennsylvania.— Dawson *v.* Condy, 7 Serg. & R. 366 (stipulation waiving right of appeal); Shippen *v.* Bush, 1 Dall. 251, 1 L. ed. 123 (agreement for appointment of referees).

South Carolina.— Dunklin *v.* Whitlaw, 1 McCord 492.

Texas.— Birdwell *v.* Cox, 18 Tex. 535; Willis *v.* Sims, (Civ. App. 1898) 47 S. W. 55; Texas, etc., R. Co. *v.* Boggs, (Civ. App. 1895) 30 S. W. 1089 (agreement for admission of statement made by witness before trial); Morse *v.* State, 39 Tex. Cr. 566, 47 S. W. 645, 50 S. W. 342.

This rule applies to stipulations as to pleadings and evidence,[7] trial,[8] motions for new trial,[9] judgment and enforcement thereof,[10] appeals,[11] and to stipulations to abide by the result of another action.[12] If, however, a stipulation is not denied, the court will give it effect in the absence of all doubts as to its existence;[13] and where there is no dispute as to the terms of a stipulation, but only as to its construction and effect, there is no sufficient reason why it should not be considered by the court.[14] Furthermore the operation of the rule is limited to the ordinary routine of practice, and has no application to agreements made to facilitate or guide officers in the execution of writs; [15] nor does the rule making such an agreement inadmissible in evidence apply to an agreement which may give rise to a cause of action in another suit, but only to the conduct and management of a cause before the court in which it is pending.[16] In the absence of such a rule an oral stipulation is binding.[17]

2. Stipulations in Court. Statutes and court rules requiring stipulations to be in writing, in order to be binding in case of dispute, do not apply to stipulations made in open court.[18]

Washington.— Livesley *v.* Pier, 9 Wash. 658, 38 Pac. 156.

United States.— Evans *v.* Louisiana State Nat. Bank, 19 Fed. 676; American Saddle Co. *v.* Hogg, 1 Fed. Cas. No. 316, 6 Fish. Pat. Cas. 67, Holmes 177, 2 Off. Gaz. 595.

England.— See Petch *v.* Lyon, 9 Q. B. 147, 15 L. J. Q. B. 393, 58 E. C. L. 147; Doe *v.* Derby, 1 A. & E. 783, 3 L. J. K. B. 191, 3 N. & M. 782, 28 E. C. L. 363; Blackstone *v.* Wilson, 26 L. J. Exch. 229; Snow's Annual Practice (1910), vol. 1, p. 460; White Solicitors 134; Jud. Order xxxii.

7. Patterson *v.* Ely, 19 Cal. 28; Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52; McCormick Harvesting Mach. Co. *v.* Harned, 6 Ky. L. Rep. 668; Texas, etc., R. Co. *v.* Boggs, (Tex. Civ. App. 1895) 30 S. W. 1089.

8. *California.*— Peralta *v.* Mariea, 3 Cal. 185.

Colorado.— Morse *v.* Budlong, 5 Colo. App. 147, 38 Pac. 59.

Iowa.— Sapp *v.* Aiken, 68 Iowa 699, 28 N. W. 24.

Kansas.— Anderson *v.* Burchett, 48 Kan. 153, 29 Pac. 315.

New York.— Shadwick *v.* Phillips, 3 Cai. 129; Parker *v.* Root, 7 Johns. 320; Griswold *v.* Lawrence, 1 Johns. 507.

Pennsylvania.— Shippen *v.* Bush, 1 Dall. 251, 1 L. ed. 123.

Texas.— Birdwell *v.* Cox, 18 Tex. 535.

See 44 Cent. Dig. tit. "Stipulations," § 7.

9. Lee *v.* Atlantic, etc., R. Co., 91 Ga. 215, 18 S. E. 136; Rankin *v.* Campbell, 1 Mont. 300.

10. Barnes *v.* Smith, 34 Ind. 516; Reamer's Appeal, 18 Pa. St. 510.

11. *Indiana.*— Goben *v.* Goldsberry, 72 Ind. 44.

Iowa.— Searles *v.* Lux, 86 Iowa 61, 52 N. W. 327; Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64.

Massachusetts.— Nye *v.* Old Colony R. Co., 124 Mass. 241.

Montana.— Rankin *v.* Campbell, 1 Mont. 300. See also in this connection Stewart *v.* Miller, 1 Mont. 301.

Nebraska.— Haylen *v.* Missouri, etc., R. Co., 28 Nebr. 660, 44 N. W. 873.

New York.—Leese *v.* Schermerhorn, 3 How. Pr. 63.

North Carolina.— La Duc *v.* Moore, 113 N. C. 275, 18 S. E. 70; Randleman Mfg. *v.* Simmons, 97 N. C. 89, 1 S. E. 923; Hutchinson *v.* Rumfelt, 83 N. C. 441; Walton *v.* Pearson, 82 N. C. 464; Adams *v.* Reeves, 72 N. C. 106; Wade *v.* Newbern, 72 N. C. 498.

Pennsylvania.— Dawson *v.* Condy, 7 Serg. & R. 366.

See 44 Cent. Dig. tit. "Stipulations," § 10.

12. Ransom *v.* Peters, 2 Ala. 647; Borkheim *v.* North British, etc., Co., 38 Cal. 623.

13. Toupin *v.* Gargnier, 12 Ill. 79; *Ex p.* Pearson, 79 S. C. 302, 60 S. E. 706. See also Knox *v.* Gregory, 21 N. Brunsw. 196; Moore *v.* May, 19 N. Brunsw. 506.

14. Woodruff *v.* Fellows, 35 Conn. 105.

15. Reamer's Appeal, 18 Pa. St. 510.

16. Johnston *v.* Yale, 19 La. Ann. 212.

17. Chamberlain *v.* Fitch, 2 Cow. (N. Y.) 243; *Ex p.* Pearson, 79 S. C. 302, 60 S. E. 706.

In Texas the rule does not apply to justices' courts. Gulf, etc., R. Co. *v.* King, 80 Tex. 681, 16 S. W. 641.

18. *Alabama.*— Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600.

California.— Hearne *v.* De Young, 111 Cal. 373, 43 Pac. 1108.

Colorado.— Solomonovich *v.* Denver Consol. Tramway Co., 39 Colo. 282, 89 Pac. 57.

Georgia.— Caldwell *v.* McWilliams, 65 Ga. 99.

Indiana.— Welch *v.* Bennett, 39 Ind. 136.

Massachusetts.— Savage *v.* Blanchard, 148 Mass. 348, 19 N. E. 396.

Nebraska.— Rich *v.* State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382.

New York.— Staples *v.* Parker, 41 Barb. 648; Carpenter *v.* Pirner, 107 N. Y. Suppl. 875; Keator *v.* Ulster, etc., Plank Road Co., 7 How. Pr. 41; Corning *v.* Hooper, 7 Paige 587; Jewett *v.* Albany City Bank, Clarke 241.

United States.— Lewis *v.* Wilson, 151 U. S. 551, 14 S. Ct. 419, 38 L. ed. 267.

See 44 Cent. Dig. tit. "Stipulations," § 14.

B. Entry, Filing, or Record — 1. Necessity. It is essential to the validity of stipulations under many statutes that they be filed with the clerk, if written, or entered in the minutes of the court, if oral, and that they be made a part of the record.[19] But it has been held that a stipulation allowing extra time to answer need not be of record to authorize the setting aside of a default entered before the expiration of the time stated,[20] and a written stipulation that the testimony of a witness on a former trial may be read in the trial of a cause is not of such nature as to require that it be filed in the cause.[21]

2. Time For Filing or Entry. There is no fixed rule as to the time for filing or entering a stipulation, but it seems that this may be done at any time so long as it is capable of being properly and conveniently carried into effect by the parties and the court;[22] but a record entry cannot be made after a dispute has arisen as to the terms of the agreement.[23]

3. Place of Filing or Entry. A parol stipulation made in open court and entered on the minutes, agreeing to the discontinuance of an action pending in another court will be enforced;[24] but agreements affecting the conduct of a cause in an appellate court must be filed in that court.[25]

4. Effect. A stipulation duly signed and filed becomes a part of the record of the case[26] and has the effect of a pleading, and a subsequent pleading inconsistent with its terms should be stricken out.[27]

C. Estoppel to Object to Want of Writing, Entry, or Filing. If attorneys have acted upon an oral stipulation that has not been entered on the minutes, or a written stipulation that has not been filed, to such an extent that it would be inequitable not to recognize its binding effect, courts will not allow the agreement to be repudiated upon the ground that it has not been entered or filed,[28]

19. *Illinois.*— Gershenow *v.* West Chicago St. R. Co., 103 Ill. App. 591.

Kentucky.— Moore *v.* Howe, 4 T. B. Mon. 199.

Nevada.— Seawell *v.* Cohn, 2 Nev. 308.

New Hampshire.— Olcott *v.* Banfill, 7 N. H. 469.

Texas.— Gulf, etc., R. Co. *v.* Frost, (Civ. App. 1896) 34 S. W. 167.

Wisconsin.— Hathaway *v.* Milwaukee, 132 Wis. 249, 111 N. W. 570, 112 N. W. 455, 122 Am. St. Rep. 975, 9 L. R. A. N. S. 778.

See 44 Cent. Dig. tit. "Stipulations," § 16.

In California the rule laid down in the text has been followed. Merritt *v.* Wilcox, 52 Cal. 238; Borkheim *v.* North British, etc., Ins. Co., 38 Cal. 628. But Cal. Code Civ. Proc. § 283, which declares that an attorney may bind his client by an agreement filed in accordance therewith and not otherwise is held to have reference merely to agreements which are executory (Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529), and it has even been held under this section that a written stipulation may be enforced, although not filed, unless forbidden by some other statute, or by some principle of law (Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386).

20. Crane *v.* Crane, 121 Cal. 99, 53 Pac. 433.

21. Carroll *v.* Paul, 19 Mo. 102.

22. Dougherty *v.* Friermuth, 68 Cal. 240, 9 Pac. 98 (holding that a stipulation waiving findings, filed after entry of judgment, will estop a party from objecting that there are no findings); Chambers *v.* Simpson, 1 T. B. Mon. (Ky.) 112 (holding that a parol agreement to submit pleas as on demurrer, made at the term when judgment is rendered upon it, may be entered at the time of the rendition of final judgment at the subsequent term); Schell *v.* Devlin, 82 N. Y. 333 (holding that a stipulation waiving objections, founded upon want of notice of proceedings in a lower court, was properly received upon the argument in an appellate court).

23. Hiller *v.* Landis, 44 Iowa 223.

24. Deen *v.* Milne, 5 N. Y. St. 319.

25. Steele *v.* State, 33 Fla. 354, 14 So. 841, holding that a stipulation for oral argument of an appeal would not be considered, where it was not filed with the record.

26. Watson *v.* Hemphill, 99 Ga. 121, 25 S. E. 262, holding that a copy of a stipulation, the original of which was lost after being filed with the papers in the case, could be established in the same manner as any other office paper.

English admiralty practice.— In England under a special rule applicable to admiralty actions it is equivalent to an order of the court. The Karo, 13 P. D. 24, 6 Aspin. 245, 57 L. J. P. D. & Adm. 8, 58 L. T. Rep. N. S. 188.

27. Vail *v.* Stone, 13 Iowa 284. See Coubrough *v.* Adams, 70 Cal. 374, 11 Pac. 634.

28. *California.*— Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074; Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529; Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116; Himmelmann *v.* Sullivan, 40 Cal. 125.

Georgia.— Henderson *v.* Merritt, 38 Ga. 232.

Illinois.— Chicago, etc., R. Co. *v.* Hintz, 132 Ill. 265, 23 N. E. 1032.

and the court will not suffer a party who has relied and acted on an undisputed verbal agreement of counsel to be prejudiced by his opponent thereby taking an unfair advantage.[29]

III. CAPACITY AND AUTHORITY TO ENTER INTO STIPULATION.

An attorney duly retained has, as a general rule and in the absence of special circumstances, authority and exclusive authority to execute stipulations,[30] after[30a] but not before[30b] action is brought. A party to an action who has retained an attorney to represent him cannot make a binding stipulation with respect to matters of procedure without the consent of his attorney of record,[31] unless the validity of such a stipulation is recognized by statute or court rules.[32] A nominal plaintiff cannot, by stipulation, deprive the real parties in interest of their rights.[33] If an attorney exceeds due bounds, he is personally liable,[33a] and when an attor-

New York.— People *v.* Stephens, 52 N. Y. 306; Montgomery *v.* Ellis, 6 How. Pr. 326.

North Carolina.— Parker *v.* Wilmington, etc., R. Co., 84 N. C. 118.

Texas.— Thompson *v.* Ft. Worth, etc., R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29.

See 44 Cent. Dig. tit. "Stipulations," § 12.

29. Burnham *v.* Smith, 11 Wis. 258.

One who joins in a written stipulation cannot dispute the genuineness of the signatures of the other parties. Jones *v.* Wolverton, 15 Wash. 590, 47 Pac. 36.

30. See ATTORNEY AND CLIENT, 4 Cyc. 937.

30a. Prestwich *v.* Poley, 18 C. B. N. S. 806, 34 L. J. C. P. 189, 12 L. T. Rep. N. S. 390, 114 E. C. L. 806; *In re* Newen, [1903] 1 Ch. 812, 72 L. J. Ch. 356, 88 L. T. Rep. N. S. 264, 19 T. L. R. 247, 51 Wkly. Rep. 297.

30b. Macaulay *v.* Polley, [1897] 2 Q. B. 122, 66 L. J. Q. B. 665, 76 L. T. Rep. N. S. 643, 45 Wkly. Rep. 681; Wagstaff *v.* Wilson, 4 B. & Ad. 339, 1 N. & M. 4, 24 E. C. L. 154; Duffy *v.* Hanson, 16 L. T. Rep. N. S. 332. But see Lyons *v.* Donkin, 23 Nova Scotia 258.

31. *California.*— San José Funded Debt Com'rs *v.* Younger, 29 Cal. 147, 87 Am. Dec. 164, agreement for dismissal.

Indiana.— McConnell *v.* Brown, 40 Ind. 384.

Massachusetts.—Lewis *v.* Gamage, 18 Mass. 347.

Michigan.— Jackson *v.* Cole, 81 Mich. 440, 45 N. W. 826, dismissal of appeal and consent to affirmance of judgment.

New York.— See Webb *v.* Gill, 18 Abb. Pr. 264.

South Dakota.— Frederick Milling Co. *v.* Frederick Farmers' Alliance Co., 20 S. D. 335, 106 N. W. 298.

Wisconsin.— State *v.* Gratiot, 17 Wis. 245, stipulation changing place of trial.

United States.— Bonnifield *v.* Thorp, 71 Fed. 924 (stipulation extending time to answer); Nightingale *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338 (stipulation for continuance); Earhart *v.* U. S., 30 Ct. Cl. 343 (stipulation giving opposite party advantage with respect to cross-examination and evidence).

England.— Johnson *v.* Alston, 1 Camph. 176; Vincent *v.* Groome, 1 Chit. 182, 18 E. C. L. 109.

Canada.— See McFarlane *v.* Smith, 8 Can. L. T. Occ. Notes 64, 19 Nova Scotia 541; Rideout *v.* McLeod, 6 Brit. Col. 161; Soder *v.* Yorke, 5 Brit. Col. 133; Stewart *v.* Hall, 17 Manitoba 653; De Santis *v.* Canadian Pac. R. Co., 14 Ont. L. Rep. 108; Walker *v.* Gurney-Tilden Co., 18 Ont. Pr. 274, 471; Friedrich *v.* Friedrich, 10 Ont. Pr. 308, 546; Shaw *v.* Nickerson, 7 U. C. Q. B. 541.

See 44 Cent. Dig. tit. "Stipulations," § 3.

An agreement between some of the parties to a pending action, to coöperate in securing a judgment and to settle their own differences by arbitration is valid and need not be brought to the attention of the court. Salinas *v.* Stillman, 66 Fed. 677, 14 C. C. A. 50.

The client cannot authorize an agent to sign a stipulation without the consent of his attorney of record, although such agent is counsel in the cause. Nightingale *v.* Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338.

The purpose of the rule is to secure the orderly conduct of the cause and to safeguard the client against the intrigues of his adversary. San José Funded Debt Com'rs *v.* Younger, 29 Cal. 147, 87 Am. Dec. 164.

Where a party appears in person in the trial court, a stipulation consenting to judgment in a higher court must be signed by him. *In re* Arguello, 50 Cal. 308.

32. McBratney *v.* Rome, etc., R. Co., 87 N. Y. 467 (holding that a plaintiff who stipulated for an order of discontinuance was precluded from objecting that, having appeared by attorney, he only was authorized to sign such stipulation); Braisted *v.* Johnson, 5 Sandf. (N. Y.) 671 (holding, under a rule of court making stipulations equally valid when signed by a party as when signed by his attorney, that a stipulation extending defendant's time to answer was binding when signed by plaintiff without his attorney's knowledge). See also Pilger *v.* Gou, 21 How. Pr. (N. Y.) 155.

33. Selleck *v.* Phelps, 11 Wis. 380.

33a. Chambers *v.* Hodges, 23 Tex. 104; Geilinger *v.* Gibbs, [1897] 1 Ch. 479, 66 L. J. Ch. 230, 76 L. T. Rep. N. S. 111, 45 Wkly. Rep. 315; Fricker *v.* Van Grutten, [1896] 2 Ch. 649, 65 L. J. Ch. 823, 75 L. T. Rep. N. S. 117, 45 Wkly. Rep. 53; *In re* Savage, 15 Ch. D. 557, 29 Wkly. Rep. 348; Nurse *v.*

ney does exceed due bounds he is not only personally liable, but his act may be set aside.[33b]

IV. MATTERS WHICH MAY BE THE SUBJECT OF STIPULATION.

A. In General. Any matter which involves the individual rights of the parties to a cause may properly be made the subject of a stipulation between them.[34] They may, by stipulation, waive the benefit of a statutory or constitutional provision [35] or rule of law,[36] or irregularities,[36a] and they may agree upon the existence or truth of certain facts.[37] But stipulations involving matters of public interest, or which affect the interests of individuals, which cannot be ascertained in advance of the adjudication in the cause, are invalid.[38] Thus courts will disregard stipulations involving the validity or constitutionality of a statute,[39] or stipulations involving the validity of a will;[40] and, generally, it may be stated

Durnford, 13 Ch. D. 764, 49 L. J. Ch. 229, 41 L. T. Rep. N. S. 611, 28 Wkly. Rep. 145; Malins *v.* Greenway, 10 Beav. 564, 12 Jur. 66, 319, 17 L. J. Ch. 26, 331, 50 Eng. Reprint 699; Wheatley *v.* Bastow, 7 De G. M. & G. 261, 3 Eq. Rep. 865, 1 Jur. N. S. 1124, 24 L. J. Ch. 727, 3 Wkly. Rep. 296, 540, 56 Eng. Ch. 201, 44 Eng. Reprint 102; Fray *v.* Voules, 1 E. & E. 839, 5 Jur. N. S. 1253, 28 L. J. Q. B. 232, 7 Wkly. Rep. 446, 102 E. C. L. 839; Freeman *v.* Fairlie, 8 L. J. Ch. 44; Johnson *v.* Ogilby, 3 P. Wms. 277, 24 Eng. Reprint 1064; Filmer *v.* Delber, 3 Taunt. 486, 12 Rev. Rep. 688; Benner *v.* Edmonds, 19 Ont. Pr. 9; Taylor *v.* Wood, 14 Ont. Pr. 449. But see Swinfen *v.* Chelmsford, 5 H. & N. 890, 6 Jur. N. S. 1205, 29 L. J. Exch. 382, 2 L. T. Rep. N. S. 406, 8 Wkly. Rep. 545; Robertson *v.* MacDonagh, 70 L. T. J. 101.

33b. Ball *v.* Leonard, 24 Ill. 146; Yonge *v.* Toynbee, [1910] 1 K. B. 215; Williams *v.* Preston, 20 Ch. D. 672, 51 L. J. Ch. 927, 47 L. T. Rep. N. S. 265, 30 Wkly. Rep. 555; Flower *v.* Lloyd, 6 Ch. D. 297, 302, 46 L. J. Ch. 838, 37 L. T. Rep. N. S. 419, 25 Wkly. Rep. 793; Connatty *v.* O'Reilly, 11 Ir. Eq. 333; Stretton *v.* Thompson, 72 L. T. J. 136; Kempshall *v.* Holland, 14 Reports 336; Aspin *v.* Wilkinson, 23 Sol. J. 388; Ellender *v.* Wood, 4 T. L. R. 680; Stokes *v.* Latham, 4 T. L. R. 305.

34. Dubuic *v.* Lazell, 182 N. Y. 482, 75 N. E. 401; Chichester *v.* Winton Motor Carriage Co., 110 N. Y. App. Div. 78, 96 N. Y. Suppl. 1006; Muir *v.* Preferred Acc. Ins. Co., 203 Pa. St. 338, 53 Atl. 158; *In re* Dardis, 135 Wis. 457, 115 N. W. 332.

Stipulations waiving rights in the matter of pleading, which go only to the manner of bringing the action, will be upheld. Coler *v.* Sante Fe County, 6 N. M. 88, 27 Pac. 619 (stipulation awarding pleadings as to averment of claim); Punchard *v.* Delk, 55 Tex. 304 (where it was stipulated that plaintiffs might sue as joint owners of land, although they owned the land in severalty).

35. McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39; Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207 (stipulation for separate trial of issues raised by pleadings); Dubuic *v.* Lazell, 182 N. Y. 482, 75 N. E. 401; Chichester *v.* Winton Motor Carriage Co., 110 N. Y. App. Div. 78, 96 N. Y. Suppl. 1006; McGuire *v.* New York Cent., etc., R. Co., 6 Daly (N. Y.) 70 (waiver of trial by jury); Home Ins. Co. *v.* Morse, 10 Alb. L. J. (N. Y.) 377 (stipulation not to assert right to remove cause to federal court); Runnion *v.* Ramsay, 93 N. C. 410.

36. Mills *v.* Garrison, 3 Abb. Dec. (N. Y.) 297, 3 Keyes 40; McGuire *v.* New York Cent., etc., R. Co., 6 Daly (N. Y.) 70, stipulation that cause of action should not abate by death of plaintiff. See also Garlington *v.* Clutton, 1 Call (Va.) 520.

36a. Strauss *v.* Francis, L. R. 1 Q. B. 379, 7 B. & S. 365, 12 Jur. N. S. 486, 35 L. J. Q. B. 133, 14 L. T. Rep. N. S. 326, 14 Wkly. Rep. 634; Matter of Jamieson and Binns, 4 A. & E. 945, 5 L. J. K. B. 187, 31 E. C. L. 411; Hodson *v.* Drewry, 2 Jur. 1088, 1 W. W. & H. 540; Backhouse *v.* Taylor, 20 L. J. Q. B. 233, 2 L. M. & P. 70.

37. Bingham *v.* Winona County, 8 Minn. 441; Prout *v.* Starr, 188 U. S. 537, 23 S. Ct. 398, 47 L. ed. 584 [*affirming* 110 Fed. 3], holding that the parties to a suit may make a valid agreement to dispense with the taking of evidence, and to accept the evidence taken and abide by the decrees which shall be entered in certain other cases in which the allegations of fact and the contentions of law are identical with those in the suit in question.

38. *In re* Dardis, 135 Wis. 457, 115 N. W. 332.

39. *Arizona.*— Graves *v.* Alsap, 1 Ariz. 274, 25 Pac. 836, holding that parties cannot stipulate what the action of a law-making body was in a given case, and ask the court to determine upon such stipulation, whether or not a general law is in force.

Florida.—Wade *v.* Atlantic Lumber Co., 51 Fla. 638, 41 S. W. 72.

Michigan.— Atty.-Gen. *v.* Rice, 64 Mich. 385, 31 N. W. 203.

Mississippi.— Jones *v.* Madison County, 72 Miss. 777, 18 So. 87.

North Carolina.— Gatlin *v.* Tarboro, 78 N. C. 119.

Wyoming.— State *v.* Schnitger, 16 Wyo. 479, 95 Pac. 698.

See 44 Cent. Dig. tit. "Stipulations," § 2.

40. *In re* Dardis, 135 Wis. 457, 115 N. W. 332, holding, in a proceeding to probate a will that the court would disregard a stipula-

that no valid agreement can be made as to a question of law;[41] nor can a valid agreement or stipulation between persons be entered into to confer jurisdiction.[41a]

B. Particular Stipulations. In accordance with and subject to the rules above stated,[42] the parties by their attorneys may stipulate for non-abatement of the action by death of a party,[43] and may stipulate as to pleading,[44] as to variation of orders,[44a] as to issues and proof thereunder,[45] as to production of

tion of all the heirs and next of kin, including those named in the will, to the effect that decedent was mentally incapable of making a will.

41. *Arizona.*— Graves *v.* Alsap, 1 Ariz. 274, 25 Pac. 836.

California.— San Francisco Lumber Co. *v.* Bibb, 139 Cal. 325, 73 Pac. 864; Owen *v.* Herzihoff, 2 Cal. App. 622, 84 Pac. 274, holding that a stipulation in the record that a lease has "expired by its terms" is a stipulation as to the legal effect of a contract, and if erroneous should be disregarded.

Colorado.— Breeze *v.* Haley, 11 Colo. 351, 18 Pac. 551.

Mississippi.— Jones *v.* Madison County, 72 Miss. 777, 18 So. 87.

Missouri.— Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607.

North Dakota.— Prescott *v.* Brooks, (1902) 94 N. W. 88.

Tennessee.— Holms *v.* Johnston, 12 Heisk. 155, stipulation that land was sufficiently described under the statute of frauds.

See 44 Cent. Dig. tit. "Stipulations," § 2.

Contra.— Matter of Cullinan, 113 N. Y. App. Div. 485, 99 N. Y. Suppl. 374, holding that parties may stipulate what the law is that governs their dispute as well as what the facts are, and that the court will give as complete effect to the former as to the latter class of stipulations.

41a. Lewis *v.* The Orpheus, 15 Fed. Cas. No. 8,330, 3 Ware 143, 30 Fed. Cas. No. 18,169, 2 Cliff. 29.

42. See *supra*, IV, A.

43. See ABATEMENT AND REVIVAL, 1 Cyc. 137.

44. See cases cited *infra*, this note.

Extending time to file or serve pleading.— A stipulation extending the time to answer gives the time stipulated in addition to the unexpired period existing when the agreement is executed. Pattison *v.* O'Connor, 23 Hun (N. Y.) 307, 60 How. Pr. 141. Under the stipulation extending his time to plead, defendant may demur within the time limited (Steele *v.* Moss, 69 Wis. 496, 34 N. W. 237, 2 Am. St. Rep. 756. See also Pattison *v.* O'Connor, 23 Hun (N. Y.) 307, 60 How. Pr. 141), unless he agrees to plead to the merits (Doty *v.* Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773); but if there is a provision that defendant may make such application as he may be advised, a motion to strike out portions of the complaint is proper (Lackey *v.* Vanderbilt, 10 How. Pr. (N. Y.) 155). A stipulation not expressly extending the time to file an answer, but providing that it may be filed on being signed by defendant's attorney in fact, gives defendant a reasonable time to file his answer. Maxwell *v.* Jarvis, 14 Wis. 506.

The last day is included, under a stipulation extending the time to plead "until" a certain date, if, from the context, it appears to have been intended as inclusive of the last date. Barker *v.* Keith, 11 Minn. 65.

Amendments.— A stipulation not to amend a pleading, when clearly intended only to avoid delaying the trial, does not prevent the court from granting an amendment at the trial in furtherance of justice (Hennequin *v.* Clews, 46 N. Y. Super. Ct. 330 [*affirmed* in 84 N. Y. 676 (*affirmed* in 111 U. S. 676, 4 S. Ct. 576, 28 L. ed. 565)], and under a stipulation allowing defendant to amend a plea after judgment overruling his demurrer, and providing that such leave shall not embrace the right to file new pleas, defendant is in no way precluded from asking leave of the court to file new pleas (Hale *v.* Lawrence, 22 N. J. L. 72), nor does a stipulation allowing a demurrer to the complaint to be overruled on leave to answer estop defendant from subsequently objecting that the complaint does not state facts sufficient to constitute a cause of action (Hitchcock *v.* Caruthers, 82 Cal. 523, 23 Pac. 48).

Waiving defects in pleadings.— By stipulating to accept a plea as one setting up a certain defense, plaintiff waives objections to matters of form (Cleveland *v.* Chandler, 3 Stew. (Ala.) 489), as that a plea in abatement was filed after a plea in bar (Cleveland *v.* Chandler, *supra*), or that a cross complaint and answer were joined in the same pleading (Harrison *v.* McCormick, (Cal. 1885) 9 Pac. 114). If there is an agreement that pleas may be stated in short, by mere outline of the defense, such pleas will not be held bad on demurrer, if an available defense is presented (Governor *v.* Bancroft, 16 Ala. 605; Lacy *v.* Rockett, 11 Ala. 1002), and where parties agree to accept a plea in short, as filed, the replication to it may be of the same character (Cole *v.* Harman, 8 Sm. & M. (Miss.) 562).

Withdrawing pleas see Burnett *v.* Proois, 22 L. T. Rep. N. S. 543; Leedham *v.* Baxter, 4 Wkly. Rep. 241.

44a. Hackett *v.* Bible, 12 Ont. Pr. 482; Johnston *v.* Johnston, 9 Ont. Pr. 259; Wilson *v.* Huron, 11 U. C. C. P. 548.

45. *Alabama.*— Bradford *v.* Barclay, 42 Ala. 375.

California.— Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256.

Illinois.— Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298, 21 N. E. 789; Whitehouse *v.* Halstead, 90 Ill. 95; Miller *v.* McManis, 57 Ill. 126; Murto *v.* McKnight, 28 Ill. App. 238, holding that a defense under the statute of frauds may be proved.

Indiana.— Moore *v.* Harmon, 142 Ind. 555,

deeds,[45a] as to admissibility of evidence,[46] as by dispensing with proof of conceded facts,[47] or of foreign law,[48] by extending time for taking testimony or proof,[49] or by admitting evidence interposed in other actions or former trials of the same

41 N. E. 599; McElwaine *v.* Hosey, 135 Ind. 481, 35 N. E. 272; Talcott *v.* Jackson, 41 Ind. 201, such a stipulation is a waiver of the right to have the proper pleadings placed on file, and conclusively implies that a proper finding and judgment shall follow the introduction of the evidence.

Iowa.—Mills *v.* Bills, 97 Iowa 684, 66 N. W. 881; Bailey *v.* Landingham, 52 Iowa 415, 3 N. W. 460.

Maine.— Gray *v.* Kimball, 42 Me. 299.

Maryland.— Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 89 Am. Dec. 779 (holding that, under a stipulation releasing errors in pleadings in an action on a single count in tort, and providing that the declaration should be considered as amended by the addition of such counts in tort as the state of the facts brought out at the trial should justify, the amendments were limited to counts in tort); State *v.* Norwood, 12 Md. 177 (holding that, in an action on a bond in which the declaration did not specify breaches, a stipulation waiving errors in pleading and permitting either party to give evidence of any matters which could have been given, if such matters had been pleaded, rendered the proof of breaches admissible); Booth *v.* Hall, 6 Md. 1.

Massachusetts.— Leonard *v.* White, 5 Allen 177, holding that if defendant binds himself to defend only upon a certain ground, plaintiff need not prove facts not essential to entitle him to recover as against the defense so limited.

Michigan.— Menominee *v.* S. K. Martin Lumber Co., 119 Mich. 201, 77 N. W. 704, holding that a stipulation in an action to recover taxes, stating that the amount of the taxes was the subject-matter of the action, presumed the regularity of the assessment proceedings.

Minnesota.— Bingham *v.* Winona County, 8 Minn. 441.

Missouri.—Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607.

New York.—Ackerman *v.* Cobb Lime Co., 125 N. Y. 361, 26 N. E. 455; Casey *v.* Leslie, 12 N. Y. App. Div. 34, 42 N. Y. Suppl. 362.

Pennsylvania.— Com. *v.* Pittsburg Illuminating Co., 180 Pa. St. 578, 37 Atl. 107; Collins *v.* London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924; Continental Ins. Co. *v.* Delpeuch, 82 Pa. St. 225 (holding, in an action on an insurance policy that, under a stipulation restricting the defense to the question of suicide, defects in the summons, or irregularity in an award could not be proved); Beaumont *v.* Lane, 3 Pa. Super. Ct. 73.

Texas.— Carley *v.* Parton, 75 Tex. 98, 12 S. W. 950; Cushing *v.* Smith, (1889) 12 S. W. 19; Smith *v.* Leach, 70 Tex. 493, 7 S. W. 767 (holding that the court in reaching its conclusion will eliminate all other questions); Taylor *v.* Brown, 8 Tex. Civ. App. 261, 27 S. W. 911. See also McCrary *v.* Comanche, (Civ. App. 1896) 34 S. W. 679.

United States.— Mutual L. Ins. Co. *v.* Harris, 97 U. S. 331, 24 L. ed. 959.

See 44 Cent. Dig. tit. "Stipulations," § 27; and Taylor Ev. (1895) par. 772.

45a. Fenwick *v.* Reed, 1 Meriv. 114, 124, 126, 35 Eng. Reprint 618.

46. *Alabama.*— Thompson *v.* Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443.

Indiana.— Tippecanoe County *v.* Mitchell, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520; Springfield State Nat. Bank *v.* Bennett, 8 Ind. App. 679, 36 N. E. 551.

South Carolina.— Hellman *v.* McWhennie, 3 Rich. 364.

Texas.— Cox *v.* Giddings, 9 Tex. 44.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

Virginia.— Unis *v.* Charlton, 12 Gratt. 484.

Wisconsin.— Douglass *v.* Rogers, 4 Wis. 304, holding that, under a stipulation allowing depositions to be used in evidence, subject only to objections to matters of substance, objections that no statutory reason existed for taking depositions could not be raised.

See 44 Cent. Dig. tit. "Stipulations," § 31 *et seq.*

Illegal evidence cannot be admitted under a stipulation that testimony taken by deposition shall be considered as regularly taken. Millard *v.* Hall, 24 Ala. 209.

The admission of documentary evidence may be stipulated for by the parties.— See *In re* Hedrick, 127 Cal. 184, 59 Pac. 590; Keator *v.* Colorado Coal, etc., Development Co., 3 Colo. App. 188, 32 Pac. 857; Patterson *v.* Collier, 75 Ga. 419, 58 Am. Rep. 472; People *v.* Cooper, 139 Ill. 461, 29 N. E. 872; Thomas *v.* Star, etc., Milling Co., 104 Ill. App. 110; Supreme Lodge K. P. *v.* Trebbe, 74 Ill. App. 545; Wright *v.* Bundy, 11 Ind. 398; Kruger *v.* Walker, (Iowa 1894) 59 N. W. 65; Curl *v.* Watson, 25 Iowa 35, 95 Am. Dec. 763; Levy *v.* Rich, 106 La. 243, 30 So. 377; Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.) 106; Boardman *v.* Kibbee, 10 Cush. (Mass.) 545; Hannah *v.* Baylor, 27 Mo. App. 302; White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Goldsmid *v.* Lewis County Bank, 7 Barb. (N. Y.) 427; Hankinson *v.* Giles, 17 Abb. Pr. (N. Y.) 251, 29 How. Pr. 478; Osmun *v.* Winters, 30 Oreg. 177, 46 Pac. 780; Taffinder *v.* Merrell, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814; Mackey *v.* Armstrong, 84 Tex. 159, 19 S. W. 463; Rio Grande, etc., R. Co. *v.* Milmo Nat. Bank, 72 Tex. 467, 10 S. W. 563; Paschal *v.* Acklin, 27 Tex. 173.

47. See EVIDENCE, 16 Cyc. 973.

48. Williams *v.* Chamberlain, 123 Ky. 150, 94 S. W. 29, 29 Ky. L. Rep. 606.

49. James *v.* McMillan, 55 Mich. 136, 20 N. W. 826; Force *v.* St. Paul F. & M. Ins.

action;[50] and the parties, by their attorneys, may stipulate as to an agreed state of facts upon which to submit their case to the court for decision,[51] and to abide

Co., 80 N. Y. Suppl. 708; Scballer *v.* Chicago, etc., R. Co., 97 Wis. 31, 71 N. W. 1042.

Stipulation superseded by order.— A stipulation in a chancery case continuing the time for taking proofs beyond the time limited by the court rules, and the usual order previously entered, requiring the closing of proofs within a certain time, is superseded by a subsequent order for a limited extension. Damouth *v.* Klock, 29 Mich. 289.

50. *Alabama.*— Thompson *v.* Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443.

California.— Nathan *v.* Dierssen, 146 Cal. 63, 79 Pac. 739; People *v.* Brennan, 121 Cal. 495, 53 Pac. 1098; Kalkman *v.* Baylis, 23 Cal. 303.

Colorado.— Magnes *v.* Sioux City Nursery, etc., Co., 14 Colo. App. 219, 59 Pac. 879.

Illinois.— Thomas *v.* Adams, 59 Ill. 223.

Indiana.— Robbins *v.* Spencer, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263.

Indian Territory.— Noble *v.* Worthy, 1 Indian Terr. 523, 42 S. W. 431.

Iowa.— Pitts *v.* Lewis, 81 Iowa 51, 46 N. W. 739.

Louisiana.— Thompson *v.* Parent, 15 La. Ann. 57.

Maine.— Haynes *v.* Hayward, 41 Me. 488.

Missouri.— Carroll *v.* Paul, 19 Mo. 102.

New York.— Ryan *v.* New York, 154 N. Y. 328, 48 N. E. 512; Clason *v.* Baldwin, 152 N. Y. 204, 46 N. E. 322; Voisin *v.* Providence Washington Ins. Co., 51 N. Y. App. Div. 553, 65 N. Y. Suppl. 333; Carroll *v.* New York El. R. Co., 14 N. Y. App. Div. 278, 43 N. Y. Suppl. 524 [*affirmed* in 162 N. Y. 603, 57 N. E. 1106]; Herbst *v.* Vacuum Oil Co., 68 Hun 222, 22 N. Y. Suppl. 807 [*affirmed* in 143 N. Y. 671, 39 N. E. 21].

South Dakota.— Distad *v.* Shanklin, 15 S. D. 507, 90 N. W. 151.

Tennessee.— Ballinger *v.* Stinnett, (Ch. App. 1900) 59 S. W. 1044.

Texas.— Lee *v.* Wharton, 11 Tex. 61.

Vermont.—Weldon Hotel Co. *v.* Seymour, 54 Vt. 582.

Virginia.— Unis *v.* Charlton, 12 Gratt. 484.

Wisconsin.— U. S. Express Co. *v.* Jenkins, 73 Wis. 471, 41 N. W. 957; Hinckley *v.* Beckwith, 23 Wis. 328.

United States.—Kneeland *v.* Luce, 141 U. S. 437, 12 S. Ct. 39, 35 L. ed. 808; Vattier *v.* Hinde, 7 Pet. 252, 8 L. ed. 675; Carey *v.* Williams, 79 Fed. 906, 25 C. C. A. 227.

Canada.— Reilander *v.* Bengert, 1 Sask. 259.

See 44 Cent. Dig. tit. "Stipulations," § 32.

51. *Alabama.*— Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223.

California.— Carpentier *v.* Small, 35 Cal. 346.

Florida.— Lawyers' Co-operative Pub. Co. *v.* Bennett, 34 Fla. 302, 16 So. 185.

Georgia.—West *v.* Berry, 98 Ga. 402, 25 S. E. 508; Southwestern R. Co. *v.* Atlantic, etc., R. Co., 53 Ga. 401.

Idaho.—Andrews *v.* Moore, 14 Ida. 465, 94 Pac. 579.

Illinois.— Chicago, etc., R. Co. *v.* Vaughn, 206 Ill. 234, 69 N. E. 113; Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88; Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40; Peddicord *v.* Security Live Stock Ins. Co., 26 Ill. App. 407.

Iowa.— Logan *v.* Hall, 19 Iowa 491.

Kansas.— Lyon *v.* Robert Garrett Lumber Co., 77 Kan. 823, 92 Pac. 589; Jeffries *v.* Robbins, 66 Kan. 427, 71 Pac. 852; Kansas Pac. R. Co. *v.* Butts, 7 Kan. 308.

Maine.— Machias Hotel Co. *v.* Fisher, 56 Me. 321; Ditson *v.* Randall, 33 Me. 202; Moore *v.* Philbrick, 32 Me. 102, 52 Am. Dec. 642; Hatch *v.* Allen, 27 Me. 85; Gardiner *v.* Nutting, 5 Me. 140, 17 Am. Dec. 211.

Maryland.— Birney *v.* York, etc., Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607; Inloes *v.* American Exch. Bank, 11 Md. 173, 69 Am. Dec. 190; Swatara R. Co. *v.* Brune, 6 Gill 41.

Massachusetts.—West Roxbury *v.* Minot, 114 Mass. 546; Com. *v.* Greene, 13 Allen 251; Cushing *v.* Kenfield, 5 Allen 307; Wolcott *v.* Ely, 2 Allen 338; Ellsworth *v.* Brewer, 11 Pick. 316; Boston *v.* Tileston, 11 Mass. 468.

Michigan.— Gillett *v.* Detroit Bd. of Trade, 46 Mich. 309, 9 N. W. 428; Goodrich *v.* Detroit, 12 Mich. 279.

Missouri.— Robidoux *v.* Casseleggi, 81 Mo. 459; McLennon *v.* Siebel, 135 Mo. App. 261, 115 S. W. 484; State *v.* Hudson, 86 Mo. App 501.

Oklahoma.— Consolidated Steel, etc., Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654.

Pennsylvania.—West Branch Logging Co. *v.* Strong, 196 Pa. St. 51, 46 Atl. 290; Beaumont *v.* Lane, 3 Pa. Super. Ct. 73.

Texas.— Pinkston *v.* West, (Civ. App. 1905) 85 S. W. 1014.

Virginia.— Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854; Sawyer *v.* Corse, 17 Gratt. 230, 94 Am. Dec. 445.

United States.— Saltonstall *v.* Russell, 152 U. S. 628, 14 S. Ct. 733, 38 L. ed. 576; Helena *v.* Helena Waterworks Co., 122 Fed. 1, 58 C. C. A. 381 [*affirmed* in 195 U. S. 383, 25 S. Ct. 40, 49 L. ed. 245].

England.—Van Wart *v.* Wolley, R. & M. 4, 21 E. C. L. 690.

See 44 Cent. Dig. tit. "Stipulations," § 34.

Findings by the trial court which are in conflict with the agreed facts will be ignored by the appellate court. Brown *v.* Evans, 15 Kan. 88.

The agreed statement is not the pleadings or the issues, but simply the proofs on which the cause is tried. Teopfer *v.* Kaeufer, 12 N. M. 372, 78 Pac. 53, 67 L. R. A. 315.

Effect of the stipulation.— Such a stipulation renders immaterial the want of an answer (Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Saltonstall *v.* Russell, 152 U. S. 628, 14 S. Ct. 733, 38 L. ed. 576), or replication (Hamilton *v.* Cook County, 5 Ill. 519; Vanderline *v.* Smith, 18 Mo. App. 55;

by the result of another trial.[52] Stipulations may be entered into concerning

Frank *v.* Frank, 6 Mo. App. 589), and operates as a waiver of all objections to the sufficiency of the pleadings (Winter *v.* Montgomery, 79 Ala. 481; St. John State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312; West Roxbury *v.* Minot, 114 Mass. 546; Esty *v.* Currier, 98 Mass. 500; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Smith *v.* Minor, 1 N. J. L. 19; Saltonstall *v.* Russell, 152 U. S. 628, 14 S. Ct. 733, 38 L. ed. 576; Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210), or the remedy adopted (Cushing *v.* Kenfield, 5 Allen (Mass.) 307; Kimball *v.* Preston, 2 Gray (Mass.) 567; Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210; Fisher *v.* Knight, 61 Fed. 491, 9 C. C. A. 582 [*affirming* 58 Fed. 991]), so far as it does not attempt to confer jurisdiction upon a court which does not possess it (McRae *v.* Locke, 114 Mass. 96; Willard *v.* Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. ed. 210; Goodyear Shoe Mach. Co. *v.* Dancel, 119 Fed. 692, 56 C. C. A. 300).

The court has no power to add any fact to the agreed case without the consent of the parties, and cannot order further evidence to be taken. Smyth *v.* McDougall, 1 Can. Sup. Ct. 114.

Where there were conflicting statements of fact involving issues of fraud, the court refused to consider a case submitted by consent of order, although power was given to draw inferences of fact and determine the cause on the evidence. Howard *v.* Lancashire Ins. Co., 14 Nova Scotia 374.

52. *Alabama.*— *Ex p.* Lawrence, 34 Ala. 446.

Georgia.— Commercial Union Assur. Co. *v.* Chattahoochee Lumber Co., 130 Ga. 191, 60 S. E. 554; Jarrett *v.* McLaughlin, 123 Ga. 256, 51 S. E. 329; People's Bank *v.* Merchants', etc., Bank, 116 Ga. 279, 42 S. E. 490.

Illinois.—Alton *v.* Foster, 207 Ill. 150, 69 N. E. 783; Dilworth *v.* Curts, 139 Ill. 508, 29 N. E. 861; Commercial Union Assur. Co. *v.* Scammon, 35 Ill. App. 659; Niagara F. Ins. Co. *v.* Scammon, 35 Ill. App. 582; McKinley *v.* Wilmington Star Min. Co., 7 Ill. App. 386.

Indiana.— Kimberlin *v.* Tow, 133 Ind. 696, 33 N. E. 770.

Iowa.— Rogers *v.* Alexander, 2 Greene 443.

Kansas.— Crockett *v.* Gray, 31 Kan. 346, 2 Pac. 809; Edwards *v.* Cary, 20 Kan. 414.

Maine.— Jewett *v.* Cornforth, 3 Me. 107, holding that, if the party afterward chooses to proceed, the stipulation is not a bar to the suit.

Massachusetts.— Campbell *v.* Talbot, 132 Mass. 174; Hodges *v.* Pingree, 108 Mass. 585; Higginson *v.* Gray, 8 Mass. 385.

Michigan.—Auditor-Gen. *v.* Smith, 95 Mich. 132, 54 N. W. 641.

Minnesota.—Abbott *v.* Anheuser-Busch Brewing Assoc., 60 Minn. 266, 62 N. W. 286.

Mississippi.— Moore *v.* Martin, (1895) 18 So. 110.

Missouri.— Dowling *v.* Wheeler, 117 Mo. App. 169, 93 S. W. 924; St. Joseph *v.* Hax, 55 Mo. App. 293; State *v.* Hannibal, etc., R. Co., 34 Mo. App. 591.

Nebraska.—Abbott *v.* Lane, 4 Nebr. (Unoff.) 629, 95 N. W. 599.

New York.— Herman *v.* Michel, 36 N. Y. App. Div. 127, 55 N. Y. Suppl. 359; Hempy *v.* Griess, 30 N. Y. App. Div. 434, 51 N. Y. Suppl. 1072; Murphy *v.* Keyes, 4 Thomps. & C. 561; Dean *v.* Milne, 5 N. Y. St. 319; Honlahan *v.* Sackett's Harbor, etc., R. Co., 24 How. Pr. 155; Brown *v.* Sprague, 5 Den. 545.

North Dakota.— Mooney *v.* Williams, 9 N. D. 329, 83 N. W. 237.

Oregon.— Small *v.* Lutz, 34 Oreg. 131, 55 Pac. 529, 58 Pac. 79.

Pennsylvania.— Haubert *v.* Haworth, 78 Pa. St. 78 [*reversing* 9 Phila. 123].

South Carolina.— Brown *v.* Peckman, 55 S. C. 555, 33 S. E. 732.

Texas.—Watrous *v.* McKie, 54 Tex. 65.

Wisconsin.— Wakeley *v.* Delaplaine, 15 Wis. 554.

United States.— McNeill *v.* Andes, 40 Fed. 45.

England.— *In re* London, etc., Gen. Agency Assoc., L. R. 4 Ch. 503, 20 L. T. Rep. N. S. 156, 17 Wkly. Rep. 628; *In re* Estates Inv. Co., L. R. 4 Ch. 497, 38 L. J. Ch. 412, 17 Wkly. Rep. 599.

See 44 Cent. Dig. tit. "Stipulations," § 29.

Contra.— Naas *v.* Backman, 28 Nova Scotia 504; Dewar *v.* Orr, 3 Ch. Chamb. (U. C.) 224.

Effect of stipulation.— Such a stipulation made before trial does not, in the absence of a provision express or implied to that effect, preclude a party from giving other pertinent evidence. Dillon *v.* Cockcroft, 90 N. Y. 649; Kempner *v.* Rosenthal, 81 Tex. 12, 16 S. W. 639; Provident Nat. Bank *v.* Webb, (Tex. Civ. App. 1906) 95 S. W. 716; Imhoff *v.* Whittle, (Tex. Civ. App. 1904) 84 S. W. 243.

If it is stipulated that evidence may be added at the trial, only such evidence as is pertinent to the issue made, and which was in existence at the date of the stipulation is admissible. Donner *v.* Palmer, 51 Cal. 629. And if the stipulation does not expressly limit its operation to a particular occasion or purpose, it is admissible in evidence at any subsequent trial of the cause. Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600; Mugge *v.* Jackson, 50 Fla. 235, 39 So. 157; Hammontree *v.* Huber, 39 Mo. App. 326; Donovan *v.* Twist, 119 N. Y. App. Div. 734, 104 N. Y. Suppl. 1; Consolidated Steel, etc., Co. *v.* Burnham, 8 Okla. 514, 58 Pac. 654; Blankinship *v.* Oklahoma City Light, etc., Co., 4 Okla. 242, 43 Pac. 1088; Cornbest *v.* Wall, (Tex. Civ. App. 1909) 115 S. W. 354.

Discontinuance as to some defendants.— Where, in an action against several, an agreement is entered into whereby the interests of all defendants except one are adjusted, no formal order of dismissal as to

the trial or hearing generally,[53] as to the time [54] or place of trial,[55] as to the verdict or finding,[56] as to referring the cause,[57] or compromising it in most [57a] but not in

the parties to the stipulation is necessary to make a judgment against the one defendant valid. Bailey *v.* McWilliams, 111 Mo. App. 35, 85 S. W. 618.

Judgment may be entered without notice by the trial judge, upon learning the result of a test case, under a stipulation suspending the decision of a case tried before him, until the decision of an appellate court can be had in a pending case, and it is not necessary that he should have read the decision in such pending case. Stein *v.* Burden, 30 Ala. 270.

The agreement cannot be defeated by withdrawing a claim. Gilmore *v.* American Cent. Ins. Co., 67 Cal. 366, 7 Pac. 781; Bradshaw *v.* Gormerly, 54 Ga. 557.

The stipulation is a waiver of a jury.— Cummings *v.* Smith, 50 Me. 568, 79 Am. Dec. 629.

Waiver of stipulation.— A subsequent agreement for a continuance of the test case is not a waiver of the agreement. McKinley *v.* Wilmington Star Min. Co., 7 Ill. App. 386.

Authority of court.— The stipulation does not authorize the supreme court to assume jurisdiction in cases not before it, or warrant the expression of an opinion purely speculative. Belden *v.* Snead, 84 N. C. 243.

The stipulation governs only the facts, not the law.— Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403 [*affirmed* in 63 Ill. App. 534]; Huff *v.* Cook, 44 Iowa 639; Lyon *v.* Robert Garrett Lumber Co., 77 Kan. 823, 92 Pac. 589.

Matters in abatement will not be considered. Libbey *v.* Hodgdon, 9 N. H. 394; Morse *v.* Calley, 5 N. H. 222.

53. *Illinois.*— Jacksonville, etc., R. Co. *v.* Hall, 2 Ill. App. 618.

Maryland.— Caledonian F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782.

Mississippi.—Yalabusha County *v.* Carbry, 3 Sm. & M. 529.

Texas.— Neill *v.* Tarin, 9 Tex. 256.

Wisconsin.— Hills *v.* Passage, 21 Wis. 294; Beach *v.* Beckwith, 13 Wis. 21; Rogan *v.* Walker, 1 Wis. 597.

See 44 Cent. Dig. tit. "Stipulations," § 35.

54. *Illinois.*— Jacksonville, etc., R. Co. *v.* Hall, 2 Ill. App. 618.

New York.— Baldwin *v.* Woolever, 2 How. Pr. 165; Stover *v.* Batterman, 2 How. Pr. 135; Goodenow *v.* Butler, 1 How. Pr. 82; Jackson *v.* Phœnix Bank, 5 Wend. 101.

Tennessee.— Jones *v.* Kimbro, 6 Humphr. 319.

Texas.— Travelers' Ins. Co. *v.* Arant, (Civ. App. 1897) 40 S. W. 853.

Canada.— Hechler *v.* Berrigan, 26 Nova Scotia 291; Gilbert *v.* Moore, 9 Quebec Pr. 316.

55. Shenandoah Nat. Bank *v.* Read, 86 Iowa 136, 53 N. W. 96; Babcock *v.* Wolf, 70 Iowa 676, 28 N. W. 490; Hawkins *v.* Richmond Cedar Works, 122 N. C. 87, 30 S. E. 13.

56. *California.*— Dreyfous *v.* Adams, 48 Cal. 131; Marius *v.* Bicknell, 10 Cal. 217.

Georgia.— Nolan *v.* State, 53 Ga. 137.

Illinois.— St. Louis, etc., R. Co. *v.* Faitz, 19 Ill. App. 85.

Mississippi.— Doolittle *v.* Adams, (1907) 43 So. 951.

Nebraska.— Griffin *v.* Western Mut. Assoc., 20 Nebr. 620, 31 N. W. 122, 57 Am. Rep. 848.

North Carolina.— Fleming *v.* Wilmington, etc., R. Co., 115 N. C. 676, 20 N. E. 714.

Wisconsin.— Lally *v.* Rossman, 82 Wis. 147, 51 N. W. 1132.

United States.— Koon *v.* Phœnix Mut. L. Ins Co., 104 U. S. 106, 26 L. ed. 670.

See 44 Cent. Dig. tit. "Stipulations," § 35 *et seq.*

57. Daverkosen *v.* Kelley, 43 Cal. 477; Hearne *v.* Brown, 67 Me. 156; Weare *v.* Putnam, 56 N. H. 49; Hughes *v.* Christy, 26 Tex. 230. See Neale *v.* Lennox, [1902] A. C. 465, 66 J. P. 757, 71 L. J. K. B. 939, 87 L. T. Rep. N. S. 341, 18 T. L. R. 791, 51 Wkly. Rep. 140; Matthews *v.* Munster, 20 Q. B. D. 141, 52 J. P. 260, 57 L. J. Q. B. 49, 57 L. T. Rep. N. S. 922, 36 Wkly. Rep. 178; Smith *v.* Troup, 7 C. B. 757, 6 D. & L. 679, 18 L. J. C. P. 209, 62 E. C. L. 757; Oakes *v.* Halifax, 13 Nova Scotia 98 [*reversed* in 4 Can. Sup. Ct. 640].

57a. *Connecticut.*— Day *v.* Welles, 31 Conn. 344.

Kansas.— Marbourg *v.* Smith, 11 Kan. 554.

Mississippi.— Jenkins *v.* Gillespie, 10 Sm. & M. 31, 48 Am. Dec. 732.

Pennsylvania.— Dodds *v.* Dodds, 9 Pa. St. 315.

South Carolina.— Smith *v.* Bossard, 2 McCord Eq. 406.

United States.—Holker *v.* Parker, 7 Cranch 496, 3 L. ed. 396.

England.— King *v.* Pinsoneault, L. R. 6 P. C. 245, 259, 44 L. J. P. C. 42, 32 L. T. Rep. N. S. 174, 23 Wkly. Rep. 576; *In re* Mathews, [1905] 2 Ch. 460, 74 L. J. Ch. 656, 93 L. T. Rep. N. S. 158, 54 Wkly. Rep. 75; *In re* Newen, [1903] 1 Ch. 812, 72 L. J. Ch. 356, 88 L. T. Rep. N. S. 264, 19 T. L. R. 247, 51 Wkly. Rep. 297; Leeming *v.* Murray, 13 Ch. D. 123, 48 L. J. Ch. 737, 28 Wkly. Rep. 338; Prestwich *v.* Poley, 18 C. B. N. S. 806, 34 L. J. C. P. 189, 12 L. T. Rep. N. S. 390, 114 E. C. L. 806; Chown *v.* Parrot, 14 C. B. N. S. 74, 9 Jur. N. S. 1290, 32 L. J. C. P. 197, 8 L. T. Rep N. S. 391, 11 Wkly. Rep. 608, 108 E. C. L. 74; Fray *v.* Voules, 1 E. & E. 839, 5 Jur. N. S. 1253, 28 L. J. Q. B. 232, 7 Wkly. Rep. 446, 102 E. C. L. 839; Swinfen *v.* Swinfen, 27 L. J. Ch. 35, 491; Aspin *v.* Wilkinson, 23 Sol. J. 388.

Canada.— Norquay *v.* Broggio, 2 West. L. Rep. 108; Nova Scotia Bank *v.* Morrow, 17 N. Brunsw. 343; Benner *v.* Edmonds, 19 Ont. Pr. 9; Watt *v.* Clark, 12 Ont. Pr. 359; Doran *v.* Great Western R. Co., 14 U. C. Q. B. 403.

all [57b] jurisdictions, or the submission of issues to court,[58] as to instructions,[59] as to judgment and enforcement thereof,[60] as to staying execution,[61] and as to review and appeal.[62] In most jurisdictions many of these actions are governed by special rules or statutes.

V. CONSTRUCTION, OPERATION, AND EFFECT.

A. Construction. The rules applicable to the construction of contracts generally [63] govern the courts in their interpretation of stipulations,[64] and thus stipulations will receive a reasonable construction with a view to effecting the intent of the parties; [65] but in seeking the intention of the parties, the language

57b. *Arkansas.*—Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346.

Connecticut.— Derwort *v.* Loomer, 21 Conn. 245.

Kentucky.— Smith *v.* Dixon, 3 Metc. 438.

New York.— Mandeville *v.* Reynolds, 68 N. Y. 528.

Vermont.— Vail *v.* Conant, 15 Vt. 314.

58. *Alabama.*— Gibson *v.* Land, 27 Ala. 117.

Georgia.— Hodges *v.* Holiday, 29 Ga. 696.

Illinois.— King *v.* Chicago, etc., R. Co., 98 Ill. 376; Anderson *v.* White, 27 Ill. 57.

Kansas.— Richards *v.* Griffith, 1 Kan. App. 518, 41 Pac. 196 [*reversed* on other grounds in 57 Kan. 234, 45 Pac. 600].

Michigan.— Drovers' Nat. Bank *v.* Blue, 110 Mich. 31, 67 N. W. 1105, 64 Am. St. Rep. 327; Hollenberg *v.* Shuffert, 47 Mich. 126, 10 N. W. 137.

Minnesota.— Chezick *v.* Minneapolis, etc., El. Co., 66 Minn. 300, 68 N. W. 1093.

Nebraska.— Hodges *v.* Graham, 71 Nebr. 125, 98 N. W. 418.

Oklahoma.— Walker *v.* Walker, 17 Okla. 467, 88 Pac. 1127.

Tennessee.— Ward *v.* Crenshaw, 4 Yerg. 197.

59. Burns *v.* Oliphant, 78 Iowa 456, 43 N. W. 289; Parsons *v.* Hedges, 15 Iowa 119; Forsee *v.* Hurd, 185 Mo. 503, 84 S. W. 872.

60. *Alabama.*— Winter *v.* Montgomery, 79 Ala. 481.

California.— Semple *v.* Wright, 32 Cal. 659.

Iowa.— Gressly *v.* Hamilton County, 136 Iowa 722, 114 N. W. 191.

United States.— Hardesty *v.* Pyle, 15 Fed. 778.

England.— Gilbert *v.* Endean, 9 Ch. D. 259, 39 L. T. Rep. N. S. 404, 27 Wkly. Rep. 252; Butler *v.* Knight, L. R. 2 Exch. 109, 36 L. J. Exch. 66, 15 L. T. Rep. N. S. 621, 15 Wkly. Rep. 407; Latuch *v.* Pasherante, 1 Salk. 86, 91 Eng. Reprint 81. But see Levi *v.* Abbott, 4 Exch. 588, 19 L. J. Exch. 62, 63.

Canada.— Muirhead *v.* Shirreff, 14 Can. Sup. Ct. 735; Norquay *v.* Broggio, 2 West. L. Rep. 108; McNamee *v.* O'Brien, 9 N. Brunsw. 548; Stephens *v.* Higgins, 3 Quebec Pr. 155; Tabb *v.* Beckett, 9 Quebec Super. Ct. 159.

61. *Alabama.*— Sharp *v.* Allgood, 100 Ala. 183, 14 So. 16.

California.— Keys *v.* Warner, 45 Cal. 60; Moulton *v.* Ellmaker, 30 Cal. 527.

Illinois.—Dick Co. *v.* Sherwood Letter File Co., 157 Ill. 325, 42 N. E. 440; Cairo, etc., R. Co. *v.* Killenberg, 92 Ill. 142.

Maryland.— Farmers' Bank *v.* Sprigg, 11 Md. 389.

Montana.—Kleinschmidt *v.* Morse, 1 Mont. 100.

New York.— *In re* Welch, 14 Barb. 396; Keating *v.* Serrell, 5 Daly 278.

England.— Lovegrove *v.* White, L. R. 6 C. P. 440, 40 L. J. C. P. 253, 24 L. T. Rep. N. S. 554, 19 Wkly. Rep. 823; Whyte *v.* Nutting, [1897] 2 Ir. 241; Savory *v.* Chapman, 11 A. & E. 829, 8 Dowl. P. C. 656, 4 Jur. 411, 9 L. J. Q. B. 186, 3 P. & D. 604, 39 E. C. L. 439; Connop *v.* Challis, 6 D. & L. 48, 2 Exch. 484, 17 L. J. Exch. 319; Barker *v.* St. Quintin, 1 D. & L. 542, 13 L. J. Exch. 144, 12 M. & W. 441; Levi *v.* Abbott, 4 Exch. 588, 19 L. J. Exch. 62; *Re* Commonwealth Land, etc., Co., 43 L. J. Ch. 99, 29 L. T. Rep. N. S. 502, 22 Wkly. Rep. 106.

Canada.— Brock *v.* McLean, Taylor (U. C.) 398; Stocking *v.* Cameron, 6 U. C. Q. B. O. S. 475; Courchaine *v.* Courchaine, 9 Quebec Pr. 54.

See 44 Cent. Dig. tit. "Stipulations," § 36.

62. *California.*—Glotzback *v.* Foster, 11 Cal. 37.

Iowa.— Lundon *v.* Waddick, 98 Iowa 478, 67 N. W. 388.

Nebraska.— Johnson *v.* Parrotte, 46 Nebr. 51, 64 N. W. 363.

England.— *In re* West Devon Consols Mine, 38 Ch. D. 51, 57 L. J. Ch. 850, 58 L. T. Rep. N. S. 61, 36 Wkly. Rep. 342; Watson *v.* Cave, 17 Ch. D. 23, 50 L. J. Ch. 561, 44 L. T. Rep. N. S. 117, 29 Wkly. Rep. 768; *In re* Hull, etc., Bank, 13 Ch. D. 261, 41 L. T. Rep. N. S. 537, 28 Wkly. Rep. 125.

Canada.— Société Canadienne-Francaise, etc. *v.* Daveluy, 20 Can. Sup. Ct. 449.

63. See CONTRACTS, 9 Cyc. 577.

64. Abbott *v.* Lane, 4 Nebr. (Unoff.) 629, 95 N. W. 599; Schroeder *v.* Frey, 60 Hun (N. Y.) 58, 14 N. Y. Suppl. 71 [*affirmed* in 131 N. Y. 562, 30 N. E. 66]. See Schroeder *v.* Frey, 114 N. Y. 266, 21 N. E. 410.

65. *Alabama.*— Ober *v.* Thomason Grocery Co., 138 Ala. 217, 35 So. 127.

California.— Pacific Pav. Co. *v.* Vizelich, 141 Cal. 4, 74 Pac. 352; Cooper *v.* Burch, 140 Cal. 548, 74 Pac. 37; Brady *v.* Ranch Min. Co., 7 Cal. App. 182, 94 Pac. 85.

Georgia.— Reynolds *v.* Hindman, 88 Ga. 314, 14 S. E. 471; Planter's Bank *v.* Houser, 57 Ga. 140.

Illinois.— Telluride Power Transmission Co. *v.* Crane Co., 208 Ill. 218, 70 N. E. 319; Magnusson *v.* Charleson, 9 Ill. App. 194.

used will not be so construed as to give it the effect of an admission of a fact obviously intended to be controverted,[66] or the waiver of a right not plainly intended to be relinquished,[67] and all agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein are void, although not open to the actual charge of corruption.[68]

B. Operation and Effect — 1. Matters Concluded. A valid stipulation concerning any matter properly before the court acts as an estoppel upon the parties thereto and is conclusive of all matters necessarily included in the stipulation;[69] but not of matters extraneous to the litigation.[69a] An agreement wholly

Iowa.— Goodenow *v.* Foster, 108 Iowa 508, 79 N. W. 288.

Michigan.—Shaw-Walker Co. *v.* Fitzsimons, 148 Mich. 626, 112 N. W. 501.

Missouri.—Hall *v.* Goodnight, 138 Mo. 576, 37 S. W. 916.

Montana.— Murray *v.* Butte, 31 Mont. 177, 77 Pac. 527.

Nebraska.— Whalen *v.* Brennan, 34 Nebr. 129, 51 N. W. 759.

New York.—Title Guarantee, etc., Co. *v.* Withers, 105 N. Y. Suppl. 195.

North Dakota.— Purcell *v.* Farm Land Co., 13 N. D. 327, 100 N. W. 700.

Ohio.— Swisher *v.* McWhinney, 64 Ohio St. 343, 60 N. E. 565.

United States.—Hyatt *v.* People, 188 U. S. 691, 23 S. Ct. 456, 47 L. ed. 657; Second Ward Sav. Bank *v.* Huron, 80 Fed. 660; Tracy *v.* Reed, 38 Fed. 69, 13 Sawy. 622, 2 L. R. A. 773; Atlantic Ins. Co. *v.* Conard, 2 Fed. Cas. No. 627, 4 Wash. 662.

See 44 Cent. Dig. tit. "Stipulations," § 24 *et seq.*

Failure to instruct upon a question admitted by stipulation is no ground for objection. Adler *v.* Wagner, 47 Mo. App. 25.

66. *California.*— San Jose *v.* Uridias, 37 Cal. 339; Seale *v.* Ford, 29 Cal. 104.

Florida.— Mutual Loan, etc., Assoc. *v.* Price, 19 Fla. 127.

Illinois.— United Breweries Co. *v.* Bass, 121 Ill. App. 299.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

Texas.— Selkirk *v.* Watkins, (Civ. App. 1907) 105 S. W. 1161.

United States.— U. S. *v.* Wong Hong, 71 Fed. 283.

See 44 Cent. Dig. tit. "Stipulations," § 24 *et seq.*

67. *Alabama.*— Baker *v.* Starling, (1905) 39 So. 775.

Kansas.— Hiatt *v.* Auld, 11 Kan. 176.

Maine.— Buck *v.* Spofford, 35 Me. 526.

Massachusetts.— Huntington *v.* Saunders, 166 Mass. 92, 43 N. E. 1035.

Minnesota.— Barker *v.* Keith, 11 Minn. 65.

Nebraska.— Lau *v.* W. B. Grimes Dry-Goods Co., 38 Nebr. 215, 56 N. W. 954.

New York.— *In re* Metropolitan El. R. Co., 136 N. Y. 500, 32 N. E. 1043; *In re* Rochester, 136 N. Y. 83, 32 N. E. 702, 19 L. R. A. 161; Schroeder *v.* Frey, 114 N. Y. 266, 21 N. E. 410; Dean *v.* Marschall, 90 Hun 335, 35 N. Y. Suppl. 724; People *v.* Stephens, 51 How. Pr. 227.

Texas.— King *v.* Elson, 30 Tex. 246.

Wisconsin.— McNaughton *v.* Thayer, 17 Wis. 290.

See 44 Cent. Dig. tit. "Stipulations," § 24 *et seq.*

68. Thompson *v.* Buffington, 7 S. & C. Pl. Dec. 557, 7 Ohio N. P. 134.

69. *California.*— Grady *v.* Porter, 53 Cal. 680; Lawrence *v.* Ballou, 50 Cal. 258; Reynolds *v.* Lawrence, 15 Cal. 359; Brotherton *v.* Hart, 11 Cal. 405.

Illinois.—Chicago *v.* Drexel, 141 Ill. 89, 30 N. E. 774; Dinet *v.* Eigenmann, 96 Ill. 39.

Indiana.— Brownlee *v.* Hare, 64 Ind. 311; Sidener *v.* Essex, 22 Ind. 201.

Iowa.— Van Horn *v.* Burlington, etc., R. Co., 69 Iowa 239, 28 N. W. 547; Updegraft *v.* Edwards, 45 Iowa 513.

Maine.— Hatch *v.* Dennis, 10 Me. 244.

Massachusetts.— Masonic Bldg. Assoc. *v.* Brownell, 164 Mass. 306, 41 N. E. 306.

Michigan.— Petrie *v.* Torrent, 107 Mich. 648, 65 N. W. 557; Alexander *v.* Rice, 52 Mich. 451, 18 N. W. 214.

Minnesota.— Shaw *v.* Henderson, 7 Minn. 480.

Mississippi.— Worsham *v.* McLeod, (1891) 11 So. 107.

Missouri.— Hammontree *v.* Huber, 39 Mo. App. 326.

Nebraska.— Tecumseh Nat. Bank *v.* Harmon, 48 Nebr. 222, 66 N. W. 1128.

New York.— Van Aernam *v.* Bleistein, 102 N. Y. 355, 7 N. E. 537; Bowers *v.* Durant, 43 Hun 348; Keenan *v.* Gantert, 20 N. Y. Suppl. 38; Van Zandt *v.* Van Zandt, 10 N. Y. Suppl. 200, 23 Abb. N. Cas. 328; People *v.* Boyd, 2 Edw. 516.

Pennsylvania.— Long's Appeal, 92 Pa. St 171; Fursht *v.* Overdeer, 3 Watts & S. 470; Gratz *v.* Philips, 2 Penr. & W. 410; Pizer *v* Voyle, 8 Luz. Leg. Reg. 69.

Texas.— Crabtree *v.* Whiteselle, 65 Tex. 111.

See 44 Cent. Dig. tit. "Stipulations," § 41 *et seq.*

69a. Dodds *v.* Dodds, 9 Pa. St. 315; Swinfen *v.* Swinfen, 24 Beav. 549, 2 De G. & J. 381, 3 Jur. N .S. 1109, 4 Jur. N. S. 774, 27 L. J. Ch. 35, 491, 6 Wkly. Rep. 10, 53 Eng. Reprint 470; Swinfen *v.* Chelmsford, 5 H. & N. 890, 6 Jur. N. S. 1035, 29 L. J. Exch. 382, 2 L. T. Rep. N. S. 406, 8 Wkly. Rep. 545; Stretton *v.* Thompson, 72 L. T. J. 136; Kempshall *v.* Holland, 14 Reports 336; Ellender *v.* Wood, 4 T. L. R. 680, 32 Sol. J. 628; *Re* Wood, 21 Wkly. Rep. 104.

prospective in its operation will not constitute a waiver of any rights or claims accruing prior to its execution.[70]

2. Persons Concluded. A stipulation of an attorney who has been retained in anticipation of a suit to be brought is as conclusive upon his client when entered into before the commencement of the action as it would be afterward.[71] But a stipulation between some of the parties to an action, although made of record, will not bind other parties who did not sign it;[72] and the fact that an attorney signs a stipulation on behalf of one of several co-parties, whom he represents, does not make the stipulation binding on those whose rights are reserved.[73] In an action to recover land a stipulation between the original parties is binding upon those who purchase from defendants pending suit, and later become parties thereto.[74] The legal representatives of one who has become insane after trial are bound by a stipulation entered into by such person's guardian for the purpose of obtaining a review.[75]

3. Conclusive Effect Upon Court. Courts are not bound by the private agreements of counsel respecting the conduct of business before them.[76] But a stipulation relating to some interest of the party which is wholly under his control, and in no way affects the procedure in the cause, cannot be controlled by the court.[77]

VI. RESCISSION OR WITHDRAWAL FROM STIPULATION.

Stipulations between counsel concerning the conduct of a pending cause cannot ordinarily be repudiated or withdrawn from by one party without the consent of the other, except by leave of court upon cause shown;[78] but where a party,

70. Heywood *v.* Miner, 102 Mass. 466.

71. Hefferman *v.* Burt, 7 Iowa 320, 71 Am. Dec. 445. But see Macaulay *v.* Polley, [1897] 1 Q. B. 122, 66 L. J. Q. B. 665, 76 L. T. Rep. N. S. 643, 45 Wkly. Rep. 681; Duffy *v.* Hanson, 16 L. T. Rep. N. S. 332; Lyons *v.* Donkin, 23 Nova Scotia 258.

72. *Alabama.*— Trimble *v.* Fariss, 78 Ala. 260.

Georgia.— Field *v.* Armstrong, 69 Ga. 170.

Illinois.— Evans-Montague Commission Co. *v.* Spaulding, 229 Ill. 405, 82 N. E. 404.

Indiana.— Midland R. Co. *v.* Island Coal Co., 126 Ind. 384, 26 N. E. 68.

Iowa.— Bixby *v.* Carskaddon, 63 Iowa 164, 18 N. W. 875; Clapp *v.* Sohmer, 55 Iowa 273, 7 N. W. 639.

Michigan.—Fowler *v.* Hosmer, 105 Mich. 90, 62 N. W. 1028.

Minnesota.— State *v.* Merchants' Bank, 74 Minn. 175, 77 N. W. 31.

Nebraska.— Gregory *v.* Edgerly, 17 Nebr. 373, 374, 22 N. W. 243, 703.

New York.— Matter of Meehan, 29 Misc. 167, 60 N. Y. Suppl. 1003.

Texas.— Grant *v.* Hill, (Civ. App. 1894) 30 S. W. 952.

United States.— Kneeland *v.* Luce, 141 U. S. 437, 12 S. Ct. 39, 35 L. ed. 808; New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 128 Fed. 483.

England.— *In re* Mathews, [1905] 2 Ch. 460, 74 L. J. Ch. 656, 93 L. T. Rep. N. S. 158, 54 Wkly. Rep. 75.

See 44 Cent. Dig. tit. "Stipulations," § 39.

Infant defendants are not bound by a stipulation as to facts. Anderson *v.* Anderson, 191 Ill. 100, 60 N. E. 810.

Parties to a foreclosure suit cannot, by stipulation between themselves, make any change in the mortgagor's grant, which will affect the rights of such mortgagor's liens or legal representatives. Morgan *v.* Meuth, 60 Mich. 238, 27 N. W. 509.

Effect on persons not parties to suit.— An agreement between the parties to an action for divorce that each should pay half of the fees of the stenographer employed to take testimony before the referee is not binding on the stenographer, where no stipulation to that effect was filed with the referee or entered on his minutes, and no notice of the agreement was given to the stenographer. Coale *v.* Suckert, 18 Misc. (N. Y.) 76, 41 N. Y. Suppl. 583.

Stipulation by agent.— One who unites his claims in a controversy with those of another, submitting the management thereof to the latter, is bound by a stipulation made by such other. Blight *v.* Banks, 6 H. B. Mon. (Ky.) 192, 17 Am. Dec. 136.

73. Richardson *v.* Chicago Packing, etc., Co., (Cal. 1900) 63 Pac. 74.

74. Delk *v.* Punchard, 64 Tex. 360.

75. Austin *v.* Dunham, 65 Me. 533.

76. Kidd *v.* McMillan, 21 Ala. 325; Ford *v.* Holmes, 61 Ga. 419; State *v.* McArthur, 23 Wis. 427.

77. Dorr *v.* Steichen, 18 Minn. 26.

78. *Georgia.*— Harris *v.* McArthur, 90 Ga. 216, 15 S. E. 758; Johnson *v.* Wright, 19 Ga. 509.

Maine.— Hutchings *v.* Buck, 32 Me. 277.

New York.— Herbst *v.* Vacuum Oil Co., 68 Hun 222, 22 N. Y. Suppl. 807 [*affirmed* in 143 N. Y. 671, 39 N. E. 21].

Ohio.— Ish *v.* Crane, 13 Ohio St. 574.

Pennsylvania.— Continental Ins. Co. *v.* Delpuch, 82 Pa. St. 225.

United States.— Aurrecoechea *v.* Bangs,

by stipulation, inadvertently admitted facts which are not true, he may withdraw such admission upon timely notice, provided nothing prejudicial to the adverse party has occurred since it was made,[79] and a stipulation postponing the trial of a case to abide the determination of another may be rescinded, if the case in which the decision is awaited is not determined within a reasonable time.[80] If the stipulation is obtained by fraud it may be repudiated on discovery of the fraud and treated as void *ab initio*.[81]

VII. RELIEF FROM STIPULATION.

A. Discretion and Power of Court. The court has power to relieve a person from a stipulation upon proper application and a showing of sufficient cause;[82] and it is within the discretion of the court to set aside stipulations of attorneys relating to the conduct of a pending cause when their enforcement would result in serious injury to one of the parties, and the other party would not be prejudiced by its being set aside.[83] The exercise of judicial discretion cannot be invoked without cause shown;[84] and on the other hand the circumstances may be such that it will be error to grant the relief asked.[85] An appellate court will not interfere with the decision of the lower court in regard to setting aside a stipulation unless there is an apparent abuse of discretion.[86]

110 U. S. 217, 3 S. Ct. 639, 28 L. ed. 125; Muller *v.* Dows, 94 U. S. 277, 24 L. ed. 76.

England.— See King *v.* Pinsoneault, L. R. 6 P. C. 245, 259, 44 L. J. P. C. 42, 32 L. T. Rep. N. S. 174, 23 Wkly. Rep. 576; Harvey *v.* Croydon Union, 26 Ch. D. 249, 53 L. J. Ch. 707, 50 L. T. Rep. N. S. 291, 32 Wkly. Rep. 389; Davis *v.* Davis, 13 Ch. D. 861, 49 L. J. Ch. 241, 41 L. T. Rep. N. S. 790, 28 Wkly. Rep. 345; Scully *v.* Dundonald, 8 Ch. D. 658, 664, 665, 39 L. T. Rep. N. S. 116, 27 Wkly Rep. 249; Holt *v.* Jesse, 3 Ch. D. 177, 46 L. J. Ch. 254, 24 Wkly. Rep. 879; Carew *v.* Cooper, 12 Wkly. Rep. 767; Stokes *v.* Latham, 4 T. L. R. 305.

Canada.— See Benner *v.* Edmonds, 19 Ont. Pr 9; Watt *v.* Clark, 12 Ont. Pr. 359.

See 44 Cent. Dig. tit. "Stipulations," § 66.

79. Wallace *v.* Matthews, 39 Ga. 617, 99 Am. Dec. 473 (holding that sufficient time should be allowed after the withdrawal to allow the adverse party to prepare his case); Carnegie Steel Co. *v.* Cambria Iron Co., 185 U. S. 403, 22 S. Ct. 698, 46 L. ed. 968 [*reversing* 96 Fed. 850, 37 C. C. A. 593]; Brown *v.* Blackwell, 26 U. C. C. P. 43.

80. Martin *v.* Martin, 107 S. W. 771, 32 Ky. L. Rep. 1100, holding that a motion to submit the case is sufficient notice of rescission.

81. Powell *v.* Turner, 139 Mass. 97, 28 N. E. 453; Priestman *v.* Thomas, 9 P. D. 210, 53 L. J. P. D. & Adm. 109, 51 L. T. Rep. N. S. 843, 32 Wkly. Rep. 842.

82. *Alabama.*— Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344.

California.— Bonds *v.* Hickman, 29 Cal. 460.

Minnesota.—Gerdtzen *v.* Cockrell, 52 Minn. 501, 55 N. W. 58.

New Hampshire.— Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468.

New York.— Tauziede *v.* Jumel, 138 N. Y. 431, 34 N. E. 274; Magnolia Metal Co. *v.* Pound, 60 N. Y. App. Div. 318, 70 N. Y. Suppl. 230.

See 44 Cent. Dig. tit. "Stipulations," § 67 *et seq.*

83. *California.*— Moffitt *v.* Jordan, 127 Cal. 628, 60 Pac. 175.

Nebraska.—State Ins. Co. *v.* Farmers' Mut. Ins. Co., 65 Nebr. 34, 90 N. W. 997; Keens *v.* Robertson, 46 Nebr. 837, 65 N. W. 897.

New Hampshire.— Page *v.* Brewster, 54 N. H. 184.

New York.— Barry *v.* Mutual L. Ins. Co., 53 N. Y. 536.

South Dakota.— Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863.

Texas.— Cullers *v.* Platt, 81 Tex. 258, 16 S. W. 1003; McClure *v.* Sheek, 68 Tex. 426, 4 S. W. 552; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448.

Vermont.— Fayston *v.* Richmond, 25 Vt. 446.

Wisconsin.— Brown *v.* Cohn, 88 Wis. 627, 60 N. W. 826.

See 44 Cent. Dig. tit. "Stipulations," § 67 *et seq.*

The court may revoke its ruling that a stipulation admitting facts may be withdrawn, in the absence of a showing of injustice or hardship to the adverse party. Nathan *v.* Dierssen, 146 Cal. 63, 79 Pac. 739.

84. Morris *v.* Press Pub. Co., 98 N. Y. App. Div. 143, 90 N. Y. Suppl. 673; Hering *v.* Bohemia Land, etc., Co., 53 Misc. (N. Y.) 644, 103 N. Y. Suppl. 108. See Sullivan *v.* Bruhling, 70 Wis. 388, 36 N. W. 23.

85. Paschall *v.* Penry, 82 Tex. 673, 18 S. W. 154; Porter *v.* Holt, 73 Tex. 447, 11 S. W. 494.

86. *California.*— Moffitt *v.* Jordan, 127 Cal. 628, 60 Pac. 175.

Nebraska.— State Ins. Co. *v.* Farmers' Mut. Ins. Co., 65 Nebr. 34, 90 N. W. 997.

South Dakota.— Meldrum *v.* Kenefick, 15 S. D. 370, 89 N. W. 863.

B. Grounds. It has been held that a stipulation, having all the binding force of a contract, should not be set aside on less grounds than would justify the setting aside of any other contract;[87] and where, by statute, stipulations settling the issues to be tried are made effective as verdicts, the reasons advanced for setting them aside must be as weighty as those required to set aside a verdict.[88] In order to warrant the court in interfering to relieve a party from a stipulation there must be a showing of fraud, collusion, mistake, accident, or surprise.[89] But although the court will always relieve a party from a stipulation on the ground that it was induced by fraud,[90] fraud, collusion, or bad faith need not appear in every case, since the court, by reason of the broad equitable powers which it has over its own proceedings, may set aside a stipulation in any case where it would be inequitable to enforce it,[91] as where it was entered into under a mistake or misunderstanding as to a fact or circumstance connected with the subject-matter.[92]

Texas.— Cullers *v.* Platt, 81 Tex. 258, 16 S. W. 1003.

Wisconsin.— Brown *v.* Cohn, 88 Wis. 627, 60 N. W. 826.

See 44 Cent. Dig. tit. "Stipulations," § 67 *et seq.*

87. Bingham *v.* Winona County, 6 Minn. 136; Keogh *v.* Main, 52 N. Y. Super. Ct. 160; Connatty *v.* O'Reilly, 11 Ir. Eq. 333.

88. Bingham *v.* Winona County, 6 Minn. 136.

89. Bingham *v.* Winona County, 6 Minn. 136; Lee *v.* Winans, 99 N. Y. App. Div. 297, 90 N. Y. Suppl. 960; Slaven *v.* Germain, 64 Hun (N. Y.) 506, 19 N. Y. Suppl. 492; Keogh *v.* Main, 52 N. Y. Super. Ct. 160; Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273, 64 L. J. Ch. 523, 72 L. T. Rep. N. S. 703, 12 Reports 331, 43 Wkly. Rep. 567; Davenport *v.* Stafford, 8 Beav. 503, 522, 9 Jur. 801, 14 L. J. Ch. 414, 50 Eng. Reprint 198; Connatty *v.* O'Reilly, 11 Ir. Eq. 333.

90. Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468; Seaver *v.* Moore, 1 Hun (N. Y.) 305; Williams *v.* Preston, 20 Ch. D. 672, 51 L. J. Ch. 927, 47 L. T. Rep. N. S. 265, 30 Wkly. Rep. 555.

91. Commercial Union Assur. Co. *v.* Chattahoochee Lumber Co., 130 Ga. 191, 60 S. E. 554; Wells *v.* Penfield, 70 Minn. 66, 72 N. W. 816; Magnolia Metal Co. *v.* Pound, 60 N. Y. App. Div. 318, 70 N. Y. Suppl. 230.

92. *California.*— Noriega *v.* Knight, 20 Cal. 172.

New Hampshire.—Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Pike *v.* Emerson, 5 N. H. 393, 22 Am. Dec. 468.

New Jersey.— Smock *v.* Jones, 39 N. J. Eq. 16.

New York.— Morris *v.* Press Pub. Co., 98 N. Y. App. Div. 143, 90 N. Y. Suppl. 673; Magnolia Metal Co. *v.* Pound, 60 N. Y. App. Div. 318, 70 N. Y. Suppl. 230; Sperb *v.* Metropolitan El. R. Co., 57 Hun 588, 10 N. Y. Suppl. 865 [*affirmed* in 123 N. Y. 659, 26 N. E. 749]; Adams *v.* Moore, 22 Misc. 451, 50 N. Y. Suppl. 718.

South Carolina.—Alexander *v.* Muirhead, 2 Desauss. Eq. 162.

Texas.— Paschall *v.* Penry, 82 Tex. 673, 18 S. W. 154; Botts *v.* Martin, 44 Tex. 91; Freeman *v.* Preston, (Civ. App. 1895) 29 S. W. 495.

Wisconsin.— Brown *v.* Cohn, 88 Wis. 627, 60 N. W. 826; Wells *v.* American Express Co., 49 Wis. 224, 5 N. W. 333.

England.— Wilding *v.* Sanderson, [1897] 2 Ch. 534, 66 L. J. Ch. 684, 77 L. T. Rep. N. S. 57, 45 Wkly. Rep. 675; Hickman *v.* Berens, [1895] 2 Ch. 638, 64 L. J. Ch. 785, 73 L. T. Rep. N. S. 323, 12 Reports 602; Lewis *v.* Lewis, 45 Ch. D. 281, 59 L. J. Ch. 712, 63 L. T. Rep. N. S. 84, 39 Wkly. Rep. 75; Mullins *v.* Howell, 11 Ch. D. 763, 48 L. J. Ch. 679; The Monarch, 12 P. D. 5, 6 Aspin. 90, 56 L. J. P. D. & Adm. 114, 56 L. T. Rep. N. S. 204, 35 Wkly. Rep. 292; Furnival *v.* Bogle, 6 L. J. Ch. O. S. 91, 4 Russ 142, 28 Rev. Rep. 34, 4 Eng. Ch. 142, 38 Eng. Reprint 758.

Canada.— Beaudry *v.* Gallien, 5 Ont. L. Rep. 73.

See 44 Cent. Dig. tit. "Stipulations," § 68 *et seq.*

If there is a mistake of law it is the duty of the court to interfere. Sanders *v.* Ellington, 77 N. C. 255.

An inadvertent admission of a fact which afterward proves to be erroneous justifies the setting aside of the stipulation. Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Ward *v.* Clay, 82 Cal. 502, 23 Pac. 50, 227; Richardson *v.* Musser, 54 Cal. 196; Welsh *v.* Noyes, 10 Colo. 133, 14 Pac. 317; Butler *v.* Chamberlain, 66 Nebr. 174, 92 N. W. 154; German Nat. Bank *v.* Atherton, 64 Nebr. 610, 90 N. W. 550; Dame *v.* Wood, 74 N. H. 212, 66 Atl. 484; Page *v.* Brewster, 54 N. H. 184; Donovan *v.* Twist, 119 N. Y. App. Div. 734, 104 N. Y. Suppl. 1; Calvet-Rogniat *v.* Mercantile Trust Co., 46 Misc. (N. Y.) 20, 93 N. Y. Suppl. 241; Matter of Smith, 9 Abb. N. Cas. (N. Y.) 452; Becker *v.* Lamont, 15 How. Pr. (N. Y.) 23; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448; Levy *v.* Sheehan, 3 Wash. 420, 28 Pac. 748.

Where the only evidence in support of the petition to set aside a stipulation on the ground of mistake is a party's affidavit which is controverted by the affidavit of the adverse party no further evidence in support of the petition being offered the stipulation is properly enforced. Charles *v.* Miller, 36 Ala. 141.

In England the court accepts the mere statement of counsel. Hickman *v.* Berens, [1895] 2 Ch. 638, 64 L. J. Ch. 785, 73 L. T.

But the court will not alter or vary the terms of a stipulation so as to relieve a party from its obvious consequences;[93] and if the facts on which the application for relief is based were known to the parties when the stipulation was entered into, the court will not grant relief,[94] and matters subsequently occurring which should have been foreseen will be no ground for setting the agreement aside,[95] for the mistake which will entitle a party to relief from a stipulation must be one which could not have been avoided by the exercise of ordinary care,[96] and the fact concerning which the mistake occurred must be such as will have a material bearing on the rights of the parties, otherwise it will be no ground for relief in the absence of fraud.[97] In the absence of other compelling consideration, a stipulation which has been acted upon will not be set aside unless the interests of the parties will resume their position *in statu quo*;[98] and if the party applying for relief has been guilty of laches, the court will not interfere to relieve him from a stipulation by which he gave up a right in consideration of the waiver of a right by the other party.[99]

C. Application For Relief — 1. Form. Since the stipulation is a proceeding in the cause, the proper method of obtaining relief therefrom is by motion in the court where the suit is pending.[1] But a compromise of the action or a final consent order, if entered, can be set aside only in a fresh action.[1a]

Rep. N. S. 323, 12 Reports 602. But solicitors make affidavits. Counsel may be sworn in the witness-box if they so desire. Wilding *v.* Sanderson, [1897] 2 Ch. 534, 66 L. J. Ch. 684, 77 L. T. Rep. N. S. 57, 45 Wkly. Rep. 675.

93. Keys *v.* Warner, 45 Cal. 60; Rowell *v.* Lewis, 95 Me. 83, 49 Atl. 423; Hickman *v.* Berens, [1895] 2 Ch. 638, 64 L. J. Ch. 785, 73 L. T. Rep. N. S. 323, 12 Reports 602.

94. Conner *v.* Belden, 8 Daly (N. Y.) 257.

An agreed case will be set aside only upon a strong showing that it is not what the parties intended to make it (Page *v.* Brewster, 54 N. H. 184; Heywood *v.* Wingate, 14 N. H. 73; U. S. *v.* Butterfield, 25 Fed. Cas. No. 14,704, 8 Ben. 23), and that the result has been brought about by fraud, accident, or mistake (Page *v.* Brewster, *supra*; Heywood *v.* Wingate, 14 N. H. 73; U. S. *v.* Butterfield, 25 Fed. Cas. No. 14,704, 8 Ben. 23), without laches on the part of the applicant (U. S. *v.* Butterfield, *supra*). A stipulation will not be set aside because one of the parties finds it less beneficial than he expected. Hickman *v.* Berens, [1895] 2 Ch. 638, 64 L. J. Ch. 785, 73 L. T. Rep. N. S. 323, 12 Reports 602; Powell *v.* Smith, L. R. 14 Eq. 85, 41 L. J. Ch. 734, 20 Wkly. Rep. 602; Midland Great Western R. Co. *v.* Johnson, 6 H. L. Cas. 798, 811, 4 Jur. N. S. 643, 6 Wkly. Rep. 510, 10 Eng. Reprint 1509; Cousineau *v.* London F. Ins. Co., 12 Ont. Pr. 512.

95. McKinley *v.* Wilmington Star Min. Co., 7 Ill. App. 386; Galbreath *v.* Rogers, 30 Mo. App. 401.

96. Rogers *v.* Greenwood, 14 Minn. 333; Mutual Security Ins. Co. *v.* Drummond, 3 Code Rep. (N. Y.) 143; McNeill *v.* Andes, 40 Fed. 45.

97. Chapman *v.* Coats, 26 Iowa 288.

A stipulation that one case shall be determined by the judgment in another will not be relieved against because of newly discovered defenses which will not be sufficient ground for a new trial (Franklin *v.* National Ins. Co., 43 Mo. 491; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; McNeill *v.* Andes, 40 Fed. 45), or because plaintiff amends his pleadings in the test case so long as no new issues are raised (Gilmore *v.* American Cent. Ins. Co., 67 Cal. 366, 7 Pac. 781; Galbreath *v.* Rogers, 45 Mo. App. 324).

98. Johnson *v.* Wright, 19 Ga. 509; Matter of Richardson, 118 N. Y. App. Div. 164, 103 N. Y. Suppl. 22; Slaven *v.* Germain, 64 Hun (N. Y.) 506, 19 N. Y. Suppl. 492; Hine *v.* New York El. R. Co., 3 Misc. (N. Y.) 462, 23 N. Y. Suppl. 187; McNeill *v.* Andes, 40 Fed. 45; Sills *v.* Long, 17 Grant Ch. (U. C.) 691.

A stipulation limiting the issues to a certain question may properly be set aside where the condition of the parties has materially changed, if the adverse party is given leave to amend. Randall *v.* Burk Tp., 11 S. D. 40, 75 N. W. 276.

99. Milbank *v.* Jones, 60 N. Y. Super. Ct 259, 17 N. Y. Suppl. 464. See also Page *v.* Brewster, 54 N. H. 184; Duhuc *v.* Lazell, 182 N. Y. 482, 75 N. E. 401; *In re* Reed, 117 Fed. 358.

1. Gerdtzen *v.* Cockrell, 52 Minn. 501, 55 N. W. 58; Rogers *v.* Greenwood, 14 Minn. 333; Becker *v.* Lamont, 13 How. Pr. (N. Y.) 23; Wilbur *v.* Wilbur, 18 R. I. 654, 30 Atl. 455; Hancock *v.* Winans, 20 Tex. 320. *Compare* Frisbee *v.* Fitzsimons, 3 Hun (N. Y.) 674; Hickman *v.* Berens, [1895] 2 Ch. 638, 64 L. J. Ch. 785, 73 L. T. Rep. N. S. 323, 12 Reports 602; Mullins *v.* Howell, 11 Ch. D. 763, 48 L. J. Ch. 679. But see Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273, 64 L. J. Ch. 523, 72 L. T. Rep. N. S. 703, 12 Reports 331, 43 Wkly. Rep. 567.

1a. Ainsworth *v.* Wilding, [1896] 1 Ch. 673, 65 L. J. Ch. 432, 74 L. T. Rep. N. S. 193, 44 Wkly. Rep. 540; Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273, 64 L. J. Ch. 523, 72 L. T. Rep. N. S. 703, 12 Reports

2. When Application Must Be Made; Notice. The application for relief from a stipulation entered into without fraud should be made upon proper notice to the adverse party before the latter has acted upon the agreement to such an extent that to disregard it would cause him serious injury.[2] Relief will not be granted when first asked for on appeal.[3]

D. Nature and Extent of Relief. The proper method of relieving a party from the effects of a stipulation which makes an erroneous admission of a fact is by canceling the stipulation and not by striking out a material portion;[4] but an amendment may properly be made concerning any matter which is not repugnant to the agreed statement, and which does not alter the real understanding of the parties.[5] In acting upon the application the court will exercise its power in such a manner as to restore the parties to their rights as they existed at the time the agreement was made and will not permit one party to obtain relief and hold the other party bound by the stipulation.[6]

VIII. Enforcement of Stipulation.

A. In General. The court, by its general superintending power over all proceedings before it, will take notice of stipulations properly made and will act upon them in such a way as to carry them specifically into effect;[7] but a court of equity will not decree the specific performance of a stipulation which is in conflict with a valid statute,[8] or concerning the execution of which it appears that there was some accident, surprise, or excusable mistake as to its meaning and effect on the part of one of the parties,[9] and the court will disregard an agreement concerning which a controversy has arisen.[10] A stipulation will not be enforced after it has been wholly disregarded by the parties and the court,[11] nor will it be enforced in favor of one who has failed to comply with the conditions under which it was made,[12] or who has waived the right to demand compliance by taking some step in conflict with the provisions of the agreement,[13] unless such act is insufficient to show an intention to disregard the stipulation or to place the opposite party at a disadvantage.[14]

331, 43 Wkly. Rep. 567; Atty.-Gen. *v.* Tomline, 7 Ch. D. 388, 47 L. J. Ch. 473, 38 L. T. Rep. N. S. 57, 26 Wkly. Rep. 188.

2. Moffitt *v.* Jordan, 127 Cal. 628, 60 Pac. 175; Green *v.* Green, 61 Ga. 141; Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766; Dickerson *v.* Matheson, 50 Fed. 73 [*affirmed* in 57 Fed. 524, 6 C. C. A. 466].

3. Bonds *v.* Hickman, 29 Cal. 460; Warren *v.* Great Northern R. Co., 64 Minn. 239, 66 N. W. 984.

4. Welsh *v.* Noyes, 10 Colo. 133, 14 Pac 317.

5. Montana Milling Co. *v.* Jefferis, 16 Mont. 559, 41 Pac. 712.

6. *Georgia.*—Johnson *v.* Wright, 19 Ga. 509.
Minnesota.—Wells *v.* Penfield, 70 Minn. 66, 72 N. W. 816; Gerdtzen *v.* Cockrell, 50 Minn. 546, 52 N. W. 930.
Nebraska.— Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.
New York.— Malin *v.* Kinney, 1 Cai. 117.
United States.— Emerick, etc., Co. *v.* Hascy, 146 Fed. 688, 77 C. C. A. 114.
See 44 Cent. Dig. tit. "Stipulations," § 75.

7. *Alabama.*— Charles *v.* Miller, 36 Ala. 141.
Illinois.— Coultas *v.* Green, 43 Ill. 277; Henchey *v.* Chicago, 41 Ill. 136; Toupin *v.* Gargnier, 12 Ill. 79; Chapman *v.* Shattuck, 8 Ill. 49.
Massachusetts.— Coburn *v.* Whitely, 8 Metc. 272.
New Hampshire.— Blain *v.* Patterson, 47 N. H. 523.
Pennsylvania.—Wilkins *v.* Burr, 6 Binn. 389.
Tennessee.— Jones *v.* Kimbro, 6 Humphr. 319.
Texas.— Hancock *v.* Winans, 20 Tex. 320.
See 44 Cent. Dig. tit. "Stipulations," § 55 *et seq.*

8. Noonan *v.* Thompson, 231 Ill. 588, 83 N. E. 426.

9. Cook *v.* Newby, 213 Mo. 471, 112 S. W. 272.

10. Lombard *v.* Citizens' Bank, 107 La. 183, 31 So. 654; Wager *v.* Stickle, 3 Paige (N. Y.) 407; Taylor *v.* Brower, 78 N. C. 8; Botts *v.* Martin, 44 Tex. 91. See also Anonymous, [1884] W. N. 91; Anonymous, [1876] W. N. 296; Brown *v.* Blackwell, 26 U. C. C. P. 43.

11. People *v.* Holden, 28 Cal. 123; Hughes *v.* Jackson, 12 Md. 450.

12. Bank *v.* Hitchcock, 76 Cal. 489, 18 Pac. 648; People *v.* Branch Judge Cir. Ct., 26 Mich. 370; Cunningham *v.* Scott, 2 Wkly. Notes Cas. (Pa.) 306.

13. Givens *v.* Lawler, 9 Ala. 543; Gage *v.* Commercial Nat. Bank, 86 Ill. 371.

14. Yost *v.* Devault, 9 Iowa 60; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

B. Manner. The violation of a stipulation is regarded as a breach of contract for which a separate action will lie,[15] but the court always has power to grant relief in a summary manner upon motion.[16] The manner of giving effect to a stipulation which has been violated by one of the parties depends entirely upon the character of the violation, and the condition in which the action or proceeding is at the time relief is granted. Thus if there is an agreement by attorneys in the lower court to allow an amendment, the court will grant leave to amend after an appeal is taken, without costs.[17] A judgment obtained in violation of a stipulation dismissing the action will be restrained,[18] one obtained in violation of a stipulation for a continuance will be reversed.[19] Under a stipulation extending defendant's time to answer upon condition that he will answer to the merits, a plea in abatement will be stricken from the files,[20] and a plea filed after a stipulation to confess judgment will be treated as a nullity,[21] and the court will dismiss an appeal taken in violation of a stipulation not to appeal.[22] If it is stipulated that the report of auditors shall be final, exceptions to a report subsequently filed will be disregarded.[23]

C. Forum. The remedy of one who has been injured by the disregard of a stipulation should be sought in the court in which it was filed, or in some court of original jurisdiction.[24] In order to have a stipulation, filed in a lower court, examined on appeal, it must appear that it was brought to the attention of the lower court,[25] and must be preserved in the bill of exceptions.[26]

D. Evidence. Parol evidence is not admissible to vary the terms of a valid written stipulation;[27] and extrinsic evidence is inadmissible to prove the undertaking or intention of the parties to a plain and unambiguous stipulation, where the circumstances under which it was made are fully before the court.[28] So also it is not error to refuse to hear parol proof of stipulations which vary the effect of the pleadings on file.[29] But the judgment record of the action in which the stipulation was made may sometimes be admitted to show the scope and purpose of the agreement.[30] Where statutes provide that stipulations of attorneys shall be established only by the attorney's statement, the written stipulation signed and filed with the clerk, or by an entry thereof upon the records of the

15. Phillips *v.* Wicks, 38 N. Y. Super. Ct 74; Valentine *v.* Central Nat. Bank, 10 Abb. N. Cas. (N. Y.) 188; Hart *v.* Hart, 18 Ch. D. 670, 50 L. J. Ch. 697, 45 L. T. Rep. N. S. 13, 30 Wkly. Rep. 8.

16. Mutual L. Ins. Co. *v.* O'Donnell, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; Case *v.* Beloe, 125 N. Y. App. Div. 906, 109 N. Y. Suppl. 168; Potter *v.* Rossiter, 109 N. Y. App. Div. 737, 96 N. Y. Suppl. 177; Kelsey *v.* Sargent, 2 N. Y. St. 669; Valentine *v.* Central Nat. Bank, 10 Abb. N. Cas. (N. Y.) 188; Smythe *v.* Smythe, 18 Q. B. D. 544, 56 L. J. Q. B. 217, 56 L. T. Rep. N. S. 197, 35 Wkly. Rep. 346; *In re* Gaudet Freres Steamship Co., 12 Ch. D. 882, 48 L. J. Ch. 818; Scully *v.* Dundonald, 8 Ch. D. 658, 39 L. T. Rep. N. S. 116, 27 Wkly. Rep. 249; Eden *v.* Naish, 7 Ch. D. 781, 47 L. J. Ch. 325, 26 Wkly. Rep. 392; Graves *v.* Graves, [1893] L. J. 494. But see Phillips *v.* Wicks, 38 N. Y. Super. Ct. 74.

Undertaking of attorney see *Ex p.* Hales, [1907] 2 K. B. 539, 76 L. J. K. B. 931, 97 L. T. Rep. N. S. 212, 23 T. L. R. 573; Swyny *v.* Harland, [1894] 1 Q. B. 707, 63 L. J. Q. B. 415, 70 L. T. Rep. N. S. 227, 9 Reports 210, 42 Wkly. Rep. 297; *In re* Kerly, [1901] 1 Ch. 467, 70 L. J. Ch. 189, 83 L. T. Rep. N. S. 699, 17 T. L. R. 189, 49 Wkly. Rep. 211; D. *v.* A., [1900] 1 Ch. 484, 69 L. J. Ch. 382, 82 L. T. Rep. N. S. 47, 48 Wkly. Rep. 429; *In re* Coolgardie Goldfields, [1900] 1 Ch. 475, 69 L. J. Ch. 215, 82 L. T. Rep. N. S. 23, 16 T. L. R. 161, 48 Wkly. Rep. 461; *In re* Woodfin, 51 L. J. Ch. 427, 30 Wkly. Rep. 422; Williams *v.* Williams, 54 Sol. J. 506; *In re* Aytoun, 20 T. L. R. 252; Reeves *v.* Reeves, 16 Ont. L. Rep. 588.

17. Johnson *v.* Chaffant, 1 Binn. (Pa.) 75.

18. McLeran *v.* McNamara, 55 Cal. 508.

19. McBride *v.* Settles, (Tex. App. 1890) 16 S. W. 422.

20. Morgan *v.* Corlies, 81 Ill. 72.

21. Teal *v.* Russell, 3 Ill. 319.

22. Rheem *v.* Allison, 2 Serg. & R. (Pa.) 113.

23. Miller's Appeal, 30 Pa. St. 478.

24. Grady *v.* Porter, 53 Cal. 680; Clarke *v.* Forshay, 3 Cal. 290.

25. Clarke *v.* Forshay, 3 Cal. 290.

26. Filley *v.* Cody, 4 Colo. 542.

27. State *v.* Lefaivre, 53 Mo. 470; Holford *v.* Hughes, 10 Wkly. Rep. 60.

28. Schroeder *v.* Frey, 60 Hun (N. Y.) 58, 14 N. Y. Suppl. 71 [*affirmed* in 131 N. Y. 562, 30 N. E. 66].

29. Matthews *v.* Tally, Morr. (Iowa) 159.

30. Hine *v.* New York El. R. Co., 149 N. Y. 154, 43 N. E. 414.

court, it is not competent to prove a disputed parol stipulation by the testimony or affidavits of an adverse party or his attorney;[31] but statements and affidavits of the attorney made in some other proceeding in the action are admissible to establish the agreement against the person for whom it was made.[32] In England and Canada the courts accept the mere statement of counsel as to arrangements regarding proceedings and the facts and circumstances surrounding them. They should not make affidavits,[33] but may be sworn as witnesses.[34] Solicitors give evidence as other witnesses.

STIRPS. A root of inheritance; a word which designates the ancestor from whom the heir derives title, and which necessarily presupposes the death of the ancestor.[1] (Stirps: Taking Per, see DESCENT AND DISTRIBUTION, 14 Cyc. 53; WILLS.)

STOCK. A word used, both in common parlance and statutory enactments, in a variety of senses, some broader, some more limited,[2] including money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation, or government;[3] the funds employed in some business or enterprise; also public funds or securities; the shares of various corporations;[4] the entire property employed in business;[5] articles accumulated in a

31. Doerr *v.* Mutual Life Assoc., 92 Iowa 39, 60 N. W. 225; Council Bluffs Loan, etc., Co. *v.* Jennings, 81 Iowa 470, 46 N. W. 1006; Hardin *v.* Iowa R., etc., Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52 (holding that conflicting affidavits would not be considered); Riegelman *v.* Todd, 77 Iowa 696, 42 N. W. 517; Preston *v.* Hale, 65 Iowa 409, 21 N. W. 701; Hiller *v.* Landis, 44 Iowa 223 (holding that a stipulation cannot be proved by an entry on the record made after a dispute has arisen and based upon testimony or affidavits).

Negotiations over the telephone, between the parties themselves, conducted through their attorneys as spokesmen, are not within the rule. Kraner *v.* Chambers, 92 Iowa 681, 61 N. W. 373.

32. Council Bluffs Loan, etc., Co. *v.* Jennings, 81 Iowa 470, 46 N. W. 1006; Myers *v.* Funk, 51 Iowa 92. 50 N. W. 72.

33. Hickman *v.* Berens, [1895] 2 Ch. 638, 64 L. J. Ch. 785, 73 L. T. Rep. N. S. 323, 12 Reports 602.

34. Wilding *v.* Sanderson, [1897] 2 Ch. 534, 66 L. J. Ch. 684, 77 L. T. Rep. N. S. 57, 45 Wkly. Rep. 675.

1. See Rotmanskey *v.* Heiss, 86 Md. 633, 634, 39 Atl. 415.

2. State *v.* Hamilton, 5 Ind. 310, 313.

Need of construction.—"Its use may open a wide field for the work of interpretation, and require a close consideration of the whole subject-matter in relation to which it is applied. We speak of the goods of a merchant, as his stock; of the lumber and materials of the manufacturer, as his stock of raw materials; of the cattle, hogs, &c., of the farmer, as his stock; of the cars, locomotives, &c., of railroad companies, as their stock of these articles respectively; and we speak of the subscriptions and shares in these companies as stock, though these are more properly, it would seem, denominated the capital stock of such corporations." State *v.* Hamilton, 5 Ind. 310, 313.

"Bank stock" applied to deposits see Tomlinson *v.* Bury, 145 Mass. 346, 347, 14 N. E. 137, 1 Am. St. Rep. 464 (where it appeared that the testator who used the words had no shares in banks or banking associations, but had deposits in savings banks); Clark *v.* Atkins, 90 N. C. 629, 640, 47 Am. Rep. 538 (where, in view of the intent of the testatrix, the words were held to pass bonds on deposit in a bank).

"Common stock" applied to capital invested in partnership business see Richardson *v.* Carlton, 109 Iowa 515, 520, 80 N. W. 532.

3. State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 528, 9 Am. & Eng. R. Cas. 631.

However obtained.—"It makes no difference how the money is obtained, whether by labor, by borrowing, or otherwise." State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 528, 9 Am. & Eng. R. Cas. 631.

4. Worcester Dict. [*quoted* in Com. *v.* Danville, etc., R. Co., 2 Pearson (Pa.) 400, 401].

"Debenture stock is borrowed money capitalised for purposes of convenience." *In re* Bodman, [1891] 3 Ch. 135, 138, 61 L. J. Ch. 31, 65 L. T. Rep. N. S. 522, 40 Wkly. Rep. 60.

Debenture stock distinguished from proprietary stock see *In re* Bodman, [1891] 3 Ch. 135, 138, 61 L. J. Ch. 31, 65 L. T. Rep. N. S. 522, 40 Wkly. Rep. 60. See also Sellar *v.* Bright, [1904] 2 K. B. 446, 449, 73 L. J. K. B. 643, 91 L. T. Rep. N. S. 9, 20 T. L. R. 568, 52 Wkly. Rep. 563, and argument for defendant therein adopted as the basis of the opinion.

"Capital stock" and "stock in the public funds" not analogous see Morrice *v.* Aylmer, L. R. 10 Ch. 148, 154, 44 L. J. Ch. 212, 31 L. T. Rep. N. S. 660, 23 Wkly. Rep. 221.

5. Burrill L. Dict. [*quoted* in Com. *v.* Danville, etc., R. Co., 2 Pearson (Pa.) 400, 401]. To the same effect see Tomlin L. Dict. [*cited* in Com. *v.* Danville, etc., R. Co., 2 Pearson (Pa.) 400, 401].

business or calling for use and disposal in its regular prosecution;[6] corporate stock, whether the whole property of the corporation, its authorized capital, the shares of shareholders therein or the certificates of such shares;[7] also, sometimes, papers securing loans, such as bonds, notes or governmental securities;[8] live stock,[9] farm, or agricultural stock;[10] in mercantile law, the goods and chattels which a tradesman holds for sale or traffic.[11] In common use, when applied to goods of a mercantile house, those which are kept for sale;[12] a supply of materials

6. Jewell *v.* Sumner Tp., 113 Iowa 47, 51, 84 N. W. 973.

In the language of business.—"Many business men, not of course so expert in the use of language as in the affairs of business, speak of their 'stock' as lawyers speak of a corporation. They keep accounts in which the stock has debits and credits. Bills given by them for the purchase of or to replenish the 'stock,' i. e., their goods and merchandise in trade, are charged against the 'stock.'" Whiting *v.* Root, 52 Iowa 292, 301, 3 N. W. 134.

Things in use included.— Lumber wagons, road sleighs, buggies, cows, horses, hay and other articles were included by the word as used in an agreement for sale of a man's "stock" to satisfy a debt, construed together with a notice of sale which specified such property and afforded a contemporaneous construction by the parties. Bradshaw *v.* McLoughlin, 39 Mich 480, 482. *Compare infra*, text and notes 11, 12.

"Any stock of goods, wares or merchandise in bulk" as used in Pierce Code Wash. § 5346, regulating sales, is not limited to the meaning of the phrase "stocks of merchandise" relating to the business of merchandising alone. "Any," and "stock," are comprehensive. A stock of goods may mean a great many different kinds of goods, of wares or merchandise. Plass *v.* Morgan, 36 Wash. 160, 162, 78 Pac. 784.

7. See STOCK OR SHARES OF CORPORATIONS, *post*, p. 1302.

8. See State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 528, 9 Am. & Eng. R. Cas. 631, where it is said that "stocks" in this sense do not make the lender a stockholder in the business for which the money is borrowed.

In England the word "stock" includes not only corporate shares, but also "certain public and private obligations, usually known with us as bonds." Tucker *v.* Curtin, 148 Fed. 929, 934, 78 C. C. A. 557 [*modified* in another respect in 153 Fed. 91, 82 C. C. A. 225]. *Compare*, however, Seller *v.* Bright, [1904] 2 K. B. 446, 448, 73 L. J. K. B. 643, 91 L. T. Rep. N. S. 9, 20 T. L. R. 586, 52 Wkly. Rep. 563.

"The indebtedness of states is sometimes represented by stocks." Bouvier L. Dict. [*quoted* in Lockwood *v.* Weston, 61 Conn. 211, 216, 23 Atl. 9].

9. See STOCK OR LIVE STOCK, *post*, p. 1301.

10. See STOCK OF A FARM, *post*, p. 1323.

11. Com. *v.* Danville, etc., R. Co., 2 Pearson (Pa.) 400, 401.

When applied to merchandise expressly, as in Iowa Code, § 1318, providing for assessment of the stock of a merchant, the word does not include sheep purchased and kept for fattening and sale. Jewell *v.* Sumner Tp., 113 Iowa 47, 51, 84 N. W. 973.

Stock in a grocery, in insurance, includes such articles as have been laid out for sale or traffic in the usual way in the store, but not such as are concealed or intended for secret sale or other use. Clary *v.* Protection Ins. Co., Wright (Ohio) 227, 229.

"Entire stock of groceries" now in my store designated in a mortgage does not include goods in a neighboring wareroom, although they had been placed temporarily in the store and transferred to the wareroom to be afterward added to such stock. Robinson *v.* Norton, 108 Ga. 562, 565, 34 S. E. 147.

A cash register is not included by the terms "stock of goods, wares, or merchandise," within the meaning of Wash. St. (1901) c. 109, whereby such stock is made attachable in the hands of the buyers by judgment creditors of the sellers. Albrecht *v.* Cudihee, 37 Wash. 206, 208, 79 Pac. 628.

Collections for debt are not included whether in money or property, within the meaning of Miss. Code (1880), § 585, fixing a privilege tax on each store proportionate to the "stock" carried therein. Harness *v.* Williams, 64 Miss. 600, 603, 1 So. 759.

"Stock of hair, wrought, raw and in process," insured, does not extend to fancy goods of other material, although such as are usually kept and sold in a retail hair store. Medina *v.* Builders' Mut. F. Ins. Co., 120 Mass. 225, 226.

Not limited to initial supply.—The word is not confined to the goods with which a merchant begins business, but rather refers to the stock he employs in trade, and where a contract is given to supply a stock of goods and goods are supplied thereunder from time to time, parol evidence cannot be received to show that the same "stock" means only the first stock delivered, so as to limit a contemporaneous bond to payment of the price of such single stock. Braun *v.* Woollacott, 129 Cal. 107, 112, 61 Pac. 801.

12. Albrecht *v.* Cudihee, 37 Wash. 206, 208, 79 Pac. 628.

"Stock of merchandise," as the phrase is used in a statute providing for sale thereof in bulk, "properly and naturally describes articles which the seller keeps for sale in the usual course of his business," and "does not naturally describe fixtures." Gallus *v.* Elmer, 193 Mass. 106, 109, 78 N. E. 772, construing the term as used in St. (1903) p. 276, c. 415. The term so used is defined as "goods and merchandise employed in trade, which in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, would be sold or bartered otherwise than by a sale in bulk." Wilson *v.* Edwards, 32 Pa

for a business.[13] In horticulture, the stalk, stem, or trunk of a tree or other plant; the main body or fixed and firm part; stem in which a graft is inserted and which is its support; also a stem, tree, or plant that furnishes slips or cuttings.[14] In the law of descent, a term used metaphorically to denote the original progenitor of a family, or the ancestor from whom the persons in question are all descended, such persons being metaphorically called branches.[15] (Stock: Corporate, see STOCK OR SHARES OF CORPORATIONS, *post*, p. 1302, and Cross-References Thereunder. Farm, see STOCK OF A FARM, *post*, p. 1323. In the Law of Descent, see, generally, DESCENT AND DISTRIBUTION, 14 Cyc. 1; WILLS. In Trade, see STOCK IN TRADE, *post*, p. 1321. Live, see STOCK or LIVE STOCK, *post*, this page, and Cross-References Thereunder. Of Goods Insured, see FIRE INSURANCE, 19 Cyc. 667, 668. Rolling-Stock, see RAILROADS, 33 Cyc. 462, 496, 503, 524; ROLLING-STOCK, 34 Cyc. 1815.)

STOCK or LIVE STOCK.[16] In General, see LIVE STOCK, 25 Cyc. 1515. As Domestic Animals in General, see, generally, ANIMALS, 2 Cyc. 288. Brokers, Authority Concerning Live Stock, see FACTORS AND BROKERS, 19 Cyc. 195. Carriers of Live Stock — In General, see CARRIERS, 6 Cyc. 271; SHIPPING; Relation to Persons Traveling With Live Stock, see CARRIERS, 6 Cyc. 545, text and notes 60, 61. Cruelty to Animals, see ANIMALS, 2 Cyc. 341. Defacing Ear-Marks on Cattle With Intent to Steal, see LARCENY, 25 Cyc. 100 text and note 58. Exemption From Seizure and Sale, see EXEMPTIONS, 18 Cyc. 1411, 1424, 1425, 1426. Increase Fraudulently Conveyed, see FRAUDULENT CONVEYANCES, 20 Cyc. 628 text and notes 86, 87. Injuries by Animals, see ANIMALS, 2 Cyc. 367. Injuries to Animals — In General, see ANIMALS, 2 Cyc. 414; By Railroads, see RAILROADS, 33 Cyc. 1161; Criminal Prosecution, see ANIMALS, 2 Cyc. 437; Due to Fences Defective or Lacking, see FENCES, 19 Cyc. 487, 488; Measure of Damages, see ANIMALS, 2 Cyc. 426; DAMAGES, 13 Cyc. 149. Insurance Upon Live Stock, see LIVE-STOCK INSURANCE, 25 Cyc. 1516. Killing — Cattle With Intent to Steal, see LARCENY, 25 Cyc. 100 text and note 57; Domestic Animals as Subject of

Super. Ct. 295, 302, construing St. March 28, 1905, Pamphl. Laws 62.

13. See Gates *v.* McKee, 13 N. Y. 232, 234, 64 Am. Dec. 545, construing a guarantee for "what stock" a shoemaker "has had or may want hereafter."

14. Century Dict. [*quoted* in U. S. *v.* American Express Co., 158 Fed. 808, 809, 86 C. C. A. 68, in the opinion of the board of general appraisers (where, however, "stock" is substituted for "stalk")].

"Nursery or greenhouse stock," dutiable under U. S. Tariff Act July 24, 1897, c. 11, § 1, sched. G, par. 252, 30 U. S. St. at L. 170 [U. S. Comp. St. (1901) p. 1650] see U. S. *v.* American Express Co., 158 Fed. 808, 809, 86 C. C. A. 68.

15. Black L. Dict.

A word of common not civil law see Davis *v.* Vanderveer, 23 N. J. Eq. 558, 567.

16. **"Stock" defined as "live stock"** in Webster Dict. [*quoted* in Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 461, 15 N. W. 286]; Wood *v.* George, 6 Dana (Ky.) 343, 344, where the word, used in a will, is so construed. For other definitions of "stock" in a like sense see STOCK OF A FARM, *post*, p. 1323 text and notes 90–94.

Kinds of beast included.— The word has been held to include horses (Webb *v.* Brandon, 4 Heisk. (Tenn.) 285, 292); not the less when harnessed to a vehicle (Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 461, 15 N. W. 286); and swine, although it is restricted by Code, § 1450, for the purposes only of that section and of Code, § 309; to cattle, horses, mules, and asses (State *v.* Clark, 65 Iowa 336, 337, 21 N. W. 666); and is sometimes confined, in agricultural usage, to cattle (see STOCK OF A FARM, *post*, p. 1323 text and note 90).

Does not include negroes as used in Md. St. (1846) c. 146, declaring that in actions for injury by railroads to stock, employees shall be incompetent to testify. Scaggs *v.* Baltimore, etc., R. Co., 10 Md. 268, 278.

"Ordinary stock" in agreements to maintain fences, has been construed: "Stock . . . such as is not extraordinarily unruly or breachy" (Albright *v.* Bruner, 14 Ill. App. 319, 322); "such stock only as is permitted by law to run at large," therefore not including swine (Usher *v.* Hiatt, 21 Kan. 548, 551).

"Sufficient fence 'to turn stock,'" along the line of a railroad is to be so construed that the word "stock" includes breachy and unruly animals as well as others. Pittsburg, etc., R. Co. *v.* Howard, 40 Ohio St. 6, 7, construing Rev. St. § 3324, 71 Laws 85, § 1.

"Stock 'running at large' has reference to stock under the control of no person; free commoners, as it is sometimes termed," within the meaning of Nebr. Comp. St. 381, relating to the duty and liability of railroad companies. Burlington, etc., R. Co. *v.* Webb, 18 Nebr. 215, 220, 24 N. W. 706, 53 Am. Rep. 809. See also as to the statute cited Burlington, etc., R. Co. *v.* Brinkman, 14 Nebr. 70, 73, 15 N. W. 197. What constitutes "running at large" see ANIMALS, 2 Cyc. 443.

Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 313; Live Stock For Market, see ANIMALS, 2 Cyc. 451. Larceny of Live Stock — Description of Animals in Indictment or Information, see LARCENY, 25 Cyc. 108; Evidence as to Marks and Brands, see LARCENY, 25 Cyc. 108; Variance Between Allegations and Proof as to Description of Animals, see LARCENY, 25 Cyc. 100 note 63, 101 notes 64, 68, text and notes 69, 70, 102 text and note 71, notes 73, 75, 103 text and note 87, 104 text and note 2. Ranging Over Uninclosed Lands Not Evidence of Possession of Land, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1132 note 89. Replevin, see REPLEVIN, 34 Cyc. 1357. Stock Alarms, see RAILROADS, 33 Cyc. 1227. Swine Included, see ANIMALS, 2 Cyc. 455 note 83. See also CATTLE, 6 Cyc. 702; STOCK CATTLE, *post*, p. 1310; STOCK HOGS, *post*, p. 1315; STOCK LAWS, *post*, p. 1323; STOCK OF A FARM, *post*, p. 1323 text and notes 90–94; STOCK PENS, *post*, p. 1324; STOCK-YARDS, *post*, p. 1324.)

STOCK or SHARES OF CORPORATIONS. — A. In General. "Stock" is a term used to denote first, the capital stock; second, the shares of stock or of the stockholder; third, as being applied so as to include both.[17]

17. Henderson Bridge Co. *v.* Com., 99 Ky. 623, 635, 31 S. W. 486, 17 Ky. L. Rep. 389, 29 L. R. A. 73 [*affirmed* in 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953].

Stock is not a credit in the sense of a debt due from the corporation to the holder, within the meaning of a statute requiring notice, to the debtor, of the pledge of a credit not negotiable (Smith *v.* Crescent City Live-Stock Landing, etc., Co., 30 La. Ann. 1378 [*cited* in New Orleans Nat. Bank Assoc. *v.* Wiltz, 10 Fed. 330, 332, 4 Woods 43], construing Rev. Civ. Code, art. 3160; Civ. Code, art. 3127); nor within the meaning of tax statutes providing for deduction of debts from credits (Dutton *v.* Citizens' Nat. Bank, 53 Kan. 440, 452, 36 Pac. 719 [*affirmed* in 160 U. S. 660, 16 S. Ct. 412, 40 L. ed. 573]; Niles *v.* Shaw, 50 Ohio St. 370, 373, 34 N. E. 162; Rosenberg *v.* Weeks, 67 Tex. 578, 585, 4 S. W. 899 [*cited* in Primm *v.* Fort, 23 Tex. Civ. App. 605, 611, 57 S. W. 86, 972]; Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 342, 61 Pac. 560, 56 L. R. A. 346 [*affirmed* in 182 U. S. 556, 21 S. Ct. 863, 45 L. ed. 1227]).

"Common stock" distinguished from "preferred stock."—"The owner of the former is entitled to an equal *pro rata* division of the profits, if there be any, but has no advantage of any other shareholder or class of shareholders of common stock. Preferred stock, on the other hand, generally entitles its owner to dividends out of the net profits before and in preference of the holders of the common stock. Generally, the rights, powers, and privileges of preferred stockholders depend upon the terms upon which it is issued." Storrow *v.* Texas Consol. Compress, etc., Assoc., 87 Fed. 612, 616, 31 C. C. A. 139.

"Increased stock" distinguished from "original" or "formative" stock see Gettysburg Bank *v.* Brown, 95 Md. 367, 386, 52 Atl. 975, 93 Am. St. Rep. 339; Baltimore City Pass. R. Co. *v.* Hambleton, 77 Md. 341, 346, 26 Atl. 279.

"Nonassessable," distinguished from "paid up nonassessable."—"Stock upon which nothing has been paid may be called nonassessable and may be so treated, not legally, however, under our Constitution. But 'paid up nonassessable stock' can only mean stock that is made nonassessable by reason of the fact that the amount for which it calls has been fully paid." San Antonio St. R. Co. *v.* Adams, 87 Tex. 125, 130, 26 S. W. 1040.

"Original" or "formative" stock is "such stock as may be authorized and required by the charter." Gettysburg Nat. Bank *v.* Brown, 95 Md. 367, 386, 52 Atl. 975, 93 Am. St. Rep. 339.

"Paid up stock."—"In this country . . . fully-paid up stock in a building association is really an anomaly. Strictly speaking there can be no such thing; for the moment such stock is matured — that is, brought to its par value — the holder thereof is entitled to his money, and his connection with the association ceases." Cashen *v.* Southern Mut. Bldg., etc., Assoc., 114 Ga. 983, 990, 41 S. E. 51.

"Preferred stock."— In general see CORPORATIONS, 10 Cyc. 569. "Ordinarily, preferred stock is understood to indicate such stock as is entitled to dividends from income or earnings of the corporation before any other dividend can be paid. . . . Yet to determine in each case the special properties and qualities it possesses, resort must be had to the statute or contract under which it was issued" (Scott *v.* Baltimore, etc., R. Co., 93 Md. 475, 497, 49 Atl. 327); it takes "a multiplicity of forms according to the desire and ingenuity of the stockholders and necessity of the corporation itself" (Scott *v.* Baltimore, etc., R. Co., *supra*; Storrow *v.* Texas Consol., etc., Mfg. Assoc., 87 Tex. 612, 616); "gives the holders a priority of dividends, and no priority of assets or capital unless expressly stipulated for" (Jones *v.* Concord, etc., R. Co., 67 N. H. 234, 238, 30 Atl. 614, 68 Am. St. Rep. 650); under St. March 5, 1870, 67 Ohio Laws, p. 26, "is created by the owners of the common stock for the purpose of putting the company in which they are proprietors on a firmer footing and giving it better credit, and for this purpose they take in with them, as proprietors, or consent to the creation of a class of shareholders, or stockholders, who are to share in the profits of the corporation in preference

B. As Capital—1. In General. Stock as capital is the capital of corporations usually divided into shares of a definite value;[18] the capital of an incorporated company in transferable shares of a specific amount;[19] the share capital of a corporation or commercial company; the funds employed in the carrying on of some business or enterprise, divided into shares of equal amount and owned by individuals who jointly form a corporation;[20] the capital of the corporation on which it is to do business.[21]

2. Including Money Invested. "Stock" as capital may also include or refer to money invested in the business of the company represented by certificates of shares known as capital or capital stock;[22] the capital invested in such property as may be necessary and proper for conducting the business for which the corporation was chartered;[23] the capital stock, the subscribed fund held by the company as distinguished from the separate interest of the individual stockholders;[24] technically, in connection with a chartered or joint stock company, the money advanced by the corporators or members as the capital, which is usually, for convenience, divided into equal amounts called shares, for which each member is entitled to a certificate, showing the number of shares he has in the company; or in other words the amount of money he has furnished to the common stock; which certificate is the evidence of his being a stockholder.[25]

to themselves, and who, as between the common and preferred stockholders, are first to be paid their dividends on the capital invested by them in the stock of the corporation" (Burt *v.* Rattle, 116 Ohio St. 123); as used in a statute empowering counties to issue bonds in subscription for preferred stock of a railroad company, the term, means "preferred capital stock, or a preferred interest in the money paid in by stockholders, divided into shares and represented by certificates showing the shares of each holder;" the word "preferred" being intended "to give the counties some advantage over others holding a similar interest, and occupying (without that word) the same position to the company as the counties, and who, but for the county being preferred, would stand with them on the same plane" (State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 530, 9 Am. & Eng. R. Cas. 631).

"Prepaid stock" is "stock paid for in full when issued." See Thornton & B. Bldg. & Loan Assoc. [*quoted* in Johnson *v.* National Bldg., etc., Assoc., 125 Ala. 465, 479, 28 So. 2, 82 Am. St. Rep. 257].

"Watered" stock is "stock which purports to be paid in full, but which in fact has not been fully paid for." Lester *v.* Bemis Lumber Co., 71 Ark. 379, 383, 74 S. W. 518. The "watering" of stock is "an increase of the nominal capital, without any addition, or only a partial addition to the actual capital." Wiltbank's Appeal, 64 Pa. St. 256, 260, 3 Am. Rep. 585.

"Merchandise" is broad enough to include stocks or shares within the meaning of the statute of frauds. Tisdale *v.* Harris, 20 Pick. (Mass.) 9, 13.

"Securities" does not apply to shares of stock unless pledged as collateral. Graydon *v.* Graydon, 23 N. J. Eq. 229, 231. *Compare*, however, 35 Cyc. 1283 text and note 59.

Debt misnamed "stock."—The use of the word "stock," in describing the debt of a corporation to one from whom it borrows, does not invest such debt with the attributes of stock. Burt *v.* Rattle, 31 Ohio St. 116, 128–130.

18. Bouvier L. Dict. [*quoted* in Bibb County *v.* Central R., etc., Co., 40 Ga. 646, 650 (*quoted* in Georgia R., etc., Co. *v.* Wright, 132 Fed. 912, 914), and, in substantially the same form, in Lockwood *v.* Weston, 61 Conn. 211, 216, 23 Atl. 9 (where "those" is substituted for "shares" and "determined" for "definite")].

Capital stock is "the sum fixed by the charter as the amount paid in, or to be paid in" (Cook Stock & Stockh. § 3 [*quoted* in American Pig Iron Storage Co. *v.* State Bd. of Assessors, 56 N. J. L. 389, 392, 29 Atl. 160)]; "the entire property owned by the corporation" (People *v.* Chicago Gas Trust Co., 130 Ill. 268, 280, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497).

19. Anderson L. Dict. [*quoted* in Parker *v.* Otis, 130 Cal. 322, 328, 62 Pac. 571, 927, 92 Am. St. Rep. 56 (*affirmed* in 187 U. S. 606, 23 S. Ct. 168, 47 L. ed. 323)].

20. Continental Securities Co. *v.* Interborough Rapid Transit Co., 165 Fed. 945, 963.

21. Coyote Gold, etc., Min. Co. *v.* Ruble, 8 Oreg. 284, 293.

Not available for purpose of doing business until after election of directors see Coyote Gold, etc., Min. Co. *v.* Ruble, 8 Oreg. 284, 293.

22. State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 530, 9 Am. & Eng. R. Cas. 631.

23. See Bibb County *v.* Central R., etc., Co., 40 Ga. 646, 650 [*quoted* in Georgia R., etc., Co. *v.* Wright, 132 Fed. 912, 914].

24. See Trask *v.* Maguire, 18 Wall. (U. S.) 391, 402, 21 L. ed. 938, construing the words "stock of the company" as used in Mo. St. (1851) p. 479, declaring the stock of a railroad company exempt from certain taxes, and holding that an amendment thereto (Mo. St. (1852) p. 296), declaring that all engines, cars, wagons, machines, and other property belonging to the company should be deemed a part of its capital stock, does not qualify this meaning.

25. State *v.* Cheraw, etc., R. Co., 16 S. C. 524, 528, 9 Am. & Eng. R. Cas. 631.

3. Including Physical and Other Property. Again "stock" as capital may include the aggregate of the property and effects of the company, which as a principal or capital fund is employed in, or made subservient to, the prosecution of the specific business for which the company was chartered.[26] On the other hand it may refer to the capital stock divided into shares, as a separate thing from the property of the corporation.[27]

C. As the Aggregate Interest of the Stock-Holders. "Stock" may refer to the sum of all the rights and duties of the shareholders,[28] of which the interest of the shareholder is a fraction.[29]

D. As the Interest of the Individual Stock-Holder.[30] Stock, in the sense of the interest of the stockholder, is a species of incorporeal personal property

26. State *v.* Hood, 15 Rich. (S. C.) 177, 185, defining "stock" of a railroad company and adding: "In its original form, it is the sum of the moneys, contributed in fixed proportions, for the purposes of the adventure, by the persons willing to take part in it, but, by speedy conversion, it becomes the lands, rights of way, roadbed, track, depots, workshops, machinery, engines, carriages, &c., acquired, or constructed by or for the company, and the franchises derived from the Legislative grant."

Physical property and franchise.—"The term 'stock' . . . has been held to mean capital stock, and that the term 'capital stock' embraces the franchise of the company as well as its physical property can hardly admit of question. Without the franchise there would be no capital stock, properly speaking." Georgia R., etc., Co. *v.* Wright, 132 Fed. 912, 919, construing Georgia railroad and banking company's charter (Ga. St. (1833) p. 264, § 15).

27. See Tennessee *v.* Whitworth, 117 U. S. 129, 6 S. Ct. 645, 29 L. ed. 830 (applying an exemption of the "capital stock" of a corporation); Memphis, etc., R. Co. *v.* Gaines, 97 U. S. 697, 707, 24 L. ed. 1091 [*followed* in St. Louis, etc., R. Co. *v.* Loftin, 98 U. S. 559, 563, 564, 25 L. ed. 222] (where it is said that while many cases hold that an exemption of the capital stock of a corporation from taxation was equivalent to an exemption of the property into which that stock had been converted, it means that all these decisions are based on a construction of "capital" or "capital stock" according to the intention of the legislature as gathered from the whole charter; and held that where the capital stock was exempted forever, but the railroad with fixtures and appurtenances for twenty years only, the term "capital stock" did not cover the road and fixtures).

28. Lowell Transfer of Stock, § 4 [*quoted* in Winslow *v.* Fletcher, 53 Conn. 390, 395, 4 Atl. 250, 55 Am. Rep. 122; Henderson Bridge Co. *v.* Com., 99 Ky. 623, 635, 31 S. W. 486, 17 Ky. L. Rep. 389, 29 L. R. A. 73 (*affirmed* in 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953)].

29. Lowell Transfer of Stock, § 4 [*quoted* in Winslow *v.* Fletcher, 53 Conn. 390, 395, 4 Atl. 250, 55 Am. Rep. 122], where it is said: "Each share thereof is but a fraction of all the rights and duties which compose this sum. . . . A share of stock in a corporation consists in a set of rights and duties between the corporation and the owner of the share."

Stock whether preferred or common is capital. Heller *v.* National Mar. Bank, 89 Md. 602, 610, 43 Atl. 800, 73 Am. St. Rep. 212, 45 L. R. A. 438.

30. "Stock" and "shares;" relative uses explained.—In construing a bequest of "preference shares" Lord Cairns, L. C., after citing the Companies Clauses Consolidation Act as "the first occasion on which this term 'stock' was applied by the authority of Parliament to interests in railways," and which provided that a company may convert or consolidate shares into "stock," that a register of "stock" shall be kept, that holders of "stock" shall be entitled to participate in dividends and profits, and that the respective interests in such stock "shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages . . . as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any aliquot part of such amount of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages respectively," said: "It is to be observed that the term 'stock,' or 'capital stock,' which is there used, obviously is derived from the consideration that these were what were called joint stock companies, and that 'stock' was the short name for 'joint stock,' and joint stock, in my opinion, is only another name for 'shares,' because the owner of part of the capital of a company is an owner of a part or a share of the joint stock. The use of the term 'stock' appears to me merely to denote that the company have recognized the fact of the complete payment of the shares, and that the time has come when those shares may be assigned in fragments, which for obvious reasons could not be permitted before, but that stock shall still be the qualification, for example, of directors, who must possess a certain number of shares, and that the meetings shall be of the persons entitled to this stock, who shall meet as shareholders, and vote as shareholders, in the proportion of shares which would entitle them to vote before the consolidation into stock." Reverting to the particular case: "If ever there was a case in which the substance is that 'stock' and 'shares' are iden-

in the nature of a chose in action;[31] a proportional part of certain rights in the management and profits of the corporation during its existence, and in the assets upon its distribution;[32] an intangible right of property, the shares being distinguishable from each other only by their respective owners;[33] in the plural, shares of incorporated companies;[34] property consisting of shares in joint stock companies.[35] A share of stock is specifically, one of the whole number of equal parts into which the capital stock of a trading company or corporation may be divided, as shares in a bank, shares in a railway;[36] a right to a certain proportion of the capital stock of a corporation — never realized except upon the dissolution and winding up of the corporation — with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends;[37] a right which the owner has in the management, profits, and ultimate assets of the corporation;[38] the interest or right which the owner, who is called the shareholder or stockholder, has in the management of the corporation and in its surplus profits, and,

tical, this is a case of this kind;" and, attributing the doubt of this to a supposition that stock in a railway had some sort of analogy to stock in public funds: "It has none whatever. It is possible that debenture stock in a railway company may be said to have some analogy to stock in the public funds, but the joint stock capital of a company is a perfectly different thing. . . . It appears to me that it would be putting a meaning upon the term 'shares' so technical as to be in opposition to the ordinary use of the word, if 'shares' was held to mean for the purpose of a bequest something different from and something which would not pass stock in a railway company." Sir W. M. James, L. J., concurring, said: " . . . stock, or that which is called 'stock,' the thing into which the shares have been consolidated, so far as regards the interest of one person in that stock, is the right to participate in the profits of the undertaking. Both sets of words, 'my railway stock,' 'my railway shares,' mean, etymologically, my right to share," adding in substance, that, both etymologically and according to common usage, stock may be described as "share," or "shares." Morrice *v.* Aylmer, L. R. 10 Ch. 148, 153–156, 44 L. J. Ch. 212, 31 L. T. Rep. N. S. 660, 23 Wkly. Rep. 221 [*overruling* Oakes *v.* Oakes, 9 Hare 666, 41 Eng. Ch. 666, 68 Eng. Reprint 680, *distinguishing In re* Gibson, L. R. 2 Eq. 669, 35 L. J. Ch. 596, 14 Wkly. Rep. 818, and *explaining*, as in line with the view of the court, Trinder *v.* Trinder, L. R. 1 Eq. 695, 14 Wkly. Rep. 557].

"Stock" or "stocks" in the sense of "shares."—"Stock" and "shares" are used synonymously in Texas statute of June 3, 1873, relating to taxation, as, often, in common parlance. Harrison *v.* Vines, 46 Tex. 15, 21. "Stocks" defined as "shares" see *infra*, text and note 34.

"Property" includes stocks, as used in Utah Const. art. 13, § 3, providing for taxation of all property not exempt. Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 333, 61 Pac. 560, 56 L. R. A. 346 [*affirmed* in 182 U. S. 556, 21 S. Ct. 863, 45 L. ed. 1227].

"Stock or shares" within the meaning of English Judgments Acts (1838), § 14, or order XLVI, rule 1, providing for charging orders, does not include debentures. Sellar *v.* Bright, [1904] 2 K. B. 446, 448, 73 L. J. K. B. 643, 91 L. T. Rep. N. S. 9, 20 T. L. R. 586, 52 Wkly. Rep. 563.

31. Cherry *v.* Frost, 7 Lea (Tenn.) 1, 7. **"Bank stock"** as used in Tenn. Const. art. 2, § 28, and in St. (1836) cc. 13, 14, where it is declared taxable, means "individual interest in the dividends as they are declared, and a right to a *pro rata* distribution of the effects of the bank on hand at the expiration of the charter" as distinguished from the capital stock of the bank. Union Bank *v.* State, 9 Yerg. (Tenn.) 490, 498 [*quoted* in State *v.* Petway, 55 N. C. 396, 406].

32. 1 Cook Stock & Stockh. § 12 [*quoted* in Thayer *v.* Wathen, 17 Tex. Civ. App. 382, 391, 44 S. W. 906].

33. Princeton Bank *v.* Crozer, 22 N. J. L. 383, 386, 53 Am. Dec. 254.

34. Parker *v.* Otis, 130 Cal. 322, 328, 62 Pac. 571, 927, 92 Am. St. Rep. 56 [*affirmed* in 187 U. S. 606, 23 S. Ct. 168, 47 L. ed. 323], construing contracts to buy and sell "stocks."

35. Webster Dict. [*quoted* in Parker *v.* Otis, 130 Cal. 322, 328, 62 Pac. 571, 92 Am. St. Rep. 56 (*affirmed* in 187 U. S. 606, 23 S. Ct. 168, 47 L. ed. 323)]; Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 334, 61 Pac. 560, 56 L. R. A. 346 [*affirmed* in 182 U. S. 556, 21 S. Ct. 863, 45 L. ed. 1227], construing Const. art. 13, § 3.

36. Century Dict. [*quoted* in Continental Securities Co. *v.* Interborough Rapid Transit Co., 165 Fed. 945, 963].

37. Neiler *v.* Kelley, 69 Pa. St. 403, 407 [*quoted* in Commercial F. Ins. Co. *v.* Montgomery County Bd. of Revenue, 99 Ala. 1, 4, 14 So. 490, 42 Am. St. Rep. 17].

38. Cook Stock & Stockh. § 5 [*quoted* in Commercial F. Ins. Co. *v.* Montgomery County Bd. of Revenue, 99 Ala. 1, 4, 14 So. 490, 42 Am. St. Rep. 17; Rice *v.* Gilbert, 72 Ill. App. 649, 650 (*affirmed* in 173 Ill. 348, 50 N. E. 1087); Jones *v.* Concord, etc., R. Co., 67 N. H. 234, 238, 30 Atl. 614, 68 Am. St. Rep. 650; American Pig Iron Storage Co. *v.* State Bd. of Assessors, 56 N. J. L. 389, 392, 29 Atl. 160; Lamkin *v.* Palmer, 24 N. Y. App. Div. 255, 260, 48 N. Y. Suppl. 427]; Storrow *v.* Texas Consol. Compress, etc., Assoc., 87 Fed. 612, 615, 31 C. C. A. 139, where the quotation is given without reference.

on a dissolution, in all of its assets remaining after the payment of its debts;[39] the right to partake, according to the amount put into the fund, of the surplus profit obtained for the use and disposal of the capital stock of the company to those purposes for which the company is constituted;[40] the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for debts of the corporation;[41] the right to a *pro rata* periodical dividend of all profits, and if the corporation is not immortal, a right to a *pro rata* distribution of all its effects after payment of its debts on its death;[42] a right to participate in the profits or in the final distribution of the corporate property *pro rata*;[43] simply the title of the shareholder to his proportion of the corporate property;[44] simply a right to participate in the profits of a particular joint stock undertaking;[45] a fraction of the sum of all the rights and duties of the stockholders; a set of rights and duties between the corporation and the owner of the share;[46] a thing incorporeal — a mere right which entitles its owner to participate in the general management of the concerns of the corporation by being a member, in the meeting of the stockholders, to elect officers and do other acts of the kind; to demand and receive from the corporation a dividend of profits, whenever dividends are declared, and to demand and receive a portion of whatever may be on hand at its dissolution;[47] a species of incorporeal intangible property in the nature of a chose in action;[48] a species of incorporeal personal prop-

39. Clark & M. Corp. p. 1141, § 376*a* [*cited* in Lipscomb *v.* Condon, 56 W. Va. 416, 420, 49 S. E. 392, 107 Am. St. Rep. 938, 67 L. R. A. 670].

40. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 280, 22 N. E. 798, 17 Am. St. Rep. 319, 8 L. R. A. 497.

41. Burrall *v.* Bushwick R. Co., 75 N. Y. 211, 216 [*quoted* in Clow *v.* Redman, 6 Ida. 568, 573, 57 Pac. 437].

42. People *v.* New York Tax., etc., Com'rs, 40 Barb. (N. Y.) 334, 353.

43. Field *v.* Pierce, 102 Mass. 253, 261 [*quoted* in Budd *v.* Multnomah R. Co., 12 Oreg. 271, 272, 7 Pac. 99, 53 Am. Rep. 355].

44. Donnell *v.* Wyckoff, 49 N. J. L. 48, 52, 7 Atl. 672.

45. Morrice *v.* Aylmer, L. R. 10 Ch. 148, 155, 44 L. J. Ch. 212, 31 L. T. Rep. N. S. 660, 23 Wkly. Rep. 221.

46. See Winslow *v.* Fletcher, 53 Conn. 390, 395, 4 Atl. 250, 55 Am. Rep. 122.

47. Evans *v.* Monot, 57 N. C. 227, 232.

48. Vanstone *v.* Goodwin, 42 Mo. App. 39, 47.

"Neither a specific chattel, nor a debt, but a mere chose in action" see Foster *v.* Potter, 37 Mo. 525, 529 [*quoted* in Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 21, 20 S. W. 690, 35 Am. St. Rep. 691].

Place of existence.—"It is true a share of the stock is personal estate in the sense that it will, at the death of the owner, devolve upon his personal representative, but, it would seem, that it cannot be so in the sense of attending his person, for it is but one of many parts, the aggregate of which make an artificial body, which has its existence fixed in this State, and creates a right or duty which must be yielded and performed here, and cannot be enforced in any other country; in other words, it is estate of the shareholder 'here' in the hands of the corporation, for his benefit." Evans *v.* Monot, 57 N. C. 227, 232. "Shares of stock in a corporation are personal property whose location is in that state where the corporation is created." Cook Corp. § 485 [*quoted* in Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 20, 20 S. W. 690, 35 Am. St. Rep. 691]. *Contra*, Union Bank *v.* State, 9 Yerg. (Tenn.) 490, 500, where it is said: "Stock is in the nature of a chose in action, and can have no locality; it must, therefore, of necessity follow the person of the owner."

Relation to the company.—In most corporations "every share of stock has a vote, every share of stock is an integral part of the corporation," while the stockholder is not. Fredericks *v.* Pennsylvania Canal Co., 16 Phila. (Pa.) 605, 607.

Share as power.—"A share of stock is a share in the power to increase the stock, and belongs to the stockholders the same as the stock itself." Stokes *v.* Continental Trust Co., 186 N. Y. 285, 299, 78 N. E. 1090, 12 L. R. A. N. S. 969.

Shares held choses in action see CORPORATIONS, 10 Cyc. 367 note 56. *Compare* Fisher *v.* Essex Bank, 5 Gray (Mass.) 373, 377 (where a share is said to be analogous to, but is distinguished from, a chose in action, in respect to the effect of assignment); Ramsey *v.* Gould, 57 Barb. (N. Y.) 398, 408 (holding that stock is not a chose in action within the meaning of 2 Rev. St. p. 288, § 71, prohibiting an attorney from buying a thing in action for the purpose of bringing suit thereon).

"No such thing in rerum natura as a railway share. It is not such a thing as you can see, or touch, or handle." Morrice *v.* Aylmer, L. R. 10 Ch. 148, 155, 44 L. J. Ch. 212, 31 L. T. Rep. N. S. 660, 23 Wkly. Rep. 221.

An incorporeal intangible thing see Commercial F. Ins. Co. *v.* Montgomery County Bd. of Revenue, 99 Ala. 1, 4, 14 So. 490, 42

erty;[49] a chose in action, entitling its owner to yearly payments from a corporation, if there are net earnings;[50] constituting a species of property entirely distinct from the corporate property, and representing a right to participate in profits only;[51] representing the interest which the shareholder has in the capital and net earnings of the corporation;[52] and conferring upon the holder a right to participate, in a certain proportion, in the immunities and benefits of the corporation, and vote in the choice of their officers, to share in the dividends and profits, and to receive an aliquot part of the capital, on winding up and terminating the active existence and operations of the corporation.[53]

E. As the Certificate.[54] To "issue any stock" is to issue a "certificate of stock," and where the phrases occur, although coupled by the word "or," they mean the same.[55]

F. In Tax Exemptions and Limitations. The scope of the word in statutes relating to exemption from, or limitation from, taxation is frequently in dispute,[56] and is limited in general to that which the statute is clearly intended to exempt.[57] The word may cover all the property of the corporation,[58] or so

Am. St. Rep. 17; Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 20, 20 S. W. 690, 35 Am. St. Rep. 691; Foster *v.* Potter, 37 Mo. 525, 529; Neiler *v.* Kelley, 69 Pa. St. 403, 407.

49. Lowell Transfer of Stock, § 9 [*cited* in Rice *v.* Gilbert, 72 Ill. App. 649, 650 (*affirmed* in 173 Ill. 348, 50 N. E. 1087); Allen *v.* Pegram, 16 Iowa 163, 173].

50. Western Union Tel. Co. *v.* Poe, 61 Fed. 449, 456 [*overruled* on other grounds in Western Union Tel. Co. *v.* Poe, 64 Fed. 9 (*affirmed* in 69 Fed. 546, 16 C. C. A. 305 [*affirmed* in 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683])].

51. Bidwell *v.* Pittsburgh, etc., Pass. R. Co., 114 Pa. St. 535, 541, 6 Atl. 729 [*quoted* in Monongahela Bridge Co. *v.* Pittsburg, etc., Traction Co., 196 Pa. St. 25, 28, 46 Atl. 99, 79 Am. St. Rep. 685].

52. Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483, 492.

53. Fisher *v.* Essex Bank, 5 Gray (Mass.) 373, 378 [*quoted* in Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 19, 20 S. W. 690, 692, 35 Am. St. Rep. 691].

54. **Certificate of stock** see STOCK CERTIFICATES, *post*, p. 1310.

Not commercial paper see *In re* People's Live Stock Ins. Co., 56 Minn. 180, 57 N. W. 468.

55. Pietsch *v.* Krause, 116 Wis. 344, 349, 351, 93 N. W. 9.

Bank stock is "merely evidence of title to shares in the capital stock of the bank." Primm *v.* Fort, 23 Tex. Civ. App. 605, 611, 57 S. W. 86, 972.

56. See *infra*, text and notes 57–61.

57. See Anne Arundel County Com'rs *v.* Annapolis, etc., R. Co., 47 Md. 592, 611 [*affirmed* in 103 U. S. 1, 26 L. ed. 359] (holding that while the exemption of the shares of the capital stock operates as an exemption of the property of the corporation, or so much of it as the corporation is fairly authorized to hold for the proper exercise of its franchises, and this upon the principle that the shares of stock in the hands of the shareholders represent the property held by the corporation, yet such exemption must be clear, and is not clear where the company claims it on the ground that its charter grants it the privileges of another road, which is exempt, but when such grant is limited to such rights and privileges as are necessary to the construction and repair of the road, to which such exemption is not in fact necessary); Central R., etc., Co. *v.* Wright, 164 U. S. 327, 335, 17 S. Ct. 80, 41 L. ed. 454 (where it is said: "In the absence of any words showing a different intent, an exemption of the stock or capital stock of a corporation may imply, and carry with it, an exemption of the property in which such stock is invested, yet, if the legislature uses language at variance with such intention, the courts . . . will construe any doubts which may arise as to the proper interpretation of the charter against the exemption").

58. See Michigan Cent. R. Co. *v.* Porter, 17 Ind. 380, 383 (holding that the word, as used in 1 Rev. St. (1852) p. 113, requiring stock of certain companies to be assessed against them, includes "not only stock subscriptions, but all the actual, tangible property of the company" [for which proposition is there *cited* State *v.* Hamilton, 5 Ind. 310, 314, 317, where the exact language used is that the word includes "all the property of the corporation;" that it "is not the stock subscriptions, but the actual tangible property of railroad companies that is to be listed for taxation"]); Connersville *v.* State Bank, 16 Ind. 105 (holding that an exemption of capital stock of a bank is an exemption of all the property, including the money and notes); Frederick County Com'rs *v.* Farmers', etc., Nat. Bank, 48 Md. 117, 120 (holding that an exemption of capital stock of a bank covers its specific property); State *v.* Cumberland, etc., R. Co., 40 Md. 22, 52 (holding that the stock of the company is the representative of its whole property, and payment of a tax upon the capital stock exempts from taxation all the property, real and personal, of the company); Baltimore *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 288, 294, 48 Am. Dec. 531 [*followed* in State *v.* Baltimore, etc., R. Co., 48 Md. 49, 71] (holding that an exemption from taxes upon the shares of stock of the corporation exempts its whole property, including the franchises);

much thereof as is necessary and proper to the business for which the company is incorporated;[59] it may apply to shares in the hands of shareholders,[60] or not.[61] (Stock or Shares of Corporations: In General, see CORPORATIONS, 10 Cyc. 364. Assessments and Calls Upon, see CORPORATIONS, 10 Cyc. 484, 767. Attachment of, see ATTACHMENT, 4 Cyc. 571; FOREIGN CORPORATIONS, 19 Cyc. 1338. Bank Stock — In General, see BANKS AND BANKING, 5 Cyc. 435; National, see BANKS AND BANKING, 5 Cyc. 575; Savings, see BANKS AND BANKING, 5 Cyc. 604; Transferable by Guardian of Shareholder, see GUARDIAN AND WARD, 21 Cyc. 83 note 82. Bequest of, see WILLS. Building and Loan Society Stock, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 126, 141, 147, 153. Capital Stock, see CAPITAL STOCK, 6 Cyc. 348; CORPORATIONS, 10 Cyc. 364. Cemetery Association Stock, see CEMETERIES, 6 Cyc. 711 text and notes 13, 14. Conversion of — By Foreign Corporation, of Its Own, as Ground For Attachment, see FOREIGN CORPORATIONS, 19 Cyc. 1331 note 92; Measure of Damages, see DAMAGES, 13 Cyc. 172. Dealings in — By Banks, see BANKS AND BANKING, 5 Cyc. 492; By Directors, see CORPORATIONS, 10 Cyc. 768, 796; By Guardians, see GUARDIAN AND WARD, 21 Cyc. 83 note 82, 89 note 32, 91 note 48. Evidence of Value of, see EVIDENCE, 16 Cyc. 1140 note 97. Executions Upon, see EXECUTIONS, 17 Cyc. 944. Forfeiture of — For Non-Payment of Assessments, see CORPORATIONS, 10 Cyc. 499; Not to Be Enjoined When Authorized, see INJUNCTIONS, 22 Cyc. 877 text and notes 25–29; Not to Be Used to Enforce By-Law, see CORPORATIONS, 10 Cyc. 363. Fraudulent Issue of, Right of Purchaser Against Directors, see CORPORATIONS, 10 Cyc. 141 text and note 52. Gambling in, see GAMING, 20 Cyc. 897 text and note 45, 926–932. Garnishment of, see FOREIGN CORPORATIONS, 19 Cyc. 1338; GARNISHMENT, 20 Cyc. 1005. Gift of — Causa Mortis, see GIFTS, 20 Cyc. 1240; Inter Vivos, see GIFTS, 20 Cyc. 1202. Guaranty of, see GUARANTY, 20 Cyc. 1458 note 36, 1459

Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 327, 331, 41 Atl. 846, 42 L. R. A. 852 (holding that exemption from taxation of "the stock of the said corporation held or owned by any of its stockholders" covers all its property); State *v.* Hood, 15 Rich. (S. C.) 177, 188, 189, 192 (holding that the word covers gross income).

59. See the opinion of Warner, J., in Bibb County *v.* Central R., etc., Co., 40 Ga. 646, 650 [*criticized* and *explained* in Central R., etc., Co. *v.* Wright, 164 U. S. 327, 332, 17 S. Ct. 80, 41 L. ed. 454 (where it is shown that the two other judges in Bibb County *v.* Central R., etc., Co., *supra*, concurred in the general result only on other grounds)]; Rome R. Co. *v.* Rome, 14 Ga. 275, 277.

It covers real estate only to the extent to which the corporation would be entitled to take it without consent of the owner. Vermont Cent. R. Co. *v.* Burlington, 28 Vt. 193, 198.

Payment of tax on "capital stock" does not cover property not used and occupied for the necessary purposes of the company. State *v.* Newark East, etc., Wards Collectors, 25 N. J. L. 315, 317.

"Each share of capital stock" of a bank held to cover specific property only to the extent which, by its charter, it was expressly authorized to purchase and hold, namely, a lot of ground for its use, as a place of business, and such real or personal property as might be conveyed to it to secure debts due the institution. Bank of Commerce *v.* Tennessee, 104 U. S. 493, 494, 26 L. ed. 810.

60. See State *v.* Lewis, 118 Wis. 432, 435, 95 N. W. 388 (holding that in Wisconsin tax laws, the word as applied to the stock of banking corporations, by Rev. St. (1898) § 1044, is used in a technical sense, that is, as "shares," while in regard to other corporations and persons engaged in banking business, by Rev. St. (1898) § 1042, it refers to rights in the property equivalent to the rights represented by shares of stock in corporations); Central R., etc., Co. *v.* Wright, 164 U. S. 327, 336, 17 S. Ct. 80, 41 L. ed. 454 (holding that the amendment of Dec. 14, 1835, to the Cent. R. Co., exempting its "stock" from municipal taxation, was consistent with a later statute taxing the property of railroad companies on the ground that "stock" in the charter amendment was used in the sense of "shares of stock").

On each share of capital stock.—A provision limiting taxation against a corporation to a certain amount on each share of capital stock, and giving the corporation a lien on the stock and all creditors except the state for taxes, limits the taxation on each share in the hands of the stock-holders so that an attempt to impose additional taxation on such shares in their hands as against them is void (Bank of Commerce *v.* Tennessee, 161 U. S. 134, 141, 16 S. Ct. 456, 40 L. ed. 645 [*following* to that extent Farrington *v.* Tennessee, 95 U. S. 679, 24 L. ed. 558]); but the phrase does not apply to or cover the case of the capital stock of the corporation (Shelby County *v.* Union, etc., Bank, 161 U. S. 149, 161, 16 S. Ct. 558, 40 L. ed. 650).

61. See Georgia R., etc., Co. *v.* Wright, 132 Fed. 912, holding that the word covers the capital stock of the company and not the separate shares in the hands of the stockholders.

note 41, 1461 note 54. Injunctions — Against Disposal of, see INJUNCTIONS, 22 Cyc. 877; Against Issuance of in Exchange For Fraudulent Bonds Bought With Notice, see INJUNCTIONS, 22 Cyc. 870 note 16. Insurance Stock, see INSURANCE, 22 Cyc. 1398, 1402. Interpleader — Action by Corporation to Determine Title to, see INTERPLEADER, 23 Cyc. 23 note 87; Right of Holder of in Escrow to Require Parties Interested to Plead, see INTERPLEADER, 23 Cyc. 4 note 3. Joint Stock — Forfeiture, see JOINT STOCK COMPANIES, 23 Cyc. 473; Sole Ownership as Means of Dissolution, see JOINT STOCK COMPANIES, 23 Cyc. 480; Taxation, see JOINT STOCK COMPANIES, 23 Cyc. 468; Transfer, see JOINT STOCK COMPANIES, 23 Cyc. 473. Lis Pendens Affecting, see LIS PENDENS, 25 Cyc. 1453. Loan and Trust Stock, see BANKS AND BANKING, 5 Cyc. 612. Mining Stock, see MINES AND MINERALS, 27 Cyc. 764 notes 86, 89, 765 note 91, text and note 92, 766 note 2, 767 notes 5, 6, 768 note 7, text and note 9, note 10. Mortgages — Of Property and Franchises of Corporation, see CORPORATIONS, 10 Cyc. 1182; Of Shares, see CHATTEL MORTGAGES, 6 Cyc. 1038 text and note 93. Overissued Stock, see OVERISSUED STOCK, 29 Cyc. 1547. Ownership of — By Corporation Generally, see CORPORATIONS, 10 Cyc. 1107, 1109; By Director as Qualification, see CORPORATIONS, 10 Cyc. 851; By Insurance Company, see INSURANCE, 22 Cyc. 1399 note 59; By Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1376 text and note 78, 1415 note 21, 1419 note 48; By Municipal Corporation in Public Service Companies, see CORPORATIONS, 10 Cyc. 379; By Railroad Company, Purchase, see RAILROADS, 33 Cyc. 385; By Religious Society in Building Corporation, Proxy, see RELIGIOUS SOCIETIES, 34 Cyc. 1139 note 53; By Sole Stock-Holder, of Whole, Not Dissolution, see CORPORATIONS, 10 Cyc. 1277; By Stock-Holders Generally, see STOCK-HOLDERS or SHAREHOLDERS, *post*, p. 1315, and Cross-References Thereunder. Payment For — By Note, see COMMERCIAL PAPER, 7 Cyc. 709 note 1, 849 note 92; In Property, see CORPORATIONS, 10 Cyc. 460; Requisite to Its Assignment For Creditors of Corporation, see CORPORATIONS, 10 Cyc. 1239. Pledge of, Delivery and Possession of Certificate, see PLEDGES, 31 Cyc. 807. Preferred Stock, see CORPORATIONS, 10 Cyc. 568. Railroad Stock — In General, see RAILROADS, 33 Cyc. 63, 64; Bonds Convertible Into Stock, see RAILROADS, 33 Cyc. 453; Right of County or Municipality to Stock on Payment of Subscription, see RAILROADS, 33 Cyc. 105. Sales of — Affected by Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 244; Agreements Not to Sell, see CONTRACTS, 9 Cyc. 541 note 25; Right of Seller to Indemnity Against Calls, see FACTORS AND BROKERS, 19 Cyc. 291. Shares as Property, see CORPORATIONS, 10 Cyc. 366, 538. Special Stock, see SPECIAL STOCK, *ante*, p. 524. Stock Book, Mandamus to Permit Stock-Holder to Examine, see MANDAMUS, 25 Cyc. 343 note 28. Stock in New Corporation as Payment For Corporate Property Sold, see CORPORATIONS, 10 Cyc. 1269. Street Railroad Stock, see STREET RAILROADS, *post*, p. 1338. Surrender of Stock and Release of Stock-Holder, see CORPORATIONS, 10 Cyc. 449. Taxation of — In General, see TAXATION; By Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1680, 1681, 1682, 1683 text and note 84. Telegraph or Telephone Stock, see TELEGRAPHS AND TELEPHONES. Toll-Road Stock, see TOLL-ROADS. Transfer of — By Members as Transfer of Franchise, see CORPORATIONS, 10 Cyc. 1095; For Purpose of Corruption, see CONTRACTS, 9 Cyc. 555 note 78; Restraint by By-Law Generally Illegal, see CORPORATIONS, 10 Cyc. 359. Water Company Stock, see WATERS. See also STOCK ASSOCIATION, *post*, this page; STOCK-BROKER, *post*, p. 1310; STOCK CERTIFICATES, *post*, p. 1310; STOCK COMPANY, *post*, p. 1314; STOCK CORPORATION, *post*, p. 1314; STOCK DIVIDEND, *post*, p. 1314; STOCK EXCHANGES, *post*, p. 1315; STOCK-HOLDER OR SHAREHOLDER, *post*, p. 1315; STOCK JOBBER, *post*, p. 1323; STOCK JOBBING, *post*, p. 1323; STOCK MORTGAGES, *post*, p. 1323; STOCK POLICY, *post*, p. 1324; STOCK SUBSCRIPTION, *post*, p. 1324.)

STOCK ASSOCIATION. In General, see JOINT STOCK COMPANIES, 23 Cyc. 466. Agricultural Society, see AGRICULTURE, 2 Cyc. 72. Mining Association, see MINES AND MINERALS, 27 Cyc. 755. Mining Joint Stock Company, see MINES AND MINERALS, 27 Cyc. 764.

STOCK-BROKER.[62] One who deals in stock of moneyed corporations and other securities;[63] one employed to buy and sell shares of stocks in incorporated companies and the indebtedness of governments;[64] one who deals in stocks of moneyed corporations and other securities for his principal.[65] (Stock-Broker: In General, see FACTORS AND BROKERS, 19 Cyc. 186 note 67. Authority, see FACTORS AND BROKERS, 19 Cyc. 198. Duration of Agency, see FACTORS AND BROKERS, 19 Cyc. 193 note 96. Included by Word "Broker" in Tax Laws, see FACTORS AND BROKERS, 19 Cyc. 188 text and note 74. Liability For Gambling in Stocks or Futures, see GAMING, 20 Cyc. 897 text and note 45. Purchase and Sale of Shares by Brokers on Instruction Not Commercial Matters Under Quebec Civil Code, see COMMERCE, 7 Cyc. 414 note 11. Title to Stock Held by Broker, see FACTORS AND BROKERS, 19 Cyc. 209.)

STOCK CATTLE. A term including all descriptions of cattle except beef cattle, that is, all except steer cattle over the age of three years.[66] (See CATTLE, 7 Cyc. 702; STOCK or LIVE STOCK, *ante*, p. 1301; and, generally, ANIMALS, 2 Cyc. 288.)

STOCK CERTIFICATES. The declarations in writing by the company's officers as to who are entitled to participate in its benefits, its profits or losses;[67] showing the number of shares held by a person and the amount paid thereon, which paper is recognized in mercantile transactions as evidence of the property it represents, and is surrendered when a transfer or sale is made;[68] nothing else than evidence

62. **Other definitions** see FACTORS AND BROKERS, 19 Cyc. 186 note 67.

63. Webster Dict. [*quoted* in Little Rock *v.* Barton, 33 Ark. 436, 447].

Not including one dealing for himself.—"No person is considered a broker who buys for himself a note, bill, or debt due from any person or government." Gast *v.* Buckley, 64 S. W. 632, 633, 23 Ky. L. Rep. 992.

"**It is a calling of great responsibilities,** in which punctuality, honesty, and knowledge are required." White *v.* Brownell, 2 Daly (N. Y.) 329, 337, 4 Abb. Pr. N. S. 162.

64. See Bouvier L. Dict. *sub verb.* "Brokers" [*quoted* in Little Rock *v.* Barton, 33 Ark. 436, 446 (reading "incorporate" for "incorporated"); Gast *v.* Buckley, 64 S. W. 632, 633, 23 Ky. L. Rep. 992].

65. White *v.* Brownell, 2 Daly (N. Y.) 329, 337, 4 Abb. Pr. N. S. 162.

66. See Elliott *v.* Long, 77 Tex. 467, 471, 14 S. W. 145, construing the term according to evidence.

67. Watson *v.* Sidney F. Woody Printing Co., 56 Mo. App. 145, 151.

Certificates of so-called stock issued under the Ohio statute, March 25, 1870, held certificates of indebtedness see Burt *v.* Rattle, 31 Ohio St. 116, 128–130.

"**Interest certificates**" as "scrip dividends" see Bailey *v.* New York, etc., R. Co., 22 Wall. (U. S.) 604, 633, 638, 22 L. ed. 840 [*cited* in Gibbons *v.* Mahon, 136 U. S. 549, 560, 10 S. Ct. 1057, 34 L. ed. 525], holding that certificates issued to stockholders declaring them entitled to eighty per cent of the amount of stock held by them, payable out of future earnings, with dividends thereon at the same rates and time as dividends on shares of the company, or convertible into stock at the option of the company on increase of capital, and called "interest certificates," were "dividends in scrip," taxable to the company under U. S. Int. Rev. Act June 30, 1884, § 22.

68. Princeton Bank *v.* Crozer, 22 N. J. L. 383, 386, 53 Am. Dec. 254.

Assurance to purchaser.—"Stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. . . . No better form could be adopted to assure the purchaser that he can buy with safety." South Bend First Nat. Bank *v.* Lanier, 11 Wall. (U. S.) 369, 377, 20 L. ed. 172. "He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates." Bank *v.* Lanier, *supra* [*quoted* in Smith *v.* Crescent City Live-Stock Landing, etc., Co., 30 La. Ann. 1378, 1382].

Bank stock certificates.—"It is an undoubted fact that bank stock certificates, while not possessing all the characteristics of commercial paper, are nevertheless esteemed by the business world as having a value somewhat superior to ordinary securities. For this reason they have come to be regarded as one of the most desirable bases of commercial transactions, and when transferred to a purchaser for value and without notice of any defect in title, the certificate is of itself generally an assurance to the

of the shareholder's right to a share of the net products of all property of the company.[69] The evidence in the hands of the holders of the ownership of the undivided property of the corporation;[70] which, although not the stock, is documentary evidence of title to stock and may be used for purposes of symbolical delivery as the stock itself is incapable of actual delivery.[71] (Stock Certificates: Acceptance of Certificate — As Implying Promise to Pay For Shares, see CORPORATIONS, 10 Cyc. 381; With Retention, as Estoppel Upon Stock-Holder to Deny Liability, see CORPORATIONS, 10 Cyc. 537 text and note 54. Assignee in Possession of Certificate Not Bound by Subsequent Contract Between Corporation and Registered Stock-Holder, see CORPORATIONS, 10 Cyc. 598 text and note 6. Bona Fide Purchaser of Certificates — Face of Certificate Generally as Notice to Purchaser, see CORPORATIONS, 10 Cyc. 634, 636 text and notes 75, 78; Provisions Affecting Transfer as Notice to Purchaser, see CORPORATIONS, 10 Cyc. 585, 586 text and note 3, 586 text and notes 4, 7; Title of Bona Fide Purchaser in Possession of Certificate, Different American and English Doctrines, see CORPORATIONS, 10 Cyc. 630, 631. Cancellation of Certificates — As Right of Stock-Holder Under Certain Circumstances, see CORPORATIONS, 10 Cyc. 455 text and note 38, 608 text and notes 75, 76; Certificates Not Canceled on Issue of New, Mere Vouchers, see CORPORATIONS, 10 Cyc. 447 text and note 80; Certificates Not to Be Effectively Canceled by Corporation, see CORPORATIONS, 10 Cyc. 450. Certificates as Affected by Forgery — Action to Procure New Certificate by One Whose Shares Have Been Transferred on Faith in Forged Power of Attorney, see CORPORATIONS, 10 Cyc. 627 text and notes 14, 15; Liability of Corporation For Transferring Shares on Forged Indorsement, see CORPORATIONS, 10 Cyc. 625; Liability to Corporation

transferee that, upon its presentation, the holder will be entitled to have the stock transferred to him upon the books of the bank." Buffalo German Ins. Co. *v.* Buffalo Third Nat. Bank, 29 N. Y. App. Div. 137, 141, 51 N. Y. Suppl. 667 [*reversed* on grounds favorable to the above statement in 162 N. Y. 163, 56 N. E. 521, 48 L. R. A. 107, and *quoted* in Lyman *v.* Randolph State Bank, 81 N. Y. App. Div. 367, 372, 80 N. Y. Suppl. 901 (*affirmed* in 179 N. Y. 577, 72 N. E. 1145)].

Treated as property.— Certificates of stock "are treated by business men as property for all practical purposes. They are sold in the market, transferred as collateral security to loans, and are used in various ways as property. They pass by delivery from hand to hand." Matter of Whiting, 150 N. Y. 27, 30, 44 N. E. 715, 55 Am. St. Rep. 640, 34 L. R. A. 232 [*cited* in Simpson *v.* Jersey City Contracting Co., 165 N. Y. 193, 198, 58 N. E. 896, 55 L. R. A. 796].

Compared with bills of lading or warehouse receipts.—"A certificate of stock is in some respects like a bill of lading or a warehouse or wharfinger's receipt. Each is the representation of property existing under certain conditions, and the documentary evidence of title thereto. They are all alike transferable by endorsement and delivery, and the title to the property thus represented passes by such transfer. So far they resemble each other, but there are distinctions to be noted. Bills of lading and wharfinger's receipts are commercial instruments, and their transferability, or, as it is sometimes termed, their 'quasi negotiability,' depends on the custom of merchants and the conveniences of trade. Certificates of stock are not commercial instruments, and the title to the property they represent passes in equity only by indorsement and delivery, where, by any law or rule of the corporation, the transfer is required to be made on the books." Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 627.

A certificate purports to represent a perfect title to the stock when in common form. Clews *v.* Friedman, 182 Mass. 555, 557, 66 N. E. 201.

69. Donnell *v.* Wyckoff, 49 N. J. L. 48, 52, 7 Atl. 672.

"A shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it; the shares represent a right to participate in profits only." Bidwell *v.* Pittsburgh, etc., Pass. R. Co., 114 Pa. St. 535, 541, 6 Atl. 729 [*quoted* in Monongahela Bridge Co. *v.* Pittsburg, etc., Traction Co., 196 Pa. St. 25, 28, 46 Atl. 99, 79 Am. St. Rep. 685].

70. See Smith *v.* Crescent City Live-Stock Landing, etc., Co., 30 La. Ann. 1378, 1380; Harris *v.* Mobile Bank, 5 La. Ann. 538, 539 [*cited* in Smith *v.* Crescent City Live-Stock Landing, etc. Co., *supra*], where it is said: "The certificates of stock were the evidence of the ownership of that property in the hands of the holders, as the subscription and transfer books were the evidence of the ownership in the possession of the corporations."

71. McAllister *v.* Kuhn, 96 U. S. 87, 89, 24 L. ed. 615.

As evidence of ownership or title see CORPORATIONS, 10 Cyc. 450 text and note 2, 526 text and note 43, 588 text and note 25, 645 text and note 42.

Not stock see CORPORATIONS, 10 Cyc. 450 text and note 2, 526 text and note 43, 645 text and note 42.

of Person Obtaining New Certificate on Forged Assignment, see CORPORATIONS, 10 Cyc. 629 text and note 15; Right of Bona Fide Subpurchaser of Forged Certificate, see CORPORATIONS, 10 Cyc. 628 text and notes 18, 19. Certificates as Affected by Fraud — As Misrepresentations to Public, Right of Innocent Purchaser, see CORPORATIONS, 10 Cyc. 446; Held by Guardian, Giving Notice on Face That Stock Is Property of Minors, When Transfer Void, see CORPORATIONS, 10 Cyc. 623 text and note 83; Issued Directly to Stock-Holder Misled by Fraudulent Representations, Cancellation, see CORPORATIONS, 10 Cyc. 455 text and note 38; Issued Fraudulently by Authorized Officer, Liability of Corporation, see CORPORATIONS, 10 Cyc. 628 text and note 2; Issued Fraudulently, When Binding, Remedy of Corporation Against Its Agent, see CORPORATIONS, 10 Cyc. 448 text and note 87; Issued Fraudulently, When Not Overissue, Cancellation Not a Right of Corporation, see CORPORATIONS, 10 Cyc. 445; Issued in Pursuance of Fraudulent Indorsement, Corporation Not Liable to Person First Deceived, see CORPORATIONS, 10 Cyc. 629; New Certificate Issued After Removal of Executor, Liability of Corporation, see CORPORATIONS, 10 Cyc. 22; New Certificate on Transfer by Trustee in Breach of Trust, Liability of Corporation, see CORPORATIONS, 10 Cyc. 624; Of Stock Held in Trust, Wrongful Change and Reissue, Liability of Corporation, see CORPORATIONS, 10 Cyc. 615 text and note 34; Overissue, Fraudulent, Subscriber's Remedy, see CORPORATIONS, 10 Cyc. 444 text and notes 54–57, 445 text and notes 58, 60; Right of Bona Fide Subpurchaser, American Doctrine, see CORPORATIONS, 10 Cyc. 628 text and note 19. Certificates as Evidence — Of Ownership or Title, see CORPORATIONS, 10 Cyc. 450 text and note 2, 526 text and note 43, 588 text and note 25, 645 text and note 42; Of Relation Between Corporation and Corporator, Secondary to Stock-Book, see CORPORATIONS, 10 Cyc. 594 text and note 75. Certificates as Means of Conversion of Stock — Corporation Accepting in Good Faith Surrender From Fraudulent Holder With Power of Attorney Not Liable, see CORPORATIONS, 10 Cyc. 610 text and note 92; Demand and Refusal of Certificate as Evidence of Conversion, see CORPORATIONS, 10 Cyc. 612 text and note 6; Wrongful Transfer by Means of Certificate as Conversion of Stock, see CORPORATIONS, 10 Cyc. 610 text and note 95. Certificates as Means of Transfer of Stock — By Indorsement and Delivery, see CORPORATIONS, 10 Cyc. 594, 617, 630 text and notes 30, 31, 40, 631 text and notes 42, 43, 632 text and notes 44–48, 643; By Surrender of Old and Issue of New, see CORPORATIONS, 10 Cyc. 596; Possession of Certificate Unavailing to Compel Transfer Against Superior Equities, see CORPORATIONS, 10 Cyc. 606 text and note 60. Certificates as Quasi-Negotiable Instruments, see CORPORATIONS, 10 Cyc. 630. Certificates as Subjects of Action — For Conversion of Certificate, see CORPORATIONS, 10 Cyc. 611 text and notes 97–112, 612 text and note 5, 613 text and notes 19, 20, 614 text and note 22; For Negligent Cancellation and New Issue to Wrong Person, see CORPORATIONS, 10 Cyc. 612 text and notes 9, 10; In Assumpsit For Refusal to Issue Certificate, see CORPORATIONS, 10 Cyc. 611, 612 text and note 3; On the Case in Nature of Trover, see CORPORATIONS, 10 Cyc. 612 text and note 5; To Compel Issue of Certificate, see CORPORATIONS, 10 Cyc. 605 text and notes 51, 56, 606 text and note 58, 607 text and note 71, 608 text and note 77, 611 text and note 97, 627 text and notes 14, 15; To Compel Transfer, Effect of Failure to Produce Certificate, see CORPORATIONS, 10 Cyc. 607 note 68. Certificates Indorsed in Blank, Transfer — By Delivery Generally Sufficient in America, see CORPORATIONS, 10 Cyc. 594, 630 text and notes 30, 31, 631; By Delivery Insufficient Under English Rule, see CORPORATIONS, 10 Cyc. 630 text and note 40; By Pledgee, see CORPORATIONS, 10 Cyc. 643; Of Stolen Certificate Unavailing, see CORPORATIONS, 10 Cyc. 631 text and note 42; Whether Blank Transferee Must Satisfy Corporation That He Is Genuine Holder, see CORPORATIONS, 10 Cyc. 617. Certificates in Relation to Lien of Corporation on Stock — Assignment of Certificates as Affecting Statutory Lien, see CORPORATIONS, 10 Cyc. 581 text and note 65; Language of Certificate Creating Equitable Lien, see CORPORATIONS, 10 Cyc. 582; Language of Certificate Not Importing Equitable Lien, Protection of Purchaser,

see CORPORATIONS, 10 Cyc. 582. Certificates in Relation to Pledges — Certificate of Stock Held in Trust and Pledged Giving no Notice to Pledgee, see CORPORATIONS, 10 Cyc. 641 text and notes 16, 17, 642 text and note 26; Certificate Showing Issue " in Trust " as Notice, see CORPORATIONS, 10 Cyc. 644; Certificate Showing Owner's Name Not Notice of Owner's Rights to Pledgee, see CORPORATIONS, 10 Cyc. 644; Certificate Showing Requirement of Transfer Upon Books as Charging Pledgee or Other Taker With Lien, see CORPORATIONS, 10 Cyc. 640 text and notes 5–7; Delivery Essential to Assignment of Shares in Pledge as Against Creditors Without Notice, see CORPORATIONS, 10 Cyc. 642–643 text and note 27; Delivery Essential to Pledgee, see CORPORATIONS, 10 Cyc. 637, 638 text and notes 88, 91; PLEDGES, 31 Cyc. 807 text and note 26; Delivery of Certificate in Unregistered Pledge as Affecting Rights of Attachment or Execution Creditors of Pledgor, or Execution Purchasers, see CORPORATIONS, 10 Cyc. 643 text and notes 40, 41; Failure of Corporation to Insist on Production of Certificate Pledged But Not Transferred on Books Not a Waiver of Lien, see CORPORATIONS, 10 Cyc. 587 text and note 13; Innocent Pledgee of Certificate Signed in Blank and Fraudulently Pledged, see CORPORATIONS, 10 Cyc. 641 text and note 18, 642 text and notes 19, 20; Pledgee When Not Entitled to New Certificate, see CORPORATIONS, 10 Cyc. 642; Power of Pledgee Holding Certificate Indorsed in Blank to Pass Title to Innocent Purchaser, see CORPORATIONS, 10 Cyc. 643; Returning Identical Certificate After Pledge How Far Material, see CORPORATIONS, 10 Cyc. 645; Statutory Requirement That Pledged Certificate State Right of Pledgor to Proxy From Pledgee, see CORPORATIONS, 10 Cyc. 641 text and note 14. Certificates Not Necessary to Rights of Stock-Holders — In General, see CORPORATIONS, 10 Cyc. 389; Exception in Case of Preferred Shares, see CORPORATIONS, 10 Cyc. 390; Where no Certificate Issued Written Agreement of Subscription Necessary, see CORPORATIONS, 10 Cyc. 390. Certificates Not Negotiable Instruments, see CORPORATIONS, 10 Cyc. 629. Certificates Not Stock, see CORPORATIONS, 10 Cyc. 450 text and note 2, 526 text and note 43, 645 text and note 42. Conditional Certificate, see CORPORATIONS, 10 Cyc. 592. Delivery of Certificates — As Means of Transfer, see CORPORATIONS, 10 Cyc. 630 text and notes 30, 31, text and note 40, 631; Essential to Pledge of Stock, see CORPORATIONS, 10 Cyc. 637, 638 text and note 88; PLEDGES, 31 Cyc. 807 text and note 26; Essential, With Assignment, to Pass Title, see CORPORATIONS, 10 Cyc. 599; For Paid-Up Stock to Amount Paid Not Resulting in Inference of Release of Stock-Holder, see CORPORATIONS, 10 Cyc. 450 note 96; Lack of Delivery no Defense to Action to Enforce Subscription, see CORPORATIONS, 10 Cyc. 526; Material to Proceeding to Compel Transfer, see CORPORATIONS, 10 Cyc. 604 note 44, 605 text and note 52; Not Essential to Mortgage, see CORPORATIONS, 10 Cyc. 638 text and notes 88, 90; Symbolical, by Assignment With Power to Assignee to Transfer to Self, see CORPORATIONS, 10 Cyc. 601 text and note 26; Without Registration, Sufficient to Execute Gift, see CORPORATIONS, 10 Cyc. 598, 607 text and note 67; Without Registration, Sufficient to Pass Equitable Title Only, see CORPORATIONS, 10 Cyc. 599; Without Registration, Sufficient to Pass Legal and Equitable Title, see CORPORATIONS, 10 Cyc. 599; Without Registration, Sufficient to Perfect Pledge as Against Attachment or Execution, see CORPORATIONS, 10 Cyc. 643 text and notes 31–33. Demand and Refusal of Certificate as Evidence of Conversion of Stock, see CORPORATIONS, 10 Cyc. 612 text and note 6. Gifts of Certificates, Without Registration, as Gifts of Stock, see CORPORATIONS, 10 Cyc. 598, 607 text and note 67. Issue of Certificates, see CORPORATIONS, 10 Cyc. 592. Lost Certificates, Duties and Responsibilities of Corporations Concerning, see CORPORATIONS, 10 Cyc. 619. Nature of Certificates, see CORPORATIONS, 10 Cyc. 588. Outstanding Certificates, Unavailing Against Decree Made With Proper Parties Before the Court, see CORPORATIONS, 10 Cyc. 608 text and note 80. Overissue — Cancellation, see CORPORATIONS, 10 Cyc. 446; Certificates Issued Without Authority Conveying no Rights Unless by Estoppel, see CORPORATIONS, 10 Cyc. 444 text and note 50; Fraudulent Overissue of Certificate, Subscriber's Remedy, see CORPORATIONS, 10 Cyc. 444 text

and notes 54–57, 445 text and notes 58, 60; Fraudulent Overissues of Stock Generally, see CORPORATIONS, 10 Cyc. 443; Under Statute, Certificates Void When Issued to Give Purchasers at Former Price Benefit of Reduction Without Other Consideration, see CORPORATIONS, 10 Cyc. 444 text and note 48. Preferential Certificates — Containing Guaranty of Interest, see CORPORATIONS, 10 Cyc. 575 text and note 19; Recitals as Aid in Determining Rights of Preferred Stock-Holders, see CORPORATIONS, 10 Cyc. 571 text and note 1; Whether Certificate of Stock or of Indebtedness, see CORPORATIONS, 10 Cyc. 575. Right of Subscribers to Certificates, see CORPORATIONS, 10 Cyc. 592. Stolen Certificates — As Means of Transfer Unavailing, see CORPORATIONS, 10 Cyc. 631 note 42; Duty and Responsibility of Corporation Concerning, see CORPORATIONS, 10 Cyc. 619. Surrender of Certificates Prerequisite — To Issue of New Certificate, see CORPORATIONS, 10 Cyc. 615; To Transfer by Corporation, see CORPORATIONS, 10 Cyc. 618. Tender of Certificates, Prerequisite to Mandamus to Compel County or Municipal Aid, Excused by Refusal to Issue Bonds, see MANDAMUS, 26 Cyc. 303 note 72. Terms of Certificates — As Affecting Question of Bona Fides in Purchase, see CORPORATIONS, 10 Cyc. 585–586 text and note 3, 586 text and notes 4, 7, 634, 636; As Aid in Determining Rights of Preferred Stock-Holders, see CORPORATIONS, 10 Cyc. 571 text and note 1; False Purport of Full Payment, see CORPORATIONS, 10 Cyc. 467 text and notes 36, 37, 468 text and note 47, 479 text and note 33, 483, 616 note 38; Guaranty of Stated Interest, Making Certificate a Bond or Debenture, see CORPORATIONS, 10 Cyc. 574 text and note 16; "Non-Assessable" on Certificate, see CORPORATIONS, 10 Cyc. 464 text and note 9; Notice That Shares Are Property of Minors, Effect on Transfer by Guardian, see CORPORATIONS, 10 Cyc. 623 text and note 83; Regulations of Transfer, see CORPORATIONS, 10 Cyc. 593; Restrictions Upon Transfer Omitted From New Certificate, see CORPORATIONS, 10 Cyc. 579 text and note 50. Validity — In General, see CORPORATIONS, 10 Cyc. 591; Of Certificates Formally Issued, Estoppel Upon Corporation to Deny, see CORPORATIONS, 10 Cyc. 633. See also CERTIFICATE, 6 Cyc. 728; STOCK or SHARES OF CORPORATIONS, *ante*, p. 1302.)

STOCK CLOCK. A mechanical contrivance composed of wheels, cogs, and weights, through which cards can be passed in such a way as to afford a chance adapted to betting; held to be a gambling device.[72] (See GAMING, 20 Cyc. 883 text and note 32.)

STOCK COMPANY. In General — As Association, see Cross-References Under STOCK ASSOCIATIONS, *ante*, p. 1309; As Corporation, see STOCK CORPORATION, *post*, p. 1302; and, generally, CORPORATIONS, 10 Cyc. 1. Insurance Stock Companies, see INSURANCE, 22 Cyc. 1397.

STOCK CORPORATION. A corporation having a capital stock divided into shares, and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus profits of the corporation.[73] (See, generally, CORPORATIONS, 10 Cyc. 1, and Cross-References Thereunder. See also STOCK COMPANY, *ante*, this page; STOCK-HOLDER or SHAREHOLDER, *post*, p. 1315; STOCK or SHARES OF CORPORATIONS, *ante*, p. 1302.)

STOCK DIVIDEND. Merely an increase in the number of shares, the increased number representing exactly the same property that was represented by the smaller number of shares.[74] (Stock Dividend: In General, see CORPORATIONS,

72. See State *v.* Grimes, 49 Minn. 443, 445, 52 N. W. 42, where the machine is described at length.

73. N. Y. Gen. Corp. Law, § 3, subd. 2, as amended by Laws (1895), c. 672 [*quoted* in Buker *v.* Steele, 43 N. Y. Suppl. 346, 350, omitting the word "a" following "is"].

74. Kaufman *v.* Charlottesville Woolen Mills Co., 93 Va. 673, 675, 25 S. E. 1003, distinguishing the term from "dividends."

Evidences of additions to capital.—"A stock dividend gives the stockholder merely the evidences of additions made by the corporation to its own capital. De Koven *v.* Alsop, 205 Ill. 309, 314, 68 N. E. 930, 63 L. R. A. 587.

"Stock dividends add nothing to the capital of the corporation nor to the capital of the stockholder." De Koven *v.* Alsop, 205 Ill. 309, 315, 68 N. E. 930, 63 L. R. A. 587. "The corporate property remains the same after the stock is increased as before, and the interest of each stockholder in the corporate property is also unchanged." Kauf-

10 Cyc. 555. By Foreign Corporation, Restraint From Paying Refused, see FOREIGN CORPORATIONS, 19 Cyc. 1237 text and note 53. Right to Stock Dividends — As Between Life-Tenant and Remainder-Man, see CORPORATIONS, 10 Cyc. 563; ESTATES, 16 Cyc. 624; As Between Successive Shareholders, see CORPORATIONS, 10 Cyc. 558. Whether Income or, in Distinction From Cash Dividend, Capital, see CORPORATIONS, 10 Cyc. 563; ESTATES, 16 Cyc. 624 text and note 1.)

STOCK EXCHANGES. In General, see EXCHANGES, 12 Cyc. 848, 849 text and note 2. Entries on Books in Evidence, see EVIDENCE, 17 Cyc. 481 note 58. Membership Fraudulently Assigned, see FRAUDULENT CONVEYANCES, 20 Cyc. 367. Seat as Property Subject to Execution, see EXECUTIONS, 17 Cyc. 945.

STOCK HOGS. A term which excludes swine incapable of reproduction.[75] (See STOCK CATTLE, *ante*, p. 1310.)

STOCK-HOLDER or SHAREHOLDER. In a broad sense, a stockholder is one who is the holder or proprietor of stock in the public funds, or in the funds of a bank or other stock company.[76] Stockholder in a corporation is one owning stock;[77] one possessed of the evidence that the holder is the real owner of a certain

man *v.* Charlottesville Woolen Mills Co., 93 Va. 673, 675, 25 S. E. 1003.

75. See Byous *v.* Mount, 89 Tenn. 361, 363, 17 S. W. 1037, applying the term as used in a statute.

76. Webster Dict. [*quoted* in Ross *v.* Knapp, 77 Ill. App. 424, 433 (*affirmed* in 181 Ill. 392, 55 N. E. 127)].

Unincorporated "stock-holders."—The word applied to mere partners does not limit their liability to the amount paid for their "shares." Farnum *v.* Patch, 60 N. H. 294, 325, 327, 49 Am. Rep. 313.

77. Mills *v.* Stewart, 41 N. Y. 384, 386.

Stock-holder who is director.—So far as the duty of a director conflicts with his personal interests as a stock-holder the former must prevail. When a stockholder became a director, there was "a radical change in his relations to the company the moment he assumed the office." He became a trustee for the entire body of stockholders and accountable therefore for profits of a contract made by him before he became a director, so far only as they proceeded, to the loss of the corporation, from his failure to disclose a fact material to the corporate interest. Bird Coal, etc., Co. *v.* Humes, 157 Pa. St. 278, 287, 291–293, 27 Atl. 750, 37 Am. St. Rep. 727.

Right to act without regard to the corporate interest see Bird Coal, etc., Co. *v.* Humes, 157 Pa. St. 278, 287, 27 Atl. 750, 37 Am. St. Rep. 727, where, in relation to the freedom of a mere stockholder as such from the duty with which he was afterward charged on becoming a director, it was said: "As stockholder, being the owner of his shares absolutely, he had a right to manage his own property as suited his own notions. It is one of the purposes of corporate organization of capital to facilitate the independent enjoyment and use by each member of his fractional interests in the whole."

How far "an integral part of a corporation" see Fredericks *v.* Pennsylvania Canal Co., 16 Phila. (Pa.) 605, 607 (where it is said: "A stockholder is a person, and, as such, is not an integral part of a corporation in which he may own stock"); Sanger *v.* Upton, 91 U. S. 56, 58, 23 L. ed. 220 [*cited* in Hawkins *v.* Glenn, 131 U. S. 319, 329, 9 S. Ct. 739, 33 L. ed. 184 (*quoted* in Johnson *v.* Stebbins-Thompson Realty Co., 177 Mo. 581, 601, 76 S. W. 1021)] (where it is said that a stockholder is "an integral part of the corporation" so far that "in the view of the law he is privy to the proceedings touching the body of which he is a member").

Stockholders are "not 'in law' owners, either jointly of the whole, or severally of distinct parts of the property and effects which . . . constitute the stock of the company. They cannot, as individuals, dispose of it or any part of it, by sale, gift or otherwise, nor can it, at common law, be taken in execution for their separate personal debts." State *v.* Hood, 15 Rich. (S. C.) 177, 186.

As liable for corporate debts; statutory definitions.— Defined in Cal. Civ. Code, § 322 [*quoted* and *explained* in Hurlburt *v.* Arthur, 140 Cal. 103, 105, 73 Pac. 734, 98 Am. St. Rep. 17], providing for stockholder's liability: "The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another, and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian, or other trustee, who voluntarily invests any trust funds in the stock. . . . Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder, as respects such liability." Defined by N. Y. Banking L. (1892) § 52 [*cited* in Hirshfeld

undivided portion of the property, in actual or potential existence, held by the company in its name, as a unit, for the common benefit of all the holders of the entire capital stock of the company;[78] defined in the plural, individual contributories to the stock of the company, holders of the stock in shares proportionate to their several contributions;[79] in an association supplied by assessment and not by subscription to stock, a term which may include persons who agree to be answerable for assessments.[80] Shareholder, in a corporation, is one who has a proportionate interest in its assets, and is entitled to take part in its control and receive its dividends;[81] as defined by an English statute, any person entitled to

v. Bopp, 145 N. Y. 84, 90, 91, 39 N. E. 817], as including every owner of stock, legal or equitable, although not standing in his own name on the books of the corporation, but not a person who holds such stock as collateral security for the payment of a debt.

Stock-holder and creditor.—"There is a palpable difference between the relation of a stockholder and a creditor to the corporate property. . . . As his chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to the capital, it is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation are satisfied." Heller *v.* National Mar. Bank, 89 Md. 602, 610, 43 Atl. 800, 73 Am. St. Rep. 212, 45 L. R. A. 438.

As partner subject to the charter.—"The stockholders of a business corporation are partners, with rights and liabilities fixed by the general or special law which is a part of their contract." Opinion of Justices, 66 N. H. 629, 639, 33 Atl. 1076.

As tenant in common on dissolution of business corporation see Opinion of Justices, 66 N. H. 629, 639, 33 Atl. 1076.

Stock-holder by representation.—An officer of a corporation which holds stock in another corporation may be a stockholder by representation in the latter, although, personally, he holds no stock therein. Chase *v.* Tuttle, 55 Conn. 455, 463, 12 Atl. 874, 3 Am. St. Rep. 64.

Registered stock-holder.—"A person in whose name the stock of the corporation stands on the books of the corporation, is, as to the corporation, a stock-holder, and has the right to vote upon the stock." Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, 355, 38 Am. Rep. 594 [*quoted* in *In re* Argus Printing Co., 1 N. D. 434, 439, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781].

"Members" used in sense of "stockholders" see Com. *v.* Detwiller, 131 Pa. St. 614, 631, 18 Atl. 990, 992, 7 L. R. A. 357, 360. See also Bank of Commerce *v.* Newport Bank, 63 Fed. 898, 900–902, 11 C. C. A. 484, holding that the registered owner of shares is a "member" under a statute providing for a lien by the corporation on the property of its "members." *Compare In re* Albion Assur. Soc., 12 Ch. D. 239, 248, 48 L. J. Ch. 607, 40 L. T. Rep. N. S. 838, 27 Wkly. Rep. 752, where, according to the articles of association of a certain insurance company, the word "members" therein included both shareholders and "assurance members."

Does not include one who merely holds a contract from a company whereby the latter agrees to sell him a diamond (Mann *v.* German-American Inv. Co., 70 Nebr. 454, 462, 97 N. W. 600); one who has forfeited his stock (Mills *v.* Stewart, 41 N. Y. 384, 385).

Holders of debts misnamed "stock."—A transaction under Ohio St. March 25, 1870, providing manufacturing corporations with a system of borrowing, and describing the transaction as the sale of "preferred stock," the debt as "stock," and the lenders as "holders of such preferred stock," does not invest such lenders with the status of stockholders. Burt *v.* Rattle, 31 Ohio St. 116, 128, 130.

Construed "shares of stock" in a charter provision for dissolution by "two thirds in number and value of the members and stockholders." Com. *v.* Detwiller, 131 Pa. St. 614, 631, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

"Own" in sense of "hold."—Under Comp. Laws, § 3393, providing that "each stockholder . . . shall be entitled to as many votes as he . . . may 'own' . . . shares of stock," the word "own" is used in the sense of "hold" and does not exclude one to whom stock has been merely transferred upon the books of the company, in pursuance of the desire of the transferrer that the transferee may be eligible to office in the company. State *v.* Leete, 16 Nev. 242, 249.

78. See Ross *v.* Knapp, 77 Ill. App. 424, 433 [*affirmed* in 181 Ill. 392, 55 N. E. 127].

79. See State *v.* Hood, 15 Rich. (S. C.) 177, 186.

80. Sugg *v.* Farmers' Mut. Ins. Assoc., (Tenn. Ch. App. 1901) 63 S. W. 226, 228.

81. Beal *v.* Essex Sav. Bank, 67 Fed. 816, 817, 15 C. C. A. 128.

Right to participate only.—A shareholder has no distinct and individual title to the moneys or property of the corporation, nor any actual control over it; the shares represent a right to participate in the profits only. Bidwell *v.* Pittsburgh, etc., R. Co., 114 Pa. St. 535, 541, 6 Atl. 729 [*quoted* in Monongahela Bridge Co. *v.* Pittsburgh, etc., Tract. Co., 196 Pa. St. 25, 28, 46 Atl. 99, 79 Am. St. Rep. 685].

"'A bona fide owner of stock, of record,' in a corporation, is a 'shareholder' therein." Continental Securities Co. *v.* Interborough Rapid Transit Co., 165 Fed. 945, 963.

As defined in the articles of association of an insurance company, the term includes "every person who holds shares." *In re* Albion Assur Soc., 12 Ch. D. 239, 248, 48 L. J. Ch. 607, 40 L. T. Rep. N. S. 838, 27

shares in any company who has executed a deed of settlement,[82] or a deed referring to it;[83] in a building and loan association, for voting purposes, the holder of a share.[84] (Stock-Holder or Stock-Holders: Acceptance of Amendment to Charter, see CORPORATIONS, 10 Cyc. 216. Acquiescence — In Acceptance of Charter Amendment by Directors, see CORPORATIONS, 10 Cyc. 215; In Contract Between Railroad and Construction Company Having Common Directors, see CORPORATIONS, 10 Cyc. 820 text and note 81; In Misdeeds of Directors Generally, see CORPORATIONS, 10 Cyc. 834. Actions Against — By Corporations, see CORPORATIONS, 10 Cyc. 510, 1335, 1336 text and note 76; On Motion For Execution Under Missouri Statute, no Right to Jury, see JURIES, 24 Cyc. 106 note 19; To Recover Assessment on Note For Security Against Losses and Claims, Limitations of Time and Amount, see INSURANCE, 23 Cyc. 1407 note 63. Aggregate Body of Stock-Holders Distinct From Intangible Corporate Body, see CORPORATIONS, 10 Cyc. 823 text and note 9. As Beneficiary of Trust Held by Directors, see CORPORATIONS, 10 Cyc. 787. As Component of Corporation, see CORPORATIONS, 10 Cyc. 145 text and note 5. As Creditor — Of Corporation For Paid-Up Stock on Winding Up, see CORPORATIONS, 10 Cyc. 366 text and note 54; Who Are Stock-Holders, Rights as to Excessive Corporate Debts, see CORPORATIONS, 10 Cyc. 880 text and note 76, 885 text and notes 32, 33. As Member of Corporation, see CORPORATIONS, 10 Cyc. 1277 text and notes 58, 60. By-Laws as Affecting — Not to Be Enforced by Forfeiture Against Defaulting Member, see CORPORATIONS, 10 Cyc. 362; Not to Compel Stock-Holder to Submit Disputes to Arbitration, see CORPORATIONS, 10 Cyc. 362; Not to Make Stock-Holder Liable For Corporate Debts, see CORPORATIONS, 10 Cyc. 357; Presumed to Be Known by Members, see CORPORATIONS, 10 Cyc. 350; Resulting in Contract Between Stock-Holder and Corporation, see CORPORATIONS, 10 Cyc. 351. Consent, Authorization, or Assent — As Means of Dissolution, see CORPORATIONS, 10 Cyc. 1308; To Assignment For Creditors by Directors of Insolvent Corporation, Needless, see CORPORATIONS, 10 Cyc. 1240; To Condone Fraud of Directors, see CORPORATIONS, 10 Cyc. 823; To Consolidation, see CORPORATIONS, 10 Cyc. 297; To Contract Between Corporations Having Common Directors, see CORPORATIONS, 10 Cyc. 818 note 70; To Contracts Between Director and Corporation, see CORPORATIONS, 10 Cyc. 811 text and notes 15, 16; To Contracts of Corporation, see CORPORATIONS, 10 Cyc. 1000, 1006 text and note 85, 1066 text and note 18; To Increase of Bonded Indebtedness Under Constitutional and Statutory Provisions, see CORPORATIONS, 10 Cyc. 1171; To Increase of Indebtedness of Bank, see CORPORATIONS, 10 Cyc. 881 text and note 87; To Incurring Debt, Whether Separate Assent of All Sufficient, see CORPORATIONS, 10 Cyc. 1146 note 58; To Mortgage, Corporate, see CORPORATIONS, 10 Cyc. 1190, 1196; To Mortgage, Corporate, Assent by Company as Its Own Stock-Holder Impossible, see CORPORATIONS, 10 Cyc. 1191; To Mortgage, Corporate, by Requisite Number of Stock-Holders, see CORPORATIONS, 10 Cyc. 1190, 1196; To Proposed Measure, Sense of Stock-Holders Taken by Directors, see CORPORATIONS, 10 Cyc. 781; Unanimous as Means of Dissolution, see CORPORATIONS, 10 Cyc. 1308; Unanimous Necessary to Condone Fraud of Directors, see

Wkly. Rep. 752, where that is said to be the ordinary definition.

"The expression 'preference shareholder' is equivocal. It by no means clearly indicates what are the rights of those to whom it applies. . . . All which the language fairly imports is, that 'some' preference is given to the persons to whom the language applies. How far the preference is to extend must be ascertained by other media than the mere expression itself." Henry *v.* Great Northern R. Co., 1 De G. & J. 606, 636, 3 Jur. N. S. 1133, 27 L. J. Ch. 1, 6 Wkly. Rep. 87, 58 Eng. Ch. 470, 44 Eng. Reprint 858.

82. See St. 7 & 8 Vict. c. 110 [*cited* in Wilkinson *v.* Anglo-Californian Gold Min. Co., 18 Q. B. 728, 733, 17 Jur. 257, 21 L. J. Q. B. 327, 83 E. C. L. 728, 12 Eng. L. & Eq. 444, 449; Galvanized Iron Co. *v.* Westoby, 8 Exch. 17, 27, 16 Jur. 892, 21 L. J. Exch. 302, 7 R. & Can. Cas. 318, 14 Eng. L. & Eq. 386].

83. See 7 & 8 Vict. c. 110 [*cited* in Galvanized Iron Co. *v.* Westoby, 8 Exch. 17, 27, 16 Jur. 892, 21 L. J. Exch. 302, 7 R. & Can. Cas. 318, 14 Eng. L. & Eq. 386].

84. *In re* Provident Bldg., etc., Assoc., 62 N. J. L. 590, 591, 41 Atl. 952.

CORPORATIONS, 10 Cyc. 823; Unanimous, to Contract Between Corporations Having Common Directors, see CORPORATIONS, 10 Cyc. 818 note 70; Unanimous, to Contract Between Directors and Corporation, Necessary, see CORPORATIONS, 10 Cyc. 811 text and note 15; Vote Authorizing Corporation to Contract Through Officers, see CORPORATIONS, 10 Cyc. 1006 text and note 85. Corporation as Stock-Holder — In Itself, see CORPORATIONS, 10 Cyc. 1109, 1191 text and note 67; In Others, see CORPORATIONS, 10 Cyc. 377, 378, 379, 1107, 1145; Municipal, in Public Service Corporations, see CORPORATIONS, 10 Cyc. 379; MUNICIPAL CORPORATIONS, 28 Cyc. 1553; Purchase by One Company of Capital Stock of Another Resulting in Consolidation, see CORPORATIONS, 10 Cyc. 314. Corporation as Trustee For Stock-Holders, see CORPORATIONS, 10 Cyc. 376. Counties or Taxpayers as Stock-Holders, see COUNTIES, 11 Cyc. 530. Demand by Stock-Holder Before Suing Corporation, see CORPORATIONS, 10 Cyc. 1344 text and note 38, 1345 text and note 39. Dissent to Transfer of All Corporate Property, see CORPORATIONS, 10 Cyc. 1139 text and notes 88, 89. Dissolution — At Suit of Stock-Holders, see CORPORATIONS, 10 Cyc. 1304; By Loss of Members, Prevented by Succession, see CORPORATIONS, 10 Cyc. 1277 text and notes 58, 60; By Unanimous Consent, see CORPORATIONS, 10 Cyc. 1308; Extinguished Liability of Stock-Holders Upon, see CORPORATIONS, 10 Cyc. 1311; Fraud Upon Stock-Holders by Company as Ground For Dissolution, see CORPORATIONS, 10 Cyc. 1288; Liability of Corporation to Stock-Holder For Paid-Up Stock on Dissolution, see CORPORATIONS, 10 Cyc. 366 text and note 54; Minority Entitled to Wind Up Company Irretrievably in Hands of Dishonest Directors, see CORPORATIONS, 10 Cyc. 817 text and note 69; Number and Value Needed to Surrender Franchise and Wind Up, see CORPORATIONS, 10 Cyc. 1302; Ownership of Sole Stock-Holders Not, see CORPORATIONS, 10 Cyc. 1277; Private Agreements Among Sole Stock-Holders Not, Unless Necessary Effect Is Surrender of Charter, see CORPORATIONS, 10 Cyc. 1278; Survival of Obligations Upon, see CORPORATIONS, 10 Cyc. 1320. Erratic Use of Word Explained by Parol, see EVIDENCE, 17 Cyc. 684 text and note 36. Estoppel — By Acquiescence Validating Unauthorized Contracts, see CORPORATIONS, 10 Cyc. 1066; By Delay in Dissenting, Validating Acts of Directors in Excess of Authority, see CORPORATIONS, 10 Cyc. 1066; By Repudiation of Rights of Stock-Holder of Association, to Claim Him as Stock-Holder or Partner, see CORPORATIONS, 10 Cyc. 1067; To Deny Acceptance of Amendment, see CORPORATIONS, 10 Cyc. 217; To Deny Existence of Corporation, see CORPORATIONS, 10 Cyc. 249, 1346; To Maintain Remedy Against Directors For Indebtedness Beyond Limit, see CORPORATIONS, 10 Cyc. 880 text and notes 76, 77; Upon Corporation, When Validating Contracts Unauthorized by Stock-Holders, see CORPORATIONS, 10 Cyc. 1066; When Stock-Holder Is Creditor, no Estoppel From Creditor's Action by Accepting Unlawful Dividend, see CORPORATIONS, 10 Cyc. 885 text and note 32. Forfeiture of Charter For Previous Unlawful Act as Affected by Innocence of Present Stock-Holders, see CORPORATIONS, 10 Cyc. 1286 text and note 30. Frauds Upon Stock-Holders by Corporation, see CORPORATIONS, 10 Cyc. 1288. Indebted to Corporation, Capable of Being Prohibited From Transferring Stock, see CORPORATIONS, 10 Cyc. 360. Individual Stock-Holder — Declarations Not Binding on Corporation, see CORPORATIONS, 10 Cyc. 948; Unable to Act For Corporation, see CORPORATIONS, 10 Cyc. 760; Without Inherent Authority as Agent of Corporation, see CORPORATIONS, 10 Cyc. 936. Insurable Interest of Stock-Holder, see FIRE INSURANCE, 19 Cyc. 589 text and note 46; MARINE INSURANCE, 26 Cyc. 556. Invalid Stock, Right of Holder to Rescind, see CORPORATIONS, 10 Cyc. 373. Irresponsible Stock-Holder, Liability of Director For Allotting Shares, see CORPORATIONS, 10 Cyc. 852 text and note 21. Joinder and Splitting of Actions — Against Stock-Holder, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 414 note 46, 434; By Stock-Holder, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 410 text and note 14, 417 note 61, 426 note 46. Judgment — Against Corporation as Affecting Stock-Holder, see CORPORATIONS, 10 Cyc. 890 note 69; JUDGMENTS, 23 Cyc. 1267; Against Corporation Vacated at Instance of

Stock-Holders, see JUDGMENTS, 23 Cyc. 899 note 57; Against Domestic Corporation as Affecting Non-Resident Stock-Holders, see JUDGMENTS, 23 Cyc. 1586; Against Stock-Holder by Default in Action to Impose Liability, Conclusive That Defendant Was Stock-Holder, see JUDGMENTS, 23 Cyc. 752 note 77; On Severable Demand Against Stock-Holder For Various Claims, see JUDGMENTS, 23 Cyc. 1175 note 85; Open to Defense of Not Being Stock-Holder, see JUDGMENTS, 23 Cyc. 1268 note 40, 1443 text and note 35. Judicial Sales of Corporate Property, Stock-Holder as Purchaser, see JUDICIAL SALES, 24 Cyc. 30 text and note 23. Liability of Directors to Stock-Holders — As Trustees, see CORPORATIONS, 10 Cyc. 787; At Law, to Stock-Holders Distributively Not Usual, see CORPORATIONS, 10 Cyc. 825; For Corporate Debts Beyond Prescribed Limit, see CORPORATIONS, 10 Cyc. 880; For Failure to Declare Dividend, None Except in Case of Fraud, see CORPORATIONS, 10 Cyc. 827; For False Representations Resulting in Loan to Corporation, see CORPORATIONS, 10 Cyc. 842 text and note 58; For False Representations Resulting in Purchase of Shares, see CORPORATIONS, 10 Cyc. 842 text and note 59, 845 text and note 77; For Fraudulent Issue, see CORPORATIONS, 10 Cyc. 841 text and note 52; For Unlawful Dividend, to Stock-Holders Who Are Also Creditors, see CORPORATIONS, 10 Cyc. 885 text and note 32; For Wrongs Done to Stock-Holders Personally, see CORPORATIONS, 10 Cyc. 825; Remedies of Stock-Holders Against Directors Only Statutory, see CORPORATIONS, 15 Cyc. 823 text and note 10. Liability of Stock-Holder — Constitutional, For Demands Against Corporation, see CONSTITUTIONAL LAW, 8 Cyc. 757; Constitutional or Statutory, Enforceable by Director Creditor, see CORPORATIONS, 10 Cyc. 802; Distinguished From That of Member of Joint Stock Company, see CORPORATIONS, 10 Cyc. 145 text and note 10; Extinguished Upon Dissolution, see CORPORATIONS, 10 Cyc. 1311; For Calls on Stock of Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1236 note 45; For Contempt by Corporation, see CONTEMPT, 9 Cyc. 23, 24 text and note 15; For Contribution to Directors, see CORPORATIONS, 10 Cyc. 898; For Debts Beyond Prescribed Limit, see CORPORATIONS, 10 Cyc. 878; For Debts, by Charter, Not Affecting Validity of Assignment For Creditors, see CORPORATIONS, 10 Cyc. 1243; For Debts Contracted Before Organization, see CORPORATIONS, 10 Cyc. 864; For Debts Generally, see CORPORATIONS, 10 Cyc. 649; For Debts, Not to Be Imposed by By-Law, see CORPORATIONS, 10 Cyc. 357; For Proportion of Corporate Indebtedness as Contractual Obligation Within Justice's Jurisdiction, see JUSTICES OF THE PEACE, 24 Cyc. 446 note 90; In Insurance Companies Generally, see INSURANCE, 22 Cyc. 1398; In Insurance Company on Assessment, Limitations of Time and Amount, see INSURANCE, 22 Cyc. 1407 note 63; In Insurance Company, Relative Liabilities of Policy-Holders and Stock-Holders Under English Statutes, see INSURANCE, 22 Cyc. 1408 note 78; Provision in Corporate Bond That no Shareholder Shall Be Individually Liable in Respect Thereto Not Relieving Directors of Statutory Liability For Debts, see CORPORATIONS, 10 Cyc. 857 text and note 56; Remedy of Creditor Against Stock-Holder Not Merged in Statutory Remedies Against Directors For Making False Reports, see CORPORATIONS, 10 Cyc. 875 text and note 28; Rule That Personal Representative of Deceased Obligor Cannot Be Joined to Survivor Applied to Exempt Estate of Deceased Stock-Holder in Massachusetts, see CORPORATIONS, 10 Cyc. 893 text and note 85; Statute Altering Stock-Holder's Liability Not Unconstitutional in Destroying Interest of Creditor in Debt Due Corporation, see CONSTITUTIONAL LAW, 8 Cyc. 918; Survival of Obligations After Dissolution, see CORPORATIONS, 10 Cyc. 1320; Trust Fund Doctrine Charging Stock-Holders With Knowledge of Trust Character of Assets of Insolvent Corporation, see CORPORATIONS, 10 Cyc. 850 text and note 7. List of Stock-Holders to Be Kept Alphabetically, see CORPORATIONS, 10 Cyc. 1298. Married Woman as Stock-Holder, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 124 note 31; HUSBAND AND WIFE, 21 Cyc. 1342, 1457 text and note 98, 1535 note 86. Minority — Able to Avoid Contracts Between Corporation and Directors, see CORPORATIONS, 10 Cyc. 817 text and note 64; Able to Prevent Unlawful Combination, see MUNICIPALITIES, 27 Cyc. 908 note 59; Able to Wind Up Company

Where Irretrievably in the Hands of Dishonest Directors, see CORPORATIONS, 10 Cyc. 817 text and note 69; Not to Be Forced Into Reorganization, see CORPORATIONS, 10 Cyc. 286 text and note 86. Mortgages to Stock-Holders by Corporation, see CORPORATIONS, 10 Cyc. 1195. Municipal Corporation as Stock-Holder in Public Service Companies, see CORPORATIONS, 10 Cyc. 379; MUNICIPAL CORPORATIONS, 28 Cyc. 1553. Notice — Of Corporate Affairs Not Necessarily Ascribed to Stock-Holders, see CORPORATIONS, 10 Cyc. 375; Of Meeting to Authorize Mortgage, Non-Compliance With Requirements, see CORPORATIONS, 10 Cyc. 1195–1196 note 3; To Mere Stock-Holder Not Notice to Corporation, see CORPORATIONS, 10 Cyc. 1061. Not One of a Body of Owners of Corporate Property, see CORPORATIONS, 10 Cyc. 1296 text and note 97. Of Agricultural Association Organized as Joint Stock Company, see AGRICULTURE, 2 Cyc. 76 note 87. Of Banking Corporations and Associations — In General, see BANKS AND BANKING, 5 Cyc. 442; Of National Bank, see BANKS AND BANKING, 5 Cyc. 575 note 39, text and note 43, 576 text and notes 44–48, 577 text and notes 54–58, 578 text and notes 60–64; Of Savings Bank, see BANKS AND BANKING, 5 Cyc. 604; Stock-Holders' Consent Not Necessary to Mortgage Given by Bank to Secure Deposit, as to Increase of Indebtedness, see CORPORATIONS, 10 Cyc. 881 text and note 87. Of Building and Loan Society, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 124, 125. Of Foreign Corporation — Actions by Stock-Holders to Redress Grievances, see FOREIGN CORPORATIONS, 1237–1239 text and notes 51–69; Domestic Stock-Holders Subjects of Protection and Discrimination, see FOREIGN CORPORATIONS, 19 Cyc. 1284; Liability For Calls, see FOREIGN CORPORATIONS, 19 Cyc. 1236 note 45; Liability on Contract, see FOREIGN CORPORATIONS, 19 Cyc. 1311; Tenancy in Common on Dissolution of Private Foreign Corporation, see CORPORATIONS, 10 Cyc. 1328. Of Insurance Company, Liability, see INSURANCE, 22 Cyc. 1398, 1407 note 63. Of Joint Stock Company — As Party to Action By or Against Association, see JOINT STOCK COMPANIES, 23 Cyc. 477–479 text and notes 80–91; As Stock-Holder in New Corporation, see JOINT STOCK COMPANIES, 23 Cyc. 480 text and note 99; Dissolution by Consent of Members, see JOINT STOCK COMPANIES, 23 Cyc. 479; Dissolution Not Brought About by Decease of Members, see JOINT STOCK COMPANIES, 23 Cyc. 469 text and note 19; Distribution of Assets Among Stock-Holders on Dissolution, see JOINT STOCK COMPANIES, 23 Cyc. 481; Liabilities, see JOINT STOCK COMPANIES, 23 Cyc. 469 text and note 17, 469–470 text and note 20, 470 text and notes 21, 23; Powers and Duties, see JOINT STOCK COMPANIES, 23 Cyc. 470; Rights, see JOINT STOCK COMPANIES, 23 Cyc. 469 text and note 17, 469–470 text and note 20; Sole Ownership of Stock as Dissolution, see JOINT STOCK COMPANIES, 23 Cyc. 480; Taxation of Members as Partners, see JOINT STOCK COMPANIES, 23 Cyc. 468; Who Are Members, see JOINT STOCK COMPANIES, 23 Cyc. 476. Of Loan and Trust Companies, see BANKS AND BANKING, 5 Cyc. 612. Of Mining Company — Distribution of Assets on Dissolution, see MINES AND MINERALS, 27 Cyc. 766 text and note 2; Liability Not Removed Under Statute by Consolidation, see MINES AND MINERALS, 27 Cyc. 767 text and note 3; Members in Cost-Book Mines, see MINES AND MINERALS, 27 Cyc. 767; Portion Unable to Dissolve, see MINES AND MINERALS, 27 Cyc. 766 note 2; Vote Authorizing Lease or Mortgage, see MINES AND MINERALS, 27 Cyc. 765 text and note 92. Of Railroad Company — In General, see RAILROADS, 33 Cyc. 64; Consent to Consolidation, see RAILROADS, 33 Cyc. 427; Consent to Lease of Road, see RAILROADS, 33 Cyc. 395; Consent to Sale or Purchase, see RAILROADS, 33 Cyc. 386; Liabilities, see RAILROADS, 33 Cyc. 437; Preferred Railroad Stock-Holders as Purchasers at Foreclosure Sale, see RAILROADS, 33 Cyc. 587 note 68; Rights, Generally, see RAILROADS, 33 Cyc. 437; Rights as to Lease of Road, see RAILROADS, 33 Cyc. 404; Rights as to Purchase of Road, see RAILROADS, 33 Cyc. 386; Rights as to Reorganization, see RAILROADS, 33 Cyc. 599–604 text and notes 74–78, 602, 604; Rights as to Sale of Road, see RAILROADS, 33 Cyc. 386; Right to Assert Want of Title in Purchaser at Foreclosure, see RAILROADS, 33 Cyc. 579 note 84. Of Street Railroad Company, see STREET RAILROADS,

post, p. 1357. Of Telegraph and Telephone Company, see TELEGRAPHS AND TELEPHONES. Of Trust Company, see BANKS AND BANKING, 5 Cyc. 612. Of Turnpike and Toll-Road Company, see TOLL-ROADS. Of Water Company, see WATERS. Ownership by Stock-Holder Distinguished From That by Corporation, see CORPORATIONS, 10 Cyc. 365 text and note 41. Ownership of Stock as Qualification of Director, see CORPORATIONS, 10 Cyc. 737, 837 text and note 55. Ownership of Stock Where Corporation Is a Party as Disqualification — By Arbitrator, see ARBITRATION AND AWARD, 3 Cyc. 618 note 50; By Judge, see JUDGES, 23 Cyc. 577; By Juror, see JURIES, 24 Cyc. 270; By Relation of Judge, Not a Disqualification of Judge, see JUDGES, 23 Cyc. 585 text and note 15. Preference by Corporation — Of Particular Stock-Holders in Restoring Deposits, see CORPORATIONS, 10 Cyc. 267; Of Stock-Holders to Creditors, see CORPORATIONS, 10 Cyc. 1252, 1253. Ratification — Of Acts of Corporation Generally, see CORPORATIONS, 10 Cyc. 1073; Of Acts of Directors in Accepting Amendment of Charter, see CORPORATIONS, 10 Cyc. 215; Of Breaches of Trust by Directors, see CORPORATIONS, 10 Cyc. 821; Of Contracts Between Corporations Having Common Directors, see CORPORATIONS, 10 Cyc. 818 text and note 70; Of Contracts Between Directors and Corporation, see CORPORATIONS, 10 Cyc. 811–812 text and note 20, 812 text and notes 21, 22; Of Sale of Corporate Assets, see CORPORATIONS, 10 Cyc. 1269. Relation of Stock-Holder to Corporation, Contractual, see CORPORATIONS, 10 Cyc. 380. Release From Payment For Shares — By By-Law, see CORPORATIONS, 10 Cyc. 361; Of Dissenting Subscriber on Alteration of Contract of Association, see CORPORATIONS, 10 Cyc. 445. Remedies of Stock-Holders — In General, see CORPORATIONS, 10 Cyc. 954; By Action Against Directors on Statutory Liability, see CORPORATIONS, 10 Cyc. 888; By Action For Cancellation of Bonds, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 303 note 73, 322 note 68; By Action of Malicious Prosecution For Malicious and Fraudulent Attachment of Stock Impossible, see MALICIOUS PROSECUTION, 26 Cyc. 13 note 72; By Injunction, see INJUNCTIONS, 22 Cyc. 875, 948 note 14; JUDGMENTS, 23 Cyc. 988 note 18; For Grievances in Regard to Management of Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1237–1239 text and notes 51–69, 1345; For Sale of All Corporate Property of Prosperous Company, see CORPORATIONS, 10 Cyc. 1139 text and note 89; For Ultra Vires Acts of Corporation, see CORPORATIONS, 10 Cyc. 1166 text and notes 90–92. Rights of Stock-Holders — Generally, see CORPORATIONS, 10 Cyc. 954; Of Defendants in Common With Directors, see CORPORATIONS, 10 Cyc. 791. Sale — Judicial, Stock-Holder as Purchaser, see JUDICIAL SALES, 24 Cyc. 30, text and note 23; Of All Corporate Property, as Affecting Stock-Holders, see CORPORATIONS, 10 Cyc. 1296 text and note 96; Prejudicial to Stock-Holders, see CORPORATIONS, 10 Cyc. 1268. State as Stock-Holder, see CORPORATIONS, 10 Cyc. 1332. Status of Stock-Holder, see CORPORATIONS, 10 Cyc. 373. Statute of Frauds — Agreement to Procure Person to Take Another's Place as Stock-Holder and Indemnify Him From Expense or Damage in Consequence Not Within the Statute, see FRAUDS, STATUTE OF, 20 Cyc. 178 text and note 2; Promises by Stock-Holders Within Statute, see FRAUDS, STATUTE OF, 20 Cyc. 172. Subscriber, How Made Stock-Holder, see CORPORATIONS, 10 Cyc. 380. Unable — To Act For Corporation, see CORPORATIONS, 10 Cyc. 760; To Decide Question Submitted to Directors, see CORPORATIONS, 10 Cyc. 321. Vested Property and Rights of Stock-Holders, see CONSTITUTIONAL LAW, 8 Cyc. 901. Voting — Corporate Meetings and Elections Generally, see CORPORATIONS, 10 Cyc. 318; Law Changing Number of Votes of Stock-Holder, Impairing Obligation of Charter Contract, see CONSTITUTIONAL LAW, 8 Cyc. 962 note 31. Who May Become Stock-Holders, see CORPORATIONS, 10 Cyc. 376. See also STOCK or SHARES OF CORPORATIONS, *ante*, p. 1302; and Cross-References Thereunder.)

STOCK IN TRADE. A term which, in general, may be taken to mean the whole capital employed in the trade, everything that is necessary to the carrying on of the trade;[85] a very general term which may mean any kind of trade goods,

85. Todd *v.* Lewers, Rich. Eq. Cas. (S. C.) 463, 464.

according to the business carried on by the person and in the particular place with reference to which it is used,[86] but is not sufficient by itself to identify prop-

86. See Nolan *v.* Donnelly, 4 Ont. 440, 445.

Relation to the trade essential.—A note not founded on the trade in question does not pass under a bequest of all my "stock in trade" at a place named, and the "notes and book accounts" there owing to me, although found on the premises. Todd *v.* Lewers, Rich. Eq. Cas. (S. C.) 463, 467.

Scope.—"What shall be comprehended in these terms, must always, in a great measure, depend upon evidence of intention intrinsically or extrinsically collected; but, where there is nothing peculiar in the case to determine the import of the phrase, the popular and usual understanding of the words must govern their interpretation." Todd *v.* Lewers, Rich. Eq. Cas. (S. C.) 463, 464 [*citing* 1 Robert Wills 369]. Used by a member of a commercial firm, the words might, in general, signify his interest in the firm. If the terms of the partnership were to employ a certain stated capital and to divide profits annually, the capital would constitute the stock in trade; probably profits, accrued at the death of a partner, would not pass by will under the words. If the terms were to reinvest the profits, the original capital and profits might remain "stock in trade" till any part should be actually withdrawn. In the case of an individual there may be more difficulty. He might set apart a specific capital for trade, withdrawing the annual profits to be employed otherwise, in which case, probably, only the original capital would be the "stock in trade." But if his practice were to make no distinction between profits and capital, but to reinvest all the profits in the trade, the term would probably include everything; goods, shop furniture, cash on hand; and debts, whether by note, book account or judgment; but he might still withdraw any part of the funds or property from the trade, and so, by whatever means he might signify his intention that part would cease to be stock in trade. If the merchant should purchase land with money, or with a note or bond arising from his trade, that would be a withdrawal from his stock. The same intention might be signified in infinitely various ways, such, perhaps, as taking a bond payable at a distant day, out of the usual course of trade, with interest payable annually. Todd *v.* Lewers, Rich. Eq. Cas. (S. C.) 463, 464.

Ice stored for sale is included as taxable under Gen. Laws, c. 54, § 9. Winkley *v.* Newton, 67 N. H. 80, 84, 36 Atl. 610, 35 L. R. A. 756.

Patents may be included when the expense of procuring them is considered as stock brought into the trade. Crawshay *v.* Collins, 2 Russ. 325, 339, 26 Rev. Rep. 83, 3 Eng. Ch. 325, 38 Eng. Reprint 358.

Debts due are not included in the term as used in Pub. St. c. 11, § 26. New York Biscuit Co. *v.* Cambridge, 161 Mass. 326, 37 N. E. 438.

Internal revenue stamps are not included, although in the hands of one whose business consists in the sale thereof, in the term as used for convenience of description, and not as describing a distinct object of taxation, in Gen. St. c. 11, § 12. Palfrey *v.* Boston, 101 Mass. 329, 333, 3 Am. Rep. 364.

Money in bank is not included in the term as used in Pub. St. c. 11, § 26, relating to taxation. Boston Investment Co. *v.* Boston, 158 Mass. 461, 463, 33 N. E. 580.

Notes.—Not included (see Kemp *v.* Carnley, 3 Duer (N. Y.) 1, 7), may be included if founded on the trade (see Todd *v.* Lewers, Rich. Eq. Cas. (S. C.) 463).

It "differs essentially from the term 'capital stock' when applied to corporate bodies." Palfrey *v.* Boston, 101 Mass. 329, 333, 3 Am. Rep. 364, construing the term as used in Gen. St. c. 11, § 12.

Distinguished from "stock" or "goods on hand."—In criticising the suggestions of counsel that the popular meaning of the term is, "the stock of goods on hand at any particular time," was said, in substance, that, while, among tradesmen, the goods on hand are called "stock," in the general understanding "stock in trade" seems to have a wider scope, notwithstanding the practice of merchants, in paying the tax on "stock in trade" to estimate only the goods on hand. Todd *v.* Lewers, Rich. Eq. Cas. (S. C.) 463, 464. *Compare* Wicker *v.* Comstock, 52 Wis. 315, 317, 9 N. W. 25, where it is said: "The goods kept for sale by a merchant or shopkeeper is his stock in trade."

As subject of insurance.—Goods insured in favor of one who is only part-owner may be properly described as the stock in trade of that person. Millaudon *v.* Atlantic Ins. Co., 8 La. 557, 562. The expression when used in a policy of insurance as a term of description, with reference to a specified business, includes everything necessary for carrying on that business. Harper *v.* Albany Mut. Ins. Co., 17 N. Y. 194, 197 [*citing* 1 Phillips Ins. § 489]; Moadinger *v.* Mechanics' F. Ins. Co., 2 Hall (N. Y.) 527, 531. The words as used in a policy of insurance on a baker's stock in trade are to have a more extended meaning than in their ordinary application to the business of merchants. Their meaning will vary according to the business to which they are applied. A mechanic who insures his stock covers his implements of trade also. The stock of a merchant comprehends articles entirely different from that of a farmer, but the terms in all cases apply to personal property. Moadinger *v.* Mechanics' F. Ins. Co., *supra.*

Purpose of transportation immaterial.—In Gen. Laws, c. 54, § 9, taxing "stock in trade" employed in any town the purpose of transporting it to another state and disposing of it there in the course of business does not affect its taxable status in the town. Winkley *v.* Newton, 67 N. H. 80, 84, 36 Atl. 610, 30 L. R. A. 756.

"Floating capital stock in trade" see Mason *v.* MacDonald, 25 U. C. C. P. 435, 438.

erty to which it is applied.[87] (Stock in Trade: After-Acquired Not Bound by Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1045 note 15. Exempt, see EXEMPTIONS, 18 Cyc. 1420. Insurance on Stock and Merchandise, see FIRE INSURANCE, 19 Cyc. 667, 755. Merchandise or Stock in Trade Defined, see MERCHANDISE, 27 Cyc. 478 note 14. Necessity For Enumeration in Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1026. Sale by Mortgagor, see CHATTEL MORTGAGES, 7 Cyc. 10 note 25. See also STOCK, *ante*, p. 1299.)

STOCK-JOBBER. See FACTORS AND BROKERS, 19 Cyc. 292.

STOCK-JOBBING. The business of dealing in stocks or shares, the purchase and sale of stocks, bonds, etc., as carried on by jobbers who operate on their own account.[88] (See JOBBER, 23 Cyc. 375; STOCK, *ante*, p. 1299; STOCK or SHARES OF CORPORATIONS, *ante*, p. 1302.)

STOCK LAWS. In General, see ANIMALS, 2 Cyc. 439. Affecting — Care and Liability as to Animals About Tracks, see RAILROADS, 33 Cyc. 1165; Contributory Negligence of Owner, see RAILROADS, 33 Cyc. 1241, 1244; Duty to Maintain Fences, Cattle-Guards, etc., see RAILROADS, 33 Cyc. 1181; Speed of Trains, see RAILROADS, 33 Cyc. 1221.

STOCK MORTGAGES. See BANKS AND BANKING, 5 Cyc. 525.

STOCK NOTES. See FIRE INSURANCE, 19 Cyc. 611 note 89.

STOCK OF A FARM.[89] A term which may be restricted to CATTLE,[90] *q. v.*, or to domestic animals or beasts collected or raised upon a farm,[91] the animals which are used with, supported or reared upon the farm or land,[92] animals with which the plantations of farmers are usually supplied,[93] domestic animals, and nothing more;[94] or which may embrace some other things pertaining to the farm.[95] (See STOCK, *ante*, p. 1299; STOCK or LIVE STOCK, *ante*, p. 1301.)

87. See Wilson *v.* Kerr, 17 U. C. Q. B. 168, 171, 172. See also Howell *v.* McFarlane, 16 U. C. Q. B. 469, 470.

88. Century Dict. [*quoted* in State *v.* Debenture Guarantee, etc., Co., Ltd., 51 La. Ann. 1874, 1887, 26 So. 600].

89. "Stock belonging to 'his house, messuage, farm and premises'" cannot be confined to stock in husbandry. Brooksbank *v.* Wentworth, 3 Atk. 64, 26 Eng. Reprint 839.

90. See Dudley *v.* Deming, 34 Conn. 169, 173.

91. Webster Dict. [*quoted* in State *v.* Clark, 65 Iowa 336, 338, 21 N. W. 666 (omitting "or beasts"); Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 461, 15 N. W. 286].

92. Graham *v.* Davidson, 22 N. C. 155, 171, where it is said that the term, in connection with farm or land, has a settled meaning by which it is restricted to such animals, and that "no farmer or planter would think of passing the crop of the 'antecedent' year made upon a tract of land and gathered, or his farming utensils, by a disposition of the plantation and the stock thereon."

93. Van Norden *v.* Primm, 3 N. C. 149, where it is said that such animals are commonly called "stock" in the country, and held that in St. (1796) c. 29, providing for a widow's settlement out of stock, crop and provisions, the word has that meaning exclusively.

94. Heagy *v.* Cheesman, 33 Ind. 96, 98.

95. See *infra*, this note.

Includes hay, oats, cattle, and corn stalks, as property from which a selection for exemption may be made, on the same principle that a merchant's stock in trade is exempted to a certain amount, within the meaning of Howell St. Mich. c. 266, § 7 (Hutchinson *v.* Whitmore, 90 Mich. 255, 260, 263, 51 N. W. 451, 30 Am. St. Rep. 431); "seed [as stock] is unquestionably necessary to enable one to carry on the business of farming," within the meaning of an exemption law (Stilson *v.* Gibbs, 46 Mich. 215, 219, 9 N. W. 254).

Does not include all the personal property of a farm, nor wool shorn from sheep thereon, when used in a bequest of "all the stock, grain and farming utensils" thereon. Baker *v.* Baker, 51 Wis. 538, 544, 8 N. W. 289.

Application to crops.— The word does not, in common and popular parlance, include crops in the ground (Vaisey *v.* Reynolds, 5 Russ. 12, 19, 5 Eng. Ch. 12), although, in the light of a favorable context, such crops may pass by it (see West *v.* Moore, 8 East 339, 103 Eng. Reprint 372; Cox *v.* Godsalve, 6 East 604 note, 102 Eng. Reprint 1420 [both *explained* in Vaisey *v.* Reynolds, 5 Russ. 12, 19, 29 Rev. Rep. 4, 5 Eng. Ch. 12, 38 Eng. Reprint 931, where it is said that, in those cases the intention of the testator to include growing crops was inferred rather because the executor was clearly meant to take the whole personal estate than from the mere force of the word; both *cited*, however, in Blake *v.* Gibbs, 5 Russ. 13, 16 note, 29 Rev. Rep. I, 5 Eng. Ch. 13 note, 38 Eng. Reprint 932, as holding that emblements are part of the stock]. *Compare* Steward *v.* Cotton, 5 Russ. 16 note, 5 Eng. Ch. 16, 38 Eng. Reprint 934, where in construing a will devising to the widow a farm and all the stock which should be on it at the time of testator's decease, which it was his will should

STOCK PENS. As Nuisance, see NUISANCES, 29 Cyc. 1169. Presence in to Examine Cattle Not Negligence, see ANIMALS, 2 Cyc. 381 note 84.

STOCK POLICY. See POLICY OF INSURANCE, 31 Cyc. 906 note 91.

STOCK SHEETS. In the glass trade, the sheets of glass which, when taken from the machines, are squared and put in stock.[96]

STOCK SUBSCRIPTION. Nothing but a contract, by which the subscriber is bound to pay the company certain amounts.[97] (Stock Subscription: In General, see CORPORATIONS, 10 Cyc. 164, 380. Action to Enforce, see CORPORATIONS, 10 Cyc. 510. By Infant, Avoidable, see INFANTS, 22 Cyc. 600. By Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1553, 1672 note 97. By Railroad Company, see RAILROADS, 33 Cyc. 385. By Sovereign State, see CORPORATIONS, 10 Cyc. 380. Cancellation of, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 296. Collection of, Object of Mandamus, see MANDAMUS, 26 Cyc. 357. Conditional, see CORPORATIONS, 10 Cyc. 411. Contract of — In General, see CORPORATIONS, 10 Cyc. 380; Affected by Fraud, see CORPORATIONS, 10 Cyc. 421. For Stock of Railroad, see RAILROADS, 33 Cyc. 64. Payment of by Note, see COMMERCIAL PAPER, 7 Cyc. 709 note 1, 849 note 92. Unpaid, Subject to Garnishment, see GARNISHMENT, 20 Cyc. 1001. Whole Number of Shares to Be Subscribed Before Assessment by Directors, see CORPORATIONS, 10 Cyc. 767.)

STOCK-YARDS. As Nuisance, see NUISANCES, 29 Cyc. 1169. Operating Not Interstate Commerce, see COMMERCE, 7 Cyc. 432.

STOLEN. A word which means that a larceny or theft has been committed.[98] (See RECEIVING STOLEN GOODS, 34 Cyc. 513, 520. See also STEAL, *ante*, p. 1258, and Cross-References Thereunder; STOLEN GOODS, *post*, this page.)

STOLEN GOODS. In General, see LARCENY, 35 Cyc. 1. Advertising For, "No Questions Asked," see COMPOUNDING FELONY, 8 Cyc. 493 note 2. Commercial Paper Stolen, see BANKS AND BANKING, 6 Cyc. 550; COMMERCIAL PAPER, 7 Cyc. 685 note 68, 1042 note 18. Escape of Passenger With, Permitted by Railroad Conductor, see ACTIONS, 1 Cyc. 645 note 14. Joinder of Counts Regarding, see BURGLARY, 6 Cyc. 224 text and note 19, 225 text and note 26. Mail Stolen — Contents of Embezzled Letters, see POST-OFFICE, 31 Cyc. 1024 note 78; Description, see POST-OFFICE, 31 Cyc. 1021; Letters, see POST-OFFICE, 31 Cyc. 1010; Liability of Mail Carrier or Contractor, see POST-OFFICE, 31 Cyc. 999; Liability of Postmaster, see POST-OFFICE, 31 Cyc. 979; Receiving Property Stolen From Mail, see POST-OFFICE, 31 Cyc. 1013; Retention of Money Found on Person of Burglar, see POST-OFFICE, 31 Cyc. 1014; Robbery of Mail, see POST-OFFICE, 31 Cyc. 1013. Note to Secure Restoration of, in Part Consideration of Agreement Not to Search House of Maker Before Next Day, see CONTRACTS, 9 Cyc. 506 note 40. Possession of — As Evidence of Crime, see POSSESSION, 31 Cyc. 949 notes 45, 53, 950 text and notes 54, 55; RECEIVING STOLEN GOODS, 34 Cyc. 525, 528; ROBBERY, 34 Cyc. 1806 text and note 66; As Probable Cause Justifying Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 37. Purchaser's Title and Rights, see SALES, 35 Cyc. 362. Receiving, see RECEIVING STOLEN GOODS, 34 Cyc. 513. Restitution For Property Stolen by Relatives as Consideration For Bond and Mortgage, see MORTGAGES, 27 Cyc. 1051 note 93. Seizure and Sale of Property Believed by Inspector to Be Stolen, see CONSTITUTIONAL LAW, 8 Cyc. 1129 note 70.

STONE. Earthy or mineral matter condensed into a hard state.[99] (Stone:

be kept up by her during his life and go along with the farm, with a codicil giving the remainder to another, it was held that the widow's executor was entitled to crops on the farm at the decease of the testator from the time they were severed by the widow).

96. James H. Rice Co. *v.* Penn Plate Glass Co., 117 Ill. App. 356, 360 [*affirmed* in 216 Ill. 567, 75 N. E. 246], adding "they are of different sizes."

97. Downie *v.* Hoover, 12 Wis. 174, 175, 78 Am. Dec. 730.

98. See State *v.* Mayer, 209 Mo. 391, 395, 107 S. W. 1085, 1086, distinguishing the word from "taken and carried away . . . with intent to criminally deprive the owner" in regard to the effect of the expression in an information for receiving stolen goods.

99. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516, 519, 5 Fish. Pat. Cas. 433.

As a Mineral, see MINES AND MINERALS, 27 Cyc. 533 text and note 35. As Subject of Common, see COMMON LANDS, 8 Cyc. 349 notes 43, 44. As Subject to Customs Duties — Marble, see CUSTOMS DUTIES, 12 Cyc. 1119 text and note 72; Precious Stones, see CUSTOMS DUTIES, 12 Cyc. 1126 text and note 1. In Mines, see, generally, MINES AND MINERALS, 27 Cyc. 516. On Land Taken by Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 603. See also COBBLE, 7 Cyc. 268; COBBLESTONE, 7 Cyc. 268; FOSSILS, 19 Cyc. 1448; GEM, 20 Cyc. 1181; JET, 23 Cyc. 373; JEWEL, 23 Cyc. 374; PEBBLE, 30 Cyc. 1327; PRECIOUS STONE, 31 Cyc. 1158; RIP-RAP, 34 Cyc. 1791; ROCK, 34 Cyc. 1814; ROCK EXCAVATION, 34 Cyc. 1814.)

STOP. Ordinarily, to cease from some particular motion, although sometimes used in a loose sense to signify slackening speed.[1] (See STOP-OVER TICKET, *post*, this page; STOPPAGE IN TRANSITU, *post*, this page.)

STOPE. An excavation made in a mine to remove the ore which has been rendered accessible by the shafts and drifts.[2]

STOP ORDER. An instruction to a broker to await a certain figure, and, whenever this figure is reached, to stop the transaction by then selling or buying, as the case may be, as well as possible.[3]

STOP-OVER TICKET. A ticket which gives one a right to stop at a station beyond the time of the departure of the train on which one came with the purpose of continuing one's journey on a subsequent train.[4] (Stop-Over Ticket: Stop-Over Privileges — In General, see CARRIERS, 6 Cyc. 583; Compulsory by Statute, see COMMERCE, 7 Cyc. 447 note 81.)

STOPPAGE IN TRANSITU. See CARRIERS, 6 Cyc. 435; INTERPLEADER, 23 Cyc. 22 note 80; SALES, 35 Cyc. 493.

STORAGE. Space for the safe keeping of goods.[5] (Storage: In General, see, generally, WAREHOUSEMEN. By Carrier — In General, see CARRIERS, 6 Cyc. 456; Charges, see CARRIERS, 6 Cyc. 496 text and note 72; Liability of Carrier of Goods as Custodian or Warehouseman, see CARRIERS, 6 Cyc. 460, 462; Liability of Car-

Shaped blocks included see Fisher *v.* Lee, 12 A. & E. 622, 623, Arn. & H. 11, 10 L. J. Q. B. 1, 4 P. & D. 447, 40 E. C. L. 311, holding that blocks reduced to certain dimensions according to order and squared for use as railway sleepers are properly subject to toll as "stone" rather than "merchandise."

A mineral stone belongs, as a mineral product, to owners of mining claims under the United States statutes. Johnston *v.* Harrington, 5 Wash. 73, 78, 31 Pac. 316.

Meaning "limestone" in real, technical parlance in Hinsdale, Illinois, "stone," in a local ordinance, is a duly definite description of that material. Shannon *v.* Hinsdale, 180 Ill. 202, 204, 54 N. E. 181 [*distinguished* in Kelly *v.* Chicago, 193 Ill. 324, 327, 61 N. E. 1009].

"Flat stone" as a descriptive term in an ordinance held insufficient (see Kelly *v.* Chicago, 193 Ill. 324, 327, 61 N. E. 1009; Kuester *v.* Chicago, 187 Ill. 21, 22, 58 N. E. 307; Lusk *v.* Chicago, 176 Ill. 207, 209, 52 N. E. 54), at least unless proved to have a well-known local and technical meaning (Kelly *v.* Chicago, *supra*; Kuester *v.* Chicago, *supra*).

1. Zeigler *v.* Northeastern R. Co., 7 S. C. 402, 408.

"Bicycler's stop" is a term which has been applied to the act of circling round and round on a bicycle, riding in circles. Such an act is not a legal "stop," within the rule requiring persons to stop, look, and listen at railway crossings, to comply with which the bicycler must dismount. Robertson *v.* Pennsylvania R. Co., 180 Pa. St. 43, 46, 36 Atl. 403, 57 Am. St. Rep. 620.

Regularity not implied — In Ohio Rev. St. 3375*a*, providing for the use of freight trains by physicians and sheriffs "between stations where such trains stop," the word does not mean "'regularly' stop," or "are 'scheduled' to stop," but simply "in fact stop." Allen *v.* Lake Shore, etc., R. Co., 57 Ohio St. 79, 84, 47 N. E. 1037.

2. Century Dict. [*quoted* in Fisher *v.* Central Lead Co., 156 Mo. 479, 490, 56 S. W. 1107, reading "the" for "an" and "shaft" for "shafts"].

3. See Porter *v.* Wormser, 94 N. Y. 431, 443, where the definition is quoted from the testimony.

4. Robinson *v.* Southern Pac. Co., 105 Cal. 526, 556, 38 Pac. 94, 722, 28 L. R. A. 773.

5. Webster Int. Dict.

Statutory definition is "a deposit not gratuitous . . . called storage." Okla. St. (1893) c. 30, art. 2, § 13 [*quoted* in Walker *v.* Eiklcberry, 7 Okla. 599, 601, 54 Pac. 553].

Storage occupied.—A place where lumber is merely piled awaiting shipment, not owned or hired by the owner of the lumber, is not a "storage" occupied by him within the meaning of a statute taxing personalty at such storage (Monroe *v.* Greenhoe, 54 Mich. 9 11, 19 N. W. 569 [*followed* in Osterhout *v.* Jones, 54 Mich. 228, 229, 19 N. W. 964, 569]); but ground hired and used to pile lumber for the purpose of seasoning is a

rier of Passenger as Custodian of Passengers' Effects, see CARRIERS, 6 Cyc. 752; Lien, see CARRIERS, 6 Cyc. 502 text and note 10. Care of Property by Bailee, see BAILMENTS, 5 Cyc. 176. Charges For — In General, see WAREHOUSEMEN; By Carrier, see CARRIERS, 6 Cyc. 496 text and note 72; Of Goods Seized in Mass by One of Several Owners, see CONFUSION OF GOODS, 8 Cyc. 576 note 30; Of Mortgaged Goods Attached in Possession of Mortgagee's Depositary, see ATTACHMENT, 4 Cyc. 758 note 96. Evidence in Actions on Contracts For — Parol, see EVIDENCE, 17 Cyc. 719; Receipts, see EVIDENCE, 17 Cyc. 633; Value of Things Stored and of Place of Storage, see CONTRACTS, 9 Cyc. 769 note 81. Of Explosives, see EXPLOSIVES, 19 Cyc. 4. Of Intoxicating Liquors — In Place Apart From Licensed Place of Business, see INTOXICATING LIQUORS, 23 Cyc. 120 note 69; In Railroad Warehouse, see INTOXICATING LIQUORS, 23 Cyc. 307 note 5. Of Mortgaged Goods, With Person in Whose Possession They Are Attached, Fees, see ATTACHMENT, 4 Cyc. 758 note 96. Use of Premises For Storage, Change as Affecting Insurance, see FIRE INSURANCE, 19 Cyc. 720 note 20. Warehouseman's Lien — In General, see WAREHOUSEMEN; Of Mortgaged Property, see CHATTEL MORTGAGES, 7 Cyc. 39.)

STORE. As a noun, a word employed in many senses and variously defined as meaning a place where goods are kept on deposit, especially in large quantities; a warehouse; also a place where goods are kept for sale in large or small quantities;[6]

storage occupied by the person so using it (Hood *v.* Judkins, 61 Mich. 575, 579, 28 N. W. 689).

6. Pitts *v.* Vicksburg, 72 Miss. 181, 184, 16 So. 418.

The outside of the walls is included in a lease of a "store" in a designated building. Biddle *v.* Littlefield, 53 N. H. 503, 506, 16 Am. Rep. 388.

Land passes with the building under the word in a deed (Pottkamp *v.* Buss, (Cal. 1892) 31 Pac. 1121, 1122), lease (Hooper *v.* Farnsworth, 128 Mass. 487, 488; Rogers *v.* Snow, 118 Mass. 118, 119, 124; Lanpher *v.* Glenn, 37 Minn. 4, 5, 33 N. W. 10), or will (Toms *v.* Williams, 41 Mich. 552, 559, 2 N. W. 814).

A store may come within the term "dwelling-house" as subject to burglary at common law, if it is not a part of the house or under the same roof, or if any of the family sleep in it. State *v.* Ginns, 1 Nott & M. (S. C.) 583, 584.

"Building" as a statutory word of description not supplied by "store" in an indictment see Com. *v.* McMonagle, 1 Mass. 517, where, however, Sewell, J., concurred in spite of his opinion that the word has in Massachusetts "a settled, known meaning, and is not used otherwise than as and for the name of a building."

A bakery and restaurant may be described as a store without misrepresentation. See Richards *v.* Washington F. & M. Ins. Co., 60 Mich. 420, 423, 424, 426, 27 N. W. 586.

A lumber yard may be a store. Folkes *v.* State, 63 Miss. 81, 83.

A store selling only to tenants of the owner is not the less "a store," and is subject to a privilege tax as such under Miss. Code, § 3390. Craig *v.* Pattison, 74 Miss. 881, 884, 21 So. 756; Alcorn *v.* State, 71 Miss. 464, 466, 15 So. 37.

"Store or office for the sale of meat at retail" describing a subject of privilege tax may include a place where only one kind of meat is sold and that only for a part of the year and incidental to another principal business. Eastman *v.* Jackson, 10 Lea (Tenn.) 162, 164.

Not necessarily in a house.—"The word 'store' is employed in Miss. Code, § 585, to designate a place where goods are sold. Although goods are usually kept for sale in a house, it is not true that their being kept in a house is necessary to constitute a store." Folkes *v.* State, 63 Miss. 81, 83 [*cited* in Craig *v.* Pattison, 74 Miss. 881, 884, 21 So. 756].

A junk store is included as is every other kind of store by the word as used in Miss. Code (1892), § 3390, by which a privilege tax is imposed on each "store" where the stock never exceeds a certain value. Pitts *v.* Vicksburg, 72 Miss. 181, 183, 16 So. 418.

As used in Wash. Pen. Code, § 46, in regard to breaking and entering, the word is not qualified by the subsequent phrase "or any building in which any goods, merchandise or valuable things are kept," etc. State *v.* Sufferin, 6 Wash. 107, 108, 32 Pac. 1021.

"'Store,' in which goods were kept for use, 'sale' and deposit," in a description of a place broken and entered, is not satisfied by proof of a mere business office of a board of underwriters, in which were kept only furniture and articles for their business use. People *v.* Marks, 4 Park Cr. (N. Y.) 153, 157.

Separate building.—"In the country the designation of a well-known 'store' not near any other houses . . . would certainly include, as part of the 'place,' a building on the trading premises used in connection with the business," and such use of the building agrees with the designation of the "store" to which it belongs as the place for holding an election. Hayes *v.* Kirkwood, 136 Cal. 396, 398, 69 Pac. 30.

a magazine, a storehouse, a warehouse;[7] a place where supplies, as provisions, arms, clothing or goods of any kind, are kept for future use or distribution; a store-house; a warehouse; a magazine;[8] a shop;[9] a building or room in which

"Shop, house, store, saloon or other building" does not include an inclosed park, although liquors are exposed for sale there. State *v.* Barr, 39 Conn. 40, 44.

To occupy a store, within the meaning of provisions for local taxation of personal property of a non-resident where the owner occupies a store, refers, when the statute describes the property as "employed in trade" and the act of occupying as "for the purpose of such employment," to a "store for trade" as distinguished from a "store-house for storage," and while "store" as there used may under some circumstances include a store-house, it does not include one not employed for the purpose of employing in trade the goods stored therein (New Limerick *v.* Watson, 98 Me. 379, 381, 384, 57 Atl. 79, construing Rev. St. (1883) c. 6, § 14); and does not apply to mere desk-room occupied by a cotton broker for purposes of correspondence, where he receives samples but makes no sales (Martin *v.* Portland, 81 Me. 293, 296, 17 Atl. 72); nor does one who has a mere privilege in a counting-room, where he transacts business, and has goods stored in warehouses and wharves occupied by others and not hired by him, thereby "hire or occupy" a store (Huckins *v.* Boston, 4 Cush. (Mass.) 543, 546, 548, construing Rev. St. c. 7, § 10, and St. (1839) c. 139, § 1).

7. State *v.* Wilson, 47 N. H. 101, 104.

"Store, storehouse and warehouse are synonymous and interchangeably used to express the same thought." State *v.* Sprague, 149 Mo. 409, 418, 50 S. W. 901.

A banking house may properly be described as "the store, shop and warehouse of the president, directors and company" in an indictment under St. (1854) p. 312, concerning breaking and entering a "store, shop or warehouse." Wilson *v.* State, 24 Conn. 57, 62.

8. Century Dict. [*quoted* in State *v.* Sprague, 149 Mo. 409, 418, 50 S. W. 901].

9. Webster Int. Dict. [*quoted* in Petty *v.* State, 58 Ark. 1, 2, 22 S. W. 654].

Keeping open store on Sunday is not properly described, in an indictment, as "keeping open shop." Sparrenberger *v.* State, 53 Ala. 481, 483, 25 Am. Rep. 643.

Often synonymous with "shop" in the United States see Anderson L. Dict. *sub verb.* "shop" [*quoted* in Petty *v.* State, 58 Ark. 1, 2, 22 S. W. 654]; Rapalje & L. L. Dict. [*cited* in Petty *v.* State, 58 Ark. 1, 3, 22 S. W. 654]; Webster Int. Dict. [*quoted* in Petty *v.* State, *supra*]; Worcester Dict. *sub verb* "shop" [*quoted* in Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667]; Barth *v.* State, 18 Conn. 432, 439 [*quoted* in Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 385, 58 Am. Rep. 667]; State *v.* Smith, 5 La. Ann. 340, 341 [*followed* in State *v.* Moore, 38 La. Ann. 66, 68 (*citing* Webster Dict.)]. *Compare* Com. *v.* Annis, 15 Gray (Mass.) 197, 199, 201 (holding that an instruction to the jury defining "shop" as "a place where goods were sold at retail" and "store" as "a place where goods are deposited," and adding that in this country shops for the sale of goods are frequently called stores, is not open to exception, and an indictment on a trial for breaking and entering a shop may be supported by testimony describing the building in question as a store); Com. *v.* Riggs, 14 Gray (Mass.) 376, 378, 77 Am. Dec. 333 (where on a trial for larceny in a "shop" the fact that the owner in testifying alluded to it as a "store" was held unimportant when the word "store" was not found in the statutes of the state).

Shop and store compared and distinguished. —"The word 'store' is of larger signification than the word 'shop.' It not only comprehends all that is embraced in the word 'shop,' when that word is used to designate a place in which goods or merchandise are sold, but more, a place of deposit, a 'store house.' In common parlance the two words have a distinct meaning. We speak of 'shops' as places in which mechanics pursue their trades, as 'a carpenter's shop,' 'a blacksmith's shop,' 'a shoemaker's shop.' While, if we refer to a place where goods and merchandise are bought and sold, whether by wholesale or retail, we speak of it as a 'store.' . . Unless in derision, we would never say a 'drug shop,' but a 'drug store.' There are but few, if any, who would understand that a man had a 'store,' and was engaged in buying and selling goods or merchandise, if we said he had a 'shop.' We never speak of the place in which a mechanic exercises his trade as a 'store,' nor do we speak of the place in which goods are bought and sold as a 'shop.'" Sparrenberger *v.* State, 53 Ala. 481, 483, 25 Am. Rep. 643. "We would not say that the terms 'store' and 'shop' may, under all circumstances, be used indiscriminately for each other, where they are connected with nothing which shows the particular meaning intended to be attached to them; but we are clearly of opinion that the fact that the place kept by the accused was one in which liquors were designed to be sold, entitles it to either of these appellations. A store kept for the sale of goods is to all intents a shop, the very definition of which is a place where anything is sold.'" Barth *v.* State, 18 Conn. 432, 440. "In conversation, we speak of a 'store' as a place where goods are exposed for sale, thus giving it the same meaning as 'shop.' Still, we recognize a difference between the meanings of these two words. Thus, we do not call the place where any mechanic art is carried on a 'store,' but we give it the name of 'shop,' as a tailor's shop, a blacksmith's shop, a shoemaker's shop. We usually understand by the word 'store,' a place where goods are exhibited for sale, but we do not always mean a 'store' when we use the word 'shop.'" State *v.* Canney, 19 N. H. 135, 137, holding that since both terms

goods of any kind are kept for sale; a shop for the sale of goods;[10] a place where goods are kept for sale either at wholesale or retail; a shop; as a book store, a dry goods store;[11] any place where goods are sold, whether by wholesale or retail;[12] a place in which merchandise is kept for sale;[13] a place where goods are exhibited for sale;[14] frequently, in describing buildings in a street, the house in which goods are kept for sale, or a house erected for that purpose.[15] As a verb, to stock against a future time;[16] to lay away for future use;[17] to deposit in a storehouse or other building for preservation;[18] to keep merchandise for safe custody, to be delivered in the same condition as when received.[19] (Store: The Noun — Burglary of, see BURGLARY, 6 Cyc. 189, 190; Larceny From, see LARCENY, 25 Cyc. 65 text and note 13; Liability of Shopkeeper as Bailee of Articles Left in, see BAILMENTS, 5 Cyc. 185 note 27; Vacancy or Non-Occupancy of, Within Meaning of Insurance Policy, see FIRE INSURANCE, 19 Cyc. 733 note 97. The Verb — Storing Hazardous Articles, see FIRE INSURANCE, 19 Cyc. 727 text and notes 16, 17. See also SHOP, *ante*, p. 431; STORAGE, *ante*, p. 1325; STORE ACCOUNT, *post*, this page; STORE FIXTURES, *post*, p. 1329; STOREHOUSE, *post*, p. 1329; STOREKEEPER, *post*, p. 1329; STORE-ROOM, *post*, p. 1330; STORES, *post*, p. 1330.)

STORE ACCOUNT. A statutory term which has been held to apply, without discrimination, to all accounts of goods sold by store-keepers and charged in their books against the purchasers.[20] (Store Account: Book Entries in Evidence, see

are used in Rev. St. c. 436, § 9, to describe places subject to burglary, they are used distinctively and not synonymously, and an indictment which alleges the breaking and entering a "store" and larceny from the "shop" aforesaid, is bad on demurrer. See also *infra*, this note.

Shop and store; American and English uses distinguished.—"By a reference to the lexicographers of this country and England, it appears that the word 'shop' is used in the same sense in both; but that the word 'store,' as applicable to a building, is used in a more extensive sense in this country than in that. There it is never applied to a place where goods are sold, but only to one where they are merely deposited; here it is used to denote both of these. Indeed, it is so true that the two words are here in common parlance synonymous, as to have been a matter of remark by English travelers." Barth *v.* State, 18 Conn. 432, 439. "The word 'store' is commonly used in this country as the equivalent of the English word 'shop,' which is very generally applied . . . to any room or building where any kind of article or traffic is sold. The American word 'store' applies to the building,—the name more strictly belonging to the collection of ware within it. The English 'shop' is the building itself, as distinguished from a place of sale which is open, like a stall.'" Richards *v.* Washington F. & M. Ins. Co., 60 Mich. 420, 425, 27 N. W. 586.

10. Webster Dict. [*quoted* in Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667].

11. Century Dict. [*quoted* in State *v.* Sprague, 149 Mo. 409, 419, 50 S. W. 901].

12. Webster Dict. [*quoted* in Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667; Martin *v.* Portland, 81 Me. 293, 297, 17 Atl. 72]; Webster Int. Dict. [*quoted* in Petty *v.* State, 58 Ark. 1, 2, 22 S. W. 654].

13. Com. *v.* Whalen, 131 Mass. 419, 421, where this definition is said to be one of the common significations of the word in this country.

14. State *v.* Canney, 19 N. H. 135, 137, where it is said that the word is generally so understood in the United States.

15. Burress *v.* Blair, 61 Mo. 133, 140.

16. Johnson Dict. [*quoted* in Lee *v.* Vacuum Oil Co., 7 N. Y. Suppl. 433 note (*affirmed* in 54 Hun 156, 7 N. Y. Suppl. 426)]; Webster Dict. [*quoted* in Lee *v.* Vacuum Oil Co., *supra*].

17. See Easley Town Council *v.* Pegg, 63 S. C. 98, 103, 41 S. E. 18, where "storing" is defined as "the laying away for future use."

18. Webster Dict. [*cited* in Renshaw *v.* Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 605, 15 S. W. 945, 23 Am. St. Rep. 904, where, in construing an insurance policy, it is said: "We think . . . that there is an intended distinction between storing an article and keeping it for sale. The meaning of the word 'store' itself sufficiently indicates the distinction"].

"Placed or located," the construction of the word as used in a statute describing larceny of cotton "from any place where the same may be stored" see Moseley *v.* State, 74 Ga. 404.

"Storing and keeping in possession" contraband liquors declared an offense by the Dispensary Act, amended March 5, 1897, 22 S. C. St. at L. 537, involves the idea of continuity or habit. Easley Town Council *v.* Pegg, 63 S. C. 98, 101, 103, 41 S. E. 18.

19. Anderson L. Dict. [*quoted* in Smith *v.* German Ins. Co., 107 Mich. 270, 282, 65 N. W. 236, 30 L. R. A. 368].

20. See Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 385, 58 Am. Rep. 667, where it is said, in construing a statute of limitations: "The test is not whether the store is one of retail or wholesale, nor in the locality of the store, or the use made of the articles, or the quantity in which they are bought,

EVIDENCE, 17 Cyc. 365. See also ACCOUNT-BOOK, 1 Cyc. 350; STORE, *ante*, p. 1326; and, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 351.)

STORE FIXTURES. A term of trade, commonly used among traders and insurers and subject to construction in the light of evidence as to its scope, which may cover all the movable articles of shops and warehouses which are convenient or necessary for use in the course of trade;[21] fixtures attached to the store, tributary to its use, as a store;[22] store fittings or fixed furniture which are peculiarly adapted to make a room or store.[23] (See FIRE INSURANCE, 19 Cyc. 366 text and note 64. See also STORE, *ante*, p. 1326; and, generally, FIXTURES, 19 Cyc. 1033.)

STOREHOUSE. A house in which things are stored, a building for the storing of grain, food-stuffs or goods of any kind; a magazine; a repository; a warehouse; a store;[24] a building for keeping grain or goods of any kind, a repository, a warehouse; also, according to a common use, a building in which domestic supplies are kept at a place of residence; also applied to places of business, and there vulgarly used as synonymous with "shop" in one of its proper senses meaning a building in which goods are offered openly for sale;[25] an apartment or building for the temporary reception and storage of goods and merchandise;[26] a warehouse, a building for keeping grain or goods of any kind;[27] a house for the storage of goods;[28] a building for keeping goods of any kind, especially provisions; a magazine . . . a warehouse;[29] a building for keeping goods of any kind, especially provisions.[30] (Storehouse: Arson of, see ARSON, 3 Cyc. 990. Burglary of, see BURGLARY, 6 Cyc. 189, 190. Gaming in, see GAMING, 20 Cyc. 892 notes 15, 18. Larceny From, see LARCENY, 25 Cyc. 65. Police Regulation of Storage Houses, see MUNICIPAL CORPORATIONS, 28 Cyc. 731. Warehouses Generally, see WAREHOUSEMEN. See also STORAGE, *ante*, p. 1325; STORE, *ante*, p. 1326.)

STOREKEEPER. A man who has the care of a store;[31] one who takes care of a store.[32] (Storekeeper: Official, see INTERNAL REVENUE, 28 Cyc. 1662. See also SHOPKEEPER, *ante*, p. 432; STORE, *ante*, p. 1326.)

but is the vendue of goods by a store-keeper and have they been charged in his books in an account against the purchaser?"

21. See Whitmarsh *v.* Conway F. Ins. Co., 16 Gray (Mass.) 359, 361, 362, 77 Am. Dec. 414.

22. Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 578, 1 So. 202, where the term is said to include shelving and an office within the store, but held not to include an awning on the outside of the building.

23. Thurston *v.* Union Ins. Co., 17 Fed. 127, 129, construing the term with reference to the particular policy.

24. Century Dict. [*quoted* in Jefferson *v* State, 100 Ala. 59, 60, 14 So. 627 (*citing* Webster Dict.; Worcester Dict.); State *v.* Sprague, 149 Mo. 409, 419, 50 S. W. 901; Steele *v.* State, 80 Nebr. 9, 113 N. W. 798, 127 Am. St. Rep. 741; Metz *v.* State, 46 Nebr. 547, 551, 65 N. W. 190].

Synonymous with "store" and "warehouse" see *ante*, notes 7, 8.

"Store for trade" and "storehouse for storage" distinguished see *ante*, text and note 6.

Description of a place insured as a "storehouse" is not necessarily a warranty that it shall be used for no other purpose, although, if such place were converted into one of a class enumerated as not insured without special agreement, as a manufactory, there would be a departure from the terms of the policy. Franklin F. Ins. Co. *v.* Brock, 57 Pa. St. 74, 78, 83.

Land on which the warehouse stands passes by the word in a deed. Den *v.* Wheeler, 28 N. C. 196, 200 [*cited sub nom.* Wise *v.* Wheeler, in Indianapolis, etc., R. Co. *v.* Indianapolis First Nat. Bank, 134 Ind. 127, 131, 33 N. E. 679].

25. State *v.* Sandy, 25 N. C. 570, 573.

26. Andrews *v.* State, 123 Ala. 42, 45, 26 So. 522, defining "warehouse" and stating that "storehouse" is of similar meaning.

27. State *v.* Wilson, 47 N. H. 101, 104.

28. Krebs Mfg. Co. *v.* Brown, 108 Ala. 508, 509, 18 So. 659, 54 Am. St. Rep. 188.

29. Webster Dict. [*quoted* in Adams County *v.* Kansas City, etc., R. Co., 71 Nebr. 549, 554, 99 N. W. 245]; Givens *v.* State, 40 Fla. 200, 202, 23 So. 850.

30. Benton *v.* Com., 91 Va. 782, 793, 21 S. E. 495.

31. Webster Dict. [*quoted* in Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667].

Indefinite, not implying good credit.—"The term is indefinite: it may mean a wholesale merchant, or a petty dealer in toys or candies; it may imply a principal, or an agent or servant; it may be applied to one notoriously without capital and who lives by his wits rather than by legitimate trades; in short, disconnected from all else, it can never indicate that the person who bears the designation is one who can safely be trusted with a loan." Higler *v.* People, 44 Mich. 299, 302, 6 N. W. 664, 38 Am. Rep. 267.

32. Worcester Dict. [*quoted* in Salomon *v.*

STORE-ROOM. A word which does not necessarily mean either a storehouse or warehouse.[33] (See ROOM, 34 Cyc. 1815; STORE, *ante*, p. 1326; STOREHOUSE, *ante*, p. 1329.)

STORES. A term more general than provisions; in that it is not confined to articles of food or subsistence, and may include such things as wood or coal.[34] (See SEA STORES, 35 Cyc. 1279. Store, see STORE, *ante*, p. 1326.)

STORM.[35] As a noun, a violent wind; a tempest;[36] a violent disturbance of the atmosphere producing wind, rain, snow, hail, or thunder and lightning; hence, often a fall of rain or snow,[37] involving, both in the grammatical and popular sense, some preternatural action of the elements;[38] a tempest; a commotion of the elements;[39] a tempest.[40] As a verb, to throw into a commotion or tumult; to rage or rave; to move about with violence, rage or fury; to be, or cause to be, tempestuous;[41] to attack by open force; to rage.[42] (Storm: As Insured Risk, see FIRE INSURANCE, 19 Cyc. 830; LIGHTNING INSURANCE, 25 Cyc. 958. Effect on Duty of Person Crossing Railroad, see RAILROADS, 33 Cyc. 1024, 1026 note 33, 1125 text and notes 38, 39, 40. Overflow of Sewers, Drains, or Watercourses Caused by Storm, as Affecting Liability of Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 1322. See also LIGHTNING, 25 Cyc. 958; STORMY, *post*, this page; TEMPEST.)

STORM TIDE LINE or MARK. A term which has been held incapable of designating an absolute or fixed boundary, but relative, and as having relation to the condition of things from time to time.[43]

STORMY. Tempestuous, agitated, with furious winds, boisterous;[44] tempestuous, violent.[45] (See STORM, *ante*, this page.)

STORY. A connected account of narration, oral or written, of events of the past; history; an account of an event or incident; a relation; a recital; a narrative, either true or fictitious . . . specifically a fictitious tale; . . . the facts or events in a given case considered in their sequence, whether related or

Pioneer Co-operative Co., 21 Fla. 374, 384, 58 Am. Rep. 667].

33. Hagar *v.* State, 35 Ohio St. 268, 270, holding that an indictment for breaking and entering a "store-room" is insufficient under a statute using the terms "store-house" and "ware-house."

34. See Crooke *v.* Slack, 20 Wend. (N. Y.) 177, construing the word as used in 2 Rev. St. 493, § 1, providing for a lien for "'provisions' and 'stores'" furnished and proper for the use of a vessel.

35. Figurative use, such as "storm of passion," or "a storm of affliction," or "a storm of sedition," or "storming a fort," excluded in construing an insurance policy see Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39.

36. Webster Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39.

The rate of a "storm" when the word is applied to a wind, is sixty to eighty miles an hour. The Snap, 24 Fed. 292, 293.

Distinguished from brisk "wind," "high wind," and "gale," the latter blowing at the rate of forty to fifty miles an hour see The Snap, 24 Fed. 292, 293.

37. Webster Dict. [*quoted* in Tyson *v.* Union Mut. F., etc., Ins. Co., 2 Montg. Co. Rep. (Pa.) 17].

Rain and snow not essential.—"Storm is a violent agitation, a commotion of the elements by wind, etc., but not necessarily implying the fall of anything from the clouds. Hence, to call a mere fall of rain without wind, a storm (though common in this country), is a departure from the true sense of the word. Webster Dict. [*quoted* in Tyson *v.* Union Mut. F., etc., Ins. Co., 2 Montg. Co. Rep. (Pa.) 17].

"Storm or hurricane."—A charter power to insure against "fire, storm or hurricane" is not to be read as if "hurricane" were explanatory of "storm," or so as to exclude any storm not a hurricane. For "every hurricane is a storm, but every storm not necessarily a hurricane." Tyson *v.* Union Mut. F., etc., Ins. Co., 2 Montg. Co. Rep. (Pa.) 17, 18.

38. See Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 40–42, holding that a rain, warm, soft wind, and ice freshet caused thereby, do not constitute a storm within the meaning of a policy insuring against loss by storm, the rain and warm wind having no violent character, and the freshet in itself not being within the definition of the word.

39. Johnson Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39].

40. Walker Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39].

41. Richardson Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39].

42. Johnson Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39].

43. See Camden, etc., Land Co. *v.* Lippincott, 45 N. J. L. 405, 413, 415, considering the term as used in a deed.

44. Webster Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39].

45. Walker Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39].

not; an anecdote; a report, an account; a statement; anything told; a falsehood; a lie; a fib.[46] Of a building, a set of rooms on the same floor or level; a floor or the space between two floors;[47] therefore, a vertical physical division of a house.[48] (Story: As Literary Property, see, generally, COPYRIGHT, 9 Cyc. 889; LITERARY PROPERTY, 25 Cyc. 1488.)

STOVE. As Element of Risk, see FIRE INSURANCE, 19 Cyc. 740. As Fixture, see FIXTURES, 19 Cyc. 1058 note 14. Cooking Stove — As Family Expense, see HUSBAND AND WIFE, 21 Cyc. 1231–1232 text and note 97; As Necessary Furniture, see EXEMPTIONS, 18 Cyc. 1428 text and note 97.

STOVEPIPE. A word well understood to refer to a pipe made either of sheet iron or heavy tin, which usually connects the stove with the chimney or flue.[49]

STOVE WORKS. A term used to designate all the grounds used by a manufacturer for the manufacture of stoves, including the buildings and all the grounds about the buildings, whether such grounds are fenced in or not.[50]

STOWAGE. See SHIPPING, *ante*, page 1 *et seq.*

STOWAWAY. One who conceals himself on board a vessel about to leave port, in order to obtain free passage.[51] (Stowaway: Enrolled in Crew and Deserting in United States, see ALIENS, 2 Cyc. 123 note 65.)

STRADDLE. In the language of brokers, the double privilege of a "put" or "call," securing to the holder the right to demand of the seller, at a certain price within a certain time, a certain number of shares of specified stock, or to require him to take at the same price, within the same time, the same shares of stock.[52] (See GAMING, 20 Cyc. 932 text and note 65. See also CALL, 6 Cyc. 205 text and note 11; PUT, 32 Cyc. 1273; PUTS AND CALLS, 32 Cyc. 1275.)

STRAIGHT-CUT. A term which, when applied to tobacco, designates that particular product in which the plant has been so cut and treated at the time of cutting, as to preserve the fibers long, even, straight and parallel when prepared for sale or use; and, when applied to cigarettes, implies that they are made of straight cut tobacco.[53]

STRAIGHT LINE. A line free from irregularities or curvatures; shortest distance between two points.[54] (Straight Line: In Boundary, see BOUNDARIES, 5 Cyc. 876, 878 text and note 41, 879 text and note 46. See also LINE, 25 Cyc. 1491.)

STRAIGHT WHISKIES. Whiskies produced directly from grain by process of distillation, without the use of any liquid save water, and marketable when

46. Century Dict. [*quoted* in Carleton *v.* State, 43 Nebr. 373, 400, 61 N. W. 699, where it is said: "These definitions, while much more extended than those given in other dictionaries, are similar in their effect"].

47. Webster Dict. [*quoted* in Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36, 37].

A basement is, "according to the definitions of lexicographers and the common understanding of the word, a story of the building." Cleverly *v.* Moseley, 148 Mass. 280, 284, 19 N. E. 394.

48. Lagler *v.* Bye, 42 Ind. App. 592, 85 N. E. 36, 37.

49. Fowle *v.* Atlantic Coast Line R. Co., 147 N. C. 491, 498, 61 S. E. 262, construing a city ordinance regulating adjustment of stovepipes.

50. People *v.* Haight, 54 Hun (N. Y.) 8, 9, 7 N. Y. Suppl. 89, holding that the words do not necessarily imply a place inclosed by a fence, still less a building, and so are inadequate to describe in an indictment premises broken and entered.

51. U. S. *v.* Sandrey, 48 Fed. 550, 551.

52. Harris *v.* Tumbridge, 83 N. Y. 92, 95, 38 Am. Rep. 398, adding: "The continuance of the option is fixed by the agreement. . . . The value of a 'straddle,' it is proven, depends upon the fluctuation of the stock selected. The wider the range of these fluctuations, whether up or down, the greater the amount which may be realized; and of course the longer the option continues the greater the chance of such fluctuations during the period."

53. Ginter *v.* Kinney Tobacco Co., 12 Fed. 782.

Not susceptible of appropriation as a trademark see Ginter *v.* Kinney Tobacco Co., 12 Fed. 782, 783.

54. Matter of McCusker, 23 Misc. (N. Y.) 446, 448, 51 N. Y. Suppl. 281 [*distinguished* in Matter of McCusker, 47 N. Y. App. Div. 111, 62 N. Y. Suppl. 201], holding that a straight line, as the term is applied to a measure of distance within which the sale of liquor is prohibited, is independent of the line of the street.

matured by age; those produced by distilling and refined by age into perfected articles.[55] (See, generally, INTOXICATING LIQUORS, 23 Cyc. 43.)

STRAIT. An inland sea, having connection with the ocean at each end, and lying between a long extent of land on each side of it.[56] (See, generally, NAVIGABLE WATERS, 29 Cyc. 285; WATERS.)

STRAND. Of a water, that portion of land lying between high and low water marks;[57] shore;[58] the shore or beach of the sea or ocean or of large lakes;[59] the sea beach;[60] of material, a single thread, a string; one of a number of flexible things, as grasses, strips of bark or hair when used to be twisted or woven together.[61]

STRANDING. Running upon the shore.[62] (Stranding: Of Vessel — Generally, see MARINE INSURANCE, 26 Cyc. 654; As Cause For Opening Memorandum Clause of Policy, see MARINE INSURANCE, 26 Cyc. 682, 683; When Constructive Total Loss, see MARINE INSURANCE, 26 Cyc. 692. See also SALVAGE, 35 Cyc. 722; SHIPPING, *ante*, page 1 *et seq.*)

STRANGER. A word defined in the plural as third persons generally, all persons in the world except parties and privies;[63] a term which is often used to denote a person who has no part in a transaction with which he may yet afterwards have some concern;[64] one not in privity;[65] one who is not a party to the action,[66] or agreement in question;[67] to the owner or claimant of a title, one who

55. Block *v.* Lewis, 5 Ohio S. & C. Pl. Dec. 370, 7 Ohio N. P. 543.

56. The Martha Anne, 16 Fed. Cas. No. 9,146, Olcott 18, 21 [*citing* Jacob L. Dict., where "straits" is defined as "a narrow sea between two lands, or an arm of the sea"].

57. Stillman *v.* Burfeind, 21 N. Y. App. Div. 13, 15, 47 N. Y. Suppl. 280.

58. See Burrill L. Dict. [*cited* in Stillman *v.* Burfeind, 21 N. Y. App. Div. 13, 15, 47 N. Y. Suppl. 280]; Gould Waters, § 28 [*cited* in Stillman *v.* Burfeind, *supra*].

59. Webster Dict. [*quoted* in Littlefield *v.* Littlefield, 28 Me. 180, 184].

"Beach;" "shore;" "flats."—By a beach, is to be understood the shore or strand; and it has been decided, that the seashore is the space between high and low water mark. Cutts *v.* Hussey, 15 Me. 237, 241 [*quoted* in Littlefield *v.* Littlefield, 28 Me. 180, 184]. "The term 'beach' we consider, when used in reference to places anywhere in the vicinity of the sea, or arms of the sea, as having a fixed, definite meaning, comprising the territory lying between the lines of high water and low water, over which the tide ebbs and flows. It is, in this respect, like 'shore,' or 'strand'" (Doane *v.* Willcutt, 5 Gray (Mass.) 328, 335, 66 Am. Dec. 369 [*quoted* in East Hampton *v.* Kirk, 6 Hun (N. Y.) 257, 259 (*reversed* in 68 N. Y. 459, where, however, a substantially similar definition of "beach" as used in lines and descriptions of boundary, and of "strand" and "shore" is given at pages 462, 463)]) or, "as much used in this country, 'flats'" (Doane *v.* Willcutt, *supra*).

60. Littlefield *v.* Littlefield, 28 Me. 180, 184 [*citing* lexicographers generally].

61. Haskell Golf Ball Co. *v.* Perfect Golf Ball Co., 143 Fed. 128, 131.

62. See Lake *v.* Columbus Ins. Co., 13 Ohio 48, 55, 42 Am. Dec. 188.

What more exactly constitutes "stranding" within the meaning of policies of insurance see MARINE INSURANCE, 26 Cyc. 654.

63. Anderson L. Dict. [*quoted* in Balfour *v.* Burnett, 28 Oreg. 72, 74, 41 Pac. 1].

Stranger purchasing land in a town.—As used in an act of the provincial legislature passed in 1742, relating to two towns; in a provision in case a "stranger" should purchase land in either of them, the word probably applies to "those who were not then land-owners in either town." Lamprey *v.* Batchelder, 40 N. H. 522, 528.

64. Abbott L. Dict. [*cited* in Simpson *v.* Treat, 126 Fed. 1003, 1007], adding: "Thus the effect of an act may be drawn in question as to either parties, privies, or strangers. Thus the parties to a fine are either the cognizors or cognizees; the privies are such as are in any way related to those who levy the fine, and claim under them by any right of blood, or other right of representation; the strangers are all persons in the world, except only the parties and privies. In its general legal signification, stranger is opposed to the word privy."

65. See O'Donnell *v.* McIntyre, 118 N. Y. 156, 163, 23 N. E. 455, holding that one not in privity with another in relation to the matter in question is a "stranger."

66. See Kirk *v.* Morris, 40 Ala. 225, 229, where in construing Code, § 2536, providing that goods or chattels taken in actachment may be replevied by the defendant, or, in his absence, by a "stranger," the word is held to mean one not a party to the suit, who acts for the defendant in attachment.

67. See *infra*, this note.

May be agent or representative of party or person dealing with party see Simpson *v.* Treat, 126 Fed. 1003, 1006, where it is said: "The complaint alleges that 'plaintiffs' said firm were strangers to said charter parties and the matter to which the same were related,' which means that the plaintiffs' firm was not a party to the same, but does not necessarily mean that plaintiffs' firm was not and is not the agent or representative of one or the other parties to the agreements, or

does not derive title from or in connection with the same source.[68] In subrogation, one who, in no event resulting from the existing state of affairs, can become liable for the debt, and whose property is not charged with the payment thereof, and cannot be sold therefor;[69] anyone being under no legal obligation or liability to pay the debt.[70] (Stranger or Strangers: Alteration of Instrument by, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 151, 205 note 27. Appeal-Bond Insufficient — Executed by, see APPEAL AND ERROR, 2 Cyc. 827 note 88; Running in Favor of, see APPEAL AND ERROR, 2 Cyc. 828 note 92. Error, Proceeding as Affecting, see APPEAL AND ERROR, 2 Cyc. 511. Execution Issued on Judgment After Death of Plaintiff Good Against, see JUDGMENTS, 23 Cyc. 1439 note 91. Judgments as Affecting — In General, see JUDGMENTS, 23 Cyc. 1280; Judgment by Confession, see JUDGMENTS, 23 Cyc. 1540 note 20; Judgment in Ejectment, see JUDGMENTS, 23 Cyc. 1328 note 2; Judgment Quasi In Rem, see JUDGMENTS, 23 Cyc. 1410; Not Estoppel Against Nor Bar in Favor Of, see JUDGMENTS, 23 Cyc. 1206; Promoting Litigation Bound, see JUDGMENTS, 23 Cyc. 1249; Who Is a, to a Cause, see JUDGMENTS, 23 Cyc. 1281–1284 note 25. Opinion of Court as Affecting, see JUDGMENTS, 23 Cyc. 1227 note 37. Persons Not, see PARTIES, 30 Cyc. 1, and Cross-References Thereunder; PRIVIES, 32 Cyc. 388; PRIVITY, 32 Cyc. 392; PRIVY, 32 Cyc. 393. Replevin Under Statute by, in Absence of Defendant in Attachment, see ATTACHMENT, 4 Cyc. 682 note 96. Satisfaction by, see ACCORD AND SATISFACTION, 1 Cyc. 316. To Commercial Paper — Indorsing Paper With Pledge of Property a Surety, see COMMERCIAL PAPER, 7 Cyc. 664 note 41; Promising Payment Not Waiving Demand and Notice, see COMMERCIAL PAPER, 7 Cyc. 1134 note 18; Unable to Give Notice of Dishonor, see COMMERCIAL PAPER, 7 Cyc. 1081. To Corporation — Duty to Take Notice of By-Laws and Other Matters, Conflicting Doctrines, see CORPORATIONS, 10 Cyc. 1151; Intermeddling With Corporate Affairs, Ratification of Acts, see CORPORATIONS, 10 Cyc. 1080. To Garnishee Proceeding Unable to Sue Out Writ of Error in Name of Defendant, see APPEAL AND ERROR, 2 Cyc. 827 note 45. To Guardianship of Infant, Notice of Application For Appointment of Guardian, see GUARDIAN AND WARD, 21 Cyc. 40. To Title of Land Mortgaged by Corporation Unable to Question Power to Mortgage, see CORPORATIONS, 10 Cyc. 1197. See also THIRD PERSONS.)

STRATAGEM. A word which implies artifice, trickery, deception, and perhaps even positive fraud practiced;[71] any artifice, a trick by which some advantage is to be obtained;[72] an artifice, particularly in war; a plan or scheme for deceiving an enemy; a trick by which some advantage is intended to be obtained; any

that one or the other of the parties to such charter parties are not customers of the plaintiffs' firm."

Strangers to a covenant are those persons "who are in no way parties to a covenant, nor bound by it." Abbott L. Dict. [*cited* in Simpson *v.* Treat, 126 Fed. 1003, 1007]; Balfour *v.* Burnett, 28 Oreg. 72, 74, 41 Pac. 1.

In the law of escrows, the word is used merely in opposition to the person to whom the contract runs. Minneapolis Threshing Mach. Co. *v.* Davis, 40 Minn. 110, 115, 41 N. W. 1026, 12 Am. St. Rep. 701, 3 L. R. A. 796.

68. See *infra*, this note.

As defendant in trespass to try title.— "The term 'stranger,' as here used, means one who claims by title other than that asserted by the plaintiff; or, more strictly speaking, one who, in deraigning title, does not in any way connect himself with that asserted by the plaintiff." Pilcher *v.* Kirk, 55 Tex. 208, 216.

Attornment to a stranger.—A purchaser at a tax sale is a stranger to the former owner within the meaning of 1 N. Y. Rev. St. p. 744, § 2, providing that, with certain exceptions, attornment of a tenant to a stranger shall be void. O'Donnell *v.* McIntyre, 118 N. Y. 156, 162, 163, 23 N. E. 455.

69. Arnold *v.* Green, 116 N. Y. 566, 573, 23 N. E. 1 [*quoted* in Durante *v.* Eannaco, 65 N. Y. App. Div. 435, 440, 72 N. Y. Suppl. 1048; Hoffman *v.* Habighorst, 49 Oreg. 379, 396, 89 Pac. 952, 91 Pac. 20], defining "stranger or volunteer" and adding "payment made by one who was liable to be compelled to make it, or lose his property, will not be regarded as made by a stranger. Where the person paying has an interest to protect he is not a stranger.

70. Suppiger *v.* Garrels, 20 Ill. App. 625, 629.

71. Fortune *v.* Watkins, 94 N. C. 304, 317.

Compared with "strategy" see Fortune *v.* Watkins, 94 N. C. 304, 317.

72. Century Dict. [*quoted* in Payne *v.* State, 38 Tex. Cr. 494, 498, 43 S. W. 515, 70 Am. St. Rep. 757].

artifice.[73] (See ARTIFICE, 3 Cyc. 1013; DECEPTION, 13 Cyc. 427; FRAUD, 20 Cyc. 8; TRICK.)

STRATEGY. A term used in the operation of armies conducted by a skilful commander, and implying tact and art in military manœuvering.[74]

STRAW. A material too well known to require any description, and not applicable to things made of the leaf of a tree.[75] (Straw: Applied to Persons, see STRAW BAIL, *post*, this page; STRAW MAN, *post*, this page.)

STRAW BAIL. A term which, as a description, has been said to equal a statement that the bail has no real estate; that there is no such man; that he is not to be found.[76] (See STRAW MAN, *post*, this page; and, generally, BAIL, 5 Cyc. 1.)

STRAW MAN. A term applied to one who merely represents those who actually bear the expense and take the profits of a transaction;[77] in the parlance of real estate means, a mere conduit or medium for convenience in holding and passing title.[78] (See STRAW BAIL, *ante*, this page.)

STRAY. An animal found in an unusual place for such an animal; or an animal that has roved for some time in a certain place, whose owner is unknown.[79] (Stray: Estrays, see ANIMALS, 2 Cyc. 358.)

STREAM. A word which has a well defined meaning, wholly inconsistent with a body of water at rest, implying motion as, to issue in a stream, to flow in a current.[80] For example the term has been variously employed as meaning a river, a brook or rivulet, anything in fact that is liquid and flows in a line or course;[81]

73. Webster Dict. [*quoted* in Mooney *v.* State, 29 Tex. App. 257, 15 S. W. 724].

74. Fortune *v.* Watkins, 94 N. C. 304, 317, adding that the word is "not very appropriate to the transactions of civil life," and holding that a finding of the jury that the plaintiff employed "strategy in bringing about the agreement," must, in the light of further findings tending to show that the transaction resulted in no extraordinary advantage to that party, and to show competence on the part of the other party to the agreement, be inferred to mean "that it was brought about by acts, and perhaps representations, not in themselves unlawful, but such as are common to persons entering into contract relations, each endeavouring to make the best terms for himself in the transaction."

Compared with "strategem" see Fortune *v.* Watkins, 94 N. C. 304, 317.

75. U. S. *v.* Goodwin, 25 Fed. Cas. No. 15,229, 4 Mason 128, 130, holding that hats made of the palmetto leaf are not within the meaning of a statute laying a duty on "hats of straw."

"Stack of straw within the meaning of stat. 7 & 8 Geo. 4, c. 30, s. 17," concerning the offense of burning a "stack of straw," does not include a stack of which the lower part consists of cole-seed straw and the upper part of wheat stubble (Rex *v.* Tottenham, 7 C. & P. 237, 32 E. C. L. 590); nor a stack of stubble, or, as it is called in Cambridgeshire, "haulm" (Rex *v.* Reader, 4 C. & P. 245, 246, 1 Moody C. C. 239, 19 E. C. L. 498).

"Straw laces" and "twisted straw" see Rheimer *v.* Maxwell, 20 Fed. Cas. No. 11,738, 3 Blatchf. 124, 125, holding that "twisted straw" was not dutisble under 9 U. S. St. at L. 44, 45, § 11, Schedule C, since it had not been known in commerce or prepared or used in this country before the passage of that act, and containing in the statement of facts, the following passage relating to the evidence: "It was also proved, that an article was known in trade and commerce as straw laces, which was used in being manufactured into hats, bonnets, &c., and that twisted straw was the raw material used in making straw laces. A stalk of rye-straw is split into two parts, and those parts, twisted together, compose the twisted straw of commerce."

76. People *v.* Bogart, 3 Park. Cr. (N. Y.) 143, 163, where the definition is found in the charge to the jury, below.

77. See Matter of Shawmut Min. Co., 94 N. Y. App. Div. 156, 159, 87 N. Y. Suppl. 1059, the following language: "Merely a 'straw man' in the transaction, representing other parties who actually furnished the money and took the property."

78. Van Raalte *v.* Epstein, 202 Mo. 173, 187, 99 S. W. 1077.

79. E. Imbeaux Co. *v.* Severt, 9 La. Ann. 124, 125.

80. School Trustees *v.* Schroll, 120 Ill. 509, 521, 12 N. E. 243, 60 Am. Rep. 575 [*cited* with approval in Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 484, 50 N. E. 1104, 53 L. R. A. 408 (*affirmed* in 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622), but *discredited* in Hardin *v.* Jordan, 140 U. S. 371, 385, 11 S. Ct. 808, 35 L. ed. 428].

81. French *v.* Carhart, 1 N. Y. 96, 107 [*quoted* in Western Pac. R. Co. *v.* Southern Pac. Co., 151 Fed. 376, 398, 80 C. C. A. 606].

Used synonymously with "river" see Western Pac. R. Co. *v.* Southern Pac. Co. 151 Fed. 376, 398, 80 C. C. A. 606 (holding that in Cal. Civ. Code (1873), § 1014, relating to alluvion upon a "river" or "stream," stream is used "in the same sense as river" —that is, with reference to running water, and not lakes, bays, arms of the sea, or other large bodies of waters—"and as a more comprehensive term"); Rolle *v.* Whyte, L. R. 3 Q. B. 286, 305, 8 B. & S. 116, 37 L. J. Q. B. 105, 17 L. T. Rep. N. S. 560, 16 Wkly. Rep. 593 (holding the words synonymous as used in 24 & 25 Vict. c. 109, §§ 27, 28).

a current of water, a body of flowing water;[82] a current of water, a body of water having a continuous flow in one direction;[83] a word frequently used to

82. Black L. Dict. [*quoted* in Johnson *v.* State, 114 Ga. 790, 791, 40 S. E. 807].

83. Bouvier L. Dict. [*quoted* in Johnson *v.* State, 114 Ga. 790, 791, 40 S. E. 807].

Not applicable to mere tidal inlet.—"The term 'stream of water' . . . would hardly be understood to describe a creek or inlet, in which the tide ebbs and flows, twice in each day, on the same level." Murdock *v.* Stickney, 8 Cush. (Mass.) 113, 117.

Distinguished from "lake" and "pond."—"The controlling distinction between a stream and a pond or lake is, that in the one case the water has a natural motion, — a current, — while in the other the water is, in its natural state, substantially at rest." School Trustees *v.* Schroll, 120 Ill. 509, 521, 12 N. E. 243, 60 Am. Rep. 575 [*cited* with approval in Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 484, 50 N. E. 1104, 53 L. R. A. 408 (*affirmed* in 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622), but *discredited* in Hardin *v.* Jordan, 140 U. S. 371, 385, 11 S. Ct. 808, 35 L. ed. 428]. A body of water five or six miles long and in some places a mile wide, fed by springs and having, in its natural state, no current, is a lake, and cannot be held a stream merely because, for a portion of the year, some water flows from it through a slough to a river, that being the only connection with any stream. School Trustees *v.* Schroll, *supra*. A body of water shaped like a bowl of a spoon, sixteen feet deep in places and fourteen feet deep at the outlet, fed by two small streams, one of which loses identity as a stream before reaching it, having a gentle, perceptible movement toward the outlet, but no current and no thread, is not the widening or spreading of a stream, nor the confluence of two streams, and possesses none of the characteristics of a stream. It is a pond, and not a stream of water. Gouverneur *v.* National Ice Co., 57 Hun (N. Y.) 474, 477, 11 N. Y. Suppl. 87 [*reversed*, but on the ground that the grant of land upon a pond or lake small enough to be private property gives title as far as its central line, in 134 N. Y. 355, 31 N. E. 865, 30 Am. St. Rep. 669, 18 L. R. A. 695].

Not applicable to a great lake.—"The word 'stream,' so far as we are advised, has never been held to include the waters of a great lake like Lake Michigan. If the word can be applied to a large body of water like Lake Michigan it may also be applied to the ocean." Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 484, 50 N. E. 1104, 53 L. R. A. 408 [*affirmed* in 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622].

Classes of streams.—"Streams of water have been divided into several distinct classes. 1. Arms of the sea, in which the tide ebbs and flows. These belong to the public. 2. Streams which are navigable for vessels, boats, lighters, and as it has also been held, for rafts. In these the people have the right of eminent domain for the purposes of navigation and commerce; and the riparian owner has only a qualified right to the bed of the stream, and the water which flows over it, subordinate to the superior rights of the public. To this class may, perhaps, be added such streams as have been declared by statute to be public highways. 3. Streams which are so small, shallow or rapid, as 'not to afford a passage for the king's people,' as Lord Hale expresses it; such streams as are not navigable for boats or vessels or rafts. These are altogether private property. The Hudson river has been said to furnish an example of each of these classes of streams, in different parts of its course." Munson *v.* Hungerford, 6 Barb. (N. Y.) 265, 269.

Three constituents.—"A stream or water course consists of bed, banks and water." Miller *v.* Black Rock Springs Imp. Co., 99 Va. 747, 756, 40 S. E. 27, 86 Am. Rep. 924.

Percolating water is not a stream. McNab *v.* Robertson, [1897] A. C. 129, 134, 61 J. P. 468, 66 L. J. P. C. 27, 75 L. T. Rep. N. S. 666 (where it is further said that the insertion of a common rubble or other agricultural drain, while it tends to accelerate percolation, does not constitute a stream); Taylor *v.* St. Helens, 6 Ch. D. 264, 273, 274, 46 L. J. Ch. 857, 37 L. T. Rep. N. S. 253, 25 Wkly. Rep. 885 (where it is said that the word has been held not to include the percolation of water below ground, and held that the words "cleanse, open, and repair springs or streams of water," as used in a grant of an easement, "obviously refer to definite springs or streams," and not to percolating water).

"Surface streams" and "subterranean streams," described in their connection with relative rights of riparian owners, "flow in a permanent, distinct and well-defined channel from the lands of one to those of another," as distinguished from "surface waters" — however originating — "which, without any distinct or well-defined channel, by attraction, gravitation or otherwise, are shed and pass from the lands of one proprietor to those of another," and "subsurface waters which, without any permanent, distinct or definite channel, percolate in mere veins, ooze, or filter from the lands of one owner to the lands of another." Frazier *v.* Brown, 12 Ohio St. 294, 298 [*quoted* in Tampa Waterworks Co. *v.* Cline, 37 Fla. 586, 593, 20 So. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Miller *v.* Black Rock Springs Imp. Co., 99 Va. 747, 751, 40 S. E. 27, 86 Am. St. Rep. 924].

Size immaterial.—"The flowing rivulet of but a few inches in width is a stream as certainly as the Mississippi." School Trustees *v.* Schroll, 120 Ill. 509, 521, 12 N. E. 243, 60 Am. Rep. 575 [*cited* with approval in Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 484, 50 N. E. 1104, 53 L. R. A. 408 (*affirmed* in 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622), but *discredited* in Hardin *v.* Jordan, 140 U. S. 371, 385, 11 S. Ct. 808, 35 L. ed. 428].

Conversion to sewer.—A natural stream may by use gradually have become a sewer, subject to use as such, and not protected as a stream of water from pollution. Falconer

signify running water at places where its flow is rapid, as distinguished from a sluggish current in other places;[84] in its ordinary signification, a body of running water, a continuous current;[85] in its primary and natural sense, a body of water, having, as such body, a continuous flow in one direction;[86] primarily, a course of running water, a river, rivulet or brook;[87] second, a steady current in a river or in the sea, especially in the most rapid part of a current or tide, as the Gulf Stream; third, a flow; a flowing; that which flows; fourth, anything issuing from a source and moving or flowing continuously; fifth, a continued course or current;[88] in another and more technical use, the volume of water of a river, rivulet or brook, as distinguished from the banks and bed;[89] technically, in law, water which runs in a defined course so as to be capable of division.[90] (Stream: In General, see WATERS. As Boundary, see BOUNDARIES, 5 Cyc. 894, 899 text and note 18, 900 text and note 22, 902, 903 note 35, 904. Bank of, see BANK, 5 Cyc. 226; BOUNDARIES, 5 Cyc. 903, 904; RIPA, 34 Cyc. 1790; SHORE, *ante*, p. 432. Bed of, see BED, 5 Cyc. 678 text and notes 42–46; RIVER BED, 34 Cyc. 1793. Brook, see BOUNDARIES, 5 Cyc. 903 note 35. Canal — In General, see, generally, CANALS, 6 Cyc. 267; Diversion or Blocking of Stream by Canal Company, see CANALS, 6 Cyc. 273; Use of Stream as Part of Canal, see CANALS, 6 Cyc. 274 note 38. Collisions on — In General, see generally, COLLISION, 7 Cyc. 299; Steering and Sailing Rules in Narrow Channels, see COLLISION, 7 Cyc. 362. Construction of Word as Used in Statute Authorizing Bridge Building, see BRIDGES, 5 Cyc. 1064 note 51. Creek as, see CREEK, 12 Cyc. 66 text and note 4. Dams, see DAM, 12 Cyc. 393; DIKE, 14 Cyc. 289; MILLS, 27 Cyc. 510, 512 text and note 28. Diversion of — By Canal Company, see CANALS, 6 Cyc. 273; Defined, see DIVERSION OF STREAM, 14 Cyc. 552. Drains — In General, see, generally, DRAINS, 14 Cyc. 1018; As Cause of Municipal Liability, see MUNICIPAL CORPORATIONS, 28 Cyc. 1312; As Subjects of Municipal Management, see MUNICIPAL CORPORATIONS, 28 Cyc. 917; Straightening and Widening of Natural Streams For Drainage, see DRAINS, 14 Cyc. 1052. Head of, see BOUNDARIES, 5 Cyc. 903 note 35. Logs Driven, Floated, or Rafted, see LOGGING, 25 Cyc. 1566. Navigable, see LOGGING, 25 Cyc. 1566 text and notes 5, 6; and, generally, NAVIGABLE WATERS, 29 Cyc. 285. Negligence With Regard to, Question of Attractiveness to Children, see NEGLI-

v. South Shields, 11 T. L. R. 223, 224 [*distinguished* in West Riding of Yorkshire's River Bd. *v.* Preston, 92 L. T. Rep. N. S. 24, 26; West Riding of Yorkshire's River Bd. *v.* Reuben Garnett & Sons, Ltd., 19 T. L. R. 140, 141, both holding that the mere act of polluting with sewage a watercourse otherwise pure will not make it legally a sewer].

"Implies a continuous current in one direction." Murdock *v.* Stickney, 8 Cush. (Mass.) 113, 117 [*quoted* in Western Pac. R. Co. *v.* Southern Pac. Co., 151 Fed. 376, 398, 80 C. C. A. 606].

Not necessarily running, where the word is used in a statute requiring a liberal construction to the contrary see Long *v.* Boone County, 36 Iowa 60, 64, construing a statute authorizing county judges to cause the erection of bridges over streams.

In the port of New York.— The word, as used in Laws (1850), c. 72, p. 81, relating to harbor masters of the port of New York, "embraces all the waters of the East and North rivers, lying within the limits of the city, and the wharves thereof. It applies to no particular part within these limits; and in contemplation of the statute, a vessel fastened to one of the wharves, is in the stream as fully as a vessel lying in the centre of the river." Adams *v.* Farmer, 1 E. D. Smith (N. Y.) 588, 589.

84. McNab *v.* Robertson, [1897] A. C. 129, 134, 61 J. P. 468, 66 L. J. P. C. 27, 75 L. T. Rep. N. S. 666.

85. Johnson *v.* State, 114 Ga. 790, 792, 40 S. E. 807.

86. McNab *v.* Robertson, [1897] A. C. 129, 134, 61 J. P. 468, 66 L. J. P. C. 27, 75 L. T. Rep. N. S. 666 [*quoted* in Miller *v.* Black Rock Springs Imp. Co., 99 Va. 747, 757, 40 S. E. 27, 86 Am. St. Rep. 924].

87. Century Dict. [*quoted* in Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 484, 50 N. E. 1104, 53 L. R. A. 408 (*affirmed* in 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622); Dodge County *v.* Saunders County, (Nebr. 1904) 100 N. W. 934, 935 (where it was further stated that "all rivers and brooks are streams and have currents"); Western Pac. R. Co. *v.* Southern Pac. Co., 151 Fed. 376, 398, 80 C. C. A. 606].

88. Century Dict. [*quoted* in Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, 484, 50 N. E. 1104, 53 L. R. A. 408 (*affirmed* in 176 U. S. 646, 20 S. Ct. 509, 44 L. ed. 622)].

89. See Dodge County *v.* Saunders County, (Nebr. 1904) 100 N. W. 934.

90. Taylor *v.* St. Helens, 6 Ch. D. 264, 273, 46 L. J. Ch. 857, 37 L. T. Rep. N. S. 253, 25 Wkly. Rep. 885 [*quoted* in New Hamburg Village *v.* Waterloo County, 22 Ont. 193, 202].

GENCE, 29 Cyc. 464. Thread of — As Boundary, see BOUNDARIES, 5 Cyc. 902, 904; Defined, see BOUNDARIES, 5 Cyc. 902; THREAD. See also CHANNEL, 6 Cyc. 981; DITCH, 14 Cyc. 552; FLOOD, 19 Cyc. 1080; FLOWING LANDS, 19 Cyc. 1081; FRESHET, 25 Cyc. 849; RIPARIAN, 34 Cyc. 1790, and Cross-References Thereunder; RIVER, 34 Cyc. 1792; RIVER FRONT, 34 Cyc. 1793; and, generally, BRIDGES, 5 Cyc. 1049; FERRIES, 19 Cyc. 491; LEVEES, 25 Cyc. 188; WHARVES.)

STREET. See STREETS AND HIGHWAYS.

STREET BROKERS. A name often applied to bill brokers; the agents and go-betweens of others by whom the discount of bills in the street for an enormous usury is effected, receiving therefor a regular commission.[91] (See FACTORS AND BROKERS, 19 Cyc. 186.)

STREET-CAR. A word which has been held not necessarily to include a "trailer" or car without a motor, where the context would render such inclusion unreasonable.[92] (Street-Car: Carrier, Duty and Liability to Passengers — Care in Cases of Boarding or Alighting, see CARRIERS, 6 Cyc. 615; Liability For Personal Injury, see CARRIERS, 6 Cyc. 595; Transfers, see CARRIERS, 6 Cyc. 584. Companies in General, see, generally, STREET RAILROADS. Companies, Liability For Injuries to Servants — How Affected by Railroad Employee Statute, see MASTER AND SERVANT, 26 Cyc. 1370; Selection of Cars For Use, see MASTER AND SERVANT, 26 Cyc. 1331 note 45. See also CAR, 6 Cyc. 350; TRAILER.)

STREET COMMISSIONER. As used in certain local statutes, an officer charged with the powers and duties of highway surveyors, except as enlarged by the greater necessities of a larger municipality.[93] (See MUNICIPAL CORPORATIONS, 28 Cyc. 556; and, generally, OFFICERS, 29 Cyc. 1356; STREETS AND HIGHWAYS.)

STREET IMPROVEMENT. A term which has been held not to apply to operations existing in the improvement of a thing which, although it passes or crosses the same ground, is not a part of the street itself, or to repairs in the street itself, necessitated by the defective condition of such things, or the repair or improvement of such things.[94] (Street Improvement: Municipal Public Improvements, Generally, Including Street Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 941–1256. Right to Jury Trial on Scire Facias For Enforcing Municipal Lien For Street Assessments, see JURIES, 24 Cyc. 130 note 17. Statutes Directing Return of Payments of Assessment, see CONSTITUTIONAL LAW, 8 Cyc. 811 note 36. See, generally, STREETS AND HIGHWAYS.)

91. See Com. *v.* Holmes, 11 Pa. St. 468, 470, adding: "These brokers have offices, but when bills or notes are put into their hands to sell, they traverse the streets in pursuit of purchasers, and from their experience they generally know where to find them."

92. See Von Diest *v.* San Antonio Traction Co., 33 Tex. Civ. App. 577, 579, 77 S. W. 632, holding that an ordinance prohibiting the operation upon any public street of any "street car" without a fender does not apply to a car without a motor, the latter not needing a fender.

93. Eaton *v.* Burke, 66 N. H. 306, 309, 22 Atl. 452, defining the term as used in Laws (1889), c. 248, and Laws (1878), c. 165, § 11, relating to the city of Nashua, as used in Nashua Charter, § 22, adding: "The office existed in England before the settlement of this state."

94. See Clay *v.* Grand Rapids, 60 Mich. 451, 454, 456, 27 N. W. 596, holding that where a break in a waterway used for drainage and other purposes, crossing a street diagonally sixteen feet below the surface, resulted in a caving of the street which interfered with passage thereon, and a city council resolved to reconstruct the drain under the street upon a plan which involved grading, leveling, repairing, and graveling of the street, and the construction of bridges, culverts and paved gutters therein, characterized by the resolution as "a necessary public improvement," such work was not a "street improvement," and not to be assessed entirely to owners abutting upon the street front along the course of operations.

Under the Hoboken charter "street improvements and building sewers are different things." Hoboken *v.* Harrison, 30 N. J. L. 73, 79.

STREET RAILROADS

By Henry H. Skyles,* Stanley A. Hackett,† and Edward C. Ellsbree ‡

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† Joint author of "Religious Societies," 34 Cyc. 1112.
‡ Author of "Inspection," 22 Cyc. 1363; "Novation," 29 Cyc. 1129; "Obscenity," 29 Cyc. 1314; "Piracy," 30 Cyc. 1626; "Post-Office," 31 Cyc. 970; "Salvage," 35 Cyc. 716. Joint author of "Religious Societies," 34 Cyc. 1112.

CROSS-REFERENCES

For Matters Relating to:

Condemnation of Property, see EMINENT DOMAIN, 15 Cyc. 543.

Constitutionality of Legislation Affecting Street Railroads, see CONSTITUTIONAL LAW, 8 Cyc. 695.

Corporations Generally, see CORPORATIONS, 10 Cyc. 1.

Railroads, see RAILROADS, 33 Cyc. 1.

Street Railroad Company.

As Common Carrier, see CARRIERS, 6 Cyc. 352.

As Employer, see MASTER AND SERVANT, 26 Cyc. 941.

Taxation of Street Railroads in General, see TAXATION.

I. DEFINITION AND NATURE.*

A. Definition — **1. Of Street Railroad.** A street railroad or railway has been defined as a railroad or railway laid down upon roads or streets for the purpose of carrying passengers.[1] Ordinarily the chief characteristics of a street railroad are: That it is constructed upon and passes along streets and highways;[2] that it is usually constructed so as to conform to the grade of the street and so as not to interfere with the use of the street by pedestrians and vehicles;[3] that it is operated for the transportation of passengers from one point to another in a city or town, or to and from its suburbs;[4] that its cars run at short intervals,[5] at a moderate rate of speed as compared with the speed of commercial railroads,[6] and make frequent stops, particularly at street crossings to take on and leave off passengers;[7] and that primarily its business is confined to the transportation of passengers and not freight.[8] But in the light of the development in recent years of the equipment, operation, and use of street railroads,[9] it is not now con-

1. Montgomery *v.* Santa Ana Westminster R. Co., 104 Cal. 186, 189, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L. R. A. 654 [*quoting* Elliott Roads and Str. (2d ed.) 792].

Other definitions are: "A railway constructed upon streets and highways, and for the purpose of facilitating the use thereof in the transportation of persons and property." State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212.

A railway "on and along the streets of a city or town." Rahn Tp. *v.* Tamaqua, etc., St. R. Co., 167 Pa. St. 84, 90, 31 Atl. 472.

A tramway has been defined as a roadway with rails on which a vehicle with wheels can run. A street railway. English L. Dict.

2. Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Aurora *v.* Elgin, etc., Traction Co., 227 Ill. 485, 81 N. E. 544 [*reversing* 128 Ill. App. 77]; Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78; *In re* South Beach R. Co., 119 N. Y. 141, 23 N. E. 486.

A railroad not constructed upon or occupying streets at all, although operated like a street railroad, is not a street railroad. Baltimore *v.* Baltimore, etc., Pass. R. Co., 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503. Thus a passenger railway in a park where there are no streets is not a street railway. Philadelphia *v.* McManes, 175 Pa. St. 28, 34 Atl. 331.

3. *Florida.*— Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507.

Indiana.— Michigan Cent. R. Co. *v.* Hammond, etc., Electric R. Co., 42 Ind. App. 66, 83 N. E. 650.

Michigan.— Nichols *v.* Ann Arbor, etc., St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371.

Missouri.— Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78.

Pennsylvania.— Rahn Tp. *v.* Tamaqua, etc., St. R. Co., 167 Pa. St. 84, 31 Atl. 472.

United States.— Williams *v.* City Electric St. R. Co., 41 Fed. 556.

4. Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163; Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78; *In re* South Beach R. Co., 119 N. Y. 141, 23 N. E. 486; Williams *v.* City Electric St. R. Co., 41 Fed. 556.

Its fundamental purpose is to accommodate street travel and not travel beyond the city's limits. Aurora *v.* Elgin, etc., Traction Co., 227 Ill. 485, 81 N. E. 544 [*reversing* 128 Ill. App. 77].

5. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78; Williams *v.* City Electric St. R. Co., 41 Fed. 556.

6. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Williams *v.* City Electric St. R. Co., 41 Fed. 556.

7. *Florida.*— Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507.

Illinois.— Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163.

Indiana.— Michigan Cent. R. Co. *v.* Hammond, etc., Electric R. Co., 42 Ind. App. 66, 83 N. E. 650.

Michigan.— Nichols *v.* Ann Arbor, etc., St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371.

Missouri.— Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78.

United States.— Williams *v.* City Electric St. R. Co., 41 Fed. 556.

8. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163; Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78; Williams *v.* City Electric St. R. Co., 41 Fed. 556. See also Com. *v.* Northeastern Electric R. Co., 3 Pa. Dist. 104.

9. Street railroads came into use about the year 1850, being twenty years later in origin than steam roads. In New York one of the first street railroads was the outgrowth of an omnibus line, and differed from it only in the fact that it was confined to a track. So little did street railways figure, at that

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sidered essential that a railroad should strictly adhere to all of these characteristics in order to constitute it a street railroad, and if its primary purpose is to operate upon streets for the transportation of passengers to and from points in a city or town or its suburbs, it is none the less a street railroad because of the fact that it also operates beyond the city limits,[10] or between contiguous towns or cities as an interurban railroad,[11] or for a part of its route upon property other than streets or highways,[12] or even that it transports freight as a part of its business.[13] Whether

time, in the general activities of the country that no legislative authority was in existence for so much as their incorporation. Govin *v.* Chicago, 132 Fed. 848, 854 [*citing* 3 Cook Corp. par. 912, and *reversed* on other grounds in 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801]. "The street railway in its inception is a purely urban institution. . . . This strictly urban character of the street railways remained practically unchanged for many years. . . . Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street-car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances and connecting widely separated cities and villages, by using the country highways, and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country." Zehren *v.* Milwaukee Electric R., etc., Co., 99 Wis. 83, 96, 74 N. W. 538, 67 Am. St. Rep. 844, 41 L. R. A. 575.

10. Michigan Cent. R. Co. *v.* Hammond, etc., Electric R. Co., 42 Ind. App. 66, 83 N. E. 650.

The fact that a railroad becomes an interurban railroad when it leaves the city limits does not prevent it from being a street railroad within such limits. Jeffers *v.* Annapolis, (Md. 1907) 68 Atl. 361; Newell *v.* Minneapolis, etc., R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303.

Pennsylvania act of May 14, 1889, providing for the incorporation and government of street railway companies, does not limit the construction of such railways to streets and roads within boroughs or cities, but they may be constructed over township or county roads. Pennsylvania R. Co. *v.* Greensburg, etc., St. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839; Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 3 Pa. Dist. 58, 14 Pa. Co. Ct. 88; Conshohocken R. Co. *v.* Pennsylvania R. Co., 15 Pa. Co. Ct. 445.

11. Michigan Cent. R. Co. *v.* Hammond, etc., Electric R. Co., 42 Ind. App. 66, 83 N. E. 650, holding that a road is a street railroad where large double truck cars are operated over it through contiguous towns, nearly all the lines are within the corporate limits and no interstate cars are run, the lines are built throughout on public streets and highways, the cars stop at all street crossings and between such crossings where the distance is great or the convenience of passengers require it, and the tracks are maintained at a level with the streets. But see Zebren *v.* Milwaukee Electric R., etc., Co., 99 Wis. 83, 74 N. W. 538, 67 Am. St. Rep. 844, 41 L. R. A. 575, holding that an electric railway constructed under a charter authorizing it to carry passengers, merchandise, baggage, and mail, and running from city to city, is not a street railway so far as it passes over the highways of intervening country towns.

An interurban railway has been defined as a railway operated upon the streets of a city or town and which extends from within the corporate limits of one municipal corporation to and within the limits of another and embraces the entire system. Cedar Rapids, etc., R. Co. *v.* Cummins, 125 Iowa 430, 101 N. W. 176.

A railroad constructed in the country without regard to roads, for the transportation of persons from one city to another, is rural rather than urban, although it confines its business to carrying passengers only and is operated by a street railroad company. Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78.

Under Ohio Rev. St. § 2780-17, suburban and interurban railroads are classed as street railroads. Cincinnati, etc., Electric St. R. Co. *v.* Lohe, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637; Cincinnati, etc., St. R. Co. *v.* Cincinnati, etc., R. Co., 21 Ohio Cir. Ct. 391, 12 Ohio Cir Dec. 113; Hamilton *v.* C., etc., Electric St. R. Co., 8 Ohio S. & C. Pl. Dec. 174, 5 Ohio N. P. 457.

12. Matter of Syracuse, etc., R. Co., 33 Misc. (N. Y.) 510, 68 N. Y. Suppl. 881 (part of way over own property); Rahn Tp. *v.* Tamaqua, etc., St. R. Co., 167 Pa. St. 84, 31 Atl. 472.

13. State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212, holding that a company organized under the general laws for the purpose of constructing and

or not a certain railroad is a street railroad is not determined alone by the kind of rails it uses in its tracks,[14] or by its position in reference to the surface of the street;[15] or by the fact that its tracks are laid in and confined to the streets of a city;[16] but its character usually depends upon the purposes it fulfils, and if it is designed and used primarily for street passengers and for their reception and discharge along its route, it is a street railroad without regard to the method of construction or operation,[17] the kind of motive power used, whether animal or mechanical,[18] or whether it is constructed at grade,[19] or upon an overhead structure as in the case of an elevated railroad,[20] or with cuts and fills,[21] or is beneath the surface as in the case of a subway.[22]

2. Of Street Railroad Company. A street railroad company is a corporation by which a street railroad is conducted, maintained, and operated.[23]

operating a street railway has, in the absence of a statute prescribing its powers, corporate power to carry freight as well as passengers. See also Aycock *v.* San Antonio Brewing Assoc., 26 Tex. Civ. App. 341, 63 S. W. 953.

In New York under the General Railroad Law (Laws (1890), c. 565, § 90), allowing street surface railroads to convey "persons and property in cars for compensation," a street railroad company may operate cars designed and intended exclusively for carrying express matter, freight, or property, and used exclusively for that purpose. De Grauw *v.* Long Island Electric R. Co., 43 N. Y. App. Div. 502, 60 N. Y. Suppl. 163 [*affirmed* in 163 N. Y. 597, 57 N. E. 1108].

In Illinois, however, an electric railway company chartered under the general railway act, and by its charter authorized to operate between two cities and transport passengers, mail, express, and other matter is a commercial railroad and not a street railroad. Aurora *v.* Elgin, etc., Traction Co., 227 Ill. 485, 81 N. E. 544 [*reversing* 128 Ill. App. 77]; Spalding *v.* Macomb, etc., R. Co., 225 Ill. 585, 80 N. E. 327.

14. Nieman *v.* Detroit Suburban St. R. Co., 103 Mich. 256, 61 N. W. 519, holding that the use of a T rail by an electric railroad company does not determine that the railroad is commercial in character.

15. People's Rapid Transit R. Co. *v.* Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728 [*affirming* 10 N. Y. Suppl. 849]; *In re* New York Dist. R. Co., 107 N. Y. 42, 14 N. E. 187.

16. Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 61 Atl. 881.

17. Potts *v.* Quaker City El. R. Co., 2 Pa. Dist. 200, 12 Pa. Co. Ct. 593.

18. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Nichols *v.* Ann Arbor, etc., St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Clement *v.* Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355 (holding that a street railroad does not cease to be such because a grip cable is substituted for horses as the motive power); Potts *v.* Quaker City El. R. Co., 2 Pa. Dist. 200, 12 Pa. Co. Ct. 593; Williams *v.* City Electric St. R. Co., 41 Fed. 556.

A dummy railroad operated on a street by means of a steam-engine and coaches is on the line between a street railroad and a commercial railroad. East End St. R. Co. *v.* Doyle, 88 Tenn. 747, 13 S. W. 936, 17 Am. St. Rep. 933, 9 L. R. A. 100.

A horse railroad is a street railroad as a general rule. Briggs *v.* Lewiston, etc., R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788. See also Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324.

19. Potts *v.* Quaker City El. R. Co., 2 Pa. Dist. 200, 12 Pa. Co. Ct. 593.

20. Potts *v.* Quaker City El. R. Co., 2 Pa. Dist. 200, 12 Pa. Co. Ct. 593. *Compare* Com. *v.* Northeastern El. R. Co., 161 Pa. St. 409, 29 Atl. 112 [*reversing* 3 Pa. Dist. 104].

An elevated passenger railway is one built upon a structure high enough to allow the ordinary traffic of the street to go on without serious obstructions, and devoted solely to the carrying of passengers, and operating frequent trains which stop at stations not far apart and upon which a uniform fare is charged. Com. *v.* Northeastern El. R. Co., 3 Pa. Dist. 104.

21. Dietz *v.* Cincinnati, etc., Traction Co., 6 Ohio S. & C. Pl. Dec. 513, 4 Ohio N. P. 399, holding that a railroad on a highway does not cease to be a street railroad because some cutting and some fills have been made, if the top of the rail is generally on the grade of the highway.

22. *In re* New York Dist. R. Co., 107 N. Y. 42, 14 N. E. 187 [*affirming* 42 Hun 621] (holding that an underground railway in a city or village following the line of the streets is a street railway); Potts *v.* Quaker City El. R. Co., 2 Pa. Dist. 200, 12 Pa. Co. Ct. 593.

An underground tunnel railroad with a large portion of its route beneath a river, and much of it built on private property, is not a street railroad. New York, etc., R. Co. *v.* O'Brien, 121 N. Y. App. Div. 819, 106 N. Y. Suppl. 909 [*affirmed* in 192 N. Y. 558, 85 N. E. 1113]; Sparks *v.* Philadelphia, etc., R. Co., 212 Pa. St. 105, 51 Atl. 881.

23. Holland *v.* Lynn, etc., R. Co., 144 Mass. 425, 427, 11 N. E. 674, statutory definition.

A traction motor company which operates a street railroad and leases the franchises of various railway companies and operates them on its own account exercises the franchises of a street railway company and enjoys the privileges granted to and becomes subject to

B. Nature and Status — 1. Of Street Railroad. A street railroad is a public utility and is peculiarly an institution for the accommodation of people in cities and towns,[24] although it cannot be considered strictly a street improvement.[25] Street railroad tracks constructed and operated in the streets of a city are merely a part of the highway, furthering the identical use of travel for which the streets were established.[26]

2. Of Street Railroad Company. A street railroad company is a common carrier of passengers,[27] and is a quasi-public corporation;[28] but at the same time, notwithstanding it is given corporate existence to enable it to provide the means of rapid transportation for the convenience of the people and the promotion of the public welfare,[29] it is a private enterprise subject to such restrictions and regulations as the statutes may prescribe and the municipality is authorized to impose.[30]

3. Distinguished From Other Railroads. The terms "railroad" and "railway" are synonymous and are generally used interchangeably,[31] unless it appears from the connection in which one term or the other is used that a particular kind of road is intended.[32] Technically speaking, the term "railroad" is broad enough to include a street railroad, so far as its road-bed is made of iron or steel rails for wheels of cars to run upon;[33] but there is a clear distinction between an ordinary commercial railroad and a street railroad;[34] and when there is doubt as to the true meaning of the term "railroad" or "railway," the legislative intent is to be determined from the general legislation upon the subject-matter, and may or may not include a street railroad according to the purpose and intention of the particular statute or ordinance.[35] The distinction between a street railroad and an ordinary com-

the liabilities imposed by law upon such companies. Philadelphia *v.* Philadelphia Traction Co., 206 Pa. St. 35, 55 Atl. 762.

24. Detroit *v.* Detroit United R. Co., 133 Mich. 608, 95 N. W. 736; Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78; Heilman *v.* Lebanon, etc., St. R. Co., 180 Pa. St. 627, 37 Atl. 119, 175 Pa. St. 188, 34 Atl. 647].

25. Cleveland *v.* Cleveland City R. Co., 23 Ohio Cir. Ct. 373. *Compare* Atty.-Gen. *v.* Pingree, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407, holding that street railroads are works of internal improvement.

26. State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506.

27. South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114; North Chicago Electric R. Co. *v.* Peuser, 190 Ill. 67, 60 N. E. 78; Thompson-Houston Electric Co. *v.* Simon, 20 Oreg. 60, 25 Pac. 147, 23 Am. St. Rep. 86, 10 L. R. A. 251. See also Carriers, 6 Cyc. 535 text and note 14.

28. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Cameron *v.* Lewiston, etc., St. R. Co., 103 Me. 482, 70 Atl. 534, 125 Am. St. Rep. 315, 18 L. R. A. (N. S.) 497; Amesbury *v.* Citizens' Electric St. R. Co., 199 Mass. 394, 85 N. E. 419, 19 L. R. A. N. S. 865.

29. North Chicago Electric R. Co. *v.* Peuser, 190 Ill. 67, 60 N. E. 78; Cleveland *v.* Cleveland City R. Co., 23 Ohio Cir. Ct. 373.

30. Cleveland *v.* Cleveland City R. Co., 23 Ohio Cir. Ct. 373. See also *infra*, X, A.

31. Mobile Light, etc., Co. *v.* MacKay, 158 Ala. 51, 48 So. 509; Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208; Philadelphia *v.* Philadelphia Traction Co., 206 Pa. St. 35, 55 Atl. 762; Gyger *v.* Philadelphia City Pass. R. Co., 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369. See also Railroads, 33 Cyc. 33.

32. Philadelphia *v.* Philadelphia Traction Co., 206 Pa. St. 35, 55 Atl. 762; Gyger *v.* Philadelphia City Pac. R. Co., 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369.

The word "railway" may include railroads operated by steam as well as those whose cars are propelled by some other power, yet it is common knowledge that such corporations as belong to the latter class are usually operated as street railways for local convenience. Thompson-Houston Electric Co. *v.* Simon, 20 Oreg. 60, 25 Pac. 147, 23 Am. St. Rep. 86, 10 L. R. A. 251.

33. Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208. But see Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175.

34. Harvey *v.* Aurora, etc., R. Co., 174 Ill. 295, 51 N. E. 163; State *v.* Duluth St. R. Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212; Shipley *v.* Continental R. Co., 13 Phila. (Pa.) 128.

A "railroad" and a "street railroad," or way, are, in both their technical and popular import, as distinct and different things as "a road" and "a street," or as "a bridge" and "a railroad bridge." Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175; Front St. Cable R. Co. *v.* Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693.

35. *Florida.*— Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507.

mercial railroad is not in the motive power used,[36] but is in the manner of construction and operation.[37] It has been held that the distinctive and essential feature of a street railroad, considered in relation to other railroads, is that it is a railroad for the transportation of passengers and not of freight;[38] but under the

Georgia.—Hill *v.* Rome St. R. Co., 101 Ga. 66, 28 S. E. 631, holding that a city ordinance which by its terms relates exclusively to railroads upon which cars are moved by locomotives propelled by steam and which regulate the running, speed, and engines within the city's limits has no application to a street railroad.

Illinois.— Chicago *v.* Evans, 24 Ill. 52.

Iowa.— Fidelity L. & T. Co. *v.* Douglas, 104 Iowa 532, 73 N. W. 1039.

Minnesota.— Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208.

Missouri.— Riggs *v.* St. Francois County R. Co., 120 Mo. App. 335, 96 S. W. 707.

Pennsylvania.— Cheetham *v.* McCormick, 178 Pa. St. 186, 35 Atl. 631 (holding that street railway companies are included in a statutory provision against railroad corporations issuing stock for less than its par value); Norristown Pass. R. Co. *v.* Citizens Pass. R. Co., 3 Montg. Co. Rep. 119 (holding that a statute authorizing one railroad to connect with another does not apply to street railways).

United States.— Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46; Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324.

See 44 Cent. Dig. tit. "Street Railroads," § 7. See also RAILROADS, 33 Cyc. 34.

According to common popular usage the word "railroad," without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads, used for the transportation of both passengers and freight, and whenever street railroads are referred to the word "street" is prefixed. State *v.* Duluth St. R. Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; Funk *v.* St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. Rep. 608, 29 L. R. A. 208. But it has been held that when either of the words, "railroad" or "railway," is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used. Gyger *v.* Philadelphia City Pass. R. Co., 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369.

The term "railroad" includes a street railroad within the meaning of a statute extending a mechanic's lien law to "any railroad." Egan *v.* Cheshire St. R. Co., 78 Conn. 291, 61 Atl. 950. But see Massillon Bridge Co. *v.* Cambria Iron Co., 59 Ohio St. 179, 52 N. E. 192.

An elevated steam railroad is not a street railway within the meaning of a statute providing for the compensation of owners of roads abutting on a street in which a railway, but not a street railway, may be laid. Freiday *v.* Sioux City Rapid Transit Co., 92 Iowa 191, 60 N. W. 656, 26 L. R. A. 246.

36. Diebold *v.* Kentucky Traction Co., 117 Ky. 146, 77 S. W. 674, 25 Ky. L. Rep. 1275, 11 Am. St. Rep. 230, 63 L. R. A. 637; Briggs *v.* Lewiston, etc., Horse R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Williams *v.* City Electric St. R. Co., 41 Fed. 556.

37. Diebold *v.* Kentucky Traction Co., 117 Ky. 146, 77 S. W. 674, 25 Ky. L. Rep. 1275, 11 Am. St. Rep. 230, 63 L. R. A. 637; Briggs *v.* Lewiston, etc., Horse R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212; Williams *v.* City Electric St. R. Co., 41 Fed. 556.

The distinction between street railroads and ordinary commercial railroads is discussed in the following cases: Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Bloxham *v.* Consumers' Electric Light, etc., R. Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Ecorse Tp. *v.* Jackson, etc., R. Co., 153 Mich. 393, 117 N. E. 89; Rische *v.* Texas Transp. Co., 27 Tex. Civ. App. 33, 66 S. W. 324. The track of a commercial railroad in a street is generally so laid as to exclude vehicles from passing along it, and from crossing, except at places specially provided, and in its operation the running of the trains drives traffic from the street and intends to destroy the use for which the street is required, while a street railroad is so constructed and operated as not to destroy but to facilitate the use of the street. Canastota Knife Co. *v.* Newington Tramway Co., *supra*; State *v.* Dayton Traction Co., etc., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212. So a street railroad is local, derives its business from the street along which it is operated, and is in aid of local travel on those streets, while on the other hand a commercial railroad usually derives its business either directly or indirectly through connecting roads from a large area of territory and not from the travel on the streets of those cities along which it happens to be constructed and operated. State *v.* Duluth St. R. Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

38. Montgomery *v.* Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 43 Am. St. Rep. 89, 25 L. R. A. 654; Aurora *v.* Elgin, etc., Traction Co., 227 Ill. 485, 81 N. E. 544 [*reversing* 128 Ill. App. 77]; Spalding *v.* Macomb, etc., R. Co., 225 Ill. 585, 80 N. E. 327; Louisville, etc., R. Co. *v.* Louisville City R. Co., 2 Duv. (Ky.) 175; Hannah *v.* Metropolitan St. R. Co., 81 Mo. App. 78; Thompson-Houston Electric Co. *v.* Simon, 20 Oreg. 60, 25 Pac. 147, 23 Am. St. Rep. 86, 10 L. R. A. 251; Scott *v.* Farmers', etc., Nat. Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

recent development of street railroads, it has been held that there is no such inherent distinction.[39]

II. RIGHT TO CONSTRUCT AND OPERATE.*

A. Nature of Right. The right to construct and operate a street railroad upon and along the streets of a municipality is a franchise, which must be derived from legislative authority,[40] and which, in the absence of constitutional restrictions, may be conferred directly by the legislature,[41] or by a municipality pursuant to authority delegated by the legislature, but not otherwise.[42] When accepted, the grant of a street railroad franchise or license constitutes a contract,[43] and the franchise itself is real property, being in the nature of an easement and classified as an incorporeal hereditament.[44]

39. State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212.

40. *Colorado.*— Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

Illinois.— Goddard *v.* Chicago, etc., R. Co., 202 Ill. 362, 66 N. E. 1066 [*affirming* 104 Ill. App. 526].

Missouri.— State *v.* East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742, 38 L. R. A. 218.

New York.— Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186.

Ohio.— State *v.* Columbus R. Co., 24 Ohio Cir. Ct. 609.

Texas.—San Antonio *v.* Rische, (Civ. App. 1896) 38 S. W. 388.

See 44 Cent. Dig. tit. "Street Railroads," §§ 31, 32.

Franchises defined see FRANCHISES, 19 Cyc. 1452.

Secondary franchises.— The rights of a street railroad company in the streets of a city, derived by permit, license, or contract with the city, have been held to be not franchises, but "secondary franchises," that is to say, instrumentalities by which the corporate powers granted by the charter may be exercised. Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457.

When traffic agreement only.— A privilege or license, granted for a consideration, to operate cars upon tracks belonging to the city is a mere traffic agreement and not a franchise. Schinzel *v.* Best, 45 Misc. (N. Y.) 455, 92 N. Y. Suppl. 754 [*affirmed* in 109 N. Y. App. Div. 917, 96 N. Y. Suppl. 1145].

In Illinois the rights of a street railroad company which are derived from a municipality and not from the state are considered as mere licenses and not franchises. Blocki *v.* People, 220 Ill. 444, 77 N. E. 172; Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Metropolitan City R. Co. *v.* Chicago West Div. R. Co., 87 Ill. 317; Chicago City R. Co. *v.* People, 73 Ill. 541; Potter *v.* Calumet Electric St. R. Co., 158 Fed. 521.

The fact that an ordinance is called a franchise, and is couched in terms frequently used in granting franchises, is not conclusive as to its character; but where it bears nearly all the marks usually borne by street railroad franchise ordinances, and exacts an expensive service to be rendered to the city and its citizens, it will be construed as such. State *v.* Milwaukee, etc., R. Co., 116 Wis. 142, 92 N. W. 546.

A statute which only confirms and regulates franchises previously possessed by another company, and which does not give any new authority to lay tracks, does not confer a new franchise. *In re* New York El. R. Co., 70 N. Y. 327 [*followed* in Mattlage *v.* New York El. R. Co., 14 Daly 1].

41. See MUNICIPAL CORPORATIONS, 28 Cyc. 289.

42. See MUNICIPAL CORPORATIONS, 28 Cyc. 866, 868.

43. *Arkansas.*— Little Rock R., etc., Co. *v.* North Little Rock, 76 Ark. 48, 88 S. W. 826, 1026.

Illinois.— Harvey *v.* Aurora, etc., R. Co., 186 Ill. 283, 57 N. E. 857.

Indiana.— Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 25 Am. St. Rep. 462, 10 L. R. A. 770; Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Indianapolis, etc., R. Co. *v.* New Castle, 43 Ind. App. 467, 87 N. E. 1067; Columbus St. R., etc., Co. *v.* Columbus, 43 Ind. App. 265, 86 N. E. 83.

Missouri.— State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361.

New York.— New York *v.* New York City R. Co., 193 N. Y. 543, 86 N. E. 565.

West Virginia.— Wheeling, etc., R. Co. *v.* Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. N. S. 321.

Wisconsin.—Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47.

United States.— Chicago *v.* Sheldon, 9 Wall. 50, 19 L. ed. 594; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Africa *v.* Knoxville, 70 Fed. 729; Coast Line R. Co. *v.* Savannah, 30 Fed. 646.

See 44 Cent. Dig. tit. "Street Railroads," §§ 31, 32.

Impairment of obligation of contract: By regulation as to paving see *infra*, VII, D, 1, b. By repeal or revocation of grant see *infra*, III, E, 3, a.

44. O'Sullivan *v.* Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; Thompson *v.* Schenec-

* II-VI, by Stanley A. Hackett.

B. Who May Exercise. Corporations formed for the purpose of constructing and operating street railroads [45] may exercise that right upon the streets of a municipality when duly authorized by the state, either directly or through the agency of a municipality,[46] and, although this right to construct, maintain, and operate a street railroad is most frequently conferred on such corporations it may be conferred on, and exercised by, natural persons, acting either individually,[47] or as a partnership,[48] except where the statutes authorizing the granting of such a right are applicable to corporations only.[49] In some jurisdictions municipal corporations are authorized by constitutional or statutory provisions to construct and own street railroads,[50] or to assume the ownership of existing street

tady R. Co., 124 Fed. 274; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Africa *v.* Knoxville, 70 Fed. 729; Detroit Citizens' St. R. Co. *v.* Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667 [*reversing* 56 Fed. 867, and 60 Fed. 161]. See also New York Underground R. Co. *v.* New York, 116 Fed. 952 [*affirmed* in 193 U. S. 416, 24 S. Ct. 494, 48 L. ed. 733]; and FRANCHISES, 19 Cyc. 1460.

A grant, unlimited as to time, is not a license, but the conveyance of an estate in perpetuity. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255.

Distinguished from tangible property.—The franchise, while it is property, is separate and distinct from the tangible property used in the operation of the road; the city, by granting the franchise, does not become the owner of the tangible property used in the operation of the railroad, nor, unless the ordinance granting the franchise so expressly provides, can it become such owner by the forfeiture or termination by limitation of the franchise. Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

45. Incorporation of street railroad company see *infra*, III, A.

46. See *supra*, II, A.

47. New York, etc., R. Co. *v.* Forty-Second St., etc., R. Co., 50 Barb. (N. Y.) 309, 32 How. Pr. 481; *In re* Kerr, 42 Barb. (N. Y.) 119; Henderson *v.* Ogden City R. Co., 7 Utah 199, 26 Pac. 286; Watson *v.* Fairmont, etc., R. Co., 49 W. Va. 528, 39 S. E. 193. And see Budd *v.* Multnomah St. R. Co., 15 Oreg. 413, 15 Pac. 659, 3 Am. St. Rep. 169.

48. O'Neil *v.* Lamb, 53 Iowa 725, 6 N. W. 59; Nash *v.* Lowry, 37 Minn. 261, 33 N. W. 787.

49. Wilder *v.* Aurora, etc., Electric Traction Co., 216 Ill. 493, 75 N. E. 194; Goddard *v.* Chicago, etc., R. Co., 202 Ill. 362, 66 N. E. 1066 [*affirming* 104 Ill. App. 526]; Phœnix *v.* Gannon, 123 N. Y. App. Div. 93, 108 N. Y. Suppl. 255 [*reversing* 55 Misc. 606, 106 N. Y. Suppl. 927]. And see San Antonio *v.* Rische, (Tex. Civ. App. 1896) 38 S. W. 388.

Transfer by individual grantee to corporation.—Where, by statute, an individual cannot be authorized to construct and operate a street railroad, he may nevertheless acquire the right by purchase, and transfer it unimpaired to a corporation which is capable of exercising the franchise. Trojan R. Co. *v.* Troy, 125 N. Y. App. Div. 362, 109 N. Y. Suppl. 779 [*affirmed* in 195 N. Y. 614, 89 N. E. 1113].

An ordinance granting a franchise to certain persons and authorizing them, no matter how small their number, to become incorporated at any time, under the general railroad act, although the road may have been previously constructed, is void, where the act itself does not allow an incorporation after completion of a road, or of a less number than twenty-five persons. Atty.-Gen. *v.* New York, 3 Duer (N. Y.) 119 [*reversed* on other grounds in 14 N. Y. 506, 67 Am. Dec. 186].

50. Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788 (holding that the construction of an underground street railroad is a "city purpose" within the meaning of N. Y. Const. art. 8, § 10, allowing a city to incur indebtedness for such a purpose); Matter of Rapid Transit R. Com'rs, 128 N. Y. App. Div. 103, 112 N. Y. Suppl. 619 [*modified* in 197 N. Y. 81, 90 N. E. 456] (holding that for the purpose of constructing an underground railroad, under statutes authorizing such construction, the city has the same powers and privileges, and is subject to the same duties and obligations as a railroad corporation).

Exceeding debt limit.—Although cities are authorized by Hurd Rev. St. Ill. (1905) p. 438, c. 24, to acquire, construct, own, operate, and lease street railroads, they are not authorized, in so doing, to incur indebtedness beyond the constitutional limit. Lobdell *v.* Chicago, 227 Ill. 218, 81 N. E. 354.

In Michigan an act providing for the acquisition and operation of an existing street railroad by a city was held to be unconstitutional as being in violation of Const. art. 14, § 9, which provides that the state shall not be a party to or interested in any work of internal improvement. Atty.-Gen. *v.* Pingree, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407.

Rights of city and lessee.—Under N. Y. Laws (1891), c. 4, as amended by subsequent acts, providing that the city of New York shall, by contract, construct an underground street railroad, and then lease such railroad to the operating party, and under the contract made in pursuance of such statutory authority that part of the tunnel which is construction the city is to furnish, pay for, and own, while that part which is equipment the contractor is to furnish, pay for, and own. Matter of McDonald, 80 N. Y. App. Div. 210, 80 N. Y. Suppl. 536 [*affirmed* in

railroads and tramways,[51] upon giving proper notice,[52] and paying for their value.[53]

C. Determination as to Necessity and Location — 1. By Commissioners Appointed by Court — a. Appointment. In some jurisdictions provision is made for the determination of the necessity for and location of a street railroad by commissioners appointed for that purpose.[54] Under the constitution and statutes in New York, when the requisite number of abutting property-owners fail to consent to the construction of a street railroad,[55] the determination of commissioners that the road shall be constructed and operated, when confirmed by the court which appoints them, may be taken in lieu of such consent.[56] To obtain the appointment of such commissioners, the applicant must make a positive and affirmative statement of facts in his petition and accompanying affidavit, showing that proper application was made to the property-owners and that the requisite number refused to consent;[57] but when such a showing has been made, and proper notice of the application has been given,[58] the court must make the

175 N. Y. 470, 67 N. E. 1085]. Whatever control is reserved to the city over the lessee's possession of the railroad is vested in the rapid transit commissioners created by the act. Interborough Rapid Transit Co. *v.* New York, 47 Misc. (N. Y.) 221, 95 N. Y. Suppl. 886.

Under a local act (51 Vict. No. 37), the secretary for public works of Sydney has authority to construct a tramway. Sydney Municipal Council *v.* Young, [1898] A. C. 457, 67 L. J. P. C. 40, 71 L. T. Rep. N. S. 365, 46 Wkly. Rep. 561.

51. Venner *v.* Chicago City R. Co., 236 Ill. 349, 86 N. E. 266.

52. Quebec St. R. Co. *v.* Quebec, 15 Can. Sup. Ct. 164.

53. *In re* Manchester Carriage, etc., Co., 68 J. P. 576; Manchester Carriage Co. *v.* Swinton, etc., Dist. Council, 68 J. P. 440, 2 Loc. Gov. 896, 90 L. T. Rep. N. S. 795, 20 T. L. R. 528; *In re* Manchester Carriage, etc., Co., 67 J. P. 14, 87 L. T. Rep. N. S. 504, 18 T. L. R. 779; *In re* Southampton Tramways Co., 63 J. P. 788, 81 L. T. Rep. N. S. 652, 16 T. L. R. 38 [*affirming* 80 L. T. Rep. N. S. 236, 15 T. L. R. 217]. And see Regent's Canal, etc., Co. *v.* London County Council, 71 J. P. 201, 5 Loc. Gov. 956.

Payment must be made before title passes and the purchaser becomes entitled to take possession. Manchester Carriage, etc., Co. *v.* Manchester, 67 J. P. 17, 87 L. T. Rep. N. S. 678.

54. See the constitutions and statutes of the several states.

55. **Necessity and sufficiency of consent of abutting owners** see *infra*, IV, D.

56. N. Y. Const. art. 3, § 18; N. Y. Railroad Law (1909), § 94. And see cases cited *infra*, notes 56–59.

Purpose of provisions.— These constitutional and statutory provisions recognize the fact that there may be a conflict between public and private interests, and that public convenience may require the construction of a street railroad in a case where the consent of the property-owners cannot be obtained. *In re* Thirty-fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172.

Unconstitutional act.— A statute which makes the order of the court confirming the report of the commissioners a substitute not only for the consent of the abutting owners, but also for the consent of the city authorities, is unconstitutional. *In re* New York Dist. R. Co., 107 N. Y. 42, 14 N. E. 187 [*affirming* 42 Hun 621].

57. *In re* People's R. Co., 112 N. Y. 578, 20 N. E. 367 (holding further that more than one application may be made); *In re* New York Cable R. Co., 109 N. Y. 32, 15 N. E. 882 [*affirming* 45 Hun 153].

Facts must be stated, not inferences and conclusions. *In re* New York Cable R. Co., 36 Hun (N. Y.) 355; *In re* Broadway Underground R. Co., 23 Hun (N. Y.) 693, holding that an averment of belief that the consent cannot be obtained is not sufficient.

What not a refusal.— Where the railroad commissioners have authorized a railroad to use electricity, a refusal of the property-owners to consent to the construction of a road "to be operated by electricity, or any motive power other than steam that might be approved" by the railroad commissioners, is not a refusal to consent to the operation of the road by electricity, so as to authorize the appointment of commissioners. Matter of Kingsbridge R. Co., 66 N. Y. App. Div. 497, 73 N. Y. Suppl. 440.

Refusal of abutters along part of line to consent.— A company which has obtained consent of the authorities to construct its road along a street is not entitled to the appointment of commissioners to determine whether its road shall be constructed for a less distance along the street, on a showing merely that it has been unable to obtain the consent of owners along that portion, where nothing is said about a failure to obtain the requisite consents for the entire distance, or about the abandonment of its right on the other portion of the street. Matter of Cross-Town St. R. Co., 68 Hun (N. Y.) 236, 22 N. Y. Suppl. 818.

58. *In re* Broadway Surface R. Co., 34 Hun (N. Y.) 414.

Reason for notice.— The requirement of notice enables property-owners to appear at the hearing and oppose the application on the ground that the petitioner is not in a situa-

appointment, as it is not vested with discretion in the premises, and the failure to obtain the requisite consents is the only condition precedent.[59]

b. Proceedings and Review. The commissioners, after giving public notice of their hearings,[60] may, in receiving evidence and making up their report, consider all the circumstances bearing on the necessity for the proposed road;[61] but they have no power to consent to the construction of a road according to amended plans which have not been submitted to the property-owners.[62] The determination of the commissioners, when in favor of the construction of the road, must be confirmed by the court which appointed them before it becomes final and effective;[63] but, when unfavorable, it is final, except when affected with fraud, mistake, or gross irregularity, in which case it is the duty of the court to set their report aside and appoint other commissioners, or remit the matter to the same commissioners with proper instructions.[64] In considering the question of confirmation, the court has power to examine the merits of the case,[65] and to attach conditions to its confirmation.[66]

2. By Other Bodies and Tribunals. For the purpose of restraining the construction of useless street railroads, it is provided by statute in some jurisdictions that, before the company shall begin the construction of its road, it must obtain

tion to make it, and also to be heard in respect to the selection of commissioners. *In re* Thirty-fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172.

59. *In re* Thirty-fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172 (holding that primarily the court has the mere naked power of appointment, and that it has no power in the first instance to hear, try, or determine the question that is to be sent to the commissioners); Matter of Auburn City R. Co., 88 Hun (N. Y.) 603, 34 N. Y. Suppl. 992 [*distinguishing* Matter of Cross-Town St. R. Co., 68 Hun 236, 22 N. Y. Suppl. 818]; *In re* Broadway Surface R. Co., 34 Hun (N. Y.) 414. See also *In re* People's R. Co., 112 N. Y. 578, 20 N. E. 367.

60. *In re* Union El. R. Co., 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359, holding that where the statute makes no provision for personal notice to each person interested, constructive notice by publication in a newspaper, and by posting notices along the proposed route, is sufficient.

61. Matter of United Traction Co., 119 N. Y. App. Div. 806, 104 N. Y. Suppl. 377; Matter of Port Chester St. R. Co., 43 N. Y. App. Div. 536, 60 N. Y. Suppl. 160, holding that it is proper for them to consider whether there are other routes equally available.

They are not confined, in preparing their report, to the consideration of the evidence produced before them, but have a right to use their own judgment, and to examine the situation for themselves. Matter of Rapid Transit R. Com'rs, 65 Hun (N. Y.) 63, 19 N. Y. Suppl. 561.

However, their action is judicial in character and must, to a reasonable extent, conform to judicial methods. *In re* Nassau Electric R. Co., 167 N. Y. 37, 60 N. E. 279.

62. *In re* New York Cable R. Co., 109 N. Y. 32, 15 N. E. 882.

63. *In re* Nassau Electric R. Co., 167 N. Y. 37, 60 N. E. 279 [*reversing* 6 N. Y. App. Div. 141, 40 N. Y. Suppl. 334]; *In re* Kings County El. R. Co., 82 N. Y. 95; Matter of East River Bridge Co., 75 Hun (N. Y.) 119, 27 N. Y. Suppl. 145.

The confirmation of a report of a majority of the commissioners is permissible. Matter of Port Chester St. R. Co., 43 N. Y. App. Div. 536, 60 N. Y. Suppl. 160.

The confirmation is conclusive as to all questions necessarily involved, upon all interested persons having due notice of the proceedings (*In re* Union El. R. Co., 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359 [*affirming* 1 N. Y. Suppl. 797]), and it has been held that the exercise of the discretion of the supreme court is not reviewable by the court of appeals (*In re* Kings County El. R. Co., 82 N. Y. 95).

64. *In re* Nassau Electric R. Co., 167 N. Y. 37, 60 N. E. 279 [*reversing* 6 N. Y. App. Div. 141, 40 N. Y. Suppl. 334].

65. Matter of Port Chester St. R. Co., 43 N. Y. App. Div. 536, 60 N. Y. Suppl. 160 (holding that the court will not allow a corporation to construct a street railroad over a roadway which has been improved at private expense, when there are other roadways which will answer equally as well the purposes of the public); Matter of Rapid Transit R. Com'rs, 5 N. Y. App. Div. 290, 39 N. Y. Suppl. 750; *In re* Kings County El. R. Co., 20 Hun (N. Y.) 217. And see Matter of Atlantic Ave. R. Co., 12 N. Y. Suppl. 228 [*affirmed* in 136 N. Y. 292, 32 N. E. 771].

Where the company has not been validly incorporated, the court should refuse to confirm a report of its commissioners in favor of the construction of the road. New York Cable Co. *v.* New York, 104 N. Y. 1, 10 N. E. 332.

66. Matter of New York Rapid Transit R. Com'rs, 114 N. Y. App. Div. 379, 100 N. Y. Suppl. 611; Matter of New York Rapid Transit R. Com'rs, 104 N. Y. App. Div. 468, 93 N. Y. Suppl. 930; Matter of New York Rapid Transit Com'rs, 26 N. Y. App. Div. 608, 50 N. Y. Suppl. 306, 23 N. Y. App. Div. 472, 49 N. Y. Suppl. 60.

from the state board of railroad commissioners a certificate that public convenience and necessity require the construction of the road,[67] or under some provisions, a finding, by a designated court, of such public convenience and necessity.[68] While in some jurisdictions the municipal authorities have power in the first instance to approve the route and location of tracks, their proceedings are reviewable by the railroad commissioners who have the same power on appeal as on an original application.[69] Statutes of this nature are generally held not to apply to existing

67. *In re* Portland R. Extension Co., 94 Me. 565, 48 Atl. 119; New York Cent., etc., R. Co. *v.* Auburn Interurban Electric R. Co., 178 N. Y. 75, 70 N. E. 117 (holding that since the Railroad Law (1902), section 59*a*, no extension of a street surface railroad, that will practically parallel such a road, already constructed and in operation, can be made without such a certificate); New York Cent., etc., R. Co. *v.* Buffalo, etc., Electric R. Co., 96 N. Y. App. Div. 471, 89 N. Y. Suppl. 418 (as to extension of line).

Time of issuance.—The certificate need not be issued before the consent of the local authorities is obtained. Matter of Empire City Traction Co., 4 N. Y. App. Div. 103, 38 N. Y. Suppl. 983.

Notice of determination.—The failure to give notice of a change of location by the railroad commissioners of a street railroad line within five days after the filing of that decision, as required by law, to all parties of record, does not deprive the railroad of its right to construct and operate its road. Parsons *v.* Waterville, etc., St. R. Co., 101 Me. 173, 63 Atl. 728.

68. New England R. Co. *v.* Central R., etc., Co., 69 Conn. 47, 36 Atl. 1061, holding that Act (1893), c. 169, § 8, prohibiting the construction of a street railroad from one town to another in the public highways, so as to parallel any other street railroad or steam railroad, until there has been obtained from the superior court a finding that public convenience and necessity require such construction, confers on a company affected by the construction of such a parallel and rival street railroad the right to be protected against it unless and until such rival has obtained the prescribed finding.

The applicant's financial ability to build the proposed street railroad, being a circumstance to be considered in determining whether public convenience and necessity require its construction, the trial court does not exceed its jurisdiction by receiving evidence upon that point, and finding as a fact that the applicant has not such ability. *In re* Shelton St. R. Co., 69 Conn. 626, 38 Atl. 362.

In New Hampshire a "provisional corporation" must, as one of the steps of its formation, obtain from the court a finding that the public good requires the proposed street railroad and that it shall be built on the proposed route. Keene Electric R. Co.'s Petition, 68 N. H. 434, 41 Atl. 775.

69. New York, etc., R. Co. *v.* Stevens, 81 Conn. 16, 69 Atl. 1052; Waterbury's Appeal, 78 Conn. 222, 61 Atl. 547; Boston, etc., R. Co. *v.* Portsmouth, 71 N. H. 21, 51 Atl. 664. And see Hartford *v.* Hartford St. R. Co., 75 Conn. 471, 53 Atl. 1010.

The municipal officers are vested with a judicial discretion and may consider the width of the street, the convenience and safety of the public, and all other matters bearing on the suitableness of the proposed route. Cherryfield, etc., Electric R. Co.'s Appeal, 95 Me. 361, 50 Atl. 27.

Statutory requirements as to the municipal authorities putting their decision in writing and making a proper record thereof are mandatory. Lenoix *v.* Dover, etc., St. R. Co., 72 N. H. 58, 54 Atl. 1022.

Under the Massachusetts statute (St. (1906) c. 520, § 3), the number of stations to be established by a company constructing a subway is a question to be determined by the railroad commissioners, and not by the mayor whose only authority is to approve or disapprove the locations of the stations after determination by the board as to their number; and, in case of his refusal to approve, his decision is subject to review by the board. Cambridge *v.* Railroad Com'rs, 197 Mass. 574, 83 N. E. 869. Also there is nothing in the Massachusetts statutes preventing a temporary location being granted. Daniels *v.* Commonwealth Ave. St. R. Co., 175 Mass. 518, 56 N. E. 715.

Commission appointed by mayor.—N. Y. Laws (1875), c. 606, § 1 *et seq.*, since repealed by N. Y. Laws (1901), c. 4, § 64, in so far as it authorizes the appointment of commissioners or the location of new routes by commissioners already appointed, provided for the appointment of commissioners by the mayor of a city, who should not only pass upon the necessity of a proposed road, but locate the routes, prepare plans for construction, etc. For the construction given to this act, and the powers and duties of commissioners appointed under it see *In re* Union El. R. Co., 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359 [*affirming* 1 N. Y. Suppl. 797]; *In re* Kings County El. R. Co., 112 N. Y. 47, 19 N. E. 654; *In re* New York Cable R. Co., 109 N. Y. 32, 15 N. E. 882; *In re* Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18; New York Cable Co. *v.* New York, 104 N. Y. 1, 10 N. E. 332; Auchincloss *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 63, 74 N. Y. Suppl. 534 [*reversing* 29 Misc. 151, 60 N. Y. Suppl. 792]. For the powers and duties of rapid transit commissioners appointed under N. Y. Laws (1891), c. 4 see Matter of Rapid Transit R. Com'rs, 65 Hun (N. Y.) 63, 19 N. Y. Suppl. 561; *In re* Rapid Transit R. Com'rs, 18 N. Y. Suppl. 320.

corporations operating roads at the time of their passage,[70] or to mere extensions of roads; [71] and where the statutes are applicable, the decisions of the boards are subject to review by the courts.[72]

III. INCORPORATION, POWERS, AND DISSOLUTION OF STREET RAILROAD COMPANY.

A. Incorporation and Organization.[73] In order that a street railroad company may be entitled to corporate existence, as a legal entity, with the right to own, construct, and operate a street railroad, it must be incorporated or organized in compliance with the laws regulating the organization of such a corporation.[74]

70. Keene Electric R. Co.'s Petition, 68 N. H. 434, 41 Atl. 775 [*followed* in *In re* Nashua St. R. Co., 69 N. H. 275, 41 Atl. 858]; New York Cent., etc., R. Co. *v.* Buffalo, etc., Electric R. Co., 96 N. Y. App. Div. 471, 89 N. Y. Suppl. 418.

71. Keene Electric R. Co.'s Petition, 68 N. H. 434, 41 Atl. 775 [*followed* in *In re* Nashua St. R. Co., (N. H. 1898) 41 Atl. 858]; New York Cent., etc., R. Co. *v.* Auburn Interurban Electric R. Co., 178 N. Y. 75, 70 N. E. 117; Roberts *v.* Huntington R. Co., 56 Misc. (N. Y.) 62, 105 N. Y. Suppl. 1031; Delaware, etc., R. Co. *v.* Syracuse, etc., R. Co., 28 Misc. (N. Y.) 456, 59 N. Y. Suppl. 1035 [*affirmed* in 43 N. Y. App. Div. 621, 60 N. E. 386]. *Contra*, in Connecticut (State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942); and also in New York, when the proposed extension is in fact a new road (New York Cent., etc., R. Co. *v.* Buffalo, etc., R. Co., 96 N. Y. App. Div. 471, 89 N. Y. Suppl. 418).

In Massachusetts it seems that the assent of the railroad commissioners to an extension is required, but it has been held that they may authorize an extension consisting of an additional track not connected with existing tracks except by the tracks of another railroad corporation. Daniels *v.* Commonwealth Ave. St. R. Co., 175 Mass. 518, 56 N. E. 715.

72. New York, etc., R. Co. *v.* Stevens, 81 Conn. 16, 69 Atl. 1052; Waterbury's Appeal, 78 Conn. 222, 61 Atl. 547; *In re* Portland R. Extension Co., 94 Me. 565, 48 Atl. 119; *In re* Wood, 181 N. Y. 93, 73 N. E. 561, 34 N. Y. Civ. Proc. 127 [*affirming* 99 N. Y. App. Div. 334, 91 N. Y. Suppl. 225]. *Compare* Parsons *v.* Waterville, etc., St. R. Co., 101 Me. 173, 63 Atl. 728 (holding that the determination of the railroad commissioners as to a change of location is final); *In re* Milbridge, etc., R. Co., 96 Me. 110, 51 Atl. 818.

Review of questions of law.— Under some statutes only questions of law are reviewable by the courts (Paine *v.* Newton St. R. Co., 192 Mass. 90, 77 N. E. 1026); and a statutory provision that on appeal the decree of the railroad commissioners affirming or setting aside the location made by the municipal authorities shall be final on all questions of fact includes the determination whether the "interests of the public" require certain conditions and limitations imposed by such authorities (Boston, etc., R. Co. *v.* Portsmouth, 71 N. H. 21, 51 Atl. 664).

Appeal.— In Connecticut the finding of the superior court is not subject to review, unless the special jurisdiction conferred by statute has been exceeded, or the methods of judicial procedure essential to the due course of law have been violated. *In re* Shelton St. R. Co., 69 Conn. 626, 38 Atl. 362; Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32.

73. Consolidation of street railroad corporation see *infra*, VIII, D.

Estoppel to deny corporate existence see CORPORATIONS, 10 Cyc. 1065 note 14.

74. See the constitutions and statutes of the several states. See also Smith *v.* Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849 (holding that it will be presumed, in an action against a street railroad corporation, that it was incorporated under a general statute of the state for the incorporation of such companies); Aycock *v.* San Antonio Brewing Assoc., 26 Tex. Civ. App. 341, 63 S. W. 953; and CORPORATIONS, 10 Cyc. 201 *et seq.*, 219 *et seq.*

Alabama statute construed.— The word "purchasers," used in Code (1896), § 1199, authorizing purchasers of the franchises and property of a street railroad company at a judicial sale to organize as a corporation, embraces subpurchasers. Birmingham R., etc., Co. *v.* Birmingham Traction Co., 128 Ala. 110, 29 So. 187.

In Massachusetts a corporation cannot own and operate a street railroad within the state without having been organized under the laws of that state. American Steel, etc., Co. *v.* Bearse, 194 Mass. 596, 80 N. E. 623.

Special charters.— The validity of special charters is dependent upon constitutional provisions (Dieter *v.* Estill, 95 Ga. 370, 22 S. E. 622), or the statutes of the United States, in case of a territory (Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673); but the legal existence of a company holding a special charter may be confirmed by legislative act regardless of whether or not the charter was rightfully issued (Brown *v.* Atlanta R., etc., Co., 113 Ga. 462, 39 S. E. 71; Keene Electric R. Co.'s Petition, (N. H. 1896) 41 Atl. 775. And see Berks County *v.* Reading City Pass. R. Co., 167 Pa. St. 102, 31 Atl. 474, 665, holding that the Pennsylvania statutes authorize street railway companies lawfully organized under special acts to reincorporate under the general laws relating to such companies). A special charter to a city railroad company, when accepted and

As the term "railroad" or "railway" is a generic term sufficiently broad to include street railroads,[75] a street railroad company, in the absence of a special statute, may be incorporated under a general railroad incorporation act,[76] unless expressly prohibited by statute,[77] and it has been held that a statute providing for the incorporation of industrial corporations generally authorizes the formation of a street railroad company.[78] The articles of incorporation must comply with all the statutory requirements such as to provisions relating to forfeitures,[79] and must state with reasonable certainty the termini and route of the proposed road.[80] The time when the corporation comes into existence is dependent upon the statute,[81] as is also the question of an extension of corporate life.[82]

acted upon by the company, becomes a contract. New York *v.* New York City R. Co., 193 N. Y. 543, 86 N. E. 565.

75. See *supra*, I, A, B; and RAILROADS, 33 Cyc. 34.

76. Wilmington City R. Co. *v.* People's R. Co., (Del. 1900) 47 Atl. 245; Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 30 N. E. 544 (holding that the general railroad incorporation act applies to elevated railroads, as Ill. Rev. St. (1891) § 68, relating to elevated ways or conveyors, makes incorporation under that act permissive, but not compulsory); Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457 (holding also that street and other railroads may be incorporated under the same charter); Minneapolis St. R. Co. *v.* Minneapolis, 155 Fed. 989.

77. Jersey City *v.* North Jersey St. R. Co., 74 N. J. L. 774, 67 Atl. 113 (holding, however, that the validity of the existence of corporations attempted to be incorporated under the general railroad act prior to the passage of the general street railway act has been confirmed by statute); Thompson *v.* Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087 [*followed* in Tallon *v.* Hoboken, 60 N. J. L. 212, 37 Atl. 895]; Com. *v.* Northeastern El. R. Co., 161 Pa. St. 409, 29 Atl. 112 [*reversing* 3 Pa. Dist. 104]; Potts *v.* Quaker City El. R. Co., 161 Pa. St. 396, 29 Atl. 108; Pennsylvania R. Co. *v.* Bridgeport R. Co., 11 Montg. Co. Rep. (Pa.) 73.

Construction of statutes.— The mere circumstance that a railroad is located parallel and near to a public highway cannot be considered as evidence that the purpose of the company is to offend against the prohibition of the operation of a road as a street railroad by a corporation chartered as a railroad. Gaw *v.* Bristol, etc., R. Co., 22 Pa. Co. Ct. 332. The right of a corporation to construct a street railroad in the streets of a city, under an act incorporating it and conferring the express power to do so, is not affected by the fact that the act also contains provisions which are usually inserted in special charters granted to railroad companies. Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

In New York, although corporations for the construction of horse railways in the streets of cities other than New York may be formed under the General Railroad Act of 1850 (*In re* Washington St., etc., R. Co., 115 N. Y. 442, 22 N. E. 356), by reason of an amendment of this statute corporations for the construction of either surface or elevated railroads in the streets of the city of New York may not be so formed (*In re* People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728 [*affirming* 57 Hun 587, 10 N. Y. Suppl. 849, and *followed* in Schapter *v.* Brooklyn, etc., R. Co., 124 N. Y. 630, 26 N. E. 311]; Webb *v.* Forty-Second St., etc., R. Co., 52 Misc. (N. Y.) 46, 102 N. Y. Suppl. 762).

78. New York Cent. Trust Co. *v.* Warren, 121 Fed. 323, 58 C. C. A. 289.

79. New York Cable Co. *v.* New York, 104 N. Y. 1, 10 N. E. 332.

80. State *v.* Lincoln St. R. Co., 80 Nebr. 333, 114 N. W. 422, 14 L. R. A. N. S. 336; Webb *v.* Forty-Second St., etc., R. Co., 52 Misc. (N. Y.) 46, 102 N. Y. Suppl. 762. And see Central R., etc., Co. *v.* New York, etc., R. Co., 72 Conn. 33, 43 Atl. 490, holding that a charter which describes a terminus as a convenient point, where connection can be made with a certain named railroad, is sufficient, although the railroad named is afterward abandoned and connection cannot be made with it.

A slight change from the route specified in the articles of association may be allowed by the board of railroad commissioners under New York Railroad Law, section 59. People *v.* New York R. Com'rs, 42 N. Y. App. Div. 366, 59 N. Y. Suppl. 144.

A more specific designation of the termini is dispensed with by a later act of the legislature which recognizes the company as a valid existing corporation. Koch *v.* North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377.

81. Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345, holding that under Rev. St. (1905) § 1140, the persons associated constitute a corporation from the time of filing a proper certificate in the office of the secretary of state, and that it is not necessary that stock be issued or paid up before a valid organization can be effected or corporate action taken.

Under the Pennsylvania statute, the filing of articles of association with the secretary of state is merely a preliminary step to the obtaining of a charter, and the incorporators have no standing as a corporation before the issuance of letters patent. Andel *v.* Duquesne St. R. Co., 219 Pa. St. 635, 69 Atl. 278 [*followed* in Lovejoy *v.* Duquesne St. R. Co., 219 Pa. St. 639, 69 Atl. 280].

82. Blair *v.* Chicago, 201 U. S. 400, 26

B. Officers, Agents, and Stock-Holders. Except in so far as they are regulated by special statutory or charter provisions, the law applicable to the officers and agents of corporations in general governs questions relative to the officers and agents of a street railroad company.[83] Thus the president and secretary of a street railroad company have no inherent or implied power to bind the company by the execution of promissory notes,[84] but the board of directors may bind the stock-holders by their acceptance of a franchise;[85] and, in cases of emergency or accident, the acts and contracts of the corporate representatives in charge at the time are binding on the company, especially when ratified.[86] The elementary principle that, in the absence of any charter provision to the contrary, a majority of the stock-holders control in deciding corporate questions requiring their action, is applicable in determining the rights of stock-holders of street railroad corporations.[87] The stock-holders of a street railroad company have been held to be within the meaning of statutes defining the liability of stock-holders of railroad corporations,[88] and, in a proper case, may sue to rescind a fraudulent contract.[89]

C. Powers Generally.[90] Like other corporations a street railroad corporation possesses only such powers as are expressly given or are necessary incidents to the enjoyment of the franchise expressly granted;[91] and where it clearly acts beyond its corporate powers and franchises, no consent by the municipality can supply the want of power.[92]

D. Grants of Franchises and Privileges — 1. Necessity of. In some jurisdictions the charter of a street railroad corporation, granted under state laws, gives it but the bare power to exist, and in order that it may carry out the purpose of its existence by constructing and operating its road upon and along

S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848].

83. See Corporations, 10 Cyc. 736 *et seq.*, 903 *et seq.*

Liability of directors for debts.— Under Mass. St. (1906) c. 463, pt. 3, § 29, making the directors of a street railway corporation liable for its debts until the capital stock has been paid in and a certificate of that fact filed with the secretary of state, the directors are not liable for a judgment against the company in a personal injury suit; but where the debt is one for which they are liable, they are not relieved by the filing of an untrue certificate, and an action in equity may be brought against them in the first instance without joining the corporation. Westinghouse Electric, etc., Co. *v.* Reed, 194 Mass. 590, 80 N. E. 621 [*followed* in American Steel, etc., Co. *v.* Bearse, 194 Mass. 596, 80 N. E. 623].

The managing executive officers represent the corporation and the law will impute to them knowledge of the equipment of cars operated under their direction. State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068.

84. City Electric St. R. Co. *v.* First Nat. Exch. Bank, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535.

85. Venner *v.* Chicago City R. Co., 236 Ill. 349, 86 N. E. 266.

86. Chicago Consol. Traction Co. *v.* Mathews, 117 Ill. App. 174 (medical attendance in case of accident); Heinrich *v.* Pittsburg R. Co., 36 Pa. Super. Ct. 612. And see, generally, Corporations, 10 Cyc. 926.

When emergency insufficient.— The president of a trolley company cannot bind the company to suspend the running of its cars, and permit the cutting or elevation of its wires, to enable a third party to move a building across the tracks. Millville Traction Co. *v.* Goodwin, 53 N. J. Eq. 448, 32 Atl. 263.

87. Venner *v.* Chicago City R. Co., 236 Ill. 349, 86 N. E. 266. See, generally, Corporations, 10 Cyc. 346.

88. Jerman *v.* Benton, 79 Mo. 148.

89. Old Colony Trust Co. *v.* Dubuque Light, etc., Co., 89 Fed. 794.

90. Power to acquire private property: By condemnation see Eminent Domain, 15 Cyc. 571 note 80. By purchase see *infra*, V.

Power to alienate property see *infra*, VIII, A.

Power to engage in collateral enterprise see *infra*, III, D, 4, b, (I).

91. Brooklyn Heights R. Co. *v.* Brooklyn, 152 N. Y. 244, 46 N. E. 509; Atty.-Gen. *v.* Lombard, etc., Pass. R. Co., 10 Phila. (Pa.) 352. And see, generally, Corporations, 10 Cyc. 1096.

Vending machines and advertising.— One of the incidental powers of an underground street railroad company is that of maintaining in its station automatic weighing and vending machines (New York *v.* Interborough Rapid Transit Co., 53 Misc. (N. Y.) 126, 104 N. Y. Suppl. 157); and it seems that a street railroad company does not exceed its corporate powers when it places advertisements on the upper inside parts of its cars (Burns *v.* St. Paul R. Co., 101 Minn. 363, 112 N. W. 412, 12 L. R. A. N. S. 757).

92. Brooklyn Heights R. Co. *v.* Brooklyn, 152 N. Y. 244, 46 N. E. 509.

the streets of a municipality, it must have a further exercise of sovereign power in its behalf, by a grant or consent from the municipality.[93]

2. Proceedings to Obtain and Conditions Precedent. Before a street railroad franchise may be legally granted, all statutory conditions precedent must be fulfilled.[94] Thus there must be a compliance with statutory requirements relating to the application for a franchise,[95] and the giving of public notice of the application or of the proposed ordinance.[96]

3. Validity[97] — a. Franchises Generally. In granting a street railroad

93. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Larimer, etc., R. Co. *v.* Larimer St. R. Co., 137 Pa. St. 533, 20 Atl. 570; Ft. Worth St. R. Co. *v.* Rosedale Co., 68 Tex. 169, 4 S. W. 534; Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848]. See also *infra*, IV, C, 1, a.

Nature of franchise see *supra*, II, A.

94. Ruckert *v.* Grand Ave. R. Co., 163 Mo. 260, 63 S. W. 814.

Submission to voters.— Under Wis. Laws (1903), c. 387, § 1, requiring that an ordinance granting a street railroad franchise be submitted to a direct vote of the voters, an ordinance merely extending the existing lines and system of a street railroad to other streets, the extension expiring at the same time as the franchise, is operative without submitting the same to a direct vote. State *v.* Wauwautosa, 124 Wis. 451, 102 N. W. 894.

In New York the granting of the state railroad commissioner's certificate of convenience and necessity is not a prerequisite to the granting of a local franchise. People *v.* Bauer, 54 Misc. 28, 103 N. Y. Suppl. 1081; Seccomb *v.* Wurster, 83 Fed. 856. It has also been held that a condition in the articles of association of an elevated railroad company that the company shall not be permitted to do any work toward the construction of its road on a certain street until it shall have entered into an agreement with the companies owning and operating a surface steam railroad thereon, transforming such surface road into a mere street railroad, and transferring its operation by steam to the elevated tracks, is a condition subsequent and not precedent to the granting of a franchise. *In re* Atlantic Ave. El. R. Co., 136 N. Y. 292, 32 N. E. 771.

Consent of abutting owners as condition precedent see *infra*, IV, D, 1, a.

95. Sanfleet *v.* Toledo, 10 Ohio Cir. Ct. 460, 8 Ohio Cir. Dec. 711, holding that the presentation to the city council of an ordinance granting the right to construct and operate a street railway is a sufficient application.

The signing of an application by a person styling himself "trustee" is sufficient. Simmons *v.* Toledo, 5 Ohio Cir. Ct. 124, 3 Ohio Cir. Ct. 64.

In Illinois a petition of consenting property-owners is required, and where an ordinance is void because it grants a franchise to individuals, a new petition is necessary before a new franchise may be lawfully granted to a corporation, which is the assignee of the rights granted under the previous ordinance, as there can be no valid assignment of rights conferred by a void ordinance. Wilder *v.* Aurora, etc., Traction Co., 216 Ill. 493, 75 N. E. 194.

Proceedings to obtain municipal consent see *infra*, IV, C, 1, b.

96. Harvey *v.* Aurora, etc., R. Co., 186 Ill. 283, 57 N. E. 857; Metropolitan City R. Co. *v.* Chicago, 96 Ill. 620.

In Ohio a somewhat liberal interpretation is given to the statute requiring notice, and it is held sufficient if the notice is given at any time before the final grant is made (Hamilton *v.* Cincinnati, etc., Electric St. R. Co., 8 Ohio S. & C. Pl. Dec. 174, 5 Ohio N. P. 457; Aydelott *v.* Cincinnati, 11 Ohio Cir. Ct. 11, 4 Ohio Cir. Dec. 486); that the statute does not apply to proceedings for the extension of the track of an existing line (Belle *v.* Glenville, 27 Ohio Cir. Ct. 181; State *v.* Cincinnati, etc., Electric St. R. Co., 19 Ohio Cir. Ct. 79, 10 Ohio Cir. Dec. 418; Sommers *v.* Cincinnati, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612); unless the extension is from a line wholly without the municipality into or through the municipality (Cleveland, etc., St. R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180), nor to the renewal of a franchise previously granted (State *v.* East Cleveland R. Co., 6 Ohio Cir. Ct. 318, 3 Ohio Cir. Dec. 471); and that a publication in one daily paper for the prescribed time is a sufficient compliance with the requirement, although publication in two daily papers is required by ordinance (Simmons *v.* Toledo, 5 Ohio Cir. Ct. 124, 3 Ohio Cir. Dec. 64; Smith *v.* Columbus, etc., R. Co., 10 Ohio S. & C. Pl. Dec. 441, 8 Ohio N. P. 1). However, where the notice is legally insufficient, the city council cannot, after granting the franchise, render the notice sufficient by a subsequent curative ordinance. Raynolds *v.* Cleveland, 28 Ohio Cir. Ct. 463 [*affirmed* in 76 Ohio St. 619, 81 N. E. 1182].

Where service of notice necessary.—An application for permission to construct and operate a street railway in a certain city is not "pending" at the time of the repeal of the statute under which the proceeding was brought, within the meaning of Vt. St. §§ 28, 29, saving from the effect of such repeal suits and proceedings in civil causes then pending, where such statute was repealed before notice of such application had been served. Burlington *v.* Burlington Traction Co., 70 Vt. 491, 41 Atl. 514.

97. As affected by general power to grant see MUNICIPAL CORPORATIONS, 28 Cyc. 866.

franchise, statutory requirements relating to the passage and approval of ordinances must be observed,[98] and, before the contract becomes binding and operative, it must be perfected,[99] as by a valid acceptance on the part of the street railroad company.[1] A street railroad franchise ordinarily can only be legally granted to a street railroad corporation; it cannot be granted to an ordinary commercial railroad,[2] nor, in some states, to individuals.[3] A street railroad franchise is void when granted for private and not public purposes,[4] or when its granting is attended with fraud,[5] although the partial invalidity of such a franchise ordinance does not necessarily affect the validity of the whole,[6] and although a void grant by a municipality may be confirmed and ratified by an act of the legislature,[7] yet a void grant is not validated by an assignment thereof,[8] nor is an ordinance or resolution, void because conferring on the corporation authority to exercise power not given to it by the articles of association, validated by a second ordinance or resolution.[9]

98. Eisenhuth *v.* Ackerson, 105 Cal. 87, 38 Pac. 530; Benton *v.* Seattle Electric Co., 50 Wash. 156, 96 Pac. 1033; Potter *v.* Calumet Electric St. R. Co., 158 Fed. 521; Holst *v.* Savannah Electric Co., 131 Fed. 931 [*reversed* on other grounds in 132 Fed. 901, 65 C. C. A. 449]; Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

99. People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844.

Consideration.— The privilege granted to a street railroad company of entering upon the streets of a village, erecting poles and stringing wires thereon, and constructing and operating its roads upon and along the streets constitutes ample consideration for the contract. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

The fact that the contract is not advantageous to the city is immaterial and does not affect its binding force. City R. Co. *v.* Citizens' R. Co., (Ind. 1898) 52 N. E. 157.

1. State *v.* Milwaukee, etc., R. Co., 116 Wis. 142, 92 N. W. 546, holding, however, that an ordinary commercial railroad company has no power to accept a street railroad franchise.

Sufficiency of acceptance.— An acceptance may be consummated for and on behalf of the corporation by its board of directors, and, when so consummated, is binding on the stock-holders. Venner *v.* Chicago City R. Co., 236 Ill. 349, 86 N. E. 266. A written acceptance which is signed in the name of the company by its president and secretary, accompanied by the seal of the company, is *prima facie* an acceptance by the company (Niles *v.* Benton Harbor-St. Joe R., etc., Co., 154 Mich. 378, 117 N. W. 937); and, in the absence of a formal resolution, the acceptance may be shown by action constituting an actual practical acceptance (City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114).

Time of acceptance.— Where the ordinance provides that, before the privileges granted shall be enjoyed, the company shall within thirty days signify in writing its acceptance of the ordinance, the company will be allowed the full thirty days to file the acceptance; and where there is no objection by the body passing the ordinance, the company will not be enjoined from building its road on account of its failure to file such acceptance before commencing work. Williams Valley R. Co. *v.* Lykens, etc., St. R. Co., 1 Dauph. Co. Rep. (Pa.) 225.

Acceptance as estoppel.— A street railroad company which has availed itself of a grant of authority from the city to occupy a street cannot question the validity of that authority (People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97); as by claiming that, at the time of acceptance, the franchise ordinance had not been published and gone into effect, as the publication relates back to the time that the ordinance was accepted (Hattersley *v.* Waterville, 26 Ohio Cir. Ct. 226); nor will the city, after the company has made a large expenditure of money, be allowed to repudiate the action of its council on the ground that their proceedings were irregular (Mill Creek Valley St. R. Co. *v.* Carthage, 18 Ohio Cir. Ct. 216, 9 Ohio Cir. Dec. 833).

Estoppel as to condition imposed by grant see *infra*, III, D, 3, c.

2. State *v.* Milwaukee, etc., R. Co., 116 Wis. 142, 92 N. W. 546.

3. See *supra*, II, B.

4. Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; San Antonio *v.* Rische, (Tex. Civ. App. 1896) 38 S. W. 388.

5. Finch *v.* Riverside, etc., R. Co., 87 Cal. 597, 25 Pac. 765; Adamson *v.* Nassau Electric R. Co., 12 Misc. (N. Y.) 600, 33 N. Y. Suppl. 732 [*reversed* on other grounds in 89 Hun 261, 34 N. Y. Suppl. 1073].

6. Koch *v.* North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; Gray *v.* Dallas Terminal R., etc., Co., 13 Tex. Civ. App. 158, 36 S. W. 352.

7. People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. 109.

8. Wilder *v.* Aurora, etc., Electric Traction Co., 216 Ill. 493, 75 N. E. 194; San Antonio *v.* Rische, (Tex. Civ. App. 1896) 38 S. W. 388.

9. McClean *v.* Westchester Electric R. Co., 25 Misc. (N. Y.) 383, 55 N. Y. Suppl. 556.

Where the second ordinance is complete and valid in itself, it is not invalid because passed as an amendment to a void act (Wilder *v.* Aurora, etc., Electric Traction Co., 216 Ill.

The municipality generally possesses either express or implied power to limit the duration of the franchise;[10] but under the statutes of some states the municipality has no power to grant other or different rights than those named in the charter of the company.[11] The courts will interfere only to prevent a fraudulent or manifestly abusive or oppressive exercise of the power of municipal authorities in granting franchises.[12]

b. Exclusive Grants and Licenses.[13] When not restrained by constitutional provisions, and when the public interest makes it desirable, the state may grant an exclusive street railroad franchise;[14] but in regard to the granting of an exclusive street railroad franchise by a municipal corporation, the general rule that, except where authorized by the legislature either expressly or by necessary implication, the power conferred upon a municipality to grant certain rights in streets does not authorize it to grant an exclusive privilege or franchise[15] applies.[16]

c. Conditions and Reservations.[17] Except as to matters which are regulated by statute and over which the legislature and certain officers have entire control,[18] a municipal corporation or other body, making a grant to a street railroad company,

493, 75 N. E. 194); nor is a second ordinance invalid because granted under a mistake of law or of fact as to the validity of the prior ordinance (City R. Co. *v.* Citizens' St. R. Co., (Ind. 1890) 52 N. E. 157).

10. Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

A grant in perpetuity may be made by a municipality only when the authority to do so is conferred on the city either expressly or by necessary implication by the legislature. Logansport R. Co. *v.* Logansport, 114 Fed. 688.

Construction of grant as to duration see *infra*, III, D, 4, b, (II).

11. Citizens' St. R. Co. *v.* Africa, 100 Tenn. 26, 42 S. W. 485, 878; Knoxville *v.* Africa, 77 Fed. 501, 23 C. C. A. 252 [*reversing* 70 Fed. 729].

12. People *v.* Grand Trunk Western R. Co., 232 Ill. 292, 83 N. E. 839; Wagner *v.* Bristol Belt Line R. Co., 108 Va. 594, 62 S. E. 391.

Uncertainty.— An ordinance providing in general terms for the future occupancy of the streets will not be held void for uncertainty. Thurston *v.* Huston, 123 Iowa 157, 98 N. W. 637.

13. What grants are exclusive see *infra*, III, D, 4, c.

14. See CONSTITUTIONAL LAW, 8 Cyc. 1039 text and note 90.

15. See MUNICIPAL CORPORATIONS, 28 Cyc. 874.

16. *Illinois.*— Russell *v.* Chicago, etc., Electric R. Co., 205 Ill. 155, 68 N. E. 727 [*modifying* 98 Ill. App. 347].

Ohio.— Cincinnati St. R. Co. *v.* Smith, 29 Ohio St. 291; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

Oregon.— Parkhurst *v.* Capital City R. Co., 23 Oreg. 471, 32 Pac. 304.

Tennessee.— Memphis City R. Co. *v.* Memphis, 4 Coldw. 406.

Utah.— Henderson *v.* Ogden City R. Co., 7 Utah 199, 26 Pac. 286.

United States.— Detroit Citizens' St. R. Co. *v.* Detroit, 171 U. S. 48, 18 S. Ct. 732, 43 L. ed. 67 [*affirming* 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350, 35 L. R. A. 859]; Logansport R. Co. *v.* Logansport, 114 Fed. 688; New Orleans City R. Co. *v.* Crescent City R. Co., 12 Fed. 308.

Canada.— Winnipeg St. R. Co. *v.* Winnipeg Electric St. R. Co., 9 Manitoba 219.

See 44 Cent. Dig. tit. "Street Railroads," § 46.

And see Florida Cent., etc., R. Co. *v.* Ocala St., etc., St. R. Co., 39 Fla. 306, 22 So. 692.

Power held to exist.— The power to grant exclusive rights and privileges in streets to a street railroad company for a reasonable length of time has been held to exist under a statute empowering the city council to authorize or prohibit the location and laying down of tracks for street railways. Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602.

Where the city has no power to confer an exclusive franchise, an agreement based upon and in consideration of such franchise is also void. Potter *v.* Collis, 156 N. Y. 16, 50 N. E. 413 [*affirming* 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471, and *distinguishing* New York *v.* Eighth Ave. R. Co., 118 N. Y. 389, 23 N. E. 550].

Where an alley is so narrow that its use by a street railroad would prevent the passage of vehicles and exclude the public, the municipality is without power to grant any rights therein to a street railroad company. Watson *v.* Robberson Ave. R. Co., 69 Mo. App. 548.

17. Conditions attached to consent of: Abutting owners see *infra*, IV, D, 3. Highway officers see *infra*, IV, C, 2. Municipal authorities see *infra*, IV, C, 1, b.

18. Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277 [*affirming* 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174]; *In re* Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18.

Corporate powers.— A condition that the company shall not exercise one of its corporate powers is void. State *v.* Dayton Traction Co., 18 Ohio Cir. Ct. 490, 10 Ohio Cir. Dec. 212.

may make such reservations,[19] and impose such conditions as are reasonable and not against public policy;[20] and the street railroad company, by accepting the franchise and the privileges conferred thereby, obligates itself to perform the conditions imposed, and estops itself from questioning their reasonableness.[21]

19. Shepard *v.* East Orange, 69 N. J. L. 133, 53 Atl. 1047 (holding that a reservation of power to change by resolution the location of tracks and poles on the application of the street railroad company is not void); Spring City Borough *v.* Montgomery, etc., Electric R. Co., 35 Pa. Super. Ct. 533. *Compare* North Jersey St. R. Co. *v.* Newark St., etc., Com'rs, 73 N. J. Eq. 106, 67 Atl. 691, holding that the power of a city to arbitrarily remove the tracks of a street railroad cannot be created by reservation or otherwise, except by virtue of legislative authority.

Void reservation.— An ordinance which provides that the location of the lines of the company is to be made subject to such further conditions as might be imposed by ordinance when the street railroad company adopts the route, and that the ordinance is not to be construed as a grant of rights in any street, but that the determination whether such rights should be granted is reserved until a petition for the same should be presented by the company, is a nullity as a location, in that there is no grant of a right to go upon or along the streets on which the ordinance professes to provide for location. Harvey *v.* Aurora, etc., R. Co., 186 Ill. 283, 57 N. E. 857.

20. *Arkansas.*— Little Rock R., etc., Co. *v.* North Little Rock, 76 Ark. 48, 88 S. W. 826, 1026.

Illinois.— Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703; Citizens' Horse R. Co. *v.* Belleville, 47 Ill. App. 388 [*reversed* on other grounds in 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681].

Massachusetts.— Worcester *v.* Worcester Consol. St. R. Co., 192 Mass. 106, 78 N. E. 222.

Missouri.— Kansas City *v.* Kansas City Belt R. Co., 187 Mo. 146, 86 S. W. 190.

New York.— People *v.* Barnard, 110 N. Y. 548, 18 N. E. 354 [*reversing* 48 Hun 57].

Ohio.— Hattersly *v.* Waterville, 26 Ohio Cir. Ct. 226.

Texas.— Texarkana Gas, etc., Co. *v.* Texarkana, (Civ. App. 1909) 123 S. W. 213.

See 44 Cent. Dig. tit. "Street Railroads," § 43.

General right of municipality to impose conditions on use of streets see MUNICIPAL CORPORATIONS, 28 Cyc. 876.

Illustrations.— It is competent for the body granting the franchise to impose conditions that the construction of the road shall be completed within a certain time (Plymouth Tp. *v.* Chestnut Hill, etc., R. Co., 168 Pa. St. 181, 32 Atl. 19); that the company shall observe and be subject to all ordinances of the city then in force or thereafter passed in reference to passenger railroads (Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695; Philadelphia *v.* Citizens' Pass. R. Co., 10 Pa. Co. Ct. 16); that the company shall pay the incidental expense of the ordinance and a reasonable counsel fee (Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643 [*affirmed* in 62 N. J. L. 450, 45 Atl. 1092]); that the company shall pay a tax on each mile of track (Chicago Gen. R. Co. *v.* Chicago, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959), or on the dividends earned (Allegheny City *v.* Millville, etc., R. Co., 159 Pa. St. 411, 28 Atl. 202); that the rate of fare shall not exceed a certain specified amount (Allegheny City *v.* Millville, etc., R. Co., *supra*); that the company shall give for each fare collected one continuous ride in the same general direction, and shall provide a transfer ticket to such of its lines, at any point of intersection or connection therewith, as may be necessary to enable the passenger to continue to his destination (Raynolds *v.* Cleveland, 28 Ohio Cir. Ct. 463 [*affirmed* in 76 Ohio St. 619, 81 N. E. 1182]. See also *infra*, X, A, 2, b, (III)); and that there shall be no abandonment of tracks already laid, and that there shall be trips thereon as often as every twenty minutes (Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32). It is also competent to require an elevated railroad company to enter into an agreement with the companies owning and operating a surface steam railroad on the same street transforming such surface road into a mere street railway, and transferring its operation by steam to the elevated tracks (*In re* Atlantic Ave. El. R. Co., 136 N. Y. 292, 32 N. E. 771); and to require a street railroad company to carry passengers to and from points beyond one of its termini for a single fare, where there is a method under the statutes by which the right may be acquired to use the track of another company running to those points (People *v.* Barnard, 110 N. Y. 548, 18 N. E. 354), and even to require the company to carry passengers in the municipality free of charge where the company is interested in getting a franchise through the municipality that it may construct its road between other termini (Hattersly *v.* Waterville, 26 Ohio Cir. Ct. 226).

Payment of compensation for use of streets see *infra*, III, D, 5.

21. *Illinois.*— Chicago Gen. R. Co. *v.* Chicago, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188.

Indiana.— Cincinnati, etc., Electric St. R. Co. *v.* Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363.

Massachusetts.—Clinton *v.* Worcester Consol. St. R. Co., 199 Mass. 279, 85 N. E. 507.

Michigan.— Rapid R. Co. *v.* Mt. Clemens, 118 Mich. 133, 76 N. W. 318.

Missouri.— Kansas City *v.* Kansas City Belt R. Co., 187 Mo. 146, 86 S. W. 190.

So long as the discretion vested in the municipality as to such reservations and conditions is fairly and honestly exercised, it is not the province of the courts to interfere.[22]

d. Renewals and Extensions. As the continued operation of a street railroad constitutes a sufficient consideration for an ordinance extending the date for the expiration of its franchise,[23] it is competent for a municipal corporation to grant a renewal, even before the expiration of the franchise,[24] for a term within the limit prescribed by statute.[25] Likewise, under statutes conferring authority therefor, grants of authority by municipal corporations to street railroad companies to extend their lines of track, or their charter routes in case no tracks have been laid, are valid,[26] except where they authorize the extension of an ordinary

Ohio.— Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651.

See 44 Cent. Dig. tit. "Street Railroads," § 43.

Conditions imposed by statute need not be embodied in the franchise ordinance in order to be binding. General Electric R. Co. *v.* Chicago City R. Co., 66 Ill. App. 362.

Limitation of number of wires.— Under the provision of a grant that "no wires carrying an electric current shall be placed in said street except the trolley wire," the company may not, without further authority, place in the street an additional feed wire, not a trolley wire. Monroe *v.* Detroit, etc., R. Co., 143 Mich. 315, 106 N. W. 704.

Reasonable time.—The conditions, if precedent, must be complied with in a reasonable time, or else no rights vest under the franchise. Little Rock R., etc., Co. *v.* North Little Rock, 76 Ark. 48, 88 S. W. 826, 1026.

22. Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703.

23. City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114.

24. Belle *v.* Glenville, 27 Ohio Cir. Ct. 181; State *v.* East Cleveland R. Co., 6 Ohio Cir. Ct. 318, 3 Ohio Cir. Dec. 471; Cincinnati *v.* Cincinnati St. R. Co., 1 Ohio S. & C. Pl. Dec. 591, 31 Cinc. L. Bul. 398; Cleveland *v.* Cleveland Electric R. Co., 201 U. S. 529, 26 S. Ct. 513, 50 L. ed. 854 [*affirming* 135 Fed. 368]; Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 24 S. Ct. 756, 48 L. ed. 1102.

The renewal must be express and not implied. Cincinnati *v.* Cincinnati Inclined Plane R. Co., 4 Ohio S. & C. Pl. Dec. 507, 30 Cinc. L. Bul. 321 [*affirmed* in 52 Ohio St. 609, 44 N. E. 327]; Cleveland Electric R. Co. *v.* Cleveland, 137 Fed. 111 [*affirmed* in 204 U. S. 116, 27 S. Ct. 202, 51 L. ed. 399].

A city charter provision that the city council shall not extend any franchise until within three years of its expiration is not violated by an ordinance granting a street railroad franchise which provides that the acquisition, by purchase or otherwise, by the grantees, of any existing railroads or parts thereof, and the bringing of the same under the operation of this franchise, shall be equivalent to new construction and completion, and which also provides for the surrender and termination of existing franchises. Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

25. Haskins *v.* Cincinnati Consol. St. R. Co., 7 Ohio Dec. (Reprint) 713, 4 Cinc. L. Bul. 1126.

26. South Boston R. Co. *v.* Middlesex R. Co., 121 Mass. 485; Trenton St. R. Co. *v.* Pennsylvania R. Co., 63 N. J. Eq. 276, 49 Atl. 481; Sims *v.* Brooklyn St. R. Co., 37 Ohio St. 556 (holding that such a grant does not confer additional corporate powers, but simply gives permission for the exercise of corporate powers already conferred); Belle *v.* Glenville, 27 Ohio Cir. Ct. 181; Cincinnati *v.* Cincinnati St. R. Co., 1 Ohio S. & C. Pl. Dec. 591, 31 Cinc. L. Bul. 398; Sommers *v.* Cincinnati, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612 (holding that under Rev. St. § 2595, giving the city council power to grant permission to an existing street railroad company to extend its track on any streets where the council may deem such extension beneficial to the public, the council is not bound to determine in which streets the location of a street railroad would be the most beneficial, but may declare that any one of four routes proposed would be beneficial, and give to the street railway company an option of choosing in which it will lay its tracks).

Extent of legislative authority.— A statute authorizing street railroad companies organized under special acts, whose time for commencing the building of their roads has not expired, to extend their tracks on obtaining consent of the proper municipal authorities, is not confined in its application to companies whose charters limit the time for commencing the building of their road. West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333. A later New Jersey statute (Gen. St. pars. 55, 59) authorizing extensions does not apply to companies not specially chartered or incorporated thereunder. Trenton St. R. Co. *v.* United New Jersey R., etc. Co., 60 N. J. Eq. 500, 46 Atl. 763.

Application of lessor.— A street railroad company that has leased its property and franchises to another company, on terms that after-acquired railroads shall come under the lease without increase of rent, may lawfully apply to the municipality for permission to construct and maintain an extension of a street railroad embraced in the lease. Shepard *v.* East Orange, 69 N. J. L. 133, 53 Atl. 1047.

The New York city council has no power to authorize an extension except possibly where such extension is really necessary to

steam railroad as a street railroad and invest it with all the powers of a street railroad company.[27]

4. CONSTRUCTION — a. General Rules. It is a well-settled rule of construction that grants of franchise rights to street railroad companies are to be strictly construed against the grantees and in favor of the public.[28] It is also true that, as the grant is made for the benefit of the grantee, and also for the express accommodation and benefit of the public, everything which is reasonably proper and necessary to effect the essential objects of the grant passes by necessary implication.[29] When expressed in clear and unambiguous language, the intention of the parties will be given effect,[30] by construing the language employed in its natural and ordinary sense,[31] and without resorting to the practical construction placed upon the grant by the parties.[32] As the authority of the state is paramount in the granting of such rights, the statutes of the state relative thereto enter into a grant made by a municipality and are controlling in case of conflict.[33]

the enjoyment of a previous grant. People *v.* Third Ave. R. Co., 45 Barb. 63.

Compelling construction of extension.— Sometimes the municipality reserves, in the ordinance or agreement, power to compel the construction of extensions (State *v.* St. Paul City R. Co., 78 Minn. 331, 81 N. W. 200), but such power can be exercised only over territory within the limits of the municipality at the date of the agreement (Toronto R. Co. *v.* Toronto, 37 Can. Sup. Ct. 430 [*followed* in Toronto *v.* Toronto R. Co., 12 Ont. L. Rep. 534, 8 Ont. Wkly. Rep. 179 (*reversing* 11 Ont. L. Rep. 103, 6 Ont. Wkly. Rep. 871)]); and a street railroad company cannot be compelled to build an extension before the occurrence of a condition upon which the ordinance under which it originally built the road required it to make the extension, simply because the consent of property-holders to the building of the road was accompanied by a request that the ordinance require the extension immediately (People *v.* Chicago, etc., R. Co., 118 Ill. 113, 7 N. E. 116 [*affirming* 18 Ill. App. 125]). The statutory authority of a municipality to compel an extension must be reasonably exercised, and if it is not the courts will interfere. Woonsocket St. R. Co. *v.* Woonsocket, 22 R. I. 64, 46 Atl. 272.

Right to construct additional tracks, branches, and switches see *infra*, IV, F.

27. Cincinnati *v.* Cincinnati Inclined Plane R. Co., 4 Ohio S. & C. Pl. Dec. 507, 30 Cinc. L. Bul. 321 [*affirmed* in 52 Ohio St. 609, 44 N. E. 327].

28. *Illinois.*— Blocki *v.* People, 220 Ill. 444, 77 N. E. 172.

Indiana.— Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770; Columbus St. R., etc., Co. *v.* Columbus, 43 Ind. App. 265, 86 N. E. 83.

Minnesota.— Romer *v.* St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455.

Nebraska.— Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

New York.— New York *v.* New York City R. Co., 126 N. Y. App. Div. 36, 110 N. Y. Suppl. 720 [*affirmed* in 193 N. Y. 680, 87 N. E. 1117].

Ohio.— Hamilton, etc., Electric Transit Co. *v.* Hamilton, 4 Ohio S. & C. Pl. Dec. 10, 1 Ohio N. P. 366.

Pennsylvania.— Wilkesbarre *v.* Coalville Pass. R. Co., 7 Leg. Gaz. 397, 4 Luz. Leg. Reg. 279.

United States.— Cleveland Electric R. Co. *v.* Cleveland, etc., R. Co., 204 U. S. 116, 27 S. Ct. 202, 51 L. ed. 399 [*affirming* 137 Fed. 111, and *following* Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801]; Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324; Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543.

See 44 Cent. Dig. tit. "Street Railroads," §§ 39, 40.

29. Romer *v.* St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455; State *v.* Newport St. R. Co., 16 R. I. 533, 18 Atl. 161. And see Wilkesbarre *v.* Coalville Pass. R. Co., 7 Leg. Gaz. (Pa.) 397, 4 Luz. Leg. Reg. 279.

30. Houghton County St. R. Co. *v.* Laurium, 135 Mich. 614, 98 N. W. 393.

31. Koch *v.* North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377.

32. Cincinnati *v.* Cincinnati St. R. Co., 9 Ohio S. & C. Pl. Dec. 235, 6 Ohio N. P. 140.

33. Los Angeles R. Co. *v.* Los Angeles, 152 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. N. S. 1269. And see Hamilton *v.* Cincinnati, etc., St. R. Co., 8 Ohio S. & C. Pl. Dec. 174, 5 Ohio N. P. 457, holding that a street railroad corporation, having a charter to construct a street railroad within and without a city or village, may, under a grant from the city or village, build its line in and through the city or village.

However, a street railroad company holding a grant from a city, which was confirmed by the legislature, does not, by virtue of its incorporation under the general railroad laws, acquire any greater franchise rights. People *v.* Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174 [*affirming* 48 Hun 477, 1 N. Y. Suppl. 197].

In Nebraska the franchise rights of a street railroad company are derived directly from the state and, while the obtaining of the consent of a majority of the electors of the city is a condition precedent to the exercise of such rights, such consent does not enlarge or restrict the grants arising by virtue of the

b. Nature and Extent of Rights Granted[34] — (i) *RIGHT TO ENGAGE IN COLLATERAL ENTERPRISES.* Although no authority to receive property for, and to construct, a freight belt railroad can be derived from the naked power to construct a street railroad,[35] and although street railroads were, until a comparatively recent date, confined exclusively to the carriage of passengers,[36] they are now authorized, under the legislation of some states, to carry, and to enter into traffic arrangements for carrying, freight,[37] and, under some statutes to extend their business to other authorized purposes.[38] But a street railroad company usually has no power, by virtue of its charter, to pave the streets of a city independently of the consent of the city;[39] nor does a permit from the city to string electric wires confer any right to use such wires to distribute power to private consumers.[40]

(ii) *DURATION OF FRANCHISE.*[41] The duration of a street railroad franchise is to be determined by the terms of the grant, unless there is an express statutory prohibition against giving or accepting a franchise beyond a certain term of years.[42] A franchise unlimited in time is at least one for the term of the corporate life of the grantee,[43] and in some cases has been held to be in perpetuity.[44] In juris-

general laws. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

34. Nature and extent of rights in streets see *infra*, IV, A.

35. South, etc., Alabama R. Co. *v.* Highland Ave., etc., R. Co., 119 Ala. 105, 24 So. 114.

36. See *supra*, I, B.

37. De Grauw *v.* Long Island Electric R. Co., 43 N. Y. App. Div. 502, 60 N. Y. Suppl. 163 [*affirmed* in 163 N. Y. 597, 57 N. E. 1108] (holding that under N. Y. Laws (1890), c. 565, § 90, street surface railroads may operate cars designed and intended exclusively for carrying express matter, freight, or property, and used exclusively for that purpose); State *v.* Dayton Traction Co., 64 Ohio St. 272, 60 N. E. 291; Aycock *v.* San Antonio Brewing Assoc., 26 Tex. Civ. App. 341, 63 S. W. 953.

In Georgia, although in 1891 the general assembly had no power to confer on a street car companies the authority to become common carriers of freight, the grant of such authority did not in any way affect other powers which had been lawfully granted to such companies. Brown *v.* Atlanta R., etc., Co., 113 Ga. 462, 39 S. E. 71.

A collateral attack upon the right of a street railroad company to run freight cars over its lines cannot be made in an action for injuries to a person on the street inflicted by such cars. Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895.

38. State *v.* Lindell R. Co., 151 Mo. 162, 52 S. W. 248.

39. Farson *v.* Fogg, 205 Ill. 326, 68 N. E. 755 [*reversing* 105 Ill. App. 572].

40. Chicago Gen. St. R. Co. *v.* Ellicott, 88 Fed. 941.

41. Power of municipality to limit duration see *supra*, III, D, 3, a.

42. Augusta, etc., R. Co. *v.* Augusta, 100 Ga. 701, 28 S. E. 126 (holding that the grant of a right to the streets, by a city, to a street railroad company and their successors, for the term of their charter, expires when the original charter of the company expires); Cleveland *v.* Cleveland Electric R. Co., 201 U. S. 529, 26 S. Ct. 513, 50 L. ed. 854 [*affirming* 135 Fed. 368]; Detroit Citizens' St. R. Co. *v.* Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667 [*reversing* 60 Fed. 161]; *In re* Toronto, 20 Ont. App. 125 [*affirmed* in [1893] A. C. 511, 63 L. J. P. C. 10, 1 Reports 418, and *affirming* 22 Ont. 374].

A statute extending the corporate life of the grantee does not extend the term of a grant by a municipality limited in time. Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848].

43. Mercantile Trust Co. *v.* Denver, 161 Fed. 769. *Compare* Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848, and *followed* in Venner *v.* Chicago St. R. Co., 236 Ill. 349, 86 N. E. 266], holding that in Illinois a grant of a street railroad franchise does not extend beyond the life of the municipality conferring it, where there was no attempt to make a grant of a definite term.

Shorter term than life of grantee.— The fact that the corporate life of a corporation is for an unlimited term does not abridge its capacity to accept a grant of a street franchise for a shorter term. Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

44. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255, holding that, under such a grant, the franchise survives the dissolution of the corporation by legislative act. And see Des Moines City R. Co. *v.* Des Moines, 151 Fed. 854 [*reversed* on other grounds in 214 U. S. 179, 29 S. Ct. 553, 53 L. ed. 958], holding that a limitation of thirty years in the franchise involved in that case related only to the exclusive character of the rights granted.

The omission of a term of years in one ordinance does not indicate an intention on the part of the city to confer a right in perpetuity, where other ordinances making grants for the same system have limited them to a term of twenty-five years. Blair *v.*

dictions where the franchises of street railroad companies are assignable, a grant for a definite term extending beyond the corporate life of the company will be upheld;[45] and where the term for which a franchise may be granted is limited by statute, a grant for a longer time will be sustained for the statutory term.[46] A franchise of a distinct branch line made to terminate with the grant to the main line is to be measured by the grant as it then exists, and not by any subsequent extension thereof.[47]

c. Exclusive and Conflicting Grants and Licenses. As the policy of the law is against monopolies and exclusive grants in derogation of common right, grants to street railroad companies, which are claimed to confer an exclusive right, as against rival companies, to the use of particular streets, will be strictly construed and will not be held to confer such right by implication;[48] nor, where the grant does confer such right, will it be extended by construction beyond the clear import of its terms.[49] But where a valid grant of exclusive rights has been made to a

Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848].

45. Detroit Citizens' St. R. Co. *v.* Detroit, 64 Fed. 628, 12 C. C. A. 365, 26 L. R. A. 667 [*reversing* 60 Fed. 161, and *followed* in Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592].

46. Sommers *v.* Cincinnati, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612.

A franchise granted before the passage of a statute limiting the time for which such grants may be made may contain a valid limitation as to time (Cleveland Electric R. Co. *v.* Cleveland, 137 Fed. 111 [*affirmed* in 204 U. S. 116, 27 S. Ct. 202, 51 L. ed. 399]), but a franchise without limitation of time, and granted before the statute took effect, is perpetual, subject only to the power of the legislature to determine it, under a constitutional provision that no special privileges shall ever be granted that may not be altered, revoked, or repealed by the general assembly (State *v.* Columbus R. Co., 24 Ohio Cir. Ct. 609).

47. Cleveland Electric R. Co. *v.* Cleveland, etc., R. Co., 204 U. S. 116, 27 S. Ct. 202, 51 L. ed. 399 [*affirming* 137 Fed. 111], holding further that an extension of the time for the termination of the franchise of a branch line to the date set for the termination of the main line was not effected by a municipal ordinance consenting to a consolidation of several street railroads, including the lines in question, on condition that but one fare should be charged for a continuous ride.

48. *Delaware.*— Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12.

Indiana.— Indianapolis Cable St. R. Co. *v.* Citizens' R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539.

Kentucky.— Covington St. R. Co. *v.* Covington, etc., St. R. Co., 1 Ky. L. Rep. 318.

New York.— Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. 364.

Wisconsin.— Murray Hill Land Co. *v.* Milwaukee Light, etc., Co., 110 Wis. 555, 86 N. W. 199.

See 44 Cent. Dig. tit. "Street Railroads," § 46.

49. *Georgia.*— West End, etc., R. Co. *v.* Atlanta St. R. Co., 49 Ga. 151.

Maryland.— North Baltimore Pass. Co. *v.* Baltimore, 75 Md. 247, 23 Atl. 470, holding that an ordinance prohibiting a company from laying tracks on a certain bridge is not intended to secure to the company whose tracks are already on the bridge a monopoly of the right of way, but only to avoid encumbering the bridge with unnecessary tracks; and the fact that a temporary bridge is to be erected, while the other is being replaced, and that only those companies that are entitled to occupy the permanent bridge are licensed to lay tracks upon the temporary bridge, does not prevent a similar license from afterward being given to other companies.

Massachusetts.— New Bedford, etc., R. Co. *v.* Achusnet St. R. Co., 143 Mass. 200, 9 N. E. 536.

United States.— New Orleans City R. Co. *v.* Crescent City R. Co., 12 Fed. 308, holding that a city, which has contracted with one company not to grant similar franchises over the same streets to any other company during the period of said contract, is not thereby estopped from granting to others the privilege of running lines across any of the streets mentioned in the contract, nor for such short distances along such streets as are necessary to make connections and turnouts for other lines running mainly along other streets, and between entirely different termini.

Canada.— Toronto R. Co. *v.* Toronto, 37 Can. Sup. Ct. 430.

See 44 Cent. Dig. tit. "Street Railroads," §§ 46, 47.

And see Grand Rapids St. R. Co. *v.* Grand Rapids West Side R. Co., 48 Mich. 433, 12 N. W. 643.

Extension of time.— Where a city ordinance grants a street railroad company a franchise, providing that it might operate in such streets as might be designated from time to time, and that the company shall have an exclusive privilege for five years, a subsequent permission to the company to operate a track in the street does not amount to an extension of the time for the exclusive privilege. Thurston *v.* Houston, 123 Iowa 157, 98 N. W. 637.

An exclusive right to operate a horse railroad does not exclude other street railroads

street railroad company, the courts will affirm and protect such rights,[50] as by the issuance of an injunction on the application of the grantee.[51] As the right of a street railroad company to the use of its tracks is exclusive by reason of the mere right of property, at least against other competing companies, if not against the public,[52] a grant of exclusive rights relates to streets and not to the tracks.[53] A municipality is not precluded from conferring the same or similar rights and

operated by other means than animal power (Teachout *v.* Des Moines Broad Gauge St. R. Co., 75 Iowa 722, 38 N. W. 145), such as a cable tramway (Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324), or a street railroad operated by steam (Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673); but the exclusiveness of a right to operate a city railroad generally is not impaired by the fact that electricity was not used at the time the grant was made (Wilmington City R. Co. *v.* Wilmington, etc., R. Co., (Del. 1900) 46 Atl. 12).

50. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., (Del. 1900) 46 Atl. 12 (holding, however, that in the case in question there was a valid revocation of the exclusive privilege); West End, etc., R. Co. *v.* Atlanta St. R. Co., 49 Ga. 151.

Option.— An ordinance granting a street railroad company exclusive authority, at its option, to construct street railroads on all streets within the city, is a grant of an exclusive privilege, and is in effect an exclusive franchise. Detroit Citizens' St. R. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 64 Am. St. Rep. 350, 35 L. R. A. 859 [*affirmed* in 171 U. S. 48, 18 S. Ct. 732, 43 L. ed. 67].

51. Santa Rosa R. Co. *v.* Central St. R. Co., (Cal. 1895) 38 Pac. 986; St. Louis R. Co. *v.* Northwestern St. Louis R. Co., 69 Mo. 65 [*reversing* 2 Mo. App. 69]; Central Crosstown R. Co. *v.* Metropolitan St. R. Co., 17 Misc. (N. Y.) 716, 40 N. Y. Suppl. 1095 [*affirmed* in 16 N. Y. App. Div. 229, 44 N. Y. Suppl. 752]; Germantown Pass. R. Co. *v.* Citizens' Pass. R. Co., 9 Pa. Co. Ct. 638. But see Market St. R. Co. *v.* Central R. Co., 51 Cal. 583, denying the right of one company to enjoin the unauthorized occupation of the same street by another company, but not discussing the exclusive right, or lack of it, of the complaining company.

A company in default for not constructing its road within the prescribed time is not entitled to the aid of equity to specifically enforce by injunction an implied negative provision in its grant denying the municipality the right to grant to another street railroad company the right to use its streets (South Shore Traction Co. *v.* Bookhaven, 53 Misc. (N. Y.) 392, 102 N. Y. Suppl. 1074); and a company, to whom an option to construct on a certain street has been given, by not objecting or protesting to the granting of a similar franchise to another company, thereby acknowledges that it has lost its option (Kent *v.* Binghamton, 40 Misc. (N. Y.) 1, 81 N. Y. Suppl. 198 [*affirmed* in 87 N. Y. App. Div. 632, 84 N. Y. Suppl. 1131]).

Where the rights granted are not exclusive, the public alone is entitled to complain against one company occupying streets without authority. Christopher, etc., R. Co. *v.* Central Crosstown R. Co., 67 Barb. (N. Y.) 315. And see Ogden City R. Co. *v.* Ogden City, 7 Utah 207, 26 Pac. 288. Thus, a street railroad company will not be enjoined from constructing tracks on a street on which complainant has not been granted the exclusive use, but only the use of such street for a distance of two blocks, for the purpose of completing its circuit. 13th St., etc., Pass. R. Co. *v.* Southern Pass. R. Co., 3 Pa. Dist. 337. However, a telephone company occupying the streets of a city, although not claiming any exclusive rights therein, may maintain an injunction against a street railroad company constructing its poles and wires so as to interfere with and injure the former's poles and wires, upon showing the acts complained of to be a continuing trespass, and creating damages which are not merely incidental but are an abuse of its franchise. Birmingham Traction Co. *v.* Southern Bell Tel., etc., Co., 119 Ala. 144, 24 So. 731.

52. Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602; Citizens' Coach Co. *v.* Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542 [*affirming* 31 N. J. Eq. 525].

Rights confined to space occupied.— However, it is only so much of the street as may be actually occupied that can be claimed to be exclusive of other tracks. City R. Co. *v.* Citizens' R. Co., (Ind. 1898) 52 N. E. 157; North Baltimore Pass. R. Co. *v.* Baltimore, 75 Md. 247, 23 Atl. 470.

Straddling the tracks of one company with the tracks of another is not permissible, as it interferes with the vested rights of the first company. Hamilton, etc., Traction Co. *v.* Hamilton, etc., Transit Co., 69 Ohio St. 402, 69 N. E. 991; Com. *v.* Bond, 214 Pa. St. 307, 63 Atl. 741, 112 Am. St. Rep. 745. This is true, although in the grant to the first company the power to grant the common use of the street to another company is reserved, as the common use of the street does not mean common use of the tracks. Com. *v.* Bond, *supra*.

Right of one company to use tracks of another see *infra*, VII, E.

53. Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602. *Compare* Winnipeg St. R. Co. *v.* Winnipeg Electric St. R. Co., 9 Manitoba 219, holding that a provision in a grant that the street railroad "shall have the exclusive right to such portion of any streets as shall be occupied by said railroad" relates only to the space upon which a track and rails are laid.

franchises upon another company when the grant to a prior company is not exclusive,[54] or is exclusive but is invalid because so,[55] or is otherwise *ultra vires*,[56] and although mere priority of grant does not confer exclusive rights,[57] where valid grants of the right to use the same street or a particular portion thereof have been made to two different companies, the first of the grantees to rightfully occupy the street acquires the superior and better claim of right thereto.[58] In some jurisdictions the policy of the legislation is that there shall be no more than one lawfully authorized street railroad track laid upon the same street or highway at the same time,[59] while in other jurisdictions this policy obtains with the limita-

54. *Indiana.*— Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539.

Maryland.— North Baltimore Pass. R. Co. *v.* Baltimore, 75 Md. 247, 23 Atl. 470.

New York.— Christopher, etc., R. Co. *v.* Central Crosstown R. Co., 67 Barb. 315.

Pennsylvania.— Com. *v.* Bond, 214 Pa. St. 307, 63 Atl. 741.

Texas.— Houston *v.* Houston City St. R Co., 83 Tex. 548, 19 S. W. 127; Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, 4 S. W. 534.

Washington.— Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369, holding that under a city charter providing that no exclusive franchise shall be granted for the use of any street, the city has power to grant a franchise for a street railroad along a street on which there is an existing street railroad operating under an existing franchise, created by an ordinance providing that such franchise shall not be exclusive.

See 44 Cent. Dig. tit. "Street Railroads," §§ 46, 47.

And see Wilmington City R. Co. *v.* People's R. Co., (Del. 1900) 47 Atl. 245, holding that the consent of a city to a street railroad company to use certain streets does not estop it from thereafter giving such consent to another company, unless the former consent has been so acted upon by the first company as to cause substantial loss if it is recalled.

55. Henderson *v.* Ogden City R. Co., 7 Utah 199, 26 Pac. 286.

Validity of exclusive grants and licenses see *supra*, III, D, 3, b.

56. Pennsylvania R. Co. *v.* Hamilton Tp., 67 N. J. L. 477, 51 Atl. 926 [*affirmed* in 68 N. J. L. 414, 53 Atl. 1125].

57. Brooklyn City, etc., R. Co. *v.* Coney Island, etc., R. Co., 35 Barb. (N. Y.) 364.

58. City R. Co. *v.* Citizens' St. R. Co., (Ind. 1898) 52 N. E. 157; Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539 (holding further that where two street railroad companies take actual possession of a part of a street on the same day, and one of them has theretofore undertaken the construction of a line between two points which includes the part of the street in controversy, and is diligently prosecuting the construction of that line, it has the better right; but that a company which is authorized by charter to build a cable road only acquires no right by commencing the construction of a horse or electric road, and another company which, in good faith, and in pursuance of its charter, afterward begins the construction of a road upon the same streets, is entitled to an injunction against it); Hamilton, etc., Traction Co. *v.* Hamilton, etc., Electric Transit Co., 69 Ohio St. 402, 69 N. E. 991; Norristown Pass. R. Co. *v.* Citizens' Pass. R. Co., 3 Montg. Co. Rep. (Pa.) 119. And see Denison, etc., R. Co. *v.* Denison Land, etc., Co., 11 Tex. Civ. App. 157, 32 S. W. 332. *Compare* Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 33 N. W. 610, 35 N. W. 602, holding that a company possessed of a grant of an exclusive right is entitled to protect its rights as to streets not occupied by it.

Equal rights.— It has been held that where two street railroad companies have been given the right to place rails in and to use the same street, each is bound to place its rails and to use the street in such manner that the public may have the benefit which may be derived from the joint use, and that accordingly equity will permit neither to unnecessarily interfere with the right of the other to lay its tracks. Chicago Gen. R. Co. *v.* West Chicago St. R. Co., 63 Ill. App. 464.

59. West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333; Com. *v.* Broad St. Rapid Transit St. R. Co., 219 Pa. St. 11, 67 Atl. 958; Com. *v.* Uwchlan St. R. Co., 203 Pa. St. 608, 53 Atl. 513; Homestead St. R. Co. *v.* Pittsburg, etc., St. R. Co., 166 Pa. St. 162, 30 Atl. 950, 27 L. R. A. 383; West Philadelphia Pass. R. Co. *v.* Philadelphia, 10 Phila. (Pa.) 70, holding, however, that where the obstruction of a street is due to the construction of another track in a street which has been occupied by a street railroad company, the city, in the exercise of its power to remove obstructions, cannot order the first track removed. And see Pennsylvania R. Co. *v.* Philadelphia Belt Line R. Co., 10 Pa. Co. Ct. 625.

Reservation in grant.— However, it seems that a borough may, in its grant to one company, reserve the power to grant the use of the street in common to another company. Com. *v.* Bond, 214 Pa. St. 307, 63 Atl. 741, 112 Am. St. Rep. 745.

Under the California code, two street railroad corporations cannot use or occupy the same street or track for a distance of more than five blocks, and in no case may the right to use the same street be granted to more than two corporations. Omnibus R. Co. *v.* Baldwin, 57 Cal. 160. And see Oakland R.

tion that a second company may occupy the same street upon obtaining the consent of the first; [60] and it follows that in such jurisdictions priority of user under a valid grant confers an exclusive right to the streets occupied; [61] but under statutes allowing a street railroad company to acquire exclusive rights and privileges, conditions precedent must be complied with before such rights vest.[62]

5. Sale of Franchises by Municipality. A municipality has the power to exact compensation for the use of its streets by street railroad companies; [63] and under some statutes, a street railroad franchise must be granted to the highest bidder,[64]

Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181.

60. *In re* Thirty-Fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172 [*reversing* 37 Hun 442]; Forty-Second St., etc., R. Co. *v.* Thirty-Fourth St. R. Co., 52 N. Y. Super. Ct. 252; Central Crosstown R. Co. *v.* Metropolitan St. R. Co., 17 Misc. (N. Y.) 716, 40 N. Y. Suppl. 1095 [*affirmed* in 16 N. Y. App. Div. 229, 44 N. Y. Suppl. 752]. *Compare* Electric City R. Co. *v.* Niagara Falls, 48 Misc. (N. Y.) 91, 95 N. Y. Suppl. 73, holding that the consent of an existing company is not a condition precedent to the right of such competing company to obtain the consent of the local authorities.

61. See the cases cited *supra*, in notes 59, 60.

62. People's Traction Co. *v.* Atlantic City, 71 N. J. L. 134, 57 Atl. 972; New York Cable R. Co. *v.* Chambers St., etc., R. Co., 40 Hun (N. Y.) 29; Com. *v.* Lance, 8 Del. Co. (Pa.) 9, holding that the mere grant of a charter to a street railroad company does not give such authority to lay tracks on the streets named in the charter as will invalidate a charter subsequently granted to another company for the same route. But see Tamaqua, etc., St. R. Co. *v.* Inter-County St. R. Co., 167 Pa. St. 91, 31 Atl. 473 [*affirming* 4 Pa. Dist. 20].

The provision of the New York rapid transit act which prohibits the commissioners from locating routes for elevated railroads over streets "already legally authorized for or occupied by an elevated or underground railroad" does not apply to streets alleged to be covered by the routes of other railroad companies, but in which no company has a complete right to build. *In re* Union El. R. Co., 1 N. Y. Suppl. 797 [*affirmed* in 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359].

63. Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32; Venner *v.* Chicago City R. Co., 236 Ill. 349, 86 N. E. 266; Providence *v.* Union R. Co., 12 R. I. 473.

The smallness of the charge made by a city for a franchise granted to a street railroad company does not invalidate the ordinance, where it is not claimed that the charge was collusively or dishonestly arrived at, or was not fixed as prescribed by the city charter. Dulaney *v.* United R., etc., Co., 104 Md. 423, 65 Atl. 45.

Estoppel.—Where a street railroad company, in order to induce the mayor of a city to sign a franchise ordinance, executed a contract which was void in its inception, by which the company agreed to pay the city fifty thousand dollars in instalments for the rights granted under the franchise, and after executing the contract the company proceeded to construct and operate its road on one of the streets under a permit issued by the commissioner of public works pursuant to such franchise and contract, the company is thereafter estopped to deny that the contract was valid. Potter *v.* Calumet Electric St. R. Co., 158 Fed. 521.

Percentage of earnings.—Under a law requiring an elevated railroad company to pay to the city five per cent of its net income of its passenger traffic, "net income" means the gross receipts from passenger traffic, less the general expenses of operating the road. New York *v.* Manhattan R. Co., 192 N. Y. 90, 84 N. E. 745 [*affirming* 119 N. Y. App. Div. 240, 104 N. Y. Suppl. 609]. Where the contract is for the payment of a percentage of gross earnings, the city is only entitled to percentage on the gross earnings arising from the whole operation of the lines within its territorial limits. Montreal St. R. Co. *v.* Montreal, [1906] A. C. 100, 75 L. J. P. C. 9, 93 L. T. Rep. N. S. 678, 22 T. L. R. 60, 5 Can. R. Cas. 287.

Compensation for use of public bridge see *infra*, IV, H.

64. Johnson *v.* New Orleans, 105 La. 149, 29 So. 355; People *v.* Barnard, 110 N. Y. 548, 18 N. E. 354.

As to the various changes which the New York statutes relating to the sale of franchises have undergone see Kuhn *v.* Knight, 190 N. Y. 339, 83 N. E. 293 [*affirming* 115 N. Y. App. Div. 837, 101 N. Y. Suppl. 1]; Adamson *v.* Nassau Electric R. Co., 89 Hun 261, 34 N. Y. Suppl. 1073; Smith *v.* Buffalo, 51 Misc. 244, 100 N. Y. Suppl. 922.

Validity of statute.—An act providing for the sale of street railroad franchises is void, if its meaning cannot be determined by any known rules of construction, or if it is incapable of enforcement. State *v.* West Side St. R. Co., 146 Mo. 155, 47 S. W. 959.

An interurban electric railroad comes within the exception of trunk railways contained in Ky. Const. § 164, requiring the sale of street railway franchises by cities. Diebold *v.* Kentucky Traction Co., 117 Ky. 146, 77 S. W. 674, 25 Ky. L. Rep. 1275, 111 Am. St. Rep. 230, 63 L. R. A. 637.

The Louisiana statutes relating to the sale of franchises apply to street railroad franchises granted for the purpose of operating a road exclusively within the city limits, and do not apply to commercial railroads coming into the city from a distance. East

or to the bidder offering to transport passengers at the lowest rate of fare,[65] and upon the fulfilment of certain conditions by the successful bidder.[66] These statutes do not generally apply to mere extensions or renewals;[67] but in cases where they are applicable, the sale must be made in compliance with the statutory requirements.[68] Mere inadvertence or informality in the use of words which do not go to the substance of the bid will not invalidate the sale,[69] and in general the duty of the local authorities consists in deciding which is the best bid within the meaning of the statute, without inquiring into the motives of the bidder,[70]

Louisiana R. Co. *v.* New Orleans, 46 La. Ann. 526, 15 So. 157. However, in determining what is a street railroad within the meaning of the statutes, the term is to be given a liberal and not a strict interpretation. New Orleans City, etc., R. Co. *v.* Watkins, 48 La. Ann. 1550, 21 So. 199.

65. Simmons *v.* Toledo, 5 Ohio Cir. Ct. 124, 3 Ohio Cir. Dec. 64.

66. See the cases cited *infra*, this note.

Under the New York statute, prescribing certain conditions of the sale and providing that the local authorities may, in their discretion, impose further conditions, the board of aldermen may require the purchaser to deposit half the money necessary to complete the road (Abraham *v.* Meyers, 23 N. Y. Suppl. 225, 228, 29 Abb. N. Cas. 384); but the "further conditions" are only *ejusdem generis* with those specifically enumerated in the statute and do not authorize the local authorities to attach additional monetary conditions to their consent (Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277 [*affirming* 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174]). Whatever conditions the local authorities impose must be specified in the notice of sale, and no other condition can be inserted in the consent and none other exacted or imposed by the officer conducting the sale. People *v.* Barnard, 110 N. Y. 548, 18 N. E. 354.

67. Kuhn *v.* Knight, 115 N. Y. App. Div. 837, 101 N. Y. Suppl. 1 [*affirmed* in 190 N. Y. 339, 83 N. E. 293]; Smith *v.* Buffalo, 51 Misc. (N. Y.) 244, 100 N. Y. Suppl. 922; Clement *v.* Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355; Haskins *v.* Cincinnati Consol. St. R. Co., 7 Ohio Dec. (Reprint) 713, 4 Cinc. L. Bul. 1126. *Compare* Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277 [*affirming* 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174], holding that the language of the New York statute seems to contemplate the sale of a franchise for a single branch or extension, and not several branches or extensions grouped together.

68. Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277 [*affirming* 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174]; Sloane *v.* People's Electric R. Co., 7 Ohio Cir. Ct. 84, 3 Ohio Cir. Dec. 674 (holding that a publication of the notice inviting bids for the construction of a street railroad for the time and in the manner prescribed by statute is sufficient, although made by the city clerk without any direct authority of the council); Pacific Electric R. Co. *v.* Los Angeles, 194 U. S. 112, 24 S. Ct. 586, 48 L. ed. 896 [*affirming* 118 Fed. 746] (holding that the acceptance of a bid already made, when the successful bidder defaults, is necessitated by the provision of Cal. Act, March 11, 1901, c. 103, § 5, for the granting of a street railroad franchise by a municipality to the "next highest bidder" therefor, in case the successful bidder fails to make the requisite deposit of the amount of his bid within twenty-four hours after the sale); Hart *v.* Buckner, 54 Fed. 925, 5 C. C. A. 1 [*affirming* 52 Fed. 835].

Publication.— The consent of the board of aldermen to a sale of a street railroad franchise is not an alienation or appropriation of property of the city, within N. Y. Consol. Act (Laws (1882), c. 410), § 80, providing that no resolution or ordinance shall be adopted, respecting the alienation or appropriation of property of the city, until an abstract thereof has been published. Abraham *v.* Meyers, 23 N. Y. Suppl. 225, 228, 29 Abb. N. Cas. 384.

69. Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277 [*affirming* 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174]; Compton *v.* Johnson, 9 Ohio Cir. Ct. 532, 6 Ohio Cir. Dec. 110; Simmons *v.* Toledo, 5 Ohio Cir. Ct. 124, 3 Ohio Cir. Dec. 64.

70. Compton *v.* Johnson, 9 Ohio Cir. Ct. 532, 6 Ohio Cir. Dec. 110; Knorr *v.* Miller, 5 Ohio Cir. Ct. 609, 3 Ohio Cir. Dec. 297 [*affirming* 25 Cinc. L. Bul. 128]. And see Gallagher *v.* Johnson, 11 Ohio Dec. (Reprint) 840, 30 Cinc. L. Bul. 139, holding that a proposal cannot be rejected by the city council on the ground that it is not made in good faith, except for things done and said by the bidder in the council's presence, and that its inquiry must be confined to the question of whether he withdraws his bid or intends to comply with its terms.

Advantage of one bidder.—A sale is not illegal because it happens that one purchaser, without his connivance or procurement, and without fraud, collusion, or undue influence being shown, is in a position, by reason of his situation to bid a price higher than another. Johnson *v.* New Orleans, 105 La. 149, 29 So. 355.

The personnel of the bidders is immaterial, and if there is a compliance with the terms of the sale, the highest bid must be accepted; hence where an individual is the highest bidder, he is entitled to the franchise, although he is himself unable under the law to construct and maintain the road, as he can either organize a corporation to con-

but they have authority to reject a bid which they find to be frivolous or fraudulent.[71]

E. Amendment, Revocation, or Forfeiture of Charter or Franchise

— **1. Amendment or Revocation of Charter.** Under power to alter, amend, or repeal reserved at the time of granting the charter, or conferred by constitution or statute, the body which granted the charter of a street railroad company may alter or supplement the same, either on its own initiation or on application of the company, provided its action is not arbitrary or destructive of vested rights acquired in good faith under the charter;[72] and in some jurisdictions the charter of the company may be revoked or vacated, as by proceedings in quo warranto for a violation of the ordinance which granted its franchise.[73] An amendment or supplement does not discharge the company from contractual obligations previously undertaken.[74]

2. Modification and Amendment of Franchise.[75] As a street railroad franchise constitutes a contract,[76] the body granting the same may not later modify or amend it, without the company's consent, so as to lessen the rights and privileges of the company, or impose additional burdens upon it,[77] unless the power to do so is clearly reserved.[78]

struct and maintain it, or can assign his bid to another, who will do so. Trojan R. Co. *v.* Troy, 125 N. Y. App. Div. 362, 109 N. Y. Suppl. 779 [*affirmed* in 195 N. Y. 614, 89 N. E. 1113].

71. Compton *v.* Johnson, 9 Ohio Cir. Ct. 532, 6 Ohio Cir. Dec. 110.

One bidder cannot enjoin the sale on the ground that his was the highest *bona fide* bid made on the day of the sale, unless he shows that no bid made thereafter was a legitimate and binding offer. Southern Boulevard R. Co. *v.* People's Traction Co., 5 N. Y. App. Div. 330, 39 N. Y. Suppl. 266 [*affirming* 16 Misc. 263, 39 N. Y. Suppl. 266].

72. Metropolitan R. Co. *v.* Macfarland, 20 App. Cas. (D. C.) 421 [*affirmed* in 195 U. S. 322, 25 S. Ct. 28, 49 L. ed. 219]; Williamsport Pass. R. Co.'s Appeal, 120 Pa. St. 1, 13 Atl. 496; Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848] (holding that the declaration in the title of the various acts constituting the charters of the Chicago street railroad companies that they concern "horse railways," does not, because of the provision of Ill. Const. (1848) that no private or local law shall embrace more than one subject, which shall be expressed in the title, prevent the exercise of the power to amend such charters in such manner as to authorize the use of cable or electricity as the motive power); Montgomery Amusement Co. *v.* Montgomery Traction Co., 139 Fed. 353 [*affirmed* in 140 Fed. 988, 72 C. C. A. 682]. And see Taylor *v.* Bay City St. R. Co., 80 Mich. 77, 45 N. W. 335.

Consideration.— That a street railroad company will connect its two systems, construct new lines, and reduce the fare to all parts of the city, is a sufficient consideration to make valid an ordinance amending the company's charter by relieving it of the obligation to pave between the rails, and for a given distance outside. Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770.

General statutes relating to corporations generally, and authorizing amendments of the certificates of incorporation, are inapplicable to companies formed under the street railroad laws, where the latter laws were intended to embrace the whole law as to the formation of companies thereunder. *In re* New York Cable R. Co., 109 N. Y. 32, 15 N. E. 882.

Various supplements construed.—Where the charter required the consent of the city council to extensions of the railroad, and a supplemental charter authorized an extension without such consent, a second supplement, silent as to consent, must be taken subject to the requirement of the charter that consent to the extension must be obtained. Philadelphia *v.* Citizens' Pass. R. Co., 10 Pa. Co. Ct. 16 [*following* Philadelphia *v.* Lombard, etc., Pass. R. Co., 4 Brewst. (Pa.) 14].

73. State *v.* Madison St. R. Co., 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771. See, generally, Quo Warranto, 32 Cyc. 1427.

A revocation of part of a charter does not terminate all the powers granted by the charter. Dedham, etc., R. Co. *v.* Metropolitan R. Co., 8 Allen (Mass.) 279.

An injunction whose only effect is to keep the company within the limits of its charter does not operate as a repeal thereof. Lehigh Coal, etc., Co. *v.* Inter-County St. R. Co., 167 Pa. St. 75, 31 Atl. 471.

74. Jersey City *v.* North Jersey St. R. Co., 72 N. J. L. 383, 61 Atl. 95.

75. Extensions of route and renewals of franchise see *supra*, III, D, 3, d.

76. See *supra*, II, A.

77. Burlington *v.* Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145; Grand Rapids Electric R. Co. *v.* Grand Rapids, 84 Mich. 257, 47 N. W. 567; Minneapolis St. R. Co. *v.* Minneapolis, 155 Fed. 989.

78. Denver *v.* Denver City Cable R. Co., 22 Colo. 565, 45 Pac. 439; Sioux City St. R.

3. Forfeiture, Revocation, and Relinquishment of Franchise — a. Authority and Grounds. The franchise of a street railroad company to maintain its line of road upon a certain street, as distinguished from its franchise to be a corporation, may be voluntarily surrendered with the consent of the city which granted it, without the consent of the state;[79] but as such a franchise is contractual in its nature and confers vested rights, it cannot be revoked without the consent of the company, except where power to revoke is reserved in the grant or is conferred by constitution or statute[80] in effect at the time the franchise rights become complete.[81] Within constitutional or statutory limits, the body grant-

Co. *v.* Sioux City, 78 Iowa 742, 39 N. W. 498.

Particular statutes construed.— Ohio Rev. St. § 2502, providing that a city shall not, during the term of a grant of a franchise to a street railroad company, "release the grantee from any obligation or liability imposed by the terms of such grant," does not render void a modification of a contract between the city and the railroad owner, made in good faith, for the better accommodation of the public. Clement *v.* Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355. The New York statute (act April 9, 1867) for laying out a certain highway, having provided that no railroad should be constructed on such highway without a special act for that purpose, may be amended so as to permit the construction of a road by a company organized under a general act. Spofford *v.* Southern Boulevard R. Co., 15 Daly (N. Y.) 162, 4 N. Y. Suppl. 388.

Where the right to amend exists, it may be rightfully exercised only by complying with all the formalities prescribed by law. Buckner *v.* Hart, 52 Fed. 835. However, in the absence of fraud, an amendatory franchise ordinance for which there is a consideration will not be set aside because the amendment is injudicious or the consideration inadequate. Indianapolis, etc., R. Co. *v.* New Castle, 43 Ind. App. 467, 87 N. E. 1067.

79. Wood *v.* Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369; Thompson *v.* Schenectady R. Co., 124 Fed. 274. But see Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47.

An agreement to postpone for a certain specified time the exercise of the right granted does not constitute an abandonment or surrender. McNeil *v.* Chicago City R. Co., 61 Ill. 150.

A turnpike company which, after becoming the purchaser of the franchises of a passenger railroad company, authorized to lay a track along the road of said turnpike company, releases and gives up to the city all its interest in that portion of their road within the limits of the city, thereby releases the right to lay a railroad track thereon. West Philadelphia Pass. R. Co. *v.* Philadelphia, etc., Turnpike Road Co., 6 Pa. Dist. 160.

80. *Georgia.*— Floyd County *v.* Rome St. R. Co., 77 Ga. 614, 3 S. E. 3.

Illinois.— Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681 [*affirming* 47 Ill. App. 388].

Michigan.— Hamtramck Tp. *v.* Rapid R. Co., 122 Mich. 472, 81 N. W. 337.

New Jersey.— Asbury Park, etc., R. Co. *v.* Neptune Tp. Committee, 73 N. J. Eq. 323, 67 Atl. 790. And see Roebling *v.* Trenton Pass. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129.

New York.— Herzog *v.* New York El. R. Co., 14 N. Y. Suppl. 296 [*affirmed* in 76 Hun 486, 27 N. Y. Suppl. 1034].

North Carolina.— Asheville St. R. Co. *v.* Asheville, 109 N. C. 688, 14 S. E. 316.

Ohio.— State *v.* Columbus R. Co., 24 Ohio Cir. Ct. 609.

Texas.— Houston *v.* Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127.

United States.— Africa *v.* Knoxville, 70 Fed. 729; Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715.

See 44 Cent. Dig. tit. "Street Railroads," § 50.

Compare Lake Roland El. R. Co. *v.* Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126, holding that revocation may be made under a general power to regulate the use of the streets by railway or other tracks.

Where the company has not acted under the ordinance for a period of six years, the city possesses the power of repeal. Snouffer *v.* Cedar Rapids, etc., R. Co., 118 Iowa 287, 92 N. W. 79.

Arbitration clause.—Where an ordinance giving a street railroad company the right to use a street contains no clause of forfeiture, an agreement of the company with the mayor, at the time of signing the ordinance, to arbitrate any difficulty with another street railroad company seeking to use the street, does not give the city the right to forfeit the franchise because its arbitrator is unable to agree with the second arbitrator in the choice of a third. Chester City *v.* Union R. Co., 218 Pa. St. 24, 66 Atl. 1107.

81. Suburban Rapid-Transit Co. *v.* New York, 128 N. Y. 510, 28 N. E. 525; People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255; Coney Island, etc., R. Co. *v.* Kennedy, 15 N. Y. App. Div. 588, 44 N. Y. Suppl. 825; Citizens' St. R. Co. *v.* City R. Co., 64 Fed. 647. And see City R. Co. *v.* Citizens' St. R. Co., (Ind. 1898) 52 N. E. 157.

The extension of the city limits does not confer on the city any power to impair the vested rights of a street railroad company operating in the annexed territory at the time

ing a street railroad franchise has power to provide in the grant for a revocation or forfeiture of the right granted,[82] as for a failure to begin [83] or to complete the construction of the road within a specified time,[84] or for non-user.[85] Although

of annexation. Johnson *v.* Owensboro, etc., R. Co., 36 S. W. 8, 18 Ky. L. Rep. 276.

82. Tower *v.* Tower, etc., R. Co., 68 Minn. 500, 71 N. W. 691.

Power to contract for waiver of forfeiture.—A city cannot contract with a street railroad company, by ordinance or otherwise, that non-user of its tracks for a specified period shall not operate as a forfeiture of its franchises, as such a contract would allow the devotion of the streets to private purposes. State *v.* East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955.

Failure to lay planks.—A street railroad license in a street may be forfeited for a failure to lay planks of prescribed dimensions along the rails in front of improved property if the ordinance gives the right to forfeit for such cause. Wheeling, etc., R. Co. *v.* Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. N. S. 321.

83. Manton *v.* South Shore Traction Co., 121 N. Y. App. Div. 410, 106 N. Y. Suppl. 82 [*reversing* 104 N. Y. Suppl. 612]. And see Atchison St. R. Co. *v.* Nave, 38 Kan. 744, 17 Pac. 587, 5 Am. St. Rep. 800, holding that a license to build on a street within a certain time lapses on the expiration of the time without being availed of, and that no revocation is needed to terminate the same.

Failure to begin the construction of an extension within the time allowed creates a forfeiture of the franchise rights as to such extension. *In re* Brooklyn, etc., R. Co., 185 N. Y. 171, 77 N. E. 994 [*affirming* 106 N. Y. App. Div. 240, 94 N. Y. Suppl. 113].

Under Cal. Code, § 502, the franchise of a street railroad company is not forfeited merely for a failure to begin work within a year, but a failure to commence work within that time and to complete the work within three years has that effect. Omnibus R. Co. *v.* Baldwin, 57 Cal. 160.

84. Los Angeles R. Co. *v.* Los Angeles, 152 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. N. S. 1269; *In re* Kings County El. R. Co., 41 Hun (N. Y.) 425 [*reversed* on other grounds in 105 N. Y. 97, 13 N. E. 18]; Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, 4 S. W. 534.

To prevent a forfeiture for non-completion, there must be a substantially constructed track, and what constitutes such a track is a question of fact for the jury. Houston *v.* Houston Belt, etc., R. Co., 84 Tex. 581, 19 S. W. 786.

Failure to construct a branch line within the time allowed by a supplementary charter works a forfeiture of the rights granted by it (Williamson *v.* Gordon Heights R. Co., 8 Del. Ch. 192, 40 Atl. 933), and the fact that part of an extension has been completed is no defense (Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12).

Application of statutes.—The provisions of the act under which a company is chartered as to the time within which the road must be completed in order not to incur a forfeiture control over provisions of general railroad laws, when they are conflicting (*In re* Brooklyn El. R. Co., 125 N. Y. 434, 26 N. E. 474 [*affirming* 57 Hun 590, 11 N. Y. Suppl. 161]), and statutes which extend the time for building railroads for two years, and provide that "failure by any railroad company to construct its railroads heretofore, shall not cause a forfeiture," do not apply to a railroad company which has wilfully and intentionally failed to construct its road when able to do so (People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961 [*reversing* 56 Hun 45, 9 N. Y. Suppl. 6]). Where a franchise is granted on condition that the company complete its road within a certain time, but, although the road is not completed within the time prescribed, no forfeiture is declared on behalf of the state, and a special act is passed providing that the time within which a railroad succeeding to such franchise shall finish the roads and put them in operation shall be extended such unused franchise cannot be forfeited at the suit of an abutting owner for the railroad's failure to complete the line within the time prescribed. Kent *v.* Binghamton, 94 N. Y. App. Div. 522, 88 N. Y. Suppl. 34.

85. *California.*— People *v.* Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736, holding that a mere pretense of running does not save a forfeiture.

Minnesota.— Tower *v.* Tower, etc., R. Co., 68 Minn. 500, 71 N. W. 691, 64 Am. St. Rep. 493, 38 L. R. A. 541.

Missouri.— State *v.* East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742, 38 L. R. A. 218.

New York.— People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961 [*reversing* 56 Hun 45, 9 N. Y. Suppl. 6].

Pennsylvania.— Girard College Pass. R. Co. *v.* 13th and 15th Sts., etc., R. Co., 7 Phila. 620.

See 44 Cent. Dig. tit. "Street Railroads," § 50.

Suspension of business.— The failure of a street railroad company to commence its lawful business comes within the meaning of a statute authorizing a forfeiture for a suspension of ordinary or lawful business for a year; and a demand to compel a license to do an unauthorized act is not a performance of business. People *v.* New York City Cent. Underground R. Co., 66 Hun (N. Y.) 633, 21 N. Y. Suppl. 373 [*affirmed* in 137 N. Y. 606, 33 N. E. 744].

Acts indicating an intention to abandon the right to the streets must accompany the non-user in order to extinguish the franchise. Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47.

the grant itself is strictly construed against the street railroad company,[86] in passing upon the conduct or omissions of the company, the courts will lean against forfeitures,[87] and will not hold matters which merely require regulation, or which are not unequivocally grounds of forfeiture, to be such.[88] Nor will a forfeiture be declared or allowed for a delay in constructing and operating the road which is due to unforeseen circumstances,[89] such as an injunction[90] or a failure to obtain the consent of abutting owners.[91]

b. Who Entitled to Assert and Waiver. A forfeiture of a street railroad franchise can only be taken advantage of by the state,[92] or possibly by a municipality,[93] and cannot be asserted and taken advantage of by a competitor, either

A presumption of abandonment of the grant is raised by a failure for twenty years to operate a railroad on certain streets included in the franchise. Louisville Trust Co. *v.* Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

Non-user is not excused by the fact that the city has passed an ordinance attempting to repeal the franchises granted to the company, nor by the fact that the city has prevented the company from laying a small portion of its track, where, had it not interfered, the road could not have been operated without acquiring a right to use a portion of another company's track, which right could not be acquired. State *v.* East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742, 38 L. R. A. 218.

86. See *supra*, III, D, 4, a.

87. People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961 [*reversing* 56 Hun 45, 9 N. Y. Suppl. 6].

Partial forfeiture.— The courts will allow a forfeiture of only so much of the franchise as is clearly forfeited (Houston *v.* Houston Belt, etc., R. Co., 84 Tex. 581, 19 S. W. 786; Mercantile Trust Co. *v.* Denver, 161 Fed. 769), and where the grant is so framed as to authorize a total, but not a partial, forfeiture, none will be decreed where the failure of the company to perform its part of the contract is only slight (Toledo *v.* Toledo R., etc., Co., 25 Ohio Cir. Ct. 441).

88. Olathe *v.* Missouri, etc., R. Co., 78 Kan. 193, 96 Pac. 42; Atty.-Gen. *v.* Toledo, etc., R. Co., 151 Mich. 473, 115 N. W. 422 (holding that the fact that the company carried freight not authorized, and charged excessive fares, merely called for the regulation of the business done by the corporation); Forty-Second St., etc., R. Co. *v.* Cantor, 104 N. Y. App. Div. 476, 93 N. Y. Suppl. 943; Missouri, etc., R. Co. *v.* Olathe, 156 Fed. 624 (holding that a reservation in a franchise ordinance of power to repeal the ordinance in case of a breach of its conditions by the company does not authorize the city to repeal the ordinance at its pleasure without assigning any breach, and when there has, in fact, been none); Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715. *Compare* Wheeling, etc., R. Co. *v.* Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. N. S. 321, holding that a substantial performance of the contract as a whole constitutes no answer in a proceeding to forfeit for a failure to comply with conditions subsequent.

The granting of the same rights to another company by the city does not effect a forfeiture. Santa Rosa City R. Co. *v.* Central St. R. Co., (Cal. 1895) 38 Pac. 986.

The right to lay a double track is not lost by laying and using a single one for a time (People's Pass. R. Co. *v.* Baldwin, 14 Phila. (Pa.) 231), or by abandoning a double track for a single one, and later resuming it (Hestonville, etc., Pass. R. Co. *v.* Philadelphia, 89 Pa. St. 210).

89. North Jersey St. R. Co. *v.* South Orange Tp., 58 N. J. Eq. 83, 43 Atl. 53.

However, where a street railroad franchise provides that, on the company's failure to pay the cost of paving between its tracks, the city may forfeit the franchise, a forfeiture will not be enjoined because from insufficiency of earnings the company has become insolvent and unable to pay such cost. Union St. R. Co. *v.* Snow, 113 Mich. 694, 71 N. W. 1073.

90. Chicago *v.* Chicago, etc., R. Co., 105 Ill. 73. *Contra*, Com. *v.* Middletown Electric R. Co., 23 Pa. Co. Ct. 262.

91. Millcreek Tp. *v.* Erie Rapid Transit St. R. Co., 216 Pa. St. 132, 64 Atl. 901. *Compare* New York Underground R. Co. *v.* New York, 116 Fed. 952 [*affirmed* in 193 U. S. 416, 24 S. Ct. 494, 48 L. ed. 733].

92. Kent *v.* Binghamton, 94 N. Y. App. Div. 522, 88 N. Y. Suppl. 34; Plymouth *v.* Chestnut Hill, etc., R. Co., 4 Pa. Dist. 8, 15 Pa. Co. Ct. 442; Milwaukee Electric R., etc., Co. *v.* Milwaukee, 95 Wis. 39, 69 N. W. 794, 60 Am. St. Rep. 81, 36 L. R. A. 45. And see Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213.

Power of state absolute.— The sovereign power of the state to proceed against a street railroad company by quo warranto for forfeiture of its franchise even at the relation of the city cannot be contracted away, or in any way abridged, by the city; and a provision in a franchise ordinance that the city may in its own name proceed against the company for forfeiture of its franchises at the most only provides another remedy. State *v.* East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742, 38 L. R. A. 218.

93. See New Orleans, etc., R. Co. *v.* New Orleans, 44 La. Ann. 748, 11 So. 17; Hamilton St. R., etc., Co. *v.* Hamilton, etc., Electric Transit Co., 5 Ohio Cir. Ct. 319, 3 Ohio Cir. Dec. 158.

Borough officials cannot, in an injunction

in a direct or collateral proceeding.[94] As provisions for forfeiture are for the benefit of the municipality that body may waive a forfeiture, either expressly or impliedly,[95] as by granting renewal or additional franchises.[96]

c. Proceedings to Enforce. Where either the grant or the statute governing the matter provides that a failure to comply with its conditions works a forfeiture, or employs similar language, the statute or grant is self-executing;[97] but in the absence of such express language, a non-fulfilment of the conditions mentioned does not *ipso facto* work a forfeiture, but only furnishes grounds for forfeiture, and a judicial determination is necessary,[98] or at least affirmative action on the part of the municipality.[99] Under statutes or grants which are not self-executing, a forfeiture can be availed of only in a direct and not a collateral proceeding,[1] and the petition for a forfeiture must state facts constituting a cause of

suit, take advantage of a forfeiture until after a revocation has been made by the borough which made the grant. Burke *v.* Carbondale Traction Co., 3 Lack. Jur. (Pa.) 297.

94. New Orleans, etc., R. Co. *v.* New Orleans, 44 La. Ann. 748, 11 So. 77; Hamilton St. R., etc., Co. *v.* Hamilton, etc., Electric Transit Co., 5 Ohio Cir. Ct. 319, 3 Ohio Cir. Dec. 158; Union Pass. R. Co.'s Appeal, 2 Pennyp. (Pa.) 434; Newport News, etc., R., etc., Co. *v.* Hampton Roads R., etc., Co., 102 Va. 795, 47 S. E. 839. *Compare* Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12, holding that an exclusive right granted to a street railroad company to operate its line in a city is such a property right as will entitle it to raise by injunction the question of forfeiture of the charter of another company, which is granted the right to build a street railroad in certain streets of the same city.

When private person may sue.— The construction and maintenance by an individual of a street railroad upon the highway for private purposes constitutes a nuisance for which any person sustaining special injury may bring an action, and an attempt by a street railroad company to transfer its franchise to an individual for the purpose of enabling him to operate the road exclusively for the purpose of his private business constitutes no defense thereto. Fanning *v.* Osborne, 102 N. Y. 441, 7 N. E. 307.

95. New Orleans, etc., R. Co. *v.* New Orleans, 44 La. Ann. 748, 11 So. 77; Hodges *v.* Baltimore Union Pass. R. Co., 58 Md. 603. But see State *v.* East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742, 38 L. R. A. 218.

Contra, as to highway commissioners.— Manton *v.* South Shore Traction Co., 121 N. Y. App. Div. 410, 106 N. Y. Suppl. 82 [*reversing* 104 N. Y. Suppl. 612].

Character of waiver.— The waiver of a forfeiture by the state or municipality is not the granting of a new right. Newport News, etc., R., etc., Co. *v.* Hampton Roads R., etc., Co., 102 Va. 795, 47 S. E. 839.

96. Santa Rosa City R. Co. *v.* Central St. R. Co., (Cal. 1895) 38 Pac. 986; Akron *v.* Northern Ohio Traction, etc., Co., 27 Ohio Cir. Ct. 536; Dern *v.* Salt Lake City R. Co., 19 Utah 46, 56 Pac. 556.

97. Los Angeles R. Co. *v.* Los Angeles, 152 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. N. S. 1269; Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181; *In re* Brooklyn, etc., R. Co., 185 N. Y. 171, 77 N. E. 994 [*affirming* 106 N. Y. App. Div. 240, 94 N. Y. Suppl. 113] (holding that Railroad Law (1890), c. 565, § 99, which relates to forfeiture of street railroad franchises but is not self-executing, does not provide the only method by which the charter of a street railroad company may be forfeited for delay in constructing its road, and hence does not prevent section 5 of the same act, which relates to railroads generally and is self-executing, from applying to street railroads, so as to work a forfeiture without any proceedings for that purpose, if such a corporation neglects for a period of five years after its incorporation to commence the construction of its road); Millcreek Tp. *v.* Erie Rapid Transit St. R. Co., 209 Pa. St. 300, 58 Atl. 613. *Contra*, Santa Rosa City R. Co. *v.* Central St. R. Co., (Cal. 1895) 38 Pac. 986, 112 Cal. 436, 44 Pac. 733.

98. Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; Day *v.* Ogdensburgh, etc., R. Co., 107 N. Y. 129, 13 N. E. 765; *In re* Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18; Coney Island, etc., R. Co. *v.* Kennedy, 15 N. Y. App. Div. 588, 44 N. Y. Suppl. 825; Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Plymouth Tp. *v.* Chestnut Hill, etc., R. Co., 4 Pa. Dist. 8, 15 Pa. Co. Ct. 442; Spencer *v.* Palestine, (Tex. Civ. App. 1909) 116 S. W. 857.

99. Louisville, etc., R. Co. *v.* Bowling Green R. Co., 110 Ky. 788, 63 S. W. 4, 23 Ky. L. Rep. 273; Union St. R. Co. *v.* Snow, 113 Mich. 694, 71 N. W. 1073; Akron *v.* Northern Ohio Traction, etc., Co., 27 Ohio Cir. Ct. 536; Archbald Borough *v.* Carbondale Traction Co., 3 Pa. Dist. 751; Scranton R. Co. *v.* Scranton, 5 Lack. Leg. N. (Pa.) 250. And see Toledo *v.* Toledo R., etc., Co., 25 Ohio Cir. Ct. 441, holding that a suit to forfeit the rights of a street railroad company for a failure to complete the road within the time required must be based on the determination of the city council that the forfeiture shall be declared.

1. Hodges *v.* Baltimore Union Pass. R. Co., 58 Md. 603; Fayetteville St. R. Co. *v.* Aher-

action [2] and presenting the questions of which an adjudication is desired.[3] Under some statutes, in addition to the forfeiture, a fine may be imposed.[4]

IV. RIGHTS IN AND USE OF STREETS, ROADS, AND BRIDGES.

A. Nature and Extent of Rights in Streets—1. IN GENERAL. It is now recognized that the use of streets and public highways by street railroad companies is a legitimate public use,[5] which does not impose any additional servitude.[6] The right of a street railroad company, however, to use streets is not the natural right which every citizen possesses, but is a right which is derived from, and limited by, a lawful grant made by the proper authorities.[7] A street railroad

deen, etc., R. Co., 142 N. C. 423, 55 S. E. 345; Africa *v.* Knoxville, 70 Fed. 729. And see Denver Tramway Co. *v.* Londoner, 20 Colo. 150, 37 Pac. 723, holding that the city cannot, while its consent remains unrevoked, deny the right of the street railway company to complete the work already begun. *Compare* State *v.* Latrobe, 81 Md. 222, 31 Atl. 788, holding that on a petition by a street railroad company for mandamus to compel the mayor of a city to grant a permit to tear up streets, the mayor may set up that the petitioner had forfeited its rights to a permit by delay in prosecuting the work of laying its tracks.

Right of city to intervene.— Where the property of the company is, at the time of the passage of an ordinance repealing the grant of franchise for a breach of conditions subsequent, in possession of a receiver appointed in a suit to foreclose a mortgage thereon, it is proper for the city, by an intervening petition, to set up the forfeiture of the company's rights, and ask leave to remove its tracks from the street. Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681.

2. People *v.* Los Angeles Electric R. Co., 91 Cal. 338, 27 Pac. 673.

3. Little Rock R., etc., Co. *v.* North Little Rock, 76 Ark. 48, 88 S. W. 826, 1026.

Where plaintiff alleges that defendant is a corporation, statutory provisions that unless certain acts were performed by a street railroad company within a certain time the incorporation should be void cannot be urged to show a forfeiture. Dern *v.* Salt Lake City R. Co., 19 Utah 46, 56 Pac. 556.

4. See People *v.* Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736.

5. Birmingham Traction Co. *v.* Birmingham R., etc., Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97; Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569; Smith *v.* Jackson, etc., Traction Co., 137 Mich. 20, 100 N. W. 121; Detroit *v.* Detroit United R. Co., 133 Mich. 608, 95 N. W. 736. See also MUNICIPAL CORPORATIONS, 28 Cyc. 868 text and note 59.

Modification of public use.— The movement of street railroad cars on their tracks in the highway has been held to be only a modification of the public use to which the highway was originally devoted. Camden, etc., R. Co. *v.* U. S. Cast Iron Pipe, etc., Co., 68 N. J. Eq. 279, 59 Atl. 523 [*following* Citizens' Coach Co. *v.* Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542].

The maintenance and use of switches and curves are a proper street use, as they are a necessary incident to the operation of a street car system, which derives its business from the streets, is intended for the convenience of travel therein, and is in aid of the identical use for which the streets were acquired. Romer *v.* St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455.

Where the operation of a telephone service worked by the earth circuit system is interfered with by a street railroad company's adoption of electricity as its motive power, the telephone company, having no vested interest in, or exclusive right to the use of, the ground circuit or earth system as against a street railroad company incorporated by statute, cannot recover by way of damages from the street railroad company the cost of converting its earth circuit system to the McCleur or common return system, a change which is rendered necessary by the street railroad company's adoption of electricity as its motive power. Bell Tel. Co. *v.* Montreal St. R. Co., 6 Quebec Q. B. 223 [*affirming* 10 Quebec Super. Ct. 162].

6. See EMINENT DOMAIN, 15 Cyc. 676.

7. Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569. And see Elmira *v.* Maple Ave. R. Co., 4 N. Y. Suppl. 943.

After the termination of the grant by revocation or lapse of time, the company has no right to continue the operation of its road without another grant of authority (City R. Co. *v.* Citizens' St. R. Co., (Ind. 1898) 52 N. E. 157; Plymouth Tp. *v.* Chestnut Hill, etc., R. Co., 168 Pa. St. 181, 32 Atl. 19; Louisville Trust Co. *v.* Cincinnati, 73 Fed. 716. *Compare* Clinton *v.* Clinton, etc., Horse R. Co., 37 Iowa 61), nor can it enjoin the city from granting a similar franchise to another company (Canal, etc., R. Co. *v.* New Orleans, 39 La. Ann. 709, 2 So. 388).

Suspension of city's conflicting rights.— Where the legislature, in the exercise of its paramount authority over the streets of a city, grants a franchise to a street railroad company to occupy certain streets, and by a later act requires the company to extend its existing lines and to operate its entire road under restrictions therein imposed during the

company has no property in the soil of the street or highway,[8] although its right to use the highway is a species of property;[9] its occupancy is not superior to, but is in common with, the general public,[10] all persons being at liberty to drive upon and over the tracks when they are laid in the traveled portion of the street,[11] and the rights of each must be exercised in a reasonable and careful manner, so as not to unnecessarily abridge or interfere with the rights of the other.[12] Such use and occupancy is also subject to the right of the city to improve the streets by sewers or otherwise,[13] and to remove, or cause to be removed, the tracks when they no longer subserve the purposes for which they were intended,[14] as the company will not be permitted to obstruct a street for the purpose of holding a right therein, and not for the purpose of serving the public.[15]

2. Under Legislative Grant. In jurisdictions where authority to use streets and roads is derived directly from the legislature, a street railroad company is not entitled to occupy a street or public road even temporarily, unless such right

life of its charter, such legislation suspends during that time any conflicting rights of the city in the streets. Potter *v.* Collis, 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471 [*affirmed* in 156 N. Y. 16, 50 N. E. 413].

Statutes authorizing commercial railroads to change the course and direction of any street or highway, when necessary or desirable to secure more ascent or descent by reason of an embankment, do not apply to street railroads. Murray Hill Land Co. *v.* Milwaukee Light, etc., Co., 110 Wis. 555, 86 N. W. 199.

Where a prescriptive right is acquired to use a portion of a street for a steam railroad, such right does not justify a structure above the surface for use in the operation of an elevated railroad. Leffmann *v.* Long Island R. Co., 47 Misc. (N. Y.) 169, 93 N. Y. Suppl. 647.

Rules of construction applying to grant see *supra*, III, D, 4, a.

8. New Orleans *v.* King, 104 La. 735, 29 So. 359; Interborough Rapid Transit Co. *v.* Gallagher, 44 Misc. (N. Y.) 536, 90 N. Y. Suppl. 104 [*affirmed* in 96 N. Y. App. Div. 632, 89 N. Y. Suppl. 152]; Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443.

9. Chicago Gen. R. Co. *v.* Chicago City R. Co., 62 Ill. App. 502; Interborough Rapid Transit Co. *v.* Gallagher, 44 Misc. (N. Y.) 536, 90 N. Y. Suppl. 104 [*affirmed* in 96 N. Y. App. Div. 632, 89 N. Y. Suppl. 152].

The annexation of unincorporated territory to a municipality does not deprive a street railroad company operating lines within the limits of the municipality of any of its property rights. Belle *v.* Glenville, 27 Ohio Cir. Ct. 181.

Interference with gas mains.— See *Re* Ilford Gas Co., 67 J. P. 239, 1 Loc. Gov. 213, 88 L. T. Rep. N. S. 236.

10. General Electric R. Co. *v.* Chicago City R. Co., 66 Ill. App. 362; Detroit *v.* Detroit United R. Co., 133 Mich. 608, 95 N. W. 736; Atty.-Gen. *v.* Lombard, etc., Pass. R. Co., 10 Phila. (Pa.) 352; Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443.

11. Detroit *v.* Detroit United R. Co., 133 Mich. 608, 95 N. W. 736. See also *infra*, X, B, 3, j.

12. Garrett *v.* People's R. Co., 6 Pennew. (Del.) 29, 64 Atl. 254; Camden, etc., R. Co. *v.* U. S. Cast Iron Pipe, etc., Co., 68 N. J. Eq. 279, 59 Atl. 523. See also *infra*, X, B, 3, j.

Rights of abutting owners see *infra*, VI, A.

13. Kirby *v.* Citizens' R. Co., 48 Md. 168, 30 Am. Rep. 455; Ridge Ave. Pass. R. Co. *v.* Philadelphia, 181 Pa. St. 592, 37 Atl. 910, holding that the company cannot recover damages from the city for an impediment to travel caused by a change of grade made in the street by the city, where the delay was not wilful or unnecessary, apart from a mere mistake of judgment by the city as to the best manner of doing the work.

The most that an elevated railroad company has a right to insist upon is that its structure shall not be unreasonably interfered with. The city still has the right to make use of the streets for proper and authorized urban purposes, and is not obliged to consult the mere convenience of the company. Interborough Rapid Transit Co. *v.* Gallagher, 44 Misc. (N. Y.) 536, 90 N. Y. Suppl. 104 [*affirmed* in 96 N. Y. App. Div. 632, 89 N. Y. Suppl. 152].

14. Southern R. Co. *v.* Memphis, 97 Fed. 819, 38 C. C. A. 498 [*modified* in 99 Fed. 170, 39 C. C. A. 451], holding that the right to maintain a track upon a street is only accessory to the right to operate it, and is lost when the right to operate ceases.

Where the company is unlawfully constructing its road, the municipal authorities having the control and regulation of the streets may summarily remove the tracks as an obstruction. Cape May, etc., R. Co. *v.* Cape May, 58 N. J. L. 565, 34 Atl. 397.

15. Chicago Gen. R. Co. *v.* Chicago City R. Co., 62 Ill. App. 502; Southern R. Co. *v.* Memphis, 97 Fed. 819, 38 C. C. A. 498 [*modified* in 99 Fed. 170, 39 C. C. A. 451], holding that a company whose grant to operate its cars by animal power cannot be exercised on account of the grade of the street will not be allowed to maintain its tracks in the hope that it may be granted the right to change its motive power.

is clearly conferred by its charter;[16] but when the company is acting within express charter authority, it is not subject to interference by a municipality.[17]

B. Acquisition of Rights in Streets and Roads in General. In some jurisdictions the matter of conferring upon a street railroad corporation the right to construct and operate its road in public streets and highways is delegated almost entirely to municipalities, and these bodies grant the right as a franchise;[18] while in other jurisdictions the legislature confers the right more directly, but requires as a condition precedent the obtaining of the consent of the local authorities[19] and the abutting owners.[20] Whatever consents are required by statute must be obtained before the company acquires any right to build,[21] as the unauthorized occupation of a street or highway by a street railroad company is a nuisance *per se*,[22] which may be enjoined on application of the proper officers,[23]

16. Atty.-Gen. *v.* Lombard, etc., Pass. R. Co., 10 Phila. (Pa.) 352; Norfolk R., etc., Co. *v.* Consolidated Turnpike Co., 100 Va. 243, 40 S. E. 897.

Remedying defects in charter.— Under the New York statutes, if the charter does not cover the proposed streets, there must be filed in the office where the certificate of incorporation is filed a statement of the names of the streets upon which it is proposed to build the road. Trojan R. Co. *v.* Troy, 125 N. Y. App. Div. 362, 109 N. Y. Suppl. 779 [*affirmed* in 195 N. Y. 614, 89 N. E. 1113].

Implied authority to construct switches and turnouts see *infra*, IV, F.

17. Hiss *v.* Baltimore, etc., Pass. R. Co., 52 Md. 242, 36 Am. Rep. 371; Asbury Park, etc., R. Co. *v.* Neptune Tp., 73 N. J. Eq. 323, 67 Atl. 790; West Philadelphia Pass. R. Co. *v.* Philadelphia, 30 Leg. Int. (Pa.) 256; Citizens' St. R. Co. *v.* Memphis, 53 Fed. 715.

18. See *supra*, III, D, 3, a.

19. Asbury Park, etc., R. Co. *v.* Neptune Tp., 73 N. J. Eq. 323, 67 Atl. 790. And see *infra*, IV, C.

Submission to voters.—Under the Nebraska statute, the consent of a majority of the electors of a city to the use of the streets over which a proposed street railroad is to be constructed must be obtained before the construction is commenced, the consent to be given or withheld at an election held for that purpose (State *v.* Lincoln St. R. Co., 80 Nebr. 333, 114 N. W. 422, 14 L. R. A. N. S. 336), and a city is not authorized to grant a charter to or enter into a contract in respect thereto with a street railroad company (Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802). However, the city, under its power to regulate, may require street railroad companies holding franchises to use the streets to apply for a permit before entering upon and obstructing the streets, and require the applicant to file specifications as to the work to be done and the location thereof and a bond to hold the city harmless for any damages caused by the work. State *v.* Frost, 78 Nebr. 325, 110 N. W. 986. In order to render a consent by voters sufficient, the notice of election must be full and explicit (State *v.* Lincoln St. R. Co., *supra*); and when the election is had in conjunction with a general city election, the affirmative of the proposition must receive a majority of all the votes cast at such general election (State *v.* Bechel, 22 Nebr. 158, 34 N. W. 342). Under the statutes of Washington a city council is without authority to submit to the voters, for their ratification, any ordinance granting a franchise to a street railroad company. Benton *v.* Seattle Electric R. Co., 50 Wash. 156, 96 Pac. 1033.

20. See *infra*, IV, D.

21. *In re* Rochester Electric R. Co., 123 N. Y. 351, 25 N. E. 381; Taylor *v.* Erie City Pass. R. Co., 37 Pa. Super. Ct. 292; Pennsylvania R. Co. *v.* Parkersburg, etc., R. Co., 26 Pa. Super. Ct. 159.

22. St. Louis, etc., R. Co. *v.* Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300; Eldert *v.* Long Island Electric R. Co., 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186 [*affirmed* in 165 N. Y. 651, 59 N. E. 1122]; Atty.-Gen. *v.* Lombard, etc., R. Co., 10 Phila. (Pa.) 352; San Antonio *v.* Rische, (Tex. Civ. App. 1896) 38 S. W. 388.

Nuisances generally see NUISANCES, 29 Cyc. 1143.

Property rights of company without authority.— However, even if an existing street railroad company is without legal right to operate its road, it has a property right in the rails, ties, poles, and wires which even the legislature cannot take away. Jersey City *v.* North Jersey St. R. Co., 74 N. J. L. 774, 67 Atl. 113 [*affirming* 73 N. J. L. 175, 63 Atl. 906]; Cleveland Electric R. Co. *v.* Cleveland, 204 U. S. 116, 27 S. Ct. 202, 51 L. ed. 399 [*affirming* 137 Fed. 111].

When lawfully authorized, the proper construction and operation of tracks in a street cannot be a nuisance. Denver, etc., R. Co. *v.* Hannegan, 43 Colo. 122, 95 Pac. 343, 127 Am. St. Rep. 100, 16 L. R. A. N. S. 874; Linn County *v.* Hewitt, 55 Iowa 505, 8 N. W. 340; North Jersey St. R. Co. *v.* Newark St., etc., Com'rs, 73 N. J. Eq. 106, 67 Atl. 691.

23. Atty.-Gen. *v.* Lombard, etc., R. Co., 10 Phila. (Pa.) 352.

A city is entitled to relief in equity against the maintenance of a public nuisance by a street railroad company, growing out of its failure to comply with the conditions annexed to its use of the streets. Springfield *v.* Robberson Ave. R. Co., 69 Mo. App. 514. However, a municipality can abate a street railroad as a nuisance in its streets only by due process of law; and threats of tearing

or of an abutting owner who suffers special injury or inconvenience;[24] but when all the consents required by statute have been obtained, the right of a company, duly incorporated, to build is complete.[25]

C. Consent of Local Authorities — 1. Municipal — a. General Necessity of. As the legislature possesses the dominant control of streets and highways, it may, unless there is a constitutional restriction,[26] authorize a street railroad company to occupy and use the streets of a municipality without obtaining the consent of the authorities thereof;[27] while on the other hand it may lawfully require such consent.[28] Such consent is required by statute in some jurisdictions,[29] and when so required is one of the conditions precedent which must be

up the tracks by the municipality gives the railroad company a right of action against the municipality by injunction. Mill Creek Valley St. R. Co. *v.* Carthage, 18 Ohio Cir. Ct. 216, 9 Ohio Cir. Dec. 833.

24. See *infra*, VI, B.

25. Coney Island, etc., R. Co. *v.* Kennedy, 15 N. Y. App. Div. 588, 44 N. Y. Suppl. 825; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 1 Pa. Super. Ct. 409.

26. *In re* Long Island R. Co., 189 N. Y. 428, 82 N. E. 443; Wilcox *v.* McClellan, 47 Misc. (N. Y.) 465, 95 N. Y. Suppl. 941 [*affirmed* in 110 N. Y. App. Div. 378, 97 N. Y. Suppl. 311]; Philadelphia *v.* McManes, 175 Pa. St. 28, 34 Atl. 331.

27. State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602; Jersey City *v.* North Jersey St. R. Co., 74 N. J. L. 774, 67 Atl. 113; State *v.* Columbus R. Co., 24 Ohio Cir. Ct. 609. And see Chicago *v.* Illinois Steel Co., 66 Ill. App. 561.

When consent is not required, a street railroad company is entitled to an injunction against interference by the city officials. Harrisburg City Pass. R. Co. *v.* Harrisburg, 149 Pa. St. 465, 24 Atl. 56.

28. State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590.

29. See the statutes of the several states.

Application of statutes. — These statutes have been held to apply to a street surface railroad company (Delaware, etc., R. Co. *v.* Syracuse, etc., R. Co., 28 Misc. (N. Y.) 456, 59 N. Y. Suppl. 1035 [*affirmed* in 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 386]) which runs it cars over an extensive route, receives its own passengers, and collects its own fares, although its cars for a part of the distance run over the tracks of another company (Colonial City Traction Co. *v.* Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810 [*affirming* 15 N. Y. App. Div. 195, 44 N. Y. Suppl. 732]); and to a company whose road is to be constructed part of the way underground, and at other points cross over streets at right angles on bridges resting on piers built on private lands (People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728 [*affirming* 57 Hun 587, 10 N. Y. Suppl. 849]); but not to apply to a railroad corporation, whose lines extend beyond municipal control, and whose corporate existence, authority, and powers are not derived from or subject to municipal regulations (Birmingham Min. R. Co. *v.* Jacobs, 92 Ala. 187, 200, 9 So. 320, 12 L. R. A. 830). The granting of permits by the highway commissioner of New York city to elevated and surface railroad companies to connect their tracks by a viaduct so as to enable each to operate its cars on the tracks of the other does not create a new franchise, so as to require the consent thereto of the municipal assembly, under sections 72–74 of the charter of the city of New York. Gallagher *v.* Keating, 27 Misc. (N. Y.) 131, 58 N. Y. Suppl. 366 [*affirmed* in 40 N. Y. Suppl. 81, 67 N. Y. Suppl. 1132].

Under some statutes municipal consent must be obtained in addition to the consent of the county or township through which the road will pass. Woodbridge Tp. *v.* Raritan Traction Co., 64 N. J. Eq. 169, 53 Atl. 175.

As a dock department has no authority to give consent or grant franchises, the consent of such department to the construction of a street railroad is a mere license, and not a franchise. Central Crosstown R. Co. *v.* Metropolitan St. R. Co., 16 N. Y. App. Div. 229, 44 N. Y. Suppl. 752.

Particular charters and statutes construed. — A corporation possessing power to construct a street railroad without municipal consent, subject to the right of the legislature to alter its charter, must comply with subsequent constitutional and statutory provisions requiring such consent (Williamsport *v.* Williamsport Pass. R. Co., 3 Pa. Co. Ct. 39); and, while the provisions of a charter requiring consent may be repealed by a subsequent enactment or supplement dispensing with consent (Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 360; Philadelphia *v.* Lombard, etc., R. Co., 4 Brewst. (Pa.) 14); they are still in force in regard to an extension of route authorized by a second supplement which is silent as to consent (Philadelphia *v.* Lombard, etc., R. Co., *supra*).

The consent of a village incorporated for general purposes is within the meaning of a statute requiring the consent of the corporate authorities to the construction of a street railroad (Electric St. R. Co. *v.* North Bend, 70 Ohio St. 46, 70 N. E. 949; Harrison *v.* Mt. Auburn Cable R. Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265); but the consent of a village incorporated for the special purpose of being a road district is not (Cincinnati, etc., R. Co. *v.* Cumminsville, 14 Ohio St. 523).

complied with before the company acquires any rights in the street,[30] or any standing in court to assert its rights.[31] A company which does not possess the requisite consent may be enjoined from entering upon and using the streets.[32]

b. Proceedings to Obtain and Sufficiency. As, in giving its consent, the municipality is exercising a delegated power, there must be a substantial compliance with the terms and conditions prescribed by statute,[33] such as those relating to public notice and hearing before giving consent,[34] and the giving of consent by an ordinance approved by the mayor, and not by resolution.[35] Municipal consent cannot create or enlarge corporate franchises,[36] and, when given before the incorporation of the company, is, at least against competing companies,

30. Brown *v.* Atlanta R., etc., Power Co., 113 Ga. 462, 39 S. E. 71; Almand *v.* Atlantic Consol. St. R. Co., 108 Ga. 417, 34 S. E. 6; Underground R. Co. *v.* New York, 116 Fed. 952 [*affirmed* in 193 U. S. 416, 24 S. Ct. 494, 48 L. ed. 733]. *Compare* North Jersey St. R. Co. *v.* Newark St., etc., Com'rs, 73 N. J. Eq. 106, 67 Atl. 691 (holding that the city may waive the privilege and that the failure to obtain consent does not alone render the construction of a track altogether illegal); West Jersey Traction Co. *v.* Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49 (holding that where a company, possessing legislative power to build a railroad on a designated street, commences to build such railroad without municipal consent, the municipal authorities cannot grant to another company the exclusive right to build a railroad in that street, without giving to the first company notice and an opportunity to be heard).

31. Larimer, etc., R. Co. *v.* Larimer St. R. Co., 137 Pa. St. 533, 20 Atl. 570; Coatesville, etc., R. Co. *v.* Uwchlan St. R. Co., 18 Pa. Super. St. 524; People's Pass. R. Co. *v.* Memphis, (Tenn. 1875) 16 S. W. 973.

32. Trenton *v.* Trenton Pass. R. Co., (N. J. Ch. 1893) 27 Atl. 483.

33. Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; Montreal St. R. Co. *v.* Montreal Terminal R. Co., 36 Can. Sup. Ct. 369, 4 Can. R. Cas. 373.

Other statutes.— A restriction on a municipality that an ordinance shall be submitted in writing at a regular meeting, and passed at a subsequent meeting, does not apply to an ordinance passed under another statute providing for the granting of permission to construct a street railroad. Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643.

34. Rutherford *v.* Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84; Camden Horse R. Co. *v.* West Jersey Traction Co., 58 N. J. L. 102, 32 Atl. 72; West Jersey Traction Co. *v.* Camden Bd. of Public Works, 56 N. J. L. 431, 29 Atl. 163; Matter of Buffalo Traction Co., 25 N. Y. App. Div. 447, 49 N. Y. Suppl. 1052 [*affirmed* in 155 N. Y. 700, 50 N. E. 1115]; Secor *v.* Pelham Manor, 6 N. Y. App. Div. 236, 39 N. Y. Suppl. 993; People *v.* Grant, 21 N. Y. Suppl. 232 [*affirmed* in 138 N. Y. 653, 34 N. E. 513].

Notice to abutting property-owners unnecessary.— See Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281.

An adjournment of the hearing may be had (Shepard *v.* East Orange, 69 N. J. L. 133, 53 Atl. 1047; Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643); but where the adjournment is not to a day certain, the governing body cannot again consider the application at a subsequent meeting without a publication of their intent to do so (Hough *v.* Smith, 37 Misc. (N. Y.) 363, 75 N. Y. Suppl. 451).

Incidental changes in the character of a street railroad may be authorized without the public notice and hearing required on the original installation of the system. Specht *v.* Central Pass. R. Co., 76 N. J. L. 631, 72 Atl. 356 [*affirming* (Sup. 1908) 68 Atl. 785, and *following* Moore *v.* Haddonfield, 62 N. J. L. 386, 792, 41 Atl. 946].

A change in membership of the committee of the council, after notice has been given and hearings had, does not necessitate a new notice, or render the action of the council on the report of the committee invalid. Seccomb *v.* Wurster, 83 Fed. 856.

Conditions precedent to publication of notice.— The authorities will not be enjoined from publishing the required notice of a public hearing before the common council on the question of such consent because the company has not obtained a certificate of convenience and necessity from the state railroad commissioners. McWilliams *v.* Jewett, 14 Misc. (N. Y.) 491, 36 N. Y. Suppl. 620.

35. Specht *v.* Central Pass. R. Co., 76 N. J. L. 631, 72 Atl. 356 [*affirming* (Sup. 1908) 68 Atl. 785]; West Jersey Traction Co. *v.* Camden Bd. of Public Works, 58 N. J. L. 536, 37 Atl. 578.

Implied consent.— It has been held that an implied consent may be given by acquiescence (North Jersey St. R. Co. *v.* Newark St., etc., Com'rs, 73 N. J. Eq. 106, 67 Atl. 691); and under charters simply authorizing the municipal authorities to disapprove of the construction of the road, within a specified time, consent will be inferred, unless the city manifests its disapproval within the named time in clear and certain terms (Faust *v.* Third St. Pass. R. Co., 3 Phila. (Pa.) 164). However, the approval or disapproval by a city council of the occupancy of a street by a street railroad company cannot be inferred until proof of notice of intention to use the street is given to the city authorities. Hestonville, etc., R. Co. *v.* Schuylkill River Pass. R. Co., 6 Phila. (Pa.) 141.

36. Almand *v.* Atlanta Consol. St. R. Co.,

inoperative after incorporation.[37] However, after incorporation, there is no limit to the time within which application may be made and consent given except that provided by statute.[38] In some jurisdictions the consent must embody a location of the tracks and other matters pertaining thereto,[39] while in others this is left to subsequent regulation.[40] Such conditions as are not illegal or improper may be attached,[41] and the consent of the local authorities of one municipality is sufficient to authorize the construction of the road therein, without proof of the consent of other municipalities through which the road will pass.[42] The consent may be renewed from time to time, and is valid until revoked.[43]

2. Authorities Other Than Municipal.[44] Under statutes requiring the consent of the local authorities having control and supervision of highways, outside of an incorporated town, city, or village, or of parks not under the control of city authorities, to the use of such a highway or park by a street railroad company, such consent must be obtained to render the occupation of such a highway or park by such a company lawful,[45] and where a highway is occupied without the required consent

108 Ga. 417, 34 S. E. 6; Hannum *v.* Media, etc., Electric R. Co., 200 Pa. St. 44, 49 Atl. 789.

37. Homestead St. R. Co. *v.* Pittsburg, etc., Electric St. R. Co., 166 Pa. St. 162, 30 Atl. 950, 27 L. R. A. 383. And see Brown *v.* Atlanta R., etc., Co., 113 Ga. 462, 39 S. E. 71, holding that the consent is a condition precedent to the construction of the road, but not to the granting of the charter.

38. Nanticoke Suburban St. R. Co. *v.* People's St. R. Co., 212 Pa. St. 395, 61 Atl. 997 (holding that the fact that the first application of the company is denied does not prevent a subsequent application within the two years granted by statute); Coatesville, etc., St. R. Co. *v.* West Chester R. Co., 206 Pa. St. 40, 55 Atl. 844.

39. Theberath *v.* Newark, 57 N. J. L. 309, 30 Atl. 528; Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; West Jersey Traction Co. *v.* Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49.

40. Baker *v.* Selma St., etc., R. Co., 130 Ala. 474, 30 So. 464.

41. Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643.

42. Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 24 N. Y. App. Div. 335, 48 N. Y. Suppl. 842 [*reversed* on other grounds in 163 N. Y. 228, 57 N. E. 498].

43. Hannum *v.* Media, etc., Electric R. Co., 8 Del. Co. (Pa.) 91.

44. Consent to use of bridge see *infra*, IV, H.

45. Hartshorn *v.* Illinois Valley Traction Co., 210 Ill. 609, 71 N. E. 612; Grey *v.* New York, etc., Traction Co., 56 N. J. Eq. 463, 40 Atl. 21; West Jersey Traction Co. *v.* Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49; Bergen Traction Co. *v.* Ridgefield Tp., (N. J. Ch. 1895) 32 Atl. 754 (holding that, under the New Jersey statute, although a company had obtained the consent of a board, in whom was vested the exclusive control of the roads of a township, to the construction of its road, it must also obtain the consent of the township committee to the location of its tracks); *In re* Rochester Electric R. Co., 123 N. Y. 351, 25 N. E. 381 [*affirming* 57 Hun 56, 10 N. Y. Suppl. 379]; Citizens' Electric R. Co. *v.* Richland County, 56 Ohio St. 1, 46 N. E. 60.

The consent is in the nature of a license and must be shown and established by the street railroad company, when its authority is questioned. Swinhart *v.* St. Louis, etc., R. Co., 207 Mo. 423, 105 S. W. 1043.

Crossing of highway.— Under the New York statute, a street surface railroad company must obtain the consent of the local authorities before it may cross a highway. Matter of Syracuse, etc., R. Co., 33 Misc. (N. Y.) 510, 68 N. Y. Suppl. 881.

When particular officers have not exclusive control of the streets and highways in question, their consent is not required (Bohmer *v.* Haffen, 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030 [*affirming* 22 Misc. 565, 50 N. Y. Suppl. 857]); and where there is repugnancy between different acts conferring exclusive control on different sets of officers, the more recent act controls and the consent of the officers designated therein is all that is required (Gaedeke *v.* Staten Island Midland R. Co., 43 N. Y. App. Div. 514, 60 N. Y. Suppl. 598 [*affirmed* in 46 N. Y. App. Div. 219, 61 N. Y. Suppl. 290]).

Consent of all authorities required.— In Pennsylvania a street railroad company has no right to enter on the highways of a township which has given its consent to its construction until consent to the construction of the line has been obtained from all the townships and boroughs through which its route lies, as shown by its application for incorporation and its charter. Pennsylvania R. Co. *v.* Turtle Creek Valley Electric R. Co., 179 Pa. St. 584, 36 Atl. 348; Rahn Tp. *v.* Tamaqua, etc., St. R. Co., 167 Pa. St. 84, 31 Atl. 472 [*affirming* 4 Pa. Dist. 29]; Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L. R. A. 766; Reading Co. *v.* Schuylkill Valley Traction Co., 14 Montg. Co. Rep. (Pa.) 10.

State and territorial roads within township.— Under Mich. Comp. Laws (1897), § 6466, declaring that any company may construct and maintain a street railroad in and along streets and highways of any township upon such terms as may be agreed on by

the local authorities may sue for damage to the highway.[46] These officials may attach to their consent such conditions as they are authorized to impose,[47] but they have no right to impose conditions outside the limits of their authority.[48] To be valid, the consent must be given to a corporation authorized to receive it;[49] and if given by a board, must be given by the members thereof acting as a board at a regularly convened meeting, and not as individuals,[50] and must be untainted with fraud, extortion, or bribery.[51] The consent, when given, is operative only within the

the company and the township board, the authority conferred will include state and territorial roads within the territory of a township, for whose condition the township is responsible. Smith *v.* Jackson, etc., Traction Co., 137 Mich. 20, 100 N. W. 121.

The abolition of the office of supervisor in a township, whose consent is essential to the extension of a street railroad over and along the highways of the township, does not authorize such extension without official consent. Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848].

46. Citizens' Electric R. Co. *v.* Richland County, 56 Ohio St. 1, 46 N. E. 60.

47. South Shore Traction Co. *v.* Brookhaven, 116 N. Y. App. Div. 749, 102 N. Y. Suppl. 75 [*followed* in South Shore Traction Co. *v.* Patchogue, 116 N. Y. App. Div. 924, 102 N. Y. Suppl. 78]; Carlisle Borough *v.* Cumberland Valley Electric Pass. R. Co., 8 Pa. Dist. 497, 22 Pa. Co. Ct. 221.

Stipulation as to fare.—A condition attached to the consent of the authorities of one town, requiring the company to transport passengers for a given fare within its own territory, is not void, as conflicting with the right of highway authorities in other towns or villages to prescribe conditions for the construction of the road within their limits. Gaedeke *v.* Staten Island Midland R. Co., 46 N. Y. App. Div. 219, 61 N. Y. Suppl. 290 [*affirming* 43 N. Y. App. Div. 514, 60 N. Y. Suppl. 598].

The conditions form part of the contract and will be enforced by the courts (Grosse Pointe Tp. *v.* Detroit, etc., R. Co., 130 Mich. 363, 90 N. W. 42; Asbury Park, etc., R. Co. *v.* Neptune Tp., 73 N. J. Eq. 323, 67 Atl. 790); provided the local authorities demand performance within a reasonable time (Conshohocken Borough *v.* Conshohocken R. Co., 206 Pa. St. 75, 55 Atl. 855).

The validity of the consent of park commissioners to the construction of a street railroad through a park approach is not affected by the fact that it differs in its terms from the consent of the common council, especially where its terms are more rigorous. Kuhn *v.* Knight, 190 N. Y. 339, 83 N. E. 293 [*affirming* 115 N. Y. App. Div. 837, 101 N. Y. Suppl. 1].

48. Freud *v.* Detroit, etc., R. Co., 133 Mich. 413, 95 N. W. 559; People *v.* Kennedy, 97 N. Y. App. Div. 103, 89 N. Y. Suppl. 608.

49. Goddard *v.* Chicago, etc., R. Co., 202 Ill. 362, 66 N. E. 1066 [*affirming* 104 Ill. App. 526]; Homestead St. R. Co. *v.* Pittsburg, etc., Electric St. R. Co., 166 Pa. St. 162, 30 Atl. 950, 27 L. R. A. 383.

Route over private property.—A consent by the highway commissioners of a town to the construction of a street railroad is not void because the route consented to was at the time entirely over private property, in which the public had not then acquired any rights whatever. People *v.* Coler, 121 N. Y. App. Div. 293, 105 N. Y. Suppl. 887 [*reversed* on other grounds in 189 N. Y. 554, 82 N. E. 1132].

50. West Jersey Traction Co. *v.* Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49 (holding further that declarations of individual members of a township committee that the committee had given its consent will not estop the township from objecting to the laying of the road on the ground that proper consent has not been given); Tamaqua, etc., St. R. Co. *v.* Inter-County St. R. Co., 167 Pa. St. 91, 31 Atl. 473 [*affirming* 4 Pa. Dist. 20]; Union St. R. Co. *v.* Hazleton, etc., Electric R. Co., 7 Kulp (Pa.) 47, 313.

Place of meeting.—Consent obtained from township supervisors for the construction of a street railroad along a highway is valid, when they all meet together and deliberate in their council's office at the county-seat. Meixell *v.* Northampton Cent. R. Co., 7 North. Co. Rep. (Pa.) 274.

Notice, when required by statute, must be given. Smith *v.* Buffalo, 51 Misc. (N. Y.) 216, 99 N. Y. Suppl. 986. And see Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 24 N. Y. App. Div. 335, 48 N. Y. Suppl. 842 [*reversed* on other grounds in 163 N. Y. 223, 57 N. E. 498]. However, notice is not required for subsequent action removing some of the restrictions embodied in the consent given. Moore *v.* West Jersey Traction Co., 62 N. J. L. 386, 792, 41 Atl. 946.

A record of the consent in the proper book of the county or township officers is necessary in some jurisdictions (Pennsylvania R. Co. *v.* Montgomery County Pass. R. Co., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L. R. A. 766); but not in others (Nearing *v.* Toledo Electric St. R. Co., 9 Ohio Cir. Ct. 596, 6 Ohio Cir. Dec. 664).

Certiorari to review the proceedings may be granted, in the absence of laches. Orton *v.* Metuchen, 66 N. J. L. 572, 49 Atl. 814.

51. Tamaqua, etc., St. R. Co. *v.* Inter-County St. R. Co., 167 Pa. St. 91, 31 Atl. 473 [*affirming* 4 Pa. Dist. 20]; Lehigh Coal, etc., Co. *v.* Inter-County St. R. Co., 167 Pa. St. 75, 31 Atl. 471; Keogh *v.* Pittston, etc., R. Co., 5 Lack. Leg. N. (Pa.) 242.

Unfavorable terms.—The neglect of a supervisor to procure the most favorable terms for permission to a street railroad company to construct its tracks on highways

jurisdiction of the officers giving it and does not affect the necessity of obtaining the consent of the authorities of municipalities through which the road will pass.[52]

D. Consent of Abutting Owners — 1. Necessity and Nature — a. In General. The owner of lands abutting on a private street has no such inherent right or interest in the lands included within the street as to make his consent necessary for the construction and operation of a street railroad upon the street.[53] While the legislature may, unless there are constitutional restraints,[54] authorize the construction and operation of a street railroad without the consent of abutting owners, it may, however, lawfully require such consents,[55] and this legislative power has been exercised in some jurisdictions by requiring the written consent of a certain proportion of the abutting owners as a condition precedent to the right of the company to construct its road,[56] or as a condition precedent to the vesting of jurisdiction in the municipal authorities to grant a franchise or permit to use the streets.[57] This right or privilege of the abutting owner is wholly statu-

is not ground for annulling the contract. Rahn Tp. *v.* Tamaqua, etc., St. R. Co., 4 Pa. Dist. 29.

52. Wheeling, etc., R. Co. *v.* Triadelphia, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. N. S. 321.

53. Paterson, etc., Traction Co. *v.* Wostbrock, (N. J. Ch. 1903) 56 Atl. 698.

54. *In re* Long Island R. Co., 189 N. Y. 428, 82 N. E. 443; Colonial City Traction Co. *v.* Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810 [*affirming* 15 N. Y. App. Div. 195, 44 N. Y. Suppl. 732]; *In re* Metropolitan Transit Co., 111 N. Y. 588, 19 N. E. 645; *In re* New York Dist. R. Co., 107 N. Y. 42, 14 N. E. 187 [*affirming* 42 Hun 621] (holding that the constitutional restraint applies to acts authorizing the construction and operation of underground street railroads); Schaper *v.* Brooklyn, etc., Cable R. Co., 4 N. Y. St. 860 [*affirmed* in 124 N. Y. 630, 26 N. E. 311, 3 Silv. App. 335]; Spader *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 467.

A company existing prior to the taking effect of constitutional amendments requiring the consent of property-owners need not obtain such consent. Gilbert El. R. Co. *v.* Handerson, 70 N. Y. 361 [*affirming* 9 Hun 303].

55. Paterson, etc., Traction Co. *v.* Wostbrock, (N. J. Ch. 1903) 56 Atl. 698.

56. Matter of New York, 104 N. Y. App. Div. 445, 93 N. Y. Suppl. 655 [*reversing* 45 Misc. 184, 91 N. Y. Suppl. 987]; Merriman *v.* Utica Belt Line St. R. Co., 18 Misc. (N. Y.) 269, 41 N. Y. Suppl. 1049. And see Washington Cemetery *v.* Prospect Park, etc., R. Co., 68 N. Y. 591; Schaper *v.* Brooklyn, etc., Cable R. Co., 4 N. Y. St. 860 [*affirmed* in 124 N. Y. 630, 26 N. E. 311, 3 Silv. App. 335].

Where consent has not been obtained, the company has no such right in the streets as to entitle it to an injunction against the construction of another railroad therein (New York Cable R. Co. *v.* Forty-Second St., etc., R. Co., 13 Daly (N. Y.) 118); but when its road has been built and is in operation, the court may, in its discretion, allow the company a reasonable time in which to obtain such consent before enjoining it from operating the road (Black *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 468, 53 N. Y. Suppl. 312).

Tennessee — consent not required. Smith *v.* East End St. R. R., 87 Tenn. 626, 11 S. W. 709.

When determination of commissioners in lieu of consent authorized see *supra*, II, C, 1, a.

57. Currie *v.* Atlantic City, 66 N. J. L. 671, 50 Atl. 504 [*reversing* 66 N. J. L. 140, 48 Atl. 615]; Avon-by-the-Sea Land, etc., Co. *v.* Neptune City, 57 N. J. L. 362, 30 Atl. 529 [*affirmed* in 57 N. J. L. 701, 32 Atl. 220]; Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819; Hamilton, etc., Traction Co. *v.* Parish, 67 Ohio St. 181, 65 N. E. 1011; Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119; Dempster *v.* United Traction Co., 205 Pa. St. 70, 54 Atl. 501 (township of the first class); Gray *v.* Dallas Terminal R., etc., Co., 13 Tex. Civ. App. 158, 36 S. W. 352.

In Illinois, by virtue of the express provisions of Laws (1903), p. 285, a city may grant the use of its streets for street railroad purposes without the petition or consent of abutting owners. Venner *v.* Chicago City R. Co., 236 Ill. 349, 86 N. E. 266. As to the necessity of obtaining the consent of abutting owners prior to the passage of this statute see Hunt *v.* Chicago Horse, etc., R. Co., 121 Ill. 638, 13 N. E. 176 [*reversing* 20 Ill. App. 282]; People *v.* Decatur, etc., R. Co., 120 Ill. App. 229; Stewart *v.* Chicago Gen. St. R. Co., 58 Ill. App. 446 [*affirmed* in 166 Ill. 61, 46 N. E. 765]; West Chicago St. R. Co. *v.* Vandehouten, 58 Ill. App. 318; Beeson *v.* Chicago, 75 Fed. 880.

The purpose of these statutes is to impose a check and limitation upon the exercise of the arbitrary power possessed by municipalities (Hamilton, etc., Traction Co. *v.* Parish, 67 Ohio St. 181, 65 N. E. 1011; Roberts *v.* Easton, 19 Ohio St. 78), and to protect the property of an individual citizen against injury without his personal consent or the consent of a majority of the abutting property-owners (Colonial City Traction Co. *v.* Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810 [*affirming* 15 N. Y. App. Div. 195, 44 N. Y. Suppl. 732]).

tory, and its nature, scope, and extent depends entirely upon the statute which confers it.[58] These statutes do not confer any new rights in the street upon the abutting owner, nor is the right to consent a property right;[59] it is a personal right or option which the property-owner may exercise or withhold without compulsion from other owners, public authorities, or the courts.[60] However, the consent when granted is more than a mere license, as it confers valuable rights,[61] and it is limited to the purpose for which it was given;[62] and, when acted upon, it is not revocable at the will of the person who gave it, or his succes-

Additional tracks, switches, and turnouts. — It has been held that a city may, without the consent of abutting owners, grant the right to construct a temporary track (Mathers *v.* Cincinnati, 7 Ohio Dec. (Reprint) 521, 3 Cinc. L. Bul. 709), or a turnout as a switch (Specht *v.* Central Pass. R. Co., 76 N. J. L. 631, 72 Atl. 356 [*reversing* (Sup. 1898) 68 Atl. 785]); while, on the other hand, the right has been denied as to the subsequent addition of a second track (Roberts *v.* Easton, 19 Ohio St. 78); and it has been held that a street railroad company, which has located and constructed its railroad, with all the switches and turnouts which were then deemed necessary, cannot afterward construct additional switches, or extend those already constructed, without first obtaining the written consent of a majority of the property holders abutting on that part of the street where such additional switches are proposed to be constructed (Harner *v.* Columbus St. R. Co., 11 Ohio Dec. (Reprint) 807, 29 Cinc. L. Bul. 387).

58. Paterson, etc., Traction Co. *v.* Wostbrock, (N. J. Ch. 1903) 56 Atl. 698.

Distinguished from other consents. — The consent of the abutting owners and the consent of the municipal authorities are separate and distinct matters; neither one is a substitute for the other, nor is the giving of one conclusive evidence that the other has been given. Paterson, etc., R. Co. *v.* Paterson, 24 N. J. Eq. 158; Roberts *v.* Easton, 19 Ohio St. 78; Sommers *v.* Cincinnati, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612. In New Jersey the consent of abutters is only required to be once given and filed before the municipal authorities grant permission, and the same consent need not be again filed as a condition to the railroad obtaining the additional consent of the board of chosen freeholders of the county. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819. Under a charter requiring the consent of the city council or the property-owners, the consent of either is sufficient. Brooklyn City, etc., R. Co. *v.* Coney Island, etc., Co., 35 Barb. (N. Y.) 364.

59. Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97 [*affirming* 60 Ill. App. 471]; Paterson, etc., Traction Co. *v.* Wostbrock, (N. J. Ch. 1903) 56 Atl. 698; Hamilton, etc., Traction Co. *v.* Parish, 67 Ohio St. 181, 65 N. E. 1011, holding further that the consent cannot be appropriated under the power of eminent domain.

60. Hamilton, etc., Traction Co. *v.* Parish, 67 Ohio St. 181, 65 N. E. 1011; Cleveland *v.* Cleveland City R. Co., 23 Ohio Cir. Ct. 373.

The right belongs to every owner of property fronting on the streets selected, regardless of whether his ownership extends to the center of such streets. St. Columba's Church *v.* North Jersey St. R. Co., (N. J. Ch. 1908) 70 Atl. 692.

61. Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113]. And see Currie *v.* Atlantic City, 66 N. J. L. 140, 48 Atl. 615 [*reversed* on other grounds in 66 N. J. L. 671, 50 Atl. 504].

62. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 68 N. J. Eq. 715, 61 Atl. 461 [*reversing* 65 N. J. Eq. 574, 56 Atl. 897]; Colonial City Traction Co. *v.* Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810 [*affirming* 15 N. Y. App. Div. 195, 44 N. Y. Suppl. 732]; Collins *v.* Amsterdam St. R. Co., 76 N. Y. App. Div. 249, 78 N. Y. Suppl. 470; Eldert *v.* Long Island Electric R. Co., 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186 [*affirmed* in 165 N. Y. 651, 59 N. E. 1122] (holding that consent to the construction and operation of a surface road does not permit of the construction and operation of an elevated structure); Sanfleet *v.* Toledo, 10 Ohio Cir. Ct. 460, 8 Ohio Cir. Dec. 711; Neare *v.* Mt. Auburn Cable R. Co., 4 Ohio S. & C. Pl. Dec. 475, 29 Cinc. L. Bul. 171 (holding that the consent of a property-owner for a certain designated extension cannot be made available, and counted as a consent for another and different extension).

Undedicated street. — The consents fail when it appears that part of the proposed route is over a supposed street which has never been dedicated. Beeson *v.* Chicago, 75 Fed. 880.

Inuring of consent to lowest bidder. — In jurisdictions where a franchise is granted to the lowest bidder, the consent of property-owners, by whomsoever obtained, inures to the lowest bidder. State *v.* Bell, 34 Ohio St. 194.

Change in grade of street. — A property-owner's consent to the construction and operation of a cable railway "over, along, and upon" the street does not authorize a material change in the grade of the street. Fred *v.* Kansas City Cable R. Co., 65 Mo. App. 121.

Necessity of new consent to use of tracks by another company see *infra*, VII, E, 1, b.

sors,[63] nor is its efficacy impaired by a subsequent alienation of the property,[64] nor can it be made the basis of further municipal action on a second application.[65]

b. Number Required. In some jurisdictions, the computation of the number of abutting owners whose consent must be obtained is based on the number of frontage feet which their properties occupy, while in others it is based on the value of the property. In the former, each street is considered by itself;[66] in the latter, while the value of only that part of the property which the road will pass is to be considered,[67] the value of an entire tract which is bounded on the street over which the road will operate is to be counted, although the tract extends back to another street,[68] or, strictly speaking, fronts on another street.[69]

2. Who May Give. The statutes requiring the consent of abutting owners contemplate or require that the consent shall be given by the owner of the property,[70] or by an agent, who possesses either oral or written authority to con-

63. Paterson, etc., Traction Co. *v.* Westbrock, (N. J. Ch. 1903) 56 Atl. 698; Currie *v.* Atlantic City, 66 N. J. L. 140, 48 Atl. 615 [*reversed* on other grounds in 66 N. J. L. 671, 50 Atl. 504]; Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887 [*reversing* 18 N. Y. Suppl. 396]; Taylor *v.* Erie City Pass. R. Co., 37 Pa. Super. Ct. 292.

Before the consent is finally acted upon by the granting of the franchise or the construction of the road, it may be withdrawn or revoked. People *v.* Decatur, etc., R. Co., 120 Ill. App. 229; Parrish *v.* Hamilton, etc., Traction Co., 23 Ohio Cir. Ct. 527 [*reversed* on other grounds in 67 Ohio St. 181, 65 N. E. 1011, 60 L. R. A. 531]; Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69. But the revocation is not operative if notice thereof is not given before the passage of the ordinance, either to the petitioning company or to the governing body of the municipality. Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643 [*affirmed* in 62 N. J. L. 450, 45 Atl. 1092].

64. Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113].

65. Currie *v.* Atlantic City, 66 N. J. L. 671, 50 Atl 504 [*reversing* 66 N. J. L. 140, 48 Atl. 615, and *distinguishing* Sanfleet *v.* Toledo, 10 Ohio Cir. Ct. 460, 8 Ohio Cir. Dec. 711].

After the property has changed hands the consents obtained from the original owners cannot be used on further applications. Paterson, etc., Traction Co. *v.* Westbrock, (N. J. Ch. 1903) 56 Atl. 698.

A new company seeking a franchise after the expiration of the franchise of another company must obtain new consents. Isom *v.* Low Fare R. Co., 29 Ohio Cir. Ct. 583.

A renewal may be granted, under the Ohio statutes, without the consent of abutting owners. Pelton *v.* East Cleveland R. Co., 10 Ohio Dec. (Reprint) 545, 22 Cinc. L. Bul. 67.

Where a franchise for an extension of route is sought, new consents from the abutting owners on the part of the line already built need not be obtained (Broadway, etc., R. Co. *v.* Brooklyn St. R. Co., 9 Ohio Dec. (Reprint) 25, 10 Cinc. L. Bul. 72), but the consents of the abutting owners on the proposed extension must be obtained (Mt. Auburn Cable R. Co. *v.* Neare, 54 Ohio St. 153, 42 N. E. 768).

66. Neare *v.* Mt. Auburn Cable R. Co., 4 Ohio S. & C. Pl. Dec. 475, 29 Cinc. L. Bul. 171. *Compare* Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

Cross streets are to be omitted in estimating the number of lineal feet of frontage necessary. People's Traction Co. *v.* Atlantic City, 71 N. J. L. 134, 57 Atl. 972.

Road extending beyond city limits.—Where the proposed route is partly outside the jurisdiction of a municipality, it will be sufficient to support a grant for the part of the route within such jurisdiction that consents of the owners of the requisite proportion of frontage upon that part of the route be obtained and filed. Hutchinson *v.* Belmar, 61 N. J. L. 443, 39 Atl. 643 [*affirmed* in 62 N. J. L. 450, 45 Atl. 1092].

67. Merriman *v.* Utica Belt Line St. R. Co., 18 Misc. (N. Y.) 269, 41 N. Y. Suppl. 1049.

68. Fox *v.* New York City Interborough R. Co., 112 N. Y. App. Div. 832, 98 N. Y. Suppl. 338 [*reversing* 48 Misc. 162, 95 N. Y. Suppl. 251].

69. Tiedemann *v.* Staten Island Midland R. Co., 18 N. Y. App. Div. 368, 46 N. Y. Suppl. 64; Merriman *v.* Utica Belt Line St. R. Co., 18 Misc. (N. Y.) 269, 41 N. Y. Suppl. 1049.

The property on all four corners of two intersecting streets is bounded by the intersecting space common to both; and where a proposed route runs south through one street to the intersection, and thence west through the other, the consent of the owner of the southeast corner, opposite its outer curve, should be counted in making up the requisite one half in value. Sea Beach R. Co. *v.* Coney Island, etc., Electric R. Co., 22 N. Y. App. Div. 477, 47 N. Y. Suppl. 981.

70. Shepard *v.* East Orange, 70 N. J. L. 203, 57 Atl. 441 [*reversing* 69 N. J. L. 133, 53 Atl. 1047].

A board of education, having no title to lands on which school buildings stand, is not their owner, and cannot give a valid consent. Currie *v.* Atlantic City, 66 N. J. L. 140, 48 Atl. 615 [*reversed* on other grounds in 66 N. J. L. 671, 50 Atl. 504].

sent.[71] The word "owner" when used in this connection includes persons holding life-estates,[72] remainder-men,[73] devisees,[74] vendees of land contracts, in possession,[75] and equitable owners;[76] but excludes tenants,[77] fathers and guardians of minor children who are owners,[78] husbands of wives who hold the legal titles,[79] and executors.[80] Where property is owned by tenants in common, the consent of all is required.[81]

3. Sufficiency.[82] Although the consent required is only to the construction of the road in general, and not to the mode and manner of construction and operation,[83] an abutting owner may attach a condition or limitation to his consent,[84] except that in jurisdictions where the franchise is sold to the best bidder a limitation to any one company is inoperative;[85] and he may give or withhold his consent for a consideration.[86] In order that the consent may be counted it is usually

Mortgagee.—A consent given by the holder of the legal title of an abutting lot cannot be affected by his subsequent admission that his interest is only that of a mortgagee in possession. Sea Beach R. Co. *v.* Coney Island, etc., Electric R. Co., 22 N. Y. App. Div. 477, 47 N. Y. Suppl. 98].

A city owning property abutting the street over which the company desires to operate may consent as a landowner, notwithstanding it acts in a dual capacity. Emerson *v.* Forest City R. Co., 28 Ohio Cir. Ct. 683.

71. Tibbetts *v.* West Towns, etc., St. R. Co., 153 Ill. 147, 38 N. E. 664 [*affirming* 54 Ill. App. 180]; North Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318; Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69.

The president of a corporation which owns property along the proposed route, if acting under a resolution passed by the board of directors, can consent for the corporation. Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

Ratification.—A written consent given by an unauthorized person, which is afterward ratified by the owner and adopted as his own act, but not until after the passage of an ordinance granting permission to construct the road or extension, cannot be considered "the written consent of the owner," within the meaning of a statute. Sommers *v.* Cincinnati, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612.

72. Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

73. Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69, in which case the remainder-man had charge and possession of the property.

74. Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

75. Day *v.* Forest City R. Co., 27 Ohio Cir. Ct. 60 [*reversed* on other grounds in 73 Ohio St. 83, 76 N. E. 396].

76. Gray *v.* Dallas Terminal R., etc., Co., 13 Tex. Civ. App. 158, 36 S. W. 352, in which case the holder of the legal title refused to express himself as being willing or unwilling to consent.

77. Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

78. Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

79. Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69.

80. Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119.

Under the New Jersey statute executors may consent when they hold the legal title or possess a present power of sale. Orton *v.* Metuchen, 66 N. J. L. 572, 49 Atl. 814.

81. Orton *v.* Metuchen, 66 N. J. L. 572, 49 Atl. 814; Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119; Ronnebaum *v.* Mt. Auburn R. Co., 6 Ohio S. & C. Pl. Dec. 24, 29 Cinc. L. Bul. 338. *Compare* Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69, holding that where consent is signed by one of several tenants in common, it will be counted for the number of feet front which his undivided interest in the land proportionately represents.

82. **Consents given to promoters.**—A consent given to certain promoters of a proposed corporation, their assigns and legal representatives, which is subsequently assigned to the corporation, has been held sufficient. Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 163 N. Y. 228, 57 N. E. 498 [*reversing* 24 N. Y. App. Div. 335, 48 N. Y. Suppl. 842].

83. Sloane *v.* People's Electric R. Co., 7 Ohio Cir. Ct. 84, 3 Ohio Cir. Dec. 674.

84. Specht *v.* Central Pass. R. Co., (N. J. Sup. 1908) 68 Atl. 785; Shaw *v.* New York El. R. Co., 187 N. Y. 186, 79 N. E. 984 [*affirming* 110 N. Y. App. Div. 892, 96 N. Y. Suppl. 1146]. And see Getchell, etc., Lumber, etc., Co. *v.* Des Moines Union R. Co., 115 Iowa 734, 87 N. W. 670. *Contra*, Doane *v.* Chicago City R. Co., 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588 [*affirming* 51 Ill. App. 353].

Condition subsequent.—A consent conditioned that the construction of the road shall be begun and completed within a specified time should be considered as if no condition were attached, as it is a condition subsequent. Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69.

85. Forest City R. Co. *v.* Day, 73 Ohio St. 83, 76 N. E. 396 [*reversing* 27 Ohio Cir. Ct. 60].

86. Hamilton, etc., Traction Co. *v.* Parish,

necessary that it be in writing,[87] properly signed,[88] acknowledged,[89] sealed,[90] and filed or recorded,[91] before the granting of the franchise.[92]

4. Who Entitled to Assert Failure to Obtain. In the absence of fraud or collusion, a city cannot attack its grant on account of the requisite number of consents not having been obtained,[93] nor can a taxpayer;[94] and while a non-consenting abutting owner may contest the construction and operation of the road over his property in the street on that ground,[95] his right is confined to the

67 Ohio St. 181, 65 N. E. 1011, 60 L. R. A. 531 [*reversing* 23 Ohio Cir. Ct. 527]; Cleveland *v.* Cleveland City R. Co., 23 Ohio Cir. Ct. 373. *Contra*, Montclair Military Academy *v.* North Jersey St. R. Co., 70 N. J. L. 229, 57 Atl. 1050 [*reversing* 65 N. J. L. 328, 47 Atl. 890].

Fraud.—Where the consent of more than the required number was properly obtained, the fact that the consent of two others was obtained by fraud does not affect the validity of the company's right. Ecorse Tp. *v.* Jackson, etc., R. Co., 153 Mich. 393, 117 N. W. 89.

87. Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69.

88. Rapp *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119, holding, however, that the consent of a trustee of real property is not invalidated by his failure to write the word "trustee" after his name.

89. Orton *v.* Metuchen, 66 N. J. L. 572, 49 Atl. 814.

Sufficiency of certificate.—A certificate of acknowledgment which states that the grantors sign and deliver the instrument as their voluntary act and deed, but makes no mention of sealing, is sufficient where the instrument is actually sealed. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819.

90. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819. *Contra, In re* Cortland, etc., R. Co., 31 Hun (N. Y.) 72 [*affirmed* in 95 N. Y. 663].

91. Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113], holding that the consents of the different owners may be executed and recorded at different times, and that a consent is not invalidated by the fact that it is not recorded until after the person giving it has conveyed the property.

In Ohio it is not necessary that the consents of the abutting property-owners should be entered on the records of the city council, the recitals in the ordinance itself being considered sufficient. Sanfleet *v.* Toledo, 10 Ohio Cir. Ct. 460, 8 Ohio Cir. Dec. 711.

92. Sloane *v.* People's Electric R. Co., 7 Ohio Cir. Ct. 84, 3 Ohio Cir. Dec. 674. And see Day *v.* Forest City R. Co., 27 Ohio Cir. Ct. 60 [*reversed* on other grounds in 73 Ohio St. 83, 76 N. E. 396], holding that where consents were signed when proceedings were being had under an old ordinance and application was renewed after the reorganization of the city government under a similar ordinance, such consents were not *functus officio*, as they were outstanding with full knowledge of such property holders and were unrevoked.

93. Hamilton *v.* Cincinnati, etc., Electric St. R. Co., 8 Ohio S. & C. Pl. Dec. 174, 5 Ohio N. P. 457.

94. Glidden *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 423, 30 Cinc. L. Bul. 213; Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69.

A railroad company which has constructed a bridge over which the street railroad will pass is entitled to set up the fact that the necessary consents have not been obtained. Pennsylvania R. Co. *v.* Parkesburg, etc., St. R. Co., 26 Pa. Super. Ct. 159.

95. See Paige *v.* Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213 [*modifying* 84 N. Y. App. Div. 91, 82 N. Y. Suppl. 192].

Where the requisite number of consents has been obtained, a non-consenting owner of abutting property may maintain an action for his damages, but cannot prevent the construction of the road. Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113].

Estoppel.—An abutting owner may estop himself to object by acquiescing in the construction of the road (Tilton *v.* New Orleans City R. Co., 35 La. Ann. 1062); but the fact that he has given his consent to the construction of the road does not affect his right to object to construction in front of another property on the street which he afterward buys (Taylor *v.* Erie City Pass R. Co., 186 Pa. St. 120, 40 Atl. 316). Likewise a vendee of property is not estopped by a consent given by the vendor, but not recorded until after the conveyance of the property. Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113]. The street railroad company is not estopped by the pending of proceedings, under N. Y. Railroad Law, § 94, for the appointment of commissioners to determine whether the road should be constructed and operated, from showing that since the commencement of such proceedings it has obtained a sufficient number of consents. Adee *v.* Nassau Electric R. Co., *supra*.

Non-fulfilment of conditions.—Non-consenting abutting owners cannot complain of violations by the grantee of conditions imposed by those who consented when the consenting owners do not themselves complain. Barney *v.* Mt. Adams, etc., Inclined Plane R. Co., 30 Cinc. L. Bul. (Ohio) 286.

General rights and remedies of abutting owners see *infra*, VI.

street on which his property abuts.[96] The burden of showing that the required number of consents has not been obtained is on the party asserting that claim.[97]

E. Location of Route and Tracks.[98] The location of a street railroad upon a street or highway presupposes a prior grant of the right to locate, and consists of a definite appropriation of a particular portion of the street or highway for street railroad use.[99] A street railroad company is entitled to establish its road on the streets specified or described generally in the legislative or municipal grant,[1] and while it is confined within the limits specified in the grant,[2] these

96. Glidden *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 423, 30 Cinc. L. Bul. 213.

97. Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113]; Simmons *v.* Toledo, 8 Ohio Cir. Ct. 535, 4 Ohio Cir. Dec. 69.

98. Determination as to location by boards and tribunals see *supra*, II, C, 2.

99. Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32.

An "original grant of location," within the meaning of a statute preserving and confirming to street railroad companies locations previously granted, is the first location granted to it in a city or town; it is synonymous with "original location" and "grant of original location," but is to be distinguished from an extension or alteration of location. Springfield *v.* Springfield St. R. Co., 182 Mass. 41, 47, 64 N. E. 577.

Action of board of directors.— The location of a railroad by a street railroad company whose charter does not itself fully prescribe the precise location is the definite and final selection and demarcation of its route by its board of directors. New York, etc., R. Co. *v.* Stevens, 81 Conn. 16, 69 Atl. 1052. See also Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

Necessity of formal location.—Where the consent of a city council and the street committee to the prosecution of the work of extending a street railroad has been given, and it appears that the only location for the line is the extension of a track which has been laid for years on the same street, the company will not be restrained from carrying on the work because the street committee has not in its official capacity defined and authorized the exact location of the tracks. Trenton *v.* Trenton Horse R. Co., (N. J. Ch. 1890) 19 Atl. 263.

Filing of map.— In some jurisdictions, before the company may begin the construction of the road or an extension, it is required by statute to file a map and profile of the route (Matter of Rochester Electric R. Co., 57 Hun (N. Y.) 56, 10 N. Y. Suppl. 379 [*affirmed* in 123 N. Y. 351, 25 N. E. 381]); but under such statute, a slight variance between the map and description filed is immaterial (Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 64 N. J. Eq. 588, 54 Atl. 819). And in North Carolina, while a map and profile must be filed, the information contained therein is for the benefit of the corporation commission and is not required as a part of a correct and completed location. Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

The location of route and tracks are two distinct matters, and the fact that the company may not have acquired an exclusive right to its route does not preclude it from applying to the proper authorities for the location of its tracks. Theberath *v.* Newark, 57 N. J. L. 309, 30 Atl. 528.

1. Stranahan *v.* Sea View R. Co., 84 N. Y. 308; Com. *v.* Union Pass. R. Co., 163 Pa. St. 22, 29 Atl. 711; Africa *v.* Knoxville, 70 Fed. 729. And see Schmitz *v.* Union El. R. Co., 50 Hun (N. Y.) 407, 3 N. Y. Suppl. 331.

An ordinance renewing the rights, privileges, and franchises conferred by a previous ordinance covers the right to construct new lines as well as the right to maintain and operate existing lines. Akron *v.* Northern Ohio Traction, etc., Co., 27 Ohio Cir. Ct. 536. However, the right to operate street railroads in Chicago under the municipal ordinance confirmed by Illinois acts of Feb. 14, 1859, and Fed. 6, 1865, until the city should exercise its reserved right to purchase, is confined to the streets designated in the original ordinance and in such other later ordinances as indicate a purpose to preserve the permission of the original ordinance, and does not, by reason of the unity of the street railway system, extend to the rights of occupancy acquired in other streets, so as to continue such rights until purchase is made of the entire system. Blair *v.* Chicago, 201 U. S. 400, 26 S. Ct. 427, 50 L. ed. 801 [*reversing* 132 Fed. 848].

2. New York, etc., R. Co. *v.* Stevens, 81 Conn. 16, 69 Atl. 1052; Stamford *v.* Stamford Horse R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; *In re* Metropolitan Transit Co., 111 N. Y. 588, 19 N. E. 645 (holding further that where the location of the main route is different from that prescribed, the location of branch lines fail with it); Curvin *v.* Rochester R. Co., 78 Hun (N. Y.) 555, 29 N. Y. Suppl. 521; Philadelphia *v.* Citizens' Pass. R. Co., 151 Pa. St. 128, 24 Atl. 1099 [*affirming* 10 Pa. Co. Ct. 16] (holding that a grant conferring power to lay tracks on any street "between" two named streets does not authorize the laying of tracks on one of the streets named); Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543. And see Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107 (holding that a franchise for the construction of a street railroad in a certain highway, as a part of a route particularly specified, does not authorize the use of the highway as part of a route other than that specified, by con-

limits will be liberally construed to uphold the action of the company, and it is sufficient if they are substantially observed.[3] Where the authority to locate is general in its terms, or specifically confers an option on the company as to which streets it will use or what termini it will establish, such option must be exercised within a reasonable time,[4] and only once,[5] as the principle that a power once exercised is exhausted forbids a street railroad company which has once made a location of its road to change it, unless statutory provision is made to the contrary.[6]

necting it with other lines); Browne *v.* Turner, 174 Mass. 150, 54 N. E. 510.

Center of street.—Where the authority of the street railroad company is to put down its tracks in the center or middle of the street, they must be so laid or as near thereto as is possible. Finch *v.* Riverside, etc., R. Co., 87 Cal. 597, 25 Pac. 765; Philadelphia *v.* Continental Pass. R. Co., 11 Phila. (Pa.) 315. But the location of part of the railroad upon open ground formed by the intersection of five streets, aside from the center of the designated street, and slightly deflecting therefrom to the railroad company's private property, is not a nuisance *per se*, in the absence of evidence that such location interferes with public travel. Com. *v.* Wilkes Barre, etc., R. Co., 127 Pa. St. 278, 17 Atl. 996. *Compare* Kennedy *v.* Detroit R. Co., 108 Mich. 390, 66 N. W. 495.

Construction of prohibition.—The provisions in the charter of a street railroad company, authorizing it to lay its tracks upon and over such streets in the city, except in certain of the streets therein mentioned, as shall from time to time be fixed and determined by the city council, are not to be construed to prevent the company from laying its tracks "across" one of the excepted streets (State *v.* Newport St. R. Co., 16 R. I. 533, 18 Atl. 161); nor does a prohibition in a charter against locating a terminus in a certain street prevent the company from locating part of its route on that street (McFarland *v.* Orange, etc., R. Co., 13 N. J. Eq. 17).

Continuous route.—A street railroad company does not fulfil the requirement of the act under which it is incorporated that it shall have a continuous route, by locating a portion of its route on a street already occupied by the tracks of another company over which tracks it has no right to run. Altoona Belt Line St. R. Co. *v.* City Pass. R. Co., 209 Pa. St. 280, 58 Atl. 477. However, an ordinance establishing a street railroad route is not invalid as establishing more than one route, in that it provides that the railroad may fork at a certain point, the two branches proceeding in different directions. Aydelott *v.* Cincinnati, 11 Ohio Cir. Ct. 11, 4 Ohio Cir. Dec. 486.

3. New York, etc., R. Co. *v.* Stevens, 81 Conn. 16, 69 Atl. 1052; Jordan *v.* Washington, etc., R. Co., 25 Pa. Super. Ct. 564. And see Atty.-Gen. *v.* Metropolitan R. Co., 125 Mass. 515, 28 Am. Rep. 264.

4. Junction Pass. R. Co. *v.* Williamsport Pass. R. Co., 154 Pa. St. 116, 26 Atl. 295.

Grants to two companies.—Where there are indefinite grants to two different companies, the prior right will attach to that company which first locates its line, and, in the absence of statutory regulation to the contrary, the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. Fayetteville St. R. Co. *v.* Aberdeen, etc., R. Co., 142 N. C. 423, 55 S. E. 345.

5. New York, etc., R. Co. *v.* Stevens, 81 Conn. 16, 69 Atl. 1052; City R. Co. *v.* Citizens' St. R. Co., (Ind. 1898) 52 N. E. 157; Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358; McCruden *v.* Rochester R. Co., 5 Misc. (N. Y.) 59, 25 N. Y. Suppl. 114 [*affirmed* in 28 N. Y. Suppl. 1135]; Fort Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, 4 S. W. 534.

The rule is otherwise where the grant clearly contemplates the building of more than one railroad or lines of railroad. West Jersey Traction Co. *v.* Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333. Thus, under a charter authorizing the construction of a road between several termini, the building of a road between two of the designated points does not exhaust the power to construct other lines of railroad connecting the other termini. Thomas *v.* Milledgeville R. Co., 99 Ga. 714, 27 S. E. 756.

Subsequent designation by city.—An ordinance providing that a street railroad company might construct and operate a railroad on such streets as might thereafter be designated by the company in a written acceptance of the ordinance, and on such other streets as the city council might from time to time designate by resolution, has been construed as meaning that the provision that the company should designate the streets applied only to the minimum of mileage required by the ordinance, and that a subsequent resolution permitting the railroad to occupy another street did not amount to the granting of a new franchise. Thurston *v.* Huston, 123 Iowa 157, 98 N. W. 637.

6. Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32; West Jersey Traction Co. *v.* Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49 [*affirming* in part 52 N. J. Eq. 452, 29 Atl. 333].

In Massachusetts locations granted to street railroad companies do not constitute contracts, or at least are not of such a nature that the legislature cannot modify, change, or annul them without impairing the obligations of contracts. Springfield *v.* Springfield St. R. Co., 182 Mass. 41, 64 N. E. 577.

An act extending the time for the completion of a road, on its routes as finally adopted,

It has been held that where the power to locate the route of a street railroad through a township is conferred by statute upon the supervisor and highway commissioner, courts have no power to review their action.[7]

F. Right to Construct Additional Tracks, Branches, and Switches. The grant of a right to construct a street railroad carries with it, as an incident, the right to construct such turnouts and switches as public convenience and the successful operation of the road render necessary,[8] subject to the right of the municipality to be consulted about the situation of the side tracks, turnouts, and switches.[9] In some instances authority to construct branches, switches, and side tracks is expressly given;[10] but, regardless of whether the right is derived from express or implied authority, it must not be exercised in such a way as to arbitrarily and

does not give the company any right to lay its tracks where it had no right to lay them previously. *In re* Metropolitan Transit Co., 1 N. Y. Suppl. 114.

Consent of local authorities.—In some jurisdictions a change of location can only be made with the consent of the municipal or other authorities having charge of the streets (Snouffer *v.* Cedar Rapids, etc., R. Co., 118 Iowa 287, 92 N. W. 79; Shamokin *v.* Shamokin, etc., R. Co., 196 Pa. St. 166, 46 Atl. 382), but a change is lawful when the city by its tacit acceptance ratifies the act of its agents (Collins *v.* Carbondale Traction Co., 5 Pa. Dist. 18), and all the formalities necessary in making an original grant need not be observed in authorizing a slight change in location (Manuel *v.* Detroit, etc., R. Co., 139 Mich. 106, 102 N. W. 633).

In New York a change or alteration of route is only permitted for the improvement of the lines, and not to extend it for the purpose of increasing revenues or to change its direction (Webb *v.* Forty-Second St., etc., R. Co., 52 Misc. 46, 102 N. Y. Suppl. 762); and where a corporation secures a right to construct a street railroad along a certain route by obtaining the consent of abutting property-owners, it cannot change its route, and construct its road over the land of a private person (Matter of South Beach R. Co., 53 Hun 131, 6 N. Y. Suppl. 172 [*affirmed* in 119 N. Y. 141, 23 N. E. 486]).

An extension of a street railroad need not necessarily continue its track in the same general direction as the original track as it may include a line at right angles with an already existing line. Belle *v.* Glenville, 27 Ohio Cir. Ct. 181.

7. Silsby *v.* Lyle, 117 Mich. 327, 75 N. W. 886.

8. Romer *v.* St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455; Concord *v.* Concord Horse R. Co., 65 N. H. 30, 18 Atl. 87; Wilkes-Barre *v.* Coalville Pass. R. Co., 8 Kulp (Pa.) 298 (holding that where the road is single track, the grant impliedly authorizes the construction of such switches as are necessary to the running of cars in both directions); Wyoming *v.* Wilkes-Barre, etc., R. Co., 8 Kulp (Pa.) 113; Houston *v.* Houston Belt, etc., R. Co., 84 Tex. 581, 19 S. W. 786. *Compare* Atty.-Gen. *v.* Derry, etc., R. Co., 71 N. H. 513, 53 Atl. 443, holding that a special act authorizing the construction of an electric railroad through four towns contemplates a rural railroad only, and does not permit of the establishment of a local system in each town.

Spur track to storage buildings.—A company which possesses express authority to erect such buildings as may be necessary and expedient for its purposes may lay a spur or side-track for the purpose of conveying its cars to a building erected for the sheltering and storage of cars (Stroudsburg *v.* Stroudsburg Pass. R. Co., 2 Pa. Dist. 35, 12 Pa. Co. Ct. 124. And see Brooklyn Heights R. Co. *v.* Brooklyn, 152 N. Y. 244, 46 N. E. 509 [*affirming* 18 N. Y. Suppl. 876]); and it is proper for a city, under power conferred by its charter to control the streets, to allow a street railroad company to construct a proper spur track, connecting the main line with a point at which the company expects to build a power house and shed to store its cars when not in use (Powell *v.* Macon, etc., R. Co., 92 Ga. 209, 17 S. E. 1027).

9. Concord *v.* Concord Horse R. Co., 65 N. H. 30, 18 Atl. 87; Irvine *v.* Atlantic Ave. R. Co., 10 N. Y. App. Div. 560, 42 N. Y. Suppl. 1103; Harner *v.* Columbus St. R. Co., 11 Ohio Dec. (Reprint) 807, 29 Cinc. L. Bul. 387; Houston *v.* Houston Belt, etc., R. Co., 84 Tex. 581, 19 S. W. 786.

An interurban electric railroad after securing the right to do so, as required by law, from the proper local authorities, may construct branches from its main line. Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.

Compulsory removal of turnout.—The power of a city, under its authority to adopt reasonable rules for the regulation of street railroads, to compel the removal of a turnout whenever the public interests demand it, must be exercised reasonably and impartially. Eastern Wisconsin R., etc., Co. *v.* Hackett, 135 Wis. 464, 115 N. W. 376, 1136, 1139.

10. Brooklyn Heights R. Co. *v.* Brooklyn, 152 N. Y. 244, 46 N. E. 509 [*affirming* 18 N. Y. Suppl. 876]; People's Pass. R. Co. *v.* Marshall St. Pass. R. Co., 8 Pa. Co. Ct. 273 (holding that power given in a street railroad charter to construct "such branches as may be necessary to connect them with any other railway or railways within the said city" is to be confined in its operations to the railways in existence at the time the charter was granted); Eastern Wisconsin R., etc., Co. *v.* Hackett, 135 Wis. 464, 115 N. W. 376, 1136, 1139 (holding that where a street railroad company possesses, under the ordinances

unnecessarily obstruct public travel, and interfere with the rights of abutting owners.[11] A double-track line cannot be constructed under authority to lay a single track;[12] but authority conferred on a company to lay a double track cannot

of a city, the power to maintain necessary switches and turnouts, and a single or double track along a street and a bridge, the city after constructing a new bridge in place of the existing one, and entering into a contract with it, cannot lawfully adopt a resolution providing that no diagonal switch or connecting track shall be placed on the new bridge or approaches thereto, and thereby prevent the street railroad company from restoring the connections existing prior to the construction of the new bridge).

Express authority to construct a turnout is limited to the construction of a short line of track, having connection by means of switches with the main line, and does not permit of the construction of an additional track connecting the original track with a two-track system, and which together make one continuous, unbroken double track line. Bridgewater *v.* Beaver Valley Traction Co., 214 Pa. St. 343, 63 Atl. 796. And where a street railroad company, under the guise of building switches, is attempting to double track its railroad, a court of equity may determine what switches and turnouts the company is entitled to. Willis *v.* Erie City Pass. R. Co., 188 Pa. St. 56, 41 Atl. 307. Likewise, only such sidings and turnouts as are provided for in the grant can be constructed, and any extension of those provided for, or connection between them is illegal. Cape May, etc., R. Co. *v.* Cape May, 58 N. J. L. 565, 34 Atl. 397. However, where the number or length of turnouts is not limited, the company is not obliged to exercise all its power at once but may extend the length of a turnout as traffic increases (Taylor *v.* Erie City Pass. R. Co., 37 Pa. Super. Ct. 292), or construct such additional turnouts as increase of travel renders necessary (Detroit Citizens' St. R. Co. *v.* Detroit Bd. of Public Works, 126 Mich. 554, 85 N. W. 1072).

Connection of different lines.—Where the company has contracted with the city to connect all its lines of road, it must be held that the city conferred the right to do so, as the contract, to be binding, must be mutual (Houghton County St. R. Co. *v.* Laurium, 135 Mich. 614, 98 N. W. 393); and a street car company which has acquired the lines of street railroad of two other companies, when authorized by its charter, and with the consent of the authorities of the city in which its lines of railroad are situated, may connect the lines acquired from the other companies by laying its tracks on such portions of a street of the city as may be necessary to make the connection (Brown *v.* Atlanta R., etc., Co., 113 Ga. 462, 39 S. E. 71). However, a branch built as a distinct line under a separate grant is not an extension or part of another line by reason of the fact that it uses the tracks of that line for a short distance, nor is it made so by a subsequent resolution of the city council which provides simply for a change of connection with the main line (Cleveland Electric R. Co. *v.* Cleveland, etc., R. Co., 204 U. S. 116, 27 S. Ct. 202, 51 L. ed. 399 [*affirming* 137 Fed. 111]); and an ordinance granting a street railroad company the right to put in necessary switches, and providing that the whole length of road authorized by the ordinance shall be deemed one route, with a fare not exceeding five cents, does not authorize such company to put in a Y to make a turning point for another company (Rapid R. Co. *v.* Mt. Clemens, 118 Mich. 133, 76 N. W. 318).

Under the Pennsylvania statute giving a street railroad company the right to construct extensions on complying with certain prescribed requirements, it is a condition precedent to the extension that the company file in the office of the secretary of state an exemplification of the record of the adoption of the extension (Coatesville, etc., R. Co. *v.* West Chester R. Co., 206 Pa. St. 40, 55 Atl. 844); but when this requirement has been fulfilled, the company is immediately invested with an exclusive privilege in the streets covered by such extension; and a further provision that no right to actually construct the extension shall vest until after thirty days from the filing of such exemplification, merely postpones the right to construct the extension for such thirty days (Com. *v.* Uwchlan St. R. Co., 203 Pa. St. 608, 53 Atl. 513). However, a company which has no right to build its charter route cannot construct an extension. Hannum *v.* Media, etc., R. Co., 200 Pa. St. 44, 49 Atl. 789.

11. Dulaney *v.* United R., etc., Co., 104 Md. 423, 65 Atl. 45; Stroudsburg *v.* Stroudsburg Pass. R. Co., 2 Pa. Dist. 35, 12 Pa. Co. Ct. 124.

12. Bridgewater *v.* Beaver Valley Traction Co., 214 Pa. St. 343, 63 Atl. 796.

A general power in the charter of a street railroad company to construct a line of street railroad authorizes the construction of double tracks on the streets of a municipality, provided the authorities of such municipality consent that the streets may be so used. Brown *v.* Atlanta R., etc., Co., 113 Ga. 462, 39 S. E. 71.

Under extension proceedings, a street railroad company, whose articles contemplate a single, connected road, carrying from end to end for a single fare, cannot construct an independent line, not connected with its original line. McClean *v.* Westchester Electric R. Co., 25 Misc. (N. Y.) 383, 55 N. Y. Suppl. 556. But the company is not restricted to a mere prolongation of existing branches, but may extend its operation in any direction or upon any street or avenue, provided the additional lines are to be operated in connection with existing lines. Bohmer *v.* Haffen, 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030 [*affirming* 22 Misc. 565, 50 N. Y. Suppl. 857].

be taken away by subsequent action on the part of the city,[13] nor is it exhausted by the laying and using of a single track.[14]

G. Right to Erect Buildings. A street railroad company possesses a right to erect buildings in or over the street only when such right is expressly granted;[15] or at least only when it is shown that the rights to use the street which have been expressly granted cannot be used unless the buildings in question are placed in the street.[16]

H. Rights in and Use of Bridges. As a bridge is a part of the highway which passes over it,[17] the authority of a street railroad company to use certain streets and highways includes the right to construct and operate or extend its road on bridges connecting with and constituting portions of such streets and highways.[18] This right is subject to the power of the proper authorities to repair and improve the bridge;[19] and the company may be required to pay for the additional cost of improvement and maintenance caused by its operation on the bridge, especially where the bridge was constructed and is owned and maintained by another private or quasi-public corporation.[20] When the bridge is owned by the

13. Burlington *v.* Burlington St. R. Co., 49 Iowa 144, 31 Am. Rep. 145.

14. Houghton County St. R. Co. *v.* Laurium, 135 Mich. 614, 98 N. W. 393; Ransom *v.* Citizens' R. Co., 104 Mo. 375, 16 S. W. 416; Dunmore *v.* Scranton R. Co., 34 Pa. Super. Ct. 294; People's Pass. R. Co. *v.* Baldwin, 14 Phila. (Pa.) 231. *Compare* Eastern Wisconsin R., etc., Co. *v.* Winnebago Traction Co., 126 Wis. 179, 105 N. W. 571, holding that the exercise of an option to build either a single or double track line within a specified time by building and putting in operation a single track line, exhausts the rights of the company, and it cannot, after the expiration of the time limited, lay additional tracks, and thus convert its line wholly or partially into a double track line.

Third track.— Express authority is necessary for the construction of a third track. Auchincloss *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 63, 74 N. Y. Suppl. 534 [*reversing* 29 Misc. 151, 60 N. Y. Suppl. 792].

15. Adler *v.* Metropolitan El. R. Co., 61 N. Y. Super. Ct. 85, 18 N. Y. Suppl. 858 [*modified* in 138 N. Y. 173, 33 N. E. 935]; Mattlage *v.* New York El. R. Co., 14 Daly (N. Y.) 1; Hamilton, etc., Transit Co. *v.* Hamilton, 4 Ohio S. & C. Pl. Dec. 10, 1 Ohio N. P. 366; Gray *v.* Dallas Terminal R., etc., Co., 13 Tex. Civ. App. 158, 36 S. W. 352. And see Hudson, etc., R. Co. *v.* Wendel, 193 N. Y. 166, 85 N. E. 1020 [*affirming* 122 N. Y. App. Div. 917, 107 N. Y. Suppl. 1130]. *Compare* Brooklyn Heights R. Co. *v.* Brooklyn, 18 N. Y. Suppl. 876 [*affirmed* in 152 N. Y. 244, 46 N. E. 509].

Platforms.— It is not permissible for surface street railroad companies to provide platforms, and other similar conveniences, along the streets for the use of passengers. Robinson *v.* Helena Light, etc., Co., 38 Mont. 222, 99 Pac. 837.

16. Williams *v.* Los Angeles R. Co., 150 Cal. 592, 89 Pac. 330.

17. See BRIDGES, 5 Cyc. 1052.

18. Pittsburg, etc., Pass. R. Co. *v.* Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323. And see Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969, holding that in the absence of any showing as to whether the city or the street railroad company built the bridge or as to how the company acquired the right to use it, the presumption is that the bridge is a part of the public street, and that the company's user of it is based on its franchise right to use the street itself.

Occupation of bridge by two companies.— A statute providing that no extension or branch shall be constructed on any street or highway on which a track is laid or authorized by any existing charter does not prevent a city from authorizing a company formed thereunder to cross a city bridge over which another railroad has laid its tracks. Hestonville, etc., Pass. R. Co. *v.* Forty-second St., etc., R. Co., 4 Pa. Dist. 343.

The use of a toll bridge as a part of a public highway, in the operation of a street railroad, in such manner and on such terms as will protect the right of the bridge company and the traveling public, by a corporation chartered for such purpose, is one reasonably consistent with the purpose for which the bridge was erected. Pittsburg, etc., Pass. R. Co. *v.* Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323. The directors of a bridge company have power to authorize the use of the bridge by a street railroad company to any extent that will not interfere with its use by the general public in other proper ways (Hasson *v.* Venango Bridge Co., 11 Pa. Co. Ct. 383), and where a bridge company, which is authorized to construct a bridge for ordinary travel, induces street car companies subsequently organized to spend large sums in building to and over the said bridge, and then allows the use of the bridge for a great length of time, it cannot deny the right to such use upon payment of a reasonable toll (Covington, etc., Bridge Co. *v.* South Covington, etc., St. R. Co., 93 Ky. 136, 19 S. W. 403, 14 Ky. L. Rep. 52, 15 L. R. A. 828).

19. Middlesex R. Co. *v.* Wakefield, 103 Mass. 261.

20. Salem, etc., R. Co. *v.* Essex County,

township or county, the consent of the proper township or county officials must be obtained, regardless of whether it is situated within or without a city;[21] but the officials have no power to arbitrarily withhold their consent.[22] It has been held that the consent of a canal company owning a bridge over its canal must be obtained before a street railroad may be constructed thereon.[23]

I. Rights in and Use of Turnpikes and Toll-Roads. Under statutes and charters varying somewhat in their terms, it has been held that turnpike, plank-road, or toll-road companies have power to contract with street railroad companies as to the use of such turnpikes, plank-roads, or toll-roads by the street railroad companies,[24] and that such contracts, when made, are binding and govern the rights of the parties.[25] In the absence of such contract, a street railroad company may obtain the use of such a road by condemnation proceedings,[26] except where the legislature has conferred an exclusive privilege on the turnpike company.[27] However, the right of a street railroad company to construct and

9 Allen (Mass.) 563; Carolina Cent. R. Co. *v.* Wilmington St. R. Co., 120 N. C. 520, 26 S. E. 913; Berks County *v.* Reading City Pass. R. Co., 167 Pa. St. 102, 31 Atl. 474, 663. See also *infra*, VII, D, 2, c. *Compare* Floyd County *v.* Rome St. R. Co., 77 Ga. 614, 3 S. E. 3, holding that additional compensation cannot be exacted to meet part of the expense of replacing an old bridge washed away by flood with a new one.

21. Wheatfield *v.* Tonawanda St. R. Co., 92 Hun (N. Y.) 460, 36 N. Y. Suppl. 744; Lysander *v.* Syracuse, etc., R. Co., 31 Misc. (N. Y.) 330, 65 N. Y. Suppl. 415 [*affirmed* in 51 N. Y. App. Div. 617, 66 N. Y. Suppl. 1146]; Berks County *v.* Reading City Pass. R. Co., 167 Pa. St. 102, 31 Atl. 474, 663. And see Venango County *v.* Oil City St. R. Co., 3 Pa. Dist. 546.

The commissioner of bridges of New York city has statutory authority to operate, or authorize to be operated, a railroad or railroads over the Williamsburg bridge. Schinzel *v.* Best, 45 Misc. (N. Y.) 455, 92 N. Y. Suppl. 754 [*affirmed* in 109 N. Y. App. Div. 917, 96 N. Y. Suppl. 1145].

Where the requisite consents have not been obtained, a railroad company which has constructed and erected the bridge may maintain an injunction to have the street railroad company enjoined from using the bridge. Pennsylvania R. Co. *v.* Parkesburg, etc., St. R. Co., 26 Pa. Super. Ct. 159.

22. Berks County *v.* Reading City Pass. R. Co., 167 Pa. St. 102, 31 Atl. 474, 603. And see Chester, etc., R. Co. *v.* Darby, 217 Pa. St. 275, 66 Atl. 357, holding that where a county changes a bridge so that a street railroad company is compelled to move its tracks to align them with a track on the bridge, the borough whose consent is necessary to such change cannot arbitrarily withhold consent or burden its consent with conditions imposing further pecuniary obligations on the company.

Where the bridge is of insufficient strength, or of insufficient capacity to accommodate the general public travel and the cars of the street railroad company, and cannot be strengthened or enlarged so as to do so, the officials should refuse consent to use the bridge (Elmer *v.* Cumberland County, 57 N. J. L. 366, 30 Atl. 475; Lewis *v.* Cumberland County, 56 N. J. L. 416, 28 Atl. 553; Larue *v.* Oil City St. Pass. R. Co., 170 Pa. St. 249, 32 Atl. 977), and, in such a case, neither the city nor the county can be compelled to provide the company with a suitable viaduct or other means of crossing at the point in question (Larue *v.* Oil City St. Pass. R. Co., *supra*).

23. Pennsylvania Canal Co. *v.* Lewisburg, etc., Pass. R. Co., 10 Pa. Super. Ct. 413 [*reversing* 7 Pa. Dist. 244, 20 Pa. Co. Ct. 550].

24. Green *v.* City, etc., R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288 (holding that such a contract does not absolve the turnpike company from its duty to keep the road in proper condition for vehicles other than street cars, and of the width required by its charter); Eastern Dist.-Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242; Little Sawmill Valley Turnpike, etc., Road Co. *v.* Federal St., etc., Pass. R. Co., 194 Pa. St. 144, 45 Atl. 66, 75 Am. St. Rep. 690.

A lease is not required under the New Jersey statute granting the privilege of entering into a lease, but the street railroad company may acquire a mere use of part of a roadway by consent of the turnpike company. Hunt *v.* West Jersey Traction Co., 62 N. J. Eq. 225, 49 Atl. 434.

25. Baltimore, etc., Turnpike Road *v.* United R., etc., Co., 93 Md. 138, 48 Atl. 723; Detroit, etc., Plank-Road Co. *v.* Oakland R. Co., 131 Mich. 663, 92 N. W. 346; Detroit, etc., Plank Road Co. *v.* Detroit Suburban R. Co., 103 Mich. 585, 61 N. W. 880.

26. Trotier *v.* St. Louis, etc., R. Co., 180 Ill. 471, 54 N. E. 487, holding, however, that the road cannot be condemned in such a manner as to destroy its utility or the use of any part of it as a highway.

Change of grade.—A street railroad company, occupying by condemnation, a turnpike, cannot change the grade, except so far as is reasonably necessary. Berks, etc., Turnpike Road *v.* Lebanon, etc., St. R. Co., 3 Pa. Dist. 55.

27. See Detroit, etc., Plank Road Co. *v.* Detroit Suburban R. Co., 103 Mich. 585, 61 N. W. 880.

operate its road on a turnpike, whether created by agreement or otherwise, does not do away with the necessity of its complying with statutory conditions precedent,[28] such as obtaining the consent of the proper authorities.[29]

V. ACQUISITION AND USE OF PRIVATE PROPERTY.

In addition to its right to use the streets of a municipality;[30] a street railroad company may acquire by purchase land or a right of way over private property and construct a part of its road thereon,[31] regardless of its right to acquire such property by condemnation proceedings,[32] and the right of the company in the land or right of way so acquired will be protected by the courts.[33]

28. Stockton *v.* Atlantic Highlands, etc., Electric R. Co., 53 N. J. Eq. 418, 32 Atl. 680.

29. Trotier *v.* St. Louis, etc., R. Co., 180 Ill. 471, 54 N. E. 487; *In re* Rochester Electric R. Co., 123 N. Y. 351, 25 N. E. 381 [*affirming* 57 Hun 56, 10 N. Y. Suppl. 379]; Cincinnati *v.* Columbia, etc., St. R. Co., 9 Ohio Dec. (Reprint) 782, 17 Cinc. L. Bul. 192; Johnstown, etc., Turnpike Co. *v.* Johnstown Pass. R. Co., 4 Pa. Dist. 594; Harrisburg, etc., Electric R. Co. *v.* Harrisburg, etc., Turnpike Co., 4 Pa. Dist. 17; Harrisburg, etc., R. Co. *v.* Harrisburg, etc., Turnpike Co., 15 Pa. Co. Ct. 389; Steelton Borough *v.* East Harrisburg Pass. R. Co., 11 Pa. Co. Ct. 161; Steelton Borough *v.* East Harrisburg Pass. R. Co., 2 Dauph. Co. Rep. (Pa.) 313.

30. See *supra*, IV, A, 1.

31. Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457; Farnum *v.* Haverhill, etc., St. R. Co., 178 Mass. 300, 59 N. E. 755; Pennsylvania R. Co. *v.* Glenwood, etc., Electric St. R. Co., 184 Pa. St. 227, 39 Atl. 80 (holding that a street railroad company may diverge from the highway and construct its road on property which it has secured for that purpose in order to avoid a grade crossing); Pennsylvania R. Co. *v.* Greensburg, etc., Electric St. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839; Delaware, etc., Canal Co. *v.* Lackawanna Valley Traction Co., 2 Lack. Leg. N. (Pa.) 295. And see *dictum* in Rahn Tp. *v.* Tamaqua, etc., St. R. Co., 167 Pa. St. 84, 31 Atl. 472. *Compare* Hartshorn *v.* Illinois Valley Traction Co., 210 Ill. 609, 71 N. E. 612, limiting the right of the company to deflect from the highway to cases of actual necessity.

Franchise unnecessary.—Where a city vacates a street and conveys a right of way over it to a street railroad company, the company may construct its road thereon without obtaining the usual franchise necessary in the case of the use of streets. Tomlin *v.* Cedar Rapids, etc., R., etc., Co., 141 Iowa 599, 120 N. W. 93, 22 L. R. A. N. S. 530. And see Harvey *v.* Aurora, etc., R. Co., 186 Ill. 283, 57 N. E. 857, holding that it is not necessary, as a condition precedent to the location by a street railroad company of such portions of its line as are not within, upon, or across a street, that the consent of the city be obtained, as that may be secured subsequently.

The location of its route entirely upon private lands and not upon any street or highway prevents the company from being considered as a street railroad company. Gaw *v.* Bristol, etc., R. Co., 22 Pa. Co. Ct. 332, 465.

Limitations imposed by ordinance on the width and location of a right of way of an elevated railroad over private lands may be removed by ordinance, under a statute authorizing cities to provide for and change the location of railroads within their limits. Tudor *v.* Chicago, etc., Rapid Transit R. Co., 164 Ill. 73, 46 N. E. 446, 36 L. R. A. 379.

Mode of construction.—Under a deed granting a right of way to a suburban electric railroad company and authorizing it to construct and operate its road in the same manner as is authorized by a certain named franchise, which franchise requires the rails to be laid flush with the streets, the company has no right to build and maintain a trestle above grade. Lane *v.* Michigan Traction Co., 135 Mich. 70, 97 N. W. 354.

32. Montgomery Amusement Co. *v.* Montgomery Traction Co., 139 Fed. 353 [*affirmed* in 140 Fed. 988, 72 C. C. A. 682].

Right of street railroad company to condemn private property see EMINENT DOMAIN, 15 Cyc. 571 note 80.

33. Ft. Worth St. R. Co. *v.* Queen City R. Co., 71 Tex. 165, 9 S. W. 94, holding that a right of way so acquired can only be taken from the company without its consent by a lawful exercise of the power of eminent domain, and that the company is entitled to an injunction against another company interfering with its rights.

Contract or option.—Specific performance of a contract for the conveyance of a right of way may be had where there has been a substantial compliance with conditions precedent (St. Louis, etc., Electric R. Co. *v.* Van Hoorebeke, 191 Ill. 633, 61 N. E. 326), and the landowner may recover such compensation as he has contracted for, either verbally or in writing (Quigley *v.* Montgomery, etc., Electric R. Co., 208 Pa. St. 238, 57 Atl. 512); but where the contract is not performed by the company, and the land remains intact, the owner may recover only such damages as he has actually sustained (Hays *v.* Wilkinsburg, etc., St. R. Co., 204 Pa. St. 488, 54 Atl. 322). An option to purchase is not kept alive after its expiration by the company laying its tracks and

VI. RIGHTS AND REMEDIES OF ABUTTING OWNERS.

A. In General.[34] Although the use of a street, when duly authorized, for the construction and operation of a street railroad does not impose an additional servitude on the fee so as to entitle abutting owners to compensation or damages for such use,[35] except to the extent that they suffer special injury thereby,[36] the abutting property-owners have equal rights with the street railroad company to the use of the street,[37] and have a right to insist that the road be not constructed and operated in such a manner as to constitute a public nuisance and cause them special injury.[38] The distinction is not always clearly drawn, but most of the cases involving the rights of abutting property-owners turn upon the point whether the street railroad company has lawful authority to do the acts complained of. Thus an abutting owner has no ground of complaint where the street railroad is constructed and operated in a manner which is lawfully authorized;[39] and conversely, where he suffers a present and special injury,[40] he has a right to insist

holding the land by force. Jackson *v.* Slate Belt Electric St. R. Co., 7 North. Co. Rep. (Pa.) 286.

Ejectment.—Where, at the time an owner of land subject to a deed of trust attempted to dedicate a portion thereof to the public as a street, and contracted with a street railroad company to grant a right of way over the same, the deed of trust was duly registered, and the holder of the deed notified the company of his rights in the land, a purchaser on foreclosure of the deed is not estopped from maintaining ejectment against the company to recover the land. Newport News, etc., R., etc., Co. *v.* Lake, 101 Va. 334, 43 S. E. 566.

34. **Consent of abutting owner to construction of road** see *supra*, IV, D.

35. See EMINENT DOMAIN, 15 Cyc. 676.

Elevated road as additional servitude see EMINENT DOMAIN, 15 Cyc. 679.

36. Oviatt *v.* Akron St. R. Co., 3 Ohio S. & C. Pl. Dec. 252, 2 Ohio N. P. 84. See also EMINENT DOMAIN, 15 Cyc. 676.

37. Dulaney *v.* United R.'s, etc., Co., 104 Md. 423, 65 Atl. 45. See also *infra*, X, B, 3, j; Wagner *v.* Bristol Belt Line R. Co., 108 Va. 594, 62 S. E. 391.

Right of access.— The abutting owner has a right to occupy the street in front of his property to take away or deliver persons or goods, and may occupy the street for such a length of time as is reasonable for such purposes, even though the passage of street cars is thereby impeded (Raferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763 [*followed* in Patterson *v.* Pittston, 8 Kulp (Pa.) 530]; but he has no right, as against a street railroad company, to load his drays in the street in a manner prohibited by law (Louisville Bagging Mfg. Co. *v.* Central Pass. R. Co., 95 Ky. 50, 23 S. W. 592, 15 Ky. L. Rep. 417, 44 Am. St. Rep. 203), nor can he rightfully complain of the temporary interference with the access to his property which results from the tearing up of a street for the construction of the street railroad (Glidden *v.* Cincinatti, 4 Ohio S. & C. Pl. Dec. 423, 30 Cinc. L. Bul. 213). Whether a street cable railroad is an obstruction to access to abutting property is a question of fact, depending on the width of the street and the effect on its grade (Harrison *v.* Mt. Auburn Cable R. Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265), and where the access of an abutting owner is wrongfully interfered with, he may enjoin the unauthorized construction over only so much of the highway as is necessary for convenient access by him or his customers (Beekman *v.* Third Ave. R. Co., 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174).

38. Hussner *v.* Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 11 Am. St. Rep. 679; Mahady *v.* Bushwick R. Co., 91 N. Y. 148, 43 Am. Rep. 661 (holding that a street cannot be lawfully converted into a yard for the storing or deposit of cars to the injury of adjoining owners); Bernheimer *v.* Manhattan R Co., 13 N. Y. Suppl. 913. And see Hogencamp *v.* Paterson Horse R. Co., 17 N. J. Eq. 83.

Carriage of freight.— The use of streets by a street railroad company for the transportation of freight is consistent with the purposes for which streets exist, and an abutting property-owner is not entitled to have such use enjoined, or declared a nuisance. Aycock *v.* San Antonio Brewing Assoc. (Tex. Civ. App. 1901) 63 S. W. 953.

39. Stewart *v.* Chicago Gen. St. R. Co., 166 Ill. 61, 46 N. E. 765 [*affirming* 58 Ill. App. 446]; Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97; Hogencamp *v.* Paterson Horse R. Co., 17 N. J. Eq. 83; Hannum *v.* Media, etc., Electric R. Co., 221 Pa. St. 454, 70 Atl. 847; Ranken *v.* St. Louis, etc., R. Co., 98 Fed. 479; Macdonell *v.* British Columbia Electric R. Co., 9 Brit. Col. 542.

40. Potter *v.* Saginaw Union St. R. Co., 83 Mich. 285, 47 N. W. 217, 10 L. R. A. 176; Black *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 468, 53 N. Y. Suppl. 312. And see Clark *v.* Second St., etc., Pass. R. Co., 3 Phila. (Pa.) 259, holding that an owner of adjacent property cannot restrain a street railroad company from constructing its track, which intersects, on the curve from one street to another, an extreme point of the sidewalk, as such sidewalk of a public street is in no proper sense private property.

that the company does not act without or in excess of the lawful authority conferred.[41]

B. Actions. The attitude of the courts seems to be against the granting of injunctions against the construction of street railroads at the suits of abutting owners, for while such abutting owners are entitled to have all their property rights fully protected, those rights should be accorded, if possible, by a remedy which will not render impossible the construction and operation of necessary facilities for public travel,[42] and where the construction of a street railroad is authorized, an abutting owner who sustains special injury thereby usually has an adequate remedy at law for compensation or damages, and cannot maintain an injunction to restrain the construction and operation of the road or a portion thereof,[43] except to prevent irreparable injury.[44] In some jurisdictions an attempt

A taxpayer who is not an abutter, nor financially affected by the operation of a street railroad in a street, cannot maintain a suit to enjoin such use. Buning *v.* Cincinnati St. R. Co., 1 Ohio Cir. Ct. 323, 1 Ohio Cir. Dec. 178.

Use of tracks of another company.— The objection that a statute prescribing the length of a new street railroad which must be in actual operation in order to justify the use of the existing tracks of another railroad company has not been complied with cannot be urged by an abutting property-owner. Sanfleet *v.* Toledo, 10 Ohio Cir. Ct. 460, 8 Ohio Cir. Dec. 711.

In New York an abutting owner must own at least a part of the fee of the street, before he has any standing to complain. Kennedy *v.* Mineola, etc., Traction Co., 77 N. Y. App. Div. 484, 78 N. Y. Suppl. 937 [*affirmed* in 178 N. Y. 508, 71 N. E. 102].

41. Tuebner *v.* California St. R. Co., 66 Cal. 171, 4 Pac. 1162; Kennedy *v.* Detroit R. Co., 108 Mich. 390, 66 N. W. 495 (holding that abutting property-owners may require that a street railroad be built in the center of the street, if possible, as required by the ordinance granting the company permission to lay its tracks upon the street); Waldmuller *v.* Brooklyn El. R. Co., 40 N. Y. App. Div. 242, 58 N. Y. Suppl. 7.

Where the requisite permission of townships and boroughs has not been obtained, contractors for the construction of the road are trespassers, in digging a trench in a street of a borough, so that an abutting owner is not liable for filling it up. Wheeler *v.* Pennsylvania R. Co., 194 Pa. St. 539, 45 Atl. 338.

Use of electricity.— The operation of an electric street railroad by the overhead wire system is not so dangerous to those who reside or do business on a public street as to authorize its restraint by injunction (Louisville Bagging Mfg. Co. *v.* Central Pass. R. Co., 95 Ky. 50, 23 S. W. 592, 15 Ky. L. Rep. 417, 44 Am. St. Rep. 203); and where a municipality authorizes a street railroad company to equip its line for operation by electricity, and the company constructs such electric system, and as an essential part of such system erects on the margin of the sidewalk a pole in front of an owner's premises, on which it places wires for the operation of its cars, the company cannot be compelled by such owner to remove such pole, where it is not dangerous to persons or property and does not impede access to his premises (Mt. Adams, etc., R. Co. *v.* Winslow, 3 Ohio Cir. Ct. 425, 2 Ohio Cir. Dec. 240).

Additional tracks.— Injunctive relief may be had against the construction of an additional track which would constitute an unnecessary interference with the use of the street and a special injury to the property rights of abutters. Dooly Block *v.* Salt Lake Rapid Transit Co., 9 Utah 31, 33 Pac. 229, 24 L. R. A. 610.

Changing grade of street.— In the absence of express authority, a street railroad company has no right to change the existing grade of a street, and when it does so, it is liable for the damages suffered by an abutting owner (Stritesky *v.* Cedar Rapids, 98 Iowa 373, 67 N. W. 271), and the fact that the abutting property was above the grade of the street does not preclude the owner from recovering damages where the grade is lowered (Brady *v.* Kansas City Cable R. Co., 111 Mo. 329, 19 S. W. 953). When, however, the street in question has had no grade, and the ordinance granting the right to construct the road fixes the official grade of the street, the company is not liable for damages sustained by its cutting down the street, in a proper manner, to grade. Interstate Consol. Rapid Transit R. Co. *v.* Early, 46 Kan. 197, 26 Pac. 422.

Use of care in construction of road.—An abutting property-owner cannot recover for injuries by vibration, caused by running cars, so long as the company uses ordinary care in the construction of the road. Lewis *v.* Mt. Adams, etc., Inclined Plane R. Co., 7 Ohio Dec. (Reprint) 566, 3 Cinc. L. Bul. 1007.

42. Baker *v.* Selma St., etc., R. Co., 135 Ala. 552, 33 So. 685, 93 Am. St. Rep. 42; Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97 [*affirming* 60 Ill. App. 471].

43. Oviatt *v.* Akron St. R. Co., 3 Ohio S. & C. Pl. Dec. 252, 2 Ohio N. P. 84.

44. Taphorn *v.* Marietta, etc., R. Co., 6 Ohio Dec. (Reprint) 842, 8 Am. L. Rec. 421, holding that where a municipality has agreed that a street railroad company may lay its track in a certain street, an injunction re-

to construct and operate a street railroad on a public highway, without authority of law, or in an unlawful manner, is considered a public nuisance, which any abutting owner who suffers a special injury may sue to enjoin,[45] although such

straining it will not be granted at the instance of abutting property-owners, unless access to their property is thereby injured.

Hardship to public will not defeat right.— The fact that enjoining the construction of a street railroad, at the suit of an individual owner of property abutting on the street affected, will work a hardship upon the public will not suffice to defeat such owner of his legal right. Isom *v.* Low Fare R. Co., 29 Ohio Cir. Ct. 583.

45. *California.*— City Store *v.* San Jose-Los Gatos Interurban R. Co., 150 Cal. 277, 88 Pac. 977; Reynolds *v.* Presidio, etc., R. Co., 1 Cal. App. 229, 81 Pac. 1118.

Missouri.— Swinhart *v.* St. Louis, etc., R. Co., 207 Mo. 423, 105 S. W. 1043.

New York.— Fanning *v.* Osborne, 102 N. Y. 441, 7 N. E. 307; Henning *v.* Hudson Valley R. Co., 90 N. Y. App. Div. 492, 85 N. Y. Suppl. 1111; Beekman *v.* Third Ave. R. Co., 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174 [*affirmed* in 153 N. Y. 144, 47 N. E. 277]; Irvine *v.* Atlantic Ave. R. Co., 10 N. Y. App. Div. 560, 42 N. Y. Suppl. 1103; Webb *v.* Forty-Second St., etc., R. Co., 52 Misc. 46, 102 N. Y. Suppl. 762; Merriman *v.* Utica Belt Line St. R. Co., 18 Misc. 269, 41 N. Y. Suppl. 1049; Matter of Brooklyn Rapid Transit Co., 62 How. Pr. 404.

Pennsylvania.— Breen *v.* Pittsburg, etc., R. Co., 220 Pa. St. 612, 69 Atl. 1047; Hannum *v.* Media, etc., Electric R. Co., 200 Pa. St. 44, 49 Atl. 789 [*reversing* 8 Del. Co. 91] (holding that the right to challenge the authority of the company is given by statute in Pennsylvania); Mory *v.* Olcy Valley R. Co., 199 Pa. St. 152, 48 Atl. 971; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 487; Dilley *v.* Wilkesbarre, etc., Pass. R. Co., 6 Kulp 503. *Compare* Minnich *v.* Lancaster, etc., R. Co., 10 Pa. Dist. 126, 24 Pa. Co. Ct. 312, holding that if there is a variance from the charter route of an electric railroad greater than is necessary, or the charter itself is open to objection, the commonwealth alone can raise the question, and not an abutting owner.

Wisconsin.— Younkin *v.* Milwaukee Light, etc., Co., 120 Wis. 477, 98 N. W. 215 (holding that inasmuch as prior to Laws (1901), c. 465, making the statutes relative to eminent domain applicable to street and electric railroads, a street railroad company had no right to condemn land in the streets of a city, the remedy of the owners of land abutting on a street in which a street railroad was unlawfully being operated was to restrain the operation, and not by instituting condemnation proceedings); Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

See 44 Cent. Dig. tit. "Street Railroads," §§ 87–90.

No special injury.—An owner of premises abutting upon a city street, who has no interest in the street except an easement of passage, cannot, in the entire absence of proof of any special damage whatever, maintain an action to restrain a nuisance consisting in the unauthorized operation of surface cars through the street. Black *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 468, 53 N. Y. Suppl. 312.

Parties.—Where an action for an injunction by an abutting owner is authorized, the city is not a proper party to the action. Beekman *v.* Third Ave. R. Co., 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174 [*affirmed* in 153 N. Y. 144, 47 N. E. 277]. To a suit by property-owners on a street to prevent the construction of a street railroad thereon, other property-owners who consented to such building are not necessary parties. Thompson *v.* Schenectady R. Co., 124 Fed. 274. One or more property-owners may sue in behalf of others situated on the same street, but property-owners on different streets cannot unite in the same action. Glidden *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 423, 30 Cinc. L. Bul. 213.

Abatement of part of road.—Where, in a suit by owners of property abutting on a street against a street railroad company, the relief sought is the abatement of such use of the street, and the removal of all tracks, etc., but it appears that the operation of the road is lawful save in so far as it cast an additional burden on the fee because of the operation of an interurban service, plaintiffs are entitled to an abatement of such additional servitude, notwithstanding they have prayed for an abatement of the road in its entirety. Younkin *v.* Milwaukee Light, etc., Co., 120 Wis. 477, 98 N. W. 215.

Modification of decree.—Where a street railroad company has been enjoined from operating its road because the necessary consent of the county court has not been obtained, it is not error to refuse to modify the decree so as to allow the company permission to use one side of the street, instead of the center, since such modification would be granting the company a right which it could obtain only from the county court. Swinhart *v.* St. Louis, etc., R. Co., 207 Mo. 423, 105 S. W. 1043.

After an elevated road has been constructed, whether or not a court of equity will interfere by injunction to restrain the wrongful operation of a third track rests in the sound judicial discretion of the court, and in determining whether it should grant an injunction, or should leave the party to his remedy at law, the actual injury sustained by plaintiff, together with the resulting injury to defendant and to the public at large, should be considered, and if the loss to the public by the removal of the road would be greatly in excess of the damage accruing to plaintiff by the continuance thereof, the court has power to refuse an injunction on condition

owner has no title to any part of the street itself.[46] In other jurisdictions, however, this right is denied on the ground that an adequate remedy at law exists and that the authority of the company to act can only be challenged by the state or municipality,[47] an exception being made in the case of irreparable injury;[48] and an abutting owner can invoke equity jurisdiction only in order to protect his property from direct injury by the use of the street for railroad purposes.[49] Before he can become entitled to an injunction, the abutting owner must present grounds for equitable relief by showing some threatened injury,[50] and the company will not be enjoined from merely accepting an invalid ordinance and franchise.[51] In suits, either at law or in equity, by abutting owners, the petition

of payment of damages for the injuries sustained. Knoth *v.* Manhattan R. Co., 109 N. Y. App. Div. 802, 96 N. Y. Suppl. 844 [*affirmed* in 187 N. Y. 243, 79 N. E. 1015].

46. Kennedy *v.* Mineola, etc., Traction Co., 178 N. Y. 508, 71 N. E. 102 (holding, however, that one is not entitled to an injunction, as an abutter on the street, against the company, for having built in violation of law, where the action is based on his ownership in fee, and on trespass against his rights as such owner); Henning *v.* Hudson Valley R. Co., 90 N. Y. App. Div. 492, 85 N. Y. Suppl. 1111; Merriman *v.* Utica Belt Line St. R. Co., 18 Misc. (N. Y.) 269, 41 N. Y. Suppl. 1049.

47. Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97 [*affirming* 60 Ill. App. 471]; Newell *v.* Minneapolis, etc., R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Budd *v.* Camden Horse R. Co., 61 N. J. Eq. 543, 48 Atl. 1028 [*affirmed* in 63 N. J. Eq. 804, 52 Atl. 1130], holding that a trolley railway track, laid in accordance with the direction of a special ordinance, will not be enjoined from operation because its location works inconvenience and injury to the abutting owners, since, if the municipality has so unreasonably appropriated the divisions of the highway as to injure abutting owners, their remedy is not in equity, but in the courts of law which supervise inferior jurisdictions.

Certiorari.— The fact that a street railroad company, with which a board of freeholders has made a contract to construct a street railroad on a public highway under its control, has no franchise, apart from such contract, does not give a taxpayer owning land on the highway a standing to attack the contract in certiorari proceedings. Randolph *v.* Union County, 63 N. J. L. 155, 41 Atl. 960.

An abutting owner owning title to the center of the street cannot maintain a suit in equity to compel the removal of a street railroad switch from the street, on the theory that it was so laid without authority, since, if such were the fact, he has an adequate remedy at law by ejectment. St. Columba's Church *v.* North Jersey St. R. Co., (N. J. Ch. 1908) 70 Atl. 692. A bill for such a removal should allege whether complainant owned the title to the middle of the street, so as to indicate whether the suit was based on complainant's property rights in the street or on his rights as an abutting owner. St. Columba's Church *v.* North Jersey St. R. Co., *supra*.

48. General Electric R. Co. *v.* Chicago, etc., R. Co., 98 Fed. 907, 39 C. C. A. 345, 58 L. R. A. 231.

49. Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569.

When such use is only indirect or consequential it may be recovered for in an action at law, and a court of equity will not interfere by injunction. Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569.

It is where the right of a party is "to demand compensation," as distinguished from "a legal right to recover damages," that a court of equity will entertain jurisdiction. The right to demand compensation exists when the injury is direct, and the right to recover damages exists when it is consequential. Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569; Gray *v.* Dallas Terminal R., etc., Co., 13 Tex. Civ. App. 158, 36 S. W. 352.

50. Baker *v.* Selma St., etc., R. Co., 135 Ala. 552, 33 So. 685, 93 Am. St. Rep. 42; Watson *v.* Fairmont, etc., R. Co., 49 W. Va. 528, 39 S. E. 193. *Compare* McClean *v.* Westchester Electric R. Co., 25 Misc. (N. Y.) 383, 55 N. Y. Suppl. 556, holding that an abutting owner may enjoin the unauthorized construction of an electric railroad in a street without showing that the benefits from the railroad will not offset the injuries.

When injunction will not issue.— Where the property of complainant does not abut that street or part of the street on which it is claimed the company has not authority to lay tracks, the injunction will not issue (Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851); nor will an injunction issue where the complainants are individuals who have filed articles of association as a step toward securing a street railroad charter, but who have obtained no charter (Andel *v.* Duquesne St. R. Co., 219 Pa. St. 635, 69 Atl. 278 [*followed* in Lovejoy *v.* Duquesne St. R. Co., 219 Pa. St. 639, 69 Atl. 280]).

The mere grant of consent by the local authorities to the building and operation of a street railroad does not constitute irreparable injury to abutting property, so as to entitle an owner to maintain a suit to enjoin such action. Seccomb *v.* Wurster, 83 Fed. 856.

51. Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

must allege that the company is proceeding without proper authority, in order to render evidence of lack of authority admissible; [52] but when such lack of authority is alleged, the burden is on the company to show its authority,[53] which burden is sustained, however, by showing estoppel or consent to construction by plaintiff.[54] It has been held that, in an action at law, a single recovery may be had for the entire damages, present and future.[55]

VII. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.*

A. Duty to Construct. Mere authority to construct a street railroad is permissive only, and imposes no positive obligation on the company to do so; [56] and a company which has built a part of its road cannot be prevented from abandoning the enterprise.[57] But the rule is otherwise where by the terms of its contract with the municipality the company is obliged to complete the road; [58] and if it builds at all, it has no right to stop when it has finished a part, and operate its cars on that part, but is bound to go on and complete the road in its entirety; [59]

52. Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145.

Allegations of fact required.— The facts which would negative the public use for which the charter and franchise were granted, and clearly show that the use intended is private, should be specifically averred before a company can be prohibited by law from exercising the rights granted it by the proper authorities; an allegation that the road is solely for private use is insufficient as it is merely a conclusion of the pleader. Mangan *v.* Texas Transp. Co., 18 Tex. Civ. App. 478, 44 S. W. 998.

Variance.— In an action against a street railroad company for trespass in the use of the highway, evidence that the company had not complied with the statutory requirements to enable it to build a road is inadmissible, where failure of the company to comply with the requirements of the statute was not alleged in the complaint. Kennedy *v.* Mineola, etc., Traction Co., 178 N. Y. 508, 71 N. E. 102 [*affirming* 77 N. Y. App. Div. 484, 78 N. Y. Suppl. 937]. So where, in an action to restrain a street car company from laying its tracks in a public street, the only ground alleged is that the constitutional and statutory consents have not been obtained, plaintiffs are not entitled to recover upon the theory that defendant is a trespasser upon land owned by them in the street. Benedict *v.* Seventh Ward R. Co., 51 Hun (N. Y.) 111, 5 N. Y. Suppl. 406.

53. Hannum *v.* Media, etc., Electric R. Co., 200 Pa. St. 44, 49 Atl. 789.

The grant to the street railroad company must be introduced in evidence by it. Bathgate *v.* North Jersey St. R. Co., 75 N. J. L. 763, 70 Atl. 132.

Evidence admissible in behalf of defendant. — Where plaintiffs contend that the county authorities have not given their consent for the railway company to appropriate that part of the public road of the county between two cities, and that therefore it will be impossible for the company to construct and operate a continuous road as contemplated, evidence that, if there should be any difficulty in obtaining the consent of the county authorities the company could and would acquire the property contiguous to such public road is admissible. Almand *v.* Atlanta Consol. St. R. Co., 108 Ga. 417, 34 S. E. 6.

54. Heimburg *v.* Manhattan R. Co., 19 N. Y. App. Div. 179, 45 N. Y. Suppl. 995 [*affirmed* in 162 N. Y. 352, 56 N. E. 899]; Meixell *v.* Northampton Cent. R. Co., 7 North. Co. Rep. (Pa.) 274.

Mere silence for a period of two years does not constitute an estoppel (Swinhart *v.* St. Louis, etc., R. Co., 207 Mo. 423, 105 S. W. 1043), nor does acquiescence in the use of two tracks of an elevated road for seventeen years affect the right of an abutting owner to object to a third track (Roosevelt *v.* New York El. R. Co., 58 Misc. (N. Y.) 463, 111 N. Y. Suppl. 440).

55. Doane *v.* Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97 [*affirming* 60 Ill. App. 471].

56. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942; Martin *v.* Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 316. And see People *v.* Chicago West Div. R. Co., 118 Ill. 113, 7 N. E. 116.

A street railroad company is not bound to build an extension of one of its lines merely because a plan therefor submitted by it to the municipal authorities has been approved, with certain proper modifications, by the latter. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942.

57. See Martin *v.* Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 316.

58. See Martin *v.* Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 316, holding that the words "power and authority to lay out and construct a railway" in such a contract are imperative.

59. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942; Martin *v.* Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 316.

A street railroad company which succeeds to the rights, franchises, and obligations of another stands in the shoes of the latter with

*VII — IX, by Edward C. Ellsbree.

and being bound by law so to do, it may be compelled by an appropriate remedy either by mandamus or injunction.[60]

B. Time For Construction. Statutory or charter provisions frequently limit the time within which a street railroad company must begin or complete the construction of its road;[61] and, where the time is so limited, any construction of the road after the expiration of the specified time is unauthorized,[62] and may be enjoined.[63] Furthermore under some of the statutes a failure to begin or

respect to its duty to complete and operate a railroad extension begun by the former under a plan approved by the municipal authorities, and the failure of the original company to complete the extension within the time limited by the municipality affords no excuse to such successor for not subsequently proceeding to complete it. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942.

60. Martin *v.* Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 316.

61. See the statutes of the several states. And see the following cases:

California.— People *v.* Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736.

Illinois.— Blocki *v.* People, 220 Ill. 444, 77 N. E. 172; McNeil *v.* Chicago City R. Co., 61 Ill. 150.

Maryland.— United R., etc., Co. *v.* Hayes, 92 Md. 490, 48 Atl. 364.

Michigan.— Hamtramck Tp. *v.* Rapid R. Co., 122 Mich. 472, 81 N. W. 337.

New York.— People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961 [*reversing* 56 Hun 45, 9 N. Y. Suppl. 6]; Auchincloss *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 63, 74 N. Y. Suppl. 534.

Pennsylvania.— Plymouth Tp. *v.* Chestnut Hill, etc., R. Co., 4 Pa. Dist. 8, 15 Pa. Co. Ct. 442.

Virginia.— Newport News, etc., R., etc., Co. *v.* Hampton Roads R., etc., Co., 102 Va. 795, 47 S. E. 839.

See 44 Cent. Dig. tit. "Street Railroads," § 91.

Application of statutory provisions.— A statute requiring a street railroad company to do certain work within a specified time after the filing of articles of association under penalty of forfeiture is not applicable to previous franchises, where its effect would be to impair the contracts (Dern *v.* Salt Lake City R. Co., 19 Utah 46, 56 Pac. 556); and a general statute requiring railroads to be completed within a certain number of years has no application to a street railroad completed within the time allowed by the act creating it (Bohmer *v.* Haffen, 22 Misc. (N. Y.) 565, 50 N. Y. Suppl. 857 [*affirmed* in 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030 (*affirmed* in 161 N. Y. 390, 55 N. E. 1047)]).

Particular statutory and charter provisions construed.— The word "paving" as used in an ordinance, requiring a street railroad company to construct its tracks and begin running its cars within a specified time after its approval, but providing that the requirement shall not apply if the streets are not "graded and paved," and in such case extending the time to comply therewith, does not include macadamizing. United R., etc., Co. *v.* Hayes, 92 Md. 490, 48 Atl. 364. N. Y. Laws (1860), c. 461, granted to a street railroad company permission to lay several lines of road on certain streets and plank roads, and provided that the company should complete the tracks upon said streets by Oct. 1, 1861, or as soon thereafter as said streets should be opened and paved, and upon the plank roads whenever the consent of the plank road companies should have been obtained. It was held that the company, having accepted the franchise, was obliged to lay its tracks by the date named on so much of said streets as had then been opened and paved, although they had not been so opened and paved for the entire extent of the proposed lines. People *v.* Broadway R. Co., 126 N. Y. 29, 26 N. E. 961 [*reversing* 56 Hun 45, 9 N. Y. Suppl. 6].

"Completion," as used in such a grant or franchise, means such a completion as will render the road suitable for the use contemplated by the parties to the contract. Hamtramck Tp. *v.* Rapid R. Co., 122 Mich. 472, 81 N. W. 337.

62. Auchincloss *v.* Metropolitan El. R. Co., 69 N. Y. App. Div. 63, 74 N. Y. Suppl. 534 [*reversing* 29 Misc. 151, 60 N. Y. Suppl. 792].

Great delay in beginning the construction of the road authorizes the city to take steps to prevent its construction. East St. Louis Connecting R. Co. *v.* East St. Louis, 182 Ill. 433, 55 N. E. 533 [*affirming* 81 Ill. App. 109].

63. Dusenberry *v.* New York, etc., Traction Co., 46 N. Y. App. Div. 267, 61 N. Y. Suppl. 420.

Temporary injunction.— While legal proceedings are necessary to declare a forfeiture of a street railroad company's franchise for a failure to comply with a condition that, if the road shall not be completed and in running order within a fixed time, the franchise shall cease and determine, yet, where no excuse is shown for a failure to carry out the condition, the construction and operation will be temporarily enjoined, pending an action to permanently enjoin for a failure to carry out said condition. Dusenberry *v.* New York, etc., Traction Co., 46 N. Y. App. Div. 267, 61 N. Y. Suppl. 420. And where a street railroad company does not begin to construct its road until after its franchise therefor has expired, a taxpayer and owner of property abutting on the line of the proposed road under process of construction is entitled to a continuance of a temporary injunction during the pendency of an action to perpetually enjoin the construction of the road. Manton *v.* South Shore Traction Co., 121 N. Y. App. Div. 410, 106 N. Y. Suppl. 82 [*reversing* 104 N. Y. Suppl. 612].

complete the road within the time limited works a forfeiture of the corporate powers and franchises of the company,[64] or of the bond required to be deposited as a guarantee of the performance of the obligation.[65] The time may be fixed by statute, or the duty to fix it may be devolved upon commissioners.[66] The time specified is not irrevocable, but may be extended by the power that fixed it,[67] except that when fixed by statute a different period cannot be fixed in the grant of the franchise.[68] Time unavoidably consumed by legal proceedings, or by the delay or interference of the public authorities, or otherwise, should not be deemed a part of, but should be added to, the time limit.[69]

C. Plan and Mode of Construction — 1. In General. Unless limited by its charter or by ordinance, a street railroad company may lay its tracks on such part of the street as it deems best,[70] and may begin the construction of the road in any part of the route, whether it be the charter route or an extension.[71] And unless required to do so by statute, charter, or ordinance, a street railroad company is not bound to lay any particular style of rail,[72] but it must lay down the rail it has adopted in such manner as to do as little injury to the street, and to offer as little hindrance to public travel thereon, as is reasonably possible.[73] Moreover, it is not to be held to the style of rail first adopted, but may, unless pro-

64. See *supra*, III, E, 3, a.

65. West Springfield, etc., R. Co. *v.* Bodurtha, 181 Mass. 583, 64 N. E. 414; Whiting *v.* New Baltimore, 127 Mich. 66, 86 N. W. 403; Carlstadt *v.* City Trust, etc., Co., 69 N. J. L. 44, 54 Atl. 815.

Evidence held insufficient to show commencement within time limit see Spencer *v.* Palestine, (Tex. Civ. App. 1909) 116 S. W. 857.

66. See the statutes of the several states. And see cases cited *infra*, this note.

Power of commissioners.— Under N. Y. Laws (1875), c. 606, § 6, requiring the commissioners to fix and determine the time within which a street railroad shall be constructed and ready for operation, the commissioners, in providing that the work shall be completed at a specified date, but that time unavoidably consumed by legal proceedings, or by the delay or interference of the public authorities, or otherwise, shall not be deemed a part of, but shall be added to, the time limited, do not exceed their power, and such provision fixes and determines the time within the meaning of the act. *In re* Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18; New York Cable Co. *v.* New York, 104 N. Y. 1, 10 N. E. 332 [*reversing* 40 Hun 1].

67. McNeil *v.* Chicago City R. Co., 61 Ill. 150.

68. People *v.* Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736; Plymouth Tp. *v.* Chestnut Hill, etc., R. Co., 4 Pa. Dist. 8, 15 Pa. Co. Ct. 442.

69. *In re* Kings County El. R. Co., 105 N. Y. 97, 13 N. E. 18.

Injunction.— Where the failure to complete a street railway within the time limited for its construction is due to an injunction being granted against the company by a competitor, the right to put down the line is not lost by the expiration of the period limited. Blocki *v.* People, 220 Ill. 444, 77 N. E. 172 [*affirming* 123 Ill. App. 369]; State *v.* Cockrem, 25 La. Ann. 356; Newport News, etc., R., etc., Co. *v.* Hampton Roads R., etc., Co., 102 Va. 795, 47 S. E. 839. But the failure of a street railroad company to build a certain part of its line within the time limited is not excused by the pendency of an injunction restraining it from building a small and relatively unimportant connecting line situated several miles from the portion of the road in question, in the absence of anything to show that the portion of the road covered by the injunction was connected with the rest of the system in such a way as to make it undesirable or inconvenient to build one without the other. Blocki *v.* People, 229 Ill. 444, 77 N. E. 172.

"Any cause beyond the control of the company," within the meaning of such a provision of the commissioners, comprehends delay caused by interference of the courts, or other acts of interference over which the company has no control, but not delay caused by a failure to obtain consent of property-owners or the right of way through private property, where it has the legal right to force its way. Manton *v.* South Shore Traction Co., 121 N. Y. App. Div. 410, 106 N. Y. Suppl. 82 [*reversing* 104 N. Y. Suppl. 612].

70. Norristown Pass. R. Co. *v.* Citizens' Pass. R. Co., 3 Montg. Co. Rep. (Pa.) 119.

71. Hannum *v.* Media, etc., Electric R. Co., 8 Del. Co. (Pa.) 91.

72. Berks, etc., Turnpike Road *v.* Lebanon, etc., St. R. Co., 3 Pa. Dist. 55.

73. Berks, etc., Turnpike Road *v.* Lebanon, etc., St. R. Co., 3 Pa. Dist. 55.

Its line of rails must conform to the grade of the street as closely as is reasonably possible. Berks, etc., Turnpike Road *v.* Lebanon, etc., St. R. Co., 3 Pa. Dist. 55.

Where two street railroad companies have a common right to place rails in and use the same street, each is bound to so place its rails that the public may have the benefit which can be derived from such joint use. General Electric R. Co. *v.* Chicago City R. Co., 66 Ill. App. 362; Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 63 Ill. App. 464.

hibited, change the style, as from a flat rail to a "T" rail.[74] So also in the absence of any statutory or charter requirement as to gauge, the company may change the gauge originally adopted,[75] although the city cannot compel it to do so.[76]

2. Municipal Regulations.[77] A municipality has authority to regulate, by reasonable ordinance, the manner in which a street railroad company, empowered by its charter to occupy the streets of the municipality, shall lay its tracks in the public streets, although the charter of the company is silent on the subject.[78] Likewise where the consent and approval of the municipal authorities is necessary to the construction of a street railroad, they may, as a condition to the granting of such consent or approval, impose such reasonable terms and conditions as the public interests may require,[79] such as to where and how the tracks shall be laid,[80] the poles located and wires strung,[81] the kind of rails, etc.[82] Conditions which the municipal authorities in such cases have no power to impose are void;[83] but when they

74. Easton, etc., R. Co. *v.* Easton, 133 Pa. St. 505, 19 Atl. 486, 19 Am. St. Rep. 658 [*reversing* 7 Pa. Co. Ct. 577].

75. Denver, etc., R. Co. *v.* Barsaloux, 15 Colo. 290, 25 Pac. 165, 10 L. R. A. 89, narrow to broad guage.

76. Des Moines St. R. Co. *v.* Des Moines Broad Guage R. Co., 74 Iowa 585, 38 N. W. 496.

77. Statutory and municipal regulations of operation see *infra*, X, A, 2.

78. North Chicago City R. Co. *v.* Lake View, 105 Ill. 183; Harrisburg City Pass. R. Co. *v.* Harrisburg, 7 Pa. Co. Ct. 593; Harrisburg City Pass. R. Co. *v.* Harrisburg, 7 Pa. Co. Ct. 584; Ft Worth, etc., St. R. Co. *v.* Hawes, 48 Tex. Civ. App. 487, 107 S. W. 556; State *v.* Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759.

Ordinances held reasonable.— A city ordinance providing that passenger railroad companies shall submit all proposed styles of rails and the manner of laying the same, either as to repairs, extension, or construction, to the highway department for approval, etc., which shall be obtained before they proceed to make such repairs, etc. Passenger R. Co. *v.* Easton, 7 Pa. Co. Ct. 577. An ordinance prohibiting the use of "T" rails and providing that the rails shall be those known as street rails for horse-cars, that they shall conform to the grade of the street so as not to obstruct public travel, and that the company shall submit all plans to the city councils, of the streets to be occupied, the character of materials, and the kind of rail proposed to be laid. Harrisburg City Pass. R. Co. *v.* Harrisburg, 7 Pa. Co. Ct. 593; Harrisburg City Pass. R. Co. *v.* Harrisburg, 7 Pa. Co. Ct. 584; Harrisburg City Pass. R. Co. *v.* Harrisburg, 2 Chest. Co. Rep. (Pa.) 333. An ordinance requiring the street car company to string guard wires at the crossings with other lines of wire. State *v.* Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759.

Double and single track.— A city, after granting to a street railroad company the use of its street for double tracks for many miles, may, under its general power of regulation, limit the company to the use of one track for a short distance in one crowded and narrow street, and require it to remove the double track already laid. Baltimore *v.* Baltimore Trust, etc., Co., 166 U. S. 673, 17 S. Ct. 696, 41 L. ed. 1160 [*reversing* 64 Fed. 153].

79. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942; State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506; Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32; Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

The question whether such restrictions are reasonable is a question of fact, and the burden of proof is on him who asserts them to be unreasonable. Rutherford *v.* Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84.

A statute exempting a street railroad company from making repairs does not exempt it from the duty to comply with orders made by the selectmen of the town in granting the location, and which require the company, in case a certain character of rail, pavement, etc., does not appear satisfactory, to cause another rail, and pavement between the rails, to be substituted therefor. Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

80. Schmitt *v.* New Orleans, 48 La. Ann. 1440, 21 So. 24; Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

81. Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281.

82. Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340; Kalamazoo *v.* Michigan Traction Co., 126 Mich. 525, 85 N. W. 1067.

83. Fair Haven, etc., R. Co. *v.* New Haven, 74 Conn. 102, 49 Atl. 863; Grand Rapids Electric R. Co. *v.* Grand Rapids, 84 Mich. 257, 47 N. W. 567.

Under the Connecticut street railway act of 1893, the only "modifications" which the municipal authorities can lawfully make in the plan submitted to them by a street railway company are such as legitimately affect one or more of the particulars which the statute requires to be specified in the plan. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942; Fair Haven, etc., R. Co. *v.* New Haven, 74 Conn. 102, 49 Atl. 863; Central R., etc., Co.'s Appeal, 67 Conn. 197,

are reasonable, and otherwise valid, the discretion of the municipal authorities in this regard cannot be controlled by the courts.[84] Where a street railroad company authorized to construct tracks in the streets of a municipality departs from the plan adopted by the municipality for the construction thereof, the municipality may compel conformity to the plan adopted,[85] or it may ratify the variation by a formal change of plan [86] or by informal acquiescence.[87]

3. MODE OF CONSTRUCTION AS CONSTITUTING NUISANCE. A street railroad built by authority of law is not a nuisance, and therefore can work no legal injury, either to the public or to any private individual.[88] It may occasion inconvenience or loss, or may depreciate the value of property, and render its enjoyment incommodious and almost impossible, yet this is "*damnum absque injuria.*" [89] But the construction and maintenance of a street railroad along the public streets of a city, without authority of law, or in an unlawful manner, is a nuisance; [90] and although a public one, it may be restrained by injunction, at the suit of a private person who suffers a special injury thereby.[91] So a street railroad which is allowed to become so out of repair that the tracks project above the surface of the street thereby becomes a nuisance for which the owners are liable in damages.[92]

4. REMEDIES.[93] Where a street railroad company fails to comply with the conditions and restrictions imposed upon it by statute or ordinance as to the plan and mode of construction, it may be compelled to do so by mandamus [94] or by a suit in equity.[95] So a municipality may sue to enjoin a street railroad company

35 Atl. 32. No change of such plan can be deemed a modal one, or within the power of such authorities to make, which deprives the plan of its essential qualities, or imposes conditions wholly foreign to the plan. Fair Haven, etc., R. Co. *v.* New Haven, 74 Conn. 102, 49 Atl. 863; Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32.

84. Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340; Old Colony R. Co. *v.* Rockland, etc., R. Co., 161 Mass. 416, 37 N. E. 370; Rankin *v.* St. Louis, etc., Suburban R. Co., 98 Fed. 479.

Under Mass. Rev. Laws, c. 112, § 7, it is competent for selectmen to prescribe that the construction shall be done to their satisfaction, and if they do so prescribe, their determination, at least in the absence of fraud, is final, and cannot be transferred to or controlled by the court. Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

When a statute expressly authorizes a municipal board to designate the number of street railroad tracks that shall be laid in any street, lane, or avenue of the city, the court cannot set aside, as unreasonable, an ordinance which authorizes the laying of double tracks. Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281.

85. State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506.

86. State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506.

87. Bridgewater *v.* Beaver Valley Traction Co., 214 Pa. St. 343, 63 Atl. 796.

88. Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186; Hollis *v.* Brooklyn Heights R. Co., 128 N. Y. App. Div. 821, 113 N. Y. Suppl. 4; Faust *v.* Passenger R. Co., 3 Phila. (Pa.) 164.

An elevated railroad in a street cannot be enjoined as a nuisance, if constructed in the manner authorized by the legislature. Currier *v.* West Side El. Patent R. Co., 6 Fed. Cas. No. 3,493, 6 Blatchf. 487.

Where an electric railroad company is authorized to locate trolley poles along a street, they are not nuisances. Lambert *v.* Westchester Electric R. Co., 191 N. Y. 248, 83 N. E. 977 [*affirming* 115 N. Y. App. Div. 78, 100 N. Y. Suppl. 665].

89. Faust *v.* Passenger R. Co., 3 Phila. (Pa.) 164.

90. City Store *v.* San Jose-Los Gatos Interurban R. Co., 150 Cal. 277, 88 Pac. 977; Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186; Faust *v.* Passenger R. Co., 3 Phila. (Pa.) 164; Halifax St. R. Co. *v.* Joyce, 22 Can. Sup. Ct. 258. See also *supra*, IV, B.

91. Faust *v.* Passenger R. Co., 3 Phila. (Pa.) 164.

92. San Antonio Rapid Transit St. R. Co. *v.* Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730.

93. Rights and remedies of abutting owners see *supra*, VI.

94. Hartford *v.* Hartford St. R. Co., 73 Conn. 327, 47 Atl. 330; Washington, etc., R. Co. *v.* Alexandria, 98 Va. 344, 36 S. E. 385; State *v.* Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759. And see MANDAMUS, 26 Cyc. 365.

95. Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

Parties.— Under Mass. Rev. Laws, c. 112, § 100, providing that the superior court shall have jurisdiction in equity, on the petition of the selectmen of a town in which a street railroad is located, to compel the observance of all orders made relative to the construction of the road in accordance with such chapter by such selectmen, the selectmen are the proper parties plaintiff to bring a bill to compel observance of an order properly made by them under the statute as to the

from unlawfully obstructing a street, by the manner in which it is constructing or maintaining its tracks.[96] Where a contract exists between the company and the municipality it may be enforced by a mandatory injunction,[97] or the municipality may sue for damages for a breach of the contract.[98] Likewise a street railroad company is entitled to an injunction to prevent unlawful interference with the construction of its road by the municipal authorities.[99]

D. Restoration, Paving, and Repair of Streets[1] — **1. Duty to Repair or Pave — a. Duty to Repair.** A street railroad company is bound to keep the portions of streets occupied by its right of way in good condition, even in the absence of any express contract or statutory directions to that effect,[2] and this duty is a continuing one;[3] but the question as to whether it is compelled to improve the street, as ordered by the municipality, in the absence of a contract to that effect,

manner of the construction of a street railroad within their jurisdiction. Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

96. Wilkesbarre *v.* Coalville Pass. R. Co., 7 Leg. Gaz. (Pa.) 397, 4 Luz. Leg. Reg. 279.

97. Chester, etc., Road Co. *v.* Chester, etc., R. Co., 217 Pa. St. 272, 66 Atl. 358.

98. Montooth Borough *v.* Brownsville Ave. St. R. Co., 206 Pa. St. 338, 55 Atl. 1036.

Defenses.—Where a street railroad company contracts to build a road on a certain street, the fact that, because of the narrowness of part of the street, it is impossible to build such railroad safely is no defense to an action for a breach of the contract. Montooth Borough *v.* Brownsville Ave. St. R. Co., 206 Pa. St. 338, 55 Atl. 1036.

99. Tarrytown, etc., R. Co. *v.* New York, etc., Traction Co., 47 N. Y. App. Div. 642, 62 N. Y. Suppl. 418; Akron, etc., R. Co. *v.* Bedford, 8 Ohio S. & C. Pl. Dec. 142, 6 Ohio N. P. 276, holding that it is no reason for refusing such relief that the street railroad company has not complied with the terms of the franchise, for if the company fails to perform its contract obligation, the city must seek its legal remedy; it cannot be permitted to take the law into its own hands.

1. Assessments for improvements see Municipal Corporations, 28 Cyc. 1120.

2. *Alabama.*— Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757.

Arkansas.— Pugh *v.* Texarkana Light, etc., Co., 86 Ark. 36, 109 S. W. 1019.

Indiana.—Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770.

Kentucky.— Groves *v.* Louisville R. Co., 109 Ky. 76, 58 S. W. 508, 22 Ky. L. Rep. 599, 52 L. R. A. 448; Owensboro City R. Co. *v.* Barber Asphalt Paving Co., 107 S. W. 244, 32 Ky. L. Rep. 844, 14 L. R. A. N. S. 1216.

Michigan.— Kaiser *v.* Detroit, etc., R. Co., 131 Mich. 506, 91 N. W. 752.

New York.—Worster *v.* Forty-Second St., etc., Ferry R. Co., 50 N. Y. 203.

Pennsylvania.— Reading *v.* United Traction Co., 215 Pa. St. 250, 64 Atl. 446; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106; Harrisburg *v.* Harrisburg Pass. R. Co., 1 Pearson 298.

Tennessee.— Memphis, etc., R. Co. *v.* State, 87 Tenn. 746, 11 S. W. 946.

Texas.— Citizens' R., etc., Co. *v.* Johns, (Civ. App. 1908) 116 S. W. 62; Laredo Electric, etc., Co. *v.* Hamilton, 23 Tex. Civ. App. 480, 56 S. W. 998.

See 44 Cent. Dig. tit. "Street Railroads," §§ 99, 100.

Reason for rule.— When the state gives up a portion of one of its highways to a particular use, without providing that what had been the duty of the municipality as to it shall continue, such duty devolves upon the party acquiring the right to use it, and a street railroad company, given the right to use such portion of a street as is needed for its tracks, in taking charge of it, is charged with the duty of properly maintaining it. It is because the municipality, as the agent of the state, has charge of the streets, that it must maintain and keep them in proper repair, and when the state permits this charge, as to a portion of a street, to be committed to another, it must be understood as imposing upon such party the responsibility that formerly rested upon the municipality, unless in the grant, or in the municipal consent thereto, of the right to use a portion of the street, such responsibility is expressly withheld and its imposition continued upon the municipality. Reading *v.* United Traction Co., 215 Pa. St. 250, 64 Atl. 446.

Some cases seem to assert a contrary doctrine.— Thus it has been said that a traction company is under no common-law obligation to keep in repair that portion of the streets upon which its right of way exists; and that such a duty, if it exists, must be imposed by statute or in some other way; but that such a company is under the obligation so to construct and maintain its tracks as that, by the exercise of reasonable care and supervision with respect to them, no danger will be occasioned to the public in its use of the highway along which the tracks are laid. Chicago Union Traction Co. *v.* Case, 129 Ill. App. 451. And see Calumet Electric St. R. Co. *v.* Nolan, 69 Ill. App. 104; Schild *v.* Central Park, etc., R. Co., 133 N. Y. 446, 31 N. E. 327, 28 Am. St. Rep. 658; New York *v.* New York, etc., R. Co., 19 N. Y. Suppl. 67.

3. Memphis, etc., R. Co. *v.* State, 87 Tenn. 746, 11 S. W. 946.

seems to be in some doubt.[4] No duty to repair ordinarily rests upon it as to the remainder of the street, but where as to that any such duty exists, it must be by virtue of statutory imposition or of contract,[5] the precise terms of either necessarily furnishing the only measure for its extent.[6]

b. Duty to Pave. The duty on the part of a street railroad company to pave the street, or to pay the cost of paving, or a portion thereof, must be imposed by legislative authority, or exist by virtue of some contract, express or implied;[7] and a charter or statute imposing this liability should use language admitting of no ambiguity.[8] The powers of the municipality in this respect are derived solely from statute, and it can exercise only such powers as are there conferred,[9] and in the manner prescribed, when the mode of exercise is prescribed in the statute.[10] Municipal ordinances requiring street railroad companies to pave the streets occupied by them relate only to such companies as are required by their several charters to do this,[11] or to such as are amenable to conditions precedent imposed, in pursuance of acts of the legislature, by the municipality as the price and consideration of its consent to their occupation of the streets.[12] No company

4. Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770. And see *infra*, VII, D, 1, h.

5. Indianapolis Traction, etc., Co. *v.* Pressell, 39 Ind. App. 472, 77 N. E. 357; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106.

6. See *infra*, VII, D, 2.

7. Indianapolis, etc., R. Co. *v.* New Castle, 43 Ind. App. 467, 87 N. E. 1067; New York *v.* Bleecker St., etc., R. Co., 130 N. Y. App. Div. 830, 115 N. Y. Suppl. 592; New York *v.* Eighth Ave. R. Co., 7 N. Y. App. Div. 84, 39 N. Y. Suppl. 959; New York *v.* New York, etc., R. Co., 19 N. Y. Suppl. 67 [*affirmed* in 139 N. Y. 643, 35 N. E. 206]; Philadelphia *v.* Spring Garden Farmers' Market Co., 161 Pa. St. 522, 29 Atl. 286.

In Georgia the act of Oct. 10, 1891 (Acts (1890–1891), vol. 2, p. 457), is the only source from which the mayor and general council of Atlanta can derive power to charge a street railroad company with a portion of the original cost of paving, when it lays its tracks upon a street which has already been thus improved; and where the mayor and general council grant such a railroad company permission to lay its tracks on a paved street, expressly stipulating that no charge for paving shall be made against the company, the general council cannot thereafter, under the provisions of the act above cited, enforce, by execution or otherwise, a claim against the company for any portion of the original cost of laying the paving in that street. Atlanta Consol. St. R. Co. *v.* Atlanta, 111 Ga. 255, 36 S. E. 667.

The words "cost of paving" are generally understood to include not only the actual cost of the paving itself, but as well the cost of the work necessarily preliminary to the laying of the same (Danville St. R., etc., Co. *v.* Mater, 116 Ill. App. 519), unless the contract entered into between the city and the company otherwise provides (Fort St., etc., R. Co. *v.* Schneider, 15 Mich. 74). A general provision requiring the company to lay and maintain paving is not limited to paving only, and does not exclude the cost of subsequent maintenance. Worcester *v.* Worcester Consol. St. R. Co., 192 Mass. 106, 78 N. E. 222.

8. See cases cited *infra*, this note.

Charter provisions held not to impose duty of paving.— A provision in the charter of a street railroad company that, on completion of the road, the company should be subject to city ordinances "regulating the running of passenger railway cars" (Philadelphia *v.* Empire Pass. R. Co., 177 Pa. St. 382, 35 Atl. 721; Philadelphia *v.* Empire Pass. R. Co., 5 Pa. Dist. 53, 18 Pa. Co. Ct. 81), or in regard to "paving, repairing, grading," etc., of the streets on which its tracks are located (Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 35 Atl. 718), does not authorize the city to impose upon the company the cost of street paving.

9. Oskaloosa St. R., etc., Co. *v.* Oskaloosa, 99 Iowa 496, 68 N. W. 808.

Where the charter of a street railroad company fixes the company's liability for street paving, the city cannot enlarge (Kansas City *v.* Corrigan, 86 Mo. 67; Philadelphia *v.* Philadelphia City Pass. R. Co., 177 Pa. St. 379, 35 Atl. 720), or diminish it (Kent *v.* Binghamton, 40 Misc. (N. Y.) 1, 81 N. Y. Suppl. 198 [*affirmed* in 88 N. Y. App. Div. 617, 84 N. Y. Suppl. 113]]; Weed *v.* Binghamton, 26 Misc. (N. Y.) 208, 56 N. Y. Suppl. 105), unless power so to do is expressly conferred upon it by the city charter or by statute.

10. See cases cited *infra*, this note.

When the mode prescribed to charge the company for paving is by assessment, the city may only proceed in that mode. Oskaloosa St. R., etc., Co. *v.* Oskaloosa, 99 Iowa 496, 68 N. W. 808.

11. Philadelphia *v.* Empire Pass. R. Co., 5 Pa. Dist. 53.

12. Rutherford *v.* Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84; Trenton *v.* Trenton St. R. Co., 72 N. J. L. 317, 63 Atl. 1; Frankford, etc., Pass. R. Co. *v.* Philadelphia, 1 Pa. Cas. 583, 4 Atl. 550; Philadelphia *v.* Empire Pass. R. Co., 5 Pa. Dist. 53.

Such conditions must be reasonable, and whether they are reasonable is a question of fact, and the burden of proof is upon him

can be compelled to pay for paving in a street not occupied by it, or beyond a line drawn from the corner of curb lines of the street it occupies.[13] Where the subject of paving has become a matter of contract, no additional burdens in this respect can be imposed by subsequent legislation, since this would be impairing the obligation of a contract.[14] But no question can arise as to the impairment of the obligation of a contract in such a case, where the company accepts all of its corporate powers subject to the reserved power of the state to modify its charter and to impose additional burdens upon the enjoyment of its franchise.[15]

2. Extent of Duty — a. In General. The common-law duty of a street railroad company to keep the portion of the street or highway occupied by it in repair extends, it has been held, at least to the ends of its cross ties.[16] This duty may be enlarged by proper statutory or municipal authority or by a contract voluntarily entered into, and the extent of the company's liability then depends upon the terms of the statute, ordinance, or contract.[17] Thus the company may be required to keep in constant repair that portion of the street occupied by it,[18] or

who asserts them to be unreasonable. Rutherford *v.* Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84.

13. Gardner *v.* Chester, 2 Pa. Dist. 704.

14. *Illinois.*— West Chicago St. R. Co. *v.* Chicago, 178 Ill. 339, 53 N. E. 112.

Indiana.— Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770.

Missouri.— Kansas City *v.* Corrigan, 86 Mo. 67; State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361.

New York.— Davidge *v.* Binghamton, 62 N. Y. App. Div. 525, 71 N. Y. Suppl. 282.

United States.— Chicago *v.* Sheldon, 9 Wall. 50, 19 L. ed. 594; Coast-Line R. Co. *v.* Savannah, 30 Fed. 646.

15. *Connecticut.*— New Haven, etc., R. Co. *v.* New Haven, 75 Conn. 442, 53 Atl. 960.

Iowa.— Marshalltown Light, etc., Co. *v.* Marshalltown, 127 Iowa 637, 103 N. W. 1005.

Nebraska.— Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

New York.— Weed *v.* Binghamton, 26 Misc. 208, 56 N. Y. Suppl. 105.

Oklahoma.— Oklahoma City *v.* Shields, (1908) 100 Pac. 559.

Texas.— Kettle *v.* Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874.

United States.— Sioux City St. R. Co. *v.* Sioux City, 138 U. S. 98, 11 S. Ct. 226, 34 L. ed. 898.

See 44 Cent. Dig. tit. "Street Railroads," §§ 99, 100.

The omission, in a charter of a street railroad company, of a provision compelling it to pave streets along its tracks, does not vest in it or its successors a perpetual exemption from such obligation subsequently imposed by the legislature. Weed *v.* Binghamton, 26 Misc. (N. Y.) 208, 56 N. Y. Suppl. 105.

The term "vested rights" relates to property rights only, and does not embrace an immunity or exemption created by an omission, in a statute incorporating a street surface railroad company, to impose a liability on it to pave parts of streets occupied by its tracks. Weed *v.* Binghamton, 26 Misc. (N. Y.) 208, 56 N. Y. Suppl. 105.

Under Tex. Const. (1895) art. 1, § 17, providing that no irrevocable or uncontrollable grant of special immunities shall be made, but all privileges and franchises created under the authority of the legislature shall be subject to its control, the legislature had the right to amend a city charter so that a street car company became liable for the cost of paving six inches on each side of its tracks in addition to its former liability of paving between the rails, and such law was not unconstitutional as impairing the obligation of a contract in reference to a prior mortgage executed while the constitutional provision was in force. Storrie *v.* Houston City St. R. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716.

16. Pugh *v.* Texarkana Light, etc., Co., 86 Ark. 36, 109 S. W. 1019; Memphis, etc., R. Co. *v.* State, 87 Tenn. 746, 11 S. W. 946.

17. Crotty *v.* Danbury, 79 Conn. 379, 65 Atl. 147 (holding that where a street railroad company is required by statute to keep in repair a part of the street on which its tracks are laid to a distance of two feet on each side thereof, the company owes no duty to travelers in respect to the repair of the street except the specific duty imposed by the statute); Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106.

Maintenance and repair of "junction" of surfaces laid by city and company.— Under a statute requiring a street railroad company to maintain and keep in good condition "the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation," the word "junction" does not only mean the mere point or place where the two surfaces meet, but the company has to maintain the even contour of the road at the junction of the two surfaces. Norwich *v.* Norwich Electric Tramways Co., 91 L. T. Rep. N. S. 558.

18. See cases cited *infra*, this note.

Requirement construed.— It has been held that a charter provision imposing on the company the duty of keeping in repair "that portion of the street which they use and occupy" requires the company to keep in repair not only the portion of the street occupied by it, but the whole street from curb to curb. Philadelphia *v.* Thirteenth St., etc.,

the space in and about the rails,[19] or the space between its tracks and a certain distance outside thereof.[20]

b. Extension. A municipal ordinance requiring any street railroad company operating a line within the corporate limits to keep in good repair all that part of the street occupied by its tracks includes additional tracks to be laid, as well as those already laid and under operation.[21] Where an extension is authorized by an amendment to the original act, such extension is subject to the obligations contained in such original act as amended, including the duty to pave, although the amendatory statute, permitting the construction of the tracks in the street in question, contains no provision for repair or paving;[22] but where the extension is authorized by a subsequent independent act, which does not refer to or incorporate into itself the terms of the original act, and which makes no provision as

Pass. R. Co., 169 Pa. St. 269, 33 Atl. 126; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695; Thirteenth St., etc., Pass. R. Co. *v.* Philadelphia, 13 Wkly. Notes Cas. (Pa.) 487; Mayberry *v.* Second St., etc., Pass. R. Co., 9 Wkly. Notes Cas. (Pa.) 404; Philadelphia, etc., Ferry Pass. R. Co. *v.* Philadelphia, 2 Wkly. Notes Cas. (Pa.) 639. Moreover such a provision imposes on the company the duty of cleansing the street from the dirt and filth casually accumulating (Pittsburgh, etc., Pass. R. Co. *v.* Birmingham, 51 Pa. St. 41), and of removing a deposit of rocks and débris caused by an extraordinary rain (Pittsburg, etc., Pass. R. Co. *v.* Pittsburg, 80 Pa. St. 72).

Where two street railroad companies occupying intersecting streets are liable for the paving of the streets occupied by them, they are each liable for one half the cost of the paving of the intersection, without regard to the width of the streets. Philadelphia *v.* Second St., etc., Pass. R. Co., 2 Pa. Dist. 705, 13 Pa. Co. Ct. 580, 33 Wkly. Notes Cas. 522.

Space occupied by road-bed.—Under a statute requiring a street railroad company to pave its road-bed the outside of the track cannot be considered, on the ground that the road is also benefited by the adjacent pavement. Shreveport *v.* Shreveport Belt R. Co., 107 La. 785, 32 So. 189.

19. See cases cited *infra*, this note.

The words "in and about the rails" include so much of the street surface outside the rails as is disturbed in laying the track (New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; McMahon *v.* Second Ave. R. Co., 75 N. Y. 231), and in the absence of evidence as to how far that space extends, it is a reasonable presumption that it includes as much as one foot outside the rails (McMahon *v.* Second Ave. R. Co., *supra*).

Space between double tracks.—It has been held that an act requiring a street railroad company to keep in repair that part of the street lying between the rails does not render the company liable for the expense of repairing the street between double tracks. Robbins *v.* Omnibus R. Co., 32 Cal. 472; St. Louis *v.* St. Louis R. Co., 50 Mo. 94. But a covenant by a railroad company to pave and keep in repair the streets "in and about" a railroad which has double tracks binds the company to pave and keep in repair the space between the double tracks. New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839 [*affirming* 31 Hun 241].

20. *Nebraska.*— Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.

New York.— New York *v.* Broadway, etc., R. Co., 130 N. Y. App. Div. 834, 115 N. Y. Suppl. 872; Doyle *v.* New York, 58 N. Y. App. Div. 588, 69 N. Y. Suppl. 120; New York *v.* New York City R. Co., 60 Misc. 487, 113 N. Y. Suppl. 869.

Oklahoma.— Oklahoma City *v.* Shields, (1908) 100 Pac. 559.

Pennsylvania.— McKeesport *v.* Pittsburg, etc., R. Co., 213 Pa. St. 542, 62 Atl. 1075, holding that an ordinance containing such a requirement applies to the improvement of all streets occupied by the company, and not merely to those enumerated in the ordinance.

United States.— Washington, etc., R. Co. *v.* District of Columbia, 108 U. S. 522, 2 S. Ct. 865, 27 L. ed. 807.

See 44 Cent. Dig. tit. "Street Railroads," § 100.

Requirement construed.—A requirement in a street railroad charter to "keep the surface of the streets inside the rails, and for two feet four inches outside thereof, in good order and repair," means two feet on each side of the track. People *v.* Fort St., etc., R. Co., 41 Mich. 413, 2 N. W. 188; Amsterdam *v.* Fonda, etc., R. Co., 119 N. Y. App. Div. 680, 104 N. Y. Suppl. 411 [*affirming* 51 Misc. 438, 101 N. Y. Suppl. 694].

21. Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757.

Extension by consolidated company.— Where a city agrees with two street railroad companies that they shall pay one fifth of the net cost of laying new pavement between the rails, the contract to apply to any extensions of the tracks, and be binding on their successors and any company with which they might be consolidated, such contract embraces a subsequent extension of the tracks made by a company formed by the consolidation of the two companies contracting. Davidge *v.* Binghamton, 62 N. Y. App. Div. 525, 71 N. Y. Suppl. 282.

22. New York *v.* Harlem Bridge, etc., R. Co., 186 N. Y. 304, 78 N. E. 1072 [*affirming* 100 N. Y. App. Div. 257, 91 N. Y. Suppl. 557].

to paving, the extension is not required to be paved.[23] Where a grant of a franchise for an extension can only be made subject to the restrictions of the municipal charter as to repairing and paving the streets, such extension is subject to the charter regulation, although the existing line is operated under a legislative act exempting it from paving.[24] Although the charter of a company does not require it to pave, the right to extend its line may be granted on condition that it shall pave a certain portion of the street, not only that embraced within the extension, but also that originally occupied.[25]

c. Bridges. The local authorities may require, as a condition of their consent to the use of a bridge by a street railroad company, that the company shall bear the expense of strengthening the bridge, assume the cost of repairs and alterations, and pay a reasonable rental.[26] Under a charter or ordinance requiring a street railroad company to keep the streets occupied by it in repair, and making no reference to bridges as distinguished from streets, bridges are regarded as parts of said streets.[27] But where an ordinance grants the right to lay street railroad tracks on the streets and bridges of a city, but in terms imposes the duty to repair only as to streets, it has been held that the company is not bound to keep in repair bridges crossed by its tracks.[28] The duty to keep in repair a bridge crossed by the company's tracks extends to the whole bridge, and not merely to that portion immediately under or between the tracks.[29]

d. Change of Grade. It has been held that if a street railroad company once lays its tracks flush with the level of the street, it is not bound afterward to adapt them to the grade of the street as it may change or be worn away by traffic,[30] unless the language of the company's charter, or the ordinances to which the company is subject, admit of this duty being imposed upon it.[31] But the better rule seems to be that the common-law duty of a street railroad company to keep its tracks in such a condition of repair that the street will be safe for travel requires it to conform its tracks to all changes of grade.[32] Ordinarily the duty to conform its tracks to changes of grade is expressly imposed upon street railroad companies,[33] and where such a requirement exists, it is implied that it will change the grade of its road-bed whenever that is necessary to adjust the track to the changed

23. New York *v.* Eighth Ave. R. Co., 7 N. Y. App. Div. 84, 39 N. Y. Suppl. 959 (holding further that a resolution providing that another railroad company, on paying to defendant one half of the cost of a certain portion of its track, and of keeping it in repair, from time to time thereafter, and also half of the cost of the repairs, from time to time, of the extension, should have the right to use the track and run its cars thereon, did not show an intention that defendant should repair the street between its tracks on the extension of its road); New York *v.* New York, etc., R. Co., 64 Hun (N. Y.) 635, 19 N. Y. Suppl. 67 [*affirmed* in 139 N. Y. 643, 35 N. E. 206].

24. St. Louis *v.* Missouri R. Co., 87 Mo. 151 [*affirming* 13 Mo. App. 524].

25. Frankford, etc., City Pass. R. Co. *v.* Philadelphia, 17 Wkly. Notes Cas. (Pa.) 245.

26. Lawrence County *v.* New Castle Electric St. R. Co., 8 Pa. Super. Ct. 313, 43 Wkly. Notes Cas. 76. See also *supra*, IV, H.

27. Northern Cent. R. Co. *v.* United R's., etc., Co., 105 Md. 345, 66 Atl. 444.

28. Cedar Rapids *v.* Cedar Rapids, etc., R. Co., 108 Iowa 406, 79 N. W. 125.

29. State *v.* Canal St., etc., R. Co., 44 La. Ann. 526, 10 So. 940.

Bridge privately maintained.— Under a charter requiring a street railroad company to keep in repair all bridges occupied by its tracks, the company is bound to keep in repair a bridge within the highway, erected over a canal for the convenience of public travel, the burden of maintaining which is upon the person or corporation for whose use the canal was made. Proprietors Merrimack River Locks, etc. *v.* Lowell Horse R. Corp., 109 Mass. 221.

30. Eddy *v.* Ottawa City Pass. R. Co., 31 U. C. Q. B. 569.

31. Atty.-Gen. *v.* Toronto St. R. Co., 14 Grant Ch. (U. C.) 673.

32. Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145; Wooley *v.* Grand St., etc., R. Co., 83 N. Y. 121; New York *v.* Bleecker St., etc., R. Co., 130 N. Y. App. Div. 830, 115 N. Y. Suppl. 592.

33. See District of Columbia *v.* Washington, etc., R. Co., 4 Mackey (D. C.) 214; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106 (holding that under a provision in a street railroad company's charter that the city council may establish such regulations in regard to the railroad as may be required for the purpose of grading streets and to prevent obstructions, the company may be required, at its own expense, to lower

grade of the street.[34] But under such a requirement the company is not bound to grade the street on either side of its tracks to the height of its road-bed.[35]

3. NECESSITY AND CHARACTER OF REPAIRS OR IMPROVEMENTS — a. In General. A street railroad company, bound to "repair" or "keep in repair" a specified portion of the streets occupied by its tracks, is not thereby bound to pave,[36] except in so far as such work comes within the category of repairs.[37] The duty of making repairs requires them to be made in such manner and with such materials as will correspond with the general condition of the street at the time the repairs are needed;[38] so that while a company may not be compelled to tear up a sound pavement of antiquated style, and replace it with a different and better one, whenever the municipality may direct,[39] yet, if a necessity for repairing the pavement within the right of way arises after an improved pavement has been laid in the remainder of the street by the municipality, the company may be required reasonably to conform with such improved pavement.[40] Municipal ordinances

its tracks to conform to a change in grade of the street); and cases cited *infra*, note 34.

34. Little Rock *v.* Citizens' St. R. Co., 56 Ark. 28, 19 S. W. 17; District of Columbia *v.* Washington, etc., R. Co., 4 Mackey (D. C.) 214; McKeesport *v.* McKeesport Pass. R. Co., 158 Pa. St. 447, 27 Atl. 1006 (holding that when a street railroad company contracts in case of a change of grade or improvement to change its "railway" to conform thereto, it does not conform to a change of grade by digging trenches for its rails to the new grade leaving the space between unexcavated); Ashland St. R. Co. *v.* Ashland, 78 Wis. 271, 47 N. W. 619.

35. State *v.* New Orleans Traction Co., 48 La. Ann. 567, 19 So. 565; Galveston *v.* Galveston City R. Co., 46 Tex. 435.

36. *Florida.*— State *v.* Jacksonville St. R. Co., 28 Fla. 590, 10 So. 590.

Indiana.— Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770; Indianapolis, etc., R. Co. *v.* New Castle, 43 Ind. App. 467, 87 N. E. 1067; Columbus St. R., etc., Co. *v.* Columbus, 43 Ind. App. 265, 86 N. E. 83.

Missouri.— Kansas City *v.* Corrigan, 86 Mo. 67; State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361.

New Jersey.— Dean *v.* Paterson, 67 N. J. L. 199, 50 Atl. 620.

Pennsylvania.— Williamsport *v.* Williamsport Pass. R. Co., 203 Pa. St. 1, 52 Atl. 51; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106.

United States.— Chicago *v.* Sheldon, 9 Wall. 50, 19 L. ed. 594.

See 44 Cent. Dig. tit. "Street Railroads," §§ 100–102.

There is a marked distinction between the duties of repaving and of repairing. Repair may involve partial reconstruction, but the repairs contemplated are those necessitated by the ordinary use of the pavement, and not those which amount to reconstruction made necessary by the voluntary act of the city in carrying out municipal improvements. Reading *v.* Reading, etc., St. R. Co., 19 Pa. Super. Ct. 202. To repair a street is to restore it to a former condition or state, after decay or partial destruction. State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590. Under the duty to repair would doubtless be included the liability to restore any pavement that might be put down by the city (State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590), but simply to repair cannot be construed into a duty to place the pavement primarily (State *v.* Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Baltimore *v.* Scharf, 54 Md. 499; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594).

"Pave" defined see 30 Cyc. 1160.

"Pavement" defined see 30 Cyc. 1161.

Underground drainage or sewerage does not come within the head of "paving." Mobile *v.* Mobile Light, etc., Co., 141 Ala. 442, 38 So. 127.

37. Ft. Wayne, etc., R. Co. *v.* Detroit, 34 Mich. 78; McKeesport *v.* McKeesport Pass. R. Co., 158 Pa. St. 447, 27 Atl. 1006; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594.

When paving in nature of repair.— A street macadamized at the cost of the property-holders is an improved street, and, when it wears out, a paving with Belgian blocks is in the nature of a repair, and not of an original improvement. McKeesport *v.* McKeesport Pass. R. Co., 158 Pa. St. 447, 27 Atl. 1006.

38. Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106.

Reconstruction.— The obligation to keep a street in good order necessarily involves repairs, and repairs may involve the use of new material; and, although this may be called "reconstruction," it is nevertheless included in the obligation to keep the street in good order. State *v.* New Orleans, etc., R. Co., 52 La. Ann. 1570, 28 So. 111.

39. Dean *v.* Paterson, 67 N. J. L. 199, 50 Atl. 620; Williamsport *v.* Williamsport Pass. R. Co., 206 Pa. St. 65, 55 Atl. 836; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106; Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 35 Atl. 718; Norristown *v.* Norristown Pass. R. Co., 148 Pa. St. 87, 23 Atl. 1060; Reading *v.* Reading, etc., R. Co., 19 Pa. Super. Ct. 202.

40. Columbus St. R., etc., Co. *v.* Columbus, 43 Ind. App. 265, 86 N. E. 83; New York *v.* Harlem Bridge, etc., R. Co., 186 N. Y. 304, 78 N. E. 1072 [*affirming* 100 N. Y. App. Div. 257, 91 N. Y. Suppl. 557]; New York *v.*

which require a street railroad company to repair and repave the streets on which its line is operated do not impose on it the duty to pave the unpaved part of a street on which it runs.[41] But under a charter requiring a company to keep the street at all times "well paved and in good order," it has been held that the company is bound to lay pavement where none previously existed.[42] So a statute or ordinance providing that a street railroad company shall bear the entire expense of necessary "paving, repaving, and repairing" on any street on which its line is laid, renders it liable for the expense of paving such a street for the first time.[43] But where the language of the charter or ordinance necessarily relates to the improvement of streets occupied by the company, the municipality cannot recover for paving a street on which the railroad is not built until afterward.[44]

b. Determination of. The necessity of repairing or repaving the streets is to be determined by the municipal authorities.[45] Such authorities may also

Metropolitan St. R. Co., 130 N. Y. App. Div. 842, 115 N. Y. Suppl. 878; New York *v.* Broadway, etc., R. Co., 130 N. Y. App. Div. 834, 115 N. Y. Suppl. 872; New York *v.* Bleecker St., etc., R. Co., 130 N. Y. App. Div. 830, 115 N. Y. Suppl. 592; Reading *v.* United Traction Co., 215 Pa. St. 250, 64 Atl. 446; West Chester *v.* West Chester St. R. Co., 203 Pa. St. 201, 52 Atl. 252 (notwithstanding an ordinance relieving it from repairs till it earns a dividend); Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106; Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 35 Atl. 718; Philadelphia *v.* Thirteenth, etc., Sts. Pass. R. Co., 169 Pa. St. 269, 33 Atl. 126; McKeesport *v.* McKeesport Pass. R. Co., 158 Pa. St. 447, 27 Atl. 1006.

The duty to repair is a continuous one; it is for all time. It is not intended to perpetuate in each street of the city the style of pavement in use upon it when the railway company entered upon it with its tracks. Detroit *v.* Ft. Wayne, etc., R. Co., 90 Mich. 646, 51 N. W. 688; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106; Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 35 Atl. 718; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695. The duties specified in the charters are imposed with reference to the changes and improved methods of street paving which experience may sanction as superior to and more economical than old methods. In other words the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions. The city authorities have just as much right to require it to repave at its own expense with a new, better, and more expensive kind of pavement as they have to cause other streets to be repaved, in like manner, at the public expense. Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695. And see New York *v.* Harlem Bridge, etc., R. Co., 186 N. Y. 304, 78 N. E. 1072 [*affirming* 100 N. Y. App. Div. 257, 91 N. Y. Suppl. 557]; Mechanicville *v.* Stillwater, etc., R. Co., 35 Misc. (N. Y.) 513, 71 N. Y. Suppl. 1102 [*affirmed* in 67 N. Y. App. Div. 628, 74 N. Y. Suppl. 1149].

When the city repairs a street with a new and improved pavement, the company's duty to repair relates to the pavement so put in place, and requires that the repairs shall be adapted to the style of pavement which the city has placed, or caused to be placed, upon the particular street upon which repairs are necessary. Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 35 Atl. 718. The burdensome character of that duty, in that it involves large expense to the company, does not affect the obligation to perform it. Detroit *v.* Ft. Wayne, etc., R. Co., 90 Mich. 646, 51 N. W. 688.

41. Leake *v.* Philadelphia, 150 Pa. St. 643, 24 Atl. 351 [*affirming* 10 Pa. Co. Ct. 263]; Philadelphia *v.* Evans, 139 Pa. St. 483, 21 Atl. 200.

42. District of Columbia *v.* Washington, etc., R. Co., 4 Mackey (D. C.) 214.

43. Philadelphia *v.* Spring Garden Farmers' Market Co., 161 Pa. St. 522, 29 Atl. 286.

44. Uhlich *v.* Chicago, 224 Ill. 402, 79 N. E. 598; Gulf City St. R., etc., Co. *v.* Galveston, 69 Tex. 660, 7 S. W. 520; Dallas *v.* Dallas Consol. Traction R. Co., (Tex. Civ. App. 1895) 33 S. W. 757.

Particular ordinance construed.— The language that "the grantees named and their successors shall at all times keep the road bed of said railway in good repair and upon a level with the street" necessarily implies that there shall be a road-bed, which may be repaired, and which may be kept upon a level with the street, before the duty to do these things can arise. Until the duty becomes fixed, in the nature of things there can be no obligation. The duty of the company has relation only to a track or road-bed existing at the time the city may deem it necessary to raise or lower the street — to an existing track or road-bed on the street to be raised or lowered — and not to a place where, under the ordinance, these at some future time might be placed. Gulf City St. R., etc., Co. *v.* Galveston, 69 Tex. 660, 7 S. W. 520.

45. *District of Columbia.*— District of Columbia *v.* Washington, etc., R. Co., 4 Mackey 214.

Georgia.— Atlanta *v.* Gate City St. R. Co., 80 Ga. 276, 4 S. E. 269.

Illinois.— Madison *v.* Alton, etc., Traction Co., 235 Ill. 346, 85 N. E. 596.

determine the material with which the paving shall be done,[46] and may require it to be done with a better and more expensive material than was in use when the company was chartered,[47] unless restricted by some legislative provision,[48] or unless to so require will result in the violation of a contract with the company.[49] The discretion of these authorities to determine what repairs or improvements are necessary is not an arbitrary one,[50] but must be reasonably exercised,[51] and whether it has been so exercised is for the jury to determine under all the facts.[52] In some jurisdictions a street railroad company is authorized, on being denied by the municipal authorities the right to lay a particular kind of pavement, to appeal from such order to the railroad commissioners.[53]

4. Termination Of or Release From Duty — a. Termination Of Duty. Since the duty of a street railroad company to pave is coextensive with the existence of its street franchise,[54] if its license to occupy the street with its tracks is revoked

Michigan.— Detroit *v.* Ft. Wayne, etc., R. Co., 90 Mich. 646, 51 N. W. 688.

New York.— New York *v.* Metropolitan St. R. Co., 130 N. Y. App. Div. 842, 115 N. Y. Suppl. 878.

Pennsylvania.— Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 35 Atl. 718; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695.

See 44 Cent. Dig. tit. "Street Railroads," § 102.

46. *District of Columbia.*— District of Columbia *v.* Washington, etc., R. Co., 4 Mackey 214.

Georgia.— Atlanta *v.* Gate City St. R. Co., 80 Ga. 276, 4 S. E. 269.

Illinois.— Madison *v.* Alton, etc., Traction Co., 235 Ill. 346, 85 N. E. 596.

Michigan.— Detroit *v.* Ft. Wayne, etc., R. Co., 90 Mich. 646, 51 N. W. 688.

New York.— Conway *v.* Rochester, 157 N. Y. 33, 51 N. E. 395.

Ohio.— Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651.

Pennsylvania.— Philadelphia *v.* Hestonville, etc., R. Co., 177 Pa. St. 371, 35 Atl. 718; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695; Philadelphia *v.* Evans, 139 Pa. St. 483, 21 Atl. 200.

See 44 Cent. Dig. tit. "Street Railroads," § 103.

The material to be used is only an incident to the primary feature of the covenant, which is to "keep the pavement in repair." Doyle *v.* New York, 58 N. Y. App. Div. 588, 69 N. Y. Suppl. 120.

Reference to arbitration.— Under the English Tramways Act (1870), § 33, where a difference arises between a street railroad company and the local authorities as to the material to be used in paving a street, the difference must be referred to a referee appointed by the board of trade, and mandamus will not be granted to compel the company to lay a particular kind of pavement. Reg. *v.* Croydon, etc., Tramways Co., 18 Q. B. D. 39, 51 J. P. 420, 56 L. J. Q. B. 125, 56 L. T. Rep. N. S. 78, 35 Wkly. Rep. 299. And see Bristol Trams, etc., Co. *v.* Bristol, 25 Q. B. D. 427, 55 J. P. 53, 59 L. J. Q. B. 441, 63 L. T. Rep. N. S. 177, 38 Wkly. Rep. 693, where it was held that no difference had arisen within this section.

47. Hyde Park *v.* Old Colony St. R. Co., 188 Mass. 180, 74 N. E. 352; Lansing *v.* Lansing City Electric R. Co., 109 Mich. 123, 66 N. W. 949; New York *v.* Harlem Bridge, etc., R. Co., 186 N. Y. 304, 78 N. E. 1072 [*affirming* 100 N. Y. App. Div. 257, 91 N. Y. Suppl. 557]; Binninger *v.* New York, 177 N. Y. 199, 69 N. E. 390 [*modifying* 80 N. Y. App. Div. 438, 81 N. Y. Suppl. 226]; Mechanicville *v.* Stillwater, etc., St. R. Co., 35 Misc. (N. Y.) 513, 71 N. Y. Suppl. 1102 [*affirmed* in 67 N. Y. App. Div. 628, 74 N. Y. Suppl. 1149 (*affirmed* in 174 N. Y. 507, 66 N. E. 1117)]; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106 [*affirming* 24 Pa. Co. Ct. 629]; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 544, 22 Atl. 695.

48. Philadelphia *v.* Evans, 139 Pa. St. 483, 21 Atl. 200.

49. Binghamton *v.* Binghamton, etc., R. Co., 61 Hun (N. Y.) 479, 16 N. Y. Suppl. 225.

Where the materials to be used by the company in paving are specified in the charter or the ordinance granting the right to use the streets, the municipality cannot subsequently require the company to pave with any other substance. Madison *v.* Alton, etc., Traction Co., 235 Ill. 346, 85 N. E. 596; West Chester Borough *v.* West Chester St. R. Co., 203 Pa. St. 201, 52 Atl. 252; Shamokin *v.* Shamokin St. R. Co., 178 Pa. St. 128, 35 Atl. 862.

50. Binghamton *v.* Binghamton, etc., R. Co., 61 Hun (N. Y.) 479, 16 N. Y. Suppl. 225.

Ordinance requiring paving not presumptive evidence of necessity.— See Binghamton *v.* Binghamton, etc., R. Co., 61 Hun (N. Y.) 479, 16 N. Y. Suppl. 225.

51. Reading *v.* United Traction Co., 215 Pa. St. 250, 64 Atl. 446; McKeesport Borough *v.* McKeesport Pass. R. Co., 158 Pa. St. 447, 27 Atl. 1006; Philadelphia *v.* Empire Pass. R. Co., 3 Brewst. (Pa.) 570.

52. Atlanta *v.* Gate City St. R. Co., 80 Ga. 276, 4 S. E. 269; McKeesport Borough *v.* McKeesport Pass. R. Co., 158 Pa. St. 447, 27 Atl. 1006.

53. Hartford *v.* Hartford St. R. Co., 75 Conn. 471, 53 Atl. 1010.

54. Brick, etc., Co. *v.* Hull, 49 Mo. App. 433.

by the city, the corresponding duty to pave necessarily terminates.[55] So where the company has the right to remove its tracks from the street, it can in such event be in no way liable for the improvement of such street.[56] But the fact that the occupation of the street is terminable on certain contingencies, which may happen at any time, and at the will of the municipality, does not destroy the obligation of the company to keep in repair so long as it occupies the street.[57]

b. Release From Duty. The legislature which imposes the duty to pave may also relieve from it.[58] But the municipal authorities have no power to exempt a street railroad company, by contract or otherwise, from the provisions of a statute requiring all street surface railroads to pave certain portions of streets occupied by their tracks,[59] unless the authorizing act leaves paving regulations to the discretion of the municipal authorities.[60] Where a municipality, under a provision of its charter providing for the repair and repaving of streets, contracts with a paving company to pave a street occupied by a street railroad, and to maintain such pavement for a specified time, the railroad company to be assessed a certain proportion of the cost, the latter is thereby relieved from its charter liability to keep the street in repair.[61] In some jurisdictions street railroad companies are made subject to a mileage tax in lieu of the duty to repair.[62]

5. Notice or Demand by Municipality. Under a statute requiring street railroad companies to keep in repair that portion of the pavement adjacent to their tracks,

55. Brick, etc., Co. *v.* Hull, 49 Mo. App. 433.

56. Brick, etc., Co. *v.* Hull, 49 Mo. App. 433.

Removal of siding.—Where a company is required to pave the full width of the street where sidings are maintained, the removal of such sidings relieves the company from such liability. Shamokin *v.* Shamokin, etc., Electric R. Co., 206 Pa. St. 625, 56 Atl. 64.

57. Philadelphia *v.* Thirteenth St., etc., Pass. R. Co., 169 Pa. St. 269, 33 Atl. 126.

58. Philadelphia *v.* Spring Garden Farmers' Market Co., 161 Pa. St. 522, 29 Atl. 286.

59. Weed *v.* Binghamton, 26 Misc. (N. Y.) 208, 56 N. Y. Suppl. 105.

60. Lacey *v.* Marshalltown, 99 Iowa 367, 68 N. W. 726; Philadelphia *v.* Bowman, 175 Pa. St. 91, 34 Atl. 353; Philadelphia *v.* Evans, 139 Pa. St. 483, 21 Atl. 200; Galveston *v.* Galveston City R. Co., 46 Tex. 435.

61. Binninger *v.* New York, 177 N. Y. 199, 69 N. E. 390 [*modifying* 80 N. Y. App. Div. 438, 81 N. Y. Suppl. 226]. And see State *v.* St. Charles St. R. Co., 44 La. Ann. 562, 10 So. 927.

The **English Tramways Act (1870), § 28,** imposes upon a tramway company the duty of maintaining and keeping in good condition and repair, to the satisfaction of the road authority, a certain portion of the road whereon their tramway is laid; and, by section 29, empowers the road authority to make agreements with the tramway company with respect to the keeping in repair of such portion of the road; and when a tramway company has made a contract with a road authority, under section 29, whereby the road authority undertakes to maintain and keep in repair that portion of the road which the company is by section 28 bound to repair, the company is relieved from all liability for damages caused by the non-repair of that portion of the road. Barnett *v.* Poplar, [1901] 2 K. B. 319, 70 L. J. K. B. 698, 84 L. T. Rep. N. S. 845, 17 T. L. R. 461, 49 Wkly. Rep. 574; Alldred *v.* West Metropolitan Trams, [1891] 2 Q. B. 398, 55 J. P. 824, 60 L. J. Q. B. 631, 65 L. T. Rep. N. S. 138, 39 Wkly. Rep. 609; Howitt *v.* Nottingham, etc., Tramways Co., 12 Q. B. D. 16, 53 L. J. Q. B. 21, 50 L. T. Rep. N. S. 99, 32 Wkly. Rep. 248.

62. See Boston *v.* Union Freight R. Co., 181 Mass. 205, 63 N. E. 412; St. Louis *v.* St. Louis R. Co., 50 Mo. 94.

Under Mass. St. (1898) c. 578, §§ 4, 7, 10, 13, providing that street railroad companies shall be subject to a certain tax, levied according to mileage, to be adjusted so that the amount collected shall correspond to the amount formerly paid by the companies for the repair of the streets, and providing that street railroad companies shall not be required to keep any portion of the streets and highways in repair, except that such companies shall remain subject to all legal obligations imposed in original grants of locations to them, such companies are not bound to repair streets over which their lines run which are not embraced in their original locations. Worcester *v.* Worcester Consol. St. R. Co., 182 Mass. 49, 64 N. E. 581; Springfield *v.* Springfield St. R. Co., 182 Mass. 41, 64 N. E. 577. But if the obligation as to repairs contained in the original location of the company, it is not affected by this statute. Hyde Park *v.* Old Colony St. R. Co., 188 Mass. 180, 74 N. E. 352.

Obligation voluntarily assumed not tax.—The obligation to repair or pave voluntarily assumed by a street railroad company in consideration of the privilege of using the public streets is not a tax, and is not annulled by a statute declaring that the franchise tax therein provided shall be in lieu of all other franchise taxes assessable against

"under the supervision of the local authorities," and "whenever required by them to do so," the fact that the municipal authorities have not notified or requested the company to make repairs in a pavement does not relieve the company from liability for injuries caused by defects therein,[63] as such a provision does not apply to repairs, but rather to a paving of the street.[64] Where notice to repave between its tracks is given a street railroad company, with a definite statement as to the extent of repavement required, the municipality is not concluded by an erroneous calculation of the area to be paved.[65]

6. Estoppel to Deny Liability. Where a street railroad company is liable to be assessed for improvements, it will be estopped to deny its liability therefor if it stands by and sees the improvements made without objection;[66] but where the company is not subject to assessment for improvements, it is not so estopped, although the municipal council has by ordinance attempted to make it liable therefor.[67] Nor does the fact that a street railroad company complies with an order requiring it to lay and maintain paving within certain streets according to certain specifications estop it to thereafter contest the legality of the order.[68]

7. Repairs by Municipality and Recovery Against Company — a. In General. Where the duty of keeping in repair and repaving a street is imposed upon a street railroad company occupying the same, the municipality may, after notice to the delinquent company, cause the street to be repaired or repaved at the expense of such company,[69] and recover the cost thereof by an action of assumpsit;[70]

street railroad companies. Trenton *v.* Trenton St. R. Co., 72 N. J. L. 317, 63 Atl. 1.

63. Schuster *v.* Forty-Second St., etc., R. Co., 192 N. Y. 403, 85 N. E. 670 [*affirming* 118 N. Y. App. Div. 197, 102 N. Y. Suppl. 1054]; Doyle *v.* New York, 58 N. Y. App. Div. 588, 69 N. Y. Suppl. 120. See also Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469.

Where the company has notice of a defect it is not relieved of liability for damages resulting therefrom by the fact that the notice was not given by any local authority. Simon *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 126, 60 N. Y. Suppl. 251.

Such notice is not a condition precedent to the performance by defendant of the duty assumed by it of keeping the public thoroughfare in repair, neglect of which renders it liable in a civil action to any one of the public sustaining special damage from such neglect. Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Simon *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 126, 60 N. Y. Suppl. 251.

64. Schuster *v.* Forty-Second St., etc., R. Co., 192 N. Y. 403, 85 N. E. 670 [*affirming* 118 N. Y. App. Div. 197, 102 N. Y. Suppl. 1054]; Conway *v.* Rochester, 157 N. Y. 33, 51 N. E. 395.

65. New York *v.* New York City R. Co., 60 Misc. (N. Y.) 487, 113 N. Y. Suppl. 869.

66. New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399; Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770; Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651.

67. Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770.

68. Worcester *v.* Worcester Consol. St. R. Co., 192 Mass. 106, 78 N. E. 222.

69. District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361; New York *v.* Ninth Ave. R. Co., 130 N. Y. App. Div. 839, 115 N. Y. Suppl. 876; Mechanicville *v.* Stillwater, etc., St. R. Co., 35 Misc. (N. Y.) 513, 71 N. Y. Suppl. 1102 [*affirmed* in 67 N. Y. App. Div. 628, 74 N. Y. Suppl. 1149 (*affirmed* in 174 N. Y. 507, 66 N. E. 1117)]; Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651; Philadelphia *v.* 13th St., etc., Pass. R. Co., 3 Pa. Dist. 468. But *compare* Fielders *v.* North Jersey St. R. Co., 68 N. J. L. 343, 53 Atl. 404, 54 Atl. 822, 96 Am. St. Rep. 552, 59 L. R. A. 455 [*reversing* 67 N. J. L. 76, 50 Atl. 533], holding that an ordinance requiring a street railroad company to pave between its rails, and providing that, if it should fail to do so, the city may do the work at the cost of the company, is an assumption of the power of taxation and cannot be supported as an exercise of the police power; and that where no other authority exists for its enactment, it imposes no duty on the company to repair.

70. District of Columbia *v.* Washington, etc., R. Co., 4 Mackey (D. C.) 214.

Assumpsit more appropriate than debt.— District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361.

Municipality surety for company.— The municipality is responsible for the condition of its streets, and in this respect stands in the relation of surety for the performance by the company of its obligation to keep its road in good condition; hence, on default being made, it may at once do the work and sue in assumpsit for the cost on the same theory that a surety, who discharges the defaulted obligation of his principal, does so upon his implied request and upon his implied promise to indemnify. District

and the company cannot complain of any injury to its business by reason of the stoppage of its traffic, if such stoppage was reasonably necessary to the work.[71] But opportunity must be given the company to do the work before the municipality can itself do it and recover therefor;[72] and, to this end, notice is usually required to be given to the company requiring or requesting it to make the necessary repairs,[73] unless the company waives such notice.[74] It is not essential to the liability of the company that the notice shall precede the letting of the contract by the municipality for the work,[75] so long as the work is not commenced or done within the time limited for the company to do the same.[76] Nor need the notice in all cases conform strictly to the requirements of the ordinance.[77]

b. Amount of Recovery. Where a municipalty has made repairs or done paving which the street railroad company was bound, but neglected, to make or do, it is entitled to recover the reasonable cost of the work.[78] Where no fraud is shown, or any facts to impeach the reasonableness of the account, the sum exactly expended in the work is *prima facie* the sum which the municipality is entitled to recover.[79] Extravagant amounts recklessly expended in the work without reference to its true value should not be allowed, as the municipality cannot proceed in a reckless or extravagant manner and charge the company for expenses unnecessarily or unreasonably incurred.[80]

8. Companies Liable. Charter restrictions and conditions as to repairing and paving the street or highway are obligatory upon any subsequent purchaser,[81] or

of Columbia *v.* Washington, etc., R. Co., 4 Mackey (D. C.) 214.

When two companies liable.— Where each of two street railroad companies occupying a street are by charter, contract, and ordinance liable for the cost of paving the street, the city may sue one of them therefor, and the company be compelled to look to the other for contribution, or it may sue each for one half the cost. Philadelphia *v.* Second St., etc., Pass. R. Co., 2 Pa. Dist. 705, 13 Pa. Co. Ct. 580.

71. Philadelphia *v.* 13th St., etc., Pass. R. Co., 3 Pa. Dist. 468; Philadelphia, etc., Pass. R. Co. *v.* Philadelphia, 11 Phila. (Pa.) 358.

Set-off.—An offer by a street railroad company to show damages by way of set-off by causing the stoppage of its cars and consequent loss of profits during the progress of the work will be refused, where the city in so doing acted on its express legal rights. Philadelphia *v.* Thirteenth St., etc., Pass. R. Co., 169 Pa. St. 269, 33 Atl. 126.

72. New York *v.* Metropolitan St. R. Co., 130 N. Y. App. Div. 842, 115 N. Y. Suppl. 878.

73. Conway *v.* Rochester, 157 N. Y. 33, 51 N. E. 395 [*reversing* 24 N. Y. App. Div. 489, 49 N. Y. Suppl. 244]; Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651; Reading *v.* United Traction Co., 215 Pa. St. 250, 64 Atl. 446; Philadelphia *v.* Hestonville, etc., Pass. R. Co., 203 Pa. St. 38, 52 Atl. 184; Galveston *v.* Galveston City R. Co., 46 Tex. 435.

Notice held insufficient see New York *v.* Bleecker St., etc., R. Co., 130 N. Y. App. Div. 830, 115 N. Y. Suppl. 592.

74. New York *v.* Ninth Ave. R. Co., 130 N. Y. App. Div. 839, 115 N. Y. Suppl. 876; New York *v.* Broadway, etc., R. Co., 130 N. Y. App. Div. 834, 115 N. Y. Suppl. 872.

75. New York *v.* New York City R. Co., 132 N. Y. App. Div. 164, 116 N. Y. Suppl. 765; Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651.

76. New York *v.* New York City R. Co., 132 N. Y. App. Div. 164, 116 N. Y. Suppl. 765; Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651.

77. Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651, holding that where the company, after notice, without attempting to perform any part of the work, permits the city, without objection, to commence and complete it, adjusts its track to conform thereto, as it progresses, and with knowledge that the city expects it to pay for the same, and of all the circumstances, receives all the benefits of the work, the city may recover the cost of the work, although the notice does not strictly conform to the ordinance.

78. District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361; New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651.

79. New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106.

80. District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361; New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.

81. Niles *v.* Benton Harbor-St. Joe R., etc., Co., 154 Mich. 378, 117 N. W. 937; Rutherford *v.* Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84; Citizens' R., etc., Co. *v.* Johns, (Tex. Civ. App. 1908) 116 S. W. 62.

Purchasing company failing to act under own charter.— Where a street railroad company fails to act under its own charter, but

lessee,[82] of the street railroad tracks and franchises, even without an express assumption. Such conditions will also be binding upon a company formed by the consolidation or merger of the first and other companies.[83]

E. Rights in and Use of Tracks of Other Roads — 1. Right to Use — a. In General. As a general rule a street railroad company has no right to enter upon and use the tracks of another company without the latter's consent.[84] Such right may, however, be acquired by virtue of an agreement between the companies; [85] by legislative,[86] or municipal,[87] authority; by the exercise of the power

purchases the franchise of another company, the purchasing company is bound, as to repairing and paving, by the provisions in the charter of the company purchased, and not by the provisions of its original charter, the powers of which it never attempts to exercise. Kent *v.* Binghamton, 40 Misc. (N. Y.) 1, 81 N. Y. Suppl. 198 [*affirmed* in 88 N. Y. App. Div. 617, 84 N. Y. Suppl. 1131, and *reversed* on other grounds in 90 N. Y. App. Div. 553, 86 N. Y. Suppl. 411].

82. Reading *v.* United Traction Co., 202 Pa. St. 571, 52 Atl. 106; Mullen *v.* Philadelphia Traction Co., 20 Wkly. Notes Cas. (Pa.) 203.

83. Philadelphia *v.* Thirteenth St., etc., Pass. R. Co., 169 Pa. St. 269, 33 Atl. 126; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695.

Extension built by consolidated company. — Where a city agreed with two street railroad companies that they should pay one fifth of the net costs of laying new pavement between the rails, the contract to apply to any extensions of their tracks, and to be binding on their successors and any company with which they might be consolidated, such contract embraces a subsequent extension of the tracks made by a company formed by the consolidation of the two contracting companies. Davidge *v.* Binghamton, 62 N. Y. App. Div. 525, 71 N. Y. Suppl. 282.

84. Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262; Citizens' Coach Co. *v.* Camden Horse R. Co., 33 N. J. Eq. 267, 36 Am. Rep. 542 [*affirming* 31 N. J. Eq. 525]; Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61.

85. Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262; Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., 101 Fed. 347.

To connect main line and extension.— Where a street railroad company under its charter has a right to build branches and extensions, it has the right to use the tracks of another company for a short distance under a contract with such company to connect its main line and the proposed extension. Hannum *v.* Media, etc., Electric R. Co., 221 Pa. St. 454, 70 Atl. 847.

Term of use.— A contract for the use of the tracks of another company for the term of the charter of the former company expires by limitation when the period mentioned in such charter is completed. Augusta, etc., R. Co. *v.* Augusta, 100 Ga. 701, 28 S. E. 126.

86. *California.*— Pacific R. Co. *v.* Wade, 91 Cal. 449, 27 Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754.

Kentucky.— Louisville City R. Co. *v.* Central Pass. R. Co., 87 Ky. 223, 8 S. W. 329, 10 Ky. L. Rep. 125.

Louisiana.— Crescent City R. Co. *v.* New Orleans, etc., R. Co., 48 La. Ann. 856, 19 So. 868.

Massachusetts.— Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen 262.

Missouri.— St. Louis R. Co. *v.* Southern R. Co., (1891) 15 S. W. 1013.

New York.— Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330 [*affirming* 28 How. Pr. 382 (*affirming* 45 Barb. 138)]; Staten Island Midland R. Co. *v.* Staten Island Electric R. Co., 34 N. Y. App. Div. 181, 54 N. Y. Suppl. 598.

Ohio.— Kinsman St. R. Co. *v.* Broadway, etc., St. R. Co., 36 Ohio St. 239.

Pennsylvania.— Com. *v.* Sycamore St. R. Co., 3 Dauph. Co. Rep. 95, 30 Pittsb. Leg. J. N. S. 333.

See 44 Cent. Dig. tit. "Street Railroads," § 112.

87. St. Louis R. Co. *v.* Southern R. Co., (Mo. 1891) 15 S. W. 1013; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 50 Ohio St. 603, 36 N. E. 312; State *v.* Cincinnati, etc., Electric St. R. Co., 19 Ohio Cir. Ct. 79, 10 Ohio Cir. Dec. 418 (holding that the right of a city to give a street railroad company the privilege of using the track of another company, under Rev. St. § 3438, is not affected by the fact that the existing railroad runs over a bridge on a public highway in said city, which bridge was erected by the county commissioners); Broadway, etc., St. R. Co. *v.* Brooklyn St. R. Co., 9 Ohio Dec. (Reprint) 25, 10 Cinc. L. Bul. 72; Norristown Pass. R. Co. *v.* Citizens Pass. R. Co., 3 Montg. Co. Rep. (Pa.) 119.

The city of New Orleans, by delegated power from the legislature, has the paramount control and regulation of the streets of the city, and can grant the use of a street railroad already constructed to another, which it has authorized to be operated. New Orleans, etc., R. Co. *v.* Canal, etc., R. Co., 47 La. Ann. 1476, 17 So. 834; Canal, etc., R. Co. *v.* Crescent City R. Co., 44 La. Ann. 485, 10 So. 888; Canal, etc., St. R. Co. *v.* Crescent City R. Co., 41 La. Ann. 561, 6 So. 849. It can continue the use of a different car, propelled by a different motor than the one in use on the track. Canal, etc., R. Co. *v.* Crescent City R. Co., *supra*.

In Ohio the council of a municipal corporation, in the exercise of its discretion, and acting in good faith, may grant to one street railroad company the right to use, to a lim-

of eminent domain;[88] by virtue of an express reservation in the grant,[89] or it may result from such necessary implication from the grant that without it the grant itself would be defeated.[90] This right to appropriate the joint use of the tracks of another company is not affected by a statute conferring the power on street railroad companies to make traffic agreements with other companies.[91] In some jurisdictions this right may be acquired without resorting to condemnation proceedings.[92] In other jurisdictions, however, it is held that the owning company has a private property in its tracks and their use, although devoted to a public purpose, of which it cannot be deprived without its consent, except by an authorized appropriation, in which it is entitled to have compensation therefor assessed by a jury.[93] To protect the original company, the extent of track which may be thus occupied and used is usually limited to some fixed distance or some proportionate part of the total mileage of the second company.[94]

ited extent, the tracks of another company, on provision being made for the payment of reasonable compensation for such use. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493. But the council possesses no power to take from one company a portion of its tracks, or railway system, and hand it over, absolutely, to another company, to the exclusion of the former; and especially is this so where the portion sought to be taken constitutes the heart of the system. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., *supra*.

88. See EMINENT DOMAIN, 15 Cyc. 617 *et seq.*

89. Staten Island Midland R. Co. *v.* Staten Island Electric R. Co., 34 N. Y. App. Div. 181, 54 N. Y. Suppl. 598; Chester City *v.* Union R. Co., 218 Pa. St. 24, 66 Atl. 1107 (holding also that where a city gave a street railroad company by ordinance permission to use the street in question, with a provision therein reserving the right to another company to use the same street, the city cannot maintain a bill in equity to compel the first company to permit the second company to use the street; the party aggrieved in such case being the second company); Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., 101 Fed. 347.

Right of city to attach conditions to grant. — Under a constitutional or statutory provision requiring the consent of the corporate authorities of a town or city to the construction of a street railroad therein, such authorities may annex a condition to its grant that the tracks may be used by any other company to which the same streets may afterward be given. North Baltimore Pass. R. Co. *v.* North Ave. R. Co., 75 Md. 233, 23 Atl. 466; Hanum *v.* Media, etc., Electric R. Co., 8 Del. Co. (Pa.) 91; Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., 101 Fed. 347. Under such a grant the city council has power to determine when the necessity exists for exercising the right reserved, subject only to the condition that its judgment must be based on reasonable grounds. Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., *supra*. The company, under the contract made by its acceptance of the grant containing such reservation, cannot object to the exercise of the power reserved in any reasonable and proper manner; and the city may, on determining the necessity for condemning portions of the company's tracks for the use of another company, properly authorize the latter to institute proceedings in its own name to make the condemnation in accordance with the procedure prescribed in such cases by the laws of the state. Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., *supra*. Under such reservation, reasonably construed, the city has the right to make and enforce such regulations as to the movement of cars or use of tracks by the company as are reasonably necessary to make the purpose of the reservation effective, by enabling the portion of the track condemned to be jointly used by the two companies. Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., *supra*. But the exercise of the power of condemnation under such a reservation as to a short portion of track is not reasonably justified, where each company requires but a single track, and the street is of sufficient width to accommodate two tracks without interference with other travel along it or with each other. Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., *supra*.

90. Crescent City R. Co. *v.* New Orleans, etc., R. Co., 48 La. Ann. 856, 19 So. 868.

91. State *v.* Cincinnati, etc., Electric St. R. Co., 19 Ohio Cir. Ct. 79, 10 Ohio Cir. Dec. 418.

92. Pacific R. Co. *v.* Wade, 91 Cal. 449, 27 Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754; Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 920. And see cases cited *infra*, notes 4–8.

Such a grant is not a violation of any right of property, as the grantee must be considered as holding the grant for the public use, in the public street, which is all open to the public. Canal St., etc., R. Co. *v.* Crescent City R. Co., 41 La. Ann. 561, 6 So. 849; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. (N. Y.) 138.

93. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 50 Ohio St. 603, 36 N. E. 312. See also Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

94. See the statutes of the several states. See also State *v.* Cincinnati, etc., Electric

Where one street railroad company using another's tracks is required to make and maintain connections and pay switchmen, it is properly allowed to select and employ such switchmen.[95]

b. Consent of Municipal Authorities. A grant to a street railroad company to operate its own lines on streets, subject to conditions and regulations, does not confer on the company obtaining such franchise a right to permit other companies to use its tracks without municipal consent and against municipal protest.[96] But a street railroad company which has, under power given by the legislature and the municipality, appropriated a right to use a portion of the tracks of another company, is not thereby precluded from appropriating the right to use more of the tracks without obtaining an additional ordinance from the municipality.[97]

c. Consent of Abutting Owners. Under some statutes the consent of the abutting property-owners to the construction and operation of one street railroad is not sufficient to authorize the use of the tracks by another company for the operation of its road, but such consent must be obtained for the operation of the second road.[98] Under other statutes such consent seems not to be necessary.[99]

2. Compensation — a. Necessity and Determination. A company acquiring

St. R. Co., 19 Ohio Cir. Ct. 79, 10 Ohio Cir. Dec. 418.

95. Grand Ave. R. Co. *v.* Citizens' R. Co., 148 Mo. 665, 50 S. W. 305.

96. Erie *v.* Erie Traction Co., 222 Pa. St. 43, 70 Atl. 904.

The statutory requirement of the consent of the local authorities to the construction of a street railroad applies to the use of the tracks of one road by another. Colonial City Traction Co. *v.* Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810 [*affirming* 15 N. Y. App. Div. 195, 44 N. Y. Suppl. 732].

A street railroad company may not lawfully carry the cars of a commercial railroad for the purpose of transporting therein the passengers of the latter over the lines of the street railroad without the permission of the city authorities of the city in which the lines in question are located. Aurora *v.* Elgin, etc., Traction Co., 227 Ill. 485, 81 N. E. 544 [*reversing* 128 Ill. App. 77]. If it were otherwise, the power to determine when, where, and in what manner interurban lines should enter a city and traverse its thoroughfares with passenger traffic would be lodged, in great part, not in the city authorities, but in the street railroad company in every city where a street railroad company is rightfully operated. Aurora *v.* Elgin, etc., Traction Co., *supra*.

A street railroad company which has lost the municipal consent to the use of streets it once had by a failure to perform the conditions imposed cannot, without municipal consent, secure the right to operate its cars by contract for the joint use of the tracks of another street railroad company. Erie *v.* Erie Traction Co., 222 Pa. St. 43, 70 Atl. 904.

97. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 12 Ohio Cir. Ct. 367, 5 Ohio Cir. Dec. 643.

98. See cases cited *infra*, this note.

In New York in order to obtain the right to operate its road over the tracks of another company, under Railroad Law, § 102, a street railroad company must first obtain the consent of the property-owners and of the local authorities. Colonial City Traction Co. *v.* Kingston City R. Co., 153 N. Y. 540, 47 N. E. 810, 154 N. Y. 493, 48 N. E. 900. But this rule has been held not to extend to cases of traffic contracts. Ingersoll *v.* Nassau Electric R. Co., 89 Hun 213, 34 N. Y. Suppl. 1044 [*affirmed* in 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236]; Kunz *v.* Brooklyn Heights R. Co., 25 Misc. 334, 54 N. Y. Suppl. 187. Although a company has the right to consent to the use of its tracks by another company without the consent of property-owners, if it refuses to consent to such use by a company attempting, under Railroad Law, § 102, to acquire such privilege, the latter company cannot compel it to give its consent until the consent of the local authorities and abutting owners has been obtained. Colonial City Traction Co. *v.* Kingston City R. Co., 154 N. Y. 493, 48 N. E. 900.

99. See the statutes of the several states.

In Ohio where application is granted by a city to use the track of another existing street railroad, the consent of abutting owners on that part of the road where the existing tracks are to be used need not be obained, as would be necessary if a new road was to be constructed. State *v.* Cincinnati, etc., Electric St. R. Co., 19 Ohio Cir. Ct. 79, 10 Ohio Cir. Dec. 418; Broadway, etc., St. R. Co. *v.* Brooklyn St. R. Co., 9 Ohio Dec. (Reprint) 25, 10 Cinc. L. Bul. 72. *Compare* Consolidated St. R. Co. *v.* Toledo Electric St. R. Co., 8 Ohio S. & C. Pl. Dec. 268, 6 Ohio N. P. 537; Toledo Electric St. R. Co. *v.* Toledo, etc., R. Co., 1 Ohio S. & C. Pl. 33, 7 Ohio N. P. 211, in both of which cases it was held that in an action by a street railroad company against another company, to appropriate a right of way in the tracks of the latter, the question whether plaintiff has obtained the consent of the majority of the abutting property-owners prior to the grant of its franchise by the council cannot be de-

the right to use the road-bed and tracks of another company must ordinarily first make compensation for such use.[1] The mode and amount of such compensation may be fixed by contract between the companies;[2] and in some jurisdictions it is held that, if there is no agreement between the companies as to the mode or amount of compensation, it must be fixed as in other cases of the condemnation of private property to public uses.[3] In other jurisdictions where the acquisition of the joint use of railroad tracks is held not to involve the exercise of the power of eminent domain the determination of the amount of compensation may be devolved upon the municipal authorities,[4] appraisers,[5] the board of railroad commissioners,[6] commissioners appointed by the court,[7] or upon the court without the intervention of a jury.[8]

termined for its consideration is for the council, which had special charge of such subject.

1. Canal, etc., R. Co. *v.* Crescent City R. Co., 44 La. Ann. 485, 10 So. 888; Canal, etc., R. Co. *v.* Orleans R. Co., 44 La. Ann. 54, 10 So. 389; Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; Kinsman St. R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239; Union Pass. R. Co. *v.* Continental R. Co., 33 Leg. Int. (Pa.) 43.

Right of second company to compensation from third company using tracks.— Where an ordinance authorizes a street railroad company to use so much of the existing tracks of another company as may be necessary for the successful operation of the grantee's road, the appropriation proceedings thereunder do not invest such grantee with a joint ownership in the property of the company owning the road, so as to entitle it to compensation from a third company, to which such owner grants a like privilege. Toledo Electric St. R. Co. *v.* Toledo, etc., R. Co., 10 Ohio Cir. Ct. 168, 6 Ohio Cir. Dec. 578.

2. Canal, etc., R. Co. *v.* Orleans R. Co., 44 La. Ann. 54, 10 So. 389.

Acceptance of ordinance as constituting contract.—When city ordinances provide the mode of compensation, and the two corporations are within the limits of the same franchise, the ordinances will control the mode to be pursued in reference to fixing the compensation, as the corporations accept their franchises with reference to said ordinances. Canal, etc., R. Co. *v.* Orleans R. Co., 44 La. Ann. 54, 10 So. 389; Kinsman St. R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239. But the city ordinances cannot arbitrarily fix the amount of compensation. Canal, etc., R. Co. *v.* Orleans R. Co., *supra*. Where the council has the right to fix a reasonable compensation, the amount so fixed will be deemed reasonable in the absence of proof to the contrary. Kinsman St. R. Co. *v.* Broadway, etc., R. Co., *supra*.

3. Canal, etc., R. Co. *v.* Orleans R. Co., 44 La. Ann. 54, 10 So. 389; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 50 Ohio St. 603, 36 N. E. 312; Kinsman St. R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493. And see EMINENT DOMAIN, 15 Cyc. 638.

4. See cases cited *infra*, this note.

In Missouri under article 10, section 6, of the charter of St. Louis, the city has the power to make rules and regulations, not only for running the cars of one company over the tracks of another, but also for ascertaining the compensation to be paid therefor. St. Louis R. Co. *v.* Southern R. Co., 105 Mo. 577, 16 S. W. 960; Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 920; St. Louis R. Co. *v.* Southern R. Co., 1891) 15 S. W. 1013. Under such section, the municipal assembly has also the implied power to make the commissioners' award reviewable by the circuit court. Grand Ave. R. Co. *v.* Lindell R. Co., 148 Mo. 637, 50 S. W. 302; St. Louis R. Co. *v.* Southern R. Co., (1891) 15 S. W. 1013. If a company is not satisfied with the compensation awarded by the commissioners, it can either adopt the special mode of procedure by appeal to the circuit court, or may apply to the court under its general jurisdiction. St. Louis R. Co. *v.* Southern R. Co., *supra*.

5. See Second St., etc., Pass. R. Co. *v.* Green St., etc., Pass. R. Co., 3 Phila. (Pa.) 430.

6. See cases cited *infra*, this note.

In Massachusetts, under Pub. St. c. 113, §§ 48–55, the rate of compensation to be paid is submitted, in the broadest terms to the determination of the board of railroad commissioners. It is left entirely to their discretion to decide what compensation is, under all the circumstances of the case, just and equitable between the companies. Cambridge R. Co. *v.* Charles River St. R. Co., 139 Mass. 454, 1 N. E. 925; Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290.

7. Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262.

An award of such commissioners will not be invalid by reason of its omission to require the corporation whose tracks are entered upon to keep them in repair, that duty being imposed by statute. Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262. An award of commissioners, appointed on petition under St. (1864) c. 229, § 29, to revise a previous award of commissioners determining the compensation to be paid by one street railroad company for using the tracks of another, takes effect only when returned and approved by the court, and until then the former award remains in force. Metropolitan R. Co. *v.* Broadway R. Co., 99 Mass. 238.

8. Pacific R. Co. *v.* Wade, 91 Cal. 449, 27

b. Measure of Compensation. The compensation to be allowed a street railroad company for the use of its tracks by another company should be a fair and full equivalent for the loss thus sustained.[9] In estimating this amount there should be taken into consideration the value of the railroad structure and materials sought to be used,[10] including the cost of paving in conformity with the municipal ordinances;[11] and also the increased wear on the tracks, and expense in keeping them in repair.[12] But no compensation should be allowed for interference with the franchise or profits of the company whose tracks are sought to be used.[13] Where the right to use the tracks of another company is not derived from the legislature but by contract between the two companies, the compensation should be determined by a consideration of the contract.[14]

3. Rights and Remedies. The fact that a street railroad company is about to proceed to lay its track in a street already occupied by another company with its tracks is not necessarily a threatened invasion of the easements of the latter company or of its property rights, so as to entitle it to an injunction;[15] and when a street railroad company accepts its charter, or a renewal thereof, with the condition attached that the municipality may grant the right to use the tracks to any other company on such terms as the municipal council shall deem equitable, and the municipality has granted such right and prescribed the terms, the court will not interfere with them if they are reasonable,[16] and the company, the use of whose tracks has been granted, cannot object because a part of its busi-

Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754.

9. The phrase "just compensation," as used in the charter of a city and its ordinances, has the same meaning which that phrase has when used in the federal and state constitutions with respect to the exercise of the right of eminent domain; and when thus used "means a fair and full equivalent for the loss sustained by the taking for public use." Grand Ave. R. Co. *v.* People's R. Co., 132 Mo. 34, 33 S. W. 472.

10. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

Time for estimating valuation.— The value of the road at the time another company seeks to use its tracks, and not the original cost of constructing it, is the basis for estimating the compensation to be paid. Hook *v.* Los Angeles R. Co., 129 Cal. 180, 61 Pac. 912; Grand Ave. R. Co. *v.* Citizens' R. Co., 148 Mo. 665, 50 S. W. 305.

Cable road used by electric road.— In estimating the compensation which an electric railroad company should pay a cable company for the use of the latter's tracks under the provisions of a city charter, the cost of building the cable conduit should be considered, although it cannot be used by the electric company, and its construction made the cost of the cable road much greater than that of an electric road. Grand Ave. R. Co. *v.* People's R. Co., 132 Mo. 34, 33 S. W. 472.

11. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

12. Grand Ave. R. Co. *v.* People's R. Co., 132 Mo. 34, 33 S. W. 472; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

Repair of tracks at joint expense.— Where street railroad tracks owned by one company, and subject to the use of another company operating on the same street, become out of repair, the latter company may compel the former to reconstruct the tracks at the joint expense. New Orleans, etc., R. Co. *v.* Canal, etc., R. Co., 47 La. Ann. 1476, 17 So. 834.

13. Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; Grand Ave. R. Co. *v.* Citizens' R. Co., 148 Mo. 665, 50 S. W. 305. See also Louisville City R. Co. *v.* Central Pass. R. Co., 87 Ky. 223, 8 S. W. 329, 10 Ky. L. Rep. 125.

In Ohio it has been decided that the original company is not entitled to compensation for any supposed depreciation in value of its franchise to operate its line of railroad in the streets of the city caused by the proposed joint use and occupancy of its tracks; nor for the loss of fares which may be occasioned thereby; nor for the inconvenience and interruptions to business which may be caused thereby; nor for the consequential diminution in value of other portions of the line forming part of its street railroad system. Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

Special franchise tax.— Where one street railroad company uses part of another's tracks, it should not be required, as part of the just compensation therefor, to pay any proportion of the latter company's special franchise tax, payment of half the annual property tax on the tracks used being sufficient. Grand Ave. R. Co. *v.* Citizens' R. Co., 148 Mo. 665, 50 S. W. 305.

14. Louisville City R. Co. *v.* Central Pass. R. Co., 87 Ky. 223, 8 S. W. 329, 10 Ky. L. Rep. 125.

15. General Electric R. Co. *v.* Chicago City R. Co., 66 Ill. App. 362.

16. Broadway, etc., St. R. Co. *v.* Brooklyn St. R. Co., 9 Ohio Dec. (Reprint) 25, 10 Cinc. L. Bul. 72.

ness will be taken away.[17] But a street railroad company which has constructed, and is legally operating, a line of railroad in the streets of a municipality, is possessed of such a property interest as gives it a legal right to maintain an action to restrain a similar company from using or interfering with its line of tracks, without authority of law;[18] and likewise an injunction will issue to restrain a company in the occupation and use of the tracks of another company, from interfering with the latter's franchise or vested rights.[19] But when one company has a lawful right to the use of the tracks of another company, the latter is not entitled to an injunction to restrain it from exercising that right, without alleging and proving such facts as clothe the courts with power to grant relief in the exercise of their equitable jurisdiction.[20]

F. Crossing Other Railroads[21] — **1. Right to Cross — a. In General.** Street and electric railroads have the same implied power, from the law authorizing their construction, to cross other railroads, as have commercial railroads.[22] As the right of way acquired by a steam railroad company across a street is subject to the easement of the public in the street,[23] and as the operation of a street railroad

17. Broadway, etc., St. R. Co. *v.* Brooklyn St. R. Co., 9 Ohio Dec. (Reprint) 25, 10 Cinc. L. Bul. 72.

18. Atlanta R., etc., Co. *v.* Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12; Camden Horse R. Co. *v.* Citizens' Coach Co., 31 N. J. Eq. 525; Camden, etc., R. Co. *v.* Atlantic City Pass. R. Co., 26 N. J. Eq. 69; Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61; Hamilton, etc., Traction Co. *v.* Hamilton, etc., Transit Co., 69 Ohio St. 402, 69 N. E. 991; Metropolitan St. R. Co. *v.* Toledo Electric St. R. Co., 9 Ohio Cir. Ct. 664, 6 Ohio Cir. Dec. 733 (holding that to entitle one street railroad company to an injunction to prevent the operation of another company's cars over tracks in the street in which it has appropriated a right of use, it must appear not only that plaintiff was not made a party to the appropriation proceedings, but also that it has a real and abiding interest in the tracks); Hampton Roads R., etc., Co. *v.* Newport News, etc., Electric Co., 131 Fed. 534.

Parties.— To an application by a street railroad company, which has constructed and is operating a line of railroad, to restrain a similar company from interfering with its line and from constructing its road over the applicant's private property, the city is not a necessary party. Atlanta R., etc., Co. *v.* Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12.

Road in hands of receiver.— The use of five blocks of the road-bed of a street railroad company in the hands of a receiver by another street railroad company materially impairs the just enjoyment of the property, and will be enjoined, at the instance of the receiver. Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687.

In granting a restraining order before final judgment only such restraint should be imposed as will keep the property in its actual condition until trial; the comparative mischief or inconvenience to the parties from granting or withholding the order is a governing consideration, and the applicant for the order must show that the balance of inconvenience preponderates on his side, and the order is to be framed so that if the party in whose favor it is turns out to be in the wrong, the other party shall not be deprived of the benefit he was entitled to, and the means the court has to secure such benefit to the ultimately successful party is a consideration. Defendant, as a condition of refusing the order, may be required to do acts, or remove work, or keep accurate accounts of profits, and give an undertaking to pay them over if the other party shall succeed on final hearing, and bring into court an amount of money, the payment of which would be a condition precedent to exercising the right he claims. The inconvenience to the public at large is also to be considered. Cincinnati Consol. St. R. Co. *v.* Cincinnati, 7 Ohio Dec. (Reprint) 125, 1 Cinc. L. Bul. 134.

19. See cases cited *infra*, this note.

Illustrations.— A street railroad company having been granted the right to construct its tracks in a street already occupied by another company under a prior grant has no right to interfere with its franchise or vested rights by undertaking to straddle its tracks (Parrish *v.* Hamilton, etc., Traction Co., 23 Ohio Cir. Ct. 527; Hamilton St. R., etc., Co. *v.* Hamilton, etc., Electric Transit Co., 5 Ohio Cir. Ct. 319, 3 Ohio Cir. Dec. 158; Union Pass. R. Co. *v.* Continental R. Co., 33 Leg. Int. (Pa.) 43), or by interfering with its right to run its cars on schedule time in accordance with its contract with the city (Canal, etc., R. Co. *v.* Crescent City R. Co., 44 La. Ann. 485, 10 So. 888).

20. People's R. Co. *v.* Grand Ave. R. Co., 149 Mo. 245, 50 S. W. 829; St. Louis R. Co. *v.* Southern R. Co., (Mo. 1891) 15 S. W. 1013.

21. **Right of railroad to cross** see RAILROADS, 33 Cyc. 242.

22. Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457. And see RAILROADS, 33 Cyc. 242, 243.

23. Southern R. Co. *v.* Atlanta Rapid Transit Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; South East, etc., R. Co. *v.* Evansville, etc., R. Co., 169 Ind. 339, 82 N. E. 765, 13 L. R. A. N. S. 916; Chicago, etc., R. Co. *v.* Whiting, etc., R. Co., 139 Ind. 297, 38 N. E.

imposes no additional burden on a street,[24] a street railroad company operating under proper municipal authority may construct its lines across the tracks thereof without instituting condemnation proceedings or paying damages therefor;[25] and the steam railroad company cannot enjoin such crossing.[26] The right of a street railroad company to cross the tracks of another road is frequently expressly provided for by constitutional or statutory provisions,[27] and if any conditions precedent are provided for they must be complied with.[28]

b. Removal of Crossing. Where a railroad company unlawfully constructs a crossing over the tracks of a street railroad company, the latter is authorized to protect its property and remove the crossing;[29] and the municipality cannot enjoin such removal.[30]

2. Place and Mode of Crossing — a. In General. Where a street railroad company constructs its tracks across the tracks of a steam railroad company, the crossing should be so located and constructed as to inflict as little injury as possible upon the

604, 47 Am. St. Rep. 264, 26 L. R. A. 337; Evansville, etc., Traction Co. *v.* Evansville Belt R. Co., (Ind. App. 1909) 87 N. E. 21; Michigan Cent. R. Co. *v.* Hammond, etc., Electric R. Co., 42 Ind. App. 66, 83 N. E. 650; Chicago, etc., R. Co. *v.* Steel, 47 Nebr. 741, 66 N. W. 830 (holding that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities); East St. Louis R. Co. *v.* Louisville, etc., R. Co., 149 Fed. 159, 79 C. C. A. 107; Pennsylvania Co. *v.* Lake Erie, etc., R. Co., 146 Fed. 446.

Ownership in fee of its right of way by a railroad company gives it no power to prevent a street railroad company, a subsequent grantee of the state, from crossing it on a highway. Williams Valley R. Co. *v.* Lykens, etc., R. Co., 192 Pa. St. 552, 44 Atl. 46; Pennsylvania R. Co. *v.* Inland Traction Co., 25 Pa. Super. Ct. 115.

24. Chicago, etc., R. Co. *v.* Whiting, etc., R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337. See also Eminent Domain, 15 Cyc. 676; Railroads, 33 Cyc. 243.

25. Birmingham R., etc., Co. *v.* Birmingham Traction Co., 122 Ala. 349, 25 So. 192; Southern R. Co. *v.* Atlanta R., etc., Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; Chicago, etc., R. Co. *v.* Whiting, etc., R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337; Michigan Cent. R. Co. *v.* Hammond, etc., R. Co., 42 Ind. App. 66, 83 N. E. 650; Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180. And see Eminent Domain, 15 Cyc. 670.

Any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railroads by permission of the proper authorities is *damnum absque injuria*. Chicago, etc., R. Co. *v.* Steel, 47 Nebr. 741, 66 N. W. 830.

26. See *infra*, VII, F, 2, c.

27. See the statutes of the several states. And see Elizabethtown, etc., R. Co. *v.* Ashland, etc., St. R. Co., 96 Ky. 347, 26 S. W. 181, 16 Ky. L. Rep. 42; Shreveport Traction Co. *v.* Kansas City, etc., R. Co., 119 La. 759, 44 So. 457; Wellsburg, etc., R. Co. *v.* Panhandle Traction Co., 56 W. Va. 18, 48 S. E. 746.

The Pennsylvania act of 1873, supplementing the railroad charter of 1864, granting the right to cross any "railways and railroads now or hereafter to be laid on Market street" does not give a right to cross a railroad already constructed. Market St. Pass. R. Co. *v.* Union Pass. R. Co., 10 Phila. 43; Maris *v.* Union Pass. R. Co., 10 Phila. 41.

Railroad chartered by legislature. — Where the charter of a street railroad company, although granted by the secretary of state, has been confirmed and validated by the legislature, such company is "chartered by the legislature," within Ga. Civ. Code, § 2219, permitting any railroad company "heretofore or hereafter chartered by the legislature of this State" to cross the tracks of any other railroad under certain conditions. Southern R. Co. *v.* Atlanta R., etc., Co., 111 Ga. 679, 36 S. E. 873.

28. See cases cited *infra*, this note.

Map of route. — Under the New York Railroad Law (Laws (1890), c. 565, § 90, as amended by Laws (1895), c. 933), providing that every street surface railroad corporation, before constructing any part of its road on or through any private property described in its statement, and before instituting any proceedings for the condemnation of any real property, shall make a map and profile of the route adopted by it on or through any private property, a street surface railroad company, across whose road another company proposes to construct its track, is entitled to a map of the route over its road. Delaware, etc., R. Co. *v.* Syracuse, etc., R. Co., 28 Misc. (N. Y.) 456, 59 N. Y. Suppl. 1035 [*affirmed* in 43 N. Y. App. Div. 621, 60 N. Y. Suppl. 386].

Notice of time and manner of construction. — Where a company has a right to construct a crossing over the tracks of a street railroad company, it must give notice of the time and manner of its construction. Consolidated Traction Co. *v.* South Orange, etc., Traction Co., 56 N. J. Eq. 569, 40 Atl. 15.

29. Kingston *v.* Colonial City Traction Co., 17 N. Y. App. Div. 274, 45 N. Y. Suppl. 762.

30. Kingston *v.* Colonial City Traction Co., 17 N. Y. App. Div. 274, 45 N. Y. Suppl. 762.

road crossed;[31] and in some cases the statutes provide that the crossing shall be made at such place and in such manner as will not unnecessarily impede or endanger the travel or transportation upon the railroad so crossed;[32] or that such crossing may be made at any point where it is reasonable or feasible.[33] A statute authorizing street railroad companies to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, does not confer an unqualified right to cross a steam railroad anywhere without regard to whether there is an established street or highway crossing at the same point or not.[34] Street railroad companies crossing steam railroads may also be required to use crossing frogs.[35]

b. Grade Crossings. Under its police power a state may forbid grade crossings of one railroad by another at particular places,[36] and, by the same authority, may permit them at particular places, conditionally or unconditionally.[37] Owing to the danger of collisions and necessary interference with the operation of the roads, grade crossings should be avoided when possible,[38] and in some jurisdictions the statutes provide that they shall not be permitted whenever it is reasonably practicable to avoid them.[39] Under such a statute the rights of the

31. West Jersey, etc., R. Co. *v.* Atlantic City, etc., Traction Co., 65 N. J. Eq. 613, 56 Atl. 890.

32. *In re* Atlantic Highlands, etc., R. Co., (N. J. Ch. 1890) 35 Atl. 387; Delaware, etc., Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist. 287, 7 Kulp 509.

The Illinois railroad act requires that crossings of this character shall be made at such places and in such manner as will not unnecessarily impede or endanger travel or transportation upon the railroad crossed, and that when the question whether or not a crossing made or proposed to be made, complies with the statute in this regard, is raised by objection, such question is relegated to the railroad and warehouse commission for its final decision and is not one of fact to be determined by the courts. Illinois Cent. R. Co. *v.* St. Louis, etc., R. Co., 125 Ill. App. 446.

33. Louisville, etc., R. Co. *v.* Bowling Green R. Co., 110 Ky. 788, 63 S. W. 4, 23 Ky. L. Rep. 273.

34. Northern Cent. R. Co. *v.* Harrisburg, etc., R. Co., 177 Pa. St. 142, 35 Atl. 624, 34 L. R. A. 572

Since the location of street railroads is ordinarily authorized only on streets and highways, such a statutory provision as the above is predicated on that fact, and hence the authority therein granted is necessarily applicable only to crossings at points where the railroad is crossed by a street or highway. Northern Cent. R. Co. *v.* Harrisburg, etc., Electric R. Co., 177 Pa. St. 142, 35 Atl. 624, 34 L. R. A. 572; Trenton Cut-off R. Co. *v.* Newtown Electric St. R. Co., 8 Pa. Dist. 549.

35. See Cincinnati, etc., R. Co. *v.* Cincinnati, etc., R. Co., 21 Ohio Cir. Ct. 391, 12 Ohio Cir. Dec. 113.

But Ohio Rev. St. § 247f (93 Ohio Laws 334), providing for interlocking or other safety devices at grade crossings where one railroad, or an electric railroad, crosses another, does not apply to street railroads crossing steam railroads at grade, and therefore an electric suburban or interurban railroad is not required to prepare or present any interlocking or safety device for crossing a steam railroad at grade to the commissioner of railroads before being entitled to make the crossing. Cincinnati, etc., R. Co. *v.* Cincinnati, etc., R. Co., 21 Ohio Cir. Ct. 391, 12 Ohio Cir. Dec. 113.

36. New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Jackson, etc., Traction Co. *v.* Railroad Com'r, 128 Mich. 164, 87 N. W. 133.

37. New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

Where grade crossings by steam railroads are permitted by the authorities of the state, a federal court will not refuse permission to an electric railroad company to cross at grade the tracks of a steam railroad company in the hands of its receivers. Stewart *v.* Wisconsin Cent. Co., 89 Fed. 617.

38. Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780.

39. See the statutes of the several states. And see Jackson, etc., Traction Co. *v.* Railroad Com'r, 128 Mich. 164, 87 N. W. 133; *In re* West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. 780; Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 13 Pa. Co. Ct. 291.

The purpose of the Pennsylvania act of June 19, 1871 (Pamphl. Laws 1361), was to discourage grade crossings and absolutely to prohibit them where it was reasonably practicable to avoid them. Williams Valley R. Co. *v.* Lykens, etc., St. R. Co., 192 Pa. St. 552, 44 Atl. 46. A grade crossing should be prohibited unless it is impracticable to avoid it, and unless such crossing is an imperative necessity. Delaware, etc., R. Co. *v.* Danville, etc., R. Co., 221 Pa. St. 149, 70 Atl. 578.

The question of what is reasonably practicable depends upon the circumstances of each particular case. These circumstances may be many and varied. Among them are the difficulties to be overcome in changing from a grade to a crossing above or below grade; the cost, whether reasonable or extraordinary; the extent of public travel; the frequency of trains and cars; the character of the country, whether level or hilly;

crossing company are secondary and subordinate to those of the company to be crossed,[40] and the burden rests on the crossing company to show that no unnecessary injury will be inflicted on the other by a crossing at grade, and that such a crossing cannot reasonably be avoided.[41]

c. Injunctions. The weight of authority is to the effect that unless such jurisdiction has been conferred by statute or some constitutional provision, there is no jurisdiction in equity to enjoin a street railroad company from crossing a steam railroad company's track at grade in a public street,[42] on the mere ground that the operation of its trains will be inconvenienced, and the dangers of the street crossing increased,[43] unless it appears that the crossing company is insolvent,[44] or that the injury will be irreparable,[45] or the proposed crossing will amount to a public nuisance.[46] Nor does the mere fact that the street railroad company proceeds

whether the employees of one company may see the cars of the other company far enough away to put their own under control before reaching the crossing; to what extent, if at all, dangers to persons being conveyed by the cars will be eliminated; whether the dangers from ascending and descending the long gradients made necessary by the elevation or depression of the track of the crossing company will be greater or less than the dangers from collision encountered at the grade crossing; the availability and efficiency of well-known devices for the avoidance of collisions at grade; and such other surrounding conditions as naturally and reasonably address themselves to the judgment of prudent and cautious persons. Pittsburgh, etc., R. Co. *v.* Indianapolis, etc., Traction Co., 169 Ind. 634, 81 N. E. 487. What is reasonably practicable under such circumstances is determined largely by what is physically practicable, and not by what is practicable to the treasury of the road seeking to cross. Delaware, etc., R. Co. *v.* Danville, etc., St. R. Co., 221 Pa. St. 149, 70 Atl. 578; Williams Valley R. Co. *v.* Lykens, etc., St. R. Co., 192 Pa. St. 552, 44 Atl. 46; Chester Traction Co. *v.* Philadelphia, etc., R. Co., 188 Pa. St. 105, 41 Atl. 449, 44 L. R. A. 269. But it has been held that the term "reasonably practicable" does not refer to engineering difficulties alone. *In re* Saddle River Traction Co., (N. J. Ch. 1898) 41 Atl. 107. The extent to which the risk may be reduced by care and the cost of an overhead crossing are not to be considered. Delaware, etc., R. Co. *v.* Danville, etc., St. R. Co., *supra*; Pennsylvania R. Co. *v.* Warren St. R. Co., 188 Pa. St. 74, 41 Atl. 331. Nor does the fact that the traffic on one railroad is so great that the crossings of such railroad across another are not sufficient to enable the former to quickly move its cars across the latter constitute such an "imperious necessity" as will entitle the former company to additional grade crossings on the latter. Chester Traction Co. *v.* Philadelphia, etc., R. Co., *supra*.

For cases in which it has been held reasonably practicable to avoid grade crossings see Williams Valley R. Co. *v.* Lykens, etc., St. R. Co., 192 Pa. St. 552, 44 Atl. 46; Chester Traction Co. *v.* Philadelphia, etc., R. Co., 188 Pa. St. 105, 41 Atl. 449, 44 L. R. A. 269; New York Cent., etc., R. Co. *v.* Warren St. R. Co., 188 Pa. St. 85, 41 Atl. 333; Pennsylvania R. Co. *v.* Warren St. R. Co., 188 Pa. St. 74, 41 Atl. 331; Scranton, etc., Traction Co. *v.* Delaware, etc., Canal Co., 180 Pa. St. 636, 37 Atl. 122; Delaware, etc., Canal Co. *v.* Scranton, etc., Traction Co., 4 Pa. Dist. 287, 7 Kulp 509.

40. Baltimore, etc., R. Co. *v.* Hanover, etc., R. Co., 13 Pa. Co. Ct. 291.

41. Baltimore, etc., R. Co. *v.* Hanover, etc., R. Co., 13 Pa. Co. Ct. 291.

42. *Delaware.*— Philadelphia, etc., R. Co. *v.* Wilmington City R. Co., 8 Del. Ch. 134, 38 Atl. 1067.

Georgia.— Southern R. Co. *v.* Atlanta R., etc., Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125.

Indiana.—South East, etc., R. Co. *v.* Evansville, etc., Electric R. Co., 169 Ind. 339, 82 N. E. 765, 13 L. R. A. N. S. 916; Evansville, etc., Traction Co. *v.* Evansville Belt R. Co., (App. 1909) 87 N. E. 21; Michigan Cent. R. Co. *v.* Hammond, etc., Electric R. Co., 42 Ind. App. 66, 83 N. E. 650.

Kentucky.— Louisville, etc., R. Co. *v.* Bowling Green R. Co., 110 Ky. 788, 63 S. W. 4, 23 Ky. L. Rep. 273.

Ohio.— Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.

United States.— Pennsylvania Co. *v.* Lake Erie, etc., R. Co., 146 Fed. 446.

Street railroad crossing street railroad.—A street railroad company will not be enjoined from crossing the tracks of another street railroad company. Brooklyn Cent., etc., R. Co. *v.* Brooklyn City R. Co., 33 Barb. (N. Y.) 420; Metropolitan St. R. Co. *v.* Toledo Electric St. R. Co., 9 Ohio Cir. Ct. 664, 6 Ohio Cir. Dec. 733.

43. Louisville, etc., R. Co. *v.* Bowling Green R. Co., 110 Ky. 788, 63 S. W. 4, 23 Ky. L. Rep. 273; Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180; East St. Louis R. Co. *v.* Louisville, etc., R. Co., 149 Fed. 159, 79 C. C. A. 107. *Compare* New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Delaware, etc., R. Co. *v.* Danville, etc., R. Co., 211 Pa. St. 591, 61 Atl. 80.

44. Highland Ave., etc., R. Co. *v.* Birmingham Union R. Co., 93 Ala. 505, 9 So. 568.

45. Highland Ave., etc., R. Co. *v.* Birmingham Union R. Co., 93 Ala. 505, 9 So. 568.

46. Highland Ave., etc., R. Co. *v.* Birmingham R., etc., Co., 113 Ala. 239, 21 So. 342.

ultra vires, or usurps a franchise, give the steam railroad company any standing to ask for an injunction, unless it suffers some special damage differing in kind from that suffered by the rest of the community.[47] Where the crossing company is proceeding in a lawful and proper manner, the court will enjoin the company whose tracks are being crossed from interfering with the work of construction,[48] or from interfering with the crossing or its use after it is constructed.[49]

3. Determination of Place and Mode of Crossing — a. By Courts. Under some statutes certain courts have the power to define the mode of the crossing of one railroad by another,[50] and require them to prevent grade crossings whenever it is reasonably practicable to do so;[51] and such power is held not to be abridged by a statute giving street railroad companies the right to cross other railroads at grade.[52] Where the right to construct a crossing over the tracks of a street railroad company exists, a court of equity will control its construction and operation on the application of either party;[53] and upon application to the court for this purpose, the petitioning road must show everything essential to the court's jurisdiction.[54]

47. Philadelphia, etc., R. Co. *v.* Wilmington City R. Co., 8 Del. Ch. 134, 38 Atl. 1067; Consolidated Traction Co. *v.* South Orange, etc., Traction Co., 56 N. J. Eq. 569, 40 Atl. 15; West Jersey R. Co. *v.* Camden, etc., R. Co., 52 N. J. Eq. 31, 29 Atl. 423; Morris, etc., R. Co. *v.* Newark Pass. R. Co., 51 N. J. Eq. 379, 29 Atl. 184. And see Chicago, etc., R. Co. *v.* General Electric R. Co., 79 Ill. App. 569.

Remedies to restrain, abate, or punish a public nuisance are to be invoked by the public officials who are charged with the duty in that respect and not by a mere volunteer, who is without special cause of complaint. West Jersey R. Co. *v.* Camden, etc., R. Co., 52 N. J. Eq. 31, 29 Atl. 423.

48. Chicago, etc., R. Co. *v.* Whiting, etc., St. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337; Du Bois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1, 24 Atl. 179 [*affirming* 10 Pa. Co. Ct. 401].

49. Du Bois Traction Pass. R. Co. *v.* Buffalo, etc., R. Co., 149 Pa. St. 1, 24 Atl. 179 [*affirming* 10 Pa. Co. Ct. 401].

50. See the statutes of the several states. And see the cases cited *infra*, this note.

Extent of power.— Under the New Jersey act of March 22, 1895 (2 Gen. St. p. 2717), the only power conferred upon the chancellor is "to define the mode" in which such crossing shall be made, and he cannot change the location of the crossing to a point which he considers better for the public. *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. Ch. 1896) 35 Atl. 387. He cannot change the grade of the highway over which the street railroad runs. *In re* Saddle River Traction Co., (N. J. Ch. 1898) 41 Atl. 107. Nor can he impose upon the company whose steam railroad is to be crossed at grade by an electric railroad the duty and responsibility of operating a derailing switch in the line of the electric railroad. New York, etc., R. Co. *v.* Atlantic Highlands, etc., Electric R. Co., 55 N. J. Eq. 522, 37 Atl. 736. The Pennsylvania act of 1871 (Pamphl. Laws 300) imposes on the courts the threefold duty of: (1) Ascertaining the mode of crossing of one road by another, which will least injuriously affect the road to be crossed; (2) compelling by decree the adoption of such decree; and (3) the prevention of grade crossings when any other method is practicable. Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 13 Pa. Co. Ct. 291.

Ohio Rev. St. § 3333-1, authorizing the court of common pleas, upon the application of a railroad company to prescribe the mode and manner in which one road may cross another, does not authorize an electric railroad to invoke the power of the court to fix the mode and manner of crossing another street railroad, as it has reference to steam railroads. Dayton, etc., R. Co. *v.* Dayton, etc., Traction Co., 26 Ohio Cir. Ct. 1.

51. Delaware, etc., Canal Co. *v.* Lackawanna Valley Traction Co., 2 Lack. Leg. N. (Pa.) 295.

52. Delaware, etc., Canal Co. *v.* Lackawanna Valley Traction Co., 2 Lack. Leg. N. (Pa.) 295.

53. Consolidated Traction Co. *v.* South Orange, etc., Traction Co., 56 N. J. Eq. 569, 40 Atl. 15.

54. See cases cited *infra*, this note.

In New Jersey upon an application to the court of chancery under the act of March 22, 1895 (2 Gen. St. p. 2717), to define the mode in which one railroad may cross another, it is incumbent upon the petitioner to show that it has lawful power to construct its road. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., 68 N. J. Eq. 715, 61 Atl. 461. And see *In re* Trenton St. R. Co., 58 N. J. Eq. 533, 44 Atl. 177. One of the steps to that end being an ordinance of the township committee granting permission to the petitioner to construct its road under the railroad act of April 21, 1896 (Pamphl. Laws, p. 329), it is incumbent upon the petitioner to show the jurisdiction of the township committee to pass such an ordinance. Mercer County Traction Co. *v.* United New Jersey R., etc., Co., *supra*. So also, as it is made essential to the jurisdiction of the chancellor that the route of the petitioning company should cross the line of railroad of the other company, and by the route

b. By Commissioners. Under other statutes the determination of the manner in which the crossing shall be made, whether above, below, or at grade, is vested in the state board of railroad commissioners,[55] or in commissioners appointed by the court;[56] and although the right to except to the ruling of the commissioners is expressly given, the exercise of their discretion will not be reviewed by the courts unless there has been a clear abuse thereof.[57]

4. Expense of Crossing. A steam railroad company rightfully maintaining its tracks in a city street is entitled to require a street railroad company constructing a line across such tracks to pay for the construction of the crossing, and for any change in the tracks necessitated by the crossing.[58] Moreover it has been held that the street railroad company must perpetually maintain and repair such crossing according to the direction of the engineer of the steam railroad.[59] But ordinarily it is not required to pay a portion of the expense of the steam railroad in maintaining crossing gates and other safety appliances at the crossing,[60] although it may be required to do so if equity demands it.[61]

5. Compensation. For the crossing of tracks at grade, without material injury,

here mentioned is intended the lawful route, it is incumbent on the petitioner to show that it has legally laid its route over the other railroad, and, as one of the steps to that end, that it has lawful power to lay out and construct its proposed extension. Trenton St. R. Co. *v.* United New Jersey R., etc., Co., 60 N. J. Eq. 500, 46 Atl. 763. On a petition to define the mode of crossing a steam railroad by a trolley road, a map, filed by the petitioner, showing that the route of the trolley road crosses the railroad at the point where the mode of crossing is to be defined, is sufficient, although it does not exhibit any indication of a crossing. *In re* West Jersey Traction Co., 59 N. J. Eq. 63, 45 Atl. 282.

55. See cases cited *infra*, this note.

Under Mich. Comp. Laws, § 6434, as amended in 1897, giving the commissioner of railroads power to make all reasonable rules and regulations for the operation of street railroads, the railroad commissioner has power to compel a street railroad company to elevate its tracks over those of a steam railroad. Jackson, etc., Traction Co. *v.* Railroad Com'r, 128 Mich. 164, 87 N. W. 133.

By N. Y. Laws (1897), p. 794, c. 754, the determination of the manner in which the crossing shall be made, that is, whether above, below, or at grade, is vested exclusively in the state board of railroad commissioners; but the provisions of Laws (1890), p. 1087, c. 545, § 12, remain in full effect as to the determination by court commissioners of the point of crossing and compensation. Olean St. R. Co. *v.* Pennsylvania R. Co., 75 N. Y. App. Div. 412, 78 N. Y. Suppl. 113 [*affirmed* in 175 N. Y. 468, 67 N. E. 1086]; Lake Shore, etc., R. Co. *v.* Chautauqua Traction Co., 54 Misc. 275, 104 N. Y. Suppl. 550.

Corporation commission.— Under the Virginia statutes, application may be made to the state corporation commission to determine the necessity and propriety of a proposed crossing of the tracks of two street railroads, and, by Va. Const. § 156, the rulings of such commission are to be regarded as *prima facie* just, reasonable, and correct. Newport News, etc., R., etc., Co. *v.* Hampton Roads R., etc., Co., 102 Va. 847, 47 S. E. 858.

Ky. St. § 767, forbidding the construction of one railroad across another without the approval of the railroad commission, does not apply to the crossing of a trunk railroad by a street railroad, as street railroads, by section 821, are expressly excepted from the jurisdiction of the railroad commission. Louisville, etc., R. Co. *v.* Bowling Green R. Co., 110 Ky. 788, 63 S. W. 4, 23 Ky. L. Rep. 273.

56. Matter of Saratoga Electric R. Co., 58 Hun (N. Y.) 287, 12 N. Y. Suppl. 318.

The petition of a street railroad company, incorporated under chapter 252 of the New York Laws of 1884, asking for the appointment of commissioners to ascertain the points of crossing another road, must allege that it has acquired the consent of one half in value of the adjoining property-owners and of the local authorities, to the construction of its road, in order to confer jurisdiction on the court to act thereon. Matter of Saratoga Electric R. Co., 58 Hun (N. Y.) 287, 12 N. Y. Suppl. 318.

57. Jackson, etc., Traction Co. *v.* Railroad Com'r, 128 Mich. 164, 87 N. W. 133.

58. Chicago, etc., Terminal R. Co. *v.* Whiting, etc., St. R. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. Rep. 264, 26 L. R. A. 337; Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752; West Jersey, etc., R. Co. *v.* Atlantic City, etc., Traction Co., 65 N. J. Eq. 613, 56 Atl. 890; Chatham, etc., R. Co. *v.* Canadian Pac. R. Co., 5 Can. R. Cas. 175.

59. Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752.

Change of crossing.—A street railroad company, the right of which to cross a railroad has been determined, has the right, if it is not its duty, on the old crossing wearing out, to put in a more modern one, which is an improvement. Chicago, etc., R. Co. *v.* Hammond-Whiting, etc., Electric R. Co., (Ind. 1897) 46 N. E. 999.

60. Central Pass. R. Co. *v.* Philadelphia, etc., R. Co., 95 Md. 428, 52 Atl. 752.

61. Chatham, etc., R. Co. *v.* Canadian Pac.

compensation is not allowed.[62] Thus damages are not allowable for increased delay or danger in crossing,[63] or for the mere interruption of traffic during the construction of the crossing.[64] To be allowable the damages must be real, tangible, and proximate, and not conjectural or speculative.[65]

G. Connections and Intersections With Other Roads. Statutes authorizing or compelling connections or intersections of tracks between railroads have been held to apply to the intersection and connection of a street railroad operated by electricity with a steam railroad;[66] but not to the connection between a street surface railroad and an elevated railroad by an inclined plane, where the property-owners have consented only to a surface road.[67] Such connections are usually required to be made with the consent of, and subject to the conditions imposed by, the city authorities.[68]

H. Injuries From Construction or Maintenance[69] **— 1. In General.** An obstruction caused by the construction of a railroad in a public street is *damnum absque injuria* as to an abutting property-owner, in the absence of a showing that it is of such a character as to affect the use or enjoyment of the adjoining property, and thereby impair its value.[70] An abutting owner cannot maintain an action for damages for an obstruction of a street by which he is injured only

R. Co., 5 Can. R. Cas. 175; Ottawa *v.* Canada Atlantic R. Co., 5 Can. R. Cas. 126.

62. *Connecticut.*— New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

Delaware.— Philadelphia, etc., R. Co. *v.* Wilmington City R. Co., 8 Del. Ch. 134, 38 Atl. 1067.

Illinois.— Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485.

Indiana.— South East, etc., R. Co. *v.* Evansville, etc., Electric R. Co., 169 Ind. 339, 82 N. E. 765, 13 L. R. A. N. S. 916.

New Jersey.— Consolidated Traction Co. *v.* South Orange, etc., Traction Co., 56 N. J. Eq. 569, 40 Atl. 15, holding that a street railroad company operating the trolley system along a public street is not entitled to compensation for the construction of a crossing over its tracks by another company duly authorized, where such crossing, when properly constructed, will not interfere with the exercise of its franchise, although it necessitates some actual interference with the tracks and wires as constructed, and changes its exclusive use at the crossing.

Ohio.— Cincinnati, etc., Electric R. Co. *v.* Cincinnati, etc., R. Co., 21 Ohio Cir. Ct. 391, 12 Ohio Cir. Dec. 113.

Pennsylvania.— Pennsylvania R. Co. *v.* Greensburg, etc., St. R. Co., 176 Pa. St. 559, 35 Atl. 122, 36 L. R. A. 839.

63. Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485.

64. Consolidated Traction Co. *v.* South Orange, etc., Traction Co., 56 N. J. Eq. 569, 40 Atl. 15.

65. Chicago, etc., R. Co. *v.* West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485.

66. Stillwater, etc., R. Co. *v.* Boston, etc., R. Co., 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489 [*reversing* 72 N. Y. App. Div. 294, 76 N. Y. Suppl. 69].

67. Eldert *v.* Long Island Electric R. Co., 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186 [*affirmed* in 165 N. Y. 651, 59 N. E. 1122].

68. Monroe *v.* Detroit, etc., R. Co., 143 Mich. 315, 106 N. W. 704.

A connection of the tracks of the same street railroad company lying on two different streets is not within an ordinance prohibiting any connection of one railroad with another without consent of the municipal council. North Jersey St. R. Co. *v.* Newark St., etc., Com'rs, 73 N. J. Eq. 106, 67 Atl. 691.

69. **Injuries from negligent use of electricity** see Electricity, 15 Cyc. 471 *et seq.*

70. Lake St. El. R. Co. *v.* Brooks, 90 Ill. App. 173. And see Eminent Domain, 15 Cyc. 676.

Vibration.—An abutting owner is entitled to recover damages for a special injury to his property from vibration caused by the operation of a street or elevated railroad. Lake St. El. R. Co. *v.* Brooks, 90 Ill. App. 173; Rogers *v.* Philadelphia Traction Co., 182 Pa. St. 473, 38 Atl. 399, 61 Am. St. Rep. 716. *Compare* Roebling *v.* Trenton Pass. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129; Lewis *v.* Mt. Adams, etc., Inclined Plane R. Co., 7 Ohio Dec. (Reprint) 566, 3 Cinc. L. Bul. 1007. And see Eminent Domain, 15 Cyc. 754.

Change of grade.—A street railroad company, changing the grade of a highway for the construction of its road in accordance with locations granted by the officers of a municipality, is not liable for damages to an abutting owner. Hyde *v.* Boston, etc., St. R. Co., 194 Mass. 80, 80 N. E. 517; Laroe *v.* Northampton St. R. Co., 189 Mass. 254, 75 N. E. 255. Mass. Rev. Laws, c. 48, § 7, and c. 51, §§ 15, 16, authorizing a person aggrieved by the relocation or alteration of a highway to petition for the assessment of his damages by a jury, etc., afford no relief to an abutting owner for injuries caused by a change of the grade of a highway made by a street railroad company for the construction of its road in accordance with locations

as a member of the public generally;[71] but for any actual and special damage sustained by him by reason of the construction of the railroad, or resulting from its use,[72] as where the right of ingress or egress is improperly obstructed,[73] he has his remedy by an action at law for damages, unless he has waived his right.[74] The company will also be liable for injuries sustained by persons in the use of a street or highway due to a dangerous condition negligently created,[75] or to the neglect

granted by municipal officers. Hyde *v.* Boston, etc., St. R. Co., *supra*. Nor has Rev. Laws, c. 112, § 44, making a street railroad company liable for injuries sustained during construction resulting from the carelessness of defendant's servants, if notice is given and an action begun as provided by c. 51, § 20, any application to injuries suffered by an abutting owner by a slight raising of the grade of the surface of a street by the company in the process of construction. Laroe *v.* Northampton St. R. Co., *supra*.

71. Reynolds *v.* Presidio, etc., R. Co., 1 Cal. App. 229, 81 Pac. 1118; State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506; Mordhurst *v.* Ft. Wayne, etc., Traction Co., 163 Ind. 268, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L. R. A. 105; Kellinger *v.* Forty-Second St., etc., R. Co., 50 N. Y. 206. And see, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 904 *et seq.*

72. Reynolds *v.* Presidio, etc., R. Co., 1 Cal. App. 229, 81 Pac. 1118; Mordhurst *v.* Ft. Wayne, etc., Traction Co., 163 Ind. 268, 71 N. E. 642, 106 Am. St. Rep. 222, 66 L. R. A. 105.

Parties.—A reservation by a grantor of damages to the premises conveyed, caused by the construction and operation of an elevated railroad in the street on which the premises abut, does not establish any trust relation between the grantor and the grantee, and therefore the grantor is not entitled to be made a party in an action by the grantee against the company to recover such damages. Shepard *v.* Metropolitan El. R. Co., 82 Hun (N. Y.) 527, 31 N. Y. Suppl. 537 [*affirmed* in 147 N. Y. 685, 42 N. E. 726].

73. Rosenbaum *v.* Meridian Light, etc., Co., (Miss. 1905) 38 So. 321; Lambert *v.* Westchester Electric R. Co., 191 N. Y. 248, 83 N. E. 977 [*affirming* 115 N. Y. App. Div. 78, 100 N. Y. Suppl. 665]; San Antonio Rapid Transit St. R. Co. *v.* Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730 (holding, however, that the proper construction and operation of an electric railway on a street where there are two other such railways, and so near an abutting store building as to inconvenience the occupants in receiving and delivering goods, is not such an infringement on the right of access to such building as to entitle the owner thereof to damages based on the consequent depreciation of the value of the property).

74. Somerset Water, etc., Co. *v.* Doyle, 107 S. W. 208, 32 Ky. L. Rep. 726, holding that an abutting owner is not prevented from recovering from a street railroad company for injury to his property through an excavation made in the street in the construction of the line, because, when he acquired the property, he knew that the line was to be constructed, and because he did not object to the excavation until it was nearly completed; no waiver of his right to recover being shown.

Evidence.—Where, in an action to recover damages for the maintenance and operation of defendant's elevated railroad in front of plaintiffs' premises, it is set up as a defense that plaintiffs stood by during the construction of the road without objecting or interfering to prevent it, plaintiffs are properly allowed to prove that when defendant began to build its road it went into the vaults of their building, and put posts there, and that they protested. Taber *v.* New York, El. R. Co., 11 N. Y. Suppl. 584 [*affirmed* in 134 N. Y. 615, 32 N. E. 649].

75. Fulton County St. R. Co. *v.* McConnell, 87 Ga. 756, 13 S. E. 828; Kaiser *v.* Detroit, etc., R. Co., 136 Mich. 541, 99 N. W. 743; Sullivan *v.* Staten Island Electric R. Co., 50 N. Y. App. Div. 558, 64 N. Y. Suppl. 91.

Illustrations — company liable.— Proof that during the construction of an elevated railroad by a contractor, or his subcontractors, under the direction and supervision of the engineer of the company, a person while passing along the street underneath, in the exercise of ordinary care for his safety, was injured by a bolt falling from such railroad, establishes a *prima facie* case of negligence, on the part of such railroad. Metropolitan West Side El. R. Co. *v.* McDonough, 87 Ill. App. 31. Where an electric railroad company is raising a feed wire, a small boy, starting to cross the street, steps across the wire, which lay in the gutter, just as it is suddenly, without notice of its presence or intention to lift it, raised with such force that the boy is thrown many feet in the air, the company is negligent. Devine *v.* Brooklyn Heights R. Co., 1 N. Y. App. Div. 237, 37 N. Y. Suppl. 170.

Company not liable.— Merely because there was a large knot hole in a board constituting part of the temporary crossing where a street railroad company had the street torn up between its tracks, whereby a pedestrian was injured, does not show that it was negligent, it not being shown that it put the board there, or that it had knowledge of the defect, or that the board had been there long enough to give it notice. Keating *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 362, 94 N. Y. Suppl. 117. An elevated railroad company is not liable for injuries to a pedestrian caused by his stepping on a nail in a plank placed on the sidewalk by the company in the course of the construction of steps, unless it permits the plank to remain upon the side-

of its duty to keep its road-bed in repair.[76] But the company can only be held liable where the defect or condition causing the injury was one for which it was responsible. Thus the company is not liable for the negligence of an independent contractor,[77] unless it retains the right to direct or supervise his work,[78] although it owes a duty to the public in such a case to keep the street in a reasonably safe condition while the work is in progress.[79]

2. Release of Damages. A release of damages will be construed as a release of such damages only as would arise from the construction and use of the street railroad in accordance with the terms of the grant.[80]

3. Companies Liable. An ordinary street railroad company, which has leased its line to a corporation formed for the purpose of operating a street railroad for the transportation of freight, is a party to the use of such line for freight traffic, and is liable equally with such corporation for injury to adjacent property.[81]

I. Offenses Incident to Construction and Maintenance. A railroad constructed upon a public street or highway without legislative authority is a public nuisance.[82] When authorized by the legislature, and approved, in its location and mode of construction, by the municipal council, and built in substantial accord with that approval, it is not a public nuisance,[83] even if it does not follow the approved plan in every respect.[84] But it may become a nuisance by the disregard of a positive command of a statute,[85] by the negligent operation thereof,[86]

walk beyond a reasonable time. Hedenberg *v.* Manhattan R. Co., 91 N. Y. Suppl. 68. Where a railroad and electric company is required by municipal authorities to remove its poles inside the curb line of the sidewalk, and, while the company's linemen are engaged in repairing and swinging wires on the poles they stretch a rope across the sidewalk about four feet above it to warn pedestrians not to pass under the poles on which the men are at work, it is not negligence rendering the company liable for the death of a child from coming in contact with the rope which passes under her chin as she is running along the sidewalk, and throws her backward on the pavement. Newport News, etc., R., etc., Co. *v.* Clark, 105 Va. 205, 52 S. E. 1010, 115 Am. St. Rep. 868, 6 L. R. A. N. S. 905.

Adopting unsafe method of construction.—If in the progress of the work it becomes necessary to do a certain thing, and there are two ways of doing it, one safe and the other unsafe and unnecessary, if the unsafe method is adopted, and a person is injured thereby, it is such negligence on the part of the corporation performing the work as will authorize the party injured to recover damages. Fulton County St. R. Co. *v.* McConnell, 87 Ga. 756, 13 S. E. 828.

76. Milton *v.* Bangor R., etc., Co., 103 Me. 218, 68 Atl. 826, 125 Am. St. Rep. 293, 15 L. R. A. N. S. 203.

77. Fulton County St. R. Co. *v.* McConnell, 87 Ga. 756, 13 S. E. 828; Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336; Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564.

Contractor not "agent."—A charter of a street railroad company, which provides that it shall be liable for the negligence or misconduct of its agents and servants in constructing the road, does not apply to the negligence of an independent contractor. Sanford *v.* Pawtucket St. R. Co., 19 R. I. 537, 35 Atl. 67, 33 L. R. A. 564.

78. Fulton County St. R. Co. *v.* McConnell, 87 Ga. 756, 13 S. E. 828; Metropolitan West Side El. R. Co. *v.* McDonough, 87 Ill. App. 31.

79. Keating *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 362, 94 N. Y. Suppl. 117; Wolf *v.* Third Ave. R. Co., 67 N. Y. App. Div. 605, 74 N. Y. Suppl. 336.

80. Murray Hill Land Co. *v.* Milwaukee Light, etc., Co., 110 Wis. 555, 86 N. W. 199, holding that where a street railroad company is granted a right to construct and operate a railroad on a certain street as platted by the grantor, and the company is to grade it without any material change in the natural surface, a release of damages in the deed does not release those arising from a substantial change in the grade.

81. Aycock *v.* San Antonio Brewing Assoc., 26 Tex. Civ. App. 341, 63 S. W. 953.

82. Reg. *v.* Train, 2 B. & S. 640, 9 Cox C. C. 180, 8 Jur. N. S. 1151, 31 L. J. M. C. 169, 6 L. T. Rep. N. S. 380, 10 Wkly. Rep. 539, 110 E. C. L. 640.

83. State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506; Poole *v.* Falls Road Electric R. Co., 88 Md. 533, 41 Atl. 1069.

84. State *v.* Hartford St. R. Co., 76 Conn. 174, 56 Atl. 506.

85. Reg. *v.* Toronto St. R. Co., 24 U. C. Q. B. 454.

86. People *v.* Metropolitan Traction Co., 50 N. Y. Suppl. 1117, 12 N. Y. Cr. 405, holding, however, that an indictment against a street railroad for maintaining a nuisance, in that it ran its cars at a dangerous rate of speed around a curve at a street intersection, is not sustained by evidence that in the course of two years twelve or fifteen accidents occurred at such place, when there is nothing connecting defendant with the accidents.

or by reason of a failure to keep its tracks and road-bed in repair, thereby obstructing travel.[87]

J. Motive Power[88] — **1. In General.** Under a general grant of power to maintain and operate a street railroad, a corporation takes, by necessary and unavoidable implication, a right to use any force in the propulsion of its cars that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street, according to other customary methods, from having the free and safe use thereof.[89] Moreover such a grant carries with it, at least in the absence of specific limitations or prohibitions,[90] the right from time to time to operate the road by new methods and motive powers, developed in the progress of invention and experience.[91] But whenever a statute specifies the motive power to be used, the expression of that power may be construed to exclude any other.[92]

2. Steam. Steam, as a motive power, may be used along the streets of a city, by proper permission,[93] and in such case the use thereof cannot be abated as a public nuisance, even though it tends to the immediate annoyance of the public in general.[94] But the use of steam as a motive power is usually either expressly,[95]

87. Memphis, etc., R. Co. *v.* State, 87 Tenn. 746, 11 S. W. 946.

Validity of ordinance making superintendent guilty of misdemeanor.—A municipal ordinance making it unlawful for any street railroad company to permit its road-bed or track to remain so high above the surface of the streets as to interfere with public travel, and declaring that "the president, superintendent . . . or other officer" of such company violating its provisions is guilty of a misdemeanor, and subject on conviction to a fine, is unreasonable and void, so far as it undertakes to hold the superintendent of such a company responsible for the failure of his company to put its road in repair. Oxanna *v.* Allen, 90 Ala. 468, 8 So. 79.

88. Power of municipality to regulate motive power see *infra*, X, A, 2, b, (I).

89. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12; North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Williams *v.* City Electric St. R. Co., 41 Fed. 556.

An ordinance consenting to the laying of "horse railroad track or tracks" along certain streets does not restrict the use of such tracks to cars propelled by horses, as the words "horse railroad track or tracks," used in the ordinance, must be taken as descriptive of the railroad to be constructed and not of the motive power to be used. Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

90. See Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

91. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12 (in which it was said that when an exclusive right is given in general terms to a city railroad, the effort to confine it to the particular motive powers in use at the time would seem to be as artificial and unauthorized as to confine it to the kind of rails then in use, excluding the idea of modern rails of steel and of great weight, or to limit the size and shape and quality of cars to those known at the time. All these things, including the motive power, are subordinate, mere means to make the franchise effective); Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007; Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674.

If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage, rather than to embarrass, the inventive and progressive tendency of the people. Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674. *Compare* Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324.

92. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12.

93. Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516.

94. Vason *v.* South Carolina R. Co., 42 Ga. 631.

95. See the statutes of the several states; and the cases cited *infra*, this note.

Cases not within express prohibition.—A cable operated by steam is not within the prohibition of steam motive power. Stranahan *v.* Sea View R. Co., 84 N. Y. 308; Harrison *v.* Mt. Auburn Cable R. Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265; Clement *v.* Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355. *Compare* People *v.* Newton, 48 Hun (N. Y.) 477, 1 N. Y. Suppl. 197 [*affirmed* in 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174], holding that the construction and operation of a cable road by a company which has the right to construct and operate a horse railroad is a violation of the provision of an agreement that no steam power is to be used on any part of the road for propelling cars, although the cars are propelled by a cable, the movement of which is effected by steam generated by an apparatus situated off the street and on private property. A kinetic motor, operated by

or impliedly,[96] prohibited, and its use then constitutes a nuisance, constructive, if not actual,[97] especially in a thickly populated city.[98]

3. Electricity. Where the grant of power to construct and operate a street railroad is silent as to the motive power to be used,[99] or where it authorizes the use of any motive power whatever,[1] or steam, horse, or other power, as the city council may from time to time direct,[2] or any power other than by locomotive,[3] the company has the right to use electricity; even by the use of overhead wires,[4] unless the use of such wires is expressly prohibited.[5] The fact that electricity was unknown at the time the grant was made is immaterial,[6] unless the company was thereby limited to the use of such powers as were known at the time.[7]

4. Change of Motive Power[8] — a. In General. Legislative authority is necessary to enable a street railroad company to change its motive power.[9] Such

steam, generated from water heated in a stationary boiler, and transferred to a reservoir under the car and the motor, is not within a statute providing that a street surface railroad may not operate its road by locomotive steam power. People *v.* New York R. Com'rs, 32 N. Y. App. Div. 179, 52 N. Y. Suppl. 908 [*affirmed* in 158 N. Y. 711, 53 N. E. 1129]. Nor can an electrical system be regarded as the use of steam as a motive power. Prospect Park, etc., R. Co. *v.* Coney Island, etc., R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610 [*reversing* 66 Hun 366, 21 N. Y. Suppl. 1046].

Power of city to forbid use of steam as motive power see Municipal Corporations, 28 Cyc. 728 note 59.

96. See cases cited *infra*, this note.

Illustrations of implied prohibition.—Where a street railroad company's charter is silent as to the motive power to be used (North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788), or authorizes the use of animal power (Newport, etc., St. R. Co. *v.* Newport, 1 Ky. L. Rep. 404), or any power other than locomotive (Gillette *v.* Chester, etc., R. Co., 2 Pa. Dist. 450), the use of steam as a motive power will not be permitted, at least if the safety of the public is thereby endangered. But where a municipal ordinance authorizes the construction of a railway "to be operated by electricity, or such other power as will not necessarily obstruct the use of the said streets by the public," it will be conclusively presumed in the absence of any showing of mistake or fraud, or that the ordinance is expressed in language not intended to be used, that the ordinance expresses the purpose of the municipality in adopting it, and evidence that it was not intended to allow the use of steam is inadmissible (Houston *v.* Houston Belt, etc., R. Co., 84 Tex. 581, 19 S. W. 786).

97. Tilton *v.* New Orleans City R. Co., 35 La. Ann. 1062.

98. North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788.

99. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12; Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736.

1. Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007; Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674 [*affirming* 61 Hun 140, 15 N. Y. Suppl. 752]; Bell Tel. Co. *v.* Montreal St. R. Co., 6 Quebec Q. B. 223.

2. Taggart *v.* Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205.

3. Lockhart *v.* Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26; Gillette *v.* Chester, etc., R. Co., 2 Pa. Dist. 450; Fox *v.* Catharine St., etc., R. Co., 12 Pa. Co. Ct. 180; Com. *v.* West Chester, 9 Pa. Co. Ct. 542.

4. Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Com. *v.* West Chester, 9 Pa. Co. Ct. 542.

A charter granting a street railroad company the right to use the trolley system authorizes such company to erect trolley poles in the streets since they are a necessary part of such a system. Hooper *v.* Baltimore City Pass. R. Co., 85 Md. 509, 37 Atl. 359, 38 L. R. A. 509, holding further that Md. Acts (1890), c. 370, giving the mayor and council of Baltimore power to require all wires to be placed underground, does not authorize the mayor to prevent a street railroad company from erecting trolley poles in the streets under a charter power to use the trolley system, where the city council has taken no action under such act as to trolley wires.

Authority to use electric or chemical motors or grip cables as a means of propulsion does not legalize the erection of poles and the stretching of wires in a public street. State *v.* Trenton, 54 N. J. L. 92, 23 Atl. 281.

5. Farrell *v.* Winchester Ave. R. Co., 61 Conn. 127, 23 Atl. 757.

6. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12; Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007; Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674 [*affirming* 61 Hun 140, 15 N. Y. Suppl. 752].

7. See Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

8. As additional servitude see Eminent Domain, 15 Cyc. 678 note 13.

9. St. Michael's Protestant Episcopal Church *v.* Forty-Second St., etc., R. Co., 26 Misc. (N. Y.) 601, 57 N. Y. Suppl. 881. See also Louisville, etc., R. Co. *v.* Bowling Green R.

authority is often conferred,[10] subject to certain requirements in respect to obtaining consent.[11] A street railroad company, which has complied with the requirements of law in respect to obtaining authority to change its motive power, becomes entitled to a permit to open the streets along its route for purposes necessary in making such change,[12] and the granting of such a permit by the proper public officers may be enforced by mandamus.[13]

b. Consent of Public Authorities and Property-Owners. Statutes authorizing street railroad companies to change their motive power usually require such companies to first comply with certain conditions, such as obtaining the consent of the local authorities,[14] and owners of abutting property.[15] It is, however, com-

Co., 110 Ky. 788, 63 S. W. 4, 23 Ky. L. Rep. 273, holding that a city ordinance granting to a street railroad company the right to operate its cars by electricity was valid, although the company was authorized by its charter to operate its cars only by animal power, and the grant made by the city became effective when the company was subsequently authorized by its charter to operate its road by electricity.

Charter authority to operate a street railroad by "horse power or locomotive cars" confers a continuing option to use either steam or animal power, or both, which may be exercised from time to time. Under it the use of either motive power may be changed, and the other substituted, as the company may see fit. McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611.

Ratification of unauthorized change.— The legislature may, by subsequently conferring power upon a city council to authorize a change in the motive power of a street railroad, ratify the previous action of such council in permitting such a change (City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114), and the city then becomes estopped to set up its want of power in the first instance (City R. Co. *v.* Citizens' St. R. Co., *supra*).

10. See the statutes of the several states; and the cases cited *infra*, this note.

N. J. Act (1893) (Pamphl. Laws (1893), p. 241), §§ 1, 2, empowers city authorities, by ordinance, to authorize street railroad companies to substitute electric motors in the place of horses, as the propelling power of their cars, and to authorize the use of poles in the streets, with wires thereon to supply the motors with electricity, and to prescribe the places in which such poles should be located. The act does not confer on the companies any rights beyond those vested in them by their charters, except in allowing a change in the motive power to be applied to their cars. Roebling *v.* Trenton Pass. R. Co., 58 N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129.

Authority thus granted to city not exhausted by single exercise thereof.—Where an act incorporating a street railroad company provides that the "tracks or road shall be operated and used by said corporation with steam, horse, or other power, as the councils of said city and towns may from time to time direct," the city may, after notice has been given, and an ordinance passed permitting the use of horse power, pass a second ordinance, without further notice, changing the power to electricity. Taggart *v.* Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205.

11. See *infra*, VII, J, 4, b.

12. *In re* Third Ave. R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124; Potter *v.* Collis, 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471 [*affirmed* in 156 N. Y. 16, 50 N. E. 413].

13. *In re* Third Ave. R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124; Potter *v.* Collis, 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471 [*affirmed* in 156 N. Y. 16, 50 N. E. 413].

14. People *v.* Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174.

Consent presumed from acquiescence.— The consent of the local authorities, if necessary to enable a street railroad company to change from horse power to an electric trolley system, will be presumed, from the acquiescence of such authorities in such change for five years, so far as to preclude an individual, in a suit against the company for personal injuries, from claiming that the maintenance of such system is negligence *per se*. Potter *v.* Scranton Traction Co., 176 Pa. St. 271, 35 Atl. 188.

15. See cases cited *infra*, this note.

Under N. Y. Laws (1890), c. 565, § 100, providing that any change in the motive power of a street railroad must be consented to by the owners of one half the abutting property, and in case such consent could not be obtained the determination of a commission appointed by the general term of the supreme court in favor of such motive power, when confirmed by the court, should be taken in lieu thereof, and that such consent should be obtained in the same manner as provided in sections 91, 94, of the same act, which sections require that for the construction of a street railroad the consent of the owners of one half "in value" of the abutting property should be obtained, etc., a petition for a commission to authorize a change of motive power, alleging that the consent of the owners of one half "in value" of the required property could not be obtained, is not insufficient because it does not show that the consent of the owners of one half the "lineal front feet" of such property could not be obtained, since the evident intent of the legislature was to conform the practice of obtaining the consent to a change in motive power to that required for the construction of a street railroad. Matter of Rochester, etc., R. Co., 51 N. Y. App. Div. 65, 64 N. Y. Suppl.

petent for the legislature to authorize a change of motive power without the consent of the local authorities,[16] notwithstanding a constitutional provision that no law shall authorize the construction or operation of a street railroad without the consent of the local authorities.[17]

5. Who May Question Right to Use Particular Motive Power. The right of a street railroad company to operate its cars by other power than that specified in its charter can only be raised by the state or city with whom its contract was made, and is not subject to collateral attack in a private action to recover for injuries,[18] or in a proceeding by the company to enjoin private persons from cutting down its wires and poles.[19]

VIII. Sales, Leases, Traffic Contracts, and Consolidation.

A. Sales — 1. Right to Sell or Purchase. A corporation, created for the purpose of constructing, owning, and managing a street railroad, for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of its general franchise to be a corporation,[20] or of its subordinate franchise to manage and carry on its corporate business.[21] A sale and transfer thereof may, however, be authorized by statute.[22] A right of way upon a public street, whether granted by an act of the legislature,

429. But see St. Michael's Protestant Episcopal Church *v.* Forty-Second St., etc., R. Co., 26 Misc. 601, 57 N. Y. Suppl. 881. When the consent of the railroad commissioners and of the owners of property would otherwise be sufficient to authorize a change of motive power by a street railroad company in New York city from horses to electricity, a permit from the board of electrical control is not required. Potter *v.* Collis, 19 N. Y. App. Div. 392, 46 N. Y. Suppl. 471 [*affirmed* in 156 N. Y. 16, 50 N. E. 413]. An order of the board of railroad commissioners granting a street railroad company the right to change its motive power is not reviewable by it, in the absence of any express authority given by the statute. People *v.* State R. Com'rs, 30 N. Y. App. Div. 69, 51 N. Y. Suppl. 781 [*affirmed* in 156 N. Y. 693, 51 N. E. 1093].

16. *In re* Third Ave. R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124 [*reversing* 56 Hun 537, 9 N. Y. Suppl. 833].

17. *In re* Third Ave. R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124 [*reversing* 56 Hun 537, 9 N. Y. Suppl. 833].

18. Chicago Gen. R. Co. *v.* Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734 [*affirming* 87 Ill. App. 17]; Hine *v.* Bay Cities Consol. R. Co., 115 Mich. 204, 73 N. W. 116; Potter *v.* Scranton Traction Co., 176 Pa. St. 271, 35 Atl. 188.

19. Williams *v.* Citizens' R. Co., 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64; Detroit City R. Co. *v.* Mills, 85 Mich. 634, 48 N. W. 1007.

20. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

21. French *v.* Jones, 191 Mass. 522, 78 N. E. 118, 7 L. R. A. N. S. 525; Clemens Electric Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820 (holding that the company has no more right to sell its rails for the purpose of removal, with the intent that its road shall be abandoned, than it has to sell them to be kept where they are, and to be used along with the franchise by the buyer); Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47.

In Massachusetts the earliest statute upon this subject provided that "no street railway corporation shall sell or lease its road or property unless authorized so to do by its charter, or by special act of the Legislature." St. (1864) p. 161, c. 229, § 24. And any alienation either in fee or for the period of its corporate existence or for any less term of substantially all its real and personal property, so as to disable it from carrying on the business which it had been chartered to do for the benefit of the public, is clearly within the terms and meaning of the prohibition. French *v.* Jones, 191 Mass. 522, 78 N. E. 118, 7 L. R. A. N. S. 525; Richardson *v.* Sibley, 11 Allen 65, 87 Am. Dec. 700. And subject to certain limitations the same prohibition has since remained in force (Pub. St. c. 113, § 56; St. (1897) p. 241, c. 269; Rev. Laws, c. 112, § 85 *et seq.*), except that in 1900 power was given to the receiver of a street railroad company to make a sale of its road, property, locations, and franchises (St. (1900) p. 322, c. 381; Rev. Laws, c. 112, §§ 12, 13, 14). See French *v.* Jones, *supra*.

Who may question power of sale.—Whether the grantee of a street railroad franchise may assign a portion thereof is a question which concerns the public alone, and cannot be raised in an action by a rival corporation for an injunction. Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 3 Am. Rep. 181.

22. Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47.

In California, under Civ. Code, §§ 494, 510, 511, a street railroad franchise may be transferred, whether held by a corporation or

or an ordinance of the municipal council, or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale, and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts.[23] Likewise the rails of a street railroad company imbedded in the streets of a city remain personal property, and are subject to disposition as such.[24]

2. Property and Rights Included. The property and rights included under a sale of street railroad property is to be determined from the terms of the conveyance, subject to any statutory provisions affecting the sale.[25] A covenant of warranty will not be implied from a mere recital.[26]

3. Rights and Liabilities of Purchasers. A street railroad company purchasing the property of another company assumes all the charter obligations and public duties resting upon its vendor,[27] and is bound by all the statutory and charter limitations or restrictions of the original grant,[28] although it does not expressly assume them.[29] But these liabilities and obligations do not remain after the rights and privileges have been passed on to another.[30] The purchaser is not, in the absence of an agreement to that effect, liable for the debts, contracts, or personal obligations of the vendor,[31] which were not liens at the time of the

natural person, and no formal or express consent of the state is necessary. O'Sullivan *v.* Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323.

In Wisconsin such authority has been granted by Laws (1883), c. 221, as amended by Laws (1891), c. 127. Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47.

23. State *v.* Citizens' St. R. Co., 80 Nebr. 357, 114 N. W. 429; Knoxville *v.* Africa, 77 Fed. 501, 23 C. C. A. 252; Detroit *v.* Detroit City R. Co., 64 Fed. 628, 12 C. C. A. 365.

24. French *v.* Jones, 191 Mass. 522, 78 N. E. 118, 7 L. R. A. N. S. 525; Lorain Steel Co. *v.* Norfolk, etc., St. R. Co., 187 Mass. 500, 73 N. E. 646.

25. See cases cited *infra*, this note.

Particular conveyances construed.—Where plaintiff transferred to defendant by deed all of his interest in certain franchises for the building of a street railroad, which had been granted to him, the deed containing no covenants of title or seizin, and no fraud or mistake was alleged in making the sale, it was held that the deed transferred, not merely the paper under which plaintiff claimed, but was a transfer of an interest in real property, and amounted to a quitclaim deed. O'Sullivan *v.* Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323. Under a contract transferring "all the property, rights, and assets" of a street railroad company a contract right to have certain rotary motors installed, and to acquire title as a result of such installation, passes. Hogan *v.* Detroit United R. Co., 148 Mich. 283, 111 N. W. 765.

26. O'Sullivan *v.* Griffith, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323, holding that where plaintiff transferred to defendant certain franchises for a street railroad, the conveyance reciting that the franchise was "duly given" by the city council, such recital was merely a description of the thing granted; and, while it might constitute an estoppel against the grantors, it did not amount to an express agreement or covenant that plaintiff had good title to the franchise conveyed.

27. *California.*— Reynolds *v.* Pacific Electric R. Co., 146 Cal. 261, 80 Pac. 77.

Kansas.— Potwin Place *v.* Topeka R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312, stated car service.

Michigan.— Grosse Pointe Tp. *v.* Detroit, etc., R. Co., 130 Mich. 363, 90 N. W. 42.

New York.— Kent *v.* Binghamton, 40 Misc. 1, 81 N. Y. Suppl. 198 [*reversed* on other grounds in 90 N. Y. App. Div. 553, 86 N. Y. Suppl. 411], holding that where a street railroad company, under its charter, is liable to pay only one fifth of the cost of pavement, but does not act under such charter, and thereafter purchases the franchise of a street railroad company, which by its charter is bound to pave between its tracks and for two feet on either side of them, the purchasing company is bound, as to the paving, by the provisions in the charter of the company which it purchases, and not by the provisions of its original charter, the powers of which it has never attempted to exercise.

Texas.— Citizens' R., etc., Co. *v.* Johns, (Civ. App. 1908) 116 S. W. 62.

See 44 Cent. Dig. tit. "Street Railroads," § 124.

Liability of vendor after sale.—A street railroad company which has sold its road to another company cannot be compelled by mandamus to comply with the terms of its franchise. Grosse Pointe Tp. *v.* Detroit, etc., R. Co., 130 Mich. 363, 90 N. W. 42.

28. Snouffer *v.* Cedar Rapids, etc., R. Co., 118 Iowa 287, 92 N. W. 79; Cincinnati Inclined Plane R. Co. *v.* Cincinnati, 52 Ohio St. 609, 44 N. E. 327; Cincinnati *v.* Cincinnati Incline Plane R. Co., 4 Ohio S. & C. Pl. Dec. 507, 30 Cinc. L. Bul. 321.

29. Asbury Park, etc., R. Co. *v.* Neptune Tp., 73 N. J. Eq. 323, 67 Atl. 790.

30. Reynolds *v.* Pacific Electric R. Co., 146 Cal. 261, 80 Pac. 77.

31. Wallace *v.* Ann Arbor, etc., R. Co., 121

transfer,[32] or which did not attach to the fee of the land.[33] Nor does a contract exemption from paving obligations enjoyed by the vendor pass to the purchasing company.[34] The rights and privileges of the vendor are sometimes conferred upon the purchaser by statute or ordinance,[35] in consideration of which the purchaser assumes all the obligations and duties resting upon the vendor.[36]

B. Leases — 1. Right to Make or Take Lease. A lease of all its franchises and assets by a street railroad company, thereby disabling it to serve the public, is void, unless authorized by statute;[37] and such authority will not be implied

Mich. 588, 80 N. W. 572 (no obligation to honor passes); Dallas Consol. Traction R. Co. *v.* Maddox, (Tex. Civ. App. 1895) 31 S. W. 702 (no obligation to honor passes); Chicago, etc., R. Co. *v.* Fox River Electric R., etc., Co., 119 Wis. 181, 96 N. W. 541.

32. Hageman *v.* Southern Electric R. Co., 202 Mo. 249, 100 S. W. 1081.

33. Canal, etc., R. Co. *v.* Orleans R. Co., 44 La. Ann. 54, 10 So. 389; Wallace *v.* Ann Arbor, etc., R. Co., 121 Mich. 588, 80 N. W. 572; Chicago, etc., R. Co. *v.* Fox River Electric R., etc., Co., 119 Wis. 181, 96 N. W. 541, holding that an obligation to pay a flagman's wages does not attach to the fee of the land at the crossing over which the street railroad is constructed, so as to impose the burden thereof on the purchaser thereof.

34. Rochester R. Co. *v.* Rochester, 205 U. S. 236, 27 S. Ct. 469, 51 L. ed. 784 [*affirming* 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773].

35. Brinkerhoff *v.* Newark, etc., Traction Co., 66 N. J. L. 478, 49 Atl. 812, holding that under Act (1897) (Pamphl. Laws 229), concerning the sale of the property and franchises of corporations, and providing that the new corporations shall have the rights of the corporation whose property and franchises have been sold and conveyed thereunder, the right to take lands by condemnation and to extend existing street railroad lines passes by the sale to the new corporation.

36. Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770, holding that in such case it cannot be shown by parol that a part of the consideration of granting such privileges to the new company was its promise to assume the burdens of an ordinance not assented to by the former company.

37. Middlesex R. Co. *v.* Boston, etc., R. Co., 115 Mass. 347; Moorshead *v.* United R. Co., 119 Mo. App. 541, 96 S. W. 261 [*affirmed* in 203 Mo. 121, 100 S. W. 611]; Ft. Worth St. R. Co. *v.* Allen, (Tex. Civ. App. 1897) 39 S. W. 125, holding that where a street railroad company builds its line on the condition that it will keep the streets in repair, it cannot relieve itself from such liability by leasing its line to another company.

What constitutes lease.—When a statute speaks of a lease of a "road," it means a lease of the entire road or an entire portion of a road, and it does not cover a mere contract for passage of cars over a road of which otherwise the owner remains in possession and control. Chapman *v.* Syracuse Rapid-Transit R. Co., 25 Misc. (N. Y.) 626, 56 N. Y. Suppl. 250.

In New Jersey the act of March 14, 1893 (Gen. Pub. Laws (1893), c. 172), confers power on one of two corporations organized thereunder to lease its property to the other. Dickinson *v.* Consolidated Traction Co., 114 Fed. 232.

In Pennsylvania street railroad companies have power to make leases of their franchises, to traction, cable or electrical passenger railroad companies. Smith *v.* Reading Pass. R. Co., 2 Pa. Dist. 490. Such power is granted by necessary implication by the eighth clause of section 1 of the act of March 22, 1887 (Pamphl. Laws 8), which authorizes traction companies to lease the property and franchises of passenger railroad companies which they may desire to operate. Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763; O'Neill *v.* Hestonville, etc., Pass. R. Co., 9 Pa. Dist. 2; Smith *v.* Reading Pass. R. Co., 2 Pa. Dist. 490. The power to take a lease is expressly given to motor companies and the corresponding power in the passenger railroad companies as owners to give a lease is necessarily implied. Without it the grant in the act would be nugatory. Pinkerton *v.* Pennsylvania Traction Co., *supra*; Smith *v.* Reading Pass. R. Co., *supra*. The laws authorizing leases by street railroad companies are comprehensive enough to cover and include all such companies without regard to the motor power used by them. O'Neill *v.* Hestonville, etc., Pass. R. Co., *supra*. Nor are such companies restricted to the leasing of passenger railroads situated in boroughs and cities exclusively. Philadelphia, etc., Turnpike Co. *v.* Philadelphia, etc., R. Co., 5 Pa. Dist. 305.

Connected lines.—Pa. Acts (1861) (Pamphl. Laws 410) and (1870) (Pamphl. Laws 31) apply to street railroads, but they permit the leasing of franchises only if the roads of the companies so contracting or leasing are connected with each other, either directly or by means of intervening lines. Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763; Hestonville R. Co. *v.* Philadelphia, 89 Pa. St. 210; Smith *v.* Reading Pass. R. Co., 2 Pa. Dist. 490. The mere fact that the cars of neither road can run over the other road, and that passengers desiring to ride over both roads must change cars, does not prevent them from being "connected." Hampe *v.* Pittsburg, etc., Traction Co., 165 Pa. St. 468, 30 Atl. 931. Where one of the companies is not the owner of a railroad, either as having built or equipped it, or as having the right to operate it, these

from any general power connected with the object for which the company was created.[38]

2. Validity — a. In General. Power given to a street railroad corporation by its charter, or by the general act under which it is incorporated, to lease its property and franchises, enters into the agreement between its stock-holders;[39] and, where no particular mode of exercising such power is prescribed, it may be exercised in the same manner as other general powers of the corporation, by the vote of a majority of the stock-holders, or by the board of directors.[40]

b. Who May Question Validity. Whether a street railroad company exceeded its lawful authority by entering into a lease is a question of excessive exercise of power by a corporation, for which it is amenable to the commonwealth;[41] but not to a private suitor or another corporation, unless such suitor has sustained a private injury, or such corporation has had its rights and franchises invaded.[42]

3. Rights and Liabilities of Lessor and Lessee. Street railroad companies accepting the provisions of statutes permitting them to enter into contracts for leasing lines to other companies, as authorized thereby, are bound to assume the duties and obligations imposed by the statutes as a consideration for the privilege.[43] It is likewise true, as a general rule, that when one company leases its road to another, the lessee must, in operating it, be governed by the charter of the lessor, and must assume all liabilities imposed thereby,[44] although the lease is silent

acts do not apply. Smith v. Reading City Pass. R. Co., 2 Pa. Dist. 490, 13 Pa. Co. Ct. 49.

Parallel or competing lines.— Pa. Const. art. 17, providing that a "parallel or competing line" cannot lease or operate another with which it is "parallel or competing," applies to steam railroads, and not to street railroads. Shipley v. Continental R. Co., 13 Phila. (Pa.) 128.

Municipal assent.— Mo. Const. art. 12, § 20, forbids the lease of a street railroad franchise without the consent of the municipality. A municipal ordinance authorizing such a lease sufficiently shows consent. Gilroy v. United R. Co., 125 Mo. App. 19, 102 S. W. 1197; Burleigh v. United R. Co., 124 Mo. App. 708, 102 S. W. 624; Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261 [*affirmed* in 203 Mo. 121, 100 S. W. 611]. It must be presumed in the absence of evidence to the contrary that the required municipal assent to such a lease was obtained. Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249.

38. Dickinson v. Consolidated Traction Co., 114 Fed. 232.

39. Dickinson v. Consolidated Traction Co., 114 Fed. 232.

40. Dickinson v. Consolidated Traction Co., 114 Fed. 232.

Unanimous consent is not requisite to a valid lease of a street railroad company unless its charter so provides; the votes of a majority of the shares is all that is required. O'Neill v. Hestonville, etc., Pass. R. Co., 9 Pa. Dist. 2.

Rights of minority stock-holders.—Where a corporation is authorized by the law under which it is created to lease all of its property and franchises, the making of such a lease does not deprive a dissenting stockholder of his property without due process of law, since the exercise of such power by a majority is one of the implied conditions under which he became a stock-holder. Dickinson v. Consolidated Traction Co., 114 Fed. 232. The execution of a lease by a street railroad company to another for ninety-nine years at a rental of seven per cent on the valuation of the property is not a fraud on the minority stock-holders, in that it limits the annual dividends, no matter how great the earnings and the profits of the system may become. Wormser v. Metropolitan St. R. Co., 73 N. Y. App. Div. 626, 76 N. Y. Suppl. 1038 [*affirming* 37 Misc. 615, 76 N. Y. Suppl. 151]. Where the guaranteed rental does not appear to be inadequate, the lease is not a fraud on the minority stock-holders. Wormser v. Metropolitan St. R. Co., *supra*.

Presumption of good faith in making lease. — The directors of a street railroad company, in the absence of proof to the contrary, will be presumed to have acted in good faith in leasing the railroad to another such company. Wormser v. Metropolitan St. R. Co., 73 N. Y. App. Div. 626, 76 N. Y. Suppl. 1038 [*affirming* 37 Misc. 615, 76 N. Y. Suppl. 151].

41. Minersville v. Schuylkill Electric R. Co., 205 Pa. St. 402, 54 Atl. 1053.

42. Minersville v. Schuylkill Electric R. Co., 205 Pa. St. 402, 54 Atl. 1053.

43. O'Reilly v. Brooklyn Heights R. Co., 179 N. Y. 450, 72 N. E. 517.

44. Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 65 N. E. 451; Chicago v. Evans, 24 Ill. 52; New York v. Twenty-Third St. R. Co., 113 N. Y. 311, 21 N. E. 60.

Existing debts and liabilities.—Where a street railroad company leases the line of another company subject to all the debts and liabilities of the first company, the lessee is not liable for license-fees accruing and payable by the lessor prior to the lease. New York v. Third Ave. R. Co., 77 N. Y. App. Div. 379, 79 N. Y. Suppl. 481.

in regard thereto,[45] and although there is no statutory provision for such liability.[46] But this can only be true where the lessee company, in operating the road in accordance with the charter of the lessor, is not violating its own charter.[47] Conversely the lessee has the rights and privileges of the lessor under the charter,[48] and under any contract between the lessor and the municipality in pursuance of the charter;[49] and among these is necessarily the right to occupy such streets and lay all such tracks as the leased company is possessed of,[50] even though at the time of the lease the lessor's corporate existence has ceased by the limitations of its charter.[51] But the lessee can have no greater rights than the lessor had.[52]

C. Traffic Contracts — 1. Right to Make Contracts. A street railroad company cannot, without express legislative sanction, relieve itself from its duties to the public or its obligation to operate its franchise and exercise its powers for the public benefit.[53] But in some states the course of legislation shows a policy to promote, and to some extent to compel, agreements for joint operation of their roads between companies whose roads have been connected or united.[54]

Duty to construct extension.—A lessee succeeding to the rights and franchises of a street railroad company takes the same burdened with the obligations of its lessor to complete the construction of an extension begun by it, and put the same in operation. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942.

45. New York *v.* Twenty-Third St. R. Co., 113 N. Y. 311, 21 N. E. 60.

46. New York *v.* Twenty-Third St. R. Co., 113 N. Y. 311, 21 N. E. 60.

47. Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631, holding that as the operation of the leased lines by the lessee, in accordance with the provisions of the lessors' charters restricting the power of the city to regulate rates of fare, would be a violation of its own charter that it should be subject to regulation by the general assembly, and hence, also, by the city under the power delegated in its charter, the lessee was estopped from insisting on the right to operate the leased lines under the lessors' charters.

48. Reeves *v.* Philadelphia Traction Co., 152 Pa. St. 153, 25 Atl. 516; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 763; Wilkes-Barre *v.* Coalville Pass. R. Co., 8 Kulp (Pa.) 298, holding that a lease, by a street railroad company, of its road and franchises, gives to the lessee the right held by the company under its charter to build switches and turnouts necessary to the operation of the road.

49. Conshohocken *v.* Conshohocken R. Co., 206 Pa. St. 75, 55 Atl. 855; Wilkes-Barre *v.* Coalville Pass. R. Co., 8 Kulp (Pa.) 298.

50. Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. Rep. 163.

51. Jersey City *v.* North Jersey St. R. Co., 73 N. J. L. 175, 63 Atl. 906.

52. Port Richmond, etc., Electric R. Co. *v.* Staten Island Rapid Transit R. Co., 144 N. Y. 445, 39 N. E. 392, holding that where a company authorized to operate a street surface railroad is permitted to lay its tracks across those of a steam railroad at grade, it cannot, by a lease thereof, confer upon a company operating an electric trolley system any right to interfere, in running its wires, with the operation of such steam railroad company's gate at such crossing.

53. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., (Del. 1900) 46 Atl. 12; Prospect Park, etc., R. Co. *v.* Brooklyn, etc., R. Co., 84 Hun (N. Y.) 516, 32 N. Y. Suppl. 857.

54. See cases cited *infra*, this note.

In New York the uniform course of legislation in reference to street railroads shows a policy on the part of the state to facilitate arrangements for the connection of continuous lines, and the transfer of passengers from one road to another, with the view of giving the longest service possible to the public without increase of fare. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255; Brooklyn El. R. Co. *v.* Brooklyn, etc., R. Co., 23 N. Y. App. Div. 29, 48 N. Y. Suppl. 665; Prospect Park, etc., R. Co. *v.* Brooklyn, etc., R. Co., 84 Hun 516, 32 N. Y. Suppl. 857.

Applicability of general laws to street railroads.— Ordinarily laws authorizing railroads to contract for the use of their respective tracks, etc., is applicable to street surface roads as well as to steam railroads. Chicago *v.* Evans, 24 Ill. 52; Roddy *v.* Brooklyn City, etc., R. Co., 32 N. Y. App. Div. 311, 52 N. Y. Suppl. 1025 [*affirming* 23 Misc. 373, 52 N. Y. Suppl. 885].

Vested rights conferred by such statutes.— Such a statute confers a property right, free from the necessity of any consent of a municipality or of property-owners, which cannot thereafter be taken away or impaired, either by legislative enactments or constitutional change, except in the proper exercise of the right of eminent domain or the police power. Roddy *v.* Brooklyn City, etc., R. Co., 32 N. Y. App. Div. 311, 52 N. Y. Suppl. 1025. And see Ingersoll *v.* Nassau Electric R. Co., 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236 [*affirming* 89 Hun 213, 34 N. Y. Suppl. 1044]. But a grant to a street railroad company to operate its own lines on streets, subject to conditions and regulations, does not carry with it the right of the company obtaining such franchise to permit other companies to use its tracks without

While traffic contracts which tend to create a monopoly,[55] or restrain corporate functions,[56] are against public policy it is otherwise where the contract will apparently benefit the public.[57]

2. Nature of Contract. A contract between two such companies conferring on each the right to run its cars over the tracks of the other, each retaining absolute control over its road for all other purposes, is a mere license, and not a lease;[58] and confers no interest which can be assigned or leased.[59]

3. Construction and Operation. In construing traffic contracts the rules applicable to the construction of contracts generally apply.[60]

4. Rights, Liabilities, and Remedies. When street railroad companies make traffic agreements with each other, they acquire no new or greater powers and privileges than are conferred by their several charters,[61] and each of such roads, while

municipal consent and against municipal protest. Erie *v.* Erie Traction Co., 222 Pa. St. 43, 70 Atl. 904.

Parallel lines.—A statute forbidding any street railroad company from leasing its rights and franchises to any other company owning and operating a parallel road does not preclude such companies from making traffic contracts for the partial use of their respective roads beyond the line of parallelism. People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255.

55. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 46 Atl. 12; South Chicago City R. Co. *v.* Calumet Electric St. R. Co., 171 Ill. 391, 49 N. E. 576 [*affirming* 70 Ill. App. 254].

56. South Chicago City R. Co. *v.* Calumet Electric St. R. Co., 171 Ill. 391, 49 N. E. 576 [*affirming* 70 Ill. App. 254].

57. State Trust Co. *v.* State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520; Brooklyn El. R. Co. *v.* Brooklyn, etc., R. Co., 23 N. Y. App. Div. 29, 48 N. Y. Suppl. 665; Prospect Park, etc., R. Co. *v.* Brooklyn, etc., R. Co., 84 Hun (N. Y.) 516, 32 N. Y. Suppl. 857; Hannum *v.* Media, etc., Electric R. Co., 221 Pa. St. 454, 70 Atl. 847.

Even if the effect of such contract is to cause the abandonment of a portion of the road of one company, that does not render the agreement illegal or against public policy if no detriment to the public results therefrom. Prospect Park, etc., R. Co. *v.* Brooklyn, etc., R. Co., 84 Hun (N. Y.) 516, 32 N. Y. Suppl. 857.

Contracts held valid.—A street railroad company may properly enter into a contract with another company for the interchangeable use of the tracks of the two companies (Jourdan *v.* Long Island R. Co., 6 N. Y. St. 89 [*affirmed* in 115 N. Y. 380, 22 N. E. 153]), to fix the remuneration to be paid for the use of each other's tracks (Canal, etc., R. Co. *v.* St. Charles St. R. Co., 44 La. Ann. 1069, 11 So. 702; Canal, etc., R. Co. *v.* Orleans R. Co., 44 La. Ann. 54, 10 So. 389), and to connect their tracks at a certain point, and establish "a joint railway depot and terminus" at the terminus of a third railroad (Prospect Park, etc., R. Co. *v.* Brooklyn, etc., R. Co., 84 Hun (N. Y.) 516, 32 N. Y. Suppl. 857). Although only such vehicles may be used upon street railroad tracks as their special charters or the general laws under which they are organized permit, a traffic agreement whereby one company operates cars of another company of the same kind as those the first company is entitled to use over its lines is valid. State *v.* Atlantic City, etc., R. Co., 76 N. J. L. 15, 69 Atl. 468.

Validity question for court.—The validity of an oral contract between two railroad companies, providing for the use of each other's tracks, etc., is for the court, and not for the jury. Looney *v.* Metropolitan R. Co., 24 App. Cas. (D. C.) 510 [*affirmed* in 200 U. S. 480, 26 S. Ct. 303, 50 L. ed. 564].

58. Coney Island, etc., R. Co. *v.* Brooklyn Cable Co., 53 Hun (N. Y.) 169, 6 N. Y. Suppl. 108.

59. Coney Island, etc., R. Co. *v.* Brooklyn Cable Co., 53 Hun (N. Y.) 169, 6 N. Y. Suppl. 108; Brooklyn Crosstown R. Co. *v.* Brooklyn City R. Co., 51 Hun (N. Y.) 600, 3 N. Y. Suppl. 901.

60. See Contracts, 9 Cyc. 577. And see Atlanta R., etc., Co. *v.* Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12 (construing the right of one party to a traffic contract to intersect and connect with the line of the other party at a point between the limits named in the contract); Schenectady R. Co. *v.* United Traction Co., 101 N. Y. App. Div. 277, 91 N. Y. Suppl. 651 (construing the right of one street railroad company to run cars of a particular type over the lines of another company); Coney Island, etc., R. Co. *v.* Coney Island, etc., R. Co., 38 N. Y. App. Div. 494, 56 N. Y. Suppl. 508 (construing the right of a street railroad company under an agreement with another company that the two should construct a double track, to be used jointly by them, to operate the cars of a leased line over the double track); Prospect Park, etc., R. Co. *v.* Brooklyn, etc., R. Co., 84 Hun (N. Y.) 516, 32 N. Y. Suppl. 857 (construing an agreement between two stree. railroad companies "to erect, establish and maintain . . . a joint railway depot and terminus"), Toledo, etc., R. Co. *v.* Toledo Traction Co., 17 Ohio Cir. Ct. 22, 9 Ohio Cir. Dec. 828 (construing the right of a street railroad company, under a contract with another street railroad company, to run cars of a third company over the tracks of the second company).

61. Chicago *v.* Evans, 24 Ill. 52.

using the road of the other company, must, in all things, conform to the provisions of the charter of the company whose road is being thus used.[62] Either party to the contract is entitled to an injunction to restrain a violation thereof,[63] and also to damages.[64] While in the exercise and enjoyment of the rights conveyed by the contract, neither party can plead that the contract is *ultra vires*.[65]

5. Termination. It is competent for the parties to agree upon any period as the duration of their contract,[66] and they may, if they choose to do so, provide that it shall cease upon the passage of even an unconstitutional law.[67]

D. Consolidation — 1. Right to Consolidate. Street railroad companies may not combine with each other, or be amalgamated, or consolidated, or be merged one into another, except by express authority of statute.[68] Ordinarily the right to consolidate is limited to existing companies having railroads constructed and in operation;[69] but the fact that one of the constituent companies does not possess this qualification will not prevent the consolidated company from being a *de facto* corporation.[70] A prohibition against the consolidation of parallel or competing railroads has been held not to apply to street railroad companies.[71]

62. Chicago *v.* Evans, 24 Ill. 52.

63. Schenectady R. Co. *v.* United Traction Co., 101 N. Y. App. Div. 277, 91 N. Y. Suppl. 651; Brooklyn El. R. Co. *v.* Brooklyn, etc., R. Co., 23 N. Y. App. Div. 29, 48 N. Y. Suppl. 665; Chapman *v.* Syracuse Rapid Transit R. Co., 25 Misc. (N. Y.) 626, 56 N. Y. Suppl. 250.

Failure to pay compensation under a contract for the use of a street railroad does not authorize interference with the use. Chapman *v.* Syracuse Rapid Transit R. Co., 25 Misc. (N. Y.) 626, 56 N. Y. Suppl. 250.

64. Brooklyn El. R. Co. *v.* Brooklyn, etc., R. Co., 23 N. Y. App. Div. 29, 48 N. Y. Suppl. 665, holding that, although the difficulty of proving the damages resulting from a breach of a contract is no reason why a recovery should be denied, there must nevertheless be reasonable support in the evidence given and in the inferences to be derived from it, for the amount awarded.

65. Canal, etc., R. Co. *v.* St. Charles St. R. Co., 44 La. Ann. 1069, 11 So. 702.

66. Canal, etc., R. Co. *v.* St. Charles St. R. Co., 44 La. Ann. 1069, 11 So. 702; Buffalo East Side R. Co. *v.* Buffalo St. R. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284.

67. Buffalo East Side R. Co. *v.* Buffalo St. R. Co., 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284.

68. Capital Traction Co. *v.* Offutt, 17 App. Cas. (D. C.) 292, 53 L. R. A. 390.

In California, it is held that Civ. Code, § 473, authorizing consolidation of railroad corporations, applies to street railroads. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

In New York, Laws (1869), c. 917, authorizing the consolidation of "certain railroad companies," by section 7 expressly excluded street railroads. But Laws (1875), c. 108, entitled, "An act in relation to railroad corporations," and Laws (1883), c. 387, amending Laws (1875), c. 108, authorize the consolidation of street railroad companies. *In re* Washington St. Asylum, etc., R. Co., 115 N. Y. 442, 22 N. E. 356 [*affirming* 52 Hun 311, 5 N. Y. Suppl. 355].

In Pennsylvania the act of 1861 (Pamphl. Laws (1861) 702), which authorized any railroad company chartered by the commonwealth to merge into any other railroad company so chartered, has no application to street passenger railroad companies. Philadelphia *v.* Thirteenth St., etc., Pass. R. Co., 8 Phila. 648.

Notice of consolidation.— See Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

Who may object to consolidation.— The legality of a consolidation between two or more street railroad companies cannot be collaterally attacked, but must be dealt with in an action brought for that purpose. Adee *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113].

69. Philadelphia *v.* Thirteenth St., etc., Pass. R. Co., 8 Phila. (Pa.) 648.

70. Cleveland, etc., R. Co. *v.* Feight, 41 Ind. App. 416, 84 N. E. 15.

N. Y. Laws (1892), c. 340, authorizing an existing railroad company to consolidate its capital stock and property with the capital stock of surface railroad companies incorporated or to be hereafter incorporated for the purpose of building or operating any street surface railroad, authorizes the consolidation of such company with other street railroad companies which were incorporated, and had a capital stock and property and possessed a franchise for the building of certain lines, although they had not constructed, or entered upon the construction of, their line. Bohmer *v.* Haffen, 161 N. Y. 390, 55 N. E. 1047 [*affirming* 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030].

71. Montgomery's Appeal, 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369; Scott *v.* Farmers', etc., Nat. Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

Street railroads, although parallel, cannot be "competing" in the sense of the mischief intended to be prevented, and the prohibition does not apply to them. Montgomery's Appeal, 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369.

2. Effect of Consolidation. Ordinarily the consolidated company by operation of law assumes all the burdens and obligations of the constituent companies,[72] and correspondingly succeeds to all benefits, rights, and privileges,[73] subject to the original conditions and limitations;[74] and the statutes under which consolidation is effected usually so provide.[75] Nor does it matter whether the corporation is *de jure* or *de facto*.[76] The outstanding liabilities of the constituent companies cannot be transferred to the new company without the consent of the creditors of such companies;[77] but where the consolidated company has assumed the liabilities of the several constituent companies, although the creditors are not compelled to have recourse to the new company, they may elect to do so and recover.[78] Existing liens are not affected by consolidation.[79]

IX. Bonds, Liens, Mortgages, and Receivers.

A. Bonds. In the absence of particular statutory or charter provisions, the issuance and validity of street railroad bonds, and the rights and liabilities of holders thereof, are governed by the rules applicable to corporate bonds generally.[80] Before a legal issue of street railroad bonds can be made, all the charter, statutory, and constitutional requirements in respect thereto must be complied with.[81]

72. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444, 22 Atl. 695.

Purchase not consolidation.—When no consolidation is intended or sought to be effected, the mere purchase by one corporation of the property and franchises of another corporation under authority of law, and the succession of the purchaser corporation to the exercise of the franchise held by the vendor corporation, cannot be held to operate as a consolidation of the two companies, or to charge the purchaser company with the liabilities of its predecessor in the franchise. Capital Traction Co. *v.* Offutt, 17 App. Cas. (D. C.) 292, 53 L. R. A. 390.

73. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802; *In re* Trenton St. R. Co., (N. J. Ch. 1900) 47 Atl. 819; Wilbur *v.* Trenton Pass. R. Co., 57 N. J. L. 212, 31 Atl. 238; Adce *v.* Nassau Electric R. Co., 65 N. Y. App. Div. 529, 72 N. Y. Suppl. 992 [*affirmed* in 173 N. Y. 580, 65 N. E. 1113].

74. Consolidated Traction Co. *v.* Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A 170; Wilbur *v.* Trenton Pass. R. Co., 57 N. J. L. 212, 31 Atl. 238.

75. Birmingham R., etc., Co. *v.* Cunningham, 141 Ala. 470, 37 So. 689; Cleveland, etc., R. Co. *v.* Feight, 41 Ind. App. 416, 84 N. E. 15; Bohmer *v.* Haffen, 161 N. Y. 390, 55 N. E. 1047 [*affirming* 35 N. Y. App. Div. 381, 54 N. Y. Suppl. 1030]; Kent *v.* Binghamton, 61 N. Y. App. Div. 323, 70 N. Y. Suppl. 465; Africa *v.* Knoxville, 70 Fed. 729.

76. Cleveland, etc., R. Co. *v.* Feight, 41 Ind. App. 416, 84 N. E. 15; *In re* Trenton St. R. Co., (N. J. Ch. 1900) 47 Atl. 819.

77. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225, holding that while a creditor may not prevent a consolidation of corporations, he may insist that the property of the debtor corporation remain subject to his demands, and that its stock-holders shall be answerable to him to the extent of their statutory liability.

The effect of the exercise of such a power would be to impair the obligation of contracts, and therefore it cannot be conferred by the legislature. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

78. Market St. R. Co. *v.* Hellman, 109 Cal. 571, 42 Pac. 225.

79. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802, holding that liens arising by reason of assessments against the different constituent companies and properties attach to the new property owned and operated by the substituted company as one property, in its entirety, and may be enforced by the sale of the property without dismembering and separating it into fractional properties as it existed before consolidation.

Priority of liens.—As between conflicting equities and lien-holders, the rule is settled that the liens follow the property into the consolidated company, and one cannot take precedence, by reason of such consolidation, over other liens already existing. Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

80. See Corporations, 10 Cyc. 1167 *et seq.*; Railroads, 33 Cyc. 444 *et seq.*

81. See cases cited *infra*, this note.

In California, under Civ. Code, § 456, the directors may prescribe reasonable regulations which shall govern the proposed bond issue, but before the issue can be legally made the assent of the required number of stockholders thereto must be had in compliance with the mode laid down in section 359. Boyd *v.* Heron, 125 Cal. 453, 58 Pac. 64.

In Wisconsin, Rev. St. § 1753, provides that no corporation shall issue bonds for less than seventy-five per cent of their par value, "and all . . bonds issued contrary to the provisions of this section . . . shall be void." It was held that bonds issued and hypothecated by a street railroad company as col-

Bonds illegally issued are void, except in the hands of *bona fide* purchasers without notice;[82] but the company may be estopped by its conduct to deny the validity thereof.[83] Although completely executed in due form to be used as security, such bonds acquire no validity before delivery.[84] They are ordinarily negotiable,[85] and, as between *bona fide* purchasers thereof for value, are equal in priority.[86] Ordinarily no scheme of reorganization can be entered into by the trustee named in the mortgage securing the bonds which will prejudicially affect the rights of bondholders, without their assent.[87]

B. Liens. As a rule general mechanics' lien laws do not apply to street railroads.[88] Whether a statute giving a lien on "railroads" in certain cases does or does not include street railroads depends upon the purpose and intention of the statute.[89] When applicable to street railroads, the lien is usually confined to laborers and employees,[90] and persons furnishing necessary supplies.[91]

lateral for a loan without stipulation that they should be accounted for at not less than seventy-five per cent of their par value were void. Pfister *v.* Milwaukee Electric R. Co., 83 Wis. 86, 53 N. W. 27.

Applicability of general laws to street railroads.—A statute relating to the issue of bonds by railroad corporations is applicable to street railroad companies, unless the contrary is indicated on its face. Cheetham *v.* Atty.-Gen., 38 Wkly. Notes Cas. (Pa.) 124.

Strict compliance necessary.— Statutes regulating the issue of street railroad bonds embody a rule of public policy which cannot be ignored or overridden by the courts. Augusta Trust Co. *v.* Federal Trust Co., 153 Fed. 157, 82 C. C. A. 309.

Presumption of proper exercise of authority.— In the absence of anything to raise a presumption to the contrary, it will be presumed that the authority to issue bonds has been properly exercised. Geddes *v.* Toronto St. R. Co., 14 U. C. C. P. 513.

82. Vanderveer *v.* Asbury Park, etc., St. R. Co., 82 Fed. 355, holding that where such bonds are held by *bona fide* purchasers without notice, they constitute a valid claim against the property in the hands of a receiver, for the amount actually received therefor by the company.

83. Wells *v.* Northern Trust Co., 195 Ill. 288, 63 N. E. 136 [*affirming* 90 Ill. App. 460].

84. Zimmermann *v.* Timmermann, 193 N. Y. 486, 86 N. E. 540 [*reversing* 120 N. Y. App. Div. 218, 105 N. Y. Suppl. 443].

85. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.

86. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766, holding that the lien of each bond dates from the recording of the mortgage that secured it, and not from the time it was issued.

87. Butterfield *v.* Cowing, 112 N. Y. 486, 20 N. E. 369, holding that such assent may be shown either by acquiescing in the consummation of the transaction, or by a positive adoption of it.

88. See cases cited *infra*, this note.

The power-house of a street passenger railroad is not the subject of a mechanic's lien. Christ *v.* Schuylkill Electric R. Co., 9 Pa. Dist. 268, 23 Pa. Co. Ct. 353, 16 Montg. Co. Rep. 93; Oberholtzer *v.* Norristown Pass. R. Co., 16 Pa. Co. Ct. 13.

89. See cases cited *infra*, this note.

Applicable to street railroads.— Montgomery *v.* Allen, 107 Ky. 298, 53 S. W. 813, 21 Ky. L. Rep. 1001; Koken Iron Works *v.* Robertson Ave. R. Co., 141 Mo. 228, 44 S. W. 269; St. Louis Bolt, etc., Co. *v.* Donahoe, 3 Mo. App. 559; New England Engineering Co. *v.* Oakwood St. R. Co., 75 Fed. 162, construing Ohio statute.

Not applicable to street railroads.— Daly Bank, etc., Co. *v.* Great Falls St. R. Co., 32 Mont. 298, 80 Pac. 252; Massillon Bridge Co. *v.* Cambria Iron Co., 59 Ohio St. 179, 52 N. E. 192; Front St. Cable R. Co. *v.* Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693; Central Trust Co. *v.* Warren, 121 Fed. 323, 58 C. C. A. 289 (construing Montana statute); Massachusetts L. & T. Co. *v.* Hamilton, 88 Fed. 588, 32 C. C. A. 46 (construing Montana statute); Pacific Rolling-Mills Co. *v.* James St. Constr. Co., 68 Fed. 966, 16 C. C. A. 68 [*following* Front St. Cable R. Co. *v.* Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693]; Manhattan Trust Co. *v.* Sioux City Cable R. Co., 68 Fed. 82 (construing Iowa statute).

90. See cases cited *infra*, this note.

Contractor.—A statute giving a lien to employees and laborers does not include a contractor. One who lays the track, constructs the overhead line, and strings the feeder wire for an electric railroad at an agreed price per foot or mile is a contractor and not a laborer. Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31.

91. See cases cited *infra*, this note.

Engines for the purpose of generating electricity for propelling cars are "engines necessary to the operation" of an electric railroad, within the meaning of Va. Code (1887), § 2485, giving a prior lien to employees and persons furnishing certain supplies to transportation companies. Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31.

Materials and labor furnished in the erection of car-barns, train sheds, power and boiler houses, depots, and workshops, and rebuilding a hotel, belonging to a railroad company, are not supplies necessary to the operation of such road, within the meaning of Va. Code (1887), § 2485, giving a prior

C. Mortgages — 1. In General. A street railroad corporation has no power to mortgage its franchise, road, or property without legislative authority;[92] and a mortgage by such corporation of substantially all of its property, without such authority, is wholly void.[93] When granted the right by statute, a municipality is without power to abridge the same.[94] The conditions upon, and the limitations within which, the power may be exercised are usually regulated by the statute authorizing the mortgage. Thus the statutes usually limit the purposes,[95] and amount,[96] for which mortgages may be issued by street railroad companies. The property covered by such mortgage depends upon the intention of the parties, as evinced by the description contained in the mortgage, interpreted according to the established rules of construction and aided by extrinsic evidence.[97] Such a mortgage may include after-acquired property,[98] if the terms of the mortgage show an intention to cover such future acquisitions.[99] A mortgagor is free to

lien for necessary supplies to transportation companies. Frick Co. *v.* Norfolk, etc., R. Co., 86 Fed. 725, 32 C. C. A. 31.

Who are materialmen.—As to who is a materialman within the meaning of these statutes depends upon the wording of the particular statute. The Washington statute does not contemplate a lien in favor of him who sells materials to one who in turn sells the same to the owner or his agent. It gives the lien only to him who deals with the owner or his agent, or with a contractor in charge, or with some other person in charge of some part of the improvement for which the materials are to be used. Pacific Rolling-Mills Co. *v.* James St. Constr. Co., 68 Fed. 966, 16 C. C. A. 68.

92. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700; North Side R. Co. *v.* Worthington, (Tex. Civ. App. 1894) 27 S. W. 746.

Retroactive effect of statutory provision. —Nebraska Act (1889), authorizing street railroad companies to borrow money for certain purposes, and secure the payment of the same by mortgaging their property and franchises, applies to all street railroad companies in this state, whether chartered before or after the passage of that act. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.

Execution of mortgage as release of mortgagor from liability.— The execution of a mortgage by a street railroad company in due course of business, while the company is solvent, does not constitute a violation of a constitutional provision prohibiting the alienation of any franchise so as to release or relieve the same or property held thereunder from any of the liabilities of the grantor incurred in the operation or enjoyment of the franchise, although such mortgage on the subsequent insolvency of the company might operate to prevent the payment of a judgment for injuries subsequently recovered. Central Trust Co. *v.* Warren, 121 Fed. 323, 58 C. C. A. 289.

93. Richardson *v.* Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

94. Wells *v.* Northern Trust Co., 195 Ill. 288, 63 N. E. 136 [*affirming* 90 Ill. App. 460].

95. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.

96. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766, holding also that where it is claimed that a mortgage executed by a street railroad company is for an amount in excess of that permitted by law and its charter, such alleged fact must be proven, so that an examination of the record will disclose it; otherwise, it will be presumed that the mortgage was not for an excessive amount.

Fictitious indebtedness.—Where a street railroad company mortgaged its property and franchises to secure the sum of six hundred thousand dollars for the purpose of purchasing, constructing, and equipping its lines of electric street railroad, and it is shown that it expended for that purpose about nine hundred thousand dollars, it cannot be said that the mortgage was given to create a fictitious indebtedness. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 469, 93 N. W. 766.

97. See, generally, Mortgages, 27 Cyc. 1137 *et seq.*; Railroads, 33 Cyc. 493 *et seq.*

Particular instruments construed.—A mortgage given by a street car company of certain land, "together with the stable, and all other structures and improvements thereon; . . road bed . . including all ties, iron, side-tracks, turn-tables, and other appurtenances belonging to or connected therewith; . . . all one-horse cars; . . . the franchise of said company, with all the rights, privileges, and property pertaining thereto," does not include horses or harness, office furniture, feed, or stable machinery and utensils. Marsh *v.* Burley, 13 Nebr. 261, 13 N. W. 279; Millard *v.* Burley, 13 Nebr. 259, 13 N. W. 278. Rails, fish plates, and bolts purchased by the company for use on its road, but which have not been actually used, and stacked upon land not within the company's right of way are within the terms of a mortgage, which includes all real and personal property of every kind and description "used or intended to be used in connection with or for the purpose of said railroad." Farmers' L. & T. Co. *v.* San Diego St.-Car Co., 49 Fed. 188.

98. California Title Ins., etc., Co. *v.* Pauly, 111 Cal. 122, 43 Pac. 586.

Extension.—A street railroad mortgage covers an extension subsequently constructed. Front St. Cable R. Co. *v.* Drake, 84 Fed. 257.

99. California Title Ins., etc., Co. *v.* Pauly,

deal with the mortgaged premises according to his own views of his own interests, provided always that what he does will not materially impair the value of the property as security for the mortgage.[1] If a case of impairment of the mortgaged premises is presented, the mortgagee is entitled to relief.[2] But the mortgagee retains no right to require the mortgagor or any subsequent owner to improve the property, or to manage it in any particular way.[3]

2. Priorities — a. Taxes. A mortgage executed by a street railroad company upon its property to secure the payment of bonds issued for the purpose of constructing and equipping the mortgagor's lines of railroad is a lien upon the property of the street railroad company described therein as against all special assessments for paving taxes,[4] except such as were assessed for paving already done, or as were in contemplation at the time it was recorded.[5] One who at the request of a street railroad company pays taxes on its mortgaged property does not have a lien on the property superior to the mortgage, although the company agrees that he shall have.[6]

b. Current Expense Claims. The indebtedness of a street railroad company for motive power furnished pending its receivership takes priority of a previous mortgage.[7] A court of equity engaged in administering mortgaged street railroad property under a receivership in a foreclosure suit may, in its discretion, prefer

111 Cal. 122, 43 Pac. 586; Chalmers *v.* Littlefield, 103 Me. 271, 69 Atl. 100 (holding that it is not necessary that the company should be actually possessed of tangible property approximating in value the amount of the bonds which the mortgage is given to secure in order that an express provision therefor in the mortgage may be legally operative to include subsequently acquired property); Guaranty Trust Co. *v.* Atlantic Coast Electric R. Co., 138 Fed. 517, 71 C. C. A. 41.

Illustrations.— In equity a mortgage of a street railroad will be held to apply to after-acquired rolling stock and other personal property, if the terms of the mortgage cover such future acquisitions. Chalmers *v.* Littlefield, 103 Me. 271, 69 Atl. 100; Guaranty Trust Co. *v.* Metropolitan St. R. Co., 166 Fed. 569. A clause in a mortgage of a street railroad company on all of its property, which specifies as included therein all after-acquired engines, machinery, tools, and equipment of every description used in operating the lines, covers machinery subsequently acquired and installed in buildings on real estate afterward acquired and not subject to the mortgage, which is used in operating such lines, or in any manner in connection therewith, where it is not attached to the realty and can be removed without injury thereto. Guaranty Trust Co. *v.* Metropolitan St. R. Co., 166 Fed. 569. It will cover engines and machinery, when furnished to the company and placed in the power-house, although the contract of sale provides that title shall not pass until full payment is made. Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305; Phœnix Iron-Works Co. *v.* New York Security, etc., Co., 83 Fed. 757, 28 C. C. A. 76 [*affirming* 77 Fed. 529]. A mortgage covering a contemplated extension is enforceable as to such extension, although it is completed by another company, which subsequently purchases the line from the mortgagor. Hinchman *v.* Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867. But a mortgage on after-acquired property will not cover property purchased for a different railroad from that upon which the mortgage was executed. Hinchman *v.* Point Defiance R. Co., *supra*.

1. Fidelity Trust Co. *v.* Hoboken, etc., R. Co., 71 N. J. Eq. 14, 63 Atl. 273; New England Engineering Co. *v.* Oakwood St. R. Co., 71 Fed. 52.

2. Fidelity Trust Co. *v.* Hoboken, etc., R. Co., 71 N. J. Eq. 14, 63 Atl. 273

Lease of mortgaged property.—Where the owner of land subject to a mortgage, including the plant and franchises of a street railroad company which land is necessary for the profitable use of the company in its business, leases portions of the tract to another company which proposes to use it in part for traffic, competing with that of the street railroad company, a case of threatened injury and deterioration of the mortgaged premises is presented, which justifies the granting of relief to the mortgagee. Fidelity Trust Co. *v.* Hoboken, etc., R. Co., 71 N. J. Eq. 14, 63 Atl. 273.

3. Fidelity Trust Co. *v.* Hoboken, etc., R. Co., 71 N. J. Eq. 14, 63 Atl. 273, holding that a street railroad mortgagee accepts the security as it was when the mortgage was made, and is not injured by the present owner divesting himself of the right to make betterments.

4. Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 460, 93 N. W. 766.

5. Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41; Lincoln *v.* Lincoln St. R. Co., 67 Nebr. 460, 93 N. W. 766.

6. Mersick *v.* Hartford, etc., Horse R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. Rep. 977.

7. Manhattan Trust Co. *v.* Sioux City Cable R. Co., 76 Fed. 658. See, generally, Receivers, 34 Cyc. 353–355.

unpaid claims for current expenses, incurred in the ordinary operation of the railroad within a limited time before the receivership, to the bondholders secured by a prior mortgage, in the distribution of the income or the proceeds of the mortgaged property;[8] but the right to give such preference is confined to claims of this class;[9] it does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property.[10] Nor is a creditor entitled to such preference and priority simply because that which he furnished to the company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage security, although that fact is an important element in considering the equity of the claim.[11] Moreover, by the weight of authority, there

8. Mersick *v.* Hartford, etc., Horse R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. Rep. 977; New York Guaranty Trust Co. *v.* Philadelphia, etc., Traction Co., 160 Fed. 761 (holding that where it appears that one fourth of an expenditure for repairs to a bridge was necessary for the continued operation of the road, and that three fourths of the work was unnecessary, the claimant is entitled to a preference only to the extent of one fourth of the amount due); New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 83 Fed. 365, 27 C. C. A. 550. See, generally, RECEIVERS, 34 Cyc. 356 note 78; RAILROADS, 33 Cyc. 529.

A claim for the purchase-price of a gear wheel and pinion, furnished to a cable street railroad company and necessary for the operation of the cable by which its cars are moved, is entitled to be paid by a receiver of the road, appointed within six months after such wheel was furnished, in preference to bonds of the company secured by mortgage, especially where, immediately after obtaining possession of such wheel, the company has mortgaged it, with other property, to raise money to pay interest on the bonds. Central Trust Co. *v.* Clark, 81 Fed. 269, 26 C. C. A. 397.

The doctrine rests upon the principle of mutual benefit to the public, the mortgagee and general creditors. If the value of the security is maintained, the system must be kept a going concern; and whatever is essential to this end in labor, repairs, or equipment must be protected by the highest degree of confidence to avoid the mischiefs of suspension. Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41.

Mortgagees accept security as they find it. —When mortgagees accept their security they are bound to take the property as they find it, and are bound to know that the rights they acquire in the property are subject to the burdens already imposed upon it. Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41.

Time of incurring debt.—Claims which will be awarded priority under the rule above stated must have been incurred within a reasonable time before the appointment of the receiver. The determination of this period is ordinarily within the discretion of the court, and is usually fixed at six months (New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305), but may be a much longer period (New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 83 Fed. 365, 27 C. C. A. 550).

9. Mercantile Trust Co. *v.* Kings County El. R. Co., 40 N. Y. App. Div. 141, 57 N. Y. Suppl. 892; Merchants' L. & T. Co. *v.* Chicago Railways Co., 158 Fed. 923, 86 C. C. A. 87; New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305; Illinois, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

The test of the equity which entitles the claim to preference over the mortgage in foreclosure is the consideration of the claim, whether it was or was not for a part of the current expenses of ordinary operation within a limited time before the receivership. Illinois, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

10. Illinois, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481. See, generally, RAILROADS, 33 Cyc. 535, 536; RECEIVERS, 34 Cyc. 359, 360.

Debts created by an electric street railroad company in rebuilding its power-house, which had been destroyed by fire, do not constitute claims to which a court is authorized to give preference, in payment from the proceeds of the property of the company when sold under mortgage foreclosure, to the displacement of the lien of a prior mortgage covering all the property. Maryland Steel Co. *v.* Gettysburg Electric R. Co., 99 Fed. 150.

A heater, furnished to an electric railroad company after a test showing that it would save a certain sum per month in fuel, is not necessary to keep the company in operation, and the seller has no preferred claim for payment out of the receipts of the company after it goes into the hands of a receiver; and the fact that such heater has already earned a sum equal to the agreed consideration, by effecting a saving in fuel, does not give the seller a preferred claim. McCornack *v.* Salem R. Co., 34 Oreg. 543, 56 Pac. 518, 1022.

11. New York Guaranty Trust Co. *v.* Galveston City R. Co., 107 Fed. 311, 46 C. C. A. 305; Illinois, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481. See, generally, RAILROADS, 33 Cyc. 533 note 61; RECEIVERS, 34 Cyc. 360 notes 3, 4.

can be no restitution where there has been no diversion,[12] and he who invokes the rule must show affirmatively that the mortgage creditors have got that which, in equity, belongs to the petitioner.[13]

3. FORECLOSURE. The rules governing the foreclosure of mortgages generally [14] are applicable to the foreclosure of street railroad mortgages, as to the right to foreclose,[15] jurisdiction of the bill of foreclosure,[16] defenses,[17] the form of the decree,[18] foreclosure sale,[19] and redemption.[20]

12. Mersick *v.* Hartford, etc., Horse R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. Rep. 977; Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41; Illinois, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481. But see New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 83 Fed. 365, 27 C. C. A. 550. See, generally, RAILROADS, 33 Cyc. 531 note 49; RECEIVERS, 34 Cyc. 358 note 89.

13. Cambria Iron Co. *v.* Union Trust Co., 154 Ind. 291, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41.

14. See MORTGAGES, 27 Cyc. 1439 *et seq.*; RAILROADS, 33 Cyc. 562 *et seq.*

15. See cases cited *infra*, this note.

Right of trustees and bondholders.— Primarily, it is left to the discretion of the trustee to determine whether proceedings for foreclosure shall or shall not be instituted. New York Security, etc., Co. *v.* Lincoln St. R. Co., 74 Fed. 67 [*affirmed* in 77 Fed. 525]. If the requisite number of bondholders direct the trustee to institute proceedings, then it becomes its duty so to do. If not so directed, then it is left to the discretion of the trustee to determine whether the interests of the parties demand such action on its part. In either event, the right and power to act, by the institution of foreclosure proceedings, exists in the trustee whenever the default on the part of the mortgagor is such that a right to a bill of foreclosure exists against it. New York Security, etc., Co. *v.* Lincoln St. R. Co., *supra*. Limitations on the right of the trustee to foreclose should be strictly construed. South St. Louis R. Co. *v.* Plate, 92 Mo. 614, 5 S. W. 199; New York Security, etc., Co. *v.* Lincoln St. R. Co., 77 Fed. 525 [*affirming* 74 Fed. 67]. The holder of any one of a series of bonds secured by a mortgage made to trustees may, on refusal of the trustees so to do, maintain a suit for the foreclosure of the mortgage, for default in the payment of interest. McFadden *v.* May's Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

16. See cases cited *infra*, this note.

Under Me. Rev. St. c. 52, § 59, conferring on the supreme judicial court jurisdiction, as in equity, of all matters in dispute arising under the preceding sections of that chapter relating to trustees, mortgages, and redemption and foreclosure of mortgages of railroads, that court is authorized to take jurisdiction of a bill for the foreclosure of a mortgage of a street railroad and to appoint a receiver. Chalmers *v.* Littlefield, 103 Me. 271, 69 Atl. 100.

17. Wells *v.* Northern Trust Co., 195 Ill. 288, 63 N. E. 136 [*affirming* 90 Ill. App. 460].

18. Wells *v.* Northern Trust Co., 195 Ill. 288, 63 N. E. 136 [*affirming* 90 Ill. App. 460], holding that where the ordinance granting a franchise to a street railroad company restricts the franchise to such company, the inclusion of the rights granted in such ordinance in a decree of foreclosure of a mortgage executed by such company, if erroneous, is harmless.

19. See cases cited *infra*, this note.

Extent of property included in sale.— Unless it appears to the contrary, it will be presumed that the entire plant of a mortgaged street railroad, embracing its real and personal estate and franchises, is an entirety, and cannot be separated and a part thereof sold, without material injury to the value of each, and hence on foreclosure of the mortgage the entire plant must be sold. McFadden *v.* May's Landing, etc., R. Co., 49 N. J. Eq. 176, 22 Atl. 932. On foreclosure for unpaid interest, the principal not being due, only so much of the property as may be necessary to raise the amount due should be sold, if the property is divisible without material injury to the security. McFadden *v.* May's Landing, etc., R. Co., *supra*.

Setting aside sale.— Inadequacy of price alone is not a ground to set aside a judicial sale, unless so great as to shock the conscience and excite the suspicion of the court. Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 54 Fed. 26.

Rights of purchasers.—A purchaser at a foreclosure sale takes a title free from any personal contract made by the former owner. Chapman *v.* Syracuse Rapid Transit R. Co., 25 Misc. (N. Y.) 626, 56 N. Y. Suppl. 250. Thus under a contract between a railroad company and a street railroad company whereby the latter was to bear the expense of the construction and maintenance of a crossing of the two lines, there was no privity of contract between the parties and a purchaser of all the rights, franchise, and property of the street railroad, at a mortgage foreclosure sale thereof, which rendered the purchaser liable on the contract. Evansville, etc., Traction Co. *v.* Evansville Belt R. Co., (Ind. App. 1909) 87 N. E. 21. The purchaser is subrogated to the rights of the mortgagee. Mill Creek Valley St. R. Co. *v.* Carthage, 18 Ohio Cir. Ct. 216, 9 Ohio Cir. Dec. 833.

20. See cases cited *infra*, this note.

Time for redemption.— The mortgagor is entitled to a reasonable time in which to redeem. But where a decree of foreclosure allows only ten days in which to pay the amount found due, in default of which the

D. Receivers. The grounds for the appointment of receivers in street railroad cases;[21] their powers and duties,[22] as to the management and operation of the road,[23] and as to contracts and leases made before their appoint-

property is to be sold absolutely on at least sixty days' notice, and in fact nearly six months elapses before the sale is confirmed, the error, if any, in granting too short time in the first instance, is harmless. Wells *v.* Northern Trust Co., 195 Ill. 288, 63 N. E. 136 [*affirming* 90 Ill. App. 460].

21. See, generally, RAILROADS, 33 Cyc. 613 *et seq.*; RECEIVERS, 34 Cyc. 76 *et seq.* And see Central Trust Co. *v.* Third Ave. R. Co., 159 Fed. 959.

Temporary receiver.— The appointment of a temporary receiver in foreclosure of a street railroad mortgage is discretionary with the court, and if opposed by the mortgagor, which is a live corporation operating the property, will not be made unless the integrity of the property is threatened. Farmers' L. & T. Co. *v.* Central Park, etc., R. Co., 165 Fed. 503.

Necessity for separate receiverships.— Where receivers for a system of street railroad lines leased from different owners have been appointed in a suit against an insolvent lessee, to which suit the various lessor companies, or their stock-holders, have, or may, become parties, the fact that there may be a conflict of interests as to the distribution or application of the earnings of the receivership does not require or warrant the appointment of separate receivers to operate the property of the several lessors. Pennsylvania Steel Co. *v.* New York City R. Co., 160 Fed. 221. But where, in a creditors' suit against the lessee of a street railroad system, to which the lessor becomes a party, receivers are appointed who operate the property for all parties in interest until foreclosure suits are instituted by bondholders of the lessor, and the affairs of the lessee are so far liquidated that they may soon be wound up and an accounting had between it and the lessor, separate receivers should be appointed for the adverse interests. Pennsylvania Steel Co. *v.* New York City R. Co., 165 Fed. 463.

22. See, generally, RAILROADS, 33 Cyc. 627 *et seq.*; RECEIVERS, 34 Cyc. 242 *et seq.*

Performance of corporate functions.— The appointment *pendente lite* of receivers of a street railroad company exercising public franchises practically devolves upon the receivers the performance of corporate functions of a public character and governmental nature, amounting to a transfer of its franchises. People *v.* New York City R. Co., 57 Misc. (N. Y.) 114, 107 N. Y. Suppl. 247. It is not the practice for receivers to concern themselves with plans for reorganization. Their sole functions are to hold the property intact, operating it as efficiently for the public service as their resources will permit, to ascertain the liabilities, to marshal the assets, and eventually, unless in the meantime some entirely solvent concern able to liquidate all obligations and succeed to the owner's and lessee's interests shall appear to take it off their hands, to sell it to the best advantage, and apply the proceeds ratably to the payment of the liabilities. Pennsylvania Steel Co. *v.* New York City R. Co., 157 Fed. 440.

23. See cases cited *infra*, this note.

Illustrations.— Receivers appointed to manage and operate a street railroad may exercise large discretionary powers as to details of management, and their judgment in such matters will not be interfered with by the court appointing them unless the act done is a manifest abuse of power. Morley *v.* Saginaw Cir. Judge, 117 Mich. 246, 75 N. W. 466, 41 L. R. A. 817, holding that an order by receivers of a street railroad company requiring its conductors to carry boxes, into which passengers are required to deposit their fares, and forbidding conductors to accept money, is a proper regulation and safeguard for the collection of fares, and will not be set aside, on petition of an employee, on the ground that it tends to hold him up to the public as dishonest. Receivers are trustees for the creditors and owners, and it is their duty to operate the roads so as to increase earnings. *In re* Receiverships of Street Rys., 161 Fed. 879. They may make expenditures needed to render the road efficient and to perfect the service. Pennsylvania Steel Co. *v.* New York City R. Co., 165 Fed. 455. It is their duty to curtail transfer privileges of passengers, where it will increase the earnings of the property, and there is no law of the state requiring the issuing of such transfers. *In re* Receiverships of Street Rys., *supra*. And see *In re* Dry Dock R. Co., 165 Fed. 487. A receiver of street railroad companies will not be required to continue an arrangement by which such companies furnish power and the use of their tracks to an independent company without compensation. Central Trust Co. *v.* Third Ave. R. Co., 165 Fed. 494. A receiver appointed for a street railroad company will not, unless absolutely necessary, be authorized to discontinue service over a part of the line covered by its franchise, where that will forfeit its franchise, even though the track over such portion is owned by another company to which he must pay rent and its operation will be unprofitable. Lorain Steel Co. *v.* Union R. Co., 165 Fed. 500. An application by a receiver for permission to build an extension to a street railroad will not be granted unless an overwhelming and irresistible necessity for the construction thereof is shown. Pueblo Traction, etc., Co. *v.* Allison, 30 Colo. 337, 70 Pac. 424. Where receivers for an insolvent lessee of a street railroad system, comprising lines leased from different owners, are operating the whole as a single system, they will not be required to keep the earnings of a particular line separate to meet the claims of its lessor. Pennsylvania Steel Co. *v.* New York City R. Co., 165 Fed. 468.

ment;[24] and the operation and effect of their appointment[25] are governed by the rules applicable to the subject of receivers generally.

X. REGULATION AND OPERATION.[26]*

A. Regulation — 1. Power to Control and Regulate. The power of controlling and regulating the construction, management, and operation of a street railroad in the streets and highways of a city or town is primarily in the legislature of the state;[27] but the legislature may, either wholly or in part, and either expressly or impliedly, delegate this power to the municipal government,[28] or it may delegate

24. See cases cited *infra*, this note.

Cancellation of lease.— Receivers for insolvent street railroad companies operating a system composed of a number of constituent lines, some of them held under lease, need not operate any such lines at a loss, and where it appears that the rental is excessive, or the lease is otherwise unprofitable, they will be directed to cancel the same. Pennsylvania Steel Co. *v.* New York City R. Co., 165 Fed. 459, 462. Receivers for a street railroad system, including leased lines, may operate one of such lines for a reasonable time to enable them to determine whether to adopt the lease, without incurring liability for rental; but on an election to cancel they will be required to account to the lessor for the net profits of such operation. Morton Trust Co. *v.* Metropolitan St. R. Co., 165 Fed. 489; Pennsylvania Steel Co. *v.* New York City R. Co., 165 Fed. 472. Where a lease of a street railroad requires the lessee to pay all taxes and assessments against the property, on the cancellation of the lease by receivers for the lessee, they cannot be required to indemnify the lessor against liability for outstanding taxes in litigation. Morton Trust Co. *v.* Metropolitan St. R. Co., 165 Fed. 489.

Restoration of property after cancellation of lease.— Where under a lease of a street railroad line which requires the lessee on its termination for any cause to return all of the property leased, including all tools, implements, machinery, and equipment, or substitutes of equal value, and also a sum of money advanced, to be treated in such case as a loan, receivers for the lessee terminate the lease they cannot be required to restore property or money which did not come into their possession; but any shortage gives the lessor a claim for damages against the estate of the lessee. New York Guaranty Trust Co. *v.* Metropolitan St. R. Co., 165 Fed. 488; Pennsylvania Steel Co. *v.* New York City R. Co., 165 Fed. 472. Such property as can be identified as received under the lease or as substituted therefor should be returned, and horses, cars, or other equipment of the same kind as that received under the lease, exclusively in use on the line at the time of the appointment of the receivers, may be assumed to be substitutes. Pennsylvania Steel Co. *v.* New York City R. Co., *supra*. And see Central Trust Co. *v.* Third Ave. R. Co., 165 Fed. 478. Where a considerable part of a leased line is converted at the lessee's expense from a horse to an electric line at a large cost, and different cars are placed thereon, such electric cars are not substitutes for the horse cars which they replace and which are transferred to other parts of the lessee's system, and the lessor is not entitled to the same. Pennsylvania Steel Co. *v.* New York City R. Co., 165 Fed. 472.

25. See RAILROADS, 33 Cyc. 622; RECEIVERS, 34 Cyc. 180 *et seq.*

As to rights of third persons.—When a court takes possession of property by its receiver, it necessarily assumes an obligation to everyone interested in it, or affected by its use, either to afford by its own orders every remedy which such person might have to assert his rights had no receiver been appointed, or else to give him leave to pursue such remedy against the receiver as if the receiver were a private person. Louisville Trust Co. *v.* Cincinnati Inclined Plane R. Co., 78 Fed. 307.

On illegal combination.— Where certain street railroad companies enter into an illegal consolidation, the appointment of receivers for two of the companies does not remove them from the illegal combination. Continental Securities Co. *v.* Interborough Rapid Transit Co., 165 Fed. 945.

26. **Power to control and regulate streets generally** see MUNICIPAL CORPORATIONS, 28 Cyc. 848 *et seq.*

Regulation of construction of street railroad in general see *supra*, VII.

27. See Louisville City R. Co. *v.* Louisville, 8 Bush (Ky.) 415.

28. *Illinois.*— People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650, holding that a municipality may require of a street railroad company the performance of duties beneficial to the public, under its power to grant such company the use of its streets, alleys, and public places.

Kentucky.— Louisville City R. Co. *v.* Louisville, 8 Bush 415.

Missouri.— McHugh *v.* St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853.

United States.— Cleveland City R. Co. *v.* Cleveland, 94 Fed. 385 [*affirmed* in 194 U. S. 517, 538, 24 S. Ct. 756, 48 L. ed. 1102].

Canada.— Liverpool, etc., R. Co. *v.* Liverpool, 33 Can. Sup. Ct. 180. See also Reg. *v.* Toronto R. Co., 35 Can. L. J. N. S. 422.

See 44 Cent. Dig. tit. "Street Railroads," § 144.

* By Henry H. Skyles.

to railroad commissioners the power to supervise and regulate the operation of street railroads.[29] Hence a grant to a street railroad company of the right to own property and transact business in a municipality affords it no immunity from reasonable control and regulation by the municipality under its police power,[30] although the railroad is constructed prior to the incorporation, as a municipality, of the territory through which it runs,[31] particularly where it accepts the subsequently enacted municipal charter.[32] But on the other hand where a street railroad company accepts its charter or the grant of its franchise from a municipality, it is bound to hold its special privileges subject to the regulations then existing and to such regulations as the municipality may from time to time impose upon it, as reasonably necessary to the protection and preservation of persons and property,[33] whether or not it accepts the ordinance making the regulation,[34] and this is particularly true where the grant to it expressly reserves such right to the municipality.[35]

Apart from any constitutional authority, municipalities may impose reasonable regulations upon street railroad companies in the "operation" of their lines, and the fact that a constitutional provision forbids the construction of a street railroad without the consent of the local authorities does not limit the exercise of municipal functions to matters of "construction." Erie *v.* Erie Traction Co., 222 Pa. St. 43, 70 Atl. 904.

The power of the city of New York to pass ordinances regulating the conduct of street railroads therein is not taken away by the railroad law (Laws (1890), c. 565), which confers on the state board of railroad commissioners general supervision of all railroads, that they may ascertain the physical conditions and details of operation for the purpose of recommending improvements. New York *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 29, 86 N. Y. Suppl. 673.

29. See the statutes of the several states.

Street railroad companies are not railroad or transportation companies, within the meaning of a provision authorizing the railroad commission to establish the rates of charges for the transportation of passengers and freight by railroad and other transportation companies. San Francisco R. Com'rs Bd. *v.* Market St. R. Co., 132 Cal. 677, 64 Pac. 1065.

30. *California.*— San Jose *v.* San Jose, etc., R. Co., 53 Cal. 475.

Illinois.— Bloomington, etc., R., etc., Co. *v.* Bloomington, 123 Ill. App. 639.

Kentucky.— South Covington, etc., St. R. Co. *v.* Berry, 93 Ky. 43, 18 S. W. 1026, 40 Am. St. Rep. 161, 15 L. R. A. 604, 13 Ky. L. Rep. 943.

New Jersey.— Consolidated Traction Co. *v.* Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170; State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

New York.— People *v.* Geneva, etc., Traction Co., 112 N. Y. App. Div. 581, 98 N. Y. Suppl. 719 [*affirmed* in 186 N. Y. 516, 78 N. E. 1109].

Pennsylvania.— Frankford, etc., R. Co. *v.* Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Harrisburg City Pass. R. Co. *v.* Harrisburg, 2 Chest. Co. Rep. 333.

Virginia.— Norfolk R., etc., Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740, holding that the fact that a street railroad company has direct authority from the legislature to use the streets of a city does not exempt it from reasonable municipal control.

See 44 Cent. Dig. tit. "Street Railroads," § 144.

31. Newport News, etc., R., etc., Co. *v.* Hampton Roads R., etc., Co., 102 Va. 795, 47 S. E. 839, holding that where a street railroad company constructs lines of railroad in territory under authority of the board of county supervisors, and the territory is subsequently incorporated as a city, the control of the streets, including those on which railroad lines have been built, passes from the board of supervisors to the municipal authorities. See also Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 920.

32. Union Depot R. Co. *v.* Southern R. Co., 105 Mo. 562, 16 S. W. 920.

33. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86; Brooklyn *v.* Nassau Electric R. Co., 20 N. Y. App. Div. 31, 46 N. Y. Suppl. 651; West Philadelphia Pass. R. Co. *v.* Philadelphia, 10 Phila. 70.

Consideration.— The right given by a municipality to a street railroad company to use its streets is a sufficient consideration for an undertaking on its part to comply with certain conditions of the ordinance. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

34. Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Nagel *v.* St. Louis Transit Co., 104 Mo. App. 438, 79 S. W. 502; Meyers *v.* St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379; Gebhardt *v.* St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448; McAndrew *v.* St. Louis, etc., R. Co., 88 Mo. App. 97 [*qualifying* Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855]; Smith *v.* Butler, 16 Q. B. D. 349, 50 J. P. 260, 34 Wkly. Rep. 416. See also Murphy *v.* Lindell R. Co., 153 Mo. 252, 54 S. W. 442. But see Day *v.* Citizens' R. Co., 81 Mo. App. 471.

35. People *v.* Detroit United R. Co., 134

2. Statutory and Municipal Regulations — a. In General. As a general rule the state legislature or a municipal government, within its powers, may make any regulations, prescribing the manner in which a street railroad company shall enjoy its franchise rights, which are reasonable and proper for the safety and protection of persons and property.[36] These regulations, however, must not be imposed arbitrarily or capriciously, but must be such only as are reasonable,[37] and hence must not be such as will destroy or unreasonably impair the rights or franchises granted to the company.[38] Thus a municipal government cannot deprive a street railroad company of the right of way, which has been granted to it, except in the manner prescribed by law for the taking of private property for public use;[39] nor can it define by ordinance what shall constitute negligence on the part of a company operating street cars on its streets;[40] but a regulation is not unreasonable or invalid from the mere fact that it will require a large outlay of money by the company.[41] A regulation which shows on its face that the end contemplated is the securing of reasonable safeguards against danger, and reasonable accommodations to the public, will ordinarily be presumed to be valid,[42] and will not be interfered with on light grounds,[43] or where the regulation can fairly be said to tend toward a safer condition.[44] By some regulations a penalty

Mich. 682, 97 N. W. 36, 104 Am. St. Rep 626, 63 L. R. A. 746; Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79; Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86; New York *v.* Second Ave. R. Co., 34 Barb. (N. Y.) 41, 12 Abb. Pr. 364, 21 How. Pr. 257 [*affirmed* in 32 N. Y. 261]; Pawcatuck Valley St. R. Co. *v.* Westerly, 22 R. I. 307, 47 Atl. 691.

36. *Illinois.*— Rockford City R. Co. *v.* Blake, 173 Ill. 354, 50 N. E. 1070, 64 Am. St. Rep. 122 [*affirming* 74 Ill. App. 175].

Kentucky.— Louisville City R. Co. *v.* Louisville, 8 Bush 415.

Michigan.— People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746.

Missouri.— Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74, holding that it is competent for the municipality, in consideration of the franchise granted to a street railroad company, to impose on such company by ordinance the duty of exercising a high degree of care, and a failure on the part of the company to observe the ordinance renders it liable to the person injured, notwithstanding a fine is also imposed for such failure.

New Jersey.— Cape May, etc., R. Co. *v.* Cape May, 59 N. J. L. 396, 36 Atl. 696, 36 L. R. A. 653; Trenton Horse R. Co. *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

Pennsylvania.— Harrisburg City Pass. R. Co. *v.* Harrisburg, 2 Chest. Co. Rep. 333.

See 44 Cent. Dig. tit. "Street Railroads," § 146. See also Municipal Corporations, 28 Cyc. 727 *et seq.*

37. Shreveport Traction Co. *v.* Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345; Consolidated Traction Co. *v.* Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170; Trenton Horse R. Co. *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; West Philadelphia Pass. R. Co. *v.* Philadelphia, 10 Phila. (Pa.) 70; Newport News, etc., R., etc., Co. *v.* Hampton Roads R., etc., Co., 102 Va. 795, 47 S. E. 839.

Whether a municipality has exceeded its statutory powers in any given case, where the facts are undisputed, by the enactment of an unreasonable ordinance relative to a street railroad, is a judicial question, to be considered substantially the same as a question whether the legislature has exceeded its constitutional authority, reasonable doubts being resolved in favor of the municipal power. Eastern Wisconsin R., etc., Co. *v.* Hackett, 135 Wis. 464, 115 N. W. 376, 1136, 1139.

38. Shreveport Traction Co. *v.* Shreveport, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345 (holding that the right "to regulate" a street railroad company does not mean the least confiscation of any right or anything that will affect the revenues of the company); Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79; Consolidated Traction Co. *v.* Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170.

39. Louisville City R Co. *v.* Louisville, 8 Bush (Ky.) 415. See also Eminent Domain, 15 Cyc. 622.

40. Rockford City R. Co. *v.* Blake, 173 Ill. 354, 50 N. E. 1070, 64 Am. St. Rep. 122 [*affirming* 74 Ill. App. 175].

41. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746; New York *v.* Dry Dock, etc., R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609 [*reversing* 15 N. Y. Suppl. 297].

42. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746 (holding also that the burden of proof is on one who attacks its validity); People *v.* Detroit Citizens' St. R. Co., 116 Mich. 132, 74 N. W. 520.

43. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746.

44. People *v.* Detroit United R. Co., 134

is imposed for a violation thereof.[45] A street railroad company is not subject to regulations contained in the franchise of another company, which it has acquired, where its new franchise does not refer to such regulations, or make the provisions of the old grant part of the new one.[46]

b. Particular Regulations — (I) *In General.* In accordance with the above rules the legislature or municipal government may make reasonable regulations relative to the motive power to be used on street cars within municipal limits,[47] as by prohibiting the use of steam as a motive power;[48] or it may make a regulation against cars standing on the tracks,[49] or grant the privilege of carrying passengers, and at the same time deny the privilege of operating freight cars.[50] But it has been held that a street railroad company is not within a statutory provision making railroad companies liable for all damages caused by the running of trains,[51] or within a provision requiring drinking water to be kept on a train.[52]

(II) *As to Passenger Service and Accommodations.* Statutory and municipal regulations may also be made, relative to the services and accommodations which street railroad companies are required to provide for passengers who desire to ride on its cars.[53] Thus such regulations have been made, and held reasonable, requiring street railroad companies to keep tickets for sale on its cars;[54] or prescribing the frequency with which cars shall run during hours of the day[55] or

Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746.

45. See the statutes of the several states, and ordinances of the several municipalities. See also Chicago *v.* Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666; Caswell *v.* Boston El. R. Co., 190 Mass. 527, 77 N. E. 380; New York *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 29, 86 N. Y. Suppl. 673; New York *v.* Union R. Co., 31 Misc. (N. Y.) 451, 64 N. Y. Suppl. 483; and *infra*, X, A, 2, b, (III), (B), (1).

Penalties generally see PENALTIES, 30 Cyc. 1331.

46. Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036, holding that where a street car franchise requires the company to acquire the franchise of a former company, which contains regulations as to the manner of operating the cars, but does not refer to such old requirements, or make the provisions of the old grant part of the new one, the new franchise is not subject to the old conditions and regulations.

47. Donnaher *v.* State, 8 Sm. & M. (Miss.) 649.

48. North Chicago City R. Co. *v.* Lake View, 105 Ill. 207, 44 Am. Rep. 788; Buffalo, etc., R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209, holding that a statute giving a city corporation power to regulate the running of railroad cars within the corporate limits authorizes the corporation to prohibit the propelling of the cars by steam through any part of the city.

49. Wilson *v.* Duluth St. R. Co., 64 Minn. 363, 67 N. W. 82.

50. St. Louis, etc., R. Co. *v.* Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300.

51. Little Rock R., etc., Co. *v.* Newman, 77 Ark. 599, 92 S. W. 864. *Contra*, Cordray *v.* Savannah, etc., R. Co., 117 Ga. 464, 43 S. E. 755, holding that a chartered street railway company is a railroad company within the meaning of Civ. Code (1895), § 2321, making railroad companies liable for damages by the running of their trains.

52. Dean *v.* State, 154 Ala. 77, 45 So. 651, 149 Ala. 34, 43 So. 24, holding that Code (1896), § 5368, making it an offense for conductors to run trains without sufficient good drinking water thereon, does not apply to conductors of electric motor cars on a street railway extending between cities twelve or thirteen miles apart.

53. See Smith *v.* Butler, 16 Q. B. D. 349, 50 J. P. 260, 34 Wkly. Rep. 416.

54. Rice *v.* Detroit, etc., R. Co., 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84 (holding that a franchise by a township, providing for the sale of trip tickets on cars between a village in a township and a city without the township, requires such tickets to be sold on cars at any point on the line, and does not limit such sale to the line within the township granting the franchise); Sternberg *v.* State, 36 Nebr. 307, 54 N. W. 553, 19 L. R. A. 570.

A reservation of the right by a city to make such further regulations as may be deemed necessary to protect the interests of the public includes the right to enact an ordinance providing that the company shall keep tickets for sale on its cars. Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79.

Destroying or impairing rights.— An ordinance providing that the company shall keep tickets for sale on its cars does not destroy or unreasonably impair the right and franchise of the company, within the meaning of a statute prohibiting the city authorities from making any regulation whereby the rights or franchise granted shall be destroyed or unreasonably impaired. Detroit *v.* Ft. Wayne, etc., R. Co., 95 Mich. 456, 54 N. W. 958, 35 Am. St. Rep. 580, 20 L. R. A. 79.

55. People *v.* Detroit Citizens' St. R. Co., 116 Mich. 132, 74 N. W. 520; New York *v.*

night,[56] as by requiring that a sufficient number of cars shall be run to provide every passenger from whom fare is demanded with a seat,[57] or so that persons desiring transportation shall not be kept waiting longer than a prescribed time;[58] or requiring that conductors shall not allow ladies or children to leave or enter cars while in motion.[59] It has also been held a reasonable regulation to require that the company shall designate on its cars the destination thereof,[60] and carry a passenger thereon to any regular stopping place desired by him, on the car's route, without a change of cars,[61] except for transfer to a connecting line going in another direction,[62] or in case of an accident;[63] or to require cars to stop at any regular stopping place when signaled to do so;[64] or to prescribe the number

Union R. Co., 31 Misc. (N. Y.) 451, 64 N. Y. Suppl. 483; New York *v.* New York, etc., R. Co., 10 Misc. (N. Y.) 417, 31 N. Y. Suppl. 147. *Compare* Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999.

Expense to the company.— The reasonableness of an ordinance requiring a street railroad company to run a specified number of cars during certain hours is not controlled by considerations of expense to the company. New York *v.* Dry Dock, etc., R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609 [*reversing* 15 N. Y. Suppl. 297].

An ordinance will not be held unreasonable which requires cars to run at prescribed intervals where no trial has been made of its provisions. People *v.* Detroit Citizens' St. R. Co., 116 Mich. 132, 74 N. W. 520.

56. New York *v.* Dry Dock, etc., R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609 [*reversing* 15 N. Y. Suppl. 297]; New York *v.* Union R. Co., 31 Misc. (N. Y.) 451, 64 N. Y. Suppl. 483.

Evidence.— In an action to recover a penalty for a violation of such an ordinance, evidence of such facts as will establish, or tend to establish, that the convenience of passengers or the public do not require the running of defendant's cars during the ordinance hours specified, is relevant on the question of the reasonableness of the ordinance in defendant's case, although such evidence relates to a period of time subsequent to that when the ordinance went into effect. New York *v.* Dry Dock, etc., R. Co., 133 N. Y. 104, 30 N. E. 563, 28 Am. St. Rep. 609 [*reversing* 15 N. Y. Suppl. 297]. Evidence held sufficient to support a judgment for the penalty prescribed for a violation of such a regulation see New York *v.* Union R. Co., 31 Misc. (N. Y.) 451, 64 N. Y. Suppl. 483.

57. North Jersey St. R. Co. *v.* Jersey City, 75 N. J. L. 349, 67 Atl. 1072.

58. North Jersey St. R. Co. *v.* Jersey City, 75 N J. L. 349, 67 Atl. 1072, five minutes.

59. McHugh *v.* St. Louis Transit Co., 190 Mo. 85, 88 S. W. 853, holding that such an ordinance is not unreasonable or void in that it imposes on the carrier the duty of controlling the acts of passengers, when the passenger is at liberty to do as he pleases.

60. New York *v.* New York, etc., R. Co., 89 N. Y. App. Div. 442, 85 N. Y. Suppl. 857; New York *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 29, 86 N. Y. Suppl. 673.

Sufficiency of designation.— Where an ordinance requires street railroad companies to designate on their cars the destination thereof, so as to enable proposed passengers to board a car which will carry them to a place they seek, a car sign designating the destination as "Flushing, via Jackson Avenue," is a compliance where Flushing is a particular part of the city. New York *v.* New York, etc., R. Co., 89 N. Y. App. Div. 442, 85 N. Y. Suppl. 857.

61. People *v.* Detroit United R. Co., 154 Mich. 514, 118 N. W. 9; New York *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 29, 86 N. Y. Suppl. 673, holding that such a regulation is not satisfied by carrying a passenger on a car bearing the sign "Columbus Avenue" to the point only at which the car first reaches Columbus avenue, where such cars ordinarily run thirty blocks further on that avenue.

62. New York *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 29, 86 N. Y. Suppl. 673.

63. New York *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 29, 86 N. Y. Suppl. 673.

Diversion from route.— An ordinance providing that a car shall not be turned from its established route, except in cases of unavoidable accident or when according to schedule it is about to be turned into a car shed, does not prohibit the diversion of a car from its regular route for the purpose of making up time that has been unavoidably lost to restore it to schedule, and get the usual space ahead of the car that is following, although it necessitates a transfer of passengers. Dryden *v.* St. Louis Transit Co., 120 Mo. App. 424, 96 S. W. 1044. See also People *v.* Detroit United R. Co., 154 Mich. 514, 118 N. W. 9.

64. Lockyear *v.* Covert, 2 Ohio Cir. Ct. N. S. 389; Lockyear *v.* Covert, 25 Ohio Cir. Ct. 486, holding that an ordinance declaring it unlawful for any person in charge of an electric street car on any street of the municipality to refuse to stop at any regular stopping place when signaled to do so is authorized by a statute conferring power on municipalities to regulate the use of certain vehicles, and the speed of interurban, traction, and street railway cars within the corporation.

Interurban cars.— In the absence of statutory authority municipal corporations have no power to require by a penal ordinance the stopping of interurban cars to take on or discharge passengers. Townsend *v.* Circleville, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. N. S. 914.

of passengers to be carried in a car;[65] or to prohibit smoking in street cars.[66]

(III) *As to Rates of Fare and Transfers* — (A) *Rates of Fare*[67] — (1) In General. A street railroad company as a quasi-public corporation owes it as a duty to the public to demand reasonable rates only for the transportation of passengers,[68] and to serve its patrons in this regard without unjust discrimination,[69] and this duty may be enforced by the state acting directly through an act of the legislature;[70] or power to regulate the rates of fare to be charged within the municipal limits may be delegated to the municipality.[71] But it has been held that a municipality can make no regulation or contract with a street railroad company which curtails the power of the legislature to regulate the rates of fares to be charged thereon;[72] nor in the absence of legislative authority can a municipality

65. Smith *v.* Butler, 16 Q. B. D. 349, 50 J. P. 260, 34 Wkly. Rep. 416. See also Badcock *v.* Sankey, 54 J. P. 564, rule of company.

66. State *v.* Heidenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. Rep. 388.

67. Rules and regulations of street railroad company as to payment of fares see Carriers, 6 Cyc. 457 *et seq.*

68. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

69. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650, holding that where the constitution authorizes the general assembly to enact laws to prevent extortion and unjust discrimination by street railways in the transportation of passengers, it is a declaration of the sovereign power over the street railroad's duties to the public to demand only reasonable rates without unjust discrimination, although the legislature has enacted no laws to carry out the constitutional provision.

70. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650. See also Moneypenny *v.* Sixth Ave. R. Co., 7 Rob. (N. Y.) 328, 4 Abb. Pr. N. S. 357, 35 How. Pr. 452.

The right of the legislature to regulate the fares upon street railroads organized under a statute does not depend upon a reservation in such statute of the right to amend or repeal the statute. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

The regulation of a maximum rate to be charged by street railroad companies in cities of a particular class is not within a constitutional prohibition against the creation of corporations by special act. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

A statutory provision that railroads shall not charge over a certain sum per mile and imposing a penalty for charging a greater sum does not apply to a street railroad. Hoyt *v.* Sixth Ave. R. Co., 1 Daly (N. Y.) 528.

Uniformity.— A statute regulating the fares to be collected by street railroad companies need not operate uniformly upon all of such companies in the state, but it is sufficient if it operates upon all under the same circumstances and conditions. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

To exempt a street railroad company from legislative control over its rates of fare, it must appear that the exemption was made in its charter in clear and unmistakable language. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

A preliminary injunction will not be granted to restrain the enforcement of a statute regulating fares on street railroads at the suit of a stock-holder in such a company, notwithstanding there is serious doubt of its constitutionality, where it is not shown that either the company or its stock-holders will suffer irreparable injury or what amount of loss they will sustain by a compliance with the statute until final hearing. Ahern *v.* Newtown, etc., St. R. Co., 105 Fed. 702.

71. People *v.* Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Forman *v.* New Orleans, etc., R. Co., 40 La. Ann. 446, 4 So. 246; Sternberg *v.* State, 36 Nebr. 307, 54 N. W. 553, 19 L. R. A. 570; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592.

A municipality is not authorized to fix the rates of fare to be charged by a street railroad company by provisions in the charter of the city authorizing it to "pass all by-laws concerning carriages, wagons, carts, etc.," and "every by-law, ordinance and regulation it may deem proper for the peace, health, order or good government of the city;" nor is it so authorized by a proviso, in a street railroad company's charter, "that rates of fare and freight upon said railroad shall be subject to the approval of the mayor and city council;" or by a reservation in an ordinance granting the use of streets for a street railroad that such road shall be "subject to all the laws and ordinances now in force, and such as may be hereafter made," unless it is either expressly or by necessary implication thereto authorized by some law of the state. Old Colony Trust Co. *v.* Atlanta, 83 Fed. 39 [*affirmed* in 88 Fed. 859].

72. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

Application.—An ordinance regulating the rates of fare to be charged by a street railroad company does not prevent the state legislature from afterward providing that such company shall issue one-half-fare tickets to school children, particularly where the constitution provides that no irrevocable or

interfere with a street railroad company in the regulation of its rates of fare under express statutory authority, so long as it acts in good faith.[73] Where a municipality makes a contract with a street railroad company fixing the rates of fare, its power of altering such rates is suspended for the period of the running of the contract,[74] unless such alteration is made with the consent of both parties for a sufficient consideration.[75] Thus where a municipality authorizes a street railroad company to charge a specified rate of fare for a given period, it cannot require the company to reduce such rate during the period specified,[76] nor can the company during the continuance of such contract increase the rate of fare.[77] Regulations have been made which require that but a single fare, usually five cents, shall be charged each passenger for a continuous ride over the street railroad company's lines within the municipal limits,[78] and an additional fare for distances beyond the municipal limits; [79] or which require a certain number of tickets to be sold for a specified sum, such as six tickets for twenty-five cents; [80] or which require pupils to be carried to and from school at a rate less than the regular fare.[81]

(2) MUST BE REASONABLE. Power to regulate rates of fare of a street railroad company is subject to the limitations: (1) That there is reasonable need on the part of the public, considering the nature and extent of the service, to lower the rates and give better terms than those existing; [82] and (2) that the rates and terms fixed by the regulation are not clearly unreasonable in view of all the conditions.[83]

uncontrollable grant of privileges shall be made, and that all privileges granted by the legislature or under its authority shall be subject to its control. San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 26 S. Ct. 261, 50 L. ed. 491.

73. Cambridge *v.* Cambridge R. Co., 10 Allen (Mass.) 50.

74. Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 538, 24 S. Ct. 756, 764, 48 L. ed. 1102, 1109 [*affirming* 94 Fed. 385]; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592.

75. Cleveland City R. Co. *v.* Cleveland, 94 Fed. 385 [*affirmed* in 194 U. S. 517, 538, 24 S. Ct. 756, 764, 48 L. ed. 1102, 1109].

Contract.— A municipality and a street railroad company may, in good faith, enter into a contract for the better accommodation of the public by which, in consideration of more rapid transportation through a new motive power, the municipality increases the rate of fare as authorized by the original grant. Clement *v.* Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355; Cincinnati *v.* Cincinnati St. R. Co., 2 Ohio S. & C. Pl. Dec. 468, 2 Ohio N. P. 298.

76. Minneapolis *v.* Minneapolis St. R. Co., 215 U. S. 417, 30 S. Ct. 118, 54 L. ed. 118; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592; Old Colony Trust Co. *v.* Atlanta, 83 Fed. 39.

77. Edinburgh St. Tramways Co. *v.* Torbain, 3 App. Cas. 58, 37 L. T. Rep. N. S. 288.

78. Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344; Wimmer *v.* Union Traction Co., 12 Pa. Super. Ct. 467, holding, however, that such a regulation does not entitle a passenger to ride to a terminus and back for a single fare. See also Moneypenny *v.* Sixth Ave. R. Co., 7 Rob. (N. Y.) 328, 4 Abb. Pr. N. S. 357, 35 How. Pr. 452.

79. Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344.

80. Sternberg *v.* State, 36 Nebr. 307, 54 N. W. 553, 19 L. R. A. 570.

Liability to passenger for refusing to sell tickets in compliance with such a regulation see Rice *v.* Detroit, etc., R. Co., 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 24.

81. San Antonio Traction Co. *v.* Altgelt, 200 U. S. 304, 26 S. Ct. 261, 50 L. ed. 491, one-half fare.

Constitutionality.— A statute which requires street railroad companies to carry pupils of the public schools to and from school at rates not exceeding one half the regular fare between certain points is constitutional, although it does not apply to an elevated railroad company, and although the privilege extends only to pupils of the public schools, since this is a police regulation in the interest of education, and it is assumed that the legislature was satisfied that no railroad company would suffer loss from such regulation. Com. *v.* Interstate Consol. St. R. Co., 187 Mass. 436, 73 N. E. 530 [*affirmed* in 207 U. S. 79, 28 S. Ct. 26, 52 L. ed. 111].

82. Milwaukee Electric R., etc., Co. *v.* Milwaukee, 87 Fed. 577.

83. Milwaukee Electric R., etc., Co. *v.* Milwaukee, 87 Fed. 577.

Neither of these conditions is independent of the other and, although the public interest is of the first importance, the test is not what is desirable on the part of the other, but what is reasonable in respect to the rights of both, so as to afford a reasonable compensation to the company and to impose no unreasonable burden upon the passenger. Ellis *v.* Milwaukee City R. Co., 67 Wis. 135, 30 N. W. 218, 58 Am. Rep. 858; Milwaukee Electric R., etc., Co. *v.* Milwaukee, 87 Fed. 577.

Reasonableness.—An ordinance requiring a street railroad company charging five-cent fares to sell six tickets for twenty-five cents or twenty-five tickets for one dollar is un-

Such rates must not unreasonably discriminate against any particular class of persons.[84] But, although a rate is reasonable when fixed, under the conditions then existing, it may subsequently become unreasonable by reason of the company's building extensions and connecting lines, changing its motive power, and otherwise rendering increased services at an additional cost.[85] A street railroad company cannot be required to carry passengers without reward,[86] or for such sums as amount to a confiscation or taking of property without compensation or due process of law.[87]

(3) IN NEW YORK. Under the New York statutes[88] no corporation constructing and operating a street railroad, under such statutes, shall charge any passenger more than five cents for one continuous ride, from any point on its road, or on any road, line, or branch operated by it or under its control,[89] to any other point thereof or any connecting branch thereof,[90] within the limits of any incorporated city or village; and not more than one fare shall be charged within the limits of any such city or village for passage over the main line of the road and any branch or extension thereof,[91] if the right to construct such branch

reasonable when the road is only making yearly net earnings of three and three-tenths per cent to four and five-tenths per cent on its *bona fide* investment and paying five per cent interest on its bonds, in a city where the current rate of interest on first mortgage real estate security is six per cent; and such an ordinance is void, under the fourteenth amendment, as depriving the company of its property without due process of law. Milwaukee Electric R., etc., Co. *v.* Milwaukee, 87 Fed. 577.

84. Robira *v.* New Orleans, etc., R. Co., 45 La. Ann. 1368, 14 So. 214; Forman *v.* New Orleans, etc., R. Co., 40 La. Ann. 446, 4 So. 246, holding that a contract between a city and a street railroad company which exacts from the public a fare of ten cents except to actual residents who can on certain conditions make a trip for five cents is not an unreasonable discrimination.

85. Ellis *v.* Milwaukee City R. Co., 67 Wis. 135, 30 N. W. 218, 58 Am. Rep. 858.

86. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

Policemen and firemen.— An act of the legislature requiring a street railroad company to carry firemen and policemen free of charge is unconstitutional as depriving the company of property without due process of law, for although it be conceded that public safety requires policemen and firemen to be carried on street railroad cars, such safety will not be promoted by their carriage free of charge. Wilson *v.* United Traction Co., 72 N. Y. App. Div. 233, 76 N. Y. Suppl. 203. But see N. Y. Gen. Mun. L. (Laws 1909), c. 29, §§ 206, 207.

87. Indianapolis *v.* Nevin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; Com. *v.* Interstate Consol. St. R. Co., 187 Mass. 436, 73 N. E. 530 [*affirmed* in 207 U. S. 79, 28 S. Ct. 26, 52 L. ed. 111]. See also CONSTITUTIONAL LAW, 8 Cyc. 901, 1117.

88. New York Consol. Laws (1909), tit. RAILROAD LAW, §§ 101, 104, and Laws (1884), c. 252.

89. The control contemplated by section 101 of the New York Railroad Law means the control of the operation of the road and not merely the control of the corporation or individuals who operate it by reason of the ownership of a majority of stock, and hence the fact that one street surface railroad company owns the majority of the stock of a similar company having a separate and distinct management, and thus may be able indirectly to control the management by the election of directors in such other company, does not constitute the control of such other company within the meaning of this statute. Senior *v.* New York City R. Co., 111 N. Y. App. Div. 39, 97 N. Y. Suppl. 645 [*affirmed* in 187 N. Y. 559, 80 N. E. 1120].

90. King *v.* Nassau Electric R. Co., 128 N. Y. App. Div. 130, 112 N. Y. Suppl. 589.

Roads and connections.— Two lines of street surface railroad, originally constructed and owned by separate companies operating different lines of cars and brought into physical relation only by means of a third intervening line of road, do not, where they have been taken into a general railroad system, constitute a road and "connecting branch thereof" or "main line of road and any branch or extension thereof" within the meaning of such statute; but the terms of the statute suggest an original or main line which by an offshoot and secondary and tributary line has been extended or continued, the two constituting a single continuous and connected line of road. Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 778 [*affirming* 121 N. Y. App. Div. 582, 106 N. Y. Suppl. 378].

91. This provision does not apply to roads operated under a lease or contract, but only to the main line and branches thereof built by the carrying company itself, and entitles a passenger to transportation over the main line and branches thereof without the payment of another fare; and it has also been held that this provision does not apply where two lines owned by the same company do not connect, that is do not run into each other, but on the contrary cross at right angles. O'Connor *v.* Brooklyn Heights R. Co., 123 N. Y. App. Div. 784, 108 N. Y. Suppl. 471; Baron *v.* New York City R. Co., 120 N. Y. App. Div. 134, 105 N. Y. Suppl. 258 [*revers-*

or extension shall have been acquired under the provisions of these statutes;[92] and it is further provided that where one street surface railroad company acquires by lease or otherwise the right to operate another street surface railroad, after the passage of such statutes, it is required to carry a passenger not only over its own road but over the connecting leased road operated by it within the limits of a city or village, for a single fare;[93] and for a refusal to do so the company so refusing shall forfeit fifty dollars to the aggrieved party. It has been held that these provisions apply only to street surface railroads[94] which have been incorporated under the provisions of these statutes, and that they do not apply where a street surface railroad leases the line of an elevated railroad or steam surface railroad, or to railroad companies which are not incorporated under such statutes;[95] but that in such case the company may charge in addition to the single fare of five cents over its own road the fare which by its charter the leased elevated,[96] or steam surface railroad,[97] or which the road organized prior to May 6, 1884,[98] was entitled to charge, although it changes the motive power of such a steam railroad and operates it as an electric surface railroad.[99]

(B) *Transfers* — (1) IN GENERAL. Regulations are sometimes made and held reasonable which require that a transfer shall be given on the change of a passenger from one line to a connecting line leased or operated by the same company within the city limits,[1] and which prohibits a passenger from selling such transfer or giving it away,[2] under a prescribed penalty for a violation thereof.[3] Under the

ing 52 Misc. 581, 102 N. Y. Suppl. 746]. But see McNulty *v.* Brooklyn Heights R. Co., 31 Misc. (N. Y.) 674, 66 N. Y. Suppl. 57.

Penalty.— Section 101 of the Railroad Law provides no penalty for a violation thereof but the right to recover such penalty must be sought under section 39 which provides for the forfeiture of fifty dollars to the aggrieved party in case of an overcharge. Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 778 [*affirming* 121 N. Y. App. Div. 582; 106 N. Y. Suppl. 378]; Baron *v.* New York City R. Co., 120 N. Y. App. Div. 134, 105 N. Y. Suppl. 258 [*reversing* 52 Misc. 581, 102 N. Y. Suppl. 746].

On short service car.— If a passenger pays one fare without knowledge or notice that the destination of the car is short of the point to which he desires transportation and upon the same or another car an additional fare is exacted for carrying him beyond the destination of the car which he first boards, the carrier becomes subject to the penalty prescribed in section 39 of the Railroad Law; but where a passenger leaves a short service car at the end of its route without boarding another car which would carry him to his destination and paying another fare, an excessive fare has not been exacted and he is not entitled to recover such penalty. Baron *v.* New York City R. Co., 120 N. Y. App. Div. 134, 105 N. Y. Suppl. 258 [*reversing* 52 Misc. 581, 102 N. Y. Suppl. 746].

92. See Mendoza *v.* Metropolitan St. R. Co., 51 N. Y. App. Div. 430, 64 N. Y. Suppl. 745 [*reversing* 48 N. Y. App. Div. 62, 62 N. Y. Suppl. 580].

93. New York Consol. Laws (1909), tit. RAILROAD LAW, § 104. See also Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 778 [*affirming* 121 N. Y. App. Div. 582, 106 N. Y. Suppl. 378]; People *v.* Brooklyn Heights R. Co., 187 N. Y. 48, 79 N. E. 838. But see Roosa *v.* Brooklyn Heights R. Co., 28 Misc. (N. Y.) 387, 59 N. Y. Suppl. 664.

94. People *v.* Brooklyn Heights R. Co., 187 N. Y. 48, 79 N. E. 838.

95. Barnett *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 432, 65 N. Y. Suppl. 1068. See also McNulty *v.* Brooklyn Heights R. Co., 36 Misc. (N. Y.) 402, 73 N. Y. Suppl. 698.

96. People *v.* Brooklyn Heights R. Co., 187 N. Y. 48, 79 N. E. 838.

97. People *v.* Brooklyn Heights R. Co., 187 N. Y. 48, 79 N. E. 838; Barnett *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 432, 65 N. Y. Suppl. 1068.

98. Barnett *v.* Brooklyn Heights R. Co., 53 N. Y. App. Div. 432, 65 N. Y. Suppl. 1068.

99. People *v.* Brooklyn Heights R. Co., 187 N. Y. 48, 79 N. E. 838.

1. Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; Pine *v.* St. Paul City R. Co., 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; Richmond R., etc., Co. *v.* Brown, 97 Va. 26, 32 S. E. 775. *Compare* Atlanta *v.* Old Colony Trust Co., 88 Fed. 859, 32 C. C. A. 125 [*affirming* 83 Fed. 39].

Transfer to line of other company see Cronin *v.* Highland St. R. Co., 144 Mass. 249, 10 N. E. 833; Wakefield *v.* South Boston R. Co., 117 Mass. 544.

A regulation requiring a transfer check is not unreasonable, and the passenger must comply with the conditions thereof to entitle him to passage. Percy *v.* Metropolitan St. R. Co., 58 Mo. App. 75.

A custom of transferring without a check from one car into another cannot be changed without due notice. Consolidated Traction Co. *v.* Taborn, 58 N. J. L. 1, 32 Atl. 685.

2. *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55.

3. *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac.

New York statutes [4] every street railroad company which enters into a contract with another company for the use or lease of its road [5] shall upon demand and without extra charge give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip [6] to any point or portion of any railroad embraced in such contract,[7] and within the limits of any one incorporated city or village; [8] and for a refusal to do so the company so refusing shall forfeit fifty dollars to the aggrieved party.[9] But in order that a passenger may be

68, 79 Am. St. Rep. 47, 50 L. R. A. 55, holding that a municipal ordinance designed to correct and prevent abuses of the transfer system and making such requirement of a passenger is legitimate and within the scope of the statutory powers granted to cities to make regulations for the government of street railroads.

4. New York Consol. Laws (1909), tit. Railroad Law, § 104.

The regulation of fares under section 104 of the New York Railroad Law is an exercise of the police power of the legislature and does not necessarily tend to diminish the business of the company or to impair the salability of its property. Blume *v.* Interurban St. R. Co., 41 Misc. 171, 83 N. Y. Suppl. 989.

5. Section 104 of the New York Railroad Law (1909), requiring street surface railroads to issue transfers so that a passenger may make a continuous trip for a single fare, applies only to companies which operate the lines of other companies, acquired under section 78 of such law by lease or contract, and has no application where different lines are constructed by the same company. Griffin *v.* Interurban St. R. Co., 179 N. Y. 438, 72 N. E. 513 [*modifying* 96 N. Y. App. Div. 636, 89 N. Y. Suppl. 1105]; King *v.* Nassau Electric Co., 128 N. Y. App. Div. 130, 112 N. Y. Suppl. 589; O'Connor *v.* Brooklyn Heights R. Co., 123 N. Y. App. Div. 784, 108 N. Y. Suppl. 471; Baron *v.* New York City R. Co., 120 N. Y. App. Div. 134, 105 N. Y. Suppl. 258 [*reversing* 52 Misc. 581, 102 N. Y. Suppl. 746]; McLaughlin *v.* New York City R. Co., 106 N. Y. App. Div. 1, 94 N. Y. Suppl. 653. And since section 78 by its express terms does not apply to a lease made prior to May 1, 1891, section 104 therefore does not apply to a street railroad operated under a lease made prior to that time. Topham *v.* Interurban St. R. Co., 96 N. Y. App. Div. 323, 89 N. Y. Suppl. 298.

6. The word "continuous" as used in the statute must be construed to mean the most direct, quickest, and most convenient route, and a passenger is entitled to a transfer at a point of intersection which will enable him to reach his destination by such a route. Charbonneau *v.* Nassau Electric R. Co., 123 N. Y. App. Div. 531, 108 N. Y. Suppl. 105.

7. Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 778 [*affirming* 121 N. Y. App. Div. 582, 106 N. Y. Suppl. 378]; People *v.* Brooklyn Heights R. Co., 187 N. Y. 48, 79 N. E. 838; O'Reilly *v.* Brooklyn Heights R. Co., 179 N. Y. 450, 72 N. E. 517 [*affirming* 95 N. Y. App. Div. 253, 89 N. Y. Suppl. 41]; Hunt *v.* Brooklyn Heights R. Co., 115 N. Y. App. Div. 673, 101 N. Y. Suppl. 209 (holding also that where a passenger rides past his place of transfer and seeks to go to his destination by transferring from line to line at another point, he is not entitled to recover the penalty for the refusal of a transfer); Scudder *v.* Interurban St. R. Co., 96 N. Y. App. Div. 340, 89 N. Y. Suppl. 1115 [*modified* in 179 N. Y. 438, 72 N. E. 513]. See also O'Connor *v.* Brooklyn Heights R. Co., 123 N. Y. App. Div. 784, 108 N. Y. Suppl. 471.

"Embraced in such contract," as used in such statute, includes only roads operated by the contracting companies at the time the contract is made, and hence a company leasing another connecting company's road, and operating it, is not bound to transfer a passenger riding from a point on its original line over the leased line to a third line subsequently leased. Mendoza *v.* Metropolitan St. R. Co., 51 N. Y. App. Div. 430, 64 N. Y. Suppl. 745 [*reversing* 48 N. Y. App. Div. 62, 62 N. Y. Suppl. 580].

8. Blume *v.* Interurban St. R. Co., 41 Misc. (N. Y.) 171, 83 N. Y. Suppl. 989, holding that this provision applies to the Interurban Street Railroad Company of the city of New York, and requires it to give for a single fare transfers over all the lines of its system which are wholly within the city limits.

9. See Griffin *v.* Interurban St. R. Co., 179 N. Y. 438, 72 N. E. 513 [*modifying* 96 N. Y. App. Div. 636, 89 N. Y. Suppl. 1105]; Nicholson *v.* Brooklyn Heights R. Co., 118 N. Y. App. Div. 13, 103 N. Y. Suppl. 301; O'Connor *v.* Brooklyn Heights R. Co., 123 N. Y. App. Div. 784, 108 N. Y. Suppl. 471.

An "aggrieved party" within the meaning of such provision means a person who enters on or continues a trip with the real and actual desire of getting to some place, and whose purpose is interfered with or defeated if the street railroad company unjustly refuses to give him a transfer which will enable him to reach the point for which he has set out and who therefore by such refusal is disappointed and defeated in the object of his aim. Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385, 19 L. R. A. N. S. 778 [*affirming* 121 N. Y. App. Div. 582, 106 N. Y. Suppl. 378]. A person riding on a street surface railroad for the purpose of acquiring information to be used in an action for the penalty under such statute is not a passenger within the meaning thereof, and therefore is not an "aggrieved party." Bull *v.* New York City R. Co., *supra*; Nicholson *v.* New York City R. Co., 118 N. Y. App. Div. 858, 103 N. Y. Suppl. 695; Myers *v.*

entitled to a transfer from one line to another under these statutes, the two lines must be operated as intersecting lines in one railroad system;[10] and, although these statutes provide that the company shall incur the forfeiture for every refusal to comply with its requirements, the penalties provided for are not cumulative, and only one penalty can be recovered in a single action, and the institution of an action for a penalty is to be regarded as a waiver of all previous penalties incurred.[11] It has been held that where a company operates cars making a continuous trip between certain points, a passenger desiring to be transported between those points must take the through car, and is not entitled to a transfer from a car running only a part of the distance.[12]

(2) DEMAND OF TRANSFER. In carrying out the system of transfers, it has been held that it is a reasonable regulation for a street railroad company to establish a rule that a passenger must demand a transfer at the time of the payment of his fare.[13] Where a passenger asks for a transfer to a certain line without specifying the direction in which he wishes to go on such line and receives a transfer which is good only on a car going in the direction opposite to that which he wishes to pursue, and the transfer is refused on a car going in his direction, he cannot

Brooklyn Heights R. Co., 10 N. Y. App. Div. 335, 41 N. Y. Suppl. 798.

An infant passenger who is refused a transfer is an "aggrieved party" and may sue for the penalty in his own name under section 468 of the code of civil procedure. Fox *v.* Interurban St. R. Co., 42 Misc. (N. Y.) 538, 86 N. Y. Suppl. 64.

Fare paid by escort.— A passenger may maintain an action for the statutory penalty for the failure of a street railroad company to issue a transfer to her, although her fare was paid by her escort. McLaughlin *v.* New York City R. Co., 106 N. Y. App. Div. 1, 94 N. Y. Suppl. 653.

Defenses.— Where a street railroad company furnishes the conductor with transfer tickets, it has been held that it is a good defense to an action against it for the penalty for a refusal to give a transfer that the passenger failed to receive such transfer through the misjudgment, neglect, mistake, or inadvertence of the conductor or through the conductor's belief that the passenger was not entitled thereto for failing to demand a transfer when paying his fare. Snee *v.* Brooklyn Heights R. Co., 120 N. Y. App. Div. 570, 104 N. Y. Suppl. 907 [*affirmed* in 193 N. Y. 659, 87 N. E. 1127]; Tullis *v.* Brooklyn Heights R. Co., 71 N. Y. App. Div. 494, 75 N. Y. Suppl. 863; Schwartzman *v.* Brooklyn Heights R Co., 50 Misc. (N. Y.) 116, 98 N. Y. Suppl. 941. See also O'Connor *v.* Brooklyn Heights R. Co., 123 N. Y. App. Div. 784, 108 N. Y. Suppl. 471. But it is not a good defense that the giving of transfers at the point in question might cause undue crowding in the street and at the crossings. Moskowitz *v.* Brooklyn Heights R. Co., 47 Misc. (N. Y.) 119, 93 N. Y. Suppl. 385.

Limitations.— The time within which an action must be brought to recover such a penalty is governed by the three-year limitation prescribed by section 383 of the code of civil procedure, and not by the one-year limitation prescribed by section 39 of the Railroad Law. Munro *v.* Brooklyn Heights R. Co., 195 N. Y. 254, 88 N. E. 567 [*affirming* 120 N. Y. App. Div. 516, 105 N. Y. Suppl. 325].

10. Ketcham *v.* New York City R. Co., 48 Misc. (N. Y.) 367, 95 N. Y. Suppl. 553.

Where the roads are physically distinct and not operated as intersecting lines in one system, although wholly within the limits of the same city, a passenger on the one is not entitled to a transfer to the other. Ketcham *v.* New York City R. Co., 48 Misc. (N. Y.) 367, 95 N. Y. Suppl. 553, holding that in such a case a street railroad company is not required to give a transfer to a passenger who has been carried to the terminus of one line and to within thirty feet of the other line.

11. Griffin *v.* Interurban St. R. Co., 179 N. Y. 438, 72 N. E. 513 [*modifying* 96 N. Y. App. Div. 636, 89 N. Y. Suppl. 1105]; Harkow *v.* New York City R. Co., 121 N. Y. App. Div. 194, 105 N. Y. Suppl. 689; McLaughlin *v.* New York City R. Co., 106 N. Y. App. Div. 1, 94 N. Y. Suppl. 653; McLean *v.* Interurban St. R. Co., 102 N. Y. App. Div. 18, 92 N. Y. Suppl. 77. But see Lux *v.* New York City R. Co., 45 Misc. (N. Y.) 222, 92 N. Y. Suppl. 109.

12. Roach *v.* Brooklyn Heights R. Co., 119 N. Y. App. Div. 520, 104 N. Y. Suppl. 219. See also Baron *v.* New York City R. Co., 120 N. Y. App. Div. 134, 105 N. Y. Suppl. 258 [*reversing* 52 Misc. 581, 102 N. Y. Suppl. 746]; Mills *v.* Seattle, etc., R. Co., 50 Wash. 20, 96 Pac. 520, 19 L. R. A. N. S. 704.

13. Ketchum *v.* New York City R. Co., 118 N. Y. App. Div. 248, 103 N. Y. Suppl. 486 (holding that such a rule is not unreasonable since the company is entitled to protect itself against dishonest persons who may seek to obtain more than one transfer); Fischer *v.* New York City R. Co., 54 Misc. (N. Y.) 267, 104 N. Y. Suppl. 400. But see Levine *v.* Nassau Electric R. Co., 50 Misc. (N. Y.) 552, 99 N. Y. Suppl. 422, holding that a street railroad company is liable to the penalty prescribed by section 39 of the Railroad Law (1909), for the refusal of its conductor to give a transfer, notwithstand-

recover the statutory penalty;[14] but if he asks for a transfer in a certain direction, and a transfer good only in the opposite direction is given him, by reason of which it is not accepted on the car to which he transfers, it is tantamount to a refusal and the penalty may be recovered.[15] The fact that the conductor has no transfers at the time a passenger asks for one, does not absolve the company from liability for the statutory penalty.[16]

(3) Point of Transfer. Where a transfer is to be made, and the transfer ticket indicates that it is to be presented at the intersection of the issuing line, a passenger is entitled to transfer at a point where a connecting line leaves the road upon which he was first traveling and which affords him the nearest and most convenient route to his destination,[17] and the transfer must be made at the point where the two roads intersect;[18] but this does not mean that such route must be in the same longitudinal direction in which the passenger was first traveling;[19] nor does it entitle him to reverse the direction of his trip without paying another fare.[20]

(4) Limit of Use of Transfer. Regulations are also sometimes made which require a street car passenger to use his transfer within the time limited thereon,[21] provided a car upon which the passenger can be conveniently and comfortably transported passes the transfer point within the time so limited.[22] But a rule

ing the failure of the passenger to demand the transfer when he paid his fare.

14. Thistle *v.* New York City R. Co., 54 Misc. (N. Y.) 268, 104 N. Y. Suppl. 401; Gasper *v.* New York City R. Co., 51 Misc. (N. Y.) 43, 99 N. Y. Suppl. 904.

15. Gasper *v.* New York City R. Co., 51 Misc. (N. Y.) 39, 99 N. Y. Suppl. 902.

16. Rosenberg *v.* Brooklyn Heights R. Co., 91 N. Y. App. Div. 580, 86 N. Y. Suppl. 871.

In such an emergency the conductor should, upon request, furnish the passenger with a slip stating that he had paid his fare, or make an oral explanation to the conductor of the car to which the passenger desires to be transferred. Rosenberg *v.* Brooklyn Heights R. Co., 91 N. Y. App. Div. 580, 86 N. Y. Suppl. 871.

17. Charbonneau *v.* Nassau Electric R. Co., 123 N. Y. App. Div. 531, 108 N. Y. Suppl. 105; Kelly *v.* New York City R. Co., 119 N. Y. App. Div. 223, 104 N. Y. Suppl. 561 [*reversing* 52 Misc. 585, 102 N. Y. Suppl. 742, and *affirmed* in 192 N. Y. 97, 84 N. E. 569].

When a transfer ticket does not specify the exact place of transfer, a passenger using the same has a right to change at such point of intersection as furnishes the most direct and convenient route. Charbonneau *v.* Nassau Electric R. Co., 123 N. Y. App. Div. 531, 108 N. Y. Suppl. 105.

Custom of issuing transfer.— Where, although a passenger knows he can travel to his destination by pursuing a route over which the company issues transfers, he has frequently traveled over the route selected, and has always theretofore been given a transfer, and no notice of the discontinuance of transfers is given to him when he boards car, or until no alternative continuous route is available, the company is liable for refusing to issue a transfer to him as theretofore. Freeman *v.* New York City R. Co., 92 N. Y. Suppl. 47.

18. Hanley *v.* Brooklyn Heights R. Co., 110 N. Y. App. Div. 429, 96 N. Y. Suppl. 249, holding that where a transfer ticket reads "good only . . at intersection of issuing line" boarding a car a block down the intersecting line is a violation of the rule. See also Percy *v.* Metropolitan St. R. Co., 58 Mo. App. 75.

19. Wells *v.* New York City R. Co., 122 N. Y. App. Div. 488, 107 N. Y. Suppl. 430, holding that a street railroad company is liable for the statutory penalty upon its refusal to issue a transfer so that a passenger can reach his destination on the opposite side of a park, although the route requires him to travel north, west, and south.

20. Kelly *v.* New York City R. Co., 192 N. Y. 97, 84 N. E. 569 [*affirming* 119 N. Y. App. Div. 223, 104 N. Y. Suppl. 561].

21. *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55; Garrison *v.* United Rys., etc., Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452 (rule of company); Heffron *v.* Detroit City R. Co., 92 Mich. 406, 52 N. W. 802, 16 L. R. A. 345, 31 Am. St. Rep. 601; Laird *v.* Pittsburg Traction Co., 166 Pa. St. 4, 31 Atl. 51.

There is a reason for limiting the time within which a transfer ticket may be effectually used for the purpose of a continuous passage in the fact that otherwise the opportunity might be taken to use, or permit it to be used, for other than the contemplated continuous passage to the prejudice of the company. Muckle *v.* Rochester R. Co., 79 Hun (N. Y.) 32, 29 N. Y. Suppl. 732.

22. Hornesby *v.* Georgia R., etc., Co., 120 Ga. 913, 48 S. E. 339; Jenkins *v.* Brooklyn Heights R. Co., 29 N. Y. App. Div. 8, 51 N. Y. Suppl. 216. But see Garrison *v.* United Rys., etc., Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452, holding that where a passenger receives a transfer limited upon its face and presents the transfer on a connecting line after the expiration of the time limit, the conductor is justified in refusing to ac-

of a street railroad company which puts an improper time limit upon a transfer ticket does not relieve it from its obligation to carry for a single fare;[23] nor does the acceptance by a passenger of a transfer ticket so improperly limited modify the original contract of carriage or waive any rights acquired under it.[24]

(iv) *As to Employees.* Regulations which require a street railroad company to have a conductor in charge of each car,[25] or to have a driver or motorman and a conductor or other agent on each car to control the car and passengers,[26] or which require conductors to be licensed,[27] have been held to be reasonable regulations.

(v) *As to Equipment of Cars.* Regulations have been enacted by the legislature or municipality, and held reasonable, which require a street railroad company to furnish its cars with such equipment as will tend to make their operation safer.[28] Thus it has been held to be a reasonable regulation to require proper and suitable fenders to be placed on the front of traction cars,[29] or to require

cept it and in demanding the fare, although no car has passed the connecting point until after the expiration of the time limit, but that if in such a case the passenger is required to pay his fare, he will have his action against the company.

23. Jenkins *v.* Brooklyn Heights R. Co., 29 N. Y. App. Div. 8, 51 N. Y. Suppl. 216, holding that a rule of the company that a transfer ticket given to a passenger on alighting from a car shall be void if not used within ten minutes, regardless of whether the condition of the cars which the company supplies during that time is such as to afford him suitable accommodation, is arbitrary and illegal.

24. Jenkins *v.* Brooklyn Heights R. Co., 29 N. Y. App. Div. 8, 51 N. Y. Suppl. 216.

25. State *v.* Sloan, 48 S. C. 21, 25 S. E. 898.

26. South Covington, etc., St. R. Co. *v.* Berry, 93 Ky. 43, 18 S. W. 1026, 13 Ky. L. Rep. 943, 40 Am. St. Rep. 161, 15 L. R. A. 604; State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; Thornhill *v.* Cincinnati, 4 Ohio Cir. Ct. 354, 2 Ohio Cir. Dec. 592; Von Diest *v.* San Antonio Traction Co., 33 Tex. Civ. App. 577, 77 S. W. 632, holding that such a regulation requires a motorman only on motor cars and not on trailers. But *compare* Brooklyn Crosstown R. Co. *v.* Brooklyn, 37 Hun (N. Y.) 413 (holding that a city, under its general power to regulate horse railroads and carriers of passengers, cannot compel horse cars to be provided with conductors as well as drivers); Toronto *v.* Toronto St. R. Co., 15 Ont. App. 30 (holding that such a by-law is invalid as an invasion of the domestic concerns of the company).

Enforcement.—A provision in an ordinance, requiring the police to cause every car not provided with a "driver and conductor" to be returned to the stable, is not an attempt at enforcement without trial, but merely a means of preventing a nuisance by blockading travel. South Covington, etc., St. R. Co. *v.* Berry, 93 Ky. 43, 18 S. W. 1026, 13 Ky. L. Rep. 943, 40 Am. St. Rep. 161, 15 L. R. A. 604.

27. Caswell *v.* Boston El. R. Co., 190 Mass. 527, 77 N. E. 380, holding, however, that a person employed by a street railroad company charged with the duty of standing at the rear end of a car in charge of the motorman, and loaded with coal for transportation to a power-house, to look out for the trolley strings, turn the switches, and unload the coal, is not a conductor within the meaning of a statute relating to the licensing of conductors.

28. See Englund *v.* Mississippi Valley Traction Co., 139 Ill. App. 572.

29. Chicago, etc., Electric R. Co. *v.* Freeman, 125 Ill. App. 318; Cape May, etc., R. Co. *v.* Cape May, 59 N. J. L. 396, 36 Atl. 696, 36 L. R. A. 653 (holding that a city council has authority to provide by ordinance that it shall be unlawful to operate electric cars in the streets of the city without proper and suitable fenders); Von Diest *v.* San Antonio Traction Co., 33 Tex. Civ. App. 577, 77 S. W. 632 (holding that an ordinance making it unlawful to operate a street car unprovided with a fender of the most improved design and construction requires a fender only on motor cars and not on trailers); Toronto *v.* Toronto R. Co., 10 Ont. L. Rep. 730, 6 Ont. Wkly. Rep. 574.

Position and height of fender.—A provision in such a regulation with respect to the position and height of such fenders, if impracticable, is void. Chicago, etc., Electric R. Co. *v.* Freeman, 125 Ill. App. 318. Thus a provision, in an ordinance requiring safety fenders to be attached to the front platform of electric street cars, that they shall not be more than three inches from the tracks, is unreasonable, in view of the liability of the height of the car above the tracks to vary according to the loads, the grades, and the curves. Brooklyn *v.* Nassau Electric R. Co., 38 N. Y. App. Div. 365, 56 N. Y. Suppl. 609.

The "front" of the car within the meaning of such a regulation is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward in the sense that it would first meet a person or an object moving in the opposite direction; and the operating of a car for a distance of twelve hundred feet with the fender at the back instead of the front, as so defined, renders the company liable to the penalty prescribed by the statute. Toronto *v.*

screens or vestibules on cars during the winter months to afford protection to the motormen and conductors.[30] It has also been held to be a reasonable regulation to require a street railroad company to equip its cars with air or electric brakes,[31] unless it clearly appears that there is no necessity for a more efficient brake than that already in use,[32] or that neither an air nor electric brake is more efficient than the one in use.[33]

(VI) *AS TO MOVEMENT AND SPEED OF CARS.* It is also within the power of the legislature or municipal government to make reasonable regulations relative to the movements of street cars,[34] as by requiring cars to stop at specified places,[35] such as before crossing intersecting streets;[36] or before reaching a railroad crossing,[37] and not to proceed until it has been ascertained that the

Toronto R. Co., 10 Ont. L. Rep. 730, 6 Ont. Wkly. Rep. 574.

Suspension of regulation.— Where a statute requires all street railroad companies to use fenders in front of passenger cars, but provides that the corporation commission may "make exemptions" from the provisions of the statute, and the commission exempts all street railroad companies from such provisions until otherwise ordered, the order amounts, not to an exemption, but to a suspension of the statute, and hence is invalid, and the statute remains in force. Henderson *v.* Durham Traction Co., 132 N. C. 779, 44 S. E. 598.

Jurisdiction of railroad commissioners to order fenders put on electric cars as excluding power of the city to do so see Central R., etc., Co.'s Appeal, 67 Conn. 197, 35 Atl. 32.

30. *Minnesota.*— State *v.* Smith, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, not applicable to trailing car.

Missouri.— State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068, holding that a statute which requires companies owning or operating electric street railroads to provide their cars with screens for the protection of motormen during certain cold months and applying to every part of the state alike is not unconstitutional as class legislation, simply because it applies only to electric cars.

Ohio.— State *v.* Nelson, 52 Ohio St. 88, 23 N. E. 22, 26 L. R. A. 317.

Texas.— Beaumont Traction Co. *v.* State, 46 Tex. Civ. App. 576, 103 S. W. 238.

Canada.— Reg. *v.* Toronto R. Co., 35 Can. L. J. N. S. 422.

See 44 Cent. Dig. tit. "Street Railroads," § 153.

But *compare* Yonkers *v.* Yonkers R. Co., 51 N. Y. App. Div. 271, 64 N. Y. Suppl. 955.

31. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746.

That such a regulation will require a large outlay of money on the part of the company does not make it invalid. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746.

32. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746.

If the hand-brake is not to be dispensed with, under such a regulation, in order to show that the regulation is unreasonable, it must be made to appear that a car equipped with both kinds of brakes would not be safer than with the hand-brake alone. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A 746.

33. People *v.* Detroit United R. Co., 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746.

34. **Starting of elevated trains.**— A statute which provides that no train on an elevated railroad shall be permitted to start from a station until every passenger upon the platform desiring to enter the cars shall have done so, unless due notice has been given that the cars are filled, must be given a reasonable construction, and cannot be held to require gates of cars to be opened after they have been closed and a signal to start given, or after they have actually started, because people may thereafter come on to the platform and desire to take the train, which in many cases of daily occurrence would wholly prevent the operation of trains. Lauterer *v.* Manhattan R. Co., 128 Fed. 540, 63 C. C. A. 38.

35. North Birmingham St. R. Co. *v.* Calderwood, 89 Ala. 247, 7 So. 360, 18 Am. St. Rep. 105 (must stop on farther side of the street, clear of the crossing); Toronto *v.* Toronto R. Co., 12 Ont. L. Rep. 534, 8 Ont. Wkly. Rep. 179 [*affirming* 11 Ont. L. Rep. 103, 6 Ont. Wkly. Rep. 871].

Where stopping places are not designated by statute or ordinance, the company may regulate its own conduct in that regard. Robinson *v.* Helena Light, etc., Co., 38 Mont. 222, 99 Pac. 837.

36. Cape May, etc., R. Co. *v.* Cape May, 59 N. J. L. 404, 36 Atl. 678, 36 L. R. A. 657, holding that an ordinance compelling electric street cars to come to a full stop before crossing intersecting streets will not be set aside as unreasonable.

37. Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186; Toledo Consol. St. R. Co. *v.* Fuller, 17 Ohio Cir. Ct. 562, 9 Ohio Cir. Dec. 123 (holding that under a statute requiring street cars to come to a full stop not less than ten or more than fifty feet from steam railroad tracks, the car and horses, where such power is used, considered as one, must be stopped at that distance); Galveston, etc., R. Co. *v.* Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279 (railroad track whether main line or spur); Gulf, etc., R. Co. *v.* Holt, 30 Tex. Civ. App. 330, 70 S. W. 591.

way is clear,[38] or prohibiting motormen from moving cars across the tracks of a steam railroad until the conductor crosses the tracks and signals the motorman to proceed;[39] or requiring that a car shall not pass any other car standing at a crossing for the discharge or reception of passengers,[40] or that it shall slacken speed when approaching such a car;[41] or limiting the rate of speed at which cars may be run within municipal limits.[42] But it has been held that a regulation as

A statute imposing on engineers and conductors of trains the duty of causing their trains, when approaching a railroad crossing, to come to a full stop within a prescribed distance of the crossing and not to proceed until they have acquired knowledge that the way is clear, applies to street railroads. Montgomery St. R. Co. *v.* Lewis, 148 Ala. 134, 41 So. 736. But see Georgia R., etc., Co. *v.* Joiner, 120 Ga. 905, 48 S. E. 336.

38. Montgomery St. R. Co. *v.* Lewis, 148 Ala. 134, 41 So. 736; Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186.

39. Indianapolis Traction, etc., Co. *v.* Formes, 40 Ind. App. 202, 80 N. E. 872; Indianapolis Traction, etc., Co. *v.* Romans, 40 Ind. App. 184, 79 N. E. 1068; Bartholomaus *v.* Milwaukee Electric R., etc., Co., 129 Wis. 388, 109 N. W. 143.

Where a municipality, by its charter, has exclusive control over its streets, any law to the contrary notwithstanding, a street railroad company operating in the city is not obliged to comply with a statute requiring such companies to bring their cars to a stop at a certain distance before reaching a steam railroad crossing, and to send employees forward to ascertain whether a train is approaching. Wills *v.* Atchison, etc., R. Co., 133 Mo. App. 625, 113 S. W. 713.

40. Craven *v.* International R. Co., 100 N. Y. App. Div. 157, 91 N. Y. Suppl. 625, holding that such a regulation is applicable to a case where the street car company causes its cars to be stopped to discharge passengers before crossing a street, although it is difficult for the company to obey the ordinance under such circumstances.

41. Detroit United R. Co. *v.* Nichols, 165 Fed. 289, 91 C. C. A. 257.

42. *Connecticut.*— Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

Mississippi.— Donnaher *v.* State, 8 Sm. & M. 649.

Missouri.— Chouquette *v.* Southern Electric R. Co., 152 Mo. 257, 53 S. W. 897; Glenville *v.* St. Louis R. Co., 51 Mo. App. 629, holding that an ordinance passed about 1860, limiting the speed of street cars to eight miles an hour, will not be construed in 1892 to apply to cable cars. See also Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848.

New Jersey.— Cape May, etc., R. Co. *v.* Cape May, 59 N. J. L. 393, 36 Atl. 679, 36 L. R. A. 656.

New York.— United Traction Co. *v.* Watervliet, 35 Misc. 392, 71 N. Y. Suppl. 977, holding that an ordinance limiting the speed to only six miles an hour in the city streets is unreasonable and void.

Ohio.—Townsend *v.* Circleville, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. N. S. 914; Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229; Lewis *v.* Cincinnati St. R. Co., 10 Ohio S. & C. Pl. Dec. 53, 8 Ohio N. P. 417.

Canada.— London St. R. Co. *v.* London, 9 Ont. L. Rep. 439, 2 Ont. Wkly. Rep. 44, 3 Ont. Wkly. Rep. 123.

See 44 Cent. Dig. tit. "Street Railroads," § 154.

Reasonableness.— An ordinance limiting the rate of speed of electric street cars will not be set aside unless it unreasonably interferes with the franchise or privilege conferred upon the street railroad company (Cincinnati, etc., Electric St. R. Co. *v.* Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363; Cape May, etc., R. Co. *v.* Cape May, 59 N. J. L. 393, 36 Atl. 679, 36 L. R. A. 656), and it has been held that an ordinance restricting the speed of street cars between crossings to six miles an hour, and over crossings to four miles an hour, is not unreasonable (Cincinnati, etc., Electric St. R. Co. *v.* Stahle, *supra*); but an ordinance restricting the speed of trains within the city limits to six miles per hour is oppressive, and inapplicable to a road engaged largely in suburban business, which runs through a portion of the city thinly populated, and made up largely of truck patches (Zumault *v.* Kansas City, etc., Air Line, 71 Mo. App. 670).

Application of particular provisions.— A statute limiting the speed of riding through a street in the compact part of a town applies to a street railroad company, although its charter provides that the mayor and aldermen of the city may make such regulations as to rate of speed as the public safety and convenience require, in the absence of regulations by such mayor and aldermen. Bly *v.* Nashua St. R. Co., 67 N. H. 474, 32 Atl. 764, 68 Am. St. Rep. 681, 30 L. R. A. 303. But it has been held that an ordinance declaring it unlawful for any cart, wagon, or other vehicle used to carry passengers to be driven through the streets at a greater than a specified speed is not applicable to street surface cars operated by electricity. Robinson *v.* Metropolitan St. R. Co., 103 N. Y. App. Div. 243, 92 N. Y. Suppl. 1010. So an ordinance providing that it shall be unlawful for any locomotive, railroad car, or other vehicle to be propelled or drawn on such part of any railroad as shall be within the limits of the city at a faster rate than six miles an hour has no application to the cars of a street railroad operated in such city. Licznerski *v.* Wilmington City R. Co., 5 Pennew. (Del.) 201, 62 Atl. 1057.

An ordinance limiting speed is effective in subsequently attached territory, although a different rate of speed prevailed therein by statute prior to its being attached to the

to speed enacted in former years, when the motive power and other conditions were different, does not apply to another company operating in later years by a different motive power and under different conditions.[43]

(VII) *AS TO SIGNALS AND LOOKOUTS.* Regulations have also been enacted and held reasonable requiring street cars to have signal lights on the front and rear,[44] or a good and sufficient headlight at certain hours;[45] and requiring suitable and seasonable warning to be given of the approach of street cars to crossings,[46] as by requiring the cars to be provided with suitable gongs or bells which shall be sounded before reaching crossings of streets[47] or steam railroads.[48] Regulations have also been enacted which require that the persons in charge of a street car shall keep a vigilant lookout for teams and persons on foot, especially children, either on the track or moving toward it,[49] and shall stop the car in the shortest time and space possible,[50] on the first appearance of danger to such team or persons,[51] or on the first appearance of any obstruction;[52] and such a regulation is not extraordinary or unreasonable, as it only requires that ordinary degree of

municipality. Deneen *v.* Houghton County St. R. Co., 150 Mich. 235, 113 N. W. 1126.

Municipal consent that a street railroad company may maintain a certain rate of speed does not constitute a contract between the city and the railroad company that the latter should always have the right to operate its cars at that rate of speed. Brooklyn *v.* Nassau Electric R. Co., 20 N. Y. App. Div. 31, 46 N. Y. Suppl. 651.

Construction of general and special provisions as to rate of speed see Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86; Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626.

43. Bonham *v.* Citizens' St. R. Co., 158 Ind. 106, 62 N. E. 996, holding that city ordinances adopted in 1864 and 1876, granting franchises to a horse-power street railroad company, and restricting the speed of its cars, are not applicable to a successor of such company, operating its cars by electricity, although it accepted the franchises of its predecessor subject to all obligations imposed on it. See also Thompson *v.* Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462. But see Lewis *v.* Cincinnati St. R. Co., 10 Ohio S. & C. Pl. Dec. 53, 8 Ohio N. P. 417.

44. McGee *v.* Consolidated St. R. Co., 102 Mich. 107, 60 N. W. 293, 47 Am. St. Rep. 507, 26 L. R. A. 300, holding that where a city ordinance only requires electric street cars to be provided with "colored signal lights in front and rear" after sunset, a failure to also have a headlight is not negligence *per se*. See also Carter *v.* McDermott, 29 App. Cas. (D. C.) 145, 10 L. R. A. N. S. 1103; St. Helen's Tramways Co. *v.* Wood, 56 J. P. 70, 60 L. J. M. C. 141.

45. San Antonio St. R. Co. *v.* Mechler, (Tex. Civ. App. 1894) 29 S. W. 202.

46. Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836.

47. San Antonio St. R. Co. *v.* Mechler, (Tex. Civ. App. 1894) 29 S. W. 202.

The term, "street crossing," as used in an ordinance requiring a bell to be rung by a street car twenty-five feet from any street crossing, requires the ringing of a bell where one street intersects another, although it terminates at the point of intersection. Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734.

48. Gulf, etc., R. Co. *v.* Holt, 30 Tex. Civ. App. 330, 70 S. W. 591.

49. Caswell *v.* Boston El. R. Co., 190 Mass. 527, 77 N. E. 380; Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737; Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Gebhardt *v.* St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448; Lamb *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 489; Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

Acceptance of ordinance not necessary.— An ordinance requiring motormen on street cars to keep a vigilant watch for pedestrians approaching the tracks is a police regulation, and is binding on all corporations coming within its provisions, regardless of their acceptance thereof. Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Nagel *v.* St. Louis Transit Co., 104 Mo. App. 438, 79 S. W. 502; Meyers *v.* St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379; Gebhardt *v.* St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448. But see Day *v.* Citizens' R. Co., 81 Mo. App. 471.

50. Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737; Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

51. Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737; Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Gebhardt *v.* St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448; Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

52. Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; Murphy *v.* Lindell R. Co., 153 Mo. 252, 54 S. W. 442.

care which the common law requires under like conditions,[53] and should be construed to require the car to be stopped only when it is perceived that a collision is imminent,[54] and with due regard to the safety of passengers.[55]

(VIII) *AS TO ROAD-BED AND TRACKS.*[56] The legislature or municipality may also enact reasonable regulations relative to the condition of the road-bed and tracks of a street railroad company,[57] as by requiring that it shall keep its tracks watered so as to lay the dust,[58] clean the streets between its rails,[59] or keep the tracks free from ice and snow;[60] or by granting the right to sprinkle sand on the tracks during a certain season;[61] or by prohibiting the placing of salt on the tracks except at certain places.[62]

53. Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; J. F. Conrad Grocer Co. *v.* St. Louis, etc., R. Co., 89 Mo. App. 391.

54. Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

55. Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106, holding that such an ordinance is not unreasonable as requiring the stopping of the car without regard to the safety of the passengers, but should be construed only to require the person in charge of the car to stop as soon as possible under the circumstances, with due regard for the safety of the passengers.

56. Regulation of construction and maintenance of street railroads generally see *supra*, VII.

57. Wellesley *v.* Boston, etc., R. Co., 188 Mass. 250, 74 N. E. 355, holding that the fact that an electric street railroad company is forbidden to use its electricity for lighting purposes does not preclude it from using electricity for lighting as an incident to its business, or constitute an excuse for its failure to comply with an order of the selectmen of a town requiring it to maintain electric lights along a street on which it operates its line

Fencing track.—An interurban electric railroad company incorporated under Mo. Rev. St. (1899) c. 12, art. 3, § 1187, is a railroad corporation within the meaning of art. 2, § 1105, requiring every railroad corporation to erect and maintain lawful fences on the sides of its road passing through cultivated fields and, until such fences are constructed, making it liable for double damages for stock killed on its road; and it is not relieved of this duty because of the fact that it is constructed on the right of way of a public road by permission of the county court. Riggs *v.* St. Francois County R. Co., 120 Mo. App. 335, 96 S. W. 707.

58. Savannah City, etc., R. Co. *v.* Savannah, 77 Ga. 731, 4 Am. St. Rep. 106; State *v.* Canal, etc., R. Co., 50 La. Ann. 1189, 24 So 265, 56 L. R. A. 287 (holding that an ordinance requiring street railroad companies to water their tracks, within the city limits, so as to effectually lay the dust within their tracks, is a legal exercise of the police power of the city, tends to promote the comfort and convenience of passengers, and the health and comfort of the inhabitants of the city, and is neither indefinite nor unreasonable); Newcomb *v.* Norfolk Western St. R. Co., 179 Mass. 449, 61 N. E. 42 (holding that under Pub. St. c. 113, § 7, a condition of a grant to a street railroad company that it shall water the street over which its track is laid, between certain dates, is a lawful restriction).

An ordinance requiring all companies operating street cars in the city to water their tracks so as to keep the dust laid is not so partial and wanting in generality as to vitiate it. Savannah City, etc., R. Co. *v.* Savannah, 77 Ga. 731, 4 Am. St. Rep. 106.

An ordinance has been held unreasonable which requires a street car company to provide for the sprinkling of the streets through which the cars run (State *v.* New Orleans, etc., R. Co., 49 La. Ann. 1571, 22 So. 839, 39 L. R. A. 618), or which requires every street railroad company using any street to cause it to be sprinkled for the distance of three feet six inches each way from the center of the railroad track, so that no dust will be raised by a passing car, and providing for a penalty of twenty-five dollars for each breach of its provisions, and twenty-five dollars a day for a continued violation, and investing the municipality with power to stop the running of the cars in default of payment of the penalty (Chester *v.* Chester Traction Co., 4 Pa. Super. Ct. 575 [*reversing* 5 Pa. Dist. 609]).

Under Mass. Pub. St. c. 113, § 63, the supreme judicial court may compel a street railroad company to comply with the condition of its grant that it should sprinkle the street of a town on which its track is laid. Newcomb *v.* Norfolk Western St. R. Co., 179 Mass. 449, 61 N. E. 42.

59. Chicago *v.* Chicago Union Traction Co., 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666, holding that such a regulation is not void as casting a public burden on the company, because of the fact that owing to the condition of the street it is difficult and expensive to clean it.

60. Montreal *v.* Montreal St. R. Co., 19 Quebec Super. Ct. 504. See also *infra*, X, B, 4, e.

61. Dry Dock, etc., R. Co. *v.* New York, 47 Hun (N. Y.) 221, holding that an ordinance granting a street railroad company the right to sprinkle sand on the track from November 1 to April 1 was within the power of the city council, and prohibited its use at all other times.

62. Consolidated Traction Co. *v.* Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A.

3. Rules and Regulations of Company.[63] A street railroad company may adopt and enforce reasonable rules and regulations respecting the conduct of its business for its own protection, provided they do not seriously inconvenience passengers or subject them to probable loss or deprive them of legal rights;[64] but it cannot promulgate rules which are arbitrary and illegal.[65] A street railroad company, however, cannot avoid the requirements of a statute under color of its right to make and enforce reasonable rules and regulations for the conduct of its business.[66]

4. License Fees and Taxes[67] **— a. In General.** The business of operating a street railroad is one which may properly be subjected to the payment of a license fee or tax,[68] which is a fee or tax exacted in exchange for the privilege of operating cars upon streets subject to the control of the municipality;[69] and a street railroad company is not exempted from the payment of such fee or tax by the mere fact that it has been granted an exclusive right over the streets,[70] or by the fact that its property is taxed on an *ad valorem* basis;[71] nor does the payment of a license fee or tax exempt the company from the payment of an *ad valorem* tax on its property.[72] In the absence of constitutional restrictions, such fee or tax may be imposed directly by the legislature,[73] or by the municipal government under

170, holding that an ordinance prohibiting the placing of salt of any kind on any street railway track or other part of the street within a city, except on curves leading from one street into another running at right angles therewith, is a reasonable regulation for the common use of the street for a street railway and for ordinary travel.

Where the necessary use of salt by a street railroad company is limited to a short section of its track, and it does not appear that such necessity could not be removed at a reasonable expense, an ordinance prohibiting such use of salt will not be declared unreasonable. Consolidated Traction Co. *v.* Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170.

63. Regulation as to time limit of transfer see *supra*, X, A, 2, b, (III), (B), (4).

Regulations of the company requiring a passenger to demand a transfer at the time of paying his fare see *supra*, X, A, 2, b, (III), (B), (2).

64. Lesser *v.* St. Louis, etc., R. Co., 85 Mo. App. 326; Ketchum *v.* New York City R. Co., 118 N. Y. App. Div. 248, 103 N. Y. Suppl. 486. See also Carriers, 6 Cyc. 545 *et seq.*

65. Jenkins *v.* Brooklyn Heights R. Co., 29 N. Y. App. Div. 8, 51 N. Y. Suppl. 216.

66. Charbonneau *v.* Nassau Electric R. Co., 123 N. Y. App. Div. 531, 108 N. Y. Suppl. 105.

67. Assessment of street railroad property for public improvements see Municipal Corporations, 28 Cyc. 1120.

Licenses generally see Licenses, 25 Cyc. 593.

Taxation of street railroads generally see Taxtion.

68. San José *v.* San José, etc., R. Co., 53 Cal. 475; New Orleans *v.* New Orleans City, etc., R. Co., 40 La. Ann. 587, 4 So. 512.

69. Baltimore City *v.* Baltimore, etc., Pass. R. Co., 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503.

70. State *v.* Herod, 29 Iowa 123, holding that the grant of an exclusive right containing no provision relative to the payment of any fee or license does not exempt the company from paying a license-fee provided by a prior ordinance to be paid by all persons engaged in carrying passengers.

Exemption from taxation.—A municipal ordinance granting to a street railroad company a franchise to construct its tracks and operate cars upon the streets of the municipality, although silent as to taxation, cannot be construed as conferring immunity from the payment of a license-tax, in the absence of an express stipulation to that effect, since exemption from taxation is never to be presumed. Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 50 S. E. 645. So a contract between a municipal corporation and a street railroad company by which the latter pays a bonus for the franchise therein conferred by the municipality cannot be construed as conferring an immunity from the payment of a license on its business by the company, in the absence of an express stipulation to that effect in the contract. New Orleans *v.* Orleans R. Co., 42 La. Ann. 4, 7 So. 59, 21 Am. St. Rep. 365.

71. Kansas City *v.* Corrigan, 18 Mo. App. 206. See also Denver City R. Co. *v.* Denver, 21 Colo. 350, 41 Pac. 826, 52 Am. St. Rep. 239, 29 L. R. A. 608 [*affirming* 2 Colo. App. 34, 30 Pac. 1048]. And see, generally, Licenses, 5 Cyc. 609.

72. Newport *v.* South Covington, etc., St. R. Co., 89 Ky. 29, 11 S. W. 954, 11 Ky. L. Rep. 319; Louisville City R. Co. *v.* Louisville, 4 Bush (Ky.) 478. And see, generally, Taxation.

Double taxation.— The imposition of a license-tax on a street railroad company for the privilege of conducting its business, and a direct tax on the property engaged in carrying on the business, is not double taxation. Newport News, etc., R. etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645.

73. See New York *v.* Twenty-third St. R. Co., 113 N. Y. 311, 21 N. E. 60 [*affirming* 48 Hun 552. 1 N. Y. Suppl. 295]; Federal St.,

delegated authority,[74] or by both.[75] Under its power to grant or consent to the construction and operation of a street railroad in the streets, a municipality may, as a condition to such grant or consent, require that the company shall pay a license fee or tax;[76] and if the company accepts the grant burdened with such a condition, it accepts also the condition and makes a complete and valid contract with reference to the license fee or tax imposed,[77] although other companies operating cars in the same municipality are required to pay less fees;[78] and the liability for such fee or tax attaches to a successor or lessee company which acquires the lines and assumes the obligations of the company to which the grant was made.[79] A municipality may also, under its general police powers, impose a license fee or tax on a street railroad company as a police regulation,[80] and if authorized by statute may impose such a tax as a source of municipal revenue,[81] but it cannot

etc., R. Co. *v.* Allegheny, 14 Pittsb. Leg. J. N. S. (Pa.) 259.

74. *Georgia.*— Savannah, etc., R. Co. *v.* Savannah, 112 Ga. 164, 37 S. E. 393.

Maryland.—Baltimore *v.* United Railways', etc., Co., 107 Md. 250, 68 Atl. 557, 14 L. R. A. N. S. 805.

Missouri.— Kansas City *v.* Corrigan, 18 Mo. App. 206.

New York.— New York *v.* Eighth Ave. R. Co., 118 N. Y. 389, 23 N. E. 550 [*affirming* 43 Hun 614].

Pennsylvania.— North Braddock *v.* Second Ave. Traction Co., 8 Pa. Super. Ct. 233; McKeesport *v.* McKeesport, etc., Pass. R. Co., 2 Pa. Super. Ct. 242.

See 44 Cent. Dig. tit. "Street Railroads," § 157.

A municipality has power to impose a license fee or tax upon a street railroad company under its power "exclusively to license, regulate and tax any or all lawful occupations," etc. (Denver City R. Co. *v.* Denver, 21 Colo. 350, 41 Pac. 826, 52 Am. St. Rep. 239, 29 L. R. A. 608 [*affirming* 2 Colo. App. 34, 30 Pac. 1048]; Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645); or under its statutory authority to impose a license-tax on hacks, carriages, omnibuses, and other vehicles used in conveying persons or property for pay (Frankford, etc., Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; North Braddock *v.* Second Ave. Traction Co., 28 Pittsb. L. J. N. S. (Pa.) 278; Allerton *v.* Chicago, 6 Fed. 555, 9 Biss. 552).

Curative statute.—A grant by a municipality to a street railroad company on condition that it pay certain license-fees, although invalid for want of authority in the municipality, may be subsequently rendered valid or binding by an act of the legislature. New York *v.* Eighth Ave. R. Co., 118 N. Y. 389, 23 N. E. 550 [*affirming* 43 Hun 614].

Practical construction of statute or ordinance.— The practical construction of a statute or ordinance imposing a license fee or tax by those for whom the law was enacted, or by public officers whose duty it is to enforce it, when continued for a long period, is of great, if not controlling, importance in its interpretation, but this doctrine is never applied except in case of an ambiguity so serious as to raise a reasonable doubt. New York *v.* New York City R. Co., 124 N. Y. App. Div. 936, 109 N. Y. Suppl. 1126 [*affirming* 55 Misc. 134, 106 N. Y. Suppl. 293]; Cincinnati St. R. Co. *v.* Cincinnati, 11 Ohio S. & C. Pl. Dec. 15, 8 Ohio N. P. 80.

75. See Baltimore *v.* Baltimore, etc., Pass. R. Co., 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503.

76. Chicago Gen. R. Co. *v.* Chicago, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959; Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703 [*affirming* 63 Ill. App. 438]. *Compare* Central R., etc., Co.'s Appeal, 67 Conn. 199, 35 Atl. 32.

77. Chicago Gen. R. Co. *v.* Chicago, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959 (holding that the company cannot avoid payment of the tax in such a case on the ground that the license imposing it was *ultra vires* of the city); Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703 [*affirming* 63 Ill. App. 438]; Jersey City *v.* North Jersey St. R. Co., 72 N. J. L. 383, 61 Atl. 95; Federal St., etc., R. Co. *v.* Allegheny, 14 Pittsb. Leg. J. N. S. (Pa.) 259.

Legislative sanction of such a grant see Jersey City *v.* Jersey City, etc., R. Co., 70 N. J. L. 360, 7 Atl. 445.

78. Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703 [*affirming* 63 Ill. App. 438].

79. Jersey City *v.* North Jersey St. R. Co., 72 N. J. L. 383, 61 Atl. 95; Jersey City *v.* Consolidated Traction Co., 70 N. J. L. 364, 57 Atl. 446, lessee company. But *compare* Cape May *v.* Cape May Transp. Co., 64 N. J. L. 80, 44 Atl. 948, holding that a lessee company cannot be held liable for such fees, unless there is in the lease some agreement with reference thereto, which inures to the benefit of the city.

80. North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; Frankford, etc., Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Gettysburg *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598; Erie City *v.* Erie Electric Motor Co., 24 Pa. Super. Ct. 77; North Braddock *v.* Second Ave. Traction Co., 8 Pa. Super. Ct. 233; McKeesport *v.* McKeesport, etc., Pass. R. Co., 2 Pa. Super. Ct. 242; Allerton *v.* Chicago, 6 Fed. 555, 9 Biss. 552. See, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 745.

81. San José *v.* San José, etc., R. Co., 53

impose a license-tax for purposes of revenue as a police regulation or under a general power to license and regulate,[82] although, if the sum charged as a police regulation is a reasonable one, the fact that it incidentally increases the revenue of the municipal treasury will not invalidate it.[83] A municipality cannot impose a license fee or tax which affects existing rights;[84] but a contract conferring the right to operate a street railroad without dispensing with the payment of a license is not impaired by the exaction of such a license,[85] and where the grant is for a term of years on payment of a stated license-fee, the company is not liable for such fee after the term has expired, without a renewal.[86] A license-tax may be imposed by a municipality upon a street railroad company, upon the business done in such municipality, although the lines of the company extend beyond the municipal limits;[87] but it has been held that such a tax cannot be imposed upon a company which does not occupy a street subject to the control of the municipality, although it is within the municipal limits,[88] as where its tracks are located only upon private property or turnpike roads acquired by the company by purchase or condemnation.[89]

b. Nature of Fee or Tax. A fee or tax imposed by the legislature or by the municipal government may consist of a fixed fee for each car operated,[90] or of a

Cal. 475; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71.

82. North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; New York *v.* Third Ave. R. Co., 33 N. Y. 42; New York *v.* Second Ave. R. Co., 32 N. Y. 261 [*affirming* 34 Barb. 41, 12 Abb. Pr. 364, 21 How. Pr. 257]; Johnson *v.* Philadelphia, 60 Pa. St. 445; Gettysburg *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598. See, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 749.

A license-fee when imposed for the main purpose of revenue is not a police regulation but is a tax which can only be upheld under the power of taxation. Kansas City *v.* Corrigan, 18 Mo. App. 206.

Presumption.— Where a license-tax imposed on street cars is lawful if intended for police regulation and unlawful if intended for revenue purposes, the presumption is that the purpose of the ordinance is lawful, unless the contrary clearly appears (Gettysburg *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598); and it will not be presumed, because a city ordinance requires the payment of a license-fee on each car, that another provision requiring the payment of an annual tax on each mile of its track is an improper method of raising revenue for the municipal government (Chicago Gen. R. Co. *v.* Chicago, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959).

The distinction between the power to license as a police regulation and the same power as a revenue measure is of the utmost importance. If granted with a view to revenue the amount of the tax, if not limited by the charter, is in the discretion and judgment of the municipal authority, but if granted as a police power, it must be exercised as a means of regulation only and cannot be used as a source of revenue. North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71.

83. Johnson *v.* Philadelphia, 60 Pa. St. 445.

84. Hoboken, etc., R. Co. *v.* Hoboken, 30 N. J. L. 225, holding that a charter provision authorizing the granting of a license to a street car company and the imposition of a license-tax does not authorize the imposition of such license on a company which had previously occupied the streets under authority from the municipality.

85. New Orleans *v.* New Orleans City, etc., R. Co., 40 La. Ann. 587, 4 So. 512.

86. Cincinnati Inclined Plane R. Co. *v.* Cincinnati, 52 Ohio St. 609, 44 N. E. 327 [*affirming* 4 Ohio S. & C. Pl. Dec. 507, 30 Cinc. L. Bul. 321].

87. San José *v.* San José, etc., R. Co., 53 Cal. 475; Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645.

Where the tax is on the cars used and the road extends beyond the city limits, the tax need not be restricted to a due proportion of the company's equipment computed according to its mileage within the city. Harrisburg City *v.* Citizens' Pass. R. Co., 4 Pa. Dist. 687.

88. Baltimore *v.* Baltimore, etc., R. Co., 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503.

89. Baltimore *v.* United R., etc., Co., 107 Md. 250. 68 Atl. 557, 14 L. R. A. N. S. 805; Baltimore *v.* Baltimore, etc., R. Co., 84 Md. 1, 35 Atl. 17, 33 L. R. A. 503.

90. *Colorado.*— Denver City R. Co. *v.* Denver, 21 Colo. 350, 41 Pac. 826, 52 Am. St. Rep. 239, 29 L. R. A. 608 [*affirming* 2 Colo. App. 34, 30 Pac. 1048].

Illinois.— Bloomington, etc., R., etc., Co. *v.* Bloomington, 123 Ill. App. 639, license-fee for each and every car regularly operated within the corporate limits.

Kentucky.—Louisville City R. Co. *v.* Louisville, 4 Bush 478.

New Jersey.— Jersey City *v.* North Jersey St. R. Co., 72 N. J. L. 383, 61 Atl. 95; Jersey City *v.* Consolidated Traction Co., 70 N. J. L. 364, 57 Atl. 446; Jersey City *v.* Jersey City, etc., R. Co., 70 N. J. L. 360, 57 Atl. 445.

New York.— New York *v.* Broadway, etc., R. Co., 97 N. Y. 275; New York *v.* New York

certain percentage of the annual earnings of the company,[91] or of both;[92] or it

City R. Co., 126 N. Y. App. Div. 39, 110 N. Y. Suppl. 722 [*affirmed* in 193 N. Y. 679, 87 N. E. 1117]; New York *v.* Twenty-third St. R. Co., 62 Hun 545, 17 N. Y. Suppl. 32 (holding that such tax is based on the size of cars and not on the motive power); New York *v.* Broadway, etc., R. Co., 17 Hun 242; New York *v.* Forty-Second St., etc., R. Co., 52 How. Pr. 106.

Ohio.— Cincinnati St. R. Co. *v.* Cincinnati, 11 Ohio S. & C. Pl. Dec. 15, 8 Ohio N. P. 80.

Pennsylvania.— Braddock *v.* Monongahela St. R. Co., 28 Pa. Super. Ct. 262; Erie City *v.* Erie Electric Motor Co., 24 Pa. Super. Ct. 77.

Virginia.— Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645.

Canada.— See Montreal St. R. Co. *v.* Montreal, 23 Can. Sup. Ct. 259.

See 44 Cent. Dig. tit. "Street Railroads," § 157 *et seq.*

Where "the annual license fee for each car now allowed by law" is the fee required and the only license-fee provided for at the time is a fee on stages and omnibuses engaged in transportation of passengers, it is this fee which the company should be required to pay. New York *v.* Third Ave. R. Co., 117 N. Y. 404, 646, 22 N. E. 755; New York *v.* Third Ave. R. Co., 42 Misc. (N. Y.) 599, 87 N. Y. Suppl. 584 [*affirmed* in 115 N. Y. App. Div. 899, 101 N. Y. Suppl. 1116]; New York *v.* Third Ave. R. Co., 3 N. Y. St. 181 [*affirmed* in 1 N. Y. Suppl. 397].

Where the requirement is that the company shall pay a license-fee annually for each car as is now paid by other railroads in the city, the liability for such fee does not depend on the fact that other railroads have actually paid their license-fee into the city treasury, but only on the fact that they are required and legally liable to pay such fee. New York *v.* Forty-Second St., etc., R. Co., 52 How. Pr. (N. Y.) 106. Moreover such a requirement does not amount to a contract that the company shall never be required to pay a license-fee greater than that required of such companies at the date when the company is incorporated, but only that the company shall not then be required to pay any greater charge than that paid by other companies possessing the same privileges. Union Pass. R. Co. *v.* Philadelphia, 101 U. S. 528, 25 L. ed. 912 [*affirming* 83 Pa. St. 429].

Number of cars taxed.—Where the terms of a grant imposing a license-fee on cars are vague and the construction adopted by the parties for a number of years has been that the fees should be paid on the basis of the greatest number of cars in use at the busiest season of the year, such construction should be adopted by the court, and the company be held for the specified fee on each car of the greatest number in daily use at the busiest season of the year. New York *v.* New York City R. Co., 193 N. Y. 543, 86 N. E. 565 [*affirming* 124 N. Y. App. Div. 936, 109 N. Y. Suppl. 1126 (*affirming* 55 Misc. 134, 106 N. Y. Suppl. 293)]. But it has been held that a grant conditioned that the cars shall be licensed and the grantees shall pay an annual fee of a stated amount per car for such license is too clear for the application of the rule of practical construction, and that it requires payment for each car operated and not merely for the greatest number in daily use during the busiest season of each year. New York *v.* New York City R. Co., 126 N. Y. App. Div. 36, 110 N. Y. Suppl. 720 [*affirmed* in 193 N. Y. 680, 87 N. E. 1117].

In ascertaining the number of cars subject to such tax, the number of car trucks alone should be considered, and it is immaterial that the car body on the truck may be changed from a winter to a summer body, as such bodies when not in use, and in the shops or barns, are merely auxiliary parts of the cars in actual use, and are not subject to the license-tax. Erie City *v.* Erie Electric Motor Co., 24 Pa. Super. Ct. 77. But see Harrisburg City *v.* Citizens' Pass. R. Co., 4 Pa. Dist. 687.

91. Baltimore *v.* United R., etc., Co., 107 Md. 250, 68 Atl. 557, 14 L. R. A. N. S. 805; Baltimore Union Pass. R. Co. *v.* Baltimore, 71 Md. 405, 18 Atl. 917 (percentage of passenger earnings); Boston El. R. Co. *v.* Com., 199 Mass. 96, 84 N. E. 845 (holding that under St. (1897) c. 500, § 10; amending St. (1894) c. 598, § 21, it is the earnings of the railway in the transportation of passengers as distinguished from all other income incidental to the business, on which the tax is computed); New York *v.* Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494 [*reversing* 25 N. Y. Suppl. 860]; New York *v.* Twenty-Third St. R. Co., 113 N. Y. 311, 21 N. E. 60 [*affirming* 48 Hun 552, 1 N. Y. Suppl. 295]; New York *v.* Union R. Co., 125 N. Y. App. Div. 861, 110 N. Y. Suppl. 944; Hamilton *v.* Hamilton St. R. Co., 8 Ont. L. Rep. 455, 4 Ont. Wkly. Rep. 47; Montreal *v.* Montreal St. R. Co., 17 Quebec Super. Ct. 439. See also Detroit United R. Co. *v.* State Tax Com'rs, 136 Mich. 96, 98 N. W. 997.

Where the statute provides that when the gross earnings shall during any period of six months exceed a stated average per day, the company shall thereafter pay a certain percentage to the city, the obligation to pay arises as soon as the company has received the required average as gross earnings for any period of six months, and that period does not have to be wholly within any one fiscal year. New York *v.* Union R. Co., 125 N. Y. App. Div. 861, 110 N. Y. Suppl. 944.

Deduction of sums based upon percentage of gross earnings from special franchise tax, under N. Y. Laws (1899), c. 712, § 46, see Heerwagen *v.* Crosstown St. R. Co., 179 N. Y. 99, 71 N. E. 729 [*modifying* 90 N. Y. App. Div. 275, 86 N. Y. Suppl. 218].

92. New York *v.* Dry Dock, etc., R. Co., 112 N. Y. 137, 19 N. E. 420 [*affirming* 47 Hun

may consist of a certain sum to be annually paid for each mile of railroad constructed.[93] Under some provisions the license-tax on the earnings of a street railroad company attaches to the earnings of the entire line, including that part which extends beyond the city limits,[94] but under other provisions it is otherwise.[95] An agreement that a street railroad company shall pay a certain per cent of its net income in such manner as the "legislature may thereafter direct" does not fix any obligation on the company to pay such amount, until the legislature by further legislation directs the manner of payment.[96]

c. Amount of Fee or Tax. Where the power of imposing such a license fee or tax is vested in the municipality, the amount thereof rests in the first instance within its discretion, and it may impose such fees or taxes as in its opinion the public interests require,[97] and it may from time to time in its discretion increase or diminish the amount of such fee or tax; [98] and in the absence of abuse or fraud the courts will not interfere with the exercise of such discretion.[99] The amount of such fee or tax, however, must be reasonable,[1] and if there is a manifest abuse of discretion or fraud the courts are justified in interfering.[2] The elements which enter into the reasonableness of such a fee or tax are the necessary or probable expenses incident to the issuing of the license, and the probable expense of proper inspection, regulation, and police surveillance;[3] and the municipality may fix the amount of such fee in advance without waiting until the end of the period for which the license is granted,[4] and may make the charge large enough to carry

199]. See also Federal St., etc., R. Co. *v.* Allegheny, 14 Pittsb. Leg. J. N. S. (Pa.) 259.

93. Chicago Gen. R. Co *v.* Chicago, 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188, 66 L. R. A. 959.

94. Cincinnati *v.* Mt. Auburn Cable R. Co., 11 Ohio Dec. (Reprint) 29 Cinc. L. Bul. 276, holding this to be true where the requirement is of a certain per cent of the gross earnings from every source. See also Hamilton *v.* Hamilton St. R. Co., 8 Ont. L. Rep. 455, 4 Ont. Wkly. Rep. 47.

95. Montreal St. R. Co. *v.* Montreal, [1906] A. C. 100, 75 L. J. P. C. 9, 93 L. T. Rep. N. S. 678, 22 T. L. R. 60, 15 Quebec K. B. 174 [*reversing* 34 Can. Sup. Ct. 459]; Montreal *v.* Montreal St. R. Co., 17 Quebec Super. Ct. 439.

Where a certain percentage of the gross receipts from passenger travel within the city limits is required, and the road runs beyond the city limits, and the company keeps no separate account of the receipts from this portion of the road, it is proper in arriving at the amount of such receipts to take the amount which bears the same proportion to the receipts of the whole line as the number of miles of road beyond the city limits bears to the total number of miles operated. Baltimore Union Pass. R. Co. *v.* Baltimore, 71 Md. 405, 18 Atl. 917.

96. New York *v.* Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494 [*reversing* 25 N. Y. Suppl. 860], holding further that the fact that the company has paid such amount for several years imposes no obligation on it to pay it in the future, in the absence of further legislation.

97. Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703 [*affirming* 63 Ill. App. 438]; Gettysburg *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598; North Braddock *v.* Second Ave. Traction Co., 8 Pa. Super. Ct. 233.

98. State *v.* Hilbert, 72 Wis. 184, 39 N. W. 326.

99. Byrne *v.* Chicago Gen. R. Co., 169 Ill. 75, 48 N. E. 703 [*affirming* 63 Ill. App. 438].

1. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598. See, generally, LICENSES, 25 Cyc. 611.

A constitutional provision relating to uniformity of taxation applies only to direct taxation, and does not apply to taxation imposed on privileges and occupations. Denver City R. Co. *v.* Denver, 21 Colo. 350, 41 Pac. 826, 52 Am. St. Rep. 239, 29 L. R. A. 608 [*affirming* 2 Colo. App. 34, 30 Pac. 1048]. See, generally, LICENSES, 25 Cyc. 605.

2. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598, holding that the courts will not declare an ordinance imposing a license-tax on street cars void because of unreasonableness of the fee charged unless the unreasonableness is so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities.

The burden of proving the reasonableness of such an ordinance is upon the street railroad company. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

3. Denver City R. Co. *v.* Denver, 21 Colo. 350, 41 Pac. 826, 52 Am. St. Rep. 239, 29 L. R. A. 608 [*affirming* 2 Colo. App. 34, 30 Pac. 1048]; Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

The probable additional cost of keeping in repair the portions outside the tracks of the streets on which the railroad is operated cannot be included in the license-fee imposed by a municipality under its police power. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

4. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598. See also

any reasonable anticipated expense,[5] and such charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense.[6]

d. Payment[7] and Penalty. A municipality is not estopped from recovering a license fee or tax by reason of the fact that it has failed for some years to assert its right thereto,[8] or by reason of the fact that for several years it has accepted a lesser amount than that due it,[9] or by the fact that it has neglected part of its supervisory duty during the year.[10] Payments on a license fee or tax are to be applied as of the date made, extinguishing principal and interest under the ordinary rule as to partial payments.[11] If such fee or tax is not paid when due, the tax bills bear interest like other taxes,[12] and an action of assumpsit will lie to recover the same.[13] Some statutes or ordinances providing for such fees or taxes exact a penalty as a means of enforcing the taking out of a license and the paying of the license-fee,[14] and under such a provision mandamus will not lie to enforce the requirements thereof.[15]

B. Operation — 1. Duty to Operate.[16] A street railroad company occupies a dual relation, a public relation to the people and a private one to its stockholders.[17] In its public relation it is the duty of the company in the exercise of its rights, privileges, and franchises for the benefit of the public to maintain and operate its road according to the terms of the ordinance or statute which confers such right, privileges, and franchises upon it,[18] which duty transcends its

Cincinnati St. R. Co. *v.* Cincinnati, 11 Ohio S. & C. Pl. Dec. 15, 8 Ohio N. P. 80.

5. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

6. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598.

7. Release from payment see Cincinnati St. R. Co. *v.* Cincinnati, 11 Ohio S. & C. Pl. Dec. 15, 8 Ohio N. P. 80. The fact that a street railroad company has not complied with the conditions of its charter by which it is to pay an annual fee for each car run raises merely a presumption of fact as to the release thereof capable of being rebutted by circumstances showing that it ought not to prevail, and lapse of time being only evidence of a release will not on demurrer defeat a claim for such fee. Jersey City *v.* Jersey City, etc., R. Co., 70 N. J. L. 360, 57 Atl. 445.

8. Baltimore *v.* United R., etc., Co., 107 Md. 250, 68 Atl. 557, 14 L. R. A. N. S. 805.

9. New York *v.* New York City R. Co., 126 N. Y. App. Div. 36, 110 N. Y. Suppl. 720 [*affirmed* in 193 N. Y. 680, 87 N. E. 1117].

10. Gettysburg Borough *v.* Gettysburg Transit Co., 36 Pa. Super. Ct. 598, holding that such neglect standing alone is not a bar to an action to recover a reasonable license-fee for a particular year which was due and collectable at the beginning of the year.

11. Louisville *v.* Louisville R. Co., 118 Ky. 534, 81 S. W. 701, 26 Ky. L. Rep. 378, 84 S. W. 535, 27 Ky. L. Rep. 141.

12. Louisville *v.* Louisville R. Co., 118 Ky. 534, 81 S. W. 701, 26 Ky. L. Rep. 378, 84 S. W. 535, 27 Ky. L. Rep. 141.

13. Bloomington, etc., R., etc., Co. *v.* Bloomington, 123 Ill. App. 639.

14. Denver City R. Co. *v.* Denver, 21 Colo. 350, 41 Pac. 826, 52 Am. St. Rep. 239, 29 L. R. A. 608 [*affirming* 2 Colo. App. 34, 30 Pac. 1048]; People *v.* Swift, 66 Ill. App. 605.

15. People *v.* Swift, 66 Ill. App. 605, holding also that the remedy is the collection of the fines imposed.

16. Accident at crossing of steam railroad see Railroads, 33 Cyc. 920 *et seq.*

Assault on passenger by employees see Carriers, 6 Cyc. 600.

Collision with railroad train see Railroads, 33 Cyc. 734 *et seq.*

Duty and care as to safety of passengers see Carriers, 6 Cyc. 590 *et seq.*

Ejection of passengers and intruders see Carriers, 6 Cyc. 549 *et seq.*

Failure to operate as a ground of forfeiture of franchise see *supra*, III, E, 3, a.

Liability for injury to employee see Master and Servant, 26 Cyc. 1076.

Negligence in erection and maintenance of wires for operation of cars by electricity see Electricity, 15 Cyc. 472 *et seq.*

17. Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999.

18. Amesbury *v.* Citizens' Electric St. R. Co., 199 Mass. 394, 85 N. E. 419, 19 L. R. A. N. S. 865; State *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837; Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999. But *compare* State *v.* Helena Power, etc., Co., 22 Mont. 391, 56 Pac. 685, 44 L. R. A. 692; San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662 [*reversing* (Civ. App. 1896) 38 S. W. 54], holding that where mere permission is granted to a company by ordinance to construct and operate a line of street railroad, its acceptance of such permission by constructing the line does not impose upon it such an undertaking to continue to operate its entire line as the state can enforce by mandamus.

An implied condition attaches itself to the

duty to its stock-holders,[19] and the performance of which may in a proper case be compelled by mandamus.[20] When therefore a street railroad company has constructed and put in operation its road as authorized, it is its duty to operate such road, and it ordinarily has no right at its mere will and discretion to abandon the operation of the road or any portion thereof,[21] without the consent of the granting power,[22] except as to such portions of the road as public convenience and safety demand should be abandoned,[23] or as to a portion which can be operated only at a loss;[24] and this duty extends to a company which succeeds to the rights, franchises, and obligations of the original company,[25] and in some jurisdictions is enforced by special statutory provision.[26] A street railroad company cannot excuse its failure to perform its duty to operate on the ground that it has been prevented by violence from doing so, if the civil authorities have not failed to protect it fully in its efforts to operate,[27] or on the ground that it cannot get employees to accept its terms.[28]

2. Companies and Persons Liable For Injuries — a. In General. As a general rule a street railroad company assumes by the acceptance of the grant of its franchise from the state or municipality a duty toward the public of seeing that its franchise is properly exercised, and therefore is liable for any neglect thereof,[29] and cannot, without legislative or municipal authority, permit another company or person to exercise its franchise so as to avoid the liabilities incident thereto.[30]

grant of a street railroad franchise that it be held for public benefit and the duty upon the company is to exercise it for such purpose, and as a public agent it cannot escape this duty. State *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

19. Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999.

20. See Mandamus, 26 Cyc. 373 *et seq.*

21. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942; State *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837. See also *supra*, III, E, 3. But *compare* San Antonio St. R. Co. *v.* State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662 [*reversing* (Civ. App. 1896) 38 S. W. 54].

Excuse for failure to operate.— The fact that the located route of a street railroad is laid across a bridge which is under the control of a certain board which will not permit the tracks to be laid thereon unless on proper and reasonable regulations for the safety of the bridge furnishes no excuse why the road should not be operated on its route through the streets lying on either side of such bridge. State *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837.

22. State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515, holding that a street railroad company receiving its franchise from the state and entering upon the enjoyment of them can cease to perform its proper functions as such a company only by consent of the state.

23. Moore *v.* Brooklyn City R. Co., 108 N. Y. 98, 15 N. E. 191, holding that a city railroad company will not be restrained from moving a depot to a point more convenient and safe for the public whereby it abandons a portion of its road.

24. See Amesbury *v.* Citizens' Electric St. R. Co., 199 Mass. 394, 85 N. E. 419, 19 L. R. A. N. S. 865.

25. State *v.* New York, etc., R. Co., 81 Conn. 645, 71 Atl. 942; State *v.* Bridgeton, etc., Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837 (holding that where a duly incorporated company is in possession of a street railroad whether under a lease or foreclosure sale, it has all the duties of the original company to maintain and operate the railroad under the statute and ordinance, as was imposed on the original company); State *v.* Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

26. See Amesbury *v.* Citizens' Electric St. R. Co., 199 Mass. 394, 85 N. E. 419, 19 L. R. A. N. S. 865, holding that St. (1906) c. 463, pt. 3, § 76, simply provides a new remedy for an unlawful discontinuance and applies to past as well as future discontinuances.

Discontinuance held not "without right or lawful excuse," within the meaning of the Massachusetts statute see Amesbury *v.* Citizens' Electric St. R. Co., 199 Mass. 394, 85 N. E. 419, 19 L. R. A. N. S. 865.

27. Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999.

28. Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999.

Where a street railroad company cannot get labor at the price or conditions it offers, then it must offer such price and conditions as will get it and it cannot stop its cars for any length of time, to beat or coerce the price or condition of labor down to the conditions it offers. Matter of Loader, 14 Misc. (N. Y.) 208, 35 N. Y. Suppl. 996, 999.

29. Muntz *v.* Algiers, etc., R. Co., 111 La. 423, 35 So. 624, 100 Am. St. Rep. 495, 64 L. R. A. 222; Milton *v.* Bangor R., etc., Co., 103 Me. 218, 68 Atl. 826, 125 Am. St. Rep. 293, 15 L. R. A. N. S. 203.

30. Houston City St. R. Co. *v.* Medlenka,

Where the road has been placed in the hands of a receiver, the company owning the same is not liable for injuries due to the negligence of the receiver or his employees,[31] the receiver in his official capacity being liable therefor;[32] but if the receiver abandons a part of the road to the company, it is thereafter liable for negligent acts or omissions in regard to such part.[33] It is also well settled that a company using or operating a street railroad, although not the owner thereof, is liable for its own negligence or that of its own servants.[34] But a company which is merely using the track of another company, without any obligation to keep the track in repair or any right to interfere therewith, is not liable for defects in the street or track;[35] nor is a succeeding company ordinarily liable for injuries caused by the negligence or improper operation of the road by its predecessor.[36] Where two companies jointly operate a street railroad, partly owned by each, each is liable for the negligence of the other in operating the same.[37] Both a street railroad company and a telephone company are liable for injuries caused by a broken wire of the telephone company falling across the wire of the railroad company when both knew or should have known of its defective condition.[38]

b. Lessor and Lessee.[39] As a general rule a street railroad company cannot, without legislative or municipal authority, divest itself of any of the duties and liabilities incident to the maintenance and operation of its road by leasing the road to another,[40] and hence if the lease is unauthorized, the lessor company will

17 Tex. Civ. App. 621, 43 S. W. 1028 (holding that a street railroad company is not relieved from liability for an injury resulting from its failure to keep its tracks reasonably safe by reason of the fact that the cars on such track are operated by another company); Ft. Worth St. R. Co. *v.* Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61.

The company owning the tracks and franchises of a street railroad is liable for injuries resulting from the negligent operation of the road, whether by such company or by another company which it permits to use the premises, as the company which is permitted to use the tracks of another is regarded in using it as the acting servant or agent of the owning company. Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717 [*affirming* 102 Ill. App. 310].

A street railroad company is liable for defects in its tracks at a point of connection with another company, although as between the two companies the duty of repairing rests on the latter. McKenna *v.* Metropolitan R. Co., 112 Mass. 55.

31. Henning *v.* Sampsell, 236 Ill. 375, 86 N. E. 274, holding this to be true since the possession of the receiver is not the possession of the owner but is antagonistic to it, and the owners cannot control him.

32. Henning *v.* Sampsell, 236 Ill. 375, 86 N. E. 274.

33. Ft. Worth St. R. Co. *v.* Allen, (Tex. Civ. App. 1897) 39 S. W. 125.

34. South Chicago City R. Co. *v.* Atton, 137 Ill. App. 364 (holding that the ownership of a car which causes an injury is not essential to liability, but that possession and control are sufficient); Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65; Smith *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 531, 81 N. Y. Suppl. 838; Weyant *v.* New York, etc., R. Co., 3 Duer (N. Y.) 360; Grinsted *v.* Toronto R. Co., 24 Ont. 683 [*affirmed* in 21 Ont. App. 578 (*affirmed* in 24 Can. Sup. Ct. 570)]. See also Henning *v.* Sampsell, 236 Ill. 375, 86 N. E. 274.

35. Lowery *v.* Brooklyn City, etc., R. Co., 76 N. Y. 28 [*reversing* 4 Abb. N. Cas. 32] (holding that where a street railroad company contracts with a licensee company that the licensor company will keep the paving within the tracks and for a given distance on each side thereof in repair, the licensee company is not required to keep in repair a switch at a cross walk); Ross *v.* Metropolitan St. R. Co., 116 N. Y. App. Div. 507, 101 N. Y. Suppl. 932 [*reversed* on the facts in 193 N. Y. 328, 85 N. E. 1089]. But see Mullen *v.* Philadelphia Traction Co., 4 Pa. Co. Ct. 164.

36. Palmer Transfer Co. *v.* Paducah R., etc., Co., 89 S. W. 515, 28 Ky. L. Rep. 473, holding that in an action against a company and its successor for negligence in the operation of a street railroad, a verdict is properly directed in favor of the successor, on its appearing that it was not in existence at the time of the accident.

37. Messenger *v.* St. Paul City R. Co., 77 Minn. 34, 79 N. W. 583.

38. United Electric R. Co. *v.* Shelton, 89 Tenn. 423, 14 S. W. 863, 24 Am. St. Rep. 614.

Liability of telegraph and telephone companies see TELEGRAPHS AND TELEPHONES.

39. **Liability of lessors and lessees of railroads** generally see RAILROADS, 33 Cyc. 703 *et seq.*

40. Henning *v.* Sampsell, 236 Ill. 375, 86 N. E. 274; Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717 [*affirming* 102 Ill. App. 310]; Braslin *v.* Somerville Horse R. Co., 145 Mass. 64, 13 N. E. 65; Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284; Ft. Worth St. R. Co. *v.* Allen, (Tex. Civ. App. 1897) 39 S. W. 125, holding that where a street railroad company builds its line on condition that it will keep the streets in repair, it cannot relieve itself

remain liable for the torts of the lessee in the operation of the road;[41] and in some cases it is held that the lessor is so liable, without express reference to whether or not the lease was authorized.[42] Where, however, there is legislative or municipal authority for the lease, the question of the liability of the lessor for the torts of the lessee is one on which there is a great diversity of judicial opinion.[43] In some jurisdictions it is held that where there is legislative or municipal authority for the lease, the lessor company is thereby absolved from liability for the torts of the lessee company,[44] unless such liability is expressly reserved in the statute or ordinance,[45] or the lease is to an irresponsible company,[46] or unless the control of the road is reserved by the lessor, in the lease.[47] In other jurisdictions, however, it is held that, although there is legislative or municipal authority for the lease, the lessor is not absolved from such liability unless in addition to such authority there is a provision expressly exempting the lessor from liability,[48] notwithstanding the lessee agrees to assume all liability.[49] It is well settled, however, that the lessee company is liable for all injuries caused by its own negligence or that of its servants in the operation of the leased road;[50] but not for injuries caused by the negligence of an assignee of the lease or of the assignee's servants,[51] or for torts committed by the lessor prior to the execution of the lease, unless such liability is assumed in the lease.[52] Neither the lessor nor the lessee of a street railroad is liable for the negligent maintenance or operation of the road while in the hands of a receiver.[53]

c. Vendor and Purchaser. A street railroad company which has lawfully sold and delivered its road and franchises to another company is not liable for an

of such liability by leasing its line to another company.

41. Muntz *v.* Algiers, etc., R. Co., 111 La. 423, 35 So. 624, 100 Am. St. Rep. 495, 64 L. R. A. 222; Moorshead *v.* United R's Co., 203 Mo. 121, 96 S. W. 261, 100 S. W. 611 [*affirming* 119 Mo. App. 541, 96 S. W. 261].

42. Henning *v.* Sampsell, 236 Ill. 375, 86 N. E. 274.

43. Muntz *v.* Algiers, etc., R. Co., 111 La. 423, 35 So. 624, 100 Am. St. Rep. 495, 64 L. R. A. 222; Moorshead *v.* United Rys. Co., 203 Mo. 121, 96 S. W. 261, 100 S. W. 611 [*affirming* 119 Mo. App. 541, 96 S. W. 261 (in which the conflicting lines of authorities are discussed)]; Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284.

44. Chlanda *v.* St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249; Moorshead *v.* United Rys. Co., 203 Mo. 121, 96 S. W. 261, 100 S. W. 611 [*affirming* 119 Mo. App. 541, 96 S. W. 261]; Bensiek *v.* St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587; Gilroy *v.* United Rys. Co., 125 Mo. App. 19, 102 S. W. 1197; Burleigh *v.* United Rys. Co., 124 Mo. App. 708, 102 S. W. 624; Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284 (holding that in such a case the lessee steps into the place of the lessor and assumes all subsequent liabilities incurred in the operation of the property leased); Pinkerton *v.* Columbia, etc., Electric R. Co., 16 Lanc. L. Rev. (Pa.) 117 [*affirmed* in 193 Pa. St. 229, 44 Atl. 284].

45. Moorshead *v.* United Rys. Co., 203 Mo. 121, 96 S. W. 261, 100 S. W. 611 [*affirming* 119 Mo. App. 541, 96 S. W. 261].

46. Moorshead *v.* United Rys. Co., 203 Mo. 121, 96 S. W. 261, 100 S. W. 611 [*affirming* 119 Mo. App. 541, 96 S. W. 261], holding that where the lease is to an irresponsible company, it will be disregarded like any other fraudulent conveyance and the lessor held responsible.

47. Moorshead *v.* United Rys. Co., 203 Mo. 121, 96 S. W. 261, 100 S. W. 611 [*affirming* 119 Mo. App. 541, 96 S. W. 261].

48. Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717 [*affirming* 102 Ill. App. 310]; Braslin *v.* Somerville Horse R. Co., 145 Mass. 64, 13 N. E. 65; Ft. Worth St. R. Co. *v.* Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61, holding that a lease of its line by a street railroad company under authority of the city council does not absolve it from liability for injuries resulting from the lessee's negligent operation of the line unless the authority so provides.

That the lessee abandons a single track as leased and lays a double track at its own expense, as provided by the lease, does not absolve the lessor from liability. Ft. Worth St. R. Co. *v.* Ferguson, 9 Tex. Civ. App. 610, 29 S. W. 61.

49. Braslin *v.* Somerville Horse R. Co., 145 Mass. 64, 13 N. E. 65.

50. Henning *v.* Sampsell, 236 Ill. 375, 86 N. E. 274; Pinkerton *v.* Pennsylvania Traction Co., 193 Pa. St. 229, 44 Atl. 284; Mullen *v.* Philadelphia Traction Co., 4 Pa. Co. Ct. 164.

51. Dunn *v.* Asheville, etc., R. Co., 141 N. C. 521, 54 S. E. 416, holding that the rule holding the lessor liable for the torts of the lessee does not apply to hold the lessee liable for the torts of its assignee.

52. Higgins *v.* Brooklyn, etc., R. Co., 54 N. Y. App. Div. 69, 66 N. Y. Suppl. 334.

53. Henning *v.* Sampsell, 236 Ill. 375, 86 N. E. 274.

injury due to the negligence or improper operation of the road occurring after it has parted with its ownership, operation, and control,[54] although it may be liable for injuries due to the fact that the road was not properly constructed at the time of delivery.[55] The purchaser of a street railroad is liable for damages caused by its own negligence the same as any other owning company;[56] and where the sale is a judicial one, the court in ordering the sale may impose a liability for past damages upon the purchaser as a part of the consideration for the purchase.[57]

d. Street Railroad Company or Municipality. A street railroad company is liable for injuries caused by a failure to keep its tracks in repair,[58] or by a failure to keep the street in repair, where, under the terms of its grant, or by statute or ordinance, it is under the duty to repair the same,[59] although the municipality is also negligent in permitting the defect to remain in the street,[60] or although the defective condition in fact results from a failure of the municipality to keep its street in repair.[61] But a street railroad company is not liable for the negligence of the municipal authorities,[62] and although it is under the duty to repair the streets, it is not liable for a defect which is one of construction by the municipality, and for which the municipality alone is responsible, and which the company is not at liberty to alter,[63] unless it has assumed the duty of protecting travelers therefrom.[64] A grant, however, to a street railroad company of the privilege of constructing its tracks in the streets and running cars thereon does not exonerate the municipality from liability for failing to keep its streets in proper repair should the company fail to do so;[65] but if the municipality is compelled to pay damages in such a case by reason of the railroad company's negligence or default, it may recover over against the company.[66]

54. Pugh *v.* Texarkana Light, etc., Co., 86 Ark. 36, 109 S. W. 1019.

55. Pugh *v.* Texarkana Light, etc., Co., 86 Ark. 36, 109 S. W. 1019.

56. Citizens' R., etc., Co. *v.* Johns, (Tex. Civ. App. 1909) 116 S. W. 62. See also *supra*, X, B, 2, a.

57. Daniels *v.* Bay City Traction, etc., Co., 143 Mich. 493, 107 N. W. 94, holding that where a decree for a receiver's sale of a street railroad provides that the purchaser shall take subject to the payment of all claims for damages against the receiver, and shall discharge all claims previously filed within four months but only when and as the court shall allow the claims, the limitation as to the filing of claims does not refer to undetermined claims against the railroad for damages pending or arising within the period limited.

58. Cline *v.* Crescent City R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187. See also *infra*, X, B, 4.

59. McMahon *v.* Second Ave. R. Co., 75 N. Y. 231; Snell *v.* Rochester R. Co., 64 Hun (N. Y.) 476, 19 N. Y. Suppl. 496; Houston City R. Co. *v.* Dawson, 2 Tex. Unrep. Cas. 223.

60. Cline *v.* Crescent City R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187.

61. Fash *v.* Third Ave. R. Co., 1 Daly (N. Y.) 148; Carpenter *v.* Central Park, etc., R. Co., 11 Abb. Pr. N. S. (N. Y.) 416.

Whatever obligations may be imposed upon the municipal authorities in exercising supervisory care over streets, there is no reasonable ground for claiming that such duty relieves the owners of property and franchises from liability for injuries occasioned by obstructions created through their negligence. Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65.

62. Baltimore Consol. R. Co. *v.* State, 91 Md. 506, 46 Atl. 1000.

63. Phinney *v.* Boston El. R. Co., 201 Mass. 286, 87 N. E. 490, 131 Am. St. Rep. 400 (holding that a street railroad company is not primarily liable for injuries at a street crossing resulting from an excavation by the city water department); Snell *v.* Rochester R. Co., 64 Hun (N. Y.) 476, 19 N. Y. Suppl. 496; Campbell *v.* Frankford, etc., R. Co., 139 Pa. St. 522, 21 Atl. 92 (holding that a street railroad company, required by ordinance to keep the pavement along its track in repair, is not liable for a hole in the pavement under one rail of its track, made by direction of the city to serve as a surface drain and maintained in the condition required by the city).

64. Phinney *v.* Boston El. R. Co., 201 Mass. 286, 87 N. E. 490, 131 Am. St. Rep. 400, holding that a street railroad company which agrees with the city to guard a trench in a street made by the city at a crossing is liable for injuries to a traveler resulting from the failure to properly perform its duty.

65. Cline *v.* Crescent City R. Co., 43 La. Ann. 327, 9 So. 122, 26 Am. St. Rep. 187. See also MUNICIPAL CORPORATIONS, 28 Cyc. 1354.

Repairs by municipality and recovery against company see *supra*, VII, D, 7.

66. Troy *v.* Troy, etc., R. Co., 3 Lans. (N. Y.) 270 [*affirmed* in 49 N. Y. 657] (failure to remove snow from side of track); Ft. Worth St. R. Co. *v.* Allen, (Tex. Civ. App.

3. Care Required and Liability Generally — a. In General — (i) *Nature and Extent of Liability.* If a street railroad company, through its servants and agents, fails to exercise reasonable and ordinary care in the management and operation of its road and cars,[67] it is guilty of negligence and liable for the injuries caused thereby to persons on the tracks or street,[68] and this liability is sometimes expressly imposed upon the company by ordinance or statute;[69] and a street railroad company is not exempted from liability for its negligence by the fact that it received its franchise from the municipality.[70] But a street railroad company is not an insurer against every casualty that may happen, or liable for an injury attributable to a mere accident which ordinary vigilance could not avoid,[71] or which cannot be attributed to want of care on its part,[72] nor can negligence on its part be inferred from the mere happening of the injury.[73] The failure of a street railroad company to perform a duty imposed by ordinance or statute is ordinarily such negligence as will render it liable for the injuries resulting therefrom.[74] To run a car in one direction on a track generally used for cars going

1897) 39 S. W. 125 (holding that where a street railroad company contracts with a city to keep the street in repair and a traveler is injured by defects in the track, the city is liable therefor and is entitled to a judgment over against the railroad company).

67. See *infra*, X, B, 3, a, (II).

68. Caswell *v.* Boston El. R. Co., 190 Mass. 527, 77 N. E. 380; Dintruff *v.* Rochester City, etc., R. Co., 10 N. Y. Suppl. 402 [*affirmed* in 124 N. Y. 647, 27 N. E. 412]; Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392; Ford *v.* Metropolitan R. Co., 4 Ont. L. Rep. 29, 1 Ont. Wkly. Rep. 318.

69. Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74 [*affirming* 39 Mo. App. 447], holding that it is competent for a city, in consideration of the franchise granted to a street railroad company, to impose by ordinance the duty of exercising a high degree of care, and its failure to observe the ordinance renders it liable to the person injured, notwithstanding a fine is also imposed for such failure. See also Gunn *v.* Cambridge R. Co., 144 Mass. 430 note, 11 N. E. 678; Holland *v.* Lynn, etc., R. Co., 144 Mass. 425, 11 N. E. 674; Brocklehurst *v.* Manchester, etc., Steam Tramways Co., 17 Q. B. D. 118, 51 J. P. 55, 55 L. T. Rep. N. S. 406, 34 Wkly. Rep. 568.

A statutory provision rendering the proprietors of any railroad liable for injuries resulting from the carelessness or negligence of such proprietors, or their servants or agents, applies to street railroads. Johnson *v.* Louisville City R. Co., 10 Bush (Ky.) 231.

A general penal ordinance regulating the operation of street cars, but conferring no particular benefits upon persons injured by a violation of such ordinance, and not even making such violation negligence, is simply a police regulation, and confers no right of action upon third persons injured by its violation. Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

70. Lincoln Rapid Transit Co. *v.* Nichols, 37 Nebr. 332, 55 N. W. 872, 20 L. R. A. 853.

71. Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617 (holding that a street railroad company is not obliged to be on guard against that which is not reasonably to be expected, and, in case of an accident, as to whether or not it did its duty is to be determined, in part, by that which it knew of the nature of the place of the accident, and of the number of people, adults and children, making use of the street where such accident occurred); Memphis St. R. Co. *v.* Wilson, 108 Tenn. 618, 69 S. W. 265; Brocklehurst *v.* Manchester, etc., Steam Tramways Co., 17 Q. B. D. 118, 51 J. P. 55, 55 L. T. Rep. N. S. 406, 34 Wkly. Rep. 568.

72. McCaffrey *v.* Twenty-Third St. R. Co., 47 Hun (N. Y.) 404 (holding that a person injured in a street by stepping on a wire trailing behind a street car cannot recover of the car company, where the wire did not belong to the car, and there was no evidence that the company's employees had actual knowledge of it, or that it had been attached to the car for a sufficient length of time to charge them with knowledge of it); Bishop *v.* Belle City St. R. Co., 92 Wis. 139, 65 N. W. 733.

Where a motorman is confronted with a sudden danger, he is not liable for a failure to follow what might appear on reflection to be the wiser course. Ackerman *v.* Union Traction Co., 205 Pa. St. 477, 55 Atl. 16; Bishop *v.* Belle City St. R. Co., 92 Wis. 139, 65 N. W. 733.

73. See *infra*, X, B, 9, e, (I), (B).

74. Rockford City R. Co. *v.* Matthews, 50 Ill. App. 267; Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74 [*affirming* 39 Mo. App. 447]. See also Fortin *v.* Bay City Traction, etc., Co., 154 Mich. 316, 117 N. W. 741; Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186; and *infra*, X, B, 3, d.

Necessity for acceptance of ordinance.— The violation of a general ordinance prescribing a penalty for a violation thereof, but which is not made a part of the ordinance granting the company's franchise, does not authorize a recovery for injuries or death caused by such violation, unless the company has agreed to or contracted to be bound by such ordinance. Holwerson *v.* St. Louis, etc.,

in the opposite direction is not negligence in itself, independent of other circumstances and conditions.[75] The unauthorized transportation of freight for hire for others over its tracks may constitute negligence which will render the company liable for the resulting injuries;[76] but this does not apply to the transportation of anything which it is reasonably necessary for the company to transport as incidental to the proper management of its legitimate business.[77]

(II) *DEGREE OF CARE REQUIRED.*[78] While a street railroad company is required to exercise a very high degree of care in the operation of its road in public streets and highways,[79] it is not, as regards the general public in the streets on which it runs, required to exercise as high a degree of care as it owes to passengers on its cars,[80] or as is required of a steam railroad operating its cars on the streets;[81] but is only required to exercise what under the circumstances is ordinary care and prudence; that is, it is required to exercise such care and vigilance in the management and operation of its cars to avoid injuring persons rightfully upon such streets or highways as a person of ordinary prudence and capacity may be expected to exercise under the same or similar circumstances,[82] and it is

R. Co., 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

Neglect of a duty imposed by an invalid ordinance is not negligence on the part of the company, where it has not agreed to be bound thereby. Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855.

75. North Chicago St. R. Co. *v.* Irwin, 82 Ill. App. 146; Baldwin *v.* Heraty, 136 Mich. 15, 98 N. W. 739.

76. Caswell *v.* Boston El. R. Co., 190 Mass. 527, 77 N. E. 380.

77. Caswell *v.* Boston El. R. Co., 190 Mass. 527, 77 N. E. 380.

78. Reciprocal rights and duties of company and travelers on the street see *infra*, X, B, 3, j.

79. Barstow *v.* Capital Traction Co., 29 App. Cas. (D. C.) 362.

80. Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613; Gorman *v.* Louisville R. Co., 72 S. W. 760, 24 Ky. L. Rep. 1938; Unger *v.* Forty-Second St., etc., R. Co., 51 N. Y. 497 [*affirming* 6 Rob. 237]; Pendleton St. R. Co. *v.* Shires, 18 Ohio St. 255. But see Dallas Rapid Transit R. Co. *v.* Dunlap, 7 Tex. Civ. App. 471, 26 S. W. 877.

Care required as to passengers see CARRIERS, 6 Cyc. 595.

81. Unger *v.* Forty-Second St., etc., R. Co., 51 N. Y. 497 [*affirming* 6 Rob. 237]; Cincinnati St. R. Co. *v.* Meyer, 9 Ohio Dec. (Reprint) 256, 11 Cinc. L. Bul. 321; Wolf *v.* City R. Co., 50 Oreg. 64, 85 Pac. 620, 91 Pac. 460. See also RAILROADS, 33 Cyc. 734 *et seq.*

But a different and greater degree of care is required from a motorman on an electric street car traversing the streets of a city to avoid injury to persons upon the track than is required from the engineer of a railroad train running on the company's right of way, where any person upon the track is a trespasser, to whom the company owes no duty except not to injure him wilfully or maliciously. Stelk *v.* McNulta, 99 Fed. 138, 40 C. C. A. 357.

82. *Alabama.*— Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93.

California.— Henderson *v.* Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976; Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447.

Colorado.— Liutz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600.

Delaware.— Brown *v.* Wilmington City R. Co., 1 Pennew. 332, 40 Atl. 936.

Illinois.—Chicago City R. Co. *v.* Anderson, 193 Ill. 9, 61 N. E. 999 [*affirming* 93 Ill. App. 419]; Elgin, etc., Traction Co. *v.* Wilcox, 132 Ill. App. 446; West Chicago St. R. Co. *v.* Muttschall, 131 Ill. App. 639; Chicago, etc., R. Co. *v.* Barrows, 128 Ill. App. 11; Chicago City R. Co. *v.* Ahler, 107 Ill. App. 397; West Chicago St. R. Co. *v.* Williams, 87 Ill. App. 548.

Indiana.— Indianapolis St. R. Co. *v.* Demarce, 40 Ind. App. 228, 80 N. E. 687.

Kentucky.— Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484; Lexington R. Co. *v.* Woodward, 106 S. W. 853, 32 Ky. L. Rep. 653; Louisville R. Co. *v.* Hofgesand, 104 S. W. 361, 31 Ky. L. Rep. 976; Palmer Transfer Co. *v.* Paducah R., etc., Co., 89 S. W. 515, 28 Ky. L. Rep. 473; Gorman *v.* Louisville R. Co., 72 S. W. 760, 24 Ky. L. Rep. 1938.

Massachusetts.— Rubinovitch *v.* Boston El. R. Co., 192 Mass. 119, 77 N. E. 895.

Missouri.— Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

New York.— Unger *v.* Forty-Second St., etc., R. Co., 51 N. Y. 497 [*affirming* 6 Rob. 237]; Klimpl *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 291, 87 N. Y. Suppl. 39; Lockwood *v.* Troy City R. Co., 92 N. Y. App. Div. 112, 87 N. Y. Suppl. 311; Perras *v.* United Traction Co., 88 N. Y. App. Div. 260, 84 N. Y. Suppl. 992; Adsit *v.* Catskill Electric R. Co., 88 N. Y. App. Div. 167, 84 N. Y. Suppl. 393; Solomon *v.* New York City R. Co., 50 Misc. 557, 99 N. Y. Suppl. 529.

Ohio.— Pendleton St. R. Co. *v.* Shires, 18 Ohio St. 255; Toledo, etc., R. Co. *v.* Gilbert, 24 Ohio Cir. Ct. 181.

Pennsylvania.— Jones *v.* Greenburg, etc., St. R. Co., 9 Pa. Super. Ct. 65, 43 Wkly. Notes Cas. 298.

not required to exercise the highest degree of care,[83] or guard against unusual and extraordinary dangers.[84] What constitutes ordinary care and prudence within the meaning of the above rule depends upon the known and reasonably to be expected hazards and dangers of the particular case,[85] and varies under different conditions, such as the character of the cars, the agency of propulsion, the locality in which they are operated, whether in the country or in a city, whether over much traveled or unfrequented streets, and the possibility or probability attending their operation,[86] as what under some conditions will be ordinary and reasonable care may under other conditions amount even to gross negligence.[87] Thus, as compared with the usual operation of a car under ordinary conditions, ordinary care will require a higher degree of diligence and prudence where there is an increase of danger,[88] as at a crossing of intersecting streets,[89] or at the crossing

Texas.— San Antonio Traction Co. *v.* Haines, 45 Tex. Civ. App. 289, 100 S. W. 788.

Virginia.—Norfolk R., etc., Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740.

United States.— Cincinnati St. R. Co. *v.* Whitcomb, 66 Fed. 915, 14 C. C. A. 183.

See 44 Cent. Dig. tit. "Street Railroads," § 172.

That electric railroad tracks are far beyond any municipal limits and there is no law relating to speed does not affect the company's duty toward persons crossing its tracks to use ordinary care to avoid injuring them. Chicago, etc., Electric R. Co. *v.* Wanic, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167 [*affirming* 132 Ill. App. 477].

A horse railroad company need exercise no greater degree of care as to pedestrians in a street than is required of the driver or owner of any other vehicle. Unger *v.* Forty-Second St., etc., R. Co., 51 N. Y. 497 [*affirming* 6 Rob. 237].

83. West Chicago St. R. Co. *v.* Callow, 102 Ill. App. 323 (holding that the motorman of an electric car is not obliged to be on guard at all times against the unreasonable conduct of persons on the streets); West Chicago St. R. Co. *v.* Wizemann, 83 Ill. App. 402 (holding that the company is not required to exercise such care in operating its cars as will prevent an accident); Fath *v.* Tower Grove, etc., R. Co., 39 Mo. App. 447 [*affirmed* in 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74]; Klimpl *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 291, 87 N. Y. Suppl. 39; Solomon *v.* New York City R. Co., 50 Misc. (N. Y.) 557, 99 N. Y. Suppl. 529; Quinn *v.* New York City R. Co., 94 N. Y. Suppl. 560.

84. Chicago City R. Co. *v.* Soszynski, 134 Ill. App. 149; Bloomington, etc., R., etc., Co. *v.* Koss, 123 Ill. App. 497.

85. *Colorado.*—Liutz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600.

Delaware.— Goldstein *v.* People's R. Co., 5 Pennew. 306, 60 Atl. 975; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945.

Illinois.— Chicago City R. Co. *v.* Strong, 230 Ill. 58, 82 N. E. 335 [*affirming* 129 Ill. App. 511]; Bloomington, etc., R., etc., Co. *v.* Koss, 123 Ill. App. 497; Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617; West Chicago St. R. Co. *v.* Callow, 102 Ill. App. 323.

Maine.— Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267.

Missouri.— Kube *v.* St. Louis Transit Co., 103 Mo. App. 582, 78 S. W. 55.

New York.— Unger *v.* Forty-Second St., etc., R. Co., 51 N. Y. 497 [*affirming* 6 Rob. 237].

See 44 Cent. Dig. tit. "Street Railroads," § 172.

86. Henderson *v.* Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976; Di Prisco *v.* Wilmington City R. Co., 4 Pennew. (Del.) 527, 57 Atl. 906; Consumers' Electric Light, etc., R. Co. *v.* Pryor, 44 Fla. 354, 32 So. 797; Jenison *v.* Rhode Island Suburban R. Co., (R. I. 1906) 67 Atl. 367.

The gathering of a large crowd in the immediate vicinity of the tracks, and overflowing them, imposes upon the company's employees the duty of greater care and caution in the running of cars, but does not require the stopping of the cars altogether. Washington, etc., R. Co. *v.* Wright, 7 App. Cas. (D. C.) 295.

A heavy electric car requires greater caution in its management than an ordinary vehicle. Cincinnati St. R. Co. *v.* Whitcomb, 66 Fed. 915, 14 C. C. A. 183.

87. Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

88. Garrett *v.* People's R. Co., 6 Pennew. (Del.) 29, 64 Atl. 254; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. (Del.) 581, 52 Atl. 543; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. (Del.) 512, 52 Atl. 264.

89. *Delaware.*— Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254 (holding that street railroad companies are required to exercise a greater degree of care and caution in operating their cars at crossings, where a large number of persons and vehicles are usually found); Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906.

District of Columbia.— Eckington, etc., Home R. Co. *v.* Hunter, 6 App. Cas. 287.

Illinois.— O'Leary *v.* Chicago City R. Co., 235 Ill. 187, 85 N. E. 233 [*affirming* 136 Ill. App. 239]; Fisher *v.* Chicago City R. Co., 114 Ill. App. 217; Wallen *v.* North Chicago St. R. Co., 82 Ill. App. 103.

West Virginia.— Ashley *v.* Kanawha Valley Traction Co., 60 W. Va. 306, 55 S. E. 1016.

of two street railroads,[90] or on streets in crowded or densely populated portions of a municipality.[91]

(III) *ACTS OF SERVANTS, EMPLOYEES, AND THIRD PERSONS.* As a general rule it is the duty of a street railroad company to exercise ordinary care to employ sufficient reasonably skilled and competent servants [92] on its cars to operate them in a careful manner so as to prevent injury to persons on the track; and therefore the company is liable for injuries which are due to the inexperience and incompetency of such servants,[93] or to acts done by them within the scope of their employment,[94] but not for injuries which result from acts which are not within

Wisconsin.— Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

See 44 Cent. Dig. tit. "Street Railroads," § 172.

Where the view of the crossing is obstructed the motorman of an approaching car must use increased care and caution in proportion to such conditions. Dungan *v.* Wilmington City R. Co., 4 Pennew. (Del.) 458, 58 Atl. 868.

At the junction of two of the most prominent thoroughfares in a large city, in frequent and constant use by pedestrians and vehicles of every sort, a motorman must exercise a degree of care commensurate with such conditions, and is charged with knowledge that the diligence which may suffice in less populous and traveled parts of the city will fall short of constituting ordinary care in such thronged portions. McLeland *v.* St. Louis Transit Co., 105 Mo. App. 473, 80 S. W. 30.

Where a street railroad approaches a street crossing at a steep down grade, or where the rails are wet or the view of the railroad is obstructed, greater care is required of the motorman than where the approach is at or near the grade of the crossing, or where the rails are in the usual condition, or the view is unobstructed. Snyder *v.* People's R. Co., 4 Pennew. (Del.) 145, 53 Atl. 433. See also Foulke *v.* Wilmington City R. Co., 5 Pennew. (Del.) 363, 60 Atl. 973.

Where a point some distance from a crossing is habitually used by persons in crossing the tracks of a street railroad, it is the duty of the company to conform the movements of its cars to such condition and to approach such point with the same degree of care it is required to use in approaching street crossings. Spiking *v.* Consol. R., etc., Co., 33 Utah 313, 93 Pac. 838.

90. Metropolitan R. Co. *v.* Hammett, 13 App. Cas. (D. C.) 370, holding that the highest degree of caution is required of those in charge of street railroad cars at points where street railroad lines intersect.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VI).

91. Garrett *v.* People's R. Co., 6 Pennew. (Del.) 29, 64 Atl. 254; Di Prisco *v.* Wilmington City R. Co., 4 Pennew. (Del.) 527, 57 Atl. 906; Brown *v.* Wilmington City R. Co., 1 Pennew. (Del.) 332, 40 Atl. 936; Chicago, etc., R. Co. *v.* Wanic, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167 [*affirming* 132 Ill. App. 477] (holding that an electric railroad company must exercise greater care in running its cars along a public highway in a thickly settled locality, where the view of approaching cars is obstructed, than in a highway in the country, where the view is unobstructed); Haas *v.* New Orleans R. Co., 112 La. 747, 36 So. 670.

92. Cunningham *v.* Los Angeles R. Co., 115 Cal. 561, 47 Pac. 452; Di Prisco *v.* Wilmington City R. Co., 4 Pennew. (Del.) 527, 57 Atl. 906; Brown *v.* Wilmington City R. Co., 1 Pennew. (Del.) 332, 40 Atl. 936; Todd *v.* Second Ave. Traction Co., 192 Pa. St. 587, 44 Atl. 337; Citizens' Rapid Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518. See, generally, MASTER AND SERVANT, 26 Cyc. 1518 *et seq.*

Instruction and experience.— There is nothing in the handling of an electric street car that demands that a person, otherwise competent, should have more instruction and experience than may be acquired during four months' service as a conductor and one month's service as a motorman. Cloud *v.* Alexander Electric R. Co., 121 La. 1061, 46 So. 1017, 18 L. R. A. N. S. 371.

The placing of an inexperienced motorman in charge of a car, accompanied by a skilled motorman, to teach him the work and to see that no harm will come from his inexperience, is not negligence on the part of a street railroad company. Columbus St. R., etc., Co. *v.* Reap, 40 Ind. App. 689, 82 N. E. 977.

93. Di Prisco *v.* Wilmington City R. Co., 4 Pennew. (Del.) 527, 57 Atl. 906; Crisman *v.* Shreveport Belt R. Co., 110 La. 640, 34 So. 718, 62 L. R. A. 747 (holding that it is negligence to have a car in a city in charge of a man only eighteen years old, whose experience is limited to twenty days); Rice *v.* Crescent City R. Co., 51 La. Ann. 108, 24 So. 791 (holding that it is negligence to have an electric car running along the populous thoroughfares of a city, in charge of a man who has not the full and complete use of both eyes); Snider *v.* New Orleans, etc., R. Co., 48 La. Ann. 1, 18 So. 695; Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202; Wall *v.* Helena St. R. Co., 12 Mont. 44, 29 Pac. 721.

A single act of negligence on the part of the driver or motorman of a street car at any time other than that when the accident happened does not establish unfitness on the part of such driver or motorman. Dallas City R. Co. *v.* Beeman, 74 Tex. 291, 11 S. W. 1102.

94. Wilton *v.* Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11. See, generally, MASTER AND SERVANT, 26 Cyc. 1525 *et seq.*

the scope of such employment.[95] But a street railroad company is not liable for injuries caused by negligent or wrongful acts done by third persons not in its employ and without its knowledge and consent.[96]

b. Equipment of Cars.[97] Ordinary care and prudence for the safety of pedestrians and vehicles on the street require that a street railroad company should exercise reasonable care and diligence to equip and operate its cars with safety appliances for preventing accidents,[98] such as fenders,[99] and appliances for controlling and stopping cars,[1] and to keep such appliances in good condition.[2] Its duty in this respect is discharged if it uses cars and appliances in general use, and which have been found usually adequate and safe,[3] and it is not required to have

95. Coll *v.* Toronto R. Co., 25 Ont. App. 55.

96. Louisville R. Co. *v.* Holmes, (Ky. 1909) 117 S. W. 953 (holding that a street car company is not liable for injuries caused to a person standing at a street corner waiting for a street car by the negligence of a passenger in gratuitously throwing a bundle of papers from the car in the performance of a duty devolving on the car operatives); Lott *v.* New Orleans City, etc., R. Co., 37 La. Ann. 337, 55 Am. Rep. 500; Weldon *v.* Harlem R. Co., 5 Bosw. (N. Y.) 576.

Independent contractor.— If a street railroad company owning an amusement park properly polices it, provides a suitable place for the exhibition of fireworks, and places it in charge of a competent independent contractor, it is not liable for injuries to a person caused by the negligence of a volunteer assisting an employee of the independent contractor. Noggle *v.* Carlisle, etc., R. Co., 215 Pa. St. 357, 64 Atl. 547. See, generally, MASTER AND SERVANT, 26 Cyc. 1552 *et seq.*

97. **Requirements as to lights and signals** see *infra*, X, B, 3, e.

Statutory and municipal regulations see *supra*, X, A, 2, b, (v).

98. Warren *v.* Manchester, St. R. Co., 70 N. H. 352, 47 Atl. 735 (holding that this duty includes the adoption of such appliances as men of average prudence would use under the same circumstances); Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229; Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220. See also Pitcher *v.* People's St. R. Co., 174 Pa. St. 402, 34 Atl. 567; Buente *v.* Pittsburg, etc., Traction Co., 2 Pa. Super. Ct. 185.

The character of appliances in use at the time of the accident determines the liability of a street railroad company for failure to equip its cars with safety appliances, without regard to what is done subsequently in adding other appliances. Zimmerman *v.* Denver Consol. Tramway Co., 18 Colo. App. 480, 72 Pac. 607.

99. Englund *v.* Mississippi Valley Traction Co., 139 Ill. App. 572; Chicago City R. Co. *v.* O'Donnell, 114 Ill. App. 359 (holding that the violation of an ordinance providing for the equipment of cars with fenders is *prima facie* evidence of negligence); Ashley *v.* Kanawha Valley Traction Co., 60 W. Va. 306, 55 S. E. 1016 (holding that it is negligence *per se* to operate a car without fenders required by ordinance); Lott *v.* Sydney, etc., R. Co., 41 Nova Scotia 153.

Statutory and municipal regulations see *supra*, X, A, 2, b, (v).

Negligence may be predicated on an omission to provide cars with fenders, where the injury could have been prevented by the use of such a safeguard, and they are usually attached to cars of similar construction operated in similar localities generally throughout the country, and have proved ordinarily efficacious for the protection of persons on the highway. Fritsch *v.* New York, etc., R. Co., 93 N. Y. App. Div. 554, 87 N. Y. Suppl. 942. But the failure to equip a car with a fender is not, in the absence of an ordinance or statute requiring it, of itself negligence. Hogan *v.* Citizens' R. Co., 150 Mo. 36, 51 S. W. 473; Pitcher *v.* People's St. R. Co., 174 Pa. St. 402, 34 Atl. 567.

The fact that a fender at the rear of a car is not raised is not negligence if it is not customary to keep such fenders raised. Hoffman *v.* Philadelphia Rapid Transit Co., 214 Pa. St. 87, 63 Atl. 409.

1. Mock *v.* Los Angeles Traction Co., 139 Cal. 616, 73 Pac. 455; Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115 (holding that it is the duty of a street railroad company to so equip and operate its cars that the latter may be readily controlled by the operators, under all conditions and in all situations reasonably to be anticipated); Weitzman *v.* Nassau Electric R. Co., 33 N. Y. App. Div. 585, 53 N. Y. Suppl. 905 (as are commonly used).

Where a car is equipped with defective appliances for control, to the knowledge of the company, it is not freed from responsibility for a collision with a person coming suddenly in front of it, by the motorman on discovering such person doing all that he could with such appliances. Roberts *v.* Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

2. Mock *v.* Los Angeles Traction Co., 139 Cal. 616, 73 Pac. 455 (holding that ordinary prudence requires a street railroad company to exercise great care to keep its appliances for stopping cars in good condition); Thompson *v.* Salt Lake Rapid-Transit Co., 16 Utah 281, 52 Pac. 92, 67 Am. St. Rep. 621, 40 L. R. A. 172 (negligence in failing to repair brake).

3. Indianapolis St. R. Co. *v.* Schomberg, (Ind. App. 1904) 71 N. E. 237; Unger *v.*

in use the latest improvements which skill and ingenuity have devised to prevent accidents.[4] Where steam power is used, as in the case of an elevated railroad, the company should use reasonable care to equip its engines with, and keep in repair, appliances to prevent sparks, cinders, or coals from escaping on to persons passing under or near the road,[5] and if it uses such care it is not liable for negligence from the mere fact that a cinder or coal does escape and causes injury.[6]

c. Vigilance of Persons in Charge of Car.[7] A motorman, driver, or gripman in charge of the operation of a street car is ordinarily bound to anticipate the presence of vehicles and pedestrians on the street or highway in front of or near his car,[8] and it is his duty to keep a diligent lookout to avert injury to persons, animals, or vehicles on the track or approaching thereto,[9] and this duty is par-

Forty-Second St., etc., R. Co., 51 N. Y. 497 [*affirming* 6 Rob. 237]; Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838. See also Quinby *v.* Chester St. R. Co., 3 Lanc. L. Rev. (Pa.) 200.

The rule that it is necessary to prove that certain appliances are in general use by street railroad companies before negligence can be predicated on the omission to supply them does not apply to appliances, the use of which is a matter of common knowledge. Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

Where the car used is of the kind in general and ordinary use by other companies engaged in the same business, the mere use of such car at a curve where the running board overlaps the sidewalk, but in a manner in all other respects careful and proper, does not of itself constitute negligence. Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613.

4. Indianapolis St. R. Co. *v.* Schomberg, (Ind. App. 1904) 71 N. E. 237; Unger *v.* Forty-Second St., etc., R. Co., 51 N. Y. 497 [*affirming* 6 Rob. 237]; Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220. See also Buente *v* Pittsburg, etc., Traction Co., 2 Pa. Super. Ct. 185.

5. Searles *v.* Manhattan R. Co., 101 N. Y. 661, 5 N. E. 66; Kister *v.* Manhattan R. Co., 40 N. Y. App. Div. 441, 58 N. Y. Suppl. 132 (holding that the fact that an injury is caused by the falling of coals and cinders from a locomotive of an elevated railroad makes a *prima facie* case of negligence against the company); McNaier *v.* Manhattan R. Co., 46 Hun (N. Y.) 502, 4 N. Y. Suppl. 310 [*affirmed* in 123 N. Y. 664, 26 N. E. 750] (holding that it is the duty of an elevated railroad company to so construct the ash-pans, etc., of its engines as to reduce the danger of accident "to the least possible practical minimum point"). See also Hinchy *v.* Manhattan R. Co., 49 N. Y. Super. Ct. 406.

Where there is an appliance which, in the reasonable operation of an elevated railroad, could be used to prevent sparks from falling to the street and injuring pedestrians there, it is the duty of the company to avail itself thereof, and it is not enough for it to do all that can be reasonably required to prevent sparks, but it is bound to do all that it reasonably can, if it is impossible to prevent sparking, to see that no one is injured by the sparks. Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446.

Where a pan to prevent the falling of sparks from an elevated road is reasonably necessary, it is the duty of the company either to apply to the railroad commissioners for their approval of a pan, or to proceed to put up one without approval. Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446.

6. Wiedmer *v.* New York El. R. Co., 114 N. Y. 462, 21 N. E. 1041 [*reversing* 41 Hun 284]; Searles *v.* Manhattan R. Co., 101 N. Y. 661, 5 N. E. 66.

7. Care as to licensees see *infra*, X, B, 3, g.
Care as to trespassers see *infra*, X, B, 3, h.

8. Henderson *v.* Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976; Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478.

9. *Alabama.*— Mobile Light, etc., Co. *v.* Baker, 158 Ala. 491, 48 So. 119; Birmingham R., etc., Co. *v.* Brown, 152 Ala. 115, 44 So. 572; Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829; Anniston Electric, etc., Co. *v.* Hewitt, 139 Ala. 442, 36 So. 39, 101 Am. St. Rep. 42, bound to look out for live stock.

California.— Henderson *v.* Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976.

Florida.— Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Illinois.— Chicago, etc., Electric R. Co. *v.* Barrows, 128 Ill. App. 11; West Chicago St. R. Co. *v.* Williams, 87 Ill. App. 548.

Indiana.— Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; Moran *v.* Leslie, 33 Ind. App. 80, 70 N. E. 162.

Kentucky.— Louisville R. Co. *v.* Knocke, (1909) 117 S. W. 271; Louisville R. Co. *v.* Johnson, 131 Ky. 277, 115 S. W. 207, 20 L. R. A. N. S. 133; Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484; South Covington, etc., St. R. Co. *v.* Besse, 108 S. W. 848, 33 Ky. L. Rep. 52, 16 L. R. A. N. S. 890; Paducah City R. Co. *v.* Alexander, 104 S. W. 375, 31 Ky. L. Rep. 1043; South Covington, etc., St. R. Co. *v.* McHugh, 77 S. W. 202, 25 Ky. L. Rep. 1112.

Louisiana.— Barnes *v.* Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400.

Maine.— Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267.

ticularly applicable at street crossings,[10] and on streets in densely populated neighborhoods or on crowded streets,[11] and is sometimes prescribed by statute or ordinance.[12] But there is no duty to keep a lookout along the company's tracks outside the limits of the street or highway,[13] except at points where the company has reasonable grounds to anticipate the presence of persons on the tracks,[14] as at a point where, for a considerable length of time, pedestrians have been in the habit of walking along or crossing the company's private right of way.[15]

d. Rate of Speed and Control of Car[16] — (i) *In General.* A street railroad company must operate its cars at such a rate of speed as under all the circumstances is reasonable and compatible with the lawful and customary use of the street or highway by pedestrians and vehicles;[17] but in the absence of an express

Maryland.— Baltimore Traction Co. *v.* Wallace, 77 Md. 435, 26 Atl. 518; Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Petersen *v.* St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860; Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; Funck *v.* Metropolitan St. R. Co., 133 Mo. App. 419, 113 S. W. 694; Mertens *v.* St. Louis Transit Co., 122 Mo. App. 304, 99 S. W. 512.

South Carolina.— Sharpton *v.* Augusta, etc., R. Co., 72 S. C. 162, 51 S. E. 553.

Tennessee.— Memphis St. R. Co. *v.* Wilson, 108 Tenn. 618, 69 S. W. 265.

Virginia.— Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443.

Wisconsin.— Glettler *v.* Sheboygan Light, etc., R. Co., 130 Wis. 137, 109 N. W. 973; Forrestal *v.* Milwaukee Electric R., etc., Co., 119 Wis. 495, 97 N. W. 182.

See 44 Cent. Dig. tit. "Street Railroads," § 174.

The duty to keep a lookout is not confined to street crossings, but is applicable to the entire line of the street. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45. *Compare* De Ioia *v.* Metropolitan St. R. Co., 37 N. Y. App. Div. 455, 56 N. Y. Suppl. 22 [*affirmed* in 165 N. Y. 664, 59 N. E. 1121].

10. *Iowa.*— Remillard *v.* Sioux City Traction Co., 138 Iowa 565, 115 N. W. 900.

Kentucky.— Louisville R. Co. *v.* French, 71 S. W. 486, 24 Ky. L. Rep. 1278.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

Missouri.— Koenig *v.* Union Depót R. Co., 173 Mo. 698, 73 S. W. 637 (holding that the motorman of an electric car approaching a crossing is bound only to use such care as a person of ordinary prudence and caution, according to the usual and general experience of mankind, would exercise in the same situation and circumstances, in respect to keeping a lookout for persons crossing the track); Zalotuchin *v.* Metropolitan St. R. Co., 127 Mo. App. 577, 106 S. W. 548.

New York.— Harvey *v.* Nassau Electric R. Co., 35 N. Y. App. Div. 307, 55 N. Y. Suppl. 20.

Texas.— San Antonio St. R. Co. *v.* Mechler, 87 Tex. 628, 30 S. W. 899 [*affirming* (Civ. App. 1894) 29 S. W. 202].

Wisconsin.— Glettler *v.* Sheboygan, etc., Co., 130 Wis. 137, 109 N. W. 973.

See 44 Cent. Dig. tit. "Street Railroads," § 174.

As high a degree of care is required at a street crossing of those in charge of an electric street car as of those driving other vehicles. Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

The conductor of a street car is not required to keep a lookout to avoid accidents at crossings. Gebhardt *v.* St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448.

11. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177; Indianapolis Traction, etc., Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. N. S. 143; Remillard *v.* Sioux City Traction Co., 138 Iowa 565, 115 N. W. 900.

A gripman operating a cable car in crowded city streets must be on the lookout, to employ all reasonable means to avoid accidents, and to respect the equal rights of others to the use of the public streets. West Chicago St. R. Co. *v.* Williams, 87 Ill. App. 548.

12. See *supra*, X, A, 2, b, (VII).

A breach of such requirements of an ordinance amounts to negligence, for the results of which a street railroad company is liable to an individual. Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

It is negligence in a motorman to be looking backward, and talking to someone in the car, when the car is moving rapidly along a street where people are always likely to be crossing, under such an ordinance. Dallas Rapid Transit R. Co. *v.* Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455.

Non-compliance with such a requirement does not imply corporate negligence within the meaning of a statute imposing a penalty on a corporation operating a street railroad which by reason of its negligence causes the death of a person. Caswell *v.* Boston El. R. Co., 190 Mass. 527, 77 N. E. 380.

13 Birmingham R. Light, etc., Co. *v.* Brown, 152 Ala. 115, 44 So. 572.

14. Levelsmeier *v.* St. Louis, etc., R. Co., 114 Mo. App. 412, 90 S. W. 104; Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

15. Levelsmeier *v.* St. Louis, etc., R. Co., 114 Mo. App. 412, 90 S. W. 104.

16. **Statutory and municipal regulations** see *supra*, X, A, 2, b, (VI).

17. *California.*— Henderson *v.* Los Angeles

regulation limiting the rate of speed of street cars, the mere fact that a car is running at a rapid rate does not establish that it is being run in a negligent manner;[18] but what rate of speed is reasonable and conversely what rate of speed is unreasonable and negligent is determined by the relation of the speed to the circumstances under which it is maintained, having regard to the view of the driver or motorman, the crowded condition of the street, and all other circumstances and conditions existing at the time, which may increase the danger of persons being on or near the track.[19] In accordance with these rules a motorman or driver must

Traction Co., 150 Cal. 689, 89 Pac. 976, holding that a speed of eight miles an hour is negligence, unless it is a safe rate under all the circumstances.

Delaware.— Wilman *v.* People's R. Co., 4 Pennew. 260, 55 Atl. 332; Cox *v.* Wilmington City R. Co., 4 Pennew. 162, 53 Atl. 569; Snyder *v.* People's R. Co., 4 Pennew. 145, 53 Atl. 433; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 512, 52 Atl. 264.

Illinois.— Savage *v.* Chicago, etc., Electric R. Co., 238 Ill. 392, 87 N. E. 377 [*affirming* 142 Ill. App. 342].

Indiana.— Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995.

Maine.— Marden *v.* Portsmouth, etc., St. R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300.

New Jersey.— Newark Pass. R. Co. *v.* Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374; Camden, etc., R. Co. *v.* U. S. Cast Iron Pipe, etc., Co., 68 N. J. Eq. 279, 59 Atl. 523, holding that a street railroad company cannot require other users of the way to provide special devices to insure it the opportunity to drive its cars at unlimited speed.

Ohio.— Cincinnati St. R. Co. *v.* Lewis, 23 Ohio Cir. Ct. 127.

Virginia.— Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443, holding that unless expressly permitted the speed of a street car should be no greater than is reasonable and consistent with the usual use of the highway.

Canada.— Inglis *v.* Halifax Electric Tram Co., 32 Nova Scotia 117; Ewing *v.* Toronto R. Co., 24 Ont. 694.

See 44 Cent. Dig. tit. "Street Railroads," §§ 175, 200.

This duty exists at common law, although there are no state statutes in regard thereto, and although the city in which the road lies may not have passed an ordinance on that subject. East St. Louis Electric St. R. Co. *v.* Burns, 77 Ill. App. 529.

A reasonable speed for a horse car, in the absence of an ordinance to the contrary, is the average rate of vehicles used to convey passengers by horse-power. Com. *v.* Temple, 14 Gray (Mass.) 69; Adolph *v.* Central Park, etc., R. Co., 76 N. Y. 530.

18. West Chicago St. R. Co. *v.* Callow, 102 Ill. App. 323; Rock *v.* Chicago City R. Co., 69 Ill. App. 656 (twelve miles an hour); Reid Ice Cream Co. *v.* New York City R. Co., 97 N. Y. App. Div. 303, 89 N. Y. Suppl. 968 (holding that a speed of eight or ten miles an hour in a city does not of itself amount to negligence); Dettmers *v.* Brooklyn Heights R. Co., 22 N. Y. App. Div. 488, 48 N. Y. Suppl. 23; Baumgardner *v.* Toledo Electric St. R. Co., 5 Ohio S. & C. Pl. Dec. 159, 7 Ohio N. P. 386.

19. *Connecticut.*— Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553 (holding that the fact that a street car was running at an excessive speed at the time of the accident does not of itself show that that was the cause of the accident); Smith *v.* Connecticut R., etc., Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. N. S. 707; Garfield *v.* Hartford, etc., St. R. Co., 80 Conn. 260, 67 Atl. 890.

Illinois.— West Chicago St. R. Co. *v.* Callow, 102 Ill. App. 323.

Maine.— Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267, holding that the speed at which a car may be run along a highway must depend on the nearness of the track to the side of the street and the likelihood of persons driving out from the yards, and whether the driveways are so situated that such persons can learn of the approach of the cars in season to avoid collision.

Minnesota.— Walker *v.* St. Paul City R. Co., 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632, holding that a speed of forty-five miles an hour in the night-time past platforms used by the public is negligence.

Missouri.— Warner *v.* St. Louis, etc., R. Co., 178 Mo. 125, 77 S. W. 67, holding that the fact that a street car company ran its car at the same rate as usual at the place where the injury occurred, although faster than was usual in other parts of the city, was not negligence.

New Jersey.— Consolidated Traction Co. *v.* Glynn, 59 N. J. L. 432, 37 Atl. 66.

New York.— Cosgrove *v.* Metropolitan St. R. Co., 74 N. Y. App. Div. 166, 77 N. Y. Suppl. 624 [*affirmed* in 173 N. Y. 628, 66 N. E. 1106]; O'Callaghan *v.* Metropolitan St. R. Co., 69 N. Y. App. Div. 574, 75 N. Y. Suppl. 171 [*affirmed* in 174 N. Y. 521, 66 N. E. 1112]; Fandel *v.* Third Ave. R. Co., 15 N. Y. App. Div. 426, 44 N. Y. Suppl. 462 [*affirmed* in 162 N. Y. 598, 57 N. E. 1110]. See also McCann *v.* Sixth Ave. R. Co., 117 N. Y. 505, 23 N. E. 164, 15 Am. St. Rep. 539 [*reversing* 56 N. Y. Super. Ct. 282, 3 N. Y. Suppl. 418].

North Carolina.— Davis *v.* Durham Traction Co., 141 N. C. 134, 53 S. E. 617.

Pennsylvania.— Breary *v.* Traction Co., 5 Pa. Dist. 95.

See 44 Cent. Dig. tit. "Street Railroads," §§ 175, 200.

at all times so regulate the speed of his car as to have it under reasonable control,[20] so as to be able to reduce the speed and if necessary stop the car when danger is imminent;[21] and this rule is particularly applicable when the car is approaching a street crossing,[22] or is being run on a crowded or densely populated

Illustrations.— Thus it is negligence to run cars propelled by steam dummies, on a foggy night at a high rate of speed, without giving any signals at crossings (Hennessy *v.* Brooklyn City R. Co., 73 Hun (N. Y.) 569, 26 N. Y. Suppl. 321), or to run a car along a narrow and unlighted alley, on a dark night, so fast that it cannot be stopped within the distance covered by its own headlight (Gilmore *v.* Federal St., etc., Pass. R. Co., 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682). But a speed of ten miles an hour is not negligence where it is the customary speed at the place of the accident. Wilson *v.* Chicago City R. Co., 133 Ill. App. 433. So a rate of speed of from eight to fifteen miles an hour is not, in the absence of further evidence on the subject, negligence in an outlying district. Kupiec *v.* Warren, etc., St. R. Co., 196 Mass. 463, 82 N. E. 676; Theobald *v.* St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354. So a rate of speed of from twelve to twenty miles an hour is not of itself negligence in a sparsely settled and little frequented locality. Trigg *v.* Water, etc., Co., 215 Mo. 521, 114 S. W. 972, 20 L. R. A. N. S. 987; American Ice Co. *v.* New York City R. Co., 50 Misc. (N. Y.) 183, 98 N. Y. Suppl. 219.

The test of negligence in the rate of speed of a street car is the speed at which an ordinarily prudent man would run the car under similar circumstances. Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

Statement of rule.—Where a street car is moving at a lawful rate of speed, and a traveler comes on the track, the company is required to use ordinary care, as by giving the signals, lowering the speed, and stopping the car, if reasonably necessary, and where the car is properly equipped and the equipments are used with reasonable promptness, the company will not be liable for an injury sustained, but where the car is moving at an excessive rate of speed, and by reason thereof the signals cannot be given or the appliances used by the exercise of ordinary care, the company will be liable for an injury, because it has, by the excessive speed, brought about a condition which it cannot control. Davis *v.* Durham Traction Co., 141 N. C. 134, 53 S. E. 617. See also Louisville R. Co. *v.* Buckner, (Ky. 1908) 113 S. W. 90.

20. *Alabama.*— Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829.

Connecticut.— Currie *v.* Consolidated R. Co., 81 Conn. 383, 71 Atl. 356.

Kentucky.— Louisville R. Co. *v.* Knocke, (1909) 117 S. W. 271.

Massachusetts.— Kupiec *v.* Warren, etc., St R. Co., 196 Mass. 463, 82 N. E. 676.

Michigan.— Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741.

Minnesota.— Smith *v.* Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16.

Missouri.— Funck *v.* Metropolitan St. R. Co., 133 Mo. App. 419, 113 S. W. 694.

New York.— Harvey *v.* Nassau Electric R. Co., 35 N. Y. App. Div. 307, 55 N. Y. Suppl. 20.

Pennsylvania.— Kline *v.* Electric Traction Co., 181 Pa. St. 276, 37 Atl. 522, holding that where the motorman is able to stop an electric street car within a distance of about its length, when half-way between two cross streets, its speed is not sufficient to justify a finding of negligence on the part of the motorman.

Canada.— Gosnell *v.* Toronto R. Co., 21 Ont. App. 553 [*affirmed* in 24 Can. Sup. Ct. 582].

See 44 Cent. Dig. tit. "Street Railroads," §§ 175, 200.

21. Anniston Electric, etc., Co. *v.* Hewitt, 139 Ala. 442, 36 So. 39, 101 Am. St. Rep. 42; Flannagan *v.* St. Paul City R. Co., 68 Minn. 300, 71 N. W. 379; Consolidated Traction Co. *v.* Glynn, 59 N. J. L. 432, 37 Atl. 66; Fullerton *v.* Metropolitan St. R. Co., 37 N. Y. App. Div. 386, 55 N. Y. Suppl. 1068.

Where a person has the right to drive across the track at a certain point, it is negligence in the company to run a car there at such a rate of speed as to be unable to avoid running into him. Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955.

22. *Delaware.*—Foulke *v.* Wilmington City R. Co., 5 Pennew. 363, 60 Atl. 973.

Idaho.— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254.

Illinois.— West Chicago St. R. Co. *v.* Petters, 196 Ill. 298, 63 N. E. 662 [*affirming* 95 Ill. App. 479]; Chicago City R. Co. *v.* Nonn, 133 Ill. App. 365.

Kentucky.— Louisville R. Co. *v.* French, 71 S. W. 486, 24 Ky. L. Rep. 1278.

Maine.—Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

Missouri.— Grout *v.* Central Electric R. Co., 125 Mo. App. 552, 102 S. W. 1026; Cole *v.* Metropolitan St. R. Co., 121 Mo. App. 605, 97 S. W. 555.

New Jersey.— Searles *v.* Elizabeth, etc., R. Co., 70 N. J. L. 388, 57 Atl. 134.

New York.— Sesselmann *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 336, 78 N. Y. Suppl. 482; Towner *v.* Brooklyn Heights R. Co., 44 N. Y. App. Div. 628, 60 N. Y. Suppl. 289.

Oregon.— Wolf *v.* City R. Co., 50 Oreg. 64, 85 Pac. 620, 91 Pac. 460.

Tennessee.— Memphis St. R. Co. *v.* Wilson, 108 Tenn. 618, 69 S. W. 265.

West Virginia.— Ashley *v.* Kanawha Val-

street,[23] or where there is a sign over the tracks requiring cars to run slow,[24] although the speed need not be so regulated as to avoid injury to persons using the street or highway in an unreasonable and improper manner.[25] It is ordinarily negligence to run a car at an unusual and excessive rate of speed over a street crossing [26] or along a crowded or much used street,[27] even though such speed is not in excess of the limit of speed fixed by ordinance or statute,[28] if under the circumstances it is a dangerous rate,[29] since the mere fact that the company is prohibited by statute or ordinance from running at a greater than a given rate of speed is not a license for it to run at that rate of speed under all circumstances.[30] And where

ley Traction Co., 60 W. Va. 306, 55 S. E. 1016.

See 44 Cent. Dig. tit. "Street Railroads," §§ 175, 200.

Illustrations.— In approaching a crossing where there is a steep down grade, it is the duty of a motorman to make the descent at reasonable speed, so as not to put the car beyond his control. White *v.* Wilmington City R. Co., 6 Pennew. (Del.) 105, 63 Atl. 931; Foulke *v.* Wilmington City R. Co., 5 Pennew. (Del.) 363, 60 Atl. 973. So the running of a street car at a speed of from fifteen to forty miles an hour along a street in the populous part of a city, without reducing the speed at street intersections, is not only negligence, but is a wanton and reckless act. Grout *v.* Central Electric R. Co., 125 Mo. App. 552, 102 S. W. 1026. But where, in the absence of legislative requirements, a motorman has no occasion to foresee danger to another at a street crossing, it is not negligence to maintain the usual rate of speed over a crossing. Skinner *v.* Tacoma R., etc., Co., 46 Wash. 122, 89 Pac. 488.

Where the motorman's view of the crossing is obstructed, it is even more his duty to approach the crossing with his car under control. Schoener *v.* Metropolitan St. R. Co., 72 N. Y. App. Div. 23, 76 N. Y. Suppl. 157.

On approaching a street crossing the motorman must anticipate that a person approaching such crossing from either side may turn his team into the street, and must exercise all due care to have his car under such control as to be able to stop it if necessary to avoid an accident. Marden *v.* Portsmouth, etc., St. R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300.

23. Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447 (holding that the drivers of street cars through a densely populated city ought always to have their teams under their immediate and absolute control); Quincy Horse R., etc., Co. *v.* Gnuse, 137 Ill. 264, 27 N. E. 190 [*reversing* 38 Ill. App. 212] (holding that it is reckless and unreasonable for a drunken driver to drive at a gallop downhill in a thickly populated neighborhood); Chicago City R. Co. *v.* Roach, 76 Ill. App. 496 (holding that six miles an hour in streets crowded with teams and people on foot is negligence); Moran *v.* Leslie, 33 Ind. App. 80, 70 N. E. 162; Grout *v.* Central Electric R. Co., 125 Mo. App. 552, 102 S. W. 1026.

24. Hayward *v.* North Jersey St. R. Co., 74 N. J. L. 678, 65 Atl. 737, 8 L. R. A. N. S. 1062.

25. Meyer *v.* Lindell R. Co., 6 Mo. App. 27.

26. *Delaware.*— Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254.

Kentucky.— Owenshoro City R. Co. *v.* Hill, 56 S. W. 21, 21 Ky. L. Rep. 1638.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

Missouri.— Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445.

Nebraska.— Stewart *v.* Omaha, etc., St. R. Co., 83 Nebr. 97, 118 N. W. 1106.

New York.— Clancy *v.* New York City R. Co., 115 N. Y. App. Div. 569, 100 N. Y. Suppl. 1046, fifteen miles an hour.

Tennessee.— Memphis St. R. Co. *v.* Wilson, 108 Tenn. 618, 69 S. W. 265.

Virginia.— Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 100.

West Virginia.—Ashley *v.* Kanawha Valley Traction Co., 60 W. Va. 306, 55 S. E. 1016.

See 44 Cent. Dig. tit. "Street Railroads," §§ 175, 200.

27. See Camden, etc., R. Co. *v.* U. S. Cast Iron Pipe, etc., Co., 68 N. J. Eq. 279, 59 Atl. 523.

28. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; Beier *v.* St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876; Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; Fry *v.* St. Louis Transit Co., 111 Mo. App. 324, 85 S. W. 960; Camden, etc., R. Co. *v.* U. S. Cast Iron Pipe, etc., Co., 68 N. J. Eq. 279, 59 Atl. 523; Atherton *v.* Tacoma R., etc., Co., 30 Wash. 395, 71 Pac. 39.

An ordinance regulating the speed of street cars cannot be construed as authorizing the operation of cars at a public crossing at any particular speed, regardless of conditions at the time. Holden *v.* Missouri R. Co., 177 Mo. 456, 76 S. W. 973; Story *v.* St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992.

A motorman cannot assume that the right of way will be clear, and run his car at all points at the extreme rate permitted by law. Rouse *v.* Detroit Electric R. Co., 135 Mich. 545, 98 N. W. 258, 100 N. W. 404.

29. Quincy Horse R., etc., Co. *v.* Gnuse, 137 Ill. 264, 27 N. E. 190 [*reversing* 38 Ill. App. 212].

30. Quincy Horse R., etc., Co. *v.* Gnuse, 137 Ill. 264, 27 N. E. 190 [*reversing* 38 Ill. App. 212].

an accident is caused thereby it is usually negligence *per se* to run a street car at a rate of speed prohibited by statute or ordinance,[31] except where the regulation does not fix a uniform rate of speed applicable at all times and places.[32]

(II) *Reducing Speed and Stopping Car.* A motorman or driver must use reasonable care when danger is imminent to reduce the speed or stop his car, if necessary, in time to avoid an accident;[33] but where no danger is apparent, and, in the absence of statute or ordinance to that effect, he is not required to stop his car before reaching a street crossing for the purpose of looking and listen-

31. *Alabama.*— Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566, running of dummy locomotive backward at unlawful rate of speed.

California.— Bresee *v.* Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, holding that such prohibited speed is negligence as a matter of law, and renders the company liable for any injury caused by the excessive speed.

Maryland.— Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534, holding that where an injury is inflicted by a car running at a prohibited rate of speed, the company is liable if the accident could have been avoided had the car not been running at an unlawful rate of speed.

Michigan.— Deneen *v.* Houghton County St. R. Co., 150 Mich. 235, 113 N. W. 1126.

Missouri.— Moore *v.* St. Louis Transit Co., 194 Mo. 1, 92 S. W. 390; Campbell *v.* St. Louis Transit Co., 121 Mo. App. 406, 99 S. W. 58; Steinmann *v.* St. Louis Transit Co., 116 Mo. App. 673, 94 S. W. 799; Heintz *v.* St. Louis Transit Co., 115 Mo. App. 667, 92 S. W. 353; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140 (over a street crossing); Holden *v.* Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133; Story *v.* St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992; Kolb *v.* St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050; Meyers *v.* St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379. See also Reno *v.* St. Louis, etc., R. Co., 180 Mo. 469, 79 S. W. 464.

Tennessee.—Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374, holding also that such negligence would render the company liable, if it was the proximate cause of the accident.

Texas.— City R. Co. *v.* Wiggins, (Civ. App. 1899) 52 S. W. 577; San Antonio St. R. Co. *v.* Watzlavzick, (Civ. App. 1894) 28 S. W. 115.

Utah.— Riley *v.* Salt Lake Rapid Transit Co., 10 Utah 428, 37 Pac. 681.

Washington.— Wilson *v.* Puget Sound Electric R. Co., 52 Wash. 522, 101 Pac. 50; Engelker *v.* Seattle Electric Co., 50 Wash. 196, 96 Pac. 1039.

West Virginia.— Ashley *v.* Kanawha Valley Traction Co., 60 W. Va. 306, 55 S. E. 1016.

See 44 Cent. Dig. tit. "Street Railroads," §§ 175, 200.

But see Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093, 30 Ky. L. Rep. 644 (holding that in an action for the death of one struck by a street car, the fact that at the time of the accident the company was violating an ordinance limiting the speed of cars is no evidence of negligence toward the decedent); Hanlon *v.* South Boston Horse R. Co., 129 Mass. 310 (not conclusive proof of negligence); Davis *v.* Durham Traction Co., 140 N. C. 134, 53 S. E. 617 (is evidence of negligence).

The mere fact that a car is running at a prohibited rate of speed does not of itself entitle a person to recover for injuries received in an accident therewith, although it may be the foundation of a recovery if he receives injuries by reason of such excessive speed. Harris *v.* Lincoln Traction Co., 78 Nebr. 681, 111 N. W. 580; Omaha St. R. Co. *v.* Duvall, 40 Nebr. 29, 58 N. W. 531; Davidson *v.* Schuylkill Traction Co., 4 Pa. Super. Ct. 86.

32. Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229, holding that where an ordinance does not fix a uniform rate of speed applicable at all times and places, but provides that it shall not exceed fourteen miles per hour, including stops, it is permissible to run a part of the time at a speed greater than fourteen miles an hour, in order to make up the time lost in stopping, and the proper construction of such ordinance is, that it regulates the speed only to the extent that at the end of the run the car must not have exceeded the average of fourteen miles per hour, and whether the speed is excessive under such an ordinance depends upon the condition affecting the public safety at the particular time and place in question, and the mere fact that the speed exceeded fourteen miles per hour is not conclusive on the question of negligence, even though the speed of the car was the proximate cause of the injury.

33. Wilman *v.* People's R. Co., 4 Pennew. (Del.) 260, 55 Atl. 332; Cox *v.* Wilmington City R. Co., 4 Pennew. (Del.) 162, 53 Atl. 569; Snyder *v.* People's R. Co., 4 Pennew. (Del.) 145, 53 Atl. 433; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. (Del.) 581, 52 Atl. 543; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. (Del.) 512, 52 Atl. 264; Brown *v.* Wilmington City R. Co., 1 Pennew. (Del.) 332, 40 Atl. 936; Moran *v.* Leslie, 33 Ind. App. 80, 70 N. E. 162. See also Garth *v.* North Alabama Traction Co., 148 Ala. 96, 42 So. 627.

An ordinance requiring persons "riding or driving" to check up or halt for pedestrians, if necessary, on approaching alley or street crossings, does not apply to street cars. Citizens' R. Co. *v.* Ford, 93 Tex. 110, 53 S. W. 575, 46 L. R. A. 457.

ing;[34] and it has been held that a failure to stop before going over a steam railroad crossing, in violation of a statute or ordinance, is not negligence without regard to the circumstances attending such failure.[35]

e. Lights and Signals or Warnings.[36] As a part of their duty to exercise ordinary care to avoid injury, it is the duty of the employees in charge of a street car to give a proper warning, as by sounding a bell or gong, or otherwise, on the car's approach to a place where under the circumstances there is danger of a collision with persons or vehicles,[37] such as on its approach to a street crossing.[38] Ordinary care may also require that the company have a flagman stationed at a par-

34. Savannah, etc., R. Co. *v.* Beasley, 94 Ga. 142, 21 S. E. 285.

Statutory and municipal regulations requiring stopping before crossing see *supra*, X, A, 2, b, (VI).

35. Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186.

36. Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

37. *Connecticut.*— Murphy *v.* Derby St. R. Co., 73 Conn. 249, 47 Atl. 120, holding that it is the duty of the motorman to sound his bell when approaching a point where it is apparent that the danger of injury to the public will thereby be materially lessened.

Delaware.—Cox *v.* Wilmington City R. Co., 4 Pennew. 162, 53 Atl. 569.

Illinois.— Chicago, etc., Electric R. Co. *v.* Wanic, 132 Ill. App. 477 [*affirmed* in 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167].

Indiana.— Nelson *v.* Chicago, etc., R. Co., 41 Ind. App. 397, 83 N. E. 1019.

Missouri.— Buren *v.* St. Louis Transit Co., 104 Mo. App. 224, 78 S. W. 680; Lamb *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 489.

New Jersey.— Consolidated Traction Co. *v.* Chenowith, 61 N. J. L. 554, 35 Atl. 1067, holding that it is the duty of the managers of an electric street car going at a high rate of speed to give audible signals of the car's approach, the non-performance of which is evidence of negligence.

Pennsylvania.— Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392.

Canada.— Preston *v.* Toronto R. Co., 5 Can. R. Cas. 30, 11 Ont. L. Rep. 56, 6 Ont. Wkly. Rep. 786.

Drivers and pedestrians on a highway are not trespassers, but have an equal right with street cars to use the highways, and, if the driver or motorman of a car fails to give them timely warning of his approach, the company will be liable for a resulting injury, although the car was running at a reasonable rate of speed, and although, after the driver actually discovered the peril of the person on the track, he unavailingly used every means at his command to avert the injury. South Covington, etc., R. Co. *v.* McHugh, 77 S. W. 202, 25 Ky. L. Rep. 1112.

Where the use of a street by pedestrians is practically constant, a street railroad company must give reasonable notice of the approach of its cars, and exercise care to avoid injury to the pedestrians. Louisville R. Co. *v.* Hofgesand, 104 S. W. 361, 31 Ky. L. Rep. 976.

At a point where there is no intersecting street a street railroad company is not bound to sound a gong in the absence of knowledge that any one is on the street at that point. Theobald *v.* St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354.

Where on account of darkness a motorman is unable to see vehicles on the track far enough ahead for him to give them warning of the car's approach, he must continually sound the gong in anticipation of their being on the track. J. F. Conrad Grocer Co. *v.* St. Louis, etc., R. Co., 89 Mo. App. 391.

Workmen repairing a street about a street car track are entitled to more warning of an approaching car than the noise it makes in running. Lewis *v.* Binghamton R. Co., 35 N. Y. App. Div. 12, 54 N. Y. Suppl. 452; Green *v.* Toronto R. Co., 26 Ont. 319.

38. *Delaware.*— Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 512, 52 Atl. 264.

Illinois.— Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1; East St. Louis Electric St. R. Co. *v.* Burns, 77 Ill. App. 529, must sound gong on approach to crossing.

Kentucky.— Louisville R. Co. *v.* Knocke, (1909) 117 S. W. 271; Louisville R. Co. *v.* French, 71 S. W. 486, 24 Ky. L. Rep. 1278.

Missouri.— Zalotuchin *v.* Metropolitan St. R. Co., 127 Mo. App. 577, 106 S. W. 548.

Nebraska.— Stewart *v.* Omaha, etc., St. R. Co., 83 Nebr. 97, 118 N. W. 1106.

New Jersey.— Dennis *v.* North Jersey St. R. Co., 64 N. J. L. 439, 45 Atl. 807, evidence of negligence.

Pennsylvania.— Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392.

Virginia.— Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 100.

West Virginia.— Ashley *v.* Kanawha Valley Traction Co., 60 W. Va. 306, 55 S. E. 1016.

Running a street car at an unusual speed without warning signals as it nears a street crossing is negligence. Owensboro City R. Co. *v.* Hill, 56 S. W. 21, 21 Ky. L. Rep. 1638; Cole *v.* Metropolitan St. R. Co., 121 Mo. App. 605, 97 S. W. 555.

Failure to give signal continuously.— Where a street car, which is in good condition, with an electric headlight, approaches a crossing on a clear, still night at a time when there is not much traffic, and there is no unusual obstruction preventing a view of the car by a person approaching on a cross

ticular crossing,[39] or that other means be taken thereat to prevent accidents.[40] Street cars running in the night-time should be provided with such lights as will enable the motorman or driver to see far enough ahead to avoid, in the exercise of ordinary care, a collision with a person or vehicle on the track,[41] or as will be sufficient to warn travelers of the car's approach and put them on their guard,[42] particularly where such lights are required by statute or ordinance;[43] but the company is not bound to provide a particular kind of light, if the one in use is as good or better.[44]

f. Employing Conductor.[45] It is usual to have a motorman and conductor on a train consisting of a car and trailer carrying passengers;[46] but the failure of a street railroad company to provide a car with a conductor is not of itself such negligence as will render the company liable for injuries caused by such car,[47] unless the absence of a conductor causes the motorman to so neglect his duties as motorman, in order to perform the duties of conductor, that the injury is thereby caused.[48] In the absence of statute or ordinance otherwise a horse car may be run without a conductor.[49]

g. Care as to Licensees. As a general rule a street railroad company owes no duty to a mere licensee on its car to be actively vigilant to look out for and avoid injuring him,[50] and is bound only not to wantonly or intentionally injure him,[51] or to exercise ordinary care to avoid injuring him after it discovers his

street, the failure of the motorman to continuously sound the gong is not negligence. Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

The violation of an ordinance requiring the continuous ringing of a bell on a street car while in motion does not render the company guilty of negligence *per se* in a crossing accident, although the ordinance is a condition in the grant of a franchise to the company, since the condition is unreasonable. Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

39. Eckington, etc., R. Co. *v.* Hunter, 6 App. Cas. (D. C.) 287.

40. Eckington, etc., R. Co. *v.* Hunter, 6 App. Cas. (D. C.) 287.

41. Currie *v.* Consolidated R. Co., 81 Conn. 383, 71 Atl. 356; Carter *v.* McDermott, 29 App. Cas. (D. C.) 145, 10 L. R. A. N. S. 1103 (holding that under the common law in force in Maryland the safety of those in charge of electric cars and of passengers requires such cars while in motion after dark to be equipped with a light at each end); Calumet Electric St. R. Co. *v.* Lynholm, 70 Ill. App. 371 (duty to have headlights).

It is negligence to operate a street car, between dusk and dark, at a high rate of speed without light or signal past a car that has been discharging passengers (Donelson *v.* East St. Louis, etc., R. Co., 235 Ill. 625, 85 N. E. 914 [*affirming* 140 Ill. App. 185]), or to run a street car along the streets of a city on a dark and stormy night at the rate of fifteen miles an hour without a headlight (Nelson *v.* Chicago, etc., R. Co., 41 Ind. App. 397, 83 N. E. 1019).

42. Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1; Ensley *v.* Detroit United R. Co., 134 Mich. 195, 96 N. W. 34; Buren *v.* St. Louis Transit Co., 104 Mo. App. 224, 78 S. W. 680, holding that it is the duty of a street railroad company to have its car so lighted as to be seen at a safe distance by a person driving on the street.

But the absence of lights by the trolley pole leaving the wire is of itself insufficient to show negligence. Higgins *v.* St. Louis, etc., R. Co., 197 Mo. 300, 95 S. W. 863.

43. McGee *v.* Consolidated St. R. Co., 102 Mich. 107, 60 N. W. 293, 47 Am. St. Rep. 507, 26 L. R. A. 300, holding, however, that where a city ordinance only requires electric street cars to be provided with "colored signal lights in front and rear," after sunset, the failure to also have a headlight is not negligence *per se*. See also *supra*, X, A, 2, b, (VII).

44. Currie *v.* Consolidated R. Co., 81 Conn. 383, 71 Atl. 356, holding that a street railroad company is not necessarily bound as respects other travelers to equip its cars with a particular kind of light, known, used, and approved by those engaged in conducting the same business under like conditions, as it may be using one that is better.

45. Statutory and municipal regulations see *supra*, X, A, 2, b, (IV).

46. Russell *v.* Shreveport Belt R. Co., 50 La. Ann. 501, 23 So. 466.

47. Di Prisco *v.* Wilmington City R. Co., 4 Pennew. (Del.) 527, 57 Atl. 906.

The failure to keep a conductor on a car, as required by ordinance, does not of itself render the company liable for injuries received by a child which jumped on the rear end of the car, in play, and fell therefrom. Chicago West Div. R. Co. *v.* Hair, 57 Ill. App. 587.

48. Di Prisco *v.* Wilmington City R. Co., 4 Pennew. (Del.) 527, 57 Atl. 906.

To require the motorman to leave his post to collect the fare of passengers is negligence. City Electric R. Co. *v.* Jones, 61 Ill. App. 183.

49. Dunn *v.* Cass Ave., etc., R. Co., 21 Mo. App. 188.

50. Fleming *v.* Brooklyn City R. Co., 1 Abb. N. Cas. (N. Y.) 433 [*affirmed* in 74 N. Y. 618].

51. Birmingham R., etc. Co. *v.* Sawyer,

presence and peril.[52] But where a person is upon a car upon the express or implied consent or invitation of the company or of those in charge of the car, within the scope of their employment, although not a passenger, it is bound to exercise ordinary care and diligence for his safety while thereon.[53] The duty of exercising ordinary care to prevent injury is also due to one who is upon the company's tracks and right of way upon its express or implied invitation.[54] It has been held that a street railroad company is liable for injuries caused by the negligence of a driver, motorman, or conductor to a person while riding with due care on the platform of a car upon the invitation of such an employee without collusion with him to defraud the company;[55] and that it is negligence for a street railroad company to permit a child of tender years to ride on the platform of a car.[56]

h. Care as to Trespassers — (i) *ON CARS.* As a general rule a street railroad company is under no duty to exercise active vigilance to look out for and prevent injury to trespassers on its cars,[57] but is bound only to abstain from

156 Ala. 199, 47 So. 67, 19 L. R. A. N. S. 717; North Chicago St. R. Co. *v.* Thurston, 43 Ill. App. 587.

52. Birmingham R., etc., Co. *v.* Sawyer, 156 Ala. 199, 47 So. 67, 19 L. R. A. N. S. 717.

53. Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219; Fraser *v.* London St. R. Co., 29 Ont. 411 [*affirmed* in 26 Ont. App. 383]; Blackmore *v.* Toronto St. R. Co., 38 U. C. Q. B. 172.

An assent by implication does not arise from the fact that the driver sees him and makes no demand for fare, when the driver is neither required nor authorized to collect fares. Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

Where it is dangerous to start a car while a person who has boarded it for the purpose of negotiating with the carmen for an extra trip is standing on its platform, it is the duty of the carmen to give him warning of the intention to start the car, and a reasonable time to get into the car or alight. Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219.

54. Abrahams *v.* Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216; Levelsmeier *v.* St. Louis, etc., R. Co., 114 Mo. App. 412, 90 S. W. 104; Obenland *v.* Brooklyn Heights R. Co., 127 N. Y. App. Div. 418, 111 N. Y. Suppl. 686; Liekens *v.* Staten Island Midland R. Co., 64 N. Y. App. Div. 327, 72 N. Y. Suppl. 162. See also Williams *v.* Metropolitan St. R. Co., 114 Mo. App. 1, 89 S. W. 59.

An elevated railroad company owes to the employee of a switch company, which is putting in a switch system on its tracks, the exercise of such care to avoid injuring him as a man of ordinary experience and prudence would exercise under like circumstances. Wells *v.* Brooklyn Heights R. Co., 67 N. Y. App. Div. 212, 74 N. Y. Suppl. 196 [*affirming* 34 Misc. 44, 68 N. Y. Suppl. 305].

55. Wilton *v.* Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11, 125 Mass. 130; Buck *v.* People's St. R., etc., Co., 108 Mo. 179, 18 S. W. 1090 [*affirming* 46 Mo. App. 555] (holding that where a boy six years old is invited on a street car by the conductor, and in alighting is injured because of the negligence of the latter, the company is liable, although the boy paid no fare); Danbeck *v.* New Jersey Traction Co., 57 N. J. L. 463, 31 Atl. 1038 (holding that where a boy ten years old enters a street car on the invitation of its conductor, and is thrown from the front platform by the carelessness of the driver, the company is liable); Day *v.* Brooklyn City R. Co., 12 Hun (N. Y.) 435 [*affirmed* in 76 N. Y. 593]. See also Lott *v.* New Orleans City, etc., R. Co., 37 La. Ann. 337, 55 Am. Rep. 500; Hestonville Pass. R. Co. *v.* Grey, 1 Walk. (Pa.) 513.

Failure of servants to care for or assist passengers see CARRIERS, 6 Cyc. 598.

56. East Saginaw City R. Co. *v.* Bohn, 27 Mich. 503; Kelly *v.* Railway Co., 39 Leg. Int. (Pa.) 168.

57. Monehan *v.* South Covington, etc., St. R. Co., 117 Ky. 771, 78 S. W. 1106, 25 Ky. L. Rep. 1920; Taylor *v.* South Covington, etc., St. R. Co., 20 S. W. 275, 14 Ky. L. Rep. 355; Trigg *v.* Water, etc., Transit Co., 215 Mo. 521, 114 S. W. 972, 20 L. R. A. N. S. 987.

Guards against trespassing children.—A street railroad company is not bound to so guard its cars as to prevent trespassing children from getting on and off the cars while being operated, or from falling or being thrown from such cars. Jefferson *v.* Birmingham R., etc., Co., 116 Ala. 294, 22 So. 546, 67 Am. St. Rep. 116, 38 L. R. A. 458; Goldstein *v.* People's R. Co., 5 Pennew. (Del.) 306, 60 Atl. 975; Kaumeier *v.* City Electric R. Co., 116 Mich. 306, 74 N. W. 481, 72 Am. St. Rep. 525, 40 L. R. A. 385.

A child, although non sui juris, riding on the step of the rear platform of a street car, on the side which is not in use, and across which is a closed gate, is a trespasser to whom the street railroad company and those in charge of the car owe no duty of discovering his peril. Monehan *v.* South Covington, etc., R. Co., 117 Ky. 771, 78 S. W. 1106, 25 Ky. L. Rep. 1920; Pitcher *v.* People's St. R. Co., 154 Pa. St. 560, 26 Atl. 559. But see Levin *v.* Second Ave. Traction Co., 194 Pa. St. 156, 45 Atl. 134.

wantonly, recklessly, or wilfully injuring a trespasser, whose presence is known,[58] or to exercise reasonable care to avoid injuring him after discovering his peril;[59] and the company therefore is not liable for injuries caused to a trespasser on a car whose presence or peril is not known,[60] or whose injuries are caused without any negligence on the part of the operatives of the car.[61] Where such trespasser is a child due regard should be paid, after he is discovered, to the known indiscretion of childhood, and the inability of children to exercise proper precaution for their own safety,[62] and it will generally be negligence to allow such a child to ride on the steps of the platform, when his presence in a situation thus exposed to danger is actually known or the circumstances are such as will make a failure to note his peril palpable neglect of duty on the part of those having the control of the car.[63] In removing or ejecting a trespasser from a car the company's employees may lawfully use only such force as is reasonably necessary to accomplish that object,[64] and if they use more force than is necessary in removing the trespasser or eject him in a careless and reckless manner whereby he is injured the company is liable therefor.[65] Thus a street railroad company is liable for injuries caused to a trespasser, particularly a child, by forcibly ejecting him from a car while it is in motion,[66] or by so frightening him by gestures or otherwise as to cause him to jump or fall from a moving car.[67]

The failure of a conductor to collect fare from a person upon the platform does not make such person a trespasser, so as to preclude an action for his injuries resulting from his being thrown under the car wheels while stepping from the car. Brennan *v.* Fair Haven, etc., R. Co., 45 Conn. 284, 29 Am. Rep. 679.

58. Hagestrom *v.* West Chicago St. R. Co., 78 Ill. App. 574; Albert *v.* Boston El. R. Co., 185 Mass. 210, 70 N. E. 52, newsboy.

59. Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649; Richmond Pass., etc., Co. *v.* Racks, 101 Va. 487, 44 S. E. 709.

That a child on a street car is a trespasser does not preclude a recovery for his injuries, if the operatives of the car know of his presence and do not exercise ordinary care to avoid injury to him. Brennan *v.* Fair Haven, etc., R. Co., 45 Conn. 284, 29 Am. Rep. 679; Goldstein *v.* People's R. Co., 5 Pennew. (Del.) 306, 60 Atl. 975.

60. Goldstein *v.* People's R. Co., 5 Pennew. (Del.) 306, 60 Atl. 975; West Chicago St. R. Co. *v.* Binder, 51 Ill. App. 420; Wrasse *v.* Citizens' Traction Co., 146 Pa. St. 417, 23 Atl. 345; Hestonville Pass. R. Co. *v.* Connell, 88 Pa. St. 520, 32 Am. Rep. 472; Clutzheher *v.* Union Pass. R. Co., 1 Pa. Cas. 240, 1 Atl. 597; Bishop *v.* Union R. Co., 14 R. I. 314, 51 Am. Rep. 386.

61. Taylor *v.* South Covington, etc., St. R. Co., 20 S. W. 275, 14 Ky. L. Rep. 355; Chave *v.* New York, etc., R. Co., 1 N. Y. Suppl. 264.

62. Pueblo Electric St. R. Co. *v.* Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116 (holding that a street car company is charged with the negligence of its motorman in allowing a thirteen-year-old boy to ride upon his car, and alight therefrom when in motion, without endeavoring to restrain him); Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

63. Brennan *v.* Fair Haven, etc., R. Co., 45 Conn. 284, 29 Am. Rep. 679; Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649; Levin *v.* Second Ave. Traction Co., 201 Pa. St. 58, 50 Atl. 255.

On discovering a boy on the step of the platform, the motorman should stop and take him inside or put him off. Levin *v.* Second Ave. Traction Co., 194 Pa. St. 156, 45 Atl. 134.

64. Nussbaum *v.* Louisville R. Co., 57 S. W. 249, 22 Ky. L. Rep. 271.

Where an order to get off while the car is moving is not given in such a manner as to intimidate the trespassing boy, and he jumps off because he knows he has no right on the car, or because he had been told to get off before the car started, and is thereby injured, the company is not liable therefor. Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

Where boys have been stealing rides on a car an employee who has tried to make them desist is justified in catching hold of one of them and lecturing him, and if he, on being turned loose, runs blindly into an approaching car and is injured, neither the employee nor the company is liable therefor. Palmisano *v.* New Orleans City R. Co., 108 La. 243, 32 So. 364, 92 Am. St. Rep. 381, 58 L. R. A. 405.

65. Hagerstrom *v.* West Chicago St. R. Co., 67 Ill. App. 63; North Chicago City R. Co. *v.* Gastka, 27 Ill. App. 518 (holding that where, in ejecting a trespasser, the company's employees carelessly force him into a position in which he is injured by a car on another track, the company is liable); Jackson *v.* St. Louis, etc., R. Co., 52 La. Ann. 1706, 28 So. 241.

66. Barre *v.* Reading City Pass. R. Co., 155 Pa. St. 170, 26 Atl. 99.

67. *Delaware.*— Goldstein *v.* People's R. Co., 5 Pennew. 306, 60 Atl. 975.

Massachusetts.— Lovett *v.* Salem, etc., R. Co., 9 Allen 557, holding that a boy ten years old who wrongfully gets upon the platform of a horse car and is not immediately expelled may maintain an action against

(II) *On Tracks.* As a general rule a street railroad company is under no duty to keep a lookout for trespassers on its track or private right of way, at points where it has a right to assume that the track is clear,[68] and this rule applies as well to children as adults;[69] but its only duty is to use all proper precautions to avoid injuring such a trespasser after discovering his peril, as by sounding the gong or whistle and taking proper precautions to stop the car when necessary.[70] But where from the locality and circumstances known to the company there is reason to apprehend that the tracks will not be clear from persons or vehicles,[71] as where the tracks are so placed in a street as to become a part and parcel of the street,[72] it is the duty of the driver or motorman to keep a lookout for children and others on the street, and to use all reasonable precautions upon the first appearance of danger to avoid injury.[73]

i. **Frightening Animals** — (I) *In General.* As a general rule a street railroad company is entitled to the use of the street on which its tracks are laid, for the operation of its cars, equally with riders and drivers of horses,[74] and is not liable for injuries caused by horses on or near its tracks becoming frightened at

the company to recover for injuries sustained by him by reason of leaving the car in obedience to an order of the driver, when it is moving at such a rate that the attempt to get off is dangerous, if he exercises reasonable care.

New York.—Ansteth *v.* Buffalo R. Co., 145 N. Y. 210, 39 N. E. 708, 45 Am. St. Rep. 607 [*affirming* 9 Misc. 419, 30 N. Y. 197], boy ten years old. See also McCann *v.* Sixth Ave. R. Co., 117 N. Y. 505, 23 N. E. 164, 15 Am. St Rep. 539, causing boy to jump off in front of another car. But see Marks *v.* Rochester R. Co., 41 N. Y. App. Div. 66, 58 N. Y. Suppl. 210.

Pennsylvania.— Levin *v.* Second Ave. Traction Co., 194 Pa. St. 156, 45 Atl. 134; Biddle *v.* Hestonville, etc., R. Co., 112 Pa. St. 551, 4 Atl. 485, 16 Atl. 488.

Virginia.— Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

See 44 Cent. Dig. tit. "Street Railroads," §§ 179, 180.

68. Wade *v.* Detroit, etc., R. Co., 151 Mich. 684, 115 N. W. 713 (holding that a motorman operating a car on a right of way inclosed by fences is under no duty to keep a lookout for trespassers); Levelsmeier *v.* St. Louis, etc., R. Co., 114 Mo. App. 412, 90 S. W. 104; Camden, etc., R. Co. *v.* Young, 60 N J. L. 193, 37 Atl. 1013 (holding that there is no duty to be on the lookout for pedestrians on the track while crossing a trestle on the private right of way of the company in the night-time). See also Hooper *v.* Staten Island Midland R. Co., 32 Misc. (N. Y.) 721, 66 N. Y. Suppl. 308. But see Floyd *v.* Paducah R., etc., Co., 73 S. W. 1122, 24 Ky. L. Rep. 2364; Carney *v.* Concord St. R. Co., 72 N. H. 364, 57 Atl. 218.

One who goes upon the track in case of an emergency to rescue another person is not a trespasser Manzella *v.* Rochester R. Co., 105 N Y. App. Div. 12, 93 N. Y. Suppl. 457.

69. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177.

A child sixteen months old sitting or lying on the end of the ties of a street railroad is a trespasser, although the road-bed is in the street, if the ties are laid on the surface of the street and the rails attached thereto, thus raising the track above the surface. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177.

70. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177; Wade *v.* Detroit, etc., R. Co., 151 Mich. 684, 115 N. W. 713. See also Carney *v.* Concord St. R. Co., 72 N. H. 364, 57 Atl. 218.

71. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177.

72. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177.

Reciprocal rights and duties see *infra*, X, B, 3, j.

Statement of rule.— Where a railroad is built in a street in such a way as to become a part of it, that is, when the ties are embedded below the surface and the rails are flush with the surface, it becomes a part of the street and the public have the same right to use it as any other part of the street, but must observe care in looking out for approaching cars, with the consequent duty on the part of the servants of the company to keep a lookout for persons or vehicles; but where the ties are laid above the surface of the street and the rails placed thereon, thus raising them above the surface, such road-bed does not constitute a part of the street, and the public have no more right to the use of it than if it was not a street or road at all, and no duty rests on the operatives to keep a lookout for persons on it. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177; McKenzie *v.* United R. Co., 216 Mo. 1, 115 S. W. 13.

73. Citizens' St. R. Co. *v.* Dan, 102 Tenn. 320, 52 S. W. 177 (holding that it is the duty of a motorman to keep a vigilant lookout for children on the street, and upon the first appearance of danger, or probable collision with a child, to use ordinary care to stop the car in the shortest time and space possible); Wilkie *v.* Richmond Traction Co., 105 Va. 290, 54 S. E. 43. See also *supra*, X, B, 3, c; *infra*, X, B, 6, e.

74. See *infra*, X, B, 3, j.

the ordinary appearances and movements of cars under prudent and careful management,[75] or at the usual and necessary noises incident to the operation of cars,[76] and a driver going into the presence of cars takes the ordinary risk of being able to control his horses when frightened by their ordinary movements and noises.[77] But at the same time street cars must be so operated as not to unduly interfere with the rights of individuals using the street or highway by other modes of travel; [78] and it is the duty of the operator of a car to exercise reasonable and ordinary care under the circumstances to avoid the danger of frightening horses,[79] and hence the company will be liable if the fright of a horse or team is caused by the negligent making of unusual and unnecessary noises,[80] or appearances,[81] in the operation of its cars. The mere sounding of a gong or

75. *Illinois.*— East St. Louis, etc., St. R. Co. *v.* Wachtel, 63 Ill. App. 181; Kankakee Electric R. Co. *v.* Lade, 56 Ill. App. 454.

Indiana.— Columbus St. R., etc., Co. *v.* Reap, 40 Ind. App. 689, 82 N. E. 977 (holding that a motorman seeing a horse and wagon standing beside the track and out of danger may assume that it will not be frightened at the car); Indianapolis, etc., Rapid Transit Co. *v.* Haines, 33 Ind. App. 63, 69 N. E. 187; Terre Haute Electric R. Co. *v.* Yant, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. Rep. 376.

Massachusetts.— Henderson *v.* Greenfield, etc., St. R. Co., 172 Mass. 542, 52 N. E. 1080.

New York.— Hoag *v.* South Dover Marble Co., 192 N. Y. 412, 85 N. E. 667, 21 L. R. A. N. S. 283 [*reversing* 120 N. Y. App. Div. 892, 105 N. Y. Suppl. 1121].

Pennsylvania.— Davison *v.* Wilkes-Barre, etc., Traction Co., 10 Pa. Super. Ct. 442.

Wisconsin.— Bishop *v.* Belle City St. R. Co., 92 Wis. 139, 65 N. W. 733.

United States.— McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. 104, 20 C. C. A. 322, holding that it is not in itself negligence to start an electric street car in the ordinary manner, and in the ordinary course of the operation of such car, while a team of horses which manifest no symptoms of fright are being driven past it.

Canada.— Myers *v.* Brantford St. R. Co., 27 Ont. App. 513 [*reversing* 31 Ont. 309].

See 44 Cent. Dig. tit. "Street Railroads," § 181.

76. *Illinois.*— Galesburg Electric Motor, etc., Co. *v.* Manville, 61 Ill. App. 490, holding that there must be some misconduct on the part of the servant having control of the car.

Maine.— Moulton *v.* Lewiston, etc., St. R. Co., 102 Me. 186, 66 Atl. 388, 10 L. R. A. N. S. 845, operating car with scraper to remove snow.

Massachusetts.— Henderson *v.* Greenfield, etc., St. R. Co., 172 Mass. 542, 52 N. E. 1080.

New York.— Hoag *v.* South Dover Marble Co., 192 N. Y. 412, 85 N. E. 667, 21 L. R. A. N. S. 283 [*reversing* 120 N. Y. App. Div. 892, 105 N. Y. Suppl. 1121].

North Carolina.— Doster *v.* Charlotte St. R. Co., 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481.

United States.— McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. 104, 20 C. C. A. 322.

See 44 Cent. Dig. tit. "Street Railroads," § 181.

77. East St. Louis, etc., Electric St. R. Co. *v.* Wachtel, 63 Ill. App. 181.

78. Georgia R., etc., Co. *v.* Joiner, 120 Ga. 905, 48 S. E. 336. See also *infra*, X, B, 3, j.

A person owning an unbroken horse is not debarred from reasonable opportunities of exercising him in the presence of moving street cars in order to accustom him thereto. Flewelling *v.* Lewiston, etc., Horse R. Co., 89 Me. 585, 36 Atl. 1056.

79. Pioneer Fire-Proof Constr. Co. *v.* Sunderland, 87 Ill. App. 213 [*affirmed* in 188 Ill. 341, 58 N. E. 928]; Richter *v.* Cicero, etc., St. R. Co., 70 Ill. App. 196; Olney *v.* Omaha, etc., St. R. Co., 78 Nebr. 767, 111 N. W. 784; Adsit *v.* Catskill Electric R. Co., 88 N. Y. App. Div. 167, 84 N. Y. Suppl. 393 (holding that a motorman is not required to take any more precaution against frightening a horse on a highway than would be required by the driver of any other vehicle); Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054; Klatt *v.* Houston Electric St. R. Co., (Tex. Civ. App. 1900) 57 S. W. 1112.

80. Georgia R., etc., Co. *v.* Blacknall, 122 Ga. 310, 50 S. E. 92; Georgia R., etc., Co. *v.* Joiner, 120 Ga. 905, 48 S. E. 336 (such as are likely to frighten horses); Applegate *v.* West Jersey, etc., R. Co., 73 N. J. L. 722, 65 Atl. 127.

It is ordinarily a question for the jury whether an unusual noise made by a street car was unnecessary, so as to make the company liable for frightening a horse. Hill *v.* Rome St. R. Co., 101 Ga. 66, 28 S. E. 631. See also *infra*, X, B, 4, g, (IX). Thus where an electric car, running on a public highway, without lessening the speed runs through a pool of water thereby throwing the water up, and making an unusual hissing noise, and causing a horse driven by plaintiff along the highway to become frightened and run away, it is a question for the jury whether the company, by its servants, has exercised reasonable care. Ayars *v.* Camden, etc., R. Co., 63 N. J. L. 416, 43 Atl. 678.

Negligence in the operation of a sweeper by a street railroad company, whereby a horse is frightened see Obold *v.* United Traction Co., 19 Pa. Super. Ct. 326.

81. Indianapolis, etc., Rapid Transit Co. *v.* Haines, 33 Ind. App. 63, 69 N. E. 187, holding that where a street car company

other ordinary signal by a street car motorman or driver in the performance of his duty, near a horse, whereby it becomes frightened and causes injury, is ordinarily not negligence;[82] but where the driver or motorman sees or by the exercise of ordinary care could see that a horse is frightened, or likely to become frightened, and unmanageable,[83] it is his duty to cease sounding the gong or other signal, and if he continues to do so, thereby increasing the fright of the horse, it is negligence for which the company is liable,[84] particularly where the sounding is done in a violent and unnecessary manner.[85]

(II) *Duty After Animal Is Frightened.*[86] Where the driver or motorman operating a car sees, or by the exercise of due diligence could see, that a horse or team is frightened at the car or its noises and is becoming unmanageable it is his duty to use all reasonable efforts to diminish the fright of the horse,[87] and to prevent an accident.[88] Under such circumstances it is the motorman's duty to reduce the speed of the car,[89] and bring it under control so far as possible,[90] and if necessary to use all reasonable efforts to stop the car.[91] But a motorman is not required to check the speed of his car every time he is notified of a skittish

negligently carries on the front of its car a banner for advertising purposes, calculated to frighten horses, it is liable if a horse becomes frightened and unmanageable thereat, resulting in injuries.

82. East St. Louis, etc., R. Co. *v.* Wachtel, 63 Ill. App. 181; Galesburg Electric Motor, etc., Co. *v.* Manville, 61 Ill. App. 490; North Chicago St. R. Co. *v.* Harms, 59 Ill. App. 374; Steiner *v.* Philadelphia Traction Co., 134 Pa. St. 199, 19 Atl. 491; North Side St. R. Co. *v.* Tippins, (Tex. App. 1890) 14 S. W. 1067. See also Philadelphia Traction Co. *v.* Lightcap, 61 Fed. 762, 10 C. C. A. 46.

83. Ellis *v.* Lyon, etc., R. Co., 160 Mass. 341, 35 N. E. 1127, holding that the failure of a motorman to see the frightened condition of a horse, when he may see it by the exercise of reasonable care, is negligence.

84. Springfield Consol. R. Co. *v.* Ankrom, 93 Ill. App. 655; Galesburg Electric Motor, etc., Co. *v.* Manville, 61 Ill. App. 490; Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446; Knoxville Traction Co. *v.* Mullins, 111 Tenn. 329, 76 S. W. 890; Citizens' R. Co. *v.* Hair, (Tex. Civ. App. 1895) 32 S. W. 1050; North Side St. R. Co. *v.* Tippins, (Tex. App. 1890) 14 S. W. 1067.

If the gong is sounded after either the conductor or motorman discovers that the horse is being frightened thereby, the company is liable, without regard to whether the gong is sounded by the one who made the discovery, for either making the discovery should notify the person who does sound it to desist. Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054.

85. Owensboro City R. Co. *v.* Lyddane, 41 S. W. 578, 19 Ky. L. Rep. 698; Oates *v.* Metropolitan St. R. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447; Sauter *v.* International R. Co., 128 N. Y. App. Div. 400, 112 N. Y. Suppl. 863; Philadelphia Traction Co. *v.* Lightcap, 61 Fed. 762, 10 C. C. A. 46.

Where a runaway horse enters a street on which a street car line is operated, and the driver and horse both know of the approach of a car, it is useless and negligent for the motorman to violently ring his bell, and his act cannot be justified as being to assist the driver in keeping the horse from the car. Oates *v.* Metropolitan St. R. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447.

86. Duty to cease sounding gong or signal see *supra*, X, B, 3, i, (I).

87. East St. Louis, etc., Electric St. R. Co. *v.* Wachtel, 63 Ill. App. 181; Ellis *v.* Lynn, etc., R. Co., 160 Mass. 341, 35 N. E. 1127; Myers *v.* Brantford St. R. Co., 27 Ont. App. 513 [*reversing* 31 Ont. 309].

88. Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166; Heidelbaugh *v.* People's R. Co., 6 Pennew. (Del.) 209, 65 Atl. 587 (holding that if he fails to do so he is guilty of negligence rendering the company liable for injuries resulting therefrom); Doran *v.* Cedar Rapids, etc., R. Co., 117 Iowa 442, 90 N. W. 815. See also Kankakee Electric R. Co. *v.* Lade, 56 Ill. App. 454.

89. Freyer *v.* Aurora, etc., R. Co., 123 Ill. App. 423; South Covington, etc., St. R. Co. *v.* Cleveland, 100 S. W. 283, 30 Ky. L. Rep. 1072, 11 L. R. A. N. S. 853; O'Brien *v.* Blue Hill St. R. Co., 186 Mass. 446, 71 N. E. 951; Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446.

90. McVean *v.* Detroit United R. Co., 138 Mich. 263, 101 N. W. 527; Cameron *v.* Jersey City, etc., St. R. Co., 70 N. J. L. 633, 57 Atl. 417 (holding that where it is evident to the motorman that the horse's fright is due to the oncoming car, it is his duty to put his car under such control as to be able to stop it, and to take necessary precautions to that end); Danville R., etc., Co. *v.* Hodnett, 101 Va. 361, 43 S. E. 606 (holding that where a motorman discovers that a horse is frightened by the approach of his car it is his duty, if his car is advancing at a high rate of speed, to slacken it, or, if it is running only at a moderate rate, to have it under control, so as to readily stop it, if the latter act appear necessary from the subsequent action of the horse).

91. *Illinois.*— Freyer *v.* Aurora, etc., R. Co., 123 Ill. App. 423; Galesburg Electric Motor, etc., Co. *v.* Manville, 61 Ill. App. 490.

horse on the street; [92] and if he is operating his car in a prudent and careful manner and there is nothing to indicate that the horse or team is frightened or becoming unmanageable and that there is imminent peril, his failure to reduce speed or stop his car does not render the company liable for the resulting damages,[93] unless his conduct under the circumstances can be attributed only to a wanton or reckless disregard of the consequences.[94]

j. Reciprocal Rights and Duties of Company and Travelers on the Street — (I) *Between Street Crossings* — (A) *Reciprocal Rights.* A street railroad company has no exclusive right to the use of that part of a public street or highway occupied by its tracks; [95] but in view of the fact that its cars run on a fixed

Iowa.— Doran *v.* Cedar Rapids, etc., R. Co., 117 Iowa 442, 90 N. W. 815.

Kansas.— Ft. Scott Rapid Transit R. Co. *v.* Page, 10 Kan. App. 362, 59 Pac. 690.

Kentucky.— South Covington, etc., St. R. Co. *v.* Cleveland, 100 S. W. 283, 30 Ky. L. Rep. 1072, 11 L. R. A. N. S. 853; Owensboro City R. Co. *v.* Lyddane, 41 S. W. 578, 19 Ky. L. Rep. 698.

Michigan.— Cornell *v.* Detroit Electric R. Co., 82 Mich. 495, 46 N. W. 791.

Ohio.— Mahoning Valley Southeastern R. Co. *v.* Houston, 29 Ohio Cir. Ct. 358.

Pennsylvania.— Gibbons *v.* Wilkes-Barre, etc., St. R. Co., 155 Pa. St. 279, 26 Atl. 417.

Tennessee.—Knoxville Traction Co. *v.* Mullins, 111 Tenn. 329, 76 S. W. 890, holding that where it reasonably appears to a motorman that a horse has become unmanageable through fright, it is his duty to stop his car, whether at the usual stopping point or not, and his failure to do so renders the company liable for the resulting injury.

Virginia.— Danville R., etc., Co. *v.* Hodnett, 101 Va. 361, 43 S. E. 606.

See 44 Cent. Dig. tit. "Street Railroads," § 182.

92. Molyneux *v.* Southwest Missouri Electric R. Co., 81 Mo. App. 25.

93. *Indiana.*— Terre Haute Electric R. Co. *v.* Yant, 21 Ind. App. 486, 51 N. E. 732, 69 Am. St. Rep. 376.

Missouri.— Moxley *v.* Southwest Missouri Electric R. Co., 123 Mo. App. 80, 99 S. W. 763; Molyneux *v.* Southwest Missouri Electric R. Co., 81 Mo. App. 25.

Nebraska.— Olney *v.* Omaha, etc., St. R. Co., 78 Nebr. 767, 111 N. W. 784, holding that if the horse shows no observable signs of fright until too late to stop, the motorman is not negligent in running into it if it rears and alights immediately in front of the car.

North Carolina.— Doster *v.* Charlotte St. R. Co., 117 N. C. 651, 23 S. E. 449, 34 L. R. A. 481.

Ohio.— Mahoning Valley Southeastern R. Co. *v.* Houston, 29 Ohio Cir. Ct. 358.

Pennsylvania.— Yingst *v.* Lebanon, etc., St. R. Co., 167 Pa. St. 438, 31 Atl. 687.

See 44 Cent. Dig. tit. "Street Railroads," § 182.

The law does not imply that the driver of a horse is in peril because the horse is frightened by a street car, and in the absence of manifestations other than mere fright the fair presumption is that the driver will be able to control the horse. East St. Louis, etc., Electric St. R. Co. *v.* Wachtel, 63 Ill. App. 181.

94. Pioneer Fire-Proof Constr. Co. *v.* Sunderland, 87 Ill. App. 213 [*affirmed* in 188 Ill. 341, 58 N. E. 928]; Molyneux *v.* Southwest Missouri Electric R. Co., 81 Mo. App. 25; Chapman *v.* Zanesville St. R. Co., 11 Ohio Dec. (Reprint) 449, 27 Cinc. L. Bul. 70.

95. *Alabama.*— Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93.

Illinois.—Eckels *v.* Muttschall, 230 Ill. 462, 82 N. E. 872; Chicago West Div. R. Co. *v.* Ingraham, 33 Ill. App. 351 [*affirmed* in 131 Ill. 659, 23 N. E. 350].

Kansas.— Edgerton *v.* O'Neil, 4 Kan. App. 73, 46 Pac. 206.

Kentucky.— Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 30 Ky. L. Rep. 644, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093; Palmer Transfer Co. *v.* Paducah R., etc., Co., 89 S. W. 515, 28 Ky. L. Rep. 473.

Massachusetts.— O'Brien *v.* Blue Hill St. R. Co., 186 Mass. 446, 71 N. E. 951.

Michigan.— Deitsch *v.* Trans St. Mary's Traction Co., 155 Mich. 15, 118 N. W. 489; Rouse *v.* Detroit Electric R. Co., 135 Mich. 545, 98 N. W. 258, 100 N. W. 404; Mertz *v.* Detroit Electric R. Co., 125 Mich. 11, 83 N. W. 1036.

Missouri.— Klockenbrink *v.* St. Louis, etc., R. Co., 172 Mo. 678, 72 S. W. 900.

New York.— Perras *v.* United Traction Co., 88 N. Y. App. Div. 260, 84 N. Y. Suppl. 992; Rosenblatt *v.* Brooklyn Heights R. Co., 26 N. Y. App. Div. 600, 50 N. Y. Suppl. 333; Doctoroff *v.* Metropolitan St. R. Co., 55 Misc. 216, 105 N. Y. Suppl. 229; Arnesen *v.* Brooklyn City R. Co., 9 Misc. 270, 29 N. Y. Suppl. 748 [*affirmed* in 149 N. Y. 590, 44 N. E. 1120]; Heffran *v.* Brooklyn Heights R. Co., 8 Misc. 41, 28 N. Y. Suppl. 518 [*affirmed* in 149 N. Y. 578, 43 N. E. 987].

Pennsylvania.—Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392.

Texas.— San Antonio Traction Co. *v.* Haines, 45 Tex. Civ. App. 289, 100 S. W. 788; San Antonio Traction Co. *v.* Kumpf, (Civ. App. 1907) 99 S. W. 863; San Antonio St. R. Co. *v.* Renken, 15 Tex. Civ. App. 229, 38 S. W. 829.

United States.— See Cincinnati St. R. Co. *v.* Whitcomb, 66 Fed. 915, 14 C. C. A. 183.

See 44 Cent. Dig. tit. "Street Railroads," § 193.

track, and of the fact that they are run for the convenience and accommodation of the public, it may be said to have a paramount or superior right of way over its tracks between street crossings, whenever its right conflicts with the right of a traveler on the street, whether a pedestrian, equestrian, or driver of a vehicle, to the extent that such traveler must reasonably give way to an approaching or passing car,[96] and this so-called paramount right of way is sometimes expressly

96. *Alabama.*— Birmingham R., etc., Co. *v.* Williams, 158 Ala. 481, 48 So. 93.

Arkansas.— Hot Springs St. R. Co. *v.* Johnson, 64 Ark. 420, 42 S. W. 833.

Colorado.— Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836.

Connecticut.— Smith *v.* Connecticut R., etc., Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. N. S. 707.

Delaware.— Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906; Cox *v.* Wilmington City R. Co., 4 Pennew. 162, 53 Atl. 569; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 512, 52 Atl. 264; Brown *v.* Wilmington City R. Co., 1 Pennew. 332, 40 Atl. 936; Maxwell *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945.

Illinois.— North Chicago St. R. Co. *v.* Smadraff, 189 Ill. 155, 59 N. E. 527 [*affirming* 89 Ill. App. 411]; Chicago City R. Co. *v.* Ahler, 107 Ill. App. 397; Chicago City R. Co. *v.* Mauger, 105 Ill. App. 579; Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1; West Chicago St. R. Co. *v.* Dougherty, 89 Ill. App. 362.

Indiana.— Indianapolis Traction, etc., Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. N. S. 143; De Lon *v.* Kokomo City St. R. Co., 22 Ind. App. 377, 53 N. E. 847.

Kentucky.— Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 30 Ky. L. Rep. 644, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093; Louisville R. Co. *v.* Colston, 117 Ky. 804, 79 S. W. 243, 25 Ky. L. Rep. 1933.

Maine.— Marden *v.* Portsmouth, etc., R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300; Flewelling *v.* Lewiston, etc., Horse R. Co., 89 Me. 585, 36 Atl. 1056.

Massachusetts.— Kerr *v.* Boston El. R. Co., 188 Mass. 434, 74 N. E. 669.

Michigan.— Daniels *v.* Bay City Traction, etc., Co., 143 Mich. 493, 107 N. W. 94.

Minnesota.— Armstead *v.* Mendenhall, 83 Minn. 136, 85 N. W. 929.

Missouri.— Moore *v.* Kansas City, etc., Rapid Transit R. Co., 126 Mo. 265, 29 S. W. 9; Buren *v.* St. Louis Transit Co., 104 Mo. App. 224, 78 S. W. 680.

New Jersey.— Buttelli *v.* Jersey City, etc., Electric R. Co., 59 N. J. L. 302, 36 Atl. 700; Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61; Ward *v.* Newark, etc., Horse Car R. Co., 8 N. J. L. J. 23.

New York.— Fleckenstein *v.* Dry Dock, etc., R. Co., 105 N. Y. 655, 11 N. E. 951; Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393; Venuta *v.* New York, etc., Traction Co., 87 N. Y. App. Div. 561, 84 N. Y. Suppl. 544; Rosenblatt *v.* Brooklyn Heights R. Co., 26 N. Y. App. Div. 600, 50 N. Y. Suppl. 333; Wilbrand *v.* Eighth Ave. R. Co., 3 Bosw. 314; Moore *v.* New York City R. Co., 52 Misc. 663, 102 N. Y. Suppl. 636; Kennedy *v.* Metropolitan St. R. Co., 11 Misc. 320, 32 N. Y. Suppl. 153; Heffran *v.* Brooklyn Heights R. Co., 8 Misc. 41, 28 N. Y. Suppl. 518 [*affirmed* in 149 N. Y. 578, 43 N. E. 987]; Glynn *v.* New York City R. Co., 110 N. Y. Suppl. 836; Gilman *v.* New York City R. Co., 107 N. Y. Suppl. 770; Lejoune *v.* Dry Dock, etc., R. Co., 86 N. Y. Suppl. 749.

Ohio.— Siek *v.* Toledo Consol. St. R. Co., 16 Ohio Cir. Ct. 393, 9 Ohio Cir. Dec. 51, holding that the right of the company to its tracks for its cars is exclusive when such cars are passing or about to pass, and the right of the public is abridged to that extent.

Pennsylvania.— Barto *v.* Beaver Valley Traction Co., 216 Pa. St. 328, 65 Atl. 792, 116 Am. St. Rep. 770; McCracken *v.* Consolidated Traction Co., 201 Pa. St. 378, 50 Atl. 830, 88 Am. St. Rep. 814. See also Quinby *v.* Chester St. R. Co., 3 Lanc. L. Rev. 200.

Tennessee.— Citizens' St. R. Co. *v.* Howard, 102 Tenn. 474, 52 S. W. 864.

Utah.— Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

Washington.— Hall *v.* Washington Water Power Co., 46 Wash. 207, 89 Pac. 553; Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284.

Wisconsin.— Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

See 44 Cent. Dig. tit. "Street Railroads," § 193.

A street railroad company has no paramount right of way on every portion of the streets, except at adjoining streets, but has only a paramount right upon its tracks and for a sufficient space for the cars to pass, and beyond that has no greater rights than any other person using the highway. Newman *v.* New York, etc., R. Co., 127 N. Y. App. Div. 12, 111 N. Y. Suppl. 289.

Three considerations are usually relied upon to confer upon street railroad companies this priority of way, viz., that their tracks necessitate a fixed course, which makes it possible to turn cars to the side; that such companies are generally authorized to propel heavy cars by powerful motor force, in consequence of which the momentum and inertia of street cars differ from that of ordinary vehicles; and that general convenience demands rapid and undeterred transit by such public service companies. Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887.

[X, B, 3, j, (I), (A)]

given to the company by ordinance.[97] Subject to this qualification, the rights of the company and of the traveler on the street to use that part of the street occupied by the street railroad tracks are equal and reciprocal,[98] a traveler on the street having as much right, if in the exercise of due care, to go across or along

Repairing overhead wire.— Although the right of a street railroad company, even to that part of the street occupied by its rails, is only in common with that of other travelers, its right to use an ordinary and usual appliance upon the track to repair the overhead wire is, for a reasonable time, paramount. Potter *v.* Scranton Traction Co., 176 Pa. St. 271, 35 Atl. 188.

Compared with ordinary railroad.—A street railroad company does not have a paramount right as does an ordinary freight and passenger railroad company over its right of way. Eckington, etc., R. Co. *v.* Hunter, 6 App. Cas. (D. C.) 287; Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887. But see Flewelling *v.* Lewiston, etc., Horse R. Co., 89 Me. 585, 36 Atl. 1056. There is a natural and necessary difference between the fundamental right of an ordinary freight and passenger railroad to its right of way and the right of a street car company to use the streets of a city. The railroad company, by gift, voluntary transfer for consideration, or condemnation with compensation, secures a fee or an incorporeal hereditament, and operates its roads by virtue of ownership; the street car company obtains a privilege to build its tracks and operate its cars without gift, purchase, or condemnation of land. That privilege creates no new servitude upon the highway, but makes possible an additional use of such highway, consistent with and in furtherance of the purposes of its original dedication. The railroad company may have an estate; the street car company always has a franchise. The lands over which a railroad company builds its road are withdrawn from general or private use; the surface of a street is open to common travel. The way of a railroad company is used by it exclusively, subject to limited rights at public or private crossings; a street is used concurrently by the street car company and by the public. Bremer *v.* St. Paul City R. Co., *supra*.

97. Rend *v.* Chicago West Div. R. Co., 8 Ill. App. 517; Laethem *v.* Ft. Wayne, etc., R. Co., 100 Mich. 297, 58 N. W. 996; Thoreson *v.* La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. Rep. 64.

98. *Arkansas.*— Hot Springs St. R. Co. *v.* Johnson, 64 Ark. 420, 42 S. W. 833.

Connecticut.— Smith *v.* Connecticut R., etc., Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. N. S. 707; Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

Florida.— Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Illinois.—West Chicago St. R. Co. *v.* McCallum, 169 Ill. 240, 48 N. E. 424 [*affirming* 67 Ill. App. 645]; Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1; West Chicago St. R. Co. *v.* Maday, 88 Ill. App. 49 [*affirmed* in 188 Ill. 308, 58 N. E. 933]; Kankakee Electric R. Co. *v.* Lade, 56 Ill. App. 454.

Indiana.— Indiana Union Traction Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 1040.

Kentucky.— Louisville R. Co. *v.* Colston, 117 Ky. 804, 79 S. W. 243, 25 Ky. L. Rep. 1933.

Maine.— Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047.

Maryland.— United R., etc., Co. *v.* Watkins, 102 Md. 264, 62 Atl. 234.

Massachusetts.— Halloran *v.* Worcester Consol. St. R. Co., 192 Mass. 104, 78 N. E. 381; Kerr *v.* Boston El. R. Co., 188 Mass. 434, 74 N. E. 669.

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887; Armstead *v.* Mendenhall, 83 Minn. 136, 85 N. W. 929.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Goff *v.* St. Louis Transit Co., 199 Mo. 694, 98 S. W. 49.

Nebraska.— Olney *v.* Omaha, etc., St. R. Co., 78 Nebr. 767, 111 N. W. 784.

New Jersey.— Camden, etc., R. Co. *v.* U. S. Cast Iron Pipe, etc., Co., 68 N. J. Eq. 279, 59 Atl. 523.

New York.— Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393; Adolph *v.* Central Park, etc., R. Co., 43 N. Y. Super. Ct. 199 [*affirmed* in 76 N. Y. 530]; Koehler *v.* Interurban St. R. Co., 88 N. Y. Suppl. 904.

Pennsylvania.— Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392.

Texas.— San Antonio Traction Co. *v.* Levyson, (Civ. App. 1908) 113 S. W. 569; El Paso Electric R. Co. *v.* Kelly, (Civ. App. 1908) 109 S. W. 415; San Antonio Traction Co. *v.* Kumpf, (Civ. App. 1907) 99 S. W. 863; San Antonio St. R. Co. *v.* Renken, 15 Tex. Civ. App. 229, 38 S. W. 829.

United States.— Southern Electric R. Co. *v.* Hageman, 121 Fed. 262, 57 C. C. A. 348.

Canada.—Ewing *v.* Toronto R. Co., 24 Ont. 694.

See 44 Cent. Dig. tit. "Street Railroads," § 193.

City streets are public highways on which all may travel, and neither a pedestrian, a street car, nor a carriage has any exclusive right, but their rights are relative. Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523.

The fact that a street railroad company owns in fee its right of way, constituting a part of a street, does not affect its relation to the traveling public, where its patronage is dependent upon its relation to the street, and where it maintains a platform on one side of its right of way and partly on the street for the accommodation of passengers. McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459.

such part of the street, when not occupied by cars, as across or along any other part of the street, and is not a trespasser in doing so.[99] It is sometimes provided by statute or ordinance that fire apparatus, when proceeding to a fire,[1] and ambulances[2] shall have the right of way over street cars.

(B) *Reciprocal Duties.* In the exercise of these reciprocal rights the company and a traveler on the street are also under reciprocal duties, to the extent that the rights of each must be exercised with due regard to the rights of the other, and in such a careful and reasonable manner as not unreasonably to abridge or interfere with those rights,[3] and so as to avoid injury, the one to avoid inflicting

99. *Arkansas.*— Little Rock Traction, etc., Co. *v.* Morrison, 69 Ark. 289, 62 S. W. 1045.

California.— Shea *v.* Portrero, etc., R. Co., 44 Cal. 414.

Connecticut.— McCarthy *v.* Consolidated R. Co., 79 Conn. 73, 63 Atl. 725.

Illinois.— North Chicago St. R. Co. *v.* Smadraff, 189 Ill. 155, 59 N. E. 527 [*affirming* 89 Ill. App. 411] (such travelers are not trespassers); Chicago City R. Co. *v.* Rohe, 118 Ill. App. 322; Joliet R. Co. *v.* Barty, 96 Ill. App. 351.

Kansas.— Edgerton *v.* O'Neil, 4 Kan. App. 73, 46 Pac. 206, holding that a traveler on the tracks who receives injuries from a collision with a car is not a trespasser as against the company.

Kentucky.— Louisville R. Co. *v.* Colston, 117 Ky. 804, 79 S. W. 243, 25 Ky. L. Rep. 1933; Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484; Cornelius *v.* South Covington, etc., St. R. Co., 93 S. W. 643, 29 Ky. L. Rep. 505.

Massachusetts.— Kerr *v.* Boston El. R. Co., 188 Mass. 434, 74 N. E. 669.

Michigan.— Deitsch *v.* Trans St. Mary's Traction Co., 155 Mich. 15, 118 N. W. 489; Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741.

Missouri.— Klockenbrink *v.* St. Louis, etc., R. Co., 172 Mo. 678, 72 S. W. 900, not trespassers.

Nebraska.— Omaha St. R. Co. *v.* Duvall, 40 Nebr. 29, 58 N. W. 531.

New York.— Goodson *v.* New York City R. Co., 94 N. Y. Suppl. 10 (holding that one driving upon the side of a street has a right to drive upon a street railroad track in order to pass another vehicle standing between the curb and the track); Prince *v.* Third Ave R. Co., 84 N. Y. Suppl. 542.

Ohio.— Lake Shore Electric R. Co. *v.* Majewski, 25 Ohio Cir. Ct. 55.

Pennsylvania.— McFarland *v.* Consolidated Traction Co., 204 Pa. St. 423, 54 Atl. 308, not a trespasser.

See 44 Cent. Dig. tit. "Street Railroads," § 193.

The public are entitled to cross the tracks in the exercise of due care, as well within the blocks as at street crossings. Wilman *v.* People's R. Co., 4 Pennew. (Del.) 260, 55 Atl. 332; Snyder *v.* People's R. Co., 4 Pennew. (Del. 145, 53 Atl. 433; Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393.

One horseback riding on a public highway on which a street railroad company maintains a track has a joint right of way with the street railroad company, even on those portions of the thoroughfare traversed by its tracks, and hence has a lawful right to travel on the tracks, by maintaining a reasonable degree of vigilance in looking and listening for a car drawing near from behind. Brown *v.* St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310.

A distinction is made that where a railroad is built in a street or public road, so as to be incorporated with and become a part of the road-bed of the street or road, and the rails are level with the surface, the public has not only the right to cross it, but also to pass along and use it as any other part of the street or road, being careful to look for and avoid approaching trains or cars, and the operatives of trains and cars on such a railroad are under a duty to keep a lookout for persons exercising their right; but where the railroad is not level with the surface of the street or road, but the rails are placed on ties laid on the surface of the highway, the public has no more right to use it than if it were not in a street or road at all. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177.

1. See *infra*, X, B, 5, b, (v).

2. Dillon *v.* Nassau Electric R. Co., 59 N. Y. App. Div. 614, 68 N. Y. Suppl. 1098, holding, however, that an ordinance which provides that an "ambulance of the Department of Health" shall have the right of way in the streets does not apply to an ambulance, which is under the jurisdiction of the department of health, but does not belong to it.

An ordinance giving ambulances the right of way, being one of the restrictions under which a street railroad company operates its cars, is admissible in an action for injuries by a street car colliding with an ambulance, since the violation of an ordinance is some evidence of negligence. Buys *v.* Third Ave. R Co., 45 N. Y. App. Div. 11, 61 N. Y. Suppl. 113.

3. *Connecticut.*— McCarthy *v.* Consolidated R. Co., 79 Conn. 73, 63 Atl. 725.

Delaware.— Heincl *v.* People's R. Co., 6 Pennew. 428, 67 Atl. 173; Weldon *v.* People's R. Co., (1906) 65 Atl. 589; Heidelbaugh *v.* People's R. Co., 6 Pennew. 209, 65 Atl. 587; White *v.* Wilmington City R. Co., 6 Pennew. 105, 63 Atl. 931; Wilman *v.* People's R. Co., 4 Pennew. 260, 55 Atl. 332.

Illinois.— West Chicago St. R. Co. *v.* Maday, 88 Ill. App. 49 [*affirmed* in 188 Ill. 308, 58 N. E. 933].

Indiana.— Indiana Union Traction Co. *v.*

injury, the other to avoid being injured,[4] proper consideration being given to the difference in motive power, and to the fact that the cars must run on a fixed track and rapidly acquire a greater momentum than another vehicle.[5] Thus on the

Pheanis, 43 Ind. App. 653, 85 N. E. 1040; Indianapolis St. R. Co. *v.* Bolin, 39 Ind. App. 169, 78 N. E. 210.

Maine.— Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047.

Maryland.— Lake Roland El. R. Co. *v.* McKewen, 80 Md. 593, 31 Atl. 797.

Massachusetts.— O'Brien *v.* Blue Hill St. R. Co., 186 Mass. 446, 71 N. E. 951.

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887; Armstead *v.* Mendenhall, 83 Minn. 136, 85 N. W. 929.

Nebraska.— Olney *v.* Omaha, etc., St. R. Co., 78 Nebr. 767, 111 N. W. 784; Mathieson *v.* Omaha St. R. Co., 3 Nebr. (Unoff.) 743, 92 N. W. 639, 3 Nebr. (Unoff.) 747, 97 N. W. 243.

New Jersey.— Migans *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 535, 70 Atl. 168; Woodland *v.* North Jersey St. R. Co., 66 N. J. L. 455, 49 Atl. 479; Camden, etc., R. Co. *v.* U. S. Cast Iron Pipe, etc., Co., 68 N. J. Eq. 279, 59 Atl. 523.

New York.— Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393; Frank *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 485, 86 N. Y. Suppl. 1018, holding that a street railroad company cannot operate its cars in disregard of an obvious necessity on the part of persons lawfully using the street to occupy its tracks in passing around an excavation.

Pennsylvania.— Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392.

Texas.— San Antonio Traction Co. *v.* Levyson, (Civ. App. 1908) 113 S. W. 569.

United States.—Southern Electric R. Co. *v.* Hageman, 121 Fed. 262, 57 C. C. A. 348.

England.— Hartley *v.* Chadwick, 68 J. P. 512.

See 44 Cent. Dig. tit. "Street Railroads," § 193.

Where the night is dark, and a street car is lighted up, the driver of a wagon cannot impose on a street car company the duty to exercise greater vigilance than the law requires of himself, by driving without any lights on his wagon, against recognized custom and regulations, relying on the vigilance of the street car driver. Koehler *v.* Interurban St. R. Co., 88 N. Y. Suppl. 904.

The right to stop a wagon, for the purpose of unloading, near a street railroad track, is subordinate to the right of way of the railroad company. It is the duty of a person so unloading a wagon to get out of the way to allow a car to pass, and the duty of the motorman to approach carefully, with his car under control, so that he can stop promptly to prevent an accident. Each has the right to assume that the other will do his duty, but neither has the right to so act that, if the other does not do his duty, a collision will follow. Volosko *v.* Interurban St. R. Co., 190 N. Y. 206, 82 N. E. 1090, 15 L. R. A. N. S. 1117 [*reversing* 113 N. Y. App. Div. 747, 99 N. Y. Suppl. 484].

4. *Alabama.*— Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798.

Arkansas.— Hot Springs St. R. Co *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

Colorado.— Liutz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600, pedestrian.

Delaware.— Weldon *v.* People's R. Co., (1906) 65 Atl. 589; Wilman *v.* People's R. Co., 4 Pennew. 260, 55 Atl. 332.

Illinois.— South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210; West Chicago St. R. Co. *v.* Schwartz, 93 Ill. App. 387; West Chicago St. R. Co. *v.* Levy, 82 Ill. App. 202; North Chicago St. R. Co. *v.* Zeiger, 78 Ill. App. 463.

Indiana.— Saylor *v.* Union Traction Co., 40 Ind. App. 381, 81 N. E. 94; Indianapolis St. R. Co. *v.* Hackney, 39 Ind. App. 372, 77 N. E. 1048.

Maryland.— United R., etc., Co. *v.* Watkins, 102 Md. 264, 62 Atl. 234.

Massachusetts.— Halloran *v.* Worcester Consol. St. R. Co., 192 Mass. 104, 78 N. E. 381; Scannell *v.* Boston El. R. Co., 176 Mass. 170, 57 N. E. 341.

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887.

Missouri.— Felver *v.* Central Electric R. Co., 216 Mo. 195, 115 S. W. 980; Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523.

Nebraska.— Mathieson *v.* Omaha St. R. Co., 3 Nebr. (Unoff.) 743, 92 N. W. 639, 3 Nebr. (Unoff.) 747, 97 N. W. 243, holding that electric street railroad companies and ordinary travelers on the thoroughfare of a city are required to observe equal degrees of care to avoid accidents.

New York.— Vandenbout *v.* Rochester R. Co., 129 N. Y. App. Div. 844, 114 N. Y. Suppl. 760; Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393; Bears *v.* Metropolitan St. R. Co., 104 N. Y. App. Div. 96, 93 N. Y. Suppl. 278; Seagriff *v.* Brooklyn Heights R. Co., 31 N. Y. App. Div. 595, 52 N. Y. Suppl. 236.

North Carolina.— Davis *v.* Durham Traction Co., 141 N. C. 134, 53 S. E. 617; Moore *v.* Charlotte Electric St. R. Co., 128 N. C. 455, 39 S. E. 57.

Ohio.—Lake Shore Electric R. Co. *v.* Majewski, 25 Ohio Cir. Ct. 55.

Wisconsin.— Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833.

See 44 Cent. Dig. tit. "Street Railroads," § 193.

5. Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047; Wilson *v.* Minneapolis St. R. Co., 74 Minn. 436, 77 N. W. 238; Woodland *v.* North Jersey St. R. Co., 66 N. J. L. 455, 49 Atl. 479. See also Smith *v.* Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16.

one hand it is the duty of the company to exercise reasonable care and diligence to keep a lookout for persons and vehicles upon or near the track,[6] warn them of the car's approach,[7] give them a reasonable opportunity to get off or keep off the track,[8] and not negligently run into or otherwise injure them;[9] and the fact that the right of way over its tracks is expressly given to the company by a statute or ordinance does not relieve it from exercising ordinary care to avoid colliding with a person, animal, or vehicle on the track.[10] And on the other hand, it is the duty of a traveler on or near the track when a car approaches to exercise reasonable care and diligence to get off or keep off the track until it passes,[11] so as not unreasonably to impede or interfere with its progress,[12] and so as not to be injured thereby;[13] and if he uses reasonable care to do so, and without any fault on his part is injured by carelessness or fault chargeable to the street railroad company, the latter is liable therefor.[14]

(II) *At Street Crossings.* At the crossing of an intersecting street, a street railroad company has no right to the use of the street occupied by its track superior or paramount to the right of a traveler coming from such intersecting street to cross the track, but their rights and duties as to crossing are equal,[15]

6. See *supra*, X, B, 3, c; *infra*, X, B, 5, b, (II); X, B, 6, e.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

7. See *supra*, X, B, 3, e; *infra*, X, B, 5, b, (II); X, B, 6, d.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

8. Doctoroff *v.* Metropolitan St. R. Co., 55 Misc. (N. Y.) 216, 105 N. Y. Suppl. 229.

9. See *supra*, X, B, 3, a, (II); *infra*, X, B, 5, b; X, b, 6, d.

The same degree of care is not required to be exercised in avoiding pedestrians when the car is between crossings as is required at crossings. Bethel *v.* Cincinnati St. R. Co., 15 Ohio Cir. Ct. 381, 8 Ohio Cir. Dec. 310.

10. Rend *v.* Chicago West Div. R. Co., 8 Ill. App. 517; Thoresen *v.* La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. Rep. 64.

No excuse for injury.— A city ordinance providing that the street cars shall be entitled to the track, and that a driver of a vehicle refusing to turn out shall be fined, etc., does not authorize the company to run a vehicle down, and injure it or the driver, if the latter fails to obey the ordinance. Lacthem *v.* Ft. Wayne, etc., R. Co., 100 Mich. 297, 58 N. W. 996.

11. Shea *v.* Potrero, etc., R. Co., 44 Cal. 414; Louisville R. Co. *v.* Stammers, 47 S. W. 341, 20 Ky. L. Rep. 688; North Hudson Co. R. Co. *v.* Isley, 49 N. J. L. 468, 10 Atl. 665; Barney *v.* Metropolitan St. R. Co., 94 N. Y. App. Div. 388, 88 N. Y. Suppl. 335. And see, generally, *infra*, X, B, 7, a *et seq.*

12. Kerr *v.* Boston El. R. Co., 188 Mass. 434, 74 N. E. 669; Buren *v.* St. Louis Transit Co., 104 Mo. App. 224, 78 S. W. 680; Adolph *v.* Central Park, etc., R. Co., 65 N. Y. 554 [*reversing* 33 N. Y. Super. Ct. 186]; Wilbrand *v.* Eighth Ave. R. Co., 3 Bosw. (N. Y.) 314; Cohen *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 186, 68 N. Y. Suppl. 830; San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64.

13. Palmer Transfer Co. *v.* Paducah R., etc., Co., 89 S. W. 515, 28 Ky. L. Rep. 473; Wilbrand *v.* Eighth Ave. R. Co., 3 Bosw. (N. Y.) 314; Barker *v.* Hudson River R. Co., 4 Daly (N. Y.) 274; Glynn *v.* New York City R. Co., 110 N. Y. Suppl. 836; McCracken *v.* Consolidated Traction Co., 201 Pa. St. 378, 50 Atl. 830, 88 Am. St. Rep. 814; Hall *v.* Washington Water Power Co., 46 Wash. 207, 89 Pac. 553. And see, generally, *infra*, X, B, 7, a *et seq.*

14. Fleckenstein *v.* Dry Dock, etc., R. Co., 105 N. Y. 655, 11 N. E. 951; Fettritch *v.* Dickenson, 22 How. Pr. (N. Y.) 248, forcibly running wagon from track.

15. *Alabama.*— Birmingham R., etc., Co. *v.* Oldham, 141 Ala. 195, 37 So. 452.

Delaware.— Price *v.* Charles Warner Co., 1 Pennew. 462, 42 Atl. 699.

District of Columbia.— Eckington, etc., Home R. Co. *v.* Hunter, 6 App. Cas. 287, holding that street railroad companies have not even the same limited right of precedence over travelers at crossings as steam railroad companies have.

Georgia.— Savannah Electric Co. *v.* Elarbee, 6 Ga. App. 137, 64 S. E. 570.

Idaho.— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254.

Illinois.— Fisher *v.* Chicago City R. Co., 114 Ill. App. 217; Chicago City R. Co. *v.* Iverson, 108 Ill. App. 433; Cole *v.* Central R. Co., 103 Ill. App. 160; Chicago City R. Co. *v.* Martensen, 100 Ill. App. 306 [*affirmed* in 198 Ill. 511, 64 N. E. 1017].

Indiana.— Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486.

Maine.— Marden *v.* Portsmouth, etc., R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300.

Minnesota.— Fonda *v.* St. Paul City R. Co., 77 Minn. 336, 79 N. W. 1043; Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

Missouri.— Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Moore *v.* Kansas City, etc., Rapid Transit R. Co., 126 Mo.

except in so far as the right of way is given to the one or the other by statute or ordinance.[16] But the right of each must be exercised with due regard to the right of the other, and in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other,[17] and so as to avoid inflicting or receiving injury.[18] It has been held that the driver of a vehicle has the

265, 29 S. W. 9; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140.

Nebraska.—Omaha St. R. Co. *v.* Cameron, 43 Nebr. 297, 61 N. W. 606.

New Hampshire.— Little *v.* Boston, etc., R. Co., 72 N. H. 502, 57 Atl. 920, holding that under Laws (1895), c. 27, §§ 11, 12, prescribing the rights of street railroad companies and others as to the use of streets, the driver of a cart and the motorman of a street car have common and equal rights in a crossing.

New Jersey.— Earle *v.* Consolidated Traction Co., 64 N. J. L. 573, 46 Atl. 613 (holding that the first to reach the crossing has the right to pass over first); Atlantic Coast Electric R. Co. *v.* Rennard, 62 N. J. L. 773, 42 Atl. 1041.

New York.— O'Neil *v.* Dry Dock, etc., R. Co., 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512 [*affirming* 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84]; Reilly *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 453, 72 N. Y. Suppl. 1080; Towner *v.* Brooklyn Heights R. Co., 44 N. Y. App. Div. 628, 60 N. Y. Suppl. 289; O'Rourke *v.* Yonkers R. Co., 32 N. Y. App. Div. 8, 52 N. Y. Suppl. 706; Hergert *v.* Union R. Co., 25 N. Y. App. Div. 218, 49 N. Y. Suppl. 307; Huber *v.* Nassau Electric R. Co., 22 N. Y. App. Div. 426, 48 N. Y. Suppl. 38; Bresky *v.* Third Ave. R. Co., 16 N. Y. App. Div. 83, 45 N. Y. Suppl. 108; Zimmerman *v.* Union R. Co., 3 N. Y. App. Div. 219, 38 N. Y. Suppl. 362; Buhrens *v.* Dry Dock, etc., R. Co., 53 Hun 571, 6 N. Y. Suppl. 224 [*affirmed* in 125 N. Y. 702, 26 N. E. 752]; Dise *v.* Metropolitan St. R. Co., 22 Misc. 97, 48 N. Y. Suppl. 551; Degnan *v.* Brooklyn City R. Co., 14 Misc. 388, 35 N. Y. Suppl. 1047; Chapman *v.* Atlantic Ave. R. Co., 14 Misc. 384, 35 N. Y. Suppl. 1045; Gilman *v.* New York City R. Co., 107 N. Y. Suppl. 770.

Ohio.— Toledo St. R. Co. *v.* Westenhuber, 22 Ohio Cir. Ct. 67, 12 Ohio Cir. Dec. 22.

Tennessee.— Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 552, 61 S. E. 821, 16 L. R. A. N. S. 1123; Ashley *v.* Kanawha Valley Traction Co., 60 W. Va. 306, 55 S. E. 1016.

Wisconsin.— Goldmann *v.* Milwaukee Electric R., etc., Co., 123 Wis. 168, 101 N. W. 384 (holding, however, that no right of way exists in favor of one crossing the tracks of a street railroad when a diminution of the speed of the car ih necessary to enable him to pass in safety); Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036; Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618. See also Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833.

United States.— See Denver City Tramway Co. *v.* Norton, 141 Fed. 599, 73 C. C. A. 1, holding that while street cars and drivers of vehicles, equestrians, and pedestrians have concurrent rights to occupy public crossings in a city, the right of the railroad at such point is superior in the sense that it is preferential as to the right of way.

See 44 Cent. Dig. tit. "Street Railroads," § 193.

A street crossing or intersection within the meaning of the above rule includes a point where two streets intersect a third so as to form a triangle (Solomon *v.* Buffalo R. Co., 96 N. Y. App. Div. 487, 89 N. Y. Suppl. 99), and a point where an avenue entering a street on which is a line of railway comprises a continuous line of traffic, with an avenue on the other side of the street, although their ends are not directly opposite (Freeman *v.* Brooklyn Heights R. Co., 87 N. Y. App. Div. 127, 84 N. Y. Suppl. 108; Brozek *v.* Steinway R. Co., 23 N. Y. App. Div. 623, 48 N. Y. Suppl. 345 [*affirmed* in 161 N. Y. 63, 55 N. E. 395]). But where the railroad track passes an intersecting street, which is at that point a cul-de-sac, the company has a "paramount right of way," but the exercise of such right must be exercised with ordinary prudence, in view of the physical condition of the locality. Hewlett *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 423, 71 N. Y. Suppl. 531.

Where a vehicle is proceeding along the same street as a car, and there is a mere attempt to cross to the other side, at the intersection instead of at some other point, the rule that at an intersection of streets the rights of a street car and of a crossing vehicle are equal has no application; but in such case the care required of the driver of the vehicle is as though there were no intersection. Schmedding *v.* New York, etc., R. Co., 85 N. Y. App. Div. 24, 82 N. Y. Suppl. 1034.

16. See Demarest *v.* Forty-Second St., etc., R. Co., 104 N. Y. App. Div. 503, 93 N. Y. Suppl. 663; Cushing *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 510, 87 N. Y. Suppl. 314.

17. Price *v.* Charles Warner Co., 1 Pennew. (Del.) 462, 42 Atl. 699; Cole *v.* Central R. Co., 103 Ill. App. 160; Omaha St. R. Co. *v.* Cameron, 43 Nebr. 297, 61 N. W. 606; Hergert *v.* Union R. Co., 25 N. Y. App. Div. 218, 49 N. Y. Suppl. 307, holding that the duty of each is the same as would be imposed upon the drivers of any other two vehicles in the same situation.

18. Savannah Electric Co. *v.* Elarbee, 6 Ga. App. 137, 64 S. E. 570; Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254; Fisher *v.* Chicago City R. Co., 114 Ill. App.

right of way at the crossing if, proceeding at a rate of speed which, under the circumstances of the time and locality, is reasonable, he reaches the point of crossing in time to safely go upon the tracks in advance of an approaching car, the latter being sufficiently distant to be checked, and if need be stopped before it reaches him.[19] But on the other hand it has been held that if a street car going at a reasonable rate of speed will reach the crossing first, it has the right of way.[20] It has been held that a street car is not required to stop at a street intersection for a funeral procession to pass or to give it the right of way.[21]

4. Defects and Obstructions — a. In General. As a general rule it is the duty of a street railroad company to exercise reasonable care to so construct and maintain its tracks and equipment in a public street or highway as to restore and keep the street or highway in a reasonably safe condition for travel by pedestrians and vehicles;[22] and hence it is liable for injuries resulting to persons or animals rightfully using the street or highway, from the unsafe condition of such street or highway, caused by its failure to properly perform its duty in the construction and keeping in repair of its tracks and equipment,[23] such as the cable or trolley

217; Kennedy *v.* Third Ave. R. Co., 31 N. Y. App. Div. 30, 52 N. Y. Suppl. 551.

Each is presumed to know of the danger incident to the crossing of the car tracks by pedestrians and vehicles, and upon each is incumbent the duty of exercising such care to avoid injury as a reasonably prudent person would use under the circumstances. Birmingham R., etc., Co. *v.* Oldham, 141 Ala. 195, 37 So. 452.

Duty to stop.— Where a person approaches a street crossing toward which a car is approaching, the duty is on the party to stop and avoid a collision who can most easily and readily adjust himself to the exigencies of the case; and, where such person can do so more readily, the motorman has a right to presume that such duty will be performed. Helber *v.* Spokane St. R. Co., 22 Wash. 319, 61 Pac. 40.

A driver's motive in attempting to cross a street car track at a street intersection is immaterial, in an action for injuries sustained in a collision between his vehicle and the car. Solomon *v.* Buffalo R. Co., 96 N. Y. App. Div. 487, 89 N. Y. Suppl. 99.

19. Daggett *v.* North Jersey St. R. Co., 75 N. J. L. 630, 68 Atl. 179; New Jersey Electric R. Co. *v.* Miller, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645; Kennedy *v.* Third Ave. R. Co., 31 N. Y. App. Div. 30, 52 N. Y. Suppl. 551; Zimmerman *v.* Union R. Co., 3 N. Y. App. Div. 219, 38 N. Y. Suppl. 362; Witzel *v.* Third Ave. R. Co., 3 Misc. (N. Y.) 561, 23 N. Y. Suppl. 317 [*reversed* in mem. in 6 Misc. 635, 25 N. Y. Suppl. 1142] (holding that where a person has driven a heavily loaded team so that the horses are on the track of a street railroad, before seeing an approaching car sixty or eighty feet distant, he has the right to cross before the car, which must be stopped if necessary to avoid a collision); Toledo St. R. Co. *v.* Westenhuber, 22 Ohio Cir. Ct. 67, 12 Ohio Cir. Dec. 22. See also *infra*, X, B, 7, h, (v). But see Goldmann *v.* Milwaukee Electric R., etc., Co., 123 Wis. 168, 101 N. W. 384.

The law of the road with relation to vehicles approaching a street crossing that the first to reach the crossing traveling at a reasonable rate of speed has the right to pass over first applies to vehicles of all kinds, including fire engines and trucks driving to fires, and trolley cars. Knox *v.* North Jersey St. R. Co., 70 N. J. L. 347, 57 Atl. 423.

20. Knickerbocker Ice Co. *v.* Benedix, 206 Ill. 362, 69 N. E. 50.

21. Foulk *v.* Wilmington City R. Co., 5 Pennew. (Del.) 363, 60 Atl. 973.

22. Duty to restore street or highway generally see *supra*, VII, D.

Equipment of cars generally see *supra*, X, B, 3, b.

Injuries to abutting property from construction or maintenance of street railroad see *supra*, VII, H.

23. *Indiana.*— Citizens' St. R. Co. *v.* Marvil, 161 Ind. 506, 67 N. E. 921.

Louisiana.— Cline *v.* Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851.

Maine.— Haynes *v.* Waterville, etc., R. Co., 101 Me. 335, 64 Atl. 614, holding that where the frightening of a horse by an approaching street car would cause no injury, but for the imperfect condition of the railroad track, so that such condition is the contributing cause of the injury done by the horse, the company is liable therefor, although there is no fault in the management of the car.

Massachusetts.— Uggla *v.* West End St. R. Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, injury by piece of iron falling from trolley wire.

New York.— Worster *v.* Forty-Second St., etc., R. Co., 50 N. Y. 203; Bolster *v.* Ithaca St. R. Co., 79 N. Y. App. Div. 239, 79 N. Y. Suppl. 597 [*affirmed* in 178 N. Y. 554, 70 N. E. 1096]; Wiley *v.* Smith, 25 N. Y. App. Div. 351, 49 N. Y. Suppl. 934 (holding that a street railroad company must lay and maintain its tracks in a reasonably safe manner at a particular point, although it might not have anticipated that pedestrians would be liable to cross there, and is liable for injuries resulting from a failure to do so); Rockwell *v.* Third Ave. R. Co., 64 Barb.

slot between its tracks,[24] or the flanges of its rails,[25] or the structure and equipment of its elevated road,[26] or in keeping that part of the street occupied by its tracks in reasonably safe condition,[27] particularly where this duty and liability is imposed upon it and regulated by the terms of its grant, or by statute or ordinance.[28]

438; Fash *v.* Third Ave. R. Co., 1 Daly 148.

Pennsylvania.— Bradwell *v.* Pittsburgh, etc., Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623; Campbell *v.* Frankford, etc., Pass. R. Co., 8 Pa. Co. Ct. 415.

Texas.— Citizens' R., etc., Co. *v.* Johns, (Civ. App. 1908) 116 S. W. 62; Ft. Worth St. R. Co. *v.* Allen, (Civ. App. 1897) 39 S. W. 125.

See 44 Cent. Dig. tit. "Street Railroads," § 183.

Liability outside city limits.—The fact that the line of railroad on which a person is injured is outside of the city, on a county road, under authority of the commissioners' court, does not absolve the company from maintaining its track in a condition of safety for those using such highway. Houston City St. R. Co. *v.* Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028.

Where a street railroad company applies a lubricant to its tracks along a public street that its cars may pass around a curve more easily, it must apply the same so as not to endanger persons using the street. Slater *v.* North Jersey St. R. Co., 75 N. J. L. 890, 69 Atl. 163, 15 L. R. A. N. S. 840.

Concurrent negligence of steam railroad.— Where the accident occurs from the negligence of two companies, at the intersection of a street railroad with a steam railroad, at which point the tracks of both companies are in bad condition, the concurrent negligence of the steam railroad company does not relieve the street railroad company from liability for its negligence. Shelton *v.* Northern Texas Traction Co., 32 Tex. Civ. App. 507, 75 S. W. 338.

24. Minster *v.* Citizens' R. Co., 53 Mo. App. 276 (holding that the displacement of a slot rail at the crossing of another cable road, so as to obstruct the latter's slot, is evidence of negligence, in favor of a conductor on the latter's car, who, by its sudden stoppage thereby, is thrown down and injured); Griveaud *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 458 (holding that if the disarrangement of the slot is owing to defects in its original construction or design, the company is liable; and if the injuries which result from a widening of the slot which is continually likely to occur from frost and thaw and from the passage of heavy wagons, the company is equally liable, because its duty of inspection is commensurate with the necessity for such inspection); Brown *v.* Metropolitan St. R. Co., 60 N. Y. App. Div. 184, 70 N. Y. Suppl. 40 [*affirmed* in 171 N. Y. 699, 64 N. E. 1119] (injury to bicycle rider by his bicycle going through the slot); Griffin *v.* Interurban St. R. Co., 46 Misc. (N. Y.) 328, 94 N. Y. Suppl. 854 (injury to bicycle rider).

25. Chicago Union Traction Co. *v.* Fitzgerald, 138 Ill. App. 520, holding that under the general principles of law, independent of any ordinance, it is the duty of a traction company to use reasonable care to keep the flanges of its rails reasonably safe for vehicles to pass along and over.

26. Maher *v.* Manhattan R. Co., 53 Hun (N. Y.) 506, 6 N. Y. Suppl. 309 (falling of iron bar from elevated road); Manson *v.* Manhattan R. Co., 55 N. Y. Super. Ct. 18 (allowing particles of iron to accumulate and be blown or knocked off an elevated structure); Millie *v.* Manhattan R. Co., 10 Misc. (N. Y.) 734, 31 N. Y. Suppl. 801 [*affirming* 5 Misc. 301, 25 N. Y. Suppl. 753]; Anderson *v.* Manhattan El. R. Co., 1 Misc. (N. Y.) 504, 21 N. Y. Suppl. 1.

27. Cline *v.* Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851.

A horse railroad company is as much bound to keep those parts of its road proximately connected with its track in good order and repair, as it is the track itself, and it is negligent if it omits to have such repairs made, not only to the track, but to contiguous portions of the road, as will keep it in good condition, and make it safe for those who have a right to drive across it. Conroy *v.* Twenty-Third St. R. Co., 52 How. Pr. (N. Y.) 49.

Footway to bridge.— Where a street railroad company occupies a portion of a public street with footway approaches to its bridge, it is liable to a passer-by in the street who is injured by being tripped up by a plank in such approach, which has become loose and projects into the street. Murphy *v.* Suburban Rapid Transit Co., 60 N. Y. Super. Ct. 9, 15 N. Y. Suppl. 837.

That the street is in the same condition as any other street of that kind is no defense in an action against a street railroad company for negligence in permitting a street to remain in a dangerous condition. McLaughlin *v.* Philadelphia Traction Co., 175 Pa. St. 565, 34 Atl. 863.

28. *Arkansas.*— Pugh *v.* Texarkana Light, etc., Co., 86 Ark. 36, 109 S. W. 1019.

Indiana.— Citizens' St. R. Co. *v.* Ballard, 22 Ind. App. 151, 52 N. E. 729.

Maryland.— Miller *v.* United R., etc., Co., 108 Md. 84, 69 Atl. 636, 17 L. R. A. N. S. 978, holding that the company's liability for injuries caused by its failure to discharge such a duty is the same as in like cases against the municipality.

Massachusetts.— Mahoney *v.* Natick, etc., St. R. Co., 173 Mass. 587, 54 N. E. 349, to the road commissioners' satisfaction.

Minnesota.— Baumgartner *v.* Mankato, 60 Minn. 244, 62 N. W. 127.

New Hampshire.— Call *v.* Portsmouth, etc., St. R. Co., 69 N. H. 562, 45 Atl. 405.

New York.— McMahon *v.* Second Ave. R. Co., 75 N. Y. 231 [*affirming* 11 Hun 347];

But a street railroad company is only required to exercise reasonable care in this regard,[29] and if the company uses such care in the construction and maintenance of its tracks or equipment, it is not liable for injuries caused thereby;[30] nor is it liable for injuries caused by defects in the street which are not due to its negligence and which it is under no duty to repair.[31] Nor can negligence be inferred from a single accident, and if the defect is not one from which a reasonable man might anticipate that injury would occur, particularly where it has proved to be safe and convenient in practice, and no other accident has ever happened because of it, it is not negligence.[32] Where a street railroad passes over private property on an embankment, the company is under no obligation to persons who pass along such embankment without invitation, to safeguard it by a fence or otherwise.[33]

b. Obstructions in Street or Highway. In accordance with the above rules a street railroad company is liable for injuries which result to persons and animals from obstructions which through its negligence in constructing, maintaining, and operating its tracks and equipment it has caused or permitted to remain in the street or highway,[34] as where it leaves, without proper safeguards, an excavation

Doyle *v.* New York, 58 N. Y. App. Div. 588, 69 N. Y. Suppl. 120.

Pennsylvania.— Sanford *v.* Union Pass. R. Co., 16 Pa. Super. Ct. 393, holding that where a street railroad company's obligation to a city is "to keep and maintain in good order at all times," under the direction of the city officials, the streets which in the judgment of the said officials are in need of repair, the liability of the company to persons injured by defects in the street is no higher or greater than that which the law imposes on the municipality itself.

England.— Dublin United Tramways Co. *v.* Fitzgerald, [1903] A. C. 99, 67 J. P. 229, 72 L. J. P. C. 52, 1 Loc. Gov. 386, 87 L. T. Rep. N. S. 532, 19 T. L. R. 78, 51 Wkly. Rep. 321.

See 44 Cent. Dig. tit. "Street Railroads," § 183.

Liability for neglect to sand the street in slippery weather see Dublin United Tramways Co. *v.* Fitzgerald, [1903] A. C. 99, 67 J. P. 229, 72 L. J. P. C. 52, 1 Loc. Gov. 386, 87 L. T. Rep. N. S. 532, 19 T. L. R. 78, 51 Wkly. Rep. 321.

29. Wood *v.* Third Ave. R. Co., 13 Misc. (N. Y.) 308, 34 N. Y. Suppl. 698, holding further that it is not obliged to restore the street or highway to such a condition as under no circumstances can any one be injured in using it.

30. Alcott *v.* State Public Service Corp., (N. J. Sup. 1908) 71 Atl. 45, holding that a street railroad company is not liable for injuries caused by a wagon wheel catching in a switch device, where the switch is of standard pattern and in general use, and is properly laid and inspected.

Failure to have a trolley wire over a switch on which a car is running is not negligence, where the car is running slowly, and is stopped by the brakes within three or four feet, after the discovery of the injured person's peril. Webster *v.* New Orleans City, etc., R. Co., 51 La. Ann. 299, 25 So. 77.

31. Ross *v.* Metropolitan St. R. Co., 104 N. Y. App. Div. 378, 93 N. Y. Suppl. 679; New York Mail Co. *v.* Joline, 112 N. Y. Suppl. 1067 (holding that a street railroad company's liability for injury caused by a team falling into an excavation extending under its track, but not constructed by it, is not shown by its employees' attempts to prevent the accident by warning the driver and in rescuing an injured horse, where such efforts are not part of the employees' duty); Egan *v.* Forty-Second St., etc., R. Co., 4 N. Y. Suppl. 530; Citizens' Pass. R. Co. *v.* Ketcham, 122 Pa. St. 228, 15 Atl. 733 (defect caused by plumbers laying pipes under license from the city).

Original defects.— The obligation to keep a street in repair does not make a street railroad company liable for defects in the original construction of the street. Mayberry *v.* Second St., etc., Pass. R. Co., 9 Wkly. Notes Cas. (Pa.) 404.

32. Wood *v.* Third Ave. R. Co., 13 Misc. (N. Y.) 308, 34 N. Y. Suppl. 698.

33. Hooper *v.* Johnstown, etc., Horse R. Co., 59 Hun (N. Y.) 121, 13 N. Y. Suppl. 151 [*affirmed* in 128 N. Y. 613, 28 N. E. 252], holding that where a street railroad diverges from the highway for a short distance to avoid a sharp curve, and the track is carried over private property on an embankment, below which is a stream, the company is under no obligation to fence such embankment in order to keep foot passengers thereon from falling into the stream, there being nothing to invite them to pass along the embankment.

34. Groves *v.* Louisville R. Co., 109 Ky. 76, 58 S. W. 508, 22 Ky. L. Rep. 599, 52 L. R. A. 448.

Illustration.— Where a street car company obstructs that portion of the street outside of its tracks by snow pushed from that part of the street upon which its tracks are laid, and obstructs one of its tracks with a repair wagon, so that there remains only the other track, upon which a citizen may drive, a driver injured by collision with a car in attempting to pass such repair wagon with his team can recover against the company. West

made by it,[35] or which it is under the duty to repair; [36] or where it erects and maintains a trolley wire pole at a point and in such a manner as to make it dangerous for public travel.[37] A street railroad company is liable for injuries caused by its negligence in permitting its track or a part thereof to protrude above the surface of the street, whether such obstruction is caused by the track itself rising or by the street sinking;[38] but not for an accident caused by the unevenness of the surface of the street, where it has worn away below the established grade.[39] A street railroad company must also exercise reasonable care and diligence to so construct and maintain its trolley wire as to make it reasonably safe for the passage of persons who have a right to pass under it,[40] as by properly guarding it from coming

Chicago St. R. Co. *v.* O'Connor, 85 Ill. App. 278.

Where a street railroad company lays a hose across a public highway from a hydrant to a tank car on the company's track for the purpose of filling the tank with water to be used in sprinkling the company's tracks, the company owes a duty to all travelers on the highway to give such warning of the obstruction as may be reasonably required to protect them from injury thereby. Morhart *v.* North Jersey St. R. Co., 64 N. J. L. 236, 45 Atl. 812.

What amounts to an unreasonable obstruction is a question of fact for the trial court, and not only the actual obstruction, but any littering of the highway by reason of receiving freight thereon so as to frighten horses, will be chargeable to the railroad company both as the cause and occasion thereof. Ft. Edward *v.* Hudson Valley R. Co., 127 N. Y. App. Div. 438, 111 N. Y. Suppl. 753.

35. Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757.

36. See McMahon *v.* Second Ave. R. Co., 75 N. Y. 231 [*affirming* 11 Hun 347].

Where a street railroad company contracts with the city to pave the streets whereon its tracks are laid "in and about the rails," and to "keep the same in repair," its duty in that respect is not affected by the fact that an adjoining lot owner has a license from the city to dig a trench across part of the street and under the track to connect his lot with a sewer, and the company is directly liable to a truck driver for injuries occasioned by an insufficient bridging of the excavation. McMahon *v.* Second Ave. R. Co., 75 N. Y. 231 [*affirming* 11 Hun 347].

37. Cleveland *v.* Bangor St. R. Co., 86 Me. 232, 29 Atl. 1005 (holding also that it must be shown that the company failed in the degree of care for the public safety which it should have exercised, and that plaintiff was without fault); Lambert *v.* Westchester Electric R. Co., 191 N. Y. 248, 83 N. E. 977 [*affirming* 115 N. Y. App. Div. 78, 100, N. Y. Suppl. 665].

Erection and maintenance of pole held not negligence see Lanigan *v.* Brooklyn Heights R. Co., 125 N. Y. App. Div. 622, 110 N. Y. Suppl. 30.

38. *Kentucky.*— Groves *v.* Louisville R. Co., 109 Ky. 76, 58 S. W. 508, 22 Ky. L. Rep. 599, 52 L. R. A. 448, holding that the company cannot escape liability by showing that the obstruction was caused by the wearing away or natural sinking of the street from the rails.

Maine.— Bangs *v.* Lewiston, etc., Horse R. Co., 89 Me. 194, 36 Atl. 73.

Minnesota.— Baumgartner *v.* Mankato, 60 Minn. 244, 62 N. W. 127.

Missouri.— Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145.

New York.— Schild *v.* Central Park, etc., R. Co., 133 N. Y. 446, 31 N. E. 327, 28 Am. St. Rep. 658 [*affirming* 16 N. Y. Suppl. 701]; Wooley *v.* Grand St., etc., R. Co., 83 N. Y. 121 (holding that, although the switch which caused the injury was a proper one, and well laid down, yet if, from any cause, it subsequently was raised unduly above the pavement, or the pavement sunk below it, it was the company's duty to put it in good condition); Fash *v.* Third Ave. R. Co., 1 Daly 148.

Pennsylvania.— Bradwell *v.* Pittsburgh, etc., Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623.

Texas.— San Antonio Rapid Transit St. R. Co. *v.* Limburger, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730 (holding that a street railroad which is allowed to become so out of repair that the tracks project above the surface of the street, thereby becomes a nuisance for which the street railroad company is liable in damages); Houston City St. R. Co. *v.* Delesdernier, 84 Tex. 82, 19 S. W. 366; Citizens' R., etc., Co. *v.* Johns, (Civ. App. 1908) 116 S. W. 62; Houston City St. R. Co. *v.* Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028.

Wisconsin.— Fitts *v.* Cream City R. Co., 59 Wis. 323, 18 N. W. 186.

Canada.— Joyce *v.* Halifax St. R. Co., 24 Nova Scotia 113 [*affirmed* in 22 Can. Sup. Ct. 258].

See 44 Cent. Dig. tit. "Street Railroads," § 183.

39. Galveston City R. Co. *v.* Nolan, 53 Tex. 139.

40. Gross *v.* South Chicago City R. Co., 73 Ill. App. 217 (holding further that it owes no such duty to persons who, for their own convenience or pleasure, pass under it by other than the usual methods of travel or business); Memphis St. R. Co. *v.* Kartright, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807 (holding that a street car company is under an obligation to use the highest degree of care in constructing and maintaining its electric wires, so as to avoid injuring persons in the street).

in contact with other wires.[41] But it is not a negligent obstruction to allow its cars to stand upon its tracks for a reasonable length of time,[42] such as on a spur track or switch for the purpose of allowing another car to pass,[43] unless it is in violation of a statute or ordinance;[44] nor is it liable for excavations not made by it and which it is under no duty to repair.[45] A street railroad company is not required, in removing from its tracks an obstruction wrongfully placed there, to place it where it will not be dangerous to travelers upon the street or highway, and if it merely shifts it from its tracks to another part of the street, without otherwise increasing the danger to travelers, it is not liable for injuries caused thereby.[46]

c. Notice of Defect or Obstruction. As a general rule it is the duty of a street railroad company to make an exact and continuous inspection of its tracks and equipment,[47] and if it fails to use reasonable care and diligence to repair a defect or obstruction which it is its duty to anticipate and provide against,[48] or which is visible and has existed for such length of time as to charge it with knowledge which it would have acquired by proper inspection,[49] it is liable for injuries resulting therefrom. But it is not liable for injuries caused by a defect or obstruction of which it has no knowledge and which has occurred so recently that the company could not, in the exercise of ordinary care, have discovered and repaired it before the accident.[50]

To permit the trolley wire at a point where it crosses a railroad, to sag several feet below the height of twenty-two feet above the railroad track, required by statute, whereby a brakeman on top of a freight train on the railroad is injured, is negligence, making the street railroad company liable for the injury. Smedley *v.* St. Louis, etc., R. Co., 118 Mo. App. 103, 93 S. W. 295.

41. New York, etc., Tel. Co. *v.* Bennett, 62 N. J. L. 742, 42 Atl. 759; Hinman *v.* Winnipeg Electric St. R. Co., 16 Manitoba 16, holding that the company should put up guards such as are shown to be in use generally.

42. Poland *v.* United Traction Co., 107 N. Y. App. Div. 561, 95 N. Y. Suppl. 498; Adams *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 354, 81 N. Y. Suppl. 553.

43. Ford *v.* Charles Warner Co., 1 Marv. (Del.) 88, 37 Atl. 39.

44. Mueller *v.* Milwaukee St. R. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VI).

45. Leary *v.* Boston El. R. Co., 180 Mass. 203, 62 N. E. 1 (excavations made by sewer contractor by authority of the city); Citizens' Pass. R. Co. *v.* Ketcham, 122 Pa. St. 228, 15 Atl. 733.

46. Howard *v.* Union R. Co., 25 R. I. 652, 57 Atl. 867, 65 L. R. A. 231.

47. Keitel *v.* St. Louis Cable, etc., R. Co., 28 Mo. App. 657; Schild *v.* Central Park, etc., R. Co., 133 N. Y. 446, 31 N. E. 327, 28 Am. St. Rep. 658.

48. Citizens' St. R. Co. *v.* Marvil, 161 Ind. 506, 67 N. E. 921, although it had no notice.

49. Keitel *v.* St. Louis Cable, etc., R. Co., 28 Mo. App. 657; Bradwell *v.* Pittsburgh, etc., Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623, upturned rail loose the night before the accident.

If a defect is visible, notice to the company is not necessary in order to make it liable for an injury caused thereby, since an omission to know of such a defect is *prima facie* negligence, and the presumption of negligence is complete when it appears that the defect existed and an injury was caused thereby. Rockwell *v.* Third Ave. R. Co., 64 Barb. (N. Y.) 438.

That no complaint was ever made to the company of the condition of its track does not relieve it from liability, although it may be considered by the jury in rendering a verdict. Schild *v.* Central Park, etc., R. Co., 133 N. Y. 446, 31 N. E. 327, 28 Am. St. Rep. 658.

50. Miller *v.* United R., etc., Co., 108 Md. 84, 69 Atl. 636, 17 L. R. A. N. S. 978 (holding that where a person is thrown from a buggy and injured by the wheels dropping into a cable slot, the street railroad company is not liable for the injuries in the absence of notice of the defect, either actual or constructive, and negligent failure to repair the same); Casper *v.* Dry Dock, etc., R. Co., 23 N. Y. App. Div. 451, 48 N. Y. Suppl. 352; Griffin *v.* Interurban St. R. Co., 46 Misc. (N. Y.) 328, 94 N. Y. Suppl. 854 (holding that where the slot was safe up to within a short time before the accident, the company is not chargeable with notice); Kelly *v.* Metropolitan St. R. Co., 25 Misc. (N. Y.) 194, 54 N. Y. Suppl. 173; Houston City St. R. Co. *v.* Autrey, 4 Tex. Civ. App. 635, 23 S. W. 817.

That the rubber covering on the stairs of an elevated railroad station was out of repair, and caused plaintiff to fall, without any evidence that such condition existed before the accident, is not sufficient to charge defendant company with negligence, and therefore the maxim "*res ipso loquitur*" does not apply. Millie *v.* Manhattan R. Co., 10 Misc. (N. Y.) 734, 31 N. Y. Suppl. 801 [*affirming* 5 Misc. 301, 25 N. Y. Suppl. 753].

d. Approval of Officials or Compliance With Requirements as Excuse. If a street railroad company fails to use due care in constructing and maintaining its tracks and equipment in a reasonably safe condition for persons and vehicles using the street or highway, it is not relieved from liability for injuries caused thereby by the fact that it has lawful permission to operate its road,[51] or that in constructing and maintaining its road it has complied with the requirements of its charter or a municipal ordinance,[52] or with the plans, specifications, and requirements of a commission appointed for that purpose,[53] or that the tracks are constructed to the satisfaction of certain officers whose duty it is to pass upon and approve the same;[54] but the fact alone that the company constructs and maintains its tracks in the manner required by ordinance cannot constitute negligence on its part.[55] If the company constructs its tracks at a grade, which at some time in the future is to be the grade of the street, and such construction renders the street unsafe it is negligence on the part of the company,[56] unless it does so under direction of the proper authorities.[57]

e. Right to Pile Snow in Street. A street railroad company has a right to remove ice and snow from its tracks so as to enable it to exercise its franchise;[58] but in doing so, it is its duty to exercise reasonable care to so dispose of or distribute the removed ice and snow as not unreasonably to interfere with the use of the street by pedestrians and vehicles,[59] and this duty is sometimes expressly

51. Dominguez *v.* Orleans R. Co., 35 La. Ann. 751, holding that a company's liability for an injury, occasioned by a misplaced rail at a crossing in a tramway, is not affected by the city's permission to operate its road.

That a street railroad company is authorized by the railroad commissioners to run cars before its track is finished and put in proper condition does not exempt it from liability for injuries resulting from the imperfect condition of its track. Haynes *v.* Waterville, etc., St. R. Co., 101 Me. 335, 64 Atl. 614.

52. West Chicago St. R. Co. *v.* Annis, 62 Ill. App. 180 [*affirmed* in 165 Ill. 475, 46 N. E. 264] (holding that a street railroad company cannot avoid liability for negligence by showing that by the terms of a city ordinance it had permission or was required to lay its tracks upon particular lines); Houston City St. R. Co. *v.* Richart, (Tex. Civ. App. 1894) 27 S. W. 918.

Applications.— Thus it is no defense to an action against a street railroad company for injuries caused by an electric pole in the street that the pole was placed in accordance with the requirements of defendant's charter and the city ordinance. Cleveland *v.* Bangor St. R. Co., 86 Me. 232, 29 Atl. 1005. So the fact that a street railroad company constructs and maintains its tracks under the authority and in accordance with the direction of the city does not exempt the company from liability for injuries occasioned by its negligence in such construction and maintenance. Houston City St. R. Co. *v.* Delesdernier, 84 Tex. 82, 19 S. W. 366.

53. Manson *v.* Manhattan R. Co., 55 N. Y. Super. Ct. 18, 8 N. Y. St. 118, holding also that it is the duty of the company to take all reasonable measures to guard against injuries, even if that involves the making of additional fixtures not contemplated from the beginning, if their adoption does not involve a radical change in the general construction.

54. Osgood *v.* Lynn, etc., R. Co., 130 Mass. 492, superintendent of streets.

That the city engineer supervises the work done by a street railroad company in a public street in the course of constructing or repairing its tracks does not relieve the company from the duty resting on it to keep such part of the street in a safe condition. Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757; Houston City St. R. Co. *v.* Richart, (Tex. Civ. App. 1894) 27 S. W. 920.

55. McKillop *v.* Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739.

56. McKillop *v.* Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739, holding that where a street railroad company, without direction from the city council, lays its track in accordance with a grade established for a contemplated paving of the street, and so laying the track renders the street, until paved, unsafe, it is an act of negligence on the part of the company.

57. Miller *v.* Lebanon, etc., St. R. Co., 186 Pa. St. 190, 40 Atl. 413.

58. Smith *v.* Nashua St. R. Co., 69 N. H. 504, 44 Atl. 133; McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. 104, 20 C. C. A. 322.

59. *Maryland.*— Short *v.* Baltimore City Pass. R. Co., 50 Md. 73, 33 Am. Rep. 298.

Michigan.—Wallace *v.* Detroit City R. Co., 58 Mich. 231, 24 N. W. 870.

New Hampshire.— Smith *v.* Nashua St. R. Co., 69 N. H. 504, 44 Atl. 133.

New York.— Broadway, etc., R. Co. *v.* New York, 49 Hun 126, 1 N. Y. Suppl. 646, holding that the Broadway and Seventh Avenue Railroad Company is not authorized by its charter to throw the snow from its track, for the purpose of keeping it open, on the street along its line, so as to impede or prevent public travel thereon.

regulated by statute or ordinance;[60] and except in so far as prohibited by statute or ordinance,[61] the company may use a snow-plow, electric sweeper, rotary brushes, or other similar apparatus for the purpose of removing the ice and snow.[62] If the company violates this duty, by depositing and leaving the ice and snow in needless and dangerous obstructions on the streets, it is liable for injuries caused thereby to persons or animals,[63] or to adjacent property as by flowage.[64] It has been held, however, that the company is not obliged to haul the ice or snow away,[65] unless required by ordinance to do so.[66]

Virginia.— Newport News, etc., R., etc., Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900.

Wisconsin.— Gerrard *v.* La Crosse City R. Co., 113 Wis. 258, 89 N. W. 125, 57 L. R. A. 465.

United States.— McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. 104, 20 C. C. A. 322.

See 44 Cent. Dig. tit. "Street Railroads," § 187.

Degree of care.— A street railroad company is bound to exercise such care and diligence in clearing its track of snow as not to interfere needlessly with the safety and convenience of those lawfully using the street; and, if an extraordinary snow fall takes place, it must make extraordinary efforts to dispose of it. Bowen *v.* Detroit City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822. *Compare* Newport News, etc., R., etc., Co. *v.* Bradford, 99 Va. 117, 37 S. E. 807.

Obstructing crossing.— A street railroad company has no right to obstruct a public street crossing in removing snow from its track if it can reasonably deposit the snow elsewhere. Newport News, etc., R., etc., Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900.

60. Ovington *v.* Lowell, etc., St. R. Co., 163 Mass. 440, 40 N. E. 767; Gerrard *v.* La Crosse City R. Co., 113 Wis. 258, 89 N. W. 125, 57 L. R. A. 465; McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. 104, 20 C. C. A. 322; Mader *v.* Halifax Electric Tramway Co., 37 Nova Scotia 546; Mitchell *v.* Hamilton, 2 Ont. L. Rep. 58. See also McCrea *v.* St. John, 36 N. Brunsw. 144.

A city may legally pass an ordinance that a street railroad company shall not remove snow from the tracks in the street, unless the removal is made in a manner designated by the superintendent of streets. Union R. Co. *v.* Cambridge, 11 Allen (Mass.) 287. See also Ovington *v.* Lowell, etc., St. R. Co., 163 Mass. 440, 40 N. E. 767.

61. Ovington *v.* Lowell, etc., St. R. Co., 163 Mass. 440, 40 N. E. 767 (holding that an ordinance providing that, when snow falls of a sufficient depth for sleighing, no snow-plow shall be allowed on the tracks of a street car company, and that it shall not remove snow from its track without the consent of the superintendent of streets or mayor, does not prohibit the use of snow-plows when the consent of the proper officer has been obtained); Broadway, etc., R. Co. *v.* New York, 49 Hun (N. Y.) 126, 1 N. Y. Suppl. 646 (holding that the common council of New York city can prevent the Broadway and Seventh Avenue Railroad Company from using snow-plows so as to throw snow on the street adjacent to its tracks, and hence can permit the mayor or the city to license the company to do so).

62. Montreal *v.* Montreal St. R. Co., [1903] A. C. 482, 72 L. J. P. C. 119, 89 L. T. Rep. N. S. 30, 19 T. L. R. 568 [*affirming* 11 Quebec K. B. 458 (*affirming* 19 Quebec Super. Ct. 504)].

63. Smith *v.* Nashua St. R. Co., 69 N. H. 504, 44 Atl. 133 (holding that a street railroad company is liable for damages caused by a dangerous bank of snow left on the side of its tracks after cleaning them, where it had a reasonable time within which to remove it); McDonald *v.* Toledo Consol. St. R. Co., 74 Fed. 104, 20 C. C. A. 322.

It is negligence in a street car company, occupying a street so narrow as not to admit of two teams passing each other on either side of the car track, to throw the snow from its track with a snow-plow so as to cause a ridge of snow on either side of the track so high, when packed down by travel, as to upset a sleigh necessarily going thereon, in turning out to allow a team to pass. Somerville *v.* Poughkeepsie City R. Co., 17 N. Y. Suppl. 719.

Where the snow has been removed with due care the company is not liable for an injury caused by a horse becoming frightened, and running against a pile of snow in the street. Ovington *v.* Lowell, etc., St. R. Co., 163 Mass. 440, 40 N. E. 767.

64. Short *v.* Baltimore City Pass. R. Co., 50 Md. 73, 33 Am. Rep. 298, holding that a horse railroad company, in removing snow from its track, must be careful not to interfere with the natural flow of water from the street, either by obstructing the gutter or otherwise.

65. Short *v.* Baltimore City Pass. R. Co., 50 Md. 73, 33 Am. Rep. 298; Montreal *v.* Montreal St. R. Co., [1903] A. C. 482, 72 L. J. P. C. 119, 89 L. T. Rep. N. S. 30, 19 T. L. R. 568 [*affirming* 11 Quebec K. B. 458 (*affirming* 19 Quebec Super. Ct. 504)].

66. Broadway, etc., R. Co. *v.* New York, 49 Hun (N. Y.) 126, 1 N. Y. Suppl. 646, holding that the provision of an ordinance, requiring the company to not only remove the snow thrown up by a snow-plow, but also to reduce the snow on the street adjacent to the track to such a level as will make it convenient for all vehicles to approach the sidewalk, and to make the whole width of the road safe for travel, within twenty-four hours, is not unreasonable.

An injunction lies, at the suit of an abutting house-owner, to enjoin a street railroad company from leaving snow which it removes from its tracks, heaped up between them and

5. Collisions — a. Between Cars or Trains [67] — (i) *In General.* It is the duty of those in charge of street cars upon intersecting lines when approaching or passing a crossing of the two lines to exercise reasonable care, commensurate with the danger of the situation, to avoid a collision.[68] Where neither of two street railroad companies has any right, by usage or otherwise, of precedence at the intersection of their roads, each company owes to the other the duty of exercising reasonable care, and has a right to assume that the other will fulfil its duty until apprised to the contrary; [69] and if one car has the right to the crossing by arriving there first, the person in control of an approaching car is bound to so govern the movement thereof as that, whether the first car goes fast or slow or even stops on the crossing, he can stop his car before striking it.[70] But where by statute or ordinance the cars of one company have a right of way over the cars of another company, such regulation should be recognized.[71] It is also the duty of the person in charge of a car which is approaching another car ahead on the same track to maintain such a distance from or to so reduce the speed of his own car that he can

plaintiff's premises for a longer period than is reasonably requisite for taking it away. Prime *v.* Twenty-Third St. R. Co., 1 Abb. N. Cas. (N. Y.) 63. *Compare* Christopher, etc., St. R. Co. *v.* New York, 1 Abb. N. Cas. (N. Y.) 79 note; Johnston *v.* Christopher, etc., St. R. Co., 1 Abb. N. Cas. (N. Y.) 75 note.

67. Collisions and accidents to trains see Railroads, 33 Cyc. 734 *et seq.*

Liability to passengers for injuries in collisions see Carriers, 6 Cyc. 624.

68. See Chicago City R. Co. *v.* McLaughlin, 40 Ill. App. 496 [*affirmd* in 146 Ill. 353, 34 N. E. 796]; Taylor *v.* Grand Ave. R. Co., 137 Mo. 363, 39 S. W. 88.

As to a passenger on one of the cars, the company on whose car he is a passenger owes him the highest degree of care and diligence to avoid injuring him by a collision (see Carriers, 6 Cyc. 575, 595), but the company on whose car he is not a passenger is bound to use toward him only reasonable and ordinary care under the circumstances (O'Rourke *v.* Lindell R. Co., 142 Mo. 342, 44 S. W. 254; Loudoun *v.* Eighth Ave. R. Co., 162 N. Y. 380, 56 N. E. 988 [*reversing* 16 N. Y. App. Div. 152, 44 N. Y. Suppl. 742]; Klinger *v.* United Traction Co., 92 N. Y. App. Div. 100, 87 N. Y. Suppl. 864 [*modified* in mem. in 181 N. Y. 521, 73 N. E. 1125], holding that such company bears to the passenger on the car of another company the same relation as if he had been driving his own team upon the street; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91).

Injury to employee of other company.— Pa. Act, April 4, 1868, § 1, declaring that any person injured while lawfully employed on a railroad but not by the company owning it, shall have only such right of action against it as he would have if an employee of it, has no application to the case of a conductor of one street car company injured by the negligent attempt of the motorman of another company to cross in front of his car. Wetzel *v.* Philadelphia Traction Co., 184 Pa. St. 407, 39 Atl. 1.

69 Metropolitan R. Co. *v.* Hammett, 13 App. Cas (D. C.) 370; Metropolitan St. R. Co. *v.* Kennedy, 82 Fed. 158, 27 C. C. A. 136.

Rule stated.— Where there is a temporary obstruction to the view, the person in charge of the car of one company is not negligent in attempting to cross the intersecting track, as he has the right where he has first put his car in motion to rely on the fact that the servants in charge of the car of the other company will not attempt to make the crossing until it is safe to do so. And where the servants of one company see or should see that the car of another company is already in motion and that a collision will probably result, they are negligent in attempting to cross the track. Metropolitan St. R. Co. *v.* Kennedy, 82 Fed. 158, 27 C. C. A. 136.

The fact that the back end of one car is struck by the front end of another while passing over a crossing, on which the cars of the different lines have equal rights, of itself and without explanation, raises a presumption of negligence on the part of the colliding car. Chicago City R. Co. *v.* McLaughlin, 40 Ill. App. 496 [*affirmed* in 146 Ill. 353, 34 N. E. 796].

70. Metropolitan R. Co. *v.* Hammett, 13 App. Cas. (D. C.) 370; Chicago City R. Co. *v.* McLaughlin, 40 Ill. App. 496 [*affirmed* in 146 Ill. 353, 34 N. E. 796]. See also Taylor *v.* Grand Ave. R. Co., 137 Mo. 363, 39 S. W. 88.

71. Becker *v.* Detroit Citizens' St. R. Co., 121 Mich. 580, 80 N. W. 581; McLain *v.* St. Louis, etc., R. Co., 100 Mo. App. 374, 73 S. W. 909; Connor *v.* Electric Traction Co., 173 Pa. St. 602, 34 Atl. 238, holding that the failure to comply with such a regulation is merely evidence of negligence.

Under Mich. Comp. Laws (1897), § 6463, providing that when a car on each road approaches the crossing at substantially the same time, the car on the track first laid shall have precedence and be entitled to the right of way, a company cannot ignore an ordinance requiring a car to come to a full stop before making a crossing, and a car does not have the right of way until it stops in accordance therewith. Becker *v.* Detroit Citizens' St. R. Co., 121 Mich. 580, 80 N. W. 581.

stop it in time to avoid a collision,[72] particularly where such precautions are expressly required by the rules of the company.[73]

(II) *DUTY AT STEAM RAILROAD CROSSING.*[74] It is the duty of the persons in charge of a street car to use reasonable care to avoid a collision with an engine or train of a steam railroad which the street railroad crosses at grade.[75] It is the duty of such persons, as is sometimes provided by statute or ordinance, to stop the street car before reaching the steam railroad crossing, and not to cross until an employee of the company has gone ahead to ascertain whether the way is clear and signaled the car to proceed;[76] and where this duty is required by statute or ordinance, it should be exercised at crossings having gates and watchmen the same as at other crossings,[77] and even though there is but one employee on the car.[78] But in order that a street railroad company may be liable for its negligence in this respect, it must appear that the injury was directly caused by such negligence.[79]

b. Collisions With Animals or Vehicles[80] — (I) *NATURE AND EXTENT OF LIABILITY.* It is the duty of a street railroad company, through the servants in control of its cars, to exercise reasonable and ordinary care to avoid colliding with animals and vehicles on or near its tracks,[81] and the company is liable for

72. South Chicago City R. Co. *v.* Atton, 137 Ill. App. 364; Wynne *v.* Atlantic Ave. R. Co., 14 Misc. (N. Y.) 394, 35 N. Y. Suppl. 1034 [*affirmed* in 156 N. Y. 702, 51 N. E. 1094].

Where two street cars meet in a head-end collision on a single track, in the absence of any other showing negligence must be assumed in the employees operating the cars, and hence in their employers. Peterson *v.* Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

73. Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202, bound to keep two hundred feet from the car ahead.

74. Statutory and municipal regulations see *supra*, X, A, 2, b, (VI).

75. Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030 (holding that it is gross negligence for those in charge of a street car to cross a double railroad track when a train is almost on the car and a locomotive is but a few hundred feet away, with the bell ringing and having whistled for the crossing); Flournoy *v.* Shreveport Belt R. Co., 50 La. Ann. 635, 23 So. 465; Russell *v.* Shreveport Belt R. Co., 50 La. Ann. 501, 23 So. 466.

The same character or degree of care to avoid a collision must be exercised by those operating an electric car in approaching and going over a steam railroad crossing as is required to be exercised by one driving or operating any ordinary vehicle along and over such crossing, and they must look and listen for the approaching train, and if such care be not exercised, the electric railroad company will be liable to the steam railroad company for injuries arising thereto by reason of a collision, unless the negligence of the steam railroad company contributes to the accident. New York, etc., R. Co. *v.* New Jersey Electric R. Co., 60 N. J. L. 52, 37 Atl. 627, 38 L. R. A. 516.

76. Flournoy *v.* Shreveport Belt R. Co., 50 La. Ann. 635, 23 So. 465; Russell *v.* Shreveport Belt R. Co., 50 La. Ann. 501, 23 So. 466; Cincinnati St. R. Co. *v.* Murray, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508. See also *supra*, X, A, 2, b, (VI).

In the absence of extraordinary circumstances, it is negligence to cause a street car to cross a steam railroad track without first being stopped, and without an employee of the company first going ahead to ascertain whether the way is clear, as required by statute. Cincinnati St. R. Co. *v.* Murray, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508.

77. Cincinnati St. R. Co. *v.* Murray, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, holding that the driver of a street car is not justified in attempting to cross a steam railroad track without stopping, looking, and listening, no matter what the action of the steam railroad company's flagman at the crossing may have been, if such driver has from other circumstances information which would lead a prudent man to infer that there is danger to be apprehended from an approaching train.

78. Cincinnati St. R. Co. *v.* Murray, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508, holding that in such case it is his duty to stop the car and go ahead and ascertain whether the way is clear before driving the car over the crossing. But see Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, holding that a municipal ordinance that conductors of street railroad cars shall stop them and cross the tracks of steam railroads in advance of the car under a penalty has no application to cars where the same person acts as conductor and driver.

79. Cincinnati St. R. Co. *v.* Murray, 53 Ohio St. 570, 42 N. E. 596, 30 L. R. A. 508.

80. Contributory negligence in driving on track see *infra*, X, B, 7, h, (III) *et seq.*

81. *California.*— Shea *v.* Potrero, etc., R. Co., 44 Cal. 414.

Kentucky.— Louisville R. Co. *v.* Stammers, 47 S. W. 341, 20 Ky. L. Rep. 688.

Massachusetts.— O'Brien *v.* Blue Hill St. R. Co., 186 Mass. 446, 71 N. E. 951; O'Leary

the injuries resulting to persons, animals, or property, if through the incompetency, inattention, or carelessness of its servants a car collides with an animal [82] or vehicle on the track ahead,[83] or at a street crossing,[84] or with a vehicle so near to the track that the car could not pass without striking it.[85] But negligence on the part

v. Brockton St. R. Co., 177 Mass. 187, 58 N. E. 585.

Missouri.— Degel *v.* St. Louis Transit Co., 101 Mo. App. 56, 74 S. W. 156.

New Jersey.— Conrad *v.* Elizabeth, etc., R. Co., 70 N. J. L. 676, 58 Atl. 376.

New York.— Hirsch *v.* Interurban St. R. Co., 94 N. Y. Suppl. 330, signaling automobile to cross.

See 44 Cent. Dig. tit. "Street Railroads," § 190 *et seq.*

A street car company may run its cars single or in trains upon its track, but it is its duty to do so with due regard to the safety of those who have occasion to cross the track in driving out from the yards of houses situated along the track. Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267.

The strict rules as to care governing in railroad crossing collisions do not apply to street car cases. Citizens' St. R. Co. *v.* Abright, 14 Ind. App. 433, 42 N. E. 238, 1028.

82. Little Rock Traction, etc., Co. *v.* Hicks, 79 Ark. 248, 96 S. W. 385 (injury to cow running at large outside of "stock limit"); Joliet R. Co. *v.* Eich, 96 Ill. App. 240; Omaha St. R. Co. *v.* Duvall, 40 Nebr. 29, 58 N. W. 531; Hanlon *v.* Philadelphia, etc., Traction Co., 28 Pa. Super. Ct. 223 (killing cow being driven across track).

Proximate cause.— A street railroad company is liable if the rider of a horse is thrown from the horse, not by the contact of the horse with the car, but by the fright of the horse, if the injuries sustained are caused by the negligence of the servants of the railroad company in running the car against the horse. Danville R., etc., Co. *v.* Hodnett, 101 Va. 361, 43 S. E. 606.

A statute relating to the liability of steam railroad companies for stock killed or injured by their locomotives or cars does not apply to street railroads. San Antonio St. R. Co. *v.* Wray, (Tex. Civ. App. 1896) 37 S. W. 461.

Dogs.— A street railroad company, when its cars are properly equipped, is not liable in damages for the killing of a dog by one of its cars, unless the killing is done under such circumstances as to justify the conclusion that it is either wilful, wanton, or reckless. Moore *v.* Charlotte Electric R., etc., Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470. But where dogs are fighting on a street railroad track, and they are apparently oblivious to an approaching car, the motorman upon discovering them in a position of peril must exercise reasonable care by using proper signals, or by checking the speed of the car, to avoid injuring them. Harper *v.* St. Paul City R. Co., 99 Minn. 253, 109 N. W. 227, 116 Am. St. Rep. 415, 6 L. R. A. N. S. 911.

83. *California.*— Abrahams *v.* Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216 (negligent collision with street sprinkler); Swain *v.* Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829.

Indiana.— Citizens' St. R. Co. *v.* Lowe, 12 Ind. App. 47, 39 N. E. 165.

Maryland.— Cooke *v.* Baltimore Traction Co., 80 Md. 551, 31 Atl. 327.

Massachusetts.— Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822, holding that a street railroad company which runs down a wagon being driven along its tracks, and plainly visible, is guilty of negligence or wilful wrong, in the absence of special circumstances.

Missouri.— Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115; Wallack *v.* St. Louis Transit Co., 123 Mo. App. 160, 100 S. W. 496, if collision was proximately caused by defendant's negligence.

New York.— Geipel *v.* Steinway R. Co., 14 N. Y. App. Div. 551, 43 N. Y. Suppl. 934; Riegelman *v.* Third Ave. R. Co., 9 Misc. 51, 29 N. Y. Suppl. 299, holding that it is negligence to start a cable car while a person is driving across the track a short distance in front of the car.

Ohio.—Toledo Electric St. R. Co. *v.* Cooper, 18 Ohio Cir. Ct. 824, 8 Ohio Cir. Dec. 496.

Pennsylvania.—McFarland *v.* Consolidated Traction Co., 204 Pa. St. 423, 54 Atl. 308; Boyles *v.* Monongahela St. R. Co., 20 Pa. Super. Ct. 443.

Virginia.— Richmond Pass., etc., Co. *v.* Allen, 103 Va. 532, 49 S. E. 656.

See 44 Cent. Dig. tit. "Street Railroads," § 190 *et seq.*

Attempt to clear track.— A motorman who undertakes to clear the tracks at an upgrade by pushing a heavily loaded wagon with his car is so far acting within the scope of his employment that his failure to exercise reasonable care renders the company liable for an injury to the wagon and the team resulting therefrom. Chapman *v.* Public Service R. Co., (N. J. Sup. 1909) 72 Atl. 36. And a statutory provision directing policemen to "regulate the movement of teams and vehicles in streets" does not authorize a policeman to direct a motorman to use his car to push a coal truck blocking street car traffic, and thus render the company liable for the motorman's negligence in doing so. Connelly *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 305.

84. Boudwin *v.* Wilmington City R. Co., 4 Pennew. (Del.) 381, 60 Atl. 865; Hart *v.* Cedar Rapids, etc., R. Co., 109 Iowa 631, 80 N. W. 662.

85. Joliet R. Co. *v.* Barty, 96 Ill. App. 351; Koch *v.* St Paul City R. Co., 45 Minn. 407, 48 N. W. 191 (colliding with wagon so near the track that the car could not possibly clear it); Mayes *v.* Metropolitan St.

of the company cannot be inferred from the mere fact that there was a collision between a car and an animal or vehicle,[86] and it is not liable for the resulting injuries, if the servants in charge of the car exercise ordinary care and prudence, and the collision is merely an accident,[87] as where it results from the horse or team becoming frightened and suddenly springing, or backing the vehicle on the track in front of the car, too late for the car to be stopped.[88] Nor is the company liable if the collision and consequent injury is attributable to the injured party's own contributory negligence,[89] or to some intervening independent cause.[90] Where a street car stops in the middle of a street intersection, in violation of an ordinance or statute, whereby a vehicle collides with it, the street railroad company is liable for the resulting injuries.[91]

(II) *What Constitutes Ordinary Care in General.* In the absence of statutory or municipal regulations, the ordinary care which is to be exercised by a street railroad company to avoid a collision with an animal or a vehicle is such care as would be exercised by a reasonably prudent man under like circumstances, and depends upon the circumstances of each particular case,[92] such as

R. Co., 121 Mo. App. 614, 97 S. W. 612; Warren *v.* Union R. Co., 46 N. Y. App. Div. 517, 61 N. Y. Suppl. 1009; Gumb *v.* Twenty-Third St. R. Co., 58 N. Y. Super. Ct. 559, 9 N. Y. Suppl. 316.

A motorman knowing that he cannot pass a loaded wagon in a narrow street without colliding with it is guilty of gross negligence, if he attempts to pass it before the driver has had reasonable time to unload and move it away. Holzman *v.* Metropolitan St. R. Co., 31 Misc. (N. Y.) 644, 64 N. Y. Suppl. 1120.

86. North Side St. R. Co. *v.* Want, (Tex. App. 1890) 15 S. W. 40. See also *infra*, X, B, 9, e, (I), (B).

87. *Illinois.*— Eckels *v.* Hawkinson, 138 Ill. App. 627.

Michigan.— Guilloz *v.* Ft. Wayne, etc., R. Co., 108 Mich. 41, 65 N. W. 666.

New York.— Cardonner *v.* Metropolitan St. R. Co., 26 N. Y. App. Div. 8, 49 N. Y. Suppl. 527; Gumb *v.* Twenty-Third St. R. Co., 53 N. Y. Super. Ct. 466 [*reversed* on other grounds in 114 N. Y. 411, 21 N. E. 993]; McFarland *v.* Third Ave. R. Co., 29 Misc. 121, 60 N. Y. Suppl. 273.

Texas.— North Side St. R. Co. *v.* Want, (App. 1890) 15 S. W. 40.

Wisconsin.— Lockwood *v.* Belle City St. R. Co., 92 Wis. 97, 65 N. W. 866.

See 44 Cent. Dig. tit. "Street Railroads," § 190 *et seq.*

Where both the motorman and the driver of a truck are at fault in calculating that there is space enough for the car to pass, there can be no recovery for an injury to one of the horses on the truck, caused by a collision of the car with the truck. Gass *v.* New York City R. Co., 88 N. Y. Suppl. 950.

88. *Delaware.*— Higgins *v.* Wilmington City R. Co., 1 Marv. 352, 41 Atl. 86.

Georgia.— Rome St. R. Co. *v.* McGinnis, 94 Ga. 229, 21 S. E. 707.

Nebraska.— Omaha St. R. Co. *v.* Duvall, 40 Nebr. 29, 58 N. W. 531.

Oregon.— Coughtry *v.* Willamette St. R. Co., 21 Oreg. 245, 27 Pac. 1031.

Pennsylvania.— Wright *v.* Monongahela St. R. Co., 213 Pa. St. 318, 62 Atl. 918; McManigal *v.* South Side Pass. R. Co., 181 Pa. St. 358, 37 Atl. 516.

89. Swain *v.* Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829. And see *infra*, X, B, 7, h.

Negligently turning on track.— A street car company cannot be held liable for injury to one riding on a wagon which is negligently turned to cross the track when the car is but a short distance from it, if the speed of the car at the time is moderate, there is no negligence in its management, and everything is done to stop it as soon as possible. Kane *v.* People's Pass. R. Co., 181 Pa. St. 53, 37 Atl. 110.

90. See Harper *v.* Philadelphia Traction Co., 175 Pa. St. 129, 34 Atl. 356; Thatcher *v.* Central Traction Co., 166 Pa. St. 66, 30 Atl. 1048, 45 Am. St. Rep. 645, holding, however, that where a wagon, coming down an avenue, in attempting to get off the track out of the way of a rapidly approaching car, forces another wagon on to the track, so that it is injured by a collision, the driving of the wagon off the track is not the proximate cause of the injury.

91. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. 1019; Mueller *v.* Milwaukee St. R. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721.

92. *Arkansas.*— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

Delaware.— Boudwin *v.* Wilmington City R. Co., 4 Pennew. 381, 60 Atl. 865.

Illinois.— North Chicago St. R. Co. *v.* Allen, 82 Ill. App. 128. See also Central R. Co. *v.* Knowles, 93 Ill. App. 581 [*affirmed* in 191 Ill. 241, 60 N. E. 829].

Kentucky.— Louisville R. Co. *v.* Hutchcraft, 127 Ky. 531, 105 S. W. 983, 32 Ky. L. Rep. 429.

Massachusetts.— Chadbourne *v.* Springfield St. R. Co., 199 Mass. 574, 85 N. E. 737, on a narrow, much-traveled bridge. See also Cook *v.* Metropolitan R. Co., 98 Mass. 361, car coming back on team.

New York.— Schilling *v.* Metropolitan St. R. Co., 47 N. Y. App. Div. 500, 62 N. Y.

the locality of the vehicle, as at a public street crossing,[93] and the distance the car has to go when the vehicle is discovered or ought to be discovered.[94] As a general rule ordinary care requires that the driver or motorman of the car should keep a lookout ahead for animals or vehicles on or near the track,[95] particularly when approaching a crossing of intersecting streets;[96] and if he sees or by the exercise of ordinary care could see an animal or vehicle in a dangerous position on or near the track it is his duty to give a reasonable signal or warning of the approach of his car,[97] unless the person in charge of the vehicle has knowledge

Suppl. 403; Summerman *v.* Interurban St. R. Co., 87 N. Y. Suppl. 427.

See 44 Cent. Dig. tit. "Street Railroads," § 191.

Where a vehicle is discovered on the track ahead the driver or motorman must exercise a higher degree of care than would be required of him under other circumstances, but ordinary care and prudence, under the particular circumstances of the case, are all that is legally necessary to avoid liability. North Chicago St. R. Co. *v.* Allen, 82 Ill. App. 128.

In passing a vehicle beside the track it is the duty not only of the motorman to see that the front end of the car may pass safely, but also of the conductor or other person in charge of the car to watch for and avoid obstructions the car may meet at any time before it has entirely passed. Martin *v.* Interurban St. R. Co., 84 N. Y. Suppl. 921.

Law requiring vehicles to keep to the right. — A street railroad company is bound to take notice that the law requires other vehicles using the parts of the highway covered by its tracks, on meeting its cars coming from an opposite direction, to keep to the right, and to control its overtaking cars coming from an opposite direction, in anticipation that such other vehicles might so turn upon its tracks in obedience to the law. Adams *v.* Camden, etc., R. Co., 69 N. J. L. 424, 55 Atl. 254.

93. Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836; Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047; Fay *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 563, 75 N. Y. Suppl. 113, holding that a street railroad company is liable for the negligence of an inspector in signaling a driver to cross, whereby in attempting to do so his team is struck by the swing of a car rounding a curve at the crossing.

94. Zolpher *v.* Camden, etc., R. Co., 69 N. J. L. 417, 55 Atl. 249.

95. Anniston Electric, etc., Co. *v.* Hewitt, 139 Ala. 442, 36 So. 39, 101 Am. St. Rep. 42 (duty to look out for live stock); South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210; Louisville R. Co. *v.* Hutchcraft, 127 Ky. 531, 105 S. W. 983, 32 Ky. L. Rep. 429; Paducah Traction Co. *v.* Sine, 111 S. W. 356, 33 Ky. L. Rep. 792; South Covington, etc., St. R. Co. *v.* Eichler, 108 S. W. 329, 32 Ky. L. Rep. 1309; Palmer Transfer Co. *v.* Paducah R., etc., Co., 89 S. W. 515, 28 Ky. L. Rep. 473; Metropolitan St. R. Co. *v.* Kirkpatrick, (Tex. Civ. App. 1906) 94 S. W. 1092 (need not keep lookout on side of car). See also *supra*, X, B, 3, c.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

That the motorman momentarily ceased to keep a lookout does not render the company liable for injuries caused by a collision of the car with a wagon, where the collision occurred on a dark night, and there was nothing to show that, if the motorman had been constantly looking ahead, he would have been able to discover the presence of the wagon any sooner than he did, or in time to avert the collision, and as soon as he did discover the same he immediately applied the brakes and reversed the power. Theobald *v.* St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354.

A street car conductor owes no duty to look out for persons driving along the track in front of a car. Wallack *v.* St. Louis Transit Co., 123 Mo. App. 160, 100 S. W. 496.

96. Chicago City R. Co. *v.* Anderson, 93 Ill. App. 419 [*affirmed* in 193 Ill. 9, 61 N. E. 999]. See also *supra*, X, B, 3, c.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

97. *Illinois.*— Chicago, etc., Electric R. Co. *v.* Barrows, 128 Ill. App. 11; South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210.

Indiana.— Indianapolis St. R. Co. *v.* Marschke, 166 Ind. 490, 77 N. E. 945.

Iowa.— Wilkins *v.* Omaha, etc., R., etc., Co., 96 Iowa 668, 65 N. W. 987.

Kentucky.— Louisville R. Co. *v.* Hutchcraft, 127 Ky. 531, 105 S. W. 983, 32 Ky. L. Rep. 429; Louisville R. Co. *v.* Stammers, 47 S. W. 341, 20 Ky. L. Rep. 688.

Massachusetts.— Tashjian *v.* Worcester Consol. St. R. Co., 177 Mass. 75, 58 N. E. 281; Glazebrook *v.* West End St. R. Co., 160 Mass. 239, 35 N. E. 553.

Missouri.— Brown *v.* St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310; Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70; Jersey Farm Dairy Co. *v.* St. Louis Transit Co., 103 Mo. App. 90, 77 S. W. 346 (neglect to give warning must have been proximate cause of accident); Lamb *v.* St. Louis Cable, etc., R. Co., 33 Mo. App. 489.

New Jersey.— Ward *v.* Newark, etc., Horse R. Co., 8 N. J. L. J. 23.

New York.— McGurgan *v.* New York City R. Co., 121 N. Y. App. Div. 519, 106 N. Y. Suppl. 201, holding that it is negligence to start a street car from a standing position and run into a vehicle, which is crossing the street at an intersection in broad daylight without giving a signal.

Pennsylvania.— Fenner *v.* Wilkes-Barre, etc., Traction Co., 202 Pa. St. 365, 51 Atl. 1034.

of the car's approach;[98] and if the person in charge of the animal or vehicle does not hear or heed the signal or warning, or it is otherwise apparent that a collision is likely to occur, it is the duty of the motorman to use all reasonable and practicable means within his power to avoid it,[99] such as by checking the speed of the car,[1] and if necessary by stopping it in time to prevent the collision.[2] If the motorman or driver of the car sees or by the exercise of reasonable care could see the animal or vehicle in time to avoid a collision, but fails to exercise such care, and a collision results, the company is liable for the injuries caused thereby.[3] But the company

See 44 Cent. Dig. tit. "Street Railroads," § 191. See also *supra*, X, B, 3, e.

But see Citizens' R. Co. *v.* Holmes, 19 Tex. Civ. App. 266, 46 S. W. 116, holding that where a statute or ordinance does not require it, there is no implied negligence in a failure to sound the gong or bell of a street car while persons are on or near the track to warn them of its approach.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

98. Tashjian *v.* Worcester Consol. St. R. Co., 177 Mass. 75, 58 N. E. 281; Robinson *v.* Crosstown St. R. Co., 118 N. Y. App. Div. 543, 103 N. Y. Suppl. 58; Anderson *v.* Metropolitan St. R. Co., 30 Misc. (N. Y.) 104, 61 N. Y. Suppl. 899.

Where the injured person's driver sees the approach of a street car, actionable negligence of the railroad in a collision between the vehicle and the car cannot be established by proof that the motorman did not ring the gong. Williamson *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 324, 60 N. Y. Suppl. 477.

99. Greene *v.* Louisville R. Co., 119 Ky. 862, 84 S. W. 1154, 27 Ky. L. Rep. 316; Paducah Traction Co. *v.* Sine, 111 S. W. 356, 33 Ky. L. Rep. 792; Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; Flewelling *v.* Lewiston, etc., Horse R. Co., 89 Me. 585, 36 Atl. 1056; Schafstette *v.* St. Louis, etc., R. Co., 175 Mo. 142, 74 S. W. 826; Bectenwald *v.* Metropolitan St. R. Co., 121 Mo. App. 595, 97 S. W. 557; Degel *v.* St. Louis Transit Co., 101 Mo. App. 56, 74 S. W. 156; Meyers *v.* St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379; Doctoroff *v.* Metropolitan St. R. Co., 55 Misc. (N. Y.) 216, 105 N. Y. Suppl. 229.

That one driving a vehicle does not drive away from the track on hearing the gong of a car approaching from the rear does not authorize the motorman of the car to run the wagon down and knock it off the track. Strode *v.* St. Louis Transit Co., (Mo. 1905) 87 S. W. 976.

1. Chicago, etc., Electric R. Co *v.* Barrows, 128 Ill. App. 11; Flannagan *v.* St. Paul City R. Co., 68 Minn. 300, 71 N. W. 379; Wagner *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 591, 80 N. Y. Suppl. 191 [*affirmed* in 176 N. Y. 610, 68 N. E. 1125] (so as to lessen the force of the collision); Hurley *v.* New York, etc., Brewing Co., 13 N. Y. App. Div. 167, 43 N. Y. Suppl. 259.

The duty to check the speed of a car to avert a collision with a vehicle on the track **is not limited to the time when** the vehicle is on the track or in actual danger of collision if the car goes forward, but it is the motorman's duty to exercise ordinary care by checking the car as soon as he sees, or by the exercise of due care may see, a person in a vehicle approaching the track with the apparent intention of crossing. Barrie *v.* St. Louis Transit Co., 119 Mo. App. 38, 96 S. W. 233; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Kolb *v.* St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050.

2. See *infra*, X, B, 5, b, (III).

3. *California.*— Swain *v.* Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829.

Indiana.— Indianapolis Traction, etc., Co. *v.* Smith, 38 Ind. App. 160, 77 N. E. 1140; Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343.

Kentucky.— Montgomery *v.* Johnson, 58 S. W. 476, 22 Ky. L. Rep. 596.

Missouri.— Bensick *v.* St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587; Mertens *v.* St. Louis Transit Co., 122 Mo. App. 304, 99 S. W. 512; Winn *v.* Metropolitan St. R. Co., 121 Mo. App. 623, 97 S. W. 547; Bectenwald *v.* Metropolitan St. R. Co., 121 Mo. App. 595, 97 S. W. 557.

New York.— Obenland *v.* Brooklyn Heights R. Co., 127 N. Y. App. Div. 418, 111 N. Y. Suppl. 686 (backing train of cars with the motorman on the rear car so that he could not see objects ahead); Salcinger *v.* Interurban St. R. Co., 52 Misc. 179, 101 N. Y. Suppl. 804; Littlefield *v.* New York City R. Co., 51 Misc. 637, 101 N. Y. Suppl. 75; Piercy *v.* Metropolitan St. R. Co., 30 Misc. 612, 62 N. Y. Suppl. 867.

See 44 Cent. Dig. tit. "Street Railroads," § 191.

The rule that a steam railroad company owes no duty to trespassers on its track, except to use reasonable care to avoid their injury after they are seen, has no application to street railroad companies which occupy the streets of a city in common with the public, and a street railroad company is liable for an injury caused by one of its cars coming into collision with a wagon which is being driven on the track ahead of it, where the motorman, in the exercise of ordinary care, could have seen the wagon in time to stop his car before running into it. Robinson *v.* Louisville R. Co., 112 Fed. 484, 50 C. C. A. 357.

Where the wheels of a wagon extend over the tracks of a street railroad, and the motorman, by the use of proper care, could see them in time to stop the car, and fails to do so, and injuries result, the owner of the

is not required to exercise extraordinary precaution to avoid a collision;[4] nor is it an insurer of safety;[5] and where a motorman is confronted by a sudden and immediate danger, such as a runaway horse at a crossing, he is not required to do what, after mature deliberation, would have seemed to a prudent man to be the wisest thing to do under the circumstances.[6]

(III) *DUTY TO STOP CAR.* Except when required to do so by statute or ordinance,[7] the motorman or driver of a street car, if otherwise exercising due care, is not ordinarily required to stop his car immediately upon seeing an animal or vehicle on the street or highway near the track,[8] or approaching the tracks from an intersecting street,[9] or on the track in front of the car;[10] but if he gives a proper warning of the approach of his car,[11] he has the right to a limited extent at least, until the contrary appears, to act on the assumption that the animal or vehicle will, if on the track, be turned out in time to avoid a collision,[12] or, if on the part of the street or highway not occupied by the tracks, will remain there until the car has passed,[13] as that it will not attempt to cross the track in front of

vehicle can recover. Higgins *v.* Wilmington City R. Co., 1 Marv. (Del.) 352, 41 Atl. 86.

4. Heckmuller *v.* New York City R. Co., 54 Misc. (N. Y.) 541, 104 N. Y. Suppl. 679.

A higher degree of care is not required of the servants in charge of a car than of the drivers of other vehicles. Wilson *v.* Minneapolis St. R. Co., 74 Minn. 436, 77 N. W. 238.

The motorman is not required to foresee that the wheel of a vehicle would slide along the rail in turning out. Hebeler *v.* Metropolitan St. R. Co., 132 Mo. App. 551, 112 S. W. 34.

5. Reardon *v.* Third Ave. R. Co., 24 N. Y. App. Div. 163, 48 N. Y. Suppl. 1005.

6. Adsit *v.* Catskill Electric R. Co., 88 N. Y. App. Div. 167, 84 N. Y. Suppl. 393 (holding that where a motorman using ordinary prudence errs in a matter of judgment as to stopping the car in time, or as to the method of stopping it, it is not negligence for which plaintiff can recover in an action for injuries by a collision); Phillips *v.* People's Pass. R. Co., 190 Pa. St. 222, 42 Atl. 686.

7. See *supra*, X, A, 2, b, (VI).

8. Birmingham R., etc., Co. *v.* Clarke, (Ala 1906) 41 So. 829; Chicago Union Traction Co. *v.* Browdy, 206 Ill. 615, 69 N. E. 570 [*reversing* 108 Ill. App. 177]; Chicago City R. Co. *v.* Ahler, 107 Ill. App. 397 (holding that a motorman is not required to stop his car, when approaching a vehicle moving along the street in the same direction, with no indication that it is about to get on the track in front of the car); Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343.

9. Smith *v.* Citizens' R. Co., 52 Mo. App. 36.

10. Schneider *v.* Mobile Light, etc., R. Co., 146 Ala. 344, 40 So. 761; Hicks *v.* Citizens' R. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508 (car under control); Prendenville *v.* St. Louis Transit Co., 128 Mo. App. 596, 107 S. W. 453; Sonnenfeld Millinery Co. *v.* People's R. Co., 59 Mo. App. 668; Doctoroff *v.* Metropolitan St. R. Co., 55 Misc. (N. Y.) 216, 105 N. Y. Suppl. 229.

11. Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245; Bectenwald *v.* Metropolitan St. R. Co., 121 Mo. App. 595, 97 S. W. 557; Cawley *v.* La Crosse City R. Co., 106 Wis. 239, 82 N. W. 197.

12. Glazebrook *v.* West End St. R. Co., 160 Mass. 239, 35 N. E. 553; Gumb *v.* Twenty-Third St. R. Co., 53 N. Y. Super. Ct. 466 [*reversed* on other grounds in 114 N. Y. 411, 21 N. E. 993].

Where a driver, in turning out for an obstruction in the street, drives upon the track of a street railroad, the motorman of a car approaching from behind him has no right to assume that he will cross directly over the track, and remain on the other side. White *v.* Worcester Consol. St. R. Co., 167 Mass. 43, 44 N. E. 1052.

13. *Alabama.*— Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829.

Illinois.— South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210.

Kentucky.— Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484; Louisville R. Co. *v.* Hoskins, 88 S. W. 1087, 28 Ky. L. Rep. 124.

Missouri.— Smith *v.* Citizens' R. Co., 52 Mo. App. 36.

New York.— Schneiders *v.* Central Crosstown R. Co., 87 N. Y. Suppl. 453.

Pennsylvania.— Harman *v.* Pennsylvania Traction Co., 200 Pa. St. 311, 49 Atl. 755.

See 44 Cent. Dig. tit. "Street Railroads," § 192.

But see Halloran *v.* Worcester Consol. St. R. Co., 192 Mass. 104, 78 N. E. 381.

Untied horse.— It is not the duty of a motorman when he sees a horse some distance away, left untied, between the track and the gutter, to slow down his car, and get it under such control that he can avoid a collision if the horse should suddenly go upon the track, since he may assume, until the contrary appears, that the horse is gentle, and not afraid of street cars. Hoffman *v.* Syracuse Rapid-Transit R. Co., 50 N. Y. App. Div. 83, 63 N. Y. Suppl. 442.

If a wagon is standing still on the side of a street far enough from the track for a car to pass without striking it, the motorman has a right to assume that the wagon will remain still and has a right to go on. Hig-

the car,[14] and if the animal or vehicle is turned on to the track so suddenly that it is impossible by the exercise of reasonable care to stop the car in time to prevent an accident, the company is not liable for the resulting injuries.[15] The right to rely upon such an assumption, however, does not relieve the motorman from the duty of taking precautions which, under the circumstances, reasonable and ordinary care requires of him to take, to prevent a collision;[16] and if he sees, or by the exercise of ordinary care could see, that the person in charge of the animal or vehicle is ignorant or heedless of his danger, or that a collision is otherwise likely to occur, it is his duty to use all reasonable means within his power to check or stop his car in time to prevent it,[17] particularly where there is a statutory or municipal regulation requiring a motorman to stop his car on the first appearance

gins *v.* Wilmington City R. Co., 1 Marv. (Del.) 352, 41 Atl. 86.

14. *Alabama.*— Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829.

Arkansas.— Little Rock R., etc., Co. *v.* Green, 78 Ark. 129, 93 S. W. 752.

Maryland.— Heying *v.* United R., etc., Co., 100 Md. 281, 59 Atl. 667, holding that a motorman, seeing one driving a team toward the street car track, a short distance from an approaching car, and just before driving on the track, has a right to assume he will stop in a place of safety.

Missouri.— Markowitz *v.* Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389.

New York.— Knoll *v.* Third Ave. R. Co., 46 N. Y. App. Div. 527, 62 N. Y. Suppl. 16 [*affirmed* in 168 N. Y. 592, 60 N. E. 1113].

Washington.— Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

Wisconsin.— Cawley *v.* LaCrosse City R. Co., 106 Wis. 239, 82 N. W. 197.

See 44 Cent. Dig. tit. "Street Railroads," § 192.

15. *Alabama.*— Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829.

Arkansas.— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245, holding that if those on the vehicle can hear the warning by the exercise of ordinary care and attention, and after this the vehicle is driven suddenly in front of the car, and so close to it as to make it impossible to stop the car by the exercise of ordinary care and reasonable effort, there is no negligence on the part of the motorman.

Illinois.— Chicago Union Traction Co. *v.* Browdy, 206 Ill. 615, 69 N. E. 570 [*reversing* 108 Ill. App. 177]; Chicago City R. Co. *v.* Strong, 127 Ill. App. 472 [*affirmed* in 230 Ill. 58, 82 N. E. 335].

Indiana.— Kessler *v.* Citizens' St. R. Co, 20 Ind. App. 427, 50 N. E. 891.

New York.— Lefkowitz *v.* Metropolitan St. R. Co., 26 Misc. 787, 56 N. Y. Suppl. 215.

Pennsylvania.— Lee *v.* Schuylkill Valley Traction Co., 13 Montg. Co. Rep. 91.

Wisconsin.— Cawley *v.* LaCrosse City R. Co., 101 Wis. 145, 77 N. W. 179.

See 44 Cent. Dig. tit. "Street Railroads," § 192.

16. Gallagher *v.* Coney Island, etc., R. Co., 4 N. Y. Suppl. 870.

A motorman cannot rely on the alertness and quickness of a dog on the track, so as to relieve himself of all duty to try to prevent an accident. Citizens' Rapid-Transit Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790, 66 Am. St. Rep. 754, 40 L. R. A. 518.

17. *Alabama.*— Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829; Schneider *v.* Mobile Light, etc., R. Co., 146 Ala. 344, 40 So. 761; Birmingham R., etc., Co. *v.* Pinckard, 124 Ala. 372, 26 So. 880.

Arkansas.— Little Rock R., etc., Co. *v.* Green, 78 Ark. 129, 93 S. W. 752; Little Rock R., etc., Co. *v.* Newman, 77 Ark. 599, 92 S. W. 864, killing hog.

California.— Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908.

Connecticut.— Garfield *v.* Hartford, etc., St. R. Co., 80 Conn. 260, 67 Atl. 890, holding that reasonable care might require a motorman to stop his car until an automobile has a reasonable opportunity to get off the tracks in safety.

Delaware.— White *v.* Wilmington City R. Co., 6 Pennew. 105, 63 Atl. 931.

Illinois.— South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210.

Indiana.— Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343.

Iowa.— Christy *v.* Des Moines City R. Co., 126 Iowa 428, 102 N. W. 194, holding that where a motorman observes that a team of horses has become frightened, and is undertaking to pass in front of the car, it is his duty to stop the car, if it can be done in the exercise of ordinary care, in time to avoid an injury.

Kentucky.— Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484.

Massachusetts.— White *v.* Worcester Consol. St. R. Co., 167 Mass. 43, 44 N. E. 1052 (holding that where a wagon is being driven over the track in passing around an obstruction in the street, and is clearing the track with reasonable celerity, it is the duty of the motorman on an approaching car to move slowly, or stop, until the wagon is out of the way); Glazebrook *v.* West End St. R. Co., 160 Mass. 239, 35 N. E. 553.

Michigan.— Mertz *v.* Detroit Electric R. Co., 125 Mich. 11, 83 N. W. 1036.

Missouri.— Schafstette *v.* St. Louis, etc., R. Co., 175 Mo. 142, 74 S. W. 826; Prendenville *v.* St. Louis Transit Co., 128 Mo. App. 596, 107 S. W. 453; Sonnenfeld Millinery Co. *v.* People's R. Co., 59 Mo. App. 668; Smith *v.* Citizens' R. Co., 52 Mo. App. 36.

New York.— Doctoroff *v.* Metropolitan St.

of danger;[18] and if he fails to do so he is guilty of negligence and the company liable for the resulting injuries;[19] but if in such a case the car driver or motorman uses all reasonable means to stop in time to avoid a collision, the company is not liable although a collision results.[20]

(iv) *Rate of Speed.*[21] The rate of speed at which the car that causes the collision is running at the time is a circumstance particularly to be considered in determining whether the company is liable for the resulting injury. If the person in charge of the animal or vehicle is exercising due care, and the collision could be avoided but for the fact that the motorman or driver of the car does not have it under proper control, but permits it to run at a negligent rate of speed,[22] as at a rate of speed in violation of an ordinance,[23] the company is liable for the resulting injuries. But on the other hand, although the rate of speed is negligent, as where it is in violation of a statutory or municipal regulation which is usually regarded as negligence *per se*,[24] the company is not liable if such speed is not the proximate cause of the collision and the resulting injuries.[25]

R. Co., 55 Misc. 216, 105 N. Y. Suppl. 229.

North Carolina.— Wright *v.* Fries Mfg., etc., Co., 147 N. C. 534, 61 S. E. 380.

Virginia.— Danville R., etc., Co. *v.* Hodnett, 101 Va. 361, 43 S. E. 606.

Washington.— Baldie *v.* Tacoma R., etc., Co., 52 Wash. 75, 100 Pac. 162.

Wisconsin.— Cawley *v.* LaCrosse City R. Co., 106 Wis. 239, 82 N. W. 197.

See 44 Cent. Dig. tit. "Street Railroads," § 192.

When a motorman sees, or by ordinary care could see, a buggy sliding along the rail in front of his car, he is bound to use reasonable care to stop the car or slacken speed to avoid a collision, although whether such duty requires a full stop depends on the circumstances. Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523.

18. Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VI).

19. *Kentucky.*— Lexington R. Co. *v.* Fain, 80 S. W. 463, 25 Ky. L. Rep. 2243.

Missouri.— White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14; Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Ross *v.* Metropolitan St. R. Co., 132 Mo. App. 472, 112 S. W. 9.

New Jersey.— Consolidated Traction Co. *v.* Haight, 59 N. J. L. 577, 37 Atl. 135, holding that where a trolley car overtakes another vehicle in a line with its progress, it is negligence not to reduce it to such control that it can be brought to a standstill, if necessary, before reaching the obstructing vehicle.

New York.— Moore *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 613, 82 N. Y. Suppl. 778; Knoll *v.* Third Ave. R. Co., 46 N. Y. App. Div. 527, 62 N. Y. Suppl. 16 [*affirmed* in 168 N. Y. 592, 60 N. E. 1113]; Saffer *v.* Westchester Electric R. Co., 22 Misc. 555, 49 N. Y. Suppl. 998.

Ohio.— Toledo St. R. Co. *v.* Westenhuber, 22 Ohio Cir. Ct. 67, 12 Ohio Cir. Dec. 22.

Pennsylvania.— Waechter *v.* Second Ave. Traction Co., 198 Pa. St. 129, 47 Atl. 967.

Texas.— Dallas Consol. Electric St. R. Co. *v.* Illo, 32 Tex. Civ. App. 290, 73 S. W. 1076; City R. Co. *v.* Thompson, 20 Tex. Civ. App. 16, 47 S. W. 1038.

See 44 Cent. Dig. tit. "Street Railroads," § 192.

Where a horse balks on the tracks, and the motorman, although warned by the driver's shouts, and although the horse is in plain sight, makes no effort to stop, a verdict against the company for killing the horse will be sustained. Ward *v.* Lakeside R. Co., 20 Pa. Co. Ct. 494.

Where a dog on a street car track is seen by the servants in charge in time to slacken the speed of the car, and so avoid injury to the dog, and no efforts are made in that direction by such servants, such lack of effort will constitute negligence for which a recovery may be had. West Chicago St. R. Co. *v.* Klecka, 94 Ill. App. 346.

20. Louisville R. Co. *v.* Hoskins, 88 S. W. 1087, 28 Ky. L. Rep. 124; Lexington R. Co. *v.* Fain, 80 S. W. 463, 25 Ky. L. Rep. 2243; Smith *v.* Citizens' R. Co., 52 Mo. App. 36; Blue Ridge Light, etc., Co. *v.* Tutwiler, 106 Va. 54, 55 S. E. 539; Eastwood *v.* LaCrosse City R. Co., 94 Wis. 163, 68 N. W. 651.

21. **Statutory and municipal regulations** see *supra*, X, A, 2, b, (VI).

22. *Massachusetts.*— Fallon *v.* Boston El. R. Co., 201 Mass. 179, 87 N. E. 480.

New York.— Fisher *v.* Union R. Co., 86 N. Y. App. Div. 365, 83 N. Y. Suppl. 694.

Pennsylvania.— Finefrock *v.* United Traction Co., 33 Pa. Super. Ct. 638, 642.

Texas.— Dallas Consol. Electric St. R. Co. *v.* Illo, 32 Tex. Civ. App. 290, 73 S. W. 1076.

Canada.— Halifax Electric Tramway Co. *v.* Inglis, 30 Can. Sup. Ct. 256 [*affirming* 32 Nova Scotia 117].

See also *supra*, X, B, 3, d.

23. Steinmann *v.* St. Louis Transit Co., 116 Mo. App. 673, 94 S. W. 799; Story *v.* St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992; Butler *v.* Rhode Island Co., (R. I. 1907) 68 Atl. 425; Hays *v.* Tacoma R., etc., Co., 106 Fed. 48. See also *supra*, X, B, 3, d.

24. See *supra*, X, B, 3, d.

25. Campbell *v.* St. Louis Transit Co., 121 Mo. App. 406, 99 S. W. 58 (holding that

(v) *Collision With Fire Apparatus.*[26] It is the duty of the motorman or other person in charge of a street car to give way to, and to use due precaution to avoid colliding with, a fire engine, truck, or wagon on its way to extinguish a fire and save property therefrom,[27] and to hold himself in readiness to avoid such collision when he has reason to anticipate that such an engine, truck, or wagon may appear, as when he is approaching and passing a house in which they are kept.[28] The exercise of such precaution may be and sometimes is required by a rule or regulation of the street railroad company,[29] or by ordinance or statute.[30]

6. Injuries to Persons On or Near Tracks — a. Care Required and Negligence in General. Since travelers on a public street along which street car tracks are

the person injured in a collision with a car cannot recover because of such a violation unless it caused the injury, and he used ordinary care to avoid the injury); Molyneux *v.* Southwest Missouri Electric R. Co., 81 Mo. App. 25 (holding that the mere fact that a street car is running in excess of the rate permitted by ordinance will not entitle an injured party to go to the jury on the question of negligence, when there is no evidence showing that the motorman could have avoided the injury if the speed had been within the permitted rate); Hoffman *v.* Syracuse Rapid-Transit R. Co., 50 N. Y. App. Div. 83, 63 N. Y. Suppl. 442.

26. Contributory negligence of driver of fire engine or truck or firemen thereon see *infra*, X, B, 7, h, (IX).

27. *Kentucky.*— Flynn *v.* Louisville R. Co., 110 Ky. 662, 62 S. W. 490, 23 Ky. L. Rep. 57.

Louisiana.— Wood *v.* New Orleans R., etc., Co., 117 La. 119, 41 So. 436.

New York.— New York *v.* Metropolitan St. R. Co., 90 N. Y. App. Div. 66, 85 N. Y. Suppl. 693 [*affirmed* in 182 N. Y. 536, 75 N. E. 1128] (holding that negligence cannot be predicated upon the mere fact that the car was running at a high rate of speed, but that the only duty resting on defendant was to exercise reasonable care in the operation of the car under all the circumstances); Geary *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 441, 77 N. Y. Suppl. 54.

Virginia.—Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220.

Wisconsin.—Hanlon *v.* Wilwaukee Electric R., etc., Co., 118 Wis. 210, 95 N. W. 100.

28. Dole *v.* New Orleans R., etc., Co., 121 La. 945, 46 So. 929, 19 L. R. A. N. S. 623, holding that the motorneer of an electric car passing immediately in front of a fire engine house is guilty of double negligence when he drives at full speed in approaching such house and fails to see, in time to stop and avoid a collision with an outcoming hose cart, a signal given while the car is one hundred and forty-four feet distant from the engine house. See also New York *v.* Metropolitan St. R. Co., 90 N. Y. App. Div. 66, 85 N. Y. Suppl. 693 [*affirmed* in 182 N. Y. 536, 75 N. E. 1128].

29. Dole *v.* New Orleans R., etc., Co., 121 La. 945, 46 So. 929, 19 L. R. A. N. S. 623.

Application.—A rule of the company re-quiring that cars, when passing engine houses, must not go faster than four miles an hour, is not to be construed as applying only to the space directly in front of an engine house but includes the approach thereto. McKernan *v.* Detroit Citizens' St. R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347.

The violation of such a rule is not negligence per se, but is evidence bearing on the question whether a faster rate is in accordance with careful management. McKernan *v.* Detroit Citizens' St. R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347.

Such a rule of the company does not add to its obligation to the public, so as to change its liability in case of injury to a fireman because of the collision of a car with apparatus starting for a fire. McKernan *v.* Detroit Citizens' St. R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347.

30. McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618; Warren *v.* Mendenhall, 77 Minn. 145, 79 N. W. 661; Knox *v.* North Jersey St. R. Co., 70 N. J. L. 347, 57 Atl. 423, holding that fire engines and trucks while driving to fires may by legislative enactment be granted the right of way at street crossings, and compel all other vehicles to yield to such right.

Under the Greater New York Charter, Laws (1897), c. 378, § 748, as amended by Laws (1900), c. 155, giving the fire insurance patrol and fire apparatus proceeding to a fire the right of way in the streets over all vehicles except those carrying mail, and making it a misdemeanor to refuse to accord such right of way, it is abstractly the duty of a motorman to stop his car to give the street to a patrol truck, if it is seen, or by the exercise of reasonable care could be seen, in time to stop the car. Duffghe *v.* Metropolitan St. R. Co., 109 N. Y. App. Div. 603, 96 N. Y. Suppl. 324 [*affirmed* in 187 N. Y. 522, 79 N. E. 1104].

Construction of ordinance.—Where a section of an ordinance provides that the apparatus of the fire department shall have the right of way while going to and at any fire, and another section provides that the cars of a street railroad company shall be entitled to the track, and that in all cases where any team shall meet or be overtaken, the team or vehicle shall give way to the car, the former section is controlling as to the right of way as between a street car and fire apparatus responding to an alarm.

laid have an equal right with the street railroad company to use such street,[31] it is the duty of the company to exercise such reasonable and ordinary care in the management and operation of its cars as the particular circumstances may require, to avoid injuring persons, such as pedestrians, who may be on or near its tracks in such street,[32] and if it fails to exercise such care it is guilty of negligence and liable for injuries caused thereby,[33] provided such negligence is the proximate cause of the injuries.[34] Thus it is the duty of the company to exercise such care as is reasonably demanded by all the surrounding circumstances, in

McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618.

31. See *supra*, X, B, 3, j.

32. Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553; McGary *v.* West Chicago St. R. Co., 85 Ill. App. 610; Paducah City R. Co. *v.* Alexander, 104 S. W. 375, 31 Ky. L. R. 1043; Louisville R. Co. *v.* Blaydes, 51 S. W. 820, 21 Ky. L. Rep. 480 (holding that it is the duty of a motorman to use the highest degree of care to avoid injury to a wheelman in a public street); Dallas Rapid Transit R. Co. *v.* Dunlap, 7 Tex. Civ. App. 471, 26 S. W. 877. See also *supra*, X, B, 3.

A car driver can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would have noticed or done, with ordinary vigilance; when he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected to happen. Barnes *v.* Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400.

Unusual circumstances impose upon the company greater care than is usually imposed upon such companies. Gordon *v.* Grand St., etc., R. Co., 40 Barb. (N. Y.) 546.

When fog or rain and snow obscure the view, it is the duty of those operating street cars to proceed, not in the usual manner, but cautiously, so as to insure the safety of others on a public thoroughfare, and to warn them of danger. Engelman *v.* Metropolitan St. R. Co., 133 Mo. App. 514, 113 S. W. 700.

Street sweeper.—A motorman must use reasonable care to avoid injuring a street sweeper, since the latter has not only the right, but is required to be in the street. O'Connor *v.* Union R. Co., 67 N. Y. App. Div. 99, 73 N. Y. Suppl. 606.

33. O'Callaghan *v.* Metropolitan St. R. Co., 69 N. Y. App. Div. 574, 75 N. Y. Suppl. 171 [*affirmed* in 174 N. Y. 521, 66 N. E. 1112]; Treanor *v.* Manhattan R. Co., 28 Abb. N. Cas. (N. Y.) 47, 21 N. Y. Civ. Proc. 364, 16 N. Y. Suppl. 536 [*reversing* 14 N. Y. Suppl. 270 (shoveling dirt from elevated road); Hennessey *v.* Forty-Second St., etc., R. Co., 84 N. Y. Suppl. 158 (injury to workman at excavation); Silberstein *v.* Houston St., etc., Ferry R. Co., 4 N. Y. Suppl. 843 [*reversed* on the facts in 117 N. Y. 293, 22 N. E. 951]; Houston City St. R. Co. *v.* Woodlock, (Tex. Civ. App. 1895) 29 S. W. 817 (running into workman without signal).

It is negligence for a street car driver, after stopping his car on a busy street, to detach his horses and swing them from the track into the street, without observing whether any teams are approaching from the rear, whereby a collision occurs. Sutter *v.* Omnibus Cable Co., 107 Cal. 369, 40 Pac. 484.

Workmen, in laying pipes in a street, may temporarily obstruct a street railroad track by laying a pipe thereon, and can recover, if injured by the company's negligently driving a car against it. Lahey *v.* Central Park, etc., R. Co., 2 Misc. (N. Y.) 537, 22 N. Y. Suppl. 380 [*distinguishing* Schmidt *v.* Steinway, etc., R. Co., 132 N. Y. 566, 30 N. E. 389].

Starting without signal.—Where a street car has stopped at an unusual and dangerous place, it is negligence to start the car again without giving a warning to pedestrians intending to cross the tracks, or who are upon the tracks in the act of crossing. Chicago City R. Co. *v.* Strong, 129 Ill. App. 511 [*affirmed* in 230 Ill. 58, 82 N. E. 335].

Nuisance.—The operation of freight cars over street railroad tracks without authority and in violation of law constitutes a nuisance, for which a pedestrian injured thereby is entitled to recover without regard to the care exercised in operating such cars. Daly *v.* Milwaukee Electric R., etc., Co., 119 Wis. 398, 96 N. W. 832, 100 Am. St. Rep. 893.

34. Manning *v.* West End St. R. Co., 166 Mass. 230, 44 N. E. 135 (holding that where a conductor allowed a switch stick, which he was using from the top of a car to free the trolley, to fall from his hands and injure a bystander, negligence in the adjustment of such overhead wires is not too remote to form an element of damage); Dunn *v.* Cass Ave., etc., R. Co., 98 Mo. 652, 11 S. W. 1009; Lehman *v.* Brooklyn City R. Co., 47 Hun (N. Y.) 355 (holding that where a horse of a street car company ran away, and, striking a post on the sidewalk, was knocked down, frightening a woman standing in a doorway to such an extent as to bring on a serious nervous disease, the company was not liable for such sickness); Mooney *v.* Third Ave. R. Co., 2 N. Y. City Ct. 366; Mueller *v.* Milwaukee St. R. Co., 86 Wis. 340, 56 N. W. 914, 21 L. R. A. 721 (sudden stopping of car on crossing held proximate cause of damage done to carriage in a funeral procession by the pole of the following carriage running into it). See also Kraut *v.* Frankford, etc., Pass. R. Co., 160 Pa. St. 327, 28 Atl. 783.

regard to looking out for persons on or near the track,[35] the speed and control of the car,[36] the sounding of the bell or gong,[37] and the slowing up and stopping of the car.[38] Where, however, a street railroad company exercises due care in the management and operation of its cars, it is not liable for injuries to individuals on or near its tracks, which result from unavoidable accidents, without any fault on its part.[39]

b. Persons Passing Behind Cars or Vehicles. It is not negligence for a car driver or motorman to operate his car in the usual manner at a point where there is another car on the opposite track or another vehicle near the track, if he has no reason to anticipate that persons may come on to the track from behind such other car or vehicle;[40] but if he has reason to anticipate such an occurrence, as where the other car, bound in the opposite direction, is at a crossing or other point discharging passengers,[41] it is his duty to take such circumstances into con-

35. See *infra*, X, B, 6, e.

36. See *supra*, X, B, 3, d.

37. Heinel *v.* People's R. Co., 6 Pennew. (Del.) 428, 67 Atl. 173. See also *supra*, X, B, 3, e.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

38. Heinel *v.* People's R. Co., 6 Pennew. (Del.) 428, 67 Atl. 173. See also *supra*, X, B, 3, d, (II).

39. *Alabama.*— Schneider *v.* Mobile Light, etc., Co., 146 Ala. 344, 40 So. 761.

Kentucky.— Gordon *v.* Louisville R. Co., 44 S. W. 972, 19 Ky. L. Rep. 1959.

Maryland.— United Railway, etc., Co. *v.* Fletcher, 95 Md. 533, 52 Atl. 608, injury to workman at trench by being struck by body of conductor on side foot-board.

Massachusetts.— Blackwell *v.* Old Colony St. R. Co., 193 Mass. 222, 79 N. E. 335 (holding that the sounding of the gong of one of two standing cars as decedent was passing between them was not such a negligent act as to justify him in stepping on to the adjoining track, without looking or listening, directly in front of a rapidly approaching car); Widmer *v.* West End St. R. Co., 158 Mass. 49, 32 N. E. 899 (injured person standing too close to car and struck by handle).

Missouri.— Warner *v.* St. Louis, etc., R. Co., 178 Mo. 125, 77 S. W. 67.

New Jersey.— Jelly *v.* North Jersey St. R. Co., 76 N. J. L. 191, 68 Atl. 1091, person struck by overhang of rear end of car while passing around a loop.

New York.— Schmidt *v.* Steinway, etc., R. Co., 132 N. Y. 566, 30 N. E. 389 [*reversing* 10 N. Y. Suppl. 672] (knocking sewer pipe into excavation and injuring workman); Fenton *v.* Second Ave. R. Co., 126 N. Y. 625, 26 N. E. 967 [*reversing* 56 Hun 99, 9 N. Y. Suppl. 162]; Fay *v.* Brooklyn Heights R. Co., 129 N. Y. App. Div. 375, 113 N. Y. Suppl. 689 (injury to foreman of workmen near track); Poland *v.* United Traction Co., 107 N. Y. App. Div. 561, 95 N. Y. Suppl. 498 (not negligent as to lifting fender at terminus of route); Floettl *v.* Third Ave. R. Co., 10 N. Y. App. Div. 308, 41 N. Y. Suppl. 792 (injury to workman in trench under track without knowledge of employees in charge of car); Kuhnen *v.* Union R. Co., 10 N. Y. App. Div. 195, 41 N. Y. Suppl. 774; Rhing *v.* Broadway, etc., R. Co., 53 Hun 321, 6 N. Y. Suppl. 641 (error of judgment in backing car without unhitching horses, to extricate person under it); Weldon *v.* Harlem R. Co., 5 Bosw. 576; Ewing *v.* Atlantic Ave. R. Co., 11 N. Y. Suppl. 626.

Pennsylvania.— Patton *v.* Philadelphia Traction Co., 132 Pa. St. 76, 20 Atl. 682 (accident caused by miscalculation on the part of both plaintiff and the car driver as to distance between car and plaintiff); Trussell *v.* United Traction Co., 31 Pittsb. Leg. J. N. S. 15 (holding that where a motorman in a sudden emergency uses his best judgment to extricate plaintiff, who has been run down and is under the car, but his actions result in further injury to plaintiff, the latter cannot recover on account of these actions).

Virginia.— Trowbridge *v.* Danville St.-Car Co., (1894) 19 S. E. 780.

See 44 Cent. Dig. tit. "Street Railroads," § 195.

40. Hafner *v.* St. Louis Transit Co., 197 Mo. 196, 94 S. W. 291 (holding that where a person, before attempting to cross street car tracks, is partially concealed by certain wagons on an intervening track, the motorman is entitled to presume that such person will look and see the car before going on the track and is not bound to anticipate that he is likely to go on to the track in front of the car); Johnson *v.* Third Ave. R. Co., 69 N. Y. App. Div. 247, 74 N. Y. Suppl. 599.

The mere proximity to a street railroad of a standing wagon is not notice as a matter of fact to a motorman that someone is behind it who may suddenly attempt to cross the track. Cornelius *v.* South Covington, etc., St. R. Co., 93 S. W. 643, 29 Ky. L. Rep. 505.

41. Chicago Union Traction Co. *v.* Nuetzel, 114 Ill. App. 466; Chicago City R. Co. *v.* Loomis, 102 Ill. App. 326 [*affirmed* in 201 Ill. 118, 66 N. E. 348]; Stevens *v.* Union R. Co., 75 N. Y. App. Div. 602, 78 N. Y. Suppl. 624 [*affirmed* in 176 N. Y. 607, 68 N. E. 1125] (holding that where a person on alighting from a trolley car at a place much frequented by pedestrians, passes around the rear of the car, and attempts to cross the opposite track, and in so doing is struck and killed by a car running at full speed in the

sideration, and to operate his car accordingly, as by sounding the bell or gong,[42] reducing the speed of the car,[43] and if necessary stopping it.[44] But the mere fact that a person in going behind a street car is injured by running into a fender which is down does not establish negligence on the part of the company, where it is not customary to keep such fenders raised,[45] or where, although such is the custom, in the particular instance it is down without any want of care on the part of the company.[46]

c. Approach to Street Crossing. It is the duty of the motorman or driver of a street car, approaching a public street crossing, to exercise reasonable and ordinary care under the circumstances to avoid injuring persons who may be on or approaching such crossing, as by keeping a lookout ahead, sounding the bell or gong, and running at a reasonable rate of speed,[47] a greater degree of watchfulness and care being required at such places than under other circumstances;[48] and a failure to exercise such care is negligence for which the company is liable,[49] unless the person injured is guilty of negligence, which contributes directly to

opposite direction and giving no warning of its approach, his death is caused by the negligence of the motorman in charge of such car); Pelletreau *v.* Metropolitan St. R. Co., 74 N. Y. App. Div. 192, 77 N. Y. Suppl. 386 [*affirmed* in 174 N. Y. 503, 66 N. E. 1113]. But *compare* Johnson *v.* Third Ave. R. Co., 69 N. Y. App. Div. 247, 74 N. Y. Suppl. 599.

A street railroad company is chargeable with notice that passengers, when they alight from cars, are liable to cross to the opposite side of the street, and over the adjoining track, and the obligation is imposed on it to exercise reasonable care in the operation of its cars, having regard to such condition. Reed *v.* Metropolitan St. R. Co., 87 N. Y. App. Div. 427, 84 N. Y. Suppl. 454 [*reversed* on other grounds in 180 N. Y. 315, 73 N. E. 41].

42. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25; Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887.

43. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25 (holding that a street railroad company may not excuse its motorman's negligence in failing to give signals or to reduce the speed of his car, resulting in injury to one attempting to cross the track behind another car, on the ground that it is not the custom to give such signals or to reduce the speed while approaching and passing cars); Chicago City R. Co. *v.* Loomis, 102 Ill. App. 326 [*affirmed* in 201 Ill. 118, 66 N. E. 348]; Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887.

44. Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887.

45. Hoffman *v.* Philadelphia Rapid Transit Co., 214 Pa. St. 87, 63 Atl. 409.

46. Gargan *v.* West End St. R. Co., 176 Mass. 106, 57 N. E. 217, 79 Am. St. Rep. 298, 49 L. R. A. 421; Levison *v.* Metropolitan St. R. Co., 36 Misc. (N. Y.) 827, 74 N. Y. Suppl. 882; Klyachko *v.* Central Crosstown R. Co., 88 N. Y. Suppl. 1073. See also Adams *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 354, 81 N. Y. Suppl. 553.

47. See *supra*, X, B, 3, a, (II); X, B, 3, c, d, e.

The mere operation of a car at a crossing in such a manner as to render it dangerous for a person to cross in front thereof is not negligence. Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

48. See *supra*, X, B, 3, a, (II); X, B, 3, c.

49. *Alabama.*— Birmingham R., etc., Co. *v.* Jackson, 136 Ala. 279, 34 So. 994, holding that, although a motorman is not aware of the peril of one on the track in time to avoid injuring him, yet the company is liable if the motorman is guilty of wantonness in running his car over the crossing at the time and under the circumstances.

Kansas.— Consolidated City, etc., R. Co. *v.* Carlson, 58 Kan. 62, 48 Pac. 635, holding that where the motorneer of a street car runs the car at the rate of twelve miles an hour into a crowd of children leaving school, without ringing the bell nearer to the crossing than one hundred and fifty feet, and without watching the track ahead of him, he is guilty of gross negligence.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742.

Missouri.— Cytron *v.* St. Louis Transit Co., 205 Mo. 692, 104 S. W. 109 (holding that the running of a street car, without giving any warning of its approach, over a crossing in a thickly populated locality, where ordinary care for the safety of people on the street requires that warning be given, resulting in the killing of a child, while he is in the exercise of due care, renders the company liable to the parents, in the absence of contributory negligence on their part); Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213.

New York.— Cosgrove *v.* Metropolitan St. R. Co., 74 N. Y. App. Div. 166, 77 N. Y. Suppl. 624 [*affirmed* in 173 N. Y. 628, 66 N. E. 1106].

Negligence of a flagman stationed at a crossing of two street railroads, in signaling a person to cross the tracks, is not "negligence in operating the cars" within the meaning of Mo. Rev. St. (1889) § 4425. Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834.

his injury.[50] Thus ordinarily it is negligence, for which the company is liable, for the driver or motorman of a street car to run his car at a rapid rate of speed past a street crossing at which a car, bound in the opposite direction, is discharging passengers.[51]

d. Duty on Seeing Person On or Approaching Track. Where the driver or motorman of a street car sees a person on or approaching the track in advance of his car, he ordinarily has a right, in operating his car, to act upon the assumption that such person is in possession of all his faculties, as that he is of sound mind and has good hearing and eyesight,[52] and that he will see the approaching car,[53] or will hear and heed the bell or gong when sounded,[54] and will exercise reasonable care for himself and will get off or stay off the track until the car passes;[55]

50. Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213.

Contributory negligence generally see *infra*, X, B, 7.

51. Chicago City R. Co. *v.* Robinson, 127 Ill. 9, 18 N. E. 772, 11 Am. St. Rep. 87, 4 L. R. A. 126 [*affirming* 27 Ill. App. 26]; Schwartz *v.* New Orleans, etc., R. Co., 110 La. 534, 34 So. 667. See also *supra*, X, E, 6, b.

52. Schulte *v.* New Orleans City, etc., R. Co., 44 La. Ann. 509, 10 So. 811 (sound of hearing); Garvick *v.* United Rys., etc., Co., 101 Md. 239, 61 Atl. 138 (full powers of locomotion); Lyons *v.* Bay Cities Consol. R. Co., 115 Mich. 114, 73 N. W. 139; Simpson *v.* Rhode Island Co., 26 R. I. 200, 58 Atl. 658 (of sound mind).

53. Petty *v.* St. Louis, etc., R. Co., 179 Mo. 666, 78 S. W. 1003; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141.

54. Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 30 Ky. L. Rep. 644, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093; Doyle *v.* West End St. R. Co., 161 Mass. 533, 37 N. E. 741; Bennett *v.* Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480.

55. *Alabama.*—Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798; Randle *v.* Birmingham R., etc., Co., 158 Ala. 532, 48 So. 114; Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93.

Connecticut.— Riley *v.* Consolidated R. Co., 82 Conn. 105, 72 Atl. 562; Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613.

Delaware.—Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254.

Florida.— Consumers' Electric Light, etc., R. Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Illinois.— South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210; West Chicago St. R. Co. *v.* Schwartz, 93 Ill. App. 387. See also Chicago City R. Co. *v.* Hyndshaw, 116 Ill. App. 367.

Kentucky.— Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 30 Ky. L. Rep. 644, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093.

Louisiana.— Schulte *v.* New Orleans, etc., R. Co., 44 La. Ann. 509, 10 So. 811.

Maryland.— Garvick *v.* United Rys., etc., Co., 101 Md. 239, 61 Atl. 138.

Massachusetts.— Doyle *v.* West End St. R. Co., 161 Mass. 533, 37 N. E. 741.

Michigan.— Lyons *v.* Bay Cities Consol. R. Co., 115 Mich. 114, 73 N. W. 139.

Missouri.— Hafner *v.* St. Louis Transit Co., 197 Mo. 196, 94 S. W. 291; Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602; Petty *v.* St. Louis, etc., R. Co., 179 Mo. 666, 78 S. W. 1003; Gabriel *v.* Metropolitan St. R. Co., 130 Mo. App. 651, 109 S. W. 1042; Bennett *v.* Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480; Meyer *v.* Lindell R. Co., 6 Mo. App. 27.

Nebraska.— McLean *v.* Omaha, etc., R., etc., Co., 72 Nebr. 447, 100 N. W. 935, 103 N. W. 285.

New Jersey.— Ward *v.* Newark, etc., Horse Car R. Co., 8 N. J. L. J. 23.

New York.— Matulewicz *v.* Metropolitan St. R. Co., 107 N. Y. App. Div. 230, 95 N. Y. Suppl. 7 (will draw back far enough to avoid being struck by the overhang of the car as it rounds a curve); Barney *v.* Metropolitan St. R. Co., 94 N. Y. App. Div. 388, 88 N. Y. Suppl. 335; Jackson *v.* Union R. Co., 77 N. Y. App. Div. 161, 78 N. Y. Suppl. 1096.

Oregon.— Wolf *v.* City R. Co., 45 Oreg. 446, 72 Pac. 329, 78 Pac. 668, holding that where one approaching a street railroad track stops near the track, the motorman in charge of an approaching car has a right to assume that he intends to wait until the car passes, and is not guilty of negligence in releasing his brakes at the time.

Tennessee.— Memphis St. R. Co. *v.* Wilson, 108 Tenn. 618, 69 S. W. 265; Citizens' St. R. Co. *v.* Shepherd, 107 Tenn. 444, 64 S. W. 710.

Texas.— San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64.

Washington.— Duteau *v.* Seattle Electric Co., 45 Wash. 418, 88 Pac. 755.

See 44 Cent. Dig. tit. "Street Railroads," § 197.

Statement of rule.— A motorman having a reasonable basis for the belief that an adult person on the track is aware of the approach of the car may presume that he will get out of danger as the car approaches, but a motorman sounding his bell cannot assume that all within hearing will take notice that a car is approaching, and he can make no such assumption in justification of his failure to take reasonable precautions until at least he has reasonable grounds for believing that his warning is heeded or the presence of the car recognized, and that the person threatened is competent to protect himself by the

and in such a case the driver or motorman is not bound to anticipate that such person will stay on or get on the track, and to take steps to avoid injuring him, by slackening the speed or stopping the car, until it becomes reasonably apparent that he cannot or will not get out or keep out of the way;[58] and if in view of his right to act on such assumption the driver or motorman exercises reasonable care and caution to warn such person of his peril and to slacken the speed or if necessary stop the car in time to avoid injuring him, but is unable to avert an accident, by reason of such person's suddenly going upon or near the track, the street railroad company is not liable for the resulting injuries.[57] But at the same time it is the duty of the driver or motorman to make an intelligent use of his senses to ascertain whether such a person is in peril,[58] and if the driver or motorman sees, or by the exercise of ordinary care and caution could see, from the person's condition,[59] or from the other surrounding circumstances, that he is in danger and probably will not or cannot get out or stay out of danger, it is his duty to use all reasonable means within his power, consistent with the safety of

exercise of ordinary care. Riley *v.* Consolidated R. Co., 82 Conn. 105, 72 Atl. 562.

On trestle.—Where a motorman, upon discovering the perilous position of a pedestrian upon a trestle, could not, in the exercise of ordinary care, have foreseen or anticipated that the pedestrian would not probably leave the track in time to avoid injury, the company is not liable for injuries sustained by the pedestrian in being run down. Northern Texas Traction Co. *v.* Mullins, 44 Tex. Civ. App. 566, 99 S. W. 433.

56. *Florida.*— Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Illinois.— West Chicago St. R. Co. *v.* Schwartz, 93 Ill. App. 387.

Kentucky.— Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 30 Ky. L. Rep. 644, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093.

Louisiana.— Farrar *v.* New Orleans, etc., R. Co., 52 La. Ann. 417, 26 So. 995.

Missouri.— Lennon *v.* St. Louis, etc., R. Co., 198 Mo. 514, 94 S. W. 975; Hovarka *v.* St. Louis Transit Co., 191 Mo. 441, 90 S. W. 1142; Bunyan *v.* Citizens' R. Co., 127 Mo. 12, 29 S. W. 842; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141.

New Jersey.— Harbison *v.* Camden, etc., R. Co., 76 N. J. L. 824, 71 Atl. 1134 [*affirming* 74 N. J. L. 252, 65 Atl. 868].

New York.— Barney *v.* Metropolitan St. R. Co., 94 N. Y. App. Div. 388, 88 N. Y. Suppl. 335; Trauber *v.* Third Ave. R. Co., 80 N. Y. App. Div. 37, 80 N. Y. Suppl. 231; Jackson *v.* Union R. Co., 77 N. Y. App. Div. 161, 78 N. Y. Suppl. 1096; Scott *v.* Third Ave. R. Co., 16 N. Y. Suppl. 350.

Ohio.— Cincinnati Traction Co. *v.* Simon, 28 Ohio Cir. Ct. 780.

Tennessee.— Citizens' St. R. Co. *v.* Shepherd, 107 Tenn. 444, 64 S. W. 710.

Washington.— Duteau *v.* Seattle Electric Co., 45 Wash. 418, 88 Pac. 755.

See 44 Cent. Dig. tit. "Street Railroads," § 197.

A motorman who mistakes one lying near the track for a clump of dirt or other object is not legally bound to stop the car or slacken its speed before reaching him. Trigg *v.* Water, etc., Co., 215 Mo. 521, 114 S. W. 972, 20 L. R. A. N. S. 987; Stelk *v.* McNulta, 99 Fed. 138, 40 C. C. A. 357.

57. *California.*— Hamlin *v.* Pacific Electric R. Co., 150 Cal. 776, 89 Pac. 1109 (bicycle rider); Everett *v.* Los Angeles Consol. Electric R. Co., 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350 (bicycle rider).

Delaware.— Heinel *v.* People's R. Co., 6 Pennew. 428, 67 Atl. 173.

Illinois.— Scanlan *v.* Chicago Union Traction Co., 127 Ill. App. 406.

Louisiana.— Farrar *v.* New Orleans, etc., R. Co., 52 La. Ann. 417, 26 So. 995.

New York.— Beirne *v.* Union R. Co., 114 N. Y. App. Div. 90, 99 N. Y. Suppl. 584; West *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 373, 94 N. Y. Suppl. 250; Kappus *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 13, 81 N. Y. Suppl. 442; Mulligan *v.* Third Ave. R. Co., 61 N. Y. App. Div. 214, 70 N. Y. Suppl. 530.

Pennsylvania.— Sauers *v.* Union Traction Co., 193 Pa. St. 602, 44 Atl. 917.

Rhode Island.— Gunn *v.* Union R. Co., 22 R. I. 321, 47 Atl. 888, suddenly stepping on track.

Wisconsin.— Ryan *v.* La Crosse City R. Co., 108 Wis. 122, 83 N. W. 770.

See 44 Cent. Dig. tit. "Street Railroads," § 197.

58. Watson *v.* Broadway, etc., R. Co., 6 N. Y. St. 538, 26 N. Y. Wkly. Dig. 337 [*affirmed* in 110 N. Y. 677, 18 N. E. 482].

59. Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447, holding that when, from any apparent cause, a person liable to be injured cannot be expected to exercise the usual degree of prudence to avoid injury, a greater degree of caution is required of the car driver. See also Farrar *v.* New Orleans, etc., R. Co., 52 La. Ann. 417, 26 So. 995.

Infirm person.— It is the duty of a motorman in charge of a car to take special care to have the car sufficiently under control to enable him to avoid collision with aged and infirm persons on foot whose infirmities are plainly evident and who may be crossing the

the passengers, to slacken the speed of his car or to stop it if necessary in time to avoid injuring such person, and if he fails to do so the company is liable for the resulting injuries.[60] Thus under such circumstances it is ordinarily negligence, for which the company is liable, for the driver or motorman to fail to give a proper warning of the approach of his car,[61] except where the injury would not be prevented thereby,[62] as where the person injured has actual knowledge of the

line of railroad at a street crossing. Haight *v.* Hamilton St. R. Co., 29 Ont. 279.

60. *Alabama.*—Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798; Randle *v.* Birmingham R., etc., Co., 158 Ala. 532, 48 So. 114; Mobile Light, etc., Co. *v.* Baker, 158 Ala. 491, 48 So. 119; Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93; Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829.

Connecticut.— Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613.

Delaware.— Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254.

Illinois.— South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210; Rockford City R. Co. *v.* Blake, 74 Ill. App. 175 [*affirmed* in 173 Ill. 354, 50 N. E. 1070, 64 Am. St. Rep. 122].

Indiana.— Saylor *v.* Union Traction Co., 40 Ind. App. 381, 81 N. E. 94; Indianapolis St. R. Co. *v.* Hackney, 39 Ind. App. 372, 77 N. E. 1048; Indianapolis Traction, etc., Co. *v.* Smith, 38 Ind. App. 160, 77 N. E. 1140; Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, 72 N. E. 169, 1034.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Palmer *v.* Cedar Rapids, etc., R. Co., 124 Iowa 424, 100 N. W. 336.

Kentucky.— Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 30 Ky. L. Rep. 644, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093; Louisville R. Co. *v.* Knocke, (1909) 117 S. W. 271; Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484; South Covington, etc., St. R. Co. *v.* Besse, 108 S. W. 848, 33 Ky. L. Rep. 52, 16 L. R. A. N. S. 890; South Covington, etc., St. R. Co. *v.* Eichler, 108 S. W. 329, 32 Ky. L. Rep. 1309; Louisville R. Co. *v.* Blaydes, 52 S. W. 960, 21 Ky. L. Rep. 668 [*modifying* 51 S. W. 820, 21 Ky. L. Rep. 480].

Michigan.— Bedell *v.* Detroit, etc., R. Co., 131 Mich. 668, 92 N. W. 349; McClellan *v.* Ft. Wayne, etc., R. Co., 105 Mich. 101, 62 N. W. 1025.

Missouri.— Petersen *v.* St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860; Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602; Holden *v.* Missouri R. Co., 177 Mo. 456, 76 S. W. 973; Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834; Bunyan *v.* Citizens' R. Co., 127 Mo. 12, 29 S. W. 842; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 12 S. W. 891; Dahmer *v.* Metropolitan St. R. Co., 136 Mo. App. 443, 118 S. W. 496; Bennett *v.* Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144; Kube *v.* St. Louis Transit Co., 103 Mo. App. 582, 78 S. W. 55; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141.

Nebraska.— McLean *v.* Omaha, etc., R., etc., Co., 72 Nebr. 447, 100 N. W. 935, 103 N. W. 285.

New Jersey.— Buttelli *v.* Jersey City, etc., Electric R. Co., 59 N. J. L. 302, 36 Atl. 700.

New York.— Legare *v.* Union R. Co., 61 N. Y. App. Div. 202, 70 N. Y. Suppl. 718; Mittleman *v.* New York City R. Co., 56 Misc. 599, 107 N. Y. Suppl. 108; Frank J. Lennon Co. *v.* New York City R. Co., 108 N. Y. Suppl. 995; Friedman *v.* Dry Dock, etc., R. Co., 11 N. Y. Suppl. 429 [*affirmed* in 110 N. Y. 676, 18 N. E. 482]; Watson *v.* Broadway, etc., R. Co., 6 N. Y. St. 538, 26 N. Y. Wkly. Dig. 337 [*affirmed* in 110 N. Y. 677, 18 N. E. 482]; McClain *v.* Brooklyn City R. Co., 6 N. Y. St. 49 [*affirmed* in 116 N. Y. 459, 22 N. E. 1062]. See also Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434.

Texas.— El Paso Electric R. Co. *v.* Kelly, (Civ. App. 1908) 109 S. W. 415; Northern Texas Traction Co. *v.* Mullins, 44 Tex. Civ. App. 566, 99 S. W. 433; Galveston City R. Co. *v.* Hanna, 34 Tex. Civ. App. 608, 79 S. W. 639; Houston City St. R. Co. *v.* Woodlock, (Civ. App. 1895) 29 S. W. 817.

Washington.— Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

See 44 Cent. Dig. tit. "Street Railroads," § 197.

Statutory and municipal regulations see *supra*, X, A, 2, b, (VI).

The speed of the car and whether the bell was rung may be considered in determining whether employees in charge of a street car did all in their power to avert injury after discovering a traveler's perilous position, or by ordinary care could have discovered it. Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523.

Injury to dog.— The motorman of a street car is under no duty to stop the car to avoid injuring a dog, unless there is something about the dog's action and movements, or inaction, to indicate that he is unable to get off the track or is oblivions of the approach of the car; and in the latter case the motorman is under the duty to use ordinary care to frighten the dog off or check or stop the car. Klein *v.* St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281; Moore *v.* Charlotte Electric R., etc., Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470.

61. Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93 (by sounding the bell, or otherwise); South Chicago City R. Co. *v.* Kinnare, 117 Ill. App. 1 [*affirmed* in 216 Ill. 451, 75 N. E. 179]; Breary *v.* Traction Co., 5 Pa. Dist. 95. See also *supra*, X, B, 3, e.

62. Chicago Union Traction Co. *v.* Daly, 129 Ill. App. 519, holding that it is not negli-

car's approach, since the only purpose of sounding the gong or other warning is to attract attention and give warning that the car is approaching.[63]

e. Vigilance of Persons in Charge of Car. It is the duty of the driver or motorman of a street car to exercise reasonable and ordinary care to discover persons using the street on or near the track, and liable to be injured by his car, in time to avoid injuring them,[64] and if he fails to discover a person on or near the track, when by the exercise of ordinary care he could have done so in time to stop the car or otherwise avoid the injury, it is negligence for which the company is liable.[65] Thus it has been held that a street railroad company is liable for an accident which is caused by a moving car while the driver is inside the car collecting fares or making change for passengers.[66]

gence to fail to ring a bell or sound a whistle where the ringing of the bell or the sounding of the whistle would not have prevented the injury which ensued.

63. *Arkansas.*— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

Kentucky.— Louisville R., etc., Co. *v.* Colston, 117 Ky. 804, 79 S. W. 243, 25 Ky. L. Rep. 1933.

Maryland.— Garvick *v.* United R., etc., Co., 101 Md. 239, 61 Atl. 138; Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859.

Missouri.— Murray *v.* St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611.

New York.— McEntee *v.* Metropolitan St. R. Co., 110 N. Y. App. Div. 673, 97 N. Y. Suppl. 476; Thompson *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 10, 85 N. Y. Suppl. 181; Mullen *v.* Joline, 111 N. Y. Suppl. 776.

See 44 Cent. Dig. tit. "Street Railroads," § 197.

64. Paducah City R. Co. *v.* Alexander, 104 S. W. 375, 31 Ky. L. Rep. 1043; Downey *v.* Baton Rouge Electric, etc., Co., 122 La. 481, 47 So. 837; Mentz *v.* Second Ave. R. Co., 3 Abb. Dec. (N. Y.) 274 [*affirming* 2 Rob. 356]; Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229. See also *supra*, X, B, 3, c; X, B, 5, b, (II).

Statutory and municipal regulations see *supra*, X, A, 2, b, (VII).

That the place is darkened either by the absence of sunlight or by shadows, and a curve in the street prevents the headlight from illuminating a person's position, does not obviate the company's duty to keep a lookout, but rather increases that duty. Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

A street railroad company is bound to keep a lookout on a bridge, which is a part of the public street, over which its track runs, even in the night-time, and although there are slats similar to cattle guards across its tracks, and iron columns and railings to show the railroad section of the bridge. Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

65. *Florida.*— Consumers' Electric Light, etc., R. Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Indiana.— Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, 72 N. E. 169, 1034.

Kentucky.— South Covington, etc., St. R. Co. *v.* Eichler, 108 S. W. 329, 32 Ky. L. Rep. 1309; Louisville R. Co. *v.* French, 71 S. W. 486, 24 Ky. L. Rep. 1278; Louisville City R. Co. *v.* Wood, 2 Ky. L. Rep. 387.

Louisiana.— Barnes *v.* Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400.

Massachusetts.— Collins *v.* South Boston R. Co., 142 Mass. 301, 7 N. E. 856, 56 Am. Rep. 675 (leaning on the dasher in a listless attitude, and looking in the opposite direction); Com. *v.* Metropolitan R. Co., 107 Mass. 236.

Missouri.— McQuade *v.* St. Louis, etc., R. Co., 200 Mo. 150, 98 S. W. 552; Levin *v.* Metropolitan St. R. Co., 140 Mo. 624, 41 S. W. 968.

New York.— Morrissey *v.* Westchester Electric R. Co., 18 N. Y. App. Div. 67, 45 N. Y. Suppl. 444; Mentz *v.* Second Ave. R. Co., 3 Abb. Dec. 274 [*affirming* 2 Rob. 356]; Lang *v.* Houston, etc., Ferry R. Co., 75 Hun 151, 27 N. Y. Suppl. 90 [*affirmed* in 144 N. Y. 717, 39 N. E. 858]; Levey *v.* Dry Dock, etc., R. Co., 12 N. Y. Suppl. 485. *Compare* Pollitt *v.* Kings County El. R. Co., 10 N. Y. Suppl. 691 [*affirmed* in 126 N. Y. 630, 27 N. E. 410].

Texas.— Dallas Consol. Traction R. Co. *v.* Hurley, 10 Tex. Civ. App. 246, 31 S. W. 73.

See 44 Cent. Dig. tit. "Street Railroads," § 199.

Criminal responsibility for injuries under such circumstances see Com. *v.* Metropolitan R. Co., 107 Mass. 236.

It is gross negligence for the driver of a street car to drive rapidly along a city street without looking ahead (Goldstein *v.* Dry Dock, etc., R. Co., 35 Misc. (N. Y.) 200, 71 N. Y. Suppl. 477), or for a driver to sit on the car rail with his back to the horses, attending to a bird held in his hand, having the reins twisted about the brake (Mangam *v.* Brooklyn City R. Co., 36 Barb. (N. Y.) 230 [*affirmed* in 38 N. Y. 455, 98 Am. Dec. 66]).

66. *Louisiana.*— Barnes *v.* Shreveport City R. Co., 47 La. Ann. 1218, 17 So. 782, 49 Am. St. Rep. 400.

Missouri.— Saare *v.* Union R. Co., 20 Mo. App. 211, gross negligence.

Nebraska.— Brooks *v.* Lincoln St. R. Co., 22 Nebr. 816, 36 N. W. 529.

New York.— Hyland *v.* Yonkers R. Co., 1 N. Y. Suppl. 363.

f. Injuries to Children and Others Under Disability. As a general rule a higher degree of care on the part of a street railroad company in the operation of its cars is required toward a child who, owing to his immature years, is incapable of realizing and appreciating the proximity of danger and the necessity of care and caution to avoid injury than is required toward an adult whose knowledge and experience better enable him to look out for himself,[67] and a higher degree of care must also be exercised toward a person who, from any apparent disability or other cause, cannot be expected to exercise the usual degree of prudence and care for his own protection.[68] But at the same time the company is only required to exercise what under the circumstances is ordinary care, taking into consideration the apparent age and ability or disability of the child, or of the infirm person, to care for himself.[69] Thus a driver or motorman, when operating his car on a street where he has reason to expect the presence of children or infirm persons, must exercise a high degree of watchfulness,[70] and if he sees or by the exercise of ordinary care could see a child of tender years on or near the track he is not entitled to act on the assumption that such child will get off or stay off the track,[71] but

Wisconsin.— Dahl *v.* Milwaukee City R. Co., 65 Wis. 371, 27 N. W. 185.

See 44 Cent. Dig. tit. "Street Railroads," § 199.

67. *California.*—Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447.

Connecticut.— Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683.

District of Columbia.— Barstow *v.* Capital Traction Co., 29 App. Cas. 362.

Illinois.— Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160; West Chicago St. R. Co. *v.* Schwartz, 93 Ill. App. 387. *Compare* Chicago City R. Co. *v.* O'Donnell, 114 Ill. App. 359.

Missouri.— Cornovski *v.* St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51, holding that as to a four-year-old child it is not error to assume that the curb line of a city street is the danger line in crossing the street.

Texas.— San Antonio St. R. Co. *v.* Mechler, 87 Tex. 628, 30 S. W. 899 [*affirming* (Civ. App. 1894) 29 S. W. 202]; Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.

United States.— Camden Interstate R. Co. *v.* Broom, 139 Fed. 595, 71 C. C. A. 641.

See 44 Cent. Dig. tit. "Street Railroads," § 202.

An ordinance prohibiting the playing of any game in the street which shall interfere with its convenient use is not applicable to a child of twenty-one months straying upon a public highway, and does not lessen or modify the duty of a motorman of an electric car to exercise due care toward such child alone in the street. Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683.

Whether or not a gong is sounded at the time of an accident is immaterial in a case of a child of tender years injured or killed while attempting to cross a street car track. Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160.

68. Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447; Curtin *v.* Metropolitan St. R. Co., 22 Misc. (N. Y.) 83, 48 N. Y. Suppl. 581 [*affirming* 21 Misc. 788, 47 N. Y. Suppl. 1134].

69. Indianapolis St. R. Co. *v.* Schomberg, (Ind. App. 1904) 71 N. E. 237 [*affirmed* in 164 Ind. 111, 72 N. E. 1041]; Gorman *v.* Louisville R. Co., 72 S. W. 760, 24 Ky. L. Rep. 1938; Kube *v.* St. Louis Transit Co., 103 Mo. App. 582, 78 S. W. 55.

70. Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106 (holding that it is the duty of a motorman in charge of a car coming down grade and approaching a crossing in a populous part of a city to keep a lookout for young children either approaching the crossing or standing near the track, and to take reasonable precaution to prevent injury to them by sounding the gong and holding the car under control); Strutzel *v.* St. Paul City R. Co., 47 Minn. 543, 50 N. W. 690 (holding that it is culpable negligence for the driver of a street car to approach without watchfulness a street crossing where he has reason to suppose that children may be coasting down a hill and across the car track, although such conduct on the part of the children is unlawful); Bergen County Traction Co. *v.* Heitman, 61 N. J. L. 682, 40 Atl. 651; Curtin *v.* Metropolitan St. R. Co., 22 Misc. (N. Y.) 83, 48 N. Y. Suppl. 581 [*affirming* 21 Misc. 788, 47 N. Y. Suppl. 1134] (holding that the driver of a surface car is bound to be alert and watchful to avoid injury to those who, because of tender years, advanced age, or evidently enfeebled physical condition or accident, do not get off the track at the near approach of the car); Sample *v.* Consolidated Light, etc., Co., 50 W. Va. 472, 40 S. E. 597, 694, 57 L. R. A. 186 (holding that where a motorman in charge of an electric car comes where he has reason to expect children at play, he must exercise a high degree of watchfulness in the operation of the car).

71. South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210; Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Citizens St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778. But see Jett *v.* Central Electric R. Co., 178 Mo. 664, 77 S. W. 738.

However, where the motorman sees a child

must at once use all reasonable efforts to avoid injuring him,[72] as by sounding the bell or gong,[73] reducing the speed of the car,[74] and, if necessary, using all reasonable means to stop it in time to avoid the injury;[75] and if by the exercise of ordinary

cross the track in front of the car going in a direction that will carry him out of danger of collision as it would appear to a reasonably prudent man, taking into consideration the size of the child, the motorman has the right to presume that the child is not in danger, and is not required to slacken the speed of the car or stop it, unless from the actions of the child it is reasonably apparent that it intends to recross the track dangerously near the car. Hanley *v.* Ft. Dodge Light, etc., Co., 133 Iowa 326, 107 N. W. 593, 110 N. W. 579; Nein *v.* La Crosse City R. Co., 92 Fed. 85, 34 C. C. A. 224.

72. *Illinois.*— Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 [*affirming* 95 Ill. App. 314].

Louisiana.— Nelson *v.* Crescent City R. Co., 49 La. Ann. 491, 21 So. 635.

Missouri.— Winters *v.* Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591, 6 L. R. A. 536.

New York.— Muller *v.* Brooklyn Heights R. Co., 18 N. Y. App. Div. 177, 45 N. Y. Suppl. 954.

Wisconsin.— Forrestal *v.* Milwaukee Electric R., etc., Co., 119 Wis. 495, 97 N. W. 182 (holding that it is the duty of a motorman as he approaches a street crossing to observe children near the track in such an attitude as to suggest the probability of their placing themselves in the way of the car, and to use all reasonable care to avoid injuring them); Slensby *v.* Milwaukee St. R. Co., 95 Wis. 179, 70 N. W. 67.

Canada.— Lott *v.* Sydney, etc., R. Co., 41 Nova Scotia 153.

See 44 Cent. Dig. tit. "Street Railroads," § 202.

Acts need not be wanton or wilful.—Where a child is injured by being struck by a street car while crossing the track, it is not necessary that the acts of the company's servants should have been wanton or wilful to hold it liable for the injuries. Heinzle *v.* Metropolitan St. R. Co., 213 Mo. 102, 111 S. W. 536.

The necessity of complying with a time-table and preventing delay to passengers does not excuse a failure to take proper precautions to avert injury to a child on the track. Lott *v.* Sydney, etc., R. Co., 41 Nova Scotia 153.

73. Chicago City R. Co. *v.* Tuohy, 95 Ill. App. 314 [*affirmed* in 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270]; Rawitzer *v.* St. Paul City R. Co., 98 Minn. 294, 108 N. W. 271 (holding that where a motorneer discovers a boy in peril, it is his duty to use reasonable care to give the boy warning in time to avoid the accident, and, if he fails to exercise such care, such negligent failure will constitute wanton negligence); Butler *v.* Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877.

It is negligence for which the street railroad company is liable for a driver or motorman to run his car past a place where children are on or liable to be on the street, at a rapid rate of speed without giving any signal or warning. Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859; Hoon *v.* Beaver Valley Traction Co., 204 Pa. St. 369, 54 Atl. 270 (running near a schoolhouse, when children were on the street, at a rate of twenty-five miles an hour, without notice, by gong or otherwise); Camden Interstate R. Co. *v.* Broom, 139 Fed. 595, 71 C. C. A. 641.

But it is not negligence to fail to sound the gong or bell, when the car is proceeding at a moderate speed at a point where signals are not usually given, and where there is nothing to indicate that a child may be on or near the track. Perry *v.* Macon Consol. St. R. Co., 101 Ga. 400, 29 S. E. 304; Bouthillier *v.* Old Colony St. R. Co., 189 Mass. 537, 75 N. E. 960; Kline *v.* Electric Traction Co., 181 Pa. St. 276, 37 Atl. 522.

74. Chicago City R. Co. *v.* Tuohy, 95 Ill. App. 314 [*affirmed* in 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270]. See also Moss *v.* Philadelphia Traction Co., 180 Pa. St. 389, 36 Atl. 865.

Running a street car at a high and dangerous speed, whereby a child in the exercise of due care is run over and killed, renders the company liable to the parents, in the absence of contributory negligence on their part. Cytron *v.* St. Louis Transit Co., 205 Mo. 692, 104 S. W. 109.

75. *Indiana.*— Indianapolis St. R. Co. *v.* Schomberg, 164 Ind. 111, 72 N. E. 1041; Hammond, etc., Electric St. R. Co. *v.* Blockie, 40 Ind. App. 497, 82 N. E. 541 (failure to attempt to stop held negligent); Citizens St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

Missouri.— Cytron *v.* St. Louis Transit Co., 205 Mo. 692, 104 S. W. 109; Meeker *v.* Metropolitan St. R. Co., 178 Mo. 173, 77 S. W. 58.

New York.— Kitay *v.* Brooklyn, etc., R. Co., 23 N. Y. App. Div. 228, 48 N. Y. Suppl. 982; Huerzeler *v.* Central Crosstown R. Co., 1 Misc. 136, 20 N. Y. Suppl. 676 [*affirmed* in 139 N. Y. 490, 34 N. E. 1101].

Ohio.— Colter *v.* Cincinnati St. R. Co., 18 Ohio Cir. Ct. 382, 10 Ohio Cir. Dec. 865, negligent in not stopping.

Pennsylvania.—Tatarewicz *v.* United Traction Co., 220 Pa. St. 560, 69 Atl. 995, negligent in not stopping.

Texas.— Gutierrez *v.* Laredo Electric, etc., Co., (Civ. App. 1898) 45 S. W. 310, negligence in not stopping.

See 44 Cent. Dig. tit. "Street Railroads," § 202.

Where injuries to a child are caused by the motorman's reversing the car when an ordinarily prudent person would not have done so the company is liable. South Covington,

care he might have discovered the child or infirm person in time to avoid injuring him, and he fails to do so, the company is liable for the resulting injuries.[76] But a street railroad company is not required to guard against unexpected or thoughtless acts of such a child, and if it exercises reasonable and ordinary care in the operation of its cars to discover such child and uses all reasonable means within its power to avoid injury after discovering his peril, it is not liable for injuries which result from an unavoidable accident,[77] as where the child suddenly runs in front of or against the car, and is injured before it can be slackened or stopped, although every reasonable effort to do so is exercised,[78] or where he puts himself in such a

etc., St. R. Co. *v.* Herrklotz, 104 Ky. 400, 47 S. W. 265, 20 Ky. L. Rep. 750.

76. *District of Columbia.*— Reiners *v.* Washington, etc., R. Co., 9 App. Cas. 19.

Georgia.— Duncan *v.* Rome St. R. Co., 99 Ga. 98, 24 S. E. 953.

Indiana.—Citizens St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

Kentucky.— South Covington, etc., St. R. Co. *v.* Herrklotz, 104 Ky. 400, 47 S. W. 265, 20 Ky. L. Rep. 750.

Missouri.— Cytron *v.* St. Louis Transit Co., 205 Mo. 692, 104 S. W. 109; Czezewzka *v.* Benton-Bellefontaine R. Co., 121 Mo. 201, 25 S. W. 911; Welsh *v.* Jackson County Horse R. Co., 81 Mo. 466; O'Flaherty *v.* Union R. Co., 45 Mo. 70, 100 Am. Dec. 343.

New York.— Colabel *v.* Metropolitan St. R. Co., 74 N. Y. App. Div. 505, 77 N. Y. Suppl. 584 [*affirmed* in 173 N. Y. 627, 66 N. E. 1105]; Fullerton *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326 [*affirmed* in 170 N. Y. 592, 63 N. E. 1116]; Nugent *v.* Metropolitan St. R. Co., 17 N. Y. App. Div. 582, 45 N. Y. Suppl. 596; Goldstein *v.* Dry Dock, etc., R. Co., 35 Misc. 200, 71 N. Y. Suppl. 477; Hyland *v.* Yonkers R. Co., 4 N. Y. Suppl. 305 [*affirmed* in 119 N. Y. 612, 23 N. E. 1143]. *Compare* Stone *v.* Dry Dock, etc., R. Co., 115 N. Y. 104, 21 N. E. 712 [*reversing* 46 Hun 184].

Pennsylvania.—Jones *v.* United Traction Co., 201 Pa. St. 344, 50 Atl. 826.

Texas.—San Antonio Traction Co. *v.* Court, 31 Tex. Civ. App. 146, 71 S. W. 777.

Wisconsin.— Glettler *v.* Sheboygan Light, etc., Co., 130 Wis. 137, 109 N. W. 973.

See 44 Cent. Dig. tit. "Street Railroads," § 202.

77. *California.*— George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829 (injury to child playing on car left standing at end of line, by its being started by such playing); Roller *v.* Sutter St. R. Co., 66 Cal. 230, 5 Pac. 108 (holding that defendant is not liable for the death of a child, unless such death was caused by want of care on its part, and the person placed in charge of the child took all proper precautions for its safety).

Illinois.— West Chicago St. R. Co. *v.* Camp, 46 Ill. App. 503.

Indiana.— Bonham *v.* Citizens' St. R. Co., 158 Ind. 106, 62 N. E. 996 (injury to deaf-mute thirteen years old); Citizens St. R. Co. *v.* Carey, 56 Ind. 396.

Louisiana.— Cloud *v.* Alexandria Electric Railways' Co., 121 La. 1061, 46 So. 1017, 18 L. R. A. N. S. 371, holding that where a motorman saw a child playing on the sidewalk, and in the discharge of his duty to others turned his eyes in another direction, and a moment later saw the child running toward the track, but too late to enable him to stop the car, although he did all that could be done, he was guilty of no negligence in failing to see the child leave the sidewalk and run toward the car, so as to render the street railroad company liable for its death.

Maryland.— Siacik *v.* Northern Cent. R. Co., 92 Md. 213, 48 Atl. 149, child playing under car.

Minnesota.— Rawitzer *v.* St. Paul City R. Co., 98 Minn. 294, 108 N. W. 271, holding that if a motorman as soon as he saw a boy in peril on the track stopped the car in the shortest possible time and distance, and did all that he could under the circumstances to prevent an accident, the company was not liable for resulting injury to the boy.

New Jersey.— Graham *v.* Consolidated Traction Co., 64 N. J. L. 10, 44 Atl. 964, holding that if the motorman does everything in his power to stop the car when a boy starts to run across the street, he is not chargeable with negligence because of his failure to give signals.

New York.— Bulger *v.* Albany R. Co., 42 N. Y. 459 (injury to child getting under hind wheels); Frank *v.* Metropolitan St. R. Co., 44 N. Y. App. Div. 243, 60 N. Y. Suppl. 616; De Ioia *v.* Metropolitan St. R. Co., 37 N. Y. App. Div. 455, 56 N. Y. Suppl. 22 [*affirmed* in 165 N. Y. 664, 59 N. E. 1121]; Stabenau *v.* Atlantic Ave. R. Co., 15 N. Y. App. Div. 408, 44 N. Y. Suppl. 36; Lavin *v.* Second Ave. R. Co., 12 N. Y. App. Div. 381, 42 N. Y. Suppl. 512; Flynn *v.* Metropolitan St. R. Co., 10 N. Y. App. Div. 258, 41 N. Y. Suppl. 750; Baker *v.* Eighth-Ave. R. Co., 62 Hun 39, 16 N. Y. Suppl. 319; Griffith *v.* Metropolitan St. R. Co., 32 Misc. 289, 66 N. Y. Suppl. 801 [*reversed* on other grounds in 63 N. Y. App. Div. 86, 71 N. Y. Suppl. 406 (*reversed* in 171 N. Y. 106, 63 N. E. 808)]; Jaquinto *v.* Broadway, etc., R. Co., 2 Misc. 174, 21 N. Y. Suppl. 639.

Pennsylvania.— Pope *v.* United Traction Co., 30 Pittsb. Leg. J. N. S. 62.

Texas.— Dallas City R. Co. *v.* Beeman, 74 Tex. 291, 11 S. W. 1102.

See 44 Cent. Dig. tit. "Street Railroads," § 202.

78. *Delaware.*— Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906.

Georgia.— Perry *v.* Macon Consol. St. R. Co., 101 Ga. 400, 29 S. E. 304.

Illinois.— Rack *v.* Chicago City R. Co., 173

position of danger that he cannot be discovered by reasonable care in time to prevent an accident.[79]

7. CONTRIBUTORY NEGLIGENCE[80] — a. In General — (1) *CARE REQUIRED GENERALLY.* As a general rule it is the duty of a person going on or near a street railroad track to exercise such reasonable and ordinary care as would be exercised by a reasonably prudent person under the same or similar circumstances, to protect himself from injury,[81] and if he exercises such care, he is entitled to recover

Ill. 289, 50 N. E. 668, 44 L. R. A. 127 [*affirming* 69 Ill. App. 656]; Wilson *v.* Chicago City R. Co., 133 Ill. App. 433; Pfeiffer *v.* Chicago City R. Co., 96 Ill. App. 10.

Kentucky.— Louisville R. Co. *v.* Edelen, 123 Ky. 629, 96 S. W. 901, 29 Ky. L. Rep. 1125; Lexington R. Co. *v.* Vanladen, 107 S. W. 740, 32 Ky. L. Rep. 1047; Paducah St. R. Co. *v.* Adkins, 14 Ky. L. Rep. 425.

Louisiana.— Miller *v.* St. Charles St. R. Co., 114 La. 409, 38 So. 401; Campbell *v.* New Orleans City R. Co., 104 La. 183, 28 So. 985; Sciortino *v.* Crescent City R. Co., 49 La. Ann. 7, 21 So. 114; McLaughlin *v.* New Orleans, etc., R. Co., 48 La. Ann. 23, 18 So. 703; Gallaher *v.* Crescent City R. Co., 37 La. Ann. 288.

Massachusetts.— Douthillier *v.* Old Colony St. R. Co., 189 Mass. 537, 75 N. E. 960.

Michigan.— Rollo *v.* City Electric R. Co., 152 Mich. 77, 115 N. W. 727; Coessens *v.* Rapid R. Co., 136 Mich. 481, 99 N. W. 751.

Missouri.— Maschek *v.* St. Louis R. Co., 71 Mo. 276; Boland *v.* Missouri R. Co., 36 Mo. 484; Kennedy *v.* St. Louis R. Co., 43 Mo. App. 1.

New Jersey.— Baier *v.* Camden, etc., R. Co., 68 N. J. L. 42, 52 Atl. 215; Graham *v.* Consolidated Traction Co., 64 N. J. L. 10, 44 Atl. 964.

New York.— Stabenau *v.* Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, 63 Am. St. Rep. 698; Fenton *v.* Second Ave. R. Co., 126 N. Y. 625, 26 N. E. 967 [*reversing* 56 Hun 99, 9 N. Y. Suppl. 162]; Dorman *v.* Broadway R. Co., 117 N. Y. 655, 23 N. E. 162; Davidson *v.* Metropolitan St. R. Co., 75 N. Y. App. Div. 426, 78 N. Y. Suppl. 352; Hirschman *v.* Dry Dock, etc., R. Co., 46 N. Y. App. Div. 621, 61 N. Y. Suppl. 304; Adams *v.* Nassau Electric R. Co., 41 N. Y. App. Div. 334, 58 N. Y. Suppl. 543; Greenberg *v.* Third Ave. R. Co., 35 N. Y. App. Div. 619, 55 N. Y. Suppl. 135; Ehrman *v.* Nassau Electric R. Co., 23 N. Y. App. Div. 21, 48 N. Y. Suppl. 379; Ogier *v.* Albany R. Co., 88 Hun 486, 34 N. Y. Suppl. 867; Bello *v.* Metropolitan St. R. Co., 14 Misc. 279, 35 N. Y. Suppl. 831 [*affirmed* in 2 N. Y. App. Div. 313, 37 N. Y. Suppl. 969]; Wolf *v.* Houston, etc., R. Co., 2 N. Y. Suppl. 789.

Ohio.— Foy *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 151, 6 Ohio Cir. Dec. 396.

Pennsylvania.— Sontgen *v.* Kittanning, etc., St. R. Co., 213 Pa. St. 114, 62 Atl. 523; Leitzel *v.* Harrisburg Traction Co., 212 Pa. St. 608, 62 Atl. 102; Miller *v.* Union Traction Co., 198 Pa. St. 639, 48 Atl. 864; Hunter *v.* Consolidated Traction Co., 193 Pa. St. 557, 44 Atl. 578; Mulcahy *v.* Electric Traction Co., 185 Pa. St. 427, 39 Atl. 1106; Callary *v.* Easton Transit Co., 185 Pa. St. 176, 39 Atl. 813; Pletcher *v.* Scranton Traction Co., 185 Pa. St. 147, 39 Atl. 837; Funk *v.* Electric Traction Co., 175 Pa. St. 559, 34 Atl. 861; Fleishman *v.* Neversink Mountain R. Co., 174 Pa. St. 510, 34 Atl. 119; Flanagan *v.* People's Pass. R. Co., 163 Pa. St. 102, 29 Atl. 743; Chilton *v.* Central Traction Co., 152 Pa. St. 425, 25 Atl. 606.

Virginia.— Trumbo *v.* City St.-Car Co., 89 Va. 780, 17 S. E. 124.

Wisconsin.— Holdridge *v.* Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871, holding that where a child playing in the street suddenly and unexpectedly runs in front of a moving street car, and the motorman could not reasonably anticipate its action, his failure to anticipate it is not negligence.

See 44 Cent. Dig. tit. "Street Railroads," § 202.

Statement of rule.—A street railroad company is not bound to slacken or stop its car every time a young child, unattended by older persons, appears on the street some distance ahead; and if the motorman takes all the precautions that a reasonably prudent man would take under the circumstances, and the child, from a place apparently safe, suddenly rushes upon the track too late for the motorman to stop the car, there can be no recovery. Rollo *v.* City Electric R. Co., 152 Mich. 77, 115 N. W. 727.

79. Hearn *v.* St. Charles St. R. Co., 34 La. Ann. 160; Cords *v.* Third Ave. R. Co., 56 N. Y. Super. Ct. 319, 4 N. Y. Suppl. 439 (holding that where a car knocked down and injured a child, but there was no evidence that at any time was the child at a place where the driver could have seen him, and then have managed the horses so as to have avoided the accident, the company was not liable); Gould *v.* Union Traction Co., 190 Pa. St. 198, 42 Atl. 477; Kierzenkowski *v.* Philadelphia Traction Co., 184 Pa. St. 459, 39 Atl. 220.

80. Contributory negligence generally see NEGLIGENCE, 29 Cyc. 505 *et seq.*

Contributory negligence of passenger getting on or off car see CARRIERS, 6 Cyc. 643 *et seq.*

Reciprocal rights and duties of company and travelers on the street see *supra*, X, B, 3, j.

81. *Alabama.*— Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93.

Colorado.— Liutz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600.

Delaware.— Cox *v.* Wilmington City R. Co., 4 Pennew. 162, 53 Atl. 569; Brown *v.* Wilmington City R. Co., 1 Pennew. 332, 40 Atl. 936.

for injuries received through the company's negligence;[82] but if he fails to exercise reasonable care, whereby he is injured, he is guilty of contributory negligence which will preclude him from recovering for his injuries,[83] if such contributory negligence is a proximate cause of the injuries,[84] notwithstanding the company

Illinois.— West Chicago St. R. Co. *v.* Dougherty, 89 Ill. App. 362.

Kentucky.— Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484; South Covington, etc., St. R. Co. *v.* Besse, 108 S. W. 848, 33 Ky. L. Rep. 52, 16 L. R. A. N. S. 890, holding that travelers on the street must keep a lookout for cars, and exercise ordinary care to keep out of their way.

Missouri.— Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

New York.— Matulewicz *v.* Metropolitan St. R. Co., 107 N. Y. App. Div. 230, 95 N. Y. Suppl. 7.

Utah.— Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

Virginia.— Wilkie *v.* Richmond Traction Co., 105 Va. 290, 54 S. E. 43.

Washington.—Atherton *v.* Tacoma R., etc., Co., 30 Wash. 395, 71 Pac. 39.

See 44 Cent. Dig. tit. "Street Railroads," § 204.

A person standing near the curve of a street car track which is plainly visible to him is bound to step back a sufficient distance to avoid being struck by the overhang of the rear end of a car which he sees approaching the curve (Matulewicz *v.* Metropolitan St. R. Co., 107 N. Y. App. Div. 230, 95 N. Y. Suppl. 7; Kaufman *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 634, 88 N. Y. Suppl. 382), and the fact that he is standing on the sidewalk does not relieve him of this duty (Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613). But the mere fact that one injured by being run into by a horse car is on the sidewalk over which the car had to run on a curve to enter defendant's depot, does not constitute contributory negligence. O'Toole *v.* Central Park, etc., R. Co., 12 N. Y. Suppl. 347 [*affirmed* in 128 N. Y. 597, 28 N. E. 251].

A person standing in the street near a street railroad track because of a temporary blockade of the street by wagons is, as a matter of law, not guilty of contributory negligence, if struck by a car on such track. Hernandez *v.* Metropolitan St. R. Co., 36 Misc. (N. Y.) 793, 74 N. Y. Suppl. 898 [*reversing* 35 Misc. 853, 72 N. Y. Suppl. 1107].

Persons using streets on which street cars are operated are required to use reasonable care to avoid collisions by stopping, and, if need be, turning out and keeping off the tracks in the presence of danger. Wilman *v.* People's R. Co., 4 Pennew. (Del.) 260, 55 Atl. 332; Snyder *v.* People's R. Co., 4 Pennew. (Del.) 145, 53 Atl. 433; Brown *v.* Wilmington City R. Co., 1 Pennew. (Del.) 332, 40 Atl. 936. See also *infra*, X, B, 7, h, (IV).

82. Stastney *v.* Second Ave. R. Co., 61 N. Y. Super. Ct. 104, 18 N. Y. Suppl. 800 [*affirmed* in 138 N. Y. 609, 33 N. E. 1082].

83. *District of Columbia.*—Washington, etc., R. Co. *v.* Wright, 7 App. Cas. 295.

Illinois.— Webb *v.* Chicago City R. Co., 83 Ill. App. 565.

Louisiana.— Canedo *v.* New Orleans, etc., R. Co., 52 La. Ann. 2149, 28 So. 287.

Maryland.— State *v.* Cumberland, etc., Electric R. Co., 106 Md. 529, 68 Atl. 197, 16 L. R. A. N. S. 297, holding that one who in alighting from a wagon steps so near the track as to be struck by a car is guilty of contributory negligence in not looking for a car before so alighting.

Massachusetts.— Gilligan *v.* Boston El. R. Co., 194 Mass. 576, 80 N. E. 483; Jordan *v.* Old Colony St. R. Co., 188 Mass. 124, 74 N. E. 315, stooping over to pull down leg of trousers while standing on track.

Minnesota.— O'Brien *v.* St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805; Miller *v.* St. Paul City R. Co., 42 Minn. 454, 44 N. W. 533, standing between tracks after dark waiting to take passage on one car and paying no attention to car approaching on other track.

New Jersey.— Ward *v.* Newark, etc., Horse Car R. Co., 8 N. J. L. J. 23.

New York.— Gargano *v.* Forty-Second St., etc., R. Co., 94 N. Y. Suppl. 544 (holding that one who stands on a street car track, talking, with knowledge that a car is rapidly approaching, and without taking any precaution to avert injury to himself, is guilty of contributory negligence); Freidman *v.* Dry Dock, etc., R. Co., 3 N. Y. St. 557.

North Carolina.— Crenshaw *v.* Asheville, etc., St. R., etc., Co., 144 N. C. 314, 56 S. E. 945.

Pennsylvania.— Hoffman *v.* Philadelphia Rapid Transit Co., 214 Pa. St. 87, 63 Atl. 409, holding that there can be no recovery where plaintiff was struck by the fender at the rear of a car while it was backing around a curve, if plaintiff could have avoided the accident by the exercise of reasonable care.

Virginia.— Norfolk, etc., Traction Co. *v.* White, 109 Va. 172, 63 S. E. 418; Wilkie *v.* Richmond Traction Co., 105 Va. 290, 54 S. E. 43.

Washington.— Redford *v.* Spokane St. R. Co., 9 Wash. 55, 36 Pac. 1085.

See 44 Cent. Dig. tit. "Street Railroads," § 204.

Attempt to jump on moving car.—Where a person is injured while attempting to jump on a moving car he cannot recover whether he went out in the street with the intention to board the car, or whether the intention came to him after he was in the street. Leighton *v.* Chicago Consol. Traction Co., 235 Ill. 283, 85 N. E. 309. See also CARRIERS, 6 Cyc. 644.

84. Liutz *v.* Denver City Tramway Co., 43

itself is negligent,[85] and notwithstanding the injured person's actions are influenced by the actions of a third person.[86] If a person is familiar with the track and the conditions relative to the running of cars, he must avail himself of his knowledge in exercising ordinary care;[87] but he need not exercise extraordinary care, prudence, or foresight,[88] or take special precautions against unknown or unusual dangers;[89] nor is he guilty of contributory negligence precluding a recovery if, in an emergency, he does not pursue the best course to protect himself.[90] As regards an elevated railroad, a person on the surface of the street is not bound to wait until a train on such road has passed, or until no train is passing overhead, before going under such structure;[91] nor is it necessarily contributory negligence for a person to look up as an elevated train is passing.[92] The owner of an animal injured by a street car may be guilty of contributory negligence in permitting such animal to get in the way of the car.[93]

(II) *Reliance Upon Precautions of Company.* A person on a public street ordinarily has, subject to certain qualifications, an equal right with the street railroad company to use that part of the street occupied by its tracks,[94] and in exercising care for his own protection he has a right to act on the assumption that the company will exercise ordinary care in managing its road and operating its cars,[95] unless he has knowledge to the contrary,[96] and a failure to anticipate

Colo. 58, 95 Pac. 600. See also *infra*, X, B, 7, a, (III).

85. Webb *v.* Chicago City R. Co., 83 Ill. App. 565. See also *infra*, X, B, 7, a, (III).

86. Webb *v.* Chicago City R. Co., 83 Ill. App. 565, holding that a person influenced in his action by the call of someone on the street, so that he stops and stands in the middle of a street car track immediately in front of an approaching train, is guilty of contributory negligence precluding a recovery for injuries caused by his being struck.

87. Weldon *v.* People's R. Co., (Del. 1906) 65 Atl. 589; Norfolk, etc., Traction Co. *v.* White, 109 Va. 172, 63 S. E. 418.

88. Indianapolis St. R. Co. *v.* Walton, 29 Ind. App. 368, 64 N. E. 630; Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; Roberts *v.* Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184; Hanlon *v.* Milwaukee Electric R.. etc., Co., 118 Wis. 210, 95 N. W. 100.

89. Manning *v.* West End. St. R. Co., 166 Mass. 230, 44 N. E. 135 (holding that one walking along the sidewalk, or momentarily stopping near an electric car, is not bound to take special precautions against possible injury from the slipping of a switch stick from the hands of the conductor of the car while he is attempting, with such stick, to free the trolley); Loder *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 591, 82 N. Y. Suppl. 957.

90. South Chicago City R. Co. *v.* Atton, 137 Ill. App. 364 (holding that it is not material whether plaintiff who was injured in a collision was thrown by the collision from the car and injured, or, when the collision was imminent, he jumped from the car to avoid injury and was thereby injured); O'Toole *v.* Central Park, etc., R. Co., 12 N. Y. Suppl. 347 [*affirmed* in 128 N. Y. 597, 28 N. E. 251]; Gibbons *v.* Wilkes-Barre, etc., St. R. Co., 155 Pa. St. 279, 26 Atl. 417. See also Miller *v.* Union R. Co., 191 N. Y. 77, 83 N. E. 583.

91. Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446.

92. Walsh *v.* Boston El. R. Co., 192 Mass. 423, 78 N. E. 451.

93. Little Rock Traction, etc., Co. *v.* Hicks, 79 Ark. 248, 96 S. W. 385 (holding, however, that permitting a cow to run at large outside the "stock limit" is not contributory negligence, and hence does not preclude a recovery from a street railroad company for injuries to the cow); Little Rock R., etc., Co. *v.* Newman, 77 Ark. 599, 92 S. W. 864 (holding that it was not contributory negligence to allow a hog, killed outside the stock limit, to run at large).

94. See *supra*, X, B, 3, j.

95. *Indiana.*— Union Traction Co. *v.* Barnett, 31 Ind. App. 467, 67 N. E. 205, holding that where a street railroad company, after tearing up a brick paved street to lay its tracks, replaces the paving, a pedestrian has a right to presume that the street is safe, and, in the exercise of due care, to act upon such presumption.

Massachusetts.—Kerr *v.* Boston El. R. Co., 188 Mass. 434, 74 N. E. 669.

Missouri.— Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140.

New York.— Frank J. Lennon Co. *v.* New York City R. Co., 108 N. Y. Suppl. 995.

Rhode Island.— Oates *v.* Union R. Co., 27 R. I. 499, 63 Atl. 675, that will not violate ordinance as to speed.

See 44 Cent. Dig. tit. "Street Railroads," § 204. See also *supra*, X, B, 3, j, (I), (B); *infra*, X, B, 7, f, (I).

Overloading cars.— Travelers on public thoroughfares traversed by street cars have the right to presume that the street car company will not negligently overload its cars, thereby imperiling the safety of travelers by losing control of the cars. Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115.

96. Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140.

and guard against negligence of the company is not necessarily negligence on the part of a person injured thereby;[97] and it has been held that if the company by its own negligence throws a person off his guard or puts him in peril, the conduct of such person will not be regarded as contributory negligence under any circumstances.[98] But the right to act on such an assumption does not entitle a person to rely entirely upon a proper performance by the company of its duties, and relieve him from exercising reasonable care and precaution for his own protection, and hence his failure to exercise such care and precaution is not excused by the fact that he relied upon the company's exercising ordinary care,[99] or by the company's failure to take a certain precaution, if he did not rely upon such precaution.[1]

(III) *EFFECT OF CONTRIBUTORY NEGLIGENCE.* Negligence on the part of a person injured on or near a street railroad track, which continues up to the time of his injury and forms a proximate cause, without which the injury would not have happened, precludes a recovery for such injury,[2] and in the absence of a statutory provision otherwise it precludes a recovery, notwithstanding negligence on the part of the company concurs in causing the injury,[3] as in

97. Grass *v.* Ft. Wayne, etc., Traction Co., 42 Ind. App. 395, 81 N. E. 514; Louisville, etc., Traction Co. *v.* Short, 41 Ind. App. 570, 83 N. E. 265; O'Brien *v.* St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805; Polacci *v.* Interurban St. R. Co., 90 N. Y. Suppl. 341.

98. Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451; Gibbons *v.* Wilkes-Barre, etc., St. R. Co., 155 Pa. St. 279, 26 Atl. 417.

A street railroad company cannot, by its own failure to comply with its rules and customs made for the benefit of the public, place one who is rightfully on a street in a hazardous position, and then claim that in extricating himself he did not act with the prudence which one would use under ordinary circumstances. Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451.

99. Rundgren *v.* Boston, etc., St. R. Co., 201 Mass. 156, 87 N. E. 189; Liddy *v.* St. Louis R. Co., 40 Mo. 506.

1. Beirne *v.* Lawrence, etc., St. R. Co., 197 Mass. 173, 83 N. E. 359, holding that where it is not shown that plaintiff knew or relied on the use of searchlights by the street car company on its cars, it is no excuse for plaintiff's failure to discover the car in time to avoid being struck by it that it was only equipped with an incandescent light on the dashboard, instead of a searchlight.

The failure of the company to sound the bell or gong does not excuse a person's failure to exercise ordinary care, if he saw the car in time to avoid injury. Elgin, etc., Traction Co. *v.* Brown, 129 Ill. App. 62; McCabe *v.* Interurban St. R. Co., 49 Misc. (N. Y.) 251, 97 N. Y. Suppl. 353.

2. *California.*— See Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734.

Colorado.— Liutz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600, stepping in front of car proximate cause.

Delaware.— Davis *v.* People's R. Co., 5 Pennew. 253, 64 Atl. 70, stepping on track in front of car.

Indiana.— Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478 (stepping in front of car); De Lon *v.* Kokomo City St. R. Co., 22 Ind. App. 377, 53 N. E. 847 (holding that where the driver of a sprinkling cart saw a street car approaching, but erroneously thought he could cross the track before it reached him, there being no sudden or unexpected peril, his act was the proximate cause of his injury).

Kentucky.— Louisville R. Co. *v.* Gaar, (1908) 112 S. W. 1130.

Louisiana.— Heebe *v.* New Orleans, etc., R., etc., Co., 110 La. 970, 35 So. 251.

Maine.— Warren *v.* Bangor, etc., R. Co., 95 Me. 115, 49 Atl. 609.

Massachusetts.— Miller *v.* Boston, etc., St. R. Co., 197 Mass. 535, 83 N. E. 990.

Missouri.— Cicardi *v.* St. Louis Transit Co., 108 Mo. App. 462, 83 S. W. 980; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141; Hanselman *v.* St. Louis, etc., R. Co., 88 Mo. App. 123.

Nebraska.— Harris *v.* Lincoln Traction Co., 78 Nebr. 681, 111 N. W. 580.

Tennessee.— Memphis St. R. Co. *v.* Wilson, 108 Tenn. 618, 69 S. W. 265.

Canada.— Danger *v.* London St. R. Co., 30 Ont. 493.

See 44 Cent. Dig. tit. "Street Railroads," § 204 *et seq.*

3. *Alabama.*—Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798.

California.— Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238.

Connecticut.— Rohloff *v.* Fair Haven, etc., R. Co., 76 Conn. 689, 58 Atl. 5.

Delaware.— Heinel *v.* People's R. Co., 6 Pennew. 428, 67 Atl. 173; Foulke *v.* Wilmington City R. Co., 5 Pennew. 363, 60 Atl. 973; Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906; Cox *v.* Wilmington City R. Co., 4 Pennew. 162, 53 Atl. 569.

District of Columbia.— Hurdle *v.* Washington, etc., R. Co., 8 App. Cas. 120.

Kentucky.—Lexington St. R. Co. *v.* Strader, 89 S. W. 158, 28 Ky. L. Rep. 157.

Louisiana.— Downey *v.* Baton Rouge Electric, etc., Co., 122 La. 481, 47 So. 837;

failing to keep a proper lookout for travelers,[4] or in running at an excessive or unlawful rate of speed,[5] or without giving a proper signal or warning,[6] unless it wilfully, wantonly, or recklessly causes the injury.[7] But where the injured person's negligent act is after the accident, although it in some way contributes to the injury but only remotely, there may be a recovery.[8] So also, where the injured person's negligence is a mere condition before the accident, and the injury could be prevented by the exercise of reasonable care and prudence on the part of the company after his peril is discovered or should be discovered, his negligence is a remote cause, and the company's negligence the proximate cause of the injury, and hence there may be a recovery therefor.[9] Under the statutes, in some jurisdictions, where an injured person's injury is due to his own negligence he cannot

Schwartz *v.* New Orleans, etc., R. Co., 110 La. 534, 34 So. 667.

Maine.— Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267.

Missouri.— Brockschmidt *v.* St. Louis, etc., R. Co., 205 Mo. 435, 103 S. W. 964, 12 L. R. A. N. S. 345; Oates *v.* Metropolitan St. R. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141.

New York.— Kaufman *v.* Interurban St. R. Co., 43 Misc. 634, 88 N. Y. Suppl. 382; McKelvey *v.* Twenty-Third St. R. Co., 5 Misc. 424, 26 N. Y. Suppl. 711.

Ohio.— Northern Ohio Traction Co. *v.* Drown, 28 Ohio Cir. Ct. 735; Cleveland, etc., R. Co. *v.* Nixon, 21 Ohio Cir. Ct. 736, 12 Ohio Cir. Dec. 79.

Tennessee.— Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123.

United States.— Denver City Tramway Co. *v.* Cobb, 164 Fed. 41, 90 C. C. A. 459.

See 44 Cent. Dig. tit. "Street Railroads," § 204 *et seq.*

The violation by a street railroad company of an ordinance requiring its motormen and conductors to keep a vigilant watch for persons on or moving toward its track, and on the first appearance of danger to such persons to stop the car in the shortest time and space possible, will not authorize a recovery by one injured, where he was guilty of negligence, which, with the failure of the company's employees to obey the ordinance, contributed to and caused the injury. Murphy *v.* Lindell R. Co., 153 Mo. 252, 54 S. W. 442.

4. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798; Austin Dam, etc., R. Co. *v.* Goldstein, 18 Tex. Civ. App. 704, 45 S. W. 600.

5. *District of Columbia.*— Hurdle *v.* Washington, etc., R. Co., 8 App. Cas. 120.

Kentucky.— Louisville R. Co. *v.* Gaar, (1908) 112 S. W. 1130.

Louisiana.— Heebe *v.* New Orleans, etc., R., etc., Co., 110 La. 970, 35 So. 251.

New York.— Fancher *v.* Fonda, etc., R. Co., 111 N. Y. App. Div. 4, 97 N. Y. Suppl. 666.

Virginia.— Foreman *v.* Norfolk, etc., Co., 106 Va. 770, 56 S. E. 805.

Wisconsin.— Holdridge *v.* Mendenhall, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871.

Canada.— Danger *v.* London St. R. Co., 30 Ont. 493.

6. Fry *v.* St. Louis Transit Co., 111 Mo. App. 324, 85 S. W. 960; Foreman *v.* Norfolk, etc., Co., 106 Va. 770, 56 S. E. 805; Danger *v.* London St. R. Co., 30 Ont. 493.

7. Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032; Garth *v.* Alabama Traction Co., 148 Ala. 96, 42 So. 627; Rohloff *v.* Fairhaven, etc., R. Co., 76 Conn. 689, 58 Atl. 5; Brockschmidt *v.* St. Louis, etc., R. Co., 205 Mo. 435, 103 S. W. 964, 12 L. R. A. N. S. 345; McNamara *v.* Metropolitan St. R. Co., 133 Mo. App. 645, 114 S. W. 50 (holding that to run a cable train in a public street, in a populous section of a city, without keeping a close lookout, partakes of the nature of wantonness, and, when injury follows, engrosses the entire field of culpability, and eliminates contributory negligence as a factor in the production of the injury); Harris *v.* Lincoln Traction Co., 78 Nebr. 681, 111 N. W. 580. See also *infra*, X, B, 8, b.

8. Lowery *v.* Manhattan R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12.

9. *Alabama.*—Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798 (holding that where a motorman failed to keep a lookout for travelers, and a traveler whose peril and inability to extricate himself therefrom would have been discovered by the motorman, had he kept a lookout, the proximate cause of the injury was the motorman's failure to keep a lookout); Randle *v.* Birmingham R., etc., Co., 158 Ala. 532, 48 So. 114; Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032; Garth *v.* Alabama Traction Co., 148 Ala. 96, 42 So. 627.

California.— Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238.

Connecticut.— Murphy *v.* Derby St. R. Co., 73 Conn. 249, 47 Atl. 120, failure to sound bell.

Delaware.— Cox *v.* Wilmington City R. Co., 4 Pennew. 162, 53 Atl. 569.

Illinois.— Chicago City R. Co. *v.* Cooney, 95 Ill. App. 471 [*affirmed* in 196 Ill. 466, 63 N. E. 1029].

Indiana.— Indianapolis Traction, etc., Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. N. S. 143; Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478.

recover from the street railroad company therefor;[10] but where both he and the company are at fault in causing the injury he may recover, but his damages will be diminished in proportion to the amount of fault attributable to him,[11] and hence he cannot recover at all unless the company's fault is greater than his own.[12]

b. Violation of Statute, Ordinance, or Rule of Company. A person may also be guilty of contributory negligence precluding a recovery, notwithstanding negligence on the part of the company, where at the time he is injured he is violating a statute or ordinance,[13] as by driving at a prohibited speed,[14] or riding a bicycle in violation of an ordinance limiting the rate of speed thereof,[15] unless such injuries are caused by wantonness or recklessness on the part of the company.[16] But the mere fact that a person violates a rule or regulation of the company does not show contributory negligence or relieve the company from exercising due care to avoid injuring him while lawfully on the street or highway.[17]

c. Persons Working in Street. A person working in a public street on or near street railroad tracks must exercise ordinary care to watch for and avoid injury from passing cars and other dangers attendant upon the operation of the road, the degree of care required depending upon his familiarity with the running of the cars and other circumstances of the particular case; and if he fails to exercise such care, whereby he is injured, he is guilty of contributory negligence precluding

Louisiana.— Schwartz *v.* New Orleans, etc., R. Co., 110 La. 534, 34 So. 667.

Maine.— Butler *v.* Rockland, etc., R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267.

Missouri.— Zaletuchin *v.* Metropolitan St. R. Co., 127 Mo. App. 577, 106 S. W. 548; Williams *v.* Metropolitan St. R. Co., 114 Mo. App. 1, 89 S. W. 59; Waddell *v.* Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765; Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70; Kolb *v.* St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050; Hanselman *v.* St. Louis, etc., R. Co., 88 Mo. App. 123.

Virginia.— Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

Washington.— Roberts *v.* Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

See 44 Cent. Dig. tit. "Street Railroads," § 204 *et seq.* See also *infra*, X, B, 8, *a*.

The mere fact that a person is negligent in going on a track in close proximity to an approaching car does not, as a matter of law, show that his conduct was the proximate cause of his being struck by the car. Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616.

Aggravation of injury by third person.— Where the negligence of the company is the direct cause of the injury, and it is aggravated by improper treatment by medical attendants, through no fault of the injured party or lack of care on her part in selecting attendants, the mere fact of such aggravation will not preclude a recovery for the injury. Chicago City R. Co. *v.* Cooney, 95 Ill. App. 471 [*affirmed* in 196 Ill. 466, 63 N. E. 1029].

10. Macon R., etc., Co. *v.* Carger, 4 Ga. App. 477, 61 S. E. 882, construing Civ. Code (1895), § 2322.

11. Thomas *v.* Gainesville, etc., Electric R. Co., 124 Ga. 748, 52 S. E. 801 (holding also that defendant is not relieved, although plaintiff may have in some way contributed to the injury); Macon R., etc., Co. *v.* Carger, 4 Ga. App. 477, 61 S. E. 882; Saunders *v.* City, etc., R. Co., 99 Tenn. 130, 41 S. W. 1031 (holding that any negligence of plaintiff that contributes to the injury by a collision with a street car as a remote cause must be considered in mitigation of damages otherwise allowable).

The rule that plaintiff's contributory negligence will not bar his action, but only mitigate his damages, although applicable in actions against steam railroad companies for injuries resulting from non-compliance with statutory precautions for the prevention of accidents, does not apply in a common-law action for personal injuries resulting from the collision of an electric street car with a buggy at a street crossing. Saunders *v.* City, etc., R. Co., 99 Tenn. 130, 41 S. W. 1031. See also Macon, etc., St. R. Co. *v.* Holmes, 103 Ga. 655, 30 S. E. 563.

12. Macon R., etc., Co. *v.* Carger, 4 Ga. App. 477, 61 S. E. 882.

For construction of similar statutes see RAILROADS, 33 Cyc. 843.

13. Banks *v.* Highland St. R. Co., 136 Mass. 485, holding that where an employee of a telegraph company which has not obtained the license for running its wires, provided for by statute, is injured while climbing a pole to attach a wire, by a horse car running against the wire and dragging him from the pole, he cannot recover unless the driver is guilty of wanton recklessness. See also Connolly *v.* Knickerbocker Ice Co., 114 N. Y. 104, 21 N. E. 101, 11 Am. St. Rep. 617.

14. McGrath *v.* City, etc., R. Co., 93 Ga. 312, 20 S. E. 317.

15. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238.

16. Banks *v.* Highland St. R. Co., 136 Mass. 485.

17. Platt *v.* Forty-Second St., etc., R. Co., 2 Hun (N. Y.) 124.

a recovery.[18] But it has been held that one engaged in a public service and obliged to work near the track, such as a public street sweeper, is not required to exercise as high a degree of care in looking and listening for approaching cars as is an ordinary pedestrian on the street.[19]

d. Persons Walking on Track. As a general rule a person has a right to walk on or near a street railroad track in a public street or highway, but in doing so he must exercise reasonable care and prudence to avoid injuries,[20] as in looking

18. *California.*— Kramm *v.* Stockton Electric R. Co., 3 Cal. App. 606, 86 Pac 738, 903, holding that a person engaged in spreading gravel on a street was not guilty of contributory negligence as a matter of law in going on the tracks, just before he was struck, in order to let a street sprinkler pass.

Iowa.— Eddy *v.* Cedar Rapids, etc., R. Co., 98 Iowa 626, 67 N. W. 676, crossing repairer held guilty of contributory negligence in placing a plank too near the track and being injured thereby by a passing car.

Massachusetts.— Hanley *v.* Boston El. R. Co., 201 Mass. 55, 87 N. E. 197 (workmen in trench held not guilty of contributory negligence as a matter of law in grasping rail and having his hand run over); Kelly *v.* Boston El. R. Co., 197 Mass. 420, 83 N. E. 865, 15 L. R. A. N. S. 282 (workman laying stone on a street held guilty of contributory negligence).

Michigan.— Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186 (holding that a railroad yard-master is negligent in backing a train across a street without flagging, and cannot recover for injuries received in a collision with a street car); Lyons *v.* Bay Cities Consol. R. Co., 115 Mich. 114, 73 N. W. 139 (holding that a deaf street sweeper was guilty of negligence in failing to look for an approaching car which was in plain sight for two thousand feet, when he knew that cars were passing frequently over the track).

Minnesota.— Hafner *v.* St. Paul City R. Co., 73 Minn. 252, 75 N. W. 1048.

Missouri.— Davies *v.* People's R. Co., 159 Mo. 1, 59 S. W. 982 (unloading wagon); Davies *v.* People's R. Co., 67 Mo. App. 598 (unloading wagon).

New York.— Volosko *v.* Interurban St. R. Co., 190 N. Y. 206, 82 N. E. 1090, 15 L. R. A. N. S. 117 [*reversing* 113 N. Y. App. Div. 747, 99 N. Y. Suppl. 484] (standing on hub unloading wagon held under the circumstances contributory negligence as a matter of law); Crowley *v.* Metropolitan St. R. Co., 24 N. Y. App. Div. 101, 48 N. Y. Suppl. 863 (working at wagon backed against curb); Hennessey *v.* Forty-Second St., etc., R. Co., 103 N. Y. App. Div. 384, 92 N. Y. Suppl. 1058 [*reversing* 44 Misc. 198, 88 N. Y. Suppl. 728]; O'Connor *v.* Union R. Co., 67 N. Y. App. Div. 99, 73 N. Y. Suppl. 606; Dipaolo *v.* Third Ave. R. Co., 55 N. Y. App. Div. 566, 67 N. Y. Suppl. 421; McKelvey *v.* Twenty-Third St. R. Co., 5 Misc. 424, 26 N. Y. Suppl. 711.

Pennsylvania.— Ferguson *v.* Philadelphia Traction Co., 9 Pa. Co. Ct. 147, person at work in a street in front of a building in course of erection held guilty of contributory negligence in placing himself in a situation from which escape was obviously dangerous.

See 44 Cent. Dig. tit. "Street Railroads," § 205.

Where a person employed in sweeping a street crossing over which several street car lines pass, and with which he is familiar, steps between the tracks in getting out of the way of a north-bound car, and is struck by a south-bound car, he is guilty of contributory negligence. Daly *v.* Detroit Citizens' St. R. Co., 105 Mich. 193, 63 N. W. 73.

One working in a trench under a street car track is not entitled to rely on the motorman of an approaching car giving him warning of such approach, or on his sense of hearing alone, and is guilty of contributory negligence precluding a recovery if he permits his mind to become so engrossed in his work that he fails to take proper precautions, either by looking or listening to ascertain the approach of a car. Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509. See also Burns *v.* Second Ave. R. Co., 21 N. Y. App. Div. 521, 48 N. Y. Suppl. 523.

One engaged in laying gas pipe about three feet from the track of a street railroad, not owned by his employer, in using such track to walk on while performing his duties, must be regarded as an ordinary traveler, and is bound to exercise ordinary care for his own safety. Young *v.* Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142.

A telegraph lineman on a pole is entitled to rely on his foreman to notify him of impending danger, and therefore is not guilty of contributory negligence as a matter of law, if while on the pole he is struck by the roof of a passing car. Ahearn *v.* Boston El. R. Co., 194 Mass. 350, 80 N. E. 217.

19. McGrath *v.* Metropolitan St. R. Co., 47 Misc. (N. Y.) 104, 93 N. Y. Suppl. 519. See also O'Connor *v.* Union R. Co., 67 N. Y. App. Div. 99, 73 N. Y. Suppl. 606 (holding that a street sweeper working on street car tracks is not guilty of contributory negligence in not looking back of him all the time for a car, but need only exercise that degree of care which an ordinarily prudent man would exercise under like circumstances); Dipaolo *v.* Third Ave. R. Co., 55 N. Y. App. Div. 566, 67 N. Y. Suppl 421 (holding that a sweeper has a right to assume that some notice of the approach of a car will be given to him).

20. Shea *v.* Potrero, etc., R. Co., 44 Cal. 414; Indianapolis Traction, etc., Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. N. S. 143 (holding that a pedestrian is entitled to use the space between the rails for passage, using ordinary care for his own safety, and

and listening for an approaching car,[21] and in getting out of the way so as not to make it stop or slow up;[22] but he is not required to stay off the track in order to avoid injuries which might possibly result from the carelessness or negligence of the company,[23] and if he is injured by such carelessness or negligence while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part.[24] But if on the other hand he fails to exercise ordinary care on his part, whereby he is injured, he is guilty of contributory negligence precluding a recovery,[25] although the company is negligent,[26] unless it could avoid the accident by proper care after discovering his peril, without endangering its passengers and employees.[27] Thus a person is guilty of contributory negligence where while walking along the track of a street railroad he sees or by reasonable care could see an approaching car in time to get or keep out of the way, but fails to do so,[28] although the walking there is better than on the

is not bound to assume that he will be run into by a car approaching him from the rear at an excessive rate of speed in broad daylight, on a straight track, without warning); Goff *v.* St. Louis Transit Co., 199 Mo. 694, 98 S. W. 49 (holding that a pedestrian is not guilty of contributory negligence as a matter of law in walking at night on a street railroad track); Mt. Adams, etc., R. Co. *v.* Cavagna, 6 Ohio Cir. Ct. 606, 3 Ohio Cir. Dec. 608 (must exercise care commensurate with danger). See also *supra*, X, B, 3, j.

The degree of care required of persons walking along ordinary railroads is not required of persons walking along street railroad tracks. Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343. See also Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103, 88 N. E. 967.

21. Carlson *v.* Lynn, etc., R. Co., 172 Mass. 388, 52 N. E. 520; Adolph *v.* Central Park, etc., R. Co., 76 N. Y. 530 (holding that it is the duty of a traveler upon a street on which is a street railroad to listen to whatever signal there may be from an approaching car, and to look behind him from time to time, so that if the car is near he may turn off and allow it to pass without undue slackening of ordinary speed); Neary *v.* Citizens' R., etc., Co., 110 N. Y. App. Div. 769, 97 N. Y. Suppl. 420.

22. Adolph *v.* Central Park, etc., R. Co., 76 N. Y. 530; Neary *v.* Citizens' R., etc., Co., 110 N. Y. App. Div. 769, 97 N. Y. Suppl. 420.

23. Shea *v.* Potrero, etc., R. Co., 44 Cal. 414.

24. Shea *v.* Potrero, etc., R. Co., 44 Cal. 414.

25. Chicago City R. Co. *v.* Lewis, 5 Ill. App. 242 (holding that where deceased at the time he was run over by defendant's car, which was moving at its usual rate of speed, was badly intoxicated, and walking along defendant's tracks midway between two streets on a dark and stormy night, he was guilty of gross negligence); Smith *v.* Crescent City R. Co., 47 La. Ann. 833, 17 So. 302; Childs *v.* New Orleans City R. Co., 33 La. Ann. 154 (stepping out of way of one car and in front of another); Dooley *v.* Union R. Co., 106 N. Y. App. Div. 397, 94 N. Y. Suppl. 635 (walking close to track in dark); Mey *v.* Seattle Electric Co., 47 Wash. 497, 92 Pac. 283.

Where a man marching in a procession is run into by a street car, the same rule of contributory negligence applies as in the case of an ordinary traveler on the street. Brown *v.* Broadway, etc., R. Co., 50 N. Y. Super. Ct. 106.

Where a person walks on the tracks at a point which is not a public street, and there gets his foot caught in a safety device and is injured by a car, he is guilty of contributory negligence, preventing a recovery unless defendant's servants could, by proper care after discovering the danger, avoid the accident without endangering its passengers and employees. Williams *v.* Metropolitan St. R. Co., 114 Mo. App. 1, 89 S. W. 59.

Walking over trestle.—A passenger on a street car in the night-time, who is a stranger and has been carried past his destination, and is directed by the conductor to go back along the track, but to go around a trestle, which is dangerous, is guilty of negligence if he goes on the trestle, and cannot recover for an injury received by being struck there by a passing car. Camden, etc., R. Co. *v.* Young, 60 N. J. L. 193, 37 Atl. 1013.

An error of judgment and miscalculation on the part of one walking in dangerous proximity to a street car track as to the distance he can travel before an approaching car, which he sees and watches during the progress of his journey, will reach him, are insufficient to establish his right to recover, much less negligence on the part of the street railroad company, even in the absence of signals of the approach of the car. Sullivan *v.* New York City R. Co., 91 N. Y. Suppl. 325.

26. Childs *v.* New Orleans City R. Co., 33 La. Ann. 154. See also *supra*, X, B, 7, a, (III).

27. Williams *v.* Metropolitan St. R. Co., 114 Mo. App. 1, 89 S. W. 59.

28. *Maryland.*— Garvick *v.* United Rys., etc., 101 Md. 239, 61 Atl. 138.

Massachusetts.—Judge *v.* Elkins, 183 Mass. 229, 66 N. E. 708, walking on bridge.

New York.— Donnelly *v.* Brooklyn City R. Co., 109 N. Y. 16, 15 N. E. 733 (holding that where a person in passing at night along a wide avenue in the center of which are two tracks is injured by colliding with an engine, whose headlight he sees when it is about fifty

street or highway;[29] or where he walks on the track knowing that a car is due, although he frequently looks behind for it.[30]

e. Bicycle Riders. A bicycle rider on a public street in the exercise of ordinary care has the right to assume that a street railroad company has performed or will properly perform its duty;[31] but where a person rides his wheel between or so near to street railroad tracks as to be in danger from passing cars, without looking and listening for the approach of cars from in front or behind,[32] and without exercising reasonable care to turn out for such a car;[33] or where he rides between tracks which are close together while two cars are passing;[34] or rides at a prohibited speed;[35] or heedlessly or carelessly attempts to ride across in front of an approaching car, which he sees or hears, or which he should see or hear,[36] as where he heedlessly or care-

feet distant, but does nothing except to call to the engineer to stop, he is guilty of contributory negligence *per se*); Jager *v.* Coney Island, etc., R. Co., 84 Hun 307, 32 N. Y. Suppl. 304; Enk *v.* Brooklyn City R. Co., 64 Hun 634, 19 N. Y. Suppl. 130; Thal *v.* Metropolitan St. R. Co., 37 Misc. 794, 76 N. Y. Suppl. 918.

Pennsylvania.— Warner *v.* People's St. R. Co., 141 Pa. St. 615, 21 Atl. 737; Dix *v.* Ridge Ave. Pass. R. Co., 15 Pa. Super. Ct. 350.

Rhode Island.— Vizacchero *v.* Rhode Island Co., 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188.

Texas.— San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64, drunken person engrossed in thought.

See 44 Cent. Dig. tit. "Street Railroads," § 206.

29. Adams *v.* Boston, etc., R. Co., 191 Mass. 486, 78 N. E. 117 (holding that where deceased was killed by being struck by a street car while he was walking on the track without looking, the fact that the walking was better there than in the highway was no excuse for his assuming such a dangerous place, when he could have walked on the highway with safety); Penman *v.* McKeesport, etc., R. Co., 201 Pa. St. 247, 50 Atl. 973 [*affirming* 31 Pittsb. Leg. J. N. S. 264] (walking on track at night to avoid mud on the ground); Warner *v.* People's St. R. Co., 141 Pa. St. 615, 21 Atl. 737.

30. Gilmartin *v.* Lackawanna Valley Rapid Transit Co., 186 Pa. St. 193, 40 Atl. 322.

31. Kokomo R., etc., Co. *v.* Studebaker, 41 Ind. App. 11, 83 N. E. 260 (holding that one has the right to ride his bicycle on a public street at night, using ordinary care, and to assume that a street railroad company has done its duty in placing warning signals on an obstruction made by it in the street); Kerr *v.* Boston El. R. Co., 188 Mass. 434, 74 N. E. 669.

32. *California.*— Hamlin *v.* Pacific Electric R. Co., 150 Cal. 776, 89 Pac. 1109; Everett *v.* Los Angeles Consol. Electric R. Co., 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, contributory negligence *per se*.

Indiana.— Robards *v.* Indianapolis St. R. Co., 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953, holding that where one riding a bicycle so near a street car track as to be in danger from passing cars fails to look behind him, although he knows that the cars come frequently from such direction, and there is nothing to prevent him from riding further from the track, except a roughness in the asphalt pavement, and he is in full possession of his senses, and has control of his bicycle, he is guilty of contributory negligence if he is struck by a car.

Michigan.— Baldwin *v.* Heraty, 136 Mich. 15, 98 N. W. 739.

New Jersey.— Harbison *v.* Camden, etc., R. Co., 74 N. J. L. 252, 65 Atl. 868 [*affirmed* in 76 N. J. L. 824, 71 Atl. 1134]. But *compare* Zolpher *v.* Camden, etc., R. Co., 69 N. J. L. 417, 55 Atl. 249, holding that it is not necessarily negligent for a traveler on a bicycle to stop on the track in front of an approaching car without looking behind him, when the usual warning of bell or gong is not given by the motorman.

Ohio.— Cleveland, etc., R. Co. *v.* Nixon, 21 Ohio Cir. Ct. 736, 12 Ohio Cir. Dec. 79, riding on track in front of moving car twenty feet away.

Pennsylvania.— Bacon *v.* Consolidated Traction Co., 30 Pittsb. Leg. J. N. S. 431. See also Taylor *v.* Union Traction Co., 6 Pa. Dist. 365.

But *compare* Rooks *v.* Houston, etc., R. Co., 10 N. Y. App. Div. 98, 41 N. Y. Suppl. 824, holding that a bicycle rider on a cable road is under no obligation to look behind him for the approach of a car, which gives no signal of its approach, and the rumble and noise of which he hears only just as he is struck.

33. Dechene *v.* Greenfield, etc., St. R. Co., 188 Mass. 423, 74 N. E. 600.

34. Gagne *v.* Minneapolis St. R. Co., 77 Minn. 171, 79 N. W. 671, holding that one who rides a bicycle in a seven-foot space between the up and down tracks on which street cars run at intervals of from six to ten minutes, the handle bars being from twenty-two to twenty-four inches wide, and the space, when two cars are passing, being only four feet two inches, is negligent, as a matter of law.

35. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238.

36. *Illinois.*— Chicago North Shore St. R. Co. *v.* McCarthy, 66 Ill. App. 667.

Indiana.— Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436, holding, however, that under the circumstances plaintiff was not guilty of contributory negligence

lessly rides from behind one car on to the adjacent track in front of an approaching car,[37] he is guilty of contributory negligence barring a recovery, unless by the exercise of ordinary care the company could have avoided the rider's injury after discovering his peril.[38] But one who is unaccustomed to riding a bicycle is not guilty of contributory negligence so as to preclude a recovery, where he loses control of the bicycle, and is injured through the negligent operation of a car.[39]

f. Persons Crossing Track — (I) *CARE REQUIRED IN GENERAL* — (A) *General Rules.* Ordinarily it is not negligence *per se* to attempt to cross a street railroad track on which a car is approaching some distance away,[40] or to cross between two standing cars;[41] but it is the duty of a person crossing, whether at a street crossing or at a point between intersecting streets, to exercise reasonable and ordinary care to learn of the approach of cars and keep out of the way and avoid being injured,[42] the degree of care required depending upon the apparent

as a matter of law in failing to hear the noise of the car by which he was struck.

Massachusetts.—Bartlett *v.* Worcester Consol. St. R. Co., 189 Mass. 360, 75 N. E. 706, holding that where a person riding a bicycle when about to cross a street car track looks to ascertain whether a car is coming, and, his view of an approaching car being obstructed, takes his chances, and while crossing the track is struck by the car, he is guilty of contributory negligence.

Michigan.—Bennett *v.* Detroit Citizens' St. R. Co., 123 Mich. 692, 82 N. W. 518.

New York.—Lurie *v.* Metropolitan St. R. Co., 18 Misc. 81, 40 N. Y. Suppl. 1129.

Pennsylvania.—McCracken *v.* Consolidated Traction Co., 201 Pa. St. 378, 50 Atl. 830, 88 Am. St. Rep. 814.

Duty to stop.—A bicycle rider is not bound as a matter of law to stop, alight from his wheel, and look intently for cars before attempting to cross, in order to relieve himself of the charge of contributory negligence (Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436); nor is he negligent as a matter of law if he does not stop and wait until a car, which he sees approaching some distance away, has passed (Brooks *v.* International R. Co., 112 N. Y. App. Div. 555, 98 N. Y. Suppl. 765 [*affirmed* in 187 N. Y. 574, 80 N. E. 1105]).

37. Barrett *v.* Columbia R. Co., 20 App. Cas. (D. C.) 381; Medcalf *v.* St. Paul City R. Co., 82 Minn. 18, 84 N. W. 633; Furlong *v.* Metropolitan St. R. Co., 103 N. Y. App. Div. 215, 92 N. Y. Suppl. 1008 (contributory negligence as a matter of law); Cardonner *v.* Metropolitan St. R. Co., 38 N. Y. App. Div. 597, 56 N. Y. Suppl. 500.

38. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238. See also *infra*, X, B, 8.

39. Louisville R. Co. *v.* Blaydes, 52 S. W. 960, 21 Ky. L. Rep. 668, 51 S. W. 820, 21 Ky. L. Rep. 480.

40. *California.*—Campbell *v.* Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624; Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734.

Illinois.—West Chicago St. R. Co. *v.* Dedloff, 92 Ill. App. 547.

Indiana.—Saylor *v.* Union Traction Co., 40 Ind App. 381, 81 N. E. 94.

Iowa.—McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459.

Michigan.—McQuisten *v.* Detroit Citizens' St. R. Co., 147 Mich. 67, 110 N. W. 118, holding that, although one can see an approaching car if in the exercise of common prudence he reasonably thinks there is time to cross safely, he is not chargeable with negligence in attempting to do so.

New York.—Vandenbout *v.* Rochester R. Co., 129 N. Y. App. Div. 844, 114 N. Y. Suppl. 760 (holding that, while pedestrians are bound to use care, they may properly cross a street car track, although a car is known to be approaching, if there is reason to suppose the car will slow down and give time for the crossing); Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393; McDermott *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 214, 85 N. Y. Suppl. 807; Du Frane *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 298, 82 N. Y. Suppl. 1; O'Callaghan *v.* Metropolitan St. R. Co., 69 N. Y. App. Div. 574, 75 N. Y. Suppl. 171 [*affirmed* in 174 N. Y. 521, 66 N. E. 1112]; Cohen *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 165, 71 N. Y. Suppl. 268 [*affirmed* in 170 N. Y. 588, 63 N. E. 1116]; Schwartzbaum *v.* Third Ave. R. Co., 60 N. Y. App. Div. 274, 69 N. Y. Suppl. 1095; Frank *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 100, 68 N. Y. Suppl. 537 [*affirmed* in 171 N. Y. 666, 64 N. E. 1121].

Pennsylvania.—Callahan *v.* Philadelphia Traction Co., 184 Pa. St. 425, 39 Atl. 222.

Texas.—San Antonio Traction Co. *v.* Levyson, (Civ. App. 1908) 113 S. W. 569.

Washington.—Kalberg *v.* Seattle Electric Co., 37 Wash. 612, 79 Pac. 1101.

See 44 Cent. Dig. tit. "Street Railroads," § 207.

41. Fitzgerald *v.* New York City R. Co., 92 N. Y. Suppl. 732.

42. *California.*—Kernan *v.* Market St. R. Co., 137 Cal. 326, 70 Pac. 81.

Georgia.—Cain *v.* Macon Consol. St. R. Co., 97 Ga. 298, 22 S. E. 918.

Indiana.—Indianapolis St. R. Co. *v.* Walton, 29 Ind. App. 368, 64 N. E. 630.

Louisiana.—Ponsano *v.* St. Charles St. R. Co., 52 La. Ann. 245, 26 So. 820.

Massachusetts.—Galbraith *v.* West End St. R. Co., 165 Mass. 572, 43 N. E. 501.

distance and speed of the approaching car and the other facts and circumstances of the particular case, and being such care as would be exercised by a reasonably prudent person under the same or similar circumstances.[43] In exercising ordinary care such person has a right to act upon the assumption that the street railroad company will exercise due care on its part;[44] and although a higher degree

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887; O'Brien *v.* St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805.

Missouri.— Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834.

New Jersey.— Newark Passenger R. Co. *v.* Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374.

New York.— Tully *v.* New York City R. Co., 127 N. Y. App. Div. 688, 111 N. Y. Suppl. 919; Fenton *v.* Second Ave. R. Co., 56 Hun 99, 9 N. Y. Suppl. 162 [*reversed* on the facts in 126 N. Y. 625, 26 N. E. 967, 4 Silv. App. 380]; McQuade *v.* Metropolitan St. R. Co., 17 Misc. 154, 39 N. Y. Suppl. 335.

Pennsylvania.— Lumis *v.* Philadelphia Traction Co., 181 Pa. St. 268, 37 Atl. 414 (falling into trench); Haney *v.* Pittsburgh, etc., Traction Co., 159 Pa. St. 395, 28 Atl. 235.

Utah.— Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838; Burgess *v.* Salt Lake City R. Co., 17 Utah 406, 53 Pac. 1013, holding that a person, in crossing a street having street car tracks thereon, is bound to exercise the same degree of care which it is incumbent upon the company to exercise.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 552, 61 S. E. 821, 16 L. R. A. N. S. 1123.

See 44 Cent. Dig. tit. "Street Railroads," § 207.

That a signal to cross is given by the company's watchman to a person about to cross does not relieve the latter from exercising ordinary care for his own protection. Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834; Haney *v.* Pittsburgh, etc., Traction Co., 159 Pa. St. 395, 28 Atl. 235.

43. *Illinois.*— West Chicago St. R. Co. *v.* Dedloff, 92 Ill. App. 547; West Chicago St. R. Co. *v.* Nilson, 70 Ill. App. 171.

Indiana.— Saylor *v.* Union Traction Co., 40 Ind. App. 381, 81 N. E. 94.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459, charged with knowledge of speed of cars permitted by ordinance.

Minnesota.— Russell *v.* Minneapolis St. R. Co., 83 Minn. 304, 86 N. W. 346, holding that if a person has no actual knowledge of the danger causing the injury, and cannot by the exercise of reasonable care discover it, he cannot be said to be guilty of contributory negligence.

New York.— Hicks *v.* Nassau Electric R. Co., 47 N. Y. App. Div. 479, 62 N. Y. Suppl. 597; Read *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 503, 53 N. Y. Suppl. 209; Baxter *v.* Second Ave. R. Co., 3 Rob. 510, 30 How. Pr. 219.

Pennsylvania.— McGovern *v.* Union Traction Co., 192 Pa. St. 344, 43 Atl. 949.

Virginia.— Newport News, etc., Electric Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900 (going over crossing obstructed with snow); Newport News, etc., Electric Co. *v.* Bradford, 99 Va. 117, 37 S. E. 807.

West Virginia.—Ashley *v.* Kanawha Valley Traction Co., 60 W. Va. 306, 55 S. E. 1016.

Wisconsin.— Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833; Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

See 44 Cent. Dig. tit. "Street Railroads," § 207.

That the one crossing and a car were both approaching a platform erected for the accommodation of passengers, where the car would presumably stop, is a matter for consideration in determining whether he acted as a reasonably prudent person. McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459.

44. *Idaho.*— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254.

Indiana.— Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436, holding that a pedestrian crossing a street railroad track at night is entitled to assume that the street cars will not be run at a reckless rate of speed over street crossings, and without any headlight.

Iowa.— Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451, that car will not come at a prohibited rate of speed.

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887, holding that a passenger alighting from a car and passing behind it to cross another track may assume that the motorman of a car approaching thereon will keep a sharp lookout for such persons will have his car under such control that he can stop it upon the appearance of danger, and will give the usual signals to protect travelers.

Missouri.— Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602 (that car would not be run at prohibited speed); Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Houck-Hoerr Bakery Co. *v.* United Railways Co., 127 Mo. App. 190, 104 S. W. 1137 (holding that a person about to cross a street car track has a right to presume that an approaching car is moving at a lawful rate of speed, unless he can ascertain to the contrary); Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115 (holding that a traveler on a public street has a right to presume that the operators of approaching street cars are exercising and will continue to exercise reasonable care in approaching a crossing); Grout *v.* Central Electric R. Co., 125 Mo. App. 552, 102 S. W. 1026 (does not absolve him from

of care is required in crossing an electric railroad than in crossing a horse railroad,[45] as high a degree of care is not required in crossing a street railroad as in crossing an ordinary steam railroad.[46]

(B) *Applications.* A person is not guilty of contributory negligence from the mere fact that he attempts to cross a street railroad track in front of an approaching car where under ordinary conditions he would have sufficient time to cross in safety, as where the car is some distance away at the time,[47] but he is prevented

the duty of attending to his own safety); Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140.

New Jersey.— Slater *v.* North Jersey St. R. Co., 75 N. J. L. 890, 69 Atl. 163, 15 L. R. A. N. S. 840, holding that, in crossing a public street at a corner where a pavement crossing had been laid, plaintiff could assume that it was safe unless warned to the contrary, and, when using the crossing, was not guilty of contributory negligence because, on observing an approaching street car, to avoid danger, she stepped on a portion of the crossing covered with oil put there by defendant as a track lubricant, and was thrown down and injured.

New York.— Vandenbout *v.* Rochester R. Co., 129 N. Y. App. Div. 844, 114 N. Y. Suppl. 760 (that approaching car would slow down at crossing); Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393 (that car would not be run in disregard of safety of pedestrians crossing the street); McEntee *v.* Metropolitan St. R. Co., 110 N. Y. App. Div. 673, 97 N. Y. Suppl. 476 (no right to assume that the car would be so controlled as to enable crossing in safety); Beers *v.* Metropolitan St. R. Co., 104 N. Y. App. Div. 96, 93 N. Y. Suppl. 278; Toohey *v.* Interurban St. R. Co., 102 N. Y. App. Div. 296, 92 N. Y. Suppl. 427 (no right to assume that the car would be controlled and the speed slackened); Thompson *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 10, 85 N. Y. Suppl. 181 (no right to assume that because a car has slowed up it will stop, or its speed be so controlled as to give time to cross the track in safety); Bertsch *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 228, 74 N. Y. Suppl. 238 [*affirmed* in 173 N. Y. 634, 66 N. E. 1104]; Frank *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 100, 68 N. Y. Suppl. 537 [*affirmed* in 171 N. Y. 666, 64 N. E. 1121]; Wiley *v.* Smith, 25 N. Y. App. Div. 351, 49 N. Y. Suppl. 934 (that street car tracks are in a reasonably safe condition at a particular point, where there is no defined crossing); Mittleman *v.* New York City R. Co., 56 Misc. 599, 107 N. Y. Suppl. 108 (holding that a person crossing in front of a street car while at a standstill has a right to assume that it will not be started or so operated as to strike her until she has had a reasonable opportunity to pass the point of danger). See also Geisendorfer *v.* Union R. Co., 124 N. Y. App. Div. 597, 109 N. Y. Suppl. 68.

Ohio.— Schausten *v.* Toledo Consol. St. R. Co., 18 Ohio Cir. Ct. 691, 7 Ohio Cir. Dec. 389.

Utah.— Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

Canada.— Toronto R. Co. *v.* Gosnell, 24 Can. Sup. Ct. 582 [*affirming* 21 Ont. App. 553].

See 44 Cent. Dig. tit. "Street Railroads," § 207.

Reliance upon precautions of company generally see *supra*, X, B, 7, a, (II).

One crossing at a place other than a crossing is bound to use reasonable care not to obstruct the passage of the car unnecessarily, but he has a right to rely on a delay of the car in its progress to enable him to cross, if it becomes necessary, and contributory negligence cannot be predicated on a mere mistake of judgment on his part. Lawson *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 307, 57 N. Y. Suppl. 997 [*affirmed* in 166 N. Y. 589, 59 N. E. 1124].

45. Hawthorne *v.* Cincinnati St. R. Co., 2 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 385; Hall *v.* Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. Rep. 726.

46. *California.*— Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734; Kramm *v.* Stockton Electric R. Co., 3 Cal. App. 606, 86 Pac. 738, 903, holding that, although ordinary care is required on the part of persons crossing the tracks of both street and commercial railroads, what is ordinary care is widely different in the two cases.

Indiana.— Union Traction Co. *v.* Howard, (App. 1909) 87 N. E. 1103, 88 N. E. 967; Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436; Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343.

Iowa.— Perjue *v.* Citizens' Electric Light, etc., Co., 131 Iowa 710, 109 N. W. 280.

Maine.— Marden *v.* Portsmouth, etc., R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300.

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887; Smith *v.* Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16.

Nebraska.— Stewart *v.* Omaha, etc., St. R. Co., 83 Nebr. 97, 118 N. W. 1106.

Utah.— Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

See 44 Cent. Dig. tit. "Street Railroads," § 207.

But see Burns *v.* Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244; McNab *v.* United R., etc., Co., 94 Md. 719, 51 Atl. 421.

47. Hovarka *v.* St. Louis Transit Co., 191 Mo. 441, 90 S. W. 1142 (car nearly two hundred feet away); Cohen *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 165, 71 N. Y. Suppl. 268 [*affirmed* in 170 N. Y. 588, 63 N. E. 1116]; Wells *v.* Brooklyn City R. Co.,

from crossing in safety by some unforeseen and unavoidable occurrence or accident,[48] as by reason of his slipping and falling on the track,[49] or by reason of the car's running at an excessive or unlawful rate of speed,[50] unless he has knowledge of such speed before attempting to cross, in which case he must take the speed into consideration;[51] nor is he guilty of contributory negligence where he makes a mere error of judgment or miscalculation as to his ability or manner of crossing,[52] or merely because his crossing involves the slackening of the speed of the car,[53] or where he is compelled to attempt to cross by an emergency.[54] But where a person heedlessly or carelessly steps upon or attempts to cross a street railroad track in front of a car which he sees or hears, or which by ordinary care he could see or hear, approaching dangerously near,[55] as where he attempts to hurry across

58 Hun (N. Y.) 389, 12 N. Y. Suppl. 67; Duffy *v.* Interurban St. R. Co., 52 Misc. (N. Y.) 177, 101 N. Y. Suppl. 767; Lhowe *v.* Third Ave. R. Co., 14 Misc. (N. Y.) 612, 36 N. Y. Suppl. 463; Wolf *v.* City R. Co., 50 Oreg. 64, 85 Pac. 620, 91 Pac. 460. See also *supra*, X, B, 7, f, (I), (A).

48. Mentz *v.* Second Ave. R. Co., 3 Abb. Dec. (N. Y.) 274 [*affirming* 2 Rob. 356]; Aaron *v.* Second Ave. R. Co., 2 Daly (N. Y.) 127 (catching foot in hole in track); Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833.

49. Fenton *v.* Second Ave. R. Co., 56 Hun (N. Y.) 99, 9 N. Y. Suppl. 162 [*reversed* on the facts in 126 N. Y. 625, 26 N. E. 967, 4 Silv. App. 380]; Baxter *v.* Second Ave. R. Co., 3 Rob. (N. Y.) 510, 30 How. Pr. 219; Lhowe *v.* Third Ave. R. Co., 14 Misc. (N. Y.) 612, 36 N. Y. Suppl. 463; Friedman *v.* Dry-Dock, etc., R. Co., 11 N. Y. Suppl. 429. But *compare* Gilliland *v.* Middlesex, etc., Traction Co., 67 N. J. L. 542, 52 Atl. 693.

50. Wells *v.* Brooklyn City R. Co., 58 Hun (N. Y.) 389, 12 N. Y. Suppl. 67. See also Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833.

51. McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Franco *v.* Brooklyn Heights R. Co., 108 N. Y. App. Div. 14, 95 N. Y. Suppl. 476 (where the velocity of the car is such as to indicate to a prudent person that there is danger in crossing); Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833.

52. McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062; Mauer *v.* Brooklyn Heights R. Co., 87 N. Y. App. Div. 119, 84 N. Y. Suppl. 76; Gildea *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 528, 69 N. Y. Suppl. 568 [*affirmed* in 171 N. Y. 660, 64 N. E. 1121]; Lawson *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 307, 57 N. Y. Suppl. 997 [*affirmed* in 166 N. Y. 589, 59 N. E. 1124]; Tesch *v.* Milwaukee Electric R. etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

53. Robkin *v.* Joline, 114 N. Y. Suppl. 98 (holding that, where the motorman has ample chance to see plaintiff in attempting to cross the track, plaintiff cannot be charged with contributory negligence because such crossing involves the lessening of the speed of the car); Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618. *Compare* Du Frane *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 298, 82 N. Y. Suppl. 1.

54. See Hornstein *v.* Rhode Island Co., 26 R. I. 387, 59 Atl. 71.

55. *California.*— Higgins *v.* Los Angeles R. Co., 5 Cal. App. 748, 91 Pac. 344.

District of Columbia.— Hurdle *v.* Washington, etc., R. Co., 8 App. Cas. 120, attempt to cross between cars approaching in opposite directions.

Georgia.— Macon, etc., St. R. Co. *v.* Holmes, 103 Ga. 655, 30 S. E. 563.

Illinois.— Elgin, etc., Traction Co. *v.* Brown, 129 Ill. App. 62.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459.

Louisiana.— Knoker *v.* Canal, etc., R. Co., 52 La. Ann. 806, 27 So. 279; Webster *v.* New Orleans City, etc., R. Co., 51 La. Ann. 299, 25 So. 77.

Maryland.— United Rys., etc., Co. *v.* Watkins, 102 Md. 264, 62 Atl. 234.

Massachusetts.— Lundgren *v.* Boston, etc., St. R. Co., 201 Mass. 156, 87 N. E. 189 (holding that plaintiff cannot invoke the doctrine of sudden peril to extricate himself from a position into which he has come through his own negligence in walking so fast that he cannot stop when he sees a car approaching, especially where it is shown that there was no necessity for hurry); Madden *v.* Boston El. R. Co., 194 Mass. 491, 80 N. E. 447.

Minnesota.— Russell *v.* Minneapolis St. R. Co., 83 Minn. 304, 86 N. W. 346.

Missouri.— Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Grout *v.* Central Electric R. Co., 125 Mo. App. 552, 102 S. W. 1026; Fanning *v.* St. Louis Transit Co., 103 Mo. App. 151, 78 S. W. 62.

Nebraska.— Wood *v.* Omaha, etc., St. R. Co., 84 Nebr. 282, 120 N. W. 1121, 22 L. R. A. N. S. 228.

New Jersey.— Schwanewede *v.* North Hudson County R. Co., 67 N. J. L. 449, 51 Atl. 696.

New York.— Long *v.* Union R. Co., 122 N. Y. App. Div. 564, 107 N. Y. Suppl. 401; Robinson *v.* Union R. Co., 121 N. Y. App. Div. 553, 106 N. Y. Suppl. 203; Thompson *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 10, 85 N. Y. Suppl. 181; Du Frane *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 298, 82 N. Y. Suppl. 1 (holding that if it would be apparent to a person of ordinary prudence that the car will overtake him unless the speed is slackened, it is negligent for a per-

in front of such a car,[56] whereby he is run into and injured, he is guilty of contributory negligence precluding a recovery, in some cases as a matter of law,[57] although the company is also guilty of contemporaneous negligence,[58] and although he has an equal right to the use of the crossing or street.[59]

(II) *DUTY TO STOP, LOOK, AND LISTEN* — (A) *General Rules.* As a general rule it is the duty of a person about to cross a street railroad track to exercise ordinary care and diligence according to the circumstances, to look and listen for approaching cars in time to avoid an accident,[60] and, if he sees an approaching

son to proceed, although he has an equal right with the company to the use of the street); Freeman *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 521, 81 N. Y. Suppl. 828; Lawson *v.* Metropolitan St. R. Co., 36 Misc. 824, 74 N. Y. Suppl. 885; Williamson *v.* Metropolitan St. R. Co., 29 Misc. 324, 60 N. Y. Suppl. 477; May *v.* Metropolitan St. R. Co., 26 Misc. 748, 57 N. Y. Suppl. 277; Mullen *v.* Joline, 111 N. Y. Suppl. 776; Lazar *v.* New York City R. Co., 94 N. Y. Suppl. 9.

North Carolina.— Davis *v.* Durham Traction Co., 141 N. C. 134, 53 S. E. 617.

Pennsylvania.— Meyer *v.* Pittsburg, etc., Traction Co., 189 Pa. St. 414, 42 Atl. 41, attempt to cross between cars approaching from opposite directions.

Rhode Island.— Hornstein *v.* Rhode Island Co., 26 R. I. 387, 59 Atl. 71. See also Heeran *v.* Rhode Island Co., (1906) 67 Atl. 447.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123.

See 44 Cent. Dig. tit. "Street Railroads," § 207.

Where a traveler sees that the motorman is not going to respect his right to cross the street first, he must wait, or he will be guilty of contributory negligence if he is hurt. Schwanewede *v.* North Hudson County R. Co., 67 N. J. L. 449, 51 Atl. 696.

56. Griffith *v.* Denver Consol. Tramway Co., 14 Colo. App. 504, 61 Pac. 46; Schwartz *v.* Crescent-City R. Co., 30 La. Ann. 15; Heying *v.* United Railways', etc., Co., 100 Md. 281, 59 Atl. 667; Watson *v.* Mound City St. R. Co., 13 Mo. 246, 34 S. W. 573.

57. *California.*—Bailey *v.* Market St. Cable R. Co., 110 Cal. 320, 42 Pac. 914.

Colorado.—Griffith *v.* Denver Consol. Tramway Co., 14 Colo. App. 504, 61 Pac. 46.

Minnesota.— O'Brien *v.* St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805.

New Jersey.— Glasco *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 185, 68 Atl. 1074; Brown *v.* Elizabeth, etc., R. Co., 68 N. J. L. 618, 54 Atl. 824; Gilliland *v.* Middlesex, etc., Traction Co., 67 N. J. L. 542, 52 Atl. 693.

New York.— McEntee *v.* Metropolitan St. R. Co., 110 N. Y. App. Div. 673, 97 N. Y. Suppl. 476; Lawson *v.* Metropolitan St. R. Co., 36 Misc. 824, 74 N. Y. Suppl. 885.

Oregon.— Wolf *v.* City R. Co., 45 Oreg. 446, 72 Pac. 329, 78 Pac. 668.

Pennsylvania.— Walsh *v.* Hestonville, etc., Pass. R. Co., 194 Pa. St. 570, 45 Atl 322

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123

Canada.— Gallinger *v.* Toronto R. Co., 8 Ont. L. Rep. 698, 4 Ont. Wkly. Rep. 522.

See 44 Cent. Dig. tit. "Street Railroads," § 207.

58. *Illinois.*— Elgin, etc., Traction Co. *v.* Brown, 129 Ill. App. 62, failure to ring gong.

Indiana.— Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486, failure to give signals.

Missouri.— Watson *v.* Mound City St. R. Co., 133 Mo. 246, 34 S. W. 573.

Nebraska.— Wood *v.* Omaha, etc., St. R. Co., 84 Nebr. 282, 120 N. W. 1121, 22 L. R. A. N. S. 228, failure to sound gong.

New York.— McEntee *v.* Metropolitan St. R. Co., 110 N. Y. App. Div. 673, 97 N. Y. Suppl. 476; McQuade *v.* Metropolitan St. R. Co., 17 Misc. 154, 39 N. Y. Suppl. 335.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123, undue speed.

See 44 Cent. Dig. tit. "Street Railroads," § 207.

59. Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123. And see *supra*, X, B, 3, j.

60. *Alabama.*—Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798.

Delaware.— Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906; Wilman *v.* People's R. Co., 4 Pennew. 260, 55 Atl. 332.

District of Columbia.— Capital Traction Co. *v.* Lusby, 12 App. Cas. 295.

Georgia.— Columbus R. Co. *v.* Peddy, 120 Ga. 589, 48 S. E. 149.

Illinois.— Scanlan *v.* Chicago Union Traction Co., 127 Ill. App. 406.

Indiana.— Young *v.* Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142.

Kansas.— Kansas City-Leavenworth R. Co. *v.* Gallagher, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344; Burns *v.* Metropolitan St. R. Co., 66 Kan. 188, 71 Pac. 244.

Louisiana.— Dieck *v.* New Orleans City, etc., R. Co., 51 La. Ann. 262, 25 So. 71; Hoelzel *v.* Crescent City R. Co., 49 La. Ann. 1302, 22 So. 330, 38 L. R. A. 708, holding that there is greater reason for the application of this rule at night.

Maine.— Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047.

Missouri.— Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115; Rissler *v.* St. Louis Transit Co., 113 Mo. App. 120, 87 S. W. 578; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140, before stepping on the track.

New Jersey.— Hageman *v.* North Jersey St.

car in close proximity, to stop until it passes,[61] although he need not exercise the same high degree of care in this respect as is required in crossing a steam railroad.[62] He must look and listen at the time and place which will be reasonably effective to afford him information of the presence of an approaching car,[63] and ordinarily must look and listen in both directions,[64] and must continue to look and listen until he is safely across; [65] and if he goes along heedlessly with his head covered

R. Co., 75 N. J. L. 939, 70 Atl. 1101 [*affirming* 74 N. J. L. 279, 65 Atl. 834]; Van Ness *v.* North Jersey St. R. Co., 75 N. J. L. 273, 67 Atl. 1027 [*reversed* on other grounds in 77 N. J. L. 551, 73 Atl. 509].

New York.— Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434; Ring *v.* Nassau Electric R. Co., 115 N. Y. App. Div. 674, 101 N. Y. Suppl. 389.

Pennsylvania.— McCauley *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 354 (holding that it is always his duty to look, and if the street is obstructed to listen); Smith *v.* Electric Traction Co., 6 Pa. Dist. 471.

Texas.— Citizens' R. Co. *v.* Holmes, 19 Tex. Civ. App. 266, 46 S. W. 116.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123.

Wisconsin.— Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833; Lightfoot *v.* Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30.

See 44 Cent. Dig. tit. "Street Railroads," § 208.

A rule of the company that an approaching car must not pass, when another car is standing at a street crossing, does not relieve a person crossing the track of the duty of looking for an approaching car. Doyle *v.* Albany R. Co., 5 N. Y. App. Div. 601, 39 N. Y. Suppl. 440.

61. Dieck *v.* New Orleans City, etc., R. Co., 51 La. Ann. 262, 25 So. 71. See also *supra*, X, B, 7, f, (I), (A).

62. *District of Columbia.*— Capital Traction Co. *v.* Lusby, 12 App. Cas. 295.

Indiana.— Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478. See also Young *v.* Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142.

Maine.— Warren *v.* Bangor, etc., R. Co., 95 Me. 115, 49 Atl. 609.

Massachusetts.— Finnick *v.* Boston, etc., St. R. Co., 190 Mass. 382, 77 N. E. 500.

Minnesota.— Morris *v.* St. Paul City R. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. N. S. 598; Holmgren *v.* Twin City Rapid Transit Co., 61 Minn. 85, 63 N. W. 270; Shea *v.* St. Paul City R. Co., 50 Minn. 395, 52 N. W. 902.

New Jersey.— Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122.

New York.— Mitchell *v.* Third Ave. R. Co., 62 N. Y. App. Div. 371, 70 N. Y. Suppl. 1118; Read *v.* Brooklyn Heights R. Co., 32 N. Y. App. Div. 503, 53 N. Y. Suppl. 209.

Pennsylvania.— McCauley *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 354; Trout *v.* Altoona, etc., Electric R. Co., 13 Pa. Super. Ct. 17.

Washington.—Niemyer *v.* Washington Water Power Co., 45 Wash. 170, 88 Pac. 103.

United States.— Detroit United R. Co. *v.* Nichols, 165 Fed. 289, 91 C. C. A. 257.

See 44 Cent. Dig. tit. "Street Railroads," § 208. And see, generally, RAILROADS, 33 Cyc. 831 *et seq.*, 1000 *et seq.*

63. Tully *v.* New York City R. Co., 127 N. Y. App. Div. 688, 111 N. Y. Suppl. 919 (holding that a pedestrian before leaving a sidewalk curb to cross a street car track is bound to look out for approaching cars); Gilmore *v.* United Traction Co., 26 Pa. Super. Ct. 97; Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; Denver City Tramway Co. *v.* Cobb, 164 Fed. 41, 90 C. C. A. 459.

A traveler is not required to look the whole length of the visible track to see if a car is coming, but only far enough to warrant an ordinarily prudent person under like circumstances to conclude that no car is so near as to endanger his safety in crossing. Marden *v.* Portsmouth, etc., R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300; Newark Pass. R. Co. *v.* Block, 65 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374.

64. *California.*— Kernan *v.* Market St. R. Co., 137 Cal. 326, 70 Pac. 81.

Michigan.— McGee *v.* Consolidated St. R. Co., 102 Mich. 107, 60 N. W. 293, 47 Am. St. Rep. 507, 26 L. R. A. 300.

Minnesota.— Holmgren *v.* Twin City Rapid Transit Co., 61 Minn. 85, 63 N. W. 270.

New York.— Trauber *v.* Third Ave. R. Co., 80 N. Y. App. Div. 37, 80 N. Y. Suppl. 231.

Pennsylvania.— Ehrisman *v.* East Harrisburg City Pass. R. Co., 150 Pa. St. 180, 24 Atl. 596, 17 L. R. A. 448.

Wisconsin.— Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

See 44 Cent. Dig. tit. "Street Railroads," 208.

65. *Massachusetts.*— Kelly *v.* Wakefield, etc., St. R. Co., 175 Mass. 331, 56 N. E. 285, holding that one approaching a street railroad track obscured by a dense growth of trees for a portion of the distance to the place of crossing is not relieved of the duty to look and listen for cars on reaching the crossing, by reason of having previously looked from a point commanding a view of the further end of the growth of trees.

Michigan.— Doherty *v.* Detroit Citizens' St. R. Co., 118 Mich. 209, 76 N. W. 377, 80 N. W. 36.

Missouri.—Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144, holding that it is the duty of a person crossing to devote his attention to his line of travel during the

or ears muffled,[60] or otherwise allows his attention to become so absorbed that he gives no heed to his danger by reason whereof he is injured, he is guilty of contributory negligence precluding a recovery,[67] notwithstanding negligence on the part of the company,[68] unless the company wilfully or wantonly inflicts the injury [69] or fails to exercise ordinary care to avoid injuring him after discovering his peril.[70] But ordinarily a person is not required to stop to look and listen before crossing,[71] except where the circumstances, as where the view is temporarily obstructed, are such as to require stopping in order to properly look or listen.[72] As a general rule, however, the duty to look and listen is not an absolute duty, and it is not negligence *per se* to fail to look and listen for an approaching car before crossing;[73] but such failure is negligence only when the situation and

time he is within the range of passing cars, and to look and listen until he is safely across, and that it is not sufficient merely to look before going on the track.

New Jersey.— Jewett *v.* Paterson R. Co., 62 N. J. L. 424, 41 Atl. 707.

New York.— Knapp *v.* Metropolitan St. R. Co., 103 N. Y. App. Div. 252, 92 N. Y. Suppl. 1071; Conley *v.* Albany R. Co., 22 N. Y. App. Div. 321, 47 N. Y. Suppl. 738; Curtin *v.* Metropolitan St. R. Co., 22 Misc. 83, 48 N. Y. Suppl. 581 [*affirming* 21 Misc. 788, 47 N. Y. Suppl. 1134]; Glynn *v.* New York City R. Co., 110 N. Y. Suppl. 836, holding that the mere fact that at the time a pedestrian left the curb he thought he had time to cross ahead of a street car did not relieve him of the obligation to again look for the car after he left the curb and before he reached the track.

Pennsylvania.— Moser *v.* Union Traction Co., 205 Pa. St. 481, 55 Atl. 15; Houston Bros. Co. *v.* Consolidated Traction Co., 28 Pa. Super. Ct. 374; McCartney *v.* Union Traction Co., 27 Pa. Super. Ct. 222; Gilmore *v.* United Traction Co., 26 Pa. Super. Ct. 97; Potter *v.* Scranton R. Co., 19 Pa. Super. Ct. 444.

See 44 Cent. Dig. tit. "Street Railroads," § 208.

66. Schulte *v.* New Orleans City, etc., R. Co., 44 La. Ann. 509, 10 So. 811.

67. Deane *v.* St. Louis Transit Co., 192 Mo. 575, 91 S. W. 505; Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

Neither haste nor mental preoccupation by one using a street crossing over which a street railroad is operated will justify or excuse his failure to make a reasonable effort to ascertain whether it is reasonably safe to attempt to cross. Saylor *v.* Union Traction Co., 40 Ind. App. 381, 81 N. E. 94; Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123.

Where, however, a person's attention is diverted by an unusual and frightful occurrence, he is not guilty of negligence, if for the moment he omits to look up and down the track for an approaching car. City Electric R. Co. *v.* Jones, 61 Ill. App. 183 [*affirmed* in 161 Ill. 47, 43 N. E. 613].

68. Bennett *v.* Detroit Citizens' St. R. Co., 123 Mich. 692, 82 N. W. 518; Giardina *v.* St. Louis, etc., R. Co., 185 Mo. 330, 84 S. W. 928; Fanning *v.* St. Louis Transit Co., 103 Mo. App. 151, 78 S. W. 62; Wolf *v.* City R. Co., 45 Oreg. 446, 72 Pac. 329, 78 Pac. 668. See also *supra*, X, B, 7, a, (III).

69. See *infra*, X, B, 8, b.

70. See *infra*, X, B, 8, a.

71. Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239; Cincinnati St. R. Co. *v.* Whitcomb, 66 Fed. 915, 14 C. C. A. 183. But see Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616; Hooks *v.* Huntsville R., etc., Co., (Ala. 1906) 41 So. 273.

72. Toledo Consol. St. R. Co. *v.* Lutterbeck, 11 Ohio Cir. Ct. 279, 5 Ohio Cir. Dec. 141; McCartney *v.* Union Traction Co., 27 Pa. Super. Ct. 222; Potter *v.* Scranton R. Co., 19 Pa. Super. Ct. 444; McCauley *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 354.

If obstacles temporarily intervene to prevent observation the traveler should wait until the required observation can be made. Hageman *v.* North Jersey St. R. Co., 75 N. J. L. 939, 70 Atl. 1101 [*affirming* 74 N. J. L. 279, 65 Atl. 834]; Newark Pass. R. Co. *v.* Block, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374. See also Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798.

73. *Connecticut.*— Fay *v.* Hartford, etc., St. R. Co., 81 Conn. 330, 71 Atl. 364.

Idaho.— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254.

Illinois.— Chicago, etc., Electric R. Co. *v.* Wanic, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167 [*affirming* 132 Ill. App. 477]; Chicago City R. Co. *v.* Barnes, 114 Ill. App. 495; Springfield City R. Co. *v.* Clark, 51 Ill. App. 626.

Maine.— Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047; Marden *v.* Portsmouth, etc., St. R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300.

Maryland.— Baltimore Consol. R. Co. *v.* Rifcowitz, 89 Md. 338, 43 Atl. 762.

Massachusetts.— Robbins *v.* Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334.

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887; Shea *v.* St. Paul City R. Co., 50 Minn. 395, 52 N. W. 902.

surrounding circumstances are such that a person of ordinary prudence would have looked and listened.[74]

(B) *Applications.* In accordance with the above rule a person is guilty of contributory negligence precluding a recovery for injuries received where he goes upon or attempts to cross a street railroad track without exercising ordinary care to look and listen for an approaching car which is in close proximity and which by ordinary care he could see or hear in time to avoid the accident,[75] as

Missouri.— Prismeyer *v.* St. Louis Transit Co., 102 Mo. App. 518, 77 S. W. 313, car two hundred feet away and motorman's view unobstructed.

New Jersey.— Consolidated Traction Co. *v.* Haight, 59 N. J. L. 577, 37 Atl. 135; Consolidated Traction Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142.

New York.— Pyne *v.* Broadway, etc., R. Co., 19 N. Y. Suppl. 217.

Washington.— Chisholm *v.* Seattle Electric Co., 27 Wash. 237, 67 Pac. 601; Roberts *v.* Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

United States.— Detroit United R. Co. *v.* Nichols, 165 Fed. 289, 91 C. C. A. 257; Los Angeles Traction Co. *v.* Conneally, 136 Fed. 104, 69 C. C. A. 92.

Canada.— Ford *v.* Metropolitan R. Co., 4 Ont. L. Rep. 29, 1 Ont. Wkly. Rep. 318.

See 44 Cent. Dig. tit. "Street Railroads," § 208.

Contra.— Moser *v.* Union Traction Co., 205 Pa. St. 481, 55 Atl. 15; Ehrisman *v.* East Harrisburg City Pass. R. Co., 150 Pa. St. 180, 24 Atl. 596, 17 L. R. A. 448; Houston Bros. Co. *v.* Consolidated Traction Co., 28 Pa. Super. Ct. 374.

Where a person not familiar with the locality and other circumstances attempts to cross without looking and listening he is not guilty of negligence *per se.* Wilson *v.* Citizens' St. R. Co., 105 Tenn. 74, 58 S. W. 334; Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 100.

74. *Georgia.*— Columbus R. Co. *v.* Peddy, 120 Ga. 589, 48 S. E. 149; Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

Illinois.— Chicago City R. Co. *v.* Barnes, 114 Ill. App. 495, holding that when the court can say that the only reasonable inference that can be drawn from the facts is that plaintiff failed to exercise ordinary care, and in consequence thereof was injured, it is the province and duty of the court to find as a fact that plaintiff was guilty of contributory negligence, and to act accordingly.

Maine.— Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047; Warren *v.* Bangor, etc., R. Co., 95 Me. 115, 49 Atl. 609.

Massachusetts.— Finnick *v.* Boston, etc., St. R. Co., 190 Mass. 382, 77 N. E. 500.

New Jersey.— Consolidated Traction Co. *v.* Glynn, 59 N. J. L. 432, 37 Atl. 66; Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122.

New York.— Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434; Pyne *v.* Broadway, etc., R. Co., 19 N. Y. Suppl. 217.

Ohio.— Weiser *v.* Broadway, etc., St. R. Co., 10 Ohio Cir. Ct. 14, 6 Ohio Cir. Dec. 215.

Virginia.— Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850; Richmond Pass., etc., Co. *v.* Gordon, 102 Va. 498, 46 S. E. 772.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123, holding that a failure to look and listen for approaching street railroad cars at a street crossing is negligence *per se*, if it appears that the exercise of reasonable care would have disclosed the danger and enabled one to avoid it.

75. *Alabama.*— Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616; Hooks *v.* Huntsville R., etc., Co., (1906) 41 So. 273.

California.— Bailey *v.* Market St. Cable R. Co., 110 Cal. 320, 42 Pac. 914.

Connecticut.— Fay *v.* Hartford, etc., St. R. Co., 81 Conn. 330, 71 Atl. 364, walking along track without looking and listening held, under the circumstances, negligence *per se.*

Delaware.— Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906; Wilman *v.* People's R. Co., 4 Pennew. 260, 55 Atl. 332; Snyder *v.* People's R. Co., 4 Pennew. 145, 53 Atl. 433; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543; Adams *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 512, 52 Atl. 264.

Illinois.— Scanlon *v.* Chicago Union Traction Co., 127 Ill. App. 406.

Indiana.— Indianapolis St. R. Co. *v.* Zaring, 33 Ind. App. 297, 71 N. E. 270, 501, contributory negligence *per se.*

Kansas.— Kansas City-Leavenworth R. Co. *v.* Gallagher, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344.

Louisiana.— Dieck *v.* New Orleans City, etc., R. Co., 51 La. Ann. 262, 25 So. 71.

Massachusetts.— Beirne *v.* Laurence, etc., St. R. Co., 197 Mass. 173, 83 N. E. 359 (as a matter of law); Fitzgerald *v.* Boston El. R. Co., 194 Mass. 242, 80 N. E. 224 (negligence *per se*); Blackwell *v.* Old Colony St. R. Co., 193 Mass. 222, 79 N. E. 335 (contributory negligence as a matter of law); Donovan *v.* Lynn, etc., R. Co., 185 Mass. 533, 70 N. E. 1029; Mathes *v.* Lowell, etc., St. R. Co., 177 Mass. 416, 59 N. E. 77.

Michigan.— Wider *v.* Detroit United R. Co., 147 Mich. 537, 111 N. W. 100 (as a matter of law); Doherty *v.* Detroit Citizens' St. R. Co., 118 Mich. 209, 76 N. W. 377, 80 N. W. 36.

Minnesota.— Hickey *v.* St. Paul City R. Co., 60 Minn. 119, 61 N. W. 893.

Missouri.— Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Ries *v.* St. Louis

where he goes upon a track without looking or listening, when he knows that cars are passing every few minutes;[76] or where he looks only in one direction when he can see the approaching car if he also looks in the opposite direction;[77] or where he, particularly when he is familiar with the running of cars, attempts to cross immediately behind a passing or standing car or other vehicle without properly looking or listening for another car approaching on the same or opposite track,[78] as where upon alighting from a car he passes behind it, without waiting for it to move or without otherwise looking or listening for an approaching car on the same or opposite track, in time to avoid being struck by it.[79] A person

Transit Co., 179 Mo. 1, 77 S. W. 734; Moore *v.* Lindell R. Co., 176 Mo. 528, 75 S. W. 672 (as a matter of law); Waddell *v.* Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765; Fanning *v.* St. Louis Transit Co., 103 Mo. App. 151, 78 S. W. 62.

New Jersey.— Harbison *v.* Camden, etc., R. Co., 74 N. J. L. 252, 65 Atl. 868 [*affirmed* in 76 N. J. L. 824, 71 Atl. 1134].

New York.— Daly *v.* New York City R. Co., 132 N. Y. App. Div. 359, 116 N. Y. Suppl. 698; Barney *v.* Metropolitan St. R. Co., 94 N. Y. App. Div. 388, 88 N. Y. Suppl. 335; Kappus *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 13, 81 N. Y. Suppl. 442; Hickman *v.* Nassau Electric R. Co., 36 N. Y. App. Div. 376, 56 N. Y. Suppl. 751; Martin *v.* Third Ave. R. Co., 27 N. Y. App. Div. 52, 50 N. Y. Suppl. 284; Doller *v.* Union R. Co., 7 N. Y. App. Div. 283, 39 N. Y. Suppl. 770; A. L. & J. J. Reynolds Co. *v.* Third Ave. R. Co., 8 Misc. 313, 28 N. Y. Suppl. 734; Schroder *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 371; Healey *v.* Brooklyn Heights R. Co., 45 N. Y. Suppl. 393; Cowan *v.* Third Ave. R. Co., 1 N. Y. Suppl. 612. See also Balla *v.* Metropolitan St. R. Co., 27 Misc. 775, 57 N. Y. Suppl. 746.

Ohio.— Harpham *v.* Northern Ohio Traction Co., 26 Ohio Cir. Ct. 253.

Oregon.—Wolf *v.* City R. Co., 45 Oreg. 446, 72 Pac. 329, 78 Pac. 668; Smith *v.* City R. Co., 29 Oreg. 539, 46 Pac. 136, 780.

Pennsylvania.— Crooks *v.* Pittsburg Rys. Co., 216 Pa. St. 590, 66 Atl. 142; McCracken *v.* Consolidated Traction Co., 201 Pa. St. 378, 50 Atl. 830, 88 Am. St. Rep. 814; Sullivan *v.* Consolidated Traction Co., 198 Pa. St. 187, 47 Atl. 944; Watkins *v.* Union Traction Co., 194 Pa. St. 564, 45 Atl. 321; McCauley *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 354; Sweney *v.* Scranton Traction Co., 5 Lack. Leg. N. 86.

Wisconsin.— Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

Canada.— London St. R. Co. *v.* Brown, 31 Can. Sup. Ct. 642 [*reversing* 2 Ont. L. Rep. 54].

See 44 Cent. Dig. tit. "Street Railroads," § 208.

76. Kelly *v.* Hendrie, 26 Mich. 255; Downs *v.* St. Paul City R. Co., 75 Minn. 41, 77 N. W. 408; Harpham *v.* Northern Ohio Traction Co., 26 Ohio Cir. Ct. 253.

77. McGee *v.* Consolidated St. R. Co., 102 Mich. 107, 60 N. W. 293, 47 Am. St. Rep. 507, 26 L. R. A. 300; McGrath *v.* North Jersey St. R. Co., 66 N. J. L. 312, 49 Atl. 523; Trauber *v.* Third Ave. R. Co., 80 N. Y. App. Div. 37, 80 N. Y. Suppl. 231.

It is not negligence per se not to look in both directions for the approach of a car, but the question of negligence must depend on all the circumstances of the case. Schausten *v.* Toledo Consol. St. R. Co., 18 Ohio Cir. Ct. 691, 7 Ohio Cir. Dec. 389.

78. *Louisiana.*— Schutt *v.* Shreveport Belt R. Co., 109 La. 500, 33 So. 577.

Massachusetts.— Creamer *v.* West End St. R. Co., 156 Mass. 320, 31 N. E. 391, 32 Am. St. Rep. 456, 16 L. R. A. 490.

Michigan.— McCarthy *v.* Detroit Citizens' St. R. Co., 120 Mich. 400, 79 N. W. 631.

Minnesota.— Greengard *v.* St. Paul City R. Co., 72 Minn. 181, 75 N. W. 221.

Missouri.—Hafner *v.* St. Louis Transit Co., 197 Mo. 196, 94 S. W. 291; Moore *v.* St. Louis Transit Co., 194 Mo. 1, 92 S. W. 390 (struck by following car); Giardina *v.* St. Louis, etc., R. Co., 185 Mo. 330, 84 S. W. 928; Ross *v.* Metropolitan St. R. Co., 125 Mo. App. 614, 102 S. W. 1036.

New Jersey.— Van Ness *v.* North Jersey St. R. Co., 75 N. J. L. 273, 67 Atl. 1027 [*reversed* on other grounds in 77 N. J. L. 551, 73 Atl. 509].

New York.— Reed *v.* Metropolitan St. R. Co., 180 N. Y. 315, 73 N. E. 41 [*reversing* 87 N. Y. App. Div. 427, 84 N. Y. Suppl. 454] (as a matter of law); Thompson *v.* Buffalo R. Co., 145 N. Y. 196, 39 N. E. 709 (girl fourteen years old); Axelrod *v.* New York City R. Co., 109 N. Y. App. Div. 87, 95 N. Y. Suppl. 1072; Barney *v.* Metropolitan St. R. Co., 94 N. Y. App. Div. 388, 88 N. Y. Suppl. 335; Little *v.* Third Ave. R. Co., 83 N. Y. App. Div. 330, 82 N. Y. Suppl. 55 [*affirmed* in 178 N. Y. 591, 70 N. E. 1102]; Jackson *v.* Union R. Co., 77 N. Y. App. Div. 161, 78 N. Y. Suppl. 1096 (negligent as matter of law); Harnett *v.* Bleecker St., etc., R. Co., 49 N. Y. Super. Ct. 185; Scott *v.* Third Ave. R. Co., 16 N. Y. Suppl. 350.

Ohio.— Bethel *v.* Cincinnati St. R. Co., 15 Ohio Cir. Ct. 381, 8 Ohio Cir. Dec. 310; Toledo Consol. St. R. Co. *v.* Lutterbeck, 11 Ohio Cir. Ct. 279, 5 Ohio Cir. Dec. 141.

Pennsylvania.— Blaney *v.* Electric Traction Co., 184 Pa. St. 524, 39 Atl. 294.

Utah.— Burgess *v.* Salt Lake City R. Co., 17 Utah 406, 53 Pac. 1013.

Virginia.— Foreman *v.* Norfolk, etc., Co., 106 Va. 770, 56 S. E. 805.

See 44 Cent. Dig. tit. "Street Railroads," § 208.

79. *Indiana.*— Indianapolis St. R. Co. *v.*

is also ordinarily guilty of contributory negligence where he looks only when he is some distance from the track, and, although there is nothing to obstruct his view, he fails to look or listen when he is about to step upon it; [80] or where, although he looks or listens, he fails to see or hear a car which is plainly visible for some distance.[81] But it has been held that it is not negligence for a person to attempt to cross without looking and listening again where when he first looks and starts to cross it is reasonably apparent that he will have plenty of time under ordinary circumstances to do so.[82]

g. Leaving Horse Untied in Street. It is not negligence *per se* to temporarily leave a horse, not of restive or vicious habits, attached to a vehicle, unhitched

Tenner, 32 Ind. App. 311, 67 N. E. 1044, holding that such a person is guilty of contributory negligence as a matter of law, where he is familiar with the manner of operating the cars on the two tracks.

Kansas.— Thomas *v.* Kansas City El. R. Co., 79 Kan. 335, 99 Pac. 594, holding that a person alighting from one car and passing behind it on to the opposite track in front of approaching car, without stopping, is guilty of contributory negligence as a matter of law

Missouri.— Hornstein *v.* United Railways' Co., 195 Mo. 440, 92 S. W. 884, 113 Am. St. Rep. 693, 4 L. R. A. N. S. 729; Deane *v.* St. Louis Transit Co., 192 Mo. 575, 91 S. W. 505.

New Jersey.— Shuler *v.* North Jersey St. R. Co., 75 N. J. L. 824, 69 Atl. 180, 127 Am. St. Rep. 834.

New York.— McGreevy *v.* New York City R. Co., 113 N. Y. App. Div. 155, 98 N. Y. Suppl. 1024 (contributory negligence as a matter of law); Johnson *v.* Third Ave. R. Co., 69 N. Y. App. Div. 247, 74 N. Y. Suppl. 599 (holding that where a passenger got off a street car on a rainy, foggy night, waited for a truck on the opposite track to pass by, and then stepped on the track and was immediately struck by a car going in the opposite direction, he was guilty of contributory negligence, although he testified that he did not see the car coming); Meserole *v.* Brooklyn City R. Co., 10 N. Y. Suppl. 813. *Compare* Pelletreau *v.* Metropolitan St. R. Co., 74 N. Y. App. Div. 192, 77 N. Y. Suppl. 386 [*affirmed* in 174 N. Y. 503, 66 N. E. 1113].

Wisconsin.— Morice *v.* Milwaukee Electric R., etc., Co., 129 Wis. 529, 109 N. W. 567, contributory negligence as a matter of law.

See 44 Cent. Dig. tit. "Street Railroads," § 208.

80. Lynch *v.* Third Ave. R. Co., 88 N. Y. App. Div. 604, 85 N. Y. Suppl. 180; Ayres *v.* Forty-Second St., etc., R. Co., 54 Misc. (N. Y.) 639, 104 N. Y. Suppl. 841; Solomon *v.* New York City R. Co., 50 Misc. (N. Y.) 557, 99 N. Y. Suppl. 529; Glynn *v.* New York City R. Co., 110 N. Y. Suppl. 836 (holding that a pedestrian who, after he leaves the curb and before he reaches the track, does not again look for a car, is guilty of contributory negligence as a matter of law); Binder *v.* New York City R. Co., 99 N. Y. Suppl. 835; Keough *v.* Interurban St. R. Co., 92 N. Y. Suppl. 733; Nugent *v.* Philadelphia Traction Co., 181 Pa. St. 160, 37 Atl. 206; Pittsburg R. Co. *v.* Cluff, 149 Fed. 732, 79 C. C. A. 438.

81. *Minnesota.*— Russell *v.* Minneapolis St. R. Co., 83 Minn. 304, 86 N. W. 346.

Missouri.— Reno *v.* St. Louis, etc., R. Co., 180 Mo. 469, 79 S. W. 464.

New Jersey.— Farese *v.* North Jersey St. R. Co., 76 N. J. L. 457, 69 Atl. 959.

New York.— Margulies *v.* Interurban St. R. Co., 116 N. Y. App. Div. 157, 101 N. Y. Suppl. 499; Healy *v.* United Traction Co., 115 N. Y. App. Div. 868, 101 N. Y. Suppl. 331; Madigan *v.* Third Ave. R. Co., 68 N. Y. App. Div. 123, 74 N. Y. Suppl. 143; Stassen *v.* New York City R. Co., 52 Misc. 577, 102 N. Y. Suppl. 468; Newcomb *v.* Metropolitan St. R. Co., 36 Misc. 787, 74 N. Y. Suppl. 858.

Pennsylvania.— McCauley *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 354.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123.

See 44 Cent. Dig. tit. "Street Railroads," § 208.

82. Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451; Powers *v.* Des Moines City R. Co., (Iowa 1908) 115 N. W. 494 (holding that a person crossing a street has a right to assume that an approaching street car a block away is running at a lawful rate of speed, and if he could cross in safety before the car running at that speed could reach him he is not chargeable with contributory negligence in crossing without stopping to look just before reaching the track, unless he becomes aware that the car is running at a greater speed); Mentz *v.* Second Ave. R. Co., 3 Abb. Dec. (N. Y.) 274 [*affirming* 2 Rob. 356] (holding that where a person stumbled and fell upon the track while crossing the street, the fact that he did not look to see whether a car was approaching before he attempted to cross is immaterial, if when he started to cross there was abundant time under ordinary circumstances to cross the track before the car would reach him); Beers *v.* Metropolitan St. R. Co., 104 N. Y. App. Div. 96, 93 N. Y. Suppl. 278. See also Chicago City R. Co. *v.* Fennimore, 199 Ill. 9, 64 N. E. 985 [*affirming* 99 Ill. App. 174]. But see Heebe *v.* New Orleans, etc., R., etc., Co., 110 La. 970, 35 So. 251 (holding that the rule that, before attempting to cross a street railroad track, a person should stop, look, and listen, cannot be set aside for a rule that, being at a distance from the crossing, a person may form an opinion as to whether he or an

and unattended in a street along which a street railroad runs;[83] but to so leave a horse may constitute contributory negligence under the circumstances of the particular case,[84] as where the conditions are such that the cars may be reasonably expected to make unusual noises or present unusual appearances calculated to frighten horses.[85]

h. Drivers of Vehicles and Persons Therein — (i) *In General.* While a person riding or driving a horse or team on a street occupied by a street railroad has an equal right to the use of the street,[86] it is his duty to exercise reasonable and ordinary care and precaution to avoid being injured through dangers incident to the management and operation of the road.[87] If he exercises such care as would be exercised by a reasonably prudent man under the same or similar circumstances, he is not guilty of contributary negligence, and may recover for injuries received by reason of negligent defects or obstructions in the tracks,[88] or

electric car will get there first, and, acting on that opinion, attempt to cross without giving himself further concern in the matter); Glynn *v.* New York City R. Co., 110 N. Y. Suppl. 836.

83. Moulton *v.* Lewiston, etc., St. R. Co., 102 Me. 186, 66 Atl. 388, 10 L. R. A. N. S. 845; Albert *v.* Bleecker St., etc., R. Co., 2 Daly (N. Y.) 389, holding that where an expressman's horse and wagon were left untied in the street, while he went to deliver a parcel, and there was not room between the curbstone and defendants' car track for the wagon to stand and allow a car to pass, and a collision ensued, and the injury was increased by the horse changing his position after the wagon was struck, the horse not being of a restive or vicious habit, it was not negligence *per se* to leave him in the street untied, under the circumstances; and that the liability of defendants was not mitigated by the movements of the horse after the collision. But see Higgins *v.* Wilmington City R. Co., 1 Marv. (Del.) 352, 41 Atl. 86.

84. Stacey *v.* Haverhill, etc., St. R. Co., 191 Mass. 326, 77 N. E. 714 (holding that where the owner of a horse and vehicle left them on a street beside a street railway unfastened in any way when he knew a car was about due and remained in a house where he did not see them for about ten minutes, he was guilty of negligence barring a right to recover for injuries to them); Gilmore *v.* Federal St., etc., Pass. R. Co., 153 Pa. St. 31, 25 Atl. 651, 34 Am. St. Rep. 682 (holding that it is contributory negligence to leave a horse and wagon standing unattended on the track of an electric railway in a narrow and unlighted alley).

Violation of ordinance prohibiting the leaving of a horse unhitched in a street see Monroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498.

To leave a horse untied and unattended on a dark, stormy night, in a narrow space between the track and the street gutter, where a car with a headlight is liable to approach at any moment at a rapid rate of speed, is contributory negligence. Hoffman *v.* Syracuse Rapid-Transit R. Co., 50 N. Y. App. Div. 83, 63 N. Y. Suppl. 442.

Contributory negligence in leaving wagon on tracks under circumstances preventing its being easily discovered see New York Condensed Milk Co. *v.* Nassau Electric R. Co., 29 Misc. (N. Y.) 127, 60 N. Y. Suppl. 234.

85. Moulton *v.* Lewiston, etc., St. R. Co., 102 Me. 186, 66 Atl. 388, 10 L. R. A. N. S. 845, holding that where one leaves a horse attached to a carriage unhitched, unimpeded by any weight, and unattended by any person near enough to control him by the voice or to reach him before he can escape, in a city street in which there is an electric car line, when cars may reasonably be expected to run with snow scrapers calculated to frighten horses both by sound and sight, he is guilty of such negligence as will prevent his recovery in an action against the railroad company, if the horse frightened by the noise or action of the scrapers runs in front of a car and is injured by it, although the horse had never been afraid of the electric cars, and had never run away, although left unhitched.

86. See *supra*, X, B, 3, j.

87. Spurrier *v.* Front St. Cable R. Co., 3 Wash. 659, 29 Pac. 346. See also *supra*, X, B, 3, j, (I), (B).

"Ordinary care," as applied to the driver of a wagon on a street car track, means the degree of care which a man of average prudence, driving a wagon in the city and on the street where the accident occurred, usually exercises under similar circumstances for his own safety. Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484.

One driving a vehicle in a funeral procession is not relieved from using reasonable care and precaution to avoid a collision with a street car by the fact that by courtesy street railroads have given funeral processions the right of way. Foulke *v.* Wilmington City R. Co., 5 Pennew. (Del.) 363, 60 Atl. 973.

88. Cross *v.* California St. Cable R. Co., 102 Cal. 313, 36 Pac. 673 (holding that the absence of a lock chain on a wagon descending a hill is not negligence as a matter of law); Baltimore Cent. R. Co. *v.* State, 82 Md. 647, 33 Atl. 265; Farmer *v.* Findlay St. R. Co., 60 Ohio St. 36, 53 N. E. 447 (holding that knowledge of a driver of a team on a street that a street railroad company has negligently removed the paving from its tracks and conducting wires does not charge

of negligence in the operation of cars;[89] and the fact that he makes a mistake in judgment, or does not pursue the best course, when placed in sudden peril, without his own fault, does not constitute contributory negligence.[90] But if such a rider or driver fails to exercise reasonable and ordinary care for his own protection, by reason of which he receives injuries, he is guilty of contributory negligence and cannot recover for such injuries,[91] unless the servants of the company fail to exercise ordinary care to avoid the accident after discovering his peril.[92] In exercising care for his own protection such a rider or driver has a right, to a limited extent at least, to act upon the assumption that the street railroad company will exercise ordinary care to avoid injuring him,[93] although he is not justified

him with negligence, where he does not voluntarily drive on the exposed track and wire, as where his horses became partially beyond his control); Citizens' R. Co. *v.* Gossett, 37 Tex. Civ. App. 603, 85 S. W. 35 (holding that, although the public has an equal right with a street railroad company to the use of city streets, if the street is defective by reason of defectively laid tracks, which defect is obvious, a traveler thereon is not entitled to go on the street, unless, in view of the surrounding circumstances, a person of ordinary care would do so).

89. Indianapolis St. R. Co. *v.* Coyner, 39 Ind. App. 510, 80 N. E. 168.

90. *Maryland.*— Central R. Co. *v.* State, 82 Md. 647, 33 Atl. 265, holding that where one driving behind a gentle horse is thrown from his conveyance by the catching of one of the two front wheels in elevated diagonal switch tracks, his action in holding to the reins and pulling back on the horse, so that his chest is trodden on, does not constitute contributory negligence as a matter of law.

Michigan.— Bush *v.* St. Joseph, etc., St. R. Co., 113 Mich. 513, 71 N. W. 851, not jumping from vehicle.

Missouri.— Sheeban *v.* Citizens' R. Co., 72 Mo. App. 524, involuntarily tightening reins.

New York.— Lowery *v.* Manhattan R. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12, holding that where, by the unlawful act of defendant, pain is accidentally inflicted on a horse passing under an elevated road by coals from a locomotive, and the horse is frightened and runs away, and the driver does not exercise judgment and skill, and a collision occurs, and plaintiff is injured, the damages are the natural and probable consequence of defendant's act.

Ohio.— Lake Shore Electric R. Co. *v.* Majewski, 25 Ohio Cir. Ct. 55.

Pennsylvania.— Gibbons *v.* Wilkes-Barre, etc., St. R. Co., 155 Pa. St. 279, 26 Atl. 417, holding that if the driver of a team is placed in a state of peril by the negligence of the conductor of a car, the company is liable, provided the teamster exercises ordinary care, although the peril is increased by an effort made to avoid it, or although it might be avoided by the exercise of unusual courage and self-possession.

See 44 Cent. Dig. tit. "Street Railroads," § 210.

91. Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484; Unghero *v.* New York City R. Co., 107 N. Y. Suppl. 610; Memphis St. R. Co. *v.* Wilson, 108 Tenn. 618, 69 S. W. 265.

Where the driver's negligence is the cause of the accident, or so far contributes thereto that but for his negligence the accident would not have happened, he cannot recover. Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484.

Assumption of risk.—Where a driver, with full knowledge of the danger involved, drives over a defective track he will be held to have assumed the risk. Watson *v.* Brooklyn City R. Co., 14 Misc. (N. Y.) 405, 35 N. Y. Suppl. 1039.

Obstructing track.—Where one, after dark, obstructs an electric street car track with his team while unloading his wagon, he is guilty of such negligence as will bar an action for the injuries to the team from a car, although it is more convenient to unload the wagon in that position than in any other. Winter *v.* Federal St., etc., Pass. R. Co., 153 Pa. St. 26, 25 Atl. 1028, 19 L. R. A. 232.

A husband, driving with his wife over a street on which a street car track is so laid as to protrude above the surface of the street, must use ordinary care, and cannot recover for injuries to his wife resulting from his negligent driving against the track. Citizens' R., etc., Co. *v.* Johns, (Tex. Civ. App. 1908) 116 S. W. 62.

92. Hammond, etc., Electric R. Co. *v.* Eads, 32 Ind. App. 249, 69 N. E. 555; Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70; Consolidated Traction Co. *v.* Haight, 59 N. J. L. 577, 37 Atl. 135. See also *infra*, X, B, 8.

93. *Colorado.*— Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836, may rely on giving of timely warnings at crossing.

Indiana.— Indianapolis St. R. Co. *v.* Bolin, 39 Ind. App. 169, 78 N. E. 210.

Kentucky.— Greene *v.* Louisville R. Co., 119 Ky. 862, 84 S. W. 1154, 27 Ky. L. Rep. 316, holding that one driving on a street car track may anticipate that a proper lookout will be kept by the carmen, and that ordinary care will be exercised to avoid running into him.

Massachusetts.— Tognazzi *v.* Milford, etc., St. R. Co., 201 Mass. 7, 86 N. E. 799, 21 L. R. A. N. S. 309.

Missouri.— Petersen *v.* St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860 (holding that a traveler has a right to assume, when about to drive on a street on which a street

in relying altogether on such assumption, but must take proper measures for his own safety.[94] The violation of a statute or ordinance may constitute such contributory negligence on the part of the driver of a vehicle as to preclude him from recovering for injuries received in a collision with a street car.[95]

(II) *DRIVING HORSE NEAR CARS.* It is not contributory negligence *per se* for a person to drive a horse in a street on which a street railroad is operated,[96] where there is no reason to believe that it will become frightened and unmanageable by the operation of cars,[97] although he can drive on another street.[98] But it is contributory negligence for a person who knows that there is danger of his horse becoming frightened to drive it upon a street near street cars,[99] if he can drive on another street without serious inconvenience.[1]

(III) *DRIVING ON OR ALONG TRACK IN GENERAL.* Since a street railroad company has not an exclusive right to the use of that portion of the street occupied by its tracks,[2] it is not contributory negligence *per se* to drive a vehicle on or in close proximity to a street railroad track on a public street,[3] particularly where the public

railroad company is operating cars, that the cars are being run thereon in obedience to an ordinance limiting the maximum rate of speed, and that the servants in charge of the cars are keeping a vigilant watch for vehicles and persons on or moving toward the track, and will, on the first appearance of danger, stop the car in the shortest time possible); Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Mayes *v.* Metropolitan St. R. Co., 121 Mo. App. 614, 97 S. W. 612; Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213.

New York.— Robinson *v.* New York City R. Co., 90 N. Y. Suppl. 368. But see Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434, holding that a person seeing a street car approaching has no right to presume anything as to the car's speed.

See 44 Cent. Dig. tit. "Street Railroads," § 210. See also *supra*, X, B, 7, a, (II); *infra*, X, B, 7, h, (III).

94. Dewez *v.* Orleans R. Co., 115 La. 432, 39 So. 433; Tognazzi *v.* Milford, etc., St. R. Co., 201 Mass. 7, 86 N. E. 799, 21 L. R. A. N. S. 309.

95. Mullane *v.* St. Paul City R. Co., 104 Minn. 153, 116 N. W. 354, holding, however, that the fact that plaintiff had been, immediately before being run into by a street car, driving his team faster than a walk in violation of a city ordinance is not conclusive evidence of negligence, which will prevent recovery against the company, unless such negligence contributed toward the causing of the accident. See, generally, *supra*, X, B, 7, b.

Under 23 Del. Laws, c. 124, § 4, providing that every motor vehicle shall be equipped with good and efficient brakes, and that every driver of such vehicle must be familiar with the use of the safety appliances, and limiting the speed at which motor vehicles may be driven, either the failure of a person driving a motor vehicle to be sufficiently familiar with the brakes and safety appliances to properly use them in order to prevent a collision with a street car, or his act in driving his vehicle faster than permitted by the statute, is contributory negligence precluding a recovery for his injuries, if his negligence contributes to the happening of the accident. Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254.

96. Gibbons *v.* Wilkes-Barre, etc., St. R. Co., 155 Pa. St. 279, 26 Atl. 417, holding that it is not contributory negligence as a matter of law for a person to drive on a street occupied by an electric railroad, even though the cars cause noises calculated to frighten horses, and the space between the track and the retaining wall is narrow.

97. Marion City R. Co. *v.* Dubois, 23 Ind. App. 342, 55 N. E. 266 (driving over bridge); Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343.

98. Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343.

99. Doran *v.* Cedar Rapids, etc., R. Co., 117 Iowa 442, 90 N. W. 815; Cornell *v.* Detroit Electric R. Co., 82 Mich. 495, 46 N. W. 791, holding that one who drives a horse which is young, and unused to a place or to electric cars running there, for the purpose of testing him, to see how he will act, is guilty of contributory negligence, and cannot recover if the horse becomes frightened at the cars, and injures him. But see Montgomery St. R. Co. *v.* Hastings, 138 Ala. 432, 35 So. 412.

1. Doran *v.* Cedar Rapids, etc., R. Co., 117 Iowa 442, 90 N. W. 815.

2. See *supra*, X, B, 3, j.

3. *Arkansas.*— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

California.— Swain *v.* Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829

Illinois.— North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157 [*affirming* 78 Ill. App. 463]; Springfield Consol. R. Co. *v.* Hopkins, 137 Ill. App. 561. See also Chicago City R. Co. *v.* Eick, 111 Ill. App. 452.

Indiana.— Indiana Union Traction Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 104.

Massachusetts.— Logan *v.* Old Colony St. R. Co., 190 Mass. 115, 76 N. E. 510; Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822

Michigan.— Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741, holding

have been in the habit of using the tracks for that purpose,[4] or where it is necessary to drive upon the tracks by reason of the street outside the tracks being torn up for repairs or otherwise obstructed,[5] although the street, except where so obstructed, is of sufficient width to permit of driving off the track, out of the way of passing cars,[6] and although the rear of the vehicle is closed so as to obstruct the driver's view in that direction.[7] But it is the duty of such a driver to exercise reasonable care, under the circumstances, to ascertain whether or not a car is approaching and to avoid a collision therewith,[8] as that he should exercise reasonable care to

that it is not negligence *per se* for one to drive along the track of a street railroad in the night-time.

Missouri.— Strode *v.* St. Louis Transit Co., (1905) 87 S. W. 976.

New York.— Fleckenstein *v.* Dry Dock, etc., R. Co., 105 N. Y. 655, 11 N. E. 951; Arnesen *v.* Brooklyn City R. Co., 9 Misc. 270, 29 N. Y. Suppl. 748 [*affirmed* in 149 N. Y. 590, 44 N. E. 1120]; Cambeis *v.* Third Ave. R. Co., 1 Misc. 158, 20 N. Y. Suppl. 633.

Pennsylvania.— Jones *v.* Greensburg, etc., St. R. Co., 9 Pa. Super. Ct. 65, 43 Wkly. Notes Cas. 298; Davidson *v.* Schuylkill Traction Co., 4 Pa. Super. Ct. 86.

See 44 Cent. Dig. tit. "Street Railroads," § 212.

4. Citizens' St. R. Co. *v.* Lowe, 12 Ind. App. 47, 39 N. E. 165; United Rys., etc., Co. *v.* Seymour, 92 Md. 425, 48 Atl. 850; Consolidated Traction Co. *v.* Reeves, 58 N. J. L. 573, 34 Atl. 128.

5. *Illinois.*— See Springfield Consol. R. Co. *v.* Hopkins, 137 Ill. App. 561.

Indiana.— Citizens' St. R. Co. *v.* Lowe, 12 Ind. App. 47, 39 N. E. 165.

Maryland.— United Rys., etc., Co. *v.* Cloman, 107 Md. 681, 69 Atl. 379.

Massachusetts.— Miller *v.* Boston, etc., St. R. Co., 197 Mass. 535, 83 N. E. 990, roadway obstructed by snow thrown from car tracks.

Missouri.— Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109.

New York.— Saffer *v.* Westchester Electric R. Co., 22 Misc. 555, 49 N. Y. Suppl. 998.

See 44 Cent. Dig. tit. "Street Railroads," § 212.

Driving on the tracks to pass another vehicle in front of an approaching car is not of itself contributory negligence. Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Seifter *v.* Brooklyn Heights R. Co., 55 N. Y. App. Div. 10, 66 N. Y. Suppl. 1107 [*reversed* on other grounds in 169 N. Y. 254, 62 N. E. 349].

To allow car to pass.— It is not *per se* contributory negligence to turn off from one track upon the other track in a street in which double sets of tracks are laid, to allow a car to pass, although, in so doing, or while endeavoring to turn back again, the driver is struck by a car running upon the other track. Consolidated Traction Co. *v.* Reeves, 58 N. J. L. 573, 34 Atl. 128.

6. Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741. See also McGauley *v.* St. Louis Transit Co., 179 Mo. 583, 79 S. W. 461.

7. United Rys., etc., Co. *v.* Cloman, 107 Md. 681, 69 Atl. 379; Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822; Richmond Pass., etc., Co. *v.* Allen, 103 Va. 532, 49 S. E. 656, holding that it is not negligence to drive a vehicle, with curtains down on the sides and rear, upon the tracks of a street railroad in a public street.

8. *Arkansas.*— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

Illinois.— North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157 [*affirming* 78 Ill. App. 463].

Indiana.— Indiana Union Traction Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 1040.

Iowa.— Wilkins *v.* Omaha, etc., R., etc., Co., 96 Iowa 668, 65 N. W. 987.

Michigan.— Deitsch *v.* Trans St. Mary's Traction Co., 155 Mich. 15, 118 N. W. 489; Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741; Tunison *v.* Weadock, 130 Mich. 141, 89 N. W. 703; Blakeslee *v.* Consolidated St. R. Co., 112 Mich. 63, 70 N. W. 408.

Missouri.— Felver *v.* Central Electric R. Co., 216 Mo. 195, 115 S. W. 980; Strode *v.* St. Louis Transit Co., (1905) 87 S. W. 976.

New York.— Belford *v.* Brooklyn Heights R. Co., 86 N. Y. App. Div. 388, 83 N. Y. Suppl. 836; Devine *v.* Brooklyn Heights R. Co., 34 N. Y. App. Div. 248, 54 N. Y. Suppl. 626.

Ohio.— Toledo, etc., R. Co. *v.* Gilbert, 24 Ohio Cir. Ct. 181.

Pennsylvania.— Morrow *v.* Delaware County, etc., R. Co., 199 Pa. St. 156, 48 Atl. 974 (holding that a person driving a vehicle loaded with lumber projecting from both sides, on a highway near a trolley track, should look forward and not backward, and keep in the road wide enough to do so, and that if he looks backward and runs into a car and is injured, he cannot recover therefor); Jatho *v.* Green St., etc., Pass. R. Co., 4 Phila. 24. See also Berks *v.* Schuylkill Valley Traction Co., 22 Montg. Co. Rep. 169.

See 44 Cent. Dig. tit. "Street Railroads," § 212.

Statement of rule.— One driving along a street railroad track in a street sufficiently wide to permit a wagon to pass on either side of the track must exercise reasonable care, and use his opportunities for looking and listening for the approach of a car, and he cannot rely wholly on the motorman giving him warning of his approach, since the motorman is not bound to presume that persons will drive on the track without exercising some degree of care, and since he has

look to the rear at intervals to guard against a car approaching from that direction,[9] although he is not bound to constantly look back for that purpose.[10] In exercising reasonable care, however, the driver of a horse or team is entitled to act on the assumption that the servants in control of approaching cars will exercise reasonable care to look out for his safety and avoid running into him;[11] and the mere fact that a driver proceeds along the track for some distance in front of an approaching car without looking around does not charge him with contributory negligence in case of a collision, if, under all the circumstances his conduct is

the right to assume that the right of way will not be blocked, and that one driving on the track will leave it in time to avoid a collision. Paladino *v.* Staten Island Midland R. Co., 127 N. Y. App. Div. 183, 111 N. Y. Suppl. 715.

9. Cicardi *v.* St. Louis Transit Co., 108 Mo. App. 462, 83 S. W. 980 (failure to look to rear held proximate cause of injury); Union Biscuit Co. *v.* St. Louis Transit Co., 108 Mo. App. 297, 83 S. W. 288; Hinode Florist Co. *v.* New York, etc., R. Co., 131 N. Y. App. Div. 118, 115 N. Y. Suppl. 252; Seifter *v.* Brooklyn Heights R. Co., 55 N. Y. App. Div. 10, 66 N. Y. Suppl. 1107 [*reversed* on other grounds in 169 N. Y. 254, 62 N. E. 349]; Schleicher *v.* Interurban St. R. Co., 91 N. Y. Suppl. 356 (holding that it is the duty of one who needlessly drives upon the track of a street railroad to look back at intervals for approaching cars, and it is not sufficient to look merely when going upon the track). See also *infra*, X, B, 7, h, (VI).

It is not negligence, as matter of law, for one driving at night on the track of a street car company to fail to look behind him to see whether a car is approaching, but he must be on the alert in some manner, and by the exercise of some of his senses, as by listening, to discover if such is the case. Belford *v.* Brooklyn Heights R. Co., 86 N. Y. App. Div. 388, 83 N. Y. Suppl. 836; Bossert *v.* Nassau Electric R. Co., 40 N. Y. App. Div. 144, 57 N. Y. Suppl. 896.

10. *Arkansas.*— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245, not required, as matter of law, to keep a constant lookout to the rear.

Indiana.— Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609.

Massachusetts.— Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822, driver in closed wagon not bound to keep impossible watch to rear.

Michigan.— Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741; Rouse *v.* Detroit Electric R. Co., 135 Mich. 545, 98 N. W. 258, 100 N. W. 404 (not contributory negligence as a matter of law); Tunison *v.* Weadock, 130 Mich. 141, 89 N. W. 703.

Missouri.— Felver *v.* Central Electric R. Co., 216 Mo. 195, 115 S. W. 980; Zander *v.* St. Louis Transit Co., 206 Mo. 445, 103 S. W. 1006; Mayes *v.* Metropolitan St. R. Co., 121 Mo. App. 614, 97 S. W. 612; American Storage, etc., Co. *v.* St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184; Noll *v.* St. Louis Transit Co., 100 Mo. App. 367, 73 S. W. 907 (holding that the driver of a team which was struck by a street car from behind is not necessarily guilty of contributory negligence in driving along the car track, without looking back, where no warning was given, as should have been, if he was, or could by the use of ordinary care have been, seen, or if it was too dark to see him); J. F. Conrad Grocer Co. *v.* St. Louis, etc., R. Co., 89 Mo. App. 391.

New York.— Schilling *v.* Metropolitan St. R. Co., 47 N. Y. App. Div. 550, 62 N. Y. Suppl. 403.

Ohio.— Lewis *v.* Cincinnati St. R. Co., 10 Ohio S. & C. Pl. Dec. 53, 8 Ohio N. P. 417.

Washington.— Baldie *v.* Tacoma R., etc., Co., 52 Wash. 75, 100 Pac. 162, failure to look back from time to time not contributory negligence as a matter of law.

See 44 Cent. Dig. tit. "Street Railroads," § 212.

Where a driver looks both ways before driving on to a city street on which a street railroad is operated, to ascertain whether cars are approaching, he is not guilty of contributory negligence, as a matter of law, in not again looking behind him to ascertain the approach of cars during the time necessary to drive one block on the track. Schilling *v.* Metropolitan St. R. Co., 47 N. Y. App. Div. 500, 62 N. Y. Suppl. 403.

11. *Indiana.*— Indianapolis St. R. Co. *v.* Marschke, 166 Ind. 490, 77 N. E. 945 (car approaching from the rear); Indiana Union Traction Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 1040; Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609.

Michigan.— Deitsch *v.* Trans St. Mary's Traction Co., 155 Mich. 15, 118 N. W. 489 (holding that a person using the street has a right to drive upon it or across it, provided he exercises reasonable care, and has a right to rely on the watchfulness and prudence of the motorman, and on his ability to stop his car within a reasonable distance); Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741.

Missouri.— Mayes *v.* Metropolitan St. R. Co., 121 Mo. App. 614, 97 S. W. 612; American Storage, etc., Co. *v.* St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184 (on sounding of gong); Noll *v.* St. Louis Transit Co., 100 Mo. App. 367, 73 S. W. 907; J. F. Conrad Grocer Co. *v.* St. Louis, etc., R. Co., 89 Mo. App. 391.

New York.—Paladino *v.* Staten Island Midland R. Co., 127 N. Y. App. Div. 183, 111 N. Y. Suppl. 715 (cannot rely wholly on motorman giving warning); Devine *v.* Brook-

consistent with ordinary prudence;[12] but if without exercising reasonable care he drives on the track in front of an approaching car which might have been discovered in time to avoid a collision, he is guilty of contributory negligence;[13] and it has been held that it is contributory negligence as a matter of law to drive upon a street car track between street intersections when the driver knows that a car is coming on such track and that a collision will occur unless the car is stopped.[14] It is also contributory negligence to drive or stand a team so near a street car track, without giving proper attention to approaching cars, that the team or vehicle is struck by a passing car.[15]

(IV) *Duty to Turn Out For Cars.* While the driver of a vehicle has a right to drive upon or along street railroad tracks laid in a public street, he must not do so in such a manner as to unreasonably interfere with the passage of cars,[16]

lyn Heights R. Co., 34 N. Y. App. Div. 248, 54 N. Y. Suppl. 626; Tarler *v.* Metropolitan St. R. Co., 21 Misc. 684, 47 N. Y. Suppl. 1090.

Ohio.— Toledo, etc., R. Co. *v.* Gilbert, 24 Ohio Cir. Ct. 181.

Washington.— Baldie *v.* Tacoma R., etc., Co., 52 Wash. 75, 100 Pac. 162.

See 44 Cent. Dig. tit. "Street Railroads," § 212. See also *supra*, X, B, 7, a, (II), b, (I).

12. Bensiek *v.* St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587; Cohen *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 186, 68 N. Y. Suppl. 830 [*commenting* on Hill *v.* Metropolitan St. R. Co., 30 Misc. 440, 62 N. Y. Suppl. 596]. But *compare* Hinode Florist Co. *v.* New York, etc., R. Co., 131 N. Y. App. Div. 118, 115 N. Y. Suppl. 252.

13. *Indiana.*— Indianapolis St. R. Co. *v.* Slifer, (App. 1905) 72 N. E. 1055, 35 Ind. App. 700, 74 N. E. 19; Indianapolis St. R. Co. *v.* Marschke, (App. 1904) 70 N. E. 494, holding that where a driver, in order to pass a wagon in front of him, turns, without looking for cars, on to a street car track in front of a car approaching from the rear in plain view, he is guilty of contributory negligence.

Missouri.—Gettys *v.* St. Louis Transit Co., 103 Mo. App. 564, 78 S. W. 82 (driving on track in front of car approaching from opposite direction); J. F. Conrad Grocer Co. *v.* St. Louis, etc., R. Co., 89 Mo. App. 534.

New York.—Reynolds *v.* Larchmont Horse R. Co., 83 N. Y. App. Div. 189, 82 N. Y. Suppl. 185; Quinn *v.* Brooklyn City R. Co., 40 N. Y. App. Div. 608, 57 N. Y. Suppl. 544 (holding that a person driving on a highway, and along the tracks of a street car line, who, before coming near enough to the track to encounter danger from a passing car, fails to listen and to look to see whether a car is approaching, is guilty of contributory negligence); Bryant *v.* Metropolitan St. R. Co., 28 Misc. 532, 59 N. Y. Suppl. 595.

Texas.— Dallas Consol. Electric St. R. Co. *v.* English, 42 Tex. Civ. App. 393, 93 S. W. 1096.

Wisconsin.—McClellan *v.* Chippewa Valley Electric R. Co., 110 Wis. 326, 85 N. W. 1018.

See 44 Cent. Dig. tit. "Street Railroads," § 212.

Where a person drives on the track after dark, when there is no necessity for him to do so, there being ample room in the street proper, and when he knows that a car might overtake him at any time, and without looking around for an approaching car, and his vehicle is struck by such a car, he is guilty of contributory negligence. Indianapolis St. R. Co. *v.* Slifer, (Ind. App. 1905) 72 N. E. 1055, 35 Ind. App. 700, 74 N. E. 19; McGauley *v.* St. Louis Transit Co., 179 Mo. 583, 79 S. W. 461; Abbott *v.* Kansas City El. R. Co., 121 Mo. App. 582, 97 S. W. 198; Memphis St. R. Co. *v.* Roe, 118 Tenn. 601, 102 S. W. 343.

14. Sampsell *v.* Wilkie, 138 Ill. App. 518; McPhillips *v.* Union Traction Co., 19 Pa. Super. Ct. 223.

15. Atwood *v.* Bangor, etc., R. Co., 91 Me. 399, 40 Atl. 67 (holding that one who stops his team so that the wagon is within six inches of the track, and without giving any attention to the team or keeping any lookout for approaching cars keeps up a conversation with another, is negligent); Spaulding *v.* Jarvis, 32 Hun (N. Y.) 621; Silz *v.* Interurban St. R. Co., 92 N. Y. Suppl. 302 (injury to horse hitched to truck backed against curb); Gass *v.* New York City R. Co., 88 N. Y. Suppl. 950. But see Montgomery St. R. Co. *v.* Hastings, 138 Ala. 432, 35 So. 412 (holding that it is not contributory negligence as a matter of law to stop a vehicle in the street with one of the rear wheels within a few feet of the car track); Redford *v.* Spokane St. R. Co., 15 Wash. 419, 46 Pac. 650 (holding that driving along a street, after crossing a street car track, and stopping so near it, to converse with a person, that there is not room enough for a car to pass is not necessarily negligence contributory to the collision, but merely a "condition").

Backing a wagon up at right angles to the curb to deliver heavy goods at a store, whereby the horses necessarily stand across the tracks, is not contributory negligence as a matter of law where, owing to obstructions in the street, the wagon and horses cannot be placed longitudinally opposite such store, and no car is seen approaching, and there is no reason to apprehend that one will approach before the goods can be unloaded from the wagon and delivered. Fenner *v.* Wilkes-Barre, etc., Traction Co., 202 Pa. St. 365, 51 Atl. 1034.

16. See *supra*, X, B, 3, j, (I), (B).

and it is therefore his duty to exercise reasonable care to turn off or away from the tracks when he sees or hears, or by ordinary care should see or hear, a car approaching,[17] although he is not required constantly to look behind for approaching cars;[18] and ordinarily he is not guilty of contributory negligence if he turns off or uses every reasonable effort to do so, after he knows of the car's approach.[19] But if he fails to exercise proper care to turn out after he is aware or should have become aware of the car's approach,[20] or wilfully neglects or refuses to turn out,

17. *Alabama.*— Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955.

Illinois.— Chicago West Div. R. Co. *v.* Bert, 69 Ill. 388.

Indiana.— Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609.

Massachusetts.— Raymond *v.* Lowell, etc., St. R. Co., 170 Mass. 564, 49 N. E. 927.

Michigan.— Manor *v.* Bay Cities Consol. R. Co., 118 Mich. 1, 76 N. W. 139.

Missouri.— Theohald *v.* St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354, holding that persons driving on street car tracks are bound to know that street cars are constantly passing over the tracks, and to take proper precautions to get off the tracks in time to avoid a collision.

New York.— McCann *v.* New York, etc., R. Co., 56 N. Y. App. Div. 419, 67 N. Y. Suppl. 748 (holding also that it is no excuse that the driver's back is to the approaching car); Fishback *v.* Steinway R. Co., 11 N. Y. App. Div. 152, 42 N. Y. Suppl. 883 [*overruling* Winter *v.* Crosstown St. R. Co., 8 Misc. 362, 28 N. Y. Suppl. 695]; Gumb *v.* Twenty-Third St. R. Co., 58 N. Y. Super. Ct. 1, 559, 9 N. Y. Suppl. 316; Adolph *v.* Central Park, etc., R. Co., 43 N. Y. Super. Ct. 199 [*affirmed* in 76 N. Y. 530] (holding that as soon as the driver hears a car approaching from behind, he must use reasonable diligence and speed to get off the track before the car reaches him); Belford *v.* Brooklyn Heights R. Co., 43 Misc. 148, 88 N. Y. Suppl. 267 (holding that it is the duty of a person driving on the tracks to get out of the way of a car coming up, so as not to make it slow down or stop, and if he fails to do so, and is injured, the railroad company is not liable).

Pennsylvania.— Breary *v.* Traction Co., 5 Pa. Dist. 95.

See 44 Cent. Dig. tit. "Street Railroads," § 213.

When a driver should begin to turn his vehicle from the track must depend on the circumstances, on which the driver must exercise a reasonable judgment, and do what a prudent man, diligent to give free passage to the car, would do. North Hudson County R. Co. *v.* Isley, 49 N. J. L. 468, 10 Atl. 665. But generally he owes the street railroad company the duty to leave the track, on the approach of the car, as soon as he reasonably can; but where he is prevented from leaving the track on one side, by deep snow and on the other side by the approach of a car from the opposite direction, the right of way of the car on the same track coming in his rear is not paramount. Dietrich *v.* Brooklyn Heights R. Co., 123 N. Y. App. Div. 604, 108 N. Y. Suppl. 158.

18. See *supra*, X, B, 7, h, (III).

19. United Railways', etc., Co. *v.* Seymour, 92 Md. 425, 48 Atl. 850 (holding that where a companion of the driver sitting in the wagon and looking backward told the driver of a car approaching from the rear, and the driver immediately commenced to turn out, and was struck and injured before he got off the track by the car, which was going at a high rate of speed, he was not, as a matter of law, guilty of contributory negligence); Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822; Rouse *v.* Detroit Electric R. Co., 128 Mich. 149, 87 N. W. 68; Manor *v.* Bay Cities Consol. R. Co., 118 Mich. 1, 76 N. W. 139; Cannon *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 159, 44 Atl. 1089 (turning on to other track to allow car to pass).

It cannot be said as a matter of law that the failure of a driver to leave the track, when not warned of an approaching car, constitutes such contributory negligence as will defeat his action for injuries sustained through the negligence of the motorman in running him down without warning, although the conditions were such that by driving nearer the curb he could have avoided the accident. Barringer *v.* United Traction Co., 101 N. Y. App. Div. 330, 91 N. Y. Suppl. 386, 998.

20. Morrissey *v.* Bridgeport Traction Co., 68 Conn. 215, 35 Atl. 1126; North Chicago Electric R. Co. *v.* Peuser, 190 Ill. 67, 60 N. E. 78; Chicago West Div. R. Co. *v.* Bert, 69 Ill. 388; Robinson *v.* Crosstown St. R. Co., 118 N. Y. App. Div. 543, 103 N. Y. Suppl. 58 (holding that where a person driving on the tracks knowing that a car is approaching turns from the tracks sufficiently to allow the car to pass, but before it does so turns again upon the tracks, without taking any precaution for his safety, and is struck by the car, he is, as a matter of law, guilty of negligence, precluding a recovery); Buckley *v.* New York, etc., R. Co., 73 N. Y. App. Div. 587, 77 N. Y. Suppl. 128; Adolph *v.* Central Park, etc., R. Co., 33 N. Y. Super. Ct. 199 [*affirmed* in 76 N. Y. 530]; Adolph *v.* Central Park, etc., R. Co., 33 N. Y. Super. Ct. 186 [*reversed* on other grounds in 65 N. Y. 554] (holding that the driver of a cart which keeps upon the track of a street car company, and in front of one of its cars, and will not allow the car to pass him, but turns off suddenly and is upset by the car, is guilty of negligence); Breary *v.* Traction Co., 5 Pa. Dist. 95; Quinby *v.* Chester St. R. Co., 5 Lanc. L. Rev. (Pa.)

although he has ample opportunity to do so,[21] whereby a collision or accident is caused, he is guilty of contributory negligence precluding a recovery for his injuries, notwithstanding concurring negligence on the part of the company,[22] unless the servants of the company wilfully or wantonly cause the injury.[23] When driving past a car, the driver must keep out of its way,[24] and at curves in the street he must drive further from the car than at other points.[25] But where a driver drives upon or near a street railroad track to avoid an obstacle, he is not bound to turn out to avoid an approaching car until he has passed the obstacle and is aware of the car's approach.[26]

(v) *Attempt to Cross in Front of Approaching Car*[27]—(A) *General Rules.* The driver of a vehicle is not arbitrarily required to stop and await the passage of an approaching car;[28] and ordinarily it is not contributory negligence *per se*, or as a matter of law, for him to drive his vehicle on a street railroad track in an attempt to cross in front of such a car,[29] if the circum-

200; Jatho *v.* Green St., etc., Pass. R. Co., 4 Phila. (Pa.) 24.

21. Wood *v.* Detroit City St. R. Co., 52 Mich. 402, 18 N. W. 124, 50 Am. Rep. 259; Pechesky *v.* Metropolitan St. R. Co., 30 Misc. (N. Y.) 432, 62 N. Y. Suppl. 478.

22. Chicago West Div. R. Co. *v.* Bert, 69 Ill. 388; Kerin *v.* United Traction Co., 117 N. Y. App. Div. 314, 102 N. Y. Suppl. 423.

23. Chicago West Div. R. Co. *v.* Bert, 69 Ill. 388. See also *infra*, X, B, 8, b.

24. South Covington, etc., St. R. Co. *v.* Besse, 108 S. W. 848, 33 Ky. L. Rep. 52, 16 L. R. A. N. S. 890.

25. South Covington, etc., St. R. Co. *v.* Besse, 108 S. W. 848, 33 Ky. L. Rep. 52, 16 L. R. A. N. S. 890 (holding further that where a driver does not make a sufficient allowance for the swing of the car, and drives so close to it that it in turning strikes his vehicle, he is guilty of contributory negligence, precluding a recovery); Waters *v.* United Traction Co., 114 N. Y. App. Div. 275, 99 N. Y. Suppl. 763.

26. Sullivan *v.* Boston El. R. Co., 185 Mass. 602, 71 N. E. 90; Flannagan *v.* St. Paul City R. Co., 68 Minn. 300, 71 N. W. 379 (holding that where a driver attempts when an electric car is two hundred and fifty feet distant, to drive on to the track to avoid an obstruction, and, when he has passed it, because of wagons occupying the way, is not immediately able to turn off the track, he is not guilty of contributory negligence if a collision with the car ensues); Mertens *v.* St. Louis Transit Co., 122 Mo. App. 304, 99 S. W. 512; Delaney *v.* Yonkers R. Co., 13 N. Y. App. Div. 114, 43 N. Y. Suppl. 225.

27. Reciprocal rights and duties at street crossings see *supra*, X, B, 3, j, (II).

28. Adams *v.* Union Electric Co., 138 Iowa 487, 116 N. W. 332; Demarest *v.* Forty-Second St., etc., R. Co., 104 N. Y. App. Div. 503, 93 N. Y. Suppl. 663, holding that the driver of a vehicle is not required to stop and let an approaching car pass when the distance between them is such that, if the speed of the car is slackened, a collision will not occur.

29. *Alabama.*— Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955, whether in the open country or in the limits of a city or village.

California.— Cross *v.* California St. Cable R. Co., 102 Cal. 313, 36 Pac. 673, holding that it is not contributory negligence *per se* to drive a heavily loaded wagon on to a street car track, although a car is approaching at a distance of one hundred feet.

Colorado.— Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836; Philbin *v.* Denver City Tramway Co., 36 Colo. 331, 85 Pac. 630.

Connecticut.— McCarthy *v.* Consolidated R. Co., 79 Conn. 73, 63 Atl. 725.

Illinois.— Chicago Union Traction Co. *v.* Jacobson, 118 Ill. App. 383 [*affirmed* in 217 Ill. 404, 75 N. E. 508]; Fisher *v.* Chicago City R. Co., 114 Ill. App. 217.

Indiana.— Union Traction Co. *v.* Howard, (App. 1909) 87 N. E. 1103, 88 N. E. 967; Indianapolis St. R. Co. *v.* Bolin, 39 Ind. App. 169, 78 N. E. 210.

Missouri.— Hall *v.* St. Louis, etc., R. Co., 124 Mo. App. 661, 101 S. W. 1137 (holding that driving across a street car track when an approaching car is three hundred and fifty feet away is not as a matter of law contributory negligence, although the paving between the track rails and adjacent thereto has been removed, leaving a space about six inches deep for the vehicle to pass over); Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995.

New Jersey.— Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100.

New York.— Schoener *v.* Metropolitan St. R. Co., 72 N. Y. App. Div. 23, 76 N. Y. Suppl. 157 (car seventy-five feet away); McDonald *v.* Third Ave. R. Co., 16 Misc. 52, 37 N. Y. Suppl. 639; Reilly *v.* Third Ave. R. Co., 16 Misc. 11, 37 N. Y. Suppl. 593; Shanley *v.* Union R. Co., 14 Misc. 442, 35 N. Y. Suppl. 1030; Kelly *v.* Brooklyn Heights R. Co., 12 Misc. 568, 33 N. Y. Suppl. 851; Kerr *v.* Atlantic Ave. R. Co., 10 Misc. 264, 30 N. Y. Suppl. 1070 [*affirmed* in 151 N. Y. 656, 46 N. E. 1148]; Bullman *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 325; Carter *v.* Interurban St. R. Co., 84 N. Y. Suppl. 134.

Pennsylvania.—Downey *v.* Pittsburg, etc., Traction Co., 161 Pa. St. 131, 28 Atl. 1019.

stances are such that the driver has reasonable grounds for believing that he can cross in safety, if both he and those in charge of the car act with reasonable regard to the rights of each other,[30] as where he has ample time to cross when he starts to do so, but is delayed in crossing by some intervening agency;[31] nor is it contributory negligence as a matter of law to attempt to drive across in front of or between standing cars.[32] Such a driver, however, must exercise reasonable and ordinary care and prudence in attempting to cross; or in other words he must exercise, both before and after driving upon the track, such care to get across safely as an ordinarily prudent person similarly situated would exercise,[33] the nature and extent of the care and precaution to be exercised depending upon the proximity of the approaching car, its speed, and the other circumstances

Wisconsin.—Gerrard *v.* La Crosse City R. Co., 113 Wis. 258, 89 N. W. 125, 57 L. R. A. 465.

See 44 Cent. Dig. tit. "Street Railroads," § 214.

30. *Connecticut.*— McCarthy *v.* Consolidated R. Co., 79 Conn. 73, 63 Atl. 725.

Indiana.— Indianapolis St. R. Co. *v.* Bolin, 39 Ind. App. 169, 78 N. E. 210, holding that the driver of an ordinary vehicle may proceed over a street railroad in front of an approaching car when, and only when, he has reasonable ground for believing that he can pass in safety, if both he and those in charge of the car act with reasonable regard to the rights of others.

Iowa.— Adams *v.* Union Electric Co., 138 Iowa 487, 116 N. W. 332.

Massachusetts.— Fallon *v.* Boston El. R. Co., 201 Mass. 179, 87 N. E. 480.

Michigan.— Deitsch *v.* Trans St. Mary's Traction Co., 155 Mich. 15, 118 N. W. 489, even though the car is in sight.

Minnesota.— Smith *v.* Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16.

New York.— Heitz *v.* Yonkers R. Co., 117 N. Y. App. Div. 746, 102 N. Y. Suppl. 964; Blum *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 611, 80 N. Y. Suppl. 157; Blate *v.* Third Ave. R. Co., 44 N. Y. App. Div. 163, 60 N. Y. Suppl. 732.

Ohio.— Toledo St. R. Co. *v.* Westenhuber, 22 Ohio Cir. Ct. 67, 12 Ohio Cir. Dec. 22.

Virginia.— Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618, car one hundred yards away.

See 44 Cent. Dig. tit. "Street Railroads," § 214.

A driver has a right to take such a chance as a person of ordinary care would take under the circumstances. Doherty *v.* Metropolitan St. R. Co., 91 N. Y. Suppl. 19.

Where a driver is on the wrong side of a street on the track of an electric car which is approaching him, and knows that another car is approaching from behind, and that it is so far away that, if it goes at its ordinary rate of speed he can safely cross to that side of the street, he is not negligent in so doing, and in assuming that the car will not be run at a dangerous rate of speed. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

Colliding cars.— A motorman who has already made the stop required by ordinance at a street intersection, at least twenty feet from the crossing of another railroad, and attempts to cross when an approaching car on the other railroad is from one hundred and fifty to two hundred feet away, and also required by ordinance to stop, is not guilty of contributory negligence, if the other car fails to stop, and he is injured in colliding with it. Becker *v.* Detroit Citizens' St. R. Co., 121 Mich. 580, 80 N. W. 581.

31. Wilson *v.* North Side Traction Co., 10 Pa. Super. Ct. 325 (holding that where plaintiff, while driving a pair of horses, attempted to cross the track of a street car company, but was compelled to stop by a woman, and subsequently by a wagon obstructing his crossing, he was not guilty of contributory negligence when struck by a car, if there was, at the time he attempted to cross, ample time to make the crossing); Dallas Consol. Electric St. R. Co. *v.* Illo, 32 Tex. Civ. App. 290, 73 S. W. 1076. See also *infra*, X, B, 7, h, (VI), (B), text and note 65.

32. Walker *v.* St. Louis, etc., R. Co., 106 Mo. App. 321, 80 S. W. 282; McGurgan *v.* New York City R. Co., 121 N. Y. App. Div. 519, 106 N. Y. Suppl. 201.

33. *Delaware.*— Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254.

Illinois.— Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385].

Iowa.—Adams *v.* Union Electric Co., 138 Iowa 487, 116 N. W. 332.

Louisiana.— Riley *v.* Shreveport Traction Co., 114 La. 135, 38 So. 83.

Massachusetts.— Galbraith *v.* West End St. R. Co., 165 Mass. 572, 43 N. E. 501.

New Jersey.— Conrad *v.* Elizabeth, etc., R. Co., 70 N. J. L. 676, 58 Atl. 376.

New York.— Decker *v.* Brooklyn Heights R. Co., 64 N. Y. App. Div. 430, 72 N. Y. Suppl. 229.

See 44 Cent Dig. tit. "Street Railroads," § 214.

The test of care to be exercised at a street car crossing by the driver of a vehicle is not necessarily the same as is required at a steam railroad crossing. Smith *v.* Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16.

One riding in a wagon across the tracks of a street railroad is not required to take the same precaution before driving on the tracks as is required of pedestrians. Consolidated Traction Co. *v.* Behr, 59 N. J. L. 477, 37 Atl. 142.

[X, B, 7, h, (V), (A)]

of the particular case,[34] and also taking into consideration the fact that such a driver, until he sees or knows the contrary, need not anticipate negligence on the part of the company, but may act on the assumption that the servants in charge of the approaching car will do their duty in regard to managing and controlling it so as not to subject him to unnecessary danger and to avoid a collision.[35]

(B) *Applications.* If a driver, in crossing a street car track, exercises what under the circumstances is reasonable and ordinary care, he may recover for injuries received through the negligence of the street railroad company;[36] but if he fails to exercise such care, either before or after he drives upon the tracks,[37]

34. *Colorado.*— Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836.

Delaware.— Brown *v.* Wilmington City R. Co., 1 Pennew. 332, 40 Atl. 936.

Minnesota.— Kostuch *v.* St. Paul City R. Co., 78 Minn. 459, 81 N. W. 215.

Missouri.— Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995.

New York.— Mowbray *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 239, 69 N. Y. Suppl. 435; R. F. Stevens Co. *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 23, 68 N. Y. Suppl. 1088; Reed *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 87, 68 N. Y. Suppl. 539; Meyer *v.* Brooklyn, etc., R. Co, 47 N. Y. App. Div. 286, 62 N. Y. Suppl. 33; McGrane *v.* Flushing, etc., Electric R. Co., 13 N. Y. App. Div. 177, 43 N. Y. Suppl. 385; Brozek *v.* Steinway R. Co., 10 N. Y. App. Div. 360, 41 N. Y. Suppl. 1017; Reilly *v.* Metropolitan St. R. Co., 26 Misc. 814, 57 N. Y. Suppl. 278; Hunter *v.* Third Ave. R. Co., 21 Misc. 1, 46 N. Y. Suppl. 1010 [*affirming* 20 Misc. 432, 45 N. Y. Suppl. 1044].

Wisconsin.— Thoresen *v.* La Crosse City R. Co., 94 Wis. 129, 68 N. W. 548.

See 44 Cent. Dig. tit. "Street Railroads," § 214.

What acts of precaution are necessary by persons who cross electric street railroads must depend on the circumstances of each case, although persons crossing a highway on which cars are run at a high rate of speed and close together, or where the view is obstructed, or in a neighborhood where there is much noise and confusion, are required to exercise greater care than where the contrary facts are true. Brown *v.* Wilmington City R. Co., 1 Pennew. (Del.) 332, 40 Atl. 936.

35. *Illinois.*— Chicago City R. Co. *v.* Martensen, 100 Ill. App. 306 [*affirmed* in 198 Ill. 511, 64 N. E. 1017]; Chicago Gen. R. Co. *v.* Carroll, 91 Ill. App. 356 [*affirmed* in 189 Ill. 273, 59 N. E. 551].

Indiana.— Indianapolis St. R. Co. *v.* Hoffman, 40 Ind. App. 508, 82 N. E. 543.

Massachusetts.— Fallon *v.* Boston El. R. Co., 201 Mass. 179, 87 N. E. 480; Williamson *v.* Old Colony St. R. Co., 191 Mass. 144, 77 N. E. 655, 5 L. R. A. N. S. 1081, holding that the driver of a covered wagon, who cannot see behind it because of its size and its being loaded, has the right to assume, in attempting to diagonally cross a street railroad, that the motorman of any car coming from behind will do his duty by giving him time to cross.

Missouri.— Ledwidge *v.* St. Louis Transit Co., (App. 1903) 73 S. W. 1008.

New Jersey.— Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100, right to rely on motorman reducing excessive speed.

New York.— McGurgan *v.* New York City R. Co., 121 N. Y. App. Div. 519, 106 N. Y. Suppl. 201; Bertsch *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 228, 74 N. Y. Suppl. 238 [*affirmed* in 173 N. Y. 634, 66 N. E. 1104] (that speed of car will be checked on approaching crossing); Reilly *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 453, 72 N. Y. Suppl. 1080; Littlefield *v.* New York City R. Co., 51 Misc. 637, 101 N. Y. Suppl. 75. But see Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434; Harvey *v.* Nassau Electric R. Co., 35 N. Y. App. Div. 307, 55 N. Y. Suppl. 20, holding that a driver is not at liberty to assume that the motorman will be able successfully to stop the car.

See 44 Cent. Dig. tit. "Street Railroads," § 214. See also *supra*, X, B, 7, a, (II).

That a driver sees a car running at a rapid rate, three hundred feet distant from a street crossing, is not notice to him of an intention to continue such rate of speed in disregard of the rights of others at the crossing. Bertsch *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 228, 74 N. Y. Suppl. 238 [*affirmed* in 173 N. Y. 634, 66 N. E. 1104].

36. Chicago Union Traction Co. *v.* Chugren, 110 Ill. App. 545 [*affirmed* in 209 Ill. 429, 70 N. E. 573]; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Clancy *v.* New York City R. Co., 115 N. Y. App. Div. 569, 100 N. Y. Suppl. 1046; Dallas Consol. Electric St. R. Co. *v.* Illo, 32 Tex. Civ. App. 290, 73 S. W. 1076.

37. Chicago City R. Co. *v.* Strampel, 110 Ill. App. 482 (driving slowly across track in front of rapidly approaching car); Ledwidge *v.* St. Louis Transit Co., (Mo. App. 1903) 73 S. W. 1008; Vogts *v.* Metropolitan St. R. Co., 36 Misc. (N. Y.) 799, 74 N. Y. Suppl. 844 (negligently waiting on track for car to pass on other track); Heinz *v.* Union R. Co., 88 N. Y. Suppl. 392 (stopping on track to allow another vehicle to pass ahead of him at right angles); Watson *v.* Interurban St. R. Co., 84 N. Y. Suppl. 556 (stopping on track); McClelland *v.* Pittsburg Railways Co., 216 Pa. St. 593, 66 Atl. 76 (holding that where a driver about to cross the tracks drives so close thereto as to be hit by an approaching car while turning into the space between the track and the curb in an endeavor to avoid the car it constitutes contributory negligence); Baicker *v.* People's St. R. Co., 215 Pa. St. 478, 64 Atl. 675 [*affirm-*

as where he carelessly or negligently attempts to drive across ahead of a car which he sees or hears approaching in dangerous proximity,[38] or which by the exercise of ordinary care he could see or hear so approaching,[39] or where he suddenly and

ing 13 Luz. Leg. Reg. 91] (attempting to back off track when could have gone on safely); Smith *v.* Electric Traction Co., 6 Pa. Dist. 471 (holding that contributory negligence is displayed by a driver who drives his wagon at a walk across a trolley track, on which he has seen a trolley car approaching very fast on a down grade, although "the car was supposed to stop" on the near side of the street).

38. *Illinois.*— Goodman *v.* West Chicago St. R. Co., 101 Ill. App. 474; West Chicago St. R. Co. *v.* Boeker, 70 Ill. App. 67.

Indiana.— Moran *v.* Leslie, 33 Ind. App. 80, 70 N. E. 162; Citizens' St. R. Co. *v.* Helvie, 22 Ind. App. 515, 53 N. E. 191, holding that a person driving at night in the direction of an approaching street car, which he can plainly see, is negligent in undertaking to cross the track when the car is so close that it strikes his horse before it is off the track.

Louisiana.— Haas *v.* New Orleans R. Co., 112 La. 747, 36 So. 670; Hemingway *v.* New Orleans City, etc., R. Co., 50 La. Ann. 1087, 23 So. 952 (holding that where a person, after stopping to let one car pass, starts to drive across the track, although he sees another car coming at high speed a short distance away, he is negligent); Schlater *v.* Wilbert, 41 La. Ann. 406, 6 So. 127; Mercier *v.* New Orleans, etc., R. Co., 23 La. Ann. 264 (holding that where a person, seeing an approaching car, calls to the driver to stop, but, without waiting until he has stopped, drives upon the track, he cannot recover for injuries resulting from a collision).

Michigan.— Hilts *v.* Foote, 125 Mich. 241, 84 N. W. 139; Graff *v.* Detroit Citizens' St. R. Co., 109 Mich. 77, 67 N. W. 815.

Minnesota.— O'Connell *v.* St. Paul City R. Co., 64 Minn. 466, 67 N. W. 363.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Markowitz *v.* Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389; Roenfeldt *v.* St. Louis, etc., R. Co., 180 Mo. 554, 79 S. W. 706; Cole *v.* Metropolitan St. R. Co., 121 Mo. App. 605, 97 S. W. 555; Heintz *v.* St. Louis Transit Co., 115 Mo. App. 667, 92 S. W. 353; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Cogan *v.* Cass Ave., etc., R. Co., 101 Mo. App. 179, 73 S. W. 738.

Nebraska.— Harris *v.* Lincoln Traction Co., 78 Nebr. 681, 111 N. W. 580.

New Jersey.— Earle *v.* Consolidated Traction Co., 64 N. J. L. 573, 46 Atl. 613.

New York.— Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Goldkranz *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 590, 85 N. Y. Suppl. 667; Harvey *v.* Nassau Electric R. Co., 35 N. Y. App. Div. 307, 55 N. Y. Suppl. 20; Clancy *v.* Troy, etc., R. Co., 88 Hun 496, 34 N. Y. Suppl. 877; Norton *v.* Interurban St. R. Co., 50 Misc. 621, 98 N. Y. Suppl. 216; Williams *v.* New York City R. Co., 49 Misc. 253, 97 N. Y. Suppl. 393; Seggerman *v.* Metropolitan St. R. Co., 38 Misc. 374, 77 N. Y. Suppl. 905 [*affirmed* in 82 N. Y. App. Div. 637, 80 N. Y. Suppl. 1147]; Petri *v.* Third Ave. R. Co., 30 Misc. 254, 63 N. Y. Suppl. 315; Reiss *v.* Metropolitan St. R. Co., 28 Misc. 198, 58 N. Y. Suppl. 1024; Rohe *v.* Third Ave. R. Co., 10 Misc. 740, 31 N. Y. Suppl. 797; Bernstein *v.* New York City R. Co., 92 N. Y. Suppl. 228; Groening *v.* Interurban St. R. Co., 88 N. Y. Suppl. 355; Zerr *v.* Interurban St. R. Co., 88 N. Y. Suppl. 353; Monahan *v.* Interurban St. R. Co., 87 N. Y. Suppl. 537; Carvanio *v.* Union R. Co., 84 N. Y. Suppl. 246; Krintzman *v.* Interurban St. R. Co., 84 N. Y. Suppl. 243; Steinman *v.* Interurban St. R. Co., 84 N. Y. Suppl 231.

Pennsylvania.— Lyons *v.* Union Traction Co., 209 Pa. St. 72, 58 Atl. 118; Tyson *v.* Union Traction Co., 199 Pa. St. 264, 48 Atl. 1078; Bornscheuer *v.* Consolidated Traction Co., 198 Pa. St. 332, 47 Atl. 872; Smith *v.* Electric Traction Co., 187 Pa. St. 110, 40 Atl. 966; Thomas *v.* Citizens' Pass. R. Co., 132 Pa. St. 504, 19 Atl. 286.

Washington.— Davis *v.* Cœur d'Alene, etc., R. Co., 47 Wash. 301, 91 Pac. 839.

Wisconsin.— Johnson *v.* Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753; Little *v.* Superior Rapid Transit R. Co., 88 Wis. 402, 60 N. W. 705.

See 44 Cent. Dig. tit. "Street Railroads," § 214.

The rule that a car may not run into a person, although he is on the track through his own negligence, is not applicable, where a driver attempts to cross the track diagonally when an approaching car is so near as to render the attempt dangerous. Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125.

Where a driver, knowing that an approaching car will be at a crossing point in four or five seconds, deliberately takes the chance of safely crossing the track in front of the car, with knowledge that it will take him two or three seconds to make the crossing, he is guilty of contributory negligence barring him from recovering damages resulting from a collision. O'Connell *v.* St. Paul City R. Co., 64 Minn. 466, 67 N. W. 363.

Proximate cause.— Where a driver negligently drives on the track of a rapidly approaching electric car, the accident may properly be attributed to his negligence, although the vehicle is carried some distance along the track before it is overturned and the injuries inflicted. Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125.

39. Borschall *v.* Detroit R. Co., 115 Mich. 473, 73 N. W. 551; Markowitz *v.* Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389; Petty *v.* St. Louis, etc., R.

without warning turns his horse or team across the track directly in front of an approaching car,[40] whereby he is injured, he is guilty of contributory negligence precluding a recovery, in some cases as a matter of law,[41] notwithstanding concurring negligence on the part of the servants of the company,[42] unless they act wilfully or wantonly,[43] or fail to exercise reasonable care to avert the accident after discovering the driver's peril.[44]

(VI) *DUTY TO STOP, LOOK, AND LISTEN*[45] — (A) *General Rules.* There is no absolute rule of law that a person riding or driving along a public street must look and listen for an approaching car before going upon the track of a street railroad;[46] and ordinarily it is not contributory negligence as a matter of law for a driver of a vehicle to fail to look and listen, or to stop, look, and listen, before going upon or across such track.[47] But nevertheless ordinary care for his own

Co., 179 Mo. 666, 78 S. W. 1003; Williams *v.* New York City R. Co., 49 Misc. (N. Y.) 253, 97 N. Y. Suppl. 393; Fitzgibbon *v.* Joline, 115 N. Y. Suppl. 123.

40. *Kentucky.*— Louisville R. Co. *v.* Stammers, 47 S. W. 341, 20 Ky. L. Rep. 688.

Missouri.— Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995.

New Jersey.— Hannon *v.* North Jersey St. R. Co., 65 N. J. L. 547, 47 Atl. 803.

New York.— Meyer *v.* Brooklyn Heights R. Co., 9 N. Y. App. Div. 79, 41 N. Y. Suppl. 92 (holding that a person who attempts to cross a street car track in front of a rapidly approaching electric car, not at a street crossing, and without indicating to the motorman that he intends to cross, is guilty of contributory negligence); Costello *v.* Forty-Second St., etc., R. Co., 50 Misc. 628, 98 N. Y. Suppl. 648; Kiley *v.* New York City R. Co., 49 Misc. 254, 97 N. Y. Suppl. 375; Mason *v.* Metropolitan St. R. Co., 30 Misc. 108, 61 N. Y. Suppl. 789; Baumann *v.* Metropolitan St. R. Co., 21 Misc. 658, 47 N. Y. Suppl. 1094; Goodman *v.* New York City R. Co., 95 N. Y. Suppl. 544.

Ohio.— Cincinnati St. R. Co. *v.* Jenkins, 20 Ohio Cir. Ct. 256, 11 Ohio Cir. Dec. 130.

See 44 Cent. Dig. tit. "Street Railroads," § 214.

41. *Illinois.*— Chicago Union Traction Co. *v.* Jacobson, 217 Ill. 404, 75 N. E. 508 [*affirming* 118 Ill. App. 383] (holding that where a teamster deliberately drives on the tracks of a street car company, knowing that a car is approaching at a high rate of speed and must strike his wagon unless the car is stopped, and with intent to compel the car to stop, he is guilty of negligence *per se*); Chicago City R. Co. *v.* Soszynski, 134 Ill. App. 149.

New York.— Litzour *v.* New York City R. Co., 116 N. Y. App. Div. 477, 101 N. Y. Suppl. 990; Hamilton *v.* Third Ave. R. Co., 6 Misc. 382, 26 N. Y. Suppl. 754, holding that an attempt to pass, with a wagon, in front of a cable car forty feet away, and approaching at a speed of ten miles an hour, is negligence as a matter of law.

Pennsylvania.— March *v.* Traction Co., 209 Pa. St. 46, 57 Atl. 1131.

Washington.— Criss *v.* Seattle Electric Co., 38 Wash. 320, 80 Pac. 525.

Wisconsin.— Hogan *v.* Winnebago Traction Co., 121 Wis. 123, 98 N. W. 928; Watermolen *v.* Fox River Electric R., etc., Co., 110 Wis. 153, 85 N. W. 663.

See 44 Cent. Dig. tit. "Street Railroads," § 214.

42. Heintz *v.* St. Louis Transit Co., 115 Mo. App. 667, 92 S. W. 353. See also *supra*, X, B, 7, a, (III).

43. Harris *v.* Lincoln Traction Co., 78 Nebr. 681, 111 N. W. 580; Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125. See also *infra*, X, B, 8, h.

44. Halifax Electric Tramway Co. *v.* Inglis, 30 Can. Sup. Ct. 256 [*affirming* 32 Nova Scotia 117]. See also *infra*, X, B, 8, a.

45. Duty to look and listen while driving on or along tracks see *supra*, X, B, 7, h, (III).

46. Fairbanks *v.* Bangor, etc., R. Co., 95 Me. 78, 49 Atl. 421; Jones Bros. *v.* Greensburg, etc., R. Co., 9 Pa. Super. Ct. 65, 43 Wkly. Notes Cas. 298.

Statement of rule.— There is no absolute rule requiring one driving along a street upon which are the double tracks of a street railroad, to either stop, look, or listen, before crossing such tracks, or to look back one or more times before going upon the tracks, to ascertain whether or not there is a car operated by electricity coming from behind, in such a manner as to probably or inevitably bring about a collision. Lewis *v.* Cincinnati St. R. Co., 10 Ohio S. & C. Pl. Dec. 53, 8 Ohio N. P. 417.

Where a driver does not know of the existence of street car tracks on a street which he is about to cross, and there is nothing in the physical conditions to impute to him such knowledge, the law does not impose an absolute duty on him to look and listen for an approaching car before attempting to cross. Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836.

47. *Connecticut.*— Lawler *v.* Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545.

Illinois.— Springfield City R. Co. *v.* Clark, 51 Ill. App. 626.

New Jersey.— Dennis *v.* North Jersey St. R. Co., 64 N. J. L. 439, 45 Atl. 807, holding that the principle of law is now well established that it is not negligence *per se*, or negligence in law, for a person driving a

protection requires of him that he should exercise such precaution and diligence to look and listen for approaching cars before he drives upon or across the tracks as an ordinarily prudent person would exercise under the same or similar circumstances, the nature and extent of the precaution to be exercised in this respect depending upon the circumstances of each particular case;[48] and if he fails to do so, whereby he is injured by an approaching car, he is guilty of contributory negligence precluding a recovery unless the servants of the company are guilty of wilful or wanton negligence,[49] or fail to exercise due care after discovering the driver's peril to avoid injuring him.[50] In exercising such care the driver should ordinarily, when he has an opportunity for doing so, look, or look and listen, along the track in both directions,[51] and where he has looked and listened at some distance from the point of crossing he should look or look and listen again just before driving upon the tracks;[52] and if his line of vision or hearing is obstructed, he

vehicle, in approaching a street crossing over which he intends to cross, to fail to look for an approaching street car, in order to avoid danger from it.

New York.— Palmer *v.* Larchmont Horse R. Co., 112 N. Y. App. Div. 341, 98 N. Y. Suppl. 567 [*affirmed* in 189 N. Y. 566, 82 N. E. 1130].

Tennessee.— Memphis St. R. Co. *v.* Riddik, 110 Tenn. 227, 75 S. W. 924.

Washington.— Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284.

See 44 Cent. Dig. tit. "Street Railroads," § 215.

48. *Colorado.*— Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836.

Delaware.— Garrett *v.* People's R. Co., 6 Pennew. 29, 64 Atl. 254.

Georgia.— Columbus R. Co. *v.* Peddy, 120 Ga. 589, 48 S. E. 149.

Illinois.— Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385]; Weske *v.* Chicago Union Traction Co., 117 Ill. App. 298.

Iowa.— Doherty *v.* Des Moines City R. Co., 137 Iowa 358, 114 N. W. 183; Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

Kansas.— Honick *v.* Metropolitan St. R. Co., 66 Kan. 124, 71 Pac. 265.

Maine.— Fairbanks *v.* Bangor, etc., R. Co., 95 Me. 78, 49 Atl. 421.

Massachusetts.— Carrahar *v.* Boston, etc., R. Co., 198 Mass. 549, 85 N. E. 162, 126 Am. St. Rep. 461.

Michigan.— Deitsch *v.* Trans St. Mary's Traction Co., 155 Mich. 15, 118 N. W. 489; Fritz *v.* Detroit Citizens' St. R. Co., 105 Mich. 50, 62 N. W. 1007.

Missouri.— Sonnenfeld Millinery Co. *v.* People's R. Co., 59 Mo. App. 668; Smith *v.* Citizens' R. Co., 52 Mo. App. 36; Hickman *v.* Union Depot R. Co., 47 Mo. App. 65.

New York.— Dunican *v.* Union R. Co., 39 N. Y. App. Div. 497, 57 N. Y. Suppl. 326, view obstructed.

Pennsylvania.— Manayunk Boarding, etc., Stable Co. *v.* Union Traction Co., 7 Pa. Super. Ct. 104, 42 Wkly. Notes Cas. 45.

Rhode Island.— Beerman *v.* Union R. Co., 24 R. I. 275, 52 Atl. 1090.

Tennessee.— Saunders *v.* City, etc., R. Co., 99 Tenn. 130, 41 S. W. 1031.

Wisconsin.— Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; Dummer *v.* Milwaukee Electric R., etc., Co., 108 Wis. 589, 84 N. W. 853.

United States.— Tacoma R., etc., Co. *v.* Hays, 110 Fed. 496, 49 C. C. A. 115, holding that the rule that the failure of a person to stop, look, and listen before driving upon a railroad track constitutes negligence as a matter of law is not inflexible, even in case of steam railroads, and is only applicable to street railroads on a public street where the attending conditions are such that reasonable care and prudence require such precautions.

Canada.— O'Hearn *v.* Port Arthur, 4 Ont. L. Rep. 209, 1 Ont. Wkly. Rep. 373.

See 44 Cent. Dig. tit. "Street Railroads," § 215.

Driving more than two horses does not relieve the driver from the duty of taking reasonable precautions to ascertain whether a car is approaching before he permits his leading horses to start to cross the tracks. Houston Bros. Co. *v.* Consolidated Traction Co., 28 Pa. Super. Ct. 374.

Extraordinary care is not required of a driver in looking and listening for an approaching car. Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

49. Highland Ave., etc., R. Co. *v.* Maddox, 100 Ala. 618, 13 So. 615. And see *infra*, X, B, 8, b.

50. Cowden *v.* Shreveport Belt R. Co., 106 La. 236, 30 So. 747; Warren *v.* Bangor, etc., R. Co., 95 Me. 115, 49 Atl. 609; Hickman *v.* Union Depot R. Co., 47 Mo. App. 65. And see *infra*, X, B, 8, a.

51. Honick *v.* Metropolitan St. R. Co., 66 Kan. 124, 71 Pac. 265; Weidinger *v.* Third Ave. R. Co., 40 N. Y. App. Div. 197, 57 N. Y. Suppl. 851; Beerman *v.* Union R. Co., 24 R. I. 275, 52 Atl. 1090.

A failure to look in both directions is not, as a matter of law, negligence. Shea *v.* St. Paul City R. Co., 50 Minn. 395, 52 N. W. 902.

52. Beerman *v.* Union R. Co., 24 R. I. 275, 52 Atl. 1090; O'Hearn *v.* Port Arthur, 4 Ont. L. Rep. 209, 1 Ont. Wkly. Rep. 373.

Due care in approaching a street railroad crossing can be satisfied only by the full use

should use increased care and caution in proportion to such condition.[53] Thus it is the duty of a person driving along a street, before turning to cross street car tracks, to use reasonable care to ascertain whether or not a car is approaching from the rear,[54] especially where the attempt to cross is made in the middle of a block or at any place other than a regular crossing.[55]

(B) *Applications.* If a rider or driver of a vehicle exercises every reasonable effort to ascertain whether a car is approaching before he attempts to go upon or across the tracks, he is not guilty of contributory negligence, notwithstanding he fails to see the car in time to avoid being injured.[56] But a person is guilty of contributory negligence precluding a recovery, particularly where he is familiar with the tracks and the operation of cars, where he or his team is injured by a car which he might have discovered in time to avoid the accident, but which he does not so discover by reason of his failure to exercise proper care to look, or look and listen, for approaching cars,[57] as where he looks in one direction only and is

of the senses of sight and hearing at the last moment of opportunity before passing the line between safety and peril, and it is only when deprived in some degree of the opportunity to observe that one may rely on his judgment as to chances in driving across the tracks. Goldmann *v.* Milwaukee Electric R., etc.. Co., 123 Wis. 168, 101 N. W. 384.

Obstruction to view.— Where a driver exercises due care to look for an approaching car at a point where he has an unobstructed view, he is not guilty of contributory negligence as a matter of law, where between such point and the point of crossing his view is obstructed, in failing to again stop and look for an approaching car (Hebblethwaite *v.* Detroit United R. Co., 145 Mich. 13, 108 N. W. 433; Manayunk, etc., Boarding, etc., Stable Co. *v.* Union Traction Co., 7 Pa. Super. Ct. 104, 42 Wkly. Notes Cas. (Pa.) 45), or in failing to get down from his wagon and go forward in advance of his horse to see if a car is coming (Kelly *v.* Wakefield, etc., St. R. Co., 179 Mass. 542, 61 N. E. 139).

53. Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566; Dungan *v.* Wilmington City R. Co., 4 Pennew. (Del.) 458, 58 Atl. 868; Enders *v.* Brooklyn Union El. R. Co., 131 N. Y. App. Div. 170, 115 N. Y. Suppl. 155 (holding that where a driver's view is obstructed at places he is required to exercise greater care to see at other places, and if his view is obscured at all points he is bound to listen more intently); Omslaer *v.* Pittsburg, etc., Traction Co., 168 Pa. St. 519, 32 Atl. 50, 47 Am. St. Rep. 901.

54. Bloomington, etc., R., etc., Co. *v.* Koss, 123 Ill. App. 497; Sullivan *v.* Boston El. R. Co., 185 Mass. 602, 71 N. E. 90 (holding that one driving along a street is bound, on turning on to a parallel street railroad track, to look to ascertain whether a car is approaching him from behind); O'Hearn *v.* Port Arthur, 4 Ont. L. Rep. 209, 1 Ont. Wkly. Rep. 373 (holding further that a greater burden in this regard rests on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension lest someone may at any moment cross in front of the moving car). *Compare* Zander *v.* St. Louis Transit Co., 206 Mo. 445, 103 S. W. 1006.

55. Fritz *v.* Detroit Citizens' St. R. Co., 105 Mich. 50, 62 N. W. 1007.

56. Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489; Rascher *v.* East Detroit, etc., R. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447; Weidinger *v.* Third Ave. R. Co., 40 N. Y. App. Div. 197, 57 N. Y. Suppl. 851.

Curve in track.— Where a driver looks to see if a car is coming toward him, before attempting to cross a street, but sees and hears none, and then while crossing is struck by a car coming around a curve at full speed without warning, there is no contributory negligence on his part. Cooke *v.* Baltimore Traction Co., 80 Md. 551, 31 Atl. 327.

Reversing car.— Where, after a street car passes a driver, he turns to cross the street behind the car and it stops and reverses its motion and strikes the wagon and injures him, no negligence is attributable to him in not looking to see if the car is backing, or in failing to hear and understand signals between the conductor and the motorman relative to backing the car. Central R. Co. *v.* Knowles, 93 Ill. App. 581 [*affirmed* in 191 Ill. 241, 60 N. E. 829].

57. *Alabama.*— Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829 (holding that where deceased drove across a street railroad track in front of a moving street car, without stopping to look, and was killed in a collision which immediately followed, he was guilty of contributory negligence precluding a recovery); Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566.

Illinois.— Bloomington, etc., R., etc., Co. *v.* Koss, 123 Ill. App. 497.

Kansas.— Metropolitan St. R. Co. *v.* Agnew, 65 Kan. 478, 70 Pac. 345.

Louisiana.— Dewez *v.* Orleans R. Co., 115 La. 432, 39 So. 433; Cowden *v.* Shreveport Belt R. Co., 106 La. 236, 30 So. 747.

Maine.— Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047; Warren *v.* Bangor, etc., R. Co., 95 Me. 115, 49 Atl. 609.

Massachusetts.— Hurley *v.* West End St. R. Co., 180 Mass. 370, 62 N. E. 263.

Michigan.—Wider *v.* Detroit United R. Co.,

struck by a car coming in the opposite direction, which he might have discovered and avoided had he looked that way;[58] or where he drives on the track immediately behind another car or vehicle without properly looking or listening,[59] or

147 Mich. 537, 111 N. W. 100 (holding that one who drives immediately in front of an approaching street car, and is struck, when, had he looked before so attempting to cross, he must have seen the proximity of the car and appreciated the necessary consequences of his act, is chargeable with negligence as a matter of law); Fritz *v.* Detroit Citizens' St. R. Co., 105 Mich. 50, 62 N. W. 1007.

Minnesota.— Wosika *v.* St. Paul City R. Co., 80 Minn. 364, 83 N. W. 386; Terien *v.* St. Paul City R. Co., 70 Minn. 532, 73 N. W. 412.

Missouri.— Engelman *v.* Metropolitan St. R. Co., 133 Mo. App. 514, 113 S. W. 700; Fechley *v.* Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421; Fellenz *v.* St. Louis, etc., R. Co., 106 Mo. App. 154, 80 S. W. 49; Hickman *v.* Union Depot R. Co., 47 Mo. App. 65.

New Jersey.— Solatinow *v.* Jersey City, etc., St. R. Co., 70 N. J. L. 154, 56 Atl. 235.

New York.— Ward *v.* Brooklyn Heights R. Co., 115 N. Y. App. Div. 104, 100 N. Y. Suppl. 671 [*affirmed in* 119 N. Y. App. Div. 487, 104 N. Y. Suppl. 95 (*affirmed* in 190 N. Y. 559, 83 N. E. 1134)]; Walsh *v.* Fonda, etc., R. Co., 114 N. Y. App. Div. 272, 99 N. Y. Suppl. 773 [*affirmed* in 187 N. Y. 563, 80 N. E. 1121]; Ward *v.* Rochester Electric R. Co., 17 N. Y. Suppl. 427.

Ohio.— Schausten *v.* Toledo Consol. St. R. Co., 18 Ohio Cir. Ct. 691, 7 Ohio Cir. Dec. 389.

Pennsylvania.— Kannenberg *v.* Conestoga Traction Co., 215 Pa. St. 555, 64 Atl. 680 (holding that where plaintiff, riding in a closed laundry wagon, drove across the car track when he could have seen a car coming if he had looked, he was guilty of contributory negligence justifying a nonsuit); Timler *v.* Philadelphia Rapid Transit Co., 214 Pa. St. 475, 63 Atl. 824; Griffith *v.* West Chester St. R. Co., 214 Pa. St. 293, 63 Atl. 740 (nonsuit held properly entered); Boehmer *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 313, 45 Atl. 126; Darwood *v.* Union Traction Co., 189 Pa. St. 592, 42 Atl. 290 (holding that one who drives at a trot upon an electric railroad crossing, without slowing up and looking for a car after obstructions preventing a view are passed, cannot recover for injuries caused by a car, although it was negligently operated); Omslaer *v.* Pittsburg, etc., Traction Co., 168 Pa. St. 519, 32 Atl. 50, 47 Am. St. Rep. 901; Carson *v.* Federal St., etc., R. Co., 147 Pa. St. 219, 23 Atl. 369, 30 Am. St. Rep. 727, 15 L. R. A. 257; Houston Bros. Co. *v.* Consolidated Traction Co., 28 Pa. Super. Ct. 374; McCartney *v.* Union Traction Co., 27 Pa. Super. Ct. 222; Trout *v.* Altoona, etc., R. Co., 13 Pa. Super. Ct. 17 (peremptory instruction for defendant).

Rhode Island.— Price *v.* Rhode Island Co., 28 R. I. 220, 66 Atl. 200, 125 Am. St. Rep. 736 (as a matter of law); Beerman *v.* Union R. Co., 24 R. I. 275, 52 Atl. 1090.

Washington.— Helber *v.* Spokane St. R. Co., 22 Wash. 319, 61 Pac. 40, as a matter of law.

Wisconsin.— McClellan *v.* Chippewa Valley Electric R. Co., 110 Wis. 326, 85 N. W. 1018; Dummer *v.* Milwaukee Electric R., etc., Co., 108 Wis. 589, 84 N. W. 853; Cawley *v.* La Crosse City R. Co., 106 Wis. 239, 82 N. W. 197.

See 44 Cent. Dig. tit. "Street Railroads," § 215.

Where the car is within the range of the driver's vision, he is chargeable with knowledge of its approach, whether he actually sees it or not. Metropolitan St. R. Co. *v.* Agnew, 65 Kan. 478, 70 Pac. 345; Trout *v.* Altoona, etc., R. Co., 13 Pa. Super. Ct. 17.

Where a driver fails to look at a point where the car could be seen, although he had previously looked at a point where his view was obstructed, he is guilty of contributory negligence. Terien *v.* St. Paul City R. Co., 70 Minn. 532, 73 N. W. 412.

Where one undertakes to cross with a wagon having a covering over it, confining his view of the track to thirty feet, the failure to lean forward so as to see an approaching car is negligence *per se,* barring a recovery for injuries received from a collision. Wheelahan *v.* Philadelphia Traction Co., 150 Pa. St. 187, 24 Atl. 688; Ehrisman *v.* East Harrisburg City Pass. R. Co., 150 Pa. St. 180, 24 Atl. 596, 17 L. R. A. 448. See also Boerth *v.* West Side R. Co., 87 Wis. 288, 58 N. W. 376.

58. Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566; Dunn *v.* Old Colony St. R. Co., 186 Mass. 316, 71 N. E. 557 (holding that a driver who, with knowledge that street cars run in both directions on a street, drives on the street without looking, except in one direction, and who knows nothing of the approach of a car from the other direction until a companion informs him of it, is guilty of contributory negligence); Vonelling *v.* Metropolitan St. R. Co., 35 Misc. (N. Y.) 301, 71 N. Y. Suppl. 751; Potter *v.* Scranton R. Co., 19 Pa. Super. Ct. 444.

59. Schutt *v.* Shreveport Belt R. Co., 109 La. 500, 33 So. 577; Saltman *v.* Boston El. R. Co., 187 Mass. 243, 72 N. E. 950; Boston, etc., Dispatch Express Co. *v.* Metropolitan St. R. Co., 14 Misc. (N. Y.) 25, 35 N. Y. Suppl. 134; Roth *v.* Metropolitan St. R. Co., 13 Misc. (N. Y.) 213, 34 N. Y. Suppl. 232; Burke *v.* Union Traction Co., 198 Pa. St. 497, 48 Atl. 470.

Excuse.— That a car has just passed will not justify a driver in acting on the assumption that no other car is near, when the contrary will become known by the use of his eyes and ears. Dewez *v.* Orleans R. Co., 115 La. 432, 39 So. 433.

where, in driving along parallel to the track, he suddenly turns his team or vehicle on or across the tracks without properly looking or listening to the rear for an approaching car,[60] or, although he looks or listens, without noticing an approaching car which by ordinary care he could have discovered in time to avoid his injury.[61] A driver is also guilty of contributory negligence precluding a recovery where, although he looks and listens at some distance from the track, he carelessly and heedlessly proceeds across without looking and listening again before going on the track,[62] particularly where his view was obstructed at the first point of look-

Where a driver does not wait until a passing car is out of his line of vision so that he can see a car approaching on the opposite track, and he is injured before he has time to cross the track, he is guilty of contributory negligence. Rodgers *v.* St. Louis Transit Co., 117 Mo. App. 678, 92 S. W. 1154; Asphalt, etc., Constr. Co. *v.* St. Louis Transit Co., 102 Mo. App. 469, 80 S. W. 741.

60. *Alabama.*— Highland Ave., etc., R. Co. *v.* Maddox, 100 Ala. 618, 13 So. 615, holding that where a person, driving a wagon with curtains closed, attempts to cross a street railroad track without looking for a car at a point nearer than seventy-five yards from the crossing, and is struck by a car approaching him from behind, he is guilty of contributory negligence.

Kentucky.— Kelly *v.* Louisville R. Co., 46 S. W. 688, 20 Ky. L. Rep. 471 (holding that where a driver, not at a crossing, attempts to cross the track without looking back to see whether a car was then approaching, although he had a short time before seen a car coming from that direction, and there is nothing to show that the motorman discovered his peril in time to have avoided the collision, a peremptory instruction for defendant is proper); South Covington, etc., St. R. Co. *v.* Enslen, 38 S. W. 850, 18 Ky. L. Rep. 921.

Maine.— Fairbanks *v.* Bangor, etc., R. Co., 95 Me. 78, 49 Atl. 421.

Massachusetts.— Seele *v.* Boston, etc., St. R. Co., 187 Mass. 248, 72 N. E. 971, covered wagon.

Michigan.— Daniels *v.* Bay City Traction, etc., Co., 143 Mich. 493, 107 N. W. 94 (holding that one who drove upon a street railroad track ahead of a car at a time when, if he had looked, he would have seen that he could not get across in time to escape the car, and who knew that the car was behind him and traveling at a high rate of speed, was guilty of contributory negligence); Blakeslee *v.* Consolidated St. R. Co., 105 Mich. 462, 63 N. W. 401; Fritz *v.* Detroit Citizens' St. R. Co., 105 Mich. 50, 62 N. W. 1007.

New Jersey.— McHugh *v.* North Jersey St. R. Co., (Sup. 1900) 46 Atl. 782; Consolidated Traction Co. *v.* Knoth, 59 N. J. L. 582, 36 Atl. 1086.

New York.— Kueski *v.* New York, etc., R. Co., 109 N. Y. App. Div. 207, 95 N. Y. Suppl. 650; Schmidt *v.* Interurban St. R. Co., 82 N. Y. App. Div. 453, 81 N. Y. Suppl. 832; Roth *v.* Metropolitan St. R. Co., 13 Misc. 213, 34 N. Y. Suppl. 232; Winch *v.* Third Ave. R. Co., 12 Misc. 403, 33 N. Y. Suppl. 615.

Ohio.— Schausten *v.* Toledo Consol. St. R. Co., 18 Ohio Cir. Ct. 691, 7 Ohio Cir. Dec. 389.

Oklahoma.— Metropolitan R. Co. *v.* Fonville, 19 Okla. 283, 91 Pac. 902.

Washington.— Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

Canada.— O'Hearn *v.* Port Arthur, 4 Ont. L. Rep. 209, 1 Ont. Wkly. Rep. 373; Danger *v.* London St. R. Co., 30 Ont. 493.

See 44 Cent. Dig. tit. "Street Railroads," § 215.

Crossing to opposite track.— Where a driver on a street railroad track, in order to avoid a car coming toward him, deliberately crosses over to the opposite track in front of a car, which he has seen approaching from the rear, without looking to see where such car is, and which if he looks he could see is upon him, and he is struck and injured thereby, he is guilty of such contributory negligence as precludes a recovery. Coats *v.* Seattle Electric Co., 39 Wash. 386, 81 Pac. 830.

61. Davidson *v.* Denver Tramway Co., 4 Colo. App. 283, 35 Pac. 920.

62. *Alabama.*— Highland Ave., etc., R. Co. *v.* Maddox, 100 Ala. 618, 13 So. 615.

Maryland.— State *v.* United R., etc., Co., 97 Md. 73, 54 Atl. 612.

Massachusetts.— Birch *v.* Athol, etc., St. R. Co., 198 Mass. 257, 84 N. E. 310, holding that where one driving an automobile backward, who after starting backing, does not look where an approaching car is, although there is nothing to obstruct his view to the rear, is guilty of contributory negligence, as a matter of law, although he looked when starting backward and the car was not then in sight.

Missouri.— Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Barrie *v.* St. Louis Transit Co., 102 Mo. App. 87, 76 S. W. 706.

New York.— Baxter *v.* Auburn, etc., Electric R. Co., 190 N. Y. 439, 83 N. E. 469; Enders *v.* Brooklyn Union El. R. Co., 131 N. Y. App. Div. 170, 115 N. Y. Suppl. 155 (holding that the fact that a driver stops, looks, and listens half a block before reaching the crossing is insufficient care); Fancher *v.* Fonda, etc., R. Co., 111 N. Y. App. Div. 4, 97 N. Y. Suppl. 666; Lang *v.* Metropolitan St. R. Co., 26 Misc. 754, 57 N. Y. Suppl. 249; Levy *v.* Metropolitan St. R. Co., 86 N. Y. Suppl. 102; Cosgrove *v.* Interurban St. R. Co., 84 N. Y. Suppl. 885.

ing,[63] whereby he is injured by a car which he might have avoided by such care. But it has been held that where at the time a driver looks, or looks and listens, along the track, and starts to drive across, he has reasonable grounds for believing that he can cross in safety, taking into consideration his distance from the track and the distance at which a car is approaching, or could be seen approaching, if in sight, and the relative speed of his own vehicle and that of the car under ordinary circumstances, he is not guilty of contributory negligence in attempting to cross without further looking or listening,[64] particularly where his progress across the track is interfered with by a defect or obstruction of which he had no knowledge.[65]

(VII) *FAILURE TO OBSERVE LAW OF THE ROAD.* Except where there is a statutory or municipal regulation requiring vehicles to keep to the right hand side of the street,[66] a driver of a vehicle is not bound to cross over to such side, but is entitled to use the left hand side, unless and until he meets a vehicle coming from the opposite direction;[67] and the mere fact that a driver of a vehicle on a public street fails to observe the rule of keeping to the right is not such negligence as will preclude him from recovering for injuries sustained

Pennsylvania.— Timler *v.* Philadelphia Rapid Transit Co., 214 Pa. St. 475, 63 Atl. 824; Keenan *v.* Union Traction Co., 202 Pa. St. 107, 51 Atl. 742, 58 L. R. A. 217; Pieper *v.* Union Traction Co., 202 Pa. St. 100, 51 Atl. 739; Burke *v.* Union Traction Co., 198 Pa. St. 497, 48 Atl. 470; Kern *v.* Second Ave. Traction Co., 194 Pa. St. 75, 45 Atl. 125; Gilmore *v.* United Traction Co., 26 Pa. Super. Ct. 97; Cupps *v.* Consolidated Traction Co., 13 Pa. Super. Ct. 630; Bornscheuer *v.* Consolidated Traction Co., 30 Pittsb. Leg. J. N. S. 344.

Washington.— Criss *v.* Seattle Electric Co., 38 Wash. 320, 80 Pac. 525.

Wisconsin.— Goldmann *v.* Milwaukee Electric R., etc., Co., 123 Wis. 168, 101 N. W. 384.

United States.— Berger *v.* Philadelphia Rapid Transit Co., 141 Fed. 1020. See also Los Angeles Traction Co. *v.* Conneally, 136 Fed. 104, 69 C. C. A. 92.

Canada.— O'Hearn *v.* Port Arthur, 4 Ont. L. Rep. 209, 1 Ont. Wkly. Rep. 373.

See 44 Cent. Dig. tit. "Street Railroads," § 215.

That an electric railroad is in the country, and that cars are not so frequent and obstructions to travel not so great, as in a city, does not relieve a person about to cross the track from the duty of continuing to look for approaching cars till he reaches the track. Keenan *v.* Union Traction Co., 202 Pa. St. 107, 51 Atl. 742, 58 L. R. A. 217.

63. Merritt *v.* Foote, 128 Mich. 367, 87 N. W. 262. And see cases cited in preceding note.

64. Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836 (holding that where at the time he started to drive across the track the car was at such a distance that an attempt to cross after having seen it was not contributory negligence, his failure to look for the car will not preclude a recovery); Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; Lane *v.* Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057 [*affirmed* in 178 N. Y. 623, 70 N. E. 1101]; Walsh *v.* Atlantic Ave. R. Co., 23 N. Y. App. Div. 19, 48 N. Y. Suppl. 343; Citizens' Rapid Transit Co. *v.* Seigrist, 96 Tenn. 119, 33 S. W. 920 (holding that where one with a team when within ten yards of a street railroad track looked and saw a street car coming, seemingly two hundred or two hundred and fifty yards away, and thinking he had plenty of time to cross the track in front of the car, which was moving fast, immediately drove on, at the rate of four miles an hour, and did not look at the car again till his front wheels were on the track, when he heard it coming very fast, and, before he could get across, the car, which "was flying," struck the rear part of the wagon on the side, he is free from contributory negligence). See also Gosnell *v.* Toronto R. Co., 21 Ont. App. 553 [*affirmed* in 24 Can. Sup. Ct. 582]. But *compare* State *v.* United R., etc., Co., 97 Md. 73, 54 Atl. 612; Reilly *v.* Metropolitan St. R. Co., 30 Misc. (N. Y.) 110, 61 N. Y. Suppl. 785; Brown *v.* Pittsburg, etc., Traction Co., 14 Pa. Super. Ct. 594; Dummer *v.* Milwaukee Electric R., etc., Co., 108 Wis. 589, 84 N. W. 853.

Standing car.— Where the car is standing still when the driver attempts to drive over the track at a street intersection, he is not guilty of negligence in failing to continuously watch the car until he has passed over the crossing. McGurgan *v.* New York City R. Co., 121 N. Y. App. Div. 519, 106 N. Y. Suppl. 201.

65. Frank *v.* St. Louis Transit Co., 112 Mo. App. 496, 87 S. W. 88.

66. See Cosby Code Ord. N. Y. (1910) p. 103. See also, generally, STREETS AND HIGHWAYS.

67. Galbraith *v.* West End St. R. Co., 165 Mass. 572, 43 N. E. 501, holding that where a driver was struck by a car while attempting to cross the tracks of an electric street railroad, in order to proceed along the right hand side of the street, it was proper to charge that he had the right to drive on either side of the street, and it was for the jury to say what, under the circumstances, should have been done by a person exercising reasonable care in regard to crossing or not crossing the street at that time. See also STREETS AND HIGHWAYS.

through the negligence of the street railroad company,[68] even though there is a regulation requiring vehicles meeting each other to keep to the right, since such regulation does not apply to the meeting of ordinary vehicles with street cars.[69] Thus the mere fact that a driver, on meeting a street car, turns to the left to allow it to pass instead of to the right is not of itself contributory negligence;[70] but on the other hand it may be contributory negligence not to turn to the left, when by so doing an accident can be avoided.[71] But it may be contributory negligence to turn to the left in front of an approaching car, when the road or street to the right is passable.[72]

(VIII) *OCCUPANT OF VEHICLE DRIVEN BY ANOTHER.*[73] As a general rule the negligence of the driver of a vehicle, as in failing to properly look and listen for approaching cars, cannot be imputed to another occupant of the vehicle who is without personal fault,[74] unless such driver is the servant or agent of the occu-

68. Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48 (holding that the fact that one drove into a dangerous place on a street, through his failure to observe the rule of keeping to the right thereof, is no defense to an action by him for resulting injuries against a street car company through whose negligence the danger existed); Spurrier *v.* Front St. Cable R. Co., 3 Wash. 659, 29 Pac. 346 (holding that it was proper to refuse to charge that, as plaintiff was driving on the wrong side of the street at the time of the accident, the presumption arises that the collision was due to her fault, since a person has a right to travel on any part of the street, provided he regards the rights of others).

It is not contributory negligence per se to drive on the right hand track of a double track road, while a car is seen approaching around a curve, which prevents him from determining on which track it is approaching until too late, and the car, by reason of its running on the same track contrary to custom, collides with his team causing his injuries. Minnich *v.* Wright, 214 Pa. St. 201, 63 Atl. 428.

69. Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834; Hegan *v.* Eighth Ave. R. Co., 15 N. Y. 380; Spurrier *v.* Front St. Cable R. Co., 3 Wash. 659, 29 Pac. 346.

70. Consolidated Traction Co. *v.* Reeves, 58 N. J. L. 573, 34 Atl. 128; Hegan *v.* Eighth Ave. R. Co., 15 N. Y. 380; Schlitz *v.* Nassau Electric R. Co., 44 N. Y. App. Div. 542, 60 N. Y. Suppl. 822; Spurrier *v.* Front St. Cable R. Co., 3 Wash. 659, 29 Pac. 346.

A mistake of judgment in driving off a street car track in the wrong direction, in an effort to avoid a collision with an approaching car, will not necessarily preclude a recovery for injuries received in the collision which follows. Kane *v.* Worcester Consol. St. R. Co., 182 Mass. 201, 65 N. E. 54. But see Suydam *v.* Grand St., etc., R. Co., 41 Barb. (N. Y.) 375, holding that where the evidence makes it clear that the collision with defendant's car was caused by the mistaken act of plaintiff, in pulling his horse to the left, it is the duty of a jury to find a verdict for defendant.

71. Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834. But see Adams *v.* Camden, etc., R. Co., 69 N. J. L. 424, 55 Atl. 254, holding that it is not an act of negligence *per se* for the driver of a carriage, when either met or overtaken by the cars of a street railroad company, to keep to the right on other tracks of said company, although by turning to the left he might have avoided both meeting and being overtaken by the company's cars.

72. Schlitz *v.* Nassau Electric R. Co., 44 N. Y. App. Div. 542, 60 N. Y. Suppl. 822, holding that where a driver of a heavy drag, loaded with people, and to which six horses were attached, was driving on a street car track at night, and, to permit a car to pass from behind, turned to the left across a parallel track, and was immediately struck by a car approaching on the second track in the opposite direction, and the driver knew that cars were running a minute apart, and the dirt road to the right was muddy but passable, his turning to the left was negligence contributing to the injury.

73. **Contributory negligence of occupant of vehicle in respect to ordinary railroads** see RAILROADS, 33 Cyc. 1015.

Imputed negligence generally see NEGLIGENCE, 29 Cyc. 542.

74. *Arkansas.*— Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245.

Delaware.— Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543.

Illinois.— Chicago Union Traction Co. *v.* Leach, 215 Ill. 184, 74 N. E. 119 [*affirming* 117 Ill. App. 169].

Massachusetts.— Peabody *v.* Haverhill, etc., St. R. Co., 200 Mass. 277, 85 N. E. 1051.

Minnesota.— Johnson *v.* St. Paul City R. Co., 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586.

Missouri.— Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; Zalotuchin *v.* Metropolitan St. R. Co., 127 Mo. App. 577, 106 S. W. 548.

Ohio.— Ulrich *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 635, 5 Ohio Cir. Dec. 111, negligence of husband not imputable to wife in vehicle with him.

Compare Hilts *v.* Foote, 125 Mich. 241, 84 N. W. 139.

Teamster's helper.— It is not the duty of a teamster's helper to see that the teamster acts prudently, in the absence of knowledge or reason to believe that he is not a careful driver or prudent man, and hence he is not

pant,[75] or the occupant otherwise has the right to direct and control the driver's actions,[76] as where the driver is of obvious or known imprudence or incompetency.[77] But this rule does not relieve the occupant from the duty of exercising ordinary care on his part to avoid being injured; [78] and if he has an opportunity to do so, it is no less his duty than that of the driver to learn of danger and avoid it if possible; and if he fails to exercise reasonable care to look or listen for approaching cars, or otherwise to save himself from injury, he is guilty of contributory negligence barring a recovery.[79]

(IX) *Driver of Fire Engine or Truck or Firemen Thereon.* The mere fact that a fire engine, truck, or wagon has a right of way over street cars, whether by statute, ordinance, or otherwise,[80] does not relieve the driver thereof from exercising ordinary care, in driving across street car tracks, to avoid a collision,[81] the degree of care and diligence to be exercised by such driver depending upon the facts and circumstances of the particular case, and being such as a prudent

guilty of contributory negligence, where he is injured on account of a street car running into the wagon in which he is riding while the teamster is driving. Agnew *v.* Metropolitan St. R. Co., 125 Mo. App. 587, 102 S. W. 1041.

75. Weldon *v.* People's R. Co., (Del. 1906) 65 Atl. 589; Kerin *v.* United Traction Co., 117 N. Y. App. Div. 314, 102 N. Y. Suppl. 423. See also Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. 186.

76. Chicago Union Traction Co. *v.* Leach, 215 Ill. 184, 74 N. E. 119 [*affirming* 117 Ill. App. 169]; Peabody *v.* Haverhill, etc., St. R. Co., 200 Mass. 277, 85 N. E. 1051; Johnson *v.* St. Paul City R. Co., 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586.

77. Johnson *v.* St. Paul City R. Co., 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; Sluder *v.* St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. N. S. 186; Agnew *v.* Metropolitan St. R. Co., 125 Mo. App. 587, 102 S. W. 1041.

78. Peabody *v.* Haverhill, etc., St. R. Co., 200 Mass. 277, 85 N. E. 1051.

A gratuitous passenger riding in the vehicle of another must use due care to avoid being injured by a collision with a street car, even though not chargeable with the driver's negligence. Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. (Del.) 581, 52 Atl. 543.

79. *Indiana.*— Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602, 65 N. E. 309.

Kentucky.— Paducah Traction Co. *v.* Sine, 111 S. W. 356, 33 Ky. L. Rep. 792, rear man on covered ice wagon held not negligent.

Massachusetts.— Lawrence *v.* Fitchburg, etc., R. Co., 201 Mass. 489, 87 N. E. 898, holding that where the occupants of an automobile, stalled on a dark night close to the track of an electric line, see an electric car coming when five hundred feet away, remain in the machine, and give no warning to the motorman, trusting solely to his sceing them and stopping the car in time to avoid a collision, their negligence bars a recovery for their injuries.

Minnesota.— Wosika *v.* St. Paul City R. Co., 80 Minn. 364, 83 N. W. 386, holding that one who is riding in a rear seat of a wagon, and who has no direct control over the horses, but who is a joint contributor to the hire of the team for the occasion, is guilty of negligence if he does not look for approaching cars on crossing a street car track in the suburban and thinly settled district of a city; but that a mere passenger in a wagon, who has no control over the team, is not guilty of negligence in failing to look out for cars when crossing a street railroad track.

Missouri.— Fechley *v.* Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421.

New York.— Caminez *v.* Brooklyn, etc., R. Co., 127 N. Y. App. Div. 138, 111 N. Y. Suppl. 384; MacGuire *v.* New York City R. Co., 52 Misc. 591, 102 N. Y. Suppl. 749; Anderson *v.* Metropolitan St. R. Co., 30 Misc. 104, 61 N. Y. Suppl. 899; Krintzman *v.* Interurban St. R. Co., 84 N. Y. Suppl. 243.

Ohio.— Ulrich *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 635, 5 Ohio Cir. Dec. 111.

Wisconsin.— Johnson *v.* Superior Rapid Transit R. Co., 91 Wis. 233, 64 N. W. 753.

Relying on driver.—Where a person is riding by invitation with one whom he knows is a skilful, experienced driver, who has for many years been traveling the streets in vehicles such as they are riding in, and he sees the driver check his horse as they approach a street railroad, and lean forward beyond the side curtains and look for cars, and such person in his position cannot see through the glass in the side of the curtain, and does not hear a car approaching, he is not guilty of contributory negligence in relying on the care of the driver. United R., etc., Co. *v.* Biedler, 98 Md. 564, 56 Atl. 813.

80. See *supra*, X, B, 5, b, (v).

81. Birmingham R., etc., Co. *v.* Baker, 126 Ala. 135, 28 So. 87; Guiney *v.* Southern Electric R. Co., 167 Mo. 595, 67 S. W. 296, holding that whether or not a street railroad's servants give signals of the car's approach, it is the driver's duty to look and listen before driving upon the tracks.

It is negligence for such a driver in going to a fire to approach a street traversed by street cars without having his horses under such control as to permit of his stopping them. Garrity *v.* Detroit Citizens' St. R. Co., 112 Mich. 369, 70 N. W. 1018, 37 L. R. A.

person would exercise under like circumstances;[82] and although his duties may require him to take risks in crossing the tracks ahead of a street car which it would be negligence for a private person to take in pursuit of his private business,[83] if by reason of such driver's failure to exercise due care a collision with a car occurs, resulting in injuries to him or to his engine or truck, there can be no recovery therefor from the street railroad company.[84] But the negligence of the driver cannot be imputed to another fireman on his truck or wagon so as to preclude a recovery by the latter if he has exercised ordinary care for his own safety;[85] and a fireman riding on an engine or truck driven by another is ordinarily not required to keep a vigilant watch for cars, and if he uses reasonable care to avoid injuries after seeing an approaching car he is not negligent as a matter of law.[86]

i. Children and Others Under Disability — (i) *CHILDREN*.[87] Where a child, of such tender years that he is incapable of appreciating and avoiding danger, is injured through the negligent operation of a street railroad he may be declared as a matter of law to be free from contributory negligence,[88] and a recovery be had for his injuries, unless his parents are negligent in permitting him to go on

529. See also Hanlon *v.* Milwaukee Electric R., etc., Co., 118 Wis. 210, 95 N. W. 100.

82. *Michigan.*—Garrity *v.* Detroit Citizens' St. R. Co., 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529, driver's negligence held a question for the jury.

Minnesota.— Warren *v.* Mendenhall, 77 Minn. 145, 79 N. W. 661.

Missouri.— Guiney *v.* Southern Electric R. Co., 167 Mo. 595, 67 S. W. 296.

New Jersey.— Consolidated Traction Co. *v.* Chenowith, 58 N. J. L. 416, 34 Atl. 817, driver held not negligent as a matter of law.

New York.— New York *v.* Metropolitan St. R. Co., 90 N. Y. App. Div. 66, 85 N. Y. Suppl. 693 [*affirmed* in 182 N. Y. 536, 75 N. E. 1128].

Wisconsin.— Hanlon *v.* Milwaukee Electric R., etc., Co., 118 Wis. 210, 95 N. W. 100.

A driver has a right to assume, when crossing a track, that the motorman on an approaching street car, on discovering the fire engine or truck, will so control his car as to give such engine or truck the right of way, as he is required to do by custom, ordinance, or statute. New York *v.* Metropolitan St. R. Co., 90 N. Y. App. Div. 66, 85 N. Y. Suppl. 693 [*affirmed* in 182 N. Y. 536, 75 N. E. 1128]; Hanlon *v.* Wilwaukee Electric R., etc., Co., 118 Wis. 210, 95 N. W. 100, holding that where it was undisputed that the uniform custom of street cars is to stop or slacken speed and give fire apparatus the right of way, it is not error to charge that plaintiff, the driver of a hose cart, was entitled to assume that defendant would comply therewith.

Rate of speed.— The mere fact that a fire engine or truck was driven at the time of the accident at a greater rate of speed than was allowable in the streets for a private carriage does not constitute contributory negligence. Chicago City R. Co. *v.* McDonough, 125 Ill. App. 223 [*affirmed* in 221 Ill. 69, 77 N. E. 577]; Flynn *v.* Louisville R. Co., 110 Ky. 662, 62 S. W. 490, 23 Ky. L. Rep. 57, holding that a speed of from ten to fifteen miles an hour is not such contributory negligence as will preclude the driver from recovery for injuries received in a collision with a street car.

The rule that a person approaching a street car track is bound to look and listen, and to continue to look and listen up to the last moment, when his acts would have been of any virtue in preventing a collision with a car, is inapplicable to the driver of a hose cart approaching a street railroad crossing. Hanlon *v.* Milwaukee Electric R., etc., Co., 118 Wis. 210, 95 N. W. 100.

83. Warren *v.* Mendenhall, 77 Minn. 145, 79 N. W. 661.

84. Birmingham R., etc., Co. *v.* Baker, 126 Ala. 135, 28 So. 87; Guiney *v.* Southern Electric R. Co., 167 Mo. 595, 67 S. W. 296.

85. Burleigh *v.* St. Louis Transit Co., 124 Mo. App. 724, 102 S. W. 621; Geary *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 441, 77 N. Y. Suppl. 54, 84 N. Y. App. Div. 514, 82 N. Y. Suppl. 1016 [*affirmed* in 177 N. Y. 535, 69 N. E. 1123].

86. Quinn *v.* Dubuque St. R. Co., (Iowa 1903) 94 N. W. 476; Burleigh *v.* St. Louis Transit Co., 124 Mo. App. 724, 102 S. W. 621. See also Magee *v.* West End St. R. Co., 151 Mass. 240, 23 N. E. 1102.

87. Contributory negligence of children dependent upon age and capacity in general see NEGLIGENCE, 29 Cyc. 535.

Contributory negligence of parent or custodian imputable to child see NEGLIGENCE, 29 Cyc. 552.

Contributory negligence of parent preventing recovery for injuries to child see PARENT AND CHILD, 29 Cyc. 1643.

88. Indianapolis St. R. Co. *v.* Schomberg, (Ind. App. 1904) 71 N. E. 237 (under three years); Louisville R. Co. *v.* Gaar, (Ky. 1908) 112 S. W. 1130 (four and a half years); Kaplan *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 133, 90 N. Y. Suppl. 585 (holding that where a child is only six years of age at the time he sustains injuries in a collision with a street car, from which he dies, it will be presumed, in the absence of evidence to the contrary, that he is *non sui juris*, and cannot therefore be guilty of contributory negligence).

the street unattended.[89] But where a child is of sufficient mental capacity and experience to appreciate, to a limited extent at least, the danger of going upon or near a street railroad track, while he is not required in doing so to exercise the same degree of care and caution as a person of mature years is required to exercise,[90] he is required to exercise such care and precaution and such only as may be reasonably expected of a child of his age, experience, and intelligence, under the same or similar circumstances,[91] as in attempting to cross in front of an approaching car;[92] and if he fails to exercise such care and precaution, whereby

89. Muller *v.* Brooklyn Heights R. Co., 18 N. Y. App. Div. 177, 45 N. Y. Suppl. 954. See, generally, NEGLIGENCE, 29 Cyc. 552 *et seq.*; PARENT AND CHILD, 29 Cyc. 1643 *et seq.*

90. *Illinois.*— West Chicago St. R. Co. *v.* Stoltenberg, 62 Ill. App. 420.

Kansas.— Consolidated, etc., R. Co. *v.* Wyatt, (1898) 52 Pac. 98.

Missouri.— Brown *v.* St. Louis, etc., R. Co., 127 Mo. App. 499, 106 S. W. 83.

New York.— Glynn *v.* New York City R. Co., 110 N. Y. Suppl. 836.

Oregon.—Dubiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693, boy fifteen years old.

See 44 Cent. Dig. tit. "Street Railroads," § 217.

91. *Alabama.*— Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25.

California.— George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829.

Delaware.— Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906, child eight years old.

Illinois.— Chicago City R. Co. *v.* Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76 [*affirming* 33 Ill. App. 450]; West Chicago St. R. Co. *v.* Stoltenberg, 62 Ill. App. 420.

Indiana.— Indianapolis St. R. Co. *v.* Schomberg, 164 Ind. 111, 72 N. E. 1041; Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

Kentucky.— Louisville R. Co. *v.* Phillips, 58 S. W. 995, 22 Ky. L. Rep. 842.

Maine.— Colomb *v.* Portland, etc., St. R. Co., 100 Me. 418, 61 Atl. 898.

Maryland.— Baltimore, etc., R. Co. *v.* State, 30 Md. 47.

Massachusetts.— Burns *v.* Worcester Consol. St. R. Co., 193 Mass. 63, 78 N. E. 740; Com. *v.* Metropolitan R. Co., 107 Mass. 236, child two years old, in charge of girl sixteen years old, held to have been in the exercise of due care.

Missouri.— Wise *v.* St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Mullin *v.* St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288; Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626.

New Jersey.— Fitzhenry *v.* Consolidated Traction Co., 64 N. J. L. 674, 46 Atl. 698.

New York.— West *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 373, 94 N. Y. Suppl. 250; Dempsey *v.* Brooklyn Heights R. Co., 98 N. Y. App. Div. 182, 90 N. Y. Suppl. 639; Muller *v.* Brooklyn Heights R. Co., 18 N. Y. App. Div. 177, 45 N. Y. Suppl. 954; Glynn *v.* New York City R. Co., 110 N. Y. Suppl. 836, holding that a child thirteen years old must look again for cars after he leaves the curb and before he goes on the track.

Oregon.— Dubiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693.

Pennsylvania.— Warner *v.* Railroad Co., 6 Phila. 537.

Utah.— Riley *v.* Salt Lake Rapid Transit Co., 10 Utah 428, 37 Pac. 681.

Washington.— Roberts *v.* Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

See 44 Cent. Dig. tit. "Street Railroads," § 217.

Ability to appreciate danger does not make a child between seven and fourteen years of age responsible for contributory negligence, but it must have a maturity and discretion beyond its years which will lead it to take care, and hence the liability of such a child for contributory negligence cannot be barred upon the sole fact that he had sufficient age and discretion to know the danger of going upon a street railroad track without stopping, looking, or listening for approaching cars. Birmingham R., etc., Co. *v.* Landrum, 153 Ala. 192, 45 So. 198, 127 Am. St. Rep. 25.

The capacity of a particular child to appreciate the danger of a car is not to be determined by a consideration of the abstract intelligence of children of that age, but by what that particular child understands; and if it exercises care commensurate with its intelligence, it discharges its duty to the company, and is not guilty of contributory negligence. Grealish *v.* Brooklyn, etc., R. Co., 130 N. Y. App. Div. 238, 114 N. Y. Suppl. 582 [*affirmed* in 197 N. Y. 540, 91 N. E. 1114].

That the child was playing on the street when he was run over by a street car does not necessarily deprive him of a recovery. Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

92. Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Kitay *v.* Brooklyn, etc., R. Co., 23 N. Y. App. Div. 228, 48 N. Y. Suppl. 982; Ellick *v.* Metropolitan St. R. Co., 15 N. Y. App. Div. 556, 44 N. Y. Suppl. 523 (attempt to cross in front of approaching car); Young *v.* Atlantic Ave. R. Co., 10 Misc. (N. Y.) 541, 31 N. Y. Suppl. 441; Huerzeler *v.* Central Crosstown R. Co., 1 Misc. (N. Y.) 136, 20 N. Y. Suppl. 676 [*affirmed* in 139 N. Y. 490, 34 N. E. 1101]. And see cases cited in preceding note 91.

The failure of a child of ordinary intelligence to look in both directions for an ap-

he is injured, he is guilty of contributory negligence precluding a recovery.[93] Thus it has been held that a child is guilty of contributory negligence precluding a recovery if he is of sufficient age and intelligence to appreciate danger and take such precautions as such a child would be reasonably expected to take, where he goes upon the tracks without properly looking or listening for an approaching car which he could have discovered in time to avoid the accident,[94] as where he attempts to cross without properly looking or listening immediately behind another car,[95] or where he carelessly or heedlessly attempts to cross in front of a car which he sees approaching in dangerous proximity.[96]

proaching car, before running across the tracks, is not necessarily conclusive evidence of contributory negligence. Murphy *v.* Derby St. R. Co., 73 Conn. 249, 47 Atl. 120.

93. *Colorado.*— Pueblo Electric St. R. Co. *v.* Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116, holding that a thirteen-year-old boy of average intelligence, warned of the danger of alighting from a moving street car, is guilty of negligence in so doing.

Kentucky.— Taylor *v.* South Covington, etc., St. R. Co., 20 S. W. 275, 14 Ky. L. Rep. 355.

Maryland.—McMahon *v.* Northern Cent. R. Co., 39 Md. 438.

Massachusetts.— Murphy *v.* Boston El. R. Co., 188 Mass. 8, 73 N. E. 1018; Sewell *v.* New York, etc., R. Co., 171 Mass. 302, 50 N. E. 541 (holding that a boy who attempts to cross a private street railroad crossing on a bicycle, without looking for a car, and without relying on being warned by signals, is negligent); Mullen *v.* Springfield St. R. Co., 164 Mass. 450, 41 N. E. 664 (boy ten years old held guilty of contributory negligence in jumping from wagon in front of car).

Michigan.— Wade *v.* Detroit, etc., R. Co., 151 Mich. 684, 115 N. W. 713, failure to look for and avoid car while walking on inclosed track.

New Jersey.— North Hudson County R. Co. *v.* Flanagan, 57 N. J. L. 696, 32 Atl. 216.

New York.— Hogan *v.* Central Park, etc., R. Co., 124 N. Y. 647, 26 N. E. 950 [*reversing* 58 N. Y. Super. Ct. 322, 11 N. Y. Suppl. 588], trespassing boy jumping off car in front of another car.

See 44 Cent. Dig. tit. "Street Railroads," § 217.

Request to keep boy off car.— The fact that the father of a boy seventeen years old had previously requested the driver of a street car to keep the boy off the car does not excuse the boy's conduct in getting on the car without the knowledge or consent of the company, and needlessly and wantonly beating the mules, resulting in his injury. Taylor *v.* South Covington, etc., St. R. Co., 20 S. W. 275, 14 Ky. L. Rep. 355.

The rule requiring street car drivers to exercise vigilance in looking out for dangers to persons on the track, and to use reasonable diligence to prevent injury to a person after his peril is discovered, has no application to the case of a boy seventeen years old who jumps on a car and whips the mules, because such a boy not only assumes the attitude of a trespasser, but illegally interferes with the movement of the car, and thereby causes his own death or injury. Taylor *v.* South Covington, etc., St. R. Co., 20 S. W. 275, 14 Ky. L. Rep. 355.

94. *Indiana.*— Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778, holding that the fact that a child seven years old, injured by a street car while crossing the track, could have seen the approaching car, is a fact to be considered in connection with other circumstances in determining the child's negligence, but is not sufficient in itself to show such negligence.

Louisiana.— Kaiser *v.* New Orleans, etc., R. Co., 107 La. 539, 32 So. 75.

Massachusetts.— Morey *v.* Gloucester St. R. Co., 171 Mass. 164, 50 N. E. 530.

Michigan.— Henderson *v.* Detroit Citizens' St. R. Co., 116 Mich. 368, 74 N. W. 525.

Missouri.— Mullin *v.* St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288; Jett *v.* Central Electric R. Co., 178 Mo. 664, 77 S. W. 738.

New Jersey.—Brady *v.* Consolidated Traction Co., 64 N. J. L. 373, 45 Atl. 805; Sheets *v.* Connolly St. R. Co., 54 N. J. L. 518, 24 Atl. 483.

New York.— Pinder *v.* Brooklyn Heights R. Co., 173 N. Y. 519, 66 N. E. 405 [*reversing* 65 N. Y. App. Div. 521, 72 N. Y. Suppl. 1082]; Biederman *v.* Dry Dock, etc., R. Co., 54 N. Y. App. Div. 291, 66 N. Y. Suppl. 594; Weiss *v.* Metropolitan St. R. Co., 33 N. Y. App. Div. 221, 53 N. Y. Suppl. 449 [*affirmed* in 165 N. Y. 665, 5 N. E. 1132]; Ledman *v.* Dry Dock, etc., R. Co., 28 N. Y. App. Div. 197, 50 N. Y. Suppl. 895.

Wisconsin.— Wills *v.* Ashland Light, etc., R. Co., 108 Wis. 255, 84 N. W. 998; Ryan *v.* La Crosse City R. Co., 108 Wis. 122, 83 N. W. 770.

See 44 Cent. Dig. tit. "Street Railroads," § 217.

95. O'Rourke *v.* New Orleans City, etc., R. Co., 51 La. Ann. 755, 25 So. 323; Stackpole *v.* Boston El. R. Co., 193 Mass. 562, 79 N. E. 740.

96. *Louisiana.*— Downey *v.* Baton Rouge Electric, etc., Co., 122 La. 481, 47 So. 837.

Massachusetts.— Casey *v.* Boston El. R. Co., 197 Mass. 440, 83 N. E. 867; Holian *v.* Boston El. R. Co., 194 Mass. 74, 80 N. E. 1, 11 L. R. A. N. S. 166.

New Jersey.— Brady *v.* Consolidated Traction Co., 63 N. J. L. 25, 42 Atl. 1054.

New York.— Bambace *v.* Interurban St. R. Co., 188 N. Y. 288, 80 N. E. 913 [*reversing* 112 N. Y. App. Div 898, 97 N. Y. Suppl. 1127]; Griffith *v.* Metropolitan St. R. Co., 32

(11) *Old, Infirm, or Afflicted Persons.* A person laboring under some physical disability, as where he is aged and feeble,[97] or otherwise afflicted,[98] must, in going upon or near a street railroad track, exercise caution and prudence in proportion to his disability. If some of his senses are impaired he must be more vigilant in the use of his remaining senses,[99] as where his hearing is defective he should be more alert in the use of his other senses.[1] Thus if a deaf person carelessly goes upon or along the tracks without properly looking for an approaching car, which he could have discovered in time to avoid injury, he is guilty of contributory negligence precluding a recovery.[2]

8. Injury Avoidable Notwithstanding Contributory Negligence — a. In General. Under what is commonly known as "the last clear chance" doctrine, or as it is sometimes called, the "doctrine of discovered peril," or "humanitarian doctrine," a person may recover for injuries sustained through the negligent management or operation of a street railroad, although he is guilty of negligence in getting into a dangerous position upon or near the company's track, if, notwithstanding such negligence on his part, the servants of the company may, by the exercise of ordinary care and diligence, avoid injuring him after they discover his peril,[3] or by the weight of authority after they discover, or by the exercise of

Misc. 289, 66 N. Y. Suppl. 801 [*reversed* on the facts in 63 N. Y. App. Div. 86, 71 N. Y. Suppl. 406 (*reversed* in 171 N. Y. 106, 63 N. E. 808)].

Rhode Island.— Poland *v.* Union R. Co., 26 R. I. 215, 58 Atl. 653.

See 44 Cent. Dig. tit. "Street Railroads," § 217.

97. Cowan *v.* Third Ave. R. Co., 9 N. Y. Suppl. 610 [*affirmed* in 132 N. Y. 598, 30 N. E. 1152].

It is not negligence, as a matter of law, for a man seventy-nine years old, blind in one eye, and of defective hearing, to drive unattended on a public street. Robbins *v.* Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334; Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

98. Baltimore Traction Co. *v.* Wallace, 77 Md. 435, 26 Atl. 518 (cripple); Callaghan *v.* Boston El. R. Co., 200 Mass. 450, 86 N. E. 767 (holding that, where a cripple about sixty years old, who walked slowly with a crutch, started to cross a street railroad track, although he saw a car approaching at a speed of from six to nine miles an hour, and did not look again, or pay any attention to the car, and disregarded warnings given him in loud tones, when he was within four or five feet of the track, by a bystander, he was guilty of contributory negligence, precluding recovery).

99. Ft. Smith Light, etc., Co. *v.* Barnes, 80 Ark. 169, 96 S. W. 976.

1. Ft. Smith Light, etc. Co. *v.* Barnes, 80 Ark. 169, 96 S. W. 976; Adams *v.* Boston, etc., R. Co., 191 Mass. 486, 78 N. E. 117; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141, holding that the fact that a person is deaf imposes on him the duty of looking to learn whether he may safely proceed in crossing a track.

2. Beem *v.* Tama, etc., Electric R., etc., Co., 104 Iowa 563, 73 N. W. 1045; Adams *v.* Boston, etc., St. R. Co., 191 Mass. 486, 78 N. E. 117; Hall *v.* West End St. R. Co., 168 Mass. 461, 47 N. E. 124; Bennett *v.* Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480 (as a matter of law); Shanks *v.* Springfield Traction Co., 101 Mo. App. 702, 74 S. W. 386 (holding that a deaf person is guilty of contributory negligence in walking along a street car track without looking back frequently to see if a car is coming).

3. *Alabama.*— Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032; Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177; Birmingham R., etc., Co. *v.* Clarke, (1906) 41 So. 829; Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616; Birmingham R., etc., Co. *v.* Brantley, 141 Ala. 614, 37 So. 698.

Arkansas.— Ft. Smith Light, etc., Co. *v.* Flint, 81 Ark. 231, 99 S. W. 79; Ft. Smith Light, etc., Co. *v.* Barnes, 80 Ark. 169, 96 S. W. 976; Johnson *v.* Stewart, 62 Ark. 164, 34 S. W. 889 (not sufficient that might have become aware of peril to injured person); Citizens' St. R. Co. *v.* Steen, 42 Ark. 321. See also Hot Springs St. R. Co. *v.* Johnson, 64 Ark. 420, 42 S. W. 833.

California.— Bennichsen *v.* Market St. R. Co., 149 Cal. 18, 84 Pac. 420 (holding that in an action for injuries from being struck by a street car, it was error to authorize a recovery by plaintiff, notwithstanding contributory negligence, where the evidence showed conclusively that the motorman did not see the person injured until after the accident); Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238; Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734; Kramm *v.* Stockton Electric R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

Colorado.— Liutz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600; Oliver *v.* Denver Tramway Co., 13 Colo. App. 543, 59 Pac. 79.

Texas.— Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624; San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64; Dallas Consol. Electric St. R. Co. *v.* Conn, (Civ. App.

reasonable care could discover, his peril in time to avoid the injury,[4] and they negligently fail to do so, whether or not such failure is wilful, reckless, or wan-

1907) 100 S. W. 1019; Taylor *v.* Houston Electric Co., 38 Tex. Civ. App. 432, 85 S. W. 1019, holding that where a person lying on a street car track in an intoxicated condition is run over and killed, the company is guilty of negligence only for a failure to use proper diligence to prevent injury to him after he has been actually discovered on the track.

West Virginia.— Riedel *v.* Wheeling Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. N. S. 1123.

United States.— Denver City Tramway Co. *v.* Cobb, 164 Fed. 41, 90 C. C. A. 459.

See 44 Cent. Dig. tit. "Street Railroads," § 219.

But see Tesch *v.* Milwaukee Electric R., etc., Co., 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618.

4. *Delaware.*— Heinel *v.* People's R. Co., 6 Pennew. 428, 67 Atl. 173; Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906.

District of Columbia.— Hawley *v.* Columbia R. Co., 25 App. Cas. 1.

Indiana.— Indianapolis Traction, etc., Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. N. S. 143; Grass *v.* Ft. Wayne, etc., Traction Co., 42 Ind. App. 395, 81 N. E. 514; Indianapolis St. R. Co. *v.* Bolin, 39 Ind. App. 169, 78 N. E. 210; Hammond, etc., Electric R. Co. *v.* Eads, 32 Ind. App. 249, 69 N. E. 555.

Iowa.— Powers *v.* Des Moines City R. Co., (1908) 115 N. W. 494 (holding that a street railroad company is liable for striking a person with a car if the motorman knew of his danger, in time to have avoided injuring him in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger and continued to be negligent in not looking out for his own safety); Doherty *v.* Des Moines City R. Co., 137 Iowa 358, 114 N. W. 183; Barry *v.* Burlington R., etc., Co., 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; Orr *v.* Cedar Rapids, etc., R. Co., 94 Iowa 423, 62 N. W. 851.

Kentucky.— Louisville R. Co. *v.* Edelen, 123 Ky. 629, 96 S. W. 901, 29 Ky. L. Rep. 1125; Louisville R. Co. *v.* Hutchcraft, 127 Ky. 531, 105 S. W. 983, 32 Ky. L. Rep. 429; Flynn *v.* Louisville R. Co., 110 Ky. 662, 62 S. W. 490, 23 Ky. L. Rep. 57; Paducah Traction Co. *v.* Sine, 111 S. W. 356, 33 Ky. L. Rep. 792; Louisville R. Co. *v.* Hoskins, 88 S. W. 1087, 28 Ky. L. Rep. 124; Louisville R. Co. *v.* Colston, 79 S. W. 243, 25 Ky. L. Rep. 1933; Floyd *v.* Paducah R., etc., Co., 73 S. W. 1122, 24 Ky. L. Rep. 2364; Owensboro City R. Co. *v.* Hill, 56 S. W. 21, 21 Ky. L. Rep. 1638.

Louisiana.— Kramer *v.* New Orleans City, etc., R. Co., 51 La. Ann. 1689, 26 So. 411.

Maine.— Atwood *v.* Bangor, etc., R. Co., 91 Me. 399, 40 Atl. 67.

Maryland.— Baltimore Consol. R. Co. *v.* Rifcowitz, 89 Md. 338, 43 Atl. 762; Baltimore Traction Co. *v.* Appel, 80 Md. 603, 31 Atl. 964; Baltimore Traction Co. *v.* Wallace, 77 Md. 435, 26 Atl. 518.

Massachusetts.— Carrahar *v.* Boston, etc., St. R. Co., 198 Mass. 549, 85 N. E. 162, 126 Am. St. Rep. 461.

Michigan.— Bladecka *v.* Bay City Traction, etc., Co., 155 Mich. 253, 118 N. W. 963; Bedell *v.* Detroit, etc., R. Co., 131 Mich. 668, 92 N. W. 349, injury to bicycle rider.

Missouri.— Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969; Felver *v.* Central Electric R. Co., 216 Mo. 195, 115 S. W. 980; White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14; Goff *v.* St. Louis Transit Co., 199 Mo. 694, 98 S. W. 49 (holding that a street car company is liable even to a trespasser if it fails to use ordinary care to prevent injuring him after discovering his peril); Baxter *v.* St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856; Moore *v.* St. Louis Transit Co., 194 Mo. 1, 92 S. W. 390; Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509; Rapp *v.* St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865; Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; Jett *v.* Central Electric R. Co., 178 Mo. 664, 77 S. W. 738; Klockenbrink *v.* St. Louis, etc., R. Co., 172 Mo. 678, 72 S. W. 900; Levin *v.* Metropolitan St. R. Co., 140 Mo. 624, 41 S. W. 968; Funck *v.* Metropolitan St. R. Co., 133 Mo. App. 419, 113 S. W. 694; Bensick *v.* St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587; Wallack *v.* St. Louis Transit Co., 123 Mo. App. 160, 100 S. W. 496; Bectenwald *v.* Metropolitan St. R. Co., 121 Mo. App. 595, 97 S. W. 557; Rodgers *v.* St. Louis Transit Co., 117 Mo. App. 678, 92 S. W. 1154; Jager *v.* Metropolitan St. R. Co., 114 Mo. App. 10, 89 S. W. 62; Williams *v.* Metropolitan St. R. Co., 114 Mo. App. 1, 89 S. W. 59; Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Union Biscuit Co. *v.* St. Louis Transit Co., 108 Mo. App. 297, 83 S. W. 288; Hanheide *v.* St. Louis Transit Co., 104 Mo. App. 323, 78 S. W. 820; Sepetowski *v.* St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693; Barrie *v.* St. Louis Transit Co., 102 Mo. App. 87, 76 S. W. 706; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77, 74 S. W. 141; Degel *v.* St. Louis Transit Co., 101 Mo. App. 56, 74 S. W. 156; Hutchinson *v.* St. Louis, etc., R. Co., 88 Mo. App. 376; McAndrew *v.* St. Louis, etc., R. Co., 88 Mo. App. 97; O'Keefe *v.* St. Louis, etc., R. Co., 81 Mo. App. 386; Davies *v.* Peoples R. Co., 67 Mo. App. 598. See also Kimble *v.* St. Louis, etc., R. Co., 108 Mo. App. 78, 82 S. W. 1096.

New Hampshire.— Hanson *v.* Manchester St. R. Co., 73 N. H. 395, 62 Atl. 595; Laronde *v.* Boston, etc., R. Co., 73 N. H. 247, 60 Atl. 684; Little *v.* Boston, etc., R. Co., 72 N. H. 502, 57 Atl. 920; Parkinson *v.* Concord St. R. Co., 71 N. H. 28, 51 Atl. 268;

ton,[5] as where the driver or motorman of a car, after discovering a person in peril on or near the tracks, causes injury to such person by failing to exercise ordinary care in regard to checking the speed of or stopping the car,[6] or in regard to giving proper warnings or signals of its approach.[7] This doctrine, however, applies against the company only where the injured person's negligence is prior to the negligence of the company which causes the injury, and without which the injury would not have been caused. It does not apply where the injured person's negligence continues up to the time of the accident and directly contributes thereto,[8] as

Edgerly *v.* Union St. R. Co., 67 N. H. 312, 36 Atl. 558.

New York.— Weitzman *v.* Nassau Electric R. Co., 33 N. Y. App. Div. 585, 53 N. Y. Suppl. 905; Robkin *v.* Joline, 114 N. Y. Suppl. 98. See also Wagner *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 591, 80 N. Y. Suppl. 191 [*affirmed* in 176 N. Y. 610, 68 N. E. 1125].

Oregon.— Wallace *v.* Suburban R. Co., 26 Oreg. 174, 37 Pac. 477, 25 L. R. A. 663.

Tennessee.—Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374

Virginia.— Richmond Pass., etc., Co. *v.* Gordon, 102 Va. 498, 46 S. E. 772.

See 44 Cent. Dig. tit. "Street Railroads," § 219.

Restarting car after accident.— The fact that a person is negligent in attempting to cross the track in front of an approaching car in a collision with which his wagon is overturned will not prevent a recovery for injuries received on account of negligence in restarting the car after it has come to a full stop after the collision, and again striking the wagon. McDivitt *v.* Des Moines St. R. Co., 99 Iowa 141, 68 N. W. 595. But where a person is struck by a car at night, and while he is under the car the motorman and conductor are unable to find him, whereupon they move the car ahead and he is found dead, in the absence of affirmative proof that the moving of the car caused his death, there can be no recovery, irrespective of contributory negligence, on the theory that the motorman was guilty of negligence in moving the car after such person was struck. Healy *v.* United Traction Co., 115 N. Y. App. Div. 868, 101 N. Y. Suppl. 331.

5. White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14. But see Abbott *v.* Kansas City El. R. Co., 121 Mo. App. 582, 97 S. W. 198.

6. *Alabama.*— Mobile Light, etc., Co. *v.* Baker, 158 Ala. 491, 48 So. 119.

California.— Lee *v.* Market St. R. Co., 135 Cal. 293, 67 Pac. 765; Fox *v.* Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

Colorado.— Oliver *v.* Denver Tramway Co., 13 Colo. App. 543, 59 Pac. 79.

Connecticut.— Smith *v.* Connecticut R. etc., Co., 80 Conn. 268, 67 Atl. 888, 17 L. R. A. N. S. 707.

Kentucky.— Paducah Traction Co. *v.* Sine, 111 S. W. 356, 33 Ky. L. Rep. 792.

Maine.— Atwood *v.* Bangor, etc., R. Co., 91 Me. 399, 40 Atl. 67.

Maryland.— Baltimore Consol. R. Co. *v.* Rifcowitz, 89 Md. 338, 43 Atl. 762.

Massachusetts.— Carrahar *v.* Boston, etc., St. R. Co., 198 Mass. 549, 85 N. E. 162, 126 Am. St. Rep. 461.

Michigan.— Kotila *v.* Houghton County St. R. Co., 134 Mich. 314, 96 N. W. 437, killing a cow.

Missouri.— Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Kolb *v.* St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050; Meyers *v.* St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379.

Nebraska.— Omaha St. R. Co. *v.* Larson, 70 Nebr. 591, 97 N. W. 824.

New Hampshire.— Hanson *v.* Manchester St. R. Co., 73 N. H. 395, 62 Atl. 595.

New York.— Totarella *v.* New York, etc., R. Co., 53 N. Y. App. Div. 413, 65 N. Y. Suppl. 1044; Green *v.* Metropolitan St. R. Co., 42 N. Y. App. Div. 160, 58 N. Y. Suppl. 1039; Huerzeler *v.* Central Crosstown R. Co., 1 Misc. 136, 20 N. Y. Suppl. 676 [*affirmed* in 139 N. Y. 490, 34 N. E. 1101]; Peterson *v.* New York City R. Co., 94 N. Y. Suppl. 22. *Compare* Goodman *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 84, 71 N. Y. Suppl. 177.

Ohio.— Griffin *v.* Toledo, etc., R. Co., 21 Ohio Cir. Ct. 547, 11 Ohio Cir. Dec. 749.

See 44 Cent. Dig. tit. "Street Railroads," § 219.

Seeing object on track.— Where a person, while drunk, lies down on a street car track, and the driver of the car, although seeing an object which he thinks to be a bundle of grain, makes no effort to stop his car, in which he could easily succeed, but drives directly over the person, and so kills him, the company is liable, although such person was also negligent. Werner *v.* Citizens R. Co., 81 Mo. 368.

Negligent failure to stop car after accident as proximate cause of injury notwithstanding contributory negligence see Citizens St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Green *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 54, 72 N. Y. Suppl. 524 [*reversed* on other grounds in 171 N. Y. 201, 63 N. E. 958, 89 Am. St. Rep. 807] (carried on fender and jolted off and injured); Weitzman *v.* Nassau Electric R. Co., 33 N. Y. App. Div. 585, 53 N. Y. Suppl. 905.

7. Louisville R. Co. *v.* Edelen, 123 Ky. 629, 96 S. W. 901, 29 Ky. L. Rep. 1125.

8. *California.*— Harrington *v.* Los Angeles

where he attempts to cross in front of an approaching train, knowing that he is in peril in doing so;[9] and in some cases it has been held to apply only where the injured person is ignorant of the danger.[10] Nor does this doctrine apply where the injured person's peril is not discovered or could not be discovered by ordinary care until it is too late to avoid an accident;[11] or where the company exercises all reasonable care to avoid the accident after it discovers, or by ordinary care could discover, the injured person's peril, but is unable to avoid it,[12] unless its inability to do so is caused by its own negligence, as in not having a competent driver or motorman on the car,[13] not having it properly equipped,[14] or in running the car, at the time, at a reckless or unlawful rate of speed.[15] But mere knowledge of the presence of a person on or near the track without knowledge of his actual peril does not make the company liable for a failure to avoid injuring him,[16] since the company has the right in the absence of knowledge to the contrary to act on the assumption that such person will exercise ordinary care to keep out of danger.[17]

b. Wilful or Wanton Injury. A person may also recover for injuries received

R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238.

Indiana.— Robards *v.* Indianapolis St. R. Co., 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953.

Missouri.— Boring *v.* Metropolitan St. R. Co., 194 Mo. 541, 92 S. W. 655; Roenfeldt *v.* St. Louis, etc., R. Co., 180 Mo. 554, 79 S. W. 706; Ries *v.* St. Louis Transit Co., 179 Mo. 1, 77 S. W. 734. But see Cole *v.* Metropolitan St. R. Co., 133 Mo. App. 440, 113 S. W. 684.

New York.— McDonald *v.* Metropolitan St. R. Co., 93 N. Y. App. Div. 238, 87 N. Y. Suppl. 699; Phelan *v.* Forty-Second St., etc., R. Co., 79 N. Y. App. Div. 548, 80 N. Y. Suppl. 333.

Virginia.— Richmond Traction Co. *v.* Martin, 102 Va. 209, 45 S. E. 886.

United States.— Denver City Tramway Co. *v.* Cobb, 164 Fed. 41, 90 C. C. A. 459.

See 44 Cent. Dig. tit. "Street Railroads," § 219.

9. Lintz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600; Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Moore *v.* Lindell R. Co., 176 Mo. 528, 75 S. W. 672.

10. Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523. See also Philben *v.* Denver City Tramway Co., 36 Colo. 331, 85 Pac. 630.

11. State *v.* Cumberland, etc., Electric R. Co., 106 Md. 529, 68 Atl. 197, 16 L. R. A. N. S. 297; Hafner *v.* St. Louis Transit Co., 197 Mo. 196, 94 S. W. 291; Abbott *v.* Kansas City El. R. Co., 121 Mo. App. 582, 97 S. W. 198; Fellenz *v.* St. Louis, etc., R. Co., 106 Mo. App. 154, 80 S. W. 49; Barrie *v.* St. Louis Transit Co., 102 Mo. App. 87, 76 S. W. 706; Murray *v.* Forty-Second St., etc., R. Co., 9 N. Y. App. Div. 610, 41 N. Y. Suppl. 620 (holding that negligence on the part of a street car driver in failing to stop his car before striking a person lying on the track is not shown where the person could not be seen until the car was very close to him, and the driver, on seeing him, immediately put down his brake); Norfolk R., etc., Co. *v.* Higgins, 108 Va. 324, 61 S. E. 766 (holding that the doctrine of "last clear chance" has no application where one struck by a street car came out into the space between the two tracks, and into the view of the motorman, from behind a team on the other track, just as the car reached that point).

12. Hafner *v.* St. Louis Transit Co., 197 Mo. 196, 94 S. W. 291; Wagner *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 591, 80 N. Y. Suppl. 191 [*affirmed* in 176 N. Y. 610, 68 N. E. 1125]; Dallas Consol. Electric St. R. Co. *v.* Conn, (Tex. Civ. App. 1907) 100 S. W. 1019 (holding that the contributory negligence of one struck by a street car in attempting to cross the track in front of a moving car will bar recovery, if the motorman could not have stopped the car with the appliances at hand in time to have avoided the collision, although he could have stopped in time with the appliances that ought to have been provided, but were not); Beaty *v.* El Paso Electric R. Co., (Tex. Civ. App. 1905) 91 S. W. 365; Watermolen *v.* Fox River Electric R., etc., Co., 110 Wis. 153, 85 N. W. 663.

The failure to use all reasonable means to avoid running down a person discovered in a perilous position does not render a street railroad company liable for injuries resulting from the collision, unless the use of such means would have avoided the collision. San Antonio Traction Co. *v.* Kumpf, (Tex. Civ. App. 1907) 99 S. W. 863.

13. Little Rock Traction, etc., Co. *v.* Morrison, 69 Ark. 289, 62 S. W. 1045.

14. Little Rock Traction, etc., Co. *v.* Morrison, 69 Ark. 289, 62 S. W. 1045. See also Scott *v.* San Bernardino Valley Traction Co., 152 Cal. 604, 93 Pac. 677. But see Dallas Consol. Electric St. R. Co. *v.* Conn, (Tex. Civ. App. 1907) 100 S. W. 1019.

15. Paducah Traction Co. *v.* Sine, 111 S. W. 356, 33 Ky. L. Rep. 792; Moore *v.* St. Louis Transit Co., 95 Mo. App. 728, 75 S. W. 699.

16. Louisville R. Co. *v.* Colston, 117 Ky. 804, 79 S. W. 243, 25 Ky. L. Rep. 1933; Rissler *v.* St. Louis Transit Co., 113 Mo. App. 120, 87 S. W. 578.

17. See *supra*, X, B, 6, d.

through the operation of a street railroad, notwithstanding contributory negligence on his part in going upon or near the tracks, where the injuries are caused by reckless, wilful, or wanton acts on the part of the servants of the company in the course of their employment.[18] To constitute wilfulness, wantonness, or recklessness within the meaning of this rule there must be conduct manifesting a reckless disregard of consequences under circumstances which indicate that the acts done or omitted will naturally or probably result in injury.[19] Thus it has been held that the injury is caused by recklessness, wilfulness, or wantonness, within the meaning of the above rule, where it is caused by a car being run at such a reckless rate of speed, at a place where the motorman knows that persons are likely to be on the track, that it cannot be stopped in time to avoid an accident, after seeing the person injured on the track;[20] or where after the motorman sees a person in peril on or near the track ahead he fails to use reasonable efforts to avoid an accident,[21] such as to give warning of the car's approach and to slacken the speed of or stop the car.[22] But a mere failure to discover the person injured cannot be made the basis for wanton or wilful misconduct;[23] nor is it wantonness

18. *Alabama.*— Birmingham R., etc., Co. *v.* Oldham, 141 Ala. 195, 37 So. 452; Jefferson *v.* Birmingham R., etc., Co., 116 Ala. 294, 22 So. 546, 67 Am. St. Rep. 116, 38 L. R. A. 458.

California.— Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238. See also Scott *v.* San Bernardino Valley Traction Co., 152 Cal. 604, 93 Pac. 677.

Illinois.— Chicago Union Traction Co. *v.* McGinnis, 112 Ill. App. 177.

Massachusetts.— Aiken *v.* Holyoke St. R. Co., 184 Mass. 269, 68 N. E. 238.

Minnesota.— Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341.

Missouri.— Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509; Frank *v.* St. Louis Transit Co., 112 Mo. App. 496, 87 S. W. 88.

New Jersey.— Camden, etc., R. Co. *v.* Preston, 59 N. J. L. 264, 35 Atl. 1119.

New York.— Shea *v.* Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480 [*affirming* 5 Daly 221] (thrown off car); Cohen *v.* Dry Dock, etc., R. Co., 40 N. Y. Super. Ct. 368 [*affirmed* in 69 N. Y. 170].

Virginia.— Washington, etc., Electric R. Co. *v.* Quayle, 95 Va. 741, 30 S. E. 391, increasing speed of car and compelling trespasser to jump off.

See 44 Cent. Dig. tit. "Street Railroads," § 220.

19. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238; Montgomery *v.* Lansing City Electric R. Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; Rhymes *v.* Jackson Electric R., etc., Co., 85 Miss. 140, 37 So. 708, holding that a motorman who allows his car to run down a sharp grade past a number of persons engaged in picking up packages on the edge of the track, at the place of a recent accident, with no control of the car, and without sounding an alarm, is guilty of such gross negligence as to justify a verdict for injuries to one of the persons so engaged, although the latter may be guilty of contributory negligence.

That the car which caused the injury was not run faster than five or six miles an hour at the time of the accident does not show, as a matter of law, that the motorman was not guilty of a wilful or wanton wrong. Montgomery St. R. Co. *v.* Rice, 142 Ala. 674, 38 So. 857.

20. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45.

21. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238; Montgomery *v.* Lansing City Electric R. Co., 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287; Harpham *v.* Northern Ohio Traction Co., 26 Ohio Cir. Ct. 253.

22. *Alabama.*— Mobile Light, etc., Co. *v.* Baker, 158 Ala. 491, 48 So. 119; Birmingham R., etc., Co. *v.* Smith, 121 Ala. 352, 25 So. 768, failure to slacken speed or give warning.

California.— Bailey *v.* Market St. Cable R. Co., 110 Cal. 320, 42 Pac. 914.

Minnesota.— Teal *v.* St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945; Gagne *v.* Minneapolis St. R. Co., 77 Minn. 171, 79 N. W. 671, holding, however, that the fact that one riding his bicycle between two inside street car tracks gave no visible indication of having heard the gong, and continued to ride close to the track on which the car was coming, does not show that the motorneer was guilty of wanton or wilful negligence in failing to attempt to stop the car after he discovered the situation.

Mississippi.— Jackson Electric R., etc., Co. *v.* Carnahan, (1909) 48 So. 617.

Missouri.— Mayes *v.* Metropolitan St. R. Co., 121 Mo. App. 614, 97 S. W. 612; Frank *v.* St. Louis Transit Co., 112 Mo. App. 496, 87 S. W. 88.

New York.— Brachfeld *v.* Third Ave. R. Co., 29 Misc. 586, 60 N. Y. Suppl. 988 [*reversed* on other grounds in 30 Misc. 425, 62 N. Y. Suppl. 470].

Wisconsin.— See Wills *v.* Ashland Light, etc., Co., 108 Wis. 255, 84 N. W. 998.

See 44 Cent. Dig. tit. "Street Railroads," § 220.

23. Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032.

or wilfulness merely to run a street car at a speed in excess of that prescribed by ordinance.[24]

9. Actions For Injuries — a. In General. Except in so far as regulated by special statutory provisions, the rules governing in civil actions for injuries generally apply in actions for injuries against street railroad companies, in regard to questions of jurisdiction and venue,[25] process,[26] parties,[27] and time to sue and limitations.[28]

b. Notice of Claim. Under the statutes in some jurisdictions it is required, as a condition precedent to an injured person's right to bring an action against a street railroad company, for the injuries sustained, that he shall give the company notice of his injuries within a prescribed time after the accident occurs,[29]

24. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45 (holding that the running of a street car in the streets of a populous city at a speed in excess of that prescribed by ordinance is merely simple negligence, and not wantonness or wilfulness); Highland Ave., etc., R. Co. *v.* Maddox, 100 Ala. 618, 13 So. 615 (holding that the fact that defendant, at a point outside the city limits, was running its car at the rate of fifteen miles an hour, and did not give any signal of approach, is not such wanton negligence as will entitle one who attempts to drive across its track without looking to damages sustained by being struck by such car).

25. See, generally, Courts, 11 Cyc. 633; Venue.

In Massachusetts the provision of St. (1877) c. 234, § 3, that any person injured by a defect in a highway may bring an action for tort therefor in the superior court, does not apply to an action of tort under St. (1871) c. 381, § 21, against a street railroad corporation, for an injury caused by a defective construction of its tracks; and the supreme court has jurisdiction of such an action brought before St. (1880) c. 28. Brookhouse *v.* Union R. Co., 132 Mass. 178.

Venue.— A suit for personal injuries from being struck by a street car is a transitory action, and cannot be defeated on the ground that the venue is laid in the wrong county. Chicago City R. Co. *v.* McMeen, 102 Ill. App. 318 [*affirmed* in 206 Ill. 108, 68 N. E. 1093].

26. Process against corporations generally see Process, 32 Cyc. 544 *et seq.*

Ohio Rev. St. § 6478, regulating service of process on railroad companies in actions in a justice's court is not applicable to street railroad companies. Greene *v.* Woodland Ave., etc., St. R. Co., 62 Ohio St. 67, 56 N. E. 642.

27. See, generally, Parties, 30 Cyc. 1.

President of company.— In an action against a street railroad company to recover for injuries sustained on account of the negligence of its employees, the company's president is not a proper party defendant. Brooks *v.* Galveston City R. Co., (Tex. Civ. App. 1903) 74 S. W. 330.

Receiver as a party.— In an action against a street railroad company for injuries sustained before the appointment of a receiver, where the evidence fails to show net earnings made by the receiver, the receiver is a proper, but not a necessary, party. Dallas Consolidated Traction R. Co. *v.* Hurley, 10 Tex. Civ. App. 246, 31 S. W. 73.

28. See Kelly *v.* Ottawa St. R. Co., 3 Ont. App. 616, within six months.

Limitation of actions for injuries to persons generally see Limitations of Actions, 25 Cyc. 1047 *et seq.*

Under Mass Pub. St. c. 113, § 32, and c. 52, § 19, where one is injured owing to the presence of a ridge of snow between the tracks of a street railroad, the ridge having been caused by the manner in which a snow-plow was operated, it is not necessary to bring his action within two years as prescribed by the latter section. McMahon *v.* Lynn, etc., R. Co., 191 Mass. 295, 77 N. E. 826.

29. Peck *v.* Fair Haven, etc., R. Co., 77 Conn. 161, 58 Atl. 757 (within four months under Gen. St. (1903) § 1130); Shalley *v.* Danbury, etc., Horse R. Co., 64 Conn. 381, 30 Atl. 135; McMahon *v.* Lynn, etc., R. Co., 191 Mass. 295, 77 N. E. 826 (holding, however, that under Pub. St. c. 113, § 32, and c. 52, § 19, where one was injured owing to the presence of a ridge of snow between the tracks of a street railroad, the ridge having been caused by the manner in which a snow-plow was operated, it was not necessary for him to give notice). *Compare* Mattice *v.* Montreal St. R. Co., 20 Quebec Super. Ct. 222, holding that the provision in the charter of the Montreal Street Railway Company, compelling any one desiring to bring an action for damages against the company to give thirty days' notice, does not make such notice a condition precedent to the right of action; but it is merely a prejudicial requirement, the non-observance of which should be invoked by a dilatory exception.

Notice to city or person obliged to repair street.— A statutory provision requiring notice of an injury to be given the county, city, town, or person by law obliged to keep the way in repair does not apply in an action against a street car company for injuries resulting from defects in the street at a cross-in which the company had agreed with the city to guard. Phinney *v.* Boston El. R. Co., 201 Mass. 286, 87 N. E. 490, 131 Am. St. Rep. 400. But it does apply where an injury is occasioned by a defect in the highway by reason of the street railroad company's failure to keep its road in repair as required by statute, and the prescribed notice should be given to the street railroad company. Ma-

unless there has been some conduct on the part of the company that amounts to a waiver of such notice.[30]

c. Pleading — (i) *Complaint, Declaration, or Petition* — (A) *In General.* Ordinarily the pleadings in an action for injuries caused by the negligent management or operation of a street railroad are governed by the rules of pleading applying in civil actions generally,[31] particularly those relating to actions for negligence.[32] The complaint, declaration, or petition in such an action should allege with clearness and certainty all facts necessary to constitute plaintiff's cause of action.[33] Thus it should make clear and distinct allegations showing the

honey *v.* Natick, etc., St. R. Co., 173 Mass. 587, 54 N. E. 349; Dobbins *v.* West End St. R. Co., 168 Mass. 556, 47 N. E. 428.

An injury caused by running down a vehicle is not within a statute requiring notice to be given of injuries "suffered by any person in the management and use of its (the railway's) tracks," and no notice, under such statute, to the company of the injury is necessary. Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822.

Sufficiency of notice.— Under Conn. Gen. St. (1902) § 1130, providing that no action for personal injuries caused by negligence shall be maintained against any electric, cable, or street railroad company unless a written notice, containing a general description of the injury, and its time, place, and cause, be given within four months, etc., a notice by a married woman of an injury to her gives her husband a right to maintain an action for the loss of her services. Peck *v.* Fair Haven, etc., R. Co., 77 Conn. 161, 58 Atl. 757.

30. Shalley *v.* Danbury, etc., Horse R. Co., 64 Conn. 381, 30 Atl. 135, holding, however, that a statement by the president of the company to the husband of the person injured that he must present his claim to the company which insured the railroad company against losses, and not to the railroad company, and that the insurance company would see to it, and to wait and follow his, the president's, instructions, was not a waiver of notice.

31. See, generally, PLEADING, 31 Cyc. 1.

Alternative allegations.— It has been held that a complaint which alleges that plaintiff's position of peril was known to the motorman, "or by the exercise of reasonable care" could have been known to him, and that the motorman could have stopped the car in time to have prevented the collision, etc., does not state a cause of action founded on the failure of the motorman to exercise proper care after the discovery of the traveler's peril; the alternative form of allegation not amounting to a charge of actual knowledge of plaintiff's peril, necessary to defendant's liability. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798. But on the other hand it has been held that a complaint which alleged that while plaintiff drove the horse along a street the horse became frightened and ran on or near the track, in plain view of the motorman in charge of an approaching car, who saw the horse, or by the exercise of due diligence could have seen him, in time to have stopped the car, and that in disregard of his duty to stop the car the motorman negligently ran against the horse, injuring the same, was not vitiated because of alternative averments, for each averment referred to the ultimate fact, and each was pertinent to a single cause of action. Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539.

Amendment.— Where the general charge of negligence causing the injury is alleged in the original petition, it is not necessary to repeat it in an amended petition charging specific acts of negligence. Louisville R. Co. *v.* Will, 66 S. W. 628, 23 Ky. L. Rep. 1961.

Duplicity.— A petition which alleges a gripman's wilful pushing of plaintiff from a moving car as constituting negligence is bad for duplicity, since the same act cannot be both negligent and wilful. Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

32. See, generally, NEGLIGENCE, 29 Cyc. 565.

Allegations held to negative the imputation of negligence of the driver of a vehicle in crossing a raised track see Philbin *v.* Denver City Tramway Co., 36 Colo. 331, 85 Pac. 630.

Joinder.— In an action for injuries to the driver of a vehicle by collision with a street car, plaintiff is entitled to join in the same count or cause of action negligence arising from a breach of defendant's common-law duty to use due care, and negligence arising from defendant's breach of a city ordinance requiring a vigilant lookout. Meyers *v.* St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379.

33. **Complaint, declaration, or petition held sufficient:** To state a cause of action grounded on negligence in running a car into a vehicle on or near the track. Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166; Cowart *v.* Savannah Electric Co., 5 Ga. App. 664, 63 S. E. 804; Citizens' St. R. Co. *v.* Damm, 25 Ind. App. 511, 58 N. E. 564 (colliding with frightened team); Welty *v.* St. Charles St. R. Co., 109 La. 733, 33 So. 750. In an action for injuries caused to an automobile in running into a trolley pole at night, by reason of threatened peril from an approaching car. Bell *v.* Hartford, etc., St. R. Co., 79 Conn. 722, 65 Atl. 600; Garfield *v.* Hartford, etc., St. R. Co., 79 Conn. 458, 65 Atl. 598. In an action for injuries received by a car colliding with a carriage in which plaintiff was an occupant. Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602, 65 N. E. 309. In an action for injuries caused by the swinging of a car, to a person standing in a crowd on the

injured person's right to be upon or near the tracks,[34] and the legal duty owing to him by defendant, the failure to perform which caused the injury;[35] and showing that defendant was negligent in the performance or non-performance of such duty,[36] that the acts or omissions constituting the negligence were in the course of the employment of the servant doing them,[37] and that such negligence was the proximate cause of the injuries for which recovery is sought.[38] In some jurisdictions plaintiff or complainant must also allege that he was free from contributory negligence,[39] although in most jurisdictions contributory negligence is regarded

outside of a curve in the track. Cordray *v.* Savannah Electric Co., 5 Ga. App. 625, 63 S. E. 710. In an action for injuries received while walking on or near a street car track. Chicago Union Traction Co. *v.* Scanlon, 136 Ill. App. 212. Thus a declaration or complaint is sufficient where plaintiff avers that in driving along a city street he started to cross defendant's track in front of a car then standing still, without motorman or engineer, near a crossing, and that while he was crossing they suddenly started the car, and recklessly ran into his wagon, without his fault (Piper *v.* Pueblo City R. Co., 4 Colo. App. 424, 36 Pac. 158); or where the complaint alleges that while plaintiff was carefully driving, and necessarily upon defendant's track, its car, propelled with great force, struck his wagon, and that his injuries were due only to the negligence of defendant, and without any negligence on his part (Wright *v.* United Traction Co., 131 N. Y. App. Div. 356, 115 N. Y. Suppl. 630). So a petition, in an action by parents to recover for the death of a minor child by being run over by a street car, which avers that the child came to his death by the employees of defendant carelessly, negligently, and recklessly running said car over the body of the child, instantly killing him, is sufficient to sustain a verdict for damages, notwithstanding a special finding that the injury was not inflicted through the reckless and wanton neglect of defendant's employees. Southwest Missouri Electric R. Co. *v.* Fry, 71 Kan. 736, 81 Pac. 462.

Complaint, declaration, or petition held insufficient: In an action for injuries sustained in being thrown from a wagon by a sudden lunge of the team which was frightened by a car. Folz *v.* Evansville Electric R. Co., 40 Ind. App. 307, 80 N. E. 868.

Incapacity of person injured.— Where plaintiff contends that the person injured was *non sui juris*, such incapacity, being a matter of fact, should be pleaded. Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

A motion to make more definite and certain will be denied where the complaint contains a plain and concise statement of the facts constituting the cause of action. Agnew *v.* Brooklyn City R. Co., 13 N. Y. Civ. Proc. 25, 20 Abb. N. Cas. 235 [*affirmed* in 5 N. Y. Suppl. 756 (*affirmed* in 117 N. Y. 651, 22 N. E. 1132)].

34. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45. See also Smith *v.* Gulfport, etc., Traction Co., (Miss. 1909) 48 So. 295.

35. Birmingham R., etc., Co. *v.* Clarke, (Ala. 1906) 41 So. 829 (holding that in an action for injuries to plaintiff's intestate in a collision between his buggy and defendant's street car, an allegation in the complaint that intestate was in a vehicle on a public highway on which defendant's cars were moving, near the intersection with another public highway, was sufficient to show the relation of the parties from which a duty to exercise care could be inferred); Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030 (as to ordinance prohibiting excessive speed); Smith *v.* Gulfport, etc., Traction Co., (Miss. 1909) 48 So. 295 (declaration held not demurrable on the ground that it did not allege facts showing a duty on defendant to maintain the crossing in a safe condition).

36. See *infra*, X, B, 9, c, (I), (B).

37. Cincinnati, etc., Electric St. R. Co. *v.* Cook, (Ind. App. 1909) 88 N. E. 76; Wahl *v.* St. Louis Transit Co., 203 Mo. 261, 101 S. W. 1; Shea *v.* Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480, injured party thrown off car by driver.

A complaint need not in terms aver that defendant's employees were acting in the line of their duty, but it is enough to aver that defendant, by its agents, etc., negligently operated the street car, etc. Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030; Indianapolis St. R. Co. *v.* Slifer, (Ind. App. 1905) 72 N. E. 1055, 35 Ind. App. 700, 74 N. E. 19.

38. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45 (complaint held demurrable as not showing any causal connection between the violation of a speed ordinance and the injury); Philbin *v.* Denver City Tramway Co., 36 Colo. 331, 85 Pac. 630; Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030; Citizens' St. R. Co. *v.* Marvil, 161 Ind. 506, 67 N. E. 921; Hammond, etc., Electric R. Co. *v.* Eads, 32 Ind. App. 249, 69 N. E. 555.

Construction.— Where a petition, for the death of a pedestrian in a collision with a street car, charges certain acts of negligence, and then alleges violations of a city ordinance, "which violations of said ordinance directly contributed to cause the death and injury," the petition should be construed to mean that the violation of the ordinance contributed with the other precedent acts of negligence charged in the petition to cause such injury and death, and not that they contributed with deceased's negligence to cause such injury. McQuade *v.* St. Louis, etc., R. Co., 200 Mo. 150, 98 S. W. 552.

39. Potter *v.* Ft. Wayne, etc., Traction Co., 43 Ind. App. 427, 87 N. E. 694 (necessary

as a matter of defense and need not be so alleged.[40] But he need not allege immaterial or irrelevant matters,[41] although the fact that he does allege such matters does not render his pleading bad;[42] nor need he allege facts which are matters of justification and defense to defendant.[43] Such a complaint, declaration, or petition ordinarily is bad if it discloses contributory negligence on the part of the person injured;[44] or avers merely conclusions of law;[45] or if it contains contradictory or inconsistent allegations.[46]

(B) *Allegations of Negligence.* The complaint, declaration, or petition should clearly allege facts showing that defendant's acts or omissions causing the injury were in breach of some duty owing to the person injured, or in other words that they were negligently done or omitted.[47] But, although there are some decisions

unless other allegations show want of contributory negligence); Hammond, etc., Electric R. Co. *v.* Eads, 32 Ind. App. 249, 69 N. E. 555. See, generally, NEGLIGENCE, 29 Cyc. 575.

40. West Chicago St. R. Co. *v.* Dedloff, 92 Ill. App. 547; Wise *v.* St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Thompson *v.* North Missouri R. Co., 51 Mo. 190, 11 Am. Rep. 443. See also Chicago City R. Co. *v.* Jennings, 167 Ill. 274, 41 N. E. 629 [*affirming* 57 Ill. App. 376]. And see, generally, NEGLIGENCE, 29 Cyc. 575.

41. Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447 (holding, however, that in an action for injuries done to a person walking on the track, it is neither irrelevant nor immaterial to allege that the company has no lawful right to lay its track, or run its cars on that portion of the street where the injury was done); Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637.

42. Hammond, etc., Electric R. Co. *v.* Eads, 32 Ind. App. 249, 69 N. E. 555.

43. Bowen *v.* Detroit City R. Co., 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822, holding that in an action against a street railroad company for injuries sustained in consequence of its failure to clear its track of snow, it is not necessary to allege that the snow was left there for an unreasonable time, it being a matter of defense that its removal was not unnecessarily delayed.

44. Richmond Traction Co. *v.* Hildebrand, 98 Va. 22, 34 S. E. 888.

45. See Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616.

46. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798 (holding that a complaint which alleges that the motorman knew of the traveler's peril and failed to exercise due care to avoid injuring him, and which, after describing the injuries received, avers that the motorman knew of the traveler's peril, but nevertheless wantonly and recklessly ran the car against him, and that he did not use the means at hand to prevent the collision, when the use thereof would have prevented the same, is inconsistent, since it avers a negligent failure to take means to avert the injury after discovery of the peril and charges wantonness, and also simple negligence); McQuade *v.* St. Louis, etc., R. Co., 200 Mo. 150, 98 S. W. 552 (holding, however, that a petition alleging in one count that the motorman failed to keep a vigilant watch, etc., and also that he failed to stop the car in the shortest time and space possible, is not objectionable as alleging repugnant grounds of negligence); Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268. See also Heinzle *v.* Metropolitan St. R. Co., 213 Mo. 102, 111 S. W. 536.

47. See Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Allegations held sufficient to charge negligence: In replacing a broken rail. Citizens' St. R. Co. *v.* Marvil, 161 Ind. 506, 67 N. E. 921. In running a car at a rate of speed greater than that allowed by law, by reason of which plaintiff, a driver, was unable to get out of the way. Duffy *v.* Cincinnati St. R. Co., 3 Ohio S. & C. Pl. Dec. 678, 2 Ohio N. P. 294. In running into a child in plain view. Austin Rapid-Transit R. Co. *v.* Cullen, (Tex. Civ. App. 1895) 30 S. W. 578. In an action for injuries by a car to a traveler at a crossing. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798. In an action for injuries to one struck by a street car while driving his wagon across the track, when the wheels caught and checked the horse. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45. In an action against a cable car company for injuries in a collision. Chicago City R. Co. *v.* Jennings, 157 Ill. 274, 41 N. E. 629 [*affirming* 57 Ill. App. 376]. In an action against a street railroad company for injuries sustained by a mail clerk on a railway train in a collision with a street car at a crossing. Birmingham R., etc., Co. *v.* Livingston, 144 Ala. 313, 39 So. 374. In an action for injuries caused by collision with a team. Cincinnati, etc., Electric St. R. Co. *v.* Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363. In an action for injuries to a horse in a collision with a street car. Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539. A complaint, in an action for injuries to a pedestrian struck by a car at a crossing, which alleges that the company ran its car after dark without a headlight, that no signal was given as the car approached the crossing, that the car ran at a dangerous speed, and that it negligently ran the car against the pedestrian, injuring him, when liberally construed, as required by Burns Annot. St. Ind. (1901) § 379, sufficiently charges negligence as against a demurrer or a motion to make more definite and certain. Grass *v.* Ft.

to the contrary,[48] it is ordinarily sufficient to allege such negligence in general terms, without setting forth the specific acts constituting it,[49] or averring the name of the negligent servant,[50] unless there is a motion to make more specific.[51] Thus an allegation of sufficient acts causing the injury, coupled with an averment that they were negligently done, is sufficient;[52] but if the allegations undertake to set forth such acts without stating that they were negligently done, it must appear by direct averment that the acts causing the injury were *per se* the result

Wayne, etc., Traction Co., 42 Ind. App. 395, 81 N. E. 514.

Allegations held insufficient to charge negligence: In an action for injuries received from being run into by a street car. Lydecker *v.* St. Paul City R. Co., 61 Minn. 414, 63 N. W. 1027. A declaration charging that it was the duty of defendant to provide suitable and safe contrivances upon its cars for the purpose of braking and stopping them when necessary, but not alleging a failure to provide such devices, is insufficient to charge negligence. Hackett *v.* Chicago City R. Co., 235 Ill. 116, 85 N. E. 320 [*reversing* 136 Ill. App. 594].

Particularity.— A pleader is required to state the facts constituting the negligence complained of, only so far as they appear to be properly within his knowledge. Chicago City R. Co. *v.* Jennings, 157 Ill. 274, 41 N. E. 629 [*affirming* 57 Ill. App. 376].

Frightening animal.— An allegation that a motorman, seeing that a car was frightening and making unmanageable a horse attached to a wagon and traveling in close proximity to the track, did not lessen the speed and noise of the car, but negligently persisted in and continued the same, is a sufficiently specific statement of negligence. Richter *v.* Cicero, etc., St. R. Co., 70 Ill. App. 196.

Notice of defect.— An allegation in a complaint for negligently causing the death of plaintiff's intestate, by a car being thrown against him by reason of the defective condition of defendant's track and switch, that defendant's cars had been thrown from the track at the same place on many previous occasions, of which fact defendant had knowledge, as addressed to the question of notice, is not objectionable and should not be stricken out. Wolz *v.* Dry-Dock, etc., R. Co., 13 N. Y. Suppl. 129.

48. Newport News, etc., R., etc., Co. *v.* Nicolopoolos, 109 Va. 165, 63 S. E. 443 (holding that in an action for injuries by being struck by a street car, a general allegation that defendant negligently ran its car into plaintiff's wagon while he was attempting to cross its track was insufficient either as a count in trespass or in trespass on the case, where there was no averment showing in what particular defendant failed in its duty); Lynchburg Traction, etc., Co. *v.* Guill, 107 Va. 86, 57 S. E. 644 [*distinguishing* Blue Ridge Light, etc., Co. *v.* Tutwiler, 106 Va. 54, 55 S. E. 539].

49. *Alabama.*— Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798; Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616; Birmingham R., etc., Co. *v.* Jones, 146 Ala. 277, 41 So. 146; Russell *v.* Huntsville R., etc., Co., 137 Ala. 627, 34 So. 855; Highland Ave., etc., R. Co. *v.* Robbins, 124 Ala. 113, 27 So. 422, 82 Am. St. Rep. 153.

Indiana.— Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030; Indianapolis St. R. Co. *v.* Slifer, (App. 1905) 72 N. E. 1055, 35 Ind. App. 700, 74 N. E. 19.

Iowa.— Powers *v.* Des Moines City R. Co., (1908) 115 N. W. 494.

Mississippi.— Smith *v.* Gulport, etc., Traction Co., (1909) 48 So. 295, holding that an allegation that defendant's motorman discovered intestate on the track in time to have stopped the car before striking him had the brakes and machinery been in working order is not demurrable for not alleging in what manner they were defective.

United States.— Southern Electric R. Co. *v.* Hageman, 121 Fed. 262, 57 C. C. A. 348.

See 44 Cent. Dig. tit. "Street Railroads," § 224.

Allegations held sufficient to charge negligence: That plaintiff suffered the alleged injuries as the proximate consequence of the negligence of defendant, through its employees in the management and control of its cars. Birmingham R., etc., Co. *v.* Baker, 132 Ala. 507, 31 So. 618. That defendant so negligently operated its car that it ran into plaintiff's wagon. Donohoe *v.* Wilmington City R. Co., 4 Pennew. (Del.) 55, 55 Atl. 1011; Goldrick *v.* Union R. Co., 20 R. I. 128, 37 Atl. 635. That defendant's servant "negligently ran said car against the wagon." Citizens' St. R. Co. *v.* Lowe, 12 Ind. App. 47, 39 N. E. 165. That defendant's servant in charge of the car so negligently conducted himself as to run the car against plaintiff's intestate. Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616.

50. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798; Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955.

51. Sommers *v.* St. Louis Transit Co., 108 Mo. App. 319, 83 S. W. 268 (holding that a petition alleging that a car was negligently caused to run into his vehicle is insufficient as against a motion to require the specific acts or omissions constituting the negligence complained of to be set forth); Tuchochi *v.* Cincinnati St. R. Co., 7 Ohio S. & C. Pl. Dec. 219, 7 Ohio N. P. 276; Southern Electric R. Co. *v.* Hageman, 121 Fed. 262, 57 C. C. A. 348.

52. Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

of negligence, or negligence must appear from a statement of such facts as certainly raise the presumption that the injury was the result of defendant's negligence.[53]

(c) *Wilful, Wanton, or Reckless Injury.* In an action for wanton, wilful, or reckless injury, the complaint, declaration, or petition should aver that the injury was wilfully or wantonly inflicted, with a conscious knowledge that the wilfulness or wantonness would probably result in injury, or should set forth a state of facts from which such knowledge might be reasonably inferred,[54] and unless it avers such conscious knowledge or facts showing it, the mere fact that the acts are charged to have been wilfully, wantonly, or recklessly done is not sufficient.[55] Ordinarily a general averment that defendant's servants by certain acts or omissions wantonly, wilfully, or recklessly caused the injury is sufficient, without setting out the facts showing the wantonness, wilfulness, or recklessness;[56] but it is not sufficient to allege facts which merely show simple negligence on the part of such servants.[57]

(II) *Answer and Subsequent Pleadings.* The answer and subsequent pleadings in an action for injuries caused by the operation of a street railroad are also regulated by the rules of pleading governing in civil actions generally,[58] particularly those relating to actions for negligence.[59] A plea charging contributory negligence can only be interposed to a complaint or petition averring simple negligence,[60] and it is no answer to a complaint averring wantonness or wilfulness on the part of defendant.[61] A plea setting up contributory negligence, which

53. Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797; Elwood Electric St. R. Co. *v.* Ross, 26 Ind. App. 258, 58 N. E. 535, holding that the statement that a street car was running at a high rate of speed is not a sufficient allegation of negligence to support an action against the company for injuries received by a person run over by such car.

Allegations held sufficient.— A complaint in an action against a street car company for running over and killing a child, which alleges that the track was straight, and that the child was in plain sight of the motorman, is sufficient to show his negligence, since it will be assumed that he saw the child in time to stop the car. Elwood Electric St. R. Co. *v.* Ross, 26 Ind. App. 258, 58 N. E. 535.

54. Birmingham R., etc., Co. *v.* Jaffee, 154 Ala. 548, 45 So. 469. See, generally, Negligence, 29 Cyc. 575.

A case is not stated under the humanitarian doctrine in Missouri unless the petition contains an allegation of wilfulness, recklessness, or wantonness on the part of the servant causing the injury. Clancy *v.* St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509. See also Grout *v.* Central Electric R. Co., 125 Mo. App. 552, 102 S. W. 1026.

55. Birmingham R., etc., Co. *v.* Jaffee, 154 Ala. 548, 45 So. 469; Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45.

56. Birmingham R., etc., Co. *v.* Jaffee, 154 Ala. 548, 45 So. 469; Birmingham R., etc., Co. *v.* Brown, 152 Ala. 115, 44 So. 572; Birmingham R., etc., Co. *v.* Jones, 146 Ala. 277, 41 So. 146 (holding that a complaint for the death of a child struck by a car, which alleges that the company wantonly caused or allowed the car to run against the child, and thereby wantonly and intentionally caused the death of the child, sufficiently charges an intentional wrong); Russell *v.* Huntsville R., etc., Co., 137 Ala. 627, 34 So. 855; Birmingham R., etc., Co. *v.* Baker, 132 Ala. 507, 31 So. 618.

57. Mobile Light, etc., Co. *v.* Baker, 158 Ala. 491, 48 So. 119 (holding that a count which set out the conditions surrounding the collision and averred that the injuries were caused as a proximate consequence of the failure of defendant's servant to keep a proper lookout while running a car on the highway was a count for simple, and not for wilful or wanton, negligence); Birmingham R., etc., Co. *v.* Jaffee, 154 Ala. 548, 45 So. 469.

Illustrations.— A count which contains a general averment of wilfulness and then alleges facts showing a negligent omission of duty in keeping a proper lookout, but fails to show conscious knowledge that such omission of duty would probably result in the injuries, is bad as a count for wanton injury, since the facts on which the wilfulness and wantonness are predicated control the general averment, and such facts are nothing more than a count in simple negligence. Birmingham R., etc., Co. *v.* Jaffee, 154 Ala. 548, 45 So. 469.

58. See, generally, Pleading, 31 Cyc. 126, 241.

59. See, generally, Negligence, 29 Cyc. 580, 583. See also Garth *v.* Alabama Traction Co., 148 Ala. 96, 42 So. 627, plea of contributory negligence held demurrable.

60. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798; Mobile Light, etc., Co. *v.* Baker, 158 Ala. 491, 48 So. 119; Birmingham R., etc., Co. *v.* Jaffee, 154 Ala. 548, 45 So. 469; Highland Ave., etc., R. Co. *v.* Robbins, 124 Ala. 113, 27 So. 422, 82 Am. St. Rep. 153.

61. Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798; Birmingham R.,

attributes to the person injured conduct which may or may not have been negligent, and which fails to aver that such conduct was negligent, except as a conclusion of law resulting necessarily from the act or omission charged, is insufficient and subject to demurrer,[62] as is also a plea which does not with certainty impute to the person injured the omission of any duty or the commission of any act negligent or otherwise.[63] Averments in the complaint, declaration, or petition relating to defendant's ownership or operation of the road and cars are matters of mere inducement and can only be reached by a special plea denying that defendant owned or operated the same.[64]

d. Issues, Proof, and Variance — (i) *Issues Raised in General.* Only such matters are in issue and may be adjudicated, in an action for injuries against a street railroad company, as are properly put in issue by the pleadings and proof in the case.[65] Thus plaintiff or complainant, in such an action, can rely for recovery only upon such matters of negligence as are put in issue by his pleadings,[66] as where he alleges only specific acts of negligence he can recover only on that ground;[67] and he cannot recover upon a cause of action materially different from that alleged.[68] Likewise defendant can rely only upon such matters of defense as are put in issue by its pleadings.[69] A plea of the general issue or not guilty puts

etc., Co. *v.* Jaffee, 154 Ala. 548, 45 So. 469; Highland Ave., etc., R. Co. *v.* Robbins, 124 Ala. 113, 27 So. 422, 82 Am. St. Rep. 153.

62. Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166.

63. Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166.

64. Chicago Union Traction Co. *v.* Jerka, 227 Ill. 95, 81 N. E. 7 [*affirming* 126 Ill. App. 365], holding also that such averments are not denied by a plea of the general issue.

65. Cloud *v.* Alexandria Electric R. Co., 121 La. 1061, 46 So. 1017, 18 L. R. A. N. S. 371; Hine *v.* Bay Cities Consol. R. Co., 115 Mich. 204, 73 N. W. 116 (holding that the fact that a street railroad company was operating its cars by means of electricity, contrary to the terms of its franchise, cannot be raised in an action against it for injuries to a person on the street); Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637 (holding that an allegation "that the servants in charge of the car failed to keep a proper lookout for persons crossing" the tracks at a certain crossing does not present the issue that such servants were negligent in failing to see, when by reasonable care they might have seen, the person injured).

Allegations held sufficient to authorize the submission of the issue whether defendant's employees saw that the ringing of the bell was the occasion of the fright of a horse, and continued to ring it after such discovery see Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054.

It is error to try the case on the theory of general negligence when the complaint does not charge defendant with any negligence other than that of failure to signal, and perhaps undue rate of speed. Redford *v.* Spokane St. R. Co., 9 Wash. 55, 36 Pac. 1085.

66. Springfield Consol. R. Co. *v.* Puntenney, 200 Ill. 9, 65 N. E. 442 [*affirming* 101 Ill. App. 95]; Powers *v.* Des Moines City R. Co., (Iowa 1908) 115 N. W. 494 (holding that an allegation that defendant was negligent in not stopping the car before striking plaintiff while crossing the track is a sufficient allegation to raise the question whether defendant, with knowledge of plaintiff's danger due to his own negligence, used reasonable precautions to avoid injuring him); San Antonio Traction Co. *v.* Upson, 31 Tex. Civ. App. 50, 71 S. W. 565 (allegations held sufficient to base a recovery either on the company's negligence in failing to stop the car, or in running it at an excessive rate of speed).

67. See Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624.

Allegations that defendant carelessly, negligently, and wrongfully ran and managed its car do not charge specific acts of negligence, precluding plaintiff from relying on the presumption of negligence arising from the happening of the accident. Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624.

68. Springfield City R. Co. *v.* De Camp, 11 Ill. App. 475, holding that, where the declaration does not call in question the right of defendant to use steam power, that cannot be insisted upon as a ground for recovery.

Discovered peril.— A petition which alleges that the conductor invited plaintiff on the car, and while it was in motion negligently ordered him to get off, but did not diminish the speed, although knowing that plaintiff was going to get off, so that in doing so plaintiff was injured, does not authorize a recovery on the ground of discovered peril. Denison, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1903) 70 S. W. 322, 71 S. W. 292.

Incompetency of the motorman cannot be relied upon as a ground of recovery where it was not pleaded as such. Houston City St. R. Co. *v.* Farrell, (Tex. Civ. App. 1894) 27 S. W. 942.

69. Wise *v.* St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Engelker *v.* Seattle Electric Co., 50 Wash. 196, 96 Pac. 1039, holding that if a street railroad company, sued for injury caused by its cars striking a wagon while being run at a speed exceeding the lawful speed limit, desires to rely on

in issue all the material allegations of the complaint or petition;[70] but it does not put in issue the ownership and operation of the car causing the injury,[71] since such facts must be specially pleaded.[72]

(II) *MATTERS TO BE PROVED.* In order that plaintiff or complainant may recover, in an action for injuries against a street railroad company, every material allegation of negligence or of other matters, contained in the complaint or petition, and necessary to establish his cause of action, must be proved as alleged;[73] but it is not necessary to prove allegations which are mere surplusage and not essential to the cause of action.[74] Thus where the petition or complaint alleges specific acts of negligence as a ground of recovery such acts must be proved as pleaded;[75] but if the negligence charged consists of several acts not dependent upon each other, every act alleged need not be proved, but it is sufficient if the acts from which the injury resulted are proved.[76] The ownership, operation, or control of the road or car causing the injury must be shown to be in defendant,[77] unless the answer admits the same,[78] or unless it otherwise appears from the evidence that the tracks or cars were in the possession of defendant and operated by it.[79]

(III) *EVIDENCE ADMISSIBLE.* As in other actions, such evidence only is admissible on behalf of plaintiff or complainant as corresponds with his allegations and is restricted to the matters in issue,[80] and evidence as to matters not alleged

facts justifying the excessive speed it should plead such facts.

70. Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33, holding that in an action for killing plaintiff's intestate, a trespasser on the track at night, defendant's plea of not guilty put in issue all the material allegations of the complaint, including the allegation of the discovery of intestate's peril by defendant's motorman in time to have avoided the accident by the employment of preventive effort, and the failure to employ the same. See, generally, PLEADING, 31 Cyc. 674.

71. Brunhild *v.* Chicago Union Traction Co., 239 Ill. 621, 88 N. E. 199; Chicago Union Traction Co. *v.* Jerka, 227 Ill. 95, 81 N. E. 7 [*affirming* 126 Ill. App. 365].

72. See *supra*, X, B, 9, c, (II).

73. Johnson *v.* Birmingham R., etc., Co., 149 Ala. 529, 43 So. 33; Holden *v.* Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133.

74. Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103, 88 N. E. 967, holding that where the complaint charged that defendant's motorman was negligent in running the car at a high and dangerous speed, to wit, forty-five miles per hour, plaintiff was not required to show that the car was run at the rate of forty-five miles per hour as charged, but it was sufficient to prove the substance of the charge, which was that the car was run at a high and dangerous speed.

75. Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115.

76. Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030; Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103, 88 N. E. 967; Louisville, etc., Traction Co. *v.* Short, 41 Ind. App. 570, 83 N. E. 265 (holding that to recover for the killing of a child under a complaint alleging acts of negligence not dependent on each other, it is not necessary to prove each independent act of negligence, but proof of one sufficient to, and which did, bring about the death independent of any other, is enough); Indianapolis St. R. Co. *v.* Slifer, (Ind. App. 1905) 72 N. E. 1055, 35 Ind. App. 700, 74 N. E. 19; Ft. Worth, etc., St. R. Co. *v.* Hawes, 48 Tex. Civ. App. 487, 107 S. W. 556.

Where the gravamen of the charge is negligence or want of due care as to speed, as where plaintiff alleges in the same count negligence in law as to the rate of speed by exceeding the limit prescribed by a city ordinance, and negligence in fact by reason of the circumstances and conditions existing and apparent at the time, proof of either will sustain a finding for plaintiff on the issues of negligence. Quincy Horse R., etc., Co. *v.* Gnuse, 38 Ill. App. 212 [*reversed* on other grounds in 137 Ill. 264, 27 N. E. 190].

77. Gargano *v.* Forty-Second St., etc., R. Co., 94 N. Y. Suppl. 544. But *compare* Brunhild *v.* Chicago Union Traction Co., 239 Ill. 621, 88 N. E. 199.

78. Schnell *v.* Metropolitan St. R. Co., 50 N. Y. App. Div. 616, 64 N. Y. Suppl. 67; Gargano *v.* Forty-Second St., etc., R. Co., 94 N. Y. Suppl. 544, holding, however, that where an answer denies that defendant's car injured plaintiff, an admission of the answer that defendant operated "certain" cars on different thoroughfares, including that where the accident happened, is not an admission that it was defendant's car which caused the injury, and does not excuse plaintiff from showing that the car which injured him was owned, operated, or controlled by defendant.

79. Chicago Junction R. Co. *v.* McAnrow, 114 Ill. App. 501, holding that notwithstanding the declaration may allege that defendant owned certain railroad tracks, yet proof of such allegation is not necessary where it appears from the evidence that such tracks were in the possession of the defendant, and were operated by it.

80. See Schroeder *v.* St. Louis Transit Co., 111 Mo. App. 67, 85 S. W. 968.

or not in issue is inadmissible,[81] except as an incident of the cause of action, as for the purpose of showing the situation and surrounding circumstances at the time and place of the accident, and therefore as tending to prove or disprove matters in issue,[82] such as freedom from contributory negligence.[83] Where plaintiff's allegations of defendant's negligence are specific, his proof must also be specific as to the facts alleged,[84] and evidence of other acts of negligence is not admissible unless the complaint is amended to cover them;[85] but where such

An ordinance requiring suitable and seasonable warning to be given of the approach of street cars is admissible where the complaint charges the failure to give any warning of the approach of the car. Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836.

81. *Illinois.*—West Chicago St. R. Co. *v.* Annis, 165 Ill. 475, 46 N. E. 264 [*affirming* 62 Ill. App. 180]; Chicago City R. Co. *v.* Rohe, 118 Ill. App. 322, holding that it is not competent to show that the motorman did not intend to injure plaintiff, where no deliberate intention to injure is charged or in issue.

Indiana.— Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895.

Missouri.— Raming *v.* Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268.

New York.— Gumb *v.* Twenty-Third St. R. Co., 114 N. Y. 411, 21 N. E. 993; Unger *v.* Forty-Second St., etc., R. Co., 6 Rob. 237 [*affirmed* in 51 N. Y. 497].

Ohio.— Cleveland, etc., R. Co. *v.* Nixon, 21 Ohio Cir. Ct. 736, 12 Ohio Cir. Dec. 79; Brooklyn St. R. Co. *v.* Kelley, 6 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 393.

See 44 Cent. Dig. tit. "Street Railroads," § 225.

Illustrations.— Under a declaration describing an ordinance as requiring the servants of a street car company, in case they saw "horses approaching and they appeared frightened, to stop its cars and allow them to pass," an ordinance only requiring such servants to keep a vigilant watch for carriages, etc., and govern themselves accordingly to avoid damages, is not admissible. Kankakee Electric R. Co. *v.* Lade, 56 Ill. App. 454. Evidence that fire engines and trucks, while driving to fires, have by local custom the right of way at street crossings, cannot be given in an action against a street railroad company for injuries sustained to the driver of a fire truck in a collision with a street car at a crossing, where it is not pleaded that the trucks have the right of way by reason of a local custom, although the trolley car reaches the crossing first. Knox *v.* North Jersey St. R. Co., 70 N. J. L. 347, 57 Atl. 423.

Where the complaint simply charges negligence, evidence of a wilful intent to injure, or reckless disregard of the injured person's safety, is inadmissible. McClellan *v.* Chippewa Valley Electric R. Co., 110 Wis. 326, 85 N. W. 1018.

82. North Chicago St. R. Co. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077 [*reversing* 104 Ill. App. 150]; Walsh *v.* Atlantic Ave. R. Co., 23 N. Y. App. Div. 19, 48 N. Y. Suppl. 343, holding that where a complaint alleged that, while plaintiff was driving his cart across a city street, his horses took fright at the rapid approach of one of defendant's cars, and that the cart was thrown against the curb, and plaintiff precipitated to the ground, and injured, plaintiff's evidence that the car struck the cart wheel was properly admitted, as an incident of the cause of action.

Illustrations.— In an action for injuries to the driver of a coach in a funeral procession by a collision with a street car, evidence as to the condition of travel on the street for two hours, including the time of the accident, is admissible, although not pleaded. Wilmington City R. Co. *v.* White, 6 Pennew. (Del.) 363, 66 Atl. 1009 [*affirming* 6 Pennew. 105, 63 Atl. 931]. So the fact that the place of an injury to a pedestrian, struck by a street car by reason of its failure to take the right track at a switch, is in a busy part of the business district of the city, is admissible in evidence in an action for the injury, although not pleaded. Reynolds *v.* Metropolitan St. R. Co., 136 Mo. App. 282, 116 S. W. 1135.

83. Houston City St. R. Co. *v.* Richart, (Tex. Civ. App. 1894) 27 S. W. 918.

Custom.— In an action for injuries to the driver of a coach in a funeral procession, caused by a collision with a street car, evidence that for a long time prior thereto it had been the custom of the operators of street cars as a matter of privilege to permit funeral processions to pass without a break in the line, and that plaintiff, with knowledge of such custom, relied thereon at the time he crossed the track in front of the car, was admissible, although not pleaded. Wilmington City R. Co. *v.* White, 6 Pennew. (Del.) 363, 66 Atl. 1009 [*affirming* 6 Pennew. 105, 63 Atl. 931].

Mental capacity.—Where, in a suit for injuries to plaintiff's ward by being run over by a street car, the complaint does not allege that the ward is of a weak mind, plaintiff is not entitled to prove such fact as a part of its main case; but where a witness on cross-examination testifies that the child jumped in front of a car in motion, plaintiff is entitled to show in rebuttal that the boy is of weak mind, as bearing on the question of contributory negligence. Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895.

84. Coyle *v.* Third Ave. R. Co., 18 Misc. (N. Y.) 9, 40 N. Y. Suppl. 1131 [*reversing* 17 Misc. 282, 40 N. Y. Suppl. 362].

85. Coyle *v.* Third Ave. R. Co., 18 Misc. (N. Y.) 9, 40 N. Y. Suppl. 1131 [*reversing* 17 Misc. 282, 40 N. Y. Suppl. 362].

negligence is averred in general terms plaintiff is not confined in his evidence to any one particular act of negligence, and evidence of any fact which is a circumstance tending to show the negligence alleged is admissible, although no mention is made of such fact in the pleading.[86] On behalf of defendant evidence is admissible under a general denial or general issue to show that it is not responsible for the cause of the injury,[87] or that it was caused by the injured person's own contributory negligence,[88] or to show that he was intoxicated at the time as tending to impair his credibility;[89] and under a plea of contributory negligence any evidence tending to show the existence of such negligence at the time is admissible.[90]

(IV) *VARIANCE.* As in other civil actions,[91] the proof, in an action for injuries against a street railroad company, must substantially correspond with the pleadings,[92] and if there is a material variance therein it is fatal to a recov-

86. Bush *v.* St. Joseph, etc., St. R. Co., 113 Mich. 513, 71 N. W. 851; Klockenbrink *v.* St. Louis, etc., R. Co., 172 Mo. 678, 72 S. W. 900; Dalton *v.* United R. Co., 134 Mo. App. 392, 114 S. W. 561. See also Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115.

Evidence is admissible under a general allegation of negligence in operating a car of a failure to give warning by ringing a bell or otherwise (Chicago General R. Co. *v.* Kriz, 94 Ill. App. 277), even though there is no statute requiring a bell to be rung, and no averment in the declaration of a failure to ring the bell (East St. Louis Electric R. Co. *v.* Snow, 88 Ill. App. 660), or of negligence in sounding the gong on approaching a frightened team (Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446), or of an ordinance regulating the speed of street railroad cars (Omaha St. R. Co. *v.* Larson, 70 Nebr. 591, 97 N. W. 824). Where the petition avers the motorman's failure to use any care to control the car which caused the injuries, the averment is broad enough, as an allegation of negligence at common law, to let in evidence concerning excessive speed of the car, especially where no objection is made either to the pleading or to the evidence. Fry *v.* St. Louis Transit Co., 111 Mo. App. 324, 85 S. W. 960.

Failure to give notice of approach of cars may be shown under a complaint for injury from a collision, alleging an excessive rate of speed of defendant's car, and that no care or diligence was exercised by defendant. Citizens' St. R. Co. *v.* Abright, 14 Ind. App. 435, 42 N. E. 238, 1028.

An ordinance requiring suitable and seasonable warning to be given of the approach to crossings of street cars supplemented by other proof is competent evidence in an action by one injured in a collision with a street car by the negligence of the street railroad company, although the ordinance is not pleaded. Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836; San Antonio St. R. Co. *v.* Mechler, (Tex. Civ. App. 1894) 29 S. W. 202. So an ordinance requiring operatives of cars to keep a vigilant watch for vehicles, etc., need not be specially pleaded, and proof made of its acceptance, before reading it in evidence. Sepetowski *v.* St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693.

87. Griffin *v.* Interurban St. R. Co., 46 Misc. (N. Y.) 328, 94 N. Y. Suppl. 854, holding that where a street railroad company is sued for injuries to a bicycle rider by the spreading of the slot in the track, it may show under a general denial that it is not responsible for the spreading of the slot, which was the cause of the accident.

88. Sharpton *v.* Augusta, etc., R. Co., 72 S. C. 162, 51 S. E. 553, holding that, under the plea of a general denial, defendant may show plaintiff's intoxication, as tending to show contributory negligence.

89. Sharpton *v.* Augusta, etc., R. Co., 72 S. C. 162, 51 S. E. 553.

90. Sharpton *v.* Augusta, etc., R. Co., 72 S. C. 162, 51 S. E. 553, holding that under a plea of contributory negligence, in that plaintiff went on defendant's right of way, defendant may show, by questions to plaintiff and by his declarations, that he was intoxicated at the time of the accident.

Evidence held inadmissible on the issue of the contributory negligence of the occupant of a vehicle driven by another (Bresee *v.* Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. N. S. 1059), or of the driver of a vehicle in attempting to cross in front of an approaching car (Omaha St. R. Co. *v.* Mathiesen, 73 Nebr. 820, 103 N. W. 666).

91. See, generally, PLEADING, 31 Cyc. 700 *et seq.* See also NEGLIGENCE, 29 Cyc. 586 *et seq.*

92. Chicago Union Traction Co. *v.* Fitzgerald, 138 Ill. App. 520. See also *supra*, X, B, 9, d, (III).

"On the track."—Where a declaration alleges in one count that plaintiff was on the east track of the street railroad company when he was hurt, and in another that he was on the west track of such company, and the evidence shows that he was not on either track, but was between the two, and was within the space which the car running on the rails occupied as it passed, he was on the track, within the meaning of the allegation of the declaration. Potter *v.* Leviton, 199 Ill. 93, 64 N. E. 1029 [*affirming* 101 Ill. App. 544].

ery,[93] or matter of defense;[94] but if the proof substantially supports the pleading, any variance therein which does not materially affect the cause of action and by which defendant is not misled to his prejudice may be disregarded as immaterial.[95]

e. Evidence — (I) *PRESUMPTIONS AND BURDEN OF PROOF* — (A) *In General.* In an action for injuries caused by the negligent management and operation of a street railroad, the burden of proof, in the first instance, is upon plaintiff to prove by a preponderance of evidence all facts necessary to establish his alleged cause of action.[96] As a general rule, in such an action, negligence is a matter of proof,

93. Birmingham R., etc., Co. *v.* Brown, 152 Ala. 115, 44 So. 572 (holding that where a count alleged that the collision occurred at a point where defendant's track was on a public highway, but the proof showed that the wagon was struck while on defendant's track, not on a highway, there was a fatal variance as to such count); Haulon *v.* South Boston Horse R. Co., 129 Mass. 310 (holding that a declaration alleging that defendant's car was carelessly driven upon and over plaintiff is not supported by proof that another car, not carelessly driven, struck and injured him while he was trying to escape from the car carelessly driven).

A count charging wanton injury to a person on the track is not supported by proof of a failure to discover plaintiff's peril, but is dependent on the failure of defendant's employees to use proper means to stop the car after actually discovering such peril. Birmingham R., etc., Co. *v.* Brown, 152 Ala. 115, 44 So. 572.

94. El Paso Electric St. R. Co. *v.* Ballinger, (Tex. Civ. App. 1903) 72 S. W. 612, holding that where defendant specially pleaded the contributory negligence of plaintiff, whose hack was struck by its car, to be in not passing clear over the track, or far enough beyond it for the car to clear it, it is not entitled to submission of the issue of contributory negligence on evidence that he drove clear over the track, stopped, and, as the car was about to pass, backed into it.

95. *District of Columbia.*— Eckington, etc., R. Co. *v.* Hunter, 6 App. Cas. 287.

Missouri.— Schafstette *v.* St. Louis, etc., R. Co., 175 Mo. 142, 74 S. W. 826.

Ohio.— Griffin *v.* Toledo, etc., R. Co., 21 Ohio Cir. Ct. 547, 11 Ohio Cir. Dec. 749, holding that where plaintiff sets forth the facts complained of and denominates them "wilful conduct," if the facts so charged constitute negligence, the case should be submitted to the jury, although the evidence is insufficient to establish wilful wrong.

Tennessee.— Memphis St. R. Co. *v.* Berry, 118 Tenn. 581, 102 S. W. 85.

Washington.— South Tacoma Fuel, etc., Co. *v.* Tacoma R., etc., Co., 50 Wash. 686, 97 Pac. 970.

See 44 Cent. Dig. tit. "Street Railroads," § 226.

The variance has been held immaterial: Between an allegation in a declaration for injuries to the driver of a vehicle that he was driving on a street "at or near the track" of defendant's railway, and evidence that he was driving longitudinally on the track. Murphy *v.* Evanston Electric R. Co., 235 Ill. 275, 85 N. E. 334. Between an allegation that defendant "stopped" the car to permit plaintiff to alight, and negligently permitted it "to be put in motion while the plaintiff was in the act of leaving the car, without giving him a reasonable time to alight safely therefrom, whereby he was thrown under the car," etc., and proof that the car slackened up only, and then started up with a sudden jerk. Ridenhour *v.* Kansas City Cable R. Co., 102 Mo. 270, 13 S. W. 889, 14 S. W. 760. Between an allegation that an injury to plaintiff by being struck by a street car occurred at the crossing of a particular street, and evidence that he was injured at a point perhaps forty feet from such street, no objection having been interposed to the evidence, and defendant having made no claim of surprise. San Antonio Traction Co. *v.* Court, 31 Tex. Civ. App. 146, 71 S. W. 777. Between an allegation that plaintiff was injured by being pushed from a horse car at a crossing in the commotion caused by an approaching train, and proof that she was injured by jumping from the car in a reasonable effort to avoid danger. Washington, etc., R. Co. *v.* Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. ed. 1101. Between allegations that plaintiff's wagon was struck by defendant's electric car; that the car backed away, and then struck the wagon again; and that plaintiff was injured by the second collision, and proof that the injury was caused by the backing away of the car. Cincinnati St. R. Co. *v.* Whitcomb, 66 Fed. 915, 14 C. C. A. 183.

Where a collision with only one car is alleged, a second collision occurring from five to ten minutes after the first, and before the horses could be removed from the track, is part of the same transaction, and evidence thereof is not at variance with the allegations. South Tacoma Fuel, etc., Co. *v.* Tacoma R., etc., Co., 50 Wash. 686, 97 Pac. 970.

96. Mobile Light, etc., Co. *v.* Mackay, 158 Ala. 51, 48 So. 509 (holding that plaintiff, suing for the killing of his mule through the alleged negligent operation by defendant's agents and servants of one of its cars on its street railroad, has the burden of proving that it operated the car); McAndrews *v.* St. Louis, etc., R. Co., 83 Mo. App. 233 (existence and acceptance of ordinance, which was violated); Lynchburg Traction, etc., Co. *v.* Guill, 107 Va. 86, 57 S. E. 644 (holding that where plaintiff was injured in a collision with a street car in a highway outside the limits of a city, plaintiff has the burden of proving that the *locus in quo* was in fact a public highway).

and there is no presumption that defendant was guilty of negligence;[97] but on the other hand it is ordinarily presumed that defendant acted rightfully and with due care,[98] and hence the burden of proof is on plaintiff to show affirmatively the alleged negligence on the part of the servants of the company,[99] and that the accident and consequent injury occurred through such negligence;[1] and while he may do

97. Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245; Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 [*affirmed* in 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512].

98. Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523 (holding that where the law requires carriers of passengers to furnish safe cars and appliances in which to convey passengers, and requires them to use ordinary care not to injure persons with equal rights on the streets, the presumption is that a carrier has obeyed the law in that regard); Thilow *v.* Philadelphia Traction Co., 4 Pa. Dist. 83 (holding that in an action against a trolley company for damages resulting from a collision, it is presumed that the collision was an accident). See also White *v.* Albany R. Co., 35 N. Y. App. Div. 23, 54 N. Y. Suppl. 445.

Where a municipality has power to grant the use of its streets for public purposes only, a grant of the right to construct and operate a railroad through the streets will be presumed to be for a public purpose, and the mere fact that at the time of an accident it was transporting its own property is not sufficient to rebut this presumption and show that it was a private railroad. O'Neil *v.* Lamb, 53 Iowa 725, 6 N. W. 59.

99. *Connecticut.*— Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553; Fay *v.* Hartford, etc., St. R. Co., 81 Conn. 330, 71 Atl. 364.

Delaware.— Heidelbaugh *v.* People's R. Co., 6 Pennew. 209, 65 Atl. 587; White *v.* Wilmington City R. Co., 6 Pennew. 105, 63 Atl. 931; Wood *v.* Wilmington City R. Co., 5 Pennew. 369, 64 Atl. 246 (holding that in an action for injuries to plaintiff's horse by an electric shock, alleged to have been sustained in stepping on one of the rails of defendant's electric road, it is incumbent on plaintiff to show to the satisfaction of the jury by a preponderance of the proof that the injury was caused by an electric current, that the current came from defendant's track, and that the current so came because of the fault or negligence of defendant); Foulke *v.* Wilmington City R. Co., 5 Pennew. 363, 60 Atl. 973; Cox *v.* Wilmington City R. Co., 4 Pennew. 162, 53 Atl. 569; Farley *v.* Wilmington, etc., Electric R. Co., 3 Pennew. 581, 52 Atl. 543.

District of Columbia.—Barrett *v.* Columbia R. Co., 20 App. Cas. 381, holding that where it is charged that the negligence of defendant consisted in the failure of its motorman to ring his gong as he approached a crossing, plaintiff should adduce testimony to prove a regulation, rule, or custom requiring the sounding of a bell or ringing a gong at such crossing, or that such signals should be given at every crossing of streets of the city, and under all circumstances.

Illinois.— Chicago Union Traction Co. *v.* Giese, 229 Ill. 260, 82 N. E. 232.

Indiana.— Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995.

Louisiana.— Crisman *v.* Shreveport Belt R. Co., 110 La. 640, 34 So. 718, 62 L. R. A. 747.

Maryland.— Garvick *v.* United Ry., etc., Co., 101 Md. 239, 61 Atl. 138; Siacik *v.* Northern Cent. R. Co., 92 Md. 213, 48 Atl. 149.

Massachusetts.— Halloran *v.* Worcester Consol. St. R. Co., 192 Mass. 104, 78 N. E. 381.

Missouri.— Bennett *v.* Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480 (holding that where plaintiff was clearly negligent in failing to observe an approaching car by which he was struck, the burden is on him, in order to recover, to show that the motorman was negligently indifferent to plaintiff's safety and failed to exercise the care of an ordinarily careful person in his situation, and that mere proof that the motorman committed an error of judgment is insufficient); J. F. Conrad Grocer Co. *v.* St. Louis, etc., R. Co., 89 Mo. App. 534 (holding that a city ordinance, exacting vigilance of employees in charge of cars to discover any peril which might threaten vehicles or individuals, is not presumed to be disregarded, and proof must be furnished before defendant can be held liable for its violation).

New York.— White *v.* Albany R. Co., 35 N. Y. App. Div. 23, 54 N. Y. Suppl. 445.

Pennsylvania.—Wagner *v.* Lehigh Traction Co., 212 Pa. St. 132, 61 Atl. 814, defect in bridge.

See 44 Cent. Dig. tit. "Street Railroads," §§ 227, 228.

1. *Arkansas.*— Little Rock R., etc., Co. *v.* Newman, 77 Ark. 599, 92 S. W. 864.

Connecticut.—Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553.

Delaware.— Heinel *v.* People's R. Co., 6 Pennew. 428, 67 Atl. 173; Weldon *v.* People's R. Co., (1906) 65 Atl. 589; Wood *v.* Wilmington City R. Co., 5 Pennew. 369, 64 Atl. 246.

Illinois.— Chicago Union Traction Co. *v.* Giese, 229 Ill. 260, 82 N. E. 232.

Louisiana.— Crisman *v.* Shreveport Belt R. Co., 110 La. 640, 34 So. 718, 62 L. R. A. 747; Klein *v.* Crescent City R. Co., 23 La. Ann. 729.

New Jersey.— Solatinow *v.* Jersey City, etc., St. R. Co., 70 N. J. L. 154, 56 Atl. 235.

New York.— Nocera *v.* Brooklyn Heights R. Co., 113 N. Y. App. Div. 419, 99 N. Y.

this by circumstantial or presumptive evidence,[2] he is bound to introduce evidence enough to remove the cause from the realm of speculation or conjecture, and to establish facts affording a logical basis for the inferences which he claims the jury should draw therefrom;[3] and if he fails to do this a verdict may properly be directed for defendant.[4] But where plaintiff by his evidence makes out a *prima facie* case of negligence on the part of defendant, as where the evidence which shows the injury discloses in itself that defendant in relation to the causal act or omission did not exercise that degree of care which the law requires,[5] or, in some jurisdictions, where defendant has suffered a default,[6] the burden is then upon defendant to show that the accident was not due to negligence on its part.[7] The company will be presumed to have had knowledge of a defect which had existed for several days;[8] but there is no presumption of law that a street railroad obstructs the ordinary travel on the highway,[9] or makes it dangerous.[10]

(B) *Existence of Defect or Happening of Accident or Injury.* As a general rule mere proof of the accident or injury raises no presumption of negligence on the part of the company,[11] except where there is a statutory provision to that effect;[12]

Suppl. 349; Suydam *v.* Grand St., etc., R. Co., 41 Barb. 375.

See 44 Cent. Dig. tit. "Street Railroads," §§ 227, 228.

2. Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553; Trenton Pass. R. Co. *v.* Cooper, 60 N. J. L. 219, 37 Atl. 730, 64 Am. St. Rep. 592, 38 L. R. A. 637, holding that the escape of electricity from a street railroad to the injury of a horse being driven on a public street is presumptive proof of negligence in the operation of the railroad. See also D'Oro *v.* Atlantic Ave. R. Co., 13 N. Y. Suppl. 789 [*affirmed* in 129 N. Y. 633, 29 N. E. 1030].

3. Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553, holding that even though a four-year-old child could not be guilty of contributory negligence, in an action against a street railroad for her death by being struck by a car, plaintiff is not excused from showing her conduct and situation when she was injured as bearing upon the company's negligence.

4. Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553. See also *infra*, X, B, 9, g, (II).

5. Chicago Union Traction Co. *v.* Giese, 229 Ill. 260, 82 N. E. 232; Crisman *v.* Shreveport Belt R. Co., 110 La. 640, 34 So. 718, 62 L. R. A. 747 (incompetent motorman); Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431, 37 Am. Rep. 699 (holding that where a child was injured by being run over by a street car, the fact that the driver was asleep at the time raises the presumption of his negligence, but such presumption will not arise from testimony showing that the drivers of such cars were only allowed a certain number of hours of sleep and rest).

6. Lawler *v.* Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545, holding that under the practice in Connecticut, if defendant suffers a default in an action for negligence, it voluntarily assumes the burden of establishing by a preponderance of evidence that it was not guilty of the negligence alleged, or that the person injured was guilty of contributory negligence.

7. Adams *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 354, 81 N. Y. Suppl. 553; Campbell *v.* Consolidated Traction Co., 201 Pa. St. 167, 50 Atl. 829.

Where it is shown that the equipment of a car was out of order a short time before the accident the burden is on defendant to show that the car was not defective at the time of the accident. Frankfort, etc., Traction Co. *v.* Hulette, 106 S. W. 1193, 32 Ky. L. Rep. 732.

8. Worster *v.* Forty-Second St., etc., Ferry R. Co., 50 N. Y. 203.

9. Hawks *v.* Northampton, 121 Mass. 10.

10. Hawks *v.* Northampton, 121 Mass. 10.

11. *Delaware.*— Heinel *v.* People's R. Co., 6 Pennew. 428, 67 Atl. 173.

Kansas.— Smith *v.* Kansas City El. R. Co., (1900) 60 Pac. 1059.

Maryland.— Miller *v.* United R., etc., Co., 108 Md. 84, 69 Atl. 636, 17 L. R. A. N. S. 978; Garvick *v.* United R., etc., Co., 101 Md. 239, 61 Atl. 138.

Missouri.— Hornstein *v.* United R. Co., 97 Mo. App. 271, 70 S. W. 1105, holding that where plaintiff alighted from a street car, and, just as he passed around behind it, was struck by another car going in the opposite direction on the next track, negligence of the street car company cannot be inferred from the mere happening of the injury.

New York.— Tully *v.* New York City R. Co., 127 N. Y. App. Div. 688, 111 N. Y. Suppl. 919; Keating *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 362, 94 N. Y. Suppl. 117.

Pennsylvania.— Jones *v.* Greensburg, etc., St. R. Co., 9 Pa. Super. Ct. 65, 43 Wkly. Notes Cas. 298; Quinby *v.* Chester St. R. Co., 3 Lanc. L. Rev. 200; Cresey *v.* Railroad Co., 1 Leg. Gaz. 15.

See 44 Cent. Dig. tit. "Street Railroads," §§ 227, 228.

12. See Augusta R., etc., Co. *v.* Arthur, 3 Ga. App. 513, 60 S. E. 213.

In Georgia a chartered street railroad company is a railroad company, within the meaning of Civ. Code (1895), § 2321, making railroad companies liable for damages by the running of their trains, "the presump-

but under the doctrine of *res ipsa loquitur* a presumption of negligence from the simple occurrence of an accident arises where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the company has immediate control, or for the management or construction of which it is responsible,[13] and the burden is then upon the defendant company to rebut the presumption of negligence on its part.[14] Thus where a person is injured while passing under or near an elevated railroad by an iron bar or other object falling therefrom, it raises a presumption of negligence justifying a verdict for plaintiff,[15] unless such presumption in all cases being against the company"; and such section applies where damage is done by such a company to person or property by the running of its cars. Cordray *v.* Savannah, etc., R. Co., 117 Ga. 464, 43 S. E. 755. *Compare* Atlanta R., etc., Co. *v.* Johnson, 120 Ga. 908, 48 S. E. 389. Hence where plaintiff shows injury occasioned by the car of defendant company, the burden of proof is shifted to defendant to show that plaintiff consented to the injury, or could have avoided it by the use of due care, or that the employees of the company exercised all ordinary and reasonable care and diligence. Augusta R., etc., Co. *v.* Arthur, 3 Ga. App. 513, 60 S. E. 213.

Florida Laws (1891), c. 4071, § 1, making a similar provision applies to street railroads. Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354, 32 So. 797. Where a motorman should and must have seen a child of tender years unattended and in dangerous proximity to the track, it was his duty to use means commensurate with the demands of the occasion to prevent injuring such child, and the burden is on the car company to show that such means were used, and if such proof is not made, the company is liable in damages. Jacksonville Electric Co. *v.* Adams, 50 Fla. 429, 39 So. 183.

13. Chicago Union Traction Co. *v.* Giese, 229 Ill. 260, 82 N. E. 232; Cloud *v.* Alexandria Electric R. Co., 121 La. 1061, 46 So. 1017, 18 L. R. A. N. S. 371 (employment of a competent motorman); Richmond R., etc., Co. *v.* Hudgins, 100 Va. 409, 41 S. E. 736.

Doctrine of res ipsa loquitur stated.—When the thing which has caused the injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of affairs does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of any explanation, that it was caused by the lack of proper care by the party charged with negligence. Chicago Union Traction Co. *v.* Giese, 229 Ill. 260, 82 N. E. 232.

Illustrations.—A presumption of negligence arises where an accident occurs by reason of one of defendant's cars, which at the time of the accident was running along the tracks of defendant, on a public street on which persons and vehicles were passing, with its motive power turned on and no one in control of the car Chicago City R. Co. *v.* Barker, 209 Ill. 321, 70 N. E. 624; Chicago City R. Co. *v.* Eick, 111 Ill. App. 452 [*affirmed* in 209 Ill. 321, 70 N. E. 624]. But where plaintiff is injured by falling over a fender attached to a standing car at night, by reason of the fact that the car is unlighted or unguarded by a motorman, such fact does not constitute *prima facie* evidence of defendant's negligence, under the doctrine of *res ipsa loquitur*, so as to render it incumbent on defendant to show absence of negligence in permitting the car to remain in such condition. Adams *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 354, 81 N. Y. Suppl. 553.

Fall of trolley pole or wire.—The doctrine of *res ipsa loquitur* applies to the fall of a street car company's trolley wire, caused by a stroke from a deranged trolley pole. Memphis St. R. Co. *v.* Kartright, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807. So where a trolley pole, which has come off the trolley wire and which has been hanging the cross wires for some time, becomes disconnected from the spring and falls on a driver of a vehicle in the street, injuring him, the company has the burden of explaining its failure to stop the car forthwith, or to control the pole by the rope, and on its failure to sustain such burden a recovery is proper. Washington *v.* Rhode Island Co., (R. I. 1908) 70 Atl. 913.

14. Hogan *v.* Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 [*affirming* 6 Misc. 295, 26 N. Y. Suppl. 792]; Campbell *v.* Consolidated Traction Co., 201 Pa. St. 167, 50 Atl. 829; Washington *v.* Rhode Island Co., (R. I. 1908) 70 Atl. 913.

15. Hogan *v.* Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 [*affirming* 6 Misc. 295, 26 N. Y. Suppl. 792]; Volkmar *v.* Manhattan R. Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678 [*reversing* 58 N. Y. Super. Ct. 125, 9 N. Y. Suppl. 708]; Maher *v.* Manhattan R. Co., 53 Hun (N. Y.) 506, 6 N. Y. Suppl. 309; Goll *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 74, 5 N. Y. Suppl. 185 (holding that where it appears that the cylinder of an engine on defendant's elevated railroad burst, and that a fragment struck plaintiff, who was in the street below, negligence may be inferred from the nature of the accident, and the question should be submitted to the jury); Morsemann *v.* Manhattan R. Co., 16 Daly (N. Y.) 249, 10 N. Y. Suppl. 105 (holding that the falling from an elevated railroad structure of a crowbar which was in use by an employee repairing the track, whereby a person in the street below

tion is rebutted by defendant by evidence showing that the falling of such bar or object was not due to any negligence on its part.[16]

(c) *Contributory Negligence.* In some jurisdictions, in the absence of any evidence on the subject, the person injured will not be presumed to have been free from contributory negligence,[17] and the burden of proof is on plaintiff to show that he was free from such negligence.[18] In other jurisdictions, however, it is to be presumed, in the absence of evidence to the contrary, that the person injured exercised reasonable care to avoid injury,[19] and the burden of proving contributory negligence is upon defendant, as a matter of defense.[20]

was injured, raises a presumption of negligence, which is not overcome by proof that the crowbar was dropped through the employee's efforts to save himself from falling); Brooks *v.* Kings County El. R. Co., 4 Misc. (N. Y.) 288, 23 N. Y. Suppl. 1031 [*affirmed* in 144 N. Y. 647, 39 N. E. 493]; Sturza *v.* Interborough Rapid Transit Co., 113 N. Y. Suppl. 974. See also *infra*, X, B, 9, e, (III), (c).

16. Hogan *v.* Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403 [*affirming* 6 Misc. 295, 26 N. Y. Suppl. 792]; Volkmar *v.* Manhattan R. Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678 [*reversing* 58 N. Y. Super. Ct. 125, 9 N. Y. Suppl. 708]; Wiedmer *v.* New York El. R. Co., 41 Hun (N. Y.) 284 [*reversed* on other grounds in 114 N. Y. 462, 21 N. E. 1041].

17. Keating *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 362, 94 N. Y. Suppl. 117.

Where a collision occurs between a car and a vehicle progressing side by side with a space between them, the presumption of negligence is against the driver of the vehicle. Suydam *v.* Grand St., etc., R. Co., 41 Barb. (N. Y.) 375. *Compare* O'Neill *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 [*affirmed* in 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512].

18. Fay *v.* Hartford, etc., St. R. Co., 81 Conn. 330, 71 Atl. 364; Halloran *v.* Worcester Consol. St. R. Co., 192 Mass. 104, 78 N. E. 381; Gorham *v.* Milford, etc., St. R. Co., 189 Mass. 275, 75 N. E. 634 (although the motorman was negligent just before the accident); Gleason *v.* Worcester Consol. St. R. Co., 184 Mass. 290, 68 N. E. 225 (although defendant's servants were guilty of gross negligence); Cox *v.* South Shore, etc., St. R. Co., 182 Mass. 497, 65 N. E. 823; Enders *v.* Brooklyn Union El. R. Co., 131 N. Y. App. Div. 170, 115 N. Y. Suppl. 155; Paladino *v.* Staten Island Midland R. Co., 127 N. Y. App. Div. 183, 111 N. Y. Suppl. 715; Keating *v.* Metropolitan St. R. Co., 105 N. Y. App. Div. 362, 94 N. Y. Suppl. 117; Hoffman *v.* Syracuse Rapid-Transit R. Co., 50 N. Y. App. Div. 83, 63 N. Y. Suppl. 442; Johnson *v.* Brooklyn Heights R. Co., 34 N. Y. App. Div. 271, 54 N. Y. Suppl. 547; Lejoune *v.* Dry Dock, etc., R. Co., 86 N. Y. Suppl. 749.

Sufficiency of proof.—To sustain such burden it is not enough that the facts proven permit the inference that the person injured was free from contributory negligence; but such inference must be the only one that can fairly and reasonably be drawn from the facts. O'Reilly *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 492, 81 N. Y. Suppl. 572. Thus mere proof that the hearing of one driving on a street car track was good, and that he did not hear a car approaching from behind, does not warrant the inference that he was listening for it. Belford *v.* Brooklyn Heights R. Co., 86 N. Y. App. Div. 388, 83 N. Y. Suppl. 836. Nor can it be inferred from the mere fact that one could have looked for cars before crossing street car tracks that he did look. O'Reilly *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 492, 81 N. Y. Suppl. 572.

19. Cox *v.* Wilmington City R. Co., 4 Pennew. (Del.) 162, 53 Atl. 569; Kansas City-Leavenworth R. Co. *v.* Gallagher, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344 (holding that in the absence of evidence to the contrary a jury may infer from the instinct of self-preservation that a person about to cross a street railway track both looked and listened); McKenzie *v.* United R. Co., 216 Mo. 1, 115 S. W. 13; Powers *v.* St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655; Goff *v.* St. Louis Transit Co., 199 Mo. 694, 98 S. W. 49; Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Priesmeyer *v.* St. Louis Transit Co., 102 Mo. App. 518, 77 S. W. 313.

That the mutilated remains of a person are found along defendant's tracks in a public highway just after a car had struck him raises no legal presumption that deceased had been guilty of contributory negligence barring a recovery. Merkl *v.* Jersey City, etc., St. R. Co., 75 N. J. L. 654, 68 Atl. 74.

Trespassers.—There is no presumption that the prosecution of a work by a corporation in the public streets is unauthorized and its employees trespassers. Daum *v.* North Jersey St. R. Co., 69 N. J. L. 1, 54 Atl. 221 [*affirmed* in 70 N. J. L. 338, 57 Atl. 1132]. So in an action against a street railroad company for running down a wagon and throwing out and injuring one of its occupants, in the absence of special evidence that its tracks were laid over private land, the jury would be warranted in presuming that they were laid in a public highway, and that therefore plaintiffs were not trespassers. Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822.

20. *Idaho.*— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254.

Indiana.— Indianapolis St. R. Co. *v.*

(II) *ADMISSIBILITY OF EVIDENCE*[21] — (A) *In General.* The admissibility of evidence in an action for injuries sustained through the operation of a street railroad is regulated by the rules of evidence governing the competency, relevancy, and materiality of evidence in civil actions generally,[22] such as the rules relative to the admissibility of declarations or admissions of agents and employees,[23] or of expert or opinion evidence,[24] as that a witness should not be allowed to state his opinion or conclusion upon a particular matter without stating the facts and circumstances upon which it is based, when they may be given.[25] Subject to these rules evidence is admissible on behalf of plaintiff or defendant in such an action of all facts and circumstances which tend to prove or disprove plaintiff's cause of action,[26]

Marschke, 166 Ind. 490, 77 N. E. 945; Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936 (under Burns Rev. St. (1901) § 359); Nelson *v.* Chicago, etc., R. Co., 41 Ind. App. 397, 83 N. E. 1019. But *compare* Evansville St. R. Co. *v.* Gentry, 147 Ind. 408, 44 N. E. 311, 62 Am. St. Rep. 421, 37 L. R. A. 378.

Missouri.— Goff *v.* St. Louis Transit Co., 199 Mo. 694, 98 S. W. 49; Thompson *v.* North Missouri R. Co., 51 Mo. 190, 11 Am. Rep. 443; Schroeder *v.* St. Louis Transit Co., 111 Mo. App. 67, 85 S. W. 968.

Texas.—El Paso Electric R. Co. *v.* Kendall, (Civ. App. 1904) 78 S. W. 1081; Marshall *v.* Dallas Consol. Electric St. R. Co., (Civ. App. 1903) 73 S. W. 63.

United States.—Washington, etc., R. Co. *v.* Gladmon, 15 Wall. 401, 21 L. ed. 114.

See 44 Cent. Dig. tit. "Street Railroads," §§ 227, 228.

21. Evidence admissible under pleadings see *supra*, X, B, 9, d, (III).

22. See, generally, EVIDENCE, 16 Cyc. 1110 *et seq.*

The clothing worn by the person injured at the time of the accident is competent evidence, when it tends to establish any controverted fact in issue. Senn *v.* Southern R. Co., 108 Mo. 142, 18 S. W. 1007; Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

Rebutting presumption from failing to produce witnesses.—Evidence of a division superintendent that he could not ascertain anything in regard to the alleged accident is competent to rebut the presumption which the failure to produce certain witnesses might raise against defendant. Hope *v.* West Chicago St. R. Co., 82 Ill. App. 311. So the testimony of a witness that he talked with the driver of the truck which collided with a car, and the driver could not remember what had occurred, because of injuries received on his head at the time of the collision, is admissible as explaining to the jury why such driver was not called as a witness. Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399.

Res gestæ.—Whatever took place at the car at the time of the accident is a part of the *res gestæ* and proper to be admitted in evidence. East St. Louis Electric St. R. Co. *v.* Burns, 77 Ill. App. 529. See, generally, EVIDENCE, 16 Cyc. 1148 *et seq.*

23. See, generally, EVIDENCE, 16 Cyc. 1003 *et seq.*

Declarations, statements, or admissions not connected with the accident, made by a railroad employee, are inadmissible (Monroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498), except for the purpose of impeaching his other testimony (Chicago, etc., R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350).

But the declarations or statements of the motorman of the colliding car regarding the accident, and made immediately thereafter, are admissible as part of the *res gestæ*, regardless of the purpose in offering them. Chicago City R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577 [*affirming* 125 Ill. App. 223]; Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451; Floyd *v.* Paducah R., etc., Co., 64 S. W. 653, 23 Ky. L. Rep. 1077.

24. Birmingham R., etc., Co. *v.* Randle, 149 Ala. 539, 43 So. 355, holding that in an action for the death of plaintiff's intestate by being struck by a street car, defendant's motorman, after having testified that when he first saw deceased he was walking in a path two or three feet from the side of the track, was entitled to state whether the car would have struck deceased in passing him at that distance from the track.

Expert testimony as to care in management and operation of cars see, generally, EVIDENCE, 17 Cyc. 79, 209, 241.

25. Birmingham R., etc., Co. *v.* Randle, 149 Ala. 539, 43 So. 355 (holding that one may not testify that the motorman seemed to try to stop the car as quickly as he could, but he should be required to state what the motorman did to stop the car); Reid *v.* New York City R. Co., 93 N. Y. Suppl. 533 (holding that in an action for injuries to a horse in a collision with a street car, it is error to permit plaintiff to testify, without stating any facts, that the horse could not be used after the accident for the same purpose that it had been used before).

A motorman is not entitled to testify that he stopped the car as soon as he could, but must state what he did to stop the car, and whether that was all that could have been done to stop it as soon as possible. Birmingham R., etc., Co. *v.* Randle, 149 Ala. 539, 43 So. 355; Hogan *v.* Citizens' R. Co., 150 Mo. 36, 51 S. W. 473.

26. See Leighton *v.* Chicago Consol. Traction Co., 235 Ill. 283, 85 N. E. 309; Indianapolis, etc., Rapid Transit Co. *v.* Haines, 33 Ind. App. 63, 69 N. E. 187.

Description of injuries.—Where, in an ac-

or defendant's matters of defense.[27] But evidence which is irrelevant, immaterial, or incompetent is inadmissible, either on behalf of plaintiff,[28] or defendant.[29] On the question of defendant's negligence in the management and operation of its road and cars, for the purpose of proving or disproving such negligence, any evidence is ordinarily admissible which tends to show the surrounding circumstances or conditions existing at the time and place of the accident,[30]

tion for death in a street car collision, the injuries and death of decedent are admitted, but there is doubt as to how and where he was struck, the evidence of a physician giving the nature and a description of the wounds is admissible to aid in solving such questions. Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451.

27. See Cunningham *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 123, 60 N. Y. Suppl. 277.

28. Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613; Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834 (as to drinking by watchman); Waddell *v.* Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765; Reich *v.* Union R. Co., 78 Hun (N. Y.) 417, 28 N. Y. Suppl. 1105.

Evidence held inadmissible.—Where, in an action for injuries sustained by being run over by defendant's car, after plaintiff had fallen on the track, it is undisputed that the track at that place was icy and slippery, evidence that there had been no storm for two days before the accident is inadmissible for any purpose. Silberstein *v.* Houston, etc., R. Co., 117 N. Y. 293, 22 N. E. 951 [*reversing* 4 N. Y. Suppl. 843]. Evidence as to the use of the track by the public as a passway is not admissible, where the track, although an extension of a street railroad, is not in the highway, and such use gave the public no right thereto. Floyd *v.* Paducah R., etc., Co., 64 S. W. 653, 23 Ky. L. Rep. 1077. So where plaintiff had been on the track for some time before he was struck, and was manifestly there for his own convenience, it is inadmissible for him to testify that he had gone on the track to avoid an unruly horse that was about to run over him on the highway. Floyd *v.* Paducah R., etc., Co., *supra*.

Rules of fire department.—In an action for the death of a member of a municipal fire department in a collision between a hose wagon and a car, it is proper to refuse to admit in evidence on behalf of plaintiff rules of the fire department intended for the guidance of members thereof and issued only to them. McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618.

The arrest of the motorman or conductor of the car causing the injury, some time after the accident, is irrelevant. Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195; Seipp *v.* Dry Dock, etc., R. Co., 45 N. Y. App. Div. 489, 61 N. Y. Suppl. 409. *Compare* Chicago City R. Co. *v.* Reddick, 139 Ill. App. 160, holding that it is not error to admit proof of the arrest of the motorman at the time of the accident, but that it is error to refuse to admit evidence as to the reason for such arrest, where such evidence tends to remove the impression which might have been left in the minds of the jury that there was something culpable in the conduct of the motorman at the time.

29. Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Hyland *v.* Yonkers R. Co., 4 N. Y. Suppl. 305 [*affirmed* in 119 N. Y. 612, 23 N. E. 1143].

30. Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032 (holding that, in an action for injury to one crossing the track, a passenger could testify whether the car stopped suddenly or gradually, and whether he was thrown forward when it was being stopped); Metropolitan St. R. Co. *v.* Fawcett, 76 Kan. 522, 92 Pac. 543; Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859 (holding that where plaintiff was injured by a street car through the alleged negligence of the motorman, it was error to reject evidence whether the motorman could see plaintiff in the position he was in before the accident); Levin *v.* Metropolitan St. R. Co., 140 Mo. 624, 41 S. W. 968 (as to looking).

Evidence held admissible: In an action for injuries to a telegraph lineman by being struck and thrown from a pole by defendant's street car, evidence that flags were stationed to notify people, and particularly cars, that there was dangerous construction going on, is admissible to show the surrounding conditions. Ahearn *v.* Boston El. R. Co., 194 Mass. 350, 80 N. E. 217. In an action for injury received by plaintiff by reason of his horse becoming frightened at defendant's street cars, which were negligently allowed to stand on a bridge on a public highway, evidence that other horses had become frightened at defendant's cars standing at the same place where plaintiff's horse took fright is competent. San Antonio Edison Co. *v.* Beyer, 24 Tex. Civ. App. 145, 57 S. W. 851. In an action for injuries to the driver of a hose cart in collision with a street car, evidence that witness, who was sitting on a sidewalk, had frequently heard the gong of a fire patrol wagon, which was similar to the gong on plaintiff's wagon, a distance of two blocks, is not objectionable on the ground that the conditions surrounding the witness and those surrounding the motorman were not identical. Hanlon *v.* Milwaukee Electric R., etc., Co., 118 Wis. 210, 95 N. W. 100.

Evidence as to the distance the car ran after the accident is admissible in an action for negligently causing the death of a child by striking it with a car at a street crossing, as bearing upon the general conduct and control of the car. Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106.

Evidence of omission to sound a street car gong at a place where the law did not require

such as of the fact that the street at that place was crowded or was in a thickly populated locality,[31] or of statutory or ordinance provisions regulating the running of cars.[32]

it to be sounded is admissible as a part of the history of the transaction, and as bearing upon the degree of care exercised by the street car employees. Kleiner *v.* Third Ave. R. Co., 162 N. Y. 193, 56 N. E. 497 [*reversing* 38 N. Y. App. Div. 623, 57 N. Y. Suppl. 1140].

That the public were in the habit of driving on the track is admissible, as bearing upon the question of defendant's negligence in running a car at night without lights. Rascher *v.* East Detroit, etc., R. Co., 90 Mich. 413, 51 N. W. 463, 30 Am. St. Rep. 447.

The boot worn by the injured person at the time he was injured may be exhibited for the purpose of showing the indentations made thereon, as tending to prove that the brake was not applied, but that the wheel rolled over plaintiff's foot, where there is other evidence that, when the brakes are applied, the car wheel will not revolve, but will slide along the rail. Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

Lawfulness of location of track.—An order of the city council, approved by the mayor, prior to the date of the accident, permitting defendant to locate its tracks at the point in question, as shown on blue prints attached to the order, and relating to the location of the tracks at the time and place of the injury, and showing that it was the only location given to defendant, is admissible to show that it was lawful, and not a negligent, location. Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613.

31. *Alabama.*— Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566, holding that on the question of defendant's negligence in running its cars over a street intersection, evidence of the number of people who were accustomed to pass there, and of how they traveled, is admissible.

Delaware.— Di Prisco *v.* Wilmington City R. Co., 4 Pennew. 527, 57 Atl. 906, holding that in an action for the death of a child by his being run over by a street car while playing in the street, a question asked of a witness as to whether, prior to the accident, there were a great many small boys that gathered in the vicinity of the place where the accident happened, is admissible for the purpose of showing that it was a thronged place.

Indiana.— Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155, 72 N. E. 1045.

Missouri.— Burnstein *v.* Cass Ave., etc., R. Co., 56 Mo. App. 45.

Texas.— Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054, much traveled.

See 44 Cent. Dig. tit. "Street Railroads," § 229.

But see Monehan *v.* South Covington, etc., St. R. Co., 117 Ky. 771, 78 S. W. 1106, 25 Ky. L. Rep. 1920.

32. Quinn *v.* New York City R. Co., 94 N. Y. Suppl. 560 (holding that in an action for personal injuries caused by a collision, an ordinance giving the company the right of way in the street is admissible as bearing on the degree of caution imposed on the motorman); Taylor *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 282 (holding that in an action for damage done to plaintiff's vehicle by a collision at a crossing, it is error to exclude an ordinance entitled, "Rules of the Road," providing that all vehicles going in a northerly or southerly direction have the right of way over any vehicle going in an easterly or westerly direction).

Where both parties try the case on the theory that defendant is not liable for a violation of the ordinances governing the running of street cars, unless it is shown that it had agreed to be bound by such ordinances, an ordinance showing such an agreement on the part of defendant is relevant. Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86.

Where the action is founded on common-law negligence, without an ordinance being pleaded, proof of the violation of the ordinance is nevertheless admissible, as bearing on the question of general negligence. Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213. See also Sheehan *v.* Citizens' R. Co., 72 Mo. App. 524.

Ordinances stating merely general rules of law, such as requiring employees of the railroad company to use reasonable care to prevent injury, and to stop the car on the appearance of danger to any one near the track, and to use proper care to prevent injury to teams, are inadmissible in an action for injuries from a collision. Christy *v.* Des Moines City R. Co., 126 Iowa 428, 102 N. W. 194.

Ordinances and police regulations.—Where plaintiff contends that the car stopped on the crossing, and defendant that it passed over before stopping, ordinances and police regulations forbidding cars to be stopped on the crossing are admissible to show the greater probability of defendant's contention. Stiasny *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 172, 68 N. Y. Suppl. 694 [*affirmed* in 172 N. Y. 656, 65 N. E. 1122].

An ordinance or statute providing that the apparatus of a fire department shall have the right of way on streets when responding to an alarm of fire is admissible in an action for the death or injury of a fireman by a collision of the wagon on which he was riding with a street car, as bearing on the question of the exercise of care by the motorman (McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618; Geary *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 514, 82 N. Y. Suppl. 1016 [*affirmed* in 177 N. Y. 535, 69 N. E. 1123], holding that Greater New York Charter (Laws 1897),

(B) *Customary Methods and Acts.* On the question as to whether or not the particular acts or omissions of defendant's servants at the time and place of the accident were negligent, evidence is admissible of what is usually done by defendant's servants under the same or similar circumstances,[33] such as of the customary mode of running cars on double tracks,[34] or of the usual means of stopping cars under given conditions or circumstances.[35] Rules and regulations promulgated by the company for the guidance of its servants in such a contingency as that existing at the time of the accident are admissible on the question of defendant's negligence.[36]

(C) *Other Accidents or Acts.* As a general rule evidence of accidents or acts of negligence at other places or on other occasions, previous or subsequent, is inadmissible to show negligence on the part of defendant at the time and place of the accident in question,[37] unless the conditions and circumstances surrounding the different acts or occasions are shown to be the same and in the same locality,[38] or the acts are continuous in their nature and are closely connected with the acts

c. 378, § 748, giving vehicles of the fire department in answering a fire alarm the right of way over other vehicles, is material on the question of negligence, in a collision between a hook and ladder truck and a street car, wherein a fireman riding on the truck is killed); but an ordinance prior in time of enactment giving to street cars the right of way in matters of ordinary street traffic is inadmissible (McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618).

33. Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494.

34. North Chicago St. R. Co. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077 [*reversing* 104 Ill. App. 150], holding that where the injury occurred by reason of a car running on a track usually used by cars going in the opposite direction, evidence of the custom of running all north-bound cars on the east track and all south-bound cars on the west track is admissible, although there is no allegation that running the car northward on the west track is negligence.

35. Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494, holding that in an action for injuries to a person on the track of a street railroad company, it is competent to show, by a witness familiar with the operation of electric cars, the usual means of stopping a car under given circumstances.

36. *Illinois.*— Chicago City R. Co. *v.* McDonough, 125 Ill. App. 223 [*affirmed* in 221 Ill. 69, 77 N. E. 577] (where known as well to the party injured as to the alleged negligent servant); Fitzpatrick *v.* Bloomington City R. Co., 73 Ill. App. 516 (as to sounding gong).

Minnesota.— Isackson *v.* Duluth St. R. Co., 75 Minn. 27, 77 N. W. 433, holding, however, that a rule of defendant imposing a higher degree of care on its motormen than the law requires is inadmissible where there is no evidence to show that the person injured knew of it or as to how long it had been in existence.

Missouri.— Paquin *v.* St. Louis, etc., R. Co., 90 Mo. App. 118.

New York.— Sullivan *v.* Richmond Light, etc., Co., 128 N. Y. App. Div. 175, 112 N. Y. Suppl. 648, holding that in an action for injuries by a car operated, in the presence of the motorman, by a boy eighteen years old employed by the company as a clerk, evidence of a rule of the company prohibiting the motorman from permitting any person on the front platform, with certain exceptions, which did not include the clerk, is admissible on the issue whether the motorman exercised the care which an ordinarily prudent person would have exercised under similar circumstances.

Ohio.— Cincinnati St. R. Co. *v.* Altemeier, 60 Ohio St. 10, 53 N. E. 300.

See 44 Cent. Dig. tit. "Street Railroads," § 229.

But *compare* Louisville R. Co. *v.* Gaugh, (Ky. 1909) 118 S. W. 276, holding that in an action for injuries by being struck by defendant's car while crossing its track, the rules of the company regulating its employees in the operation of its cars are not admissible in evidence, as the question of negligence of defendant's employees cannot be tested by the manner in which they have followed the company's rules, but such negligence must be tested by the rules of law.

Rules requiring street cars to give the fire department the right of way at crossings, and, if necessary, to stop and allow the truck or engine of such department to pass, and requiring cars to slacken their speed at all permanent crossings, are admissible in an action for death or injuries caused in a collision with a hook and ladder truck at a crossing. Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399.

37. Monroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498; Perras *v.* United Traction Co., 88 N. Y. App. Div. 260, 84 N. Y. Suppl. 992 (holding that evidence that cars had been derailed at other times and places on defendant's road, and under circumstances not shown to be similar to those existing at the time of the accident, is inadmissible); Dyer *v.* Union R. Co., 25 R. I. 221, 55 Atl. 688 (holding that evidence that defendant had failed to ring the bell on the car in question at the intersection of other streets prior to the time of the accident is improper).

38. Perras *v.* United Traction Co., 88 N. Y. App. Div. 260, 84 N. Y. Suppl. 992.

complained of in point of time, place, and circumstances.[39] Thus it has been held that, as tending to show negligence on the part of an employee on a car, evidence is admissible as to his conduct just prior to the accident;[40] but on the other hand it has been held that evidence of his acts after the accident is inadmissible.[41] Likewise evidence that the negligent servant had been careful on other similar occasions is ordinarily inadmissible.[42]

(D) *Conditions and Precautions After Accident.* Evidence of precautions taken or acts done by defendant after the accident to prevent its recurrence, as in making repairs, removing obstructions, or otherwise, is ordinarily inadmissible to show negligence on its part in that respect at the time and place of the accident.[43]

(E) *As to Incompetency or Insufficiency of Employees.* For the purpose of showing negligence on the part of defendant in operating the car which caused the accident, evidence is admissible which tends to show that there were an insufficient number of employees in charge of such car,[44] or that the employee in charge at the time of the accident was incompetent.[45] Thus, as bearing on a driver's or motorman's condition or incompetency at the time of the accident, evidence is admissible that he had a drink just before starting on the trip,[46] or that he was intoxicated;[47] but evidence is inadmissible that he had some trouble on

On the question of defendant's negligence in piling snow in the street, evidence is admissible that it had previously piled snow in that vicinity, but not that it did so elsewhere. Mayer *v.* Milwaukee St. R. Co., 90 Wis. 522, 63 N. W. 1048.

39. Frankfort, etc., Traction Co. *v.* Hulette, 106 S. W. 1193, 32 Ky. L. Rep. 732 (holding that the admissibility of evidence showing a negligent condition existing prior to the accident depends upon the degree of probability afforded in each case that such condition continued up to the time of the accident); Pyne *v.* Broadway, etc., R. Co., 19 N. Y. Suppl. 217 [*affirmed* in 138 N. Y. 627, 33 N. E. 1083].

40. Bennett *v.* Brooklyn Heights R. Co., 1 N. Y. App. Div. 205, 37 N. Y. Suppl. 447; Mt. Adams, etc., Inclined R. Co. *v.* Doherty, 8 Ohio Cir. Ct. 349, 6 Ohio Cir. Dec. 810, holding that where it is alleged that, by reason of the negligence of the conductor, plaintiff, a boy six years old, was pushed off the car, so as to result in injury, evidence of threats and threatening gestures of the conductor to the boy jumping on the footboard of the car is admissible.

41. Wilcox *v.* Wilmington City R. Co., 2 Pennew. (Del.) 157, 44 Atl. 686; Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434, holding that in an action for injuries in a street car collision, evidence that after the accident the motorman would not stop the car, but wanted to get away and desired to beat those who were endeavoring to rescue plaintiff or detain the motorman, was irrelevant.

42. Sunderland *v.* Pioneer Fire Proof Constr. Co., 78 Ill. App. 102, holding that in an action against the owner of a private tramway for injuries caused by frightening a horse, evidence that the motorman had been careful in meeting other horses under similar circumstances is inadmissible.

43. Markowitz *v.* Dry Dock, etc., R. Co., 12 Misc. (N. Y.) 412, 33 N. Y. Suppl. 702, holding that in an action for personal injuries caused by a snowbank along defendant's street car track, evidence that defendant removed the snow after the accident is inadmissible.

44. See Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

Evidence that it is a street car driver's duty to see that fares are paid, make change, and keep boys off the rear of the car, is competent to show whether he was in a position to give proper attention to his driving. Silberstein *v.* Houston, etc., R. Co., 4 N. Y. Suppl. 843 [*reversed* on other grounds in 117 N. Y. 293, 22 N. E. 951]; McCoy *v.* Milwaukee St. R. Co., 88 Wis. 56, 59 N. W. 453. Thus where there is evidence that the accident was due to the driver's negligence in not observing the child in front of the car, because he was occupied in making change for a passenger, evidence that the cars on defendant's line at the point of the accident were habitually crowded with passengers is admissible, since, if the cars were habitually crowded, defendant was chargeable with notice thereof, and also with knowledge that the attention of the drivers was thereby frequently distracted from the path of the car. Anderson *v.* Minneapolis St. R. Co., 42 Minn. 490, 44 N. W. 518, 18 Am. St. Rep. 525.

Evidence that no conductor was on the car at the time of the accident is inadmissible in evidence, in the absence of a showing that his presence was necessary or requisite for the safe running of the car. Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

45. See Pyne *v.* Broadway, etc., R. Co., 19 N. Y. Suppl. 217 [*affirmed* in 138 N. Y. 627, 33 N. E. 1083].

46. See Pyne *v.* Broadway, etc., R. Co., 19 N. Y. Suppl. 217 [*affirmed* in 138 N. Y. 627, 33 N. E. 1083].

47. Pyne *v.* Broadway, etc., R. Co., 19 N. Y. Suppl. 217 [*affirmed* in 138 N. Y. 627, 33 N. E. 1083], holding that in an action for injuries sustained in being struck by a car, in consequence of the driver's negligence and intoxication, evidence that the driver had

another line in managing his car,[48] or had previously been concerned with an accident,[49] or as to the number of hours each day other employees were required to work.[50]

(F) *As to Defective Track, Premises, or Appliances.* On the question of negligence in the construction and maintenance of the tracks or equipment, evidence is admissible of any fact or circumstance which tends to show that the company failed to exercise due care and diligence in this respect.[51] Thus, on the question of negligent or defective construction or maintenance, evidence is admissible to show that structures of a similar class are or are not constructed in a similar manner,[52] as is also evidence as to the condition of the tracks some time afterward, if there is further evidence that there has been no change in their condition since the accident;[53] but evidence of other similar accidents, at the same place, is inadmissible,[54] unless they are shown to have happened under the same conditions and

on that same trip missed a switch at a certain street, that he had failed to respond to the conductor's signal to stop at another street, had driven rapidly, and that a person had been thrown down in attempting to get aboard, is admissible, as showing a series of acts indicative of such intoxication at the time of the accident as to incapacitate him to properly control the car.

48. Monroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498.

49. American Ice Co. *v.* New York City R. Co., 50 Misc. (N. Y.) 183, 98 N. Y. Suppl. 219, holding that the admission of evidence that defendant's motorman had previously been concerned with an accident was erroneous, although it may not have affected the result, and would not of itself call for a reversal.

50. Philadelphia City Pass. R. Co. *v.* Henrice, 92 Pa. St. 431, 37 Am. Rep. 699, holding that a question asked by plaintiff of a witness, as to how many hours the drivers and conductors on the railroad were employed each day, for the purpose of showing that the driver of the car which injured the child was physically unable to discharge his duty at the time of the accident, was error.

51. Minster *v.* Citizens' R. Co., 53 Mo. App. 276 (displacement of slot rail); Musser *v.* Lancaster City St. R. Co., 176 Pa. St. 621, 35 Atl. 206 (holding that, in an action for injuries caused by the breaking of a street railroad cable, testimony that the attention of one of the directors of the defendant company was called to the weakened condition of the cable is admissible); El Paso Electric R. Co. *v.* Davis, (Tex. Civ. App. 1904) 83 S. W. 718 (as to hole in road-bed).

Evidence admissible.— In an action for injuries due to the insufficient surfacing and ballasting of the track, where the complaint sets up a contract between defendant and the city, and also a municipal ordinance whereby it is made defendant's duty to keep its track in such condition as not to obstruct the passage of vehicles over them, both the contract and ordinance are admissible in evidence. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

Evidence as to devices to prevent iron parings from falling into the street below is admissible in rebuttal of evidence given in behalf of defendant, an elevated railroad company, that dust and scales of iron could be kept from falling only at a great expense. Manson *v.* Manhattan R. Co., 55 N. Y. Super. Ct. 18, 8 N. Y. St. 118.

Evidence that defendant was a trespasser at the place of the accident is immaterial in an action for injuries received by the injured person's tripping over a rail, alleged to have extended several inches above the surface of the street, since its liability does not depend upon whether or not it was a trespasser, but upon whether it negligently failed to maintain the tracks in a reasonably safe condition for people to travel over. Huff *v.* St. Joseph R., etc., Co., 213 Mo. 495, 111 S. W. 1145.

52. Jarvis *v.* Brooklyn El. R. Co., 16 N. Y. Suppl. 96 [*affirmed* in 133 N. Y. 623, 30 N. E. 1150], holding that in an action for injuries caused by falling from the unguarded end of defendant's elevated railroad station platform while looking for a urinal, plaintiff may show that on all other elevated railroads the exposed ends of platforms are guarded in some way, and that urinals are in use on such roads.

53. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525; Reynolds *v.* Metropolitan St. R. Co., 136 Mo. App. 282, 116 S. W. 1135; Wooley *v.* Grand St., etc., R. Co., 83 N. Y. 121; Byrne *v.* Brooklyn City, etc., R. Co., 6 Misc. (N. Y.) 260, 26 N. Y. Suppl. 760 [*affirmed* in 145 N. Y. 619, 40 N. E. 163].

54. Gregory *v.* Detroit United R. Co., 138 Mich. 368, 101 N. W. 546 (holding that where in an action for injuries to plaintiff from the overturning of his cutter in striking the rails of defendant's track, which are alleged to have been negligently left above the surface of the street, the sole question is the condition of the street, and whether its condition was negligence, evidence of prior accidents of a similar character at the same place is inadmissible); Morrow *v.* Westchester Electric R. Co., 54 N. Y. App. Div. 592, 67 N. Y. Suppl. 21 [*affirming* 30 Misc. 694, 63 N. Y. Suppl. 16, and *affirmed* in 172 N. Y. 638, 65 N. E. 1119]; Johnson *v.* Manhattan R. Co., 52 Hun (N. Y.) 111, 4 N. Y. Suppl. 848. See also *supra*, X, B, 9, e, (II), (C).

circumstances.[55] So also evidence of defective conditions at other times and places is generally inadmissible;[56] but the previous condition of the track at and near the place of the accident may be shown as tending to prove a failure to repair the defect and thereby establish negligence on the part of defendant.[57] As tending to disprove negligence in this respect evidence is admissible on behalf of defendant to show that other persons or vehicles were constantly crossing the track safely at the place and about the time of the accident,[58] or that the work of construction or repair was done to the satisfaction of the commissioners having the approval thereof,[59] or in compliance with an ordinance regulating the construction and maintenance;[60] but not that other similar accidents had never happened, where the same conditions are not shown to have existed.[61]

(G) *As to Equipment of Cars.* For the purpose of proving or disproving negligence in the operation of a car, evidence is admissible which tends to show whether or not it was equipped with proper appliances at the time of the accident, or, if so equipped, whether or not the appliances were in proper repair.[62] Thus,

55. Wooley *v.* Grand St., etc., R. Co., 83 N. Y. 121; Morrow *v.* Westchester Electric R. Co., 54 N. Y. App. Div. 592, 67 N. Y. Suppl. 21 [*affirming* 30 Misc. 694, 63 N. Y. Suppl. 16, and *affirmed* in 172 N. Y. 638, 65 N. E. 1119].

56. Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047, holding that where a street railroad company is charged with negligence in allowing the rails of its track to project above the roadway, testimony as to the condition of the street at places other than the place of the accident is inadmissible.

57. Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047 (previous condition within a year); Houston City St. R. Co. *v.* Medlenka, 17 Tex. Civ. App. 621, 43 S. W. 1028 (holding that where plaintiff was injured through the breaking of a wheel of his vehicle, in crossing defendant's railroad track, by reason of the protrusion of the rails above the surface of the highway, and the absence of guard rails, evidence of the condition of the track at such point, and other points immediately connected therewith, is admissible).

58. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525.

59. Mahoney *v.* Natick, etc., St. R. Co., 173 Mass. 587, 54 N. E. 349, holding that the testimony of an assistant commissioner who had charge of the locality where the accident happened that he saw the work and was satisfied is admissible to show that the work was done to the commissioner's satisfaction.

60. St. Joseph *v.* Union R. Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626.

61. Jarvis *v.* Brooklyn El. R. Co., 16 N. Y. Suppl. 96 [*affirmed* in 133 N. Y. 623, 30 N. E. 1150], holding that in an action for injuries caused by falling from the unguarded end of defendant's elevated railroad station platform, it is not error to refuse to allow defendant's superintendent to testify that he never heard of any one walking off elevated railroad platforms, where it does not appear that there were any such unguarded platforms.

62. Unger *v.* Forty-Second St., etc., R. Co., 6 Rob. (N. Y.) 237 [*affirmed* in 51 N. Y. 497]; Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229, holding that in order to support the claim that a street car was operated negligently, the manner in which the car was equipped may be shown for the purpose of determining the rate of speed at which it could run with safety to the public.

Evidence admissible.—Where defendant claims that the car was going but eight miles an hour, and plaintiff has already shown that it took eighty feet in which to stop it, plaintiff's evidence that but twelve feet would be required in which to stop a properly equipped car going eight miles an hour is admissible. McDonald *v.* Brooklyn Heights R. Co., 51 N. Y. App. Div. 186, 64 N. Y. Suppl. 480. In an action for injuries received by a cinder which fell from defendant's engine on an elevated railroad into plaintiff's eye, it may be shown that a contrivance could have been adopted which would have prevented the accident, and the fact that after the accident fewer cinders fell is admissible on this point. Searles *v.* Manhattan El. R. Co., 49 N. Y. Super. Ct. 425 [*reversed* on other grounds in 101 N. Y. 661, 5 N. E. 66]. In an action for negligently running against a person at a street crossing and failing to check the speed of the car, it is not error to receive testimony that the brake and controller of the car worked hard and were out of repair, when the court limits the effect of such evidence to the question of the manner in which the car should have been run when approaching the place of the accident. South Chicago City R. Co. *v.* Purvis, 193 Ill. 454, 61 N. E. 1046. Where the action is based on the insufficiency of the headlight, excessive speed, and not giving signals, testimony of a civil engineer, experienced in the construction of electric railroads, that at the date of the accident searchlights of considerable illuminating power had been in use and proved satisfactory, and their use and value generally understood, is material in deciding the negligence alleged. Currie *v.* Consolidated R. Co., 81 Conn. 383, 71 Atl. 356.

as a circumstance tending to show negligence in the operation of a car, evidence is admissible to show that there was no guard or fender in front of the car;[63] and as tending to show that the equipment on the car was improperly constructed or had been permitted to become defective at the time of the accident, evidence may be admitted to show that such equipment was defective a short time before the accident,[64] or that the car was dismantled shortly after the accident, and the equipment sold as old iron;[65] but evidence is inadmissible, for this purpose, to show that the equipment on other cars was defective or out of repair,[66] or that other cars on the same or other lines better equipped than the car in question were in common use,[67] although it is competent to show that other cars differently equipped could be stopped in a shorter distance and time, in order to demonstrate that the car in question could not be safely run at as high a rate of speed as others better equipped.[68]

(H) *As to Rate of Speed.* Likewise as tending to show negligence in the operation of a car, evidence is admissible in respect to the speed at which the car which caused the injury was running and the control which it was under at the time and place of the accident.[69] For such purpose evidence is admissible of the length

63. Oldfield *v.* New York, etc., R. Co., 14 N. Y. 310; Fritsch *v.* New York, etc., R. Co., 93 N. Y. App. Div. 554, 87 N. Y. Suppl. 942.

64. Frankfort, etc., Traction Co. *v.* Hulette, 106 S. W. 1193, 32 Ky. L. Rep. 732, holding that in an action for injuries received by colliding with one of defendant's street cars, it was proper to prove by former employees of defendant who had acted as motormen on the car until within ten days and two months, respectively, of the collision, that the brakes were worn out so the car could not be stopped within one hundred and fifty feet, and that the bell would not ring.

65. Frankfort, etc., Traction Co. *v.* Hulette, 106 S. W. 1193, 32 Ky. L. Rep. 732, holding that where defendant's motorman had testified that the brakes on the car by which plaintiff was injured were new and in perfect condition, a question to defendant's manager as to what was done with the car after the accident, which elicited the information that it was dismantled shortly thereafter, and the brakes and iron-work sold, was proper as being in rebuttal of the motorman's testimony.

66. Moore *v.* Charlotte Electric R., etc., Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470.

Evidence inadmissible.— In an action for the killing of plaintiff's dog, which was run over by a car, it is error to receive the testimony of plaintiff that there were several different kinds of fenders on the cars, and that those on the big cars were different from those on the little ones, and that a little car killed the dog. Moore *v.* Charlotte Electric R., etc., Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470. See also Zimmerman *v.* Denver Consol. Tramway Co., 18 Colo. App. 480, 72 Pac. 607.

67. Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229.

68. Columbus R. Co. *v.* Connor, 27 Ohio Cir. Ct. 229. But *compare* Richmond Pass., etc., Co. *v.* Racks, 101 Va. 487, 44 S. E. 709, holding that evidence is inadmissible in an action against an electric railroad for injuries to a person on the track, to show the distance in which a car could be stopped, which is entirely different from that by which the injury was caused, and differently equipped.

69. *Minnesota.*— Rawitzer *v.* St. Paul City R. Co., 98 Minn. 294, 108 N. W. 271, at and immediately before the accident.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523, holding that evidence as to the speed of the car should only be considered in determining whether the motorman should have stopped his car sooner than he did.

Nebraska.— Lindgren *v.* Omaha St. R. Co, 73 Nebr. 628, 103 N. W. 307, holding, however, that an offer to show whether the car was running slowly or fast was objectionable for its indefiniteness.

Ohio.— Northern Ohio Traction Co. *v.* Drown, 28 Ohio Cir. Ct. 735, holding that evidence that a witness saw a cloud of dust which he says was caused by the rapidity with which the street car was moving is admissible on the question as to the speed at which the car was running.

Texas.— City R. Co. *v.* Wiggins, (Civ. App. 1899) 52 S. W. 577.

See 44 Cent. Dig. tit. "Street Railroads," § 237.

Evidence inadmissible.— In an action for personal injuries caused by a street car's colliding with plaintiff and his horse and wagon, where the car was behind the wagon, and going in the same direction, evidence as to the capacity of the horse for speed is inadmissible, as it does not tend to show the rate of speed at which the car or horse was going at the time of the injury. Spargo *v.* West End St. R. Co., 175 Mass. 174, 55 N. E. 812. Testimony of a witness that he saw a car "coming down at a terrible speed" is improper, as it conveys to the jury no measurement of the rate of speed of the car, except as it conveys to them the fact that it was at such a rate as the witness disapproved. Chicago City R. Co. *v.* Wall, 93 Ill. App. 411.

of the car's trip and of the schedule time for making such trip,[70] or, together with other testimony, of a statute or ordinance regulating and limiting the rate of speed.[71] As bearing on the speed of the car at the time of the accident, evidence is also admissible as to the nature and extent of the injuries inflicted,[72] as to the condition, after the collision, of the wagon or vehicle which was struck,[73] as to its speed prior to the accident where the evidence also shows that such rate of speed continued up to the time of the accident,[74] or as to the distance in which cars running at the usual rate of speed could be stopped;[75] but it has been held that evidence is inadmissible, for such purpose, of the customary rate of speed

That the company had contracted for cars that could run a given rate per hour is inadmissible, where the evidence relative to the speed of the street car at the time of the collision is conflicting. Orr *v.* Cedar Rapids, etc., R. Co., 94 Iowa 423, 62 N. W. 851.

Evidence of the rules of a street railroad company as to the duty of drivers of its cars with respect to the rate of speed in rounding curves is inadmissible in its favor in an action against it for injuries to a third person caused by the negligent driving of a car around a curve, since they could in no way be binding on plaintiff; nor is evidence of such rules material or relevant in answer to the charge that the car in question had been driven around the curve in a careless manner and at a high rate of speed, for the purpose of showing that the rules of the company forbid such management while rounding a curve. O'Keefe *v.* Eighth Ave. R. Co., 33 N. Y. App. Div. 324, 53 N. Y. Suppl. 940.

70. Cook *v.* Los Angeles, etc., Electric R. Co., 134 Cal. 279, 66 Pac. 306; Central R. Co. *v.* Allmon, 147 Ill. 471, 35 N. E. 725 [*affirming* 45 Ill. App. 389], to show the average rate of speed, as a basis of comparison with the speed at the time of the accident.

71. *Georgia.*—Atlanta Consol. St. R. Co. *v.* Foster, 108 Ga. 223, 33 S. E. 886.

Massachusetts.—Wright *v.* Malden, etc., R. Co., 4 Allen 283.

Michigan.— Deneen *v.* Houghton County St. R. Co., 150 Mich. 235, 113 N. W. 1126, holding that where the declaration alleges that the injuries were due to the company's breach of a municipal speed limiting ordinance, the ordinance is admissible in evidence.

Missouri.— Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602; Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140.

Nebraska.— Mathieson *v.* Omaha St. R. Co., 3 Nebr. (Unoff.) 747, 97 N. W. 243, 3 Nebr. (Unoff.) 743, 92 N. W. 639.

Rhode Island.— Oates *v.* Union R. Co., 27 R. I. 499, 63 Atl. 675, holding that evidence of a city ordinance as to the rate at which cars are permitted to be run is admissible, although a violation of the ordinance is not declared on as a ground of action.

Texas.— San Antonio Traction Co. *v.* Upson, 31 Tex. Civ. App. 50, 71 S. W. 565.

Virginia.— Norfolk R., etc., Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740, holding that where a street railroad company was running its cars in excess of the speed allowed by the statutes and valid municipal ordinances, such fact is competent evidence in an action by a traveler on the highway, injured by the cars, although the statute simply imposes a penalty for its violation.

See 44 Cent. Dig. tit. "Street Railroads," § 237.

Ordinance regulating steam cars, etc.— What would be a reasonable rate of speed for an electric car in a city cannot be shown by an ordinance of the city fixing the rate of speed for steam cars, for vehicles drawn by horses, and for horseback riders. Maxwell *v.* Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945.

An ordinance limiting the rate of speed in running "across" bridges is properly rejected as immaterial, where the collision occurred just before the car reached a public bridge. Ulrich *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 635, 5 Ohio Cir. Dec. 111.

72. Greenbaum *v.* Interurban St. R. Co., 84 N. Y. Suppl. 588, holding that in an action for personal injuries, caused by defendant's car striking plaintiff as he was crossing the street, evidence of bruises to plaintiff's head is admissible as showing the violence of the collision, and thereby bearing on the speed of the car, although such injuries were not specified in the bill of particulars.

73. Moore *v.* Westchester Electric R. Co., 115 N. Y. App. Div. 62, 100 N. Y. Suppl. 610; Strauss *v.* Newburgh Electric R. Co., 6 N. Y. App. Div. 264, 39 N. Y. Suppl. 998.

74. Murphy *v.* Evanston Electric R. Co., 235 Ill. 275, 85 N. E. 334; Hilary *v.* Minneapolis St. R. Co., 104 Minn. 432, 116 N. W. 933; Rawitzer *v.* St. Paul City R. Co., 98 Minn. 294, 108 N. W. 271; Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850, holding that it is not error to receive testimony of a witness giving the rate of speed eighty feet from the scene of the accident.

That the witness was in his storehouse twenty-five feet from the door at the time he observed the car does not make his testimony inadmissible. Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850.

75. Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831 [*affirming* 68 Ill. App. 613], holding that the admission of evidence that a witness had seen cars running at the usual rate of speed stopped in twenty or thirty feet is not error.

That a street car was not stopped until its rear was beyond the place of collision, variously estimated to have been from three rods to one hundred and sixty feet, is evidence tending to show a high rate of speed. Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995.

of defendant's cars,[76] or of the speed at which defendant's cars were run at the same place some time after the accident, unless the conditions are shown to be the same.[77]

(i) *As to Contributory Negligence.* On the question of contributory negligence, evidence of any material or relevant facts which tend to establish or disprove such negligence is admissible,[78] and for this purpose evidence is admissible of all the surrounding circumstances and conditions under which the injured person acted at the time of the accident,[79] such as of his voluntary intoxication,[80] or of rules and regulations of the company known to the person injured;[81] but evidence of irrelevant or immaterial facts is inadmissible,[82] such as evidence of the usual

76. Atherton *v.* Tacoma R., etc., Co., 30 Wash. 395, 71 Pac. 39 (holding that in an action for injury from the negligent running of a street car, evidence that the customary rate of speed of cars on the line was greater than allowed by ordinance, and a high and dangerous rate, is inadmissible); Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018. But see Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486, holding that in an action for personal injuries, where it is averred in the complaint that the car which struck plaintiff was runing at the high and dangerous speed of forty miles an hour and there is a conflict in the evidence thereof, evidence as to the speed of defendant's cars at the place in question for ten days preceding the accident is admissible.

77. Hewlett *v.* Brooklyn Heights R. Co., 63 N. Y. App. Div. 423, 71 N. Y. Suppl. 531.

78. See Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591, 47 N. Y. Suppl. 356, holding that evidence of a driver of a wagon as to his observation of the distance in which a car on defendant's road could be stopped was relevant upon the question of his prudence in driving as he did at the time of a collision with the car.

79. *Indiana.*— See Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936, evidence held inadmissible as too indefinite.

Maryland.— Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859.

New York.— Northrop *v.* Poughkeepsie City, etc., R. Co., 104 N. Y. App. Div. 615, 93 N. Y. Suppl. 602, as to distance at which car might have been seen.

Pennsylvania.— Owens *v.* People's Pass. R. Co., 155 Pa. St. 334, 26 Atl. 748.

Virginia.— Newport News, etc., R., etc., Co. *v.* Bradford, 99 Va. 117, 37 S. E. 807.

Washington.— Mitchell *v.* Tacoma R., etc., Co., 13 Wash. 560, 43 Pac. 528, holding that evidence is admissible to show the noise made by the cable of a street railroad at the time plaintiff started to cross, and was struck by a car, and injured.

See 44 Cent. Dig. tit. "Street Railroads," § 238.

Evidence as to the injured person's position when found immediately after the accident is admissible as tending to show his position when struck, where it is claimed that he fell on the track and was struck by a car while attempting to rise. Lhowe *v.* Third Ave R. Co., 14 Misc. (N. Y.) 612, 36 N. Y. Suppl. 463.

In an action for injuries by the piling of snow on a cross walk by defendant, it is not error to permit plaintiff to prove that others than herself had walked over the snow bank. Newport News, etc., R. Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900.

Occupant of vehicle.— In an action for injuries received by plaintiff while riding in a vehicle driven by another in consequence of a collision with a car, evidence of the habits of the driver of the vehicle with respect to the dangers arising from collisions with cars, coupled with proof of knowledge thereof on the part of plaintiff, is admissible on the issue of his contributory negligence. Bresee *v.* Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. N. S. 1059.

80. Heinel *v.* People's R. Co., 6 Pennew. (Del.) 428, 67 Atl. 173, holding that in an action for injuries to plaintiff by being struck by a street car, plaintiff's voluntary intoxication, if it caused him to omit to take reasonable care for his safety, might be considered in determining whether he was negligent.

81. Chicago City R. Co. *v.* McDonough, 125 Ill. App. 223 [*affirmed* in 221 Ill. 69, 77 N. E. 577], holding that the rules and regulations of a traction company, known as well to the party injured as to the servant alleged to have caused the injury, and which were promulgated for guidance in such a contingency as that existing at the time of the accident, are competent upon the question of the contributory negligence. *Compare* Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494, holding that, in an action for injuries received while walking across a trestle, evidence that a person had been warned to keep plaintiff and others off the trestle, without evidence that the warning was communicated to plaintiff, is inadmissible to bind her with notice that the public were not allowed on the trestle.

82. Wosika *v.* St. Paul City R. Co., 80 Minn. 364, 83 N. W. 386 (holding that where there is no evidence that plaintiffs, injured by a collision with a street car, drove on the track at a rate in violation of the city ordinance as to fast driving, there is no error in excluding the ordinance); Knoll *v.* Third Ave. R. Co., 46 N. Y. App. Div. 527, 62 N. Y. Suppl. 16 [*affirmed* in 168 N. Y. 592, 60 N. E. 1113]; Wooster *v.* Broadway, etc., R. Co., 72 Hun (N. Y.) 197, 25 N. Y. Suppl. 378 (holding that in an action for injuries caused by a collision between plaintiff's coupé and de-

custom of persons crossing street car tracks,[83] or, in an action for injuries to a child, of the custom of such child to play in the street unattended.[84] As tending to show freedom from contributory negligence in being on or near the tracks at the time of the accident, evidence is admissible of the condition of the street or roadway outside the tracks;[85] and plaintiff may show what the person injured had reason to expect on the company's part in the way of warnings and other safeguards,[86] and for this purpose may introduce evidence of what was required of the company by statute or ordinance,[87] such as of a rule or regulation requiring vehicles of the fire department to be given the right of way in responding to an alarm of fire,[88] and also of what was the company's usual custom in running its cars in the street where the accident occurred,[89] such as of a custom to stop and allow a funeral

fendant's street car, evidence that plaintiff's driver had always been a very careful driver is irrelevant on the issue whether or not such driver's negligence contributed to the accident); Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

Declarations of a mother after an accident, in which her child was run over, that she did not blame the motorman, are inadmissible. Budd *v.* Meriden Electric R. Co., 69 Conn. 272, 37 Atl. 683.

83. Metropolitan St. R. Co. *v.* Johnson, 91 Ga. 466, 18 S. E. 816; Henry *v.* Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214, holding, however, that where plaintiff, a woman, was injured while crossing the tracks at a place not a crossing, evidence that it is very unusual for women to cross at such place, while not competent for the purpose of showing contributory negligence on the part of plaintiff, is admissible to show that a greater degree of caution was required of her than if she had crossed at the usual place.

84. Smith *v.* Grand St., etc., R. Co., 11 Abb. N. Cas. (N. Y.) 62.

85. Murphy *v.* Evanston Electric R. Co., 235 Ill. 275, 85 N. E. 334, holding that in an action for injuries to the driver of a vehicle from collision with a street car, evidence that the street outside the track was unpaved, rough, uneven, and could not be driven over is competent to show the condition of the roadway outside of the tracks, as affecting his care in driving on the street and track.

86. Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1.

Ringing bell or gong.—Where evidence of a failure to give warning of the approach of the car by ringing the bell is not available as a ground of liability, such failure may be shown as a part of the *res gestæ*, as bearing on the exercise of care by plaintiff in remaining on the track while the car was approaching. Chicago Gen. R. Co. *v.* Kriz, 94 Ill. App. 277. So evidence of omission to sound a street car gong at a place where the law did not require it to be sounded is admissible as a part of the history of the transaction, and as bearing upon the question of plaintiff's contributory negligence. Kleiner *v.* Third Ave. R. Co., 162 N. Y. 193, 56 N. E. 497 [*reversing* 38 N. Y. App. Div. 623, 57 N. Y. Suppl. 1140].

87. Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1.

88. See cases cited *infra*, this note.

Rules giving fire department right of way.—Where, in an action for the death of a fireman in a collision between a car and a fire engine on its way to a fire, it is shown that the motorman and the decedent were familiar with a rule giving the fire department the right of way, the rule is admissible as bearing on the question of contributory negligence of decedent in permitting the engine to approach the crossing at which the collision occurred at the speed he did. Chicago City R. Co. *v.* McDonough, 221 Ill. 69, 77 N. E. 577 [*affirming* 125 Ill. App. 223].

Greater New York Charter (Laws (1897), c. 378), § 748, giving vehicles of the fire department in answering a fire alarm the right of way over other vehicles is material on the question of contributory negligence in a collision between a hook and ladder truck and a street car, wherein a fireman riding on the truck is killed. Geary *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 514, 82 N. Y. Suppl. 1016 [*affirmed* in 177 N. Y. 535, 69 N. E. 1123].

Ordinances prohibiting riding or driving on the streets faster than six miles an hour are not admissible in an action against a street railroad company for injuries resulting from collision with a fire department truck, as the fire department is not subject to such ordinances. Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399.

89. Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1.

Custom in approaching crossing.—In an action for death resulting from a collision between a street car and a hook and ladder truck, it is proper to admit evidence showing that it is the custom, in approaching such crossings, for street cars to slacken their speed, with testimony showing that the deceased had often crossed such crossing, as bearing on the question of deceased's contributory negligence. Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399.

Injury to telegraph lineman.—In an action for injury to a telegraph lineman by being struck by a street car while he was climbing a telegraph pole, evidence as to a custom of giving notice of danger to linemen by men on the ground is admissible, as bearing on the issue of plaintiff's due care, although the action was not against plaintiff's employer. Ahearn *v.* Boston El. R. Co., 194 Mass. 350, 80 N. E. 217.

procession to pass without interruption.[90] Evidence that the person killed in an accident was a careful and cautious man is inadmissible, where there were several eye-witnesses to the occurrence.[91]

(III) *WEIGHT AND SUFFICIENCY OF EVIDENCE*[92] — (A) *In General.* In an action for injuries caused by the negligent management and operation of a street railroad or cars, the rules relative to the weight and sufficiency of evidence in civil actions generally apply;[93] and to warrant a recovery in such an action, the evidence on plaintiff's behalf must preponderate and be of such weight and sufficiency as will reasonably justify the jury in finding the existence of all facts and circumstances necessary to constitute his cause of action;[94] such as of the injured person's right to be upon or near the tracks at the time and place of the accident, and of the consequent duty owed by the employees of defendant to avoid injuring him,[95]

90. White *v.* Wilmington City R. Co., 6 Pennew. (Del.) 105, 63 Atl. 931 (holding that, although the custom of street cars to stop and allow a funeral procession to pass without interruption places no obligation on the company to continue it, yet the existence of such a custom and knowledge of it by the driver of a funeral cab may be considered by the jury in estimating the degree of diligence required of the driver in looking for an approaching car as he crosses the railroad track); Foulke *v.* Wilmington City R. Co., 5 Pennew. (Del.) 363, 60 Atl. 973.

Evidence of a custom to allow funeral processions to pass street car tracks without interruption, by one who has driven funeral cabs in a city for ten or twelve years, to be admissible, must be connected with the time of the injury sued for. White *v.* Wilmington City R. Co., 6 Pennew. (Del.) 105, 63 Atl. 931.

91. Spiking *v.* Consol. R., etc., Co., 33 Utah 313, 93 Pac. 838.

92. **As raising question for court or jury** see *infra*, X, B, 9, g, (II).

93. See, generally, EVIDENCE, 17 Cyc. 753 *et seq.*

Evidence held not improbable in regard to the distance the car moved while the vehicle collided with was going a given distance see Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70.

False or mistaken testimony.— Testimony of the person injured that, when he started to cross the street, the car which struck his wagon was at a certain point, will be disregarded where the team, going a little faster than a walk as testified to, would have been far beyond the track within the time necessary for the car, going at the highest speed testified to, to have reached the place of the accident. Bornscheuer *v.* Consolidated Traction Co., 198 Pa. St. 332, 47 Atl. 872.

Consistency.— Testimony by plaintiff that the driver compelled him, by threats of violence, to jump off while the car was in rapid motion, and refused to stop the car, is not inconsistent with a further statement that his last request for the driver to stop was made on the north side of a certain street, and that he fell after the car had reached the south side of that street. Baber *v.* Broadway, etc., R. Co., 13 Misc. (N. Y.) 169, 34 N. Y. Suppl. 110.

94. See Jett *v.* Central Electric R. Co., 178 Mo. 664, 77 S. W. 738; Thau *v.* New York City R. Co., 99 N. Y. Suppl. 329.

Evidence held sufficient: To sustain a judgment for plaintiff in an action for killing a dog (Jackson Electric R., etc., Co. *v.* Waycaster, 92 Miss. 816, 46 So. 135, 131 Am. St. Rep. 554), for personal injuries caused by a car striking the injured person's horse and causing it to fall on him (Berke *v.* Twenty-Third St. R. Co., 4 N. Y. Suppl. 905). To sustain a verdict for defendant in an action for injuries to a bicyclist by being struck by a street car after crossing a crossover switch. Hall *v.* Washington Water Power Co., 46 Wash. 207, 89 Pac. 553.

Delay in bringing suit.—That plaintiff does not bring his suit for personal injuries which are alleged to be very serious until several weeks after the accident, although one of the attorneys is plaintiff's nephew, and that the amount demanded is entirely inadequate to the injury alleged, tends to justify a judgment in defendant's favor based on the uncorroborated testimony of plaintiff. Hartman *v.* Interurban St. R. Co., 88 N. Y. Suppl. 352.

Damages.— Where, in an action for injuries to a horse, there is evidence tending to show that before and up to the time of the collision the horse was docile and not afraid of cars, but that after the collision it was of an ill disposition, afraid of cars, difficult to drive near cars, etc., and there is nothing to suggest a cause for the change other than the collision, the jury are warranted in finding that the change was due to the collision. Montgomery St. R. Co. *v.* Hastings, 138 Ala. 432, 35 So. 412.

95. Trigg *v.* Water, etc., Co., 216 Mo. 521, 114 S. W. 972, 20 L. R. A. N. S. 987; Daum *v.* North Jersey St. R. Co., 69 N. J. L. 1, 54 Atl. 221 [*affirmed* in 70 N. J. L. 338, 57 Atl. 1132], holding that in an action for injuries to a person working in the street, the absence of proof that plaintiff's employer had a right to prosecute any work on the street does not justify the conclusion that plaintiff was a trespasser as to defendant, where there is nothing to show that the presence of defendant's tracks in the street was authorized.

Duties imposed by ordinance.— Proof that a street railroad company is operating its cars on the streets of a city does not show that the city, in consideration of the grant

the place of the accident,[96] the injured person's position at the time,[97] the failure of defendant to discharge its duty, or in other words the negligence on the part of defendant,[98] as in regard to the equipment of its cars;[99] that the negligent act or omission was within the scope of the negligent servant's employment,[1] and that such negligence was the proximate cause of the injuries complained of.[2] Direct and positive evidence of defendant's negligence is not neces-

of the right to the company, required it to agree to be bound by an ordinance imposing certain duties on it in the operation of its cars, or that it so agreed. Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855.

96. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45, holding that testimony that the accident happened in a certain city, describing the locality as opposite a hotel, justifies a finding that it occurred within the corporate limits.

Evidence held sufficient to sustain a finding that the collision occurred at a street crossing see Remillard *v.* Sioux City Traction Co., 138 Iowa 565, 115 N. W. 900.

97. Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553; Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

Where intestate's conduct and situation at the time of the accident is not shown, so that the cause of the accident and the company's negligence is wholly speculative, a verdict is properly directed for the company. Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553.

Reproduction of situation.—Where a witness states that a picture clearly represents the scene of the accident, but states specifically that the position of the person in the picture is different from that of the person injured, his general answer must be construed with reference to his specific denial of its correctness in important details. Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

If the one injured was unconscious when he was run over, any testimony by him as to his position is without probative force. Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969.

98. Evidence held sufficient: In an action for injuries to a pedestrian to warrant a finding of negligence. Polacci *v.* Interurban St. R. Co., 90 N. Y. Suppl. 341. In an action for killing plaintiff's cow, to support a finding that the motorman was guilty of negligence entitling plaintiff to recover. Anniston Electric, etc., Co. *v.* Hewitt, 139 Ala. 442, 36 So. 39.

Evidence held insufficient to show negligence on the part of defendant: Chicago City R. Co. *v.* Roberts, 139 Ill. App. 9; Warner *v.* St. Louis, etc., R. Co., 178 Mo. 125, 77 S. W. 67. In an action for injuries to a pedestrian. Welsh *v.* Metropolitan St. R. Co., 88 N. Y. Suppl. 166. Relative to a bundle of papers thrown from a passing car. Louisville R. Co. *v.* Holmes, (Ky. 1909) 117 S. W. 953. Relative to its team of horses running away and causing injuries. Quinlan *v.* Sixth Ave. R. Co., 4 Daly (N. Y.) 487. Relative to frightening plaintiff's horse by a car. Hoag *v.* South Dover Marble Co., 50 Misc. (N. Y.) 499, 100 N. Y. Suppl. 639 [*affirmed* in 120 N. Y. App. Div. 892, 105 N. Y. Suppl. 1121 (*reversed* on the facts in 192 N. Y. 412, 85 N. E. 667, 21 L. R. A. N. S. 283)].

Where a preponderance of the evidence shows no negligence of defendant, plaintiff cannot recover. Van Wagner *v.* Metropolitan St. R. Co., 26 Misc. (N. Y.) 796, 56 N. Y. Suppl. 215.

99. See Louisville, etc., Traction Co. *v.* Short, 41 Ind. App. 570, 83 N. E. 265.

That a street car runs an unusual distance after the brakes are set is evidence that the car's equipment for stopping is ineffective. Louisville, etc., Traction Co. *v.* Short, 41 Ind. App. 570, 83 N. E. 265; Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

1. Hewson *v.* Interurban St. R. Co., 95 N. Y. App. Div. 112, 88 N. Y. Suppl. 816, holding that the testimony of a conductor that there was a rule making it his duty to prevent boys from catching on cars, and that his purpose in what he did was to remove plaintiff from the car, was sufficient to justify a finding that his act in assaulting a boy who was on, or attempting to get on, defendant's car, was within the scope of his employment.

2. Evidence held sufficient: To show that the motorman's negligence contributed directly to plaintiff's injury. Horgan *v.* Jones, 131 Cal. 521, 63 Pac. 835. To warrant a finding that the particle which entered the pedestrian's eye came from the operation of the contact-shoe on defendant's elevated road. Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446. To justify a finding that the derailment of a car, which struck plaintiff, was caused by defendant's negligence in leaving a switch open at a curve. Chicago City R. Co. *v.* Bruley, 215 Ill. 464, 74 N. E. 441. To sustain a finding that negligence of defendant was not the proximate cause of the injury by a collision. Lightfoot *v.* Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30.

Evidence held insufficient: To show that defendant's negligence was the proximate cause of the injury. Dewez *v.* Orleans R. Co., 115 La. 432, 39 So. 433; Gannon *v.* New Orleans City, etc., R. Co., 48 La. Ann. 1002, 20 So. 223; Hazel *v.* People's Pass. R. Co., 132 Pa. St. 96, 18 Atl. 1116. To show that the defective condition of the brake contributed to the injury. Gannon *v.* New Orleans City, etc., R. Co., *supra*.

Where a cart and car were moving side by side in the same course with a short space between them, and there was a collision in which the cart struck the side of the car,

sary, but it may be inferred from circumstances adduced in evidence sufficient to authorize a finding of negligence;[3] but these facts must themselves be shown by direct testimony, and cannot be inferred from other facts, as one presumption cannot be based upon another presumption,[4] and this is also true of evidence of defendant's lack of negligence.[5]

(B) *Identity of Defendant.* In order to place the responsibility for the acts complained of on defendant there must be a preponderance of evidence of facts showing defendant's ownership or operation of the road, car, or other agency,[6] or employment of the servant,[7] which caused the injury. Direct and positive evidence, however, of such ownership or operation is not essential, but it may be shown by proof of facts from which the ownership or operation at the time of the accident may be reasonably inferred.[8]

a verdict finding that the accident was caused by the action of the driver of the cart in suddenly veering was proper. Rombach *v.* Crescent City R. Co., 50 La. Ann. 473, 23 So. 604.

Where plaintiff can prove nothing except that he believes that he was struck by one of the horses of the car, but how or by whose fault he is unable to make clear, he cannot recover. Boetgen *v.* New York, etc., R. Co., 50 N. Y. Suppl. 331 [*reversed* on the facts in 36 N. Y. App. Div. 460, 55 N. Y. Suppl. 847].

In an action for injuries caused by snow or ice thrown by a sweeper used by defendant to clear the snow from its tracks, in the absence of proof that the snow or ice which had caused the injury, and which plaintiff said came from the direction of the sweeper, did in fact come from the sweeper, and in the absence of proof that this was the result of negligence which could have been avoided, a verdict for plaintiff cannot be sustained. Connor *v.* Metropolitan St. R. Co., 48 N. Y. App. Div. 580, 63 N. Y. Suppl. 509.

3. Morse *v.* Consolidated R. Co., 81 Conn. 395, 71 Atl. 553 (holding that the proximate cause of injury to plaintiff's intestate by being struck by a street car could be proved by circumstantial evidence, and need not be established beyond a reasonable doubt, but it must be established by facts affording a logical basis for an inference as to the cause, and cannot be left to speculation); Beier *v.* St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876 (holding that formal proof that the car might have been stopped in time to avoid the injury is unnecessary). And see cases cited in preceding notes 93 to 2.

Where defendant gives no evidence in an action for personal injuries by a collision with plaintiff's vehicle, the jury might draw an inference of carelessness, rather than of pure accident, from the fact of such silence. Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609.

4. Gannon *v.* New Orleans City, etc., R. Co., 48 La. Ann. 1002, 20 So. 223.

5. See Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445.

6. Frisby *v.* St. Louis Transit Co., 214 Mo. 567, 113 S. W. 1059, holding that in an action against a street railroad company for injuries in a street car collision, the evidence must support the allegations of ownership and operation of the car at the time of the injury, and where it does not appear that the car was in use by defendant, and the fact that the car was running on defendant's road, and the connection between defendant and those in charge of the car are not shown, there can be no recovery. See also Smith *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 531, 81 N. Y. Suppl. 838; Simon *v.* Metropolitan St. R. Co., 29 Misc. (N. Y.) 126, 60 N. Y. Suppl. 251.

Proof that a street railroad company is operating its cars on the streets of a city is not evidence that it does so under a grant or license from the city, where it might have acquired the right from the state. Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855.

7. Frisby *v.* St. Louis Transit Co., 214 Mo. 567, 113 S. W. 1059.

Evidence held sufficient to support a finding that the motorman and conductor in charge of the car were employees of the company and engaged in the service of the company, within the scope of their employment see Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539.

Evidence held insufficient to show that the employee causing the injury was defendant's employee, or that it was responsible for him, and that judgment for plaintiff should be reversed, and a new trial granted see Cords *v.* Third Ave. R. Co., 56 N. Y. Super. Ct. 570, 4 N. Y. Suppl. 713.

8. Mobile Light, etc., Co. *v.* Mackay, 158 Ala. 51, 48 So. 509 (holding that, in the absence of evidence of another corporation of a similar name, the jury may infer that defendant, named in the caption of the complaint as "Mobile Light & Railroad Company, a corporation," was, as alleged, operating the street car in the city of M. that killed plaintiff's mule, from his testimony that he had a mule killed on a certain street in such city, that the railroad track runs on such street, that it was the track of the "Mobile Light & Railway," and that "they" operated cars down that street); Frisby *v.* St. Louis Transit Co., 214 Mo. 567, 113 S. W. 1059; Burbridge *v.* Kansas City Cable R. Co., 36 Mo. App. 669 (holding that where in an action for injuries from negligent management of street cars, the evidence for plaintiff, with the inferences to be drawn

(c) *Condition of Track and Equipment.* To prove negligence on the part of defendant in regard to the condition of its tracks or of the equipment of its road, the evidence must be such as will reasonably justify the jury in finding the existence of a defective condition, at the time of the accident, in the equipment of the road,[9] or of the tracks,[10] or street,[11] and of its actual or constructive notice thereof,[12] and of its failure to maintain proper warning signals thereat.[13] In an action against an elevated railroad company, evidence that the injuries were occasioned by the fall of an iron plate with part of a bolt, due to the breaking of the bolt while passing under the structure, is sufficient to make out a *prima facie* case.[14] So also a case of negligence in regard to the equipment of defendant's locomotives

therefrom, tends to show that defendant was running and managing the cars which occasioned the injury, a demurrer to evidence is properly overruled, although there is no direct evidence that such cars were operated by defendant).

Evidence held sufficient: To support a finding that the car causing the injury was operated by defendant on a track owned by it. Indianapolis, etc., Traction Co. *v.* Henderson, 39 Ind. App. 324, 79 N. E. 539. To show that defendant, and not another street railroad company, was in the possession and operation of the street car line whose car jumped the track and collided with plaintiff's wagon, thereby injuring him. Chicago Union Traction Co. *v.* Jerka, 227 Ill. 95, 81 N. E. 7 [*affirming* 126 Ill. App. 365].

Evidence held insufficient: To show that the car causing the injury was operated by defendant. Anderson *v.* Des Moines St. R. Co., 97 Iowa 739, 66 N. W. 64. To establish defendant's ownership of the car, essential to a recovery, in view of the fact that other companies operated street railroads at the place of the accident. Frisby *v.* St. Louis Transit Co., 214 Mo. 567, 113 S. W. 1059.

9. See Anderson *v.* Manhattan El. R. Co., 1 Misc. (N. Y.) 504, 21 N. Y. Suppl. 1; Chattanooga Electric R. Co. *v.* Mingle, 103 Tenn. 667, 56 S. W. 23, 76 Am. St. Rep. 703.

Evidence held sufficient: To warrant a finding of negligence in the adjustment of overhead wires. Manning *v.* West End St. R. Co., 166 Mass. 230, 44 N. E. 135. To justify a finding of negligence relative to the defective condition of trolley wires. Memphis St. R. Co. *v.* Kartright, 110 Tenn. 277, 75 S. W. 719, 100 Am. St. Rep. 807. To warrant a finding, in an action against an elevated railroad for injury to a pedestrian on the street, in consequence of a piece of metal falling from the elevated railroad into the eye of the pedestrian, of actionable negligence on the part of the company in failing to provide protection for pedestrians having occasion to use the street. Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446.

10. See Nivette *v.* New Orleans, etc., R. Co., 42 La. Ann. 1153, 8 So. 581; Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482, 14 Am. St. Rep. 427, 4 L. R. A. 213 (evidence held to sustain a verdict for plaintiff); Reynolds *v.* Metropolitan St. R. Co., 136 Mo. App. 282, 116 S. W. 1135; Miller *v.* Lebanon, etc., St. R. Co., 186 Pa. St. 190, 40 Atl. 413 (evidence held insufficient to show that the accident was caused by the tracks being eight inches below the street surface, or by that and a low mound of earth, two feet outside the tracks, caused by the earth being displaced by heavy wagons).

Evidence that others had safely passed over the place where the accident occurred is not conclusive that the construction there was safe, but is merely a matter to be considered by the jury. Wood *v.* Third Ave R. Co., 91 Hun (N. Y.) 276, 36 N. Y. Suppl. 253 [*reversing* 13 Misc. 308, 34 N. Y. Suppl. 698, and *affirmed* in 157 N. Y. 696, 51 N. E. 1094].

11. Kearns *v.* South Middlesex St. R. Co., 181 Mass. 587, 64 N. E. 200 (holding that in an action for a failure to fill up an excavation made in a street, evidence that before the excavation water ran into defendant's switch, that the excavation ran under the track, and had the appearance of having been made by digging, and that while it was there defendant's employees were working near by, is sufficient, in the absence of any evidence to the contrary, to justify a finding that the excavation had been made by defendant); Williams *v.* Minneapolis St. R. Co., 88 Minn. 79, 92 N. W. 479.

12. Central R. Co. *v.* State, 82 Md. 647, 33 Atl. 265 (holding that where, in an action for injuries suffered by being thrown out of a carriage as resulting from the improper construction of a switch in the street, the evidence for defendant tends to simply show that the switch had been skilfully constructed under the supervision of a competent engineer, and had been frequently inspected, and kept in repair, while the evidence for plaintiff tends to show that the rails were so far elevated above the surface of the street as to be obviously dangerous, the jury might well conclude that the company must have been aware of such a condition of the tracks); Gilton *v.* Hestonville, etc., R. Co., 166 Pa. St. 460, 31 Atl. 249.

13. Ripley *v.* Metropolitan St. R. Co., 132 Mo. App. 350, 111 S. W. 1180, evidence held sufficient to support a finding of negligence on defendant's part in failing to maintain proper warning signals at an excavation.

14. Volkmar *v.* Manhattan R. Co., 134 N. Y. 418, 31 N. E. 870, 30 Am. St. Rep. 678 [*reversing* 58 N. Y. Super. Ct. 125, 9 N. Y. Suppl. 708], holding also that it was immaterial that plaintiff neglected to produce the part of the bolt which had fallen.

on its elevated railroad is established by evidence of the fall therefrom of coals and cinders of unusual sizes or quantities at the time of the accident, together with proof that proper appliances could have been used to prevent the same,[15] although the condition of the locomotive which caused the injury is not shown.[16]

(D) *Negligence in Management or Operation of Car* — (1) IN GENERAL. To warrant a recovery in an action for injuries received by being struck by a car, there must be evidence of sufficient facts to justify the jury in finding negligence on the part of defendant's servants in regard to the management or operation of the car which caused the injury,[17] as in regard to keeping a lookout for and

15. Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446 (holding that in an action against an elevated railroad company for injuries to a pedestrian on the street in consequence of a piece of metal falling from the elevated railroad into the eye of the pedestrian, evidence that it was feasible to construct a pan which would prevent the falling of sparks on persons in the street, and that it was known that there was a good deal of trouble from sparking after the road began operation, and that nothing was done to remedy it prior to the accident, warrants a finding of negligence); McNaier *v.* Manhattan R. Co., 46 Hun (N. Y.) 502 (holding that where the evidence shows that plaintiff, while passing under defendant's elevated railroad track, was struck and seriously injured by a red-hot cinder a half inch broad, and somewhat longer, and that proper appliances could be used so as to prevent cinders of that size from falling, it is error to nonsuit him); Ashley *v.* Manhattan R. Co., 13 Daly (N. Y.) 205; Burke *v.* Manhattan R. Co., 13 Daly (N. Y.) 75; Ruppel *v.* Manhattan R. Co., 13 Daly (N. Y.) 11 (holding that in an action against an elevated railroad company for damages from a fire caused by sparks from defendant's locomotive, evidence that the locomotive, at the time of the injury, emitted a quantity of sparks so large and so brilliant as to attract the attention of the witness, is sufficient to make a *prima facie* case of negligence); Sugarman *v.* Manhattan El. R. Co., 16 N. Y. Suppl. 533. See also *supra*, X, B, 9, e, (I), (B).

16. McNaier *v.* Manhattan R. Co., 46 Hun (N. Y.) 502. *Compare* Wiedmer *v.* New York El. R. Co., 114 N. Y. 462, 21 N. E. 1041, holding that where plaintiff, neither in her complaint nor in her evidence, informed defendant from which train the coal fell, or the hour of the accident, or any fact from which defendant could have ascertained the locomotive emitting the coal, its failure to attempt to show the condition of all of its locomotives in use on that part of its road during the afternoon of the day of the accident should not have been left for the jury to consider as evidence against defendant.

17. **Evidence held sufficient:** To show negligence on the part of defendant in the management or operation of its car generally. Indianapolis Union R. Co. *v.* Waddington, 169 Ind. 448, 82 N. E. 1030; Denis *v.* Lewiston, etc., St. R. Co., 104 Me. 39, 70 Atl. 1047. To justify a finding of negligence on the part of defendant (Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836; Savage *v.* Chicago, etc., Electric R. Co., 238 Ill. 392, 87 N. E. 377 [*affirming* 142 Ill. App. 342]; Louisville R. Co. *v.* Buckner, (Ky. 1908) 113 S. W. 90; Finnick *v.* Boston, etc., St. R. Co., 190 Mass. 382, 77 N. E. 500; Mitchell *v.* Third Ave. R. Co., 62 N. Y. App. Div. 371, 70 N. Y. Suppl. 1118; Jones *v.* Greensburg, etc., St. R. Co., 9 Pa. Super. Ct. 65, 43 Wkly. Notes Cas. 298; Tishacek *v.* Milwaukee Electric R., etc., Co., 110 Wis. 417, 85 N. W. 971), in an action for injuries to a child on or crossing the track (Cameron *v.* Duluth-Superior Traction Co., 94 Minn. 104, 102 N. W. 208; Lafferty *v.* Third Ave. R. Co., 85 N. Y. App. Div. 592, 83 N. Y. Suppl. 405 [*affirmed* in 176 N. Y. 594, 68 N. E. 1118]; Conner *v.* Pittsburg R. Co., 216 Pa. St. 609, 65 Atl. 1106). To support a verdict for plaintiff. Driscoll *v.* Market St. Cable R. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; West Chicago St. R. Co. *v.* McCallum, 169 Ill. 240, 48 N. E. 424 [*affirming* 67 Ill. App. 645]; West Chicago St. R. Co. *v.* Ranstead, 70 Ill. App. 111; Peterson *v.* Minneapolis St. R. Co., 90 Minn. 52, 95 N. W. 751; Roanoke R., etc., Co. *v.* Young, 108 Va. 783, 62 S. E. 961; Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618. To sustain a finding of negligence on the part of the motorman in running the car at a dangerous speed, while approaching a street crossing, without a warning of its approach. Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103, 88 N. E. 967. To sustain a judgment for plaintiff (Austen *v.* Brooklyn Heights R. Co., 131 N. Y. App. Div. 903, 115 N. Y. Suppl. 582; Schimmack *v.* Washington, etc., R. Co., 33 Pa. Super. Ct. 653), for injuries sustained by reason of plaintiff's wife being struck by an interurban car (Northern Texas Traction Co. *v.* Mullins, 44 Tex. Civ. App. 566, 99 S. W. 433), for injuries received by being struck by a car at a crossing (Doyle *v.* Chester Traction Co., 214 Pa. St. 382, 63 Atl. 604; Henderson *v.* United Traction Co., 202 Pa. St. 527, 51 Atl. 1027; Shaughnessy *v.* Consolidated Traction Co., 17 Pa. Super. Ct. 588).

Evidence held insufficient: To show negligence on the part of defendant generally. Cowden *v.* Shreveport Belt R. Co., 106 La. 236, 30 So. 747; Feinstein *v.* Brooklyn Heights R. Co., 130 N. Y. App. Div. 258, 114 N. Y. Suppl. 587; Sobol *v.* Union R. Co., 122 N. Y. App. Div. 817, 107 N. Y. Suppl. 656; McKinley *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 153, 86 N. Y. Suppl. 461; Mathison *v.* Staten Island Midland R. Co., 66 N. Y. App. Div. 610, 72 N. Y. Suppl. 954; Devine *v.* Metro-

discovering persons or vehicles on or near the track, in time to avoid injuring them,[18] and in exercising ordinary care to avoid injuring them after their peril is discovered or should be discovered;[19] and the above rule also applies to negligence

politan St. R. Co., 29 Misc. (N. Y.) 301, 60 N. Y. Suppl. 520 [*reversing* 58 N. Y. Suppl. 1139]; Cunningham *v.* Dry Dock, etc., R. Co., 96 N. Y. Suppl. 1070; Gentile *v.* New York City R. Co., 92 N. Y. Suppl. 264; Vought *v.* New York City R. Co., 92 N. Y. Suppl. 235; Lyons *v.* Union Traction Co., 209 Pa. St. 72, 58 Atl. 118; Ackerman *v.* Union Traction Co., 205 Pa. St. 477, 55 Atl. 16; Bugbee *v.* Union R. Co., (R. I. 1904) 59 Atl. 165. To sustain a verdict for plaintiff (U. P. Steam Baking Co. *v.* Omaha St. R. Co., 3 Nebr. (Unoff.) 396, 94 N. W. 533; Brink *v.* North Jersey St. R. Co., 75 N. J. L. 219, 67 Atl. 705; Barney *v.* Metropolitan St. R. Co., 94 N. Y. App. Div. 388, 88 N. Y. Suppl. 335; Mehrle *v.* Brooklyn, etc., R. Co., 59 N. Y. App. Div. 617, 69 N. Y. Suppl. 210), in an action for injuries to a pedestrian while attempting to cross a track (Lamm *v.* Metropolitan St. R. Co., 47 Misc. (N. Y.) 625, 94 N. Y. Suppl. 584; Lehn *v.* Central Crosstown R. Co., 92 N. Y. Suppl. 301). To support a judgment for plaintiff (Greve *v.* New Orleans, etc., Light, etc., Co., 114 La. 974, 38 So. 698; Foley *v.* Interurban St. R. Co., 88 N. Y. Suppl. 932), for injuries received by being struck by defendant's car at a street crossing (Padower *v.* Interurban St. R. Co., 119 N. Y. App. Div. 135, 103 N. Y. Suppl. 953; Mcloskey *v.* Metropolitan St. R. Co., 67 N. Y. App. Div. 617, 73 N. Y. Suppl. 324; Kochesperger *v.* Philadelphia Rapid Transit Co., 217 Pa. St. 320, 66 Atl. 547). To show that the car was so operated as to be the direct and sole cause of the fright of the horse, which resulted in plaintiff's injuries. McKinney *v.* United Traction Co., 19 Pa. Super. Ct. 362. To overcome, in an action for injuries by a bolt falling from an elevated railroad structure, the presumption of negligence arising from the accident. Sturza *v.* Interborough Rapid Transit Co., 113 N. Y. Suppl. 974.

That a car runs an unusual distance before it is stopped, after the accident, is some evidence of improper management thereof. Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 [*affirming* 95 Ill. App. 314]; Riley *v.* Shreveport Traction Co., 114 La. 135, 38 So. 83.

A finding that the street was much used is authorized by evidence that at the time a pedestrian was struck by a street car there were seven persons at or near the crossing. Wolf *v.* City R. Co., 50 Oreg. 64, 85 Pac. 620, 91 Pac. 460.

18. Remillard *v.* Sioux City Traction Co., 138 Iowa 565, 115 N. W. 900, holding that where decedent was killed at a street crossing, evidence that the motorman of the car which killed him could see one on the track one and one-half blocks away, and did not see any one at the crossing, warrants a finding that the motorman was negligent in not discovering decedent and in colliding with him.

Evidence held sufficient: To support a finding that defendant was negligent in this respect. Fullerton *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326 [*affirmed* in 170 N. Y. 592, 63 N. E. 1116]; Adams *v.* Metropolitan St. R. Co., 60 N. Y. App. Div. 188, 69 N. Y. Suppl. 1117. To show that the motorman did not maintain a lookout before his car struck a pedestrian. Louisville R. Co. *v.* Byers, 130 Ky. 437, 113 S. W. 463. To warrant a finding that the motorman failed to exercise ordinary care in keeping a lookout for persons on and at the intersection of the streets where the accident occurred. San Antonio Traction Co. *v.* Levyson, (Tex. Civ. App. 1908) 113 S. W. 569. To justify a finding of negligence of the motorman, in that he saw, or by proper diligence ought to have seen, the vehicle in time to have avoided the collision. Lawrence *v.* Fitchburg, etc., St. R. Co., 201 Mass. 489, 87 N. E. 898 (automobile); McKenzie *v.* United R. Co. of St. Louis, 216 Mo. 1, 115 S. W. 13; Klockenbrink *v.* St. Louis, etc., R. Co., 172 Mo. 678, 72 S. W. 900. Evidence that the person injured or killed could have been really seen on the track for from forty to seventy-five feet ahead of the car, and that the car was actually stopped in thirty-two feet after he was discovered on the track, justifies an inference that defendant's motorman if he had been exercising ordinary care could have discovered such person on the track in time to have avoided injuring him. Goff *v.* St. Louis Transit Co., 199 Mo. 694, 98 S. W. 49. It can be fairly inferred from testimony that, while defendant's car had stopped, and passengers were alighting, plaintiff sought to pass in front of the car, which was started without any signal to her, that the motorman saw, or should have seen, plaintiff's effort to get by the car. McLeland *v.* St. Louis Transit Co., 105 Mo. App. 473, 80 S. W. 30.

Evidence held insufficient: To show that the motorman's failure to detect plaintiff's prostrate form was negligent. Kupiec *v.* Warren, etc., St. R. Co., 196 Mass. 463, 82 N. E. 676. To show that the driver of the car was negligent in failing to keep a proper lookout. Kostenbaum *v.* New York City R. Co., 120 N. Y. App. Div. 160, 105 N. Y. Suppl. 65. To show that the motorneer of a street car could have seen the person injured in danger soon enough to have checked the car and permitted an escape from the peril. Warner *v.* St. Louis, etc., R. Co., 178 Mo. 125, 77 S. W. 67.

19. See Anniston Electric, etc., Co. *v.* Rosen, 159 Ala. 195, 48 So. 798.

Evidence held sufficient: To justify a finding of negligence on the part of defendant in this respect. Lafferty *v.* Third Ave. R. Co., 85 N. Y. App. Div. 592, 83 N. Y. Suppl. 405 [*affirmed* in 176 N. Y. 594, 68 N. E. 1118]; Fandel *v.* Third Ave. R. Co., 15 N. Y. App. Div. 426, 44 N. Y. Suppl. 462 [*affirmed*

on the part of defendant in regard to exercising care to avoid colliding with a vehicle which is discovered, or by ordinary care should be discovered, in peril on or near the tracks,[20] or in regard to avoiding the injury notwithstanding con-

in 162 N. Y. 598, 57 N. E. 1110]; San Antonio St. R. Co. *v.* Mechler, 87 Tex. 628, 30 S. W. 899 [*affirming* (Civ. App. 1894) 29 S. W. 202]; Northern Texas Traction Co. *v.* Smith, (Tex. Civ. App. 1908) 110 S. W. 774. To show the motorman negligent in failing to prepare for emergencies on the appearance of danger. Crisman *v.* Shreveport Belt R. Co., 110 La. 640, 34 So. 718, 62 L. R. A. 747. To show in an action for the death of a bicycle rider by collision with a street car, that the negligence of the motorman in failing to exercise reasonable care to avoid the collision after discovering decedent's peril, and not decedent's contributory negligence, was the proximate cause of the injury. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238. To show that the motorman acted with due diligence in stopping the car when he saw plaintiff's danger. Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969. To sustain a finding that the motorman, in the exercise of ordinary diligence, could have stopped the car in time to have avoided the accident after seeing the person's peril. Remillard *v.* Sioux City Traction Co., 138 Iowa 565, 115 N. W. 900; Barry *v.* Burlington R., etc., Co., 119 Iowa 62, 93 N. W. 68, 95 N. W. 229; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445; Coll *v.* Easton Transit Co., 180 Pa. St. 618, 37 Atl. 89; Northern Texas Traction Co. *v.* Thompson, 42 Tex. Civ. App. 613, 95 S. W. 708. To sustain a verdict for plaintiff (Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Augusta R., etc., Co. *v.* Arthur, 3 Ga. App. 513, 60 S. E. 213; Indianapolis St. R. Co. *v.* Demaree, 40 Ind. App. 228, 80 N. E. 687; Richmond *v.* Metropolitan St. R. Co., 123 Mo. App. 495, 100 S. W. 54; McCoy *v.* Milwaukee St. R. Co., 88 Wis. 56, 59 N. W. 453), for injuries to a child while on or crossing the tracks (Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; Giraldo *v.* Coney Island, etc., R. Co., 16 N. Y. Suppl. 774 [*affirmed* in 135 N. Y. 648, 32 N. E. 647]; Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32, holding that evidence showing that plaintiff, a child nineteen months old, somehow got in front of a street car, and was run over by it, but showing nothing beyond this as to the circumstances of the accident, is sufficient to sustain a verdict against the railroad company, the company not calling the driver of the car to rebut, by his testimony, the presumption of negligence arising from the facts), for injuries to a woman struck by a car while waiting for a car (O'Toole *v.* Central Park, etc., R. Co., 12 N. Y. Suppl. 347 [*affirmed* in 128 N. Y. 597, 28 N. E. 251]), for the negligence of defendant in so operating its car as to frighten the horse on which plaintiff was riding and causing it to throw him (Knoxville Traction Co. *v.* Mullins, 111 Tenn. 329, 76 S. W. 890). To support a judgment for plaintiff, a street sweeper (O'Connor *v.* Union R. Co., 67 N. Y. App. Div. 99, 73 N. Y. Suppl. 606), for the negligent killing of a child (Elwood Electric St. R. Co. *v.* Ross, 26 Ind. App. 258, 58 N. E. 535). To sustain a verdict for defendant. Wilson *v.* Citizens' St. R. Co., 105 Tenn. 74, 58 S. W. 334.

Evidence held insufficient: To show negligence on the part of the driver or motorman of the car after he discovered, or should have discovered, the injured person's peril in time to have avoided the danger. O'Farrell *v.* Metropolitan St. R. Co., 136 Mo. App. 353, 117 S. W. 615; Gabriel *v.* Metropolitan St. R. Co., 130 Mo. App. 651, 109 S. W. 1042; Sciurba *v.* Metropolitan St. R. Co., 87 N. Y. App. Div. 614, 84 N. Y. Suppl. 85.

Where the evidence shows that the car was not stopped within a space within which it was possible to stop it, the inference that the motorman was not as energetic as he should have been overcomes the statement of witnesses that he did all that was possible to stop the car. Crisman *v.* Shreveport Belt R. Co., 110 La. 640, 34 So. 718, 62 L. R. A. 747.

But where there is uncontradicted evidence by two of plaintiff's witnesses that the motorman as soon as he discovered the danger applied the brake and did all that he could to stop the car and avoid injury there is no sufficient evidence of negligence, although the car was not stopped within a distance certain expert witnesses testified it could have been stopped in. Davis *v.* People's R. Co., 5 Pennew. (Del.) 253, 64 Atl. 70.

Expert testimony.—Where the motorman saw plaintiff on the track fifty or sixty feet ahead, the track being slippery and on a sharply descending grade, expert evidence that the car could have been stopped within that distance is not essential to a recovery. Richmond *v.* Metropolitan St. R. Co., 123 Mo. App. 495, 100 S. W. 54.

20. Evidence held sufficient: To warrant a finding of negligence on the part of defendant's servants in charge of the car. Brown *v.* Los Angeles R. Co., 2 Cal. App. 618, 84 Pac. 362, 88 Pac. 1135; Indiana Union Traction Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 1040; Lexington R. Co. *v.* Fain, 80 S. W. 463, 25 Ky. L. Rep. 2243; Haas *v.* New Orleans R. Co., 112 La. 747, 36 So. 670; Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; United R., etc., Co. *v.* Cloman, 107 Md. 681, 69 Atl. 379; Williamson *v.* Old Colony St. R. Co., 191 Mass. 144, 77 N. E. 655, 5 L. R. A. N. S. 1081; Paff *v.* Union R. Co., 125 N. Y. App. Div. 773, 110 N. Y. Suppl. 145; Koehler *v.* Brooklyn Heights R. Co., 111 N. Y. Suppl. 600; Greenbaum *v.* Interurban St. R. Co., 84 N. Y. Suppl. 588. To show that the motorman recklessly ran

tributory negligence on the part of the person injured,[21] or in regard to wilful wanton, or reckless injury.[22]

(2) Lights and Signals. There must be a preponderance of direct or circumstantial evidence to show negligence on the part of defendant in regard to the discharge of particular duties, as in regard to the absence of signal lights on the car,[23]

into the vehicle with knowledge of plaintiff's dangerous position. Bladecka *v.* Bay City Traction, etc., Co., 155 Mich. 253, 118 N. W. 963. To justify a finding that the collision was due to the negligence of defendant's motorman. Peabody *v.* Haverhill, etc., St. R. Co., 200 Mass. 277, 85 N. E. 1051. To support a finding that the danger to plaintiff, the driver of a team, was evident to the motorman, in the exercise of his faculties, in time to have avoided the collision. Indianapolis St. R. Co. *v.* Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478. To justify an inference that if the motorman applied the brakes when he first saw, or by the exercise of ordinary care would have seen, the horse on the track, the car would have been stopped in ample time to have avoided the collision. Rodgers *v.* St. Louis Transit Co., 117 Mo. App. 678, 92 S. W. 1154. To establish a *prima facie* case for plaintiff. Impkamp *v.* St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119. To sustain a verdict for plaintiff. Horgan *v.* Jones, 131 Cal. 521, 63 Pac. 835; Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687, 68 N. E. 609; Shea v. St. Paul City R. Co., 50 Minn. 395, 52 N. W. 902 (at crossing); Sickler *v.* North Jersey St. R. Co., (N. J. Sup. 1900) 46 Atl. 779; Stines *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 789, 69 N. Y. Suppl. 992; Bullman *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 325; Vincent *v.* Lehigh Valley Transit Co., 220 Pa. St. 350, 69 Atl. 812; Kennedy *v.* Consolidated Traction Co., 210 Pa. St. 215, 59 Atl. 1005; Heuber *v.* Consolidated Traction Co., 210 Pa. St. 70, 59 Atl. 430; Finefrock *v.* United Traction Co., 33 Pa. Super. Ct. 638, 642; Haskins *v.* Rhode Island Co., (R. I. 1908) 69 Atl. 335. To sustain a verdict for plaintiff the occupant of a vehicle driven by another, on the theory of defendant's negligence. Louisville R. Co. *v.* Hutchcraft, 127 Ky. 531, 105 S. W. 983, 32 Ky. L. Rep. 429; Agnew *v.* Metropolitan St. R. Co., 125 Mo. App. 587, 102 S. W. 1041; Ward *v.* Brooklyn Heights R. Co., 115 N. Y. App. Div. 104, 100 N. Y. Suppl. 671, 119 N. Y. App. Div. 487, 104 N. Y. Suppl. 95 [*affirmed* in 190 N. Y. 559, 83 N. E. 1134], occupant of automobile. To sustain verdict for defendant. Riley *v.* Shreveport Traction Co., 114 La. 135, 38 So. 83; Olney *v.* Omaha, etc., St. R. Co., 78 Nebr. 767, 111 N. W. 784.

Evidence held insufficient: To show negligence on the part of defendant. Fay *v.* Hartford, etc., St. R. Co., 81 Conn. 330, 71 Atl. 364; Messing *v.* Wilmington City R. Co., 5 Pennew. (Del.) 526, 64 Atl. 247; Jacksonville R. Co. *v.* Lamb, 86 Ill. App. 487; Columbus St. R., etc., Co. *v.* Reap, 40 Ind. App. 689, 82 N. E. 977; Young *v.* Metropolitan St. R. Co., 126 Mo. App. 1, 103 S. W. 135; Lindgren *v.* Omaha St. R. Co., 73 Nebr. 628, 103 N. W. 307; Herbst *v.* New York City R. Co., 93 N. Y. Suppl. 1109; Reichenberg *v.* Interurban St. R. Co., 84 N. Y. Suppl. 523; Wagner *v.* Lehigh Traction Co., 212 Pa. St. 132, 61 Atl. 814; Flaherty *v.* Harrison, 98 Wis. 559, 74 N. W. 360. To support a verdict for plaintiff (Spiro *v.* St. Louis Transit Co., 102 Mo. App. 250, 76 S. W. 684; Lincoln Traction Co. *v.* Moore, 70 Nebr. 422, 97 N. W. 605; Klassen *v.* Interurban St. R. Co., 116 N. Y. App. Div. 153, 101 N. Y. Suppl. 581; Bang *v.* New York, etc., R. Co., 113 N. Y. App. Div. 673, 99 N. Y. Suppl. 946; Wilson *v.* United Traction Co., 94 N. Y. App. Div. 539, 88 N. Y. Suppl. 122; Goldkranz *v.* Metropolitan St. R. Co., 89 N. Y. App. Div. 590, 85 N. Y. Suppl. 667; O'Keefe *v.* Third Ave. R. Co., 25 Misc. (N. Y.) 418, 54 N. Y. Suppl. 1088; New York *v.* New York City R. Co., 107 N. Y. Suppl. 748, automobile), on the theory that plaintiff was thrown from his truck by a collision with a street car (Gormley *v.* Forty-Second St., etc., R. Co., 116 N. Y. App. Div. 155, 101 N. Y. Suppl. 583).

A verdict for plaintiff is against the weight of the evidence in an action by the owner of a vehicle against a street car company for damages from a collision, where the version of defendant's motorman, that the negligence of plaintiff's driver caused the accident is directly supported by three disinterested witnesses, and the direct testimony of plaintiff's driver varies from that on cross-examination, with but slight support by one disinterested witness. Orchard Stables *v.* Interurban St. R. Co., 91 N. Y. Suppl. 330.

21. See Asphalt, etc., Constr. Co. *v.* St. Louis Transit Co., 102 Mo. App. 469, 80 S. W. 741; Little *v.* Boston, etc., R. Co., 72 N. H. 61, 55 Atl. 190.

22. Birmingham R., etc., Co. *v.* Franscomb, 124 Ala. 621, 27 So. 508 (evidence held insufficient); Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385]; Alger *v.* Duluth-Superior Traction Co., 93 Minn. 314, 101 N. W. 298 (evidence held insufficient to sustain a finding that the motorman might have avoided the injury by the exercise of ordinary care, so that it was error to submit the question of wilful negligence).

23. Indianapolis St. R. Co. *v.* Taylor, 39 Ind. App. 592, 80 N. E. 436 (holding that where plaintiff was struck at night by a street car as he was crossing a street, proof that the motorman stood in the front vestibule of the car where he could see in front thereof, and that there was no headlight on the car, was sufficient to show that the motorman had knowledge that the headlight was not burning); Welsh *v.* United Traction Co., 202 Pa. St. 530, 51 Atl. 1026.

or in regard to sounding a bell or gong.[24] The positive testimony of witnesses who were in a position to have heard the bell or gong, if it had been sounded, that they did not hear it, is sufficient to justify a finding that it was not sounded;[25] but such testimony is of little or no weight when given by witnesses who had no means of knowledge or who paid no attention to the occurrence, and may be too insubstantial to offer any opposition to positive contradictory testimony.[26]

(3) RATE OF SPEED. Where the negligence charged is as to the speed of the car which caused the injury, it is not sufficient, in the absence of statutory or municipal regulation, merely to show that the car was running at a rapid rate of speed;[27] but the evidence must be sufficient to show that, under the circumstances existing at the time and place of the accident, the speed of the car was negligent,[28]

Evidence held insufficient to warrant a finding of a failure of proper care to furnish necessary lights on the car see Wilkie *v.* Richmond Traction Co., 105 Va. 290, 54 S. E. 43.

The positive testimony of several witnesses that there was no signal light burning on the car is not overcome by the motorman's testimony to the contrary. Cross *v.* St. Louis Transit Co., 120 Mo. App. 458, 97 S. W. 183.

Negative testimony.—Where persons are waiting and watching for an approaching car and are looking in the direction from which it is coming, and the car is directly in their presence, it cannot be said that their evidence is negative, when they declare that the car had no headlight burning, and was in such complete darkness that it could not be seen at all. Cox *v.* Schuylkill Valley Traction Co., 214 Pa. St. 223, 63 Atl. 599 [*affirming* 21 Montg. Co. Rep. 211].

24. See Chicago City R. Co. *v.* Loomis, 201 Ill. 118, 66 N. E. 348 [*affirming* 102 Ill. App. 326].

Custom to sound gong.—In an action for injury to a workman, who was struck by a street car while at work in the street, evidence that he had worked in that locality for some weeks, and had noticed that it was customary for cars to use their gongs when men were near the track, but that for hours at a time he would not notice whether the cars rang their gongs or not, but that, when he did notice, the cars rang their gongs when men were near the track, is insufficient to establish a custom to sound a gong. Kelly *v.* Boston El. R. Co., 197 Mass. 420, 83 N. E. 865, 16 L. R. A. N. S. 282.

25. Chicago City R. Co. *v.* Loomis, 201 Ill. 118, 66 N. E. 348 [*affirming* 102 Ill. App. 326] (holding that where plaintiff, while crossing a regular crossing, was struck and injured by defendant's street car, and she testified that she heard no warning given of the approaching car, and she could have heard it if one had been given, and other witnesses heard no warning given, a finding that defendant was negligent, affirmed by the appellate court, will not be disturbed); Murray *v.* St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611; Butler *v.* Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877; Welsh *v.* United Traction Co., 202 Pa. St. 530, 51 Atl. 1026.

26. **Sanders *v.* Southern Electric R. Co., [X, B, 9, e, (III), (D), (2)]** 147 Mo. 411, 48 S. W. 855; Bennett *v.* Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480 (holding that where all of the witnesses who were listening testified that the bell was rung prior to the accident, the statement of plaintiff, who was partially deaf, and was not listening, that he did not hear the bell, is no evidence on which to raise an issue of fact as to whether the bell was rung); Butler *v.* Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877; Ryan *v.* La Crosse City R. Co., 108 Wis. 122, 83 N. W. 770.

27. West Chicago St. R. Co. *v.* Callow, 102 Ill. App. 323. See also *supra*, X, B, 3, d, (I).

28. **Evidence held sufficient:** To show negligence as to the speed of the car. Plunket *v.* Brooklyn Heights R. Co., 129 N. Y. App. Div. 572, 114 N. Y. Suppl. 276 [*affirmed* in 198 N. Y. 568]. To show that the car was moving at an unusual and dangerous speed. Louisville R. Co. *v.* Byer, (Ky. 1908) 113 S. W. 463. To show that defendant's street car was not under proper control as it approached the crossing. Youngquist *v.* Minneapolis St. R. Co., 102 Minn. 501, 114 N. W. 259. To justify a finding that the car was moving slowly at the time plaintiff was struck. San Antonio Traction Co. *v.* Court, 31 Tex. Civ. App. 146, 71 S. W. 777.

Evidence held insufficient: To show negligence with respect to the speed of the car. Bennett *v.* Metropolitan St. R. Co., 122 Mo. App. 703, 99 S. W. 480; Mulligan *v.* Third Ave. R. Co., 39 N. Y. App. Div. 663, 57 N. Y. Suppl. 424; Flaherty *v.* Harrison, 98 Wis. 559, 74 N. W. 360. A street railroad company cannot be held liable for damages caused by the scaring of plaintiff's horse by defendant's electric car, on the ground that it was caused by the excessive speed of the car, on the testimony of plaintiff that the car was moving "fast," "pretty fast," "at full headway," and "swiftly," and of defendant's witnesses that it was going at a moderate rate of speed, one of them saying that it was five miles an hour. Yingst *v.* Lebanon, etc., R. Co., 167 Pa. St. 438, 31 Atl. 687.

Evidence that the car was going at a speed of from six to eight miles an hour is insufficient to show negligence, in the absence of evidence concerning the character of the place of the accident, the amount of travel on the streets there, and of the crossings.

or that it was in excess of the limit of speed prescribed by statute or ordinance.[29]

(E) *Contributory Negligence.* On the question of contributory negligence on the part of a person injured on or near a street railroad track, a preponderance of direct or circumstantial evidence from which the jury may fairly infer such fact is necessary to establish his contributory negligence,[30] or freedom from such negligence;[31] but an inference of contributory negligence or freedom therefrom

Higgins *v.* St. Louis, etc., R. Co., 197 Mo. 300, 95 S. W. 863.

That the car was not being operated at a negligent rate of speed is shown as a matter of law by evidence that the accident did not result in any injury to the car, except a few scratches, and did not disturb the lights on the car or the passengers, or persons in charge of the car, other than by the jar caused by the application of the break and the reversal of the current, and that the car stopped substantially at the place of the accident, and did not push the vehicle any distance, or break it at the point of contact. Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036.

29. **Evidence held sufficient:** To justify a finding that the car was going at more than eight miles per hour, the statutory limit of speed. Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734. To show that the street car was running at a dangerous speed much in excess of the speed limit prescribed by ordinance. Wilson *v.* Puget Sound Electric R. Co., 52 Wash. 522, 101 Pac. 50. To sustain a finding that decedent could have crossed the track in safety if defendant's car had been run at the rate prescribed by ordinance. Powers *v.* St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655. To show that the car which struck deceased was not exceeding the speed authorized by ordinance. Deane *v.* St. Louis Transit Co., 192 Mo. 575, 91 S. W. 505. To show that the city ordinance limiting the speed of cars on certain streets applied to the street where the accident in suit occurred. Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140. Evidence that the car was running somewhere between eleven and ninety-six hundredths miles and seventeen miles per hour supports a finding that defendant was negligent in running the car at a greater rate than twelve miles per hour, to which it was limited by ordinance. Riley *v.* Salt Lake Rapid-Transit Co., 10 Utah 428, 37 Pac. 681 [*affirmed* in 163 U. S. 703, 16 S. Ct. 1205, 41 L. ed. 308].

Evidence that the car was run faster than usual, that it was going at full speed, and that a man would have to run very fast to keep up with it, is sufficient to show that the speed exceeded six miles per hour and justify the admission in evidence of an ordinance restricting speed to six miles per hour. Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534.

30. **Evidence held sufficient:** To show contributory negligence (Houston City St. R. Co. *v.* Delesdernier, 84 Tex. 82, 19 S. W. 366) in an action for injuries received by being struck by or in collision with a street car (Atlanta R., etc., Co. *v.* Owens, 119 Ga. 833, 47 S. E. 213; Itzkowitz *v.* Boston El. R. Co., 186 Mass. 142, 71 N. E. 298; Baly *v.* St. Paul City R. Co., 90 Minn. 39, 95 N. W. 757; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144; Wood *v.* Omaha, etc., St. R. Co., 84 Nebr. 282, 120 N. W. 1121, 22 L. R. A. N. S. 228; McLean *v.* Omaha, etc., R., etc., Co., 72 Nebr. 447, 100 N. W. 935, 103 N. W. 285; McAuliffe *v.* New York City R. Co., 122 N. Y. App. Div. 633, 107 N. Y. Suppl. 522; Hoffman *v.* Philadelphia Rapid Transit Co., 214 Pa. St. 87, 63 Atl. 409; Bugbee *v.* Union R. Co., (R. I. 1904) 59 Atl. 165; Skinner *v.* Tacoma R., etc., Co., 46 Wash. 122, 89 Pac. 488). To show that the person injured did not back from the track as rapidly as he could, as he claimed he did, to avoid an injury from being struck by the rear end of the car as it rounded a curve and projected beyond the track. McCabe *v.* Interurban St. R. Co., 49 Misc. (N. Y.) 251, 97 N. Y. Suppl. 353.

Evidence held insufficient: To show that the child who was injured was of sufficient intelligence or capacity to exercise any care for his own safety, especially in view of the presumption that defendant obeyed the law and exercised greater care at crossings frequented by school children than at the ordinary crossing, where the child was injured. Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 [*affirming* 95 Ill. App. 314]. In an action against an electric railroad for the death of a cow to show that plaintiff was guilty of contributory negligence in law. Ensley *v.* Detroit United R. Co., 134 Mich. 195, 96 N. W. 34.

Knowledge of danger.— In a suit by a city fireman for personal injuries received in consequence of the overturning of a hose cart on which he was riding, by coming in contact with an improperly placed rail, the fact that plaintiff knew the street to be dangerous is not proof of contributory negligence, but the question should be left to the jury. Elyton Land Co. *v.* Mingea, 89 Ala. 521, 7 So. 666.

31. **Evidence held sufficient:** To show freedom from contributory negligence, in an action for injuries received in collision with a car. Finnick *v.* Boston, etc., St. R. Co., 190 Mass. 382, 77 N. E. 500; Greenbaum *v.* Interurban St. R. Co., 84 N. Y. Suppl. 588; San Antonio Traction Co. *v.* Haines, 45 Tex. Civ. App. 289, 100 S. W. 788.

Evidence held insufficient: To show freedom from contributory negligence of a person struck by a street car. Gorham *v.* Milford, etc., St. R. Co., 189 Mass. 275, 75 N. E. 634;

must be based on facts, and not on another presumption,[32] unless the presumptions refer to entirely different matters.[33] Thus a preponderance of the evidence is necessary to prove or disprove the fact of contributory negligence,[34] or freedom therefrom,[35] in regard to going along or crossing a street railroad track ahead of

Cox *v.* South Shore, etc., St. R. Co., 182 Mass. 497, 65 N. E. 823; Sobol *v.* Union R. Co., 122 N. Y. App. Div. 817, 107 N. Y. Suppl. 656; Barney *v.* Metropolitan St. R. Co., 94 N. Y. App. Div. 388, 88 N. Y. Suppl. 335; McKinley *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 153, 86 N. Y. Suppl. 461; O'Reilly *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 492, 81 N. Y. Suppl. 572; Bernstein *v.* New York City R. Co., 52 Misc. (N. Y.) 579, 102 N. Y. Suppl. 799; Gentile *v.* New York City R. Co., 92 N. Y. Suppl. 264; Beethem *v.* Interurban St. R. Co., 86 N. Y. Suppl. 700. To support a finding of freedom from contributory negligence necessary to a recovery. Lipis *v.* Metropolitan St. R. Co., 112 N. Y. App. Div. 909, 98 N. Y. Suppl. 259. To justify a finding by the jury that deceased ran in front of the car to save his brother from danger. Miller *v.* Union R. Co., 191 N. Y. 77, 83 N. E. 583 [*reversing* 120 N. Y. App. Div. 876, 105 N. Y. Suppl. 1131].

32. See Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445.

Sufficiency of proof.— To sustain the burden of proving freedom from contributory negligence it is not enough that the facts proven permit the inference that the person injured was free from contributory negligence; but such inference must be the only one that can fairly and reasonably be drawn from the facts. O'Reilly *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 492, 81 N. Y. Suppl. 572. See also Cox *v.* South Shore, etc., St. R. Co., 182 Mass. 497, 65 N. E. 823. Thus mere proof that the hearing of one driving on a street car track was good, and that he did not hear a car approaching from behind, does not warrant the inference that he was listening for it. Belford *v.* Brooklyn Heights R. Co., 86 N. Y. App. Div. 388, 83 N. Y. Suppl. 836. And it cannot be inferred from the mere fact that one could have looked for cars before crossing street railway tracks, that he did look. O'Reilly *v.* Brooklyn Heights R. Co., *supra*.

33. Electric R., etc., Co. *v.* Brickell, 73 Kan. 274, 85 Pac. 297 (holding that where a person while sitting on a railroad track is run over and killed under circumstances justifying the inference of negligence, evidence offered by plaintiff to show that deceased was subject to attacks of pleurisy which rendered her temporarily helpless, to enable the jury to infer therefrom that she was helpless when run over, is not subject to the objection that it bases one presumption on another); Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445 (holding that a presumption of due care on the part of a person injured is not a predicate for a presumption in favor of defendant that the car striking such person was running at a lawful rate of speed, and hence the latter is not objectionable as a presumption based on a presumption).

34. **Evidence held sufficient:** To show contributory negligence in crossing tracks in front of a car (Colomb *v.* Portland, etc., St. R. Co., 100 Me. 418, 61 Atl. 898; Pietraroia *v.* New Jersey, etc., R., etc., Co., 131 N. Y. App. Div. 829, 116 N. Y. Suppl. 249 [*affirmed* in 197 N. Y. 434, 91 N. E. 120]; Long *v.* Union R. Co., 122 N. Y. App. Div. 564, 107 N. Y. Suppl. 401; Greene *v.* Metropolitan St. R. Co., 100 N. Y. App. Div. 303, 91 N. Y. Suppl. 426; Piatt *v.* Pittsburg R. Co., 219 Pa. St. 583, 69 Atl. 72), or in crossing a track after alighting from a car at a place other than a crossing, and being struck by a car going in the opposite direction on an adjoining track (Cleveland Electric R. Co. *v.* Wadsworth, 25 Ohio Cir. Ct. 376). To show that the driver of a vehicle colliding with a car was guilty of contributory negligence in driving along or across the tracks. Moulton *v.* Sanford, etc., R. Co., 99 Me. 508, 59 Atl. 1023; Allworth *v.* Muskegon Traction, etc., Co., 142 Mich. 25, 105 N. W. 75; Higgins *v.* St. Louis, etc., R. Co., 197 Mo. 300, 95 S. W. 863; Fancher *v.* Fonda, etc., R. Co., 111 N. Y. App. Div. 4, 97 N. Y. Suppl. 666; Geleta *v.* Buffalo, etc., Electric R. Co., 88 N. Y. App. Div. 372, 84 N. Y. Suppl. 629 [*affirmed* in 181 N. Y. 524, 73 N. E. 1124]; Shatzman *v.* New York City R. Co., 55 Misc. (N. Y.) 300, 105 N. Y. Suppl. 115; American Ice Co. *v.* New York City R. Co., 50 Misc. (N. Y.) 183, 98 N. Y. Suppl. 219; Sauer *v.* Interurban St. R. Co., 88 N. Y. Suppl. 865; Jackson *v.* United Traction Co., 18 Pa. Super. Ct. 211.

Evidence held insufficient: To show such contributory negligence on the part of plaintiff, who was crossing the tracks to a platform to take the approaching car, as to warrant the setting aside of a verdict in her favor. Walker *v.* St. Paul City R. Co., 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632. To show contributory negligence on the part of the driver of a vehicle colliding with a car, in driving along or across the tracks. Denver City Tramway Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836; Armstead *v.* Mendenhall, 83 Minn. 136, 85 N. W. 929.

Knowledge of unlawful speed of car.— In the absence of any direct evidence as to whether the person injured knew the speed of the car, the fact that he was struck is not conclusive evidence of contributory negligence, as the presumption that he would exercise care for his safety would negative any knowledge on his part of the speed at which the car was coming. Powers *v.* Des Moines City R. Co., (Iowa 1908) 115 N. W. 494.

35. **Evidence held sufficient:** To show freedom from contributory negligence. Fandel *v.* Third Ave. R. Co., 15 N. Y. App.

an approaching car, as in regard to the injured person's negligence in not properly looking or listening for an approaching car,[36] or his freedom from negligence in that respect.[37] Where it appears that the car was so close and visible just before the accident that it must have been seen if the person injured had looked properly, evidence that he did look and did not see it is incredible, as a matter of law, as being in contradiction of matters of common knowledge or the laws of nature.[38]

f. Damages. The general rules governing the damages in civil cases ordinarily control the question of damages in an action for injuries received through the management or operation of a street railroad;[39] and as a general rule the damages awarded for such injuries must be merely compensatory,[40] and exem-

Div. 426, 44 N. Y. Suppl. 462 [*affirmed* in 162 N. Y. 598, 57 N. E. 1110]. To sustain a finding that a child was not guilty of contributory negligence in attempting to cross the tracks in front of an approaching car. Cameron *v.* Duluth-Superior Traction Co., 94 Minn. 104, 102 N. W. 208. To show that the driver of a vehicle was not guilty of contributory negligence in driving along or across the tracks. Williamson *v.* Old Colony St. R. Co., 191 Mass. 144, 77 N. E. 655, 5 L. R. A. N. S. 1081; Stines *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 789, 69 N. Y. Suppl. 992; Koehler *v.* Brooklyn Heights R. Co., 111 N. Y. Suppl. 600; Benjamin *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 1052; Westerman *v.* Metropolitan St. R. Co., 84 N. Y. Suppl. 501; Citizens' R. Co. *v.* Washington, 24 Tex. Civ. App. 422, 58 S. W. 1042. To show that plaintiff was not driving in violation of an ordinance providing that no vehicle shall use a street railroad track when driving in a contrary direction to the cars running on the track, except for the purpose of crossing or avoiding other vehicles. Schroeder *v.* St. Louis Transit Co., 111 Mo. App. 67, 85 S. W. 968.

Evidence held insufficient: To show freedom from contributory negligence in one who stepped on the track from behind a car on the other track. Casper *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 639, 82 N. Y. Suppl. 1036. To show the exercise of due care in crossing the street in front of an approaching car. Lorickio *v.* Brooklyn Heights R. Co., 44 N. Y. App. Div. 628, 60 N. Y. Suppl. 247. To show that the driver of a vehicle was free from contributory negligence. Montenes *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 493, 78 N. Y. Suppl. 1059; Fisher *v.* New York City R. Co., 50 Misc. (N. Y.) 622, 98 N. Y. Suppl. 221; Gilman *v.* New York City R. Co., 107 N. Y. Suppl. 770; Hebron *v.* New York City R. Co., 94 N. Y. Suppl. 341; Daly *v.* New York City R. Co., 92 N. Y. Suppl. 245. To sustain a verdict for plaintiff, based on the theory that decedent was not guilty of contributory negligence in crossing in front of an approaching car. Du Frane *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 298, 82 N. Y. Suppl. 1. In an action for injuries to plaintiff, in a collision between defendant's street car and a vehicle in which plaintiff was riding, to show plaintiff to have been free from negligence. Couch *v.* New York City R. Co., 94 N. Y. Suppl. 393.

36. See North Chicago St. R. Co. *v.* Martin, 51 Ill. App. 247; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445, evidence held insufficient to show that deceased did not look before attempting to cross the track.

Where a number of disinterested witnesses testify that plaintiff's driver drove on the track about thirty feet in front of a car approaching at the rate of eight miles an hour, although the driver testifies that the car was a block away when he started on the track, the evidence is insufficient to sustain a judgment for plaintiff. New York Small Stock Co. *v.* Third Ave. R. Co., 13 Misc. (N. Y.) 276, 34 N. Y. Suppl. 61.

37. Shea *v.* Lexington, etc., St. R. Co., 188 Mass. 425, 74 N. E. 931 (evidence held to justify the conclusion that plaintiff listened carefully for the approach of the car, and that his conduct showed due care); McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062; Seifter *v.* Brooklyn Heights R. Co., 55 N. Y. App. Div. 10, 66 N. Y. Suppl. 1107 [*reversed* on the facts in 169 N. Y. 254, 62 N. E. 349]; McQuade *v.* Metropolitan St. R. Co., 17 Misc. (N. Y.) 154, 39 N. Y. Suppl. 335.

Change of evidence on new trial.—Where, on the first trial of an action for damages from a collision with plaintiff's wagon, plaintiff testifies that as he was turning on the track he looked back once before he was run into, but on a second trial testifies that he looked back four times to determine whether any car was approaching, and no satisfactory explanation of such change in his evidence is given, his evidence is not worthy of belief, and a judgment in his favor is unauthorized. Bang *v.* New York, etc., R. Co., 128 N. Y. App. Div. 134, 112 N. Y. Suppl. 530.

38. Golden *v.* Metropolitan St. R. Co., 49 Misc. (N. Y.) 521, 98 N. Y. Suppl. 848.

However, plaintiff's testimony that he stopped to look and listen for cars, but did not see the one that struck him, is not so incredible that it should be disregarded, when the evidence of the motorman himself is that he could not see more than five feet ahead of his car, and there is also evidence that the gong was not sounded. Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239.

39. See, generally, DAMAGES, 13 Cyc. 1 *et seq.*

40. Solomon *v.* New York City R. Co., 107 N. Y. Suppl. 744 (holding that where, in an action for injuries to a horse, defendant has been called upon to pay for veterinary services, it is entitled to the benefit of any

plary or punitive damages cannot be recovered,[41] except where the injury is due to gross negligence or wilful or wanton misconduct.[42]

g. Questions For Court and For Jury — (I) *In General.* In an action for injuries caused by the management or operation of a street railroad, as in other civil actions, questions of law are ordinarily to be determined by the court, while questions of fact are to be determined by the jury under proper instructions from the court.[43] Thus the legal effect or force,[44] or the reasonableness or unreasonableness,[45] of a statutory or municipal regulation is a question of law for the court, unless it depends, in the opinion of the court upon the existence of particular facts which are disputed.[46]

(II) *As Determined by the Evidence in General.* In accordance with the rules applying in civil cases generally,[47] if there is any evidence from which the jury might justifiably find the existence or non-existence of the facts in issue, and the evidence is disputed, or if undisputed is such that reasonable minds might arrive at different conclusions therefrom, the issues should be submitted to the jury under appropriate instructions from the court;[48] but where there is no evidence on an issue of fact, or the evidence of its existence or non-existence is so slight that a finding thereof would not be sustained, or is conclusive of its existence or non-existence, the question becomes one of law for the court and should not be submitted to the jury.[49] Accordingly if the evidence is sufficient to establish at least a *prima facie* case for plaintiff,[50] but is conflicting or not conclusive upon the

resulting appreciation in the value of the horse, and in the absence of proof as to the difference in value prior to the injury, and after recovery there is no basis for the assessment of damages to the horse); San Antonio Traction Co. *v.* Upson, 31 Tex. Civ. App. 50, 71 S. W. 565 (holding that where, in an action for injuries sustained in a collision, the evidence shows that plaintiff's vehicle was badly smashed and broken, the jury may consider, in estimating the damages, the amount, if any, expended by plaintiff in repairing the vehicle).

Excessive damages.— A verdict for four hundred dollars rendered under proper instructions is not excessive where plaintiff was badly bruised, was thrown some twenty feet into the street, causing a shock that confined him to the house several days and requiring treatment from a physician, and the buggy in which he was riding at the time was virtually destroyed. Henderson City R. Co. *v.* Lockett, 98 S. W. 303, 30 Ky. L. Rep. 321.

41. Henderson City R. Co. *v.* Lockett, 98 S. W. 303, 30 Ky. L. Rep. 321.

42. South Covington, etc., R. Co. *v.* Cleveland, 100 S. W. 283, 30 Ky. L. Rep. 1072, 11 L. R. A. N. S. 853 (holding that exemplary damages are properly awarded where a motorman running his car at high speed fails to lessen it until too late to prevent a collision with one driving near the track, and the motorman sees, or could see, the person in time to check his car or stop it, and thereby avoid the injury); Louisville R. Co. *v.* Teekin, 78 S. W. 470, 25 Ky. L. Rep. 1692 (holding that evidence that a street car was running through a narrow city street after dark, at a rate of from twelve to twenty miles an hour; that it failed to sound its gong at the crossing; and that the motorman was looking back and not ahead was sufficient to show gross neglect and authorize punitive damages in an action for injuries by a driver of a team); Nashville St. R. Co. *v.* O'Bryan, 104 Tenn. 28, 55 S. W. 300.

43. See, generally, Trial.

44. Sanders *v.* Southern Electric R. Co., 147 Mo. 411, 48 S. W. 855.

45. Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

46. Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

47. See, generally, Negligence, 29 Cyc. 627 *et seq.*; Trial.

48. Smith *v.* Union R. Co., 61 Mo. 588; Baxter *v.* St. Louis Transit Co., 103 Mo. App. 597, 78 S. W. 70.

Evidence held sufficient to warrant submission to the jury of the question whether an emergency existed which authorized the driver of a street car to employ the person who was injured to assist him see Marks *v.* Rochester R. Co., 146 N. Y. 181, 40 N. E. 782 [*reversing* 77 Hun 77, 28 N. Y. Suppl. 314].

Whether defendant company was operating the car which caused the injury is for the jury where several witnesses testify that the car was operated on the company's tracks, that it was the same color as its cars, and bore its name painted on one side thereof. Hall *v.* St. Louis, etc., R. Co., 124 Mo. App. 661, 101 S. W. 1137.

49. Murphy *v.* Boston El. R. Co., 188 Mass. 8, 73 N. E. 1018.

Evidence held insufficient to warrant submission to the jury of the question whether the car alleged to have caused the injury belonged to defendant see Bardack *v.* Brooklyn Heights R. Co., 91 N. Y. Suppl. 10.

50. McDermott *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 214, 85 N. Y. Suppl. 807; Sophian *v.* Metropolitan St. R. Co., 38 Misc. (N. Y.) 787, 78 N. Y. Suppl. 837; Dowd *v.* Brooklyn Heights R. Co., 9 Misc.

issues as to whether the street railroad company was guilty of negligence or the person injured of contributory negligence, the case should be submitted to the jury on such issues,[51] as in an action for injuries caused by a car to a person standing or walking on, along, or across the tracks,[52] or to a person working on the street on or near the tracks,[53] or to a bicycle rider,[54] or to a person or to his animal or vehicle, while riding or driving along or across the tracks,[55] or standing close

(N. Y.) 279, 29 N. Y. Suppl. 745 [*affirmed* in 12 Misc. 647, 33 N. Y. Suppl. 1127]; Will *v.* West Side R. Co., 84 Wis. 42, 54 N. W. 30.

51. Goff *v.* St. Louis Transit Co., 199 Mo. 694, 98 S. W. 49, man lying on track.

52. *Alabama.*— Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93.

District of Columbia.— Barstow *v.* Capital Traction Co., 29 App. Cas. 362.

Illinois.— Chicago City R. Co. *v.* Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270 [*affirming* 95 Ill. App. 314] (six-year-old boy); Chicago City R. Co. *v.* Roach, 180 Ill. 174, 54 N. E. 212 [*affirming* 76 Ill. App. 496].

Minnesota.—Boyer *v.* St. Paul City R. Co., 54 Minn. 127, 55 N. W. 825.

Missouri.— Fearons *v.* Kansas City El. R. Co., 180 Mo. 208, 79 S. W. 394 (trespasser in tunnel); Levin *v.* Metropolitan St. R. Co., 140 Mo. 624, 41 S. W. 968 (child on track).

New Hampshire.— Madigan *v.* Berlin St. R. Co., 74 N. H. 303, 67 Atl. 404; Gallagher *v.* Manchester St. R. Co., 70 N. H. 212, 47 Atl. 610.

New York.— Vandenbout *v.* Rochester R. Co., 129 N. Y. App. Div. 844, 114 N. Y. Suppl. 760; Franco *v.* Brooklyn Heights R. Co., 108 N. Y. App. Div. 14, 95 N. Y. Suppl. 476 (infant in charge of parent); Fiori *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 49, 90 N. Y. Suppl. 521; Loder *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 591, 82 N. Y. Suppl. 957; Davidson *v.* Metropolitan St. R. Co., 75 N. Y. App. Div. 426, 78 N. Y. Suppl. 352 (boy running on track for hat); Sesselmann *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 484, 72 N. Y. Suppl. 1010; Halliday *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 57, 69 N. Y. Suppl. 174; Killen *v.* Brooklyn Heights R. Co., 48 N. Y. App. Div. 557, 62 N. Y. Suppl. 927; Wihnyk *v.* Second Ave. R. Co., 14 N. Y. App. Div. 515, 43 N. Y. Suppl. 1023 (girl nine years old); Bello *v.* Metropolitan St. R. Co., 2 N. Y. App. Div. 313, 37 N. Y. Suppl. 969; Murphy *v.* Interurban St. R. Co., 56 Misc. 598, 107 N. Y. Suppl. 96.

Pennsylvania.— Doyle *v.* Chester Traction Co., 214 Pa. St. 382, 63 Atl. 604; Pittsburgh, etc., Pass. R. Co. *v.* Kane, 4 Pa. Cas. 188, 6 Atl. 845; Oehmler *v.* Pittsburgh R. Co., 25 Pa. Super. Ct. 617.

Texas.— Northern Texas Traction Co. *v.* Smith, (Civ. App. 1908) 110 S. W. 774.

United States.— Cluff *v.* Pittsburg R. Co., 144 Fed. 710.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

53. Hanley *v.* Boston El. R. Co., 201 Mass. 55, 87 N. E. 197; Laschinger *v.* St. Paul City R. Co., 84 Minn. 333, 87 N. W. 836 (city employee flushing street); Reilly *v.* Interurban St. R. Co., 108 N. Y. App. Div. 254, 95 N. Y. Suppl. 721; Third Ave. R. Co. *v.* Krausz, 112 Fed. 379, 50 C. C. A. 293.

54. Palmer *v.* Cedar Rapids, etc., R. Co., 124 Iowa 424, 100 N. W. 336; Kerr *v.* Boston El. R. Co., 188 Mass. 434, 74 N. E. 669; Singley *v.* Easton Transit Co., 221 Pa. St. 174, 70 Atl. 718 (holding that in an action for injuries to a boy riding a bicycle while crossing a street behind a standing street car which was unexpectedly moved backward, the negligence of the motorman and the contributory negligence of the boy were for the jury); Reid *v.* United Traction Co., 26 Pa. Super. Ct. 55.

55. *Delaware.*—Wilmington City R. Co. *v.* White, 6 Pennew. 363, 66 Atl. 1009, driver of coach in funeral procession.

District of Columbia.— Metropolitan R. Co. *v.* Blick, 22 App. Cas. 194.

Illinois.— Central R. Co. *v.* Knowles, 191 Ill. 241, 60 N. E. 829 [*affirming* 93 Ill. App. 581].

Indiana.— Indianapolis Traction, etc., Co. *v.* Smith, 38 Ind. App. 160, 77 N. E. 1140.

Kansas.— Metropolitan St. R. Co. *v.* Fawcett, 76 Kan. 522, 92 Pac. 543.

Kentucky.— Palmer Transfer Co. *v.* Paducah R., etc., Co., 89 S. W. 515, 28 Ky. L. Rep. 473.

Massachusetts.— Carrahar *v.* Boston, etc., St. R. Co., 198 Mass. 549, 85 N. E. 162, 126 Am. St. Rep. 461; Green *v.* Haverhill, etc., St. R. Co., 193 Mass. 428, 79 N. E. 735; James *v.* Interstate Consol. St. R. Co., 193 Mass. 264, 79 N. E. 264; Halloran *v.* Worcester Consol. St. R. Co., 192 Mass. 104, 78 N. E. 381; Erb *v.* Boston El. R. Co., 191 Mass. 482, 78 N. E. 117; Orth *v.* Boston El. R. Co., 188 Mass. 427, 74 N. E. 673; Wood *v.* Boston El. R. Co., 188 Mass. 161, 74 N. E. 298; Sexton *v.* West Roxbury, etc., St. R. Co., 188 Mass. 139, 74 N. E. 315; Sullivan *v.* Boston El. R. Co., 185 Mass. 602, 71 N. E. 90; Kennedy *v.* Lowell, etc., St. R. Co., 184 Mass. 31, 67 N. E. 875; Kerrigan *v.* West End St. R. Co., 158 Mass. 305, 33 N. E. 523; Lynam *v.* Union R. Co., 114 Mass. 83.

Michigan.— Hengesbach *v.* Detroit United R. Co., 147 Mich. 681, 111 N. W. 345; Ryan *v.* Detroit Citizens' St. R. Co., 123 Mich. 597, 82 N. W. 278.

Minnesota.— Heidemann *v.* St. Paul City R. Co., 105 Minn. 48, 117 N. W. 226; Smith *v.* Minneapolis St. R. Co., 95 Minn. 254, 104 N. W. 16; Peterson *v.* St. Paul City R. Co., 54 Minn. 152, 55 N. W. 906.

Missouri.—Fleddermann *v.* St. Louis Transit Co., 134 Mo. App. 199, 113 S. W. 1143; Parker-Washington Co. *v.* St. Louis Transit

to the track.[56] Under such evidence the case should not be taken from the jury by a dismissal [57] or nonsuit,[58] or by sustaining a demurrer to the evidence,[59] or directing a verdict for defendant.[60] Where, however, the evidence on such issues

Co., 131 Mo. App. 508, 109 S. W. 1073; Hauck-Hoerr Bakery Co. *v.* United R. Co., 127 Mo. App. 190, 104 S. W. 1137; Frank *v.* St. Louis Transit Co., 112 Mo. App. 496, 87 S. W. 88; Freymark *v.* St. Louis Transit Co., 111 Mo. App. 208, 85 S. W. 606; Schroeder *v.* St. Louis Transit Co., 111 Mo. App. 67, 85 S. W. 968; Story *v.* St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992; Hanheide *v.* St. Louis Transit Co., 104 Mo. App. 323, 78 S. W. 820.

New Jersey.— Weinberger *v.* North Jersey St. R. Co., 73 N. J. L. 694, 64 Atl. 1059; Hughes *v.* Camden, etc., R. Co., 65 N. J. L. 203, 47 Atl. 441; Atlantic Coast Electric R. Co. *v.* Rennard, 62 N. J. L. 773, 42 Atl. 1041.

New York.— Countryman *v.* Fonda, etc., R. Co., 166 N. Y. 201, 59 N. E. 822, 82 Am. St. Rep. 640 (occupant of vehicle); Geoghegan *v.* Union R. Co., 122 N. Y. App. Div. 646, 107 N. Y. Suppl. 503; Brauner *v.* Third Ave. R. Co., 122 N. Y. App. Div. 572, 107 N. Y. Suppl. 759; Northrop *v.* Poughkeepsie City, etc., Electric R. Co., 104 N. Y. App. Div. 615, 93 N. Y. Suppl. 602; Klimpl *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 291, 87 N. Y. Suppl. 39; Cronin *v.* Metropolitan St. R. Co., 82 N. Y. App. Div. 227, 81 N. Y. Suppl. 752; Smith *v.* Metropolitan St. R. Co., 66 N. Y. App Div. 600, 73 N. Y. Suppl. 254; Bruss *v.* Metropolitan St. R. Co., 66 N. Y. App. Div. 554, 73 N. Y. Suppl. 256; Morris *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 78, 71 N. Y. Suppl. 321 [*affirmed* in 170 N. Y. 592, 63 N. E. 1119]; Johnson *v.* Rochester R. Co., 61 N. Y. App. Div. 12, 70 N. Y. Suppl. 113; Tait *v.* Buffalo R. Co., 55 N. Y. App. Div. 507, 67 N. Y. Suppl. 403; Feingold *v.* New York City R. Co., 57 Misc. 650, 108 N. Y. Suppl. 509; New York Bread Co. *v.* New York City R. Co., 46 Misc. 89, 91 N. Y. Suppl. 421; Ludecke *v.* Metropolitan St. R. Co., 32 Misc. 635, 66 N. Y. Suppl. 483; Kear *v.* New York City R. Co., 104 N. Y. Suppl. 444; Rosenstock *v.* Metropolitan St. R. Co., 86 N. Y. Suppl. 114; Muller *v.* Interurban St. R. Co., 84 N. Y. Suppl. 234.

Oregon.— Ryberg *v.* Portland Cable R. Co., 22 Oreg. 224, 29 Pac. 614.

Pennsylvania.— Thiele *v.* Beaver Valley Traction Co., 37 Pa. Super. Ct. 60; Rote *v.* Pennsylvania, etc., R. Co., 34 Pa. Super. Ct. 508; Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392; Conyngham *v.* Erie Electric Motor Co., 15 Pa. Super. Ct. 573; Tompkins *v.* Scranton Traction Co., 3 Pa. Super. Ct. 576; Smith *v.* Philadelphia Traction Co., 3 Pa. Super. Ct. 129, 40 Wkly. Notes Cas. 501.

Utah.— Loofbourow *v.* Utah Light, etc., Co., 33 Utah 480, 94 Pac. 981, holding that where a collision between a car and a vehicle on or near the track occurs, the question of whether either or both parties exercised, under the particular circumstances, the degree of care required by law is ordinarily one of fact for the jury.

Wisconsin.— Thoresen *v.* La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. Rep. 64.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

Concession of sufficiency of evidence.— The act of defendant in permitting the case to go to the jury without objection at the close of the case is a tacit concession of the sufficiency of the evidence to require a submission to the jury of the questions of the motorman's negligence and plaintiff's contributory negligence. Scarangello *v.* Interurban St. R. Co., 90 N. Y. Suppl. 430.

56. McCambley *v.* Staten Island Midland R. Co., 32 N. Y. App. Div. 346, 52 N. Y. Suppl. 849.

57. Cohen *v.* Dry Dock, etc., R. Co., 69 N. Y. 170 [*affirming* 40 N. Y. Super. Ct. 368]; Reilly *v.* Interurban St. R. Co., 108 N. Y. App. Div. 254, 95 N. Y. Suppl. 721; Rosenstock *v.* Metropolitan St. R. Co., 86 N. Y. Suppl. 114.

58. *Georgia.*— Macon R., etc., Co. *v.* Streyer, 123 Ga. 279, 51 S. E. 342.

New Hampshire.— Gallagher *v.* Manchester St. R. Co., 70 N. H. 212, 47 Atl. 610, nonsuit properly denied.

New York.— Killen *v.* Brooklyn Heights R. Co., 48 N. Y. App. Div. 557, 62 N. Y. Suppl. 927; Dowd *v.* Brooklyn Heights R. Co., 9 Misc. 279, 29 N. Y. Suppl. 745 [*affirmed* in 12 Misc. 647, 33 N. Y. Suppl. 1127]; Lundy *v.* Second Ave. R. Co., 1 Misc. 100, 20 N. Y. Suppl. 691, error to grant nonsuit.

Oregon.— Ryberg *v.* Portland Cable R. Co., 22 Oreg. 224, 29 Pac. 614, not error to deny motion for nonsuit.

Utah.— Hall *v.* Ogden City St. R. Co., 13 Utah 243, 44 Pac. 1046, 57 Am. St. Rep. 726.

Wisconsin.— Thoresen *v.* La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051, 41 Am. St. Rep. 64.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

59. Deitring *v.* St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140 (evidence in an action for injuries at a street crossing held to justify the overruling of a demurrer to the evidence by defendant); Moore *v.* Charlotte Electric St. R. Co., 128 N. C. 455, 39 S. E. 57. See also Story *v.* St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992.

60. *District of Columbia.*— Barstow *v.* Capital Traction Co, 29 App. Cas. 362.

Kentucky.— Lexington R. Co. *v.* Vanladen, 107 S. W. 740, 32 Ky. L. Rep. 1047, evidence in an action for the death of plaintiff's intestate, who was run down by a street car, held not to warrant a peremptory instruction for the street railroad company.

is undisputed, or is such that reasonable minds can arrive at but one conclusion therefrom, the case should not be submitted to the jury, but the court alone should dispose of it, as by a dismissal or nonsuit,[61] or by directing a verdict for defendant.[62] Whether the proximate cause of the injury or death was the company's negligence or the injured or deceased person's contributory negligence is ordinarily a question for the jury under the evidence.[63]

(III) *NEGLIGENCE OF STREET RAILROAD COMPANY IN GENERAL.* Primarily questions of negligence, in cases of injuries from the operation of a street railroad, are for the jury;[64] and if, in accordance with the above rules, there is any legally sufficient evidence to go to the jury, and it is conflicting or such that reasonable minds might arrive at different conclusions therefrom, it is a question for the jury, and should be submitted to them, as to whether or not under all the circumstances the commission or omission of particular acts by the company in the operation of its road or car at the time and place of the accident was negligence as to the person injured thereby,[65] and whether such negligence was the

Massachusetts.— Le Baron *v.* Old Colony St. R. Co., 197 Mass. 289, 83 N. E. 674.

Michigan.—Airikainen *v.* Houghton County St. R. Co., 138 Mich. 194, 101 N. W. 264, killing cow.

Minnesota.— Anderson *v.* Minneapolis St. R. Co., 42 Minn. 490, 44 N. W. 518, 18 Am. St. Rep. 525.

New Jersey.—Adams *v.* Camden, etc., R. Co., 69 N. J. L. 424, 55 Atl. 254.

Pennsylvania.— Haney *v.* Pittsburgh, etc., Traction Co., 159 Pa. St. 395, 28 Atl. 235.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

61. Wright *v.* Monongahela St. R. Co., 213 Pa. St. 318, 62 Atl. 918; Wiszginda *v.* Schuylkill Traction Co., 212 Pa. St. 360, 61 Atl. 943; Kelly *v.* Union Traction Co., 211 Pa. St. 456, 60 Atl. 998; Johnson *v.* Chester Traction Co., 209 Pa. St. 189, 58 Atl. 153; Randall *v.* Union R. Co., (R. I. 1898) 59 Atl. 165.

62. Moyer *v.* United Traction Co., 221 Pa. St. 147, 70 Atl. 551; Dunkle *v.* City Pass. R. Co., 209 Pa. St. 125, 58 Atl. 168; Moser *v.* Union Traction Co., 205 Pa. St. 481, 55 Atl. 15; Krikorian *v.* Rhode Island Co., (R. I. 1908) 71 Atl. 369 (holding that where, in an action for the death of a pedestrian by a street car, there is no evidence as to the cause of decedent's death, nor any evidence connecting the accident with her death, occurring several months thereafter, a verdict for defendant is properly directed); Cawley *v.* La Crosse City R. Co., 106 Wis. 239, 82 N. W. 197 (holding that it is not error to direct a verdict for defendant in an action for injuries sustained by one of defendant's cars, where there is no direct evidence of defendant's negligence, but there is evidence showing plaintiff to be guilty of contributory negligence).

63. Metropolitan St. R. Co. *v.* Arnold, 67 Kan. 260, 72 Pac. 857; Omaha St. R. Co. *v.* Larson, 70 Nebr. 591, 97 N. W. 824; Rooks *v.* Houston, etc., R. Co., 10 N. Y. App. Div. 98, 41 N. Y. Suppl. 824. See also *infra*, X, B, 9, g, (III).

64. Baltimore Consol. R. Co. *v.* Rifcowitz, 89 Md. 338, 43 Atl. 762.

65. *Alabama.*— Birmingham R., etc., Co. *v.* Livingston, 144 Ala. 313, 39 So. 374, injury to person on railroad train by collision with a street car.

California.— Wahlgren *v.* Market St. R. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993.

Colorado.— Liutz *v.* Denver City Tramway Co., 43 Colo. 58, 95 Pac. 600, backing car after person was run over.

Florida.— Consumers' Electric Light, etc., R. Co. *v.* Pryor, 44 Fla. 354, 32 So. 797.

Illinois.— Hackett *v.* Chicago City R. Co., 235 Ill. 116, 85 N. E. 320 [*reversing* 136 Ill. App. 594]; Chicago City R. Co. *v.* O'Donnell, 114 Ill. App. 359.

Indiana.— Roberts *v.* Terre Haute Electric Co., 37 Ind. App. 664, 76 N. E. 323, 895, backing car along crowded street.

Kentucky.— Paducah City R. C. *v.* Alexander, 104 S. W. 375, 31 Ky. L. Rep. 1043.

Maryland.— Ciacik *v.* Northern Cent. R. Co., 92 Md. 213, 48 Atl. 149.

Massachusetts.— Logan *v.* Old Colony St. R. Co., 190 Mass. 115, 76 N. E. 510.

Michigan.— Canerdy *v.* Port Huron, etc., R. Co., 156 Mich. 211, 120 N. W. 582 (backing car against pedestrian); Deneen *v.* Houghton County St. R. Co., 150 Mich. 235, 113 N. W. 1126.

Minnesota.— Morris *v.* St. Paul City R. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. N. S. 598.

Missouri.— Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523; Petersen *v.* St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860; Fry *v.* St. Louis Transit Co., 111 Mo. App. 324, 85 S. W. 960; Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219.

New Jersey.— Shiles *v.* Public Service Corp., (1909) 72 Atl. 68; Merkl *v.* Jersey City, etc., R. Co., 75 N. J. L. 654, 68 Atl. 74, holding that unless the motorman's negligence is not the proximate cause of the injury, the question of his negligence is for the jury.

New York.— Meisch *v.* Rochester Electric R. Co., 72 Hun 604, 25 N. Y. Suppl. 244 (killing dog); Pendril *v.* Second Ave. R.

proximate cause of the injury complained of,[66] or whether it was caused by an unavoidable accident;[67] and the court should not dispose of such a case without the intervention of the jury, by granting a nonsuit,[68] or dismissal,[69] or by directing a verdict for defendant.[70] But where the evidence is legally insufficient or is undisputed and is such that reasonable minds can arrive at but one conclusion therefrom, in regard to the company's negligence, such question is for the court and should not be submitted to the jury;[71] but the court should of itself dispose of the case either by granting or directing a nonsuit,[72] or by a dismissal,[73] or by giving a peremptory instruction directing the jury to return a verdict in favor of defendant.[74] Thus if there is legally sufficient evidence to go to the jury, and it is disputed, or, if undisputed, is such that different inferences might be drawn therefrom, it is a question for the jury as to whether or not under the circumstances the defendant company was guilty of negligence in running into or over a child,[75]

Co., 34 N. Y. Super. Ct. 481; Wright *v.* Third Ave. R. Co., 5 N. Y. Suppl. 707.

Pennsylvania.— Geiser *v.* Pittsburg R. Co., 223 Pa. St. 170, 72 Atl. 351; Kaselicska *v.* Pittsburg R. Co., 220 Pa. St. 43, 68 Atl. 1018; Saxton *v.* Pittsburg R. Co., 219 Pa. St. 492, 68 Atl. 1022 (boy injured while riding on step); Wehr *v.* Carbon County Electric R. Co., 217 Pa. St. 490, 66 Atl. 743; Haughey *v.* Pittsburg R. Co., 210 Pa. St. 363, 59 Atl. 1110; Fellers *v.* Warren St. R. Co., 26 Pa. Super. Ct. 31.

Tennessee.— Knoxville Traction Co. *v.* Brown, 115 Tenn. 323, 89 S. W. 319.

Wisconsin.— Glettler *v.* Sheboygan Light, etc., R. Co., 130 Wis. 137, 109 N. W. 973, whether company was negligent in imposing on the motorman the duties of conductor.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

66. *Idaho.*— Pilmer *v.* Boise Traction Co., 14 Ida. 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. N. S. 254.

Illinois.— Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1.

Kansas.— Metropolitan St. R. Co. *v.* Fawcett, 76 Kan. 522, 92 Pac. 543.

Missouri.— McAndrews *v.* St. Louis, etc., R. Co., 83 Mo. App. 233.

Nebraska.— Omaha St. R. Co. *v.* Duvall, 40 Nebr. 29, 58 N. W. 531.

New York.—Adams *v.* Nassau Electric R. Co., 51 N. Y. App. Div. 241, 64 N. Y. Suppl. 818.

Rhode Island.— Shirley *v.* Rhode Island Co., (1907) 67 Atl. 585.

Washington.— Gray *v.* Washington Water Power Co., 27 Wash. 713, 68 Pac. 360.

United States.—Atlantic Ave. R. Co. *v.* Van Dyke, 72 Fed. 458, 18 C. C. A. 632.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

67. Cook *v.* Los Angeles, etc., Electric R. Co., 134 Cal. 279, 66 Pac. 306; Koenig *v.* Union Depot R. Co., 194 Mo. 564, 92 S. W. 497; Seletskey *v.* Third Ave. R. Co., 69 N. Y. App. Div. 27, 74 N. Y. Suppl. 518 [*affirmed* in 173 N. Y. 645, 66 N. E. 1116].

68. Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122; Bernhard *v.* Rochester R. Co., 68 Hun (N. Y.) 369, 22 N. Y. Suppl. 821; Dowd *v.* Brooklyn Heights R. Co., 9 Misc. (N. Y.) 279, 29 N. Y. Suppl. 745 [*affirmed* in 12 Misc. 647, 33 N. Y. Suppl. 1127]. See also *supra*, X, B, 9, g, (II).

69. Schwarzbaum *v.* Third Ave. R. Co., 54 N. Y. App. Div. 164, 66 N. Y. Suppl. 367; Gumby *v.* Metropolitan St. R. Co., 29 N. Y. App. Div. 335, 51 N. Y. Suppl. 553. See also *supra*, X, B, 9, g, (II).

70. *Illinois.*— Chicago City R. Co. *v.* Strong, 230 Ill. 58, 82 N. E. 335 [*affirming* 129 Ill. App. 511].

Michigan.— Mertz *v.* Detroit Electric R. Co., 125 Mich. 11, 83 N. W. 1036.

Missouri.— Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848, peremptory instruction for defendant held properly refused.

New York.— Handy *v.* Metropolitan St. R. Co., 70 N. Y. App. Div. 26, 74 N. Y. Suppl. 1079.

Wisconsin.— Will *v.* West Side R. Co., 84 Wis. 42, 54 N. W. 30.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254. See also *supra*, X, B, 9, g, (II).

71. Consumers' Electric Light, etc., R. Co. *v.* Pryor, 44 Fla. 354, 32 So. 797; Baltimore Consol. R. Co. *v.* Rifcowitz, 89 Md. 338, 43 Atl. 762; Manahan *v.* Steinway, etc., R. Co., 125 N. Y. 760, 26 N. E. 736; Csatlos *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 620, 87 N. Y. Suppl. 302; Goldschmidt *v.* Metropolitan Crosstown R. Co., 1 N. Y. App. Div. 309, 37 N. Y. Suppl. 299; Small *v.* Pittsburg R. Co., 216 Pa. St. 584, 66 Atl. 76; McKee *v.* Harrisburg Traction Co., 211 Pa. St. 47, 60 Atl. 498; Thomas *v.* Citizens' Pass. R. Co., 132 Pa. St. 504, 19 Atl. 286; Hazel *v.* People's Pass. R. Co., 132 Pa. St. 96, 18 Atl. 1116; Philadelphia Traction Co. *v.* Bernheimer, 125 Pa. St. 615, 17 Atl. 477

72. Rose *v.* Alcott, (N. J. 1909) 72 Atl. 67.

73. Winterfield *v.* Second Ave. R. Co., 20 N. Y. Suppl. 801 [*affirmed* in 143 N. Y. 680, 39 N. E. 495].

74. Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032.

75. *Missouri.*— Koenig *v.* Union Depot R. Co., 194 Mo. 564, 92 S. W. 497; Hedges *v.* Metropolitan St. R. Co., 125 Mo. App. 583, 102 S. W. 1086.

or bicycle rider,[76] or person working on the tracks or street;[77] or in running into an animal,[78] or vehicle on or along the tracks;[79] or whether or not it was guilty of negligence in running into and injuring a person or vehicle crossing the tracks,[80] from behind a passing or standing car or vehicle,[81] as whether or not the car which

New Hampshire.— Carney *v.* Concord St. R. Co., 72 N. H. 364, 57 Atl. 218.

New York.— Dempsey *v.* Brooklyn Heights R. Co., 98 N. Y. App. Div. 182, 90 N. Y. Suppl. 639; Larkin *v.* United Traction Co., 76 N. Y. App. Div. 238, 78 N. Y. Suppl. 538; Gumby *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 38, 72 N. Y. Suppl. 551 [*affirmed* in 171 N. Y. 635, 63 N. E. 1117].

Oregon.— Wallace *v.* Suburban R. Co., 26 Oreg. 174, 37 Pac. 477, 25 L. R. A. 663.

Pennsylvania.— Walbridge *v.* Schuylkill Electric R. Co., 190 Pa. St. 274, 42 Atl. 689; Citizens' Pass. R. Co. *v.* Foxley, 107 Pa. St. 537; Beard *v.* Reading City Pass. R. Co., 3 Pa. Super. Ct. 171, 39 Wkly. Notes Cas. 356.

Washington.— Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341.

Wisconsin.— Dahl *v.* Milwaukee City R. Co., 62 Wis. 652, 22 N. W. 755.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

76. Rawitzer *v.* St. Paul City R. Co., 93 Minn. 84, 100 N. W. 664, 94 Minn. 494, 103 N. W. 499.

77. Wells *v.* Brooklyn Heights R. Co., 67 N. Y. App. Div. 212, 74 N. Y. Suppl. 196 [*affirming* 34 Misc. 44, 68 N. Y. Suppl. 305]; Burns *v.* Second Ave. R. Co., 21 N. Y. App. Div. 521, 48 N. Y. Suppl. 523.

78. Georgia R., etc., Co. *v.* Blacknall, 122 Ga. 310, 50 S. E. 92 (plaintiff's horse); Laronde *v.* Boston, etc., R. Co., 73 N. H. 247, 60 Atl. 684; Craft *v.* Peekskill Lighting, etc., Co., 128 N. Y. App. Div. 878, 113 N. Y. Suppl. 235 (colliding with cow); Greeley *v.* Federal St., etc., Pass. R. Co., 153 Pa. St. 218, 25 Atl. 796.

79. *Alabama.*— Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166.

Arkansas.— Hot Springs St. R. Co. *v.* Charlton, (1905) 88 S. W. 1006.

Illinois.— Chicago City R. Co. *v.* Gemmill, 209 Ill. 638, 71 N. E. 43.

Maryland.— United R., etc., Co. *v.* Seymour, 92 Md. 425, 48 Atl. 850.

Massachusetts.— Chadbourne *v.* Springfield St. R. Co., 199 Mass. 574, 85 N. E. 737 (on bridge); Stubbs *v.* Boston, etc., St. R. Co., 193 Mass. 513, 79 N. E. 795.

Michigan.— Mertz *v.* Detroit Electric R. Co., 125 Mich. 11, 83 N. W. 1036.

Mississippi.— White *v.* Vicksburg R., etc., Co., (1902) 31 So. 709.

Missouri.— White *v.* St. Louis, etc., R. Co., 202 Mo. 539, 101 S. W. 14; Beier *v.* St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876; Rapp *v.* St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865; Winn *v.* Metropolitan St. R. Co., 121 Mo. App. 623, 97 S. W. 547; Schaub *v.* St. Louis Transit Co., 112 Mo. App. 529, 87 S. W. 85.

New Jersey.— Ball *v.* Camden, etc., R. Co., 76 N. J. L. 539, 72 Atl. 76.

New York.— Pritchard *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 269, 85 N. Y. Suppl. 898; Strauss *v.* Brooklyn Heights R. Co., 85 N. Y. App. Div. 613, 82 N. Y. Suppl. 767; Blum *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 611, 80 N. Y. Suppl. 157; Connor *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 384, 79 N. Y. Suppl. 294 (injury to person riding on the rear of vehicle collided with); McCann *v.* New York, etc., R. Co., 56 N. Y. App. Div. 419, 67 N. Y. Suppl. 748; Ward *v.* New York, etc., R. Co., 79 Hun 390, 29 N. Y. Suppl. 784; Leonard *v.* Joline, 61 Misc. 336, 113 N. Y. Suppl. 682; Doctoroff *v.* Metropolitan St. R. Co., 55 Misc. 216, 105 N. Y. Suppl. 229 (injury to person riding on rear end of truck); Foley *v.* Forty-Second St., etc., R. Co., 49 Misc. 649, 97 N. Y. Suppl. 958; Central Brewing Co. *v.* New York City R. Co., 49 Misc. 523, 97 N. Y. Suppl. 1025; Mullen *v.* Central Park, etc., R. Co., 1 Misc. 216, 21 N. Y. Suppl. 101; Lehman *v.* New York City R. Co., 107 N. Y. Suppl. 561.

Pennsylvania.— Conlon *v.* Pittsburg R. Co., 223 Pa. St. 101, 72 Atl. 233; Vincent *v.* Lehigh Valley Transit Co., 220 Pa. St. 350, 69 Atl. 812; Barto *v.* Beaver Valley Traction Co., 216 Pa. St. 328, 65 Atl. 792, 116 Am. St. Rep. 770; Mortimer *v.* Beaver Valley Traction Co., 216 Pa. St. 326, 65 Atl. 758; Sturgeon *v.* Beaver Valley Traction Co., 216 Pa. St. 322, 65 Atl. 757; Fenner *v.* Wilkes-Barre, etc., Traction Co., 202 Pa. St. 365, 51 Atl. 1034; Campbell *v.* Consolidated Traction Co., 201 Pa. St. 167, 50 Atl. 829; Barnes *v.* Pittsburg R. Co., 26 Pa. Super. Ct. 36; Kissock *v.* Consolidated Traction Co., 15 Pa. Super. Ct. 103 [*affirmed* in 201 Pa. St. 167, 50 Atl. 829], backing car.

Wisconsin.— Little *v.* Superior Rapid Transit R. Co., 88 Wis. 402, 60 N. W. 705.

80. *California.*— Kramm *v.* Stockton Electric R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

Illinois.— Chicago, etc., Electric R. Co. *v.* Wanic, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167 [*affirming* 132 Ill. App. 477]; Smith *v.* Chicago City R. Co., 107 Ill. App. 177.

Kentucky.— Louisville R. Co. *v.* Knocke, (1909) 117 S. W. 271.

Maryland.— United R., etc., Co. *v.* Watkins, 102 Md. 264, 62 Atl. 234.

New York.— Faurot *v.* Brooklyn Heights R. Co., 14 Misc. 398, 35 N. Y. Suppl. 1046.

Pennsylvania.— Rauscher *v.* Philadelphia Traction Co., 176 Pa. St. 349, 35 Atl. 138.

Washington.— Burian *v.* Seattle Electric Co., 26 Wash. 606, 67 Pac. 214.

81. *Illinois.*— Chicago City R. Co. *v.* Fennimore, 199 Ill. 9, 64 N. E. 985 [*affirming* 99 Ill. App. 174].

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887.

New Jersey.— Consolidated Traction Co. *v.*

caused the injury was under the circumstances run with proper care and precaution at or approaching a public crossing.[82] It is also ordinarily a question for the jury whether or not defendant's employee exercised proper care in ordering or frightening a child off of his car.[83]

(iv) *Negligence in Equipment of Car.* It is ordinarily a question for the jury as to whether or not the street railroad company was negligent in regard to the equipment of the car which caused the injury,[84] as whether it was properly equipped with appliances for controlling or stopping it,[85] or whether it was negligence to operate the car without a fender.[86]

Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122.

New York.— Reed *v.* Metropolitan St. R. Co., 87 N. Y. App. Div. 427, 84 N. Y. Suppl. 454 [*reversed* on other grounds in 180 N. Y. 315, 73 N. E. 41]; Cohen *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 165, 71 N. Y. Suppl. 268 [*affirmed* in 170 N. Y. 588, 63 N. E. 1116]; Dobert *v.* Troy City R. Co., 91 Hun 28, 36 N. Y. Suppl. 105; Tupper *v.* Metropolitan St. R. Co., 36 Misc. 819, 74 N. Y. Suppl. 868.

Wisconsin.— Forrestal *v.* Milwaukee Electric R., etc., Co., 119 Wis. 495, 97 N. W. 182.

82. *California.*— Kernan *v.* Market St. R. Co., 137 Cal. 326, 70 Pac. 81, at crossing a short distance from the scene of the accident.

Illinois.— Chicago City R. Co. *v.* Fennimore, 199 Ill. 9, 64 N. E. 985 [*affirming* 99 Ill. App. 174].

Iowa.— Patterson *v.* Townsend, 91 Iowa 725, 59 N. W. 205.

Michigan.— Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186, collision with train at crossing.

Minnesota.— Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; Reed *v.* Minneapolis St. R. Co., 34 Minn. 557, 27 N. W. 77.

Missouri.— McLain *v.* St. Louis, etc., R. Co., 100 Mo. App. 374, 73 S. W. 909, collision with car of another company at a crossing.

New Jersey.— Migans *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 535, 70 Atl. 168; Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122.

New York.— Manzella *v.* Rochester R. Co., 105 N. Y. App. Div. 12, 93 N. Y. Suppl. 457; Mulligan *v.* Third Ave. R. Co., 87 N. Y. App. Div. 320, 84 N. Y. Suppl. 366 [*affirmed* in 180 N. Y. 552, 73 N. E. 1127]; Freeman *v.* Brooklyn Heights R. Co., 87 N. Y. App. Div. 127, 84 N. Y. Suppl. 108; Andres *v.* Brooklyn Heights R. Co., 84 N. Y. App. Div. 596, 82 N. Y. Suppl. 729; Cohen *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 165, 71 N. Y. Suppl. 268 [*affirmed* in 170 N. Y. 588, 63 N. E. 1116]; Zimmerman *v.* Union R. Co., 3 N. Y. App. Div. 219, 38 N. Y. Suppl. 362; Dobert *v.* Troy City R. Co., 91 Hun 28, 36 N. Y. Suppl. 105; Bernhard *v.* Rochester R. Co., 68 Hun 369, 22 N. Y. Suppl. 821; Muller *v.* New York City R. Co., 51 Misc. 640, 101 N. Y. Suppl. 98; Tupper *v.* Metropolitan St. R. Co., 36 Misc. 819, 74 N. Y. Suppl. 868; Schulman *v.* Houston, etc., Ferry R. Co., 15 Misc. 30, 36 N. Y. Suppl. 439; Degnan *v.* Brooklyn City R. Co., 14 Misc. 388, 35 N. Y. Suppl. 1047.

Oregon.— Wallace *v.* Suburban R. Co., 26 Oreg. 174, 37 Pac. 477, 25 L. R. A. 663; Hedin *v.* Suburban R. Co., 26 Oreg. 155, 37 Pac. 540.

Pennsylvania.— Wright *v.* Pittsburg R. Co., 223 Pa. St. 268, 72 Atl. 347; Emmel *v.* Pittsburg R. Co., 216 Pa. St. 541, 65 Atl. 1083; Boggs *v.* Pittsburg, etc., R. Co., 216 Pa. St. 314, 65 Atl. 535; Dunseath *v.* Pittsburg, etc., Traction Co., 161 Pa. St. 124, 28 Atl. 1021; Raulston *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 412; West Philadelphia Pass. R. Co. *v.* Mulhair, 6 Wkly. Notes Cas. 508.

Washington.— Roberts *v.* Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

Wisconsin.— Forrestal *v.* Milwaukee Electric R., etc., Co., 119 Wis. 495, 97 N. W. 182.

United States.— Denver City Tramway Co. *v.* Norton, 141 Fed. 599, 73 C. C. A. 1.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

83. Goldstein *v.* People's R. Co., 5 Pennew. (Del.) 306, 60 Atl. 975; Hestonville Pass. R. Co *v.* Grey, 1 Walk. (Pa.) 513; Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

84. James *v.* Interstate Consol. St. R. Co., 193 Mass. 264, 79 N. E. 264.

85. Chicago City R. Co. *v.* Mager, 185 Ill. 336, 56 N. E. 1058 [*affirming* 85 Ill. App. 524]; Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341; Atlantic Ave. R. Co. *v.* Van Dyke, 72 Fed. 458, 18 C. C. A. 632, lack of sand box.

Sand on car.— It is for the jury to say whether it was negligence not to have had sand on an electric car, for stopping in emergencies, although it was a season when the rails were dry and dusty, where the evidence shows that the streets had been sprinkled shortly before the accident, and that the rails were slippery with thin mud; that in such cases the wheels of the car will slide, making it very difficult to stop; and that if there had been sand on the car it could have been stopped more easily than it was. Penny *v.* Rochester R. Co., 7 N. Y. App. Div. 595, 40 N. Y. Suppl. 172 [*affirmed* in 154 N. Y. 770, 49 N. E. 1101].

86. Lonisville, etc., Traction Co. *v.* Short, 41 Ind. App. 570, 83 N. E. 265; Henderson *v.* Durham Traction Co., 132 N. C. 779, 44 S. E. 598.

(v) *Vigilance of Persons in Charge of Car.* Whether or not the servants in charge of the car which caused the injury exercised the proper degree of care, under the circumstances existing at the time and place of the accident, in looking out for persons, animals, or vehicles in peril on or near the tracks,[87] as at a street,[88] or railroad crossing,[89] and whether or not under the circumstances the peril to the person, animal, or vehicle was discovered,[90] or by ordinary care should have been discovered in time, by due care, to stop the car or otherwise avoid the accident, and hence whether or not there was negligence in this respect,[91]

87. *Kentucky.*—Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484.

Michigan.— Harker *v.* Detroit United R. Co., 150 Mich. 697, 114 N. W. 657, failure to discover that team was without a driver.

Missouri.— Hovarka *v.* St. Louis Transit Co., 191 Mo. 441, 90 S. W. 1142 (holding that the question of defendant's negligence in failing to keep a vigilant lookout as required by ordinance was under the evidence for the jury); Senn *v.* Southern R. Co., 108 Mo. 142, 18 S. W. 1007; McNamara *v.* Metropolitan St. R. Co., 133 Mo. App. 645, 114 S. W. 50; Hall *v.* St. Louis, etc., R. Co., 124 Mo. App. 661, 101 S. W. 1137.

New Jersey.— Markl *v.* Jersey City, etc., St. R. Co., 75 N. J. L. 654, 68 Atl. 74.

New York.— Bortz *v.* Dry Dock, etc., R. Co., 78 N. Y. App. Div. 386, 79 N. Y. Suppl. 1046; Sciurba *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 170, N. Y. Suppl. 772 (holding that whether or not a motorman of a street car was negligent in turning his face away from the front of the car was a question for the jury); Wells *v.* Brooklyn City R. Co., 58 Hun 389, 12 N. Y. Suppl. 67; Jones *v.* Brooklyn Heights R. Co., 10 Misc. 543, 31 N. Y. Suppl. 445; Wright *v.* Third Ave. R. Co., 5 N. Y. Suppl. 707.

Pennsylvania.— Evers *v.* Philadelphia Traction Co., 176 Pa. St. 376, 35 Atl. 140, 53 Am. St. Rep. 674; Reilley *v.* Philadelphia Traction Co., 176 Pa. St. 335, 35 Atl. 133 (attention diverted from track); Harkins *v.* Pittsburg, etc., Traction Co., 173 Pa. St. 149, 33 Atl. 1045; Karahuta *v.* Schuylkill Traction Co., 6 Pa. Super. Ct. 319; Buente *v.* Pittsburg, etc., Traction Co., 2 Pa. Super. Ct. 185; Henne *v.* People's St. R. Co., 1 Pa. Super. Ct. 311, 38 Wkly. Notes Cas. 275.

Texas.— San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64; Dallas Consol. Traction R. Co. *v.* Hurley, 10 Tex. Civ. App. 246, 31 S. W. 73, holding that where it is specially pleaded and proved that the charter of a city requires the drivers of street cars to keep a vigilant watch for persons on the track or moving toward it, it is proper to submit to the jury the question whether the driver complied with the charter.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

Trespasser.—Whether the locality and surrounding circumstances were such as to make it the duty of defendant's employees to keep a lookout for a trespasser on the track is a question for the jury. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177.

88. Bernhard *v.* Rochester R. Co., 68 Hun (N. Y.) 369, 22 N. Y. Suppl. 821.

89. Threlkeld *v.* Wabash R. Co., 68 Mo. App. 127, holding that it is a question for the jury whether the motorman on an electric car, who looked and listened at the first point where his view of the railroad track was unobstructed, about ninety-seven feet from the crossing, was negligent in not looking again when he turned off the power for the purpose of making the crossing within twenty or thirty feet of the track, in view of the fact that the watchman of the railroad company had not lowered the gates.

90. Randle *v.* Birmingham R., etc., Co., 158 Ala. 532, 48 So. 114; Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177; Wise *v.* St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Jett *v.* Central Electric R. Co., 178 Mo. 664, 77 S. W. 738; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600, 88 S. W. 144; Kaplan *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 133, 90 N. Y. Suppl. 585.

91. *Kentucky.*—Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484.

Maryland.— Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859.

Massachusetts.— Burns *v.* Worcester Consol. St. R. Co., 193 Mass. 63, 78 N. E. 740.

Michigan.— Boettcher *v.* Detroit Citizens' St. R. Co., 131 Mich. 295, 91 N. W. 125.

Minnesota.— Warren *v.* Mendenhall, 77 Minn. 145, 79 N. W. 661 (collision with fire truck); Anderson *v.* Minneapolis St. R. Co., 42 Minn. 490, 44 N. W. 518, 18 Am. St. Rep. 525.

Missouri.— Felver *v.* Central Electric R. Co., 216 Mo. 195, 115 S. W. 980; Wise *v.* St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; McGauley *v.* St. Louis Transit Co., 179 Mo. 583, 79 S. W. 461; Jett *v.* Central Electric R. Co., 178 Mo. 664, 77 S. W. 738; Rosenkranz *v.* Lindell R. Co., 108 Mo. 9, 18 S. W. 890, 32 Am. St. Rep. 588; Brown *v.* St. Louis, etc., R. Co., 127 Mo. App. 499, 106 S. W. 83; Kimble *v.* St. Louis, etc., R. Co., 108 Mo. App. 78, 82 S. W. 1096; Jersey Farm Dairy Co. *v.* St. Louis Transit Co., 103 Mo. App. 90, 77 S. W. 346; Priesmeyer *v.* St. Louis Transit Co., 102 Mo. App. 518, 77 S. W. 313.

New York.— Kaplan *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 133, 90 N. Y. Suppl. 585; Griffiths *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 86, 71 N. Y. Suppl. 406 [*reversing* 32 Misc. 289, 66 N. Y. Suppl. 801, and *reversed* on other grounds in 171 N. Y. 106, 63 N. E. 808];

are ordinarily questions of fact for the jury to determine. It is also ordinarily a question for the jury as to whether it is actionable negligence for the conductor of a car to fail to promptly notify the motorman of the danger to a person or animal on or near the track, which the conductor has discovered.[92]

(VI) *Precautions on Approaching Persons On or Near Track.* In accordance with the rules stated above,[93] where the facts are disputed or if undisputed are such that fair-minded persons might arrive at different conclusions therefrom it is a question for the jury as to whether or not the person or vehicle injured by the operation of a car was in a position of peril on or near the tracks, when discovered, or should have been discovered, by the driver or motorman of the car which caused the injury,[94] and whether such driver or motorman could have avoided the accident after he discovered or should have discovered such peril,[95] and hence whether or not he thereafter used all reasonable means within his power to avoid the injury, or was guilty of negligence in this respect,[96] as

Gildea *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 528, 69 N. Y. Suppl. 568 [*affirmed* in 171 N. Y. 660, 64 N. E. 1121]; Finkelstein *v.* Brooklyn Heights R. Co., 51 N. Y. App. Div. 287, 64 N. Y. Suppl. 915; McGuire *v.* Third Ave. R. Co., 9 N. Y. App. Div. 529, 41 N. Y. Suppl. 577; Coghlan *v.* Third Ave. R. Co., 7 N. Y. App. Div. 124, 39 N. Y. Suppl. 1098; Block *v.* Harlem Bridge, etc., R. Co., 55 Hun 607, 9 N. Y. Suppl. 164; Dowd *v.* Brooklyn Heights R. Co., 9 Misc. 279, 29 N. Y. Suppl. 745 [*affirmed* in 12 Misc. 647, 33 N. Y. Suppl. 1127]; Keenan *v.* Brooklyn City R. Co., 8 Misc. 601, 29 N. Y. Suppl. 325 [*reversed* on other grounds in 145 N. Y. 348, 40 N. E. 15]; Mason *v.* Atlantic Ave. R. Co., 4 Misc. 291, 24 N. Y. Suppl. 139 [*affirmed* in 140 N. Y. 657, 35 N. E. 892].

Pennsylvania.— Davis *v.* Westmoreland County R. Co., 222 Pa. St. 356, 71 Atl. 538 (holding that where a motorman sees a child running parallel to the tracks, so that a step or two might bring her upon them, the danger to such child is not so imminent as to excuse him for failing to see another child, about two years old, in dangerous proximity to the tracks; and the question of his negligence is for the jury); Nolder *v.* McKeesport, etc., R. Co., 201 Pa. St. 169, 50 Atl. 948; Kroesen *v.* New Castle Electric St. R. Co., 198 Pa. St. 26, 47 Atl. 850; Johnson *v.* Reading City Pass. R. Co., 160 Pa. St. 647, 28 Atl. 1001, 40 Am. St. Rep. 752; Schnur *v.* Citizens' Traction Co., 153 Pa. St. 29, 25 Atl. 650, 34 Am. St. Rep. 680; Distasio *v.* United Traction Co., 35 Pa. Super. Ct. 406.

Texas.— San Antonio St. R. Co. *v.* Cailloutte, 79 Tex. 341, 15 S. W. 390.

Washington.— Baldie *v.* Tacoma R., etc., Co., 52 Wash. 75, 100 Pac. 162.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

Evidence held insufficient to justify submission of the case on the ground that defendant's servants saw, or might have seen, plaintiff in a position of danger in time to have prevented the injury see Reno *v.* St. Louis, etc., R. Co., 180 Mo. 469, 79 S. W. 464.

92. Carey *v.* Milford, etc., R. Co., 193 Mass. 161, 78 N. E. 1001.

93. See *supra*, X, B, 9, g, (II).

94. Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93 (whether the position of the person injured walking beside the track was obviously dangerous when seen by the motorman); Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032 (whether the motorman had the right to assume that the person injured was not going upon the track); Floyd *v.* Paducah R., etc., Co., 64 S. W. 653, 23 Ky. L. Rep. 1077.

Whether a person standing on a street car track, with his back toward the car, presented "an appearance of danger," within the regulations of a board of aldermen, providing that the driver of a street car should, "on appearance of danger," stop the car, is for the jury, and not for the court. Doyle *v.* West End St. R. Co., 161 Mass. 533, 37 N. E. 741.

95. Indianapolis St. R. Co. *v.* Hackney, 39 Ind. App. 372, 77 N. E. 1048; Cross *v.* St. Louis Transit Co., 120 Mo. App. 458, 97 S. W. 183; Barrie *v.* St. Louis Transit Co., 119 Mo. App. 38, 96 S. W. 233; Moritz *v.* St. Louis Transit Co., 102 Mo. App. 657, 77 S. W. 477. See also *supra*, X, B, 9, g, (V).

96. *Alabama.*— Randle *v.* Birmingham R., etc., Co., 158 Ala. 532, 48 So. 114; Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177.

Illinois.— O'Leary *v.* Chicago City R. Co., 235 Ill. 187, 85 N. E. 233 [*affirming* 136 Ill. App. 239]; North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812 [*affirming* 105 Ill. App. 314] (running into vehicle turning off the track); North Chicago St. R. Co. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077 [*reversing* 104 Ill. App. 150]; Chicago City R. Co *v.* Sandusky, 198 Ill. 400, 64 N. E. 990 [*affirming* 99 Ill. App. 164].

Iowa.— Barry *v.* Burlington R., etc., Co., 119 Iowa 62, 93 N. W. 68, 95 N. W. 229.

Maryland.— Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859.

Minnesota.— Weissner *v.* St. Paul City R. Co., 47 Minn. 468, 50 N. W. 606.

Missouri.— Waddell *v.* Metropolitan St. R. Co., 213 Mo. 8, 111 S. W. 542; Hicks *v.* Citizens' R. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508 (running into vehicle turning off the track); Dahmer *v.* Metropolitan St.

whether he thereafter used all proper care and precaution to give a timely warning of the car's approach,[97] or to slacken or control its speed,[98] or if necessary to stop it,[99] in time to avoid the injury. Where, however, the evidence is legally

R. Co., 136 Mo. App. 443, 118 S. W. 496; Funck *v.* Metropolitan St. R. Co., 133 Mo. App. 419, 113 S. W. 694; Bensiek *v.* St. Louis Transit Co., 125 Mo. App. 121, 102 S. W. 587; Cooney *v.* Southern Electric R. Co., 80 Mo. App. 226.

New Jersey.— Fogarty *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 459, 69 Atl. 964.

New York.— Lawson *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 307, 57 N. Y. Suppl. 997 [*affirmed* in 166 N. Y. 589, 59 N. E. 1124]; Reilly *v.* Troy City R. Co., 32 N. Y. App. Div. 131, 52 N. Y. Suppl. 611; Howell *v.* Rochester R. Co., 24 N. Y. App. Div. 502, 49 N. Y. Suppl. 17; Schron *v.* Staten Island Electric R. Co., 16 N. Y. App. Div. 111, 45 N. Y. Suppl. 124; O'Malley *v.* Metropolitan St. R. Co., 3 N. Y. App. Div. 259, 38 N. Y. Suppl. 456 [*affirmed* in 158 N. Y. 674, 52 N. E. 1125] (holding that where a wagon is struck while turning out to allow a car, approaching from the rear, to pass, there is sufficient evidence of negligence to go to the jury); Brown *v.* Twenty-Third St. R. Co., 56 N. Y. Super. Ct. 356, 4 N. Y. Suppl. 192 [*affirmed* in 121 N. Y. 667, 24 N. E. 1094]; Mallard *v.* Ninth Ave. R. Co., 15 Daly 376, 7 N. Y. Suppl. 666; Simpson *v.* Brooklyn Heights R. Co., 14 Misc. 645, 35 N. Y. Suppl. 674 [*affirmed* in 157 N. Y. 682, 51 N. E. 1094]; Witte *v.* Brooklyn City R. Co., 4 Misc. 286, 23 N. Y. Suppl. 1028 [*affirmed* in 143 N. Y. 667, 39 N. E. 22]; Quinn *v.* Atlantic Ave. R. Co., 12 N. Y. Suppl. 223 [*affirmed* in 134 N. Y. 611, 31 N. E. 629].

Pennsylvania.— Woeckner *v.* Erie Electric Motor Co., 176 Pa. St. 451, 35 Atl. 182; Keile *v.* Kahn, 30 Pa. Super. Ct. 416.

Texas.— San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64.

Wisconsin.— Willis *v.* Ashland Light, etc., St. R. Co., 108 Wis. 255, 84 N. W. 998.

See 44 Cent. Dig. tit. "Street Railroads," § 253.

Whether a motorman is negligent in becoming spellbound with fear on the discovery of the danger to a person is a question for the jury under the circumstances. Barry *v.* Burlington R., etc., Co., 119 Iowa 62, 93 N. W. 68, 95 N. W. 229.

97. Eddy *v.* Cedar Rapids, etc., R. Co., 98 Iowa 626, 67 N. W. 676 (holding that whether a motorman is guilty of negligence in assuming that a laborer on the street, not so near the track as to be in danger of being struck by the car, does not require a signal to keep him from putting himself in a place of danger, is for the jury); McGauley *v.* St. Louis Transit Co., 179 Mo. 583, 79 S. W. 461; McNamara *v.* Metropolitan St. R. Co., 133 Mo. App. 645, 114 S. W. 50; San Antonio Traction Co. *v.* Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64; Baldie *v.* Tacoma R., etc., Co., 52 Wash. 75, 100 Pac. 162. See also *infra*, X, B, 9, g, (VIII).

98. *Illinois.*— North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812 [*affirming* 105 Ill. App. 314].

Kentucky.— Louisville R. Co. *v.* Walker, 94 S. W. 635, 29 Ky. L. Rep. 663, peremptory instruction for defendant properly refused.

Massachusetts.— Driscoll *v.* West End St. R. Co., 159 Mass. 142, 34 N. E. 171.

Michigan.— Westphal *v.* St. Joseph, etc., St. R. Co., 134 Mich. 239, 96 N. W. 19.

Missouri.— Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 12 S. W. 891; Hall *v.* St. Louis, etc., R. Co., 124 Mo. App. 661, 101 S. W. 1137.

New York.— Brennan *v.* Metropolitan St. R. Co., 60 N. Y. App. Div. 264, 69 N. Y. Suppl. 1025; Duffy *v.* Interurban St. R. Co., 52 Misc. 177, 101 N. Y. Suppl. 767; Reilly *v.* Third Ave. R. Co., 16 Misc. 11, 37 N. Y. Suppl. 593.

Pennsylvania.— Oster *v.* Schuylkill Traction Co., 195 Pa. St. 320, 45 Atl. 1006; Thompson *v.* United Traction Co., 193 Pa. St. 555, 44 Atl. 558.

United States.— McDermott *v.* Severe, 202 U. S. 600, 26 S. Ct. 709, 50 L. ed. 1162 [*affirming* 25 App. Cas. (D. C.) 276].

See 44 Cent. Dig. tit. "Street Railroads," § 253.

99. *Indiana.*— Indianapolis St. R. Co. *v.* Hackney, 39 Ind. App. 372, 77 N. E. 1048.

Kentucky.— Thiel *v.* South Covington, etc., St. R. Co., 78 S. W. 206, 25 Ky. L. Rep. 1590, peremptory instruction for defendant held erroneous.

Massachusetts.— O'Leary *v.* Brockton St. R. Co., 177 Mass. 187, 58 N. E. 585, holding that where the motorman testifies that he had control of the car, and saw the carriage at the side of the track, but did not stop, because he thought there was room to pass, the question whether he was negligent in reaching such conclusion and acting thereon is for the jury.

Michigan.— Harker *v.* Detroit United R. Co., 150 Mich. 697, 114 N. W. 657; Boettcher *v.* Detroit Citizens' St. R. Co., 131 Mich. 295, 91 N. W. 125; Bush *v.* St. Joseph, etc., St. R. Co., 113 Mich. 513, 71 N. W. 851.

Minnesota.— Mason *v.* Minneapolis St. R. Co., 54 Minn. 216, 55 N. W. 1122.

Missouri.— Meeker *v.* Metropolitan St. R. Co., 178 Mo. 173, 77 S. W. 58; Farris *v.* Cass Ave., etc., R. Co., 80 Mo. 325; McNamara *v.* Metropolitan St. R. Co., 133 Mo. App. 645, 114 S. W. 50; Burleigh *v.* St. Louis Transit Co., 124 Mo. App. 724, 102 S. W. 621 (colliding with fire truck); Cross *v.* St. Louis Transit Co., 120 Mo. App. 458, 97 S. W. 183; Waddell *v.* Metropolitan St. R. Co., 113 Mo. App. 680, 88 S. W. 765; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Sheehan *v.* Citizens'

insufficient to go to the jury, or where the facts are undisputed and the inferences therefrom clear, such questions should not be submitted to the jury;[1] but the court should dispose of them by granting or directing a nonsuit, or verdict for defendant.[2]

(VII) *RATE OF SPEED AND CONTROL OF CAR.* It is ordinarily a question for the jury under the existing circumstances, as to whether or not the car which caused the injury was under proper control at the time and place of the accident,[3] or whether it was running at an excessive or unlawful rate of speed,[4] such as at a rate in excess of that prescribed by statute or ordinance,[5] or at a rate inconsistent with the customary use of the street by others,[6] or whether or not the rate of speed at which it was running constituted negligence under the circumstances existing at the particular time and place,[7] such as at or approaching a

R. Co., 72 Mo. App. 524 (nonsuit properly refused).

New Jersey.— Zolpher *v.* Camden, etc., R. Co., 69 N. J. L. 417, 55 Atl. 249, holding that if the distance between the car and the vehicle collided with is in dispute, the existence of negligence is a question for the jury, unless the distance is in any view of the evidence so small that the motorman could not stop a car running at a reasonable rate of speed.

New York.— Freeman *v.* Brooklyn Heights R. Co., 87 N. Y. App. Div. 127, 84 N. Y. Suppl. 108; Green *v.* Metropolitan St. R. Co., 42 N. Y. App. Div. 160, 58 N. Y. Suppl. 1039; Smith *v.* Metropolitan St. R. Co., 7 N. Y. App. Div. 253, 40 N. Y. Suppl. 148; Coghlan *v.* Third Ave. R. Co., 7 N. Y. App. Div 124, 39 N. Y. Suppl. 1098; Strauss *v.* Newburgh Electric R. Co., 6 N Y. App. Div. 264, 39 N. Y. Suppl. 998; Tholen *v.* Brooklyn City R. Co., 10 Misc. 283, 30 N. Y. Suppl. 1081 [*affirmed* in 151 N. Y. 627, 45 N. E. 1134]; Timony *v.* Brooklyn City, etc., R. Co., 10 Misc. 261, 30 N. Y. Suppl. 1071 [*affirmed* in 145 N. Y. 648, 41 N. E. 90]; Walsh *v.* Manhattan R. Co., 8 Misc. 1, 28 N. Y. Suppl. 72; Dorman *v.* Broadway R. Co., 1 N. Y. Suppl. 334, 5 N. Y. Suppl. 769 [*reversed* on other grounds in 117 N. Y. 655, 23 N. E. 162].

North Carolina.— Wright *v.* Fries Mfg., etc., Co., 147 N. C. 534, 61 S. E. 380.

Ohio.— Toledo Consol. St R. Co. *v.* Rohner, 9 Ohio Cir. Ct. 702, 6 Ohio Cir. Dec. 706.

Pennsylvania.— Thompson *v.* United Traction Co., 193 Pa. St. 555, 44 Atl. 558; Lenkner *v.* Citizens' Traction Co., 179 Pa. St. 486, 36 Atl. 228; Thatcher *v.* Central Traction Co., 166 Pa. St. 66, 30 Atl. 1048, 45 Am. St. Rep. 645; Philadelphia City Pass R. Co. *v.* Henrice, 92 Pa. St. 431, 37 Am. Rep. 699; Byrne *v.* Montgomery, etc., Electric R. Co., 19 Pa Super. Ct. 531.

Wisconsin.— Ryan *v.* La Crosse City R. Co., 108 Wis. 122, 83 N. W. 770.

See 44 Cent. Dig. tit. "Street Railroads," § 253.

1. Randle *v.* Birmingham R., etc., Co., 158 Ala. 532, 48 So 114; Zurfluh *v.* People's R. Co., 46 Mo. App. 636 (holding that where in an action for damages on the theory that defendant's gripman could have stopped the car in time to avert the injury after he saw, or by the exercise of ordinary diligence could have seen, the perilous position of plaintiff, there is no evidence of the space within which the car could have been stopped, or as to the distance of plaintiff from the car when his peril could first have been observed, it is error to submit the case to the jury); Thomas *v.* Citizens' Pass. R. Co., 132 Pa. St. 504, 19 Atl. 286.

2. Ellerman *v.* St. Louis Transit Co., 102 Mo. App. 295, 76 S. W. 661 (holding that where it appeared from all the evidence that the motorman, on discovering plaintiff's peril, used every means at his command to stop the car and avoid a collision, but that, owing to the rails being in a wet and slippery condition, it was impossible to stop the car, an instruction for defendant should have been given); Oster *v.* Schuylkill Traction Co., 195 Pa. St. 320, 45 Atl. 1006.

3. Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239 (whether neglected to slacken speed on approaching a crossing); Migans *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 535, 70 Atl. 168; Conrad *v.* Elizabeth, etc., R. Co., 70 N. J. L. 676, 58 Atl. 376; Sesselmann *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 336, 78 N. Y. Suppl 482; Hoyt *v.* Metropolitan St R. Co., 73 N. Y. App. Div. 249, 76 N. Y. Suppl. 832 [*affirmed* in 175 N. Y 502, 67 N. E. 1083] (at crossing). See also *supra*, X, B, 9, g, (VI).

4. Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239; Merkl *v.* Jersey City, etc., St. R. Co., 75 N. J. L. 654, 68 Atl. 74; Hawkins *v.* Media, etc., Electric R. Co., 25 Pa. Super. Ct. 450; Davis *v.* Media, etc., Electric R. Co., 25 Pa. Super. Ct. 444.

The court cannot determine, as a matter of law, that a speed of two and a half miles an hour is not excessive for a street car with defective appliances for control, when passing at a street crossing another car going in the opposite direction. Roberts *v.* Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184.

5. Liddy *v.* St Louis R. Co., 40 Mo. 506.

6. Savage *v.* Chicago, etc., Electric R. Co., 238 Ill. 392, 87 N. E. 377 [*affirming* 142 Ill. App. 342].

7. *Illinois.*—West Chicago St. R. Co. *v.* Musa, 180 Ill. 130, 54 N. E. 168 (holding that where, in an action for personal injuries caused by plaintiff's wagon being struck by defendant's car, there was evidence

public crossing,[8] and if so, whether such negligence was the proximate cause of the injury.[9] But the reasonableness or unreasonableness of a statute or ordinance regulating the speed of cars on the streets is a question of law for the court to decide,[10] unless it depends in the opinion of the court upon the existence of particular facts which are in dispute.[11]

that after the wagon was struck it was carried seventy or eighty feet before the car could be stopped, and there was conflicting evidence as to the rate of speed at which the car was moving, the question whether the car was moving at a negligent rate of speed was properly left to the jury); West Chicago St. R. Co. *v.* Shiplett, 85 Ill. App. 683 (when passing another car discharging passengers).

Indiana.— Indianapolis St. R. Co. *v.* Bolin, 39 Ind. App. 169, 78 N. E. 210.

Iowa.— Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

Kansas.— Metropolitan St. R. Co. *v.* Summers, 75 Kan. 342, 89 Pac. 652, holding that it is proper to submit to the jury the question whether it is negligence for an electric car to be run upon a designated street at from twelve to fifteen miles an hour, although there is no ordinance affecting the matter, or evidence showing what speed is usual, or the extent of the business carried on at the place of the accident.

Massachusetts.— Hanley *v.* Boston El. R. Co., 201 Mass. 55, 87 N. E. 197.

Michigan.— Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404.

Missouri.— Engelman *v.* Metropolitan St. R. Co., 133 Mo. App. 514, 113 S. W. 700; American Storage, etc., Co. *v.* St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184; Kube *v.* St. Louis Transit Co., 103 Mo. App. 582, 78 S. W. 55.

New Jersey.— Dirigolano *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 505, 71 Atl. 257.

New York.— Fullerton *v.* Metropolitan St. R. Co., 37 N. Y. App. Div. 386, 55 N. Y. Suppl. 1068.

Ohio.— Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399; Toledo Consol. St. R. Co. *v.* Rohner, 9 Ohio Cir. Ct. 702, 6 Ohio Cir. Dec. 706.

Pennsylvania.— Gaughan *v.* Second Ave. Traction Co., 189 Pa. St. 408, 42 Atl. 41; Thatcher *v.* Central Traction Co., 166 Pa. St. 66, 30 Atl. 1048, 45 Am. St. Rep. 645; Jensen *v.* Philadelphia, etc., St. R. Co., 24 Pa. Super. Ct. 4; Hooper *v.* United Traction Co., 17 Pa. Super. Ct. 638; Gress *v.* Braddick, etc., St. R. Co., 14 Pa. Super. Ct. 87; Davidson *v.* Schuylkill Traction Co., 4 Pa. Super. Ct. 86; Buente *v.* Pittsburg, etc., Traction Co., 2 Pa. Super. Ct. 185.

Texas.— El Paso Electric R. Co. *v.* Tomlinson, (Civ. App. 1909) 115 S. W. 871.

Washington.— Baldie *v.* Tacoma R., etc., Co., 52 Wash. 75, 100 Pac. 162.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

Evidence held sufficient to require submission to the jury of the issue as to whether the failure to stop the car in time to avoid injury to plaintiff was due to the operation of the car at a reckless rate of speed in excess of that permitted by ordinance see Moore *v.* St. Louis Transit Co., 95 Mo. App. 728, 74 S. W. 699.

That the car was operated at an unlawful rate of speed is sufficient to take the case to the jury on the issue of negligence. Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451; Becker *v.* Cincinnati St. R. Co., 2 Ohio S. & C. Pl. Dec. 137, 1 Ohio N. P. 359; Oates *v.* Union R. Co., 27 R. I. 499, 63 Atl. 675.

Question for court.—Where plaintiff alleges that defendant was negligent in running its cars at a greater rate of speed than was permitted by an ordinance, and the evidence disproves this allegation, the court may properly take the question of negligence on account of the speed of the car from the jury, as plaintiff is not entitled under such allegation to rely on common-law negligence as to its speed. Hogan *v.* Citizens' R. Co., 150 Mo. 36, 51 S. W. 473.

8. *Indiana.*— Union Traction Co. *v.* Howard, (App. 1909) 87 N. E. 1103, 88 N. E. 967; Marchal *v.* Indianapolis St. R. Co., 28 Ind. App. 133, 62 N. E. 286, holding that whether it is negligence to run street cars on the same track over a public crossing in a city, at an excessive rate of speed, in close proximity to one another, and without giving warning signals, resulting in a collision with a vehicle, is a question for the jury under all the circumstances of the case.

Missouri.— Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602; Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; Petty *v.* St. Louis, etc., R. Co., 179 Mo. 666, 78 S. W. 1003; Carey *v.* Metropolitan St. R. Co., 125 Mo. App. 188, 101 S. W. 1123, holding that the question whether the running of a car approaching a street crossing in a city in the night-time at a speed of twenty-five miles an hour is an act of negligence is for the jury.

New Jersey.— Glasco *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 185, 68 Atl. 1074.

New York.— Mauer *v.* Brooklyn Heights R. Co., 87 N. Y. App. Div. 119, 84 N. Y. Suppl. 76.

Oregon.— Wolf *v.* City R. Co., 50 Oreg. 64, 85 Pac. 620, 91 Pac. 460, holding that whether a speed of twenty-six or twenty-nine miles an hour at a much used crossing is reasonable is for the jury.

9. Dirigolano *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 505, 71 Atl. 257; Gormley *v.* Union R. Co., (R. I. 1903) 67 Atl. 584.

10. Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

11. Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

(VIII) *LIGHTS, SIGNALS, OR WARNINGS.* It is ordinarily a question for the jury whether or not the servants in charge of the car which caused the injury exercised the proper degree of care, under the circumstances existing at the time and place of the accident, in regard to displaying lights on the car,[12] or in regard to giving signals or warnings of the car's approach,[13] as when approaching a crossing.[14] Thus where the evidence is conflicting or doubtful, it is a question of fact for the jury as to whether or not the bell or gong on the car was sounded just before the accident,[15] and if not, whether or not such failure constituted negligence, under the circumstances.[16]

(IX) *FRIGHTENING ANIMALS.* Where in an action for injuries resulting from a horse or team becoming frightened at the operation of a street car, the evidence is disputed or is such that different inferences might be reasonably drawn therefrom, it is a question for the jury whether or not the company was negligent in respect to the particular act or omission which caused the fright.[17] It is also

12. Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1 (holding that where a pedestrian is injured by a street car, it is a question for the jury as to whether there was a headlight on the car at the time of his injury, and whether its failure to display such headlight was the cause of the injury); Indianapolis St. R. Co. *v.* Slifer, 35 Ind. App. 700, 74 N. E. 19, (App. 1905) 72 N. E. 1055; Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239; Cox *v.* Schuylkill Valley Traction Co., 214 Pa. St. 223, 63 Atl. 599.

13. Randle *v.* Birmingham R., etc., Co., 158 Ala. 532, 48 So. 114, whether the sounding of the gong was sufficient to attract the injured person's attention. See also *supra*, X, B, 9, g, (VI).

14. Potter *v.* O'Donnell, 101 Ill. App. 546 [*affirmed* in 199 Ill. 119, 64 N. E. 1026]; Andres *v.* Brooklyn Heights R. Co., 84 N. Y. App. Div. 596, 82 N. Y. Suppl. 729.

15. *Illinois.*— Potter *v.* O'Donnell, 101 Ill. App. 546 [*affirmed* in 199 Ill. 119, 64 N. E. 1026].

Indiana.— Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138, 70 N. E. 995.

Maryland.— Central R. Co. *v.* Coleman, 80 Md. 328, 30 Atl. 918.

New York.— Hernandez *v.* Metropolitan St. R. Co., 74 N. Y. Suppl. 898 [*reversing* 35 Misc. 853, 72 N. Y. Suppl. 1107].

Ohio.— Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 339.

Washington.— Burian *v.* Seattle Electric Co., 26 Wash. 606, 67 Pac. 214.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

16. *Illinois.*— Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1.

Indiana.— Louisville, etc., Traction Co. *v.* Short, 41 Ind. App. 570, 83 N. E. 265 (holding that it being a question of fact whether the conditions were such as to render the omission of the motorman of a street car to sound the gong between street crossings negligence, it is properly left to the jury); Indianapolis St. R. Co. *v.* Slifer, 35 Ind. App. 700, 74 N. E. 19, 72 N. E. 1055.

Massachusetts.— Burns *v.* Worcester Consol. St. R. Co., 193 Mass. 63, 78 N. E. 740.

Minnesota.— Teal *v.* St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945.

Missouri.— Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637; Frank *v.* St. Louis Transit Co., 99 Mo. App. 323, 73 S. W. 239.

New Jersey.— Daum *v.* North Jersey St. R. Co., 69 N. J. L. 1, 54 Atl. 221 [*affirmed* in 70 N. J. L. 338, 57 Atl. 1132].

New York.— Andres *v.* Brooklyn Heights R. Co., 84 N. Y. App. Div. 596, 82 N. Y. Suppl. 729; Schwarzbaum *v.* Third Ave. R. Co., 54 N. Y. App. Div. 164, 66 N. Y. Suppl. 367.

Pennsylvania.— Gaughan *v.* Second Ave. Traction Co., 189 Pa. St. 408, 42 Atl. 41; Owens *v.* People's Pass. R. Co., 155 Pa. St. 334, 26 Atl. 748.

Texas.— Citizens' R. Co. *v.* Holmes, 19 Tex. Civ. App. 266, 46 S. W. 116.

Washington.— Burian *v.* Seattle Electric Co., 26 Wash. 606, 67 Pac. 214.

Canada.— Ford *v.* Metropolitan R. Co., 4 Ont. L. Rep. 29, 1 Ont. Wkly. Rep. 318, holding that an electric railroad company is not, as a matter of law, free from negligence in backing a car, on a dark night, while the light in the car is very weak, without giving any signals, along the track, which is, to the knowledge of the motorman, used to a considerable extent by foot passengers.

17. Joyce *v.* Exeter, etc., St. R. Co., 190 Mass. 304, 76 N. E. 1054; Blakeslee *v.* Consolidated St. R. Co., 112 Mich. 33, 70 N. W. 408; Kestner *v.* Pittsburgh, etc., Traction Co., 158 Pa. St. 422, 27 Atl. 1048; Lightcap *v.* Philadelphia Traction Co., 60 Fed. 212, violently ringing bell near horse.

Evidence held insufficient: In an action for personal injuries alleged to have been caused by the negligence of defendant's servants in charge of a car in approaching plaintiff's vehicle so rapidly as to frighten the horse, to justify submission to the jury of the issue of defendant's negligence. O'Brien *v.* Blue Hill St. R. Co., 186 Mass. 446, 71 N. E. 951. To justify submission to the jury of the question of defendant's negligence in making a noise which frightened the horse. Hoag *v.* South Dover Marble Co., 192 N. Y. 412, 85 N. E. 667, 21 L. R. A. N. S. 283.

A verdict should be directed for defendant

ordinarily a question for the jury, in such an action, as to whether or not the driver or motorman of the car saw the peril caused by the fright of the horse or team,[18] and whether he thereafter exercised proper care to use all reasonable efforts to avert the threatened injury,[19] as whether he should have stopped the car, after he saw that the horse or team was frightened.[20]

(x) *DEFECTS AND OBSTRUCTIONS.*[21] Except where the evidence is legally insufficient to be submitted to the jury on such question,[22] it is a question of fact for the jury as to whether or not the street railroad company was guilty of negligence in regard to the defect or obstruction in the tracks or street,[23] or in the equipment of its road,[24] which caused the injury. Whether an elevated railroad

in an action by one whose horse was frightened by a trolley car, where the negligence alleged is the excessive speed of the car, and his testimony that it was "not less than fifteen miles an hour" is a mere guess, and his further testimony that not till the car was alongside the horse did it turn into the gutter, and that it then backed against the car, shows, as testified by defendant's witnesses, that the car was running slowly. Smith *v.* Holmesburg, etc., Electric R. Co., 187 Pa. St. 451, 41 Atl. 479.

18. Folz *v.* Evansville Electric R. Co., 40 Ind. App. 307, 80 N. E. 868.

19. *Kansas.*— Dulin *v.* Metropolitan St. R. Co., 72 Kan. 676, 83 Pac. 821.

Missouri.— Oates *v.* Metropolitan St. R. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447.

New Jersey.— Applegate *v.* West Jersey, etc., R. Co., 73 N. J. L. 722, 65 Atl. 127.

New York.— Adsit *v.* Catskill Electric R. Co., 88 N. Y. App. Div. 167, 84 N. Y. Suppl. 393.

Pennsylvania.— Kelly *v.* Pittsburg, etc., Traction Co., 10 Pa. Super. Ct. 644.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254. See also *supra*, X, B, 9, g, (VI).

20. Carger *v.* Macon R., etc., Co., 126 Ga. 626, 55 S. E. 914 (holding that where the motorman saw that mules driven by plaintiff's intestate were frightened by the car, whether it was his duty to stop to give intestate an opportunity to avoid the accident was for the jury); Danville R., etc., Co. *v.* Hodnett, 101 Va. 361, 43 S. E. 606 (holding that whether or not it was negligence for a motorman not to stop his car before striking a horse evidently frightened by the approach of the car, and whether that negligence was the proximate cause of the injury to the rider, were questions for the jury).

21. Negligence in equipment of car see *supra*, X, B, 9, g, (IV).

22. Moss *v.* Crimmins, 57 N. Y. App. Div. 587, 68 N. Y. Suppl. 495, as to hole in street.

Nonsuit held justified: In an action for injuries caused by stepping on a loose rail. Casper *v.* Dry Dock, etc., R. Co., 56 N. Y. App. Div. 372, 67 N. Y. Suppl. 805. In an action for the death of a horse caused by its stepping into a hole between the rails. Sanford *v.* Union Pass. R. Co., 16 Pa. Super. Ct. 393.

23. *Arkansas.*— Little Rock Traction, etc., Co. *v.* Dunlap, 68 Ark. 291, 57 S. W. 938, not putting up railings on bridge, whereby a frightened horse fell off.

Massachusetts.— Miller *v.* Boston, etc., St. R. Co., 197 Mass. 535, 83 N. E. 990 (bad condition of road overturning sleigh); Hyde *v.* Boston, 186 Mass. 115, 71 N. E. 118 (defect in street between tracks); Kane *v.* West End St. R. Co., 169 Mass. 64, 47 N. E. 501 (boy stepping on hot rail which had been recently welded); Cook *v.* Union R. Co., 125 Mass. 57.

Michigan.— Kaiser *v.* Detroit, etc., R. Co., 131 Mich. 506, 91 N. W. 752, unprotected excavation in street.

Minnesota.— Baumgartner *v.* Mankato, 60 Minn. 244, 62 N. W. 127, raised tracks.

New Jersey.— Fox *v.* Wharton, 64 N. J. L. 453, 45 Atl. 793 (as to guarding excavations); Thomas *v.* Consolidated Traction Co., 62 N. J. L. 36, 42 Atl. 1061.

New York.— Lambert *v.* Westchester Electric R. Co., 191 N. Y. 248, 83 N. E. 977 [*affirming* 115 N. Y. App. Div. 78, 100 N. Y. Suppl. 665] (trolley pole near driveway); Higgins *v.* Brooklyn, etc., R. Co., 54 N. Y. App. Div. 69, 66 N. Y. Suppl. 334; Worster *v.* Forty-Second St., etc., R. Co., 3 Daly 278 [*affirmed* in 50 N. Y. 203]; Parkes *v.* Metropolitan St. R. Co., 37 Misc. 844, 76 N. Y. Suppl. 983.

Pennsylvania.—Wagner *v.* Pittsburgh, etc., Pass. R. Co., 158 Pa. St. 419, 27 Atl. 1008, excavation between rails.

Washington.— Gray *v.* Washington Water Power Co., 27 Wash. 713, 68 Pac. 360, holding that the question whether street car tracks allowed to remain above the level of a street render the street unsafe for ordinary travel is for the jury, in an action against the company for an injury alleged to have been caused thereby.

Canada.— Toronto R. Co. *v.* Toronto, 24 Can. Sup. Ct. 589, snow pile on street.

See 44 Cent. Dig. tit. "Street Railroads," §§ 251–254.

Whether defendant had notice of the defects in its tracks which caused the injury is ordinarily a question for the jury. Gilton *v.* Hestonville, etc., Pass. R. Co., 166 Pa. St. 460, 31 Atl. 249.

24. Bamford *v.* Pittsburg, etc., Traction Co., 194 Pa. St. 17, 44 Atl. 1068 (holding that the question of negligence, where the trolley of a car left its wire, struck a span wire between two posts, and pulled one of them down on plaintiff, is for the jury, where

company did all that could reasonably be required of it to prevent sparks from falling and injuring pedestrians on the street beneath is ordinarily a question for the jury.[25]

(XI) *CONTRIBUTORY NEGLIGENCE*—(A) *General Rules.* The question of contributory negligence or due care on the part of a person injured through the operation of a street railroad is primarily one for the jury, to be determined from the facts of the particular case;[26] and where the evidence is sufficient to justify the jury in finding for or against such negligence, and the facts are disputed, or if undisputed are such that reasonable minds might draw different inferences therefrom, the question should be submitted to the jury,[27] and should not be disposed of by the

it depends on whether there was a useless and abandoned wire forming a loop on the span wire, in which the trolley caught, although only one person testified to its presence, while the superintendent and several of the employees of the company testified that the loop was not there at the time of the accident); Musser *v.* Lancaster City St. R. Co., 176 Pa. St. 621, 35 Atl. 206 (breaking of cable); Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365 (holding that whether a company operating an electric railroad was negligent in not maintaining a guard wire over its trolley wire, so as to prevent a fallen telephone wire from resting on its trolley wire, and becoming charged with electricity, to the injury of one driving along the street, is a question of fact); Pittsburgh R. Co. *v.* Chapman, 145 Fed. 886, 76 C. C. A. 418 [*affirming* 140 Fed. 784] (failure to elevate trolley wires over a railroad crossing).

25. Walsh *v.* Boston El. R. Co., 192 Mass. 423, 78 N. E. 451.

26. Chicago, etc., Electric R. Co. *v.* Wanie, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167 [*affirming* 132 Ill. App. 477]; Cincinnati, etc., Electric St. R. Co. *v.* Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363.

27. *Arkansas.*— Ft. Smith Light, etc., Co. *v.* Flint, 81 Ark. 231, 99 S. W. 79; Ft. Smith Light, etc., Co. *v.* Carr, 78 Ark. 279, 93 S. W. 990; Johnson *v.* Stewart, 62 Ark. 164, 34 S. W. 889.

Georgia.— Lloyd *v.* City, etc., R. Co., 110 Ga. 165, 35 S. E. 170, whether might have seen a broken electric wire hanging across the street and avoided the danger.

Illinois.— North Chicago St. R. Co. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077 [*reversing* 104 Ill. App. 150]; McNulta *v.* Norgren, 90 Ill. App. 491; Thorsell *v.* Chicago City R. Co., 82 Ill. App. 375; Wallen *v.* North Chicago St. R. Co., 82 Ill. App. 103.

Massachusetts.— Hanley *v.* Boston El. R. Co., 201 Mass. 55, 87 N. E. 197 (workman in trench injured by having fingers run over by car); Harris *v.* Fitchburg, etc., St. R. Co., 193 Mass. 56, 78 N. E. 773; McMahon *v.* Lynn, etc., R. Co., 191 Mass. 295, 77 N. E. 826 (vehicle overturned by ridge of snow); Joyce *v.* Exeter, etc., St. R. Co., 190 Mass. 304, 76 N. E. 1054 (injury to frightened horse); Slayton *v.* West End St. R. Co., 174 Mass. 55, 54 N. E. 351 (falling over obstruction); Cook *v.* Union R. Co., 125 Mass. 57 (wheel of vehicle catching in loose rail).

Michigan.— Philip *v.* Heraty, 135 Mich. 446, 97 N. W. 963, 100 N. W. 186; Laughlin *v.* Grand Rapids St. R. Co., 62 Mich. 220, 28 N. W. 873.

Minnesota.— Williams *v.* Minneapolis St. R. Co., 88 Minn. 79, 92 N. W. 479, injured by defects in the paving between the tracks.

Missouri.— Ripley *v.* Metropolitan St. R. Co., 132 Mo. App. 350, 111 S. W. 1180 (automobile running into excavation made by defendant); Waechter *v.* St. Louis, etc., R. Co., 113 Mo. App. 270, 88 S. W. 147.

New Jersey.— Bauer *v.* North Jersey St. R. Co., 74 N. J. L. 624, 65 Atl. 1037; Consolidated Traction Co. *v.* Isley, 59 N. J. L. 224, 35 Atl. 896.

New York.— O'Connor *v.* Union R. Co., 67 N. Y. App. Div. 99, 73 N. Y. Suppl. 606; McGrath *v.* Metropolitan St. R. Co., 47 Misc. 104, 93 N. Y. Suppl. 519.

Pennsylvania.— Bradwell *v.* Pittsburgh, etc., Pass. R. Co., 153 Pa. St. 105, 25 Atl. 623, holding that where, in an action for injuries caused by an upturned rail to plaintiff driving on the street, it appears that plaintiff drank two glasses of beer, one about half an hour after the other, and just before the accident, the question of his contributory negligence is properly left to the jury.

Wisconsin.— McCoy *v.* Milwaukee St. R. Co., 82 Wis. 215, 52 N. W. 93.

See 44 Cent. Dig. tit. "Street Railroads," § 255.

Sudden peril.—Whether a person under the influence of sudden fear so conducted himself as to incur the imputation of contributory negligence is to be determined by the jury as a question of fact. South Chicago City R. Co. *v.* Kinnare, 216 Ill. 451, 75 N. E. 179 [*affirming* 117 Ill. App. 1, 96 Ill. App. 210].

Whether a mother was justified in believing that she could rescue her child from an approaching car, then eighty or ninety feet distant, without danger to herself, is a question of fact, and, if she was justified in so believing, it was not negligence on her part to make the effort. West Chicago St. R. Co. *v.* Liderman, 87 Ill. App. 638 [*affirmed* in 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226, 52 L. R. A. 655].

Firemen.—Whether a fireman, who has no time to put on his coat before responding to a fire alarm, and who is allowed to do so while on the cart on the way to the fire, is

court by a dismissal,[28] or nonsuit,[29] or by directing a verdict for defendant.[30] But where the evidence is undisputed, and is such that reasonable minds can arrive at but one conclusion therefrom, the question whether or not the person injured was guilty of contributory negligence is one of law for the court, and should not be submitted to the jury,[31] but should be disposed of by dismissal or nonsuit,[32] or by directing a verdict for defendant.[33]

(B) *Applications.* In accordance with the above rules it is ordinarily a question for the jury whether or not a person injured by being struck by a car exercised due care for his own protection, or was guilty of contributory negligence, under the circumstances existing at the time and place of the accident,[34] as whether

negligent in so doing, is a question for the jury, in an action for injuries received in a collision with a street car, in which defendant contends that the fireman's negligence in attempting to put on his coat on the moving cart contributed to the injury. Birmingham R., etc., Co. *v.* Baker, 132 Ala. 507, 31 So. 618. So also whether a fireman riding on a step on the side of the wagon in going to a fire, whereby he is struck by a trolley pole just back of the curb line, is guilty of contributory negligence is a question for the jury. Lambert *v.* Westchester Electric R. Co., 191 N. Y. 248, 83 N. E. 977 [*affirming* 115 N. Y. App. Div. 78, 100 N. Y. Suppl. 665].

28. G'Sell *v.* Metropolitan St. R. Co., 35 Misc. (N. Y.) 387, 71 N. Y. Suppl. 1020.

29. Raulston *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 412.

30. West Chicago St. R. Co. *v.* Shiplett, 85 Ill. App. 683; Little *v.* Grand Rapids St. R. Co., 78 Mich. 205, 44 N. W. 137 (as to hearing signal); Handy *v.* Metropolitan St. R. Co., 70 N. Y. App. Div. 26, 74 N. Y. Suppl. 1079.

31. Chicago, etc., Electric R. Co. *v.* Wanic, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. 1167 [*affirming* 132 Ill. App. 477]; Gleason *v.* Worcester Consol. St. R. Co., 184 Mass. 290, 68 N. E. 225; Dooley *v.* Greenfield, etc., St. R. Co., 184 Mass. 204, 68 N. E. 203 (evidence held insufficient to go to the jury); Petty *v.* St. Louis, etc., R. Co., 179 Mo. 666, 78 S. W. 1003.

32. McVaugh *v.* Philadelphia Rapid Transit Co., 221 Pa. St. 518, 70 Atl. 822.

Where contributory negligence is clearly imputable to plaintiff from his own testimony, and from the undisputed facts, a nonsuit is properly granted. Harnett *v.* Bleecker St., etc., R. Co., 49 N. Y. Super. Ct. 185; Mease *v.* United Traction Co., 208 Pa. St. 434, 57 Atl. 820.

33. Thorsell *v.* Chicago City R. Co., 82 Ill. App. 375; Gleason *v.* Worcester Consol. St. R. Co., 184 Mass. 290, 68 N. E. 225; Boring *v.* Union Traction Co., 211 Pa. St. 594, 61 Atl. 77.

34. *Illinois.*— Brunhild *v.* Chicago Union Traction Co., 239 Ill. 621, 88 N. E. 199; Savage *v.* Chicago, etc., Electric R. Co., 238 Ill. 392, 87 N. E. 377 [*affirming* 142 Ill. App. 342]; Chicago Consol. Traction Co. *v.* Kinane, 138 Ill. App. 636; Canfield *v.* North Chicago St. R. Co., 98 Ill. App. 1; West Chicago St. R. Co. *v.* Liderman, 87 Ill. App. 638 [*affirmed* in 187 Ill. 463, 58 N. E. 367, 79 Am. St. Rep. 226, 52 L. R. A. 655].

Indiana.— Nelson *v.* Chicago, etc., R. Co., 41 Ind. App. 397, 83 N. E. 1019; Cincinnati, etc., St. R. Co. *v.* Stahle, 37 Ind. App. 539, 76 N. E. 551, 77 N. E. 363; Howard *v.* Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890.

Iowa.— Remillard *v.* Sioux City Traction Co., 138 Iowa 565, 115 N. W. 900; Powers *v.* Des Moines City R. Co., (1908) 115 N. W. 494.

Kansas.— Interstate, etc., R. Co. *v.* Fox, 41 Kan. 715, 21 Pac. 797, workman on trestle stepping out of way of one train in front of another.

Kentucky.— Louisville R. Co. *v.* Hofgesand, 104 S. W. 361, 31 Ky. L. Rep. 976.

Massachusetts.— O'Leary *v.* Haverhill, etc., St. R. Co., 193 Mass. 339, 79 N. E. 733, employee of city working on street.

Michigan.— Canerdy *v.* Port Huron, etc., R. Co., 156 Mich. 211, 120 N. W. 582 (killed by backing car); Deneen *v.* Houghton County St. R. Co., 150 Mich. 235, 113 N. W. 1126; Westphal *v.* St. Joseph, etc., St. R. Co., 134 Mich. 239, 96 N. W. 19 (holding that where plaintiff's own testimony shows that he was using due diligence to get off the track of an approaching car, and a witness for him states that he went right on the track, the question of his negligence is for the jury).

Minnesota.— Morris *v.* St. Paul City R. Co., 105 Minn. 276, 117 N. W. 500, 17 L. R. A. N. S. 598; Curran *v.* St. Paul City R. Co., 100 Minn. 58, 110 N. W. 259.

Missouri.— Hof *v.* St. Louis Transit Co., 213 Mo. 445, 111 S. W. 1166; Petersen *v.* St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860; Reynolds *v.* Metropolitan St. R. Co., 136 Mo. App. 282, 116 S. W. 1135.

New Jersey.— Consolidated Traction Co. *v.* Isley, 59 N. J. L. 224, 35 Atl. 896.

New York.—Ward *v.* Brooklyn Heights R. Co., 190 N. Y. 559, 83 N. E. 1134 [*affirming* 119 N. Y. App. Div. 487, 104 N. Y. Suppl. 95]; Malizia *v.* Brooklyn Heights R. Co., 127 N. Y. App. Div. 202, 110 N. Y. Suppl. 1003 (workman on steam railroad at point of intersection with street railroad); Boyce *v.* New York City R. Co., 126 N. Y. App. Div. 248, 110 N. Y. Suppl. 393; Sesselmann *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 336, 78 N. Y. Suppl. 482; Wells *v.* Brooklyn Heights R. Co., 67 N. Y. App. Div. 212, 74 N. Y. Suppl. 196 [*affirming* 34 Misc. 44, 68 N. Y. Suppl. 305] (employee of switch com-

or not he was, under the circumstances, contributorily negligent, in standing between the tracks while cars were approaching,[35] or in walking on, along, or across the tracks,[36] or in riding a bicycle along or across the tracks;[37] or in driving across the tracks at a point where they were defective;[38] or in riding or driving a spirited or restive horse on a street where the street railroad was operated,[39] or whether or not the person injured was negligent in permitting his horse or vehicle to stand near the track.[40] It is also ordinarily a question for the jury as to whether or not a person whose team or vehicle was struck by a car exercised due care, or on the other hand was guilty of contributory negligence, at the time and place of

pany putting in switch); O'Connor *v.* Union R. Co., 67 N. Y. App. Div. 99, 73 N. Y. Suppl. 606 (street sweeper); Weingarten *v.* Metropolitan St. R. Co., 62 N. Y. App. Div. 364, 70 N. Y. Suppl. 1113; Burns *v.* Second Ave. R. Co., 21 N. Y. App. Div. 521, 48 N. Y. Suppl. 523.

North Carolina.— Davis *v.* Durham Traction Co., 141 N. C. 134, 53 S. E. 617.

Pennsylvania.— Garrett *v.* Beaver Valley Traction Co., 222 Pa. St. 586, 71 Atl. 1083; Fellers *v.* Warren St. R. Co., 26 Pa. Super. Ct. 31.

Tennessee.— Knoxville Traction Co. *v.* Brown, 115 Tenn. 323, 89 S. W. 319.

Texas.— San Antonio Traction Co. *v.* Upson, 31 Tex. Civ. App. 50, 71 S. W. 565.

Washington.— Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284, holding that the question of whether plaintiff went into a position of danger, by reason of which he was struck by defendant's street car, was for the jury.

Wisconsin.— Grimm *v.* Milwaukee Electric R., etc., Co., 138 Wis. 44, 119 N. W. 833; McCoy *v.* Milwaukee St. R. Co., 82 Wis. 215, 52 N. W. 93.

See 44 Cent. Dig. tit. "Street Railroads," § 255.

35. Bengivenga *v.* Brooklyn Heights R. Co., 48 N. Y. App. Div. 515, 62 N. Y. Suppl. 912 (struck by following car); Ross *v.* Joline, 115 N. Y. Suppl. 106; Hives *v.* Brooklyn City R. Co., 5 N. Y. St. 877 [*affirmed* in 110 N. Y. 678, 18 N. E. 482] (cars approaching from opposite directions).

36. *California.*—Wahlgren *v.* Market St. R. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993 (at point where track curved across street to go into car barn); Kramm *v.* Stockton Electric R. Co., 3 Cal. App. 606, 86 Pac. 738, 903.

Illinois.— Chicago City R. Co. *v.* Nelson, 215 Ill. 436, 74 N. E. 458; Chicago Union Traction Co. *v.* O'Donnell, 211 Ill. 349, 71 N. E. 1015 [*affirming* 113 Ill. App. 259].

Maine.— Marden *v.* Portsmouth, etc., St. R. Co., 100 Me. 41, 60 Atl. 530, 109 Am. St. Rep. 476, 69 L. R. A. 300, holding that whether under the circumstances a traveler in crossing a car track at a junction of the street was in the exercise of reasonable care for his own protection was a question of fact for the jury.

Massachusetts.— Howland *v.* Union St. R. Co., 150 Mass. 86, 22 N. E. 434.

Michigan.— McQuisten *v.* Detroit Citizens' St. R. Co., 147 Mich. 67, 110 N. W. 118; Quirk *v.* Rapid R. Co., 130 Mich. 654, 90 N. W. 673.

New Jersey.— Buttelli *v.* Jersey City, etc., Electric R. Co., 59 N. J. L. 302, 36 Atl. 700, holding that whether one is guilty of negligence in walking on the track, or a narrow space between the track and a wide ditch beside the highway, there being no sidewalk or path for travelers on foot, is a question for the jury.

New York.— Killen *v.* Brooklyn Heights R. Co., 31 Misc. 290, 64 N. Y. Suppl. 310.

See 44 Cent. Dig. tit. "Street Railroads," § 255.

37. Hamlin *v.* Pacific Electric R. Co., 150 Cal. 776, 89 Pac. 1109; Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238 (holding that the reasonableness of the efforts of a bicycle rider to escape injury after discovering his danger is a question for the jury); South Chicago City R. Co. *v.* Kinnare, 216 Ill. 451, 75 N. E. 179 [*affirming* 117 Ill. App. 1, 96 Ill. App. 210]; North Chicago St. R. Co. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077 [*reversing* 104 Ill. App. 150]; Youngquist *v.* Minneapolis St. R. Co., 102 Minn. 501, 114 N. W. 259; Brooks *v.* International R. Co., 112 N. Y. App. Div. 555, 98 N. Y. Suppl. 765 [*affirmed* in 187 N. Y. 574, 80 N. E. 1105].

38. Smith *v.* Union R. Co., 61 Mo. 588, driver of hose carriage.

39. Van Wie *v.* Mount Vernon, 26 N. Y. App. Div. 330, 49 N. Y. Suppl. 779; Knoxville Traction Co. *v.* Mullins, 111 Tenn. 329, 76 S. W. 890, holding that whether a person riding a young and skittish horse, which showed fright on approaching a street car, was guilty of negligence in not turning at once off the street on which the car was running was a question for the jury.

Whether it was contributory negligence for a woman to drive a horse on a street on which there was an electric railroad and where the horse became frightened and injured her is a question for the jury. Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446.

40. Carey *v.* Milford, etc., St. R. Co., 193 Mass. 161, 78 N. E. 1001 (leaving horse unattended in street); Laethem *v.* Ft. Wayne, etc., R. Co., 100 Mich. 297, 58 N. W. 996; Obenland *v.* Brooklyn Heights R. Co., 127 N. Y. App. Div. 418, 111 N. Y. Suppl. 686; Black *v.* Staten Island Electric R. Co., 40 N. Y. App. Div. 238, 57 N. Y. Suppl. 1112; Curry *v.* Union Electric R. Co., 86 Hun (N. Y.) 559, 33 N. Y. Suppl. 728.

the accident, in driving on or along the track,[41] as whether or not he exercised proper care in turning out or away from the track to avoid being injured by an approaching car,[42] or in driving across the tracks at a crossing.[43] Whether or not the occupant of a vehicle driven by another exercised proper care and precau-

41. *Alabama.*— Montgomery St. R. Co. *v.* Shanks, 139 Ala. 489, 37 So. 166.

California.— Mahoney *v.* San Francisco, etc., R. Co., 110 Cal. 471, 42 Pac. 968, 43 Pac. 518.

Illinois.— Sampsell *v.* Rybcynski, 229 Ill. 75, 82 N. E. 244; Chicago City R. Co. *v.* Gemmill, 209 Ill. 638, 71 N. E. 43; West Chicago St. R. Co. *v.* Levy, 82 Ill. App. 202.

Indiana.— Indianapolis St. R. Co. *v.* Marschke, 166 Ind. 490, 77 N. E. 945; Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518, 72 N. E. 571; Indiana Union Traction Co. *v.* Pheanis, 43 Ind. App. 653, 85 N. E. 1040.

Kansas.— Metropolitan St. R. Co. *v.* Slayman, 64 Kan. 722, 68 Pac. 628.

Massachusetts.— Chadbourne *v.* Springfield St. R. Co., 199 Mass. 574, 85 N. E. 737 (automobile); Stubbs *v.* Boston, etc., St. R. Co., 193 Mass. 513, 79 N. E. 795; McCarthy *v.* Boston El. R. Co., 187 Mass. 493, 73 N. E. 559; Evensen *v.* Lexington, etc., St. R. Co., 187 Mass. 77, 72 N. E. 355.

Michigan.—Ablard *v.* Detroit United R. Co., 139 Mich. 248, 102 N. W. 741; Tunison *v.* Weadock, 130 Mich. 141, 89 N. W. 703; Edwards *v.* Foote, 129 Mich. 121, 88 N. W. 404 (as to whether plaintiff was negligent in not jumping from buggy); Mertz *v.* Detroit Electric R. Co., 125 Mich. 11, 83 N. W. 1036.

Minnesota.— Teal *v.* St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945; Peterson *v.* St. Paul City R. Co., 54 Minn. 152, 55 N. W. 906.

Missouri.— Rapp *v.* St. Louis Transit Co., 190 Mo. 144, 88 S. W. 865; Murphy *v.* St. Louis Transit Co., 189 Mo. 42, 87 S. W. 945; Schafstette *v.* St. Louis, etc., R. Co., 175 Mo. 142, 74 S. W. 826; Carey *v.* Metropolitan St. R. Co., 125 Mo. App. 188, 101 S. W. 1123; Kimble *v.* St. Louis, etc., R. Co., 108 Mo. App. 78, 82 S. W. 1096; Buren *v.* St. Louis Transit Co., 104 Mo. App. 224, 78 S. W. 680; Twelkemeyer *v.* St. Louis Transit Co., 102 Mo. App. 190, 76 S. W. 682; Meyers *v.* St. Louis Transit Co., 99 Mo. App. 363, 73 S. W. 379.

New Jersey.— Migans *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 535, 70 Atl. 168.

New York.—Paladino *v.* Staten Island Midland R. Co., 127 N. Y. App. Div. 183, 111 N. Y. Suppl. 715; Ward *v.* Brooklyn Heights R. Co., 115 N. Y. App. Div. 104, 100 N. Y. Suppl. 671, 119 N. Y. App. Div. 487, 104 N. Y. Suppl. 95 [*affirmed* in 190 N. Y. 559, 83 N. E. 1134] (automobile); Ciarcia *v.* Westchester Electric R. Co., 116 N. Y. App. Div. 899, 102 N. Y. Suppl. 428; Moore *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 613, 82 N. Y. Suppl. 778; Blum *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 611, 80 N. Y. Suppl. 157; Mapes *v.* Union R. Co., 56 N. Y. App. Div. 508, 67 N. Y. Suppl. 358; Leonard *v.* Joline, 61 Misc. 336, 113 N. Y. Suppl. 682; Simpson *v.* Brooklyn Heights R. Co., 14 Misc. 645, 35 N. Y. Suppl. 674 [*affirmed* in 157 N. Y. 682, 51 N. E. 1094]; Dages *v.* New York City R. Co., 91 N. Y. Suppl. 29; Robinson *v.* New York City R. Co., 90 N. Y. Suppl. 368.

Ohio.— Lewis *v.* Cincinnati St. R. Co., 10 Ohio S. & C. Pl. Dec. 53, 8 Ohio N. P. 417.

Pennsylvania.— Gaughan *v.* Second Ave. Traction Co., 189 Pa. St. 408, 42 Atl. 41; Hawkins *v.* Media, etc., Electric R. Co., 25 Pa. Super. Ct. 450; Davis *v.* Media, etc., R. Co., 25 Pa. Super. Ct. 444.

Tennessee.— Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

Washington.— Baldie *v.* Tacoma R., etc., Co., 52 Wash. 75, 100 Pac. 162.

See 44 Cent. Dig. tit. "Street Railroads," § 255.

42. Adams *v.* Union Electric Co., 138 Iowa 487, 116 N. W. 332; Orange, etc., R. Co. *v.* Ward, 47 N. J. L. 560, 4 Atl. 331; Jaffa *v.* Nassau Electric R. Co., 131 N. Y. App. Div. 852, 116 N. Y. Suppl. 324; Pritchard *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 269, 85 N. Y. Suppl. 898; Fay *v.* Brooklyn Heights R. Co., 69 N. Y. App. Div. 563, 75 N. Y. Suppl. 113 (holding that whether a person with a team at a crossing who, because of a curve in the track, was struck by the rear end of a street car swinging out, was guilty of contributory negligence in not turning to one side, after he had backed as far as a car in the rear would allow, is a question for the jury); Bossert *v.* Nassau Electric R. Co., 40 N. Y. App. Div. 144, 57 N. Y. Suppl. 896; Simpson *v.* Brooklyn Heights R. Co., 14 Misc. (N. Y.) 645, 35 N. Y. Suppl. 674 [*affirmed* in 157 N. Y. 682, 51 N. E. 1094]; Quinn *v.* Atlantic Ave. R. Co., 12 N. Y. Suppl. 223 [*affirmed* in 134 N. Y. 611, 31 N. E. 629]; Lenkner *v.* Citizens' Traction Co., 179 Pa. St. 486, 36 Atl. 228; Kacchele *v.* Traction Co., 15 Pa. Super. Ct. 73.

43. *California.*— Cook *v.* Los Angeles, etc., Electric R. Co., 134 Cal. 279, 66 Pac. 306.

Indiana.— Union Traction Co. *v.* Vandercook, 32 Ind. App. 621, 69 N. E. 486; Marchal *v.* Indianapolis St. R. Co., 28 Ind. App. 133, 62 N. E. 286.

Massachusetts.— Grogan *v.* Boston El. R. Co., 194 Mass. 448, 80 N. E. 485.

Missouri.— Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115.

Texas.— El Paso Electric R. Co. *v.* Kendall, (Civ. App. 1904) 78 S. W. 1081.

See 44 Cent. Dig. tit. "Street Railroads," § 255.

Contributory negligence of the motorman of a street car in colliding with another car at a crossing as a question for the jury see Cutler *v.* Grand Rapids, etc., R. Co., 147 Mich. 615, 111 N. W. 191.

[X, B, 9, g, (XI), (B)]

tion for his own protection,[44] or whether or not the negligence of the driver was imputable to him,[45] is also ordinarily a question of fact for the jury.

(c) *Looking and Listening.* Where the evidence thereon is conflicting, or is such that reasonable minds might arrive at different conclusions therefrom, it is a question for the jury as to whether a person who received injuries, either to himself or to his animal or vehicle, by the operation of a car, exercised proper care and precaution in looking or listening for such car, or whether he was guilty of negligence in this respect,[46] as whether or not he exercised proper care in looking or listening before going on or crossing the tracks,[47] or whether or not under the

44. *Massachusetts.*—Chadbourne *v.* Springfield St. R. Co., 199 Mass. 574, 85 N. E. 737 (occupant of automobile); Chaput *v.* Haverhill, etc., St. R. Co., 194 Mass. 218, 80 N. E. 597; Sullivan *v.* Boston El. R. Co., 185 Mass. 602, 71 N. E. 90 (holding that where in an action for injuries sustained by one riding on a wagon, owing to a collision between the wagon and a car, plaintiff testified that he did not interfere with the driving, but trusted himself entirely to the driver, he had a right to have the question whether the driver exercised due care submitted to the jury).

Michigan.— McVean *v.* Detroit United R. Co., 138 Mich. 263, 101 N. W. 527, attempt to alight to hold horse.

Minnesota.—Oddie *v.* Mendenhall, 84 Minn. 58, 86 N. W. 881, failure to get out of vehicle when horse was frightened.

New York.— Brauner *v.* Third Ave. R. Co., 122 N. Y. App. Div. 572, 107 N. Y. Suppl. 759; Robinson *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 158, 86 N. Y. Suppl. 442 [*affirmed* in 179 N. Y. 593, 72 N. E. 1150]; Connor *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 384, 79 N. Y. Suppl. 294 (riding on rear of truck run into by car); Saletskey *v.* Third Ave. R. Co., 69 N. Y. App. Div. 27, 74 N. Y. Suppl. 518 [*affirmed* in 173 N. Y. 645, 66 N. E. 1116]; Morris *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 78, 71 N. Y. Suppl. 321 [*affirmed* in 170 N. Y. 592, 63 N. E. 1119]; Mullen *v.* Central Park, etc., R. Co., 1 Misc. 216, 21 N. Y. Suppl. 101; Waters *v.* Metropolitan St. R. Co., 85 N. Y. Suppl. 1120 (failure of one riding on rear of vehicle to jump off when danger of car running into such vehicle).

Ohio.— Toledo R., etc., Co. *v.* Ward, 25 Ohio Cir. Ct. 399; Ulrich *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 635, 1 Ohio Cir. Dec. 111.

Washington.—Wilson *v.* Puget Sound Electric R. Co., 52 Wash. 522, 101 Pac. 50.

Wisconsin.—Little *v.* Superior Rapid Transit R. Co., 88 Wis. 402, 60 N. W. 705.

See 44 Cent. Dig. tit. "Street Railroads," § 255.

45. Joyce *v.* St. Louis Transit Co., 111 Mo. App. 565, 86 S. W. 469. See also Leister *v.* Philadelphia Rapid Transit Co., 217 Pa. St. 652, 66 Atl. 866.

46. *California.*— Hamlin *v.* Pacific Electric R. Co., 150 Cal. 776, 89 Pac. 1109, bicycle rider.

Illinois.— North Chicago St. R. Co. *v.* Nelson, 79 Ill. App. 229.

Indiana.— Indianapolis St. R. Co. *v.* Slifer, 35 Ind. App. 700, 74 N. E. 19, 72 N. E. 1055; Howard *v.* Indianapolis St. R. Co., 29 Ind. App. 514, 64 N. E. 890, driving across tracks.

Maryland.— North Baltimore Pass. R. Co. *v.* Arnreich, 78 Md. 589, 28 Atl. 809, pedestrian crossing street.

Massachusetts.— Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446, holding that whether a woman who drove from a cross street into a street on which was an electric railroad without looking to see if a car was approaching, and who was injured by the horse becoming frightened at a car, was guilty of contributory negligence, is a question for the jury.

Missouri.— Engelman *v.* Metropolitan St. R. Co., 133 Mo. App. 514, 113 S. W. 700 (holding that in an action for injuries to a traveler on a street car track occurring on a stormy night, whether the traveler exercised due care in looking for the car's approach in view of the weather conditions and the speed of the car is a question for the jury); Peterson *v.* St. Louis Transit Co., 114 Mo. App. 374, 89 S. W. 1042.

New Jersey.— Daum *v.* North Jersey St. R. Co., 69 N. J. L. 1, 54 Atl. 221 [*affirmed* in 70 N. J. L. 338, 57 Atl. 1132].

New York.— Lewis *v.* Binghamton R. Co., 35 N. Y. App. Div. 12, 54 N. Y. Suppl. 452 (workman on track); Curry *v.* Union Electric R. Co., 86 Hun 559, 33 N. Y. Suppl. 728; Central Brewing Co. *v.* New York City R. Co., 49 Misc. 523, 97 N. Y. Suppl. 1025.

See 44 Cent. Dig. tit. "Street Railroads," § 256.

47. *California.*— Scott *v.* San Bernardino Valley Traction Co., 152 Cal. 604, 93 Pac. 677; Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908.

Illinois.— Chicago, etc., Electric R. Co. *v.* Wanic, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. N. S. 1167 [*affirming* 132 Ill. App. 477].

Michigan.— Gaffka *v.* Detroit United R. Co., 143 Mich. 456, 106 N. W. 1121.

New York.— Faurot *v.* Brooklyn Heights R. Co., 14 Misc. 398, 35 N. Y. Suppl. 1046.

Pennsylvania.— Cox *v.* Schuylkill Valley Traction Co., 214 Pa. St. 223, 63 Atl. 599; Haas *v.* Chester St. R. Co., 202 Pa. St. 145, 51 Atl. 744, holding that there being no fixed duty to stop before attempting to drive across street car tracks, the question whether a failure to do so is negligence is for the jury.

Tennessee.— Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479.

United States.— Milford, etc., St. R. Co. *v.* Cline, 150 Fed. 325, 80 C. C. A. 95.

See 44 Cent. Dig. tit. "Street Railroads," § 256.

circumstances he saw or heard, or by ordinary care should have seen or heard, the approaching car in time to avoid being injured by it,[48] or whether or not he exercised ordinary care under the circumstances in traveling on or across the tracks without looking or listening for an approaching car,[49] or in walking or driving along the tracks without looking to the rear for a car approaching from that direction;[50] or where he had looked or listened at some distance from the track, whether he was negligent in going on the track without looking or listening again.[51] But where the evidence clearly shows that the injured person's opportunity for seeing or hearing the approaching car was such that he could not fail to have seen or heard it in time to avert the accident if he had used due care in looking or listening, his contributory negligence in this respect should not be submitted to the jury, but is a question for the court,[52] and should be disposed of by the direction of a verdict for defendant [53] or by a nonsuit.[54]

48. *Indiana.*— Citizens' St. R. Co. *v.* Abright, 14 Ind. App. 433, 42 N. E. 238, 1028.

Iowa.—Doherty *v.* Des Moines City R. Co., 137 Iowa 358, 114 N. W. 183.

Missouri.—Sanitary Dairy Co. *v.* St. Louis Transit Co., 98 Mo. App. 20, 71 S. W. 726; Gebhardt *v.* St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448.

New York.— Neary *v.* Citizens' R., etc., Co., 110 N. Y. App. Div. 769, 97 N. Y. Suppl. 420; Binns *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 359, 85 N. Y. Suppl. 874; Beers *v.* Metropolitan St. R. Co., 88 N. Y. App. Div. 9, 84 N. Y. Suppl. 785; Mitchell *v.* Third Ave. R. Co., 62 N. Y. App. Div. 371, 70 N. Y. Suppl. 1118; McGuire *v.* Third Ave. R. Co., 9 N. Y. App. Div. 529, 41 N. Y. Suppl. 577.

Rhode Island.— Swanson *v.* Union R. Co., 22 R. I. 122, 46 Atl. 402.

See 44 Cent. Dig. tit. "Street Railroads," § 256.

49. Tri-City R. Co. *v.* Banker, 100 Ill. App. 6; Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103, 88 N. E. 967 (holding that whether a driver of an automobile was negligent in driving the machine, as he approached the street railroad crossing, at the rate of four or five miles per hour without stopping to look and listen for an approaching car, when he knew that a car was liable to be passing on the track where the collision occurred, and that his view of cars passing upon such track was obstructed by cars then standing on the other track, was for the jury); Riley *v.* Minneapolis St. R. Co., 80 Minn. 424, 83 N. W. 376; Thornton *v.* Interurban St. R. Co., 128 N. Y. App. Div. 872, 113 N. Y. Suppl. 127.

50. Chicago Union Traction Co. *v.* Dybvig, 107 Ill. App. 644; Winn *v.* Metropolitan St. R. Co., 121 Mo. App. 623, 97 S. W. 547; Paladino *v.* Staten Island Midland R. Co., 127 N. Y. App. Div. 183, 111 N. Y. Suppl. 715; Lamb *v.* Union R. Co., 125 N. Y. App. Div. 286, 109 N. Y. Suppl. 97 [*reversed* on the facts in 195 N. Y. 260, 88 N. E. 371]; Black *v.* Staten Island Electric R. Co., 40 N. Y. App. Div. 238, 57 N. Y. Suppl. 1112; Cohen *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 186, 68 N. Y. Suppl. 830.

51. Wider *v.* Detroit United R. Co., 147 Mich. 537, 111 N. W. 100; Chauvin *v.* Detroit United R. Co., 135 Mich. 85, 97 N. W. 160; Rissler *v.* St. Louis Transit Co., 113 Mo. App. 120, 87 S. W. 578; Moore *v.* St. Louis Transit Co., 95 Mo. App. 728, 75 S. W. 699; Levine *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 426, 80 N. Y. Suppl. 48 [*affirmed* in 177 N. Y. 523, 69 N. E. 1125]; Hickman *v.* Nassau Electric R. Co., 41 N. Y. App. Div. 629, 58 N. Y. Suppl. 858; Muller *v.* New York City R. Co., 51 Misc. (N. Y.) 640, 101 N. Y. Suppl. 98; Niemyer *v.* Washington Water Power Co., 45 Wash. 170, 88 Pac. 103.

52. Tognazzi *v.* Milford, etc., St. R. Co., 201 Mass. 7, 86 N. E. 799, 21 L. R. A. N. S. 309.

Withdrawal from jury.—Where, in an action for damages by a collision between a car and plaintiff's wagon, the physical facts show that, if plaintiff had looked before driving on the track, he could have seen the car, his testimony that he looked, but did not see the car, should be withdrawn from the consideration of the jury. Barrie *v.* St. Louis Transit Co., 102 Mo. App. 87, 76 S. W. 706.

Credibility of testimony.—Where the testimony of a person injured by a street car, that he looked, and did not see its approach, before he started to cross the street in front of it, is impeached by uncontroverted physical facts, showing that the car was in plain sight, and he therefore either did not look at all, or did not look with care, his credibility is not involved, so as to take the case to the jury. McKinley *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 153, 86 N. Y. Suppl. 461.

53. Quinn *v.* Boston El. R. Co., 188 Mass. 473, 74 N. E. 687 (holding that where it appeared that plaintiff was stooping near the track, with his face in the direction from which the car came, and could have seen it had he looked, and could have heard it had he listened, it was proper to direct a verdict for defendant); Stafford *v.* Chippewa Valley Electric R. Co., 110 Wis. 331, 85 N. W. 1036. *Compare* Beers *v.* Metropolitan St. R. Co., 88 N. Y. App. Div. 9, 84 N. Y. Suppl. 785.

54. Mulvaney *v.* Pittsburgh R. Co., 213 Pa. St. 343, 62 Atl. 926; Walsh *v.* Philadelphia Rapid Transit Co., 27 Pa. Super.

(D) *Crossing in Front of Car.* It is ordinarily a question for the jury whether a person injured by a car exercised ordinary care or was guilty of contributory negligence under the circumstances, in crossing in front of the approaching car,[55] as whether or not he was guilty of contributory negligence in assuming that he could cross in safety, and in attempting to cross in front of a car which he saw approaching some distance away,[56] or in front of a standing car which was suddenly moved;[57] or whether or not he was negligent in crossing behind a passing or standing car or vehicle whereby he was struck by an approaching car,[58] or in

Ct. 89; Flynn *v.* Wilkes-Barre, etc., Traction Co., 9 Kulp (Pa.) 28.

55. *Alabama.*— Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032.

Illinois.— O'Leary *v.* Chicago City R. Co., 235 Ill. 187, 85 N. E. 233 [*affirming* 136 Ill. App. 239]; Central R. Co. *v.* Sehnert, 115 Ill. App. 560; Chicago City R. Co. *v.* Wall, 93 Ill. App. 411.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Patterson *v.* Townsend, 91 Iowa 725, 59 N. W. 205.

Minnesota.— Youngquist *v.* Minneapolis St. R. Co., 102 Minn. 501, 114 N. W. 259.

New Jersey.— Bauer *v.* North Jersey St. R. Co., 74 N. J. L. 624, 65 Atl. 1037.

New York.— McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062; Lane *v.* Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, 82 N. Y. Suppl. 1057 [*affirmed* in 178 N. Y. 623, 70 N. E. 1101]; Wells *v.* Brooklyn City R. Co., 58 Hun 389, 12 N. Y. Suppl. 67; Brown *v.* Twenty-Third St. R. Co., 56 N. Y. Super. Ct. 356, 4 N. Y. Suppl. 192 [*affirmed* in 121 N. Y. 667, 24 N. E. 1094]; Tupper *v.* Metropolitan St. R. Co., 36 Misc. 819, 74 N. Y. Suppl. 868; Carney *v.* Metropolitan St. R. Co., 33 Misc. 781, 67 N. Y. Suppl. 947.

Texas.— San Antonio Traction Co. *v.* Levyson. (Civ. App. 1908) 113 S. W. 569; Dallas Rapid Transit R. Co. *v.* Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455.

Utah.— Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

Washington.— Chisholm *v.* Seattle Electric Co., 27 Wash. 237, 67 Pac. 601; Burian *v.* Seattle Electric Co., 26 Wash. 606, 67 Pac. 214.

See 44 Cent. Dig. tit. "Street Railroads," § 257.

56. *Alabama.*— Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032.

Illinois.— Chicago City R. Co. *v.* Sandusky, 198 Ill. 400, 64 N. E. 990 [*affirming* 99 Ill. App. 164]; Chicago City R. Co. *v.* Nelson, 116 Ill. App. 609 [*affirmed* in 215 Ill. 436, 74 N. E. 458]; West Chicago St. R. Co. *v.* Foster, 74 Ill. App. 414.

Iowa.— McDivitt *v.* Des Moines City R. Co., 141 Iowa 689, 118 N. W. 459; Kern *v.* Des Moines City R. Co., 141 Iowa 620, 118 N. W. 451; Ward *v.* Marshalltown Light, etc., Co., 132 Iowa 578, 108 N. W. 323.

Kansas.— Kansas City-Leavenworth R. Co. *v.* Gallagher, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344.

Massachusetts.— Coleman *v.* Lowell, etc., St. R. Co., 181 Mass. 591, 64 N. E. 402.

Michigan.— La Londe *v.* Trans St. Mary's Traction Co., 145 Mich. 77, 108 N. W. 365.

New Jersey.— Conrad *v.* Elizabeth, etc., R. Co., 70 N. J. L. 676, 58 Atl. 376; Connelly *v.* Trenton Pass. R. Co., 56 N. J. L. 700, 29 Atl. 438, 44 Am. St. Rep. 424.

New York.— Stillings *v.* Metropolitan St. R. Co., 177 N. Y. 344, 69 N. E. 641 [*affirming* 84 N. Y. App. Div. 201, 82 N. Y. Suppl. 726]; Lofsten *v.* Brooklyn Heights R. Co., 97 N. Y. App. Div. 395, 89 N. Y. Suppl. 1042 [*reversed* on the facts in 184 N. Y. 148, 76 N. E. 1035]; Hoyt *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 249, 76 N. Y. Suppl. 832 [*affirmed* in 175 N. Y. 502, 67 N. E. 1083]; Dorsch *v.* Brooklyn Heights R. Co., 68 N. Y. App. Div. 222, 74 N. Y. Suppl. 257; Copeland *v.* Metropolitan St. R. Co., 67 N. Y. App. Div. 483, 73 N. Y. Suppl. 856; Walls *v.* Rochester R. Co., 92 Hun 581, 36 N. Y. Suppl. 1102 [*affirmed* in 154 N. Y. 771, 49 N. E. 1105]; Mackie *v.* Brooklyn City R. Co., 10 Misc. 4, 30 N. Y. Suppl. 539; Rohkin *v.* Joline, 114 N. Y. Suppl. 98.

Pennsylvania.— Rauscher *v.* Philadelphia Traction Co., 176 Pa. St. 349, 35 Atl. 138.

See 44 Cent. Dig. tit. "Street Railroads," § 257.

57. McLeland *v.* St. Louis Transit Co., 105 Mo. App. 473, 80 S. W. 30; Armstrong *v.* Consolidated Traction Co., 216 Pa. St. 595, 66 Atl. 75; Cleary *v.* Pittsburgh, etc., Traction Co., 179 Pa. St. 526, 36 Atl. 323, holding that where one on foot was about to cross a street, and a car stopped just before reaching the crossing, each apparently expecting the other to wait, and then both started so nearly together that a collision was unavoidable, the question of contributory negligence was for the jury.

58. *Illinois.*— Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385]; McNulta *v.* Norgren, 90 Ill. App. 491.

Indiana.— Citizens' St. R. Co. *v.* Abright, 14 Ind. App. 433, 42 N. E. 238, 1028.

Minnesota.— Bremer *v.* St. Paul City R. Co., 107 Minn. 326, 120 N. W. 382, 21 L. R. A. N. S. 887.

Missouri.— Eckhard *v.* St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602.

Nebraska.— Stewart *v.* Omaha, etc., St. R. Co., 83 Nebr. 97, 118 N. W. 1106.

New York.— Monck *v.* Brooklyn Heights R. Co., 97 N. Y. App. Div. 447, 90 N. Y. Suppl. 818 [*affirmed* in 182 N. Y. 567, 75 N. E. 1131]; Beers *v.* Metropolitan St. R. Co., 88 N. Y. App. Div. 9, 84 N. Y. Suppl. 785; Schwarzbaum *v.* Third Ave. R. Co., 54 N. Y. App. Div. 164, 66 N. Y. Suppl. 367; McGuire

crossing without looking or listening.[58] But where the evidence on such issue is legally insufficient or is clear and undisputed, it becomes a question of law for the court and should not be submitted to the jury,[60] but should be disposed of by directing a verdict for defendant [61] or by a nonsuit.[62] In accordance with these rules it is ordinarily a question for the jury whether, under the circumstances, a person was guilty of contributory negligence in riding or driving his vehicle across the tracks in front of an approaching car,[63] as whether or not he was contributorily negligent in attempting to ride or drive across ahead of a car which he saw approaching.[64]

v. Third Ave. R. Co., 9 N. Y. App. Div. 529, 41 N. Y. Suppl. 577; Dobert *v.* Troy City R. Co., 91 Hun 28, 36 N. Y. Suppl. 105.

Ohio.— Snell *v.* Consolidated St. R. Co., 9 Ohio Cir. Ct. 348, 6 Ohio Cir. Dec. 346.

See 44 Cent. Dig. tit. "Street Railroads," § 257.

59. See *supra*, X, B, 9, g, (XI), (C).

60. Lee *v.* Chicago City R. Co., 127 Ill. App. 510 (holding that where it appears that plaintiff was injured while attempting to drive at a snail's pace across the tracks of defendant company, it is a question of law for the court to say that such plaintiff was guilty of contributory negligence, where no watchfulness, alertness, or reasonable care appears to have been exercised by him for his own safety); Lahti *v.* Fitchburg, etc., R. Co., 172 Mass. 147, 51 N. E. 524.

61. Ames *v.* Waterloo, etc., Rapid Transit Co., 120 Iowa, 640, 95 N. W. 161; Doty *v.* Detroit Citizens' St. R. Co., 129 Mich. 464, 88 N. W. 1050; Metz *v.* St. Paul City R. Co., 88 Minn. 48, 92 N. W. 502.

62. Harnett *v.* Bleecker St., etc., Ferry R. Co., 49 N. Y. Super. Ct. 185. See also Mathers *v.* Interurban St. R. Co., 188 N. Y. 610, 81 N. E. 1169 [*reversing* 112 N. Y. App. Div. 397, 98 N. Y. Suppl. 433].

63. *Alabama.*— Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955, failure to attempt to back off track.

California.— Campbell *v.* Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624; Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908.

Indiana.— Indianapolis St. R. Co. *v.* O'Donnell, 35 Ind. App. 312, 73 N. E. 163, 74 N. E. 253.

Iowa.—Quinn *v.* Dubuque St. R. Co., (1903) 94 N. W. 476, driver of fire truck.

Massachusetts.— Jeddrey *v.* Boston, etc., St. R. Co., 198 Mass. 232, 84 N. E. 316.

Michigan.—Plant *v.* Heraty, 131 Mich. 619, 92 N. W. 284; Moran *v.* Detroit, etc., R. Co., 124 Mich. 582, 83 N. W. 606.

Missouri.— Kolb *v.* St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050.

New York.— Vittelli *v.* Nassau Electric R. Co., 53 N. Y. App. Div. 639, 65 N. Y. Suppl. 1027; Schron *v.* Staten Island Electric R. Co., 16 N. Y. App. Div. 111, 45 N. Y. Suppl. 124.

Pennsylvania.— Haas *v.* Chester St. R. Co., 202 Pa. St. 145, 51 Atl. 744.

Wisconsin.— Giese *v.* Milwaukee Electric R., etc., Co., 116 Wis. 66, 92 N. W. 356.

See 44 Cent. Dig. tit. "Street Railroads," § 257.

64. *Illinois.*— Chicago Union Traction Co. *v.* Jacobson, 217 Ill. 404, 75 N. E. 508 [*affirming* 118 Ill. App. 383] (driver of heavy truck); Chicago City R. Co. *v.* Benson, 108 Ill. App. 193; Smith *v.* Chicago City R. Co., 107 Ill. App. 177.

Iowa.— Adams *v.* Union Electric Co., 138 Iowa 487, 116 N. W. 332.

Kansas.— Metropolitan St. R. Co. *v.* Slayman, 64 Kan. 722, 68 Pac. 628.

Maryland.— United R., etc., Co. *v.* Watkins, 102 Md. 264, 62 Atl. 234.

Massachusetts.— Creavin *v.* Newton St. R. Co., 176 Mass. 529, 57 N. E. 994; Driscoll *v.* West End St. R. Co., 159 Mass. 142, 34 N. E. 171.

Michigan.— Wider *v.* Detroit United R. Co., 147 Mich. 537, 111 N. W. 100; Chauvin *v.* Detroit United R. Co., 135 Mich. 85, 97 N. W. 160; Garrity *v.* Detroit Citizens' St. R. Co., 112 Mich. 369, 70 N. W. 1018, 37 L. R. A. 529 (driver of fire truck); Geist *v.* Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112.

Minnesota.— Warren *v.* Mendenhall, 77 Minn. 145, 79 N. W. 661, driver of fire truck.

Missouri.— Heintz *v.* St. Louis Transit Co., 115 Mo. App. 667, 92 S. W. 353; O'Neill *v.* St. Louis Transit Co., 108 Mo. App. 453, 83 S. W. 990 (driver of hose cart); Linder *v.* St. Louis Transit Co., 103 Mo. App. 574, 77 S. W. 997.

Nebraska.— Omaha St. R. Co. *v.* Mathiesen, 73 Nebr. 820, 103 N. W. 666.

New Jersey.— Weinberger *v.* North Jersey St. R. Co., 73 N. J. L. 694, 64 Atl. 1059; Vrooman *v.* North Jersey St. R. Co., 70 N. J. L. 818, 59 Atl. 459; Woodland *v.* North Jersey St. R. Co., 66 N. J. L. 455, 49 Atl. 479; North Jersey St. R. Co. *v.* Schwartz, 66 N. J. L. 437, 49 Atl. 683.

New York.— Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434; Murphy *v.* Metropolitan St. R. Co., 110 N. Y. App. Div. 717, 97 N. Y. Suppl. 483; Binsell *v.* Interurban St. R. Co., 91 N. Y. App. Div. 402, 86 N. Y. Suppl. 913; Lawson *v.* Metropolitan St. R. Co., 40 N. Y. App. Div. 307, 57 N. Y. Suppl. 997 [*affirmed* in 166 N. Y. 589, 59 N. E. 1124]; Buhrens *v.* Dry Dock, etc., R. Co., 53 Hun 571, 6 N. Y. Suppl. 224 [*affirmed* in 125 N. Y. 702, 26 N. E. 752]; Lowy *v.* Metropolitan St. R. Co., 30 Misc. 775, 62 N. Y. Suppl. 743; Degnan *v.* Brooklyn City R. Co., 14 Misc. 388, 35 N. Y. Suppl. 1047; McConnell *v.* Atlantic Ave. R. Co., 11 Misc. 177, 32 N. Y. Suppl. 114; Mattes *v.* New York City R. Co.,

(E) *Contributory Negligence of Children and Others Under Disability.* The contributory negligence of a child, or of a person laboring under some physical or mental disability,[65] who is injured by the operation of a street railroad is ordinarily a question of fact for the jury. Thus it is ordinarily a question for the jury whether in the particular case the child which was injured was capable of exercising judgment and discretion for his own protection,[66] and whether or not, in view of his age, intelligence, and all the surrounding circumstances at the time and place of the accident, he was guilty of contributory negligence,[67] unless the

95 N. Y. Suppl. 596; Carter *v.* Interurban St. R. Co., 84 N. Y. Suppl. 134.

Pennsylvania.— Hamilton *v.* Consolidated Traction Co., 201 Pa. St. 351, 50 Atl. 946; Raulston *v.* Philadelphia Traction Co., 13 Pa. Super. Ct. 412.

Utah.— Dederichs *v.* Salt Lake City R. Co., 13 Utah 34, 44 Pac. 649.

Virginia.— Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618.

Wisconsin.— Hanlon *v.* Milwaukee Electric R., etc., Co., 118 Wis. 210, 95 N. W. 100.

United States.— Tacoma R., etc., Co. *v.* Hays, 110 Fed. 496, 49 C. C. A. 115.

See 44 Cent. Dig. tit. "Street Railroads," § 257.

Whether it is negligence for a person to attempt to drive across a street car track twenty feet in front of an approaching car is a question for the jury. Coyle *v.* Third Ave. R. Co., 17 Misc. (N. Y.) 282, 40 N. Y. Suppl. 362 [*reversed* on other grounds in 18 Misc. 9, 40 N. Y. Suppl. 1131]. But see Manhattan Pie Baking Co. *v.* Metropolitan St. R. Co., 36 Misc. (N. Y.) 855, 74 N. Y. Suppl. 928.

65. Perjue *v.* Citizens' Electric Light, etc., Co., 131 Iowa 710, 109 N. W. 280; Plunkett *v.* Brooklyn Heights R. Co., 129 N. Y. App. Div. 572, 114 N. Y. Suppl. 276 [*affirmed* in 198 N. Y. 568]; Mills *v.* Brooklyn City R. Co., 10 Misc. (N. Y.) 1, 30 N. Y. Suppl. 532 [*affirmed* in 151 N. Y. 629, 45 N. E. 1133], holding that where a man seventy years old attempts to cross the street in front of a horse car about sixty feet from the crossing, and is injured by the car, it is a question for the jury whether he was negligent.

Whether one slightly deaf, walking on a street car track in the direction in which the cars ran, was negligent in failing to watch for the car or to receive notice of its coming, is a question for the jury. Buttelli *v.* Jersey City, etc., Electric R. Co., 59 N. J. L. 302, 36 Atl. 700.

66. *Illinois.*— East St. Louis Electric St. R. Co. *v.* Burns, 77 Ill. App. 529.

Indiana.— Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

Kansas.— Consolidated City, etc., R. Co. *v.* Carlson, 58 Kan. 62, 48 Pac. 635, holding that it is for the jury to determine whether a boy ten years old knows the danger of placing himself on a street car track in front of a car.

New Jersey.— Vogel *v.* North Jersey St. R. Co., 69 N. J. L. 219, 54 Atl. 563 (whether child seven years old was *sui juris*); Markey *v.* Consolidated Traction Co., 65 N. J. L. 82, 46 Atl. 573 [*affirmed* in 65 N. J. L. 682, 48 Atl. 1117].

New York.— Goldstein *v.* Dry Dock, etc., R. Co., 35 Misc. 200, 71 N. Y. Suppl. 477; Block *v.* Harlem Bridge, etc., R. Co., 9 N. Y. Suppl. 164.

See 44 Cent. Dig. tit. "Street Railroads," §§ 255–257.

67. *Colorado.*— Pueblo Electric St. R. Co. *v.* Sherman, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116, holding that the negligence of a thirteen-year-old boy of average intelligence, alighting from a moving street car, is, when the facts would have conclusively shown negligence had he been an adult, a question for the jury.

Illinois.— Chicago City R. Co. *v.* Tuohy, 95 Ill. App. 314 [*affirmed* in 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270].

Indiana.— Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

Massachusetts.— Burns *v.* Worcester Consol. St. R. Co., 193 Mass. 63, 78 N. E. 740; Sullivan *v.* Boston El. R. Co., 192 Mass. 37, 78 N. E. 382; McDermott *v.* Boston El. R. Co., 184 Mass. 126, 68 N. E. 34, 100 Am. St. Rep. 548 (passing over cross walk on way to school); Aiken *v.* Holyoke St. R. Co., 180 Mass. 8, 61 N. E. 557.

Missouri.— Mullin *v.* St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288 (holding that in an action for the death of a child six years old by being run over by a street car at a crossing, whether the child was guilty of contributory negligence was for the jury); Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626; Fry *v.* St. Louis Transit Co., 111 Mo. App. 324, 85 S. W. 960.

New Jersey.— Fogarty *v.* Jersey City, etc., St. R. Co., 76 N. J. L. 459, 69 Atl. 964; Vogel *v.* North Jersey St. R. Co., 69 N. J. L. 219, 54 Atl. 563.

New York.— Robinson *v.* Metropolitan St. R. Co., 91 N. Y. App. Div. 158, 86 N. Y. Suppl. 442 [*affirmed* in 179 N. Y. 593, 72 N. E. 1150]; Sullivan *v.* Union R. Co., 81 N. Y. App. Div. 596, 81 N. Y. Suppl. 449 [*affirmed* in 177 N. Y. 525, 69 N. E. 1131]; Pinder *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 521, 72 N. Y. Suppl. 1082 [*reversed* on the facts in 173 N. Y. 519, 66 N. E. 405]; Goldstein *v.* Dry Dock, etc., R. Co., 35 Misc. 200, 71 N. Y. Suppl. 477. See also Ferri *v.* Union R. Co., 77 N. Y. App. Div. 301, 79 N. Y. Suppl. 230.

Oregon.— Duhiver *v.* City R. Co., 44 Oreg. 227, 74 Pac. 915, 75 Pac. 693.

See 44 Cent. Dig. tit. "Street Railroads," §§ 255–257.

evidence on such issue is legally insufficient or clearly shows that the child acted in disregard of the degree of prudence which might be reasonably expected of one of his years and experience.[68] It is ordinarily a question of fact for the jury whether or not under the circumstances a child injured by being struck by a car was guilty of contributory negligence in standing on or near the track,[69] or in regard to looking or listening for an approaching car by which he was injured,[70] or in crossing the tracks in front of an approaching car,[71] or whether he was negligent in jumping from a car in front of another car in obedience to the orders or threats of the motorman or conductor.[72] It is also a question for the jury whether or not the child which was injured was properly allowable on the street unattended,[73] or whether the parent or custodian of the child was guilty of contributory negligence in allowing it to wander on or near the tracks.[74]

(XII) *INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.* Whether, notwithstanding negligence on the part of the person injured in getting into a position of peril, defendant's servants could have avoided the injury by the exercise of reasonable care and diligence, and hence whether or not they were negligent in this respect, is ordinarily a question for the jury.[75]

68. Fitzhenry *v.* Consolidated Traction Co., 64 N. J. L. 674, 46 Atl. 698.

Evidence held to require the direction of a verdict for defendant on the issue of the injured child's contributory negligence see Finley *v.* West Chicago St. R. Co., 90 Ill. App. 368; Meloy *v.* Philadelphia Rapid Transit Co., 217 Pa. St. 189, 66 Atl. 253.

69. Griffiths *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 86, 71 N. Y. Suppl. 406 [*reversed* on other grounds in 171 N. Y. 106, 63 N. E. 808]; Inquinta *v.* Citizens' Traction Co., 166 Pa. St. 63, 30 Atl. 1131.

70. *Illinois.*— Quincy Horse R., etc., Co. *v.* Gnuse, 38 Ill. App. 212 [*reversed* on other grounds in 137 Ill. 264, 27 N. E. 190].

Kansas.— Consolidated, etc., R. Co. *v.* Wyatt, (1898) 52 Pac. 98; Consolidated City, etc., R. Co. *v.* Carlson, 58 Kan. 62, 48 Pac. 635.

Massachusetts.— McDermott *v.* Boston El. R. Co., 184 Mass. 126, 68 N. E. 34, 100 Am. St. Rep. 548; Rosenberg *v.* West End St. R. Co., 168 Mass. 561, 47 N. E. 435.

Missouri.— Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737 (passing behind passing car); Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86 (driving on to crossing on dark and foggy night); Butler *v.* Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877.

Washington.— Mitchell *v.* Tacoma R., etc., Co., 13 Wash. 560, 43 Pac. 528.

71. *Indiana.*—Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

Massachusetts.— Beale *v.* Old Colony St. R. Co., 196 Mass. 119, 81 N. E. 867.

Missouri.— Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86.

New York.— Costello *v.* Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897 [*reversing* 26 N. Y. App. Div. 48, 49 N. Y. Suppl. 868]; Wabnich *v.* Dry Dock, etc., R. Co., 112 N. Y. App. Div. 4, 98 N. Y. Suppl. 38; Levine *v.* Metropolitan St. R. Co., 78 N. Y. App. Div. 426, 80 N. Y. Suppl. 48 [*affirmed* in 177 N. Y. 523, 69 N. E. 1125]; Finkelstein *v.* Brooklyn Heights R. Co., 51 N. Y. App. Div. 287, 64 N. Y. Suppl. 915; Keenan *v.* Brooklyn City R. Co., 8 Misc. 601, 29 N. Y. Suppl. 325 [*reversed* on other grounds in 145 N. Y. 348, 40 N. E. 15]; Levy *v.* Dry Dock, etc., R. Co., 12 N. Y. Suppl. 485; Block *v.* Harlem Bridge, etc., R. Co., 9 N. Y. Suppl. 164; Silberstein *v.* Houston, etc., R. Co., 4 N. Y. Suppl. 843 [*reversed* on other grounds in 117 N. Y. 293, 22 N. E. 951].

Wisconsin.— Van Salvellergh *v.* Green Bay Traction Co., 132 Wis. 166, 111 N. W. 1120.

See 44 Cent. Dig. tit. "Street Railroads," §§ 255–257.

72. McCann *v.* Sixth Ave. R. Co., 117 N. Y. 505, 23 N. E. 164, 15 Am. St. Rep. 539.

73. Levin *v.* Metropolitan St. R. Co., 140 Mo. 624, 41 S. W. 968; Lhowe *v.* Third Ave. R. Co., 14 Misc. (N. Y.) 612, 36 N. Y. Suppl. 463, boy six or seven years old.

74. Sullivan *v.* Boston El. R. Co., 192 Mass. 37, 78 N. E. 382; Wabnich *v.* Dry Dock, etc., R. Co., 112 N. Y. App. Div. 4, 98 N. Y. Suppl. 38; Henne *v.* People's St. R. Co., 1 Pa. Super. Ct. 311, 38 Wkly. Notes Cas. 275. See also PARENT AND CHILD, 29 Cyc. 1649.

75. Daniels *v.* Bay City Traction, etc., Co., 143 Mich. 493, 107 N. W. 94; Cole *v.* Metropolitan St. R. Co., 133 Mo. App. 440, 113 S. W. 684 (refusal to direct verdict for defendant held proper); Wallack *v.* St. Louis Transit Co., 123 Mo. App. 160, 100 S. W. 496 (refusal to nonsuit held proper); Cole *v.* Metropolitan St. R. Co., 121 Mo. App. 605, 97 S. W. 555; McAndrews *v.* St. Louis, etc., R. Co., 83 Mo. App. 233; Shanks *v.* Springfield Traction Co., 101 Mo. App. 702, 74 S. W. 386.

Evidence held insufficient to have the case submitted to the jury on the theory that the person injured was entitled to recover notwithstanding his contributory negligence see Markowitz *v.* Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389; McGauley *v.* St. Louis Transit Co., 179 Mo. 583, 79 S. W. 461.

(XIII) *WILFUL, WANTON, OR RECKLESS INJURY.* In accordance with the rules stated above,[76] it is a question for th jury whether the conduct of defendant's servants at the time and place of the accident was such as to make it guilty of wilfulness, wantonness, or recklessness,[77] or gross negligence,[78] in causing the injury complained of, unless the evidence is undisputed or is such that but one inference can be reasonably drawn therefrom, in which case the question should not be submitted to the jury, but should be disposed of by the court.[79]

h. Instructions — (I) *IN GENERAL.* The instructions in an action for injuries occurring through the operation of a street railroad are governed by the rules applying to instructions in civil actions generally.[80] Thus the instructions in such an action must charge in clear and comprehensive terms the law applicable to the oppos-

76. See *supra*, X, B, 9, g, (I), (II).

77. Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032; Montgomery St. R. Co. *v.* Rice, 144 Ala. 610, 38 So. 857, 1 L. R. A. N. S. 656; Birmingham R., etc., Co. *v.* Baker, 132 Ala. 507, 31 So. 618; Chicago City R. Co. *v.* O'Donnell, 207 Ill. 478, 69 N. E. 882 [*affirming* 109 Ill. App. 616] (causing boy to jump off car in front of another car); Teal *v.* St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945; Wilson *v.* Chippewa Valley Electric R. Co., 120 Wis. 636, 98 N. W. 536, 66 L. R. A. 912. See also Markowitz *v.* Metropolitan St. R. Co., 186 Mo. 350, 85 S. W. 351, 69 L. R. A. 389.

In order to submit the question of wilful and wanton injury to the jury, where a person has been injured by a car and there is no evidence tending to show that the motorman in control of the car saw the person in time to stop the car and avoid the injury, and no evidence from which an inference can be drawn that he purposely and intentionally ran his car against such person, it must appear from the evidence, drawing from it the inferences and conclusions unfavorable to defendant which might justly and properly be drawn, that the negligence of the motorman was so gross as to amount to wilful or wanton conduct. Chicago Union Traction Co. *v.* McGinnis, 112 Ill. App. 177.

Whether defendant's servant acted within the scope of his employment in regard to such wilfulness, wantonness, or recklessness is ordinarily a question for the jury. Ahrens *v.* Union R. Co., 57 Misc. (N. Y.) 651, 108 N. Y. Suppl. 590.

78. South Covington, etc., St. R. Co. *v.* McHugh, 77 S. W. 202, 25 Ky. L. Rep. 1112; Beale *v.* Old Colony St. R. Co., 196 Mass. 119, 81 N. E. 867; Evensen *v.* Lexington, etc., St. R. Co., 187 Mass. 77, 72 N. E. 355.

79. Feitl *v.* Chicago City R. Co., 211 Ill. 279, 71 N. E. 991 [*affirming* 113 Ill. App. 381], holding that where, in an action for the death of a traveler on a highway in a collision with a street car, every witness to the occurrence testified to the sudden application of the brakes by the motorman before the collision, and there was no evidence of any intention or purpose not to discharge any duty incumbent on defendant with reference to the accident, an instruction withdrawing from the jury an issue of wilful and wanton injury was proper.

Evidence held insufficient to show wilful negligence on the part of defendant's motorman after discovery of intestate's peril, so as to require a submission of that issue to the jury see Baly *v.* St. Paul City R. Co., 90 Minn. 39, 95 N. W. 757. Evidence that the car which struck plaintiff was being driven rapidly, or more rapidly than usual, is not sufficient to justify an instruction leaving it to the jury to say whether the evidence shows wanton recklessness. Chicago West Div. R. Co. *v.* Haviland, 12 Ill. App. 561. So where, in an action for injuries to one by a collision of his team with a car, there is no evidence that the car was running at an unusual rate of speed, and plaintiff's evidence, which is contradicted by defendant, merely shows that his horse became frightened and uncontrollable, and he called to the motorman to stop, but he nevertheless kept his car in motion, the submission to the jury of the question of punitive damages is improper. Lexington R. Co. *v.* Fain, 80 S. W. 463, 25 Ky. L. Rep. 2243.

80. See, generally, NEGLIGENCE, 29 Cyc. 643; TRIAL.

New trial.—It is not cause for a new trial that the court, in charging a pertinent and applicable principle of law, failed to charge in connection therewith some other principle equally pertinent and applicable. Georgia R., etc., Co. *v.* Blacknall, 122 Ga. 310, 50 S. E. 92. See, generally, NEW TRIAL, 29 Cyc. 786 *et seq.* Instructions to be given on a new trial in an action for injury to a child on defendant's street railroad track see Louisville R. Co. *v.* Gaar, (Ky. 1908) 112 S. W. 1130.

In construing the legal effect of an ordinance giving fire apparatus the right of way while going to and at any fire, it is not error to set out the ordinance at length in the instruction. McBride *v.* Des Moines City R. Co., 134 Iowa 398, 109 N. W. 618. But where an ordinance provides that the person in charge of a street car shall keep a vigilant watch for all vehicles and persons on foot, and, on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible, inasmuch as the meaning of the phrase "shortest time and space possible" is uncertain, the incorporation of the ordinance bodily into an instruction in a personal injury action is misleading. Gebhardt

ing theories of the different parties,[81] as in charging on defendant's negligence[82] and the injured person's contributory negligence,[83] defining, when necessary, the different terms or expressions used.[84] The instructions must also state with certainty all the issues in the case,[85] and specify all the facts which must be found to warrant a verdict for plaintiff;[86] and must not be confusing or misleading,[87]

v. St. Louis Transit Co., 97 Mo. App. 373, 71 S. W. 448.

81. See Holden *v.* Missouri R. Co., 177 Mo. 456, 76 S. W. 973.

Effect of negligence.—An instruction which properly defines plaintiff's and defendant's duties under the circumstances is insufficient where it does not tell the jury the legal consequence of the neglect of such duty by either party. Kimble *v.* St. Louis, etc., R. Co., 108 Mo. App. 78, 82 S. W. 1096.

82. See the following cases:

Alabama.— Birmingham R., etc., Co. *v.* Jones, 146 Ala. 277, 41 So. 146, holding that an instruction which, after hypothesizing the failure of the motorman to do all that a reasonably prudent motorman would have done under the circumstances, fails to further hypothesize that the failure proximately caused the injury, is erroneous.

Iowa.— Hart *v.* Cedar Rapids, etc., R. Co., 109 Iowa 631, 80 N. W. 662, instruction held not erroneous as substituting the rules of defendant as a test of negligence.

Massachusetts.— Silva *v.* Boston El. R. Co., 183 Mass. 249, 66 N. E. 808, as to defect in brake.

Missouri.— Masterson *v.* St. Louis Transit Co., 204 Mo. 507, 98 S. W. 504, 103 S. W. 48 (holding that where, in an action for causing the death of plaintiffs' son, the jury were instructed that defendant was not negligent in failing to stop its car after plaintiff's son was in a position of peril, unless he was in a position of peril a sufficient length of time to enable those in charge of the car to stop or check it, so as to avoid striking him, in the exercise of ordinary care on their part and with the means and instrumentalities at hand for stopping the car, the instruction was not objectionable as leaving out of view the duty of the motorman to be on the lookout for danger); Mullin *v.* St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288; Henry *v.* Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214.

New York.— Morsemann *v.* Manhattan R. Co., 16 Daly 249, 10 N. Y. Suppl. 105; Purcell *v.* Union R. Co., 58 Misc. 240, 108 N. Y. Suppl. 1068.

Tennessee.— Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486.

Texas.— San Antonio Traction Co. *v.* Levyson, (Civ. App. 1908) 113 S. W. 569.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

Instruction held sufficient to submit the question of causal connection between the negligence of defendant and the death or injury complained of, although it did not use the expression "proximate cause" see Cornoviski *v.* St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51; Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445.

Wilfulness or wantonness.—Where, in an action for injuries to one struck by a street car, there is evidence tending to show wantonness on the part of the motorman, an instruction that if the motorman saw plaintiff in danger on the track, or could have seen him by diligence, and failed to use the means at his command to stop the car, after plaintiff's danger was apparent, then such conduct would be equivalent to a wilful, wanton, or intentional act, is erroneous, as not stating to whom the danger became apparent, and failing to postulate wanton conduct in failing to stop the car. Anniston Electric, etc., Co. *v.* Elwell, 144 Ala. 317, 42 So. 45.

It is not a reversible error to fail to define the degree of care required of defendant, where the latter fails to submit an instruction defining what degree of care is required and what acts would constitute negligence. Brown *v.* St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310.

83. See *infra*, X, B, 9, h, (v).

84. See Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Linder *v.* St. Louis Transit Co., 103 Mo. App. 574, 77 S. W. 997.

Gross negligence.—Where a statute provides that no recovery can be had against a street railroad company for death caused by the negligence of its employees unless it was gross negligence, an instruction authorizing a recovery if the death was caused by the "negligence" of its employees is erroneous; gross negligence should be defined in the charge and the matter be submitted to the jury whether the driver was guilty of gross negligence. San Antonio St. R. Co. *v.* Cailloutte, 79 Tex. 341, 15 S. W. 390.

85. Boyd *v.* St. Louis Transit Co., 108 Mo. App. 303, 83 S. W. 287.

86. Chicago City R. Co. *v.* Jordan, 215 Ill. 390, 74 N. E. 452 [*reversing* 116 Ill. App. 650] (holding that in an action for death caused by a collision between plaintiff's intestate and defendant's street car, an instruction on wilful injury, that it was not necessary for plaintiff to prove that defendant intended to drive the car upon deceased, in order to sustain an allegation of wilfulness, but failing to charge what was necessary in order to sustain such allegation, was erroneous); Silva *v.* Boston El. R. Co., 183 Mass. 249, 66 N. E. 808; Boyd *v.* St. Louis Transit Co., 108 Mo. App. 303, 83 S. W. 287.

87. **Instructions held misleading:** In general. Garfield *v.* Hartford, etc., St. R. Co., 80 Conn. 260, 67 Atl. 890; Columbus R. Co. *v.* Peddy, 120 Ga. 589, 48 S. E. 149; Metropolitan St. R. Co. *v.* Rouch, 66 Kan. 195, 71 Pac. 257; Lexington R. Co. *v.* Vanladen,

or too general.[88] It is also required that the instructions in such an action must

107 S. W. 740, 32 Ky. L. Rep. 1047; Dunn *v.* Cass Ave., etc., R. Co., 98 Mo. 652, 11 S. W. 1009; Gessner *v.* Metropolitan St. R. Co., 132 Mo. App. 584, 112 S. W. 30; Klein *v.* St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281; Frank *v.* St. Louis Transit Co., 112 Mo. App. 496, 87 S. W. 88; Falotio *v.* Broadway, etc., R. Co., 9 Daly (N. Y.) 243; Denison, etc., R. Co. *v.* Carter, (Tex. Civ. App. 1902) 70 S. W. 322, 71 S. W. 292. As to the reciprocal rights and duties of defendant and the person injured in the use of the tracks. Greene *v.* Louisville R. Co., 119 Ky. 862, 84 S. W. 1154, 27 Ky. L. Rep. 316; Carrahar *v.* Boston, etc., St. R. Co., 198 Mass. 549, 85 N. E. 102, 126 Am. St. Rep. 461. As to defendant's negligence generally (Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616), in colliding with a vehicle on or near the track (North Chicago St. R. Co. *v.* Smadraff, 189 Ill. 155, 59 N. E. 527 [*affirming* 89 Ill. App. 411]; Chicago West Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350 [*affirming* 33 Ill. App. 351]; Feitl *v.* Chicago City R. Co., 113 Ill. App. 381 [*affirmed* in 211 Ill. 279, 71 N. E. 991]; Louisville R. Co. *v.* Gaar, (Ky. 1908) 112 S. W. 1130; Hof *v.* St. Louis Transit Co., 213 Mo. 445, 111 S. W. 1166), after the motorman saw, or by the exercise of ordinary care could have seen, the danger of a collision (Lexington R. Co. *v.* Woodward, 106 S. W. 853, 32 Ky. L. Rep. 653; New York *v.* Metropolitan St. R. Co., 90 N. Y. App. Div. 66, 85 N. Y. Suppl. 693 [*affirmed* in 182 N. Y. 536, 75 N. E. 1128]). As to a motorman's right to presume that an adult person on the track would remove himself from his position of danger as the car approached. Riley *v.* Consolidated R. Co., 82 Conn. 105, 72 Atl. 562. As to defendant's negligence relative to keeping a lookout from a car. Louisville R. Co. *v.* Gaar, *supra*. As to defendant's negligence under the doctrine of discovered peril. Birmingham R., etc., Co. *v.* Williams, 158 Ala. 381, 48 So. 93; Birmingham R., etc., Co. *v.* Hayes, 153 Ala. 178, 44 So. 1032; Louisville R. Co. *v.* Colston, 117 Ky. 804, 79 S. W. 243, 25 Ky. L. Rep. 1933 (holding that a charge on discovered peril was improper and misleading, where there was nothing in plaintiff's actions to indicate to the motorman that she would not stop for the car to pass and cross behind it, as was the usual custom of intending passengers); Henderson *v.* Detroit Citizens' St. R. Co., 116 Mich. 368, 74 N. W. 525. As to defendant's negligence relative to defects in its tracks. Stratton *v.* Central City Horse R. Co., 95 Ill. 25. As to the proximate cause of the injury in a collision between a vehicle and a street car. Hanson *v.* Manchester St. R. Co., 73 N. H. 395, 62 Atl. 595. An instruction that the burden of establishing by a preponderance of proof the state of facts alleged in the declaration was on plaintiff, "and if the testimony in this case should be such as to leave the minds of the jury in a state of even balance as to the truth of the allegation in the declaration, the verdict must be for the defendant," is misleading. United R., etc., Co. *v.* Cloman, 107 Md. 681, 69 Atl. 379.

Instructions held not misleading: In general. Tepper *v.* Boston El. R. Co., 192 Mass. 46, 78 N. E. 384; Steinmann *v.* St. Louis Transit Co., 116 Mo. App. 673, 94 S. W. 799; Brooklyn St. R. Co. *v.* Kelley, 6 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 393 [*affirmed* in 33 Cinc. L. Bul. 330]; Richmond Pass., etc., Co. *v.* Gordon, 102 Va. 498, 46 S. E. 772; Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284; Southern Electric R. Co. *v.* Hageman, 121 Fed. 262, 57 C. C. A. 348. As to defendant's duty to keep a lookout. Jacksonville Electric Co. *v.* Hellenthal, 56 Fla. 443, 47 So. 812; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 12 S. W. 891. As to defendant's right to use its track. Ford *v.* Paducah City R. Co., 124 Ky. 488, 99 S. W. 355, 30 Ky. L. Rep. 644, 124 Am. St. Rep. 412, 8 L. R. A. N. S. 1093. As to defendant's negligence generally (North Chicago St. R. Co. *v.* Johnson, 205 Ill. 32, 68 N. E. 463), after the motorman discovered or should have discovered the injured person's peril (Sepetowski *v.* St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693); in leaving a car standing in the street at the end of its line (George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829); in operating its car at an excessive rate of speed (Masterson *v.* St. Louis Transit Co., 204 Mo. 507, 98 S. W. 504, 103 S. W. 48); in not having a fender on the car which caused the injury (Fritsch *v.* New York, etc., R. Co., 93 N. Y. App. Div. 554, 87 N. Y. Suppl. 942); or in failing to comply with an ordinance in respect to the condition of the track (Gray *v.* Washington Water Power Co., 30 Wash. 665, 71 Pac. 206). As to the motorman's duty to stop and give a fire truck the right of way. Duffghe *v.* Metropolitan St. R. Co., 109 N. Y. App. Div. 603, 96 N. Y. Suppl. 324 [*affirmed* in 187 N. Y. 522, 79 N. E. 1104]. An instruction is not misleading in stating that the ordinances of the city in question required that no engine or car should be propelled on defendant's railway track, on a certain named street, at a rate of speed exceeding five miles an hour, where the accident complained of happened on the street named, and the question under consideration is the negligence of defendant in propelling its cars at a greater rate of speed, on such street, although the ordinance referred to is general, and applicable as well to other streets, other persons, and other classes of vehicles. Washington, etc., Electric R. Co. *v.* Quayle, 95 Va. 741, 30 S. E. 391.

88. Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Memphis City R. Co. *v.* Logue, 13 Lea (Tenn.) 32, holding that a charge, in an action by one run over by a street car, that the company is bound "to furnish lights on its cars at night such as will enable its drivers to see objects ahead

not be abstract,[89] argumentative,[90] or conflicting, inconsistent, or contradictory.[91] To be sufficient, an instruction should be complete in itself, but the instructions are to be considered as a whole, and the fact that one instruction considered separately is open to objection does not affect the sufficiency of the charge, if when such instruction is considered in connection with other instructions the charge is correct in its entirety;[92] and an instruction which covers the case generally is ordinarily sufficient in the absence of a request for further instructions in detail.[93] Mere errors

on the track, with the aid of the street lights, in time to avoid an accident," is too general.

89. Birmingham R., etc., Co. *v.* Ryan, 148 Ala. 69, 41 So. 616; Richmond Pass., etc., Co. *v.* Gordon, 102 Va. 498, 46 S. E. 772.

90. Louisville R. Co. *v.* Will, 66 S. W. 628, 23 Ky. L. Rep. 1961; Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624, holding that a charge that if, by failure of the company to employ skilled and prudent drivers, any one is injured, the company is liable, and also that, although the driver might have been careless or imprudent at other times, that would not render defendant liable, unless, on this occasion, he was careless, reckless, and imprudent, is argumentative and improper.

91. *Illinois.*— Savage *v.* Chicago, etc., Electric R. Co., 238 Ill. 392, 87 N. E. 377 [*affirming* 142 Ill. App. 342], holding that in a personal injury action, revived in plaintiff's administrator's name, an instruction authorizing the jury to deduct the sum paid plaintiff by defendant when he executed a release, and another instruction directing them to disregard the release in arriving at a verdict if its execution was obtained by fraud, without plaintiff knowing its condition, were not inconsistent.

Iowa.— Christy *v.* Des Moines City R. Co., 126 Iowa 428, 102 N. W. 194, holding that in an action for injuries from a collision, instructions directing a verdict for defendant if plaintiff failed to prove freedom from contributory negligence, and enumerating the acts of negligence relied on in the petition, except that of failing to stop the car after the motorman saw plaintiff's danger, and charging that, if the jury failed to find any of the acts of negligence, their verdict would be for defendant, were inconsistent with a charge that, although plaintiff was negligent, yet defendant would be liable if its employees saw plaintiff, and knew of his perilous position, and failed to use ordinary care to prevent injury.

Kansas.— Metropolitan St. R. Co. *v.* Rouch, 66 Kan. 195, 71 Pac. 257.

Kentucky.— Greene *v.* Louisville R. Co., 119 Ky. 862, 84 S. W. 1154, 27 Ky. L. Rep. 316.

Missouri.— Schmidt *v.* St. Louis R. Co., 163 Mo. 645, 63 S. W. 834; Ennis *v.* Union Depot R. Co., 155 Mo. 20, 55 S. W. 878; Gessner *v.* Metropolitan St. R. Co., 132 Mo. App. 584, 112 S. W. 30; Prendenville *v.* St. Louis Transit Co., 128 Mo. App. 596, 107 S. W. 453; Jager *v.* Metropolitan St. R. Co., 114 Mo. App. 10, 89 S. W. 62; Hyman *v.* St. Louis Transit Co., 108 Mo. App. 458, 83 S. W. 1030 (holding that an instruction, in an action for injuries, from a collision, that if the jury found that plaintiff knew of the approach of the car, and failed to exercise ordinary care to avoid a collision, he could not recover, was not in conflict with an instruction authorizing a verdict for plaintiff if he was unaware of the peril he was in until too late to avoid a collision, and the motorman was aware thereof in time to avert the accident, and negligently failed to do so, thereby causing the accident); Jersey Farm Dairy Co. *v.* St. Louis Transit Co., 103 Mo. App. 90, 77 S. W. 346; Bindbeutal *v.* Street R. Co., 43 Mo. App. 463 (holding that an instruction that defendant is guilty of negligence if the gripman, "intentionally and carelessly" caused the collision, is error, since the two terms are inconsistent).

Texas.— El Paso Electric R. Co. *v.* Kelly, (Civ. App. 1908) 109 S. W. 415; San Antonio Traction Co. *v.* Kumpf, (Civ. App. 1907) 99 S. W. 863.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

92. *California.*— George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829.

Illinois.— Chicago West. Div. R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350 [*affirming* 33 Ill. App. 351]; Chicago City R. Co. *v.* McDonough, 125 Ill. App. 223 [*affirmed* in 221 Ill. 69, 77 N. E. 577].

Iowa.— Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

Maine.— Bangs *v.* Lewiston, etc., R. Co., 89 Me. 194, 36 Atl. 73.

Massachusetts.— Uggla *v.* West End St. R. Co., 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481.

Missouri.— Hovarka *v.* St. Louis Transit Co., 191 Mo. 441, 90 S. W. 1142; Henry *v.* Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214.

New York.— Cumming *v.* Brooklyn City R. Co., 104 N. Y. 669, 10 N. E. 855; Etherington *v.* Prospect Park, etc., R. Co., 88 N. Y. 641.

Texas.— Dallas Rapid Transit R. Co. *v.* Dunlap, 7 Tex. Civ. App. 471, 26 S. W. 877.

Virginia.—Richmond Traction Co. *v.* Hildebrand, 98 Va. 22, 34 S. E. 888; Washington, etc., Electric R. Co. *v.* Quayle, 95 Va. 741, 30 S. E. 391.

Washington.— Gray *v.* Washington Water Power Co., 30 Wash. 665, 71 Pac. 206; Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284.

United States.— Third Ave. R. Co. *v.* Krausz, 112 Fed. 379, 50 C. C. A. 293.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

93. *Indiana.*— Indianapolis, etc., Rapid Transit Co. *v.* Haines, 33 Ind. App. 63, 69 N. E. 187.

of form or phraseology in the instructions which are not calculated to mislead the jury or to prejudice the rights of the parties are immaterial.[94]

(II) *Right to and Refusal of Instructions.* As a general rule each party to an action for injuries sustained through the operation of a street railroad is entitled to have the jury fully and properly instructed on his theory of the case,[95] and it is error for the court to refuse to give a properly requested instruction on a matter not sufficiently covered by other instructions given.[96] But a party

Iowa.— Hanley *v.* Ft. Dodge Light, etc., Co., 133 Iowa 326, 107 N. W. 593, 110 N. W. 579; Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489, holding that in an action by a driver for injuries sustained in a collision with a street car, an instruction that if the jury find "that by reason" of running the car at an unreasonable rate of speed it collided with plaintiff's vehicle, so as to injure him, then, etc., sufficiently instructs that the rate of speed must have been the proximate cause of the injury.

Missouri.— Beier *v.* St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876.

New York.— Persico *v.* Metropolitan St. R. Co., 87 N. Y. Suppl. 233.

Texas.— Citizens' R., etc., Co. *v.* Johns, (Civ. App. 1909) 116 S. W. 62.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

94. *California.*— George *v.* Los Angeles R. Co., 126 Cal. 357, 58 Pac. 819, 77 Am. St. Rep. 184, 46 L. R. A. 829, holding that in an action for injuries to a boy, sustained by him while playing on certain cars left by defendant in the street at the end of its line, an instruction "that the plaintiff was not a passenger, nor entitled to the rights of a passenger, when the injuries of which he complains were received," where the jury were not told what defendant's liability was to passengers, is not erroneous, unless it tended to mislead the jury.

Georgia.—Atlanta R., etc., Co. *v.* Johnson, 120 Ga. 908, 48 S. E. 389.

Illinois.— Chicago City R. Co. *v.* Meinheit, 114 Ill. App. 497.

Kentucky.— Paducah City R. Co. *v.* Alexander, 104 S. W. 375, 31 Ky. L. Rep. 1043, holding that an instruction that it was a motorman's duty to exercise ordinary care to discover persons on the track, and to avoid colliding with such persons, was not erroneous for omitting the clause "to use ordinary care" before the words "to avoid," etc.

Missouri.— Riggs *v.* Metropolitan St. R. Co., 216 Mo. 304, 115 S. W. 969; Heinzle *v.* Metropolitan St. R. Co., 213 Mo. 102, 111 S. W. 536; Muehlhausen *v.* St. Louis R. Co., 91 Mo. 332, 2 S. W. 315; Engelman *v.* Metropolitan St. R. Co., 133 Mo. App. 514, 113 S. W. 700.

Utah.— Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

95. West Chicago St. R. Co. *v.* Foster, 175 Ill. 396, 51 N. E. 690 [*affirming* 74 Ill. App. 414] (holding that it was not error to instruct that if plaintiff's intestate was injured by collision with a street car while exercising due care, and defendant omitted to do certain things, plaintiff could recover, as plaintiff was entitled to have the jury instructed on his theory of the case); Humbird *v.* Union St. R. Co., 110 Mo. 76, 19 S. W. 69; McLeland *v.* St. Louis Transit Co., 105 Mo. App. 473, 80 S. W. 30 (holding that where in an action for injuries to a pedestrian attempting to cross in front of a stationary car, the defense was that the car was moving, and that plaintiff was negligent in stepping immediately in front of it, it was not sufficient for the court to charge that the burden throughout rested on plaintiff to establish that her injuries were caused solely by the negligence of defendant, and without fault on plaintiff's part, but defendant was entitled to a sharply defined and concise instruction that, if plaintiff's injuries resulted from the concurrent and mutual negligence of both herself and defendant, defendant was not responsible therefor); Bittner *v.* Crosstown St. R. Co., 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. Rep. 588 (holding that where in an action by an administrator to recover damages for causing the death of his intestate, it appeared that the deceased was run over by an electric car, which, after running over him, backed and ran over him again, and there was a conflict of evidence as to whether the backing was the result of an effort to stop the car, and occurred within a few feet, or whether it did not begin until the car had run some distance, defendant was entitled to have the jury explicitly instructed that it was not responsible for any error of judgment of the motorman in managing the car after it first struck the deceased); Rutz *v.* New York City R. Co., 107 N. Y. App. Div. 568, 95 N. Y. Suppl. 345; Kroder *v.* Interurban St. R. Co., 46 Misc. (N. Y.) 118, 91 N. Y. Suppl. 341 (holding that where, at the time of a collision between a team and street car, an ordinance provides that vehicles going northerly or southerly shall have the right of way over a vehicle going easterly or westerly, the railroad company is entitled to an instruction that such ordinance is controlling); Citizens' Pass. R. Co. *v.* Ketcham, 122 Pa. St. 228, 15 Atl. 733.

96. *Illinois.*—Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385]; Chicago City R. Co. *v.* Meinheit, 114 Ill. App. 497; West Chicago St. R. Co. *v.* Kautz, 89 Ill. App. 309.

Kentucky.— Louisville R. Co. *v.* Byers, 130 Ky. 437, 113 S. W. 463.

Missouri.— Humbird *v.* Union St. R. Co., 110 Mo. 76, 19 S. W. 69.

New Jersey.— Hollingsead *v.* Camden, etc.,

cannot complain of instructions which are as favorable to him as could be reasonably asked;[97] and a requested instruction ordinarily need not be given in its exact language, if it is given in substance,[98] and it is not error to refuse a requested instruction on matters substantially covered by the instructions given,[99] or to refuse a requested instruction or omit to charge on immaterial or unessential matters;[1] nor is it prejudicial error to refuse an instruction which correctly states a legal proposition where it does not affect the substantial rights of the party asking it.[2] Where a requested instruction as a whole is incorrect it is not error for the court to refuse to give it, although a part of it taken separately may be correct.[3]

(III) *Invading Province of Jury.* The issues of fact in the case must be submitted to the jury by instructions which clearly and fully state and define them, without the expression of any opinion by the court upon the merits of the

R. Co., 72 N. J. L. 154, 60 Atl. 514, holding that where, in an action for the destruction of a wagon with which an electric car collided, the court without objection instructed as to the duty of the motorman in terms making the company an insurer against collisions under the circumstances specified, and refused a request for instructions to the effect that the motorman was not obliged to foresee that the driver of a wagon would leave his place of safety beside the track and turn across it until he did so turn, such refusal in view of evidence to that effect and of the instruction given was erroneous.

New York.— Platt *v.* Albany R. Co., 170 N. Y. 115, 62 N. E. 1071 [*reversing* 55 N. Y. App. Div. 636, 67 N. Y. Suppl. 1144]; Bittner *v.* Crosstown St. R. Co., 153 N. Y. 76, 46 N. E. 1044, 60 Am. St. Rep. 588 [*reversing* 12 Misc. 514, 33 N. Y. Suppl. 672]; Jaffa *v.* Nassau Electric R. Co., 131 N. Y. App. Div. 852, 116 N. Y. Suppl. 324; Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434; Hennessey *v.* Forty-Second St., etc., R. Co., 103 N. Y. App. Div. 384, 92 N. Y. Suppl. 1058 [*reversing* 88 N. Y. Suppl. 728]; Weitzman *v.* Nassau Electric R. Co., 40 N. Y. App. Div. 615, 57 N. Y. Suppl. 1120; Spitalera *v.* Second Ave. R. Co., 73 Hun 37, 25 N. Y. Suppl. 919; Moroney *v.* Brooklyn City R. Co., 9 N. Y. Suppl. 546.

Ohio.—Wright *v.* Cincinnati St. R. Co., 9 Ohio Cir. Ct. 503, 6 Ohio Cir. Dec. 159.

Pennsylvania.— Citizens' Pass. R. Co. *v.* Ketcham, 122 Pa. St. 228, 15 Atl. 733.

Tennessee.— Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479.

Texas.— Dallas Consol. Electric St. R. Co. *v.* Conn, (Civ. App. 1907) 100 S. W. 1019; Citizens' R. Co. *v.* Ford, 25 Tex. Civ. App. 328, 60 S. W. 680.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

97. Masterson *v.* St. Louis Transit Co., 204 Mo. 507, 103 S. W. 48; Haney *v.* Pittsburgh, etc., Traction Co., 159 Pa. St. 395, 28 Atl. 235.

98. Manson *v.* Manhattan R. Co., 55 N. Y. Super. Ct. 18; Davis *v.* Durham Traction Co., 141 N. C. 134, 53 S. E. 617 (holding that where, in an action for injuries to a traveler in a collision with a car, the evidence showed that the car was run at an excessive rate of speed, a requested instruction declaring that the company, on the traveler suddenly driving his wagon across the track, was only required to use ordinary care to avoid injuring him, was properly modified by adding, "and the car was not running at an excessive rate of speed"); Newport News, etc., R. Co. *v.* Bradford, 99 Va. 117, 37 S. E. 807.

99. *California.*— Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908.

Illinois.— Sampsell *v.* Rybcynski, 229 Ill. 75, 82 N. E. 244.

Kentucky.— Lexington R. Co. *v.* Fain, 90 S. W. 574, 28 Ky. L. Rep. 743.

Massachusetts.— Galbraith *v.* West End St. R. Co., 165 Mass. 572, 43 N. E. 501; Glazebrook *v.* West End St. R. Co., 160 Mass. 239, 35 N. E. 553.

Missouri.— Stanley *v.* Union Depot R. Co., 114 Mo. 606, 21 S. W. 832; Dunn *v.* Cass Ave., etc., R. Co., 98 Mo. 652, 11 S. W. 1009.

New York.— Hock *v.* New York, etc., R. Co., 74 N. Y. App. Div. 52, 77 N. Y. Suppl. 200; Weiler *v.* Manhattan R. Co., 53 Hun 372, 6 N. Y. Suppl. 320 [*affirmed* in 127 N. Y. 669, 28 N. E. 255]; Manson *v.* Manhattan R. Co., 55 N. Y. Super. Ct. 18; Mentz *v.* Second Ave. R. Co., 2 Rob. 356 [*affirmed* in 3 Abb. Dec. 274, 1 Alb. L. J. 99].

Texas.—Ft. Worth St. R. Co. *v.* Witten, 74 Tex. 202, 11 S. W. 1091.

Virginia.— Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

1. Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908, holding that an instruction that a street railroad company has only an equal right with the traveling public to the use of the street whereon its track is built is not improper because omitting some few exceptions not material in the case, such as that, when an ordinary vehicle meets a car on its track, it must give way to the car.

2. Schafstette *v.* St. Louis, etc., R. Co., 175 Mo. 142, 74 S. W. 826; Brown *v.* St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310.

3. Cobb *v.* Metropolitan St. R. Co., 56 N. Y. App. Div. 187, 67 N. Y. Suppl. 644.

A requested instruction excluding the distinction between negligence and a mere error of judgment is properly refused. Black-

case,[4] and hence the instructions must not invade the province of the jury by charging upon the weight of the evidence,[5] as by singling out and giving undue prominence to certain parts of the testimony,[6] or by assuming as a matter of law the existence or non-existence of a fact in issue,[7] unless the fact is undisputed or is one about which in the minds of reasonable men there is no controversy,[8] or is a matter of common knowledge;[9] or by assuming or charging that certain facts do or do not constitute negligence on the part of defendant,[10] or contributory negligence on the part of the person injured.[11] But an instruction which defines negligence and leaves the facts of the case to be found by the jury and also leaves it to them to say whether the facts found constitute negligence as defined is not a charge on the weight of the evidence.[12]

(IV) *Conformity to Issues and Evidence.* As in other civil actions, the instructions in an action for injuries caused by the operation of a street railroad must also conform and be restricted to the issues made by the pleadings and evidence, and on which the case is tried,[13] and must be applicable to the

burn *v.* Boston, etc., St. R. Co., 201 Mass. 186, 87 N. E. 579.

4. Springfield Consol. R. Co. *v.* Sommer, 55 Ill. App. 553.

However, an instruction to the jury that they should inquire whether the car was running at an excessive rate of speed, in view of the situation, locality, and circumstances, is not vitiated by further statements of the court comparing the rates of speed allowed on steam railroads to those allowed on street railroads. Galbraith *v.* West End. St. R. Co., 165 Mass. 572, 43 N. E. 501.

5. Eisler *v.* Brooklyn Heights R. Co., 14 Misc. (N. Y.) 647, 35 N. Y. Suppl. 670.

6. Montgomery St. R. Co. *v.* Rice, 142 Ala. 674, 38 So. 857; Springfield Consol. R. Co. *v.* Sommer, 55 Ill. App. 553; Lynch *v.* Metropolitan St. R. Co., 112 Mo. 420, 20 S. W. 642.

7. Birmingham R., etc., Co. *v.* City Stable Co., 119 Ala. 615, 24 So. 558, 72 Am. St. Rep. 955; Gray *v.* St. Paul City R. Co., 87 Minn. 280, 91 N. W. 1106; Cornovski *v.* St. Louis Transit Co., 207 Mo. 263, 106 S. W. 51; San Antonio Traction Co. *v.* Levyson, (Tex. Civ. App. 1908) 113 S. W. 569.

8. Schmidt *v.* St. Louis R. Co., 163 Mo. 645, 63 S. W. 834; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 12 S. W. 891, holding that an instruction assuming that defendant's servants were operating the cars is not erroneous, where plaintiff's evidence tends to show that fact, and it is not denied by defendant, but is treated as conceded by both parties.

9. Story *v.* St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992, holding that the fact that every street car is furnished with a gong is a matter of common knowledge, which the jury is presumed to possess, and hence an instruction submitting to the jury to find whether the motorman negligently failed to give timely warning to a person attempting to cross the tracks is not objectionable for failing to state in what manner the warning should have been given.

Where the fact that fenders are generally used on street cars is treated as a matter of general knowledge, of which the court would take judicial notice, and proof thereof is excluded for that reason, the court is entitled to assume that such fact existed, in its instructions, as if it had been proved. Spiking *v.* Consolidated R., etc., Co., 33 Utah 313, 93 Pac. 838.

10. *California.*— Bresee *v.* Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. N. S. 1059.

Georgia.— Columbus R. Co. *v.* Peddy, 120 Ga. 589, 48 S. E. 149.

Illinois.— Cole *v.* Central R. Co., 103 Ill. App. 160; Wachtel *v.* East St. Louis, etc., R. Co., 77 Ill. App. 465; Kankakee Electric R. Co. *v.* Lade, 56 Ill. App. 454.

New Hampshire.— Warren *v.* Manchester St. R. Co., 70 N. H. 352, 47 Atl. 735, holding that an instruction that the motorman's use of the brake, instead of the reverse, was not negligence if caused by excitement, was properly refused, as that was only a circumstance from which to determine negligence, which was a question for the jury.

New York.— Fiori *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 49, 90 N. Y. Suppl. 521; Connor *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 384, 79 N. Y. Suppl. 294; Jones *v.* Third Ave. R. Co., 34 Misc. 201, 68 N. Y. Suppl. 832, holding that an instruction that, if plaintiff was prudent, and the accident occurred, the accident was the fault of defendant, was erroneous, since it directed the jury to find that, if plaintiff was prudent, as a matter of law defendant was negligent, irrespective of defendant's conduct.

Tennessee.—Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374.

Virginia.— Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

Washington.— Atherton *v.* Tacoma R., etc., Co., 30 Wash. 395, 71 Pac. 39.

See 44 Cent. Dig. tit. "Street Railroads," § 259.

11. See *infra*, X, B, 9, h, (V).

12. Lombard St., etc., Pass. R. Co. *v.* Steinhart, 2 Pennyp. (Pa.) 358; Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486; Houston City St. R. Co. *v.* Delesdernier, 84 Tex. 82, 19 S. W. 366.

13. *Alabama.*— Montgomery St. R. Co. *v.* Rice, 142 Ala. 674, 38 So. 857, holding that

facts which the evidence tends to prove.[14] And hence an instruction is erroneous which is not pertinent to the issues,[15] as where it charges upon a theory which is not put in issue by the pleadings[16] or which is not supported by the evi-

a charge that defendant was not guilty of a wilful or wanton wrong if the car was being run at the rate of five or six miles an hour was properly refused, because it did not limit the question of speed to the time of the injury.

Illinois.— Chicago City R. Co. *v.* McDonough, 125 Ill. App. 223 [*affirmed* in 221 Ill. 69, 77 N. E. 577].

Indiana.— Indianapolis St. R. Co. *v.* Taylor, 158 Ind. 274, 63 N. E. 456, holding that an instruction that if defendant's motorman knew that plaintiff was under the car fender, and knew that he could stop the car and thereby prevent the injury, and did not do so, defendant was liable for the injury inflicted after the car could have been stopped, was erroneous, where the complaint merely charged that defendant negligently ran into plaintiff and caught him by and under the fender and dragged him.

Missouri.— Riska *v.* Union Depot R. Co., 180 Mo. 168, 79 S. W. 445 (holding that in an action for negligent death at a crossing, an instruction based on common-law allegations of negligence is not erroneous, in embracing matters of negligence in failing to stop the car in time to avoid the collision after the discovery of danger to the deceased); Meeker *v.* Metropolitan St. R. Co., 178 Mo. 173, 77 S. W. 58; Hogan *v.* Citizens' R. Co., 150 Mo. 36, 51 S. W. 473; Engelman *v.* Metropolitan St. R. Co., 133 Mo. App. 514, 113 S. W. 700; Brown *v.* St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310.

New York.— Lawrence *v.* Metropolitan St. R. Co., 114 N. Y. App. Div. 16, 99 N. Y. Suppl. 735, holding that where there was no claim or evidence that plaintiff was injured except by being struck by the car, but there was a conflict as to whether the car was stopped as soon as possible after plaintiff was thrown on the fender, defendant was entitled to an instruction that, even if defendant was negligent in failing to stop as soon as possible after plaintiff was thrown on the fender, it was not liable because plaintiff was thus carried.

Texas.— Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054; Marshall *v.* Dallas Consol. Electric St. R. Co., (Civ. App. 1903) 73 S. W. 63; San Antonio Traction Co. *v.* Court, 31 Tex. Civ. App. 146, 71 S. W. 777.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

14. Chicago, etc., R. Co. *v.* Ingraham, 131 Ill. 659, 23 N. E. 350 [*affirming* 33 Ill. App. 351] (holding that it is not error to refuse an instruction, although correct in other respects, if it is inapplicable to the facts of the case); Ramsey *v.* Cedar Rapids, etc., R. Co., 135 Iowa 329, 112 N. W. 798.

Instructions held proper or erroneously refused, as being applicable to the facts: Frankfort, etc., Traction Co. *v.* Hulette, 106 S. W. 1193, 32 Ky. L. Rep. 732; Fay *v.* Brooklyn Heights R. Co., 129 N. Y. App. Div. 375, 113 N. Y. Suppl. 689; Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479. Relative to defendant's negligence in colliding with a person or vehicle (Tri-City R. Co. *v.* Weaver, 106 Ill. App. 312; Sealey *v.* Metropolitan St. R. Co., 97 N. Y. App. Div. 399, 89 N. Y. Suppl. 1045; Palmer *v.* Larchmont Horse R. Co., 95 N. Y. App. Div. 106, 88 N. Y. Suppl. 447); in failing to ring a gong (Huber *v.* Nassau Electric R. Co., 22 N. Y. App. Div. 426, 48 N. Y. Suppl. 38); in compelling a child to jump from a moving car (Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622); or in running its car at a rapid rate of speed (Jager *v.* Metropolitan St. R. Co., 114 Mo. App. 10, 89 S. W. 62). Relative to the doctrine of injury avoidable notwithstanding contributory negligence. Kinlen *v.* Metropolitan St. R. Co., 216 Mo. 145, 115 S. W. 523. An instruction as to the location, construction, and maintenance of a switch is proper, where defendant introduced evidence that the switch was in perfect condition, although there was no allegation or proof that the switch was improperly constructed. Nashville St. R. Co. *v.* O'Bryan, 104 Tenn. 28, 55 S. W. 300.

Instructions held erroneous or properly refused as not being applicable to the facts see *infra*, note 17.

Matters of common knowledge.—An instruction, in an action for injuries sustained by one boarding a street car by reason of the car suddenly starting up while he was on the platform, that the motorman was under the direction of the conductor, was not erroneous as not based on the evidence, it being a matter of common knowledge that motormen stop and start the cars in response to signals from the conductors. Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219.

15. Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572, 82 S. W. 245; American Storage, etc., Co. *v.* St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184; Spitalera *v.* Second Ave. R. Co., 73 Hun (N. Y.) 37, 25 N. Y. Suppl. 919; El Paso Electric R. Co. *v.* Tomlinson, (Tex. Civ. App. 1909) 115 S. W. 871; San Antonio Traction Co. *v.* Yost, 39 Tex. Civ. App. 551, 88 S. W. 428.

16. *Illinois.*— Leighton *v.* Chicago Consol. Traction Co., 235 Ill. 283, 85 N. E. 309; Sampsell *v.* Rybcynski, 229 Ill. 75, 82 N. E. 244.

Iowa.— Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

Missouri.— Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86; Hartman *v.* St. Louis Transit Co., 112 Mo. App. 439, 87 S. W. 86 (holding that where, in an action for injuries from a collision of a car with plaintiff's vehicle, the complaint alleges that defendant was negligent in running the

dence.[17] An instruction is also erroneous, under the rules regulating instructions generally, if it withdraws or excludes from the consideration of the jury any material matter properly presented by the pleadings and evidence in the case,[18]

car at an excessive rate of speed and in failing to ring the bell, instructions authorizing a recovery if the motorman discovered plaintiff's danger in time to have prevented the collision by ordinary care are outside the pleadings); McLeland *v.* St. Louis Transit Co., 105 Mo. App. 473, 80 S. W. 30; Jacquin *v.* Grand Ave. Cable Co., 57 Mo. App. 320 (holding that it is error to instruct as to the negligence of a flagman in not signaling a cable car, when the negligence charged in the petition is the absence of proper appliances for stopping cars).

New York.— Delkowsky *v.* Dry Dock, etc., R. Co., 78 N. Y. App. Div. 632, 79 N. Y. Suppl. 1104.

Virginia.— Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850, holding that where the negligence alleged is excessive speed, it is error to instruct on failure to give warnings.

See 44 Cent. Dig. tit. "Street Railroads," §§ 258–267.

17. Scannell *v.* Boston El. R. Co., 176 Mass. 170, 57 N. E. 341; Wise *v.* St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898 (holding that it was proper to refuse an instruction that plaintiff could not recover if his injuries were due to mere accident or misadventure, where there is no evidence of that fact); Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848; Dunn *v.* Cars Ave., etc., R. Co., 98 Mo. 652, 11 S. W. 1009; Reilly *v.* Brooklyn Heights R. Co., 65 N. Y. App. Div. 453, 72 N. Y. Suppl. 1080; Fullerton *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 1, 71 N. Y. Suppl. 326 [*affirmed* in 170 N. Y. 592, 63 N. E. 1116]; Houston City St. R. Co. *v.* Farrell, (Tex. Civ. App. 1894) 27 S. W. 942.

Instructions held erroneous or properly refused as not being applicable to the facts: Indianapolis St. R. Co. *v.* Taylor, 158 Ind. 274, 63 N. E. 456; Galbraith *v.* West End St. R. Co., 165 Mass. 572, 43 N. E. 501; Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86; Sheets *v.* Connolly St. R. Co., 54 N. J. L. 518, 24 Atl. 483; Nocera *v.* Brooklyn Heights R. Co., 113 N. Y. App. Div. 419, 99 N. Y. Suppl. 349; Wallace *v.* Third Ave. R. Co., 36 N. Y. App. Div. 57, 55 N. Y. Suppl. 132; Toledo Traction Co. *v.* Cameron, 137 Fed. 48, 69 C. C. A. 28. As not restricting the jury to the acts of negligence shown by the proof. Sommers *v.* St. Louis Transit Co., 108 Mo. App. 319, 83 S. W. 268. Relative to defendant's negligence in not providing the car with suitable contrivances for avoiding accidents of the kind in question (Zimmerman *v.* Denver Consol. Tramway Co., 18 Colo. App. 480, 72 Pac. 607); in not stopping the car in time to avoid the accident (Indianapolis St. R. Co. *v.* Taylor, 158 Ind. 274, 63 N. E. 456; Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86); or in colliding with a person at a crossing (Wise *v.* St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Hicks *v.* Nassau Electric R. Co., 47 N. Y. App. Div. 479, 62 N. Y. Suppl. 597). Relative to injuries negligently caused by excessive speed. Bresee *v.* Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. N. S. 1059. It is error to charge the jury that, in the absence of contributory negligence, if the gripman "failed to exercise due and reasonable care to warn crossing pedestrians of the car's approach, then the defendant is liable," where it is conceded that plaintiff saw the car approaching before going on the track. Schulman *v.* Houston, etc., Ferry R. Co., 15 Misc. (N. Y.) 30, 36 N. Y. Suppl. 439.

Where there is no evidence of negligence on defendant's part, the court may properly refuse to instruct as to the precautions to be observed by the managers of cars at street crossings. Schlenk *v.* Central Pass. R. Co., 23 S. W. 589, 15 Ky. L. Rep. 409. So where there is no evidence to show that the position of a boy on the track of defendant company was discovered in time to avoid injury, a charge leaving it to the jury whether it was possible, by diligence, to stop the car after the boy came on the track is erroneous. Henderson *v.* Detroit Citizens' St. R. Co., 116 Mich. 368, 74 N. W. 525. So also an instruction relating to the duty of a motorman in operating his car, "considering the number of persons and vehicles on said street," is erroneous where there is no evidence that there were any vehicles on the street at the time of the accident. Day *v.* Citizens R. Co., 81 Mo. App. 471.

Evidence held sufficient to require the giving of a charge on discovered peril see Dallas Consol. Electric St. R. Co. *v.* Conn, (Tex. Civ. App. 1907) 100 S. W. 1019.

An instruction predicated upon facts making it the motorman's duty to keep a lookout for persons on the track is not appropriate, in the absence of testimony showing that the motorman was looking ahead, if the conditions were not such as to make it his duty to keep a lookout for plaintiff, but, if the duty to keep the lookout existed, it would be proper, irrespective of other circumstances, and hence, where the question of duty to keep the lookout is for the jury, such an instruction is proper. Birmingham R., etc., Co. *v.* Jones, 153 Ala. 157, 45 So. 177. Thus in an action for the death of a pedestrian struck at a crossing by a street car, it is proper to instruct that the motorman was bound to maintain a lookout in approaching the crossing, whether there was evidence of his failure to keep a lookout or not, since it is necessary to define the several legal duties of the motorman. Louisville R. Co. *v.* Byers, 130 Ky. 437, 113 S. W. 463.

18. *Illinois.*— Chicago City R. Co. *v.* Strong, 127 Ill. App. 472 [*affirmed* in 230 Ill. 58, 82 N. E. 335].

Missouri.— Wahl *v.* St. Louis Transit Co.,

or if it ignores or omits to charge upon such a matter,[19] or if it unduly emphasizes a particular fact in issue.[20] But it is not error to nullify, by an instruction, a theory of the case upon which there is no evidence and upon which there can be no recovery.[21]

(v) *CONTRIBUTORY NEGLIGENCE.* The rules stated above also apply to instructions relative to the question of contributory negligence of the person injured.[22] When such question is in issue the court should correctly and explicitly instruct the jury upon the law of contributory negligence as applied to the facts in the case,[23] and as to the standard or degree of care required of the injured per-

203 Mo. 261, 101 S. W. 1 (instruction held not objectionable as failing to submit to the jury that the act of the motorman was within the scope of his duties); Hogan *v.* Citizens' R. Co., 150 Mo. 36, 51 S. W. 473.

Nebraska.— Brooks *v.* Lincoln St. R. Co., 22 Nebr. 816, 36 N. W. 529, holding that where plaintiff, riding along a street railroad track, passed a street car slowly moving in the same direction, and when a few feet ahead of it was thrown on the track by reason of the falling of his horse, and run over by the car, an instruction which leaves the jury to infer that plaintiff could not recover if the injury was occasioned by his riding along the track when the car was in motion, is erroneous, as taking the question of negligence from the jury.

New Jersey.— Consolidated Traction Co. *v.* Scott, 58 N. J. L. 682, 34 Atl. 1094, 55 Am. St. Rep. 620, 33 L. R. A. 122.

New York.— Sperry *v.* Union R. Co., 129 N. Y. App. Div. 594, 114 N. Y. Suppl. 286; Binsell *v.* Interurban St. R. Co., 91 N. Y. App. Div. 402, 86 N. Y. Suppl. 913 (instruction held erroneous in an action for injuries to plaintiff in a collision with a street car as plaintiff was driving across the track at a crossing, as withdrawing from the jury's consideration both the question of defendant's negligence and plaintiff's contributory negligence); Kelly *v.* United Traction Co., 88 N. Y. App. Div. 234, 85 N. Y. Suppl. 433; Muriano *v.* Interurban St. R. Co., 92 N. Y. Suppl. 262.

Pennsylvania.— Haney *v.* Pittsburgh, etc., Traction Co., 159 Pa. St. 395, 28 Atl. 235.

Texas.— Dallas Consol. Electric St. R. Co. *v.* Ely, (Civ. App. 1905) 91 S. W. 887; El Paso Electric St. R. Co. *v.* Ballinger, (Civ. App. 1903) 72 S. W. 612; Citizens' R. Co. *v.* Gossett, (Civ. App. 1902) 68 S. W. 706.

Virginia.— Richmond Traction Co. *v.* Martin, 102 Va. 209, 45 S. E. 886.

19. *Georgia.*—Atlanta R., etc., Co. *v.* Gaston, 118 Ga. 418, 45 S. E. 508.

Illinois.— Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385]; Chicago City R. Co. *v.* Anderson, 93 Ill. App. 419 [*affirmed* in 193 Ill. 9, 61 N. E. 999].

Iowa.— Hart *v.* Cedar Rapids, etc., R. Co., 109 Iowa 631, 80 N. W. 662; Wilkins *v.* Omaha, etc., R., etc., Co., 96 Iowa 668, 65 N. W. 987.

Kentucky.—Louisville R. Co. *v.* Bossmeyer, 104 S. W. 337, 31 Ky. L. Rep. 997.

Missouri.— Masterson *v.* St. Louis Transit Co., 204 Mo. 507, 98 S. W. 504, 103 S. W. 48 (instruction held not erroneous as leaving out of consideration the duty of the motorman to be on the lookout to discover the peril); Powers *v.* St. Louis Transit Co., 202 Mo. 267, 100 S. W. 655; Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737 (holding that in an action for injuries to a boy at a crossing, caused by being struck by a car, it was error not to give an instruction embodying the duty of the motorman to keep vigilant watch, especially for children approaching the track); Hovarka *v.* St. Louis Transit Co., 191 Mo. 441, 90 S. W. 1142; Gabriel *v.* Metropolitan St. R. Co., 130 Mo. App. 651, 109 S. W. 1042; Percell *v.* Metropolitan St. R. Co., 126 Mo. App. 43, 103 S. W. 115; Brock *v.* St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219 (holding that an instruction in an action for injuries sustained by plaintiff by reason of the sudden starting of a street car while he was standing on its platform, which charged that plaintiff assumed the risk, but left out of view evidence that the motorman was given a signal to go ahead, was properly refused); Sheehan *v.* Citizens' R. Co., 72 Mo. App. 524 (holding that in an action for damages for an injury caused by a collision between a car and plaintiff's horse and buggy, instructions leaving out of consideration defendant's liability if the gripman saw the danger in time to have avoided the accident, even though plaintiff was negligent, were properly refused).

Tennessee.— Wilson *v.* Citizens' St. R. Co., 105 Tenn. 74, 58 S. W. 334.

Texas.— Denison, etc., R. Co. *v.* Carter, (Civ. App. 1902) 70 S. W. 322, 71 S. W. 292.

20. Garfield *v.* Hartford, etc., St. R. Co., 80 Conn. 260, 67 Atl. 890; Denver City Tramway Co. *v.* Norton, 141 Fed. 599, 73 C. C. A. 1.

21. Deschner *v.* St. Louis, etc., R. Co., 200 Mo. 310, 98 S. W. 737.

22. See *supra*, X, B, 9, h, (I), (II), (III), (IV).

23. See the following cases:

Indiana.— Indianapolis St. R. Co. *v.* Schomberg, (App. 1904) 71 N. E. 237, instruction held to correctly state the law of contributory negligence applicable to young children.

Kentucky.— Louisville R. Co. *v.* Gaugh, (1909) 118 S. W. 276; Louisville R. Co. *v.* Poe, 72 S. W. 6, 24 Ky. L. Rep. 1700, holding that an instruction that it was plaintiff's duty, when she started to cross the street, to exercise ordinary care, and that if

son,[24] although mere errors of form or phraseology, which are not calculated to mislead the jury or prejudice the rights of the parties, are immaterial;[25] and

she failed to exercise such care, and by reason thereof helped to cause the injury, she could not recover, was not objectionable for failing to state that it was plaintiff's duty to look and listen for approaching cars before going on the track.

Michigan.— Quirk *v.* Rapid R. Co., 137 Mich. 493, 100 N. W. 815.

Missouri.— Latson *v.* St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109, holding that an instruction for plaintiff is not erroneous for failing to take into consideration the contributory negligence of plaintiff, where it authorizes a verdict for plaintiff only in case she was exercising ordinary care at and before the time of the injury.

New York.— O'Neill *v.* Third Ave. R. Co., 3 Misc. 521, 23 N. Y. Suppl. 20; Luedecke *v.* Metropolitan St. R. Co., 60 N. Y. Suppl. 999; Hyland *v.* Yonkers R. Co., 4 N. Y. Suppl. 305 [*affirmed* in 119 N. Y. 612, 23 N. E. 1143].

Tennessee.— Memphis St. R. Co. *v.* Haynes, 112 Tenn. 712, 81 S. W. 374, holding that while the question of contributory negligence is one of fact for the jury, the trial judge, in a proper case, may instruct the jury that particular conduct on the part of plaintiff would be negligence *per se*.

See 44 Cent. Dig. tit. "Street Railroads," § 268.

Instructions held erroneous: Galesburg Electric Motor, etc., Co. *v.* Barlow, 98 Ill. App. 334; Scott *v.* Third Ave. R. Co., 59 Hun (N. Y.) 456, 13 N. Y. Suppl. 344. In that they relieved the mother of the deceased, a child, from the results of contributory negligence on her part. West Chicago St. R. Co. *v.* Egan, 74 Ill. App. 442. As failing to present the question accurately and fairly. McKinley *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 256, 79 N. Y. Suppl. 213. As improperly pointing out the particular things with reference to which it was plaintiff's duty to exercise ordinary care. Louisville R. Co. *v.* Boutellier, 110 S. W. 357, 33 Ky. L. Rep. 484. An instruction as to contributory negligence in a crossing accident case, which does not state any facts in reference to defendant's negligence, is incorrect in stating that, in case certain facts are found, the finding "should be for plaintiff," without specifying that such finding is to be confined to the determination of contributory negligence. Citizens' St. R. Co. *v.* Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778.

It is not necessary to embody the doctrine of the "last clear chance" in instructions on contributory negligence, where the instructions are correct as far as they go, and there is no request therefor (Duteau *v.* Seattle Electric Co., 45 Wash. 418, 88 Pac. 755); and where the injured person's danger was not an obvious one, an instruction that, if the motorman saw plaintiff's peril in time to have avoided injuring him, but failed to do so, defendant is liable notwithstanding plaintiff's contributory negligence, is properly refused (Shaw *v.* Louisville R. Co., 81 S. W. 268, 26 Ky. L. Rep. 359). But a charge on contributory negligence would be misleading where there is evidence which would authorize the jury to find that plaintiff's injuries were directly attributable to the subsequent negligence of defendant's servants in charge of the car in failing to keep a lookout, and that but for such negligence the injuries would not have been inflicted. Birmingham R., etc., Co. *v.* Brantley, 141 Ala. 614, 37 So. 698.

24. Macon R., etc., Co. *v.* Barnes, 121 Ga. 443, 49 S. E. 282 (holding that where the court charges that the particular measure of diligence required under the circumstances is for the jury, it is not incumbent on the court to instruct that one who drives along a street railroad track should be careful to look and listen with ordinary care to avoid a collision); Sanitary Dairy Co. *v.* St. Louis Transit Co., 98 Mo. App. 20, 71 S. W. 726 (holding that in an action for damages resulting from a collision of a car with a team crossing the track, an instruction in general terms that, if the driver was exercising ordinary care, the verdict should be for plaintiff, without specifically stating the care the driver was bound to exercise, was error); Sperry *v.* Union R. Co., 129 N. Y. App. Div. 594, 114 N. Y. Suppl. 286 (holding that an instruction that, when a pedestrian attempts to cross a street car track so far from a car that he has reasonable ground to suppose that he will be able to cross, the driver should give him a reasonable opportunity to cross, made the pedestrian's reasonable ground for belief, and not his supposition, the standard of his care); Hirtenstein *v.* Interurban St. R. Co., 115 N. Y. App. Div. 275, 100 N. Y. Suppl. 909 (holding that where, in an action for the death of a child three years and nine months old, the court left to the jury the question whether the child was *sui juris*, defendant was entitled to an instruction that if the child was *sui juris* he was bound to exercise such care and caution as was to be expected of a child of his age under the circumstances); Detroit United R. Co. *v.* Nichols, 165 Fed. 289, 91 C. C. A. 257.

An instruction requiring ordinary care "at the time of the accident" is not objectionable as restricting the exercise of ordinary care to the moment of the injury, but should be held to refer to the entire transaction. Chicago City R. Co. *v.* Ryan, 225 Ill. 287, 80 N. E. 116; West Chicago St. R. Co. *v.* Egan, 74 Ill. App. 442. See also Chicago North Shore St. R. Co. *v.* Strathmann, 213 Ill. 252, 72 N. E. 800.

25. Chicago City R. Co. *v.* Nelson, 215 Ill. 436, 74 N. E. 458; Harvey *v.* Nassau Electric R. Co., 35 N. Y. App. Div. 307, 55 N. Y. Suppl. 20; Spiking *v.* Consolidated R., etc.,

when contributory negligence is in issue an instruction ignoring or withdrawing such issue from the jury is erroneous.[26] Such instructions must conform and be applicable to the facts which the evidence tends to prove,[27] and to the pleading

Co., 33 Utah 313, 93 Pac. 838, holding that where the court repeatedly charged that decedent was required to use all his senses to avoid a collision with a street car by which he was killed, and that, unless he did so, plaintiffs could not recover, an instruction was not objectionable in the use of the expression "observing the car," instead of requiring decedent to have "looked for the car" before attempting to cross the track.

26. Blackburn *v.* Boston, etc., St. R. Co., 201 Mass. 186, 87 N. E. 579; Ross *v.* Metropolitan St. R. Co., 132 Mo. App. 472, 112 S. W. 9; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Romeo *v.* Union R. Co., 52 Misc. (N. Y.) 578, 102 N. Y. Suppl. 844; Post *v.* New York City R. Co., 93 N. Y. Suppl. 1109; Wright *v.* Third Ave. R. Co., 5 N. Y. Suppl. 707; Houston City St. R. Co. *v.* Reichart, 87 Tex. 539, 29 S. W. 1040.

27. Oates *v.* Metropolitan St. R. Co., 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447 (holding that, in an action for frightening a horse, evidence that the horse was frightened a week before by a dummy engine does not authorize an instruction that plaintiff cannot recover if the real cause of the accident was the disposition of the horse to frighten at cars); Northern Texas Traction Co. *v.* Nelson, (Tex. Civ. App. 1907) 105 S. W. 846.

Instructions held proper, or erroneously refused as conforming to or being supported by the evidence: Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850. As to the injured person's negligence in attempting to cross in front of an approaching car (Cushing *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 510, 87 N. Y. Suppl. 314; Mauer *v.* Brooklyn Heights R. Co., 87 N. Y. App. Div. 119, 84 N. Y. Suppl. 76; Muessman *v.* Metropolitan St. R. Co., 76 N. Y. App. Div. 1, 78 N. Y. Suppl. 571); or in not properly looking or listening for the approaching car (Murray *v.* St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611; Hartman *v.* St. Louis Transit Co., 112 Mo. App. 439, 87 S. W. 86; Citizens' R. Co. *v.* Holmes, 19 Tex. Civ. App. 266, 46 S. W. 116; Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850). As to plaintiff's contributory negligence in not keeping the deceased child off the street. Levin *v.* Metropolitan St. R. Co., 140 Mo. 624, 41 S. W. 968.

Instructions held erroneous or properly refused as not conforming to or being supported by the evidence: Chicago City R. Co. *v.* O'Donnell, 208 Ill. 267, 70 N. E. 294, 477 [*reversing* 108 Ill. App. 385] (holding that it is proper to refuse an instruction that deceased had no right to drive upon the track so as to obstruct or interfere with the passage of defendant's cars, where there is no evidence tending to show that he sought to obstruct the track); Muncie St. R. Co. *v.* Maynard, 5 Ind. App. 372, 32 N. E. 343; Barrie *v.* St. Louis Transit Co., 102 Mo. App. 87, 76 S. W. 706; Quinn *v.* Atlantic Ave. R. Co., 12 N. Y. Suppl. 223 [*affirmed* in 134 N. Y. 611, 31 N. E. 629] (holding that where there was no evidence as to the condition of the street on the right of the track, a request for an instruction that the presumption was that the condition of the roadway was sufficient to enable plaintiff to turn to the right was properly refused); Sharpton *v.* Augusta, etc., R. Co., 72 S. C. 162, 51 S. E. 553; Lightfoot *v.* Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30. As to the injured person's negligence in not properly looking or listening for the approaching car. Baltimore Traction Co. *v.* Wallace, 77 Md. 435, 26 Atl. 518; Rouse *v.* Detroit Electric R. Co., 135 Mich. 545, 98 N. W. 258, 100 N. W. 404; Rodan *v.* St. Louis Transit Co., 207 Mo. 392, 105 S. W. 1061; Peterson *v.* Interurban St. R. Co., 118 N. Y. App. Div. 210, 103 N. Y. Suppl. 8; Richmond Traction Co. *v.* Hildebrand, 98 Va. 22, 34 S. E. 888. As to the contributory negligence of a child in getting on a car. McCahill *v.* Detroit City R. Co., 96 Mich. 156, 55 N. W. 668. Where the person injured testifies that he did not see the car, an instruction that "a pedestrian seeing a car approaching at what to him seems to be a safe distance to allow him to cross, has not the right to assume that the car will be controlled and the speed slackened" is erroneous. Toohey *v.* Interurban St. R. Co., 102 N. Y. App. Div. 296, 92 N. Y. Suppl. 427. So an instruction is erroneous which tells the jury that plaintiff "was not necessarily bound to stop and look and listen before attempting to cross the street car track," where the evidence shows that plaintiff did see the car approaching before the accident took place. Elgin, etc., Traction Co. *v.* Brown, 129 Ill. App. 62.

Jumping from vehicle.—Where the declaration alleges that plaintiff was thrown from her wagon by a collision, but there is evidence that she jumped from the wagon, defendant is entitled to an instruction that, if the jury believe from the evidence that plaintiff jumped from the wagon, the verdict should be for defendant. West Chicago St. R. Co. *v.* Kautz, 89 Ill. App. 309.

Where there is evidence that the case comes within the general rule as to contributory negligence, and also that the case comes within the exception to the rule, it is error to refuse a charge requested by defendant that there can be no recovery where the accident was caused by the concurrent negligence of the motorman and plaintiff, due to each failing to keep a proper lookout. Richmond Pass., etc., Co. *v.* Gordon, 102 Va. 498, 46 S. E. 772.

and issues;[28] and must not be too general,[29] or calculated to confuse or mislead the jury,[30] or ignore or omit to charge on a material element of the question.[31] Such instructions also must not invade the province of the jury by charging on

Where there is no evidence of any intervening cause, as where it appears that the injured person or vehicle came on to the track immediately in front of the car, and the evidence would justify a finding that plaintiff's injuries were due to his own negligence, a charge that, although plaintiff was guilty of contributory negligence, yet if defendant, by reasonable care, could have avoided the consequences of such negligence, and if plaintiff's negligence was not the direct cause of the accident, plaintiff was entitled to recover if defendant was guilty of negligence, is error. Trauber *v.* Third Ave. R. Co., 80 N. Y. App. Div. 37, 80 N. Y. Suppl. 231; Sciurba *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 170, 76 N. Y. Suppl. 772; Csatlos *v.* Metropolitan St. R. Co., 70 N. Y. App. Div. 606, 75 N. Y. Suppl. 583. See also Poole *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 235, 82 N. Y. Suppl. 150.

Wilful injury.—Where there is no evidence of a wilful injury, a requested instruction to find for plaintiff, although deceased was guilty of negligence contributing to the accident, if the evidence showed that the motorman managed the car in a wanton and reckless manner, is properly refused. Feitl *v.* Chicago City R. Co., 211 Ill. 279, 71 N. E. 991 [*affirming* 113 Ill. App. 381].

28. South Chicago City R. Co. *v.* Kinnare, 96 Ill. App. 210 (holding that under a declaration charging that defendant's car ran against and struck the deceased, an instruction which tells the jury that if they find, from the evidence, that the deceased ran his vehicle into the side of the car, and thereby caused the accident, their verdict should be for defendant, is proper and should be given); Chicago West. Div. R. Co. *v.* Haviland, 12 Ill. App. 561 (holding that where the alleged contributory negligence of plaintiff consisted in his standing in the street waiting for a car without looking or listening, an instruction restricting the jury to a consideration of plaintiff's conduct after he saw his danger was erroneous); Lexington R. Co. *v.* Fain, 80 S. W. 463, 25 Ky. L. Rep. 2243; Sepetowski *v.* St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693; Geoghegan *v.* Third Ave. R. Co., 51 N. Y. App. Div. 369, 64 N. Y. Suppl. 630; Wills *v.* Ashland Light, etc., R. Co., 108 Wis. 255, 84 N. W. 998 (holding that where a boy, killed by being run over by a street car, was fourteen years old, intelligent, and well grown, it was error to submit the issue whether he was of sufficient age, capacity, and experience to understand the danger of going on the track without looking and listening, to the same extent as a grown person, since it was not an issuable fact).

Although contributory negligence is not in the case it is not error to charge that, if defendant was negligent in the management of the car which caused the injury, yet if plaintiffs were also negligent, and would not otherwise have been injured, they could not recover, unless, by the exercise of ordinary care, defendant could have noticed plaintiffs' negligence, and prevented the injury as such an instruction is not misleading or confusing to the jury. Central Pass. R. Co. *v.* Chatterson, 29 S. W. 18, 17 Ky. L. Rep. 5.

29. D'Oro *v.* Atlantic Ave. R. Co., 13 N. Y Suppl. 789 [*affirmed* in 129 N. Y. 632, 29 N. E. 1030].

30. Instructions held misleading: Parkinson *v.* Concord St. R. Co., 71 N. H. 28, 51 Atl. 268; Wills *v.* Ashland Light, etc., R. Co., 108 Wis. 255, 84 N. W. 998. Because open to the construction that plaintiff had no duty to exercise care after commencing to cross the tracks in front of an approaching car. Rauscher *v.* Philadelphia Traction Co., 176 Pa. St. 349, 35 Atl. 138. As to plaintiff's duty to be on the lookout to detect and avoid an excavation. Montgomery St. R. Co. *v.* Smith, 146 Ala. 316, 39 So. 757. As to the injured person's right to be on the tracks. Mitchell *v.* Tacoma R., etc., Co., 9 Wash. 120, 37 Pac. 341. As to the injured person's negligence in crossing in front of an approaching car (Marguiles *v.* Interurban St. R. Co., 116 N. Y. App. Div. 157, 101 N. Y. Suppl. 499); in not properly looking or listening for an approaching car (Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850); or in driving across defective tracks (Citizens' R. Co. *v.* Gossett, 37 Tex. Civ. App. 603, 85 S. W. 35). An instruction is misleading which gives the jury to understand that the parents of a child could ignore the street car company in permitting the child, which was less than two years of age, to play upon the streets. Englund *v.* Mississippi Valley Traction Co., 139 Ill. App. 572.

Instructions held not misleading or confusing see Indianapolis St. R. Co. *v.* Schomberg, (Ind. App. 1904) 71 N. E. 237; Toledo, etc., R. Co. *v.* Gilbert, 24 Ohio Cir. Ct. 181.

31. Saylor *v.* Union Traction Co., 40 Ind. App. 381, 81 N. E. 94 (holding that, in an action for injuries received by plaintiff through being struck by a car while crossing defendant's track, an instruction that a person about to cross the track must look and listen, and excluding every reason for conditions that might excuse such precautions on his part is erroneous); Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618 (holding that an instruction that, if a traveler in a buggy had gone on a street car track improperly, the jury must find for defendant, unless the motorman on an approaching car, which struck the buggy, had increased the car's speed, and rendered it impossible for the driver to get across, is properly refused as ignoring the doctrine of discovered peril).

the weight of the evidence,[32] as by assuming certain facts as established,[33] or by singling out and giving undue prominence to some particular parts of the evidence,[34] or by assuming or charging that certain facts in evidence do or do not constitute contributory negligence.[35] The instructions on contributory negligence are to be taken as a whole, and, although one portion considered separately might be open to objection, it may be aided by other and more explicit instructions, and does not constitute error if the charge is correct in its entirety;[36] and a requested instruction which is substantially covered by other instructions as given may be properly refused;[37] nor is it error for the court to refuse a requested instruction which as a whole is incorrect, although it is correct in part;[38] but it is error to

32. Citizens' R. Co. *v.* Holmes, 19 Tex. Civ. App. 266, 46 S. W. 116, holding that in an action for an injury by collision with a street car, a charge that it was plaintiff's duty to use greater diligence if his senses of hearing and seeing were impaired goes to the weight of the evidence.

33. Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622 (instructions held not objectionable as assuming that it was dangerous for a boy of plaintiff's age to jump off a car in motion, or that the running board of a street car was a dangerous place for a boy of plaintiff's age to stand); Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284.

34. Louisville R. Co. *v.* Bossmeyer, 104 S. W. 337, 31 Ky. L. Rep. 997 (holding that an instruction, in an action for injuries to a traveler in a collision with a car, that if the traveler crossed the track so close to the approaching car that the motorman could not, with the exercise of ordinary care, stop the car in time to prevent the collision, the company was entitled to a verdict, called the attention of the jury to selected facts, and was properly refused); Stubbs *v.* Boston, etc., St. R. Co., 193 Mass. 513, 79 N. E. 795.

35. Instructions held not erroneous see Shelly *v.* Brunswick Traction Co., 65 N. J. L. 639, 48 Atl. 562.

Instructions held erroneous: See North Chicago St. R. Co. *v.* Irwin, 202 Ill. 345, 66 N. E. 1077 [*reversing* 104 Ill. App. 150]; Chicago Union Traction Co. *v.* Dyhvig, 107 Ill. App. 644; Consolidated Traction Co. *v.* Chenowith, 58 N. J. L. 416, 34 Atl. 817; D'Oro *v.* Atlantic Ave. R. Co., 13 N. Y. Suppl. 789 [*affirmed* in 129 N. Y. 632, 29 N. E. 1030]; Richmond Pass., etc., Co. *v.* Steger, 101 Va. 319, 43 S. E. 612. As to crossing in front of a car. West Chicago St. R. Co. *v.* Callow, 102 Ill. App. 323; Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591, 47 N. Y. Suppl. 356. An instruction assuming that it was negligence *per se* to attempt to cross a street car track in front of an approaching car, without regard to the car's distance or the circumstances of the case, while ignoring evidence that the car was running at a very high and illegal rate of speed, is properly refused. Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618.

36. South Chicago City R. Co. *v.* Kinnare, 216 Ill. 451, 75 N. E. 179 [*affirming* 96 Ill. App. 210, 117 Ill. App. 1]; Manor *v.* Bay Cities Consol. R. Co., 118 Mich. 1, 76 N. W. 139; McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062 (holding that a charge that plaintiff "had a right to select any point to go across," and "had a right to go where he chose," was not erroneous, where the court also charged that the duty of exercising due care was on plaintiff); Bertsch *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 228, 74 N. Y. Suppl. 238 [*affirmed* in 173 N. Y. 634, 66 N. E. 1104] (holding that any error in charging that plaintiff "had the right to assume that the car coming south would not be run in such a way as to endanger him" was obviated by adding that, "every person who uses the street crossings has a right to assume that the people who are operating street cars are exercising them with due regard to the rights of others, and that they will exercise ordinary care and prudence in their operation"); Engelker *v.* Seattle Electric Co., 50 Wash. 196, 96 Pac. 1039.

37. *Illinois.*—Sampsell *v.* Ryhcynski, 229 Ill. 75, 82 N. E. 244.

Indiana.—Indianapolis St. R. Co. *v.* Schomberg, (App. 1904) 71 N. E. 237.

Iowa.—Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

Missouri.—Schafstette *v.* St. Louis, etc., R. Co., 175 Mo. 142, 74 S. W. 826.

New York.—Quinn *v.* Atlantic Ave. R. Co., 12 N. Y. Suppl. 223 [*affirmed* in 134 N. Y. 611, 31 N. E. 629]; Lafferty *v.* Third Ave. R. Co., 85 N. Y. App. Div. 592, 83 N. Y. Suppl. 405 [*affirmed* in 176 N. Y. 594, 68 N. E. 1118]; Dipaolo *v.* Third Ave. R. Co., 55 N. Y. App. Div. 566, 67 N. Y. Suppl. 421, holding that where an instruction that plaintiff, a street sweeper, had a right to be where he was, and that he was bound to use ordinary care, had been given, it was not error to refuse an instruction that plaintiff was bound to use care commensurate with the danger and risks of the situation.

Tennessee.—Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479, holding that the refusal of an instruction that plaintiff cannot recover if, by the exercise of reasonable care, he might have seen the car in time to have avoided the accident, is not erroneous when considered in connection with an instruction that plaintiff's failure to look and listen will prevent a recovery.

See 44 Cent. Dig. tit. "Street Railroads," §§ 268, 269.

38. See Cobb *v.* Metropolitan St. R. Co., 56 N. Y. App. Div. 187, 67 N. Y. Suppl. 644.

refuse a properly requested instruction which is not substantially embraced in other instructions given.[39]

i. Verdict and Findings. The rules applicable to verdicts and findings in civil actions generally[40] govern questions relative to general[41] and special[42] verdicts or findings, and findings by the court,[43] in actions for injuries caused by the management and operation of a street railroad, such as that the verdict or findings

39. Jackson Electric R., etc., Co. *v.* Carnahan, (Miss. 1909) 48 So. 617; Murray *v.* St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611 (holding that the fact that the court instructed that it was plaintiff's duty to use ordinary care for his own safety in attempting to cross a street car track, and then defined the term "ordinary care," did not justify the refusal of a requested instruction that if plaintiff failed to look or listen before going on the track, when, if he had done so, he could have avoided injury, he was guilty of contributory negligence); Netterfield *v.* New York City R. Co., 129 N. Y. App. Div. 56, 113 N. Y. Suppl. 434; Cushing *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 510, 87 N. Y. Suppl. 314; Curry *v.* Rochester R. Co., 90 Hun (N. Y.) 230, 35 N. Y. Suppl. 543 (holding that an instruction that if plaintiff, by the use of reasonable caution, could have discovered the approach of the car, he was negligent, and if he could not have seen the car he was not negligent, does not substantially cover a requested charge that, if the jury found that plaintiff stood on the track, without looking to see if the car was coming when, had he looked, he could have seen it, he was guilty of contributory negligence as a matter of law); Knoxville Traction Co. *v.* Brown, 115 Tenn. 323, 89 S. W. 319; Nashville R. Co. *v.* Norman, 108 Tenn. 324, 67 S. W. 479.

40. See, generally, TRIAL. See also NEGLIGENCE, 29 Cyc. 657.

41. See Wichita R., etc., Co. *v.* Liebhart, 80 Kan. 91, 101 Pac. 457 (holding that where the evidence shows that plaintiff was negligent, a finding that the motorman might have avoided the injury by due care after plaintiff was observed supports a verdict for plaintiff); Glettler *v.* Sheboygan Light, etc., Co., 130 Wis. 137, 109 N. W. 973 (holding that a finding by the jury that the negligence of a street railroad company in not keeping a proper lookout, and the negligence of imposing a conductor's duties on the motorman, were the proximate causes of plaintiff's injury, is not erroneous, because of a failure to ascertain to which of the grounds of negligence the accident was attributable, defendant being liable in either case); Balfour *v.* Toronto R. Co., 5 Ont. L. Rep. 735, 2 Ont. Wkly. Rep. 671 [*affirmed* in 32 Can. Sup. Ct. 239].

General findings of negligence will not support a verdict unless the same is shown to be the direct cause of the injury, and where on the trial of an action based on negligence questions are submitted to the jury they should be asked specifically to find what was the negligence which caused the injury. Mader *v.* Halifax Electric Tramway Co., 37 Can. Sup. Ct. 94. *Compare* Glettler *v.* Sheboygan Light, etc., Co., 130 Wis. 137, 109 N. W. 973.

42. See Hammond, etc., Electric St. R. Co. *v.* Blockie, 40 Ind. App. 497, 82 N. E. 541; Woodall *v.* Boston El. R. Co., 192 Mass. 308, 78 N. E. 446; Rouse *v.* Detroit Electric R. Co., 135 Mich. 545, 98 N. W. 258, 100 N. W. 404; Citizens' R. Co. *v.* Ford, 25 Tex. Civ. App. 328, 60 S. W. 680.

Special interrogatories relating to immaterial evidentiary facts should not be given. Chicago City R. Co. *v.* Jordan, 215 Ill. 390, 74 N. E. 452, holding that where plaintiff's intestate, a boy five years old, was killed by coming in contact with a street car at the side as he was crossing the street behind another car going in the opposite direction, it was improper for the court to submit special interrogatories as to whether the child ran into the side of the car or whether the car ran into and struck the child, as such interrogatories were both immaterial, and related only to evidentiary facts.

A special interrogatory not based on the evidence is improper. Chicago City R. Co. *v.* Jordan, 215 Ill. 390, 74 N. E. 452, holding that where, in an action for death resulting from a street car collision with intestate at a crossing, the court charged that there was no evidence to support two counts of the declaration besides the count charging a wilful and wanton injury, it was improper for the court to submit special interrogatories requesting findings as to whether defendant was guilty of wantonness or recklessness in driving the car in question, and whether it was guilty of negligence charged "in the declaration or any count thereof."

Special verdict failing to show absence of contributory negligence in an action for injury to one struck by an electric street car while walking close beside the track see Young *v.* Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 47 N. E. 142.

43. See Paine *v.* San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659.

Findings of court held sufficient.—Where the injury to plaintiff resulted directly from a collision of a street car with a buggy in which she was riding, and where the collision was caused by the negligence of the company, the finding of the court that plaintiff was injured by reason of the company's negligent act, and that it is liable therefor, is not rendered insufficient to support plaintiff's judgment by the statement in the finding that plaintiff sustained the injury by reason of the collision. Paine *v.* San Bernardino Valley Traction Co., 143 Cal. 654, 77 Pac. 659.

Conclusions of fact found by the court must stand unless they are inconsistent with other primary or subordinate facts which

must be pertinent to the issues.[44] Where there is a general verdict with special findings every reasonable presumption will be made in aid of the general verdict, and unless there is an irreconcilable conflict between them the general verdict will stand;[45] but where the special findings of the jury are inconsistent or in irreconcilable conflict with the general verdict, such findings control and the general verdict cannot be sustained;[46] although in order to entitle one party to a judgment or verdict on the special findings, notwithstanding the general verdict, he must at least have special findings that stand in such clear antagonism to the general verdict that the two cannot coexist,[47] and the special findings must be sufficient when strictly construed to warrant a judgment within the issues in favor of the moving party.[48] On a motion for such a judgment or verdict the court will assume that all issuable facts not included in the findings were established in favor of the party for whom the general verdict was rendered.[49] A judgment cannot be entered upon special findings inconsistent with each other.[50] A finding need not be supported by direct evidence but it is sufficient if the circumstances fairly warrant the inference or conclusion stated.[51]

j. Appeal and Error. Questions relating to appeal and error in actions for injuries caused by the management and operation of a street railroad are governed by the rules applicable to appeal and error in civil actions generally.[52] Thus

have been specially set forth, or with the conclusions of law. McCarthy *v.* Consolidated R. Co., 79 Conn. 73, 63 Atl. 725; Murphy *v.* Derby St. R. Co., 73 Conn. 249, 47 Atl. 120.

44. Burleigh *v.* St. Louis Transit Co., 124 Mo. App. 724, 102 S. W. 621, holding that where a petition in an action for injuries to a fireman in a collision between a street car and a fire truck charged that the motorman was negligent in running the car at a speed in excess of the rate fixed by a city ordinance so as to be dangerous to persons lawfully using the street, a finding of negligence because the speed of the car exceeded the ordinance limit, and in consequence of such high speed the car collided with the truck, was within the scope of the petition.

45. Union Traction Co. *v.* Howard, (Ind. App. 1909) 87 N. E. 1103, 88 N. E. 967 (holding that an answer by the jury to a special interrogatory that there was not sufficient evidence that the gong was sounded when approaching the crossing was not sufficient to overcome the presumption arising from a general verdict for plaintiff that the car approached the crossing without giving warning); Hammond, etc., Electric St. R. Co. *v.* Blockie, 40 Ind. App. 497, 82 N. E. 541; Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, 72 N. E. 169, 1034 (holding that in an action for injuries by collision with a street car, findings that the motorman sounded his gong when the horse first went on the track, and that up to that time there was no indication of danger, and the motorman was in proper position, and paying attention, and should first have known that the buggy would not get off the track when the car was forty feet from it, and that the car could have been stopped with the utmost care within thirty-five feet are not inconsistent with a general verdict for plaintiff); Indianapolis St. R. Co. *v.* Walton, 29 Ind. App. 368, 64 N. E. 630.

46. Hammond, etc., Electric St. R. Co. *v.* Blockie, 40 Ind. App. 497, 82 N. E. 541; Marion City R. Co. *v.* Dubois, 23 Ind. App. 342, 55 N. E. 266; Pepperall *v.* City Park Transit Co., 15 Wash. 176, 45 Pac. 743, 46 Pac. 407.

47. McCoy *v.* Kokomo R., etc., Co., 158 Ind. 662, 64 N. E. 92, holding that where plaintiff was injured at a street railroad crossing, findings that plaintiff, having average capacity to see and hear, and knowing that his horse was afraid of cars, and that cars frequently ran on a certain track, attempted to drive across the track without stopping, although his view was obstructed by buildings and trees, but that he looked and listened, but did not see the car till his horse was going on the track, which was fifteen and one-half feet from the curb, do not show contributory negligence authorizing a judgment for defendant notwithstanding a general verdict for plaintiff.

48. McCoy *v.* Kokomo R., etc., Co., 158 Ind. 662, 64 N. E. 92.

49. McCoy *v.* Kokomo R., etc., Co., 158 Ind. 662, 64 N. E. 92 (holding that in an action for injuries received at a street railroad crossing, where the complaint avers that defendant's car was operated at a high and dangerous speed, such fact will be assumed, on motion by defendant for a verdict on special findings notwithstanding a general verdict for plaintiff, in the absence of a finding as to the speed of the car, as the court, in passing on the motion, cannot consider the evidence received, but will assume that all issuable facts not included in the findings were established in plaintiff's favor); Indianapolis St. R. Co. *v.* Hoffman, 40 Ind. App. 508, 82 N. E. 543.

50. Consolidated, etc., R. Co. *v.* Wyatt, (Kan. 1898) 52 Pac. 98; Shenners *v.* West Side St. R. Co., 78 Wis. 382, 47 N. W. 622.

51. McCarthy *v.* Consolidated R. Co., 79 Conn. 73, 63 Atl. 725.

52. See APPEAL AND ERROR, 2 Cyc. 474.

Objections not raised in the lower court cannot be made for the first time on appeal.

if the verdict, finding, or judgment in the lower court is contrary to the weight of the evidence, it will be set aside or reversed on appeal;[53] but where there is sufficient evidence to support a verdict or finding, although it is conflicting, the verdict, finding, or judgment will not be disturbed or set aside on appeal;[54] nor will it be set aside or reversed for a harmless error,[55] as in respect to the admission or exclusion of evidence[56] or the giving or refusing of instructions,[57] since where

See Vincent *v.* Norton, etc., St. R. Co., 180 Mass. 104, 61 N. E. 822; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400, 12 S. W. 891. Thus defendant cannot object for the first time on appeal that there is no evidence that it was operating the road, where its answer alleges that plaintiff was allowed "to get in front of defendant's car" by the negligence of its mother. Winters *v.* Kansas City Cable R. Co., 99 Mo. 509, 12 S. W. 652, 17 Am. St. Rep. 591, 6 L. R. A. 536.

53. *Illinois.*— Elwood *v.* Chicago City R. Co., 90 Ill. App. 397.

Louisiana.— Culbertson *v.* Crescent City R. Co., 48 La. Ann. 1376, 20 So. 902, holding that where plaintiff's witnesses, in an action for the death of a boy killed by a street car, did not testify with certainty where the child was just preceding the accident, and defendant's witnesses agreed in stating that he was not on the track, and that the accident was occasioned by his suddenly darting in front of the car, a verdict for plaintiff was erroneous, whether or not the child was seen by the motorman.

Michigan.— Gregory *v.* Detroit United R. Co., 138 Mich. 368, 101 N. W. 546, holding that where none of the witnesses for plaintiff who testified as to the condition of defendant's track where the accident occurred had made such an examination as entitled their testimony to much weight, but, on the contrary, eight for defendant testified to a careful examination, and that it was in good condition — two of them being officers of the village in which the accident occurred — a verdict for plaintiff was contrary to the clear weight of the evidence.

Missouri.— Weaver *v.* Benton-Bellefontaine R. Co., 60 Mo. App. 207, holding that a judgment for plaintiff for injuries caused by a collision with his vehicle will be reversed where his version of the facts surrounding the accident is physically impossible, while the company's version is consistent, and highly probable.

New Jersey.— Graham *v.* Consolidated Traction Co., 64 N. J. L. 10, 44 Atl. 964, holding that in an action for running over a boy, a verdict in plaintiff's favor on the ground that the car was run at an excessive rate of speed, will be set aside, where the evidence as to a high rate of speed is vague and unsatisfactory, and the evidence as to a proper rate of speed is supported by the fact that the car was stopped within a few feet after the motorman discovered the boy's peril.

New York.— Lynch *v.* Nassau Electric R. Co., 40 N. Y. App. Div. 616, 58 N. Y. Suppl. 23; Gordon *v.* Second Ave. R. Co., 39 N. Y. App. Div. 658, 57 N. Y. Suppl. 298; McCann *v.* New York, etc., R. Co., 28 N. Y. App. Div. 625, 50 N. Y. Suppl. 912; O'Neill *v.* Interurban St. R. Co., 86 N. Y. Suppl. 208.

Canada.— Rowan *v.* Toronto R. Co., 29 Can. Sup. Ct. 717.

See 44 Cent. Dig. tit. "Street Railroads," §§ 271–273.

54. Campbell *v.* Los Angeles Traction Co., 137 Cal. 565, 70 Pac. 624; Driscoll *v.* Market St. Cable R. Co., 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; North Chicago St. R. Co. *v.* Zeiger, 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157 [*affirming* 78 Ill. App. 463]; Alexander *v.* Metropolitan St. R. Co., 86 N. Y. Suppl. 212; Giraldo *v.* Coney Island, etc., R. Co., 16 N. Y. Suppl. 774 [*affirmed* in 135 N. Y. 648, 32 N. E. 647]; O'Toole *v.* Central Park, etc., R. Co., 12 N. Y. Suppl. 347 [*affirmed* in 128 N. Y. 597, 28 N. E. 251]; Montreal St. R. Co. *v.* Deslongchamps, 14 Quebec K. B. 355 [*affirmed* in 37 Can. Sup. Ct. 685].

55. See Murray *v.* Paterson R. Co., 61 N. J. L. 301, 39 Atl. 648.

Under N. Y. Code Civ. Proc. § 723, empowering the trial court to conform the pleadings to the facts proved where the amendment does not substantially change the claim or defense, the fact that plaintiff, suing a street railroad company for injuries, alleges that the stage of which plaintiff was an occupant was upon a public highway over which defendant's tracks were laid, while on the trial defendant proves ownership in fee of the premises where the accident occurred, is immaterial, as for the purpose of sustaining the judgment, the complaint will on appeal be deemed to have been amended in harmony with the proofs. Liekens *v.* Staten Island Midland R. Co., 64 N. Y. App. Div. 327, 72 N. Y. Suppl. 162.

56. Bectenwald *v.* Metropolitan St. R. Co., 121 Mo. App. 595, 97 S. W. 557 (holding that where in an action for injuries sustained in a collision the motorman who was operating the car at the time in question was asked whether he was in defendant's service at the time of the trial, to which he responded in the negative, and he was then asked when he quit working for defendant, to which he replied he could not tell exactly, defendant was not prejudiced by such evidence); Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018 (holding that error in admitting evidence that the motorman was discharged after the accident was harmless, where it is shown to be a rule of the company to discharge all motormen who meet with accidents under any circumstances).

57. *California.*— Swain *v.* Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829, holding that in an action for personal injury sustained in a collision between plaintiff's wagon and defendant's street car, the statement in an

there has been no abuse of discretion the appellate court will not ordinarily interfere with the rulings of the lower court.[56]

10. Offenses in or Affecting Operation of Street Railroad — a. By Street Railroad Company or Employees.[59] In some jurisdictions street railroad companies or their employees are by statute or ordinance liable to indictment and fine for various acts or omissions in the operation of their roads,[60] such as a wrongful death due to negligence,[61] a failure to run cars through to the end of their routes,[62] a failure to place certain lights or signals at railroad crossings,[63] the operation of a car not authorized by franchise,[64] the operation of a car through the streets without both a driver and conductor thereon,[65] or the overdriving or overloading of a car.[66]

b. By Other Persons Affecting Property or Operation of Street Railroad — (i) *In General.* Under some statutes or ordinances it is an offense punishable by a penalty or fine for a person to do various acts affecting the property or opera-

instruction that "street cars are easily and readily stopped" could not have prejudiced defendant, since the fact is one of common knowledge, which the jury might consider without evidence of its existence.

Maryland.— Lake Roland El. R. Co. *v.* McKewen, 80 Md. 593, 31 Atl. 797, holding that in an action by one injured in attempting to cross a street car track, a charge that plaintiff was guilty of contributory negligence, and that he could not recover unless the jury believed defendant could have avoided the accident by the exercise of ordinary care, and failed to do so, was not prejudicial to defendant.

Missouri.— Mullin *v.* St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288.

New York.— Giraldo *v.* Coney Island, etc., R. Co., 16 N. Y. Suppl. 774 [*affirmed* in 135 N. Y. 648, 32 N. E. 647].

Virginia.— Richmond Traction Co. *v.* Wilkinson, 101 Va. 394, 43 S. E. 622.

See 44 Cent. Dig. tit. "Street Railroads," § 272.

58. Ruppel *v.* United R. Co., 1 Cal. App. 666, 82 Pac. 1073.

59. Offenses incident to construction and maintenance see *supra*, VII, I.

Penalties for violations of statutory and municipal regulations see *supra*, X, A, 2, a *et seq.*

60. See statutes of the several states, and ordinances of the several municipalities. See also Hartley *v.* Wilkinson, 49 J. P. 726.

Ala. Code (1896), § 5368, making it an offense for any conductor to run a train without a sufficiency of good drinking water thereon, does not apply to a street railroad. Dean *v.* State, 149 Ala. 34, 43 So. 24.

61. Com. *v.* Metropolitan R. Co., 107 Mass. 236.

62. People *v.* Detroit United R. Co., 154 Mich. 514, 118 N. W. 9, holding that a prosecution of a street railroad company for violating an ordinance requiring that cars be run through to the end of the respective routes, except in specified cases, is a prosecution in the name of the people, and is not a civil proceeding on behalf of a passenger.

Evidence held sufficient to show a violation of a city ordinance requiring cars to be operated through to the end of the routes, except in specified cases, in which transfers shall be given to passengers entitling them to transportation to their destination see People *v.* Detroit United R. Co., 154 Mich. 514, 118 N. W. 9.

63. People *v.* Detroit United R. Co., 152 Mich. 359, 116 N. W. 186, holding that under a city ordinance making it the duty of every street railroad company to cause a red light to be placed at the crossing and intersection of other street railroads, in such a manner as to give warning to motormen and citizens, it is necessary in order to support a conviction for a violation of the ordinance to show that the crossing and intersection at which defendant is alleged to have failed to place a light is made by the lines of separate companies.

64. St. Louis, etc., R. Co. *v.* Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300, holding that a city ordinance making it a misdemeanor for any corporation to operate any car on its lines which is not authorized by its franchise, and prescribing a fine for a violation thereof, is not void for unreasonableness, when it is passed after a corporation has been notified that it is violating its franchise.

65. See Thornhill *v.* Cincinnati, 4 Ohio Cir. Ct. 354, 2 Ohio Cir. Dec. 592.

An information charging that defendant "did unlawfully and knowingly drive a street car through the streets of said city, without having a conductor thereon," is insufficient under an ordinance providing "that no cars shall be run without both a driver and conductor," and making the offense punishable by a fine. Thornhill *v.* Cincinnati, 4 Ohio Cir. Ct. 354, 2 Ohio Cir. Dec. 592.

66. People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374, holding that the conductor of an overloaded car is equally responsible with the driver for the violation of the statute; indeed, more so, as the driver is usually subject to the orders of the conductor. See also Badcock *v.* Sankey, 54 J. P. 564.

The driver and conductor are not exempted from liability, because at the time of the commission of the offense they were in the employ of the railroad company, or were acting under its orders. People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

Form of indictment of driver and conductor on a street railroad car, for overdriving and

tion of a street railroad,[67] such as for a passenger to sell or give away a transfer,[68] or for a person to hang on the outside of a car,[69] or to board a car while in motion for the purpose of stealing a ride,[70] or to throw at cars,[71] or to wrongfully obstruct the tracks.[72] But provisions relating to offenses affecting steam railroads do not ordinarily apply to street railroads.[73]

(II) *CIVIL LIABILITY.* Where a street railroad company has lawfully

overloading, etc., horses, in violation of a statute against cruelty to animals see People *v.* Tinsdale, 10 Abb. Pr. N. S. (N. Y.) 374.

67. See statutes of the several states, and ordinances of the several municipalities.

68. *Ex p.* Lorenzen, 128 Cal. 431, 61 Pac. 68, 79 Am. St. Rep. 47, 50 L. R. A. 55.

69. Frank Bird Transfer Co. *v.* Morrow, 36 Ind. App. 305, 72 N. E. 189, holding, however, that a city ordinance providing that it should be unlawful for any person to hang from the outside of any street car, which ordinance was passed when the only cars in operation in the city were drawn by horses, is inapplicable to summer cars subsequently operated by electricity, arranged with seats running crosswise, with a footboard running lengthwise of the car, used as a step or platform for the accommodation of passengers.

70. East *v.* Brooklyn Heights R. Co., 195 N. Y. 409, 88 N. E. 751, 23 L. R. A. N. S. 513.

71. Com. *v.* Carroll, 145 Mass. 403, 14 N. E. 618, holding that Pub. St. c. 112, § 206, makes the offense of throwing a missile at a railroad car punishable whether the car be in use or not.

Evidence.— On complaint of a street railroad company, under Pub. St. c. 112, § 206, for throwing a missile at one of its cars, it is competent to prove the fact of ownership of the car by the testimony of one witness describing its particular marks, coupled with that of another witness, that the car bearing those marks belongs to the company. Com. *v.* Carroll, 145 Mass. 403, 14 N. E. 618.

72. *Georgia.*— Price *v.* State, 74 Ga. 378, holding that Code, § 4438, providing a penalty for obstructing a railroad, applies to a street railroad operated by horse power.

Massachusetts.— Com. *v.* Temple, 14 Gray 69.

Minnesota.— State *v.* Pratt, 52 Minn. 131, 53 N. W. 1069.

New York.—People *v.* Kuhn, 84 N. Y. App. Div. 631, 81 N. Y. Suppl. 1091 (evidence held insufficient to warrant a conviction); Kolzem *v.* Broadway, etc., R. Co., 1 Misc. 148, 20 N. Y. Suppl. 700 (holding that a temporary excavation for the purpose of repairing a sewer was not a wilful obstruction within the meaning of the statute).

Pennsylvania.— Com. *v.* McCaully, 2 Pa. Dist. 63, holding that a street railroad is within the act of March 31, 1860, section 142, making it a criminal offense to obstruct or injure any "railroad."

See 44 Cent. Dig. tit. "Street Railroads," § 275.

Duty to remove wagon from track.—Where a city ordinance gives the street cars of the city a precedence over other vehicles, and provides that, if any person "shall unnecessarily obstruct or impede the running of the cars," he shall be liable to a fine for such offense, it is the duty of a teamster who has obstructed the track by backing his team across the same, for the purpose of unloading goods, to remove his team at once on the approach of the cars; and a delay on his part, even for a short time, for the purpose of removing a box which is the last of his load, thereby causing a stopping of the cars during such delay, is an unnecessary obstruction within the meaning of the ordinance, and will render him liable to its penalty. State *v.* Foley, 31 Iowa 527, 7 Am. Rep. 166. So a wagon driver who for several hundred feet drives his vehicle with one wheel on the track at a point where there is ample room to turn off, and thereby impedes the progress of a horse car, which is proceeding at the usual speed, is liable to indictment for obstructing the tracks, although he did not enter upon the track with the intention of obstructing the cars, and continued thereon without intending to obstruct them. Com. *v.* Temple, 14 Gray (Mass.) 69.

Pleading.— In an indictment for wilfully and maliciously obstructing a horse railroad company in the use of its road, the intention of defendant is sufficiently alleged by charging, in the words of the statute, that his acts were "willfully and maliciously" done. Com. *v.* Hicks, 7 Allen (Mass.) 573. Under a city ordinance which prohibits the wilful obstruction of street cars by stopping or placing teams, vehicles, or other obstacles upon, across, or along the tracks, a complaint which charges that defendant wilfully, unlawfully, and wrongfully obstructed and interfered with the running of the cars of the railroad company at a certain named point in the city, by placing and stopping a house upon and across the tracks, is sufficient. State *v.* Pratt, 52 Minn. 131, 53 N. W. 1069.

Proof.— In an indictment for wilfully and maliciously obstructing a horse railroad company in the use of its road, the actual enjoyment and use of the franchise by the company is sufficient to authorize the jury to find, in the absence of any proof to the contrary, that its location was lawful; and it is not necessary to prove that defendant was requested to remove from the track, and refused to do so, if the jury are satisfied, from other evidence, that his obstructing the cars was wilful and malicious. Com. *v.* Hicks, 7 Allen (Mass.) 573.

73. State *v.* Cain, 69 Kan. 186, 76 Pac. 443, holding that the wilful breaking of a window of a street car is not a violation of any of the provisions of Gen. St. (1901) § 2098, relating to the wilful injury of the property of the railroads in the state.

acquired the right to occupy the streets, its right to operate its road cannot be interfered with, its franchise impaired, or property destroyed by others,[74] as for the purpose of enabling another to use the street in moving buildings,[75] and the company may maintain an injunction to restrain a wrongful interference with or invasion of such rights,[76] or may maintain an action to recover damages for the trespass.[77]

74. Ft. Madison St. R. Co. *v.* Hughes, 137 Iowa 122, 114 N. W. 10, 14 L. R. A. N. S. 448. See also *supra*, VII, E.

Contractors, under a contract with a city to pave a certain street, have no power to obstruct the passage of street cars over such street during the paving of the same, where the contract gives no such power, and it is shown that such work has been, and can be, done without such interference, and where the city has not attempted to exercise or to delegate to the contractors the power to stop the running of cars while the work is being done. Milwaukee St. R. Co. *v.* Adlam, 85 Wis. 142, 55 N. W. 181.

75. Ft. Madison St. R. Co. *v.* Hughes, 137 Iowa 122, 114 N. W. 10, 14 L. R. A. N. S. 448. See also Toledo, etc., Traction Co. *v.* Sterling, 29 Ohio Cir. Ct. 227.

Removal of building by company.—When railroad tracks are unduly obstructed in moving a building across them, the company has no right to use undue force in removing such obstruction, and is liable for any damage done by such unlawful act. Toledo, etc., Traction Co. *v.* Sterling, 29 Ohio Cir. Ct. 227.

A requirement by the company that the moving of a building across its track in the street shall be done in the night-time, when there is no current on the wires and the company and traveling public cannot be inconvenienced thereby, is a reasonable requirement, if insisted on by the company. Toledo, etc., Traction Co. *v.* Sterling, 29 Ohio Cir. Ct. 227.

76. Ft. Madison St. R. Co. *v.* Hughes, 137 Iowa 122, 114 N. W. 10, 14 L. R. A. N. S. 448; Camden Horse R. Co. *v.* Citizens' Coach Co., 31 N. J. Eq. 525 (holding that a horse railroad company, chartered by the legislature, may, while legally operating its road, enjoin a rival coach company, organized under the general corporation act, and licensed by the city, from regularly using its tracks with coaches adapted thereto, in competition with it in its business in transporting passengers and goods for hire, and from obstructing it in the use of such tracks by impeding the passage of its cars, by stopping thereon to take up and let down passengers); Milwaukee St. R. Co. *v.* Adlam, 85 Wis. 142, 55 N. W. 181. See also *supra*, VII, E, 3; and, generally, INJUNCTIONS, 22 Cyc. 871, 872.

77. Chicago West Div. R. Co. *v.* Rend, 6 Ill. App. 243 (holding that where a wagon collided with a horse car, lawfully running upon its track, and a passenger injured thereby recovered damages of the railroad company, the company might recover from the owner of the wagon for the wrongful invasion of its right, without regard to the special damages it sustained because of the judgment recovered by the passenger); Toronto St. R. Co. *v.* Dollery, 12 Ont. App. 679.

When a person about to move a building across the tracks is arrested by the railroad company, and taken away from the place where the moving is being done, he is not liable for injury done to the wires of the company by the moving of the building by others after his arrest. Toledo, etc., Traction Co. *v.* Sterling, 29 Ohio Cir. Ct. 227.